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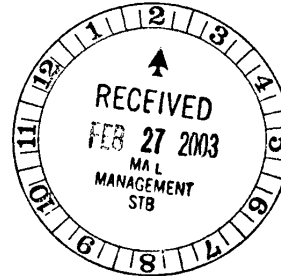
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FEB 27 2003

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**SURFACE
TRANSPORTATION BOARD**

February 27, 2003



207315

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 711
Washington, DC 20423-0001

**Re: Finance Docket No. 34284, Southwest Gulf Railroad Company --
Petition for an Exemption from 49 U.S.C. § 10901 to Construct and
Operate a Rail Line in Medina County, Texas**

Dear Secretary Williams:

Enclosed for filing please find an original and ten copies of a verified petition of Southwest Gulf Railroad Company for exemption filed in the above docket. A check in payment of the \$55,000.00 filing fee is also enclosed.

Sincerely,

David H. Coburn
Attorney for Southwest Gulf Railroad
Company

DHC:dj
Enclosures

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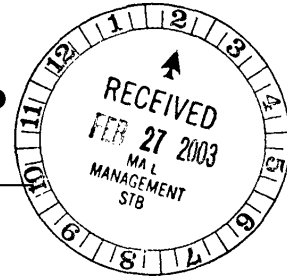
LOS ANGELES

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BRUSSELS

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BEFORE THE
SURFACE TRANSPORTATION BOARD



Finance Docket No. 34284

SOUTHWEST GULF RAILROAD COMPANY --
PETITION FOR AN EXEMPTION FROM 49 U.S.C. § 10901
TO CONSTRUCT AND OPERATE A RAIL LINE
IN MEDINA COUNTY, TEXAS

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VERIFIED PETITION OF
SOUTHWEST GULF RAILROAD COMPANY
FOR EXEMPTION

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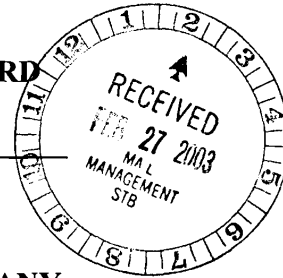
SURFACE
TRANSPORTATION BOARD

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Attorneys for Southwest Gulf
Railroad Company

February 27, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD



Finance Docket No. 34284

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INTRODUCTION

Southwest Gulf Railroad Company (SGR), a Texas corporation headquartered in San Antonio, Texas, seeks an exemption to construct and operate an approximately seven mile long rail line in Medina County, Texas. SGR is a new railroad company and does not at present own or operate any other rail lines.

I. FACTS¹

SGR is affiliated through common ownership with Vulcan Materials Company, a Birmingham, AL-based corporation and one of the nation's largest producers of aggregate, composed primarily of crushed stone, sand and gravel used for highway and other construction

¹ This Petition has been verified by Thomas Ransdell, SGR's President.

purposes.² One of Vulcan Material Company's subsidiary companies, Vulcan Construction Materials, LP (jointly, "Vulcan") is working toward the development of a quarry, at which stone would be mined, in a relatively undeveloped area of Medina County, Texas. Medina County is located just west of Bexar County, where San Antonio is located. Despite its proximity to San Antonio, Medina County is a rural area with a population of about 33,000 persons. The quarry would be located in the north central part of the County, on a site that will be in excess of 1,700 acres. The site was chosen on the basis of its geologic character, which will allow the efficient access to the type of rock that is uniquely suited to the development of an aggregate quarry.

While there is some local market in the San Antonio area for the aggregate that would be produced at the planned Medina quarry, the primary market for that aggregate is in the eastern part of Texas, including the Greater Houston area. To get the Medina County aggregate to market most efficiently, Vulcan intends to rely on rail transportation from the quarry to the market destinations, just as Vulcan does at other quarry sites that it has developed in Texas and several other states. In that regard, Vulcan has determined that rail transportation is not only more efficient, but also a more cost effective and more environmentally friendly means of transporting significant volumes of crushed stone between quarry and market.

To serve the needs of Vulcan, and of any other shippers that may locate on or near its planned line, SGR proposes to construct, and operate, a single-track rail line between the planned quarry site and the nearest Class I railroad line, which is the Del Rio Subdivision of Union Pacific Railroad Company ("UP"). That UP line is located approximately seven miles south of

² Vulcan, an S&P 500 company, is also a major chemical manufacturer, but that aspect of its business is not pertinent to the SGR project. In 2001, Vulcan's net sales exceeded \$2.7 billion. Additional information about Vulcan is available at its website, vulcanmaterials.com.

the quarry site. The SGR line would meet the UP line at approximately milepost 250 of the UP line, at a point near Dunlay, TX. See Exhibit I, which depicts the approximate proposed alignment of the SGR line.³

SGR anticipates that its annual revenues will qualify it as a Class III rail carrier. SGR may enter into an agreement with an existing rail carrier to operate the line for SGR. However, no such agreement has been negotiated to date and SGR does not anticipate reaching any decision on whether it will enter any such agreement until after this Petition has been acted on by the Board. SGR has met with UP concerning its plans, and UP is fully aware of the project. Financing for the construction of the rail line will be provided by Vulcan.

SGR intends to hold itself out as a common carrier, and thus intends to offer its services to transport freight for any other shipper that may locate in the area in the future. In that regard, SGR believes that the area in which it proposes to construct its line, while largely undeveloped at the current time, should prove to be attractive for future economic development by other businesses which may locate in the area. Among its other attractions (in addition to rail access) are relatively low property values, availability of open area for development and proximity both to a major market in the next county (Bexar, which includes San Antonio) and to Mexico, which is only approximately 150 miles away and the source of increasing trade. Further, the area is also not far from major interstate highways.

Prior to forming SGR, Vulcan retained a professional rail engineering firm, Trax Engineering and Associates, Inc., to perform an initial engineering study of the feasibility of its

³ The precise alignment will be fashioned based on environmental reviews and final engineering work.

rail proposal. On the basis of that work, Vulcan and SGR have developed and refined the plans to construct the line at issue here. The proposed line would not traverse any incorporated or densely populated areas and will not cross any other rail lines. Further, the proposed line has been planned so that it will not cross any major highways, but rather only some lightly traveled paved and unpaved roads.⁴ The area is composed primarily of relatively dry and flat farmland and pastureland. No federal lands will be traversed and, apart from the road crossings, no state-owned property will be traversed. SGR has communicated with the Board's Section of Environmental Analysis ("SEA") about its project, as discussed further below.

II. ARGUMENT

A. The Board Has Jurisdiction Over the Construction of the SGR line

The Board has jurisdiction over the construction and operation of the SGR line. Specifically, "the Board has jurisdiction over transportation by rail carrier... ." 49 U.S.C. § 10501(a)(1). Pursuant to the Interstate Commerce Act, as amended by the Interstate Commerce Commission Termination Act of 1995, "rail carrier" is defined as a "person providing common carrier railroad transportation for compensation..." 49 U.S.C. § 10102(5); *see also Paducah & Louisville Ry., Inc. -- Control Exemption -- Paducah & Illinois R.R. Co.*, STB Finance Docket No. 33362, 1997 STB LEXIS 204, at *5 n.7 (served Aug. 25, 1997) ("Under 49 U.S.C. 10102(5), a rail carrier is defined as a person providing common carrier railroad transportation for compensation."). The proposed build-out from the planned limestone quarry to the UP will be a common carrier line. While Vulcan will initially be the only shipper served by the line, SGR

⁴ Specifically, the line is expected to cross one paved state farm-to-market road; one paved county road and three unpaved county roads. Each of these roads has a very low traffic density.

will hold itself out as a common carrier to serve other shippers who may wish to transport freight over the line. The Board has previously found that it has jurisdiction over similar, initial one shipper rail projects. *E.g., Midwest Generation LLC - Exemption From 49 USC 10901 - For Construction in Will County, IL*, STB Finance Docket No. 34060, slip op. at 6 (served Mar. 21, 2002) (“The proposed line would be ‘available to provide common carriage to other shippers who could be served by the proposed project.’ The proposed build-out would be a common carrier line of railroad, subject to the Board’s licensing authority pursuant to 49 U.S.C. 10901...”) (footnote omitted); *Public Serv. Co. of Colorado--Construction Exemption--Pueblo County, CO*, STB Finance Docket No. 33862, 2000 STB LEXIS 483 (served Aug. 23, 2000) (finding Board jurisdiction over rail line that would serve a single power plant initially and noting that line would be available for future shippers that might locate on it); *Effingham R.R. Co.--Petition for Declaratory Order--Construction at Effingham, IL*, STB Docket No. 41986, 1998 STB LEXIS 253, at *9 (STB served Sept. 18, 1998) (“because it was ERRC’s initial railroad operation, this track segment became ERRC’s entire line of railroad and was not, as to ERRC, a siding or spur.”) (emphasis in original).

B. The Board Should Exempt this Transaction from the Prior Approval Requirements of 49 U.S.C. 10901

In order to construct and operate a rail line, a railroad must obtain prior approval from the Board under Section 10901.⁵ Section 10901 provides that a rail carrier may construct and operate a railroad line if the Board issues a certificate approving such construction. While SGR’s proposed construction and operation of the new line would be otherwise subject to

⁵ 49 U.S.C. § 10901(a)(2); (3).

approval under Section 10901,⁶ the Board should exempt the proposal under the exemption procedures established at 49 U.S.C. § 10502, as it has similar rail construction projects. Under Section 10502, the Board *shall* exempt construction projects from the more time consuming prior approval procedures of section 10901 and 49 C.F.R. Part 1150 when it finds that (1) regulation is “not necessary to carry out the transportation policy of section 10101” and (2) the transaction or service is of limited scope or regulation is not necessary to protect shippers from the abusive use of market power. 49 U.S.C. § 10502(a); *see also Simmons v. ICC*, 760 F.2d 126, 132 (7th Cir. 1985)(Posner, J.) (“Congress wanted the exemption power to be wielded boldly...”).

**1. Regulation of SGR’s Construction and Operation Proposal is
Not Necessary to Carry out the Rail Transportation Policy at
49 USC 10101**

The Board does not need to apply Section 10901 to the construction of the SGR line in order to carry out the federal rail transportation policy of Section 10101. In fact, exempting this transaction from regulation will further the goals of federal transportation policy as it will “ensure effective competition...between rail carriers and other modes”, “reduce regulatory barriers to entry into...the industry”, and “provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part.” 49 U.S.C. § 10101(5),(7) and (15). The Board has found that exempting a transaction with very similar facts to the SGR proposal promoted federal rail transportation policy. *Alamo North Texas R.R. Corp.- Construction and Operation Exemption-Wise County, TX*, STB Finance Docket No. 34002, slip op. at 2 (served Nov. 16, 2001) (finding that exempting a proposal to build a 2.25 mile line of

⁶ The standard for approving a construction/operating application under 10901 is quite lenient. Applications “shall” be approved “unless the Board finds that such activities are inconsistent with the public convenience and necessity.” 49 U.S.C. § 10901(c).

railroad from a limestone quarry to an interchange with the UP furthered the rail transportation policy of Section 10101).

**2. Regulation of SGR's Construction and Operation Proposal
under Section 10901 is Not Necessary as the Proposed Line is of
Limited Scope**

Regulation under Section 10901 is unnecessary as the proposed transaction is limited in scope. The line that SGR is proposing to construct and operate is only about seven miles long and is located in a sparsely populated rural area consisting of primarily pastureland and farmland. It is well-established precedent that rail construction projects of similar or even greater length are considered to be limited in scope. *See, e.g., WFEC R.R. Co. -- Construction and Operation Exemption -- Choctaw and McCurtain Counties, OK*, Finance Docket No. 32607, 1995 ICC LEXIS 34, at *4 (served Feb. 27, 1995) (14 miles); *The Elk River R.R., Inc. -- Construction and Operation Exemption -- Clay and Kanawha Counties, WV*, Finance Docket No. 31989, 1992 ICC LEXIS 105, at *5 (served May 28, 1992) (30 miles); *Southern Elec. Generating Co. -- Petition For Exemption -- Construction of a Rail Line in Shelby County, AL*, Finance Docket No. 31498, 1989 ICC LEXIS 259, at *4 (decided Sept. 12, 1989) (7.5 miles); *Louisville & Jefferson County Riverport Auth. and CSX Transp., Inc. -- Construction and Operation Exemption -- in Jefferson City, KY*, Finance Docket No. 31136, 1987 ICC LEXIS 20 (decided Dec. 16, 1987) (6.7 miles).

**3. Regulation of SGR's Construction and Operation Proposal
under Section 10901 is Not Necessary to Protect Shippers from an Abuse
of Market Power**

Moreover, even if the Board were to find that the proposal was not limited in scope, the transaction should still be exempted as regulation is not necessary to protect shippers from an abuse of market power. In fact, the proposed construction will enhance competition in the area

by giving shippers, including Vulcan, which would otherwise be served only by trucks, a rail transportation option. The Board and the Interstate Commerce Commission have found no threat of market power abuse in similar transactions in the past. *Alamo North Texas R.R. Corp. - Construction and Operation Exemption-Wise County, TX*, STB Finance Docket No. 34002, slip op. at 2 (served Nov. 16, 2001) (finding no threat of market power abuse in the case of a proposed rail line running from a limestone quarry to the UP); *Southern Gulf Ry. Co. -- Construction Exemption -- In Calcasieu Parish, LA*, Finance Docket No. 32321, 1993 ICC LEXIS 171, at *4 (served Sept. 9, 1993) (no threat of market power abuse where a coal shipper proposed to build a 4 mile rail line from a generating station to the main line of the Southern Pacific Transportation Company).

C. Environmental Requirements Will be Satisfied

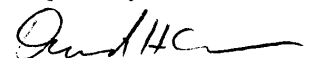
The Board's environmental review process has already been triggered by SGR. At SGR's request, SEA has agreed to the appointment, pursuant to the Board's rules at 49 CFR Part 1105, of a third party contractor to work with SEA to undertake all appropriate environmental reviews and assist in SEA's preparation of required documents under the National Environmental Policy Act.

CONCLUSION

For the aforementioned reasons, SGR respectfully requests that the Board issue an order exempting the proposed construction and operation of a rail line from the prior approval requirements of 49 U.S.C. § 10901. Further, should the Board decide to grant this Petition, SGR requests that the Board do so on a conditional basis, subject only to the completion of any environmental review that is ongoing at the time of such Board action. Such conditional

approval will facilitate SGR's ability to move forward with various engineering and other plans relating to the rail line. As it has in other, similar proceedings, the Board could then issue a final decision on this Petition once the environmental process is completed, and make that decision effective as of the date of its issuance.⁷

Respectfully submitted,



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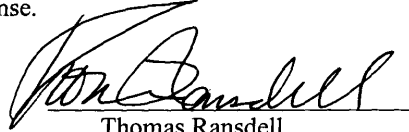
February 27, 2003

⁷ See, e.g., *Missouri Mining, Inc. v. ICC*, 33 F.3d 980 (8th Cir. 1994); *Illinois Commerce Com'n v. ICC*, 848 F.2d 1246, 1259 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1004 (1989); *Alamo North Texas R.R. Corp.-Construction and Operation Exemption-Wise County, TX*, STB Finance Docket No. 34002, slip op. at 3 (served Nov. 16, 2001).



VERIFICATION

I, Thomas Ransdell, President of Southwest Gulf Railroad Company, hereby verify under penalty of perjury that all of the facts set forth in the attached Petition for Exemption are true and correct to the best of my knowledge. I know that willful misstatements or omissions of material facts constitute Federal criminal violations punishable under 18 U.S.C. § 1001 by imprisonment up to five years and fines up to \$10,000 for each offense.



Thomas Ransdell

February 24, 2003