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May 30, 2006

Via Electronic Filing

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The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423

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34037

Re: **Finance Docket No. ~~30437~~**
General Railway Corporation d/b/a Iowa Northwestern Railroad Company –
Operation Exemption – Line of the Dickinson Osceola Railroad Association

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding is **General Railway Corporation's Reply In Opposition To Petition To Revoke Exemption.**

Please contact me if you have any questions regarding this matter. Thank you.

Respectfully submitted,

Edward J. Fishman
Counsel for General Railway Corporation

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 30437

GENERAL RAILWAY CORPORATION D/B/A
IOWA NORTHWESTERN RAILROAD COMPANY –
OPERATION EXEMPTION – LINE OF
DICKINSON OSCEOLA RAILROAD ASSOCIATION

**GENERAL RAILWAY CORPORATION'S REPLY IN OPPOSITION TO
PETITION TO REVOKE EXEMPTION**

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**ATTORNEYS FOR THE GENERAL
RAILWAY CORPORATION**

Dated: May 30, 2006

BACKGROUND

On March 3, 2001, General Railway Corporation d/b/a Iowa Northwestern Railroad ("GRC") entered into a Sale and Repurchase Agreement with the Dickinson Osceola Railroad Association ("DORA"). Pursuant to the Sale and Repurchase Agreement (the "Agreement"), DORA agreed to sell to GRC "all of its right, title, and interest in the Estherville Branch" in exchange for DORA obtaining from GRC the funds (\$375,000.00) necessary to purchase the Estherville Branch from the Union Pacific Railroad Company ("UP").¹ The Estherville Branch extends from milepost 215.00 at a point west of Superior, Iowa to milepost 252.30 at the end of the line west of Allendorf, Iowa.

DORA purchased the Estherville Branch from UP on April 4, 2001, one day after GRC had paid UP directly in the amount of \$375,000 for the rail line.² DORA designated GRC as the exclusive rail operator on the Estherville Branch pending the subsequent sale of the Estherville Branch from DORA to GRC, at which point GRC would become the sole owner and operator on the line. GRC obtained authority from the Board to operate the Estherville Branch pursuant to the Notice of Exemption that GRC filed in this proceeding in April 2001. See General Railway Corporation d/b/a Northwestern Railroad Corporation – Operation Exemption – Line of Dickinson Osceola Railroad Association, Finance Docket No. 34037 (STB served May 11, 2001).

¹ A copy of said Sale and Repurchase Agreement is attached as *Exhibit D* to the Notice of Exemption filed by GRC in Finance Docket No. 34867 on May 19, 2006.

² The facts set forth in this Reply are based on the Affidavit of John F. Larkin that is attached hereto as *Exhibit A* and incorporated herein by reference.

DORA transferred ownership of the Estherville Branch to GRC by Quitclaim Deed recorded on November 1, 2001.³ Due to an inadvertent oversight, and given its unfamiliarity with the Board's numerous rules and regulations⁴, GRC did not file a separate notice of exemption with the Board for its subsequent acquisition of the Estherville Branch from DORA. GRC learned that it was necessary for it to obtain Board authority to acquire ownership of the line in the Board's April 10, 2006 Decision in Docket No. AB 1067 (Sub-No. 1X). GRC has since initiated a proceeding in Finance Docket No. 34867 to correct this technical error.

The Board recently granted GRC authority to discontinue operations over the portion of the Estherville Branch extending between milepost 235.25 near Lake Park, Iowa and the end of the line at milepost 252.3 just west of Allendorf, Iowa. See Docket No. AB 1067 (Sub-No. 1X), General Railway Corporation d/b/a Iowa Northwestern Railroad – Abandonment Exemption – In Osceola and Dickinson Counties, IA (STB served April 10, 2006). By letter filed with the Board today in that proceeding, GRC has consummated its authority to discontinue operations on that portion of the former UP line (the "Discontinued Segment"). GRC remains the authorized operator of the remaining portion of the Estherville Branch between milepost 215.00 near Superior, Iowa and milepost 235.25 near Lake Park (the "Subject Line").

More than five (5) years after GRC's Notice of Exemption to operate the Estherville Branch became effective, DORA has filed a Petition to Revoke GRC's

³ A copy of said Quitclaim Deed is attached as *Exhibit C* to the Notice of Exemption filed by GRC in Finance Docket No. 34867 on May 19, 2006.

⁴ Until recently, GRC has made several STB filings without the assistance of experienced STB counsel. GRC's failure to file a separate notice of exemption for its acquisition transaction was inadvertent, since it explicitly notified the Board of its intention to acquire the Estherville Branch from DORA in the Notice of Exemption that it filed in this proceeding.

operating authority over the Subject Line. GRC respectfully requests that the Board deny in whole the Petition to Revoke Exemption filed by DORA for the reasons set forth below.

ARGUMENT

The Petition to Revoke should be denied because DORA fails to even allege much less establish that the original Notice of Exemption filed in this proceeding was false and/or misleading. In addition, the Petition to Revoke should be denied because DORA does not establish that revocation of GRC's operating authority over the Subject Line is required to carry out the rail transportation policy set forth in 49 U.S.C. § 10101.

1. **DORA's Complaints About GRC Service On The Discontinued Segment Have No Bearing On the Relief Sought Here**

DORA argues that GRC's operating authority on the Subject Line should be revoked because GRC did not respond to a letter it received on October 3, 2005 from the Cooperative Elevator Association ("CEA"). The CEA letter requested the delivery of 25 rail cars to CEA's elevator in Ocheyedan. DORA's complaint about GRC service to CEA does not justify the relief DORA seeks here because the Board has already authorized GRC to discontinue service over the Discontinued Segment on which CEA is located. DORA's allegation about GRC's common carrier obligation to CEA is not relevant to whether GRC's operating authority on the Subject Line should be revoked.

Moreover, DORA's allegation that GRC somehow violated its common carrier obligation under 49 U.S.C. § 11101 by not responding to CEA's alleged "request" for service is completely unfounded. As both DORA and CEA knew at the time of issuance of the October 2005 letter, no traffic has moved over the Estherville Branch since UP imposed an embargo on the GRC interchange that prevented any through traffic from

moving to or from GRC customers on the Estherville Branch. The UP embargo has been modified and extended three times and remains in effect, thereby preventing GRC from having the ability to move anything but local traffic. GRC's obligation under § 11101 is to provide transportation or service upon "reasonable" request. In light of the UP embargo and CEA's knowledge from ongoing litigation that GRC would be filing for abandonment of its common carrier obligations on the Discontinued Segment, GRC does not believe that CEA's October 2005 request was a "reasonable" one that triggered GRC's common carrier obligation under § 11101.

Prior to the UP embargo, CEA originated only 150, 100 and 225 cars of grain in 2001, 2002, and 2003, respectively, and received 34, 39 and 68 cars in each of those respective years. A set of 150 cars spotted by GRC for service at CEA were ordered returned by the lessor of the cars in 2002 and a second set of 150 cars were again ordered returned in 2003 because of low utilization of the equipment. GRC provided service to CEA from the time it began operating the Estherville Branch in 2001 until December 2003, when the UP embargo prevented GRC from moving through traffic to or from CEA.

In fact, GRC provided service to CEA prior to the UP embargo at below-tariff rates on the majority of trains to assist CEA in marketing their products to promote rail usage. However, CEA elected not to ship a sufficient volume of traffic over the rail line despite the efforts of GRC. CEA also failed to satisfy its obligation to maintain trackage in the Ocheyedan yard after the summer of 2001. DORA's complaints about GRC service to CEA since December 2003 are not relevant to the relief DORA seeks here.

GRC already has obtained and exercised its authority to discontinue common carrier operations on the portion of the Estherville Branch on which CEA is located.

2. GRC Has Not Discontinued Operations On The Subject Line

DORA also argues that GRC's operating authority on the Subject Line should be revoked because it has allegedly "discontinued its operation" without STB permission. However, DORA provides no specific evidence in support of this claim.⁵ It does not establish that GRC has somehow violated its common carrier obligation on the Subject Line. It provides no evidence that any active shipper on the Subject Line has been deprived of common carrier service in violation of 49 U.S.C. § 11101. Therefore, there is no basis for the extraordinary relief sought here by DORA.

By claiming that CEA is the only shipper on the Estherville Branch (see Petition To Revoke at 3), DORA ignores the fact that GRC also provided service to Farmers Exchange Cooperative in Lake Park, Iowa on the non-discontinued portion of the Estherville Branch. Although active service to Lake Park ended upon UP's imposition of the embargo in December 5, 2003, GRC has maintained the ability to serve that facility if the UP embargo is lifted and a reasonable request for rail service is presented to GRC.

GRC has not filed with the STB any notice or petition to abandon or discontinue service on the Subject Line. Contrary to DORA's misplaced suggestions, GRC has taken numerous steps which confirm that it still retains hope that it will be able to provide rail service the Subject Line in a profitable manner. From 2001 through 2004, GRC operated an excursion and dinner train for tourists on the portion of the Subject Line running from

⁵ DORA makes some inaccurate claims about the removal of track material from the Discontinued Segment that are, once again, not relevant to the relief sought here. Contrary to DORA's assertion, GRC did not completely dismantle the rail infrastructure on the Discontinued Segment. Although rail was removed, ties were stacked to the side of the track and the right of way was graded to a level surface without removing the ballast.

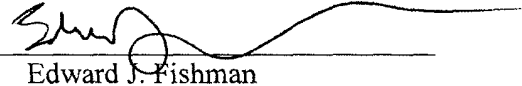
Spirit Lake, Iowa to Lake Park, Iowa. In the 2005 season, operations of the train were transferred on a no-fee basis using cars leased by GRC to a non-profit Railway Historical Society, which has also been given permission to run the excursion and dinner train in the 2006 season if it desires.

GRC also provided railcar storage service throughout 2004, moving railcars out to the UP interchange when requested by car owners (all UP shippers) who received permits from UP to move cars to the interchange for pickup. Further, GRC has approached the Lake Park cooperative in order to request that the cooperative and GRC jointly approach a proposed new ethanol plant on the east end of the Subject Line about potential online rail shipments. These actions clearly demonstrate GRC's intention to keep the rail line active in whatever financially feasible method available to it.

CONCLUSION

Since acquiring authority from the Board to operate the Subject Line in 2001, GRC has worked diligently to provide common carrier rail service over the line, even operating at a loss and subsidizing its operations for the benefit of the local communities. As explained above, GRC continues to search for ways to keep the remaining portion of the Estherville Branch operational. DORA has failed to allege that GRC's original Notice of Exemption in this proceeding was false and/or misleading, and has failed to establish that the rail transportation policy requires revocation of GRC's operating authority. Thus, GRC respectfully requests that the Board deny the Petition to Revoke Exemption in its entirety.

Respectfully submitted,

By: 

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Kirkpatrick & Lockhart

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GENERAL RAILWAY CORPORATION D/B/A
IOWA NORTHWESTERN RAILROAD COMPANY –
OPERATION EXEMPTION – LINE OF
DICKINSON OSCEOLA RAILROAD ASSOCIATION

AFFIDAVIT OF JOHN F. LARKIN

STATE OF NEBRASKA)
 :SS
COUNTY OF DOUGLAS)

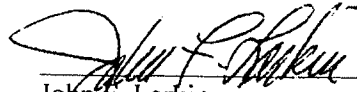
I, John F. Larkin, being first duly sworn, do on oath depose and state as follows:

- 1) I am the president and one of the owners of General Railway Corporation (hereinafter "GRC"), a Washington corporation.
- 2) I have personal knowledge of the facts recited in this Verified Statement.
- 3) On or about March 3, 2001, GRC entered into a "Sale and Repurchase Agreement" wherein GRC paid Union Pacific Railroad Company \$375,000 that allowed the Dickinson-Osceola Railway Association (hereinafter "DORA") to purchase the Estherville Branch from milepost 215.00 at a point west of Superior, Iowa to milepost 252.30 at the end of the line at Allendorf, Iowa.
- 4) The \$375,000 consideration for the line was paid by GRC directly to Union Pacific Railroad on April 3, 2001 at the request of DORA.
- 5) It was the intent of GRC and DORA in 2001 that GRC initially operate and then acquire full ownership and operating rights on the Estherville Branch from DORA.
- 6) On or about November 1, 2001, DORA transferred the rail line to GRC pursuant to a Quit Claim Deed.
- 7) GRC has continuously been the operator of the line since April 2001 and the owner of the line since November 2001.

- 8) Under Docket No. AB 1067-1-X, the Surface Transportation Board granted GRC the authority to discontinue operations over the rail line from milepost 235.25 near Lake Park, Iowa to the end of the line at milepost 252.3 just west of Allendorf, Iowa.
- 9) GRC remains the authorized operator of the line between milepost 215.00 near Superior, Iowa and milepost 235.25 near Lake Park.
- 10) There is another commercial shipper, the Farmers Exchange Cooperative in Lake Park, Iowa, on the rail line.
- 11) The ballast located on the line between milepost 235.25 and milepost 252.3 remains in place and has not been removed by GRC.
- 12) Instead, after ties were stacked to the side of the track, the right of way was graded to a level surface without removing the ballast.
- 13) No traffic has moved over the line due to an embargo placed by Union Pacific Railroad Company at its interchange with GRC at Superior, Iowa.
- 14) The Union Pacific embargo has been modified and extended three times since the initial embargo in December, 2003 and remains in affect.
- 15) It is my belief that the embargo placed by Union Pacific is illegal.
- 16) Prior to the embargo, there was only one shipper on the line between milepost 235.25 and milepost 252.3, Cooperative Elevator Association, with a grain load-out facility in Ocheyedan, Iowa.
- 17) The Cooperative Elevator Association originated 150, 100 and 225 cars of grain in 2001, 2002, and 2003, respectively, and received 34, 39 and 68 cars in each of those respective years.
- 18) In 2002, 150 cars spotted by GRC for Cooperative Elevator Association service were ordered returned by the lessor of the cars.
- 19) A second set of 150 cars were again ordered returned in 2003 because of low utilization of the equipment.
- 20) From 2001 through 2004, GRC operated an excursion and dinner train for tourists on the portion of the line running from Spirit Lake, Iowa to Lake Park, Iowa.
- 21) For the 2005 season, operations of this excursion and dinner train were transferred on a no-fee basis using cars leased by GRC to a non-profit Railway Historical Society.

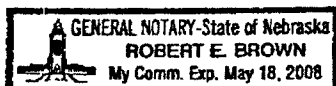
22. The Railway Historical Society has been given permission by GRC to run the excursion and dinner train in the 2006 season if it so desires.
23. GRC has also approached the Lake Park cooperative and requested they jointly approach a proposed new ethanol plant on the east end of the line in order to set up online shipments.
24. GRC has proposed sharing track and providing switching service and online grain shuttle service to the consultant for the ethanol plant.
25. Prior to rail being sold and removed from the line west of Lake Park, both DORA and Cooperative Elevator Association were offered an opportunity to purchase the line by matching the offer for the price of rail and associated steel alone. The ties, ballast and real estate would have been included at no extra cost if they would preserve the line by matching an offer for the rail. Neither accepted the offer.

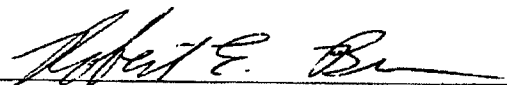
FURTHER AFFIANT SAYETH NOT


John F. Larkin

Subscribed and sworn to before me by the said John F. Larkin this 27 day of

May, 2006

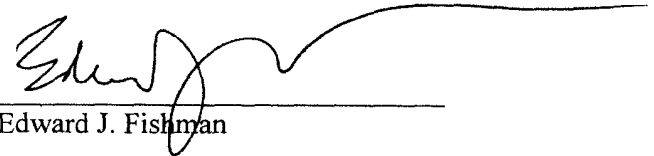



Notary Public

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Reply In Opposition*
to Petition to Revoke Exemption was served by electronic and first-class mail, postage
prepaid, upon the following on this 30th day of May, 2006:

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dandekoter@sibleylaw.com


Edward J. Fishman