

BEFORE THE
SURFACE TRANSPORTATION BOARD

PYCO INDUSTRIES, INC. --)
FEEDER LINE DEVELOPMENT --) F.D. 34890
SOUTH PLAINS SWITCHING LTD.) and F.D. 34992



ORIGINAL

PYCO INDUSTRIES, INC.'S
REPLY TO KJRY Motion TO STRIKE
PORTIONS OF PYCO'S REBUTTAL
and

RENEWED REQUEST FOR SANCTIONS AGAINST KJRY

ORIGINAL

PYCO Industries, Inc., opposes the motion to strike filed by
Keokuk Junction Railway (KJRY) against portions of PYCO's rebuttal.

Summary

The motion to strike is frivolous insofar as it purports to
present an argument for removing any evidence or argument from the
record. Because it is frivolous as an evidentiary motion, one must
view it as simply an effort to file a sur-rebuttal, or a reply to
a reply. As such, it is not a permissible pleading and should
itself be stricken. 44 C.F.R. § 1104.13(c).

KJRY says it wants to file a sur-rebuttal/reply of some sort
if the material is not stricken. But that it has already
improperly done. PYCO opposes yet more of this. If anyone is
entitled to a response to improper argument, it is PYCO that is
entitled to respond to that of KJRY. Because KJRY in part claims
that arguments are not supported because of information that KJRY

has concealed in the face of this Board's October 5 order compelling KJRY and its parent Pioneer to provide information, an appropriate response to KJRY's motion to strike is a renewal of PYCO's request for sanctions against KJRY and Pioneer, in accordance with PYCO's request for sanctions embodied in our comments on KJRY's FLA.

I. As a Motion to Strike, the KJRY
Filing Is Frivolous

KJRY moves to strike the following portions of PYCO's rebuttal: (1) Davis Rebuttal Verified Statement, which KJRY at p. 8 claims contains a "new argument" that PYCO is willing to subsidize acquisition of SAW;¹ (2) apparently pp. 19 & 21 of PYCO's Rebuttal dealing with the alleged "new argument";² (3) Mr. Mortons' letter; and (4) the entire Declaration of Stephen Gregory.³

A. Mr. Davis

KJRY's motion as to Mr. Davis is totally misdirected. A bit of case history is in order. When PYCO filed its original feeder line application (FLA) in F.D. 34844 on May 5, 2006, PYCO requested an opportunity to revise its valuation of SAW after an opportunity

¹ KJRY Mot. Strike at p. 8 (summary paragraph), and then p. 8 on Mr. Davis. Although KJRY seems to claim in its summary paragraph on p. 8 that Davis presents PYCO's alleged "new argument" about subsidization, KJRY never shows where this is done. We assume that KJRY in its haste simply made a typographical error.

² KJRY Mot. Strike at p. 9.

³ KJRY Mot. Strike at pp. 10-12.

for discovery. When this Board eventually accepted the FLA in a revised form as to Alternative Two, this Board authorized discovery and provided PYCO an opportunity to revise its valuation. After discovery (including an inspection of the SAW track by Mr. Davis), PYCO filed a revised valuation for Alternative Two. When this Board subsequently accepted the PYCO FLA for all-SAW, this Board also provided PYCO an opportunity to revise its valuation as to all-SAW. To this end, Mr. Davis provided information on rehabilitation costs as to all-SAW in his September 28 statement.

In his Verified Statement of October 19, 2006, Mr. Davis of course responded to the various criticisms made by SAW and KJRY at various points in this proceeding concerning his portion of PYCO's valuation case, to the extent still arguably germane. That is the purpose of a rebuttal statement.

In his Rebuttal Verified Statement, Mr. Davis did not alter his rehabilitation figures; he simply provided more detailed statements (including some photographic illustrations) of the conditions he observed. This is akin to the workpapers of a consultant, and is generally not required in a pleading in chief, but instead is presented either in discovery (if requested) or in rebuttal if questioned. No one sought discovery of this information from PYCO. Under this Board's procedural orders providing for PYCO to have a Rebuttal, neither PYCO nor Mr. Davis

were required to produce it earlier than the rebuttal, and it is appropriate to produce it in rebuttal in response to the critiques offered by SAW or KJRY.

KJRY complains that Mr. Davis responded to some of SAW's evidence on September 28, implying he should have responded to all at that time. The SAW "evidence" which Mr. Davis referenced on September 28 was part of SAW's initial response to PYCO's discovery requests as to all-SAW. In that evidence, SAW claimed that it owned far more trackage than BNSF thought it had sold SAW, or that SAW and BNSF had earlier represented to this Board that SAW acquired, or that PYCO (or KJRY for that matter) had assumed for purposes of this proceeding. Mr. Davis simply took this higher number into account, as did all of PYCO's experts (including for salvage valuations used in the "NLV" estimates). In order to avoid confusion, Mr. Davis set forth his valuation evidence incorporating SAW's discovery response. As his statement says, he was not endeavoring there to rebut SAW.

Presumably if Mr. Davis had rebutted SAW before he or PYCO had even seen SAW's comments on PYCO's valuation case in chief, then KJRY would complain that PYCO could not file any rebuttal on October 19 because it had already rebutted.

KJRY says Davis put in "new evidence." He put in corroboration for his conclusions insofar as they were attacked by SAW and KJRY. He had inspected the track. His original evidence

was based on the inspection. He simply spelled it out in more detail. As we said, this is like the workpapers of a financial consultant. It is not "new evidence" but directly responsive explanation.

KJRY can hardly claim "surprise." KJRY filed discovery against PYCO to which PYCO fully and timely responded. KJRY did not ask any question remotely related to Mr. Davis, his conclusions, or the basis for the conclusions.

KJRY claims Mr. Davis should not have responded to KJRY's Spice statement in his rebuttal, but should have filed that response in a later statement (presumably with PYCO's comments dated October 24 on KJRY's FLA). Even if true, there is no prejudice to KJRY or anyone else: everyone gets Mr. Davis' thoughts earlier, not later. Moreover, expert witness statements are expensive, and like testimony in court, can and should be consolidated in an orderly fashion. Finally, since the bulk of KJRY complaint is that PYCO's witness Davis responded too late, KJRY undercuts itself when it argues in essentially the same breath that PYCO's witness Davis responded too soon. Although consistency is hard for KJRY, they really should make some pretense of trying.

B. PYCO's Intent to Subsidize

KJRY's motion to strike pp. 19 & 21 of PYCO's Rebuttal lacks merit. Contrary to KJRY's claim, the idea that PYCO intends to

subsidize purchase is hardly "new argument." As KJRY indicates,⁴ PYCO stated that it would bear the full cost of acquisition right up front in our May 5 FLA in F.D. 34844. If KJRY found this confusing, it knows how to file an interrogatory and had an opportunity to do so. PYCO all along has shown the "going concern value" (GCV) is less than the "net liquidation value" (NLV). PYCO's evidence has always shown that the net revenue from operation of the SAW lines will cover only operating costs, and that it will not cover acquisition costs once rehabilitation is taken into account. This means that purchase must be subsidized by the acquiring party because the railroad will not return sufficient "profit" to cover acquisition and rehabilitation costs.

In short, contrary to KJRY's false claim, PYCO has changed no tune on rebuttal. KJRY is simply being willfully blind, or turgidly misleading.

Both SAW and KJRY have claimed it makes no economic sense for PYCO to seek to acquire a railroad with GCV less than NLV. But as Mr. Banks stated in his Verified Statement filed with PYCO's comments on KJRY's competing FLA (note: this quote is before the rebuttal where the information is alleged "new"),

"Unlike SAW and KJRY, PYCO does not have the luxury of walking

⁴ KJRY Motion to Strike at p. 9, citing original FLA at p. 23.

away from the railroad property if things don't work out financially now or in three years. PYCO must continue to operate at its current sites in Lubbock if it is to avoid huge costs of relocating elsewhere. That is why PYCO is willing to buy a railroad it knows is not capable of generating enough cash flow to fund necessary track and structure rehabilitation. It is PYCO's cost of being in business. ... PYCO will acquire and then rehabilitate the railroad over time, as laid out in the most recent Verified Statement filed by my colleague Mr. Davis."⁵

PYCO's Rebuttal at pp. 19 and 21, in the context of discussing PYCO's financial responsibility, merely reiterated at p. 19 that KJRY's arguments missed the point, and then went on to explain in the following pages that PYCO had demonstrated that it had ample funds to acquire and to rehabilitate the lines. This was all proper rebuttal argument.

KJRY argues it has been deprived of an opportunity to "evaluate" how "the subsidy would be carried out." Mr. Davis provided a rehabilitation scenario when PYCO filed its all-SAW valuation on September 28. Neither before nor after did KJRY or any other party seek any discovery on the question. In fact, KJRY

⁵ PYCO "Initial Comments" filed 12 Oct. 06 in F.D. 34890 & 34992, Appendix B, p. 9.

The Davis statement laying out what a rehabilitation program is in PYCO's revised all-SAW valuation (filed September 28) in Exhibit C.

took some discovery from PYCO but asked nothing related to rehabilitation. Any ignorance feigned by KJRY on the subject is the fault of KJRY, not PYCO.⁶

C. Mr. Morton's Letter

PYCO established as part of its Revised FLA (F.D. 34890) that it had ample resources to acquire (and for that matter to acquire, rehabilitate, and operate) the SAW lines. SAW does not contest the showing, nor does any shipper. KJRY does. KJRY's beef is that PYCO did not produce three years of pro formas. KJRY elsewhere makes the point it has, although PYCO's expert (Mr. Gannon) in his analysis dated October 24 shows that KJRY's pro formas are false

⁶ KJRY complains that PYCO has not presented a present value estimate of the cost to rehabilitate the lines. KJRY motion to strike at p. 9 n.4. The cost to rehabilitate increases the longer the rehabilitation is postponed. PYCO gives rehabilitation costs the benefit of the doubt by taking the current cost of rehabilitation without escalating it for future inflation and deterioration.

KJRY's footnote also questions whether PYCO in the future will have funds to cover rehabilitation costs. PYCO's evidence and argument shows that PYCO has ample credit (and indeed cash) to acquire and to rehabilitate the lines, without dependence on the operational revenues. PYCO in fact provided future projections through the year 2010 showing good financial health with the Morton letter. See Exhibit F (filed under seal) to PYCO Rebuttal. But KJRY's claim here proves too much: if substantial rehabilitation is needed, then KJRY obviously lacks financial responsibility, for the highly leveraged resources KJRY through Pioneer has available for this line pale even in comparison to PYCO's cash on hand, much less PYCO's credit. As PYCO demonstrated in comments (see Gannon statement) dated October 24 filed on KJRY's competing FLA, KJRY/Pioneer's rickety financial showing actually demonstrates that KJRY cannot even purchase the line at the price KJRY offers and operate if for three years, much less accomplish any substantial rehabilitation.

and misleading (they are inconsistent with KJRY's financing), and that if corrected in accordance with KJRY's evidence, show KJRY will operate at a loss.

In all events, PYCO has made three points in response: (1) PYCO's consultants demonstrated that the operating costs could be covered from revenue under the BNSF/SAW agreement (a point corroborated by Mr. Gregory in his statement discussed in part below), and that PYCO otherwise intends to subsidize the acquisition itself (as we indicated on May 5). (2) PYCO has ample financial resources, as demonstrated by Mr. Morton's Verified Statement attached as Exhibit A to PYCO's Revised FLA last June. (3) There is no express requirement for pro formas, and the prior showings are sufficient given PYCO's intent to fund the purchase to demonstrate financial responsibility.

Mr. Morton's letter merely provides PYCO's latest financial information, which is consistent with and corroborates PYCO's June showing. It is clearly relevant and hardly prejudicial to KJRY.

D. Mr. Gregory

KJRY moves to strike Mr. Gregory's statement on the grounds that it is not offered to rebut anything (KJRY Mot. Strike at 10), and that it is "irrelevant WTL self-promotion and unsupported attacks on KJRY and Pioneer" (id. at 11).

KJRY should read the statement. WTL is PYCO's alternative service provider pursuant to this Board's authorizations in F.D.

34802. PYCO has long represented that PYCO will contract with WTL to operate the lines if PYCO is allowed to acquire them;⁷ that WTL is providing excellent service to PYCO and that BNSF agrees.⁸ KJRY has been taking shots at WTL ever since KJRY belatedly became involved in this proceeding. For example, as early as KJRY's competing FLA, KJRY claimed that WTL had not shown it was safe, or that it would provide non-discriminatory service to shippers. Certainly KJRY should expect PYCO (and WTL) to make some response to KJRY's "left-field" attacks on rebuttal. For KJRY to claim that PYCO and WTL should have anticipated these attacks is a bit like saying a husband who does not beat his wife should declare that he does not beat his wife to all his neighbors or he should be assumed to have admitted the contrary and should not be allowed to deny it.

KJRY should try to present a case based more on facts and less on sophistry and Catch 22's.

Mr. Gregory's statement responds to KJRY's criticisms. It is obviously appropriate rebuttal. He shows that WTL is part of a shortline rail system with at least as much experience and at least as safe as that KJRY claimed for Pioneer or itself (Gregory ¶12). He explains that (unlike anything affiliated with Pioneer) WTL already operates in the Lubbock area and has unique efficiencies it

⁷ PYCO's original FLA in F.D. 34844, filed May 5, 2006, at p. 21.

⁸ E.g., PYCO's original FLA, filed May 5, 2006, in F.D. 34844, at pp. 30-31 and footnote 15.

can bring to the table (Gregory ¶¶ 3-4). He explains that WTL has already improved service over the very lines in question in this proceeding (Gregory ¶5(a)-(b)), and has further plans for efficiencies (Gregory ¶9(c)). He explains that WTL would not discriminate against any shipper, "nor would PYCO cause us to do so" (Gregory ¶9). He confirms that WTL has an excellent working relationship with BNSF (Gregory ¶5).

In addition, Mr. Gregory's statement corroborates PYCO's position on many other points. For example, he explains that WTL based on its experience with the SAW lines concurs that rehabilitation is necessary, that WTL agrees that Mr. Davis' approach on the rehabilitation question is correct (Gregory ¶8).⁹ He also explains that WTL has experienced considerable problems with the worn out SAW trackage (Gregory ¶8 at p. 8). KJRY's claim that Mr. Gregory's statement "is bloated with irrelevant WTL self-promotion and unsupported attacks on KJRY and Pioneer"

⁹ Mr. Gregory explains that WTL would assist PYCO in seeking FRA RRIF funds for rehabilitation. Gregory ¶8(f). KJRY expresses confusion at this (KJRY Strike at 11), but there is nothing mysterious in a party such as PYCO which recognizes a need for rehabilitation to hold out the option of applying for a RRIF loan, and it is pleasing to know that WTL is prepared to cooperate. Contrary to KJRY's effusions about WTL borrowing (at p. 11), Mr. Gregory indicates that WTL "will need little or no new investment in equipment to operate the lines" (Gregory ¶7). He notes that PYCO is buying the lines (Gregory ¶6). Mr. Gregory simply has indicated WTL is prepared to assist PYCO in seeking RRIF loans. While not essential to PYCO's ability to rehabilitate, PYCO is uniquely qualified to seek same at no or low interest to assist in fixing the lines up for shippers.

likewise lacks merit. We attach as Exhibit A corroboration from BNSF that what WTL states is not self-promotion but the truth. In BNSF's words,

"As Dizzy Dean said, 'it ain't bragging if you can do it.'

WTL has done everything PYCO and we have asked of them."

In more detail, Mr. Hale of BNSF stated that BNSF is

"[v]ery satisfied with WTL service in Lubbock. WTL service to PYCO has been an improvement over service provided by SAW. No doubt that WTL is up to the task of providing rail service to all customers currently served by SAW at a level that those customers require. Very good relationship with WTL. No doubt of the ability to work with WTL to put in place an operating protocol that will keep rail operations in Lubbock fluid to all customers."

As to WTL, BNSF's remarks make the situation res ipsa loquitur (the situation speaks for itself). There is "no doubt" that service will improve in Lubbock if PYCO acquires the lines and WTL operates them.

As to KJRY's "concern" about "unsupported attacks on KJRY and Pioneer," Mr. Gregory and WTL are far more sinned against (by KJRY/Pioneer) than sinning, and anything Mr. Gregory stated about Pioneer/KJRY in comparison to WTL is amply supported. To this point we now turn.

II. Reiteration of Sanction Request Against KJRY/Pioneer

What is really at issue here is KJRY and Pioneer's willful and obstreperous misconduct in concealing their poor relationship with Class I's, communities, and shippers. It now appears that there is overwhelming reason to question the ability, willingness, or mindset of KJRY and Pioneer to improve rail service in Lubbock. More bluntly, the "track record" the Pioneer system looks similar to that followed by SAW which resulted in PYCO's alternative service petition in F.D. 34802 and PYCO's quest for permanent relief, including F.D. 34844 and F.D. 34890.

PYCO attempted to obtain discovery from KJRY and Pioneer concerning complaints and litigation concerning or between Pioneer or its subsidiaries (including KJRY) on the one hand and Class I carriers, shippers, and communities on the other.¹⁰ This Board issued an order on October 5 compelling KJRY and Pioneer to respond to those discovery requests (among other requests) by October 10. Before, on, and after that date, Pioneer refused to disclose any relevant information about its subsidiaries, and KJRY refused to disclose any information about itself (other than some material relating to a crossing accident), concerning complaints and litigation.¹¹ As part of our Comments on the KJRY competing FLA

¹⁰ PYCO's first interrogatory to KJRY and Pioneer inquired for this information.

¹¹ KJRY took the position that interrogatory one dealing with these issues was "withdrawn" because it was not specifically part of PYCO's motion to compel. PYCO did not "withdraw" anything. But in any event, PYCO also requested litigation

dated October 24, PYCO requested sanctions against KJRY and Pioneer.

PYCO now knows that there have evidently been a plethora of disputes between Pioneer, KJRY and other Pioneer subsidiaries on the one hand and shippers, Class I carriers, and communities on the other. These show a pattern of conduct by Pioneer and KJRY which in combination with their actions in this case indicate that they have not shown, and cannot show, that KJRY is likely to improve rail service to shippers in Lubbock. As the Scots philosopher David Hume pointed out, the future is like the past. The past conduct of both Pioneer and KJRY is thus germane to what shippers can expect, and would certainly corroborate any "attack" by Mr. Gregory upon KJRY or Pioneer that KJRY purports to perceive in Mr. Gregory's statement.

-- Roquette America, Inc., filed on November 29, 2005, a "Verified Petition for Exemption" (filing fee of \$60,800 indicates that this was no "small dispute") in Finance Docket 34795 for a build out to reach the BNSF mainline directly. Roquette indicated that parts of its Keokuk facilities had fallen "captive" to KJRY, that KJRY services were "inefficient," that KJRY had not upgraded (rehabilitated) its track to handle modern 286,000 pound rail cars,

documents (Document Request No. 6 and No. 7), and PYCO expressly moved to compel the disclosure of these documents. (PYCO's discovery requests were appended to PYCO's motion to compel and are hereby again incorporated herein.)

and that shortly after Pioneer gained control of KJRY, "[p]roblems ... developed in the relationship between KJRY and BNSF" (Roquette Petition at p. 5) and "KJRY ... attempted to isolate [Roquette's] Keokuk facility from BNSF." Id. While this case apparently was eventually settled, it certainly is germane in terms of understanding the relationship of KJRY and Pioneer to BNSF and to shippers. PYCO attaches the Verified Petition and a related pleading as Exhibit B. According to KJRY/Pioneer's interrogatory answers (response to supplemental request 4, at p. 24, of Exhibit B to PYCO's Comments on KJRY FLA, filed Oct. 12), Roquette is the "major customer" disclosed in Pioneer's financial statements. Obviously this information is highly germane to the financial condition and reliability of KJRY and Pioneer as a whole. The kind of antagonistic and uncooperative relation that it shows between KJRY and the major shipper on the whole Pioneer system indicates that KJRY cannot be relied upon by PYCO or anyone else in Lubbock to improve service over that provided by SAW. Pursuant to this Board's order of October 5, this information should have been disclosed by KJRY and Pioneer to PYCO on October 10, but it was not. This is a direct and material breach of the Board's order.

-- It turns out that the Roquette dispute is but a smaller part of a broader dispute involving BNSF and shippers on the one hand and Pioneer and KJRY on the other. Evidently when Pioneer gained control of KJRY, Pioneer's president approached BNSF to buy

the "Mooar line," and when BNSF declined, KJRY terminated a crossing agreement and physically blocked the track, cutting off BNSF access to shippers. KJRY insisted on a switch fee of \$85 per car and locomotive. Litigation ensued for years. After appeals to the court of appeals, the apparent final decision by this Board (BNSF -- Petition for Declaration or Prescription of Crossing Rights, F.D. 33740, served May 13, 2003) awarded crossing rights to BNSF and ordered KJRY to allow the crossing. This information shows poor relations between Pioneer and KJRY on the one hand, and BNSF and shippers on the other. Again, pursuant to this Board's order of October 5, it should have been disclosed to PYCO on October 10, but it was not. Again, this is a direct and material breach of the order.

-- According to Mr. Ken Wise, former Director of Economic Development for City of Rochelle, a Pioneer subsidiary agreed as operator for a City-owned line not to impose switch charges in excess of what the Class I carriers would absorb. Pioneer reneged on that agreement and imposed higher charges. See Letter, BNSF to Mayor of City of Rochelle, 12 June 1997, in Exhibit C. The Class I carriers had to pass those through. Shippers were adversely affected. City of Rochelle responded with a Notice of Exemption to operate its own railroad on the trackage, which this Board authorized over the opposition of Pioneer's subsidiary (Rochelle Railroad Company). See City of Rochelle -- Notice of Exemption,

F.D. 33587, served July 7, 1998 (also contained in Exhibit C). PYCO understands that a shipper-owned railroad now operates the lines for the City of Rochelle. This information shows that Pioneer through its subsidiaries has imposed switch rate increases soon after claiming it would not do so, and otherwise has relations antagonistic to Class I's, shippers, and communities. This is germane here, because among many other things it calls into question the reliability of KJRY's claim that it will not impose surcharges. Again, the information should have been disclosed but was not, and we have another important breach of the Board's October 5 order.

-- On May 18, 2005, Ohio Valley Railroad and Mid-America Locomotive and Car Repair, Inc., filed a petition to restore a switch connection and for other relief against Indiana Southwestern Railway Company, a Pioneer subsidiary. See Petition filed in F.D. 34608, attached as Exhibit D. The Petition indicates that despite a prior order of this Board, the Pioneer subsidiary did not properly reinstall an improperly removed switch and was otherwise engaged in detrimental conduct to Ohio Valley Railroad and its customer (including purporting to charge \$2500 per car apparently for use of 300 feet of track). This is reminiscent of SAW's removal of the switch to Floyd Trucking and passive-aggressive avoidance of service since. Again, this kind of conduct by Pioneer and its subsidiaries should have been disclosed, but was

not, and this is yet another direct and material breach of the Board's October 5 order.

-- County of Salem, New Jersey, owned the Salem Branch, for which a Pioneer subsidiary (West Jersey Railroad) was supposed to be the operator. According to the pleadings, the Pioneer subsidiary pulled out of the Salem Branch, leaving shippers stranded, such that another operator had to commence operations immediately. But Pioneer through its subsidiary denied any need for urgent service and sought revocation of the new operator's notice of exemption. See pleadings filed in F.D. 32700 (Exhibit E). The new operator (and County of Salem and its shippers) prevailed. Again, this information goes to Pioneer's cavalier and antagonistic disregard for shipper interests, and its rocky relationship to shippers generally. It is echoed in Pioneer/KJRY's cavalier disregard for PYCO's need for reliable service commencing upon expiration of the F.D. 34802 authorization on or about November 22. This information should have been disclosed to PYCO but it was not. And Pioneer and KJRY have again breached this Board's order of October 5.

What PYCO has learned to date notwithstanding Pioneer/KJRY's objections and failure to provide discovery response appears to be the tip of the iceberg.¹² The point here is that KJRY and Pioneer

¹² Michigan Southern Railroad Co. v. Branch & St. Joseph Counties Rail Users Association, Inc., 287 F.3d 568 (6th Cir. 2002), discusses a contract dispute in which a Pioneer subsidiary

have intentionally concealed a pattern of litigious conduct, inadequate and unreliable service to shippers, and rocky relations with Class I's, including specifically BNSF. This concealment is particularly prejudicial to PYCO (and all other shippers in Lubbock) in that KJRY's obstreperous misconduct is occurring during the course of an expedited proceeding in which KJRY is a voluntary participant.

KJRY's modus operandi is to "hide the ball" and then accuse others of "foul play." The appropriate response to this is not to strike highly relevant parts of PYCO's pleadings, but for the Board (as requested by PYCO in our October 24 comments) to impose sanctions on KJRY (and Pioneer) pursuant to 49 C.F.R. § 1114.31(b)(2)(ii)-(iv). These sanctions include (1) refusing to allow KJRY to support its claims of financial responsibility or any assertion that it would be likely to improve service to shippers, (2) striking any such arguments or evidence from KJRY's pleadings, and (3) awarding reasonable expenses to PYCO arising from

argued that it had an option to buy a rail line from an association of rail shippers, but the rail shippers took the position that the Pioneer Subsidiary was in breach of contract for failure to maintain the line in "class 1" condition as required by the contract.

Pioneer through a subsidiary has been engaged in years of conflict with its hometown (Peoria), to the point that the City filed an adverse discontinuance proceeding against the Pioneer subsidiary. This Board granted the adverse discontinuance in City of Peoria and the Village of Peoria Heights, IL -- Adverse Discontinuance -- Pioneer Industrial Railroad, AB 878, served August 10, 2005. Litigation relating to Pioneer's conflict with its hometown continues.

prolongation of the proceeding and additional costs arising from KJRY and Pioneer's failure to provide full and complete discovery responses.

III. Conclusion

KJRY's motion to strike should be denied. If anything, the KJRY motion underscores the deficiencies in KJRY's discovery response, and emphasizes the need to impose sanctions on KJRY. If proper sanctions are imposed, the KJRY FLA must be dismissed.

In all events, any claim by KJRY that it is likely to improve service in Lubbock is belied by the record. KJRY's motion to strike is simply another slick maneuver by Pioneer's litigation machine to obfuscate the facts.

Feeder line proceedings are supposed to provide relief to shippers for inadequate service, not opportunities for another party to pummel (with motion practice) a shipper seeking to vindicate its rights, or for that party to exploit shippers by diverting the property to itself for continued inadequate rail service.

PYCO is prepared to acquire the lines immediately, and WTL is prepared to commence operation upon such acquisition. PYCO reiterates its request that it be authorized to acquire the property on terms comporting with 49 U.S.C. § 1010(5) and § 10907 before expiration of the alternative service order in F.D. 34802 on or about November 22, 2006.

Respectfully submitted,

Charles E. Montange by JEM

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Exhibit A -- BNSF email
Exhibit B -- Roquette pleadings
Exhibit C -- City of Rochelle material
Exhibit D -- Ohio Valley Railroad material
Exhibit E -- Salem Branch (New Jersey) material

Certificate of Service

I hereby certify service of the foregoing Reply to KJRY's Motion to Strike upon the following counsel of record by hand (for WDC counsel) or by express service, next business day delivery, this 31st day of October 2006:

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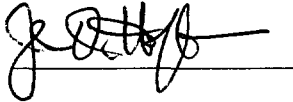
A handwritten signature in black ink, appearing to read "Andrew Goldstein", is written over a horizontal line.

Exhibit A

BNSF

c.montange

From: "Hale, Weldon E" <Weldon.Hale@bnsf.com>
To: <c.montange@verizon.net>
Sent: Thursday, October 26, 2006 6:31 PM
Subject: Re: PYCO proceedings

I read that too. Like Dizzy Dean said, "It ain't bragging if you can do it." WTL has done everything PYCO and we have asked of them. Add my comments as you see fit.

Eddie Hale
Shortline Development
BNSF Railway

-----Original Message-----

From: c.montange <c.montange@verizon.net>
To: Hale, Weldon E
Sent: Thu Oct 26 19:23:46 2006
Subject: Re: PYCO proceedings

Thanks. KJRY/Pioneer moved to strike WTL's Declaration concerning how it provided decent service as "self-serving." I may put this into the record in response to the motion to strike, for your statement is not "self-serving." I trust this would be ok.

----- Original Message -----

From: Hale, Weldon <<mailto:Weldon.Hale@bnsf.com>> E
To: c.montange <<mailto:c.montange@verizon.net>>
Sent: Thursday, October 26, 2006 4:31 PM
Subject: RE: PYCO proceedings

Very satisfied with WTL service in Lubbock. WTL service to PYCO has been an improvement over service provided by SAW. No doubt that WTL is up to the task of providing rail service to all customers currently served by SAW at a level that those customers require. Very good relationship with WTL. No doubt of the ability to work with WTL to put in place an operating protocol that will keep rail operations in Lubbock fluid to all customers.

Eddie Hale
Shortline Development

BNSF Railway
(817) 352-6012

CONFIDENTIALITY NOTICE:

This message is intended only for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for

10/26/2006

delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this message in error, please delete this message from all computers and notify us immediately by return e-mail and/or phone (817) 352-6012.

From: c.montange [mailto:c.montange@verizon.net]
Sent: Thursday, October 26, 2006 4:38 PM
To: Hale, Weldon E
Subject: PYCO proceedings

Is BNSF satisfied with WTL service in Lubbock?

Does BNSF agree that it is an improvement over service by SAW?

10/26/2006

Exhibit B
Roquette Pleadings

November 29, 2005

Via Hand Delivery

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K St. N.W.
Washington, D.C. 20423

215218
FILED

NOV 29 2005

**SURFACE
TRANSPORTATION BOARD**



RE: STB Docket No. 34795, *Roquette America, Inc. – Petition for Exemption from 49 U.S.C. § 10901 to Construct a New Line of Rail in Keokuk, Iowa*

Dear Secretary Williams:

Please find enclosed for filing the original and ten (10) copies of Roquette America, Inc.'s Verified Petition for Exemption in the above referenced proceeding. Also enclosed is a compact disk containing the electronic version of the written text and exhibits in Word format and PDF format. In addition, the filing fee of \$60,800.00 is also enclosed.

Please note that the original and the copies contain COLOR IMAGES in Exhibits No. 1, 2, 7 and 8.

An extra copy of this filing is enclosed for stamping and returning to our offices.

Should you have any questions regarding the foregoing, please do not hesitate to contact the undersigned.

Sincerely,

Jeffrey O. Moreno

ENTERED
Office of Proceedings

NOV 30 2005

Part of
Public Record

FEE RECEIVED
NOV 29 2005
**SURFACE
TRANSPORTATION BOARD**

FILED

NOV 29 2005

BEFORE THE
SURFACE TRANSPORTATION BOARD

ON BOARD

ENTERED
Office of Proceedings

NOV 30 2005

Part of
Public Record

215218
STB Finance Docket No. 34795



ROQUETTE AMERICA, INC.—

PETITION FOR EXEMPTION FROM 49 U.S.C. § 10901
TO CONSTRUCT A NEW LINE OF RAIL IN KEOKUK, IOWA

FILED

NOV 29 2005

VERIFIED PETITION FOR EXEMPTION

SURFACE
TRANSPORTATION BOARD

Roquette America Railway, Inc. ("Roquette") hereby petitions the Surface Transportation Board ("STB" or "Board"), pursuant to 49 U.S.C. §10502, for an exemption from the approval requirements of 49 U.S.C. §10901 for the proposed construction of a rail line in Keokuk, Iowa. The primary purpose of the project is to establish competitive rail service to a production facility in Keokuk that is owned and operated by Roquette's parent company, Roquette America, Inc. ("RAI"). The Keokuk facility currently is captive to the Keokuk Junction Railway ("KJRY"). The proposed rail construction would connect the facility to the BNSF Railway ("BNSF").

I.

Background

RAI created Roquette for the purpose of constructing the common carrier rail line that is the subject of this exemption petition. RAI is the U.S. subsidiary of Roquette Freres, a leading global producer of starch derivatives and sugar alcohols.

RAI owns and operates two production facilities in the U.S. that produce more than 600 carbohydrate derivatives for a variety of applications. The Keokuk facility produces corn-based starches and syrups used in foods and beverages, paper products, pharmaceuticals, cosmetics,

and agricultural goods. In 2005, RAI employed over 470 people and generated in excess of \$300 million in revenue.

The Keokuk facility is a complex consisting of multiple plants erected over the past 100 years. It is located within the city limits of Keokuk, Iowa, along the west bank of the Mississippi River. The facility is at the bottom of a line of bluffs that effectively isolate it from the dwellings and businesses of the city, which are located at the top of the bluff. Exhibit 1 is an aerial photograph of the Keokuk facility that also shows the surrounding structures, roads, rail lines (color coded to distinguish RAI, KJRY and BNSF tracks), and the Mississippi River.

There is a large complex of tracks situated between the Keokuk facility and the Mississippi River. KJRY's main track is closest to the Keokuk facility. BNSF owns most of the remaining tracks, including a mainline track that extends for approximately 55 miles from Fort Madison, Iowa to West Quincy, Missouri. In addition, BNSF's Mooar Line is located just inside the East end of the Keokuk facility. BNSF accesses the Mooar Line from its mainline by crossing over the KJRY track pursuant to authority granted by the Board in Finance Docket No. 33740, *The Burlington Northern and Santa Fe Ry. Co. – Petition for Declaration or Prescription of Crossing, Trackage, or Joint Use Rights*, 2003 STB Lexis 244 (served May 13, 2003).

The Keokuk facility is captive to the KJRY for all rail service. From a rail operations perspective, the Keokuk facility consists of three separate sets of plants served by three distinct rail leads that are not connected, except by the KJRY mainline. Exhibit 2 contains a schematic diagram of these tracks. These tracks also are visible in Exhibit 1. The High Fructose Corn Syrup Refinery and surroundings are served by a lead at the southeast corner of the complex that extends through a floodgate before connecting with the KJRY (referred to as the "HFCS Lead" in Ex. 2). Refineries A and B are served by a double-ended lead track and a connecting stub end

track on the south side of the facility (referred to as the "Plant Lead" in Ex. 2). A third lead track that originates off the KJRY line further downriver extends deep into the Keokuk facility to serve five distinct areas within the complex (referred to as the "Downriver Lead" in Ex. 2).

Because RAI must rely upon the KJRY to move cars between areas within the Keokuk facility that are served by different leads, RAI's own internal operations are inefficient. RAI must request switching service from KJRY, which is not always immediately available at the facility if power and crews are not nearby. Furthermore, because KJRY has not upgraded its track to handle 286,000 pound rail cars, RAI is restricted to using less efficient 263,000 pound rail cars, even when KJRY's role in the transportation is solely to switch cars to and from BNSF.

The Keokuk facility both tenders and receives substantial volumes of various products by rail. In 2005, the facility will receive approximately 500 carloads of processing aids and chemicals, and 2500 carloads of corn and other raw materials. The total shipments of finished goods from the Keokuk facility in 2005 will approximate 6000 carloads. RAI expects these volumes to grow 5% annually. The proposed rail construction project is not expected to increase or decrease these volumes.

Although BNSF is the long-haul carrier for a substantial portion of this traffic, it cannot deliver rail cars directly to, or originate rail cars directly from, the Keokuk facility. Currently, BNSF delivers rail cars loaded with raw materials and chemicals to an interchange track that is a few hundred feet upriver of the facility. KJRY then switches these cars into the facility as needed and places empties back on the interchange track. Loaded outbound cars are held at a KJRY storage yard approximately two miles downriver of the Keokuk facility and then delivered to the interchange track, where the cars are placed into trains. BNSF and KJRY each operate 1-2

trains per day destined to or from the Keokuk facility in this manner. This double-handling of traffic embeds substantial inefficiencies in RAI's operations.

KJRY's rail monopoly over the Keokuk facility is a relatively recent development, having arisen only since 1996. For more than 50 years prior to 1996, both the KJRY and BNSF, or their predecessors, could serve the Keokuk facility pursuant to a series of tri-partite switching agreements between the predecessors of KJRY, BNSF and RAI. The most recent of these agreements, which was dated November 1, 1977, permitted both railroads to directly access the Keokuk facility. This agreement is attached as Exhibit 3 (the "1977 Agreement").

Prior to 1995, both KJRY and BNSF had direct connections to the Keokuk facility. KJRY directly accessed each of the three RAI leads identified in Exhibit 2 from its mainline running along the Mississippi River. BNSF possessed direct access to the "Downriver" and the "Plant" leads in Exhibit 2 from its Mooar Line. BNSF, however, did not have direct access to the upriver lead that serves the HFCS facility. Section 3 of the 1977 Agreement permitted each railroad to use the other's facilities in common to serve the Keokuk facility.

Due to flooding of the Mississippi River in 1993, the City of Keokuk, the Army Corps of Engineers and RAI developed a system of floodwalls to protect the Keokuk facility and adjacent City-owned facilities from future floods. The project, however, required BNSF to relocate its Mooar Line (which previously ran directly through the Keokuk facility) further to the east, which eliminated BNSF's direct access to the Keokuk facility.

To address these changes, all three parties entered into a Supplemental Agreement to the 1997 Agreement, dated September 1, 1995. The Supplemental Agreement is attached as Exhibit 4. Pursuant to Sections 3 and 4 of the Supplemental Agreement, BNSF retained access to all portions of the Keokuk facility that existed prior to the floodwall project (except the HFCS

facility) and it was to have access to any new RAI facilities that may in the future become located along the track within the Keokuk facility. The Supplemental Agreement was to run concurrent with the term of the 1997 Agreement, which remained effective except as modified by the Supplemental Agreement.

Less than a year later, on March 13, 1996, Pioneer Railcorp, a railroad holding company, purchased the KJRY. Problems soon developed in the relationship between KJRY and BNSF. These problems, which have been described in detail in STB Docket No. 33740 (Sub-No. 1), *The Burlington Northern and Santa Fe Ry. Co. – Petition for Declaration or Prescription of Crossing, Trackage, or Joint Use Rights; The Burlington Northern and Santa Fe Ry. Co. – Petition for Determination of Compensation and Other Terms*, 2001 STB Lexis 575 (served June 22, 2001) ("*KJRY Crossing Decision*"), ultimately compelled BNSF to pursue an action before the STB in order to cross the KJRY to retain access to the newly relocated Mooar Line. BNSF's access to the Keokuk facility, however, was not at issue in that proceeding.

Shortly after being acquired by Pioneer Railcorp, the KJRY also attempted to isolate the Keokuk facility from BNSF. In a letter dated May 1, 1996, KJRY notified RAI and BNSF that it would terminate the 1977 Agreement "as to the crossings serving Roquette America, Inc., effective August 1, 1996."¹ See Exhibit 5. This eliminated BNSF's ability to serve the Keokuk facility entirely, since BNSF had lost direct access due to the relocation of the Mooar Line. KJRY served this notice at about the same time that it entered into a 10-year contract with RAI, dated May 17, 1996, to provide switching service at the Keokuk facility, which included switching cars to and from BNSF. Because of this 10-year switching contract, there was no immediate competitive impact upon RAI from KJRY's cancellation of the 1997 Agreement.

¹ In a letter dated November 13, 1998, KJRY cancelled the remainder of the 1977 Agreement, which had continued to govern the relationship between KJRY and BNSF. See Exhibit 6. That action precipitated the dispute in STB Docket No. 33740 (Sub-No. 1).

However, because that switching contract will soon expire in May 2006, RAI now seeks to re-establish its access to BNSF.

II.

Description of the Project

Roquette desires to construct a common carrier rail line that would both re-establish RAI's competitive connection with BNSF and connect the "Downriver" and "Plant" leads within the Keokuk complex, resulting in more efficient service at a lower cost. As illustrated by the schematic in Exhibit 7, Roquette would construct two segments of rail to connect the two lead tracks and it would make minor reconfigurations to the existing lead tracks. The construction would involve the following activities:

1. Beginning at the Downriver Lead, Roquette would remove the existing connection to KJRY.
2. Roquette would extend the Hub Track (the first stub end track branching off the Downriver Lead) approximately 150 feet further downriver. Within approximately 20 feet of the Fourth Lead, which is owned by KJRY, the downriver Hub Track extension would curve toward the KJRY and connect to the KJRY mainline via a new switch connection. The new switch connection would be at a point approximately 400 feet upriver of the flood wall.
3. Roquette also would construct an upriver extension to the Hub Track that would connect the Hub Track with the downriver end of the Plant Lead.

Roquette intends to purchase from RAI the Hub Track and the "Plant Lead," which would extend the total length of its track to approximately 2000 feet.

Roquette would interconnect with BNSF by crossing the KJRY track at the point of the new switch connection to the KJRY from the "Downriver" Lead. Exhibit 8 is a diagram of the crossing that Roquette plans to construct. The crossing would be a double-turnout configuration that would extend from the newly constructed switch connection with KJRY, across the KJRY track for approximately 180 feet, to a newly constructed turnout onto the BNSF mainline. If

necessary, Roquette will submit a crossing petition to the Board, pursuant to 49 U.S.C. § 10901(d), at a later date.

III.

Roquette's Rail Construction Project Meets the Standards for Exemption Contained in 49 U.S.C. §10502

Under 49 U.S.C. §10502, the Board must exempt the proposed construction of a rail line from the requirements of 49 U.S.C. §10901 if it finds that regulation of the project: (1) is not necessary to carry out the transportation policy of 49 U.S.C. § 10101; and (2) either (a) the transaction or service is of limited scope, or (b) the application of a subdivision of subtitle IV of the Interstate Commerce Commission Termination Act is not needed to protect shippers from the abuse of market power.

Congress enacted the exemption provision contained in the Staggers Rail Act—now codified at 49 U.S.C. § 10502—as a means through which transactions like the one proposed herein by Roquette could be liberated from otherwise applicable cumbersome regulatory processes. *See* H.R. Rep. No. 96-1430, at 105 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4110, 4137. Precedent dictates that the Board should apply its exemption power “boldly” to advance deregulation. *Simmons v. I.C.C.*, 760 F.2d 126, 132 (7th Cir. 1985); *American Trucking Ass’n v. I.C.C.*, 656 F.2d 1115, 1119 (5th Cir. 1981) (“[T]he Commission is charged with the responsibility of actively pursuing exemptions for transportation and services that comply with the section’s standards.”). The STB and its predecessor have consistently adhered to this directive. *See, e.g.*, Finance Docket No. 32158, *Gateway Western Railway Company -- Construction Exemption -- St. Clair County, Illinois*, (served May 11, 1993) at 8. *See Class Exemption for the Construction of Connecting Tracks Under 49 U.S.C. §10901*, 1 STB 75, 79 (1996) (presumption that rail construction projects will be approved.)

As discussed below, Roquette's proposed rail line construction project meets the standards of 49 U.S.C. § 10502 and should be exempted from the prior approval requirements of 49 U.S.C. § 10901.

A. Regulation Is Not Necessary To Carry Out The Rail Transportation Policy of 49 U.S.C. § 10101

Regulation of Roquette's construction and operation of the railroad line described herein is not necessary to carry out the rail transportation policy expressed at 49 U.S.C. § 10101. In fact, granting the requested exemption will promote the rail transportation policy through the restoration of competition between KJRY and BNSF to the Keokuk facility and the realization of the attendant benefits of such competition.

For example, in STB Docket No. 34210, *Sunflower Rail Company LLC—Construction and Operation Exemption—Finney County, KS*, (Served March 28, 2003), the Board determined that a rail construction project creating competitive service for the petitioner's parent company would achieve the objectives of the rail transportation policy codified at 49 U.S.C. §§ 10101(1), 10101(2), 10101(4), 10101(5), and 10101(7). Roquette's construction project will similarly advance the rail transportation policies and is therefore equally deserving of an exemption.

First, the proposed project will allow competition and the demand for service to establish reasonable rates for transportation by rail. 49 U.S.C. § 10101(1). Second, an exemption will minimize the need for federal regulatory control over the rail transportation system, by allowing market forces to determine rate and service levels. 49 U.S.C. § 10101(2). Third, construction of the line will promote the development of a sound rail transportation system with effective competition among rail carriers. 49 U.S.C. § 10101(4). Fourth, a promptly issued exemption will reduce regulatory barriers to entry into the rail industry. 49 U.S.C. § 10101(7). Fifth, the proposed line construction will encourage honest and efficient management through market

discipline imposed by direct rail-to-rail competition. 49 U.S.C. § 10101(9). Sixth, the project will help avoid undue concentration of market power and prohibit unlawful discrimination. 49 U.S.C. § 10101(12). Finally, granting an exemption will provide for expeditious handling and resolution of this proceeding. 49 U.S.C. § 10101(15).

The Board and its predecessor previously have exempted similar line construction projects from the prior approval requirements imposed by 49 U.S.C. § 10901, often in instances where the petitioner sought to create competitive rail service. *See* STB Finance Docket 34210, *Sunflower Rail Company, LLC—Construction and Operation Exemption, Finney County KS*, (Served March 21, 2003); STB Finance Docket No. 34060, *Midwest Generation, LLC—Exemption from 49 U.S.C. § 10901—For Construction in Will County, IL* (Served March 21, 2002); STB Finance Docket 34002, *Alamo North Texas Railroad Corp.—Construction and Operation Exemption—Wise County, TX* (Served Sept. 3, 2002); STB Finance Docket No. 33782, *Entergy Arkansas and Entergy Rail—Construction & Operation Exemption—White Bluff to Pine Bluff, AR*, (Served May 4, 2000); ICC Finance Docket No. 32630, *Omaha Public Power District—Construction Exemption in Otoe County, NE* (Served May 2, 1995); and ICC Finance Docket 32607, *WFEC Railroad—Construction & Operation Exemption—Choctaw & McCurtain Counties, OK*, (Served Feb 27, 1996). Accordingly, it is proper for the Board to follow precedent in this proceeding and to grant the exemption requested by Roquette.

B. The Proposed Construction Project is Limited in Scope

Roquette's proposed rail line construction project satisfies the second part of the exemption standard because it is limited in scope. The new line construction will be only a few hundred feet long and will be constructed in a highly industrialized area already occupied by tracks of RAI, KJRY and BNSF. The Board has found much larger projects to be of limited

scope. See ICC Finance Docket 32607, *WFEC Railroad—Construction & Operation Exemption—Choctaw & McCurtain Counties, OK*, (Served Feb 27, 1996) (14 mile line); ICC Finance Docket No. 32630, *Omaha Public Power District—Construction Exemption in Otoe County, NE* (Served May 2, 1995) (5 mile line), and ICC Finance Docket No. 31989, *The Elk River Railroad, Inc.,—Construction and Operation Exemption—Clay and Kanawha Counties, WV*, (Served May 28, 1992) (30-mile line). Therefore, precedent dictates that Roquette's proposed project is limited in scope within the meaning of 49 U.S.C. § 10502(a)(2)(A).

C. Regulation is Not Necessary to Protect Shippers from Abuse of Market Power.

Because Roquette's proposed transaction is limited in scope, the Board is not required to make the alternative finding, at 49 U.S.C. § 10502(a)(2)(B), that regulation is not needed to protect shippers from the abuse of market power. See STB Finance Docket No. 34060, *Midwest Generation, LLC—Exemption from 49 U.S.C. § 10901—for Construction in Will County, IL*, (Served March 20, 2002). Nevertheless, in addition to being limited in scope, this project should be granted an exemption because regulation of the project is not necessary to protect shippers from abuse of market power.

By its very nature, Roquette's proposed build out to BNSF is intended to protect Roquette from the abuse of market power through t of a rail transportation alternative to KJRY at the Keokuk facility. Furthermore, the proposed project simply would restore the competitive balance that existed at the Keokuk facility prior to 1996.

Consistent with established precedent, it is appropriate for the Board to find that Roquette's line construction project—which increases rail transportation alternatives—will not subject shippers to abuse of market power. See STB Finance Docket No. 34060, *Midwest Generation, LLC—Exemption from 49 U.S.C. § 10901—for Construction in Will County, IL*,

(Served March 20, 2002) ("The proposed transaction would provide Midwest, and possibly other shippers that may locate on the line, with an additional rail option, and thus would enable shippers to realize the benefit of increased railroad competition."); STB Finance Docket No. 33782, *Entergy Arkansas and Entergy Rail—Construction & Operation Exemption—White Bluff to Pine Bluff, AR*, (Served May 4, 2000); and, ICC Finance Docket 32607, *WFEC Railroad—Construction & Operation Exemption—Choctaw & McCurtain Counties, OK*, (Served Feb 27, 1996).

IV.

Conclusion

Roquette recognizes the requirement for the Board to undertake an independent environmental evaluation in connection with the proposed exemption, as set forth at 49 C.F.R. § 1105. Accordingly, on June 20, 2005, Roquette representatives consulted with the Board's Section of Environmental Analysis ("SEA") with respect to preparation of an environmental analysis by a third-party consultant. Roquette will continue to pursue its environmental obligations in conjunction with this petition for exemption, including preparation of necessary reports, and will cooperate with the Board to resolve any issues in an expeditious manner.

WHEREFORE, petitioner, Roquette, respectfully requests that the Board issue the exemption herein requested to allow the construction and operation of a new line of rail.

Respectfully submitted,

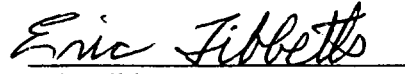


Nicholas J. DiMichael
Jeffrey O. Moreno
THOMPSON HINE LLP
1920 N Street, NW
Washington, DC 20036
(202) 331-8800

November 29, 2005

VERIFICATION

I, Eric Tibbetts, Logistics Department Manager, for Roquette America, Inc., hereby verify under the 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.


Eric Tibbetts

November 28, 2005

EXHIBIT 1

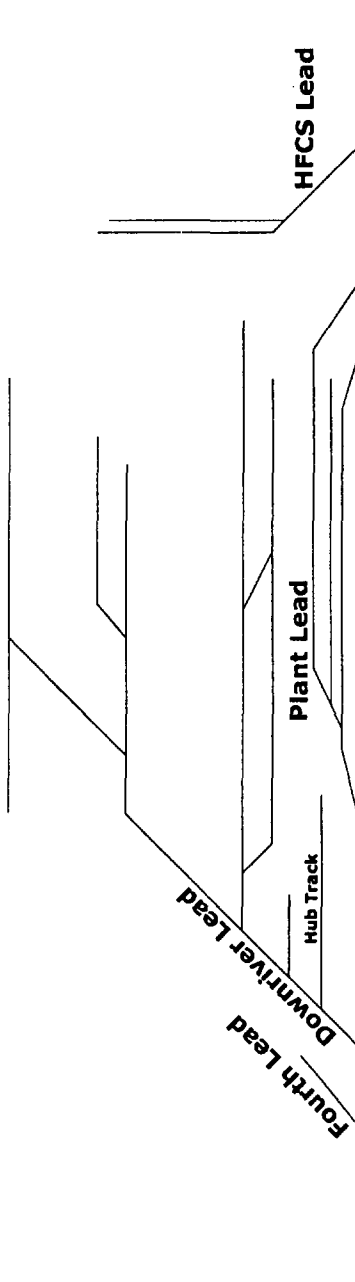
MAP TO BE
SCANNED
LATER

EXHIBIT 2

Roquette Keokuk Complex Current Track Layout

Roquette Tracks (blue)

Keokuk Junction Tracks (red)



<===Downriver to West Quincy
and Twin Rivers Yard

Upriver to Fort Madison and LaHarpe >>>>

EXHIBIT 3

THIS AGREEMENT, made and entered into this 1st day of November, 1977, by and between BURLINGTON NORTHERN INC., a corporation, hereinafter referred to as "Burlington", WILLIAM M. GIBBONS, Trustee of the property of CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, Debtor, hereinafter referred to as "Rock Island", and THE HUBINGER COMPANY, a corporation, hereinafter referred to as "Industry". Said Burlington and said Rock Island shall sometimes hereinafter be referred to collectively as "Railroad Parties", and either of them shall sometimes hereinafter be referred to individually as "Railroad Party".

RECITALS:

There is in effect between the Parties hereto, or their predecessors, agreement dated June 1, 1966, as supplemented by supplemental agreement dated October 1, 1971, covering the ownership, maintenance, operation, and use of certain trackage adjacent to and serving the Industry's plant facilities (sometimes hereinafter referred to as "Plant") in the City of Keokuk, Iowa.

By Bill of Sale of even date, Railroad Parties have sold to Industry certain of the trackage serving said Plant, and it is the desire of all of the parties hereto to terminate said agreement of June 1, 1966, as supplemented October 1, 1971, and to enter into a new agreement to cover the ownership, maintenance, repair, renewal, operation, and use of all of the trackage now situated adjacent to and serving said Plant.

NOW, THEREFORE, it is agreed by and between the parties hereto as follows:

Section 1 - TERMINATION OF EXISTING AGREEMENTS.

Except as to liabilities accrued thereunder prior thereto, and except as Section 1 providing for termination of previous agreements, said agreement dated June 1, 1966, as supplemented October 1, 1971, shall be and the same is hereby terminated as of the date first herein written.

Section 2 - EXHIBITS - DEFINITIONS.

Attached hereto and hereby made a part hereof is Burlington's Plan No. 112592-G, last revised March 3, 1977 (sometimes hereinafter referred to as "Track Plan"), upon which is shown in

- (a) dashed black lines, trackage owned by Rock Island,
- (b) dotted black lines, trackage owned by Burlington,
- (c) diagonal dashed lines, trackage owned by Industry,

to be used by said Railroad Parties in serving said Plant. Said trackage shall sometimes hereinafter be referred to respectively as "Rock Island Trackage", "Burlington Trackage", and "Industry Trackage". All of said trackage shall sometimes hereinafter be referred to collectively as "Joint Industry Trackage".

Section 3 - GRANT OF RIGHTS

Subject to the provisions of Section 6 hereof, each of the Railroad Parties hereto grants to the other the right to use in common with the granting party the granting party's ownership and interest in said Joint Industry Trackage for the purpose of handling thereupon and thereover cars in the account or possession of such other party consigned to and/or from said Plant or any tenants of Industry in said Plant who may require rail service, without cost or expense to the other Railroad Party hereto. Rock Island, without additional consideration therefor, also grants to Burlington the right to install, maintain, repair and renew, and make additions and betterments, all at the sole cost and expense of Burlington, to that portion of Burlington's crossover track No. 18 as is situated on right-of-way of Rock Island in the vicinity of H Street in said City of Keokuk.

The Industry shall, without expense to either of the Railroad Parties hereto, provide and protect each in the peaceable possession and use of necessary right-of-way for such portion, if any, of said Joint Industry Trackage as is not located upon the premises of either of said Railroad Parties, and shall at any time upon request of either of said Railroad Parties produce all easements, grants, ordinances, and all authorization from regulatory bodies having jurisdiction, which in the opinion of the Railroad Parties or either of them may be required for said right-of-way, said Joint Industry Trackage and the operation thereover and to furnish to each of said Railroad Parties copies thereof. Industry further grants to each of said Railroad Parties, without cost or expense to either, the right to use all of said Industry Trackage in serving the Industry and/or its tenants and in its general railroad business insofar as use of such shall not unreasonably interfere with the business of the Industry and to extend said Industry Trackage or to construct other spurs therefrom for the purpose of serving other industries, provided that such use shall not be detrimental to the Industry, and provided that Industry shall be reimbursed by such other industry or industries as may be negotiated.

Section 4 - MAINTENANCE - TAXES.

Each of the parties hereto shall, at its sole cost and expense, maintain, repair, renew, and remove its solely-owned trackage.

The Industry further agrees to promptly make any changes or alterations in said Industry Trackage that may be necessary in order to conform to any changes of grade or relocation of the tracks of said Railroad Party at the point of connection with said Industry Trackage required by any law, ordinance or regulation, or necessary because of any other reason beyond the control of said Railroad

Party. Industry shall also, at its sole cost and expense, and in a manner satisfactory to each of the Railroad Parties, keep said Industry Trackage clear of snow, ice, weeds or other obstructions.

Each of the parties hereto maintaining any of said Joint Industry Trackage shall be bound to use only reasonable and customary care, skill, and diligence in the maintenance, repair, and renewal of same, and none of the other parties hereto shall, by reason of any defect in said trackage, or by reason of failure or neglect of the Party hereto maintaining the same to repair such defect, have or make against such party any claim or demand for loss, damage or injury arising from such defect, neglect or failure.

Each of the parties hereto shall pay all taxes or assessments levied upon, assessed against or fairly assignable to its sole ownership in said Joint Industry Trackage.

Section 5 - CLEARANCES.

Industry shall not place, or permit to be placed, or to remain, any material, structure, pole or other obstruction within 8-1/2 feet laterally of the center or within 23 feet vertically from the top of the rail of said Industry Trackage; provided that if by statute or order of competent public authority greater clearances shall be required than those provided for in this Section 5, then Industry shall strictly comply with such statute or order. However, vertical or lateral clearances which are less than those hereinbefore required to be observed but are in compliance with statutory requirements will not be or be deemed to be a violation of this Section. Industry agrees to indemnify Railroad Parties and save them harmless from and against any and all claims, demands, expenses, costs, and judgments arising or growing out of loss of or damage to property or injury to or death of persons occurring directly or indirectly by reason of any breach of the foregoing or any other covenant contained in this agreement.

Should either, or both, the lateral or vertical clearances hereinbefore required to be observed be permitted to be reduced by order of competent public authority, Industry hereby agrees to strictly comply with the terms of any such order and indemnify and hold harmless Railroad Parties from and against any and all claims, demands, expenses, costs, and judgments arising or growing out of loss of or damage to the property or injury to or death of persons occurring directly or indirectly by reason of or as a result of any such reduced clearance.

Operations over the track by Railroad Parties with knowledge of an unauthorized reduced clearance shall not be or be deemed to be a waiver of the foregoing covenants of Industry contained in this Section 5 or of Railroad Parties' right to recover for such damages to property or injury to or death of persons that may result therefrom.

Section 6 - CONDUCT OF OPERATIONS; SWITCHING; LIMITATION OF USE.

Each of the Railroad Parties hereto will conduct its operations over the Joint Industry Trackage in such manner and at such times as shall not endanger or unreasonably interfere with the operation of the other of said parties thereover.

Unless otherwise agreed, each of the Railroad Parties hereto shall perform its own switching service over and upon said Joint Industry Trackage with its own engines and crews and at its sole cost and expense. If in the future it should be the opinion of all of the parties hereto joint switching at said Plant is desirable, a supplemental agreement will be entered into between the Railroad Parties hereto covering joint switching on such terms as may be agreed.

Unless otherwise agreed between the Railroad Parties hereto, the use by each such party of the other's ownership and interest in the Joint Industry Trackage shall be limited to the movement and handling thereover of loaded and empty cars in possession or account of the non-owner Railroad Party to and from said Plant and/or the docks or facilities of any tenant of Industry located in said Plant or any part thereof. No cars handled on said Joint Industry Trackage or any of it shall be confiscated, diverted or interchanged by and between the Railroad Parties hereto while said cars are on any of said trackage without the consent of the Superintendent of the party in whose account the car may be, it being understood and agreed that each party will keep its own cars in its own account and shall be liable for and collect demurrage or any other charges on its own cars, and shall also be responsible for and shall pay any and all per diem which may accrue on all railroad cars while the same are in its possession on said Joint Industry Trackage or any portion thereof, or otherwise.

Section 7 - PICKING UP DERAILMENTS.

Should any engine, train or car of either of the Railroad Parties hereto be derailed or damaged while on said Rock Island Trackage necessitating the use of a wrecking outfit or work train, the same shall be picked up and removed by Rock Island and shall be treated as an item of expense to be borne and assumed under the liability provisions of this agreement.

Should any engine, train or car of either of the Railroad Parties hereto be derailed or damaged while on said Burlington Trackage, the same shall be picked up and removed by Burlington and shall be treated as an item of expense to be borne and assumed under the liability provisions of this agreement.

Should any engine, train or car of either of the Railroad Parties hereto be derailed or damaged while on said Industry Trackage, the same shall be picked up and removed by the Railroad Party hereto in whose train it was being handled at the time it was derailed or damaged and the cost and expense thereof shall be treated as an item of expense to be borne and assumed under the liability provisions of this agreement.

**Section 8 - RULES FOR USE OF JOINT INDUSTRY TRACKAGE:
COMPLIANCE WITH LAWS AND OTHER PUBLIC REGULATIONS.**

Industry agrees to comply with all applicable rules published from time to time by the Association of American Railroads or any successor agency respecting the use of said Industry Trackage and the loading or unloading of cars.

If Industry Trackage is used for the receiving, forwarding or storing of hazardous commodities, Industry agrees to comply with Railroad Parties' requirements and the requirements of any statute, order, rule or regulation of any public authority having jurisdiction with respect thereto as the same may be modified, supplemented, and amended from time to time.

Engines, trains, and cars of the Railroad Parties hereto shall be operated over all or any part of said Joint Industry Trackage as hereinbefore defined under such rules and regulations as the Superintendents of the respective Railroad Parties hereto may agree upon from time to time. Engines and cars of each of said parties hereto shall in such rules and regulations be treated as equal in right with the engines and cars of the other Railroad Party hereto.

Each of the Railroad Parties hereto in respect to its use of the Joint Industry Trackage and the operation of its trains, engines, and cars thereon and thereover shall comply with all applicable Federal and State laws and regulations and all applicable rules, regulations, and orders promulgated by any municipality, board or commission in respect thereto for the protection of persons or otherwise, and if failure on the part of either party hereto to so comply therewith shall result in any fine, penalty, cost or charge being imposed or assessed on or against the other Railroad Party hereto, the Railroad Party hereto responsible therefor shall promptly reimburse and indemnify the other Railroad Party hereto for or on account of such fine, penalty, cost or charge, and all such expenses and attorneys' fees incurred in defending that action which may be brought against such other party hereto on account thereof, and the Railroad Party hereto responsible and liable therefor shall in the event of such action, upon notice thereof being given to it by the other Railroad Party hereto, defend such action free of cost, charge, and expense to such party.

Section 9 - RENDITION AND PAYMENT OF BILLS.

Bills rendered hereunder shall be paid within sixty days after receipt thereof. As between the Railroad Parties hereto, payment of bills shall not be delayed for errors but bills shall be paid as rendered notwithstanding any error of ordinary character liable to occur in railroad accounts, the necessary corrections to be made in subsequent bills; provided that no exception to any bill shall be honored, recognized or considered if filed after the expiration of two years from the last day of the calendar month during which the bill is rendered, and no bill, except settlements relating to liability, shall be rendered later than two years after the last day of the calendar month in which the expense covered thereby is incurred.

With respect to rendition and exchange of billing between said Railroad Parties, billing party may

- (a) add to labor and material costs and deduct from credits for material released percentages and charges prescribed by the General Managers' Association of Chicago, Illinois (or any successor association), which are in effect at the time such labor and material is used, and
- (b) charge for use of equipment used in the work at rates fixed by the General Managers' Association of Chicago, Illinois (or any successor association), which are in effect at the time such equipment is used, providing if no rate has been fixed by said Association then the billing party may charge for use of such equipment at its Rental of Equipment Rates then in effect.

It is further understood and agreed between all of the parties hereto that payroll taxes, sales taxes, use taxes, and other similar taxes paid by the billing party hereunder shall be billable on the same basis as the labor or material expenses to which they pertain.

Section 10 - CLASSIFICATION OF EMPLOYEES AND EQUIPMENT.

For the purpose of allocating liability hereunder between said Railroad Parties, it is understood and agreed by and between them that

- (a) all employees and any engine, machinery, equipment, tools or other property of either of said Railroad Parties, while engaged in or incident to the construction, maintenance, repair or renewal of its exclusive ownership in said Joint Industry Trackage or the making of additions or betterments or extensions thereto or changes therein, or while enroute thereto or returning therefrom, shall be deemed to be the sole employees and sole equipment, respectively, of such party, and

- (b) employees, engines, and cars of each of the Railroad Parties hereto engaged in such party's exclusive switching service shall be deemed to be the sole employees, engines, and cars, respectively, of such party, and
- (c) all wrecking trains of either Railroad Party hereto, including the equipment thereof, used in clearing up derailments on the Joint Industry Trackage, as well as persons operating the same or assigned thereto, shall, while so engaged or while enroute thereto or returning therefrom, be deemed the sole equipment and sole employees of the Railroad Party hereto responsible under Section 11 hereof for loss or damage growing out of the accidents in connection with which said wrecking trains are provided. The expense resulting from any accident which occurs in connection with the picking up of a derailment shall be treated as an expense of the derailment being picked up and borne by the Railroad Party hereto responsible under the provisions of Section 11 hereof for said derailment, and shall not be treated as a separate liability for loss, damage, injury or death under the provisions of Section 11 hereof.

Section 11 - LIABILITY - ALLOCATION OF

As between all of the parties hereto, it is understood and agreed that the Industry assumes all responsibility for and agrees to indemnify each of the Railroad Parties hereto against loss or damage to property of the Industry or to property upon its premises, regardless of the negligence of either of the Railroad Parties hereto, arising from fire caused by locomotives operated by either of the Railroad Parties on said Joint Industry Trackage or any portion thereof or in its vicinity for the purpose of serving the Industry, except to the premises of the Railroad Parties hereto and to their rolling stock or the rolling stock of others and to shipments in the course of transportation. Industry further agrees to indemnify and hold harmless Railroad Parties hereto for loss, damage or injury from any act or omission of Industry, its employees or agents, to the person or property of the parties hereto and their employees, and to the person or property of any other person or corporation while on or about said Joint Industry Trackage; and if any claim or liability other than from fire shall arise from the joint or concurring negligence or two or more of the parties hereto it shall be borne by them jointly and equally.

As between the Railroad Parties hereto, it is understood and agreed that the cost and expense of any liability for injury to or death of persons whomsoever and for loss of or damage to property whatsoever in connection with the operation, maintenance, repair, and renewal of the Joint Industry Trackage and in connection with the construction or installation of additions and betterments to or extensions or

improvements in the same or in connection with the use of or operation over and upon the same by the Railroad Parties hereto, as contemplated in this contract, that is not borne by Industry pursuant to Section 5 hereof or to the first paragraph of this Section 11, shall, except as otherwise provided, be fixed between the Railroad Parties hereto as follows:

When due to

- (a) the acts or omissions of either Railroad Party hereto or of its officers, agents or employees; or to
- (b) defects of any kind in the separate equipment or facilities of either Railroad Party hereto,

shall be borne solely by such party;

when due to

- (c) the concurring acts or omissions of both Railroad Parties hereto, their officers, agents or employees; or to
- (d) defects of any kind in the separate equipment or facilities of both Railroad Parties hereto; or to
- (e) any other cause whatsoever

shall be borne

- (1) solely by each Railroad Party as to its own property and to property in its custody or control and as to its own employees, passengers, and patrons, and all others on its trains, engines or cars or in, on or about the Joint Trackage in the transaction of business with it; and
- (2) jointly and equally by said Railroad Parties as to third persons and their property and said Industry Trackage; except that in cases of accidents in which the trains, engines, cars and/or sole employees of only one of the Railroad Parties hereto are concerned, then the liability for the resulting injury, death, loss or damage shall, as to such persons and property, be borne solely by the Railroad Party hereto whose trains, engines, cars or sole employees were involved or concerned.

Section 12 - MANNER OF SETTLING LOSS AND DAMAGE CLAIMS.

(a) Anything hereinabove to the contrary notwithstanding, no party hereto shall have any claim against any other party hereto for loss and damage of any kind caused by or resulting from interruption or delay to its business.

(b) Each party hereto covenants and agrees with each of the other parties hereto that it will pay for all loss and damage, the risk of which it has herein assumed, the judgment of any court to the contrary notwithstanding, and will forever

indemnify and save harmless the other parties hereto, and their successors and assigns, from and against all liability and all claim therefor, or by reason thereof, and will pay, satisfy, and discharge all judgments that may be rendered by reason thereof and all costs, charges, and expenses incident thereto.

(c) In the event more than one party hereto shall be liable hereunder for any claim, demand, suit or cause of action arising under Section 11 hereof and the same shall be compromised or settled by a voluntary payment of money or other valuable consideration by any other party or parties jointly liable therefor hereunder, release from liability shall be taken to and in the names of all parties hereto which are liable hereunder. No party hereto, however, shall make any such compromise or settlement in excess of the sum of Five Thousand Dollars (\$5,000.00) without the authority of the other parties hereto which may be involved hereunder, but any settlement made by any party hereto in consideration of said sum or a less sum shall be binding upon the other parties hereto.

(d) In case a suit or suits shall be commenced against any party hereto for or on account of loss and damage for which any other party or parties hereto are jointly or is solely liable under the terms of this agreement, the party hereto so sued shall give to such other party or parties hereto notice in writing of the pendency of such suit and thereupon, if the party against which suit was brought is not jointly liable, such other party or parties hereto shall assume the defense of such suit and save and hold the party hereto so sued harmless from all loss, cost, and expense by reason thereof.

(e) None of the parties hereto shall be concluded by any judgment against any other party or parties hereto unless it has had reasonable notice requiring it to defend or participate in defense and reasonable opportunity to make such a defense. When such notice and opportunity shall have been given the party or parties hereto so notified shall be concluded by the judgment as to all matters which could have been litigated in such suit.

(f) Reports of all injuries to or death of persons and loss or destruction of or damage to property shall be made in triplicate form and a copy thereof furnished to each of the parties hereto.

(g) All claims and demands arising hereunder for injuries to or deaths of employees or for loss or destruction of or damage to property of any of the parties hereto, shall be investigated by the party hereto whose employee is injured or whose property is damaged, but in the event employees of more than one of the parties hereto are injured, or the properties of more than one of the parties hereto are damaged, the representatives of the parties involved who handle such claims shall agree among themselves as to which one or more of them shall make the investigation; and such representatives

shall determine from time to time which one or more of the parties hereto shall investigate all other claims or demands arising hereunder for loss and damage.

Section 13 - DEFAULTS AND PENALTIES THEREFOR.

(a) If any of the parties hereto shall make default in any of the payments required of it to be made, or shall fail to faithfully perform any of the covenants herein required of it to be performed, then and in such case and if such default or failure shall continue for a period of thirty (30) days after it shall have received a written notice thereof, the party giving such notice may thereupon declare this agreement terminated as to the party in default and exclude such party from the use and enjoyment of the rights and privileges herein granted to it by the party giving such notice. In such event the party so excluded from the use and enjoyment of said rights and privileges shall have no claim or demand upon any of the other parties hereto by suit at law or otherwise on account of such exclusion.

(b) Any party hereto may waive any such default or failure, but no action by it in waiving such a default or failure shall extend to or be taken to affect any subsequent defaults or failures or impair its rights resulting therefrom.

(c) The termination of this agreement shall not operate to relieve any party hereto of or from any of its or their obligations incurred under the provisions of this agreement, or arising out of any transaction occurring under the same prior to the date of such termination.

(d) Nothing in this section contained shall be construed as permitting any party hereto to terminate this agreement with respect to any other party when the fact of such default shall be in dispute or when such default shall be the subject of arbitration or litigation, actual or proposed.

Section 14 - ARBITRATION.

(a) If at any time a dispute shall arise between any of the parties hereto touching the construction of any part of this contract or concerning the business or the manner of transacting business carried on under the provisions hereof or concerning the observance or performance of any condition herein contained or the rights or obligations of any party under or arising from this contract, such dispute shall be submitted to arbitration as hereinafter provided.

(b) Such dispute shall be submitted to a single arbitrator if the parties in dispute are able to agree upon such single arbitrator within ten (10) days after the party desiring such arbitration shall notify in writing the other party or parties to such dispute.

(c) If such single arbitrator cannot be agreed upon before the expiration of such period of ten (10) days and but two of the parties hereto are parties to the arbitration, such

arbitration shall be had before a board of three competent, disinterested persons to be named as follows: The party desiring such arbitration shall select its arbitrator and give notice thereof to the other party, and if such party shall fail to name an arbitrator within twenty (20) days after notice as aforesaid has been so given, the arbitrator named by the party giving such notice may and shall name and appoint an arbitrator for and on behalf of the party so in default and the arbitrator so named and appointed shall have the same power and authority as if he had been chosen by the party so in default. If the two arbitrators thus chosen shall fail to select a third arbitrator within twenty (20) days after the selection of the second arbitrator as aforesaid, such third arbitrator may be appointed upon twenty (20) days' notice by either of the parties to such arbitration to the other party thereto of its intention to make application therefor, by any Judge of the United States District Court for the time being of the district and circuit in which Keokuk, Iowa is situated, who shall be senior in service and willing to act.

(d) The single arbitrator or the board of arbitrators, as the case may be, shall as soon as possible after their selection meet to hear and decide the question or questions submitted to them, and shall give to each party to such arbitration ten (10) days' notice of the time and place of such meeting. After hearing the parties to such arbitration and taking such testimony or making such investigation as they may deem necessary, they shall make in writing their award upon the question or questions so submitted to them and shall serve a copy of such award upon the parties to such arbitration, and the award of such single arbitrator or of a majority of said board of arbitrators, as the case may be, shall be final and binding upon the parties to such arbitration, and they shall immediately make such changes in the conduct of their business or such payment or restitution as in and by such award may be required of them. The award made in any arbitration proceedings under this agreement shall be absolutely final and binding upon the parties to such arbitration and they shall abide thereby and perform the conditions thereof as if the same were made a part of this agreement.

(e) The books and papers of each party to such arbitration so far as they may relate to the matters submitted to arbitration shall be open to the examination of the arbitrator or arbitrators. Each party to the arbitration shall be responsible for the compensation of the arbitrator acting on its behalf and compensation of the additional arbitrator or arbitrators shall be divided equally between, and paid by, the parties interested in such arbitration. Until the arbitrator or arbitrators shall make their award the business, settlements, and payments to be transacted and made under this agreement shall continue to be transacted and made in the same manner and form existing prior to the rise of such dispute.

(f) If the question at issue affects more than two of the parties hereto, the required notice of a demand for arbitration shall be given to each party interested and each party, except in the cases covered by the next paragraph of this Section 15, shall within twenty (20) days thereafter name an arbitrator having the qualifications hereinbefore stated; otherwise the said arbitrator shall be appointed by the Judge as aforesaid. The arbitrators so chosen, if an even number, shall select one, if an odd number, two additional arbitrators having the qualifications before stated to complete the board. Should they fail to agree upon such additional arbitrators the same shall be appointed by the Judge as aforesaid. Such board shall proceed in the manner as if but two parties were interested and its award or an award of a majority thereof shall be final, binding and conclusive upon the parties interested in such arbitration.

(g) If the question at issue affects all of the parties hereto, and two of said parties are making the same contention and are on the same side of the question at issue they shall be considered as one party and shall have the right to appoint but one arbitrator.

(h) If any party shall refuse to perform any award the adverse party or parties may enforce the same by apt proceedings in any court of law or equity.

Section 15 - NOTICES.

Any notice herein provided for shall be in writing and shall be given by serving of the same upon the executive officer designated by any of the parties hereto for such purpose.

Section 16 - SUCCESSORS AND ASSIGNS.

The rights, covenants, and agreements herewith set forth shall attach to and run with the lands and properties of the parties hereto that are involved herein and shall inure to the benefit of and be binding upon the parties hereto, their respective successors, grantees, lessees, and assigns; provided, however, that no party hereto shall assign this agreement or any interest herein, nor permit the rights or privileges herein granted to it, or any of them, to be used for the benefit or accommodation of any other person, corporation or railroad without the previous written consent of the other parties hereto.

Whenever reference is made herein to The Hubinger Company, the same shall also be deemed to include any successors and/or assigns of said Company.

Section 17 - PROVISIONS ARE SEVERAL; LIABILITY FOR DEFAULT.

It is expressly understood and agreed that all of the covenants and agreements to be performed by the parties hereto under this agreement are several and not joint nor joint and several, and in no event shall any party hereto be liable for a default of any other party hereto.

Section 18 - AGREEMENT TO BE CONSTRUED LIBERALLY-NOT FOR THE BENEFIT OF THIRD PARTY.

This agreement shall be construed liberally so as to secure to each party hereto all the rights, privileges, and benefits herein provided or manifestly intended. This agreement and each and every provision hereof is for the exclusive benefit of the parties hereto and not for the benefit of any third party.

None of the parties hereto shall be required to keep this agreement in effect if prevented from doing so by strikes, riots, civil commotions or other causes beyond its control, or if said Joint Industry Trackage or any portion thereof is made unserviceable by floods, high water or other damage by the elements, an Act of God or by acts of military aggression by third persons or other governments.

Section 19 - EFFECTIVE DATE - TERM.

This agreement shall become effective as of the date first herein written and shall remain in full force and effect until terminated by any of the parties hereto on not less than three months' written notice to the other parties hereto.

Section 20 - SECTION HEADINGS.

All section headings are inserted for convenience only and shall not affect any construction or interpretation of this agreement.

IN WITNESS WHEREOF, the parties hereto have executed this agreement in triplicate as of the day and year first above written.

BURLINGTON NORTHERN INC.

By [Signature]
SENIOR Vice President

WILLIAM M. GIBBONS, Trustee of the Property of
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY
Debtor

[Signature]
Assistant Secretary

By [Signature]
Manager Operating Contracts

THE HUBINGER COMPANY

ATTEST

[Signature]
G. W. Brackensick
Secretary

By [Signature]

EXHIBIT 4

COPY

SUPPLEMENTAL AGREEMENT

This SUPPLEMENTAL AGREEMENT made this 1st day of Sept. 1998, between BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware corporation, hereinafter called "Burlington", KEOKUK JUNCTION RAILWAY, an Iowa corporation, hereinafter called "KJR" and ROQUETTE AMERICA, INC., hereinafter called "INDUSTRY". Said Burlington and said KJR shall sometimes hereinafter be referred to collectively as "Railroad Parties, and either of them shall sometimes be referred to as "Railroad Party".

WITNESSETH:

WHEREAS, Burlington (as successor to Burlington Northern Inc.), KJR (as successor to Chicago Rock Island And Pacific Railroad Company) and Industry (as successor to The Hubinger Company) are parties to an agreement dated November 1, 1977 "Original Agreement" (BN9533), which principally deals with ownership, maintenance, operation and use of certain trackage adjacent to and serving the Industry's plant facilities (sometimes hereinafter referred to as "Plant" in the city of Keokuk, Iowa;

WHEREAS, Changes to certain Plant track and Railroad Parties track have become necessary in connection with Industry's flood control project, the "Project";

WHEREAS, The parties hereto desire to setforth herein the post Project ownership, maintenance and operation of the trackage adjacent to and serving the Plant;

NOW, THEREFORE, in consideration of the covenants and conditions hereinafter set forth, it is mutually agreed by and between the parties hereto as follows:

1. Attached hereto, marked exhibit "A", and made part hereof is print dated June 28, 1998, which shall substitute the Track Plan made part of the Original Agreement, upon which is shown in dashed black lines, trackage owned by KJR, dotted black lines, trackage owned by Burlington, diagonal dashed lines, trackage owned by Industry, to be used by Railroad Parties in serving said Plant. Said trackage shall sometimes hereinafter be referred to respectively as "KJR Trackage" and "Industry Trackage". All of said trackage shall sometimes hereinafter be referred to collectively as "Joint Trackage".

2. The parties hereto entered into a letter of understanding "Letter of Understanding", dated January 11, 1998, covering exchange of property, track changes, maintenance and other matters. If any conflict between the Letter of Understanding and this Supplemental Agreement shall arise, the provisions of this Supplemental Agreement shall prevail.

3. The Railroad Parties shall continue to maintain access to all Industry facilities that existed prior to the Project. Burlington shall not have the right to access Industry's High Fructose Facility via the KJR Trackage.

4. The Railroad Parties shall have access to any new Industry facilities that may in the future become located along the Industry Trackage.

5. Burlington will continue to maintain the existing diamond, as shown at point "A" on exhibit "A", at Burlington expense. If BN fails to maintain the diamond, KJR may upon giving Burlington thirty (30) days written notice maintain the diamond at Burlington's expense.

6. Burlington's access to its Moar Line shall be from the new crossover opposite the Burlington's Yard Office, thence over KJR Trackage that includes seven switches. As consideration for Burlington's use of KJR track and switches, Burlington will pay to KJR the following sums annually: ONE THOUSAND FIFTY DOLLARS AND NO CENTS (\$1,050.00), representing one half (1/2) of THREE HUNDRED DOLLARS AND NO CENTS (\$300.00) per switch, commencing in 1986, this rate of \$1,050 per annum shall be considered the "Base Rate". The Base Rate shall be subject to annual adjustments, beginning July 1, 1986, in the following manners: Seventy percent (70%) of such Base Rate (\$735.00), representing maintenance and operating expense and depreciation, shall be increased or decreased based on the relationship of the Association of American Railroads (or successor organization) Railroad Cost Recovery Index, West District (material prices, wage rates and supplements combined, excluding fuel) for the year 1994 as compared with such similar Index for each subsequent year, but in no event shall the adjusted monthly rate be less than said Base Rate. The balance of the rate (30%) representing interest rental and taxes shall be fixed.

7. Any party hereto may assign any receivables due them under the Original Agreement, as supplemented, provided, however, such assignments shall not relieve the assignor of any rights or obligations under the Original Agreement, as supplemented.

8. Other than as specifically modified herein the Original Agreement, as supplemented shall remain in full force and effect.

9. This Supplemental Agreement shall take effect upon the day the Industry Project is completed and the Railroads first commence operation over the Joint Trackage and shall remain in effect concurrent with the term of the Original Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Supplemental Agreement to be executed in duplicate as of the date and year first hereinabove written.

BURLINGTON NORTHERN RAILROAD COMPANY

By _____

Title _____

KEOKUK JUNCTION RAILROAD COMPANY

By *J. J. Lufeld*

Title *President*

ROQUETTE AMERICA, INC.

By *Robert J. Ireland*

Title *President*

the Burlington's Yard Office, thence over KJR Trackage that includes seven switches. As consideration for Burlington's use of KJR track and switches, Burlington will pay to KJR the following sums annually: ONE THOUSAND FIFTY DOLLARS AND NO CENTS (\$1,050.00), representing one half (1/2) of THREE HUNDRED DOLLARS AND NO CENTS (\$300.00) per switch, commencing in 1996, this rate of \$1,050 per annum shall be considered the "Base Rate". The Base Rate shall be subject to annual adjustments, beginning July 1, 1996, in the following manner: Seventy percent (70%) of such Base Rate (\$735.00), representing maintenance and operating expense and depreciation, shall be increased or decreased based on the relationship of the Association of American Railroads (or successor organization) Railroad Cost Recovery Index, West District (material prices, wage rates and supplements combined, excluding fuel) for the year 1996 as compared with such similar index for each subsequent year, but in no event shall the adjusted monthly rate be less than said Base Rate. The balance of the rate (30%) representing interest rental and taxes shall be fixed.

7. Any party hereto may assign any receivables due them under the Original Agreement, as supplemented, provided, however, such assignments shall not relieve the assignor of any rights or obligations under the Original Agreement, as supplemented.

8. Other than as specifically modified herein the Original Agreement, as supplemented shall remain in full force and effect.

9. This Supplemental Agreement shall take effect upon the day the Industry Project is completed and the Railroads first commence operation over the Joint Trackage and shall remain in effect concurrent with the term of the Original Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Supplemental Agreement to be executed in duplicate as of the date and year first hereinabove written.

BURLINGTON NORTHERN RAILROAD COMPANY

By John F. Beason
 Title Dir. Contracts and Facilities

KEOKUK JUNCTION RAILROAD COMPANY

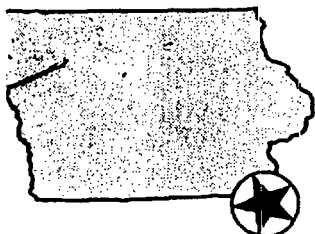
By John A. Aschell
 Title President

ROQUETTE AMERICA, INC.

By Robert J. Ireland
 Title President

Post-It Fax Note	Date	9-7	Pages	2
	To	Don Wells	From	Bill Mull
	Co./Dept.		Co.	
	Phone #		Phone #	
			Fax #	

EXHIBIT 5



Keokuk Junction Railway

1318 SOUTH JOHANSON ROAD • PEORIA, ILLINOIS 61607 • (309) 697-1400

May 1, 1996

Mr. Douglas J. Babb,
Senior Vice President and Chief of Staff
Burlington Northern Railroad
777 Main Street
Fort Worth, Texas 76102

RE: Crossing/Switching Agreement at Keokuk, Iowa

Dear Mr. Babb:

Keokuk Junction Railway Co. ("KJRY"), as successor to the Chicago, Rock Island & Pacific Railroad Company ("CRI&P"), hereby gives notice, pursuant to Section 19 of the Agreement dated November 1, 1977 between CRI&P, Burlington Northern, Inc. (of which Burlington Northern Railroad Company is successor) and The Hubinger Company (of which Roquette America, Inc. is successor), and pursuant to Section 9 of the Supplemental Agreement between the parties dated September 1, 1995, that KJRY is exercising its right to terminate the Agreement as to the crossings serving Roquette America, Inc., effective August 1, 1996.

This does not effect the crossing which the BN uses to access the "Mooar Line" (as agreed to in the Crossing Agreement dated March 13, 1996).

KJRY feels that, given the competitive changes wrought by the BN-ATSF merger, the current crossing/switching agreement at Keokuk is inequitable to KJRY.

We are willing to meet with you in Keokuk, or wherever else is convenient to do so, to discuss future operations at Keokuk. We are hopeful that a new arrangement, which is fair and beneficial to both KJRY and BN can be worked out.

Sincerely yours,

Guy L. Brenkman,
President.

cc: Roquette America, Inc.

EXHIBIT 6



Keokuk Junction Railway

1316 SOUTH JOHANNSON ROAD • PEORIA, ILLINOIS 61607 • (309) 687-1400

November 13, 1996

Director, Contracts and Joint Facilities
Burlington Northern Railroad Company
2600 Lou Hank Drive
P.O. Box 961034
Fort Worth, Texas 76161-0034

Dear Sir or Madam:

BNSF, as successor to Burlington Northern, Inc., and Keokuk Junction Railway Co., as successor to the Chicago, Rock Island & Pacific Railroad Company, Inc., are parties to an Agreement dated November 1, 1977, as supplemental by a Supplemental Agreement dated September 1, 1995, and a Crossing Agreement dated March 13, 1996.

These agreements, collectively, govern the BNSF's use of the KJRY's trackage in Keokuk, Iowa to access the BNSF's "Hoar" Line.

We have several concerns about the current arrangement, including the BNSF's failure to get approval to use the trackage (as provided in Section 4 of the Crossing Agreement), and the unrealistically low fee which KJRY receives.

We are therefore, advising you of our desire to negotiate a new arrangement, and are hereby giving notice of the termination of the current agreement, as per Section 19 of the Agreement, effective March 1, 1999.

KJRY desires to maintain a good working relationship with BNSF, and we are confident that an arrangement acceptable to both can be worked out.

If the current agreement terminates without a new agreement in place, KJRY stands ready to provide an intermediate switch to BNSF traffic to and from the Hoar Line under our tariff rates.

We look forward to discussing this matter with you, and concluding a new agreement that is satisfactory to both parties.

Sincerely yours,

Guy L. Brenkman,
President.

cc: Henry B. Lampe.

EXHIBIT 7

Roquette Keokuk Complex Proposed Track Layout

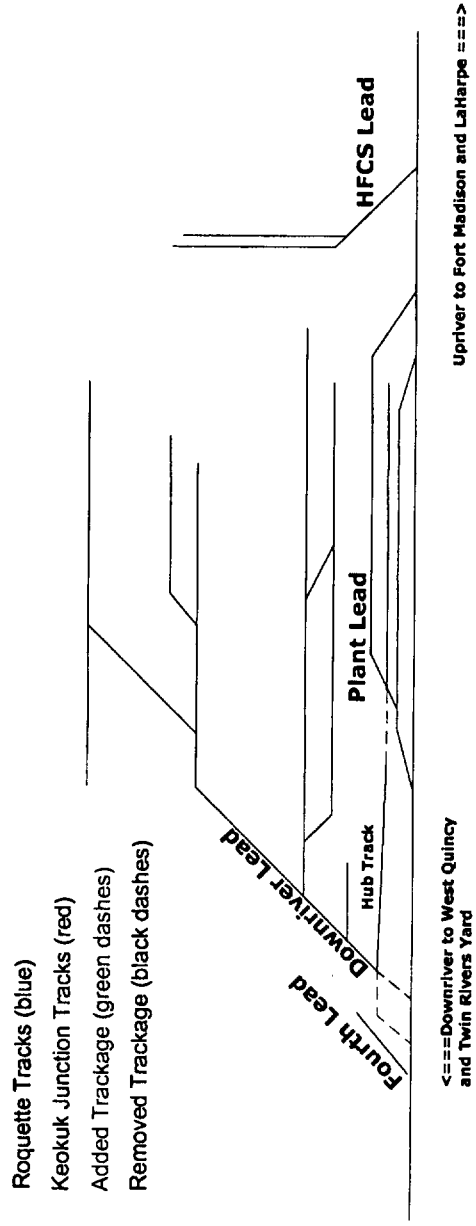


EXHIBIT 8

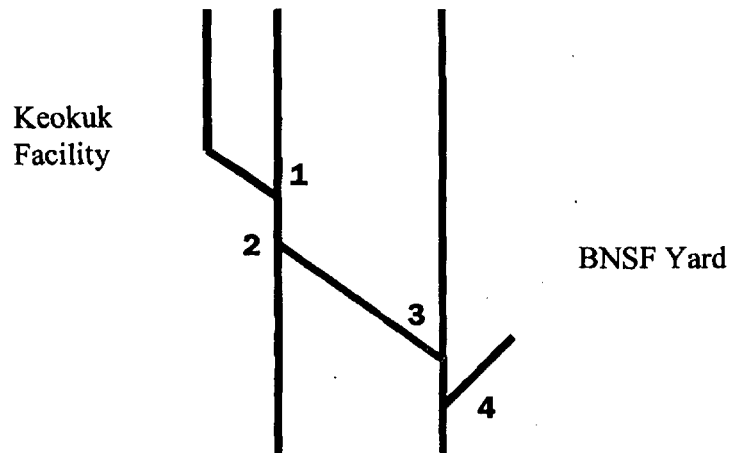
Description of KJRY Crossing

Roquette Track

KJRY Track

BNSF Track

Roquette Crossover



January 23, 2006

Via Hand Delivery

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K St. N.W.
Washington, D.C. 20423



RE: STB Docket No. 34795, *Roquette America, Inc. – Petition for Exemption from 49 U.S.C. § 10901 to Construct a New Line of Rail in Keokuk, Iowa*

Dear Secretary Williams:

Please find enclosed the original and ten (10) copies of the REPLY OF ROQUETTE AMERICA RAILWAY, INC. TO KJRY REPLY TO PETITION FOR EXEMPTION to be filed in the above referenced proceeding. Also enclosed is a diskette with a copy of the filing in Word and PDF format.

Please note that the original and the copies contain COLOR IMAGES in Exhibit 1.

An extra copy of this filing is enclosed for stamping and returning to our offices.

Should you have any questions regarding the foregoing, please do not hesitate to contact the undersigned.

Sincerely,

Jeffrey O. Moreno

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 34795



**ROQUETTE AMERICA, INC.—
PETITION FOR EXEMPTION FROM 49 U.S.C. § 10901
TO CONSTRUCT A NEW LINE OF RAIL IN KEOKUK, IOWA**

**REPLY OF ROQUETTE AMERICA RAILWAY, INC. TO
KJRY REPLY TO PETITION FOR EXEMPTION**

Pursuant to the Board's January 12, 2006 order in this proceeding, Roquette America Railway, Inc. ("RARI") hereby replies to the "Reply to Petition for Exemption" filed by the Keokuk Junction Railway Co. ("KJRY") on December 19, 2005. Although the Board's rules generally prohibit a reply to a reply, the Board directed RARI to submit this reply in response to KJRY's allegations that the Board lacks jurisdiction over the rail construction project that RARI has requested authorization to construct in its November 29, 2005 Petition for Exemption. KJRY has presented the following three reasons why it believes the Board should dismiss RARI's Petition:

1. RARI proposes only to construct industrial track under 49 U.S.C. § 10906, not a regulated common carrier line of railroad that may be constructed under 49 U.S.C. § 10901.
2. RARI does not propose to construct an extension of rail service to new territory that will provide the shipper with access to a carrier not already serving the Keokuk facility of RARI's parent company, Roquette America, Inc. ("RAI").
3. RARI's proposal is really a request for terminal trackage rights over KJRY under 49 U.S.C. § 11102.

Each of these arguments suffers from clear errors of law and fact, and thus are without merit.

The Board should not dismiss RARI's petition, but should proceed to determine that the Petition

satisfies the standards for granting an exemption for the construction of RARI's proposed line of rail.

I. RARI's Proposed Construction Is Not Spur Or Industrial Track Under Section 10906.

KJRY claims that the Board lacks jurisdiction over RARI's proposed construction under Section 10901 because RARI's proposal actually involves the construction of spur or industrial track under Section 10906. This argument can be quickly dispelled by controlling precedent that KJRY either has ignored or overlooked.

KJRY erroneously contends that a line of decisions by the Board and the courts that determine whether a particular segment of track is a "spur, industrial, team, switching or side" track within Section 10906, as opposed to track governed by Section 10901, requires dismissal of RARI's Petition. While RARI does not take issue with these decisions or KJRY's description of their holdings, KJRY has ignored other decisions that establish a clear exception to the decisions cited by KJRY.

This exception is thoroughly explained by the Board's decision in STB Docket No. 41986, *Effingham R.R. Co.—Petition for Declaratory Order—Construction at Effingham, IL*, (served Sept. 12, 1997). There, the STB held that, even when the character of the track may be switching, if the larger purpose and effect of the proposal is to construct what will constitute the petitioner's entire line of railroad to serve a new shipper, the proposed operation and construction of that line is subject to Board authority under Section 10901. *Id.*, slip op. at 3.

Even though KJRY's principal argument purports to apply the "purpose and effect" standard, it has not done so consistent with *Effingham*. In *Effingham*, the STB cited *Nicholson v. ICC*, 711 F.2d 364 (D.C. Cir. 1983), the decision upon which KJRY principally relies, for the very same proposition as KJRY cites it. *Id.* at 2. But, the STB then noted that *Texas & Pac. Ry.*

v. Gulf, Etc. Ry., 270 U.S. 266 (1926), establishes an exception to the principles described in *Nicholson*:

Where, however, the proposed trackage extends into territory not already served by the carrier, and particularly where it extends into territory already served by another carrier, the Supreme Court has found its purpose and effect to be of national concern, and subject to the jurisdiction of the Interstate Commerce Commission (now the Board).

Effingham, slip op. at 2. Indeed, the Supreme Court explicitly held that "[i]f the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of paragraph 18 [of the Transportation Act of 1920], although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks." *Texas and Pacific*, 270 U.S. at 278 [emphasis added].

The Board also observed that *Brotherhood of Locomotive Engineers v. U.S.*, 101 F. 3d 718, 728 (D.C. Cir. 1996), another D.C. Circuit case decided after *Nicholson*, holds that the Board "may not allow the focus on use to obscure the larger purpose and effect of the transaction," so that, if switching operations that otherwise might categorize track within the scope of Section 10906 have the effect of substantially extending a carrier's lines into new territory, the Board "may not decline jurisdiction." *Effingham*, slip op. at 3. KJRY has neglected both the *Texas and Pacific* and *BLE* decisions, along with the *Effingham* decision itself, and as a result reaches an erroneous conclusion. Thus, the Board must reject KJRY's contentions that RARI's proposed construction is Section 10906 track merely because the track is short and the character of service contemplated resembles service provided over spur or industrial track.

The Board's "purpose and effect" analysis in *Effingham* led it to conclude that, even though the petitioner intended only to provide switching service over track that it proposed to

both construct and acquire within an industrial park, those transactions in fact were within the Board's jurisdiction because the newly constructed and acquired track would constitute the petitioner's entire line of railroad to serve a new shipper. RARI proposes a similar transaction to serve RAI's Keokuk facility over approximately 2000 feet of track that it will both construct and acquire for that purpose. *See* Petition at 6. Because this project will constitute RARI's entire line of railroad for the purpose of extending its line into new territory already served by KJRY, RARI's project also must be within the Board's jurisdiction under Section 10901.

II. RARI Proposes to Construct an Additional or Extended Rail Line Within the Scope of Section 10901.

In its second argument, KJRY contends that Roquette does not propose to construct an additional or extended rail line within the scope of Section 10901. Although KJRY correctly states the test of whether new rail construction or operation requires approval under Section 10901, at page 13 of its Reply, KJRY fails to apply that test properly. A correct application of that test leaves absolutely no doubt that RARI's proposed construction is an additional or extended rail line.

KJRY properly cites *Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co.*, 270 U.S. 266 (1926), for the proposition that new rail construction is subject to "approval under (or exemption from) Section 10901" if the new rail line is an "extended or additional" line. KJRY Reply at 13. KJRY also correctly states that "the ICC, STB, and the courts have long held that proposed construction must extend the reach of the railroad so as to allow that railroad to provide service to new territory or new shippers that it did not previously serve." *Id.* [emphasis added]

But, then KJRY inexplicably proceeds to apply this standard, not to RARI the railroad, but to RAI the shipper.¹

The holding in *Texas & Pacific* is clear that the STB must make its determination on whether a proposed construction is an extension of service by looking to the carrier involved, and whether the construction will extend the territory of the carrier. RARI is an entirely new carrier that currently provides service to no customer or territory. As RARI currently has no "territory," simply building and operating the proposed line will extend its territory. Thus, the conclusion that this action is subject to STB jurisdiction is inescapable. Just as in *Texas & Pacific*, this conclusion is further supported by the fact that RARI will be expanding into territory already served by another carrier, in this case, KJRY.

KJRY attempts to mislead the STB by applying the *Texas & Pacific* analysis of extended territory to the shipper, rather than the carrier. Specifically, KJRY states that Section 10901 would only apply if the proposed build out "would provide Roquette [RAI] with access to a railroad that currently does not serve it." KJRY Reply at 13. KJRY then contends that it provides a neutral switching service to RAI that provides RAI with access to BNSF Railway Company ("BNSF"), and thus RAI will not gain access to a new carrier by virtue of the proposed construction. This analysis focuses on the wrong entity.

The question is not whether the shipper RAI would have access to a new railroad, but is instead whether the railroad RARI would have access to a new shipper (in this case, RAI). As RARI currently has no shippers, this extension would expand its territory by adding a new shipper – RAI. Moreover, the law does not focus on whether the carrier currently serving the

¹ KJRY apparently has confused even itself by declining to differentiate between Roquette and RAI in its Reply. Instead, KJRY has elected to refer to them both collectively as "Roquette." KJRY Reply, note 1. Nevertheless, the context in which KJRY refers to "Roquette" in Part I.B. of its Reply leaves no doubt that it is referring to RAI, the shipper.

shipper is "neutral"—it focuses on whether the carrier proposing to build is extending its line of railroad into new territory.

Even if the Board were to ask the question as posed by KJRY, it still must conclude that RARI's proposed construction is within the scope of Section 10901, because RAI will in fact receive service from a new carrier, RARI. KJRY's focus on BNSF simply is wrong, since BNSF is not the carrier proposing to extend its line. KJRY has lost sight of the fact that RARI, not BNSF, is the new carrier that proposes to extend its rail line in order to serve RAI.

Furthermore, RARI does not agree with KJRY's characterization of itself as a neutral switching carrier. KJRY Reply at 14. The situation described by KJRY at RAI's Keokuk facility exists only by a contractual arrangement that was negotiated when RAI was capable of receiving direct competitive service from both KJRY and BNSF. As detailed on pages 4-5 of RARI's Petition, RAI no longer has direct competitive service due in significant part to the actions of KJRY itself. Through the proposed build-out, RARI would restore that competitive balance by becoming a second carrier at RAI's Keokuk facility, so that RAI no longer must rely exclusively upon KJRY to serve the Keokuk facility.

III. RARI's Proposal Is Not a Request For Trackage Rights Under Section 11102.

KJRY improperly attempts to convert RARI's need to cross KJRY's line with its new construction into a request for trackage rights under Section 11102. This argument is nothing more than an absurd attempt by KJRY to avoid the crossing requirement of Section 10901(d).

What KJRY cavalierly refers to as "trackage rights" is the short distance (approximately 170 feet) that RARI must travel over KJRY track as part of a double-turnout crossing. There is nothing improper, or even unprecedented, about a double-turnout crossing. The Board noted this very fact in another recent decision involving a crossing of KJRY in Keokuk, Iowa:

KJRY argues that BNSF does not have section 10901(d) crossing rights because BNSF's operation over KJRY's track is not a crossing. KJRY claims that section 10901(d) can only apply to a crossing that is accomplished by means of the traditional "diamond" or "frog" configuration originally utilized here. But the fact that the typical crossing uses a diamond configuration does not mean that there is only one form that a crossing can take.³⁸ Nor is there any requirement that a crossing can only involve a certain amount of track. In fact, there are all sorts of configurations in the rail network that serve as crossings.³⁹ Thus, the term "crossing" must be viewed pragmatically, as we (and KJRY for several years after the crossing was relocated) did here.

³⁸ For example, in Public Service Company of Colorado—Petition for Crossing Authority Under 49 U.S.C. 10901(d), STB Finance Docket No. 33862 (Sub-No. 1 (STB served Mar. 22, 2001), we noted that the crossing carrier would cross BNSF's track by means of a double turnout configuration, rather than a diamond, so as to minimize interference with perpendicular traffic. Similarly, in STB Finance Docket No. 34178 (Sub-No. 1), Dakota, Minnesota & Eastern Railroad Corporation and Cedar American Rail Holdings, Inc.—Control—Iowa, Chicago & Eastern Railroad Corporation, Union Pacific Railroad Company discussed a situation at Owatonna, MN, where a diamond crossing was replaced by a two-turnout configuration.

³⁹ A configuration other than a diamond crossing can be beneficial to the railroads involved because of the generally higher cost of maintaining that type of crossing.

The Burlington Northern and Santa Fe Ry. Co.—Pet. for Declaration or Prescription of Crossing, Trackage, or Joint Use Rights, 2003 STB LEXIS 244, *32 (served May 13, 2003) [emphasis added] ("*BNSF Crossing*"). In that decision, the Board authorized BNSF to cross nearly one-quarter mile of KJRY track via two turnouts, a far greater distance than the 170 feet proposed by RARI. *Id.* at *3.

In many ways, the facts of this case are very similar to the facts in *BNSF Crossing*. Both cases involve crossings of KJRY track in the vicinity of Keokuk, Iowa for the purpose of restoring the rail service status quo that existed prior to construction of a floodwall in 1995 that

required both KJRY and BNSF to relocate their rail lines in the area. Compare RARI Petition at 4-5 with *BNSF Crossing* at *2-3. In *BNSF Crossing*, BNSF sought to restore access to its Mooar Line, and in this proceeding, RARI seeks to restore RAI's direct access to two rail carriers.

Indeed, Exhibit 1 shows that, prior to construction of the floodwall, BNSF operated over a double turnout crossing of KJRY in almost the same exact area that RARI has proposed to cross KJRY. Exhibit 1 is a map that was Exhibit A to the "1977 Agreement" that is attached as Exhibit 3 to RARI's Petition for Exemption. The BNSF crossing is located on the far left side of the map just above the phrase "To St. Louis." The map indicates that the BNSF crossing was 188 feet long, which is comparable to RARI's proposed crossing of approximately 170 feet. Both crossings have the same configuration and are located in virtually the same location. RARI's crossing would restore this prior crossing in a manner that is more true to the original crossing than was the BNSF's Mooar Line crossing in the *BNSF Crossing* decision, since the Mooar Line crossing was restored in a different location and in a different configuration from the original crossing.

The Board should view RARI's crossing of KJRY in the same "pragmatic" manner that it viewed BNSF's crossing of KJRY in *BNSF Crossing*. The area in which RARI must cross KJRY is on a narrow strip of land situated between the Mississippi River and a high bluff that is occupied by the RAI facility, KJRY's mainline, BNSF's mainline, BNSF's yard, the floodwall, and various road crossings. See RARI Petition, Exhibit 1. When constructing its track in this area, RARI must consider the location of these facilities, the location of other track turnouts, operating efficiencies, and various engineering considerations.

For example, it is undesirable for a locomotive or railcar to turn in two different directions at once. Therefore, at a minimum, a double turnout crossing must be as long as the

longest piece of equipment that will operate over the crossing, so that the equipment is able to clear the first turnout before turning into the second turnout. The location of the turnouts also must not interfere with the adjacent rail operations of KJRY and BNSF, including the locations of other turnouts on their track. The 170 foot length of RARI's double-turnout crossing has taken into consideration all of these factors in order to develop a crossing that will cause the least amount of interference with KJRY's operations. To the extent that KJRY contends otherwise, those issues will be addressed when RARI files its Crossing Petition pursuant to 49 U.S.C. § 10901(d).

KJRY's Reply says nothing as to why it alleges that RARI's crossing should be treated as a request for trackage rights under Section 11102, except for the fact that the double-turnout crossing requires RARI to cross over a short segment of KJRY's track. As demonstrated above, that alone is not sufficient to bring the crossing within Section 11102. Furthermore, under the circumstances, it would be absurd to treat RARI's 170-foot double turnout crossing differently from the similarly situated quarter-mile double turnout crossing approved by the Board in *BNSF Crossing*.

IV. KJRY Has Not Justified Its Request For Additional Discovery and Pleadings.

If the Board does not dismiss RARI's Petition, KJRY has asked the Board to establish a procedural schedule allowing for discovery and three rounds of additional filings. On January 4, 2006, RARI asked the Board to adopt a procedural schedule that attempts to address KJRY's request for discovery and to provide KJRY with an opportunity to supplement its Reply with information obtained through the discovery process.² Indeed the discovery process already is underway insomuch as RARI and RAI responded to KJRY discovery requests on January 3,

² Although RARI sought KJRY's agreement to this procedural schedule, KJRY stated that it would not agree to *any* procedural schedule with RARI. This refusal even to discuss a procedural schedule is compelling evidence of KJRY's overall strategy of delay in this proceeding.

2006, and KJRY filed a motion to compel additional discovery on January 13, 2006. KJRY has opposed that procedural schedule and insisted upon the need for multiple rounds of discovery, including depositions, followed by three more rounds of evidence. KJRY bases its argument upon two issues. First, KJRY disputes RAI's ownership of certain property required for the proposed construction. Second, KJRY has alleged that the third party contractor engaged to assist the Board with the NEPA process has an impermissible conflict of interest. RARI submits that neither of these issues requires additional discovery or pleadings.

A. KJRY's property ownership claims are beyond the Board's jurisdiction and expertise.

The ownership of the property required for the proposed construction is not even a matter within the Board's jurisdiction to decide. Furthermore, Board precedent dictates that, when there is a dispute over the ownership of rail assets, the Board still may grant the requested authority, subject to a subsequent determination of ownership rights in the proper forum. Thus, this is not a subject that requires further discovery or pleadings before the Board.

In *MVC Transportation, LLC—Acquisition Exemption—P&LE Properties, Inc.*, STB Finance Docket No. 34462, 2004 STB LEXIS 666, *11-12 (served Oct. 20, 2004), the Board observed:

It is a longstanding principle that the Board's grant of a notice of exemption to acquire gives the applicant permission to acquire, but does not mandate such. Thus, the authority the Board granted to MVC was permissive, not mandatory, and MVC's acquisition exemption could not confer on MVC any ownership rights to the Yard track assets it did not possess under Pennsylvania law. The Board's authorization cannot be viewed as conveying property rights to MVC or as a declaration by the Board that MVC actually owns particular assets within the Yard.

See also, *Central Kansas Ry., LLC—Abandonment Exemption—In Marion and McPherson Counties, KS*, STB Docket No. AB-406(Sub-No. 6X), 2001 STB LEXIS 472, *5 (served May 8,

2001) ("[T]he interpretation of deeds and the determination of who owns good title to property are issues of state law that are outside of the expertise of the Board."). Similarly, the Board's authorization to construct a new rail line also is permissive, not mandatory, and thus will not determine the property ownership rights of either RARI or KJRY.

In STB Finance Docket No. 34267, *Morristown & Erie Ry., Inc.—Operation Exemption—Somerset Terminal R.R. Corp.*, (served Nov. 27, 2002), the Board denied a request by a third party, STRR, to stay a Notice of Exemption on the grounds that ownership of the rail property to be conveyed was in dispute:

The exemption permits M&E and STRC to consummate the described transaction if and when they, in fact, have the legal capacity to do so. The exemption, therefore, will have no immediate or demonstrated adverse effect on [STRR].

Similarly, if there truly is a genuine dispute over ownership of any of the tracks encompassed by RARI's proposal, the Board's authorization would allow construction to begin only if and when RARI has the legal capacity to do so. If KJRY's ownership claims are based on any substantive facts, KJRY should pursue an appropriate action in Iowa state court, rather than attempt to delay this proceeding.

As a matter of public policy, the Board should not allow entities, such as KJRY, to delay rail construction cases simply by disputing ownership of the property needed for the proposed construction. Otherwise, any entity could raise hollow claims of ownership for the purpose of bringing the Board's process to a grinding halt until the proper forum has issued a ruling. Nor should the Board place itself in the position of evaluating the parties' ownership evidence, since this would entangle the Board in evidence on a subject that is beyond its expertise.

Moreover, the issue of property ownership in this proceeding would be a particularly undesirable entanglement for the STB in light of the tenuous nature of KJRY's halfhearted assertion of ownership:

Given the change in ownership of KJRY, the passage of a quarter of a century, and the lack of adequate records related to the Rock Island bankruptcy, it is premature to make any definitive statements regarding ownership of the Hub Track.

KJRY Reply at 18-20. KJRY's claims are particularly suspect because it has presented almost no evidence to support its ownership claims and it has not even pursued its ownership claims in a forum with jurisdiction to decide them.

RARI is concerned that KJRY is using hollow ownership claims to delay this proceeding. KJRY has presented no evidence of ownership over the Hub Track other than an inconclusive sketch and an allegation that it believes RARI once paid rent for the Hub Track.³ In addition, KJRY has presented absolutely no evidence at all to support its ownership claims over any of the other track at issue. By failing to submit any significant ownership evidence in its Reply, which was the appropriate time under the Board's rules to present whatever evidence it possessed, KJRY has been able to keep this issue alive for purposes of delaying this proceeding through a purported need for additional rounds of discovery and evidence. But, KJRY should not need discovery of RARI or RAI to determine whether it, KJRY, has any ownership claim over the property. Moreover, this is not the forum for such discovery. The Board should not sanction this continuing manipulation of its procedures to the detriment of RARI.

³ RAI has determined that this map does not even accurately reflect the track that existed in the Keokuk facility on the date listed on the map.

B. KJRY's conflict of interest claims are without any legal foundation and already have been rejected by SEA.

KJRY's claim that the Board's third party contractor for the environmental review process has an impermissible conflict of interest also does not compel additional discovery or pleadings. KJRY already has raised its conflict of interest claims in two extensive letters submitted to the Board's Section of Environmental Analysis ("SEA") on December 9, 2005 and again on January 9, 2006. In a December 21, 2005 reply to KJRY's December 9th letter, SEA firmly rejected KJRY's conflict of interest claims.

Apparently dissatisfied with this response, KJRY submitted the January 9th letter to SEA, in which it attempted to resurrect its conflict claim on the basis of documents that RARI and RAI voluntarily produced on January 3, 2006. Although RARI and RAI had objected to KJRY's discovery requests on this subject, they agreed to produce documents that related to KJRY's conflict allegations, in order to assuage KJRY's alleged concerns. Instead, KJRY has attempted to twist those documents to support its claims.

RARI replied to KJRY in a January 12, 2006 letter to SEA, in which RARI exposed KJRY's manipulation of the production documents and KJRY's erroneous interpretation of the law on conflicts of interest. Most notably, RARI quoted a Tenth Circuit decision, which observed that:

After discovering that many agencies had "been interpreting the conflicts provision in an overly burdensome manner," the CEQ instructed that, absent an agreement to perform construction on the proposed project or actual ownership of the construction site, it is "doubtful that an inherent conflict of interest will exist" unless "the contract for EIS preparation...contains...incentive clauses or guarantees of any future work on the project." Guidance Regarding NEPA Regulations, 48 Fed. Reg. 34,263 34,266 (Council on Env'tl. Quality 1983).

Associations Working for Aurora's Residential Environment v. Colorado Dept. of Transportation, 153 F. 3d 1122, 1127 (10th Cir. 1998) [emphasis added]. From this observation, it is clear that no conflict of interest is likely to exist unless there is a promise of future work. KJRY's conflict allegations, by contrast, are based entirely on work that RAI awarded to the contractor prior to the current engagement for the environmental review and that the contractor completed nearly three months before RARI filed its Petition for Exemption. Thus, KJRY has not presented even a colorable conflict of interest claim that conceivably might justify further discovery and evidence.

The absurdity of KJRY's conflict objections, and hence the conclusion that KJRY is simply engaging in obstructionist delay tactics, is best evidenced by the fact that RARI seeks to construct its proposed rail project over a short distance on property that is now, and has been for nearly 100 years, a highly industrialized area. RARI Petition at 2. Furthermore, the rail line will be constructed immediately adjacent to the KJRY mainline, the BNSF mainline, and the BNSF yard. Thus, it is preposterous even to suggest that RARI would have anything to gain by selecting a potentially biased third party contractor.

The SEA has not responded to KJRY's January 9th letter as of this date and it is unclear whether it intends to do so. RARI submits that KJRY has had ample opportunity to support its claims based on RARI's discovery responses and SEA's disposition of the matter in its December 21st letter. As such, there is no basis for permitting additional discovery and pleadings on this subject.

KJRY has presented nothing beyond these two subjects to justify its request for additional discovery and pleadings in this case. Thus, the Board should deny KJRY's requested procedural schedule.

V. KJRY's First Supplemental Reply and January 19th Letter Further Propagate the Legal and Factual Errors in Its Reply.

On January 17, 2006, KJRY filed its "First Supplemental Reply" in which it alleged that RARI had improperly begun construction on the project proposed in RARI's Petition. RARI has attached the Verified Statement of Eric Tibbetts as Exhibit 2, which unequivocally declares that no construction has occurred on RARI's proposed project. KJRY subsequently retracted this allegation, in a January 19, 2006 letter to the Board, after RARI counsel pointed out that none of the construction described in the First Supplemental Reply even was in the area covered by the proposed project. Nevertheless, KJRY's January 19th letter asserts that this construction further illustrates why the Board should dismiss RARI's Petition. KJRY's arguments suffer from the same legal and factual errors as its other Reply arguments.

KJRY's first argument is premised on the allegation that RARI merely proposes to construct Section 10906 track. The construction witnessed by KJRY is an eastward extension of Section 10906 industrial track by RAI, not RARI. KJRY seems to believe that RAI's eastward extension of this track must mean that RARI's plan to terminate its proposed construction at the west end of this same track also renders RARI's construction Section 10906 track.⁴ KJRY describes this as an "untenable position." KJRY 1/19/06 Letter at 2. But, as RARI has demonstrated in Part I, *supra*, KJRY has ignored STB and judicial precedent that in fact renders KJRY's position untenable.

This precedent holds that even if, as KJRY contends, RARI and RAI both use their respective tracks for services commonly rendered by means of Section 10906 track, RARI's purpose to extend its line into new territory renders such track an extended or additional line within the Board's Section 10901 jurisdiction. *Texas and Pacific* at 278; *Chicago Rail Link*,

⁴ This is an extension of the argument that KJRY makes on page 12 of its Reply.

LLC—Lease and Operation Exemption—Union Pac. R.R. Co., STB Finance Docket No. 33323, slip op. at 5 (Sept. 2, 1997).

Second, KJRY contends the construction currently being done by RAI is one of the alternatives being considered by SEA as part of its environmental analysis. KJRY is not clear, however, as to how this allegation, even assuming *arguendo* that it is true, would preclude RAI from constructing this track, since RAI has decided to construct it as private track. Indeed, KJRY stops short of actually making this argument.⁵ Thus, it is unclear how this allegation supports KJRY's request to dismiss RARI's Petition.

Third, KJRY contends that the existence of an eastern route that can be constructed without STB authority shows that "the alleged benefits of the proposed Section 10901 project appear to be achievable without Section 10901 authority [and] [a]s a result, the public convenience and necessity simply does not require the grant of Roquette's petition for exemption." KJRY 1/19/06 Letter at 2. Setting aside the factual issues surrounding this statement, KJRY misstates the proper legal standard for granting a petition for exemption to construct an additional or extended rail line.

The Board shall authorize new rail construction unless it determines that the proposed construction is "inconsistent with the public convenience and necessity." 49 U.S.C. § 10901(c) [emphasis added]. Prior to passage of the ICC Termination Act ("ICCTA"), the statute permitted the ICC to authorize new rail construction if the project was consistent with the public convenience and necessity. See 49 U.S.C. § 10901(a) and (c)(1) (1995). In ICCTA, Congress intentionally eased the statutory standard by requiring the STB to authorize new rail construction unless it was inconsistent with the public convenience and necessity. *The Burlington Northern*

⁵ KJRY quotes a July 6, 2005 letter from RAI to SEA, in which RAI observes that eastward construction towards BNSF's Moorar Line "may not require any STB action." But, KJRY conveniently omits that sentence from its quotation.

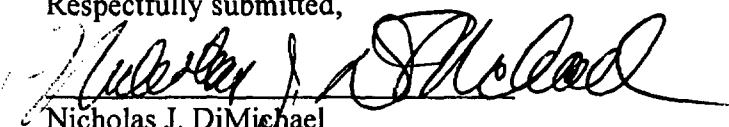
and Santa Fe Railway Co.—Petition for Declaration or Prescription of Crossing, Trackage, or Joint Use Rights, STB Finance Docket No. 33740, slip op. at 7, n. 20 (Served May 13, 2003).

Congress went even further by providing that the STB shall exempt a transaction from regulation under the statute, if it finds that (1) continued application of the statute is not necessary to carry out the rail transportation policy codified at 49 U.S.C. § 10101, and (2) either the transaction is of limited scope, or regulation under the statute is not needed to protect shippers from abuse of market power. 49 U.S.C. § 10502(a).

RARI's Petition satisfies the above standards. Those standards expressly do not require that the project be consistent with the public convenience and necessity, as KJRY seems to believe, and they do not give the STB discretion to deny RARI's construction Petition if RARI satisfies these standards. KJRY does not explain how, or otherwise allege that, the existence of a less desirable alternative route (a) renders RARI's proposal inconsistent with the public convenience and necessity; (b) makes continued application of the statute necessary to carry out the rail transportation policies; (c) broadens the scope of RARI's proposed transaction; or (d) requires regulation to protect shippers from abuse of market power. Since KJRY has not addressed the requisite legal standards, it has not provided any basis for denying RARI's Petition simply because there may be another way for RARI to connect RAI with BNSF.

WHEREFORE, RARI, respectfully requests that the Board (1) deny KJRY's request to dismiss RARI's Petition, and (2) proceed with a determination of RARI's Petition on the merits.

Respectfully submitted,

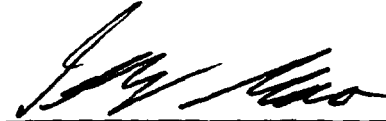


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January 23, 2006

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 23rd day of January, 2006, a copy of the foregoing Reply of Roquette America Railway, Inc. to KJRY Reply to Petition for Exemption was served by hand delivery upon counsel for Keokuk Junction Railway Co

A handwritten signature in black ink, appearing to read "Jeffrey O. Moreno", is written over a horizontal line.

Jeffrey O. Moreno

Exhibit C
City of Rochelle Material



May 28, 1997

Mr. Ken Wise
GREDCO
413 Fourth Avenue
P.O. Box 3
Rochelle, IL 61068

Dear Ken:

As you know, the price increase initiated by Pioneer Railroad has had significant impact on our current customers which include Lamb-Weston, J.R. Simplot and Ore-Ida. As a result, both the BN/Santa Fe and the Union Pacific have established rate increases to our key accounts. A letter from Stan Zbylut, Business Director Refrigerated Products for the Union Pacific states their position in regard to this increase.

Stan indicated to me that they will attempt to influence northwest processors to use other distribution locations because of the higher costs now being experienced at Rochelle. I cannot emphasize enough the importance of getting this pricing issue resolved. The future of Rochelle as a rail hub and the job security of many employees (75-100 in our case) is at stake should this business be diverted to another city.

Randy Wakenight has indicated that you are attempting to resolve the issue and to convince Pioneer to live up to their original commitment to — no increases to existing business coming into Rochelle.

I will be meeting with Lamb-Weston, Simplot and Ore-Ida people on June 9. Therefore, I would hope that we can resolve this issue prior to our meeting with them. Hopefully, Bob Walker can participate in our meetings.

Sincerely,

Raymond C. Wheaton
Senior Vice President

RCW:cc

cc: Randy Wakenight

JUN-18-98 THU 07:38 AM AMERICOLD ROCH
06/17/1998 09:53 15036390889

FAX NO. 18155628250
CRYO TRANS INC

P.01

JUN 16. 1998 5:57PM

SENT ON Jun 16. 98 FROM UNION PACIFIC RR FAX TO

288 383 654

NO. 0073
PAGE 01/01

TO: <i>Randy Wakenight</i>	FROM: <i>Lutz Beaudry</i>	DATE: <i>6/17/98</i>
FAX #: <i>815-562-5001</i>	FAX #:	PHONE #:

UNION PACIFIC RAILROAD
MARKETING & SALES DEPARTMENT
ROOM 520, 1416 DODGE STREET
OMAHA, NEBRASKA 68179
402-271-4004
FAX: 402-271-4392
cryo@notes.up.com

June 16, 1998

TO OUR VALUED CUSTOMERS:

This concerns refrigerated boxcar shipments moving on the Union Pacific Railroad (UPRR) destined to Rochelle, IL, with local switching service performed by either the City of Rochelle Railroad Company (CIR) or the Rochelle Railroad Company (RRC).

Each of these railroads maintains different charges for its service and bills the UPRR directly. The present charge for the CIR to perform this service is \$160 per car; and for the RRC the charge is \$250 per car. This cost is embedded in your total transportation rate agreement with the UPRR which in turn pays for this service.

In an effort to control price increases, effective July 15, 1998 UPRR will publish a maximum absorption switching rate in Tariff UP 8005 covering all refrigerated products moving from or to Rochelle, IL. Any shipment requiring either the CIR or the RRC to perform switching service will be subject to a maximum absorption of \$160 per car for this service.

Additionally, the UPRR will require that you specify on your Bill of Lading which switch carrier you prefer to perform this service for your shipments. Simply add the switch carrier to the end of the route, e.g., UP-CIR switch or UP-RRC switch. For an origin load add either RRC switch-UP or CIR switch-UP. Any amounts billed to UPRR from the switching provider above the maximum absorption of \$160 per car will be billed by UPRR directly to the customer to whom the freight charges are billed.

If you have any questions or would like to discuss this issue further please give me a call.

Sincerely,

STAN J. ZBYLUT
Business Director-Refrigerated Products

BNSF

BILL WOERNER
Market Manager -- Perishables

Burlington Northern Santa Fe

Post Office Box 961062

Ft. Worth, Texas 76161-0062
817-352-6541

12 June 1997

Mr. Robert Walker
City Manager
City of Rochelle
420 North Sixth Street
Rochelle, IL 61068

Dear Mr. Walker:

This letter is in reference to some issues that I believe were recently brought to your attention regarding rail service within the city of Rochelle. More specifically, I'm referencing the current fee charged by Pioneer Railcorp for switching cars from the BNSF rail yard to local industry within Rochelle. In order to insure you have all the pertinent information, allow me to review the last several months.

On or around April 15, 1996, a letter was sent to the BNSF from Allen Brown, Pioneer Railcorp's Director of Marketing. This letter stated that "the Rochelle Railroad Co. (RRCO) is agreeable to hold the rate of \$75.00 per car on all frozen french fries. . . shipped from Lamb Weston and McCain Foods to Rochelle Cold Storage. . . for a period beginning April 15, 1996 through October 31, 1996. . . The Rochelle Railroad Co. will contact you and the Burlington Northern early, on or about August 1, 1996, to discuss the rates on this business beyond October 31, 1996."

The next communication that took place between the BNSF and Pioneer Railcorp was on or around October 30, 1996. The content of this communication was Pioneer Railcorp notifying the BNSF that effective November 1, 1996, the new per car switch charge would be \$250.00. Upon receipt of this notification I contacted Allen Brown to discuss this issue. I expressed my concern over the 233% rate increase, and more importantly I conveyed my concern that the BNSF had in fact not been contacted when Pioneer Railcorp had originally stated contact would be made. It was at this time that I asked Pioneer Railcorp to continue to honor the previous switch charge (\$75.00/car) until a new rate could be negotiated. While Pioneer Railcorp seemed to be receptive of such an arrangement, no cooperation on the part of Pioneer ever took place.

During the next two months, several attempts were made to resolve this issue with little success. A counter offer was provided by the BNSF to Allen Brown but after several weeks of failing to respond, I finally received a letter dated January 14, 1997, in which Allen Brown states "Pursuant to our previous discussions. . . the RRCO revenue requirement for this and any other movements of frozen foods is \$250.00 per car."

I have several concerns regarding what has taken place. First of all, practically no advance notice was provided by Pioneer Railcorp of the new rate despite the fact that a letter was provided stating their intent to provide such notice. Furthermore, no discussion regarding the switch charges ever took place prior to them becoming effective, not to mention the fact that the request for an extension so that some sort of actual negotiation could take place was met with little cooperation on the part of Pioneer Railcorp.

Secondly, there is a wide disparity between the fees charged on shipments of frozen foods versus lumber products. According to Freight Tariff RRCO 8000, shipments of lumber products only incur a \$160.00 per car charge

while frozen foods is \$250.00. While the BNSF general rate circulars for frozen perishables absorbs up to \$250.00 per car in switching, the majority of perishable shippers utilizing Rochelle do not ship off of the circular.

Finally, and most importantly, the new rate charged by Pioneer Railcorp makes the city of Rochelle less competitive in the marketplace. As you may or may not know, many of the customers currently utilizing facilities in Rochelle do so in order to supply the Chicago area market. Currently, the market per car switch rate to get into any open facility in Chicago is \$130.00. This means that should a shipper decide to use Rochelle they would incur \$120.00 more in costs.

Up to this point the BNSF has "absorbed" the additional switch cost primarily due to its commitment to it's customers. However, the BNSF is no longer in a position to continue to absorb any switch charges over \$130.00 per car. Accordingly, effective July 15, 1997, the additional \$120.00 will be passed on to our customers. Realize that while the BNSF would like to see the current traffic continue to move into Rochelle, we will not hesitate to work with our customers to find an alternative location should our customer desire such assistance.

In closing, I welcome the opportunity to speak further about the issues I have brought forth today. It is my understanding that my organization is not the only party expressing concern over these issues. Should you wish to contact me, I can be reached at 817-352-6541. I appreciate your time and look forward to resolving this as quickly as possible.

Sincerely,



Bill Woerner

cc: Ken Wise, GREDCO
Ray Wheaton, Total Logistics Control, Inc.
Allen Brown, Pioneer Railcorp
Mark Sampson, Lamb Weston
John Risolvato, Burlington Northern Santa Fe



UNION PACIFIC RAILROAD
MARKETING & SALES DEPARTMENT
ROOM 520, 1416 DODGE STREET
OMAHA, NEBRASKA 68179
402-271-4004
Fax: 402-271-4992
sjzbylut@notes.up.com

May 27, 1997

Mr. Ray Wheaton
Sr. Vice President
Total Logistics Control, Inc.
11430 West Burleigh Street
P.O. Box 26307
Milwaukee, WI. 53226

Dear Ray:

Re our recent phone discussion concerning the Rochelle Railroad Company and its recent rate increase for switching Union Pacific frozen food business into the Rochelle Industrial Park.

Effective April 16, 1997 the price was increased from \$160 per car to \$250 per car in tariff ICC RRCO 8000, item 1000. As you know, this 56% increase comes at a time when the Pacific Northwest processors are under tremendous competitive pressure from their Canadian counterparts. The Union Pacific has assisted the producers by holding prices over the years but can no longer absorb this kind of arbitrary and capricious activity by one of its vendors. The cost increase will have to be passed on to the shippers moving into Rochelle. This will include all present and future rail movements.

The Pacific Northwest to Chicago is a very desirable lane for motor carriers and this cost increase will make them much more competitive and further erode rail movements. Therefore, this action by the Rochelle Railroad will have both a geographic and modal competitive effective on the Union Pacific and its business levels into Rochelle.

If I can clarify any issue or you would like to discuss this in greater detail please give me a call.

Best Regards,

STAN J. ZBYLUT
Business Director-Refrigerated Products

29180
EB

SERVICE DATE - LATE RELEASE JULY 7, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33587

CITY OF ROCHELLE, ILLINOIS
--NOTICE OF EXEMPTION--
COMMENCEMENT OF RAIL COMMON CARRIER OBLIGATIONS

Decided: July 6, 1998

We are denying the petitions of the Rochelle Railroad Company (RRC) and intervener Americold, Inc. (Americold) to revoke the notice of exemption filed in this proceeding by the City of Rochelle, IL (the City) for the commencement of railroad operations.

BACKGROUND

By notice filed on April 28, 1998, and published in the Federal Register on June 2, 1998, at 63 FR 30036, the City invoked our class exemption at 49 CFR 1150.31 to assume rail common carrier operations over 2.06 miles of track that it owns in an industrial park within its city limits. The notice became effective on May 5, 1998.

RRC is currently operating on the line. The City asserts that RRC has been operating on the line under a lease but that the lease has been canceled. In a preliminary motion filed in STB Docket No. AB-549, City of Rochelle, Illinois -- Adverse Abandonment -- Rochelle Railroad Company, the City has expressed an intention to file an adverse (involuntary) discontinuance application in order to obtain authority to expel RRC from the line. The City, however, maintains that its notice of exemption gives it the authority to operate on the line until an adverse discontinuance is granted, despite the presence of RRC. The City maintains that, pending our approval of an adverse discontinuance application, both carriers will have the right to operate on the line, but that shippers on the line have the right individually to designate which carrier will serve them.

On April 30, 1998, Americold filed a petition to intervene and to reject and/or revoke the notice of exemption.¹ By petition filed on May 1, 1998, RRC requests that we reject and/or revoke the notice of exemption. RRC filed a supplement to this petition on May 8, 1998. On May 21, 1998, the City filed a reply to RRC's petition to reject and/or revoke.²

¹ We grant Americold's petition for intervention because it is an "interested person" under 49 CFR 1152.25(a).

² On May 28, 1998, the City filed nonsubstantive corrections to its reply.

DISCUSSION AND CONCLUSIONS

RRC argues that we should reject or revoke the exemption on the grounds that: (1) it does not conform to our rules of practice at 49 CFR 1104, allegedly due to improper service and lack of verification; (2) the notice is void ab initio, allegedly for containing false and misleading information; and (3) the notice presents exceptional circumstances requiring regulation of the transaction.

Rejection. Our rules governing the method of service provide as follows at 49 CFR 1104.12(a):

(a) Generally. Every document filed with the Board should include a certificate showing simultaneous service upon all parties to the proceeding. Service on the parties should be by the same method and class of service used in serving the Board, with charges, if any, prepaid. One copy should be served on each party. If service is made on the Board in person, and personal service on other parties is not feasible, service should be made by first-class or express mail. When a party is represented by a practitioner or attorney, service upon the practitioner is deemed to be service upon the party.

RRC argues that the notice must be rejected because it was not served upon RRC by the "same method and class of service used in serving the Board." According to RRC, the notice was served by hand on the Board. RRC asserts that it obtained a FAX copy from counsel for the City after the filing at the Board was called to its attention through a "daily" list of filings provided by an outside watching service. RRC asserts that the mailed (non-FAX) copy "has yet to arrive." RRC argues that the City's notice should be rejected because RRC was prejudiced by this method of service.

We disagree. Under our regulations, notices of exemption are initially required only to be filed with the Board. Notice upon potentially interested parties like RRC is satisfied by publication in the Federal Register. The notice was not required to be served on RRC because RRC was not a party when the notice was filed with the Board. Moreover, the purpose of the above quoted regulation is to ensure that parties do not disadvantage each other by the use of inferior filing methods. This purpose was not contravened here. RRC received the FAXed document sufficiently early to file its petition to revoke before the City's notice was published in the Federal Register.

Under 49 CFR 1150.32(a), notices of exemption must be "verified." RRC argues that the notice must be rejected because its only verification is a one-page affidavit from its City Manager attesting to the monthly car counts, rather than an affidavit attesting to the entire notice.

We disagree. While a broader verification should have been filed, the City's error in this respect does not require rejection of its notice. The City has attached to its reply a broad verification

addressing all factual issues raised in the notice. This fulfills the purpose of the verification requirement.

RRC maintains that the notice is void ab initio on the grounds that it falsely identifies the common carrier and makes other misrepresentations. RRC asserts that there has been confusion in filings before the Board as to the identity of the entity that will conduct operations on behalf of the City and that this is grounds for finding that the notice is void ab initio.

We disagree. The notice makes the identity of the serving railroad perfectly clear -- it is the City. The City will be the licensed rail carrier that is responsible for the provision of service in a lawful manner. While the City has referred to the "operator" of the line by various names, it appears that the operator will be nothing more than an agent of the City and that the City "will assure that all common carrier obligations are fulfilled."³ The agents or employees hired by the City to fulfill its common carrier obligation will not need authority from the Board. Because such agents or employees will not be responsible to shippers for the provision of service, regulated carriers like the City are not required to identify them.

RRC asserts that the City has incorrectly stated that only one of the three current shippers, Edward Hines Lumber Company, is interested in continuing to use RRC.

Intervener Americold states that it is also interested in using RRC. This, however, is not grounds for revoking the notice. The issue of shipper support for RRC will be resolved in the adverse discontinuance application that the City has expressed an intent to file in STB Docket No. AB-549.

RRC also alleges that the City misrepresents the ability of its contractor, Total Logistics, Inc., to conduct operations on behalf of the City.

We will not reject the notice based on this allegation. As discussed above, the operating authority and common carrier obligation will belong to the City, not its agent. It would be premature to conclude that the City will not be able to provide safe, adequate service or will attempt to commence operations before it can do so safely and efficiently.

Finally, RRC alleges that "evidence of traffic tendered to or received by the three on line shippers [in the form of car counts and percentages] is at odds with traffic records kept by the railroad." We will not reject the notice based on that allegation. As noted by the City in its reply (at 4 n.4), the discrepancy can be explained by differences in measurement periods.

Revocation. Under 49 U.S.C. 10502(d), we may revoke an exemption if regulation is necessary to carry out the transportation policy of 49 U.S.C. 10101. RRC argues that the

³ Reply of the City, at 4.

transaction should be subject to regulation on the grounds that it contravenes goals in the transportation policy of 49 U.S.C. 10101 requiring avoidance of predatory practices, market concentration, adverse effect on safety, and unlawful discrimination.

The transaction does not require regulation to avoid predatory practices. The term "predatory pricing and practices" in 49 U.S.C. 10101(12) refers to the pricing and practices that one carrier observes relative to another, competing carrier. Here, RRC has submitted no evidence of predatory pricing or practices.

There are no grounds for regulating the transaction to avoid market concentration under 49 U.S.C. 10101. The entry of the City into the railroad market as a competitor to, or a replacement of, RRC will not increase market concentration.

Nor are there grounds for finding that service by the City will produce discrimination in violation of the narrow strictures contained in the ICC Termination Act. The City competes with no users of rail service and has no motivation to discriminate in favor of one to the detriment of another.

Finally, we see no reason to revoke the notice on the grounds that operations by the City on the line will adversely affect safety. In a similar situation in Cheatham County Rail Authority "Application and Petition" for Adverse Discontinuance, Finance Docket No. 32049, renumbered No. AB-379X (ICC served July 21, 1992, Aug. 31, 1992, and Nov. 4, 1992), and The Central of Tennessee Rail and Navigation Company, Incorporated--Modified Rail Certificate, Finance Docket No. 32049 (Sub-No. 1) (ICC served July 21, 1992, and Aug. 31, 1992), the ICC directed two carriers holding authority over the same line to operate in coordination pending a decision on whether one of the carriers would have to exit pursuant to a petition for discontinuance sought by the other (Aug. 31, 1992 decision at 2). Here, we of course expect that both RRC and the City will coordinate operations and operate in conformity with the regulations of the Federal Railroad Administration and all other applicable safety laws.

In finding that 49 U.S.C. 10502(d) does not support revocation of the notice of exemption filed by the City and that nothing in the ICC Termination Act or the regulations and precedents of the Board preclude the City from operating over this track, we do not purport to rule on the respective rights of RRC and the City to operate. Our determination of whether RRC service must continue will be made in the adverse discontinuance proceeding.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition to revoke and/or reject is denied.

STB Finance Docket No. 33587

2. This decision is effective on its date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.


Vernon A. Williams
Secretary

Exhibit D
Ohio Valley Railroad



2/4/08

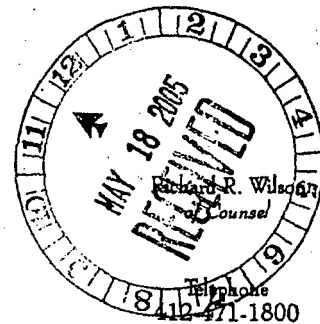
Law Offices

VUONO & GRAY, LLC

2310 Grant Building

Pittsburgh, PA 15219-2383

John A. Vuono
William A. Gray
Mark T. Vuono*
Dennis J. Kusturiss
Christine M. Dolfi
Louise R. Schrage
Susan C. Indrisano+
*Also Admitted in Florida
+Also Admitted in Maryland



Facsimile
412-471-4477

May 12, 2005

Re: STB Docket No. 34608- Ohio Valley Railroad Company – Petition to Restore Switch Connection and Other Relief

Hon. Vernon A. Williams
Secretary, Surface Transportation Board
Mercury Bldg., #711
1925 K Street, N.W.
Washington, D.C. 20423-0001

Dear Secretary Williams:

Enclosed for filing please find the original and ten copies of the Joint Petition of Ohio Valley Railroad Company and Mid-America Locomotive Car Repair Co., Inc. for imposition of procedures for proper and safe reinstallation of switch connection, prescription of interchange agreement and relief from discriminatory switch charges together with Verified Statements from Bruce E. Knight, President of Mid-America Locomotive and Car Repair, Inc. and William E. Gray, President, Ohio Valley Railroad Company.

Copies of this Joint Petition have been served on all parties of record. Please time stamp the copy of this letter for proof of filing and return it in the self addressed, stamped envelope provided.

Very truly yours,

VUONO & GRAY, LLC

Richard R. Wilson, Esq.
Attorney for Ohio Valley Railroad Company
and Mid-America Locomotive and Car
Repair, Inc.

ENTERED
Office of Proceedings

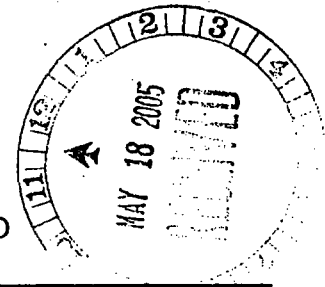
MAY 18 2005

Part of
Public Record

RRW/bab
Enclosure

xc: Office of Proceedings
All Parties of Record

BEFORE THE
SURFACE TRANSPORTATION BOARD



STB Finance Docket No. 34608

OHIO VALLEY RAILROAD COMPANY – PETITION TO RESTORE SWITCH
CONNECTION AND OTHER RELIEF

**JOINT PETITION FOR IMPOSITION OF PROCEDURES FOR PROPER AND
SAFE REINSTALLATION OF SWITCH CONNECTION,
PRESCRIPTION OF INTERCHANGE AGREEMENT
AND RELIEF FROM DISCRIMINATORY SWITCH CHARGES**

ENTERED
Office of Proceedings

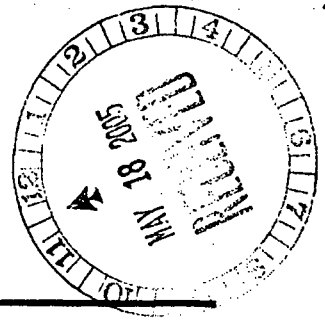
MAY 18 2005

Part of
Public Record

Richard R. Wilson, Esq.
Vuono & Gray, LLC
2310 Grant Building
Pittsburgh, PA 15219
412-471-1800
Attorney for Ohio Valley
Railroad Co. and
Mid-America Locomotive
and Car Repair Co., Inc.

Dated: May 12, 2005

BEFORE THE
SURFACE TRANSPORTATION BOARD



STB Finance Docket No. 34608

OHIO VALLEY RAILROAD COMPANY – PETITION TO RESTORE SWITCH
CONNECTION AND OTHER RELIEF

**JOINT PETITION FOR IMPOSITION OF PROCEDURES FOR PROPER AND
SAFE REINSTALLATION OF SWITCH CONNECTION,
PRESCRIPTION OF INTERCHANGE AGREEMENT
AND RELIEF FROM DISCRIMINATORY SWITCH CHARGES**

Petitioners Ohio Valley Railroad Company (“OVR”) and Mid-America Locomotive and Car Repair, Inc. (“Mid-America”) (collectively “Petitioners”) file this Petition in the above captioned proceeding seeking relief under 49 USC §§10701, 10741, and 10742 and enforcement of the Order of the Surface Transportation Board in this Docket, dated February 23, 2005.

Unfortunately, the relationship between Petitioners and Indiana Southwestern Railway Co. (“ISW”) is a contentious one. ISW has repeatedly sought to challenge efforts by OVR to utilize the rail facilities in Harwood Yard, Indiana, to provide common carrier rail service to Mid-America and establish new rail services for the public and other shippers.¹

As the Board is aware, ISW provides the only rail connection (by a 300-foot intercarrier switch) between the rail facilities of OVR and CSX Transportation, Inc. on

¹ See STB Finance Docket 34486 Ohio Valley Railroad Co. – Acquisition and Operation Exemption – Harwood Properties, Inc., Feb. 23, 2005; STB Finance Docket 34599, Petition of Mid-America for Declaratory Order, filed October 26, 2004, petition pending.

the tracks of ISW immediately adjacent to Harwood Yard. By Order dated February 23, 2005, the Board found that ISW had, in violation of 49 USC §10742, improperly removed the switch connection between OVR and its own track. The Board directed ISW to immediately reinstall the switch.

On February 24, 2005, counsel for ISW notified the Board that it had “initiated the process of restoring the switch” and stated that ISW “will advise the Board when that is done, per the Board’s Decision.”² Moreover, as indicated by the verified statements and exhibits of Mr. Bruce Knight of Mid-America and Mr. William Gray of OVR, the improper and unsafe reinstallation of this switch appears to have been designed to comply only with the letter of the STB’s Order while creating an inoperative and dangerous switch connection which is simply an accident waiting to occur. OVR is concerned that were an accident to occur during the use of this switch connection, it would provide ISW with a pretext for removing the switch for “safety” reasons.

In addition, ISW has refused to negotiate an interchange agreement with OVR without which ISW will not physically interchange cars with OVR. ISW has claimed that it does not have room on its tracks to interchange with OVR and OVR therefore proposed an interchange agreement which designates tracks within OVR’s Harwood Yard for interchange operations. OVR first sent a proposed standard interchange agreement to ISW on October 29, 2004; but to date, despite repeated inquiries, ISW has not responded to OVR’s interchange proposal.

The STB’s decisions repeatedly stress that interchange arrangements are not matters that require or are furthered by regulation, but are better handled through private

negotiations. Nonetheless, where one carrier refuses to negotiate an interchange agreement in an effort to frustrate the entry of another carrier into the rail industry, the Board can remedy such a refusal to deal by prescribing reasonable interchange arrangements proposed by the new entrant. C.f. Minnesota Northern Railroad, Inc. v. Canadian National Railway Company, STB Docket No. 42080 (March 18, 2005), Norfolk Southern Railway Company – Petition for Declaratory Order – Interchange with Reading Blue Mountain and Northern Railroad Company, STB Docket No. 42078 (April 29, 2003).

Although the Board maybe reticent as a matter of policy to prescribe interchange arrangements between carriers, Petitioners contend that the record of ISW intransigence in this proceeding and in Docket Nos. 34486 and 34599, as well as ISW's contumacious switch reinstallation, demonstrates an unacceptable determination on the part of ISW management to evade its common carrier obligations, obstruct OVR participation in the national rail transportation network and discriminate against Mid-America's car repair traffic.

Petitioners further request the Board to find that ISW has engaged in an unreasonable discriminatory practice against OVR under 49 U.S.C. §§10701 and 10742 and against Mid-America under 49 U.S.C. §§10701 and 10741. Unreasonable discrimination generally requires the establishment of dissimilar rates or services for similarly situated persons or connecting carriers which result in an unfair and anticompetitive preference to the favored party. Historically, courts have rejected attempts to limit the applicability of the requirement for nondiscriminatory conduct by rail carriers holding that these provisions can be broadly construed to accomplish their

² Contrary to the Board's decision and 49 C.F.R. §1119 no verified compliance affidavit has yet been filed

remedial purpose. Western Pacific Railway Co. v. U.S., 382 U.S. 237 (1966). While deregulation legislation has subsequently altered the scope of §§10701 and 10741, those provisions nonetheless remain in the ICC Termination Act of 1995 and the Board can apply them in appropriate circumstances to prohibit conduct by a railroad that singles out a connecting carrier or a shipper for unreasonably disparate and unequal treatment which is not inflicted upon any other shipper or connecting carrier.

The exclusionary pattern of conduct engaged in by ISW is obstructing the ability of OVR to provide common carrier rail service and the ability of Mid-America to avail itself of that service. ISW's pattern of discriminatory and unreasonable conduct is manifestly evident on the record before the Board. ISW has engaged in unwarranted administrative proceedings challenging OVR's status as a common carrier despite well established Board precedent to the contrary. Failing that, ISW physically removed switch connections to OVR without justification in violation of §10742. Under order from the Board to reinstall that switch connection, ISW has done so in a defective and unsafe manner precluding use of the switch connection by OVR or Mid-America and has failed to file a verified affidavit of compliance with the Board's February 23, 2005 reinstallation order. Simultaneously, ISW has stonewalled all attempts by OVR to negotiate standard interchange arrangements. It has also increased its intermediate switch charge between OVR and CSXT from \$150 per car to \$2,500 per car in each direction so as to commercially preclude any interchange of locomotive, passenger car and caboose repair traffic via OVR to or from Mid-America while publishing a \$250 switch charge (including in and out) for GE Plastic's rail cars for Mid-America. Moreover, the inflation of this switch charge is not a question of rate reasonableness

with the Board or petitioners by ISW.

because this rate is not intended to be compensatory, it is published for the sole purpose of prohibiting traffic to and from OVR and Mid-America. No other connecting carrier or shipper served by ISW is subject to such overt anticompetitive discrimination. If the Board cannot use the powers inherent in §§10701, 10741 and 10742 to address this abusive and unreasonable conduct on the part of ISW, then these provisions of the statute have been rendered meaningless.

Accordingly, Petitioners respectfully request that the Board order ISW to properly reinstall the switch connection with OVR, have that reinstallation inspected by an objective third party track inspector agreeable to OVR and submit a copy of the track inspection report to the Board's Office of Enforcement. Petitioners further request that the Board prescribe the Interchange Agreement set forth in Exhibit F to Mr. Gray's Verified Statement for use by ISW and OVR at Harwood Yard, Evansville, Indiana and order ISW to cease and desist from using exclusionary pricing practices to discriminate against OVR and Mid-America car and locomotive repair traffic and to publish a nondiscriminatory switch charge for locomotives, passenger cars and cabooses of not more than \$125 per car in each direction, comparable to the charge published by ISW for GE Plastics.

Respectfully submitted,

By:

Richard R. Wilson
Attorney for Ohio Valley Railroad
Company and Mid-America
Locomotive and Car Repair, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have this _____ day of _____, 2005 served a copy of the Petition for Prescription of Interchange Agreement and Proper and Safe Reinstallation upon the following by First Class United States Mail, postage prepaid:

Louis Gitomer, Esq.
BALL JANIK, LLP
1455 F. Street, N.W., Ste. 225
Washington, D.C. 20005

Daniel A. LaKemper, Esq., General Counsel
Pioneer Railcorp.
Indiana Southwestern Railroad Co.
1318 S. Johanson Road
Peoria, IL 61607

Richard R. Wilson, Esq.
Attorney for Ohio Valley Railroad Company
and Mid-America Locomotive and
Care Repair, Inc.

Exhibit E
Salem Branch

INTERSTATE COMMERCE COMMISSION

NOTICE OF EXEMPTION

FINANCE DOCKET NO.

JP RAIL, INC. d/b/a SOUTHERN RAILROAD COMPANY OF NEW JERSEY-
EXEMPTION TO CHANGE OPERATORS OF SALEM BRANCH RAIL LINE UNDER 49
CFR § 1150.31 (a) (3) IN SALEM COUNTY, NEW JERSEY

JOHN K. FIORILLA, ESQ.
WATSON, STEVENS, FIORILLA & RUTTER
390 GEORGE STREET
P.O. BOX 1185
NEW BRUNSWICK, N.J. 08903
(908) 545-2250

INTERSTATE COMMERCE COMMISSION

VERIFIED NOTICE OF PETITION

FINANCE DOCKET NO.

JP RAIL, INC. d/b/a SOUTHERN RAILROAD COMPANY OF NEW JERSEY-
EXEMPTION TO CHANGE OPERATORS OF SALEM BRANCH RAIL LINE UNDER 49
CFR § 1150.31 (a)(3) IN SALEM COUNTY, NEW JERSEY

Pursuant to 49 CFR § 1150.31 (a)(3) and 49 CFR § 1150.33,
JP Rail, Inc. d/b/a Southern Railroad Company of New Jersey
(hereinafter SRNJ), a Class III Common Carrier by Rail, which
address is 2930 Richmond Street, Philadelphia, PA 19134 and whose
representative who should receive correspondence regarding this
Notice is John K. Fiorilla, Esq., Watson, Stevens, Fiorilla &
Rutter, 390 George Street, P O Box 1185, New Brunswick, N.J. 08903,
908-545-2250, hereby states that on April 19, 1995 it was awarded
a contract for the operation of the Salem Branch Rail Line which is
owned by the County of Salem, New Jersey and which until recently
was operated by the West Jersey Railroad.

The Salem Branch Rail Line includes the Salem Branch between the
connection with the Consolidated Rail Corporation at approximately
Milepost 11.0 in Swedesboro and approximately milepost 28.4 in
Salem City and the Glass House Spur between milepost 0.0 and 1.2 in

the City of Salem. The total route miles to be operated being approximately 18.6 miles.

A resolution of the County Board of Freeholders Awarding said contract is attached hereto as Exhibit A. The actual contract to operate the Salem Branch Rail Line is currently in draft form and should be revised and consummated within the next thirty days.

The County of Salem, New Jersey and SRNJ have agreed that the operation of the line should commence on May 1, 1995. The time for the commencing of the operation of the line was arrived at when the current operator of the line, the West Jersey Railroad, ceased operations prior to the expiration of its operating agreement with the County of Salem and removed from the Salem Branch Rail Line in all operating equipment and personnel leaving the shipping public without rail service and without its giving written notice to said shippers or to the owner of the line of its intention to vacate the line and abandon service. The Salem Branch Rail Line currently has loaded undelivered freight cars on line of which the shipping public has requested immediate delivery.

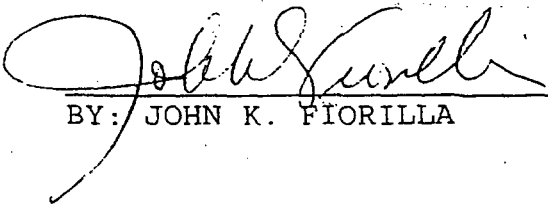
A Map showing the Salem Branch Rail Line which Southern Railroad Company of New Jersey hereby gives notice of its intent to operate is attached hereto as Exhibit B.

A Certificate that the applicants projected revenues do not exceed those that would qualify it for Class III carrier status is attached hereto as Exhibit C.

Due to the fact that the shipping public does not have rail service on the line and that loaded rail cars remain undelivered to customers thereon, the applicant hereby requests that the effective date of this notice be May 1, 1995 which is the date of filing and not seven days from filing as provided in 49 CFR § 1150.32 (b).

April 29, 1995

WATSON STEVENS FIORILLA & RUTTER
ATTORNEYS FOR J.P. RAIL, INC. d/b/a
SOUTHERN RAILROAD COMPANY OF NEW JERSEY



BY: JOHN K. FIORILLA

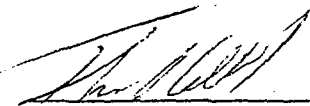
VERIFICATION

STATE OF NEW JERSEY :

: ss

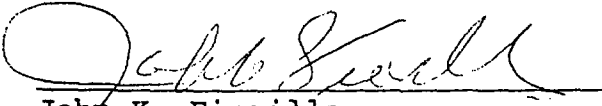
:
COUNTY OF BURLINGTON :

Thomas A. Collard, being duly sworn, makes oath and says that he is Vice-President of JP Rail, Inc. d/b/a Southern Railroad Company of New Jersey; that he has been authorized by proper corporate action of JP Rail, Inc. to verify and file with the Interstate Commerce Commission the foregoing Notice of Exemption; that he has general knowledge of the facts and matters relied upon in such Notice; and that all representations set forth herein are true and correct to the best of his knowledge, information and belief.



THOMAS A. COLLARD

Sworn To and Subscribed
Before Me this 29th Day
of April, 1995.

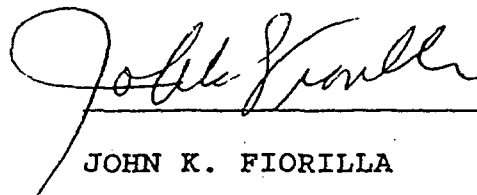


John K. Fiorilla
An Attorney at Law of New Jersey

CERTIFICATE OF SERVICE AND COMPLIANCE
WITH 49 CFR § 1150.32 (b)

I, John K. Fiorilla, hereby certify that the requirements of 49 CFR § 1150.32 was complied with by the sending on APRIL 29, 1995 of the foregoing Notice of Exemption to the shippers on the Salem Branch Rail Line whose names appear on the attached service list to this Certificate.

APRIL 29, 1995



JOHN K. FIORILLA

SERVICE LIST

John E. Bergh, Esq.
Counsel for the County of Salem
Concorde Building, Suite 800
390 North Broadway
Pennsville, N.J. 08070

Wendy Green
Anchor Glass Container
Griffith Street
Salem, N.J. 08079

Mr. J. Watts
Aluchem
62 Front Street
Salem, N.J. 08079

Mannington Mills
Mannington Mills Road
Salem, N.J. 08079

Mid-Atlantic Shipping
128 Tilbury Road
Salem, N.J. 08079

Erdner Brothers
51 Elm Street
Woodstown, N.J. 08098

SJ Farmers Exchange
101 East Avenue
Woodstown, N.J. 08098

Budd Chemical
Pennsville-Auburn Road
Carneys Point, N.J. 08069

CPS
Woodstown-Mullica Hill Road
Woodstown, N.J. 08098

COUNTY OF SALEM, NEW JERSEY

Resolution No. 95 - 177

EXHIBIT A

Approved as to Form and Legality

Date Adopted

Committee

April 19, 1995

PLANNING & TRANSPORTATION

**RESOLUTION AWARDING CONTRACT FOR RAILROAD OPERATION OF THE
SALEM BRANCH RAIL LINE FOR THE COUNTY OF SALEM**

WHEREAS, the Board of Chosen Freeholders of the County of Salem has publicly advertised for proposals for Railroad Operation of the Salem Branch Line; and

WHEREAS, three (3) proposals were received as follows:

SMS RAILROAD, Bridgeport, NJ
JAMES HAGER JR. INC., Whitehouse Station, NJ
SOUTHERN RAILROAD COMPANY OF NEW JERSEY, Philadelphia, PA

WHEREAS, Southern Railroad Company of New Jersey has substantially complied with the proposal specifications in all respects;

NOW, THEREFORE, BE IT RESOLVED as follows:

1. The Board of Chosen Freeholders of the County of Salem awards a contract to Southern Railroad Company of NJ for Railroad Operation of the Salem Branch Line, and
2. The successful proposer shall enter into a written contract with the County and the Freeholder Director and the Clerk of the Board shall be authorized to execute said agreement.

Herbert R. Strong

HERBERT R. STRONG, Chairman
Planning & Transportation Committee

I hereby certify the foregoing to be a true resolution adopted by the Salem County Board of Chosen Freeholders at a regular meeting held on Wednesday, April 19, 1995.

Gilda T. Gill

GILDA T. GILL, Clerk of the Board

RECORD OF VOTE

Freeholder	Aye	May	N.V.	A.B.	Res.	Sec.	Freeholder	Aye	May	N.V.	A.B.	Res.	Sec.
Timberman	X						Strong	X				X	
Ware	X					X	Timberman	X					
Sparks	X						Lake	X					
Halstead	X												

N.V. - Not Voting

Res. - Resolution Moved

Sec. - Resolution Seconded

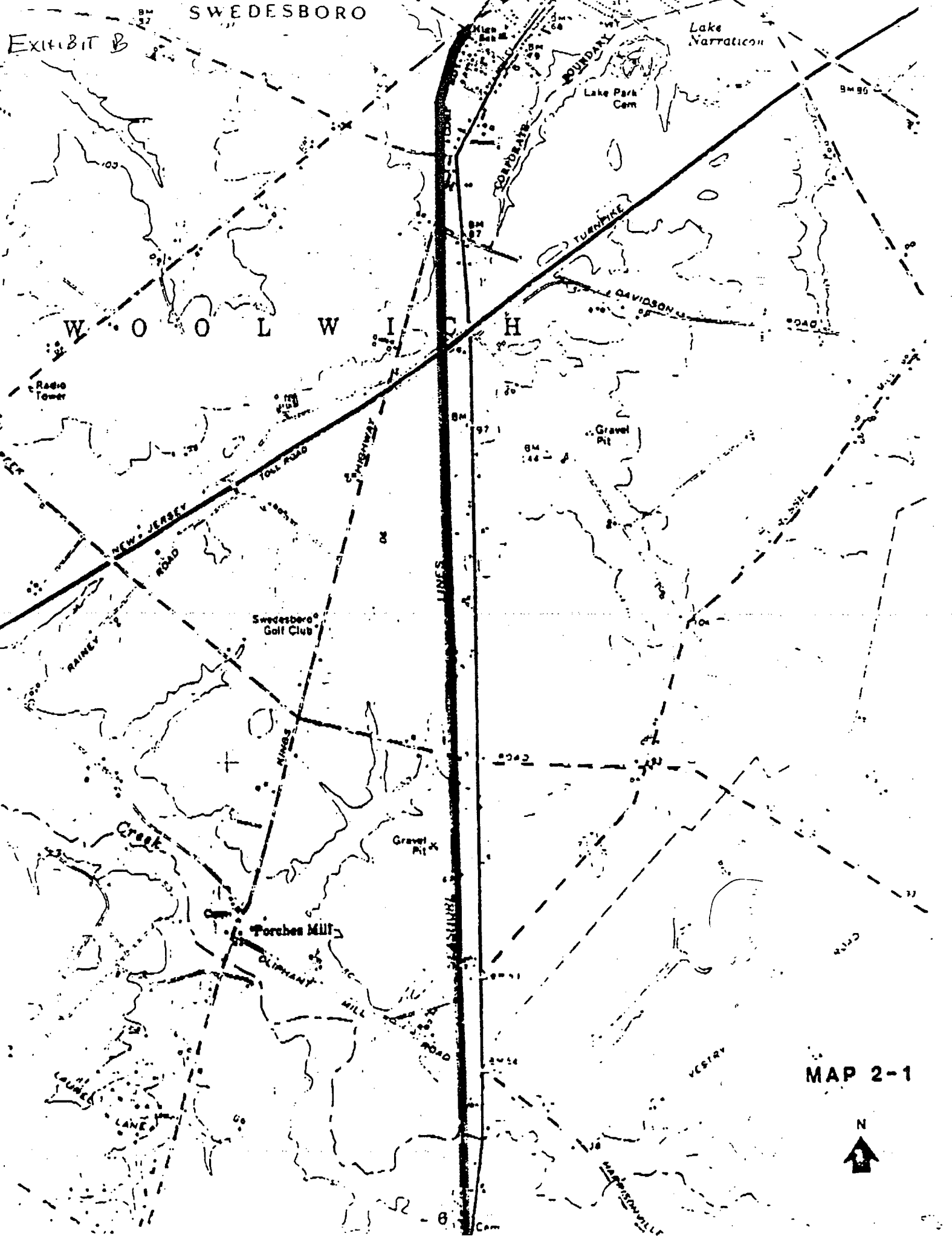


EXHIBIT B

SWEDESBORO

Lake Narraticon

Lake Park Cem

W O L W I C H

Radio Tower

NEW JERSEY
TOLL ROAD

Sweedesboro
Golf Club

Creek

Porches Mill

OLIPHANT

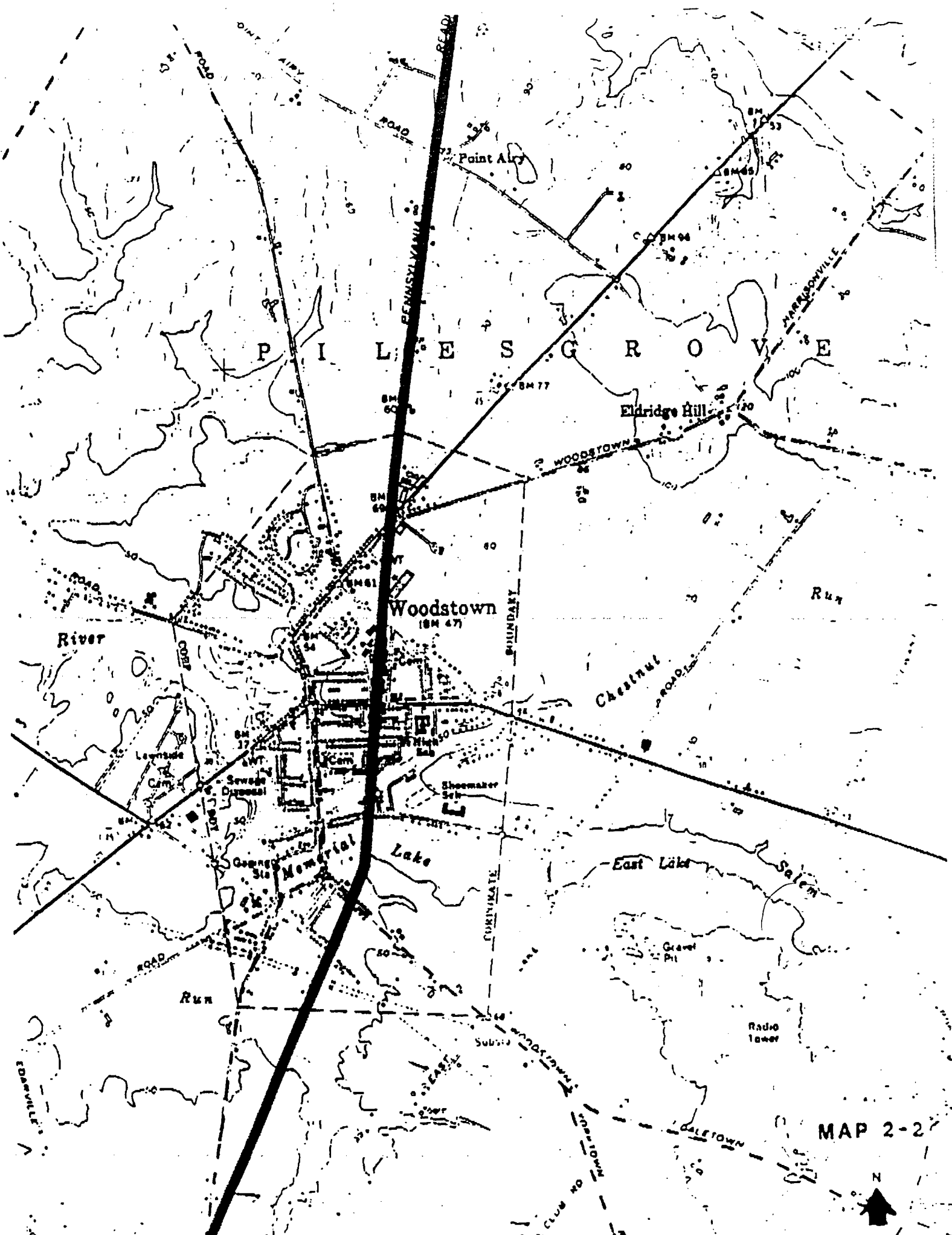
MILL

Gravel Pit

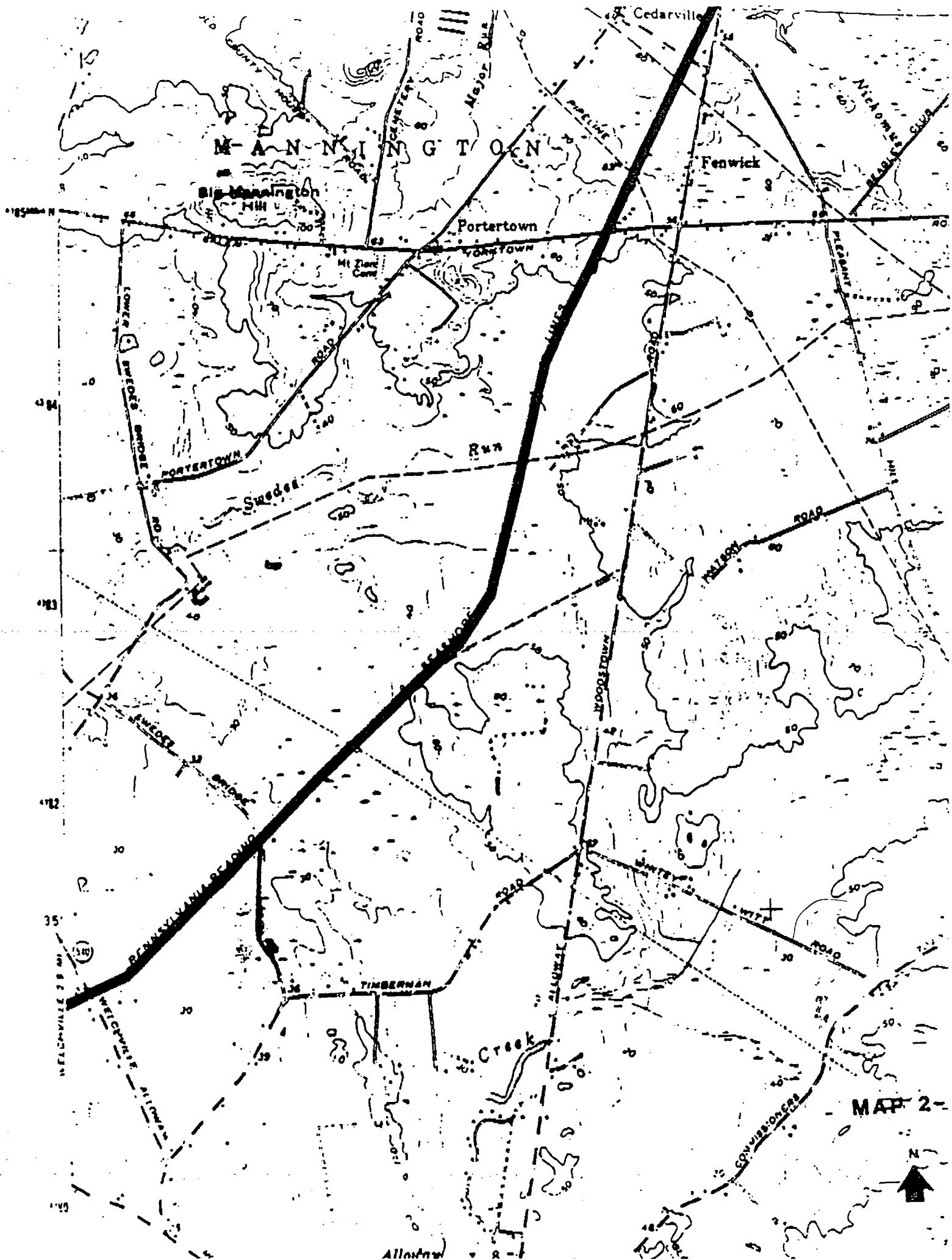
Gravel Pit

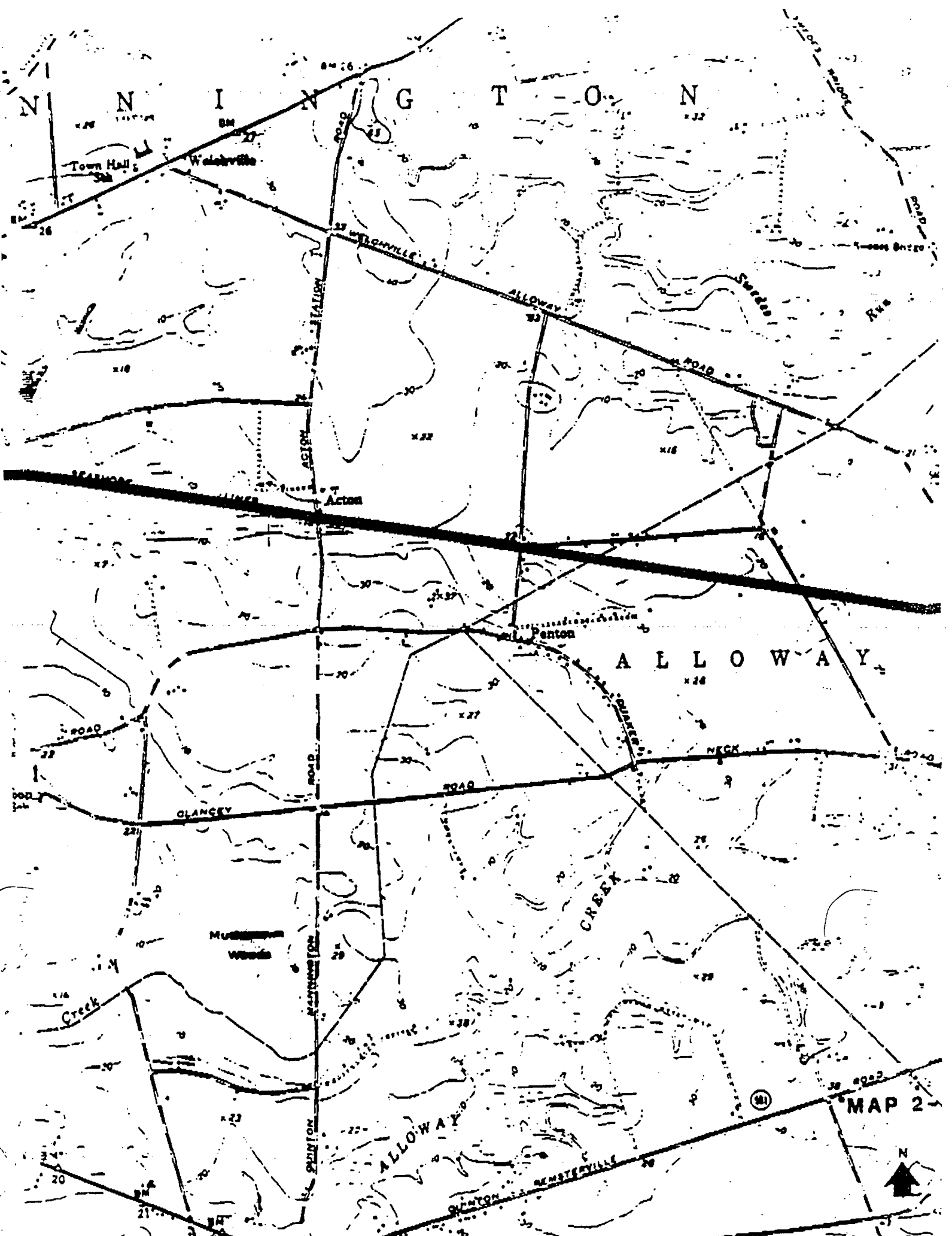
MAP 2-1





MAP 2-2





MAP 2

MANNINGTON

MEADOW

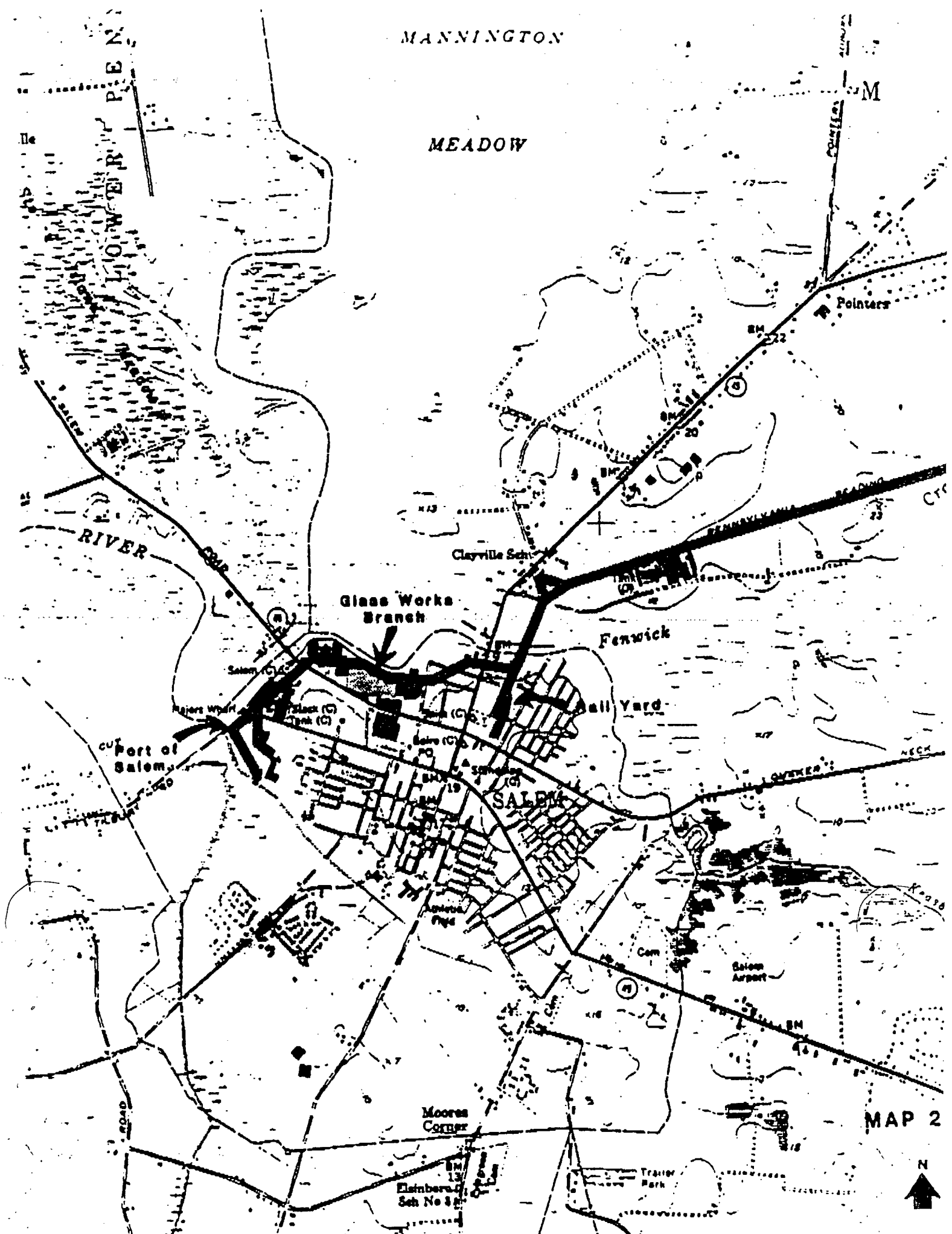


EXHIBIT C

CERTIFICATION

1. My name is Thomas A. Collard, I am Vice-President of JP Rail, Inc. d/b/a Southern Railroad Company of New Jersey, the party giving Notice of Exemption in this Proceeding.

2. Pursuant to 49 CFR 1150.33 (g) I hereby certify that I have reviewed in detail the projected carrier operating revenues for the coming year of the Southern Railroad Company of New Jersey and hereby state that said projected carrier operating revenues definitely will not exceed \$ 20,000,000.00 and that therefore Southern Railroad Company of New Jersey will remain a Class III carrier.

I hereby certify to the truth of the above statements. I understand that if I have knowingly certified to statements which are false that I am subject to punishment.

APRIL 29, 1995



THOMAS A. COLLARD, V.P.
J.P. RAIL, INC. d/b/a
SOUTHERN RAILROAD COMPANY OF NEW JERSEY

MAY 08 1995

BEFORE
THE INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 32700

JP RAIL, INC., d/b/a
SOUTHERN RAILROAD COMPANY OF NEW JERSEY

NOTICE OF EXEMPTION

VERIFIED PETITION TO REJECT OR REVOKE
NOTICE OF EXEMPTION
AND FOR ORDER ENJOINING
UNLAWFUL RAIL OPERATIONS

Daniel A. LaKemper
General Counsel
West Jersey Railroad Co.
1318 S. Johanson Road
Peoria, Illinois 61607
Tel.: (309) 697-1400
Fax: (309) 697-1677

OF COUNSEL:

Slover & Loftus
1224 Seventeenth St, NW
Washington, DC 20036

Dated: May 5, 1995

Donald G. Avery
Slover & Loftus
Attorneys at Law
1224 Seventeenth Street, NW
Washington, DC 20036
Tel.: (202) 347-7170
Fax: (202) 347-3619

Attorneys for West Jersey
Railroad Co.

BEFORE THE
INTERSTATE COMMERCE COMMISSION

In the Matter of

JP RAIL, INC. d/b/a SOUTHERN
RAILROAD COMPANY OF NEW
JERSEY--EXEMPTION TO CHANGE
OPERATORS OF SALEM BRANCH
RAIL LINE--SALEM COUNTY, NJ

Finance Docket No. 32700

VERIFIED PETITION TO REJECT OR REVOKE NOTICE OF EXEMPTION
AND FOR ORDER ENJOINING UNLAWFUL RAIL OPERATIONS

The West Jersey Railroad Co. ("WJ"), by its undersigned counsel, hereby petitions the Commission to reject the "Notice of Exemption" filed by the Southern Railroad Company of New Jersey ("SRNJ") in this proceeding on or about May 1, 1995, for the facts set forth therein demonstrate that the subject transaction is governed by 49 U.S.C. § 11343 rather than § 10901, and accordingly the claimed Class Exemption set out in 49 C.F.R. § 1150.31(a) is inapplicable.

In the alternative, WJ moves the Commission to revoke the subject Notice, *ab initio*, because it contains material misrepresentations regarding the nature of the transaction for which authorization is sought. Indeed, as will be shown, the transaction is in substance and effect an adverse abandonment application against WJ's ICC-authorized operation of the subject rail line, for which the Commission's exemptive processes are entirely unavailable.

In addition, because the evidence indicates that SRNJ has already begun operation on the subject rail line, without even waiting for its claimed exemption to become effective, WJ -- which stands ready to continue serving shippers on that line, in accordance with its common carrier duty -- requests the Commission to order SRNJ forthwith to cease and desist from its unlawful rail operations over the subject rail line.

BACKGROUND

West Jersey Railroad Co. is the lessee and operator of the line of railroad involved in the instant exemption proceeding, which runs approximately 18 miles between Swedesboro and Salem, New Jersey. The Commission authorized WJ's lease and operation of the line in Finance Docket No. 31699, *Pioneer Railroad Company, Inc.--Continuance in Control--Corporate Family Transaction--West Jersey Railroad Co.*, served July 17, 1990. Pioneer Railroad Company, Inc., which had previously operated the line as its West Jersey Division, assigned its lease to West Jersey Railroad Co., a newly-formed subsidiary, as part of a corporate reorganization. Pioneer had previously assumed the lease with the owner of the line, the County of Salem, New Jersey, on October 1, 1988 (see Finance Docket No. 31334, unprinted decision served October 14, 1988).

The compensation provision of the lease agreement between the County of Salem and WJ expired on April 30, 1995, but the lease itself did not expire, nor does it provide for unilateral termination or expiration, except for cause. Nevertheless,

the County -- without any pretense of good cause -- has now purported to terminate WJ's lease summarily, and to replace WJ with another carrier, SRNJ.

The merits of WJ's contract dispute with the County are of course not before this Commission; WJ has brought suit against both the County and SRNJ in federal court, and the court will presumably resolve such matters in due course. However, the Commission should be aware that, contrary to certain allegations in SRNJ's notice, WJ did not "cease[]" operations ... leaving the shipping public without rail service"; rather, it was effectively ousted from the line by the County, and withdrew its equipment temporarily, solely to avoid undue risk of accidents from uncoordinated simultaneous operations on the same lines and threatened seizure of its property. WJ's equipment and personnel remain nearby, and stand ready to resume service promptly, if allowed to do so. In short, if there is an unmet need for rail service on the subject line, it is of the County's own making, not WJ's.

ARGUMENT

1. The Notice of Exemption Must Be Rejected, Because On its Face it Shows that the Subject Transaction is Governed by 49 U.S.C. § 11343, Rather Than § 10901, and Therefore the § 1150.31 Class Exemption Does Not Apply.

SRNJ is, by its own admission (Notice at 1), a Class III common carrier railroad. The line it seeks authority to lease and operate is, again by SRNJ's admission, a "live" common carrier rail line. It follows that SRNJ's lease and operation of the line would be governed by 49 U.S.C. §§ 11343 et seq., rather

2011/5/11

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200K -
100K 400K 200K*

*100K 400K 200K
FLASHES*

*Remove
engine
and other
equipment*

*Left loaded cars
on tracks*

No 12022

than by 49 U.S.C. § 10901, which only covers rail line acquisitions by non-carriers, and carrier acquisitions of non-jurisdictional [abandoned or private] trackage. See 49 C.F.R. § 1150.1.

Because SRNJ's proposed acquisition and operation of the Salem Branch is subject to § 11343 rather than § 10901, the Class Exemption set out in 49 C.F.R. § 1150.31, upon which SRNJ relies, is wholly inapplicable, by its terms.¹ The Notice of Exemption is therefore fatally flawed on its face, and must be rejected.

2. If Not Rejected, the SRNJ Notice of Exemption Must Be Revoked *ab initio* for Material Misrepresentation.

Even if the SRNJ Notice of Exemption is not rejected for the reasons set out in Part 1, above, it should be revoked *ab initio*, pursuant to 49 C.F.R. § 1150.32(c), because it presents a materially misleading picture of the events leading up to May 1, and most importantly because it fails to inform the Commission that SRNJ intended to, and did, commence operations without waiting for Commission authorization.

As noted above, SRNJ's assertion that WJ abruptly "ceased operations", leaving shippers in the lurch and forcing the County to bring SRNJ in as an emergency replacement, could not be further from the truth. WJ was informed and became

¹SRNJ's attempted reliance on § 1150.31(a)(3), by characterizing this transaction as a "change of operators", is unavailing. Read in context, that provision refers only to the substitution of a new contract operator for an old one, where the transaction would otherwise fall under § 10901, e.g. because the new operator is a non-carrier.

IS THE
TRUTH
WILLING TO
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27th - one business day

STOCK 4/10/00
2000- ✓

Page 5

convinced that SRNJ intended to begin operations on May 1, 1995, with or without Commission authorization. (Indeed, it appears to have done just that.) SRNJ representatives made it clear they intended to use WJ property and facilities. Faced with a threat of a head-on collision or confrontation with a rival operator, and unable to resolve the matter after lengthy and repeated discussions with both SRNJ and the County, WJ was forced to temporarily suspend service, and on May 1, 1995, filed an action in the United States District Court for the Southern District of New Jersey for a declaratory judgment as to its rights, and to order the County and SRNJ to permit WJ to resume service, unhampered by such threats, until such time as the litigation has been resolved, and this Commission has acted to resolve the dispute.

✓
Not
True
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The Notice is also fundamentally misleading because, while it asserts (falsely) an urgent need for inauguration of service by SRNJ, and requests immediate effectiveness of the exemption, it nowhere indicates that SRNJ planned to start operations immediately, without awaiting Commission authorization. Yet that is precisely what has happened: on information and belief, SRNJ began operating on May 2, and perhaps on May 1, even though the Commission has not yet acted on its request for early effectiveness.

County
may
Duly
OK
=

Finally, the Notice is fundamentally misleading because it suggests that SRNJ has been duly authorized by the County to occupy and operate the Salem Branch, when in fact the County has

no right to admit another lessee to the property because WJ's lease is exclusive.

Because SRNJ's Notice is materially misleading, the Notice should be revoked *ab initio*, under § 1150.32(c).

3. Because the County's Ouster of WJ from the Salem Branch is Opposed by WJ, a Formal Adverse Discontinuance or Abandonment Application is Required, and an Exemption Will Not Lie.

Not only is SRNJ's Notice of Exemption invalid as an invocation of the § 1150.31 Class Exemption; under the circumstances of this case, exemptive authority would not even be available to SRNJ pursuant to a petition for individual exemption.

This case is on all fours with, and controlled by, the Commission's decision in Finance Docket No. 32049, *Cheatham County Rail Authority "Application and Petition" for Adverse Discontinuance* (unprinted decision served July 21, 1992). Here, as in *Cheatham*, there is no dispute that WJ has been operating the Salem Branch lawfully, under a valid lease from the County. Here, as in *Cheatham*, WJ's operating authority, duly sought and received from this Commission, was unqualified; WJ did not operate pursuant to a Modified Certificate. Accordingly, here, as in *Cheatham*, WJ cannot lawfully discontinue its common carrier service over that line without the prior approval of this Commission, even if its lease of the line has expired (which, to repeat, has not happened). And finally, here, as in *Cheatham*, if the County and SRNJ wish to terminate WJ's common carrier opera-

tion of the Salem Branch over WJ's objections, they must file a formal adverse discontinuance application seeking such relief.

As the Commission explained:

Since MACO [the prior operator] became authorized to operate the line under an exemption that does not include a termination of service rule, individual authorization by this Commission under 49 U.S.C. 10903(a)(2) is required to release MACO from its common carrier obligations. Because MACO does not want to discontinue operations, petitioners filed for relief in a broad form that includes a request for adverse discontinuance action against MACO.

Frequently railroad regulation matters before the Commission can be handled either by formal application or petition for exemption. *The exemption alternative is not available in this adverse discontinuance matter, however.* ... Accordingly, it is necessary to process the adverse discontinuance issue more formally.

Cheatham, at sheets 1-2 (citations omitted, emphasis supplied). See also, Finance Docket No. 31303, *Wisconsin Department of Transportation--Abandonment Exemption* (unprinted decision served December 5, 1988); Finance Docket No. 31271, *City of Colorado Springs and Metex Metropolitan Dist.--Pet. for Declar. Order, et al.* (unprinted decision served March 31, 1989).

4. The Commission Should Order SRNJ to Cease and Desist its Unlawful Rail Operations on the Salem Branch.

It is clear that SRNJ's current operation of the Salem Branch, without an effective authorization from this Commission, is unlawful. Even if its Notice of Exemption were otherwise proper, SRNJ should not be permitted to thumb its nose at the

Commission's seven-day notice requirement for the Class Exemption by simply asking that the exemption be made effective immediately, and then proceeding to operate as though its request were self-fulfilling.

Moreover, given the need for completion of an adverse discontinuance proceeding before SRNJ's ouster of WJ from the Salem Branch could be authorized, it is doubtful that SRNJ can cure the illegality of its operations any time soon.

In past cases, when the Commission has discovered illegal railroad operations, it has not hesitated to order them halted, and the lawful operator restored to active service. Cf. Finance Docket No. 32523, *Sagamore National Corporation--Acquisition and Operation Exemption--Lines of Indiana Hi-Rail Corporation* (unprinted decision served October 28, 1994). The Commission should do the same here.

CONCLUSION

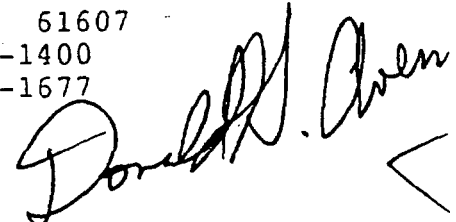
For the reasons set forth above, the Commission should reject or revoke the Notice of Exemption filed by Southern Railroad Company of New Jersey in this Docket, and order said carrier to cease and desist from its current unlawful operation of the "Salem Branch" rail line at issue in this proceeding.

*Officiant from
Customers that they requested service*

Respectfully submitted,

By: Daniel A. LaKemper
General Counsel
West Jersey Railroad Co.
1318 S. Johanson Road
Peoria, Illinois 61607
Tel.: (309) 697-1400
Fax: (309) 697-1677

Donald G. Avery
Slover & Loftus
Attorneys at Law
1224 Seventeenth Street, NW
Washington, DC 20036
Tel.: (202) 347-7170
Fax: (202) 347-3619

A handwritten signature in dark ink, appearing to read "Donald G. Avery", is written over the typed name and address. To the right of the signature is a large, stylized handwritten checkmark.

OF COUNSEL:

Slover & Loftus
1224 Seventeenth St, NW
Washington, DC 20036

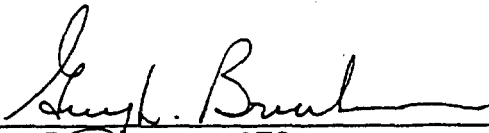
Dated: May 5, 1995

Attorneys for West Jersey
Railroad Co.

VERIFICATION

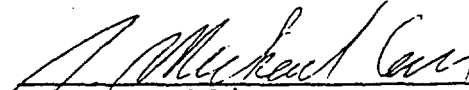
STATE OF ILLINOIS)
) SS
COUNTY OF PEORIA)

Guy L. Brenkman, CEO of West Jersey Railroad Co., having been duly sworn according to law, hereby deposes and states that he is authorized to make the Verification, has read the foregoing document, and knows the facts asserted therein are true and accurate as stated, to the best of his knowledge, information and belief.



Guy L. Brenkman, CEO
West Jersey Railroad Co.

Subscribed and sworn to before me, a Notary Public, in and for the County of Peoria, State of Illinois, this 2nd day of May, 1995.



Notary Public

My Commission expires:



Certificate of Service

I hereby certify that I have this 5th day of May, 1995, served copies of the foregoing document upon counsel for JP Rail, Inc., d/b/a/Southern Railroad Company of New Jersey, and upon all parties shown on the service list attached to the "Notice of Exemption" filed by JP Rail herein on or about May 1, 1995, in accordance with the Commission's Rules of Practice.


Donald G. Avery

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 32700

JP RAIL, INC., d/b/a/
SOUTHERN RAILROAD COMPANY OF NEW JERSEY

VERIFIED REPLY TO VERIFIED PETITION TO REJECT OR REVOKE
NOTICE OF EXEMPTION

May 24, 1995

JOHN K. FIORILLA, ESQ.
WATSON, STEVENS, FIORILLA & RUTTER
390 GEORGE STREET
P.O. BOX 1185
NEW BRUNSWICK, NJ 08903
Tel- (908) 545-2250
Fax- (908) 214-0242

BACKGROUND

The background provided by the West Jersey Railroad Co.

(hereinafter WJR) in its Petition to Reject and Revoke the Notice of Exemption of JP Rail, Inc. d/b/a Southern Railroad Company of New Jersey (hereinafter SRNJ) on the rail lines owned by the County of Salem contains several misstatements of fact.

First of all the WJR did not hold a lease on the property in question but simply an operating agreement with the County of Salem which after extensions expired on April 30, 1995. A copy of this twenty-five page agreement which SRNJ obtained from the County of Salem is attached hereto as Exhibit A. In addition the attached affidavit of officials of the County of Salem (Exhibit B attached) indicates that it publicly placed for bid a Request for Proposal (RFP) for an operator for its rail lines, that SRNJ was the successful bidder on the RFP and that WJR failed to bid to continue operating the line. WJR's statement that it ceased operations and left the scene not because of its failure to bid on the RFP but to avoid accidents with SRNJ is completely untrue. Thomas Collard, Vice-President of the SRNJ indicated to the West Jersey during the week preceding May 1, that even though it had been the successful bidder to operate Salem County's lines (a bid procedure in which the WJR did not submit a bid) SRNJ would not file to become the operator of the line or begin operations on the line if WJR continued its dispute with the owner of the line, Salem County and continued to operate. (See affidavit of Collard Exhibit C). It was

not until WJR told shippers it would no longer serve the line, moved its equipment to a distant state, removed its signs from the premises and cut off all electric power to all signals that the SRNJ filed for a Notice of Exemption to fulfill the request of customers and owner on the line and to insure that rail service was not interrupted.

Secondly, the WJR did most certainly cease operations on or about April 27, 1995 (three days before the expiration of its agreement with the County of Salem) when it shipped its only operating locomotive to Illinois (it is not available nearby as the WJR's statement indicates), told shippers that it would not handle further cars destined for them (though inbound loaded cars remained in the Salem Yard and at the interchange track at Swedesboro, N.J.). (See Certification of Wendy Green and Rickey Kennedy of Anchor Glass Container Corp. attached hereto as Exhibit D) as well as the aforementioned Collard affidavit to verify these facts.

The lack of service to shippers which was remedied by SRNJ was the direct result of the actions of WJR and not those of SRNJ or the County of Salem.

ARGUMENTS

I. THE NOTICE OF EXEMPTION IS GOVERNED BY 49 U.S.C. § 10901 AND §1150.31 CLASS EXEMPTION APPLIES.

49 U.S.C. § 10901 (a) reads

A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter 1 of chapter 105 of this title may- ... (3) acquire or operate an extended or additional railroad line if the Commission finds that the present or future public convenience and necessity require or permit ... operation of the line.

49 U.S.C. § 1150.31 Scope of Exemption applies to all acquisitions and operations under § 10901. "This exemption also includes ... (3) A change in operators on the line.

In the instant matter, the respondent, JP Rail, Inc., (SRNJ) is a rail carrier subject to the jurisdiction of the Interstate Commerce Commission (hereinafter ICC) under subchapter 1 of chapter 105, and has made application to the ICC to operate an additional railroad line in accordance with § 10901.

WJR argues that SRNJ is subject to 49 U.S.C. § 11343 rather than §10901. WJR suggests that pursuant to § 1150.1, § 10901 only covers rail line acquisition by non-carriers, and carrier acquisitions on non-jurisdictional (abandoned or private) trackage. This argument is without merit. Section 1150.1 specifically reads "Existing carriers require approval under section 10901 only to ...

operate a line owned by a noncarrier..." The subject line is owned by the County of Salem, N.J. a noncarrier. SRNJ is an existing carrier. Therefore, §10901 applies.

49 U.S.C. § 11343 refers to several types of transactions, none of which apply to this case. The only transaction which WJR might argue as being applicable would be § 11343 (a)(6). This transaction involves the acquisition by a rail carrier of joint use of a railroad line operated by another rail carrier. The facts show that there was never joint use of the subject rail line. WJR ceased its operations before SRNJ began. WJR removed its signs and turned off the grade crossing signals. Without notification, WJR removed its engine and all other equipment and left behind loaded cars on the interchange track. (See Collard Affidavit, Exhibit C). WJR voluntarily, of its own accord, ceased operations and left the shipping public without rail service.

WJR alleges that it is the lessee of the railroad line in the instant proceeding. In support of this allegation, WJR refers to Finance Docket No. 31334, an unprinted decision served October 14, 1988. Purportedly, the previous operator of the subject line, Pioneer Railroad Company, Inc., has a lease with the County of Salem. WJR professes to have been authorized to continue not only the operations but the alleged lease of the line in accordance with Finance Docket No. 31699, Pioneer Railroad Company, Inc.-- Continuation in Control-- Corporate Family Transaction -- West

Jersey Railroad., Co., served July 17, 1990. As these two aforementioned decisions were not attached to WJR's petition, it is respectfully submitted that WJR's only relation to the subject railroad line was by way of having been the operator of said line before SRNJ began operating the subject line. The County of Salem in its affidavit attached hereto as Exhibit C indicates clearly that the only contract between WJR and the County of Salem was an operating agreement which expired on its own terms on April 30, 1995 and that WJR did not lease its premises.

Whereas on its face, the Notice of Exemption is subject to 49 U.S.C. §10901, and is not a subject transaction governed by 49 U.S.C. §11343, the Exempt Transactions regulations found at 49 CFR §1150.31 are applicable to the application of SRNJ.

II. SRNJ INFORMED THE ICC OF IT INTENTIONS TO COMMENCE OPERATIONS IMMEDIATELY. THE NOTICE OF EXEMPTION, ON ITS FACE, ASSERTS AN URGENT NEED TO BEGIN AUTHORIZATION, AND SPECIFICALLY ADDRESSES THE NEED FOR WAIVER OF THE SEVEN DAY WAITING PERIOD. THEREFORE, THE NOTICE OF EXEMPTION SHOULD NOT BE REVOKED.

WJR argues that SRNJ materially mislead the ICC with regard to the facts leading up to the filing of the May 1, 1995 Notice of Exemption. This argument is without merit. The facts leading up to the filing are clear. WJR ceased operations leaving the shipping public without service. This is evidence by the fact that

WJR removed its signs. WJR turned off the electricity which included the flashers, leaving a very dangerous situation for rail service. In addition, WJR removed its engine and all other equipment and left behind loaded cars which had not been delivered on the on the interchange track at Swedesboro, N.J. (See affidavit of Thomas A. Collard attached as Exhibit C). In addition SRNJ told the WJR that it would not operate if WJR continued operations on the line and its controversy with the County of Salem that SRNJ would not file to become the operator even though it was the successful bidder to operate the lines owned by the County of Salem. (Affidavit of Collard, Exhibit C). There was never a threat of joint operations as WJR states and though joint operations are not completely unheard of on short lines, the complete voluntary withdrawal of the WJR from the line has made the question moot.

WJR argues that the Notice of Exemption of SRNJ is "fundamentally misleading because, while it asserts ... an urgent need for inauguration of service by SRNJ, and requests immediate effectiveness of the exemption, it nowhere indicated that SRNJ planned to start operations immediately..." The implication of the last paragraph of the Notice of Exemption is self-evident. It reads "Due to the fact that the shipping public does not have rail service ... the applicant hereby requests that the effective date of this notice of be May 1, 1995..." In fact, May 1, 1995 was the first day of service by SRNJ. The obvious intent of the last paragraph was to put the ICC on Notice of the start date being May

1, 1995. Otherwise the paragraph would have been unnecessary and superfluous.

III. BECAUSE WJR CEASED OPERATIONS OF ITS OWN ACCORD, LEAVING THE SHIPPING PUBLIC WITHOUT SERVICE, THE NOTICE OF EXEMPTION IS APPROPRIATE.

WJR's third argument suggests that a formal adverse discontinuance or abandonment application is required because it was ousted by the County of Salem. This argument is without merit. WJR was not ousted by the County of Salem. WJR ceased operations leaving the shipping public without service as noted above. To the contrary, SRNJ always asserted that it would not begin operations until WJR discontinued operating the line. SRNJ began operation of the line with a leased locomotive because as its Notice of Exemption indicated the public necessity required the immediate operation of the subject rail line.

WJR relies on Finance Docket No. 32049, Cheatham County Rail Authority "Application and Petition" for Adverse Discontinuance (unprinted decision served July 21, 1992.) Again, WJR failed to provide a copy of this decision. WJR's papers erroneously state that "there is no dispute that WJR has been operating the Salem Branch lawfully, under a valid lease..." Clearly these facts are in dispute. WJR was not operating the subject rail line on May 1,

1995 and in fact appeared to have ceased operations as it announced to Anchor Glass Container Corp. by close of business April 26, 1995. Since no lease was in effect, there is no evidence to support WJR's contention that it is a lessee of the subject rail line. Accordingly, SRNJ argues that a Formal Adverse Discontinuance Application is not required at this time and that an application by WJR to abandon operations nunc pro tunc will certainly not be opposed by the current operator, owner or shippers on the lines in question.

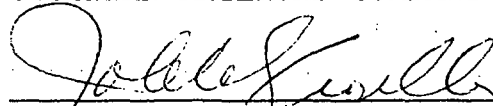
WJR's fourth argument suggests that SRNJ thumbed it's nose at the ICC's seven-day notice requirement. WJR fails to mention how it abandoned its operations prior to the expiration of its operating agreement leaving loaded cars at Salem Yard and on the interchange track at Swedesboro. The shipping public needed the service to continue without interruption and Anchor Glass Container Corporation a major shipper on the line indicated to SRNJ and to the County of Salem that it might have to close its plant if the raw material which was on line but left undelivered by WJR was not delivered to its plant early in the week of May 1. As things turned out the cars in question were delivered to Anchor on May 2. The urgent need for this service to continue was clearly addressed in the Notice of Exemption filed by SRNJ.

CONCLUSION

For the aforementioned reasons, SRNJ respectfully requests that the Notice of Exemption which it has filed in this Finance Docket be neither rejected nor revoked, and that the operation by SRNJ of the Salem Branch rail line be allowed to continue pursuant to this filing.

RESPECTFULLY SUBMITTED

WATSON, STEVENS, FIORILLA & RUTTER
ATTORNEYS FOR JP RAIL, INC. d/b/a
SOUTHERN RAILROAD COMPANY OF NEW JERSEY


By: JOHN K. FIORILLA

VERIFICATION

STATE OF NEW JERSEY :

: ss

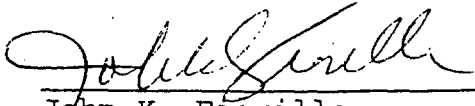
COUNTY OF BURLINGTON:

Thomas A. Collard, being duly sworn, makes oath and says that he is Vice-President of JP Rail, Inc. d/b/a Southern Railroad Company of New Jersey; that he has been authorized by proper corporate action of JP Rail, Inc. to verify and file with the Interstate Commerce Commission the foregoing Reply to the Verified Petition; that he has general knowledge of the facts and matters relied upon in this Reply; and that all representations set forth herein are true and correct to the best of his knowledge, information and belief



THOMAS A. COLLARD

Sworn to and Subscribed
Before me this 24 day
of May, 1995.

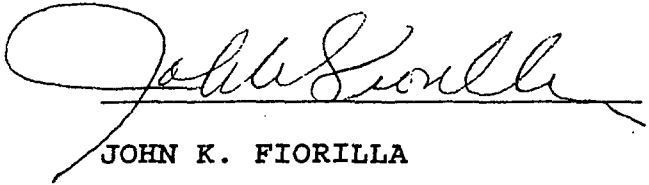


John K. Fiorilla
An Attorney at Law of New Jersey

CERTIFICATE OF SERVICE AND COMPLIANCE
WITH 49 CFR § 1150.32 (b)

I, John K. Fiorilla, hereby certify that the requirements of 49 CFR § 1150.32 was complied with by the sending on MAY 24, 1995 of the foregoing Verified Reply to the Verified Petition to Reject or Revoke a Notice of Exemption to the shippers on the Salem Branch Rail Line whose names appear on the attached service list to this Certificate.

MAY 24, 1995



JOHN K. FIORILLA

AGREEMENT

This Agreement (hereinafter called "Agreement"), made the 15 day of May, 1985, by and between the Board of Chosen Freeholders of Salem County (hereinafter called "the Board"), a Body Politic of the State of New Jersey, or its nominee and West Jersey Short Line, Inc. (hereinafter called "WJSL"), a New Jersey corporation,

W I T N E S S E T H:

WHEREAS, the Board or its nominee expects to obtain all right, title and interest of Consolidated Rail Corporation (Conrail) in certain railroad facilities including all in-place tracks, rails, ties, ballast, other track materials, bridges, signaling devices and rail-highway grade crossings (hereinafter referred to as "Property") and the right-of-way, located in Salem and Gloucester Counties, New Jersey;

WHEREAS, the Board seeks to contract with an operator to provide rail freight services on the Property;

WHEREAS, WJSL submitted to the Board a January, 1985, proposal regarding the provision by WJSL of rail freight service on the Property;

WHEREAS, WJSL expects to obtain all necessary regulatory authority permitting it to conduct such operations; and

WHEREAS, the parties hereto desire to arrange a contract for the provision by WJSL of rail freight operations on the Property.

NOW, THEREFORE, the parties hereto mutually covenant and agree as follows:

1. Provision of Rail Freight Operations

The Board hereby contracts exclusively with WJSL for the provision of continuous common carrier rail freight operations by WJSL on and through the Property described in Exhibit A hereto for the term of this Agreement. WJSL shall have sole and exclusive possession of the Property during the term of the Agreement, subject to inspection rights of the Board and all existing easements, privileges, licenses agreements and other restrictions or uses. This provision shall in no way affect the right of the Board to sell or lease portions of the Property which are not required for railroad operations. ✓

2. Term and Compensation

The term (hereinafter referred to as "Term") of the Agreement is two years commencing on the date of the closing of the Board's sale agreement with Conrail, and ending on the second anniversary date thereafter, unless sooner terminated as hereinafter provided. Unless WJSL provides written notice to the Board at least six (6) months prior the end of the Term (or the Agreement is terminated as hereinafter provided) the Agreement shall be renewed automatically for up to three additional Terms of one year each. The compensation for the

Term or any additional Term is \$1.00 per annum, payable upon execution of this agreement, at the Office of the Clerk of the Board Salem County Court House, Salem, New Jersey, 08079, or at such other place as the Board may from time to time designate.

3. Additional Compensation

WJSL shall pay as additional compensation the following:

(a) Taxes and Assessments. WJSL shall pay all taxes and assessments, general, special or otherwise, which may be levied, assessed or imposed upon the Property or any of the railroad facilities or other improvements that are a part of the Property to the extent such taxes and assessments are attributable to the Term. WJSL shall pay such taxes and assessments directly to the tax authorities on or before the date due and, upon request by the Board, shall produce tax receipts to the Board within twenty (20) days after payment thereof; provided, however, that nothing herein shall require WJSL to make any such payment so long as WJSL in good faith and by appropriate proceeding contests its obligation to do so and if a reserve as shall be required by generally accepted accounting principles shall have been made therefor. If, for any reason, such taxes or assessments are charged, billed or in any fashion imposed upon the Board, WJSL shall pay the Board for such taxes or assessments within twenty (20) days after a bill is rendered by the Board to WJSL therefor. The Board shall apply all such amounts received from WJSL to the taxes or assessments due. The Board shall assist WJSL in efforts to

prevent or minimize the levy or imposition of improper assessments and state, regional and local property taxes against the Property.

(b) Utilities. WJSL, at no cost or expense to the Board, shall arrange for, obtain and pay all bills, charges and assessments in connection with any heat, water, electricity, sewer and other utility services required for its use of the Property.

(c) Repairs/Liens. WJSL shall also pay to the Board as additional compensation, the cost of repairs made, or caused to be made, by the Board pursuant to subparagraph 9(f) hereof, and the cost of paying the amounts of liens or charges by the Board pursuant to paragraph 11 hereof.

4. Other Agreements

The following agreements are hereby incorporated herein and made a part hereof:

(a) Rate Agreement. The rate arrangement between WJSL and Conrail for traffic originating, terminating or moving over the Property during the term shall be as set forth in Exhibit B hereof, except as otherwise agreed in writing.

(b) Administrative Agreement. The orderly transition of revenues and expenses attributable to the Property, or operation thereof, and the accounting and settlement of interline revenues and expenses shall be performed and determined in accordance with the Administrative Agreement

attached hereto as Exhibit C, except as otherwise agreed in writing.

(c) Interchange Agreement. Except as otherwise modified by Conrail and WJSL, the interchange of freight between Conrail and WJSL shall be performed at such location and in accordance with such terms and conditions as set out in the Interchange Agreement attached hereto as Exhibit D. WJSL shall be responsible for any fees charged or assessed by Conrail under the Interchange Agreement or any modifications thereto.

5. Use and Removal

(a) WJSL agrees to use the Property only for railroad purposes, unless WJSL obtains the written consent of the Board to use the Property or a portion thereof for other uses.

(b) WJSL has no right to remove any assets included in the Property other than in the course of ordinary maintenance under Section 9, unless WJSL obtains the written consent of the Board. The assets of WJSL shall not be affected by this clause. The term assets shall ^{not} include the results of any track rehabilitation or maintenance program; additions, repairs or reconstruction of structures on the property; or personal property which shall become affixed to the property such as fences, signs and other items.

(c) The Board reserves the right to lease or sell any portion of the Property not used for, or useful to, rail freight services, provided, however, that the Board shall

consult with WJSL prior to leasing or selling any portion of the Property.

6. Waste

WJSL shall not commit or suffer to be committed any waste upon the Property.

7. Acceptance of the Property

WJSL has inspected and accepts the Property in its present condition "as is" and agrees that no representations or warranties with regard to the condition or fitness for use of the Property have been made, including, without limitation, the fitness of the Property for railroad purposes; nor has the Board made any representations regarding alterations or additions.

8. ICC Approvals and Compliance with Laws

(a) WJSL hereby warrants and represents to the Board that WJSL will apply for a Modified Certificate of Public Convenience and Necessity from the Interstate Commerce Commission (hereinafter referred to as the "ICC"), pursuant to 49 CFR 1150.21, and shall obtain all other Association of American Railroads, governmental or regulatory certificates, permits and authorities which are required to enter into this Agreement and to conduct railroad operations on the Property in accordance with the terms and provisions hereof. WJSL agrees that it shall obtain such Modified Certificate and any other authorizations or approvals required in a fashion so as to be

effective as of the first day of the Term, with no break in the continuation of rail freight service.

(b) WJSL, at its sole cost and expense, shall comply with and obey all laws, ordinances, rules, regulations and requirements of all governmental or regulatory authorities having jurisdiction over the Property, including but not limited to all laws, ordinances, rules, regulations and requirements governing WJSL's railroad operations on the Property. WJSL shall be solely responsible for the clean-up of any materials deposited on the Property as a result of its railroad operations under the terms of this Agreement. WJSL shall have no obligations to remedy pre-existing conditions specified in Schedule A.

9. Repair, Maintenance, Alterations and Additions

(a) WJSL agrees, at WJSL's sole cost and expense, to place and keep the property in constant good order, repair and safe condition. Without limiting the generality of the foregoing, WJSL agrees (i) to maintain the Property to the level existing as of commencement of the Term and (ii) to implement and perform the maintenance plan attached hereto as Exhibit E (hereinafter Maintenance Plan), unless WJSL obtains the prior written consent of the Board to modify such Plan which shall not be unreasonably withheld.

(b) WJSL shall not install or construct any rail facility or other improvement, or add to, alter or replace any then existing rail facility or other improvement, without the

prior written consent of the Board, which consent will not be unreasonably withheld; provided, however, that WJSL is hereby granted the Board's consent for (i) WJSL's implementation of the Maintenance Plan, and (ii) any emergency or normal maintenance involving replacement of existing rails, bars, other track materials, ties and ballast with material of equal or superior quality. The Board's consent to any proposal by WJSL for the construction of a sidetrack shall not unreasonably be withheld. All materials applied to the Property by WJSL in the course of repair, maintenance, alteration or improvement of the Property shall become the property of the Board and materials removed in the course of repair, maintenance, alteration or improvement of the Property shall become the property of WJSL, unless the parties otherwise agree in writing. WJSL shall maintain complete and accurate records of the type and location of all materials applied to the Property in the course of repair, maintenance, alteration or improvement of the Property. WJSL shall provide the Board access to these records upon request.

(c) Upon completion of any rehabilitation program, WJSL shall maintain all improvements, renewals, or replacements in same in good operating condition equal to minimum standards acceptable to the Federal Railroad Administration, (FRA), or higher FRA standards created by rehabilitation of the facilities. WJSL shall have no obligation to maintain track at a level higher than FRA class 2 track.

(d) WJSL shall comply with all laws, codes, ordinances and regulations of any governmental or regulatory authority having jurisdiction over the Property or WJSL's operations thereon which are applicable to any such operations, maintenance, repairs, alterations or additions. WJSL shall be subject to treatment as any other business in the community and County with respect to civic services and benefits such as but not limited to police protection, trash collection (other than that generated by its own maintenance or rehabilitation work), etc.

(e) If the Board makes or causes to be made any repairs to the Property required by reason of WJSL's negligent acts or omission to act, the Board may add the cost of such repairs to the compensation due, together with interest thereon from the date of the Board's payment for such repairs at an interest rate of 10 percent per annum. The Board shall provide reasonable notice to coordinate with WJSL with regard to said work, to avoid interruption of railroad operation and maintenance, prior to making any repairs pursuant to this subsection. The Board agrees to indemnify and hold WJSL harmless for any liability incurred by WJSL proximately caused by repairs made by the Board pursuant to this subparagraph.

(f) If, solely because of the nature of WJSL's use or occupancy of the Property for railroad operations, any addition, alteration, change, repair or other work of any nature, structural or otherwise (except pre-existing conditions

specified in Schedule A), shall be required or ordered or become necessary at any time during the Term due to any governmental law, ordinance or regulation or order of regulatory authority now in effect or hereafter enacted, the entire expense thereof, irrespective of when the same shall be incurred or become due, shall be solely the responsibility of WJSL, and the Board shall not be called upon to contribute thereto.

(g) WJSL further agrees, upon the expiration or other termination of this Agreement, peaceably to quit and deliver possession of the Property to the Board in like good order, repair and safe condition, reasonable wear and tear and Acts of God excepted.

10. Responsibility of WJSL for its Employees

WJSL, in the performance of any and all work under the terms of this Agreement or otherwise upon or adjacent to the Property, shall provide for all labor and supervisory forces of every kind, and WJSL shall employ, pay from WJSL's own funds and have the right to discharge all persons engaged in the performance of such work, and all such persons shall be and remain the sole employees or agents of WJSL and subject to WJSL's exclusive supervision, direction and control. The foregoing shall not preclude WJSL from hiring contract labor or contractors to perform specific services.

11. Liens and Charges

(a) WJSL shall not agree or permit any lien claim (hereinafter referred to as lien) or charge to be placed upon the Property. In the event such lien or charge is placed upon the property, the Board shall serve written notice upon WJSL directing that such lien or claim be removed by WJSL within 30 days of the imposition of such lien or charge. In the event, WJSL fails to cause removal of such lien or charge by the end of the thirty day period, or otherwise fails to comply with the provisions of this paragraph, then paragraph 11 (b) shall be applicable.

(b) In the event any lien or charge shall not be paid or fully bonded by WJSL within thirty (30) days after the lien or charge accrues, the Board shall have the right to pay such lien or charge on behalf of the WJSL, and promptly upon rendition of bill therefor, WJSL shall, as additional compensation hereunder, repay the cost to the Board, together with interest thereon at 10% per annum from the date of payment by the Board.

(c) Nothing contained in this paragraph 11 or in any other provision of this Agreement shall be construed as authority for WJSL to create any lien upon the Board's interest in the Property.

12. Insurance

(a) WJSL shall provide and maintain in effect during the Term policy of comprehensive general liability insurance

with respect to the Property, in which the limits of liability shall be not less than two million dollars (\$2,000,000), combined single limit, bodily injury and property damage, for each occurrence. Such policy shall be with an insurance company and in a form acceptable to the Board. The policy shall name both the Board and WJSL as insureds thereunder. Such policy, or evidence thereof (in a form acceptable to the Board), must be presented to the Board within 30 days from the date of settlement with Conrail.

(b) WJSL shall furnish to the Board complete copies of all such insurance policies with evidence of payment of premiums therefor upon request of the Board. All such policies shall be endorsed to provide not less than thirty (30) days' notice to the Board of any cancellation thereof and of any material change in coverage. The providing of said insurance coverage shall not be deemed a limitation on the liability of WJSL as provided in this Agreement, but shall be additional security therefor.

13. Indemnification by WJSL

(a) Except as provided in subparagraph 9(f) hereof, WJSL shall be responsible for and does hereby indemnify and agree to save harmless and defend the Board from and against any and all claims and suits for, and any and all liability, loss or expense arising from or incidental to or in connection with, damage to or loss of the property of any person or entity, or injury to or death shall arise in any manner,

directly or indirectly, out of or incidental to or in connection with this Agreement, WJSL's use or occupation of the Property (including any condition on the Property prior to the commencement of the Term), including but not limited to the use or occupation of any railroad tracks, railroad sidings, rail-highway crossings or other railroad facilities, unless such damage, loss, injury or death is determined to have been caused, either in whole or in part, by negligence of the Board. This paragraph shall apply to those instances where there exists no insurance coverage for the parties to this agreement under paragraph 12 (a) or where said insurance is insufficient in amount to cover the loss, in which case this paragraph shall apply to any excess liability of the parties to this agreement over the amount of liability insurance coverage.

(b) In the event that the Board shall, without fault on its part, be made a party to any litigation commenced by or against WJSL, then WJSL shall protect and hold the Board harmless from any verdict or judgment imposing upon the Board the payment of any sum of money, and shall pay all costs, expenses and reasonable attorneys' fees incurred or paid by the Board in connection with such litigation.

14. Damage by Casualty

In the event that any of the Property shall be damaged by casualty, such property shall be repaired and restored promptly by WJSL to its former condition. Casualty is specifically

defined herein to include action by water or waves in areas where the Property is adjacent to bodies of water, but to exclude damage caused to the sluice gate at Fenwick Creek.

15. Condemnation

(a) If the whole of the Property, or a substantial portion thereof sufficient to render the remainder of the Property unsuitable for the purposes of WJSL, shall be appropriated or condemned by the exercise of the right of eminent domain, or by sale in lieu thereof, for any public or quasi-public use or purpose, then in such event this Agreement shall terminate on the earlier of the date that the condemning authority takes possession of the Property, or such portion thereof, or the date that such authority acquires title to the Property, or such portion thereof. All compensation shall be paid up to such date and WJSL shall have no claim against the Board for the value of any unexpired term of this Agreement. The Board shall cooperate with WJSL in prosecution of any claim for compensation to which it may be entitled.

(b) All compensation awarded or paid upon a total or partial condemnation the Property shall belong to and be paid to the Board. WJSL shall have the right to claim and recover from the condemning authority, but not from the Board, such compensation as may be separately awarded to or recoverable by WJSL in its own right. The Board shall cooperate with WJSL in prosecution of any claim for compensation to which it may be entitled.

16. Assignment and Encumbrances

(a) WJSL shall not assign this Agreement. . .

(b) WJSL shall not mortgage, pledge or otherwise encumber or permit to be incumbered any of the Property; any attempt by WJSL to do so shall constitute a default hereunder. A lien by the New Jersey Department of Transportation in connection with rehabilitation of the Property by the County shall not be considered a lien under this section.

(c) Any assignment or transfer [or any merger or consolidation, any bankruptcy, insolvency or reorganization, whether by operation of law or proceedings in equity], or any transfer of a controlling interest of the stock of WJSL to persons or entities not now holding shares in WJSL without the approval of the Board, shall be deemed to be an assignment within the meaning of this Section 16.

17. Notices

All notices given under this Agreement shall be in writing and sent by express, registered or certified mail, postage prepaid, to the parties at their respective addresses set forth below, or such other addresses as are specified by written notice and delivered in accordance herewith, and all such notices shall be deemed so delivered when received.

If to the Board:

Clerk of the Board of Chosen Freeholders of
Salem County (or designee)
Salem County Salem House
Market, St.
Salem, NJ

08079

If to WJSL:

Waters and Sherman, P.A.
107 West Broadway
Salem, NJ 08079
Attn: John Waters, Jr.

West Jersey Short Line
P. O. Box 556
Salem, NJ 08079
Attn: Dale Harris

L. T. Klauder Management Services
Pennsylvania Building
15th and Chestnut Sts.
Philadelphia, PA 19102
Attn: R. Tomlinson

18. Events Constituting Default

Any of the following events shall constitute a default hereunder:

(a) The nonpayment by WJSL for a period of twenty (20) days after due date of the compensation required under section 2 hereof.

(b) The nonpayment by WJSL of any other sum required to be paid hereunder by WJSL within sixty (60) days after the receipt of written notice thereof from the Board.

(c) The nonperformance by WJSL of any other term, covenant, or condition of this Agreement which is not cured within thirty (30) days after written notice thereof from the Board.

(d) Any affirmative act of insolvency by WJSL, or the filing by WJSL of any petition under any bankruptcy, reorganization, insolvency, or moratorium law, or any law for the relief of, or relating to, debtors.

(e) The filing of any involuntary petition under any bankruptcy statute against WJSL, or the appointment of any receiver or trustee to take possession of the property of WJSL.

(f) The subjection of any of WJSL's property to any legitimate liens or seizure by any creditor or governmental agency.

(g) The suspension or revocation of WJSL's Federal, State or local regulatory authority to operate rail freight service on the Property, or the imposition by WJSL of an embargo upon all or any portion of the line for a period of over 60 days.

(h) The unjustifiable failure to provide railroad service at least once a week, if traffic conditions warrant.

19. The Board's Rights on Default

On the occurrence of any of the events listed in paragraph 18 as constituting defaults, the Board may terminate the Agreement by written notice to WJSL; and in addition do any or all of the following:

(a) Take exclusive, immediate possession of the Property and exercise its right to provide for exclusive rail service thereon;

(b) Declare the entire balance of the compensation immediately due and payable and collect the same from WJSL; and

(c) Take any other action or exercise any remedy available the Board at law or equity.

20. Obligations of WJSL Upon Termination

In the event of termination by the Board pursuant to section 19 WJSL agrees:

(a) To cease its use of the Property and to remove its railroad equipment from the Property immediately, peaceably and without legal process;

(b) To promptly join in and support in any petition by the Board seeking to terminate before any relevant federal, state or local regulatory authorities any certificate, authority or exemption conferring or purporting to confer upon WJSL the right to operate rail service on the Property; and

(c) To take no action to prevent or interfere with the Board's possession of the Property.

21. Acceptance of Partial Payments

In the event WJSL is in default hereunder by reason of non-performance of the terms of this Agreement, acceptance by the Board of partial payment or performance shall not waive the default. The Board's right to terminate shall not be prevented except by full performance of the terms of this Agreement by WJSL prior to termination. This Agreement shall not be reinstated after termination except by written agreement by the Board.

22. Leases and Easements

The Board shall retain the rights and revenues accruing under licenses, sidetrack agreements, easements, and rental agreements pertaining to the Property as of the commencement of

the Term. Subject to the prior written approval of the Board, which shall not be unreasonably withheld, WJSL may negotiate and enter into additional sidetrack agreements pertaining to the Property. Revenues from such additional sidetrack agreements shall accrue to WJSL. Revenues from any additional licenses, easements, or agreements, relating to railroad operation, shall be subject to negotiation between the parties.

23. Notice and Consultation Regarding Rates

Subject to the provisions of the Interstate Commerce Act, WJSL agrees to provide the Board a copy of all rate tariffs (including contract rate summaries) filed with the Interstate Commerce Commission. Such tariffs and contract rate summaries must be provided to the Board at the same time such tariffs are filed with the ICC. WJSL shall advise the Board prior to the effective date of such tariffs if the Board so requests.

24. Reports

(a) Within 60 days of the close of each calendar quarter, WJSL shall provide the Board with an audited or unaudited statement of revenues and expenses from operation of the Property.

(b) Within 90 days of the close of each calendar year, WJSL shall provide the Board with an annual report, which shall include:

- (i) an income statement;
- (ii) an balance sheet;
- (iii) an source and use of funds statement;

- (iv) a summary of maintenance, repair and rehabilitation performed on the property; and
- (v) a summary of carloads shipped and/or received by commodity.

All financial statements shall be prepared in accordance with ICC and generally accepted railroad accounting principals.

25. Performance Guarantee

Prior to settlement with Conrail, WJSL shall provide the County with the following documentation indicating its financial commitment to railroad operations:

- (i) Proof of ownership or lease of a locomotive suitable for short line railroad operation:
- (ii) A bank statement indicating a beginning balance of \$50,000 in cash.
- (iii) A loan agreement between LTK Management Services, Inc. and WJSL guaranteeing the provision of a \$50,000 credit line.

At no time may these start-up funds be diverted to purposes other than railroad operation. Notwithstanding any other provisions of this agreement, if this documentation is not provided, then this agreement is considered to be null and void.

26. Contingent Upon Acquisition

WJSL understands and agrees that all obligations of the Board hereunder are wholly contingent on the Board closing a sale agreement for the Property with Conrail. WJSL shall make no claim against the Board or its agents for damages, expenses, lost profits or other costs if the Board should fail to close the sale agreement for the Property with Conrail.

27. Force Majeure

In the event that either party shall be delayed, hindered in, or prevented from the performance of any act required by this Agreement by reason of any of the following:

- a. strikes, lock-outs, labor troubles;
- b. severe weather or ground conditions, including extraordinary snowfall, flooding, washouts or landslides, which prevent the normal performance;
- c. inability to procure materials;
- d. failure of power;
- e. riots, insurrection, or war; or
- f. any other Act of God beyond its control.

Then the time of performance of such party may be extended for a time period equal to such delay.

28. Miscellaneous Provisions

(a) This Agreement shall be governed by, and construed and interpreted in accordance with, the laws of the State of New Jersey.

(b) No failure of either party hereto to exercise any power given such party under this Agreement, or to insist upon strict compliance by the other party with its obligations hereunder, and no custom or practice of the parties at variance with the terms hereof, shall constitute a waiver of either party's right to demand exact compliance with the terms of this Agreement.

(c) Time is of the essence in complying with the terms, covenants and conditions of this Agreement.

(d) This Agreement and its Exhibits contain the entire agreement of the parties hereto and no representations, inducements, promises or agreements, oral or otherwise, between the

parties not embodied in this Agreement shall be of any force or effect.

(e) Except as expressly limited by the terms of this Agreement, all rights, powers and privileges conferred hereunder upon the parties shall be cumulative and not restricted to those given by law.

(f) This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and to any nominee or assign of the Board.

(g) No amendment to this Agreement shall be binding upon either of the parties hereto unless such amendment is in writing and executed by both parties hereto.

(h) Any condition or right of termination of rescission granted by this Agreement to either WJSL or the Board may be waived by the party for whose benefit such condition or right was granted, and any such waiver may be made by notice to the other party hereto.

(i) Any right or obligation of the Board hereunder may be discharged by a nominee designated in writing by the Board.

(j) The Board enters into this Agreement in its capacity as a Body Politic of the State of New Jersey, with no personal undertakings or obligations by members of the Board.

(k) WJSL will provide the County, at no cost, the following services:

- (i) Preparation of technical bid specifications for track rehabilitation program;

- (ii) Technical assistance during the bidding and award periods;
- (iii) Any track inspection services requested by the Board.

- (1) WJSL shall maintain absolute railroad operating authority during the conduct of any track rehabilitation program.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed the date first above written.

Attest:

THE BOARD OF CHOSEN FREEHOLDERS
OF SALEM COUNTY, NEW JERSEY

Lee M. Mungen
Secretary

By: Joseph Dyr

Attest:

WEST JERSEY SHORT LINE, INC.

Paul D. Harris
Secretary

By: Carl M. Lamb

Exhibit A - Property Description
Exhibit B - Rate Agreement
Exhibit C - Administrative Agreement
Exhibit D - Interchange Agreement
Exhibit E - Maintenance Plan

5356S/395

RIDER TO AGREEMENT BETWEEN THE
BOARD OF CHOSEN FREEHOLDERS OF SALEM COUNTY
AND WEST JERSEY SHORT LINE, INC.
DATED , 1985

28. (m) Any obligations assumed by the Board in its Sale Agreement executed or to be executed with the Consolidated Rail Corporation which shall survive settlement in that transaction shall be assumed by West Jersey Short Line. However, West Jersey Short Line shall have no claim whatsoever against the Board by virtue of or reliance upon any provision in said Sale Agreement. This paragraph shall specifically apply to those obligations set forth in Section IV, Paragraph B and Section XIII of the Sale Agreement as well as all other provisions of said Sale Agreement which shall survive settlement. West Jersey Short Line shall further be responsible for and does hereby indemnify and agree to save harmless and defend the Board from any claims or suits for and any and all liability loss or expense arising from or incidental to or in connection with damages or losses suffered by the Board by virtue of failure of West Jersey Short Line to comply with the terms of this provision.

ATTEST:

By

Lee M. Munyon
LEE MUNYON, Clerk of
the Board

ATTEST:

By

Gayle L. Harris
Secretary

BOARD OF CHOSEN FREEHOLDERS
OF SALEM COUNTY

By

Joseph J. Dyer
JOSEPH J. DYER,
Freeholder-Director

WEST JERSEY SHORT LINE, INC.

By

Dale M. Lamb
President

JAN 16 1987

OK

0A3

11/13/86

AMENDMENT TO AGREEMENT DATED MAY 1, 1985 BETWEEN
THE BOARD OF CHOSEN FREEHOLDERS OF SALEM COUNTY AND
THE WEST JERSEY SHORT LINE, INC.

29. The term and compensation of the agreement set by paragraph 2 entitled "Term and Compensation" shall be modified as set forth herein below.

The Board does hereby grant and give West Jersey Short Line, Inc. the option and privilege of renewing the term of the agreement for five additional periods of one year each, commencing at the expiration of the present two-year term and three one-year renewal terms on May 1, 1990, subject to the same terms and provisions in the agreement, and at the following rent, to wit, for each additional one-year period, the sum of \$25,000.00 payable at the beginning of each one-year extension on May 1, or if such day should fall on a weekend or holiday, payable on the first business day of the month, payable at the office of the Clerk of the Board, Salem County Court House, Salem, New Jersey 08079, or at such other place as the Board may from time to time designate.

THE BOARD OF CHOSEN FREEHOLDERS
OF SALEM COUNTY, NEW JERSEY

Attest:

Lee M. Munyon
Lee M. Munyon, Clerk of the Board

By: Joseph J. Dyer
Joseph J. Dyer, Freeholder
Director

Attest:

WEST JERSEY SHORT LINE, INC.

Timothy F. Klander
Secretary (Acting)

By: Richard B. Bunker
President

BEFORE THE
INTERSTATE COMMERCE COMMISSION

In the Matter of)

JP RAIL, INC. d/b/a SOUTHERN)
RAILROAD COMPANY OF NEW)
JERSEY--EXEMPTION TO CHANGE)
OPERATORS OF SALEM BRANCH)
RAIL LINE--SALEM COUNTY, NJ)

Finance Docket No. 32700

AFFIDAVIT BY CURTIS W. HARKER, PURCHASING AGENT
OF THE COUNTY OF SALEM

I, CURTIS W. HARKER, upon my oath do hereby affirm the following information to be true upon information and belief.

1. I am Purchasing Agent for the County of Salem Purchasing Department. In my capacity as Purchasing Agent one task relevant to my work is consideration of agreements between the County of Salem, a municipal corporation of the State of New Jersey, and third parties concerning the utilization of assets owned or controlled by the County. I have specific, firsthand knowledge concerning actions taken by the Salem County Purchasing Department for the two 1995 Request for Proposal (RFP hereinafter) cycles for Railroad Operation of the Salem Branch Rail Line for the County of Salem.

2. Specifications for the first RFP were drawn up by myself in cooperation with Ms. Noranne Stradley, Esq. who was then County Counsel. The original RFP of 1984 was used as a guide to prepare the first 1995 RFP with the exclusion of old marketing data, purchase of railline from Conrail, and Conrail tariffs. The first 1995 RFP added the requirements of a \$5,000.00 deposit check, winning vendor post \$250,000.00 performance bond, rail operator provide an attorney if County named in suit, rail inspections every six (6) months, curing defects found within six (6) months, and maintenance of line at Class II standard.

3. The first 1995 RFP was legally advertised March 8 in the Today's Sunbeam with the required ten (10) business day window for response. A complete list of New Jersey shortline railroads was requested and received from the NJ Department of Transportation,

Bureau of Ports, Terminals and Freight Services. Purchasing overnight mailed all New Jersey shortlines the RFP, which is not required by law, in order to improve possibilities of responses. The RFP's were received by the County Clerk of the Board's Office until close of business day on March 22, 1995. The next morning my secretary, Juanita Ashlock, and I summarized the responses to the RFP. The signed summary and the two responses (Appendix A) were presented to Freeholder Herbert Strong, Chairman of the Planning and Transportation Committee. The Freeholder Board had reserved the right to reject proposals in the RFP and in Resolution 95-149 did reject all proposals and directed the Purchasing Department to readvertise the RFPs for railroad operation.

4. The second RFP cycle had specification changes which included the removal of the \$5,000.00 deposit check, no performance bond, insurance lowered from \$5 Million to \$3 Million, and upgrade rail from present condition to Class II standard by end of fourth year of operation showing 25% maintenance progress annually.

5. The second 1995 RFP was legally advertised April 6 in the Today's Sunbeam with the required ten (10) business day window for response. Purchasing mailed the RFP via Federal Express or certified mail (if PO Box) to all NJ shortlines and two additional interested parties from the first RFP. These mailings were not required by law but done in order to improve possibilities of responses.

6. The RFP's were received by the Clerk of the Board's Office until 1:30 P.M. on April 19, 1995. I retrieved the RFP's from the Clerk's Office and opened the RFP packages promptly at 1:30 P.M. in the Freeholder Meeting Room in the presence of my secretary, Juanita Ashlock. I prepared the RFP summary, signed by myself and secretary. The summary and the three (3) RFP's (Appendix B) were made available to Freeholder Herbert Strong, Chairman of the Planning and Transportation Committee. The Freeholder Board awarded the contract for railroad operation to Southern Railroad Company of New Jersey in Resolution 95-177. The previous operator, West Jersey Railroad, failed to submit a proposal.

7. It is my belief that I, the Salem County Purchasing Agent, and the Salem County Purchasing Department followed New Jersey Public Contracts Law precisely, and fulfilled the spirit of the law in seeking competitive proposals by utilizing the express mail services to all New Jersey Shortline Railroads and interested persons.

Curtis W. Harker, Purchasing Agent
Curtis W. Harker

Sworn To and Subscribed
Before Me this 23rd Day
of May, 1995

Mildred S. Lang

MILDRED S. LANG
NOTARY PUBLIC OF N.J.
MY COMMISSION EXPIRES
JULY 27, 1999



APPENDIX A



**COUNTY OF SALEM
PURCHASING DEPARTMENT**

Court House - 92 Market Street • Salem, NJ 08079 • (609) 935-7510 Ext. 401 • Fax (609) 935-9102

LIST OF RESPONSES TO SALEM RAILROAD OPERATOR RFP

RESPONSES RECEIVED 3/22 IN CLERK OF BOARD'S OFFICE AND OPENED IN
PURCHASING DEPARTMENT 09:30 3/23/95:

Guy Brenkman, President, Pioneer Railcorp
1318 South Johanson Road, IL 61607 309-697-1400
(Corporate office: 1831 North Santa Fe Avenue, Chillicothe, IL 61523)
Quick summary: Deposit check not received, RFP format not followed.

Thomas A. Collard, Vice President, Southern Railroad Company of New
Jersey, Box 122, Willingboro, NJ 08046 609-871-8699
Quick summary: Deposit check of \$5,000 received, RFP format followed.

LETTERS/FAXES OF NO RESPONSE TO RFP:

Express Mail dated 3/22/95
Jeffrey L. Sutch, President, SMS Rail Service
PO Box 711, Bridgeport, NJ 08014 609-467-4800
Summary: Couldn't get detailed financial data for last 3 years
Substantial investment to bring back up to FRA Class II.

Facsimile dated 3/20/95:
John W. Sheppard, voice 908-522-6124, FAX 908-522-5149
Summary: Insufficient time to respond to RFP
Exception to terms to bring back up to FRA Class II.

Letter dated 3/17/95:
R. Maurice Benbow, Marketing Dept, Ashland Railway, Inc., 1200 New
Rodgers Rd, #808, Bristol, PA 19007 215-781-3902, FAX 215-781-3900
Summary: Insufficient time to respond to RFP-wanted 30 day extension

NO RESPONSE BID SURVEY form returned dated 3/12/95:
NYS & W Railway, Walter Rich
Summary: "No interest".

Curtis W. Harker, Purchasing Agent *Curtis W. Harker*

Juanita Ashlock, Secretary *Juanita Ashlock*

APPENDIX B

PREVALING RATE: 61.30 DM

AMOUNT OF BID

Upgrade to class I by SMS
3 year maint. program to class I
No Commission
Active Railhead

UPGRADE to class II with grants
No ownership of railroad in resume

Commission = \$25,000 Annually to County
Supplemental: 5% of revenue above \$180,000
per contract year.

Dinner train
4 year maintenance program 1st ed
Active Railroad

[Handwritten signature]

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	100
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AFFIDAVIT

THOMAS A. COLLARD, being of full age, being duly sworn,
according to law, deposes and says:

1. I am the Vice-President of J.P. Rail, Inc. d/b/a Southern Railroad Company of New Jersey and the statements contained in this affidavit are known to me to be true and correct.

2. On Thursday April 27, 1995, I was contacted by Wendy Green, Material Resource Scheduler for the Anchor Glass Container Corporation of Salem, N.J. and advised that the West Jersey Railroad had advised Anchor on Wednesday April 26, that West Jersey would no longer operate over the Salem County owned rail lines and that they would not deliver any railcars destined for Anchor. Ms. Green indicated that she was concerned that the failure to deliver the cars destined for Anchor could result in the closure of the Anchor facility for lack of raw materials.

3. I was very surprised by this information since I had personally notified a representative of the West Jersey that SRNJ had no intention of beginning service on the Salem County owned lines as long as West Jersey remained on the line and continued its dispute with Salem County as to whether or not it would continue as operator of the line.

4. I investigated the statement from Ms. Green and found that by Thursday April 27, 1995, the West Jersey had in fact completely removed anything of value from the railroad including the heating unit in the freight station in Salem, its cabooses and equipment and its only locomotive power on the line. My investigation indicated that the West Jersey's locomotive had been shipped off line and removed by Conrail pursuant instructions by the West Jersey. A car trace on the shipment revealed that the locomotive was shipped on Wednesday April 26, consigned for delivery in Illinois and was not remaining locally available for use by the West Jersey. A copy of the computer trace of the locomotive and its destination is attached hereto as Exhibit A. In addition, the West Jersey had taken every possible record of any kind regarding shipments, employees, maintenance etc. making it impossible to even contact its employees at the time it left the line. The West Jersey also removed all signs bearing its name from the railroad property. It was clear from these actions that the West Jersey had abandoned operations prior to filing for an abandonment and prior to the expiration of its operating contract with the County of Salem which was set to expire on April 30, 1995.

5. After this initial investigation, I contacted representatives of the County of Salem, owners of the line, and discussed with them the situation. The County requested that if at all possible that SRNJ begin operations on May 1 on their line since the West Jersey had abandoned operations over their line.

6. Under these circumstances I directed our counsel John K. Fiorilla to prepare a Notice of Exemption so that SRNJ could obtain operating rights as soon as possible so that Anchor (and other customers on the line) would have service by May 1, the day after the operating agreement between West Jersey and the County of Salem would expire. Our counsel filed a Notice of Exemption on May 1 requesting that the seven day waiting period pursuant to Federal Regulations be waived so that the customers on the line could be served as soon as possible that week.

7. SRNJ began service on the line on May 1 delivering two carloads of agricultural chemicals which had been left undelivered on the Conrail interchange track the previous week by the West Jersey to the South Jersey Farmer's Exchange at Woodstown, N.J. On May 2 SRNJ delivered a number of cars to Anchor Glass Container Corporation which had been left undelivered on the interchange track at Swedesboro and in the yard at Salem on Thursday of the week before by the West Jersey.

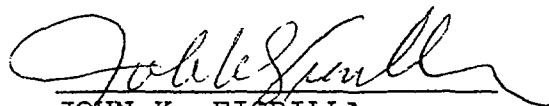
8. Upon the commencement of service on May 1, SRNJ was shocked to learn that the West Jersey had directed that all power be cut to active grade crossing protection devices on the line. SRNJ learned of this when the signals failed to activate as its first train came on line.

9. During this period the County called to our attention a letter which had been circulated by the West Jersey and written by Paul F. Osciak, one of the two employees of the West Jersey which made misleading and untrue statements regarding the SRNJ and the fact that he did not wish to work for the SRNJ. The letter in question had been delivered to customers on the line. A copy of this letter is attached hereto as Exhibit B. I was particularly surprised by this letter since when it was announced that SRNJ was the successful bidder and would be the new operator of the line I had commenced discussions with Mr. Osciak as to whether or not he would like to come to work for SRNJ. He had never given me a definite answer one way or the other and he never gave me any indication that he would write the letter in question. Since we have never seen nor met nor know the whereabouts of Rick Risko the other employee of the West Jersey mentioned in Mr. Osciak's letter, and since no records of any kind were left by the West Jersey we

have been unable to contact Mr. Risko to inquire as to whether or not he wishes to be employed by SRNJ.


THOMAS A. COLLARD

Sworn to before me this 24
day of MAY 1995.


JOHN K. FIORILLA
AN ATTORNEY AT LAW OF N.J.

ExH.8.T A

CRCT RAC 05/13 19:31 EDT SINGLE CAR TRACKING

CAR INIT NUMB WJ 56 LOAD LOCOM

KIND U 0 POOL

SHIPPER ORIGIN
WJ SWEWJ NJ

OFF JCT/RD
SWIDVRRC

CONSIGNEE
VRRC

DESTINATION
VANVRRC IL

FIRST EVENT : WAYBILL SWEWJ NJ CR WED APR 26 5:10 PM EDT :
LATEST EVENT : WAYBILL SWEWJ NJ CR WED APR 26 5:10 PM EDT :

CAR STATUS INFO : EVENTS DISPLAYED ARE FROM MOST RECENT HISTORY :
:

F KEYS 13 MOVEMENT EVENTS 14 SHIPPING INSTRUCTIONS 15 AAR TRACE
16 CUST SVC WORKSHEET 17 TRIP HISTORY 18 EQUIPMENT
19 CUSTOMER PROFILE 20 CAR ALERTS

NO WAYBILL DATA

LOCAL (P)RINT: : OTHER CDCS: OR FAX () - :
NEXT FUNCTION : : :

F1=HELP F3=RETURN OR PLACE CURSOR NEXT TO F KEY AND PRESS <ENTER>

CERTIFICATION

WENDY GREEN and RICKEY KENNEDY being of full age hereby certify and say:

1. Wendy Green is the Material Resource Scheduler and Rickey Kennedy is the Mix and Melt Supervisor for the Anchor Glass Container Corporation of Salem, New Jersey whose facility is located upon the lines of railroad owned by the County of Salem New Jersey and which was previously served by the West Jersey Railroad.

2. On Wednesday April 26, 1995 a representative of the West Jersey Railroad advised Anchor that we had received our last delivery of railcars since the West Jersey Railroad was ceasing operations on the railroad owned by the County of Salem.

3. Shortly thereafter Wendy Green learned that cars destined for Anchor had been placed on the interchange track at Swedesboro, N.J. for delivery and that these cars would not be moved the eighteen miles from Swedesboro to Salem by the West Jersey.

4. After consulting with representatives of the County of Salem, Wendy Green called Thomas Collard, a representative of the Southern Railroad Company of New Jersey (SRNJ) and asked when the SRNJ would begin service to Salem since the West Jersey had removed itself from the line and there was the very real possibility that our plant would have to close if the cars at Swedesboro were not delivered by early in the week of May 1.

5. The SRNJ then indicated that in light of the fact that the West Jersey would not move the cars that it would immediately file for operating rights on the line (for which it had already been awarded a contract to operate from the owner County of Salem) so that our plant would not be without service.

6. The SRNJ was able to serve our plant on Tuesday May 2 and delivered the required cars at that time.

Wendy Green and Rickey Kennedy hereby certify that the foregoing statements made by each of us are true. We are aware that if any of the foregoing statements made by us are willfully false that we are subject to punishment.

Wendy Green 5-23-95
WENDY GREEN
Rickey Kennedy 5-23-95
RICKEY KENNEDY