

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35016
ROCK RIVER RAILROAD LLC -- ACQUISITION AND OPERATION EXEMPTION --
RAIL LINES OF RENEW ENERGY, LLC AT JEFFERSON, WI

STB FINANCE DOCKET NO. 35017
MARK K. SMITH -- CONTINUANCE IN CONTROL EXEMPTION -- ROCK RIVER
RAILROAD, INC.

PETITION TO STAY EXEMPTIONS

J. MICHAEL HEMMER
ROBERT T. OPAL
Union Pacific Railroad Company
1400 Douglas Street
Omaha, NE 68179
(402) 544-5000

LINDA J. MORGAN
MICHAEL L. ROSENTHAL
Covington & Burling LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
(202) 662-6000

*Attorneys for Union Pacific Railroad
Company*

April 27, 2007

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PETITION TO STAY EXEMPTIONS

Union Pacific Railroad Company (“UP”) hereby petitions the Board to issue a stay of the effectiveness of the Notice of Exemptions filed in these two related proceedings on April 6, 2007. Based on the facts currently known to UP, there appears to be a substantial likelihood that the Board’s exemption procedures are being used inappropriately in this proceeding.

BACKGROUND

According to the original filings in this proceeding, pursuant to 49 C.F.R. § 1150.31 et seq. and 49 U.S.C. § 10502(a), Rock River Railroad, Inc. (“RRR”), a non-carrier, seeks an exemption in STB Finance Docket No. 35016 from 49 U.S.C. § 10901 for its acquisition from RENEW Energy, LLC (“RE”) and operation of approximately 2,100 feet of rail trackage (“Track”) located within the plant site of RE at Jefferson, Wisconsin. That plant was

formerly a malting facility operated by Cargill, Inc. The Track connects with UP at both ends.¹

Heretofore, the Track has been private industrial trackage owned by RE or its predecessors. According to the filings, RE will manufacture ethanol at the plant served by the Track. RE will ship ethanol and dried distillers' grain, a by-product of the ethanol manufacturing process, by rail from its plant at Jefferson using the Track. In seeking an exemption, the applicant cites the principle of the *Effingham* and *Bulkmatic* cases² for the proposition that the Track constitutes a line of railroad for which an exemption from the Board is required because it is RRR's initial rail acquisition and operation -- as cited by the applicant, a requirement even if the Track might otherwise be considered to be spur, industrial and/or switching track exempt from the Board's acquisition and operation authority by virtue of 49 U.S.C. § 10906.

ARGUMENT

UP is requesting a stay because it believes that the Board needs to ask for more information about the RRR and its plans. The Track involved in this proceeding consists entirely of private industrial trackage that is inside a building (a former malt house), and short stretches of access trackage between the ends of the building and the UP connections. We have attached three exhibits that clearly show the true nature of this so-called "railroad." Exhibit 1 is a copy of the map originally included as Appendix 1-A to RRR's notice of exemption, on which we have

¹ This matter is related to STB Finance Docket No. 35017, *Mark K. Smith -- Continuance in Control Exemption -- Rock River Railroad*, wherein Mr. Smith seeks an exemption under 49 C.F.R. § 1180.2(d)(2) for his continuance in control of RRR when RRR becomes a rail carrier upon the effectiveness of the exemption for acquisition and operation.

² *Effingham R.R. -- Petition For Declaratory Order -- Construction at Effingham, IL*, 2 S.T.B. 606 (1997), *reconsideration denied*, STB Docket No. 41986 (STB served Sept. 18, 1998), *aff'd sub nom. United Transp. Union v. STB*, 183 F.3d 606 (7th Cir. 1999); and *Bulkmatic R.R. -- Acquisition & Operation Exemption -- Bulkmatic Transport Co.*, STB Finance Docket No. 34145 (STB served Nov. 19, 2002), *reconsideration denied* (STB served May 15, 2003).

more clearly noted the location of the building through which the track runs and other additional information. This information is based on a personal inspection made by John T. Gray, UP Executive Director, Interline Marketing, on April 25, 2007. Exhibits 2 and 3 are photographs taken by Mr. Gray on his April 25 inspection, and show the RE trackage running between east and west ends of the building and the UP connections.

Based on the above, it appears highly unlikely that the real purpose of the notice of exemption is to create and operate a “common carrier by railroad.” While the notice says that RRR will handle ethanol and dried distillers grain for RE (Notice at p. 2), the actual service described in the notice is nothing more than a typical contract switching operation, as performed at industrial facilities throughout the United States, not common carrier service. As noted above, the “railroad” is only 2,100 feet in length, most of which runs through a building. It serves no shippers other than RE and connects with UP at both ends, so it is hard to imagine how this track could link up with other lines of railroad or serve other shippers. UP cannot understand, even applying the *Effingham* and *Bulkmatic* principle, how the RRR could possibly function as a common carrier and thus how this transaction is an appropriate use of the notice of exemption process.

It may be that RRR’s notice of exemption has some legitimate transportation purpose, but the notice does not disclose any, and UP cannot envision what it might be. From UP’s perspective, RRR does not appear to gain any transportation benefit by becoming a nominal “common carrier.” “Common carrier” status is not needed to give RRR the ability to provide any of the services RRR says it intends to provide. It does not allow RRR to provide services at less cost or more efficiently than it could as a contract switcher -- in fact, it will likely have the opposite effect by making RRR fully subject to Federal Railroad Administration

(“FRA”) regulation and railroad retirement.³ Obviously, RRR has some reason for pursuing common carrier status, but what is it? The only possibility UP can envision is that RRR and/or RE are attempting to obtain some regulatory entitlement that they could not obtain if RRR were a contract switcher, such as the ability to obtain federal preemption to avoid state or local regulation of some of RE’s industrial operations, or to defeat some contractual obligations that would otherwise apply.

In short, this transaction raises serious questions and the Board needs more information to ensure that its exemption processes are not being abused. Seeking more information here would be consistent with prior Board decisions. In several proceedings, the Board has stayed the effectiveness of the exemptions being sought to obtain additional information, or has rejected or revoked exemptions because of insufficient information. A recent example is *Ashland Railroad, Inc. -- Lease & Operation Exemption -- Rail Line in Monmouth County, NJ*, STB Finance Docket No. 34986 (STB served Feb. 27, 2007), in which the Board issued a housekeeping stay to obtain more information.⁴

In addition, the Board recently extended the notice periods for ten class exemptions in *Public Participation in Class Exemption Proceedings*, STB Ex Parte No. 659 (STB served Oct. 19, 2006). It extended these notice periods to ensure that interested parties would receive adequate notice prior to the effectiveness of the exemption. Such extended notice

³ If operated by a contract switcher, FRA would likely treat the Track and the operations on it as a “plant railroad,” rather than as part of the “general railroad system of transportation,” see 49 C.F.R. Part 209, Appendix A, “The Extent and Exercise of FRA’s Safety Jurisdiction” (“plant railroad” discussion). By becoming a nominal “common carrier,” RRR would become a “general system” railroad subject to all FRA regulations.

⁴ Cf., *James Riffin d/b/a Northern Cent. R.R. -- Acquisition & Operation Exemption -- in York County, PA & Baltimore County, MD*, STB Finance Docket No. 34484 (STB served Apr. 20, 2004), slip op. at 3 (revoking the exemption and instructing the applicant to submit “more detailed information” if the applicant chooses to refile pursuant to a petition for exemption or application).

allows parties to raise issues as appropriate in advance of the exemption's effective date, which the Board believes will ensure a more orderly processing of exemption requests. It is in this vein that UP seeks a stay to solicit more information.

Furthermore, the Board on several occasions has expressed concern about the misuse of the exemption process and has acted accordingly to prevent such misuse. In a number of cases, the agency has rejected or revoked the exemption being pursued specifically because of a concern that the exemption process was inappropriate for the transaction at issue. As an example, in *Jefferson Terminal Railroad -- Acquisition & Operation Exemption -- Crown Enterprises, Inc.*, STB Finance Docket No. 33950 (STB served Mar. 19, 2001), the Board revoked the notice of exemption because it believed that the applicant was using the process to obtain property for non-rail purposes using federal preemption as a shield. Also, in *Union Pacific Railroad -- Operation Exemption -- in Yolo County, CA*, STB Finance Docket No. 34252 (STB served Dec. 5, 2002) ("*UP-Yolo*"), the Board rejected the notice of exemption, finding that the line, which had been excepted industrial track, would not be operating as a common carrier subject to the agency's jurisdiction. The Board also found that the exemption process was not being used appropriately because UP was attempting to use an exemption to defeat the track owner's contractual rights.⁵ Similarly, UP seeks a stay here to obtain more information to ensure that the exemption process is not being misused.⁶

⁵ Unlike RRR's notice of exemption, UP's notice of exemption in *UP-Yolo* fully disclosed the purposes of the requested exemption, which permitted the Board to make an informed decision on its merits, see UP Notice of Exemption, (filed Oct. 21, 2002) Finance Docket No. 34252, at 4-5.

⁶ See also *Northeast Interchange Railway, LLC -- Lease & Operation Exemption -- Line in Croton-on-Hudson, NY*, STB Finance Docket No. 34734 (STB served Nov. 18, 2005), in which the STB stayed the effectiveness of the exemption and ultimately rejected the notice of exemption filed by Northeast Interchange Railway, LLC ("*NIR*"), where NIR sought rail carrier status by acquiring a private sidetrack, a track that had previously been used -- like most private (continued...)

In requesting a stay, UP submits that all of the criteria for a stay are met in this case. Those criteria are (1) irreparable harm absent a stay, (2) likelihood of success on the merits, (3) no substantial harm to other interested parties, and (4) the public interest. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

There would be irreparable harm to the integrity of the exemption process if this transaction were allowed to proceed and RRR turned out to not be a legitimate rail common carrier. There is likelihood of success on the merits because, given the information that UP has, it is hard to envision how the proposed “railroad” could be anything more than a contract switcher, as there is no clear transportation function that could not be performed as well as by a private switching operator. A stay to seek additional information would not harm the other parties involved, given that operations over that rail line could continue as they are today and fulfill the needs that exist today. Finally, the public interest would be served by seeking further information to ensure that the exemption process is properly used as envisioned by the Board and the statute.

sidetracks -- to switch cars to and from track of a common carrier, in this case, a CSXT track. This new “railroad” was estimated to be all of 1,600 feet long, and it was clearly anticipated that CSXT would continue to operate exactly as it had in the past. The facts of that case appear analogous to the transaction at hand.

CONCLUSION

UP asks the Board to issue a stay in these proceedings and request further information concerning the operations of RRR. Based on the information that UP has at hand, it is highly unlikely that RRR could be more than a contract carrier, and there is a substantial likelihood that the Board's exemption processes are being abused. But additional information would help to clarify the situation.

J. MICHAEL HEMMER
ROBERT T. OPAL
Union Pacific Railroad Company
1400 Douglas Street
Omaha, NE 68179
(402) 544-5000

Respectfully submitted,



LINDA J. MORGAN
MICHAEL L. ROSENTHAL
Covington & Burling LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
(202) 662-6000

*Attorneys for Union Pacific Railroad
Company*

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VERIFICATION

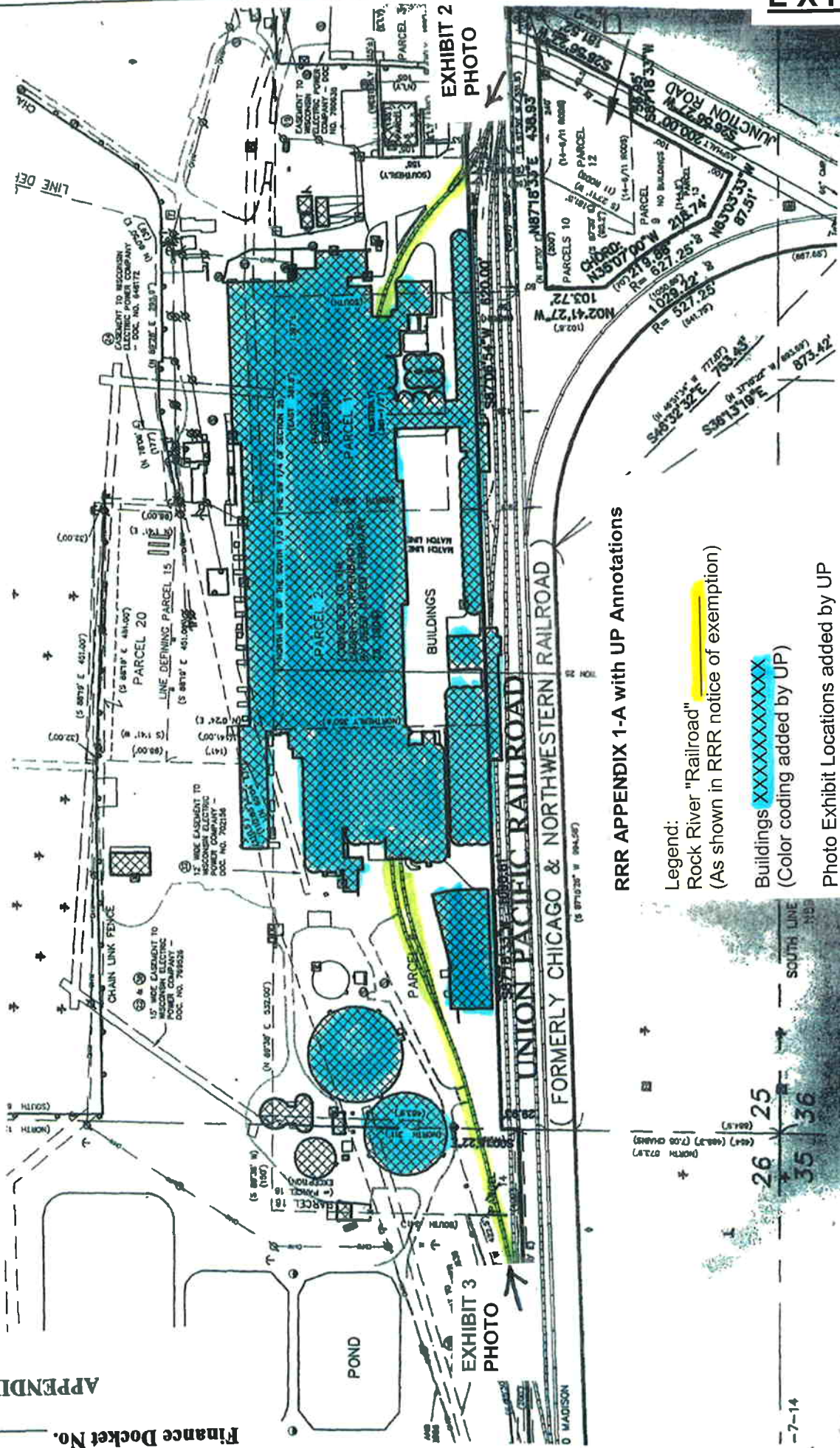
I, John T. Gray, declare under penalty of perjury that the facts stated in the foregoing document are true and correct, to the best of my knowledge, information and belief. Executed on this 27th day of April, 2007.



John T. Gray
Executive Director - Interline Marketing
Union Pacific Railroad Co.

APPENDIX 1-A

Finance Docket No.



RRR APPENDIX 1-A with UP Annotations

Legend:
Rock River "Railroad"
(As shown in RRR notice of exemption)

Buildings XXXXXXXXXX
(Color coding added by UP)

Photo Exhibit Locations added by UP

DRAWING SCALE: 1 INCH = 150 FEET

EXHIBIT 2

Photo taken from east end of RRR track at UPRR connection.

View looks west showing RRR track (the track going through gate) entering east side of plant
(Photo taken April 25, 2007 by John T. Gray)



PRIVATE
PROPERTY
NO
TRESPASSING

NO SMOKING
STOP
BEYOND
POINT

Pope
Eye and Head
Protection
Program - No Head Aids Allowed

SPEED
LIMIT
12

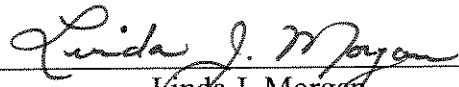
EXHIBIT 3

Photo taken from west end of RRR track at UPRR connection.
View looks east showing RRR track (the track going through gate) entering west side of plant.
(Photo taken April 25, 2007 by John T. Gray)



CERTIFICATE OF SERVICE

I, Linda J. Morgan, certify that, on this 27th day of April, 2007, I caused a copy of the foregoing document to be served by e-mail on all parties of record in STB Finance Docket Nos. 35016 and 35017.



Linda J. Morgan