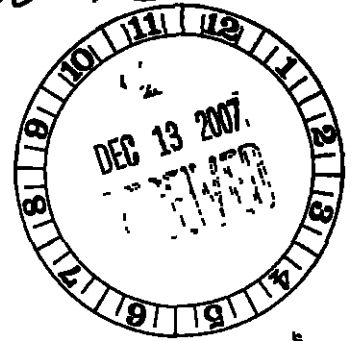


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THOMAS F MCFARLAND

December 11, 2007

By UPS overnight mail

Vernon A Williams, Secretary
Surface Transportation Board
395 E Street, S W , Suite 1149
Washington, DC 20024

FILED
DEC 13 2007
SURFACE
TRANSPORTATION BOARD

Re Finance Docket No 35111, *South Plains Switching, Ltd Co -- Compensation For Use Of Facilities In Alternative Rail Service -- West Texas and Lubbock Railway Company*

Dear Mr Williams

Enclosed please find an original and 10 copies of Petition Under 49 U S C 11123(b)(2) and 49 U S C 11102(a) For A Determination And Award Of Compensation For Use Of Facilities In Alternative Rail Service, for filing with the Board in the above referenced matter

Also enclosed is a check in the amount of \$200 for the filing fee.

Very truly yours,

Tom McFarland

Thomas F. McFarland
Attorney for Petitioner

ENTERED
Office of Proceedings
DEC 13 2007
Part of
Public Record

TMCF kl enc wp8 0-1199\lstrsb1

FEE RECEIVED
DEC 13 2007
SURFACE
TRANSPORTATION BOARD

BEFORE THE
SURFACE TRANSPORTATION BOARD

SOUTH PLAINS SWITCHING, LTD CO)
-- COMPENSATION FOR USE OF) FINANCE DOCKET
FACILITIES IN ALTERNATIVE RAIL) NO 35111
SERVICE -- WEST TEXAS AND)
LUBBOCK RAILWAY COMPANY)

**PETITION UNDER 49 U.S.C. 11123(b)(2) AND 49 U.S.C. 11102(a)
FOR A DETERMINATION AND AWARD OF COMPENSATION
FOR USE OF FACILITIES IN ALTERNATIVE RAIL SERVICE**

SOUTH PLAINS SWITCHING, LTD CO
P O Box 64299
Lubbock, TX 79464-4299

Petitioner

THOMAS F McFARLAND
THOMAS F McFARLAND, P C
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Attorney for Petitioner

DATE FILED December 12, 2007

BEFORE THE
SURFACE TRANSPORTATION BOARD

SOUTH PLAINS SWITCHING, LTD CO	)	
-- COMPENSATION FOR USE OF	)	FINANCE DOCKET
FACILITIES IN ALTERNATIVE RAIL	)	NO 35111
SERVICE -- WEST TEXAS AND	)	
LUBBOCK RAILWAY COMPANY	)	

**PETITION UNDER 49 U.S.C. 11123(b)(2) AND 49 U.S.C. 11102(a)
FOR A DETERMINATION AND AWARD OF COMPENSATION
FOR USE OF FACILITIES IN ALTERNATIVE RAIL SERVICE**

Pursuant to 49 U.S.C. § 11123(b)(2) and 49 U.S.C. § 11102(a), SOUTH PLAINS SWITCHING, LTD CO (SAW) hereby petitions for a determination and award of compensation payable by West Texas and Lubbock Railway Company (WTLC) for WTLC's use of SAW's rail facilities at Lubbock, Texas to provide alternative rail service to PYCO Industries, Inc (PYCO) between January 26, 2006 and November 9, 2007, inclusive. As required by those statutes, SAW and WTLC first attempted to negotiate such compensation, but were not able to agree.

REQUEST FOR PROCEDURAL SCHEDULE

SAW is not aware of any Board regulations that govern processing of petitions for an award of compensation for use of facilities to provide alternative rail service. Accordingly, SAW hereby requests that the Board issue a procedural schedule for processing this Petition.

This Petition, including the attached verified statement of Mr. Dennis Olmstead, is intended to constitute SAW's Initial Statement in support of a determination and award of such compensation.

As soon as possible after receipt of this Petition, the Board is urged to issue a procedural decision providing for the following schedule to govern further filings

WTLC's Reply Statement - 30 days after the service date of the procedural decision

SAW's Rebuttal Statement - 20 days after the due date for WTLC's Reply Statement

SCOPE OF THE PETITION

Compensation is payable for two distinct periods of alternative rail service. The first period is between January 26, 2006 and November 22, 2006, inclusive. During that period, alternative rail service was provided under 49 U.S.C. § 11123(a) in Finance Docket No. 34802, *PYCO Industries, Inc. -- Alternative Rail Service -- South Plains Switching, Ltd. Co.* Alternative rail service under that statute is limited to 270 days. 49 U.S.C. § 11123(c)(1). That period, plus a 30-day extension agreed to by all parties, expired on November 22, 2006.

The second period is between November 23, 2006 and November 9, 2007, inclusive. During that period alternative rail service ostensibly was provided under 49 U.S.C. § 11102(a) in Finance Docket No. 34889, *PYCO Industries, Inc. -- Alternative Rail Service -- South Plains Switching, Ltd. Co.* That period ended when the facilities used to provide alternative rail service were sold to PYCO pursuant to a feeder line application.

LEGAL STANDARDS GOVERNING COMPENSATION FOR USE OF FACILITIES IN PROVIDING ALTERNATIVE RAIL SERVICE

I. Standards Under 49 U.S.C. § 11123

It is provided in 49 U.S.C. § 11123(b)(2) as follows:

Rail carriers may establish between themselves the terms of compensation for operations, and use of facilities and equipment, required under this section. When rail carriers do not agree on the terms of compensation under this section,

the Board may establish the terms for them. The Board may act under subsection (a) before conducting a proceeding under this paragraph.

That provision does not prescribe a standard to be used in the determination of such compensation. No other provision in 49 U.S.C. § 11123 provides such a standard.

In *Expedited Relief for Service Inadequacies*, 3 S.T.B. 968 (1998), the Board adopted regulations to implement the provisions of 49 U.S.C. § 11123. No such regulation provided a standard for determination of compensation under § 11123(b)(2). The Board stated the following in explanation of the absence of a specific standard for determining such compensation (at 980):

... We agree that the incumbent railroad is entitled to fair compensation for whatever services and facilities it provides, but not for lost profits for service it is not providing. Because the type of access to an incumbent carrier's facilities and the services the incumbent will be required to provide to an alternative carrier will vary widely, depending on the service inadequacy and the relief that is fashioned, we will not attempt to prescribe in the abstract a compensation formula applicable to all situations. Rather, where appropriate we will be guided by established precedent, taking into account the circumstances of the particular case.

The upshot of the foregoing is that compensation for use of facilities in alternative rail service under 49 U.S.C. § 11123(b)(2) is to be "fair compensation" as guided by established precedent, taking into account the particular circumstances, but not including an element for lost profit.

II. Standards Under 49 U.S.C. § 11102

It is provided in 49 U.S.C. § 11102(a) as follows:

... The rail carriers are responsible for establishing the conditions and compensation for use of the facilities. However, if the rail carriers cannot agree, the Board may establish conditions and compensation for use of the facilities under the principle controlling compensation in condemnation proceedings. The compensation shall be paid or adequately secured before a rail carrier may begin to use the facilities of another rail carrier under this section.

Thus, the prescribed standard for an award of compensation under 49 U S C § 11102(a) is "the principle controlling compensation in condemnation proceedings "

That principle is "just compensation " *Backus v Fort Street Union Depot Co* , 169 U S 557, 573 (1898) ("when . . . [the] power of eminent domain is exercised it can only be done by giving the party whose property is taken or whose use and enjoyment of such property is interfered with, full and adequate compensation, not excessive or exorbitant, but just compensation") The just compensation required by the Constitution is that which constitutes "a full and perfect equivalent for the property taken " *Monongahela Navigation Co v United States*, 148 U S 312, 326 (1893) The general standard of just compensation is the market value of the property taken or used, i e , what a willing buyer or user would pay to a willing seller or owner *United States v Miller*, 317 U S 369, 374 (1943), *United States ex rel TVA v Powelson*, 319 U S 266, 275 (1943)

If property is taken or used before compensation is paid, just compensation includes an amount sufficient to produce the full equivalent of value if paid contemporaneously with the taking, i e , an increment for interest *United States v Klamath Indians*, 304 U S 119, 123 (1938), *Jacobs v United States*, 290 U S 13, 17 (1933), *Kirby Forest Industries v United States*, 467 U S 1 (1984), *Seaboard Air Line R Co v United States*, 261 U S 269, 306 (1923)

The upshot of the foregoing is that compensation payable under 49 U S C § 11102(a) is to be based on the fair market value of use of the property, plus interest if the property is used before compensation is paid

COMPENSATION STANDARDS APPLICABLE TO THE MATTER AT HAND

I. Between January 26, 2006 And November 22, 2006 Under 49 U.S.C. § 11123(b)(2)

As noted previously, the applicable standard under § 11123(b)(2) is "fair compensation" as guided by established precedent, tailored to the particular circumstances, but not including an element for profit, plus interest, if such compensation was not paid at the time of use. Under established precedent, the general standard of "fair compensation" is the market value of the property taken or used. *United States v. Miller, supra*. As tailored to the particular circumstances of the case at hand, (WTLC's use of SAW's tracks to provide rail service to PYCO), that standard is the fair market value of use of an owning rail carrier's trackage by another rail carrier to provide rail service to a shipper located on the owner's tracks, i.e., use of trackage to originate or terminate traffic in local service, in contrast to providing bridge or overhead transportation. Such payment for use of trackage is not to contain an element for profit, but it must contain an element for interest inasmuch as compensation was not paid at the time of use.

As here pertinent, 49 U.S.C. § 11102(a) contains the following requirement:

... The compensation shall be paid or adequately secured before a rail carrier may begin to use the facilities of another rail carrier under this section.

The plain meaning of that provision is that there can be no lawful alternative rail service under 49 U.S.C. § 11102(a) unless compensation for use of the facilities to provide that service has been determined and paid or secured before alternative rail service begins. That meaning is all the more apparent when that provision is contrasted with 49 U.S.C. § 11123(b)(2), which

expressly authorizes alternative rail service before determination and payment of compensation,

viz

. . . The Board may act under subsection (a) (i.e., order alternative rail service) before conducting a proceeding under this paragraph (i.e., determining and awarding compensation)

Accordingly, the Board was required to determine compensation payable for WTLC's use of SAW's facilities to provide alternative rail service to PYCO on and after November 23, 2006, and to require payment of such compensation or adequate security for such payment, before such alternative rail service could lawfully commence. The Board did not do so, despite specific formal requests and petitions by SAW that alternative rail service be terminated because of the Board's failure to have done so. See Objection to Alternative Rail Service Under 49 CFR Part 1147, filed in Finance Docket No. 34889 on February 15, 2007, as part of Emergency Petition For Partial Modification Of Operating Protocols, at 4-5, *see, also*, Petition to Terminate Alternative Rail Service, filed in Finance Docket No. 34489 on March 15, 2007. The Board has yet to rule on those petitions to terminate alternative rail service on that legal basis.

It follows from the foregoing that there was no statutory or other lawful basis for WTLC's use of SAW's facilities to provide rail service to PYCO between November 23, 2006 and November 9, 2007, inclusive. That being the case, SAW was unlawfully deprived of its division of revenue on railcars transported by WTLC for PYCO during that time frame. Accordingly, SAW is entitled to recover that division of revenue on those railcars, plus interest at the statutory rate, as appropriate compensation for unlawful deprivation of its rail facilities during that time

APPLICATION OF COMPENSATION STANDARDS TO THE FACTS OF THIS CASE

II. Between January 26, 2006 And November 22, 2006 Under 49 U.S.C. § 11123(b)(2)

Reference is made to the verified statement of Mr Dennis Olmstead, SAW's Transportation Consultant, attached to this Petition as Appendix 1 Mr Olmstead there shows that there was a contemporaneous agreement between BNSF Railway Company (BNSF) and SAW whereby BNSF agreed to pay SAW \$75 per car for use of SAW's track at Burris, Texas to provide rail service to Jarvis Metals Company, a shipper located on that track (Appdx 1, Attachment DO-1)

That agreed payment provides compelling evidence of the contemporaneous fair market value of use of a rail carrier's track by another rail carrier in order to provide local service to a shipper in the same territory as involved in the matter at hand Burris is located adjacent to Lubbock, Texas, which is the location of the matter at hand The payment is for use of SAW's trackage to provide local service to a shipper on SAW's track (Jarvis Metals), just as compensation in the matter at hand is for use of SAW's trackage to provide service to a shipper on a SAW track (PYCO) BNSF's payment was freely negotiated with SAW during the same period of time involved in the matter at hand (Appdx 1 at 2)

An award of \$75 per car as compensation for this time frame would not result in an element of profit for SAW SAW's division of revenue on PYCO traffic during 2006 was \$142.72 per car An award of \$75 per car as compensation would constitute barely more than 50 percent of SAW's revenue ($\$75 - \$142.72 = -\$67.72$) SAW's revenue on PYCO traffic does not have anywhere near a 50-percent profit margin (Appdx 1 at 2)

Moreover, BNSF's payment for use of SAW trackage to serve Jarvis Metals at Burris would support compensation of much more than \$75 per car for WTLC's use of SAW trackage to serve PYCO. The track over which BNSF operates at Burris is of minimal length compared to the track exclusively used by WTLC at Lubbock to provide service to PYCO. (Appdx 1 at 3) On a per-foot compensation basis, therefore, BNSF's payment of \$75 per car at Burris would warrant an award of much more than \$75 per car as compensation in this proceeding. Nevertheless, SAW seeks an award of only \$75 per car as compensation during this time frame.

Mr. Olmstead is indisputably correct that BNSF's payment for use of SAW's track at Burris provides the best evidence of the fair market value of use of trackage to provide local rail service to a shipper. Just as the best way to arrive at the market value for use of a rental car is to determine what car rental companies are charging for such use, the best way to determine the fair market value of use of trackage for a particular purpose is to consider the going charge for use of trackage for that purpose in the same general territory. BNSF's negotiated payment for use of SAW's track at Burris provides compelling evidence of that going rate. (Appdx 1 at 1-2)

That fair market value of \$75 per car is to be applied to the number of loaded cars that WTLC transported for PYCO during the period between January 26, 2006 and November 22, 2006, inclusive, plus interest at the statutory rate to the date of payment. SAW is attempting to

=

discover the number of railcars transported by WTLC for PYCO during that period ^{1/} When that is known and the date for payment of compensation is determined, a specific award of compensation plus interest can be calculated

III. Between November 23, 2006 And November 9, 2007

As explained earlier, compensation for use of SAW's trackage between November 23, 2006 and November 9, 2007 was not paid or adequately secured before such use, as explicitly required by 49 U S C § 11102(a) As a result, alternative rail service was not lawfully conducted during that period Consequently, SAW was unlawfully deprived of its division of revenue on cars transported for PYCO during that period

Mr Olmstead's verified statement identifies SAW's division of revenue on PYCO traffic \$142 72 per car between November 23, 2006 and December 31, 2006, inclusive, and \$146 64 per car between January 1, 2007 and November 9, 2007, inclusive (Appdx 1 at 2) That division of revenue contains an element for profit, but that is legally permissible . . . indeed, it is legally required because SAW was deprived of that revenue by virtue of alternative rail service that was unlawfully authorized

That division of revenue is to be applied to the number of loaded cars that WTLC transported for PYCO during the periods between November 23, 2006 and December 31, 2006, and between January 1, 2007 and November 9, 2007, both inclusive, plus interest at the statutory rate to the date of payment SAW's discovery seeks identification by WTLC of those numbers of

^{1/} WTLC has stated to SAW that WTLC transported 4,950 loaded cars for PYCO in 2006 (Appdx 1 at 3) SAW seeks to discover how many of those cars were transported on or before November 22, 2006

carloads ~When those numbers are known and the date of payment of compensation is determined, a specific award of compensation plus interest can be calculated

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated, the Board should determine and award compensation to SAW for WTLC's use of SAW's trackage to provide transportation for PYCO, as follows

- (1) \$75 per car, applied to the number of loaded cars transported for PYCO between January 26, 2006 and November 22, 2006, inclusive, such number to be determined in discovery, plus interest at the statutory rate to the date prescribed for payment,
- (2) \$142.47 per car, applied to the number of loaded cars transported for PYCO between November 23, 2006 and December 31, 2006, inclusive, such number to be determined in discovery, plus interest at the statutory rate to the date prescribed for payment, and
- (3) \$146.64 per car, applied to the number of cars transported for PYCO between January 1, 2007 and November 9, 2007, inclusive, such number to be determined in discovery, plus interest to the statutory rate to the date prescribed for payment

Respectfully submitted,

SOUTH PLAINS SWITCHING, LTD CO
P O Box 64299
Lubbock, TX 79464-4299

Petitioner

Thomas F McFarland

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Attorney for Petitioner

DATE FILED December 12, 2007

VERIFIED STATEMENT OF DENNIS OLMSTEAD

My name is Dennis Olmstead I am a Rail Transportation Consultant My business address is 1124 South 11th Street, Montrose, CO 81401

I have been in the consulting business since my retirement from The Burlington Northern and Santa Fe Railway Company (now BNSF Railway Company) in 1996 Prior to that time, I had been employed by The Atchison, Topeka and Santa Fe Railway Company (Santa Fe) for 26 years in its Marketing and Executive Departments During the last 6 of those years, I was the Marketing and Executive Department Representative on Santa Fe's "line-sale team," a group of employees formed to negotiate sales of Santa Fe's rail lines During that period, I was actively involved in the sale of 22 rail lines totaling over 3,500 miles My responsibility included writing line sale proposals as well as evaluation of all responses to those proposals As a result of that experience, I became familiar with traffic and revenue considerations involving rail lines operated by shortline rail carriers

I have acted as a Rail Transportation Consultant for South Plains Switching, Ltd Co (SAW) since SAW began to operate its rail lines at Lubbock, TX in 1999 As a result of consulting for SAW for many years, I have become familiar with SAW's rail traffic and revenues In particular, I regularly compile SAW's rail traffic

I have been asked to furnish information regarding SAW's Petition for a Determination and Award of Compensation for Use of Its Facilities in Alternative Rail Service

If a person wanted to determine the fair market value of use of a rental car, the best way to do so would be to determine what car rental companies are currently charging for such use

Similarly, the best way to determine the fair market value of one railroad's use of another's trackage to provide local rail service to a shipper on that trackage is to consider any contemporary charge for that use of trackage that exists in the same general territory

Such a charge is contained in an agreement between BNSF Railway Company (BNSF) and SAW identified in a letter from Donald E. Herrmann, Esq , in behalf of BNSF, to James L Gorsuch, Esq , in behalf of SAW, dated September 12, 2006 A copy of that agreement is attached to my Statement as Attachment DO-1

By virtue of that agreement, BNSF agreed to pay SAW \$75 per car as compensation for operating over SAW's track at Burris, Texas in order to provide rail service to Jarvis Metals Company Burris is located adjacent to Lubbock, Texas The agreement took effect on September 18, 2006 It remained in effect at least through November 9, 2007 ¹¹

SAW's division of revenue on traffic transported for PYCO in 2006 was \$142.72 per car SAW's division of revenue on PYCO traffic in 2007 is \$146.64 per car

An award of compensation of \$75 per car to SAW for transportation provided by WTLC for PYCO would not result in any element of profit for SAW That amount is only 52 percent of SAW's division of revenue on PYCO traffic in 2006 ($\$75 - \$142.72 = -\$67.72$) SAW did not have anywhere near a 48-percent profit margin on PYCO traffic in 2006 or 2007

The charge paid by BNSF for use of trackage to serve Jarvis Metals would support a much greater charge than \$75 per car for use of trackage to serve PYCO Whereas the SAW

¹¹ BNSF contends that the agreement terminated as of November 10, 2007 when PYCO acquired SAW's rail lines in Lubbock, Texas SAW contends that the agreement has not terminated because the trackage in Burris was not acquired by PYCO

trackage exclusively used by BNSF at Burris to serve Jarvis Metal is only 2,641 feet long, the SAW trackage exclusively used by WTLC at Lubbock to serve PYCO is over 12,700 feet in length. On a charge-per-foot basis, therefore, the charge at Burris would support a charge at Lubbock much greater than \$75 per car. Nevertheless, SAW seeks an award of only \$75 per car for the period between January 26, 2006 and November 22, 2006, inclusive.

In a letter to counsel for SAW dated February 12, 2007, counsel for WTLC stated that WTLC transported 4,950 loaded cars for PYCO in 2006. I understand that SAW has submitted discovery to determine how many of those cars were transported in 2006 on or before November 22, and how many loaded cars were transported by WTLC for PYCO in 2007 on or before November 9.

WTLC has refused to pay more than \$2.90 per car for use of SAW's trackage to provide rail service to PYCO. That amount has no relationship to fair market value for use of trackage in the involved territory. Moreover, that amount does not even come close to providing "just compensation." That amount corresponds to only 2 percent of SAW's revenue per car on PYCO traffic ($\$2.90 - \$142.72 = .02$). That amount would substantially under-compensate SAW based on fair market value for use of its trackage.



KELLY HART & HALLMAN LLP
ATTORNEYS AT LAW

ATTACHMENT DO-1
Pg 1 of 2

WRITER'S DIRECT DIAL NUMBER (817) 878-3548
EMAIL ADDRESS donald.herrmann@khh.com

FIRM TELEPHONE (817) 332-2500
FIRM TELECOPY (817) 878-9280

September 12, 2006

VIA FAX NO. (806) 771-6476

Mr. James L. Gorsuch
4412 74th Street, Suite A-100
Lubbock, Texas 79424

Re: Cause No. 2004-526,559-A
*BNSF Railway Company f/k/a Burlington Northern and Santa Fe Railway
Company v South Plains Switching, Ltd. Co.*

Dear Jim.

I am writing to propose BNSF's offer of settlement concerning claims that might arise in the future in favor of South Plains Switching, Ltd. Co. ("SAW") by reason of BNSF's continued service to the Jarvis Metals facility in Burris

As things currently stand, SAW considers BNSF to be committing a breach of the 1999 Asset Sale Agreement each time service is provided to the Jarvis Metals facility. BNSF disagrees, but recognizes that the issue may not be finally decided in the courts for some time. In an effort to allow continuing service to Jarvis Metals without further uncertainty about the financial risk associated with potential claims, BNSF proposes the following

a. Effective September 18, 2006, BNSF will pay to South Plains Switching \$75/car for each car handled on behalf of Jarvis Metals. On Monday of each week, BNSF will collect movement and waybill data for cars handled for Jarvis Metals the previous week. An Automated Clearing House ("ACH") transfer will be scheduled for the following Wednesday, and funds should arrive in SAW's account on the following Friday. Each week BNSF will also supply South Plains Switching with copies of the pertinent waybills

b. So long as the foregoing process remains in effect, SAW releases and forever discharges BNSF from any breach of contract claim, trespass claim or other claim it may have by reason of BNSF's continued service to Jarvis Metals

201 MAIN STREET, SUITE 2500
FORT WORTH, TEXAS 76102

website www.khh.com
Offices in Fort Worth and Austin

100743_1

c This agreement may be terminated by either party upon giving 30 days advance notice. If the agreement is terminated by either party, then each party reserves any claims that may thereafter accrue by reason of the provision of services to customers at Burris.

It is intended that this settlement offer will operate on a "going forward" basis only. In other words, both parties reserve all rights and claims that exist, or may arise, prior to the effective date stated in paragraph "a" above.

If your client is in agreement with this proposal, please indicate by signing below. I have the authority to execute this agreement on behalf of BNSF, and your signature will be a representation that you have similar authority to bind the SAW.

Very truly yours,



Donald E. Herrmann

DEH/dh
03051 0193

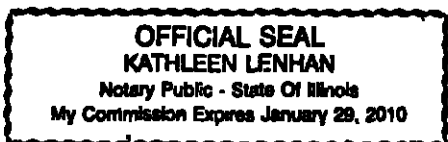
AGREED on this 13th day of September, 2006.


James L. Gorsuch

VERIFICATION

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

DENNIS OLMSTEAD, being duly sworn on oath, deposes and states that he has read the foregoing statement, that he knows the contents thereof, and that the facts therein stated are true and correct



A handwritten signature in cursive script, appearing to read "Dennis Olmstead", written over a horizontal line.

DENNIS OLMSTEAD

SUBSCRIBED AND SWORN to
before me this 3rd day
of December, 2007

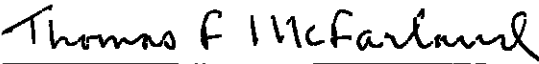
A handwritten signature in cursive script, appearing to read "Kathleen Lenhan", written over a horizontal line.

Notary Public

My Commission Expires 1/29/2010

CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2007, I served the foregoing document, Petition Under 49 U S C 11123(b)(2) And 49 U S C 11102(a) For A Determination And Award Of Compensation For Use Of Facilities In Alternative Rail Service, on John D Heffner, Esq , John D Heffner, PLLC, 1750 K Street, N W , Suite 350, Washington, DC 20006, by UPS overnight mail



Thomas F McFarland