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July 24, 2008

VIA E-FILING

The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Re STB Finance Docket No. 35155
FPN-USA Inc. – Operation Exemption – Tijuana-Tecate Shortline

Dear Acting Secretary Quinlan:

Enclosed on behalf of the San Diego and Arizona Eastern Railway Company is a "Petition To Reject" ("Petition") filed in connection with the above-captioned notice of exemption proceeding. Copies of this petition are being served today on all parties of record. If there are any questions concerning this Petition, please contact me by telephone at (202) 663-7823 or by e-mail at wmullins@bakerandmiller.com.

Sincerely,



William A. Mullins

Enclosures

cc: Tiffany Lorenzen, Esq.
All Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

STB FINANCE DOCKET NO. 35155

**FPN-USA INC.
— OPERATION EXEMPTION —
TIJUANA-TECATE SHORTLINE**

**PETITION OF THE SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY
TO REJECT FPN-USA INC.'S NOTICE OF EXEMPTION**

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July 24, 2007

**Attorneys for San Diego and Arizona
Eastern Railway Company**

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BACKGROUND AND SUMMARY OF RELIEF REQUESTED

The San Diego & Arizona Eastern Railway Company ("SD&AE"), a non-profit public benefit corporation controlled by the San Diego Metropolitan Transit System ("MTS"),¹ hereby petitions the Surface Transportation Board ("STB" or "Board") to reject the notice of exemption (the "Notice") filed by FPN-USA, Inc. ("FPN") in this proceeding. As SD&AE will show, (1) FPN's Notice does not encompass a transaction within the jurisdiction of STB; (2) the only potential part of the proposed transaction that may be within the jurisdiction of the STB is FPN's "request" for "incidental trackage rights" but such rights are in reality interchange rights which do not require advance authority from this Board; (3) FPN's filing lacks sufficient information to warrant publication of the Notice; and (4) the Notice contains information that is materially false and misleading. Accordingly, the Board should reject the Notice for lack of jurisdiction, or, in the alternative, it should reject the Notice for lack of sufficient information and/or as void ab initio.

¹ MTS – also known as the San Diego Metropolitan Transit Development Board – is the sole member of SD&AE.

BACKGROUND

As is relevant here, SD&AE owns rail lines in the U S generally extending eastward from San Diego, CA, to a connection with the Union Pacific Railroad Company ("UP") at Plaster City, CA, which lines comprise the eastern and western sections of a San Diego-Plaster City rail through route. The middle portion of this through route is located solely within Mexico and is owned by the Mexican government, not SD&AE. It is this Mexican portion that is the subject of the Notice and is therefore outside of the jurisdiction of the STB.

A basic history of the SD&AE is generally set forth in FPN's notice. As is depicted in the map attached as Exhibit A to FPN's Notice (which exhibit SD&AE incorporates herein by reference) and as noted above, an approximately 45-mile middle portion of this San Diego-Plaster City through route – the section between San Ysidro and Division, CA – passes through Baja California Norte, Mexico. SD&AE does not own this Mexican portion of the San Diego-Plaster City through route. The Mexican portion of the route, which FPN refers to as the "Tijuana-Tecate Shortline" ("TTS"), is owned by either the Mexican State of Baja California Norte or the Mexican federal government.

Rail freight operations on SD&AE-owned lines from the U.S.-Mexico border at San Ysidro, CA, to the north and west are provided by the San Diego & Imperial Valley Railroad Company, Inc. ("SD&IV") pursuant to agreements with SD&AE and MTS. See San Diego & Imperial Valley Railroad Company, Inc. – Exemption From 49 U.S.C. 10901 and 11301, Finance Docket No. 30457 (ICC served Aug. 17, 1984) ("San Diego & Imperial Valley"). In addition, rail freight operations on the SD&AE-owned line from the U.S.-Mexico border at Division, CA, eastward to Plaster City to the connection with UP are provided by the Carrizo

Gorge Railway, Inc. ("CZRY") pursuant to agreements with SD&AE, MTS, and SD&IV² See Carrizo Gorge Railway, Inc. – Operation Exemption – San Diego and Arizona Eastern Railway Company, STB Finance Docket No. 34485 (STB served Apr. 12, 2004) ("Carrizo Gorge – 1"); Carrizo Gorge Railway Inc. – Operation Exemption – Line of San Diego and Arizona Eastern Railway Company and San Diego & Imperial Valley Railroad Company, Inc., STB Finance Docket No. 34078, (STB served Aug. 16, 2001) ("Carrizo Gorge - 2")

FPN's Notice seeks STB authority for FPN to replace CZRY as the contract operator of the TTS. FPN seeks STB authority for such a substitution of operators notwithstanding the fact that the substitution takes place over a line wholly within Mexico. FPN also seeks approval for its "request" for incidental trackage rights over the CZRY between MP 59.6 at Division and MP 65.8 notwithstanding the fact there is nothing in the record to indicate that CZRY has agreed to provide such incidental trackage rights (which are, in reality, interchange rights) or the fact that neither SD&IV nor SD&AE have consented to CZRY providing such rights to FPN. See July 18, 2008 Letter from John Heffner to Acting Secretary Anne K. Quinlan and July 18 (posted for July 21) Letter from Peter Jespersen, General Manager, SD&IV, to Acting Secretary Anne K. Quinlan.

ARGUMENT

FPN's Notice does not involve a transaction over which the Board has jurisdiction because the proposed transaction would entail only the acquisition of a railroad operating

² SD&IV has rights to operate SD&AE's Division-Plaster City line segment, but, with MTS's concurrence, entered into an agreement with CZRY permitting CZRY to provide common carrier service over that line segment. MTS understands that the SD&IV-CZRY agreement contains specific terms and conditions governing CZRY's operations, and restricts CZRY's ability to grant third parties operating rights over the Division-Plaster City segment. SD&AE possesses similar rights under its agreements with SD&IV and CZRY to ensure that no third party may operate over SD&AE's lines without SD&AE's advance approval.

concession over the TTS line in Mexico. It does not involve the acquisition of any operating rights in the U S. As such, the Notice should be rejected outright as beyond the scope of the Board's jurisdiction. In addition, it should be rejected because the Notice also appears to include a request for "trackage rights" that have not been consented to by any party and appear to be solely for the purpose of interchange, not trackage rights. Interchange rights are not approved by the Board and cannot be the subject of a notice of exemption filed under 49 CFR 1150. As such, there is no "transaction" subject to the Board's authority for which approval is required or should be granted. Moreover, FPN's filing lacks sufficient information to warrant publication of the Notice, and contains materially false and misleading information.

I. THE BOARD LACKS JURISDICTION OVER THE PROPOSED OPERATION OF THE TTS LINES

The Board lacks jurisdiction over railroad lines and railroad operations in other countries, and it has specifically declined to subject transactions involving the acquisition or operation of Mexican carriers and/or Mexican trackage to the Board's regulatory oversight. See United States v. Pennsylvania R. Co., 323 U.S. 612, 621 (1945) (Congress did not empower the Interstate Commerce Commission ("Commission") with authority to regulate rail transportation in foreign countries); Carrizo Gorge – 1, slip op. at 2 n.2 ("[t]he Board has no jurisdiction over track located in Mexico"); San Diego & Imperial Valley, slip op. at n. 3.³ The transaction described in the Notice, however, ignores this obvious limitation on the Board's jurisdiction.

On its face, the Notice purports to govern a transaction whereby FPN, a noncarrier U.S. corporation, would obtain a concession from the "Mexican State of Baja California" to operate

³ The latter two cases cited involve to the very same "approximately 44.6 miles" of rail line in Mexico that are the subject of FPN's Notice. Consequently, it is abundantly clear that the Board has no jurisdiction over what FPN maintains would simply be a change in the holders of a Mexican rail freight concession.

the TTS line extending through Mexico from a U.S.-Mexico border crossing at San Ysidro to another U.S.-Mexico border crossing at Division. FPN states in a footnote that it is “the American counterpart of Ferrocarriles Peninsulares del Noroeste [‘Ferrocarriles’], the operator of the line in Mexico,” and further states that Ferrocarriles has been established in order to comply with Mexican law restricting an award of the TTS operating concession to a company that is controlled by Mexican nationals.⁴ FPN reports that “almost all” of the 44.6 miles of rail line that it would operate pursuant to the Notice is located in Mexico, but FPN does not identify with particularity (i.e., by milepost or other suitable metes and bounds) what portion of the TTS concession that FPN hopes to secure is located in the U.S. and for which U.S. authority would be required.⁵ In fact, the map that FPN attached as Exhibit A to its Notice reflects that the TTS line that it hopes to operate is located entirely in Mexico.

In fact, it appears that none of the rail line that FPN proposes to operate under its hoped-for TTS concession is located in the U.S. The rail lines contiguous with the TTS lines on both its western and eastern ends are owned by SD&AE and extend to the U.S.-Mexico border. As the owner of the U.S. portions of the San Diego to Plaster City through route, SD&AE, which is not

⁴ FPN’s notice is patently inconsistent. It begins by asserting that FPN will replace CZRY as the contract operator of the TTS lines, but then states that FPN’s affiliate, Ferrocarriles, is (present tense) “the operator of the line in Mexico.”

⁵ Similarly, the Verified Statement of Kenneth A. Kahan (“V.S. Kahan”) contains a passage stating that FPN has “formed a separate Mexican controlled entity [Ferrocarriles] to operate that part of the Tijuana-Tecate Short Line in Mexico.” Notice, V.S. Kahan at 2. Mr. Kahan’s statement, like the Notice itself, fails anywhere to identify with particularity the metes and bounds of the part of TTS line in the U.S. for which FPN is seeking to operate or which would be subject to the jurisdiction of the STB. Of course, Mr. Kahan cannot identify that part of the TTS line in the U.S. because such a line does not exist. Mr. Kahan’s own testimony reflects this fact. See *id.* (“the Mexican State of Baja California acquired that portion of the [SD&AE] line inside Mexico, known as the Tijuana-Tecate Short Line”) (emphasis added). There is no U.S. portion of the entire San Diego-Plaster City through route for which SD&AE, SD&IV, or CZRY are giving up operating rights in favor of FPN or for which SD&AE, as the ultimate owner of the U.S. portions of that through route, or SD&IV, has consented to be operated by FPN.

a party to the proposed transaction, would be a necessary party to any agreement involving FPN operations in the U.S. Consequently, FPN is misleading about the scope of its hoped-for concession to operate the TTS line by suggesting that some unidentified piece of the TTS line located in the U.S. will be operated by FPN and that such operations have somehow been approved. SD&AE has not consented and does not consent to a transaction whereby FPN would replace either SD&IV or CZRY as the provider of common carrier service on any SD&AE-owned lines. SD&AE also objects to FPN's proposed use of any SD&AE-owned rail lines for any other purpose.

Because the Notice fails to identify, and does not involve, the acquisition by FPN of common carrier operating rights on rail lines located in the U.S., the proposed transaction merely involves a Mexican rail line that the agency has stated in the San Diego & Imperial Valley and Carrizo Gorge decisions is beyond the scope of the Board's jurisdiction.⁶ Accordingly, the Board should reject FPN's Notice. See Central Illinois Railroad Company – Discontinuance Of Service Exemption – In Peoria County, IL, STB Docket No AB-1066X (STB served Nov. 21, 2005)(rejecting notice of exemption because Board had no authority to grant requested relief).

⁶ Neither San Diego & Imperial Valley nor Trans-Ontario Railway Company – Exemption – 49 U.S.C. 10901, Finance Docket No 30556 (ICC served Feb. 5, 1985) ("Trans-Ontario"), upon which FPN relies in support of its notice, support the proposition that the subject transaction falls under the Board's jurisdiction. Both of those cases involved petitions to commence common carrier operations that would take place on specified rail line segments in the U.S. in addition to non-jurisdictional operations in other countries. Here, on the other hand, FPN proposes to acquire common carrier operating rights in Mexico only, and would not acquire common carrier rights and obligations in the U.S., and indeed, has no contractual right to acquire such U.S. common carrier rights. Moreover, FPN's reliance on Trans-Ontario is completely ironic insofar as that decision actually supports rejection of FPN's notice. Specifically, the Commission denied Trans-Ontario's request for an exemption as "premature," noting that (as is the case in this proceeding) "at this time the exemption [Trans-Ontario is seeking] is hypothetical. There is no agreement between the parties, and as a result, there is no agreement to exempt the transaction." Trans-Ontario, slip op. at 2. Likewise, there is no agreement here for which a Notice is appropriate.

II. THE BOARD HAS NO JURISDICTION OVER FPN'S PROPOSED INTERCHANGE OPERATIONS

As noted above, FPN (or its affiliate, Ferrocarriles) proposes to acquire the concession to operate the TTS lines, which are located solely in Mexico, not in the U.S. But the Notice also "requests" that FPN be granted "incidental trackage rights" to operate over a portion of SD&AE's line from the U.S.-Mexico border at Division (milepost 59.6) to Campo, CA (milepost 65.8), ostensibly for the purposes of effecting an interchange at Campo with CZRY.⁷ FPN offers no precedent for the proposition that the Board can or should prescribe the terms for or location of interchange in connection with a notice of exemption proceeding under 49 CFR 1150.31, et seq., and SD&AE is aware of none. Rather, interchange is "a matter to be arranged by the parties . . . by consultation, exploration of mutual benefits, and negotiation of differences." New York, C. & St. L. R. Co. v. New York Central R. Co., 314 I.C.C. 344, 345 (1961) ("New York, Chicago"). Thus, FPN's "request" for what are in effect "interchange rights" over SD&AE's lines is beyond the scope of a notice of exemption proceeding and does not require Board action.

The Mexican government subdivision that controls and may grant a concession to FPN to operate the TTS lines – the State Government of Baja California, Tijuana-Tecate Short Line Administration ("Government of Baja") – does not own the Division-Campo line segment, nor

⁷ SD&AE questions whether FPN is "requesting" such "incidental trackage rights" solely for the purpose of interchange. If truly for the purpose of interchange, then as discussed below, such rights do not need or require authority. If the request is for "trackage rights," then FPN should have filed its Notice under 49 CFR 1180.2(d)(7), and even then, such authority would be inappropriate as no carrier has consented to the grant of trackage rights to FPN. The Board has no authority to impose trackage rights except in certain limited circumstances Railroad Consolidation Procedures – Trackage Rights Exemption, 1 I.C.C. 2d 270; 1985 ICC LEXIS 466, *9 (1985)("[W]e generally cannot compel Conrail or any carrier to grant trackage rights."). What appears to be happening is that FPN is attempting to leverage Board jurisdiction from an inherently Mexican transaction for some unrelated purpose, perhaps to argue preemption or to obtain leverage in the Mexican concession by arguing that they have already obtained U.S. regulatory approval as compared to other potential bidders.

does it possess the right to grant, or to order the conveyance of, operating rights over the Division-Campo segment for interchange or for any other purposes. Instead, the “requested” interchange rights would require the mutual concurrence of SD&AE, SD&IV, and CZRY, none of which, to SD&AE’s knowledge, consent to such a grant of interchange rights, and none of which is listed as a party to the transaction specifically described in FPN’s Notice.⁸ Because SD&AE, SD&IV, and CZRY are essential parties to the conveyance of the requested Campo interchange rights, FPN’s Notice is defective for failing to include any of them as parties in the underlying transaction

Even if SD&AE, SD&IV, and CZRY had consented to FPN’s interchange operation, such a transaction, i.e. FPN’s operations between Division and Campo for purposes of interchange, would not bring the entire transaction within the jurisdiction of the Board, or even the grant of the interchange rights themselves. The Campo interchange rights FPN seeks are beyond the scope of the Board’s licensing authority under 49 U.S.C. Section 10901; the underlying statutory authority for which the Notice has been filed. Longstanding precedent makes abundantly clear that FPN does not need Board authorization, much less a Board order (which FPN appears to be “requesting” in its Notice), to utilize SD&AE’s Division-Campo line segment for the ostensible purposes of interchange at Campo. See Norfolk Southern Railway Company – Petition for Declaratory Order – Interchange with Reading Blue Mountain & Northern Railroad Company, STB Docket No. 42078, slip op. at 4 n.5 (STB served Apr. 29, 2003) (“NS-Interchange”) (Board authority is not needed “for one carrier to use another carrier’s

⁸ Apparently having detected the significant holes in the Notice, Board staff contacted FPN’s counsel to determine who would convey the requested Campo interchange rights to FPN. In a letter to the Board dated July 18, 2008, which appears to respond to such staff inquiries, FPN advised that it intended to acquire the interchange rights it had “requested” from CZRY. As has been indicated above, CZRY lacks legal authority on its own to grant such rights to FPN.

track solely in connection with interchange”) (citing Black v. ICC, 837 F.2d 1175, 1178 (D.C. Cir. 1988)). This is a matter that FPN should address and resolve at the appropriate time with SD&AE, SD&IV, and CZRY pursuant to private negotiation (see NS-Interchange at 4, New York, Chicago, 314, I.C.C. at 345)), but FPN has not yet attempted to do so. Failing agreement, the appropriate action is to bring such a dispute before the Board under 49 U.S.C. §10742, not to attempt to include such rights or have such rights imposed in the context of a Section 10901 notice of exemption. For these reasons, the Board should decline to act upon FPN’s “request” for interchange rights over the Division-Campo line segment.

III. FPN’S NOTICE LACKS SUFFICIENT INFORMATION AND CONTAINS FALSE AND MISLEADING STATEMENTS

All notices of exemption filed pursuant to 49 CFR 1150.31, et seq., must state that if the verified notice contains false or misleading information, the exemption is void ab initio. FPN’s draft Notice contains such language. Because FPN’s Notice lacks sufficient information and contains materially false and misleading statements, it is thus null and void.

As noted above, the line FPN proposes to operate pursuant to a hoped-for concession from the Government of Baja (FPN acknowledges that it is but one of multiple potential bidders for this concession) is located in Mexico. Yet FPN states, or at least strongly implies in places, that the concession it hopes to secure, although located in Mexico, will also cover FPN’s provision of common carrier service over lines in the U.S. Yet, there is an utter absence of a description in the Notice of any U.S. lines over which FPN would, under its hoped-for concession from the Government of Baja, substitute its operations for those of CZRY here in the U.S. The only line that is described and set forth in the Notice is located solely within Mexico.

The only description of any U.S. based operations which may invoke the Board’s jurisdiction involves FPN’s request for “incidental trackage rights,” which is really a request for

interchange right, which are not a jurisdictional transaction for which 49 CFR 1150.31 is applicable.⁹ It appears that FPN has attempted inappropriately to use its “request” for interchange rights over SD&AE’s Division-Campo line segment to bootstrap a solely Mexican transaction into one that somehow triggers Board jurisdiction. For what purpose is unknown, but FPN’s false statement that its proposed transaction entails the acquisition of common carrier operating rights in the U.S. when the “transaction” entails no such rights makes the Notice void ab initio.

FPN’s Notice is also false and misleading in representing that “FPN has notified officials with [MTS, SD&IV, and UP] that it will be filing this request for an exemption with the Board.” Notice, V.S. Kahan at 4. This passage represents the first and only time that FPN indicates it has consulted with MTS (which controls, and can negotiate on behalf of, SD&AE) or SD&IV regarding the proposed transaction. FPN seems to have offered the statement to suggest that MTS and SD&IV not only have been advised of FPN’s activities, but also to suggest that MTS/SD&AE and SD&IV either have agreed to, or at least do not oppose, FPN’s Notice and the transaction that it purports to encompass. But that is not the case; MTS/SD&AE and SD&IV do not concur in the proposed transaction and do not support FPN’s notice. Mr. Kahan’s statement, therefore, appears designed to mislead the Board about MTS’s and SD&IV’s support for, or cooperation with, FPN’s plans.

Contrary to Mr. Kahan’s verified testimony, FPN did not contact MTS or SD&IV before filing the Notice. Mr. Peter Jespersen, SD&IV’s General Manager, has already advised the Board by letter dated July 18, 2008, that SD&IV was not contacted, stating that it had “no

⁹ /Such rights do not qualify as “incidental trackage rights” under 49 CFR 1150.31(a)(4). Such rights are not being granted by a U.S. based seller (presumably CZRY) nor has FPN established that it is taking assignment of U.S. based trackage rights over a third party that are being transferred to it as part of the proposed Mexican concession.

knowledge of alleged changes to the current operation of the lines currently operated by CZRY.” Similarly, FPN did not contact MTS regarding the proposed transaction. Rather, MTS learned of FPN’s Notice (and the particulars of the proposed transaction) only after the Notice had been filed. Such false and misleading statements are troubling and raise questions about the veracity of other portions of the Notice. For these reasons, FPN’s Notice is materially false and misleading, and, if not rejected on the basis that it encompasses a transaction beyond the Board’s regulatory jurisdiction, nevertheless should be deemed void ab initio for failure to include sufficient information regarding the transaction and for including misleading and false statements.

CONCLUSION

The FPN Notice is a curious filing that begs more questions than it answers, but no question looms larger than why FPN has filed a Notice at the STB for U S regulatory authority to substitute its operations for another carrier’s operations when such substitution and operations occur solely within Mexico. Even then, the “transaction” is purely speculative as the Mexican government has not even awarded a concession to another operator. FPN’s Notice is entirely devoid of definitive information concerning the location of any U S. line or lines over which FPN would need U.S. regulatory authority. This central “missing link” in FPN’s Notice is precisely why the Notice should be rejected – FPN’s Notice fails to identify a proposed transaction in the U S over which the Board has jurisdiction.

While FPN has “requested” interchange rights, such a request has no place in a Section 10901 notice of exemption. Granting such a request could imply that SD&AE and others have consented to the underlying transaction contemplated between FPN and the Government of Baja when such is not the case. The request also involves matters of interchange that are not subject

to the Board's jurisdiction under 49 U.S.C 10901. Such interchange rights are best left to the interchanging carriers and the owners of the lines in question or are governed by Section 10742, not Section 10901.

Finally, FPN's notice of exemption is false and misleading, both by stating that FPN will, by virtue of its proposed transaction with the Government of Baja, acquire the right to provide rail common carrier service in the U.S. (when such is not the case), and by stating that FPN has consulted with MTS and SD&AE (which is also not the case). For the foregoing reasons, FPN's notice should be rejected for lack of jurisdiction or, in the alternative, deemed void ab initio.

Respectfully submitted,



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Attorneys for San Diego & Arizona
Eastern Railway Company

CERTIFICATE OF SERVICE

I, Robert A Wimbish, hereby certify that on this 24th day of July, 2008, copies of the foregoing Petition to Reject have been served by first class mail, postage prepaid, or by more expeditious means of delivery upon all parties of record to this proceeding identified on the Surface Transportation Board's website.

A handwritten signature in black ink, appearing to read "R. A. Wimbish", written over a horizontal line.

Robert A. Wimbish
Attorney for San Diego & Arizona
Eastern Railway Company