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THOMAS F. MCFARLAND

August 1, 2008

By e-filing

Anne K. Quinlan, Esq.
Acting Secretary
Surface Transportation Board
395 E Street, S W, Suite 1149
Washington, DC 20024

Re: Finance Docket No 35155, *FPN-USA, Inc. -- Operation Exemption -- Tijuana-Tecate Shortline*

Dear Ms Quinlan:

Hereby transmitted is a Petition For Rejection Or For Stay Of Notice Of Exemption, for filing with the Board in the above referenced matter

Very truly yours,

Tom McFarland

Thomas F. McFarland
Attorney for Petitioner

TMcf kl enc wp8 01/329lef/STB/

BEFORE THE
SURFACE TRANSPORTATION BOARD

FPN-USA, INC -- OPERATION	)	FINANCE DOCKET
EXEMPTION -- TIJUANA-TECATE	)	NO 35155
SHORTLINE	)	

PETITION FOR REJECTION OR
FOR STAY OF NOTICE OF EXEMPTION

CARRIZO GORGE RAILWAY, INC.
2295 Fletcher Parkway, Suite 101
El Cajon, CA 92040

Petitioner

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Due Date August 1, 2008

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FPN-USA, INC -- OPERATION	)	FINANCE DOCKET
EXEMPTION -- TIJUANA-TECATE	)	NO 35155
SHORTLINE	)	

**PETITION FOR REJECTION OR
FOR STAY OF NOTICE OF EXEMPTION**

Pursuant to a notice issued by the Board on July 25, 2008, CARRIZO GORGE RAILWAY, INC ("CZRY", incorrectly referred to in the Notice of Exemption at 3 as "Carrizo George Railroad") hereby petitions for rejection or for stay of a Notice of Exemption filed by FPN-USA, Inc ("FPN") on July 11, 2008

The Notice of Exemption should be rejected or stayed on the following grounds.

- (1) for lack of Board jurisdiction because the transportation covered by the Notice would not take place within the United States,
- (2) for failure to comply with Board regulations governing the class exemption because FPN admits that it does not have an existing or imminent agreement with the owner of the rail line, and
- (3) as void because of numerous false and misleading statements in material respects

ARGUMENT

I. THE NOTICE SHOULD BE REJECTED FOR LACK OF JURISDICTION BECAUSE THE TRANSPORTATION COVERED BY THE NOTICE WOULD NOT TAKE PLACE WITHIN THE UNITED STATES

In a Petition to Reject FPN's Notice, filed on July 24, 2008, at pages 5-11, SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY ("SD&AE") submitted a compelling argument that the Board does not have jurisdiction over the proposed operation because such transportation would take place solely in Mexico, and because the "incidental trackage rights" within the United States covered by the Notice actually are interchange operations that are not subject to a requirement of Board approval. CZRY agrees with that argument and hereby adopts it as CZRY's own argument. As owner of the portions of the San Diego-Plaster City, CA through rail route that are located within the United States (i.e., San Diego to the US-Mexico border near San Ysidro, CA, and the US-Mexico border near Division to Plaster City, CA), SD&AE is in an authoritative position to testify that none of the transportation covered by FPN's Notice would take place over any of those rail lines in the United States.

CZRY hereby supplements SD&AE's argument by refuting the alleged statutory basis for FPN's Notice of Exemption. At page 5 of that Notice, FPN alleges that "the Board has entry jurisdiction over railroads and rail lines that provide service between a point in the United States and another point in the United States through a foreign country," citing 49 U.S.C. § 10501(a)(2)(E).

That is not a correct statement of the content of that statute. Section 49 U.S.C. § 10501(a)(2)(E) actually provides as follows (emphasis added)

... Jurisdiction under paragraph (1) (transportation by rail carrier only by railroad) applies only to transportation in the United States between a place in . . . the United States and another place in the United States through a foreign country
...

Under the express terms of the statute, therefore, it is not enough that the transportation covered by FPN's Notice would be between a place in the United States (the US-Mexico border point near San Ysidro, CA) and another place in the United States (the US-Mexico border point near Division, CA) through a foreign country (Mexico) The statute requires that in addition, the transportation must take place "in the United States " The transportation covered by FPN's Notice does not comply with that additional requirement Consequently, the Board does not have jurisdiction over that transportation See, e g , *San Diego & IV R Co , Inc -- Exempt from 49 USC 10901 and 11301*, Finance Docket No. 30457, decision served Aug 17, 1984, and *Trans-Ontario Ry Co -- Exempt -- 49 USC 10901*, Finance Docket No. 30556, decision served Feb. 5, 1985

Section 10501(a)(2)(E) extends Board jurisdiction over what otherwise would be transportation beyond its jurisdiction as intrastate commerce For example, transportation between San Diego, CA and Plaster City, CA through Mexico would be transportation in California intrastate commerce beyond the Board's jurisdiction except for Section 10501(a)(2)(E)

Another example is transportation by Canadian National Railway (CN) between Ray, Minnesota, and Baudette, Minnesota, that passes through Canada, as illustrated by yellow shading on the railroad map that is attached to this Petition as Appendix 1. But for 49 U S C § 10501(a)(2)(E), that transportation would be beyond the Board's jurisdiction as Minnesota

intrastate commerce In enacting Section 10501(a)(2)(E), Congress apparently considered that passage of a rail shipment through a foreign country provided a sufficient national interest to confer Board jurisdiction over what otherwise would be intrastate transportation

The critical difference between those examples and the decisions cited above on the one hand, and the transportation covered by FPN's Notice on the other, is that there is transportation "in the United States" in those examples and decisions whereas there is no such transportation in the United States in regard to the transportation covered by FPN's Notice

It follows from the foregoing that neither 49 U.S.C. § 10501(a)(2)(E) nor any other statute confers Board jurisdiction over the transportation covered by FPN's Notice

If the primary transportation is not subject to Board jurisdiction, as we have shown, neither can the so-called "incidental trackage rights" between the US-Mexico border near Division, CA and Campo, CA be subject to Board jurisdiction, not to mention the absence of SD&AE's agreement to such trackage rights as owner of that rail line segment In a supplemental filing on July 18, 2008, FPN alleged that it intends to enter into a trackage rights agreement with CZRY for the trackage between Division and Campo, CA That will not be possible CZRY does not own that trackage and would not grant FPN trackage rights even if it did own it SD&AE owns that track It does not agree to trackage rights for FPN There is no legal means for FPN to force trackage rights over tracks of an unwilling owner

In the absence of Board jurisdiction over any part of FPN's Notice, the Board should reject that Notice. Rejection of that Notice would be dispositive of the matter

II. THE NOTICE SHOULD BE REJECTED FOR FAILURE TO COMPLY WITH MINIMUM REQUIREMENTS OF THE GOVERNING REGULATIONS

Even if the Board had jurisdiction over the transportation covered by the Notice, the Notice should be rejected for failure to comply with minimum requirements of the regulations governing class exemptions for noncarrier operation of rail lines

One of such regulations is 49 C F R § 1150 33(c), which requires a statement that an agreement has been reached with the owner of the rail line for the proposed operation, or details about when such an agreement will be reached. Thus, Section 1150 33(c) requires either that there be an existing agreement with the rail line owner for operation of the line, or that such an agreement be imminent

Inasmuch as the Board does not have authority to determine whether there actually is such an enforceable agreement for operation of a rail line, Board practice is to issue operating authority (or deny a petition to stay) if the existence or imminence of such an agreement is reasonably disputed, subject to a determination by a court of the disputed contractual issue. Here, however, issuance of such operating authority would not be appropriate because FPN admits that it does not have such an agreement and that such an agreement is far from imminent.^{1/} Thus, in response to the requirement of 49 C F R § 1150 33(c), FPN acknowledges that it has not even submitted a proposal for such an agreement, let alone reached an agreement with the owner for operation of the line, viz (Notice at 2-3):

^{1/} FPN acknowledges that operations cannot commence unless and until the owner of the rail line accepts FPN's operating proposal, and an operating agreement is executed between FPN and the owner (Notice at 3). FPN's operation is too speculative, and the timetable is far too remote for the Board to allow the Notice of Exemption to become effective. Cf 49 C F R § 1150 33(e)(2), which requires a time schedule for consummation of the proposed operation

FPN-USA, Inc ("FPN") anticipates submitting in the very near future a proposal to the Mexican State of Baja California ("Baja California") to operate a state-owned rail line known as the Tijuana-Tecate Shortline that connects San Ysidro, CA, with Division, CA, through Mexico (footnote omitted)

FPN plans to commence operations once its proposal has been accepted by Baja California and it has executed an operating agreement with Baja California, more than thirty days after the filing of this notice

In that circumstance, FPN's Notice of Exemption should be rejected as premature, as was the Notice in *Trans-Ontario Ry Co -- Exempt -- 49 U S C 10901, supra*, where the Interstate Commerce Commission said

... at this time the exemption (sought by Trans-Ontario) is hypothetical
There is no agreement between the parties, and as a result, there is no agreement to exempt the transaction ...

The premature nature of FPN's Notice is thus an additional ground for rejection of that Notice

III. THE NOTICE SHOULD BE REJECTED AS VOID BECAUSE OF NUMEROUS FALSE AND MISLEADING STATEMENTS IN MATERIAL RESPECTS

Even if the FPN Notice is not rejected for lack of jurisdiction and/or as premature in the admitted absence of agreement with the rail line owner, the Notice should be rejected as void because of numerous false and misleading statements in material respects

If a verified notice of exemption pursuant to the class exemption for noncarrier operation of rail lines contains false or misleading information, the proposed exemption is void See 49 C F R § 1150 32(c) Here, the attached verified statement of Mr. Charles McHaffie, President of CZRY, establishes that the FPN Notice contains numerous false and misleading statements in material respects, including the following

- (1) The Notice falsely states at page 5 that Baja California railroad officials in charge of administering the Tijuana-Tecate Shortline (TTS) are in the process of canceling CZRY's operating contract and have invited others including FPN to submit bids to operate that line. The facts are that CZRY's operating contract is not in the process of cancellation, and such contract is not being bid. In March, 2008, ADMICARGA, the Baja California agency that administers that operating contract in behalf of the Mexican Government, temporarily suspended the operating contract with CZRY for reasons described in the letter dated April 10, 2008, attached to the Notice as Exhibit D (English translation). That suspension lasted only one week. As acknowledged in the April 10, 2008 letter, "corrective measures have been taken." CZRY provided adequate responses to ADMICARGA, such that all issues were resolved as of March 17, 2008. There has been no interruption in CZRY rail service since March, 2008. There is no bidding underway or upcoming for the operating contract. CZRY has a 20-year agreement to operate the Tijuana-Tecate Shortline. (VS McHaffie at 2-3),
- (2) The Notice falsely states at pages 4-5 that recently CZRY has been performing service only sporadically outside of the Tijuana Region on the Mexican portion of the Line. The facts are that CZRY is providing regular normal service over the entire line of approximately 10 to 15 railcars per week. (VS McHaffie at 2); and
- (3) The verified statement of Kenneth A. Kahan falsely states at page 4 that the Internal Revenue Service is seeking to collect unpaid payroll withholding taxes from CZRY. The facts are that since February 1, 2007, the new management

team at CZRY has been current each week with all IRS withholding and payroll taxes. (VS McHaffie at 3).

Those misstatements and others identified by Mr. McHaffie are designed to make it appear that CZRY is on the way out, and FPN is on the way in, as operator of the Tijuana-Tecate Shortline. That is completely false. CZRY has a 20-year contract to operate that property.^{2/} CZRY is in good standing with officials of Baja California and Mexico who administer that contract. There is no bidding process underway nor imminent for that operating contract. There is no prospect for FPN to assume that operating contract.

The foregoing false and misleading statements render FPN's Notice void. That furnishes an additional ground for Board rejection of that notice.

^{2/} There is confusion in FPN's Notice regarding the operator of TTS under sub-contract with CZRY. The current sub-contract operator is Ferrocarriles CZRY de Baja California. That entity has common officers with CZRY, including Armando Freire, Chief Operating Officer, and Homero Walss, Director of Operations. The Notice incorrectly states at page 3, note 2, that the current operator is Ferrocarriles Peninsulares del Noroeste. The sub-contract with that entity was terminated in July, 2007. Mr. John Miller of Union Pacific Railroad Company is not correct in stating in a letter dated March 12, 2008, attached to the Notice as Exhibit E, that CZRY is obligated to sub-contract with Carrizo Gorge de Mexico, an entity not affiliated with CZRY. CZRY can sub-contract with any Mexican operator of its choice. It has now sub-contracted with Ferrocarriles CZRY de Baja California.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated, FPN's Notice of Exemption should be rejected or stayed

Respectfully submitted,

CARRIZO GORGE RAILWAY, INC.
2295 Fletcher Parkway, Suite 101
El Cajon, CA 92040

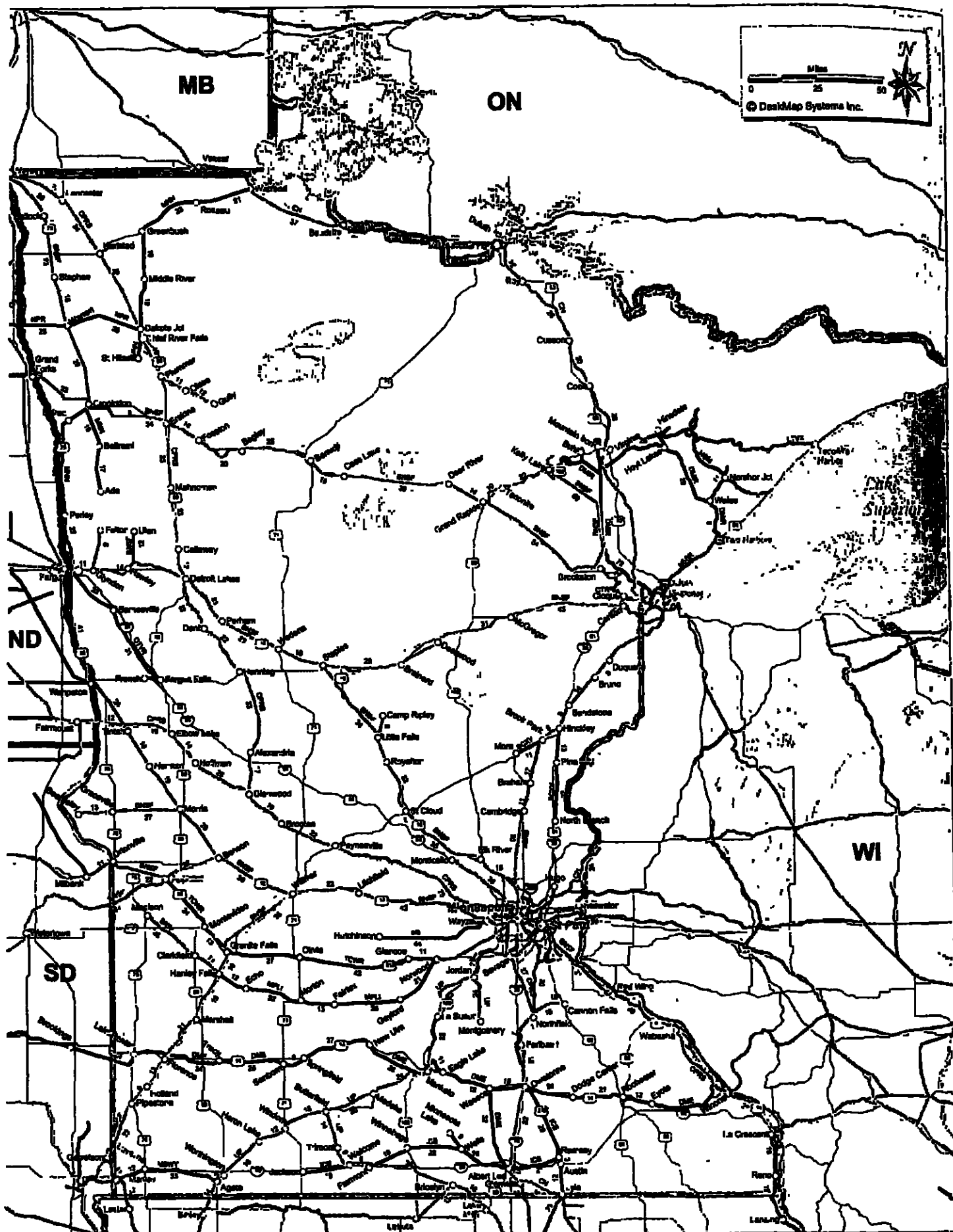
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Attorney for Petitioner

Due Date August 1, 2008



APPENDIX 2

VERIFIED STATEMENT OF CHARLES McHAFFIE

My name is Charles McHaffie. I am President and Chief Executive Officer of CARRIZO GORGE RAILWAY, INC. ("CZRY"), incorrectly referred to as "Carrizo George Railroad" in a Notice of Exemption filed by FPN-USA, Inc (FPN) on July 11, 2008.

I have been authorized by the Board of Directors of CZRY to submit this sworn Statement in response to the fraudulently misleading allegations in the verified Statement of Kenneth A. Kahan ("VS Kahan"), which is Exhibit B of FPN's Notice of Exemption. CZRY has an agreement with the State of Baja California (ADMICARGA) and the Mexican Government to operate the Tijuana-Tecate Short line ("TTS"), which is the subject of FPN's Notice of Exemption. That agreement is in full force and effect. It has a 20 year term. CZRY has subcontracted with Ferrocarriles CZRY de Baja California, S.A. de C.V. for the operation of TTS. CZRY also operates a rail line in the United States between the U.S. - Mexico border at or near Division, California and Plaster City, California, pursuant to a subcontract with San Diego & Arizona Eastern Railway Company.

I would like to bring to your attention several of the malicious and fraudulent allegations in Mr. Kahan's submitted sworn statement to the board. For the record, Mr. Kahan is a disgruntled former employee of CZRY whose position was terminated for cause.

At page 1, Mr. Kahan incorrectly states that railroad operations were "formerly provided" over the TTS by Carrizo Gorge Railway. This statement is false, and extremely disturbing. CZRY is currently providing operations over the TTS by means of subcontracting such operations to Ferrocarriles CZRY de Baja California, S.A. de C.V., a wholly controlled subsidiary of CZRY.

Verified Statement of Charles McHaffie
Finance Document 35155
Page 2

At pages 1-2, Mr. Kahan refers to Ferrocarriles Peninsulares del Noroeste as the "operator of the line (TTS) in Mexico." This statement is again false. The operator of the TTS is Ferrocarriles CZRY de Baja California, S.A. de C.V. pursuant to a subcontract with CZRY

Ferrocarriles Peninsulares del Noroeste (FPN) formerly operated the TTS pursuant to a subcontract with CZRY, but that subcontract was lawfully terminated in July 2007.

This malicious misrepresentation to the board is fully known to Mr. Kahan. Mr. Kahan incorrectly states at page 3 that San Diego & Imperial Valley Railroad Company (SD&IV) leased a rail line between the U.S.-Mexico border at or near Division, California and Plaster City, California to CZRY. The fact is SD&IV sub-contracted with CZRY for the operation of that rail line. Again, Mr. Kahan knows the truth and fabricated lies to the board.

At page 3, Mr. Kahan incorrectly alleges that recently CZRY has been performing services only sporadically outside the Tijuana Region on the TTS. The fact is that CZRY's subcontractor continues to provide normal service on 10 to 15 cars per week through the Tecate border over the TTS. Traffic on the TTS is down approximately five percent from a year ago, which is consistent with the traffic decline experienced by almost all rail carriers in North America during that period.

Mr. Kahan, at best, is completely misleading to the board in stating on page 3 that Baja California officials in charge of administering the TTS are in the process of canceling CZRY's operating contract. This statement is false. There is no such cancellation process underway, or imminent. Contrary to Mr. Kahan's allegation at page 3, the letter dated

April 10, 2008 signed by Director Jorge Monraz does not attest to a current process for cancellation of CZRY's operating contract.

Instead, that letter refers to a proceeding of a review of the 2006 amendment to the original contract that started in March 2008 due to a number of unsubstantiated allegations that were never proved. Director Jorge Monraz of ADMICARGA abused the power of his office, temporarily suspending the use of CZRY services – an action that was quickly corrected shortly thereafter. As a result of the actions of Jorge Monraz, BNSF issued an embargo causing major disruption of service to customers in the Baja

California, Mexico market. These actions were not a result of CZRY's inability to move freight. As stated in the letter (Exhibit D of FPN's Notice, English translation), "corrective measures have already been taken," and the freight which was delayed due to actions of Mr. Monraz's inability to understand the requirements to operate a railroad, "has been delivered completely by Monday, 17th of March " CZRY has provided adequate resolution of the matter and its operating contract remains in full force and in good standing today.

It is also blatantly untrue that Mexican officials are soliciting bids from new operators on a closed invitational bid basis for operation of the TTS, and that FPN has received one of only two or three invitations which have been issued. (VS Kahan at 3) No such bids have been solicited. In fact, any such bids would violate CZRY's 20-year contract with the State of Baja California to operate the TTS and it would create significant legal problems for ADMICARGA and Mexico.

At page 4, Mr Kahan misleadingly states that Union Pacific Railroad has indicated its desire to work with FPN should FPN take over operations of the TTS. The letter signed

by Mr. John Miller of Union Pacific, dated March 12, 2008, attached to FPN's Notice as Exhibit E, does not so state. What Mr. Miller actually states is that Union Pacific will work with whichever entity is authorized to operate the TTS. (Notice, Exhibit E) That

is not FPN. It is not correct to imply that Union Pacific favors FPN. It is common practice by all railroads to state that they will interchange or exchange cars based on rule 11 with any railroad and it has always been so stated in the past.

CZRY has been current each week with all IRS withholding and payroll taxes since February 1, 2007. The unpaid payroll withholding taxes that Mr. Kahan refers to on Page 4, were actually liabilities of previous management of CZRY dating back to 2005 and 2006 which included Mr. Kahan and another partner of FPN-USA, Inc.

It has already been noted, in a filing by San Diego & Imperial Valley Railroad Company (SD&IV), that Mr. Kahan is not correct in alleging at page 4 that FPN notified officials of SD&IV that FPN would file this Notice of Exemption.

It is not correct, as alleged by Mr. John Miller of Union Pacific in Exhibit E of the Notice, that CZRY is obligated by contract to use Carrizo Gorge de Mexico as operator of the TTS. As the short line representative for Union Pacific, Mr. Miller should have known the relationship between CZRY and ADMICARGA. CZRY can use any sub-contractor that is a Mexican railroad recognized by the State of Baja California. Ferrocarriles CZRY de Baja California S.A. de C.V., which is the current sub-contract operator of TTS, is such a railroad. CZRY and Ferrocarriles CZRY de Baja California have officials in common, i.e., Armando Freire, Chief Operating Officer of CZRY, and Homero Walss, Director of Operations for CZRY.

**Verified Statement of Charles McHaffie
Finance Docket No. 35155
Page 5**

As of July 20, 2008, in violation of California State Law (California Corporations Code Section 2204a and 312a), FPN-USA, Inc. failed to file a required Statement of Information with the California Secretary of State listing the officers of the corporation, among other violations.

The "management team" of FPN, referred to by Mr. Kahan at page 3, was the former management team at CZRY – not the current administration of CZRY that exists today. In fact, the former management team refused to pay ADMICARGA and the State of Baja California required operating fees through all of 2006 and the first two months of 2007. The new management team at CZRY has made all required payments to ADMICARGA and in fact is currently owed a substantial credit.

Furthermore, on or about July 24, 2008, Armando Freire, CZRY Chief Operating Officer and I met with Mr. Gary Sweetwood, a shareholder of FPN-USA, Inc. to determine his involvement in FPN-USA "charade". Mr. Sweetwood claimed he knew nothing of the filing and, in fact, claimed that the document bearing his signature was not intended for use in the FPN-USA, Inc. filing. Furthermore he stated he was not, in fact, the President of FPN-USA, Inc. as stated on the exhibit. Finally, Mr. Sweetwood stated that the FPN-USA, Inc filing was singularly Mr. Kahan's doing.

The current management team of CZRY has an excellent record of service performance with customers and has established an excellent working relationship with various government agencies and business groups on both sides of the border including SCT, Federal Railroad Administration, U.S. Customs and Border Protection, SD&AE, San Diego Metropolitan Transit System, SANDAG and the San Diego Regional Chamber of Commerce.

Verified Statement of Charles McHaffie
Finance Docket No. 35135
Page 6

Since October 2007, CZRY has undertaken a complete review of all operating procedures including satisfactory audits by the FRA in the United States and SCT in Mexico. Assurance was given by the appropriate governing bodies that CZRY is taking the necessary steps to move our business forward and provide Baja California (Mexico) and the Southern California (USA) regions with cost effective environmentally friendly transportation alternatives.

End

VERIFICATION

STATE OF CALIFORNIA)
) SS:
COUNTY OF SAN DIEGO)

CHARLES McHAFFIE, 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.


CHARLES McHAFFIE

SUBSCRIBED AND SWORN to
before me this 29th day
of July, 2008.


Notary Public

My Commission Expires:

04 / 01 / 2009



APPENDIX 3

VERIFIED STATEMENT OF ARMANDO FREIRE

My name is Armando Freire. I am the Chief Operating Officer of CARRIZO GORGE RAILWAY, INC. (CZRY).

On Thursday, July 24, 2008, I, along with Charles McHaffie, President and Chief Executive Officer of CZRY met with Mr. Gary Sweetwood, a shareholder of FPN-USA, Inc. to determine his involvement in the FPN-USA Inc. filing with the Surface Transportation Board.

Mr Sweetwood claimed he knew nothing of the filing and, in fact, claimed that the document bearing his signature was not intended for use in the FPN-USA, Inc. filing. Furthermore he stated he was not, in fact, the President of FPN-USA, Inc. as stated on the exhibit.

VERIFICATION

STATE OF CALIFORNIA)
) SS:
COUNTY OF SAN DIEGO)

ARMANDO FREIRE, 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.


ARMANDO FREIRE

SUBSCRIBED AND SWORN to
Before me this ____ day
of July, 2008

Notary Public

My Commission Expires: 12/09/2011

Jurat
State of California
County of San Diego
Subscribed and sworn to (or affirmed)
before me on this 31 day of July
2008 by Armando Freire
Proved to me on the basis of satisfactory evidence
to the person(s) who appeared before me
Signature Julio Smoes (Notary Seal)



CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2008, I served the foregoing document, Petition For Rejection Or For Stay Of Notice Of Exemption, by e-mail and by first-class, U S. mail, postage prepaid on the following

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Thomas F McFarland

Thomas F. McFarland