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October 14, 2009

BY E-FILING

Hon. Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-2001

PUBLIC VERSION

**RE: STB Finance Docket No. 35296, Anthony Macrie-Continuance
in Control Exemption**

**STB Finance Docket No. 35297, New Jersey Seashore Lines, Inc.-
Operation Exemption**

Dear Ms. Quinlan:

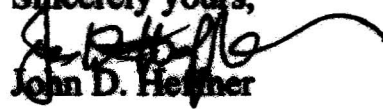
In connection with the above-captioned proceedings, I am filing on behalf of Anthony Macrie and New Jersey Seashore Lines, Inc. (collectively "NJSL"), respectively, their response to the Board's order dated September 25, 2009. There the Board instructed Clayton Companies, Inc. ("Clayton"), owner of the subject line of railroad, to seek Board authority for the line's acquisition or for NJSL to provide an explanation as to why Clayton need not seek such authority.

On October 14, 2009, the Board granted NJSL's request for a protective order. Accordingly, NJSL is submitting two copies of this document. One copy, marked "Public Version," contains its Response but omits confidential documents identified as Exhibits B and C. The other copy, marked "Highly Confidential Version," contains both its Response and Exhibits B and C.

Inasmuch as NJSL desires to consummate the requested exemptions as soon as possible, it respectfully requests that the Board act as expeditiously as possible

in issuing a decision.

Sincerely yours,


John D. Heffner

Enclosure

cc: Anthony Macrie

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 35296

**ANTHONY MACRIE
-- CONTINUANCE IN CONTROL EXEMPTION --
NEW JERSEY SEASHORE LINES, INC., AND
CAPE MAY SEASHORE LINES, INC.**

STB FINANCE DOCKET NO. 35297

**NEW JERSEY SEASHORE LINES, INC.
--OPERATION EXEMPTION--
CLAYTON COMPANIES, INC.**

RESPONSE TO BOARD DECISION

Respectfully submitted,

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Due: October 15, 2009

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 35296

**ANTHONY MACRIE
-- CONTINUANCE IN CONTROL EXEMPTION --
NEW JERSEY SEASHORE LINES, INC., AND
CAPE MAY SEASHORE LINES, INC.**

STB FINANCE DOCKET NO. 35297

**NEW JERSEY SEASHORE LINES, INC.
--OPERATION EXEMPTION--
CLAYTON COMPANIES, INC.**

RESPONSE TO BOARD DECISION

INTRODUCTION

This filing concerns two *unopposed* notices of exemption filed with the Board on September 10, 2009, whereby Anthony Macrie (“Macrie”), an individual, seeks authority to continue in control of a newly established class III short line railroad, New Jersey Seashore Lines, Inc.,¹ and an existing class III railroad common carrier, Cape May Seashore Lines, Inc.² On September 25, 2009, the Board served a decision in the above-captioned proceedings accepting these two notices of exemption but holding in

¹ Respectively, Macrie and NJSL.

² Hereafter CMSL.

abeyance their *Federal Register* publication and effectiveness pending NJSL's response and further Board action. The Board further directed Clayton Companies, Inc. ("Clayton"), the owner of the subject line of railroad and/or NJSL to respond to the Board's order by either 1) Clayton seeking Board authority for acquisition of the subject line or 2) NJSL explaining why Clayton need not obtain Board authority.

Through this Response, NJSL will demonstrate that there is no need for Clayton to obtain Board acquisition authority under a long line of Interstate Commerce Commission, Board, and court precedent. Moreover, the Board will have adequate control over the provision of common carrier service through its control over NJSL's operations and, if NJSL unlawfully abandons operations, through the residual common carrier obligation imposed by law upon Clayton.

Accordingly, Macrie and NJSL respectfully request that the Board promptly issue a decision allowing these exemptions to take effect so the proposed transaction can be consummated.

BACKGROUND

The facts in this proceeding are very simple. As relevant, Clayton operates a sand mine located on the Line in Woodmansie, NJ, at which it mines and sells sand and aggregate product. It also owns an abandoned 13

mile long line of railroad³ which it acquired from Consolidated Rail Corporation (“Conrail”) around late 1985 or early 1986.⁴ Initially, Clayton contracted with Ashland Railway, an operator of common carrier short line and private switching railroads, to operate that line as a *contract carrier* pursuant to the terms of an Operating Agreement.⁵ However, that agreement expired some years ago as it had a 5 year term with a 5 year renewal option.⁶ For a while Clayton stopped using rail service to meet its transportation needs. Recently, Clayton has begun to reevaluate its transportation requirements in view of energy and environmental concerns and markets for its products and has determined that it needs rail service again. Accordingly, on August 5, 2009, Clayton entered into an Operating Agreement with NJSL granting it the exclusive right to provide common carrier railroad service over this line for a 10 year period.⁷

As noted above, NJSL is a recently established affiliate of CMSL, a long established provider of excursion passenger service in southern New

³ The line extends between MP 66.0 at Lakehurst, Borough of Lakehurst, Ocean County, and MP 79.0 at Woodmansie, Woodland Township, Burlington County, NJ. By decision dated March 11, 1986, the former Interstate Commerce Commission authorized Conrail to abandon this line. See, Conrail Abandonment in Burlington And Ocean Counties, NJ, Docket No. AB-167 (Sub-No. 741N), ICC served March 11, 1986. A copy of that decision is attached as Exhibit A.

⁴ The Sale Agreement between Conrail and Clayton was dated December 27, 1985.

⁵ Pertinent pages from unsigned draft copy of the Agreement between Clayton and Ashland are submitted under seal as Exhibit B.

⁶ See, Clayton Agreement with Ashland Railway, sec. 1B, page 2.

⁷ NJSL is submitting under seal as Exhibit C a confidential unsigned copy of this Agreement for the Board’s review.

Jersey on the Cape May Branch of New Jersey Transit. CMSL holds operating authority from the Board⁸ to provide common carrier railroad service and it has been actively promoting freight service on that line as well as aggressively looking for expansion opportunities elsewhere in New Jersey. The reactivation of rail freight service on the subject line presents just the sort of opportunity for which CMSL's owner Anthony Macrie has been looking.

ARGUMENT

The issue the Board's September 25, decision poses is whether the owner of a long abandoned line of railroad must seek Board acquisition authority before it can restore that line to an active common carrier status by granting operating rights to a common carrier railroad. The answer to that question is *No* under consistent and longstanding Interstate Commerce Commission, Board, and judicial precedent.

The ICC squarely addressed this issue in its 1980 decision entitled Common Carrier Status of States, State Agencies and Instrumentalities, And Political Subdivisions 49 CFR 1120A, 363 I.C.C. 132, 1980 Lexis 73, where the agency held "[w]hen a rail line has been fully abandoned, it is no longer [a] rail line and the transfer of the line is not subject to our jurisdiction."

⁸ See, Cape May Seashore Lines, Inc.-Modified Rail Certificate, STB Finance Docket No. 34112, served November 19, 2001.

The issue of the ICC's [and now the Board's] jurisdiction over the acquisition of abandoned lines of railroad has even been addressed by the United States Supreme Court in Hayfield Northern R. Co. v. Chicago & N.W. Tr. Co., 467 U.S. 622 (1984), where it stated

“The proposition that, as a general matter, issuing a certificate of abandonment terminates the Commission's jurisdiction is strongly buttressed by the Commission's own interpretation of its regulatory authority. According to the Commission, ‘the disposition of rail property after an effective certificate of abandonment has been exercised is a matter beyond the scope of the Commission's jurisdiction, and within a State's reserved jurisdiction.’ ” Id. at 634.

Subsequently, the ICC followed Common Carrier Status of States and State Agencies holding in Indiana Hi-Rail Corporation, Central Illinois Shippers, Incorporated And Cisco Cooperative Grain Company – Show Cause, Finance Docket No. 32422, ICC slip op. served Dec. 29, 1994, that two rail shippers that bought abandoned railroad lines for the purpose of using a short line railroad to provide common carrier service over them were not required to obtain ICC acquisition authority. The agency stated,

“Cisco [one shipper]...did not need Commission authority to purchase the abandoned line. When operations began on the line, Cisco

assumed a residual common carrier obligation but, under Commission precedent, it did not have to obtain Commission authority.” Slip op. at 7.

At least one appeals court, the United States Court of Appeals for the Seventh Circuit, has found that the Board has no jurisdiction to require a party acquiring an abandoned rail line to obtain agency authority for either acquisition or abandonment. Cf. Wisconsin Central LTD. v. Surface Transportation Board, 112 F.3d 881 (1997). That case involved the acquisition and subsequent lease to a common carrier short line railroad of an abandoned line. After three years of operation, the ICC-authorized short line railroad sought an exemption from the agency to discontinue unprofitable operations. The ICC held that the line’s owner, Wisconsin Central LTD., needed to secure its own abandonment authority before it could salvage the track. On appeal, the Seventh Circuit held otherwise stating:

“First, as the cases and the Commission's own decisions in Dakota Rail make plain, once a line properly has been abandoned, the line and its owner are beyond the jurisdiction of the Commission. The subsequent lease of the line to an operator who wishes to provide service to the public over that line will of course subject the operator

and the service it provides to the Commission's regulatory power, but not the owner and its property. Unless the owner takes some affirmative act beyond the mere lease of the line indicating its willingness and ability to provide service in the lessee's stead, the right of way remains outside the jurisdiction of the Commission.” Id. at 892.

More recently the Board has cited the Wisconsin Central ruling with approval stating that [a public agency’s] mere ownership of the abandoned line over which the railroad had acquired authority to commence operations pursuant to a lease with the public agency also did not confer on that agency a common carrier obligation. See, City of Venice--Abandonment Exemption--in Venice, IL, and St. Louis, MO, Docket No. AB 863X, STB served June 22, 2004.

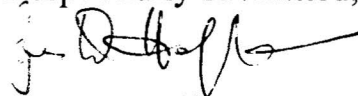
Under longstanding agency precedent in State of Vt. and Vermont Ry., Inc., Acquisition and Op., 320 I.C.C. 609 (1964) and Status of Bush Universal, Inc., 342 I.C.C. 550, 564 (1973), the fundamental test for common carriage is whether there has been a “holding out to the public as a common carrier.” During the 23 years that Clayton has owned this line, it has not been used to serve other shippers but rather just to meet Clayton’s own transportation needs. Clayton has not provided and does not provide

transportation for compensation and has not held itself out to the public as a provider of transportation. Moreover, under the terms of its contract with Ashland , Clayton engaged that railroad as a private carrier to serve its private needs and not those of the public at large. See, agreement between Clayton and Ashland at sections 2, and 3A, Exhibit B. NJSL will operate the Line as an independent contractor, not as an agent for Clayton. See, Agreement between Clayton and NJSL at Sec. 4A, Exhibit C. Accordingly, there is no basis for the Board to require Clayton to seek authority for its 1986 acquisition from Conrail.

The Board cites Pro-Go Corp.-Operation Exemption-in Suffolk County, NY, STB Finance Docket No. 35120 et al, slip op. at 3 (STB served June 13, 2008) for its contention that Clayton must seek Board acquisition authority or NJSL must provide an explanation as to why Clayton need not do so. Simply stated, NJSL is mystified as to why the Board cited Pro-Go or how that case is in any way relevant to or controlling as to the matter at hand. Neither Clayton nor NJSL have ever asserted that Clayton's ownership of this line is covered by the State of Maine precedent. Furthermore, unlike State of Maine, Clayton's 1986 acquisition of the subject track involved the transfer of an *abandoned* [emphasis supplied] line, not an active one. Unlike in ProGo, no corporate relationship exists between

NJSL and Clayton. NJSL believes the Board's September 25 decision, however well intentioned, is not only contrary to established precedent but to Congress' oft-stated desire for reduced regulation over transportation. No one has expressed any opposition to the proposed transaction. The sole current shipper, Clayton, owns the Line and supports the transaction. NJSL requests that the STB promptly issue a decision allowing it to consummate this transaction at the earliest possible opportunity.

Respectfully submitted,



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Due: October 15, 2009

EXHIBIT A

- DO

INTERSTATE COMMERCE COMMISSION
CERTIFICATE AND DECISION**SERVICE DATE**
MAR 11 1985

Docket No. AB-167 (Sub-No. 741N)

CONRAIL ABANDONMENT IN BURLINGTON AND OCEAN COUNTIES, NJ

Decided: March 6, 1985

Consolidated Rail Corporation (Conrail) filed an application on August 27, 1984 under section 308 of the Regional Rail Reorganization Act of 1973^{1/} to abandon its 13.1-mile line of railroad between Lakehurst (milepost 65.9) and Woodmansie (milepost 79.0).

Under section 308(c) the Commission must grant any application for abandonment filed by Conrail within 90 days after the date the application is filed unless an offer of financial assistance is made under section 308(d) during that 90-day period.

An offer of financial assistance to acquire the line was timely filed by Ralph Clayton & Sons.

Since it was determined that the offer was bona fide, issuance of a certificate authorizing abandonment was delayed and the parties were given time to enter into an agreement or request the Commission to set the terms and conditions of sale.

At the offeror's request, the Commission set the terms and conditions of sale. The Commission gave the offeror 10 days to accept the terms in writing and noted that failure to do so would result in the offer being considered withdrawn. Since the offeror has not filed a timely statement accepting the terms, its offer is considered withdrawn.

Accordingly, since no other bona fide offer was filed, an appropriate certificate and decision must be entered.

It is certified: Conrail is authorized to abandon the line described above.

It is ordered:

This certificate and decision is effective on service.

By the Commission, Heber P. Hardy, Director, Office of Proceedings.

James H. Bayne
Secretary

(SEAL)

1/ This section was added by the Northeast Rail Service Act of 1981. Pub. L. No. 97-35.

EXHIBIT B
(Omitted from Public Version)

EXHIBIT C
(Omitted from Public Version)