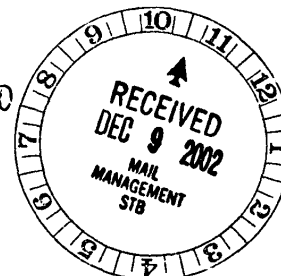


ORIGINAL

Before the  
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34145

BULKMATIC RAILROAD CORPORATION  
-ACQUISITION EXEMPTION-  
BULKMATIC TRANSPORT COMPANY



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SURFACE  
TRANSPORTATION BOARD

Finance Docket No. 34179

BULKMATIC RAILROAD CORPORATION  
-OPERATION EXEMPTION-  
BULKMATIC TRANSPORT COMPANY

PETITION FOR RECONSIDERATION

ENTERED  
Office of Proceedings

DEC 09 2002

Part of  
Public Record

**FILED**  
DEC 09 2002  
SURFACE  
TRANSPORTATION BOARD

GORDON P. MacDOUGALL  
1025 Connecticut Ave., N.W.  
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Attorney for Joseph C. Szabo

Due Date:  
December 9, 2002

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Before the  
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PETITION FOR RECONSIDERATION

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Preliminary Statement

Joseph C. Szabo,<sup>1/</sup> for and on behalf of United Transportation Union-Illinois Legislative Board (UTU-IL), petitions the Surface Transportation Board (Board), for reconsideration of the Board's decision dated November 18, 2002 (served November 19) (Decision) in the entitled proceedings.<sup>2/</sup> 49 CFR §1115.3. Reconsideration is warranted upon new evidence and to correct material error. Upon reconsideration, the Board should reject the notices of exemption, or revoke the exemptions.

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<sup>1/</sup> Illinois Legislative Director for United Transportation Union, with offices at 8 So. Michigan Avenue, Chicago, IL 60603.

<sup>2/</sup> The decision was rendered by Chairman Morgan, and Vice Chairman Burkes.

### Background

This is an important proceeding, affecting hundreds of industrial switching operations throughout the United States. It involves important questions of law and agency jurisdiction, and would alter governing precedent for determining "excepted" trackage, which heretofore has been considered settled over an eighty-year period since Transportation Act of 1920.

If the decision is allowed to stand in its present form, UTU-IL anticipates it will lead to the licensing of hundreds of bogus "short-lines," requiring they become STB-franchised carriers, but which are now free from entry/exit controls. The decision is contrary to the long-settled rules under 49 U.S.C. §10906 governing flexibility for "excepted" tracks, and contrary to the rail transportation policy. 49 U.S.C. § 10101. Indeed, also being filed today is UTU-IL's objection to a farcical industrial plant excepted trackage notice of exemption, filed for an industry neighbor, and predicated upon the recently-released instant decision for which reconsideration is sought. See: Finance Docket No. 34291, Comrail International Railroad, Inc.--Operation Exemption--Chicago Heights Railcar, Inc.

Railroad construction of line, and abandonment of line, came under federal regulation in 1920, following extensive abuses which need not be recited. Transportation Act, 1920, §402; 49 U.S.C. 1(18)-(22). Prior approval from the former Interstate Commerce Commission (ICC) was required for constructing a line of railroad, or operating a line of railroad, or for abandoning a line of railroad, or the operation thereof. However, Congress made an

exception for spur, industrial, team, switching, or side tracks. 49 U.S.C. 1(22). The exception has been broadened somewhat to include acquisition and discontinuance, but the five categories of excepted track have remained virtually unchanged since 1920, and constitutes the present, excepted track. 49 U.S.C. 10906:

The Board does not have authority under this chapter over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.

There have been more than one hundred reported cases defining the character of "excepted" trackage vis-a-vis regulated trackage requiring prior ICC-approval for construction, acquisition, operation, etc. under §1(18)-(20), now 49 U.S.C. 10901-2. See: Texas & P.R. Co. v. Gulf, C. & S.F.R. Co., 270 U.S. 266 (1926); United States v. Idaho, 298 U.S. 105 (1936); Yonkers v. United States, 320 U.S. 685 (1944); Powell v. United States, 300 U.S. 276 (1937); New Orleans Terminal Company v. Spencer, 366 F.2d 160 (5th Cir. 1966).

The instant proceeding involves an industrial plant site, known as the Bulkmatic Distribution Center located in Chicago Heights, IL, on the line of Union Pacific Railroad Company. The Bulkmatic Distribution Center contains 16 industrial tracks, totaling 3.9 miles, situated inside the plant gate. The site is advertised as a Union Pacific industrial site.<sup>3/</sup> The site is subject to UP ownership and control, and is presently leased to

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<sup>3/</sup> See: UTU-IL Supp. Pet. 5/1/02, App. 3, pp. 5-6. The property formerly had been leased to Marias Industries. UTU-IL Pet. 12/26/01, App. 2, p. 1.

Bulkmatic Transport Company (BTC).<sup>4/</sup>

BTC's affiliate, Bulkmatic Rail Corporation (BRC) on December 21, 2002 filed a notice of exemption to acquire, by sublease, the BTC's 16 tracks at Bulkmatic Distribution Center, which became effective December 28, 2001. Subsequently, on February 27, 2002, BRC filed a notice of exemption to operate the BTC trackage, with the exemption becoming effective March 6, 2002. However, until April 2, 2002, the BTC trackage continued to be switched by UP, and also by BTC's own Pettibone trackmobile and, beginning February 10, 2002, also by BTC's 1200 HP locomotive. On March 27, 2002, BRC leased the BTC's locomotive unit to Chicago Heights Switching Company (CHSC), for CHSC to act as BRC's agent to operate the BTC trackage. UP continues to deliver and pick-up cars at the Bulkmatic site but, since April 2, 2002, UP no longer performs switching in addition to its delivery and pick-up at the Bulkmatic Distribution Center.

All parties concede that when UP and BTC performed switching at the Bulkmatic Distribution Center, the trackage within the site constituted "excepted" trackage within the meaning of 49 U.S.C. 10906, outside the 49 U.S.C. 10901 "acquisition or operation" licensing authority of the Board. Further, the discontinuance or abandonment of trackage, or service on the trackage, within the site, would not require prior Board approval or exemption.

---

<sup>4/</sup> The Decision asserts that UTU-IL has not established that UP is somehow involved with the ownership of the property (Decision 10-11 & fn. 18). The Board's decision displays a lack of knowledge concerning the real world of the railroad industry and plant site locations. BRC did not contest the UTU-IL testimony on this score, which was prepared with care. BRC Reply 5/16/02.

### ISSUES PRESENTED

The issues in these proceeding, and on this petition for reconsideration, are two-fold, in addition to factual misapprehensions made by the Board in its Decision, and the receipt of new evidence. The two issues are (1) Whether the 16 tracks in the Bulkmatic Distribution Center, when acquired and operated by BRC, have their status changed from "excepted" under §10906, to regulated under §10901; and (2) If the acquisition and operation of yard trackage by BRC is subject to prior Board approval under §10901, whether application of the line acquisition class exemption be revoked for the instant transaction. If the Board finds the trackage is "excepted," it need not reach the second issue, but should reject the notice of exemption as outside Board authority.

Since correction of factual errors, and the receipt of additional evidence may have a bearing on the issues, they are treated first.

#### I. THE BOARD'S DECISION CONTAINS CERTAIN IMPORTANT FACTUAL ERRORS.

The Board's decision contains a number of factual errors, which are relevant to decision.

A. Caption of Proceeding. The Board's decision has changed the caption for F.D. No. 34145 from "Acquisition Exemption," to "Acquisition and Operation Exemption." (Decision 1). There is no basis for this change, which is contrary to the notice of exemption, 67 FR 2010, and to the caption shown by all of the parties in all of their pleadings. The Board earlier noted the error in

the caption, and corrected the same. See: Decision served March 5, and March 14, 2002. 67 FR 11547 n.2. However, the error is now repeated.

B. "Operation" of Trackage. The BRC notice of exemption in F.D. No. 34179 is to "operate" the trackage. 67 FR 11547 (Mar. 14, 2002). However, the Decision claims the BRC notice of exemption is to instead "operate over" the BTC yard trackage. (Decision, 2, para. 2; 3 para. 1, para. 4.<sup>5/</sup>

Although an exemption "to operate" a line, and an exemption "to operate over" are line, are both cognizable under the line acquisition class exemption, there are important differences in the scope of the "operation." Simmons v. ICC, 829 F.2d 150 (D.C. Cir. 1987); United Transp. Union v. Surface Transp. Bd., 175 F.3d 163 (D.C. Cir. 1999). To operate a line is to be in charge of overall operations on the line, whereas merely to operate over a line means there are more than one carrier on the line with a right to operate on the line, or less than complete control over line operations.

The difference is important. Although CHSC and BRC filed notices to "operate" the trackage, BTC and UP both "operated over" the trackage for a time; and then BTC, BRC, CHSC and UP all "operated over" the line until UP was excluded beginning April 2, 2002. Here, the use of the trackage did not change by expanding the number of carriers operating on the trackage, or by eliminating UP. Moreover, the purpose and effect remained the same.

---

<sup>5/</sup> The Decision also includes the CHSC notice of exemption in F.D. No. 34146, as to "operate over" the trackage. This is also incorrect. See: 67 FR 2010-11. (Jan. 15, 2002).

Thus, although the Board's decision errs in not correctly describing the BRC and CHSC exemption notices, the Board's decision as to what actually transpired is correct.

C. Chicago Heights Switching Company. The decision throughout its text is most devious concerning the role of CHSC. The decision notes that CHSC is to be the agent of BRC. (Decision 3, para. 2). However, the BRC-CHSC operating agreement disclaims an agency relationship. (UTU-IL Supp. Pet., 5/1/02, Ex. 1, pp. 7-8). The decision says BRC will use employees of CHSC to work on the line, and makes mention of the CHSC-BRC "lease." (Decision 6, para. 2). In actual fact, BRC is not projected to operate the trackage in any physical sense. There is no showing that BRC has any employees, equipment, or facilities at the Bulkmatic Distribution Center.

BRC is a bogus "carrier." The agreement between BTC and BRC merely provides for a pass-through of charges assessed by CHSC plus 10 percent. (UTU-IL Supp. Pet., 5/1/02, Ex. 5, p. 1).

The CHSS-BRC "lease" mentioned by the Board (Decision 6, para. 2) is not a lease of trackage, but is a lease of the BRC locomotive unit, initially placed on the premises by BTC. (UTU-IL Supp. Pet., 5/1/02, Ex. 4).

The Board egregiously errs in failing to make any mention of Finance Docket No. 34147, Paula J. Mudge-Gibson and Don L. Gibson-Continuance in Control Exemption-Chicago Heights Switching Company, which was filed simultaneously with the instant F.D. No. 34145, and with F.D. No. 34146, and all noticed alongside one another. 67 FR 2010 (Jan. 15, 2002). The two respondents in F.D. No. 34147 own and control Central Illinois Railroad Company

(CIRY), which leases and operates other properties in the Chicago area.<sup>6/</sup>

II. THE RECORD SHOULD BE REOPENED TO  
RECEIVE THE FURTHER MARTZ STATEMENT.

The proceeding should be reopened to receive the Further Verified Statement of Dennis G. Martz, identified as Attachment 1, consisting of 3 pages plus verification, which deal with events since the close of the record. Two of the items stem from mistaken assumptions in the Board's decision, recent events, and employee impact. The verified statement is not cumulative, and was not previously presented because the subject matter was highlighted in the Board's November 19, 2002 decision.

III. THE DECISION ERRS IN FINDING THAT A  
COMMON CARRIER'S ONLY TRACKAGE CANNOT  
BE EXCEPTED UNDER 49 U.S.C. 10906.

A. Effingham. The Board based its legal reasoning upon an unreported decision served September 18, 1998 in Docket No. 41986, Effingham Railroad Company-Petition for Declaratory Order-Construction at Effingham, IL. (Effingham). The Board devotes considerable attention to Effingham, and attempts to distinguish the instant proceeding from a more recent decision at Effingham, IL. Finance Docket No. 34081, Effingham Railroad Company-Operation Exemption-Line Owned by Total Quality Warehouse (served April 10,

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6/ See: Finance Docket No. 33960, Central Illinois Railroad Company-Lease and Operation Exemption-Lines of The Burlington Northern and Santa Fe Railway Company at Chicago, IL; Finance Docket No. The Central Illinois Railroad Company-Acquisition and Operation Exemption-Rail Lines of Union Pacific Railroad Company and Canadian Pacific Rail Systems at Elk Grove Village, Cook and DuPage Counties, IL.

2002) (Post-Effingham). Indeed, the bulk of the Board's decision is devoted to the Effingham cases. (Decision 2, para. 2, para. 3; 4, para. 3; 5 para. 1; 6 para. 4 & fn. 12-13; 7 (entire page); 8 para. 1, para. 2 & fn. 14; 11, para. 2).

Despite over 80 years of dealing with "excepted" trackage, the Board in this proceeding has made an absolute rule of law that a common carrier cannot operate only on excepted track. The Board claims that it "held" this principle in its unreported Effingham decision. (Decision 2):<sup>7/</sup>

In Effingham, we held that excepted track was necessarily incidental to a common carrier's other track, and a common carrier's only trackage could not therefore be deemed to be excepted within the meaning of 49 U.S.C. 10906.

The Board's decision is not clear-cut from Effingham, and in any event is wrong.

The Board's "holding" is dispositive of the "excepted" trackage issue in these proceedings, once the Board found BRC to be a "common carrier," for BRC, and BTC, as here pertinent, do not operate on trackage other than in the Bulkmatic Distribution Center.

This purported rule of law--that common carriers cannot operate exclusively on "excepted" trackage--is breathtaking. There are numerous switching and terminal rail carriers, who are common carriers, yet they operate exclusively on excepted trackage, and without any STB franchise. They commence and discontinue opera-

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<sup>7/</sup> An agency does not render a "holding," unlike a court; rather, an administrative agency makes a "finding." Accordingly, an agency's precedent is usually confined to an individual situation, rather than to serve as precedent. See: Whitman, William H., Doctrine of Precedents in I.C.C., 5 Geo. Wash. L. Rev. 543 (1937).

tions without any prior STB authorization or exemption.<sup>8/</sup>

The Board cannot operate on a clean slate to wipe ut 80 years of excepted track findings under any notion of Chevron<sup>9/</sup> or otherwise. It is arbitrary and capricious for the Board to rule, as it has now done here, that common carriers cannot operate exclusively on excepted trackage. We do not read Effingham to adopt such a radical and perverse rule of law.

The UTU-IL pleadings deal extensively on the Effingham and Post-Effingham decisions. See: UTU-IL Pet. for Stay, 12/26/01, 3-8; UTU-IL Pet., 3/4/02, 5-9; UTU-IL Supp. Pet., 5/1/02, 7-14 & Appendix 4. UTU-IL will not repeat its contentions already developed herein, but refers the Board to the record.

The Board should set aside the rule pronounced in its November 19, 2002 decision, and reopen the proceeding to evaluate the issue of excepted trackage herein by the traditional tests, such as number of shippers (here only one), length of trackage, stations, communications, etc. We point out that the Board, in denying a stay on December 27, 2001 in this proceeding, noted the complex and fact-bound issue that is involved in making an excepted track determination. (Decision, 12/27/01, 2):

Whether track is excepted under section 10906 is a complex, fact bound issue that must be resolved in light of precedents that require considerable analysis.

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<sup>8/</sup> The Board construes the effectiveness of a class exemption notice to mean that the Board "authorized" a transaction. (Decision 2-3). This is incorrect, for the authorization stems from the Board's approval of the class exemption. The Board does not again authorize the transaction after a ministerial notice is filed.

<sup>9/</sup> Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837 (1984).

The Effingham proceedings were not rulemaking proceedings, with invitation to participate by the transportation community. Yet the claimed effect is to render excepted track acquisitions and operations subject to the non-carrier line acquisition class exemption. This would be an unconscionable result.

B. Intended Use. The "use " of trackage should not be dispositive of whether trackage is excepted or line of railroad. If "use" is the exclusive test, then virtually all trackage would be "line of railroad." When the Board's exclusive "use" test was set aside after Nicholson<sup>10/</sup> in Illinois Commerce Com'n v. ICC, 779 F.2d 1270 (7th Cir. 1985), the former ICC on remand acknowledged that the "use" test is too expansive. CNW--Aban. Exemp.--In McHenry County, IL, 3 I.C.C.2d 366, 368 (1987);

Applied literally, our earlier analysis could result in the Commission never finding a line to be spur tack. Virtually any rail segment used to serve a shipper has a connection to actual transportation movements.

The intended use test is not an exclusive guide to determining the character of tracks.

C. Common Carrier. BRC is not a common carrier. It is not holding itself out to participate in the national rail network by tariff publication, unlike CHSC's sister carrier. (Further Martz V.S., p. 2).<sup>11/</sup> The Board's decision speculates that BRC in the future could become a common carrier, and that BRC's lease of the entire BTC premises could assist in that process. (Decision 5-6).

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10/ Nicholson v. ICC, 711 F.2d 364 (D.C. Cir. 1983).

11/ The Board can take official notice of Hladick OPSL 6000-W, on file with the Board.

However, the fact is that BRC is not operating as a common carrier, by tariff publication or otherwise. (Further Martz V.S., p. 2).<sup>12/</sup> Moreover, there is no evidence to support the Board's conclusion that BRC's sublease of the entire BTC premises will assist BRC in marketing rail service. The Board's speculation comes from thin air.

#### IV. THE DECISION ADOPTS AN INCORRECT STANDARD FOR REVOCATION OF AN EXEMPTION.

The decision rules that the required standard for revocation under the noncarrier class exemption is to show that BRC's operation of the trackage would be inconsistent with the provisions of the rail transportation policy that relate to the public convenience and necessity. (Decision 9, para. 1):

Under section 10901(c), we are required to issue authority to BRC unless we find affirmatively that such authority would be "inconsistent with the public convenience and necessity." Thus, to revoke the exemption in accordance with Village of Palestine, we must find that BRC's commencement of operations would be inconsistent with the provisions of the rail transportation policy that relate to the public convenience and necessity, without regard to the other provisions. id. at 1338-39.

The Board has incorrectly read §10901(c). The term "affirmatively" does not appear in that subsection, and a certificate is to be issued unless "activities" are inconsistent with the public convenience and necessity. The negative language of §10901(c)

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<sup>12/</sup> The reliance of the decision upon the "independent contractor" feature of the BRC/BTC sublease agreement is way off base. (Decision 5, para. 3). The BRC/CHSC operating agreement's "independent contractor" feature is belied by the admitted agency arrangement found in the decision. Cf. UTU-IL Supp. Pet., 5/1/02, Ex. 1, pp. 8-9; Decision 3, para. 2.

merely governs the burden of persuasion, and does not present a presumption, or even a rebuttable presumption. Commonwealth of Pennsylvania v. United States, 361 F.Supp. 208 (M.D. Pa. 1973), aff'd 414 U.S. 1017. The Board in a §10901(c) proceeding is still required to enter specific findings on the public convenience and necessity, and cannot simply issue a "not shown" finding. Great Northern Ry. Discontinuance of Service, 307 I.C.C. 59,75-77 (1959); City of Chicago v. United States, 396 U.S. 162 (1969).

The revocation standard is whether regulation of the transaction is necessary to make the findings required under §10101 relating to public convenience and necessity in order to carry out the rail transportation policy. The Board has incorrectly construed the standard for revocation.

UTU-IL disagrees with the Board's discussion of the Martz evidence on inefficient BRC operations. However, the decision finds that more detailed study is warranted. This calls for revocation if such a study is needed; the command of §10502(d) is to revoke an exemption if such further study is needed. An individual exemption can be progressed, or an application filed.

The Board on reconsideration should evaluate the evidence based upon proper reading of the statutory provisions. UTU-IL showed that regulation is necessary to carry out the provisions of §10101. Of course, the Board does not reach the rail transportation policy issues if it finds the trackage to be excepted, which it should find.

CONCLUSION

The Board should grant reconsideration for its November 19, 2002 decision, receive the tendered further verified statement (Attachment 1), and either reject the notices of exemption, or revoke the exemptions.

Respectfully submitted,

  
GORDON P. MacDOUGALL  
1025 Connecticut Ave., N.W.  
Washington DC 20036

December 9, 2002

Attorney for Joseph C. Szabo

Certificate of Service

I hereby certify I have served a copy of the foregoing upon parties of record by first class mail postage-prepaid.

Washington DC

  
Gordon P. MacDougall

ATTACHMENT 1

F.D. No. 34145  
F.D. No. 34179

FURTHER  
VERIFIED STATEMENT  
OF DENNIS G. MARTZ

My name is Dennis G. Martz. I am the same person of same name that submitted verified statements in these proceedings, dated December 26, 2001, and March 2 and April 30, 2002. I have read the Board's 12-page decision served November 19, 2002 in these proceedings. There are certain factual errors and factual assumption contained in the decision, and there are now 8 months of experience under the new arrangement.

1. BTC Operations. The decision states that Bulkmatic Transport Company (BTC) does not operate over any trackage at the Bulkmatic Distribution Center. I do not know the source for such information. In my earlier statements I pointed out that BTC and UP both performed switching services on BTC trackage within the Bulkmatic Distribution Center. The BTC power was a Pettibone vehicle, and after February 10, 2002, BTC commenced also to utilize a small 1200 HP locomotive unit. (3/2/02, pp. 2-3; 4/30/-02, p. 4). BRC's notice of exemption became effective March 6, 2002, as noted in the Board's decision, but BRC did not lease the locomotive unit to Chicago Heights Switching Company (CHSC) until March 27, 2002, according to the locomotive lease agreement. UP's operations subsequent to April 2, 2002 have been restricted to delivery and pick-up. However, the BTC Pettibone vehicle remains for use in certain situations.

2. BRC Lease of BTC Premises. The Board's decision mentions that Bulkmatic Railroad Corporation (BRC) on January 1, 2002, subleased the entire Bulkmatic Distribution Center from BTC, a change in structure for the transaction from that originally intended in December, 2001.

I am advised that the sublease of the entire premises from BTC to BRC, rather than BRC acquiring only BTC trackage, as originally intended, was motivated by tax considerations for treating the entire industrial site as "railroad operating property" under Illinois law. This appears from revisions to the operating agreement between BRC and Chicago Heights Switching Company (CHSC), (UTU-IL, Ex. 1, p. 6), and was reaffirmed in my discussions with UP management. In my experience, only one shipper has come onto the premises, other than BTC. The single exception was several years ago, where water pipes were unloaded and stored until they were installed for a water line for Chicago water between two villages. BRC and BTC are closely affiliated, and from my viewpoint, are one in the same.

3. Recent Events. I am unaware of any shipper, other than BTC, employing BRC for car switching or any other service at the Bulkmatic Distribution Center subsequent to April 2, 2002. The cars UP crews have received from or delivered to BRC have all been for BTC. Moreover, I am advised that BRC is not shown in the rail industry's list of Open and Prepay Stations, and neither is CHSC (unlike its affiliate Central Illinois Railroad Company).

Industrial switching is common in the Chicago Heights area. Other industries have their own intra-plant rail operations. They are not STB-franchised, and are not serving the public outside

their own plant. I mentioned twelve of these in my prior verified statement, including Transload Services. (4/30/02, p. 5).

4. Employee Effects. The Board faults my statement on loss of overtime pay for failure to identify any employee who may have suffered hardship, or to offer any evidence to support loss of overtime pay resulting from the lease.

In my previous statement of April 30, 2002, I made my estimate of overtime losses and adverse effect, but stated that it was still too soon after April 2, when CHSC commenced operations, to fully quantify the losses with precision. (4/30/02, pp. 6-7).

The employee injury from the BRC lease, and operation by CHSC, is now apparent from the 8-months experience. Beginning with the year 2001, the YCH 53 job made overtime consistently up to and including April 2, 2002, when BRC commenced to serve BTC's track-age. Since April 2, 2002, to the best of my knowledge, the job assignment has made overtime on only one occasion. Some of the UP personnel who worked that job assignment, or were displaced as a result of persons exercising seniority due the loss of overtime for the assignment, and have suffered a reduction of earnings include the following, in addition to myself:

Hill, C.T.  
Gonzales, E.  
Hovenga, C.B.  
Gerloff, R.J.  
Smith, G.T.  
Wilken, W.E.

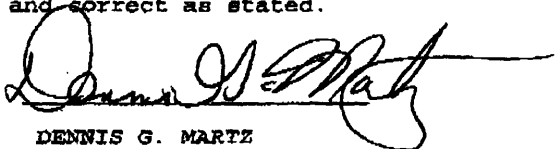
Those adversely affected are not limited to the above-named employees, as there may be others who have not reported their situation to me.

I ask that the BRC notices be rejected or the exemptions  
revoked.

VERIFICATION

STATE OF ILLINOIS )  
COUNTY OF COOK )

Under the penalties of perjury, I affirm that the foregoing  
Further Verified Statement is true and correct as stated.

  
DENNIS G. MARTZ

Dated at  
Chicago Heights, IL  
December 8, 2002