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MAR 8 2004
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March 8, 2004

VIA HAND DELIVERY

The Honorable Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W. Room 711
Washington, DC 20423-0001

Re: Finance Docket No. 34480, Chestnut Ridge Railroad Corp. –
Exemption – Acquisition and Operation of a Line of Railroad
in Carbon County, PA – Chestnut Ridge Railway Co.

Finance Docket No. 34481, Horsehead Corp. – Petition for
Retroactive Exemption – Acquisition and Operation of a Line
of Railroad in Carbon County, PA – Chestnut Ridge Railway Co.

210262

Dear Secretary Williams:

Enclosed for filing please find an original and ten copies of two related
pleadings:

- (1) for filing in the first-referenced docket, please find an original and ten
copies of the Verified Notice of Exemption of Chestnut Ridge Railroad
Corporation. A check in the amount of \$1,400.00 to cover the applicable
filing fee is also enclosed.
- (2) for filing in the second-referenced docket, please find an original and ten
copies of the Petition for Retroactive Exemption of the Horsehead Corpora-
tion. A check in the amount of \$9,400.00 to cover the applicable filing fee
is also enclosed.

An additional copy of each filing is also enclosed. Kindly indicate receipt
and filing by time-stamping these extra copies and returning them to the bearer of this
letter.

Thank you for your attention to this matter.

FILED
MAR - 8 2004
SURFACE
TRANSPORTATION BOARD

2/0262
BEFORE THE
SURFACE TRANSPORTATION BOARD

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In the Matter of)
)
)

HORSEHEAD CORP. - PETITION FOR)
RETROACTIVE EXEMPTION—)
ACQUISITION AND OPERATION OF)
A LINE OF RAILROAD IN CARBON)
COUNTY, PA - CHESTNUT RIDGE)
RAILWAY CO.)

Finance Docket No. 34481

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MAR - 8 2004

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Office of Proceedings
MAR - 9 2004
Part of
Public Record

PETITION FOR RETROACTIVE EXEMPTION

SURFACE
TRANSPORTATION BOARD

The Horsehead Corporation ("HC") respectfully petitions the Surface Transportation Board ("STB" or "Board") pursuant to 49 U.S.C. § 10502 and 49 C.F.R. §§ 1121.1 *et seq.* for a retroactive exemption to authorize its recent acquisition and operation of a 6.6 mile line of railroad in Carbon County, PA, that was formerly operated by the Chestnut Ridge Railway Company ("Railway" or "Seller").

More specifically, HC seeks a limited retroactive exemption to authorize, belatedly, its acquisition of the subject properties on December 23, 2003, and its continued operation of those properties from that date until seven days from the date hereof, when the Notice of Exemption in Finance Docket No. 34480 that is being filed today on behalf of the Chestnut Ridge Railroad Corporation ("CHR"), a newly-formed subsidiary of HC, becomes effective. At that point CHR will take over ownership and operation of the rail properties in question.

As explained below, HC inadvertently failed to seek prior authorization for its acquisition and operation of the line due to the exigencies of an expedited bankruptcy auction sale, coupled with HC's lack of knowledge going into the transaction that the track in question was a common carrier line. The Board has previously granted after-the-fact retroactive exemptions to legitimize transactions that would have been proper subjects for exemption had such relief been sought beforehand, where the applicant has demonstrated that its failure to seek authorization on a timely basis was unintentional and did not prejudice the rights of other parties. *See, e.g.,* Finance Docket No. 32964, *Brotherhood of Maintenance of Way Employees et al. v. Soo Line Railroad et al.* (unprinted decision served December 22, 1998) at 6-7, and cases cited therein at 7 n.15. HC respectfully submits that such relief is appropriate in this case.

Background

Prior to December 23, 2003, **Horsehead Industries, Inc.** ("HHI") and its subsidiaries were the largest zinc producers in the United States and HHI itself was a unique manufacturer and producer of zinc metal, zinc powders and zinc oxides for the United States galvanizing industry as well as the tire and rubber industry. HHI, through its subsidiaries, was also the world leader in recycling inorganic zinc bearing material, including material designated by the U.S. Environmental Protection Agency as hazardous waste, for the steel industry. HHI's properties included a large zinc recycling/production facility at Palmerton, PA, which received rail service via a 6.6-mile railroad line connecting its facility to Norfolk Southern's lines at Palmerton, PA. That railroad line

was operated by HHI's subsidiary, Railway. While HHI's facility provided most of the traffic handled by Railway, Railway also served three other shippers from time to time.¹

Due in large part to a downturn in the market price for zinc in the late 1990's, HHI began experiencing severe negative cash flow. As HHI continued to operate unprofitably, its very survival became threatened, and on August 19, 2002, HHI and several of its subsidiaries (but not Railway) entered bankruptcy reorganization. During 2003, the Debtors' efforts to sell substantially all of their assets failed on a number of occasions, challenging HHI's efforts to preserve jobs for a workforce that exceeded 1,000 individuals. Finally, in October of 2003, the Debtors and their creditors were able to reach a consensual agreement that provided for the sale at auction of the Debtors' assets as a going concern.

The auctioning off of HHI's properties was conducted on an expedited basis due to the dire financial situation facing HHI. It began with an order of the bankruptcy court issued November 21, 2003, directing the sale of HHI's assets to the highest bidder in an auction, and setting December 9, 2003 as the date for the auction hearing to review the bids received and declare the winner of the auction.

Horsehead Corp. is a Delaware corporation formed to purchase substantially all of the assets of HHI. On November 21, 2003, HC was approved by the U.S. Bankruptcy Court (S.D.N.Y.) as the "stalking horse" bidder for substantially all of

¹Those shippers are Ampal, LaRoche Industries, and Prince Manufacturing Company.

the assets of HHI, which included the railroad line owned and operated by HHI's subsidiary, Railway.

On December 12, 2003, following the sale order (*i.e.*, auction) hearing, the bankruptcy court approved the sale of the assets to HC as winning bidder. Pursuant to the sales contract approved by the court, the closing was to take place no later than the eleventh day following the sale order, or December 23, 2003, just 32 days after issuance of the original order directing the auction to proceed.

On December 23, 2003, HC consummated its purchase of HHI's assets, including Railway's 6.6 mile railroad track and associated equipment, in accordance with the bankruptcy court's order. The purpose of the transaction was to continue HHI's core business operations with a much-needed infusion of new capital investment. Prior to the bankruptcy sale, HHI was in danger of having to shut down its operations, and that closure would almost certainly have forced the suspension of railroad operations by Railway, which depended on the traffic generated by its corporate parent's zinc recycling/production facility. HC intends to keep the Palmerton zinc facility in operation and to continue the operation of the railroad line that serves the zinc facility.

As noted, the auctioning off of HHI's properties was conducted on an expedited basis. During that 32-day process, HC and other potential bidders had to complete their "due diligence" examinations of the extensive industrial properties being auctioned off, and had to formulate their bids, at a greatly accelerated pace. By the time it submitted its bid, HC had become aware that the properties being sold included the 6.6-

mile railroad track in question, and that the nominal transferor of that railroad property was a corporate subsidiary of the bankrupt, Railway. HC was also aware that the track was used to serve HHI's zinc recycling/production facility. However, HC was NOT aware that the track might be a common carrier line subject to the jurisdiction of the Board.²

Following HC's acquisition of the HHI properties, its continuing review of the properties and their operations led it to investigate the precise legal status of the railroad properties it had taken over as part of the acquisition. During that investigation, HC learned that Railway had in the past been regarded as a common carrier subject to the former Interstate Commerce Commission's ("ICC's") jurisdiction,³ and that inasmuch as it had apparently never obtained abandonment or discontinuance authority, its properties remained subject to the jurisdiction of the STB as the ICC's successor. At that point, HC directed its counsel to seek all requisite authorizations from this Board for its December 23 acquisition of Railway's properties, and it created a separate new subsidiary, CHR, to own and operate the railroad properties on a prospective basis as a Class III common carrier railroad. In accordance with that instruction, a Notice of Exemption is being filed on behalf of CHR contemporaneously herewith.⁴

²Neither HC nor its affiliates, nor the management personnel of HC and its affiliates, had any prior involvement with the railroad industry.

³Railway had been created in 1898 and had been wholly owned since 1901 by corporate predecessors of HHI.

⁴ Prior to its acquisition of the properties of HHI (and Railway), HC was not a

Request for Exemption

It is clear that if HC had realized seven days prior to December 23 that its acquisition of the former Railway properties required the prior approval of the STB, it could have filed a Notice of Exemption covering the acquisition then, either in its own name or in the name of a subsidiary such as CHR, and the entire transaction would have been exempt from the start. In other words, the Board has in effect determined, through its adoption of the 49 C.F.R. § 1150.31 Class Exemption for acquisitions by new carriers, that regulation of such acquisitions is not needed.

Of course HC did not file such a Notice on a timely basis. However, its unintentional delay in bringing this matter before the STB has not prejudiced anyone: HC has continued during this interim period to operate the railroad properties in the same manner as Railway did, providing the same service for shippers, charging the same rates, and using the same employees, as Railway had before December 23. In other words, HC's brief stewardship over the railroad operations has been essentially invisible to the public. Moreover, in the unlikely event that someone would have wished to challenge HC's acquisition of the railroad operation, they can still do so now, using the same mechanism – a petition to revoke – that would have been available to them if a Notice of Exemption had been filed in December.

railroad and was not affiliated with any railroad. Following HC's transfer of the former Railway properties to CHR in seven days, HC will once again not be a railroad, although of course it will control a railroad. Accordingly, no continuance in control or other ancillary filing is required to legitimize HC's ownership and control of CHR, and CHR's ownership and operation of the rail properties at issue, on a prospective basis.

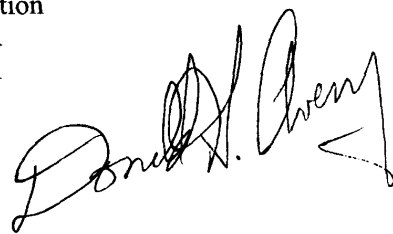
HC regrets its oversight, and apologizes to the Board, for its failure to seek and obtain prior authorization to acquire the railroad properties in question. HC requests that, in light of the circumstances explained above, and after due consideration, the Board act favorably on this petition for retroactive exemption, and thereby authorize *nunc pro tunc* its acquisition and operation of the railroad from December 23, 2003 through the date CHR's Notice of Exemption in Finance Docket No. 34480, filed herewith, becomes effective.

Petitioner so prays.

Respectfully submitted,

By: Ali Alavi
Vice President & General
Counsel
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Of Counsel:

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Dated: March 8, 2004

Attorneys for Petitioner Horsehead
Corporation

VERIFICATION

COUNTY OF CARBON)
) SS:
COMMONWEALTH OF PENNSYLVANIA)

ROBERT L. SUNDERMAN, being duly sworn, deposes and says that he has read the foregoing document, knows the contents thereof, and that the same are true as stated to the best of his knowledge, information, and belief.

Robert L Gundersen

Subscribed and sworn to before me
this 25th day of February, 2004.

Paula L. Depperbrock
Notary Public in and for the
Commonwealth of Pennsylvania

My Commission expires 2/18/2006

