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BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings
December 22, 2023
Part of
Public Record

FD 36750

EMPIRE RIVER RAIL LLC
— OPERATION EXEMPTION —
IN BROOKE COUNTY, WV

**VERIFIED NOTICE OF EXEMPTION OF EMPIRE RIVER RAIL LLC
PURSUANT TO 49 C.F.R. PART 1150, SUBPART D**

Robert A. Wimbish
Fletcher & Sippel LLC
29 North Wacker Drive, Suite 800
Chicago, Illinois 60606-3208
(312) 252-1500
rwimbish@fletcher-sippel.com

ATTORNEY FOR EMPIRE RIVER RAIL LLC

Dated: December 22, 2023

FILED
December 22, 2023
SURFACE
TRANSPORTATION BOARD

FEE RECEIVED
December 22, 2023
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BEFORE THE
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FD 36750

EMPIRE RIVER RAIL LLC
— OPERATION EXEMPTION —
IN BROOKE COUNTY, WV

**VERIFIED NOTICE OF EXEMPTION OF EMPIRE RIVER RAIL LLC
PURSUANT TO 49 C.F.R. PART 1150, SUBPART D**

Empire River Rail LLC (“ERRA”), a non-carrier controlled by Empire Diversified Energy, Inc. (“Empire”),¹ hereby files this notice of exemption under 49 C.F.R. part 1150, subpart D, to assume common carrier operations over certain railroad trackage (the “Track”) located along the Ohio River in Brooke County, West Virginia. The subject Track is part of a logistics facility currently owned by Empire Trimodal Terminal LLC d/b/a Port of West Virginia (the “Port of West Virginia”) – also an Empire non-carrier holding.

In accordance with the requirements of 49 C.F.R. § 1150.33, ERRA submits the following information:

Name and Address of Applicant: 49 C.F.R. § 1150.33(a)

The full name and address of the applicant herein is as follows:

Empire River Rail LLC
1400 Main Street
Follansbee, WV 26037

¹ Empire currently has no rail carrier holdings.

Applicant's Representative: 49 C.F.R. § 1150.33(b)

ERRA's representative to whom correspondence regarding this transaction should be sent is as follows:

Robert A. Wimbish
Fletcher & Sippel LLC
29 North Wacker Drive, Suite 800
Chicago, Illinois 60606-3208
(312) 252-1504
rwimbish@fletcher-sippel.com

Statement Concerning Agreement: 49 C.F.R. § 1150.33(c)

ERRA and its corporate affiliate, Port of West Virginia, have reached an agreement under which ERRA will commence common carrier railroad service over the Track (described below) and ancillary yard trackage (to be operated as such) located within Port of West Virginia's multi-modal logistics complex.

Operation of the Property: 49 C.F.R. § 1150.33(d)

ERRA will offer common carrier service over the Track on or after the effective date of this exemption. As the service will constitute the entirety of ERRA's railroad common carrier operations, authorization of the commencement of such operations (by way of this notice of exemption) is subject to Board jurisdiction in accordance with *Effingham Railroad Company — Petition for Declaratory Order — Construction at Effingham, Ill.*, Docket No. FD 41986, 2 STB 606, 607 (1997) and *Effingham Railroad Company — Operation Exemption — Line Owned by Agracel*, FD 33468 (STB served Sep. 24, 1997), 1 *aff'd United Transp. Union v. United States*, 183 F.3d 606, 614 (7th Cir. 1999).

Summary of the Transaction: 49 C.F.R. § 1150.33(e)

The Track is part of a Port of West Virginia-owned logistics complex located in Follansbee, along the eastern bank of the Ohio River in West Virginia's Northern Panhandle.² The Port of West Virginia is a privately-owned logistics terminal that boasts barge, warehousing, truck, transloading, and railroad service capabilities. The Port of West Virginia, in cooperation with its parent company, Empire, has chosen to arrange for the commencement of common carrier operations for the first time within the logistics complex. (None of the trackage within the Port of West Virginia is currently a Board-regulated line of railroad.) To that end, the Port of West Virginia has negotiated an operating agreement with ERRA that extends to ERRA the exclusive right to conduct common carrier service.

The Track consists of roughly 0.464 miles of main line track and an additional 4.08 miles (approximately) of connecting ancillary (yard) trackage, all of which will fall within the scope of the Board's jurisdiction upon the commencement of ERRA common carrier operations.³ ERRA's prospective main line extends from a point of connection with Norfolk Southern Railway Company's ("NSR") Wells Industrial Track at a switch located at approximately NSR milepost 3.6, and extending northward from there roughly .464 miles (2,446 feet). The Track has not been deployed in common carrier service previously, and thus has no mileposts.

ERRA intends to commence common carrier service on or after the effective date of the subject class exemption.

² See <https://portofwestvirginia.com>

³ See, e.g., *Wheeling & Lake Erie Railway Company – Operation Exemption – Valley Line in Harrison and Jefferson Counties, Ohio*, FD 36010 (STB served Sep. 8, 2016); *Arkansas Midland Railroad Company, Inc. – Operation Exemption – In Jacksonville, AR*, FD 35152 (STB served Sep. 12, 2008).

Map: 49 C.F.R. § 1150.33(f)

See Map attached as Exhibit A.

Certification: 49 C.F.R. § 1150.33(g)

A Certificate in compliance with the provisions of 49 C.F.R. § 1150.33(g) is attached as Exhibit B.

Interchange Commitments: 49 C.F.R. § 1150.33(h)

ERRA will not be contractually limited in its ability to interchange of traffic with any third-party connecting carrier. See Exhibit B. As matters currently stand, ERRA's only interline connection is NSR.

Advance Notice: 49 C.F.R. § 1150.32(e)

To the extent relevant here,⁴ ERRA's projected annual revenue is not expected to exceed \$5 million, and, accordingly, the advance notice requirements of 49 C.F.R. § 1150.32(e) are not applicable to this transaction. See Exhibit B.

Environmental and Historic Preservation Data: 49 C.F.R. § 1105

Under 49 C.F.R. § 1105.6(c)(2), the proposed operation of the Track is exempt from environmental reporting requirements. ERRA's proposed common carrier operations will not result in significant changes in operations, *i.e.*, changes that exceed the thresholds established in 49 C.F.R. § 1105.7(e)(4) or (5).

⁴ See, e.g., *Wheeling; R.J. Corman Railroad Company/Memphis Line – Operation Exemption – Line in Montgomery and Stewart Counties, TN*, (STB served Jan. 18, 2000) (for the proposition that the advance notice requirements of Section 1150.33(g) are not applicable to a transaction involving the commencement of common carrier operations over a track segment that currently is beyond the scope of the Board's jurisdiction).

Under 49 C.F.R. § 1105.8(b)(1), ERRA's proposed operation of the Line also is exempt from historic preservation reporting requirements, as the proposed change of operators is not expected to impact historic structures along the Line that are 50 years old or older.

Caption Summary: 49 C.F.R. § 1150.34

A caption summary in appropriate form is attached as Exhibit C.

Respectfully submitted,

By: /s/ *R. A. Wimbish*

Robert A. Wimbish
Fletcher & Sippel LLC
29 North Wacker Drive, Suite 800
Chicago, Illinois 60606-3208
(312) 252-1500
rwimbish@fletcher-sippel.com

ATTORNEY FOR EMPIRE RIVER RAIL LLC

Dated: December 22, 2023

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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IN BROOKE COUNTY, WV**

EXHIBIT A

MAP

EXHIBIT A

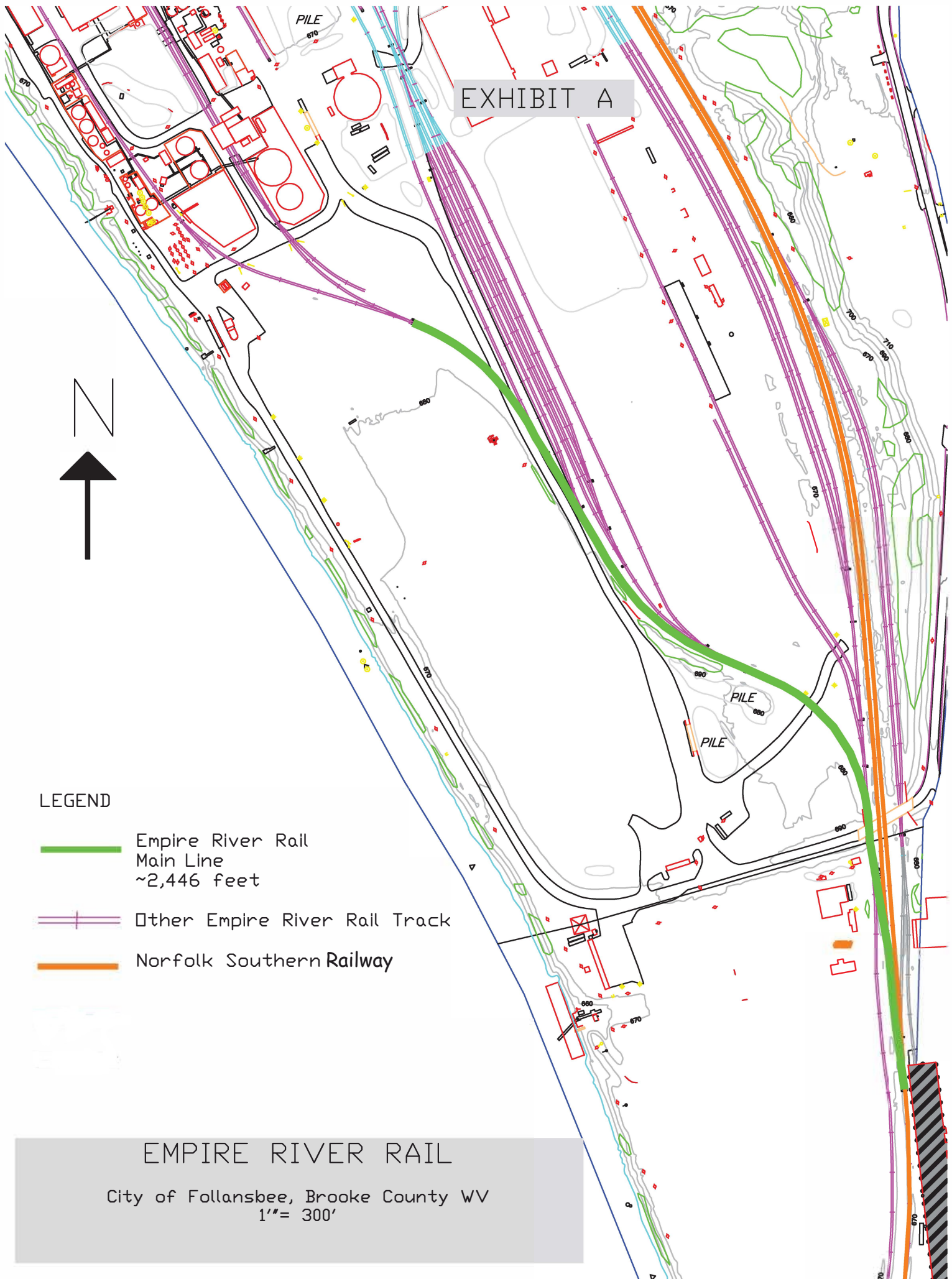


LEGEND

-  Empire River Rail Main Line
~2,446 feet
-  Other Empire River Rail Track
-  Norfolk Southern Railway

EMPIRE RIVER RAIL

City of Follansbee, Brooke County WV
1" = 300'



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EXHIBIT B

CERTIFICATION

CERTIFICATION

I, Frank J. Rosso, hereby certify that the projected annual rail revenue of Empire River Rail LLC (“ERR”) is not projected to exceed \$5 million, and will not result in the creation of a Class II or Class I rail carrier under the provisions of 49 C.F.R. § 1201 (1-1). I further certify that ERR is not contractually limited in its ability to interchange of traffic with any third-party connecting carrier.



Frank J. Rosso
Chief Executive Officer, Empire River Rail LLC

Dated: December 22, 2023

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EXHIBIT C

FEDERAL REGISTER NOTICE

SURFACE TRANSPORTATION BOARD

NOTICE OF EXEMPTION

FD 36750

EMPIRE RIVER RAIL LLC
— OPERATION EXEMPTION —
IN BROOKE COUNTY, WV

Empire River Rail LLC (“ERRA”), a non-carrier, has filed a Verified Notice of Exemption under 49 C.F.R. § 1150.31, et seq., to initiate common carrier operations over certain currently-private track (the “Track”) located in the City of Follansbee, Brooke County, West Virginia, extending from a point of connection with Norfolk Southern Railway Company’s (“NSR”) Wells Industrial Track at approximately NSR milepost 3.6, and extending roughly northward for 0.465 miles (2446 feet).

ERRA expects to commence common carrier operations over the Track on or after the effective date of this exemption.

Comments must be filed with the Board and served on:

Robert A. Wimbish
Fletcher & Sippel LLC
29 North Wacker Drive, Suite 800
Chicago, Illinois 60606-3208
(312) 252-1500
rwimbish@fletcher-sippel.com

This Notice is filed under 49 C.F.R. § 1150.31. If this Notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. § 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

Dated: January __, 2024

By the Board

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IN BROOKE COUNTY, WV**

VERIFICATION

VERIFICATION

I, Frank J. Rosso, hereby verify under penalty of perjury that – (a) I am the Chief Executive Officer of Empire River Rail LLC (“ERRA”); (b) I have read the foregoing Notice of Exemption, know the facts asserted therein, and that the same are true as stated to the best of my knowledge, information, and belief; and (c) I am authorized to make this verification on behalf of ERRA.



Frank J. Rosso

Dated: December 22, 2023