

**ORIGINAL**

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November 26, 2002

Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Suite 700  
Washington, DC 20423



RE: Finance Docket No. 34282, *Western Illinois Railway Company*— > 206720  
*Acquisition Exemption—Toledo, Peoria & Western Railway Corporation*  
Finance Docket No. 34283, *RailAmerica, Inc., et al.—Corporate Family* > 206721  
*Reorganization Exemption—Western Illinois Railway Company*

Dear Secretary Williams:

Enclosed for filing are the original and ten copies of a Motion to Dismiss the two above-referenced Notice of Exemption documents and three diskettes with the file Motion.doc. Please time and date stamp the extra copy of this letter and the Motion to Dismiss and return them with our messenger.

If you have any questions, please contact me.

Sincerely yours,

Louis E. Gitomer  
Attorney for RailAmerica, Inc., et al.

Enclosures

**ENTERED**  
**Office of Proceedings**

**NOV 26 2002**

**Part of**  
**Public Record**

**ORIGINAL**

BEFORE THE  
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34282



206720

WESTERN ILLINOIS RAILWAY COMPANY —ACQUISITION EXEMPTION—TOLEDO,  
PEORIA & WESTERN RAILWAY CORPORATION

FINANCE DOCKET NO. 34283

206721

RAILAMERICA, INC., ET AL.—CORPORATE FAMILY REORGANIZATION  
EXEMPTION—WESTERN ILLINOIS RAILWAY COMPANY

MOTION TO DISMISS

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(202) 638-3307

Attorneys for: RailAmerica, Inc., et al.

Dated: November 26, 2002

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BEFORE THE  
SURFACE TRANSPORTATION BOARD



FINANCE DOCKET NO. 34282

WESTERN ILLINOIS RAILWAY COMPANY —ACQUISITION EXEMPTION—TOLEDO,  
PEORIA & WESTERN RAILWAY CORPORATION

FINANCE DOCKET NO. 34283

RAILAMERICA, INC., ET AL.—CORPORATE FAMILY REORGANIZATION  
EXEMPTION—WESTERN ILLINOIS RAILWAY COMPANY

MOTION TO DISMISS

On November 20, 2002 the following verified notices of exemption were filed with the Surface Transportation Board: (1) in Finance Docket No. 34282, *Western Illinois Railway Company —Acquisition Exemption—Toledo, Peoria & Western Railway Corporation* (the “Acquisition Notice”), Western Illinois Railway Company (“WIRC”), a noncarrier, filed a Verified Notice of Exemption under 49 C.F.R. §1150.31 with the Surface Transportation Board (the “Board”) to permit WIRC to acquire from Toledo, Peoria & Western Railway Corporation (“TP&W”) the non-real estate assets of a 71.5-mile rail line between La Harpe, milepost 194.5, and Peoria, milepost 123.0, in Hancock, McDonough, Fulton, and Peoria Counties, IL (the “Line”); and (2) in Finance Docket No. 34283, *RailAmerica, Inc., Et Al.—Corporate Family*

*Reorganization Exemption—Western Illinois Railway Company* (the “Control Notice”), RailAmerica, Inc. (“RailAmerica”) and Palm Beach Rail Holdings, Inc. (“Palm Beach”) have filed a Verified Notice of Exemption under 49 C.F.R. §1180.2(d)(3) with the Board to permit RailAmerica and Palm Beach to continue-in-control of WIRC once it becomes a rail carrier. WIRC, RailAmerica, and Palm Beach (jointly referred to as “Petitioners”) file this Motion to Dismiss (1) the Acquisition Notice on the grounds that the acquisition described in the Acquisition Notice is not subject to the Board’s jurisdiction and consummation of the involved transaction will not render the WIRC a common carrier; and (2) the Control Notice on the grounds that since WIRC did not become a rail carrier as a result of the acquisition of the Line, then the continuance-in-control of WIRC by RailAmerica and Palm Beach is not subject to the Board’s jurisdiction.

#### **STATEMENT OF FACTS**

WIRC has agreed with TP&W to acquire the physical non-real estate assets of the Line (the “Assets”) from TP&W. TP&W has retained the permanent right to operate over the Assets, the common carrier obligation, and the right to maintain and renew the rail line.<sup>1</sup> TP&W continues to own the real estate underlying the Line. WIRC will not acquire the obligation or right to conduct common carrier operations. WIRC does not have and does not intend to acquire the employees or equipment necessary to fulfill the common carrier obligation. Once the sale has been completed, TP&W will operate over the Line.

The Agreement for Sale of Track Material (the “Agreement”) between TP&W and WIRC

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<sup>1</sup> TP&W has also retained the right to require WIRC to transfer the Assets in the event an offer of financial assistance is made under 49 U.S.C. § 10904 and TP&W either agrees to or is required to sell the Line to the offeror.

is attached as Exhibit A.

### ARGUMENT

It is well established that the acquisition of a rail line by a noncarrier requires approval by the Board under 49 U.S.C. § 10901. *Common Carrier Status of States, State Agencies*, 363 I.C.C. 132, 133 (1980), *aff'd sub nom., Simmons v. Interstate Commerce Commission*, 697 F. 2d 326 (D.C. Cir. 1982). *See also United States v. California*, 297 U.S. 175 (1936); *Iowa Term. R. Co. Acquisition and Operation*, 312 I.C.C. 546, 549 (1961). The Board, as well as its predecessor agency, the Interstate Commerce Commission ("ICC"), however, consistently recognized the distinction between the acquisition of a rail line by a noncarrier accompanied with the common carrier rights and obligations to provide rail service – a transaction subject to the Board's jurisdiction – and the mere acquisition of all or part of the physical assets of the rail line where the common carrier rights and obligations are retained by the selling railroad or transferred to another entity – a transaction outside of the Board's jurisdiction. *Santa Clara Valley Transportation Authority—Acquisition Exemption—Union Pacific Railroad Company*, STB Finance Docket No. 34094 (STB served November 16, 2001) ("*Santa Clara*"); *Maine, DOT—Acq. Exemption, Me. Central R. Co.*, 8 I.C.C. 2d 835 (1991) ("*State of Maine*"); and *Utah Transit Authority—Acquisition Exemption—Line of Union Pacific Railroad Company*, ICC Finance Docket No. 32186 (ICC served April 14, 1993) ("*Utah Transit*").

A "rail carrier" is defined as a "person providing common carrier railroad transportation for compensation...." 49 U.S.C. § 10102 (5). A "railroad" is defined to include "the road used by a rail carrier and owned by it or operated under an agreement...." 49 U.S.C. § 10102 (6).

Consequently, a rail carrier or a railroad subject to the Board's jurisdiction is an entity that has assumed the common carrier obligation to provide rail freight service over a rail line. In other words, a rail carrier is not necessarily the owner of the rail line nor is the owner of a rail line necessarily a rail carrier. The acquirer of a rail line becomes a rail carrier only if it holds itself out to provide common carrier rail service and has the ability to provide common carrier rail service. See *Status of Bush Universal, Inc.*, 342 I.C.C. 550, 564 (1973); *State of Okla. Ex Rel., Dept. of Highways, Abandonment*, 324 I.C.C. 666 (1965).

In *State of Maine*, the State of Maine, acting by and through its Department of Transportation, filed a notice of exemption to acquire the physical assets and underlying real property of a rail line from Maine Central Railroad Company ("MEC"). MEC retained a permanent easement for continued common carrier freight operations and the right to maintain, operate, and renew the rail line. In dismissing the notice of exemption for lack of jurisdiction, the ICC noted that it had jurisdiction over the acquisition of a rail line only where the common carrier rights and obligations were being transferred, in whole or in part. In concluding that it had no jurisdiction over the transaction, the ICC found that MEC retained the common carrier obligation and that the transaction did not impair MEC's ability to fulfill its continuing common carrier obligation. *State of Maine* at 836-7.

In a long line of cases, the ICC and the Board reached the same result. See e.g., *South Orient Railroad Company, LTD. -- Acquisition and Operation Exemption -- Line of The Atchison, Topeka and Santa Fe Railway Company*, ICC Finance Docket No. 31971 (ICC served September 2, 1992) [transfer of rail line assets to a state transit authority found not subject to ICC

jurisdiction where common carrier rights and obligations were transferred to another entity]; *Utah Transit* [transfer of rail line assets to a state transit authority found not subject to ICC jurisdiction where common carrier rights and obligations were transferred to a third party freight operator]; *Metro. Transit Auth. of Harris County, TX -- Declar. Order*, 9 I.C.C. 2d 559 (1993) [transfer of rail line assets and local commuter operating rights to metropolitan transit agency found not subject to ICC jurisdiction where common carrier rights and obligations were retained by selling railroad]; *Centex Rural Transportation District -- Acquisition Exemption -- Certain Assets of Cen-Tex Rail Link, LTD.*, ICC Finance Docket No. 32496 (ICC served August 1, 1994) [transfer of rail assets to a state entity not subject to ICC jurisdiction where selling railroad retained the common carrier rights and obligations]; *Los Angeles County Transportation Commission -- Petition for Exemption -- Acquisition from Union Pacific Railroad Company*, STB Finance Docket No. 32374 (STB served July 23, 1996) ("*Los Angeles County*") [sale and lease of rail line and grant of trackage rights for commuter operations to local transit authority not subject to the Board's jurisdiction where selling rail carrier retained common carrier rights and obligations over the line]; *Sacramento-Placerville Transportation Corridor Joint Powers Authority -- Acquisition Exemption -- Certain Assets of Southern Pacific Transportation Company*, STB Finance Docket No. 33046 (STB served October 28, 1996) [transfer of rail line assets to a state agency for passenger rail service found not subject to the Board's jurisdiction where selling rail carrier retained the common carrier rights and obligations to provide freight rail service over the line]; *Southwest Ohio Regional Transit Authority -- Acquisition Exemption -- Certain Assets of the Indiana & Ohio Railway Company*, STB Finance Docket No. 33524 (STB

served December 24, 1997) [acquisition of rail line assets by a political subdivision of a State found not subject to the Board's jurisdiction where selling rail carrier retained the common carrier rights and obligations to provide freight rail service over the rail line]; and *City of Charlotte, North Carolina -- Acquisition Exemption -- Certain Assets of the North Carolina Railroad Company*, STB Finance Docket No. 33529 (STB served February 24, 1998) ("*City of Charlotte*") [acquisition of physical assets of rail line by city found not subject to Board jurisdiction where selling railroad retained common carrier rights and obligations which were expected to be abandoned].

The current transaction between WIRC and TP&W is similar to the transactions described above. As in the above transactions, WIRC will not hold itself out as a common carrier performing freight rail service, nor will it acquire the ability to do so. TP&W has retained a permanent exclusive right to perform the common carrier freight obligation over the Line. Under the Agreement, TP&W will be responsible for performing the railroad operations after the sale. TP&W will retain all of the common carrier obligations and will be required to seek discontinuance and abandonment authority from the Board if it ever decides to terminate all or a portion of the service. Instead of owning the Assets, TP&W will retain the right to operate over them and sell them in certain limited conditions as agent for WIRC pursuant to the Agreement.

In summary, *State of Maine* and its progeny establish that an entity may acquire all or part of the physical assets of a rail line without becoming a rail carrier as long as the selling carrier retains, or another operator obtains, the common carrier rights to operate the line and the transaction does not interfere with or impede the ability of the operator to provide rail service.

WIRC has simply acquired the Assets on the Line. In acquiring the Assets, WIRC is not holding itself out as willing or able to provide freight rail service to the public on the Line. TP&W will operate over the Line under the Agreement. WIRC has neither the desire nor the capability of providing common carrier rail service over the Line.

Moreover, TP&W's ability to continue meeting the common carrier obligations will not be impaired by the involved transaction. Under the Agreement, TP&W retains the exclusive and unrestricted right to provide rail freight service over the Line.

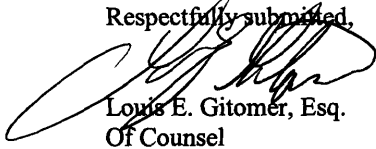
Since WIRC will not become a rail carrier as a result of its acquisition of the Assets, RailAmerica and Palm Beach will not continue to control a new carrier. Therefore, their control of WIRC does not require Board approval under 49 U.S.C. § 11323(a)(5) and the Control Notice should be dismissed for lack of jurisdiction.

#### CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Board dismiss for lack of jurisdiction both the Acquisition Notice filed by WIRC on November 20, 2002 and the Control Notice filed by RailAmerica and Palm Beach on November 20, 2002.

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Respectfully submitted,



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Attorneys for: RailAmerica, Inc., et al.

Dated: November 26, 2002

**EXHIBIT A**

**AGREEMENT FOR  
SALE OF TRACK MATERIAL  
OF  
TOLEDO, PEORIA & WESTERN RAILWAY CORPORATION  
TO  
WESTERN ILLINOIS RAILWAY COMPANY**

This Agreement, effective of this 20<sup>th</sup> day of November, 2002, is entered into by and between the Toledo Peoria & Western Railway Corporation, a New Jersey corporation, (hereinafter referenced as "Seller"), and Western Illinois Railway Company, a Delaware corporation (hereinafter referenced as "Buyer").

WHEREAS, the Surface Transportation Board ("STB") in a Decision served on October 17, 2002 in FD 33995 directed SF&L Railway, Inc. to Re-convey to Seller and Seller to accept that line of railroad extending between MP 123.0 near Peoria, IL and MP 194.5 near LaHarpe, IL, including the track, track materials and related track structures and facilities and the easement for the underlying trackage, together with other rights, obligations and assets; and

WHEREAS, the Buyer desires to purchase said track assets and lease them to Seller to provide rail common carrier service and Seller desires to sell said track assets and lease them back to provide exclusive rail common carrier service:

NOW THEREFORE, Buyer and Seller agree as follows:

1. Description of Assets Sold.

(a) Seller shall convey to Buyer on the Closing Date by a Bill of Sale delivered by Seller to Buyer, all of Seller's interest in that line of railroad from MP 123.0 near Peoria to MP 194.5 near LaHarpe including, without limitation, the road bed, rails, ties, tie plates, rail anchors and ballast, as well as all switches, crossings, crossing signals, bridges, bridge abutments, structures, fixed communications and signal equipment, parking and storage areas, depots, yards, shops, buildings, spur tracks, side tracks, sidings,

connections, other facilities, and all other fixtures and improvements situate thereon (together, "Track Materials") excluding: (i) any and all motor vehicles, locomotives, rollingstock, maintenance equipment, radios' end of train devices ("ETD") or computer equipment; (ii) any ownership interest in the underlying or adjacent rail corridor real estate; and (iii) Seller's franchise to operate as a common carrier railroad. The form of the Bill of Sale is attached as Exhibit A. Seller shall retain as agent of Buyer, all Agreements affecting the Track Materials and railroad customers. It is understood that public crossings in Illinois are determined by the Illinois Commerce Commission (ICC) orders and not by contract. All existing ICC orders on the Rail Corridor continue to apply.

2. Consideration for the Sale.

In consideration for Seller's sale to Buyer of its interests in the Track Material, Buyer agrees to all of the following:

(a) To accept all assets comprising the Rail Line conveyed at Date of Transfer of Operations "AS IS, WHERE IS" and "with all faults", as provided in Paragraph 5 hereof.

(b) To pay to Seller on the Closing Date Five Million Seven Hundred Thousand Dollars (\$5,700,000) in the form of a promissory note, less the dollar amount of any encumbrances on the Track Materials plus other good and valuable consideration.

(c) To grant Seller the right to sell the Track Materials on behalf of Buyer if Seller is authorized to abandon the rail line between MP 123.0 near Peoria to MP 194.5 near LaHarpe and an offer of financial assistance in made under 49 U.S.C. § 10904, and either Seller voluntarily accepts the offer of financial assistance or Seller is required to accept the offer of financial assistance by the STB.

3. Governmental Approval.

Buyer shall have obtained STB authority or an exemption for the proposed transaction or a ruling that the STB does not have jurisdiction over the transaction.

4. Representations and Warranties.

(a) Seller hereby represents and warrants to Buyer, and Buyer's successors and assignees, the following facts, as of the date of this Agreement and as of the Closing Date:

- (1) Seller is a corporation duly organized, validly existing, and in good standing under the laws of the State of New Jersey, and is qualified to do business in the State of Illinois;
- (2) Seller has the corporate power and authority to enter into this Agreement and carry out its obligations under this Agreement;
- (3) The execution, delivery and performance of this Agreement have been duly authorized and approved by all necessary corporate actions of Seller, and no further corporate proceedings of Seller are required to complete the transactions covered by this Agreement;
- (4) All of Seller's obligations set forth in this Agreement constitute legal, valid and binding obligations of Seller which are enforceable against Seller in accordance with their terms, except to the extent enforcement may be limited by bankruptcy, insolvency or reorganization law
- (5) There is no provision in the Certificates of Incorporation or by-laws of Seller which prohibits the execution of this Agreement or consummation of the transactions covered by this Agreement.
- (6) The negotiations related to this Agreement have been performed by Seller on its own behalf, without intervention of any agent or other person, so that no party has a valid claim on this basis for any finder's fee, brokerage commission, or other similar payment in connection with any of the transactions included in this Agreement;
- (7) Seller has duly filed with the appropriate agencies of Federal State, and appropriate local governments or political subdivisions, all tax

returns and report required to be filed; Seller either has paid in full, or is agreeable to paying in full as finally determined, all taxes, interest, penalties, assessments or deficiencies which are due for the period up to the date of Transfer of Operations;

- (8) As of the date hereof, to Seller's knowledge, except for STB Docket No. AB-448 (Sub-No. 2X) and STB FD Nos. 33995 and 33996, there is no pending or threatened litigation or arbitration proceeding, or administrative proceeding or investigation, against or affecting the Track Material; and
- (9) No representation or warranty by Seller in this Agreement contains any untrue statement of a material fact, nor omits any material fact that is necessary to make any representation or warranty not materially misleading.

(b) Buyer hereby represents and warrants to Seller, and Seller's successors and assignees, the following facts as of the date of this Agreement and as of the Closing Date:

- (1) Buyer is a corporation duly organized, validly existing, and in good standing under the laws of the State of Delaware, and is qualified to do business in the State of Illinois;
- (2) Buyer has the corporate power and authority to enter into this Agreement and carry out its obligations under this Agreement;
- (3) The execution, delivery and performance of this Agreement have been duly authorized and approved by all necessary corporate actions of Buyer, and no further corporate proceedings of Buyer are required to complete the transactions covered by this Agreement;
- (4) All of Buyer's obligations set forth in this Agreement constitute legal, valid and binding obligations of Buyer which are enforceable against Buyer in accordance with their terms, except to the extent

enforcement may be limited by bankruptcy, insolvency or reorganization law

- (5) There is no provision in the Certificates of Incorporation or by-laws of Buyer which prohibits the execution of this Agreement or consummation of the transactions covered by this Agreement.
- (6) The negotiations related to this Agreement have been performed by Buyer on its own behalf, without intervention of any agent or other person, so that no party has a valid claim on this basis for any finder's fee, brokerage commission, or other similar payment in connection with any of the transactions included in this Agreement;
- (7) Buyer is not a common carrier in the United States nor is it a Class III railroad as classified by the STB.
- (8) As of the date hereof to Buyer's knowledge, except for STB Docket No. AB-448 (Sub-No.2) and STB Finance Dockets Nos. 33995 and 33996, there is no pending or threatened litigation or arbitration proceeding, or administrative proceeding or investigation, against or affecting the properties or assets comprising the Rail Line; and
- (9) No representation or warranty by Buyer in this Agreement contains any untrue statement of a material fact, nor omits any material fact that is necessary to make any representation or warranty no materially misleading.

5. Inspection and Condition of Track Material.

SELLER HEREBY DISCLAIMS ANY REPRESENTATION OR WARRANTY, WHETHER EXPRESS OR IMPLIED, AS TO THE DESIGN OR CONDITION OF THE TRACK MATERIAL, ITS MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE, THE QUALITY OF THE MATERIAL OR WORKMANSHIP

OF THE TRACK MATERIAL, OR ITS CONFORMITY TO ITS INTENDED USES. SELLER SHALL NOT BE LIABLE TO BUYER FOR ANY INCIDENTAL OR CONSEQUENTIAL DAMAGES (INCLUDING STRICT LIABILITY IN TORT) WITH RESPECT TO THE DESIGN, CONDITION, QUALITY, SAFETY, MERCHANTABILITY, OR FITNESS FOR ANY PARTICULAR PURPOSE, OF THE PROPERTIES, OR THE CONFORMITY OF THE TRACK MATERIAL TO ITS INTENDED USES. SELLER OFFERS, AND BUYER ACCEPTS, THE RAIL LINE IN "AS IS, WHERE IS" AND "WITH ALL FAULTS" CONDITION, AND SUBJECT TO ALL LIMITATIONS ON SELLER'S RIGHTS, INTEREST, AND TITLE TO THE TRACK MATERIAL.

6. Closing Date.

(a) The Closing Date shall occur after Buyer has obtained STB authority for its purchase or a ruling that the STB does not have jurisdiction over the transaction and immediately after Seller receives the reconveyance of the Track Material from SF&L Railway, Inc.

(b) On the Closing Date, Seller shall deliver to Buyer the following executed documents:

- (1) An executed Bill of Sale in the form of Exhibit A; and
- (2) A list of Operating Agreements in the form of Exhibit C; and

(c) On the Closing Date, Buyer shall deliver to Seller:

- (1) The Purchase Price.

7. Obligations are Continuing.

The representations, warranties and obligations of Buyer and Seller in this Agreement are continuing and survive the Closing Date. Terms of continuing obligations in this Agreement are subject to amendment only by a written contract signed by both Buyer and Seller, or their respective successors or assignees.

8. Applicable Law.

This Agreement shall be governed by and construed in accordance with the laws of the State of Illinois.

9. Effect of Waiver.

Any waiver by either Buyer or Seller, or failure of either Buyer or Seller to insist upon full and complete performance by Seller or Buyer of its obligations set forth in the Agreement, shall not constitute a waiver or release of such party's right to insist upon full and complete performance of any other obligations in this Agreement, or waiver or release of such party's right to insist upon full and complete performance of the obligations that were waived or not enforced for period prior to, or following, the waiver or failure to insist upon full and complete performance. This Agreement shall be amended or modified only by written agreement signed by the parties hereto.

10. Notices.

All notices and other communications under this Agreement shall be in writing and deemed properly served if delivered by hand to the party addressed or, if mailed, when received by the United States Postal Service in registered or certified mail, postage prepaid, or, if sent by a national overnight service, when received by the carrier service in a prepaid mailer, return receipt requested, addressed as follows:

Seller: Toledo Peoria and Western Railway Corporation  
1990 E. Washington Street  
East Peoria, IL 61611  
Attn: General Manager

Western Illinois Railway Company  
5300 Broken Sound Blvd., N.W. 2<sup>nd</sup> Floor  
Boca Raton, FL 33487  
Attn: Vice President, Treasurer

Either Party hereto may change its address or addressee to which notices are to be given by providing written notice of the change to the other party.

11. Entire Agreement: Integration of Agreement.

This document, together with the Exhibit attached hereto, and a Lease, constitutes the entire agreement between Buyer and Seller relating to this transaction. Any other prior or contemporaneous agreements, understanding, representations or statements, whether oral or written, relating to this transaction are merged herein. The headings and titles to provision to this Agreement are for convenience only, and shall not be deemed to modify or affect the rights or duties of Buyer or Seller. All rights and obligations of Buyer and seller set forth in this Agreement, or in any Exhibit attached hereto, are integral parts of this Agreement. The consideration inducing Buyer and Seller to enter into this Agreement included all of the commitments by Buyer to Seller, and all of the commitments by Seller to Buyer, as set forth in this Agreement, including terms set forth in the Exhibits attached hereto.

IN WITNESS WHEREOF, authorized representatives of the parties have executed this Agreement.

TOLEDO, PEORIA AND WESTERN  
RAILWAY CORPORATION

WESTERN ILLINOIS RAILWAY  
COMPANY

By: \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

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