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July 5, 2006

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By UPS overnight

Vernon A. Williams, Secretary
Surface Transportation Board
Case Control Unit, Suite 713
1925 K Street, N.W.
Washington, DC 20423-0001

Re: Finance Docket No. 33753 (Sub-No. 1), *South Plains Switching, Ltd. Co. -- Acquisition Exemption -- The Burlington Northern and Santa Fe Railway Company*

Dear Mr. Williams:

Enclosed please find an original and 10 copies of Reply In Opposition To Petition To Revoke Exemption, for filing with the Board in the above referenced matter.

Very truly yours,

Tom McFarland

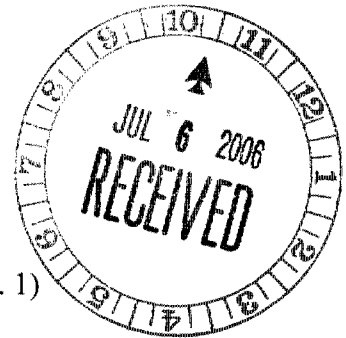
Thomas F. McFarland
*Attorney for South Plains
Switching, Ltd. Co.*

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BEFORE THE
SURFACE TRANSPORTATION BOARD

SOUTH PLAINS SWITCHING, LTD. CO.)
-- ACQUISITION EXEMPTION -- THE) FINANCE DOCKET
BURLINGTON NORTHERN AND) NO. 33753 (SUB-NO. 1)
SANTA FE RAILWAY COMPANY)



REPLY IN OPPOSITION TO
PETITION TO REVOKE EXEMPTION

ENTERED
Office of Proceedings

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Public Record

SOUTH PLAINS SWITCHING, LTD. CO.
P.O. Box 64299
Lubbock, TX 79464-4299

Replicant

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DATE FILED: July 6, 2006

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SURFACE TRANSPORTATION BOARD

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**REPLY IN OPPOSITION TO
PETITION TO REVOKE EXEMPTION**

OVERVIEW

PYCO's Petition is fatally defective in multiple respects. Most fundamentally, PYCO's attempt to use revocation of an acquisition exemption as a substitute for a feeder line application is legally impermissible. The revocation remedy is not designed nor intended for forced sale of rail lines. Revocation does not provide for payment to the rail line owner of the constitutional minimum value of the line at the time of the taking. Revocation without such payment would be unconstitutional where, as here, SAW has very substantially increased the traffic base and revenues on the line in the seven years after acquisition. In addition, revocation does not provide other essential safeguards for a rail line owner that are provided for in the feeder line statute.

It is evident that PYCO's claim of injury relates to inadequate rail service that allegedly occurred for the first time during 2005. PYCO has not claimed injury in relation to SAW's rail service prior to that year, nor in regard to events that occurred at or around the time of SAW's acquisition of its rail lines in 1999. Consequently, PYCO is limited to pursuit of remedies that relate to alleged inadequate rail service in 2005, such as a feeder line application, an application for adverse abandonment, or a complaint seeking adequate rail service. It is not permissible for

PYCO to seek revocation of the acquisition exemption because PYCO's claimed injury does not relate to that exemption.

To the extent that the Petition may nevertheless be directed at the 1999 acquisition exemption, the Petition is barred by laches. The law does not permit a person to sleep on his rights for seven years and only then seek to undo a transaction. If not barred by laches, a long-consummated acquisition cannot be undone except on a strong showing of fraud, mistake or ministerial error. The Petition does not even come close to establishing any of those extraordinary grounds.

PYCO does not have standing to seek revocation of the 1999 acquisition exemption. PYCO was not a party to that exemption. The parties to that exemption -- SAW and The Burlington Northern and Santa Fe Railway Company (it was so long ago that BNSF had a different name) -- have not sought revocation. PYCO has not shown that it was injured as a result of that exemption.

The Petition should be denied because PYCO has failed to sustain its burden of proof under 49 U.S.C. § 10502(d) for revocation of the acquisition exemption.

PYCO's Petition misstates and distorts the facts of this matter. We correct the factual record before setting forth argument on the foregoing points. The corrected facts are verified by Mrs. Delilah Wisener, owner of SAW.

ESSENTIAL FACTS

SAW acquired its rail lines at Lubbock from The Burlington Northern and Santa Fe Railway Company (predecessor of BNSF Railway Company) in 1999. SAW commenced rail operations on July 5, 1999, more than seven years ago. The exemption by which SAW acquired those lines was unopposed.

There were no shipper complaints regarding the adequacy of SAW's rail service prior to 2005. On the contrary, in a shipper survey conducted by SAW in 2004, all of SAW's shippers, including PYCO, rated SAW's rail service at the highest level possible.

Two factors combined to put pressure on PYCO's ability to ship its desired volume of rail traffic in 2005: (1) an unusually large cotton crop in the area; and (2) insufficient private tracks at PYCO's plants to accommodate the resulting increased rail traffic volume. However, SAW substantially eased that pressure by permitting PYCO to operate a trackmobile between PYCO Plant 1 and SAW's yard and on SAW's yard tracks in order to switch and stage PYCO's traffic. In essence, PYCO used SAW's extensive yard tracks as if they were private PYCO tracks. PYCO was able to operate its trackmobile in SAW's yard at all hours of the day and night. Operation of the trackmobile enabled PYCO to originate substantial rail traffic that it would not otherwise have been able to ship due to insufficient private plant trackage.

In November, 2005, at the urging of SAW's transportation consultant, SAW discontinued the practice of permitting PYCO to operate a trackmobile over SAW's tracks. That practice was discontinued for legitimate safety reasons inasmuch as the trackmobile had caused a number of railcar derailments at and near SAW's yard, and PYCO employees were observed operating unsafely on SAW's tracks. Contrary to PYCO's contention, that practice was not discontinued in

retaliation for PYCO's refusal to purchase certain SAW assets at a price asked by SAW.

Regardless of SAW's motivation, PYCO did not have a legal right to operate its equipment over SAW's tracks without SAW's permission.

SAW did not intend to leave PYCO high and dry. When SAW notified PYCO that the privilege of operating a trackmobile on SAW's tracks was being discontinued, SAW also invited representatives of PYCO to a meeting to discuss alternative means of handling the traffic affected by the discontinuance. PYCO declined to attend the meeting. PYCO has attempted to excuse that failure on the ground that it was intimidated by the behavior of SAW's then-President at prior meetings. That excuse is not credible. PYCO could have asked to meet with a different SAW representative, or asked to communicate in writing rather than in person. PYCO did neither. By its own testimony, PYCO is a large and financially powerful corporation. Such a corporate giant should not have been fearful of what is essentially a mom-and-pop switching company.

Instead of negotiating with SAW, PYCO filed a Petition for Alternative Rail Service at the Board. PYCO claimed in that Petition that it needed to ship 24 cars per day from its Plant No. 1. PYCO's private trackage at Plant No. 1 could accommodate only 13 cars at that time. One means of solving that problem was for PYCO to construct additional private trackage. Another was to arrange for a second daily switch and weekend switching. PYCO did not begin construction of more private tracks at Plant 1 until it was too late to enable PYCO to ship its 2005 crop on a timely basis. PYCO never requested that SAW provide a second daily switch or weekend switching. SAW submitted an offer in writing to provide that added switching at no extra charge, but PYCO did not accept that offer, and the Board disregarded it in ordering that

West Texas & Lubbock Railway Company (WTLR) provide alternative rail service to PYCO.

That order has been extended to apply through October 25, 2006.

PYCO has alleged that during the period of alternative rail service, WTLR transported significantly more railcars per day from Plant 1 than SAW transported prior to the alternative rail service. That is neither surprising nor meaningful, however, inasmuch as WTLR performed the additional switching that PYCO did not accept when offered by SAW, and PYCO's additional private tracks were completed.

PYCO filed a Formal Complaint against SAW (Finance Docket No. 34838) alleging that SAW failed to provide adequate rail service to PYCO on reasonable request in violation of 49 U.S.C. § 11101(a), and that SAW violated other statutes in relation to the rail service that it provided to PYCO. That Complaint seeks, among other things, to require SAW to provide adequate rail service to PYCO in the future. SAW has filed an Answer denying the essential allegations of the Complaint, and a Motion to Partially Dismiss on the ground that transportation of most of the commodities shipped by PYCO are exempt from regulation. PYCO has filed a Petition to Revoke the exemption of those commodities. SAW has filed a Reply in Opposition to that Petition. All matters in relation to PYCO's Complaint are pending.

PYCO filed a Feeder Line Application (Finance Docket No. 34844) seeking to force sale of SAW's entire rail line or a portion of that line (Alternative Two). Director Konschnik of the Board's Office of Proceedings rejected that Application on the ground, among others, that it did not contain sufficient evidence to show that transportation over either the entire SAW rail line or the portion comprising Alternative Two was inadequate for the majority of shippers who transport traffic over those lines, as required by 49 U.S.C. § 10907(c)(1)(B). In response to that

decision, PYCO has filed (1) an Appeal; (2) a Petition to Allow Amendment of the Application; and (3) a Revised Feeder Line Application. SAW has filed Replies in Opposition to the Appeal and Petition to Allow Amendment, and a Motion to Reject the Revised Feeder Line Application. In a decision issued on July 3, 2006, the Board accepted only Alternative Two of PYCO's Feeder Line Application for filing.

Throughout all of the foregoing litigation, PYCO has not provided an iota of evidence to show that SAW failed to provide timely pick up and/or delivery of any specific shipment as requested by PYCO or by any other shipper on SAW's rail lines. Instead, the complaint has been that the former President of SAW has yelled at some of the shippers or otherwise acted in a discourteous manner toward them. That complaint is overblown. SAW has denied the allegations, and the former President has resigned. The overriding point is that the statutes that require adequate rail service require timely pick up and/or delivery of shipments, which SAW has consistently provided. It can be acknowledged that it is desirable that such consistently adequate rail service should also be provided with a smile, but that is not a requirement of the statute.

ARGUMENT

I. THE PETITION SHOULD BE DENIED BECAUSE REVOCATION OF AN ACQUISITION EXEMPTION IS NOT AN APPROPRIATE REMEDY FOR ALLEGED INADEQUATE RAIL SERVICE OCCURRING MANY YEARS AFTER THE ACQUISITION

PYCO's claim of injury does not relate to the 1999 exemption for SAW's acquisition of its Lubbock rail lines from BNSF's predecessor. PYCO's claim relates instead to inadequate rail service by SAW that allegedly began six years later in 2005. Indeed, prior to 2005, PYCO rated

SAW's rail service as excellent. In those circumstances, revocation is not an appropriate remedy. Instead, PYCO must pursue remedies that are designed to deal with inadequate rail service: (1) a feeder line application; (2) an application for adverse abandonment; or (3) a formal complaint seeking an order requiring adequate rail service.

Support for that legal proposition is found in *Indiana Hi-Rail Corp. -- Lease & Oper. Exempt. -- Norfolk & Western Ry. Co.*, 1998 STB LEXIS 19 (Finance Docket No. 32162, served Jan. 30, 1998). (Ironically, that decision is also cited in PYCO's Petition at 22). In that case, Indiana Hi-Rail (IHR) leased a rail line and operated it without incident for several years. Then IHR declared bankruptcy and rail service deteriorated. A shipper on the line filed a petition to revoke the exemption for IHR's lease and operation of the rail line. In denying that petition, the Board said (at *11-12):

At the outset, we note that exemptions from prior approval requirements may not be revoked simply because the transaction subsequently fails to live up to the expectations of the parties and/or the affected public, respectively, who sought or supported it. Subjecting exempted transactions to requests for reopening and reconsideration, with hindsight as the dominant consideration, would place an intolerable burden on the exemption process. A burden of this nature would constitute a disincentive to the exemption process and, as such, would be inconsistent with the legislative intent to encourage the use of exemptions. See H.R. CONF. REP. 1430, 94th Cong., 2d Sess. 105 (1980).

The rail service provided by IHR under the lease and operate exemption apparently was satisfactory until the bankruptcy filing. The bankruptcy filing, however, does not establish error in the ICC's March 31 decision or provide a basis for revoking the exemption that was granted. Moreover, revoking the exemption will do nothing to give Wilson the level of service it seeks. Indeed, a new operator is now on the line and, as a consequence, this aspect of the case is essentially moot. Accordingly, Wilson's petition to reopen and revoke IHR's lease and operation exemption will be denied.

Wilson had alternative remedies available to it, short of revocation, once service deteriorated after the bankruptcy filing. For example, it could have filed a

complaint challenging the adequacy of rail service under 49 U.S.C. 11101(a) and 11121(a)(1). Additionally, it could have filed a feeder line application under 49 U.S.C. 10910. Revocation of the exemption simply was not necessary or appropriate to obtain better service from IHR (footnote omitted).

The foregoing principle is based on the propriety of feeder line, complaint, or adverse abandonment remedies in dealing with allegations of inadequate rail service, and the impropriety of the revocation remedy for that purpose. It does not matter from a legal standpoint, therefore, that PYCO's ability to successfully obtain relief by means of a feeder line application or complaint may be uncertain. (Petition at 22-23). That does not transform revocation into an appropriate remedy for inadequate rail service.

There is an equally fundamental reason why revocation of an acquisition exemption cannot be used to force sale of a rail line. The provision for revocation of an exemption in 49 U.S.C. § 10502(d) does not have the legal safeguards for protection of a rail line owner's interests that are provided for in the feeder line statute. Thus, the feeder line statute assures that the owner will receive the constitutional minimum value (CMV) of the rail line in a forced sale (*see* 49 U.S.C. §§ 10907[b][1] and [2]), but the revocation statute does not contain such a provision. Revocation of the acquisition exemption, resulting in forced conveyance of the rail line to BNSF without payment of CMV, would be patently unconstitutional where, as here, SAW has very substantially increased the traffic base and corresponding revenues on the line in the years after acquisition. In 2000, the first full year of operation after SAW acquired the rail line, SAW originated and terminated a total of 5,935 cars. In 2005, the most recent full year for which data are available, SAW originated and terminated a total of 14,048 cars, an increase of 237 percent in only six years! SAW has created a significant going concern value by increasing

traffic and revenues so dramatically. SAW is entitled to fair compensation for that value.

Revocation would not provide that value.

There are other substantial safeguards for a rail line owner's interests in the feeder line statute that are not provided for in the revocation statute. One such highly significant safeguard is that an owner cannot be forced to sell a line involuntarily on the ground that public convenience and necessity (PC&N) require or permit such a sale unless the Board makes all five findings required by 49 U.S.C. §§ 10907(c)(1)(A)-(E). There is no such safeguard in the revocation statute, which does not provide specific standards to determine whether acquisition of a rail line should be undone.

For all the foregoing reasons, PYCO's Petition should be denied as inappropriately filed under revocation provisions that are not designed nor intended to remedy alleged inadequate rail service occurring many years after the acquisition.

II. IF THE PETITION IS NEVERTHELESS DEEMED TO BE DIRECTED AT THE 1999 EXEMPTION, IT SHOULD BE DENIED AS BARRED BY LACHES, AND/OR FOR FAILURE TO PROVE FRAUD, MISTAKE OR MINISTERIAL ERROR

If PYCO's Petition is nevertheless deemed to be directed at the 1999 exemption for acquisition of SAW's rail lines rather than the claim of inadequate rail service in 2005, the Petition should be denied as barred by laches, and/or for failure to prove fraud, mistake or ministerial error.

The principle of laches is that a legal right will not be enforced if a long delay in asserting a right has prejudiced an adverse party. Here, PYCO waited seven years to seek revocation of

this exemption, during which time SAW increased rail traffic on the line by 237 percent!

PYCO's Petition is barred by laches in those circumstances.

There is compelling precedent for applying laches to preclude revocation here, i.e., denial as to delayed filings not nearly as long as the 7-year hiatus in the case at hand. Thus, in *S.R. Investors, Ltd. - Aband. - in Tuolumne County, CA*, 1987 ICC LEXIS 218 (ICC Docket No. 239X, decided July 14, 1987), the Board's predecessor denied a petition to reopen that was filed 16 months after the effective date of the decision sought to be reopened. In doing so, the Interstate Commerce Commission (ICC) said (at *27-28):

There are also strong equitable reasons for not reopening this proceeding. These include the substantial amount of time that has passed from the time Sierra's abandonment was exempted (February, 1985) to the time that Friends' petition to reopen was filed (June, 1986), and in addition, the good faith reliance by Sierra and LPC on the exemption authority in abandoning and purchasing, respectively, the right-of-way. We also emphasize that both the California SHPO and Friends had actual notice of Sierra's exemption, but that Friends, the SHPO and other California agencies all slept on their rights.

Objections to agency proceeding(s) should be made while the agency has the opportunity for correction. *United States v. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). As the Supreme Court there concluded (*Id.*):

(s)imple fairness to those who are engaged in the tasks of administration and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate in practice.

A petition for judicial review of the ICC's decision in that proceeding was dismissed for want of jurisdiction in *Friends of Sierra Railroad, Inc. v. ICC*, 881 F.2d 663 (9th Cir. 1989).

Similarly, in *Consolidated Rail Corp. - Aband. Exempt. - in Erie County, NY*, 1998 STB LEXIS 777 (STB Docket No. AB-167 [Sub-No. 1164X], decided Sept. 28, 1998), the Board

denied a petition to revoke an abandonment exemption and OFA acquisition that was filed 18 months after the OFA acquisition was consummated. In doing so, the Board emphasized that revocation of the OFA acquisition at such a late date would undermine the OFA statute, viz. (at *5-6, emphasis added):

... Were we to revoke the exemption as requested by BCS, our action not only would adversely affect Conrail, but it would also negate a purchase by an innocent third party, RJCN, which invoked section 10904 in the good faith belief that, if it complied with the statutory standards and procedures, it would acquire the line. To hold otherwise would not only work unjustifiable injury to bona fide purchasers such as RJCN, but also would undermine section 10904. Purchasers acquiring lines under that provision would have to worry that their rights to the lines they acquire might be abrogated months and perhaps years later because of some defect in the underlying abandonment.

Our practice of revoking abandonments authorized pursuant to the class exemption is predicated on the need to maintain the integrity of the applicable regulations. But that purpose is not served when upholding the class exemption can only be achieved at the expense of derogating section 10904 of the statute (footnote omitted).

The Board's decision in that proceeding was upheld on judicial review in *Buffalo Crushed Stone, Inc. v. STB*, 194 F.3d 125 (D.C. Cir. 1999). In doing so, the Court said (at 130):

... (T)he Board's action preserved the integrity of section 10904's OFA procedures, protected a bona fide purchaser, and promoted the goals of the statute ...

In *United States v. Northern Pacific Ry. Co.*, 288 U.S. 490 (1933), the Supreme Court upheld the ICC's denial of a petition for rehearing that was filed 22 months after the ICC's decision became final. In doing so, the Court said (at 494):

Though the order substantially reduced the carriers' revenue, we do not consider the merits of the application for rehearing, as we think the carriers' lack of diligence in bringing this matter to the Commission's attention deprived them of any equity to complain of the refusal of their petition. They sat silent and took the chance of a favorable decision on the record as made. They should not be

permitted to reopen the case for the introduction of evidence long available and susceptible of production months before the Commission acted. The denial of a rehearing, in view of this delay, was not such an abuse of discretion as would warrant setting aside the order.

Most recently, in *Railroad Ventures, Inc. -- Aband. Exempt. -- between Youngstown, OH and Darlington, PA, in Mahoning and Columbiana Counties, OH and Beaver County, PA*, 2004 STB LEXIS 788 (Docket No. AB-556 [Sub-No. 2X], decided Dec. 13, 2004), the Board denied a petition to reopen and request to file “new” evidence that was submitted more than 3 years after the Board’s original determination. The Board there said (at *12-13)0:

RVI’s attempt to renew its challenge to the underlying valuation methodology is repetitive and without merit and should not be considered further, as concerns for administrative finality, repose, and detrimental reliance counsel against a reopening here. More than 3 years elapsed after the Board’s original assessment of the line before RVI tendered its purportedly “new” evidence. CCPA/CCPR reasonably relied on the Board’s determination of the purchase price when they chose to proceed to acquire and operate the line, and they invested substantial resources to restore rail service. Were we to alter the purchase price at this time, CCPA could not simply walk away from the deal, as it could have when we originally set the price.

The ICC stated on a number of additional occasions that it would apply the equitable doctrine of laches in appropriate circumstances, notwithstanding that a statute allowed the filing of petitions at any time. *Louisville & Jefferson Co. & CSX Const. & Oper. Jeff., KY*, 4 I.C.C.2d 749, 756, n.8 (1988); *see, also, Midwestern Rail Prop., Inc. - Pur. - Rock Island*, 366 I.C.C. 915, 922 (1983); *Norfolk & W. Ry. Co. and New York C. & St. L. R. Co. Merger*, 5 I.C.C.2d 234, 237 (1989); and *Mountain Laurel R. Co. - Acq. & Oper. Exempt. - Consolidated Rail Corp.*, 1998 STB LEXIS 131 (F.D. No. 31974, decided May 13, 1998) at *17 (“While specific time limits are not applicable to the filing of petitions to reopen and revoke under 49 U.S.C. 10505(d), the time elapsed is relevant and, depending on the facts of the case, concerns for administrative finality,

repose and detrimental reliance must be balanced with those factors that support reopening and revocation, particularly when the challenged exemption pertains to a transaction that cannot readily be undone, as MLRR alleges here.”); c.f. Rule 60(b)(3) of the Federal Rules of Civil Procedure, which precludes relief from a United States District Court judgment based on fraud or misrepresentation if the request for relief is not filed within one year after entry of the judgment.

Here, SAW reasonably relied on the Board’s decision in the exemption proceeding in consummating acquisition of the line. In continued reliance on that decision, SAW has expended substantial sums in building up the rail traffic on the line. Now, 7 years later, a third party, PYCO, seeks to undo the acquisition. Were the Board to accede to that request, the salutary purpose of the class exemption would be undermined, as prospective sellers and buyers would hesitate to act for fear that their transaction would be negated years later. The case for application of laches to the Petition of PYCO is compelling in view of both the lengthy delay in filing that Petition and the reasonable reliance by SAW on the decision sought to be revoked in consummating the acquisition of the rail line. The Petition should be rejected or denied on that legal basis.

Where, as here, review is sought of a Board decision that has resulted in a consummated rail line acquisition, such a Board decision is reviewable only for fraud, mistake or ministerial error. Thus, in *Napa Valley Wine Train, Inc. -- Petition for Declaratory Order, supra*, the ICC referred to the predecessor of 49 U.S.C. § 722(c), which provides for reopening of a proceeding at any time because of material error, new evidence or substantially changed circumstances, and said (4 I.C.C.2d at 729):

. . . However, the Commission has never viewed that authority as limitless. Rather, the need for administrative finality weighs heavily where, as here, a party has acted in reliance on a Commission decision, making a substantial investment. Hence, the circumstances in which jurisdiction reasonably can be reasserted are considerably more circumscribed. Fraud, mistake and ministerial error are the only grounds traditionally asserted by the Commission as a basis for revoking authority already exercised . . . (footnote omitted; emphasis added).

Accord: CSX Transp., Inc. -- Aband. -- between Bloomingdale and Montezuma, in Parke County, IN, 2002 STB LEXIS 535 at *9-11 (ICC Docket No. AB-55 [Sub-No. 486], decision served September 13, 2002), *aff'd sub nom. Montezuma Grain Co. v. STB*, 339 F.3d 535 (7th Cir. 2003). There has never been a contention that the SAW and BNSF's predecessor were mutually mistaken in regard to the acquisition, nor that the Board committed a ministerial error in approving the acquisition. That leaves fraud as the only potential ground for relief.

In order to grant a petition to revoke on the basis of fraud where the proceeding has resulted in a consummated transaction, the Board would have to find not only that the request for approval of the transaction contained information that was materially false or misleading, but also that the Board relied on that information in approving the transaction. *Southern Pacific Transp. Co. -- Exempt. -- Abandonment in Fort Bend County, TX*, 1987 ICC LEXIS 189 at *6 (ICC Docket No. AB-12 [Sub-No. 110X], decided Aug. 4, 1987).

There is no showing in the Petition (nor any attempt to show) that SAW fraudulently misrepresented to the Board that it intended to provide rail service over the acquired lines. Thus, there was no showing of fraud.

Based on the foregoing, therefore, if the Petition is not determined to be barred by laches, it should be denied for failure to prove fraud, mistake or ministerial error in relation to the exemption for acquisition.

III. THE PETITION SHOULD BE REJECTED OR DENIED FOR LACK OF STANDING

The exemption sought to be revoked approved SAW's acquisition of the subject rail line from BNSF's predecessor under the class exemption for noncarrier acquisition of rail lines. Neither party to that acquisition -- SAW and BNSF -- seeks revocation of that exemption. The Petition filed by PYCO should be rejected or denied because PYCO is a third party who lacks standing to complain that exemption for acquisition was unlawful.

Third parties lack standing to seek review of agency action approving an exemption for acquisition because they are not injured by the agency's action. *See Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002). That is so because the new rail operator under the class exemption is merely a successor-in-interest to the license held by the previous rail carrier. The acquirer thus stands in the shoes of the former rail carrier. The acquisition does not have an adverse effect on third parties because the new rail carrier has the same rights and obligations as the prior rail carrier. *Napa Valley Wine Train, Inc. - Petition for Declaratory Order*, 4 I.C.C.2d 720, 727-728 (1988) ("... [the previous carrier] could have added passenger operations without seeking regulatory approval ... (I)n any instance where the previous carrier could have performed a particular service without seeking additional authority, the new operator ... should be able to also ...").

Based on the foregoing, the Board should reject or deny the Petition based on PYCO's lack of standing.

IV. THE PETITION SHOULD BE DENIED BECAUSE OF PYCO'S FAILURE TO SUSTAIN ITS BURDEN OF PROOF UNDER 49 U.S.C. § 10502(d)

Under 49 U.S.C. § 10502, the Board may revoke an exemption, in whole or in part, if it finds that (1) the notice or petition for exemption contains false or misleading information; (2) regulation is necessary to carry out the rail transportation policy of 49 U.S.C. § 10101; or (3) revocation is necessary to ensure the integrity of the Board's processes. *SF&L Railway, Inc. -- Acq. & Oper. Exempt. -- Toledo, Peoria & Western Rwy. Corp.*, 2002 STB LEXIS 602 (Finance Docket No. 33995, served Oct. 17, 2002).

To justify revocation, a petitioner must meet its burden of proof by articulating reasonable specific concerns under the revocation criteria. *Indiana Hi-Rail, supra*, 1998 STB LEXIS 19 at *7-8.

Inasmuch as PYCO's alleged injury relates to post-acquisition rail service rather than exemption of the acquisition, it is not surprising that PYCO's Petition utterly fails to sustain the burden of proof for revocation of the exemption. Contrary to PYCO's contention (Petition at 19), it was not false or misleading for SAW to seek Board authority for the acquisition in light of SAW's current claim that its trackage is not subject to Board authority because it constitutes switching tracks under 49 U.S.C. § 10906. The trackage constituted switching tracks at the time of the acquisition, but Board authority was required under the *Effingham*^{1/} and *Bulkmatic*^{2/} decisions because it was SAW's initial rail line acquisition and SAW's only rail line.

^{1/} *Effingham RR Co. - Pet. for Declaratory Order*, 2 S.T.B. 606 (1997), *aff'd sub nom. United Transp. Union v. STB*, 183 F.3d 606 (7th Cir. 1999).

^{2/} *Bulkmatic R. Corp. -- Acq. & Oper. Exempt. -- Bulkmatic Transport Co.*, 2002 STB LEXIS 691 (Finance Docket No. 34145, served Nov. 19, 2002), *recons. denied.*, 2003 STB LEXIS 256 (served May 15, 2003).

There is no evidence to support PYCO's contention (Petition at 20) that when SAW acquired its rail line, it intended "to provide service on a whim," and did not intend to operate a common carrier railroad. This is not a case like *SF&L Railway, supra*, where a rail line was acquired with an intent to abandon and salvage it. SAW has never abandoned and salvaged any part of its rail line used in rail operations. Thus, there has been no showing that revocation is necessary to protect the integrity of the Board's processes.

PYCO has not shown that revocation of SAW's acquisition exemption is necessary in order to carry out any rail transportation policy. Contrary to PYCO's claim (Petition at 20-22), the national rail policy does not require an acquisition application rather than an exemption on the ground that SAW's former President is alleged to have a gruff and discourteous business style. As set out earlier in this Reply, the allegations about that SAW employee are overblown and out of date. That employee resigned from SAW months ago. But even if PYCO's allegations were accurate, there is no connection between that impolite behavior and the rail transportation policies cited by PYCO. There is no connection between that alleged impolite behavior and the rail policies cited by PYCO. It is ludicrous for PYCO to contend that SAW's rail service has resulted in "predatory practices." That is typical of the absence of merit in the Petition.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated, the Petition should be rejected or denied.

Respectfully submitted,

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Replicant

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Chicago, IL 60604-1112
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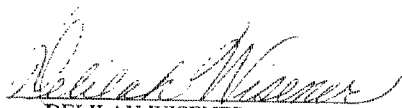
Attorney for Replicant

DATE FILED: July 6, 2006

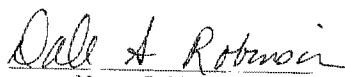
VERIFICATION

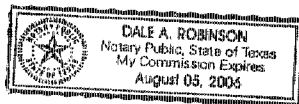
STATE OF TEXAS)
) SS:
COUNTY OF LUBBOCK)

DELILAH WISENER, being duly sworn on oath, deposes and states that she has read the foregoing statement, that she knows the contents thereof, and that the facts therein stated are true and correct.


DELILAH WISENER

SUBSCRIBED AND SWORN to
Before me this 30th day
of June, 2006.


Notary Public



My Commission Expires: August 05, 2006

CERTIFICATE OF SERVICE

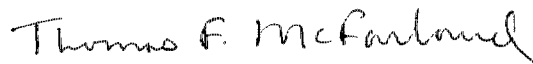
I certify that on July 5, 2006, I served the foregoing document, Reply In Opposition To
Petition To Revoke Exemption, by UPS overnight mail, on the following:

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Thomas F. McFarland