

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

232419

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**STB Finance Docket No. 35622**

ENTERED  
Office of Proceedings  
June 8, 2012  
Part of  
Public Record

**STEELRIVER INFRASTRUCTURE PARTNERS LP,  
STEELRIVER INFRASTRUCTURE ASSOCIATES LLC,  
STEELRIVER INFRASTRUCTURE FUND NORTH  
AMERICA LP and PATRIOT FUNDING LLC**

**—CONTROL EXEMPTION—**

**PATRIOT RAIL CORP., ET AL.**

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**SIERRA’S PETITION TO REJECT NOTICE OF EXEMPTION  
AND REQUEST FOR STAY OF EFFECTIVE DATE OF EXEMPTION**

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Sierra Railroad Company and Sierra Northern Railway (“SERA”) (collectively, “Sierra”) hereby ask the Board to reject the Verified Notice of Exemption filed on May 7, 2012, by SteelRiver Infrastructure Partners LP, SteelRiver Infrastructure Associates LLC, Steel River Infrastructure Fund North America LP, and Patriot Funding LLC (collectively “SteelRiver”) and Patriot Rail Corp. (“Patriot”). Sierra also asks the Board to stay the effective date of the requested exemption so that the Board has adequate time to decide Sierra’s petition to reject the exemption before it becomes effective.

The Board’s exemption procedures are intended for routine and non-controversial cases that do not require regulatory scrutiny. However, the proposed sale of Patriot to SteelRiver is highly controversial and raises several issues that must be investigated by the Board to determine whether the proposed sale should be allowed to go forward as currently structured. As explained below, one of the railroad entities that is the subject of the proposed sale is the beneficiary of a pattern of anticompetitive conduct by Patriot in the Sacramento, California area that has resulted

in the ouster of Sierra as the freight carrier serving the McClellan Business Park traffic.<sup>1</sup> The Board will need to investigate the impact of the proposed sale on Sierra's ability to pursue a remedy for Patriot's anticompetitive conduct and to regain its rightful access to McClellan Business Park traffic. In addition, the possibility of a large damages award in Sierra's pending federal district court litigation against Patriot raises serious questions that the Board must consider regarding the potential impact of the sale on the adequacy of transportation provided by Patriot's subsidiary railroads.

Sierra sought to have these issues relating to the impact of the proposed sale addressed by the federal district court in California that is hearing Sierra's unfair competition claims against Patriot. However, the Board intervened in that proceeding and asserted its exclusive jurisdiction to consider whether Patriot's sale should be approved. The court agreed that the issues raised by Sierra must be addressed by the Board, not the court. Now that the issues are before the Board, the Board must conduct an adequate inquiry into Sierra's concerns about the impact of the proposed transaction, and such an inquiry cannot be made in the context of a Notice of Exemption. Therefore, the Board should reject the Notice of Exemption and require Patriot and SteelRiver to seek approval for the sale under a procedure that will allow adequate investigation of the impact of the proposed transaction. If necessary, the Board should stay the effective date of the exemption until the Board decides Sierra's petition.

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<sup>1</sup> References to Patriot's anti-competitive conduct are drawn from publicly available materials in the California federal court litigation pending between Sierra and Patriot. *See Patriot Rail Corp. v. Sierra R.R. Co.*, E.D. Cal. Case No. 2:09-cv-00009. A protective order in that litigation prevents the parties' STB attorneys, and the Board, from reviewing additional evidence of Patriot's anti-competitive conduct produced in that action over the past three years. Sierra is willing to make available to the Board and to the parties' counsel in this proceeding, subject to the Board's Protective Order, protected materials in the federal court action if Patriot will agree to do the same.

**I. BACKGROUND**

Sierra Railroad Company is the oldest privately-owned railroad in California. Sierra Railroad Company wholly owns and controls SERA, a California corporation that is a Class III rail carrier subject to the Board's jurisdiction. SERA operates approximately 105 miles of track in Northern California, through the heart of a number of California's prime industrial areas. SERA has rail lines in Northern California between Watsonville and Davenport; West Sacramento and Woodland, including the Port of West Sacramento (formerly known as the Port of Sacramento); Oakdale and Sonora; and Riverbank and Sonora.

Beginning in 2001, SERA's predecessor provided common carrier service over seven miles of track within McClellan Business Park in the County of Sacramento, California. In 2001, SERA obtained from the Board "the exclusive occupancy and operating rights" over those tracks. *Yolo Shortline R.R. Co.—Acquis. & Op. Exemption—County of Sacramento, CA*, FD 34018, Bd. Notice at 1 (STB served Mar. 27, 2001). SERA's rail service to the Port of West Sacramento and McClellan Business Park was part of an integrated and efficient rail service that provided substantial benefits to the Sacramento region and to shippers moving freight to and from that region.

In 2001, McClellan Business Park was a new industrial area that was being developed on the site of the former McClellan Air Force Base. SERA made substantial investments to ensure the success of the enterprise and by 2007, McClellan Business Park's business accounted for about 45% of SERA's annual revenue. In 2007, Patriot expressed an interest in purchasing Sierra's rail operations, including the McClellan Business Park business. Patriot is a non-carrier holding company that currently controls 13 Class III railroads that operate in 13 states. *See* Verified Notice at 3-4. In 2007, Patriot did not have any rail operations in California. Patriot and Sierra entered into a Non-Disclosure Agreement so that Patriot could examine confidential

information about Sierra's business, including Sierra's McClellan Business Park operations, to evaluate purchasing Sierra. However, Patriot unlawfully used Sierra's confidential information about the McClellan Business Park operation to bid for the McClellan Business Park traffic. As a result of the unfair competitive advantage that Patriot gained through the misuse of Sierra's confidential information, Patriot won the bidding and in March 2008 created what is now Sacramento Valley Railroad, LLC ("SAV")<sup>2</sup> to replace SERA as the rail service provider to McClellan Business Park. SAV then obtained from the Board, through a Notice of Exemption, the right to operate over the McClellan Business Park track, even though SERA had previously obtained an "exclusive" right to such operation and that "exclusive" right had not been withdrawn or revoked. Indeed, SERA's "exclusive" right to operate over the McClellan Business Park track continues in effect today.

The loss of the McClellan Business Park operation was a serious blow to SERA's financial health. It also disrupted the efficient and integrated rail service that previously connected McClellan Business Park with the Port of West Sacramento. Since 2008, Sierra has been seeking to restore the competitive landscape that existed before Patriot engaged in its unlawful acts. In a lawsuit pending in federal district court in California, *Patriot Rail Corp. v. Sierra R.R. Co.*, E.D. Cal. Case No. 2:09-cv-00009 (the "Federal Court Litigation"), Sierra is seeking compensatory and punitive damages from Patriot that could amount to \$100 million. Sierra is also seeking an order restoring SERA's rights to operate as a common carrier to provide freight rail service to McClellan Business Park. The court has found that Sierra has adduced sufficient evidence to proceed to trial on claims including unfair competition, misappropriation of trade secrets, interference with prospective economic advantage, fraud in the inducement, and

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<sup>2</sup> All references to SAV include its predecessor entity, Sacramento Valley Railroad, Inc.

breach of the implied covenant of good faith and fair dealing. *See* Feb. 21, 2011 Mem. & Order, Fed. Ct. Litig. Doc. No. 145. The trial is scheduled to begin on February 25, 2013. *See* Apr. 18, 2012 Order, Fed. Ct. Litig. Doc. No. 224.

In addition to the Federal Court Litigation, Sierra has asked the Board to address questions relating to the operating authority that SAV obtained after unlawfully taking the McClellan Business Park operation away from SERA. Sierra has filed a complaint with the Board asserting that Patriot, McClellan Business Park, and the County of Sacramento have engaged in an unreasonable practice by interfering with SERA's common carrier obligations without seeking adverse discontinuance of SERA's exclusive operating authority. *See* Dec. 7, 2011 Compl., *Sierra R.R. Co. v. Sacramento Valley R.R., LLC*, NOR 42133. In a decision served on April 23, 2012, the Board denied the respondents' motion to dismiss the complaint. *See Sierra R.R. Co.*, NOR 42133, slip op. (STB served Apr. 23, 2012) (denying motion to dismiss). Sierra filed its opening evidence on May 23, 2012. Reply evidence is due on June 12 and rebuttal evidence is due on July 2.

While these various litigations have been pending, Patriot has sought to sell its rail subsidiaries, including SAV. On May 7, 2012, Patriot and SteelRiver filed with the Board a Verified Notice of Exemption, seeking to exempt from the prior approval requirements of 49 U.S.C. §§ 11323-11325 a transaction in which SteelRiver would acquire control of Patriot and its rail carrier subsidiaries, including SAV. Very little is known about SteelRiver. According to its website, SteelRiver invests in and operates core infrastructure assets in North America, such as port facilities and gas transmission pipelines. The Verified Notice states that the SteelRiver entities are non-carriers and that "none of these entities controls any railroads and none is

commonly controlled with any railroads.” Verified Notice at 5. No additional information about SteelRiver has been provided to the Board.

Prior to the filing of the May 7, 2012 Notice of Exemption, Sierra suspected that Patriot was seeking to sell its railroads. Indeed, when Patriot on March 15, 2012 moved to continue the July 16, 2012 trial date in the Federal Court Litigation, Sierra asked Patriot to stipulate that it would not sell its railroads before the date of any continued trial. Not only did Patriot refuse, but Patriot represented to Sierra and to the federal court that Sierra’s concerns about a sale of Patriot’s rail assets were speculative. In fact, at the time Patriot made those representations, Patriot was in the process of negotiating to sell its rail assets.<sup>3</sup>

When the proposed sale of Patriot was announced on May 7, 2012, Sierra promptly asked the federal court to enjoin the sale to protect Sierra’s rights. Patriot responded that the Board’s exclusive jurisdiction over rail transactions prevents the federal court from reviewing the sale or even the effects of the sale on Sierra or on SERA’s common carrier rights. The Board intervened in support of Patriot’s exclusive jurisdiction argument. The Board’s brief asserted that only the Board can review the transaction to ensure that the sale does not adversely impact Sierra’s rights and the relief available to Sierra in the Federal Court Litigation. *See* STB’s Opp’n to Ex Parte App. for TRO at 5, E.D. Ca. Case No. 2:09-cv-00009, Doc. No. 239 (May 30, 2012) (“Even if the transaction would cause irreparable injury [to Sierra], this Court would not be the appropriate forum in which a party would seek a stay. Rather, the appropriate forum in which to address those matters is the STB, with review in the court of appeals.”). In light of the Board’s position, the Court denied Sierra’s request for a TRO.

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<sup>3</sup> { } “{}” indicate Confidential Information under the Protective Order in this proceeding. “{{{}}” indicate Highly Confidential Information.

On May 23, 2012, the Board served and published a notice that the exemption would become effective on June 6 and that petitions to stay must be filed by May 30. However, because of deficiencies in the initial protective order submitted by SteelRiver and Patriot, the Board subsequently stayed the effective date of the exemption until June 16, and the Board extended the deadline for seeking to stay the effectiveness of the exemption to June 8.

## **II. ARGUMENT**

### **A. Legal Standards**

In this proceeding, SteelRiver and Patriot seek to exempt their proposed transaction from the prior approval requirements of 49 U.S.C. §§ 11323-11325. Under 49 U.S.C. § 11323(a)(4), the Board's approval is required for a transaction in which a non-rail carrier such as SteelRiver acquires control of two or more rail carriers. In deciding whether to approve a transaction, the Board applies a public-interest standard with a focus on the transaction's effect on competition. *See* 49 U.S.C. 11324(c)-(d). The statutory scheme contemplates that to obtain the Board's approval for a change in control transaction, a party generally must file an application with detailed information about the transaction, including an analysis of the transaction's likely effect on competition. *See* 49 C.F.R. § 1180.6. The information allows the Board and interested parties to determine whether the proposed transaction is in the public interest.

Under 49 U.S.C. § 10502(a), the Board is authorized to exempt a transaction from the full approval process if it finds that a full investigation is not necessary to carry out the Rail Transportation Policy set forth in 49 U.S.C. § 10101 and "either—(A) the transaction or service is of limited scope; or (B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power." Upon a party's application for an exemption, the Board may begin an exemption proceeding to decide whether to grant the requested

exemption. *See* 49 U.S.C. § 10502(b). In addition, the Board has determined that its prior review and approval is usually unnecessary for the eight classes of transactions described in 49 C.F.R. § 1180.2(d). A party invokes a class exemption by filing a notice of exemption. An exemption generally becomes effective 30 days after the notice of exemption is filed, unless another party challenges the exemption by filing a petition to reject or stay the notice of exemption. In their Verified Notice of Exemption, SteelRiver and Patriot assert that the transaction at issue satisfies the class exemption at 49 C.F.R. § 1180.2(d)(2) for control transactions involving non-connecting railroads.

The Board has explained that “the notice of exemption process is an expedited means of obtaining Board authority in certain classes of transactions, defined in the Board’s regulations, that ordinarily do not require greater regulatory scrutiny. Thus, notices of exemption are intended to be used for routine and non-controversial cases.” *Winamac S. Ry.—Trackage Rights Exemption—A. & R. Line, Inc.*, FD 35208, slip op. at 2 (STB served Jan. 9, 2009). The Board has rejected notices “that raise[] unresolved issues” and has stated that transactions “that require considerable scrutiny may be rejected.” *ABC & D Recycling—Lease & Op. Exemption—A Line of R.R. in Ware, Mass.*, FD 35397, slip op. at 4 (STB served Jan. 20, 2011); *see also James Riffin d/b/a N. Cent. R.R.—Acquis. & Op. Exemption—In York County, PA*, FD 34501, slip op. at 6 (STB served Feb. 23, 2005) (revoking exemption and stating that “the class exemption process is not appropriate for controversial cases in which a more detailed record is required than what is produced through a notice invoking a class exemption”). Additionally, the Board may reject an exemption under its “inherent authority to act to ensure the fairness, efficiency, and integrity of its processes.” *SF&L Ry.—Acquis. & Op. Exemption—Toledo, Peoria & W. Ry. Corp. Between La Harpe & Peoria, IL*, FD 33995, slip op. at 3 (STB served Jan. 31, 2003).

**B. The Notice of Exemption Should Be Rejected Because the Impact of the Proposed Transaction As Currently Structured on Competition and Transportation Must Be Considered Based on a More Fully Developed Record.**

The proposed sale of Patriot to SteelRiver is not a transaction that can be properly evaluated based on a Notice of Exemption. The transaction at issue here is far from the type of routine and non-controversial transaction contemplated by the Board's Notice of Exemption procedures. The proposed sale of Patriot to SteelRiver occurs against the backdrop of a highly contentious dispute involving allegations by Sierra of Patriot's anticompetitive conduct and questions regarding the validity of operating rights to be conveyed in the proposed sale. The transaction as structured appears to lock into place the anticompetitive effects of Patriot's usurpation of the McClellan Business Park traffic and to foreclose remedies that would restore SERA's role in providing service to McClellan Business Park.

Given the important questions raised by the proposed sale, the Board's class exemption procedures—under which the Board does not scrutinize the transaction at all—are inappropriate. Instead, Patriot and SteelRiver should be required to pursue the Board's approval of the proposed sale through a full exemption proceeding under 49 U.S.C. § 10502(b) or a full approval proceeding under 49 U.S.C. § 11324, which would allow the Board and the parties to explore the issues raised by Sierra and to consider possible conditions on the sale that would preserve Sierra's competitive options.

**1. The Board Needs to Investigate Sierra's Concern that Patriot is Misusing the Board's Procedures to Set in Stone the Effects of Patriot's Anticompetitive Conduct.**

At the heart of Sierra's dispute with Patriot is Patriot's anticompetitive conduct that has disrupted the proper operation of rail markets in the Sacramento region. Patriot used unlawful and fraudulent business practices to usurp Sierra's right to serve McClellan Business Park. The

McClellan Business Park operation represented about 45% of SERA's revenues and the loss of that business due to unfair practices put, and continues to put, severe financial strains on SERA. The displacement of Sierra from McClellan Business Park also harmed efficient local railroad operations by separating the McClellan Business Park operations from SERA's other rail operations, including Sierra's service of the nearby Port of West Sacramento. This type of anticompetitive conduct would support a claim under the Board's competitive access rules. *See* 49 C.F.R. §1144. The court in the Federal Court Litigation has already determined that Sierra has enough evidence to proceed to trial against Patriot on claims including misappropriation of trade secrets and unfair competition. Sierra is seeking remedies including significant monetary damages and equitable relief that would restore the McClellan Business Park service to SERA.

Sierra believes that the proposed sale of Patriot may be intended by Patriot to put Patriot's anticompetitive conduct beyond the reach of any legal authority, thereby perpetuating the anticompetitive effects of Patriot's conduct. Sierra has two basic concerns about the proposed transaction. First, {{

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Sierra's second concern is that the proposed sale of Patriot may have an impact on Sierra's ability to restore rail competition in the Sacramento region. Sierra is actively seeking to restore its rights to serve McClellan Business Park. Sierra is seeking equitable relief in the Federal Court Litigation that would result in Patriot's assignment of SAV to Sierra, thereby

restoring the McClellan Business Park operations to Sierra and restoring the efficient rail operations that existed before Patriot usurped SERA's rights to the McClellan Business Park operations. Patriot's proposed sale could affect Sierra's ability to obtain such relief. For example, Patriot might argue that the Board's approval of the sale of SAV to SteelRiver precludes the federal court from considering the equitable relief that Sierra seeks. Patriot might also argue that the sale of SAV to a new company that was not responsible for Patriot's anticompetitive conduct should foreclose the equitable relief that Sierra is requesting.

The validity of SAV's operating authority to serve McClellan Business Park is also called into question in light of a separate proceeding pending before the Board. As noted above, Sierra has claimed that it is an unreasonable practice for Patriot and SAV to interfere with SERA's "exclusive occupancy and operating rights" without seeking adverse discontinuance of SERA's authority. Evidence is currently being submitted on those claims.

The controversy in the Federal Court Litigation and before the Board over the operating rights for McClellan Business Park may well prove to be an appropriate subject of the Board's authority to impose conditions in control transactions to preserve competition and to otherwise assure that a transaction is consistent with the public interest. Although Sierra does not know at this time exactly what form a proposed McClellan Business Park condition should take, Sierra believes the Board should consider imposing a condition on the approval of any sale of Patriot that would ensure that the sale does not adversely affect Sierra's ability to recover the McClellan Business Park operation if the record established before the Board indicates that such a result is appropriate. The condition should also take account of the fact that Sierra is currently the only railroad with "exclusive" common carrier authority to handle the McClellan Business Park traffic. The Notice of Exemption procedures invoked by Patriot and SteelRiver here do not

allow for the establishment of a record that would give the Board the opportunity to consider the appropriateness of such a condition.

It is necessary for the Board to address these issues because the Board is the only legal entity with the power to protect Sierra's interests as they relate to the proposed sale of Patriot. A month before the proposed transaction between SteelRiver and Patriot was announced, Sierra raised concerns about a potential sale by Patriot and the impact such a sale could have on Sierra's rights and remedies in the Federal Court Litigation, including Sierra's request for equitable relief. In response, Patriot carefully avoided disclosing its ongoing sale discussions to Sierra or the court. After the sale was announced, Sierra promptly sought a Temporary Restraining Order so the court could ensure that the terms of the sale do not adversely impact Sierra's ability to recover monetary and equitable relief from Patriot. Patriot argued to the court that the court had no authority to address Sierra's concerns. The Board subsequently intervened in support of Patriot's argument that the Board's exclusive jurisdiction over rail transactions precludes the court from reviewing the transaction and the impacts of that transaction on Sierra. The Board stated in its brief to the court that the Board is the only authority that can address Sierra's concerns.

By seeking to obtain approval for the proposed transaction under the Board's Notice of Exemption rubber-stamp procedure, Patriot is attempting to avoid any scrutiny of the impact of its proposed sale on Sierra. The federal court cannot consider Sierra's concerns as they relate to the transaction, and the Board's Notice of Exemption procedures preclude any investigation of controversial issues. In light of the Board's intervention in the Federal Court Litigation, the Board is now the only authority that can review the transaction to examine the possible effects of the sale on Sierra's ability to challenge Patriot's anticompetitive conduct and to restore efficient

and competitive rail service in the Sacramento region. Because such review is not available under the notice-of-exemption process, the Board must reject the notice of exemption and institute a full exemption or approval proceeding.

**2. The Board Needs to Investigate the Transaction’s Potential Impact on Patriot’s Rail Service under the New Ownership of SteelRiver.**

A critical factor that the Board considers in approving a sale of a railroad entity is the “continued maintenance of the transportation network.” *SF&L Ry.—Acquis. & Operation Exemption—Toledo, Peoria & W. Ry. Corp.*, FD No. 33995, slip op. at 19 (STB served Oct. 17, 2002). The proposed transaction could have an adverse impact on transportation in two areas that must be investigated.

**a. The Board Should Ensure that SteelRiver, a Non-Carrier, is Adequately Committed to Operating and Maintaining the Patriot Railroads in the Event that Patriot is Required to Pay a Large Damages Award in the Litigation.**

First, the Board would need to investigate the impact of a large damages award in favor of Sierra on SteelRiver’s commitment to continue providing quality rail service. As explained above, Sierra is seeking damages that could amount to \$100 million, plus the assignment of SAV to Sierra. Also as explained above, the indemnification provisions of the SPA {

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The impact of such a damages award on SteelRiver’s ability and willingness to continue providing an appropriate level of rail service is uncertain for several reasons. First, SteelRiver is not currently a railroad operator and does not, as far as Sierra is aware, have any railroad operating experience. The SPA contemplates that most of the current officers and directors of

Patriot and its rail subsidiaries will resign and no longer be involved with the company when the transaction closes. *See* SPA Art. 2.4(i). Moreover, SteelRiver's commitment to making the large expenditures needed to maintain the operations of Patriot's short lines may be dampened by the recognition that the actual cost to purchase Patriot—once the damage award is factored in—turned out to be much higher than SteelRiver believed it had committed to pay. There would be an unavoidable temptation to scrimp on maintenance and improvements in order to make the post-transaction numbers turn out as originally projected. Moreover, SteelRiver may be reluctant to make expenditures necessary to maintain, improve, or expand SAV in light of the prospect that SteelRiver may have to turn SAV over to Sierra as a result of the Federal Court Litigation.

The uncertainty over SteelRiver's possible response to a large damages award or the prospect of a transfer of SAV to Sierra is compounded by the fact that very little is known about SteelRiver. The Notice of Exemption contains virtually no information about the company. Based on a record created for purposes of a Notice of Exemption, it is not possible for the Board to reach any conclusions about the impact of a potential damages award and the potential assignment of SAV to Sierra on SteelRiver's willingness or ability to continue funding rail operations.

In addition, Patriot's disclosures to SteelRiver regarding the nature and extent of Sierra's claims {

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In addition, the terms of the protective order in the Federal Court Litigation may have been used by Patriot to keep SteelRiver from obtaining access to key information about the Federal Court Litigation. The federal court’s protective order states that “Litigation Information produced or exchanged in the course of this case may be used only for the purposes of this litigation.” Prot. Order ¶ 1, E.D. Ca. Case No. 2:09-cv-00009, Doc. No. 21 (May 21, 2009). “Litigation Information” is broadly defined as “any [non-public] information obtained by either party from the other party in the course of this litigation.” *Id.* ¶ 2. Without access to key confidential information developed in the Federal Court Litigation, SteelRiver would not have been able to make an informed assessment of the risks associated with that proceeding.

These circumstances raise a serious question as to whether SteelRiver has been adequately informed about the risks that Patriot faces in the Federal Court Litigation—risks that would ultimately be borne by SteelRiver if the sale is approved by the Board. If the transaction is consummated and SteelRiver subsequently must satisfy a judgment that far exceeds its expectations, it is unclear whether SteelRiver will have sufficient assets and commitment to support continued service to Patriot’s shippers and continued maintenance of Patriot’s rail transportation network. Full scrutiny of the transaction is necessary to satisfy the Board that rail service will not be diminished as a result of the transaction.

**b. The Board Should Scrutinize Whether the Proposed Transaction Would Further Weaken Sierra’s Ability to Compete as a Common Carrier.**

As explained previously, when Patriot misappropriated the McClellan Business Park rail service, Sierra lost about 45% of its revenues and the Sacramento business community lost the

efficiencies associated with SERA's integrated rail operations. Sierra suffered financial harm as a result of Patriot's anticompetitive conduct. Sierra's ability to continue providing adequate and efficient rail service could be jeopardized by delays in obtaining compensation for the damages suffered by Patriot's conduct.

However, the structure of the SPA makes it virtually certain that Sierra's access to relief will be delayed. {

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}} The inevitable delay in resolving the litigation would prolong the continued effects of Patriot's anticompetitive conduct and could adversely affect Sierra's ability to maintain its current levels of rail service.

For all of the reasons discussed above, the Board should reject SteelRiver and Patriot's Verified Notice of Exemption. Patriot and SteelRiver should be required to pursue the Board's approval for the proposed sale through either a full exemption proceeding under 49 U.S.C. § 10502(b) or a full approval proceeding under 49 U.S.C. § 11324.

**C. The Effective Date of the Exemption Should Be Stayed.**

On May 23, 2012, the Board served and published a notice that the exemption sought by Patriot and SteelRiver would become effective on June 6. The Board subsequently stayed the effective date of the exemption until June 16. However, as the Board stated in its notice, the filing of a request to revoke or reject a Notice of Exemption does not automatically stay the

effective date of an exemption. A party challenging the proposed transaction that is the subject of a Notice of Exemption must also seek a stay of the effective date from the Board to ensure that the exemption does not become effective while the Board is addressing the party's challenge.

The circumstances of this case satisfy the Board's traditional criteria for granting a stay. Under those criteria, a party can obtain a stay by showing: "(1) it is likely to succeed on the merits; (2) it will be irreparably harmed in the absence of injunctive relief; (3) issuance of the injunction will not substantially harm other parties; and (4) granting the injunction is in the public interest." *Gen. Ry. Corp. d/b/a Iowa N.W.R.R.—Exemption for Acquis. Of Line—In Osceola & Dickinson Counties*, FD 34867, 2007 WL 2022134, at \*1 (STB served July 13, 2007) (citing *Washington Metro. Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841 (D.C. Cir. 1977)) (other citations omitted). The Board has referred to these elements as the *Holiday Tours* factors. See *Seminole Elec. Coop. v. CSX Transp. Inc.*, NOR 42110, at 4 (STB served Dec. 22, 2008).

**1. Sierra is Likely to Succeed on the Merits.**

Sierra is likely to succeed on the merits of its petition to reject SteelRiver and Patriot's Notice of Exemption. As discussed above, the Board's class exemption procedures are not appropriate for a notice of exemption "that raises unresolved issues or questions that require considerable scrutiny." *ABC & D Recycling—Lease & Op. Exemption—A Line of R.R. in Ware, Mass.*, FD 35397, slip op. at 4 (STB served Jan. 20, 2011). This case presents unique circumstances that must be addressed by the Board based on a more fully developed record. The Board has rejected notices of exemption in situations, such as this one, where "a more detailed record is required than what is produced through a notice invoking a class exemption." See

*James Riffin d/b/a N. Cent. R.R.—Acquis. & Op. Exemption—In York County, PA, FD 34501*, slip op. at 6 (STB served Feb. 23, 2005) (revoking exemption and stating that “the class exemption process is not appropriate for controversial cases in which a more detailed record is required than what is produced through a notice invoking a class exemption”). The inadequacy of the Board’s Notice of Exemption procedures to address the issues raised by the proposed transaction are addressed in detail above and there is no need to repeat that discussion here.

**2. Sierra Faces Irreparable Harm If the Transaction is Not Stayed.**

For the reasons explained in detail above, Sierra faces irreparable harm if the transaction is allowed to go forward without any scrutiny by the Board. The proposed transaction could affect Sierra’s ability to recover compensation for the injuries it suffered as a result of the anticompetitive conduct of Patriot’s current owners and could impair Sierra’s ability to restore competition and efficient rail service that existed before Patriot usurped Sierra’s McClellan Business Park operating rights. In addition, Sierra’s financial condition would be adversely affected by the delays in resolving the Federal Court Litigation that would inevitably result from the way the SPA has been structured.

**3. No Party Would Be Substantially Harmed By a Stay.**

A stay of the effective date will not cause substantial harm to either SteelRiver or Patriot. In its brief opposing a TRO in the Federal Court Litigation, Patriot argued that it would suffer irreparable harm because the Board’s approval of the transaction is a condition of closing, and SteelRiver could terminate the deal if it does not promptly obtain Board approval. But Patriot would not suffer any cognizable harm from a Board decision to conduct a full review of the transaction if the Board concludes, as it should, that such a review is warranted. Patriot is not entitled to expedited review of a proposed sale when a more complete review of the transaction

is necessary to determine whether it is in the public interest. As to the possibility that SteelRiver would abandon the proposed transaction, such a concern is entirely speculative. If the fundamental economics of the proposed transaction are strong, there is no reason to believe that SteelRiver would terminate the deal if the closing date is extended.

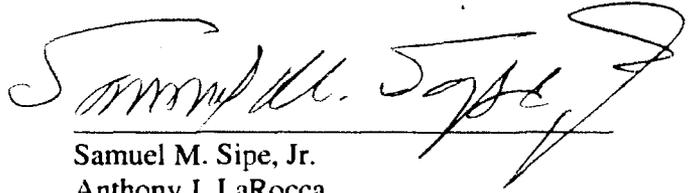
**4. A Stay is in the Public Interest.**

A stay is also in the public interest. Without a stay, the transaction can close as early as June 16, 2012. Once the transaction closes, Patriot's owners will have effectively insulated themselves from the full extent of the consequences of their unlawful and anticompetitive misconduct. It would be contrary to the public interest to allow a rail carrier's owners to engage in unfair competition with another rail carrier and then use the Board's exemption procedures to shield their ill-gotten gains. Additionally, the closing of the transaction could compromise rail service and rail maintenance because there are unanswered questions about SteelRiver's ability and commitment to fund Patriot's rail operations if Patriot is required to pay a large judgment in the Federal Court Litigation or Patriot is ordered to assign SAV to Sierra. Further, the closing of the transaction could harm regional and interstate rail service by permanently separating rail service for McClellan Business Park from Sierra's rail service for the Port of West Sacramento. For all of these reasons, it is in the public interest to issue a stay so that the Board can decide the merits of Sierra's petition to reject before the transaction is consummated.

**III. CONCLUSION**

For the reasons stated above, the Board should reject SteelRiver and Patriot's Verified Notice of Exemption and the Board should stay the effective date of the exemption until the Board decides the merits of Sierra's petition to reject the notice.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that on June 8, 2012, I caused a copy of the foregoing to be served by e-mail and first-class mail, postage prepaid, upon all parties of record in this case as follows:

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