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May 24, 2016  
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Public Record

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May 24, 2016

## VIA ELECTRONIC FILING

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W., Room 1034  
Washington, DC 20024

Re: **Docket No. FD 36032,  
OmniTRAX Holdings Combined, Inc. – Acquisition of Control  
Petition for Exemption**

*Expedited Consideration Requested*

Dear Ms. Brown:

Enclosed for filing in the above-captioned proceeding is a **Supplement to the Acquisition of Control Petition for Exemption of OmniTRAX Holdings Combined, Inc. (“Supplement”)**, dated May 24, 2016. As indicated above, the Supplement includes a request for expedited consideration.

Should any questions arise regarding this filing, please feel free to contact me. Thank you for your assistance on this matter. Kind regards.

Respectfully submitted,



Robert A. Wimbish  
Attorney for OmniTRAX Holdings Combined, Inc.

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Enclosures

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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DOCKET NO. FD 36032

OMNITRAX HOLDINGS COMBINED, INC. --  
ACQUISITION OF CONTROL PETITION FOR EXEMPTION

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**SUPPLEMENT TO THE PETITION FOR EXEMPTION OF OMNITRAX  
HOLDINGS COMBINED, INC., AND REQUEST FOR EXPEDITED CONSIDERATION**

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**ATTORNEYS FOR OMNITRAX HOLDINGS  
COMBINED, INC.**

Dated: May 24, 2016

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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DOCKET NO. FD 36032

OMNITRAX HOLDINGS COMBINED, INC. --  
ACQUISITION OF CONTROL PETITION FOR EXEMPTION

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**SUPPLEMENT TO THE PETITION FOR EXEMPTION OF OMNITRAX  
HOLDINGS COMBINED, INC., AND REQUEST FOR EXPEDITED CONSIDERATION**

On May 5, 2016, OmniTRAX Holdings Combined, Inc. (“OmniTRAX”) filed in the above-captioned proceeding a petition (the “Petition”) pursuant to 49 U.S.C. § 10502 and the regulations of the Surface Transportation Board (the “Board”) at 49 C.F.R. § 1121 for an exemption from the requirements of 49 U.S.C. §§ 11324 and 11325 to authorize OmniTRAX to control 18 Class III railroad carriers identified in the original petition (the “OmniTRAX Railroads”).<sup>1</sup> OmniTRAX explained that the Petition served “to address and remedy a very-recently-discovered and inadvertent regulatory oversight” discovered in the course of preparing class exemption notices in connection with the railroad property transaction (hereinafter, the “CTCR Transaction”) covered by Central Texas & Colorado River Railway, LLC – Acquisition and Operation Exemption – Line of Heart of Texas Railroad, L.P., Docket No. FD 36018 (both filed on April 27, 2016); and OmniTRAX Holdings Combined, Inc. – Continuance in Control

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<sup>1</sup> The OmniTRAX Railroads are as follows: Alabama & Tennessee River Railway, LLC; Alliance Terminal Railroad, LLC; Brownsville & Rio Grande International Railway, LLC; Chicago Rail Link, LLC; Fulton County Railway, LLC; Georgia & Florida Railway, LLC; Georgia Woodlands Railroad, LLC; Great Western Railway of Colorado, LLC; Illinois Railway, LLC; Kettle Falls International Railway, LLC; Manufacturers’ Junction Railway, LLC; Nebraska, Kansas and Colorado Railway, LLC; Newburgh & South Shore Railroad, LLC; Northern Ohio & Western Railway, LLC; Panhandle Northern Railroad, LLC; Peru Industrial Railroad, LLC; Sand Springs Railway Company; and Stockton Terminal and Eastern Railroad.

Exemption – Central Texas & Colorado River Railway, LLC, Docket No. FD 36019

(collectively, the “CTCR Class Exemptions”). Petition at 1.

In light of regulatory developments, OmniTRAX seeks leave to supplement its Petition and to request expedited consideration of the Petition (and corresponding expedited action on the FD 36018 and FD 36019 exemption notices), thereby facilitating public benefits that will flow therefrom, and to offer additional evidence to support a Board determination that the subject Petition presents no adverse impacts to the public interest, and thus should be granted in the ordinary course, OmniTRAX also hereby offers a supplement to the Petition.

**Background and Request for Leave to Supplement**

As indicated above, on April 27, 2016, OmniTRAX’s wholly-owned non-carrier subsidiary, Central Texas & Colorado River Railway, LLC (“CTCR”), filed a notice of exemption in Docket No. FD 36018 to acquire and operate a railroad line in Texas. OmniTRAX, seeking to continue in control of CTCR (along with other short line railroads) upon CTCR’s consummation of the CTCR Transaction, simultaneously filed a corresponding continuance in control exemption in Docket No. FD 36019. OmniTRAX acknowledged in its FD 36019 class exemption filing that, as a result of an oversight, it had at the end of 2015 acquired direct and exclusive control of 18 Class III railroads (two of which interconnect) without first having obtained Board authority, and committed to rectify that situation shortly by way of a corrective filing to the Board. By its May 5, 2016 Petition, OmniTRAX has made good on its pledge in the FD 36019 proceeding to seek to rectify the situation.

For class exemptions under 1150.31, et seq. (such as the FD 36018 proceeding) or under 1180.2(d) (such as the FD 36019 proceeding) the Board will publish notice of the proposed transaction(s) on its website and in the Federal Register within 16 days of the class exemption

filing, and the class exemption would take effect 30 days from the date the notice is filed with the agency. See 49 C.F.R. §§ 1150.32(b) and 1180.4(g)(1)(ii). For the FD 36018 and 36019 proceedings, the 16<sup>th</sup> day after filing was Friday, May 13. The Board, however, did not arrange for the publication of the FD 36018 and 36019 notices in the Federal Register on May 13 or at any other time prior to the present filing. The absence of Board-issued notice suggests to OmniTRAX that the Board may not intend to allow the FD 36018 and 36019 exemptions to take effect within the usual 30 days. If that is so, then OmniTRAX currently anticipates that the Board nevertheless will accept the notice filings in those proceedings and allow them to become effective at or shortly after a hoped-for decision granting the subject Petition.

This turn of events, quite obviously, has a bearing on the previously targeted-closing date for the CTCR Transaction. In turn, a postponed closing would delay steps toward substantial and critical capital improvements that OmniTRAX-controlled CTCR plans to undertake on the railroad property it is seeking to acquire. Believing that it now grasps the situation in which it finds itself before the Board, OmniTRAX has deemed it appropriate to provide a supplement to its Petition in order to assist the Board toward swift action on the Petition so that the CTCR Transaction is not delayed beyond what is reasonably necessary for the Board to reach a decision on the merits herein and to issue a decision that would allow the class exemptions in FD 36018 and 36019 to take effect.

The Board has from time to time allowed (and has sometimes required) a party that has invoked the Board's individual exemption procedures at 49 C.F.R. § 1121 to supplement its original petition.<sup>2</sup> Here, OmniTRAX submits that its supplement is warranted in the interest

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<sup>2</sup> See, e.g., Iowa Interstate R.R. – Acquis. Exemption – Line of BNSF Railway, Docket No. FD 35751 (filed Oct. 17, 2013); U S Rail Corporation – Construction and Operation Exemption – Brookhaven Rail Terminal, Docket No. FD 35141 (STB served Nov. 5, 2008); Houston Belt

of a fully-informed decision on the merits, and to permit the Board to act on the Petition as it may see fit in view of the benefits of the tangentially-related CTCR Transaction that would be postponed (at best) by procedural delay. OmniTRAX therefore requests leave to offer the following additional information and request for expedited consideration.

**Supplemental Information**

OmniTRAX previously had provided thorough evidence and argument for why its Petition should be granted in the ordinary course in keeping with congressional intent, federal law and policy, and Board regulations. Regulation of OmniTRAX's acquisition of control of the OmniTRAX Railroads is not necessary to carry out the rail transportation policy ("RTP") of 49 U.S.C. § 10101; the subject control transaction is of limited scope; and regulation is unnecessary to protect shippers from market power abuse, because OmniTRAX's request for authority to control the OmniTRAX Railroads will not result in the accumulation of market power that could be used against shippers. To the contrary, OmniTRAX has pointed out in the Petition that the control transaction would advance certain elements of the RTP, and would thwart no others. Petition at 8-9.

The primary, and arguably the only reason that OmniTRAX has been required to seek control authority pursuant to an individual exemption petition is that two of the railroads that OmniTRAX seeks authority to control – Illinois Railway, LLC ("IR") and Peru Industrial Railroad, LLC ("PIR") – happen to interconnect with one another, thus making unavailable the 30-day verified class exemption at 49 C.F.R. 1180.2(d)(2).

As may be of further guidance to the Board in its assessment of the merits of the Petition, OmniTRAX offers the following:

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& Terminal Railway Company – Discontinuance Exemption – In Harris County, TX, Docket No. AB-423 (Sub-No. 1X) (ICC served Nov. 14, 1994).

- IR and PIR connect at Peru, Illinois. Prior to December 31, 2015, IR and PIR were separately-controlled. PIR's only outlet to the balance of the interstate railroad network is via its connection to IR at Peru. Accordingly, PIR and its customers depend upon intermediate IR service to reach line-haul carriers, and would continue to do so post CTCR Transaction.
- Board records reflect that IR obtained exemption authority to lease and operate over PIR's lines – see Illinois Railway, LLC—Lease and Operation Exemption—Rail Line of Peru Land Acquisition 2, LLC, Docket No. FD 35886 (Board served Dec. 24, 2016) – but OmniTRAX advises that IR has not exercised its leasehold rights.
- The respective railroad lines of IR and PIR do not access or serve any common industry or customer(s).

There is no evidence or credible argument that IR or PIR possesses market power, that the common control of the two short line carriers would result in the undue accretion of market power, or that a commonly-controlled IR and PIR would have the capacity or wherewithal individually or collectively to subject shippers to market power abuse, even assuming that either or both, collectively, possessed appreciable market power in the first place.

#### **Expedited Consideration**

The subject Petition seeks after-the-fact Board authorization for OmniTRAX to control the OmniTRAX Railroads, two of which happen to connect with one another, thus necessitating the use of the individual petition for exemption process. But for the aforementioned IR-PIR interconnection, OmniTRAX would have been able to avail itself of the 30-day class exemption at 49 C.F.R. 1180.2(d)(2). Moreover, in isolation of any other events or developments, expeditious Board handling of the Petition might not have been a factor here. But based upon the Board's inaction thus far on the CTCR Class Exemptions, it appears that the CTCR Transaction may not be authorized until after (preferably simultaneously with) the Board's disposition of this Petition.

Postponement of the property sale transaction covered by FD 36018 thwarts the interests of CTCR, CTCR's parent (OmniTRAX), and the owners of the railroad properties that CTCR has agreed to purchase – private interests to be sure. But postponement of closing on the CTCR Transaction also would result in corresponding delays to critical railroad physical plant improvements that shippers have sought for some time and that CTCR has planned to undertake post-acquisition<sup>3</sup> – improvements that would facilitate safer and more efficient railroad operations (by permitting heavier car loadings), promote economic development along the lines that CTCR is seeking to acquire (hence, facilitating job growth in the local economy), and potentially attract traffic currently handled by motor carriage to the railroad. Accordingly, the prompt delivery of CTCR's post-transaction infrastructure improvements clearly would advance the public interest. Procedural delay, however, would mean a corresponding delay in the delivery of these public benefits.

OmniTRAX recognizes that the Board is entrusted with the orderly processing of matters under its regulatory authority, and that action on the subject Petition before (or simultaneously with) the FD 36018 and FD 36019 proceedings is an understandable exercise of agency prerogative. And while very mindful of the current press on the Board's resources occasioned by various proceedings triggered by the Surface Transportation Board Reauthorization Act of 2105, P.L. 114-110, 129 Stat. 2228 (2015), and a noted recent influx of petitions for declaratory order – to note a few of the more visible demands upon the Board – OmniTRAX hereby urges expedited consideration of its Petition to avoid delay and uncertainty

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<sup>3</sup> Specifically, CTCR has planned to commit several million dollars to track and bridge improvements, which it could, if permitted by the Board, commence as early as June 6 of this year. Such track and bridge improvements are intended to permit safe handling of railroad cars up to and including 286,000 pound gross weight on the rail. The line that CTCR seeks to acquire (and then to rehabilitate) cannot currently handle “286 cars,” which CTCR understands has resulted in reduced use of the subject line by existing customers.

in the planning and delivery of rail physical plant improvements that its subsidiary, CTCR, has planned for the lines it would acquire. Specifically, OmniTRAX respectfully requests that the Board act expeditiously on the subject Petition and, in so doing, exercise its discretion to provide for the earliest possible effective dates for the FD 36018 and FD 36019 exemptions. In further support of its expedited action request, OmniTRAX submits that, in its view, the Petition constitutes a routine, reasonably straightforward, and non-controversial exercise of the Board's individual petition for exemption procedures for a transaction that, aside from requiring after-the-fact authorization, presents no factors or circumstances that would weigh against prompt approval.

WHEREFORE, OmniTRAX respectfully requests that the Board grant its request to supplement the record here, accept the foregoing supplement, and act expeditiously on both the subject Petition and, by extension, the class exemption filings in the FD 36018 and FD 36019 proceedings.

Respectfully submitted,

By: 

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Dated: May 24, 2016