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June 11, 2012

232429

Ms. Cynthia T. Brown
Chief of the Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D. C. 20423

ENTERED
Office of Proceedings
June 11, 2012
Part of
Public Record

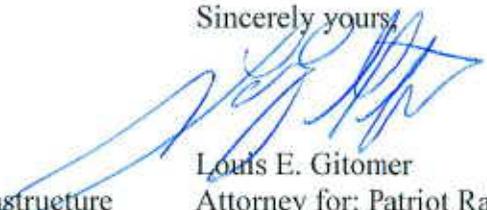
RE: Finance Docket No. 35622, *SteelRiver Infrastructure Partners LP*,
SteelRiver Infrastructure Associates LLC, *SteelRiver Infrastructure Fund*
North America LP and *Patriot Funding LLC—Control Exemption—Patriot*
Rail Corp. et al.

Dear Ms. Brown:

Enclosed for e-filing is the Response to Petition to Reject Notice of Exemption and Request for Stay of Effective Date of Exemption of SteelRiver Infrastructure Partners LP, SteelRiver Infrastructure Associates LLC, SteelRiver Infrastructure Fund North America LP, Patriot Funding LLC, and Patriot Rail Corp.

Thank you for your assistance. If you have any questions, please call or email me.

Sincerely yours,



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Attorney for: Patriot Rail Corp., et al.

Ahren Tryon
Attorney for: SteelRiver Infrastructure
Partners LP, SteelRiver Infrastructure
Associates LLC, SteelRiver Infrastructure
Fund North America LP and Patriot
Funding LLC

Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35622

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.

RESPONSE TO PETITION TO REJECT NOTICE OF EXEMPTION AND REQUEST FOR
STAY OF EFFECTIVE DATE OF EXEMPTION

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Fund North America LP and Patriot Funding
LLC

Dated: June 11, 2012

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35622

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.

RESPONSE TO PETITION TO REJECT NOTICE OF EXEMPTION AND REQUEST FOR STAY OF EFFECTIVE DATE OF EXEMPTION

SteelRiver Infrastructure Partners LP (“SteelRiver Partners”), SteelRiver Infrastructure Associates LLC (“SteelRiver Associates”), SteelRiver Infrastructure Fund North America LP (“SteelRiver Fund”), and Patriot Funding LLC (“Patriot Funding”) (collectively “SteelRiver”) and Patriot Rail Corp. (“Patriot Rail”)¹ respectfully request the Surface Transportation Board (the “Board”) to expeditiously deny the Petition to Reject Notice of Exemption and Request for Stay of Effective Date of Exemption filed on June 8, 2012 (the “Petition”) by Sierra Railroad Company (“SRC”) and Sierra Northern Railway (“SERA”).²

Sierra has failed to demonstrate any basis to reject or further stay the effectiveness of the Notice of Exemption (the “Notice”) whereby SteelRiver seeks to obtain control of Patriot Rail and its short line railroad subsidiaries (the “Proposed Transaction”). The Notice does not raise unresolved issues or questions that require considerable scrutiny with respect to the Proposed Transaction. Instead, Sierra proposes that the Board substitute the issues in unrelated pending litigation between Patriot Rail and SRC for the absence of issues involved in the Proposed

¹ SteelRiver and Patriot Rail are jointly referred to as “Applicants.”

² SRC and SERA are collectively referred to as “Sierra.”

Transaction. Applicants strongly urge the Board to reject the overreaching argument of Sierra that parties not be permitted to use a class exemption when one of the parties is a counter defendant in pending litigation. Applicants also point out that no shipper has opposed the Proposed Transaction or supported the claims of Sierra with respect to the Proposed Transaction.

Prior to responding to the Petition, which is comprised only of inferences and innuendo³, Applicants believe that describing the transaction, the suit before the United States District Court Eastern District of California, No. 2:09-cv-0009-MCE-EFB (the “Court”), the proceedings before the Board, and the lack of opposition or concern expressed by shippers will allow the Board to conclude that the Proposed Transaction simply involves the replacement of one non-carrier holding company in control of Patriot Rail and its railroad subsidiaries with another non-carrier holding company, that the operations of the Patriot Rail subsidiaries will not change, and that there will be no anticompetitive effects as a result of the Proposed Transaction. After providing the factual background, Applicants will show that the proceedings cited as Sierra’s basis for rejection are distinguishable and inappropriate to the Proposed Transaction. Finally, Applicants will demonstrate that Sierra has not met its burden to justify a further stay of the effectiveness of the Notice of Exemption. The information presented through this Response demonstrates that Sierra’s Petition is wholly lacking in merit and represents little more than an attempt at delay based on grounds that are irrelevant to the Proposed Transaction and Notice.

³ Applicants urge the Board to ignore (or better yet strike) the inflammatory and slanderous language used by Sierra throughout the Petition, especially since neither the Court nor the Board has found in favor of Sierra or made the statements that Sierra uses in its Petition as if they are factual. E. g. See “anticompetitive conduct by Patriot” Petition at 1, “Patriot unlawfully” Petition at 4, “unfair competitive advantage” Petition at 4, et seq.

BACKGROUND

Patriot Rail. In November 2006, Patriot Rail acquired the stock of the Tennessee Southern Railroad Company, Inc. (“TSRR”). Since Patriot Rail did not own any railroads at that time and was acquiring only the stock (and not the assets) of TSRR, authority for the acquisition was not sought from the Board. Over the intervening years, the corporate structure of Patriot Rail has changed, to take advantage of certain financial and tax benefits. Today, Patriot Rail, LLC (“PR”), a non-carrier, controls Patriot Rail Holdings LLC (“Holdings”), a non-carrier, which controls Patriot Rail. As of today, Patriot Rail owns and operates 13 short line freight railroads comprising approximately 500 total rail miles in 13 states, including: (1) TSRR in Tennessee and Alabama; (2) Rarus Railway, LLC in Montana;⁴ (3) Utah Central Railway Company in Utah⁵; (4) Sacramento Valley Railroad, LLC (“SAV”) in California⁶; (5) The Louisiana and North West Railroad Company, Inc., in Louisiana and Arkansas⁷; (6) the Temple & Central Texas Railway, Inc. in Texas⁸; (7) the Piedmont & Northern Railway, LLC in North Carolina⁹; (8) the Columbia & Cowlitz Railway, LLC in Washington¹⁰; (9) the DeQueen and Eastern Railroad, LLC in Arkansas¹¹; (10) the Golden Triangle Railroad, LLC in Mississippi¹²; (11) the Patriot Woods Railroad, LLC in Washington¹³; (12) the Texas, Oklahoma & Eastern Railroad, LLC in Oklahoma¹⁴; and (13) the Kingman Terminal Railroad, LLC in Arizona¹⁵ (collectively referred to as the “Subsidiary Railroads”). Patriot Rail also controls the Mississippi & Skuna Valley Railroad, LLC in Mississippi¹⁶.

⁴ *Patriot Rail, LLC and Patriot Rail Corp.—Control Exemption—Rarus Railway Company*, STB Finance Docket No. 35013 (STB served April 11, 2007).

⁵ *Patriot Rail, LLC, Patriot Rail Holdings LLC, and Patriot Rail Corp.—Control Exemption—Utah Central Railway Company*, STB Finance Docket No. 35102 (STB served November 15, 2007).

⁶ *Sacramento Valley Railroad, Inc.—Operation Exemption—McClellan Business Park*, STB Finance Docket No. 35117 (STB served February 14, 2008); *Patriot Rail, LLC, Patriot Rail Holdings LLC, and Patriot Rail Corp.—*

Appropriate authority was received from the Board for each of the acquisitions subsequent to the TSRR acquisition. No opposition was filed to any of the acquisitions, including the control of SAV and the acquisition by the SAV of the operation over the approximately 7-mile line in the McClellan Business Park (“MBP”).¹⁷

The Proposed Transaction. Patriot Funding, as purchaser, and Holdings, as seller, entered into the Stock Purchase Agreement dated May 4, 2012 (the “SPA”). Holdings owns

Continuance in Control Exemption—Sacramento Valley Railroad, Inc., STB Finance Docket No. 35118 (STB served February 14, 2008).

⁷ *Patriot Rail, LLC, Patriot Rail Holdings LLC, and Patriot Rail Corp.—Control Exemption—The Louisiana and North West Railroad Company LLC*, STB Finance Docket No. 35138 (STB served May 16, 2008).

⁸ *Patriot Rail, LLC, Patriot Rail Holdings LLC, and Patriot Rail Corp.—Control Exemption—Temple & Central Texas Railway, Inc.*, STB Finance Docket No. 35256 (STB served July 15, 2009).

⁹ *Patriot Rail, LLC, Patriot Rail Holdings LLC, and Patriot Rail Corp.—Continuance in Control Exemption—Piedmont & Northern Railway, Inc.*, Docket No. FD 35403 (STB served August 27, 2010). *Patriot Rail, LLC, Patriot Rail Holdings LLC, and Patriot Rail Corp.—Continuance in Control Exemption—Piedmont & Northern Railway, Inc.*, Docket No. FD 35403 (STB served August 27, 2010).

¹⁰ *Tennessee Southern Railroad Company, Patriot Rail, LLC, Patriot Rail Holdings LLC, and Patriot Rail Corp.—Continuance in Control Exemption—Columbia & Cowlitz Railway, LLC, DeQueen and Eastern Railroad, LLC, Golden Triangle Railroad, LLC, Mississippi & Skuna Valley Railroad, LLC, Patriot Woods Railroad, LLC, and Texas, Oklahoma & Eastern Railroad, LLC*, STB Docket No. FD 35425 (STB served November 12, 2010).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Kingman Terminal Railroad, LLC—Operation Exemption—Kingman Airport Authority, Inc.*, STB Docket No. FD 35618 (STB served May 11, 2012).

¹⁶ *Id.* MSV was authorized to abandon its entire 21-mile rail line extending between milepost 21.0 at Bruce Junction, and milepost 0.0 at Bruce, in Yalobusha and Calhoun Counties, Miss. (the “Line”). *Mississippi & Skuna Valley Railroad, LLC.—Abandonment Exemption—in Yalobusha and Calhoun Counties, Miss.*, STB Docket No. AB 1089X (STB served January 20, 2012). Instead of consummating the abandonment, MSV entered a trail use agreement with Mississippi & Skuna Valley Rails-to-Trails (“MSV Trail”) and donated the real estate of the Line to MSV Trail. MSV salvaged the track and material from the Line. MSV retains a residual common carrier obligation over the Line and therefore is a rail carrier subject to the Board’s jurisdiction, even though it does not perform railroad operations. See *National Trails System Act and Railroad Rights-of-Way*, STB Docket No. EP 702 slip op. at 5 (STB served February 16, 2011).

¹⁷ *Sacramento Valley Railroad, Inc.—Operation Exemption—McClellan Business Park LLC*, STB Finance Docket No. 35117 (STB served February 14, 2008) (the “SAV Acquisition”). Applicants contend that it would be appropriate to inquire of Sierra why it did not immediately oppose the acquisition by SAV and instead has sat on its hands until recently to seek relief in unrelated proceedings before the Board. The obvious answer is that Sierra knew it could not win on the merits and so has embarked on a trail of collateral attacks on SAV’s authorization to operate in MBP, including the instant unrelated proceeding.

1,000 shares of Patriot Rail, all of the issued and outstanding stock of Patriot Rail. Under the SPA, Holdings will sell all 1,000 shares of Patriot Rail to Patriot Funding, whereby Patriot Funding would acquire direct control of Patriot Rail and through Patriot Rail indirect control of the Subsidiary Railroads, after receiving appropriate authority from the Board. In order to comply with statutory (49 U.S.C. §11323(a)(4)) and regulatory requirements (49 C.F.R. §1180.2(d)(2) and .4(g)), on May 7, 2012, SteelRiver Partners, SteelRiver Associates, SteelRiver Infrastructure, and Patriot Funding filed a Notice of Exemption under 49 CFR §1180.2(d)(2) to acquire control of Patriot Rail and its Railroad Subsidiaries.

Patriot Rail is not selling its Railroad Subsidiaries contrary to Sierra's false statement ("Patriot has sought to sell its rail subsidiaries including SAV." Petition at 5).

As a precursor to entering the SPA, SteelRiver conducted in depth due diligence concerning Patriot Rail. SteelRiver is a company that invests in infrastructure and wants to acquire an operating railroad. Sierra is wholly lacking any basis in fact for its assertion that SteelRiver, an independent investment management firm with almost \$2 billion in long-term capital commitments to core North American infrastructure assets, somehow failed to conduct proper due diligence (Petition at 14-17), including having any understanding of the Court Case (described below), prior to entering the SPA. Moreover, Sierra has no basis to suggest that it or the Board is in a better position to determine the risk to SteelRiver of the Proposed Transaction. Applicants contend that the consideration relevant to the Board is whether the Proposed Transaction has an anticompetitive effect, not whether SteelRiver has properly weighed the value of the Court Case discussed below.

Sierra hints that because SteelRiver is not a carrier an application must be filed with the Board. To the contrary, because SteelRiver is not a carrier, the Proposed Transaction would not result in any competitive harm and would have to be properly approved under the criteria of 49 U.S.C. §11324(d), making the filing of an application an unnecessary and wasteful exercise contrary to the rail transportation policy. See 49 U.S.C. §10101(1, 2, 5, 7, 12, and 15).¹⁸

The Court Case. Prior to all of the litigation that has occurred between the Sierra parties and the Patriot parties, Patriot Rail was negotiating to acquire SERA. Negotiations began in 2007 which terminated upon SRC's rejection of Patriot Rail's 2007 offer. Negotiations resumed in February 2008 which led to the execution of a Letter of Intent ("LOI") on March 20, 2008. Pursuant to the LOI, the parties agreed to enter into formal negotiations for Patriot Rail to acquire SERA. Although the LOI is not an actual purchase agreement that required Patriot Rail to acquire SERA, it did provide certain contractual obligations under which SERA agreed to be bound. Under the LOI, SERA agreed to conduct its business consistent with good business practices, and refrain from selling or otherwise disposing of any assets or equipment. SERA also agreed not to directly or indirectly solicit or entertain negotiations with other persons or entities for the acquisition of SERA for 150 days from the date of the LOI (the "150-day no shop period").

The negotiations spanned over nine months after the execution of the LOI. Patriot Rail believed that an agreement was close enough to being completed with Sierra that it filed notices

¹⁸ Obviously, Sierra's failure to even refer to the rail transportation policy in seeking rejection of the Notice or a stay is highly demonstrative of the reality that the Proposed Transaction is not contrary to the Rail Transportation Policy at section 10101.

of exemption with the Board.¹⁹ However, despite presenting numerous multi-million dollar purchase agreements to SRC, SRC failed to execute any of the agreements. After SRC rejected Patriot Rail's final written agreement, on December 31, 2008, Patriot Rail filed its complaint in *Patriot Rail Corp. v. Sierra Railroad Company*, USDC, Eastern District, Case No. 2:09-cv-00009 MCE-EFB.

In this court case, Patriot Rail contends that SRC violated the LOI by misrepresenting SERA's financial information and alleged assets, improperly disposing of assets, and entertaining acquisition solicitations and negotiations with other companies during the 150-day no shop period. Patriot Rail believes that SRC engaged in bad faith tactics with the intent to use Patriot Rail's offer to obtain higher acquisition offers from other companies, and that SRC did not have the intent to sell SERA to Patriot Rail. Patriot Rail has incurred hundreds of thousands of dollars in damages as the result of expending significant amounts of time and costs in conducting the due diligence for the contemplated transaction as well as for the cost of drafting numerous formal written contracts that SRC repeatedly rejected.

On January 26, 2009, SRC filed its original Answer and Counterclaim against Patriot Rail. Thereafter, on February 17, 2009, SRC filed an Amended Answer and Counterclaim naming additional counter defendants Patriot Rail LLC, Larry Coe, Patriot Rail Holdings LLC, and Patriot Equity LLC. Since the filing of the Amended Counterclaim in 2009, neither Holdings nor Patriot Equity LLC have been served by SRC with the Amended Counterclaim and Summons, and neither Holdings nor Patriot Equity LLC has made an appearance in the Court

¹⁹ *Sierra & Central Pacific Railroad Company, Inc.–Acquisition and Operation Exemption–Sierra Northern Railway and Sierra Railroad Company*, STB Finance Docket No. 35165 (STB served August 1, 2008 and *Patriot Rail, LLC, Patriot Rail Holdings LLC, and Patriot Rail Corp.–Continuance in Control Exemption–Sierra & Central Pacific Railroad Company, Inc.*, STB Finance Docket No. 35166 (STB served August 1, 2008).

Case. Thus, the only parties to this litigation are Patriot Rail, Patriot Rail LLC, Larry Coe and SRC.

In its counter claims, SRC claims that Patriot Rail did not have the intent to acquire SERA when the parties entered into the 2008 LOI. The counter claim also concerns the operation of a short-line railroad at MBP by Patriot Rail's SAV subsidiary. On August 31, 2007, McClellan Business Park, Ltd. ("McClellan") notified Sierra that the Railroad License and Operating Agreement dated as of February 6, 2001 (the "License") would be terminated on February 29, 2008. Thereafter, on October 11, 2007, McClellan issued a public Request for Proposal ("RFP") for a new operator of MBP, and invited four rail operators, including Patriot Rail and SRC to respond to the RFP. McClellan provided written notice to each participating bidder the identity of the four bidders invited to participate in the RFP. After the three month RFP process was completed and Patriot Rail was announced the winner of the McClellan contract, SRC for the first time claimed Patriot Rail used SRC's confidential trade secret information in its response to the RFP. Patriot Rail denies the use of any of SRC's confidential information in the RFP process.

In its Amended Answer and Counterclaim filed in 2009, SRC seeks damages including, in part, lost profits for its claim that Patriot Rail improperly used SRC's confidential information and interfered with SRC's relationship with McClellan.²⁰ Sierra's pleading does not, however, seek specific performance for reinstatement of SRC's terminated license contract with McClellan or the assignment of the separate contract between SAV and McClellan. Likewise, McClellan has never been named a party to the Court Case. Sierra's claim for the transfer of the rail

²⁰ Sierra's assertion that a judgment in the Court Case could reach \$100 million is grossly inflated and flies in the face of the facts. Indeed, this estimate is more than ten times Sierra's own expert's valuation.

operator contract between SAV and non-party McClellan to SRC was first raised in a pleading in its Opposition to Patriot Rail's Motion to Continue filed in March of 2012, and it is relief which SRC cannot by law obtain. Non-expert discovery in the Court Case was completed in September 2010, and trial is set to begin on February 25, 2013.

The TRO. As part of the Court Case, SRC sought a temporary restraining order ("TRO") to prohibit the Proposed Transaction from going forward. Patriot Rail filed in opposition. In addition, the Board sought intervention and filed an Opposition to Ex Parte Application for Temporary Restraining Order and Order to Show Cause on May 30, 2012 ("STB Brief") (Exhibit A). The STB Brief at 4 argued that "Because this Court lacks jurisdiction to rule on a matter currently pending before the STB, Sierra's Application should be summarily denied. The language of the statute, 49 U.S.C. §11321(a), specifically gives the Board exclusive jurisdiction over transactions such as the acquisition of the stock of Patriot Rail by SteelRiver. If this Court were to enjoin the transaction, it would exceed its own jurisdiction and interfere with the STB's exclusive jurisdiction to rule on the transaction in the first instance."

In response to SRC's argument that it would suffer irreparable harm if the Proposed Transaction were allowed to go forward, the STB Brief stated "Even if the transaction would cause irreparable injury, 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." STB Brief at 5. Sierra misinterprets the clear statement in the STB's Brief to say "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." Petition at 6. The STB Brief did not equate irreparable harm with "Sierra's rights and the relief

available to Sierra in the Federal Court Litigation,” nor did the Court interpret irreparable harm as suggested by Sierra.

On May 31, 2012, the Court denied the TRO on the following grounds: “The injunctive relief request is denied. I’m denying it. I don’t believe it’s appropriate under the standard that I would have to find to grant injunctive relief, number one. Number two, I do find that the STB has jurisdiction over this particular transaction at this point.” See Exhibit B, Transcript of Proceedings (the “Transcript”) at 16.

Applicants contend that it is pivotal for the Board to take notice of the Court’s ruling for the following reasons. First, the Court is acutely aware of the matters at issue in the Court Case: “I have heard this case, I’ve spent a lot of time on this case, I tried to settle this case. I understand what this is about.” Transcript at 19. Second, the standard for the Court to rule on the TRO is the *same* as for the Board to act on a stay request. The Court ruled that “I don’t believe it’s appropriate under the standard that I would have to find to grant injunctive relief” (Transcript at 16), meaning that SRC did not prove irreparable harm or likelihood of success on the merits. Applicants contend that if the Court cannot make those findings in the Court Case, then the Board also cannot make those findings in the Proposed Transaction where Sierra is attempting to substitute the issues in the Court Case for the actual issues before the Board.

As discussed below, Sierra puts forth nothing to show its likelihood of success on the merits here, *i.e.*, that the exemption process is inappropriate because the Proposed Transaction will have an anti-competitive effect; nor does Sierra show that the Proposed Transaction will irreparably harm Sierra (rather, it attempts to obscure the fact that all entities in the Court Case will remain unchanged after the consummation of the Proposed Transaction). In fact, while any

relevant assertions or evidence would have to concern the effect of Sierra and SteelRiver's conduct together, Sierra does not make a single assertion about SteelRiver's conduct relative to the Proposed Transaction's effect on competition. In other words, Sierra's case for a stay before the Board is just as flimsy, if not moreso, than for the TRO in the Court Case.

The Proceedings Before the Board. As discussed above, on August 31, 2007, McClellan notified SERA that the Railroad License and Operating Agreement dated as of February 6, 2001 (the "License") (See Exhibit C)²¹ between McClellan, as successor-in-interest to the County of Sacramento, and SERA, as successor to Yolo Shortline Railroad Company, would terminate on February 29, 2008. Section 9.4 of the License provided that "this License Agreement may be terminated, without cause, by written notice given by either party to the other ... not less, however, than six (6) months subsequent to the date which such notice shall be given." Section 15.1 of the License requires that "Prior to or upon the termination of this License Agreement howsoever, the Licensee [SERA] shall, at Licensee's sole expense remove its equipment, personnel, and other property from Licensor's premises." SERA voluntarily vacated the MBP, but did not complete removal of its "other property" because it did not terminate the authority that it had acquired from the Board to provide common carrier service in the MBP. That authority is intangible property on Licensor's premises.

The SAV Operation. McClellan issued a Request for Proposal on October 11, 2007 to four railroads or railroad holding companies, including Patriot Rail and Sierra. Patriot Rail submitted a bid without using information provided by Sierra during the negotiations.

²¹ Sierra filed the License as Exhibit 2 to the Public version of the Opening Evidence and Arguments in Docket No. 42133, *Sierra Railroad Company and Sierra Northern Railway v. Sacramento Valley Railroad, LLC, McClellan Business Park LLC and County of Sacramento* filed on May 23, 2012.

Sierra also submitted a bid. McClellan selected Patriot Rail, and stated in the Court Case that even if Patriot Rail had not been selected, Sierra would not have been selected. Upon winning the bid, Patriot Rail created a new subsidiary, SAV.

SAV filed a notice of exemption on January 29, 2008 (“SAV NOE”) to operate the 7-mile line in MBP.²² Not knowing whether SERA had complied or would comply with the requirements of Section 15.1 of the License, SAV stated that:

SAVR understands that Yolo’s successor has been asked by MBP to vacate the Line, but may or may not have filed for abandonment authority with the Board at the time this notice is filed. MBP has asked SAVR to be prepared to commence operations on March 1, 2008. SAVR does not know what Yolo’s successor’s response will be and if it will oppose SAVR’s notice in this proceeding. SAVR wants to meet the needs of MBP and the shippers on the Line in McClellan Park. SAVR is willing to enter an operational protocol with Yolo’s successor, if that becomes necessary, in order to meet the needs of MBP. SAV NOE at 5.

This offer from SAV has not been withdrawn. More importantly, in more than four years since SAV made the offer, Sierra has not even asked SAV to enter an operating protocol, nor has any shipper served by SAV asked to be served by SERA.

Despite SAV’s concerns, Sierra did not file to stay, reject, revoke or reopen the SAV NOE at the time the matter was pending before the Board. Indeed, Sierra has never filed a request to reopen or revoke the SAV NOE. Instead, Sierra has inappropriately and unsuccessfully attempted to obtain relief in three other proceedings before the Board.

The Revocation Proceeding. On December 7, 2011, Sierra filed a petition to “nullify” a corporate family restructuring because the “2010 Notice contained false or misleading

²² *Sierra & Central Pacific Railroad Company, Inc.–Acquisition and Operation Exemption–Sierra Northern Railway and Sierra Railroad Company*, STB Finance Docket No. 35165 (STB served August 1, 2008). Control authority was authorized in *Patriot Rail, LLC, Patriot Rail Holdings LLC, and Patriot Rail Corp.–Continuance in Control Exemption–Sierra & Central Pacific Railroad Company, Inc.*, STB Finance Docket No. 35166 (STB served August 1, 2008).

information—specifically, that the purpose for Patriot Rail’s corporate family restructure was not, as the notice stated, to gain certain tax advantages, but rather to secure greater protection of Patriot Rail’s assets under the Delaware Limited Liability Company Act in anticipation of a judgment against Patriot Rail in the pending federal court action.”²³ The Board, treating Sierra’s pleading as a petition to revoke, denied all relief sought by SERA stating:

... we find that SERA has failed to demonstrate that the 2010 Notice contained false or misleading information. Further, SERA has failed to demonstrate, through a showing of material error, new evidence, or substantially changed circumstances, that revocation of the exemption is necessary to carry out the RTP. Moreover, the record does not provide a sufficient basis to persuade us that further proceedings are warranted. Thus, SERA’s petition to revoke will be denied. (footnote omitted)²⁴

The Complaint. Sierra filed a complaint on December 7, 2011 against SAV, McClellan, and the County of Sacramento alleging unreasonable practices because SAV, McClellan and Sacramento did not file an adverse abandonment application with the Board when SERA’s access to the MBP was terminated and that McClellan and Sacramento are common carriers.²⁵

The Board denied a motion to dismiss filed by SAV on procedural grounds.²⁶ The Board also did not dismiss McClellan and Sacramento as parties because they were not rail carriers, but

²³ *Tennessee Southern Railroad Company, Patriot Rail, LLC, Patriot Rail Holdings LLC, and Patriot Rail Corp.—Corporate Family Transaction Exemption—Sacramento Valley Railroad, LLC and Piedmont & Northern Railway, LLC*, STB Docket No. FD 35449, slip op. at 2 (STB served March 6, 2012).

²⁴ *Id.* at 3.

²⁵ *Sierra Railroad Company and Sierra Northern Railway v. Sacramento Valley Railroad Company, LLC, McClellan Business Park, LLC, and County of Sacramento*, Docket No. NOR 42133.

²⁶ *Sierra Railroad Company and Sierra Northern Railway v. Sacramento Valley Railroad Company, LLC, McClellan Business Park, LLC, and County of Sacramento*, Docket No. NOR 42133, slip op. at 3-4 (STB served April 23, 2012).

did not conclude that they were rail carriers either.²⁷ The Board also denied a motion to compel discovery filed by Sierra.²⁸ The record in the complaint proceeding is now being developed.

The Proposed Transaction. Under the SPA, SteelRiver would purchase the stock of Patriot Rail from Holdings and acquire control of the Subsidiary Railroads. Prior to 1980, SteelRiver would have been required to file an application for approval of the Proposed Transaction pursuant to the predecessor statutes to 49 U.S.C. 11323-11326. In 1980, the Interstate Commerce Commission (the “ICC”), the Board’s predecessor, promulgated the exemption at 49 C.F.R. §1180.2(d)(2). “In proposing these regulations we stated that ‘because of de minimus competitive and operational impact, we propose to exempt these seven classes of transactions from our jurisdiction. 44 F.R. 66627’” *Railroad Consolidation Procedures*, 363 I.C.C. 200, 204 (1980).

Applicants filed the Notice of Exemption under 49 C.F.R. §1180.2(d)(2) and .4(g) on May 7, 2012. The Board served a notice.²⁹ The Board did not find any information in the Notice of Exemption to be false and misleading, nor has Sierra argued that the Notice of Exemption contains false or misleading information.

Also on May 7, 2012, Applicants filed a Motion for Protective Order in order to file a redacted version of the SPA in the public filing made with the Board and served on various parties. The Protective Order was granted.³⁰ Sierra knew of the filing of the Motion and Notice

²⁷ Id. at 4.

²⁸ Id. at 4-5.

²⁹ *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.*, STB Docket No. FD 35622 (STB served May 23, 2012).

³⁰ *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.*, STB Docket No. FD 35622 (STB served May 18, 2012).

of Exemption on May 7, 2012. Sierra's subsequent actions demonstrate that it intends to use any means to delay the Proposed Transaction. Sierra did not expeditiously ask counsel to the Proposed Transaction to modify the Motion. Instead, Sierra waited until May 18, 2012 to file a pleading with the Board to seek access to an unredacted version of the SPA. Applicants offered Sierra a version of the SPA with only certain dollar amounts and bank account numbers redacted in the version of the SPA to be provided to other than outside STB counsel and an unredacted version of the SPA to be provided to outside STB counsel. Instead of accepting this offer, Sierra complained to the Board that it required access to all of the information in the SPA.³¹ Applicants then sought to modify the Protective Order. Sierra objected and requested a housekeeping stay because of a discovery dispute that was manufactured by Sierra, and the Board granted the modified protective order, just as Applicants had offered to Sierra on May 21, 2012.³² Now in the Petition at 2, Sierra is contending that it needs additional time to have the protective order in the Court Case modified so that it can present additional information from the Court Case to the Board. First, the Court Case is pending. Second, the issues in the Court Case are not related to the competitive impacts (of which there are none, so Sierra discusses none) of the transfer of control of Patriot Rail and its Railroad Subsidiaries from Holdings to SteelRiver vis-à-vis Patriot Funding.

Sierra has produced no evidence that the transfer of control of Patriot Rail and its Subsidiary Railroads from Holdings to SteelRiver requires regulation under the rail transportation policy at 49 U.S.C. §10101 or that any aspect of a non-carrier acquiring control of

³¹ Applicants advise the Board that Sierra did not even submit one undertaking so that it could see what Applicants were offering in the redacted SPA, clearly a sign that Sierra was acting in bad faith and only interested in delay.

³² *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.*, STB Docket No. FD 35622 (STB served May 25, 2012).

13 Class III railroads is anticompetitive. Nor has Sierra demonstrated that the Notice of Exemption contains false or misleading information. Sierra has done nothing more than assert that the existence of the Court Case in and of itself makes the Proposed Transaction controversial, thus justifying rejection or a stay of the exemption. As discussed below, Sierra's reasoning is at odds with the standards that govern this proceeding and is otherwise baseless.

ARGUMENT

SteelRiver's acquisition of control of Patriot Rail and its Railroad Subsidiaries does not require regulation under 49 U.S.C. §10101 and is not anticompetitive. Today Holdings, a non-carrier, owns Patriot Rail and Patriot Rail controls the Subsidiary Railroads. As envisioned in the Proposed Transaction, ownership of the stock of Patriot Rail will be transferred to Patriot Funding, a non-carrier, and the Subsidiary Railroads will be controlled by Patriot Funding and the other SteelRiver entities, all of which are non-carriers, through their control of Patriot Rail. As a result of the Proposed Transaction, the operations of the Subsidiary Railroads will not change and no shipper will go from being served by two railroads to being served by one railroad. Only the ownership of Patriot Rail will change. None of the parties to the Court Case are changing, so nothing that Sierra is concerned about will be different because of the Proposed Transaction (*i.e.*, there will be no harm). Replacing one non-carrier holding company with a different non-carrier holding company that does not control any railroads will not result in an anticompetitive transaction (*i.e.*, there is no merit to the petition for stay). That is the Proposed Transaction.

SteelRiver is investing in Patriot Rail and the Subsidiary Railroads because SteelRiver invests in infrastructure and views the railroad industry as an essential part of the infrastructure

of the United States. SteelRiver recognizes that the true value of the Subsidiary Railroads is in their operations and not in their net liquidation value. In order to recognize a reasonable return on its investment, SteelRiver, through its due diligence, determined that the operations of the Subsidiary Railroads will return a reasonable return, but that the downgrading and disposal of the railroad assets will not. Put simply, the structure of the Proposed Transaction demonstrates that it is being conducted in good faith at arm's length, and that there is no basis to allege that rejection of the Notice or a stay of the exemption is justified.

Importantly, Sierra has taken an odd and unfounded approach in opposing the Proposed Transaction. Sierra did not file a petition to revoke as provided for at 49 C.F.R. §1180.4(g)(1)(iii) or argue that the Notice of Exemption contains false and misleading information as provided for in 49 C.F.R. §1180.4(g)(1)(ii). The reason that Sierra did not make these arguments is apparent: Sierra had nothing meritorious to put forth, it could not meet the burden of a petition to revoke (because there are no anticompetitive effects from the Proposed Transaction – one holding company is buying out the other) and the Notice of Exemption does not contain false or misleading information. Despite Sierra's unsupported attempts to suggest that the Board does not have adequate information (as opposed to alleging that Applicants put forth false or misleading information), Applicants submitted all information required in the Notice by statute and regulation, and the Notice was accepted and published by the Board as complete and satisfactory.

Instead of addressing any issue relevant to the Board's consideration of the Proposed Transaction under its statutes and regulations, Sierra has attempted to portray the Proposed Transaction as controversial and non-routine by seeking to improperly bootstrap the issues in the

Court Case (that are within the jurisdiction of the Court) into the Board's consideration of the Proposed Transaction. Essentially, Sierra is asking the Board to rule that a notice of exemption is not available whenever the entity being sold is being sued. Sierra wants the Board to turn the clock back to before 1980 and require every railroad to file an application where a party to the transaction is a defendant or counter-defendant in a law suit, thus effectively frustrating the Board's implementation of the class exemption. Applicants urge the Board not to condone the waste and expense that Sierra is attempting to foster on the railroad industry and its shippers.

The next two sections specifically address and rebut Sierra's ill-founded rationale for rejection and stay of the Notice of Exemption.

The Petition to Reject. SteelRiver has filed its Notice under 49 C.F.R. §1180.2(d)(2) to acquire control of Patriot Rail and its Subsidiary Railroads. Sierra seeks "rejection" of the Notice because "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." Petition at 9. **Sierra is wrong.** The Proposed Transaction is exactly the type of routine and non-controversial transaction fostered by 49 C.F.R. §1180.2(d)(2). The controversy arises solely from Sierra and its attempt to convince the Board to reject the Notice, not from the Proposed Transaction.

Sierra relies on four decisions by the Board to support its request for rejection and stay. All four decisions are distinguishable and do not involve a lawsuit as the basis for the proposal being controversial and not routine, and thus are wholly inapposite to the present matter. Moreover, none of the decisions involves an acquisition of control under Section 11323. Thus, the cases cited by Sierra provide no support for its requests.

In *Winamac Southern Railway Company-Trackage Rights Exemption- A.& R. Line, Inc.*, STB Finance Docket No. 35208 (STB served January 9, 2009) (“*Winamac Trackage Rights*”), the Winamac Southern Railway Company (“WSRY”) sought trackage rights over the A.& R. Line, Inc. (“A&R”) in 2008 based on a 1995 trackage rights agreement. The Toledo, Peoria & Western Railway Corporation (“TP&W”), which had acquired the A&R sought rejection of the WSRY’s notice of exemption. In rejecting the notice of exemption, the Board, at 2, stated:

The exemption sought here would belatedly authorize trackage rights under an agreement entered into nearly 14 years ago. Moreover, TP&W, the successor to the original granting party, is actively opposed to the grant of the exemption and asserts that the 1995 Trackage Rights Agreement is no longer in effect. WSRY “disagrees emphatically” with that assertion. This serious contractual dispute raises issues of state law that the Board is not in a position to resolve and calls into question whether a key component of the trackage rights class exemption—that the trackage rights be based on a written agreement—is met. These uncertainties preclude use of the expedited notice of exemption process here.

Finally, the underlying justification for the trackage rights class exemption is not just that the agreement has been reduced to writing, but that the rights are, in fact, volitional on the part of both parties to the transaction-i.e., that the granting carrier does not object.

In the Proposed Transaction, Holdings and Patriot Funding entered into the SPA. Applicants state unequivocally that not only is there a written agreement, but that the agreement is volitional on the part of Holdings and Patriot Funding. There is no contractual dispute between Holdings and Patriot Funding. Sierra, on the other hand, is not a party to the SPA and has no rights under the SPA. The facts underlying *Winamac Trackage Rights* bear no relation to the Proposed Transaction and rejection of WSRY’s notice of exemption is not precedent for the rejection of the Notice of Exemption.

Sierra next wrongly relies on *ABC & D Recycling, Inc.—Lease And Operation Exemption—A Line Of Railroad In Ware, Mass.*, STB Docket No. FD 35397 (STB served

January 20, 2011) (“*ABCD Lease*”) for the proposition that the Board should reject the Notice of Exemption. ABC & D Recycling, Inc. (“ABC&D”) sought authority to lease certain property from O’Riley Family Trust (the “Trust”) to operate as a common carrier handling construction and demolition debris. Ware, MA, opposed the notice. In *ABCD Lease*, at 4-5, the Board stated:

Ware has raised significant questions regarding ABC & D’s ability and intent to act as a common carrier, and ABC & D has not adequately responded to Ware’s concerns. In addition, the structure of the underlying transaction remains unclear, notwithstanding the parties’ extensive filings. ABC & D stated in its Notice that it had reached an agreement “pursuant to which ABC & D leases and will operate the railroad trackage in Ware, Massachusetts owned by [the] O’Riley Family Trust.” Notice at 3. Now, however, ABC & D claims that, while no written lease agreement exists, a written agreement would be a mere “formality.” Reply at 6. Indeed, it now appears that ABC & D will not enter into a lease with the O’Riley Family Trust, but rather will enter into an agreement with an individual, Chris Berardi, who will make the acquisition from the O’Riley Family Trust. Petition at 3. Another key component of the proposed transaction that remains ambiguous relates to the respective parcels of land owned or controlled by the O’Riley Family Trust and by the Massachusetts Department of Transportation. It is unclear whether either parcel, or both, would be necessary for ABC & D to provide common carrier rail service. See, e.g., Petition at 5 n.8. In short, there remain a number of unanswered questions surrounding ABC & D’s Notice.

In its Notice, ABC & D also stated that it is engaged “primarily in the business of handling construction and demolition debris,” (Notice at 2) and that, in connection with those activities, it had “obtained” all required state and local permits. Notice at 5. However, while ABC & D may have obtained certain permits, it failed to disclose that the validity of its Special Permit has been called into question and is the subject of litigation, and that its proposal to transfer MSW has been rejected and is also the subject of litigation.

The facts supporting the rejection of the notice of exemption in *ABCD Lease* are completely different than those in the Proposed Transaction. There is no barrier to the Subsidiary Railroads acting as common carriers; they are authorized and active railroads. The SPA is an agreement between Holdings and Patriot Funding. It is clear that under the Proposed Transaction Patriot

Funding will acquire the stock of Patriot Rail and control Patriot Rail and the Subsidiary Railroads. There is also no question of permits. Moreover, as noted above, Sierra has not claimed that the Notice contained false and misleading information.

Sierra next relies on *James Riffin d/b/a The Northern Central Railroad — Acquisition and Operation Exemption — in York County, PA*, STB Finance Docket No. 34501 (STB served February 23, 2005) (“*Riffin Acquisition*”). The Board did not reject the notice of exemption in this proceeding, instead it revoked the exemption. Mr. Riffin sought to operate an abandoned rail line in Pennsylvania. The State of Maryland sought **revocation**, not rejection, of the notice of exemption, which the Board granted. The Board revoked the exemption in *Riffin Acquisition*, at 6 because:

Here, it appears that NCR is attempting to use the cover of Board authority allowing rail operations in Pennsylvania to shield seemingly independent operations and construction in Maryland from legitimate processes of state law. Maryland has shown its legitimate state interest in construction matters within its borders and, once again, has raised sufficient concerns regarding NCR’s proposal to make it inappropriate for NCR to use the expedited class exemption procedures in this case.

Applicants are not seeking to shield non-railroad operations and construction from state law. Nor is the State of California, or any other state opposing the Proposed Transaction. Indeed, Applicants served the Notice on the Secretary of the United States Department of Transportation, the Attorney General of the United States, the Federal Trade Commission and on the Governor, Public Service Commission, and Department of Transportation of the States of Alabama, Arizona, Arkansas, California, Louisiana, Mississippi, Montana, North Carolina, Oklahoma, Tennessee, Texas, Utah, and Washington. Not a single one of these government agencies has filed in opposition to the Proposed Transaction. In addition, Applicants are not trying to shield

Patriot Rail from the Court Case. Patriot Rail is a counter-defendant in the Court Case today. If the Proposed Transaction is consummated, Patriot Rail will continue to be a counter-defendant in the Court Case subject to the rulings of Judge England. Given that nothing will change with respect to the parties in the Court Case as a result of the Proposed Transaction, there are no concerns here like there were in *Riffin Acquisition*, and that case is not valid precedent for considering the Proposed Transaction.

Sierra also wrongly relies on *SF&L Railway, Inc.—Acquisition and Operation Exemption—Toledo, Peoria and Western Railway Corporation Between La Harpe and Peoria, IL*, STB Finance Docket No. 33995 (STB served January 31, 2003) (“*SF&L Acquisition*”). The *SF&L Acquisition* involved the use of a notice of exemption to acquire a line of railroad under 49 U.S.C. 10901. The Board revoked the exemption in a decision served on October 17, 2002, where it stated at 12:

Our finding that Respondents have abused the class exemption process in this case is based on a variety of indicia: the disjointed and incomplete structure of the sale; the buyers’ obvious lack of interest in the operational aspects of the Line, as evidenced by their failure even to inspect the Line before the sale; the confusion as to whether certain essential components of the Line were even bought; the delay in consummation and the confusion over whether the buyer or the seller had the responsibility to quote rates; the understanding that TP&W and RailAmerica would support SF&L’s future abandonment of the Line; and the unstructured financing of the Line.

Contrary to the *SF&L Acquisition*, the Proposed Transaction has a complete sale structure provided by the SPA; the Subsidiary Railroads will continue to provide rail service; SteelRiver conducted in-depth due diligence before entering into the SPA; there is no question that Patriot Funding is buying the stock of Patriot Rail and will control the Subsidiary Railroads through Patriot Rail; there will be no delay in consummation once the Board allows the Proposed

Transaction to go forward; the Subsidiary Railroads will continue to quote rates; there are no abandonment plans; and the financing of the Proposed Transaction is structured and waiting for the effective date.

Sierra seeks to use these inapposite opinions to create the illusion that the Court Case makes the Proposed Transaction non-routine and controversial. The only reason that the Proposed Transaction is non-routine and controversial is because Sierra has decided to try to stop the Proposed Transaction. The Court Case has no effect on the Proposed Transaction and the Proposed Transaction has no effect on the Court Case.

Beyond the irrelevance of the Court Case to the Proposed Transaction, Patriot Rail believes that Sierra's claims are baseless and that the only judgment awarded in the Court Case will be to Patriot Rail for Sierra's violation of the LOI. The Court has not made a single ruling adopting the charged language that Sierra uses in the Petition. The best that can be said is that as of now, the Court Case is going to trial in 2013.

Sierra contends that operations in Sacramento have been disrupted (not as a result of the Proposed Transaction but purportedly as a result of allegations in the Court Case pending under the Court's jurisdiction). Putting aside the fact that these contentions do not concern anything relevant to the Proposed Transaction, Sierra sets forth its contentions while conveniently failing to advise the Board that MBP and the Port of West Sacramento (Petition at 10) are not connected. Nor does Sierra describe how these unconnected operations have been disrupted. Most importantly, no shippers have complained about SAV's service, nor have any shippers opposed the Proposed Transaction.

Sierra consistently ignores that Patriot Rail is the counter-defendant in the Court Case, and Patriot Rail will remain so following the consummation of the Proposed Transaction. If there is a judgment against Patriot Rail, then Patriot Rail will have to satisfy that judgment, just as would be the case absent the Proposed Transaction. There is no indication that Sierra has attempted to or will be able to pierce the corporate veil to reach the current parent of Patriot Rail, Holdings, or the proposed parent of Patriot Rail (Patriot Funding) and any attempt would be purely speculative and unsupported. The owners of Patriot Rail will not be liable for any judgment against Patriot Rail.

It is curious how Sierra believes it will “restore rail competition in the Sacramento region” (Petition at 11). Sierra seeks to usurp SAV in MBP, not to compete with SAV. If Sierra wanted to compete with SAV, Sierra would have approached SAV about establishing protocols for joint operations in MBP that SAV had offered. It has been more than four years and Sierra has not approached SAV about protocols. Sierra does not want to restore competition, Sierra wants to supplant SAV. Moreover, Sierra does not provide any proof that its service would be more efficient than SAV. The shippers, MBP, and SAV’s interchange partners are all highly satisfied with SAV’s service.

Sierra contends that only the Board can protect Sierra from Patriot Rail’s past “anticompetitive conduct” (Petition at 12-14). If that were true, Sierra would have no claim to maintain in the Court Case. If Sierra truly believed its contention, Sierra should have filed to revoke the SAV NOE over four years ago. Again, what is clear here is that the anticompetitive conduct Sierra complains of, whether demonstrable or not, is not occurring in the Proposed Transaction and so has nothing to do with the matter currently before the Board.

Contrary to Sierra's unsubstantiated allegations, the Board does not use control transactions to correct past wrongs (which do not exist here) but to resolve competitive issues in the proceeding before the Board. As stated earlier, there are no competitive issues raised by the Proposed Transaction. Railroad service to shippers will not go from two to one. Joint rates, joint routes, and through routes will not be canceled. Railroad market power will not increase. The only change will be that a new, different non-carrier holding company will control Patriot Rail and the Subsidiary Railroads.

Sierra has not justified rejection of the Notice of Exemption. The Board decisions relied upon by Sierra do not support its theory that a pending law suit creates controversy that in and of itself prevents the use of the notice of exemption procedure. Sierra has shown no anticompetitive impact of the Proposed Transaction. Sierra has not shown that the Proposed Transaction will impact the Court Case. Sierra has provided no basis for rejecting the Notice of Exemption. Sierra has not even tried to demonstrate that the Notice of Exemption contains false and misleading information or that the rail transportation policy requires regulation of the Proposed Transaction. As Sierra's conduct in the TRO proceeding in the Court Case made clear, Sierra's pleadings demonstrate little more than its intent to abuse whichever forum may be available to Sierra in an attempt to create leverage in the Court Case, without respect for the statutes or regulations that actually govern the Board's consideration of the Proposed Transaction.

Accordingly, Applicants respectfully request that the Board deny the Petition to Reject the Notice of Exemption.

Petition for Stay. Sierra relies exclusively on the petition for the rejection of the Notice to justify a further stay of the Proposed Transaction. Sierra has not satisfied the Board's criteria for an extended stay of the Proposed Transaction, and Applicants respectfully request that the Board deny the stay. Sierra has not met its burden with respect to any of the following criteria:

In deciding a petition for stay, the Board follows the traditional stay criteria by requiring a party seeking a stay to establish that: (1) there is a likelihood that it will prevail on the merits of any challenge to the action sought to be stayed; (2) it will suffer irreparable harm in the absence of a stay; (3) other interested parties will not be substantially harmed by a stay; and (4) the public interest supports the granting of the stay.³³ The petitioner carries the burden of persuasion on all of the elements required for such extraordinary relief.³⁴

Entergy Arkansas, Inc. & Entergy Services, Inc. v. Union Pacific Railroad Company, Missouri & Northern Arkansas Railroad Company, Inc., & BNSF Railway Company, Docket No. NOR 42104 (STB served April 25, 2011) at 2.

Sierra will not prevail on the merits. Sierra is wrong when it claims that it has justified rejection of the Notice of Exemption through its simple assertion that the existence of the Court Case creates controversy. The only thing that is controversial about the Proposed Transaction and this proceeding is Sierra's bizarre theory as to why the Board should reject the Notice. Not only is Sierra's pleading completely devoid of any showing that it could prevail on merits that are actually relevant to this proceeding, Sierra's attempt to bootstrap its claims in the Court Case into this proceeding stretches the bounds of good faith.

Moreover, the record before the Board overwhelmingly supports a determination that Applicants, and not Sierra, would most likely be successful on the merits. Applicants have

³³ See *Washington Metro. Area Transit Comm'n v. Holidays Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958).

³⁴ *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974).

demonstrated that the precedent relied upon by Sierra is inapplicable. Sierra has provided no precedent or justification for its proposition that a pending law suit is all that is required to make a transaction before the Board controversial and non-routine, and thus unsuitable for an exemption. Sierra alone has made this proceeding controversial, and Sierra's involvement is completely unrelated to the effect on competition posed by the Proposed Transaction at issue. Absent Sierra's attempts to contort Board policy and procedures, the Proposed Transaction is similar to dozens of transactions that the Board has allowed to proceed under the notice of exemption process. The acquisition of control of a family of railroads by a non-carrier is also routine and causes no competitive concerns.

The Board's procedures are sufficient to address the Proposed Transaction. And the Court Case is sufficient to address the issues that Sierra is raising there. However, Sierra's attempt to conflate these separate proceedings and the separate jurisdiction of the Board and the Court would frustrate both forum's purposes. Applying the same standards that apply to Sierra's request for a stay, the Court refused to let Sierra abuse its processes in the TRO proceeding. The Board should reach the same result for the same reason: Sierra has failed to carry its burden of persuasion with regard to proving that it will prevail on the merits and is therefore not entitled to a stay.

Sierra will not suffer irreparable harm absent a stay. Patriot Rail is the counter-defendant today and will be the counter-defendant once the Board denies Sierra's stay request and the Proposed Transaction is allowed to proceed. If Sierra prevails, Patriot Rail will have its assets available to satisfy any judgment. Moreover, despite any of Sierra's contentions, the indemnity provision of the SPA that Sierra discusses actually benefits Sierra and prevents it from

suffering harm. The indemnity requirements and establishment of an indemnity escrow account preserve funds and earmark such funds for use related to the Court Case. Sierra's complaints about the amount in such escrow account are simply a ruse because, absent the Proposed Transaction, there would be no requirement for Holdings to set aside money to satisfy any potential judgment in the Court Case. Thus, with respect to the Court Case, Sierra is effectively better off and more insulated from potential harm as a result of the Proposed Transaction than it would be absent the Proposed Transaction.

Moreover, Sierra has not demonstrated that it is entitled to anything other than monetary damages, if at all. "Monetary damages generally are insufficient to demonstrate irreparable harm."³⁵ Accordingly, Sierra has failed to carry its burden of persuasion with regard to irreparable harm and is therefore not entitled to a stay.

Other parties will be harmed if a stay is granted. Holdings will suffer irreparable harm if the Proposed Transaction is stayed and a full application proceeding is ordered by the Board. SteelRiver may not decide to continue to wait to close the Proposed Transaction. Holdings and SteelRiver would be required to pay for the litigation of an application before the Board, where the record before the Board now shows that Sierra would be highly unlikely to prove any competitive harm would result from the Proposed Transaction.

Moreover, SteelRiver has a commitment to finance the acquisition of Patriot Rail on terms that reflect the current state of the financial market. SteelRiver cannot predict that the market for the Proposed Transaction, and the financing thereof, will not deteriorate if the Proposed Transaction is stalled by the Board – indeed, transactions of this nature are highly

³⁵ See *Suffolk & Southern Rail Road, LLC—Lease and Operation Exemption—Sills Road Realty, LLC*, STB Finance Docket No. 35036, slip op. at 6 (STB served Nov. 16, 2007).

sensitive to timing. Additionally, the current management of Patriot Rail and the Subsidiary Railroads would be unsure of their future, would it be as a subsidiary of SteelRiver, Holdings or some unknown third party. Thus, while Sierra has put forth no evidence of irreparable harm if the Board declines to grant a stay, Applicants may suffer significant harm and may lose the opportunity to engage in their transaction if the Board grants a stay.

Sierra has failed to carry its burden of persuasion with regard to demonstrating that other parties will not be harmed by an injunction.

The public interest requires that the stay be denied. Closing of the Proposed Transaction will not shield Patriot Rail from the counterclaim filed by Sierra in the Court Case. A stay of the Proposed Transaction, which has no anticompetitive effects and has not generated any opposition from shippers, would chill investment in the railroad industry. If Sierra's theory for rejecting the Notice is adopted, potential acquirers will avoid transactions that involve any railroad that is being sued. Ironically, that would damage business prospects for virtually every railroad in the country. Indeed, it would open the door for people to file lawsuits against railroads just to stop unrelated transactions. Such a result cannot be allowed by the Board.

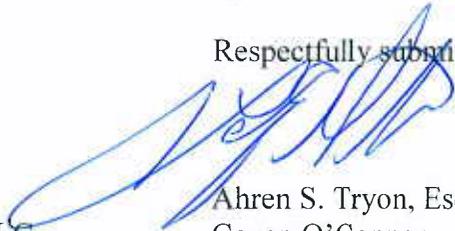
CONCLUSION

The Proposed Transaction is simply the acquisition of control of Patriot Rail and its Subsidiary Railroads by Patriot Funding, the substitution of one non-carrier holding company for another, with no anticompetitive impacts as explained above.

For the reasons explained in this Response, Applicants respectfully request that the Board deny the Petition for Rejection of the Notice of Exemption and deny Sierra's Petition for Stay.

Respectfully submitted,

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Dated: June 11, 2012

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document to be served upon counsel for Sierra Railroad Company and Sierra Northern Railway electronically.



Louis E. Gitomer
June 11, 2012

EXHIBIT A-STB BRIEF

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

PATRIOT RAIL CORP., a Delaware corporation,

Plaintiff,

v.

SIERRA RAILROAD COMPANY, a California corporation,

Defendant.

Case No. 2:09-cv-00009-MCE-EFB

SURFACE TRANSPORTATION BOARD'S OPPOSITION TO EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER, AND ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION

Hearing:

Date: May 31, 2012

Time: 2:00 p.m.

Dept: Courtroom 7

Judge: Morrison C. England, Jr.

And Related Counterclaim.

1 **OPPOSITION TO EX PARTE APPLICATION FOR TEMPORARY RESTRAINING**
2 **ORDER AND ORDER TO SHOW CAUSE**

3 Intervenor, the Surface Transportation Board (“STB” or “the Board”), files this
4 Opposition to the Ex Parte Application for Temporary Restraining Order and Order to Show
5 Cause re Preliminary Injunction (“Application”) filed by Sierra Railroad Company
6 (“Sierra”). The Board takes no position on the merits of the underlying controversy before
7 this Court. But Sierra’s Application does not address the proceeding that is properly before
8 this Court. Rather, it asks the Court to enjoin a transaction that is subject to the exclusive
9 jurisdiction of the STB, whose orders are reviewable only by a court of appeals under the
10 Hobbs Act, 28 U.S.C. § 2321 *et seq.* Because this Court lacks the authority to grant the
11 relief sought, the Application should be summarily denied.

12 **STATEMENT OF FACTS**

13 **A. Statutory and Regulatory Framework**

14 **1. STB review of rail control cases**

15 Under the Interstate Commerce Act (IC Act), 49 U.S.C. § 10101, *et seq.*, the STB
16 has plenary and exclusive jurisdiction over rail carriers that provide transportation over any
17 part of the interstate rail network. *See* 49 U.S.C. § 10501. Since 1920, Congress has given
18 the Interstate Commerce Commission (ICC), and now the STB,¹ exclusive regulatory
19 authority over rail consolidations, mergers, and acquisitions of control. 49 U.S.C.
20 § 11321(a). Acquisitions of control involving multiple rail carriers may be carried out only
21 with prior Board approval. 49 U.S.C. § 11323.

22 STB authorization of control transactions may take one of two forms. Under 49
23 U.S.C. § 11324, a party may file a full application for authority, and the STB will grant the
24 application if it determines that various statutory criteria are met. Alternatively, the agency
25 may “exempt” a transaction from the section 11324 approval process and grant
26

27 ¹ In the ICC Termination Act of 1995 (ICCTA), Pub. L. No. 104-88,
28 109 Stat. 803 (1995), Congress abolished the ICC, modified the IC Act, and transferred the
ICC’s remaining rail regulatory functions to the Board.

1 authorization under a more streamlined regulatory process in cases where the full
2 application process is not necessary.

3 Exemptions are pursued under 49 U.S.C. § 10502, in which Congress directed the
4 STB to exempt a transaction or class of transactions from its regulation, in whole or in part,
5 when the agency finds that (1) such regulation is not necessary to carry out the rail
6 transportation policy set forth in 49 U.S.C. § 10101 and (2) either the transaction is of
7 limited scope or regulation is not needed to protect shippers from an abuse of market power.
8 Under this exemption authority, the agency has developed a simple, streamlined process for
9 authorizing control transactions involving small carriers that do not connect. *See* 49 C.F.R.
10 § 1180.2(d)(2). Under those class exemption procedures, a party files a “notice of
11 exemption,” which is published in the Federal Register. Opposing parties may seek to block
12 the transaction by filing requests for stay at the agency, or they may seek revocation of a
13 transaction that has become effective. *See* 49 C.F.R. § 1180.4(g)(iii).

14 **2. Judicial review of STB actions**

15 Under the provisions of 28 U.S.C. §§ 2321 and 2342(5) (portions of the “Hobbs
16 Act”), STB actions are reviewed only in the U.S. courts of appeals. *See DHX, Inc. v. STB*,
17 501 F.3d 1080, 1082 (9th Cir. 2007). District courts may review agency orders for the
18 payment of money (28 U.S.C. § 1336(a)), and they have responsibilities in cases involving
19 enforcement of STB orders (28 U.S.C. § 2321(b) & (c)). But in all other respects, the
20 jurisdiction of the court of appeals in reviewing STB proceedings is “exclusive.” 28 U.S.C.
21 § 2342. *See FCC v. ITT World Commc’ns, Inc.*, 466 U.S. 463, 468 (litigants may not evade
22 28 U.S.C. § 2342 “by requesting the District Court to enjoin action that is the outcome of
23 the agency’s order”); *United Transp. Union v. Burlington N. Santa Fe R.R. Co.*, 528 F.3d
24 674, 678-80 (9th Cir. 2008) (*UTU*); *Ry. Labor Executives Assn. v. Southern Pac. Transp.*
25 *Co.*, 7 F.3d 902, 906-08 (9th Cir. 1993); *King Cnty. v. Rasmussen*, 299 F.3d 1077, 1089 (9th
26 Cir. 2002) (district courts lack jurisdiction to review ICC or STB decisions).

27 Sometimes litigants seek judicial intervention in ongoing agency proceedings. When
28 that happens, “where a statute commits review of agency action to the Court of Appeals, any

1 suit seeking relief that might affect the Circuit Court's future jurisdiction is subject to the
2 *exclusive* review of the Court of Appeals." *Telecomm. Research & Action Center v. FCC*,
3 750 F.2d 70, 75 (D.C. Cir. 1984) (*TRAC*) (emphasis in original); *Pub. Util. Comm'r v.*
4 *Bonneville Power Admin.*, 767 F.2d 622, 626-27 (9th Cir. 1985) (following *TRAC*). Thus, a
5 party seeking interlocutory relief in a case that is ultimately reviewable under the Hobbs Act
6 must go to an appropriate court of appeals, not a district court. *Id.* at 626 (regarding
7 injunction request); *TRAC*, 750 F.2d at 75-78 (regarding mandamus request). Similarly, a
8 party that wants a court to enjoin an agency's final decision must bring a stay action before
9 the court of appeals, not a district court. *See Scripps-Howard Radio v. FCC*, 316 U.S. 4, 9-
10 10 (1942); *UTU*, 528 F.3d at 677 (noting availability of injunction remedy in court of
11 appeals rather than district court); *Busboom Grain Corp. v. ICC*, 830 F.2d 74 (7th Cir.
12 1987).

13 3. This case

14 The proceedings before this Court involve claims by Sierra that Patriot Rail Holding,
15 LLC (Patriot) acted improperly in connection with a rail license and operating agreement
16 awarded in 2008. But although its memorandum in support of its motion argues almost
17 exclusively about the dispute over the licensing agreement, Sierra's request for injunctive
18 relief in this Court does not involve that matter. Rather, it involves a transaction in which
19 another entity, SteelRiver Infrastructure Fund North America LP (SteelRiver), seeks to
20 acquire the stock of Patriot. That transaction is not before this Court. Rather, it is currently
21 pending before the STB.

22 ARGUMENT

23 Because this Court lacks jurisdiction to rule on a matter currently pending before the
24 STB, Sierra's Application should be summarily denied. The language of the statute, 49
25 U.S.C. § 11321(a), specifically gives the Board exclusive jurisdiction over transactions such
26 as the one between SteelRiver and Patriot. If this Court were to enjoin the transaction, it
27 would exceed its own jurisdiction and interfere with the STB's exclusive jurisdiction to rule
28 on the transaction in the first instance. *Cf. UTU*, 528 F.3d at 679 (district court lacked

1 jurisdiction to review, under the Railway Labor Act, a trackage rights agreement that was
2 subject to the STB's exclusive jurisdiction).

3 Sierra argues that the Court must act because otherwise Sierra will be irreparably
4 injured if the SteelRiver/Patriot transaction is allowed to go forward. Even if the transaction
5 would cause irreparable injury, this Court would not be the appropriate forum in which a
6 party would seek a stay. Rather, the appropriate forum in which to address those matters is
7 the STB, with review in the court of appeals. That is the teaching of *TRAC* and *Bonneville*
8 *Power*. It is the process provided in the agency's regulations, *see* 49 C.F.R. § 1180.4(g)(iii)
9 (time limits for seeking stay of a notice of exemption). And it is the process provided in the
10 Board's decision publishing SteelRiver's acquisition notice in the Federal Register, which
11 expressly established a deadline for petitions for stay – the same relief sought in this Court.
12 *SteelRiver Infrastructure Partners LP, SteelRiver Infrastructure Associates, LLC, SteelRiver*
13 *Infrastructure Fund North America LP, and Patriot Funding LLC – Control Exemption –*
14 *Patriot Rail Corp., et al.*, FD 35622 (STB served May 23, 2012) (available on the Board's
15 website at www.stb.dot.gov). Thus, Sierra has a forum, the STB, which plainly has
16 jurisdiction, at which to bring its requests for stay.

17 Indeed, Sierra knows well that it belongs at the agency: it has already asked the
18 Board for injunctive relief, which the agency has granted, in the FD 35622 proceeding. In
19 connection with its request for access to certain documents that had been filed under seal in
20 the agency proceeding, in a pleading filed on May 22, 2012, at p. 2, Sierra requested a
21 “housekeeping stay” that would temporarily enjoin the transaction so that the parties could
22 “make appropriate filings regarding issues related to the proposed exemption after the
23 protective order issues have been resolved.” The Board granted that request and stayed the
24 effectiveness of the notice of exemption until June 16, 2012. *SteelRiver Infrastructure*
25 *Partners LP, SteelRiver Infrastructure Associates, LLC, SteelRiver Infrastructure Fund*
26 *North America LP, and Patriot Funding LLC – Control Exemption – Patriot Rail Corp., et*
27 *al.*, FD 35622 (STB served May 25, 2012). What that means is that the transaction cannot
28 become effective until at least June 16. Moreover, the Board extended, until June 8, 2012,

1 the deadline by which Sierra may seek a further stay at the Board. Thus, Sierra has ample
2 opportunity to seek to stay the transaction before the proper tribunal.

3 **CONCLUSION**

4 Because the Court lacks jurisdiction to enjoin a proceeding that is pending before the
5 STB, Sierra's motion should be summarily denied.

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Dated: May 30, 2012

SURFACE TRANSPORTATION
BOARD

By: /s/ Craig M. Keats
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CERTIFICATE OF SERVICE

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I HEREBY CERTIFY that on the 30th day of May, 2012, I filed the foregoing Surface Transportation Board's Opposition to Ex Parte Application for Temporary Restraining Order, and Order to Show Cause re Preliminary Injunction electronically, which caused the following counsel to be served by electronic means:

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/s/ Craig M. Keats
Craig M. Keats
Attorney for Intervenor
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EXHIBIT B-TRO HEARING TRANSCRIPT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

---o0o---

BEFORE THE HONORABLE MORRISON C. ENGLAND, JR., JUDGE

---o0o---

PATRIOT RAIL CORP.,
a Delaware corporation,

Plaintiff,

vs.

No. Civ. S-09-0009

SIERRA RAILROAD COMPANY,
a California corporation,

Defendant.

_____/

And Related Counterclaim.

_____/

---o0o---

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION HEARING

THURSDAY, MAY 31, 2012

---o0o---

Reported by: KATHY L. SWINHART, CSR #10150

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22 395 E Street, S.W.
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24 BY: CRAIG M. KEATS
25 Deputy General Counsel
(Appearing telephonically)

1 SACRAMENTO, CALIFORNIA

2 THURSDAY, MAY 31, 2012, 2:03 P.M.

3 ---o0o---

4 THE CLERK: Calling civil case 09-009, Patriot Rail
5 Corp. v. Sierra Railroad Company on for motion hearing, Your
6 Honor.

7 THE COURT: All right. Thank you.

8 Good afternoon, counsel. Appearances here in the
9 courtroom first.

10 MS. LOVETT: Good afternoon, Your Honor. Mary-Olga
11 Lovett, Tess Tolentino Meehan and Melissa Jones for the
12 plaintiff Patriot Rail Corp.

13 THE COURT: Thank you very much.

14 MR. GONZALEZ: Good afternoon, Your Honor. Louis
15 Gonzalez on behalf of Sierra Rail Corporation, defendant and
16 counter claimant.

17 MR. PLAMONDON: Scott Plamondon on behalf of Sierra.

18 THE COURT: Thank you.

19 MS. MILLEMANN: Audrey Millemann on behalf of
20 plaintiff.

21 THE COURT: And one on the phone, please.

22 MR. KEATS: Yes, Your Honor. Craig Keats on behalf of
23 intervenor Surface Transportation Board.

24 THE COURT: All right. Thank you.

25 Let me start first off with Mr. Keats on the phone,

1 the Surface Transportation Board. There's been a motion to
2 intervene in this action, the basis for which is that the
3 Surface Transportation Board would have jurisdiction, original
4 jurisdiction over the issue at hand here. And that if there
5 were any issue regarding review of the Surface Transportation
6 Board's decision, it would go to the circuit court, not to the
7 district court for its -- for secondary jurisdiction.

8 And there is apparently a protective order that is in
9 place. There's been a request to have it modified. There's
10 been a request for the Court to take judicial notice of these
11 things.

12 What I need to know is, first off, where are we with
13 the STB and with the fact that this court may not have
14 jurisdiction even to hear this case in the first place?

15 I'll start with you, Mr. Keats.

16 MR. KEATS: Yes, sir.

17 The STB has exclusive jurisdiction over various
18 matters related to railroads, and these type of transactions
19 are one such matter. And under the pretty long established
20 law, anybody who has a concern over what the STB is doing
21 brings it to the STB first and then, if they're unsatisfied
22 with the STB, goes to the Court of Appeals, which is the forum
23 that reviews board actions and procedures.

24 And so, ah, in a couple of cases that have come up
25 over the years, parties have sought to challenge things that

1 were going on at the STB in district court. And there is --
2 and the precedent is that to the extent that such a challenge
3 is available at all, it has to be brought in the Court of
4 Appeals. And so that is why when we saw that the injunction
5 request had been brought before Your Honor, we thought it was
6 appropriate for us to weigh in on the matter.

7 THE COURT: All right. Well, first of all, let me
8 clear up one thing. You've made a motion to intervene in this
9 case, and I'm going to grant your motion because I think it's
10 appropriate for that to occur at this time. And the
11 information that you're providing is directly on point.

12 With respect, first of all, to Patriot Rail, your
13 position with respect to the comments just made by Mr. Keats?

14 MS. LOVETT: Your Honor, we adopt and hold Mr. Keats'
15 comments. We do believe that the exclusive jurisdiction
16 regarding regulation of acquisition of rail carriers lies with
17 the Surface Transportation Board as discussed.

18 THE COURT: All right. Thank you.

19 And with respect to Sierra Railroad.

20 MR. GONZALEZ: Your Honor, the situation has sort of
21 evolved since we initially filed our papers, and at the
22 present time Sierra is comfortable with the STB hearing
23 Sierra's challenge to the proposed transaction and will raise
24 its issues there. But that being said, there are other issues
25 before the Court that are not affected by the STB's claim of

1 jurisdiction in this matter with respect to other issues in
2 the case that are before the Court today.

3 THE COURT: Would you be more specific as to what you
4 believe -- well, first of all, if -- and I think that what
5 you're saying is the issue with respect to the injunctive
6 relief, that aspect should be off the table here in this
7 court?

8 MR. GONZALEZ: Well, no. What I'm saying, Your Honor,
9 is that the issue as to injunctive relief with respect to
10 trying to enjoin the transaction is -- we sought injunction on
11 multiple bases. On that basis, we are -- we are asserting
12 that Sierra is comfortable with asserting those issues at the
13 STB.

14 With respect to the issues concerning the Court's
15 orders, violations of court orders and other issues in this
16 case that are unaffected by the STB's jurisdiction, we are not
17 conceding that this entire proceeding, the entire basis for
18 the ex parte relief is affected by the STB's position on the
19 transaction. So, yes, the transaction aspect of it should be
20 heard by the STB at this time.

21 THE COURT: But if the Court were to proceed with
22 other requests for injunctive relief that you've made at this
23 time, aren't you potentially setting yourself up, and the
24 Court up and all parties to inconsistent rulings, judgments,
25 ineffective use of lawyer time and court resources?

1 MR. GONZALEZ: Well, what I did not hear, nor see in
2 the STB's papers, is that they're suggesting that the STB
3 proceeding has to go forward before this action may go
4 forward. The STB's jurisdiction, as I read their papers, is
5 that they are the sole entity or the sole tribunal that will
6 establish whether the control and ownership of the Patriot
7 Rail entities can go forward and will go forward and if this
8 court is without power to affect that decision.

9 That's -- that's what I understood they were
10 intervening on that basis.

11 With respect to the disclosure of the documents, the
12 disclosure -- or the inappropriate use of or violations of
13 information subject to the protective order in this case,
14 those are not issues before the STB.

15 THE COURT: All right. I understand more now. Thank
16 you.

17 MS. LOVETT: Your Honor, our position on that is that
18 this ex parte motion for injunctive relief, first of all, we
19 maintain in our papers, and the Court has our multiple
20 declarations, that at no time was the protective order in any
21 way violated or breached. But assuming that that were true,
22 then obviously there is a vehicle for that, which is a motion
23 to enforce the Court's protective order, which is not before
24 the court today, which has not been filed, upon which there's
25 been no meet and confer.

1 What they've done is taken this ex parte motion with
2 the idea -- the gravamen of that motion is that the
3 transaction must be stopped to prevent what they claim is
4 irreparable harm, which is the transmission of these
5 confidential documents. If they're correct -- and again, Your
6 Honor, we vehemently the contest that -- number one, that
7 horse is out of the barn because the documents have already
8 been transmitted, although they have not. And, second, this
9 still would be an improper vehicle because, for the Court to
10 intervene on an injunctive basis where they have damages at
11 law and where they have not exhausted their remedies at law,
12 would be an impermissible exercise of jurisdiction as well.

13 This was couched as to way to stop this transaction.
14 We understand that they're pulling back from that now, but
15 that still doesn't make this the proper vehicle to address
16 what they claim is their harm.

17 THE COURT: Well, let me just say that the reason why
18 you're in court today is because of this court's understanding
19 until yesterday that there was a pending transaction about to
20 occur, I believe it's June 6th?

21 MR. GONZALEZ: Correct, Your Honor.

22 THE COURT: And as a result of that impending
23 transaction of the sale of shares of the parent company of
24 Patriot, that this needed to be brought before the Court on an
25 expedited basis so that the Court could determine whether or

1 not that transaction should go through.

2 And now, based upon what I hear, the whole basis for
3 this court bringing you in today appears to be supplanted by
4 the STB and the fact that the STB has to have jurisdiction
5 over that transaction.

6 Furthermore, there's been a protective order issued by
7 the STB with respect to not only confidential documents, but
8 highly confidential documents. There's been a request to the
9 STB to modify the protective order, which would seem to also
10 give credence to the fact that there's an acknowledgement by
11 asking for that request that the STB is in fact handling that
12 as well.

13 So I don't necessarily see right now, based upon this
14 new information or new intervention by STB, why this court
15 today on May 31st should hear the issue which is on -- not
16 necessarily on the highest expedited basis, but this was on a
17 fairly expedited basis to get you into court today. It would
18 seem to me that before that proceed -- and that's what we're
19 here about is the injunctive relief -- this has to go to the
20 STB.

21 Mr. Keats, your comments, please.

22 MR. KEATS: Yes, Your Honor. That is our position,
23 that this matter is pending before the STB. There is
24 currently a temporary stay in effect until May -- June 16th.
25 And by June 8th, parties such as Sierra have the opportunity

1 to file further pleadings as to why an extensive stay should
2 be put into place. The board will rule on that before June
3 16th. And if Sierra or any party is dissatisfied with the
4 board's ruling, the remedy we believe would be in the Court of
5 Appeals.

6 MR. GONZALEZ: May I be heard on that, Your Honor?

7 THE COURT: Yes.

8 MR. GONZALEZ: We're not disagreeing with what's being
9 said here with respect to the STB. However, there's a couple
10 of things that are going on that I think there's a little bit
11 of a misunderstanding.

12 The reason we're here today is because there's been a
13 transaction that's been kept from us that required us to come
14 to court here because the other side would not provide the
15 documentation to us to deal with this in a more orderly basis.
16 So, number one, that's why we're here, and then it's evolved
17 since we filed it.

18 Number two, there is a protective order in the STB
19 action. However, the protective order in the STB action does
20 not allow me, on behalf of my client, to share information
21 about this case with the STB's lawyer. The protective
22 order -- for example, the protective order in our case says I
23 can only use the information developed in this case for this
24 proceeding. Likewise, the STB's protective order says that
25 the information that they have can only be used in that

1 proceeding. Effectively the STB -- my client's STB lawyer and
2 myself, my firm as their district court litigation counsel,
3 cannot speak to each other about information developed in each
4 other's cases because it would violate one or the other of the
5 protective orders.

6 So if the -- if the Surface Transportation Board is
7 going to rule on these issues and it's going to exercise
8 exclusive authority to hear this issue, we believe it's
9 appropriate to modify the protective order to allow Sierra's
10 challenges to be heard at the STB and not as has been
11 orchestrated by Patriot, where we have siloed the STB --
12 Sierra's STB lawyer from being able to share information with
13 us and us being able to share information with them through
14 the use of protective orders.

15 So we're glad to have this issue decided there, you
16 know, but that's the case. It should be -- you know, the STB
17 should have the opportunity to actually hear whatever basis
18 Sierra has to challenge that.

19 THE COURT: I understand your position, counsel.

20 MS. LOVETT: Your Honor, first of all, again, there is
21 nothing to suggest that Patriot had any obligation to discuss
22 any of its ongoing business with someone who is not only a
23 competitor, but a bitter enemy in litigation to be blunt. And
24 unless there was any thought that there was going to be any
25 disclosure of confidential information which would require an

1 expansion of this court's protective order, and there was
2 not -- as is made out in our papers, there were no -- the
3 acquiring party was limited largely to public filings, and in
4 fact our client took some flack from the acquiring party
5 because of refusal to provide more than public filings and
6 opinions of counsel.

7 But there was certainly no affirmative obligation to
8 come to court, and we contest this, and say here are all the
9 transactions we're contemplating. Here are the deal partners
10 that we are looking at. There's certainly nothing that would
11 require Patriot to do that. And again, if there were, and
12 there's no basis that's been cited for that, then injunctive
13 relief would not be the proper vehicle.

14 The vehicle would be, again if there was a breach of
15 the protective order, to address that and then move the Court
16 to enforce the protective order or seek contempt based on
17 violation of that protective order. That has not happened.

18 Moreover, as the Court correctly notes, by invoking
19 the jurisdiction of the separate protective order -- and I
20 have in front of me an undertaking that Mr. Gonzalez has
21 executed with the Surface Transportation Board under that
22 separate protective order to allow him to have access to that
23 information.

24 So, again, we have to let that process take its
25 course. But it is an improper indication of this court's

1 authority on injunctive relief when clearly the gravamen of
2 that ex parte motion is to stop the deal because of the
3 irreparable harm that they claim if somehow these confidential
4 documents will be turned over. And Mr. Gonzalez makes that
5 point beautifully.

6 We have such a Chinese wall at this point between the
7 two sets of litigation and counsel that that will not happen,
8 has not happened to this point either.

9 THE COURT: Well, based upon what I've heard, I don't
10 believe that this court is in a position, number one, to deal
11 with the injunctive relief requested today.

12 First of all, it is inappropriate. There's no basis
13 for it. There is a remedy, which is the STB, which has
14 clearly agreed to take this situation on based upon the
15 representations of Mr. Keats today. And, if that is the case,
16 then the entire basis for which this court would grant
17 injunctive relief, that is no adequate remedy at law, that
18 there is irreparable harm that is about to occur -- which is
19 what the Court understood initially was potentially going to
20 occur if the sale went through. But now that that has been
21 taken off the board, I don't see at all where there is any
22 basis for this court exercising its equitable jurisdiction for
23 issuing an injunction.

24 Even if there is an issue with the protective order,
25 again, I have to agree with counsel that there are remedies,

1 and that is to, if you believe that there's been a violation
2 of the protective order, advise the Court of that and let the
3 the Court deal with it. Or even now that you are with the
4 STB, and from what it sounds like with Mr. Keats, they are
5 prepared to deal with the protective orders, the stays, the
6 transfer, everything. And that would be the most expeditious
7 way to utilize all of the attorney time and other time that's
8 going to have to be expended here.

9 MR. GONZALEZ: Well, Your Honor --

10 THE COURT: Go ahead, Mr. Gonzalez.

11 MR. GONZALEZ: So --

12 THE COURT: You can see where I'm going, but I'm going
13 to give you an opportunity to be heard.

14 MR. GONZALEZ: I just wanted to make sure I did, and
15 thank you.

16 First of all, I did sign an undertaking in the STB
17 action, but I cannot use the information I have developed --
18 that's been provided to me there to make arguments to the
19 Court today on why injunctive relief is appropriate. That
20 information provided to me there has been provided solely for
21 the use in those proceedings. So I'm being -- I'm being
22 invited and baited into violating that order by trying to
23 breach some sort of confidence there.

24 The issue here is that I cannot point you to
25 information, more specific information other than violation of

1 the protective order because the underlying document, the
2 purchase transaction has not been provided.

3 This isn't, you know, some pending or negotiated
4 transaction. It is a fully executed agreement waiting for STB
5 approval, and then it's a done deal. It goes directly to the
6 damages in the case. It goes to the value of McClellan Park
7 operations. It goes to the EBITDA multiplier. We believe
8 that the document will reveal whether there's been a
9 protective order violation by information that was disclosed.

10 Our confidential information that was disclosed in the
11 due diligence process, which Patriot says hasn't occurred, the
12 best evidence of that isn't what their counsel, you know, or
13 what some declarations say, it's actually the documentation.
14 It is relevant to the proceedings, and it is relevant for the
15 expert work in the case.

16 So we can come back and raise these issues later, but
17 in the absence of the documents and the fact that documents
18 are not being provided, we're just asking for further issues.

19 And the fact that I may get a less redacted version of
20 that document in the STB proceedings will be of no moment
21 because I can't use it here. And exactly the problem that's
22 happening with the protective orders is being illustrated.
23 We're using one proceeding to silo what's happening here.

24 And that's why I think we need an amendment to the
25 protective order to allow the STB to actually hear this issue.

1 But, more importantly, I think --

2 THE COURT: Who needs to hear this issue?

3 MR. GONZALEZ: The STB.

4 THE COURT: The STB. Okay.

5 MR. GONZALEZ: So I think for the STB to actually hear
6 this challenge, you know, and the information that the client
7 has, and not in these walled off compartments of Patriot's
8 making, they can decide it, but they need the information. So
9 we're asking for a modification of the protective order there.

10 But, more importantly, we're asking for the Court to
11 provide -- or to order the production of that unredacted copy
12 of the document in this case so we can establish whether
13 there's been these violations. If there are, we'll be back
14 for further proceedings. If there isn't, fine. It's all
15 subject to a protective order.

16 THE COURT: And I'm assuming that you are opposing the
17 modification of the protective order?

18 MS. LOVETT: We are, Your Honor. But for a very basic
19 level reason, which is that this court ordering modification
20 of the protective order that usurps what the STB has put in
21 place, at the behest of Sierra in asking for the modification
22 of the protective order in that proceeding, usurps the STB's
23 exclusive jurisdiction with regard to this transaction.

24 And, again, counsel was required to have a good faith
25 basis to come in with the ex parte relief motion. They

1 allege, and I don't know on what basis, that we violated the
2 protective order that we -- in the due diligence process that
3 we turned over confidential information. Apparently they're
4 now admitting they had no good faith basis for making that
5 allegation because they couldn't have known, but they did come
6 to court seeking that specific relief based on that
7 representation.

8 And the bottom line is that the transaction changes
9 nothing with respect to this litigation. Companies are bought
10 and sold while they're in litigation all the time. None of
11 the assets changed. This is a stock sale. Patriot Rail will
12 continue with the McClellan contract. They will continue to
13 own 13 railroads throughout the country. It changes nothing
14 with respect to this litigation.

15 MR. GONZALEZ: Well, and the document would establish
16 that.

17 MS. LOVETT: Your Honor, I --

18 MR. GONZALEZ: It's just that simple.

19 MS. LOVETT: And it is absolutely not that simple.
20 There's no way that a document would satisfy what they want,
21 which is some guarantee -- I mean, what they're asking for,
22 Your Honor, still is their damages at law.

23 THE COURT: Mr. Keats, do you have anything final to
24 say on this?

25 MR. KEATS: Well, it sounds to me like these arguments

1 that Sierra wants to make about the protective order at the
2 STB ought to be made at the STB. I don't think that -- I
3 think that that process has happened already. But if they
4 want something different, I think that the STB is the place
5 they ought to bring that, if it's a problem with the STB's
6 order.

7 THE COURT: Well, I note that on May 25th, 2012, which
8 is less than seven days ago, the STB granted at least a
9 portion of Sierra's motion to modify the protective order. So
10 there has been some movement already within the past six days.
11 So if the STB is able to modify the protective order in that
12 respect, I don't see why it could not modify it further if the
13 appropriate requests were made and it had all of the parties
14 present before it without the interference of a district court
15 action.

16 The injunctive relief request is denied. I'm denying
17 it. I don't believe it's appropriate under the standard that
18 I would have to find to grant injunctive relief, number one.
19 Number two, I do find that the STB has jurisdiction over this
20 particular transaction at this point. And, furthermore, that
21 if there is a request to have that reviewed, it should go to
22 the circuit court.

23 If there are other issues relevant to failure to
24 comply with this court's orders that will not have an effect
25 upon the STB's governance at this time, I will hear those.

1 But at this point in time, it sounds to this court like
2 everything should be transferred to the STB to allow them to
3 have an opportunity to make a full and informed decision after
4 hearing from all parties without this court's intervention.

5 MR. GONZALEZ: Your Honor, and to allow that to occur,
6 we ask the Court to modify the protective order in this case
7 so we can do that. The modification you just referenced at
8 the STB was Patriot's request to modify the protective order
9 to create a dual level of disclosure, so that we would be
10 included in the lower level and only, again, for the STB
11 proceeding. So at this point, I am not able or my firm is not
12 able to assist my client's STB counsel so it can assert its
13 rights in that proceeding with the information developed in
14 this case.

15 MS. LOVETT: Your Honor, I can represent to the Court
16 that the only thing redacted from that -- from their
17 information is the complete sale price. They know the range,
18 that it's over \$200 million, but the exact sale price is not
19 part of that document. Otherwise they've got full access to
20 what they need to see in the STB.

21 THE COURT: I have made my ruling that it's going to
22 be at the STB's discretion at this time. There is no basis
23 for the Court today to issue injunctive relief in any way.
24 Furthermore, I find that there's been not a sufficient showing
25 for this court to modify its previously issued protective

1 orders. And, furthermore, if there is further requests, it
2 should be made to the STB. The STB can issue orders or make
3 further requests of this court if necessary.

4 Mr. Keats, is there anything else that the STB would
5 need from this court to allow it to continue to pursue the
6 handling of this matter?

7 MR. KEATS: I don't think so, Your Honor. I think
8 that's about where we need it to be. Thank you so much.

9 THE COURT: All right.

10 MR. GONZALEZ: Your Honor, just one last point, and I
11 know I'm asking for indulgences here.

12 Is it the Court's ruling then that the STB will be in
13 a position to modify this court's protective order?

14 THE COURT: I've not -- as a direct order, no. But
15 could they advise this court or make a request? Absolutely.
16 I think that that would be as any party could. Patriot could
17 make that request. You could make that request. If it turns
18 out that there is an issue that does not permit you to
19 adequately represent your client before the STB, and the STB
20 feels that there is some restriction this court has done
21 that's causing that, I would be more than willing to entertain
22 any such request.

23 MR. GONZALEZ: Your Honor, that all has to be done by
24 June 6th. And I understand --

25 THE COURT: But I understand that there's been -- but

1 the bottom line is you're still not going to have a decision
2 by June 6th that you need if the case is at the STB.

3 MR. GONZALEZ: I'd be able to assist the STB lawyer in
4 asserting its challenge by the 6th. And I'm currently
5 prevented from doing so based on the protective order as
6 currently drafted in this case. That's the problem.

7 THE COURT: That request is denied. I have heard this
8 case, I've spent a lot of time on this case, I tried to settle
9 this case. I understand what this is about. I am very well
10 aware of what the protective orders are, I issued the
11 protective orders, and in this case the request is denied.
12 This will go forward to the STB as previously ordered. That's
13 the Court's order. Thank you.

14 MS. LOVETT: Thank you, Your Honor.

15 THE COURT: Nothing else on calendar at this time,
16 Madam Clerk?

17 THE CLERK: No, Your Honor.

18 THE COURT: Thank you. Court is adjourned.

19 (Proceedings were concluded at 2:29 p.m.)

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I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

/s/ Kathy L. Swinhart
KATHY L. SWINHART, CSR #10150

**EXHIBIT C-LICENSE AND OPERATING
AGREEMENT**

RAILROAD LICENSE AND OPERATING AGREEMENT

McClellan Park
Sacramento County, CA

This Railroad License and Operating Agreement ("License Agreement") is made and entered into as of the 6th day of February, 2001 ("Agreement Date"), by and between the COUNTY OF SACRAMENTO, a political subdivision of the State of California ("Licensor") and YOLO SHORTLINE RAILROAD COMPANY, a California Corporation ("Licensee").

RECITALS:

- A. McClellan Air Force Base is being closed by the U.S. Air Force and transferred to Sacramento County for redevelopment, and
- B. Licensor, pursuant to separate documentation, has the right to enter into leases and other contracts with businesses and other enterprises for the redevelopment of McClellan Air Force Base (hereinafter also referred to as "McClellan Park"), and
- C. Licensor desires to provide for common carrier rail service to tenants of McClellan Park utilizing the existing trackage at McClellan Park, and
- D. Licensor desires to arrange for the necessary repairs and maintenance to the existing trackage and road crossings of the trackage so that such trackage becomes and remains operational in accordance with applicable regulations, and
- E. Licensee is a common carrier railroad and is willing to make the necessary repairs to the trackage to make it operational and to operate and maintain such trackage to provide rail service to Licensor's tenants at McClellan Park, and
- F. Licensee will make such necessary agreements with the Union Pacific Railroad Company and other users of the trackage at McClellan Park so that railroad traffic may be interchanged, delivered, received, and otherwise handled in accordance with standard railroad practices.

AGREEMENT:

Now, therefore, it is mutually agreed by and between the parties hereto as follows:

1. LICENSOR GRANTS RIGHT.

1.1 In consideration of the license fees to be paid by the Licensee and in further consideration of the covenants and agreements herein contained to be by the Licensee kept, observed and performed, the Licensor hereby grants to the Licensee the exclusive license (which is not coupled with an interest) to occupy, maintain, repair and operate all of the Railroad Facilities (as hereinafter defined) within McClellan Park, except (1) that trackage that is specifically specified for dismantling (see Section 5.1 below), and (2) trackage that is specifically leased to other parties by Licensor (see Section 4.1 below) ("License"). Exhibit A, attached hereto and made a part hereof, shows all trackage subject to this License Agreement. This License shall encompass all such trackage so designated in Exhibit A and in shall include the area within 15 feet of the centerline of each track, except where

roadways or buildings, as permitted by Licensor, reduce such distance to less than 15 feet. Also this License shall include all railroad signs, switch mechanisms, and other appurtenances associated with the trackage subject to this License Agreement, as designated on Exhibit A. All such trackage and appurtenances described on Exhibit A shall be as subject to this License Agreement are hereinafter defined as the "Railroad Facilities".

2. LIMITATION AND SUBORDINATION OF RIGHTS GRANTED.

2.1 The foregoing grant of right is subject and subordinate to the prior and continuing right and obligation of the Licensor to use and maintain McClellan Park, including the right and power of the Licensor to construct, maintain, repair, renew, use, operate, change, modify or relocate railroad tracks, signal, communication, fiber optics, pipelines or other facilities upon, along or across any or all parts of its property, all or any of which may be freely done at any time or times by the Licensor without liability to the Licensee for compensation or damages, provided that Licensor shall, to the extent possible, notify the Licensee as soon as practicable of any planned or actual interference with the Railroad Facilities or Licensee's operation thereof, and Licensor shall take all practicable measures to minimize such interference.

2.2 The foregoing grant is also subject to all outstanding superior rights (including those in favor of licensees of the Licensor's property, and others), and the right of the Licensor to renew and extend the same; and, is made without covenant of title or for quiet enjoyment.

2.3 Licensee hereby acknowledges that (1) it has satisfied itself with respect to the condition of the Railroad Facilities and the present and future suitability of the Railroad Facilities for Licensee's intended use; (2) that Licensee has made such investigations as it deems necessary with respect to the Railroad Facilities, is satisfied with reference thereto, and assumes a responsibility therefore as to Licensee's occupancy and use thereof; and (3) neither the Licensor, nor any of Licensor's agents, has made any oral or written representations or warranties with respect to said Railroad Facilities other than as set forth in this License Agreement.

2.4 Notwithstanding any other provision of this Agreement to the contrary, Licensee acknowledges and agrees that Licensor's obligations under this Agreement are expressly contingent upon Licensor, in its sole discretion, determining that the requisite governmental approvals, authorizations and/or permits for the operation of the Railroad Facilities, which includes, but is not limited to, approvals from the United States Air Force (collectively, "Initial Approvals") have been issued. Licensor agrees to utilize its good faith efforts and due diligence to obtain the Initial Approvals on or before May 1, 2001; provided, however, the failure to do so on or before such date shall not be deemed a breach of either parties' obligations under this Agreement, but rather a failed condition precedent to Licensor's obligations hereunder. If the Initial Approvals have not been granted by May 1, 2001, this Agreement shall automatically terminate, and the provisions of Section 9.4 shall thereafter apply.

3. MAINTENANCE, AND OPERATION OF RAILROAD FACILITIES.

3.1 Following the Agreement Date, using its best commercial efforts and its due diligence, the Licensee, at its expense, shall make all necessary repairs and install all necessary signage to a portion of the Railroad Facilities identified on Exhibit A attached hereto ("Primary Use Railroad Facilities") in accordance with the requirements of Section 3.2 below. The remaining portion of the Railroad Facilities not within the definition of Primary Use Railroad Facilities shall be referred to as the "Dormant Railroad Facilities". Licensee acknowledges and agrees that the Railroad Facilities marked as "Delayed Delivery" on Exhibit A attached hereto may be delivered to Licensee following the Agreement Date by Licensor upon Licensor's receipt of requisite approvals from the applicable governmental authorities for

the use thereof. Following such election by Licensor, the Delayed Delivery areas shall thereafter be within the definition of "Railroad Facilities" and a portion of the "Primary Use Railroad Facilities."

3.2 The Licensee, at its expense, but subject to Licensor's payment obligation set forth in Section 3.4 below, shall keep the Railroad Facilities in use in good repair and in a good and safe condition in conformity with the requirements of General Orders of the California Public Utilities Commission and the regulations of the Federal Railroad Administration ("FRA"), as applicable, and all other applicable laws, codes or regulations. Such trackage will be maintained to FRA class 1 or better. For purposes of this section, such repairs include, but are not limited to, tie replacements, joint bar replacements, replacements of bolts, spikes, broken tie plates and fittings, and repair or replacement of cracked or broken rails, frogs and/or switch parts, but does not include upgrades of rail, switches and other track material. In addition, Licensee shall keep the Railroad Facilities in a clean condition and keep all weeds mowed and trash and debris picked up and removed.

3.3 All track materials installed as part of the Railroad Facilities shall become the property of the Licensor. All materials removed from the Railroad Facilities as part of maintenance or repairs shall become the property of Licensee.

3.4 Notwithstanding the provisions of this Section 3, Licensor shall reimburse Licensee for its costs incurred pursuant to the provisions of this Section 3 allocable to the Dormant Railroad Facilities. In this regard, on an annual basis during the term of this Agreement, Licensee shall prepare written budget ("Dormant Track Budget"), which sets forth Licensee's anticipated costs with regard to performing its obligations under this Section for the Dormant Railroad Facilities. Licensor's obligations to reimburse Licensee pursuant to this Section shall not become effective until Licensor has approved of the Dormant Track Budget, which approval shall not be unreasonably withheld, and Licensor's reimbursement obligation shall be limited to the amounts set forth on such approved budget notwithstanding Licensee's annual expenses. Licensee shall update the Dormant Track Budget on an annual basis. Following the approval of the Dormant Track Budget, if Licensor fails to reimburse Licensee for amounts owing under this Section 3.4 within fifteen (15) business days following Licensor's receipt of written request, Licensee may cease all maintenance and repair required with regard to the Dormant Railroad Facilities until such amounts are paid in full. Any amounts which are not paid when due shall accrue interest at (i) twelve percent (12.00%) per annum, or (ii) the maximum legal rate, whichever is less, until paid in full.

3.5 At any time during the Term of this License Agreement, Licensee may request Licensor, in writing, to convert any Dormant Railroad Facilities into Primary Use Railroad Facilities. Licensor shall, within fifteen (15) business days following receipt of such request, approve or disapprove of such request. Until such time as Licensor has approved of such conversion, excepting Licensee's repair and maintenance obligations set forth in this Section, Licensee shall have no right to utilize the Dormant Railroad Facilities for any purpose. Upon a conversion of the Dormant Railroad Facilities to Primary Use Facilities, Licensor's obligations pursuant to Section 3.4 above shall cease.

4. TRACKAGE LEASED TO OTHER PARTIES BY LICENSOR,

4.1 Licensor may lease, from time to time, specific trackage at McClellan Park to third parties as part of a land or facility lease. Such trackage leased to third parties shall not be part of the Railroad Facilities as defined in this License Agreement. All trackage specifically leased by Licensor to third parties shall be separated from the trackage subject to this License Agreement by means of gates, fencing, signs, derails or similar means that prevent operations by such other parties on trackage licensed to Licensee or operations by Licensee on trackage leased or licensed to such other parties, unless and

except when such operations are conducted under a specific agreement between Licensee and such other party.

4.2 Subject to the terms and conditions of this License Agreement, Licensee shall have the exclusive right to switch rail cars or other on-rail equipment of any type, and receive revenue therefor, between any trackage leased by Licensor to a third party(ies) and Licensee, any other railroad common carrier, or any other party.

5. RELOCATION OR REMOVAL OF RAILROAD FACILITIES.

5.1 The License herein granted is subject to the needs and requirements of the Licensor in the operation of McClellan Park and in the improvement and use of that property. The Licensor, at its sole expense, may add to or remove any portion of the Railroad Facilities, or relocate them to such new location(s) as the Licensor may designate, whenever, in the furtherance of Licensor's needs and requirements, the Licensor shall find such action necessary. In such cases, Licensee shall provide Licensor with a fixed price quote for performing such work, and Licensor shall have the option of accepting Licensee's quote and have Licensee perform the work, or have another rail contractor perform such work. In the event that any railroad trackage is removed at McClellan Park, Licensee may designate and stockpile for future use all or a portion of such removed materials as is reasonably necessary for repairs and maintenance of the Railroad Facilities. All such work performed and installation of railroad trackage shall be in conformance to all requirements of the General Orders of the California Public Utilities Commission and regulations of the Federal Railroad Administration (FRA), as applicable, and all other applicable laws, codes or regulations.

5.2 All the terms, conditions and stipulations herein expressed with reference to the Railroad Facilities, so far as any new or relocated trackage is on McClellan Park, shall apply to the Railroad Facilities as so modified, changed or relocated within the contemplation of this Section.

6. MINIMIZE INTERFERENCE WITH LICENSOR'S TENANTS.

6.1 The Railroad Facilities shall be operated in such a manner as to minimize interference with the use by tenants of the roadways, property and facilities of the Licensor, and nothing shall be done or suffered to be done by the Licensee at any time that would in any manner impair the safety thereof.

7. LICENSE FEES.

7.1 The License Fees shall be dependent upon the railroad traffic. Licensee shall pay Licensor the following fees based on railcars received from the connecting carrier and delivered to tenants of McClellan Park or received from tenants of McClellan Park and delivered to the connecting carrier, when Licensee receives revenue from the connecting carrier under negotiated standard divisions, which amount is referred to as the "Railcar Division" (Licensee shall provide Licensor with a summary of its negotiated Railroad Division and shall update such summary on any adjustments to such amounts).

7.1.1 On the first 350 railcars each calendar year—No fee

7.1.2 On the 351st through 1000th railcar each calendar year—ten percent (10%) of the Railcar Division received by Licensee from the connecting carrier railroad.

7.1.3 On the 1001st and greater railcars each calendar year—fifteen percent (15%) of the Railcar Division received by Licensee from the connecting carrier railroad

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7.1.4 For all railcars received, for which Licensee is paid a special negotiated division (such as excess dimension or weight railcars) higher than standard, Licensor shall receive twenty percent (20%) of the Railcar Division received by Licensee.

7.1.5 All other incidental switching or operating fees (if any) shall accrue solely to Licensee (the parties acknowledge that the amounts anticipated to be received by Licensee pursuant to this Section 7.1.5 are minimal and if such assumption is incorrect and Lessee begins to receive significant funds from the services described in this Section 7.15 (defined as five percent (5.00%) or more of revenues generated at McClellan Park), the parties shall meet and agree upon an allocation share for Licensor.

7.1.6 For all non-operating revenue (car storage fees or track sublicense fees) received by Licensee related to the trackage at McClellan Park, Licensee shall pay to Licensor fifty percent (50%) of such revenue.

7.2 On or before the last day of each month, Licensee shall determine the amounts payable arising from the preceding month, and shall pay such amount to the Licensor. Licensee shall prepare a statement detailing the payments made. Any adjustments shall be made as soon as practicable on subsequent statements. Licensee shall, upon reasonable request from Licensor, make available for inspection and copying all documents and receipts upon which the License fees are based.

8. TEMPORARY USE OF LAYDOWN SPACE

8.1 Licensee may make arrangements from time to time with a temporary shipper by rail for use of otherwise unused laydown space (open space next to railroad track). Licensee shall notify Licensor of each such use. If Licensor reasonably objects to any specific use of laydown space by Licensee or its shipper, Licensee shall discontinue that use of such laydown space as soon as practicable. Licensee shall pay to Licensor twenty percent (20%) of all revenue (if any) received by Licensee by such shippers for such use of such laydown space.

9. TERM AND TERMINATION.

9.1 This License Agreement shall be effective when fully executed, shall continue in full force and effect for a period of five (5) years and year to year thereafter ("Term"), unless otherwise terminated as provided herein.

9.2 This License Agreement may be terminated by either party upon notice in the event that Licensee cannot make commercially reasonable interchange and trackage rights agreements with Union Pacific Railroad Company for the interchange, delivery and receipt of cars at McClellan Park, a reasonable division of revenues, and trackage rights to move locomotives and non-revenue equipment between West Sacramento and McClellan Park.

9.3 If the Licensee does not use the right herein granted or the Railroad Facilities for one (1) year, or if the Licensee continues in default in the performance of any covenant or agreement herein contained for a period of thirty (30) days after written notice from the Licensor to the Licensee specifying such default, the Licensor may, at its option, forthwith terminate this License Agreement by written notice, provided however, that if such default cannot reasonably be cured within thirty (30) days, Licensor shall not terminate this License Agreement if Licensee begins to cure the default within the thirty day notice period and proceeds diligently to complete such cure.

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9.4 Notwithstanding any other provision of this License Agreement to the contrary, this License Agreement may be terminated, without cause, by written notice given by either party to the other on any date stated in such notice, not less, however, than six (6) months subsequent to the date which such notice shall be given, provided that, if Licensor terminates this License Agreement pursuant to this subsection or any other section of this License Agreement within five (5) years of the effective date of this License Agreement, Licensor shall reimburse Licensee for the unamortized (using the initial 5-year term as an amortization period) costs, including labor, material and overhead costs, incurred by Licensee under Section 3.1 hereof, which reimbursement obligation shall not, in any event exceed One Hundred Thousand and No/100ths (\$100,000.00).

9.5 All obligations incurred by the Parties prior to the termination of this License Agreement shall be preserved until satisfied.

9.6 If this License Agreement is terminated pursuant to Section 9.2 or 9.3 above, Licensor shall not be obligated to reimburse Licensee for any of its costs incurred pursuant to this License Agreement.

10. INSURANCE.

10.1 The Licensee shall, at its own cost and expense, provide and procure General Public Liability and, as applicable, Workman's Compensation or Federal Employer's Liability Act (FELA) insurance. This insurance shall be kept in force during the life of this License Agreement.

10.2 The General Public Liability insurance providing bodily injury, including death, personal injury and property damage coverage shall have a combined single limit of at least \$5,000,000 each occurrence or claim and at all times an unimpaired aggregate limit of at least \$5,000,000. This insurance shall contain broad form contractual liability covering the indemnity provisions contained in this License Agreement, coverage for construction or demolition work on or near railroad tracks, and name the Licensor as an additional insured. Such insurance coverage shall be subject to Licensor's prior written approval and Licensee shall provide Licensor with a certificate of such insurance prior to the execution of this License Agreement.

10.3 Workers' Compensation or FELA insurance shall cover the statutory liability as determined by the compensation laws of the State of California or FELA, as applicable, with a limit of at least \$1,000,000.

10.4 In addition to the provisions of this Section 10, Licensee shall maintain the insurance and comply with the requirements set forth on Exhibit B attached hereto.

11. NOTICES

11.1 All correspondence, notices and other papers shall be delivered either in person or by certified or registered mail, postage prepaid, to the parties hereto at the following addresses:

General Manager
Yolo Shortline Railroad Company
341 Industrial Way
Woodland, CA 95776-6012

McClellan Business Park LLC
5241 Arnold Avenue
McClellan, CA 95652
Attention: Senior Vice President of Property Management and
General Counsel

12. CLAIMS AND LIENS FOR LABOR AND MATERIAL.

12.1 The Licensee shall fully pay, when due and before any lien shall attach to the Railroad Facilities, if the same may lawfully be asserted, for all materials joined or affixed to, and labor performed upon, the property of the Licensor in connection with the maintenance, repair, and operation of the Railroad Facilities, and shall not permit or suffer any mechanic's or materialman's or other lien of any kind or nature to be created or enforced against the property for any work done or materials furnished thereon at the instance or request or on behalf of the Licensee. The Licensee agrees to indemnify, hold harmless, and defend, the Licensor and Licensor's property against and from any and all liens, claims, demands, liabilities, causes of action, costs, and expenses of whatsoever nature in any way connected with or growing out of such work done, labor performed, or materials or other things furnished. The provisions of this Section 12 shall survive the termination or expiration of the term of this License Agreement.

13. PROPERTY TAXES

13.1 The Licensee shall not be responsible or liable for any property or other taxes assessed on the Railroad Facilities by any governmental authority. Licensor shall indemnify, defend and hold Licensee harmless for any property taxes on the Railroad Facilities that are assessed to and/or paid by Licensee.

14. INDEMNITY.

14.1 As used in this Section, "Loss" includes loss, damage, claims, demands, actions, causes of action, penalties, costs, and expenses of whatsoever nature, including court costs and attorneys' fees, which may result from: (1) injury to or death of persons whomsoever (including the Licensor's officers, agents and employees, the Licensee's officers, agents and employees, as well as any other person); and (2) damage to or loss or destruction of any property whatsoever (including Licensee's property, adjacent property and crops, the roadbed, tracks, equipment or other property of the Licensor, or property in its care or custody).

14.2 The Licensee shall indemnify, defend and hold harmless the Licensor from any Loss which is due to or arises from: (1) the operation, maintenance, repair, or use of the Railroad Facilities and appurtenances thereto, or any part thereof; or (2) Licensee's failure to comply with or perform any of the terms and conditions set forth in this License Agreement; except to the extent that the Loss is caused by the negligence or willful misconduct of the Licensor or a breach of an express material warranty of Licensor. The provisions of this Section 14 shall survive the termination or expiration of the term of this License Agreement.

15. REMOVAL OF LICENSEE EQUIPMENT, PERSONNEL AND PROPERTY UPON TERMINATION OF LICENSE.

15.1 Prior to or upon the termination of this License Agreement howsoever, the Licensee shall, at Licensee's sole expense, remove its equipment, personnel, and other property from Licensor's

premises and shall restore, to the satisfaction of the Licensor, such portions of such premises to as good a condition as they were in at the beginning of this License Agreement, excepting normal wear and tear. If the Licensee fails to do the foregoing, the Licensor may do such work at the cost and expense of the Licensee.

16. HAZARDOUS SUBSTANCES AND WASTES.

16.1 For the purpose of this Section, "**Hazardous Materials**" shall mean any substance: (A) that now or in the future is regulated or governed by, requires investigation or remediation under, or is defined as a hazardous waste, hazardous substance, pollutant or contaminant under any governmental statute, code, ordinance, regulation, rule or order, and any amendment thereto, including for example only and without limitation, the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9601 *et seq.*, and the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*, or (B) that is toxic, explosive, corrosive, flammable, radioactive, carcinogenic, dangerous or otherwise hazardous, including for example only and without limitation, gasoline, diesel, petroleum hydrocarbons, polychlorinated biphenyls (PCBs), asbestos, radon and urea formaldehyde foam insulation, and "**Hazardous Materials Laws**" shall mean all present and future governmental statutes, codes, ordinances, regulations, rules, orders, permits, licenses, approvals, authorizations and other requirements of any kind applicable to Hazardous Materials.

16.2 Licensee shall comply with all federal, state and local environmental laws and regulations in its occupancy, operation and maintenance of the Railroad Facilities. Without first obtaining the Licensor's written permission (which may be withheld in Licensor's sole discretion), Licensee shall not treat, or dispose of Hazardous Materials (as hereinafter defined) on the Railroad Facilities, and shall not transport or bring any Hazardous Materials onto McClellan Park, except such Hazardous Materials which have been approved by Licensor pursuant to the Hazardous Materials Handling Plan, by railcar, or transloaded to or from railcars. If such permission is granted (which may be withheld in Licensor's sole discretion), the Licensee shall obtain any necessary permits and identification numbers and provide the Lessor the identification numbers and copies of the permits. Licensee shall assume all responsibility for and shall indemnify, defend and hold harmless Licensor against all costs and claims associated with a release or leak of any such Hazardous Materials, unless such event was caused by the negligence or willful misconduct of Licensor.

16.3 In addition, Licensee shall not install any above ground or underground storage tanks without first obtaining the Licensor's written permission. If such permission is granted (which may be withheld in Licensor's sole discretion), the Licensee shall obtain any necessary permits, notify the proper authorities, and provide the Lessor with copies of such permits and notifications. Furthermore, Licensee shall assume all responsibility for and shall indemnify, defend and hold harmless Lessor against all costs and claims associated with a release or leak of any tank contents, unless such event was caused by the negligence or willful misconduct of Licensor.

16.4 If Licensee knows, or has reasonable cause to believe, that a Hazardous Material has come to be located under or about McClellan Park, other than as specifically provided herein or as previously consented to by Licensor, Licensee shall immediately give Licensor written notice thereof, together with a copy of any statement, report, notice, registration, application, permit, business plan, license, claim, action, or proceeding given to or received from, any governmental authority or private party concerning the presence, spill, release, discharge of, or exposure to, such hazardous substance.

16.5 Licensee shall not be liable or responsible for any Hazardous Materials present at McClellan Park prior to the Agreement Date.

16.6 Licensee shall not release any Hazardous Materials on or at McClellan Park, including through any drainage or sewer systems. Licensee assumes all responsibility for the investigation and cleanup of any such release and shall indemnify, defend and hold harmless the Licensor and its property, its officers, agents and employees, for all costs, including environmental consultant and attorney fees and claims resulting from or associated with any such release. This provision shall continue in full force and effect regardless of whether this Lease is terminated pursuant to any other provision, or the Railroad Facilities are abandoned and vacated by the Licensee.

16.7 Licensee acknowledges and agrees that Licensor has disclosed that McClellan Park has contained and may continue to contain Hazardous Materials in violation of Hazardous Material Laws. Licensee hereby assumes all risk for and waives, to the fullest extent permitted by law, any and all claims, damages, liabilities, and expenses relating to any property damage, personal injury and/or adverse affect associated with the presence of Hazardous Materials at McClellan Park and any contact therewith by Licensee, its agents, employees, and/or subcontractors. Licensee, for itself and its agents, affiliates, successors and assigns, hereby waives, releases and forever discharges Licensor, its agents, affiliates, successors and assigns from any and all rights, claims and demands at law or in equity, whether known or unknown at the time of this License Agreement, which Licensee has or may have in the future, arising out of the matters set forth and disclosed in this Section concerning the presence of Hazardous Materials. Licensee hereby specifically waives the provisions of Section 1542 of the California Civil Code, which provides:

"A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

Licensee

16.8 Environmental Questionnaire; Reports. Prior to execution of this License Agreement, Licensee shall complete, execute, and deliver to Licensor an Environmental Questionnaire Disclosure Statement (the "**Environmental Questionnaire**"), in a form of Exhibit C attached hereto. For a period of fifteen (15) days following Licensor's receipt of the Environmental Questionnaire, Licensor shall have the right to approve or disapprove such document. The failure of Licensor to approve such document shall be deemed Licensor's disapproval thereof. Licensor's approval of the Environmental Questionnaire shall constitute approval for Licensee's use of the Hazardous Materials set forth therein in compliance with Hazardous Materials Laws and the Hazardous Materials Handling Plan. Licensee acknowledges that, in conjunction with Licensor's review of the Environmental Questionnaire, Licensor may require Licensee to comply with a "**Hazardous Materials Handling Plan**," the approval of which by Licensor and Licensee is a condition precedent to each party's obligations hereunder (Licensee shall be responsible for the preparation of the draft Hazardous Materials Handling Plan). If Licensor and Licensee cannot reach agreement upon the provisions of the Hazardous Materials Handling Plan within ten (10) days following Licensor's receipt thereof, Licensor shall have the right to terminate this License Agreement by providing Licensee with written notice of such election, in which case the parties shall have no further obligations hereunder. Except as provided in this License Agreement, following approval of the Hazardous Materials Handling Plan, Licensee shall comply therewith throughout the Term. Unless approved in writing by Licensor, Licensee shall not be entitled to utilize any Hazardous Materials within the Premises. To the extent Licensee is permitted to utilize Hazardous Materials upon the Railroad Facilities, such use shall be limited to the items set forth in the Environmental Questionnaire, shall comply with Hazardous Materials Laws, and Licensee shall promptly provide Licensor with complete and legible copies of all the following environmental comments relating thereto: reports filed pursuant to any self-reporting requirements; permit applications, permits, monitoring reports, workplace exposure and

community exposure warnings or notices and all other reports, disclosures, plans or documents relating to water discharges, air pollution, waste generation or disposal, and underground storage tanks for Hazardous Materials; orders, reports, notices, listings and correspondence of or concerning the release, investigation of, compliance, cleanup, remedial and corrective actions, and abatement of Hazardous Materials; and all complaints, pleadings and other legal documents filed by or against Licensee related to Licensee's use, handling, storage or disposal of Hazardous Materials. If, in conjunction with Licensee's business operations at McClellan pursuant to this License Agreement, Licensee must commence the utilization of previously undisclosed Hazardous Materials, prior to the usage thereof, Licensee shall notify Licensor thereof, by written summary determining the scope of such usage and updating the Hazardous Materials Handling Plan to the extent required by such additional usage. Such notice shall be captioned with the following: [Licensor's failure to respond within fifteen (15) days following receipt of this notice shall be deemed approval of this notice]. For a period of fifteen (15) days following Licensor's receipt of such notice, Licensor shall have the right to approve or disapprove of such documents which approval shall not be unreasonably withheld (provided such usage is consistent with Hazardous Materials Laws, the McClellan Use Documentation, and the requirements of applicable governmental authorities). The failure of Licensor to disapprove of such documents within such time period shall be deemed Licensor's approval thereof.

17. WAIVER OF BREACH.

17.1 Except as set forth in this License Agreement, the waiver by a party of the breach of any condition, covenant, or agreement herein contained to be kept, observed and performed by the other party shall in no way impair the right of the first party to avail itself of any subsequent breach thereof.

18. CONSENT.

18.1 Wherever the consent, approval, judgment or determination of a party is required or permitted under this License, that party shall exercise good faith and reasonable business judgment in granting or withholding such consent or approval or in making such judgment or determination and shall not unreasonably withhold or delay its consent, approval, judgment or determination.

19. SUBLEASE STATUS

19.1 Licensor, pursuant to the EDC Lease Agreement between Licensor, as Lessee, and the United States Air Force, as Lessor, dated August 13, 1998, as supplemented and/or amended ("**EDC Lease Agreement**"), and subject to Operating Agreement, as supplemented and/or amended ("**Operating Agreement**") between Licensor as "**Lessee**," and the United States Air Force, as "**Air Force**," is entitled to certain leasehold rights within McClellan Park. As a result of such tenancy pursuant to the EDC Lease Agreement, (i) the provisions of this License Agreement are junior, subordinate and subject to the terms and conditions of the EDC Lease Agreement, and (ii) this License Agreement is a "**Sublease**" in accordance with applicable law, statutes and ordinances. During the Term of this License Agreement, Licensor, using its commercially reasonable efforts, shall not violate the provisions of the EDC Lease Agreement. Subject to Section 9.4 of this License Agreement, the termination of the EDC Lease Agreement for any reason shall result in the automatic termination of this License Agreement, without liability to Licensee or Licensor, as a result of such termination, in which case the parties shall have no further obligations under this License Agreement. Licensee shall not cause or take any action or inaction or cause or permit any Licensee representatives to take any action or which would constitute a default by Licensor under the EDC Lease Agreement, which occurrence would be deemed a default by Licensee under Section 22 of this License Agreement. Licensee acknowledges and agrees that pursuant to the provisions of, and in accordance with, the documentation described on Exhibit D attached hereto (collectively, "**McClellan Use Documentation**"), the Air Force, its agents,

employees, contractors and subcontractors, have the right to enter upon all areas within McClellan, which includes, but is not limited to, the Railroad Facilities, to implement hazardous waste remediation activities, whether imposed by law or regulatory agencies, and to perform various tasks, repairs, maintenance and obligations required by the McClellan Use Documentation. Licensee acknowledges that some or all of these actions may interfere with Licensee's business operations within McClellan for the duration of such entrance. Such entrance shall not cause any form of liability, offset, abatement and/or claim against Licensor and/or the Air Force.

19.2 In accordance with the Licensor's Economic Development Conveyance Agreement with the United States Air Force ("**EDC Agreement**"), Licensor has the right to acquire fee title to McClellan, including the Railroad Facilities, which acquisition may or may not occur during the term of this License Agreement. Notwithstanding any other provision of this License Agreement to the contrary, in the event the Licensor does acquire fee title to McClellan during the term of this License Agreement, and as a result thereof, the EDC Lease Agreement terminates as such document relates to the Railroad Facilities, the parties hereto agree that this License Agreement shall remain in full force and effect as a direct contractual obligation between the Licensor and Licensee, Licensee shall recognize and attorn to the Licensor as its direct "Owner", and the Licensee agrees to enter into any further documentation with the Licensor to evidence the intent of the parties as set forth in this Section; provided, however, such further documentation shall not materially increase Licensee's obligations under this License Agreement.

19.3 Notwithstanding any other provision of this License Agreement to the contrary, Licensee acknowledges and agrees that the Licensor's right, title and interest in this License Agreement is transferable and assignable to any third party selected by the Licensor. In this regard, upon written notice from the Licensor, Licensee agrees to execute any and all reasonable documentation to evidence such assignment as set forth in this Section, and the named Licensor shall be release from any and all future liability under this License Agreement; provided, however, such further documentation shall not materially increase Licensee's obligations under this License Agreement.

20. ARBITRATION

20.1 If at any time a question or controversy shall arise between the parties hereto in connection with the Agreement and upon which the parties cannot agree, such question or controversy shall be submitted to and settled by a single arbitrator within twenty (20) days after written notice by one party of its desire for arbitration to the other party. The arbitrator so selected shall be a person with at least one-year exposure to the concepts of railroad operations and maintenance. If the parties are unable to agree on a single arbitrator, the party demanding such arbitration (the "**Demanding Party**") shall notify the other party (the "**Noticed Party**") in writing of such demand, stating the question or questions to be submitted for decision and nominating one similarly qualified arbitrator. Within twenty (20) days after receipt of said notice, the Noticed Party shall appoint an arbitrator and notify the Demanding Party in writing of such appointment. Should the Noticed Party fail within twenty (20) days after receipt of such notice to name its similarly qualified arbitrator, the arbitrator for the Demanding Party shall select one for the Noticed Party so failing. The arbitrators so chosen shall select one similarly qualified additional arbitrator to compete the board. If they fail to agree upon an additional arbitrator, the same shall, upon application of any party, be appointed by the Chief Judge (or acting Chief Judge) of the United States District Court for the Eastern District of California.

20.2 Upon selection of the arbitrator(s), said arbitrator(s) shall with reasonable diligence determine the questions as disclosed in said notice of demand for arbitration, shall give both parties reasonable notice of the time and place (of which the arbitrator(s) shall be the judge) of hearing evidence and argument, may take such evidence as they deem reasonable or as either party may submit with witnesses required to be sworn, and may hear arguments of counsel or others. If any arbitrator declines or

fails to act, the party (or parties in the case of a single arbitrator) by whom he was chosen or said judge shall appoint another to act in his place. After considering all evidence, testimony, and arguments, said single arbitrator or the majority of said board of arbitrators shall promptly state such decision or award in writing which shall be final, binding, and conclusive on all parties to the arbitration when delivered to them. Until the arbitrator(s) shall issue the first decision or award upon any question submitted for arbitration, performance under the Agreement shall continue in the manner and form existing prior to the rise of such question. After delivery of said first decision or award, each party shall forthwith comply with said first decision or award immediately after receiving it.

20.3 Each party shall pay the compensation, costs and expenses of the arbitrator appointed in its behalf and all fees and expenses of its own witnesses, exhibits and counsel. The compensation, cost, and expenses of the single arbitrator or the additional arbitrator in the board of arbitrators shall be paid in equal shares by the parties.

20.4 The books, records, documents (however recorded or stored) of the parties, as far as they relate to any matter submitted for arbitration, shall be open to the examination of the arbitrator(s).

21. ENTIRE AGREEMENT

21.1 This document, and the exhibits attached hereto, constitute the entire agreement between the parties, all oral agreements being merged herein, and supersedes all prior representations, agreements, arrangements, understandings, or undertakings, whether oral or written, between or among the parties relating to the subject matter of this License Agreement that are not fully expressed herein.

22. MODIFICATION TO AGREEMENT

22.1 The provisions of this License Agreement may be modified at any time by agreement of the parties hereto, provided such modification is in writing and signed by all parties to this License Agreement. Any agreement made after this date of this License Agreement and related to the subject matter contained herein shall be ineffective to modify this License Agreement in any respect unless in writing and signed.

23. LICENSE NOT TO BE ASSIGNED.

23.1 The Licensee shall not assign this License Agreement, in whole or in part, or any rights herein granted, without the written consent of the Licensor, which may be withheld in Licensor's sole discretion, and it is agreed that any transfer or assignment or attempted transfer or assignment of this License Agreement, whether voluntary, by operation of law or otherwise, without such consent in writing, shall be absolutely void and, at the option of the Licensor, shall terminate this License Agreement.

23.2 Licensee may enter into agreements with Union Pacific Railroad (or its successor) for trackage rights over any portion of the Railroad Facilities or for railcar storage. Subject to the terms and conditions of this License Agreement, Licensee may enter into agreements with any party for railcar storage or repairs. Pursuant to Section 8, Licensee may make agreements with shippers for use of temporary laydown space.

24. SUCCESSORS AND ASSIGNS.

24.1 Subject to the provisions of Section 23 hereof, this License shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, successors and assigns.

25. CHOICE OF LAW.

25.1 This License Agreement shall be governed, construed, and enforced in accordance with the laws of the State of California.

26. ACTS OF GOD, ETC.

26.1 Neither party shall be deemed to be in default of this License Agreement if any failure to meet any condition or to perform any obligation or provision hereof is caused by, a result of, or due to strikes, insurrections, acts of God, or any other causes beyond the party's control.

27. LIMITATION ON LIABILITY. The Licensee agrees that the obligations incurred by the Licensor under this License Agreement shall not constitute personal obligations of the members, partners, joint venturers, directors, officers, trustees, employees, policyholders or any other principals or representatives of Licensor. Licensee further agrees that its recourse against the Licensor under this License Agreement (including, without limitation, with respect to Licensor's indemnity of Licensee) shall be strictly limited to the Licensor's interest in the Rail Facilities, and that the Licensee shall have no recourse to any other asset of the Licensor, or of any member, partner, joint venturer, director, officer, trustee, employee, policyholder or any other principal or representative of the Licensor for the satisfaction of any of the Licensor's obligations hereunder.

IN WITNESS WHEREOF, the parties hereto have caused this License Agreement to be executed as of the date first herein written.

LICENSEE:

YOLO SHORTLINE RAILROAD COMPANY,
a California corporation

By: _____
David Magaw
President

Date: _____

LICENSOR:

COUNTY OF SACRAMENTO, a political
subdivision of the State of California

By: _____
Name: _____

Its: _____

Date: _____

WITNESS:

Date: _____