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April 29, 2013

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

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ENTERED
Office of Proceedings
April 29, 2013
Part of
Public Record

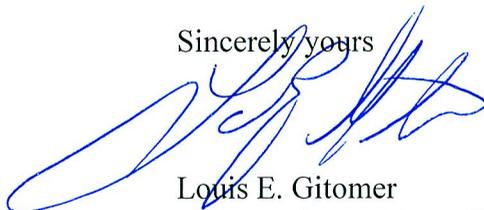
RE: Docket No. FD 35725, *MCM Rail Services LLC, d/b/a Baltimore Industrial Railroad —Operation Exemption—HRE Sparrows Point, LLC*

Dear Ms. Brown:

Enclosed for efilng is the Response of MCM Rail Services LLC, d/b/a Baltimore Industrial Railroad to the Maryland Department of Transportation.

If you have any questions, please call or email me.

Sincerely yours



Louis E. Gitomer
Attorney for: MCM Rail Services LLC, d/b/a
Baltimore Industrial Railroad

Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 35725

MCM RAIL SERVICES LLC, d/b/a BALTIMORE INDUSTRIAL RAILROAD—OPERATION
EXEMPTION—HRE SPARROWS POINT, LLC

RESPONSE OF MCM RAIL SERVICES LLC, d/b/a BALTIMORE INDUSTRIAL RAILROAD
TO THE MARYLAND DEPARTMENT OF TRANSPORTATION

EXPEDITED HANDLING REQUESTED

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Attorney for MCM RAIL SERVICES LLC,
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Dated: April 29, 2013

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 35725

MCM RAIL SERVICES LLC, d/b/a BALTIMORE INDUSTRIAL RAILROAD—OPERATION
EXEMPTION—HRE SPARROWS POINT, LLC

RESPONSE OF MCM RAIL SERVICES LLC, d/b/a BALTIMORE INDUSTRIAL RAILROAD
TO THE MARYLAND DEPARTMENT OF TRANSPORTATION

MCM Rail Services LLC, d/b/a Baltimore Industrial Railroad (“MCM”) responds to the Petition of the Maryland Department of Transportation (“MDOT”) filed on April 8, 2013 (the “Petition”). MCM requests that the Surface Transportation Board (the “Board”) deny the unsupported request by MDOT to continue to hold this proceeding in abeyance. Instead, MCM respectfully requests that the Board expeditiously authorize MCM to operate pursuant to the Notice of Exemption in Docket No. FD 35725, *MCM Rail Services LLC d/b/a Baltimore Industrial Railroad-Operation Exemption-HRE Sparrows Point LLC* filed on March 20, 2013 (the “Notice of Exemption”).

BACKGROUND

MCM is seeking authority to operate over an approximately 12-mile line of railroad in Sparrows Point, Baltimore County, MD, along with the spur, industrial, team, switching, and side tracks (the “Line”).

The Petition is devoid of any factual basis and does not support the relief sought. MDOT did not contact MCM before filing the Petition, even though there was substantial advance public notice that MCM would assume operations of the Line. Public notice was provided: (1) by United States Bankruptcy Judge Kevin J. Carey on August 21, 2012 in *Order Authorizing and*

Approving (I) Sale of Sparrows Point Assets Free and Clear of Liens, Claims, Encumbrances, and Interests; and (II) Granting Related Relief in *WP Steel Venture LLC, et al.*, Debtors, Case No. 12-11661 (KJC) (the “*Order*”); (2) in a Petition for Retroactive Exemption filed on December 20, 2012 (as amended on December 21, 2012) in Docket No. FD 35707, *MCM Rail Services LLC-Petition for Retroactive Exemption-of the Operation of a Line of Railroad in Sparrows Point, Baltimore County, Maryland* (the “*Retroactive Petition*”); (3) in *MCM Rail Services LLC—Petition for Retroactive Exemption—in Sparrows Point, Md.*, Docket No. FD 35707 (served March 20, 2013) (the “*March Decision*”); (4) in the Notice of Exemption; and (5) in *MCM Rail Services LLC d/b/a Baltimore Industrial Railroad-Operation Exemption-HRE Sparrows Point LLC*, Docket No. 35725 (served April 7, 2013) (the “*April Decision*”). It was not until nearly eight months after the *Order* that MDOT saw fit to file the Petition.¹

Once the Petition was filed, MCM contacted MDOT and met with MDOT. However, before the meeting between MDOT and MCM, MCM complied with all of the requirements in the *March Decision* and *April Decision*. The Notice of Exemption responded to many of the questions raised in the *March Decision*. See *April Decision* at 1. The *April Decision* sought additional information, which has been provided in: (1) a letter filed April 9, 2013 withdrawing the Retroactive Petition; (2) a second letter filed April 9, 2012, certifying service of the *April Decision* on HRE Sparrows Point, LLC (“HRE”); (3) the filing of a Motion for Protective Order on April 12, 2013, along with the Railroad Services Agreement dated September 14, 2012 between MCM and Hilco Rail Services, LLC (“Hilco”)²; (4) an amendment to the Notice of

¹ Even though the Retroactive Petition was filed on December 20, 2012, MDOT has not sought discovery from MCM to develop any facts.

² MCM notes that at its April 23, 2013 meeting with MDOT, MCM, as a matter of good faith and transparency, provided MDOT with an unredacted confidential copy of the Railroad Services Agreement, upon MDOT executing the Undertakings that MCM had filed with the Motion for Protective Order, even though the Board had not acted on the Motion at that time.

Exemption filed on April 12, 2013 that clarifies that MCM entered the Rail Services Agreement with Hilco and not HRE; and (5) a Notice of Exemption was filed on April 12, 2013 in Docket No. FD 35734, *Hilco SP Rail, LLC—Acquisition and Operation Exemption—RG Steel Railroad Holding, LLC*.³

MCM and Hilco have complied with the *March Decision* and the *April Decision*. However, the MDOT Petition is seeking to extend the period of abeyance, with no rationale explanation or factual basis. Indeed, MCM has suffered significant harm because it has not received authority from the Board. MCM recognized that it had not complied with the statute or rules by operating prior to receiving authority from the Board. MCM believes that it has corrected that mistake by filing the Notice of Exemption and complying with the *March Decision* and the *April Decision*. Since it does not have Board authority to operate, MCM has not been able to obtain railroad reporting marks, which makes it ineligible to use the many electronic data interchange facilities used in the railroad industry. In addition, MCM has not received interchange payments from its interchange partners because it is not an authorized railroad. Granting MDOT the unjustified relief it seeks will exacerbate the harm to MCM.

ARGUMENT

MDOT contends that it “has serious concerns regarding whether MCM’s proposed operations are consistent with the rail transportation policy of 49 U.S.C. § 10101 and whether the expedited processes available under 49 U.S.C. § 10502 and 49 C.F.R. § 1150.31 are appropriate under the circumstances.” Petition at 1.

MCM believes that those unspecified concerns would have been alleviated had MDOT met with MCM within the eight months between the *Order* and the filing of the Petition. MCM

³ See *Hilco SP Rail, LLC—Acquisition and Operation Exemption—RG Steel Railroad Holding, LLC*, Docket No. 35734 (served April 26, 2013).

also contends that MDOT would not have argued that MCM intended to scrap the Line if it had reviewed the *Order* or the Notice of Exemption.

MCM recognized that “Unless the Agreement is extended or MCM is otherwise able to continue to provide rail service over the Line, MCM shall seek discontinuance authority from the Board prior to discontinuing service over the Line.” Notice of Exemption at 4. MCM is the subsidiary of MCM Management Corp. (“MCM Management”), a company involved in demolition throughout the country. However, MCM is a railroad, created for the purpose of operating the Line. MCM recognizes that it must continue to provide rail service until authorized to discontinue service by the Board or until the common carrier obligation is assigned to another operator. MCM also recognizes that it is not a party with the right to scrap the Line.

MDOT bundled the Line and assets of the bankrupt steel mill into the definition of “Property” used in the Petition. Not only is MDOT misleading the Board, but it is factually wrong. MCM Management has been hired to demolish the bankrupt steel mill, but not the Line. MCM has been licensed to operate the Line as a common carrier, not demolish it. As a common carrier, MCM will comply with all of the Board’s requirements. MCM has no intent of scrapping the Line. Indeed, as the operator of the Line, MCM cannot demolish the Line. Not content to just to mislead the Board, MDOT compares MCM to a rail salvage company.

MDOT relies on *SF&L Railway, Inc.-Acquisition and Operation Exemption-Toledo, Peoria and Western Railway Corporation Between La Harpe and Peoria, IL*, Finance Docket No. 33995 (served October 17, 2002) (“*SF&L Railway*”) for the proposition that MCM should not be permitted to operate over the Line. In *SF&L Railway*, the Board revoked a notice of exemption because the line was purchased for the “purpose of abandoning and salvaging it.” *Id.* at 19. MDOT contends that there were six factors considered in *SF&L Railway*, and infers that

MCM's proposed operation also suffers from the same six defects. MDOT provides no factual support, merely an erroneous inference that MCM will salvage the Line. The "**evidence**" the Board considered in *SF&L Railway* at 19, included:

(1) Respondents' decision not to purchase enough of the West End of TP&W's line to procure interchange traffic from KJRY; (2) the hasty purchase of the Line with no analysis other than an assessment of the salvage value of the track; (3) the failure of Respondents to acquire essential components of the Line (bridges, trestles, and culverts); (4) the anticipation of abandonment and understanding that TP&W and RailAmerica would support the future abandonment of the Line; (5) the unstructured financing; and (6) the unexplained delay in consummating the transaction and related confusion that resulted.

SF&L Railway is distinguishable from MCM's proposed operation of the Line. First, MDOT has not produced any evidence, merely an erroneous inferences. MCM has operated the Line since September 14, 2012. There is no plan for MCM Management to demolish the Line.

Specifically, all of the *SF&L Railway* factors are readily distinguishable.

1. MCM has operated the Line and interchanged traffic with CSX Transportation, Inc., and Norfolk Southern Railway Company, the only connecting railroads.
2. MCM is the operator of the Line and did not value the Line based on the salvage value of the track, but on the potential revenue from going concern value.
3. MCM is licensed to operate all of the essential components of the Line under the Railroad Services Agreement.
4. MCM does not anticipate discontinuing service over the Line. It is MCM's desire to continue to operate the Line beyond the 42 month license it has been granted. Neither MCM nor Hilco has expressed support for a future abandonment of the Line.
5. The Line was acquired under the *Order*. The *Order* would not have approved the transfer of the Line and steel mill properties from the bankrupt estate unless there was

financing in place. Moreover, any financing required for MCM's operation of the Line is detailed in the Railroad Services Agreement.

6. Finally, there was no delay in consummating the transaction. Upon transfer of the bankrupt estate on September 14, 2012, MCM began operating the Line.

Finally, the Board relied on the "prior pattern of conduct of SF&L and other A&K affiliates in acquiring and promptly liquidating lines." *Id.* The operation of the line is MCM's first venture into the railroad business. MCM does not have a prior pattern of conduct of "acquiring and promptly liquidating lines." For MDOT to impute that MCM would act like SF&L without any evidence is improper.

MDOT has failed to demonstrate that MCM's operation of the Line has met even one of the factors the Board considered in *SF&L Railway*. There is no evidence that MCM is seeking authority to operate the Line for the purpose of demolishing and scrapping the Line. The 42-month license is tied to the estimated period of time required to demolish steel mill and remove the material. However, in addition to removing the material from the steel mill, MCM is serving 12 other shippers on the Line. MCM is aggressively marketing its service to bring additional shippers to the Line and has added four new shippers on the Line since it began operating.

MDOT states that it has connected the dots and arrived at the conclusion that "there is a distinct possibility that MCM and HRE intend to demolish and salvage the Line along with the rest of the Property acquired by HRE and discontinue service at the end of the three and a half year operating agreement." Petition at 7. The only dots that MDOT has connected are those that it created through its erroneous assumptions and failure to even attempt to obtain any facts (a clear failure to review relevant public documents objectively, a failure to discuss the project with MCM or any of the other parties involved, and a failure to seek discovery). There is no intent to

abandon and salvage the Line. Even if there were, abandonment and salvage could not occur without advance Board approval.

MDOT next suggests that the Board extend the abeyance period imposed by the *April Decision*. MDOT is actually asking the Board to stay MCM's operation of the Line without addressing or demonstrating the Board's traditional stay criteria. The Board has denied a stay request when the "motion does not even recite *Holiday Tours* criteria,"⁴ much less offer any evidence or argument to show that its stay request meets any of them.⁵ MCM urges the Board to deny MDOT's unsupported request for a stay, especially in light of the harm that MCM is incurring.

Finally, MDOT seeks an investigation of the MCM operation prior to consummation because it would produce irreparable harm. Petition at 8. First, the Board has already engaged in an investigation through the *March Decision* and the *April Decision*, which requested additional information from MCM. MCM has supplied all of the information requested by the Board as shown above. Second, there is no irreparable harm demonstrated by MDOT, merely a theory that has been rebutted by facts. Moreover, the normal process for reviewing an exemption is available here because there would be no irreparable harm. MDOT erroneously argues that MCM will scrap the Line at the end of a 42-month license. As MDOT infers, demolition of the Line will not occur until after March of 2016, which it will not. Hence, MDOT

4 A party seeking a stay must establish that: (1) there is a strong 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; and (4) the public interest supports the granting of the stay. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) (*Holiday Tours*); *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958). On a motion for stay, "it is the movant's obligation to justify the . . . exercise of such an extraordinary remedy." *Cuomo v. United States Nuclear Regulatory Comm'n*, 772 F.2d 972, 978 (D.C. Cir. 1985). The parties seeking a stay carry the burden of persuasion on all of the elements required for such extraordinary relief. *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974).

5 *General Railway Corporation, d/b/a Iowa Northwestern Railroad – Exemption for Acquisition of Railroad Line – in Osceola and Dickinson Counties, IA*, STB Finance Docket No. 34867 (served July 13, 2007).

has more than enough time to follow the Board's standard procedure by seeking revocation. For this transaction, "an after-the fact remedy" is satisfactory. *See Class Exemption-Acq. & Oper. Of R. Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810, 812 (1985).

CONCLUSION

MCM does not oppose intervention by MDOT.

MCM opposes all other relief sought by MDOT. MDOT's entire position is without any factual basis, despite opportunities to develop facts. Had MDOT been diligent in developing the facts surrounding the operation of the Line by MCM, even MDOT would have realized that the Petition lacked any merit.

For the reasons set forth above, MCM respectfully requests that the Board not continue to hold this proceeding in abeyance, deny the stay of the proceeding requested by MDOT, and deny MDOT all other relief. MCM respectfully requests the Board to expeditiously authorize MCM to operate the Line in order to alleviate the harm MCM is currently incurring.

Respectfully submitted,



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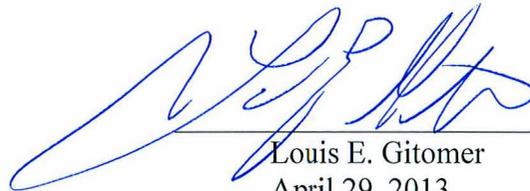
Dated: April 29, 2013

CERTIFICATE OF SERVICE

I hereby certify that I have caused the Response of MCM Rail Services LLC, d/b/a Baltimore Industrial Railroad to the Maryland Department of Transportation, to be served electronically on:

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April 29, 2013