

# BAKER & MILLER PLLC

ATTORNEYS and COUNSELLORS

2401 PENNSYLVANIA AVENUE, NW  
SUITE 300  
WASHINGTON, DC 20037

TELEPHONE: (202) 663-7820  
FACSIMILE: (202) 663-7849

WILLIAM A. MULLINS

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233335

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Office of Proceedings

November 9, 2012

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(202) 663-7823 (Direct Dial)

E-Mail: [wmullins@bakerandmiller.com](mailto:wmullins@bakerandmiller.com)

November 9, 2012

## VIA E-FILING

Cynthia T. Brown, Chief  
Section of Administration, Office of Proceedings  
Surface Transportation Board  
395 E Street, SW  
Washington DC 20423-0001

Re: *Rail Switching Services, Inc. – Operation Exemption – Line Of Pemiscot County  
Port Authority In Pemiscot County, Missouri, FD 35685*

*Pioneer Railcorp – Continuation In Control Exemption - Rail Switching Services,  
Inc., FD 35686*

Dear Ms. Brown:

Attached hereto is the "Motion To Strike And Reply Of Pioneer Railcorp And Rail Switching Services, Inc." to the "Petition For Leave To Reply" filed on November 8 by the Pemiscot County Port Authority in the above-captioned proceedings. If there are any questions about this reply, please contact me directly, either by telephone: (202) 663-7823 or by e-mail: [wmullins@bakerandmiller.com](mailto:wmullins@bakerandmiller.com).

Sincerely,



William A. Mullins

Enclosures

cc: J. Michael Carr  
Hon. Charles "Chip" Nottingham  
Parties of Record

**BEFORE THE  
SURFACE TRANSPORTATION BOARD  
WASHINGTON, DC**

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**Docket No. FD 35685**

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**RAIL SWITCHING SERVICES, INC.  
– OPERATION EXEMPTION –  
LINE OF PEMISCOT COUNTY PORT AUTHORITY  
IN PEMISCOT COUNTY, MISSOURI**

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**DOCKET NO. FD 35686**

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**PIONEER RAILCORP  
– CONTINUATION IN CONTROL EXEMPTION –  
RAIL SWITCHING SERVICES, INC.**

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**MOTION TO STRIKE AND REPLY OF PIONEER RAILCORP AND RAIL  
SWITCHING SERVICES, INC.**

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**Daniel A. LaKemper, Esq.  
General Counsel  
Pioneer Railcorp  
1318 S. Johanson Road  
Peoria, Illinois 61607  
Tel.: (309) 697-1400  
Fax: (309) 697-8486**

**William A. Mullins  
Robert A. Wimbish  
BAKER & MILLER PLLC  
2401 Pennsylvania Ave., NW  
Suite 300  
Washington, DC 20037  
Tel: (202) 663-7823  
Fax: (202) 663-7849**

**November 9, 2012**

**Attorneys for Pioneer Railcorp and Rail  
Switching Services, Inc.**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD  
WASHINGTON, DC**

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**Docket No. FD 35685**

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**RAIL SWITCHING SERVICES, INC.  
– OPERATION EXEMPTION –  
LINE OF PEMISCOT COUNTY PORT AUTHORITY  
IN PEMISCOT COUNTY, MISSOURI**

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**PIONEER RAILCORP  
– CONTINUATION IN CONTROL EXEMPTION –  
RAIL SWITCHING SERVICES, INC.**

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**MOTION TO STRIKE AND REPLY OF PIONEER RAILCORP AND RAIL  
SWITCHING SERVICES, INC.**

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Rail Switching Services, Inc. (“RSS”) and Pioneer Railcorp (“Pioneer”) hereby file this motion to strike and reply (“Reply”) to the November 8, 2012 “Petition For Leave To Reply” (“Leave Petition”) filed by Pemiscot County Port Authority (“PCPA”) in the above-referenced proceedings. The Leave Petition should be denied and stricken from the record as an impermissible reply to a reply. But if it is not stricken, RSS and Pioneer offer this brief reply to the numerous incorrect statements of law and fact in PCPA’s Leave Petition.

A. PCPA Should Not Be Granted Leave to File a Prejudicial Reply to a Reply – Its November 8 Filing Should Be Stricken

Parties to a proceeding such as this one are prohibited from filing a “reply to a reply.” 49 CFR §1104.13(c). PCPA acknowledges this rule, but asks permission to submit such a filing anyway. The Leave Petition should be denied and stricken as an impermissible pleading. See,

e.g., Norfolk Southern Railway Company – Abandonment Exemption – In Baltimore City and Baltimore County, MD, STB Docket No. AB-290 (Sub-No. 311X) (STB served March 22, 2010) (“Under Board rules at 49 CFR 1104.13(c), a reply to a reply is not permitted . . . Therefore, [the subject reply to a] reply will be stricken”).

PCPA claims that its attempt to have the last word actually “focuses the argument,” and “does not prejudice any party.” Its impermissible filing does neither. In fact, it offers two new verified statements that introduce new facts to the proceeding, and introduces new arguments. The evidence contained in those statements is not “new evidence” that might justify its acceptance as proper rebuttal, but rather is evidence and argument that PCPA could have and should have presented in its initial Petition To Reject or its Petition To Supplement. The newly-offered verified statements are submitted simply to try and rebut claims made by RSS and Pioneer even though the procedural schedule does not provide for rebuttal. Where rebuttal presents no newly discovered evidence or changed circumstances and is not provided for in the procedural rules, the STB has previously rejected such improper rebuttal and stricken it from the record. It should do so here.<sup>1</sup>

Of course, when read, the “evidence” is just an attempt by PCPA to have its witnesses get the last word and to expand the scope of the proceeding to air discussions back and forth between counsel. Rather than focusing the argument, PCPA’s latest filing expands it – requiring RSS and Pioneer to confer with its own witnesses to respond to PCPA’s new arguments, and so

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<sup>1</sup> See SWKR Operating Company – Abandonment Exemption – In Cochise County, AZ, In the Matter of a Request to Set Terms and Conditions, STB Docket No. AB-441 (Sub-No. 2X), slip op. at 2 (STB served Nov. 12, 1997) (Board struck an impermissible reply to a reply – deemed by the Board to be a rebuttal filing – because the issues presented in the “rebuttal” could have been presented at an earlier time, and because allowing new evidence and argument to be introduced in to the record on rebuttal by way of new verified statement testimony would be improper and would prejudice the other party).

on and so forth. RSS and Pioneer have no desire to further prolong this proceeding through the type of impermissible one-upmanship that is typified by PCPA's undisciplined and overreaching tactics.

PCPA's disregard of orderly Board processes in the interest of trying to get the last word, and trying and to get the Board to rule before the effective date of the Notices prove the procedural and due process points that RSS and Pioneer have made previously. Petitions to Reject are better resolved after the effective date of the challenged notice in order to facilitate an orderly and more deliberate approach to the issues that PCPA would have the Board address in haste. Those processes allow for the filing of the petition, a full 20 days to reply, and then, if the Board chooses to initiate a proceeding to further resolve the issues, it can do so. Such a process would allow for discovery as needed (including the taking of depositions), and the presentation of evidence in an orderly and thorough manner.

PCPA would rather that the Board eschew such a process, preferring instead a hastily-issued Board rejection of the Notices before their effective date.<sup>2</sup> RSS and Pioneer have responded as quickly as they were able to all of PCPA's prior filings and do so again here. Because RSS and Pioneer have no desire to further delay the process and believe the record is already adequate for the Board to make a decision, RSS and Pioneer have chosen not to provide additional verified statements to rebut PCPA's improper rebuttal statements. Instead they will briefly respond to some of the incorrect statements made in the Leave Petition.

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<sup>2</sup> Interestingly enough, as if now to admit that perhaps its evidence and argument weren't as strong as it initially thought, PCPA now backs away from its prior insistences that the Board rule on the Petitions to Reject before the effective date and now suggests that the Board should "commence a proceeding in order that it may have an adequate record upon which to render a proper decision." Leave Petition at 9. RSS and Pioneer submit that there already is an adequate record and that no additional proceeding is necessary.

B. RSS Does Need Common Carrier Authority For Its Proposed Operations

In some sense, PCPA and RSS do not disagree. There are instances where an entity may be able to conduct rail operations, even over an STB-regulated line of railroad, without becoming a common carrier and without the need for advance Board authority to provide service. PCPA and RSS agree that RSS could switch empty railcars to/from BNSF for the sole purpose of car storage without Board authority, and they presumably agree that RSS may undertake such empty car positioning for railcar storage without any STB-issued authority regardless of the legal or regulatory status of the tracks over which RSS provided such service. But RSS has made abundantly clear that it no longer will, or desires to, provide car storage services only. Rather, RSS will hold itself out as providing for-hire common carrier services for the transfer of loaded and empty cars for shippers who desire service to/from BNSF, which is fully consistent with its rights and obligations under its agreement with PCPA.

RSS and PCPA also presumably agree that an entity can provide private carriage over private or STB-regulated tracks without STB authority, but unlike PCPA's position, such non-STB operations can only occur under certain circumstances that no longer exist here. PCPA has offered Board decisions addressing the distinction between private and common carriage, insisting that RSS fails to grasp this precedent. In fact, RSS understands this precedent very well. PCPA, however, does not. A full review of the relevant portions of those cases reflects that it is PCPA who has engaged in an egregious, selective misreading of those decision. Those cases, discussed below, show that a shipper, not a rail carrier such as RSS, can conduct private rail operations for its own goods over private track, or even over regulated track, as long as the shipper is moving its own traffic for its own account.

In V&S Railway, LLC – Petition For Declaratory Order – Railroad Operations In Hutchinson, Kan., STB Docket No. FD 35459, 2012 STB LEXIS 259, \*15 (STB served July 12, 2012)(“V&S Railway, LLC”), Hutchison Salt Company (“HSC”), desired to conduct private rail operations for its own goods and using its own sister transportation company, Hutchinson Transportation Company (“HTC”). The Board said that in such circumstances, HSC/HTC could conduct private rail operations without Board authority. Is relying on this case, however, PCPA conveniently ignores the following, highly-relevant passage:

HSC/HTC may be able to operate trains over any of the disputed track that consists of private track—*i.e.*, track that is separate from the Line and is not part of the national transportation system. When an entity conducts private carriage on its own private track, such track is not a rail line subject to the Board’s jurisdiction. Private track is “typically built and maintained by a shipper (or for a shipper at the shipper’s expense) and operated by the shipper (or its contractor) to serve only that shipper, moving the shipper’s own goods, so that there is no ‘holding out’ to serve other shippers for compensation.” B. Willis, C.P.A., Inc.—Petition for Declaratory Order, FD 34013, slip op. at 2 (STB served Oct. 3, 2001), *aff’d*, 51 Fed. Appx. 321 (D.C. Cir 2002). Private track is not considered part of the national rail system even if a common carrier operates on the track, as long as the common carrier “operates on the private track exclusively to serve the owner of the track pursuant to a contractual arrangement with that owner.” Devens Recycling Ctr., LLC—Petition for Declaratory Order, FD 34952, slip op. 2 (STB served Jan. 10, 2007).

Id., slip op. at 8. Here, it is undisputed that PCPA’s track is not private track. It is an STB-regulated line of railroad. Furthermore, RSS is not a shipper and is not in the business of transporting its own goods (unlike the car storage situation).

S.D. Warren Co. d/b/a Sappi Fine Paper N.A.—Acquis. & Operation Exemption—Maine Cent. R.R., FD 34133, slip op. at 2 (STB served Sept. 30, 2002) also is of little help to PCPA. There, the Board found that a noncarrier shipper could conduct private rail carriage for its own purposes on a common carrier-owned, STB-regulated rail line, but only where the shipper was transporting its own goods, not holding itself out to others to provide service for compensation,

and was not unduly interfering with the common carrier's operations. Here, again, RSS is not a shipper. RSS will not be transporting its own freight, but that of shippers who desire service to/from BNSF. RSS will hold itself out to provide such service for compensation and there are no allegations that RSS's service will interfere with any other common carrier service.

As such, neither of the cases cited by PCPA establishes that the operations RSS intends to conduct are private operations outside the jurisdiction of the Board. RSS does not have a contract with a shipper to operate over that shipper's track as the agent of the shipper nor is it transporting its own goods. Here, PCPA, a common carrier, has given a contract to RSS to operate over a regulated line of railroad. RSS is permitted to move cars for car storage purposes as a private carrier, which RSS can do without Board authority, but it also possesses the exclusive right to provide transportation services between BNSF and shipper on PCPA's line. This latter service unquestionably requires STB authority.

What PCPA and Marquis Marine Terminal, LLC ("MMT") do not seem to understand is that it doesn't matter from an STB regulatory standpoint whether or not MMT desires to use RSS's services or never uses RSS's services. RSS needs STB authority to provide intermediate switching services between BNSF and any existing or potential shipper on the line because it is and will hold itself out to be a rail carrier operating on regulated common carrier track. RSS would not merely be moving its own goods. STB precedent is abundantly clear that, under such circumstances, RSS has no choice but to secure STB operating authority.<sup>3</sup>

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<sup>3</sup> Kansas City Transportation Company LLC – Lease And Assignment Of Lease Exemption – Kansas City Terminal Railway Company And Kaw River Railroad, Inc., STB Docket No. FD 34830 (STB served May 30, 2006 and May 23, 2007)(collectively, "KCT"). Ohio Valley; Kaw River Railroad, Inc. – Acquisition and Operation Exemption – The Kansas City Southern Railway Company, STB Docket No. FD 34509 (STB served May. 3, 2005) ("Kaw River") (an entity intending to hold itself out as a common carrier pursuant to certain lease transactions requires advance STB authorization to do so. That entity will hold out service to the public, its

BNSF and PCPA opposition to RSS's efforts to obtain permissive STB authority is perplexing, even quixotic. The STB authority doesn't compel MMT to use RSS. If MMT is compelled to use RSS, it would be the result of a court's interpretation of the relevant contracts, not because RSS possesses STB authority to become a common carrier. Indeed, if MMT and PCPA are correct that the contracts do not require MMT to use RSS, then MMT does not need to use RSS, regardless of whether RSS holds STB authority or not.

Likewise, for arguments sake, if PCPA and BNSF are correct that RSS does not need STB authority to undertake its proposed operations, and the STB so finds, such a result still does not ensure that MMT is perfectly free to choose who will move its rail-borne traffic for it. If, hypothetically speaking, the STB says that RSS needs no authority to undertake existing or proposed operations, but a court finds that RSS is entitled under its contract rights to handle all traffic moving to/from all PCPA-located shippers on the one hand and from/to BNSF on the other, then MMT, and any other shipper for that matter, would be required to use RSS-supplied private switching service.<sup>4</sup> Whether RSS has or does not need STB authority to serve shippers on PCPA's line is only a piece of the puzzle, it is not the whole puzzle.

C. Reply To PCPA's Responses On RSS's Assertions

Assertion #1

RSS admits that PCPA is, in theory, a governmental entity under Missouri law and that PCPA opposes the Notices. But PCPA is not a disinterested party nor is PCPA acting in the

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customers are new to It, and much therefore obtain Board authority to commence operations); and Rock River Railroad, Inc. – Acquisition And Operation Exemption – Rail Lines Of Renew Energy, LLC, STB Docket No. FD 35016, et al. (STB served May 10, 2007).

<sup>4</sup> RSS strongly believes that it would need STB authority to provide such rail services. But if the STB says otherwise, and the courts hold that the contacts give RSS the exclusive contractual right to provide service to/from BNSF, RSS will provide that service, for a fee, and it won't matter, from a basic service perspective, whether RSS has STB authority or not.

public interest. PCPA is also a common carrier subject to the jurisdiction of the STB. It has a financial self-interest in the transactions. RSS's point was that no community, state, or local government, other than PCPA has raised concerns about the transaction. As such, the RSS acquisition Notice transaction is dissimilar from other notice of exemption proceedings where the notices were rejected due to substantial and significant government opposition. The opposition of PCPA does not meet that standard.

As with respect to shipper opposition, there is no shipper that opposes RSS's request for authority. It is true that MMT has stated that it does not want or need to use RSS. However, neither the David Madison verified statement or the D.L. Marquis statement say that they oppose RSS getting authority. PCPA's statement that "MMT is a shipper that opposes the Notice" is not true. A careful reading of both statements indicates that not once did either gentleman state an opposition to RSS getting STB authority. They are opposed to RSS service, but have not stated opposition to RSS having STB authority.

#### Assertion # 2

There is in fact a shipper on the line seeking rail service -- MMT. That shipper believes it has a valid contract with PCPA for it to use PCPA's line as industry track. That shipper also believes that BNSF has the legal right to also operate over PCPA's track to serve MMT and without the need to use RSS's services. Whether these beliefs are valid will be sorted out in court as a matter of contract law. But RSS's statement that MMT is a shipper on the line that desires rail service was not false or misleading.

MMT is also not likely to remain the only shipper. Yes, there are no other active shippers on the line at this time, but as Mr. Madison's statement admits, PCPA is actively pursuing other customers. Madison also admits that there are economic development activities

occurring on the line.<sup>5</sup> The complaint is not that RSS's statement that PCPA is pursuing other customers was inaccurate, but rather that RSS's statement was "exaggerated." One can differ over the scope of PCPA's efforts, but RSS's statement that PCPA was marketing the line to other shippers was not false or misleading. It is possible, now that MMT has located on the line that other shippers will also locate on the line. RSS wants to be in a position to lawfully serve those shippers, as well as MMT, in the event those shippers need RSS's rail services to switch them to/from BNSF.

### Assertion #3

While PCPA claims that RSS took the statement out of context, PCPA does the same thing. For the Board's clarification, the entire sentence reads "It is understood, that a customer may provide his own means of switching his industry, i.e. a track mobile; but customers will not be allowed to retrieve from or deliver cars to the BNSF." (PCPA-RSS Agreement, ¶4).

According to PCPA this simply means that "MMT cannot operate over the Line to Hayti to get the train from BNSF (or return it to BNSF)(citing Madison statement)." RSS of course believes that the sentence, in full context, means what it says, a shipper "will not be allowed to retrieve from or deliver cars to the BNSF."

Yet, that is precisely what MMT is doing. They are receiving BNSF trains directly from BNSF in clear violation of a contractual provision that prohibits them from doing that. Likewise, BNSF is unlawfully operating over PCPA's tracks to deliver those trains directly to MMT.

Whether BNSF operates over the line to deliver the cars directly to MMT or whether MMT

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<sup>5</sup> It is unclear whether there are "active" negotiations with other shippers occurring at this time. In Mr. Madison's November 8, 2012 verified statement, in a bracketed passage that obviously inadvertently didn't get deleted, he asks his counsel, Mr. Heffner, to call him to discuss that statement. This infers that perhaps there are negotiations going on but Mr. Madison wasn't sure whether or not to characterize those negotiations as "active."

operates on the line to get the cars from BNSF, the result is the same – there is a direct receive from/deliver to transaction between MMT and BNSF in violation of the contract. RSS will be seeking damages in the appropriate court as a result of BNSF's and MMT's actions, but that is precisely the point: the courts are the proper forum to determine the parties' contractual rights and not the STB.

Assertion #4

PCPA's discussion simply revisits issues that the parties have already presented and discussed. MMT is not the only basis for RSS's decision to invoke exemption authority, as RSS has made abundantly clear. Yet PCPA uses the MMT issue as the stick with which to beat the proverbial dead horse. RSS understands that MMT does not currently desire RSS service as an originating or terminating carrier, although it is unclear if MMT has a choice in the matter. But even if MMT may bypass RSS service as it evidently designs to do, this, in and of itself, does not somehow disqualify RSS from seeking to become a common carrier on the PCPA lines through the exemption process.

RSS has made very clear that its invocation of the Board's class exemption procedures was not solely for the purposes of serving MMT, although MMT was admittedly part of the calculus prompting RSS to invoke the exemption process when it did. Rather, RSS seeks to hold itself out as a common carrier to any shipper on the PCPA rail line that should seek service from RSS going forward. PCPA's fixation on the MMT issue has prompted PCPA to infer incorrectly that the subject class exemption procedures somehow require RSS to provide proof of immediate need of RSS's common carrier service (and potentially beyond that to show that RSS's provision of common carrier service would be financially remunerative from the beginning). The class exemption procedures, however, require no such evidence. To the contrary, RSS's invocation of

the class exemption now ensures that there will be no lag time for the provision of common carrier service when the additional need arises. Accordingly, even if it were true that MMT did not need, did not want, and was not obligated to use RSS service, these considerations alone have absolutely no bearing upon whether or not RSS has met all of the prescribed informational prerequisites under the Board's regulations to avail itself of the class exemption process.

Assertion #5

PCPA's response is baseless and self-serving. PCPA claims that RSS cannot possibly serve as a common carrier, because PCPA, as a "public agency" could not possibly procure rail common carrier services (such as those RSS intends to provide) and install a short line railroad on PCPA's lines without first soliciting bids from prospective common carrier service providers. This reads as conclusory nonsense to RSS. Consider that PCPA's David Madison, in his newly-concocted verified statement, asserts that PCPA "must" solicit proposals from various potential rail service providers before installing a rail common carrier on PCPA's lines. Leave Petition, V.S. Madison at 1.

In reality, PCPA already has procured the services of a rail common carrier. RSS has been granted rights and obligations under its agreement with PCPA warranting RSS's pursuit here of rail common carrier authority, so there is no need for the bid solicitation process PCPA has cooked up. And even if it were true (for the sake of discussion) that the RSS-PCPA agreement did not convey to RSS the right to conduct common carrier operations (and there is a clear disagreement between the parties concerning this very issue), Mr. Madison's claim that PCPA's subsequent award of a common carrier contract would necessitate a bid process is an unsupported assertion. It is unsupported by reference to any state statutes, ordinances, charters,

or other provisions under Missouri or local law governing how PCPA conducts its own business as a rail common carrier.

Moreover, the legitimacy of PCPA's claim regarding contract awards is clearly undercut by its award of an industrial track agreement with BNSF, its contract rights given to MMT, and its rail operating agreement with RSS – all of which RSS has good reason to believe PCPA entered into without first engaging in a bidding process. In light of this, PCPA should have at least explained how its award of a rail services contract giving rise to third-party provision of common carrier service over PCPA's lines is unique among the other contracts that PCPA has already entered into that did not appear to require this formality. In short, PCPA raises the bid procurement process as a convenient, but ultimately made up excuse – PCPA has not shown that as a matter of fact or law that it cannot grant common carrier rights to another party, especially since RSS strongly believes it already has done so.

PCPA's second claim that issuance of the exemption that RSS seeks would necessitate PCPA's subsequent invocation of the Board's adverse discontinuance process is also not only self-serving but incorrect as well. RSS has stated repeatedly that, if PCPA believes that RSS has not been granted the right to conduct common operations on PCPA's line, it can pursue that claim in court as a matter of contract law, including seeking an injunction to prevent RSS from commencing common carrier operations. Thus, even if RSS had initiated common carrier operations in excess of its contract rights, if the court sides with PCPA, then RSS's "consummation" of common carrier operations was contractually impermissible, and its common carrier operations would be invalid from the outset. RSS cannot legally "consummate" anything that is beyond the scope of RSS's legal rights, and there would be no need for an adverse

discontinuance process if RSS lacks the legal contractual right that RSS believes that it has to commence common carrier operations.

### **CONCLUSION**

PCPA cannot seem to resist trying to have the last word on the issues presented in this proceeding, even if that means flaunting the Board's rules. In any event, PCPA latest iteration of the last word – its Leave Petition – offers nothing that warrants acceptance into the record. Even assuming that PCPA's continual and undisciplined "supplementation" of the record could be sanctioned in theory, it has no place in a petition to reject under which PCPA is trying to get the Board to act hastily to reject notices of exemption before they can take effect. If they have any place at all, PCPA's piling on strategy would be better-suited to the more circumspect exemption revocation process or other Board review of the exemptions continuing beyond the subject exemptions' effective dates. For all of the reasons set forth herein, PCPA's Leave Petition and the arguments and evidence offered therein must be stricken and the filing rejected as an impermissible and unnecessary reply to a reply.

But should the Board accept PCPA's latest filing, then RSS expects the Board also to accept this reply. RSS submits, as shown herein, that the arguments contained in the Leave Petition – many of which RSS has shown to be self-serving contrivances – lack merit, and that the Board should allow the subject notices of exemption filed by Pioneer and RSS to take effect as scheduled.

Respectfully submitted,



William A. Mullins  
Robert A. Wimbish  
Baker & Miller PLLC  
2401 Pennsylvania Ave., NW  
Suite 300  
Washington, DC 20037  
Tel: (202) 663-7823  
Fax: (202) 663-7849

Attorneys for Pioneer Railcorp and  
Rail Switching Services, Inc

Daniel A. LaKemper, Esq.  
General Counsel  
Pioneer Railcorp  
1318 S. Johanson Road  
Peoria, Illinois 61607  
Tel.: (309) 697-1400  
Fax: (309) 697-8486

November 9, 2012

## CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Reply by mailing copies of the same to all parties via prepaid first class mail to all parties of record in these proceedings or by more expeditious means of delivery.

Dated at Washington, D.C. this 9<sup>th</sup> day of November, 2012.



William A. Mullins  
Attorney for Pioneer Railcorp and  
Rail Switching Services, Inc.