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February 13, 2012

VIA ELECTRONIC FILING

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

ENTERED
Office of Proceedings

FEB 13 2012

Part of
Public Record

Dear Ms. Brown:

This refers to Docket No. NOR 42133, Sierra Railroad Company and Sierra Northern Railway v. Sacramento Valley Railroad, LLC, McClellan Business Park, LLC and County of Sacramento, and to the Motion to Dismiss filed by the Respondents on January 25, 2012.

Attached for filing is the Complainants' Reply.

I certify that a copy of this letter and its attachment this day were served upon the Respondents by e-mailing copies to their attorney, Louis E. Gitomer, Esq., at Lou@lgrailaw.com.

If you have a question concerning this filing or I otherwise can be of assistance, please let me know.

Sincerely yours,


Fritz R. Kahn

SURFACE TRANSPORTATION BOARD

Docket No. NOR 42133

SIERRA RAILROAD COMPANY AND SIERRA NORTHERN RAILWAY,

Complainants,

v.

**SACRAMENTO VALLEY RAILROAD, LLC, MCCLELLAN BUSINESS
PARK, LLC AND COUNTY OF SACRAMENTO,**

Respondents.

REPLY

**OF SIERRA RAILROAD COMPANY AND SIERRA NORTHERN RAILWAY
TO THE MOTION TO DISMISS OF SACRAMENTO VALLEY RAILROAD, LLC,
MCCLELLAN BUSINESS PARK, LLC AND COUNTY OF SACRAMENTO**

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Attorneys for

**SIERRA RAILROAD COMPANY
SIERRA NORTHERN RAILWAY**

Dated: February 13, 2012

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Complainants, Sierra Railroad Company ("Sierra") and Sierra Northern Railway ("SERA"), respectfully request that the Motion to Dismiss of the Respondents, Sacramento Valley Railroad, LLC ("SAV"), McClellan Business Park, LLC ("McClellan") and County of Sacramento ("County"), filed January 25, 2012, be denied by the Board for the reason that, in acting on a motion to dismiss, the Board needs to accept as true the allegations of the complaint, drawing all reasonable inferences from its allegations in favor of the complainant, and as the further grounds state, as follows:

Preliminary Comments Responsive to the Respondents' Assertions

Apparently not confident of the merits of their arguments against the Complaint, filed by Complainants on December 7, 2011, Respondents have peppered their Motion to Dismiss with false and misleading assertions in what appears to be an effort to discredit

the Complainants and undermine their Complaint. For example, in footnote 1 on page 4 of their Motion to Dismiss, Respondents assert that Patriot Rail Corporation ("Patriot"), corporate parent of SAV, initiated the pending District Court action "following Sierra's breach of a letter of intent."¹ Respondents failed to mention that it was Sierra which initially sued Patriot for having used proprietary information obtained from Sierra pursuant to a confidentiality agreement to wrest -- some would say steal -- the McClellan business from SERA. Respondents further fail to disclose that Patriot tricked Sierra into dismissing its suit by saying that it was improving its offer to buy Sierra, including SERA, only to turn around and itself file a new action against Sierra, so that Patriot, rather than Sierra, would be viewed as the wronged party

In that same footnote 1 on page 4 of their Motion to Dismiss, Respondents accuse Sierra of initiating the Complaint in this proceeding solely to obtain additional discovery and thereby obtain from the Respondents documents that Sierra intends to use in the pending District Court action. This is patently false although difficult to prove, because it has been Patriot that has blocked the disclosure, even to the Board, of the many documents and witness statements which would prove just how unethically and illegally Patriot acted in spiriting away SERA's McClellan operations. In fact, in an ironic twist some of the very documents which Respondents seek by their Initial Discovery Request may not be able to be produced by Complainants because of the protective order which the District Court entered on May 21, 2009, at Patriot's urging.

Respondents' obfuscation extends even to their discussion of the merits of Complainants' Complaint. For example, Respondents falsely charge, at page 5 of their

¹ The District Court has ruled that the letter of intent which Patriot claims as the basis for the pending action against Sierra is non-binding and thus does not support a claim for breach of contract.

Motion to Dismiss, that McClellan had become dissatisfied with SERA's operations at McClellan, inferring that this was why McClellan invited proposals from interested short line railroads. This charge is directly contradicted by McClellan's own knowledgeable personnel who uniformly expressed their satisfaction with SERA's past performance, stating they not only looked forward to receiving Sierra's bid for an extended operating agreement, but viewed Sierra as the experienced operator of the McClellan railroad line and hence the probable winning bidder. The reason that Patriot was able to outbid Sierra for the McClellan operation is that Patriot had received a copy of Sierra's preliminary bid during the parties' purchase discussions and, in violation of the parties' confidentiality agreement, used that information in submitting its higher bid to McClellan.

At page 5 of their Motion to Dismiss, Respondents suggest that there is something improper in Sierra's initiating this proceeding almost four years after SAV was formed to take over the McClellan operations. The pending District Court proceeding, however, is far from being concluded, and, contrary to Respondents' surmise, Sierra is seeking a court order reinstating its right to resume the McClellan operations. Only the Board, however, authoritatively can state that SERA continues to be a rail carrier on the McClellan line so that an order of the District Court requiring the restoration of SERA as the operator on the line would not intrude upon the Board's jurisdiction.

At pages 3-4 and 6 of their Motion to Dismiss, Respondents advance the nonsensical argument that in their filing in another pending proceeding, STB Docket No. FD 35331, *Sierra Northern Railway -- Lease and Operation Exemption -- Union Pacific Railroad Company* ("*lease proceedings*"), "Complainants have admitted and conceded

that none of the [Respondents] are required to file a third-party discontinuance in order for SERA to terminate its common carrier obligations." To begin with, none of the Respondents -- SAV, McClellan or the County -- is a party to the *lease proceedings*. Second, unlike McClellan and the County in this proceeding, the owner of the line at issue in the *lease proceedings* isn't the one who seeks to get rid of SERA and have it cease rendering service on the line. Thus, there is no reason why the owner of the line, Union Pacific Railroad Company, should file a third-party or adverse discontinuance application. Finally, unlike this proceeding in which SAV is said to have been granted the exclusive occupancy and operating rights on the railroad line within McClellan, though the Board previously granted SERA the same authority on that same line, in the *lease proceedings* no one as yet has been granted the authority by the Board to replace SERA as the rail carrier. As is underscored by the very Decision of the Board in STB Finance Docket No. 35022, *New Hampshire Central Railroad, Inc.--Lease and Operation Exemption--Line of the New Hampshire Department of Transportation*, served December 11, 2007, cited in footnote 7 on page 6 of the Respondents' Motion to Dismiss, "[SERA's] operating rights have not been extinguished by adverse discontinuance or otherwise. Consequently, [SERA] continues to have Board authority to provide rail service over the Line."

Denial of the Motion to Dismiss

It is axiomatic that in passing on a motion to dismiss, the facts as alleged in the complaint are taken as true and all reasonable inferences therefrom are drawn in the complainant's favor. As the Supreme Court stated in *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), "[I]t is well established that, in passing on a motion to dismiss, whether on the

ground of lack of jurisdiction over the subject matter or failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader."

Only a few days ago, on February 3, 2012, in Case No. 10-7135, *City of Jersey City, et al. v. Consolidated Rail Corporation, et al.*, the United States Court of Appeals for the District of Columbia Circuit said, "At this state of the litigation, we 'must accept as true all material allegations of the complaint, drawing all reasonable inferences from those allegations in plaintiffs' favor.' *LaRoque v. Holder*, 650 F.3d 777, 785 (D.C. Cir. 2011) (internal quotation marks omitted)." *Accord, Krishna Mujir v. Navy Federal Credit Union*, 529 F.3d 1100, 1109 (D.C. Cir. 2008) ("For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party."); *Roger Wood v Department of Labor*, 275 F.3d 107, 108 (D.C. Cir. 2001) ("On a motion to dismiss, the facts as alleged in the complaint are taken as true and all reasonable inferences therefrom are drawn in the plaintiff's favor.")²

Over a hundred years ago, the Interstate Commerce Commission in *White v. Michigan Central R. Co.*, 2 I.C.C. 641, 642 (1889), in ruling on a motion to dismiss, said, "The case . . . stands for decision upon the sufficiency of the complaint, taking the facts therein charged to be true."³

Based upon the truth of the allegations of the Complaint, filed December 7, 2011, and drawing all inferences therefrom in Complainants' favor, it is evident that Respondents' Motion to Dismiss should be denied by the Board.

² While the forgoing are court decisions, 49 C.F.R. §1114.1 indicates that in construing its rules of evidence the Board will tend to follow the rules of evidence applicable in non-jury cases in the courts of the United States.

³ Pursuant to Section 204(a) of the ICC Termination Act of 1995, the decisions of the Interstate Commerce Commission continue to have precedential value until overturned by decision of the Board.

Respondents will have ample opportunity to assail the validity of the allegations of the Complaint. Respondents' Answer, filed December 27, 2011, permits of no doubt that they will attempt to do so. One or two examples will serve to make that evident.

In Paragraphs 21 and 22 of their Answer, the Respondents denied the Complainants' allegation that the Respondents' failure to file a third-party or adverse discontinuance application with the Board constituted an unreasonable practice, a position that Respondents emphasized in stating as their second affirmative defense in their Answer that they "are not under any legal obligation to seek or to incur the cost of seeking authority for SERA to discontinue service in [McClellan]."

Respondents' argument relates to an issue to be decided in this proceeding: Did Respondents' failure to file a third-party or adverse discontinuance application constitute an unreasonable practice as alleged in the Complaint? Complainants will endeavor to persuade the Board that it is. SERA was authorized by the Board operate on the McClellan railroad line and continues to be a rail carrier authorized operate on that railroad line. Nevertheless, Respondents since March 1, 2008, have barred SERA from entering the facility or serving any of the industries within the complex. SERA would like the opportunity to fulfill its common carrier obligation at McClellan, but Respondents have denied it the ability to do so. Since it is the Respondents who wish to be rid of SERA as the rail carrier at McClellan, they are the ones who need to file a third-party or adverse discontinuance application with the Board. Their failure to do so constitutes an unreasonable practice in violation of 49 U.S.C. §10702(2).

Complainants, of course, have the burden of proving this, and in aid of their meeting their burden of proof the procedural schedule permits the Complainants to

pursue discovery, to file their opening evidence and arguments on or before April 9, 2012, and to file their rebuttal evidence and argument on or before May 21, 2012. If Complainants fail to meet their burden of proof, their Complaint in due course will be denied by the Board.

In Paragraphs 4 and 5 of their Answer, Respondents deny the Complainants' allegation that McClellan and the County respectively are rail carriers, notwithstanding that they never sought certification by the Board. Respondents reaffirmed their view by stating as their sixth affirmative defense in their Answer that "[County] and McClellan are not rail carriers subject to the jurisdiction of the Board."

This then is another issue which will need to be decided in this proceeding: Are McClellan and the County rail carriers subject to the jurisdiction of the Board? Complainants will seek to convince the Board that they are. Neither McClellan as the manager of the industrial park nor the County as its owner has granted the rail carriers -- first, SERA and now SAV -- a permanent and irrevocable easement to operate on the line. The license and operating agreements pursuant to which the rail carriers have been operating within the facility have been for a mere five years, renewable annually. In fact, the license and operating agreements expressly provide for their cancellation upon six months' notice. Pending cancellation of the license and operating agreements, McClellan can exercise control of the rail carrier's operations by various means. Neither McClellan nor the County is on the U.S. Railroad Retirement Board index of "not covered employers". If SAV or a successor were to cease operating on the railroad line, the residual common carrier obligation would be that of McClellan or the County. That makes McClellan and the County rail carriers as defined in 49 U.S.C. §10102(5).

Again, Complainants have the burden of proving that they are, and to assist them in meeting their burden of proof the procedural schedule permits the Complainants to pursue discovery, to file their opening evidence and arguments on or before April 9, 2012, and to file their rebuttal evidence and arguments on or before May 21, 2012. If the Complainants fail to meet their burden of proof, their Complaint in due course will be denied by the Board.

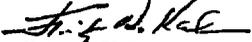
WHEREFORE, given that all of the material allegations of their Complaint need to be accepted as true and all reasonable inferences from those allegations are to be drawn in Complainants' favor, Complainants, Sierra Railroad Company and Sierra Northern Railway, ask that the Board deny the Motion to Dismiss of Respondents, Sacramento Valley Railroad Company, LLC, McClellan Business Park, LLC and the County of Sacramento.

Respectfully submitted,

SIERRA RAILROAD COMPANY
SIERRA NORTHERN RAILWAY

By their attorneys,

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Dated: February 13, 2012

CERTIFICATE OF SERVICE

I certify that I this day served the forgoing Reply of Complainants upon Respondents by e-mailing a copy to their counsel, Louis E. Gitomer, Esq., at lou@lgrailaw.com. Additionally, a copy was mailed to Mr. Gitomer by prepaid first-class mail.

Dated at Washington, DC, this 13th day of February 2012.



Fritz R. Kahn