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January 25, 2012

ENTERED
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Part of
Public Record

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

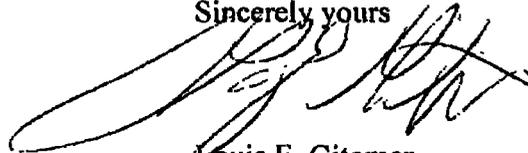
RE: Docket No. 42133, *Sierra Railroad Company and Sierra Northern
Railway v. Sacramento Valley Railroad Company, LLC, McClellan
Business Park, LLC, and County of Sacramento*

Dear Ms. Brown:

Enclosed for e-filing is the Motion to Dismiss of Sacramento Valley Railroad
Company, LLC, McClellan Business Park, LLC, and County of Sacramento.

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

Sincerely yours



Louis E. Gitomer
Attorney for: Sacramento Valley Railroad
Company, LLC, McClellan Business Park, LLC,
and County of Sacramento

Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. 42133

SIERRA RAILROAD COMPANY AND SIERRA NORTHERN RAILWAY
v.
SACRAMENTO VALLEY RAILROAD COMPANY, LLC
MCCLELLAN BUSINESS PARK, LLC
AND COUNTY OF SACRAMENTO

MOTION TO DISMISS

EXPEDITED HANDLING REQUESTED

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LLC, and County of Sacramento

Dated: January 25, 2012

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. 42133

SIERRA RAILROAD COMPANY AND SIERRA NORTHERN RAILWAY
v.
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MCCLELLAN BUSINESS PARK, LLC
AND COUNTY OF SACRAMENTO

MOTION TO DISMISS

Sacramento Valley Railroad Company, LLC (“SAV”), McClellan Business Park, LLC (McClellan”), and the County of Sacramento (“Sacramento” and with SAV and McClellan, jointly referred to as “Defendants”) respectfully move the Surface Transportation Board (the “Board”) to dismiss the complaint filed on December 7, 2011 (the “Complaint”) by Sierra Railroad Company (“Sierra”) and Sierra Northern Railway (“SERA” and with Sierra jointly referred to as “Complainants”).

Pursuant to 49 U.S.C. §§ 10702(2) and 10704(b) the Complaint requests that the Board find Defendants have failed to maintain reasonable practices due to their alleged failure to file a third-party discontinuance of SERA’s authorization to operate as a common carrier on McClellan’s seven miles of railroad track. Complaint at ¶¶ 21, 22. Defendants move to dismiss the Complaint in *toto* on the basis that Defendants were not required to file a third-party discontinuance of SERA’s common carrier obligations, and Complainants admit and concede that Defendants are not required to seek such discontinuance as demonstrated by SERA’s self-

initiated filing before the Board also seeking to be relieved of their common carrier obligation. *Sierra Northern Railway-Lease and Operation Exemption-Union Pacific Railroad Company*, STB Docket No. FD 35331 (the “*Lease Proceeding*”). McClellan and Sacramento also seek to dismiss the Complaint as to them because neither of them is a rail carrier subject to the Board’s jurisdiction, and therefore the Board lacks jurisdiction over either of them under 49 U.S.C. §§10702(2) and 10704(b).¹

SERA should not be rewarded for acting inconsistently before the Board.

Without citing any authority or precedent, the Complaint contends that upon McClellan entering into an agreement with SAV to be the sole and exclusive provider of rail operator services in the Park in March 2008, Defendants were required to file a third party discontinuance of SERA’s common carrier obligations on that track. Complaint at ¶¶ 19-22. The Complaint further asserts that Defendants failure to obtain such discontinuance, Complainants allege, constitutes an unreasonable practice. *Id.*, at ¶¶ 21, 22.

After it was closed, the McClellan Air Force Base was acquired by Sacramento. In turn, Sacramento contracted with McClellan to develop and operate the newly renamed Park as a rail-served industrial park.² McClellan hired the Yolo Shortline Railroad Company (“Yolo”) to

¹ Patriot Rail Corporation (“Patriot”), parent of SAV, and Sierra are currently involved in highly contentious litigation, *Patriot Rail Corp. v. Sierra Railroad Company* USDC Eastern District, Case No. 2:09-cv-00009-MCE-EFB, which was initiated by Patriot following Sierra’s breach of a letter of intent. Sierra’s repeated attempts to prolong discovery in the federal lawsuit have been rejected by the U.S. District Court. Defendants thus believe that Sierra initiated the Complaint in order to make use of the Board’s discovery procedures in an attempt to re-open discovery and obtain documents that Sierra intends on using in the federal lawsuit.

² Neither Sacramento nor McClellan has ever held themselves out to provide rail service, nor has either applied to the Board to become rail carriers. A review of the Railroad Retirement Board (the “RRB”) coverage decisions indicates that the RRB does not consider Sacramento or McClellan a rail carrier for the RRB’s purposes. Since SAV has operated in the Park, neither

provide rail service in MBP.³ Sierra Railroad Company (“SRC”), predecessor in interest to Sierra, acquired control of Yolo.⁴

McClellan became dissatisfied with SERA’s operation in the Park and on August 31, 2007, SERA was notified that its License and Operating Agreement to operate in the Park was terminated. McClellan via a formal Request for Proposal (“RFP”) process solicited bids for the continued rail operation in the Park including from Patriot Rail, LLC (“PRL”), SAV’s parent. Patriot responded to McClellan’s RFP and in January 2008 was awarded the right to provide rail service in the Park.

Thereafter, SAV was formed and incorporated to be the entity to provide rail operator services at the Park. SAV sought and obtained Board authority and PRL obtained authority to continue-in-control of SAV upon SAV becoming a rail carrier.⁵ No opposition to these proceedings was filed with the Board by any party, including Complainants, prior to consummation.

Now, for the first time in nearly four years after SAV first began operations in March of 2008, SERA is complaining that it cannot fulfill its common carrier obligations at the Park

Sacramento nor McClellan have exerted or attempted to exert any type of operational control over how SAV performs its common carrier service.

³ Yolo acquired an exclusive occupancy and operating rights over seven miles of unmarked railroad track in MBP. *Yolo Shortline Railroad Company--Acquisition and Operation Exemption--County of Sacramento, CA*, Finance Docket No. 34018 (STB served March 27, 2001) (“Yolo”).

⁴ *Sierra Railroad Company--Acquisition of Control Exemption--Yolo Shortline Railroad Company*, Finance Docket No. 34351 (STB served June 11, 2003). Sierra was then merged into Yolo. *Sierra Railroad Company--Corporate Family Transaction Exemption--Yolo Shortline Railroad Company*, Finance Docket No. 34360 (STB served June 23, 2003).

⁵ *Sacramento Valley Railroad, Inc.—Operation Exemption—McClellan Business Park LLC*, Finance Docket No. 35117 (STB served February 14, 2008); and *Patriot Rail, LLC, Patriot Rail Holdings LLC, and Patriot Rail Corp.—Continuance in Control Exemption—Sacramento Valley Railroad, Inc.*, Finance Docket No. 35118 (STB served February 14, 2008).

because Defendants are denying them access to perform such services, and that Defendants must file a third-party or adverse discontinuance of service in order to terminate SERA's common carrier obligations. SERA raises these allegations without any authority that any of Defendants were legally required to seek such discontinuance. Moreover in the *Lease Proceedings*, Complainants have admitted and conceded that none of Defendants are required to file a third-party discontinuance in order for SERA to terminate its common carrier obligations. SERA can obtain such termination on its own.

In the *Lease Proceeding*, SERA was authorized to lease a line of railroad from the Union Pacific Railroad Company ("UP").⁶ Now, SERA is seeking to terminate its obligation to operate over the UP, but not by filing a discontinuance application or exemption or demanding that UP file an adverse discontinuance application. Instead, SERA is asking the Board to revoke the exemption granted in the *Lease Proceeding*. SERA is not seeking authority to discontinue service under 49 U.S.C. §10903, instead it has taken the unilateral step of seeking a revocation of the notice of exemption that allowed it to lease the UP line in the first place.⁷ If SERA believes that the proper approach to discontinuing its common carrier obligation is a revocation of the exemption granting that authority, Defendants contend that the Board should require SERA to follow the same procedure to terminate its right and obligation to provide common carrier operations in the Park pursuant to *Yolo*. If the Board requires SERA to seek revocation of the

⁶ *Sierra Northern Railway-Lease and Operation Exemption-Union Pacific Railroad Company*, STB Docket No. FD 35331 (STB served December 17, 2009).

⁷ Defendants note that SERA's obligation to operate over UP's line cannot be extinguished by a revocation of the notice of exemption, but would require the grant of a discontinuance of service request. *Thompson v. Tex. Mexican Ry.*, 328 U.S. 134 (1946); *New Hampshire Central Railroad, Inc.—Lease and Operation Exemption—Line of the New Hampshire Department of Transportation*, STB Finance Docket No. 35022 (STB served December 11, 2007) slip op. at 4.

notice of exemption in *Yolo*, then Defendants respectfully request the Board to dismiss the instant proceeding.

Sacramento and McClellan are not railroads subject to the Board's jurisdiction.

If the Board does not dismiss the Complaint in full, Sacramento and McClellan respectfully request that the Board dismiss Sacramento and McClellan as parties to the Complaint because Sacramento and McClellan are not rail carriers subject to the Board's jurisdiction. Under each section of the statute cited by the Complainants, the Board's jurisdiction is limited to actions by a rail carrier.

Neither Sacramento nor McClellan hold themselves out to provide railroad service. They own no railroad equipment. They do not employ people to operate the railroad. Neither has sought authority from the Board to provide railroad service. The railroad operations in the Park have always been performed by a railroad hired by McClellan, without any interference in the operations of that railroad by McClellan or Sacramento. Indeed, Sacramento is a government entity within the State of California and is not in the business of operating a railroad. The Board has acknowledged that McClellan is a non-carrier in *Sacramento Valley Railroad, Inc.—Operation Exemption—McClellan Business Park LLC*, STB Finance Docket No. 35117 (STB served February 14, 2008). The Railroad Retirement Board (the "RRB") has not even been asked to determine whether Sacramento or McClellan is an employer under 45 U.S.C. §231 (a)(1)(i), which defines an employer as a carrier by railroad subject to the Interstate Commerce Act. Thus under sections 10702 and 10704 the Board does not have jurisdiction over Sacramento or McClellan.

EXPEDITED HANDLING REQUESTED

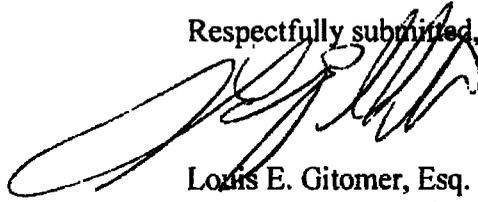
Sacramento and McClellan are not rail carriers. However, Complainants intend to seek discovery from Sacramento and McClellan in this proceeding. Defendants respectfully request the Board to act expeditiously on this Motion in order to allow Sacramento and McClellan to avoid the burden of discovery in this proceeding, in the event the Board determines that they are not rail carriers subject to the Board's jurisdiction.

On January 17, 2012, pursuant to 49 C.F.R. §1110, a schedule agreed to by the parties was filed in this proceeding. Pursuant to the proposed schedule, responses to discovery are due by February 16, 2012. In order to avoid the burden of discovery on Sacramento and McClellan, Defendants also request that the Board postpone the time for responding to discovery until one week after the Board rules on this Motion.

CONCLUSION

For the forgoing reasons, Defendants respectfully request that the Board dismiss the Complaint filed in this proceeding. Additionally, Sacramento and McClellan request that the Board dismiss Sacramento and McClellan from this proceeding for lack of jurisdiction. Defendants further request expedited handling of this Motion.

Respectfully submitted,



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Dated: January 25, 2012

CERTIFICATE OF SERVICE

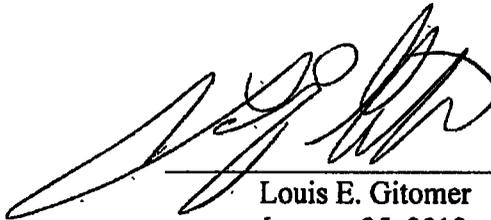
I hereby certify that I have caused the foregoing document to be served electronically

upon:

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