

233025

LAW OFFICES  
FRITZ R. KAHN, P.C.  
1919 M Street, NW (7th fl.)  
Washington, DC 20036

ENTERED  
Office of Proceedings  
September 24, 2012  
Part of  
Public Record

September 24, 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

re: Docket No. FD 35247, Grenada Railway, LLC--Acquisition and Operation  
Exemption--Illinois Central Railroad Company and Waterloo Railroad  
Company

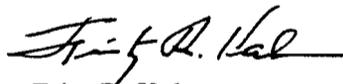
Dear Ms. Brown:

Attached for filing in the subject proceeding is the Reply of Grenada Railway, LLC to the Petition to Reject or Revoke of Mr. Robert J. Riley, filed September 11, 2012.

Copies of this letter and its attachment have been mailed by me by prepaid first-class mail to Mr. Riley and Dr. Sidney Bondurant.

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

Sincerely yours,

  
Fritz R. Kahn

cc: Mr. Robert J. Riley  
Dr. Sidney Bondurant

SURFACE TRANSPORTATION BOARD

---

Docket No. FD 35247

GRENADA RAILWAY, LLC  
--ACQUISITION AND OPERATION EXEMPTION--  
ILLINOIS CENTRAL RILROAD COMPANY  
AND WATERLOO RAILWAY COMPANY

---

REPLY  
OF  
GENADA RAILWAY, LLC

Fritz R. Kahn  
Fritz R. Kahn, P.C.  
1919 M Street, NW (7th fl.)  
Washington, DC 20036  
Tel.: (202) 263-4152

Attorney for

GRENADA RAILWAY, LLC

Dated: September 24, 2012

SURFACE TRANSPORTATION BOARD

---

Docket No. FD 35247

GRENADA RAILWAY, LLC  
--ACQUISITION AND OPERATION EXEMPTION--  
ILLINOIS CENTRAL RILROAD COMPANY  
AND WATERLOO RAILWAY COMPANY

---

REPLY  
OF  
GENADA RAILWAY, LLC

Grenada Railway, LLC ("GRYR"), a Class III rail carrier subject to the Board's jurisdiction, pursuant to 49 C.F.R. §1104.13(a), replies to the Petition to Reject or Revoke of Mr. Robert J. Riley, a former locomotive engineer of the Canadian National Railway Company ("CN"), filed September 11, 2012, by respectfully asking the Board to dismiss the pleading or, in the alternative, to deny it, and in support thereof GRYR states as follows::

I.

Mr. Riley's pleading is barred by the doctrine of collateral estoppel.

The Board already has entertained and denied as wanting a petition to reject or revoke GRYR's Verified Notice of Exemption, filed May 13, 2009. In a pleading more concise but no less contrived than that of Mr. Riley, Dr. Sidney Bondurant, Representative of District 24 of the State of Mississippi House of Representatives, by his Petition, filed June 9, 2009, sought to have the Board reject or revoke GRYR's Verified Notice of Exemption.

Mr. Riley, at page 18 of his Petition, as had Dr. Bondurant, at page 1 of his Petition, maintains that GRYR's Verified Notice of Exemption contained false and misleading information. Neither Mr. Riley nor Dr. Bondurant, however, indicated what information was called for by 49 C.F.R. §1150.33 that was not completely and accurately included in GRYR's Verified Notice of Exemption. In denying Dr. Bondurant's rejection request, the Board, in its Decision, served December 3, 2009, declared, "Pursuant to 49 CFR 1150.42(c), if a verified notice contains false or misleading information, the exemption is void ab initio, but Grenada's notice meets the Board's requirements under 49 CFR 1150.33 and is neither false or misleading."

In support of his plea that GRYR's Verified Notice of Exemption be revoked, Mr. Riley, at page 1 of his Petition, as had Dr. Bondurant, at page 1 of his Petition, noted that GRYR is an affiliate of A&K Railroad Materials, Inc. Mr. Riley, at page 3 of his Petition, as Dr. Bondurant, at page 1 of his Petition, contends that GRYR acquired the railroad line between Southaven and Canton, MS, from CN's Illinois Central Railroad Company ("IC") only to operate it for a short while and then to abandon all or part of it for its salvage value. In Denying Dr. Bondurant's revocation request, the Board, in its Decision, served December 3, 2009, held, "The Petition does not cite specific concerns that require revocation to carry out the rail transportation policy (RTP) of 49 U.S.C. 10101. While Rep. Bondurant expresses concerns that Grenada might provide inadequate service to shippers and eventually abandon the lines, he does not provide specific evidence to substantiate his claims."

Mr. Riley's belated endeavor to revive matters previously considered and found by the Board to be insufficient to warrant the rejection or revocation of GRYR's Verified

Notice of Exemption violates the doctrine of collateral estoppel. As the Board observed in Finance Docket No 30400 (Sub-No. 21), *Santa Fe Southern Pacific Corporation - Control Southern Pacific Transportation Company*, served December 10, 1996, at p. 15, footnote 12, "Collateral estoppel (also referred to as 'issue preclusion') like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." In STB Finance Docket No. 21510 (Sub-No. 6), *Norfolk and Western Railway Company and New York, Chicago and St. Lois Railroad Company--Merger, etc*, served December 3, 1996, at p. 5, the Board stated, "Collateral estoppel or 'issue preclusion' forecloses the relitigation of a matter that has been litigated and decided." In Docket No. FD 34890, *Pyco Industries, Inc--Feeder Line Application--Lines of South Plains Switching, Ltd. Co*, served June 11, 2010, at p. 5, the Board said, "[T]he doctrine of judicial estoppel is instructive here, and may be applied in the context of agency adjudication." See, *Astoria Federal S. & L. Assn v. Solimino*, 501 U.S. 104, 107 (1991); *United States v. Utah Constr. Co.*, 384 U.S. 394, 422 (1966)

Since Mr. Riley seeks to relitigate matters which were considered and found by the Board, in its Decision, served December 3, 2009, to be insufficient to justify the rejection or revocation of GRYR's Verified Notice of Exemption, his claims are barred by the doctrine of collateral estoppel, and his Petition to Reject or Revoke accordingly should be dismissed.

## II.

### Mr. Riley's pleading fails to meet the burden for revocation.

Mr. Riley's Petition to Reject or Revoke does little more than regurgitate the opponents' evidence and arguments filed in Docket No. AB-1087X, *Grenada Railway LLC--Petition for Abandonment Exemption--in Grenada, Montgomery, Carroll, Holmes, Yazoo and Madison Counties*, GRYR's abandonment proposal which GRWR withdrew with the consent of the Board, which by its Decision, served November 10, 2011, discontinued the abandonment proceeding. The opponents' evidence and arguments, reiterated in substance in Mr. Riley's Petition, therefore were never appraised or deemed meritorious by the Board and hence are wholly without substantive value.<sup>1</sup>

On page 2 of his Petition, Mr. Riley quotes from Dr. Bondurant's June 9, 2009, Petition to reject or revoke GRYR's Verified Notice of Exemption.

On page 3 of his Petition, Mr. Riley excerpts from newspaper articles, attached as Exhibit B to his Petition. The newspaper articles were attachments to the Reply and Protest filed October 27, 2011, by the Mississippi Transport Commission in the discontinued abandonment proceeding.

On page 4 of his Petition, Mr. Riley refers to letters, dated June 17, 2011, sent by GRYR to the shippers remaining on the Grenada-to-Canton railroad line seeking their commitments of traffic to avoid the line's abandonment, and Mr. Riley attaches a copy of one of the letters as Exhibit C to his Petition. Copies of the letters were attachments to

---

<sup>1</sup> The press release, referred to on page. 1 of, and attached as Exhibit A to, Mr. Riley's Petition, was issued by CN and not by GRYR. The out-of context reference to the qualifications of Mr. Kern W. Schumacher, on page 2 of Mr. Riley's Petition, was taken from the Verified Notice of Exemption, filed May 13, 2009, in STB Finance Docket No. 35249, *Kern W. Schumacher--Continuance in Control Exemption--Grenada Railway, LLC and Natchez Railway, LLC*.

GRYR's Petition, filed September 20, 2011, in the discontinued abandonment proceeding.

On page 4 of his Petition, Mr. Riley notes that GRWR embargoed a bridge, attaching a copy of the embargo notice as Exhibit D to his Petition. The embargo was cited on page 2 of the Environmental and Historic Report appended to GRYR's Petition, filed September 20, 2011, in the discontinued abandonment proceeding.

On page 5 of his Petition, Mr. Riley outlines the contents of the Reply and Protest filed October 27, 2011, by the Mississippi Transport Commission and of the Comments, filed October 24, 2011, by Mr. Joe Marascalco in the discontinued abandonment proceeding.

On page 6 of his Petition, Mr. Riley outlines the contents of his own protest statement, filed October 6, 2011, and of the protest statement, filed October 6, 2011, by Dr. Bondurant in the discontinued abandonment proceeding.

On pages 7-11 of his Petition, Mr. Riley attempts to analogize at length GRYR's acquisition of the Southaven-to-Canton railroad line from CN's IC to SF&L Railway's acquisition of the LaHarpe-to-Peoria railroad line from Toledo, Peoria & Western Railway Corporation. This argument was taken directly from page 12, footnote 16, of the Reply and Protest, filed October 27, 2011, by the Mississippi Transportation Commission in the discontinued abandonment proceeding.<sup>2</sup>

On pages 10 & 23 of his Petition, Mr. Riley quotes from the Reply of Mr. Don Brown, former President of the Kosciusko & Southwestern Railway, filed October 4, 2011, in the discontinued abandonment proceeding.

---

<sup>2</sup> At page 7 of his Petition, Mr. Riley cites STB Docket No. AB-448 (Sub-No. 2X), *SF&L Railway, Inc.--Abandonment Exemption--In Hancock, McDonough, Fulton and Peoria Counties, IL*, the embraced proceeding rendered moot by the Board's October 17, 2002, Decision.

On pages 12-13 of his Petition, Mr. Riley criticizes CN for not having allowed GRYR to acquire the entire 211.3-mile Memphis-to-Jackson railroad line, portrayed on the maps, Exhibits E and F attached to his Petition, a matter he failed to raise in his October 6, 2011, protest statement in the discontinued abandonment proceeding.<sup>3</sup>

On page 13 of his Petition, Mr. Riley seeks to fault GRYR for not giving greater weight to the revenue from overhead traffic in determining whether operations on the Grenada-to-Canton railroad line were profitable. This was taken directly from pages 5 and 16 of the Analysis of Snavely King Majoros & O'Connor, Inc., Exhibit B of the Reply and Protest, filed October 27, 2011, by the Mississippi Transportation Commission in the discontinued abandonment proceeding.

On pages 15-17 of his Petition, Mr. Riley cites several decisions in which the Board authorized the abandonment of all or segments of lines of railroads affiliated with A&K Railroad Materials, Inc.. These were taken directly from page 12, footnotes 17-21, of the Reply and Protest, filed October 27, 2011, by the Mississippi Transportation Commission in the discontinued abandonment proceeding.<sup>4</sup>

On pages 18-19, Mr. Riley misstates the substance of the Board's revocation process to be followed in this proceeding. In Docket No. FD 35573, *Watco Holdings, Inc. and Watco Transportation Services, L.L.C.--Acquisition of Control Exemption--Wisconsin & Southern Railroad, L.L.C.*, served March 22, 2012, the Board held:

"Under 49 U.S.C. § 10502(d), an exemption may be revoked, in whole or in part, if the Board finds that regulation of the transaction is necessary to carry out the rail

---

<sup>3</sup> At page 19 of his Petition, Mr. Riley refers to the change in the classification and signaling on part of the acquired railroad line, referring to Exhibits G and H attached to his Petition. He offers no explanation of Exhibit I.

<sup>4</sup> Mr. Riley fails to realize that his citations constitute criticisms of the Board and the ICC before it, because the railroads could not have abandoned all or segments of their lines on their own, but in each instance the Board or the ICC determined that the present or future public convenience and necessity permitted the abandonment.

transportation policy (RTP) of 49 U.S.C. § 10101. When, as here, an exemption has become effective, a revocation request is treated as a petition to reopen and revoke, and, under 49 C.F.R. § 1115.3(b), must state in detail whether revocation is supported by material error, new evidence, or substantially changed circumstances. See New York Cent. Lines--Aban. Exemption--in Montgomery & Schenectady Cntys., AB 565 (Sub-No. 14X) (STB served Jan. 22, 2044). The party seeking revocation has the burden of showing that regulation is necessary to carry out the RTP, 49 C.F.R. § 1121.4(f), and petitions to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and more detailed scrutiny of the transaction is necessary. See Consol. Rail Corp.--Trackage Rights Exemption--Mo. Pac. R.R., FD 32662 (STB served June 18, 1998)."

Virtually the identical detailing of the relevant revocation process appear in the Board's Decisions in Docket No. FD 35449, *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*, served March 6, 2012, p. 3, and STB Docket No. AB-565 (Sub-No. 14X), *New York Central Lines, LLC-Abandonment Exemption-in Montgomery and Schenectady Counties NY*, served January 22, 2004, p..3.

The exemption herein - GRYR's acquisition and operation of the 175.4-mile Southaven-to-Canton railroad line acquired from CN's IC - has been in effect more than three years, since May 29, 2009. It, therefore, was incumbent upon Mr. Riley in his Petition to state in detail the material error, the new evidence or the substantial changed circumstances which would support revocation of the exemption. He failed completely to meet the burden which was his to secure the revocation of the exemption. To the contrary, as has been shown, his submissions were little more than the rehashing of the evidence and arguments of the opponents of the proposed abandonment by GRYR of the Grenada-to-Canton segment of the acquired railroad line, withdrawn with the consent of the Board, which discontinued the abandonment proceeding

Beginning at page 20 of his Petition, Mr. Riley endeavors to establish that GRYR has abused the exemption process. Nothing could be further from the truth.

When the Board, by its Decision, served December 3, 2009, denied Dr. Bondurant's Petition to reject or revoke GRYR's Verified Notice of Exemption, the Board cautioned,

"[W]e note that common carriers - and Grenada will become a Class III rail carrier as a result of this transaction - have a common carrier obligation to provide service to shippers. If a carrier provides inadequate service, shippers have recourse before the Board under 49 U.S.C. 11101 and 11102. Similarly, there are statutory protections for shippers in abandonment procedures under 49 U.S.C. 10903. In short, acquisition and operation authority exposes rail carriers to a variety of regulatory responsibilities."

Throughout the more than three-year period since the exemption became effective on May 29, 2009, not a single shipper has lodged a complaint with the Board - whether informal or formal - that GRYR was rendering less than adequate service. GRYR has been faithful to its obligation as a rail carrier.

To be sure, the one hundred year old, 112-foot bridge at Milepost 656.4, between Beatty and West, embargoed on July 28, 2011, remains embargoed. The insufficiency of traffic and, hence, the revenue to be earned simply do not justify the expenditure of \$784,000.00 which Landreth Engineering of Albuquerque, NM, estimated would be the cost of replacing the bridge. As the Board noted in its Decision in STB Finance Docket No. 34337, *Michael H. Meyer, Trustee in Bankruptcy for California Western Railroad, Inc. v. North Coast Railroad Authority, d/b/a Northwestern Pacific Railroad*, served July 27, 2005, p. 4, "The Supreme Court has found that '[it] is well settled that a carrier cannot legitimately be required to expend money to rehabilitate a line where it will lose money on the operation [citations omitted]'" See, STB Finance Docket No. 33386, *Decatur*

*County Commissioners, et al. v. The Central Railroad Company of Indiana*, served September 29, 2000, p. 18, footnote 34.<sup>5</sup>

Indeed, it is the continued embargo of the bridge at Milepost 656.4 which prompted GRYR, on July 13, 2012, to send a letter to Mr. Pablo Diaz of the North Mississippi Regional Rail Authority offering to sell it the Grenada-to-Canton railroad line in lieu of filing for its abandonment, which letter was discussed at page 24 in the Conclusion of Mr. Riley's Petition, and a copy of the letter is attached to Mr. Riley's Petition as Exhibit J. GRYR, however, has no alternative but to consider abandoning the Grenada-to-Canton railroad line. As the Board discussed in its Decision in Docket No. 41230, *GS Roofing Products Company, Inc., Beazer West, Inc., d/b/a Gifford-Hill & Company, Bean Lumber Company and Curt Bean Lumber Company v. Arkansas Midland Railroad and Pinsly Railroad Company*, served March 11, 1997, p. 9, an embargo, such as the embargo of the bridge at Milepost 656.4, can only be justified as a temporary measure. GRYR either must seek the Board's authorization to abandon the Grenada-to-Canton railroad line or replace the bridge so that service once again can be rendered on it. As previously noted, however, the traffic and, hence, the revenue to be earned do not justify the expenditure of the \$784,000.00 estimated cost of replacing the bridge. The abandonment of the line, therefore, may be necessary to avoid an unconstitutional taking. *See, State of Colorado v. U.S.*, 271 U.S. 153, 161 (1926); *Brooks-Scanlon Co. v. Railroad Commission of Louisiana*, 251 U.S. 396, 399 (1920).

Mr. Riley has failed to meet the burden that is his of citing the material error, new evidence or substantial changed circumstances which establish that the Verified Notice of

---

<sup>5</sup> The details, discussed on page 25 of Mr. Riley's Petition, and portrayed in Exhibits K, L and M attached to his Petition, are intended to safeguard that no one inadvertently will seek to operate on the embargoed bridge.

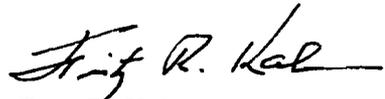
Exemption which permitted the GRYR to acquire and operate the Southaven-to-Canton railroad line warrants revocation.

WHEREFORE, Grenada Railway, LLC asks that the Petition to Reject or Revoke, filed by Mr. Robert J. Riley on September 11, 2012, be dismissed or, in the alternative, be denied.

Respectfully submitted,

GRENADA RAILWAY, LLC

By its attorney,



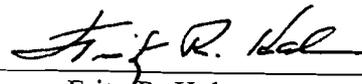
Fritz R. Kahn  
Fritz R. Kahn, P.C.  
1919 M Street, NW (7th fl.)  
Washington, DC 20036  
Tel.: (202) 263-4152

Dated: September 24, 2012

#### CERTIFICATE OF SERVICE

I certify that I this day have served the foregoing Reply on Mr. Robert J. Riley and Dr. Sidney Bondurant by mailing a copy by prepaid first-class mail to each of them.

Dated at Washington, DC, this 24th day of September 2012.

  
\_\_\_\_\_  
Fritz R. Kahn