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October 6, 2008

By e-filing

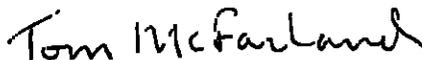
Anne K. Quinlan, Esq.
Acting Secretary
Surface Transportation Board
395 E Street, S.W., Suite 1149
Washington, DC 20024

Re: Finance Docket No. 35133, *Milwaukee Industrial Trade Center, LLC, d b a Milwaukee Terminal Railway -- Acquisition and Operation Exemption -- Line Owned By Milwaukee Industrial Trade Center, LLC, d.b.a. Milwaukee Terminal Railway*

Dear Ms. Quinlan:

Heroby transmitted is a Reply In Opposition To Pctition To Revoke Exemption, for filing with the Board in the above referenced matter.

Very truly yours,



Thomas F. McFarland
Attorney for Applicant

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BEFORE THE
SURFACE TRANSPORTATION BOARD

MILWAUKEE INDUSTRIAL TRADE)
CENTER, LLC, d.b.a. MILWAUKEE)
TERMINAL RAILWAY -- ACQUISITION)
AND OPERATION EXEMPTION -- LINE) FINANCE DOCKET
OWNED BY MILWAUKEE INDUSTRIAL) NO. 35133
TRADE CENTER, LLC, d.b.a.)
MILWAUKEE TERMINAL RAILWAY)

REPLY IN OPPOSITION TO
PETITION TO REVOKE EXEMPTION

MILWAUKEE INDUSTRIAL TRADE CENTER, LLC
d.b.a. MILWAUKEE TERMINAL RAILWAY
4777 West Lincoln Ave.
West Milwaukee, WI 53219

Applicant

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Attorney for Applicant

DATE FILED: October 6, 2008

BEFORE THE
SURFACE TRANSPORTATION BOARD

MILWAUKEE INDUSTRIAL TRADE)	
CENTER, LLC, d.b.a. MILWAUKEE)	
TERMINAL RAILWAY -- ACQUISITION)	
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MILWAUKEE TERMINAL RAILWAY)	

**REPLY IN OPPOSITION TO
PETITION TO REVOKE EXEMPTION**

Pursuant to 49 C.F.R. § 1104.13(a), MILWAUKEE INDUSTRIAL TRADE CENTER, LLC, d.b.a. MILWAUKEE TERMINAL RAILWAY (MITC), hereby replies in opposition to a Petition to Revoke Exemption (Petition) filed by the REDEVELOPMENT AUTHORITY OF THE CITY OF MILWAUKEE, WISCONSIN (RACM) on September 18, 2008.

The Petition is directed at an exemption from 49 U.S.C. § 10901 for MITC's acquisition and operation of approximately two miles of rail line (the Rail Line) that is located within 84 acres of land (the Land Parcel) owned by MITC at Milwaukee, WI. The Rail Line was formerly operated as privately-owned track initially by A.O. Smith Corp , then by Tower Automotive, Inc , and most recently by MITC.

The exemption is a class exemption from 49 U.S.C. § 10901 for noncarrier acquisition and operation of rail lines. Procedures for that class exemption are published at 49 C.F.R. § 1150.31 *et seq.* The exemption was applied for by MITC in a Notice of Exemption filed on April 14, 2008, as corrected on April 16, 2008. The Board provided notice to the public of the

filing of the Notice of Exemption in a Notice served May 1, 2008. The Board's Notice was published in the *Federal Register* on May 1, 2008, 73 F.R. 24115. Pursuant to 49 C.F.R. § 1150.32(b), the exemption became effective 30 days after the Notice of Exemption was filed at the Board, i.e., the exemption became effective on May 16, 2008. As of that date, MITC was authorized to acquire and operate the Rail Line. However, the exemption is permissive, not mandatory. Thus, MITC was permitted to operate the Rail Line as of May 16, 2008, but it could choose to commence operations at any time after that date.

RACM acknowledges that it has known of the exemption since June 5, 2008 (Petition at 15). RACM's Petition was filed approximately 3½ months after RACM became aware of the Petition. RACM has not attempted to explain its lengthy delay in filing the Petition. In view of RACM's leisurely pace in filing, the Board should be in no hurry to decide the Petition

LEGAL STANDARDS GOVERNING REVOCATION OF EXEMPTIONS

The sole issue for decision is whether or not the exemption that authorized MITC to acquire and operate the Rail Line should be revoked. That involves two sub-issues, i.e.:

- (1) whether MITC's Notice of Exemption contained false or misleading information; and
- (2) whether application of the provisions of 49 U.S.C. § 10901 to MITC's acquisition and operation of the Rail Line is necessary to carry out the transportation policy of 49 U.S.C. § 10101. The latter issue is provided for by statute in 49 U.S.C. § 10502(d), viz.:

The Board may revoke an exemption, to the extent it specifies, when it finds that application in whole or in part of a provision of this part to the person, class, or transportation is necessary to carry out the transportation policy of section 10101 of this title . . .

The transportation policies of 49 U.S.C. § 10101 are as follows:

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board;

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;

(7) to reduce regulatory barriers to entry into and exit from the industry;

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

(9) to encourage honest and efficient management of railroads;

(10) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

(11) to encourage fair wages and safe and suitable working conditions in the railroad industry,

(12) to prohibit predatory pricing and practices, to avoid undue concentrations of market power, and to prohibit unlawful discrimination;

(13) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information;

(14) to encourage and promote energy conservation; and

(15) to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part.

The party seeking revocation must express reasonable specific concerns to demonstrate that revocation of an exemption is warranted. *I&M Rail Link LLC - Acq & Oper. Exem.*

Canadian Pacific Ry., 2 S.T.B. 167 (1997), *aff'd sub nom. City of Ottumwa v STB*, 153 F.3d 879 (8th Cir. 1998). The Board focuses on the sections of the rail policy relating to the underlying statute from which an exemption is sought. *Missouri Pac. R. Co. - Aban Exempt. - Counties in Oklahoma*, 9 I.C.C.2d 18, 25 (1992), *Village of Palestine v. ICC*, 936 F.2d 1335 (DC Cir. 1991), *cert. denied* 111 S.Ct. 868 (1992); *Minnesota Commercial Ry, Inc - Trackage Exempt. - BN RR Co.*, 8 I.C.C.2d 31, 35-38 (1991), *aff'd sub nom Winter v. ICC*, 992 F.2d 824 (8th Cir. 1993)

Here, the statutory provision from which MITC was exempted is 49 U.S.C. § 10901. Under 49 U.S.C. § 10901(c), the Board is required to issue authority to acquire and/or operate a rail line unless it finds affirmatively that such authority would be “inconsistent with the public convenience and necessity.” Thus, to revoke an exemption from § 10901 in accordance with the *Village of Palestine* case, *supra*, the Board must find that MITC’s acquisition and operation would be inconsistent with the provisions of the rail transportation policy that relate to the public convenience and necessity, without regard to the other policies. *Bulkmatic RR - Acquire and Operate - Bulkmatic Transport*, 6 S.T.B. 481 (2002) at 489, citing *Village of Palestine v ICC*, *supra*, 936 F.2d at 1338-1339. The rail policies most implicated by an exemption for acquisition and operation of a rail line are subsection (7), “to reduce regulatory barriers to entry into . . . the rail industry”; subsection (4), “to ensure the development and continuation of a sound rail transportation system . . . to meet the needs of the public and the national defense; and subsection (5), “to foster sound economic conditions in transportation . . .”

Inasmuch as the statutory standard for issuing acquisition and operating authority under 49 U.S.C. § 10901 is quite liberal, it should be correspondingly difficult to revoke an exemption for authority under that statute.

OVERVIEW

Despite its hundreds of pages, the Petition hardly mentions any transportation policy of 49 U.S.C. § 10101, even though such policy is a statutory standard for revocation. In contrast to the narrow issues identified earlier in this Reply, the Petition is verbose and takes a scatter-gun approach, yet much of it is extremely simplistic. For example, one of RACM's major arguments is that the Board's regulations that permit application of the class exemption to acquisitions that convert private track to regulated common carrier track are arbitrary and capricious and deprive RACM of its constitutional rights. (Petition at 5, argument 7). That collateral attack on the Board's regulations is clearly out of order in this revocation proceeding. In any event, the law has been to the contrary at least since the Board's decision in *Bulkmatic RR - Acquire and Operate - Bulkmatic Transport*, 6 S.T.B. 481 (2002). Even more simplistic is RACM's apparent contention that publication of MITC's Notice of Exemption in the *Federal Register* was not legally-sufficient notice to RACM. (Petition at 15). It has been found so often to the contrary that RACM's contention is not open for discussion. A number of RACM's arguments are to the effect that municipal regulation of MITC's activities should not be federally preempted, a proposition that is not properly at issue in an exemption-revocation proceeding.

Despite those and other patently impermissible contentions, MITC will respond as briefly as possible to each of RACM's arguments in the pages that follow. Also included in this Reply is the Verified Statement of Mr. Brian Bjodstrup, General Manager of MITC. Mr. Bjodstrup's Statement responds to the very few allegations in the Verified Statements of Messrs. Marcoux, Timm and Hagopian that relate to the issues involved in this exemption-revocation proceeding (e.g., the legitimacy of MITC as a rail carrier). Those Verified Statements are filled with

extraneous matter relating to purchase offers and sale negotiations involving the Land Parcel and the like. MITC will not clutter this Reply with responses to that wholly irrelevant matter. However, MITC's silence in that respect should not be interpreted in any other context as agreement with any of such matter.

REPLY

I. Reply To Contentions That The Notice Of Exemption Contains False Or Misleading Information

1. Contention That The Statement That The Trackage Is "To Be Acquired" By MITC Is False

RACM argues that MITC acquired the trackage as part of the Land Parcel on November 10, 2006, so that the statement in the corrected Notice that the trackage is "to be acquired" by MITC pursuant to the exemption is false. (Petition at 19-20).

The statement at issue is accurate. The acquisition involved in the Notice is acquisition of the track as regulated common carrier trackage. That acquisition occurred for the first time when the exemption became effective on May 16, 2008. Indeed, the Board's staff informally brought to MITC's attention that the Notice of Exemption as initially filed should have sought authority to acquire the rail line (as initially filed, the Notice sought authority only to operate the trackage). As the Corrected Notice of Exemption clearly stated (at 1), the correction was necessary to seek an exemption for acquisition of the trackage as common carrier track ("... trackage is being acquired for the first time as common carrier property").

2. Contention That The Statement Of Intended Use Of The Property Is Inconsistent With A Subsequent Statement Of Such Use

RACM contends that the "intended uses for the MITC Parcel" set forth in the Corrected Notice of Exemption are not consistent with the intended uses of such Parcel as stated in a subsequent letter written in behalf of MITC. (Petition at 20).

The statement in the Corrected Notice is accurate. Contrary to RACM's contention, the statement in the Corrected Notice described the intended rail activities of MITC, not the intended uses of the Land Parcel. The subsequent letter described potential uses of the Land Parcel. Thus, the statements are directed at different subject matter. Therefore, the statements are not inconsistent. Moreover, the Board's regulations governing the class exemption for noncarrier acquisition and operation of rail lines did not require MITC to identify the intended rail activities of MITC. MITC volunteered that information in the interest of full disclosure in light of conversion of the trackage from private to common carrier track. MITC should not be faulted for providing more information than that required by the Board.

3. Contention That MITC Failed To Disclose Prior Sale Negotiations And Preparation For Condemnation

RACM contends that it was misleading for the Corrected Notice of Exemption to fail to disclose that MITC and RACM had negotiated for sale of the Land Parcel to RACM, and that RACM was preparing to condemn the Land Parcel. (Petition at 21).

Nothing in the Board's regulations governing the class exemption required MITC to provide information concerning prior sale negotiations relating to the Land Parcel on which the trackage is located, nor information regarding RACM's potential litigation strategy in regard to

that Land Parcel. Accordingly, it cannot have been misleading to anyone for MITC to have failed to provide that information in the Notice of Exemption.

The issue of disclosure here raised by RACM relates to whether the exemption should be revoked because closer scrutiny of the acquisition and operation is required by the transportation policy of 49 U.S.C. § 10101. MITC will deal with that issue in that proper context later in this Reply.

4. Contention That MITC Failed To Disclose On-Going Litigation Between MITC And RACM

RACM contends that it was misleading for the Corrected Notice of Exemption to fail to disclose that MITC and RACM were involved in litigation over RACM's refusal to grant occupancy permits to potential users of the Land Parcel, and MITC's refusal to permit RACM to access the Land Parcel for environmental testing. (Petition at 21-22).

MITC's response to Contention No. 3 above has equal application to this contention. Inasmuch as the applicable regulations did not require disclosure of the matter under consideration, a failure to have disclosed that matter cannot have misled anyone.

5. Contention That Annual Revenues From Operation Of The Rail Line Were Falsely Stated In The Corrected Notice

RACM contends that annual revenues to be derived from operating the Rail Line were falsely stated in the Corrected Notice of Exemption because whereas MITC there stated that such revenues would not exceed \$5 million per year, MITC subsequently filed a claim for inverse condemnation in which it claimed damages of \$32 million for six months of delay in receiving occupancy permits. (Petition at 22).

The statement in the Corrected Notice is correct. MITC does not expect to collect revenues of \$5 million per year or more from its rail operations. It is evident that the damages sought in the inverse condemnation action do not relate to lost profits from MITC's rail operation, but instead cover losses from inability to use the Land Parcel as a whole.

6. Contention That The Corrected Notice Misleadingly Identified The Nature Of The Trackage Covered By The Exemption

RACM contends that the Corrected Notice misleadingly referred to the trackage covered by the exemption as a "rail line," when in fact the trackage consists of 31 spur tracks the longest of which is 2,214 feet. (Petition at 23).

The identification of the trackage in the Corrected Notice is accurate. RACM's contention is frivolous. The totality of trackage is referred to as a "rail line" in common parlance regardless of its components. Identification of the trackage as a rail line was also correct as a matter of law. Under the decisions in the *Effingham* and *Bulkmatic* cases,^{1/} the trackage was properly classified as a line of railroad under 49 U.S.C. § 10901, rather than exempt switching track under 49 U.S.C. § 10906 because it was the subject of MITC's initial rail acquisition

II. Reply To Contentions That The Exemption Should Be Revoked For Other Reasons

1. Contention That The Board Does Not Have Jurisdiction Over The Exempted Acquisition And Operation By Virtue Of The Consolidated Appropriations Act

RACM contends that the Board does not have jurisdiction over the exempted acquisition and operation by virtue of the Consolidated Appropriations Act because MITC and its tenants

^{1/} *Effingham RR - Pet. for Declaratory Order*, 2 S.T.B. 606 (1997), *aff'd sub nom. United Transp. Union v. STB*, 183 F.3d 606 (7th Cir. 1999), and *Bulkmatic RR - Acquire and Operate - Bulkmatic Transport*, 6 S T.B. 481 (2002) and 6 S.T B. 878 (2003).

intend to process solid waste in the form of construction and demolition waste (C&D) on the Land Parcel. (Petition at 23-24).

MITC will not transport C&D by rail to or from the Land Parcel. The C&D presently on that site is the result of construction and demolition of buildings on the Land Parcel in preparation for rail activities to be conducted there. That C&D is being transported from the Land Parcel by truck. None of it has been, or will be, transported by MITC.

The Consolidated Appropriations Act prohibits specified activities that occur at a solid waste rail transfer facility without State approval. *See Consolidated Appropriations Act, 2008 - Solid Waste Rail Transfer Facilities, Ex Parte No. 675, 73 F.R. 3803 (Jan. 22, 2008)* However, the Land Parcel is not a solid waste rail transfer facility. There is no evidence that MITC has ever transported C&D to or from the Land Parcel, nor that it intends to do so. That distinguishes the present case from *JP Rail, Inc. - Lease and Operation Exemption, Nat Industries, Inc.*, Finance Docket No. 35090, decision served Jan. 17, 2008, cited by RACM at Petition, 24, which involved what clearly constituted a solid waste rail transfer facility to which the rail carrier would transport C&D. RACM's allegation relating to whether processing of C&D on the Land Parcel should have the benefit of federal preemption under 49 U.S.C. § 10501(b) is not relevant in this revocation proceeding.

2. Contention That The Jefferson Terminal Case Is Precedent For Disposition Of The Petition

RACM contends that the Petition should be granted based on precedent in *Jefferson Terminal Railroad Company - Acquisition and Operation Exemption - Crown Enterprises, Inc.*,

2001 STB LEXIS 267 (Finance Docket No. 33950, decision served March 19, 2001) ("*Jefferson Terminal*"). (Petition at 25-27).

Reference is made to Exhibit H attached to RACM's Petition, which is a legal opinion submitted by counsel for MITC to the effect that MITC is a legitimate rail carrier under the precedent of *Riverview Trenton R. Co. - Pet. for Exemption from 49 USC 10901 to Acquire & Operate a Rail Line in Wayne County, MI*, 2003 STB LEXIS 251 (Finance Docket No. 34040, decision served May 15, 2003), *aff'd sub nom City of Riverview v. STB*, 398 F.3d 434 (6th Cir. 2005) ("*Riverview Trenton*") The Court of Appeals in that case upheld the STB's decision in which it was found that Riverview Trenton Railroad Company was a legitimate rail carrier, where that rail carrier and the City of Riverview had previously conducted sale negotiations in regard to the land on which the rail line was located, and the City had preliminarily considered acquiring that land by condemnation. The Court of Appeals specifically distinguished *Jefferson Terminal* on the following ground (398 F 3d at 441):

. . . (U)nlike in *Jefferson*, the local governments had not commenced condemnation proceedings by the time RTR requested an exemption from the Board. The local governments admitted that they had just taken the preliminary steps of investigating the possibility of condemning the land and that the 'County had not at that time and has not at this time decided to take this parcel.

The case at hand is governed by *Riverview Trenton*, not by *Jefferson Terminal* for the reason identified by the Court as quoted above and for the reasons explained in the legal opinion that is attached as Exhibit H to the Petition.

3. Contention That Transloading Of Bulk Commodities Does Not In And Of Itself Constitute Rail Common Carrier Service

RACM argues that the transloading of bulk commodities on railroad-owned property does not in and of itself constitute rail common carrier service, and where the property is a former shipper industrial site, "the presumption against defining the operator as a rail carrier should be even stronger." (Petition at 27-29).

The Board should take note of the obvious *non sequitur* in that argument. There is no legal presumption that an operator of a bulk-commodity transloading facility on railroad-owned property is not a rail carrier. RACM does not claim that there is any such presumption. Therefore, it is an obvious *non sequitur* to state, as RACM has, that there is a stronger presumption that an operator of such a facility is not a rail carrier where the facility was formerly a shipper's industrial site. There is no such presumption in the first place

Instead, it is up to RACM to prove that the transloading service to be provided by MITC is not rail common carrier service. RACM certainly does not prove that proposition by citing federal preemption cases in which the transportation at issue did not qualify as rail transportation under 49 U.S.C. § 10501(b). (Petition at 27-29).

Directly on point on this issue is *Bulkmatic RR - Acquire and Operate - Bulkmatic Transport*, 6 S.T.B. 481 (2002) and 6 S.T.B. 878 (2003), in which revocation was sought in regard to acquisition and operation of a bulk transloading facility that had been operated for many years as private track. The Board specifically rejected the argument of the petitioner that the acquisition and operation constituted a sham transaction, *viz.* (6 S.T.B. at 485-486):

Sham Transaction UTU-IL's argument, in essence, is that BRC will not be operating as a common carrier because BRC cannot, or will not, hold itself out to operate as a common carrier. UTU-IL views BRC as merely an extension of BTC and maintains that the two entities are not independent of each other as they would be in a normal shipper/carrier relationship

The evidence falls far short of establishing that BRC is not holding itself out to operate as a common carrier. Although BRC had a contractual relationship with BTC when it began operating on April 2, 2002, that contract does not preclude BRC from providing rail service to other shippers or motor carriers at the Distribution Center. To the contrary, the agreement specifically states that BRC and BTC are independent contractors and in no way requires BRC to give any preference to shipments involving BTC. BRC has subleased the entire premises, which includes warehouses as well as the transloading facilities. This further indicates that BRC will operate as a common carrier providing service to shippers who may avail themselves of the warehouse space or locate elsewhere on the premises. The sublease also enables BRC to solicit transloading business from other shippers without interference from BTC. BRC states that it has no financial interest in the goods that it transports for BTC, and that it will serve the general public and provide rail service for any other transloaders and/or shippers that might locate at the Distribution Center. UTU-IL does not demonstrate that this statement is false.

Furthermore, BRC will serve BTC for compensation, and the arrangements between these separate entities do not tie BRC to serving BTC alone, to the exclusion of the general public. BRC is not BTC's agent, and it will be the common carrier responsible for service on the Chicago Heights Track, dealing with customers on its own. BRC's sublease and service agreements with BTC appear to be arm's-length transactions, and do not, by their mere existence, turn this into a sham transaction.

Nor does the fact that BRC will use employees of CHSC to perform the work on the line, as well as maintain it, detract from BRC's status as the licensed common carrier, authorized and obligated to provide service on the line. UTU-IL has not cited any authority for the proposition that a carrier such as BRC must employ its own crews to establish itself as a common carrier. Although CHSC employees may physically operate the equipment on the Chicago Heights Track, the CHSC-BRC lease does not allow CHSC to deal with BRC's customers or give CHSC any independent right or obligation to serve them. Contrary to UTU-IL's assertions, this contractual arrangement does not preclude BRC from being a bona fide common carrier. Indeed, even if CHSC operated as a common carrier in its own right, BRC would retain a residual common carrier obligation and would

remain subject to our jurisdiction by virtue of its acquisition and ownership of the track. (footnotes omitted)

For the reasons stated in that decision, RACM has certainly not sustained its burden to show that MITC's operations would not be legitimate common carriage.

4. Contention That Processing And Manufacturing On The Land Parcel Do Not Constitute Rail Transportation Under ICCTA (Petition at 30-31)

RACM argues that processing and manufacturing activities performed by tenants of MITC on the Land Parcel do not constitute rail transportation under ICCTA, citing *New England Transrail - Const., Acq & Oper Exempt. - in Wilmington and Woburn, MA*, 2007 STB LEXIS 391 (Finance Docket No. 34797, decision served June 29, 2007).

The matter raised by this argument is not at issue in this revocation proceeding. The question presented by this RACM argument is whether federal preemption applies to processing and manufacturing activities performed adjacent to rail operations. There is no evidence that MITC is conducting such activities or intends to do so in conjunction with its rail activities. RACM's federal preemption argument is not a proper subject matter for resolution in this revocation case.

5. Contention That The Decisions In Effingham and Bulkmatic Are Distinguishable

Although the heading of this RACM argument includes both the *Bulkmatic* and *Effingham* decisions, the supporting argument relates solely to the *Bulkmatic* decision. The contention is that the *Bulkmatic* decision is distinguishable from the case at hand because a ground for the Board's ruling in the *Bulkmatic* case that the trackage in question was a line of railroad subject to Board entry authority was that Bulkmatic would be competing with other

carriers in territory that it had not previously served, whereas that would not be true for MITC in the case at hand. (Petition at 31-32).

On the contrary, the cases are identical on that point. Bulkmatic Railroad Company (BRC) was competing with Chicago Heights Terminal Transfer Company (CHTT) in the *Bulkmatic* case in the sense that BRC replaced CHTT as the rail carrier providing rail switching service at the plant site. BRC's operations were confined to switching at the plant site. Likewise, in the case at hand, MITC will be competing with Wisconsin & Southern Railroad (WSOR) and Canadian Pacific Railroad (CP) in the sense that MITC will replace WSOR and/or CP as the rail carrier providing rail switching service within the Land Parcel. Like BRC, MITC's rail operations are to be confined to switching within the Land Parcel.

6. Contention That The Board's Regulations Implementing The Class Exemption For Noncarrier Acquisition And Operation Of Rail Lines Are Arbitrary And Capricious And Deprive The City Of Milwaukee And RACM Of Their Constitutional Due Process Rights Insofar As They Are Applicable To Conversions Of Industry Switching Track To Regulated Rail Lines

RACM's final legal argument is one of desperation that is patently out of order as an unwarranted collateral attack on the Board's regulations implementing the class action for noncarrier acquisition and operation of rail lines. RACM contends that those regulations are arbitrary and capricious, and deprive the City of Milwaukee of their Constitutional due process rights to the extent that they are applied to conversions of private industrial switching track into regulated rail lines. (Petition at 33-35).

The lawfulness of application of the Board's regulations on noncarrier acquisition and operation of rail lines to conversions of private industry track to regulated common carrier track is settled. See *Bulkmatic RR - Acquire and Operate - Bulkmatic Transport, supra*, and *Rock*

River Railroad, LLC - Acq. & Oper. Exempt. - Rail Line of Renew Energy, LLC at Jefferson, WI,
2007 STB LEXIS 213 (Finance Docket No. 35016, decision served May 4, 2007).

RACM's collateral attack on the Board's regulations is based on the unsustainable proposition that Federal Register notice is not legally sufficient notice of Board action, viz.:

... As a consequence of the only notice being Federal Register publication, communities are not given the opportunity to participate in the decision to convert the track to carrier track, nor to voice any concern regarding the severe curtailment of the powers of their local government that results from that decision. (Petition at 33).

* * *

... RACM and the City should not have had their powers confiscated without actual notice ... (*Id.* at 35).

Few principles of law are more settled than that Federal Register notice is adequate legal notice.

For all of these reasons, RACM's contention in this respect should be rejected.

III. MITC Has Taken Reasonable Steps To Implement Its Rail Operating Authority

As established in the attached verified statement of MITC General Manager Brian Bjodstrup, MITC has taken reasonable steps to implement its rail operating authority since the exemption for that authority became effective on May 16, 2008, viz.:

1. MITC has purchased 31 open-top hopper cars;
2. MITC has a locomotive on site;
3. MITC has made progress in negotiating an interchange agreement with its connecting rail carrier, Canadian Pacific-Wisconsin & Southern;

4. MITC has responded to a questionnaire submitted by the United States Railroad Retirement Board designed to determine MITC's status as a railroad employer,
- 5 MITC has applied to the Association of American Railroads for railroad reporting markets, and has received marks "MTM" in response to that application.
6. MITC has filed an Annual Report for 2007 as a railroad with the Wisconsin Department of Revenue.
- 7 MITC has registered as a railroad with the Office of the Commissioner of Railroads for the State of Wisconsin.
8. MITC has worked to locate potential rail shippers at the Land Parcel to ship and/or to transload by rail. That effort has been hampered by lack of cooperation and diversionary tactics by RACM and the City of Milwaukee.

MITC has been a Board-authorized rail carrier for less than five months. In that time, MITC has made a good-faith effort, resulting in substantial progress, toward implementation of its rail operating authority. RACM has not provided evidence to the contrary. Accordingly, this record establishes that MITC is a legitimate Board-authorized rail common carrier

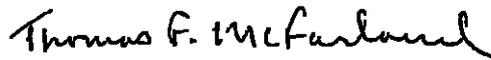
CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for each of the foregoing reasons, and for all of them as a whole,
RACM's Petition should be denied

Respectfully submitted,

MILWAUKEE INDUSTRIAL TRADE CENTER, LLC
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Applicant



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Attorney for Applicant

DATE FILED: October 6, 2008

VERIFIED STATEMENT OF BRIAN BJODSTRUP

My name is Brian Bjodstrup. I am General Manager of Milwaukee Industrial Trade Center, LLC (MITC), d.b.a. Milwaukee Terminal Railway. My job responsibilities include communicating with government and private entities regarding railroad activities of MITC. I have personal knowledge of such activities.

I am familiar with a Petition to Revoke Exemption filed by the Redevelopment Authority of the City of Milwaukee, Wisconsin (RACM) with the Surface Transportation Board on September 18, 2008. My Statement is responsive to RACM's contention that MITC is not a legitimate rail carrier.

It has been approximately 4½ months since the exemption for MITC's acquisition and operation of trackage became effective. During that time, I have personally conducted and overseen the following activities:

- a) MITC has purchased and taken delivery on 31 Open-Top-Hopper cars. Mr. Timm admits in his Verified Statement that he has seen the cars on the track at MITC.
- b) MITC has a locomotive on site.
- c) MITC has communicated with Paul Ransall of Railinc regarding assignment of railroad reporting marks. Initial conversations regarding railroad marks for Milwaukee Terminal Railway indicated that the letters "MITC" were available. On July 21 we were notified that those reporting marks were not available. On September 9, 2008, we received a Section 10706 Agreement and an invoice for the assignment of the letters MTM to Milwaukee Terminal Railway.

- d) MITC has been working with Canadian Pacific Railroad-Wisconsin & Southern regarding an Interchange Agreement.
- e) MITC has been in communication with the Railroad Retirement Board (RRB). MITC has completed and filed RRB's questionnaire concerning MITC's carrier-employer status.
- f) MITC has registered with the Wisconsin Commissioner of Railroads.
- g) MITC has filed a Railroad Annual Report for 2007 with the Wisconsin Department of Revenue.

The property acquired by MITC includes extensive railroad infrastructure including approximately 2 miles of track, a rail scale and dock level loading. MITC intends to extend portions of the track on the site, including the construction of track into buildings to be used for locomotive shops. The track has been used when MITC received delivery of "open-top-hopper" cars purchased by MITC.

While the property was historically used to ship or receive a limited number of commodities and products, MITC offers freight rail service to multiple customers as a common carrier. A variety of commodities and products will come through the facility. MITC itself will not produce or receive any goods as the former owners did. Instead MITC will provide rail service to others by providing transloading and rail service, logistical services, rail cars and short term storage. It is necessary for MITC to be a railroad to provide these services to our customers. Our ability to enter into interchange agreements with other railroads and build relationships with other terminal railroads throughout the country will give us economic viability. The profitability of our rail-car fleet will be dependent on our ability to use Rule 5 to return our cars from remote locations.

Pursuant to 28 U.S.C. 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on October 1, 2008.



BRIAN P. BJODSTRUP

CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2008, I served a copy of the foregoing document, Reply In Opposition To Petition To Revoke Exemption, on Robert P vom Eigen, Esq., Foley & Lardner, LLP, 3000 K Street, N.W., Washington, DC 20007, by e-mail *rvomeigen@foley.com*, and by first-class, U.S. mail, postage prepaid, and on Thomas O. Gartner, Esq., Gregg C. Hagopian, Esq., Assistant City Attorneys, Milwaukee City Hall, 200 E. Wells Street, Suite 800, Milwaukee, WI 53202, by first-class, U.S. mail, postage prepaid.

Thomas F. McFarland

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