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December 18, 2003

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BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

RE: *Central Michigan Railway Company – Abandonment Exemption – In Saginaw County, MI, Docket AB-308 (Sub-No. 3X)*

Dear Secretary Williams:

Enclosed please find an original and eleven (11) copies of the Reply of Central Michigan Railway Company to the Petition for Clarification of a Condition Contained in a Decision Served October 31, 2003. Please time and date stamp the eleventh copy of this letter and the attached pleading to be returned to the messenger.

Copies of this filing are being served by first-class mail, or by more expeditious service, upon all parties of record. Please do not hesitate to contact me directly if you have any questions regarding this letter or the enclosed materials.

Sincerely,

William A. Mullins

Enclosures

cc: Central Michigan Railway Co.
All Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. AB-308 (SUB-NO. 3X)

**CENTRAL MICHIGAN RAILWAY COMPANY
- ABANDONMENT EXEMPTION -
IN SAGINAW COUNTY, MI**



**REPLY OF CENTRAL MICHIGAN RAILWAY COMPANY TO THE PETITION FOR
CLARIFICATION OF CONDITION CONTAINED IN A DECISION SERVED
OCTOBER 31, 2003**

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December 18, 2003

Attorneys for
Central Michigan Railway Company

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. AB-308 (SUB-NO. 3X)

**CENTRAL MICHIGAN RAILWAY COMPANY
- ABANDONMENT EXEMPTION -
IN SAGINAW COUNTY, MI**



**REPLY OF CENTRAL MICHIGAN RAILWAY COMPANY TO THE PETITION FOR
CLARIFICATION OF CONDITION CONTAINED IN A DECISION SERVED
OCTOBER 31, 2003**

By decision served in this proceeding on October 31, 2003 (the "October 31 Decision"), the Surface Transportation Board ("STB" or "Board") granted the abandonment exemption petition filed herein by Central Michigan Railway Company ("CMR"), subject to two conditions; namely, that CMR: "(1) establish a transload operation to handle Plastatech's shipments under the terms CMR proposed in its October 16, 2003 report; and (2) compensate Plastatech in the amount of \$100,710 (less salvage value) for the shipper's recent investment in facilities to receive direct rail service from CMR." On December 15, 2003, Plastatech Engineering, Ltd. ("Plastatech") petitioned the Board to clarify that the phrase "under the terms CMR proposed in its October 16, 2003 report" meant that CMR must continue a \$200 per car rebate allowance perpetually, rather than for a three (3) year period proposed by CMR. Plastatech's petition for clarification should be denied because the relief requested is unreasonable, impracticable, and is inconsistent with the intent of CMR's offers and October 16 report to the Board.

DISCUSSION

It is unfortunate that the Board has been asked to intercede over what are essentially private negotiations between the parties. The Board should resist the temptation to do so and should deny the petition for clarification. As has been the case throughout this proceeding, CMR has always been willing to work with Plastatech to resolve its concerns regarding the abandonment, which was precipitated by the State of Michigan's need to improve the highway infrastructure underlying CMR's rail bridge used in providing service to Plastatech, and remains committed to resolving these issues in the marketplace.

Indeed, earlier in this proceeding, CMR was pleased by the Board's September 25, 2003 decision requesting the parties to negotiate over Plastatech's concerns and CMR made every effort to resolve those concerns in those negotiations. Unfortunately, nothing CMR offered pleased Plastatech and the parties were required to report to the Board on the progress of those negotiations. Accordingly, on October 16 CMR informed the Board that it had "offered Plastatech (1) a \$200 per car rebate on future rail freight charges for Plastatech shipments transloaded at CMR's facility in Saginaw." CMR's October 16 Report at 3. CMR also stated that it "offered a rail transload option and a \$200 per car rebate for all future rail movements shipped via the transload operation." *Id.*, at 6. The Board's October 31 Decision recited that CMR had offered to "provide a \$200 per car rebate on future rail freight charges for Plastatech shipments transloaded at CMR's facility in Saginaw, MI," and conditioned the abandonment exemption on CMR establishing a transload operation consistent with those representations. Plastatech did not petition to stay the exemption nor did it petition to reopen the Board's decision.

Although the Board's October 31 Decision did not require CMR to formalize its obligations to Plastatech or Plastatech to formalize a commitment to using CMR, in light of the contentiousness of this proceeding, CMR thought it best to prepare a contract to prevent any misunderstandings between the parties about their future relationship. As with the earlier negotiations, Plastatech objected to the substantial majority of the proposed terms of that contract.¹ Again, Plastatech has returned to the Board rather than negotiate these issues in good faith.

The instant petition is limited to the issue of the duration of the \$200 per-car rebate offered by CMR. Plastatech's petition for clarification asks the Board to guarantee Plastatech a perpetual subsidy. Plastatech cites to CMR's October 16 Report that "all future" rail movements via the transload would be subject to the rebate. Plastatech reads the word "all" to mean forever, without any limitations. Of course Plastatech conveniently ignores both the intent and the context of CMR's commitment and statement. The October 16 Report was prepared in the

¹ The duration of the rebate is not the only issue in dispute. For example, Plastatech notified CMR on December 5 that it considered the salvage value of its trackage and transloading facilities to be a mere \$6,500, even though those facilities were installed 5 to 7 years ago at an alleged cost of \$100,710 and have an alleged book value of \$57,787. If accepted at face value, this assertion would increase the amount that Plastatech would obtain for those facilities from the \$57,787 that it asked the Board to order CMR to pay for those facilities (*see* October 31 Decision at 4) to \$94,210 under the Board's order directing CMR to pay \$100,710 less salvage value (October 31 Decision at 10, ordering paragraph 3). Moreover, Plastatech wants to retain and to continue to use the unloading equipment for truck deliveries, which is contrary to its previous assertions that the equipment would become useless if direct rail service were extinguished through abandonment. As a result, CMR should not be required to reimburse Plastatech for the cost of that unloading equipment, but unless the parties agree, CMR appears to be bound by the Board's order to pay Plastatech for that equipment. The Board should make it clear that CMR should only have to pay for equipment that becomes obsolete as a result of the abandonment.

Plastatech also disagrees with CMR's proposed transload site. Although CMR's offer was always limited to establishing a transload operation at CMR facilities in Saginaw, Plastatech has thus far rejected the two Saginaw locations available to CMR, attempting instead to require CMR to establish special paved, secured facilities for the transload operation. It is not clear to CMR whether Plastatech has dropped these other objections to the contract, or intends to raise them serially to the Board.

context of private negotiations, which were ordered by the Board, between CMR and Plastatech. In those discussions, CMR had initially offered a three-year contract to govern Plastatech's future transload movements. CMR was prepared to go to a five-year term if Plastatech would commit to a minimum number of cars per year. At no time did CMR offer to provide Plastatech with a \$200 rebate allowance forever, without qualification. CMR always intended the words "all future" to be limited to the context of the rail contract that CMR was negotiating. Plastatech would like the Board to ignore this context, but the Board should not take the bait.

Indeed, to require CMR to abide by this commitment when Plastatech is unwilling to guarantee any minimum traffic would be entirely unreasonable and inconsistent with the pattern of conduct in the rail industry. Even the longest rail contracts last no more than 15 years and most contracts are annual in nature.² In fact, the pricing arrangements under which Plastatech's PVC is shipped today³ expire in less than two years. Plastatech desires to change that practice and have a guaranteed rebate allowance forever, something that no other shipper has. That request should be rejected.⁴

In addition to being inconsistent with the intent and context of the October 16 Report to the Board, Plastatech's request for a perpetual subsidy of its rail shipping exceeds the relief ordered by the Board's October 31 decision. Plastatech's October 15 report to the Board

² Even rate prescriptions established following the Board's painstaking analyses under 49 U.S.C. Chapter 107 do not endure perpetually.

³ These pricing arrangements are established by the origin carriers; *i.e.*, Norfolk Southern ("NS"), Canadian National ("CN"), and perhaps others. CMR merely participates in those rates and receives a division thereof, but it does not set the rates. It is CMR's understanding that NS and CN establish the rates by negotiation with the PVC manufacturers, who actually pay the transportation charges in most instances.

⁴ CMR even offered to extend the subsidy to a full five years, without any corresponding minimum volume commitment by Plastatech, but Plastatech has rejected that offer as well.

requested that the Board order CMR to pay Plastatech half of the net present value of CMR's anticipated shipping cost increases over the next 10 years. Plastatech October 15 Report at 5-6. The Board rejected that request to compensate Plastatech for 10 years' alleged costs, stating that a railroad will not be required to continue a rail operation merely to protect a shipper from higher shipping costs. October 31 Decision at 6. Plastatech's request for a perpetual \$200 per car rebate flies in the face of the Board's unwillingness to condition CMR's abandonment on compensating Plastatech for 10 years' alleged costs. Having rejected such a 10-year approach previously, it would be unreasonable to now impose it.

Plastatech's request for a perpetual subsidy of its rail shipping is also impracticable, and would be a source of continuing dispute between Plastatech and the railroad. As noted, CMR offered to provide Plastatech with a \$200 rebate allowance off of the current rates for PVC delivered for Plastatech at Saginaw via CMR. CMR never offered a perpetual freeze of the overall rail rate, nor could it as CMR is not the originating carrier and does not establish the overall rail rates. If the Board rewards Plastatech's intransigence, Plastatech will resort to the Board every time it has a disagreement with CMR or CMR's successor⁵ with respect to all future rates and practices, a policy that CMR believes this Board should not encourage.

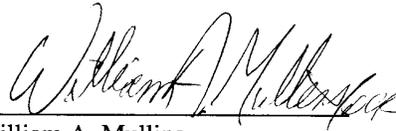
CONCLUSION

In the end, CMR's offer of a three-year limit, and possibly a five-year limit under certain circumstances, with respect to CMR's obligations to Plastatech is entirely reasonable, consistent with both the intent and the context of the negotiations that led up to the October 16 Report,

⁵ CMR has agreed to sell substantially all of its assets to the Huron and Eastern Railway Company, Inc. ("HESR"). F.D. No. 34438, *Huron & Eastern Railway Company, Inc.—Acquisition And Operation Exemption—Central Michigan Railway Company*. As a result, HESR is purchasing the rail assets that will be used to service Plastatech via a transload. With the exception of payment of the \$100,710 minus salvage value, HESR has agreed to assume CMR's contracts and obligations to Plastatech.

consistent with the Board's prior practices, and represents good policy—encouraging parties to work things out in the marketplace without resorting to the Board for every little disagreement. Plastatech's petition for clarification should be denied. A request for perpetual rate protection contradicts the Board's refusal to require CMR to compensate Plastatech for cost increases it projected over a 10-year period. Furthermore, requesting that CMR perpetually rebate \$200 per car to Plastatech would represent an unfair burden on CMR and its successor and would represent bad policy as well. Accordingly, Plastatech's petition should be denied.

Respectfully submitted,



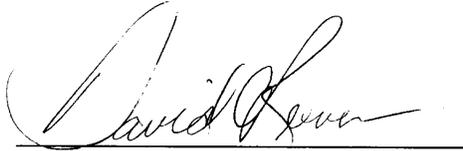
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December 18, 2003

Attorneys for
Central Michigan Railway Company

CERTIFICATE OF SERVICE

I certify that on December 18, 2003, I served copies of the foregoing Reply of Central Michigan Railway Company to the Petition for Clarification of a Condition Contained in a Decision Served October 31, 2003, upon all parties of record, by first class mail or more expedited service, charges prepaid.

A handwritten signature in black ink, appearing to read "David C. Reeves", written over a horizontal line.

David C. Reeves
Attorney for
Central Michigan Railway Company