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February 27, 2004

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Suite 700
Washington, DC 20423

ENTERED
Office of Proceedings

FEB 27 2004

Part of
Public Record

RE: Finance Docket No. 34438, *Huron & Eastern Railway Company, Inc.—Acquisition and Operation Exemption—Central Michigan Railway Company*

Dear Secretary Williams:

Enclosed for filing are the original and ten copies of a Response and three diskettes with the file Response.doc. Please time and date stamp the extra copy of this letter and the Verified Notice of Exemption and return them with our messenger.

If you have any questions, please call or email me.

Sincerely yours,

Louis E. Gitomer
Attorney for Huron & Eastern Railway
Company, Inc.

Enclosure

ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34438

HURON & EASTERN RAILWAY COMPANY, INC.—ACQUISITION AND OPERATION
EXEMPTION—CENTRAL MICHIGAN RAILWAY COMPANY

RESPONSE TO JAMES D. FENSKE



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Attorneys for HURON & EASTERN
RAILWAY COMPANY, INC.

Dated: February 27, 2004

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34438



HURON & EASTERN RAILWAY COMPANY, INC.—ACQUISITION AND OPERATION
EXEMPTION— CENTRAL MICHIGAN RAILWAY COMPANY

RESPONSE TO JAMES D. FENSKE

The Huron & Eastern Railway Company, Inc. (“HESR”) responds to the letter dated February 7, 2004 from James D. Fenske (“Mr. Fenske”).¹ Mr. Fenske seeks imposition of labor protective conditions by the Surface Transportation Board (the “Board”). Mr. Fenske’s arguments are incorrect as a matter of fact and law, and therefore, HESR respectfully requests the Board to deny the relief sought by Mr. Fenske.

HESR, a Class III rail carrier, filed a Verified Notice of Exemption pursuant to 49 C.F.R. Part 1150, Subpart E, *Exempt Transactions Under 49 U.S.C. 10902 for Class III Rail Carriers* (the “Notice”), for exemption from the prior approval requirements of 49 U.S.C. § 10902 to permit HESR, pursuant to contract, to acquire and operate 99.87 miles of railroad line, and incidental trackage rights of about 16.55 miles, from the Central Michigan Railway Company (“CMRY”). Prior to filing the Notice, on November 26, 2003, HESR certified to the Board that it had complied with the notice requirements of 49 C.F.R. § 1150.42(e). In the Notice, HESR certified that it would not become a Class II railroad as a result of the acquisition of CMRY’s

¹ HESR is enclosing the letter from Mr. Fenske in Exhibit A. Although the letter received by HESR indicates service upon the Board, the letter does not appear as a filing on the Board’s web site.

assets. On January 25, 2004, HESR consummated the transaction by acquiring CMRY's assets and beginning to operate the rail lines.

A notice was served in *Huron & Eastern Railway Company, Inc.—Acquisition and Operation Exemption—Central Michigan Railway Company*, STB Finance Docket No. 34438 (STB served February 4, 2004), which did not impose labor protection.

Mr. Fenske claims that the Missouri and Northern Arkansas Railroad Company, Inc. (the "M&NA") is a Class II railroad,² and that RailAmerica controls more than one Class II railroad. Mr. Fenske states that he was a dispatcher employed by the M&NA railroad. He also claims that the dispatching function on the M&NA was moved from Carthage, MO to St. Albans, VT because of the acquisition of the assets of the CMRY by HESR. Based on these claims, Mr. Fenske concludes that the M&NA dispatchers are entitled to labor protection under the conditions developed in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979) (the "*New York Dock Conditions*"). As stated before, Mr. Fenske has both the facts and the law wrong.

Mr. Fenske relies on incorrect facts as far as the number of Class II railroads controlled by RailAmerica, the reason for the relocation of the dispatchers, and the statutory standard that applies to the HESR acquisition from CMRY.

RailAmerica is a holding company that controls a number of Class III railroads and one Class II railroad, among other entities not regulated by the Board. The Class II railroad is the Central Oregon & Pacific Railroad, Inc. ("CORP"). M&NA is not a Class II railroad, its revenues for 2003 were \$21,617,033, which is below the \$21,758,050 threshold for Class II

² M&NA is commonly controlled with HESR, and other railroads, by RailAmerica, Inc. ("RailAmerica").

railroads. See 49 C.F.R. § 1201 1-1. Moreover, M&NA's revenue has not exceeded the Class II threshold for three consecutive years, as required by 49 C.F.R. § 1201 1-1(b)(2) for a railroad to be reclassified from a Class III to a Class II railroad. In addition, the classification of the M&NA is not relevant because the railroad acquiring the assets of CMRY is the HESR is a Class III railroad, which will remain so after the acquisition.

Mr. Fenske next contends that the dispatching positions were transferred because of the acquisition of CMRY's assets by HESR. That was not the basis for the transfer. RailAmerica has been improving its efficiency and a new, more efficient dispatching center exists in St. Albans, VT. Use of the St. Albans center for the functions performed at Carthage, MO has been in planning and development since early 2003, far before the acquisition of CMRY's assets by HESR. There is no relation between the acquisitions and transfer of dispatching functions.

HESR received authority to acquire the assets of CMRY by making use of the exemption process under 49 U.S.C. § 10902. Section 10902 does not permit the imposition of the New York Dock conditions. Labor protection under Section 10902 is limited to the provisions of Section 10902(d) when the acquiring entity is a Class II railroad, which HESR is not.

HESR did not seek approval to acquire the assets under 49 U.S.C. § 11323(a)(2), *et seq.* Even if HESR acquired CMRY's assets under Section 11323, *et seq.*, 49 U.S.C. § 11326(c) prohibits the imposition of labor protection on this transaction, which involves only Class III railroads.

RailAmerica did not engage in a transaction to acquire control of CMRY under the Board's jurisdiction pursuant to 49 U.S.C. § 11323(a), and hence, did not seek approval or exemption under 49 U.S.C. §§ 11324 or 11325. Therefore, the labor protection provisions under 49 U.S.C. § 11326(a) do not apply.

Mr. Fenske relies on 49 U.S.C. § 10502(g) for the proposition that “The Board may not exercise its authority under this section to relieve a rail carrier of its obligation to protect the interest of employees as required by this part.” He also cites to *RailAmerica, Inc.-Control Exemption-Kiamichi Holdings, Inc. and Kiamichi Railroad L.L.C.*, STB Finance Docket No. 34130 (STB served January 30, 2002). In that decision, RailAmerica was exempted from the requirements of 49 U.S.C. § 11323, *et seq.*, to acquire control of the Kiamichi Railroad L.L.C. The *New York Dock Conditions* were imposed in that proceeding because RailAmerica, at that time, controlled two Class II railroads. One of those Class II railroads, ParkSierra Corp., has been split into three Class III railroads,³ so that RailAmerica now controls only one Class II railroad, CORP.

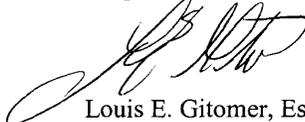
The acquisition of the assets of CMRY by HESR is not a transaction under 49 U.S.C. § 11323, *et seq.*, but it is a transaction under 49 U.S.C. § 10902. Hence the *New York Dock Conditions* do not apply.

³ *ARZC Operating Company, Inc.-Acquisition and Operation Exemption-ParkSierra Corp.*, STB Finance Docket No. 34198 (STB served May 23, 2002); *CFNR Operating Company, Inc.-Acquisition and Operation Exemption-ParkSierra Corp.*, STB Finance Docket No. 34199 (STB served May 23, 2002); and *PSAP Operating Company, Inc.-Acquisition and Operation Exemption-ParkSierra Corp.*, STB Finance Docket No. 34200 (STB served May 23, 2002).

CONCLUSION

The acquisition of the assets of one Class III railroad by another Class III railroad under 49 U.S.C. § 10902, as occurred here, does not require or permit the imposition of the *New York Dock Conditions*. Therefore, HESR respectfully requests the Board to deny the relief requested by Mr. Fenske.

Respectfully submitted,



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Washington, D.C. 20005
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Attorneys for HURON & EASTERN
RAILWAY COMPANY, INC.

Dated: February 27, 2004

EXHIBIT A

James D. Fenske
1702 Weber Road
Billings, Missouri 65610
February 7, 2004

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

Dear Secretary Williams:

Finance Docket No. 34438, Huron & Eastern Railway Company, Inc -Acquisition and Operation Exemption-
Central Michigan Railway Company.

This Merger will effect the Missouri Northern Railroad Dispatchers at Carthage, Missouri.

Missouri Northern Arkansas Railroad (MNA) as of December 31, 2003 should be a Class II Railroad. Your
Statistics should verify this Revenue data. The Missouri Northern Arkansas Railroad Dispatchers at Carthage,
Missouri had been dispatching the Huron & Eastern Railroad.(HESR) until purchase of Central Michigan Railway
Co.

Mr Tom Murphy, Manager of the Dispatching Center in Vermont and Mr. Satunas, General Manager (MNA) have
notified the MNA dispatchers, that since the HESR railroad is purchasing the Central Michigan Railway
Company, the dispatching will be moved to Vermont. Dispatching was moved to St Abanys, Vt on February 1,
2004. Dispatchers at Carthage received notice January 27, 2004 (5 days notice) there jobs would be abolished on
January 31, 2004. Dispatchers received 10 days severance pay if they did not mark off for any reason. HESR did
not post any notice of a merger at Carthage, Mo. were dispatching duties have been performed for past 4 years.

See STB Finance Docket No 34130. "Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to
relieve a rail carrier of its statutory obligation to protect the interest of its employees. Because Rail America
controls more than one Class II rail carrier, the transaction will be made subject to the labor protective conditions
described in New York Dock Ry-Control-Brooklyn Eastern Dist., 360 I.C.C. 60 (1979)."

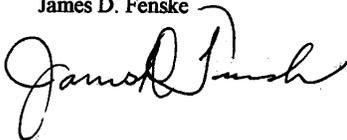
The Missouri Northern Arkansas Railroad Dispatchers request protection under New York Dock Ry. Control-
Brooklyn Eastern Dist., 360 I.C.C. 60 (1979).

I thank you for you assistance.

I have served first Class Mail to: Louis E Gitomer, Attorney for Huron Eastern Railway Co, 1455 F ST. Suite 225,
Washington D. C. And TO: Honorable Vernon A. Williams, Secretary, Surface Transportation Board, 1925 K
Street, N.W. Washington, D. C.

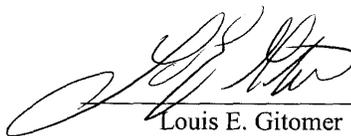
Sincerely,

James D. Fenske



CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document to be served by first-class mail,
postage prepaid on all parties of record in STB Finance Docket No. 34438.

A handwritten signature in black ink, appearing to read "Louis E. Gitomer", is written over a horizontal line.

Louis E. Gitomer
February 27, 2004