

LAW OFFICE
THOMAS F. MCFARLAND, P.C.
208 SOUTH LASALLE STREET - SUITE 1890
CHICAGO, ILLINOIS 60604-1112
TELEPHONE (312) 236-0204
FAX (312) 201-9695
mcfarland@aol.com

THOMAS F. MCFARLAND

May 4, 2007

By e-filing

Vernon A. Williams, Secretary
Surface Transportation Board
395 E Street, S.W., Suite 1149
Washington, DC 20024

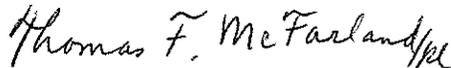
Re: Finance Docket No. 35016, *Rock River Railroad, LLC -- Acquisition and
Operation Exemption -- Rail Line of Renew Energy, LLC at Jefferson, WI*

Finance Docket No. 35017, *Mark K. Smith -- Continuance in Control Exemption
-- Rock River Railroad, Inc.*

Dear Mr. Williams:

Enclosed please find a Reply In Opposition To Petition To Stay Exemptions, for filing
with the Board in the above referenced matters.

Very truly yours,



Thomas F. McFarland
*Attorney for Rock River Railroad, Inc.
and Mark K. Smith*

TMCF:kl:wp8.0\1226\efileSTB2

cc: Linda J. Morgan, Esq., *by first-class mail & e-mail to lmorgan@cov.com*

BEFORE THE
SURFACE TRANSPORTATION BOARD

ROCK RIVER RAILROAD, INC. --)
ACQUISITION AND OPERATION) FINANCE DOCKET
EXEMPTION -- RAIL LINE OF RENEW) NO. 35016
ENERGY, LLC AT JEFFERSON, WI)
)
MARK K. SMITH -- CONTINUANCE IN) FINANCE DOCKET
CONTROL EXEMPTION -- ROCK RIVER) NO. 35017
RAILROAD, INC.)

**REPLY IN OPPOSITION TO
PETITION TO STAY EXEMPTIONS**

ROCK RIVER RAILROAD, INC.
P.O. Box 474
Watertown, WI 53094

MARK K. SMITH
P.O. Box 474
Watertown, WI 53094

Applicants

THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street
Suite 1890
Chicago, IL 60604-1112
(312) 236-0204
(312) 201-9695 [fax]
mcfarland@aol.com

Attorney for Applicants

DATE FILED: May 4, 2007

BEFORE THE
SURFACE TRANSPORTATION BOARD

ROCK RIVER RAILROAD, INC. --)	
ACQUISITION AND OPERATION)	FINANCE DOCKET
EXEMPTION -- RAIL LINE OF RENEW)	NO. 35016
ENERGY, LLC AT JEFFERSON, WI)	
)	
MARK K. SMITH -- CONTINUANCE IN)	FINANCE DOCKET
CONTROL EXEMPTION -- ROCK RIVER)	NO. 35017
RAILROAD, INC.)	

**REPLY IN OPPOSITION TO
PETITION TO STAY EXEMPTIONS**

Pursuant to 49 C.F.R. § 1104.13(a), Applicants ROCK RIVER RAILROAD, INC. (RRR) and MARK K. SMITH hereby reply in opposition to a Petition to Stay Exemptions (Petition) filed by Union Pacific Railroad Company (UP) on April 27, 2007.

REPLY

UP's Petition is long on innuendo and speculation that there is some sinister motive behind RRR's proposed acquisition and operation. (Petition at 2-5). The Petition is short, however, on treatment of the dispositive criteria for obtaining a stay, devoting only one generalized paragraph on page 6 to application of those criteria. It should not be lost on the Board that there is no contention that UP would be irreparably harmed if the exemptions were to become effective. Contrary to UP's contention (at 6) that a criterion for obtaining a stay is "irreparable harm" in general, that criterion is irreparable harm to the moving party (UP). UP's claim of irreparable harm to "the exemption process" (*id.*) is no substitute for harm to UP. It is

clear that UP would not be irreparably harmed if the exemptions were to become effective. UP's failure to contend otherwise, let alone provide evidence of such harm, is fatal to its Petition.

Contrary to the innuendo in UP's Petition, there is nothing sinister, or even unusual, about a shipper such as RENEW ENERGY, LLC (RE) preferring to have its terminal switching performed by a small Class III rail carrier, such as RRR, rather than by a larger Class I rail carrier, such as UP, and instead of performing that switching itself. Examples of operations of that kind abound. The two that have received the most notoriety are the short line operation at Effingham, IL and Bulkmatic Railroad's operation at a plant site in Chicago Heights, IL. *See Effingham RR -- Petition for Declaratory Order -- Construction at Effingham, IL*, 2 S.T.B. 606, 1997 STB LEXIS 344, *recons. den.* 1998 STB LEXIS 253 (STB Docket No. 41986, served Sept. 18, 1998), *aff'd sub. nom United Transp. Union v. STB*, 183 F.3d 606, 1999 U.S. App. LEXIS 14237; and *Bulkmatic RR -- Acq. & Oper. Exempt. -- Bulkmatic Transport Co.*, 2002 STB LEXIS 691 (STB Finance Docket No. 34145 served Nov. 19, 2002), *recons. den.*, 2003 LEXIS 256, served May 15, 2003; *see, also, SMS Rail Service, Inc. -- Pet. for Declar. Order*, 2005 STB LEXIS 44 (STB Finance Docket No. 34483, served Jan. 24, 2005), and *Rail & Transload, Inc. -- Acq. & Oper. Exempt. -- Rail Line of Tower Investments, LLC*, 2006 STB LEXIS 473 (STB Finance Docket No. 34894, served July 26, 2006).

The *Bulkmatic* case is most like the case at hand in that an opponent of the exemption there contended that the applicant rail carrier was "dedicated to" the shipper at the plant site (or, as UP puts it, was a "contract switching operation"), and thus would not hold itself out as a common carrier. (2002 STB LEXIS 691 at *9). The Board refuted that contention in language that is equally applicable to UP's contention in the present case (at *9-11):

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 (footnote omitted). 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 (footnote omitted). 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.

As evident from the *Bulkmatic* case, something far more than a contention that RRR is a "contract switching operation" is required to raise an inference that RRR would not operate as a common carrier by rail.

The attached verified statement of Mr. Jeff White, Chief Executive Officer of RE, (Appendix 1), thoroughly refutes UP's contention that RRR is merely a contract switching operation, and that the trackage to be operated by RRR is too short and too restricted by virtue of running through a building to permit RRR to serve additional shippers. The photographs attached to the Petition are designed to emphasize the minimal trackage located outside the building. However, Mr. White's testimony identifies numerous opportunities for RRR to serve other shippers within the building, or on additional trackage that can be constructed elsewhere in

the 370-acre property. (The building and trackage in UP's Exhibit 1 constitutes only about 100 acres of the 370-acre property). Reference should be made to Mr. White's Statement for details in relation to the following opportunities for RRR to serve additional shippers at the RE plant:

1. Shipments of wheat and corn for Olsen's Mill, Inc. from elevators accessible within the building to interstate and foreign destinations;
2. Potential shipments of bio-diesel by a yet-to-be-created company from new trackage that could be constructed within the plant property to interstate destinations;
3. Potential shipments of dried distiller's grain, germ and bran transloaded from truck to rail for other ethanol companies in the area from new trackage that could be constructed within the plant property to interstate destinations; and
4. Potential shipments of corn oil by a yet-to-be-created company from new trackage that could be constructed within the plant property to food and/or bio-diesel manufacturers at interstate destinations.

A Class III rail carrier having complied with all Board regulations for a class exemption for acquisition and operation of rail lines should not have its transaction delayed as a result of a Class I rail carrier's generalized contention that more information is required to establish the small railroad's common carrier status. Consequently, the Petition to Stay these routine class exemptions should be denied. Nevertheless, Applicants voluntarily have elected to provide additional information on the subject matter in the form of Mr. White's verified statement.

WHEREFORE, the Petition to Stay Exemptions should be denied.

Respectfully submitted,

ROCK RIVER RAILROAD, INC.
P.O. Box 474
Watertown, WI 53094

MARK K. SMITH
P.O. Box 474
Watertown, WI 53094

Applicants

Thomas F. McFarland/pe

THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street
Suite 1890
Chicago, IL 60604-1112
(312) 236-0204
(312) 201-9695 [fax]
mcfarland@aol.com

Attorney for Applicants

DATE FILED: May 4, 2007

APPENDIX 1

VERIFIED STATEMENT OF JEFF WHITE

My name is Jeff White. I am Chief Executive Officer of RENEW ENERGY, LLC (RE). RE is constructing an ethanol plant adjacent to a malting facility it acquired for that purpose at Jefferson, WI. That plant was formerly operated by Cargill, Inc. It sits on 370 acres of land. (The ethanol plant will be on this land as well). RE will ship ethanol and its by-products, such as germ, bran, and dry distillers' grain (DDG), by rail from the plant at Jefferson.

RE owns 2,100 feet of rail trackage within the Jefferson plant. RE has decided to have its terminal switching performed by a small Class III rail carrier, rather than by Union Pacific Railroad Company (UP), with whom that trackage connects, and rather than do such switching itself. To that end, RE has agreed in principle to convey that trackage to Rock River Railroad, Inc. (RRR), a Class III railroad that is affiliated with Rail & Transload, Inc., another Class III railroad. RRR would also provide intra-plant and inter-plant switching for RE and other shippers.

I am familiar with the Petition to Stay Exemptions (Petition) that has been filed by UP. UP has contended that RRR will be merely a contract switching operation for RE, and that RRR will not be in a position to serve other shippers at the Jefferson plant site because the trackage is relatively short and is located mostly within a building (*id* at 3). The photographs attached to the Petition are designed to show the relatively short length of trackage that is located outside the building (*id.*, Ex. 2-3).

UP's arguments are not sound. RRR is not restricted against providing rail service to other shippers at the Jefferson plant site. Contrary to UP's contention, there will be plenty of

opportunities for RRR to provide rail service to other shippers at that location. UP's photographs do not take into account the extensive rail loading and unloading space within the building, and the space available for additional RRR trackage within the 370-acre property area not shown on UP's Exhibit 1.

RE has made it clear that RRR is not precluded from providing rail service to other shippers at Jefferson. RRR will operate as a common carrier providing service to shippers who may avail themselves of use of RE's building to originate or terminate rail shipments, or who may be served by newly-constructed track elsewhere within the 370-acre property. RRR does not have a financial interest in any of the shipments that it will transport for RE. RRR has made it clear to RE that RRR will serve the general public.

RRR will serve RE for compensation. No arrangements between those unaffiliated entities tie RRR to serving RE alone, to the exclusion of the general public. In no sense will RRR be RE's agent. RRR will be the common carrier responsible for rail service at the Jefferson property, dealing with shippers on its own. All arrangements between RRR and RE have been arrived at through arm's-length negotiations.

Extensive grain traffic to be shipped from the Jefferson property by Olsen's Mill, Inc. (Olsen) will be available for transportation by RRR. Olsen is not under common control with RE. Cargill, Inc. formerly shipped substantial quantities of brewer's malt from the Jefferson plant site. There is grain elevator storage for 10 million bushels of grain on the Jefferson property. UP's tracks serve elevators at that location (pictured in Exhibit 3 of UP's Petition), but

elevators are also accessible from the building through which RRR's tracks will operate. Olsen intends to shift grain tonnage from its Milwaukee elevators to the elevators at Jefferson. Olsen intends to ship 5,600 carloads of wheat per year and 3,000 carloads of corn per year from the Jefferson property to interstate and foreign destinations. RRR would participate in a substantial portion of that traffic. That grain traffic is not news to UP. That traffic was listed on a summary of traffic that was presented to UP at a meeting in Omaha, NE on September 6, 2006. A copy of that summary is attached to my statement as Appendix JW-1.

Another potential source of traffic for RRR will be bio-diesel in rail tank cars. A new corporation (yet to be formed) independent of RE may construct a bio-diesel plant on the Jefferson property. Trackage will be constructed to serve that plant. RRR will provide rail service to that plant. That plant is expected to ship approximately 1,100 carloads of bio-diesel per year to interstate destinations. That traffic also appeared on the traffic summary presented to UP at the meeting in Omaha on September 6, 2006 (*see* my Appendix JW-1).

Yet another potential source of traffic for RRR is DDG or germ or bran transloaded from trucks to railcars at the Jefferson property. That would be DDG from other ethanol shippers in the area that would otherwise be transported a longer distance by truck to UP's intermodal terminal at Rochelle, IL. Some of those truck shipments would be aggregated with RE's containerized DDG for shipment to China. However, other of such truck shipments would be transloaded into railcars for shipment to interstate destinations. The truck-to-rail transloading would likely take place on newly-constructed trackage within the Jefferson property. The other

APPENDIX 1

VS - Jeff White

Page 4 of 4

ethanol companies would be the shippers in regard to those rail shipments. RRR would provide rail service for those shippers. DDG also appears on the traffic summary provided to UP (Appdx. JW-1).

Still another source of traffic for RRR is corn oil. A new corporation independent of RE (yet to be formed) may construct a corn oil extraction plant on the Jefferson property. Trackage will be constructed to serve that plant. RRR will provide rail service to that plant. That plant will ship corn oil by rail in tank cars to food and/or bio-diesel manufacturers at interstate destinations.

These specific sources of traffic for RRR from shippers other than RE are in addition to other truck-to-rail and rail-to-truck transloading operations that arise from time to time in an area such as southern and central Wisconsin in which numerous shippers have lost their rail service through abandonment and desire to continue to utilize long-haul rail transportation. The RE plant would be available for transloading of that nature. RRR holds itself out to provide rail transportation of that traffic.

Yard Operation Statistical Overview Worksheet

Commodity	Railer Type	Customer Restriction or Comment	6 Day per Week - 2 Shift Yard Operation				Average Yard Car per Day
			Cars per Year	Average Cars per Week	Average Cars per Day	Average Handling per Car	
Ethanol	Tank	30 min./car	3,000	57.7	9.6	3.5	33.7
Denaturant	Tank		200	3.8	0.6	3.5	2.2
High Protein Concentrate	Container		1,200	23.1	3.8	3.5	13.5
Dried Distillers Grain	Container		1,200	23.1	3.8	3.5	13.5
Corn (outbound)	Container		3,000	57.7	9.6	3.5	33.7
Corn (inbound)	Hopper		9,125	175.5	29.2	3.5	102.4
Fish Food	Hopper		150	2.9	0.5	3.5	1.7
Wheat	Hopper		1,400	26.9	4.5	3.5	15.7
Wheat	Hopper/Container		4,200	80.8	13.5	3.5	47.1
Bio Diesel	Tank		1,100	21.2	3.5	3.5	12.3
Fiber & Germ	Hopper		1,560	30.0	5.0	3.5	17.5
Total Yard			24,575	472.6	78.8		275.7
(loads plus empties)				X 2			
Interchange Crew Operating on 7 days basis Weekly volume =				945.2			
Interchange Crew Operating on 7 days basis Daily volume =				135.0			

CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2007, I served the foregoing document, Reply In Opposition To Petition To Stay Exemptions, by e-mail and first-class, U.S. mail, postage prepaid, on Linda J. Morgan, Esq., Covington & Burling, LLP, 1201 Pennsylvania Avenue, N.W., Washington, DC 20004-2401, lmorgan@cov.com.

Thomas F. McFarland/te

Thomas F. McFarland