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March 13, 2008

By e-filing

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

Re: Docket No. AB-398 (Sub-No. 8X), *San Joaquin Valley Railroad Company --
Abandonment Exemption -- in Tulare County, CA (between Exeter and
Strathmore)*

Dear Ms. Quinlan,

Hereby transmitted is a Reply In Opposition To Request for Procedural Schedule for
filing with the Board in the above referenced matter.

Very truly yours,



Thomas F. McFarland
Attorney for Protestants

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BEFORE THE
SURFACE TRANSPORTATION BOARD

SAN JOAQUIN VALLEY RAILROAD)
COMPANY -- ABANDONMENT) DOCKET NO. AB-398
EXEMPTION -- IN TULARE COUNTY,) (SUB-NO 8X)
CA (BETWEEN EXETER AND)
STRATHMORE))

REPLY IN OPPOSITION TO
REQUEST FOR PROCEDURAL SCHEDULE

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DATE FILED March 13, 2008

BEFORE THE
SURFACE TRANSPORTATION BOARD

SAN JOAQUIN VALLEY RAILROAD)	
COMPANY -- ABANDONMENT)	.DOCKET.NO. AB-398
EXEMPTION -- IN TULARE COUNTY,)	(SUB-NO. 8X)
CA (BETWEEN EXETER AND)	
STRATHMORE))	

**REPLY IN OPPOSITION TO
REQUEST FOR PROCEDURAL SCHEDULE**

Pursuant to 49 C.F.R. § 1104.13(a), Protestants CITY OF LINDSAY, CALIFORNIA (the City) and TULARE FROZEN FOODS COMPANY (TFF) hereby oppose the request of Petitioner SAN JOAQUIN VALLEY RAILROAD COMPANY(SJVR) for adoption of a procedural schedule that would include a right of SJVR to reply to any replies in opposition that may be filed in regard to SJVR's Petition for Exemption, filed on February 28, 2008. SJVR's request for procedural schedule appears at pages 12-15 of that Petition.

BACKGROUND

The Petition seeks an exemption from 49 U.S.C. § 10903 for abandonment of a 9.2-mile SJVR rail line between a point south of Exeter and a point north of Strathmore, in Tulare County, California. The rail line proposed for abandonment extends through the intermediate City of Lindsay, California. TFF is located at Lindsay. TFF ships frozen foods by rail over the line proposed for abandonment.

The City and TFF intend to file a reply in opposition to the Petition.

In accordance with 49 C.F.R. § 1152.60(a), notice of the filing of the Petition will be published in the Federal Register on or about March 19, 2008. Board practice is to permit the filing of replies to the Petition within 25 days after the Federal Register publication. The Petition then proceeds to decision, to be issued within 110 days after the filing date of the Petition.

In the case at hand, however, SJVR has requested the Board to adopt a procedural schedule that would include an opportunity for SJVR to file a reply to any replies that may be filed in opposition to the Petition (Petition at 12-15).

That request for procedural schedule has necessitated the filing of this reply in opposition to the request, inasmuch as Protestants are opposed to the request and the Board may rule on the request in conjunction with the Federal Register notice that will be published on or about March 19, 2008.

REPLY IN OPPOSITION TO PETITION

As set out below, the Board's longstanding practice of denying petitions for exemption of abandonment where the burden of proof is not sustained in the petition, in lieu of permitting the petitioner to furnish additional information in a reply, is firmly-grounded in an unbroken line of decisions. SJVR is well aware of the rationale for the practice inasmuch as one of the leading decisions in which the Board adhered to the practice involved denial of an extensive petition for reconsideration filed by SJVR, supported by the American Shortline and Regional Railroad Association. See *San Joaquin Valley R Co - Aband. Exempt - in Tulare County, CA*, 1999 STB LEXIS 121 (Docket No. AB-389 [Sub-No. 4X], decision served March 5, 1999), upholding a decision in that Docket served on May 23, 1997, 1997 STB LEXIS 114. SJVR's request that the Board depart from that established practice in this adjudicatory proceeding is clearly improper.

The appropriate procedure for SJVR to follow if it seeks a departure from that practice is to file a petition for rulemaking under 49 C.F.R. § 1110.2(b)

Set out below is a listing of the unbroken line of decisions in which petitions for exemption of abandonment were denied for failure to sustain the required burden of proof, with no opportunity provided to furnish additional information by way of a reply to replies in opposition to the petitions:

- (1) *Lake State Ry Co - Aband Exempt - Rail Line in Otsego County, MI*, 2007 STB LEXIS 403 at *12, STB Docket No. AB-534 (Sub-No. 3X), decision served July 26, 2007,
- (2) *The Burlington N & S.F. Ry Co -- Aband of Chicago Area Trackage in Cook County, IL*, 1999 STB LEXIS 553 at *11-12, STB Docket No. AB-6 (Sub-No. 382X), decision served Sept. 21, 1999,
- (3) *Gauley River Railroad, LLC -- Aband. & Discon. of Serv. -- in Webster and Nicholas Counties, WV*, 1999 STB LEXIS 345 at *14, STB Docket No. AB-559 (Sub-No. 1X), decision served June 16, 1999,
- (4) *Buffalo & Pittsburgh RR, Inc -- Aband Exempt. -- in Erie and Cattaraugus Counties, NY*, 1998 STB LEXIS 247 at *13-18, STB Docket No. AB-369 (Sub-No. 3X), decision served Sept. 18, 1998;
- (5) *Central RR Co of Ind -- Aband Exempt -- in Dearborn, Decatur, Franklin, Ripley and Shelby Counties, IN*, 1998 STB LEXIS 121 at *26-27, STB Docket No. AB-459 (Sub-No. 2X), decision served May 4, 1998;
- (6) *San Joaquin Valley R. Co -- Aband. Exempt -- in Kings and Fresno Counties, CA*, 1997 STB LEXIS 114 at *8-9, STB Docket No. AB-398 (Sub-No. 4X), decision served May 23, 1997, *pet. to reopen den.*, 1999 STB LEXIS 76, decision served March 5, 1999;
- (7) *Tulare Valley R. Co -- Aband & Discon. Exempt -- in Tulare and Kern Counties, CA*, 1997 STB LEXIS 37 at *18-19, STB Docket No. AB-397 (Sub-No. 5X), decision served Feb. 21, 1997, *pet. for recons. den.*, 1998 STB LEXIS 76, decision served March 6, 1998,

- (8) *Boston & Maine Corp. -- Aband. Exempt. -- in Hartford and New Haven Counties, CT*, 1996 STB LEXIS 361 at *12-13, STB Docket No. AB-32 (Sub-No. 75X), decision served Dec. 31, 1996,
- (9) *CSX Transp. Inc -- Aband Exempt -- in Grant, Delaware, Henry, Randolph and Wayne Counties, IN*, 1989 ICC LEXIS 297 at *12-16, Docket No AB-55 (Sub-No 282X), decision served Oct. 16, 1989.^{1/}

The rationale for the practice is set forth succinctly in *Central R R Co of Ind - Aband Exempt - in Dearborn, Decatur, Franklin, Ripley and Shelby Counties, IN, supra*, 1998 STB LEXIS 121 at *5, viz :

... CIND filed its petition knowing that our procedures provide only for the filing of a petition and a reply thereto. Had CIND wished to assure itself the right to rebut a filing in opposition to its abandonment request, it could and should have filed a formal application . . .

As noted, SJVR is well aware of the Board's procedure, having attempted unsuccessfully to obtain a departure from it. Moreover, SJVR acknowledges that it expects opposition to its Petition ("SJVR expects Lindsay and perhaps others, including Tulare Frozen Foods, to oppose the abandonment of the Line," Petition at 13). In light of that expected opposition, it would be reasonable to expect a challenge to SJVR's testimony regarding revenues, costs and return on value. As the Board has said many times, an abandonment that is contested and in which there are likely to be disputed financial issues is not conducive to exemption procedure (see the

^{1/} Petitions for exemption of abandonment are granted where shippers do not contest the abandonment (see *Tulare Valley R Co -- Aband & Discon. Exempt. -- in Tulare and Kern Counties, CA, supra*, 1997 STB LEXIS 37 at *18), and where opponents do not effectively challenge or refute the rail carrier's evidence that continued operation of the rail line would be unduly burdensome (see *Paducah & L Ry., Inc -- Aband Exempt -- in McCracken County, KY*, 2003 STB LEXIS 344 at *5-6, STB Docket No. AB-468 (Sub-No. 5X), decision served June 20, 2003, and *Minnesota Northern RR, Inc. -- Aband Exempt -- betw Redland Jct and Fertile, in Polk County, MN*, 1997 STB LEXIS 294 at *25-26, n.17, STB Docket No. AB-497 (Sub-No 2X), decision served Nov 14, 1997)

decisions cited above). Nevertheless, SJVR can choose to have its proposed abandonment processed under exemption procedure, but if it does so it must abide by the Board's rules and practices for such processing.

Contrary to SJVR's contention (Protest at 14), SJVR's request is not consistent with recent Board practice. The *Lake State* case, *supra*, decided last July, reflects the Board's recent practice in cases involving petitions for exemption of abandonment. That practice is consistent with nine additional decisions in such cases over the past 10 years, which is that there is no right of rebuttal in cases involving petitions for exemption of abandonment. The case cited by SJVR in note 9 on page 14 of the Petition in support of "the Board's recent practice" did not involve a petition for exemption of abandonment. Indeed, that case did not involve abandonment at all. There is no authority in support of SJVR's request for the right of rebuttal in petitions for exemption of abandonment. Consistent Board authority is contrary to that request.

Counsel for SJVR (Rail America) has recently filed two additional requests for a procedural schedule with rebuttal. In publishing notice in the Federal Register in those instances, the Board has stated that if replies in opposition to those petitions are filed, leave to file rebuttal can be requested. See *San Joaquin Valley R Co - Aband. Exempt - in Tulare County, CA*, Docket No. AB-398 (Sub-No. 7X), decision served March 10, 2008, and *Mid-Michigan Railroad, Inc -- Aband Exempt - in Kent, Ionia and Montcalm, CA*, Docket No. AB-364 (Sub-No. 14X), decision served March 11, 2008. For the reasons stated herein, those requests should be denied outright. If Rail America wants to change the rules, let it file for a rulemaking proceeding.

The attempt of SJVR (Rail America) to circumvent established Board procedure is especially unwarranted inasmuch as the Board carefully considered that procedure in a recent rulemaking and concluded that such procedure is not unfair or unduly burdensome. Thus, in *Class Exemption for Expedited Abandonment Procedure for Class II and Class III Railroads*, 2006 STB LEXIS 772 (Ex Parte No. 647, decision served December 15, 2006, the Board said (at *16-17)

In attempting to justify the need for new abandonment rules for small carriers, Petitioners point to the few cases in which petitions for exemption to abandon lines, where there were significant protests, have been denied. But even protested abandonments are generally granted. Most denials of petitions for exemption are based on technical deficiencies in the information provided by the railroad. However, the filing requirements in abandonment exemption cases are not onerous. We do not require that a petitioner in an abandonment exemption proceeding provide evidence in any prescribed way. We evaluate the record before us, and if the petitioner has presented enough evidence to meet its burden, we will grant an exemption from the regulatory requirements of section 10903 under 49 U.S.C. 10502. Even if a petitioner initially fails to provide sufficient evidence to meet the statutory requirements for an exemption, we often will deny the petition without prejudice to refiling a new petition for exemption, or to filing a formal application with the evidence that is needed to support its request. If the carrier provides the additional information, we will then grant the abandonment authority. Whether or not a carrier provides cost evidence for the Board to use in evaluating the petition is solely within the railroad's control. And waivers to cover situations where small railroads may not have certain types of cost data are routinely granted. We fail to see how these procedures are so unfair, burdensome, or harmful to the public interest that issuance of an NPR to propose changes to the existing process is warranted. (footnotes omitted)

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated, SJVR's request for a procedural schedule that includes a right to reply to replies in opposition should be denied.

Respectfully submitted,

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DATE FILED. March 13, 2008

CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2008, I served the foregoing document, Reply In Opposition To Request For Procedural Schedule, by e-mail and UPS overnight mail to Louis E Gitomer, Esq , Law Office of Louis E Gitomer, The Adams Building, Suite 301, 600 Baltimore Avenue, Towson, MD 21204, *lou_gitomer@verizon.net*

Thomas F. McFarland

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