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April 8, 2008

By e-filing

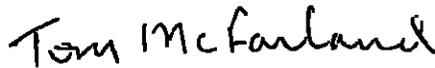
Anne K. Quinlan, Esq  
Acting Secretary  
Surface Transportation Board  
395 E Street, S.W., Suite 1149  
Washington, DC 20024

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

Dear Ms. Quinlan:

Hereby transmitted is a Reply In Opposition To Pctition For Exemption for filing with the Board in the above referenced matter.

Very truly yours,



Thomas F. McFarland  
*Attorney for Protestants*

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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

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REPLY IN OPPOSITION TO  
PETITION FOR EXEMPTION

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DATE FILED. April 8, 2008

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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

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**REPLY IN OPPOSITION TO  
PETITION FOR EXEMPTION**

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Pursuant to the Board's procedural decision, served March 19, 2008, TULARE FROZEN FOODS, LLC (TFF) and the CITY OF LINDSAY, CALIFORNIA (the City), referred to collectively as Protestants, hereby reply in opposition to a Petition for Exemption from 49 U.S.C. § 10903 (Petition) filed by SAN JOAQUIN VALLEY RAILROAD COMPANY (SJVR) on February 28, 2008 for abandonment of a 9.2-mile rail line between Milepost 259.4 near Exeter and Milepost 268 6 near Strathmore in Tulare County, CA (Exeter-Strathmore line)

**PROCEDURAL ISSUES**

At pages 12-15 of its Petition, SJVR requests adoption of a procedural schedule whereby it would have the right to file rebuttal of any reply that might be filed in opposition to its Petition. On March 13, 2008, Protestants filed a reply in opposition to that request. In its procedural decision served March 19, 2008, the Board deferred a ruling on that request, but allowed SJVR to request leave to file rebuttal if replies in opposition to the Petition are filed (at 1-2). The Board's decision did not mention Protestants' reply, which apparently was filed too late to be considered in that decision. Protestants hereby request that the Board give consideration to their

reply in opposition to that request. As established in that reply, based on an unbroken line of decisions over nearly 20 years, SJVR's request should have been denied outright. Protestants will strenuously oppose any request by SJVR for leave to file rebuttal.

Nine days before it filed the Petition under consideration, SJVR filed a Petition for Exemption from 49 U.S.C. §-10903 for abandonment of its 30 57-mile rail line between a point near Strathmore and the end of the line at a point near Jovista, CA. That rail line is a continuation of the Exeter-Strathmore line south to its dead end near Jovista. SJVR has not provided an explanation for segmentation of abandonment of its 39.77-mile rail line south of Exeter in consecutive, almost simultaneous filings. Neither SJVR abandonment Petition makes reference to the other SJVR Petition. The Petitions in the two proceedings are not consistent with each other. The first page of Appendix 1 (attached hereto) is a map from the Petition in the Exeter-Strathmore proceeding that shows Milepost 268.60, the southern terminus of that abandonment, at a point north of Strathmore. The second page of Appendix 1 is a map from the Petition in the Strathmore-Jovista proceeding that shows the same Milepost 268.60, the northern terminus of that abandonment, at a point south of Strathmore. The difference is not explained. Taken literally, the SJVR maps indicate that trackage in the town of Strathmore itself is not proposed for abandonment. The entire rail line south of Exeter should be covered in a single conventional abandonment application.

It is not clear whether Union Pacific Railroad Company (UP) would have a common carrier obligation to provide service over the rail line south of Exeter if SJVR were to be authorized to abandon that line. UP's predecessor, Southern Pacific Transportation Company (SP), retained ownership of the land in the right-of-way when SJVR was authorized to acquire

and operate that line *See San Joaquin Valley R. Co. - Acq. & Lease Exempt. - Southern Pacific Transp Co.*, 1993 ICC LEXIS 192 at \*4, note 8 (Finance Docket No 31993 [Sub-No. 1], served Oct. 4, 1993). The ICC there said (*id.*).

On the present record we lack sufficient information to determine whether SP will continue to have a common carrier obligation over the involved lines. SP is retaining a substantial interest in the involved properties, namely, ownership of the underlying rights-of-way. We were not furnished a copy of the lease agreement, although SJVR assumes that we have jurisdiction over the lease transaction because it seeks to exempt it from the requirement of our prior approval. Absent the lease or other evidence fully setting forth the nature of the relationship governing the respective rights and access to the rights-of-way, clearly necessary for continued exercise of the rail franchises being conveyed, we do not and cannot rule on whether SP will continue to have a common carrier obligation with respect to these lines upon consummation of the transaction. SP may file a petition for declaratory order to clarify the issue of its common carrier obligation after consummation.

As far as Protestants have been able to determine, neither SP nor UP filed such a petition for declaratory order. This is yet another issue that warrants investigation in a formal abandonment application.

#### **IDENTITY AND INTEREST OF PROTESTANTS**

TFF is a manufacturer and distributor of frozen foods. Its place of business is located on the Exeter-Strathmore rail line at Lindsay, CA. According to SJVR (Petition at 71), TFF is located at Milepost 264 1 That is 4.7 miles south of the point at which the proposed abandonment would begin

SJVR's own evidence shows TFF's dramatically increasing use of the involved rail line: 39 carloads in 2005; 67 carloads in 2006 (an increase of 72 percent); and 79 carloads in 2007 (an additional increase of 18 percent) (Petition at 5). TFF acquired the company (formerly known as Lindsay Foods) in January, 2008. As a result of an expansion program undertaken by the new

ownership of TFF, rail traffic is expected to increase to 150 carloads in the forecast year, an increase of 90 percent over 2007 rail traffic. The new ownership plans to build a 10-million-pound freezer storage facility at Lindsay. The increased storage capacity resulting from that facility will enable TFF to ship 200 carloads per year from Lindsay by 2009-2010 <sup>1/</sup>

TFF is highly dependent on rail transportation for delivery of frozen spinach and greens to distant markets on the East Coast, and in the Midwest and South. That traffic constitutes a substantial portion of TFF's overall business. Approximately 65 percent of TFF's frozen foods are transported by rail.

Truck transportation would be cost-prohibitive for that traffic. If TFF were to lose rail service at Lindsay, the lowest cost alternative would be truck-rail service, with transloading at a freezer storage facility at Fresno, CA, which is approximately 60 highway miles from Lindsay. While the rail rate from Fresno and Lindsay to the locations of TFF's customers is the same, there would be significant added costs for trucking from Lindsay to Fresno (approximately \$250 per truckload) and for transloading at Fresno (approximately \$330 per truckload), for total added costs of \$580 per truckload. At three truckloads per rail carload, the total added costs of truck-rail transportation would be \$1,740 per rail carload. For 79 rail carloads shipped in 2007, the total added costs would be \$137,460 per year. For 150 rail carloads to be shipped in the forecast year, the total added cost would be \$261,000 per year. That would dwarf the forecast year operating loss claimed, but by no means proven, by SJVR. (Petition at 73) A cost increase of more than a quarter of a million dollars per year would have a severe adverse impact on TFF's

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<sup>1/</sup> This is extremely high-rated rail traffic, with revenues averaging approximately \$9,000 per carload. TFF's rail traffic will provide total rail revenues of approximately \$1.35 million in the forecast year. ( $\$9,000 \times 150 = \$1,350,000$ ).

overall financial condition. These facts compel a finding that there is no economically feasible alternative to TFF's use of rail transportation. *See Georgia Public Serv. Comm'n. v United States*, 704 F.2d 538, 545 (11<sup>th</sup> Cir. 1983). That strongly militates against approval of abandonment. *See Busboom Grain, Inc. v. ICC*, 856 F.2d 790, 795 (7<sup>th</sup> Cir. 1988)

The City is a municipal corporation formed under California law. It has a population of 10,700. Construction of the SP through Lindsay in 1889 was instrumental to development of the Lindsay townsite. TFF and other citrus packing houses are by far the largest employers in Lindsay. There are 38 acres of land in Lindsay zoned heavy-industrial; 23 acres zoned light-industrial; and 32 acres zoned mixed-use, that are dependent on continued rail service for future development. The City is opposed to abandonment of the rail line through Lindsay because it would prevent that vital economic development and it would severely harm the City's major employer. The foregoing compels a finding that abandonment would have a serious adverse impact on rural and community development in and around Lindsay, which is statutorily required to be considered by the Board in determining whether public convenience and necessity permits abandonment. *See 49 U.S.C. § 10903(d)*.

#### **STANDARDS GOVERNING DISPOSITION OF PETITIONS FOR EXEMPTION OF ABANDONMENT**

Prerequisite to the grant of an exemption from any statutory requirement under 49 U.S.C. § 10502(a) are two Board findings:

- (1) the application in whole or in part of the statutory requirement is not necessary to carry out the transportation policy of 49 U.S.C. § 10101;
- and
- (2) either
  - (a) the transaction or service to be exempted is of limited scope,

or

- (b) the application in whole or in part of the statutory requirement is not needed to protect shippers from the abuse of market power.

The rail transportation policy most directly implicated by a proposed rail abandonment is 49 U.S.C. § 10101(4), i.e., "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."

In a long line of decisions, the Board (and its predecessor, the ICC) has denied petitions for exemption of abandonment where shippers opposed abandonment, and it was not shown that rail line revenues were minimal compared to the cost of operating the line (i.e., where the record did not support a finding that the filing of a formal abandonment application under 49 U.S.C. § 10903 is not necessary to carry out the rail policy of 49 U.S.C. § 10101(4)):

- (1) *Lake State Ry Co - Aband. Exempt. - Rail Line in Otsego County, MI*, 2007 STB LEXIS 403 at \*12-14, STB Docket No. AB-534 (Sub-No. 3X), decision served July 16, 2007;
- (2) *CSX Transp., Inc -- Aband. Exempt. -- (betw. Memphis and Cordova) in Shelby County, TN*, 2001 STB LEXIS 943 at \*7, STB Docket No. AB-55 (Sub-No. 590X), decision served Dec. 12, 2001;
- (3) *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,
- (4) *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;
- (5) *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;

- (6) *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;
- (7) *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;
- (8) *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;
- (9) *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,
- (10) *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.

The rationale for that well-established principle is quoted below from *Central R.R. Co. of Ind -- Aband Exempt. -- in Dearborn, Decatur, Franklin, Ripley and Shelby Counties, IN*, 1998 STB LEXIS 121 at \*9-10, but it appears in essentially the same form in almost all of the cited decisions.

The petition for exemption procedure for abandonment is primarily intended to be used to expedite decisions and minimize regulatory burdens in uncontested or noncontroversial proceedings. It should not be used in proceedings like the one before us where detailed analysis of revenues and costs is necessary. Detailed revenue and cost analysis is generally reserved for the application process, which provides for a recordbuilding process and for Board analysis by requiring workpapers and other information needed to make an informed decision. This is not a case in which it is clear that revenue from local and overhead traffic is minimal compared to the cost of operating the line. Rather, a detailed analysis of revenue and cost evidence, and the resolution of various issues enumerated above is required to determine the profit/loss of the line . . .

It is provided in 49 C.F.R. § 1121.3(a) that a party filing a petition for exemption is required to provide its entire case-in-chief, along with all supporting evidence, workpapers and related documents, at the time that it files its petition. Consequently, any rebuttal evidence or argument filed by a petitioner for abandonment will be stricken. *Paducah & L. Ry., Inc. -- Aband. Exempt -- in McCracken County, KY, supra, 2003 STB LEXIS 344 at \*2; Central Kansas Ry., LLC -- Aband Exempt. -- in Sedgwick County, KS, 2001 STB LEXIS 356 at \*3, STB Docket No AB-406 (Sub-No 14X), decision served April 10, 2001* If a petition for exemption is denied because of an inadequate record, the deficiencies cannot be corrected by means of rebuttal; the rail carrier instead must file a new petition for exemption or a formal abandonment application if it continues to seek abandonment of the rail line *Central RR Co of Ind -- Aband. Exempt -- in Dearborn, Decatur, Franklin, Ripley and Shelby Counties, IN, supra, 1998 STB LEXIS 121 at \*27.*

**THE RECORD IS NOT ADEQUATE TO SUPPORT AN EXEMPTION FOR ABANDONMENT**

This case falls squarely within the principle requiring denial of exemption where detailed analysis of revenues and costs is required to determine the merits of abandonment. SJVR has submitted verified statements in an attempt to establish that revenues from traffic on the line are minimal compared to the cost of operating the line. However, as explained below, the content of those statements falls far short of establishing that proposition

**1. Revenues**

SJVR has predicated forecast year traffic and revenues on traffic and revenues experienced in 2007. (Petition at 71). That is highly questionable in light of the pronounced

upward trend in revenues on the line, and evidence that traffic and revenues will continue to accelerate. Thus, revenues were \$15,385 in 2005; \$27,380 in 2006, an increase of 72 percent; and \$32,745 in 2007, an additional increase of 20 percent Rail line revenues more than doubled in the space of only two years! A large freezer storage facility to be constructed by TFF will increase rail traffic by an additional 90 percent to 153 percent! The dramatically increasing use of the line cannot be rationally ignored, as does SJVR in positing forecast year revenues.

## 2. Maintenance Costs

A substantial percentage of the costs charged against the rail line for maintenance are incurred on the portion of the rail line south of TFF's place of business in Lindsay, CA, on which there was no traffic in 2007. (Petition at 63-64). SJVR should not be permitted to segment abandonment of its rail line south of Exeter in a manner that costs to operate the inactive rail line south of Lindsay are charged against operation of the active rail line between Exeter and Lindsay. In addition to opposing the proposed abandonment in its entirety, Protestants have the right to seek partial denial as to that active segment comprised of 4.7 miles between Exeter and Lindsay (Lindsay Segment). See, e.g., *Indiana Sugars, Inc v. ICC*, 694 F.2d 1098 (7<sup>th</sup> Cir. 1982). Costs incurred south of Lindsay are not avoidable costs of operating the Lindsay Segment

Thus, maintenance costs have been substantially overstated by SJVR because (1) an unknown number of the 17 crossing signals referred to at page 63 of the Petition are located south of Lindsay, (2) much of the vegetation referred to at page 63 of the Petition is located south of Lindsay; (3) track inspection referred to at pages 63-64 of the Petition includes inspection south of Lindsay; and (4) maintenance repairs referred to at page 64 of the Petition include repairs south of Lindsay. Moreover, there is no support in the Petition for the contention of

SJVR's witness that it takes two hours to inspect the line (at 63), and that SJVR's maintenance crew spends 1.7 hours per week maintaining the line (at 64). Indeed, there is no support whatsoever for any of the unit costs for maintenance and maintenance service units referred to at pages 63-64 of the Petition. All of those unsupported costs can be verified only by review of workpapers and underlying documentation. A formal abandonment application is required for that review

### **3. Locomotive and Train Crew Costs**

Costs posited by SJVR for locomotive operation and train crew expenses are entirely unsupported, and/or demonstrably inaccurate. Thus, in estimating the time required to provide service to TFF at Lindsay, SJVR's witness predicated train operation from the south via Strathmore, i.e., between Milepost Nos. 268.6 and 264.1. (Petition at 72). Incredibly, SJVR's own witness was not aware that service to TFF at Lindsay is provided from the north via Exeter, and that the trackage south of Lindsay is not connected to the national rail system (i.e., it is stub-ended) Indeed, as noted above, the latter line is undergoing abandonment.

SJVR's cost witness states that the rail line proposed for abandonment is excepted track (Petition at 72) However, SJVR's engineering witness states that the line does not require rehabilitation, and can be operated as FRA Class I track. (Petition at 63). There is no reconciliation of that inconsistent testimony

Key elements of SJVR's cost testimony are unsupported. Thus, there is no evidence to support SJVR's contention that switching at Lindsay takes one hour. (Petition at 72) If SJVR were correct that it transports one car at a time, switching would take much less time than that. Nor is there any support for SJVR's contention that all traffic at Lindsay moves one car at a time.

*(Id.)*. Appendix 2 is a recent photograph showing six cars at a time on TFF's sidetrack. Indeed, as in the case of maintenance costs, there is no support in the Petition for any of the operating unit costs and service units referred to at page 72 of the Petition. That, too, requires a formal abandonment application.

4. **Summary re Operating Profitability**

As identified in the foregoing, legitimate issues exist in regard to practically every element of revenues and costs. It certainly cannot be found on any rational basis that it is established in the Petition that rail line revenues are minimal compared to the cost of operating the line. That being the case, the long line of precedent cited above requires denial of the Petition

5. **Opportunity Cost**

The opportunity cost posited by SJVR is entirely unsupported. There is not an iota of support anywhere in the Petition for any of the values of track materials and associated costs that are listed at page 68 of the Petition. A number of those values and costs are highly suspect. It seems highly unlikely, for example, that the rail line would be classified as excepted track (Petition at 72) if, as alleged, the majority of track in the line is composed of heavy 112-pound rail, and more than half the crossties are in good enough condition not to be scrapped. (*Id.* at 68) SJVR assigned costs to remove 10 crossing signals. (*Id.*). However, SJVR has stated that there are 17 crossing signals on the line. (*Id.* at 63). No costs were assigned for disposal of 15,795 scrap crossties. (*Id.* at 68)

Even if SJVR's opportunity cost had been adequately supported, it would not, by itself, warrant abandonment of the line where, as here, continued operation of the line has not been

shown to be unprofitable, and abandonment would seriously harm local interests. That was made clear in *Southern Pacific Transp. Co. v ICC*, 871 F.2d 838 (9<sup>th</sup> Cir. 1989), where the Court said (at 843):

Southern Pacific contends the ICC's decision is fatally flawed by the Commission's failure to calculate the value of Southern Pacific's opportunity costs. The Commission declined to resolve the discrepancy between the railroad's estimate and that of the County because it concluded that even if Southern Pacific's estimate was accurate, "those costs would not constitute a reason to grant the abandonment" . . . "Other factors, including the profitability of the line, lack of feasible alternative transportation service, and adverse impact on the community," the Commission concluded, "outweighed the opportunity cost . . .

The ICC was not required to resolve a subsidiary issue irrelevant to the ultimate outcome. (footnote omitted). Moreover, by treating Southern Pacific's estimate of opportunity costs as if it were correct, the Commission accorded it as much weight as the Commission could without treating it as dispositive, which the Commission could not do. "Opportunity cost is just one of the factors that must be taken into consideration in determining whether abandonment is justified. Merely because a railroad could earn greater revenue by investing its assets elsewhere does not mean that public convenience and necessity requires abandonment." *Cartersville Elevator, Inc. v. ICC*, 724 F.2d 668, 675 (8<sup>th</sup> Cir. 1984) (quoting *Burlington N R.R. Abandonment*, No. AB-6 (Sub-No. 104F) (ICC Jan. 29, 1982)).

**CONCLUSION AND REQUESTED RELIEF**

WHEREFORE, for the reasons stated, SJVR's Petition for Exemption should be denied without prejudice to the filing of a conventional abandonment application

Respectfully submitted,

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Protestants

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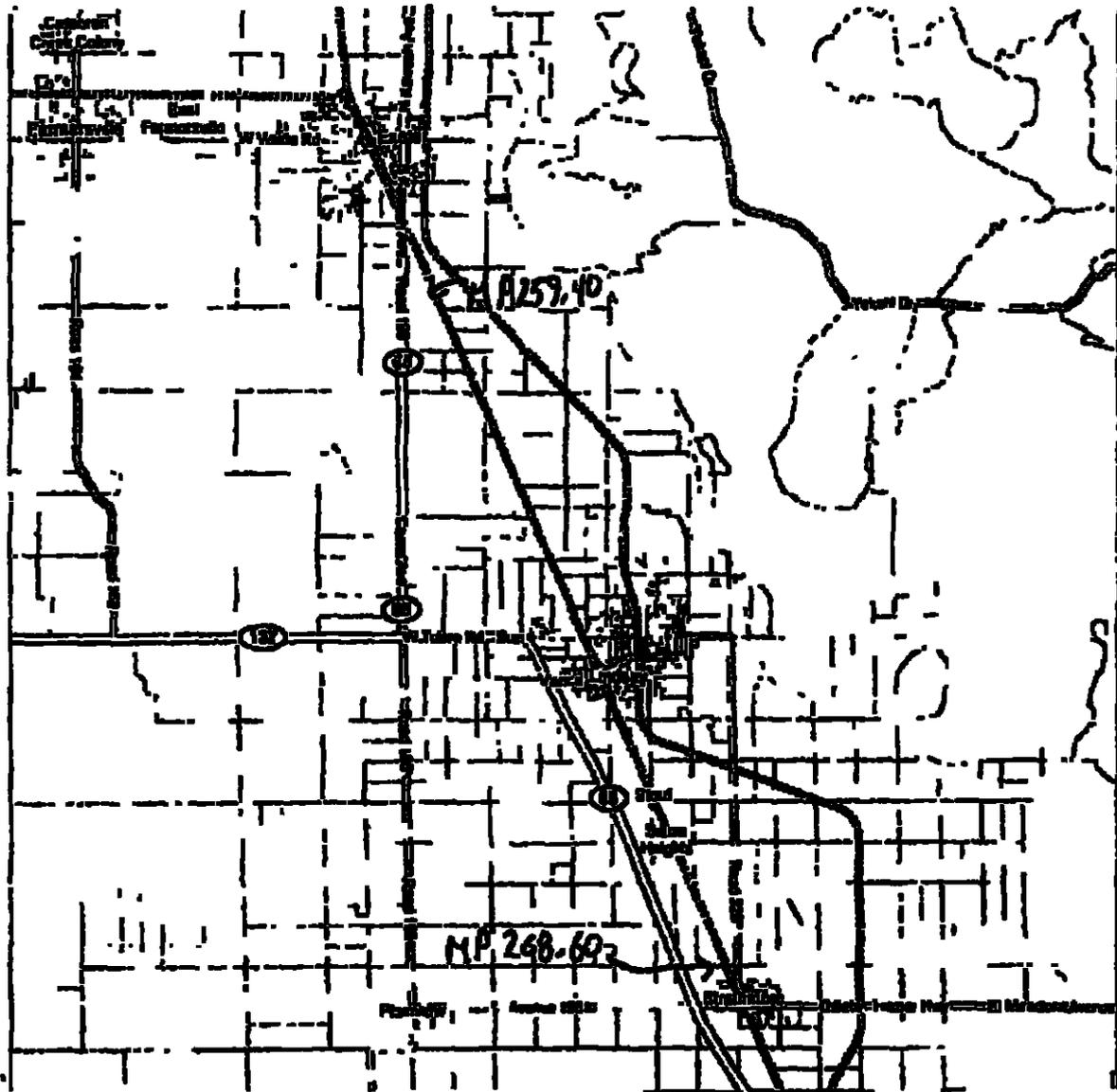
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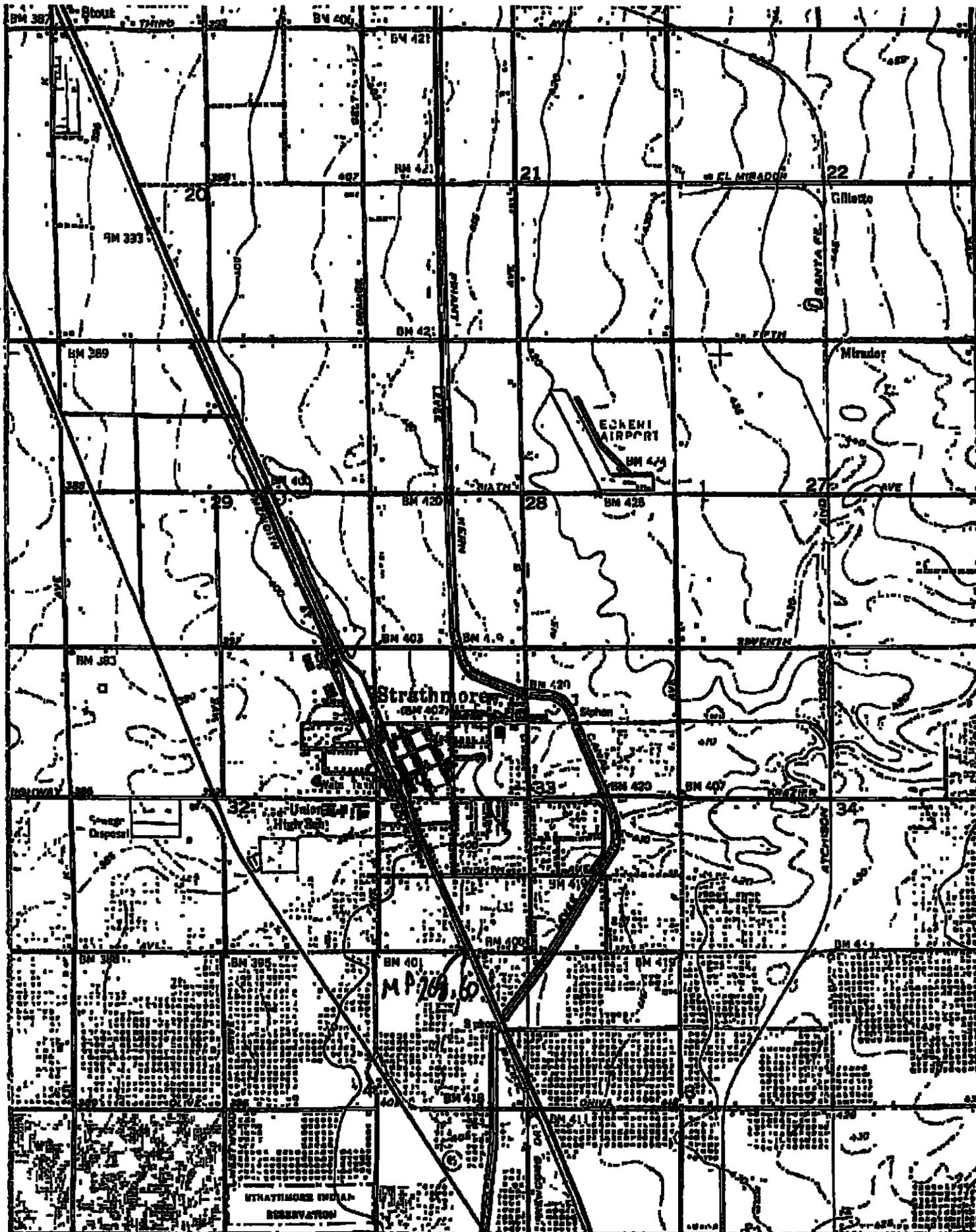
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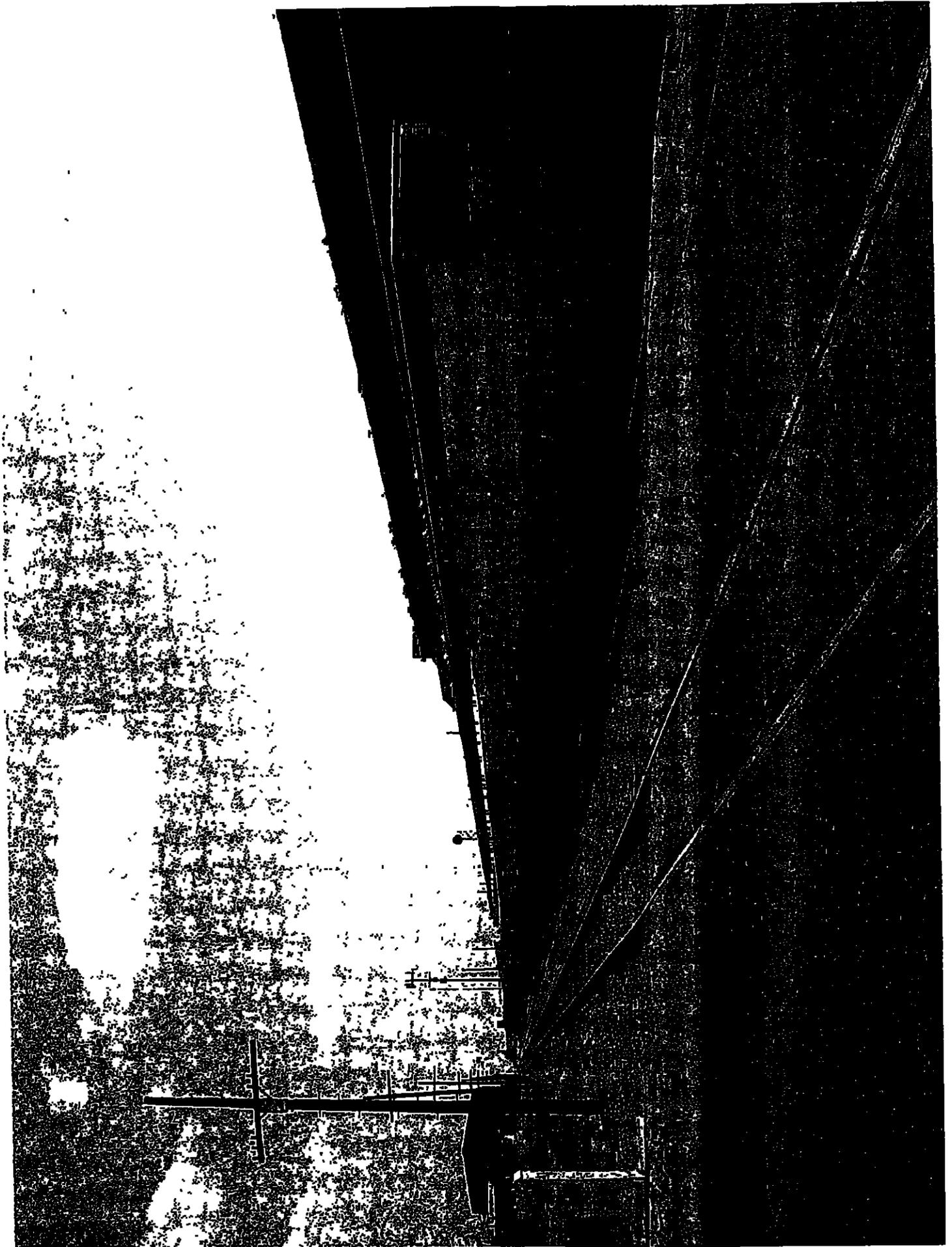
DATE FILED: April 8, 2008





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SCALE 1:24,000



**CERTIFICATE OF SERVICE**

I hereby certify that on April 8, 2008, I served the foregoing document, Reply In Opposition To Petition For Exemption, 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*, and by UPS overnight mail on Scott G Williams, Esq., Senior Vice President & General Counsel, Rail America, Inc., 5300 Broken Sound Boulevard, N W., Second Floor, Boca Raton, FL 33487.

*Thomas F. McFarland*

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