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November 4, 2009



BY HAND DELIVERY

The Honorable Anne K. Quinlan  
Acting Secretary  
Surface Transportation Board  
395 E Street S.W.  
Washington, DC 20423-0001

225974

Re: STB Docket No. 35260, Watco Companies, Inc. – Continuance in Control Exemption – Boise Valley Railroad, Inc.

Dear Acting Secretary Quinlan:

Enclosed for filing in the above-referenced matter are an original and 10 copies of the Reply of Watco Companies, Inc., to the Petition To Reject Exemption.

Please time and date stamp the extra copy of the Reply and return it with our messenger.

If you have any questions, please call me.

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Sincerely,

A handwritten signature in cursive script that reads 'Karl Morell'.

Karl Morell

Enclosures

BEFORE THE  
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35260

WATCO COMPANIES, INC.  
– CONTINUANCE IN CONTROL EXEMPTION –  
BOISE VALLEY RAILROAD, INC.

REPLY TO PETITION TO REJECT EXEMPTION



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Dated: November 4, 2009

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SURFACE TRANSPORTATION BOARD

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– CONTINUANCE IN CONTROL EXEMPTION –  
BOISE VALLEY RAILROAD, INC.



REPLY TO PETITION TO REJECT EXEMPTION

Watco Companies, Inc. (“Watco”), hereby replies in opposition to the Petition To Reject Watco’s Continuance in Control Exemption (“Petition”) filed with the Surface Transportation Board (“Board”) on October 15, 2009 purportedly by the Brotherhood of Maintenance of Way Employes Division (“BMWE”).<sup>1</sup>

**BACKGROUND**

On September 16, 2009, Watco filed its Verified Notice of Exemption, pursuant to 49 C.F.R. § 1180.2(d)(2), for Watco to continue in control of Boise Valley Railroad, Inc. (“BVR”) upon BVR’s becoming a Class III railroad. Concurrently, BVR filed a Verified Notice of Exemption, pursuant to 49 C.F.R. Part 1150, Subpart D—Exempt Transactions, to permit BVR to acquire by assignment of lease from Idaho Northern & Pacific Railroad Company the operating and lease rights over approximately 35.99 miles (not including yard track) of rail lines owned by Union Pacific Railroad Company (“UP”). Both exemptions became effective on October 16, 2009.

<sup>1</sup> On the cover page of the Petition, Mr. Collins indicates that he is an attorney for BMWE. Nowhere in the Petition, however, is there any indication that the Petition was filed on behalf of BMWE.

## REPLY

The relief sought by BMWWE is the rejection of Watco's Notice of Exemption in STB Finance Docket No. 35260. Yet, the Petition addresses the granting of exemptions from the provisions of 49 U.S.C. § 10902. Neither Watco nor BVR sought an exemption from the provisions of Section 10902. BVR, as a non-carrier, filed its Notice of Exemption pursuant to 49 C.F.R. Part 1150, Subpart D, which applies to acquisitions and operations under 49 U.S.C. § 10901. Watco, a non-carrier, which controls indirectly 21 Class III railroads, filed its Notice of Exemption pursuant to 49 C.F.R. § 1180.2(d)(2), which applies to transactions under 49 U.S.C. § 11323(a)(5) (control of a rail carrier by a person that is not a rail carrier but controls any number of rail carriers).

If a notice of exemption contains false or misleading information, the exemption either: (1) is void *ab initio*, with respect to notices filed under 49 C.F.R. Part 1150, Subpart D; or (2) will be summarily revoked by the Board, with respect to notices filed under 49 C.F.R. § 1180.2(d)(2). *See* 49 C.F.R. §§ 1150.32(c) and 1180.4(g)(1)(ii). BMWWE does not allege, much less demonstrate, that either BVR's notice of exemption or Watco's notice of exemption contains false or misleading information.

The exemption in STB Finance Docket No. 35260 became effective on October 16, 2009. Consequently, BMWWE's request that the exemption be rejected by the Board is moot. Where, as here, an exemption has become effective, a revocation request is treated as a petition to reopen and revoke. Therefore, under 49 C.F.R. § 1115.3(b), BMWWE must state in detail whether reopening is supported by material error, new evidence, or substantially changed circumstances. BMWWE has failed to address these standards much less introduce any evidence to warrant a finding favorable to BMWWE under these standards. To the extent that the Petition contains any

evidence, it all predates the filing of Watco's notice. BMW has also not demonstrated any changed circumstances or material error. Consequently, the Petition should be summarily denied for failure to address the criteria of Section 1115.3(b).

A petition to revoke an effective exemption is governed by 49 C.F.R. Part 1121 which, in pertinent part, requires a party seeking to revoke a notice of exemption to "provide all of its supporting information at the time it files its petition." 49 C.F.R. § 1121.3(c). The Petition, however, is devoid of any meaningful information addressing the statutory standard for revoking an exemption. Instead, the Petition is replete with unfounded, unsupported and totally irrelevant allegations.

The standard for revoking an exemption is whether regulation is needed to carry out the rail transportation policy of Section 10101. 49 U.S.C. § 10502(d). Requests to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted. *Minnesota Comm. Ry., Inc. – Trackage Exempt. – BN RR. Co.*, 8 I.C.C.2d 31, 35-36 (1991); Finance Docket No. 31617, *Chesapeake & Albemarle R. Co. – Lease, Acq. & Oper. Exempt. – Southern Ry. Co.* (not printed), served September 19, 1991; Finance Docket No. 31102, *Wisconsin Central Ltd. – Exempt. Acq. & Oper. – Certain Lines of Soo L.R. Co.* (not printed), served July 28, 1988.

The party seeking revocation of an exemption has the burden of proving that regulation of the transaction is necessary. *Id.* Here, BMW has simply come forward with unsupported and unsupportable assertions. Moreover, BMW seeks revocation on totally extraneous and irrelevant matters. Because BMW has submitted no evidence in support of its revocation request, it has failed to meet its burden of proof and its requested relief must be denied.

In addition to the above, granting BMWWE's request in STB Finance Docket No. 35260 would merely require Watco to file an individual petition for exemption under Section 10502 or an application for control of BVR under 49 U.S.C. § 11323(a)(5). Pursuant to the provisions of 49 U.S.C. § 11324(d), the Board would be required to grant the application or petition for exemption unless it finds that Watco's control of BVR: (1) is likely to substantially lessen competition, create a monopoly, or restrain trade "in freight surface transportation in any region of the United States"; and (2) "the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs." *Id.* BMWWE has failed to submit any evidence or allegations from which the Board could find that Watco's control of BVR would lessen competition, create a monopoly, or restrain trade. Consequently, even if BMWWE's allegations had some basis in fact, which they do not, the allegations are totally irrelevant to the statutory standard governing Watco's control of BVR. Consequently, granting BMWWE's request would serve no useful purpose. Watco would be forced to incur the significant expense of filing a petition for exemption or application. In all other respects, however, the parties and the Board would simply come full circle to the same result. It is inconceivable that BMWWE would be able to demonstrate that Watco's control of BVR would lessen competition, create a monopoly or restrain trade.

BMWWE argues that the Board must consider the Rail Transportation Policy ("RTP") in granting an exemption under 49 U.S.C. § 10502. In modifying the class exemption at 49 C.F.R. § 1180.2(d)(2), to include continuance-in-control transactions, the Board's predecessor, the Interstate Commerce Commission ("ICC") specifically considered and addressed the relevant provisions of the RTP. *See Rail Consol. Proc. – Con. In Cont. Of Nonconnecting Carrier*, 2 I.C.C.2d 677, 679 (1986). The ICC deemed relevant Sections 10101(2) and (7), "reduce

regulatory oversight over the rail transportation system and regulatory barriers to entry”; and Sections 10101(4), (5) and (9), “[ensure] the development and continuation of a sound rail transportation system to meet public needs, foster sound conditions in transportation, and [encourage] efficient rail management.”

One cannot cherry-pick provisions of the RTP in seeking revocation of an exemption as BMWWE advocates. Rather, the Board must focus “on the sections of the [RTP] related to the underlying statutory section from which the exemption is sought.” *City of Ottumwa v. STB*, 153 F.3d 879, 883 (8<sup>th</sup> Cir. 1998). *See also, Village of Palestine v. I.C.C.*, 936 F.2d 1335 (D.C. Cir. 1991) (“*Village of Palestine*”). Consequently, the only provisions of the RTP relevant to revoking Watco’s notice, are the provisions in the RTP addressing competition and restraints of trade. None of the BMWWE’s allegations fall within the provisions of the RTP relevant to this proceeding. For example, Section 10101(11) dealing with fair wages is not an appropriate consideration in a control proceeding. *Village of Palestine* at 1339.

Revoking the notice would be inconsistent with Sections 10101(2) and (7) since such action would unnecessarily increase Federal regulation and increase regulatory barriers to entry. Revoking the notice would also be inconsistent with Sections 10101(4), (5) and (9). Watco believes BVR can operate the UP leased lines more efficiently than the current operator thus developing a more sound transportation system, fostering sound economic conditions, ensuring effective competition and promoting efficient management of railroads.

Even if BMWWE’s allegations were relevant to the revocation of Watco’s notice, which they are not, the allegations are unsupported and unsupportable.

BMWWE implies that Watco should be treated differently than other short-line holding companies because it is the “largest short-line operator in the U.S.” Petition at 4. Watco is a

non-carrier holding company which indirectly controls 21 class III railroads which collectively comprise the largest private short-line operations. Genese & Wyoming, Inc., and RailAmerica, Inc., are publicly traded non-carrier holding companies that control class III and class II railroads which collectively are significantly larger than Watco's-controlled railroads. Moreover, Section 11323(a)(5) contains no limitations as to the number of rail carriers a non-carrier may control. Consequently, Watco should not be treated differently than other short-line holding company simply due to its size.

BMWE next claims that Watco should be treated differently because it "permits Class I carriers to access its track to haul substantial ton miles." Petition at 4. BMWE's contention is unsupported and simply untrue. The only significant Class I operations over mainline tracks owned or leased by a Watco-controlled carrier is BNSF Railway Company's ("BNSF") operations over Stillwater Central Railroad, Inc. ("Stillwater"). In any event, there is nothing unique about Class I railroads operating over short lines. As the Board well knows, Class I railroads often retain trackage rights or operating rights over rail lines that are either sold or leased to short lines. Also, Class I railroads operate over sections of rail lines owned or leased by short lines for purposes of interchange. This is a widespread and daily occurrence and it is hardly unique to the Watco-controlled carriers.

The derailment near Oklahoma City, OK of a BNSF train on tracks owned by Stillwater was an unfortunate occurrence which Watco does not take lightly. Ironically, BMWE fails to point out to the Board that the Stillwater tracks are maintained by Stillwater employees who are members of BMWE.

In an attempt to disparage the safety record of Watco-controlled carriers, BMWE cites to the Federal Railroad Administration's ("FRA") lists of Accidents In Descending Frequency By

Railroad. BMW's use of the FRA lists is highly misleading and inaccurate in a number of respects. The lists simply identify reportable train derailments, regardless of cause, and do not reflect injury statistics which are a much more important indicator of a carrier's commitment to safety, in general, and the safety of employees, in particular. Also, the lists are tabulated in descending order of reportable derailments without regard to the size of the railroad, number of employees, or man-hours worked. It is therefore not surprising that, in the words of BMW, the "worst of the worst" are in descending order: UP, BNSF, CSX Transportation, Inc. ("CSXT"), Norfolk Southern Railway Company ("NS"), Canadian National Railway Company ("CN"), Amtrak, and Kansas City Southern Railway Company.

With respect to the Group 3 railroads (railroads with less than 400,000 employee hours), Watco-controlled carriers do not constitute 6 of the top 18 positions, as BMW alleges, but 6 of the top 48. The top two listed Watco-controlled carriers, South Kansas and Oklahoma ("SKO") and Stillwater, are located in areas that experienced the Nation's worst flooding in 100 years in 2007, which significantly contributed to increased derailments. Indeed, SKO was named Shortline of the Year by Railway Age because of the way SKO handled and was able to recover from the flooding. A review of the Group 3 railroads demonstrates that short lines, including the Watco-controlled carriers, are safer than the Group 1 and 2 carriers. In 2008, the top 48 listed short lines had reportable derailments ranging from 17 to 0, with most having less than 5 derailments whereas the Group 2 railroads had reportable derailments of up to 37 and the Group 1 railroads had reportable derailments of up to 385.

The relative safety of the Watco-controlled carriers compared to other segments of the industry is best illustrated by the Reportable Personal Injury Ratio<sup>2</sup>:

Watco-Controlled Carriers:	1.33
ASLRRA Carriers <sup>3</sup>	3.13
U.S. Railroad Industry:	1.91
UP	1.47
CN	1.76
BNSF	1.78

As the above chart illustrates, the Watco-controlled carriers are significantly safer than the railroad industry as a whole as well as segments of the industry. Attached as Exhibit 1, is a graph which further illustrates that the Watco-controlled carriers were collectively safer than the ASLRRA member carriers and the U.S. Railroad Industry as a whole from 2004 through September 2009. The graph further illustrates that the Watco-controlled carriers have consistently improved their safety performance year-over-year and are now operating significantly below industry averages.

Watco's commitment to safety is further illustrated by the ASLRRA's safety Awards. In 2008, four Watco-controlled carriers won the Jake Award with Distinction and an additional seven were Jake Award winners. In 2007, three Watco-controlled carriers won the Jake Award with Distinction and an additional six were Jake Award winners. In 2006, four Watco-controlled carriers won the Jake Award with Distinction and an additional six won the Jake Award.

BMWE next makes the illogical argument that any railroad seeking federal grants or accepting federal loans has inadequate capital to fund its operations in a safe manner. Petition at

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<sup>2</sup> The information is derived from FRA and Occupational Safety and Health Administration data. The ratio is calculated by taking the number of reportable/recordable injuries times 200,000 and dividing by the number of actual manhours worked. The data for the Watco-Controlled Carriers is as of October 30, 2009, the data for the other carriers is as of July 2009.

<sup>3</sup> Carriers that are members of the American Short Line and Regional Railroad Association ("ASLRRA").

5-6. As the Board well knows, virtually the entire railroad industry, including Class I railroads, are seeking some form of federal funding to assist in necessary capital improvements.<sup>4</sup> Also, federal loans are no different than other debt financing only the rates are cheaper. Debt is a portion of virtually all railroads capital structure mix. Moreover, the cost of equity (13.17 percent) was approximately twice the cost of long-term debt (6.57 percent) for Class I railroads in 2008. See STB Ex Parte No. 558 (Sub-No. 12), *Railroad Cost of Capital – 2008* (slip op.) served September 25, 2009. Thus, maintaining a reasonable level of debt is financially prudent.

In summary, Watco is committed to safe operations as the above data demonstrates. Watco recognizes that by placing a priority on safety, it not only protects the employees of its controlled carriers and the communities served by the carriers but is also good for business. In any event, the safety matters raised by BMW are within the competent jurisdiction of FRA. FRA is more than capable of enforcing its safety rules and ensuring that railroads, including the Watco-controlled railroads, comply with the FRA rules. Also, the rail lines BVR will be leasing and operating are owned by UP and the lease agreement has specific provisions governing the maintenance of the lines. Consequently, BVR will be answerable to two higher authorities: FRA and UP.

In its typical hyperbolic fashion, BMW claims that “Watco has been sued and cited repeatedly for anti-union” conduct. Petition at 6. In support of this expansive assertion, BMW is able to muster but one example. As BMW correctly notes, the National Mediation Board

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<sup>4</sup> The U.S. Department of Transportation (“DOT”) has estimated that U.S. freight railroad demand will increase by 88 percent by 2035. A recent study commissioned by the Association of American Railroads estimates that the Class I railroads will have a \$39 billion short-fall of rail capacity funding to meet DOT’s projected demand. Private and government studies estimate that the short-line industry will need \$13 billion to bring their rail lines up to the necessary level of efficiency. In order to gap the projected revenue shortfalls, the short-line industry is supporting an extension of the Short Line Tax Credit and the Class I railroads are supporting investment tax credits.

,"(NMB") ordered a re-run election because NMB found that the laboratory conditions required for a fair election were tainted in *In the Matter of the Application of the Brotherhood of Locomotive Engineers and Trainmen*, 33 NMB No. 24 (2006). BMW, of course, fails to point out that the NMB subsequently dismissed the case. See *In the Matter of the Representation of Employees of Stillwater Central Railroad, Inc.*, 33 NMB No.32 (2006). Watco also concedes that it lost a jury award to three former employees of Stillwater. Watco strongly disagrees with the verdict since one of the employees was terminated for insubordination and the other two employees resigned. Nevertheless, Watco accepted the verdict and views the situation as a lesson learned. Watco does not believe that it made any mistakes in the Stillwater representation dispute. But even if mistakes were made, this is an isolated situation. Since 2003, Watco-controlled carriers have had approximately 11 other elections and to our knowledge not one of those elections resulted in a complaint with the NMB.

Relying solely on the Stillwater representation dispute, BMW takes exaggeration to new heights: claiming that Watco lacks "respect for organized labor" and habitually flaunts state and federal wage statutes.<sup>5</sup> As noted above, there have been no other complaints filed with the NMB. Watco believes the wages paid by its carriers are fair: they may not be the highest but they certainly are not the lowest in the industry. Most importantly as to this proceeding, the wages paid are in full compliance with state and federal wage statutes.

Best illustrating the shallowness of its allegations is BMW last absurd argument: that Watco attempted to hoodwink the Board in STB Finance Docket No. 35064, *Watco Companies, Inc. and Watco Transportation Services, Inc. – Continuance in Control Exemption – Michigan Central Railway, LLC* (not printed), served December 10, 2007. As the Board well knows, that

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<sup>5</sup> The Stillwater dispute was about union representation and not about wages. Yet the only support BMW can muster for allegations regarding Watco wages is the Stillwater dispute.

transaction was denied because NS retained too much control over Michigan Central Railway, LLC ("Michigan Central") and not because of any conduct by Watco or Michigan Central.

### CONCLUSION

Watco respectfully urge the Board to deny BMW's Petition. The Petition falls woefully short of demonstrating that regulation of the transactions is necessary.

Respectfully submitted,



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Dated: November 4, 2009

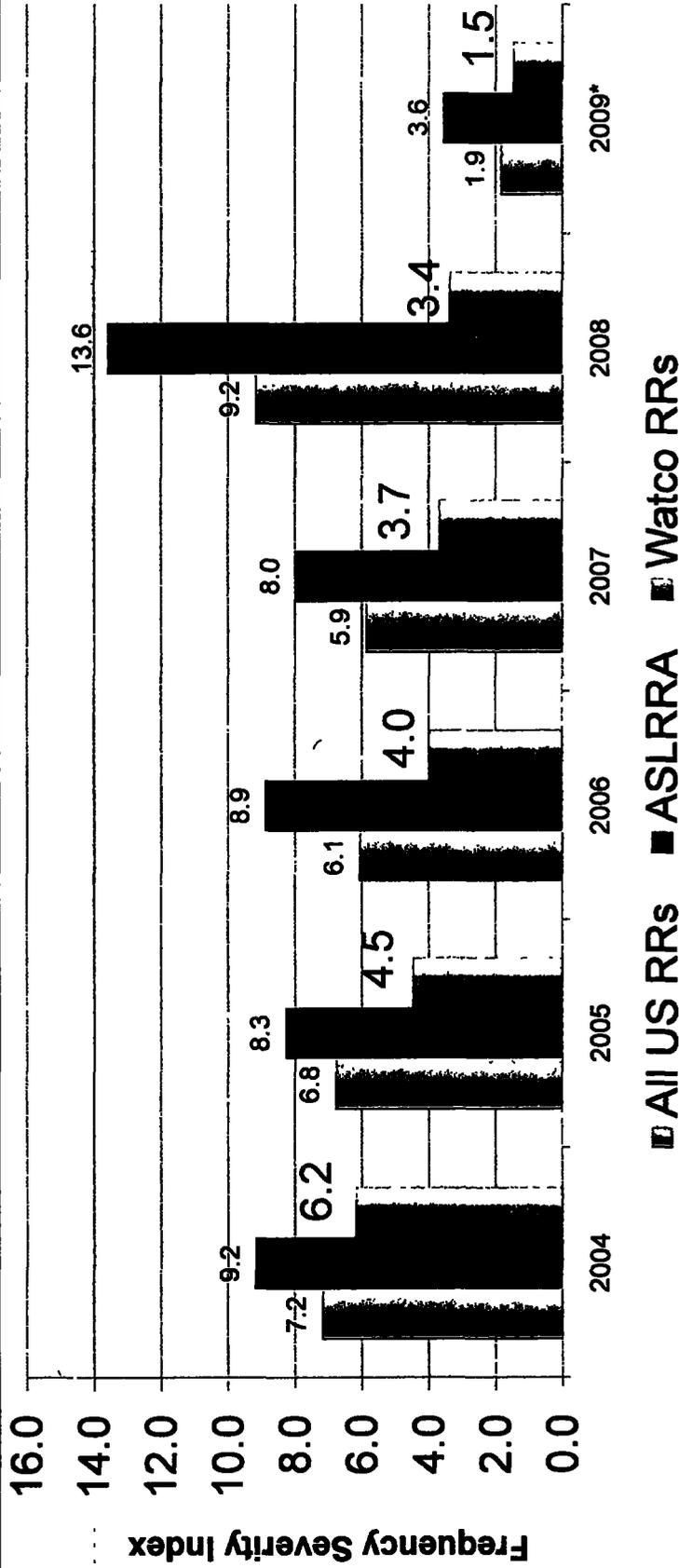
**CERTIFICATE OF SERVICE**

I hereby certify that on this 4<sup>th</sup> day of November, 2009, I have caused a copy of the foregoing Reply to be served on all parties of record by first class mail.

  
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Karl Morell

# Watco Safety Commitment



\*2009 data as of 9-27-09, ASLRRRA data as of March 09'