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June 15, 2010

The Honorable Ann K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

ENTERED
Office of Proceedings

JUN 16 2010

Part of
Public Record

Re: FD 35304
REPLY OF THE SAN FRANCISCO BAY
RAILROAD TO THE MOTION OF THE
CITY OF VALLEJO FOR LEAVE TO
INTERVENE AND TO FILE A REPLY TO
A REPLY

Dear Acting Secretary Quinlan:

Enclosed please find the original and 11 copies of the reply of the San Francisco Bay Railroad-Mare Island to the motion of the City of Vallejo California for leave to intervene and to file a reply to a reply. Due to issues with our computer system today we cannot provide this material on a disk.

Thank you for your attention to this matter.

Very truly yours,

John F. McHugh

cc: Karen E. Escalante
Morrison & Forrester LLP
2000 Pennsylvania Ave. N.W.
Washington, D. C. 20006

Charles A. Spitulnik
Kaplan Kirsch & Rockwell, LLP
1001 Connecticut Ave. N.W.
Washington, DC 20036

Frederick G. Soley
Vallejo, CA City Attorney
Vallejo City Hall
555 Sanda Clara St., 3rd Floor
Vallejo, CA 94590

BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, DC

FINANCE DOCKET NO. 35304



SAN FRANCISCO BAY RAILROAD-MARE ISLAND
NOTICE OF EXEMPTION-CALIFORNIA NORTHERN RAILROAD

REPLY OF THE SAN FRANCISCO BAY RAILROAD TO THE MOTION
OF THE CITY OF VALLEJO FOR LEAVE TO INTERVENE AND TO
FILE A REPLY TO A REPLY

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FILE A REPLY TO A REPLY

On June 8, 2010 The City of Vallejo, (the City) many months late, filed this motion to intervene and to file a reply to a reply. It is of note that the railroad's reply is based upon the motion found on the Board's web page, no papers have been served on the railroad or its representative as of June 15, 2010. The City seeks to reply to the San Francisco Bay Railroad-Mare Island's defense of its Notice of Exemption. The application is superfluous.

The Notice of Exemption here in issue involves the operation of a line of railroad of about 8 miles between Flosden Junction in Vallejo, California, and the end of useable track on Mare Island, also in that city. The line and a naval facility on the Island were acquired by the City in 2002 and on the

same day the City conveyed the naval facility with the portion of the railroad thereupon to Lennar Mare Island, a private developer. The City retained the line from the Island's edge to Flosden, Jt. The City asserts that although the California Northern Railroad was serving several private customers in addition to the Navy before the City acquired title to the rail line, the line was a spur and not a common carrier because no entity ever received authority to operate the line from the Surface Transportation Board or its predecessor, the Interstate Commerce Commission¹. In *American Orient Express Petition for a Declaratory Order* FD 34501 (Dec. 27, 2005), this Board ruled that where an entity is providing rail transportation services to the public it is a rail carrier notwithstanding its not having sought operating authority. The California Northern was clearly providing such service on this line and continued to do so from 2002 through 2008 when that service was terminated by Lennar Mare Island.

The City dismisses the significance of this pre acquisition service, as the number of non-Navy customers was small. In a closely parallel situation, the Tap Line cases, *U.S. v. Louisiana & P.R. Co.* 234 U.S. 1, 25,

¹ Petitioner, in its response to the Petition to Revoke Exemption, contested this assertion based upon the map and descriptions of lines included in the CNR's notice of exemption relating to its acquiring operating rights on this line, i.e. the inclusion of all spurs and branches in the application. *CFNR Operating Company Inc. Inc.-Acquisition and Operation Exemption-Parksiera Corp.* FD 34199 9April 23 20020 (see Reply page 14).

(1914) the Supreme Court explained how a private mill line evolves into a common carrier:

While these logging roads are almost or quite without exception mill propositions at the outset, built exclusively for the purpose of transporting logs to the mill, they soon reach a point where they engage in other business to a greater or less extent. As the length of the road increases, as the lumber is taken off and other operations obtain a foothold along the line, various commodities besides lumber are transported, and this business gradually develops until in several cases what was at first a logging road pure and simple has become a common carrier of miscellaneous freight and passengers. Almost all these lines, even where they are run as private enterprises, *26 do more or less outside transportation, and it would be difficult to draw any line of demarcation between the logging road as such and the logging road which has become a general carrier of freight.'

In that case the Court held that: "It is the right of the public to use the road's facilities and to demand service of it, rather than the extent of its business, which is the real criterion determinative of its character." Id 24.

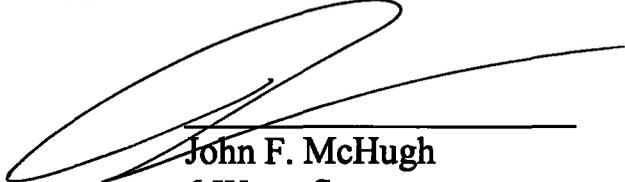
In *Groom & Associates, Inc and Lee K. Groome v. Greenville County Economic Development Corp.* NOR 42087-0 January 27, 2005 the Board held that any entity, including a governmental one, such as the City here, which acquired an active, i.e. un-abandoned, rail line, has the obligation to provide service on reasonable demand, i.e. as a residual common carrier.

Therefore, the Notice of Exemption properly characterized the City. This was a common carrier line from not later than 1996 when XKT Engineering Inc. became a non-Navy rail user on the island.²

The designation of the City as a residual common carrier is of no moment. Should the line become non-viable the San Francisco Bay Railroad-Mare Island must seek Board authority to cease operation or to abandon the line. Should the City so request, the railroad will include the City in any such petition at no cost to the City and thus, solve any issue related to the City's residual status.

Therefore, the City's belated application should be denied.

Dated, New York, N.Y.
June 15, 2010

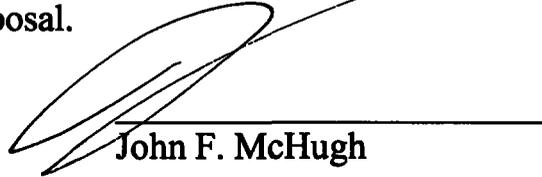


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² See Exhibit E, and H to San Francisco Bay Railroad –Mare Island Petition for a Declaratory Order-Lennar Mare Island, etc. FD 35360 (filed Mar. 15, 2010). Also see Exhibit F showing Alco Iron and metal becoming a customer in 1997.

VERIFICATION

John F. McHugh verifies that he is the attorney for the San Francisco Bay Railroad-Mare Island and is authorized to verify the facts set forth above based upon my knowledge of this matter. The facts asserted are true based upon the documents at my disposal.



John F. McHugh

Affidavit of Service

State of New York

ss:

County of New York

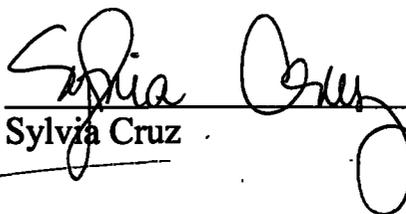
Sylvia Cruz being first duly sworn deposes and says that on this 15th day of June, 2010 I served a copy of this Reply of the San Francisco Bay Railroad-Mare Island to the Petition to Revoke Exemption upon:

Karen E. Escalante, Esq.
Morrison & Forrester LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006

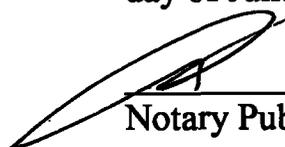
Charles A. Spitulnik, Esq.
Kaplan Kirsch & Rockwell, LLP
1001 Connecticut Ave., N.W.
Washington, DC 20036

Frederick G. Soley, Esq.
Vallejo California City Attorney
Vallejo City Hall
555 Santa Clara St., 3rd Floor
Vallejo, CA 94590

all by Federal Express.


Sylvia Cruz

Sworn before me this 15th
day of June, 2010


Notary Public

JOHN FRANCIS McHUGH
Notary Public, State of New York
No. 31-4886140
Qualified in New York County
Commission Expires February 2, 2014