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STB FINANCE DOCKET NO. 35296

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ANTHONY MACRIE – CONTINUANCE IN CONTROL EXEMPTION – NEW JERSEY SEASHORE LINES, INC.

STB FINANCE DOCKET NO. 35297

NEW JERSEY SEASHORE LINES, INC. – OPERATION EXEMPTION – CLAYTON COMPANIES, INC.

NOTICE OF INTENT TO PARTICIPATE AS A PARTY OF RECORD
COMMENTS

1. **Notice is herewith given that James Riffin ("Riffin" or "Protestant") intends to participate as a party of record in the above entitled proceeding.** All documents, filings or decisions in the above entitled case should be served on Riffin at:

James Riffin
1941 Greenspring Drive
Timonium, MD 21093
(443) 414-6210

2. Riffin, pursuant to the applicable regulations of the Surface Transportation Board ("STB" or "Board") herewith files his Comments on New Jersey Seashore Lines, Inc.'s Operation Exemption ("Exemption") to operate 13 miles of rail line in Ocean and Burlington Counties, New Jersey, which Exemption is the subject of the above entitled cases, and states:

BACKGROUND INFORMATION

3. On September 10, 2009, in STB Finance Docket No. 35296, Anthony Macrie, ("**Macrie**") a noncarrier individual, filed a verified notice of exemption to continue in control of Cape May

Seashore Lines, Inc. ("**CMSL**"), an existing Class III carrier, and its corporate affiliate New Jersey Seashore Lines, Inc. ("**NJSL**"), upon the latter becoming a common carrier. NJSL concurrently filed a verified notice of exemption pursuant to 49 CFR 1150.31 in STB FD No. 35297 to operate a line of railroad that extends between milepost 66.0 at Lakehurst, Borough of Lakehurst, Ocean County, NJ and milepost 79.0 at Woodmansie, Woodland Township, Burlington County, NJ ("**Line**").

4. In the parties' pleadings, they stated that: (A) Consolidated Rail Corporation ("**Conrail**") abandoned the line, referencing Interstate Commerce Commission ("**ICC**") Docket No. 167 (Sub-No.741N), Decided March 6, 1985; (B) Clayton Companies, Inc. ("**Clayton**"), made an Offer of Financial Assistance ("**OFA**") to acquire the Line; (C) Clayton asked the ICC to set the terms and conditions; (D) Clayton failed to notify the ICC that it agreed to accept the terms set by the ICC, within 10 days after the ICC set the terms; (E) the ICC considered Clayton's OFA as being withdrawn, since Clayton had failed to notify the ICC that it agreed to accept the terms set by the ICC; (F) in the March 6, 1985 Decision, the ICC granted Conrail authority to abandon the Line; (G) on **December 27, 1985** Conrail and Clayton executed an agreement whereby Conrail agreed to convey title to the Line to Clayton, to be used as a private industry track; (H) Clayton contracted with Ashland Railway, Inc. ("**Ashland**") to operate the line for a period of 10 years, **as a contract carrier**; (I) NJSL proposes to operate the Line as a common carrier.

5. In a Decision served on September 25, 2009, the STB directed Macrie and NJSL to serve a copy of the Decision on Clayton, and to show cause why Clayton need not seek acquisition authority.

6. On October 14, 2009, Macrie and NJSL filed their Answer. Appended to the Answer were **unsigned** copies of operating agreements between Clayton and Ashland and between Clayton and NJSL. Macrie and NJSL argued that because the ICC had granted Conrail authority to abandon the Line, the ICC was divested of jurisdiction over the Line as of the ICC's March 11, 1985 decision date. Consequently, when Clayton acquired the Line on December 27, 1985, Clayton did not need authority to acquire the Line.

COMMENTS

7. **Riffin's interest:** As the Board knows, Riffin and Strohmeyer have submitted to the Board an OFA to purchase a portion of the Lehigh Valley Line in Jersey City, NJ. See AB 167, Sub No. 1190. On October 1, 2009, then again on October 9, 2009, John Heffner, counsel for Macrie and NJSL, filed letters with the Board, wherein Mr. Heffner stated:

> "Any statement or implication by Mssrs. Strohmeyer and Riffin, that Mr. Macrie or his two companies are in any way cooperating or working with them is totally false ... ." 10/1/09 letter.
>
> "NJSL does not have and does not seek a relationship with either of you." 10/9/09 letter.

8. Were the Board to grant NJSL authority to operate the Line as a common carrier, NJSL would, as a part of its common carrier obligations, be required to "cooperate" with Riffin and Strohmeyer, in the event that Riffin and Strohmeyer were granted authority to acquire the Lehigh Valley Line, and Clayton decided it wanted to ship its product to Riffin and Strohmeyer's proposed transload facility. Were the Board to grant NJSL authority to operate as a common carrier, with the proviso that NJSL could with impunity prohibit / impede shipments to Riffin and Strohmeyer's transload facility, that would adversely affect Riffin and Strohmeyer. Consequently, given the express declaration of NJSL that it would not "cooperate" with Riffin and Strohmeyer, Riffin and Strohmeyer would argue that they have a property interest in the outcome of this proceeding, and would further argue that any grant of authority to NJSL should include the admonition that NJSL must deal with all shippers and carriers indiscriminately.

9. Riffin has a second interest in the outcome of this proceeding: As will be discussed below, whatever decision the Board renders, will set a precedent, which would, if not distinguished, apply to Riffin in future proceedings (particularly Cockeysville and Allegany County, and perhaps even Jersey City).

10. **Riffin's position: Riffin supports NJSL's Operation Exemption, and would ask that the Board grant the requested exemption.**

ISSUES

11. There are a number of issues that Riffin believes the Board should resolve prior to granting NJSL authority to operate the Line. Resolving these issues now will lessen the probability that NJSL's exemption will be successfully attacked at some future date on the grounds that it contained 'false and misleading information.'

12. **Line of railroad or private industry track:** Mr. Heffner argued that the line was a private industry track. To support this argument, he provided the Board with a copy of the ICC's March 11, 1985 decision, which granted Conrail authority to abandon the Line. While the ICC's decision did grant Conrail authority to abandon the Line, abandonment authority is permissive, not mandatory, and does not occur without some definitive indication of an intent to abandon, and some form of abandonment action. Generally this intent to abandon can be deduced from actions by the carrier: Removal of the rails, crossties, infra structure, crossings. The filing of a notice of consummation of abandonment. In the instant case, none of this occurred. Shortly after the ICC granted Conrail authority to abandon the Line, Conrail sold its interest in the Line to Clayton. Clayton then contracted with an existing carrier, Ashland Railway, Inc., a Class II carrier, to operate the Line. Ashland Railway then did in fact operate the Line, moving railcars loaded with Clayton's sand, from Woodmansie to Lakehurst.

13. What is unknown, is did Ashland Railway transport any railcars for any other shipper, or hold itself out as being a common carrier on the Line. If Ashland Railway transported railcars for any other shipper, or held itself out as a common carrier on the Line, then that would support the premise that the line was not in fact abandoned. And if the line was not in fact abandoned, then it would still be a line of railroad.

14. Consequently, Riffin would argue that the Board should address the issue of whether the trackage is a line of railroad, or private trackage. If the Board finds that the trackage is a line of railroad, then NJSL could move to amend its NOE, asking for authority to operate an existing line of railroad. Clayton then could seek belated authority to acquire the Line. This is what happened in *General Railway Corp., d/b/a Iowa Northwestern Railroad – Exemption for*

Acquisition of Railroad Line – In Osceola and Dickinson Counties, IA, FD No. 34867, Served June 15, 2007.

15. Input on this point from Ashland Rail**way** could help resolve this unknown. Unfortunately, the Board did not order NJSL to serve a copy of the Board's September 25, 2009 decision on Ashland Rail**way**. In a telephone conversation between Jane and Eric Strohmeyer on Friday, October 16, 2009, Mr. Strohmeyer learned that David Crane, the owner of Ashland Railway, recently passed away, and that Ashland Rail**way** was not aware of this proceeding. In addition, Jane had no immediate recollection of the details of Ashland Rail**way**'s operation of the Line.

16. It should be noted at this time that Riffin has emphasized the word "**way**" when referring to Ashland Rail**way**. This is because on January 30, 2007, David Crane filed a Notice of Exemption ("**NOE**"), see FD 34986, on behalf of Ashland Rail**road**, Inc., a **non-carrier**, to acquire and operate a line of railroad in Freehold, New Jersey, and concurrently filed a Continuance and Control Exemption, see FD 34987, seeking authority to control more than one line of railroad. Ashland Rail**way** is an existing Class II railroad, with a line of railroad in Ohio. Ashland Rail**road** was a non-carrier that sought authority to become a carrier. (In a decision served on August 14, 2007, the Board rejected Ashland Rail**road**'s NOE and David Crane's Continuance in Control Exemption.)

17. Reference to the filings in FD 34987 would suggest that Ashland Rail**way** did in fact hold itself out as a common carrier on the Line. In the Continuance in Control Exemption filed on January 30, 2007, John K. Fiorilla (the same Mr. Fiorilla whose comments are the subject of AB 167 Sub No. 1190), made the following representations:

> "Crane is an individual who currently owns the stock and controls ASRY [Ashland Rail**way**], a Class II carrier which operates in Ohio and **has operating rights in New Jersey**. ASRY **interchanges** with Norfolk Southern Railroad in Mansfield, Ohio, with CSX Transportation Company at Willard, Ohio and with the Wheeling and Lake Erie Railway Company at Plymouth, Ohio. In **New Jersey** ASRY **interchanges** with Consolidated Rail Corporation on behalf of CSX Transportation Company and Norfolk Southern Railroad Company **at Lakehurst, NJ**. Crane has created a new company, the

Ashland Rail**road**, Inc. (A New Jersey Corporation) which has filed a Notice of Exemption to operate trackage in the Township of Freehold, Monmouth County, New Jersey which will **interchange** with Consolidated Rail Corporation at Freehold on behalf of CSX Transportation Company and Norfolk Southern Railroad." P. 4 of Ashland Railway's January 30, 2007 filing. (Emphasis added.)

18. The word "interchange" connotes the exchange of railcars between common carriers. If Ashland Rail**way** was merely providing switching services on a private line, it would have been more appropriate to describe the exchange of railcars at Lakehurst, as Ashland Rail**way** "**placing / removing railcars at the turnout**, after removal / placement of railcars on Clayton's private spur by Conrail."

19. In a February 21, 2007 filing by Conrail in FD 34986 and 34987, Conrail made the following statements:

> "Similarly, on page two of the Crane NOE, Crane states that 'Crane has created a new company, the Ashland Railroad, Inc. (A New Jersey Corporation) which has filed a Notice of Exemption to operate trackage in the Township of Freehold, Monmouth County, New Jersey which will **interchange** with Consolidated Rail Corporation at Freehold on behalf of CSX Transportation Company and Norfolk Southern Railroad.'
>
> Please be advised that to date Conrail has no agreement with ASRR [Ashland Rail**road**] or Crane to provide **interchange** service as stated in the NOEs. In fact, Conrail has not had conversations of any kind with ASRR or Crane regarding matters that are the subject of these NOEs.

20. Conrail's statements are technically correct, for as of that date, Conrail did not have an interchange agreement with Ashland Rail**road** at the **Freehold** location. What is unsaid, is whether Conrail had an **interchange agreement**, or a **private sidetrack agreement** with Ashland Rail**way** / Clayton, at Lakehurst, NJ.

SIGNIFICANCE OF LINE VS PRIVATE TRACK

21. At this point, the reader may be wondering what is the significance of whether the track is a line of railroad or private track. All of the grade crossings at public highways, and many of the grade crossings at private roads, have been removed. If the line is private track, then

replacing these grade crossings would constitute "**new construction.**" Because these grade crossings have been removed, the line is composed of many disconnected segments. If the Board has lost jurisdiction over the Line, then neither NJSL nor Clayton would have the **federal right** to cross any of the public highways, nor would it have the **federal right** to cross any of the private roads. In addition, Clayton would have lost its **federal right** to prevent New Jersey from taking title to the real estate underlying every highway crossing, and would have lost its **federal right** to prevent private landowners from acquiring via adverse possession, title to the right-of-way where the private landowners' road crosses the right-of-way. [The Line was last used circa 1987, or more than 20 years ago. It does not appear that Clayton has exercised its right to exclusive dominion and control over these crossings-portion of its right-of-way. Under the Doctrine of Adverse Possession, title to these crossing would have passed to those exercising dominion and control over these crossings.]

22. If the line is found to be a private line, then Clayton would be precluded from utilizing the preemptive reach of 49 U.S.C. 10501(b), to preempt the jurisdiction and regulatory authority of the New Jersey Pine Barrens Commission with regard to reinstalling the grade crossings, and with regard to removing the trees that have grown in the right-of-way.

23. If the line is found to be a private line, then the State of New Jersey, and local governments, could prohibit Clayton from installing grade crossings at all highway crossings, or could make unreasonable demands regarding any crossings that would be permitted. Public hearings may be required. Environmental impact statements could be demanded. Clayton could be compelled to install grade-separated crossings, all at Clayton's expense.

24. If the Line is still a line of railroad, then all of these uncertainties would vanish. Riffin would argue that Clayton would have the absolute right to clear its right-of-way and to reinstall all grade crossings. The only question left would be who has the financial obligation to pay for reinstalling the grade crossings? New Jersey? Local Governments? [Presumably, the crossings were removed by those maintaining the highways. Since each removal of each grade crossing would constitute an unauthorized abandonment of a line of railroad, each entity could be compelled to restore that which it destroyed without Board authorization.]

25. **Riffin's additional interest:** As the Board is aware, many of the infirmities noted above have occurred on Riffin's Allegany County line, and on the Cockeysville line. [Crossings have been removed without Board authority. Riffin has argued that maintenance of his Allegany County line is not subject to local regulation.] How the Board treats the restoration of crossings / maintenance of Clayton's right-of-way, will directly impact Riffin's legal right to restore crossings removed / maintain his right-of-way.

CONCLUSION

26. WHEREFORE, Riffin would ask that the STB:

A. Address the issue of whether the trackage is a line of railroad, or private track.

B. If the Board finds that the trackage is a line of railroad, find that:

a. Clayton has the absolute right to reinstall all grade crossings that were removed;
b. The entity that unauthorizedly removed each grade crossing, has the legal obligation to pay for the reinstallation of the grade crossing;
c. Clayton has the absolute right to remove all vegetation from its right-of-way, free from any local or State regulation;
d. Clayton has the absolute right to rehabilitate its tracks, including all necessary grading / filing;

C. Grant NJSL authority to operate the trackage as a common carrier, without discriminating against any shipper or carrier;

D. Grant Clayton an exemption to acquire the Line;

E. Find that Clayton has a residual common carrier obligation;

F. Direct NJSL to serve a copy of the Board's decision on Ashland Railway, Inc.

27. I hereby certify under the penalties of perjury that the above is true and correct to the best of my knowledge and belief.

Respectfully submitted,

James Riffin

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of October, 2009, a copy of the foregoing Notice of Intent to Participate as a Party of Record / Comments, was mailed via first class mail, postage prepaid, to John Heffner, Ste. 200, 1750 K Street NW, Washington, DC 20006; Fritz Kahn, 8th Floor, 1920 N St NW, Washington, DC 20036-1601; Ashland Railway, Inc., 1 Village Square, Logan Square, New Hope, PA 18938; William Clayton, Jr., P.O. Box 3015, Lakewood, NJ 08701.

James Riffin

Before the
Surface Transportation Board

Finance Docket No:

FD-34987

In the Matter
of
G. DAVID CRANE
Continuance in Control Exemption
ASHLAND RAILWAY, INC.

VERIFIED NOTICE OF EXEMPTION
PURSUANT TO 49 C.F.R. § 1180.2(d)(2)

G. David Crane ("Crane") hereby files this Verified Notice of Exemption under 49 C.F.R. § 1180.2(d)(2) to continue control of the Ashland Railway, Inc. (A Pennsylvania Company) ("ASRY") a Class II carrier, and to create, operate and control Ashland Railroad, Inc. (A New Jersey Company) (ASRR) a Class III carrier. Mr. Crane is the controlling stockholder of both ASRY and ASRR.

ASRR will not connect with ASRY and this control transaction is not part of a series of anticipated transactions that would result in such a connection and this control transaction does not involve a Class I carrier. Crane's continuance in control of ASRY is accordingly exempt under 49 C.F.R. § 1180.2(d)(2).

Pursuant to 49 C.F.R. § 1180.4(g), Crane submits the following information:

Section 1180.6(a)(1)(i)
Description of the Proposed Transaction

Crane is an individual who currently owns the stock and controls ASRY, a Class II carrier which operates in Ohio and has operating rights in New Jersey. ASRY interchanges with Norfolk Southern Railroad at Mansfield, Ohio, with CSX Transportation Company at Willard, Ohio and with the Wheeling and Lake Erie Railway Company at Plymouth, Ohio. In New Jersey ASRY interchanges with Consolidated Rail Corporation on behalf of CSX Transportation Company and Norfolk Southern Railroad Company at Lakehurst, N.J. Crane has created a new company, the Ashland Railroad, Inc. (a New Jersey Corporation) which has filed a Notice of Exemption to operate trackage in the Township of Freehold, Monmouth County, New Jersey which will interchange with Consolidated Rail Corporation at Freehold on behalf of CSX Transportation Company and Norfolk Southern Railroad.

intereg = com car
priv. siding = place cars not intereg.
= private side track Agmt vs. intereg. Agmt.

Crane intends to operate ASRY and ASRR as separate entities. Crane does not anticipate that ASRY and ASRR will connect or be part of a series of transactions to operate ASRY and ASRR as connecting carriers.

The full name and address of the applicant is:

G. David Crane
1 Village Square,
Logan Square
New Hope, PA 18938

Any questions concerning this Notice should be sent to Crane's representative at the following address:

John K. Fiorilla, Esq.
Capehart & Scatchard P.A.
8000 Midlantic Drive Suite 300S
Mt. Laurel, N.J. 08054
856-914-2054
jfiorilla@capehart.com

CONRAIL

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STB

February 20, 2007

VIA UPS Overnight

Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

218674

Re: STB Finance Docket No. 34986
Ashland Railroad, Inc. – Verified Notice of Exemption –
Notice of Lease and Operation of Rail Line
Freehold, Monmouth County, New Jersey

218675

STB Finance Docket No. 34987
G. David Crane - Continuance in Control Exemption –
Ashland Railway, Inc. – Verified Notice of Exemption

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Dear Mr. Williams:

Consolidated Rail Corporation ("Conrail") hereby submits the following comments regarding the above-referenced Notices of Exemption ("NOE") filed by Ashland Railroad, Inc. ("ASRR") (the "Ashland NOE") and G. David Crane (the "Crane NOE)" on January 30, 2007. On page four of the Ashland NOE, ASRR states that the "operation of 'the Line' and appurtenant transportation facilities will enable facility tenants and other shippers to receive inbound and originate outbound freight shipments from and to points throughout the United States and Canada via Consolidated Rail Corporation (Conrail) who will interchange traffic with ARC on behalf of both Norfolk Southern Railroad Company (NS) and CSX Transportation Company (CSX) at Freehold, N.J. ARC will maintain and operate 'the Line' provide switching and related rail services to facility tenants that utilize the terminal facilities, and effect the interchange and delivery of inbound and the origination and interchange of outbound line-haul rail shipments with NS and CSX via Conrail."

Similarly, on page two of the Crane NOE, Crane states that "Crane has created a new company, the Ashland Railroad, Inc. (a New Jersey Corporation) which has filed a Notice of Exemption to operate trackage in the Township of Freehold, Monmouth County, New Jersey which will interchange with Consolidated Rail Corporation at Freehold on behalf of CSX Transportation Company and Norfolk Southern Railroad."

Please be advised that to date Conrail has no agreement with ASRR or Crane to provide interchange service as stated in the NOEs. In fact, Conrail has not had conversations of any kind with ASRR or Crane regarding matters that are the subject of these NOEs.

Conrail requests that it be made a party of interest in these dockets.

Please time stamp the enclosed extra copy of this letter and return it to me in the enclosed self-addressed stamped envelope.

Should you have any questions, please contact the undersigned. Thank you for your consideration in this matter.

Very truly yours,

Jonathan M. Broder
V-P Law and General Counsel
Conrail
2001 Market Street, 8th Floor
Philadelphia, PA 19103
(215) 209-5020

cc: J. K. Fiorilla