

LAW OFFICE
THOMAS F. MCFARLAND, P.C.
208 SOUTH LASALLE STREET - SUITE 1890
CHICAGO, ILLINOIS 60604-1112
TELEPHONE (312) 236-0204
FAX (312) 201-9695
mcfarland@aol.com

235242

THOMAS F. MCFARLAND

December 27, 2013

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Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20024

Re: Docket No. AB-1087 (Sub-No. 1X), *Grenada Railway LLC -- Abandonment
Exemption -- in Montgomery, Carroll, Holmes, Yazoo, and Madison Counties, MS*

Dear Ms. Brown:

Hereby transmitted is a Motion For Rejection Of Petition For Exemption Of
Abandonment for filing with the Board in the above referenced matter.

Very truly yours,



Thomas F. McFarland
Attorney for Robert J. Riley

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BEFORE THE
SURFACE TRANSPORTATION BOARD

GRENADA RAILWAY LLC --)
ABANDONMENT EXEMPTION -- IN) DOCKET NO.
MONTGOMERY, CARROLL, HOLMES,) AB-1087 (Sub-No. 1X)
YAZOO, AND MADISON COUNTIES,)
MS)

**MOTION FOR REJECTION OF PETITION FOR
EXEMPTION OF ABANDONMENT**

ROBERT J. RILEY
1799 Greer Road
Coldwater, MS 38618

Protestant

THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street, Suite 1890
Chicago, IL 60604-1112
(312) 236-0204
(312) 201-9695 (fax)
mcfarland@aol.com

Attorney for Protestant

DATE FILED: December 27, 2013

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SURFACE TRANSPORTATION BOARD

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ABANDONMENT EXEMPTION -- IN)	DOCKET NO.
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**MOTION FOR REJECTION OF PETITION FOR
EXEMPTION OF ABANDONMENT**

Protestant Robert Riley (Riley)^{1/} hereby moves for rejection of a Petition for Exemption of Abandonment (Petition) filed by Grenada Railway LLC (GRYR) on December 17, 2013. For the reasons explained below, GRYR should be required to file an abandonment application if it continues to seek abandonment of the involved rail line.

OVERVIEW

Rejection is sought on the ground that, in view of serious issues regarding GRYR's intent to facilitate abandonment by discouraging traffic, application of the public convenience and necessity standard of 49 U.S.C. § 10903(d) and the Board's abandonment regulations for cross-examination at oral hearing in 49 C.F.R. § 1152.25(c)(6), and for mandatory submission of workpapers underlying revenue and cost data at 49 C.F.R. § 1152.22(b) and (d), are necessary to carry out the following rail transportation policies:

^{1/} Mr. Riley has participated actively in recent proceedings involving the rail line at issue. *See Grenada Railway LLC -- Acq. & Oper. Exempt. -- Illinois Central R. Co. and Waterloo Ry. Co.*, 2013 STB LEXIS 289 (FD No. 35247, et al., decision served September 10, 2013).

- (1) continuation of a sound rail system to meet the needs of the public and the national defense (49 U.S.C. § 10101[4]); and
- (2) encouragement of honest and efficient management of railroads (49 U.S.C. § 10101[9]); and
- (3) fostering effective competition between rail carriers (49 U.S.C. § 10101[5]).

Resolution of the following issues requires application of those conventional abandonment standards and procedures:

- (1) the purpose and effect of GRYR's lengthy embargo of rail service over the line; and
- (2) the purpose and effect of GRYR's 47-percent rate increase on southbound traffic over the line; and
- (3) the purpose and effect of GRYR's segmentation of abandonment of this main line that always has been operated as a through route; and
- (4) the utter lack of underlying support, explanation and workpapers for GRYR's revenue and cost testimony.

Thus, resolution of the overriding issues in this proceeding turns on GRYR's intent in embargoing; in exorbitantly increasing rates; in segmenting abandonment of a traditional through route; and in putting forth unsupported financial operating results.

It is difficult to prove intent by direct evidence. GRYR is not likely to acknowledge that its actions in the foregoing respects were intended to pave the way for abandonment of the rail line. Instead, intent must be inferred from circumstantial evidence. *See United States v. Hurley*, 755 F.2d 788, 790 (11th Cir. 1985); and *United States v. Arrendondo-Morales*, 624 F.2d 681, 684 (5th Cir. 1980) ("Because guilty knowledge is difficult to prove by direct evidence, surrounding circumstances may supply inferences of knowledge which adequately prove intent").

In order to determine GRYR's true intent in taking the foregoing actions, cross-examination at oral hearing and examination of underlying workpapers are absolutely essential. Cross-examination has often been referred to as "the greatest legal engine ever invented for discovery of truth." *See Lilly v. Virginia*, 527 U.S. 116 (1999) at 124, quoting renowned Professor Wigmore. Workpapers reflecting contemporary records can be relied on to refute unsupported and unexplained claims of revenues and costs.

Because cross-examination at oral hearing, adequate time for effective discovery, and examination of underlying workpapers are essential to determine whether GRYR's intent was to preordain abandonment, and because those critical tools are not available under accelerated exemption procedure, GRYR's Petition for Exemption is required to be rejected.

ARGUMENT

1. Cross Examination At Oral Hearing And Adequate Time For Effective Discovery Are Essential To Determine Whether GRYR's Lengthy Embargo Was Intended To Pave The Way For Abandonment

GRYR has argued extensively (Petition at 3-11) that its embargo was reasonable under the five-criteria test used by the Board^{2/} to determine whether a rail carrier has violated 49 U.S.C. § 11101(a) by failing to provide transportation on reasonable request. That is not the issue raised by this Motion. The Board has instituted a separate proceeding in FD No. 35247 (Sub-No. 1) to investigate that issue. *See Grenada Ry., LLC -- Acq. & Oper. Exempt. -- Illinois Central R. Co.*

^{2/} *See, e.g., Decatur County Comm's v. The Central R. Co. of Ind.*, 2000 STB LEXIS 575 at *14 (F.D. 33386, decision served September 29, 2000). The five criteria are:

- (1) length of embargo
- (2) cost of repair
- (3) traffic volume and revenues
- (4) intent of the rail carrier
- (5) financial condition of the rail carrier

and Waterloo Ry. Co., 2013 STB LEXIS 289 at *1 (FD No. 35247, et al., decision served September 10, 2013) embracing FD No. 35247 [Sub-No. 1]). That proceeding is pending.

The Board is not called upon here to determine whether or not GRYR failed to provide transportation on reasonable request. The controlling issue here is whether the purpose and effect of the lengthy embargo was to preordain abandonment of the rail line. Why did GRYR fail for so long either to repair the condition that gave rise to the embargo, or to seek approval of abandonment if repair was deemed to be uneconomic?

The facts and circumstances that bear on resolution of that issue are in the exclusive knowledge and possession of GRYR. Procedural due process requires that Protestants be afforded reasonable access to that matter through cross-examination at oral hearing and adequate time for effective discovery. Because those critical procedural tools are available in conventional abandonment procedure, but not in accelerated exemption procedure, GRYR's Petition for Exemption of Abandonment should be denied.

2. Cross-Examination At Oral Hearing And Adequate Time For Effective Discovery Are Essential To Determine Whether GRYR's Exorbitant Rate Increase On Southbound Traffic Was Intended to Preordain Abandonment

The lengthy embargo was not the only action taken by GRYR to discourage traffic over the rail line. Several months before the embargo took effect, GRYR increased rates on southbound traffic by 47 percent, from \$850 per car to \$1250 per car. When some southbound traffic continued to move over the rail line, GRYR imposed the embargo to shut off even that reduced traffic level.

As a result of the 47-percent increase in rates (and the embargo), substantial traffic was required to be routed northbound away from its destination before turning around at an off-line

junction to begin southbound transportation. GRYR attempts to make light of the effect of such rerouting (Petition at 9, “Such circuitous routings are not at all unusual”). On the contrary, away-from-destination routing that would result from abandonment caused the Board’s predecessor to require that an abandonment be processed under formal abandonment procedure, rather than under the class exemption for abandonment of out-of-service rail lines. *See Consolidated Rail Corp. -- Exempt. -- Aband. of the Weirton Secondary Track in Harrison and Tuscarawas Counties, OH*, 1989 ICC LEXIS 126 (Docket No. AB-167 [Sub-No. 1088X]). The ICC there said (at *15):

. . . (T)here are limits on this discretion (to route overhead traffic) where it can be proven that the rerouting is inefficient . . . Routing inefficiency harms carriers as well as shippers and harms the public interest generally.

The facts and circumstances that bear on GRYR’s intent in raising southbound rates by 47 percent are in GRYR’s exclusive knowledge and possession. Procedural due process requires that Protestants be afforded reasonable access to that information by means of cross-examination at oral hearing and adequate time for effective discovery. Because those critical tools are not available in accelerated exemption procedure, GRYR’s Petition for Exemption should be denied.

3. Cross-Examination At Oral Hearing And Adequate Time For Effective Discovery Are Essential To Determine Whether GRYR’s Intent In Segmenting Abandonment Was To Preclude Future Operation Of The Line As A Through Route In Competition With Canadian National Railway

Prior to its sale to GRYR, the rail line proposed for abandonment was part of one of two through routes of Canadian National Railway (CN) for north-south traffic between Memphis, TN and Jackson, MS. CN did not need nor want the second through route, but neither did it want that route to be operated by a competitor.

CN's solution to that situation was to sell one of those routes (i.e., the Southaven - Canton, MS rail line) to A&K Railroad Materials with the understanding that in due course A&K would abandon a segment of that rail line in order to preclude any potential competitor from acquiring and operating the entire through route in competition with CN. Such a scheme is patently anti-competitive, directly contrary to the rail transportation policy in favor of intramodal rail competition at 49 U.S.C. § 10101(5).

Details of that CN-A&K scheme are solely within the knowledge and possession of GRYR (except for CN). Cross-examination at oral hearing and adequate time for effective discovery are essential for the true facts to come to light. Procedural due process requires that protestants be afforded full access to those facts. That cannot be done under accelerated exemption procedure. Accordingly, GRYR's Petition for Exemption should be denied.

4. Mandatory Submission Of Workpapers Is Required To Determine Whether The Revenues And Costs Posited By GRYR Accurately Reflect The Likely Future Result Of Operating The Rail Line

The likely financial result of operating a rail line in a forecast year is a crucial, if not overriding, consideration in determining whether abandonment of the line should be authorized. *See Abandonment Regulations - Costing*, 5 ICC 2d 123 (1988).

In disregard of that principle, the revenues and costs posted by GRYR are tucked away in an obscure Exhibit F of the Petition for Exemption. Nowhere in the Petition are those revenues and costs explained, nor is there any attempt to support or justify them. Worst of all, the forecast year costs posited by GRYR do not reflect normalized future rail operations, but instead are predicated on an absence of rail operations due to the embargo.

In accordance with Board regulations, forecast year operating results must reflect normalized future rail operations without the effect of the embargo, and the financial results of such operations must be supported by detailed workpapers. *See, e.g., 49 C.F.R. § 1152.22(b) and (d). See Abandonment Regulations - Costing, supra* where the ICC said (5 ICC 2d at 133):

“(O)ur rules will require that the parties in abandonment and subsidy proceedings fully support and substantiate all forecasts of revenues, costs, and asset values. This support and substantiation would include the submission of all underlying source records and/or an explanation of the rationale and key assumptions used to develop the forecast amounts...irrespective of the technique employed, all projections should be fully supported...”

Thus, the absence of the appropriate forecast year operating results and the failure to provide detailed supporting workpapers provide an additional reason for rejecting GRYR’s Petition for Exemption and for requiring that any future attempt to abandon the rail line be conducted under formal abandonment application procedure.

5. There Are Additional Serious Defects In The Petition For Exemption

A. Cost To Rehabilitate The Line To FRA Class I Standards

As a major through route, the involved rail line was constructed to exacting main line standards. The line has been maintained and operated for many years as part of a primary through route for north-south traffic moving between the Memphis, TN and Jackson, MS gateways. The track chart in GRYR’s Petition (Ex. B of Draft Environmental and Historic Report) shows that it consists of heavy 112-pound and 115-pound rail. The rail line complied with FRA Class III track safety standards when GRYR acquired it in 2009. Currently, the rail line complies with FRA Class II standards (25 mph).

In view of those facts, GRYR's claim (Petition at 6) that an expenditure of \$33,827,928 is required to rehabilitate the line to comply with FRA Class I standards, when the line currently complies with more stringent FRA Class II standards, is nothing short of preposterous (i.e., absurd, nonsensical). When a rail line complies with a higher standard than FRA Class I, the cost to rehabilitate that line to comply with Class I standards by definition is zero.

B. Frequency Of Service

GRYR has falsely alleged that shippers on the rail line are switched four times per week, i.e., twice by the northbound train and twice by the southbound train (Petition at 8).

Common sense disproves that allegation. Unless a shipper has both a northward-facing and southward-facing switch (which no shipper on the line has), the shipper can be switched only by a train going in the direction that its switch is facing. Accordingly, shippers on the line are getting only two switches per week.

C. Koscuisko & Southwestern Railway

The Petition for Exemption ignores the drastic effect of abandonment on the Koscuisko & Southwestern Railway (KSRY). KSRY's sole access to the national rail system is by means of its connection to GRYR at Aberdeen Junction, MS, which is a point on the rail line proposed for abandonment. Consequently, the proposed abandonment would isolate KSRY from the national rail system, thereby necessarily leading to its demise. KSRY is a Board authorized rail carrier who holds itself out to transport freight by rail in interstate commerce. The failure of the Petition for Exemption to acknowledge the effect of the proposed abandonment on KSRY is a material omission.

CONCLUSION AND REQUESTED RELIEF

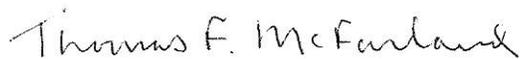
Many additional false statements and material omissions in the Petition could be identified here, but that would lengthen this Motion unnecessarily. The overriding defect in the Petition is its attempt to use exemption procedure, which, as shown, is wholly inadequate to deal with the serious issues of GRYR's intent to facilitate abandonment and the absence of workpapers or other support for GRYR's revenue and cost testimony.

WHEREFORE, for the reasons stated, the Board should reject the Petition for Exemption of Abandonment, and should state that GRYR will be required to file a conventional abandonment application if it continues to seek abandonment of the rail line.

Respectfully submitted,

ROBERT J. RILEY
1799 Greer Road
Coldwater, MS 38618

Protestant



THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street, Suite 1890
Chicago, IL 60604-1112
(312) 236-0204
(312) 201-9695 (fax)
mcfarland@aol.com

Attorney for Protestant

DATE FILED: December 27, 2013

CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2013, I served a copy of this Motion by e-mail, with confirmation by mail, on:

Fritz R. Kahn, Esq.
1920 N Street, NW (8th Floor)
Washington, D.C. 20036
xiccg@verizon.net

Mr. Hunter Ferguson
Stoel Rives LLP
600 University Street, Suite 3600
Seattle, WA 98101-4109
HOFFerguson@stoel.com

Mr. John Heffner
Strasburger & Price, LLP
1700 K Street, N.W.
Suite 640
Washington, D.C. 20006
john.heffner@strasburger.com

Mr. Ed Ellis
Iowa Pacific Holdings, LLC
118 South Clinton Street
Chicago, IL 60661
ellise@iowapacific.com

Mr. Robert Riley
1799 Greer Road
Coldwater, MS 38618
ksryengr@yahoo.com

All other parties of the record were served by first-class U.S. mail.

Thomas F. McFarland

Thomas F. McFarland