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THOMAS F. MCFARLAND

January 13, 2003

By UPS overnight mail

Vernon A. Williams, Secretary
Surface Transportation Board
Case Control Unit, Suite 713
1925 K Street, N.W.
Washington, DC 20423-0001

Re: Docket No. AB-6 (Sub-No. 399X), *The Burlington Northern and Santa Fe
Railway Company -- Abandonment Exemption -- in Jefferson County, NE*

Dear Mr. Williams:

Enclosed please find an original and 10 copies of Opposition To Reinstatement Of Notice
Of Exemption, for filing with the Board in the above referenced matter.

Kindly acknowledge receipt by date stamping the enclosed duplicate copy of this letter
and return in the self-addressed stamped envelope.

Very truly yours,

Tom McFarland

Thomas F. McFarland
Attorney for Protestant

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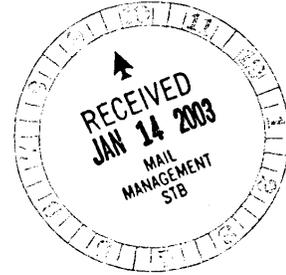
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Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

THE BURLINGTON NORTHERN AND)
SANTA FE RAILWAY COMPANY --) DOCKET NO.
ABANDONMENT EXEMPTION -- IN) AB-6 (SUB-NO. 399X)
JEFFERSON COUNTY, NE)



OPPOSITION TO REINSTATEMENT
OF NOTICE OF EXEMPTION



ENDICOTT CLAY PRODUCTS CO.
P.O. Box 17
Fairbury, NE 68352

Protestant

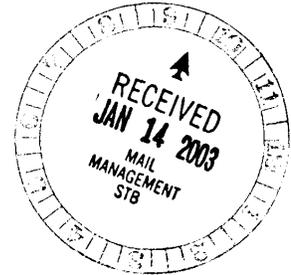
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Attorney for Protestant

DATE FILED: January 14, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD

THE BURLINGTON NORTHERN AND)
SANTA FE RAILWAY COMPANY --) DOCKET NO.
ABANDONMENT EXEMPTION -- IN) AB-6 (SUB-NO. 399X)
JEFFERSON COUNTY, NE)



**OPPOSITION TO REINSTATEMENT
OF NOTICE OF EXEMPTION**

Pursuant to 49 C.F.R. § 1117.1, ENDICOTT CLAY PRODUCTS CO. (Endicott Clay) hereby submits this opposition to reinstatement of the notice of exemption in this proceeding.

BACKGROUND

The notice of exemption was filed by The Burlington Northern and Santa Fe Railway Company (BNSF) on November 20, 2002. The abandonment noticed for exemption is between Milepost 127.83 near Reynolds and Milepost 117.03 near Endicott, a distance of 10.8 miles, in Jefferson County, NE (Reynolds-Endicott line). That 10.8-mile segment is part of a contiguous 222-mile BNSF rail line across southern Nebraska between Table Rock, NE and Orleans, NE. The proposed abandonment would break the continuity of that rail line, resulting in two stub-end lines from Table Rock and from Orleans.

On December 19, 2002, United Transportation Union (UTU) moved for a stay of the exemption on the ground that the Reynolds-Endicott line does not qualify for the class exemption because local traffic moved over that line during the two-year period prior to the filing of the notice of exemption. BNSF did not reply to that motion.

In a decision served January 7, 2002, the Board, through Office of Proceedings Director David M. Konschnik, dismissed the notice of exemption on the ground that BNSF had not disputed UTU's contention that the line does not qualify for the class exemption. It was stated in that decision (at 2) that dismissal will stand unless BNSF demonstrates, by January 17, 2003, that the line qualifies for the class exemption.

ENDICOTT CLAY'S POSITION

Endicott Clay opposes reinstatement of the notice of exemption regardless of whether BNSF demonstrates the absence of local traffic on the line in the past two years. Endicott Clay's opposition is based on the fact that there are substantial issues whether traffic that is moving overhead to the Reynolds-Endicott line, including Endicott Clay's traffic, can be rerouted efficiently and economically. The Board has found that issues of that nature cannot be addressed adequately under exemption procedure. If BNSF wants to revive the Reynolds-Endicott abandonment, therefore, BNSF should be required to file an application for abandonment.

ARGUMENT

A demonstration of absence of local traffic in the prior two-year period would not be sufficient to warrant reinstatement of the notice of exemption. It must also appear that overhead traffic moving over the line can be rerouted efficiently and economically. If there are substantial issues regarding the efficiency and/or economy of rerouting of that overhead traffic, the class exemption for abandonment is to be stayed and denied (or, as here, not reinstated). There is direct precedent for that proposition, i.e., *Consolidated R. Corp. -- Aband. of the Wierton Secondary Track in Harrison and Tuscarawas Counties, OH*, 1989 ICC LEXIS 136 at *15-16 (ICC Docket No. AB-167 [Sub-No. 1088X], decided June 7, 1989) ("Substantial questions about

Conrail's rerouting have been raised . . . (w)e are unprepared on this record to decide the question . . ." (*id.* at *15). It is implicit in the requirement of the class exemption that overhead traffic can be rerouted, that such rerouting be efficient and economical.

There are substantial issues of rerouting efficiency and economy here. As shown by the attached verified statement of Ryan Parker, Vice President of Finance of Endicott Clay, the facilities of Endicott Clay are located a short distance beyond the eastern terminus of the proposed abandonment. However, all of Endicott Clay's rail shipments are transported west over the Reynolds-Endicott line segment. That traffic will require rerouting. Endicott Clay made 292 shipments by rail in 2002.

All that is stated in BNSF's notice of exemption is that overhead traffic will be rerouted via Table Rock, NE (amendment to notice of exemption, dated December 16, 2002). No further details were provided in the notice. No attempt was made in the notice to demonstrate the efficiency and/or economy of the proposed rerouting. As stated in Mr. Parker's verified statement, no representative of BNSF ever contacted anyone from Endicott Clay to state that BNSF proposed to abandon a segment of the rail line used for overhead transportation of Endicott Clay's traffic, nor to explain the proposed rerouting of that traffic following abandonment, nor to provide assurance that such rerouting would be efficient and economical.

There is reason to question the efficiency and economy of BNSF's proposed rerouting of overhead traffic. Traffic for shippers located east of the eastern terminus of the proposed abandonment currently is routed westbound over the Reynolds-Endicott line segment. Presumably, that manner of routing is efficient and economical, or BNSF would not handle traffic in that manner. Rerouting via Table Rock may well not be as efficient and economical,

particularly for shipments destined to points west of Endicott, such as Denver, CO, Phoenix, AZ and West Coast points.

As recognized in the *Conrail* case cited above, class exemption procedure is wholly inadequate for addressing issues of routing efficiency and economy of the kind here presented. So is petition-for-exemption procedure because of its informal nature and the absence of access to required information through discovery.

For those reasons, and because of the transportation significance of BNSF's proposal to break up a recognized through rail route, BNSF should be required to file a conventional abandonment application if it continues to desire abandonment of the Reynolds-Endicott line.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, the Board should not reinstate the notice of exemption regardless of whether BNSF demonstrates the absence of local traffic on the line in the pertinent two-year period.

Respectfully submitted,

ENDICOTT CLAY PRODUCTS CO.
P.O. Box 17
Fairbury, NE 68352

Protestant

Thomas F. McFarland

THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
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(312) 236-0204

Attorney for Protestant

DATE FILED: January 14, 2003

VERIFIED STATEMENT OF RYAN PARKER

My name is Ryan Parker. I am Vice President of Finance of Endicott Clay Products Co. My business address is P.O. Box 17, Fairbury, NE 68352.

As here pertinent, Endicott Clay Products makes shipments of brick and tile by rail from manufacturing facilities located on a Burlington Northern and Santa Fe Railway Company (BNSF) rail line at Endicott, NE. We shipped 291 carloads by rail in 2001 and 292 carloads in 2002. All of our rail traffic is handled westbound at present. Presumably, therefore, that is the most efficient and economical manner of handling that traffic.

No representative from BNSF contacted anyone from Endicott Clay Products to state that BNSF intended to abandon the trackage west of our facilities, nor to explain how our rail traffic would be rerouted after abandonment, nor to demonstrate that rerouting would be efficient and economical.

I understand that in its filing with the Surface Transportation Board, BNSF stated that it intends to reroute traffic via Table Rock, NE. Table Rock is 67 miles east of Endicott. It is in the opposite direction from the current handling of our traffic. It may well be that the proposed handling of our traffic would not be as efficient and economical as at present. That would especially be the case for shipments destined to points west of Endicott, such as Denver, Phoenix or West Coast points.

We think that abandonment should not be authorized until the Surface Transportation Board has had an opportunity to investigate the rerouting of traffic after abandonment. That cannot be done under accelerated exemption procedure.

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2003, I served the foregoing document, Opposition To Reinstatement Of Notice Of Exemption, by facsimile transmission (312-360-6520) and UPS overnight mail on Michael A. Smith, Freeborn & Peters, 311 South Wacker Drive, Suite 3000, Chicago, IL 60606-6677 and by facsimile transmission (216-228-0937) and UPS overnight mail on Daniel R. Elliott, III, United Transportation Union, 14600 Detroit Avenue, Cleveland, OH 44107-8250.

Thomas F. McFarland
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