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THOMAS F. MCFARLAND

January 21, 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

ENTERED  
Office of Proceedings

JAN 22 2003

Part of  
Public Record

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 Joint Petition For Leave To File Reply To Response Of Burlington Northern and Santa Fe Railway Company To 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,

Thomas F. McFarland

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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 )

**JOINT PETITION FOR LEAVE TO FILE  
REPLY TO RESPONSE OF BURLINGTON NORTHERN  
AND SANTA FE RAILWAY COMPANY TO OPPOSITION  
TO REINSTATEMENT OF NOTICE OF EXEMPTION**

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UNITED TRANSPORTATION UNION  
14600 Detroit Avenue  
Cleveland, OH 44107-4250

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

Joint Petitioners

By: DANIEL R. ELLIOTT, III  
Associate General Counsel  
United Transportation Union  
14600 Detroit Avenue  
Cleveland, OH 44107-4250

By: THOMAS F. McFARLAND  
Thomas F. McFarland, P.C.  
208 South LaSalle Street, Suite 1890  
Chicago, IL 60604-1194  
(312) 236-0204

Attorneys for Petitioners

DATE FILED: January 22, 2003

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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THE BURLINGTON NORTHERN AND )  
SANTA FE RAILWAY COMPANY -- ) DOCKET NO.  
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Pursuant to 49 C.F.R. § 1117.1, UNITED TRANSPORTATION UNION (UTU) and ENDICOTT CLAY PRODUCTS CO. (Endicott Clay) hereby jointly petition for leave to file a reply to the Response filed by Burlington Northern and Santa Fe Railway Company (BNSF) on January 17, 2003 to Opposition to Reinstatement of Notice of Exemption previously filed by UTU and Endicott Clay. A Joint Reply to BNSF's Response is tendered with this Petition. The following is submitted in support of this Petition.

**PROCEDURAL BACKGROUND**

On November 20, 2002, BNSF filed a notice of exemption under the class exemption for abandonment of out-of-service rail lines at 49 C.F.R. § 1152.50 for abandonment of a 10.8-mile rail line between Reynolds and Endicott, NE (Reynolds-Endicott line). The Reynolds-Endicott line is a segment 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 ends of rail line.

On December 19, 2002, UTU filed a motion for a stay of the notice of exemption on the ground that the Reynolds-Endicott line does not qualify for the class exemption because local traffic moved over the line during the 2-year period prior to the filing of the notice of exemption.

BNSF did not respond to UTU's motion.

In a decision served January 7, 2003, the Board through Office of Proceedings Director Konschnik dismissed the notice of exemption in view of BNSF's failure to have disputed UTU's contention regarding local traffic. It was provided in that decision that such dismissal would stand unless BNSF demonstrated, by January 17, 2003, that the line qualifies for the class exemption.

On January 14, 2003, Endicott Clay filed Opposition to Reinstatement of the Notice of Exemption on the ground that even if no local traffic originated or terminated on the line in the 2-year period, the notice of exemption should not be reinstated because 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, and because the Board has determined that issues of that nature cannot be addressed adequately through class exemption procedure, citing *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).

United States Senator E. Benjamin Nelson of Nebraska, Nebraska State Senator Jeanne M. Combs, and the Nebraska Grain and Feed Association have filed requests with the Board for a six-month moratorium on abandonment of the line.

On January 17, 2003, BNSF filed a Response to the UTU and Endicott Clay opposition filings. BNSF alleged in that Response that no local traffic originated or terminated on the line during the 2-year period prior to the filing of the notice of exemption. BNSF also alleged that 88 percent of Endicott Clay's traffic in 2001 and 2002 was destined to eastern markets via Chicago, routed west from Endicott to Superior, NE, thence south to Newton, KS, thence east to destinations via Chicago. BNSF stated that such traffic would be rerouted east from Endicott to Table Rock, NE, thence north to Lincoln, NE, thence east to destinations via Chicago. BNSF stated that the mileage via the proposed reroute would be 25 percent shorter than the mileage via the current route of movement. BNSF contended on that basis that the proposed reroute would be more efficient and economical for that traffic than the current route of movement.

**BASIS FOR LEAVE TO FILE REPLY TO BNSF'S RESPONSE**

Under Board regulations, a reply to a reply is not permitted. 49 C.F.R. § 1104.13(c). However, the Board sometimes grants leave to file such a reply where the pleading to which the reply is sought to be directed is incomplete, inaccurate or misleading. This is such a case.

As appears in more detail in the tendered Reply, BNSF's Response is misleading in contending that a mileage comparison as to the current and proposed routes for Endicott Clay's eastern traffic is conclusive as to the relative efficiency and economy of the proposed rerouting. *See, e.g., Pittsburgh & Lake Erie R. Co. v. ICC*, 796 F.2d 1534, 1542 (D.C. Cir. 1986) ("The Commission found that more circuitous routes could sometimes be more efficient . . ."). Much more detailed evidence is required before legitimate findings can be made concerning the relative efficiency and economy of the current and proposed routes. Detailed evidence of that nature cannot be reasonably considered through exemption procedure.

Moreover, BNSF's Response is woefully incomplete. It says nothing in explanation of the current routing of Endicott Clay's eastbound traffic to the west and south. It provides no explanation for failure to currently route Endicott Clay's eastbound traffic via the shorter route via Table Rock and Lincoln. It says nothing about the efficiency and economy of rerouting of Endicott Clay's other rail traffic that does not move to destinations east of Endicott. It says nothing about the efficiency and economy of rerouting of traffic of shippers other than Endicott Clay.

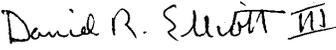
WHEREFORE, the tendered Reply should be accepted for filing.

Respectfully submitted,

UNITED TRANSPORTATION UNION  
14600 Detroit Avenue  
Cleveland, OH 44107-4250

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

Joint Petitioners

  
By: DANIEL R. ELLIOTT, III<sup>TM</sup>  
Associate General Counsel  
United Transportation Union  
14600 Detroit Avenue  
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By: THOMAS F. McFARLAND  
Thomas F. McFarland, P.C.  
208 South LaSalle Street, Suite 1890  
Chicago, IL 60604-1194  
(312) 236-0204

Attorneys for Petitioners

DATE FILED: January 22, 2003

**CERTIFICATE OF SERVICE**

I hereby certify that on January 21, 2003, I served the foregoing document, Joint Petition For Leave To File Reply To Response Of Burlington Northern and Santa Fe Railway Company To Opposition To Reinstatement Of Notice Of Exemption, by UPS overnight mail on Michael A. Smith, Freeborn & Peters, 311 South Wacker Drive, Suite 3000, Chicago, IL 60606-6677.

*Thomas F. McFarland*

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Thomas F. McFarland