



KAPLAN KIRSCH ROCKWELL

Pet



September 18, 2008

Honorable Anne Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Re: *BNSF Railway Company - Abandonment Exemption - In King County, Washington*, Finance Docket No AB-6 (Sub-No. 463X)

223 643

Dear Ms. Quinlan:

I am enclosing an original and ten (10) copies of each of:

- 1) Reply of King County, Washington, to BNSF Railway Company's Petition for Exemption from 49 U S C §10904;
- 2) Request of King County, Washington, for Interim Trail Use Pursuant to 49 CFR 1152.29, and
- 3) Response of BNSF Railway Company, Port of Seattle and King County, Washington, to Request for Information in Docket No AB-6 (Sub-No. 465X)

in the above referenced proceeding An additional copy is enclosed for date stamp and return to our messenger. Please note that a 3 5 inch diskette is enclosed with this document.

I am enclosing the \$200 00 filing fee required for the Interim Trail Use. However, King County is seeking a waiver of the filing fee based on the fact that it is a local government entity filing the Interim Trail Use on behalf of the general public. See 49 CFR §1002.2(e), STB Ex Parte No 542 (Sub-No. 6) - *Regulations Governing Fees For Services Performed In Connection With Licensing and Related Services - Policy Statement* (Served December 6, 2000). King County is a "state or local government entity" and is a non-carrier, as explained in the Interim Trail Use.

Sincerely,

Charles A. Spitulnik

Enclosures

cc: All Parties of Record

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BEFORE THE
SURFACE TRANSPORTATION BOARD



DOCKET NO. AB-6 (SUB-NO. 463X)

BNSF RAILWAY COMPANY – ABANDONMENT EXEMPTION
IN KING COUNTY, WASHINGTON

REPLY OF KING COUNTY, WASHINGTON
TO PETITION FOR EXEMPTION FROM 49 U.S.C. §10904

ENTERED
Office of Proceedings

SEP 19 2008

Part of
Public Record

King County, Washington (“King County”) hereby submits its Reply in support of the Petition of BNSF Railway Company (“BNSF”) for Exemption from 49 U.S.C. §10904 filed in this proceeding on September 8, 2008 (the “*BNSF Petition*”). The *BNSF Petition* relates to a segment of line with respect to which BNSF filed a Notice of Exemption on the same day (the “*BNSF Notice*”) King County supports BNSF’s request for exemption from the requirements of 49 U.S.C. §10904 in the above-referenced proceeding. As BNSF has argued, the relief requested in the BNSF Petition satisfies the requirements of 49 U.S.C. §10502 and will permit the County to implement a proposed trail pursuant to 16 U.S.C. §1247(d).

BACKGROUND

The abandonment authority that BNSF seeks in this proceeding is an integral part of a multi-faceted series of transactions involving BNSF, King County and the Port of Seattle (the “Port”). As those three parties describe in more detail in the Response of BNSF, Port of Seattle and King County to the Board’s request for information, filed jointly by them today in this proceeding (the “*Joint Response*”)¹, the Port will acquire from BNSF (1) a continuous 33.25

¹ The *Joint Response* is also being filed in the following dockets: Finance Docket No. 35128 *The Port of Seattle – Acquisition Exemption – Certain Assets of BNSF Railway Company*; Docket No. AB-6 (Sub-No 464X), *BNSF*

mile-long corridor along the Woodinville Subdivision extending from milepost 5.00 in Kenndale to milepost 38.25 in Snohomish County and (2) the 7.30 mile-long Redmond Spur, which intersects the Woodinville Subdivision at milepost 23.80. With respect to the northernmost segment, between milepost 23.80 and milepost 38.25, BNSF will retain an exclusive freight easement.² BNSF has sought authority to abandon and will enter into a trail use agreement with King County for the remaining segments, including the one that is the subject of this proceeding.³ The Port will grant King County an easement to permit King County to fulfill its trail use responsibilities. King County will also acquire BNSF's reactivation right with respect to the Railbanking Segments. BNSF, the Port and King County expect to consummate the BNSF Transactions as soon as feasible after September 30, 2008, once all of the required approvals from this Board have been obtained.

The relief sought in the instant proceeding is an integral aspect of these transactions, and King County respectfully requests that the Board grant BNSF's Petition.

ARGUMENT

Exemption from the requirements of 49 U.S.C. §10904 will permit King County to implement the proposed trail. Prior Board decisions have confirmed that this is a legitimate public purpose that provides sufficient justification for approving such an exemption.

There is no reason to preserve this line for continued rail service. As BNSF has explained in the *BNSF Notice*, no local traffic has moved over this line for at least two years and

Railway Company – Abandonment Exemption in King County, Washington, Docket No. AB-6 (Sub-No 465X), *BNSF Railway Company – Abandonment Exemption in King County, Washington*

² BNSF will transfer that freight easement to a third party operator. At the appropriate time, that operator will comply fully with all regulatory requirements

³ The segment of the Woodinville Subdivision from Milepost 10.6 to Milepost 11.25 (the "Wilburton Segment") has been fully abandoned and is therefore no longer under the Board's jurisdiction. STB Docket No. AB-6 (Sub-No. 453X) *BNSF Railway Company – Abandonment Exemption in King County, WA* Notice of Consummation (Filed March 10, 2008). BNSF will transfer the Wilburton Segment to the Port along with the segment that is the subject of this proceeding

all overhead traffic has been rerouted. *BNSF Notice* at Exhibit A. Moreover, BNSF stated in the *BNSF Petition*, "...[t]here has been no recent demand for rail service on the line and to the best of BNSF's knowledge there is no prospect that rail service will be required in the foreseeable future." *BNSF Petition* at 4.

Moreover, as BNSF has explained in the *BNSF Petition* at 4, an explanation that is confirmed in the *Joint Response* filed today, the three parties have worked out an arrangement by which this line will become part of a trail to be planned and implemented by King County. In these circumstances, ample Board precedent supports granting the relief BNSF seeks. In Docket No. AB-33 (Sub-No. 141X), *Union Pacific R. Co. – Abandonment Exemption – In Pima Co., AZ* (*slip op.*, Service Date Feb. 16, 2000), the Board stated the following:

Exemptions from 49 U.S.C. 10904-10905 have been granted from time to time, provided the right-of-way is needed for a valid public purpose and there is no overriding public need for continued rail service. [Footnote, citing earlier cases supporting this conclusion, omitted] Here, UP has transferred the right-of-way to the City for a valid public purpose and the sole shipper on the line will be relocated and will have access to rail service from UP. Imposition of OFA procedures would delay the City's land use plans and policies and development of the area. Likewise, there is no need for a public use condition because a public use for the right-of-way has already been established between UP and the City.

Id. at 3-4. *Accord*, Docket No. AB-33 (Sub-No. 105X), *Union Pacific R. Co. – Abandonment Exemption – In Kane Co., IL* (*slip op.*, Service Date April 29, 1997), at 3 ("Exemptions from 49 U.S.C. 10904 have been granted from time to time, but only when the right-of-way is needed for a valid public purpose and there is no overriding need for continued rail service."). The Board noted further that in those circumstances, the requirements of 49 U.S.C. §10502 are satisfied because "applying the OFA or public use requirements in this instance is not necessary to carry out the rail transportation policy" and "[a]llowing the abandonment exemption to become effective expeditiously, without first being subject to these requirements, would minimize the

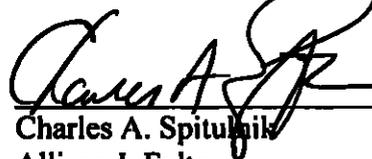
need for Federal regulatory control over the rail transportation system, expedite the regulatory decision and reduce regulatory barriers to exit [49 U.S.C. 10101(2) and (7)].” *Id.*

The criteria and circumstances that have permitted this Board to grant an exemption from the requirements of 49 U.S.C. §§10904 are present here. King County and the Port have agreed upon the implementation of a trail on this segment, and the Port will grant King County an easement that will provide it with the property rights and interests that are sufficient to implement that objective. King County and BNSF have agreed upon the terms and conditions of a Trail Use Agreement. BNSF has confirmed that there is no legitimate reason to preserve the option for freight service on this corridor.

Accordingly, and in view of the foregoing, and of the facts and argument stated in the *BNSF Notice*, the *BNSF Petition* and in the *Joint Response*, King County respectfully requests that this Board grant the relief requested in the Petition for Exemption from 49 U.S.C. §10904 submitted in this proceeding.

Dated: September 18, 2008

Respectfully submitted,



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Attorneys for King County, Washington

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served a copy of the foregoing REPLY
OF KING COUNTY, WASHINGTON TO PETITION FOR EXEMPTION FROM 49 U.S.C.

§10904 to be served by first class mail, postage prepaid upon the following:

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Dated this 18th day of September, 2008.



Charles A. Spitulnik