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October 5, 2009

E-File

The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-001

225819

Re: STB Docket No. AB-6 (Sub-No. 468X), BNSF Railway Company –
Abandonment Exemption – In Kootenai County, ID

Dear Acting Secretary Quinlan:

Attached for E-Filing is the Response of BNSF Railway Company to the
Reply filed by Pan-American Railway, Inc.

If you have any questions, please call me.

Sincerely,



Karl Morell

Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. AB-6 (SUB-NO. 468X)

**BNSF RAILWAY COMPANY
-- ABANDONMENT EXEMPTION --
IN KOOTENAI COUNTY, IDAHO**

RESPONSE

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**Attorneys for:
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Dated: October 5, 2009

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SURFACE TRANSPORTATION BOARD

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BNSF RAILWAY COMPANY
-- ABANDONMENT EXEMPTION --
IN KOOTENAI COUNTY, IDAHO

RESPONSE

BNSF Railway Company ("BNSF") hereby responds to the Reply in Opposition to the Petition for Exemption From 49 U.S.C. § 10904 filed by Pan-American Railway, Inc., d.b.a. Post Falls-Coeur d'Alene, Railroad ("Pan-Am") filed with the Surface Transportation Board ("Board") on September 15, 2009 ("Reply").

BACKGROUND

On August 10, 2009, BNSF filed with the Board a petition under 49 U.S.C. § 10502 for exemption from the provisions of 49 U.S.C. § 10903 to abandon a 6.23-mile rail line located between milepost 6.10, near Post Falls, and milepost 12.33, at Coeur d'Alene, in Kootenai County, ID (the "Line"). BNSF also sought an exemption from the offer of financial assistance ("OFA") provisions at 49 U.S.C. § 10904 and the public use provisions at 49 U.S.C. § 10905 ("Petition").

On September 15, 2009, Pan-Am filed its Reply. On September 30, the City of Coeur d'Alene ("City") filed a Statement of Support For Petition For Exemption ("Statement in Support"). On October 2, 2009, North Idaho College Foundation ("Idaho College") and Stimson Lumber Company ("Stimson") filed separate replies to the Pan-Am Reply.

REQUESTED LEAVE TO FILE RESPONSE TO REPLY

BNSF hereby seeks leave to file rebuttal evidence and argument in response to the Reply. While a reply to a reply is not permitted (49 C.F.R. § 1104.13(c)), the Board can waive the rule pursuant to 49 C.F.R. § 1110.9. BNSF could not possibly have anticipated the filing of fabricated evidence alleging a need for rail service on the Line. Therefore, in the interest of having a more complete record, BNSF urges the Board to accept for filing this Response. See *Chicago Rail Link, L.L.C. – Lease & Oper. – Union Pacific RR Co.*, 2 S.T.B. 534, 535 (1997); *Delaware & H. Ry. Co. v. Consolidated Rail Corp.*, 9 I.C.C.2d 989, 990 (1993).

RESPONSE

Congress adopted the OFA provisions to preserve rail service on a rail line being abandoned. *Borough of Columbia v. STB*, 342 F.3d 222, 226 (3d Cir. 2003) (OFA provisions are “to facilitate continued rail service.”); *Roaring Fork – Exem. – In Garfield, Eagle & Pitkin Counties, Co.*, 4 S.T.B. 116, 119 (1999) (“*Roaring Fork*”) (“The OFA process is designed for the purpose of continuing to provide freight rail service, and is not to be used to obstruct other legitimate processes of law (whether Federal, state, or local) when continuation of such service is not likely”).

Pan-Am claims to have “identified a need for rail service” on the Line. Reply at 3. A careful review of the Reply, however, demonstrates that there is no need to preserve rail service on the Line. Pan-Am fails to identify a single customer that requires rail service to or from the Line. Instead, Pan-Am offers a transportation plan straight out of fantasyland. The “apparent interest in such continued rail service” (Reply at 6) is nothing more than a figment of Mr. Cooper’s imagination. Mr. Cooper claims that he “is in the process of attempting to form a

Public-Private Partnership with the City of Post Falls, Idaho,¹ and/or form a Port Authority under Idaho law....” Reply at 6 (emphases added). If there was even a remote chance that the City of Post Falls (“Post Falls”) would consider such a partnership, surely Post Falls would have lent some support to Pan-Am’s Reply.²

The Partnership or Port Authority, which do not exist, would, according to Mr. Cooper, “purchase half of the DeArmond mill site to serve as a log terminal for transloading logs from water to rail....” Reply at 6. Reality, however, gets in the way of Mr. Cooper’s fantasy. As pointed out by the City, Idaho College and Stimson, the DeArmond mill site has already been sold to Idaho College. Statement in Support at 4, Idaho College reply at 2, and Stimson Reply at 2.

The unformed Partnership or Port Authority next plans on acquiring the Atlas mill site which would serve as their “main terminal and industrial park” featuring, among other activities, “an industrial park for a borate treatment plant, a sawmill, and a biofuels plant. Reply at 6. Once again, Mr. Cooper’s plans meet reality. As pointed out by the City and Stimpson, the former Stimson Atlas mill site is under contract for sale to a private developer, with plans for high-end mixed use residential and light commercial development. Statement in Support at 4, and Stimson reply at 2.

Mr. Cooper’s proposal has an additional fundamental and fatal flaw: there are no shippers, not even fantasy shippers, included in his plan. Mr. Cooper postulates a transload facility for logs but identifies not single entity that has a need for the transportation of logs. Mr.

¹ Mr. Cooper is not in the process of forming a partnership with the City of Post Falls, he is, in his words, in the process of attempting to form such a partnership.

² Indeed, as pointed out by the City, Post Falls is interested in converting a portion of the Line into a trail and not reinstating rail service on the Line. Statement in Support at 5.

Cooper postulates a borate treatment plant, a sawmill, and a biofuels plant, but, once again, identifies not a single entity interested in building or using such facilities along the Line. Pan-Am fails to identify a single entity that has a desire, much less a need, for rail service over the Line. All we have is Mr. Cooper's crazy dreams and schemes.

This is not Mr. Cooper's first unrealistic transportation plan. In July 2004, Mr. Cooper wrote a letter to BNSF stating that he planned to develop an industrial park along the Line and wanted to acquire the Line. Five years later and still no industrial park. In July 2004, Mr. Cooper told the Idaho Public Utilities Commission that he was interested in acquiring a rail line being abandoned by Union Pacific Railroad Company ("UP") with federal grants and turn the corridor into a public transportation system using street cars. After the hearing, Mr. Cooper stated that he was having trouble getting city officials to take him seriously. *See Exhibit 1.* Five years later and still no street cars. In 2007, Mr. Cooper claimed that he was forming a public-private partnership to build a 9- to 10-mile street car system in Sandpoint, ID. *See Exhibit 2.* Two years later and still no street car system. In June 2008, Mr. Cooper called a BNSF employee and stated that he was interested in purchasing the Line under the guise of using it as a railroad. In other words, Mr. Cooper expressly told BNSF that he was interested in acquiring the Line for purposes other than providing rail freight operations.

Not all of Mr. Cooper's schemes are as diminutive as his plans for the Line. In June 2008, Mr. Cooper's web page solicited investors for his plans to develop hydrogen-powered rail cars and a unique switching system that will make coast-to-coast rail travel a rival of the airlines in efficiency, speed and ease of transport. *See Exhibit 3.* In STB Docket No. AB-33 (Sub-No. 272X), *Union Pacific Railroad Company – Abandonment Exemption – In Kootenai County, ID* (not printed), served May 4, 2009, slip op. at 1-2, n 2, UP noted that Mr. Cooper had approached

UP about a barge-to-rail transload facility for logs along the line being abandoned. UP also noted that Mr. Cooper had not acquired any property along the line and had no prospect of doing so. UP further noted that Mr. Cooper's plan was not feasible.

In its Petition, BNSF explained that the portion of the Line between Mileposts 12.33 and 8.66 was urgently needed for the development of the area's educational corridor and other civic uses. In its Statement in Support, the City further elaborates on the intended uses of much Line that is located within the City limits. For example, the portion of the Line between Mileposts 12.33 and 12.21 will be used to expand the City Park and for the construction of a new museum building. The portion of the Line between Mileposts 12.21 and 10.96 will be used to: (1) support expansion of North Idaho College, University of Idaho and Lewis Clark State College; (2) provide increased street access to the City's oldest neighborhood; (3) allow the expansion of the North Idaho Centennial Trail; and (4) allow urban development, including an Institute for Advanced Study of Waste Water Treatment. The City also seeks to incorporate the section of the Line between Mileposts 10.96 and 6.23 in the Centennial Trail.

Pan-Am argues that the segment of the Line between Mileposts 6.10 and 8.66 is not intended for public use since BNSF intends to use that segment to store surplus rail cars. Reply at 4. While BNSF's immediate goal is to continue storing cars on that segment, local officials have expressed an interest in acquiring most of the segment for inclusion in the Centennial Trail. Moreover, that segment is of little use to Pan-Am because no rail shippers are located on that segment and it is extremely unlikely in the real world that any ever will. In any event, BNSF seriously doubts that Pan-Am has the financial wherewithal to acquire even that segment of the Line. While Mr. Cooper has expansive dreams, it appears he has very limited financial means.

Where, as here, the Line is inactive, a potential offeror has the burden of demonstrating that shippers are likely to locate on the line and make sufficient use of the line to enable continued rail service. *Roaring Fork* at 199-20. As noted above, Pan-Am has failed to identify a single shipper that is interested in rail service along the Line.

As the Petition demonstrates, there is no continued need for rail freight service on the Line. Also, the Petition and Statement in Support demonstrate that most of the corridor is needed for a valid public purpose. In circumstances such as these, the Board and its predecessor have consistently granted the requested exemption from the OFA provisions. See STB Docket No. AB-406 (Sub-No. 14X), *Central Kansas Railway, L.L.C. – Abandonment Exemption – In Sedgwick County, KS* (not printed), served April 10, 2001; STB Docket No. AB-33 (Sub-No. 105X), *Union Pacific Railroad Company – Abandonment Exemption – In Kane County, IL* (not printed), served April 29, 1997.

It is unclear whether Mr. Cooper is seeking to file an OFA in order to extort money from the public entities seeking to utilize the corridor for valid public purposes or whether Mr. Cooper is a harmless dreamer with grand, but unattainable, visions. In either event, the OFA provisions administered by the Board were not intended for use by extortionists³ or dreamers.

³ See STB Docket No. AB-290 (Sub-No. 293X), *Norfolk Southern Railway Company – Abandonment Exemption – In Norfolk and Virginia Beach, VA* (not printed), served November 6, 2007.

CONCLUSION

BNSF respectfully urges the Board to grant the requested exemption from Section 10904.

Respectfully submitted,



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Dated: October 5, 2009

CERTIFICATE OF SERVICE

I hereby certify that, on this 5th day of October, 2009, I had the foregoing Response to be served by first class mail, postage pre-paid on all parties of record

A handwritten signature in cursive script that reads "Karl Morell". The signature is written in black ink and is positioned above a horizontal line.

Karl Morell

SR.com: Funds sought to buy UP tracks

SPOKESMANREVIEW.COM

Funds sought to buy UP tracks

EXHIBIT 1

CdA, group want to turn 5.2 miles into public trail

Erica Curless
Staff writer
July 28, 2004

Coeur d'Alene and the North Idaho Centennial Trail Foundation are looking for money to buy about 5.2 miles of railroad track for a public trail that would link the Centennial Trail and the town's northwest neighborhoods and schools.

City Attorney Mike Gridley told the Idaho Public Utilities Commission on Tuesday that the Union Pacific Railroad should abandon the spur, which runs north from Stimson's DeArmond mill downtown along Northwest Boulevard through Ramsey Park before veering across the Rathdrum Prairie. The railroad must abandon the line before anybody can buy the right of way.

"The trail systems that have been done up here are very popular and are becoming an attraction in the area and a boost to the economy," Gridley told Commissioner Paul Kjellander, who was in Coeur d'Alene for the public hearing.

The PUC will determine if the track abandonment would adversely affect the state or current rail service. However, the federal Surface Transportation Board will make the final decision on the abandonment.

The Burlington Northern and Santa Fe Railway Co. has agreed to haul UP's railcars between Spokane and downtown Coeur d'Alene. That clears the way for UP to abandon the line.

Union Pacific once used the short spur track, which was built in 1910 by the Spokane International Railroad Co. to haul lumber from the Stimson mill to the main line that crosses the prairie between Spokane and Sandpoint. It also serves a gas company. The track is no longer used, except by the gas company.

Nobody spoke against the abandonment proposal, but Peter Cooper of Hayden said he wants to buy the track and turn it into a public transportation system that would eventually run street cars from downtown Coeur d'Alene north to the Coeur d'Alene Airport.

Cooper said he wants this spur to provide freight service to the Industrial Park off Atlas Road. He is willing to allow the city and the North Idaho Centennial Trail Foundation to use a portion of the right of way for a bike-pedestrian trail.

Cooper told the PUC that he could get federal grants to start the public transportation system, which – after it was built – would pay for itself with the money generated from hauling freight.

"By working with me the city would be miles ahead in funding this project," Cooper told the commission.

After the hearing, Cooper said he was having trouble getting city officials to take him seriously.

"I want to get the attention of the business community," Cooper said, adding he wants to attract investors.

Gridley said the city's idea is to convert the railroad spur into a pathway that would connect into the Centennial Trail.

The Centennial Trail also is getting a new waterfront route between Seltice Way and North Idaho College. The city recently finalized plans to reroute the trail through the Riverstone development where it will cross the BNSF tracks and

http://www.spokesmanreview.com/tools/story_pf.asp?ID=17828

run parallel to the Spokane River.

The Idaho Department of Transportation is reviewing the plan and Gridley said he hopes the city can start taking bids for construction in August.

"There's a good chance we could be building trail by fall," Gridley said.

Coeur d'Alene will use a \$500,000 federal grant to rebuild the section of trail, which is part of the 63-mile path that stretches from Nine Mile Falls to Coeur d'Alene's Higgins Point. The grant has been on hold for a couple of years while Coeur d'Alene figured out the best way for the Centennial Trail to cross the railroad tracks along the route.

City officials are hoping that someday all the railroad tracks that run downtown to the mill can be removed. The city's ultimate plan is to relocate the mill so it can create an educational corridor. But the city has yet to find the money or a new spot to relocate the mill.

The educational corridor would allow the University of Idaho, Lewis-Clark State College, Idaho State University and NIC all to offer classes in one location.



Developer gauges street car desire

By GWEN ALBERS
Staff writer

SANDPOINT -- A Hayden developer is proposing to build a 9- to 10-mile street car system in the Sandpoint area.

Peter Cooper, chief executive officer for Pan-American Railway, hopes to eventually include a transportation center, condominiums, apartments and a retail district as part of a \$21 million development.

Cooper discussed his plan during last week's Dover Council meeting since he hopes to establish a stopping point for the street car line at the new Dover Bay Marina.

On Monday, Cooper told The Daily Bee he wants to know if the business community is interested and that he is looking for investors.

"I am gearing out to form a public-private partnership," he said. "Basically what I would like to do is to get the business community to contact me if they want to participate in the project."

The street cars would run along two branches. One branch would start in Sagle, run along the bike trail and Long Bridge over Lake Pend Oreille, and end on Lake Street in the downtown. The second would run from the downtown to Dover.

Cooper also is proposing to build a few hundred condominiums and apartments, and retail area within a three- to four-block area of Sandpoint. Cooper is working toward acquiring land for the development.

"It would be nice to work with the old sawmill (L-P Mill site)," he said.

Cooper chose the Sandpoint area for his first project because he said it costs less to develop something around a smaller, growing town.

"History has taught us that once something is developed and becomes a big city, it costs billions instead of a few million," Cooper said. "We'll be laying about 9 to 10 miles of track. If I was to do that in an urban area, it would cost \$100 to \$200 million instead of \$21 million."

He is waiting for a partnership agreement with the state since the state owns the right-of-way for the proposed street car line. Cooper has not discussed his proposal with Sandpoint or Bonner County officials.

"I'm waiting for the highway department," he said.

Dover Mayor Randy Curless said he believes Cooper has an interesting idea, but understands the street car tracks would be elevated.

"I feel it would be better in a different location," Curless said. "We recommended that he go and speak to the Bonner County Area Transportation Team."

PAN-AMERICAN RAILWAY, Inc.

**INLAND NORTHWEST FREIGHT
AND
LIGHT RAIL DEVELOPMENT PROJECT**

The Inland Northwest Freight and Light Rail Project currently being developed by Peter Cooper, CEO of Pan-American Railway is seeking equity partners. The project is based in Coeur d'Alene, ID, then will expand to include Spokane, WA and the entire Inland Northwest. The development of hydrogen-powered rail cars and a unique switching system will eventually make coast-to-coast rail travel rival the airlines in efficiency, speed and ease of transport.

Pan-American Railway is in a unique position to take advantage of large plots of undeveloped land in North Idaho. During the initial phase of the Project, the Log Port on the Spokane River, the Forest Products Complex in the Industrial Park and County Solid Waste Transfer Station will become operational.

Later phases of the project will include condominium/townhouse complexes, the Locomotive Shop, Research and Development Center, office and business space, railway stations, heritage streetcars and partnerships with public and private organizations to provide community parks and recreational facilities.

The project provides both long and short term employment, is environmentally friendly, financially sound and will increase the industrial desirability of the Inland Northwest. For additional information and a brochure, please contact Peter Cooper, CEO.

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