

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

THOMAS F. MCFARLAND

September 15, 2009

By e-filing

Anne K. Quinlan, Esq.
Acting Secretary
Surface Transportation Board
395 E Street, S.W., Suite 100
Washington, DC 20024

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

Dear Ms. Quinlan:

Hereby transmitted is a Reply In Opposition To Petition For Exemption From 49 U.S.C. § 10904, for filing with the Board in the above referenced matter.

Very truly yours,



Thomas F. McFarland
*Attorney for Pan-American Railway, Inc.,
d.b.a. Post Falls-Coeur d'Alene Railroad*

TMcF:kl:enc:wp8.0\1397\efstb1

BEFORE THE
SURFACE TRANSPORTATION BOARD

BNSF RAILWAY COMPANY --) DOCKET NO. AB-6
ABANDONMENT EXEMPTION -- IN) (SUB-NO. 468X)
KOOTENAI COUNTY, ID)

**REPLY IN OPPOSITION TO
PETITION FOR EXEMPTION
FROM 49 U.S.C. § 10904**

PAN-AMERICAN RAILWAY, INC.
d.b.a. POST FALLS-COEUR d'ALENE RAILROAD
1671 Miles Avenue
Hayden, ID 83835

Replicant

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 Replicant

Due Date: September 17, 2009

BEFORE THE
SURFACE TRANSPORTATION BOARD

| | | |
|-----------------------------|---|-----------------|
| BNSF RAILWAY COMPANY -- |) | DOCKET NO. AB-6 |
| ABANDONMENT EXEMPTION -- IN |) | (SUB-NO. 468X) |
| KOOTENAI COUNTY, ID |) | |

**REPLY IN OPPOSITION TO
PETITION FOR EXEMPTION
FROM 49 U.S.C. § 10904**

Pursuant to the Board's procedural decision in this proceeding served August 28, 2009, at 3, PAN-AMERICAN RAILWAY, INC., d.b.a. POST FALLS-COEUR d'ALENE, RAILROAD (PFCA-RR) hereby replies in opposition to a Petition for Exemption from 49 U.S.C. § 10904 filed by BNSF Railway Company (BNSF) on August 10, 2009. That exemption would preclude acquisition of the 6.23-mile Post Falls-Coeur d'Alene, ID rail line (the Rail Line) for continued rail operation pursuant to an Offer of Financial Assistance (OFA). PFCA-RR does not oppose the other exemptions sought by BNSF in its Petition.

IDENTITY AND INTEREST OF THE REPLICANT

Pan-American Railway, Inc., d.b.a. PFCA-RR, is an Idaho corporation formed for the purpose of providing interstate and intrastate transportation of freight and passengers by rail. PFCA-RR is not yet a rail carrier subject to the jurisdiction of this Board. However, PFCA-RR intends to file an OFA for acquisition of the Post Falls-Coeur d'Alene rail line for resumed and continued rail operation. Such an acquisition and operation would subject PFCA-RR to Board jurisdiction.

As explained hereafter, PFCA-RR has identified a need for rail service that would be furthered by PFCA-RR's acquisition and operation of the Rail Line. The requested exemption from the OFA process of 49 U.S.C. § 10904 would frustrate that public need.

GOVERNING LEGAL STANDARDS

The federal rail transportation policy, as set by Congress, is intended to ensure development and continuation of a sound rail transportation system to meet the needs of the public. 49 C.F.R. § 10101(4). "More specifically, the OFA provisions reflect a Congressional desire to preserve legitimate prospects for continuing or resuming freight rail service on corridors that would otherwise be abandoned." *Union Pacific R. Co. -- Aban. -- in New Madrid, Scott, and Stoddard Counties, MO*, ___ STB LEXIS ___ at * ___ (Docket No. AB-33 [Sub-No. 261], decision served September 10, 2009, at 2), citing *Redmond-Issaquah R.R. Pres. Ass'n v. STB*, 223 F.3d 1057, 1060-1063 (9th Cir. 2000).

Accordingly, exemption from the OFA provisions of 49 U.S.C. § 10904 is "unusual relief." *Southern Pacific Transp. Co. -- Discon. of Serv. Exempt. -- in Los Angeles County, CA*, 1994 WL 712841 at *2 (Docket No. AB-12 [Sub-No. 172X], decision served December 23, 1994, at 3). Thus, in *Norfolk Southern Ry. Co. -- Aband. Exempt. -- in Orange County, NY*, 2007 STB LEXIS 206 (Docket No. AB-290 [Sub-No. 283X], decision served May 2, 2007), the Board said (at *6-7):

The OFA provisions . . . reflect a Congressional intent that rail service be preserved whenever possible. While exemptions from 49 U.S.C. 10904 have been granted from time to time, they have been granted (only) when the right of way is needed for an overriding public purpose (footnote omitted), or an important private undertaking (footnote omitted), and there is no apparent interest in continued rail service (footnote omitted). Here, the petition for abandonment is not tied to a public project, and no transfer to facilitate private rail operations is

referenced by NSR. Also, Mr. Riffin has shown an interest in providing continued rail service, despite the absence of an active shipper on the line for almost 2 years. Accordingly, the Board finds no basis for undercutting the Congressional objective of maintaining rail service, despite the fact that prospects for a successful OFA are marginal. Therefore, NSR's request for an exemption from the OFA requirements of 49 U.S.C. 10904 will be denied.

ARGUMENT

BNSF's REQUEST FOR AN EXEMPTION FROM 49 U.S.C. § 10904 SHOULD BE DENIED

1. There Is No Overriding Public Purpose Or Important Private Rail Operation That Would Be Furthered By An Exemption From 49 U.S.C. § 10904

According to BNSF, the 2.56-mile segment of the Rail Line between Milepost Nos. 8.66 and 6.10 would be used after abandonment for "storage of surplus rail cars." Petition at 8. Quite obviously, that proposed use does not constitute an overriding public purpose for that segment of the Rail Line, nor would an important private rail operation be furthered by use of that segment as parking space for unneeded rail cars. That proposed use of the Rail Line does not even come close to satisfying the standards for exemption from OFA provisions. Accordingly, the Petition for exemption from 49 U.S.C. 10904 is required to summarily denied as to that rail line segment.

The Petition tells the Board and the parties very little about the post-abandonment use of the other 3.67-mile segment of the Rail Line between Milepost Nos. 12.33 and 8.66. It is stated at page 7 of the Petition that this segment would be used "for the continued development of the area's educational corridor." At page 8, we are told, no more specifically, that this segment would be used "for expansion of higher education institutions and other civic uses" . . . "expansion of an economically viable education corridor."

That, too, does not approach the showing that is required for an exemption from OFA provisions. It does not even appear from the Petition whether the higher education institution involved is a public or a private institution. Quite obviously, an exemption cannot be found to satisfy a public purpose if the educational institution involved is not a public institution. Additionally, the term “other civic uses” is far too vague to warrant a finding of a valid public purpose.

Moreover, even if a public educational institution were assumed to be involved, the Petition does not begin to establish a valid nonrail public use for this segment. Indeed, the Petition does not state how this rail segment would assertedly further expansion of an educational institution. Is the rail segment desired for construction of an educational building? Or for automobile parking associated with an educational institution? If so, are other alternatives available that would not require use of the Rail Line right-of-way? It was BNSF’s burden to make those essential showings in its case-in-chief for an exemption from § 10904 and, having failed to do so, it would now be too late because filing such information in a reply to a reply would clearly constitute improper rebuttal. *See Malone Freight Lines, Inc. v. United States*, 204 F.Supp. 745, 755 (ND, Ala., SD, 1962) (“We hold that such evidence was not in rebuttal of any facts appearing in any statements but served merely to aid plaintiff’s case in chief after its deficiencies had been pointed out by protestants. Under the Commission’s General Rules of Practice (footnote omitted), it was proper to strike such evidence.”)^{1/}

^{1/} PFCA-RR would move to strike if BNSF were to try to resuscitate its case-in-chief for exemption by means of improper rebuttal evidence in a reply to this reply.

2. There Is Apparent Interest In Continued Rail Service

BNSF's failure to establish an overriding post-abandonment non-rail public purpose for the involved Rail Line is fatal to its request for exemption from § 10904 without regard to a need for continued rail service on that Line. However, as appears below, there is an apparent interest in such continued rail service.

In that respect, Mr. Peter Cooper, a principal of PFCA-RR, is in the process of attempting to form a Public-Private Partnership with the City of Post Falls, Idaho, and/or to form a Port Authority under Idaho law, to acquire the Rail Line and a site for the Port District on the Spokane River at its confluence with Lake Coeur d'Alene. The Port District would purchase half of the DeArmond mill site to serve as a log terminal for transloading logs from water to rail, and for a future rail passenger terminal. The site is already served by rail and its permit to handle logs is grandfathered. The site has the advantage of being up-river from the U.S. Highway 95 bridge so that it would not be necessary to barge the logs under the bridge.

The Atlas mill site would serve as the Port District's main terminal and industrial park. The site would feature:

- (1) an industrial park for a borate treatment plant, a sawmill, and a biofuels plant;
- (2) a marine terminal, dry dock, and boat storage facility; and
- (3) a mixed-use area with boardwalk.

The site requires wood waste clean-up. It is currently zoned industrial and is permitted to handle logs along its waterfront. It has access to rail transportation and Seltice Boulevard.

Attached to this Reply as Appendix 1 is an overhead map that depicts the log transload port and renewable energy industrial park referred to above. As there illustrated, by virtue of the

Port District's acquisition of the involved Rail Line, PFCA-RR would be able to provide rail service at both of those facilities. (Pan-American, d.b.a. PFCA-RR is shown in red on that map). PFCA-RR would thus be able to transport both logs and renewable energy products by rail over the involved Rail Line.

Attached to this Reply as Appendix 2 is a schematic drawing of the contemplated Atlas Industrial Park, showing a lumber treatment plant, a biofuels plant, a sawmill, and a log yard. Those would be fertile sources of rail traffic for PFCA-RR.

Based on the foregoing, the Board should find that there is a legitimate interest in resumed and continued rail service over the involved Rail Line.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, there having been no showing of an overriding post-abandonment non-rail public purpose for the involved Rail Line, and it appearing that there is a legitimate interest in resumed and continuing rail service over that Line, the national rail policy at 49 U.S.C.

§ 10101(4) dictates that BNSF's Petition for an exemption from the OFA provisions of 49 U.S.C. § 10904 be denied.

Respectfully submitted,

PAN-AMERICAN RAILWAY, INC.
d.b.a. POST FALLS-COEUR d'ALENE RAILROAD
1671 Miles Avenue
Hayden, ID 83835

Replicant

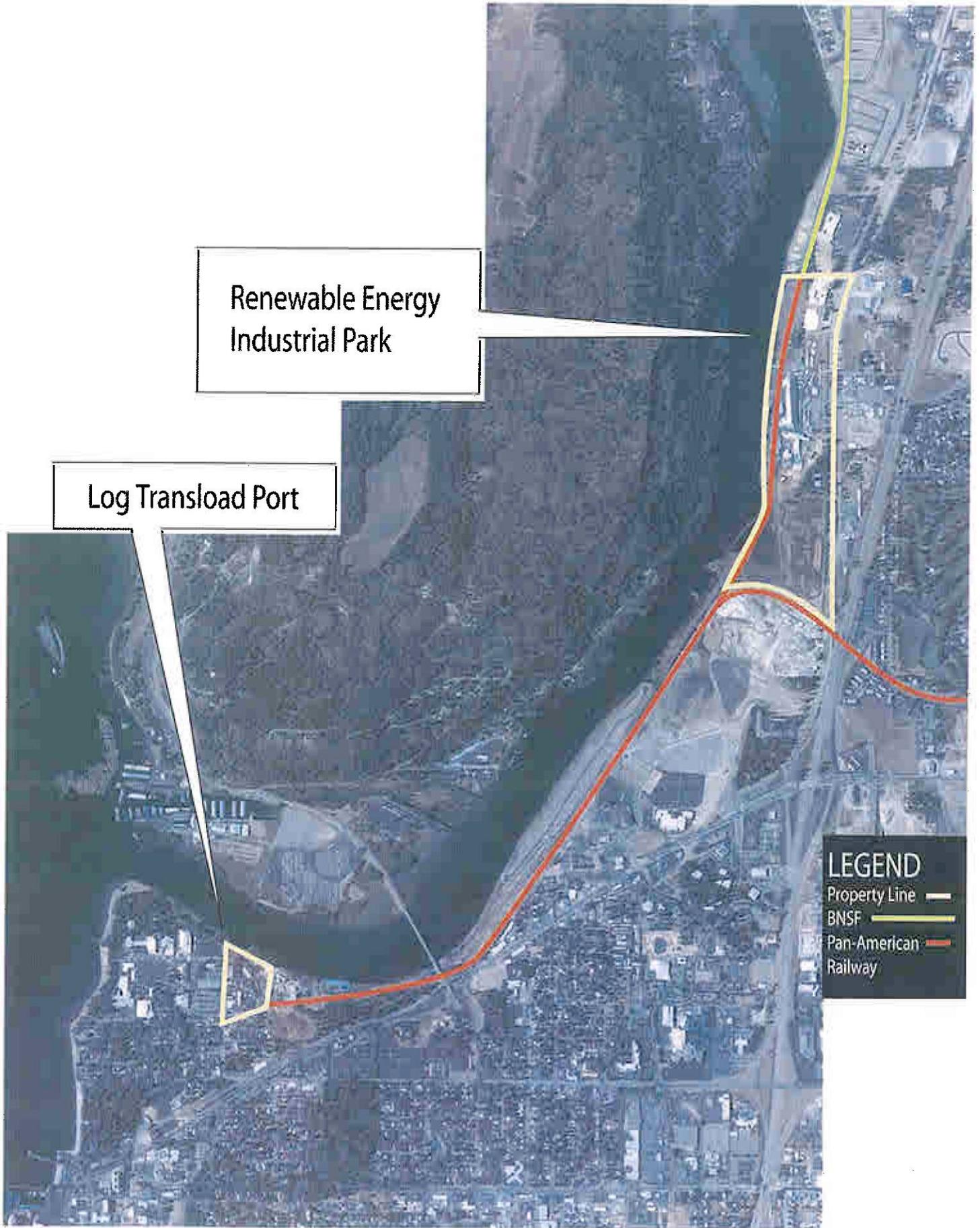
Thomas F. McFarland

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 Replicant

Due Date: September 17, 2009

Appendix 1



Renewable Energy
Industrial Park

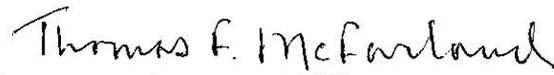
Log Transload Port

LEGEND
Property Line —
BNSF —
Pan-American
Railway —

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2009, I served the foregoing document, Reply In Opposition To Petition For Exemption From 49 U.S.C. § 10904, by UPS overnight mail on:

Kristy Clark, Esq.
General Attorney
BNSF Railway Company
2500 Lou Menk Drive, AOB-3
Fort Worth, TX 76131



Thomas F. McFarland