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January 16, 2002

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 the Secretary

JAN 17 2002

Part of
Public Record

Re: STB Docket No. AB-573X, *Trinidad Railway, Inc. -- Abandonment Exemption --
in Las Animas County, CO 204445*
and
STB Finance Docket No. 34087, *Trinidad Railway, Inc. -- Lease and Operation
Exemption -- Kern Valley Railroad Company 204446*

Dear Mr. Williams:

Enclosed please find an original and 10 copies of Reply In Opposition To Petitions For Reconsideration And Reopening Of Decision Served December 12, 2001, 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,

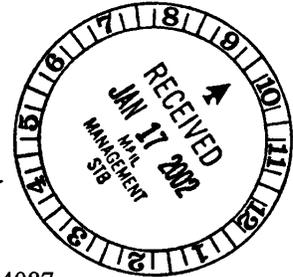
A handwritten signature in cursive script that reads 'Tom McFarland'.

Thomas F. McFarland

ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

TRINIDAD RAILWAY, INC. --)
ABANDONMENT EXEMPTION -- IN) DOCKET NO. AB-573X
LAS ANIMAS COUNTY, CO) 204445
)
)
TRINIDAD RAILWAY, INC. -- LEASE)
AND OPERATION EXEMPTION --) FINANCE DOCKET NO. 34087
KERN VALLEY RAILROAD COMPANY) 204446



REPLY IN OPPOSITION TO PETITIONS
FOR RECONSIDERATION AND REOPENING
OF DECISION SERVED DECEMBER 12, 2001

ENTERED
Office of the Secretary

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Part of
Public Record

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Attorney for Replicant

DATE FILED: January 17, 2002

BEFORE THE
SURFACE TRANSPORTATION BOARD

TRINIDAD RAILWAY, INC. --)	
ABANDONMENT EXEMPTION -- IN)	DOCKET NO. AB-573X
LAS ANIMAS COUNTY, CO)	
)	
TRINIDAD RAILWAY, INC. -- LEASE)	
AND OPERATION EXEMPTION --)	FINANCE DOCKET NO. 34087
KERN VALLEY RAILROAD COMPANY)	

**REPLY IN OPPOSITION TO PETITIONS
FOR RECONSIDERATION AND REOPENING
OF DECISION SERVED DECEMBER 12, 2001**

Pursuant to 49 C.F.R. § 1104.13(a), RAIL VENTURES, INC. (RVI) hereby replies in opposition to two pleadings that seek appellate relief in regard to the Board's decision served December 12, 2001, i.e., (1) petition for Reconsideration filed by Kern Valley Railroad Company (KVR) on December 28, 2001, and (2) Petition to Reopen filed by Trinidad Railway, Inc. (Trinidad) and A.P. Maxwell Development Company, LLC (Maxwell) on January 2, 2002.^{1/}

OVERVIEW

The decision under review marks the third time in four months that the Board has upheld the right of RVI to acquire the involved rail line under the offer-of-financial-assistance (OFA) provisions of 49 U.S.C. § 10904 in the face of appeals, refusals to furnish pertinent information and other legal maneuverings by KVR and Trinidad.^{2/} KVR and Trinidad have had their day in

^{1/} A Petition for Stay of the decision filed by KVR was denied by decision of Chairman Morgan, served January 15, 2002.

^{2/} The other decisions were served on August 13, 2001 (August 13 decision) and September 12, 2001 (September 12 decision).

court, and then some. Their latest appellate pleadings are designed merely to tediously extend the administrative process. The Board should deny their petitions swiftly and summarily.

A. REPLY IN OPPOSITION TO ALLEGATIONS OF MATERIAL ERROR

1. Allegation That The Record Is Contrary To The Finding That There Is No Convincing Evidence That RVI Will Not Be Successful In Operating The Rail Line (KVR Petition at 2-7)

In denying KVR's request to withdraw its abandonment filing, the Board found that KVR has not presented any convincing evidence to show that RVI will not be successful in operating the rail line (Decision at 4).

In support of its argument that the record is to the contrary, KVR has relied on the same evidence and argument that it advanced at the outset of the case in arguing unsuccessfully that RVI is not financially responsible and that RVI's offer is not reasonable (KVR Petition at 2-7). KVR acknowledges that the substance of its argument is that its evidence showed that RVI is financially unqualified and that its offer is unreasonable (*see* heading of argument at 2).

Those issues were decided against KVR in the August 13 decision (at 6-11), which upheld determinations made by the Director of the Board's Office of Proceedings in a decision served December 8, 2000.^{3/} The Board's resolution of those issues in the August 13 decision was thorough and unequivocal. KVR has not presented any evidence on this score that was not presented to the Board in its appeal of the Director's determinations.^{4/}

^{3/} Determinations of that nature have been delegated by the Board to the Director, with the right of appeal to the Board. *Abandonments - Delegations of Authority*, 3 I.C.C.2d 49 (1986).

^{4/} Ironically, the "changed circumstances" referred to by KVR elsewhere in its Petition (at 16-18) reinforce the Board's determination that RVI's operation of the rail line will be
(continued...)

The Board should not entertain KVR's impermissible second appeal of this subject matter. In *Buffalo Ridge RR Inc. - Aban. bet. Manley, MN and Brandon, SD*, 9 I.C.C.2d 544 (1993) the ICC found that the issue of the reasonableness of an OFA is not to be revisited where the Director's determination of reasonableness was not timely appealed to the ICC (at 546). It follows logically that neither are the issues at hand to be revisited where an appeal was resolved adversely to the party now attempting to resurrect the matter.

2. Allegation Of Procedural Error In Granting RVI's Petition To Compel Disclosure And Access (KVR Petition at 7-9)

The Board did not await a reply from KVR in granting RVI's petition to compel KVR to disclose the price that it paid to purchase the rail line and to provide access to the line for inspection to aid valuation. KVR argues that such was procedural error (KVR Petition at 7-9).

However, the Board's rationale at page 6 of the decision fully justifies its action in that respect. First, KVR had the opportunity in its petition for reconsideration to explain why it should not be required to disclose the price and/or grant access, but it failed to do so. These are routine matters on which KVR unquestionably was stonewalling. Evidence of comparable sales is routinely relied on in determining the fair market value of rail line assets. The price that KVR paid for the line is clearly relevant in valuing the line, particularly inasmuch as the purchase was so recent and for the acknowledged purpose of liquidation. Access to the line for inspection is so essential to meaningful valuation that no prior instance comes to mind where such access was

⁴(...continued)
successful. The significant revenues furnished by new coal traffic will make it more likely that RVI's operation will be profitable.

refused. If there was a sound reason for failing to compel disclosure and access, it was incumbent on KVR to identify such in its petition. KVR failed to do so.

Secondly, the Board appropriately found that its action was justified to avoid further delay. RVI's OFA was filed in early December, 2000. KVR has stonewalled and has filed pleading after pleading, the net effect of which has been 13½ months of delay to date without the OFA going forward. It is highly ironic that KVR is here alleging procedural unfairness. KVR has used Board processes to obtain maximum delay in the OFA process. It is time to put a halt to KVR's delaying tactics.

3. Allegation That It Was Arbitrary To Deny KVR's Request For Leave To Withdraw Its Abandonment Filing In View Of RVI's Right To Withdraw Its OFA At Any Time (KVR Petition at 9-13)

KVR has argued that it was arbitrary for the Board to deny KVR's request for leave to withdraw its abandonment filing in view of RVI's right to withdraw its OFA at any time (KVR Petition at 9-13).

However, the differences in those situations are readily apparent. The right to withdraw an OFA is statutory, even after the terms of acquisition have been fixed by Board decision. *See* 49 U.S.C. § 10904(f)(2). The rail carrier-owner of the rail line is not harmed in that circumstance. The Board reinstates abandonment authority, which is what the rail carrier sought in the first instance.

In contrast, there is no statutory right to withdraw an abandonment filing. As the Board correctly found (Decision at 9, n. 8), there is no unqualified right to withdraw a request for abandonment. In *Conrail Abandonment of a Portion of the West 30th Street Secondary Track in New York, NY*, 1988 ICC LEXIS 73, ICC Docket No. AB-167 (Sub-No. 493N), decision served

Feb. 11, 1988, the ICC found that parties to an abandonment proceeding acquire certain rights, and that it is within the ICC's discretion to protect those rights by denying a request for withdrawal of an abandonment filing (1988 ICC LEXIS 73, at 13-14).

Here, the Board correctly found that withdrawal of KVR's abandonment filing would "compromise the integrity of the statutory scheme by pulling the rug out from under (RVI's) OFA" (Decision at 5). The Board lawfully exercises its discretion when it refuses to take action that would derogate the OFA provisions of 49 U.S.C. § 10904. In that respect, *see Consolidated Rail Corporation -- Abandonment Exemption -- in Erie County, NY*, STB Docket No. AB-167 (Sub-No. 1164X), decision served Oct. 7, 1998 (not printed), at 8-9, where the Board said:

Our practice of revoking abandonments authorized pursuant to the class exemption is predicated on the need to maintain the integrity of the applicable regulations. But that purpose is not served when upholding the class exemption can only be achieved at the expense of derogating section 10904 of the statute (footnote omitted).

The Board is referred to RVI's Reply in Opposition to Motion for Leave to Withdraw Notice of Exemption for Abandonment, filed September 17, 2001, at 2-7, for a more thorough discussion of why the Board's discretion was exercised correctly in denying leave to withdraw the abandonment filing in this case.

4. Allegation That A Stay Was Improperly Entered And Expanded (KVR Petition at 13-15)

KVR has alleged that the stay imposed by virtue of Chairman Morgan's decision served September 10, 2001 was improperly entered, and was improperly enlarged in the decision under review. (KVR Petition at 13-15).

The stay entered by Chairman Morgan was in the nature of a housekeeping stay until the issues raised by the request to withdraw the abandonment filing and to lease the line for continued rail operation could be more carefully considered and decided. Board regulations provide explicit authority for the Chairman to take such action. *See* 49 C.F.R. § 1011.5(a)(2). Such action clearly was appropriate in view of the complexity of the issues that were presented. The Board issued its decision on the merits of those issues approximately 90 days later, which was timely action under the circumstances. There was no error in regard to entry of the stay.

There was no impropriety in the Board's refusal to permit KVR to lease the line to Trinidad while the OFA is pending. That action was essential to uphold the integrity of the statutory OFA process. There is clearly no merit in KVR's contention that the Board unlawfully deprived KVR of the use of its property (KVR Petition at 15), as if the Board's prohibition was made without regard to the pending OFA.

B. REPLY TO ALLEGATIONS OF NEW EVIDENCE AND/OR CHANGED CIRCUMSTANCES (KVR Petition at 16-18; Trinidad-Maxwell Petition at 4-5, Ex. A)

KVR and Trinidad-Maxwell have argued that increased demand for coal and resulting reinstatement of rail service on the line constitute new evidence and changed circumstances that warrant reversal of the decision under review. (KVR Petition at 16-18; Trinidad-Maxwell Petition at 4-5).

However, the fact that rail traffic is now moving over the line does not constitute substantially changed circumstances within the meaning of 49 U.S.C. § 722(c), nor provide new evidence that would warrant a different result than that reached in the decision under review. It was not the absence of rail traffic on the line that caused the Board to reject the notice of

exemption for lease of the rail line, and to refuse to permit KVR to withdraw its abandonment filing. Instead, the pendency of the OFA was the primary reason for the Board's action (Decision at 4-5). In taking action in the decision under review, the Board expressed concern about "creating a substantial disincentive to invoking the OFA process"; "disturbing the section 10904 process"; "infringing on the OFA process of section 10904"; and "pulling the rug out from under Rail Ventures' OFA" (Decision at 5). It is apparent that the pendency of a legitimate OFA precludes withdrawal of an abandonment filing and lease of a rail line to a third party, whether or not rail traffic is moving over the line. Therefore, the evidence and circumstances referred to by the Petitioners do not warrant a result different from that reached in the decision under review. Reopening is properly denied on that basis. *See Brooklyn Eastern Dist. Term. v. United States*, 302 F.Supp. 1095, 1105 (ED, NY, 1969) (reopening properly denied where there is no clear indication that additional evidence could have altered the result).

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated, the Petitions for Reconsideration and for Reopening should be denied.

RVI respectfully requests that the Board act on an accelerated basis in denying the most recent appeals. Thirteen and one-half months have passed since RVI's OFA was filed. There have been three full-Board decisions, two decisions by the Chairman on requests for stays, and a decision by the Director of the Office of Proceedings. It is understatement to say that the issues have been thoroughly considered and decided. It is high time for litigation to end. *See Potomac Electric Power Co. v. Penn Central*, 358 I.C.C. 473, 480 (1978) (petition to reopen denied where

it seeks relitigation of issues which have been thoroughly explored in an already overlong proceeding).

Respectfully submitted,

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DATE FILED: January 17, 2002

CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2002, I served the foregoing document, Reply In Opposition To Petitions For Reconsideration And Reopening Of Decision Served December 12, 2001, by UPS overnight mail, on the following:

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