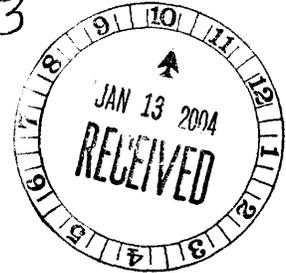


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209843



12 January 2004

ENTERED
Office of Proceedings

Hon. Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

JAN 13 2004

Part of
Public Record

Re: City of Venice -- Abandonment Exemption,
AB 863X

Dear Mr. Williams:

Enclosed please find an original and ten copies of an Opposition to the Petition for Stay filed on or about January 6, 2004, by TRRA in the above proceeding. As indicated in the Opposition, this Board has four criteria for a stay; each criterion must be met; and TRRA utterly fails to meet any.

City of Venice also seeks a procedural schedule to respond to any "comments" and petitions for reconsideration which may be filed by the due date (January 20) for same. TRRA filed its "comments" seeking reconsideration in advance of that date. City of Venice does not wish to respond to "comments" until the "comment" period has terminated.

Respectfully submitted,


Charles H. Montange
for City of Venice

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Encls

cc. counsel for TRRA per cert. serv.
Joseph Levine (STB Off. Proc.) (by fax to 202-565-9002)

BEFORE THE SURFACE TRANSPORTATION BOARD

DOCKET AB 863X

CITY OF VENICE

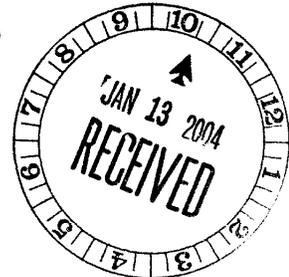
-- ABANDONMENT EXEMPTION --

BETWEEN BRANCH STREET YARD, MO
AND MCKINLEY JUNCTION, IL

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209843

OPPOSITION TO STAY PETITION
AND
MOTION FOR ESTABLISHMENT OF SCHEDULE
TO RESPOND TO PETITIONS/MOTIONS FOR RECONSIDERATION

I. Opposition to Stay

City of Venice hereby opposes the petition for stay dated January 6, 2004, filed by Terminal Railroad Association of St. Louis (TRRA) in this proceeding.

A. Background

Pursuant to 49 C.F.R. § 1152.50 (two year out of service class exemption for abandonments), this Board served a Notice of Exemption in this proceeding on December 29, 2003. The Notice is not effective until January 28, 2004. Madison County Transit (MCT) has filed a "statement of willingness" seeking issuance of a Notice of Interim Trail Use (NITU) pursuant to 16 U.S.C. § 1247(d) (trails use/railbanking), to which request City has consented. This Board has not yet ruled on MCT's pending request.

On the same date (December 29) that this Board issued the

Notice of Exemption, TRRA filed "comments," but the "comments" amount to a petition for reconsideration seeking dismissal of City's Notice of Exemption on the ground that the City has no common carrier obligations to abandon.

In its comments/petition for reconsideration, TRRA indicates that it wishes to dismantle a deteriorated trestle which is part of the rail corridor at issue in this proceeding. The trestle crosses certain property in which TRRA claims underlying fee ownership. TRRA acknowledges that City accurately represents that the wooden portion of the trestle is in deteriorated condition, and TRRA attaches photographs demonstrating the poor condition of the structure. TRRA states that the trestle is an "attractive nuisance" and exposes TRRA to "tremendous liability." TRRA suggests that it wishes to remove the trestle for safety reasons.

TRRA's professed alarm is difficult to understand. The wooden trestle has been in a deteriorated state for some time. City concurs that the trestle is no longer usable for transportation purposes, and must be removed or replaced for any use. The steel trestle, on the other hand, may be salvageable.

If the wooden trestle is an "abandoned fixture" which now belongs to the underlying fee owner, as TRRA implies in its comments/petition for reconsideration, then TRRA may remove it now on the theory that this is its right. However, TRRA runs the risk of its action being deemed a violation of common carrier obligations still extant on City of Venice. This risk

is removed once the exempt abandonment becomes effective. It would thus appear to City that it is in TRRA's interest for the abandonment exemption to become effective. If the wooden trestle will become an "abandoned fixture" that will belong to the underlying fee owner when City's exempt abandonment authorization becomes effective on January 28, 2004, then TRRA may still remove it immediately, on the theory it must go anyway, but TRRA should feel more secure in removing it after January 28, 2004, when the exempt abandonment authorization becomes effective.

If the trestle does not belong to TRRA by virtue of TRRA being (as it claims) the underlying fee owner either at this time or on January 28, 2004, then it will belong to City of Venice by virtue of the deed from Illinois Terminal Railroad granting to City all of Illinois Terminal's interests in real estate and fixtures on the two mile section of rail corridor in which the trestle is located.¹ City of Venice may lawfully

¹ The deed, dated 14 October 1958, on its face conveyed from Illinois Terminal Railroad to Venice, among other things, "[a]ll railroad approaches to [the McKinley] Bridge within the City of Venice, including the elevated approach extending eastwardly into Illinois to the east city limits of Venice, Illinois." as well as al "real estate situated in the City of Venice." The elevated structure concerning which TRRA professes concern is located within the area encompassed in the above description.

The 14 October 1958 deed was subject to Illinois Terminal Railroad's rights under a Railroad Agreement of even date. The Railroad Agreement established a lease arrangement, wherein Illinois Terminal leased portions of the property back for railroad purposes for a renewable 50 year term, subject to termination in the event certain bonds were repaid and in the event Illinois Terminal lawfully abandoned rail use of the line.

transfer whatever interests City owns by virtue of its deed from Illinois Terminal. TRRA would presumably require the permission of City or City's successor in interest to remove the trestle if the trestle belongs to the City. If City of Venice owns the trestle, City acknowledges that it is no longer restorable for any transportation use and should be removed. City has no objection to TRRA's removal of the wooden trestle immediately, so long as TRRA holds City harmless from any claims arising therefrom. The chief potential claim is that intentional removal of the trestle prior to an effective STB abandonment authorization amounts to an unlawful de facto abandonment prior to authorization. This potential claim would go away if the abandonment authorization becomes effective on January 28. Under the circumstances, it is hard to see how TRRA's interests are served by a "stay" of the abandonment effective date, even if TRRA is right that City has no common carrier obligation. TRRA should realize that authorizing abandonment does not create an obligation; it dispositively indicates that there is none, so that normal processes of state and local law can apply. In sum, TRRA does not demonstrate how the effectiveness of an abandonment authorization on January 28, 2004, could possibly harm its interests.

City of Venice's interests are injured by delays in the effective date of an abandonment. The City currently expects the State of Illinois or its nominee to acquire the McKinley Bridge for rehabilitation for automobile and other

transportation uses as soon as possible. That Bridge is currently closed for all use due to deteriorated condition. It is in the public interest for the Bridge to be rehabilitated. It is in City's interests to cooperate in obtaining rehabilitation of the bridge, because it will make it far easier for City residents to access jobs in St. Louis.

In order to facilitate rehabilitation, it is obviously prudent to remove any residual common carrier obligation that may be extant upon the property. Allowing the abandonment exemption to become effective on January 28, 2004, will permit transfer of the Bridge at any time after that date, fear of any risk or legal obligation flowing from an extant common carrier obligation. Among other things (i) the City acquired all the interests of Illinois Terminal Railroad in the two-mile rail line at issue here, (ii) Illinois Terminal did not retain a rail easement but instead leased sufficient property to operate a railroad from the City under a terminable lease, and (iii) the City did not receive an exemption from common carrier obligations or a determination of lack of jurisdiction at the time of transfer or thereafter. The City believes that it either has or likely has a residual common carrier obligation with respect to the property, which should be lawfully terminated. The Notice of Exemption procedure employed herein (49 C.F.R. § 1152.50) offers the fastest method to lawfully terminate any extant obligation.

Reading between the lines, City believes TRRA's concern is

not so much the trestle, but that Madison County Transit (MCT) may acquire some or all of City's interests in the rail corridor for interim trail use and railbanking purposes. But if that is the case, TRRA could accomplish its objectives simply by seeking a stay of the issuance of a NITU until there is a determination on TRRA's petition for reconsideration. But even if it sought only a stay of issuance of any NITU pending a determination on its petition for reconsideration, TRRA fails to show how there could be any injury to it were a NITU to be issued. If this Board were to issue a NITU (and City of Venice sees no reason why it should not), the NITU merely authorizes negotiation with MCT which may result in a transaction to keep the corridor, or portions of it, intact and under this Board's jurisdiction. MCT may never acquire any of City of Venice's interests in the railroad corridor at issue pursuant to a NITU issued by this Board, assuming this Board issues a NITU.² Even if MCT were to acquire Venice's interests in the rail corridor across property which TRRA claims to own in fee, MCT has authorized counsel for City of Venice to state that it has no objection to City's allowing TRRA to remove the wooden trestle, because MCT concurs that the wooden trestle is beyond reasonable repair for any purpose. In any event, MCT is an independent

² City understands TRRA to represent that Illinois Terminal Railroad only held a leasehold interest across TRRA property, notwithstanding the language of the deed from Illinois Terminal to City of Venice. If that is the case, it may well be that MCT will not be interested in acquiring that interest from City.

taxing authority in Madison County, and we do not understand TRRA to claim that MCT lacks resources to deal with the remaining steel trestle, including liability for it, should MCT acquire interests encompassing it from the City.

B. Argument

TRRA's petition for stay is manifestly defective. This Board's standards for a stay are well-established, and nothing in those standards has been satisfied by TRRA here.

In the recent words of this Board,

"[t]he standards governing disposition of a petition for stay are: (1) that there is a strong likelihood that the movant will prevail on the merits; (2) that the movant will suffer irreparable harm in the absence of a stay; (3) that other interested parties will not be substantially harmed; and (4) that the public interest supports granting of the stay. Hilton v. Braunskill, 481 U.S. 770, 776 (1987); WMATC v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C.Cir. 1997); Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C.Cir. 1958). On a motion for stay, 'it is the movant's obligation to justify the ... exercise of such an extraordinary remedy.' Cuomo v. NRC, 772 F.2d 972, 978 (D.C.Cir. 1985). The parties seeking a stay carry the burden of persuasion on all of the elements required for such extraordinary relief. Canal Authority of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974)."

Portland & Western RR -- Lease and Operation Exemption -- BNSF, STB Finance Dkt. 34255, served Dec. 26, 2002, appeal denied, id., served December 31, 2002. See also Trinidad Railway, Inc. -- Abandonment Exemption -- in Las Animas County, CO, AB-573X, served Jan. 15, 2002 (reiterates four-fold criteria for stay and indicates that in the absence of any showing of irreparable injury, party is not entitled to a stay, without regard to other three factors); Railroad Ventures, Inc. -- Abandonment Exemption -- between Youngstown, OH, and Darlington, PA, AB 556 (Sub-no.

2X), served Nov. 2, 2000 (reiterates four-fold criteria for stay pending judicial review).

In its Stay Petition, even if read in context of its earlier "comments," TRRA fails to carry its burden of proof on any of the four elements it must prove in order to obtain a stay. Indeed, TRRA in effect surprisingly ignores this Board's well-established standards for issuance of a stay. As a result, TRRA does not even attempt to make a showing on most of the elements.

1. Likelihood of Success on the Merits

TRRA fails to show a strong likelihood of success on the merits. City of Venice (perhaps in conjunction with Madison County Transit) intends to reply in full to TRRA's pending "comments," which as already indicated amount to a petition for reconsideration, in the time frame specified by this Board (see Part II below). Our limited remarks in this Opposition to TRRA's substantive claims are merely a summary of some of our points.

It is undeniable that Venice in 1958 acquired all the interests of Illinois Terminal Railroad in the two mile rail corridor at issue here, including ownership of all track, ties, bridges and interests in land. It is undeniable that Illinois Terminal did not retain any railroad easement. Instead, Venice leased certain interests sufficient for Illinois Terminal to continue to operate a railroad for 50 years, subject to renewal. The lease arrangement provided for early termination in the

event certain bonds were paid off and Illinois Terminal lawfully abandoned its use of the line. At that point Venice would have exclusive control over the property.

It is well-established that when a state or local government acquires a rail line that has not been abandoned, it is supposed to seek the approval of the ICC/STB. See Common Carrier Status of States, 363 I.C.C. 132, 133 (1980), aff'd sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982). The agency has indicated that the new owner is presumed to succeed the prior owner in terms on ensuring discharge of the common carrier obligation over the line. In essence, the new owner has a residual common carrier obligation even if the prior owner continues to provide service over the line.

TRRA relies on State of Maine, 8 ICC2d at 836-37 for the proposition that a state or local government does not become a residual common carrier if only the physical assets are conveyed but the common carrier rights and obligations are not transferred. But State of Maine also indicated that such jurisdictional determinations must be submitted in advance, and turn on specific facts of the transaction. 8 ICC 2d at 838. While ICC authorized Illinois Terminal to transfer the property in question here to City of Venice,³ ICC did not determine that

³ TRRA selectively quotes from the relevant decision (327 ICC 70 (1958)) at pp. 3-4 of its Dec. 29 comments. But in that decision, ICC pointedly rejected Illinois Terminal's claim that the transaction was outside the Commission's jurisdiction. 327 ICC at 71. In other words, ICC asserted jurisdiction over the transaction, and certainly did not determine that the transaction was outside its jurisdiction as in State of Maine.

City lacked any residual common carrier obligation with respect to the property in question should its lessee (Illinois Terminal) cease providing service. City of Venice acknowledges that the lease between City and Illinois Terminal provided for Illinois Terminal to have an exclusive right to use the line of railroad, but this was for the term of the lease. The parties did not specify that the common carrier obligation forever remained with Illinois Terminal, or that City would not have any such obligations.

Under this Board's precedent, it seems clear that a party cannot acquire rail property subject to an arrangement (as here) under which it can exercise either immediate or (as here) future exclusive authority over the property necessary for rail service, without either (1) some form of prior determination or exemption from ICC/STB jurisdiction, or (2) subjecting itself to federal rail jurisdiction as holder of a residual common carrier obligation. City of Venice did not obtain, so far as we can tell, any determination or exemption from jurisdiction, and thus the City prudently should take appropriate action to terminate

To the contrary, ICC instead held that due to loss of control over the property by Illinois Terminal, it was correct for the railroad to seek approval from ICC before entering into the transaction. 327 ICC at 74-75. ICC analogized the transaction to a situation in which a railroad abandoned its line in favor of a parallel track over another common carrier. 327 ICC at 74. In short, ICC neither determined the transaction outside its jurisdiction, nor did the Commission grant some sort of exemption to the City, which was apparently not even a party before it. The decision thus underscores that the City properly seeks a termination of its residual common carrier obligations with regard to the property interests it acquired from Illinois Terminal in 1958.

its residual common carrier obligation.⁴ To terminate this federal regulatory jurisdiction, the proper course (as this Board has indicated) is to file for an abandonment authorization.⁵

This does not mean that Illinois Terminal, or its successors, were not common carriers on the property. Illinois Terminal's successor (Norfolk) properly sought termination of its obligations. But the fact that another railroad terminated its obligations does not mean that City of Venice can ignore its obligations, even if only residual.

In sum, TRRA has failed to demonstrate a likelihood of success on the merits, let alone a strong likelihood. "[B]ut in any event, these issues are better addressed in the context of ... fully developed" briefing of the petition for reconsideration. See Portland & Western, *supra*, paragraph commencing "Third", served Dec. 31, 2002.

2. Irreparable Injury

⁴ See, e.g., Southern Pacific Transportation Company--Abandonment Exemption -- Los Angeles County, 8 ICC2d 495 (served May 20, 1992). None of the cases cited by TRRA are to the contrary. While we will discuss them at length in our Reply to TRRA's "comments"/petition for reconsideration, in all the cases the parties sought an exemption in advance subject to the special conditions applicable in each case and/or the railroad retained or obtained a railroad easement.

⁵ The situation in which City of Venice finds itself is not unusual in situations where local governments acquire rail property. The only thing that may be unusual is that City is attempting to address the matter in accordance with STB procedures rather than waiting to be caught, or imprudently ignoring this Board's authority. To the extent TRRA implies otherwise, it is engaging in misleading polemics.

TRRA fails to show any injury from allowing the Notice of Exemption to become effective, let alone irreparable injury. TRRA's petition for stay does not identify any injury at all, much less set forth a claim of an irreparable injury to it, and most certainly it does not make any showing that it would sustain an irreparable injury but for a stay. TRRA's "comments" dated December 29 discuss the trestle, with a focus on the deteriorated wooden trestle, do not fill in these gaps. Although they note that the deteriorated trestle constitutes a liability problem, TRRA and the trestle have co-existed for some time. As already explained, allowing the abandonment exemption to become effective on January 28 will, if anything, facilitate action by TRRA to remove the wooden trestle, and not adversely effect TRRA's ability, assuming arguendo that failure to remove the trestle at some point would amount to injury, much less an irreparable injury, to TRRA. Since TRRA fails to show any irreparable injury, its requested stay must be denied on this ground alone. Trinidad Railway, Inc., supra.

3. Interests of Third Parties and the Public

TRRA makes no showing at all on the related issues of injury to third parties flowing from a stay, and impact on the public interest. TRRA in fact seems blind to these matters.⁶

⁶ The closest TRRA comes in its "comments" to a discussion of third party interests is a claim at p. 4 that the trestle needs "to be removed to permit relocation of Illinois Route 3, a project of the Illinois Department of Transportation." City of Venice concurs that the wooden trestle needs to be removed to facilitate this project, but as indicated in this Opposition, City of Venice does not object to that removal (nor, MCT informs

Granting a stay is contrary to the interests of third parties and to the public interest. City of Venice wishes to remove any common carrier obligation extant on this property so that the McKinley Bridge can be transferred to Illinois Department of Transportation or its nominee for rehabilitation for highway purposes as soon as possible free and clear of any residual common carrier obligation. This goal clearly is in the interest of third parties and the public. If the Notice of Exemption becomes effective, this goal is accomplished. If this Board stays the effectiveness of the Notice of Exemption, then transfer of the Bridge will be adversely affected. This delay is manifestly contrary to the public interest and those third parties concerned with the Bridge.

In addition, removal of the trestle is best served by allowing the exempt abandonment to become effective, because such removal would then no longer amount to a possible unlawful de facto abandonment, prior to STB authorization. If TRRA believes that removal of the wooden trestle is in the public interest, then the stay is contrary to the public interest.

Because TRRA has failed to meet any of the standards for a stay, much less all of them as required to be entitled to a stay, TRRA's stay request must be denied. Stays of abandonment

us, does MCT). Allowing the abandonment authorization to become effective will facilitate the removal, not compromise it. In any event, City of Venice is informed that the relocation of Illinois Route 3 is two years away. In other words, relocation of Route 3 will not be held up by allowing the abandonment authorization here to become effective on January 28, and a stay would be totally irrelevant to relocation of Route 3.

authorizations are ordinarily considered when a line must be preserved intact to permit vindication of a shipper interest in continued rail service, or to allow meaningful consideration of environmental or historic preservation issues. Here TRRA seeks a stay ostensibly to accomplish what can be done if there is no stay, and indeed what can best be done with no stay. TRRA's stay request makes no sense.

II. Motion for Scheduling Order

Under STB procedures, petitions for reconsideration are due twenty days after the publication of a Notice of Exemption under 49 U.S.C. § 1152.50(d)(3). Under this schedule, petitions for reconsideration in this proceeding may be filed as late as January 20, 2004. Under this Board's general procedural regulations, responses to such petitions are due twenty days after filing. 49 C.F.R. § 1104.13(a). TRRA filed its petition on or about December 29, such that under § 1104.13(a), a reply by Venice is nominally due on January 20. Yet that is the due date for other "comments" and petitions for reconsideration, and on or before that date, other petitions or comments may be filed.

City of Venice does not wish to be in the position of having to file multiple responses to petitions and comments filed pursuant to § 1152.50(d)(3). One consolidated response will be more efficient and less confusing for all parties, and for this Board. The City accordingly requests this Board to issue a scheduling order providing for the City to file its

response to any timely filed petitions for reconsideration (including the "comments" dated December 29 by TRRA) or other similar "comments" twenty days from the due date (January 20) for such filings. By City's calculation, its response under this proposal would be due on or before February 9, 2004. As indicated, TRRA despite opportunity shows no prejudice or injury to its interests that could possibly arise during this interval.

Conclusion

TRRA's request for a stay must be denied. TRRA fails to make any of the showings required for a stay. This Board should enter a scheduling order providing for City of Venice to respond to timely petitions for reconsideration on or before February 9, 2004.

Respectfully submitted,



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for City of Venice

Certificate of Service

I hereby certify that copies of the foregoing were tendered to an express delivery service on 12 January 2004 for next-day delivery upon Fritz Kahn, 1920 N Street, NW (8th Fl.), Washington, D.C. 20036-1601 and Rebecca R. Jackson, Bryan Cave LLP, 211 No. Broadway (36th Fl.), St. Louis, MO 63102.

