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BEFORE THE SURFACE TRANSPORTATION BOARD

Yakima Interurban )  
Lines Association -- ) AB 600  
Adverse Abandonment -- )  
in Yakima County, WA )



OPPOSITION TO  
KERSHAW SUNNYSIDE RANCHES, INC.'s  
PETITION FOR RECONSIDERATION AND CLARIFICATION

on behalf of

YAKIMA COUNTY,  
CITY OF YAKIMA,  
TOWN OF NACHES, and  
YAKIMA INTERURBAN LINES ASSOCIATION

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Office of Proceedings

JAN 18 2005

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Public Record

Yakima County, et al. ("rail commenters") request that this Board deny the Petition for Reconsideration and Clarification filed by Kershaw Sunnyside Ranches (Kershaw) in this proceeding.

Summary

The referenced Petition is tantamount to a petition to reopen, for that is the only vehicle envisioned by this Board's regulations which is available to Kershaw for the issues which it is raising. Yet Kershaw does not meet this Board's requirements for reopening.

Argument

This Board's abandonment regulations do not envision any administrative appellate procedures from denials of abandonment authorization. To the contrary, such "decisions are administratively final upon the date they are served." 49 C.F.R. § 1152.25(e)(2). This Board's regulations provide that

parties "seeking further administrative action may file a petition to reopen." Id. § 1152.25(e)(2)(i). Insofar as relevant here, the Board's regulations appear to envision two kinds of petitions to reopen: (a) petitions filed within 15 days of the decision, coupled with motions to stay the effectiveness, with the purpose of preventing an abandonment authorization from becoming effective (§ 1152.25(e)(2)(i), and (b) any other petition to reopen an administratively final action. Id. § 1152.25(e)(4).

Petitioner Kershaw Sunnyside Ranches ("Kershaw") did not file its "petition to reconsider" within 15 days of the service date (November 19, 2004) of what it refers to as "this Board's November 10 order." To the contrary, the Kershaw petition was not filed until December 29, 2004 -- some forty days after the service date of the order against which it is directed. Accordingly, the Kershaw petition is subject to 49 C.F.R. § 1152.25(e)(4). As with all such petitions, the Board may only grant the petition if Kershaw shows that the "November 10 order"

"would be affected materially because of new evidence, changed circumstances, or material error."

49 C.F.R. § 1152.24(e)(2)(ii). See also id. § 1115.4.

Kershaw's petition appears to be predicated on arguments to the effect that the Board committed a material error. Kershaw's first argument (Kershaw pet. p. 1) is that YILA is not a rail carrier in that it has not provided transportation for compensation, and no other party to the proceeding has been or

is a rail carrier as so defined on this line. Rail Commenters note that YILA has provided passenger transportation for compensation on Yakima's historic trolleys for over 20 years, starting in 1974, although not on the Naches Branch, so Kershaw is misleading if it means to imply that YILA has no rail experience. As to the Naches Branch and freight operations, YILA, originally a "non-carrier," became a "rail carrier" upon acquiring the line in question pursuant to YILA--Acquisition Exemption--BNSF Acquisition, STB F.D. 33719, served March 4, 1999. The fact that it has not provided freight transportation for compensation is not material because it acquired the line for that purpose, and proceeded with a major rehabilitation effort (using over a half million dollars in funding provided by Washington Department of Transportation) to that end. Kershaw's distinction (argument) is not relevant or material, and thus does not show material error.

Kershaw next argues (Kershaw pet. p. 2) that this Board's decision is contrary to City of Colorado Springs, F.D. 31271 & 31223 (ICC, served March 22, 1989). Kershaw in essence claims there are no feasible plans to rehabilitate the line. But WSDOT has already invested over a half million in efforts to rehabilitate this line. Once the dust settles in this proceeding, and Yakima County can move forward with an effort to acquire the line and with arrangements for completion of remaining rehabilitation work. Yakima County has a demonstrated ability to lease the line to operators; indeed, Kershaw in its

petition notes that at least four companies have bid to lease and to operate another railroad line already owned by the County, including the new carrier (Columbia Basin Railroad) to which BNSF has recently leased some adjoining trackage.<sup>1</sup> The evidence already on file, corroborated by the evidence now put forward by Kershaw, indicates both motivation, ability, and feasibility to complete rehabilitation of the line in question in this proceeding, and then to operate it. Indeed, the "developments" -- if that is what Kershaw means to argue -- are positive, not negative for the line. In all events, Kershaw has failed to show any material error, or any new evidence or circumstance which would materially change the previous outcome.

Yakima County, et al., confesses not to understand Kershaw's third argument (Pet. pp. 3-4) to the effect that an effort by CSX to acquire unused trackage for rail purposes in STB Dkt. AB-31 (Sub-no. 38) (Jan. 28, 2002) is somehow equivalent to the County's efforts here. CSX sought an adverse abandonment in order to allow it to engage in rail operations which were perceived to be inconsistent with unused rail obligations on the line against which CSX's application for adverse abandonment was directed. County is not seeking any such abandonment. To be sure, the County is seeking to ensure rail service, but here that requires that the corridor be maintained, not that a mile

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<sup>1</sup> See Yakima Herald Republic archive article entitled "Rail Spur to White Swan Draws Bids" attached to Wixson Declaration. Rail Commenters view the recent lease as making operation of the Naches Branch more economic.

in its middle be adversely abandoned so the corridor is fragmented and reverts to adjacent landowners so as to preclude rail service. Again, Kershaw fails to show any material error; instead, Kershaw seems to be emphasizing that the result the Board reached is correct.

Finally, Kershaw (pet. at 5) calls for this Board to set a "reasonable period of time" for service to be restored, arguing that the Board's decision otherwise creates a "legal limbo." Kershaw seems to be suggesting this argument either as a "material error" or as a grounds to issue a "clarification." It is neither. Yakima County understands that efforts must move forward to restore rail service. However, the main uncertainty holding up progress at this time is legal in nature, and flows from Kershaw's various lawsuits and proceedings challenging the integrity of the line, including Kershaw's claim for adverse abandonment authority (coupled with Kershaw's implicit suggestion that if adverse abandonment is authorized, then the property in question here automatically reverts or extinguishes to Kershaw). Should Kershaw prevail in its litigation, then further investment in preserving the line will be wasted. Thus, Kershaw holds up that investment by its persistence here. In other words, Kershaw's litigative stance creates an uncertainty that serves as a roadblock to the contractual arrangements and additional proceedings Yakima County and other rail proponents must undertake to foster completion of rehabilitation and ultimate operation of this line. Kershaw can keep this

uncertainty open merely by taking appeals and instituting further proceedings, which an arbitrary "deadline" would encourage Kershaw to do. We think STB's reliance on the language "reasonable period of time" allows exigencies under Kershaw's control as well as other exigencies to be taken into appropriate account.

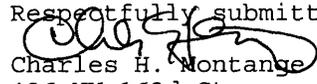
Kershaw in the alternative asks for the Board to require the County to "demonstrate good cause why the line should not be abandoned" if the some specific time limit is not met. The County is not a proponent of abandonment of the line. The burden of proof for abandonment is on the proponent of abandonment under 49 U.S.C. § 10903 and applicable regulations. Kershaw provides no basis to shift the burden, as its proposal would require. Moreover, as we indicated in our opposition to the adverse abandonment in the first place, Kershaw's application to abandon one mile in the middle of the line is illegal in all events, because it would amount to a de facto severance of the line into two inoperable remnants, and this has never been subjected to required transportation, environmental and other analyses. Indeed, the Board never ruled on our arguments (although the Board noted them in its Decision served November 19). These arguments independently preclude the adverse abandonment sought by Kershaw. Indeed, nothing Kershaw raises in its petition would materially change the result (denial of adverse abandonment) in light of our unaddressed "severance" arguments. In all events, Kershaw has failed to

meet any of the criteria for reopening the administratively final result embodied in this Board's Decision served November 19, 2004.

Conclusion

For the reasons stated above, the petition filed by Kershaw should be denied.

Respectfully submitted,

  
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Certificate of Service

I hereby certify service upon the following parties as indicated on 18 January 05:

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