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January 17, 2007

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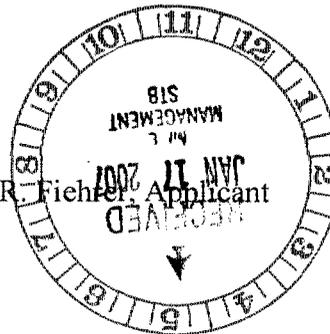
Honorable Vernon A. Williams  
Secretary  
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Re: Finance Docket No. 34947, Dr. Daniel R. Fiehrer, Applicant  
v. BNSF Railway, Respondent



Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding is the original and ten (10) copies of BNSF Railway Company's Response in Opposition to Appeal of Decision of Director Konschnik Served November 22, 2006.

I would appreciate it if you would date-stamp the enclosed extra copy and return it to the messenger for our files. Please let me know if you have any questions. Thank you for your assistance.

Sincerely yours,

Robert M. Jenkins III

Enclosures

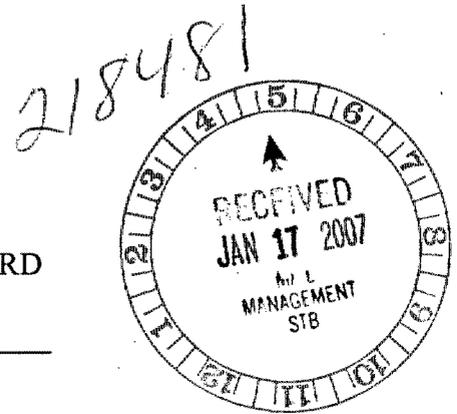
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cc: M.A. Fiehrer  
Dr. Daniel R. Fiehrer  
Charles H. Montange, Esq.  
Mr. David M. Konschnik

BEFORE THE  
SURFACE TRANSPORTATION BOARD



Finance Docket No. 34947

DR. DANIEL R. FIEHRER—FEEDER LINE APPLICATION—A LINE OF BNSF RAILWAY  
COMPANY BETWEEN HELENA AND GREAT FALLS, MONTANA

**RESPONSE IN OPPOSITION TO APPEAL OF  
DECISION OF DIRECTOR KONSCHNIK  
SERVED NOVEMBER 22, 2006**

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Dated: January 17, 2007

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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 34947

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COMPANY BETWEEN HELENA AND GREAT FALLS, MONTANA

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**RESPONSE IN OPPOSITION TO APPEAL OF  
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**INTRODUCTION**

This appeal concerns Director Konschnik's November 22, 2006 Decision ("the Decision") rejecting a fundamentally flawed feeder line application.<sup>1</sup> The October 27, 2006 "Preliminary Application" ("the Application") filed by Dr. Daniel R. Fiehrer ("Dr. Fiehrer") seeks to acquire a rail line owned by BNSF Railway Company ("BNSF") that runs approximately 90 miles between Helena and Great Falls, Montana. As the Decision establishes, Dr. Fiehrer's Application fails to satisfy the core requirements for a feeder line application laid out in 49 U.S.C. § 10907 and 49 C.F.R. § 1151.

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<sup>1</sup> Dr. Fiehrer styled his opening filing in this appellate proceeding as a "Petition For Reconsideration, Review and Appeal To Full Board To Resubmit Preliminary Application To Acquire BNSF's De Facto Abandoned Railroad Between Helena and Great Falls, Montana." The governing regulations do not provide for "reconsideration" or "review" of the Decision, but only for an appeal. *See* 49 C.F.R. §§ 1115.2; *see also* 49 C.F.R. § 1011.7(a)(8). Therefore, BNSF takes Dr. Fiehrer's filing as a request for appellate review by the full Board.

Most importantly, the Application does not and cannot demonstrate that BNSF has refused to provide adequate service to shippers seeking to use the line. As Director Konschnik wrote:

This application provides no indication that any shipper has requested service over this rail line during the time that it has not been operated. Absent such evidence, the application does not show that BNSF has refused to make the necessary efforts to provide adequate transportation to shippers, nor that transportation is inadequate for the majority of shippers that transported traffic over the line in the past.

Decision, Slip op. at 4. Director Konschnik's conclusion confirms the incurable defect in Dr. Fiehrer's Application. Congress established the feeder line program to ensure that underserved shippers can satisfy their rail transportation needs. Yet, Dr. Fiehrer offers nothing to show that BNSF is in any way neglecting the needs of shippers. It follows that there is no basis for a determination that "the public convenience and necessity require or permit a sale," which is the required statutory standard for forcing a sale. This fact alone is a sufficient reason to affirm the Decision.

Moreover, Dr. Fiehrer's Application is rife with other omissions, as the Decision details. Dr. Fiehrer has provided no objective evidence regarding the net liquidation value of the rail line, and has not even attempted to identify the owners or the value of the land that the tracks sit on. In addition, he has not demonstrated that he (or, more to the point, the non-profit entity that he has established to own the railroad) has the financial wherewithal to guarantee that the proposed railroad can function for at least three years. Further, he has not shown that his business plan, from which he assumes he will derive profits to fund the railroad's operations, is anything more than speculation, and he has not contracted for either an operator or for liability insurance, as the regulations require that he must. Finally, the burdensome discovery from BNSF that Dr. Fiehrer requests cannot fix this string of problems – the information that he requests is readily accessible

in the public domain, such as in real estate records, or from retained experts, such as a scrap metal appraiser or an investigator to find potential shippers that Dr. Fiehrer claims to exist.

Ultimately, though, these are subsidiary points. The Application fails because there is no evidence that BNSF is not adequately meeting the needs of shippers. Accordingly, BNSF respectfully asks the Board to affirm Director Konschnik's Decision.

## ARGUMENT

### A. Dr. Fiehrer Cannot Meet The Criteria For A Successful Feeder Line Application

To understand why the Director's Decision rejecting Dr. Fiehrer's Application was correct, the Board need look no further than Congress' purpose in establishing the feeder line program. Now codified at 49 U.S.C. § 10907 and 49 C.F.R. § 1151, the program was designed to "give shippers and communities an opportunity to insist upon adequate rail service. Where such service is not forthcoming the provision provides, through acquisition, a viable alternative to poor service or total abandonment." *Caddo Antoine & Little Missouri R.R. v. United States*, 95 F.3d 740, 746 (8<sup>th</sup> Cir. 1996) (quoting H.Conf.Rep. No. 1430, 96<sup>th</sup> Cong., 2d Sess. 124, reprinted in 1980 U.S.C.C.A.N. 4110, at 4156-57). That is, the program only applies where railroads are not providing adequate service to shippers.<sup>2</sup> Where a railroad such as BNSF is fulfilling its obligation, the feeder line statute is inapplicable, as Director Konschnik recognized.

In addition, the statute requires an applicant seeking to acquire a feeder line to be a "financially responsible person." 49 U.S.C. § 10907(a). A "financially responsible person" must in turn satisfy two criteria. First, he must be "capable of paying the constitutional minimum value of the railroad line proposed to be acquired." 49 U.S.C. § 10907(a)(1). The statute in turn

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<sup>2</sup> In addition, as noted in the comments filed on November 15, 2006, by Charles H. Montange, Esq., on behalf of Recreation Trails, Inc., Eric Grove and Doug Monger, 49 U.S.C. § 10907 was intended by Congress to principally apply to "feeder lines", not trunk lines carrying overhead traffic.

defines the term “constitutional minimum value” to mean “not less than the net liquidation value of such line or the going concern value of such line, whichever is greater.” 49 U.S.C. § 10907(b)(2). Second, a financially responsible person must be “able to assure that adequate transportation will be provided over the line for a period of not less than 3 years.” 49 U.S.C. § 10907(a)(2). If an applicant qualifies as a financially responsible person, he can apply to take over ownership of a line where “the public convenience and necessity require or permit the sale,” according to a series of factors set forth in 49 U.S.C. § 10907(c)(1).<sup>3</sup>

In order for the Board to accept his Application, Dr. Fiehrer bears the burden of demonstrating not only that he is a financially responsible person, but also that *every* element of the statutory public convenience and necessity test is met. *See* 49 C.F.R. § 1151.3(a)(3) (stating “[t]he initial application . . . must include the following: . . . Information sufficient to demonstrate that the applicant is a financially responsible person”); 49 U.S.C. § 10907(c)(2) (stating “the burden of proving that the public convenience and necessity require or permit the sale of a particular railroad line is on the person filing the application.”).<sup>4</sup>

As is discussed below, Director Konschnik’s November 22, 2006 Decision properly concluded that Dr. Fiehrer’s Application failed to meet either of his burdens – it does not demonstrate that he is a financially responsible person capable of guaranteeing the railroad’s

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<sup>3</sup> A financially responsible person can also apply to take over a railroad line that the operator has marked on its system diagram map as a candidate or potential candidate for abandonment (categories 1 and 2). *See* 49 U.S.C. § 10907(b)(1)(A)(2); 49 C.F.R. § 1151.4(b)(1)(ii). But this option is not applicable here, because BNSF has not so marked its system diagram map and has no current plans to abandon the line for the foreseeable future.

<sup>4</sup> Dr. Fiehrer’s statutory and regulatory burden is a high one. The STB has the responsibilities of guaranteeing the public’s safety and of ensuring that a successful feeder line application will satisfy the purposes of the program, namely, providing adequate service to shippers. The STB can ensure these goals only by closely vetting all feeder line applications.

operations for at least three years, and further it does not establish that “the public convenience and necessity require or permit a sale.”

In exercising its appellate authority over Director Konschnik’s Decision, the Board can reverse only in the narrow circumstances set out at 49 C.F.R. §§ 1115.2. That provision states in subpart (b):

Appeals must be based on one or more of the following grounds:

- (1) That a necessary finding of fact is omitted, erroneous, or unsupported by substantial evidence of record;
- (2) That a necessary legal conclusion, or finding is contrary to law, Board precedent, or policy;
- (3) That an important question of law, policy or discretion is involved which is without governing precedent;
- (4) That prejudicial procedural error has occurred.

Because none of those conditions hold true here, the Board should affirm the Decision.

**B. There Is No Evidence That BNSF Is Refusing To Adequately Serve Shippers**

The Decision establishes that Dr. Fiehrer’s Application cannot satisfy the key question in this case of whether BNSF is adequately serving shippers. As is quoted above, the Decision states that Dr. Fiehrer “provides no indication” that any shippers have even requested service over the Helena-Great Falls line over the last six years. Decision, Slip op. at 4. The Decision properly states that, without such evidence, “the application does not show that BNSF has refused to make the necessary efforts to provide adequate transportation.” *Id.*

This conclusion has the strong support of the statute and of this Board’s previous decisions. As noted, the statute itself lays out the five criteria at § 10907(c)(1). In order to be successful, an application must meet all of them. Dr. Fiehrer, however, meets none.

**1. There Is No Evidence That BNSF Has Refused Rail Service To Any Shipper Who Requested It**

Section 10907(c)(1)(A) calls for the applicant to establish that the operating rail carrier “refuses . . . to make the necessary efforts to provide adequate service to shippers who transport traffic over such line.” Dr. Fiehrer appears to offer three arguments for why his Application satisfies this requirement.<sup>5</sup> None is sufficient.

First, he claims that the fact that BNSF has not used the line since 2000 “is *prima facie* evidence of ‘inadequate’ service required under the Statute.” Appeal at 5. But whether trains are running on the line is not germane. The relevant statutory inquiry is whether BNSF “refuses . . . to provide adequate rail service to shippers.” Here, BNSF has not refused service, because shippers have not asked for it.<sup>6</sup> Dr. Fiehrer’s Application ignores this key question. Further, the Board has previously rejected a feeder line application in a case involving a much longer period of dormancy. In *Forty Plus Foundation/Manhattan Central Railway Systems, LLC—Feeder Line Acquisition—The Manhattan Highline*, STB Fin. Dkt. No. 34606, 2005 WL 156801 (January 24, 2005), the rail line had not carried traffic for *twenty years*. Though Director Konschnik decided that case under the financial responsibility provisions of the statute, the fact that the application was rejected shows that a period of dormancy does not constitute “*prima facie*” evidence of anything. The statute requires Dr. Fiehrer to provide evidence that BNSF has refused to provide adequate service, and he has not done so.

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<sup>5</sup> His appeal seems to blend together financial responsibility arguments with those involving public convenience and necessity.

<sup>6</sup> Further, the lack of overhead shipping on the line is not reviewable here. It involves a matter of how to route trains, and so is within BNSF’s discretion. See *Futurex Indus., Inc. v. I.C.C.*, 897 F.2d 866, 873 (7<sup>th</sup> Cir. 1990) (stating “decisions to reroute rail traffic are ordinarily within the discretion of the carrier.”).

Second, Dr. Fiehrer claims that his Application shows that “two shippers would use the line if acquired and operated by someone other than BNSF,” and that, if he prevails in this appeal, “Applicant contends he will provide verified statements from ten shippers who would use this line.” Appeal at 3, 7. But the fact that unidentified shippers might use the line is irrelevant to the question of whether BNSF is currently providing inadequate service. Just as occurred in the *Forty Plus* case, the applicant here has failed to identify “any shippers that want to move any traffic.” *Forty Plus* at \*3.<sup>7</sup> Without doing so, the Application must fail.

Additionally, Dr. Fiehrer is simply wrong when he states that two shippers have pledged that they will use an independently-owned line. As Director Konschnik wrote in his Decision, one of these alleged shippers, Gwynn Lumber, “does not indicate that it would use the line if purchased by Dr. Fiehrer, but only that the line would provide a more direct route for an unspecified number of Gwynn Lumber’s shipments.” Decision, Slip op. at 3 n.3. The other alleged shipper appears to be Exel Transportation Services, Inc., based in Sulligent, Alabama. However, Exel’s letter to Dr. Fiehrer, included as an appendix to his Application, makes clear that it has no intention of acting as a shipper. Rather, the letter demonstrates that the company informed Dr. Fiehrer that it has “locomotives and Rail equipment available for sale and lease.” Exel’s web site further demonstrates that its connection to Dr. Fiehrer is not as a potential customer, but as a potential service provider. It states: “Exel’s rail car services provide critical equipment procurement and positioning matching the correct asset with the right move.”<sup>8</sup>

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<sup>7</sup> See also *New York & Greenwood Lake Ry.—Feeder Line Acquisition—A Line of Norfolk S. Ry. Co.*, STB Fin. Dkt. No. 34649, 2005 WL 1767440 (July 27, 2005) at \*2, where the Board noted that the applicant conceded that it would not meet the public convenience and necessity criteria where there had been no service on the subject line and no complaints about failure to serve for the previous two years.

<sup>8</sup> See <http://www.exeltransportation.com/intermodal.html>.

Finally, Dr. Fiehrer claims that shippers are refusing to allege that BNSF provides inadequate service for fear of retaliation. Appeal at 3. In addition to the fact that Dr. Fiehrer provides no specifics which would support his claim, the full Board just last year rejected a similar attempt to excuse a feeder application's failure to include complaints by shippers. The Board wrote, "There is a fundamental problem with [the applicant's] argument that silence of a majority of the shippers should be excused because shippers may be reluctant to speak out for fear of retribution by [the incumbent provider]." *PYCO Industries, Inc.—Feeder Line Acquisition—South Plains Switching, Ltd.*, STB Fin. Dkt. Nos. 34844, 34890, 2006 WL 1807378 (July 3, 2006) (*PYCO II*) at \*2. That same "fundamental problem" exists here.

**2. There Is No Evidence that A "Majority" Of Shippers Receive Inadequate Service**

Subsection (B), also closely linked to the core purpose of the statute, calls for the applicant to establish that "the transportation over such line is inadequate for the majority of shippers" who transport traffic over the line.

Just as Dr. Fiehrer does not show that BNSF has refused to provide adequate service, he also does not show that even a single shipper has received subpar service – never mind a "majority" of shippers. Demonstrating dissatisfaction is the key burden that Dr. Fiehrer must meet under this statute, and he has not. As the Director of the Office of Proceedings wrote in *PYCO Industries, Inc.—Feeder Line Acquisition—South Plains Switching, Ltd. Co.*, STB Fin. Dkt. No. 34844, 2006 WL 1516604 (June 1, 2006) (*PYCO I*) at \*3, the application there was deficient where the applicant "has not provided information regarding the number of shippers on the line, which clearly is needed to determine whether a majority of the shippers . . . have received inadequate service." And, as is discussed above, the full Board on appeal in *PYCO II*

held that silence is not sufficient to demonstrate that a majority of shippers is dissatisfied with the existing service.

### 3. Selling The Line Would “Significantly” Harm BNSF’s Finances

Additionally, the statute calls for the applicant to carry his burden to show that requiring the sale “will not have a significantly adverse financial effect on the rail carrier operating such line.” 49 U.S.C. § 10907(c)(1)(C).

Director Konschnik’s Decision does not explicitly address this prong, but the Decision makes clear that BNSF stands to suffer substantial economic harm if the Board approves Dr. Fiehrer’s Application. As the Decision states, “if rail traffic in the region increases sufficiently, [BNSF] could reopen the line without having to invest *millions of dollars* to reacquire the real estate and *rebuild the line.*” Decision, Slip op. at 2 (emphasis added).

This is correct. BNSF anticipates “that overhead traffic between western Canada and certain western states might someday return to levels that could justify reopening the line. If so, we feel that BNSF is best positioned to operate and maintain the route in a safe, effective and efficient manner.” Letter from Matthew K. Rose to Dr. Daniel Fiehrer, dated August 7, 2006, in Dr. Fiehrer’s Application at Appendix 5. The fact is that the demand for rail lines is increasing, and BNSF would likely need to pay a significant amount of money if it needs to buy back the rail line or build a new one.

In a similar situation, BNSF retained a portion of its Stampede Pass line, a major through route in the State of Washington, in out-of-service status not listed on BNSF’s system diagram map for a number of years, on the chance that traffic levels might demand reinstatement for through route operations. The line has now been reinstated in recent years (*see Burlington N. Santa Fe Corp., et al.—Control—Washington Cent. R.R. Co.*, 1 S.T.B. 792 (Oct. 24, 1996)) in

order to accommodate an increase in demand for rail capacity. If BNSF were divested of a corridor and needed to build a new one to accommodate an upswing in demand for rail capacity, such a new rail line would be estimated to cost no less than \$2 million per mile for 100 miles of track, and years of regulatory delay to satisfy the review processes envisioned by the National Environmental Policy Act. Given this significant expense, a forced sale of the line could potentially have a very real and significant financial effect on BNSF.

**4. Selling the Line Would Also Have An “Adverse Effect” On BNSF’s “Operational Performance”**

Subsection (D) establishes a related requirement that the applicant must show that “the sale of such line will not have an adverse effect on the overall operational performance of the rail carrier operating such line.” As is discussed above, BNSF may well need this line to accommodate overflow traffic in the future.

**5. The Proposed Line Will Not Improve Rail Transportation**

The final statutory criteria that an applicant must satisfy, but Dr. Fiehrer does not, is that “the sale of such line will be likely to result in improved railroad transportation for shippers that transport traffic over such line.” 49 U.S.C. § 10907 (c)(1)(E). Dr. Fiehrer admits in his appeal that an independent rail line is unlikely to provide much service to any local shippers on the line. Appeal at 4. Rather, he seeks to use the 90 miles of track to somehow create a modern “bridge” or “silk road” to link Canada to Mexico. *See, e.g.*, Application at 40; *see also* Decision, Slip op. at 4. Whatever his hopes for the line, the fact is that Dr. Fiehrer has not demonstrated there is a need to improve rail service, has not shown that any shippers have complained about inadequate service, has not shown that BNSF has refused to accommodate any reasonable requests from shippers, has not shown that even a single shipper would use the line if he establishes service, and has not shown how his 90 mile shortline railroad would serve as a route of choice for

shippers as part of a through route between Canada and Mexico. As Director Konschnik wrote in the Decision, “the lack of statements of support from shippers or other railroads undermines the likelihood that a sufficient number of . . . shipments would occur. Absent such support, the Application does not show that Dr. Fiehrer’s purchase of the line would improve the existing transportation options for shippers.” Decision, Slip op. at 4. BNSF agrees, and therefore urges the Board to affirm rejection of the Application.

**C. Neither Dr. Fiehrer Nor The Nonprofit Shell Company That Would Own The Railroad Is A Financially Responsible Person**

Even if there were a need for an independent rail line between Helena and Great Falls (and there is not), Dr. Fiehrer is not the person to own it. His Application fails to show that he is a financially responsible person within the terms of the statute. As Director Konschnik concluded, “[t]he failure to provide sufficient evidence of financial responsibility is, in itself, ground to reject the application as incomplete.” Decision, Slip op. at 3. *See also Forty Plus* at \*2 & n.10 (rejecting feeder line application on this prong alone).

According to the statute, Dr. Fiehrer must provide evidence that he “(1) is capable of paying the constitutional minimum value of the railroad line proposed to be acquired” and “(2) is able to assure that adequate transportation will be provided over such line for a period of not less than 3 years.” 49 U.S.C. § 10907(a), (b). As the Director establishes, Dr. Fiehrer has done neither.

**1. Dr. Fiehrer's Calculation Of The Rail's Net Liquidation Value Is Rank Speculation**

The Decision establishes that Dr. Fiehrer cannot pay the constitutional minimum value of the rail line, defined as its net liquidated value.<sup>9</sup> The Decision notes a series of flaws in Dr. Fiehrer's Application in this regard.

First, Dr. Fiehrer makes the astonishing claim that the 90 miles of track and associated property have absolutely no value. As the Director summarized Dr. Fiehrer's position, "[w]ithout providing any supporting evidence, Dr. Fiehrer assumes that the salvage and cleanup costs must be greater than the estimated scrap value of the line because, he argues, BNSF would otherwise have salvaged the line." Decision, Slip op. at 2 (emphasis added). But as the Director explained, BNSF has provided an alternate explanation. It plans to retain the line so that, "if rail traffic in the region increases sufficiently, it could reopen the line without having to invest millions of dollars to reacquire the real estate and rebuild the line." *Id.*

There are still deeper flaws in Dr. Fiehrer's estimate of the line's value. The Director notes that "Dr. Fiehrer estimates that the line has a scrap value of \$3,375,520." Decision, Slip op. at 2. This figure is pure speculation. The chart containing Dr. Fiehrer's alleged valuations, Application at 41, was apparently created by Dr. Fiehrer. There is no proof that he hired a reputable expert appraiser to assist him, or that he in any way used rigorous criteria to verify various asset values and calculations. This ad hoc guess of the line's value runs afoul of the

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<sup>9</sup> Director Konschnik's Decision did not address the going concern value of the line in detail. Decision, Slip op. at 2. BNSF does not wish to belabor the going concern value, given the flaws in Dr. Fiehrer's net liquidated value analysis that the Director has confirmed. Decision, Slip op. at 2-3. However, BNSF does note that the going concern value in this case must take into account the *future* value of the line's usefulness in providing potential future capacity for BNSF's network to meet the needs of its customers. In the Washington Central Railroad Company situation, mentioned above, no one can deny that the revitalized Stampede Pass line has a substantial going concern value. Similarly, the Helena-Great Falls line has a significant going concern value today based on its future potential use.

governing regulations. According to 49 C.F.R. § 1151.3(a)(4), “The initial application . . . must include the following information in the form of verified statements: . . . . An estimate of the NLV and the GCV of the line and *evidence in support of these estimates.*” Without an expert’s opinion or some objectively verifiable data, there is no support.

Similarly, Dr. Fiehrer’s estimate that the line has zero value is based on his completely unsupported assertion that the cleanup costs will be so high that they will outweigh the line’s inherent value. Again, Dr. Fiehrer provides no support from a reputable expert with experience in environmental cleanup work to back up his claim. And Dr. Fiehrer’s Application ignores land value all together. He simply asserts with the hopeful optimism of an adjacent landowner that “[t]he right-of-way itself would *probably* revert to adjacent land parcels of present day owners from which it was originally taken to build the railroad.” Application at 39. The Director’s Decision notes the inadequacy of this assumption, stating, “Dr. Fiehrer further assumes that BNSF owns all of the real estate in the line by easement, rather than in fee, and he assigns no value to the real estate. But absent any supporting evidence, it is not possible to determine if ownership by easement is true for the entire line.” Decision, Slip op. at 2. In fact, a search of publicly available real estate records would establish the ownership of the land and right of ways, but Dr. Fiehrer failed to make use of this resource. The Director was correct in concluding that Dr. Fiehrer’s Application therefore was lacking, stating: “If, as BNSF asserts, it owns much of the real estate in fee, any [net liquidation value] must take into account the value of land owned in fee.” *Id.* at 2.

By providing only guesswork as to the value of the scrap, the alleged environmental clean up costs, and the ownership of the underlying land, the Application fails to provide the support required by 49 C.F.R. § 1151.3(a)(4).

**2. Dr. Fiehrer Cannot Guarantee Funding For The Railroad To Operate For Three Years**

Even if Dr. Fiehrer had correctly established the constitutional minimum value of the railroad line (and he has not), his Application still fails to demonstrate that he is a financially responsible person within the terms of the statute, because he cannot show that he “is able to assure that adequate transportation will be provided over such line for a period of not less than three years.” 49 U.S.C. § 10907(a)(2). The Director correctly held in the Decision that Dr. Fieher has not identified sufficient revenue, either from his own resources or from third parties, and that Dr. Fiehrer’s business plan is too speculative to cover operating costs.

**a. Dr. Fiehrer Has Not Secured Any Resources To Fund The Railroad**

The Director noted that Dr. Fiehrer has not secured any commercial loans or lines of revolving credit that would secure the railroad’s finances for at least three years. Decision, Slip op. at 3. Dr. Fiehrer claims that his personal net worth is sufficient to cover the proposed railroad’s ongoing expenses. Appeal at 5; *see also* Application at Appendix 24 (claiming that Dr. Fiehrer’s net worth is \$4.85 million). He further asserts that he will find “an appropriate revolving line of credit obtained under protective conditions to operate the line for three years,” Appeal at 5. Significantly, however, even now Dr. Fiehrer does not pledge his entire net worth to fund the railroad or as collateral for a loan. Rather, he states in ambiguous terms that “Applicant pledges to provide *a* financial commitment” if he prevails in this proceeding. Appeal at 9 (emphasis added). Such an indeterminate financial pledge is far from sufficient.<sup>10</sup>

The Board has repeatedly rejected precisely this sort of vague, undocumented assertion of financial responsibility. Dr. Fiehrer cannot rely on the hope that his railroad will qualify for

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<sup>10</sup> The Decision’s comment that “Dr. Fiehrer did not pledge to liquefy his assets,” Decision, Slip op. at 3 n.4, is simply one example of how Dr. Fiehrer might have tried to show that the proposed railroad might be on firm financial footing for the required time.

loans or grants from banks or from the government, “because the mere existence of these programs does not represent a committed source of funds.” Decision, Slip op. at 3. As the Director’s Decision points out, both *PYCO* and *Forty Plus* demand more.

In *PYCO*, the STB rejected an application that did not specifically show that it could operate for three years, and the full Board accepted that the applicant was a financially responsible person only when a new application containing a letter from the applicant’s CEO, an annual financial statement, and a promised loan from a bank was filed. Compare *PYCO I* at \*3 with *PYCO II* at \*3 n.6. In the *Forty Plus* decision, the STB held that the applicant was not a financially responsible person where it had neither loan commitments nor its own adequate resources. *Forty Plus* at \*2-\*3.

Further, in *Glenwood and Southern Railroad Co.—Feeder Line Acquisition—Arkansas and Midland Railroad Company Line Between Gurdon and Birds Mill, AR*, ICC Fin. Dkt. No. 32613, 1994 WL 659336 (Nov. 23, 1994) at \*2, *aff’d* by 1995 WL 97025 (March 9, 1995), the ICC refused to accept as financially responsible an applicant who did not include a firm financial commitment from an outside source of revenue. Given these precedents, Dr. Fiehrer simply cannot make a credible case that his Application demonstrates that he has enough financial backing to run a railroad for three years or more.

The *Forty Plus* decision is significant for another reason. There, the application made clear that the non-profit applicant would not own or operate the railroad, but that it was creating a for-profit subsidiary for that purpose. Similarly, in this case, Dr. Fiehrer’s Application states that he will not personally own the railroad, but rather that it would be owned by a non-profit corporation that he has established. Application at 55, and Appendices 3, 25. Neither in his Application nor on appeal does Dr. Fiehrer claim that the non-profit has *any* assets, or any ability

to qualify for loans. Rather, he frames all of the discussion in terms of his own net worth and of his own supposed ability to obtain credit. This is not sufficient. As the *Forty Plus* decision makes clear, the operating company – as distinct from that company’s parent – “has not established that it has any financial resources of its own and does not show where or how it would otherwise obtain these funds.” *Forty Plus*, at \*2. That same reasoning applies here to the non-profit shell that Dr. Fiehrer has created, whatever the state of Dr. Fiehrer’s own personal finances.

**b. The Operating Plan Will Not Support The Railroad For Three Years**

The Director’s Decision also points out that Dr. Fiehrer cannot reasonably expect to rely on his proposed operating plan to fund the railroad for the minimum three years. The Decision states: “Without providing any evidentiary support, Dr. Fiehrer assumes that unnamed local shippers will seek service over the line, that other rail carriers will route cars over the line or seek trackage rights to use this line, and that the line will make a profit. In the absence of statements supporting those assumptions, however, there is no indication that the line could be operated profitably.” Decision, Slip op. at 2-3.

Indeed, Dr. Fiehrer’s proposed operating plan is unworkable on its face. The plan projects beginning operations with “on demand” service, with a goal of eventually running one train, round trip, each day between Helena and Great Falls. Application at 49. He proposes running a “mixed” train of freight and passenger cars, for a total of 3,000 cars per year; two locomotives would pull the train. Application at 32, 49-50. He says that he would lease or buy the cars and locomotives, and that a contractor would provide fueling services. Application at 33, 50, 57. He anticipates identifying shippers and offering his services to them. Application at 42, 52-53, 57-59. He expects to generate business by using the rail line as a “bridge” for traffic

running between Western Canada and Mexico. Application at 9-10, 33, 40, 46, 53, 55, 57-58, & Appendix 19. The railroad would employ five people, Application at 50, 63, and would be owned by the non-profit corporation that he has established. Dr. Fiehrer and his wife seem to be the two officers for the nonprofit. Application at 55, and Appendices 3, 25. In order to begin operations, the railroad would need to repair the damaged section of the line, which Dr. Fiehrer claims would cost only a few thousand dollars, but which BNSF estimates would be much more expensive. Application at 22, 30. He includes a pro-forma income statement that estimates after-tax income of about \$154,380 per year based on annual expenses of \$942,700. Application at 63.

This plan is at best wildly hopeful, and at worst is completely unworkable. Though Dr. Fiehrer claims that the line's operations would provide enough revenue to fund it, he provides nothing more than speculation that the railroad – which will no doubt cost at least hundreds of thousands of dollars per year to run after rehabilitation – will be successful enough to be self-sustaining. He *admits* that he has no commitments from any shippers to use the rail line if he restarts service, Application at 49; he provides no evidence that there will be interest by Canadian or Mexican shippers in using the rail line as a bridge nor means to access it on a commercial and service basis for connecting railroads; he offers no surveys or other evidence of consumer interest to support his asserted interest in passenger service; and he has no support for his claim that the rail line could actually generate rail movements of 3,000 cars per year.

To be part of the through routings he contemplates, his railroad would have to become part of interline service routings which would have to be cost and service competitive with other existing and potential service offerings in the corridors he identifies to participate in any “overhead” (handling of rail traffic neither originating or terminating on his Helena-Great Falls

railroad) traffic and generate revenues from such movements. Such interline, inter-regional and international flows are moving over all the rail carriers named in his Application via long-established and cost/service competitive lanes currently. Believing that injecting a 90-mile shortline operating a mixed train accommodating passenger and freight traffic once a day each way into the middle of a new multicarrier routing will generate significant revenues for the shortline just because it exists is counter to current successful rail operations, which depend on heavy-density scheduled services over fewer high capacity corridors to drive service improvement, shipment velocity and consistency, and favorable costs to support infrastructure investment and expansions.

Other aspects of the plan also do not make sense on their face. For instance, if the daily trains he runs have mixed passenger and freight cars, will passengers be willing to detour to a freight area where the cars will be added and removed? Further, he admits that the rail line cannot support stacked intermodal container cars and can only “probably” accommodate unstacked cars, Application at 24 – but he provides no support that these deficiencies could be overcome to accommodate the sort of trans-continental rail “bridge” that he seeks to establish and rely on. And it seems implausible for a staff of only five people to run the complex operation that he lays out. Also, his Application is ambiguous about whether he will directly employ the labor for the rail operations, or whether the new railroad will contract with an established rail operator.<sup>11</sup>

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<sup>11</sup> Compare Application at 50, 63 (indicating that Dr. Fiehrer or his company will employ workers directly) with Application at 47-48, 50 (indicating that he or his company will contract with an operating company and a fueling company). Significantly, Dr. Fiehrer’s proposed budget does not include any provision for contracting with an operating company. Application at 63.

Dr. Fiehrer's estimate of the cost to repair the tracks is far too low. Rather than costing several thousand dollars, the work to restore the line to service and maintain it in a northern climate for safe operations year-round (which will be needed to ensure that HAZMAT, passenger and other traffic can safely be carried on the line) will likely cost many, many multiples of that. BNSF estimates the repairs to fix (versus "patch") the areas where the line has washed out to cost several million dollars alone. Finally, the rail service as a whole would almost certainly cost hundreds of thousands more each year than the Application claims.<sup>12</sup>

The Board's precedents will not permit such an ill-conceived plan to support a finding of financial responsibility. For example, in *Glenwood and Southern Railroad Co.* at \*3, the Director of the Office of Proceedings refused to accept an application as financially responsible, partially because the operating plan called for over 4,600 cars per year, but there was no evidence that the four shippers on the line could support so much traffic. Of course, that is four more shippers than Dr. Fiehrer can identify.

And in the *Forty Plus* decision, as is also the case here, the applicant stated that it would rely on operating revenues and an unidentified growing network of shippers. *Id.* at \*2-\*3. The applicant there, according to the Board, "fail[ed] to identify any specific traffic it plans to move or any shippers that want to move any traffic," a failing that Dr. Fiehrer's Application shares. *Id.* at \*3. The Board continued that the applicant "has not submitted any contracts, affidavits, or other verification to support its contention that there are shippers along the [line] that currently desire service;" *Id.* Neither has Dr. Fiehrer. The Board summed up the situation there by stating

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<sup>12</sup> As further evidence that Dr. Fiehrer's plan is speculative, note that he lists as one of his goals the ability to "Generate a return-on-invested-capital of 20%." Application at 57. By contrast, the stock market has an historical return of about 10 percent per year. See Matt Krantz, *Believe It Or Not, 10% Annual Returns Are The Average*, USA Today.com, January 12, 2006, available at <http://tinyurl.com/ukyzf>.

that the “operating plan is sketchy at best” and that the applicant’s “assumptions about operating revenues and the interest of shippers are pure speculation.” *Ibid.* So are Dr. Fiehrer’s.

**D. Dr. Fiehrer Has Not Arranged For An Operator Or For Insurance, In Violation Of Regulatory Requirements**

The Director’s Decision also independently rejects Dr. Fiehrer’s Application on the basis that it does not include the required rail operator or liability insurance. Decision, Slip op. at 3. These are regulatory requirements that Dr. Fiehrer ignores at his peril. According to 49 C.F.R. § 1151.3(a)(7), “The initial application . . . *must* include the following information in the form of verified statements: . . . An operating plan that identifies the proposed operator; [and] attaches any contract that the applicant may have with the proposed operator” (emphasis added). Similarly, sub-part (8) of the same regulation requires the initial application to include “A description of the liability insurance coverage carried by applicant or any proposed operator.” Dr. Fiehrer’s Application includes neither. The Director’s Decision correctly captures Dr. Fiehrer’s cavalier attitude to the operator requirement, where it states that “Dr. Fiehrer hopes to contract with an operator, but does not identify one.” Decision, Slip op. at 3.

Even on appeal, Dr. Fiehrer still has not identified either an operator or arranged for liability insurance. Regarding the operator, he states that if his Application is accepted, only then will he “submit the names and addresses, along with proposed Operating Plans from at least four (4) qualified shortline operators expressing an interest in operating the line if the sale is ultimately approved.” Appeal at 6. This is completely backwards, and shows that Dr. Fiehrer still does not understand that the regulations oblige him to arrange for an operator as part of his “initial application.”<sup>13</sup>

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<sup>13</sup> Dr. Fiehrer is also laboring under another misconception of what the law requires. He states in his appeal that he is in a “catch 22,” in that it is his understanding that the statute does not permit

Similarly, Dr. Fiehrer has not yet arranged for insurance coverage. Appeal at 7. Again, the regulations make clear that insurance must be included in the “initial” application. This is not a mere technicality. Rather, as the Director’s Decision explains, the insurance requirement is meant to “assure the protection of the public.” Decision, Slip op. at 3.

**E. Discovery Will Not Cure Dr. Fiehrer’s Flawed Application**

Dr. Fiehrer has requested a range of discovery, including a list of shippers who previously used the line. Application at 10, 11-12. The regulations do allow an applicant to receive discovery necessary for an application from an owner of a line “to obtain required information that is primarily or exclusively within the personal knowledge of the owning carrier.” 49 C.F.R. § 1151.2(d)(1). However, Dr. Fiehrer is not entitled to receive discovery here. Dr. Fiehrer can and should hire his own expert appraisers who can provide him with this information without the need of taxing BNSF’s resources to develop information that he has the ability and responsibility to develop. As the Director wrote, “information that BNSF could provide would not cure all the deficiencies in the application. For example, BNSF could shed no light on Dr. Fiehrer’s financial responsibility, the identity of Dr. Fiehrer’s proposed operator, or the insurance carried by the proposed operator.” Decision, Slip op. at 4-5.

Further, on appeal, Dr. Fiehrer claims that discovery is necessary to establish the scrap value of the line, and the value of the land in the land’s right of way. Appeal at 2-3. This is nonsense. Dr. Fiehrer can and should hire his own expert appraisers who can provide him with this information without burdening BNSF with legwork that he has the responsibility to perform.

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him to identify an operator, for fear of impermissibly “‘fronting’ for any railroad operator.” Appeal at 4. Dr. Fiehrer seems to be referring to the requirement in 49 U.S.C. § 10907(a) that precludes any Class I and Class II rail carrier from qualifying as financially responsible person. Of course, there is no conflict in the law, which is perfectly comprehensible – a Class I or II railroad cannot qualify for the feeder line program, but anyone who does qualify must identify an operator. Dr. Fiehrer’s excuse for his failure to identify an operator is therefore unacceptable.

Similarly, no discovery is necessary to discover potential shippers, as Dr. Fiehrer claims in his Application. In his appeal, Dr. Fiehrer claims that “One nationally syndicated investigative transportation reporter contacted eleven current BNSF shippers personally” who he indicates might use the line. Appeal at 3. If an “investigative transportation reporter” can find shippers so easily, surely Dr. Fiehrer can hire an expert to assist in his search for shippers.

This is not the first time that the STB has rejected a discovery request on the grounds that discovery could not fix the application. In *PYCO I*, the STB held that “These deficiencies would not be cured by obtaining discovery of information in [the incumbent rail’s] possession.” *PYCO I* at \*5. The Board should reaffirm that holding in this case.<sup>14</sup>

**F. Dr. Fiehrer Is Abusing The Feeder Line Program To Protect His Own Personal Property**

The Decision notes that Dr. Fiehrer owns land adjacent to the rail line and that he may have been motivated to file his feeder line application in order to thwart any possibility that BNSF will turn the line into a hiking trail. Decision, Slip op. at 1 & n.2. Indeed, given that Dr. Fiehrer’s Application states that the proposed railroad would initially provide only “on demand” service, and given that he has not identified even a single shipper who would use the line, there is a real possibility that the railroad will not run a single train. The Board has already expressed its strong disapproval for those who use its procedures toward such an end. Specifically, the Board prohibited a group of landowners from trying to take ownership of an unused line pursuant to a

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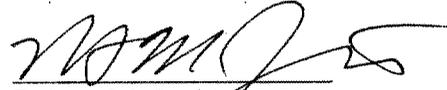
<sup>14</sup> In addition, a review of Dr. Fiehrer’s discovery requests, Application at 11-12, reflects that many, if not most, of the requests seek information and data not related in any way to the various statutory criteria which Dr. Fiehrer must meet. For instance, Dr. Fiehrer seeks the names and ages of BNSF employees who operated the line prior to July 2000. He also seeks track profiles, maps, time tables, maintenance costs, information on rates, on property taxes and a variety of other financial and commercial information. Moreover, even assuming that somehow this information is needed by Dr. Fiehrer to prepare his application (and is not available to him otherwise), the requests are unduly burdensome, vague and irrelevant.

related statute, where the landowners had no intention of operating a railroad but instead sought to “abuse” the Board’s procedures and prevent the line from becoming a hiking trail. *See, e.g., The Burlington Northern and Santa Fe Ry. Co.—Abandonment Exemption—in King County, WA in the Matter of an Offer of Financial Assistance*, 3 S.T.B. 634, 640 (Aug. 5, 1998) at \*5, *aff’d sub nom. Redmont-Issaquah R.R. Preservation Ass’n v. STB*, 223 F.3d 1057 (9<sup>th</sup> Cir. 2000). Just as the Board rejected the application there, it should also reject Dr. Fiehrer’s Application here.

### CONCLUSION

Dr. Fiehrer’s Application fails to satisfy the underlying purpose of the feeder line program – because BNSF is not failing to provide adequate service, the STB cannot force a sale of the line to Dr. Fiehrer. Further, even if such a deficiency in BNSF’s service somehow were to be established, Dr. Fiehrer’s Application fails to demonstrate that he is a financially responsible person capable of running the railroad for at least three years. The Director’s Decision recognizes these stark facts, and nothing in that Decision meets the criteria necessary for the full Board to reverse. Therefore, BNSF respectfully requests that the Board affirm the Director’s well-reasoned Decision.

Respectfully submitted,



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January 17, 2007

CERTIFICATE OF SERVICE

I certify that I have on this 17<sup>th</sup> day of January, 2007, served copies the foregoing "Response In Opposition To Appeal Of Decision Of Director Konschnik Served November 22, 2006" by First Class U.S. Mail upon:

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A handwritten signature in black ink, appearing to read "CH Montange", is written over a horizontal line.