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BEFORE THE SURFACE TRANSPORTATION BOARD

Yakima Interurban Lines Association,)
-- Abandonment Exemption -- in) AB 600 (sub-no 1-X)
-- Yakima County, WA)

ENTERED
Office of Proceedings
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Part of
Public Record

**MEMORANDUM IN OPPOSITION TO MOTION TO EXTEND THE NITU
NEGOTIATION PERIOD AND IN SUPPORT OF PETITION TO REOPEN
ABANDONMENT**

I. FACTS

On September 15, 2003, Kershaw Sunnyside Ranches, Inc., (Kershaw Sunnyside Ranches) filed a Notice of Intent to Abandon or Discontinue Service. (AB 600, 20896). Kershaw Sunnyside Ranches filed the Adverse Abandonment Application on December 11, 2003. (AB 600, 209589).¹ Kershaw Sunnyside Ranches' Adverse Abandonment Application alleged that \$750,000 in liens existed against the line. (AB Docket No. 600, 209589, p.3). As the Application indicated, Yakima Interurban Lines Association (YILA) has been "negotiating" with Yakima County and the City of Yakima regarding the line for two years. However, no one has initiated any action before the Board and no agreements have been reached. (Adverse Abandonment Application, AB 600, 209589, p.3).

On December 26, 2003, Yakima County, Washington, through Charles Montange, its attorney, filed a response to Kershaw Sunnyside Ranches' application and aspects of the Petition for Waiver it filed. (AB 600, 209738). On March 12, 2004, Yakima County, the city of Yakima, town of Naches,² and YILA, filed a joint protest and comments and Motion to Modify (Expand) or to Dismiss. In that, the governmental entities and YILA indicated that

¹ The Adverse Abandonment Application appears filed on December 11, 2003.

² The City of Yakima, Town of Naches and Yakima County will hereinafter be referred to as the "governmental entities."

“Yakima County and WsDOT [Washington State Department of Transportation] had worked out a plan for the restoration of rail service on the Naches branch.” (Joint Protest and Comments, March 12, 2004, p.3, AB 600, 210283). In the plan, the governmental entities and YILA indicated that they had a two step rehabilitation project to pay off the substantial debts owed by YILA. (AB 600, 210283, March 12, 2004, p. 3-5). The county provided detail about how it would pay off the debt on the line. (AB 600, 210283, p. 3-4). Alternatively, they indicated that several of the rail commentators were interested in possible trail use of the line. (AB 600, 210283, p.5).

In Yakima County’s letter regarding environmental assessment, dated March 17, 2004, the county indicated, “Washington Department [sic]of Transportation and the local governments on the Naches branch all wish to rehabilitate the Naches Line as currently owned by YILA, and restore freight rail operations to it. Yakima County and WsDOT have developed a plan to accomplish this end, as further set forth in the protest and comments” (AB 600, 210713, March 17, 2004, letter, p.2). The letter continues to state “neither WsDOT, nor Yakima County have [sic] sufficient funds to pay for such a re-route as part of their plan for a line acquisition and rehabilitation, such a re-route may only be implemented if Kershaw will pay for it.” (p.2-3).

On November 19, 2004, the STB issued a decision that denied Kershaw Sunnyside Ranches’ Petition for Adverse Abandonment. (AB 600, 34751 EB). The Decision recognized that “Kershaw has legitimate concerns here, related to YILA’s management of the property.” (p.5). Additionally, it indicated that “[g]iven the evidence before us we cannot find that the prospect for continued rail service, or the need for that service, is as negligible as Kershaw would have us find” (p.5). The Decision also stated, “we note that our finding is without prejudice to Kershaw’s seeking to reopen or file a new abandonment application, should the proposed rehabilitation and restoration not occur within a reasonable period of time.” (AB 600, 34751 EB).

Kershaw Sunnyside Ranches then filed a Petition for Reconsideration and Clarification that requested that STB set a deadline for the “reasonable time.” (AB 600, 212885, p.5). In a decision on Kershaw Sunnyside Ranches’ Petition for Reconsideration

and Clarification, on September 15, 2005, the STB again noted Kershaw Sunnyside Ranches' legitimate concerns regarding the upkeep of the property at issue. (AB 600, 35592 EB p.4). The STB decision stated:

[O]ur decision was without prejudice to Kershaw's seeking to **reopen** or to file a new adverse abandonment application if the proposed rehabilitation and restoration of service did not occur within a reasonable time. **Our PC&N Finding was not (and is not) intended to be a shield to hold the line open indefinitely without a resumption of rail service.** A significant delay and a demonstrated lack of progress could be evidence of changed circumstances warranting a grant of adverse abandonment authority.

(AB 600, 35592, p.4) (emphasis added).

The Order also stated Kershaw Sunnyside Ranches had the burden to monitor the changed position and to demonstrate that the "state and local governmental are no longer continuing to proceed to undertake the lines restoration." (p.4).

II. ARGUMENT

A. Extending the NITU negotiation period will frustrate the STB's prior orders in this case.

The STB'S decision, AB 600, 35592 EB indicated that the PC&N Finding was not intended "to be a shield to hold this line open indefinitely. . . ." However, the rail banking action, combined with the shifting theories that keep the line from reverting to Kershaw Sunnyside Ranches have been a shield to prevent Kershaw Sunnyside Ranches' planned development of its property. Additionally, YILA is using the rail banking process as a sword to try to extract concessions in unrelated state court litigation. (Declaration of Bob Kershaw, dated March 1, 2007, exhibits 2 and 3). The STB should not countenance indefinite delays in abandoning and in rail banking property for illegitimate purposes.

B. Federal Court authority and STB authority allows the STB to deny a second extension of time.

The STB will follow its authority and past orders if it denies the governmental entities and YILA's request for extension. 49 CFR § 1152.29(d)(1) allows the railroad to fully abandon the line if no agreement is reached within 180 days of filing a Notice of Interim Trail Use. In *Birt v. Surface Transportation Board*, the United States District Court, District of Columbia, recognized that the STB regulations are silent as to whether an extension may be granted for the 180 day period to negotiate a CITU period. 90 F. 3d. 580, 588 (D.C. Cir. 1996).³ In granting an extension, the court ruled that the commission's policy of "granting extensions when presented with evidence of good-faith negotiations between the railroad and potential trail sponsor [does not] compromise the goal that a CITU is intended to advance-providing a defined window of opportunity for reaching agreement on a trails conversion." *Id.* at 589. The court noted further that "extension *ad infinitum* might frustrate that purpose by allowing the railroad to stop service without either relinquishing its rights to the easement or putting the right-of-way to productive use, an extension of 30 or 60 days does not threaten such a result." *Id.*

YILA requests a 180 day extension, not 60 days as requested in *Birt*. 90 F.3d at 584. YILA and the governmental entities have been delaying the abandonment of this rail line since Kershaw Sunnyside Ranches filed its original abandonment in late 2003, even though no traffic has taken place for approximately a decade. Now, YILA makes a conclusory statement to support a request for another 180 days with only a statement that "the County states that it is continuing its efforts to achieve arrangements with the lien holders to settle their remaining claims against YILA assets." (AB 600, 218703 p.2). YILA is using a never ending rail banking procedure as a bludgeon to try to gain an advantage in a state court proceeding. YILA has not even filed the Notice of Consummation as required in the Director's decision, dated January 12, 2006. (AB 600, 36616 DO).

³ In *Birt*, the STB had issued three extensions of a CITU. *Id.* at 588.

YILA's and the County's showing that additional time is required to negotiate is insufficient. Furthermore, the record shows that YILA and the County are not requesting good faith, limited extensions based on an adequate record.

C. The STB should reopen Kershaw Sunnyside Ranches' original Abandonment proceeding.

The STB's prior orders allow a reopening of Kershaw Sunnyside Ranches' Abandonment proceedings. 49 CFR § 1117.1 allows a person to file a petition not otherwise covered by the rules. The STB's November 19, 2004 Decision allows Kershaw to "reopen" its abandonment claim. (AB 600, 34751 EB). Kershaw Sunnyside Ranches is filing a Petition to Reopen Abandonment of Naches Rail Line in conjunction with this opposition.

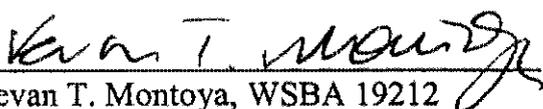
YILA's Notice of Exemption states that it "intends to abandon the Naches branch between Milepost 2.97 (near Yakima) to Milepost 14.26 (near Naches), a distance of 11.29 miles. This is the area covered by Kershaw Sunnyside Ranches Application. The YILA Notice explains that the "county was unwilling to acquire the line until certain private liens were satisfied . . ." (AB 600, 215462, p.1 Notice, n.1). No evidence shows any payment of liens. YILA's efforts have to end at some point.

III. CONCLUSION

Based on the above, Kershaw Sunnyside Ranches respectfully request that the STB deny the Motion to Extend the NITU Negotiation Period and allow the Abandonment of the rail line.

Dated this 2nd day of March, 2007.

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Attorneys for Kershaw Sunnyside Ranches


Kevan T. Montoya, WSBA 19212

CERTIFICATE OF SERVICE

By my signature below, I certify service on March 2, 2007, by U.S. Mail, postage pre-paid first class, a copy of the foregoing upon the following counsel of record:

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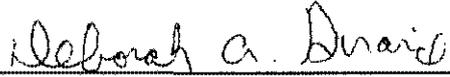
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