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222204

April 28, 2008

Via Hand Delivery

Vernon A. Williams
Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423



Re: **Finance Docket No. 34943**
Beaufort Railroad Company, Inc.'s - Modified Rail Certificate

Dear Mr. Williams:

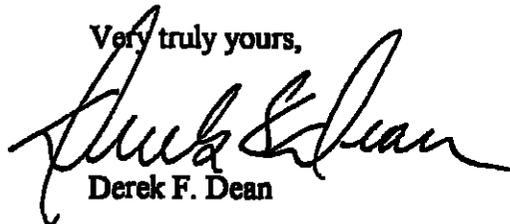
Enclosed please find an original and ten (10) copies of a Reply in Opposition to Petition for Reconsideration to be filed in the above-referenced docket.

Kindly date stamp the additional copy of this letter and Reply and return the same to our courier.

If you have any questions regarding the enclosed, please contact me at the telephone number listed above.

With kind regards, I am

Very truly yours,


Derek F. Dean

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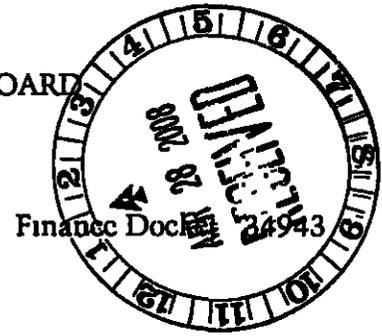
Enclosures

cc: Mr. McWhorter (via facsimile only w/o enc.)

222204

BEFORE THE
SURFACE TRANSPORTATION BOARD

Modified Certificate of Public Convenience and
Necessity of Beaufort Railroad Company, Inc., a
subsidiary of the South Carolina Division of
Public Railways



REPLY IN OPPOSITION TO
PETITION FOR RECONSIDERATION

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Ports Authority

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BEFORE THE
SURFACE TRANSPORTATION BOARD

Modified Certificate of Public Convenience and Necessity of Beaufort Railroad Company, Inc., a subsidiary of the South Carolina Division of Public Railways

Finance Docket 34943

**REPLY IN OPPOSITION TO
PETITION FOR RECONSIDERATION**

Beaufort Railroad Company, Inc ("BRC") and the South Carolina State Ports Authority ("SCSPA") (collectively the "South Carolina State Parties"), hereby file this Reply in Opposition to the "Landowners" Petition for Reconsideration ("Petition") of the Board's March 19, 2008 decision ("Decision") This is the second Petition for Reconsideration filed by the Petitioners, and like the first, which was denied, this Petition does not contain the required showing of new evidence or changed circumstances that would affect the Board's Decision nor does it show that the Board's Decision involved material error. Therefore, the South Carolina State Parties respectfully request that the Board deny and disregard the Petition since the Petitioners fail to meet the required standard for reconsideration as set out in 49 C.F.R. §1115.3.

Background

On March 19, 2008, the Board issued its Decision denying petitions filed by several petitioners for reconsideration and a request for investigation of a December 2006 notice of filing of a modified certificate of public convenience and necessity under 49 C.F.R. §§1150.21-23 for operation of the Port Royal Railroad Line ("PRRR" or "Line") in South Carolina. In the Decision, issued one full year after Petitioner's first petition for reconsideration and investigation, the Board denied all the pending petitions for reconsideration and investigation in this docket. The Board found that the Line had not been abandoned, that the Line

remained a part of the interstate rail system, and that the Board retained jurisdiction to authorize BRC's operation pursuant to the modified certificate See Decision dated March 19, 2008 at 1. This Decision was based on a careful review of the law and the record.

Petitioners filed the current Petition asserting that the Decision involved material error. The Petition fails to support this claim. Petitioners also fail to show that the Decision would be affected materially by new evidence or changed circumstances. Since Petitioners fail to meet either of the standards for a petition for reconsideration to be granted, their Petition must be denied.

Argument

I. Petitioners' Self-Serving Claims Regarding State Law Reversionary Interest Must be Ignored

As a preliminary matter, the South Carolina State Parties must initially address the entirely self-serving and wholly unsupported statements that appear in the Petition at 2 through 4. Petitioners assert that the Board should confirm that the Petitioners are "entitled to enforce the reversionary interest they retain." See Petition at 3. First, Petitioners have not provided any evidence that they have the interest they allege. Second, since there is no abandonment of the Line, under state law the Petitioners do not have any property interest at all. Third, any questions concerning the Line's abandonment under state law and any reversionary interests for state law purposes are questions of South Carolina state property law. Therefore, Petitioners' state law interests in the property are not properly before the Board. The Board does, however, have the authority to determine whether the Line has been abandoned under federal law and the Board determined that there is no abandonment in this proceeding, therefore, no state law inquiry is triggered. As a result, the Board should disregard Petitioners' assertions regarding state property law and reversionary interests in their entirety.

II. Petitioners Fail to Meet Their Burden of Showing that the Board's Decision Involved Material Error or that the Decision Will be Affected Materially Because of New Evidence or Changed Circumstances.

Under 49 C.F.R. §§1115 3(a) and (b), a petition for reconsideration will be granted only upon Petitioners' showing that the prior decision involved material error or the prior decision will be affected materially because of new evidence or changed circumstances. The burden rests entirely on the Petitioners, not the Respondents. There is no new law, material error, or new evidence shown in the Petition to warrant granting the Petition, rather there are only unsupported assertions and pure speculation.

Having already petitioned for reconsideration and been denied once, the Petitioners now assert that the Board's Decision involves material error in that the Board "announced principles inconsistent with its own regulations and decisions," "made factual findings wholly inconsistent with the record in this case," and "denied without adequate justification Landowners' request for investigation." See Petition dated April 8, 2008 at 2. The Board's well-reasoned Decision shows that all of these assertions lack merit. Since Petitioners have not shown that there was material error that would affect the Board's Decision nor have they shown that there is new evidence or changed circumstances that would materially affect the Decision, the Petition must be denied.

A. The Board's Decision Is Consistent with Its own Regulations and Decisions

There is nothing in the Board's Decision that suggests that it has announced principles that are inconsistent with its regulations and decisions. Petitioners reiterate their same position (and the Coberly petitioners' assertions) that upon Tangent Transportation

Company's ("Tangent")¹ expiration of its notice to terminate service, the Board's jurisdiction over the Line came to an end and the Board should not have entertained and issued BRC's notice for a modified certificate. See Petition dated April 8, 2008 at 4-5. Petitioners assert that their position is supported by the regulations, decisions of the Board, and "was expressly embraced by an official of the Board itself." *Id.* There exist serious flaws in each of the Petitioners' assertions.

First, there is no regulation in Subpart C of the Board's regulations that supports Petitioners' position. The regulations clearly make a distinction between owners and operators and the Board's Decision thoroughly addresses the Board's interpretation of its own regulations and its finding that intent to temporarily discontinue service by an operator is not the same thing as abandonment by the owner. Tangent's notice to terminate service was nothing more than a temporary discontinuance and the SCSPA was well within its rights to retain another operator without having that temporary discontinuance be deemed a consummation of abandonment. On August 23, 1984, the Interstate Commerce Commission ("ICC"), issued a decision authorizing Seaboard to abandon the Line. In 1985, the SCSPA acquired the Line and leased it to the South Carolina Public Railways Commission. In June 1985, Tangent commenced service on the Line. During this interim period between August 1984 and June 1985, the Line was not abandoned and no alleged reversionary rights were

¹ Petitioners state that Tangent is a wholly-owned subsidiary of the State instrumentality that acquired the Line from Seaboard. This is incorrect. The SCSPA is the owner of the Line and acquired the Line from Seaboard. See *Tangent Transportation Company – Modified Rail Certificate*, F.D. No. 30655 (June 17, 1985). The SCSPA then leased the Line to the South Carolina Public Railways Commission ("SCPRC"). Tangent was a wholly-owned subsidiary of the SCPRC, not the SCSPA. Tangent operated over the Line as an independent contractor under an operating agreement comparable to the Operating Agreement between BRC and SCSPA. Under the new operating agreement (see Notice dated December 1, 2006 at Attachment D), BRC is an independent contractor on the Line just as Tangent was before it.

triggered. That same result applies in this proceeding as well. To hold otherwise would mean that temporary discontinuance acts as an automatic abandonment. That, in turn, would risk the loss of the right of way altogether because of a temporary stoppage in service. The Board properly observes that this result is clearly not the intent of the regulations.

The Board stated that it "retains jurisdiction over rail properties until abandonment has been consummated by some action of the owner." *See* Decision at 6. In support of this determination, the Board cited and discussed decisions and federal cases in support of its Decision that when making a determination on whether abandonment has occurred, the Board looks for a "physical act which shows clear intention on the part of the rail line owner to remove the line from the national rail system and relinquish the property interest." *See* Decision at 6-7. The Board does not just look at one piece of information to make this determination, rather it looks at the totality of the circumstances. Based on the totality of the circumstances surrounding the Line and the submissions in the record, the Board concluded that there was no intent to abandon the Line and the Line remains subject to the Board's jurisdiction. *See* Decision at 7. Petitioner has not provided a showing that the Board's Decision involved material error in any way and, therefore, the Petition must be denied.

Second, Petitioners assert that their position that the Tangent notice of termination constituted an act of abandonment by the State of South Carolina was supported or consistent with previous Board decisions. *See* Petition at 9. The Petitioners simply provide the citation to two Board decisions that they believe support this contention. The Board, however, fully addressed these two decisions, clearly distinguished the two cases from the current case, and provided a detailed analysis of why the decisions do not establish general agency policy that an operator's temporary discontinuance of service amounts to a self-executing consummation of

abandonment by the owner and termination of Board jurisdiction over the line. See Decision at 7-8. In *Pennsylvania Department of Transportation – Abandonment Exemption – Portion of Valley Branch*, Docket No. AB-373X (ICC Served April 29, 1993), the ICC stated in a footnote that the discontinuance of operations by a modified certificate terminated the agency's jurisdiction over the line. However, as the Board correctly points out, the issue that was presented in that case for Board determination was whether further agency authority was needed to abandon certain line segments not whether temporary discontinuance by a modified certificate operator amounted to consummation of abandonment by the line owner. See Decision at 7. Even though the ICC made the statement in the footnote, the ICC did find that it had retained jurisdiction over a previously abandoned line owned by the Commonwealth of Pennsylvania, even though the contract operator and modified certificate holder had discontinued service several years earlier. See *Portion of Valley Branch* at 6. The decision in *Wisconsin and Calumet Railroad, Inc. – Notice of Interim Trail Use and Termination of Modified Certificate*, STB Finance Docket No. 30724 (Sub-No 2) (STB served Mar. 11, 1998), is also distinguishable in that it addresses the issuance of a NITU for a line that had been previously abandoned - unlike the current Line which has never been abandoned. Petitioners cannot claim that the Board committed material error by not following decisions that do not address the issue in the current case or that are clearly distinguishable. Again, there is no indication that the Board's Decision involves material error and the Petition must be denied.

Third, the Petitioners assert that their contentions were "expressly embraced by an official of the Board itself." See Petition at 5. This is misleading. The statement was made by a representative of the Office of Public Services in response to a public inquiry that

contained inaccuracies regarding the status of the Line and operations on the Line. *See BRC* Reply dated February 6, 2007, Attachment C at 7-8. The representative's statement was nothing more than an informal and non-binding response to a question that contained inaccurate facts. The statement is in no way a binding decision of the Office of Proceedings or the Board. Therefore, the fact that the Board's Decision did not address the representative's statement in its Decision does not constitute material error since the statement has no precedential value or bearing on the Board's Decision.

B. The Board's Decision Does not Contain Factual Findings Inconsistent with the Record

On December 1, 2006, in accordance with the specific requirements of 49 C.F.R. §1150.23, the BRC submitted its Notice for Modified Certificate of Public Convenience and Necessity ("Notice"). That Notice contained factual information regarding the operator, dates of operation, services to be performed, BRC's incorporation, financial information regarding the South Carolina Department of Commerce – Division of Public Railways ("SCDPR") and the SCSPA, an operating agreement for the Line (including financial responsibilities), and insurance information. Over the course of this proceeding, the Petitioners have submitted petitions alleging "facts" that were completely unsubstantiated, speculative, or in some cases, completely fabricated.² In short, over the course of this proceeding, the Petitioners have failed to show new evidence that would affect materially the Board's Decision. However, even

² In its petition dated March 21, 2007, Petitioners state as fact that the Line has "not been operational in any sense of the word since, at least, 1985," and that "there has been no rail service over the line for over twenty years." As BRC stated in its Reply dated March 29, 2007, under the Board's authority, Tangent moved cargoes for various shippers over the Line in each year from 1985 through 2003. From 1989 through 1999, Tangent moved over 17,000 carloads over the Line for commercial shippers. From 2000 through 2003, Tangent moved in excess of 1,300 carloads. As noted in BRC's Reply, this information was publicly available from multiple sources.

though not required to do so, the State of South Carolina Parties have rebutted these unsubstantiated allegations in their responsive filings and have provided specific details on the record in opposition to the Petitioners' unsubstantiated claims.

The Board has reviewed the record in this case and has determined that the Petitioners have failed to meet their burden of showing new evidence or substantially changed circumstances that would justify reconsideration. Since it is incumbent upon the Petitioners to show this new evidence, not just mere speculation, the Board correctly denied Petitioners' Petition and no material error was committed.

C. The Board's Decision Provided Adequate Justification for Denying Petitioners' Request for Investigation

Petitioners assert that the Board's Decision involves material error in that it denied Petitioners' request for investigation without adequate justification. See Petition at 2. Even a cursory reading of the Board's Decision shows that this assertion lacks merit. The Board stated that it will not grant the request for investigation because the existing record provided sufficient information for resolution of the issues relevant to the proceeding and the Petitioners have not demonstrated that any further investigation is warranted. See Decision at 4 and 10. The Board then discussed each of the several issues that has been raised by the Petitioners, thoroughly analyzed each issue, and provided support for each and every conclusion the Board made in finding that the Line was not abandoned, that the Line remains a part of the national rail system, and that the modified certificate process is not being used improperly. *Id.* at 4. Since the Petitioners failed to provide specific evidence and failed to meet their burden of demonstrating that any further investigation was warranted, the Board denied their request for investigation. Petitioners have again failed to show that the Decision involves material error.

D. Petitioners Present No New Evidence or Changed Circumstances that Would Affect Materially the Board's Decision

As stated above, under 49 C.F.R. §1115.3(b), a petition for reconsideration may also be granted if petitioner can show that the prior decision will be affected materially because of new evidence or changed circumstances. Here, Petitioners assert that the State has not "retained the tracks and ties in place," "it has not maintained [the tracks and ties] in a state of readiness for service," or "maintained and repaired cross ties, patched and paved railroad crossings, controlled weeds and brush, and removed and replaced track." See Petition at 7. However, Petitioners have provided no new evidence or proof to support their claims, therefore, there is no new evidence or changed circumstance that would materially affect the Board's Decision. Indeed, the Petition contains needlessly cumulative "evidence" of the same type that were made in the Coberly petition for reconsideration (January 17, 2007). That petition was denied on March 19, 2008 because the Board determined that no new evidence was presented in that petition to rebut the South Carolina State Partics' maintenance program. Petitioners now attempt to bolster the allegations first made by the Coberly petitioners (and adopted by the Petitioners on March 22, 2007) but again, like the petitioners in the Coberly petition, the Petitioners here have failed to show any new evidence in support of their claims.

In addition, there is nothing about the current state of the Line that would constitute an intent or physical act needed to show that abandonment has occurred. To the contrary, as BRC and SCSPA have stated before in their February 2007 Reply, SCSPA performed the necessary maintenance to preserve the railroad including track inspections, cross tie maintenance and repair, patching and paving railroad crossings, chemical weed control, weed and brush cutting and removal, and removal and replacement of track for utility repairs. See Reply dated February 6, 2007 at 11. At that time, SCSPA stated that some additional expense

would be required to completely restore active service over the Line. *Id.* Since BRC's Reply was filed in February 2007, the SCSPA has spent approximately \$30,000 on continued maintenance on the Line. All of these facts are a part of the record and remain unrebutted by a showing of any evidence to the contrary. As the Board itself observed, a party intent on taking the Line out of the national rail system would not spend the time, effort or money on the line that the SCSPA has invested.

Since Petitioners have not provided new evidence that would materially affect the Board's Decision, the Petition must be denied.

Conclusion

For the reasons set forth above, the Petitioners have failed to meet their burden under 49 C.F.R. §1115.3, and therefore, the South Carolina State Parties respectfully request the Board to deny and disregard the Petition for Reconsideration

Respectfully submitted,



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Certificate of Service

I hereby certify that on April 28, 2008, I served the foregoing Reply in Opposition to Petition for Reconsideration on the following individuals by Federal Express overnight mail:

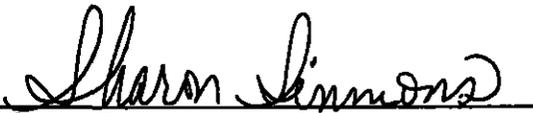
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