

Before the Surface Transportation Board

BNSF Railway Co. --)
Abandonment Exemption -) AB 6 (Sub-no. 468X)
in Kootenai County, ID)

226206

Reply to Petition for Stay
on behalf of
City of Coeur d'Alene and
North Idaho College Foundation
and
Motion for Leave to File Late-filed
Petition to Reconsider if Stay Is Granted
Despite Opposition

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I.

City of Coeur d'Alene ("City") and North Idaho College Foundation ("NICF") oppose the petition for stay filed by Pan-American Railway ("PAR") and join in the Reply of BNSF Railway Company to that petition.

Under the Board's November 27 decision, "offers of financial assistance" were to be filed no later than December 7, with petitions for stay no later than December 14. PAR did not file an OFA by December 7 nor a petition for a stay by December 14. As a result, the Board's failure to grant an exemption from OFA (49 U.S.C. 10904) was moot. City and NICF accordingly did not prepare papers seeking to reconsider the proceeding on that basis by the due date for such petitions (December 22). On that date, however, PAR filed a letter request for a stay for it to tender a late-filed request for valuation information to BNSF concerning the line.

The ICCTA declares among its purposes a policy "to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under [the ICCTA]. 49 U.S.C.

10101(15). It violates that policy to stay the effectiveness of a decision to permit PAR to seek valuation information from BNSF pursuant to a request first made over two weeks after the due date for the OFA for which the valuation information is sought. The fact that PAR was asleep at the switch, which is all that it effectively alleges, is not grounds for additional delays in this proceeding. If PAR needs valuation information from BNSF, it should have sought it months ago, and certainly prior to the December 7 due date for OFA's. PAR, as BNSF has previously indicated, has participated in prior STB proceedings. It has experienced counsel. It knows the rules. The exemption process is supposed to be employed to facilitate proceedings, not to draw them out by flaunting deadlines for making filings. In Mid-Michigan RR - Abandonment Exemption - in Kent, et al Counties, MI, AB 364 (Sub-no. 14X), served Sept. 26, 2008, slip opinion at 5, this Board denied a similar request for extension of OFA deadlines in a petition for abandonment proceeding. This Board noted that the party requesting the extension had the opportunity to file an OFA from the inception of the proceeding up to and including the OFA deadline, and had failed to articulate a reason for it to need more time.

II.

If the Board nonetheless grants the stay requested by PAR, then City and NICEF seek leave to file a petition to reconsider the Board's material error in failing to exempt this proceeding

from section 10904 in the first instance.¹ Such leave should be granted for City and NICF had no way to predict that PAR would late-file a stay request in order to belatedly seek valuation information for an OFA two weeks after the due date for an OFA.

The Board has many cases in which it grants exemptions from OFA when bona fide public purposes are sought for a line, or portions of a line. Indeed, at p. 4 of its November 27 decision in this proceeding, the Board acknowledged that it grants exemptions when a right of way is needed for a valid public purpose and there is no overriding public need for continued rail service. City, NICF and Stimson Lumber all supported exemption of this proceeding from the "offers of financial assistance" ("OFA") under 49 U.S.C. 10904. There are no shippers on the line. The property identified by PAR for possible location of unknown and speculative shippers has been sold for non-rail purposes. NICF, for example, plans a college campus expansion - dormitories, class rooms and so forth -- not rail facilities on one of the properties on which PAR relied.

The Board appeared to ignore the NICF and other submissions. Instead, the Board seemed to center its reasoning on the fact that North Idaho Centennial Trail Foundation had filed a railbanking request. The Board, in denying the OFA exemption, stated that "OFA's to acquire rail lines for continued rail service ... take priority over rail banking." Id.

¹ This petition for reconsideration is fee exempt by reason of City's status as a municipality, and NICF's representation of a public college. 49 C.F.R. 1002.2(e)(1).

But City, Stimson, and NICF are not seeking rail banking. The Board's reference to its railbanking policies is simply irrelevant to our showing that this proceeding should be exempted from OFA procedures. The Board's quoted railbanking policy flows from the fact that OFA's, if made, are mandatory on a railroad, whereas the ICC/STB rules make railbanking voluntary. The mandatory of course takes precedence over the voluntary. An OFA takes precedence over any alternative use, trail or not, because all alternative uses are in essence voluntary. The question that was tendered to the Board was whether the Board should grant an OFA exemption, not what would happen if it did not.

The question whether to exempt the line from OFA turns on a balancing of need for alternative public purposes versus need for continued rail. NICF has paid a large sum of money for property for the expansion of its college campus, including structures like dormitories and class rooms, which are not consistent with any continued rail use of this line. A college campus is as important a public use as sports stadiums which this Board's decisions have recognized as justifying OFA exemptions. E.g., Norfolk & Western Railway - Abandonment Exemption - in Cincinnati, AB 290 (Sub-no. 184X), served May 13, 1998 (OFA exemption to facilitate sports stadium even though actual shippers objected). In addition, a pedestrian or bicycle path in an urban setting like Coeur d'Alene is as important a "public highway" as are automobile highway expansions or mass transit expansions in other cities, both of which this Board has

indicated justify OFA exemption. Compare CSX Transportation - Abandonment Exemption - in Pike County, KY, AB 55 (Sub-no. 653X), served Sept. 13, 2004 (highway expansion justifies OFA exemption) with Los Angeles County Metro Transp. Authority - Abandonment Exemption - in Los Angeles County, CA, AB 409 (Sub-no. 5X), served July 17, 2000 (light rail justifies OFA exemption). Moreover, City has cited other public uses of portions of the corridor other than as a trail. City, NICEF and Stimson have thus demonstrated a prima facie case for valid public purpose alternative to rail.

Additionally, the Board errs if it treats trail use as a public use which is somehow secondary to all other public uses. Trail use can be as important as any other public transportation use, or any other public non-transportation use, in a particular community. To claim otherwise is without any basis in fact or law. The Board cannot treat the various uses put forward by NICEF and City as somehow "tainted" because the City's purposes include trails.

The next question is to balance the valid public purposes put forward by City and NICEF against the need for rail service. PAR showed no "public need" for rail service, and BNSF, Stimson, NICEF and City instead showed there can be no such need on this line: there are no shippers, nor any place for shippers now to locate. In other words, although there is a valid set of alternative public purposes for the line, no public need for rail service is possible. Balancing something against nothing results

in the side with nothing losing. In this case, that means that the section 10904 exemption should have been granted, because in performing a balance, the Board must find valid public purposes in non-rail uses, but no purpose at all for rail. Any other balance is arbitrary and capricious. PAR's belated actions to pursue an OFA weeks after the deadline for submitting an OFA, all without an iota of showing that there is any rail need or any public support for continued rail use or any possible shipper even hinting that it might someday want rail service, illustrate the problems that arise when the Board errs in its balancing task.

Conclusion

The PAR stay petition should be denied. If it is instead granted, then this Board should grant leave to file the petition to reopen contained above, and grant the petition to reconsider to exempt this proceeding from OFA, thus mooting the stay requested by PAR.

Respectfully submitted,
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