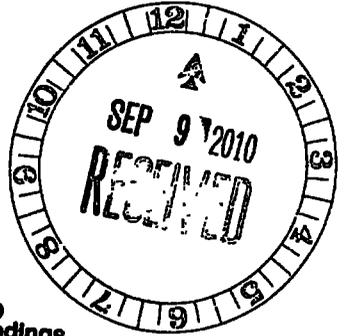


CHARLES H. MONTANGE
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227760



8 September 2010
by express

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Part of
Public Record

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20024

Re: C.T. Chappellear - Feeder Railroad Dev. App. --
Line of Nebraska Railroad Museum, F.D. ~~33405~~

35405

Dear Ms. Brown:

Enclosed for filing on behalf of the Nebraska Railroad Museum ("Museum") please find an Opposition (original and ten copies) to the pending "Petition for Waiver" filed by C.T. Chappellear on or about August 20, 2010 in F.D. 33405. The Chappellear Petition seeks relief from certain requirements for feeder line applications under 49 U.S.C. 10907, and also a predetermination of the constitutional minimum value for the Museum's property before a feeder line application is even accepted by this agency. As the Opposition indicates, the Museum opposes this request not only on the merits, but also on the ground that it abuses the Board's processes, and the Board lacks jurisdiction to apply section 10907 to the Museum's property and interests in any event.

Nebraska Railroad Museum was not served with a copy of the Petition for Waiver. We also request the Board to remind the Mr. Chappellear of the need to serve the owner of the rail property that he seeks this Board's authority to requisition.

Respectfully submitted,

Charles H. Montange
for Nebraska Railroad Museum

Encl(s)

cc. Mr. Chappalear (w/encl.)
Mr. Wallen (w/encl.)

Before the Surface Transportation Board

C.T. Chappellear -)
Feeder Railroad Development Application -) F.D. 35405
Line of Nebraska Railroad Museum)
between Fremont and West Point, NE)

Opposition to
"Petition for Waiver"

This Opposition is on behalf of the Nebraska Railroad Museum (formerly Eastern Nebraska Chapter, National Railway Historical Society), owner of the abandoned rail line at issue in this proceeding. Nebraska Railroad Museum (NRM) doing business as Fremont and Elkhorn Valley Railroad (FEVR) operates a tourist excursion service on remaining portions of the line that Mr. Chappellear says he wishes to eminent domain via this Board's feeder line statute, 49 U.S.C. 10907. NRM/FEVR opposes the "petition for waiver" filed by Mr. Chappellear in this proceeding on a variety of grounds, including lack of jurisdiction and abuse of process, as well as on the merits.

I. Background

In his pleading filed on or about August 20, 2010, C.T. Chappellear, d/b/a Omaha and North Western Railroad, indicated that he intended to file a feeder line application to acquire and to operate an approximate 37.5 mile rail line between M.P. 1.5 at Fremont and M.P. 39.0 at West Point, Nebraska.¹ As Mr. Chappellear acknowledges, the line is owned by NRM/FEVR. NRM is a Nebraska 501(c)(3) non-profit, which, as its website indicates, provides

¹ It is not clear that the end points asserted by Mr. Chappellear would result in a connection with the interstate rail network.

tourist excursion rail services on some trackage it owns at Fremont, Nebraska, d/b/a Fremont and Elkhorn Valley Railroad (FEVR). We will refer to NRM and FEVR collectively as NRM/FEVR.

As Mr. Chappellear further acknowledges in his Petition, Chicago & North Western Railroad obtained abandonment authority from this Board's predecessor agency for the line in 1984 [see ICC Dkt. AB-1 (Sub-no. 180X), served Feb. 25, 1984, cited by Chappellear in his Motion at p. 3]. As he also indicates, NRM purchased the line as an abandoned line of railroad for purposes of operating a tourist railroad.

In his petition for waiver, Chappellear seeks waiver of requirements regarding estimating a net liquidation value (NLV) and going concern value (GCV) for the line for purposes of his prospective feeder line application.

II. Abuse of Process

49 U.S.C. 10907, the feeder line statute, provides for mandatory transfer of rail lines under this Board's jurisdiction when their owner is providing inadequate rail service to a majority of shippers on the line. In order to invoke the statute, a person such as Chappellear has to demonstrate (among many other things) that the public convenience and necessity (PCN) require or permit the sale. In particular, Chappellear has to demonstrate, and this Board has to find, inter alia, that the "rail carrier" whose line is targeted has refused to make the necessary efforts within a reasonable time to provide adequate service to a majority of shippers over such line, and that rail service is inadequate to a

majority of shippers over the line. 49 U.S.C. 10907(c)(1)(A)-(B). The provision is clearly for the benefit of freight rail shippers. Yet on page one of his waiver petition, Chappellear admits that "there are no longer shippers along the ... rail line...." Chappellear asserts that this condition is because of unauthorized discontinuance and abandonment.² But this does not negate the fact that it is impossible for Chappellear to show PCN, or for this Board to find it, since there simply are no freight shippers, as Chappellear admits. Thus there can be no way for this Board to make a finding of PCN to permit or require transfer of this property under section 10907.

Even more indicative of abuse, the only communication received by NRM/FEVR from Chappellear prior to his filing of his waiver "petition" was an e-mail dated July 21, 2010, indicating interest in purchasing the assets and rights of FEVR. A copy of this e-mail is attached as Exhibit B. Mr. Chappellear, then d/b/a Omaha Street Railway, did not represent that he intended to provide freight rail service. Instead, he indicated that he wished to provide "commuter rail service between Omaha and Norfolk" and that he intended to seek authority from this Board for such a line.³ This Board does not have jurisdiction over commuter rail, and certainly this Board

² Chappellear's claim that the lack of shippers is due to unauthorized discontinuance and abandonment is totally without foundation. The abandonment of the line was authorized in 1984, and there are no shippers, let alone shippers requesting service.

³ Except for certain segments acquired by NRM/FEVR, the old C&NW line from Omaha to Norfolk line is essentially obliterated. Beyond Norfolk, it is the Cowboy Trail, owned by the State of Nebraska.

lacks jurisdiction under 49 U.S.C. 10907 to order a transfer of a long-abandoned line for commuter rail. Under section 10907, this Board may act only if PCN requires transfer in order to provide adequate freight rail service as further defined in section 10907(c)(1). It is a clear abuse of process for Mr. Chappellear to invoke section 10907 for passenger rail purposes, which he clearly indicated to NRM/FEVR was his intent.

In addition, Mr. Chappellear in his e-mail indicates that he is aware that NRM was negotiating with another potential purchaser. This suggests that Mr. Chappellear's otherwise anomalous petition for waiver was submitted to disrupt NRM's relations with another potential purchase. This abuse is confirmed by Chappellear's admission that there are no freight shippers on the line.

Furthermore, under this Board's rules, Chappellear is supposed to serve at least the owning railroad. 49 C.F.R. 1151.2(a)(1). See also 49 C.F.R. 1104.12 (general requirement of service on parties, which an owning railroad definitely is). Perhaps Chappellear did not serve NRM/FEVR because he in fact admits they are outside the jurisdiction of this Board, but in that event, he has abused the Board's process by filing for property which he admits is outside the Board's jurisdiction. If he intends instead to claim that NRM/FEVR is an "owning railroad" over which STB has authority, he must timely serve NRM/FEVR, which he did not. In any event, NRM/FEVR is obviously an adverse party to Chappellear, since Chappellear indicates that he wishes this Board to order a mandatory (eminent domain type) transfer of the Museum's property to himself

pursuant to 49 U.S.C. 10907. Due process requires that NRM/FEVR have notice and opportunity to be heard. The address, e-mail, and telephone number of Nebraska Railroad Museum are readily available via the google search engine. Yet Chappellear failed to served the Museum, which learned of Chappellear's filing only by chance. Chappellear was able to communicate to NRM/FEVR at least by e-mail (Exhibit B) prior to filing his paper with STB; his failure to communicate his "petition" is thus inexcusable. Moreover, it is prejudicial and at least vexing, as it has deprived NRM/FEVR of time sufficient to obtain a copy of a decision (discussed below) on which Chappellear relies. While we could file a motion for more time, we take note of this Board's regulations requiring a decision on waiver petitions within 30 days (49 C.F.R. 1151.3(j)). Compliance with that regulation suggests that service should be timely as opposed to non-existent, as here. In any event, in light of 1151.3(j), we have elected to respond to the "petition" within the ordinary 20 day period for replies, but we reserve the right to make further response if the Board's librarian is able to find the decision on which Chappellear relies and furnishes same to us, as we have requested.

III. The Board Lacks Jurisdiction

As Chappellear admits, NRM/FEVR purchased its property as an abandoned line for tourist purposes. After searching its records, the Lexis Trans Library (for old ICC decisions) and STB's electronic library, NRM/FEVR has confirmed that there is no record that it has sought or obtained freight common carrier

authority for the line. Moreover, NRM/FEVR has not held itself out as a common carrier of freight. NRM/FEVR, as its website indicates, does operate a tourist train on the premises, d/b/a Fremont & Elkhorn Valley Railroad (FEVR). Pursuant to a search of NRM/FEVR's records, FEVR has never obtained freight common carrier authority for the line, nor held itself out as a freight provider.

Under the feeder line statute, 49 U.S.C. 10907, this Board has authority under certain conditions to order the transfer, pursuant to a valuation set by the Board, of certain a "railroad line" within its jurisdiction. Since NRM/FEVR's railroad line passed out of this Board's jurisdiction by reason of the abandonment authorization in 1984, this Board lacks jurisdiction over it, and certainly for purposes of applying 49 U.S.C. 10907 to it. See Fritsch v. ICC, 59 F.3d 248 (D.C. Cir. 1995), cert denied sub. nom. CSX v. Fritsch, 116 S.Ct. 1262 (1996) (public use condition does not provide continued jurisdiction over abandoned line); Becker v. STB, 132 F.3d 6001 (D.C. Cir. 1997) (once abandonment is consummated, STB loses jurisdiction).

Chappelear appears to argue that this Board has jurisdiction over the NRM/FEVR line by reason of Fremont, West Point and Pacific Railway - Exemption for Operation - Certain Abandoned Rail Lines Owned by Eastern Nebraska Chapter, National Railway Historical Society in Dodge and Cuming Counties, NE, F.D. 31147 (ICC decided Oct. 30, 1987). This decision, if correctly cited, is evidently not published, is unavailable on the Lexis Trans

library site, and Mr. Chappellear has informed NRM/FEVR counsel that he does not have a copy. NRM/FEVR through its counsel has requested a copy from the STB librarian, but has not yet received one, if it exists. We reserve the right to make further response if the decision is found and made available to us. We have located a Federal Register notice (52 Fed.Reg. 45258, Nov. 25, 1987) indicating that FWPP filed a notice of exemption to operate over M.P. 1.5 to M.P. 39 on NRM/FEVR's "abandoned railroad lines." Nothing in that notice (which may constitute the actual decision) indicates any common carrier obligations on the part of NRM/FEVR. Fritsch and Becker govern the agency's relationship with NRM/FEVR.

In all events, the Fremont, West Point and Pacific Railway (FWPP) was a separate entity from NRM (then known as the Eastern Nebraska Chapter, National Railway Historical Society). Based on a search of NRM's records, the current NRM president understands that FWPP may have had either an oral (year to year) or a lost written lease arrangement to use some NRM trackage for freight and car storage purposes. The relationship was never intended to create, and did not create, a common carrier obligation on the part of NRM/FEVR, or otherwise to jeopardize NRM/FEVR's 501(c)(3) status. Chappellear says in his petition that NRM/FEVR "formed" FWPP. Some of the members of the two boards apparently at one time were the same, but FWPP was not a subsidiary of NRM/FEVR; it was a separate entity, carefully organized as such so that NRM/FEVR could retain 501(c)(3) status. Mr. Wallen, president of

NRM, attests to these points per his Verification attached hereto as Exhibit A.

As Chappellear admits (Petition at 3), FWPP evidently went out of business and was dissolved by the State of Nebraska for failure to pay taxes in 1988. This dissolution was shortly after Chappellear claims FWPP obtained operating authority per a ICC decision he does not have, and concerning which we have so far only been able to obtain a Federal Register notice.

Although Chappellear does not discuss the point, NRM/FEVR granted an exclusive lease of a portion of trackage (certainly not all that Chappellear seems to want) to another independent entity (the Fremont Northwestern Railroad or "FNR") in 2003 for use for freight rail and car storage for one year, with a one year renewal. FNR obtained a lease exemption from this agency to provide common carrier services, but only for M.P. 0.69 to M.P. 10.01 (9.5 miles). FNR-Lease and Operation Exemption- Rail Line of Eastern Nebraska Chapter, National Railway Historical Society, F.D. 34383, served August 8, 2003. STB indicated in that decision that NRM/FEVR "will have no freight rights or freight responsibilities on the line." FNP now appears to be defunct, much as FWPP. This 2003 decision gives rise to no section 10907 jurisdiction on the part of STB over NRM/FEVR property.

It may be that FWPP and FNP both have freight common carrier obligations on the line which should at some point be formally discontinued as to those portions of NRM/FEVR's abandoned line concerning which they may have obtained ICC or STB authority in

1987 and 2003 respectively, at least if FWPP and FNP in fact then held themselves out as freight operators as opposed to providers of non-common carrier (e.g., car storage) services. Mr. Chappellear in his petition appears to assert that no freight service was provided by any entity since 1988, Petition at p. 3, which if true suggests that at least FNP never exercised common carrier authority over any portion of the abandoned line, and if FWPP did so, it did so only briefly. NRM/FWPP is examining what records it has to determine if there is any information still extant on what FWPP and FNP may have done in terms of freight service. But the point here is that this Board does not have authority to entertain a feeder line application under 49 U.S.C. 10907 for what amounts to a trackage right by a dissolved entity like FWPP, if FWPP had any relevant right.⁴

IV. The Waiver Petition Is Otherwise Defective

The Petition for waiver in any event lacks merit. Insofar as relevant here, under 49 U.S.C. 10907(b), the Board may order conveyance of a rail line in its jurisdiction at the constitutional minimum value only if it first finds PCN permits

⁴ So far as NRM is aware, the only STB-administered relief available to a freight shipper which feels that the holder (dissolved or not) of what amounts to a trackage right is providing inadequate service over an abandoned line is via an application for emergency or alternate service under 49 C.F.R. Parts 1146 and 1147. Neither of these remedies provides for mandatory transfer of an abandoned rail line. In any event, neither Parts 1146 nor 1147 are available to Chappellear, for he is neither a freight shipper, nor a proposed emergency or alternative service provider for one. Instead, he admits there are no freight shippers on NRM's line, and he told NRM/FEVR that his plans were for a commuter line, not a freight line.

and the person making the feeder line application is "financially responsible." The constitutional minimum value is the greater of GCV or NLV. This Board's regulations require the feeder line applicant to file an application showing, among many other things, financial responsibility to pay the higher of GCV or NLV, and to operate the line for three years, plus an estimate of the GCV and the NLV with supporting evidence, and an offer to pay the greater of GCV or NLV. 49 C.F.R. 1151.3(a)(3)-(5).

The waiver petition specifically states it seeks a waiver from section 1151.3(a)(I) (applicant must show financial responsibility to pay minimum constitutional value), (4) estimate of GCV and NLV and evidence in support, and (5) offer to pay the greater.

It would be extraordinary for this Board to waive requirements pertaining to payment of minimum constitutional value. That could result in a taking without just compensation in violation of the statute and the Fifth Amendment. This suggests that Chappellear's particular waiver request seeks relief which cannot be granted. But we will focus here on Chappellear's internal inconsistency in his argument, which itself is grounds for denial of the petition without reaching constitutional questions. While Mr. Chappellear appears to seek to justify his waiver request on the notion that it he cannot provide estimates of GCV and NLV, he proceeds to do so, albeit on the basis of shallow evidence. But his action in providing estimates as part of his Petition hardly states a case for waiver of any of the

requirements that he provide such estimates and the basis for them as part of his Application.

Chappelear basically complains he cannot estimate NLV or GCV because of unauthorized discontinuance and abandonment of service. But the line was authorized for abandonment in 1984, as Chappelear admits. The fact that FWPP, which was independent of NRM/FEVR was dissolved under state law for non-payment of taxes and may no longer be providing service, is irrelevant to valuation. If FWPP has failed to obtain a formal discontinuance authorization (assuming arguendo one is needed), NRM/FEVR should not be responsible for that failure. NRM/FEVR, or adjoining landowners, may end up having to seek an adverse discontinuance authorization for defunct NWPP, but that is irrelevant as to valuing NRM/FEVR's property.

Chappelear says that "an applicant in a feeder line proceeding is not required to present evidence of a line's GCV when the line is uneconomic." Petition at p. 3. Chappelear implies that NRM/FEVR's line is uneconomic, evidently as there are no freight shippers. But in that case, he cannot show PCN so one does not get to the valuation issue under ordinary STB feeder line practice anyway. Nonetheless, he admits he can supply a GCV in these circumstances (Petition at p. 4), namely zero, so he needs no waiver of estimating GCV. He instead is evidently seeking some kind of pre-determination that the GCV is zero before he even files a feeder line application, but he cites no authority for this, and there is none. NRM/FEVR object to pre-

determinations of value. Under this Board's regulations, Chappellear should present his estimates and their basis in his Application. The Board then decides whether to accept the application as complete in 30 days. If the Board accepts the application, NRM/FEVR have 60 days to file their comments and evidence. It would be a denial of due process to require NRM/FEVR to put their evidence of value on record 20 days after an unserved waiver request before any application was filed.

As with the situation on GCV, Chappellear's claims on NLV fall on their own sword. As to NLV, Chappellear claims that this is "trickier" because, he says, NRM has used salvaged rail from the "Northern Segment" (which he defines at Petition p. 3 as M.P. 19 to M.P. 39) to keep the "Southern Segment" (which he defines as M.P. 1.5 to M.P. 19.0). He claims that vegetation is growing on the track, the ties are rotten, and the rail needs to be replaced, and that NRM has deeded off much of the "Northern Segment" without retaining rail easements. He then argues that the Board should waive any NLV showing, and set the price at \$500 per acre for the 37.5 mile line, which he says contains approximately 454.5 acres, at \$500 per acre, or \$227,250.

There are all kinds of factual problems with this, commencing with the fact that assuming arguendo that vegetation is bad in the "Northern Segment," there is still a tourist operation in the "Southern Segment." Clearly that segment has positive NLV.

Since, among other things, the Board lacks any jurisdiction,

it is unduly burdensome as well as a denial of due process to put NRM/FEVR to the task of rebutting Chappelear's NLV "evidence" in an unserved waiver motion in connection with an unaccepted feeder line application which NRM/FEVR otherwise would have at least 60 days to deal with, and then only if the Board in fact accepted to the application. Chappelear's waiver request puts the valuation "cart" way before the PCN and jurisdictional "horse."

Since Chappelear has not filed a feeder line application, and this Board has not found PCN to conduct a valuation proceeding, it is obviously premature and beyond this Board's jurisdiction to set the price at \$227,250. In any event, Mr. Chappelear just offered NRM \$750,000 for the property (see e-mail attached as Exhibit C). He cannot contend for a constitutional minimum value any less than his own offer, unless he now contends his own offer is not bona fide, which would be passing strange, and call into question everything else he says at any point in this proceeding.

Nothing herein should be construed as suggesting that Mr. Chappelear meets any requirements for the filing of a feeder line application or that this Board has jurisdiction to grant any relief under section 10907 as to the line here.

V. Conclusion

For all these reasons, the petition for waiver should be denied.

Respectfully submitted,


Charles H. Montange
426 NW 162d St.
Seattle, WA 98177
E-mail: c.montange@frontier.com
Tel: 206-546-1936
Fax: 206-546-3739
For Nebraska Railroad Museum

Certificate of Service

I hereby certify service of the foregoing this 9th day of September 2010 by placement in the U.S. Mail, postage pre-paid, first class, addressed to C.T. Chappellear, Omaha and NW Railroad, P.O. Box 51, Boys Town, NE 68010.


Charles H. Montange

Exhibit A

Verification

Pursuant to penalties for perjury, I, Dennis Wallen, president, Nebraska Railroad Museum, 1835 North Somers Avenue, Fremont, NE 68025, hereby verify that I have read the foregoing Opposition and that all matters of fact set forth therein are true and correct to the best of my knowledge and information. Further, I certify that I am qualified and authorized to execute this Verification on behalf of Nebraska Rail Museum.


Dennis Wallen

Dated: 8 September 2010

Exhibit B

Charles Montange

From: "Fremont & Elkhorn Valley Railroad" <fevr@fremontrailroad.com>
To: "Montange Charles" <c.montange@frontier.com>
Sent: Monday, September 06, 2010 5:11 PM
Subject: Re: Omaha & Northwestern Offer
 Following is the first email contact we had from Mr. Chappellear.

Dennis Wallen, President
 Nebraska Railroad Museum
 1835 North Somers Avenue
 Fremont, NE 68025
www.FremontRailroad.com
fevr@FremontRailroad.com

Begin forwarded message:

From: Christopher Chappellear <chris@omahastreetrailway.com>
Date: July 21, 2010 3:18:57 PM CDT
To: fevr@FremontRailroad.com
Subject: F&EV

To the Board of Directors:

The Omaha Street Railway Company desires to purchase the assets and rights of the Fremont & Elkhorn Valley Railroad. The Company would continue and improve operations as they are now, while working to upgrade the whole line to at least FRA Class 3 track, with repairs over the Maple Creek bridge being finished first.

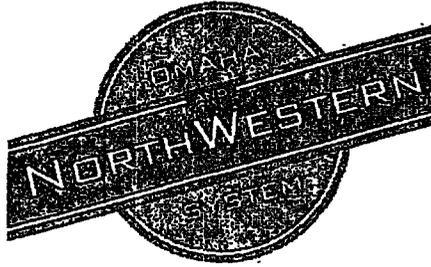
The goal of this acquisition would be to provide a vital link in establishing commuter rail service between Omaha and Norfolk. We are currently in the process of identifying current owners of the former Fremont, Elkhorn and Missouri Valley Railroad line from Norfolk to Omaha via Arlington, Bennington and Irvington; and will within a year seek construction and operation authority from the Surface Transportation Board for said line. The acquisition of assets and rights assigned to the F&EV by Chicago and Northwestern Transportation Company would greatly aid us.

We are willing to take on all debts associated with and used for the railroad, either through assignment or payment-in-full upon the sale to our Company. And I am aware that your Board has already agreed to proceed with negotiations with another party, but I would ask your Board to reconsider that matter and consider the Omaha Street Railway Company's offer.

C.T. Chappellear
 President, Omaha Street Railway Company

—
DISCLAIMER: This transmission is intended only for the use of the addressee and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If you are not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please destroy it and notify us immediately via e-mail. Thank you.

Exhibit C



Omaha and North Western Railroad
P.O. Box 51 • Boys Town, Nebraska 68010
TELEPHONE 402 • 305 • 1443

August 30, 2010

Board of Directors
Nebraska Railroad Museum
1835 North Somers Ave.
Fremont, NE 68025

To Whom It May Concern:

The Omaha and North Western Railroad (ONW) wishes to purchase the rail line, consisting of land, rail and all other track materials, owned by the Nebraska Railroad Museum, and offers \$750,000 for all right, title and interest in and to the line. Upon purchase, we plan to rehabilitate the line and to begin rail operations immediately after.

If you have any questions or wish to set up an in-person meeting, please do not hesitate to send a written response.

Sincerely,

A handwritten signature in black ink, appearing to read "C. I. Chappelle". The signature is fluid and cursive, extending across the width of the text area.

C. I. Chappelle
Omaha and North Western Railroad