

BEFORE THE
SURFACE TRANSPORTATION BOARDENTERED
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Public Record

DOCKET NO. AB-1296X

**R. J. CORMAN RAILROAD PROPERTY, LLC
– ABANDONMENT EXEMPTION –
IN SCOTT, CAMPBELL, AND ANDERSON COUNTIES, TENNESSEE****APPLICANT’S REPLY TO PETITION FOR STAY FILED BY
NORTH EAST TENNESSEE RAILROAD AUTHORITY AND
ARKANSAS-OKLAHOMA RAILROAD COMPANY AND MOTION TO STRIKE
EVIDENCE SUBMITTED FOR FIRST TIME ON APPEAL**

R. J. Corman Railroad Property, LLC (“RJC Railroad Property” or “Applicant”), by counsel, submits its reply to the Petition for Reconsideration filed by North East Tennessee Railroad Authority (the “NETRA”)¹ and Arkansas-Oklahoma Railroad Company (“AOK”) (collectively “Petitioners”), pursuant to 49 C.F.R. § 1115.3(a), on October 13, 2020.

I. Introduction

AOK’s OFA has been rejected twice based on its failure under applicable regulations to demonstrate a specific and concrete need for continued rail service on the subject Line. The instant Petition for Reconsideration (“Petition”) is another effort by AOK to offer “new evidence” in hopes that this third effort will prompt the Board to change its position and force Applicant to sell

¹ In *R. J. Corman Railroad Property, LLC – Abandonment Exemption – in Scott, Campbell, and Anderson Counties, Tenn.*, Docket No. AB 1296X (STB served Sept. 23, 2020)(the “Decision”), the Board declined to address whether the NETRA had standing to appeal the rejection of AOK’s offer of financial assistance, and rather, considered its filing as a comment. See Footnote 3. Consistent with its earlier filings, Applicant objects to the NETRA’s standing in this matter as it did not file an OFA in this matter. Applicant further objects to the fact that the only verification of the Petition is from the NETRA and not AOK.

the Line through the OFA process, even though Applicant continues to be willing to negotiate with any third party to sell the Line outside of the OFA process.

For the reasons described below and in Applicant's reply to the Petition to Stay filed by Petitioners, the instant Petition should be denied. Petitioners have failed to establish the prior action will be affected materially because of new evidence or substantially changed circumstances, or that the prior action involves material error. 49 C.F.R. § 1115.3. Moreover, the Petition reflects an abuse of the Board's processes, designed to ensure fairness in the process, and as such, is without merit.

II. Petitioners Cannot Substantiate Material Error

In its Decision rejecting AOK's appeal of the denial of the OFA, the Board considered new information submitted by the NETRA, and after weighing the totality of the circumstances, properly concluded that the evidence did not establish a continued need for rail service.²

Because of this, Petitioners do not seriously argue that the Decision involves material error. Petitioners devote one paragraph addressing material error on page 9 of the Petition which consists of urging the Board to adopt Vice Chairman Oberman's Dissent (the "Dissent"). Petitioners do so even though the Dissent *applied same standard* used by the Board but *weighed* the totality of the circumstances differently. *See Dissent*, page 11 ("Given the majority's according virtually no weight to the additional information submitted on appeal..."). In other words, Petitioners are effectively attempting to argue "the Board should have agreed with [theirs and the Dissent's] arguments and given more weight to the evidence that it has already submitted." *Canadian Pacific*

² The standard for evaluating whether a continued need for rail service, as well as the four examples set forth in the regulation, is well-established and understood by Petitioners. Offers of Financial Assistance, EP 729 (STB served June 29, 2017). AOK's original OFA consisted primarily of evidence of community support; since the initial denial of the OFA, Petitioners have attempted to establish facts supporting a "demonstrable commercial need for service (as reflected by support from shippers or receivers on the line or other evidence of immediate and significant commercial need)." 49 C.F.R. § 1152.27(c)(1)(iv)(E).

Railway Company, et. al – Control – Dakota Minnesota & Eastern Railroad Corp. et. al., Finance Docket 35081 (STB served May 7, 2009)(denying petition for reconsideration). Without question, such argument does not constitute material error and is grounds for denial of the Petition.

Even so, the Dissent’s conclusion that AOK met its burden of showing that there are “potential shippers who need and could use the Line if AOK acquires it” effectively undermines the current standard found in 49 C.F.R. § 1152.27(c)(1)(iv)(E). (Dissent at p. 13). The word “need” is defined as “essential,” “necessary” and is something more than a desire or want. It suggests there are no alternatives for that potential shipper to operate if the Line is no longer active. Yet neither IRAIL nor Straight Fork,³ on whom the Dissent relies exclusively, “need” the Line in order to continue to engage in their present commercial activities. Nor have they taken any concrete or specific action that would suggest that any use of the Line is imminent or significant. The second word used by the Dissent is “could”. The word “could” is permissive. It means “possibly will” or “might”. The Dissent’s use of the word “could” does not suggest the potential shippers will use the Line, only that they might at some point in the future, provided all business conditions are appropriate and economically viable. This is the opposite of an immediate and significant commercial need.

Based on the evidence before it, the Dissent does not advocate for a standard consistent with the regulation and the examples provided, i.e. “demonstrable commercial need for service (as reflected by support from shippers or receivers on the line or other evidence of immediate and significant commercial need).” 49 C.F.R. § 1152.27(c)(1)(iv)(E). The Dissent argues that it is enough that there are those with potential commercial interests who could operate on the Line if

³ IRAIL and Straight Fork’s status as “potential shippers who need and could use” the Line is strongly disputed by RJC Railroad Property. Quite simply, as addressed in this Reply and RJC Railroad Property’s Replies to the Appeal and Comment filed by Petitioner, neither entity has demonstrated credible evidence of immediate and significant commercial need.

the conditions are ultimately favorable. Again, there is nothing immediate or significant about what is being proposed by IRAIL and Straight Fork. Because of this, the Dissent's claim that the Board's Decision set a standard that makes it "nearly impossible for an OFA offeror to establish a continued need for rail service unless there were existing shippers on the line at the time of the proposed abandonment," is simply not correct. Accordingly, there was no material error in the Board's September 22, 2020 decision.

III. *New Evidence is Properly Rejected as Immaterial and Stricken from the Record*

Secondly, Petitioners argue that the prior Board action will be affected materially because of new evidence. But Petitioners completely ignore the express terms of 49 CFR § 1115.3(c). Section 1115.3(c) requires a party seeking to introduce new evidence on appeal to explain why that evidence was not previously adduced. "The rationale underlying our rule governing the introduction of new evidence on appeal is one of fairness. A party should not be able to withhold available evidence until after it has obtained a result not to its liking, and then introduce that evidence on appeal, to the surprise of the other parties in the proceedings." *S.R. Investors, LTD. d/b/a Sierra Railroad Company – Abandonment – In Tuolumne County, CA*, Docket No. AB-239-X, 1988 WL 225711, *2- 3 (I.C.C. Jan. 20, 1988). Absent an explanation why evidence was not previously adduced, the evidence should be stricken. *Id.*

The only explanation offered by Petitioners for why the new evidence was not submitted earlier is a reference to the Dissent's contention that it is not clear what evidence is needed to demonstrate a continued need for rail service. The Board has not applied a new standard for demonstrating a continued need for rail service and accordingly, Petitioners have failed to state any credible reason why the new evidence was not previously adduced, and by any objective

reading the information could have been produced earlier. Petitioners' actions in this proceeding are precisely the same as that rejected in *S.R. Investors* and should likewise be rejected.

It is equally clear that the “new evidence” submitted by Petitioners is not material. For example, Petitioners state the new letters they have obtained show that two customers in Indiana and North Carolina could receive timber by rail and that the parties have “seriously discussed the use of rail between them” and that “Straight Fork can demonstrate it has taken concrete steps to explore rail service.” (Petition, p. 10). Language matters and in this case, Petitioners continue to make statements that simply have no basis in fact and only further undermine their credibility. Neither “new” letter remotely claims the use of rail has been seriously discussed between the parties; in fact the letters are addressed to Mayor Frank and not Straight Fork.⁴ The Indiana client’s letter confirms it “could accommodate shipments from [Straight Fork] if this option was available and cost effective for both of our companies.” So in summary, *if* conditions are right, they may consider using rail. In the second letter, the North Carolina client only confirms that it can receive timber via Norfolk Southern Railway. This only highlights the point previously made by RJC Railroad Property that there is a Norfolk Southern Railway (“NS”) line that is near Straight Fork, providing carrier services. Given this, the lack of any explanation by Straight Fork as to why it does not currently use NS for its shipping needs is striking. In sum, Straight Fork makes no attempt to address how it could use the Line in its operations, given that it is not physically located on the Line.

⁴ It should not be overlooked that Straight Fork’s only letter is addressed to a local mayor and begins by stating, “Thank you for reaching out to my company and mentioning the possibility of being able to utilize the rail line,” and states that “if we had the opportunity we would look to” use the Line. There is absolutely nothing in this letter or the two new letters presented on appeal that affirmatively states there have been any discussions between Straight Fork and these two customers. Moreover, if it was the case that the Board somehow misconstrued the information provided by Straight Fork in its Decision, one would expect that Straight Fork would be the first to provide clarifying information in support of this Petition; yet, this did not occur.

Similarly, Petitioners claim IRAIL’s latest letter provides concrete evidence of a continued need for service on the Line. Yet, IRAIL likewise does not have a location on or near to the Line, or for that matter, even in the State of Tennessee. According to IRAIL’s latest letter, “It is true that we do not currently have storage contracts, nor have we purchased land and constructed a repair facility.” (IRAIL Letter dated June 29, 2020).⁵ IRAIL’s sole interest in the Line is for car storage and repair, neither of which even requires carrier track.⁶ It should also be noted that IRAIL is unwilling to publicly state the nature of its discussions with AOK, submitting a highly redacted public version of its original letter dated July 3, 2020. Significantly, although Applicant has never had the opportunity to access IRAIL’s representations, the Dissent cited the nonpublic information. Again, the lack of transparency or fairness is a consistent theme for Petitioners.⁷

Petitioners also submit a letter from Great Lakes & Transportation, LLC (“GLG&T”). That letter states that GLG&T has been in discussions with AOK in “recent months”. Putting aside the express failure to state why this was not earlier or timely presented, the letter speaks to an alignment between AOK and GLG&T’s management rather than describing concrete steps that might be a basis for deeming it to be a potential shipper. There is no contract between GLG&T and AOK, no identified site or contract to purchase land on the Line, and no business plan. *Ballard*

⁵ IRAIL’s latest letter dated June 29, 2020 predates the Board’s September 23, 2020 denial of AOK’s appeal.

⁶ Petitioners offer no support for their claim that a new rail car storage business demonstrates a need for continued rail service. In contrast, in *BNSF Railway Company – Abandonment Exemption – in Los Angeles County, CAL*, Docket No. AB 6 (Sub-No. 477X)(STB served Sept. 16, 2011), the Board, then including Mr. Elliot, counsel for Petitioners, agreed that objections raised by Mount Olive who currently had an easement for rail ingress and egress to the line in question and used the easement for rail car storage, was not relevant to the abandonment proceedings inasmuch as Mt. Olive was not receiving service by rail. The Board stated that Mount Olive did not currently ship or receive freight on the Line and does not propose to do so. (*Id.* at *5).

⁷ Recall that the NETRA also repeatedly alleged that an “unidentified large volume of importer of foreign wood is in the process of purchasing land on the Line and should need rail service in the near future,” but explained no more information can be provided due to a nondisclosure agreement. (NETRA letter dated July 6, 2020). Four months have passed since this assertion, yet there is no new evidence regarding any progress being made toward purchase of land on the Line or an actual need for rail service “in the near future.” Instead, Petitioners moved on to the next new thing to argue, hoping it will carry the day.

Terminal Railroad Company, LLC – Acquisition and Operation Exemption – Woodinville Subdivision, Finance Docket No. 35731, slip op. at 3 (STB served Aug. 1, 2013)(concluding no demand for rail service where two cited prospective shippers were not located on the line and did not have a contract to participate in the local construction projects cited as purported need for freight rail service and the carload estimates cited by the potential shippers were not supported by any probative support).⁸

Finally, Petitioners argue that the Tennessee Department of Transportation (“TDOT”) “heavily” invested in the Line between FY 2008 and FY 2013 to rehabilitate the Line and that this is new information which materially impacts the Board’s Decision. Again, this is not “new” information – NETRA states it administered the funds. Nor is this information relevant beyond the fact that at one point in time several years ago, and before natural gas was selling at \$2.00 a unit, such investment appeared prudent. Significantly, RJC Railroad Property notified the TDOT prior to seeking an exemption to abandon the Line (before and as part of the abandonment proceeding) and received no objection, formal or otherwise. This is further confirmed by the June 22, 2020 TDOT letter filed of record which states TDOT was not taking a position in the proceeding. To the extent that the money was used for structural repairs to bridges, which it was in large part, the bridges will remain in place regardless of the outcome of the OFA proceedings and be put to good use as part of the public trail development.

Petitioners’ new information should be rejected and stricken from the record as they have not complied with Section 1115.3(c), requiring a party seeking to introduce new evidence on

⁸ Moreover, GLG&T says nothing about why the Line is necessary to its operations; presumably, if they anticipate shipping a few car loads per month, where they need to be is at the NS interchange point in Oneida, Tennessee as there are no shippers anywhere on the Line.

appeal to explain why that evidence was not previously adduced. In the alternative, the new evidence does not materially affect the prior Board action.

IV. *The Board's Denial of the OFA is Consistent with its Duty to Promote Continued Rail Service*

Petitioners argue the Board materially erred in affirming the underlying OFA decision because its Decision was inconsistent with the Board's duty of promoting continued freight rail service. Such assertion might be relevant if, in fact, there was evidence of a continued need for rail service on the Line. But as the Board clearly considered whether there was a continued need for rail service in rejecting AOK's appeal, it certainly cannot be said the Board ignored a statutory duty to preserve rail lines where possible.

Nevertheless, Petitioners cite an abandonment case *New York Cross Harbor v. Surface Transportation Board*, 374 F.3d 1177 (D.C. Cir. 2014), suggesting the STB was reversed for ignoring its duty to preserve and promote continued rail service. However, in that case, the D.C. Circuit held "seven active shippers oppose the abandonment and eight active shippers will lose Cross Harbor's service in Brooklyn. Five active shippers...will lost *direct* connection to rail service." *Id.* at 362. In contrast, the instant proceeding involves the denial of an OFA, not abandonment. Similarly, there are no active or potential shippers on the Line and no substantial or imminent commercial need. Petitioner's reliance on *Cross Harbor* is wholly misplaced.

In addition, Petitioners' claim that removal of the track will have an adverse impact on the community is unsupported.⁹ Petitioners assert the "loss of the Line, which was in past years the leading economic engine for this region" will have a long-term effort on the counties' ability to

⁹ There are two non-profit groups representing their local communities who have appeared in this matter, filing for public use and a NITU, in order to pursue development of the Line into a recreational trail and tourism destination which is a well-established source of economic development for communities. Clearly, they do not agree that removal of the Line will have an adverse impact on the community. See Letter Filed October 14, 2020 by the Cumberland Trails Conference and Tennessee Citizens for Wilderness Planning, attached as Exhibit A.

improve their economic status. However, this statement misses the mark entirely; as there was only ever one shipper on the Line - the coal mine - it was the *coal mine*, not the Line that was the leading economic engine for the region. As the coal mine has been closed for more than seven years, and there is are no current or potential shippers on the Line, it is simply not true that removal of the Line will negatively impact the economic status of these counties. Moreover, the Line is in a rural, forested area, which essentially follows the winding New River until the Line dead ends at the now closed coal mine. While quite scenic, that characteristic does not lend itself to commercial developments in which commodities are shipped or received. For the same reason, Petitioners' unsupported statement that there is a plan that will have a "\$15 to \$20 million annual economic impact" on the community must also be rejected. Nor does the newly filed Tennessee Department of Economic and Community Development's letter, submitted by Petitioners, support that claim.

Petitioners conclude by stating that "it would be inherently wrong now to allow this Line to be abandoned and allow RJC Railroad Property to scavenge the Line for its harvestables." (Petition, p. 14). As stated previously, the abandonment has already been approved through the exemption process. Moreover, such statement ignores the fact that even if the OFA proceeds, there is no guarantee AOK will decide to purchase the Line – to date, AOK has made no effort to make an offer consistent with the net liquidation value or even share any specifics relating to their calculation of net liquidation value. Finally, Petitioners' statement does not acknowledge the fact that there is nothing preventing the NETRA and AOK from negotiating to buy the Line outside of the OFA process.

V. Conclusion

For the reasons set forth above, the Petition is not supported in law or fact, and RJC Railroad Property respectfully requests the Board to deny the Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2020, I served the foregoing Reply using the below email addresses on all parties of record in this proceeding:

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/s/ Catherine S. Wright

EXHIBIT A

October 12, 2020

Ms. Cynthia Brown
Chief, Section of Administration
Surface Transportation Board Office of Proceedings
395 E Street, S.W.
Washington, DC 20423-0001

301179
ENTERED
Office of Proceedings
October 14, 2020
Part of
Public Record

Re: R.J. Corman Railroad Property Abandonment in Scott, Campbell and Anderson Counties, Tennessee, AB-1296 (sub-no. 0x)

Dear Ms. Brown:

We write to highlight the significant economic opportunities in a Rails to Trails conversion on the R. J. Corman Railroad, the Tennessee New River line, in Scott, Campbell and Anderson counties, Tennessee. It is indisputable that the rail line travels through very scenic wildlands and the renowned New River. In addition to offering a world-class multi day scenic walking and bicycling path, a trail would offer access to water-related activities such as fishing, canoeing and kayaking.

Our intention is to assist the Counties in pursuit of a trail that would be a near-term, sustainable utilization of this corridor by bolstering eco-tourism opportunities. Similar projects elsewhere demonstrate considerable economic benefit from such trail projects. Economic analyses conducted by Headwaters Economics estimate that similar rails-to-trails projects in Virginia, the New River Trail and the Virginia Creeper Trail, generate between \$1.6 million and \$3.4 million for the local economies. See <https://headwaterseconomics.org/trail/12-virginia-creeper-rail-trail/> and <https://headwaterseconomics.org/trail/66-new-river-state-park-water-trail/>.

We've had conversations with officials in two of the Counties which indicate that there would be interest in development of a rails-to-trails project. This proposed trail could easily connect to mainstays of the area's widely recognized outdoor recreation venues the Frozen Head State Park, Cumberland Trail State Park, and Big South Fork National River and Recreation Area. Such synchronicity will strengthen area tourism efforts.

Presently, there is no economic benefit in preserving the railroad line. There are no existing or near-term customers ready to place orders for shipments and the owners have concluded that a Rail to Trail option is the

EXHIBIT A

best option for any significant near-term economic benefit to the counties. The corridor will remain intact for later re-establishment of rail service under this option should such use be deemed needed and appropriate.

We ask the Board for a timely decision in favor of R. J. Corman Railroad's abandonment. We oppose staying this process.

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Cumberland Trails Conference

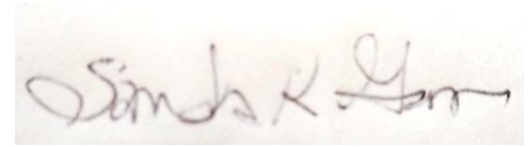
A handwritten signature in blue ink, appearing to read "Mark Bevelhimer".

Tennessee Citizens for Wilderness Planning

CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2020, I served the foregoing Reply using the below email addresses on all parties of record in this proceeding:

October 14, 2020

A handwritten signature in dark ink, appearing to read "Daniel A. LaKemper", is shown on a light-colored background.

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