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February 16, 2021
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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 36460

**Michael Williams
—Control Exemption—
S&S Shortline Leasing, LLC**

STB Finance Docket No. 36461

**S&S Shortline Leasing, LLC
—Acquisition Exemption—
City of Ely and Nevada Northern Railway Foundation**

Comments of the

City of Ely, Nevada and Nevada Northern Railway Foundation, Inc.

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Dated: February 16, 2021

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**Comments of the
City of Ely, NV and Nevada Northern Railway Foundation**

The City of Ely, Nevada, and Nevada Northern Railway Foundation, Inc. (“Sellers”) hereby submit these comments in response to the January 26, 2021 Decision of the Surface Transportation Board (“STB” or “Board”), which directed Michael Williams to file further supplemental information in the above-captioned dockets by February 15, 2021.¹ Sellers are the current owners of the rail line (the “Line”) that Mr. Williams, through S&S Shortline Leasing, LLC (“S&S”) (collectively “Applicants”), seeks authority to acquire in these dockets, and they possess knowledge of certain information that is responsive to the questions posed by the Board. These comments are supported by the attached Verified Statement of Mark Bassett (“Bassett V.S.”), who is the President of the Foundation. Sellers hope that this information will enable the Board to authorize the Applicants to consummate their purchase of the Line.

¹ The Decision also encompassed a third docket in which the Sellers have no interest. Docket No. FD 36474, Michael Williams—Control Exemption—McCloud Railway Company.

This transaction is in settlement of a lawsuit that Sellers filed against Applicants in Nevada state court in 2015.² Bassett V.S. ¶¶ 5, 14. Several of the questions raised in the Decision pertain to facts that also are germane to that litigation. The settlement will render those facts moot and cure any existing defects that may exist with respect to prior Board authorizations concerning the Line. Therefore, Sellers ask the Board to accept the Applicants' exemption notices and allow this transaction to proceed.

Sellers originally leased an unspecified portion of the Line to S&S in 2009 for rail car storage "at or near the Shafter Junction and/or at or near the Cobre Junction" when S&S was owned by Steve Flanders. *Id.* ¶¶ 6, 8. The lease was only for rail car storage; it did not include operating rights. *Id.* at ¶¶ 6-7, 13. In fact, Section 2 of the lease states in relevant part:

If, however, at any time during pendency of this agreement, a potential customer presents a viable option to Ely to bring the track into operation, this agreement may be terminated by Ely upon notice to S&S of a minimum of 12 months. Additionally, should operations commence on this section of the rail line, Ely will consider S&S proposal to become the operator of that track[.]

Id. ¶ 7. Thus, not only did the lease not extend to operations, but once the Sellers determined to commence operations, S&S was not guaranteed to be the operator.

Mr. Flanders executed the lease on July 31, 2009. *Id.* ¶ 8. Unbeknownst to the Sellers at the time, that very same day S&S filed a Notice of Exemption in FD No. 35284, *S&S Shortline Leasing, LLC—Operation Exemption—The City of Ely and White Pine Historical Railroad Foundation* (filed July 31, 2009), to operate all 128 miles of the Line as a common carrier.³ *Id.* ¶ 9. Mr. Flanders later claimed that STB authority was necessary for the rail car storage

² *City of Ely et al. v. S&S Shortline Leasing LLC et al.*, CV-1506071 (Nev. 7th Jud. Dist. Ct.).

³ White Pine Historical Railroad Foundation, Inc., has since changed its name to Nevada Northern Railway Foundation, Inc.

operation under the lease. *Id.* ¶ 10. The Sellers accepted Mr. Flanders’ claims as accurate without consulting STB-experienced counsel. *Id.*

Mr. Flanders also claimed that the lease should be amended to identify the mileposts for all 128 miles of the Line even though track conditions only permitted operations over the northernmost portion of the Line near the Shafter Junction. *Id.* ¶ 11. The Sellers thus proceeded to amend the lease in August 2009 to identify all 128 miles of the Line by milepost. There have not been any amendments to the lease since then to include operating rights or address any other subject matter. *Id.* ¶¶ 11-12. The purpose of the lease, however, remained limited to rail car storage despite the contrary statements in the 2009 Exemption Notice that the Board has identified. *Id.* ¶ 13.

In 2011, Michael Williams acquired control of S&S from Steve Flanders through the purchase of the stock and assets of S&S. This is the transaction about which the Board has inquired why Mr. Williams did not request authorization at that time. The Sellers confirm Mr. Williams’ response to the Board that S&S had no property rights under the lease that entitled it to operate the Line as a common carrier, despite contrary representations by S&S in the 2009 Exemption Notice. *Id.* ¶¶ 6-7, 13. Whether Mr. Williams nevertheless required Board authorization by virtue of the representations in the 2009 Exemption Notice is a question on which the Sellers express no opinion.⁴

⁴ The Board also has identified an alleged inconsistency between Mr. Williams’ December 29, 2020 supplemental filing and a representation made in the Notice of Exemption filed by the Great Basin & Northern Railroad in FD 36459, *Great Basin & Northern R.R.—Change in Operators Exemption—City of Ely et al.* (filed Nov. 13, 2020). Decision at 2. Specifically, the Board notes that the Great Basin has stated that it “would replace S&S as the operator” of the 0.9 mile segment of rail line that is the subject of that Notice, which the Board alleges is inconsistent with Mr. Williams’ assertion that S&S lacks such operating rights. Great Basin is a subsidiary of Nevada Northern Railway Foundation, Inc., and is represented by the same STB counsel. Regardless whether S&S possesses operating rights from Sellers, the Board did authorize it to

The litigation settlement between the Sellers and Applicants, however, will render these questions moot by curing any regulatory defects associated with the prior transactions involving S&S. S&S will become the owner of the Line with all the rights it needs to operate the Line as a common carrier. The inconsistencies observed by the Board between the pending exemption notices and those in 2009 are primarily the result of inaccurate and misleading statements in the 2009 Exemption Notice filed by Mr. Flanders. Therefore, the swiftest and most effective remedy to this situation is to authorize the pending transactions.

Respectfully submitted,

City of Ely, Nevada
Nevada Northern Railway Foundation, Inc.

By its attorneys,



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Dated: February 16, 2021

operate that 0.9 mile line segment as part of the 128 miles authorized in FD 35284. Therefore, regardless whether rail operations are currently occurring on that segment, Great Basin required authority to replace S&S as the authorized operator. It had no intent to represent that S&S currently provides service on the Line. Termination of S&S's STB-authorized operating rights over that line segment is part of the overall litigation settlement between Sellers and Applicants. Bassett V.S. ¶ 14.

Before the Surface Transportation Board

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City of Ely and Nevada Northern Railway Foundation**

Verified Statement of Mark Bassett

1. I, Mark Bassett, submit this verified statement in support of the comments of City of Ely, Nevada, (the “City”) and Nevada Northern Railway Foundation, Inc., (the “Foundation”) in STB Dockets FD 36460 and 36461.
2. I am the President of the Foundation and have held this position since 2016. I was Executive Director of the Foundation from 2002 to 2016.
3. The Foundation changed its name from the White Pine Historical Railroad Foundation, Inc., in 2016.
4. The Foundation and the City jointly own a rail line beginning at milepost 0.0 near Cobre, Nevada, and terminating near milepost 146.1, which is at or near Keystone, Nevada (the “Line”). The Line also contains two branch lines. The southern portion of the Line, from approximately mileposts 127.9 to 146.1 and including the two branch lines, is leased to the Great Basin &

Northern Railroad. The northern portion, from approximately mileposts 0.0 to 127.9 (“Northern Line”), is leased to S&S Shortline Leasing, LLC, (“S&S”).¹

5. In 2015, the Foundation and the City filed a lawsuit against S&S and others concerning their lease agreement entered into in 2009 by the Foundation, the City, and S&S titled “Lease Agreement/Joint Development Agreement” (the “Lease”).

6. The Lease initially referred to a portion of the Northern Line for rail car storage “at or near the Shafter Junction and/or near the Cobre Junction.” Shafter Junction is at or near milepost 18.75 of the Line, and Cobre Junction is at or near milepost 0.0 of the Line.

7. Section 2 of the Lease states: “If, however, at any time during pendency of this agreement, a potential customer presents a viable option to Ely to bring the track into operation, this agreement may be terminated by Ely upon notice to S&S of a minimum of 12 months. Additionally, should operations commence on this section of the rail line, Ely will consider S&S proposal to become the operator of that track[.]”

8. On July 31, 2009, Steve Flanders, then owner of S&S, executed the Lease.

9. On July 31, 2009, S&S filed a Notice of Exemption with the Surface Transportation Board (“STB”) in FD No. 35284, *S&S Shortline Leasing, LLC—Operation Exemption—The City of Ely and White Pine Historical Railroad Foundation* (filed July 31, 2009), to operate all 128 miles of the Northern Line as a common carrier from milepost 0.0 at or near the Cobre Junction to milepost 127.9 at or near the McGill Junction. This filing occurred without the knowledge of the Foundation or, upon information and belief, the City.

¹ The validity of the lease is being litigated in State court, as described below, and is not conceded to within this Verified Statement.

10. Subsequent to filing the July 31, 2009 Notice of Exemption, Mr. Flanders represented to the Foundation and the City that STB authority was necessary for the rail car storage operation under the Lease. The Foundation and, upon information and belief, the City accepted Mr. Flanders' representations without consulting counsel with STB regulatory experience.

11. Mr. Flanders also asserted that the lease should be amended to reference the mileposts for all 128 miles of the Northern Line even though track conditions only enabled operations near Shafter Junction. In August 2009, the City and the Foundation amended the Lease to refer to the mileposts for the entire Northern Line, but the purpose of the lease remained limited to rail car storage.

12. The Lease has not been amended after August 2009.

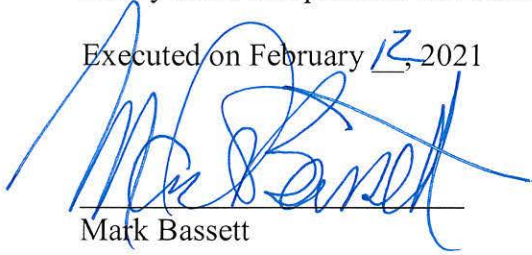
13. The Lease has never granted to S&S any operating rights over any portion of the Northern Line or any property rights that would entitle it to operate any portion of the Northern Line as a common carrier.

14. As part of the settlement of the litigation concerning the Lease, S&S agreed to: purchase from the City and Foundation the portion of the Northern Line from milepost 0.0 to milepost 127.0; and terminate the STB-authorized operating rights of S&S over the remaining 0.9-mile portion of the Northern Line between milepost 127.0 and 127.9.

VERIFICATION

I, Mark Bassett, verify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on February 12, 2021



Mark Bassett

Certificate of Service

I certify that on February 16, 2021, I served a copy of the Comments of the City of Ely, Nevada, and Nevada Northern Railway Foundation, Inc. upon the following parties of record in this proceeding, by electronic mail.

A handwritten signature in black ink, appearing to read 'Jeffrey Moreno', written in a cursive style.

Jeffrey Moreno

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Attorney for S&S Shortline Leasing, LLC
and Michael Williams