

FLETCHER & SIPPEL LLC

ATTORNEYS AT LAW

29 North Wacker Drive
Suite 800
Chicago, Illinois 60606-3208

ENTERED
Office of Proceedings
August 25, 2022
Part of
Public Record

Phone: (312) 252-1500
Fax: (312) 252-2400
www.fletcher-sippel.com

ROBERT A. WIMBISH
(312) 252-1504
rwimbish@fletcher-sippel.com

August 25, 2022

VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief Section of Administration
Office of Proceedings
Surface Transportation Board
395 E. Street SW, Room 1034
Washington, DC 20024

Re: AB 1324X

**Alabama Railroad, LLC—Abandonment Exemption—in Escambia, Conecuh,
and Monroe Counties, Ala.**

Dear Ms. Brown,

Alabama Railroad, LLC (“ARL”) hereby requests leave to file the following Rebuttal in support of its abandonment petition for exemption (“Petition”) filed in the above-captioned proceeding, and in response to reply comments filed by a collective of 39 individual landowners (the “Landowners”) with land located adjacent to the railroad line (the “Line”) that is the subject of the proposed abandonment. The Surface Transportation Board’s (“Board”) rules for proceedings initiated under the agency’s individual petition for exemption procedures do not specifically provide for the filing of a rebuttal in response to comments received. However, Board precedent establishes that, for good cause shown, parties seeking relief under an individual petition for exemption are permitted to file a rebuttal.¹ In fact, given the novel issues

¹ See, e.g., *Wisconsin Central Ltd. – Abandonment Exemption – In Winnebago County, WI*, Docket No. AB-303 (Sub-No. 2X) (ICC served Feb. 22, 1990) slip op. at 1, n. 1; cf. *Grand Trunk Western Railroad Company – Acquisition of Operating Easement – CSX Transportation, Inc.*, Docket No. FD 35661 (STB served Sep. 12, 2012) (procedural schedule in an individual petition for exemption proceeding permitted rebuttal, upon the filing of which the record would close); *Mid-Michigan Railroad, Inc. – Abandonment Exemption – In Kent, Ionia, and Montcalm Counties, MI*, Docket No. AB-364 (Sub-No. 14X) (STB served Mar. 11, 2008) (instead of scheduling rebuttal up front, the Board would await any responses to the petition, and, if any

raised in this proceeding as reflected in the Petition and in the Landowners' comments and communications, a rebuttal filing is warranted and should be accepted. If the Board chooses to accept ARL's proffered Rebuttal, then ARL submits the following:

ARL seeks authorization to terminate its common carrier obligations over, and to abandon, the roughly 47.5-mile Line in the State of Alabama. The Line was the subject of a previous abandonment proceeding when owned by a different railroad that did not consummate abandonment, as was its prerogative. The Landowners, represented by counsel also appearing in this proceeding, have exerted considerable pressure on ARL to initiate the present abandonment, threatening a variety of dubious legal actions if ARL does not accede to the Landowners' demands.² ARL has elected (of its own volition) to pursue abandonment. Even so, ARL has not decided whether or not it will necessarily proceed with outright abandonment of the entire line, abandon an as-yet-undetermined portion of it, or arrange for interim trails use. While this proceeding might otherwise be rather innocuous, ARL has pointed out that, in Alabama, state law has functioned, and could continue to function, to deprive railroads of their lines of railroad before the exercise of formal consummation processes under 49 C.F.R. § 1152.29(e)(2) that, when exercised, properly removes a line from the scope of the Board's exclusive jurisdiction.

ARL did not expect any comments on the Petition from shippers or from any other party interested in the transportation elements of the transaction and, indeed, none has come forward. But ARL anticipated that the Landowners would register their views, and the Landowners did as expected. The Landowners eagerly support ARL's abandonment effort, *provided* it results in the *consummated* abandonment of the entire Line. Anything short of a consummated abandonment, including prospective interim trails use for some or all of the Line,³ appears to be unacceptable to the Landowners.

responses were lodged, the agency would entertain petitioner's request for leave to file a rebuttal); *Holrail, LLC - Construction and Operation Exemption - In Orangeburg and Dorchester Counties, SC*, Docket No. FD 34421, *et al.* (STB served Feb. 9, 2007) slip op. at 3-4 (rebuttal accepted to ensure a just determination of the issues presented, and to facilitate a just assessment of the merits of the individual petition).

² To grasp the tenor of the Landowners' interaction with ARL see, as representative of that dialogue, the sequence of written correspondence between ARL's counsel and the Landowners' counsel, appended hereto.

³ ARL is in active discussions with prospective trail sponsors concerning a donation of the Line's right-of-way to a suitable entity willing to assume all of the general requirements for trail sponsorship under 49 C.F.R. § 1152.29(a). But, in light of *Monroe County Commission v. Nettles*, 288 So.3d 452 (Ala. 2019) ("*Nettles*") (discussed at length in the Petition) and aware of the posturing of the Landowners, such prospective sponsors have thus far been reluctant to come forward to seek issuance of a notice of interim trails use ("NITU"). ARL believes that at least one such prospective sponsor ultimately will come forward to request issuance of an NITU under a late-filed request (for good cause shown) pursuant to 49 U.S.C. § 1152.29(b)(3). In fact, to

To be sure, if ARL were to withdraw the subject Petition, opt against consummating abandonment pursuant to 49 C.F.R. § 1152.29(e)(2), or pursue an interim trails use arrangement for some or all of the Line, ARL understands and accepts that the Landowners could attempt to force the comprehensive abandonment of the Line by way of a formal application for adverse abandonment, as they have stated at unnumbered page 2 of their Reply. ARL questions whether the Landowners would succeed on an adverse abandonment initiated to permit adjacent property owners to regain the unencumbered use of any of the Line's right-of-way held in easement, although it would certainly be within the Landowners' rights to try.

More of concern, however, is whether the Landowners (or any other parties allied in interest) might invoke *Nettles* in a state court action to dispossess a trail sponsor of its interests in the Line, thereby permitting adjacent property owners to reclaim full enjoyment of any railroad right-of-way currently held by ARL in easement. The Landowners properly reject the suggestion that they might "pursue a state court action that would conflict with federal jurisdiction over the Line" (Reply, 2). They add, however, that they may pursue a state law claim against ARL associated with certain, unspecified sub-surface rights. The subsurface rights appear to have nothing to do with this proceeding (except to serve an obvious mechanism by which the Landowners suspect that they can leverage abandonment consummation).

While the Landowners' stated commitment to forego state court action that would conflict with Board jurisdiction is an encouraging sign, the Landowners also later – and ambiguously – offer that, "If a trail operator comes forward that truly intends to convert the Line pursuant to a trail use agreement, obviously, that would change the landscape." *Id.* This passage may serve to qualify the Landowners' current position. It may mean that the Landowners might not challenge a trails use arrangement by an "operator" that "truly intends" to deploy the line for trails use (whatever "true intent" may mean in the subjective eyes of the Landowners). Or it could mean that, if ARL were to negotiate trails use for some or all of the Line, regardless of the circumstances, the Landowners might change position and invoke *Nettles* in an effort to undo the trails arrangement. The correspondence appended hereto suggests that the Landowners might opt for the *Nettles* path if the Board were to authorize interim trails use.

Again, ARL has not ruled out fully consummating abandonment of the entire Line in accordance with Board-imposed conditions (if any), but it would far prefer not forego a prospective interim trails use arrangement. Currently unclear to ARL and prospective trails sponsors is whether a trails sponsor would be left to "go it alone" to defend against a *Nettles* quiet title action – regardless of whether the Landowners or some other interest initiates such a case in state court – or whether the Board would intervene to protect against unlawful intrusions into the scope of its exclusive jurisdiction, including with respect to a line under an NITU.

preserve the interim trails use option, ARL is considering whether it will serve as trails sponsor on a provisional basis.

Board direction on this issue will bear upon whether a willing trail sponsor may ultimately come forward in this proceeding.

Respectfully submitted,

By: /s/ *R. A. Wimbish*

Robert A. Wimbish
Thomas J. Litwiler
Bradon J. Smith
Fletcher & Sippel LLC
29 North Wacker Drive, Suite 800
Chicago, Illinois 60606-3208
(312) 252-1500

ATTORNEYS FOR ALABAMA RAILROAD, LLC

Attachment (Appendix)

cc: All parties of record

APPENDIX

LANDOWNERS – ALABAMA RAILROAD, LLC CORRESPONDENCE

July 15, 2022

Via U.S. Mail & Electronic Mail

Mr. Robert A. Wimbish
Fletcher & Sippel, LLC
29 North Wacker Dr., Suite 800
Chicago, IL 60606

RE: Abandonment Petition for Exemption of Alabama Railroad LLC

Dear Mr. Wimbush,

We represent 39 landowners who collectively own 53 parcels of land adjacent to and underlying Alabama Railroad's ("ARR") right-of-way in Escambia, Conecuh, and Monroe Counties, Alabama. We have received and reviewed the Abandonment Petition for Exemption filed by ARR on July 6, 2022. Although we support and applaud the Abandonment Petition for Exemption, we believe you need to correct your Petition to specify an effective date for the abandonment, and we also want to correct some misstatements and mischaracterizations of our clients' position.

Pursuant to 49 C.F.R. § 1152.50(d)(2), a rail carrier proposing an exempt abandonment is required to file a verified notice that includes the proposed consummation date of the abandonment. Specifically, the regulation states that the verified notice shall include the proposed consummation date and that the verified notice must be filed with the Board at least 50 days before the abandonment is to be consummated. Our review of ARR's Verified Notice does not reveal any proposed effective date for the abandonment to be consummated, and we request that ARR supplement its filing to designate the effective date of the consummation. As a practical matter, the Board will likely reject ARR's filing without such an effective date.

Furthermore, we believe ARR's Abandonment Petition for Exemption contains several misstatements and/or misconceptions concerning our clients' position, as follows:

- 1) "While ARL sees independent, economic merit to abandoning the Line, ARL has been approached by adjacent landowners threatening to divest ARL of its interest in the Line via hostile state court action (and outside of ordinary Board processes)" (*see* Pages 2-3);
- 2) "Dissatisfied with the continued status of the Line as a line of railroad under the exclusive jurisdiction of this Board, these Landowners have threatened to pursue relief under Alabama state law to reclaim unencumbered use of the portions of their land currently occupied by ARL by way of easement" (*Id.* at 3);
- 3) "Such hostile state court action, if successful would, of course, conflict with federal law, which entrusts railroad line abandonments exclusively to this Board pursuant to 49 U.S.C. §§ 10501(b) and 10903" (*Id.*); and

- 4) “ARL has reason to believe that landowners adjacent to the Line intend to argue that, in keeping with Alabama common law, a railroad line... is *abandoned*, such that a state court may order ARL’s non-marketable interest in the subject right-of-way... to be extinguished.” *See Id.* at 4 (emphasis in original).

ARR’s representations concerning our clients’ legal position are completely misplaced. Because ARR merely possesses an easement for its railroad purposes and does not possess any type of ownership interest in the sub-surface underlying the right-of-way, our clients’ state court action, if necessary, would seek to quiet title in their interest in the fee ownership of the right-of-way and to recover whatever monies have been received by ARR for any type of use, including a pipeline, that is not a railroad purpose. Our clients never envisioned and would not pursue a state court action that would conflict with federal jurisdiction over the Line.

Contrary to ARR’s assertions, our clients’ state court action would not seek a determination of abandonment, based on *Nettles* or otherwise. We recognize the appropriate procedure for that determination is an adverse abandonment application before the STB, which our clients are prepared to file. Absent ARR’s recent Abandonment Petition for Exemption, our clients would have already initiated that application, and they do not foreclose that possibility, should the need arise.

In addition, contrary to ARR’s assumptions or inferences, our clients have no interest in taking possession of the trackage before it can be salvaged and support an orderly disposition of the Line. If ARR proposes a reasonable effective date for the consummation of abandonment as the regulations require, and clarifies to the STB our clients’ position as to the Line’s disposition, our clients will support ARR’s salvage activity and orderly disposition.

Thereafter, if ARR commits to the actual consummation of abandonment, such that consummation of abandonment occurs in a timely and reasonable fashion, our clients will pursue neither a state court action to quiet title and recover damages nor an adverse abandonment application before the STB, as abandonment would render both actions moot. If ARR does not follow through with the above-described clarification and reasonable movement toward abandonment, we will file official comments before the STB and move forward with our clients’ state court action.

Please let us know your position as soon as practicable.

Sincerely yours,



Thomas S. Stewart

TSS/hrb

cc: Meghan Largent

FLETCHER & SIPPEL LLC

ATTORNEYS AT LAW

29 North Wacker Drive
Suite 800
Chicago, Illinois 60606-3208

Phone: (312) 252-1500
Fax: (312) 252-2400
www.fletcher-sippel.com

ROBERT A. WIMBISH

(312) 252-1504
rwimbish@fletcher-sippel.com

July 21, 2022

VIA E-MAIL

Thomas F. Stewart
Stewart Wald + McCulley
2100 Central Street #22
Kansas City, MO 64108

Re: ***Alabama Railroad, LLC – Abandonment Exemption – In Escambia, Conecuh
and Monroe Counties, Alabama, AB 1324X***

Dear Mr. Stewart:

Thank you for your letter of July 15, 2022 on behalf of 39 landowners with an interest in the progress of the abandonment petition for exemption (the “Petition”) filed by Alabama Railroad, LLC (“ARL”) in the above-captioned proceeding on July 6, 2022. In your letter, you state that ARL “need[s] to correct [the] Petition” to address an allegedly missing effective (or consummation) date, and to correct what you or your clients consider to be “misstatements or mischaracterizations” of your clients’ legal positions. For reasons supplied below, the Petition is not substantively deficient (you are mistaken about the abandonment procedures ARL has invoked, and may not know why ARL needed to invoke those procedures in the first place), and, thus, there is no deficiency in need of correction. Furthermore, I would recommend that you address whatever misstatements or mischaracterizations about your clients, their interests in this case, and their intended outcome from this proceeding you think may be contained in the Petition. Finally, I will touch upon your comments about possibly initiating an adverse abandonment proceeding against my client if ARL does not do as your clients demand.

To begin with, as you seem to recognize toward the end of your letter, ARL initiated the above-referenced abandonment proceeding before the Surface Transportation Board (“STB”) pursuant to the agency’s individual abandonment petition for exemption procedures set forth at 49 C.F.R. § 1152.60, and **not** the class exemption procedures at 49 C.F.R. § 1152.50 (the latter of which are available in certain situations where a railroad has owned the line targeted for abandonment for at least two years and where that line segment has been inactive for at least two consecutive years). Here, ARL’s railroad line has been inactive for the requisite period of time,

FLETCHER & SIPPEL LLC

Thomas F. Stewart
July 21, 2022
Page 2

but ARL has not owned the line for two years, and STB jurisprudence does not permit a new owner of a railroad to “tack” pre-ownership inactivity to become eligible for the Section 1152.50 class exemption.¹ You may have not recognized the significance of the point, but ARL addressed this item – albeit without directly referencing *Tulare Valley* – in its Petition at page 2. And, as you will notice when you compare the provisions of Sections 1152.50 and 1152.60, the controlling regulations contain no counterpart to 49 C.F.R. § 1152.50(d)(2).

On that note, I see that you seem to be very focused upon abandonment *consummation* dates and deadlines, which is troubling. As you may know, STB authorization to engage in a particular action– whether under a class exemption, individual exemption or otherwise – is strictly *permissive*. It does not mandate the authorization seeker to undertake the action that may be authorized. For example, STB abandonment authorization – unless undertaken by adverse abandonment (more on that later) – does not mandate abandonment. A railroad may elect not to consummate abandonment (whether by permission to withdraw the request or by inaction beyond the STB-prescribed consummation notice deadline), even when authorized to do so. Indeed, abandonment proceedings commonly involve situations where the abandoning carrier elects to negotiate interim trails use under the governing federal laws, an arrangement that definitely does not constitute abandonment consummation (and may never lead to abandonment consummation) – contrary to *Nettles*² alarming, wildly-incorrect take on interim trails use and STB jurisdiction, generally.

Relatedly, I appreciate your clients’ stated commitment not to disrupt track salvage or to attempt to claim any track materials not removed from the line prior to abandonment consummation. But I am concerned by the meaning of your clients’ conditional “support” for ARL’s “salvage activity and orderly disposition” as long as ARL “proposes a reasonable effective date for consummation of abandonment” – again, relying upon the an inapplicable STB regulation. Your passage could be read to convey an ultimatum and a threat if ARL does not do as your client demands. If you did not mean to level a threat, please let me know that I have misconstrued that part of your letter. I am pretty sure I haven’t.

I gather that your clients want to see ARL consummate abandonment of its rail system, but you do not mention if they would be amenable to an interim trails use arrangement for some – or all – of the subject railroad corridor, extending to your clients the option to pursue a Tucker Act claim with the federal government. Your firm’s website conveys considerable

¹ See *Tulare Valley R. Co. – Aban. – Kings & Tulare County, CA*, 9 I.C.C.2d 1205 (1993) (“*Tulare Valley*”).

² *Monroe County Commission v. Nettles*, 288 So.3d 452 (Ala 2019) (“*Nettles*”).

FLETCHER & SIPPEL LLC

Thomas F. Stewart
July 21, 2022
Page 3

experience with Tucker Act claims related to interim trails use arrangements. In light of this, I would be most interested your clients' position on prospective trails use arrangements for some or all of the railroad right-of-way underlying the subject railroad line, particularly in light of *Nettles*. It is quite possible that some or all of the railroad corridor could become the subject of an interim trails use arrangement, and we are looking into that for ARL.

I take no position on whether or not ARL's Petition contained misstatements about your client's intentions and legal positions. But, rather than demand, or expect, that *ARL* address such misstatements in a supplemental filing that might not fully or accurately express your position, I would strongly encourage *you* to file reply comments on behalf of your clients. I don't intend to offer any such corrections under the circumstances. In case you were not aware, unlike a class exemption proceeding, the procedures governing an abandonment petition for exemption provide for public notice of the proposed abandonment and typically extend to the public an opportunity to tender a formal reply.³ So, if you believe that your clients' position is not fully, or accurately, expressed in the Petition, I again would expect, and hope, that you would take the opportunity that is afforded to interested parties in such proceedings to share your clients' views. Given the unusual circumstances surrounding this proceeding, I am certain that it would be very helpful to the STB and to its decision making process to better understand your clients' position and expectations.

Finally, you have raised the possibility that, if ARL does not proceed promptly to consummate abandonment of the line,⁴ your clients may: (a) pursue a state court action to quiet title (presumably under the legal theories enunciated in *Nettles* – since such action under state law to divest ARL of its right of way would be categorically preempted under 49 U.S.C. §§ 10501(b) and 10903, absent a consummated abandonment); (b) initiate an adverse abandonment proceeding before the STB; or (c) both. Your clients are certainly welcome to pursue an adverse abandonment before the STB, and I suspect that you have investigated such a possibility and governing STB jurisprudence on the subject. But I would suggest that you and your clients consider that option very carefully. First of all, depending upon your clients' expectations about the outcome of the present proceeding, it may be that that particular threatened "action" indeed would be moot. Second, given my years of experience in this particular legal field, I am confident that your client's prospects of success in such an undertaking at the STB are dubious at best. But you may want to check that issue for yourself, if you haven't already, by consulting

³ See 49 C.F.R. § 1121.4(c).

⁴ That would suggest to me, incidentally, that your clients would object to an interim trails use arrangement for the line should ARL decide to pursue such an option.

FLETCHER & SIPPEL LLC

Thomas F. Stewart
July 21, 2022
Page 4

directly with the Board's Office of Rail Customer and Public Assistance ("RCPA"), which I would invite you to do. RCPA's phone number is 866-254-1792 / 202-245-0238.

Although I am inescapably put off some by the tone of your letter and the unnecessary threats and demands expressed in it (presumably included for the purposes of your clients), I am cautiously optimistic that we could reach an understanding about my client's efforts and expected outcomes of those efforts nevertheless. And I believe that a cordial discussion would clarify matters, and at least enable us to better understand one another. I hope that you will consider reaching out to me by phone for that purpose. Aside from that, I will close by again encouraging your clients to submit comments in the present abandonment proceeding to clarify their position (to the extent you believe ARL got it wrong) and to convey their expectations as to the outcome of this case. In less than a week, we expect the STB to publish notice of this proceeding in the *Federal Register* (and on the agency's website), and I fully expect (consistent with agency practice) that the notice will provide for public comment (usually styled as "replies to the petition") by a prescribed deadline.⁵

Please let me know if you wish to discuss this matter by phone, as I have proposed, and I would be glad to arrange for a time to do so.

Respectfully yours,

/s/ *Rob*

Robert A. Wimbish
Counsel for Alabama Railroad, LLC

Enclosure

Cc: Ivory Beggs
Tom Hayes

⁵ See the attached example, taken from a past abandonment proceeding initiated under the same abandonment petition for exemption procedures as ARL has invoked here.

44363

SERVICE DATE – MARCH 31, 2015

DO

FR-4915-01-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. AB 303 (Sub-No. 46X)]

Wisconsin Central Ltd.—Abandonment Exemption—in Lake County, Ill.

On March 11, 2015, Wisconsin Central Ltd. (WCL) filed with the Surface Transportation Board (Board) a petition under 49 U.S.C. § 10502 for exemption from the provisions of 49 U.S.C. § 10903 to abandon 3.6 miles of rail line extending between milepost 71.0 in North Chicago, Lake County, Ill., and milepost 74.6 in Waukegan, Lake County, Ill. (the Line). The Line traverses United States Postal Service Zip Codes 60064, 60085, and 60087.

According to WCL, there is one shipper, International Precision Components Corporation (IPCC), located on the Line. WCL states that IPCC has entered into a terminable agreement with WCL to lease a side track connecting to the Line. From WCL's side track, IPCC transloads shipments to truck for final delivery at IPCC's off-Line manufacturing facility. WCL notes that it is exploring the relocation of IPCC's transloading operations to another rail-served location. After receiving Board authority to abandon the Line, WCL states that it intends to salvage the rails, ties, and other track material and then to negotiate a sale of the right-of-way to the City of Waukegan (City). According to WCL, the sale of the right-of-way will allow the City to implement an urban redevelopment project.

In addition to an exemption from the provisions of 49 U.S.C. § 10903, WCL seeks an exemption from 49 U.S.C. § 10904 (offer of financial assistance (OFA) procedures). In support, WCL states that the right-of-way is needed for a valid public purpose as it is an essential component of the City's multi-faceted lakefront revitalization and redevelopment effort. WCL further asserts that there is no overriding public need for continued freight rail service. This request will be addressed in the final decision.

According to WCL, the Line does not contain federally granted rights-of-way. Any documentation in WCL's possession will be made available promptly to those requesting it.

The interest of railroad employees will be protected by the conditions set forth in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, In Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979).

By issuing this notice, the Board is instituting an exemption proceeding pursuant to 49 U.S.C. § 10502(b). A final decision will be issued by June 29, 2015.

Any OFA under 49 C.F.R. § 1152.27(b)(2) will be due by July 9, 2015, or 10 days after service of a decision granting the petition for exemption, whichever occurs first.

Each OFA must be accompanied by a \$1,600 filing fee. See 49 C.F.R. § 1002.2(f)(25).

All interested persons should be aware that, following abandonment, the Line may be suitable for other public use, including interim trail use. Any request for a public use condition under 49 C.F.R. § 1152.28 or for trail use/rail banking under 49 C.F.R. § 1152.29 will be due no later than April 20, 2015. Each trail request must be accompanied by a \$300 filing fee. See 49 C.F.R. § 1002.2(f)(27).

All filings in response to this notice must refer to Docket No. AB 303 (Sub-No. 46X) and must be sent to: (1) Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001; and (2) Robert A. Wimbish, Fletcher & Sippel LLC, 29 North Wacker Drive, Suite 920, Chicago, IL 60606-2832. Replies to the petition are due on or before April 20, 2015.

Persons seeking further information concerning abandonment procedures may contact the Board's Office of Public Assistance, Governmental Affairs and Compliance at (202) 245-0238 or refer to the full abandonment regulations at 49 C.F.R. part 1152. Questions concerning environmental issues may be directed to the Board's Office of Environmental Analysis (OEA) at (202) 245-0305. Assistance for the hearing impaired is available through the Federal Information Relay Service at 1-800-877-8339.

An environmental assessment (EA) (or environmental impact statement (EIS), if necessary) prepared by OEA will be served upon all parties of record and upon any other agencies or persons who comment during its preparation. Other interested persons may contact OEA to obtain a copy of the EA (or EIS). EAs in abandonment proceedings normally will be made available within 60 days of the filing of the petition. The deadline for submission of comments on the EA generally will be within 30 days of its service.

Board decisions and notices are available on our website at
"WWW.STB.DOT.GOV."

Decided: March 25, 2015.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

From: Thomas S. Stewart <Stewart@swm.legal>

Sent: Friday, July 22, 2022 9:36 AM

To: Angie Harrison

Cc: avory@rrmaterials.com; Thomas E. Hayes; Audrey E. Lane; Robert A. Wimbish; Elizabeth G. McCulley; Reed Ripley

Subject: RE: Stewart Reply Final

Mr. Wimbish, this will acknowledge receipt of your condescending letter. Based on your response, we will now proceed on all fronts, which will now include comments to the STB, an adverse abandonment application, and a state court action. Thanks.

From: Angie Harrison <aharrison@fletcher-sippel.com>

Sent: Thursday, July 21, 2022 5:36 PM

To: Thomas S. Stewart <Stewart@swm.legal>

Cc: avory@rrmaterials.com; Thomas E. Hayes <thayes@wallacesaunders.com>; Audrey E. Lane <ALane@fletcher-sippel.com>; Robert A. Wimbish <RWimbish@fletcher-sippel.com>

Subject: Stewart Reply Final

Correction:

Attached, please find a corrected copy of the letter previously sent to you by Rob Wimbish. The letter that was sent was missing footnotes. This letter is the correct version

Should you have any questions, please let us know.

Best regards,

Angie Harrison

Assistant to Robert A. Wimbish

Fletcher & Sippel LLC

29 N. Wacker Drive, Suite 800

Chicago, Illinois 60606-3208

Phone: 312-252-1542

Facsimile: 312-252-2400



From: Robert A. Wimbish
Sent: Friday, July 22, 2022 9:55 AM
To: Thomas S. Stewart; Angie Harrison
Cc: avory@rrmaterials.com; Thomas E. Hayes; Audrey E. Lane; Elizabeth G. McCulley; Reed Ripley
Subject: RE: Stewart Reply Final

Tom -

So I take it you don't care to discuss the case at all?

It would be great if you would reconsider.

I think you mistook my attempt at clarification and constructive dialogue for condescension, which is unfortunate.

But if you are set on your approach after some reflection, and I cannot dissuade you, then that is certainly your prerogative.

Kind regards.

Rob

Sent from my Verizon, Samsung Galaxy smartphone

From: Thomas S. Stewart <Stewart@swm.legal>
Sent: Friday, July 22, 2022 10:22 AM
To: Robert A. Wimbish; Angie Harrison
Cc: avory@rrmaterials.com; Thomas E. Hayes; Audrey E. Lane; Elizabeth G. McCulley; Reed Ripley
Subject: RE: Stewart Reply Final

Rob, your letter did not strike me as any attempt at clarification. I am very familiar with the permissive nature of abandonments, and I am also very familiar with adverse abandonments, and as I attempted to politely explain in my initial letter, if ARR is just going through the motions to obtain the right to later decide if they are going to actually consummate abandonment, there really isn't anything for us to discuss. Thanks.

From: Robert A. Wimbish <RWimbish@fletcher-sippel.com> Rob, your letter did not strike me as any attempt at clarification.
Sent: Friday, July 22, 2022 9:55 AM
To: Thomas S. Stewart <Stewart@swm.legal>; Angie Harrison <aharrison@fletcher-sippel.com>
Cc: avory@rrmaterials.com; Thomas E. Hayes <thayes@wallacesaunders.com>; Audrey E. Lane <ALane@fletcher-sippel.com>; Elizabeth G. McCulley <McCulley@swm.legal>; Reed Ripley <ripley@swm.legal>
Subject: RE: Stewart Reply Final

Tom -

So I take it you don't care to discuss the case at all?

It would be great if you would reconsider.

I think you mistook my attempt at clarification and constructive dialogue for condescension, which is unfortunate.

But if you are set on your approach after some reflection, and I cannot dissuade you, then that is certainly your prerogative.

Kind regards.

Rob

Sent from my Verizon, Samsung Galaxy smartphone

From: Robert A. Wimbish

Sent: Wednesday, July 27, 2022 10:25 AM

To: Thomas S. Stewart

Cc: ivory@rrmaterials.com; Thomas E. Hayes; Audrey E. Lane; Elizabeth G. McCulley; Reed Ripley

Subject: Re: Stewart Reply Final

Tom -

As I suspect you saw yesterday, the STB issued notice of the proposed abandonment by way of a Federal Register notice (and similar notice on the STB's website). Just in case, that notice is attached. The deadline for comments (styled as replies) to the Abandonment Petition are due by August 15, and a decision on the merits is expected by October 24.

As I stated before, I would encourage you to file a reply on behalf of your clients.

I understand from your letter that your clients want to see Alabama Railroad move forward with "consummation" of the proposed abandonment, and to commit to the same, under threat of adverse abandonment or state court action. Less clear to me is whether or not your clients would object to Alabama Railroad pursuing an interim trails use arrangement for some or all of the line. My current assumption is that your clients WOULD oppose such arrangements, but that's just an assumption. If you were to clarify whether or not your clients would object to trails use would likely inform my client's plans for disposition of the corridor. We are currently looking at trails use as an option, but that could certainly change, so we'd really appreciate clarification.

Finally, while you and I understand what "consummation" means as a legal term of art, Ivory Beggs does not, and her email from last week about ARL's consummation plans, while intended to be helpful, reflects that lack of

understanding. I have confirmed with Avory that she meant that ARL's current plans are to proceed with track salvage for most, if not all, of the railroad line. Consummation of abandonment is a separate, voluntary step (outside of the context of an adverse abandonment), and one of the reasons why ARL might not consummate abandonment is in furtherance of interim trails use, depending upon your client's position on trails use.

Please let me know, so that we can proceed accordingly.

Thanks.

Kind regards,

Rob

From: Thomas S. Stewart <Stewart@swm.legal>

Sent: Tuesday, August 2, 2022 10:31 AM

To: Robert A. Wimbish

Cc: ivory@rrmaterials.com; Thomas E. Hayes; Audrey E. Lane; Elizabeth G. McCulley; Reed Ripley

Subject: RE: Stewart Reply Final

Rob, this will acknowledge receipt of your further e-mail of July 27. We indeed saw the STB's Notice and we are well aware of the applicable procedural steps and deadlines associated with your abandonment exemption.

First, your e-mail repeatedly seeks some "clarification" regarding the possibility of interim trail use. Simply put, our history and experience with this corridor (and many others similarly situated) lead us to believe that trail use is not a viable option. If you have any concrete information to the contrary, please advise. Otherwise, it is rather obvious to us that pursuing interim trail use serves no purpose other than to inappropriately forestall the consummation of abandonment, and our landowners are not interested.

Second, you have also raised several issues related to the consummation of abandonment, particularly related actions for adverse abandonment and/or a state court action. As I have attempted to explain, these related actions are not "threats" but are, instead, eventualities should ARL fail to consummate abandonment. I am well aware that consummation of abandonment is permissive after the abandonment exemption is granted, which is the reason that related actions will become necessary if abandonment is not consummated under federal law, but that permissive authority cannot extend into perpetuity and cannot shield ARL from the legal effects of the corridor's status and state law title issues. Although you apparently indicate that Ivory Beggs does not understand what "consummation" means, which I sincerely doubt, I am also sure that you have explained all of these issues to her by now in any event.

Third, under these facts, there is simply no reason why ARL should oppose the ultimate consummation of abandonment (except as discussed in the next paragraph). You and ARL have both indicated, to me and the STB, that ARL has not moved any local traffic since its acquisition, there has been no local traffic for years, the line is stub-ended, there are no current shippers or prospects, and there is no likelihood of any future demand for service and, even if there was, the costs would be prohibitive. Frankly, the PC&N test should be easily established under these facts. Plus, you have indicated a desire to salvage the infrastructure within the rail bed, which the Landowners do not and will not oppose—in essence, a de facto abandonment has already occurred. The simple conclusion must be that ARL should have no qualms consummating abandonment since there is no current source or prospective source of revenue from railroad operations.

Fourth, and most importantly, it is readily apparent that ARL has sought and is seeking to derive revenue from the corridor for things that are not railroad purposes or railroad operations. Frankly, that conclusion must be the only driving force for ARL to even contemplate any result other than the consummation of the abandonment of the corridor. We are aware of the license agreements that exist, and we are also aware of Ms. Beggs' testimony concerning the agreement with TerraPact whereby TerraPact operates and manages license agreements and ARL receives 50% of the revenue. In fact, she even testified that ARL was in the process of finalizing a pipeline agreement and ARL would receive 50% of those revenues as well. Obviously, ARL has no right to revenue derived from non-railroad purposes, particularly for subsurface rights within the right-of-way itself (we have already litigated that specific issue on a number of different occasions around the country and I have little doubt how the Alabama courts will rule on that issue). Under the law, ARL currently has the exclusive right of possession to the surface of the right-of-way for railroad purposes, but ARL has no right to utilize either the surface or particularly the subsurface of the landowners' land to generate revenue (and that obviously includes TerraPact as well). As a result, the Landowners are not only entitled to have their state law property rights determined, but they are also entitled to all revenue for those property rights that are either not generated from railroad purposes or that are generated from the subsurface rights that they own.

Although it remains our desire to avoid years of additional litigation, we do not see how it can be avoided unless ARL consummates the abandonment so our Landowners can get their land back. Should ARL fail to consummate abandonment (as the corridor is clearly no longer used for railroad purposes and there are no discernible prospects for such uses either), an application for adverse abandonment will be required (because, as you say, it is permissive). Should ARL continue to be unjustly enriched and unjustly benefit from revenue sources that are not railroad purposes and/or infringe on their subsurface rights without compensating the Landowners, an Alabama state court action is necessary and warranted. From our perspective, it appears that ARL is using the abandonment process, and potentially possible interim trail use, as a means to continue to wrongfully exploit the situation to the detriment of the Landowners. Obviously, the consummation of abandonment would demonstrate otherwise.

If I am mistaken in any regard, or if you see some other solution, please let me know? Otherwise, we will proceed accordingly as outlined in this response.

Thanks, Tom.