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June 19, 2019

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BY E-FILING

Ms. Cynthia T. Brown
Chief of Administration
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings
June 19, 2019
Part of
Public Record

RE: FD 36300, Leavenworth, Lawrence and Galveston Railroad d/b/a the Baldwin City & Southern Railroad Company ("Baldwin")-Operation Exemption

Dear Ms. Brown:

I am writing on behalf of the Leavenworth, Lawrence and Galveston Railroad d/b/a the Baldwin City & Southern Railroad Company ("Baldwin") in connection with the Board's decision served in the above-captioned proceeding on May 31, 2019. That decision requires Baldwin to address whether the Atchison Topeka & Santa Fe Railway ("ATSF") consummated the abandonment of the subject rail line before it was acquired by Baldwin's corporate affiliate and owner Midland Railway ("Midland").

The 1996 decision of the United States Court of Appeals for the District of Columbia Circuit in *Birt v. Surface Transportation Board*, 90 F.3d 580, is very relevant on the issue of abandonment of a line before the enactment of the ICC Termination Act and the present notice of consummation requirement. There the Court looked to the carrier's intent in determining whether or not a line is abandoned. More specifically, factors considered as indicia of intent to abandon include cessation of operations, salvage of the track and track materials, and relinquishment of control over the right of way. Here there is no question that

ATSF terminated operations and relinquished control over the right of way when it sold the line to Midland.

As evidence of intent I am attaching an affidavit prepared by Michael W. Blaszak, the attorney who represented ATSF in obtaining abandonment authority. He states that the railroad did obtain abandonment authority from the Commission and that he feels certain that it terminated service and cancelled tariffs pertaining to the line. He also noted that the line is not shown on any maps of ATSF and BNSF Railway indicating that those carriers no longer considered the line to be a part of their system.

The second part of the Board's decision suggests that Midland might have to obtain acquisition authority for the subject line because it assumed a residual common carrier obligation at the time of acquisition citing Board and judicial precedent. With all due respect, the Board misinterprets those cases. The undersigned counsel is intimately familiar with *Macrie—Continuance in Control Exemption—N.J. Seashore Lines, Inc.*, FD 35296 et al. (STB served Aug. 31, 2010) having represented that applicant. Both *Macrie* and *Wisc. Cent. Ltd. v. STB*, 112 F.3d 881 (7th Cir. 1997) stand for the proposition that a party acquiring an abandoned rail line for lease to a rail carrier for common carrier rail service does not acquire a residual common carrier obligation and does not need to obtain authority for its acquisition. As the Board stated in *Macrie*,

“The first issue before us is whether Clayton, the track's owner and lessor, must seek and obtain Board acquisition authority and assume a residual common carrier obligation to perform service in the event of NJSL's absence. Based on *Wisconsin Central Ltd. v. STB*, 112 F.3d 881 (7th Cir. 1997), we find that Clayton need not seek such authority, as it would not acquire a residual common carrier obligation.”

...

“On appeal, the court reversed the ICC's decision, stating that “the mere act of leasing the line [to the operator] was insufficient to confer any common carrier obligation on [the underlying owner].” *Id.* at 883. The underlying owner in Wisconsin Central was not required to seek abandonment authority; for the same reasons, we conclude that Clayton need not seek acquisition authority here. There is no evidence on this record that Clayton

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has done anything more than merely lease its property to NJSL for the provision of rail freight service.”

As with *Macrie* and *Wisconsin Central*, Midland acquired the Line back in 1988 as a piece of real estate with track thereon. As a tourist railroad operating in intrastate commerce, it was and is a noncarrier outside the Board’s jurisdiction. The mere act of leasing the Line to Baldwin does not render Midland a common carrier subject to the Board’s jurisdiction. The Management and Operating Agreement between Midland and Baldwin contains language that comports with the Board’s *State of Maine* precedent to the effect that Midland cannot undertake actions that restrict or impede the ability of Baldwin to meet its common carrier obligations.

Midland requests that the Board expeditiously issue a decision permitting this transaction to proceed.

Respectfully submitted,

CLARK HILL



John D. Heffner
Senior Counsel

Attachment

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AFFIDAVIT OF MICHAEL W. BLASZAK

Michael W. Blaszak, being duly sworn, deposes and states as follows.

1. My name is Michael W. Blaszak. I am an attorney admitted to practice in the State of Illinois. I was formerly employed for many years by the Atchison, Topeka, and Santa Railway ("ATSF") practicing both before the former Interstate Commerce Commission and the courts in matters involving ATSF.

2. I have reviewed the decision rendered by the Surface Transportation Board in FD 36300 involving the Leavenworth, Lawrence and Galveston Railroad d/b/a Baldwin City & Southern Railroad ("Baldwin") wherein the Board required the applicant to submit certain information in order for the agency to grant its notice of exemption for operation of a rail line. As relevant here, the Board seeks to determine whether ATSF consummated the abandonment of the rail line acquired in 1988 by Baldwin's owner Midland Railway Company ("Midland") before its sale to Midland.

3. I am the very same Michael W. Blaszak who represented ATSF in seeking ICC approval for the abandonment of the subject rail line. I note that the ICC did not require that abandonment applicants provide notice of consummation for an abandonment as the Board now does. Where an applicant did not file a notice of consummation, the ICC looked at the railroad's intent to abandon as exemplified by various factors including 1) did the ICC grant the abandonment

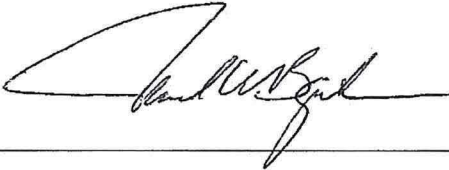
request, 2) did the railroad cease operations, 3) did the railroad cancel its tariffs pertaining to the line, and 4) did it salvage the track. I can attest to the fact that the ICC granted the application. It is highly likely that ATSF terminated service and cancelled tariffs pertaining to the line. I should also note that the line is not shown in any more recent system maps of ATSF or BNSF Railway. But I do not have in my files any notice of consummation. I feel comfortable stating in my professional opinion that the abandonment was in fact consummated.

I would be happy to provide the Board additional information should that be necessary.

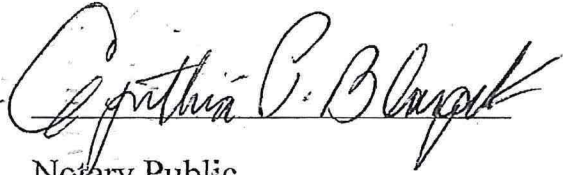
VERIFICATION

STATE OF ILLINOIS)
)
COUNTY OF COOK)

Michael W. Blaszak, being duly sworn according to law, hereby deposes and states that he is authorized to make this Verification, had read the foregoing document, and knows the facts asserted therein are true and accurate as stated, to the best of his knowledge, information, and belief.



Subscribed to and sworn to before me, a Notary Public, in and for the County of Cook in the State of Illinois, this 19th day of June, 2019.



Notary Public

