

SURFACE TRANSPORTATION BOARD

Adverse Abandonment Proceeding

AB Docket No. 600



**YAKIMA INTERURBAN LINES ASSOCIATION - ADVERSE ABANDONMENT
in YAKIMA COUNTY, WASHINGTON**

**PETITION FOR WAIVER OF PRE-FILING REQUIREMENTS
FOR
ADVERSE ABANDONMENT APPLICATION**

**ENTERED
Office of Proceedings**

DEC 23 2003

**Part of
Public Record**

BACKGROUND:

Kershaw Sunnyside Ranches, Inc., (Kershaw) pursuant to 49 U.S.C. § 10903 is requesting that the Surface Transportation Board (Board) authorize an adverse abandonment of a portion of the Naches Line, approximately 11.29 miles of rail line between milepost 2.97, at Fruitvale, WA, and milepost 14.26, at Naches, WA. The rail line was acquired by Yakima Interurban Lines Association ("YILA") from Burlington Northern and Santa Fe Railway (BNSF) in 1999 (Finance Docket No. 33719). Kershaw seeks abandonment only of that portion of the line which crosses its property. The line traverses United States Postal Service ZIP Code 98908 and includes no stations.

The line occupies a railroad right-of-way that was granted in 1905 for railroad purposes only. (Declaration of Robert Kershaw, Exhibit A.) BNSF acquired the line in 1996 and took the line out of service in 1997 due to poor track conditions. The line has

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not been in service and has not had any local traffic on it for approximately seven years.

(Declaration of Robert Kershaw, Ex. C, Deposition of Jerry Henderson, Operations Manager Yakima Interurban Lines Association).

Kershaw seeks an adverse abandonment in order to remove the line from the jurisdiction of the Surface Transportation Board and to allow the issue of abandonment and reversionary interests to be adjudicated under the laws of the State of Washington.

REQUEST FOR WAIVER:

Kershaw is seeking an adverse abandonment. The regulations governing abandonment are written for a railroad that is seeking to abandon a line. Although third party abandonment proceedings are allowed, many of the requirements are inapplicable or impossible. In appropriate instances, the Board, and its predecessor agency the ICC, has granted waivers of portions of the abandonment regulations. Chelsea Property Owners-Abandonment-Portion of Consolidated Rail Corporation's West 30th Street Secondary Track in New York, NY, Docket No. AB-167 (Sub-No. 1094) (ICC served July 19, 1989); Grand Trunk Western Railroad Incorporated-Adverse Discontinuance of Trackage Rights Application-A Line of Norfolk and Western Railway Company in Cincinnati, Hamilton County, OH, Docket No. AB-31 (Sub-No. 30) (STB served Feb. 12, 1998). Kershaw seeks a waiver of the following provisions:

1. Waiver of filing fees

Kershaw requests a waiver of the filing fees for this waiver petition (49 C.F.R. § 1002.2(f)(24)) and its adverse abandonment application (49 C.F.R. § 1002.2(f)(21)(i)). The filing fee for an adverse abandonment proceeding is \$ 16,300 (49 C.F.R. § 1002.2(f)(21)(i)).

The Board sets its fees in order to recover the full costs of providing its services. See 61 Fed. Reg. 152089. However, the Board also states that its fees “will not have a significant impact on a substantial number of small entities because the Board’s regulations in 49 C.F.R. § 1002.2(e) provide for waiver of filing fees for those entities which can make the required showing of financial hardship.” Id. The fee may be waived if in “the best interest of the public or if payment of the fee would impose an undue hardship upon the requestor.” 49 C.F.R. §1002.2(e)(2). However, there are no stated set criteria as to what constitutes “best interest of the public” or “undue hardship.”

The Board recently clarified its position regarding fee waivers in STB Decision, STB Ex Parte No. 542 (Sub-No.6). The Board stated that a waiver request should be accompanied by the appropriate fee. If the waiver is granted, the fee is then refunded. Id. However, the Board further stated that it will permit parties to file waiver requests without filing the fee so long as the substantive document is filed contemporaneously. Id. Therefore, Kershaw has filed its abandonment application with the waiver request.

a. There is a strong public interest in preserving property rights.

There is a strong public interest in preserving property rights. The right to use and enjoy land one's own land is a constitutionally cognizable property right. State ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); West Main Assocs. v. City of Bellevue, 106 Wash.2d 47, 50, 720 P.2d 782 (1986). The right to exclude others from one's property is "traditionally ... one of the most treasured strands in an owner's bundle of property rights." Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435-436 (1982).

The railroad easement upon which the line sits is conditioned upon "railroad purposes only." (Declaration of Robert Kershaw, Exhibit A.) The line has not been used for railroad purposes for approximately seven years. Kershaw is asking that the Board determine the issue of abandonment so that Kershaw can either have its reversionary rights determined under State law or seek compensation under the takings clause without further delay. See Preseault v. I.C.C., 494 U.S. 1, 22 (1990).

b. The filing fee constitutes an undue hardship to Kershaw.

Kershaw is a family owned and operated fruit farm. As such, it has limited resources. The Kershaw property at issue is comprised of 10.81 acres which has an orchard and a fruit warehouse. The property's assessed value is \$39,503. (See

Declaration of Robert Kershaw, Exhibit D, Yakima County Assessor's Valuation of Kershaw Fruit and Cold Storage.) The portion of the 10.81 acres which is occupied by the rail line is relatively small, approximately one mile of track passes through the property. Removal of the line would not greatly enhance the value of the property.

When a railroad seeks abandonment of a line, it may rid itself of the economic burden of maintaining the line and may be able to salvage trackage and other materials, it divests itself of tax liabilities and maintenance costs. Therefore, the cost of an abandonment is proportionate to benefit received by the railroad. See Clark v. Paul Gray, Inc., 306 U.S. 583, 599, 59 S.Ct. 744, 753, 83 L.Ed. 1001 (1939).

Individual land owners are held to the same standards as railroads in an abandonment proceeding, but do not receive the same economic benefit. A compensatory fee, such as the one imposed in an abandonment proceeding, may be invalidated if it is "manifestly disproportionate to the services rendered." Clark v. Paul Gray, Inc., 306 U.S. 583, 599, 59 S.Ct. 744, 753, 83 L.Ed. 1001 (1939). An individual land owner does not rid himself of any financial burden by obtaining an abandonment nor is he able to salvage any trackage. Rather, the individual landowner, such as Kershaw, receives only that which he, in theory, already had, the reversionary interest in his land. The required filing fee ~~of~~ is grossly disproportionate to the value of the property and the services rendered.

- c. **Absent a fee waiver, the filing fee violates a reversionary landowner's right to due process.**

Reversionary property owners should have a meaningful opportunity to be heard.

Without the fee waiver, the burdens imposed on an individual reversionary land owner seeking an abandonment determination are so onerous as to violate due process under the Fifth Amendment. The requirements for seeking an adverse abandonment effectively preclude an individual land owner from access to the courts. When the Surface Transportation has jurisdiction over a particular line such jurisdiction is exclusive. Therefore, until an abandonment application has been approved by the STB the state court lacks the authority to determine the reversionary interests of the land owner. Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 321, 101 S.Ct. 1124 (1981).

Waiver provisions are included in regulatory schemes "in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests." Better Government Ass'n v. Department of State, 780 F.2d 86 (D.C.Cir. 1986)(discussing waiver provisions in the FOIA). The filing fee of \$16,300 is a significant amount of money for any reversionary landowner. Without a meaningful waiver provision, a reversionary landowner cannot have his issues heard before the Board.

In addition, there is a constitutional right of access to the courts. Bounds v. Smith, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977). The right to access to the courts is not unfettered. See Ortwein v. Schwab, 410 U.S. 656, 93 S.Ct. 1172, 35 L.Ed.2d 572(1973)(upholding appellate filing fee applied to indigents seeking to appeal adverse

welfare decision); United States v. Kras, 409 U.S. 434, 93 S.Ct. 631, 34 L.Ed.2d 626 (1973)(upholding statutorily imposed bankruptcy filing fees). However, where the right involved is of a constitutional magnitude and there are no alternative means to seek redress the denial of a feasible means to be heard raises constitutional implications. Id., see also Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). Both the right to hold property without uncompensated interference and the right to seek redress from the court are rights which receive constitutional protections. See Zinerman v. Burch, 494 U.S. 113, 127, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990)(quoting Mathews v. Eldridge, 424 U.S. at 335, 96 S.Ct. 893)(usually Constitution requires some kind of a hearing before the government deprives a person of liberty or property.) see also Memphis Light, Gas, and Water Div. v. Craft, 436 U.S. 1, 19, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978) ("Ordinarily, due process of law requires an opportunity for 'some kind of hearing' prior to the deprivation of a significant property interest."). Kershaw must first bring the issue of abandonment before the STB, before it can access the courts. There are no alternative avenues for the Kershaws to seek relief.

c. There is a strong public interest in putting land to beneficial use.

The line at issue has not been in service for approximately seven years. Yakima Interurban Lines Association ("YILA"), the entity responsible for maintaining the line is insolvent and deeply in debt. As of April 2001, YILA was liquidating its assets. (Declaration of Robert Kershaw, Ex. C, p. 7). YILA has been "negotiating" with Yakima

County and the City of Yakima regarding the line for at least two years. Id., at p. 14. However, no one has initiated any action before the Board and no agreements have been reached. Rather, the line sits idle and benefitting no one. Kershaw has filed this application in an attempt to move this issue forward so that the land may be put to some use.

The Board has stated that "where no overriding public interest in continuing rail service in interstate commerce exists, we will not allow our jurisdiction to shield a railroad, or any party seeking relief before us, from the legitimate processes of state law." See Modern Handcraft, Inc.--Aban., 363 I.C.C. 969 (1981) (Modern Handcraft); Kansas City Pub. Ser. Frgt. Operation--Exempt--Aban., 7 I.C.C.2d 216, 224-226 (1990); and Chelsea Property Owners--Aban.--The Consol. R. Corp., 8 I.C.C. 773, 778 (1992), aff'd sub nom. Consolidated Rail Corp. v. ICC, 29 F.3d 706 (D.C. Cir. 1994).

The line at issue is in legal limbo. No one is responsible for it, yet no one can do anything with it. Kershaw seeks to bring the line out of purgatory and put the land to beneficial use.

2. Notice Requirements

Kershaw requests a waiver of the posting requirements of 1152.20(a)(3) and 1152.24(c). Compliance with these provision is onerous and not feasible by a third party applicant. In addition, there are no employees on the affected rail line and no known labor organizations that represent employees. 49 CFR § 1152.20(a)(2)(xiii). Kershaw

therefore requests a waiver of the requirements of 49 CFR §1152.20(a)(2)(xiii). Kershaw agrees to comply with the pre-filing notice requirements of 49 CFR 1152.20(a)(1) and (2) and 1152.20(b)(1) and to serve copies of its pre-filing notice, the waiver petition and the application on shippers, and other parties listed in 49 CFR 1152.20(a)(2). Potential parties with legitimate interests will be informed about Kershaw's proposal.

3. Environmental review

The line has not been operating for approximately seven years. An official abandonment of the line will not significantly alter the condition of the surrounding land and environment. Kershaw has completed an environmental report pursuant to 49 CFR § 1105.7.

4. Historic review.

There are no structures or properties which are 50 or more years old that would be affected by the adverse abandonment proceeding. Kershaw has completed a historic report pursuant to 49 C.F.R. § 1105.8.

5. Application information

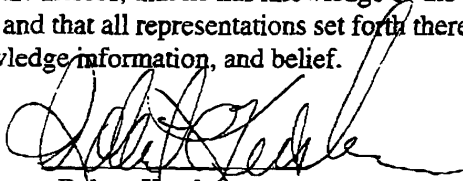
Kershaw seeks a waiver of portions of the information required for an abandonment application by 49 CFR § 1152.22. Much of this information is unavailable to Kershaw or is not relevant in a third party abandonment application. Kershaw therefore seeks a waiver of 49 C.F.R. 1152.22(a)(4) and (5), 49 C.F.R. § 1152.22(b), (c) and (d), (f) and (g).

6. Abandonment consummation

Kershaw seeks a waiver of the abandonment consummation notification requirements in 49 CFR 1152.24(f), as well as the one-year authorization limit in 1152.29(e)(2). Kershaw will not have any control over consummation once the Board's decision is issued. Kershaw will have to proceed in State court in order to obtain control of the property after the Board's decision.

State of Washington
County of Yakima

Robert Kershaw, makes oath and says that he is the President of Kershaw Sunnyside Ranches, Inc. applicant herein; that he has been authorized by the applicant to verify and file with the Surface Transportation Board the foregoing application in STB-AB 600; that he has carefully examined all the statements in the application as well as the exhibits attached thereto and made a part thereof; that he has knowledge of the facts and matter relied upon in the application and that all representations set forth therein are true and correct to the best of his knowledge, information, and belief.


Robert Kershaw

Subscribed and sworn to before me, Cindy Erwin in and for the State and County above named, this 1st date of July, 2003.



SURFACE TRANSPORTATION BOARD**Adverse Abandonment Proceeding****AB Docket No. 600****CERTIFICATION**

I am Cindy Erwin. I hereby certify under penalty of perjury of the laws of the State of Washington that the following statements are true and correct.

I am one of the employees of the attorneys for Kershaw Sunnyside Ranches in the above-entitled matter; that I am a citizen of the United States, a resident of Yakima County, Washington, over the age of twenty-one years, and not a party to said action. On the 8th day of October 2003, I caused to be deposited via UPS Next Day Air, an original and 10 copies of the Petition for Waiver of Pre-Filing Requirements for Adverse Abandonment Application to the Surface Transportation Board. Additionally, on the 8th day of October 2003, I caused to be deposited in the United States mail, via First Class Mail, postage prepaid, the following:

**Petition for Waiver of Pre-Filing Requirements for
Adverse Abandonment Application**

to the addresses attached to this Certification.

Dated at Yakima, Washington this 8th day of October 2003.


Cindy Erwin

Velikanje Moore & Shore, P.S.
attorneys at law

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FAX COVER SHEET

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