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26 December 2003

Hon. Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: Yakima Interurban Lines -- Adverse Abandonment
-- in Yakima County, WA, AB 600

Dear Mr. Williams:

1. Entry of appearance. Please enter the undersigned's appearance in the above-captioned proceeding on behalf of Yakima County (WA). Yakima County is fax filing this letter pleading directed at the sufficiency of the adverse abandonment application and aspects of the pending "petition for waiver" filed by Kershaw Sunnyside Ranches, Inc. ("Kershaw"), because this Board is evidently considering possible publication of Federal Register notice of this proceeding possibly as early as December 31, 2003.

2. Background. The line at issue in this proceeding (MP 2.97, at Fruitvale, to MP 14.26, at Naches) is located entirely within Yakima County, WA. Yakima County thus has an obvious interest in this proceeding. This abandonment proceeding was initiated adversely by Kershaw, through an application which appears as filed on the STB website on December 11, 2003.

3. Kershaw's Petition for Waiver. A "petition for waiver of pre-filing requirements" appears as filed on the STB website on December 23, 2003. In the latter petition, Kershaw primarily seeks a waiver of the fee for a waiver petition, and a return of its \$16,300 filing fee for the application. Kershaw Pet. for Waiver at 3 et seq. STB does not grant such waivers automatically except for government agencies. Private parties (and in some cases government agencies) must seek such waivers pursuant to 49 C.F.R. § 1002.2(e).

Secondarily, Kershaw seeks a waiver of certain requirements which an applicant for abandonment must otherwise meet. The waivers Kershaw seeks are as follows:

1152.20(a)(3) -- posting of notice of intent to abandon allegedly because this is "onerous";

1152.24(c) -- service of the application on the Governor and certain state agencies, and making the application available for inspection by the public at stations, allegedly because this is "onerous";

1152.20(a)(2)(xiii) -- service on rail labor, allegedly because there are no rail employees;

1152.22(a)(4) & (5) -- map of line and system diagram map inclusion, allegedly because the information is either not available to Kershaw, or irrelevant in an adverse abandonment proceeding;

1152.22(b) -- condition of line, allegedly for similar reasons;

1152.22(c) -- service provided, allegedly for similar reasons;

1152.22(d) -- revenue and cost data, allegedly for similar reasons;

1152.22(f) -- environmental information, allegedly for similar reasons;

1152.22(g) -- passenger service, allegedly for similar reasons.

4. Yakima County's Opposition to Treating the Abandonment Application as Filed. Under 49 C.F.R. § 1152.24(e)(1), this Board must promptly reject any application which does not substantially conform to the regulations contained in Subpart C of Part 1152 of this Board's regulations regarding notice, form and content. In general, the Board makes this determination within twenty days of the filing of an application, that is, prior to publication of Federal Register notice of the proceeding.

Kershaw's abandonment application does not meet the requirements of § 1152.24(e)(1) and should be rejected by this Board.

Under this Board's rules, Kershaw must serve a "notice of intent" no less than 15 days, nor more than 30 days, prior to filing an application for abandonment. 49 C.F.R. § 1152.20(b)(1). Moreover, the notice of intent must be "fully published" within the 30 day period prior to filing the application. 49 C.F.R. § 1152.20(b)(2). Furthermore, the notice must be published for three consecutive weeks during that interval. 49 C.F.R. § 1152.20(a)(4).

Kershaw has not complied with any of these requirements. To the contrary, Kershaw has certified that it served its notice of intent sometime in September, roughly 90 days prior to filing its application. Furthermore, although Kershaw appears to have published some newspaper notices in September, it published no newspaper notice at all in the 30 day period prior to filing its application on December 11. These failings directly violate the time periods specified in § 1152.20(b)(1) & (2). As a result, the public has not received an accurate and timely notice of proceeding as specified in this Board's regulations. Compounding this problem, Kershaw in its "petition

for waiver" not only fails to seek a waiver from requirements in § 1152.20(a) or (b), but actually represents (Pet. for Waiver at p.9) that it will comply with the regulations insofar as relevant here.

In addition, Kershaw, which has not sought waiver of the requirement to give Notice of Intent to file an abandonment pursuant to 49 C.F.R. § 1152.20(a) or of any portion of the form of Notice, has failed to prepare an adequate Notice of Intent. In particular, Kershaw's form of notice fails to disclose the mileposts of the one mile of line Kershaw purportedly seeks to have authorized for abandonment. Instead, Kershaw states that it seeks authorization for one mile somewhere between MP 2.97, at Fruitvale, and MP 14.26, at Naches. This gives inadequate notice of the endpoints of the proposed abandonment, and fails to disclose geographic information sufficient as a substitute for the milepost endpoints so that the public can determine what Kershaw seeks to have authorized for abandonment. The form of notice submitted to newspapers for publication by Kershaw is deficient in form for the same reasons. It should be self-evident that notice of a rail abandonment proceeding must disclose the location of track proposed for abandonment in a particular line, and not make some general reference to a mile of track located somewhere in a particular line.

Because Kershaw neither conformed to this Board's regulations governing notice and form of notice, nor sought a waiver (much less been granted one) insofar as is pertinent, the application should be rejected pursuant to 49 C.F.R. § 1152.24(e)(1).

In addition, Yakima County notes that Kershaw represents that "[p]otential parties with legitimate interests will be informed about Kershaw's proposal." Kershaw Pet. for Waiver at 9. So far as Yakima County can determine from review of the service list appended to Kershaw's Petition, Kershaw has failed to serve Yakima Interurban Lines Association (YILA), the owner of this railroad.¹ Surely YILA is a party with a legitimate interest, that should not have to rely on newspaper notices or what it may pick up on the local rumor mill. The application should be rejected for failure to serve the railroad against which it is directed.

Evidently Kershaw may intend to avoid serving certain state agencies with its application, for Kershaw seeks waiver of pertinent service requirements. But unless a waiver is granted (and as indicated below, Yakima County sees no reason why it should be in the entirety requested), Kershaw's failure to post and serve also constitutes grounds for rejection under § 1152.24(e)(1).

The application is of course also deficient in form and content because it fails to contain information required under

¹ See Yakima Interurban Lines Association -- Acquisition Exemption -- BNSF, F.D. 33719, served March 4, 1999.

§ 1152.22(b),(c) and (d), (f) and (g). Unless these requirements are waived (Kershaw seeks a waiver, which Yakima County opposes at least in part, as indicated below), the application must also be rejected.

Ordinarily, a party filing an adverse possession obtains a waiver of those portions of this Board's regulations with which the party wishes not to conform prior to filing an application. Then the application can be filed in conformity to the regulations which the Board has determined relevant. Until the Board waives a regulatory requirement, the application must meet that requirement. Since Kershaw's application obviously does not meet very important provisions (namely much of § 1152.22), it must be rejected for filing under § 1152.24(e)(1). Kershaw can file a new application, after proper notice and after obtaining such waivers as this Board determines are appropriate. Any new application should be based on notices of intent and newspaper notices which are not defective in form (i.e., which state the exact location of the portion of the Naches line which Kershaw proposes for abandonment authorization).

There is another related reason that Kershaw application is fatally defective and must be rejected: Kershaw seeks an abandonment authorization only for approximately one mile of track. As noted, Kershaw nowhere identifies where this mile is, except by a legal description referencing a right of way deed recorded in 1905, which is reproduced in Kershaw's historic report and environmental report for the line. The only thing that is clear is that the one mile in question is not at the end of the Naches line. This means that abandonment of the roughly one mile of line covered by the deed will sever much of the line (i.e., the portion ending at MP 14.26 at Naches) from the interstate rail network. If the end of the line is so severed, it is effectively abandoned as well. Yakima County believes that the end of the line is roughly four miles beyond the one mile with respect to which Kershaw claims to be seeking abandonment authorization. In short, it appears that Kershaw is seeking abandonment of much more than it is claiming. By focussing on only one mile in the central portion of the line, Kershaw either intentionally or negligently is ignoring the impact of its proposal on the community of Naches, on shippers and potential shippers at Naches, and on environmental and historic preservation issues (e.g., the old depot at Naches) which will obviously be affected by de facto abandonment of the line all the way to Naches, as effectively sought by Kershaw.²

² Thus, although Kershaw claims that "potential parties with legitimate interests will be informed of Kershaw's proposal" (Pet. for waiver at 9), it appears to the County that Kershaw's practice is to conceal the impact of its application from potential parties (including shippers, Naches, and historic preservation groups interested in the Naches depot) with legitimate interests at the Naches end of the line at issue.

This Board would not tolerate an abandonment application by any regulated carrier which attempted so cutely to avoid issues by applying only to abandon a mile somewhere in the middle of a regulated branch line, thus severing the end without notice or analysis. Such a maneuver would be rejected as a classic case of de facto (but unauthorized) abandonment of the entire end of a line, and a mis-invocation of this Board's processes. Even if the line had no shippers or potential shippers, the mis-filing by Kershaw here makes its environmental and historic reports fatally flawed, both as to notice of what is being proposed, and as to provision of information to local, state, and federal officials about environmental and historic preservation impacts of Kershaw's proposal. Indeed, the information supplied by Kershaw appears to Yakima County to be insufficient for the Board to mount its own environmental and historic preservation investigation, for the Board is not being adequately apprised by Kershaw of the actual scope of the action Kershaw proposes. In short, Kershaw's application violates 49 C.F.R. Part 1105 in analyzing environmental and historic impacts only on approximately one mile of the track when its application, if granted, will result in a de facto abandonment of all the line up to Naches. There may be other deficiencies in the Kershaw application and notice regime which would become apparent upon further analysis. Yakima County reserves the right to object as to the sufficiency of notice, form of notice, and form of the application on all grounds, whether or not stated herein, should this Board not reject the Kershaw application on the basis stated herein, and instead permit this proceeding to go forward.

5. Opposition to Petition for Waiver. Yakima County opposes various aspects of Kershaw's Petition for Waiver.

Kershaw devotes most of its petition for waiver to an elaborate argument that it should not have to pay the requisite fee for a petition for waiver or for its application for abandonment. Kershaw does not satisfy the requirements for any waiver. We will focus on the abandonment application fee as the gravamen of Kershaw's petition for waiver.

Abandonment applications are costly proceedings for this Board to administer. As Kershaw seems to admit (Pet. at 3, second paragraph, first sentence), this Board generally attempts to recoup a substantial portion of its costs for processing various proceedings, including abandonment application proceedings, filed before it. In addition, this Board follows a "general policy ... not to waive or reduce filing fees...." 49 C.F.R. § 1002.2(e).

Since Kershaw is apparently defining who may have a "legitimate" interest based on a misleading characterization of the line it seeks to abandon, no credit should be extended to Kershaw's claim that "potential parties with legitimate interests will be informed of Kershaw's proposal."

STB fee waiver requests are governed by 49 C.F.R. § 1002.2(e)(2). As applicable here, STB "will accept" requests for fee waiver only in an "extraordinary situation" and only where the applicant shows

-- "the waiver or reduction of the fee is in the best interest of the public" or

-- "payment of the fee would impose an undue hardship upon the requestor."

Kershaw's showing for a fee waiver is deficient. Kershaw nowhere explains how the instant situation is "extraordinary." Kershaw's suggestions are limited to a general claim that the waiver it seeks is in the best interests of the public in order to foster "preserving property rights." Pet. for Waiver at 4. While Yakima County can agree that STB jurisdiction should not be employed to defeat the otherwise legitimate processes of state and local law (including those pertaining to enjoyment of rights to private property), Kershaw without justification is assuming that its action preserves property rights. Kershaw implicitly admits that someone else (YILA) owns at least a railroad easement in the one mile of track that Kershaw apparently covets. Even if YILA were in financial straits as Kershaw implies, there are other entities which may wish to operate a railroad on that property and, indeed, Yakima County is informed that Washington Department of Transportation wishes to see the line restored to service. Yakima County itself wishes to foster restoration of the line at issue and continuation of rail service. In the County's view, assuming arguendo that the portion of the rail line at issue were held by YILA only in the form of a rail easement, any such rail easement has not been abandoned and there is no reason to think that it will be, wholly apart from this Board's jurisdiction. That being the case, there is no public interest in "preserving property rights" that is being served by Kershaw's petition. Kershaw's request for a waiver of the filing fee thus falls short on this ground. Indeed, to the extent that it is in the public interest to keep the line intact (as the County is prepared to show in more detail is the case if the adverse abandonment application must be litigated), then Kershaw's adverse abandonment application and fee waiver request are not serving any public interest, but instead are serving only the very parochial, commercial, and inherently private interests of Kershaw. While there is nothing wrong in the abstract with a party pursuing its private interests, the point is that pursuit of private interests does not justify a fee waiver.

The County also notes that the Kershaw claims that the acreage involved in the line insofar as relevant to Kershaw "is relatively small" and that "[r]emoval of the line would not greatly enhance the value of Kershaw's property." Pet. for Waiver at 5. But these considerations seem to constitute admissions by Kershaw that the impact of this proceeding on "preserving property rights" would be de minimis and certainly insufficient to justify a fee waiver.

Kershaw's claim to sustain undue hardship fares no better. Kershaw claims to be a small family owned fruit farm, but its characterization of itself is misleading. Its assets are not limited to the "property at issue" (which it implies is 10.81 acres). So far as we can determine, Kershaw has failed to file any kind of profit and loss statement or other financial information sufficient to show it cannot bear the cost of filing fees. Moreover, Kershaw has filed the requisite fee, evidently having liquidity and cash flow sufficient for the purpose.

Kershaw suggests (Pet. at 5) that it draws no benefit from the abandonment proceeding commensurate to a railroad's benefit in terms of avoiding taxes and liquidating assets. But Kershaw elsewhere (e.g., Pet. at 4) implies that the proceeding will serve the purpose of causing the rail line to be abandoned, and that Kershaw will then enjoy full use of its property without the burden of an alleged rail easement across it. Kershaw's interest is more than sufficient to justify the fee. This Board customarily refuses fee waiver requests by non-profit organizations serving public purposes. This position has been upheld essentially on the ground that the private non-profits must invoke the agency's processes in order to secure the benefit for the public and that this is a sufficient benefit to the non-profit to justify charging a fee. NTC v. STB, 120 F.3d 901, 906-07 (8th Cir. 1997). Certainly if a non-profit organization must pay a fee to obtain an STB order allowing it to negotiate to obtain a property interest from a railroad pursuant to 16 U.S.C. § 1247(d), an adjacent property owner may legitimately be charged a fee to obtain an STB order allowing it to pursue state law remedies to obtain a property interest (or termination of same) from the railroad.

Finally, Kershaw claims that fee application requirements are unconstitutional as applied to adjacent landowners filing adverse abandonment proceedings, on the ground that payment of a fee denies due process. STB fees are cost-based. Kershaw does not claim otherwise. STB fees are authorized by statute. See NTC v. STB, supra. Kershaw does not claim otherwise. Kershaw obviously can pay the fee; it already has. It is therefore impossible for Kershaw to claim that charging a fee in this adverse abandonment proceeding is an unconstitutional denial of due process.

As to the other waivers specifically requested by Kershaw and not already addressed, Yakima County states as follows:

Kershaw seeks a broad exemption from the requirements of § 1152.24(c) for service of the application on the Governor and identified state agencies in addition to posting the application at "stations." While waiver of the "station" requirement may make sense in an adverse abandonment proceeding, the other service requirements should be met. They are neither onerous nor infeasible.

Kershaw purports to seek an exemption from § 1152.22(f) for environmental information (Pet. at 9). Kershaw states that "much of the information" is either unavailable to Kershaw or

"irrelevant." Congress by statute and this Board by regulation has settled the relevancy question by determining environmental and historic preservation matters germane. This Board accordingly cannot grant a blanket waiver in respect to environmental and historic preservation information. Indeed, on the same page of its Petition in which Kershaw seeks a waiver, Kershaw states that it is supplying an environmental report and a historic report pursuant to 49 C.F.R. §§ 1105.7 & .8. If Kershaw believes that certain aspects of this Board's environmental and historic preservation regulations should not be required of Kershaw in Kershaw's application, Kershaw should identify those aspects with particularity and state a grounds for not supplying the information in question. In general, Kershaw's environmental and historic preservation compliance is manifestly defective in that Kershaw deals with only one mile of the line, rather than the entire line from its property to end of line in Naches which its application de facto would abandon. In all events, Kershaw does not justify the blanket waiver of environmental and historic preservation requirements that it seeks.

6. Waiver of 1152.24(f)/1152.29(e)(2). Kershaw also seeks a waiver (Pet. at 10) of the filing of a consummation notice (§ 1152.24(f)), and evidently the requirements relating to such a notice in § 1152.29(e)(2). Yakima County opposes any waivers of these requirements at this time (with the caveat that the County does not oppose extending the one year limit for abandonment consummation in § 1152.29(e)(2), if that is what Kershaw means to seek). Yakima County is concerned that if this Board waives the requirement for the filing of a consummation notice, Kershaw may take the position that the line is immediately abandoned for purposes of state law should an abandonment authorization be granted. But this Board administers many post-abandonment authorization remedies, including 49 U.S.C. § 10904 (offers of financial assistance) and 16 U.S.C. § 1247(d) (railbanking). Yakima County wishes to ensure that interested parties have an adequate and real opportunity to preserve the line for continued or future rail service, and for other public purposes, under the OFA remedy, the railbanking remedy, or other applicable remedies. If the line is acquired for current or future rail use (either under an OFA or a railbanking authorization), the issue of a consummation notice is moot.

While it may in general be necessary to do something about the consummation notice requirement in an adverse abandonment proceeding, under the circumstances here, this Board should instead focus on ensuring a delay in the effective date of any abandonment authorization sufficient for the Board can act on any OFA or railbanking request prior to the effectiveness of an abandonment authorization. The County believes that the issue of a consummation notice can better be handled in the context of proceedings on the application for abandonment and remedies

should such an application be granted, for the issue of consummation is likely to be moot. Thus, the County suggests that Kershaw's request for waiver of the consummation notice requirement be deferred until and unless an abandonment authorization be granted, and become effective. In no event should consummation be presumed any earlier than this Board's ruling on all pending remedies to keep the line intact.

7. Conclusion. For the reasons stated above, this Board should reject the Application for filing. In addition, this Board should decline to grant the Petition for Waiver as to the filing fee and as to the various notice and informational requirements stated. Yakima County and other interested parties should not be required to expend further resources on this proceeding until Kershaw obtains such waivers as are appropriate, and then files an application relating to the whole line which would be abandoned in a fashion that substantially conforms to this Board's regulations, to the extent not waived. The public interest is not served by putting the Naches line at issue in response to so manifestly a deficient application.

Respectfully submitted,


Charles H. Montange
for Yakima County (WA)

Certificate of Service

I hereby certify service of the foregoing by U.S. Mail, postage pre-paid, first class on December 26, 2003, upon the following counsel:

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