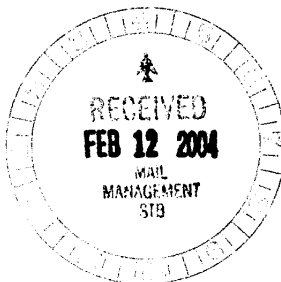


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February 12, 2004



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VIA HAND DELIVERY

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

ENTERED
Office of Proceedings

FEB 12 2004

Part of
Public Record

**Re: Lamoille Valley Railroad Company – Abandonment and
Discontinuance of Trackage Rights Exemption – In Caledonia,
Washington, Orleans, Lamoille and Franklin Counties, VT,
STB Docket No. AB-444 (Sub-No. 1X)**

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are an original and ten copies of Lamoille Valley Railroad Company's **Reply In Opposition To Timothy D. Phelps' Petition For Stay Of Abandonment Exemption.**

If you have any questions regarding this filing, please feel free to contact me.
Thank you for your assistance.

Respectfully submitted,

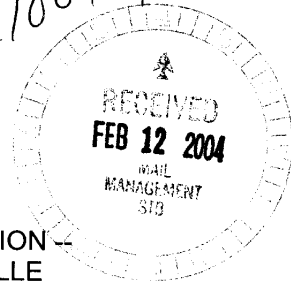
Tracie D. Spear

Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. AB-444 (SUB-NO. 1X)

LAMOILLE VALLEY RAILROAD COMPANY
-- ABANDONMENT AND DISCONTINUANCE EXEMPTION --
IN CALEDONIA, WASHINGTON, ORLEANS, LAMOILLE
AND FRANKLIN COUNTIES, VERMONT



**LAMOILLE VALLEY RAILROAD COMPANY'S REPLY IN OPPOSITION TO
TIMOTHY D. PHELPS' PETITION FOR STAY OF ABANDONMENT EXEMPTION**

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Public Record

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**ATTORNEYS FOR LAMOILLE VALLEY
RAILROAD COMPANY**

Dated: February 12, 2004

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. AB-444 (SUB-NO. 1X)

LAMOILLE VALLEY RAILROAD COMPANY
-- ABANDONMENT AND DISCONTINUANCE EXEMPTION --
IN CALEDONIA, WASHINGTON, ORLEANS, LAMOILLE
AND FRANKLIN COUNTIES, VT

**LAMOILLE VALLEY RAILROAD COMPANY'S REPLY IN OPPOSITION TO
TIMOTHY D. PHELPS' PETITION FOR STAY OF ABANDONMENT EXEMPTION**

I. INTRODUCTION

Lamoille Valley Railroad Company ("LVRC") hereby submits this Reply in Opposition to the Petition for Stay of the Abandonment Exemption filed by Timothy D. Phelps (the "Petition for Stay"). The arguments made by Mr. Phelps in the Petition for Stay are without merit and are based upon an apparent misunderstanding of the historical background of the instant abandonment and discontinuance proceeding. Moreover, Mr. Phelps' Petition for Stay was late-filed and does not satisfy the requirements for granting a stay or reopening the instant abandonment exemption. Therefore, the Petition for Stay should be denied.

II. BACKGROUND

On December 29, 2003, LVRC filed a Verified Notice of Exemption (the "LVRC Notice") pursuant to 49 CFR Part 1152, Subpart F, in connection with the abandonment of approximately 96.78 route miles of rail line in Caledonia, Washington, Orleans,

Lamoille and Franklin Counties, Vermont. The rail lines to be abandoned are: (1) a certain railroad right-of-way located between approximately milepost 0.057 (SJLC valuation station 3+00) in St. Johnsbury, Vt. and approximately milepost 95.324 (SJLC valuation station 5033+10) in Swanton, Vermont, a distance of approximately 95.26 miles; and (2) the Hardwick and Woodbury ("H&W") Connecting Track between approximately H&W valuation station 0+00 (Granite Junction) and approximately H&W valuation station 80+48 (Buffalo Road), a distance of approximately 1.52 miles, in Hardwick, Vermont (collectively, the "Subject Line"). On January 16, 2004, the Surface Transportation Board ("STB" or "Board") served and published notice that LVRC had filed the LVRC Notice in connection with the abandonment of the Subject Line (the "Board Notice"). The LVRC Notice is scheduled to become effective on February 17, 2004.

III. ARGUMENT

A. **Mr. Phelps' Petition For Stay Was Late-Filed, Does Not Satisfy The Requirements For Granting A Petition For Stay Or, In the Alternative, A Petition To Reopen, And Therefore Should Be Rejected By The Board**

The Petition for Stay was late-filed and therefore should be rejected by the Board. The Board Notice indicates that "[p]etitions to stay that do not involve environmental issues...must be filed by January 26, 2004." See Board Notice at 3-4. The Petition for Stay was filed on February 5, 2004, over a week after the January 26th deadline. Therefore, the Board should reject the Petition for Stay as late-filed.

Even if the Board accepts Mr. Phelps' filing as a Petition to Reopen, it does not meet the standard for such a filing. Pursuant to 49 C.F.R. § 1115.4, a petition to reopen or revoke must state in detail whether revocation is supported by material error, new

evidence, or substantially changed circumstances. Mr. Phelps' filing does not allege material error, new evidence or substantially changed circumstances and therefore does not satisfy the requirements for a petition to reopen.

B. Mr. Phelps Does Not Provide A Sufficient Basis For Granting the Relief He Seeks

Mr. Phelps suggests that LVRC's abandonment of the Subject Line should not qualify for exemption as an out-of-service line. Pursuant to 49 C.F.R. § 1152.50(b), a proposed abandonment or discontinuance of trackage rights is exempt from the provisions of 49 U.S.C. § 10903 if:

1. No rail traffic of any kind has moved over the line for at least two years and any overhead traffic on the line can be rerouted over other lines; and
2. No formal complaint filed by a user of rail service on the line (or a state or local governmental entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Board or any U.S. District Court or has been decided in favor of such complainant within the two-year period.

As certified in the LVRC Notice, LVRC's abandonment of the Subject Line meets the criteria in 49 C.F.R. § 1152.50(b). Mr. Phelps makes certain claims regarding the historical background of LVRC's proposed abandonment of the Subject Line, but does not assert that the exemption criteria in 49 C.F.R. § 1152.50(b) have not been met. In addition, Mr. Phelps does not allege that the LVRC Notice contains false or misleading information that should void the exemption.¹ Therefore, the arguments raised in Mr.

¹ Mr. Phelps states that portions of the trackage on the H&W Connecting Track have been removed from the right-of-way. LVRC did not indicate or suggest otherwise in its notice. A significant portion of the former H&W branch between Hardwick and Woodbury was abandoned in the 1930's. See Hardwick & Woodbury R.R. Co. – Abandonment, 202 I.C.C. 345 (1934). The H&W Connecting Track was not included in that abandonment filing, even though there has been no rail service on that line since the 1930's and presumably the track has been gone for many years.

Phelps' filing do not provide a sufficient basis for reopening the instant abandonment exemption.

1. Alleged Potential Interest In Rail Service Does Not Provide A Sufficient Basis To Reopen The Abandonment Exemption

Mr. Phelps suggests that certain documents submitted to the owner of the Subject Line, the Vermont Agency of Transportation ("VTrans"), in response to a 2001 Request for Proposals on future rail and non-rail uses of the Subject Line provide evidence of a continuing interest in rail service on the Subject Line. Mr. Phelps' filing is replete with speculative claims regarding the alleged interest in future rail service on the Subject Line.

Mr. Phelps is clearly mistaken. There has been no rail traffic on the Subject Line for more than five (5) years. Additionally, there is no evidence in the record of any formal shipper complaints regarding lack of service on the Subject Line. Mr. Phelps is not a shipper, and does not purport to represent any shipper, that is in a position to make a reasonable request for rail service on the Subject Line. Mr. Phelps' assertions about the purported interest in rail service are based solely on shipper estimates and support letters that were submitted to VTrans over two (2) years ago. These alleged expressions of interest in rail service on the Subject Line (many of which were submitted by entities that had never used rail service) are not a sufficient basis for reopening the instant abandonment exemption. See Red River Valley & Western Railroad Company – Abandonment Exemption – In Dickey County, ND and Brown County, SD, Docket No. AB-391 (Sub-No. 8X)(STB served October 5, 2001); CSX Transp., Inc. and Illinois Central Railroad Company – Abandonment Exemption –

Between Varnado Switch and Bassfield, MS, Docket No. AB-43 (Sub-No. 156X)(ICC
served Apr. 23, 1993).

2. Assertions Regarding The Absence Of An Operator With A Contractual Obligation To Provide Freight Service On The Subject Line Are Mistaken And Do Not Provide A Sufficient Basis To Reopen The Instant Abandonment Exemption

Mr. Phelps erroneously asserts that there has been no leaseholder on the Subject Line since July 1997 and that no operator has a contractual obligation to provide freight service on the Subject Line. See Petition for Stay at 1. In fact, an agreement governing LVRC's operations on the Subject Line currently remains in effect between VTrans and LVRC.

Pursuant to a Settlement Agreement between VTrans and LVRC, dated February 19, 1998 (the "Settlement Agreement"), LVRC agreed to surrender its leasehold in, among other things, the Subject Line upon receipt of the necessary Board authority. This decision was based upon a "highest and best use" study of certain leased premises, including the Subject Line, which concluded that notwithstanding the marketing and business development effort made by LVRC, freight operations on the Subject Line likely would continue to be unviable for the foreseeable future. The study also concluded that the Subject Line would be suitable for use as a recreational trail or multi-use corridor.

LVRC subsequently sought to obtain and simultaneously terminate a modified rail certificate of public convenience and necessity under 49 CFR Part 1150, Subpart C, which the Board denied. See Finance Docket No. 33709, Lamoille Valley R.R. Co. – Modified Certificate of Public Convenience and Necessity (STB served February 10, 1999 and May 17, 1999). As a result, LVRC and VTrans determined that other

procedural avenues were necessary to obtain Board approval to abandon the Subject Line (or transfer the Subject Line to another operator). VTrans and LVRC then began reviewing proposals by other parties for rail and other public uses of the Subject Line. Subsequently, pursuant to an Interim Corridor Management Agreement between VTrans and LVRC, dated January 4, 2002 (the "Interim Agreement"), the parties agreed to amend the Settlement Agreement to provide that LVRC would continue to serve as the common carrier on the Subject Line, until such time as LVRC assigned its common carrier obligation to another entity designated by VTrans, or, in the alternative, obtained the necessary Board approval to abandon or discontinue service over the Subject Line.² Since the Interim Agreement currently remains in effect, Mr. Phelps' claim that there is no operator with a contractual obligation to provide freight service on the Subject Line is mistaken and based on a clear misunderstanding of the facts.

Even assuming for the sake of argument that no contractual arrangement existed between VTrans and LVRC, LVRC, under federal law, still would have a common carrier obligation to provide freight rail service on the Subject Line upon reasonable request, which obligation could not be removed without Board approval. Thus, contrary to Mr. Phelps' assertion, the mere absence of a contractual arrangement is not an impediment to the continued availability of rail service until abandonment authority is obtained.

Mr. Phelps also suggests that VTrans and LVRC have acted in such a way as to deny any railroad service to shippers on the Subject Line from 1995 to the present. See

² VTrans and LVRC amended the Settlement Agreement to modify the language requiring LVRC to surrender its leasehold in the Subject Line to allow for the possibility of LVRC's assigning its operating rights to a successor carrier selected by VTrans.

Petition for Stay at 15. VTrans and the current owners of LVRC are not responsible for the lack of rail traffic on the Subject Line. As described in the Historic Report filed in this proceeding, Mr. Clyde S. Forbes acquired control of LVRC in the early 1990's. The erosion of LVRC's traffic base on the Subject Line began back in the early 1980's, as a result of "the closing of talc and asbestos mines located along the [Subject Line], as well as the long-term decline of agriculture in the area served by the [Subject Line]." See Historic Reports at 4. LVRC's participation in once significant overhead or "bridge" traffic moving between paper mills in the State of Maine and the Midwest ended when Guilford Transportation Industries, Inc., the new owner of the Maine Central Railroad Company ("MEC"), closed MEC's Mountain Division, which ran between Portland, Maine and St. Johnsbury, Vermont. Revenue freight service over the Subject Line effectively ended on April 21, 1989, when the prior owners of LVRC imposed a \$600 per car surcharge on originating or terminating traffic on the Subject Line. See Historic Report at 3-5.

Thus, the complete lack of rail traffic on the Subject Line was not caused by VTrans and LVRC denying service to shippers on the Subject Line over the past 8 years; the erosion of LVRC's traffic base was caused by mill closings, declines in agriculture and other changes in shipper needs for service that occurred over 15 years ago, well before the Forbes group acquired control of the Subject Line.

3. Assertions That The Removal Of Two Bridges On The Subject Line Are The Equivalent Of An Illegal Embargo Are Misguided And Do Not Provide A Sufficient Basis To Reopen The Instant Abandonment Exemption

Mr. Phelps repeatedly suggests that VTrans intentionally removed bridges to make the Subject Line impassable. Mr. Phelps claims that VTrans' removal of two

bridges from the Subject Line (Bridge No. 27A and Bridge No. 13) was the equivalent of an illegal embargo. See Petition for Stay at 17.

Mr. Phelps appears unaware of the fact that rail traffic on the Subject Line dissipated prior to the washouts in the 1990's that necessitated the removal of the bridges for safety reasons. Revenue freight service over the Subject Line effectively ended in 1989. Since that time, the Subject Line has been damaged by floods, washouts and other causes outside the control of LVRC and VTrans. Once it became clear that LVRC would be unable to develop a significant traffic base on the Subject Line (which, at nearly 100 miles in length, requires a critical mass of traffic to justify operating and maintaining), VTrans simply could not justify the use of additional tax dollars to repair the bridges on the Subject Line.

As explained in the Environmental & Historic Reports, the Subject Line suffered numerous washouts and mudslides during floods in August 1995, which halted all remaining operations between St. Johnsbury and Morrisville. In 1996, VTrans removed Bridge No. 27A after its abutments became hazardous to highway traffic. VTrans also removed Bridge No. 14 because of instability in its eastern abutment.³ Therefore, VTrans did not remove the bridges to prevent rail traffic from moving over the Subject Line. The Subject Line had been severed prior to the removal of the bridges by the floods and there was no justification for rebuilding such bridges, at significant cost, given the lack of rail traffic on the Subject Line at the time. More importantly, VTrans removed the bridges because of the hazard of the abutments and its concern for the

³ Additionally, at certain locations on the Subject Line, VTrans paved over grade crossings because the cost of maintaining, repairing and renewing such grade crossings with adequate safety measures could not be justified in light of the lack of traffic.

safety of highway traffic. Therefore, Mr. Phelps' assertion that the two bridges were intentionally removed to prevent service on the Subject Line is unfounded and does not present a sufficient basis for reopening the instant abandonment exemption.

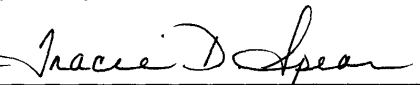
4. Assertions That The Decision To Make The Subject Line Available For Interim Trail Use Was Not Based Upon A Complete Public Process Are Unfounded And Do Not Provide A Sufficient Basis To Reopen the Instant Abandonment Exemption

Mr. Phelps takes issue with the process used by VTrans to determine the best future use of the Subject Line. As evidenced by Mr. Phelps' own extensive description of the "best-use" selection process, VTrans solicited and received significant public input regarding both rail and non-rail use of the Subject Line. Therefore, Mr. Phelps' assertions that the decision to make the Subject Line available for interim trail use was not based upon a complete public process are unfounded and do not provide a sufficient basis to reopen the instant abandonment exemption.

IV. CONCLUSION

For the foregoing reasons, the Board should deny Mr. Phelps' attempt to stay or reopen the instant abandonment exemption.

Respectfully submitted,

By: 

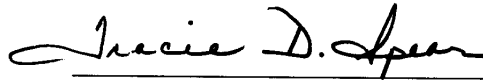
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**ATTORNEYS FOR LAMOILLE VALLEY
RAILROAD COMPANY**

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of February, 2004, a copy of this **Reply In Opposition To Timothy D. Phelps' Petition For Stay Of Abandonment Exemption** was served by first class mail, postage prepaid, on Mr. Timothy D. Phelps at the following address:

Mr. Timothy D. Phelps
P.O. Box 67
East Hardwick, Vermont 05836

A handwritten signature in black ink, reading "Tracie D. Spear". The signature is fluid and cursive, with the first name "Tracie" being more prominent. It is written above a horizontal line.

Tracie D. Spear
Attorney for Lamoille Valley Railroad
Company