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26 May 2004
by delivery service



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

21115

ENTERED
Office of Proceedings

Re: AB 290 (Sub-no. 168X)
Norfolk and Western -- Exemption -- MAY 27 2004
between Kokomo and Rochester in
Howard, et al Counties, IN

Part of
Public Record

Opposition to Request to Add Armstrong as Party
to Petition

Dear Mr. Williams:

Enclosed please find an Opposition and ten copies, tendered for filing on behalf of Indiana Trails Fund, Inc., and Nickel Plate Trail, Inc., to the "Request by Petitioners to Add Tedd G. Armstrong as a Party to Their Petition" dated May 19, 2004.

By my signature below, I certify service on ²⁶ May 2004 of the enclosed petition by First Class U.S. Mail upon Nels Ackerson, Sommer Barnard Ackerson, 1666 K Street, N.W., Suite 1010, Washington, D.C. 20006-1217; Donald J. Tribbett, Starr Austen et al, 201 South Third Street, Logansport, IN 46947; and upon James R. Paschall, Law Department, Norfolk Southern Corporation, Three Commercial Place, Norfolk, Virginia, 23510-9241.

Very truly,


Charles H. Montange
for Indiana Trails Fund, Inc.
and Nickel Plate Trail, Inc.

Encls.

cc. Counsel as indicated above (w/encl.)
Richard Vonnegut, pres. ITF (w/encl.)
Michael Kuepper, pres. Nickel Plate Trail (w/encl.)

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BEFORE THE SURFACE TRANSPORTATION BOARD

Norfolk and Western Railway Co. --)
Abandonment Exemption --) AB 290 (Sub-no. 168X)
between Kokomo and Rochester)
in Howard, et al. Counties, IN)



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Opposition
on behalf of
Indiana Trails Fund, Inc.
and Nickel Plate Trail, Inc.
to

Friend, et al. "Request ... to Add Tedd G. Armstrong as a
Party to Their Petition"

Indiana Trails Fund and Nickel Plate Trail, Inc.
(hereinafter jointly referred to as "ITF") oppose the "Request"
by petitioners Friend, et al., to add Tedd G. Armstrong as a
party to their petition.

This proceeding supposedly is a "petition for
reconsideration" filed by three petitioners (Friend, et al.)
directed at a decision and Notice of Interim Trail Use ("NITU")
served March 10, 2004. That NITU involved the so-called
"northern segment" [defined as MP 75.5 (Peru) to MP 95.6
(Rochester)] of the right of way originally encompassed by this
proceeding. The petition for reconsideration in connection with
the "northern segment" was timely in that it was filed within
the twenty day period prescribed for such petitions by this
Board's regulations at 49 C.F.R. § 1115.3(e).

In their "Request," petitioners Friend, et al., represent
(1) that they wish to add Armstrong as a party to their petition
contesting the March 10 NITU¹ and (2) that Armstrong is a

¹ Request at p. 1, introductory sentence.

property owner abutting the "southern segment" of the right of way.² But the "southern segment" is not at issue in the March 10 NITU. Mr. Armstrong thus lacks any interest (standing) in respect to the March 10 NITU.

The "southern segment" of the right of way is covered by a NITU issued on May 14, 1996. No one filed a timely petition for reconsideration of that order. It has long since been administratively final. Moreover, the May 14, 1996 was not put in issue in Friend, et al's original "petition for reconsideration."

At Friend, et al's request, this Board authorized supplemental information to be filed within 20 days of the original petition with respect to the March 10 NITU. In response, Friend, et al filed a "Supplemented Petition" on April 19, 2004. This "Supplemented Petition" for the first time purported to contest the May 14, 1996 NITU.

Insofar as the "Supplemented Petition" purports to contest the 1996 NITU, it is not a petition for reconsideration, but a petition to reopen an administratively final decision governed, inter alia, by 49 C.F.R. § 1115.4. Under that regulation, any petitioner "must state in detail" new evidence, changed circumstance or material error, request a Board determination of this, and in addition requirements of § 1115.3 for timely petitions for reconsideration.

As we have previously pointed out, Friend, et al do not

² Request, p.2, fragment sentence labelled "(1)."

have standing to contest the 1996 NITU as it was applicable to the "southern segment," which none of them appear to abut. In any event, they failed to comply with the requirements of 49 C.F.R. § 1115.4 in connection with this aspect of their "Supplemented Petition." At best, petitioners argued two grounds for reopening the 1996 NITU. First, based on speculation, they claimed that Norfolk Southern and ITF had failed to enter into a trail contract within the relevant NITU period (as extended). Norfolk Southern and ITF showed that this was false speculation by presenting a timely executed contract. Second, petitioners argued the railbanked portion of the "southern segment" was severed from connection from the interstate rail system, relying primarily on deeds. But as Norfolk Southern and ITF showed, Norfolk Southern did not abandon the connecting track in the south, but conveyed it to another railroad to serve a shipper, and, among other things, Norfolk appears to continue to own the connecting corridor at the northern end of the southern segment. Besides having no standing as to the "southern segment," petitioners simply stated no grounds for reopening the NITU for that segment.

Mr. Armstrong, who now wishes to be added as a petitioner, has no standing as to the northern segment, as he admits he is not an abutter there, and in fact makes no allegations and supplies no evidence germane to the northern segment. As to the southern segment, Armstrong's affidavit utterly fails to comply with 49 C.F.F. § 1115.4, in that it fails to adduce any

evidence, or argument, that would support reopening. The only potentially relevant assertion in Armstrong's affidavit is that track has been removed in the "southern segment," but such removal is perfectly consistent with railbanking and trail use under a NITU. Nothing in the "Request" filed by Petitioners Friend, et al. even begins to address the showings required under § 1115.4 for reopening an administratively final decision.

Since Mr. Armstrong makes no showing relevant to the March 10, 2004 NITU, and since he lacks standing as to that, his addition as a petitioner should be denied. Since Mr. Armstrong makes no showing relevant to reopening the administratively final 1996 NITU, his addition as a party to a petition to reopen the administratively final 1996 decision should be denied. Indeed, ITF reiterates that this Board should deny or ignore the "Supplemented Petition" insofar as it contests the 1996 NITU because petitioners lack standing and because they utterly fail to comply with § 1115.4 insofar as they seek to reopen that NITU.

The only other statement made in the "Request" worthy of note is the claim by petitioners that Norfolk Southern and ITF will not be prejudiced by the addition of Armstrong because the "northern segment" and "southern segment" are part of the same "legally contiguous right of way."³

Petitioners' assertion that the northern and southern segments are a "legally contiguous right of way" proves nothing

³ Request p. 2, fragment sentence "(4)."

and is not an argument for anything relevant here. It is a mere label without any legal significance in the context here. Although Norfolk Southern initiated a proceeding for a rail corridor abandonment from Kokomo to Rochester, the line in question is not a dead-end branch, but instead a line which intersects active lines at its northern and southern termini as well as in its center. With any such line, the various segments may have independent viability and utility, and as a result are handled quite differently from a regulatory and ultimate disposition perspective. Here the various segments had differing trackage rights residing in third parties (and indeed a bankruptcy court dealing with some of those rights), differing involvement in "offers of financial assistance," differing postures of shippers and potential shippers, and other factors relating to "relief" and final disposition after issuance of relevant STB orders. In such a case, a particular issue involving one segment may have (and most likely will have) nothing to do with the remainder of the line. More specifically, the fact that Norfolk Southern initiated a proceeding with respect to a rail corridor does not create an obligation on the part of parties interested in preserving a portion of it for either current rail or trail/future rail purposes to preserve the entire corridor, at least so long as they preserve some viable linkage to the interstate network by some reasonable means. As to the "southern segment" of concern to Armstrong, Norfolk Southern ended up keeping a portion of

trackage in Peru, selling a portion of the trackage in Kokomo for rail use to another railroad, and transferring the remainder to ITF for trail use and railbanking. The railbanked portion of the southern segment was and remains connected to the interstate network by reasonable means, as indicated in the ITF and Norfolk Southern Replies. There is no logical reason why a quibble over an administrative order dealing with the northern segment could or should open up an earlier order on the southern segment to further quibbling by parties without standing, much less why it could or should serve as a springboard for a non-party who claims standing to seek to evade the necessity of meeting the standards for reopening an administratively final decision set forth in § 1115.4.

Contrary to petitioners' assumptions, addition of Armstrong, who lacks standing to contest the March 10 NITU which this proceeding is supposed to be about,⁴ will be highly prejudicial if it results in an expansion of the proceeding to encompass the southern segment. As ITF indicated in its Reply (see Vonnegut Verified Statement ¶6; Kuepper Verified Statement ¶3 and exhibits), City of Peru and Nickel Plate Trail, Inc., have major grant proposals pending for development of the southern segment. They expect soon to receive a substantial grant, and to contract for trail surfacing this summer. Petitioners' half-backed and belated effort to challenge the

⁴ We also note that Armstrong makes no argument and presents no evidence bearing on the northern segment.

1996 NITU appears obviously designed to have prejudicial effect. Any time one seeks to upset administratively final orders upon which parties have been placing reliance there is a very high risk of severe prejudice, and that risk is reality here.

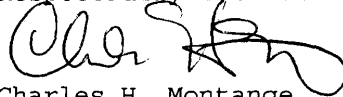
In the end, petitioners assert that Mr. Armstrong should be belatedly added to their petition so they and he can have a go at the "southern segment" as covered by the 1996 NITU.⁵ But, like kids begging for candy at a candy store, they give no reason for this boon other than they want it. Armstrong lacks standing on the original petition; the original petitioners lack standing on the 1996 NITU; and however one views the matter, purporting to add Armstrong amounts to a tardy effort to multiply zero by something, assuming arquendo that Armstrong's affidavit amounts to something, as opposed to the nothing we have shown it to be. But whether petitioners seek to multiply zero by something, or by nothing, the answer is the same: nothing. Given that petitioners' present no viable argument, their Request to add Armstrong a fortiori should be denied.

Finally, counsel for ITF would appreciate it if petitioners would serve him with copies of their pleadings. While the STB website is a useful stop-gap for obtaining pleadings not served on a party's counsel, the Board's rules are most consistent with service on representatives of parties (see 49 C.F.R. § 1104.12(a) (last sentence)), rather than on the parties themselves, because this saves a good deal of time and

⁵ Request, p. 2, fragment sentence "(5)."

confusion, and that is important given the tight deadlines applicable for replies and oppositions in STB practice. It is also polite.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'Charles H. Montange', written in a cursive style.

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for Indiana Trails Fund, Inc.
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