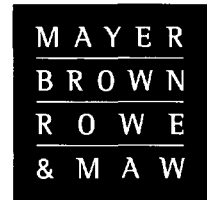


218076



November 13, 2006

**BY HAND-DELIVERY**

Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, NW  
Washington, DC 20423-0001

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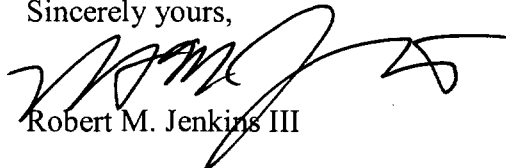
Re: Finance Docket No. 34947, Dr. Daniel R. Fiehrer, Applicant  
v. BNSF Railway, Respondent

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding is the original and ten (10) copies of BNSF Railway Company's Motion to Reject Feeder Line Application and Deny Discovery Request.

I would appreciate it if you would date-stamp the enclosed extra copy and return it to the messenger for our files. Please let me know if you have any questions. Thank you for your assistance.

Sincerely yours,



Robert M. Jenkins III

Enclosures

**ENTERED**  
**Office of Proceedings**

**NOV 13 2006**

**Part of**  
**Public Record**

cc: M.A. Fiehrer  
Dr. Daniel R. Fiehrer

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 34947

DR. DANIEL R. FIEHRER—FEEDER LINE APPLICATION—A LINE OF BNSF RAILWAY  
COMPANY BETWEEN HELENA AND GREAT FALLS, MONTANA

---

**MOTION OF BNSF RAILWAY COMPANY  
TO REJECT FEEDER LINE APPLICATION  
AND DENY DISCOVERY REQUEST**

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Attorneys for BNSF Railway Company

Dated: November 13, 2006

**ENTERED**  
**Office of Proceedings**

**NOV 13 2006**

**Part of  
Public Record**

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 34947

DR. DANIEL R. FIEHRER—FEEDER LINE APPLICATION—A LINE OF BNSF RAILWAY  
COMPANY BETWEEN HELENA AND GREAT FALLS, MONTANA

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**MOTION OF BNSF RAILWAY COMPANY  
TO REJECT FEEDER LINE APPLICATION  
AND DENY DISCOVERY REQUEST**

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**INTRODUCTION**

BNSF Railway Company (“BNSF”) respectfully requests that the Board reject the Feeder Line Application filed on October 27, 2006 (“the Application”) by Dr. Daniel R. Fiehrer (“Dr. Fiehrer”), who pursuant to 49 U.S.C. § 10907 seeks to acquire BNSF’s rail line that runs approximately 100 miles between Helena and Great Falls, Montana. Dr. Fiehrer has failed to allege facts sufficient to meet the criteria for a valid feeder line application established by the statute, by the governing regulations, and by the Board’s decisions. Most importantly, he has not met his statutory burden of demonstrating that he is a “financially responsible person” capable of purchasing and operating the rail line for three years. Nor has he made even a prima facie showing that BNSF has ever refused to provide service to shippers on the line—or has in any way inadequately served shippers—so that “the public convenience and necessity require or permit the sale.” The simple truth is that Dr. Fiehrer’s Application shows no realistic prospects of operating a rail line. Indeed, it seems that Dr. Fiehrer has been motivated to file his

Application mainly to prevent the line from being converted into a hiking trail, so that he can protect his own private property bordering the rail line's right-of-way. The Board should reject the Application as deficient on its face, and deny Dr. Fiehrer's request for discovery because the information that he seeks cannot remedy his Application's fatal flaws.

Significantly, the STB has already rejected two applications in cases with compelling parallels to this one. In one case, the Director of the Office of Proceedings rejected an application where a non-profit group with no financial backing and a "sketchy" operating plan sought to take over a line with no known shippers that had not been used for years. *Forty Plus Foundation/Manhattan Central Railway Systems, LLC—Feeder Line Acquisition—The Manhattan Highline*, STB Fin. Dkt. No. 34606, 2005 WL 156801 (January 24, 2005). In another case, the Board prohibited a group of landowners from trying to take ownership of an unused line pursuant to a related statute, where the landowners had no intention of operating a railroad but instead sought to "abuse" the Board's procedures and prevent the line from becoming a hiking trail. See, e.g., *The Burlington Northern and Santa Fe Ry. Co.—Abandonment Exemption—in King County, WA in the Matter of an Offer of Financial Assistance*, STB Dkt. No. AB-6 (Sub-No. 380X), 3 S.T.B. 634, 640 (Aug. 5, 1998) at \*5, *aff'd sub nom. Redmont-Issaquah R.R. Preservation Ass'n v. STB*, 223 F.3d 1057 (9<sup>th</sup> Cir. 2000). Just as the Board rejected the applications in those cases, it should also reject Dr. Fiehrer's Application here.

## BACKGROUND

### A. Factual Background

BNSF owns the line that runs from Helena to Great Falls, Montana. It operated the line until July 2000, when it took the line out of service due to continuing landslide movement that caused subgrade failure leaving several sections of trackage washed out along the Missouri River. In the approximately six years since suspending service on the line, BNSF is aware of no demands for service from local shippers that it has been unable to satisfy. Moreover, no formal service complaints have been filed at the STB or in any federal court in the history of BNSF's ownership of this rail line.

Dr. Fiehrer, an orthodontist, owns land next to a portion of the rail line, and he apparently hopes to prevent the line from being converted into a trail, for fear that his privacy might be compromised.<sup>1</sup> In July 2006, Dr. Fiehrer wrote to BNSF "to explore with you personally [the] acquisition of ownership" of the line. Letter from Dr. Daniel Fiehrer to Matthew K. Rose, attached to Dr. Fiehrer's Application at Appendix 5. Dr. Fiehrer's letter also stated that he was in the process of filing a feeder line application with the Board. *Id.* BNSF Chief Executive Officer Matthew K. Rose responded to Dr. Fiehrer's letter, explaining that "there has been no demand for rail service to or from stations on this line for several years and none is anticipated." Letter from Matthew K. Rose to Dr. Daniel Fiehrer, dated August 7, 2006, in Dr. Fiehrer's Application at Appendix 5. Mr. Rose continued that BNSF expects that it might need to use the line to accommodate a future increase in rail traffic. He wrote:

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<sup>1</sup> As Dr. Fiehrer wrote in a July 9, 2005 email to a BNSF representative, "Most of all we do not want this piece of RR land to become a 'Rails to Trails' acquisition. The RR cuts through some very p[r]istine habitats as well as running extremely close to private homes. We are all very concerned about the loss of our privacy and the environment we are all preserving (we have a conservation on one of the pieces of our land that the RR passes through.)" Email from Dan and Mary Anne Fiehrer to Craig Smetko, July 9, 2005 (attached as Appendix A to this motion).

[T]here is a small but realistic chance that overhead traffic between western Canada and certain western states might someday return to levels that could justify reopening the line. If so, we feel that BNSF is best positioned to operate and maintain the route in a safe, effective and efficient manner. Accordingly, we have decided to keep the line in-place but out-of-service until we have a clearer view of its role in moving traffic over the broader corridor of which it is part.

*Ibid.* Nevertheless, on October 27, 2006, Dr. Fiehrer filed the Application.

## **B. Legal Background**

Congress passed the law governing the feeder line development program in order to ensure that shippers can receive adequate rail service. The program was designed to “give shippers and communities an opportunity to insist upon adequate rail service. Where such service is not forthcoming the provision provides, through acquisition, a viable alternative to poor service or total abandonment.” *Caddo Antoine & Little Missouri R.R. v. United States*, 95 F.3d 740, 746 (8<sup>th</sup> Cir. 1996) (quoting H.Conf.Rep. No. 1430, 96<sup>th</sup> Cong., 2d Sess. 124, reprinted in 1980 U.S.C.C.A.N. 4110, at 4156-57). The law is now codified at 49 U.S.C. § 10907, and regulations interpreting it appear at 49 C.F.R. § 1151 *et seq.*

The statute requires an applicant seeking to acquire a feeder line to be a “financially responsible person.” 49 U.S.C. § 10907(a). A “financially responsible person” must in turn satisfy two criteria. First, he must be “capable of paying the constitutional minimum value of the railroad line proposed to be acquired.” 49 U.S.C. § 10907(a)(1). The statute in turn defines the term “constitutional minimum value” to mean “not less than the net liquidation value of such line or the going concern value of such line, whichever is greater.” 49 U.S.C. § 10907(b)(2). Second, a financially responsible person must be “able to assure that adequate transportation will be provided over such line for a period of not less than 3 years.” 49 U.S.C. § 10907(a)(2).

If an applicant qualifies as a financially responsible person, he can seek to acquire a rail line under two circumstances. *See* 49 C.F.R. § 1151.4(b). First, he can apply to take over a

railroad line that the operator has marked on its system diagram map as a candidate or potential candidate for abandonment (categories 1 and 2). *See* 49 U.S.C. § 10907(b)(1)(A)(2); 49 C.F.R. § 1151.4(b)(1)(ii). Second, a financially responsible person can apply for ownership of a line where “the public convenience and necessity require or permit the sale,” according to a series of factors. Those factors, discussed further below, are:

- (A) the rail carrier operating such line refuses within a reasonable time to make the necessary efforts to provide adequate service to shippers who transport traffic over such line;
- (B) the transportation over such line is inadequate for the majority of shippers who transport traffic over such line;
- (C) the sale of such line will not have a significantly adverse financial effect on the rail carrier operating such line;
- (D) the sale of such line will not have an adverse effect on the overall operational performance of the rail carrier operating such line; and
- (E) the sale of such line will be likely to result in improved railroad transportation for shippers that transport traffic over such line.

49 U.S.C. 10907(c)(1).

In his Application, Dr. Fiehrer does not claim that BNSF has marked the line between Great Falls and Helena as a candidate (or a potential candidate) for abandonment on its system diagram map, and in fact BNSF has not marked the line for abandonment (or potential abandonment) on its system map. Therefore, in order for the Board to accept the Application, Dr. Fiehrer bears the burden of demonstrating not only that he is a financially responsible person, but also that every element of the statutory public convenience and necessity test are met.<sup>2</sup>

The law specifically places the burden of making each of these showings on the applicant. *See* 49 C.F.R. § 1151.3(a)(3) (stating “[t]he initial application . . . must include the following: . . . Information sufficient to demonstrate that the applicant is a financially responsible person”); 49 U.S.C. 10907(c)(2) (stating “the burden of proving that the public

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<sup>2</sup> Dr. Fiehrer’s Application makes clear that he is relying on the “Public Convenience and Necessity” prong of the statute. Application at 26.

convenience and necessity require or permit the sale of a particular railroad line is on the person filing the application.”). As is discussed below, Dr. Fiehrer’s Application fails to meet either burden, and the Board should reject it.

The Board’s regulations provide for the Board, through the Director of the Office of Proceedings, to reject an application that does not contain substantially all of the information required by the statute and the regulations. 49 C.F.R. § 1151.2(b)(1). The Director is permitted to conditionally accept an incomplete application only if the applicant has requested discovery and the Director determines that “the discovery sought is necessary for the application and primarily or exclusively within the knowledge of the owning carrier.” 49 C.F.R. § 1151.2(d)(2). Since the required showing of the *applicant’s* financial responsibility cannot possibly turn on discovery against the owning carrier, the Director must reject any application that fails to make that showing. *See, e.g., PYCO Industries, Inc.—Feeder Line Acquisition—South Plains Switching, Ltd. Co.*, STB Fin. Dkt. No. 34844, 2006 WL 1516604 (June 2, 2006) (*PYCO I*) at \*5 (stating that deficiencies in the application, including deficiencies regarding whether the applicant was a financially responsible person, “would not be cured by obtaining discovery of information in [the owner’s] possession. Therefore the application cannot be conditionally accepted but *must instead be rejected.*”) (emphasis added).

Furthermore, the Director will not permit the Board’s processes to be abused by an applicant engaged in a discovery fishing expedition, ostensibly regarding public convenience and necessity factors, where the applicant has not made even a prima facie showing that there are local shippers that have a serious or even a passing interest in using the line and that the owning carrier has refused to provide adequate service. *See, e.g., Forty Plus* at \*2 (rejecting application where applicant “has named no shippers that want to move any traffic”); *PYCO I* at \*3 (rejecting

application where “evidence is lacking to show that the majority of shippers on the line experienced inadequate service . . . or that a majority of the shippers asked [the rail’s owner] to improve its service to them.”). *See also King County, WA*, 3 S.T.B. at 641 (rejecting application under 49 U.S.C. 10905’s offer of financial assistance program where applicant “provide[s] no basis for us to conclude that future traffic on the line is other than highly speculative”). The Board is also appropriately skeptical of efforts by landowners to abuse its processes to ward off the possibility of trail use, as opposed to maintaining rail service on a line. *King County, WA*, 3 S.T.B. at 641.

In this case, as we discuss below, Dr. Fiehrer has failed in his Application to demonstrate either that he has the requisite financial responsibility to purchase and operate the Helena-Great Falls line, or that he has any realistic possibility of meeting the public convenience and necessity requirements of the statute and the Board’s implementing regulations. His Application, accordingly, should be rejected, along with his costly and time-consuming discovery requests.

## ARGUMENT

### **A. Dr. Fiehrer’s Application Fails To Demonstrate That He Is A “Financially Responsible Person” Within The Terms Of 49 U.S.C. § 10907**

Dr. Fiehrer’s Application does not present sufficient evidence to satisfy either of the two statutory tests required to show that he is a financially responsible person. He has not shown either that he “(1) is capable of paying the constitutional minimum value of the railroad line proposed to be acquired” or “(2) is able to assure that adequate transportation will be provided over such line for a period of not less than 3 years.” 49 U.S.C. § 10907(a), (b). These failures alone give the Board sufficient grounds to reject his Application. *See Forty Plus* at \*2 & n. 10 (rejecting feeder line application based on this prong alone, without proceeding to consider other potential flaws in the application).

**1. The Application's Claim That The Constitutional Minimum Value Of The Rail Is Zero Lacks Any Support**

Dr. Fiehrer claims that each of the two methods of valuing the Helena-Great Falls line leads to an astonishing conclusion that this 100 miles of rail line is worth nothing. He states that the rail line has no going concern value because no trains have operated on it for six years. And he claims that the rail line would cost so much to salvage, and would leave so many environmental liabilities behind, that the net liquidation value of the line might also be zero (or could even have a negative value). He further asserts (contrary to the fact that much of the property on which the line is located is owned by BNSF in fee, as recorded in county deed records) that the property the rail line sits on would "probably" revert to abutting property owners. *See* Application at 34, 36-41. The Application contains a chart that purports to calculate the "Estimated Scrap Value" of the line. It does not include any property values, and Dr. Fiehrer apparently put it together himself. Application at 41.

Dr. Fiehrer's valuation is inadequate, ad hoc, and speculative. As a result, he does not come close to meeting his evidentiary burden as established by the governing regulations and by the Board's decisions. According to 49 C.F.R. § 1151.3(a)(4), "The initial application . . . must include the following information in the form of verified statements: . . . An estimate of the NLV and the GCV of the line *and evidence in support of these estimates.*" (Emphasis added).

Regarding the going concern value, Dr. Fiehrer has not put forward any of the required evidence to back up his claim that the line has no value. BNSF fully acknowledges that the line has not run trains for several years, but the going concern value in this case must take into account the *future* value of the line's usefulness in providing potential future capacity for

BNSF's network to meet the needs of its customers.<sup>3</sup> As the August 7, 2006 letter from BNSF CEO Matthew Rose explained to Dr. Fiehrer, there is a "realistic chance that overhead traffic between western Canada and certain western states might someday return to levels that could justify reopening the line." Given the existence of that possibility in the future, BNSF receives value *today* from maintaining possession of the line as a factor in its future capacity planning to meet volume growth needs in the region. Dr. Fiehrer has not even acknowledged this real present-day value of the line in his going concern value; he surely does not attempt to quantify it with calculations or evidence. That failure by itself is reason enough for the Board to reject the Application.

In any event, the Application's claim that the net liquidation value is zero (or negative) is entirely speculative. It hinges on Dr. Fiehrer's bare assertion that salvage and cleanup costs could outweigh scrap costs. Application at 36; *see also* Application at 34, 37, 38, 41. Nowhere, though, does Dr. Fiehrer establish that such costs would in fact be necessary. An applicant cannot merely assert that clean up costs will occur, but must quantify them. Dr. Fiehrer has not. Further, Dr. Fiehrer ignores land value all together. He simply asserts with hopeful optimism benefiting of an adjacent landowner that "[t]he right-of-way itself would *probably* revert to

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<sup>3</sup> Similarly, BNSF retained a portion of its Stampede Pass line, a major through route in the State of Washington, in out-of-service status not listed on BNSF's System Diagram Map for many years, on the chance that traffic levels might demand reinstatement for through route operations. The line has been reinstated in recent years (*see Burlington Northern Santa Fe Corporation, et al.—Control—Washington Central Railroad Company*, 1 S.T.B. 792 (1996)) in order to accommodate an increase in demand for rail capacity, and today no one can deny that the Stampede Pass line has a substantial going concern value. Similar to the Stampede Pass line, BNSF's Great Falls-Helena line, as a through corridor, has a potentially substantial going concern value, and its strategic retention for the future cannot be ignored. If BNSF were divested of the corridor and needed to build a corridor to accommodate a substantial upswing in demand for rail capacity, such a new rail line would be estimated to cost no less than \$2 million per mile for 100 miles of track and years of regulatory delay to satisfy the review processes envisioned by the National Environmental Policy Act.

adjacent land parcels of present day owners from which it was originally taken to build the railroad.” Application at 39 (emphasis added). His Application is woefully shy of the detail required for acceptance by the Board. Taken together, it is apparent that Dr. Fiehrer’s evidence on valuation is really nothing but hopeful speculation. This is simply not enough to meet the standard for establishing the constitutional minimum value of the line, laid out in the statute and in 49 C.F.R. § 1151.3(a)(4).

**2. Nothing In The Application Gives Sufficient Assurance That Dr. Fiehrer Will Be Able To Operate The Line For Three Years Or More**

The second requirement that the statute sets for an applicant to demonstrate that he is a “financially responsible person” is to show that he is capable of operating rail service on the line and covering the costs associated with that service for at least three years. Dr. Fiehrer attempts to satisfy this requirement by pointing both to his own personal wealth and also to the operating plan that he has created for the line. Neither basis is sufficient.

**a. The Board Requires More Concrete Financial Backing Than Dr. Fiehrer Has Established**

As part of his attempt to show that he is a financially responsible person within the terms of the statute, Dr. Fiehrer points to his personal net worth to demonstrate that the railroad will have financial backing. The Application states that Dr. Fiehrer will provide details of his finances under seal. Application at 42. And an appendix to his Application includes a report from his accountant stating that he is worth approximately \$4.85 million and the accountant’s opinion that “thus [I] declare him to be a financially responsible person.” Application at Appendix 24. He also writes that one of his “goals” is to “obtain [a] revolving line of credit for working capital needed by June 1, 2007.” Application at 57 (internal punctuation omitted). He

also suggests without any basis whatsoever that BNSF might be willing to accept a promissory note for some or all of the acquisition costs. Application at 34, 52.

This is not adequate for a feeder line application. First, Dr. Fiehrer includes *no* information at all about the financial condition of the non-profit corporation that Dr. Fiehrer says will own and run the railroad. With regard to his own net worth, he does not guarantee that he will personally underwrite the railroad's operations for any amount of time; he certainly does not specify that he will do so for three years. And he includes no evidence that a bank or other supporter has agreed to provide lines of credit or loans—rather, he identifies only a “goal” of finding financing.

Yet, the Board's precedents make clear that an application needs to provide precisely the indicia of financial responsibility that his Application lacks. In *PYCO*, the STB rejected an application that did not specifically show that it could operate for three years, and only accepted that the applicant was a financially responsible person when a new application contained a letter from the applicant's CEO, an annual financial statement, and a promised loan from a bank. Compare *PYCO I* at \*3 with *PYCO Industries, Inc.—Feeder Line Acquisition—South Plains Switching, Ltd.*, STB Fin. Dkt. Nos. 34844, 34890, 2006 WL 1807378 (July 3, 2006) (*PYCO II*) at \*3 n.6. In the *Forty Plus* decision, referenced above, the STB held that the applicant was not a financially responsible person, where it had neither loan commitments nor its own adequate resources. *Forty Plus* at \*2-\*3. And in *Glenwood and Southern Railroad Co.—Feeder Line Acquisition—Arkansas and Midland Railroad Company Line Between Gurdon and Birds Mill, AR*, ICC Fin. Dkt. No. 32613, 1994 WL 659336 (Nov. 23, 1994) at \*2, *aff'd* by ICC, 1995 WL 97025 (March 9, 1995), the ICC refused to accept as financially responsible an applicant who did not include a firm financial commitment from an outside source of revenue. Given these

precedents, Dr. Fiehrer simply cannot make a credible case that his Application demonstrates that he has enough financial backing to run a railroad for three years or more.

**b. The Operating Plan That Dr. Fiehrer Proposes Cannot Support Rail Transportation On The Line For Three Years Or More**

Dr. Fiehrer also claims that his plan for operating the rail line will generate enough revenue to support it. Even a generalized review of Dr. Fiehrer's plan reveals an unsustainable business model.

The plan projects beginning operations with "on demand" service, with a goal of eventually running one train, round trip, each day between Helena and Great Falls. Application at 49. He proposes running a "mixed" train of freight and passenger cars, for a total of 3,000 cars per year; two locomotives would pull the train. Application at 32, 49-50. He says that he would lease or buy the cars and locomotives, and that a contractor would provide fueling services. Application at 33, 50, 57. He anticipates identifying shippers along the line and offering his services to them. Application at 42, 52-53, 57-59. He expects to generate business by using the rail line as a "bridge" for traffic running between Western Canada and Mexico. Application at 9-10, 33, 40, 46, 53, 55, 57-58, & Appendix 19. The railroad would employ five people, Application at 50, 63, and would be owned by the non-profit corporation that he has established. Dr. Fiehrer and his wife seem to be the two officers for the nonprofit. Application at 55, and Appendices 3, 25. In order to begin operations, the railroad would need to repair the damaged section of the line, which Dr. Fiehrer claims would cost only a few thousand dollars. Application at 22, 30. He includes a pro-forma income statement that estimates after-tax income of about \$154,380 per year based on annual expenses of \$942,700. Application at 63.

This plan is at best wildly hopeful, and at worst is completely unworkable. Though Dr. Fiehrer claims that the line's operations would provide enough revenue to fund it, he provides

nothing more than speculation that the railroad—which will no doubt cost hundreds of thousands of dollars per year to run—will be successful enough to be self-sustaining. He *admits* that he has no commitments from any shippers to use the rail line if he restarts service, Appendix at 49; he provides no evidence that there will be interest by Canadian or Mexican shippers in using the rail line as a bridge; he offers no surveys or other evidence of consumer interest to support his asserted interest in passenger service; and he has no support for his claim that the rail line could actually generate revenue rail movements of 3,000 cars per year.

The only market Dr. Fiehrer could count on would be serving customers directly on the Helena-Great Falls line, and his Application does not identify one freight customer on the line willing to use his rail service if provided. To be part of the through routings he contemplates, his railroad would have to become part of interline service routings which would have to be cost and service competitive with other existing and potential service offerings in the corridors he identifies to participate in any “overhead” (handling of rail traffic neither originating or terminating on his Helena-Great Falls railroad) traffic and generate revenues from such movements. Such interline, inter-regional and international flows are moving over all the rail carriers named in his Application via long-established and cost/service competitive lanes currently. Believing that injecting a 90-mile shortline into the middle of a new multicarrier routing will generate significant revenues for the shortline just because it exists is counter to current successful rail operation, which depends on heavy-density scheduled services over fewer high capacity corridors to drive service improvement, shipment velocity and consistency, and favorable costs to support infrastructure investment and expansions.

Other aspects of the plan also do not make sense on their face. For instance, if the daily trains he runs have mixed passenger and freight cars, will passengers be willing to detour to a

freight area where the cars will be added and removed? Further, he admits that the rail line cannot support stacked intermodal container cars and can only “probably” accommodate unstacked cars, Application at 24—but he provides no support that these deficiencies could be overcome to accommodate the sort of trans-continental rail “bridge” that he seeks to establish and rely on. And it seems implausible for a staff of only five people to run the complex operation that he lays out. Also, his Application is ambiguous about whether he will directly employ the labor for the rail operations, or whether the new railroad will contract with an established rail operator.<sup>4</sup> Dr. Fiehrer’s estimate of the cost to repair the tracks is far too low. Rather than costing several thousand dollars, the work to restore the line to service and maintain it in a northern climate for safe operations year-round (which will be needed to ensure that HAZMAT, passenger and other traffic can safely be carried on the line) will likely cost many, many multiples of that. BNSF estimates the repairs to fix (versus “patch”) the areas where the line has washed out to cost several million dollars alone. Finally, the rail service as a whole would almost certainly cost hundreds of thousands more each year than the Application claims.<sup>5</sup>

The Board’s precedents will not permit such an ill-conceived plan to support a finding of financial responsibility. For example, in *Glenwood and Southern Railroad Co.* at \*3, the Director of the Office of Proceedings refused to accept an application as financially responsible, partially because the operating plan called for over 4,600 cars per year, but there was no

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<sup>4</sup> Compare Application at 50, 63 (indicating that Dr. Fiehrer or his company will employ workers directly) with Application at 50, 47, 48 (indicating that he or his company will contract with an operating company and a fueling company). Significantly, Dr. Fiehrer’s proposed budget does not include any mention of contracting with an operating company. Application at 63.

<sup>5</sup> As further evidence that Dr. Fiehrer’s plan is nothing more than rank speculation, note that he lists as one of his goals the ability to “Generate a return-on-invested-capital of 20%.” Application at 57. By contrast, the S&P 500 Index is up about 10 percent so far this year.

evidence that the four shippers on the line could support so much traffic. Of course, that is four more shippers than Dr. Fiehrer can identify.

Of particular interest is the STB's *Forty Plus* decision, a case that has many close parallels to the Application here, where the Board concluded that the operating plan was not nearly sufficient to show that the applicant was a financially responsible person. *Forty Plus* at \*2-\*3. There, the rail line had not been operated for twenty years, and the applicant had not signed up any shippers to use the new line. *Ibid.* As is the case here, the applicant was a non-profit company with no railroad experience. *Id.* at \*1 n. 1. In addition, as is also the case here, the applicant stated that it would rely on operating revenues and an unidentified growing network of supporters. *Id.* at \*2-\*3. The applicant there, according to the Board, "fail[ed] to identify any specific traffic it plans to move or any shippers that want to move any traffic," a failing that Dr. Fiehrer's Application shares. *Id.* at \*2. The Board continued that the applicant "has not submitted any contracts, affidavits, or other verification to support its contention that there are shippers along the [line] that currently desire service;" *Id.* at \*3. Neither has Dr. Fiehrer. The Board summed up the situation there by stating that the "operating plan is sketchy at best" and that the applicant's "assumptions about operating revenues and the interest of shippers are pure speculation." *Ibid.* So are Dr. Fiehrer's.<sup>6</sup>

Finally, it is significant that Dr. Fiehrer seems to have a personal motivation for acquiring the track that further diminishes the possibility that he can or will provide rail transportation for three years. The July 9, 2005 email that he sent to BNSF (included in Appendix A to this motion) states that he is concerned that a rails-to-trails conversion of the line would open up his

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<sup>6</sup> It is also worth noting that 49 C.F.R. § 1151.3 specifies that, in order to show financial responsibility, the applicant must identify the proposed operator and include a description of its liability insurance; neither are included in Dr. Fiehrer's Application. Rather, he states only that he has the "goals" of finding an operator and an insurance policy. Application at 57.

adjoining property to trespassers, thus disturbing his privacy. Dr. Fiehrer's Application makes the same point, without admitting that he actually owns some of the land next to the rail line. He wrote: "Many adjacent landowners and ranchers are opposed to the abandoned railway becoming a hiking or biking trail because of potential trespass, vandalism, fires, camping, animal, weed control and refuse." Application at 39. Therefore, it seems that Dr. Fiehrer may be motivated to buy the line not because he wants to provide rail service, but rather because he wants to keep hikers off of his land adjacent to the line's right-of-way. If this is so, Dr. Fiehrer will have little incentive to keep the rail line functioning; he could prevent trespassing just as well by keeping the line empty as by running trains on it. Indeed, given that Dr. Fiehrer writes in his Application that he will initially provide rail service only when there is demand for it, there is a real possibility that Dr. Fiehrer will never run a train on the tracks, particularly if he has little or no interest in growing the rail business.

In a related statutory context, the Board considered precisely this situation in the *King County, WA* decision. Though that case involved § 10905 and an offer for financial assistance (OFA), the goal of the two statutes is the same—to maintain rail service for shippers not being adequately served. There, a group of land owners filed their OFA application in order to prevent the rail line from being converted into a trail. 3 S.T.B. at 641. Indeed, even the name of the applicant there—the "Redmond-Issaquah Railroad Preservation Association"—is parallel to the name of the nonprofit company that Dr. Fiehrer has formed here, the "Transportation Preservation Society of Montana." Compare *King County, WA*, 3 S.T.B. at 634 with Application at Appendix 3. Despite his corporation's name, it seems quite possible that Dr. Fiehrer has no intent to "preserve" rail transportation on the line, but rather seeks to thwart it. In *King County, WA*, the Board specifically noted that the applicant "is not an entrepreneur with a track record of

running short lines and a sound business plan to attract new shippers.” 3 S.T.B. at 644 at \*7.

The same is true with regard to Dr. Fiehrer. Just as the Board rejected the sham offer in *King County, WA*, it should not allow Dr. Fiehrer’s similarly questionable and unworkable application to proceed here.

**B. Dr. Fiehrer’s Application Fails To Establish Any “Public Convenience And Necessity” That Would Require BNSF To Sell The Line To Him**

Even if Dr. Fiehrer could demonstrate that he is a financially responsible person within the terms of the statute—and for the reasons discussed above he cannot—his Application would still be deficient, because he does not make out even a prima facie case that “the public convenience and necessity require or permit the sale,” as Section 10907 requires. The statute lists five separate criteria which Dr. Fiehrer had the burden of meeting, and his Application does not satisfy any of them. Perhaps most important, as is discussed below, Dr. Fiehrer never demonstrates that any local shippers who want rail service are going without service due to BNSF not operating over the line. Given that the entire point of the statute is to provide rail service where it is needed, Dr. Fiehrer’s complete inability to demonstrate any unmet need is fatal to his Application.

**1. There Is No Evidence That BNSF Has Ever Refused Rail Service to Any Shipper On The Line Who Requested It**

Section 10907(c)(1)(A) calls for the applicant to establish that the operating rail carrier “refuses . . . to make the necessary efforts to provide adequate rail service to shippers who transport traffic over such line.” This is in large part the crux of the entire statute—where shippers are satisfied, there is no need to require the sale of a line.

Dr. Fiehrer argues that, because BNSF has not provided rail service over the line for six years, it is not adequately serving shippers on the line. Application at 6, 27, 40, 46, 60. He more

generally argues that BNSF has a “dominant chokehold” on the rail market in Montana.

Application at 9.

But Dr. Fiehrer’s argument is wholly inadequate. The question is not whether a rail carrier is running trains or not, but whether a rail carrier has *refused* to provide adequate service to shippers who have requested it. And Dr. Fiehrer has failed to provide any support or evidence that any shippers have ever asked BNSF to provide service to, from, or via the line that it has refused.

The Board’s precedent illustrates the importance of this point. In the *Forty Plus* case, the Board denied an application, in part, because the applicant had failed to identify “any shippers that want to move any traffic.” *Forty Plus* at \*3. That is precisely the same situation here.<sup>7</sup> Dr. Fiehrer cannot point to any evidence that BNSF has failed to meet its common carrier obligations.

**2. Dr. Fiehrer Cannot Establish That a “Majority” Of Shippers Receive Inadequate Service, Where He Cannot Point To A Single Shipper Who Wants Service**

Subsection (B) contains a related requirement, also closely linked to the core purpose of the statute. It calls for the applicant to establish that “the transportation over such line is inadequate for the majority of shippers” on the line.

Dr. Fiehrer does not even attempt to satisfy this requirement, given that there is no indication in his Application that even a single shipper is receiving “inadequate” rail service. It follows, by necessity, that Dr. Fiehrer has no support to claim that a *majority* of shippers are

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<sup>7</sup> See also *New York & Greenwood Lake Railway—Feeder Line Acquisition—A Line of Norfolk Southern Railway Company*, STB Fin. Dkt. No. 34649, 2005 WL 1767440 (July 27, 2005) at \*2, where the Board noted that the applicant conceded that it would not meet the public convenience and necessity criteria where there had been no service on the subject line and no complaints about failure to serve for the previous two years.

suffering inadequate service. Demonstrating dissatisfaction is the key burden that Dr. Fiehrer must meet under this statute, and he has not. As the Director of the Office of Proceedings wrote in *PYCO I*, the application there was deficient where the applicant “has not provided information regarding the number of shippers on the line, which clearly is needed to determine whether a majority of the shippers . . . have received inadequate service.” *PYCO I* at \*3.

Instead, Dr. Fiehrer attempts to avoid the requirement by requesting discovery from BNSF for a list of the shippers who used the line before it closed six years ago. Application at 10, 12, 65. And he hedges even there, asserting that he expects that after he identifies those shippers they will be reluctant to speak out against BNSF for fear of retribution. Application at 65. The Board has already rejected exactly this ploy, when another applicant tried to use it earlier this year. As the STB wrote in *PYCO II*, “There is a fundamental problem with [the applicant’s] argument that silence of a majority of the shippers should be excused because shippers may be reluctant to speak out for fear of retribution by [the incumbent provider].” *PYCO II* at \*2. That same “fundamental problem” exists here.

### **3. Selling the Line Would “Significantly” Harm BNSF’s Finances**

Additionally, the statute calls for the applicant to carry his burden to show that requiring the sale “will not have a significantly adverse financial effect on the rail carrier operating such line.” 49 U.S.C. § 10907(c)(1)(C).

Dr. Fiehrer argues that BNSF has an extremely strong bottom-line, and that losing the rail would not materially affect the company. Application at 43-45, 47. He also argues that BNSF would be in a stronger financial situation if it sells the line, given that he claims his rail line would offer a mix of cash, securities, promissory notes, and tax credits.

Dr. Fiehrer again fails to satisfy his burden—in this case, he does not even discuss the importance or value of the rail to BNSF’s financial health. Application at 46-48.<sup>8</sup> As is discussed above, BNSF has already informed Dr. Fiehrer that it may need to use the line in the future to accommodate overflow traffic, but he has declined to accept the importance of this claim. The fact is that the demand for rail lines is increasing every year, and that BNSF would likely need to pay a significant amount of money if it needs to buy back the rail line or build a new one. Given the high expense of such a transaction, and given the distinct possibility that BNSF will need to run trains on this rail in the future, a forced sale of the line could potentially have a very real and significant financial effect on BNSF. Additionally, the specific compensation that Dr. Fiehrer says BNSF would receive—the combination of cash, securities, promissory notes, and tax credits—is completely speculative.

**4. Selling the Line Would Also Have An “Adverse Effect” on BNSF’s “Operational Performance”**

Subsection (D) establishes a related requirement that the applicant must show that “the sale of such line will not have an adverse effect on the overall operational performance of the rail carrier operating such line.” Dr. Fiehrer argues that BNSF is not using the rail now, and so would not suffer from a transfer of ownership. Application at 47. He also asserts that BNSF’s connected lines would gain traffic if the new line is successful. Application at 27. Again, BNSF has already informed Dr. Fiehrer of how the line fits into its operational plans. As is discussed above, Dr. Fiehrer has failed to show that BNSF will not need this line to accommodate overflow traffic in the future. Dr. Fiehrer does not address the increasing pressure on rail lines or other aspects of how BNSF operates and how the loss of this line might affect BNSF’s ability to

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<sup>8</sup> Dr. Fiehrer gives BNSF’s position of the possible future importance of the line only the briefest of mentions. Application at 8. Nowhere does the Application consider how BNSF’s position affects the “public convenience and necessity” analysis that the statute demands.

handle traffic in the future. Moreover, given that Dr. Fiehrer's own operational plan is speculative, for the reasons described above, there is no real chance that BNSF would stand to gain any traffic from Dr. Fiehrer's hypothetical rail service.

**5. Dr. Fiehrer Has Not Demonstrated That His Proposed Line Will Improve Rail Transportation**

The final statutory criteria that an applicant must satisfy, but Dr. Fiehrer does not, is that "the sale of such line will be likely to result in improved railroad transportation for shippers that transport traffic over such line." 49 U.S.C. § 10907 (c)(1)(E). Dr. Fiehrer states that he will provide not only better service to shippers on the line, but that he will also be able to create a modern "bridge" or "silk road" to link Canada to Mexico. *See, e.g.*, Application at 40. As is discussed above, Dr. Fiehrer has not demonstrated there is a need to improve rail service, has not shown that any shippers have complained about inadequate service, and has not shown that BNSF has refused to accommodate any reasonable requests from shippers. Additionally, Dr. Fiehrer has not shown that his own rail service would actually improve anything, given that he has put together a plan that will not work.

**C. The Board Should Deny Dr. Fiehrer's Request For Discovery, Because He Cannot Cure The Flaws In His Application**

Dr. Fiehrer has requested a range of discovery, including a list of shippers who previously used the line. Application at 10, 11-12. The regulations do allow an applicant to receive discovery necessary for an application from an owner of a line "to obtain required information that is primarily or exclusively within the personal knowledge of the owning carrier." 49 C.F.R. § 1151.2(d)(1). However, Dr. Fiehrer is not entitled to receive discovery here. As the Director of the Office of Proceeding's opinion in *PYCO I* states of the flawed application submitted there, "These deficiencies would not be cured by obtaining discovery of

information in [the incumbent rail's] possession." *PYCO I* at \*5. The same applies to Dr. Fiehrer, especially with regard to his fundamentally flawed showing on financial responsibility. That is, given the problems with the parts of his Application that he does have control over, allowing discovery would be pointless, given that the STB would still need to reject Dr. Fiehrer's Application. Additionally, Dr. Fiehrer could probably gather the information on the shippers himself. As the Director's decision states in *PYCO I*, "it would not be difficult [for the applicant] to determine all of the shippers who recently used or could use" the line.<sup>9</sup> *PYCO I* at \*3 n.9.

### CONCLUSION

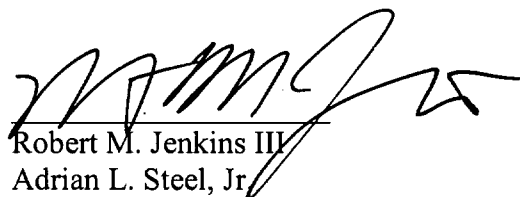
Dr. Fiehrer is proposing a remedy for a problem that does not exist in order to further his personal agenda of thwarting any prospects for a future trail. This brinksmanship should not be

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<sup>9</sup> In addition, a review of Dr. Fiehrer's discovery requests, Application at 11-12, reflects that many, if not most, of the requests seek information and data not related in any way to the various statutory criteria which Dr. Fiehrer must meet. For instance, Dr. Fiehrer seeks the names and ages of BNSF employees who operated the line prior to July 2000. He also seeks track profiles, maps, time tables, maintenance costs, information on rates, on property taxes and a variety of other financial and commercial information. Moreover, even assuming that somehow this information is needed by Dr. Fiehrer to prepare his application (and is not available to him otherwise), the requests are unduly burdensome, vague and irrelevant.

lightly dismissed, particularly when 100 miles of a potentially strategic rail line are at issue. No shippers have complained of lack of local rail service on this line, and no local shippers have even come forward to suggest that they would commit to use the line if it were reinstated at this time. For these reasons, as well as the other reasons stated above, BNSF respectfully requests that the Board reject Dr. Fiehrer's Feeder Line Application, and that it also deny his request for discovery.

Respectfully submitted,



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Evan P. Schultz

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1909 K Street, NW  
Washington, D.C. 20006  
202-263-3000

Attorneys for BNSF Railway Company

November 13, 2006

## APPENDIX A

**Battle, Richard A**

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**From:** Mary Ann Fiehrer [mafiehrer@yahoo.com]  
**Sent:** Saturday, July 09, 2005 9:46 PM  
**To:** Smetko, Craig N  
**Subject:** Helena to Great Falls BNSF RR

Dear Mr. Smetko,

As the BNSF Board liason, I was wondering if you could provide some help to us concerning the possible abandonment of the BNSF RR line from Great Falls to Helena?

We own two pieces of property along the Missouri River that the RR passes through (one stretch of 1/2 to 3/4 mile and the other 1 to 1 and 1/2 miles). We are very interested in purchasing these pieces of property when abandonment is announced. Other property owners along this RR route are also very interested in purchasing the RR land that passes through their property.

Most of all we do not want this piece of RR land to become a "Rails to Trails" acquisition. The RR cuts through some very pristine habitat as well as running extremely close to private homes. We are all very concerned about the loss of our privacy and the environment we are all preserving (we have a conservation on one of the pieces of our land that the RR passes through).

I would appreciate any assistance that you might be able to give to us.

Thank you.

Sincerely Dan and Mary Ann Fiehrer  
POBox 11  
Helena, MT 59624

406-442-3720

mafiehrer@yahoo.com

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Yahoo! Mail

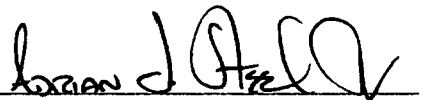
Stay connected, organized, and protected. Take the tour:  
<http://tour.mail.yahoo.com/mailtour.html>

CERTIFICATE OF SERVICE

I certify that I have on this 13<sup>th</sup> day of November, 2006, served copies the foregoing "Motion Of BNSF Railway Company To Reject Feeder Line Application And Deny Discovery Request" by First Class U.S. Mail upon:

Dr. Daniel R. Fiehrer  
P.O. Box 1004  
Helena, MT 59624

M.A. Fiehrer  
Authorized Representative  
P.O. Box 811  
Helena, MT 59624-0811

  
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