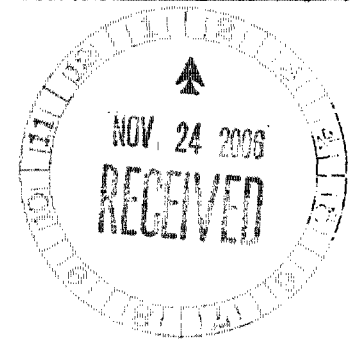


218145

DR. DANIEL R. FIEHRER
P.O. Box 1004 . HELENA, MONTANA 59624-1004

November 20, 2006

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



**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 10 copies of my response to BNSF Railway's November 13, 2006 Motion to Reject Feeder Line Application and Deny Discovery request.

Please date stamp the enclosed copy and return it to me.

I would hope my response would cause the Board to accept my Preliminary Application and allow Discovery.

Sincerely,

Daniel R. Fiehrer
Dr. Daniel R. Fiehrer

ENTERED
Office of Proceedings

NOV 24 2006

Part of
Public Record

Enclosures

CC: Joe Dettmar, Director of Proceeding
Charles Nottingham, Chairman

**BEFORE THE
SURFACE TRANSPORTATION BOARD
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 to Reject
Feeder Line Application and Deny Discovery**

INTRODUCTION

I, Daniel R. Fiehrer, Applicant in above action respectfully request the Board accept the Feeder Line Preliminary Application filed on October 27, 2006 pursuant to 49 USC 10907 to acquire BNSF's rail line that runs approximately 100 miles between Helena and Great Falls and allow Discovery to complete the Application. This is in Response to BNSF's November 13, 2006 Response to the above Preliminary Application by Robert M. Jenkins of Mayer, Brown, Rowe and Maw, attorney(s) for BNSF Railway company.

- 1) Lack of Service for six and one half years constitutes prima facie evidence of "inadequate service". No service is inadequate service!

- 2) Since it is mandated by the Statute that the STB should determine the Constitutional Value of the line as defined as the greater of The Going Concern Value or Net Liquidation Value, it is impossible to determine whether the Applicant is financially responsible enough to purchase the line until that determination is made by the Board. Future value is speculative and cannot be used to determine "Going Concern Value." There has been no traffic over this line for over six and a half years, which is prima facie evidence of no current "Going Concern Value" as there is no revenue or profit generated. Indeed there is a negative "Going Concern Value" since there is a cost of retaining the line on the BNSF Balance Sheet such as property taxes that must be cross-subsidized by other BNSF profitable business.
- 3) Net Liquidated Value is defined as the scrap value of a line less the cost of removing the line. The scrap value of this line has been estimated at \$3,375,520 and removal of tracks, bridges, abutments, implosion of tunnels, removal of ballast and remediation of subgrade that might be polluted. The removal and clean-up costs will presumably reduce this amount and will be less than the net worth of the Applicant, which will determine whether Applicant has ability to purchase the line.
- 4) If the revenue of operating the line covers the costs, it should cause the line to be a profitable operation. And, if the costs of operating the line are \$1 million per year, then \$3 million would cover its operation for three years.
- 5) BNSF cannot demonstrate continued closure of the line is in the public interest, convenience and necessity.
- 6) Not allowing Applicant to acquire through Discovery a list of shippers and receivers who used this line in the past so they can be contacted and surveyed with regard to whether they would use the line in the future if it were re-opened will prevent any applicant from ever completing an Application, if the owning railroad refuses to provide this so-called proprietary information. This undermines the spirit of the enactment of this statute.
- 7) Allowing the owner to avoid providing a cost estimate of removing the line and remediating it will prevent any Applicant from determining Net Liquidation Value.
- 8) If the Preliminary Application is accepted by the Board, Applicant will provide a bona fide estimate by a licensed contractor to repair the washout at UIm, Montana, which owner attests is worth several million and applicant maintains is only several thousand dollars to repair.
- 9) Applicant maintains he is as qualified to operate this railroad as Dennis Washington of Missoula, Montana was when he purchased BN's line from Sandpoint, Idaho to Laurel, Montana. This is now successfully operated as a shortline called Montana Rail Link. He is also just as qualified to operate the line as the one BN sold to Doug Sauder of Christina Lake, B.C. who operates it as a shortline called International Rail Systems.

- 10) Applicant maintains that the bare land value that constitutes the right-of-way held in fee is only 75 feet wide and may be of negligible value, if not a liability, due to 100 years of potential pollution of the subgrade that could be an environmental liability without remediation. Perhaps the Board should order an Environmental Assessment of the right-of-way and subgrade as part of the determination of Net Liquidated Value.
- 11) Applicant submits his "sketchy" Operating Plan, alleged by BNSF's advocate, is no less sketchy than BNSF's alleged future potential traffic.
- 12) If BNSF has no immediate prospect for re-opening this line, which is not profitable, and a financial burden to their ROA and Balance Sheet, why should they be opposed to selling a non-profitable line segment to a buyer who can operate it as a shortline at less cost due to lower overhead and labor costs and has the prospect of bringing incremental compensatory traffic to BNSF regardless of what that volume should be? Maybe the real reason BNSF wishes to retain the control over the line is to deny existing shippers and potential new shippers direct competitive access.
- 13) The fact BNSF argues that there is no service required by present shippers on the line, but alleges there may be future overflow service, and, a real possibility is contradictory, but consistent with Applicant's submission that there is "bridge" traffic potential.
- 14) When STB determines the Constitutional Value of the line, then they will be in a position to determine whether Dr. Diehrer's financial responsibility is enough to acquire it and operate it for three years.
- 15) BNSF has not shown on their System Map it has marked this line for abandonment, nor applied to STB for abandonment.
- 16) BNSF has not within six and a half years made any effort to repair the washout at Ulm and transport traffic over the line.
- 17) Transportation over this line is "inadequate" for the majority of shippers who would or could transport traffic over this line because of the washout.
- 18) Sale of this line will not have significantly adverse effect on rail carrier operating the line since it will remove an unprofitable line from owner's Balance Sheet and offer the prospect of incremental traffic that doesn't currently exist.
- 19) Sale of this line will not have an adverse effect on over-all operational performance of the BNSF in that it will provide additional capacity to move traffic to connections with UP, CP and MRL over less circuitous routes with lower traffic density.
- 20) The sale of this line will likely present an improved transportation for shippers that would or could transport traffic over this line by lower transit times, due to

shorter route miles and faster turn around times done with less delays than via longer more circuitous higher density corridors.

- 21) Applicant respectfully requests the Director of Proceedings conditionally accept this Preliminary Application based on Discovery of Net Liquidated Value and list of BNSF customers who used the line before its closure and present BNSF receivers and shippers in Montana. It is necessary for completion of the Application and exclusively within the knowledge of the "owning carrier".
- 22) Applicant's financial responsibility can then be determined after Discovery in that if BNSF's Net Liquidation Value is negative, or very small, it can affect Applicant's ability to purchase and operate the line which in turn can measure Applicant's financial responsibility.
- 23) Gwynn Lumber Company and Excel Logistics have indicated they would use the line if re-opened.
- 24) Future traffic on the line as envisioned by Applicant is no less speculative than future traffic envisioned by BNSF.
- 25) It is obvious a recreational trail has less public service, necessity and economic benefit than reopening a rail line and restoring rail service.
- 26) Applicant can't determine whether he is capable of paying the Constitutional Minimum Value of the railroad line until that Constitutional Value is determined by the Board.
- 27) BNSF has not demonstrated (for whatever reason) that they are capable of restoring service for six years, much less three years required to operate the line by Applicant. This alone should cause the Board to force re-opening of this line, because if applicant is denied acquisition BNSF will continue to keep line closed, which is not in the public interest, convenience and necessity or best interest of Homeland Security.
- 28) If BNSF alleges Applicant's claim that Constitutional Minimum Value of the rail line is zero or less (as defined by the Statute) then BNSF should be required as part of the Proceeding through Discovery to demonstrate it is greater than zero by requiring BNSF to furnish a verifiable estimate of scrap value, cost of removal, environmental remediation and land approval to determine New Liquidated Value; and, or "Going Concern Value."
- 29) Where in the Statute does it define that "Going Concern" will be determined by "future" value or providing potential future capacity for owning line's network to meet the needs of its customers?
- 30) BNSF CEO Matt Rose's August 7, 2006 letter to Dr. Fiehrer expresses concerns and argues with Dr. Fiehrer regarding overhead traffic potential from Western Canada.

- 31) There is no provision in the Statute for determining or calculating "Present Day Value" of future value in determining "Going Concern Value."
- 32) If no one wants to buy an abandoned rail right-of-way from which the tracks have been removed, property taxes will continue with no prospect for profitable return on assets.
- 33) How can one determine how much financial backing is required until Constitutional Value and annual operating cost is determined? If BNSF challenges Applicant's Operating Cost perhaps the Board should require BNSF to submit annual operating costs of the line for five years prior to cessation of service in 2000 and cost of maintaining this line since.
- 34) BNSF allegation that there is a real possibility that Applicant will never run a train on the tracks and growing the business is no less speculative than BNSF's future prospect of operating the railroad and growing the business if Applicant's acquisition is denied.
- 35) BNSF alleges Applicant's offer is a sham. STB can determine whether this is a sham by approving Applicant's Application and determining whether Applicant has the financial strength to purchase the line at the Constitutional Value determined by the Board and can obtain funds to operate this line for three years.
- 36) If BNSF is caused to provide names and addresses of shippers and receivers who had used the line in the past and who are in Montana, a survey by Applicant as part of this will determine how many would ship via this route if service restored.
- 37) If BNSF feels Constitutional Value of the line as defined by the Statute does not reflect the value of the line, BNSF should be caused by the Board to submit what they feel the line is worth and support their reasons for something other than Net Liquidated Value of Going concern Value.
- 38) If BNSF's attorneys feel compensation for the line in the form of cash, securities, promissory notes, and tax credits is "speculative" perhaps they should be caused to suggest what other forms of compensation or assets are less speculative.
- 39) BNSF has leased other branch lines to shortlines to operate lower density feeder lines, which can originate and handle cars at less cost than BNSF such as the Eureka to Whitefish, Montana line operated by Watco.
- 40) Ultimately the Board can decide whether it is better to operate a line at some level of prospective incremental traffic at a lower cost than to not operate it at all.
- 41) BNSF's attorney's allege Applicant's plan will not work, which puts Applicant's plan on a parity with BNSF's past and present plan, which also is obviously not working in spite of BNSF's financial resources. The prospect of even one car of incremental traffic is better than no traffic!

- 42) There is a Homeland Security issue of allowing this line to remain closed. If a bridge were damaged or destroyed on BNSF's main east/west line food, fuel and lumber would be threatened to and from Montana to the rest of the U.S.
- 43) Applicant's letter to BNSF in 2005 referring to sale of the de facto rail line being promoted for a bike trail prompted numerous meetings of concerned property owners who have a right to "quiet enjoyment" of their land. BNSF has "No Trespassing" signs all along their line. The bike trail proposal stimulated meetings in communities along the rail route for fear that this line would be lost to commercial service if the tracks were removed. Grain elevators along this line could never use rail service and tourist or passenger service and would forever be denied. In recent years more than 2,000 miles of rail have been abandoned in Montana and through this interest to prevent more abandonments, Applicant became involved in an organization to preserve rail transportation in Montana. No political leaders, legislation or other support groups have been able to convince BNSF to re-open this line for service and open competitive access. The Applicant stepped forward and has taken individual initiative to restore this 100 mile line and restore such services when BNSF hasn't.

CONCLUSION

BNSF's response summarily requesting denial of Applicant's request for approval by STB for Acquisition of the line and restoration of service is little more than a personal attack on the Applicant. If the Application is denied, it will only result in the status quo of the line remaining closed and "competitive access" to shippers and receivers denied with prospect of higher rates, less service and equipment, as compared to the prospect of re-opening the line and restoring service envisioned when Congress enacted the Feeder Line Statute. If all an owning line has to do is deny furnishing exclusive information in Discovery or Receipt of Application, then the Statute is ineffective.

Therefore, Applicant respectfully requests the Board accept the Preliminary Application and Motion for Discovery and thwart BNSF's attempts to overcome STB's authority to act under the provisions empowering it by the Statute.

In conclusion we pray the STB will in its wisdom accept our Preliminary Application and allow Discovery in order to complete our Application for consideration by the Board to determine costs and Net Liquidation Value and obtain input from past and potential customers who have and will use the line. Enclosed are copies of recent public opinion expressed in letters to the Editor of the Great Falls Tribune on the tourist value of re-opening the line, which is in the Public Interest.

Respectfully Submitted,

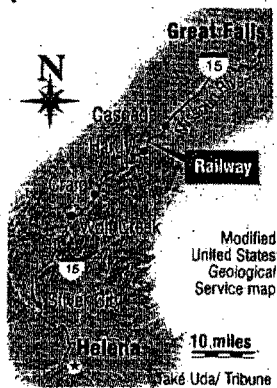


Dr. Daniel R. Fiehrer
P.O. Box 1004
Helena, Montana 59624-1004

November 20, 2006

APPENDIX: News Articles from Great Falls Tribune

GREAT FALLS TO HELENA



① Dentist wanting to run trains on railway

By BRIAN TUMULTY
Gannett News Service

WASHINGTON — The unused railroad line between Great Falls and Helena would reopen as an independent short line to foster competition in freight rail under an application filed with the federal Surface Transportation Board.

Dr. Daniel Fiehrer, a dentist from Helena, is asking the federal agency to award him "running rights" and let him purchase the 92-mile stretch of railroad from the BNSF Railway Co. based in Fort Worth, Texas.

Fiehrer is not the only one to express interest in the line.

TODAY'S QUESTION

Weight in on
this topic.
Details on 1M

The
Helena-
based
Corridor
of Dis-

covery Action Committee has expressed interest in converting the line to a bicycle trail.

Trails advocates in Great Falls and Helena are urging development of the trail.

Both Cascade and Lewis and Clark counties and Great Falls and Helena city commissions have proclaimed their support for the trail.

Landowners along the

② corridor have reservations about the trail. Standard concerns are trespass from the trail right of way onto private property, litter, dogs, fires, illegal camping and weed control.

Fiehrer, in a telephone interview Tuesday, said he wants to run one freight train daily on the single-track feeder line.

"We're basically going to provide competition from central Montana to outside sources," he said, explaining that it would provide a link to the Canadian Pacific, the Union Pacific and the Montana Rail Link. "It's one of the few north-south routes from Canada

See TRAINS, 7A

Trains: Hearing set for Thursday in D.C.

③

FROM 1A

to Mexico."

Fiehrer said he doesn't know how much the shipping cost of grain would change, but said he was confident prices would drop if there is competition.

Secondarily, the scenic 92-mile stretch along the Missouri River would be used for a dinner line, according to Fiehrer, who also is considering rail service for trout fishing enthusiasts who would be dropped off at hard-to-reach fishing spots.

The new short line would be headquartered in Cascade. Daily operations would be handled by one of several interested short line operators.

In the application filed with the Surface Transportation Board, Fiehrer states that BNSF has decided there isn't enough business to warrant reopening the line, but the railroad also has declined to file for abandonment.

The line is not usable because of a 50-foot washout at Ulm, which Fiehrer says in his application would be immediately repaired if he were given ownership. The application also points out that the longer the railroad is

not used — currently 6 1/2 years — the greater the expense will be to reopen it.

BNSF spokesman Gus Melonas declined to comment on when the railroad might reopen the line. "BNSF has determined to retain the Helena to Great Falls line based on current and projected regional transportation volume and shippers' needs, which could impact this line," said Melonas.

About two years ago Fiehrer and his wife, Mary Ann, co-founded the Transportation Preservation Society of Montana with the hope of preserving rail lines for commercial use. Their organization — which says it includes business and landowners — is concerned that BNSF now controls almost all rail shipping in the state.

The high cost of shipping grain has been a controversial issue in the state.

Sen. Conrad Burns, R-Mont., who is in a tight race for re-election against Democrat Jon Tester, held an Oct. 11 news conference in Great Falls with the chairman of the Surface Transportation Board to announce a public hearing on grain shipping rates.

That hearing will be held in Washington on Thursday at 8 a.m.

The hearing is a response to an Oct. 6 report by the U.S. General Accountability Office, the nonpartisan investigative arm of Congress that found the agency's "rate relief processes are largely inaccessible and rarely used."

The GAO urged the Surface Transportation Board to assess the competition.

Railroads, shippers, and trade organizations are scheduled to speak at Thursday's hearing. Advance copies of their hearing statements were posted on the Internet late Tuesday.

Meanwhile, the application for a Great Falls to Helena short line does not require a public hearing.

Instead, the agency has 30 days to decide whether to accept the application. A final ruling would take another six months to a year.

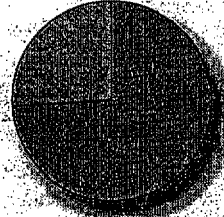
If Fiehrer receives a favorable ruling, the Surface Transportation Board would decide on the price of the sale after receiving appraisals from both sides.

— Tribune staff contributed to this report.

will not record your vote.

Yesterday's question

Do you favor a short line rail
road instead of a recreational
trail between Helena
and Great Falls?



Yes ☒ 74% No ☐ 26%

Total votes cast: 395

Results are not scientific

Reader Comments

Responses selected from
recorded messages and The
Buzz online forum at www.

“

It would be wonderful to
have a train go by again. —

D.L., Cascade

What a beautiful ride it
would be, just like the
Lewistown run.

— R., Great Falls

Yes, what an intriguing
ride it would be.

— L.B., Great Falls,

”

Helena man seeks forced sale of rail line

Orthodontist wants to operate short line between Helena, Great Falls

By LARRY KLINE
IR Staff Writer

A Helena orthodontist has asked the federal Surface Transportation Board to force BNSF Railway to sell him its Great Falls-to-Helena line.

Daniel Fierher said this week he plans to lease the 95-mile route — which some have advocated turning into a hike-and-bike trail — to a short-line railroad that would run a few trains each day, offering a north-south route to area shippers. He also said he's spoken to folks interested in operating a dinner train on the route, much of which follows the Missouri River.

Fierher said he's spoken to short lines in Montana and elsewhere, but declined to name the railroads.

He submitted his application last month, asking the board to use a federal statute allowing it to force the sale.

According to a document on the board's Web site, the panel has more than two months to render a decision. If the board forces the sale, the price is either set by the panel or agreed upon by the railroad and applicant.

A BNSF lawyer has sent the board a letter, stating the railroad will respond to the application by Monday. Railway spokesman Gus Melonas said the company plans to keep the line.

"We are retaining the line for possible future use to provide additional capacity to meet shippers' needs if necessary," he said.

President and CEO Matthew Rose when he contacted the railroad this summer with an offer to buy the route. Rose said the line wasn't for sale, Fierher said.

Most of the route hasn't seen rail traffic in about five years. BNSF uses a portion of the line north of Ulm for storage and switching operations, Melonas has said.

He's declined to comment on the upgrades BNSF would need to make to run trains along the line, but trail enthusiasts who hope the line can one day be turned into a path for bicyclists and pedestrians have said several problems exist — sinkholes have undermined the rail bed near Ulm, tunnels along the route are too small for modern rail traffic, a crossing at Wolf Creek has been paved over, and on some curves trains would be limited to 15 mph.

The effort to create the trail has garnered support from officials in Helena and Great Falls, and advocates believe the path could boost the economies of both cities, along with smaller towns along the route.

Trail advocates have said they'd like to see trains running along the line but would push for the path if the line's operation isn't feasible.

Fierher, who owns a ranch near Cascade, has joined landowners along the route who object to the creation of the trail, citing concerns over pets, trash and trespassers.

According to Fierher, the line was built in 1886 by Great Northern Railway founder James J. Hill at a cost of \$15 million. The route connected Hill's railroad with the Northern Pacific at Helena and served regional mining interests.

Reporter Larry Kline can be reached at 447-4075 or larrykline@helenair.com.

So far this month, we've printed ...

Our opinions	50	Counterpoints	5
Montana guest opinions	6	Editorial cartoons	57
National guest opinions	10	Reader letters	490
Syndicated columnists	10	Current letter backlog	20

OPINION

Editorial board

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Dentist deserves shot at reopening rail line

Anyone who has driven between Great Falls and Helena knows it's one of the most scenic routes in the state.

That's why we've been excited about the possibility of eventually turning a defunct rail line between the cities into a recreational trail.

Always, we said, on the condition that rail traffic can't be restored on the 92-mile route.

Now it turns out that Helena dentist Daniel Fiehrer wants to buy the line from BNSF and reopen

rail traffic on it. As disheartening as that may be for trail enthusiasts, Fiehrer deserves a chance to make a go of it.

He asked the federal Surface Transportation Board for "running rights" and permission to let him purchase the single-track line.

Fiehrer proposes repairing the 50-foot rail washout at Uhm, then running a daily freight train on the route. "We're basically going to provide competition from central Montana to outside

sources," he said. "It's one of the few north-south routes from Canada to Mexico."

That's got to be good news to grain shippers who've been captive to BNSF routes and rates. BNSF officials aren't saying much about the proposal. In fact, they've been virtually mum on the line's prospects for years.

The company hasn't repaired the washout and hasn't run trains for more than six years. But it also hasn't filed for abandonment.

Fiehrer also is consider-

ing adding a dinner line along the route, as well as rail service for fishing enthusiasts. Much of the route follows the Missouri River.

We think those are fantastic ideas that could generate lots of support and business.

Of course the thought of losing the chance for a recreational trail hurts.

There's been a lot of interest in such a trail by government officials and recreationists in Great Falls, Helena and beyond.

Both city commissions and the Lewis and Clark

County Commission passed resolutions supporting the trail. Cascade County Commissioners offered their support on condition the route couldn't be used for rail traffic.

But if BNSF doesn't abandon the line, the trail likely won't happen anyway.

In terms of a future recreation corridor, selling the line is not the worst thing that could happen. Selling off pieces of the line would be.

That must not happen. The Surface Transportation Board has 30 days to decide whether to accept

Fiehrer's application. A final ruling could take six months to a year.

The proposal deserves a strong review.

If Fiehrer can make a go of it, great.

If at any point the line's owners — no matter who they may be — decide running trains won't work, the line must remain intact.

At that point, there's a new chance for trail supporters to make their case.

In the meantime, grain shippers might get a break. And a dinner train through the Wolf Creek Canyon sounds divine.

OUR
OPINION

OPINION

Editorial board

Jim Strauss, President & Publisher
 Elaine Kulhanek, Executive Editor
 Gary Moseman, Managing Editor
 Mike Grate, Production Director

READER /OPINIONS

On our minds: Holiday run, railroad

Trains like this are very popular throughout the country.

They are located in similarly scenic areas also rich in history.

This attraction would bring needed tourist dollars and jobs to both cities. Their location on the route between Yellowstone and Glacier National Parks with this attraction would encourage tourists to stop longer in this area.

There would be an all-year income to support the endeavor. Bike trails are wonderful, but they do not serve tourism much.

The users are local. The trails are strictly seasonal. Trail maintenance, security, rest stop facilities all must be paid for through tax dollars. Bikers will not pay a toll charge.

Bike trails serve the young and healthy. Older and retired folks make up much of the tourist trade and dollars. They would take advantage of enjoying a train ride, and the attractions at either end and parents with children would never forget the experience or where it happened.

If the railroad is allowed to

Dr. Fiehrer's proposal to run trains on the existing tracks between Helena and Great Falls is an economic opportunity that both cities must use to their advantage.

Tourist industry growth potential is great with the additional possibility of a scenic, tourist-oriented train between Helena and Great Falls tying the two central Montana cultural centers together.

Good idea

Dr. Fiehrer's proposal to run trains on the existing tracks between Helena and Great Falls is an economic opportunity that both cities must use to their advantage.

Tourist industry growth potential is great with the additional possibility of a scenic, tourist-oriented train between Helena and Great Falls tying the two central Montana cultural centers together.

give up the roadbed and the tracks are taken up, there will never be another opportunity to reverse the process.

City and industry must support this endeavor.

— Paul T. Snyder,
 Great Falls

We're on board

I was born and raised in Great Falls and am in the town on one of my three or four visits a year.

I was delighted to read in the Tribune the possible opening of the rail line between this city and Helena. Not only will it help the farmers with competitive prices but will add a much needed tourist attraction for the city if the dinner car becomes reality.

The city needs more sights and attractions for visitors, and the route to Helena would fill the bill nicely. It is a beautiful ride. My husband and I will definitely be on board on my next summer visit.

— Dorothy Courtneage Wilson,
 Shalimar, Fla.