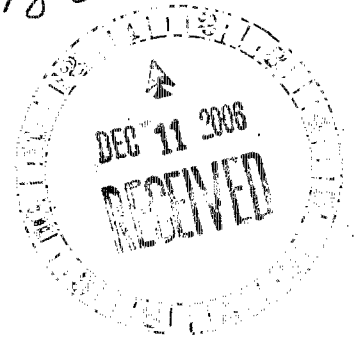


218347

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



November 28, 2006

FILED

DEC 21 2006

SURFACE

TRANSPORTATION BOARD

The Honorable Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street NW
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 a copy of my response (and 10 copies) to Director of Proceedings David Konshinik's decision to reject my PRELIMINARY APPLICATION and Motion for Discovery to complete the Application.

Please date stamp the enclosed extra copy and return it to me for our files. Thank you for your assistance.

Sincerely,

Dr. Daniel R. Fiehrer

ENTERED
Office of Proceedings

DEC 27 2006

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Public Record

FILED

DEC 21 2006

STP

TRANSPORTATION BOARD

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

FINANCE DOCKET NO. 34947

DR. DANIEL R. FIEHRER APPLICANT

V.

BNSF RAILWAY RESPONDENT

PETITION FOR RECONSIDERATION, REVIEW AND APPEAL TO
FULL BOARD TO RESUBMIT PRELIMINARY APPLICATION
TO ACQUIRE BNSF'S DE FACTO
ABANDONED RAILROAD BETWEEN
HELENA AND GREAT FALLS, MONTANA

M.A. Fiehrer
Authorized Representative
P.O. Box 811
Helena, Montana 59624-0811
Phone 406-442-3720
FAX 406-442-0344

DATED: NOVEMBER 28, 2006

INTRODUCTION

On October 27, 2006 Applicant filed a Preliminary Application to acquire BNSF's de facto abandoned rail line between Helena and Great Falls, Montana which had not been operated for over six years and for which BNSF had not filed for abandonment and was still shown on BNSF's System Diagram Map. These were the criteria required for filing an application of a "financially responsible" individual to acquire under terms of the Feeder Line Statute 49 USC 10907. The statute further stated the line could be acquired at "Constitutional Value (CV) defined by the statute to be the greater of either the "Going Concern Value (GCV) or "Net Liquidated Value" (NLV) defined as the "Scrap Value" less the cost of removal of the railroad. Applicant filed a Preliminary Application recognizing any Application could not be completed without shipper support or Net Liquidation Value, both of which required Discovery of BNSF's customer list, cost of land and tearing up the line. Applicant also requested protective order to prevent economic reprisals against shippers expressing support of Applicant's Application.

BACKGROUND

Although the Statute does not set a specified threshold amount for what constitutes financial responsibility, the Applicant submitted a verified statement of financial responsibility of net worth at \$4.85 million by a licensed CPA. Also, Applicant submitted a statement of "scrap value" of the line based on current rail scrap and salvage prices in Central Montana and requested (*because it was within the personal knowledge of BNSF*) a Motion of Discovery that BNSF be caused to show track removal costs and records of sales of scrap to Montana track scrap dealers for the last six years the line has been de facto abandoned.

With regard to Net Liquidating Value (NLV) the Scrap Value of \$3,375,250 this was based on weights of rails, tie plates, spikes and numbers of track components which came off the line itself and prices being paid per ton by local buyers of track scrap and ties. Current track scrap value is listed at \$110/ton and ties \$5/tie based on 40% salvage rate, which can be verified under Discovery of prices being paid to BNSF for track salvage in Central Montana for the past six years.

The real cost of removal of steel and ties for sale for the last six years and salvage dollars realized can only be

verified in on uncontestable manner by Discovery. The value of the bare land itself can only be determined by real estate appraisal of the land "as is" which might be contaminated environmentally. This too, can only be determined by Discovery of what value BNSF carries on its books for this line for paying state property taxes regardless of how much is owned in fee or merely easements.

The argument, that if rail traffic in the region increases sufficiently BNSF could re-open the line without having to invest millions of dollars to re-acquire the real estate and rebuild the line, is no less hypothetical than the Applicant's contention that traffic in the region is already sufficient to re-open the line and that a shortline can operate the line at a lower cost now or in the future than BNSF due to lower overhead and labor costs. BNSF would benefit from this traffic without having the ownership costs on its Balance Sheet.

The Statute 49 USC 10907 is silent on how many shippers are required to demonstrate they would use the line if service were restored. Applicant showed two shippers would use the line if acquired and operated by someone other than BNSF, which has a 94% market dominant share of all rail shipments into and out of Montana. This makes rail shippers in Montana "captive" to BNSF and subject to arbitrary increases in rates, service and equipment offerings at will, without any alternative direct competitive access to other railroads except by longer haul, higher cost routes, slower service, transit times and longer turnaround times.

Shippers are also captive to expressing their opinion. One nationally syndicated investigative transportation reporter contacted eleven current BNSF shippers personally, who were all reluctant to comment on whether they could support the Application and use the line out of alleged fear of economic reprisals.

As part of Applicant's Preliminary Application Discovery, a list of existing BNSF shippers was requested to contact regarding possible use of the line in order to complete the Preliminary Application. There is nothing in the Statute which differentiates, prejudices or establishes a minimum number of "local" shippers vs. overhead or "bridge" interline shippers who would use the line or a minimum volume required if service were restored. Failure to repair a washout interdicting the line at Ulm created two "feeder" branch lines: one from Ulm to Great Falls; and one from Ulm to Helena. All railroads are

"feeder" lines in that they feed other railroads at either end of their line. The Statute does not define feeder lines, "branch" lines or "trunk" lines. The Homeland Security value of re-opening the line is of obvious importance in that if one of BNSF's bridges on their East/West line were damaged or destroyed, there would be no other connection to shippers or receivers of rail commodities from and to Montana. BNSF is already shipping overhead traffic over Montana Rail Link from Sandpoint, Idaho to Laurel, Montana through fewer crew districts and at presumably less cost (via a shortline - MRL) to relieve traffic pressure on BNSF's main line believed to be at, or near capacity. Applicant contends he is as worthy and well qualified as MRL's owner was when he purchased BN's line from Sandpoint to Laurel. Applicant contends he had support from various government officials such as Montana's Director of Agriculture, State Legislator Schmidt and U.S. Senator, Max Baucus (who will now become Chairman of the Senate Finance Committee.)

Although Applicant submitted a workable operating plan reviewed by a qualified shortline operator, no shortline operator was submitted in the Preliminary Application, because Applicant had to attest he was not "fronting" for any railroad operator, which would be grounds for denial (a catch-22) if Applicant would have submitted in his Preliminary Application a preferred shortline operator. Three other qualified existing shortline operators contacted Applicant following Applicant's filing of the Preliminary Application wishing to be considered and selected for operation should Applicant's Application be approved. There was concern some shortline operators who operate former BNSF shortlines or connect with BNSF could be subject to economic reprisals, especially if they supported Applicant's Application and BNSF prevailed; or, if Applicant succeeded. Understandably, they wished to remain anonymous until the Application was approved and "protective orders" sought in the Motion in the Preliminary Application as part of STB's decision.

The identification of a proposed operator and insurance carried by the proposed operator can be remedied and so can funding once the STB determines what the Net Liquidation Value (NLV) is, approves an operating plan and determines how much, what kind and the amount of insurance STB requires.

The value of the line has not since its building (see Application) ever been, is, or will ever be dependent on "local" traffic originating on it, but, rather the interline traffic from BNSF's loading and unloading points in Montana, as well as

Canadian shippers and Union Pacific Shippers and their connections.

Lack of service i.e.: no service for six and a half years is prima facie evidence of "inadequate" service required under the Statute.

As to whether Applicant "has adequate financing necessary to purchase and operate the route for at least three years...." Is dependent on what STB determines the "Constitutional Value" (CV) to be. Since the line has not been operated for over six years, Applicant contends there is no "Going Concern Value" (GCV) and, if the cost of tearing up the line exceeds the Scrap Value (SV) then the Net Liquidated Value (NLV) will be negative, or non-existent. The line can be easily purchased and operated from Dr. Fiehrer's net worth, or, if needed for operation, and an appropriate revolving line of credit obtained under protective conditions to operate the line for three years if Dr. Fiehrer's net worth is found to be inadequate by some, as yet undefined criteria in the Statute. Applicant respectfully requests the Board clarify where in the Statute Applicant must pledge "liquefying his net worth" as required by Director Konschnik.

Applicant contends if BNSF prevails in this case, they will likely file for abandonment and convert the line to a bike trail to permanently close the line and prevent it from ever being opened again for rail commerce. The support of the two Helena Bike sellers (*Great Divide Cyclery*) and Great Falls trail advocacy groups suggest some "quid pro quo" might exist and possible discussions have taken place between the Bike Trail Advocates (*Recreational Trails, Inc.*) and BNSF.

Neither BNSF in their response of November 13, 2006, nor the Bike Trail Advocacy Groups supporting BNSF has shown or been asked to show or submitted evidence that keeping the rail line closed is in the "public interest" or how many bikers/hikers would use the trail, especially since county, state and federal tax supported roadways already exist parallel to the rail line currently used by bikers and hikers.

The statute requires if the line is ordered sold to Dr. Fiehrer for whatever "Constitutional Value" is determined by the Board he is required to provide "first refusal" to sell the line back to BNSF for whatever he paid BNSF for it. Thus, if Applicant purchases the line and decides to sell the line, he must resell the line to BNSF for what he paid for it. In the interim, BNSF shippers, regardless of how many or what

commodities, or volume would have the ability to ship over the line - a value they do not have now, nor would have if Applicant's petition for reconsideration is denied. Indeed BNSF and Bike Trail advocates in support of BNSF's position attempted to put a "negative" spin on the word "speculation" when describing Dr. Fiehrer's initiative. Every railroad venture in the U.S. was based on speculation, especially the Montana Central Line built by James J. Hill in 1886.

The General Accounting Office as well as 17 State Attorney's General and the District of Columbia, including Montana's Mike McGrath, have a letter to the U.S. House and Senate Judiciary Committees recently expressed serious concern for the railroad industry's anti competitive activity and admonished STB to remedy the broad monopoly power they wield, which STB has failed to do.

Allowing BNSF to continue to keep this viable rail line closed, or abandon it to create a bike trail will do little to demonstrate STB is increasing commerce in a competitive manner.

PETITION

Applicant respectfully requests STB reconsider conditionally accepting Applicant's Preliminary Application and asks for a review by the Full Board based on the following:

- 1) Financial responsibility does not have a specified number in the Act and its perceived relationship or value cannot be determined until a Constitutional Value (CV) is determined by the Board. In this case it hinges on the Net Liquidation Value (NLV) which can only be determined by "Discovery" from BNSF in (a) the cost of tearing up the line and, (b) scrap value(s) of steel and ties sold to salvage buyers in Central Montana for the last six years.
- 2) If Applicant's Preliminary Application is conditionally accepted, Applicant will submit names and addresses, along with proposed Operating Plans from at least four (4) qualified shortline operators expressing an interest in operating the line if the sale is ultimately approved. These shortline operators have experience and equipment available (some have the diesel electric locomotives and idle passenger cars used on this line).

- 3) If Reconsideration and Applicant's Preliminary Application is accepted conditionally and Discovery granted to cause BNSF under protective orders requested to prevent economic reprisals to furnish Montana shippers names who used (or would use) this line, Applicant contends he will provide verified statements from ten shippers who would use this line. One is located on the line and a second who would locate on the line if acquired by someone other than BNSF who would provide competitive access to carriers other than BNSF. If STB feels 1,2 or 10 shippers, etc. who would use the line is inadequate, Applicant would appreciate clarification by STB as to how many shippers it would require to be deemed adequate for Applicant to demonstrate he can operate the line and generate a more profitable volume and adequate service than BNSF has provided in the last six and a half years.
- 4) Although the Statute does not establish the amount of insurance that is adequate and is silent on that subject, Applicant will obtain quotes from all three existing providers of shortline liability insurance if that is required for conditional acceptance of the Applicant's Preliminary Application for approval and completion of an Application. Applicant respectfully requests Board clarification of how much insurance STB requires to approve Application.
- 5) Applicant feels Director of Proceedings prematurely made his decision on Wednesday, November 22, 2006 immediately after receiving BNSF and "Commentors" response without benefit of Applicant's reply to BNSF and the "Commentors" response, nor U.S. Senator Baucus' letter of support. *Note: Director of Proceedings Konschnik had until "Close of Business" on Monday, November 27, 2006 to publish his decision.
- 6) Applicant respectfully requests STB to advise whether former STB chairman Kober (now an employee of BNSF) had any conversation on or off the record with any STB members regarding this case.

Since Director Konschnik found Applicant's Preliminary Application defective in these four areas, Applicant would like a decision and clarification by the entire Board that if these defects named by the Director of Proceedings were corrected, that it would conditionally accept Applicant's

Preliminary Application and Motion for Discovery so
Application can be completed for reconsideration by the Board.

CONCLUSIONS

1. Director of Proceedings rejects Applicants "Preliminary" Application as "incomplete" without prejudice to Applicant filing a new application containing the necessary information. Without Discovery to develop accurate information on BNSF's sale of salvage ties and track scrap since 2000 and value of land for tax payments, or obtain BNSF shipper's lists to obtain support of Applicant's acquisition of line (under a protective order to prevent economic reprisals) any new Application would be rejected. These are the reasons Applicant filed a "Preliminary" Application and now appeals to the Full Board and requests review and reconsideration to conditionally accept Applicant's Preliminary Application for completion.
2. Applicant needs clarification by the Board on:
 - a) How many letters of support are required by the Board from shippers who would use the line.
 - b) Definition of Financial Responsibility in the Statute
 - c) Acceptable amount and type of liability insurance coverage required by the Board
 - d) What public interest is served by allowing the line to remain closed to commerce providing rail service or creating a bike trail.
 - e) How Going Concern Value (GCV) is defined in the Statute with respect to "speculation" of undefined future business.
 - f) Whether if Preliminary Application is conditionally accepted by the Board it has the ability and, or, inclination to order Discovery of BNSF's Net Liquidation Value (NLV) and list of BNSF shippers and receivers in Montana and, issue protective orders to prevent BNSF from taking economic reprisals against shippers or shortlines who would support Applicant's Application, or allow BNSF to sell off part of the line during the Proceeding.

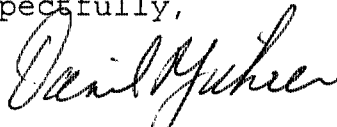
- g) How can Applicant obtain a firm commitment from a financial institution or pledge to liquefy his net worth without a "Constitutional Value" (CV) or Net Liquidated Value (NLV) established by the STB in the proceeding? Applicant pledges to provide a financial commitment as part of the proceeding once the STB determines what the Constitutional Value is that must be funded!
3. With respect to the public convenience and necessity (PC&N) criteria 1151.3(a)(11)
- a) The owning rail carrier BNSF has not operated the line or repaired a washout for over six years which is deemed to be prima facie evidence that there is not "adequate service" for shippers to transport over the line.
- b) Applicant submitted financial information on BNSF in his Preliminary Application showing BNSF's financial position and market dominance in Montana has improved significantly over the last six years this line has been closed. Removal of it from BNSF's Balance Sheet by sale or acquisition would improve BNSF's Return on Assets (ROA) due to property tax burden that now must be cross-subsidized by other profitable traffic. Applicant acknowledges that operation by a shortline traditionally has the prospect of handling either local or interline traffic at a lower cost than a Class I railway.
- c) Since the northern end of the line terminates at the BNSF's Great Falls Classification Yard where the shortline would interchange cars with BNSF, overall performance of BNSF would not be adversely affected. Indeed, additional revenue traffic interchanged to BNSF would allocate total costs of operating that Classification Yard over a greater volume thus lowering the cost-per-unit or car handled.
- d) It is obvious to any casual observer that sale of the line would likely result in improved railroad transportation for shippers who would or could transport traffic over the line. It would provide a more direct, less circuitous route, lower transit times and get better turnaround times for their shipments with the prospect of lower total costs due to more direct competitive access to Union Pacific,

Montana Rail Link and Canadian Pacific with less threat of higher arbitrary anti competitive freight rate increases due to BNSF's current 94% market dominant share of Montana rail traffic.

- e) If Petition for Reconsideration, Review and Appeal to the Board is granted to accept Applicant's Preliminary Application for proceeding with necessary Discovery and Protective Orders, Applicant contends he will obtain shippers' statements, including interline shippers and try to get them to formally request re-establishment of "adequate service over the line."

Applicant prays the full Board will reconsider and review his Preliminary Application and conditionally accept it on these conditions for further consideration.

Respectfully,



Dr. Daniel R. Fiehrer

CC: Senator Max Baucus
Governor Brian Schweitzer