

LAW OFFICES OF

SIMONS & KEAVENY

147 WAPPOO CREEK DRIVE • SUITE 604 • CHARLESTON, SC 29412

TELEPHONE: (843) 762-9132 • FACSIMILE: (843) 406-9913

KEATING L. SIMONS, III
klsimons@charlestonattorneys.net

THOMAS J. KEAVENY, II
tjkeaveny@charlestonattorneys.net

DEREK FARRELL DEAN
dfean@charlestonattorneys.net

BOB J. CONLEY
bjconley@charlestonattorneys.net

February 5, 2007

Via Hand Delivery

The Honorable Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423

ENTERED
Office of Proceedings
FEB 6 - 2007
Part of
Public Record

Re: Finance Docket No.: 34943
Beaufort Railroad Company, Inc.'s
Modified Certificate of Public Convenience and Necessity

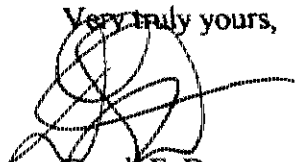
Dear Secretary Williams:

Enclosed please find one (1) original and ten (10) copies of Beaufort Railroad Company, Inc.'s ("BRC") Reply in Opposition to Petition to Reopen and/or For Reconsideration of Decision Served December 28, 2006.

Kindly date stamp the additional copy of this letter and Reply and return the same to our courier.

If you have any questions regarding the enclosed, please contact me at the telephone number listed above.

Very truly yours,



Derek F. Dean

DFD/

Enclosures

cc: Mr. Dan Green (w/o enc.)

BEFORE THE
SURFACE TRANSPORTATION BOARD

Modified Certificate of Public Convenience and
Necessity of Beaufort Railroad Company, Inc., a
subsidiary of the South Carolina Division of
Public Railways

Finance Docket: 34943

REPLY IN OPPOSITION TO PETITION TO REOPEN
AND/OR FOR RECONSIDERATION
OF DECISION SERVED DECEMBER 28, 2006

ENTERED
Office of Proceedings

FEB 6 - 2007

Part of
Public Record

Derek F. Dean
Law Offices of Simons & Keaveny
147 Wappoo Creek Drive, Suite 604
Charleston, SC 29412
Tel.: 843-762-9132
Fax: 843-406-9913

Warren L. Dean, Jr.
Sean McGowan
Thompson Coburn, LLP
1909 K Street, N.W.
Suite 600
Washington, D.C. 20006
Tel.: 202-585-6900
Fax: 202-585-6969

Counsel for Beaufort Railroad Company,
Inc., a subsidiary of the South Carolina
Division of Public Railways

Counsel for the South Carolina State
Ports Authority

February 6, 2007

ENTERED
Office of Proceedings

FEB 6 - 2007
Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

Modified Certificate of Public Convenience and Necessity of Beaufort Railroad Company, Inc., a subsidiary of the South Carolina Division of Public Railways
--

Finance Docket: 34943

**REPLY IN OPPOSITION TO PETITION TO REOPEN
AND/OR FOR RECONSIDERATION
OF DECISION SERVED DECEMBER 28, 2006**

On January 17, 2007, Mr. Thomas McFarland filed a Petition to Reopen and/or For Reconsideration of Decision Served December 28, 2006 ("Petition"). This Petition, apparently filed on behalf of certain landowners, seeks to set aside the Board's decision that the Port Royal Railroad ("PRR") line qualifies for a modified certificate of public convenience and necessity ("Modified Certificate"), issuing a Modified Certificate to Beaufort Railroad Company, Inc. ("BRC"), and thereby authorizing the BRC to offer service on the PRR line. BRC, a subsidiary of the South Carolina Division of Public Railways ("SCDPR"), SCDPR, and the South Carolina State Ports Authority ("SCSPA") (collectively the "South Carolina State Parties"), hereby file their Reply in Opposition to the Petition.

Under 49 C.F.R. §§ 1150.21 through 1150.23, the Board has jurisdiction and authority to issue Modified Certificates on rail lines that have been abandoned, fully abandoned, or approved for abandonment by the Board or a bankruptcy court. The PRR line was authorized for abandonment in 1984, but abandonment was never consummated. The Board continues to have jurisdiction over the PRR line and jurisdiction to issue Modified Certificates on the PRR line. The BRC applied for, and obtained, the same authority that BRC's predecessor, Tangent Transportation Company, Inc., ("Tangent"), obtained in 1985, no more and no less. Therefore, any challenge to the Board's jurisdiction should have been brought in 1985 when

the initial application for Modified Certificate was filed and approved. For this reason and the reasons set forth below, the Board did not err when it decided that the PRR line qualifies for a Modified Certificate. Nor did it err when it issued BRC's Modified Certificate. Therefore, the South Carolina State Parties respectfully request that the Board deny the Petition.

Background

Today, the PRR line extends from the Port of Port Royal in South Carolina in a north-westerly direction to the city of Yemassee, South Carolina, a distance of approximately 25 miles, where it meets the CSX main line. In the southeast, the PRR line runs adjacent to the United States Marine Corps Recruit Depot at Parris Island and the U.S. Marine Corps Air Station. These military bases are connected to the PRR line by a spur. The PRR line was operated by Seaboard System Railroad, Inc., then a subsidiary of CSX Corporation until 1984, when Seaboard received ICC authority to abandon the line. The State of South Carolina, through the South Carolina State Ports Authority, acquired the line in 1985 to preserve it as part of the state's rail infrastructure.¹ It was operated by Tangent, a subsidiary of the South Carolina Public Railways Commission, until service was suspended in late 2003.

Since 2003, Petitioners' counsel, Mr. McFarland, has represented different interests in attempts to force the South Carolina State Parties to relinquish control over the PRR. On January 9, 2004, Mr. McFarland, representing St. Mary's Railroad Company of St. Mary's, Georgia, threatened to challenge the alleged abandonment of the PRR before the Board, claiming that St. Mary's was interested in providing a rail freight service complemented by a

¹ The South Carolina Department of Transportation ("SCDOT") has identified the PRR line for preservation for future transportation use. SCDOT states that reactivation of the PRR line as a rail line is compatible with SCDOT's preservation efforts under South Carolina law. See SCDOT Letter dated February 5, 2007, attached hereto at Attachment A.

passenger excursion and dinner train on the PRR.² At the time, SCSPA conducted preliminary background research of the St. Mary's line and determined that it was not a viable entity for what it proposed.³

Counsel for SCSPA informed Petitioners' counsel that termination of service on the PRR itself did not require abandonment authority.⁴ On March 24, 2004, Petitioners' counsel again wrote to SCSPA's counsel in which he disagreed with the assertion that termination of service was not subject to abandonment authority and continued to threaten action unless SCSPA promptly decided to sell or lease the PRR to St. Mary's.⁵ On April 2, 2004, SCSPA counsel informed Petitioners' counsel that the PRR was authorized for abandonment on August 23, 1984, that subsequent operation on the PRR was conducted pursuant to 49 C.F.R. §§ 1150.22-24, and that no additional abandonment authority was required.⁶ On April 5, 2004, Petitioners' counsel informed SCSPA counsel that he was withdrawing the St. Mary's offer and proposed course of action stated in his prior letters.⁷

² See McFarland Letter dated January 9, 2004 at Attachment B1.

³ Petitioners state that SCSPA "rejected and/or ignored attempts by the Preservation Authority and others" to lease and purchase the PRR. See Petition at 8. However, the SCSPA provided Mr. Peter Strickland of St. Mary's Railroad with a "hi-railing" run over the PRR line on or about December 16, 2003. It was not until after this "hi-railing" run and receipt of Mr. McFarland's correspondence that SCSPA became suspicious of St. Mary's and Mr. McFarland's intentions. SCSPA's research determined that St. Mary's was not financially fit for the operation it seemed to suggest. St. Mary's never submitted any supporting documentation or business plan. Mr. McFarland subsequently withdrew St. Mary's "offer."

⁴ See Dean Letter dated March 9, 2004 at Attachment B2.

⁵ See McFarland Letter dated March 24, 2004 at Attachment B3.

⁶ See Dean Letter dated April 2, 2004 at Attachment B4.

⁷ See McFarland Letter dated April 5, 2004 at Attachment B5.

Just three months later, on July 26, 2004, Petitioners' counsel again contacted counsel for the SCSPA, this time purportedly on behalf of a group of landowners located along the PRR known as the Port Royal Railroad Preservation Association ("Preservation Association").⁸ This time, Petitioners' counsel asserted that the PRR was abandoned and that the fee owners of the land in the right-of-way of the PRR were freed of an alleged easement. Petitioners' counsel again threatened to take legal action on behalf of the Preservation Association.

On September 12, 2004, Mr. Steve Allen, an individual holding himself out as a railroad consultant under the company named Allen Railroad,⁹ directly contacted Mr. Bernard Groseclose, President & Chief Executive Officer of the SCSPA, informing Mr. Groseclose that Mr. McFarland had written the July 26, 2004 letter to SCSPA's counsel and was still awaiting a reply.¹⁰ Mr. Allen referred to Mr. McFarland as "our attorney." *Id.* The "our" was a reference to Allen Railroad and the Preservation Association. On September 16, 2004, Mr. Allen again contacted Mr. Groseclose directly via e-mail and stated that the abandonment had been consummated in 1985 and the PRR was no longer under STB jurisdiction.¹¹ Mr. Allen further threatened that there were hundreds of property owners waiting for the tracks to come up so as to regain full ownership of their property and the National Association of Reversionary Property Owners stood ready to intervene if the PRR tracks started coming up so

⁸ See McFarland Letter dated July 26, 2004 at Attachment B6. Mr. McFarland uses the term "Port Royal Railroad Preservation Association" in his July 2004 letter and "Port Royal Railroad Preservation Authority" in the Petition. The terms "Preservation Association" and "Preservation Authority" presumably refer to the same entity and are treated as such in this Reply. However, we have no knowledge of the composition of this entity. It is certainly not an "Authority," as that term is generally used under South Carolina law.

⁹ See www.Allenrailroad.com.

¹⁰ See Text of Allen E-mail dated September 12, 2004 at Attachment B7.

¹¹ See Text of Allen E-mail dated September 16, 2004, at Attachment B8.

that the PRR could not be preserved as a trail. On September 24, 2004, Mr. Allen stated that he could offer more than just "criticism and obstructions" and offered the SCSPA his services to "help bring this to a very quick end."¹²

On July 22, 2005, Mr. Allen contacted the South Carolina Governor's Office stating that because SCSPA did not "follow the STB rules" when the railroad was first bought, and again when the SCSPA "stopped operation," SCSPA is now "attempting to violate the 'Rails to Trails Act' as well as the Fifth Amendment to the Constitution."¹³ Again, Mr. Allen stated that the group he represents, i.e., the Preservation Association, insists that the SCSPA seek the assistance of a professional railroad consultant – presumably Mr. Allen was offering his own services again. *Id.* To this date, the Preservation Association has not provided SCSPA, SCDPR, or BRC with a viable proposal for service over the PRR line.

By early December 2006, it was evident that Mr. Allen and Mr. McFarland were acting in concert to drum up support for filing the Petition.¹⁴ On the Allen Railroad website, Mr. Allen provides a sign-up form for landowners to use and provides excerpts of e-mail correspondence with STB officials.¹⁵ On the same website, Mr. McFarland provided advice

¹² See Text of Allen E-mail dated September 24, 2004 at Attachment B9. Mr. Allen's offer of his services to resolve a dispute that Mr. McFarland, his counsel, appeared to have initiated raised obvious ethical questions. In response to an inquiry by SCSPA, each individual denied they were working in concert on this matter. See Attachments B10 and B11. As confirmed subsequently by Mr. Allen's own web site, those denials appear to be false.

¹³ See Text of Allen E-mail dated July 22, 2005 at Attachment B12.

¹⁴ See Special Notice January 12, 2007, available at <http://www.allenrailroad.com/Beaufort/APO.htm>, attached hereto at Attachment C.

¹⁵ See Special Notice January 16, 2007, available at <http://www.allenrailroad.com/Beaufort/APO.htm>, attached hereto at Attachments D1-D3.

about abandonment under South Carolina state law and federal law, and advice that landowners with standing would have to step up in order to prepare and file the Petition.¹⁶

On January 17, 2007, Petitioners' counsel filed the instant Petition, stating that he now represents individual fee land owners of the right-of-way in their challenge of the Modified Certificate as they seek to invoke their alleged reversionary interests.¹⁷

The South Carolina State Parties respond to the Petition with deep reservations about the activities of Mr. McFarland and Mr. Allen. It appears that the landowners may have been induced to join the Petition on the basis of opinions under South Carolina law that neither Mr. McFarland or Mr. Allen appear competent or authorized to provide. Further, Mr. McFarland has suggested that the State is acting in bad faith in this matter. The South Carolina State Parties are considering what action may be appropriate in response. Subject to those reservations, we now address the questions of whether the PRR line qualifies for a modified certificate and the Board retains jurisdiction to issue a modified certificate in this matter.

Argument

I. Summary of the Argument

The Petition fails to meet its burden of showing that material error, new evidence, or changed circumstances exist that would affect the Board's December 28, 2006 Decision, where the Board qualified the PRR line for a modified certificate and exercised its jurisdiction to issue BRC's Modified Certificate to operate over the PRR line. The BRC applied for and

¹⁶ See December 11, 2006 through January 8, 2007 correspondence in the section labeled "Special Notice January 12, 2007" at Attachments C and D2.

¹⁷ See Petition at 2.

obtained the same authority that its predecessor, Tangent, held and operated for over 18 years. There has been no material change in the status or condition of the line that would affect the Board's jurisdiction to issue a modified certificate to the BRC.

The Board retains jurisdiction and authority to issue modified certificates to operators of abandoned lines, fully abandoned lines, or lines approved for abandonment. Indeed, a rule that would result in the Board not having jurisdiction to issue modified certificates would negate the need for Subpart C's Modified Certificate application and approval process altogether. The PRR line was approved for abandonment but abandonment was never consummated. Therefore, the PRR line has not been fully abandoned and the Board retains jurisdiction.

The Board has continued jurisdiction over the PRR line since it will continue to operate in interstate commerce. The very nature of the PRR line and its historical use make it clear that any freight transportation provided by BRC would operate in interstate commerce and thus be subject to the Board's jurisdiction. The PRR line has never been solely used for intrastate commerce and the proposed service by BRC contemplates that when shippers engage BRC to provide "as required" service, BRC will provide the same interstate service that its predecessor, Tangent, did before it. By the Board's issuance of the Modified Certificate to BRC, the Board has authorized continued interstate service over the PRR line.

The Petition is the most recent in a series of efforts to prevent the South Carolina State Parties from preserving the line for present or future use in interstate commerce. None of the preceding efforts had merit and the Petition is no exception. The South Carolina State Parties respectfully request that the Petition be denied.

II. Petitioners Fail to Provide the Requisite New Evidence that would Materially Affect the Board's Decision that the PRR Line Qualifies for a Modified Certificate or that the Board has Jurisdiction to Issue the Same

Petitioners have filed this Petition in accordance with 49 C.F.R. §§ 1115.3 and 1115.4. These regulations plainly state that the Petition will be granted only upon a detailed showing of material error or that new evidence, change circumstances or substantially changed circumstances would materially affect the Board's prior decision.¹⁸ Petitioners bear the burden of proof to sustain their claims. Petitioners fail to meet their burden. None of the items Petitioners list constitute new evidence, changed circumstances, or substantially changed circumstances that would materially affect the Board's decision. We briefly address Petitioners' comments below.

First, Petitioners state that "until three years ago, the Landowner's fee interest was subject to an easement for operation of rail freight service over the line." *See* Petition at 3. Petitioners provide no evidence that the right-of-way is a mere easement, or if so, that it is extinguished or that the PRR line would be considered abandoned under state law.¹⁹ This assertion is pure speculation regarding what a South Carolina court may find, nothing more. The South Carolina State Parties have carefully reviewed these state law questions, and it is sufficient for these purposes to note that Petitioners are wrong.

¹⁸ *See* 49 C.F.R. §§ 1115.3 and 1115.4; STB Docket No. AB-6 (Sub-No. 335X) *Burlington Northern Railroad Company – Abandonment Exemption*, decision served June 8, 2005, 2005 STB LEXIS 235 (analyzing same factors for petition to reopen under 49 CFR § 1152.25(e)(4) and denying petitioner's petition to reopen where petitioners provide no basis for granting the relief they sought.)

¹⁹ The question of PRR line abandonment for state law purposes is a question of South Carolina state property law that must be addressed and resolved by the courts of South Carolina. The tests for abandonment of an easement under state law and abandonment for federal regulatory purposes are not identical. The Board should disregard, in their entirety, Petitioner's arguments about state property law. There is nothing to support them.

Second, Petitioners refer to Mr. Groseclose's statement in April 2003 regarding the Port Royal area as evidence of SCSPA's decision to abandon the PRR line. *See* Petition at 4. Mr. Groseclose's "suggestion" that the SCSPA look into redeveloping or re-using "portions of [its] property in Port Royal" is not evidence of abandonment. *See* Petition at Appendix 2. The property in Port Royal encompasses much more than just the PRR line. This suggestion also does not constitute a changed circumstance. Finally, Petitioners appear to argue that the Port's closing is somehow new evidence or a change in circumstance that would materially affect the Board's decision. The Port was authorized for closure in 2004, certainly not a new development that the Petitioners nor the Board were unaware of at the time of the Board's decision. Despite the authorization to close the Port, some shippers remain in the area. The Port has not been fully closed down.

Therefore, SCSPA's statements regarding potential future uses of the Port Royal area and the closure of the Port do not constitute new evidence or changed circumstances that would materially affect either the status of the PRR line or the Board's prior decision.²⁰

Third, Petitioners state that the Preservation Authority made "several proposals" to SCSPA to purchase or lease the PRR for the takeover and continued rail service on the line. *See* Petition at 4. Petitioners state that "all of these proposals were denied or ignored." *Id.* This is neither new evidence nor changed circumstances, and it is simply not true. SCSPA

²⁰ Petitioners also seemingly cite to Tangent's Notice of Termination as new evidence or changed circumstances that would somehow warrant the Board's opening of this matter. *See* Petition at 4. As explained below, Tangent's suspension of service does not constitute full abandonment nor does Tangent's suspension of service in November of 2003 constitute new evidence or changed circumstances that were not available to the Board or would materially affect the Board at the time of its decision on December 28, 2006. Indeed, the Tangent Notice was filed in the public docket and referenced in BRC's notice of modified rail certificate. These facts and circumstances were known to Petitioners and to the Board in 2003 and at the time of its decision and therefore do not constitute new evidence or changed circumstances to warrant opening or reconsidering the Board's decision.

has never seen any written proposal from St. Mary's, the Preservation Authority, or any other entity exhibiting a viable business plan or displaying the financial or operating ability for service over the PRR line.²¹ Although SCSPA allowed St. Mary's to "hi-rail" the line in December 2003, St. Mary's never provided SCSPA with any proposal for service over the PRR line.²² Further, the Preservation Authority failed to demonstrate any background in rail operations. Any communication from St. Mary's and the Preservation Authority did not arrive in the form of credible, viable proposals, rather, they came as harassing threats of litigation and promises of creating obstacles to SCSPA's continued control of the PRR line. Since no credible proposals exist, there is no new evidence or changed circumstances that would materially affect the Board's decision.

Fourth, Petitioners appear to argue that the SCSPA's statements regarding the potential sale of the PRR line for use as a recreational trail is either new evidence or changed circumstances that materially affect the Board's prior decision. Again, this does not constitute new evidence or changed circumstances that would materially affect the Board's decision. Indeed, the Board is fully aware, as evidenced by its many decisions, that if the BRC determines that service over the PRR line does not prove feasible, it may seek to preserve the right of way for potential future use through railbanking.²³ Petitioners acknowledge that this is a lawful outcome. *See* Petition at 6. The fact is, potential railbanking of the PRR line and

²¹ The only "proposal" received from Mr. Allen was for the purchase of the right-of-way, however, there was no proposal for rail operation.

²² *See* note 3 *supra*.

²³ *See* STB Finance Docket No. 33398-0, *Sammumish Transportation Company Notice for Modified Certificate*, decision served June 12, 1997.

its use as a trail has been an option for the PRR line since 1985, and thus does not constitute new evidence or changed circumstances that would materially affect the Board's decision.

Fifth, Petitioners assert, again without any shred of evidence, that the right-of-way is "grown over with weeds, brush and trees" and that a "massive expensive effort" would be required to restore service over the line. As Petitioners have provided no new evidence or proof to support this claim, there is no new evidence that would materially affect the Board's decision - this is purely speculation on Petitioners' part. It is also wrong. While there may be some areas where grass or weeds have accumulated near or on the tracks, this is a relatively minor issue that would certainly not pose an obstacle to reviving continued service. The SCSPA performed the necessary maintenance to preserve the railroad. Indeed, over the last three years, the type of maintenance performed includes track inspections, cross tie maintenance and repair, patching and paving railroad crossings, chemical weed control, weed and brush cutting and removal, and removal and replacement of track for utility repairs. The PRR line is capable of accepting shipper traffic at this time. Of course, some additional expense would be required to completely restore active service over the PRR line. Petitioners' claims that the line is over grown and would take a massive expensive effort to restore service are unsupported, and these claims cannot constitute new evidence sufficient to materially affect the Board's prior decision.

Sixth, Petitioners also appear to argue that BRC's statement that it does not expect to make interchange with connecting railroads is new evidence or a changed circumstance that would materially affect the Board's prior decision. *See* Petition at 5. This is despite the fact that the BRC's Notice that the Board used to determine the PRR line's qualification for the modified certificate included this statement and therefore, could not be new evidence or a

change in circumstances that would materially affect the Board's prior decision. Further, the modified regulations require that the proposed operator inform the Board, where applicable, of any interline connections including connections with railroads. *See* 49 C.F.R. 1150.23. The SCSPA, SCDPR, and PRR line have a long history of interchange with CSX for the interstate shipment of freight and SCDPR expects that should BRC's offer to transport freight on an "as required basis" be met by shippers, just like Tangent had done before it, SCDPR, through BRC, will make appropriate arrangements with CSX for such services. Indeed, Tangent, the wholly-owned subsidiary of the South Carolina Public Railways Commission ("SCPRC"), the predecessor to the SCDPR, had entered into a Line Haulage Agreement and Freight Rate Agreement with CSX for interchange at Yemassee, S.C.

Therefore, based on the above, there is no new evidence, changed circumstances or substantial change in circumstances that would materially affect the Board's decision that the PRR line qualifies for the modified certificate or that the Board has jurisdiction to issue the modified certificate. The Petitioners fail to meet their burden under 49 C.F.R. §§ 1115.3 and 1115.4 and, therefore, their Petition must be denied.

III. The Board Retains Jurisdiction and Authority to Issue Modified Certificates Over Rail Lines that are Fully Abandoned or Approved for Abandonment

Petitioners' argument that the Board lacks jurisdiction to issue a modified certificate is clearly without merit. The PRR was not fully abandoned in 2003 and even if it was, the clear and unambiguous language of 49 C.F.R. § 1150.21 is that the Board has jurisdiction to issue modified certificates to operators of abandoned, fully abandoned, or approved for abandonment rail lines acquired by States. The acquisition of the PRR line occurred in 1985 after the PRR had been approved for abandonment. That abandonment was not

consummated. It is clear that the PRR line qualifies for a modified certificate and the Board has retained jurisdiction over the PRR to issue the modified certificate.

The Modified Certificate rules of 49 C.F.R Subpart C apply to operations over abandoned rail lines, which have been acquired (through purchase or lease) by a State. *See* 49 C.F.R. § 1150.21. The rail line “must have fully abandoned, or approved for abandonment by the Board or a bankruptcy court.” *Id.* (emphasis added).²⁴ It has been consistently shown that the Board, and its predecessor, has jurisdiction to issue Modified Certificates over rail lines that have been abandoned and approved for abandonment.²⁵ BRC’s instant application was consistent with this long-standing precedent.

While the regulation states that the actual “acquisition by a State of a fully abandoned line is not subject to the jurisdiction of the [Board],” it does not state that the application and issuance of a Modified Certificate on a fully abandoned line or an approved for abandonment line is not subject to the jurisdiction and approval of the Board. *See* 49 C.F.R. § 1150.22 (emphasis added). Indeed, such a result would negate the need for Subpart C’s Modified Certificate application and approval process altogether. In accordance with these regulations then, BRC qualifies for a modified certificate since the PRR is a rail line that was approved for

²⁴ Further, the Board’s predecessor, the ICC has found that where a State acquires a line authorized for abandonment over which service is still being provided, the transaction is subject to the ICC regulations. *See Common Carrier Status of States, State Agencies and Instrumentalities, and Political Subdivisions*, Finance Docket No. 28990F, decision served July 16, 1981.

²⁵ *See* STB Finance Docket No. 34924-0, *Black Hills Transportation, Inc., D/B/A Deadwood, Black Hills & Western Railroad – Modified Certificate*, decision served September 29, 2006 (finding rail segment approved for abandonment in 1970 and subsequently acquired by the State of South Dakota qualified for a modified certificate in 2006); STB Finance Docket No. 34908, *CSX Transportation, Inc., Norfolk Southern, and Consolidated Rail Corporation – Modified Rail Certificate*, decision served August 26, 2006 (finding rail segments that were approved for abandonment in 1991 and consummated qualified for a modified certificate in 2006); and STB Finance Docket No. 33398-0, *Sammamish Transportation Company Notice for Modified Certificate*, decision served June 12, 1997 (finding rail segment approved for abandonment in 1980 and subsequently acquired by the State of South Dakota qualified for a modified certificate in 1997).

abandonment by the ICC and thus is clearly subject to the Board's jurisdiction. The PRR line to be operated by BRC from Yemassee, South Carolina to Port Royal, South Carolina, was the subject of an abandonment application filed by Seaboard on June 14, 1984. *See* Docket No. AB-55 (Sub. No. 110). On August 23, 1984, the Interstate Commerce Commission ("ICC") issued a decision authorizing Seaboard to abandon the PRR line. On December 27, 1984, the ICC determined that the certificate authorizing abandonment would be effective upon the service date - January 4, 1985. No consummation of abandonment was ever filed because the SCSPA acquired the "approved for abandonment" line, leased it to the South Carolina Public Railways Commission ("SCPRC"), and Tangent Transportation Company, Inc. ("Tangent"), a wholly-owned subsidiary of the SCPRC, filed its Application for Modified Certificate on April 16, 1985.²⁶ The ICC approved the Modified Rail Certificate on June 7, 1985.²⁷ The BRC and SCDPR through its application for Modified Certificate, seek nothing more today than what was originally sought by Tangent and approved by the Board's predecessor – the authority to offer service over the approved for abandonment PRR line. The Petitioners should have raised any issue with respect to the Board's jurisdiction under the modified certificate program at the time SCSPA acquired the PRR line or when Tangent applied for its Modified Certificate to operate over the PRR Line. Petitioners failed to allege that the Board lacked jurisdiction to issue a modified certificate to Tangent and should not, at this late date, be permitted to assert that argument against the BRC.

²⁶ At the time of the acquisition, the rails, rail bed, all railroad signals, switches, and other operating equipment remained in place.

²⁷ *See Tangent Transportation Company*, ICC Finance Docket No. 30655.

Petitioners assert that the PRR was fully abandoned in 2003 when Tangent suspended service, the SCSPA "ignored" St. Mary's and the Preservation Authority's attempts to lease or purchase the PRR and therefore the Board lost jurisdiction to issue the modified certificate over the line at that time. As noted above, the regulations clearly indicate that while the Board may not have jurisdiction over the actual acquisition by a State of a fully abandoned line, the Board retains jurisdiction to issue Modified Certificates to operators where the rail line is abandoned, fully abandoned, or approved for abandonment. *See* 49 C.F.R. §§ 1150.21, 1150.23.

Even if true -- and they are not -- these assertions would not establish that the status of the line has changed.²⁸ In fact, the Board has routinely looked to several factors when determining whether a rail line has been fully abandoned including whether there has been discontinued operations, salvaging of track, cancelled tariffs, intent that the property be removed from the interstate rail network, and relinquishment of control over the right-of-way.²⁹ The actions of the railroad should be looked at in their entirety to see if an indication of intent to abandon is present rather than looking at any single piece of evidence of abandonment. *See Birt*, 90 F.3d at 587. Until actual consummation of abandonment, none occurs, and the Board retains jurisdiction. *Id.* at 589. In the present case, none of the elements of full abandonment exist. Service with Tangent was suspended but SCSPA continued to maintain the PRR line. SCSPA now has entered into a new operating agreement

²⁸ BRC seeks Board authority to offer service over the line just as Tangent did before it. There has been no change in the line's abandonment status under the Board's regulations since Tangent applied for the modified certificate.

²⁹ *See Birt v. Surface Transportation Board*, 90 F.3d 580, 585 (D.C. Cir. 1996) [finding that railroad had not consummated the abandonment nor demonstrated the requisite intent to abandon the track by salvaging the tracks and ties, canceling tariffs, and referring to the line as "abandoned" in correspondence], *reh'g denied*, 98 F.3d 644 (1996).

with BRC and SCDPR to provide rail service over the PRR line. The PRR line is not “substantially deteriorated” as Petitioners suggest. SCSPA has maintained the right-of-way on the PRR line for the 21 year period over which it has controlled the PRR line. SCSPA continues to maintain the right of way on the PRR line and retains the line in working order. The rails, rail bed, railroad signals, switches, and other operating equipment all remain in place and are operational. Although BRC states that it does not currently intend to interchange with connecting railroads, that is because it does not yet have a shipper engaged in such an arrangement. Petitioners further suggestion that the SCSPA ignored both St. Mary’s and the Preservation Authority’s alleged overtures is not true. Even if it were, it does not indicate an intent to fully abandon. The South Carolina State Parties are not required to entertain proposals from entities it has determined lack the requisite viability and veracity. Finally, the South Carolina State Parties have shown their intent to retain the PRR line for continued rail service or for preservation of the future rail service, clearly indications of the South Carolina State Parties intent to retain possession and control of the line.

Even though it appears quite clear that the PRR line is not fully abandoned, Petitioners cite *Becker v. STB* for the proposition that the Board’s decision with respect to BRC’s Modified Certificate should be vacated for lack of jurisdiction. In *Becker*, the court found that T&P Railway, Inc.’s (“T&P”) ceasing of service, removal of all the rails and ties from the line, and expressed intent not to extend the negotiation period for an interim trail use and railbanking agreement led the court to conclude that T&P had consummated abandonment when the NITU, which permits the railroad to fully abandon if no agreement is reached within 180 days, expired. See *Becker v. STB*, 132 F.3d 60, 63 (D.C. Cir. 1997). Petitioners’ cited case is clearly distinguishable from the present case. In the present case, BRC (and Tangent before it)

obtained authority to offer service over the line and the rails and ties remain in tact and available to accept traffic in interstate commerce. Further, the South Carolina State Parties' intent shows that they promote continued rail service and the concept of preservation through interim trail use should no shippers engage BRC for rail service.

Simply stated, the PRR line has not been fully abandoned, the PRR line qualifies for a modified certificate, and BRC's Modified Certificate is valid since the Board retains jurisdiction to issue a modified rail certificate over the PRR line.

IV. Board has Continued Jurisdiction over the PRR because it Operates in Interstate Commerce

Petitioners' argument that the Board lacks jurisdiction to issue a modified certificate is based on the erroneous presumption that, because at the time of filing BRC stated that it had not made any interchange or interline connections with any connecting railroads, the operation of its line between Yemassee and Port Royal would not be in interstate commerce. In fact, the very nature of the line and its prior use make it clear that any freight transportation provided by BRC would most definitely move in interstate commerce, and, thus, the PRR line and BRC are subject to the Board's jurisdiction.

It has been consistently held, by STB and its predecessor, ICC, that STB has jurisdiction over a railroad that participates in the movement of freight in interstate or foreign commerce.³⁰ In the case of BRC's line between Yemassee and Port Royal, all previous use of

³⁰ *Fun Trains, Inc.—Operation Exemption—Lines of CSX Transp., Inc. and Florida Dep't of Transp.*, STB Finance Docket No. 33472 (Feb. 24, 1998); *Int'l Bhd. of Elec. Workers, Local Union 465—Petition for Declaratory Order—San Diego Trolley, Inc.*, ICC Finance Docket No. 31862, 1992 WL 189043, *4 (July 23, 1992); *Allegany Central R.R.—Application for a Modified Certificate of Public Convenience and Necessity*, I.C.C. Finance Docket No. 31371, 1989 WL 237986, *1 (Feb. 23, 1989). See also *Transit Solutions Group, LLC—Operation Exemption—Nashville and Eastern R.R.; William J. Drunsic and Jeffrey D. Wilson—Corporate Family Transaction Exemption—Nashville and Eastern R.R. and Nashville & W. R.R.*, STB Finance Docket Nos. 34832 and 24833, 2006 STB LEXIS 144, *3-4 (Mar. 2, 2006).

the line involved the movement of freight in interstate or foreign commerce. Indeed, PRR has a long and storied past in the interstate transport of cement, fertilizer, and diesel fuel for various shippers including the Department of Defense. It has never been used for the transportation of solely intrastate freight. Previous shippers used the line to move freight originating in other states through South Carolina to Port Royal to be transported by ship to other states and foreign countries, as well as to carry freight received at Port Royal from other states and foreign countries to inland points in states outside South Carolina.³¹ Thus, the primary, if not only, use of the line was, and will continue to be, the transport of freight in interstate commerce.

By gaining a Modified Certificate, BRC gained Board authority to reinstate that former use of the line, which is still part of the interstate rail system. The line connects with CSX's line at Yemassee, and CSX's line is a main line that travels south to Florida and north to points in other states. The infrastructure, track, signage, and switch remain and with appropriate refurbishing, BRC will be able to resume service for a shipper to interchange with CSX. The Yemassee-Port Royal line is able to accept these interstate freight shipments. Since the Modified Certificate has been issued to BRC, and if a shipper desires to make use of the line to ship freight, BRC will be required to ship that freight, which will most certainly move in interstate commerce.

³¹ In an analogous case, the National Mediation Board has held that, where a railroad operating between two points in the same state transports passengers who arrive in the state from other states via ship, the railroad is part of interstate commerce. In *International Brotherhood of Teamsters*, NMB Case No. R-6861, File No. CR-6730, 2002 NMB Ltr. LEXIS 1 (Jan. 7, 2002), NMB considered a case where tourists traveled to Alaska on a Holland America cruise ship and then, as part of a tour package, traveled on a train between points in Alaska. *Id.* at *141. Because travel on the train was "an integral part of a transportation package which originates from other parts of the United States or Canada," NMB found that the railroad was engaged in interstate commerce. *Id.* at 147.

Notwithstanding the fact that the Yemassee-Port Royal line was historically used solely for interstate freight shipments and connects at Yemassee to the interstate rail system, Petitioners argue that the Board lacks jurisdiction in this case because no interstate commerce is involved. The cases cited by Petitioners to support that argument, however, are clearly distinguishable. In *RLTD Railway Corp. v. STB*, 166 F.3d 808 (6th Cir. 1999), the court found that STB lacked jurisdiction because the line at issue was no longer part of the interstate rail system. *Id.* at 814. Part of the line had been completely paved over, such that there was no longer any physical connection between the line and the interstate rail system. *Id.* at 812, 814. Such is not the case here, where BRC's line remains connected to the interstate rail system through its connection to CSX's line at Yemassee and is capable of reinstituting service to handle trains traveling in interstate commerce.³²

Stated simply, BRC's line is part of the interstate rail network, has been historically used for interstate freight transportation, and any future operations on the line will most certainly involve the movement of freight in interstate or foreign commerce. Thus, the Board clearly has jurisdiction to issue a Modified Certificate to BRC.

³² Similarly, in *Napa Valley Wine Train, Inc.*, 7 I.C.C. 2d 954 (July 18, 1991), a case involving a passenger excursion train, the ICC found that it lacked jurisdiction where the evidence did not demonstrate that riders would be moving in interstate commerce and where there was no direct connection between the line and the interstate rail system. *Id.* at 20-21. Interstate travelers would be required to use a bus service with a separate ticket in order to travel between the excursion train and the nearest Amtrak line, and there was no evidence that any significant number of passengers would use the excursion train as part of interstate travel. *Id.* The train's planned operations would be primarily local, intrastate passenger service that was not subject to the ICC's jurisdiction. *Id.* at 26-28. By contrast, unlike the excursion line in *Napa Valley Wine Train, Inc.*, BRC's line will not be used for intrastate passenger service, but rather, when and if operations recommence, it will be used exclusively for interstate freight service. Moreover, in contrast with the line in *Napa Valley Wine Train, Inc.*, BRC's line is physically connected with the interstate rail network, as it has been through its entire existence.

Conclusion

For the reasons set forth above, the South Carolina State Parties respectfully requests the Board to deny Petitioners' Petition and affirm the BRC's Modified Certificate.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Derek F. Dean", is written over a horizontal line.

Derek F. Dean
Law Offices of Simons & Keaveny
147 Wappoo Creek Drive, Suite 604
Charleston, SC 29412
Tel.: 843-762-9132

Warren L. Dean, Jr.
Sean McGowan
Thompson Coburn, LLP
1909 K Street, N.W.
Suite 600
Washington, D.C. 20006
Tel.: 202-585-6900

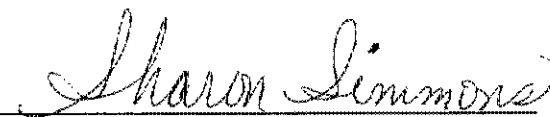
Counsel for Beaufort Railroad Company,
Inc., a subsidiary of the South Carolina
Division of Public Railways

Counsel for the South Carolina State Ports
Authority

Certificate of Service

I hereby certify that on February 6, 2007, I served the foregoing Reply in Opposition to Petition to Reopen and/or for Reconsideration of Decision Served December 28, 2006, on the following individual via UPS overnight mail and facsimile:

Thomas F. McFarland
Thomas F. McFarland, P.C.
208 South LaSalle Street – Suite 1890
Chicago, IL 60604-1112
Tel: 312-236-0204
Fax: 312-201-9695


Sharon Simmons

Attachment A



South Carolina
Department of Transportation

February 5, 2007

Mr. Berbnard S. Groseclose, Jr.
President and CEO
South Carolina Ports Authority
176 Concord Street
Post Office Box 22287
Charleston, SC 29413-2287

Re: SCDOT Rail Corridor Preservation and Revitalization Program
S.C. Code Ann. 57-3-40 (2006, as amended)

Dear Mr. Groseclose:

Pursuant to S.C. Code Ann. 57-3-40, South Carolina Department of Transportation's (SCDOT) Division of Mass Transit is the designated agency of the State principally responsible for preserving railroad rights-of-way for future transportation use. As a part of this responsibility, SCDOT is charged with the implementation of a Rail Corridor Preservation and Revitalization Program. With scarce public finances and rising costs of highway construction and maintenance, preserving and revitalizing existing railroad infrastructure has become an attractive and cost-effective option, especially since the current freight-rail system serves every major city and most counties in the state.

In 2006, SCDOT issued a Request for Proposals (RFP) to identify rail corridors in South Carolina available for possible preservation efforts. The Port Royal Rail Line is one of several lines under consideration by the RFP initiative. The RFP provides for the updating of the rail element to the South Carolina Statewide Multimodal Transportation Plan, the identification of rail corridors available for preservation and, if necessary, acquisition of targeted rail corridors. The consultant is to identify all rail corridors and contact carrier groups to determine the extent of continued rail ownership and the potential disposition of lower-density lines.

SCDOT understands that the South Carolina Ports Authority is in the process of reactivating the Port Royal Rail Line. Reactivation as a rail line is compatible with SCDOT's preservation efforts under South Carolina law. Please advise when the reactivation is final and any future changes to this rail line.

Thank you for your consideration in this regard.

Sincerely,

Glennith C. Johnson, Esquire
Deputy Director of Mass Transit

GCI/

cc: Jim Daniels, Special Assistant
Mark D. Pleasant, Chief of Statewide
Douglas W. Frate, Chief Transit Planner

Attachment B1

Jan-13-2004 10:06am From-PORT OF GEORGETOWN

+843 527 2601

T-086 P.002/004 F-505

LAW OFFICE

THOMAS F. MCFARLAND, P.C.

208 SOUTH LA SALLE STREET - SUITE 1890

CHICAGO, ILLINOIS 60604-1112

TELEPHONE (312) 236-0204

FAX (312) 201-9695

mcfarland@aol.com

THOMAS F. MCFARLAND

January 9, 2004

Mr. Bernard S. Groseclose, Jr.
President & CEO
South Carolina State Ports Authority
176 Concorde Street
Charleston, SC 29403

Re: Port Royal Railroad

Dear Mr. Groseclose:

I represent St. Marys Railroad Company (St. Marys), P.O. Box 520, St. Marys, GA 31558. St. Marys is a Class 3 common carrier by rail subject to the jurisdiction of the United States Department of Transportation, Surface Transportation Board (STB). For the past 60 years, St. Marys has owned and operated an 11-mile rail line that extends between a point of connection with CSX Transportation, Inc. at Kingsland, GA and St. Marys, GA on the Atlantic Coast. In addition, St. Marys operates a 3-mile branch line that extends to the U.S. Naval submarine base at Kings Bay, GA.

It has come to the attention of St. Marys that the State of South Carolina suspended rail service on the Port Royal Railroad (PRYL), effective November 30, 2003. PRYL is a Class 3 common carrier by rail subject to the jurisdiction of the STB. It operates a 26-mile rail line between Yemassee and Port Royal, SC. Articles in the local press indicate that the State will seek STB authority to abandon the Port Royal Railroad, remove and salvage the track materials, and sell the land in the railroad right-of-way for railbanking and recreational trail use. However, as of yet the State has not initiated STB proceedings for abandonment of the railroad, and initiation of such proceedings apparently is not imminent.

St. Marys is interested in acquiring the State's common carrier authority to provide rail service between Yemassee and Port Royal. St. Marys is also interested in acquiring the State's interest in the track materials and right-of-way land between those points. St. Marys would consider a lease of those assets if the State does not want to sell them. St. Marys' acquisition would be for the purpose of providing rail freight and passenger service. St. Marys is confident that it can develop export traffic that would move by rail over the Yemassee-Port Royal rail line through the Port of Port Royal. St. Marys is also prepared to compete with barge transportation to deliver jet fuel by rail to the Marine base near Port Royal. St. Marys' rail freight service would be complemented by rail passenger service in the form of excursion and dinner trains. The strategic location of Yemassee near Interstate 95, the quaintness of Beaufort, and the scenic

Jan-13-2004 10:08am From:PORT OF GEORGETOWN

+843 527 2601

T-088 P.003/004 F-508

THOMAS F. MCFARLAND

Mr. Bernard S. Groseclose, Jr.

January 9, 2004

Page 2

nature of coastal Port Royal combine to make such excursion and dinner train service highly attractive.

When the State files an application or petition with the STB for abandonment of the Yemassee-Port Royal rail line, St. Marys is prepared to file an offer of financial assistance (OFA) to purchase that rail line and operating authority for continuation of rail service. Pursuant to 49 U.S.C. § 10904, the State would be legally required to sell the line and operating authority to St. Marys at a price equal to the net liquidation value (NLV) of the line as agreed by the parties or as determined by the STB in the absence of agreement. Moreover, St. Marys' OFA would take legal precedence over any request for acquisition of the line for railbanking and recreational trail use (see 2 L.C.C.2d at page 608). Your railroad attorney will be able to confirm those legal principles.

There is a legal alternative to the abandonment-OFA procedure for purchase and sale of the Yemassee-Port Royal rail line that would be mutually beneficial to the State and St. Marys. Pursuant to 49 U.S.C. § 10902, the State can sell the line directly to St. Marys without going through the abandonment-OFA process. St. Marys would file a simple notice of exemption at the STB describing the transaction. The exemption authorizing implementation of the transaction would become effective by operation of law seven days after the notice was filed at the STB (see 49 C.F.R. § 1150.42). That procedure would save the State the legal fees and STB filing fees for abandonment of the line, which would be significant. St. Marys would bear the legal fees and STB filing fees for the notice of exemption for purchase and sale. St. Marys would also draft a purchase and sale agreement for review by the State. Here, too, your railroad attorney will be able to verify the accuracy of the foregoing statements.

I respectfully urge that the State respond without delay to this expression of St. Marys' interest in rail line acquisition. Having suspended rail service over the line at the end of November, the State is legally required, within a reasonable time, (1) to institute abandonment proceedings; or (2) to sell the rail line outside the abandonment process; or (3) to restore rail service over the line. Failure to take such action would subject the State to claims for damages for unlawful abandonment and failure to provide rail service (see 5 L.C.C.2d at page 316). Your railroad attorney can verify that legal principle.

St. Marys awaits the State's early response to this expression of interest.

Very truly yours,

Tom McFarland

Thomas F. McFarland
Attorney for St. Marys
Railroad Company

TMcF:Mavpl1/986Urbag1

Attachment B2

THOMPSON COBURN

Thompson Coburn LLP
Attorneys at Law

Suite 600
1909 K Street, N.W.
Washington, D.C. 20006-1167
202-585-6900
FAX 202-585-6969
www.thompsoncoburn.com

March 9, 2004

Warren L. Dean Jr.
direct dial 202-585-6908
direct fax 202-508-1011
wdean@thompsoncoburn.com

VIA FACSIMILE & REGULAR MAIL

Thomas F. McFarland, Esq.
Law Office of Thomas F. McFarland, P.C.
208 South LaSalle Street
Suite 1890
Chicago, IL 60604-1112

Re: Port Royal Railroad

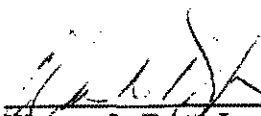
Dear Mr. McFarland:

Your letter to the South Carolina State Ports Authority ("SPA") on behalf of St. Mary's Railroad Company ("St. Mary's") dated January 9, 2004, has been referred to us for response. Please be advised that the SPA is not a common carrier. In addition, the termination of service on the Port Royal Railroad itself is not subject to abandonment authority.

Very truly yours,

Thompson Coburn LLP

By


Warren L. Dean Jr.

Attachment B3

LAW OFFICE
THOMAS F. MCFARLAND, P.C.
208 SOUTH LASALLE STREET - SUITE 1890
CHICAGO, ILLINOIS 60604-1112
TELEPHONE (312) 236-0204
FAX (312) 201-9695
mcfarland@aol.com

THOMAS F. MCFARLAND

March 24, 2004

By fax to 202-585-6969.
w/confirmation by mail

Warren L. Dean, Jr.
Thompson Coburn LLP
Suite 600
1909 K Street, N.W.
Washington, DC 20006-1167

Re: Port Royal Railroad

Dear Mr. Dean:

Receipt is acknowledged of your letter to me dated March 9 about the above railroad. I take it from your letter that the State is not willing to sell or lease the Yemassee-Port Royal rail line to St. Marys Railroad Company, as requested in my letter of January 9 to Mr. Bernard S. Groseclose, Jr. I urge the State to reconsider that position for the reasons explained in this letter.

I disagree with your contentions that the Ports Authority is not a common carrier and that abandonment authority is not required for termination of rail service on the Port Royal Railroad.

The State of South Carolina both owns and operates the rail line between Yemassee and Port Royal, SC, and has provided rail service over that line for 20 years in interstate and foreign commerce. State ownership of the rail line is implemented through the South Carolina State Ports Authority. State operation of the rail line is implemented through the State Department of Commerce, Public Railways Division. The State operation is conducted under the name Port Royal Railroad. Notwithstanding that the rail line is located in a single state, it has historically been used for transportation of kaolin, cement, feldspar and diesel fuel in interstate and foreign commerce to and through the Port of Port Royal.

A non-carrier requires STB approval under 49 U.S.C. § 10901 or an exemption therefrom for operation in interstate or foreign commerce of a rail line that was previously abandoned. *Plymouth Short Line, Ltd. -- Oper. Exempt. -- In Plymouth, IN*, 1985 ICC LEXIS 382 (ICC Finance Docket No. 30654, decided May 28, 1985).

THOMAS F. MCFARLAND

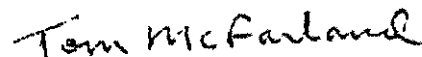
Warren L. Dean, Jr.
March 24, 2004
Page 2

Where, as here, a State has acquired a rail line that was previously abandoned,¹ and has itself operated that line in interstate and foreign commerce, that State will be considered to be a common carrier. *Common Carrier Status of States, State Agencies*, 363 I.C.C. 132, 138 (1980) ("A State will be considered a common carrier if it operates a rail line itself"); *see, also, Southern Pac. Transp. Co. - Aban. - L.A. County*, 9 I.C.C.2d 385, 387-389 (1993), and *Southern Pacific Transp. Co. - Abandonment*, 8 I.C.C.2d 495, 501-505 (1992), and decisions there cited. STB authority or an exemption is required for discontinuance of rail service over such a line, even though the line be located wholly within a single state. *Southern Pacific Transp. Co. - Abandonment, supra*, 8 I.C.C.2d at 503-505; 49 U.S.C. § 10903(d); *Colorado v. United States*, 271 U.S. 153 (1926). Where a common carrier has terminated service without STB authority, it will be liable for damages for failure to provide rail transportation over such line on reasonable request. 49 U.S.C. § 11101(a); *GS Roofing Products Co. v. STB*, 143 F.3d 387 (8th Cir. 1998).

There is a remedy under 49 U.S.C. § 10907 when a rail common carrier terminates rail service and refuses to either abandon or sell the rail line on which service was previously provided. The cited statute is commonly referred to as the feeder line provision. It is a forced sale statute. If a financially responsible person files a feeder line application for acquisition of such a rail line and the STB finds that public convenience and necessity require or permit sale of the line, the STB will require the owner of the line to sell it to such person at a price equal to its constitutional minimum value. 49 U.S.C. §§ 10907(b)(1)(A)(i) and (B). The standards for determining whether public convenience and necessity require or permit such a sale are set out at 49 U.S.C. §§ 10907(c)(1)(A)-(E). Where the owner has terminated rail service over the involved rail line, the constitutional minimum value for such line will likely be determined to be equal to the net liquidation value (salvage value) of the rail line. 49 U.S.C. § 10907(b)(2).

I have been authorized by St. Marys Railroad Company to file a feeder line application for forced sale of the Yemassee-Port Royal rail line unless the State promptly reconsiders and decides to sell or lease that line to St. Marys voluntarily for continued rail operation. Please advise within the next two weeks whether the State will negotiate for sale or lease of the rail line to St. Marys Railroad.

Very truly yours,



Thomas F. McFarland
Attorney for St. Marys
Railroad Company

TMcf:kl:wp8.01986ltrwld1

cc: Mr. Pete Strickland, by fax

¹ Abandonment was authorized in *Seaboard System Railroad, Inc. - Abandonment - in Beaufort County, SC*, ICC Docket No. AB-55 (Sub-No. 110), decision served Aug. 23, 1984.

Attachment B4

THOMPSON COBURN

*Thompson Coburn LLP
Attorneys at Law*

Suite 600
1909 K Street, N.W.
Washington, D.C. 20006-1167
202-585-6900
FAX 202-585-6969
www.thompsoncoburn.com

April 2, 2004

Warren L. Dean Jr.
direct dial 202-585-6908
direct fax 202-508-1011
wdean@thompsoncoburn.com

VIA FACSIMILE & REGULAR MAIL

Thomas F. McFarland, Esq.
Law Office of Thomas F. McFarland, P.C.
208 South LaSalle Street
Suite 1890
Chicago, IL 60604-1112

Re: Port Royal Railroad

Dear Mr. McFarland:

We are in receipt of your letter dated March 24, 2004. On behalf of the St. Mary's Railroad Company ("St. Mary's"), your letter states that you intend to invoke the abandonment authority of the Surface Transportation Board ("STB") in an effort to force the South Carolina State Ports Authority ("SPA") to sell or lease the Yemassee-Port Royal Line (the "Line") to St. Mary's.

Your letter correctly acknowledges that abandonment of the Line was authorized on August 23, 1984. On January 4, 1985, the certificate and decision with respect to the abandonment became effective. Subsequent operations of the Line were conducted pursuant to 49 C.F.R. §§ 1150.22-24. Notice of intent to terminate service over the Line was filed and served, pursuant to 49 C.F.R. § 1150.24, on October 1, 2003, sixty days before the November 30, 2003, termination date. No additional abandonment authority is required.

The arguments made in your letters dated January 9, and March 24, are completely devoid of merit. For these and other reasons, we have to question the foundation for this effort.

Thomas F. McFarland, Esq.
April 2, 2004
Page 2

We have been authorized to advise you that the SPA is prepared to pursue all remedies that may be available to it, including the award of appropriate attorneys' fees and costs, should this unwarranted effort to interfere with the business interests of the SPA continue.

Very truly yours,

Thompson Coburn LLP

By 
Warren L. Dean Jr.

cc: David M. Konschnik, Director
Office of Proceedings
Surface Transportation Board
(with attachment: Letter dated March 24, 2004, from Thomas F. McFarland)

Attachment B5

LAW OFFICE
THOMAS F. MCFARLAND, P.C.
208 SOUTH LASALLE STREET - SUITE 1890
CHICAGO, ILLINOIS 60604-1112
TELEPHONE (312) 236-0204
FAX (312) 201-9695
mcfarland@aol.com

THOMAS F. MCFARLAND

April 5, 2004

By fax to 202-585-6969

Warren L. Dean, Jr.
Thompson Coburn LLP
Suite 600
1909 K Street, N.W.
Washington, DC 20006-1167

Re: Port Royal Railroad

Dear Mr. Dean:

Receipt is acknowledged of your letter to me of April 2 regarding the above subject.

Based on the information contained in the second paragraph on page 1 of your letter, which I have confirmed to be true, I now agree that the Yemassee-Port Royal rail line is not subject to STB jurisdiction. It would have been helpful if you have furnished that information at an earlier time. In any event, I hereby withdraw the offer and proposed course of action stated in my prior letter to you.

Nevertheless, I urge the State to voluntarily sell the rail line to St. Marys Railroad or to enter into an agreement for St. Marys Railroad to operate the line. This rail line has functioned for a hundred years as a lifeline of commerce for the port of Port Royal. It should be allowed to continue to do so as long as there is an entity willing to operate the rail line.

Please advise.

Very truly yours,

Tom F. McFarland

Thomas F. McFarland
Attorney for St. Marys
Railroad Company

TMcf:lr:wp8.01986/ltrwld2

cc: Mr. David M. Konschnik
Mr. Pete Strickland

Attachment B6

51-0104

LAW OFFICE
THOMAS F. MCFARLAND, PC.
208 SOUTH LASALLE STREET - SUITE 1890
CHICAGO, ILLINOIS 60604-1112
TELEPHONE (312) 236-0204
FAX (312) 201-9695
mcfarland@aol.com

THOMAS F. MCFARLAND

July 26, 2004

By UPS overnight mail

W. Barnwell Vaughn, Esq.
Young Clement Rivers, LLP
28 Broad Street
Charleston, SC 29401

Re: Port Royal Railroad

Dear Mr. Vaughn:

This is directed to you in your capacity as attorney for the South Carolina State Ports Authority (Ports Authority). In 1985, the Ports Authority acquired from Seaboard System Railroad, Inc. (Seaboard) whatever interest Seaboard had in a railroad line approximately 25 miles in length between Yemassee and Port Royal in Beaufort County, SC. The Ports Authority leased that interest to the South Carolina Public Railway's Commission, which operated the line through its subsidiary, Tangent Transportation Company, as the Port Royal Railroad. See Interstate Commerce Commission Finance Docket No. 30655, *Tangent Transportation Company*, Modified Rail Certificate issued June 13, 1985. On October 1, 2003, Tangent sent a notice to the Surface Transportation Board, successor of the Interstate Commerce Commission, stating its intent to terminate rail service over the Port Royal Railroad, effective November 30, 2003. The Ports Authority stated publicly that the Port Royal Railroad would not be used for the provision of rail service after November 30, 2003. No railroad operations have been conducted over the Port Royal Railroad after November 30, 2003.

I have been retained by a group of landowners who are located along the Port Royal Railroad, and who refer to themselves as the Port Royal Railroad Preservation Association. Based on my initial legal research, I have reached the following conclusions:

- (1) Seaboard had an easement for railroad purposes over the land in the right-of-way of the Port Royal Railroad, not fee ownership of that land. The Ports Authority acquired that easement interest from Seaboard;
- (2) that easement for railroad purposes was extinguished by operation of law on November 30, 2003, when Tangent formally terminated rail service over the Port Royal Railroad, and when the Ports Authority acknowledged publicly that rail

THOMAS F MCFARLAND

W. Barnwell Vaughn, Esq.
July 26, 2004
Page 2

service over the Port Royal Railroad was discontinued and abandoned as of that date;

- (3) upon extinguishment of the easement for railroad purposes, the fee owners of the land in the right-of-way of the Port Royal Railroad were freed of the burden of that easement; and
- (4) the Ports Authority does not currently have either a fee ownership interest nor a railroad easement interest that it can lawfully convey or transfer to a third party for any purpose.

Notwithstanding the foregoing, I have been advised that the Ports Authority has stated that it intends to convey all or part of its interest in the Port Royal Railroad to Beaufort County for use as a recreational trail and/or for other purposes. As stated above, my research indicates that the Ports Authority has neither an ownership interest nor an easement interest in the land in the right-of-way of the Port Royal Railroad that it can lawfully convey to Beaufort County.

Before I take any legal action in behalf of the Preservation Association, I request that you provide me with an explanation of the basis for the Ports Authority's apparent belief that it has a legal interest in the right-of-way land that it can lawfully convey to Beaufort County. If you can provide a satisfactory explanation and documentation for such a legal interest, the Preservation Association will take such interest into account in determining its course of action in this matter.

Very truly yours,

Tom McFarland

Thomas F. McFarland
*Attorney for Port Royal Railroad
Preservation Association*

Attachment B7

-----Original Message-----

From: steveallen@allenrailroad.com [<mailto:steveallen@allenrailroad.com>]

Sent: Sunday, September 12, 2004 2:44 PM

To: Groseclose, Bernard

Subject: Port Royal Railroad

09/12/04

Mr. Groseclose,

I believe, I had spoke with you several months ago about this issue, but not recently. I was told by David Schronce some time ago that SCPA would not talk to anyone about the railroad while they were talking to Beaufort County. Dick Stewart confirmed this to me. Our Attorney, Tom McFarland had written to who we though was your Attorney, Barnwell Vaughn, July 26, 2004 and has not received a response.

I am sorry if I had left the impression that I tried to call you personally, I didn't try calling you and never told anyone I did. I thought, if anyone knew for a fact what was going on with the Port Royal Railroad, Phil Lawrence would. I did for a fact try to call him at least ten times last week and also emailed him. Still no response.

We are looking for an answer as to what is SCPA's plan for the Port Royal Railroad, that's all. I have been told through a letter (to Tom Logan) from Weston Newton, the chairman of Beaufort County Council just 30 days ago (August 11, 2004) that they were not negotiating with the Ports Authority either publicly or in executive session. Now I am told that it is almost a done deal.

I know that the track itself belongs to SCRC and that SCPA bought the right to operate a railroad there in 1985. I know for a fact that a large percentage of the right of way was obtained through easement and very little land was ever transferred. It took us less than a few days to find SCPA ownership. Beyond that what does SCPA plan on selling to Beaufort County? Please just answer this one question. If you need to refer to your Attorney that is what we have been trying to do all along, refer to SCPA's Attorney. I believe SPCA's Attorney would be considered a SCPA official.

Respectively

Steve Allen

SteveAllen@AllenRailroad.Com

AllenRailroad.Com

P.O. Box 191 Stanton, KY 40380

Fax/Phone: 606-663-5463 E-Mail: info@AllenRailroad.Com

31 Years serving the Railroad Industry 1973-2004

The contents of this e-mail are confidential to the ordinary user of the e-mail address to which it was addressed and may also be privileged. If you are not the addressee of this e-mail you should not copy, forward, disclose or otherwise use it or any part of it in any form whatsoever. If you have received this e-mail in error please notify us by telephone or e-mail the sender by replying to this message, and then delete this e-mail and other copies of it from your computer system.

Thank you.

We reserve the right to monitor all e-mail communications through our network.

Attachment B8

-----Original Message-----

From: steveallen@allenrailroad.com [mailto:steveallen@allenrailroad.com]

Sent: Thursday, September 16, 2004 1:32 PM

To: slade.gleaton@tpl.org; svonharten@bcgov.net

Cc: Groseclose, Bernard

Subject: 091604 Port Royal Railroad

09/16/04

To all parties concerned,

The only way you can keep the railroad right-of-way in tact is to use "Rail Banking". Without the protection of "Rail Banking" as soon as the track is removed, property owners along the railroad right-of-way can exercise the reversionary clauses of the railroad deeds to extinguish the railroad easements and regain ownership and full use of their property.

"Rail Banking" keeps the right-of-way in tact for the purpose of a "Rails to Trails". However, "Rail Banking" can only go into effect when the railroad is under jurisdiction of the Surface Transportation Board (STB). In order for you to apply for "Rail Banking" it must be applied for within 30 days after the railroad had been abandoned and then the STB may grant a 180 day extension for the trail operator to raise funds to open the trail.

The Port Royal Railroad was abandoned in 1985 and was assigned the ICC number of AB 55 Sub 110. I checked with Ellen Hanson (202-565-1558) General Counsel of the STB yesterday to make sure that the CSX abandonment had been consummated in 1985 and whether or not the Port Royal Railroad was still under jurisdiction of the STB. I got a call last night and again this morning to confirm, from STB Public Services Attorney, Nancy Beiter (202-565-1592) and was told that for absolutely sure the Port Royal Railroad was abandoned in 1985 and that the railroad no longer comes under the jurisdiction of the STB. I specifically asked Mrs. Beiter if STB would protect the Port Royal Railroad under the "Rail Banking", I was told absolutely no.

I wanted you to know that if you recommend this purchase to Beaufort County that they will no doubt lose all their money by purchasing the railroad right-of-way. We also understand from the Rural and Critical Land Board that none of the \$40M referendum passed in 2000 for this purpose can be used to purchase the right-of-way if it is to accommodate any sort of road or highway connector. This was not and is not the intended use of this money.

There are hundreds of property owners waiting for the tracks to start coming up so as to regain the the full ownership of their property. Also there is a very powerful group called The National Association of Reversionary Property Owners (NARPO) just waiting for the Port Royal Railroad tracks to start coming up and this group will intervene to see that it does not become a trail.

This information could save you a lot of time and money underwriting something that can not happen. Property owners along the railroad right-of-ways are very skeptical about having trails running through their property.

Respectfully

Steve Allen

SteveAllen@AllenRailroad.Com

cc: Trust for Public Land - Mr. Gleaton

Land Management Commity - Mr. Von Harten

S.C. State Ports Authority - Mr. Groseclose

AllenRailroad.Com

P.O. Box 181 Stanton, KY 40380
Fax/Phone: 606-663-6463 E-Mail: info@AllenRailroad.Com
31 Years serving the Railroad Industry 1973-2004

The contents of this e-mail are confidential to the ordinary user of the e-mail address to which it was addressed and may also be privileged. If you are not the addressee of this e-mail you should not copy, forward, disclose or otherwise use it or any part of it in any form whatsoever. If you have received this e-mail in error please notify us by telephone or e-mail the sender by replying to this message, and then delete this e-mail and other copies of it from your computer system.

Thank you.

We reserve the right to monitor all e-mail communications through our network.

Attachment B9

-----Original Message-----

From: steveallen@allenrailroad.com [mailto:steveallen@allenrailroad.com]

Sent: Friday, September 24, 2004 11:59 AM

To: Groseclose, Bernard

Subject: Port Royal Railroad

09/24/04

Mr. Groseclose,

After more than 30 years in the railroad business providing railroad consulting services, I can offer more than just criticism and obstructions. I can offer a politically and finically expedient solution to the present situation the Port Authority is in pertaining to the Port Royal Railroad. I would like to offer my services to help bring this to a very quick end.

I have come across this same situation a number of times. There is certain procedures that can be implemented now that will make most everyone happy. Please let me know if you would be open to hearing my suggestions.

Respectfully

Steve Allen

SteveAllen@AllenRailroad.Com

AllenRailroad.Com

P.O. Box 191 Stanton, KY 40380

Fax/Phone: 606-863-5463 E-Mail: info@AllenRailroad.Com

31 Years serving the Railroad Industry 1973-2004

The contents of this e-mail are confidential to the ordinary user of the e-mail address to which it was addressed and may also be privileged. If you are not the addressee of this e-mail you should not copy, forward, disclose or otherwise use it or any part of it in any form whatsoever. If you have received this e-mail in error please notify us by telephone or e-mail the sender by replying to this message, and then delete this e-mail and other copies of it from your computer system.

Thank you.

We reserve the right to monitor all e-mail communications through our network.

Attachment B10

LAW OFFICE
THOMAS F MCFARLAND, PC.
208 SOUTH LASALLE STREET - SUITE 1890
CHICAGO, ILLINOIS 60604-1112
TELEPHONE (312) 236-0204
FAX (312) 201-9695
mcfarland@aol.com

THOMAS F MCFARLAND

October 5, 2004

By fax to 202-585-6969
w/confirmation by mail

Warren L. Dean, Jr.
Thompson Coburn LLP
1909 K Street, N.W.
Suite 600
Washington, DC 20006-1167

Re: Port Royal Railroad

Dear Mr. Dean:

This is in response to your letter to me regarding the above subject.

I offer the following in response to the questions posed on page 2 of your letter. It is my understanding that Mr. Steve Allen is acting as a transportation consultant for the Port Royal Railroad Preservation Association, for whom I am acting as transportation attorney. I have no knowledge of the relationship between Mr. Allen and Allen Railroad. As stated, I am acting as a transportation attorney for the Preservation Association.

Although Mr. Allen and I are both acting in behalf of the Preservation Association, Mr. Allen reports to the Preservation Association, not to me. Consequently, I have no knowledge of why Mr. Allen offered his services to the Ports Authority. It may be that Mr. Allen was continuing to attempt to determine the position of the Ports Authority on the subject of my letter of July 26 to an attorney for the Ports Authority. The Ports Authority has not responded to that letter.

Very truly yours,

Tom McFarland

Thomas F. McFarland
Attorney for Port Royal Railroad
Preservation Association

TMcf:kdrwp8.001027\lirwld1

cc: Mr. Steve Allen, by e-mail
Mr. Tom Logan, by fax to 843-524-0142

Attachment B1 1

From: steveallen@allenrailroad.com [mailto:steveallen@allenrailroad.com]

Sent: Tuesday, October 05, 2004 11:22 AM

To: Deal, David R.

Subject: Port Royal Railroad

10/05/04

DDEAL@ThompsonCoburn.com

Mr. Dean,

I received a copy of your letter to Tom McFarland. I can explain my relationship with the different parties you have asked about. 1) Mr. McFarland and I have a very minimal relationship. I have spoke with him on just a few occasions and not at anytime in the last month. 2) Mr. McFarland has only advised Allen Railroad on one matter in the past and that has been several months ago, but no more. 3) I work with the Port Royal Preservation Association but have not met with them or discussed much with them in the last six weeks. Mr. McFarland advises PRRPA on a as needed basis. To the best of my knowledge Mr. McFarland has provided no services to the PRRPA since his letter in July. Mr. McFarland has very little involvement, except to write a letter in July. I didn't know Mr. McFarland contacted you in the past about this railroad and he is certainly not the driving force behind this now.

Yes, I did offer to help to SCPA figure out a solution but only as a consultant. I have been involved in matters such as these for many years. I have a contract with other consultants such as Stone Consulting in Warren PA. the same company that was hired as a consultant by the city of Port Royal several years ago to study the same railroad. I get advise from many corners. On this project I consulted with Trust For Public Lands in Sarasota Florida to find out their procedures in acquiring a railroad right of way for a trail. I got un-solicited advise from a Beaufort area "Rail to Trails" leader about "Rail Banking". I was advised by Dick Welsh from The National Association of Reversionary Property owners. As a consultant my advise comes from everywhere, but the only attorneys involved is the ones at the Surface Transportation Board. I gave you the STB phone numbers to confirm their advise to me yourself.

You sent my letters to Mr. McFarland as if there was some kind of conspiracy going on between he and I. I assure you are very wrong with this. You didn't send any of the letters I got from Mr. Groseclose although they were very few and short. Particularly a letter where Mr. Groseclose told me Trust for Pubic Lands was handling the buy of the railroad right-of-way and that I was not to talk to his attorney but to send everything I had through him. You suggest I am offering "regulatory advise". As a consultant, I collect information and decimate it, that's all. What people do with my consulting information is totally up to them.

You are attempting to change the focus of the issue here through intimidation. We have been asking a few very simple questions. You are an notable expert in the field, transportation law. Would you please answer as to what does the SCPA have that they can sell to Beaufort County? Can this railroad right-of-way be "Rail Banked" for a trail? And if so, how does it become "Rail Banked" if a railroad already exists there and there is interest there from a railroad operator to reactivate it? Even if I or Mr. McFarland weren't involved, others would know the situation of this railroad right-of-way eventually.

Looking forward to your response.

Respectfully

Steve Allen

SteveAllen@AllenRailroad.Com

AllenRailroad.Com

P.O. Box 191 Stanton, KY 40380

Fax/Phone: 606-863-5463 E-Mail: info@AllenRailroad.Com

31 Years serving the Railroad Industry 1973-2004

Attachment B12

>>> <steveallen@allenrailroad.com> 7/22/2005 1:55:20 PM >>>
SteveAllen Stationery07/20/05
Ms. Crawford,

Anyone telling you that Beaufort County can buy the Port Royal Railroad for their intended purpose, is either flat out lying to you or is being terribly mislead. It doesn't take an attorney to know that selling something that belongs to another is a crime. This is precisely what South Carolina State Port Authority Board (SCSPA) is attempting to do. SCSPA is knowingly trying to fool the public and apparently government officials into thinking that SCSPA actually owns something to sell when in fact the railroad track materials belongs to South Carolina Railway Commission, a subsidiary of the South Carolina Commerce Department. It is a undisputed fact that the underlying railroad right-of-way, for the most part, actually belongs to the adjacent property owners. In other words except for a very few parcels of land here and there SCSPA has nothing to sell to Beaufort County unless Beaufort County intends to run the railroad as a railroad. SCSPA can however, sell the railroad as a railroad only providing of course the railroad remains a railroad. Its common knowledge that Beaufort County intents on buying the railroad to have the tracks removed and to build a trail on the right-of-way. You have made it clear to me that Governor Sanford supports Beaufort County in this action.

The federal governments Surface Transportation Board (STB) told me that the Port Royal Railroad has "passed through the STB" so the STB has no intent of "Rail Banking" the Port Royal Railroad. While railroads are federally controlled and the STB has no claim to the Port Royal Railroad, the fifth amendment of the bill of rights of the US Constitution clearly said that "one shall not be deprived of live, liberty or property, without due process of law". What SCSPA is doing with the support of Beaufort County and the apparent support of Governor Sanford is contrary to the fifth amendment.

Had SCSPA had good title to the Port Royal Railroad the Railroad would have been sold to Beaufort County a year ago. SCSPA has very bad title to the railroad right-of-way property so SCSPA is taking a lot of time trying to figure out a way to steal the railroad right-of-way land from the adjacent property owners, so to sell it to Beaufort County. During the early 1990's I was involved in an identical situation between CSX Railroad and some five Kentucky Counties that wanted to buy right-of-way for the same purpose.

It

took the Kentucky Attorney General to step in and force CSX Reality out of Kentucky forever. CSX Reality is much larger than SCSPA. Since that time the "Rails to Trail Act" was passed by the federal government. The "Rails to Trail Act" was tested by the US Supreme Court to see if it violated the Fifth Amendment. The US Congress ordered STB to administer the "Rails to Trail Act" and certain rules such as "Rail Banking" was put in place to get around the fifth amendment. Because SCSPA did not follow the STB rules when the railroad was first bought, 20 years ago, and again when the SCSPA stopped operation over the railroad in the fall of 2003, SCSPA is now attempting to violate the "Rails to Trail Act" as well as the Fifth Amendment to the Constitution.

In our last phone conversation you told me that this is such a small issue that it really doesn't matter to SCSPA and the Governor. As you can see, this can get very much out of control and become a very large issue for everyone involved. The constitutional rights of not one citizen of Beaufort County or the whole state of South Carolina should be brushed aside in such a cavalier way.

SCSPA uses South Carolina tax payers property and funds but is elected by no one and answers to no one. Like Santee Cooper, SCSPA is a out of control non government, government entity. You told me that SCSPA was legislative driven. We all know that isn't presently right. When 70 legislators vote in favor of the Jasper County issues, SCSPA came out against the legislators nearly before the vote was over. You also told me that Governor Sanford has no control over the SCSPA. This might be true however, Governor Sanford is sworn to follow the US Constitution.

This is precisely why the group I represent is insisting that SCSPA seek help from a Professional Railroad Consultant during the SCSPA August 16, 2005 board meeting. I will be looking forward to your response.

Sincerely,

Steve Allen

SteveAllen@AllenRailroad.Com

AllenRailroad.Com

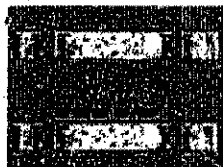
P.O. Box 191 Stanton, KY 40380

Fax/Phone: 606-663-5463

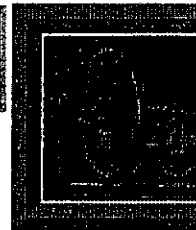
E-Mail: info@AllenRailroad.Com

32 Years serving the Railroad Industry 1973-2005

Attachment C



Home Training
Jobs Extra Board



Special Notice

January 12, 2007

Is the last day to protect your property from the South Carolina Port Authority permanent control, costing you thousand of dollars in property value. You must act now!

Law Office
THOMAS E. McFARLAND, P.C.
208 South LaSalle Street - Suite 1890
Chicago, Illinois 60604-1112
Telephone (312) 296-0204
Fax (312) 201-9695
mcfarlandpc.com

January 8, 2007

Dear Steve:

On December 28, 2006, the Surface Transportation Board (STB) issued a notice to the public of the filing by Beaufort Railroad Company of a Notice of Modified Certificate of Public Convenience and Necessity in regard to the former Port Royal Railroad (PRR). Beaufort Railroad Company was created as a subsidiary of the State of South Carolina Railway Commission.

While a Modified Certificate of Public Convenience and Necessity authorizes its holder to provide rail freight service over rail lines, you and I have reason to believe that the state, through Beaufort Railroad Company, does not intend to provide rail freight or passenger service over the former PRR. That is evident from the state's consistent negative responses to your request for cooperation in re-establishing rail service over the former PRR. It also shown by the statement on Page 2 of the attached STB notice that Beaufort Railroad Company does expect to make any interchanges or interline connections with any connecting railroads.

Instead, it is very likely that the state intends to terminate the modified certificate after holding it for a short time, after which it would remove the tracks and transfer the right-of-way for use as a

recreational trail. There have been two recent cases in which that occurred. In neither case was there opposition to issuance of the modified certificate. The STB does not have jurisdiction to issue a modified certificate if a prior abandonment of a rail line has been consummated, that railroad easement has been. Upon consummation of abandonment, ownership of the land in the railroad right-of-way land is determined under State laws. Under South Carolina law, the state had a railroad easement to operate the PRR, not fee title. If abandonment of the PRR has been extinguished under South Carolina laws, so that the fee ownership interest would be in the adjacent landowners, no longer subject to the state's railroad easement. If the STB does not have jurisdiction to issue a modified certificate, neither does it have jurisdiction to issue a trail use certificate upon termination of a modified certificate.

A strong argument can be made that abandonment of the PRR was consummated in October 2003 when Tangent Transportation Company terminated a prior modified certificate of public convenience and necessity to operate that rail line. The State made statements at the time that rail service would not be restored over the PRR. The failure of the State to attempt to re-establish rail service over the line for more than 3 years after the modified certificate was terminated also supports a determination that abandonment was consummated, especially in view of your efforts during that period to lease the PRR for rail operation.

Unless the STB's issuance of a modified certificate to Beaufort Railroad Company is overturned, it is my opinion that conversion of the PRR right-of-way into recreational trail would not be able to be defeated. If opponents of trail use were to wait until termination of the modified certificate and issuance of a trail use certificate to object to trail use, supporters of trail use would be able to make a compelling argument that opponents failed to attack the STB's re-assertion of jurisdiction over the PRR by virtue of issuance of the modified certificate despite having legal notice of the STB's action in that respect. And if the STB had jurisdiction to issue a modified certificate, it also has jurisdiction to issue a trail use certificate.

The STB's issuance of the modified certificate can be attacked by filing of a petition for reconsideration at the STB by January 17. If I am to be called upon to prepare and file a petition for reconsideration, I will need several days to prepare it for filing. In the circumstances, I would have to know by the end of the work week (Friday, January 12) whether I am to prepare a petition for reconsideration.

The legal fee for preparing and filing the petition for reconsideration would be several thousand dollars. There could be additional legal fees thereafter, depending on whether additional legal filings would be required. If the STB were to deny the petition for reconsideration, an appeal could be filed in the US Court of Appeals for the Fourth Circuit in Richmond, VA or for the DC Circuit in Washington, DC.

While I believe that there is a reasonable chance to defeat recreational trail use of the PRR, if action is taken now, the process would be expensive, and the result would be uncertain. However, if nothing is done now, I see little chance of defeating trail use in the future.

Sincerely,

Thomas F. McFarland

The below deceptive news article, Beaufort Gazette Published Sat, Dec 9, 2006 claims that "an agreement cemented" when in fact the public has 20-days to protest and 60-days to find legal solutions.

A decision was posted December 26, 2006 by the Surface transportation Board started the clock. The Port Authority will be using this news article as the required public "notice to the Public" to form a "rails to trails" project.

Steve Allen

SteveAllen@AllenRailroad.Com

Published Sat, Dec 9, 2006

By SCOTT DANCE
The Beaufort Gazette

Railway revamp takes its first step

Brush has overgrown much of the dormant railway between Port Royal and Yemassee since 2003, but an agreement cemented last week to resume operation..... Saturday December 9 2006

Welcome

Adjacent Property Owners (APO) of the Port Royal Railroad and other interested parties.

Allen Railroad Consulting (ARC) has been in the railroad business going on 35 years. ARC has provided railroad consulting services to property owners (AKA Adjacent Property Owners APOs) that own land attached to abandoned railroad right-of-way's for more then 25 years all round the country. An abandoned railroad right-of-way attached to your property effects your land value tremendously. For independent information on how abandoned railroad right -of-way effects your property see, National Association of Reversionary Property Owners

Tom McFarland has been a railroad regulator attorney going on 40 years and is well respected in the industry. Tom McFarland's filings are often found on the Surface Transportation Board web site, the Federal Government regulator agency that must approved railroad transitions. (See www.stb.dot.gov)

Like all businesses, Allen Railroad Consulting does charge a fee for services rendered. To be fair we never charge more than the fair market value of the over the fence value of the railroad right-of-way land. The minimum "Consulting Agreement" is \$250.00 for a .08 of an acre of railroad right-of-way and up from there.

If you are an Adjacent Property Owner to the old Port Royal Railroad in Beaufort County, South Carolina and have not yet registered with ARC, please fill in the form below to allow Allen Railroad Consulting to protect your property rights as they are related to the Port Royal Railroad Right of Way attached to your property.

DATE:
 LAST NAME: FIRST NAME:
 STREET ADDRESS:
 CITY: STATE: ZIP CODE:
 TELEPHONE: MOBILE:
 OTHER PHONE: E-MAIL ADDRESS:
 E-mail address required for processing



To find information on your property as it relates to the Port Royal Railroad go to the
Beaufort County Real Property Lookup

The South Carolina Port Authority has powerful people behind them to help them take the railroad right-of-way or potential revenue, that might very well belong to you.

ARC spreads out the cost of protecting APO's. For information on how much it will cost you to protect your rights please contact ARC Portroyalrailroad@AllenRailroad.Com

Contract with ARC to protect your rights Printable Railroad "Consulting Agreement"

News From the legal Front

January 5, 2007

" The STB today issued a decision extending a trail use negotiating period on a right-of-way for which a modified certificate of public convenience and necessity had been terminated. It is very likely that the State of South Carolina intends to do the same in regard to the former Port Royal Railroad...namely, terminate the modified certificate and substitute a trail use certificate. In my opinion, there is a reasonably good chance to defeat that action on the ground that prior consummation of abandonment of the Port Royal Railroad deprived the STB of jurisdiction to grant either a new modified certificate or ultimately a trail use certificate. However, time is a factor. There is a 20-day period for filing a petition for reconsideration of the STB decision granting a modified certificate to Beaufort Railway. That 20-

day period expires on **January 17**.

Cost is also a factor. It would cost several thousand dollars to prepare and file a petition for reconsideration at the STB. Like you, I have done considerable work on this subject without having been paid. If the landowners don't take action now, they may well be met with an argument down the road that their failure to have attacked the modified certificate on a timely basis precludes them from challenging trail use of the right-of-way after termination of the modified certificate."

Tom McFarland

December 28, 2006

The filing by the State--Beaufort Railroad Company of its modified certificate of public convenience and necessity was noticed to the public today by the STB. The notice is available on the STB website. The notice triggers a 20-day period for the filing of petitions for reconsideration (essentially a protest) against the modified certificate on the ground that the rail line does not qualify for a modified certificate of public convenience and necessity because the line was fully abandoned in 2003 when Tangent Transportation terminated the prior modified certificate. The notice also triggers a 60-day period during which judicial review of issuance of the modified certificate can be sought in the US Court of Appeals in Washington, DC or in the 4th Circuit in Richmond, VA. If the issuance of the modified certificate is not challenged now, it would be difficult to challenge it at a later time because of the STB's statement in the notice that the rail line qualifies for a modified certificate. A challenge filed beyond the above deadlines would be seen as a collateral attack against that statement on an untimely basis. Do you have contacts locally that would want to challenge the modified certificate? If so, a petition for reconsideration would have to be begun soon in order to be ready for filing 20 days hence. One or more adjacent landowners would have standing to challenge issuance of the modified certificate because it has the effect of depriving them of fee simple title to the right-of-way land that reverted to them in 2003 when the rail line was fully abandoned. Preparation of a petition for reconsideration would involve a legal fee estimated at several thousand dollars, plus a filing fees payable to the STB.

Tom McFarland

December 19, 2006

Hi, Steve. A notice for modified certificate of PC+N is effective automatically under STB rules and remains in effect unless the STB terminates it. Anyone can file with the STB a petition to vacate the Modified Certificate on the ground that the STB does not have jurisdiction over the rail line because a prior abandonment of that line was consummated, triggering the extinguishment of railroad easement to provide rail service over the line. Such a petition is the equivalent of a protest of the Modified Certificate. In my opinion, that's what happened here: abandonment of the Port Royal Railroad was consummated, in my opinion, when the holder of the prior Modified Certificate formally terminated the certificate, and years passed without there being an effort to restore rail service or to sell the line for continued rail service. On the contrary, the owner of the line ignored your own efforts to lease the line for continued rail service. That being the case, I believe that a landowner or landowner group could successfully petition the STB to terminate the current Modified Certificate on the ground that a prior abandonment of the line has been consummated, depriving the STB of jurisdiction over the rail line.

Tom McFarland

December 14, 2006

In my opinion, SCSPA will not be able to successfully railbank the Port Royal Railroad and provide for interim recreational trail use of the right-of-way of that rail line under the National Trails System Act. In order for there to be legitimate railbanking and interim trail use under that Act, the rail line must have been approved for abandonment by the STB, but not "fully abandoned". Full abandonment occurs when an approved abandonment is consummated. Whether an abandonment is consummated is determined under federal law. Under federal law, an abandonment is consummated when the rail carrier who operates over the rail line evidences an intent to abandon the line on a permanent basis. In my opinion, that intent was unmistakably evidenced several years ago when the modified certificate of public convenience and necessity that authorized rail operations over the line was unconditionally terminated. In my opinion, such a consummated abandonment cannot be legitimately reversed by the issuance of a new modified certificate of public convenience and necessity more than three years later. If a rail line has been fully abandoned under federal law, ownership of the right-of-way land is then determined under state law. In my opinion, under South Carolina law, SCSPA's easement to provide rail service over that land has been legally extinguished, and the adjoining landowners now own the right-of-way land free and clear of the SCSPA rail easement. That being the case, it is my opinion that any such landowner or all of them could bring a successful quiet title action in a Beaufort County, South Carolina Court.

Tom McFarland

The South Carolina Port Authority has powerful people behind them to help them take the railroad right-of-way or potential revenue, that might very well belong to you.

ARC spreads out the cost of protecting APO's. For information on how much it will cost you to protect your rights please contact [ARC Portroyalrailroad@AllenRailroad.Com](mailto:ARC.Portroyalrailroad@AllenRailroad.Com)

Contract with ARC to protect your rights Printable Railroad "Consulting Agreement"

News Bogs

December 11, 2006

Nancy's analysis is legally correct...Tom

-----Original Message-----

From: steveallen@allenrailroad.com

To: Mcfarland@aol.com

Sent: Mon, 11 Dec 2006 7:51 AM

Subject: FW: 091704 Port Royal Railroad

-----Original Message-----

From: nancy.beiter@stb.dot.gov [mailto:nancy.beiter@stb.dot.gov]
Sent: Friday, September 17, 2004 11:02 AM
To: steveallen@allenrailroad.com
Subject: Re: 091704 Port Royal Railroad

Dear Mr. Allen

I can't help you with your SCPA issue. I have no idea how a court would view that. The line has passed out of our jurisdiction at the time of the abandonment so we no longer have any interest in it. You might need authority from us if you were to start a passenger/freight service that hooked up with the interstate system, but not if you only ran on the 26-mile track and none of the freight moved interstate.

In the event that you do hook up to the interstate system, you would have to get authority from us, but I can't tell you at this stage how to apply since I don't have enough details. If you need to know more, please call me when you are at the stage where you think you might need authority.

Sincerely yours,

Nancy R. Beiter
Staff Attorney
Office of Congressional and Public Services
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423
phone: 202 565 1591
fax: 202 565 9016

<steveallen@allenrailroad.com>
09/17/2004 10:47 AM
To <nbeiter@stb.dot.gov>
Subject 091704 Port Royal
Railroad

09/17/04
Nancy Beiter

Ms. Beiter;

I would like to thank you for your help. I would like to trouble you for a little more information, if you would please.

The Port Royal Railroad was abandoned in 1985 by CSX and then sold to South Carolina Ports Authority (SCPA). SCPA operated the railroad as a local railroad so they never bothered to go to the ICC for common carrier statues, this is why we understand that you informed us that the SCPA is no longer under the jurisdiction of the STB. Over the years the SCPA sold all the track to another South Carolina government entity, the South Carolina Railway Commission (SCRC) that runs all switching for the SCPA.

The group of well financed local business men I am working for, wants to buy or at minimum lease the railroad track from SCRC. SCRC has shown a lot

of interest in working with my group. Our group wants to have the new 26 mile railroad licensed as a Freight/Passenger railroad with the STB if that is required.

Also since SCPA is not under the jurisdiction of the STB and does not own either the track or the land and had stopped using the railroad service nearly one year ago, would you know what if any rights SCPA has control over as far as the Port Royal Railroad is concerned? Despite the fact SCPA has no actual ownership and if the tracks were removed the right-of-way will all revert to the property owners, SCPA is suggesting that they should be compensated for the land they don't own. Is this something the STB would mediate should our group acquire the track from SCRC and become a licensed railroad by STB?

Again, thank you for your time and consideration in this matter.

Respectfully

Steve Allen

SteveAllen@AllenRailroad.Com

The South Carolina Port Authority has powerful people behind them to help them take the railroad right-of-way or potential revenue, that might very well belong to you.

ARC spreads out the cost of protecting APO's. For information on how much it will cost you to protect your rights please contact ARC Portroyalrailroad@AllenRailroad.Com

Contract with ARC to protect your rights Printable Railroad "Consulting Agreement"

Railway revamp takes its first step

Brush has overgrown much of the dormant railway between Port Royal and Yemassee since 2003, but an agreement cemented last week to resume operation..... Saturday December 9 2006

The above deceptive news article claims that "an agreement cemented" when in fact the public has 20-days to protest and 60-days to find legal solutions. This decision was posted December 26, 2006 starting the clock. The Port Authority the miss leading article as the required public "notice to the Public" to form a "rails to trails" project.

Steve Allen

December 8, 2006

Sounds like the Ports Authority is still making decisions about the railroad...not a good thing for us...Tom

-----Original Message-----

From: steveallen@allenrailroad.com
 To: Mcfarland@aol.com
 Sent: Fri, 8 Dec 2006 12:27 PM
 Subject: FW: 120806 RR Beaufort

12/08/06

Tom,

I talked to both Jim fisher and Mark Pleasant. They had a meeting with the Port Authority a few days before the filing, but were not made aware of the filing. In the email below it would appear the Port Authority is still pulling the strings ...what do you think?

Steve

-----Original Message-----

From: Dan Green [mailto:Dan_Green@scrailways.com]
 Sent: Friday, December 08, 2006 1:17 PM
 To: steveallen@allenrailroad.com
 Subject: RE: 120806 RR Beaufort

I will forward your note to the SCSPA.

From: steveallen@allenrailroad.com [mailto:steveallen@allenrailroad.com]
 Sent: Friday, December 08, 2006 10:44 AM
 To: Dan Green
 Subject: 120806 RR Beaufort

12/08/09

Dan

We have talked on many occasions about the Port Royal Railroad. We have been clear about the interest of the group of local Beaufort business people, Allen Railroad Consulting is working for there. Our group is well financed and as you know has interest in working with the Beaufort Railroad Company for regular use of the rail line for Tour Railroad services.

Please let me know when would be a good time for us meet to discuss the options.

Thanks again,

Steve Allen

The South Carolina Port Authority has powerful people behind them to help them take the railroad right-of-way or potential revenue, that might very well belong to you.

ARC spreads out the cost of protecting APO's. For information on how much it will cost you to protect your rights please contact ARC Portroyalrailroad@AllenRailroad.Com

Contract with ARC to protect your rights Printable Railroad "Consulting Agreement"

December 5, 2006

If I were representing the landowners, I could make a strong argument that the line was "fully abandoned" when the previous modified certificate was voluntarily terminated several years ago. However, there are not many attorneys who are familiar enough with the concept of "fully abandoned" to make that argument. I think the modified certificate will go unchallenged. The STB will publish notice of the filing of the modified certificate in the Federal Register as notice to the public. That publication will occur within 30 days of the filing of the modified certificate at the STB. If the modified certificate is not challenged at the STB or in US Court within 60 days after that publication, the modified certificate would become final and immune from legal challenge thereafter. Call or email me if you have any questions.

Tom McFarland

-----Original Message-----

From: steveallen@allenrailroad.com
To: Mcfarland@aol.com
Sent: Tue, 5 Dec 2006 8:02 AM
Subject: 120506 Beaufort RR
12/05/06

Tom,

I reviewed the STB filing for Beaufort Railroad Company. I see nothing that would keep us from being able to work something out with Dan Green the President of the company. I left a message with Mark Pleasant and Jim Fisher late yesterday. I haven't heard anything from them. I also sent an email to Dan Green.

According to the filing this had been in the works for several months. Do you see any reason why the filing wouldn't be approved? And if it is challenged by adjacent property owners will it stand?

I will keep you up to date.

Thanks,
Steve
SteveAllen@AllenRailroad.Com

The South Carolina Port Authority has powerful people behind them to help them take the railroad right-of-way or potential revenue, that might very well belong to you.

ARC spreads out the cost of protecting APO's. For information on how much it will cost you to protect your rights please contact [ARC Portroyalrailroad@AllenRailroad.Com](mailto:ARC.Portroyalrailroad@AllenRailroad.Com)

Contract with ARC to protect your rights Printable Railroad "Consulting Agreement"

Send e-mail to info@allenrailroad.com with questions or comments about this web site. Copyright © 2006

AllenRailroad.Com

PO BOX 191 STANTON, KY 40380 606-663-5463

Attachment D1

AllenRailroad.Com

LIVE HELP CLOSED

page 1

Special Notice

January 16, 2007 a petition was filed to reopen and/or for reconsideration of decision served December 28, 2006. The following was submitted on behalf of these specific property owners in the matter of the abandoned Port Royal line as well as the subsequent usage of the adjacent right of way properties

[APO page one](#) [page two](#) [page three](#)

The following information is our filing to reconsider or reopen the Port Royal line as well as the modified certificate that was filed and decided on December 28, 2006 [Petition Filing January 16 \(PDF\)](#)

The below deceptive news article, Beaufort Gazette Published Sat, Dec 9, 2006 claims that "an agreement cemented" when in fact the public has 20-days to protest and 60-days to find legal solutions.

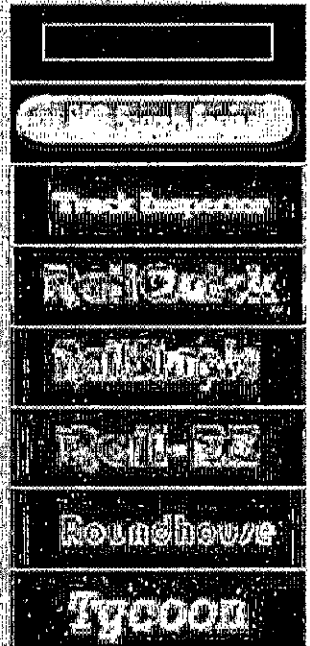
A decision was posted December 26, 2006 by the Surface transportation Board started the clock. The Port Authority will be using this news article as the required public "notice to the Public" to form a "rails to trails" project.

Steve Allen

SteveAllen@AllenRailroad.Com

Published Sat, Dec 9, 2006

By SCOTT DANCE
The Beaufort Gazette



Railway revamp takes its first step

Brush has overgrown much of the dormant railway between Port Royal and Yemassee since 2003, but an agreement cemented last week to resume operation. Saturday December 9 2006

Welcome

Adjacent Property Owners (APO) of the *Port Royal Railroad* and other interested parties.

Allen Railroad Consulting (ARC) has been in the railroad business going on 35 years. ARC has provided railroad consulting services to property owners (AKA Adjacent Property Owners APOs) that own land attached to abandoned railroad right-of-ways for more than 25 years all round the country. An abandoned railroad right-of-way attached to your property effects your land value tremendously. For independent information on how abandoned railroad right-of-way effects your property see: National Association of Reversionary Property Owners

Tom McFarland has been a railroad regulator attorney going on 40 years and is well respected in the industry. Tom McFarland's filings are often found on the Surface Transportation Board web site, the Federal Government regulator agency that must approved railroad transitions. (See www.stb.dot.gov)

Like all businesses, Allen Railroad Consulting does charge a fee for services rendered. To be fair we never charge more the the fair market value of the over the fence value of the railroad right-of-way land. The minimum "Consulting Agreement" is \$250.00 for a .08 of an acre of a railroad right-of-way and up from there.

If you are an Adjacent Property Owner to the old Port Royal Railroad in Beaufort County, South Carolina and have not yet registered with ARC, please fill in the form below to allow Allen Railroad Consulting to protect your property rights as they are related to the Port Royal Railroad Right of Way attached to your property.

DATE:
LAST NAME: FIRST NAME:
STREET ADDRESS:
CITY: STATE: ZIP CODE:
TELEPHONE: MOBILE:
OTHER PHONE: E-MAIL ADDRESS:

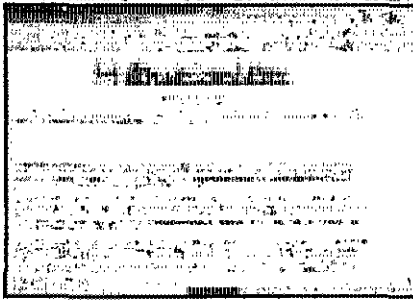
E-mail address required for processing

To find information on your property as it relates to the Port Royal Railroad go to the

Beaufort County Real Property Lookup

The South Carolina Port Authority has powerful people behind them to help them take the railroad right-of-way or potential revenue that might very well belong to you.

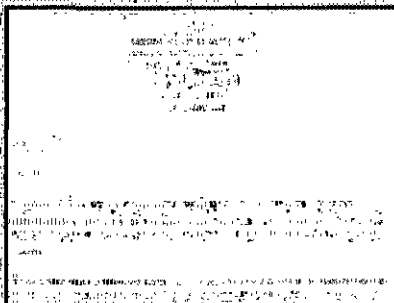
ARC spreads out the cost of protecting APO's. For information on how much it will cost you to protect your rights please contact
ARC.Portroyalrailroad@AllenRailroad.Com



Contract with ARC to protect your rights
 Printable Railroad "Consulting Agreement"

Estimate how much it could cost to have say
 so over the railroad right-of-way in our 4-
 Step process page

APO page one page two page three



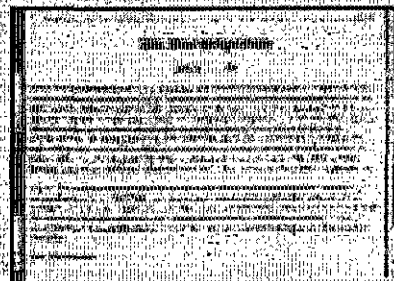
January 8, 2007

On December 28, 2006, the Surface Transportation Board (STB) issued a notice to the public of the filing by Beaufort Railroad Company of a Notice of Modified Certificate of Public Convenience and Necessity in regard to the former Port Royal Railroad (PRR). Beaufort Railroad Company was created as a subsidiary of the State of South Carolina Railway Commission.



January 5, 2007

The STB today issued a decision extending a trial use negotiating period on a right-of-way for which a modified certificate of public convenience and necessity had been terminated. It is very likely that the State of South Carolina intends to do the same in regard to the former Port Royal



December 28, 2006

The filing by the State-Beaufort Railroad Company of its modified certificate of public convenience and necessity was noticed to the public today by the STB. The notice is available on the STB website. The notice triggers a 20-day period for the filing of petitions for reconsideration (essentially a protest) against the modified certificate on the ground that the rail line does not

December 19, 2006

Hi, Steve: A notice for modified certificate of PC+N is effective automatically under STB rules, and remains in effect unless the STB terminates it. Anyone can file with the STB a petition to vacate the Modified Certificate on the ground that the STB does not have jurisdiction over the rail line because a prior abandonment of that line was consummated, triggering the extinguishments of railroad easements to provide rail service over the line. Such a petition is the equivalent of a

December 14, 2006

In my opinion, SCSA will not be able to successfully railbank the Port Royal Railroad and provide for interim recreational trail use of the right-of-way of that rail line under the National Trails System Act. In order for there to be legitimate railbanking and interim trail use under that Act, the rail line must have been approved for abandonment by the STB, but not "fully abandoned." Full abandonment occurs when an approved abandonment is consummated. Whether an abandonment is consummated is determined under federal law. Under federal law, an

The South Carolina Port Authority has powerful people behind them to help them take the railroad right-of-way or potential revenue, that might very well belong to you.

ARC spreads out the cost of protecting APO's. For information on how much it will cost you to protect your rights please contact ARC.Portroyalrailroad@AllenRailroad.Com

Contract with ARC to protect your rights Printable Railroad "Consulting Agreement"

Contract with ARC to protect your rights Printable Railroad "Consulting Agreement"

Estimate how much it could cost to have say so over the railroad right-of-way in our 4-Step process page

APO page one page two page three

<http://home.earthlink.net/~dickj56>

APO page one page two page three

Send e-mail to allenrailroad.com

allenrailroad.com Copyright © 2006 Allen Railroad Company

LAW OFFICE
THOMAS F. MCFARLAND, P.C.
208 SOUTH LA SALLE STREET - SUITE 1890
CHICAGO, ILLINOIS 60604-1112
TELEPHONE (312) 236-0204
FAX (312) 201-9695
mcfarland@aol.com

THOMAS F. MCFARLAND

January 16, 2007

By UPS overnight mail

Vernon A. Williams, Secretary
Surface Transportation Board
Case Control Unit, Suite 713
1925 K Street, N.W.
Washington, DC 20423-0001

Re: Finance Docket No. 34943, *Beaufort Railroad Company, Inc. - Modified Rail
Certificate*

Dear Mr. Williams:

Enclosed please find an original and 10 copies of Petition To Reopen And/Or For
Reconsideration Of Decision Served December 28, 2006, in behalf of Delores Coberly, et al., for
filing with the Board in the above referenced matter. Also enclosed is a check for \$200 to cover
the filing fee.

Very truly yours,

Tom McFarland

Thomas F. McFarland
Attorney for Petitioners

TMcf:kl:enc:wp8.0\1206\1rstb1

BEFORE THE
SURFACE TRANSPORTATION BOARD

BEAUFORT RAILROAD COMPANY,)
INC. - MODIFIED RAIL CERTIFICATE) NO. 34943

PETITION TO REOPEN AND/OR FOR RECONSIDERATION
OF DECISION SERVED DECEMBER 28, 2006

DELORES COBERLY
P.O. Box 39
Sheldon, SC 29941

DON EDGERLEY
2618 Rodgers Drive
Beaufort, SC 29902

JOHN KEITH
P.O. Box 386
Beaufort, SC 29902

PENDER BROTHERS, INC.
1851 Rebaut Rd.
Port Royal, SC 29935

DARTHA P. PIERCE
302 Frasier Drive
Sheldon, SC 29941

JOHN SCHERER
104 Yale Drive
Lincroft, NJ 07738

Petitioners

THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street, Suite 1890
Chicago, IL 60604-1112
(312) 236-0204

Attorney for Petitioners

DATE FILED: January 17, 2007

BEAUFORT RAILROAD COMPANY,) FINANCE DOCKET
INC. - MODIFIED RAIL CERTIFICATE) NO. 34943

Pursuant to 49 C.F. R. § 1115.3 and 1115.4, DELORES COBERLY, DON EDGERLY, JOHN KEITH, DARTHA P. PIERCE, PENDER BROTHERS, INC. and JOHN SCHERER hereby petition to reopen and/or for reconsideration of the Board's decision/notice (decision) served December 28, 2006 of a Modified Certificate of Public Convenience and Necessity (Modified Certificate) issued to Beaufort Railroad Company, Inc. (BRC), a subsidiary of the South Carolina Division of Public Railways (SCDPR).

-2-

BACKGROUND

The persons filing this Petition own the fee interest in parcels of right-of-way land that, together with other such parcels, comprise a rail line that extends from point of connection with CSX Transportation, Inc. (CS) at Yemassee, SC to the Port of Port Royal, SC, a distance of approximately 25 miles.^{1/} For convenience, Petitioners will sometimes be referred to as the Landowners.

Until three years ago, the Landowners' fee interest was subject to an easement for operation of rail freight service over the rail line. That easement was initially held by predecessors of CSX. Abandonment of that rail line by a CSX predecessor was authorized by the Board's predecessor in 1984. *See Seaboard System Railroad, Inc. -- Abandonment -- in Beaufort County, SC*, Docket No. AB-55 (Sub-No. 110), decision served Aug. 23, 1984.

That rail easement was subsequently acquired by the State of South Carolina through the South Carolina State Ports Authority (Ports Authority). The Ports Authority leased that interest to the South Carolina Public Railways Commission, which is now SCDPR. The Railways Commission created a subsidiary, Tangent Transportation Company (Tangent), to operate the rail line. In a decision served June 13, 1985 in ICC Finance Docket No. 30655, *Tangent Transportation Company -- Modified Rail Certificate*, the Board's predecessor provided notice

^{1/} Petitioners' claim of fee ownership of the right-of-way land is based on review of the deeds by which a CSX predecessor originally acquired its interest in those parcels, and on application of South Carolina real property law to the terms of those deeds. Petitioners recognize that the Board does not have jurisdiction to determine the nature of Petitioners' real property interest. That interest is subject to the jurisdiction of South Carolina Courts. However, the Board does have jurisdiction to determine whether the rail line has been fully abandoned (i.e., whether an authorized abandonment has been consummated), so as to trigger application of South Carolina real property law to the parcels of land under consideration.

of issuance of a Modified Certificate to Tangent. That decision stated that the rail line would be known as the Port Royal Railroad (PRR), and that the rail line would connect with a CSX predecessor at Yemassee, SC. A copy of that decision is attached to this Petition as Appendix 1.

Tangent operated the PRR for the next 18 years, until 2003. In that year, the State of South Carolina decided to close the Port of Port Royal and abandon the PRR. Attached to this Petition as Appendix 2 is a copy of a public statement by Mr. Bernard S. Groseclose, Jr., President and CEO of the Ports Authority, issued on August 1, 2003. In that statement, Mr. Groseclose referred to his suggestion to the Governor of South Carolina, with which the Governor concurred, that the Ports Authority "look at redeveloping or re-using portions of our property in Port Royal." Mr. Groseclose stated that "(i)f or when the Port of Port Royal discontinues cargo operations, rail access to Beaufort County will likely disappear."

Exactly two months later, on October 1, 2003, SCDPR and Tangent filed a Notice with the Board under 49 C.F.R. § 1150.24 of termination of Tangent's Modified Certificate, effective 60 days later. A copy of that Notice is attached to this Petition as Appendix 3.

Rail service over the PRR ceased on November 30, 2003. Thereafter, the Ports Authority made a number of public statements to the effect that rail freight service over the PRR would not be restored. A group of investors known as the Port Royal Railroad Preservation Authority (Preservation Authority) made several proposals to the Ports Authority to lease or purchase the PRR for continued rail freight service and tourist passenger service. All of those proposals were denied or ignored. On several occasions, the Ports Authority stated publicly that it intended to sell all or part of the PRR to Beaufort County, SC for use as a recreational trail. The Landowners let it be known that they oppose any such use, and that they would attack any such sale on the

ground that the Ports Authority's easement cannot lawfully be sold to Beaufort County because that easement was extinguished by operation of law when abandonment of the PRR was consummated as a result of termination of Tangent's Modified Certificate and the Port Authority's refusal to lease or sell the PRR for continued rail freight transportation.

The PRR has sat idle for over three years following termination of rail freight service at the end of November, 2003. The right-of-way is grown over with weeds, brush and trees. A massive expensive effort would be required to restore rail freight service over the line. There is absolutely no prospect that such freight service will be restored.

Nevertheless, in a Notice for Modified Certificate of Public Convenience and Necessity in this proceeding filed on December 1, 2006, the Ports Authority, SCDPR and the latter's new subsidiary, BRC, provided notice of a Modified Certificate for BRC to provide rail freight service over the former PRR. A copy of that Notice is in this record. The following very meaningful acknowledgment appears at page 4 of the Notice:

... The Operator (BRC) does not expect to make any interchange or interline connections with any connecting railroads ...

The plain meaning of that statement is that BRC does not expect nor intend to transport rail freight traffic for interchange with CSX to or from points beyond Yemassee, SC.

The Board's decision providing notice of the filing of BRC's Notice was served on December 28, 2006. As here pertinent, the Board there stated that the PRR qualifies for a Modified Certificate (at 2). However, the Board also noted BRC's acknowledgment that it does not expect to make interchange or interline connections with any connecting railroads (*id.*).

The Landowners are filing this Petition because they are convinced that the Modified Certificate has not been sought by BRC in a good faith effort to provide rail freight service over the PRR, but instead is designed to re-establish the Board's jurisdiction over the PRR, after which the Modified Certificate would be terminated and the PRR would be converted to recreational trail use. That is certainly not an idle concern. The Modified Certificate-Recreational Trail Use scenario has been used on at least two recent occasions of which the Landowners are aware, i.e., (1) STB Finance Docket No. 29910 (Sub-No. 1), *D&I Railroad Company -- Notice of Interim Trail Use and Termination of Modified Rail Certificate*, decision served Oct. 6, 2004; and (2) STB Finance Docket No. 32609, *Chesapeake Railroad Company -- Certificate of Interim Trail Use and Termination of Modified Certificate*, decision served Jan. 7, 2007.

The Landowners do not contend that it is inherently unlawful to use modified certificate procedure and recreational trail use procedure consecutively where the involved rail line has not been fully abandoned and the modified certificate was obtained in a good faith effort to provide rail freight service on the line. That was not the case here. The Landowners are forced to challenge the Modified Certificate at this time because if they were to fail to do so, they could be precluded from challenging issuance of a trail use certificate at a later time because the modified certificate would have re-established the Board's jurisdiction to issue a trail use certificate. In that circumstance, Landowner opposition to issuance of a trail use certificate could be seen as an untimely collateral attack against BRC's Modified Certificate.

ARGUMENT

THE BOARD SHOULD VACATE ITS FINDING THAT THE RAIL LINE QUALIFIES FOR A MODIFIED CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY AND DISMISS THE NOTICE FOR MODIFIED CERTIFICATE FOR LACK OF JURISDICTION

I. The Board Lacks Jurisdiction To Issue A Modified Certificate Because The Rail Line Has Been Fully Abandoned

The Board's regulations providing for Modified Certificates apply to rail lines that have been approved for abandonment, but not yet fully abandoned, at the time when the lines are acquired by States or political subdivisions thereof. 49 C.F.R. § 1150.23. The regulations do not apply to rail lines that have been fully abandoned at that time because the Board has lost jurisdiction over such lines. Thus, it is provided in 49 C.F.R. § 1150.23 that the acquisition by a State of a fully abandoned line is not subject to the jurisdiction of the Board.

Accordingly, the PRR qualifies for a Modified Certificate only if it was not fully abandoned prior to issuance of the Modified Certificate. The PRR does not qualify for a Modified Certificate because the PRR was fully abandoned in 2003 when a prior holder of a Modified Certificate terminated the Certificate and the State declined attempts by the Preservation Association to lease or purchase the PRR for continued rail operation.

Whether a rail line has been fully abandoned (that is, whether an approved abandonment has been consummated) is a mixed question of fact and law. In the case of PRR, the facts and law are convincing that it has been fully abandoned. That is shown by the following:

- (1) a prior Modified Certificate was terminated by Tangent in 2003 when the Port of Port Royal was closed. Termination of that Modified Certificate signaled an end to the State's intent to provide rail freight service over the PRR;

- (2) Shortly prior to termination of that Modified Certificate, the State Ports Authority publicly stated that it intended to redevelop its rail property in Port Royal, and that if the Port of Port Royal discontinued cargo operations, "rail access to Beaufort County will likely disappear.";
- (3) thereafter, the State Ports Authority rejected and/or ignored attempts by the Preservation Authority and others to lease or purchase the PRR for continued rail operation; and
- (4) for a period of more than three years after termination of rail freight service, the State Ports Authority did not perform even minimal maintenance of the PRR, with the result that its right-of-way and trackage have substantially deteriorated.

The Landowners respectfully submit that those facts demonstrate conclusively that in 2003 and thereafter, the State Ports Authority manifested an unmistakable intent to cease rail freight service over the PRR on a permanent basis. That being the case, it follows that the PRR has been fully abandoned (i.e., the abandonment that was approved in 1984 was consummated in 2003 or soon thereafter). Inasmuch as the PRR has been fully abandoned, it does not qualify for a Modified Certificate. The Board's contrary finding in the decision served December 28, 2006 should thus be vacated. And since the PRR does not qualify for a Modified Certificate, the Board did not have jurisdiction to issue a Modified Certificate to BRC to operate the PRR. Accordingly, BRC's Notice for Modified Certificate should be dismissed for lack of jurisdiction. *See Becker v. STB*, 132 F.3d 60, 63 (D.C. Cir. 1997) ("Given T&P's intent to abandon before that time and its expressed opposition to extension of the negotiation period, we must conclude that

when the May 1993 NITU expired on November 27, 1993 abandonment was consummated and the Board lost jurisdiction over the line.”).

II. The Board Lacks Jurisdiction To Issue A Modified Certificate Because BRC Does Not Propose To Provide Transportation Of Freight To Or From The PRR In Interstate Commerce _____

Even if the PRR had not been fully abandoned, the Board lacks jurisdiction to issue a Modified Certificate because BRC does not propose to provide transportation of freight to or from the PRR in interstate commerce. That is evident from BRC’s acknowledgment at page 2 of the Notice for Modified Certificate that “the Operator (BRC) does not expect to make any interchange or interline connections with any connecting railroads.”

The plain meaning of that Statement is that any rail freight transportation that would be provided by BRC would be performed wholly on the rail line between Yemassee, SC and Port Royal, SC. Any such transportation would be wholly in South Carolina intrastate commerce. The Board does not have jurisdiction over transportation that is performed in South Carolina intrastate commerce. *See Napa Valley Wine Train, Inc. -- Declaratory Order*, 7 I.C.C. 2d 954 (1991); 49 U.S.C. § 10501(a)(2). Accordingly, the Board does not have jurisdiction to issue a Modified Certificate to BRC to perform transportation that is conceded to be solely in South Carolina intrastate commerce. That being the case, BRC’s Notice for Modified Certificate should be dismissed for lack of jurisdiction. *See RLTD Railway Corp. v. STB*, 166 F.3d 808, 814 (6th Cir. 1999) (“... (W)e cannot say that the STB erred in its judgment that it loses jurisdiction over a line once it becomes severed from the interstate rail system so that it (the STB) may not issue a trail condition.”).

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, premises considered, the Board should: (1) vacate the finding in its decision served December 28, 2006 that the PRR qualifies for a Modified Certificate; and (2) dismiss the Notice for Modified Certificate filed by BRC for lack of jurisdiction.

Respectfully submitted,

DELORES COBERLY
P.O. Box 39
Sheldon, SC 29941

JOHN KEITH
P.O. Box 386
Beaufort, SC 29902

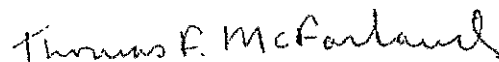
DARTHA P. PIERCE
302 Frasier Drive
Sheldon, SC 29941

DON EDGERLEY
2618 Rodgers Drive
Beaufort, SC 29902

PENDER BROTHERS, INC.
1851 Rebaut Rd.
Port Royal, SC 29935

JOHN SCHERER
104 Yale Drive
Lincroft, NJ 07738

Petitioners



THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street, Suite 1890
Chicago, IL 60604-1112
(312) 236-0204

Attorney for Petitioners

DATE FILED: January 17, 2007

APPENDIX 1

PN-7015-01
CC

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 30655

TANGENT TRANSPORTATION COMPANY

Modified Rail Certificate

SERVICE DATE

JUN 13 1985

June 7, 1985

NOTICE:

On April 16, 1985 as amended June 4, 1985, a notice was filed by Tangent Transportation Company (Tangent), for a modified rail certificate of public convenience and necessity under 49 C.F.R. 1150, Subpart C to operate a line of trackage from Yemassee (MF 443.26) to Port Royal (MF 468.11) in Beaufort County, SC. This line of railroad had formerly been owned and operated by Seaboard System Railroad, Inc. (SSR). In Docket No. AB-95 (Sub-No. 110), served August 23, 1984, the Commission authorized SSR to abandon this line.

The South Carolina State Ports Authority, a political subdivision of the State of South Carolina, has acquired the line and has leased the line to the South Carolina Public Railways Commission (Commission). Tangent, a wholly-owned subsidiary of the Commission, will operate the line, beginning May 1, 1985. The railroad will be known as the Port Royal Railroad and will connect with SSR at Yemassee.

This notice will be served upon the Association of American Railroads (Car Service Division) as agent of all railroads subscribing to the car-service and car-hire agreements, and upon the American Short Line Railroad Association.

By the Commission, Haber F. Hardy, Director, Office of Proceedings.

(SEAL)

James N. Bayne
James N. Bayne
Secretary

APPENDIX 2

Port of **PORT ROYAL**

**SOUTH CAROLINA STATE
PORTS AUTHORITY**
607 PARIS AVENUE
PORT ROYAL, SC 29931-2431 USA
(843) 524-5311
FAX: (843) 524-5397

**STATEMENT FROM THE S.C. STATE PORTS AUTHORITY
REGARDING THE PORT OF PORT ROYAL**

*Bernard S. Groseclose, Jr. – President & Chief Executive Officer
August 1, 2003*

On July 17, at a public meeting with Gov. Mark Sanford and his staff, I suggested that the Ports Authority look at redeveloping or re-using portions of our property in Port Royal. Gov. Sanford concurred and encouraged an expedited approach.

While certainly not a new concept, I brought the idea forward because there are probably some higher and better uses for the Ports Authority's land in this historic seaport.

Additionally, the cost of providing rail access to the terminal is rising. The Ports Authority owns the rail, and trains are operated by the S.C. Public Railways. If or when the Port of Port Royal discontinues cargo operations, rail access to Beaufort County will likely disappear. This has obvious impacts on the future development of Beaufort County, as well as on the private and federal users of the railroad.

Any future redevelopment of the Authority's land in Port Royal must generate the highest possible financial return for the State's ports, while meshing with the community's long-term desires.

But redevelopment will not be like flipping a switch. We have several long-term customers in the Port of Port Royal – customers that have invested in facilities and signed contracts. We value their business and respect our business relationships.

Part of our legislated mandate is to operate port facilities in Port Royal, and over the years the Ports Authority has attempted to be a good corporate citizen. We are committed to moving this project forward to the benefit of the state and her citizens and we look forward to working with the Mayor, Town officials and the community.

Media Contact: Byron Miller, S.C. State Ports Authority, (843)577-8197

###

APPENDIX 3

LAW OFFICES OF

SIMONS & KEAVENY

147 WAPPOO CREEK DRIVE • SUITE 604 • CHARLESTON, SC 29412

TELEPHONE: (843) 762-9132 • FACSIMILE: (843) 406-9913

KEATING L. SIMONS, III THOMAS J. KEAVENY, II DEREK FARRELL DEAN BOB J. CONLEY
ksimons@charlestonattorneys.net tkeaveny@charlestonattorneys.net ddean@charlestonattorneys.net bkonley@charlestonattorneys.net

October 1, 2003

Surface Transportation Board
1925 K Street, NW
Washington, D.C. 20423

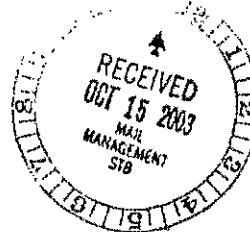
The Honorable Mark Sanford
Governor's Office
PO Box 11829
Columbia, SC 29211

Secretary of Commerce Bob Faith
S.C. Department of Commerce
1201 Main Street, Suite 1600
PO Box 927
Columbia, SC 29202

Executive Director Gary E. Walsh
S.C. Public Service Commission
101 Executive Ctr. Dr., Suite 100
PO Drawer 11649
Columbia, SC 29211

Bernard S. Groseclose, Jr.
President & Chief Executive Officer
S.C. State Ports Authority
PO Box 22287
Charleston, SC 29413

Executive Director Elizabeth S. Mabry
S.C. Department of Transportation
955 Park Street
PO Box 191
Columbia, SC 29202



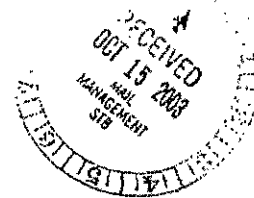
ENTERED
Office of Proceedings

OCT 15 2003

Part of
Public Record

October 1, 2003
Page 2

Mr. Fred Dennin
Regional Administrator
Federal Railroad Administration
Sam Nunn Atlanta Federal Center
Suite 16T20
61 Forsyth Street, S.W.
Atlanta, GA 30303-3104



RE: *Port Royal Railroad*

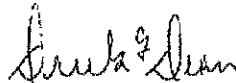
To Whom It May Concern:

Please be advised that this firm represents the South Carolina Division of Public Railways and its subsidiary Tangent Transportation Company, Inc. ("Tangent"). Tangent operates the Port Royal Railroad in Beaufort County, South Carolina pursuant to a Modified Rail Certificate issued by the Interstate Commerce Commission (Finance Docket No. 30655) on June 7, 1985. A copy of Finance Docket No. 30655 is attached hereto and incorporated by reference herein. This line is owned by the South Carolina State Ports Authority.

In accordance with 49 CFR Section 1150.24, this correspondence is intended to serve as Tangent's Notice of Intent to terminate service over the line known as the Port Royal Railroad sixty (60) days from the date noted above. Based thereon, service over the Port Royal Railroad line will cease on November 30, 2003.

With best regards, I am

Yours very truly,


Derek F. Dean

DFD/
Enclosure

cc: Mr. Dan Green (via facsimile only w/enc.)

Mr. Carlos Gonzalez (w/enc.)
Operations Manager
Port Royal Cement Company, LLC
601-A Paris Avenue
Port Royal, SC 29935

Mr. Kent Hollonbeck (w/enc.)
Transportation Manager
Hydro Agri North America Inc.
100 North Tampa Street
Suite 3200
Tampa, FL 33611

CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2007, I served the foregoing document, Petition To Reopen And/Or For Reconsideration Of Decision Served December 28, 2006, on Derek F. Dean, Esq., Simons & Keaveny, 147 Wappoo Creek Drive, Suite 604, Charleston, SC 29412, by UPS overnight mail.

Thomas F. McFarland

Thomas F. McFarland



Consulting Agreement

For purpose of this agreement AllenRailroad.Com will be referred to, as "Consultant" and (Your name and the address of the property you are owner of, that is adjacent to the Abandoned Port Royal Railroad) will be referred to as "Adjacent property owner"

1. Applicable Law and Arbitration. Any controversy or claim arising out of or relating to this Agreement or the breach of it shall be settled by arbitration to be held in Beaufort, South Carolina, in accordance with the Commercial Rules of the American Arbitration Association. Judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction. The laws of the State of South Carolina will govern this Agreement. Pending the resolution of any dispute, the Consultant shall proceed as directed by Adjacent property owner in writing.

2. Assignment. This Agreement is for consulting services and shall not be transferred or assigned by the Consultant without prior written consent of Adjacent property owner. The purpose of the services is for the consultant to perform research and to hire qualified legal services for the adjacent property owner to gain the property connected to their property according to Adjacent property owner's deed, from the Old Port Royal Railroad. These services will included but not be limited to "quite title or class action law suit" should that become necessary. In the event that the Port Royal Railroad remains a railroad the property will remain an easement right-of-way for that railroad to continue services.

3. Confidential Matters and Proprietary Information. The Consultant shall keep in strictest confidence all information relating to this Agreement or which may be acquired in connection with or as a result of this Agreement. During the term of this Agreement and at any time after that, without the prior written consent of Adjacent property owner, the Consultant shall not publish, communicate, divulge, disclose or use any of the information, which has been designated by Adjacent property owner as proprietary or which from the surrounding circumstances in good conscience, ought to be treated as proprietary. Upon termination or expiration of this Agreement, Consultant shall deliver all records, data, information, and other documents and all copies to Adjacent property owner and such shall remain the property of Adjacent property owner.

4. General Relationship. In all matters relating to this Agreement, the Consultant shall be acting as an independent contractor. Neither the Consultant nor employees of the Consultant, if any, are employees of Adjacent property owner under the meaning or application of any Federal or State Unemployment or Insurance Laws or Worker's Compensation Laws, or otherwise. The Consultant shall assume all liabilities or obligations imposed by any one or more of those laws with respect to employees of the Consultant, if any, in the performance of this Agreement. The Consultant shall not have any authority to assume or create any obligation, express or implied, on behalf of Adjacent property owner and the Consultant shall have no authority to represent itself as an agent, employee, or in any other capacity of Adjacent property owner.

5. Independent Contractors and Employees of Consultant. The Consultant shall not utilize any entities, persons or employees on the work to be performed unless the entities, persons or employees have executed an agreement under which they are bound by the terms of this agreement.

6. No assertion of Rights by Consultant or Others. During and after the term of this Agreement, Consultant shall not

assert or permit any other party to assert against Adjacent property owner, its subsidiaries, vendors and customers, mediate and immediate, any patent or other rights with respect to which Consultant has the right to assert or license at the termination or expiration of this Agreement because of the practice of any process or the manufacture, use or sale of any product arising out of the subject matter of this Agreement.

7. Notices. Any notice required to be given, shall be deemed to have been sufficiently given either when served personally or when sent by first class mail addressed to the Parties at the addresses set forth in this Agreement.

8. Reports. The Consultant, when directed, shall provide written reports with respect to the services rendered.

9. Strict Loyalty The Consultant and its employees shall avoid all circumstances and actions which would place the Consultant in a position of divided loyalty with respect to the obligations undertaken under this Agreement.

10. Superseding Effect This Agreement supersedes all prior oral or written agreements, if any, between the parties, and constitutes the entire agreement between the parties.

11 Terminations. Adjacent property owner reserves the right to terminate this Agreement upon five (5) days [or as the case may be] prior written notice to the Consultant. If this Agreement is terminated, Adjacent property owner shall be liable only for the payment of services performed and approved travel prior to the effective date of termination.

12 Title to Information All information, developed under this Agreement, of whatever type relating to the work performed under this Agreement shall be the exclusive property of Adjacent property owner. All information, instruments and paper work purchased or assembled by Consultant pursuant to this Agreement and paid for by Adjacent property owner shall be the exclusive property of Adjacent property owner. Upon termination of this Agreement, Consultant shall dispose of such items as directed by Adjacent property owner.

13 Duration of agreement. This agreement in 6 months from the time it is signed unless otherwise continued at no additional charge to complete normal administration delays.

14 Consideration and Payment The Consultant will be paid \$500.00 per 1/4 acre gained, \$_____ This fee includes but not limited to all legal fees, research fees, Consultant assistants, travel expenses and all other charges related to Consultant's work as described in "2. Assignment." above.

Dated: _____

Dated: _____

Signed

Signed

Printed Name

Printed Name

January 8

LAW OFFICE
THOMAS F. MCFARLAND, P.C.
208 SOUTH LA SALLE STREET - SUITE 1890
CHICAGO, ILLINOIS 60604-1112
TELEPHONE (312) 236-0204
FAX (312) 201-9695
mcfarland@aol.com

January 8, 2007

Dear Steve:

On December 28, 2006, the Surface Transportation Board (STB) issued a notice to the public of the filing by Beaufort Railroad Company of a Notice of Modified Certificate of Public Convenience and Necessity in regard to the former Port Royal Railroad (PRR). Beaufort Railroad Company was created as a subsidiary of the State of South Carolina Railway Commission.

While a Modified Certificate of Public Convenience and Necessity authorizes its holder to provide rail freight service over rail lines, you and I have reason to believe that the state, through Beaufort Railroad Company, does not intend to provide rail freight or passenger service over the former PRR. That is evident from the state's consistent negative responses to your request for cooperation in re-establishing rail service over the former PRR. It also shown by the statement on Page 2 of the attached STB notice that Beaufort Railroad Company does expect to make any interchanges or interline connections with any connecting railroads.

Instead, it is very likely that the state intends to terminate the modified certificate after holding it for a short time, after which it would remove the tracks and transfer the right-of-way for use as a recreational trail. There have been two recent cases in which that occurred. In neither case was there opposition to issuance of the modified certificate. The STB does not have jurisdiction to issue a modified certificate if a prior abandonment of a rail line has been consummated, that railroad easement has been. Upon consummation of abandonment, ownership of the land in the railroad right-of-way land is determined under State laws. Under South Carolina law, the state had a railroad easement to operate the PRR, not fee title. If abandonment of the PRR has been extinguished under South Carolina laws, so that the fee ownership interest would be in the adjacent landowners, no longer subject to the state's railroad easement. If the STB does not have jurisdiction to issue a modified certificate, neither does it have jurisdiction to issue a trail use certificate upon termination of a modified certificate.

A strong argument can be made that abandonment of the PRR was consummated in October 2003 when Tangent Transportation Company terminated a prior modified certificate of public convenience and necessity to operate that rail line. The State made statements at the time that rail

service would not be restored over the PRR. The failure of the State to attempt to re-establish rail service over the line for more than 3 years after the modified certificate was terminated also supports a determination that abandonment was consummated, especially in view of your efforts during that period to lease the PRR for rail operation.

Unless the STB's issuance of a modified certificate to Beaufort Railroad Company is overturned, it is my opinion that conversion of the PRR right-of-way into recreational trail would not be able to be defeated. If opponents of trail use were to wait until termination of the modified certificate and issuance of a trail use certificate to object to trail use, supporters of trail use would be able to make a compelling argument that opponents failed to attack the STB's re-assertion of jurisdiction over the PRR by virtue of issuance of the modified certificate despite having legal notice of the STB's action in that respect. And if the STB had jurisdiction to issue a modified certificate, it also has jurisdiction to issue a trail use certificate.

The STB's issuance of the modified certificate can be attacked by filing of a petition for reconsideration at the STB by January 17. If I am to be called upon to prepare and file a petition for reconsideration, I will need several days to prepare it for filing. In the circumstances, I would have to know by the end of the work week (Friday, January 12) whether I am to prepare a petition for reconsideration.

The legal fee for preparing and filing the petition for reconsideration would be several thousand dollars. There could be additional legal fees thereafter, depending on whether additional legal filings would be required. If the STB were to deny the petition for reconsideration, an appeal could be filed in the US Court of Appeals for the Fourth Circuit in Richmond, VA or for the DC Circuit in Washington, DC.

While I believe that there is a reasonable chance to defeat recreational trail use of the PRR, if action is taken now, the process would be expensive, and the result would be uncertain. However, if nothing is done now, I see little chance of defeating trail use in the future.

Sincerely,

Thomas F. McFarland

News From the legal front

January 5, 2007

"The STB today issued a decision extending a trail use negotiating period on a right-of-way for which a modified certificate of public convenience and necessity had been terminated. It is very likely that the State of South Carolina intends to do the same in regard to the former Port Royal Railroad, namely, terminate the modified certificate and substitute a trail use certificate. In my opinion, there is a reasonably good chance to defeat that action on the ground that prior consummation of abandonment of the Port Royal Railroad deprived the STB of jurisdiction to grant either a new modified certificate or ultimately a trail use certificate. However, time is a factor. There is a 20-day period for filing a petition for reconsideration of the STB decision granting a modified certificate to Beaufort Railway. That 20-day period expires on January 17.

Cost is also a factor. It would cost several thousand dollars to prepare and file a petition for reconsideration at the STB. Like you, I have done considerable work on this subject without having been paid. If the landowners don't take action now, they may well be met with an argument down the road that their failure to have attacked the modified certificate on a timely basis precludes them from challenging trail use of the right-of-way after termination of the modified certificate."

Tom McFarland

December 28, 2006

The filing by the State--Beaufort Railroad Company of its modified certificate of public convenience and necessity was noticed to the public today by the STB. The notice is available on the STB website. The notice triggers a 20-day period for the filing of petitions for reconsideration (essentially a protest) against the modified certificate on the ground that the rail line does not qualify for a modified certificate of public convenience and necessity because the line was fully abandoned in 2003 when Tangent Transportation terminated the prior modified certificate. The notice also triggers a 60-day period during which judicial review of issuance of the modified certificate can be sought in the US Court of Appeals in Washington, DC or in the 4th Circuit in Richmond, VA. If the issuance of the modified certificate is not challenged now, it would be difficult to challenge it at a later time because of the STB's statement in the notice that the rail line qualifies for a modified certificate. A challenge filed beyond the above deadlines would be seen as a collateral attack against that statement on an untimely basis. Do you have contacts locally that would want to challenge the modified certificate? If so, a petition for reconsideration would have to be begun soon in order to be ready for filing 20 days hence. One or more adjacent landowners would have standing to challenge issuance of the modified certificate because it has the effect of depriving them of fee simple title to the right-of-way land that reverted to them in 2003 when the rail line was fully abandoned. Preparation of a petition for reconsideration would involve a legal fee estimated at several thousand dollars, plus a filing fees payable to the STB.

Tom McFarland

December 19, 2006

Hi, Steve. A notice for modified certificate of PC+N is effective automatically under STB rules and remains in effect unless the STB terminates it. Anyone can file with the STB a petition to vacate the Modified Certificate on the ground that the STB does not have jurisdiction over the rail line because a prior abandonment of that line was consummated, triggering the extinguishments of railroad easements to provide rail service over the line. Such a petition is the equivalent of a protest of the Modified Certificate. In my opinion, that's what happened here: abandonment of the Port Royal Railroad was consummated, in my opinion, when the holder of the prior Modified Certificate formally terminated the certificate, and years passed without there being an effort to restore rail service or to sell the line for continued rail service. On the contrary, the owner of the line ignored your own efforts to lease the line for continued rail service. That being the case, I believe that a landowner or landowner group could successfully petition the STB to terminate the current Modified Certificate on the ground that a prior abandonment of the line has been consummated, depriving the STB of jurisdiction over the rail line.

Tom McFarland

December 14, 2006

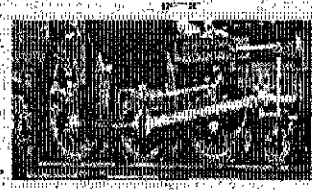
In my opinion, SCSPA will not be able to successfully railbank the Port Royal Railroad and provide for interim recreational trail use of the right-of-way of that rail line under the National Trails System Act. In order for there to be legitimate railbanking and interim trail use under that Act, the rail line must have been approved for abandonment by the STB, but not "fully abandoned." Full abandonment occurs when an approved abandonment is consummated. Whether an abandonment is consummated is determined under federal law. Under federal law, an abandonment is consummated when the rail carrier who operates over the rail line evidences an intent to abandon the line on a permanent basis. In my opinion, that intent was unmistakably evidenced several years ago when the modified certificate of public convenience and necessity that authorized rail operations over the line was unconditionally terminated. In my opinion, such a consummated abandonment cannot be legitimately reversed by the issuance of a new modified certificate of public convenience and necessity more than three years later. If a rail line has been fully abandoned under federal law, ownership of the right-of-way land is then determined under state law. In my opinion, under South Carolina law, SCSPA's easement to provide rail service over that land has been legally extinguished, and the adjoining landowners now own the right-of-way land free and clear of the SCSPA rail easement. That being the case, it is my opinion that any such landowner or all of them could bring a successful quiet title action in a Beaufort County, South Carolina Court.

Tom McFarland

Attachment D2



AllenRailroad.Com



Rating
Extra Board

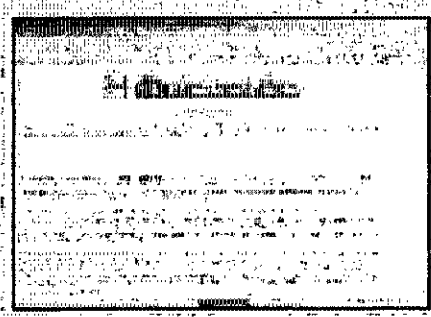
LIVE HELP CLOSED

page 2

Special Notice January 12, 2007

Is the last day to protect your property from the South Carolina Port Authority permanent control costing you thousand of dollars in property value. You must act now!

[APO page one](#) [page two](#) [page three](#)



*Contract with ARC to protect your rights
Primable Railroad "Consulting Agreement"*

*Estimate how much it could cost to have say
so over the railroad right-of-way in our 4-
Step process page*

[APO page one](#) [page two](#) [page three](#)

News briefs and others

December 11, 2006

Nancy's analysis is legally correct. Tom

-----Original Message-----

From: steveallen@allenrailroad.com

To: Mcfarland@aol.com

Sent: Mon, 11 Dec 2006 7:51 AM

Subject: FW: 091704 Port Royal Railroad

-----Original Message-----

- [Home](#)
- [Track Inspection](#)
- [Railroad](#)
- [Railroads](#)
- [Rail-EE](#)
- [Roundhouse](#)
- [Tycoon](#)

From: nancy.beiter@stb.dot.gov [mailto:nancy.beiter@stb.dot.gov]

Sent: Friday, September 17, 2004 11:02 AM

To: steveallen@allenrailroad.com

Subject: Re: 091704 Port Royal Railroad

Dear Mr. Allen

I can't help you with your SCPA issue. I have no idea how a court would view that. The line has passed out of our jurisdiction at the time of the abandonment so we no longer have any interest in it. You might need authority from us if you were to start a passenger/freight service that hooked up with the interstate system, but not if you only ran on the 26-mile track and none of the freight moved interstate.

In the event that you do hook up to the interstate system, you would have to get authority from us, but I can't tell you at this stage how to apply since I don't have enough details. If you need to know more, please call me when you are at the stage where you think you might need authority.

Sincerely yours,

Nancy R. Beiter
Staff Attorney
Office of Congressional and Public Services
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423
phone: 202.565.1591
fax: 202.565.9016

<steveallen@allenrailroad.com>

09/17/2004 10:47 AM

To: <nbeiter@stb.dot.gov>

Subject: 091704 Port Royal Railroad

09/17/04

Nancy Beiter

Ms. Beiter,

I would like to thank you for your help. I would like to trouble you for a

little more information, if you would please.

The Port Royal Railroad was abandoned in 1985 by CSX and then sold to South Carolina Ports Authority (SCPA). SCPA operated the railroad as a local railroad so they never bothered to go to the ICC for common carrier status, this is why we understand that you informed us that the SCPA is no longer under the jurisdiction of the STB. Over the years the SCPA sold all the track to another South Carolina government entity, the South Carolina Railway Commission (SCRC) that runs all switching for the SCPA. The group of well financed local business men I am working for, wants to buy or at minimum lease the railroad track from SCRC. SCRC has shown a lot of interest in working with my group. Our group wants to have the new 26 mile railroad licensed as a Freight/Passenger railroad with the STB if that is required.

Also since SCPA is not under the jurisdiction of the STB and does not own either the track or the land and had stopped using the railroad service nearly one year ago, would you know what if any rights SCPA has control over as far as the Port Royal Railroad is concerned? Despite the fact SCPA has no actual ownership and if the tracks were removed the right-of-way will all revert to the property owners, SCPA is suggesting that they should be compensated for the land they don't own. Is this something the STB would mediate should our group acquire the track from SCRC and become a licensed railroad by STB?

Again, thank you for your time and consideration in this matter.

Respectfully,
Steve Allen
SteveAllen@AllenRailroad.Com

The South Carolina Port Authority has powerful people behind them to help them take the railroad right-of-way or potential revenue, that might very well belong to you.

ARC spreads out the cost of protecting APO's. For information on how much it will cost you to protect your rights please contact ARC
Portroyalrailroad@AllenRailroad.Com

Contract with ARC to protect your rights Printable Railroad "Consulting Agreement"

APO page one page two page three

Railway revamp takes its first step

Brush has overgrown much of the dormant railway between Port Royal and Yemassee since 2003, but an agreement cemented last week to resume operation. Saturday December 9, 2006

The above deceptive news article claims that "an agreement cemented" when in fact the public has 20-days to protest and 60-days to find legal solutions. This decision was posted December 26, 2006 starting the clock. The Port Authority the miss leading article as the required public "notice to the Public" to form a "rails-to-trails" project.

Steve Allen

December 8, 2006

Sounds like the Ports Authority is still making decisions about the railroad. not a good thing for us. Tom

-----Original Message-----

From: steveallen@allenrailroad.com

To: Mcfarland@aol.com

Sent: Fri, 8 Dec 2006 12:27 PM

Subject: FW: 120806 RR Beaufort

12/08/06

Tom,

I talked to both Jim fisher and Mark Pleasant. They had a meeting with the Port Authority a few days before the filing, but were not made aware of the filing. In the email below it would appear the Port Authority is still pulling the strings. what do you think?

Steve

-----Original Message-----

From: Dan Green [<mailto:Dan.Green@scrailways.com>]

Sent: Friday, December 08, 2006 1:17 PM

To: steveallen@allenrailroad.com

Subject: RE: 120806 RR Beaufort

I will forward your note to the SCSPA.

From: steveallen@allenrailroad.com [mailto:steveallen@allenrailroad.com]

Sent: Friday, December 08, 2006 10:44 AM

To: Dan Green

Subject: 120806 RR Beaufort

12/08/09

Dan

We have talked on many occasions about the Port Royal Railroad. We have been clear about the interest of the group of local Beaufort business people. Allen Railroad Consulting is working for there. Our group is well financed and as you know has interest in working with the Beaufort Railroad Company for regular use of the rail line for Tour Railroad services.

Please let me know when would be a good time for us meet to discuss the options.

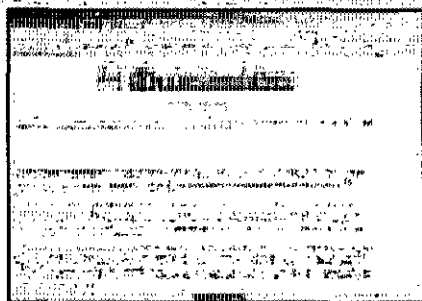
Thanks again,

Steve Allen

The South Carolina Port Authority has powerful people behind them to help them take the railroad right-of-way or potential revenue, that might very well belong to you.

ARC spreads out the cost of protecting APO's. For information on how much it will cost you to protect your rights please contact
ARCPortroyalrailroad@AllenRailroad.Com

Contract with ARC to protect your rights Printable Railroad "Consulting Agreement"



Contract with ARC to protect your rights
Printable Railroad "Consulting Agreement"

Estimate how much it could cost to have say
so over the railroad right-of-way in our 4-
Step process page

[APO page one page two page three](#)

[APO page one page two page three](#)

December 5, 2006

If I were representing the landowners, I could make a strong argument that the line was "fully abandoned" when the previous modified certificate was voluntarily terminated several years ago. However, there are not many attorneys who are familiar enough with the concept of "fully abandoned" to make that argument. I think the modified certificate will go unchallenged. The STB will publish notice of the filing of the modified certificate in the Federal Register as notice to the public. That publication will occur within 30 days of the filing of the modified certificate at the STB. If the modified certificate is not challenged at the STB or in US Court within 60 days after that publication, the modified certificate would become final and immune from legal challenge thereafter. Call or email me if you have any questions.

Tom McFarland

----- Original Message -----

From: steveallen@allenrailroad.com

To: McFarland@aol.com

Sent: Tue, 5 Dec 2006 8:02 AM

Subject: 120506 Beaufort RR

12/05/06

Tom,

I reviewed the STB filing for Beaufort Railroad Company. I see nothing that would keep us from being able to work something out with Dan Green the President of the company. I left a message with Mark Pleasant and Jim Fisher late yesterday. I haven't heard anything from them. I also sent an email to Dan Green.

According to the filing this had been in the works for several months. Do you see any reason why the filing wouldn't be approved? And if it is challenged by adjacent property owners will it stand?

I will keep you up to date.

Thanks,

Steve

SteveAllen@AllenRailroad.Com

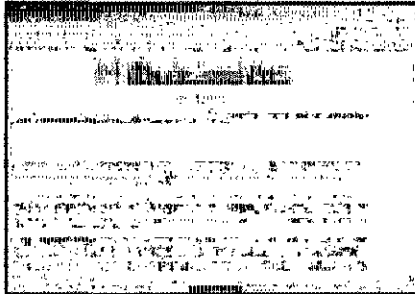
The South Carolina Port Authority has powerful people behind them to help them take the railroad right-of-way or potential revenue, that might very well

belong to you.

ARC spreads out the cost of protecting APO's. For information on how much it will cost you to protect your rights please contact:

ARC Portroyalrailroad@AllenRailroad.Com

Contract with ARC to protect your rights Printable Railroad "Consulting Agreement"



Contract with ARC to protect your rights
Printable Railroad "Consulting Agreement"

Estimate how much it could cost to have say
so over the railroad right-of-way in our 4-
Step process page

APO page one page two page three

APO page one page two page three

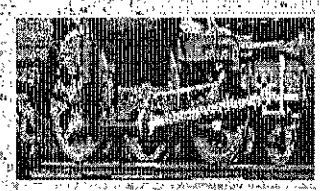
Send e-mail to Portroyalrailroad@AllenRailroad.Com with questions or comments about this web site. Copyright © 2006 AllenRailroad.Com

PO BOX 1011 STATION KY 40380 606-663-5463

Attachment D3



AllenRailroad.Com

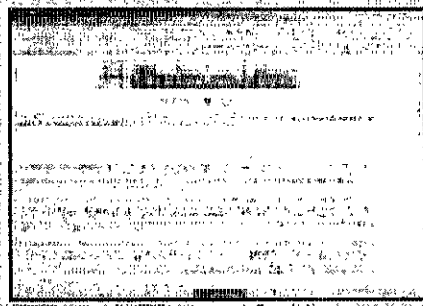


Training
Extra Board

LIVE HELP CLOSED

page 3

Below AllenRailroad.Com will take you through a **4-Step** procedure for owners of property connected to the **Port Royal Railroad** Right-of-way to protect your property rights



Contract with **ARC** to protect your rights
Printable Railroad "Consulting Agreement"

Estimate how much it could cost to have say
so over the railroad right-of-way in our **4-Step** process page

APO page one page two page three

Should you need additional help please fill in the below information and we will help you.

DATE:

LAST NAME: FIRST NAME:

STREET ADDRESS:

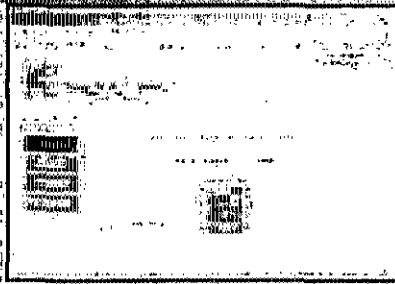
CITY: STATE: ZIP CODE:

TELEPHONE: MOBILE:

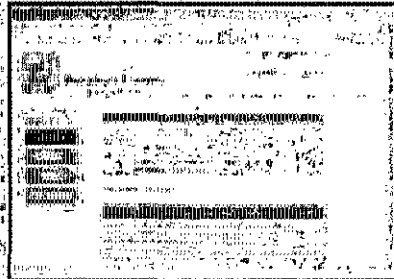
OTHER PHONE: E-MAIL ADDRESS:

E-mail address required for processing

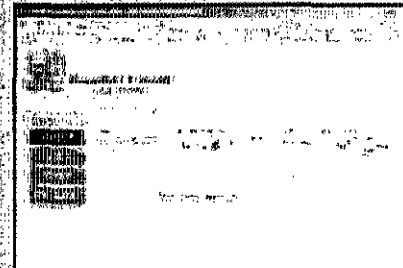
- [Home](#)
- [Track Inspection](#)
- [RailQuick](#)
- [RailSimple](#)
- [Rail-BX](#)
- [Roundhouse](#)
- [Tycoon](#)



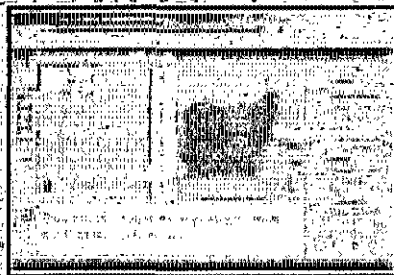
Step 1 Go to Beaufort County Real Property Lookup then select "owner"



Step 2 Type name of property "owner" as it appears on property



Step 3 Click on "map". In the case of multiple properties, do each property separately



Step 4 Measure the length of your property as it runs along

side the Port Royal Railroad right-of-way

The South Carolina State Port Authority is planning to sell the Port Royal Railroad right-of-way for more then \$115,000.00 per mile to the Jasper-Beaufort Water Company. This works out to more then \$22.00 per running-track foot.

Should the "right-of-way" be split down the center between property owners on either side of the right-of-way each property will have an average of \$11 per foot of the right-of-way that adjoins their property.

South Carolina State Port Authority

SAMPLE The length of the "Right-of-way" along your property is 900 feet

South Carolina State Port Authority wants \$11 per foot, per side

South Carolina State Port Authority gains \$19,800

Allen Railroad Consulting

SAMPLE The length of the "Right-of-way" along your property is 900 feet*

Property owners share of Allen Railroad Consulting processing fees per foot \$2 per foot, per side**

Property owners share of Allen Railroad Consulting processing fees total this SAMPLE \$1,800

* A minimum fee of \$250 per agreement; large parcel discounted.

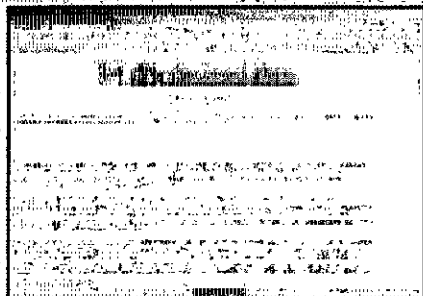
** Assuming 50 foot right-of-way, wider right-of-way will be charged accordingly

Beaufort County Real Property Lookup

The South Carolina Port Authority has powerful people behind them to help them take the railroad right-of-way or potential revenue that might very well belong to you.

ARC spreads out the cost of protecting APO's. For information on how much it will cost you to protect your rights please contact ARC at Portroyalrailroad@AllenRailroad.Com

Contract with ARC to protect your rights Printable Railroad "Consulting Agreement"

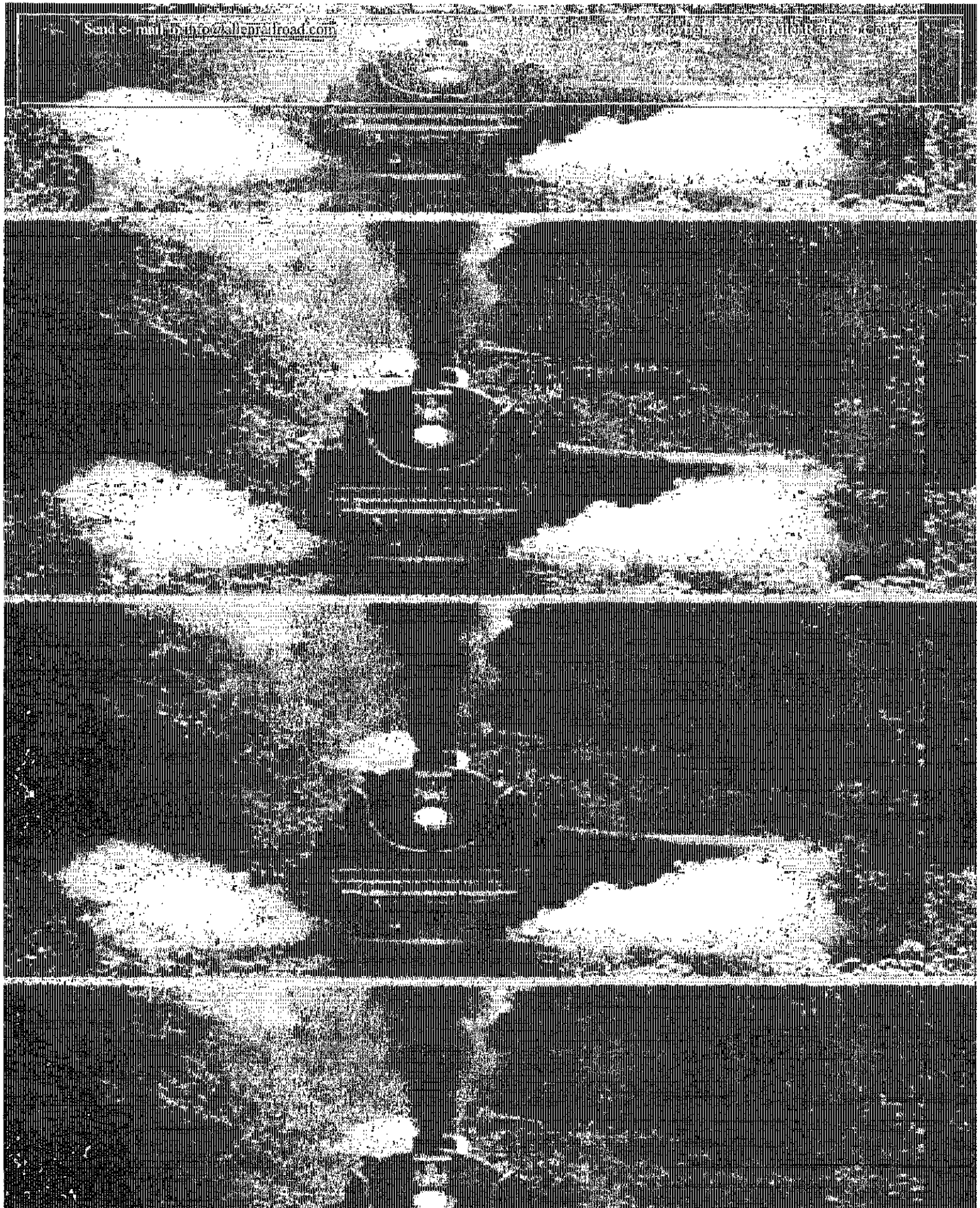


Contract with ARC to protect your rights Printable Railroad "Consulting Agreement"

Estimate how much it could cost to have say so over the railroad right-of-way in our 4-Step process page

APO page one page two page three

APO page one page two page three



Attachment E