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May 23, 2007

Via HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

ENTERED
Office of Proceedings
MAY 23 2007
Part of
Public Record



**Re: Docket No. AB-999X, Caldwell County Railroad Company –
Discontinuance of Service Exemption – In Caldwell County, NC**

Dear Secretary Williams:

Enclosed for filing in the above-captioned docket are the original plus ten copies of the Caldwell County Railroad Company's Motion to Strike Late-Filed Protest.

I would appreciate it if you would date-stamp the additional copy of the filing provided and return it to the messenger for our files. I appreciate your attention to this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Betty Jo Christian".

Betty Jo Christian
Attorney for Caldwell County
Railroad Company

Enclosure

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. AB-999X

**CALDWELL COUNTY RAILROAD COMPANY --
DISCONTINUANCE OF SERVICE EXEMPTION --
IN CALDWELL COUNTY, NC**

**MOTION TO STRIKE
LATE-FILED PROTEST**

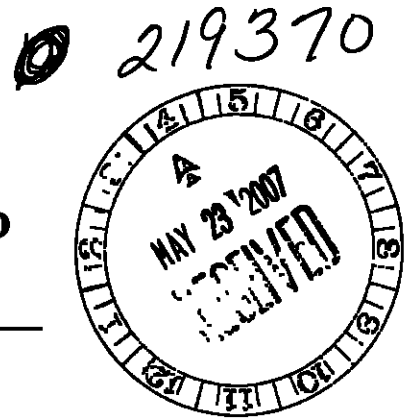
**ENTERED
Office of Proceedings**

MAY 23 2007

**Part of
Public Record**

Caldwell County Railroad Company (CCRC) hereby files this motion pursuant to 49 C.F.R. § 1104.13(a) to strike the late-filed protest of Dick Keyes (Keyes). In support of this Motion, CCRC states as follows:

On March 21, 2007, CCRC filed a Petition for Exemption to allow the discontinuance of rail activity on an approximately five mile segment of its rail line in Caldwell County, NC. The filing of that Petition was preceded by the March 20, 2007 publication in the local newspaper in Lenoir, NC of a notice that the line segment was going to be the subject of a discontinuance petition to be filed with the Board. The Board published notice of the filing of the Petition on April 10, 2007, setting April 30, 2007 as the due date for replies and providing for the service of any replies on counsel for CCRC.



Ignoring those deadlines and procedures, Keyes filed his protest out of time and without observance of Board procedures. The protest was filed under cover of a May 1, 2007 letter, which apparently did not reach the Board until on or about May 14, when it was posted on the STB website. Undersigned counsel received a copy of this protest under cover of a May 8 letter, attached hereto as Exhibit A.

ARGUMENT

The Board should not countenance filings by parties that ignore the Board's deadlines and processes. No reason was offered for the late filing or for the belated service of the filing on CCRC counsel, and Keyes has not filed a request that his filing be accepted late. For these reasons, the Keyes protest should be stricken. *See Georgia Central Ry., L.P.--Abandonment Exemption--In Chatham County, GA*, STB Docket No. AB-367 (Sub-No. 2X), slip op. at 1 n.1 (served Sept. 17, 1997)(rejecting late-filed comments filed in opposition to petition for exemption in abandonment proceeding where commenter "failed to explain the delay or to seek permission to intervene at such a late date . . .").

Further, if the protest is accepted for filing, it should be denied as it lacks merit. Keyes' property abuts the rail segment proposed for discontinuance and he complains that the proposed discontinuance deprives him of rail service. The short answer to this claim is that Keyes does not use such rail service and has not done so in the recent past. Nor does he identify any intention or opportunities to use such rail service in the future. As a non-user of rail service, Keyes plainly has no basis upon which to complain of the proposed discontinuance. Indeed, while he complains in his protest that he will be deprived of service, he has written to the Caldwell County Commissioners to advise them that he would prefer that the line be abandoned

so that the right of way does not stay in place. See March 25, 2007 Letter from Dick Keyes to County Commissioners, attached as Exhibit B to this Motion.

Keyes also complains that, unlike the 1 shipper (Sealed Air) that does currently use rail service and for which the Caldwell County Economic Development Commission ("CCEDC") has agreed to provide an alternative rail offload facility, no such accommodation has been made for his benefit. However, unlike rail user Sealed Air, Keyes is not in need of any trans-loading facility; he identifies no freight to transport. Further, should Keyes or some subsequent property owner or other business in the area ever have need to use the offload facility, they will be able to do so. That facility will be a public facility open to any shipper in the area that may need rail and other transportation service. As the CCRC Petition reports, there are in fact other area businesses that have expressed interest in the use of that facility. See Petition, at 4. However, at this point Sealed Air is the only rail shipper on the line segment at issue, notwithstanding that there are other businesses that may have used rail service in the past and that other rail sidings still exist. Because Sealed Air is the only active shipper on the line segment at issue, CCRC sees no reason to build the connector track proposed by Keyes.

Keyes also complains that his property will be devalued by the proposed discontinuance and that he is entitled to some economic benefit similar to that provided to Sealed Air in the form of the rail offload facility. There is no legal principle under which property owners adjoining a line proposed for discontinuance are entitled to any form of compensation and Keyes cites to no such principle. Further, the difference between rail user Sealed Air and non-user Keyes has already been noted, as has the fact that the offload facility is open to use by Mr. Keyes should he have future need for it.

Keyes claims that the discontinuance will last for 30 years. That is merely his supposition. There is no agreement with the entity that is developing a facility in the area (which Keyes correctly identifies as Google) that requires a 30 year discontinuance and there is no certainty at this stage as to how long rail service might be discontinued. The proposed discontinuance will serve to maintain the rail right of way for potential future use in years to come, consistent with the national policy favoring preservation of rail lines for future use. *See* 16 U.S.C. § 1247(d) (stating that there is a “national policy to preserve established railroad rights-of-way for future reactivation of rail service . . .”).

Finally, CCRC notes that the conditions warranting an exemption are fully met in this case – regulation is not needed to carry out the Rail Transportation Policy, the transaction is of limited scope and there is no opportunity for CCRC to abuse market power. *See Longhorn Ry Co.--Discontinuance Exemption--In Burnet, TX*, STB Docket No. AB-501 (Sub-No. 1X) (served Sept. 2, 1997) (granting petition for discontinuance where local government owned track and sole shipper will have service at new rail connection). Keyes has not shown otherwise.

Keyes does not address whether regulation is needed to carry out the rail transportation policy or whether the proposed discontinuance is limited in scope. Further, Keyes only makes the bald, unsupported assertion that “[i]t is an abuse of market power by CCRC and CCEDC to selectively eliminate rail service to a group of property owners for the benefit of one company.” *Protest*, at 4-5. The Board and its predecessor have previously held that there can be no abuse of market power where *current* shippers do not object to the discontinuance. *See Kansas & Oklahoma R R., Inc.--Discontinuance Exemption--In Lane, Ness and Rush Counties, KS*, STB Docket No. AB-853 (Sub-No. 2X), slip op. at 2 (served Oct. 15, 2004) (regulation not needed to protect shippers from abuse of market power where no current shippers objected to

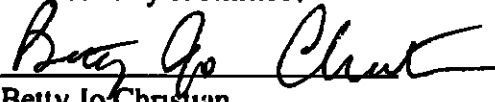
discontinuance); *Soo Line R.R. Co --Discontinuance Exemption--In Rockford, IL*, Docket No. AB-57 (Sub-No. 30X), 1990 WL 287258, at *3 (ICC decided Feb. 2, 1990)(since the sole shipper “fully supports the relief, regulation is not necessary to protect shippers from an abuse of market power.”). Here, Sealed Air, the sole shipper on the line segment at issue, supports the discontinuance and filed a verified statement in support of CCRC’s Petition. *See* Petition, Exh. C, Verified Statement of Kevin J. Holian, at 3.

Keyes obviously disagrees with some of the decisions that were made by CCRC, Caldwell County and others relative to this matter. That is his right and the political process is available to him to make his grievances known. However, he has raised no issue that warrants Board intervention or denial of the CCRC Petition.¹

CONCLUSION

For the aforementioned reasons, CCRC respectfully requests that the Board issue an order exempting the proposed discontinuance of service over a 5.2 mile section of the HG Line from the prior approval requirements of 49 U.S.C. § 10903

Respectfully submitted,



Betty Jo Christian

David H. Coburn

Scott M. Mirelson

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Washington, D.C. 20036

(202) 429-8113

Attorneys for Caldwell County Railroad Company

May 23, 2007

¹ Keyes’ complaint about the state of the CCRC line is off-base and irrelevant to this proceeding

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Motion to Strike in Docket No. AB-999X, *Caldwell County Railroad Company-Discontinuance of Service Exemption-in Caldwell County NC*, was mailed via first class mail, postage prepaid, on May 23, 2007 to the following.

Mr. Dick Keyes
1370 Mountain Circle Drive
Lenoir, NC 28645



Keith Decker

EXHIBIT A

May 8, 2007

**Dick Keyes
1370 Mountain Circle Drive
Lenoir, NC 28645**

**Mr. David H. Coburn
Steptoe and Johnson
1330 Connecticut Ave , NW
Washington, DC 20036-1795**

Dear Mr. Coburn

**This is to provide you with information that I have filed with the STB in protest of
Docket No AB-999X Caldwell County Railroad Company Discontinuance**

**Sincerely,
Dick Keyes
Dick Keyes**

EXHIBIT B

March 25, 2007

Dear County Commissioners:

I watched this week the EDC's program to explain the transloading site and also saw the county's program to describe the many hurdles to recruit Google.

Recently, I wrote you about the concern of my family that the discontinuance of rail service to Sealed Air would lower the value of our rail frontage. I understand it had to be done, but the fact remains we have no useable rail frontage. Since my first letter, I have talked to other property owners (Bill Stone should have advised all of us about what was going to happen to our property). In addition, I have talked to NCDOT Rail division and the Surface Transportation Board in Washington, DC and I would like to refine my initial request.

If we cannot have rail service I am asking the Commissioners to direct the EDC to apply for an abandonment of the closed portion of the railroad tracks instead of discontinuance. What is the difference?

Under a discontinuance the tracks remain under the control of the county railroad with all the inherent responsibilities and costs. For the length of the commitment to Google the tracks would lay dormant, but unusable. The county would have to maintain right of ways. At the end of 30 years the cross ties would be rotten and have to be replaced. The rail bed would have to be stabilized and repaired. Is this a cost that the county can afford to bear? More importantly, the tracks are frozen in time and the property owners are limited with what can be done with his/her property. The real estate agents say rail siding is worthless, yet, they would feature it as an asset if the property were listed. Some of the land along the rail being closed could be used for housing developments because some owners have road frontage and existing county water.

I ask you, would you develop land for a housing development if there was a railroad that could be opened in 30 years with the possibility of industrial customers at your doorsteps. Would you buy a house under these conditions? A discontinuance harms the property owners and ties the hands of those of us who want choices in how we use our property.

We ask you to direct the EDC to apply for an abandonment. Under abandonment, the Surface Transportation Board ceases to have jurisdiction and at that point the local people would have the right to use their land to the highest economic value. This is the fair thing to do. The decision of the EDC to apply for a discontinuance instead of an abandonment has the result of restricting the use of the land of the individual property owner and controls what can be done with it.

Simply put, the land can't be sold to a rail customer because it doesn't have rail service. It cannot be used for a housing development even though much of it has road frontage and water because no one would buy a house near a railroad. It cannot be used to highest potential for other commercial uses because the Caldwell County Railroad controls a 100' strip of land that cannot be built upon, filled over, or driven over.

Friends, our citizens have sacrificed a tremendous amount to recruit Google. George Robinson has financially benefited enormously. (By the way, why is our rail frontage worth zero and George's frontage is worth \$3,000,000?) I guess this is Valmead hard luck. The county has accommodated big out of town developers (Backbone Ridge and The Coves and Round Mountain) and Google. We are asking you to help some local people who have spent their life here. Would you please direct the EDC to apply for an abandonment of the closed portion of the railroad so that we can use our land to the highest economic value?

I would appreciate one of you responding to this letter.

Thank you,

Dick Keyes