

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB FINANCE DOCKET NO. 35073**

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**NORTHWESTERN PACIFIC RAILROAD COMPANY  
– CHANGE IN OPERATORS EXEMPTION –  
NORTH COAST RAILROAD AUTHORITY,  
SONOMA-MARIN AREA RAIL TRANSIT DISTRICT, AND  
NORTHWESTERN PACIFIC RAILWAY CO., LLC**

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**NORTHWESTERN PACIFIC RAILROAD COMPANY'S  
REPLY IN OPPOSITION TO THE PETITION TO  
REVOKE OF FRIENDS OF THE EEL RIVER**

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**October 19, 2007**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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On October 1, 2007,<sup>1</sup> Friends of the Eel River (“FEER”) filed a “Petition to Revoke”<sup>2</sup> the change of operator class exemption invoked by Northwestern Pacific Railroad Company (“NWPCO”) in the above-captioned proceeding. FEER’s Petition essentially repeats arguments already made by other opponents of the transaction – Mendocino Railway (“Mendocino”) and Baywood Partners, Inc. (“Baywood”) – albeit now in the form of a petition to revoke. For the reasons set forth below, FEER’s Petition must be denied for the same reasons that Mendocino’s and Baywood’s requests for agency action were denied previously.

Under 49 U.S.C. 10502(d), the Board may revoke an exemption if regulation is necessary to carry out the rail transportation policy of 49 U.S.C. 10101 (“RTP”). To obtain a revocation, the petitioner must demonstrate that greater regulatory scrutiny is

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<sup>1</sup> Although the filing bears a date of September 14, 2007, the Board’s website at [www.stb.dot.gov](http://www.stb.dot.gov) indicates that FEER’s petition to revoke was not accepted as filed with the agency until October 1.

<sup>2</sup> Hereinafter, FEER’s Petition to Revoke will be referred to as the “Petition.”

necessary to carry out the RTP. Nevada Pacific Railroad Corporation – Lease and Operation Exemption – Rail Lines of Pan Western Corporation, STB Finance Docket No. 34958, slip op. at 2 (STB served Mar. 15, 2007); Illinois RailNet, Inc. – Acquisition and Operation Exemption – BNSF Railway Company, STB Finance Docket No. 34549, slip op. at 3 (STB served Feb. 1, 2006). FEER has failed anywhere to articulate, much less address, this standard for revocation in its Petition.

Although FEER does not set forth a standard under which NWPCO's exemption should be revoked,<sup>3</sup> FEER nevertheless advances two arguments for revocation, both of which the Board already has found to lack merit. First, FEER criticizes the accuracy of NWPCO's notice of exemption because the notice could be read to suggest that the lines NWPCO would operate have been operational when, in fact, they have been out of service for some time pursuant to emergency safety orders issued by the Federal Railroad Administration ("FRA").<sup>4</sup>

NWPCO has already satisfied the Board that there is nothing misleading in NWPCO's notice, including the passages in the notice that FEER has highlighted. The Board has already addressed this very issue in a decision served in this proceeding on September 7, 2007, stating as follows:

The first alleged misstatement is that NWPCO will replace [Northwestern Pacific Railway Co. ("NWPY")], "which has been operating over [the line]. . . ." Mendocino points out that NWPY has not operated over the line because of safety orders issued by the Federal Railroad Administration (FRA) forbidding such operations. As NWPCO points out in reply, the assailed statement more

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<sup>3</sup> The transaction covered by NWPCO's notice of exemption is well-suited for the use of the class exemption. FEER has not given any reason why the proposed transaction warrants greater regulatory scrutiny, nor has FEER offered any facts or arguments to show that the objectives of the RTP are jeopardized by the proposed transaction.

<sup>4</sup> It would appear that the essence of FEER's Petition on this subject is that NWPCO's notice of exemption contains false and misleading information and, thus, is void ab initio.

accurately might have read that “NWPCO will replace [NWPY], which has the authority to operate over [the line].” But even if the original wording in the notice could be considered a misstatement, it was not material to the authorization sought by NWPCO to replace NWPY as the entity authorized to provide service over the line. Thus, the statement does not constitute false or misleading information within the meaning of 49 CFR 1150.34. See Central Illinois Railroad Company—Lease and Operation Exemption—Lines of The Burlington Northern and Santa Fe Railway Company at Chicago, Cook County, IL, STB Finance Docket No. 33960, slip op. at 4 (STB served Sept. 12, 2002) (errors that are trivial, not misleading, and not material to the grant of an exemption are not a basis for rejection).<sup>5</sup>

Similarly, NWPCO’s notice is not false and/or misleading for – (1) not referring to the FRA orders that have prohibited operation of the subject lines until certain specified repairs are made; and (2) not explaining that NWPCO anticipates the reactivation of dormant rail lines. The Board’s notice of exemption rules at 49 CFR 1150.31, et seq., contain no such informational requirements. Moreover, the Board is already well aware of the FRA orders and the status of the line in question by virtue of the Mendocino and Baywood filings made earlier in this proceeding. Had the Board concluded that NWPCO erred or misled by failing to disclose either the existence of the FRA orders or the status of the line in NWPCO’s notice of exemption, then the Board could have deemed the notice void ab initio in NWPCO-1. For good reason, the Board did not do so there, and it should not do so now.

FEER’s second argument for revocation is that NWPCO has stated incorrectly that the proposed transaction would not exceed the thresholds for environmental review. Once again, whether it was aware of the record in this proceeding or not, FEER is merely

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<sup>5</sup> Northwestern Pacific Railroad Company – Change in Operators Exemption – North Coast Railroad Authority, Somoma-Marin Area Rail Transit District and Northwestern Pacific Railway Co., LLC, STB Finance Docket No. 35073 slip op. at 2 (STB served Sept. 7, 2007) (“NWPCO-1”) (footnotes omitted).

rehashing arguments already made by Mendocino – arguments the Board already has fully considered and rejected. Like Mendocino, FEER seems to be unaware of the correct thresholds for determining whether a transaction that would restore service to a non-abandoned rail line is subject to the Board’s environmental review processes. The correct measure in this case is whether the transaction would result in an increase of eight trains per day over any section of the line to be operated [49 CFR 1105.7(e)(5)(i)(C)], not the 100% threshold of 49 CFR 1105.7(e)(5)(i)(A). NWPCO has certified that the eight-trains-per-day threshold at 49 CFR 1105.7(e)(5)(i)(C) will not be exceeded and that, accordingly, environmental review is not necessary. In fact, the material that FEER supplies in support of its Petition reinforces NWPCO’s certification. As the Board stated in NWPCO-1:

The second alleged misstatement is that the proposed transaction would not exceed the thresholds for environmental review under the regulation at 49 CFR 1105.7. That statement is factually correct, however. Where there have been no operations over a rail line, the applicable threshold is an increase of eight trains per day over any section of the line to be operated. 49 CFR 1105.7(e)(5)(i)(C); Missouri Central Railroad Company—Acquisition and Operation Exemption—Lines of Union Pacific Railroad Company, STB Finance Docket No. 33508, et al., slip op. at 7 (STB served Apr. 30, 1998), aff’d sub nom. Lee’s Summit, Mo. v. STB, 231 F.3d 39 (D.C. Cir. 2000). NPWCO certifies that operations will not exceed the threshold of eight trains per day. Therefore, under the regulation, no environmental review is required.<sup>6</sup>

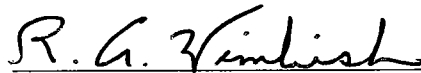
In sum, there is nothing truly new in FEER’s Petition. There is nothing materially false or misleading in NWPCO’s notice of exemption, and the reactivation of service contemplated under the notice would not exceed the applicable environmental thresholds to require STB environmental review. As shown above, the arguments that FEER has raised in support of a nominal revocation are virtually identical to those already raised by

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<sup>6</sup> Id.

others and rejected by the Board in this very proceeding. Had FEER consulted in advance with the record here, it might have recognized that its Petition does little more than necessitate an unfortunate waste of agency resources. FEER is not entitled to the relief it seeks, and, for that reason, the Petition should be denied in its entirety.

Respectfully submitted,



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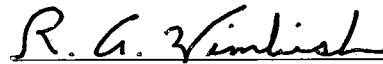
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Dated: October 19, 2007

## **CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of the foregoing Reply in Opposition to Revoke of Friends of the Eel River by facsimile transmitting and mailing by prepaid first class mail copies to all parties of record.

Dated at Washington, D.C. this 19th day of October, 2007.

  
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Robert A. Wimbish