

BEFORE THE
SURFACE TRANSPORTATION BOARD

223350

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

RESPONSE AND MOTION TO STRIKE

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Dated August 22, 2008

The effectiveness of the Notice and Request is dependent entirely upon the validity and effectiveness of the South Carolina Parties' December 1, 2006 Notice for a Modified Certificate of Public Convenience and Necessity, which Landowners have challenged through their Petition for Leave to Intervene, Petition to Reconsider, and Petition for an Investigation filed on

March 22, 2007 and supplemented on May 21, 2008. If the South Carolina Parties' 2006 Notice fails, as Landowners contend that it must, the essential predicate for the most recent filing by the South Carolina Parties will be eliminated and the Notice and Request will be a nullity.

The South Carolina Parties' Notice and Request is only the latest step in an improper continuing effort by those parties to retain control of property they do not own and that should be returned to the rightful owners. In the unlikely event there could be any remaining doubt that Landowners have been right about the inappropriate actions of the South Carolina Parties from the start, those doubts are eliminated by the Notice and Request.

The Board served its Notice of BRC's Modified Rail Certificate on December 28, 2006 in response to and in reliance upon the Notice filed by the South Carolina Parties on December 1, 2006. In their December 1 Notice, the South Carolina Parties represented that they had formed a fully functioning railroad and had adopted a business plan, supported by appropriate arrangements and agreements, calling for the complete restoration of rail service over the railroad right-of-way at issue. While they candidly admitted that there was not a single shipper along the line that needed rail service and while they failed to identify any likely shipper which would be attracted to the service they proposed to institute, they assured the Board that service was needed and that their declared business plan was reasonable and achievable.^{1/}

As far as Landowners have been able to discern, not one railroad engine has ever operated over the line since December 28, 2006. Neither has BRC expended anything more than token

^{1/} Nowhere in their December 1 Notice did the South Carolina Parties mention the possibility that they intended to sell or even contemplated the sale of the right-of-way to the Authority or that there was any idea that they might be thinking about an extraordinarily early termination of service by BRC to be followed by a request for a Notice of Trail Use/Rail Banking.

amounts of money to maintain the line as it has continued to deteriorate. There is no record evidence to show that BRC has made any expenditures designed to restore the line to a fully functioning operational condition, and the record is silent with respect to any BRC program to market the line or to try to attract shippers to locate along the right-of-way. Neither Landowners nor the Board is informed about the employment of any qualified personnel by BRC to maintain the line, restore it to full service, market the line to shippers or to be available to potential shippers should they be interested in using the railroad. These are all things, among many others, that one would expect to see when a new legitimate operator assumes responsibility for a rail operation, and the fact that none is seen in connection with this project speaks volumes about the credibility of the South Carolina Parties' December 1 Notice and the honesty and candor of the South Carolina Parties' declaration that they intended to reinstitute rail service over the right-of-way.

What Landowners have seen is a series of activities led by the Authority confirming what Landowners and others have suspected has been underway with respect to this rail property since the end of 2006. The only honest business plan that has ever been under serious consideration was one designed by the South Carolina Parties to take improper advantage of the Board's processes and manipulate its systems so that an abandoned right-of-way and railroad operation might be brought back to life -- but only to the extent necessary to permit the Authority to buy whatever interest in the line the State may have and use the property not for a railroad operation but for the installation of sewer and water lines.²¹

²¹ Despite several challenges by Landowners, the South Carolina Parties have failed expressly to deny that their strategic goal was and always has been to effect a sale of the right-of-way to the Authority through the use of the Board's Part 1152 processes

Thus, it came as no surprise to Landowners when the South Carolina Parties told the Board last month that, after merely nineteen months of very limited effort, they had determined that the BRC project was a failure and that BRC would terminate its "service" by September 16, 2008.

It is long past the time when the Board should bring this charade to an end. The South Carolina Parties never intended to reinstitute rail service over the line, and it is now painfully clear that their only goal was to try to use or abuse the Board's processes in hopes of turning an abandoned right-of-way that should revert to adjoining landowners into an asset the State of South Carolina could sell for a huge profit and the Authority could use for the installation of sewer and water lines.

Even now, the South Carolina Parties are being less than candid with the Board. They still contend that they have an "interest in preserving the Line."^{3/} But there is absolutely no evidence in this filing or anywhere else even suggesting that the South Carolina Parties have any interest in preserving the rail line. Indeed, all evidence on that point has been to the contrary. If the South Carolina Parties' assurances regarding their interest in preservation of the line of railroad were credible at all, they would not have filed their Notice to Terminate, they would have used BRC to begin -- finally -- their marketing, maintenance and operational efforts as they said they would do in December of 2006, only nineteen months ago.

Similarly, the South Carolina Parties continue to mislead the Board about their actions in 2006. Despite overwhelming evidence to the contrary, they are still telling the Board that their

^{3/} Notice and Request, p. 2. "Line" is defined by the South Carolina Parties as a "line of railroad" not just the right-of-way over which the line of railroad operated. Notice and Request, p. 1

2006 Notice was filed so that they could market railroad service to potential new shippers.⁴ As shown above, if those goals were what the South Carolina Parties intended to achieve in 2006, they have not done anything to achieve them over the succeeding year and a half, and their termination of the effort after such a short time does not demonstrate much of a commitment to the program.

In summary, it is simply beyond question that the South Carolina Parties' only interest in this right-of-way was to attempt to transform a legally abandoned railroad line and rail operation into an operational one so that they could try to have it abandoned in a way that might permit the Parties to execute the scheme they have now laid on the table -- sale of the right-of-way to the Authority for use as a water and sewer line facility.

It is important to note also that the South Carolina Parties' Notice to Terminate is not a standard notice provided for in 49 C.F.R. Section 1150.24 and is not expressly sanctioned by that regulation. Again, exposing their true goals and ambitions, the effectiveness of the present Notice "is contingent upon the Board's issuance of the NITU," which is the subject of the South Carolina Parties' accompanying Request. In other words, the South Carolina Parties declare that BRC will only terminate service over the line and effect a new abandonment if, contemporaneously, they can realize their ultimate goal -- the sale of the right-of-way by the State to the Authority for a big profit. If they cannot get that NITU, they say the Notice of Termination is not effective.

The South Carolina Parties offer absolutely no support for the legitimacy of such an inextricably coupled Notice of Termination or a Notice of Termination that is contingent in any way, and Landowners are certainly not aware of any other instance where the Board has

⁴ Notice and Request, p. 2

permitted such a Notice of Termination to be effective. Under the Board's regulatory regime, a Notice of Termination becomes effective 60 days after it is filed and, absent some authorized intervening event, an abandonment occurs at that time. Thereafter, any number of things can happen to the right-of-way. The Board's regulations do not sanction the type of "have your cake and eat it too" program the South Carolina parties are proposing, and the Board should reject the program summarily.

It would be completely inconsistent with the public interest for the Board to sanction the type of process the South Carolina Parties are attempting to perpetrate. There can be no justification for foreclosing post-abandonment alternatives and approving the sale of the right-of-way to the Authority under the pretense of a Notice of Interim Trail Use filing. This filing by the South Carolina Parties, in short, is very reminiscent of and identical in purpose and approach to the Notice that began this process nineteen months ago.

The implicit declaration by the South Carolina Parties that they intend to use the right-of-way for a trail is not credible. The South Carolina Parties are much more careful in this filing about declaring their true intentions than they were in their 2006 Notice. While the atmospherics surrounding the Notice and Request certainly suggest that the South Carolina Parties plan to convert the erstwhile right-of-way into a trail under the National Trails System Act, the South Carolina Parties do not expressly represent that to be their goal. And it would not be credible for them to make such an assertion. Published reports describing public meetings called to discuss the Authority's plan suggest that there can be many uncertainties and doubts about what the Authority intends to do with the erstwhile right-of-way, who will control and have

access to it, how its construction and maintenance will be financed,²⁷ what use conditions would be imposed on it, and where, if any place, it would really be located.

Especially against the procedural background of this case, the Board should be wary about accepting less than precise statements about what the Authority really intends to do with the right-of-way it hopes to be able to purchase.²⁸ Part 1152.29 requires the Board to determine whether the Trails Act is applicable to a proffered proposal. It is difficult to understand how such a determination could be made on a record as thin and as suspect as the present one is. For this reason, as well as all the others set forth above, the Notice and Request should be stricken

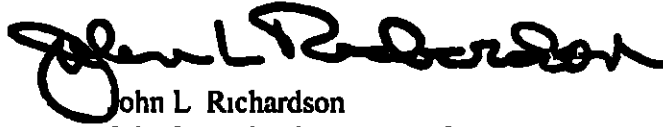
While, as noted, the South Carolina Parties have yet to acknowledge openly and candidly that their only goal is and has been to secure the right-of-way in a manner that would permit them to sell it to the Authority so that it can be used for sewer and water pipe lines, Landowners doubt that any of the parties would deny the truthfulness of this contention. It is then the responsibility of the Board to declare whether it is prepared to sanction the misuse of its processes in such a manner. And that determination should not be made until final action has been taken on Landowners' long-pending Petitions. But even if the Board determines that it may and should authorize such conduct, serious questions remain about the efficacy of the scheme the South Carolina Parties have concocted.

²⁷ There has been speculation that the cost of buying, modifying and maintaining a trail would be defrayed in part by salvaging and selling off the railroad assets currently located on the right-of-way. Such a financing plan would, of course, be completely inconsistent with the representation by the South Carolina Parties that they will "preserve" the "line of railroad" for railroad use.

²⁸ It would also be prudent for the Board to require the South Carolina Parties to submit some evidence that the Authority is capable of making and complying with the financial assurances contained in the Request.

Therefore, for all these reasons, Landowners oppose the South Carolina Parties' most recent filing and urge the Board to strike it from the docket

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John L. Richardson". The signature is stylized with a large, looping initial "J" and a cursive "Richardson".

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Dated August 22, 2008

CERTIFICATE OF SERVICE

I hereby certify that, on August 22, 2008, I caused a copy of the foregoing document to be served upon the following persons by U S mail, postage prepaid, or by electronic mail

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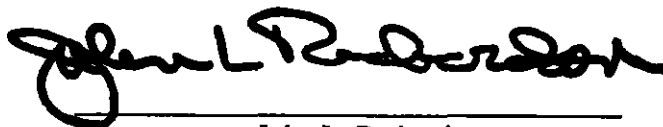
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