

Crockford, Konrad S.

From: ECastillo@bakerandmiller.com
Sent: Friday, May 27, 2022 15:50
To: Crockford, Konrad S.
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Subject: Reply Letter to ND PUC
Attachments: Reply Letter to ND PUC (Final).pdf

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Good afternoon,

Hope this email finds you well. Please find the attached reply letter to North Dakota Public Service Commission. If you have any questions, kindly e-mail Crystal Zorbaugh at Czorbaugh@bakerandmiller.com.

Kind Regards,

Eleanor



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Response to 20 May 2022 request for additional information

BAKER & MILLER PLLC

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May 27, 2022

VIA E-MAIL

Konrad Crockford
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Public Service Commission State of North Dakota
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Dear Mr. Crockford,

As we discussed in a call on May 6, 2022, Red River Valley & Western Railroad Company (“RRVW”) has reviewed your April 22, 2022 response (“April 22 Letter”) to our letter and Environmental and Historic Report, sent to your office on March 22, 2022, concerning RRVW’s abandonment of its common carrier obligation over a 2.29-mile railroad line¹ (“Line”) in the City of Horace in Cass County, North Dakota. Before responding to your letter, I want to reiterate that RRVW appreciates you taking the time to discuss this abandonment and the unique considerations related to it, and your commitment to facilitating a plan for moving forward that is acceptable to all parties. To be clear, RRVW values the relationship that has developed between RRVW and the North Dakota Public Service Commission (“Commission”) over the years, and as such does not take lightly the Commission’s concerns.

Per our discussion, RRVW sought abandonment authority from the Surface Transportation Board (“Board”) because the agency is the sole independent federal agency charged with the economic regulation of the freight railroads, including responsibility for determining and enforcing entry and exiting requirements for railroads.²

¹ Under 49 U.S.C. § 10901 mainline track requires STB authority to construct, acquire, operate, discontinue (cease operations), and abandon under 49 U.S.C. § 10903 (permanently remove from the interstate rail network). See Allied Indus. Dev. Corp. – Petition for Declaratory Order, FD 35477 (S.T.B. served Sept. 17, 2015) (“Allied”).

² See also Suffolk & S. R.R. LLC – Lease & Operation Exemption – Sills Road Realty, FD 35036, slip op. 1 (S.T.B. served Nov. 16, 2007) (explaining that [t]he federal government has

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As I explained to you over the phone, RRVW's abandonment differs from a typical abandonment in a couple of ways. First, when RRVW acquired the tracks, physical assets, and common carrier obligation for the Line and various other rail lines as part of the acquisition of 656 miles of rail line from BNSF in 1987,³ BNSF retained the real estate underlying the Line. Thus, because of the 1987 transaction, the rights for the rail line (the combined bundle of sticks, which included the common carrier obligation and real property rights), were separated into two separate and distinct rights. Post-transaction, RRVW owned the common carrier obligation⁴ and bore the responsibility under 49 U.S.C. §§ 10903 to seek Board authority to permanently cease operations over the Line, and BNSF owned the real property underlying the Line.

Second, RRVW filed for abandonment authority at the request of the Metro Flood Diversion Authority ("MFDA") to accommodate an important public project, which involves MFDA acquiring the railroad right-of-way and constructing a large drainage ditch facility at approximately milepost 11 ("Drainage Facility").⁵ The drainage ditch facility is critically important to address flooding issues facing the immediate region. For MFDA to undertake this important public project, it had to engage in a series of related transactions. These transactions included (1) getting RRVW to agree to cease operations over the Line, (2) relocating the Line's sole shipper, and (3) and negotiating with BNSF to acquire its real property interest. As we discussed, it is my understanding that MFDA acquired all adjacent property owners' interests directly adjacent to where the Drainage Facility will be located at milepost 11. Additionally, negotiations and discussions remain ongoing with other property owners adjacent to Line, but at the time of writing this letter, not all adjacent property interests, have been acquired by MFDA.

Third, as RRVW understands not all the real property underlying the Line is necessary for MFDA to complete the construction of and establish the Drainage Facility. In addition to the Drainage Facility, MFDA's acquisition of the Line and the real property has an additional public

licensed rail carrier entry and exit since 1920. Thus, the STB and its predecessor agency, the Interstate Commerce Commission ("ICC"), have long had exclusive jurisdiction and plenary authority over the construction, operation, and abandonment of mainlines. 49 U.S.C. §§ 10901, 10903).

³ See Red River Valley and W. R.R. Co.; Acquisition and Operation Exemption; Certain Lines of Burlington N. R.R. Co., FD 31071 (S.T.B. served July 22, 1987)

⁴ Reading, Blue Mountain & N. R.R. Co. –Petition for Declaratory Order, FD 35956 (S.T.B. served June 6, 2016) (a railroad line subject to the Board's jurisdiction, remains jurisdictional common carrier track until abandonment authority is sought and approved by the Board);

⁵ The abandonment, which has been requested by the MFDA, is being sought to allow MFDA to move forward with a project developed by the U.S. Army Corps of Engineers and the Diversion Board Authority, which is necessary for flood control purposes. Metro Flood Diversion Authority. <https://fmdiversion.gov/about-the-project/>. Accessed March 9, 2022.

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interest component. MFDA plans to utilize the excess real property, including the sole bridge⁶ on the Line to establish a public trail. As such, the bridge will remain largely as it exists today, except for the fact that RRVW will remove the tracks and physical infrastructure from the surface of the bridge.

As explained during our call and as set forth below, the above three considerations limit the actions that RRVW can take concerning the Commission's concerns as set forth in your April 22 Letter. While we understand the requirements set forth in *North Dakota Century Code (N.D.C.C.) Chapter 49-09 Acquiring and Transferring Utility Property* relating to the sale/transferring of the railroad right-of-way real estate and the bridge structure located at milepost 11.0, RRVW does not own the real property and as such cannot force or ensure compliance with such provisions. RRVW has forwarded your letter to the Board's Office of Environmental Analysis ("OEA") for their consideration and inclusion in the record. Of course, keep in mind that the Board's conditioning authority on abandonments is limited and I am unaware of any power held by the Board that would allow them to force BNSF as the owner of the real property to comply with the above provision. The Draft Environmental Assessment issued by OEA on May 13, 2022, acknowledges the Commission's concerns and directs RRVW to "consult with the North Dakota Public Service Commission to determine any compliance requirements related to the potential sale or transfer of the real property and the extent of salvage."⁷ RRVW is providing this response as part of that process and further would be open to participating in a conference call with other interested parties and the Board to discuss this issue further.

The second concern raised in your April 22 Letter references *N.D.C.C. Chapter 49-09*, which requires a railroad to remove and clear all rail, ties, materials, supplies, and debris from the railway line and *N.D.C.C. Chapter 49-11 Railroad Bridges, Crossings, Intersections, and Fences*, which requires a railroad to restore every stream of water, watercourse, street, highway, or canal across, along, or upon which such railroad may be constructed to its former state or to such condition that its usefulness shall not be materially impaired. As I confirmed over the phone, RRVW is fully committed to removing all rail, ties, materials, supplies, and debris from the railway line. With respect to the bridge, the bridge's utility is maximized by keeping the bridge and ballast intact, so that it can be used as part of the community trail that will be established over the former line as requested by the MFDA. Thus, consistent with the Commission's letter, the usefulness of the bridge is not materially impaired, as presumably, the structure would be exempt from *N.D.C.C. Chapters 49-09 and 49-11*.

The Commission raises two additional concerns. The Commission's third concern relates to the abandonment resulting in the cessation of service over six public grade crossings and one private crossing. To address this concern, RRVW has notified and is coordinating with local road

⁶ The bridge is located at milepost 11.0 and crosses the Sheyenne River at Horace, North Dakota.

⁷ Red River Valley and W. R.R. Co. – Abandonment Exemption – In Cass County, ND, AB-391 (Sub-No. 11X) (S.T.B. served May 13, 2022) ("Draft Environmental Assessment")

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authorities concerning the closure and paving over of the impacted crossings. This will help ensure that roadway users are not adversely impacted by RRVW's abandonment. The Commission's final concern relates to a siding located on the Line between Center Ave. and Park Drive. RRVW confirms that this siding will be salvaged as part of RRVW's salvaging efforts.

As I explained on our call, to the extent after reviewing this response, you wish to set a call to address any remaining issues RRVW is happy to participate. It may be beneficial to also include representatives from BNSF, MFDA, and the Board on that call. RRVW understands MFDA looks forward to proceeding with its plans to establish the Drainage Facility, which would be beneficial to the public at large, expeditiously. As such, should the Commission be able to schedule a call quickly, RRVW will make effort to accommodate the Commission's chosen date and time for the call. In closing, RRVW looks forward to developing a plan for moving forward that is acceptable to all parties. Please do not hesitate to contact me, at the email or phone number at the top of this letter.

Sincerely,

/s/ Crystal M. Zorbaugh

Crystal M. Zorbaugh

Enclosure

cc : Victor Meyers (RRVW)
Spencer Naake (B&M)
Danielle Gosselin (STB)
Andrea Poole (STB)
Peter Denton