

Peter W. Denton
202 429 6445
pdenton@steptoe.com

1330 Connecticut Avenue, NW
Washington, DC 20036-1795
202 429 3000 main
www.steptoec.com

Steptoe

300608

ENTERED
Office of Proceedings
May 7, 2020
Part of
Public Record

May 7, 2020

VIA E-FILING

Allison C. Davis
Director
Office of Proceedings
Surface Transportation Board
395 E Street, NW
Washington, DC 20423

Re: **STB Docket No. AB 6 (Sub-No. 498X), BNSF Railway Company—
Abandonment Exemption—In Pawnee County, Oklahoma**

Dear Ms. Davis,

I write on behalf of BNSF Railway Company (“BNSF”) regarding the above-captioned abandonment class exemption proceeding to respectfully request that you waive the otherwise applicable deadlines for filing a consummation notice or extension request, and that you grant a one-year extension of the consummation deadline in this proceeding, to April 25, 2021.

By a decision served in this proceeding on April 25, 2019, the Surface Transportation Board (“Board”) authorized the abandonment of the subject rail line, effective May 25, 2019. That decision states, “[i]f consummation has not been effected by BNSF’s filing a notice of consummation by April 25, 2020, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.” Slip op. at 3.

In a decision served on May 24, 2019, the Board reopened this proceeding and imposed three environmental conditions related to salvage activities. The second condition requires BNSF, prior to commencement of any salvage activities, to consult with the Oklahoma Department of Environmental Quality (“DEQ”) “to ensure that DEQ’s Tier 2a screening level requirements for the petroleum hydrocarbon contamination in the area of the proposed abandonment have been adequately addressed and submit the results of these consultations in writing to [the Board’s Office of Environmental Analysis].” Slip op. at 2.

The Board's rules, 49 C.F.R. § 1152.29(e)(2), provide that, "[f]or good cause shown, a railroad may file a request for an extension of time to file a notice so long as it does so sufficiently in advance of the expiration of the deadline for notifying the Board of consummation to allow for timely processing." While BNSF has been diligently working to satisfy the Board's conditions, BNSF has not yet completed its required consultations with DEQ, and BNSF is not prepared to consummate the abandonment at this time. BNSF therefore requests that the Board grant a one-year extension of the consummation deadline, to April 25, 2021.

In connection with preparing an extension request yesterday, I recognized that I had the mistaken understanding that the Board's decision reopening this proceeding, served May 24, 2019, had reset the consummation deadline to one year after that decision, or May 24, 2020. It is now clear that the "deadline for notifying the Board of consummation" was in fact April 25, 2020 – twelve days ago, and one year after the service date of the initial Board decision in this proceeding. *See* 49 C.F.R. § 1152.29(e)(2) (the consummation notice "shall be filed within 1 year of the service date of the decision permitting the abandonment"). I regret very much my misinterpretation of the rule and having to submit an extension request that I now understand is ten days past the consummation deadline.

The Board's regulations delegate to the Director of the Office of Proceedings "authority initially" to "waive the regulations at 49 CFR part 1152, subpart C," which includes 49 C.F.R. § 1152.29(e)(2), on "appropriate petition." 49 C.F.R. § 1011.7(a)(2)(xiv); *see also* *GTE Serv. Corp. v. FCC*, 782 F.2d 263, 273-74 & n.12 (D.C. Cir. 1986) (affirming an agency's "inherent powers" to control its own docket).

Therefore, BNSF hereby requests that the Director waive the deadline for filing a consummation notice in this proceeding and allow the aforementioned extension request to be made at this time. The Director has granted a similar petition where a failure to timely request a consummation deadline extension soon after the deadline expired was due to a comparable honest mistake. *Norfolk S. Ry. Co.—Abandonment Exemption—in Marietta, Lancaster Cnty., Pa.*, AB 290 (Sub-No. 328X) (STB served Apr. 3, 2013); *see also* *Norfolk S. Ry. Co.—Abandonment Exemption—in Marietta, Lancaster Cnty., Pa.*, AB 290 (Sub-No. 328X) (STB served Mar. 5, 2014) (granting a second late-filed request to extend the consummation deadline for similar reasons).

There was no opposition to the initial BNSF notice of exemption in this proceeding, no party will be prejudiced by the granting of these waiver and extension requests, and there has been no change in circumstances since the consummation deadline of April 25, 2020. Denial of these requests would require BNSF to file a new notice of exemption to obtain fresh Board authority to abandon the rail line at issue here pursuant to the class exemption established by the Board for out-of-service rail lines. This would extend the time by which BNSF could abandon the line by a number of weeks and add increased costs and administrative burdens.

Allison C. Davis
May 7, 2020
Page 3

Steptoe

For the foregoing reasons, I respectfully request that you waive the otherwise applicable deadlines for filing a consummation notice or extension request, and that you grant a one-year extension of the consummation deadline in this proceeding, to April 25, 2021.

Please contact me with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'Peter W. Denton', with a long horizontal flourish extending to the right.

Peter W. Denton
Attorney for BNSF Railway Company

CERTIFICATE OF SERVICE

I certify that I have, on May 7, 2020, served copies of this letter on all parties of record in this proceeding.



Sarah B. Nural
Attorney for BNSF Railway Company