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General Railway Corporation
dba

Iowa Northwestern Railroad

4814 Douglas St. Omaha, NE 68132
V (402) 558-0553 Cell (712) 574-9800
john@ianwrr.com

22 December 2005

VIA: Fed Ex

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
Mercury Building, #711
1925 K Street, N.W.
Washington, DC 20423-0001



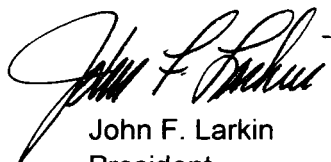
Re: Docket Number AB-1067, (Sub-No. 1X), General Railway Corporation,
dba Iowa Northwestern Railroad Abandonment Exemption in Osceola
and Dickinson Counties, Iowa

Dear Secretary Williams:

Enclosed for filing are the original and ten copies of a Petition for Exemption for abandonment in the afore-mentioned proceedings and our check in the amount of \$5,200 representing the filing fee. Also enclosed is a computer diskette with the notice, environmental report and historic report.

Please time-stamp the extra copy of this letter to indicate receipt and return it to me in the stamped, self-addressed envelope provided for your convenience.

Respectfully



John F. Larkin
President

Enclosures

cc: All Parties on Service List (w/enclosure)

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. AB 1067 (Sub-No. 1X)

**IOWA NORTHWESTERN RAILROAD - ABANDONMENT EXEMPTION -
IN OSCEOLA AND DICKINSON COUNTIES, IOWA**

PETITION FOR EXEMPTION

John F. Larkin
General Railway Corporation
4814 Douglas St.
Omaha, NE 68132
(402) 558-0553

Dated: 22 December 2005

**Before the
SURFACE TRANSPORTATION BOARD**

Docket No. AB 1067 (Sub-No. 1X)

**IOWA NORTHWESTERN RAILROAD - ABANDONMENT EXEMPTION -
IN OSCEOLA AND DICKINSON COUNTIES, IOWA**

PETITION FOR EXEMPTION

EXPEDITED CONSIDERATION REQUESTED

General Railway Corporation, doing business as the Iowa Northwestern Railroad ("IANW") petitions the Surface Transportation Board ("STB") to exempt, under 49 U.S.C. § 10502, IANW's abandonment of 17.05 miles of rail line from the prior approval requirements of 49 U.S.C. § 10903.

PROPOSED TRANSACTION

IANW proposes to abandon 17.05 miles of its track (the "Line") between Milepost 235.25 (Engineering Station 1593+95) west of Lake Park, IA and Milepost 252.3 (Engineering Station 886+81) west of Allendorf, IA, located in Dickinson and Osceola Counties, Iowa. The Line traverses Zip Codes 51249, 51347, 51345 and 51354.

A map of the Line is attached as Exhibit A. The Environmental Report is included as Exhibit B and the Historic Report is included as part of Exhibit B. Exhibit C contains the Federal Register Notice, Exhibit D contains the Certificate of Publication, and Exhibit E contains the Certificate of Service.

Based on information in IANW's possession, the Line does not contain any federally granted right-of-way. Any documentation in IANW's possession concerning title will be made available to those requesting it.

LACK OF TRAFFIC SUPPORTS ABANDONMENT

No traffic has moved on the line since 22 December 2003. The entire IANW line was embargoed by Union Pacific Railroad (Embargo Number 7-03) on 5 December 2003, terminating all freight traffic. There was only one shipper on the line, the Cooperative Elevator Association ("CEA") in Ocheyedan, IA. The shipper originated 150, 100 and 225 cars of grain in 2001, 2002, and 2003 respectively and received 34, 39 and 68 cars in 2001, 2002 and 2003 respectively.

In addition, 150 grain cars that had been spotted in Ocheyedan for loading since 2001 were ordered returned by the lessor in 2002 due to low utilization. A second set of 150 cars that had been obtained based on CEA's representation that they intended to ship 900-1200 cars annually was ordered returned in fall 2003 prior to the UP embargo due to low utilization of the equipment, effectively ending outbound grain shipping. The UP embargo has been modified and extended three times since the initial embargo in December 2003 and remains in effect. The only other shipper on the IANW (on a part of the line to retained) received less than 20 cars of fertilizer per year. There are no other shippers on the IANW.

CEA has the option of receiving inbound fertilizer at their site in Sibley which is 12 miles away. Further, this location receives traffic at a lower freight rate than at Ocheyedan, offsetting any additional cost of transshipping. IANW does not expect any future rail-oriented shipping to develop on the line. There has been no overhead traffic since the line was stub-ended in 1993.

There has been no revenue generated on the line since December 2003. IANW continues to bear the cost of property taxes and costs associated with inspecting and maintaining the property. IANW has previously offered the line for sale to at least 4 different parties, but to date has not received any offers to purchase.

The condition of the rail in the Ocheyedan yard had deteriorated to the point that rails were spreading under a locomotive causing a derailment on the main lead. The shipper (CEA)

had been notified prior to this that the yard, which CEA was obligated to maintain by contract, required maintenance to correct developing problems. There had been negligible maintenance since and the shipper has continued practices (i.e., pumping water onto the tracks, placing very large piles of snow onto the track) that led to rapid deterioration of the track structure. The yard tracks were considered unsafe for continued operations in early 2004.

In a series of decisions, the Interstate Commerce Commission found that the abandonment of rail lines on which no traffic originated or terminated for at least two years should be exempt from regulation under then 49 U.S.C. § 10505 (now 49 U.S.C. § 10502). Exemption of Out of Service Rail Lines, 366 ICC 885 (1983); Exemption of Out of Service Rail Lines, 1 ICC 2d 55 (1984), as modified by 2 ICC 2d 146 (1986). On the 22nd of December 2003 it will be over two years since any freight traffic was carried on this line of railroad.

ARGUMENT SUPPORTING THE ABANDONMENT

IANW seeks an exemption under 49 U.S.C. §10502 from the applicable requirements of 49 U.S.C. § 10903 for this proposed abandonment of 17.05 miles of railroad.

Under 49 U.S.C. § 10502, the STB must exempt a transaction from regulation when it finds that:

(1) regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101; and,

(2) either:

(a) the transaction is of limited scope, or

(b) regulation is not necessary to protect customers from the abuse of market power.

The legislative history of § 10502 reveals a clear Congressional intent that the STB should liberally use its exemption authority to free certain transactions from the administrative and financial costs associated with continued regulation. In enacting the Staggers Rail Act of

1980, Pub. L. No. 96-488, 94 Stat. 1895, Congress encouraged the Interstate Commerce Commission ("ICC"), the STB's predecessor agency, to liberally use the expanded authority under former §10505:

The policy underlying this provision is that while Congress has been able to identify broad areas of commerce where reduced regulation is clearly warranted, the Commission is more capable through the administrative process of examining specific regulatory provisions and practices not yet addressed by Congress to determine where they can be deregulated consistent with the policies of Congress. The conferees expected that, consistent with the policies of this Act, the Commission will pursue partial and complete exemption from the remaining regulation.

H.R. Rep No. 1430, 96th Cong. 2nd Sess. 105 (1980). See also *Exemption From Regulation-Boxcar Traffic*, 367 I.C.C. 424, 428 (1983), vacated and remanded on other grounds, *Brae Corp. v. United States*, 740 F.2d 1023 (D.C. Cir 1984). Congress reaffirmed this policy in the conference report accompanying the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, which re-enacted the rail exemption provisions as Section 10502. H.R. Rep. No 422, 104th Cong., 1st Sess. 168-69 (1995).

1. The application of 49 U.S.C. § 10903 Is Not Necessary To Carry Out the Rail Transportation Policy.

Detailed scrutiny of this transaction is not necessary to carry out the rail transportation policy. An exemption would minimize the unnecessary expense associated with the preparation and filing of a formal abandonment application, expedite regulatory decisions and reduce regulatory barriers to exit. 49 U.S.C. § 10101 (2) and (7). By abandoning the line IANW will be able to avoid maintenance and ownership costs for a line of railroad with no reasonable prospects for economical railroad use. By granting this exemption the STB fosters sound economic conditions and encourages efficient management by permitting the rationalization of an unnecessary rail line. 49 U.S.C. § 10101 (3), (5) and (9). IANW is negotiating to sell the right of way to the Iowa Trails Council upon abandonment. There are no adverse affects upon other aspects of the rail transportation policy. For example, competition

and the continuation of a sound rail transportation system are not affected since there has been no rail traffic for over two years, and the only shipper on the line has requested IANW pursue abandonment of the line.

a. This Transaction Is Of Limited Scope

The proposed transaction is of limited scope. IANW seeks to abandon an unused 17.05 miles of its' right of way in two counties (Osceola and Dickinson) in Iowa. The length of the line, its limited geographic area, and the lack of use of the Line all demonstrate the limited scope of the proposed abandonment.

b. This Transaction Will Not Result In An Abuse Of Market Power

There is no freight traffic, either local or overhead on the line. The last shipment occurred over two years ago and rail shipments were a very small portion of the total freight shipped by the only shipper on the line. The remaining shipping consists of inbound fertilizer which can be received by rail 12 miles away at a freight rate lower than that delivered to the shipper on this Line. There are no cars remaining to ship outbound freight. Hence, there are no shippers that can be subjected to an abuse of market power by IANW.

Since the scope of the exemption requested is limited and will have no direct impact on shippers or other rail carriers, it is not necessary for the STB to consider whether shippers need to be protected from abuse of market power. However, if the Board were to consider market power, it is clear that the only shipper on the Line made little use of it when it was readily available for use and clearly has other options available for shipping. Accordingly, regulation is not needed to protect shippers from abuse of market power.

ENVIRONMENTAL REPORT

The Environmental Report containing the information required by 49 C.F.R. § 1105.7 is attached hereto as Exhibit B.

HISTORIC REPORT

The Historic Report containing the information required by 49 C.F.R. § 1105.8 is incorporated within the attached Exhibit B, the Environmental Report.

FEDERAL REGISTER NOTICE

The Federal Register Notice is attached in Exhibit C.

LABOR PROTECTION

The interests of railroad employees of IANW will not be adversely affected. There is only one full-time employee, the President of the IANW, who will continue to manage the remaining portion of the line. One part-time employee, the Secretary of the IANW, will also continue to manage the remaining portion of the line. There will be no impact on employees and the labor protective conditions in Oregon Short Line R. Co.-*Abandonment-Goshen*, 360 I.C.C. 91 (1979) will be not applicable to this abandonment.

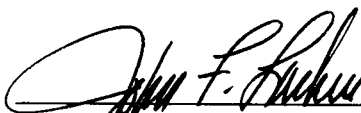
EXPEDITED CONSIDERATION REQUESTED

There is currently pending an action in the United States District Court for the Northern District of Iowa District, Western Division entitled "Cooperative Elevator Association v. General Railway Corporation d/b/a Iowa Northwestern Railroad," Docket No. 5:04-cv-4069. Attached hereto as Exhibit F are relevant documents from the suit for the STB to consider, including the Court's "Order Accepting Magistrate's Report and Recommendation," the "Judgement," and the Court's "Order Regarding Defendant's Motion to Modify Court Order and Plaintiff's Third Application for Order Finding Defendant in Civil Contempt." In light of this, IANW requests the STB to consider granting an expedited resolution to this matter to the extent possible by the STB.

CONCLUSION

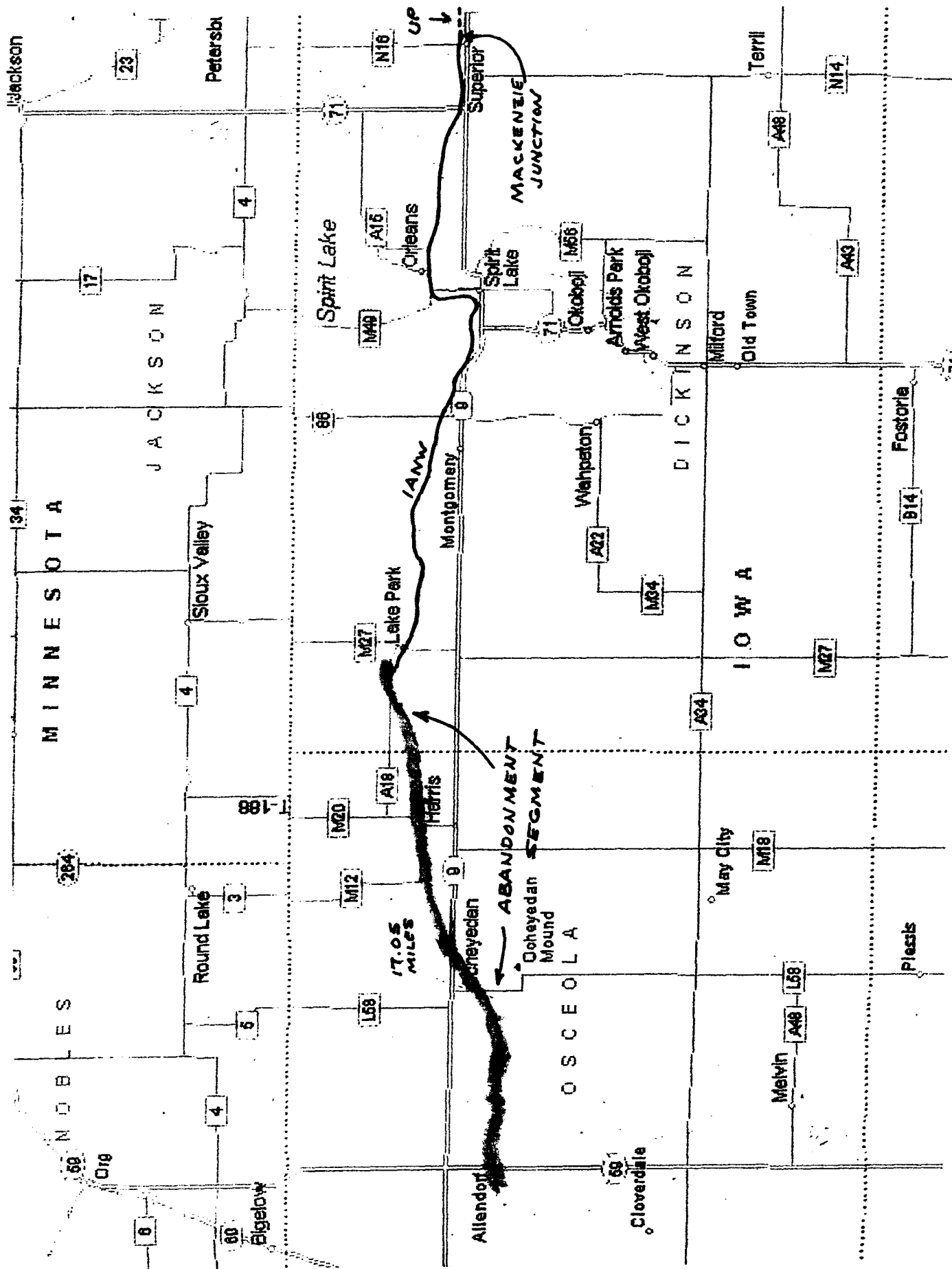
Application of the regulatory requirements and procedures of 49 U.S.C. § 10903 and § 10905 is not required to carry out the rail transportation policy set forth in 49 U.S.C. § 10101. STB regulation is not required to protect customers from the abuse of market power and this abandonment is of limited scope. Accordingly, IANW respectfully requests the STB to grant the proposed exemption of the abandonment of the 17.05 miles of unused line from the provisions of 49 U.S.C. § 10903.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "John F. Larkin", is written over a horizontal line.

John F. Larkin
General Railway Corp, dba Iowa Northwestern Railroad
4814 Douglas St.
Omaha, NE 68132
(402) 558-0553

Dated: 22 December 2005



Map of Iowa Northwestern Railroad
Proposed Abandonment Highlighted in Black

EXHIBIT B

ENVIRONMENTAL REPORT

IOWA NORTHWESTERN RAILROAD DOCKET AB-1067 (SUB-NO 1X)

The following information is submitted to provide the information required under Title 49 CFR § 1105.7(e).

1. *Proposed Action.* The Iowa Northwestern Railroad is proposing the abandonment of approximately 17 miles of the railroad from Milepost 235.25 near Lake Park, Iowa to Milepost 252.3, west of railroad station Braaksma, the current end of the line. There has been no freight activity since a Union Pacific Railroad embargo ended inbound fertilizer traffic on the 5th of December 2003, with the last empty freight cars returned to interchange on 21 December 2003. Freight activity consisted of fewer than 300 cars per year on this stretch of track from 2001 through 2003. Freight consisted of outbound soybean and corn and inbound dry fertilizer. There was no freight activity in 2004 or year to date 2005.

The rail, ties and other track material will be removed from the right of way. A small amount of ballast will be transferred to remaining operational trackage on the IANW with the rest remaining in place and a small number of ties used for fencing. The trackbed will be graded and remain intact and all bridges (2) and culverts will remain. It is the intent of the Iowa Northwestern Railroad to preserve the right of way for future railroad use by transferring the right of way to a trails group that will use it for a hiking and biking trail with no motorized traffic allowed, other than that required for trail maintenance.

Highway crossings will be removed and all highway crossing areas will be graded or paved as appropriate. Crossing signals at Ocheyedon and Highway 9 will be removed. All crossbuck signs at unsignaled crossings will be removed.

2. *Transportation System.* The abandonment of this portion of the line will have no effects on regional local transportation systems or patterns. There is no freight activity remaining and there will be no diversion to other modes.

3. *Land use.*

(i) The abandonment will not change existing land use.

(ii) Over 95% of the right of way runs through rural farm and pasture land and consists of native prairie stands with encroaching weeds and trees in some sections. In some sections, local farmers have encroached onto the right of way to plant corn and soybean crops. It is the desire of the Iowa Northwestern Railroad that a trails group will assume ownership of the right of way and will convert at least part of the right of way back to native prairie.

This was reviewed with the Osceola County Conservation Board (Mr. Ron Spangler on 24 February 2005) and the U.S. Soil Conservation Service (Mr. John Vogel on 24 February 2005) and they were unaware of any possible adverse impact that abandonment would create.

(iii) There is no coastal zone affected by the abandonment. This section is not applicable.

(iv) The right of way is suitable for use as a trail and the Iowa Northwestern Railroad has taken an active position to contact interested groups to acquire the right of way for use as a trail. The Osceola County Conservation Board has a 5 mile trail west of the Iowa

Northwestern Railroad that runs between Allendorf and Sibley. They were notified on the 24th of February 2005 that we would be willing to work with them to see a trail established. They in turn referred us to the Iowa Trails Council who has been provided with a copy of the valuation maps for the right of way.

4. Energy

(i) There has been no transport of energy resources on the line since acquisition and to the best of our knowledge, none in the past twenty years or more. This abandonment will have no effect on the transportation of energy resources.

(ii) There has been no transport of recyclable commodities on the line since acquisition and to the best of our knowledge, none in the past twenty years or more. This abandonment will have no effect on the transportation of recyclable commodities.

(iii) With no diversion of freight traffic to trucks remaining there will be no decrease in energy efficiency.

(iv) The freight traffic on this line was well under the thresholds identified in section (iv).

5. Air. The freight traffic on this line was well under the thresholds identified in Item (5)(i).

6. Noise. The traffic on this line was well under the thresholds identified in Item (5)(i).

7. Safety. (i) The proposed action will result in the closing of two signaled and 11 unsignaled crossings. This will reduce the potential for grade crossing accidents.

(ii) There has been no hazardous material transported over the line since the IANW purchased it in April 2001. This section is not applicable.

(iii) There are no known hazardous waste sites on the right of way.

8. *Biological Resources.*

(i) To the best of our knowledge the proposed action will not affect any endangered or threatened species. There are no areas designated as a critical habitat that would be affected. IANW intends to remove only the track material. We do not believe that any federally endangered or threatened species will be negatively affected or critical habitats modified if the line is abandoned.

(ii) There will be no affect on any wildlife sanctuaries or refuges. The right of way is currently primarily composed of native grasses, with areas where trees and shrubs have invaded over a period of years. It is expected that the right of way will be transferred for use as a trail with provisions requiring the trail operation to restore native prairie habitat where farming has encroached on the right of way, enhancing the value of the right of way for wildlife.

9. *Water.* (i) The action will not result in any change in water usage, drainage or quality and this

proposed action is consistent with all applicable Federal, Iowa and local water quality standards. The underlying roadbed will not be disturbed by any removal actions.

(ii) Discussions with the U.S. Army Corp of Engineers indicated that no permits under section 404 of the Clean Water Act (33 U.S.C. 1344) are expected to be required. There will be no change in wetlands or flood plains associated with this action.

(iii) There will be no changes in water flow, usage, wetlands, flood plains or other potential water issues and no permits will be required.

10. *Proposed Mitigation.* IANW does not believe that there any environmental impacts associated with this proposed action and will comply with State and Federal regulations and obtain any necessary permits required.

HISTORICAL REPORT

Iowa Northwestern Railroad Proposed Abandonment

In addition to the Environmental Report attached, the following information is submitted to provide the information required under Title 49 Part 1105.8.

1. The requirement for topographic maps or equivalent is not necessary because there are no historic structures of record for this line 50 or more years old.
2. The line consists of a 100' right of way through rural countryside, with narrower sections of right of way remaining in Allendorf and Harris, two very small towns located on the line. Another small town at Ocheyedan has a 100' right of way remaining with all additional right of way sold off during the 1970's. The railroad line was acquired from Union Pacific Railroad in 2001. Prior to the purchase, the predecessor railroads of the Union Pacific sold all right of way extending more than 50' from the centerline of track to other companies, with most of these sales occurring during the late 1960's. The line travels through rolling hills and consists primarily of grass with very few trees. ***Within the segment of track proposed for abandonment there are no structures built by the railroad or it's predecessors that are over 50 years old. All depots, water tanks, etc., were demolished many years ago including those at Allendorf, Ocheyedan, and the original Harris depot.***
3. The line was purchased from Union Pacific Railroad with no structures of any type except two railroad bridges, one of which was totally rebuilt as a steel piling bridge in 1987. The other bridge, a short 26'-long two pile trestle has had renewed pile trestles within the past 40 years

according to information received from former Rock Island railroaders who have visited the railroad. No pictures are required of these.

While not a structure of historic record for this railroad, a former Milwaukee Railroad depot was relocated to the line at Harris, Iowa from Fostoria, Iowa by the Iowa Northwestern Railroad in May, 2004. The structure is in fair condition and was modified by the addition of a storage shed after its use by the Milwaukee Railroad in the late 1970's. Current plans are to sell or donate this structure to the Northwest Iowa Railroad Historical Society for removal to an active portion of the Iowa Northwestern Railroad. The structure will not be torn down or destroyed as a result of the proposed abandonment.

4. There are no structures of historic record to the line remaining.
5. The line was a former branch line of the Rock Island Railroad, built in 1884. The section from Allendorf to Sibley was abandoned in 1993 and all track taken up except a short stretch west of Allendorf that is owned by the Allendorf Coop. The rest of the abandoned section is now a trail over relatively level ground. Railroad operations during the past 10 years consisted of grain trains from Ocheyedon ranging from 1500 cars a year in the mid-90's to fewer than 250 cars per year in the 2000's and fewer than 70 inbound fertilizer cars to Ocheyedon. During the past 10 years all traffic was served from the east, through Estherville, Iowa with trains originating at Eagle Grove, Iowa. All freight traffic ended in December 2003 when Union Pacific Railroad imposed an embargo on the railroad. A recent embargo states that the reason for the embargo is "threatened congestion" to the Union Pacific Railroad from lack of interchange facilities – with less than 100 cars a year of traffic remaining. Because there is no freight traffic remaining on the line, the proposed abandonment will result in no changes in operations.
6. There are copies of railroad valuation maps in our possession that show the sites of former structures, and in some cases document the year of removal.

7. There are no structures of historic record for this railroad remaining and the railroad right of way does not meet the criteria for listing on the National Register of Historic Places. There is no known likelihood that any archeological or other previously unknown historic properties are in the project area. The basis for this opinion is the total lack of historic structures on the line and the fact that most land directly adjacent to the right of way has been extensively plowed and cultivated for over 100 years with no known discoveries of any relevant nature uncovered..
8. A new concrete pad was poured over the previous site of the Harris depot. The original depot had no basement and the only evidence of it's prior existence was a concrete chunk that may have been a base for a train order semaphore in prior years.
9. While we believe they may exist we have been unable to locate any photographs of the demolished structures on the railroad.

**ENVIRONMENTAL & HISTORIC REPORT
CERTIFICATE OF SERVICE**

Pursuant to the requirements of 49 C.F.R. § 1105.7, the undersigned hereby certifies that a copy of the Environmental Report in Docket No. AB-1067 (Sub-No. 1X) was mailed via first class mail on 2 December 2005 to the following parties:

Iowa State Clearinghouse
Division for Community Progress
Iowa Department of Economic Development
200 East Grand Ave.
Des Moines, IA 50309

Department of Natural Resources
Environmental Protection Division
Wallace State Office Building
502 East 9th St.
Des Moines, IA 50319-0034

Mr. Bill Imhoff
Osceola County Courthouse
300 7th St.
Sibley, IA 51249

Mr. Wayne Northey
1802 Hill Avenue
County Courthouse
Spirit Lake, IA 51360-1259

Mr. James B. Guilliford
United States Environmental Protection Agency Region 7
901 N. 5th St.
Kansas City, 66101

Ms. Robyn Thorson
U.S. Fish & Wildlife Service, Region 3
1 Federal Drive
BHW Federal Building
Fort Snelling, MN 55111

Cindy Gorton
Chief CENWO-PM-AE
Army Corp of Engineers
106 So. 15th St.
Omaha, NE 68102

U.S. Army Corp of Engineers
Omaha District
215 No. 17th St.
Omaha, NE 68102-4978

National Park Service
Midwest Region
1709 Jackson St.
Omaha, NE 68102

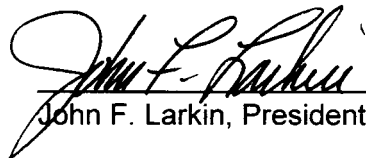
Natural Resource Conservation Service
693 Federal Building
210 Walnut St.
Des Moines, IA 50309

National Geodetic Survey
1315 East-West Highway
Silver Spring, MD 20910-3282

State Historical Society of Iowa
Capitol Complex
East 6th & Locust St
Des Moines, IA 50319

Peggy Baer, Director
Office of Rail Transportation
Iowa Department of Transportation
800 Lincoln Way
Ames, IA 50010

I, John F. Larkin, President of Iowa Northwestern Railroad, certifies that on 2 December 2005 a copy of the Environmental Report and Historic Report was mailed via first class mail to the offices shown above in this Certificate of Service.



John F. Larkin, President

Date: 22 December 2005

EXHIBIT C - FEDERAL REGISTER NOTICE

STB No. AB-1067 (Sub-No. 1X)

Notice of Petition for Exemption to Abandon or to Discontinue Service

On 23 December 2005, General Railway Corporation, doing business as the Iowa Northwestern Railroad, filed with the Surface Transportation Board, Washington, D.C. 20423, a petition for exemption for the abandonment of (the discontinuance of service on) a line of railroad known as the Iowa Northwestern Railroad, extending from railroad milepost 225.25 near Lake Park to the end of line at railroad milepost 252.3 near Allendorf which traverses through 51249, 51347, 51345 and 51354 United States Postal Service ZIP Codes, a distance of 17.05 miles, in Osceola and Dickinson Counties, Iowa. The line for which the abandonment exemption request was filed includes the stations of Harris (MP 240.5), Ocheyedan (MP 246.0) and Allendorf (MP 251.8).

The line does not contain federally granted rights-of-way. Any documentation in the railroad's possession will be made available promptly to those requesting it.

The interest of railroad employees will be protected by continued employment on the remainder of the line.

Any offer of financial assistance will be due no later than 10 days after service of a decision granting the petition for exemption.

All interested persons should be aware that following abandonment of rail service and salvage of the line, the line may be suitable for other public use, including interim trail use.

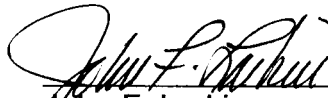
Any request for a public use condition and any request for trail use/rail banking will be due no later than 20 days after notice of the filing of the petition for exemption is published in the Federal Register.

Persons seeking further information concerning abandonment procedures may contact the Surface Transportation Board or refer to the full abandonment or discontinuance regulations at 49 CFR part 1152. Questions concerning environmental issues may be directed to the Board's Section of Environmental Analysis.

An environmental assessment (EA) (or environmental impact statement (EIS), if necessary) prepared by the Section of Environmental Analysis will be served upon all parties of record and upon any agencies or other persons who commented during its preparation. Any other persons who would like to obtain a copy of the EA (or EIS) may contact the Section of Environmental Analysis. EAs in these abandonment proceedings normally will be made available within 60 days of the filing of the petition. The deadline for submission of comments on the EA will generally be within 30 days of its service.

EXHIBIT D - CERTIFICATE OF PUBLICATION

The undersigned hereby certifies that notice of the proposed abandonment in Docket No. AB-1067 (Sub-No. 1X) was advertised on 21 December, 2005 in the Osceola County Gazette-Tribune and the Dickinson County News, newspapers of general circulation in Osceola and Dickinson Counties, Iowa, as required by 49 C.F.R. § 1105.12.

A handwritten signature in cursive script, appearing to read "John F. Larkin", is written over a horizontal line.

John F. Larkin

21 December 2005

Public Notice

General Railway Corporation doing business as the Iowa Northwestern Railroad gives notice that on or about 23 December 2005 it intends to file with the Surface Transportation Board, Washington, DC 20423, a Petition for Exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903, et seq., permitting the abandonment of 47.05 miles of railroad between railroad milepost 233.35 near Lake Park which traverses through United States Postal Service ZIP Code 51347 in Dickinson County, and railroad milepost 252.3 near Atterdorf which traverses through United States Postal Service ZIP Codes 51245, 51354 and 51345 in Osceola County, Iowa. The proceeding will be docketed as No. AB1067 (Sub-No. 1X).

The Board's Section of Environmental Analysis (SEA) will generally prepare an Environmental Assessment (EA) which will normally be available 60 days after the filing of the petition for abandonment exemption. Comments on environmental and energy matters should be filed no later than 30 days after the EA becomes available to the public and will be addressed in a Board decision. Interested persons may obtain a copy of the EA or make inquiries regarding environmental matters by writing to SEA, Surface Transportation Board, Washington, DC 20423 or by calling SEA at (202) 565-1543.

Appropriate offers of financial assistance to continue rail service can be filed with the Board. Requests for environmental conditions, public use conditions, or rail banking/trails use also can be filed with the Board. An original and 10 copies of any pleading that raises matters other than environmental issues (such as rail use, public use, and offers of financial assistance) must be filed directly with the Board's Office of the Secretary, 1925 K Street, NW, Washington, DC 20423 [See 49 CFR 1104.1(a) and 1104.3(a)], and one copy must be served on applicants' representative [See 49 CFR 1104.32(b)]. Questions regarding offers of financial assistance, public use or trails use may be directed to the Board's Office of Congressional and Public Services at (202) 565-1594. Copies of any comments or requests for conditions should be served on the applicant's representative, John Larkin, 4814 Douglas St., Omaha, NE 68132.

PROOF OF PUBLICATION

Osceola County Gazette-Tribune

Sibley, Iowa 12/21/2005

STATE OF IOWA

Osceola County, ss.

I, Jerry D. Wiseman, publisher of the Osceola County Gazette-Tribune, a weekly newspaper published at Sibley, Iowa, being duly sworn on oath say that the notice hereto attached was published in said newspaper for 1 consecutive week(s), the last publication being 12/21/05.

Signed:

Jerry D. Wiseman

I, Jerry D. Wiseman, do hereby state that I certify, under penalty of perjury, and pursuant to the laws of the State of Iowa, that the preceding is true and correct as I verily believe.

12/21/05 20

Publication

Fee:

\$ 27.81

AFFIDAVIT OF PUBLICATION
SPIRIT LAKE, DICKINSON COUNTY, IOWA

consecutive weeks: that the date of the first

publication was: 12/21/05

The date of last publication was: 12/21/05

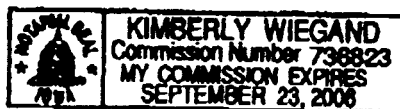
Lisa Johnson
Lisa Johnson
General Manager

Subscribed and sworn before me on 12/21/05

Notary Public Kimberly Wiegand

My commission expires

Publication Fee \$ 19.69

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156 PR 36105, July 21, 1991; 156 PR 36106, July 21, 1991;
49R21, Oct. 1, 1991; 38 PR 44619, Aug. 24, 1993; 54 PR
47483, Dec. 24, 1996; 64 PR 53248, Oct. 1, 1999;
ON 12R 88746, Sept. 30, 2004.

5 December 2005

44-1721-8

EXHIBIT E - CERTIFICATE OF SERVICE

Pursuant to 49 C.F.R. § 1152.60 (d), the undersigned hereby certifies that the Petition for Exemption for Abandonment in Docket No. AB-1067 (Sub-No. 1X) was mailed via first-class mail on 22 December 2005 to the following parties:

State Public Service Commission - the following agency handles railroad related items in Iowa:

Peggy Baer, Director
Office of Rail Transportation
Iowa Department of Transportation
800 Lincoln Way
Ames, IA 50010

Military Traffic Management Command - this command no longer exists. The function of the MTMC has been assumed by the following:

Military Surface Deployment and Distribution Command
Transportation Engineering Agency
Railroads for National Defense Program
720 Thimble Shoals Blvd., Suite 130
Newport News, VA 23606-4537

National Park Service

Mr. Mark Weekley
National Park Service Midwest Region
601 Riverfront Drive
Omaha, NE 68102-4226

National Park Service

U.S. Department of the Interior
National Park Service
Land Resources Division
800 North Capitol St, N.E., Room 540
Washington, DC 20240-0001

U.S. Department of Agriculture

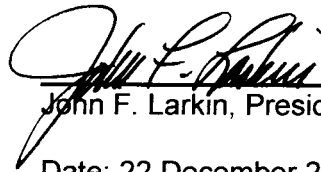
U.S. Department of Agriculture
Chief of the the Forest Service
4th Floor N.W., Auditor's Building
14th Street and Independence Avenue, S.W.
Washington, DC 20250

Other Parties

Lisa Heinz
Iowa Heritage Foundation
Insurance Exchange Building, Suite 444
505 Fifth Ave.
Des Moines, IA 50309-2321

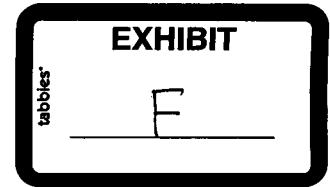
Coop Elevator Association
c/o Daniel E. DeKoter
PO Box 253
Sibley, IA 51249-0253

I, John F. Larkin, President of Iowa Northwestern Railroad, certify that on 22 December 2005 a copy of the Petition for Exemption was mailed via first class mail to the offices shown above in this Certificate of Service.



John F. Larkin, President

Date: 22 December 2005



IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

COOPERATIVE ELEVATOR
ASSOCIATION,

Plaintiff,

vs.

GENERAL RAILWAY
CORPORATION d/b/a IOWA
NORTHWESTERN RAILROAD,

Defendant.

No. C04-4069-MWB

ORDER ACCEPTING
MAGISTRATE'S REPORT AND
RECOMMENDATION

I. BACKGROUND

On July 29, 2004, plaintiff Cooperative Elevator Association ("CEA") filed a complaint in this court on grounds of diversity jurisdiction, 28 U.S.C. § 1331, and federal question jurisdiction grounded in 49 U.S.C. § 10903. (Doc. No. 2). The complaint further avers that defendant General Railway Corporation ("General Railway") owns and operates a short-line railroad called the Iowa Northwestern Railroad ("INR"), which extends from Allendorf, Iowa, to Superior, Iowa. The complaint further states that CEA is a shipper with grain load-out facilities on the INR short-line, a "rail carrier" within the meaning of 49 U.S.C. § 10903, and subject to the jurisdiction of the Surface Transportation Board ("STB") pursuant to 49 U.S.C. § 10101, *et seq.* The complaint asserts that General Railway removed, and discontinued use of, approximately ten miles of steel rail from the INR without the approval of the STB and without following the abandonment and discontinuance of service procedures established by federal law. The complaint seeks two

forms of relief: (1) an order of the court directing General Railway to send a Notice and Application for Abandonment to the STB and to follow all other federal laws in relation to the discontinuance and abandonment of portions of the INR short-line; and (2) a preliminary and permanent injunction prohibiting General Railway from removing any additional rail, railroad ties, tie plates or other components from the INR short-line.

On August 23, 2004, John F. Larkin, the President and CEO of General Railway, filed a *pro se*, unsigned, answer to CEA's complaint. (Doc. No. 6). On November 30, 2004, CEA filed a Proposed Scheduling Order (filed as a status report)—which indicated that CEA has attempted to confer with General Railway as to the details of the proposed scheduling order on a number of occasions, but had received no response. (Doc. No. 9). Following a telephonic scheduling conference on December 7, 2004, United States Magistrate Judge Paul A. Zoss entered an order requiring General Railway to have an attorney appear in the case on its behalf within thirty days of the date of the order, "or the defendant will be deemed to be in default and the court will entertain the plaintiff's motion for default judgment against the defendant." (Doc. No. 11). No attorney entered an appearance on behalf of General Railway within the specified time period.

On February 3, 2005, CEA filed a Motion for Default Judgment. (Doc. No. 14). On February 22, 2005, this court denied CEA's Motion for Default Judgment without prejudice for failure to comply with the procedure embodied in Federal Rule of Civil Procedure 55(a). (Doc. No. 16). On February 23, 2005, in accordance with Rule 55, CEA filed an Application for Entry of Default by Clerk of Court (Doc. No. 17), which was granted by the Clerk of Court on that same day. (Doc. No. 18).

On May 12, 2005, General Railway filed a Motion to Set Aside Entry of Default (Doc. No. 19), which was granted by Magistrate Judge Zoss. (Doc. No. 20). On May 24, 2005, CEA filed a Motion to Set Aside Order of Court Allowing Entry of Default to Be

Set Aside. (Doc. No. 22). A resistance to this motion was subsequently filed by General Railway. (Doc. No. 27). Following two telephonic hearings on the matter with Judge Zoss, CEA filed a Motion for Judgment on Default on June 28, 2005. (Doc. No. 28). Judge Zoss held yet another telephonic conference with the parties, and on June 30, 2005 issued an order which withdrew Judge Zoss's previous order setting aside the entry of default, granted the Motion to Reconsider Order Setting Aside Entry of Default, and reinstated entry of default against General Railway. (Doc. No. 30). Additionally, Judge Zoss issued a Report and Recommendation as to CEA's June 28, 2005, Motion for Judgment on Default. (Doc. No. 30). In his Report and Recommendation, Judge Zoss noted the following:

This case arises from the defendant's apparent abandonment of Iowa Northwestern Railroad ("INR"), a short-line railroad extending from Allendorf, Iowa, to Superior, Iowa. The record before the court indicates the defendant has removed several miles of steel rail from the INR line, including a section of the line that passes through Harris, Iowa, where the plaintiff maintains an elevator. The record also indicates the defendant has taken up additional rail during the pendency of this action. The plaintiff claims the defendant has not followed applicable law in discontinuing rail service on the INR, to the plaintiff's detriment. (*See* Doc. No. 2)

In this action, the plaintiff seeks only equitable relief, in the form of an order enjoining the defendant from removing any further rail, railroad ties, or tie plates, or taking any further action with regard to the abandonment of the INR or discontinuance of service on the INR line, until the defendant receives approval from the Surface Transportation Board ("STB") as required by 49 U.S.C. § 10101 *et seq.* The plaintiff also seeks an order directing the defendant to initiate appropriate proceedings with the STB.

During the proceedings regarding the plaintiff's motion to reinstate the entry of default, the defendant, for the first

time, raised the issue of whether this court has subject matter jurisdiction over the plaintiff's claims. The defendant argues the STB has exclusive jurisdiction over the plaintiff's claims, citing 49 U.S.C. § 10501(b), which confers upon the STB exclusive jurisdiction over the abandonment or discontinuance of service of a rail line. The statute specifically provides that its remedies "with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." 49 U.S.C. § 10501(b).

However, in the present case, the plaintiff is not seeking to have the INR declared to be abandoned, to have abandonment of the INR line declared exempt from regulation, or any other remedy within the STB's exclusive province. Rather, the plaintiff seeks to force the defendant to pursue appropriate action with the STB before the plaintiff commits further waste upon the INR line and its equipment. The court has jurisdiction over the plaintiff's claims in this case. *See Pejepscot Indust. Park, Inc. v. Maine Central R. Co.*, 215 F.3d 195 (1st Cir. 2000) (examining legislative history of statute and reaching similar conclusion).

The next question is whether the court should exercise its jurisdiction in granting relief, or refer the plaintiff's claim to the STB under the doctrine of primary jurisdiction. *See id.* Because the plaintiff is not seeking a determination with regard to the defendant's operation of the INR, but rather seeks only to force the defendant to file an application for abandonment with the STB, the court believes referral of this case to the STB is neither warranted nor necessary.

The court finds the most appropriate action would be to enjoin the defendant from removing further rail line or taking any further action with regard to the physical components of the INR unless and until the defendant obtains approval from the STB to do so. This remedy will protect the plaintiff's interests and prevent ongoing prejudice to the plaintiff, while respecting the jurisdiction of the STB with regard to any decision about what further actions the defendant may take with respect to the INR and the rails, ties, and other physical

components of the rail line.

Report and Recommendation at 1-3. Ultimately, Judge Zoss recommended CEA's Motion for Judgment on Default be granted and that the defendant be enjoined from removing further rails or other physical components of the INR unless authorized to do so by the STB. Report and Recommendation at 3-4. Though the Report and Recommendation gave the parties ten days in which to file objections, objections were not filed by either party.

II. ANALYSIS

Pursuant to statute, this court's standard of review for a magistrate judge's Report and Recommendation is as follows:

A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge].

28 U.S.C. § 636(b)(1). Similarly, Federal Rule of Civil Procedure 72(b) provides for review of a magistrate judge's Report and Recommendation on dispositive motions and prisoner petitions, where objections are made, as follows:

The district judge to whom the case is assigned shall make a *de novo* determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

FED. R. CIV. P. 72(b). The Eighth Circuit Court of Appeals has repeatedly held that it is reversible error for the district court to fail to conduct a *de novo* review of a magistrate

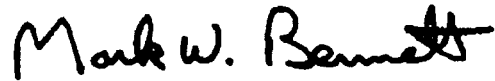
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III. CONCLUSION

For the reasons set forth above, the court **accepts** Judge Zoss's Report and Recommendation. CEA's Motion for Judgment on Default is **granted**. Additionally, General Railway is **enjoined** from removing **any** further physical components—including, but not limited to: rail, railroad ties, and tie plates—from the INR short line, or taking any further action with regard to the abandonment or discontinuance of service on the INR short line, without first receiving prior permission of the Surface Transportation Board as required by 49 U.S.C. §§ 10101 *et seq.* Finally, General Railway is **ordered to file its Notice and Application for Abandonment** of the portion of the Iowa Northwestern Railroad at issue in this controversy to the Surface Transportation Board, the Department of Transportation and all shippers along the rail line pursuant to 49 U.S.C. §10101 *et seq.*, **on or before September 5, 2005**. General Railway shall also, concurrently with filing with the Surface Transportation Board, **serve a copy of the Notice and Application for Abandonment on CEA and file a copy with this court as indicia of compliance with this order.**

IT IS SO ORDERED.

DATED this 16th day of August, 2005.

A handwritten signature in black ink that reads "Mark W. Bennett". The signature is written in a cursive style with a horizontal line extending from the end of the name.

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

COOPERATIVE ELEVATOR
ASSOCIATION,

Plaintiff,

vs.

GENERAL RAILWAY
CORPORATION d/b/a IOWA
NORTHWESTERN RAILROAD,

Defendant.

No. C04-4069-MWB

JUDGMENT IN A CIVIL CASE

This matter came before the Court and

IT IS ORDERED AND ADJUDGED

Judgment is entered in accordance with the attached Order Accepting Magistrate's Report and Recommendation.

Dated: **AUG 26 2005**

PRIDGEN J. WATKINS

Clerk

(By) Deputy Clerk

APPROVED BY:

MARK W. BENNETT
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

COOPERATIVE ELEVATOR
ASSOCIATION,

Plaintiff,

vs.

GENERAL RAILWAY
CORPORATION d/b/a IOWA
NORTHWESTERN RAILROAD,

Defendant.

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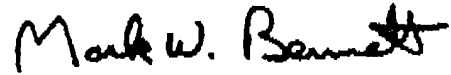
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III. CONCLUSION

For the reasons set forth above, the court accepts Judge Zoss's Report and Recommendation. CEA's Motion for Judgment on Default is granted. Additionally, General Railway is enjoined from removing any further physical components—including, but not limited to: rail, railroad ties, and tie plates—from the INR short line, or taking any further action with regard to the abandonment or discontinuance of service on the INR short line, without first receiving prior permission of the Surface Transportation Board as required by 49 U.S.C. §§ 10101 *et seq.* Finally, General Railway is ordered to file its Notice and Application for Abandonment of the portion of the Iowa Northwestern Railroad at issue in this controversy to the Surface Transportation Board, the Department of Transportation and all shippers along the rail line pursuant to 49 U.S.C. §10101 *et seq.*, on or before September 5, 2005. General Railway shall also, concurrently with filing with the Surface Transportation Board, serve a copy of the Notice and Application for Abandonment on CEA and file a copy with this court as indicia of compliance with this order.

IT IS SO ORDERED.

DATED this 16th day of August, 2005.

A handwritten signature in black ink, reading "Mark W. Bennett". The signature is written in a cursive style with a horizontal line underneath the name.

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

Other Orders/Judgments

5:04-cv-04069-MWB Cooperative Elevator Association v. General Railway Corporation

U.S. District Court

Northern District of Iowa

Notice of Electronic Filing

The following transaction was received from des, cntcred on 8/16/2005 at 9:22 AM CDT and filed on 8/16/2005

Case Name: Cooperative Elevator Association v. General Railway Corporation

Case Number: 5:04-cv-4069

Filer:

Document Number: 31

Docket Text:

ORDER ACCEPTING REPORT AND RECOMMENDATIONS for [30] Report and Recommendations (See Order Text). Signed by Judge Mark W Bennett on 8/16/05. (des,)

The following document(s) are associated with this transaction:

Document description:Main Document

Original filename:n/a

Electronic document Stamp:

[STAMP dcecfStamp_ID=1025896836 [Date=8/16/2005] [FileNumber=251845-0]
[96e46cf06d9fb8880d03b834fd89f768a16fd88d972f7c5b2d6d5c26ff1a20805b0d
f7080d988640989bbe71572601d8f883300e456830641ab3587b4f7296da]]

5:04-cv-4069 Notice will be electronically mailed to:

Daniel E DeKoter dandekoter@sibleylaw.com, marsha@sibleylaw.com

Daniel L Hartnett dhartnet@craryhuff.com, kurbanec@craryhuff.com

Nicole M Jensen-Harris njharris@sibleylaw.com,

5:04-cv-4069 Notice will be delivered by other means to:

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

COOPERATIVE ELEVATOR
ASSOCIATION,

Plaintiff,

vs.

GENERAL RAILWAY
CORPORATION d/b/a IOWA
NORTHWESTERN RAILROAD,

Defendant.

No. C04-4069-MWB

ORDER REGARDING
DEFENDANT'S MOTION TO
MODIFY COURT ORDER AND
PLAINTIFF'S THIRD APPLICATION
FOR ORDER FINDING DEFENDANT
IN CIVIL CONTEMPT

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I. INTRODUCTION

This case originated over the defendant's apparent abandonment of approximately seventeen miles of rail line of the Allendorf section of the Iowa Northwestern Railroad ("INR"). The defendant removed portions of the steel rail of the rail line without first seeking approval from the Surface Transportation Board ("STB"), as required by 49 U.S.C. § 10101 *et seq.* The section of removed line passes through the town of Harris, Iowa, which is where the plaintiff maintains a local grain elevator next to the line. Finding itself in somewhat uncharted territory, this court will attempt to arrive at a destination satisfactory to both "passengers" of this lawsuit.

II. FACTUAL AND PROCEDURAL BACKGROUND

On July 29, 2004, Cooperative Elevator Association ("CEA") filed the current action against General Railway Corporation ("General Railway") seeking equitable relief, in the form of an order enjoining the defendant from removing any further rail, railroad ties, or tie plates, or taking any further action with regard to the abandonment of the INR or discontinuance of service on the INR line, until the defendant receives approval from the STB (Doc. No. 2). A hearing on CEA's original complaint was held before United States Magistrate Judge Paul A. Zoss. On June 30, 2005, Judge Zoss issued his Report and Recommendation (Doc. No. 30). Ultimately, Judge Zoss recommended General Railway be enjoined from removing further rails or other physical components of the INR unless expressly authorized to do so by the STB. On August 16, 2005, this court entered an order adopting Judge Zoss's report and recommendation (Doc. No. 31). The court's August 16, 2005 order required that General Railway

file its *Notice and Application for Abandonment* of the portion of the Iowa Northwestern Railroad at issue in this controversy to the Surface Transportation Board . . . on or before September 5, 2005. General Railway shall also, concurrently with filing with the Surface Transportation Board, serve a copy of the Notice and Application for Abandonment on C[operative] E[levator] A[ssociation] and file a copy with this court as indicia of compliance with this order.

(emphasis added). On September 7, 2005, CEA filed its First Application For Order To Find Defendant In Civil Contempt (Doc. No. 33), alleging that General Railway had failed to comply with the court's order within the allotted time period. General Railway filed a resistance to CEA's application on September 9, 2005 (Doc. No. 34). Although General Railway conceded it failed to comply with the aforementioned terms of the court's order, the defendant asserted its noncompliance did not warrant a finding of contempt because complete compliance was not possible due to the extensive notice and service provisions that must be satisfied prior to filing an Application for Abandonment. *See* 49 C.F.R. § 1105.7(b) (2005) (identifying the agencies entitled to service of the applicant's environmental report); 49 C.F.R. § 1152.20 (identifying the agencies entitled to service of the applicant's notice of intent to file an abandonment application). Accordingly, General Railway requested this court grant it additional time to comply with the terms of the August 16, 2005 order. Finding that the extensive notice and service provisions promulgated in the Code of Federal Regulations regarding abandonments effectively operated to delay the defendant's compliance, this court granted the defendant's Motion To Extend Time and denied the CEA's First Application For Order To Find Defendant In Civil Contempt on September 15, 2005 (Doc. No. 35). Pursuant to this order, the court gave General Railway until October 14, 2005 to comply with the terms of the court's original August 16, 2005 order.

On October 14, 2005, General Railway filed a second Motion For Extension of Time and requested “an additional period of time beyond December 22, 2005, within which to file a *notice of exemption*.” (emphasis added) (Doc. No. 39). Attached to the defendant’s motion was “Exhibit 1,” which is a copy of a “Notice of Exemption of Iowa Northwestern Railroad for Exemption of Abandonment Between MP 237.25 (West of Lake Park) and MP 252.3 (West of Braaksma)” [hereinafter “Notice of Exemption”] that was filed with the STB on September 14, 2005. Further attached is “Exhibit 2,” which is the STB’s subsequent written rejection of the defendant’s Notice of Exemption. Exhibit 2 indicates the STB rejected the defendant’s Notice of Exemption on a number of grounds, specifically because in order to be exempt from the abandonment process, a carrier must certify that “no local traffic has moved on the line for the past 2 years” See 49 C.F.R. § 1152.50.¹ Based on General Railway’s representations to the STB, the two-year period will not expire with respect to the piece of rail line at issue in this case until December 21, 2005. Consequently, General Railway asked this court to grant it additional time beyond December 22, 2005, so that it could become eligible for an exemption and file a corrected notice of exemption.

CEA resisted the defendant’s motion for an extension of time (Doc. No. 40) and filed a Third Application For Order Of Contempt against General Railway (Doc. No 41). CEA contended that General Railway should not be granted additional time by

¹The defendant’s Notice of Exemption was further rejected because the defendant’s Environmental and Historic Report was not served upon the agencies specified in 49 C.F.R. § 1105.7(b) at least twenty days prior to filing its Notice of Exemption with the STB. Further, the STB noted the defendant failed to file a certification of publication of a newspaper notice, as required by 49 C.F.R. § 1105.12. The STB also requested the defendant confirm the milepost designations, as the milepost numbers utilized in the defendant’s Notice of Exemption contradicted the milepost numbers cited in its Environmental Report.

this court so as to enable it to file a second notice of exemption because the procedures governing an exemption from abandonment are fundamentally different than the procedures governing the formal abandonment process. CEA alleged it would be harmed if the defendant were permitted to file a Notice of Exemption, in lieu of the more formal Notice and Application for Abandonment, because exemption proceedings are abbreviated and do not take into account the "public interest" or afford other parties with the opportunity to purchase the rail line. Additionally, CEA averred that General Railway should be held in contempt because the defendant, by filing a Notice of Exemption, was in essence asking the court to overturn its previous ruling because the exemption process is distinct from the normal abandonment process mandated by the court's August 16, 2005 order.

In an order issued on October 24, 2005, this court concluded:

This court's August 16, 2005 order specifically required the defendant "to file its Notice and Application for Abandonment of the portion of the Iowa Northwestern Railroad at issue in this controversy to the Surface Transportation Board" This is clearly a reference to the procedure of formal abandonment as required under 49 U.S.C. § 10903. The court's order makes no mention of an exemption or an alternative to the abandonment process. Additionally, the plaintiff specifically requested relief under 49 U.S.C. § 10903 in its original complaint (Doc. No. 2). Accordingly, it appears the defendant has attempted to circumvent the explicit terms of this court's August 16, 2005 order. This conclusion is bolstered by the fact that the defendant was not eligible for an exemption from the abandonment process on the date of the court's original August 16, 2005 order and remains ineligible until after December 21, 2005.

Accordingly, the court's order required the parties to appear at a show cause hearing to

demonstrate whether General Railway should be held in civil contempt. Moreover, the court denied the defendant's Motion For Additional Time To File Second Notice of Exemption. Instead, the court gave General Railway seven days to either (1) file a motion requesting this court's permission to modify the August 16, 2005 order to permit for filing a Notice of Exemption in lieu of a Notice and Application for Abandonment, (2) request additional time to comply with the original terms of the court's order, or (3) serve a copy of the Notice and Application for Abandonment on the plaintiff and this court pursuant to the terms of the original order.

On October 31, 2005, General Railway filed a Motion To Modify Court Order (Doc. No. 43). General Railway contended the court should modify its prior order to permit the defendant to either file a "notice of exemption" or a "petition of exemption" in lieu of a notice and application for abandonment. CEA filed a resistance to General Railway's motion to modify on November 14, 2005 (Doc. No. 47). CEA alleged General Railway was not eligible for an exemption because in order to qualify for an exemption, the carrier must certify, pursuant to 49 C.F.R. § 1152.50 that:

no formal complaint filed by a user of rail service on the line . . . regarding cessation of service over the line is pending with the Board or any U.S. District Court or has been decided in favor of the complainant within the 2-year period.

CEA contended its complaint filed with this court effectively precluded General Railway from utilizing the exemptory process unless General Railway intended to falsify its notice to the STB. CEA further contended it would be harmed by permitting General Railway to file for an exemption because it would result in further delay, since General Railway's exemption application would be inevitably denied by the STB. Oral arguments on the plaintiff's contempt application and the defendant's motion to modify

were held on November 17, 2005. At oral argument plaintiff Cooperative Elevator Association (“CEA”) was represented by Daniel E. DeKoter of DeKoter, Thole & Dawson, P.L.C. in Sibley, Iowa. Defendant General Railway Corporation (“General Railway”) was represented by Daniel L. Harnett of Crary-Huff-Inkster-Hecht-Sheehan-Ringenberg-Hartnett-Storm in Sioux City, Iowa. In light of those arguments and the parties’ written submissions, the court now turns to the merits of the parties’ respective arguments.

III. LEGAL ANALYSIS

A. Abandonments And Exemptions

Generally, a rail carrier who intends to abandon any part of its railway or discontinue the operation of any part of its railway lines must file an application with the STB. 49 U.S.C. § 10903(a)(1). However, the STB has the authority to exempt rail lines from the normal abandonment process pursuant to 49 U.S.C. § 10502. This section gives the STB the power to exempt rail carriers from almost any kind of STB regulation. These exemptions are widely used and consist of two types: Class exemptions and Individual Exemptions. *Surface Transportation Board, Office of Public Servs., Abandonments & Alternatives to Abandonments* 14-16 (April 1997). To invoke the class exemption, a carrier must provide a notice to the STB certifying that (1) “no local traffic has moved on the line for the past 2 years”, (2) any overhead traffic that has moved over the line can be rerouted over other lines”, and (3) “no formal complaint about a lack of service is pending or has been decided in favor of the shipper.” *Abandonments & Alternatives to Abandonments*, *supra* at 15; *see* 49 C.F.R. § 1152.50. If use of the class exemption is unavailable to a rail line, the railroad may seek what is known as an “individual exemption.” *Abandonments & Alternatives to*

Abandonments, *supra* at 16; *see* 49 C.F.R. § 1152.60.

An individual exemption may be sought by filing a petition for an exemption with the STB. 49 C.F.R. § 1152.60. The petition is typically not accompanied by detailed financial or other information and generally, only includes a brief description of the pertinent facts. *Abandonments & Alternatives to Abandonments*, *supra* at 16. The only notice a railroad is required to give prior to filing an individual exemption petition is an environmental notice to the designated State agency in the state where abandonment is sought.² *Id.* The requesting carrier's petition must be accompanied by a map that meets the requirements of 49 C.F.R. § 1152.22(a)(4).³ 49 C.F.R. § 1152.60(b). Additionally, a draft notice of the carrier's petition to be published by the STB in the *Federal Register* must also be submitted with the petition as "data contained on a computer diskette compatible with the [STB's] current word processing capabilities." *Id.* § 1152.60(c).⁴

²The name and address of the designated State agency in any given case can be obtained by calling the STB's Section of Energy and Environment at (202) 565-1538.

³49 C.F.R. § 1152.22(a)(4) describes the following:

Detailed map of the subject line on a sheet not larger than 8x10 1/2 inches, drawn to scale, and with the scale shown thereon. The map must show, in clear relief, the exact location of the rail line to be abandoned or over which service is to be discontinued and its relation to other rail lines in the area, highways, water routes, and population centers.

49 C.F.R. § 1152.22(a)(4).

⁴49 C.F.R. § 1152.60 provides that the draft notice should be submitted in the
(continued...)

⁴(...continued)
following form:

STB No. AB-____ (Sub-No. ____)

Notice of Petition for Exemption to Abandon or to Discontinue Service

On (insert date petition was filed with the Board) (name of petitioner) filed with the Surface Transportation Board, Washington, D.C. 20423, a petition for exemption for the abandonment of (the discontinuance of service on) a line of railroad known as ____, extending from railroad milepost near (station name) to (the end of line or rail milepost) near (station name), which traverses through ____ (ZIP Codes) United States Postal Service ZIP Codes, a distance of ____ miles, in [County(ies), State(s)]. The line for which the abandonment (or discontinuance) exemption request was filed includes the stations of (list all stations on the line in order of milepost number, indicating milepost location). The line (does) (does not) contain federally granted rights-of-way. Any documentation in the railroad's possession will be made available promptly to those requesting it. The interest of railroad employees will be protected by (specify the appropriate conditions). Any offer of financial assistance will be due no later than 10 days after service of a decision granting the petition for exemption. All interested persons should be aware that following abandonment of rail service and salvage of the line, the line may be suitable for other public use, including interim trail use. Any request for a public use condition and any request for trail use/rail banking will be due no later than 20 days after notice of the filing of the petition for exemption is published in the Federal Register. Persons seeking further information concerning abandonment procedures may contact the Surface

(continued...)

After the petition is filed, the STB must publish notice of the proposed exemption in the *Federal Register* twenty days after the petition is filed. *Id.*; 49 C.F.R. § 1152.60(a). No further public notice is provided. *Abandonments & Alternatives to Abandonments*, *supra* at 16. Rail carriers, typically, serve a courtesy copy of the petition on all shippers on the line. *Id.* It is not statutorily required, however, that the railroad give notice to shippers when the petition is either granted or denied. *Id.* Although no further public notice is given, the carrier must serve a copy of the petition on the persons listed in 49 C.F.R. § 1152.50(d).⁵ An individual exemption can be

⁴(...continued)

Transportation Board or refer to the full abandonment or discontinuance regulations at 49 CFR part 1152. Questions concerning environmental issues may be directed to the Board's Section of Environmental Analysis.

An environmental assessment (EA) (or environmental impact statement (EIS), if necessary) prepared by the Section of Environmental Analysis will be served upon all parties of record and upon any agencies or other persons who commented during its preparation. Any other persons who would like to obtain a copy of the EA (or EIS) may contact the Section of Environmental Analysis. EAs in these abandonment proceedings normally will be made available within 60 days of the filing of the petition. The deadline for submission of comments on the EA will generally be within 30 days of its service.

49 CFR § 1152.60

⁵This section provides as follows:

(d) Notice of exemption.

(continued...)

⁵(...continued)

(1) At least 10 days prior to filing a notice of exemption with the Board, the railroad seeking the exemption must notify in writing:

(i) The Public Service Commission (or equivalent agency) in the state(s) where the line will be abandoned or the service or trackage rights discontinued;

(ii) Department of Defense (Military Traffic Management Command, Transportation Engineering Agency, Railroads for National Defense Program);

(iii) The National Park Service, Recreation Resources Assistance Division; and

(iv) The U.S. Department of Agriculture, Chief of the Forest Service.

The notice shall name the railroad, describe the line involved, including United States Postal Service ZIP Codes, indicate that the exemption procedure is being used, and include the approximate date that the notice of exemption will be filed with the Board. The notice shall include the following statement "Based on information in our possession, the line (does) (does not) contain federally granted rights-of-way. Any documentation in the railroad's possession will be made available promptly to those requesting it."

(2) The railroad must file a verified notice using its appropriate abandonment docket number and subnumber (followed by the letter "X") with the Board at least 50 days before the abandonment or discontinuance is to be consummated. The notice shall include the proposed consummation date, the certification required in § 1152.50(b), the information required in §§ 1152.22(a)(1) through (4), (7) and (8), and (e)(4), the level of labor protection, and a certificate that the notice requirements of §§ 1152.50(d)(1) and 1105.11 have been complied with.

(3) The Board, through the Director of the Office of

(continued...)

⁵(...continued)

Proceedings, shall publish a notice in the Federal Register within 20 days after the filing of the notice of exemption. The notice shall include a statement to alert the public that following any abandonment of rail service and salvage of the line, the line may be suitable for other public use, including interim trail use. Petitions to stay the effective date of the notice on other than environmental or historic preservation grounds must be filed within 10 days of the publication. Petitions to stay the effective date of the notice on environmental or historic preservation grounds may be filed at any time but must be filed sufficiently in advance of the effective date in order to allow the Board to consider and act on the petition before the notice becomes effective. Petitions for reconsideration, comments regarding environmental, energy and historic preservation matters, and requests for public use conditions under 49 U.S.C. 10905 and 49 CFR 1152.28(a)(2) must be filed within 20 days after publication. Requests for a trail use condition under 16 U.S.C. 1247(d) and 49 CFR 1152.29 must be filed within 10 days after publication. The exemption will be effective 30 days after publication, unless stayed. If the notice of exemption contains false or misleading information, the use of the exemption is void ab initio and the Board shall summarily reject the exemption notice.

(4) In out-of-service rail line exemption proceedings under 49 CFR 1152.50, the Board, on its own motion, will stay the effective date of individual notices of exemption when an informed decision on pending environmental and historic preservation issues cannot be made prior to the date that the exemption authority would otherwise become effective.

(5) A notice or decision to all parties will be issued if use of the exemption is made subject to environmental, energy, historic preservation, public use and/or interim trail use and rail banking conditions.

(continued...)

opposed by filing, within twenty days after publication of the *Federal Register* notice, an opposition with the STB. Further, offers to purchase the line can be filed 120 days after the filing of the petition or ten days after the service of the STB's decision granting the petition, whichever occurs first. *Id.* The exemption procedure, from both an administrative and financial standpoint, is preferable to the more formal abandonment application procedure because it is generally less expensive and time consuming for all of the parties involved. Keeping these principles in mind, the court will now proceed to address the merits of the parties' arguments.

B. General Railway's Motion To Modify

Under Rule 60(b) of the Federal Rules of Civil Procedure, federal courts have the authority to amend prior judgments for any reason "justifying relief from the operation of the judgment." Here, with respect to the facts of this case, a review of the relevant law regarding abandonments reveals that General Railway will not qualify, at least not anytime in the near future, for a class exemption due to the existence of CEA's formal complaint regarding the defendant's lack of service. However, nothing—except this court's August 16, 2005 order—prevents the defendant from

⁵(...continued)

(6) To address whether the standard labor protective conditions set forth in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979), adequately protect affected employees, a petition for partial revocation of the exemption under 49 U.S.C. 10502(d) must be filed.

49 CFR § 1152.50

requesting an individual exemption by filing a petition with the STB. It is also clear, that the exemption procedure is widely utilized, and will sufficiently protect CEA's right of protest, as CEA can file an opposition with the STB. Additionally, offers to purchase the rail line can still be submitted to the STB for consideration. Further, this proceeding will provide for a more expeditious resolution of this matter, with relatively little expense when compared with the more formal procedure. Accordingly, the court modifies its August 16, 2005 ruling as follows:

General Railway is ordered to file, **not later than 45 days** from the date of this order, a **petition for an individual exemption** with the STB. In its petition, General Railway should **alert the STB** of the prior proceedings that have occurred before this court and **request an expedited resolution** of the matter in light of the pending nature of this action. General Railway shall also, concurrently with filing with the STB, **serve a copy of its petition for exemption on CEA and file a copy with this court as indicia of compliance with this order.** Given this court's detailed analysis with respect to what materials must be provided with the petition, the court expects General Railway's petition to be **completed in full and accompanied by the requisite documents.** A failure to submit a complete petition may result in future sanctions.

General Railway is further ordered to **file with this court, and serve a copy on CEA,** a detailed status report **twenty days** from the date of this order. The report, at a minimum, must **exposit General Railway's progress** in preparing its petition to the STB and **provide an estimated date** in which compliance with this order will occur.

Finally, General Railway is **ordered to serve a copy of the STB's grant or denial of its petition, whichever occurs, on CEA and also file a copy with this court.** In the event that General Railway's petition for an individual exemption is denied by the STB, General Railway shall have **fifteen days** to comply with the terms

of this court's original August 16, 2005 order by filing its notice and application for abandonment with the STB, unless the STB directs an different course of action. If the STB recommends an alternative procedure, General Railway is ordered to comply with the STB's recommendation within **fifteen days**, unless a different deadline is enunciated by the STB. **Copies of any additional submissions** required by the STB shall **concurrently be filed with this court and served on CEA**. Additionally, General Railway shall serve on CEA a copy of all future correspondence received from the STB.

C. CEA's Third Motion For Sanctions

With respect to CEA's motion to find General Railway in civil contempt, the Eighth Circuit has noted that "[c]ourts have power to adjudge persons who wilfully disobey their orders to be in contempt and such power extends to both civil and criminal contempt." *Taylor v. Finch*, 423 F.2d 1277, 1279 (8th Cir. 1970); *see Coleman v. Espy*, 986 F.2d 1184, 1190 (8th Cir. 1993) (noting courts have the power to punish willful violations of its lawful orders). Thus, in order to impose sanctions, this court must determine (1) whether its prior order was violated, and if so, (2) whether the violation was willful. *See Coleman*, 986 F.2d at 1190.

Upon a review of the aforementioned procedures, it is clear that General Railway, in lieu of utilizing the formal abandonment procedure, filed for a class exemption from abandonment as opposed to utilizing the formal abandonment process. Thus, it is with little difficulty that this court concludes that the defendant violated the court's August 16, 2005 order, which unequivocally contemplated that General Railway would utilize the more formal abandonment process, not an exemption from that process.

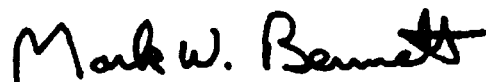
However, what is less clear, at least to this court is whether General Railway's violation was willful. During the oral argument, Mr. John Larkin, President of General Railway, testified he, in good faith, thought he was complying with court's August 16, 2005 order by filing for a class exemption. Mr. Larkin testified that based on some website research he performed, "[i]t just never occurred to [him] that application for abandonment was the title of the process," and that he "thought [General Railway was] complying fully with the order when [he] filed the notice of exemption." The court's ruling with respect to whether it finds Mr. Larkin's testimony to be credible, and if so, whether it is sufficient to defeat CEA's contempt action is **deferred** until these matters have been fully resolved by the STB.

IV. CONCLUSION

Based on the foregoing, the court's August 16, 2005 order is hereby **modified**. With respect to CEA's Third Application For Order To Find Defendant In Civil Contempt, the court's judgment is **reserved** until this matter reaches resolution with the STB. The court is optimistic that its modified order will ensure both parties have a smoother ride during the remaining course of this litigation and that a mutually-satisfactory destination will be reached sometime in the near future.

IT IS SO ORDERED.

DATED this 19th day of November, 2005.



MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT
COURT
NORTHERN DISTRICT OF IOWA