

To: The Marin County Board of Supervisors
From: Bernard Meyers

December 10, 2010

I am one of 2 Marin County appointees to the NCRA Board. For nearly 3 years I have unsuccessfully tried to have NCRA *consider* renegotiating its Lease with its Operator, NWP. The Lease was entered into before Marin had representatives on the NCRA Board, but is not yet final. It is conditioned upon 4 items, at least 2 of which have not occurred. I would appreciate direction and any assistance you could provide. The Lease is on NCRA's web site: <http://www.northcoastrailroad.org/plandocs.html>

BACKGROUND

NCRA is governed by Gov. Code Sect 93000 et seq. It owns or has freight easements for the rail right-of-way from Lombard through Novato and up to Humboldt Bay. SMART has some ownership and cross-easements. The State bought the line out of bankruptcy. Several private operators, including the Southern Pacific, failed to successfully operate within the right-of-way. Trains stopped running about a decade ago when the FRA shut the line for safety reasons.

NCRA income in the last 5 years stems mainly from government support. Roughly one-third of the income has come from rail cars purchased with FEMA funds which cars are leased out. One-third of its income is from leases, etc. of the line's property, which property was purchased with taxpayer dollars. One-third comes from advance lease payments from NWP, based on an MOU of Oct. 11, 2006.

LEASE ORIGIN

A comparison of the terms of the NWP-NCRA Lease with comparable terms in other leases between a state and a private operator demonstrates that NCRA should diligently commence re-negotiations with NWP. Another compelling reason is the manner in which the Lease arose.

In January 2006 NCRA issued a request for proposals for an "operator" – a company to haul freight and provide passenger service on the line. It received 5 proposals. Three of the responders were interviewed on April 18. On May 10 the Board decided to commence negotiations with two - Sierra Railroad and NWP (although at that time, NWP had not been incorporated). The negotiating committee was to report back to the Board at the June 14 meeting. Instead, less than 3 weeks later, at a specially called meeting on May 30, the Board announced that the yet to be formed company - NWP - was chosen as the winner and that staff (headed by Ex. Dir. Stogner) would commence negotiations for a lease. NWP was incorporated in July 2006. NWP listed two of its four prospective owners as John H Williams (a former NCRA Ex. Dir.) and NWP's attorney, Douglas H Bosco (a former California legislator and former Congressman). Ex. Dir. Stogner had worked for then Congressman Bosco in Washington, DC for eight years as his Chief Assistant, and for five years as then Assemblyman Bosco's Chief of Staff.

At the September 13, 2006 NCRA meeting the Board approved “authorization to enter into agreement with NWP”. The minutes do not show that any of the agreement terms were announced to the public or that any were discussed. There was no comment offered by the public. The next day, a NCRA press release said only that NCRA “approved a 5 year contract” with NWP to operate trains “from Eureka to Novato”. While the Lease states it “is made” on Sept. 13, 2006 it does not state when it was finalized or executed; it simply shows “Final 9-21-06” at the foot of each page. The Board does not seem to have publicly approved the final version. The general public does not appear to have seen any version of the Lease until years later. The Board did not publicly consider an EIR for the Lease; none has been certified. See: NCRA minutes at:

<http://www.northcoastrailroad.org/meetings.html>. See also: Business Plan For the NWP Co. prepared for the CTC and dated 10/24/06, and the 10/24/06 NCRA Plan.

We thus have a Lease whose terms were negotiated between NWP - represented by a former legislator - and NCRA - represented by that legislator's long-time former chief assistant. It does not matter whether both are honorable and their negotiations were in good faith. The Lease appears to be lop-sided. Its term can be unilaterally extended by NWP to 105 years, without any meaningful oversight by NCRA. The fees that may be paid by NWP to NCRA are indeterminate, but are certainly far, far less than the public funds needed to rehabilitate the line. NCRA is charged with acquiring further public funds should the line be affected by an act of nature (flood, earthquake, etc.). NWP can receive rights to all of NCRA's properties not directly used for railroad purposes, for use as NWP sees fit. There has been no analysis as to whether the Lease is fiscally prudent.

THE MAJOR PROBLEMS PRESENTED

A. The Lease Term

The term is up to 105 years without any meaningful oversight by NCRA (Section VI). Enough said.

B. Expenditures by NCRA and what is received in return for taxpayer dollars

1. The public's expenditures:

The Lease requires that NCRA obtain and expend public funds without limitation. Recently NCRA/NWP asserted that \$68 million has been expended just for the Lombard to Windsor rehabilitation. Many *tens* of millions will be needed for the Windsor to Willits rehab. *Hundreds* of millions are estimated to rehab through the Eel River Canyon. Additional *tens* of millions are estimated to rehab in the Eureka area. If, over the term of the Lease, there are major storms, fires, and earthquakes, (there is little doubt that there will be – the only question is how frequently and how bad) responsibility is on NCRA and SMART to get further public funds to cover all such damages.

2. NWP's payments:

The Lease payments provision is complicated (see Section X, pp 20 - 24). Essentially it says:

1. No payments will be made by NWP until the 1st year *after* NWP has a net profit of \$5 million.
2. At that point, NWP is to pay 20% of its yearly net income into a kitty, but -
3. NWP stops making payments when the kitty reaches \$20 million, except to top off the kitty if and when needed.
4. The kitty is to be jointly administered by NWP and NCRA. NWP's agreement must be obtained for withdrawals.
5. There can be withdrawn up to \$1 million/yr for NCRA expenses, including salaries. Any money NCRA gets from its property and rail car leases diminishes NCRA's withdrawals. If NWP takes over all NCRA's leases and properties and gets the funds NCRA would otherwise have gotten, the withdrawal can be up to \$1 million/yr from the kitty.
6. Kitty money is to be used for repairs, litigation and the like.
7. At end of the Lease, any money remaining in the kitty is given to NWP. If NCRA terminates the Lease, kitty funds are to be used to cover NWP's expenses. Section XII (D).
8. In case of any major problems (Force Majeure Section VIII (B)(2)), NCRA and SMART are to seek public funds for repairs. In NWP's view, the Treasury, via FEMA and California's OES, will "insure" the public's line against catastrophic damage, and thus "minimize" this business risk.
9. If NCRA decides to sell any of its property, NWP has a right of first refusal (Section XVIII).
10. NWP can take any of NCRA's rock deposits (Island Mountain, river gravel) for use on the line, without any payments to NCRA (Section V(E)(3)).

C. Similar Leases: For nearly three years NCRA staff declined to provide information on how similarly situated lines operated. On my own I found similar leases with major differences:

1. Term:

Generally, leases are for terms of between 5 and 20 years, with provision for limited renewal. For example, Ohio provides a term of 5 years and possible renewals if various conditions are met, such as shipper satisfaction, safety, car loadings, financials, and track maintenance.

2. Payments:

Other lines have provisions for percentages of operator revenues to the line owner as well for revenues if the operator leases out public property.

3. Other operator leases also have:

A. No conflict of interest requirements.

B. Energy efficiency and environmental practice provisions, hazardous substances and waste provisions, etc., etc.

CONCLUSION

A new lease should, *inter alia*, be for a reasonable term (with possible renewals), take into account NWP's need to cover its capital investments, its costs of operation

(including maintenance costs), and its profits/losses. It should also guard the taxpayers' past and future investments in the line. It must consider the highly probable need to perform major restoration after one or more force majeure events, and the timely provision of sufficient funds to provide for the proper functioning of NCRA. However, if the Lease is left as is, for the next century there could be a major drain on the public fisc and mainly private gain. Perhaps this is the inevitable outcome when an obscure public agency is given the opportunity to draw public funds without proper checks and balances. Unlike public agencies that must directly tax or charge constituents to obtain the funds they spend, NCRA can draw on the public weal, supposedly for public benefit. Its insular status, with circumscribed outside oversight has, in this case, yielded an aberrant result.

Hundreds of millions of taxpayer dollars stand to be paid apparently for private gain and limited public benefit. The role of fiscal prudence has been swept aside in an effort to bring freight rail to the 4-county area. While the restoration of freight service may be desirable, it should not be carried out in a fiscally imprudent manner. If the public perceives this public-private partnership as mismanaged, or worse, it could have a severe effect on future such partnerships, transportation funding, and government projects generally.

Your other Marin appointee, Tom MacDonald, concurs with my views. Any assistance you care to provide would be greatly appreciated. You may wish to provide a public hearing on the matter, inviting your appointed representatives, as well as NCRA and NWP representatives who should respond in writing at least one week prior to the hearing. Thereafter, formulate and provide your views to some or all of the following:

Your appointed representatives;
The NCRA Board;
The Boards of Supervisors of the 3 other Counties on the NCRA Board;
The Governor;
The State and Federal legislators representing Marin County and/or the areas through which the line traverses;
State and/or federal agencies that interact with NCRA, including USDOT, CTC, and Caltrans.

Thank you for your attention to this matter.

CC: NCRA Board of Directors; NWP