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April 12, 2023

By e-filing

Cynthia T. Brown
Chief, Section of Administration,
Office of Proceedings
Surface Transportation Board
395 E Street SW
Washington, DC 20024

Re: ICC Finance Docket No. 29761
Ontario Central Railroad Corporation –
Operations – Between Shortsville and Victor, NY
Modified Rail Certificate

*Response of Ontario Central Rail Corp. to Comments
of Victor Insulators, Inc.*

Dear Ms. Brown:

Ontario Central Railroad Corp. ("ONCT") files this response to the comments (the "VI Comments") filed on March 24, 2023 on behalf of Victor Insulators, Inc. ("VI") raising issues with ONCT's Notice of Intent to Partially Terminate (Abandon) Service ("Notice of Partial Termination"), and whether the Board's offer of financial assistance ("OFA") procedures should somehow apply.¹ ONCT has properly implemented the Board's procedures for terminating rail service under a modified certificate, and disputes the contentions that any OFA procedures apply.

A. Termination of Service Procedures Applicable to Modified Certificates.

VI acknowledges that ONCT has only a "modified certificate" and that it can terminate its service under 49 CFR 1150.24. ONCT properly gave notice under Section 1150.24 on February 9, 2023, of its intent to partially terminate service under its modified certificate² and pursuant to the regulations, the termination became effective on April 10,

¹ George Beltz and Douglas Fisher also filed comments opposing the "abandonment" but did not raise any legal basis for their comments.

² The Notice of Intent applied only to the segment of the rail line between MP 370.9 and MP 366.5. ONCT will continue providing service under the modified certificate over the balance of the rail line covered by the modified certificate, that being the line between MP 366.5 and MP 358.3 near the Village of Shortsville, New York.

2023. ONCT's reference to "terminate (abandon)" does not create any ambiguity with respect to its notice. This was merely the addition of a commonly used railroad term to indicate that service was being permanently terminated with respect to the 4.4-mile segment of rail line (the "Victor Rail Line Segment") that was the subject of the termination notice. The use of the term "abandon" in the "termination notice" does not in any way indicate that the requirements of 49 USC 10903 or the Board's regulations at 49 CFR Part 1152 are applicable.

Under 49 CFR 1150.22 (footnote and emphasis added):

The acquisition by a State of a fully abandoned line is not subject to the jurisdiction of the Surface Transportation Board. The acquisition by a State of a line approved for abandonment and not yet fully abandoned is exempted from the Board's jurisdiction. If the State intends to operate the line itself, it will be considered a common carrier. However, when a State³ acquires a rail line described under §1150.21 and contracts with an operator to provide service over the line, only the operator incurs a common carrier obligation. The operators of these lines are exempted from 49 U.S.C. 10901 and 10903 which are the statutory requirements governing the start up and termination of operations.

Because the owner of the Victor Line, the County of Ontario (the "County") never intended or held itself out to operate the rail line itself, it never incurred a common carrier obligation and is not subject to the jurisdiction of the Board, or any acquisition or abandonment requirements.

It is also clear that ONCT as the operator is exempt from any requirements to "abandon" the Victor Line under 49 USC 10903. Since ONCT is the only entity with a common carrier obligation, ONCT's "termination" is not equivalent to a discontinuance, and is more equivalent to an abandonment, as following the termination, no entity will have any obligation to provide service on the Victor Line.

Since the abandonment requirements of 49 USC 10903 are not applicable to either the County or ONCT, the corresponding regulations under 49 CFR Part 1152 are also not applicable. VI is in error in asserting that the County, as the owner of the Victor Rail Line Segment, must comply with the notice requirements of the Board's abandonment regulations. See VI Comments at 1-2.

B. Offers of Financial Assistance Are Not Applicable to Terminations of Service under Modified Certificates.

In particular, VI's assertion that the specific offer of financial assistance ("OFA") regulations in 49 CFR 1152.27(n) apply is in error. See VI Comments at 2-3. As discussed above, since the abandonment requirements of 49 USC 10903 do not apply to either the

³ The County of Ontario, NY, the owner of the Victor Rail Line, falls within the definition of "State" under the regulations. See 49 CFR 1150.21 ("As used in these rules, the term "State" includes States, political subdivisions of States, and all instrumentalities through which the State can act.")

County or ONCT, neither do the abandonment regulations under 49 CFR Part 1152, including the OFA regulations.

The specific OFA requirements of 49 CFR 1152.27(n) apply to a narrow class of abandonments under 49 USC 10903 that does not include lines operated under a modified certificate since the termination of lines those lines fall solely under the regulations (49 CFR Part 1150) that govern certificates to operate rail lines under 49 USC 10901 and 10902. The cited OFA regulation was adopted by the Board in 1998 to replace rules concerning standards for determining subsidies for the continuation of rail service on properties not transferred to Consolidated Rail Corporation ("Conrail") under the Final System Plan. See *Rail Service Continuation Subsidy Standards*, Docket No. Ex Parte No. 566 (served May 22, 1998). In order to eliminate outdated regulations for the calculation of subsidies, the Board adopted a limited amendment to the OFA regulations to "provide rules for the purchase or subsidization of rail lines that have been continuously subsidized since the inception of the Final System Plan." *Id.* at 1 (emphasis added). As noted by the Board at the time, "there appear to be a few lines that have been continuously subsidized under 49 U.S.C. 744." *Id.*, at 6.

The Victor Rail Line (including the Segment over which service has been terminated) at issue here is not one of those few lines. The line is owned by the County of Ontario, NY. The County is not a successor to any of the railroads in reorganization that were subject to the Final System Plan. Further, ONCT's original Notice for a Modified Certificate filed October 5, 1981 in Finance Docket No. 29761 (a copy of which is enclosed herewith for the Board's convenience), specifically states that "Ontario County is not to be regarded as a subsidizer of ONCT." Thus, the Victor Rail Line has not been subsidized on a continuous basis since the inception of the Final System Plan, and the provisions of 49 CFR 1152.27(n) do not apply. ONCT has properly given notice of its proposed termination of operations, and the County, as the non-carrier owner, is not required to give any notice in connection with the termination of service.

VI also wrongfully asserts that Finger Lakes Railway Corp. ("FGLK") is a common carrier on the Victor Rail Line Segment and must seek abandonment authority. FGLK received authority to control connecting carrier ONCT in a Board decision in Finance Docket No. 35062 (served October 5, 2007). In its Petition for Exemption (filed July 9, 2007), FGLK sought only to control ONCT and make ONCT part of FGLK's corporate family (system). FGLK did not seek any common carrier authority to provide service on or over the Victor Rail Line operated by ONCT. Since FGLK has no authority or obligation to provide common carrier service over the Victor Rail Line, FGLK is not required to file for abandonment of the Victor Rail Line Segment.

C. Public support of and claims of individual harm to VI does not negate ONCT's right to partially terminate service under its modified certificate.

The modified certificate regulations provide a simple method to start up and terminate rail service on lines that have been abandoned or approved for abandonment. ONCT has complied with the requirements of the regulations both with respect to its startup of operations under a modified certificate in 1981, and as to its partial termination of service that became effective on April 10, 2023.

ONCT is sympathetic to VI's claims that its business may be harmed by a loss of direct rail service. However, ONCT has agreed (although not obligated to do so) to continue

to provide service to VI by transload and delivery (without additional transportation charges to VI), and does not believe that VI has suffered any harm.

ONCT notes that the "public support" provided with the VI Comments does not include any shippers or potential shippers that seek to use the Victor Rail Line Segment for the handling of freight. And despite VI's claims of increased demands and business over the past several years, VI still continues to receive only five to six carloads of freight per year. Additionally, although VI includes several letters of individual officials of the Village of Victor, VI noted in its Amended Complaint filed on March 24, 2023, in Docket No. NOR 42176, ¶¶ 36-37, that the Town of Victor is in the process of reviewing and adopting redevelopment plans that contemplate the removal of the Victor Rail Line Segment tracks to facilitate several planned public projects.

D. Conclusion

As acknowledged in the VI Comments, ONCT's notice of partial termination was proper and its service obligations have terminated as of April 10, 2023. As set forth above, there are no other abandonment or OFA obligations that are triggered by the partial termination of service by ONCT or that are applicable to the Victor Rail Line Segment.

I hereby certify that I have served a copy of this Response by email on all parties of record as shown below.

Respectfully submitted,

CLARK HILL

/s/ Eric M. Hocky

Eric M. Hocky
Counsel for Ontario Central Railroad Corp.

EMH:e
Enclosure

cc: Allison E. Bartlett (abartlett@hseilaw.com)
George Heltz (heltzgeorge@gmail.com)
Douglas Fisher (dglfsfshr@gmail.com)
Arthur L. James, III (Arthur.James@ontariocounty.gov)

FD- 29761

(F)

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OF COUNSEL
STEPHEN MAY

September 30, 1981

FD-29761
Secretary of the Interstate
Commerce Commission
12th Street and Constitution Ave. NW
Washington, DC 20423

Attn: Mr. Richard Kelly

Re: Ontario Central Railroad Corp. (ONCT)
NOTICE FOR A MODIFIED CERTIFICATE OF
PUBLIC CONVENIENCE AND NECESSITY
USRA Lines 1022 and 98; Victor and
Shortsville Connections

FILED
OCT 5 1981
INTERSTATE
COMMERCE COMMISSION

Dear Sir:

The Ontario Central Railroad Corp. (hereinafter referred to as ONCT) presently providing rail service on the captioned USRA lines and connections as Designated Operator, D-OP 33 pursuant to Certificate from the Commission dated September 26, 1979 intends to continue to provide such rail service under Modified Certificate of Public Convenience and Necessity. ONCT hereby makes application for such modified certificate and submits the following information in support thereof:

1. ONCT is a domestic corporation incorporated pursuant to Section 5 of the Railroad Law of the State of New York with its principal office and mailing address - P.O. Box 248, Sodus, New York 14551.

(i) Officers and directors:

Joseph Kaminski, Jr.
Brown-Boveri
280 Maple Avenue
Victor, NY 14564

Chairman of the Board/Director

David M. Beers
219 Goodrich Avenue
Syracuse, NY 13210

President/Director

Lawrence Ellis
Stoda Corporation
18 Garfield Street
Auburn, NY 13021

Director

INTERSTATE
COMMERCE COMMISSION
RECEIVED
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ADMINISTRATIVE SERVICES

Secretary/Treasurer/Director

Director

Director

Assistant Secretary/Counsel/Director

2. Regarding prior abandonment see Commission proceeding - D-OP 33 - 9/26/79.
3. The County of Ontario has negotiated the acquisition of the captioned lines from the Trustee of the Lehigh Valley Railroad, the Penn Central Railroad Corporation and the NYDOT. Ontario County is leasing the operation and maintenance of the lines to ONCT under agreement dated April 1981 which agreement is being modified to comply with requirements of the NYDOT. The agreement runs for five years with a provision for renewal for an additional period of five years. A certified copy of the final agreement will be forwarded to the Commission as soon as it is available.
4. The continuation of the rail service to be performed by ONCT is as described in ONCT's application dated September 11, 1979.
5. Ontario County is not to be regarded as a subsidizer of ONCT.
6. The continued rail service offered and the applicable rates, charges, and conditions will be described in tariffs published by ONCT pursuant to the Commission's rules.

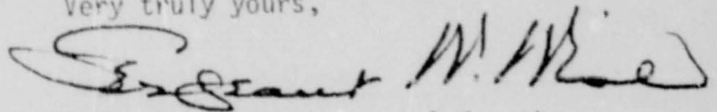
Please contact the undersigned if you have any questions with respect to the foregoing or should you require additional information to expedite

Page 3.

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your processing of this notice and application for a Modified Certificate of Public Convenience and Necessity.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Sergeant W. Wise". The signature is fluid and cursive, with a large initial "S" and a distinct "W".

Sergeant W. Wise, Counsel for the
Ontario Central Railroad Corp.

SWW/fg

cc: Joseph Kaminski, Jr.
D.M. Beers