

306450

**Before the
SURFACE TRANSPORTATION BOARD**

STB Docket No. NOR 42176

ENTERED
Office of Proceedings
April 13, 2023
Part of
Public Record

**VICTOR INSULATORS, INC. V. FINGER LAKES RAILWAY CORP. AND
ONTARIO CENTRAL RAILROAD CORP.**

**ANSWER OF FINGER LAKES RAILWAY CORP.
AND ONTARIO CENTRAL RAILROAD CORP.
TO AMENDED COMPLAINT**

Eric M. Hocky
CLARK HILL PLC
Two Commerce Square
2001 Market St.
Suite 2620
Philadelphia, PA 19103
(215) 640-8523
ehocky@clarkhill.com

Justin J. Marks
CLARK HILL PLC
1001 Pennsylvania Ave. N.W.
Suite 1300 South
Washington, DC 20004
(202) 772-0916
jmarks@clarkhill.com

*Counsel for Finger Lakes Railway
Corp. and Ontario Central Railroad
Corp.*

Dated: April 13, 2023

Before the
SURFACE TRANSPORTATION BOARD

STB Docket No. NOR 42176

**VICTOR INSULATORS, INC. V. FINGER LAKES RAILWAY CORP. AND
ONTARIO CENTRAL RAILROAD CORP.**

**ANSWER OF FINGER LAKES RAILWAY CORP.
AND ONTARIO CENTRAL RAILROAD CORP.
TO AMENDED COMPLAINT**

On March 24, 2023, Victor Insulators, Inc. (“VI”) filed an Amended Complaint incorporating and replacing the Original Complaint filed December 27, 2022. In accordance with the requirements of 49 C.F.R. §1111.5, Finger Lakes Railway Corp. (FGLK) and Ontario Central Railroad Corp. (“ONCT”) hereby answer the Amended Complaint filed by VI.¹ To the extent that FGLK and ONCT do not specifically admit a factual allegation in the Amended Complaint, that allegation is denied.

In response to the unnumbered paragraphs on page 1 of the Amended Complaint, FGLK/ONCT state that the unnumbered paragraphs consist of a characterization of the Amended Complaint, to which no response is required. FGLK/ONCT respond to the allegations in each separately numbered paragraph of the Amended Complaint as follows:

¹ As permitted by 49 C.F.R. §1111.6, FGLK/ONCT are contemporaneously filing a motion to dismiss the Amended Complaint (the “Motion to Dismiss”).

Answers to the Amended Complaint: Paragraphs 1-55

1. Admitted only that since 2017, VI has received rail shipments of a single commodity (clay). ONCT/FGLK deny the remaining allegations in Paragraph 1 because they lack knowledge or information sufficient to form a belief as to their truth.
2. ONCT/FGLK deny the allegations in Paragraph 2 because they lack knowledge or information sufficient to form a belief as to their truth.
3. Admitted.
4. Admitted.
5. Admitted.
6. Paragraph 6 states a legal argument to which no response is required. To the extent a response is required, ONCT/FGLK deny the allegation in Paragraph 6. *See* Motion to Dismiss Amended Complaint being filed together with this Answer.
7. Admitted.
8. ONCT denies that it is the “designated operator” of the Victor Rail Line. ONCT has operated the Victor Rail Line under a modified certificate beginning in 1981. *Ontario Central Railroad Corporation – Modified Rail Certificate*, ICC Finance Docket No. 29761 (ICC served Nov. 3, 1981). ONCT terminated its modified certificate with respect to the portion of the Victor Rail Line between Milepost 366.5 and Milepost 370.9 (which includes the portion of the Victor Rail Line that served VI) as of April 10, 2023, by providing the notice required under 49 C.F.R. §1150.24, and filing the notice with the Board, on February 9, 2023, in ICC Finance Docket No. 29761.

- 9.** Admitted only that FGLK controls ONCT pursuant to authority granted by the Board in Finance Docket No.35062 (served October 1, 2007). ONCT/FGLK deny the remaining allegations of the introduction of 9.
- a. Admitted that FGLK and ONCT share a common office, that some personnel act as representatives of both FGLK and ONCT, and that the same person serves as the President of FGLK and of ONCT.
 - b. Paragraph 9(b) states a legal argument to which no response is required. To the extent that a response is required, FGLK denies the allegation that it holds itself out to the public as the operator of the Victor Rail Line.
 - c. ONCT/FGLK deny the allegations in Paragraph 9(c).
 - d. ONCT/FGLK deny the allegations in Paragraph 9(d).
 - e. ONCT/FGLK deny the allegations in Paragraph 9(e) because they lack knowledge or information sufficient to form a belief as to their truth given that the “various public records” are not identified. ONCT/FGLK deny that discussions with the Town and Village of Victor were with FGLK and not with ONCT.
- 10.** Paragraph 10 states a legal argument to which no response is required. To the extent that a response is required, FGLK denies the allegation in Paragraph 10, and in particular denies that FGLK has assumed, sought or obtained any common carrier authority to operate the Victor Rail Line.
- 11.** Paragraph 11 states a legal argument to which no response is required. To the extent that a response is required, FGLK denies the allegation in Paragraph 11.

- 12.** Paragraph 12 states a legal argument to which no response is required. To the extent that the allegations relate to the provision of common carrier service on the Victor Rail Line and a response is required, FGLK denies the allegation in Paragraph 12.
- 13.** Paragraph 13 states a legal argument to which no response is required. To the extent that a response is required, FGLK denies the allegation in Paragraph 13, and in particular denies that FGLK held itself out as the operator of the Victor Rail Line.
- 14.** Admitted in part and denied in part. Denied that Victor Rail Line and the Spur currently serve the Facility given that effective April 10, 2023, ONCT terminated its modified certificate over the portion of the Victor Rail Line that previously was used to serve the Spur and the Facility, ending service over that portion of the Victor Rail Line.
- 15.** ONCT/FGLK deny the allegations in Paragraph 15 because they lack knowledge or information sufficient to form a belief as to their truth.
- 16.** ONCT/FGLK deny the allegations in Paragraph 16 because they lack knowledge or information sufficient to form a belief as to their truth.
- 17.** Admitted only that the only commodity received by VI by rail since 2017 had been clay (STCC 3295232). ONCT/FGLK deny the remaining allegations in Paragraph 17 because they lack knowledge or information sufficient to form a belief as to their truth.
- 18.** ONCT/FGLK deny the allegations in Paragraph 18 because they lack knowledge or information sufficient to form a belief as to their truth.
- 19.** ONCT/FGLK deny the allegations in Paragraph 19 because they lack knowledge or information sufficient to form a belief as to their truth.

- 20.** Admitted.in part and denied in part. FGLK/ONCT deny that the representative who spoke with VI was a representative of FGLK; rather he was a representative of ONCT.
- 21.** Admitted only that Mr. Habberfield (presenting ONCT) spoke with Mr. Knickerbocker in November 2021. ONCT/FGLK deny the remaining allegations in Paragraph 21.
- 22.** ONCT/FGLK admit only to the allegation in the first sentence in Paragraph 22 of ONCT's estimate of the cost o repairs of the Spur. ONCT/FGLK deny the remaining allegations in Paragraph 22 because they lack knowledge or information sufficient to form a belief as to the truth of that sentence.
- 23.** Paragraph 23 states a legal argument to which no response is required. To the extent that a response is required, ONCT/FGLK deny the allegation in Paragraph 23.
- 24.** Admitted only that ONCT did not rehabilitate the portion of the Victor Rail Line that serves VI's Facility. ONCT/FGLK deny that ONCT had an obligation to do so, and that FGLK had any common carrier rights or service obligations with respect to the portion of the Victor Rail Line.
- 25.** Admitted only that ONCT representatives had discussions with VI about possible repair of the segment of the Victor Rail Line and Spur that were out of service. ONCT/FGLK deny the remaining allegations in Paragraph 25.
- 26.** Admitted that ONCT filed a notice of partial termination on February 9, 2023. FGLK denies that it filed a notice of partial termination, or that it has any common carrier obligations with respect to the Victor Rail Line that need to be terminated or abandoned.
- 27.** Paragraph 27 states a legal argument to which no response is required. To the extent that a response is required, ONCT/FGLK deny the allegation in Paragraph 27.

28. Paragraph 28 states a legal argument to which no response is required. To the extent that a response is required, ONCT/FGLK deny the allegation in Paragraph 28.

29. ONCT/FGLK admit only to the allegation that ONCT has arranged for the transloading and delivery of clay from Seneca Falls to the Facility since November 2021. The remainder of Paragraph 29 states a legal argument to which no response is required. To the extent that a response is required, ONCT/FGLK deny the remainder of the allegation in Paragraph 29.

30. ONCT/FGLK deny the allegations in the introduction to Paragraph 30 because they lack knowledge or information sufficient to form a belief as to their truth. With respect to the remaining allegations in in Paragraph 30:

- a. ONCT/FGLK deny the allegations in Paragraph 30 (a) because they lack knowledge or information sufficient to form a belief as to their truth.
- b. Admitted only that ONCT has indicated that it will continue providing transloading and delivery at no additional transportation cost to VI for so long as VI remains under its current ownership. ONCT/FGLK deny the remaining allegations in Paragraph 30(b).
- c. ONCT/FGLK deny the allegations in Paragraph 30 (c) because they lack knowledge or information sufficient to form a belief as to their truth.
- d. ONCT/FGLK deny the allegations in Paragraph 30 (d) because they lack knowledge or information sufficient to form a belief as to their truth

31. ONCT/FGLK deny the allegations in Paragraph 31 because they lack knowledge or information sufficient to form a belief as to their truth. With respect to the remaining allegations in in Paragraph 31:

- a. Admitted only that a shipment in December 2021 was delayed for several weeks. ONCT/FGLK deny the remaining allegations in Paragraph 31(a) because they lack knowledge or information sufficient to form a belief as to their truth.
- b. ONCT/FGLK deny the allegations in Paragraph 31(b) because they lack knowledge or information sufficient to form a belief as to their truth.

32. Admitted.

33. Admitted only that ONCT did not issue an embargo. The remainder of Paragraph 33 states a legal argument to which no response is required. To the extent that a response is required, ONCT/FGLK deny the remainder of the allegation in Paragraph 33.

34. Admitted only that as of the date of the Original Complaint, ONCT had not filed a notice of intent to terminate service over all or part of the victor Rail Line, and that ONCT filed a notice of intent to partial terminate service on a portion of the Victor Rail Line.

35. Paragraph 35 states a legal argument to which no response is required. To the extent that a response is required, ONCT/FGLK deny the allegation in Paragraph 35.

36. Admitted only that the Town of Victor is in the process of reviewing and adopting redevelopment plans for the Town. ONCT/FGLK deny the remaining allegations in Paragraph 36 because they lack knowledge or information sufficient to form a belief as to their truth.

37. Admitted only that the report, if it were attached, would be a document that speaks for itself. Since the report is not attached, ONCT/FGLK deny the allegations in Paragraph

37 because they lack knowledge or information sufficient to form a belief as to their truth

38. Admitted only that ONCT did not restore direct rail service to the VI Facility between November 2021 and the termination of ONCT's service obligations over a portion of the Victor Rail Line, and now that ONCT's service obligations have been terminated, ONCT expects to salvage the track. ONCT/FGLK deny the remaining allegations in Paragraph 38 because they lack knowledge or information sufficient to form a belief as to their truth.

39. Paragraph 39 states a legal argument to which no response is required. To the extent that a response is required, ONCT/FGLK deny the allegation in Paragraph 39.

40. ONCT/FGLK reassert and incorporate their previous responses to Paragraphs 1-39.

41. Paragraph 41 states a legal argument to which no response is required. To the extent that a response is required, ONCT/FGLK deny the allegation in Paragraph 41as FGLK never had an common carrier obligation to serve VI, and as of April 10, 2013, ONCT does not have a common carrier obligation to serve VI.

42. Paragraph 42 states a legal argument to which no response is required. To the extent that a response is required, ONCT/FGLK deny the allegation in Paragraph 42.

43. Admitted only that ONCT has filed a notice to terminate rail service with respect to a portion of the Victor Rail Line while continuing to operate the remainder of the Victor Rail Line. Further, admitted that ONCT believes that the Spur and connecting main line track require substantial repair and were unsafe to operate. To the extent that Paragraph 43 states a legal argument to which no response is required, ONCT/FGLK deny Paragraph 43.

- 44.** ONCT/FGLK deny the allegations in Paragraph 44 because they lack knowledge or information sufficient to form a belief as to their truth.
- 45.** ONCT/FGLK deny the allegations in Paragraph 45 because they lack knowledge or information sufficient to form a belief as to their truth.
- 46.** Admitted only that ONCT did not repair the Spur and connecting main line, and that ONCT has filed a notice to partially terminate rail service over the Victor Rail Line that became effective on April 10, 2013, and has no continuing obligation to repair the rail line or to provide service to VI.
- 47.** Paragraph 47 states a legal argument to which no response is required. To the extent that a response is required, ONCT/FGLK deny the allegation in Paragraph 47.
- 48.** Paragraph 48 states a legal argument to which no response is required. To the extent that a response is required, ONCT/FGLK deny the allegation in Paragraph 48.
- 49.** ONCT/FGLK reassert and incorporate their previous responses to Paragraphs 1-48.
- 50.** Paragraph 50 states a legal argument to which no response is required. To the extent that a response is required, ONCT/FGLK deny the allegation in Paragraph 50.
- 51.** Admitted only that ONCT has arranged for the transloading and delivery of clay from Seneca Falls to the Facility by truck. The remaining allegations of Paragraph 51 state a legal argument to which no response is required. To the extent that a response is required, ONCT/FGLK deny the remaining allegations of Paragraph 51.
- 52.** Admitted only that ONCT has filed a notice to partially terminate rail service over the Victor Rail Line that became effective on April 10, 2013, and has no continuing obligation to repair the rail line or to provide service to VI.

53. Paragraph 53 states a legal argument to which no response is required. To the extent that a response is required, ONCT/FGLK deny the allegation in Paragraph 53.

54. Paragraph 54 states a legal argument to which no response is required. To the extent that a response is required, ONCT/FGLK deny the allegation in Paragraph 54.

55. Paragraph 55 states a legal argument to which no response is required. To the extent that a response is required, ONCT/FGLK deny the allegation in Paragraph 55.

Affirmative Defenses

1. The Board lacks jurisdiction over FGLK because only ONCT and not FGLK had authority to operate the Victor Rail Line.
2. FGLK never had any common carrier obligations to serve VI, and ONCT has not violations any of its common carrier obligations to serve VI.
3. Any VI prayer for relief requesting Board action after April 10, 2023 should be rejected because the Board lacks jurisdiction over ONCT's operations of the segment of Victor Rail Line that connects to the Spur to VI because ONCT properly filed a notice of partial termination under 49 C.F.R. §1150.24 for that segment of rail line on February 9, 2023 in ICC Finance Docket No. 29761.
4. Given the cost of needed repairs to the Victor Rail Line and the Spur to VI's facility to allow for safe operations, and the current and expected freight traffic moving to VI's facility, it was reasonable for ONCT not to repair the portion of the Victor Rail Line and Spur, and to designate them as out of service.
5. ONCT has arranged for transfer and truck delivery of clay moving to VI's Facility, at no additional transportation charge.

6. There was no wrongful intent by ONCT in designating the portion of the Victor Rail Line and Spur out of service, while providing VI with transfer and truck delivery without additional charge.
7. VI did not suffer any damages.

Conclusion and Requested Relief

The Conclusions and Requested Relief in the Amended Complaint state legal conclusions to which no response is required. However, for the reasons set forth above in response to the allegations to the Amended Complaint, in the Affirmative Defenses, and in the Motion to Dismiss, the relief requested by VI should be denied.

Respectfully submitted,

/s/ Eric M. Hocky

Eric M. Hocky
CLARK HILL PLC
Two Commerce Square
2001 Market St.
Suite 2620
Philadelphia, PA 19103
(215) 640-8523
ehocky@clarkhill.com

Justin J. Marks
CLARK HILL PLC
1001 Pennsylvania Ave. N.W.
Suite 1300 South
Washington, DC 20004
(202) 772-0916
jmarks@clarkhill.com

*Counsel for Finger Lakes Railway Corp.
and Ontario Central Railroad Corp.*

Dated: April 13, 2023

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of April, 2023, I caused a copy of the foregoing Answer to be served on the persons listed below by email as indicated.

Allison E. Bartlett
Harter Secrest & Emery LLP
1600 Bausch & Lomb Place, Rochester, NY
14604-2711
abartlett@hselaw.com

George Heltz
6966 Morgan Circle
Victor, NY 14564
heltzgeorge@gmail.com

Douglas A. Fisher
P.O. Box 30592
Rochester, NY 14603
dglsfshr@gmail.com

/s/ Eric M. Hocky

Eric M. Hocky
CLARK HILL PLC
Two Commerce Square
2001 Market St.
Suite 2620
Philadelphia, PA 19103
(215) 640-8523
ehocky@clarkhill.com