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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. AB-55 (Sub-No. 643X)

ENTERED
Office of Proceedings
February 22, 2017
Part of
Public Record

**CSX TRANSPORTATION, INC.—ABANDONMENT EXEMPTION—
IN LAPORTE, PORTER AND STARKE COUNTIES, IN**

**CHESAPEAKE AND INDIANA RAILROAD
PETITION TO REOPEN
OFFER OF FINANCIAL ASSISTANCE PROCEEDING**

FD 36076

**CHESAPEAKE AND INDIANA RAILROAD COMPANY
PETITION FOR DECLARATORY RELIEF**

MOTION TO COMPEL

Submitted by

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Dated: February 22, 2017

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I.

INTRODUCTION

Chesapeake & Indiana Railroad Company, Inc. (“CKIN”) hereby moves the Board pursuant to 49 C.F.R. § 1114.31 to compel Chicago & North Judson Railway Company (“CNJR”), a noncarrier affiliate of Lake State Railway Company (“LSRC”),¹ to remove all objections and produce

¹ LSRC established CNJR to assume operations over the subject line of railroad as a replacement carrier for CKIN.

all responsive documents to CKIN's Request for Production ("Request") served on January 25, 2017. To the extent that CKIN and LSRC/CNJR cannot resolve these matters voluntarily, CKIN asks the Board to appoint an administrative law judge or other appropriate official to resolve these discovery disputes.

II.

BACKGROUND

This motion concerns a proceeding initiated by CKIN on November 14, 2016, whereby it seeks to reopen the above-captioned offer of financial assistance ("OFA") proceeding and to obtain declaratory relief. Generally, CKIN seeks this relief due to new evidence that the true purpose for the acquisition of the Line by the Town of North Judson, IN ("the Town"), was to provide the Hoosier Valley Railroad Museum ("HVRM") with a track for its operations. As explained more fully in CKIN's Petition, the involvement of HVRM, intrastate passenger excursion train operator exempt from Board regulatory jurisdiction, in the 2015 RFP process indicates the true, underlying purpose for the Town's 2004 acquisition and runs afoul of ICCTA policy. At the conclusion of the RFP process, the Town selected LSRC as the new operator.

On January 25, 2017, CKIN served its Request—containing only two requests for production—on CNJR. In turn, CNJR served its objections to the Request on CKIN on February 14, 2017 and refused to produce any documents. In general, the Request seeks documents and communications relating to (1) the Agreement for Lease identified in CNJR’s reply to CKIN’s Petition to Reopen and Petition for Declaratory Relief; (2) communications pertaining to rail service for on-line customers; and (3) communications pertaining to CNJR’s Operating Protocols Agreement with Hoosier Valley Railroad Museum. CNJR has asserted both general and specific objections to these requests. A copy of its discovery responses is attached hereto.

II. **ARGUMENT**

1. The Standard for Relief

The Board’s Rules of Practice at 49 C.F.R. § 1114.21 entitle parties to obtain discovery “regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding” (emphasis added). Furthermore, the Rules state that a motion to compel will be granted when the information sought is either relevant *or reasonably calculated to lead to the discovery of admissible evidence* See 49 C.F.R. § 1114.21. “The requirement of relevance

means that the information might be able to affect the outcome of a proceeding.” *Waterloo Ry.—Adverse Aban.—Lines of Bangor & Aroostook R.R. & Van Buren Bridge Co. in Aroostook Cnty., Me.*, Docket No. AB 124 (Sub-No. 2), et al. (STB served Nov. 14, 2003). The documents that CKIN expects to obtain through its Request will at the very least establish whether the Town and HVRM interfered with CKIN’s ability to provide common carrier service over the Line. Similarly, the documents sought will illustrate disparate treatment towards CKIN and CNJR as operators of the Line. Specifically, CKIN seeks evidence that CNJR has been given greater control over its operations than CKIN ever received.

2. The Agreement for Lease of Rail Line and related communications are relevant to CNJR’s operation of the Line.

Request for Production No. 1 seeks the proposed or agreed upon terms of the Agreement for Lease of Rail Line (collectively “Agreement for Lease”) establishing the Town’s relationship with CNJR. Request for Production 2(1) seeks communications relating to the Agreement for Lease. CNJR objects to producing that the requested documents because the transaction is not yet subject to any Board proceeding. However, the rules of discovery do not mandate that documents be subject to a Board proceeding to be discoverable. Rather, evidence is discoverable if it is relevant to the

subject matter involved in a proceeding—even if the party responding party is not before the Board. *See* 49 C.F.R. § 1114.21; *Ballard Terminal Railroad Company, L.L.C.-Acquisition and Operation Exemption-Woodinville Subdivision*, 35731 (STB served May 17, 2013) (Approving of discovery propounded against a nonparty that has a clear interest in the proceeding and will be directly affected by the outcome).

Compelling CNJR to respond to the request is consistent with discovery procedures in Federal Court. “Several courts have concluded that a non-party could be compelled to comply with discovery requests where the non-party has a substantial interest in the litigation and is playing the role of a party.” *In re Jee*, 104 B.R. 289 (C.D. Cal. 1989). Similarly, one of the elements that a party must establish before intervening under Federal Rule of Civil Procedure 24(a) is the applicant must have a substantial, legal interest in the subject matter of the pending litigation. *Bailey v. White*, 320 Fed. Appx. 364 (6th Cir. 2009); FEDERAL PRACTICE & PROCEDURE, 7C § 1920 (3d ed.) (“the intervenor is treated as if the intervenor were an original party and has equal standing with the original parties”). Thus, because discovery is allowed against a person with a substantial interest in the litigation—a prerequisite to intervention—discovery is allowed against an intervening party. There is no question that CNJR has a substantial interest

in this proceeding. A Board ruling against CKIN would likely pave the way for CNJR to become the new operator on the Line. A ruling in CKIN's favor could end CNJR's prospects for providing rail service as the Town's lessee.

The Agreement for Lease and related communications are relevant here to define the relationship between the Town, HVRM, and CNJR. CKIN anticipates that the Agreement for Lease will reveal that HVRM exercised control over the Line and operations thereon. In turn, the Agreement for Lease will also show that CNJR would be provided more favorable treatment than CKIN as the operator of the Line. Therefore, the requested documents and communications pertaining to the Agreement for Lease are relevant.

Requiring CNJR to produce the Agreement for Lease would be consistent with Board actions asking parties proposing transactions where the line's owner and operator are different parties. For example in *Cleveland Harbor Belt Railroad—Operation Exemption—Cleveland-Cuyahoga County Port Authority*, FD 35624 (STB served May 24, 2012) the Board required the applicant to furnish a copy of the operating agreement for its review citing *Anthony Macrie—Continuance in Control Exemption—N.J. Seashore Lines, Inc.*, FD 35296, slip op. at 3-4 (STB served Aug. 31, 2010).

Unlike the Town here, the line owners in those two cases did not hold Board operating authority. However, here the Town has effectively enabled HVRM, another entity outside Board jurisdiction, a substantial role in dictating how CKIN's operations are conducted.

CNJR further objects to producing the requested communications because doing so would be unduly burdensome. However, CNJR has provided no explanation as to *why* producing the requested communications would be unduly burdensome.

3. Communications pertaining rail service for the on-line customers are relevant to CNJR's operation of the line

Although CNJR contends request for Production No. 2(2) is vague and ambiguous, the request merely seeks communications between CNJR and the on-line customers. Such communications are relevant or likely to lead to the discovery of admissible evidence because they will further reveal HVRM's control over the Line.

Co-Alliance, one of the on-line customers which accounts for 95% of the traffic on the Line, has advised counsel for CKIN that it has had minimal communications with CNJR. Accordingly, there is no reason why the production of any communications would be unduly burdensome to CNJR. Therefore, the Board should overrule CNJR's objections and compel the production of the requested communications.

4. The Operating Protocols Agreement does not speak for itself.

Request for production No. 2(3) seeks communications pertaining to the Operating Protocols Agreement. Communications pertaining to the Operating Protocols Agreement are relevant for the same reason that the communications relating Agreement for Lease are relevant; such communications reveal the details of the relationship of the parties to this proceeding. CNJR objects to producing the requested communications because it asserts that the Operating Protocols Agreement speaks for itself. Even if the Operating Protocols Agreement speaks for itself though, it does not reveal how the terms of the agreement were reached. We are not asking for the Operating Protocols Agreement but *the communications leading up to the negotiation and preparation of that agreement*. CKIN anticipates the requested communications will evidence HVRM's control in the development of the agreement and attempts to prioritize passenger rail excursions over freight. As more fully explained on p. 13 of CKIN's January 17, 2017 Reply to Respondents in this proceeding, the communications will relate to the many advantages the Town and HVRM provided CNJR that were not provided CKIN.

5. The remainder of CNJR's general objections is not applicable in this case.

CNJR asserts seven general objections to the Request, none of which are applicable to this case. As explained more fully above, all the documents requested by CKIN are relevant or likely to lead to the discovery of admissible evidence. As such, the Request does not exceed or alter the discovery responsibilities imposed by the Board. Furthermore, CKIN specifically reserved the right to supplement its pleadings and there is no order preventing additional submissions in this proceeding. The “reply-to-reply” objection is premature as the Board has not ruled on that issue and may very well not do so until its disposition of the case on the merits.

In addition, the information sought by CKIN is not subject to the attorney-client privilege. As noted above, the communications sought in the Request are those between CNJR and third parties such as the Town, HVRM, and on-line customers, not between CNJR and its counsel. The attorney-client privilege does not prevent the disclosure of communications with third parties.

Similarly, there is no attorney work product privilege available because the documents requested—the Agreement for Lease, and communications relating to the Operating Protocols Agreement and the Agreement for Lease—were not prepared in anticipation of litigation but

were the result of an effort to define the relationship of the parties involved in the agreements.

To the extent any potentially responsive documents contain confidential or proprietary information; there is already a protective order in place in this matter. CKIN is willing to sign a confidential undertaking, if necessary.

III. **CONCLUSION**

For the reasons stated above, the Board should issue an Order overruling the CNJR's objections and compel CNJR to respond in full to CKIN's Request for Production. To the extent that CKIN and LSRC/CNJR cannot resolve these matters voluntarily, CKIN asks the Board to appoint an administrative law judge or other appropriate official to resolve these discovery disputes.

Respectfully submitted,



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(202) 742-8607

Dated: February 22, 2017

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CSX TRANSPORTATION, INC.
-- ABANDONMENT EXEMPTION --
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DOCKET NO. FD 36076

CHESAPEAKE AND INDIANA RAILROAD COMPANY --
PETITION FOR DECLARATORY RELIEF

**RESPONSES OF CHICAGO & NORTH JUDSON RAILWAY COMPANY
TO CHESAPEAKE AND INDIANA RAILROAD COMPANY, INC.'S
REQUEST FOR PRODUCTION OF DOCUMENTS**

Janet H. Gilbert
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Fletcher & Sippel LLC
29 North Wacker Drive
Suite 920
Chicago, Illinois 60606-2832
(312) 252-1500

**ATTORNEYS FOR CHICAGO & NORTH
JUDSON RAILWAY COMPANY**

Dated: February 14, 2017

BEFORE THE
SURFACE TRANSPORTATION BOARD

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REQUEST FOR PRODUCTION OF DOCUMENTS**

Chicago & North Judson Railway Company ("CNJR") hereby submits these responses to the Request for Production of Documents propounded by Petitioner Chesapeake and Indiana Railroad Company, Inc. ("CKIN"):

GENERAL OBJECTIONS

The following general objections are made with respect to each of the document requests. Additional specific objections are stated in response to individual document requests.

1) CNJR objects to CKIN's document requests to the extent they seek responses from Lake State Railway Company ("LSRC"), and to the extent they identify CNJR and LSRC as "Respondents."

2) CNJR objects to CKIN's document requests to the extent they call for the disclosure of information which is protected from disclosure by the attorney-client privilege.

3) CNJR objects to CKIN's document requests to the extent they call for the production of information which is protected from disclosure by the attorney-work product privilege.

4) CNJR objects to CKIN's document requests to the extent they seek confidential or proprietary information or documents.

5) CNJR objects to CKIN's document requests to the extent they exceed or alter the discovery responsibilities imposed on parties to Surface Transportation Board proceedings pursuant to 49 C.F.R. § 1114.

6) CNJR specifically objects to CKIN's document requests given that no further pleadings are authorized to be filed by CKIN in these proceedings, that the Board has not granted CKIN's January 17, 2017 Petition for Leave to File a Reply (filed January 13, 2017) and the Town of North Judson has opposed such Petition, and that CKIN's proffered January 17, 2017 Reply to Respondents (filed January 13, 2017) is a prohibited "reply to a reply" under the Board's regulations.

7) CNJR specifically objects to CKIN's document requests to the extent they relate to a potential transaction between CNJR and the Town of North Judson which is not yet the subject of any proceeding before the Board. *See* 49 C.F.R. § 1121.2; *Cedar River Railroad Company -- Acquisition and Operation Exemption -- Certain Lines of Cedar Valley Railroad Company*, Docket No. FD 31958, et al. (ICC served June 5, 1992).

Subject to, and without waiver of, the foregoing General Objections, CNJR responds individually to the document requests propounded by CKIN to CNJR as follows:

REQUESTS FOR PRODUCTION

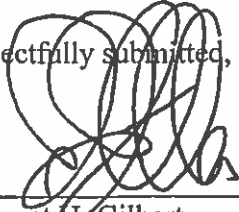
1. Any final or draft copy of "The Agreement for Lease of a Rail Line" referenced in paragraph 1 of page two of its responsive filing dated December 27, 2016, to CKIN's Petition to Reopen and Petition for Declaratory Relief along with all appendices, exhibits, attachments, and ancillary documents. Please state if no such documents currently exist.

ANSWER: CNJR objects to Request to Produce No. 1 for the reason stated in General Objection No. 7 above and for the reason that it is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence in the pending proceedings. Without waiving its objections, CNJR responds that it has not executed a lease agreement with the Town of North Judson. CNJR further responds that negotiations with the Town of North Judson regarding such an agreement continue, and that CNJR will produce such agreement to CKIN upon any execution thereof.

2. All communications, written or oral in a producible form (i.e. voice mail messages pertaining to (1) the "Agreement for Lease of a Rail Line", (2) rail service to the on-line customers; and (3) the "Operating Protocols Agreement" with the Hoosier Valley Railroad Museum. Please state if no such documents currently exist. Any confidential documents may be filed under seal pursuant to an appropriate motion for a protective order.

ANSWER: CNJR objects to Request to Produce No. 2 for the reason that it is overly broad, unduly burdensome, irrelevant and not reasonably calculated to lead to the discovery of admissible evidence in the pending proceedings. CNJR further objects to clause (1) of Request to Produce No. 2 for the reason stated in General Objection No. 7 above. CNJR further objects to clause (2) of Request to Produce No. 2 for the reason that it is vague and ambiguous with respect to the phrase "rail service to the on-line customers." CNJR further objects to clause (3) of Request to Produce No. 2 for the reason that CKIN is in possession of the executed Operating Protocols Agreement and the document speaks for itself.

Respectfully submitted,

By: 

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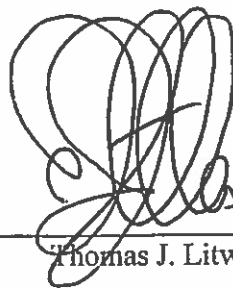
**ATTORNEYS FOR CHICAGO & NORTH
JUDSON RAILWAY COMPANY**

Dated: February 14, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of February, 2017, a copy of the foregoing
**Responses of Chicago & North Judson Railway Company to Chesapeake and Indiana
Railroad Company's Inc.'s Request for Production of Documents** was served by electronic
mail and first class mail, postage prepaid, upon:

John D. Heffner, Esq.
Strasburger & Price, LLP
1025 Connecticut Avenue, N.W.
Suite 717
Washington, DC 20036

A handwritten signature in black ink, appearing to be 'T. Litwiler', is written over a horizontal line.

Thomas J. Litwiler

CERTIFICATE OF SERVICE

I, John D. Heffner, hereby certify that a copy of the foregoing Chesapeake And Indiana Railroad Company's Motion to Compel was sent by electronic mail to all parties of record in this proceeding.

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A handwritten signature in blue ink, appearing to read "JD Heffner", is written over a horizontal line.

John D. Heffner

Dated: February 22, 2017