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August 1, 2017

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VIA E-FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 20024

ENTERED
Office of Proceedings
August 1, 2017
Part of
Public Record

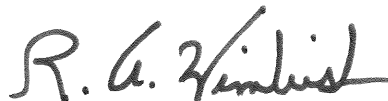
Re: **Docket No. FD 36137**
City of Fishers, City of Noblesville, and Hamilton County, Indiana –
Petition for Partial Revocation of Exemption

Dear Ms. Brown:

Enclosed for filing in the above-captioned proceeding is the **Petition for Partial Revocation of Exemption of the Cities of Fishers and Noblesville, Indiana, and Hamilton County, Indiana**, dated August 1, 2017. Payment in the amount of \$300, representing the appropriate filing fee for this proceeding is being supplied by credit card form included as a confidential attachment to this filing.

Should any questions arise regarding this filing, please feel free to contact me.
Thank you for your assistance on this matter. Kind regards.

Respectfully submitted,



Robert A. Wimbish
Attorney for City of Fishers, Indiana, City of
Noblesville, Indiana, and Hamilton County, Indiana

RAW/ekf
Enclosures

FILED
August 1, 2017
SURFACE
TRANSPORTATION BOARD

FEE RECEIVED
August 1, 2017
SURFACE
TRANSPORTATION BOARD

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. FD 36137

**CITY OF FISHERS, CITY OF NOBLESVILLE, AND HAMILTON COUNTY, INDIANA
-- PETITION FOR PARTIAL REVOCATION OF EXEMPTION**

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**ATTORNEY FOR CITY OF FISHERS,
CITY OF NOBLESVILLE, AND
HAMILTON COUNTY, INDIANA**

Dated: August 1, 2017

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. FD 36137

**CITY OF FISHERS, CITY OF NOBLESVILLE, AND HAMILTON COUNTY, INDIANA
-- PETITION FOR PARTIAL REVOCATION OF EXEMPTION --**

Pursuant to 49 U.S.C. § 10502(d) and 49 C.F.R. part 1121, the City of Fishers, Indiana (“Fishers”), the City of Noblesville, Indiana (“Noblesville”), and Hamilton County, Indiana (collectively, the “Owners”) hereby request that the Surface Transportation Board (“Board”) partially revoke the exemption that they enjoy collectively as joint owners of a railroad line (the “Line”) previously authorized for abandonment but not fully abandoned. The requested partial revocation will permit the Owners to move forward with plans to rail bank the Line pursuant to the National Trails System Act, 16 U.S.C. § 1247(d) (“Trails Act”), and the Board’s interim trails use regulations at 49 C.F.R. § 1152.29. As set forth below, the requested partial revocation is consistent with the Rail Transportation Policy of 49 U.S.C. § 10101.

In support of this petition, the Owners submit the following:

BACKGROUND

The subject Line extends roughly 37.56 miles from milepost I- 2.13 at Indianapolis, Indiana, to milepost I-39.69 at Tipton, Indiana. Immediately prior to the Owner’s purchase of the Line, it was owned by Norfolk and Western Railway Company (“N&W”), at that time a wholly-owned railroad carrier subsidiary of Norfolk Southern Railway Company

(“NSR”).¹ Operations over the line were conducted by The Indiana Rail Road (“INRD”) pursuant to a lease authorized by the Board’s regulatory predecessor, the Interstate Commerce Commission (“ICC”), in Indiana Rail Road – Lease and Operation Exemption – Norfolk and Western Railway Company, Docket No. FD 31464 (ICC decided Jul. 3, 1989).

The Line then became the subject of jointly-filed individual petitions for exemption under which N&W obtained authority to abandon the Line and INRD secured discontinuance authority. Norfolk and Western Railway Company – Abandonment Exemption – Between Indianapolis and Tipton in Marion, Hamilton, and Tipton Counties, IN, Docket No. AB-290 (Sub-No. 117X), et al. (ICC decided Nov. 4, 1991) (“Norfolk Abandonment”).

Following issuance of Norfolk Abandonment, Noblesville and Fishers, cities through which the Line passed, reached an agreement with N&W to purchase the Line, and consummated purchase of the railroad property on or about June 9, 1995.² The Owners did not seek – and were not required to seek – authority to acquire the Line because it had been approved for abandonment. Pursuant to Common Carrier Status of States, State Agencies, 363 I.C.C. 132 (1980) aff’d sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982) (“Common Carrier Status”), the Owners, all political subdivisions of the State of Indiana, were, and presently remain, exempted from the STB’s (and, before that, the ICC’s) jurisdiction and the otherwise applicable provisions of Title 49, Subtitle IV of the United States Code as non-carriers.³

¹ N&W has since been merged into NSR.

² On or about July 5, 2006, Hamilton County, Indiana, became a joint owner of the Line, along with Noblesville and Fishers.

³ See Common Carrier Status at 137-38; see also 49 C.F.R. § 1150.22 (“The acquisition by [a State or State subdivision] of a line approved for abandonment and not yet fully abandoned is exempted from the Board’s jurisdiction.”)

Accordingly, the Owners understand that they are free to retain or dispose of the Line at their collective discretion without the need to invoke any STB procedures if they so wished.⁴

Fishers and Noblesville contemplated at the time of purchase that the railroad corridor might be re-deployed for transit purposes. The track and track material remained in place and were included in the purchase. In addition, although INRD was authorized to discontinue service over the Line in 1991, a source indicates that INRD continued to operate trains between Indianapolis and Noblesville (an intermediate point on the Line, roughly 17 miles south of Tipton) until 2003.⁵ Perhaps due in part to INRD's continued operations, the Owners have found no notice of abandonment consummation for the Line.⁶

For several years following N&W's sale of the railroad property, portions of the Line hosted passenger excursion train service provided by the Indiana Transportation Museum ("ITM"). The last such excursions operated in 2015. Beside the now-suspended ITM passenger operations, the Owners believe that the Line has seen no freight activity since the termination of INRD service in 2003.

Recently, the Owners have decided to revisit their options for the Line, and have concluded that the local area would most benefit from the creation of a recreational trail/linear park along the Line's right-of-way. Such a plan would entail the removal of significant portions of the trackage along the route. The Owners would prefer that such a trail be created pursuant to

⁴ See Pennsylvania Department of Transportation – Abandonment Exemption – Portion of Valley Branch, Docket No. AB-373X (ICC Served Apr. 23, 1993) ("PennDOT – Valley Branch").

⁵ Christopher Rund, *The Indiana Rail Road Company: America's New Regional Railroad*, 152 (Indiana University Press, 1st ed. 2006).

⁶ At the time of the Norfolk Abandonment proceeding, abandoning carriers were not required to provide written notice of abandonment consummation. The current notice requirement at 49 C.F.R. § 1152.29(e)(2) had not yet been promulgated.

the STB's interim trails use procedures, because such an arrangement would ensure preservation of the corridor as a railroad transportation asset.

Ordinarily, the owners of a railroad corridor would pursue rail banking through invocation of the Board's abandonment procedures. But, here, the Owners are regarded as non-carriers exempted from this agency's abandonment provisions. As things now stand, it is unclear whether the Owners would need to invoke the Board's abandonment procedures to secure a trails use arrangement administered by the Board or whether the agency might accommodate interim trails use under the Trails Act via a simpler path, but it seems clear to the Owners that at least some form of partial revocation is necessary to achieve Board-administered rail banking.

REQUESTED RELIEF

The Owners' intend to pursue rail banking under the line under either direct authority from the Board to do so or via the agency's abandonment procedures, which, if they must be invoked, will serve as a prerequisite to a notice of interim trails use. If required (and permitted) to initiate abandonment as a necessary path to trails use, the Owners do not anticipate consummating abandonment. Instead, they plan to negotiate a trails use arrangement intended to preserve the corridor for the possible future restoration of railroad common carrier service. To facilitate such an end, the Board should partially revoke the exemption that the Owners now hold for purposes of – (1) (*if necessary here*) allowing the Owners to avail themselves of the Board's abandonment statute (49 U.S.C. § 10903) and the corresponding class exemption procedures at 49 C.F.R. part 1152, subpart F; and (2) permitting interim trails use in accordance with 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29.

The Owners have been purposely selective concerning the degree to which they wish to become subject to the STB's jurisdiction, given that the objective is to rail bank the

unused railroad assets pursuant to the Trails Act. If the Board concludes that an abandonment proceeding is a necessary prerequisite to interim trails use, then the Owners request that the partial revocation extend only so far as is necessary to facilitate the Owners' objectives.

Specifically, the Owners request that, if at all possible, the Owners should remain exempt from the Board's jurisdiction for purposes of – (a) 49 U.S.C. § 10904 (offers of financial assistance) and the corresponding Board regulations at 49 C.F.R. § 1152.27; and (b) 49 U.S.C. § 10905 (public use conditions) and the corresponding Board regulations at 49 C.F.R. § 1152.28.

DISCUSSION

Regardless of the exact details of the partial revocation path that the STB requires the Owners to take to pursue an interim trails use arrangement, it seems clear that some degree of partial revocation will be necessary to achieve the Owner's objective. The Owners demonstrate below why – (a) currently, they are categorically exempt from the agency's jurisdiction; and (b) the relief requested herein is warranted and in keeping with precedent.

A. The Line was not fully abandoned – only “approved for abandonment.”

As explained in preceding sections, the Line was the subject of the 1991 Norfolk Abandonment proceeding, at which time N&W obtained abandonment authority and INRD simultaneously secured authority to discontinue its operations. As evidence of the Line's not-fully-abandoned status at the time of sale from N&W,⁷ the Owners point out again that – (1) INRD operations over a portion of the Line continued for over a decade, post-sale; (2) the Line

⁷ As explained above, N&W was not obligated to supply the ICC with notice of abandonment consummation. As such, whether N&W manifested sufficient intent to fully abandon the Line, if challenged, would entail a fact-specific, case-by-case analysis that would consider the various “indicia” of intent to abandon, which would include factors such as voluntary, written notices of consummation, removal of the track, etc. See Baros v. Texas Mexican Ry. Co., 400 F.3d 228, 236 (5th Cir. 2005); Birt v. STB, 90 F.3d 580, 585 (D.C. Cir. 1996); Becker v. STB, 132 F.3d 60, 62 (D.C. Cir. 1997).

was sold to the Owners with trackage intact, which, among other things, allowed for the occasional operation of passenger excursion trains; and (3) they can find no record of abandonment consummation.

Concerning rail line ownership by a public entity under the categorical exemption of Common Carrier Status, the Board has explained that it will look to concrete evidence of the state owner's intent and effort to "withdraw" the line from the national railroad network, and that the mere fact that a line is dormant under public ownership is not by itself persuasive evidence of withdrawal (abandonment). Specifically, the Board has remarked as follows:

[T]ermination by the modified certificate operator was not enough to show an intent to abandon by the line owner. That conclusion is consistent with the Board's larger policy of facilitating the continuation of rail service. The Board, and the ICC before it, have long encouraged states to purchase rail lines at risk to preserve them for present or future rail service. One of the ways in which the Board has done this is by relieving states of the regulatory burdens of entry and exit. It would be at odds with the Board's long-standing policy for the Board to have concluded that a state would automatically lose its property and the public would lose the opportunity for future rail service (as well as the public investment of funds in the property) merely because the state's arrangement with a particular operator ends and the state did not engage a replacement operator immediately or within a short period of time.

Beaufort Railroad Company, Inc. – Modified Rail Certificate, Docket No. FD 34943 (STB served Jul. 20, 2009), slip op. at 6 (footnotes omitted).

Accordingly, the Line falls into the category of a railroad line "approved for abandonment and not yet fully abandoned" set forth at 49 C.F.R. § 1152.22 when it was acquired by the Owners, and the railroad asset remains a line of railroad today.

B. The Owners are categorically exempted from the STB's jurisdiction.

Because the Line was approved for abandonment but not fully abandoned when acquired by the Owners, Common Carrier Status and section 1150.22 establish that the Owners, who would ordinarily be subject to Subtitle IV of Title 49 of the United States Code (essentially

the STB's organic statute and the federal railroad regulatory scheme that the Board administers) by virtue of their joint ownership of a railroad line, are excused from the STB's jurisdiction.

The Owners submit that the exemption they enjoy is essentially the same as if they had requested and had been granted an individual exemption from Subtitle IV, which public acquirers of railroad lines sometimes obtain in connection with the acquisition and ownership of active railroad lines that have not been approved for abandonment.⁸

C. Under the applicable standard, the requested partial revocation is appropriate to avoid frustrating the objectives of 49 U.S.C. § 10101.

In assessing whether to revoke an exemption – either entirely or, as here, in limited part – the Board must consider the statutory standard set forth at 49 U.S.C. § 10502(d), which provides that the agency may revoke an exemption “when it finds that application in whole or in part of a provision of this part to the person, class or transportation is necessary to carry out the transportation policy of [49 U.S.C. § 10101].” Also, “[t]he Board will revoke an exemption if a petitioner has demonstrated conduct that frustrates the [rail transportation policy] and the Board has determined that the reinstated regulatory provisions could ameliorate the alleged harms.” Caldwell R.R. Commission – Exemption from 49 U.S.C. Subtitle IV, Docket No. FD 32659 (Sub-No. 1) (STB served Nov. 26, 2014), slip op. at 2.

Rail banking is consistent with the rail transportation policy of 49 U.S.C. § 10101.

The Trails Act states as follows:

Consistent with the purposes of [the Railroad Revitalization and Regulatory Reform Act of 1976], and in furtherance of the national policy to preserve

⁸ See, e.g., Caldwell County Economic Development Commission – Exemption from 49 U.S.C. Subtitle IV, Docket No. FD 32659 (ICC served Aug. 3, 1995); Metro North Commuter Railroad Company – Exemption – From 49 U.S.C. Subtitle IV, Docket No. FD 32639 (Sub-No. 1) (ICC served Jan. 13, 1995); Rutherford Railroad Development Corporation – Exemption – 49 U.S.C. Subtitle IV, Docket No. FD 31623 (ICC decided May 29, 1991).

established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.

16 U.S.C. § 1247(d). Rail banking ensures the “development and continuation of a sound rail transportation system . . . to meet the needs of the public” by preserving railroad rights-of-way for future railroad use. 49 U.S.C. § 10101(4). An abandoned railroad right-of-way is subject to encroachment by underlying or adjoining landowners, and such claims are adjudicated pursuant to state property law. *See* H.R. Rep. No. 98-28, at 8-9 (1983) (“The concept of attempting to establish trails only after the formal abandonment of a railroad right-of-way is self-defeating; once a right-of-way is abandoned for railroad purposes there may be nothing left for trail use.”), S. Rep. No. 98-1, at 9 (1983) (same). Rail banking does not constitute abandonment, 16 U.S.C. § 1247(d). As such, those working within the Board’s interim trails use provisions gain a degree of certainty in preserving rail corridors for future transportation use. This certainty reduces industry entry and exit barriers, thereby promoting the policy objective at 49 U.S.C. § 10101(7).

Beyond application of the rail transportation policy, the Owner’s rail banking objectives advance the Board’s view of the public interest. Specifically, the Board has explained in very similar circumstances involving Common Carrier Status and a proposed rail trail on railroad property previously operated under a modified certificate that trails use would promote the public interest.⁹

The Owners understand the basic concepts of rail line abandonment and rail banking under the Trails Act provisions. Critically, they also understand that, in order for a

⁹ See Beaufort Railroad Company, Inc. – Modified Rail Certificate, Docket No. STB 34943 (STB served Mar. 19, 2008 and May 20, 2009).

railroad right-of-way to be rail banked, there may first need to be an abandonment proceeding usually initiated by the filing of a petition or notice of exempt abandonment. Beyond showing that the requested partial revocation advances the objectives of the rail transportation policy, the Owners hereby establish that – (a) there is adequate factual basis for seeking a partial revocation here; and (b) the requested partial revocation is in keeping with agency precedent.

D. It would be consistent with agency precedent to partially revoke the Owner's categorical exemption to allow direct invocation of the interim trails use provisions.

In other situations, public bodies owning lines approved for abandonment have successfully invoked the Board's interim trails use provisions as an outgrowth of modified certificate service termination under 49 C.F.R. 1150.24 – a simpler and less costly regulatory process than if the Owners were required to achieve a rail banking arrangement through the formality of an abandonment proceeding.¹⁰ The Owners would do the same here if only that simple mechanism were available. But the Line lacks a modified certificate operator, and, indeed, has seen no freight service since 2003. It is unclear why the Board should require more of the Owners here than it did in the case of Tillamook Bay or Sammamish simply because of the presence there of modified certificate arrangements, or why the agency would consider it in keeping with the general policies articulated in Common Carrier Status or in furtherance of the rail transportation policy to subject the Owners to the cost and regulation occasioned by an abandonment proceeding.

¹⁰ See, e.g., Port of Tillamook Bay Railroad – Modified Rail Certificate, Docket No. FD 31676 (STB served Jul. 26, 2016) (“Tillamook Bay”); Sammamish Transp. Co. – Notice of Interim Trail Use & Termination of Modified Certificate, Docket No. FD 33398 (Sub-No. 1) (STB served Feb. 26, 1998) (“Sammamish”); and Wis. & Calumet R.R. – Notice of Interim Trail Use & Termination of Modified Certificate, Docket No. FD 30724 (Sub-No. 1) (ICC served Aug. 8, 1989).

The Owners respectfully submit that the Board can and should exercise its broad discretion under 49 U.S.C. § 10502 to partially revoke the existing exemption from the Board's jurisdiction strictly for the purposes of allowing the Owners to invoke the agency's interim trails use provisions while continuing to leave the Owners excused from the abandonment procedures that otherwise would serve as a predicate to trails use. See, e.g., Common Carrier Status at 134.

E. Barring partial revocation limited strictly to the trails use provisions, the Owners should be allowed to submit themselves to the Board's jurisdiction in part in order to initiate an abandonment proceeding and then interim trails use.

In the absence of the usual modified certificate termination of service mechanism discussed immediately above, the Owners have identified another, more complex, path to trails use reflected in analogous agency precedent. Because there is no rail operator and, thus, no modified certificate service termination afoot, and since the exemption the Owners enjoy is tantamount to a Subtitle IV exemption granted to a public entity, the Owners have devised here, in the alternative, to follow the path set in Caldwell Railroad Commission – Exemption from Subtitle IV, Docket No. FD 32659 (Sub-No. 2) (STB served Sep. 8, 2015) (“Caldwell”).

In Caldwell, the subject railroad commission, a public entity previously known as the Caldwell County Economic Development Commission, had purchased and owned an active, 22.1-mile railroad line. The railroad commission had requested and had obtained a “Subtitle IV exemption” freeing the commission from the agency's regulatory requirements. Years later, the commission chose to rail bank the line, and so invoked the Board's abandonment procedures as a precursor to that objective. The Board, however, denied the commission's invocation of the usual abandonment procedures, explaining that the commission was currently excused from the agency's abandonment processes by virtue of the Subtitle IV exemption. Thereupon, the commission (evidently somewhat grudgingly, based upon the administrative record) sought and

obtained a partial revocation of the Subtitle IV exemption, permitting it to initiate an abandonment proceeding and, ultimately, to negotiate an interim trails use arrangement.

Here, aside from the fact that the Owners did not request (and, due to Common Carrier Status, did not have to request) a Subtitle IV exemption, their collective legal status is essentially the same as that of the Caldwell Railroad Commission. As such, and for the same policy reasons as discussed in Caldwell, the Board should grant the Owners the requested relief to facilitate rail banking.

CONCLUSION

In adopting the regulations and policies set forth in Common Carrier Status, the ICC surely did not intend to erect obstacles precluding entities such as the Owners from preserving railroad transportation assets through rail banking. Yet, to date, the categorical exemption of Common Carrier Status (which holds that the Owners of the Line under the circumstances here are not considered railroad carriers subject to the agency's jurisdiction) is a regulatory impediment to rail banking. This current state of affairs frustrates the rail transportation policy goals described above which would be furthered by rail banking.

As demonstrated in the foregoing sections, a partial revocation of the exemption is appropriate and necessary to facilitate invocation of Board-administered interim trails use for the Line. That revocation could simply entail revocation sufficient for the Owners and one or more trail sponsors (who might, initially, be the Owners themselves) to invoke the Board's trails use provisions directly without the need to resort to an abandonment proceeding. Barring that uncomplicated process, the Owners respectfully request in the alternative that the Board grant a partial revocation of the Owners' exemption strictly for purposes of allowing the Owners to initiate an abandonment proceeding as a mechanism to then invoke the Board's interim trails use

provisions in keeping with Caldwell. Specifically, under this alternative relief, the Owners seek partial revocation of their exemption so that they may be subject only to 49 U.S.C. § 10903, the corresponding Board regulations governing abandonment at 49 C.F.R. part 1152, subpart F, and to the Board's interim trails use regulations at 49 C.F.R. § 1152.29.

WHEREFORE, the Owners respectfully request that the Board partially revoke their exemption from Board jurisdiction to permit them to pursue a rail banking arrangement for the Line under the Trails Act and the Board's regulations at 49 C.F.R. § 1152.29.

Respectfully submitted,

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**ATTORNEYS FOR CITY OF FISHERS, CITY
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INDIANA**

Dated: August 1, 2017