

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
May 22, 2019
Part of
Public Record

CITY OF FISHERS, CITY OF	)	
NOBLESVILLE, AND HAMILTON	)	
COUNTY, INDIANA – PETITION FOR	)	
PARTIAL REVOCATION OF	)	
EXEMPTION	)	
	)	DOCKET NO. AB-290 (Sub-No. 117X)
NORFOLK AND WESTERN RAILWAY	)	
COMPANY – ABANDONMENT	)	
EXEMPTION – BETWEEN INDIANAPOLIS	)	
AND TIPTON IN MARION, HAMILTON,	)	
AND TIPTON COUNTIES, IND.	)	

**US RAIL HOLDINGS, INC.’S REPLY TO THE
MOTION TO REJECT AND STRIKE**

US Rail Holdings, LLC
7846 West Central Avenue
Toledo, OH 43617

Submitted By:

Donn C. Meindertsma
Conner & Winters, LLC
1850 M Street NW, Suite 600
Washington, DC 20036
(202) 887-5711
dmeindertsma@cwlaw.com

Attorney for US Rail Holdings

Date: May 22, 2019

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

CITY OF FISHERS, CITY OF	)	
NOBLESVILLE, AND HAMILTON	)	
COUNTY, INDIANA – PETITION FOR	)	
PARTIAL REVOCATION OF	)	
EXEMPTION	)	
	)	DOCKET NO. AB-290 (Sub-No. 117X)
NORFOLK AND WESTERN RAILWAY	)	
COMPANY – ABANDONMENT	)	
EXEMPTION – BETWEEN INDIANAPOLIS	)	
AND TIPTON IN MARION, HAMILTON,	)	
AND TIPTON COUNTIES, IND.	)	

**US RAIL HOLDINGS, INC.’S REPLY TO THE
MOTION TO REJECT AND STRIKE**

US Rail Holdings, Inc. (“USR”) respectfully submits to the Surface Transportation Board (“Board”) its reply to the Motion to Reject and Strike of the City of Fishers, Indiana, City of Noblesville, Indiana, and Hamilton County, Indiana (collectively the “Owners”). USR provides its response to the three arguments made by the Owners in this Motion.

First, Owners argue that the evidence submitted by USR in its rebuttal regarding its financial ability to purchase the NITU Line should be stricken because its introduction in a rebuttal is inappropriate. However, Owners completely ignore their extremely strong objection to USR’s evidence in its Motion to Vacate/Reactivate and for Preliminary Injunction (“Motions”) of its ability to purchase the NITU Line and valuation of it.

Owners argued in their Reply to USR’s Motions (“Owners’ Reply”) that USR’s evidence of financial ability “boils down to a bald assertion, that, in essence, *we must all take Ms.*

Mitchell's word for it." Owners' Reply at p. 7 (emphasis added by Owners). They also state that Ms. Mitchell's statement that USR has sufficient financing based on a line of credit that would more than cover the value of the NITU Line is "meager proof of the sufficiency of USR's finances" because it is a "conclusory statement, comprising the entire substance of USR's evidence of financial wherewithal." *Id.* at p. 8. Upon review of these objections, USR felt it necessary to supplement its evidence to support its earlier evidence regarding financial ability.

Moreover, Owners asserted that USR's valuation of the NITU Line was "flimsy" and "dubious". In response to USR's \$1.1 million valuation, Owners submitted their own valuation of the NITU Line of \$1.6 million and Inspection & Rehabilitation Plan that would require \$3.715 million in costs to bring the entire 37-mile line up to a Class Two standard. (The NITU Line is the southern 20 miles of this line, so the northern 17-mile portion would not be part of any rehabilitation by USR.) In total, Owners argued that USR would need somewhere in the area of \$5.315 million to purchase and make the NITU Line functional at a Class Two standard.

In its Motions, USR stated that it had sufficient financing to cover a \$1.1 million purchase price for the NITU Line. Because of these valuations by Owners and their strong objection to USR's initial evidence, USR felt compelled to refute these portions of the Owners' Reply.¹

¹ See 5 Handbook of Fed. Evid. § 611:13 (8th ed.):

The function and scope of rebuttal and surrebuttal is the presentation of evidence in refutation of evidence presented by an opponent during his last opportunity to offer evidence. Refutation evidence is that which denies, explains, qualifies, disproves, repels or otherwise sheds light on evidence offered by an opponent as to a fact of consequence in the litigation including the credibility of witnesses. The scope of rebuttal is restricted to non-collateral matters. Refutation evidence may be offered by the defendant when he presents his case in chief. Refutation evidence offered by the plaintiff/prosecution after the close of defendant's case in chief is called rebuttal. The refutation evidence of the plaintiff/prosecution must rebut new evidence or new theories proffered during the defendant's case in chief.

USR's evidentiary support in its Rebuttal of its financial ability to purchase the NITU Line directly deals with non-collateral matters raised by Owners' Reply. Consequently, USR respectfully asks the Board to deny Owners' Motion to Strike this important evidence.

Second, Owners argue that USR's discussion of Ballard Terminal – 2² (final decision on the merits) does not make sense because Owners only relied upon Ballard Terminal – 1³ (decision regarding the Preliminary Injunction Motion) in their Reply. As a result, Owners argue that USR's Rebuttal is not needed. Owners point to four "failures" by the movant to succeed on its motion for preliminary injunction in Ballard Terminal – 1, as found by the Board, including inadequate demonstration of funding, inadequate demand for rail service, inadequate demonstration of the rail line's condition for freight service, and an inadequate proposal to provide freight service on the line. Because of this assertion by Owners regarding Ballard – 1 being directly on point, Owners wanted to explain the weakness of this argument and why this case was good for USR.⁴

USR's point was that Ballard – 1 or 2 was easily distinguished from its situation mainly because it had the financial ability to purchase and operate the NITU Line. In fact, Ballard – 1 is more easily distinguished regarding the merits than Ballard – 2. Ballard – 1 holds that the movant did not demonstrate a likelihood of success on the merits because it did not "appear to be in a financial position to reinstitute service" and neither of the "prospective shippers" was "located on the Line." Slip op. at 5. USR has clearly demonstrated its financial position to

² *Ballard Terminal R.R. Co., LLC – Acquisition and Operation Exemption – Woodinville Subdiv.*, STB Docket No. 35731, et al. (STB served Dec. 30, 2014) (Ballard Terminal – 2).

³ *Ballard Terminal R.R. Co., LLC – Acquisition and Operation Exemption – Woodinville Subdiv.*, STB Docket No. 35731, et al. (STB served Aug. 1, 2013) (Ballard Terminal – 1).

⁴ USR admittedly referred to Ballard – 2 instead of Ballard – 1. However, this final decision holds more sway before the Board on the merits, which is what Owners are arguing about here.

reinstitute service and two of the prospective shippers are located on the NITU Line. As a result, Owners' reliance on this case was flawed, and USR felt compelled to make this clear.

The Owners also argue that USR's discussion in its Rebuttal about the timing for reactivation of a railbanked line is unnecessary and its rebuttal should be rejected. Owners point out the language in the December 21, 2018 decision in this proceeding that reactivation can occur after NITUs are issued by the Board and notice of a trails use agreement is given to the Board. However, USR believes there is another appropriate path to seek reactivation of a railbanked line which could occur once the NITUs were requested by parties or issued by the Board, both of which have happened here. USR lays out its reasoning for this position, mainly pointing to the Board's ministerial role in railbanking cases and its complete absence from the trails use agreement negotiation process. As a result, this argument on an issue that has not been directly before the Board is why the Rebuttal is needed.

In conclusion, the Owners' Motion to Strike and Reject should be denied. The Board has allowed replies to replies in the past to have a more complete record. *See The City of Alexandria – Petition for Declaratory Order*, STB Docket No. 35157, slip op. at 2 (STB served Nov. 6, 2008). The Board's rules are construed liberally to ensure a just determination of the issues presented in these circumstances. *See Railroad Ventures, Inc. – Abandonment Exemption – Between Youngstown, OH and Darlington, PA*, STB Docket No. AB-55 (Sub-No. 643X), slip op. at 1 (STB served July 30, 2003) (citing 49 CFR § 1100.3). USR respectfully asks the Board to permit its Rebuttal to be part of the record here for these reasons discussed above.

Respectfully submitted,



Donn C. Meindertsma
Conner & Winters, LLP
1850 M Street NW, Suite 600
Washington, DC 20036
(202) 887-5711

On behalf of US Rail Holdings, LLC

CERTIFICATE OF SERVICE

I, Priscilla Leonard, hereby certify that a copy of the foregoing US RAIL HOLDINGS, INC.'S REPLY TO THE MOTION TO REJECT AND STRIKE dated May 22, 2019, was sent by email to Owners, and U.S. Mail to the all other parties in this proceeding.

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

Priscilla Leonard