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THOMAS F. McFARLAND

December 27, 2016

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ENTERED
Office of Proceedings
December 27, 2016
Part of
Public Record

By efilng

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

Re: Docket No. AB-55 (Sub-No. 643X), *CSX Transportation, Inc. -- Abandonment
Exemption -- in La Porte, Porter and Starke Counties, IN*

Finance Docket No. 36076, *Chesapeake and Indiana Railroad Company, Petition
for Declaratory Relief*

Dear Ms. Brown:

Hereby transmitted is a Reply in Opposition to (1) Petition to Reopen Offer of Financial Assistance Proceeding and (2) Petition for Declaratory Relief for filing with the Board in the above referenced matter.

Respectfully submitted,

Rachel Arndt TM

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Tom McFarland

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*Attorneys for the Town of
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THOMAS F. MCFARLAND

Ms. Cynthia T. Brown

December 27, 2016

Page 2

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BEFORE THE
SURFACE TRANSPORTATION BOARD

CSX TRANSPORTATION, INC. --	)	
ABANDONMENT EXEMPTION -- IN	)	DOCKET NO.
LAPORTE, PORTER, AND STARKE	)	AB-55 (SUB-NO. 643X)
COUNTIES, IN	)	
	)	
CHESAPEAKE AND INDIANA	)	FINANCE DOCKET
RAILROAD COMPANY -- PETITION	)	NO. 36076
FOR DECLARATORY ORDER	)	

**REPLY IN OPPOSITION TO (1) PETITION TO REOPEN
OFFER OF FINANCIAL ASSISTANCE PROCEEDING
AND (2) PETITION FOR DECLARATORY RELIEF**

TOWN OF NORTH JUDSON, INDIANA
204 Keller Avenue
North Judson, IN 46366

Replicant

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Attorneys for Replicant

DUE DATE: December 27, 2016

BEFORE THE
SURFACE TRANSPORTATION BOARD

CSX TRANSPORTATION, INC. --	)	
ABANDONMENT EXEMPTION -- IN	)	DOCKET NO.
LAPORTE, PORTER, AND STARKE	)	AB-55 (SUB-NO. 643X)
COUNTIES, IN	)	
	)	
CHESAPEAKE AND INDIANA	)	FINANCE DOCKET
RAILROAD COMPANY -- PETITION	)	NO. 36076
FOR DECLARATORY ORDER	)	

**REPLY IN OPPOSITION TO (1) PETITION TO REOPEN
OFFER OF FINANCIAL ASSISTANCE PROCEEDING
AND (2) PETITION FOR DECLARATORY RELIEF**

Pursuant to 49 C.F.R. § 1104.13(a), the Town of North Judson, Indiana (the Town) hereby replies in opposition to (1) a Petition in Docket No. AB-55 (Sub-No. 643X) to Reopen Offer of Financial Assistance Proceeding, and (2) a Petition in Finance Docket No. 36076 for Declaratory Relief (referred to collectively as the Petition), both filed by Chesapeake and Indiana Railroad Company (CKIN) on November 14, 2016. In a decision served November 30, 2016, the Board extended the date for filing replies to the Petition to December 27, 2016.^{1/}

^{1/} Disgruntled over not being chosen to continue to operate the Town's rail line upon expiration of an operating agreement, CKIN has launched a vendetta against the Town. CKIN refuses to vacate the rail line, necessitating the filing of an application for adverse discontinuance of its rail service. In an act of shameful spite, CKIN opposed the Town's request for waiver of significant filing fees associated with the discontinuance proceeding, influencing denial of the request even though CKIN had nothing financially to gain from the Town's loss. CKIN has brought an action against the Town in the Circuit Court of LaPorte County, Indiana for alleged breaches of contract and declaratory relief. (Cause No. 46C01-1610-PL-1774). The current Petition is the latest in CKIN's scorched-earth strategy.

SUMMARY OF REPLY ARGUMENT

The Petition is fatally defective as a matter of law. Accordingly, the Petition should be denied without a need to resolve factual disputes.

Where, as here, an acquisition of a rail line in an Offer-Of-Financial-Assistance (OFA) proceeding has been consummated many years ago, the proceeding can be reopened only on narrow grounds of fraud, mistake, or ministerial error, not on broader grounds of new evidence, changed circumstances, or material error. The Petition should be denied because CKIN has not attempted to prove the existence of fraud, mistake, or ministerial error in the 2004 OFA proceeding in which the Town acquired the rail line.

Even if the Board were to reopen the OFA proceeding, there is no statutory or any other legal authority by which the Board could void the OFA acquisition and require the Town to sell the rail line to CKIN. The Board has determined that such a forced sale is not available by means of reopening but only by means of a feeder line application, if all of the findings required by 49 U.S.C. § 10907(c)(1)(A)-(E) can be made. The Petition should be denied because CKIN has not filed a feeder line application, and has neither alleged nor proven the existence of any of the required findings.

CKIN cannot obtain the relief that it seeks indirectly by means of a declaratory order when that relief is not available to it directly by means of reopening. Even if a declaratory proceeding were to be instituted, the Rail Transportation Policy of 49 U.S.C. § 10101 (RTP) does not provide an independent cause of action, but instead serves only to guide the proper interpretation of statutes that do provide for substantive relief. The decisions alleged to constitute precedent for CKIN's position actually support the principle that the relief sought by

CKIN is available only by means of a successful feeder line application. The request for declaratory relief should be denied for any or all of the foregoing reasons.

There being no pending request for operating authority by a new operator of the rail line, it is obviously premature for CKIN to argue that such authority should not be available by means of the class exemption at 49 C.F.R. § 1150.41. When the appropriate time for resolution of that issue arrives, the Board should rule that CKIN's legally defective Petition does not constitute controversy that should prevent use of the class exemption.

While the Petition should be denied as a matter of law with no need to resolve factual disputes, the Town, in an abundance of caution, is filing a verified statement to rebut the numerous false and/or misleading statements in the Verified Statement of R. Powell Felix, President of CKIN. By far the most pertinent facts, contained in CKIN's own Petition, are that in calendar year 2005, shortly after the Town acquired the rail line, originated, and terminated (O&T) traffic was 506 carloads; in 2014, O&T traffic had risen to 3,282 carloads, an increase of 549 percent! Even from 2014 to 2015, when the Town is alleged to be most strongly favoring passenger service over freight service, O&T traffic rose again from 3,282 carloads to 4,312 carloads, an additional increase of 31 percent! If the Town was impeding rail freight traffic as alleged by CKIN, that traffic data would indicate that the Town was doing a remarkably poor job of doing so. What the data actually show is that the Town has continuously promoted freight traffic since the inception of its ownership of the rail line to the present.

REPLY ARGUMENT

I. THE PETITION SHOULD BE DENIED BECAUSE CKIN HAS NOT ATTEMPTED TO PROVE THE PREREQUISITES FOR REOPENING THE 2004 OFA PROCEEDING IN WHICH THE TOWN ACQUIRED THE RAIL LINE

Attached to this Reply as Appendix 1 is a copy of the OFA to acquire the subject rail line filed by the Town on March 1, 2004.^{2/} The Board approved that acquisition in a decision in Docket No. AB-55 (Sub-No. 643X) issued on May 14, 2004. Immediately upon the effectiveness of that decision, the Town consummated the OFA acquisition. Thus, the acquisition authority in the Board proceeding sought to be reopened was consummated more than 12 years ago!

Where, as here, an acquisition of a rail line in an OFA proceeding has been consummated many years ago, that proceeding can be reopened only on narrow grounds of fraud, mistake, or ministerial error, rather than on broader grounds of new evidence, changed circumstances, or material error. Thus, in *Napa Valley Wine Train, Inc. -- Petition for Declaratory Order*, 4 I.C.C. 2d 720 (1988), the Board's predecessor said (at 729 and note 10):

Under 49 U.S.C. § 10327(g) (now 722[c]), the Commission has the power to reopen a proceeding at any time because of material error, new evidence, or substantially changed circumstances. However, the Commission has never viewed that authority as limitless. Rather, the need for administrative finality weighs heavily where, as here, a party acted in reliance on a Commission decision, making a substantial investment. Hence, the circumstances in which jurisdiction reasonably can be reasserted are considerably more circumscribed. Fraud, mistake and ministerial error are the only grounds traditionally asserted by

^{2/} The Town specifically alleged that the OFA was for continued rail freight service (Appdx. 1 at 5, "Upon acquisition of the rail line, the Town intends to contract with a rail operator to provide rail service to shippers and receivers located or to be located along the rail line").

the Commission as a basis for revoking authority already exercised.^{10/} The parties have not met those strict criteria in making their ultimate NEPA claims here.

X X X

^{10/} Fraud and mistake refer to situations where the agency relied upon false information, whether the carrier intended to deceive the agency (fraud) or not (mistake). Ministerial error refers to such obvious clerical errors as the issuance of a decision which states in its discussion that the authority is being denied but which grants the authority in the ordering paragraph. *Cf. Pinto Trucking Serv. Inc. v. Cape Airfreight, Inc.*, 357 I.C.C. 197, 206 (1977).

Decisions in other OFA proceedings are to the same effect. Thus, in *Railroad Ventures, Inc. -- Aband. Exempt. -- between Youngstown, OH and Darlington, PA*, 2004 WL 2852171

(Docket No. AB-556 [Sub-No. 2X], decision served December 13, 2004), the Board said (at *5):

... (C) concerns for administrative finality, repose, and detrimental reliance counsel against a reopening here. More than 3 years elapsed after the Board's original assessment of the line before RVI tendered its purportedly "new" evidence. CCPA/CCPR reasonably relied on the Board's determination of the purchase price when they chose to proceed to acquire and operate the line, and they invested substantial resources to restore the rail service. Were we to alter the purchase price at this time, CCPA could not simply walk away from the deal, as it could have when we originally set the price.

In *Union Pacific R. Co. -- Aband. Exempt. -- in Rio Grande and Mineral Counties, CO*, 2004 WL 1387312 (Docket No. AB-33 [Sub-No. 132X], decision served June 22, 2004), the Board said (at *5):

... Although 49 C.F.R. 1152.25(e)(4) allows the filing of a petition to reopen any administratively final decision, the need for administrative finality dictates that the hurdle to be overcome by such a petitioner increases substantially as time passes. The City had every opportunity to question D&RGHF's financial responsibility during the OFA process, but did not until November 22, 1999, long after D&RGHF and UP notified the Board that they had reached an agreement on the sale of the line. . .

The ICC and the Board have stated on a number of additional occasions that they would apply the equitable doctrine of laches to deny reopening in appropriate circumstances, notwithstanding that a statute allowed the filing of petitions at any time. *Louisville & Jefferson Co. & CSX Const. & Oper. Jeff., KY*, 4 I.C.C. 2d 749, 756, n.8 (1988); *see, also, Midwestern Rail Prop., Inc. -- Pur. -- Rock Island*, 366 I.C.C. 915, 922 (1983); *Norfolk & W. Ry. Co. and New York C. & St. L. R. Co. Merger*, 5 I.C.C. 2d 234, 237 (1989); and *Mountain Laurel R. Co. -- Acq. & Oper. Exempt. -- Consolidated Rail Corp.*, 1998 STB LEXIS 131 (F.D. No. 31974, decided May 13, 1998) at *17 (“While specific time limits are not applicable to the filing of petitions to reopen and revoke under 49 U.S.C. 10505(d), the time elapsed is relevant and, depending on the facts of the case, concerns for administrative finality, repose and detrimental reliance must be balanced with those factors that support reopening and revocation, particularly when the challenged exemption pertains to a transaction that cannot readily be undone, as MLRR alleges here.”); c.f. Rule 60(b)(3) of the Federal Rules of Civil Procedure, which precludes relief from a United States District Court judgement based on fraud or misrepresentation if the request for relief is not filed within one year after entry of the judgement.

Here, the Town reasonably relied on the Board’s decision in the OFA proceeding in consummating acquisition of the line. In continued reliance on that decision, the Town has expended substantial sums in building up the rail traffic on the line. Now, 12 years later, a party seeks to undo the acquisition. Were the Board to accede to that request, the salutary purpose of the OFA provision would be undermined, as prospective sellers and buyers would hesitate to act for fear that their transaction would be negated years later. The case for application of laches to the Petition of CKIN is compelling in view of both the lengthy delay in filing that Petition and

the reasonable reliance by the Town on the decision sought to be reopened in consummating the acquisition of the rail line.

In the absence of fraud, mutual mistake, or ministerial error, a petition to reopen an OFA proceeding in which an acquisition was consummated long ago is to be denied. In the present case, there has been no allegation by CKIN that the 2004 OFA proceeding by which the Town acquired the rail line was tainted by fraud, mistake, or ministerial error. In that circumstance, CKIN's Petition is to be denied. *See CSX Transportation, Inc. -- Aband. -- between Bloomington and Montezuma in Parke County, IN*, 2002 WL 31045472 (Docket No. AB-55 [Sub-No. 486], decision served September 13, 2002), where the Board said (at *4):

...There are rare cases, such as instances of fraud, where we may assert jurisdiction over property after abandonment authority has been exercised (footnote omitted). But this is not such a case, and, in fact, fraud has not even been alleged here by petitioners.

Inasmuch as CKIN has failed to satisfy the standards for reopening the Board's decision in this proceeding, CKIN's Petition to Reopen Offer of Financial Assistance in Docket No. AB-55 (Sub-No. 643X) should be denied.

II. THE BOARD LACKS AUTHORITY UPON REOPENING TO RESCIND A CONSUMMATED OFA ACQUISITION AND TO REQUIRE THAT THE RAIL LINE BE RESOLD TO ANOTHER PERSON

Inasmuch as the Petition is required to be denied for failure to satisfy the applicable standards for reopening, the Board need not reach the issue of its authority upon reopening. As set out below, even if it were to be assumed that reopening is appropriate, there is no statutory or other legal basis for CKIN's contention that upon reopening the Board has authority to void the OFA acquisition and require that the rail line be resold to CKIN.

CKIN argues that this is an issue of first impression. (Petition at 8). It is not. The Board has correctly ruled that only the OFA provisions of 49 U.S.C. § 10904 and the feeder line

provisions of 49 U.S.C. § 10907 authorize the Board to require a rail carrier to sell a line involuntarily. Thus, in *SR Investors Ltd., d.b.a. Sierra Railroad Co. -- Aband. -- in Tuolumne County, CA*, 1987 WL 98935 (Docket No. AB-239X, decision served July 14, 1987), the Board's predecessor said (at *4):

Even if (reopening were possible), we could not grant the relief Friends ultimately seeks - an order requiring Sierra to transfer the right-of-way to Friends for public use or trail use. Contrary to Friends' argument, we do not have the power to require railroads to sell property for public use other than for continued rail service under 49 U.S.C. 10905 (now 49 U.S.C. 10904). . .

Another petition to reopen that proceeding was denied. 1998 WL 225711 (January 20, 1988). The agency decisions were upheld on review *sub. nom. Friends of Sierra Railroad, Inc. v. ICC*, 881 F.2d 663 (9th Cir, 1989). Certiorari was denied *sub. nom. Tuolumne Park & Dist. v. ICC*, 493 US 1093 (1990). See, also, *Indiana Hi-Rail Corp. -- Lease & Oper. Exempt. -- Norfolk & Western Ry. Co. Line between Rochester and Argos, IN*, 1998 WL 32184 at *4 (F.D. No. 32162, decision served January 30, 1998) (revocation of exemption was denied; shipper could have filed a feeder line application); and *South Plains Switching Ltd. Co. -- Acq. Exempt. -- BNSF Ry. Co.*, 2006 WL 2644250 at *2 (F.D. No. 33753, decision served September 15, 2006) (revocation of acquisition exemption was denied because a pending feeder line application was a sufficient means of recourse for a shipper's service-related problems).

In view of the foregoing, the Board has authority to require a rail carrier to sell a rail line to another rail carrier involuntarily only by means of an OFA under 49 U.S.C. § 10904 or a feeder line application under 49 U.S.C. § 10907, not by means of a petition for reopening under 49 U.S.C. § 722(c) or for revocation under 49 U.S.C. § 10502(d). It follows that the Board does not have authority to grant the involuntary sale relief sought in CKIN's Petition.

The foregoing principle is based on the propriety of the feeder line remedy in dealing with allegations of inadequate rail service, and the impropriety of the revocation or reopening remedy

for that purpose. There is an equally fundamental reason why reopening of an OFA proceeding cannot be used to force sale of a rail line. The provision for reopening of an OFA proceeding in 49 U.S.C. § 722(c) does not have the legal safeguards for protection of a rail line owner's interests that are provided for in the feeder line statute. Thus, the feeder line statute assures that the owner will receive the constitutional minimum value (CMV) of the rail line in a forced sale (*see* 49 U.S.C. § 10907[b][1] and [2]), but the revocation or reopening statute does not contain such a provision. A reopening or revocation of the OFA, resulting in forced conveyance of the rail line to CKIN without payment of CMV, would be patently unconstitutional where, as here, traffic on the rail line has very substantially increased in the years after acquisition. The Town has created a significant going concern value by increasing traffic and revenues so dramatically. The Town would be entitled to fair compensation for that value. Revocation and reopening would not ensue provision of that value.

There are other substantial safeguards for a rail line owner's interests in the feeder line statute that are not provided for in the revocation and reopening statute. One such highly significant safeguard is that the owner cannot be forced to sell a line involuntarily on the ground that public convenience and necessity (PC&N) require or permit such a sale unless the Board makes all five findings required by 49 U.S.C. § 10907(c)(1)(A)-(E). There is no such safeguard in the revocation or reopening statute, which does not provide specific standards to determine whether acquisition of a rail line should be undone. Another very meaningful difference is that a potential OFA purchaser can walk away from a purchase if the price fixed by the Board is too high. That is not possible on reopening.

For all the foregoing reasons, CKIN's Petition should be denied as inappropriately filed under reopening provisions that are not designed nor intended to remedy alleged inadequate rail service occurring many years after an OFA acquisition.

III. DECLARATORY RELIEF IS NOT APPROPRIATE

There are several compelling reasons why the declaratory relief requested by CKIN would not be appropriate in the circumstances of this case.

Declaratory relief is not a permissible alternative if primary relief is not granted. Relief that is not available to CKIN directly by means of reopening should not be available to CKIN indirectly by means of declaratory relief. The declaratory relief sought by CKIN suffers from the same legal shortcomings that doom its petition for reopening, and more.

One of the two purported justifications for the requested declaratory relief is “to determine whether the Town’s ownership and administration of the Line satisfy ICCTA’s rail transportation goals” (Petition at 24). In particular, the Board’s stewardship of the rail line is alleged to have violated paragraphs 3, 8, 9, and 11 of the Rail Transportation Policy (RTP) set out at 49 U.S.C. § 10101. (Petition at 13).

That does not provide a valid legal basis for a declaratory order because the RTP does not create an independent basis for Board action in the absence of a violation of a substantive prohibition in the Interstate Commerce Act. *Seaboard Coast Line RR v. United States*, 724 F.2d 1482, 1492 (11th Cir, 1984). Instead, the proper role of the RTP is to guide the Board in its administration and enforcement of the substantive provisions of that Act. *Schaffer Transportation Co. v. United States*, 355 U.S. 83, 87-88 (1957); *see, also, Louisville Jefferson Co. & CSX Const. & Oper. Jeff, KY*, 4 ICC 2d 749, 754 (1988). Inasmuch as CKIN failed to allege a violation of a substantive statute along with its allegation of a violation of the RTP, CKIN has failed to provide justification for the requested declaratory relief.

The only other purported justification for the requested declaratory relief is to determine whether the Town’s stewardship of the rail line satisfies “common carrier precedent” (Petition at 24). In particular, the Town’s administration of the rail line is alleged to violate the “State of

Maine doctrine” (Petition at 15-16). The State of Maine citation is *Maine, Department of Transportation -- Acq. & Oper. Exempt -- Maine Central RR*, 8 ICC 2d 835 (1991).

That does not provide a valid legal basis for a declaratory order because the present case is in no way governed by the *State of Maine* precedent. The latter principle applies when a governmental agency acquires only the physical assets of a rail line, and the selling carrier retains an easement to continue to provide rail service to shippers on the line. Under that principle, the governmental agency is treated as a rail carrier requiring Board authority for its acquisition of the assets if it appears that its use of those assets would impede the rail carrier’s provision of service to shippers. In contrast, in the present case the Town acquired the right to provide rail service to shippers on the line at the same time that it acquired the rail line assets. There never was any question whether the Town required Board authority for its acquisition. That authority was obtained more than 12 years ago.

Even if the *State of Maine* principle applied in the present case, the Verified Statement of Wendy J. Hoppe thoroughly rebuts CKIN’s contention that the Town has impeded rail freight operations over the line. That CKIN contention is ludicrous in view of the 752-percent increase in freight traffic over the line since the Town’s acquisition 12 years ago.

IV. IT IS PREMATURE TO DETERMINE WHETHER A REPLACEMENT RAIL OPERATOR CAN USE THE CLASS EXEMPTION FOR AUTHORITY TO OPERATE THE LINE

Unless CKIN suddenly comes to its senses and permits an orderly transition of operations over the rail line, it will be necessary for the Town to file an application for adverse discontinuance of CKIN’s rail service (see note 1, *supra*). It will also be necessary for a replacement rail operator to obtain Board authority or exemption to operate the line. That authority or exemption will not be sought until the Town and the replacement operator have entered into a new operating agreement and CKIN has been lawfully removed from the rail line.

There being no pending request for operating authority or exemption by a replacement operator, it is obviously premature for the Board to determine whether such an exemption can be obtained by means of the class exemption at 49 C.F.R. § 1150.41 *et. seq.* Accordingly, CKIN's request that the Board make that determination at this time should be denied. (Petition at 3, 22-24).^{3/}

V. IT IS NOT NECESSARY FOR THE BOARD TO RESOLVE FACTUAL DISPUTES

For the reasons explained in this Reply, CKIN's Petition is fatally defective as a matter of law, and should be denied on that basis without the need to resolve factual disputes. In an abundance of caution, the Town is submitting the Verified Statement of Wendy J. Hoppe, attached to this Reply as Appendix 2, in rebuttal of the numerous false and misleading allegations in the Verified Statement of Mr. R. Powell Felix, President of CKIN. Even assuming the truth of those allegations solely for the purpose of argument, they do not even purport to establish fraud, mistake, or ministerial error in the Board's 2004 OFA decision by which the Town acquired the subject rail line. Therefore, it is not necessary for the Board to determine their truth or falsity as a prerequisite to a decision on the merits of the Petition.

^{3/} While the Board sometimes precludes use of that class exemption in controversial cases, CKIN's patently defective Petition does not serve to make this case controversial.

Respectfully submitted,

TOWN OF NORTH JUDSON, INDIANA
204 Keller Avenue
North Judson, IN 46366

Replicant

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Attorneys for Replicant

DUE DATE: December 27, 2016

DOCKET NO. AB-55 (SUB-NO. 643X)

FINANCE DOCKET NO. 36076

APPENDIX 1

1628

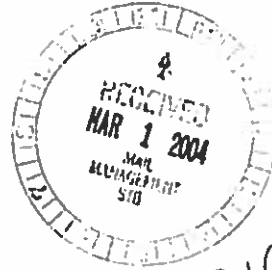
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**SURFACE
TRANSPORTATION BOARD**

February 27, 2004

By UPS overnight mail
(Monday delivery)



Vernon A. Williams, Secretary
Surface Transportation Board
Case Control Unit, Suite 713
1925 K Street, N.W.
Washington, DC 20423-0001

Natalie Rosenberg, Esq.
CSX Transportation, Inc.
500 Water Street, J-150
Jacksonville, FL 32202

Re: Docket No. AB-55 (Sub-No. 643X), *CSX Transportation, Inc. -- Abandonment
Exemption -- in LaPorte, Porter and Starke Counties, IN*

Dear Mr. Williams & Ms. Rosenberg:

Hereby transmitted to each of you is an Offer of Financial Assistance in the above proceeding filed in behalf of the Incorporated Town of North Judson. The Offer sent to Mr. Williams is an original. It is accompanied by 10 copies and a check for \$1,100 to cover the filing fee.

Mr. Williams is respectfully requested to acknowledge receipt by date stamping the enclosed duplicate copy of this letter and return in the self-addressed stamped envelope.

ENTERED
Office of Proceedings

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Public Record

Very truly yours,

Tom McFarland

Thomas F. McFarland
Attorney for The Incorporated
Town of North Judson

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FEE RECEIVED

MAR 1 2004

**SURFACE
TRANSPORTATION BOARD**

BEFORE THE
SURFACE TRANSPORTATION BOARD

CSX TRANSPORTATION, INC. --)
ABANDONMENT EXEMPTION -- IN) DOCKET NO. AB-855
LAPORTE, PORTER AND STARKE) (SUB-NO. 643X)
COUNTIES, IN)



OFFER OF FINANCIAL ASSISTANCE

FILED

MAR - 1 2004

SURFACE
TRANSPORTATION BOARD

THE INCORPORATED TOWN OF NORTH JUDSON
P.O. Box 56
North Judson, IN 46366

Offeror

FEE RECEIVED
MAR - 1 2004
SURFACE
TRANSPORTATION BOARD

THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street, Suite 1890
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(312) 236-0204

Attorney for Offeror

DATE FILED: March 1, 2004

ENTERED
Office of Proceedings

MAR - 1 2004

Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

CSX TRANSPORTATION, INC. --	)	
ABANDONMENT EXEMPTION -- IN	)	DOCKET NO. AB-855
LAPORTE, PORTER AND STARKE	)	(SUB-NO. 643X)
COUNTIES, IN	)	

OFFER OF FINANCIAL ASSISTANCE

Pursuant to 49 U.S.C. § 10904(c) and 49 C.F.R. § 1152.27(c)(2)(iii), THE INCORPORATED TOWN OF NORTH JUDSON (the Town) hereby offers financial assistance in the form of purchase of the entire rail line involved in the above proceeding, i.e., between Milepost CF 0.63 at LaCrosse and Milepost CF 15.23 at Wellsboro, and between Milepost CI 212.55 at North Judson and Milepost CI 230.92 at Malden, a total distance of 32.97 miles, in LaPorte, Porter and Starke Counties, Indiana ("the rail line"). The Town hereby offers to pay \$1,200,000 for the rail line. The Town submits the following in support of its offer.

**THERE IS A REASONABLE EXPLANATION FOR THE DISPARITY
BETWEEN THE AMOUNT OFFERED AND THE OWNER'S
VALUATION OF THE RAIL LINE**

In accordance with 49 U.S.C. § 10904(c), the Town hereby explains the disparity between the amount it has offered to purchase the rail line and the rail carrier's valuation (asking price) for the line.

CSX Transportation, Inc. (CSXT) values the rail line at \$1,769,950. (Exhibit F, page 1, line 12c). That value is the sum of the alleged net salvage value of \$1,050,550 for the track materials in the line and \$719,400 for land in the rail line right-of-way. *Id.*, page 2, line 12.

Land value is based on a CSXT system average land value of \$21,800 per mile applied to 33 miles of land in the rail line. *Id.*

The Town does not disagree with the net salvage value of track materials posited by CSXT. CSXT furnished a detailed breakdown of the quantity, quality and valuation of those track materials, which appears to support the net valuation used by CSXT. Consequently, the Town has adopted the valuation of \$1,050,550 used by CSXT for track materials.

However, CSXT did not provide adequate support nor explanation for its land value. CSXT provided a summary of land allegedly held in fee title and land for which it has only a railroad easement. However, CSXT did not provide copies of the original acquisition documents for the land that would have provided verification for the summary. Nor did CSXT provide any appraisal of the value of the land, either by an outside appraiser or in-house.

In the circumstances, the Town has estimated that the land for which CSXT has marketable title has a value of \$149,450. That plus the value of track materials results in the amount of \$1,200,000 hereby offered by the Town.

THE Town IS FINANCIALLY RESPONSIBLE

The Town is a unit of government in Starke County, Indiana. As such, the financial responsibility of the Town is presumed. *South Orient RR - Aban. & Discon. of Trackage Rights*, 3 S.T.B. 743, 759 (1998) ("... all government agencies are deemed to be financially responsible ...").

The purchase price for the rail line is likely to be paid from a combination of sources, i.e., (1) a grant of \$1 million in Enhancement Grant funds from the Indiana Department of Transportation; (2) \$150,000 contributed by LaPorte County Farm Bureau Cooperative

Association, Inc., and (3) \$50,000 contributed by Starke County, Indiana. The Town is committed to acquisition and continued operation of the rail line.

THE OFFER IS FOR CONTINUED RAIL SERVICE

Upon acquisition of the rail line, the Town intends to contract with a rail operator to provide rail service to shippers and receivers located or to be located along the rail line. The rail line is active at the present time. The offer thus contemplates continued rail service on the rail line.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, the Board should find that the Town is a financially responsible person who has offered financial assistance to permit rail service to be continued on the rail line. Based on that finding, the Board should postpone the effectiveness of the exemption for abandonment of that rail line pending further proceedings under 49 U.S.C. § 10904.

Respectfully submitted,



Town of North Judson
P.O. Box 56
North Judson, IN 46366
Offeror

 *TMK*

THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street
Suite 1890
Chicago, IL 60604-1194
(312) 236-0204
Attorney for Offeror

Date Filed: March 1, 2004

CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2004, I served the foregoing document, Offer of Financial Assistance, by overnight mail, Monday delivery, on Natalie Rosenberg, Esq., CSX Transportation, Inc., 500 Water Street, J-150, Jacksonville, FL 32202.

Tom McFarland

Thomas F. McFarland

MAK

DOCKET NO. AB-55 (SUB-NO. 643X)

FINANCE DOCKET NO. 36076

APPENDIX 2

AFFIDAVIT OF WENDY J. HOPPE

Wendy J. Hoppe, first being duly sworn upon an oath, does affirm and state under the pains and penalties of perjury as follows:

1. I am the President of the Town Council for the Incorporated Town of North Judson, Indiana. I have been President of the Town Council since 2012 and a member of the Town Council since 2008.
2. I have reviewed the Verified Statement of R. Powell Felix submitted in this matter and offer this Affidavit in response to the allegations contained therein.
3. In general the allegations contained in Paragraph 1 of Mr. Felix's Statement are correct, but CKIN only classified North Judson to LaPorte County Road 875 W as class 1 track from July 2004 until November 2005. CKIN marked-up 35 bad ties within a one-mile segment of track for replacement before HVRM trains could enter into Lacrosse. HVRM volunteers installed the 35 ties from HVRM inventory, thus allowing CKIN to permit the class of track from downtown Lacrosse going eastward towards North Judson to road 875 W, to be raised to class 1 track. HVRM made its first caboose train into Lacrosse on Saturday, November 19th, 2005, with the assistance of CKIN locomotive and crew.
4. I agree that the relationship between CKIN, HVRM, and the Town has deteriorated. While I cannot affirm or deny CKIN's fears in this matter, the Town is aware of the 2011 personal injury lawsuit against HVRM. The Town Council, however, after hearing the concerns raised by CKIN, did not share in CKIN's concerns regarding safety. The Town did not ignore CKIN's safety concerns. They were investigated and ultimately determined to be without merit.
5. The Town Council did not direct funds from the ROA maintenance account beyond the scope of the purposes envisioned by the ROA.
6. The Council believes that it is important to maintain a close and collaborative relationship with all of those operating on the line. That includes collaboration with both HVRM and Co-Alliance. However, the Council is the owner of the line and has not given HVRM decision making authority over the line and has not

ceded control of the line to HVRM.

7. It is true that the Town began working with HVRM to create an updated Railroad Operating Agreement. The Council believed that the original Railroad Operating Agreement was outdated and that it did not provide adequate clarity in several areas. The Council also believed that the original Railroad Operating Agreement did not provide protections to the Town in case of breach. HVRM provided information to the Town regarding day to day operations and issues between HVRM and CKIN in order to better understand the current needs in an Operating Agreement.
8. I quickly became apparent that CKIN had violated the current ROA in multiple ways. A Demand Letter was provided to CKIN. CKIN made no efforts to remedy its breach.
9. As a result, the Town determined that the relationship between the Town, CKIN, and HVRM had deteriorated to a point in which the continued relationship between the parties could not continue. As a result, the Town issued its Notice of Termination. Accurate copies of both the Demand Letter and the Notice of Termination are attached to this Affidavit as Exhibit 1 and 2.
10. It is true that HVRM began searching for a replacement operator. Frontier Rail became interested in bidding to be the replacement operator, contacted the Town, and the Town was initially interested in working with Frontier Rail. Frontier Rail also attempted to meet informally with our attorney, although such a meeting did not occur.
11. The Town determined that any further communication with Frontier Rail should not occur and that a formal RFP process should be conducted. However, it became apparent to the Town that Frontier believed that it had been chosen as the replacement operator of the line. As soon as the Town became aware of this, a letter was sent to Frontier Rail stating the Town's position. A copy of the letter is hereby attached as Exhibit 3. The Town had no further communication with Frontier Rail or any other interested operators.

12. It is important to note that Frontier Rail did ultimately submit a response to the Town's Amended Request for Proposal. The Town did not consider any prior communication with Frontier Rail in making its decision. In fact, after consideration of all proposals, the Town did not choose Frontier Rail as a finalist and did not ultimately choose Frontier Rail as the successful respondent.
13. Mr. Felix is correct that the Town disputes CKIN's entitlement to substantial reimbursement for capital improvements made during its operation pursuant to the ROA. Resolution of that dispute is a legal question that will be decided by the LaPorte or Starke Circuit Court in an action against the Town filed by CKIN.
14. Mediation did occur on December 9, 2015 between The Town, CKIN, and Co-Alliance. The parties agreed that Mark Knebel, from HVRM, could be contacted if questions arose involving HVRM.
15. A Mediation Agreement was reached. The Town agrees that CKIN offered to forgo its claims for payment due under Section 10 if Co-Alliance was chosen. However, the Town advised that any agreements to lease specifically to one party without a formal RFP process were invalid under Indiana Law and that the Town could not agree to such a provision. Despite continued demands to forego the RFP process altogether, the Town determined that an RFP process could not be dispensed with.
16. The Town further advised the parties on April 29, 2016 that the Town could not agree to Lease to Co-Alliance without a formal RFP process. A copy of an email written by Town's attorney to CKIN is hereby attached as Exhibit 4.
17. The parties did agree to work in Good Faith. The "grand bargain" however, was a phone call that Counsel for the Town received in which CKIN offered to purchase the rail line from the Town. The Town, however, did not want to sell the rail line. The Town also believed Good Faith to mean operating within the confines of Indiana Law, rather than ignoring RFP requirements when they became inconvenient for CKIN and then insisting on RFP requirements and public disclosure when it eliminated competition such as Frontier Rail; as is CKIN's

apparent position in this matter.

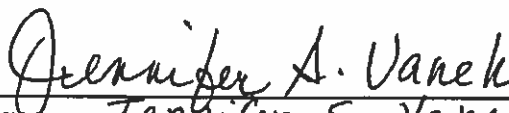
18. It is true that the Town's initial filing indicated that an operator had been chosen. However, the filing was made before the Town determined that an RFP process would be required. It was also filed prior to Mediation in this matter.
19. The Town denies that the RFP process was defective. HVRM was given a small role advisory role in selection following the formal RFP process. Further, after CKIN advised the Town that the RFP had released confidential information, the Town worked with Co-Alliance, CKIN, HVRM, and all others who had been provided the RFP to stop the dissemination of the information. Specifically, the Town issued an amended RFP with explicit instructions to disregard the original RFP. The Town also updated its RFP response requirements to include an Amended Non-Collusion Affidavit that all who submitted responses were to have included. All who submitted a response supplied an Amended Non-Collusion Affidavit, except for Co-Alliance, as evidenced by Exhibits 5-8.
20. HVRM was allowed to provide input. HVRM's role was clearly identified and disclosed in the RFP. The Town considered HVRM's input, but ultimately selected a successful respondent that was not HVRM's top choice.
21. The Town's RFP did not favor unfettered passenger operations over the entire Rail Line, nor did it favor the same while disregarding freight operations or safety. The Town's RFP attempted to maintain or expand freight operations while also maintaining and expanding passenger operations. The Town believes that both goals can be met with parties who will cooperate with each other and collaborate in an effective and professional manner.


Wendy J. Hoppe

STATE OF INDIANA, COUNTY OF STARKE, SS: ACKNOWLEDGMENT

Before me, a Notary Public in and for said State and County, personally appeared Wendy J. Hoppe, who acknowledged the execution of the foregoing Affidavit, and who, having been duly sworn, stated that any representations therein contained are true.

Witness my hand and Notarial Seal this day of , 2016.


Name: Jennifer S. Vanek
A Resident of Starke County
My Commission Expires: June 27, 2020

Prepared by Rachel A. Arndt, Peterson Waggoner & Perkins, LLP, 125 E. 10th St. Rochester, IN 46975.

CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2016, I served a copy of the foregoing Reply in Opposition to (1) Petition to Reopen Offer of Financial Assistance Proceeding and (2) Petition for Declaratory Relief by e-mail and first-class, U.S. mail, postage prepaid, on the following:

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Thomas F. McFarland