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June 25, 2018

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 20423-0001

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

and

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.

Dear Ms. Brown:

Enclosed for filing in the above-captioned proceeding is the Reply of the City of Fishers, Indiana, City of Noblesville, Indiana, and Hamilton County, Indiana, in Opposition to the Motion for Clarification and Verified Motion for Preliminary Injunction of U.S. Rail Holdings, LLC, dated June 25, 2018.

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/ah
Enclosures

**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**

STB 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.**

**REPLY IN OPPOSITON TO MOTION FOR CLARIFICATION AND TO
VERIFIED MOTION FOR PRELIMINARY INJUNCTION**

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

Dated: June 25, 2018

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. FD 36137

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VERIFIED MOTION FOR PRELIMINARY INJUNCTION**

The Cities of Fishers ("Fishers") and Noblesville, Indiana, and Hamilton County, Indiana, collectively as the "Owners," and Fishers in its individual capacity as proposed trails sponsor, hereby respond in opposition to the Motion for Clarification (the "Clarification Motion") and the Verified Motion for Preliminary Injunction Pursuant to 49 U.S.C. § 1321(b)(4) (the "Injunction Motion") filed with the Surface Transportation Board (the "Board") in the above-referenced dockets by US Rail Holdings, LLC ("USR") on June 11, 2018. For the reasons provided herein, USR's Clarification Motion should be denied as unnecessary, because it is apparent from the Board's May 31, 2018 decision in the FD 36137 proceeding (the "May 31 Decision") that the Owners are not, and should not be made to be, subject to the feeder line provisions of 49 U.S.C. § 10907. Similarly, the Injunction Motion should be denied as legally

unsupported, and because the injunction will only serve to postpone local efforts to re-deploy a long-unused railroad corridor for purposes far more in keeping with the public interest.

BACKGROUND

The history of the subject proceedings is adequately set forth in the Board's May 31 Decision. The Owners and Fishers separately hereby adopt and incorporate herein by reference the "Background" section of that decision. USR was an active, albeit late-arriving, participant in the FD 36137 proceeding, and tendered comments on November 13, 2017, through different regulatory counsel, disclosing USR's desire to acquire the 37.56-mile "Nickel Plate Line" via the Board's offer of financial ("OFA") assistance procedures. The Board, however, concluded that it was unnecessary for the Owners to submit to a new abandonment process to gain their intended objective of invoking the Trails Act.¹ In so doing, the Board established that the time for an OFA long had passed following Interstate Commerce Commission ("ICC") authorization of abandonment of the Nickel Plate Line in 1991. Finally, the Board agreed that the Owners are "non-carrier state entities . . . exempt from Board regulation,"² adding that the Owners may "directly invoke the Trails Act without the need to revoke their exempt status."³

On June 8, 2018, Fishers (joined by the Owners) jointly filed in the AB-290 (Sub-No. 117X) proceeding a request for issuance of a notice of interim trails use ("NITU") to permit negotiations to begin toward a rail banking arrangement for a 5-mile portion of the Nickel Plate Line within Fishers. (The Owners anticipate that certain other communities will soon follow suit and seek to pursue rail banking arrangements with the Owners for the portions of the Nickel Plate Line traversing their respective jurisdictions.) Fishers' NITU request remains pending.

¹ National Trails System Act ("Trails Act"), 16 U.S.C. § 1247(d).

² May 31 Decision at 5.

³ Id. at 6.

Shortly thereafter, on June 11, 2018, USR filed its Clarification Motion and Injunction Motion, seeking, in effect, for the Board to – (1) establish that USR is entitled pursue, and that the Board may order, the forced sale of the Nickel Plate Line via feeder line application processes, notwithstanding the substance of the May 31 Decision; (2) enjoin the Owners from engaging in any track removal; and (3) postpone issuance of the NITU requested by Fishers. In essence, USR seeks to resuscitate its OFA objectives through an alternative process.

ARGUMENT

USR argues that the Board should somehow permit the forced sale of the Nickel Plate Line, even if that cannot be accomplished via OFA. USR admits that it isn't sure how, or whether, Board processes will enable USR to wrest the long-inactive line from its public owners, but it asks the Board to order the Owners and Fishers to “pause for a few months” while the Board addresses the issue.⁴ But USR has settled upon a preferred option: to force the sale of the Nickel Plate Line via feeder line application. To that end, USR argues that the Board should declare that USR may immediately commence a feeder line proceeding, all while the Owners’ overarching trails use objectives remain on hold. In the alternative, USR argues for partial revocation of the Owners’ non-carrier status to facilitate a feeder line application process intended in any case to usurp local, public prerogative for the railroad corridor.

USR’s clarification request must fail, and its backup request for partial revocation of the Owners’ non-carrier status is unsupported and inconsistent with the governing principles of Common Carrier Status,⁵ and therefore must be denied. Because revocation of the Owners’

⁴ Clarification Motion at 13 (“There certainly is not harm in requiring Petitioners to pause for a few months while the Board determines whether USR may purchase the Line . . .”).

⁵ Common Carrier Status of States, State Agencies & Instrumentalities, & Political Subdivisions (“Common Carrier Status”), 363 I.C.C. 132 (1980), aff’d sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982).

non-carrier status as a potential precursor to the forced sale of the Nickel Plate Line is legally unsupported and for other reasons USR's related request for an injunction must be denied.

A. USR's revocation petition (misabeled as a "clarification motion") must be denied.

The Board's May 31 Decision is sufficiently clear.

The Owners are non-carrier state entities exempt from Board regulation.⁶ The unqualified, sweeping statements of the Owners' legal status contained in the Board's May 31 Decision beg no clarification – the Board's feeder line statute and regulations do not apply to the Owners any more so than do the agency's abandonment statute and regulations. Despite such a pronouncement, USR nevertheless asks the Board to clarify that section 10907 applies to the Owners. That is not a request for clarification; it is instead a request for the Board to contradict itself. As such, the "clarification" component of the Clarification Motion must be denied as unnecessary, because it is already clear that the Board's feeder line processes are unavailable. If anything, the Board could clarify that the Owners' non-carrier status exempts them from the entirety of 49 U.S.C. subtitle IV, including, of course, 49 U.S.C. § 10907.

USR misreads Common Carrier Status and, in so doing, contradicts itself.

USR contends that the Owners aren't actually non-carriers, but that they are instead carriers selectively exempted from the provisions of 49 U.S.C. §§ 10901, 10903, and 11101 only. USR is mistaken, having conflated the Board's modified certificate procedures as the full sum and substance of Common Carrier Status. USR fails to recognize that the modified certificate process set forth at 49 C.F.R. part 1150, subpart C, extends to a discrete element of public ownership of railroad lines authorized for abandonment. Specifically, the passage upon

⁶ May 31 Decision at 5.

which USR relies from Simmons v. I.C.C.⁷ relates to modified certificate operators, not to non-operating state entity owners of lines authorized for abandonment like the Owners. The Owners have never functioned as a modified certificate rail service provider, nor have they ever hosted a modified certificate operator, as the record in the FD 36137 proceeding reflects.

For the sake of argument, however, even if the Owners were exempted from sections 10901, 10903 and 11101 only, those exemptions are enough on their own to render a feeder line application inapplicable. As USR recognizes, the Board's feeder line procedures, if they were to be available here, would require a showing that the incumbent (the Owners) among other things – (a) “refuse[] within a reasonable time to make the necessary efforts to provide adequate service to shippers who transport traffic over [the] line;” and (b) that the Owners are providing inadequate service “for the majority of shippers who transport traffic over” the line.⁸ But even under URS' too-narrow reading of Common Carrier Status (which loses sight of the Owners' non-common carrier status), the simple fact that the Owners are at the very least excused from any and all obligations to provide service upon reasonable request under 49 U.S.C. § 11101(a), as they acknowledge, makes the required showings under section 10907(c)(1) impossible and illogical. The Owners cannot be accused of refusing to provide service, much less of providing inadequate service, when they are categorically excused from the fundamental common carrier service requirements of section 11101(a). Accordingly, even if the Owners were “only” exempted from section 11101 (and sections 10901 and 10903) as USR argues, that exemption makes it impossible for USR to make the prerequisite public convenience and necessity (“PC&N”) showing, because the owners have no service obligation to fulfill.

⁷ Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982).

⁸ 49 U.S.C. § 10907(c)(1)(A) and (B)

The Owners are not valid feeder line application targets.

USR's feeder line aspirations run headlong into serious procedural and substantive factors militating against the forced sale of the Nickel Plate Line. To begin with, as the Board recognized in its May 31 Order, the Nickel Plate Line was authorized for abandonment in 1991, and no further abandonment is necessary for the Owners either to remove the line from the Board's jurisdiction (assuming that they were to choose to do so) or to invoke the Board's trails use procedures. Secondly, the Board's May 31 Decision states that prospective shipper statements of interest in rail service – recall that the Nickel Plate Line has been without service for well over a decade – were relevant to an abandonment analysis long since undertaken, but not here.⁹ In short, the PC&N favored abandonment of the Nickel Plate Line in 1991, and also supported the transfer of that line to its current Owners free of any common carrier obligations.

USR is too late to press for the forced sale of the Nickel Plate Line. Indeed, the precedent upon which USR relies in support of its feeder line application objectives states that section 10907 was intended by Congress to encourage the transfer of feeder lines “prior to their . . . abandonment.”¹⁰ On that note, USR acknowledges that longstanding agency policy restricts access to the feeder line application procedures to case-by-case evaluation once a carrier has filed to abandon some or all of the targeted railroad line.¹¹ But here, the Board is not presented with the question of whether to permit a feeder line application in the presence of a pending

⁹ May 31 Decision at 6.

¹⁰ Keokuk Junction Ry. Co. – Feeder Line Application – Line of Toledo Peoria & Western Ry. Corp. between LaHarpe and Hollis, IL, Docket No. 34335 (STB served Sept. 26, 2003), slip op. at 4.

¹¹ Clarification Motion at 9 (citing Revision of Feeder R.R. Development Rules, Docket No. EP 395 (STB served Sept. 8, 1991), slip op. at 8).

abandonment proceeding. Rather USR would have the Board endorse its feeder line efforts some 27 years after the relevant abandonment proceeding has concluded.

Such a significant threshold procedural defect aside, it is far from clear how USR's proposed feeder line application would satisfy the essential PC&N analysis were the matter allowed to proceed. The Nickel Plate Line is moribund, and the Owners do not recall any expressions of interest in resumed freight common carrier service over the line until it became apparent to passenger rail excursion advocates that pressing the Board to protect excursion trains in the FD 36137 matter was an exceedingly weak basis upon which to oppose the conversion of the railroad corridor to trails use. USR would like the Board to facilitate a feeder line application despite a number of critically missing pieces. For example, the section 10907(c)(1) analysis requires, at a minimum – (1) an active railroad line (the Nickel Plate Line hasn't hosted any freight service in roughly 15 years); (2) a rail common carrier incumbent that is unwilling or unable to provide service upon reasonable request (there is no rail carrier on the Nickel Plate Line and hasn't been one in, again, roughly 15 years); (3) shippers who transport traffic over the subject line (there are no active shippers); and, of course, (4) a *majority* of shippers pointing to inadequate service to support a Board-ordered transfer of the Nickel Plate Line (when there are no shippers and there is no rail service whatsoever). In the absence of an incumbent common carrier and freight common carrier service, much less "inadequate" service, there is no foundation for a feeder line application.

USR's backdoor attempt to revoke the Owner's non-carrier status is unsupported and unavailing.

As discussed in the foregoing sections of this Reply, USR's request for Board "clarification" that the Nickel Plate Line and its owners are subject to the Board's feeder line procedures ignores or overlooks a central and pivotal fact. Specifically, the Owners are *non-*

carrier holders of a Board-jurisdictional railroad line, and, consequently, they are immune from regulation under subtitle IV of Title 49 generally. In fact, the Owners could effectuate the full abandonment of the Nickel Plate Line if they were to so choose without further Board action, thereby rendering moot USR's feeder line aspirations. USR acknowledges that the exemption extended to the Owners under Common Carrier Status might "somehow" (in its words) be sufficiently broad to encompass the feeder line provisions under section 10907.¹² Confronted with that regulatory reality, USR resorts to a roughly 1.5-page, last-ditch effort to present a case to force the Nickel Plate Line out of the hands of its municipal owners by asking the Board to regard its nominal "clarification" request as a petition for revocation.¹³ However, USR's half-hearted revocation petition is unsupported, conflicts with the policy of Common Carrier Status, and must be denied.

To begin with, the Owners note again here that Congressional purpose behind the feeder line statute was to facilitate the transfer of under-served rail lines before they were abandoned. That policy objective is not met here, because the Nickel Plate Line was long ago authorized for abandonment and has remained inactive for freight service since at least 2005. Similarly, as noted before, the feeder line statute itself deals with active railroad lines, unable and/or unwilling incumbent common carriers, and the unmet demands for adequate rail service. There is no basis under the facts here to warrant revocation of the Owners' non-carrier status to subject the Owners to the feeder line statute. Indeed, USR has not offered any precedent supporting the proposition that public railroad line owners subject to the non-carrier protections of Common Carrier Status could, or should, be the subject of a Board-mandated divestiture, and

¹² Clarification Motion at 11; Injunction Motion at 13, n. 4.

¹³ Id. (Query whether URS' fallback petition for partial revocation was accompanied by the appropriate filing fee.)

the Owners are unaware of any controlling precedent under which the rail transportation policy of 49 U.S.C. § 10101 would override the fact-specific policy objectives enunciated in Common Carrier Status.

In fact, USR's so-called request for "clarification" is in reality a request to circumvent the central function and purpose of Common Carrier Status – to encourage states and state subdivisions to step in as last-resort acquirers of rail lines authorized for abandonment by assuring that public ownership of such lines will not confer upon a public owner the regulatory burdens of common carrier-hood. Implicit in the principles of that case is the understanding that the agency, in excluding public owners of such lines from all facets of common carrier regulation, has effectively ceded PC&N prerogative to the state subdivision rail line owner. Revocation, whether in full or in part, would be a chilling repudiation of the tacit non-regulatory compact that the Owners, and others situated like them, have depended upon in taking ownership of marginal or inactive lines approved for abandonment.

But even if the Board were to reject the guiding principles of Common Carrier Status and reopen and revisit the Owners' regulatory status, USR has failed to show why the Board automatically should conclude that USR may wrest the Nickel Plate line from the Owners. After all, the Owners have done nothing wrong, having relied all of these years on their recently-reaffirmed non-carrier status and on the prerogative that they clearly possess to decide whether, under what circumstances, and for how long the Nickel Plate Line could remain inactive or whether it restore it to operation under the carefully-limited circumstances of a modified certificate. Exempt from section 11101, the Owners cannot reasonably be accused of the sort of conduct that would trigger rail line divestiture from regulated common carriers.

USR reveals its overzealousness, not only in asking for hard-wired permission to move ahead with a feeder line case despite the legal shortcomings that such a feeder line application would possess, but also in asking the Board to prejudge the Owners' alleged incapacity or malfeasance by allowing the matter to move directly to the merits of divestiture. Assuming the Board were to repudiate the principles of Common Carrier Status and entertain the possibility here of a feeder line application, the predicate for any such ill-advised step would have to be the revocation of the Owners' exemption from 49 U.S.C. § 11101. That is, if the Board were to choose despite the foregoing legal argument to consider revocation of the Owners' non-carrier status, the preliminary issue that would follow is whether the Owners adequately have responded to alleged service demands once they were saddled with common carrier status. That analysis should precede any forced taking process, and yet USR asks for the Board to bypass such analysis by allowing USR to move directly to a forced sale.

B. USR meets none of the standards for a Board-issued injunction.

USR is not entitled to the extraordinary relief of an injunction¹⁴ because USR cannot satisfy any of the four prongs for such relief under Holiday Tours,¹⁵ let alone all of them. It is

¹⁴ "A preliminary injunction is an extraordinary remedy that should be granted only when the party seeking the relief, by a clear showing, carries the burden of persuasion." Cobell v. Norton, 391 F.3d 251, 258 (2004) (citing Mazurek v. Armstrong, 520 U.S. 968, 972 (1997)). The Board requires a party to make a very strong showing of entitlement to equitable relief. "A preliminary injunction is an extraordinary remedy and will generally not be granted unless the requesting party can show that it faces *unredressable actual and imminent harm* that would be prevented by an injunction." Richard Best Transfer, Inc. v. Union Pac. R.R. Co., Docket No. 42149 (STB served Dec. 22, 2016) ("Richard Best") (emphasis added) (denying a preliminary injunction in connection with an unreasonable practices dispute, where the complainant argued that it needed the injunction or it would go out of business due to carrier rate increases). Just as in Richard Best, such an extraordinary remedy is not warranted here.

¹⁵ Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 842-43 (D.C. Cir. 1977) (citing Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958)).

highly unlikely that USR will prevail on the merits of its attempt to have the Owners' non-carrier status rescinded and, thereafter, to force the sale of the Nickel Plate Line. USR has not proven that it will suffer irreparable harm, and the harm it alleges is far too speculative to warrant an injunctive remedy in the first place. An injunction, however, will irreparably harm MET and the public interest generally by overriding the policies set forth in Common Carrier Status and by postponing the delivery of a valuable public amenity where today there lies a long-inactive, publicly-owned rail corridor that the ICC authorized for abandonment decades ago.

USR has not substantiated its claim of irreparable harm.

USR would like to buy the Nickel Plate Line, and has argued that the Board should agree that it is entitled immediately to invoke the agency's feeder line provisions toward that end. It also argues that the Owners must be forbidden to negotiate trails use arrangements that could result in removal of trackage that USR would like to acquire. If its efforts to pursue the reactivation of the Nickel Plate Line are made more difficult by virtue of partial or complete track removal, USR argues that such an outcome equates to irreparable harm. USR's alleged harm is far too speculative to support an injunction.

The thrust of USR's irreparable harm argument is that, in the absence of an injunction it may suffer the loss of a business opportunity. USR presupposes, among other things, that it will be able to pursue a feeder line application in the first place (which is exceedingly unlikely); that, if allowed to pursue purchase of the Nickel Plate Line, the Board will order the line sold; that, if the Board orders the line sold, USR will be selected as the purchaser; that USR will be able and willing to purchase the Nickel Plate Line for its minimum constitutional value; and that, if USR were to purchase the line and restore it to safe operating condition, shippers would make use of USR's services, and the revenues it would earn from such

services would be sufficiently remunerative to justify the entire undertaking. None of these steps in the process are assured. With so many underlying assumptions, and the absence of any certainty that any or all of them will pan out as USR hopes, the irreparable harm USR alleges is far too speculative to support an injunction.¹⁶

USR is very unlikely to succeed on the merits.

USR contends that it will prevail on the merits of its forced sale objectives, because, although it acknowledges that it does not know by what path it will be permitted to force the Nickel Plate Line out of the hands of the owners, it insists that there “must be [such] a path available.”¹⁷ The fact is, there is no such path to the forced sale of the Nickel Plate Line, and thus no chance, let alone a “strong” one, that USR will ever secure a Board order directing the sale of that line to USR. Again, the Owners, as non-carriers, are exempt from the feeder line application statute, and are under no common carrier obligation to provide service. Moreover, there is no persuasive evidence that there is a genuine demand for freight service on the line, much less a demand that would ensure that rail line rehabilitation, reactivation, maintenance and operation of the Nickel Plate Line would be remunerative and worth the cost.

The Owners already have pointed out in considerable detail above USR’s badly-mistaken assumptions that – (1) USR should be entitled to file a feeder line application straightaway, given the Owners’ non-carrier status; and (2) USR would prevail if it were entitled to file a feeder line application against the Owners. The Owners also have demonstrated in the preceding sections of this Reply that USR’s revocation petition to permit for its pursuit of a

¹⁶ See, e.g., Ballard Terminal Railroad Company, L.L.C. – Acquisition and Operation Exemption – Woodinville Subdivision, Docket No. FD 35731, et al. (STB served Aug. 1, 2013), slip op. at 5-6 (the alleged loss of future freight rail business opportunities is too remote, speculative, and uncertain to constitute irreparable harm).

¹⁷ Injunction Motion at 9.

feeder line application against the Owners – an apparent afterthought in the Clarification Motion – must be denied.

Viewing USR's efforts in the most positive light, which assumes that the Board would consider revoking the Owners' non-carrier status, there is no assurance that the Board would provide an outcome supportive of USR's rail line purchase aspirations. As indicated above, the only possible path to divestiture would be through revocation of the Owners' non-carrier status to enable a feeder line application ultimately to go forward, but such a revocation petition would be pitted against the broader policy objectives of Common Carrier Status, which was intended to assure entities like the Owners that they would not find themselves encumbered by Board regulation and common carrier obligations when acquiring lines authorized for abandonment.

USR meekly advances the idea of revocation of the Owners' non-carrier status, evidently envisioning a three-step plan leading to a taking of the Nickel Plate Line. First, USR would have the Board obligate the Owners under section 11101 to move non-existent freight traffic in absence of a formal demand for service. Second, once the Owners were stripped of their non-carrier status, USR would then attempt to establish an inadequacy of, or refusal to provide, service. And third, USR would then attempt to persuade the Board that, under applicable legal standards, the Nickel Plate Line should be wrested from the Owners to meet alleged, but vaguely-articulated, freight rail service needs. Ultimately, to secure the injunction it seeks, USR must show that it would succeed in a petition for revocation against the Owners; that USR could bring an actionable feeder line application for a long-inactive line already authorized for abandonment; and that it could prevail in the forced transfer of the Nickel Plate Line under such a dubious feeder line application process. Contrary to USR's speculation, there is no "path"

leading to a Board-sanctioned forced divestiture of the Nickel Plate Line, and even assuming there were such a path, it does not assure a successful journey for URS. It is highly unlikely that USR would prevail on the merits of its proposed multi-stage forced sale process, and, accordingly, USR's motion for an injunction must be denied.

The public interest considerations set forth in Common Carrier Status weigh against an injunction, not for one.

USR argues that the public interest would best be served by stripping the Owners of the non-carrier status that they long have enjoyed as the public owners of a rail line acquired following abandonment authorization. Common Carrier Status provides that entities such as the Owners may acquire and subsequently dispose of rail lines post-abandonment authorization without advance Board approval; it does not provide for an exception when local industries and opportunistic short line railroads assert an emerging interest in freight rail transportation. Rather, Common Carrier Status vests the prerogative (and the determination of when and whether to restore rail service) in the Owners. Accordingly, the public interest is manifested in the decisions of the Owners, not in the designs of a handful of non-committal local industries (acting in the interest of passenger excursion interests) and a short line operator.

The Owners in this case have been granted the discretion to deploy and dispose of the Nickel Plate Line as their own determinations of the public interest dictate. Indeed, Common Carrier Status suggests that the public interest is best served by assuring public entities a non-carrier status in those instances where they choose to acquire rail lines authorized for abandonment. Affording such entities the assurance of non-carrier status encourages state involvement in the preservation of railroad corridors. Public entities acquiring such lines, like the Owners have, do so understanding that the Board will not intervene in, or second guess, their subsequent decisions associated with the disposition of the subject rail lines. Concluding here

that the PC&N is best served by intervening in, and overriding, the Owners' plans undermines the public interest objectives of Common Carrier Status by substituting third party perspectives on PC&N for those of the Owners. Such policy reversal would discourage public acquisition of rail lines approved for abandonment to the detriment of the public interest and gut Common Carrier Status, and, accordingly, the public interest prong of USR's injunction request is not satisfied.

Local interests would be harmed by an injunction.

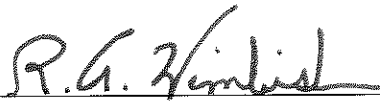
As the record in the FD 36137 proceeding reflects, the Owners have for nearly a year now committed to the plan of redeploying the Nickel Plate Line – or portions of it as circumstances may unfold – as a recreational asset for the overall benefit of on-line communities. The benefits of trails use would be pointlessly delayed by an injunction, given that USR is unlikely to succeed in its goals of subjecting the Owners to rail common carrier obligations and then threatening them with a feeder line application. USR's flippant assertion that a further, indefinite postponement of trails use efforts would harm no one is disingenuous and self-serving. Fishers is intent on converting the portion of the Nickel Plate Line within its boundaries to a trail as soon as the Board and interim trails use negotiations will allow, and thereafter to implement its plans to develop a key local recreational feature. Delay would frustrate ongoing local land use planning and would shroud longstanding community plans in a new phase of uncertainty. For these reasons, USR has failed to show that others will not be harmed by the requested injunction, and, accordingly, it must be denied.

CONCLUSION

For the foregoing reasons, USR's Clarification Motion (essentially a mislabeled petition for revocation) and Injunction Motion must be denied, and Fishers and the Owners

generally should be permitted to implement interim trails use arrangements for the Nickel Plate Line. Accordingly, Fishers and the Owners respectfully request prompt issuance of the NITU for which Fishers recently has petitioned.

Respectfully submitted,

By: 

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

Dated: June 25, 2018

CERTIFICATE OF SERVICE

I hereby certify that, on this 25th day of June, 2018, a copy of the foregoing **Reply in Opposition to Motion for Clarification and to Verified Motion for Preliminary Injunction** was served by U.S. Mail, first class postage prepaid, or by more expeditious means of delivery, upon all parties of record.


Robert A. Wimbish