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March 14, 2017

VIA ELECTRONIC 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

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ENTERED
Office of Proceedings
March 14, 2017
Part of
Public Record

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

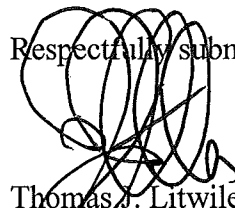
Docket No. FD 36076
Chesapeake and Indiana Railroad Company --
Petition for Declaratory Relief

Dear Ms. Brown:

Attached for filing in the above-captioned proceedings is the **Reply of Chicago & North Judson Railway Company to Motion to Compel**, dated March 14, 2017.

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,



Thomas J. Litwiler
Attorney for Chicago & North Judson
Railway Company

TJL:tl

Attachment

cc: Parties on Certificate of Service

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

CSX TRANSPORTATION, INC.
-- ABANDONMENT EXEMPTION --
IN LA PORTE, PORTER AND STARKE COUNTIES, IN

DOCKET NO. FD 36076

CHESAPEAKE AND INDIANA RAILROAD COMPANY --
PETITION FOR DECLARATORY RELIEF

**REPLY OF CHICAGO & NORTH JUDSON
RAILWAY COMPANY TO MOTION TO COMPEL**

Janet H. Gilbert
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**ATTORNEYS FOR CHICAGO & NORTH
JUDSON RAILWAY COMPANY**

Dated: March 14, 2017

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

CSX TRANSPORTATION, INC.
-- ABANDONMENT EXEMPTION --
IN LA PORTE, PORTER AND STARKE COUNTIES, IN

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CHESAPEAKE AND INDIANA RAILROAD COMPANY --
PETITION FOR DECLARATORY RELIEF

**REPLY OF CHICAGO & NORTH JUDSON
RAILWAY COMPANY TO MOTION TO COMPEL**

Chicago & North Judson Railway Company ("CNJR") hereby submits this reply to the motion to compel submitted in these proceedings on February 22, 2017 by Chesapeake and Indiana Railroad Company, Inc. ("CKIN"). The document production requests to which CKIN seeks to compel a CNJR response are untimely and irrelevant as to these proceedings, as well as vague and overly broad. The discovery sought would not inform or affect the outcome of any matter pending before the Board; instead, it appears motivated by the asserted unfairness that CKIN perceives in the selection of CNJR as the future operator of a publicly-owned rail line in Indiana that CKIN operates today. That is not a proper subject for Board intervention, or for invocation of the Board's discovery procedures. CKIN's motion to compel should be denied.

BACKGROUND

CNJR is a newly-formed, non-carrier affiliate of Lake State Railway Company ("LSRC"), a Class III rail carrier that operates in the lower peninsula of Michigan. CNJR has been selected by the Town of North Judson, Indiana (the "Town") to lease and operate the Town-

owned rail line extending between Wellsboro and La Crosse, Indiana and from Malden through La Crosse to North Judson, Indiana (the "Line"). CKIN is the incumbent operator of the Line. CNJR anticipates that it will shortly execute an Agreement for Lease of Rail Line with the Town in connection with the transaction, and CNJR will file a notice of exemption pursuant to 49 C.F.R. § 1150.31, *et seq.* for its lease and operation of the Line.¹

In its extensive petition to reopen and for declaratory relief filed on November 14, 2016 in these proceedings, CKIN sought to unwind the 2004 offer of financial assistance ("OFA") transaction in which the Town acquired the Line from CSX Transportation, Inc. ("CSXT").² CKIN also asked the Board to preemptively reject any notice of exemption LSRC/CNJR might file to operate the Line. CKIN Petition at 3, 22-23, 24. While CKIN referenced the possible submission of "additional material obtained through discovery," CKIN Petition at 2, it served no discovery either in conjunction with its petition or in the two months thereafter.

Four parties responded to the CKIN Petition on December 27, 2016: the Town; Hoosier Valley Railroad Museum ("HVRM"), which operates rail passenger excursion trains on the Line; the State of Indiana Department of Transportation; and CNJR. CNJR's brief reply relied upon and attached an "Operating Protocols Agreement" that CNJR had entered into with HVRM to govern the mutual operations of CNJR and HRVM on the Line.³

¹ A notice of exemption pursuant to 49 C.F.R. § 1180.2(d)(2) permitting the common control of LSRC and CNJR will be submitted at the same time.

² *CSX Transportation, Inc. – Abandonment Exemption – In LaPorte, Porter and Starke Counties, IN*, Docket No. AB-55 (Sub-No. 643X) (STB served April 30, 2004 and May 14, 2004).

³ Reply of Chicago & North Judson Railway Company to Petition to Reopen and Petition for Declaratory Relief, dated December 27, 2016 ("CNJR Reply"), at 4-5 and Exhibit 1.

While the filing of these replies should have concluded briefing on this matter, on January 13, 2017 CKIN filed a voluminous "reply" of its own, along with a petition for leave to file a reply.⁴ The CKIN surreply was nearly as long as CKIN's initial petition, and included a nine-page, single-spaced verified statement from CKIN's president. On January 18, 2017, the Town replied in opposition to CKIN's petition for leave to file its surreply. Undaunted, CKIN filed another five-page reply on January 25, 2017.

Also on January 25, 2017 – more than two months after the filing of its initial petition – CKIN served requests for production of documents on CNJR. At no time has CKIN filed discovery requests of any kind on any other party to these proceedings. CKIN's discovery requests to CNJR sought: (1) any final or draft copies of the prospective lease agreement between CNJR and the Town; and (2) any and all communications involving (a) the CNJR-Town lease; (b) "rail service to the on-line customers;" and (3) the CNJR-HVRM Operating Protocols Agreement. On February 14, 2017, CNJR responded to CKIN's discovery requests, indicating that CNJR would provide the lease agreement with the Town once such an agreement was executed but otherwise objecting to the requests. CKIN's pending motion to compel followed.

DISCUSSION

The Board has noted that it "often does not provide for discovery in declaratory order proceedings." *Illinois State Toll Highway Authority – Petition for Declaratory Order*, Docket No. FD 36075 (STB served January 17, 2017) at 3. That should particularly be the case here, where the record closed with the various filings by opposing parties on December 27, 2016 and CKIN's petition for leave to file its voluminous and unauthorized January 13, 2017 surreply has not been granted by the Board and is affirmatively opposed by the Town. There simply is no

⁴ CKIN's pleadings filed on January 13, 2017 were dated January 17, 2017.

basis for CKIN to pursue discovery at this stage of the proceedings, when the Board's rules do not contemplate any further filings by it. *E.g., Clifford J. Hunt d/b/a Jack Hunt-Coins v. United Parcel Service, Inc.*, Docket No. 40996 (ICC served August 26, 1994) at 2 ("Under our rules, discovery may only be sought in conjunction with an ongoing proceeding, and must be sought in time to allow incorporation of the evidence obtained in a timely pleading in that proceeding."); *Louisiana Railcar, Inc. v. Missouri Pacific R. Co.*, 7 I.C.C.2d 30, 34 (1990) ("The requests at issue . . . were made after the record was closed when LRC was not required to respond to further discovery or requests for information.").

CKIN was aware at the time of its initial petition in November – indeed, long before it – that LSRC/CNJR had been selected by the Town as the new operator of the Line. To the extent CKIN believed that CNJR's current communications regarding "rail service to the on-line customers" were somehow relevant to the validity of an OFA sale twelve years prior, CKIN could have and should have sought such discovery with its petition. Its belated effort at discovery some two months later is more indicative of opportunistic imposition on CNJR than any genuine and legitimate need for the information sought. *Illinois Central Railroad Company – Construction and Operation Exemption – In East Baton Rouge Parish, LA*, Docket No. FD 33877 (STB served May 21, 2001) at 3 (service of discovery 7-10 weeks after submission of filings in case "tends to impeach" representations that information is needed).

If much of CKIN's discovery is too late, the attempt to compel production of information regarding CNJR's as-of-yet unexecuted lease agreement with the Town is plainly premature. That agreement will be the subject of a notice of exemption filed pursuant to 49 C.F.R. § 1150.31, *et seq.*, and discovery relating to such matters can only commence upon the filing of a petition to revoke. 49 C.F.R. § 1121.2; *Expedited Procedures for Processing Rail*

Rate, 1 S.T.B. 754, 772 (1996) (rejecting proposal to allow pre-petition discovery in exemption revocation proceedings); *Cedar River Railroad Company -- Acquisition and Operation Exemption -- Certain Lines of Cedar Valley Railroad Company*, Docket No. FD 31958, et al. (ICC served June 5, 1992). Given the likelihood that CKIN will, in fact, eventually file such a petition to revoke, CNJR has agreed to produce a copy of any lease agreement between CNJR and the Town upon execution. Nothing further can or should be required from CNJR here.⁵

Beyond these problems, CKIN's discovery requests have little if any relevance to the issues it has asked the Board to address in this matter. To be relevant, the information sought must be capable of affecting the outcome of a proceeding. Such discovery "also may be denied if it would be unduly burdensome in relation to the likely value of the information sought." *Waterloo Railway Company – Adverse Abandonment – Lines of Bangor and Aroostook Railroad Company and Van Buren Bridge Company in Aroostook County, Maine*, Docket No. AB-124 (Sub-No. 2) (STB served November 14, 2003) at 2. In these proceedings, CKIN seeks to rescind the 2004 OFA sale of the Line to the Town because, allegedly (1) the Town's primary purpose in acquiring the line was to facilitate passenger excursion service; and (2) the Town has "elevat[ed] the needs and desires of its passenger excursion service operator over the needs for freight service" CKIN Petition at 11, 18.

We are at a loss to understand what possible relevance, for example, CNJR's current communications with on-line customers would have to the validity of CNJR's underlying claims. CKIN blindly recites in its motion to compel that such communications between CNJR

⁵ CKIN's request for "drafts" of the CNJR-Town lease agreement would, if taken literally, require CNJR to produce iterations of the agreement to CKIN on a rolling basis as it was being negotiated with the Town. There could be no justification for allowing an unhappy, departing incumbent operator to intrude in such a manner on the negotiations between the line owner and a new operator. And where a final, executed agreement is itself produced, earlier draft provisions would not provide any additional relevant or admissible information.

and its future customers "will further reveal HVRM's control over the Line." CKIN Motion to Compel at 8. More broadly, it claims that the documents it seeks "will at the very least establish whether the Town and HVRM interfered with CKIN's ability to provide common carrier service over the Line." CKIN Motion to Compel at 5. How? How would discussions in 2016-2017 between CNJR and prospective customers about future service by CNJR tend to prove prior machinations by the Town and HVRM to degrade CKIN's service? How would CNJR's current negotiation of a new lease agreement with the Town tend to prove the Town's intentions when it acquired the Line in 2004? How would underlying communications regarding the new Operating Protocols Agreement – already of record in this proceeding, and the product of considerable CKIN envy – tend to do anything other than roadmap CKIN's own failure to develop productive relationships on the Line? CKIN is fishing for a relevance linkage that crosses from unlikely to inconceivable.

Ultimately, CKIN seems to want to argue that it has been treated unfairly compared to CNJR. Its motion to compel is replete with contentions of "disparate treatment towards CKIN and CNJR as operators of the Line," and that "CNJR has been given greater control over its operations than CKIN ever received," and that "CNJR would be provided more favorable treatment than CKIN as the operator of the Line," and of "the many advantages the Town and HVRM provided CNJR that were not provided CKIN." CKIN Motion to Compel at 5, 7, 9. As the involuntarily departing incumbent operator of the Line, CKIN's self-serving perspective is not surprising. But its gripes have little if anything to do with assertions that the Town acquired the Line for unacceptable reasons in 2004, or that HVRM can exercise unacceptable control over the Line to the detriment of rail freight service. Indeed, CKIN has now specifically conceded – it "wholeheartedly agree[s]" – that the Operating Protocols

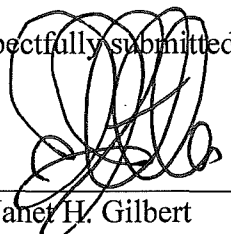
Agreement between CNJR and HVRM is a "reasonable accommodation of common carrier freight and passenger excursion operations on the Line," and that nothing in that Agreement "elevate[s] the needs and desires of passenger excursion interests over the need for common carrier freight service." CKIN Surreply at 13, 14-15. The very existence of such an agreement belies the notion that HVRM can unilaterally dictate operations and denigrate rail freight service on the Line. CKIN's discovery doesn't seek to prove that HVRM exercises unwarranted "control over the Line and operations thereon." CKIN Motion to Compel at 7. It seeks excuses for CKIN's failure to maintain its own productive relationships with the Town and HVRM. That is not a relevant subject matter to the relief that CKIN has sought in these proceedings.

CNJR stands by its assertion that the Operating Protocols Agreement speaks for itself. Given the limited relevance that "all communications pertaining to" that agreement would have, there is no justification for imposing the burden of collecting that broad and vague category of documentation on CNJR. The same is true for communications relating to the (not yet finalized) lease agreement with the Town, and communications between CNJR and its future shippers.

While the information CKIN has demanded from CNJR could have been sought from the Town (with whom CKIN is in state court litigation) or from HVRM or from the Line's shippers, CKIN has served discovery in this proceeding solely on CNJR. Whatever the motivations for that course of action, CKIN has not shown that its discovery is appropriate at this stage in these proceedings, and has not met the relevant standards for compelling discovery responses in any event. CKIN already has the Operating Protocols Agreement, and will be provided with the CNJR-Town lease once executed. It is not entitled to anything further.

WHEREFORE, CNJR respectfully requests that CKIN's motion to compel be denied.

Respectfully submitted,

By: 

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

Dated: March 14, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of March, 2017, a copy of the foregoing
Reply of Chicago & North Judson Railway Company to Motion to Compel was served by
electronic mail and first class mail, postage prepaid, upon:

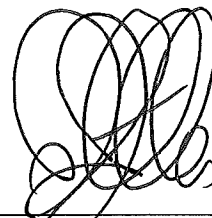
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A handwritten signature in black ink, appearing to read 'Thomas J. Litwiler', is written over a horizontal line.

Thomas J. Litwiler