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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
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July 3, 2018
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CITY OF FISHERS, CITY OF	)	
NOBLESVILLE, AND HAMILTON	)	FINANCE DOCKET
COUNTY, INDIANA – PETITION FOR	)	NO. 36137
PARTIAL REVOCATION OF	)	
EXEMPTION	)	
	)	
NORFOLK AND WESTERN RAILWAY	)	
COMPANY – ABANDONMENT	)	DOCKET NO. AB-290 (Sub-No. 117X)
EXEMPTION – BETWEEN INDIANAPOLIS	)	
AND TIPTON IN MARION, HAMILTON,	)	
AND TIPTON COUNTIES, IND.	)	

REBUTTAL TO REPLY OF PETITIONERS

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Movant

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Date: July 3, 2018

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INTRODUCTION

US Rail Holdings, LLC (“USR”) respectfully submits its Rebuttal to the Reply of City of Fishers, Indiana, City of Noblesville, Indiana, and Hamilton County, Indiana (collectively “Petitioners”) in Opposition to USR’s Motion for Clarification and Motion for Preliminary Injunction. This case presents two novel issues to the Surface Transportation Board (“Board”), including the original issue about how Petitioners should invoke the National Trails System Act (“Trails Act”) as a non-carrier state entity under 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). USR now raises the novel issue of how it should purchase this rail line at issue (“Line”) from the non-carrier state entity, that has sought to pursue this Trails Act option. The Board has settled the first issue by permitting Petitioners to directly invoke the Trails Act without seeking revocation of their

exempt status under Common Carrier Status. In its Motion for Clarification, USR asked the Board for direction on the second issue.

Petitioners' Reply settles some significant factual matters. First, they did not dispute that USR is a "financially responsible person" permitted to purchase the Line under the feeder line statute, 49 U.S.C. § 10907, under the offer of financial assistance ("OFA") statute, 49 U.S.C. § 10904, or under the Trails Act. Second, they did not dispute that USR stands ready to purchase the Line and operate it as a "common carrier." Because USR has established as undisputed facts that it is ready to purchase and operate the line and has the financial wherewithal to do so, USR should have a path to purchase the Line from Petitioners, who have no intention of reactivating it.

Petitioners do claim that USR's request is a backdoor attempt to allow a passenger excursion group to operate on the Line with USR. This request is not a backdoor attempt to turn the Line over to a passenger excursion group. It is a request by a well-respected common carrier to purchase and operate the Line for freight service. Moreover, even if a passenger excursion group was to operate on the Line with USR, the Board has found in past adverse abandonment and OFA cases that revenue from passenger service can be taken into consideration in determining the viability of the rail line in these proceedings, which logically would also be relevant in a feeder line case. See Trinidad Ry, Inc.- Abandonment Exemption- in Las Animas County, CO, AB-573X, et al., slip op. at 10 (STB served Aug. 13, 2001) (In the OFA context, passenger service could factor into the public convenience and necessity analysis if revenue from existing or potential passenger service on a line might make more than a de minimis amount of rail freight service feasible); Denver & Rio Grande Railway Historical Foundation – Adverse Abandonment – in Mineral County, CO, AB-1014 (STB served May 23, 2008) (same conclusion

in the adverse abandonment context). Here, if anything, a successful passenger service group on the Line with USR is a positive rather than a negative.

Also, Petitioners assert that the Line has no need for freight rail service. Yet they provide no support for this bald assertion. Petitioners supply no verification of this belief or explanation. They simply state that nobody has asked them for freight rail service. On the other hand, several significant shippers who reside on the Line have come forward in this proceeding and expressed a need for freight rail service. Moreover, USR has examined the financial case for freight service on this Line and has determined it wants to purchase it. This market evidence alone demonstrates that Petitioners' cries of no need for freight service are weak at best.

Moreover, the public policies behind the Interstate Commerce Act, Common Carrier Status, the feeder line statute, the OFA statute, and the Trails Act all focus on the maintenance of the national freight rail system, thereby making the purchase of this Line directly in line with this policy. Therefore, USR just seeks clarification from the Board as to the proper avenue to purchase this Line under these unique circumstances.

I. The Public Policy behind the Statutes and Regulations at Issue Here Favors the Purchase of the Line by USR to Make It an Active Line in the US National Freight Rail System.

In their Reply, Petitioners argue that the public policy favors its path under the Trails Act to turn the Line into a trail. This path would result in the removal of the track on the northern half of the Line to make a trail and intrastate passenger excursion service on the southern half of the Line, effectively causing half of the Line to never be used again for freight service and to be cut off from an important Class I connection. Petitioners' Reply highlights secondary policies; for the Trails Act, promoting interim trail use; and under Common Carrier Status, giving state

entities flexibility through the common carrier status exemption to encourage them to buy lines subject to abandonment. These secondary policies, however, do not overcome the overriding public policy behind these provisions, which is preserving railroad rights-of-way for railroad use.

Petitioners mainly focus on the flexibility provided by the Interstate Commerce Commission (“ICC”) to non-carrier state entities that purchase a rail line in accordance with Common Carrier Status. In that decision, the ICC exempted non-carrier state entities from the regulatory obligations of common carrier status, thereby generally making them free from regulation by the ICC (and now the Board). This exemption ensured that these regulations did not prevent a state entity from initiating programs to continue rail service. Slip op. at 1. This flexibility was a means to an end—that is, to continue service over these endangered rail lines. The real public policy behind these regulations was to save these rail lines from being permanently removed from the US rail system through abandonment.

The need for such a program in 1980 was a sign of the times for the rail industry. Two major rail systems, Chicago, Rock Island and Pacific Railroad Company and the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, had terminated all or a substantial portion of their rail operations. In response, some states began to develop programs to purchase these lines and hire operators to provide service. Consequently, the ICC felt compelled to implement Common Carrier Status to facilitate this process for the states to protect the national rail system. The explicit purpose was “to promote continuation of rail service by removing certain regulatory constraints from the State and thus encouraging rail continuation programs.” Common Carrier Status, slip op. at 1.

However, the purpose was not to give States the freedom to do whatever they wanted to with these lines. These lines remained subject to the jurisdiction of the ICC and now the Board

and to various regulatory constraints set forth in Common Carrier Status, especially on the rail line operators. Here, Petitioners did properly purchase the Line from Norfolk and Western Railway Company, but a modified certificate of public convenience and necessity to operate the Line under Common Carrier Status has never been filed since the sale in 1995. The only freight service on the Line after the purchase was provided by Indiana Rail Road, apparently until 2003, and was in violation of these modified certificate rules. In other words, Petitioners never really fulfilled the purpose of Common Carrier Status, which was to continue service on this endangered line. Now, however, Petitioners attempt to deploy the applicable exemption from Board regulation as justification to prevent USR's purchase of this Line.

The public policy behind the Trails Act further enforces the position of USR that it is entitled to purchase this Line. Petitioners' Reply largely ignores the purpose of the Trails Act and the predicament that would be created by the granting of a Notice of Interim Trail Use ("NITU"), where a "financially responsible" purchaser stands ready to buy the Line to reactivate freight service.¹

"In 1983, Congress added Section 8(d), codified at 16 U.S.C. 1247(d) [Trails Act], to promote two declared policies: (1) preserving unused railroad rights-of-way for possible future railroad use and (2) promoting trail use in the interim." Policy Statement on Rails to Trails Conversions, EP 274 (Sub-No. 13B), slip op. at 1 (ICC decided January 29, 1990) (citing H.R. Rep. No. 28, 98th Cong., 1st Sess., 8-9 (1983)). The enactment of the Trails Act "followed a history of Congressional concern about the loss of rail corridors as a national transportation

¹ That is why in the normal course of an abandonment proceeding that OFAs take precedence over Trails Act requests. However, here, the abandonment proceeding took place over 25 years ago, so the course of how to purchase the Line is unclear.

resource.” Id. The request by USR to purchase the Line immediately serves this primary purpose behind the Trails Act by implementing common carrier freight service on the Line. In stark contrast, Petitioners would pull up half the track on the Line and render it effectively useless for future freight rail service. Therefore, once again, the public policy favors the result that USR seeks in its request for clarification.

In addition, it is beyond cavil that the public policy behind the feeder line and OFA provisions is to maintain freight service on a rail line. The purpose of these statutes is self-evident.

Based on the clear public policy behind all of the statutes and regulations at issue, it is quite clear that the route USR seeks to pursue here to purchase and operate the Line fits perfectly into the scheme set up by Congress and the Board/ICC to maintain rail service in the United States. Petitioners on the other hand seek a route that would eliminate the possibility of rail service on the Line which runs directly counter to this policy.

II. USR Now Merely Seeks the Proper Path Forward to Purchase the Line in Accordance with the Applicable Statutes and Regulations and the Public Policy Discussed Herein.

Petitioners strongly argue that there is no path forward for USR to purchase the Line and instead assert that turning the Line into a trail is the only proper result. This desired outcome by Petitioners, which completely runs counter to the public policy discussed herein, is illogical. Also, this outcome makes little sense because Petitioners’ argument against the purchase of the Line is that it has invoked the Trails Act by seeking a NITU. However, the policy behind the Trails Act is to preserve rail lines for future use. Therefore, the purpose behind the Trails Act can be realized immediately through a sale under the feeder line or OFA provisions.

In their Reply, Petitioners settle on the only plausible path forward for USR in their eyes, which is a feeder line application after revocation of their exemption under Common Carrier Status from 49 U.S.C. § 10907. While USR does not agree that this is the only path forward to purchase the Line, it certainly does not object to that path, which it proposed in its Motion for Clarification (if the Board endorses it).

Petitioners then argue that revocation of the exemption would not be successful, unfairly characterizing USR's argument as an afterthought and a backdoor attempt to revoke their non-carrier status. However, the revocation argument strongly presented by USR was not an afterthought and should be permitted if that is the route the Board finds to be most appropriate here to purchase the Line. As USR noted in its Motion for Clarification, "[t]he Board may revoke an exemption, to the extent it specifies, when it finds that application in whole or in part of a provision of this part to the person, class, or transportation is necessary to carry out the transportation policy of section 10101 of this title." 49 U.S.C. § 10502(d). Here, an exemption revocation is required to carry out the overriding transportation policy for "the development and continuation of a sound rail transportation system...to meet the needs of the public." 49 U.S.C. § 10101(4). Moreover, as the ICC stated in Common Carrier Status, the purpose of that rulemaking was "to facilitate the acquisition and operation of lines for which service by the current carrier will in all likelihood not be continued. This purpose clearly fulfills our most fundamental congressional mandate to ensure the development, coordination, and preservation of a transportation system." Slip op. at 4. Permitting application of section 10907 here squarely fits within the purpose behind Common Carrier Status and this most fundamental Congressional mandate, by allowing USR to acquire and operate the Line for freight service that Petitioners have all but abandoned.

Indeed, once Petitioners came to the Board for authority to invoke the Trails Act and remove half of the Line's valuable track, they essentially rendered any argument against revocation toothless. Petitioners are hard pressed to claim protection now under Common Carrier Status because they have come to the Board to railbank the Line. Once the Line is railbanked, there can be no dispute that it is subject to reactivation by a willing buyer. In other words, the applicability of the Trails Act would override any exemption the Petitioners now argue they have as non-carriers. Also, as discussed herein, all the public policy behind the statutes and regulations at issue here favor the continuation of service on this Line over its being turned into a trail. Therefore, revocation of Petitioners' exemption from section 10907 should be permitted.

Also, Petitioners argue that the feeder line provision, 49 U.S.C. § 10907(b)(1)(A)(i), does not apply where there has been no freight service on the Line in fifteen years, because the public convenience and necessity ("PCN") factors listed in this section do not make sense in this situation. Section 10907(C)(1) identifies five factors to satisfy this standard:

- (A) the rail carrier operating such line refuses within a reasonable time to make the necessary efforts to provide adequate service to shippers who transport traffic over such line;
- (B) the transportation over such line is inadequate for the majority of shippers who transport traffic over such line;
- (C) the sale of such line will not have a significantly adverse financial effect on the rail carrier operating such line;
- (D) the sale of such line will not have an adverse effect on the overall operational performance of the rail carrier operating such line; and
- (E) the sale of such line will be likely to result in improved railroad transportation for shippers that transport traffic over such line.

The Board does not apply these factors in the cramped manner that Petitioners describe them. In fact, the Board has found the PCN standard to be satisfied where there was no service for the shippers and the incumbent carrier had received authority to discontinue service and abandon the rail line. See Oregon Int'l Port of Coos Bay – Feeder Line Application – Coos Bay Line of the Central Oregon & Pacific RR, Inc., FD 35160, slip op. at 4-6 (STB served Oct, 31, 2009).² See also Keokuk Junction Ry Co. – Feeder Line Application – Line of Toledo Peoria & Western Railway Corp. between La Harpe and Hollis, IL. FD 34335, slip op. at 4-7 (STB served October 28, 2004) (PCN satisfied where carrier had not provided service for over a year). “The Conference Report accompanying the Staggers Rail Act of 1980 states that section 10907 is to “[provide] through acquisition , a viable alternative to poor service or total abandonment.” Keokuk Junction, slip op. at 4 (quoting H.R. Rep. No. 1430, 96th Cong., 2d Sess. 125 (1980)). Consequently, Petitioners’ strict reading of the PCN factors is unfounded. Based on the absence of rail service for fifteen years and Petitioners’ request to invoke the Trails Act, it is clear that USR satisfies the public convenience and necessity requirement under section 10907(b)(1)(A)(i).

In addition, USR also argued that the Board should allow it to directly apply the feeder line provision in this situation without the need for revocation. Petitioners noted that this path was improper due to their exemption from common carrier status in Common Carrier Status. USR does not dispute that that proceeding made Petitioners non-carriers who were not subject to most of the ICC and now Board regulation. However, section 10907 should not be exempted

² Petitioners also argue that a feeder line application is not permissible once an abandonment has been authorized. However, the Board will consider and grant post-abandonment feeder line applications filed under the PCN standard in certain circumstances. Revision of Feeder Line Railroad Development Rules, 7 I.C.C.2d 902, 912 (1991). Where, as in this case, a line of rail is about to be effectively removed from rail service for good, exceptional circumstances for permitting a feeder line application are evident. See, e.g., Sunshine Mills, Inc. – Feeder Line Application – Norfolk Southern Ry Co. Line between Corinth, MS and Haleyville, AL, FD 32337, slip op. at 1 (ICC served October 7, 1993); Oregon Int'l, slip op. at 4.

under Common Carrier Status, because its purpose is to provide a route to a willing buyer to purchase a rail line that is not being properly served. It does not relate directly to the requirements of a common carrier to serve shippers on a rail line. This provision fits perfectly within the purpose behind Common Carrier Status to save endangered rail lines. It makes perfect sense that the ICC did not intend to exempt state entities from this provision that protects rail lines from bad actors or financially incapable owners. As a result, USR believes that the Board should allow it to submit a feeder line application without having to go through the additional procedure of revoking the exemption. Either way, with or without revocation, USR would like to submit a feeder line application and seeks the Board's guidance on its propriety at this point in an abandonment proceeding.

If the Board does not find the feeder line route to be appropriate, the offer of financial assistance route under 49 U.S.C. § 10904 would make the most sense except for the statutory timeline therein. See 49 U.S.C. § 10904(c) (statutory four-month deadline to file offer). However, the Board could revoke the Petitioners' exemption from section 10904 and exempt USR under 49 U.S.C. § 10502 from this statutory time limit, as USR noted in its Motion for Clarification. An exemption from this time limit here would clearly be appropriate because the transaction is extremely limited in scope as it only involves a 37.56 rail line and is necessary to carry out the transportation policy under 49 U.S.C. § 10101 as has been discussed at length herein. See Indiana Southwestern Railway Co. – Abandonment Exemption – in Posey and Vanderburgh Counties, Ind., AB 1065X, slip op. at 5 (STB served Apr. 8, 2011) (STB used exemption authority to hold in abeyance proceeding in OFA case); Norfolk Southern Ry Co. – Abandonment Exemption – between Red Bay & Haleyville, AL in Franklin, Marion, & Winston Counties, AL in the Matter of a Request to Set Terms and Conditions, AB 290 (Sub-No. 123X),

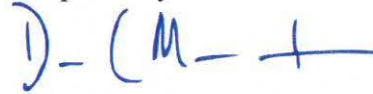
slip op. at 2 (ICC served September 10, 1993) (ICC exempted OFA proceeding from statutory deadline). Therefore, USR asks the Board to allow it to file an OFA if it finds this route to be procedurally correct.

Even if the Board does not find either of these routes to be proper, which they appear to be, the result would be that Petitioners would be granted a NITU and the Line would then be railbanked subject to reactivation under the Trails Act. At that point, USR could file a petition to vacate the NITU and purchase the railbanked Line. However, as USR expressed in its Motion for Preliminary Injunction, if Petitioners are permitted to remove the track on the Line to construct a trail, which they have said would happen, the Line would not be salvageable as an active line of rail due to the cost to replace the track. If the Board grants the Motion for Preliminary Injunction, prohibiting removal of the track until USR has the opportunity to purchase the railbanked Line, this route would also work but seems illogical because allowing the purchase before the Line is railbanked skips this unnecessary process.

CONCLUSION

Based on the foregoing discussion and USR's Motion for Clarification and Preliminary Injunction, the Board should find that USR can purchase the Line. There is no dispute that USR is a financially responsible person and stands ready to purchase and operate the Line. The only question is exactly how USR should proceed to purchase the Line. The feeder line and OFA routes are the most logical paths forward in this situation. USR will proceed down one of these paths once the Board gives its endorsement of the right one.

Respectfully submitted



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Dated: July 3, 2018

CERTIFICATE OF SERVICE

I, Priscilla Leonard, hereby certify that a copy of the foregoing **REBUTTAL TO
REPLY OF PETITIONERS** dated July 3, 2018, was served by overnight mail to Petitioners,
and U.S. Mail, first class postage prepaid, upon all other parties of record.


Priscilla Leonard