



KAPLAN KIRSCH ROCKWELL

242326

242328

December 27, 2016

ENTERED

Office of Proceedings

December 27, 2016

Part of

Public Record

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Re: *Chesapeake & Ind. R.R. Co.*, STB Finance Docket No. 36076; *CSX Transp., Inc. in La Porte, Porter, & Starke Ctys., Ind.*, STB Docket No. AB-55 (Sub-No. 643X)

Dear Ms. Brown:

I am enclosing for filing in the above-captioned proceedings the Reply of the State of Indiana Department of Transportation to the Chesapeake and Indiana Railroad's Petition to Reopen the Offer of Financial Assistance Proceeding and Petition for Declaratory Relief.

Please do not hesitate to contact me if you have any questions. Thank you very much for your assistance in this matter.

Sincerely,

Charles A. Spitulnik

*Counsel for the State of Indiana
Department of Transportation*

Enclosure

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 36076

CHESAPEAKE AND INDIANA RAILROAD COMPANY

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

**CSX TRANSPORTATION, INC., IN
LA PORTE, PORTER, AND STARKE COUNTIES, INDIANA**

**REPLY OF THE STATE OF INDIANA DEPARTMENT OF TRANSPORTATION TO
CHESAPEAKE AND INDIANA RAILROAD COMPANY'S PETITION TO
REOPEN OFFER OF FINANCIAL ASSISTANCE PROCEEDING AND
PETITION FOR DECLARATORY ORDER**

Communications with respect to this pleading should be addressed to:

Charles A. Spitulnik
Steven L. Osit
Kaplan Kirsch & Rockwell LLP
1001 Connecticut Avenue, NW
Suite 800
Washington, DC 20036
(202) 955-5600
Email: cspitulnik@kaplankirsch.com
sosit@kaplankirsch.com

*Counsel for the State of Indiana
Department of Transportation*

Dated: December 27, 2016

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 36076

CHESAPEAKE AND INDIANA RAILROAD COMPANY

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

**CSX TRANSPORTATION, INC., IN
LA PORTE, PORTER, AND STARKE COUNTIES, INDIANA**

**REPLY OF THE STATE OF INDIANA DEPARTMENT OF TRANSPORTATION TO
CHESAPEAKE AND INDIANA RAILROAD COMPANY'S PETITION TO
REOPEN OFFER OF FINANCIAL ASSISTANCE PROCEEDING AND
PETITION FOR DECLARATORY ORDER**

The State of Indiana Department of Transportation ("INDOT")¹ submits this reply in opposition to the Chesapeake and Indiana Railroad Company's ("CKIN") Petition to Reopen the Offer of Financial Assistance ("OFA").² CKIN's primary argument before the Board is that the Town of North Judson (the "Town") allegedly abused the OFA process by acquiring the subject rail line for purposes other than the continuation of freight service. This claim is without basis in either law or fact. The Town's acquisition of the line was in full compliance with the Board's OFA procedures, and CKIN's Petition raises no "new evidence" or "changed circumstances" to justify revisiting the Board's OFA determination over a decade after its consummation. The

¹ INDOT's interest in this matter is twofold. Through INDOT, the Federal Highway Administration provided \$1.5 million in Federal funding for the Town to acquire the line through the OFA process. Through that funding instrument, INDOT holds an executory interest in the line in the event the Town "cease[s] operation." See Agreement for Transportation Enhancement Funds ¶ II.C (Petition, Ex. 3). As the entity charged with preserving and developing freight and passenger corridors throughout the State of Indiana, INDOT also has a more general interest in ensuring the integrity of the OFA process.

² STB Docket No. AB-55 (Sub-No. 643X) (Filed Nov. 14, 2016).

Board should decline to reopen the OFA proceeding in this instance – where freight service on the line has been and will continue to be provided – and dismiss CKIN’s Petition to Reopen.³

I. THE TOWN’S OFA COMPLIED WITH THE OFA PROCESS

The Town’s OFA complied with the Board’s procedures because it was intended to continue, and did continue, freight service on the line. INDOT agrees with CKIN’s initial premise that Congress’ overriding purpose in establishing the OFA process was the continuation of common carrier freight service.⁴ CKIN’s argument fails, however, by suggesting that the “primary purpose” of an *offeror* must also be common carrier freight service. Congress did not intend and the Board has never required such a criterion. Rather, in each proceeding the Board has looked to the totality of circumstances to determine whether the OFA was likely to fulfill the statutory objective of continued freight service. An offeror’s motives, while relevant to this inquiry, are clearly not dispositive.

A. The OFA Process Permits Acquisition in Order to Develop Passenger Service as Long as the OFA is Likely to Result in Continued or Restored Freight Service.

The Board has squarely rejected interpretations of the OFA statute that would limit an offeror to providing *only* freight service. To the contrary, the Board has explained:

[N]othing in section 10904 precludes a line from being acquired under the OFA procedures to provide combined passenger/freight service, and indeed there are situations where . . . it is the inclusion of passenger

³ CKIN also petitions the Board for a Declaratory Order that (a) finds the Town’s ownership and administration of the line inconsistent with its common carrier obligation, (b) would preemptively reject the class exemption of a putative replacement freight carrier, and (c) would require the Town to sell the line to CKIN. The Town and interested parties are actively negotiating a new agreement governing the operation of and respective rights of the parties on the line, and INDOT believes that CKIN’s contentions on this point are not ripe for the Board’s consideration. Moreover, as there is currently no operations exemption with respect to this line pending before the Board, any ruling on such a matter would be premature.

⁴ See Petition at 10–11.

operations that would seem to make it financially viable for an operator to offer continued (or restored) freight service.

Trinidad Ry., Inc. – Abandonment Exemption – In Las Animas Cty., Col., STB Docket No. AB-573X, *slip op.* at 8 (Service Date Aug. 13, 2001). Thus, in *Trinidad* the Board approved an OFA notwithstanding Rail Ventures’ plan to establish a tourist excursion train on the line because “the objective of section 10904 – future rail freight service – will have a better chance of being achieved through the OFA sale than if the line remains in the hands of its present owner . . . who seeks only to dismantle the line.” *Id.* at 10; *see also Union Pac. R.R. Co. – Abandonment Exemption – In Rio Grande & Mineral Ctys., Col.*, STB Docket No. AB-33 (Sub-No. 132X), *slip op.* at 7–8 (Service Date June 22, 2004) (approving an OFA where the offeror “intended from the outset to rehabilitate the Creede Branch and subsidize any available freight traffic by running a tourist passenger excursion service on the line”).

As these cases demonstrate, the Board’s touchstone is not whether an OFA’s “primary purpose” is the continuation of freight service, but whether the continuation or restoration of freight service is likely to result. *See Trinidad*, *slip op.* at 10. Indeed, in its recent Notice of Proposed Rulemaking (“NPRM”), the Board rejected a request by the City of Jersey City, New Jersey, to make it any more explicit “that governmental entities should be allowed to use OFAs to acquire rail lines for passenger rail service, as long as they also assume the freight common carrier obligation.” *Offers of Financial Assistance*, STB Docket No. EP-729, *slip op.* at 13 (Service Date Sept. 30, 2016). Citing to its holding in *Trinidad*, the Board stated it “does not believe the OFA regulations require further clarification on this point.” *Id.*⁵

⁵ The NPRM would require an OFA offeror to demonstrate that continued rail service would be needed and feasible. *Offers of Financial Assistance*, *slip op.* at 19 (citing *Los Angeles*

The proceeding principally relied on by CKIN does not support its position. In *Roaring Fork*, the Board considered an OFA that, as acknowledged by the offeror, was primarily motivated by the development of passenger service. *Roaring Fork R.R. Holding Auth. – Abandonment Exemption – Garfield, Eagle, & Pitkin Ctys., Co.*, STB Docket No. AB-547X (Service Date May 21, 1999), *aff’d sub nom., Kulmer v. Surface Transp. Bd.*, 236 F.3d 1255 (10th Cir. 2001). The owner seeking abandonment of the line also had plans to develop light-rail passenger service, and had been given a \$40 million Federal grant for such a purpose. Due to the absence of shippers on the line, the Board concluded that restored freight service was highly unlikely to occur under either party’s plan. However, to the extent that restored freight service was a possibility, the Board concluded that “any future reinstitution of rail freight service (as an adjunct to passenger service) appears to be more likely under RFRHA’s own plans for the future of the right-of-way than through the OFA process.” *Id.* at 6 n. 19. Thus, it was not the offeror’s plan to develop light-rail service that was fatal, but rather the unlikelihood that the OFA would result in the continuation or restoration of freight service.

The Board’s inquiry into the need and feasibility of freight service is designed to protect the integrity of the OFA process, and ensure it is not “used to obstruct other legitimate processes of law (whether Federal, state, or local) when continuation of such service is not likely.” *Id.* at 4. It does not demand that an “offeror . . . prove in advance that its efforts to revive a failing line will, without question, succeed,” *Union Pac. R.R. Co., slip op.* at 7 (citing *1411 Corp. – Abandonment Exemption – In Lancaster Cty., Pa.*, STB Docket No. AB-581X, *slip op.* at 5 n.9 (Service Date Sept. 6, 2001)), *aff’d sub nom., Borough of Columbia v. Surface Transp. Bd.*,

Cty. Metropolitan Transp. Auth. – Abandonment Exemption – in Los Angeles Cty., Cal., STB Docket No. AB-409 (Sub-No. 5X), *slip op.* at 3 (Service Date June 16, 2008).

342 F.3d 222 (3rd Cir. 2003), or that an offeror will give first priority to freight service above all else. Rather, “the Board considers whether the plan *taken as a whole* is intended to result in continuing or resumed freight rail service.” *Id.* Here, the Town’s OFA did intend to continue freight rail service, and in fact *has* continued freight rail service for over a decade.

B. The Motive of the Offeror or Relative Priority of Freight Service is Not Dispositive.

No precedent from this Board supports CKIN’s argument that an OFA intended to preserve freight service – and which has preserved freight service – may nevertheless be invalid because “[f]reight was merely a secondary consideration”⁶ to the offeror. The Board has held that an offeror’s motives are but one of many factors that inform its analysis of whether an OFA is likely to result in continued freight service. In *Burlington Northern*, a group of adjacent-landowners submitted an OFA that was opposed by the abandoning carrier and trail use proponents. *Burlington N. & Santa Fe Ry. Co. – Abandonment Exemption – In King County, Wa.*, STB Docket No. AB-6 (Sub-No. 380X) (Service Date Aug. 5, 1998), *aff’d sub nom. Redmond-Issaquah R.R. Pres. Ass’n v. Surface Transp. Bd.*, 223 F.3d 1057 (9th Cir. 2000). These opponents alleged that the offerors’ only interest was the frustration of the trail development so as to preserve the privacy of the offerors’ adjacent properties.

Despite ample evidence that this *was* the offerors’ intent, the Board concluded that their motivations were not dispositive: “That their primary motivation might be to defeat interim trail use would by itself not condemn an offer, as long as they were intending to provide rail service and there existed a real need for that service.” *Id.* at 7. Rather, the Board went on to perform an exhaustive inquiry into “whether the circumstances in their entirety indicate that the financial assistance is being offered for rail service.” *Id.* at 10. The Board ultimately dismissed the OFA,

⁶ Petition at 7.

not because of the offerors' motives, but because it found there was no present need for rail service and the offeror was unlikely to make the substantial investments required to rehabilitate the line and revive rail traffic that had ended long ago. *Id.* Likewise, on review, the Ninth Circuit recognized that "[t]he critical factor, and the basis for the OFA's rejection, was the STB's determination that future traffic on the line was highly, if not totally, unlikely." *Redmond-Issaquah*, 222 F.3d at 1064.

Contrary to *Burlington Northern*, CKIN alleges that the OFA process was violated – even though the Town intended to continue and has continued freight service – because the Town's "primary purpose" was the development of excursion service. Assuming, *arguendo*, that that was the Town's primary motivation, *Burlington Northern* clearly demonstrates that that should have no bearing on this case. The Board's inquiry is whether, regardless of an offeror's motives, freight service is part of its plan and is likely to continue. Here, it was and it has.

II. THE PETITION TO REOPEN IS PROCEDURALLY INAPPROPRIATE

In addition to there being no substantive basis for reopening the OFA proceeding, it is also procedurally inappropriate to reopen an OFA proceeding at this late stage. The Town has continued freight service as it intended, and the Board has emphasized the need for administrative finality in OFA proceedings.

A. There is No Basis to Reopen an OFA Where Freight Service Continues.

Reopening the OFA process in this instance would lead to perverse results. The OFA statute provides, "No purchaser of a line or portion of line sold under this section may transfer or discontinue service on such line *prior to the end of the second year after consummation of the sale*, nor may such purchaser transfer such line, except to the rail carrier from whom it was purchased, prior to the end of the fifth year after consummation of the sale." 49 U.S.C.

§ 10904(f)(4)(A) (emphasis added). By CKIN's logic, an offeror that has satisfactorily⁷ fulfilled its obligation to continue service through this period and beyond risks its acquisition being declared void *ab initio* if it is later discovered that the offeror's acquisition was motivated in part by something more important to it than the preservation of freight service, even if in fact that service *has* continued.

This cannot possibly be so. Regardless of whether or not the Town would have been able to meet its burden to prove, if challenged at the time of the OFA, that it intended to continue freight service and that such continuation was necessary and feasible, the simple reality is that it has continued that service for over a decade. If the Board been able to gaze into a crystal ball and ordain this reality in such a hypothetical proceeding, it would have had no basis at all to reject the OFA. Indeed, the continuation of service would have been much more than "likely," see *Roaring Fork, slip op.* at 4, it would have essentially been guaranteed.

B. Administrative Finality is Particularly Important in the OFA Context

Finally, the need for administrative finality in the context of an OFA proceeding should control in this case. "Although 49 CFR 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." *Union Pac. R.R. Co., slip op.* at 6. Here, more than ten years after the fact, CKIN cannot meet this burden.

CKIN provides virtually no "new evidence" or "changed circumstances." CKIN claims that its new evidence "consist[s] of the fact that the real reason for the Town's 2004 acquisition was to provide HVRM, an exempt intrastate passenger excursion train operator, with track for its operations." But, in fact, the original 2004 operating agreement reflects the Town's protection of

⁷ See Letter from Co-Alliance, Petition, Ex. 2.

the then-proposed excursion service. Specifically, the agreement required CKIN to coordinate with the Town and the Museum before making any operational changes that may impact the line's use for historic railroad excursions. Petition, Ex. 1, ¶ 4. The agreement also stated that "establishment of passenger excursion activity on the Rail Line is a stated purpose and goal of the INDOT Agreement, and CKIN shall not impede or prevent the creation of additional, special, or regular passenger excursion activity on portions or all of the Rail Line." *Id.* ¶ 16. Similarly, the HVRM's application for Transportation Enhancement funds indicates that "[t]ourist train operations would eventually be developed over then 10-mile eastern leg between North Judson and LaCrosse," and that [m]aintenance funding sources for the project would derive from freight revenues and in part from tourist train operations." Petition, Ex. 3, at 6. CKIN cannot pretend that these matters are "new" only now at the end of its contract to operate over the line.

Apart from the length of time that has elapsed since the Board's approval of the Town's OFA, the Board has been extremely hesitant to reopen OFA proceedings. In *Chelsea Property Owners*, for example the Interstate Commerce Commission ("Commission") rejected an attempt by the offerors to reopen an OFA proceeding after the Board had found that they failed to demonstrate financial responsibility or that their offer would continue freight rail service. The Commission explained that "the entire scheme of statutory deadlines associated with abandonments and OFAs was intended by Congress to protect carriers from protracted legal proceedings." 1993 ICC LEXIS 137 at *9 (internal quotations omitted). "Barring any extenuating circumstances, to reopen an OFA decision based on allegations of new evidence and changed circumstances would violate the entire thrust of the statutory scheme." *Id.* at *10. Thus, although it appears never to have done so, the Board has suggested that only a showing of "material misrepresentation" could serve to reopen an OFA proceeding, and only then to address

an abuse of the Board's process in setting the terms and conditions of a sale. *Delta S. R.R., Inc. – Abandonment Exemption – Between Lake Village, Ar., And Shelburn, La.*, STB Docket No. AB-384 (Sub-No. 1X) (suggesting that a “material misrepresentation and an abuse of the Board’s processes” may reopen the OFA process) (citing *1411 Corp.*, *slip op.* at 7 n.15).⁸

The cases cited by CKIN also fail to establish a precedent for reopening the OFA proceeding. First, the Petition cites *CSX Transp., Inc. – Abandonment Exemption – In Allegany Cty., Md.*, STB Docket No. AB 55 (Sub-No. 659X) (Service Date Dec. 30, 2010), wherein the Board permitted the purchaser of a line pursuant to an OFA to transfer it prior to the end of the five-year period following the consummation of the sale. This was not an instance of the Board “fashioning a remedy to prevent violations of the ICCTA and its policies,” Petition at 21, but rather the Board exercising its statutory exemption authority to remove a matter from unnecessary regulation. Similarly, *Keokuk Junction Ry. Co. – Feeder Line Acquisition – Line of Toledo Peoria and Western Ry. Corp. Between La Harpe and Hollis, Ill.*, STB Finance Docket No. 34335 (Service Date Oct. 28, 2004), the Board merely exercised its statutory authority to force the sale of a line from a carrier not providing adequate service to one that would. Neither case involved the reopening of an administratively final Board determination.

CKIN also cites *SF&L Ry. – Acquisition and Control Exemption – Toledo, Peoria & Western Ry. Corp. Between La Harpe and Peoria, Ill.*, STB Finance Docket No. 33995, *slip op.* at 11 (Service Date Oct. 17, 2002), for the proposition that the Board may revoke an OFA and

⁸ Here, there was no material misrepresentation in the OFA application. The Town's OFA indicated that it “intend[ed] to contract with a rail operator to provide service to shippers and receivers located or to be located along the rail line,” and it did. See Offer of Financial Assistance, STB Docket No. AB-55 (Sub-No. 643X), at 5 (Filed Mar. 1, 2004). The Town made no representations as to its plan to also develop excursion train service, nor was it required to. And, as discussed above, any “misrepresentation” of the Towns’ motivation in filing the OFA could not, under Board precedent, be “material.” See *supra* at 2–6.

order the subject line's reconveyance. There, the Board revoked a class exemption authorizing a non-carrier's acquisition when it became clear, based on a thoroughly developed record, that the non-carrier's actions "reflect[ed] . . . a scheme to use our processes to obtain active rail assets with a view toward dismantling and selling them." Ultimately, the Board ordered that the subject line be transferred back to the *selling carrier*. *SF&L* does not even approach the extraordinary remedy requested by CKIN here: unwinding an administratively final OFA proceeding that has, as intended, resulted in the continuation of freight service for over a decade, and ordering that the line be conveyed to *itself*.

For the aforementioned reasons, the Board should dismiss CKIN's Petitions.



Charles A. Spitulnik
Steven L. Osit
Kaplan Kirsch & Rockwell LLP
1001 Connecticut Avenue, NW
Suite 800
Washington, DC 20036
(202) 955-5600
Email: cspitulnik@kaplankirsch.com
sosit@kaplankirsch.com

*Counsel for the State of Indiana
Department of Transportation*

Dated: December 27, 2016

**Before the
Surface Transportation Board
Washington, D.C.**

**Finance Docket No. 36076
STB Docket No. AB-55 (Sub-No. 643X)**

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of December 2016, I have caused a copy of the foregoing Reply of the State of Indiana Department of Transportation to Chesapeake And Indiana Railroad Company's Petition to Reopen Offer of Financial Assistance Proceeding and Petition for Declaratory Order to be served upon the following individuals via first class mail, postage prepaid:

Thomas F. McFarland
Thomas F. McFarland, P.C.
208 South LaSalle Street, Suite 1890
Chicago, IL 60604

John D. Heffner
Strasburger & Price, LLP
1025 Connecticut Avenue, N.W., Suite 717
Washington, D.C. 20036



Charles A. Spitulnik
Kaplan Kirsch & Rockwell LLP
1001 Connecticut Avenue, NW
Suite 800
Washington, DC 20036
(202) 955-5600
cspitulnik@kaplankirsch.com

Dated: December 27, 2016