CONNER & WINTERS
Attorneys and Counselors at Law

Donn C. Meinertsma | Partner
p 202.887.0465 | f 202.887.6999 | DMeindertsma@cwlaw.com

Conner & Winters, LLP
1850 M Street, N.W., Suite 600 | Washington, D.C. 20036
p (202) 887-5711 | f (202) 887-6999 | cwlaw.com

FD 36137
AB 290 (Sub-No. 117X)

May 10, 2019

247750
247751

BY E-FILING

ENTERED
Office of Proceedings
May 10, 2019
Part of
Public Record

Ms. Cynthia T. Brown
Chief, Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423

Re: FD ~~36167~~ 36137, City of Fishers, City of Noblesville, and Hamilton County, Indiana
Petition for Partial Revocation of Exemption

Dear Ms. Brown:

US Rail Holdings, LLC ("USR") respectfully submits for filing electronically on the public record in this proceeding the public version of USR's Rebuttal. Being sent by Federal Express for filing under seal in the above-referenced docket is an original and 10 copies of the highly confidential version of this submission. Also being submitted in that package is a disc containing the highly confidential version of this submission in electronic form.

Thank you for your attention to this letter.

Sincerely yours,

D. C. M.

Donn C. Meindertsma

PUBLIC VERSION-REDACTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

US RAIL REBUTTAL TO OWNERS' REPLY IN OPPOSITION

US Rail Holdings, LLC
7846 West Central Avenue
Toledo, OH 43617

Movant

Submitted By:

Donn C. Meindertsma
Conner & Winters, LLC
1850 M Street NW, Suite 600
Washington, DC 20036
(202) 887-5711
dmeindertsma@cwlaw.com

Attorney for Movant

Date: May 10, 2019

PUBLIC VERSION-REDACTED

BEFORE THE
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US RAIL REBUTTAL TO OWNERS' REPLY IN OPPOSITION

US Rail Holdings, Inc. ("USR") respectfully submits its Rebuttal to the City of Fishers ("Fishers"), the City of Noblesville ("Noblesville"), and Hamilton County (collectively, the "Owners") Reply in Opposition to the USR Motion to Vacate NITUs and to Reactivate Rail Service and Motion for Preliminary Injunction. Ultimately, the Owners want the Surface Transportation Board ("STB" or "Board") to reject USR's request to restore freight and passenger rail service that has the potential to create economic growth in and around Indianapolis. In their Reply, the Owners urge the STB to deny USR's motions on three grounds, none of which are persuasive.

1. **Owners' Claim that USR's Motion to Reactivate Rail Service Is Premature Is Misplaced.**

Owners first argue that USR's Motion to Vacate NITUs and Reactivate Rail Service is premature. According to Owners, finalizing their trail use agreements is a prerequisite for the relief USR seeks. Their argument misinterprets the STB's role in these types of proceedings.

The STB's role under 16 U.S.C. § 1247(d) of the National Trails System Act ("Trails Act") is solely ministerial. *Rail Abandonment – Trails Act – Policy Statement,* 5 I.C.C.2d 370, 372-73 (1989) (the ICC has no discretion under the Trails Act to deny or condition an interim trail use arrangement.) The STB's only decision in these types of matters is whether to issue a NITU or CITU[1] if the trail sponsor complies with the requirements of the Trails Act. *Union Pac. R.R. -Aban. and Discontinuance of Operations – in Canyon and Ada, Counties, ID,* ICC Docket No. AB-33 (Sub-No. 79), 1995 WL 61495, *7 (ICC served February 16, 1995) (under the Trails Act, the ICC's "role extends only to determining whether the statute has been properly invoked and statutory requirements regarding liability and rail banking have been met."); *Wisc. Central, Ltd – Abandonment Exemption – in Price and Taylor Counties, WI,* ICC Docket No. AB-303 (Sub-No. 1X), 1989 WL 239394, *2 (ICC served August 30, 1989) (ICC determines "whether the statute has been properly invoked, and then issue[s] a NITU"). The STB does not "decide whether rail banking and use of the right-of-way as a trail is desirable for a particular line of railroad; Congress has itself made that determination (for all lines) in section 1247(d)." *Union Pac.,* 1995 WL at *7. "The Trails Act is invoked when the parties seeking to convert a railroad right-of-way to a trail indicate their willingness to assume financial and managerial responsibility, acknowledge that interim trail use/rail banking is subject to future restoration of the right-of-way for rail service; and identify the relevant portions of the right-of-way." *Wisc.*

[1] Notice of Interim Trail Use; Certificate of Interim Trail Use.

Central, 1989 WL at *2 n. 2. Here, the Owners invoked the Trails Act by requesting the three NITUs, and the Board issued the three NITUs, thereby completing its sole duty under the Trails Act.

An entity's right to reactivate rail service pursuant to the Trails Act is not triggered by an owner of a line entering into a trail use agreement with a trail sponsor. *See Goos v. ICC,* 911 F.2d 1283, 1295 (8th Cir. 1990) (agency has "little, if any, discretion to forestall a voluntary agreement to effect a conversion to trail use"). The right is activated when these parties file a request for the Board to issue a NITU under the Trails Act. At this point, both parties to the request have agreed and sworn to the STB that the requirements of the Trails Act have been met. If the Board agrees that these requirements have been satisfied, it issues a NITU or CITU for the trackage at issue. At this point, the STB's role ceases.

"The STB plays no part in the negotiations between trail sponsors and railroads, nor does it analyze, approve, or set the terms of rail banking/interim trail use agreements." *National Trails System Act and Railroad Rights of Way,* STB Docket No. EP 702, slip op. at 3 (STB served April 30, 2012) citing *Ga. Great S. Div. – Aban. & Discontinuance Exemption – Between Albany & Dawson, in Terrell, Lee. & Dougherty Counties, Ga.,* 6 S.T.B. 902, 907 (2003). *Policy Statement on Rails to Trails Conversion,* ICC Docket No. EP 274 (Sub-No. 13B), 1990 WL 287255, *2 (ICC served January 29, 1990) ("Section 1247(d) does not permit us to impose an interim trail use arrangement upon either a railroad or trails group; they must enter into the arrangement voluntarily."); *Iowa Power, Inc. – Construction Exemption – Council Bluffs, IA,* ICC Docket No. 31717 (ICC served December 11, 1995) (Trail use agreement is voluntary.) "Indeed [the agency has] never approved a trail use agreement. [The agency has] always viewed it as a private contractual matter, one that was beyond the limited scope of [the agency's] Trails

Act authority. [The agency] only issues CITUs and NITUs, and [it] issue[s] them when the abandoning carrier consents to trail use and the potential user satisfies the criteria in § 1152.29(a)." *Norfolk & Western Ry Co. – Aban. – Between St. Marys and Minster in Auglaize County, OH,* 9 I.C.C.2d 1015, 1019 (1993). The Board merely provides the parties 180 days to negotiate and may grant 180-day extensions thereafter.[2] In fact, the STB/ICC did not require the parties to a trail use agreement even to notify it of its consummation until 2012 in *National Trails System Act and Railroad Rights of Way, supra.*[3]

The real trigger of the right to seek rail reactivation is when the parties invoke the Trails Act by seeking a NITU/CITU or at least by the Board's issuance of the NITU/CITU.[4] The Board has stated specifically that it plays no role in the actual trail use agreement. No such agreement had even been filed at the Board in any proceeding until 2012. Here, the Owners and trail sponsors have clearly invoked the Trails Act, thereby allowing USR to seek reactivation of the NITU Line. As a result, USR respectfully asks the Board to require the parties to negotiate over the value of the NITU Line to permit USR to purchase it.

---

[2] Numerous 180-day extensions can be granted by the STB and can result in trail negotiations that go on for years. This possibility is another reason why the trigger should be the NITU request; otherwise, a possible rail carrier could wait years before being able to seek reactivation despite a need for rail service.

[3] The STB noted in this decision that the rules issued in that proceeding would not address reactivation issues. The rules were for STB informational purposes only. *Id.*

[4] Even if the trigger is the trail use agreement, on January 14, 2019, the City of Fishers Board of Public Works & Safety approved by resolution a license agreement to use a certain portion of the Nickel Plate Trail pursuant to the Trails Act. This resolution provided that HHPA, acting on behalf of Owners, would enter into the Fishers Trails Use Agreement with Fishers in its individual capacity as a trail sponsor. The Fishers Trails Use Agreement was also consummated on January 14. **A provision in the Fishers Trails Use Agreement provides that HHPA has decided to remove all trackage and other rail assets on the NITU Line.** While Owners claim this agreement was never consummated, they did not provide any verification by one of these parties that this was the case.

2. **Owners' Fail to Establish that USR's Request for Reactivation of Rail Service Lacks Adequate Evidentiary Support.**

USR will have no problem paying for the NITU Line at its present market value. USR stated in its Motion to Reactivate Rail Service that the NITU Line's salvage value is approximately $1.1 million, and it has a line of credit well above that to purchase the NITU Line. For some reason, Owners do not believe this verified statement is adequate to demonstrate that USR has the finances to purchase the NITU Line from them.

First, Owners attack USR's resources. They claim the statement that USR has a line of credit that can cover this purchase price is inadequate. While USR disagrees with that argument, USR hereby submits [redacted] and a public document providing a market capitalization for United Rail[5] of $28 million, which leaves no doubt that USR can satisfy the purchase price of the NITU Line and/or the costs of any additional work needed for the line to be fully functional as a freight rail line based on the Owners' studies. Third Verified Statement of Danielle Hall Mitchell ("Mitchell VS"), attached hereto as Exhibit A, at paragraph 4.

Second, Owners argue over the line's value. They contend that the salvage value of the NITU Line is $1.6 million, as opposed to the $1.1 million valuation by USR. This argument is unavailing: while USR does not concede that the $1.6 million value is the more accurate number, even that amount is easily within USR's ability to satisfy Owners' asking price. As a result, whether the price is USR's or Owners' amount, USR stands ready to pay the appropriate amount and has the money to do it. Moreover, if the parties cannot come to an agreement, the Board can provide the fair market value of the NITU Line which is the salvage value of it.

[5] United Rail is the parent company of USR.

Owners also argue that the NITU Line will require significant rehabilitation to make it satisfactory for Federal Railroad Administration ("FRA") Class Two level of service (permitting operations at 25 miles per hour for freight traffic and 30 miles per hour for passenger traffic). Owners submit a report that says it will cost approximately $3.7 million to bring the track up to Class Two working condition.[6] That, however, does not aid Owners' objections: the report is focused on bringing the track to a higher level and does not say the present condition of the track is inadequate for Class One service (permitting operations at 10 miles per hour for freight traffic and fifteen miles per hour for passenger traffic). In fact, the report states that the track is in surprisingly good condition, especially with respect to its drainage. USR plans to evaluate the condition and make it FRA compliant initially.

In addition, even if there was some need to upgrade the track to Class Two level, which there is not, USR has demonstrated it has more than enough money to make this happen based on its financial documents. As a result, USR has satisfied any evidentiary requirement necessary to prove it can purchase this NITU Line and make it operable.

3. Contrary to Owners' Proposition, Board Precedent Supports USR's Motion.

Owners attempt to support their position by citing *Ballard Terminal R.R. Co., LLC – Acquisition and Operation Exemption – Woodinville Subdiv.,* STB Docket No. 35731, et al. (STB served December 30, 2014). There, the Board rejected a request to reactivate rail service on a rail banked line. The Board held that Ballard Terminal R.R. Co. ("Ballard") was not a "bona fide petitioner" to reactivate rail service under the Trails Act, reasoning: "Because Ballard has failed to demonstrate that it has a specific plan to restore the Line for freight rail service and the financial resources to implement that plan, or that there is sufficient real demand to warrant

[6] The report submitted by Owners inspects 37 miles of track; however, the NITU Line is only 21 miles of this total number. As a result, the rehabilitation cost for this would be much less than $3.7 million.

authorizing the resumption of service, we find that Ballard is not a bona fide petitioner in this case." *Id.,* slip op. at 11.

As to Ballard's financial resources, the Board found it insufficient that Ballard claimed to have numerous investors willing to provide these resources if the STB issued authority to reactivate rail service. The Board found this claim to be speculative; a mere assertion that investors stood ready to support rail service was not enough. Rather, the Board stated that Ballard "must show some reasonable basis or likelihood that it can obtain the necessary level of funding, based on a reasonable estimate of that level, if the regulatory approval is granted." *Id.,* slip op. at 7.

Ballard has no bearing on this case. USR's financial resources most certainly are not speculative. USR has already demonstrated that it has [redacted], plus its parent company has a market capitalization of $28 million. Mitchell VS at paragraph 4. USR is not reliant on potential investors who have made no firm commitment to the rail reactivation. Moreover, the Board focused on Ballard's failure to provide an estimate of how much it would cost to provide rail service. However, here, in all likelihood, the NITU Line can presently provide freight service at a Class One level. Moreover, if USR wanted to upgrade the NITU Line to a Class Two level, Owners have supplied an estimate of approximately $3.7 million to satisfy this level of service and supplied a line value of $1.6 million. USR has demonstrated it has these funds available now.

In *Ballard,* the Board also found that the petitioner did not demonstrate an adequate need for rail service based on the various letters submitted by local industries. Here, USR has presented letters from various possible rail shippers that demonstrate an adequate need for rail

service. The main shipper, Quikrete, is located on the NITU Line and has a more than sufficient need to warrant reactivation of rail service.

Ballard actually supports USR's position here that it is a "bona fide petitioner". USR has the finances and the shipper customer base to bring rail service back to the NITU Line. In fact, USR has followed the directions set forth in *Ballard* to a tee to demonstrate what is required to reactivate rail service on the NITU Line.

4. In Conclusion, USR Is a "Bona Fide Petitioner" to Reactivate Rail Service.

USR has demonstrated that it has timely filed its request, as well as sufficient finances and shipper need, and has followed *Ballard* for reactivation of rail service on the NITU Line. Therefore, USR respectfully asks the Board to allow it to proceed with its request to purchase (or operate on) the NITU Line for the market price.

Respectfully submitted,

Donn C. Meindertsma
Conner & Winters, LLP
1850 M Street NW, Suite 600
Washington, DC 20036
(202) 887-5711

On behalf of US Rail Holdings, LLC

CERTIFICATE OF SERVICE

I, Priscilla Leonard, hereby certify that a copy of the foregoing Public Version – Redacted of the US RAIL REBUTTAL TO OWNERS REPLY IN OPPOSITION dated May 10, 2019, was sent by email to Owners, and U.S. Mail to the all other parties in this proceeding.

Priscilla Leonard

Priscilla Leonard

EXHIBIT A

THIRD VERIFIED STATEMENT OF DANIELLE MITCHELL

1. My name is Danielle Mitchell, and my business address is 7846 West Central Avenue, Toledo, Ohio 43617. I am the President of the US Rail Holdings, LLC ("USR"). I have been the President for the past year. I am extremely familiar with the line of rail at issue in Finance Docket No. 36137 and Docket No. AB-290 (Sub-No. 117X) and the finances of USR.

2. I am making this statement in support of USR's Motions for Preliminary Injunction and to Vacate NITUs and Reactivate Rail Service and the USR Rebuttal filed herewith in this proceeding. The statements in these motions and rebuttal are true and correct. More specifically, this statement describes and documents that US Rail has sufficient financing to purchase and operate the rail line.

3. This rail line is owned by the cities of Fishers, Noblesville, Ind., and Hamilton County, Ind. (collectively, "Owners"). It is a 37.56-mile rail line that runs between milepost I-2.13 at Indianapolis, Ind. and milepost I-39.69 at Tipton, Ind. ("the Line"). A portion of the Line is presently subject to three Notices of Interim Trail Use between MP I-2.13 and MP I-23 (NITU Line) issued by the Surface Transportation Board (Board) in this proceeding. USR intends to buy and operate the NITU Line as a common carrier if given the authority to do so by the Board.

4. USR has sufficient financing to purchase and operate the NITU Line. United Rail, the parent company of US Rail, presently has [redacted]. that is attached hereto as Exhibit 1. Also, United Rail has a market capitalization of $28 million which information is available to the public on a document that is attached hereto as Exhibit 2.

5. USR is a Class III, short line railroad operator. USR is also growing its presence in other markets by providing a variety of rail logistics services: transloading, private industrial rail car switching, track maintenance services, rail car repair, and rail car storage.

VERIFICATION

I, Danielle Mitchell, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on May 9th 2019.

Danielle Mitchell

EXHIBIT 1

REDACTED

EXHIBIT 2

-- Markets

Market Activity

Corporate Services

About

Blog

Quote

Stock Screener

OTC MARKETS TOTALS	SECURITIES	DOLLAR VOL	SHARE VOL	TRADES
	10,676	$1.5B	5.8B	196,023

Market Activity / Stock / URAL / Company Profile

URAL

United Rail, Inc.

Common Stock

0.008 -0.004 -33.33%

0.0085 / 0.014 (1 x 1)

Real-Time Best Bid & Ask 04:39pm 05/09/2019
Delayed (15 Min) Trade Data: 03:43pm 05/09/2019

Overview Quote Company Profile Security Details News Financials Disclosure Research

Pink Verified Profile 03/2019

Pink Current Information Transfer Agent Verified

CONTACT DETAILS

9480 S. Eastern Ave.
Suite 205
Las Vegas, NV
89123

www.unitedrailinc.com
702-481-2343
mbarron@unitedrailinc.com

DESCRIPTION

United Rail, Inc. is in the business of acquiring short line railroads in both the passenger operations sector as well as freight operations. The company has been active in this space for five years. It has operated the Santa Fe Southern Railway, WSRY, X Wine Railroad and plans to develop rail infrastructure projects and terminal operations. It also has licensed Las Vegas Xpress, Inc. (OTC:PK:LVX!) to use the X Train brand on the planned LA to Vegas X Train service. Revenues from the licensing are calculated at 5% of the gross revenue of LVXI's revenue derived from the deployment of the X Train brand on operating trains.

SECURITY DETAILS

Market Cap	
28,829,407	05/08/2019
Shares Out	
2,402,450,580	04/24/2019

MORE >

DAILY ADVANCER

QX EMGC
QX VSQTF
QX PFSCF
QX NGPHI
QX MEDIF

FINANCIAL REPORTING

Reporting Status
Alternative Reporting Standard

Audited Financials
Unaudited

Latest Report
12/31/2018 Quarterly Report

CIK
0001405227

Fiscal Year End
3/31

COMPANY OFFICERS & CONTACTS

Michael Barron
CEO, President

Wanda Witoslawski
CFO

COMPANY DIRECTORS

Michael Barron

SERVICE PROVIDERS

Accounting/Auditing Firm

Pritchett, Siler & Hardy, P.C.
515 South 400 East
Suite 100
Salt Lake City, UT 84111

Investment Bank OTCQX Sponsor

Cowen and Company, LLC
599 Lexington Avenue
New York, NY 10019

Securities Counsel OTCQX Sponsor

Sichenzia Ross Ference LLP
1185 Avenue of the Americas
37th Floor
New York, NY 10036

PROFILE DATA

SIC - Industry Classification
Not Available

Incorporated In
NV, USA, 2009

Employees
12 as of 12/01/2018

Shell
No

COMPANY NOTES

Domicile change from Delaware to Nevada 10/12/2018

Formerly=Las Vegas Railway Express, Inc. until 10-2018

Formerly=Liberty Capital Asset Management, Inc. until 3-2010

Formerly=Corporate Outfitters, Inc. until 11-2008

QUOTE OTCM 33.8492 -0.6508 (-1.89%) 33.85 14:49