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November 8, 2017

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

Response to latest filings of Save the Nickel Plate, Inc.; Mayor Dave
Kitchell; Linda Kraatz; and The Quikrete Companies

Dear Ms. Brown:

The Cities of Fishers and Noblesville, Indiana, and Hamilton County, Indiana (collectively, the “Owners”) urge the Surface Transportation Board (the “Board”) to uphold the integrity of its procedures, and provide for an orderly, swift, and fair disposition of the above-referenced proceeding. The Owners appeal for Board action in light of new and procedurally-deficient filings – from Save the Nickel Plate, Inc. (“STNKP”); Mayor Dave Kitchell of Logansport, Indiana (“Kitchell”); and Linda Kraatz (“Kraatz”) – each of which, respectively, should be rejected (or, in the alternative, denied), disregarded, and denied. In similar fashion, the Board should re-designate as correspondence and remove from the official record a letter by The Quikrete Companies (“Quikrete”) that purportedly was filed on October 13, 2017.

By decision served on September 22, 2017 (the “September 22 Order”) the Board granted interested parties until October 12, 2017 – a generous 72 days from the date the Owners filed their Petition for Partial Revocation on August 1, 2017 – to file responsive comments. The Owners did not object to the extension, because nearly all of those seeking to comment were unfamiliar with the Board’s processes, and also because the prescribed deadline would promote orderly development, and closing, of the record.¹ The September 22 Order also granted the

¹ The Owners have not challenged the apparent practice of many commenters to skirt the agency’s service rules at 49 C.F.R. § 1104.12(a). Specifically, most commenters have certified in their filings that they have served counsel for the Owners, indicating that the filer has not served all other parties to the proceeding (of which there are dozens) as is required.

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Owners until October 23, 2017, to respond to comments filed. As of October 23, the administrative record would close, permitting the Board to proceed with disposition of the case.

Or so the Owners thought.

Those tendering or re-hashing arguments weeks after the applicable deadline has passed disrespect the Board's procedures and orders, frustrate orderly agency processing of this case, and undercut a balance that the September 22 Order intended to strike. Aside from Kitchell whose November 6 filing does nothing to advance the Board's analysis of this case, STNKP has filed on November 2, 2017, what it has styled as a "Motion to Suspend and Investigate" (the "STNKP Motion"), and Kraatz has asked, in essence, that the procedural schedule be reopened so that comments may be filed until January 12, 2017. The STB should sanction none of these recent, abusive filings.

The STNKP Motion portrays itself as a request for Board investigation coupled with a vague call for a "suspension" of the proceeding. The filing nominally is rooted in the Board's statutory authority under 49 U.S.C. § 1321(b) to – (1) "inquire and report" on the "management of the business of carriers providing transportation and services subject to subtitle IV;" and (2) issue orders (typically injunctive orders) where appropriate to prevent irreparable harm. STNKP's invocation of Section 1321 is a sham – a poorly-disguised attempt to reply to the Owners' October 23 Response to Comments, and thereby evade the restrictions of 49 C.F.R. §1104.13(c). As such, the STNKP Motion must be rejected out-of-hand.

The STNKP Motion is an affront to the efforts of this agency to impose order and provide for a date certain for the closing of the record. Although weakly couched as a request for Board action under Section 1321 (mentioned only once at the outset of STNKP's filing and never actually applied), the statutory citation rings hollow. Section 1321 governs Board "inquiries," not "investigations."² Additionally, Board inquiries must focus on carriers subject to Subtitle IV, and the Owners have demonstrated throughout that they are not carriers. Finally, the Owners assume, in the absence of any other context, that, in requesting a "suspension," STNKP is seeking a stay under Section 1321(b)(4). But STNKP does not demonstrate that such injunctive relief is warranted under the applicable standards. In sum, STNKP offers no support for an investigation, and its resort to Section 1321 is a false pretense to revisit the merits. For these reasons, the STNKP Motion should be rejected as abusive of agency processes and prejudicial to the Owners, or at least it should be denied as meritless.

The Owners opposed Kitchell's late-filed comments, arguing, among other things, that his tactic reflected serious disregard for agency procedure and administrative fairness. That

² Board investigations, incidentally, fall under 49 U.S.C. § 11701 (which is inapplicable here).

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should have been the end of it, procedurally – Kitchell had tendered his petition and the Owners responded. Instead, Kitchell has, on November 6, 2017, responded to the Owners’ strenuous (but fair) reply to his petition in a manner and tone that speaks for itself.³ Kitchell’s latest filing does not defend the lateness of his intervention, reflects no regard for the Board’s Section 1104.13(c) prohibition of surreplies, and is objectionable under 49 CF.R. § 1104.8. Kitchell’s latest filing should be rejected or disregarded.

Kraatz’s request for an extension of the comment period until January 12, 2018, although illuminating, should be denied. Kraatz appears to assume that the record has not closed despite the Board’s September 22 Order. Or perhaps she would acknowledge that the record *has* closed, in which case, her request also implicitly seeks a reopening of the proceeding. Kraatz appears to presume that, by virtue of posting Kitchell’s and STNKP’s recent filings on the agency’s website, the Board formally has accepted them and will consider them as part of its merits analysis. In fact, the Board can (and should) reject those late filings. It is revealing to see how and why a non-practitioner before this agency might conclude, as Kraatz seems to have done, that the Board’s deadlines are automatically waived whenever a party submits (and the agency posts) an untimely or otherwise impermissible filing. This may help explain, in part, why interested parties in this case have shown scant concern for the agency’s rules of procedure or its explicit procedural orders.

While Kraatz’s filing is interesting in its context, reopening the proceeding to allow for additional comments is unwarranted. The 72-day comment period was more than generous to interested parties. Usually, those appearing before this agency would honor the procedural deadlines set forth in the September 22 Order and conduct themselves accordingly. But it appears that those opposed to the Owners’ trails use objectives want to see the dialogue continue, regardless of whether that is in keeping with the Board’s earlier procedural deadlines.

Finally, in reviewing the docket, the Owners discovered only today that Quikrete addressed a letter to Acting Chairman Begeman that was added to the record as a formal filing on October 13, 2017. Quikrete claims to have a qualified interest in restored rail service,⁴ and it expresses concern about a possible rail trail adjacent to its plant. The Owners were unaware of

³ Kitchell’s November 6 filing was delivered to the undersigned via an email address attributed to Stone Spectrum (another party of record in this proceeding), and it lacks a certificate of service or any indication that it has been served upon all parties of record. Much of that to which Kitchell takes exception in the *Owners’* response to his petition to late file appears to stem from his misreading of the Owners’ reply.

⁴ Quikrete offers no specific traffic estimate, and it conditions its interest on the availability of “competitive rates.”

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this late-filed correspondence. The Quikrete letter has no certificate of service and was never served upon counsel for the Owners. Accordingly, Quikrete's letter should be treated as correspondence, and the Board should either re-designate the letter as such (and not as a filing) or, if intended as a formal filing, reject it for its procedural deficiencies.

For the foregoing reasons –

1. The STNKP Motion should be rejected as an impermissible surreply masquerading as a motion for (unavailable) relief under 49 U.S.C. § 1321(b), or, at the very least, the motion should be denied;
2. Kitchell's November 6 filing, which reads as a re-hash of his prior, untimely arguments (among other things), should be rejected as an impermissible reply to a reply and disregarded;
3. Kraatz's request for an extension of the already-passed comments deadline should be denied as unsupported and unnecessary; and
4. The Quikrete letter should be correctly designated as correspondence or it should be rejected as a formal filing for its procedural deficiencies.

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/ekf
Enclosures

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CERTIFICATE OF SERVICE

I hereby certify that, on this 8th day of November, 2017, a copy of the foregoing **Response to Latest Filings of Save the Nickel Plate, Inc.; Mayor Dave Kitchell; Linda Kraatz; and The Quikrete Companies** 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