

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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.	)	

MOTION FOR CLARIFICATION

US RAIL CORPORATION
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: June 11, 2018

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INTRODUCTION

US Rail Holdings, LLC (“USR”) seeks from the Surface Transportation Board (“Board”) clarification of the Board’s decision in this proceeding served May 31, 2018 (“Decision”) that permitted the Indiana cities of Fishers and Noblesville, and Hamilton County, Indiana (collectively, “Petitioners”) to pursue rail banking of a 37.56-mile rail line between milepost I-2.13 at Indianapolis and milepost I-39.69 at Tipton, Indiana (“the Line”) under 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29 without the need for exemption authority. The Board currently maintains the exclusive authority to permit a rail carrier to purchase and operate on this Line. As demonstrated below, there is a clear need for transportation on the Line, and USR desires to purchase the Line and fulfill that need. By this Motion, USR requests that the Board delineate how USR can obtain the Board’s authorization to purchase and operate the Line before the Petitioners rail bank the Line. USR simultaneously is filing a Motion for Preliminary Injunction

asking the Board to prohibit Petitioners from (a) finalizing the trail use process Fishers invoked on June 8, 2018, and (b) removing any track on the Line. Also, attached hereto is the Verified Confidential Statement of Danielle Hall Mitchell, President, USR.

On August 1, 2017, Petitioners filed a petition to partially revoke their exempt status relating to the Line, which was authorized for abandonment over 26 years ago, in 1991. Petitioners sought to partially revoke their exempt status as state entities that acquired a line after it was authorized for abandonment so that they could initiate a new abandonment proceeding and then invoke Section 8(d) of the National Trails System Act (“Trails Act”), 16 U.S.C. § 1247(d), and the Board’s interim trail use regulations, 49 C.F.R. § 1152.29, to rail bank and develop a trail on the Line. USR did not oppose the request to revoke Petitioners’ exempt status to commence a new abandonment proceeding, but it asked the Board to allow 49 U.S.C. § 10904 to be used in this new abandonment proceeding, if it was permitted, so USR could file an offer of financial assistance for the Line. (USR/Indiana Transportation Museum Comments 4, November 13, 2017).

On May 31, 2018, as noted, the Board decided that Petitioners may pursue rail banking of the Line under the trail use provisions without revocation authority from the Board. In other words, there would not be a new abandonment proceeding in which USR could file an offer of financial assistance under Section 10904. The Board did not address what route USR could take to purchase the Line from Petitioners now that they do not need to initiate a new abandonment proceeding. On June 8, 2018, Fishers petitioned the Board for the issuance of a Notice of Interim Trail Use (“NITU”) for five miles of the Line. As a result, USR is asking the Board for guidance in this proceeding on the proper and most efficient way to buy the Line.

STATEMENT OF FACTS

The Line was previously owned by Norfolk and Western Railway Company (“N&W”), and rail service on the Line was provided by the Indiana Rail Road (“INRD”) pursuant to a lease authorized by the Interstate Commerce Commission (“ICC”), the Board’s predecessor. Ind. R.R. – Lease & Operation Exemption – Norfolk & W. Ry., FD 31464 (ICC decided Jul. 3, 1989). In 1991, the ICC granted INRD authority to discontinue service over the Line and granted N&W authority to abandon the Line. Norfolk & W. Ry. – Aban. Exemption – Between Indianapolis & Tipton in Marion, Hamilton, & Tipton Ctys., Ind., AB 290 (Sub-No. 117X), et al. (ICC decided Nov. 4, 1991).

In 1995, the cities of Fishers and Noblesville purchased the Line from N&W, and Hamilton County became a joint owner of the Line in 2006. The 1995 purchase was not subject to ICC licensing authority pursuant to Common Carrier Status of States, State Agencies & Instrumentalities, & Political Subdivisions (“Common Carrier Status of States”), 363 I.C.C. 132 (1980), aff’d sub nom. Simmons v. I.C.C., 697 F.2d 326 (D.C. Cir. 1982). Pursuant to that decision, where a state entity acquires a line of railroad approved for abandonment and the abandonment has not been consummated, the acquisition is exempt from Board regulation.

As noted, on August 1, 2017, Petitioners filed a petition for partial revocation of their exempt status under Common Carrier Status of States. Petitioners sought revocation so that they could rail bank the Line and develop a trail pursuant to the Trails Act, 49 U.S.C. § 1247(d), and the Board’s interim trail use regulations, 49 C.F.R. § 1152.29. Petitioners argued that the Line remains within the Board’s jurisdiction and available for interim trail use, because the 1991 abandonment authority was never consummated. Petitioners presented various legal paths in their Petition and subsequent filings through which they might pursue rail banking of the Line,

including revocation of their exemption from certain regulation under Common Carrier Status of States to enable them to initiate a new abandonment proceeding and invoke the Trails Act in that proceeding. Petitioners also asked that any such abandonment proceeding be exempted from the statutes and regulations pertaining to an offer of financial assistance (“OFA”) (49 U.S.C. § 10904 and 49 C.F.R. § 1152.27) and public use (49 U.S.C. § 10905 and 49 C.F.R. § 1152.28). In making this request, Petitioners obviously were trying to prohibit anyone from reactivating common carrier service on this Line, contrary to the policy behind the Trails Act to maintain rail lines for future rail use. See 16 U.S.C. § 1247(d) (expressing “national policy to preserve established railroad rights-of-way for future reactivation of rail service”).

On November 13, 2017, USR and the Indiana Transportation Museum (“ITM”) filed joint comments arguing that the Board should partially revoke the exemption to allow Petitioners to commence a new abandonment proceeding, but only if that proceeding is subject to the OFA procedures cited above. This result would have permitted USR and ITM to file an offer of financial assistance, therein demonstrating “that there is an overriding public need for rail service over the [L]ine” and that USR and ITM are “financially responsible” persons in accordance with the OFA regulations.¹

On May 31, 2018, the Board served its Decision in this proceeding in response to the Petition. The Board found that the Petitioners were exempt from certain Board regulation under Common Carrier Status of States. It also decided that the abandonment of the Line authorized in 1991 was never consummated. Finally, the Board found “that Petitioners can directly invoke the Trails Act without the need to revoke their exempt status or commence a new abandonment

¹ ITM is not a party to this motion because USR alone will purchase the Line once given authority by the Board.

proceeding, because it has allowed similarly situated line owners to do so on lines acquired under Common Carrier Status of States.” The Board specifically rejected the argument by USR and ITM for the commencement of a new abandonment proceeding but did not elaborate on whether they could pursue another avenue at this point to attempt to purchase the Line from Petitioners.

On June 8, 2018, Fishers petitioned the Board for a NITU on five miles of the Line from approximately MP 14 to approximately MP 19 in the 1991 abandonment proceeding. Norfolk & W. Ry. – Aban. Exemption – Between Indianapolis & Tipton in Marion, Hamilton, & Tipton Cts., Ind., AB 290 (Sub-No. 117X), et al. (ICC decided Nov. 4, 1991). This filing caused USR also to file a Motion for Preliminary Injunction with this motion to ensure it protects its rights to purchase the Line.

USR is a “financially responsible person” under 49 U.S.C. § 10907(a); that is, USR has the financial resources to purchase the Line for the constitutionally minimum value and to provide adequate transportation over the Line for three years. USR is a Class III, short line railroad operator. It currently operates a railroad in Indiana through a lease, The Winamac Southern Railway (“WSRY”). In addition to the WSRY trackage, USR operates a 12-mile segment of track from Marion to Amboy, Indiana. This track is owned by a company called Kokomo Rail (part of the Kokomo Grain family of companies). This track connects directly to Norfolk Southern at Marion. USR is 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. The WSRY is a Class III railroad in northern Indiana. It owns two lines radiating from Logansport to Kokomo and Bringhurst, Indiana. It hauls mainly outbound grain and inbound agricultural supplies, connecting with

the Toledo, Peoria & Western Railway at Logansport and with the Central Railroad of Indianapolis at Kokomo. WSRV comprises approximately 59 miles of main line track.

Moreover, pursuant to the “preliminary financial responsibility” provision in 49 C.F.R. § 1152.27(c)(1)(ii) for offers of financial assistance under 49 U.S.C. § 10904, USR meets this requirement. USR has in place a quote from OmniSource for the delivery of random lengths of rail at a price of \$275.00 per gross ton dated June 11, 2018. Based upon this scrap price per ton times 132 short tons times 37.56 miles of rail, the scrap value of the line is \$1,363,428.00. The additional sum pursuant to 49 C.F.R. § 1152(c)(1)(ii) of \$4,000 times 37.56 is \$150,240 times 2 equals \$300,480.00. The total preliminary financial responsibility is \$1,663,908.00 ($\$1,363,428.00 + \$300,480.00 = \$1,663,908.00$). USR has cash available through a line of credit in excess of that amount to pay the purchase price.

In addition, there is a need for rail service on the Line. Crown Technology, Inc. (“Crown”), Stone Spectrum (“Stone”) and The Quikrete Companies (“Quikrete”) have filed comments in this proceeding expressing a need for rail service on the Line. Crown and Quikrete are former shippers on the Line. Crown has a private sidetrack to enable rail transportation. Quikrete has buildings on both sides of the Line. Stone has a need for 100+ railcars of service on the Line per year. Kokomo Grain, Inc. has stated in this proceeding that based on its knowledge of the local grain market, the Line could expect to handle as many as 1900 carloads of grain per year. USR is ready to operate the Line and handle this need for rail service once it obtains proper authority from the Board.

Consequently, USR wants to purchase this Line and has the resources to do so. As a result, USR respectfully asks the Board for guidance on how to achieve this outcome before Petitioners finalize the trail use process and remove any track on the Line.

DISCUSSION

USR asks the Board to grant its request to clarify the Decision to describe USR's options to obtain authority to purchase the Line from Petitioners. As noted, the Line remains subject to the jurisdiction of the Board because the abandonment authorization was never consummated. Accordingly, the Board has the exclusive authority to permit a new rail carrier to purchase and operate on this Line. However, because of the unusual procedural state of the abandonment case, which has been in limbo since 1991 and was recently addressed in the Decision, it is unclear what path USR must pursue now to purchase the Line. It is clear though that there must be a path available that would allow USR to purchase and operate the Line to comply with the transportation policy to maintain rail service on the Line. See 49 U.S.C. § 10101(4) (stating federal policy "to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense").

Where a rail line remains subject to the Board's jurisdiction, there are various ways for an interested party to purchase a Line that its owner no longer wants to operate.² Even though Fishers has already petitioned the Board for a NITU, these various ways to purchase the Line

² As proposed by USR and ITM in their earlier comments, they would have been able in a new abandonment proceeding to acquire the Line through an offer of financial assistance under 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27. However, section 10904(c) provides that "[w]ithin 4 months after an application is filed under section 10903, any person may offer to subsidize or purchase the railroad line that is the subject of such application." Clearly, USR and ITM now cannot offer to purchase the Line within four months after the notice of exemption from section 10903 was filed by N&W since that occurred over 26 years ago, unless the Board can toll or exempt USR from this statutory period. See R.R. Ventures, Inc. v. STB, 299 F.3d 523 (6th Cir. 2002), SF&L Ry., Inc. – Abandonment Exemption – In Hancock, McDonough, Fulton & Peoria Counties, IL, AB 448 (Sub. No. 2X) (STB served December 26, 2002). USR asks the Board if it can file an offer of financial assistance in this abandonment proceeding by having the Board toll or exempt it from this statutory period.

take priority over the trail use request because they are mandatory and the NITU is voluntary.

See Rail Abandonments--Use of Rights of Way as Trails, 2 I.C.C.2d 591, 608 (1986). Therefore, the Board can and should delay the trail use process to permit the completion of the purchase of the Line. See BNSF Ry. Co.—Abandonment Exemption—In Flathead County, MT, slip op. at 5 (STB served August 14, 2017).

USR asks if it can submit an application under the feeder line statute, 49 U.S.C. § 10907, and the corresponding regulation, 49 C.F.R. § 1151.2. Section 10907 provides in pertinent part:

(b)(1) When the Board finds that—

(A)(i) the public convenience and necessity require or permit the sale of a particular railroad line under this section; or

(ii) a railroad line is on a system diagram map as required under section 10903 of this title, but the rail carrier owning such line has not filed an application to abandon such line under section 10903 of this title before an application to purchase such line, or any required preliminary filing with respect to such application, is filed under this section; and

(B) an application to purchase such line has been filed by a financially responsible person,

the Board shall require the rail carrier owning the railroad line to sell such line to such financially responsible person at a price not less than the constitutional minimum value.

Section 10907 should apply here and the Board should authorize USR to file an application under Section 10907(b)(1)(A)(i) to purchase the Line. The public convenience and necessity (“PCN”) clearly require the sale of the Line, because USR is a “financially responsible person” that can pay a price not less than the constitutional minimum value and provide freight transportation service on the Line for three years. Also, there is a need for rail service on this Line as demonstrated by the four shippers who have filed letters in support of rail service in this proceeding.

Section 10907 lists five standards to satisfy the PCN:

(c)(1) For purposes of this section, the Board may determine that the public convenience and necessity require or permit the sale of a railroad line if the Board determines, after a hearing on the record, that—

(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.

USR satisfies these standards because the Line has been authorized for abandonment and no freight traffic has been on the Line in over fifteen years.

Moreover, it makes sense to utilize the feeder line provision to allow USR to seek the authority to purchase the Line. While feeder line applications are usually filed before an abandonment proceeding has commenced at the Board, the Board has ruled that a feeder line application can be heard when an abandonment proceeding involving the line is pending.

Revision of Feeder R.R. Development Rules, EP 395 (Sub. No. 2), slip op. at 8 (STB served Sept. 8, 1991). See Oregon Int'l Port of Coos Bay--Feeder Line Application—Coos Bay Line of the Central Oregon & Pac. R.R., Inc., FD 35160 (STB served October 31, 2008); New York & Greenway Ry.—Feeder Line Acquisition—A Line of Norfolk Southern Ry. Co., FD 34649 (STB served July 27, 2005). The Board decides on a case-by-case basis whether to accept a feeder line application filed subsequent to an overlapping abandonment application. Id. A feeder line application is ideal in the present case because USR is a financially responsible person interested

in purchasing the Line, which otherwise would be rendered useless by the removal of the track and development of a trail on it. Consequently, the Board should consider a feeder line application by USR first before permitting the interim trail use process to proceed.

In addition, the Board should allow USR to use the feeder line process because, if the Petitioners successfully negotiate an interim trail use agreement under the Trails Act, USR could then seek to reactivate the rail-banked line because it would remain subject to the jurisdiction of the Board. This additional process of going through the Trails Act seems counterintuitive because the same result would occur if a feeder line application is accepted now. The policy behind the Trails Act is to maintain rail lines for future rail service, and here rail service could be obtained more efficiently through a feeder line application. See 16 U.S.C. § 1247(d) (“Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.”) Accordingly, the Board should decide now whether USR can purchase and operate the Line under the feeder line process. USR respectfully asks the Board to allow it to purchase the Line pursuant to the feeder line guidelines to reactivate rail service here.

Lastly, as the final option to purchase the Line, the Board could determine that USR could purchase the Line only after it has been rail banked by Petitioners pursuant to the Trails Act. USR would then have to file a petition to vacate the Notice of Interim Trail Use (“NITU”)

and file an application to purchase the Line. See 49 C.F.R. § 1152.29(d)(2); Norfolk and Western Ry. Co. – Abandonment – St. Marys and Minister in Auglaise County, OH, 9 I.C.C. 2d 1015, 1016-1017 & n.3 (1993). As discussed above, that option would unnecessarily involve an additional process and presents the risk of destruction of the rail infrastructure in the interim. USR seeks clarification if this avenue is the only way it can pursue the purchase of the Line.

1. Common Carrier Status of the States Does Not Exempt Petitioners

Petitioners may argue in response that they are exempt from 49 U.S.C. § 10907 under the Common Carrier Status of the States exemption from regulation by the Board. However, this exemption only applies to 49 U.S.C. §§ 10901, 10903, and 11101. Simmons v. I.C.C., 697 F.2d 326, 343 (D.C. Cir. 1982) (“The effect of the modified certificate program was to exempt states, or their operators, from the filing procedures and other restrictions contained in 49 U.S.C. §§ 10901, 10903, and 11101.”) The purpose behind this exemption was to make it easier for states to purchase and operate a rail line “in danger of immediate termination” by streamlining the regulatory process to permit them to start and stop service without regulatory approval. Id. There is no mention of exemption from the feeder line statute in Common Carrier Status of the States. In fact, the point behind the feeder line statute was also the preservation of rail lines in danger of being abandoned, so it would not make any sense to exempt the states from this provision. It makes more sense to permit this exemption and Section 10907 to act in harmony with one another.

If the Board finds that the Common Carrier Status of States exemption does somehow apply to Section 10907 or any other provision in the Interstate Commerce Act needed here to purchase the Line, USR respectfully asks the Board to revoke the exemption for the purposes of its request to purchase the Line under the feeder line provision or after the Line is rail-banked.

“The 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). Under the facts presented here, transportation policy clearly warrants allowing USR to purchase the Line and revocation (if needed) of the Common Carrier Status of States exemption to allow USR to proceed with its plan. As noted above, the Line is over forty miles long and the cost of replacing track, if Petitioners were allowed to remove it, would make reactivation of rail service cost prohibitive. The transportation policy is best followed by keeping the track in place while the Board determines whether USR can purchase the Line. The transportation policy would certainly be served by protecting the public’s access to rail service. See Colorado Wheat Administrative Committee, et al. v. V & S Ry., LLC, NOR 42180, slip op. at 6 (STB served May 7, 2015). Otherwise, it is likely the Line would never be reactivated if the track is removed and it is turned into a trail.

A trail with removal of the track would run counter to this same rail transportation policy to maintain a sound rail transportation system for the public. 49 U.S.C. § 10101(4). It also would undercut the national policy behind the Trails Act “to preserve established rights way for future reactivation of rail service.” 16 U.S.C. § 1247(d). Moreover, “[i]t has long been the policy of the Board and its predecessor, [ICC], to encourage feeder line applications.” Keokuk Junction Ry. Co. – Feeder Line Application – Line of Toledo Peoria & Western Ry. Corp. between LaHarpe and Hollis, IL, slip op. at 3 (STB served September 26, 2003). “Indeed, the Feeder Railroad Development Program was enacted by Congress to encourage financially responsible persons to

acquire and preserve feeder lines prior to their substantial deterioration and abandonment.” Id. (cites omitted). All of these policies favor keeping the Line active and the granting of this revocation request over the development of a rail trail. As such, the Board should permit USR to file a feeder line application now whether it requires revocation of the exemption or not.

Petitioners have had over twenty years to convert this Line into a trail since the ICC authorized it for abandonment in 1991, or at least since it was purchased by the cities in 1995. There certainly is not harm in requiring Petitioners to pause for a few months while the Board determines whether USR may purchase the Line, as it wishes to do.

CONCLUSION

Based on the foregoing discussion, the Board should grant this request for clarification and permit USR to purchase and operate the Line pursuant to one of these options.

Respectfully submitted

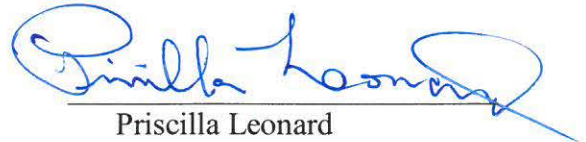
Donn C. Meindertsma
Conner & Winters, LLP
1850 M Street N.W., Suite 600
Washington, D.C. 20036
(202) 887-5711

Counsel for Joint Petitioners

Dated: June 11, 2018

CERTIFICATE OF SERVICE

I, Priscilla Leonard, hereby certify that a copy of the foregoing **MOTION FOR CLARIFICATION** dated June 11, 2018, was served by overnight mail to Petitioners, and U.S. Mail, first class postage prepaid, upon all other parties of record.


Priscilla Leonard

VERIFIED STATEMENT OF DANIELLE HALL MITCHELL

My name is Danielle Hall Mitchell, and my business address is 7846 W. 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 the finances of USR.

I am making this statement in support of USR's Motions for Preliminary Injunction and Clarification in this proceeding. The statements in these motions are true and correct. More specifically, this statement describes and documents that US Rail is financially responsible and the line of rail at issue could serve the needs of shippers who want rail service in this area.

This rail line is owned by the cities of Fishers, Noblesville, Ind., and Hamilton County, Ind. (collectively, Petitioners). 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"). USR intends to buy and operate the Line as a common carrier if given the authority to do so by the Surface Transportation Board.

USR is a "financially responsible person" as that term is defined in 49 U.S.C. § 10907(a); that is, it has the financial resources to purchase the Line for the constitutionally minimum value and to provide adequate transportation over the Line for three years. USR is a Class III, short line railroad operator and provides a variety of value-added rail transportation services. It currently operates a railroad in Indiana, The Winamac Southern Railway ("WSRY"). In addition to the WSRY trackage, USR operates a 12-mile segment of track from Marion to Amboy, Indiana. This track is owned by a company called Kokomo Rail (part of the Kokomo Grain

family of companies). This track connects directly to Norfolk Southern at Marion. 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.

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per year. Kokomo Grain, Inc. has stated in this proceeding that based on its knowledge of the local grain market, the Line could expect to handle as many as 1900 carloads of grain per year. USR is ready to operate the Line and handle this need for rail service once it obtains proper authority from the Board.

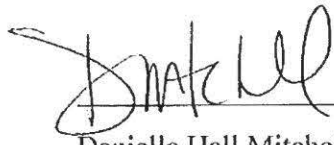
Removal of the track and other rail assets on the Line now would cause irreparable harm to USR because reactivation of the Line would become cost prohibitive if Petitioners are permitted to take this action. The finalization of the trail use process and removal of the track is imminent as the Petitioner Fishers has petitioned the Board for a Notice of Interim Trail Use in this abandonment proceeding.

However, if the track and rail assets remain in place while USR pursues the proper avenue for the purchase and operation of the Line at the Board, nobody would be harmed and the reactivation of common carrier freight rail service could be realized. The Line has been in a suspended state for over 26 years and waiting a few more months to review whether reactivation of rail service is permissible under the Board's regulations would not hurt anyone.

VERIFICATION

I, Danielle Hall 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 June 11, 2018.


Danielle Hall Mitchell