

March 17, 2017

JOHN D. HEFFNER
(202) 742-8607
Direct Fax (202) 742-8697
John.Heffner@strasburger.com

ENTERED
Office of Proceedings
March 17, 2017
Part of
Public Record

BY E-Filing

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

**RE: STB Docket No. AB-55 (Sub-No. 643X), CSX Transportation, Inc.,
Abandonment Exemption-In La Porte, Porter and Starke Counties, IN
Petition to Reopen Offer of Financial Assistance Proceeding**

**FD 36076, Chesapeake And Indiana Railroad Company
Petition for Declaratory Relief**

Dear Ms. Brown:

On behalf of the Chesapeake And Indiana Railroad Company ("CKIN"), I am e-filing CKIN's Response to the Chicago and North Judson Railway Company's Reply to CKIN's Motion to Compel Production of Documents. CKIN respectfully requests that the Board waive its usual rule against the filing of a reply to a reply in the interest of a complete record in this case.

Sincerely yours,



John D. Heffner

Enclosures

cc: All parties

8784965 1/SP/25194/0101/031717

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**CSX TRANSPORTATION, INC.—ABANDONMENT EXEMPTION—
IN LAPORTE, PORTER AND STARKE COUNTIES, IN**

**CHESAPEAKE AND INDIANA RAILROAD
PETITION TO REOPEN
OFFER OF FINANCIAL ASSISTANCE PROCEEDING**

FD 36076

**CHESAPEAKE AND INDIANA RAILROAD COMPANY
PETITION FOR DECLARATORY RELIEF**

**RESPONSE OF
CHESAPEAKE AND INDIANA RAILROAD COMPANY
TO CHICAGO & NORTH JUDSON RAILWAY COMPANY REPLY**

Submitted by

John D. Heffner
Strasburger & Price, LLP
1025 Connecticut Ave., NW
Suite 717
Washington, D.C. 20036
(202) 742-8607

Dated: March 17, 2017

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**CSX TRANSPORTATION, INC.–ABANDONMENT EXEMPTION–
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**I.
INTRODUCTION**

Chesapeake and Indiana Railroad Company, Inc. (“CKIN”) moves the Board for leave to respond to the reply filed on March 14, 2017, by the Chicago & North Judson Railway (“CNJR”) to CKIN’s timely Motion to Compel submitted in the above-captioned proceedings.¹ Granting CKIN’s request and considering its

¹ The Board has held on numerous occasions that it will accept a “reply to a reply” where necessary for a complete record. *See, e.g., City of Woodinville, Wash.-Petition for Declaratory Order*, FD 35905 (STB served Oct. 7, 2015).

arguments will not unduly complicate or delay these proceedings. Moreover, CKIN anticipates that the information obtained through discovery will provide the Board with a more complete record.

II. BACKGROUND

By now the Board is extremely familiar with the facts of this dispute so they will only be repeated as necessary for the Board's understanding.

On January 10, 2017, CKIN sent CNJR a very simple document production request. Because counsel for CNJR advised that he did not receive that request, CKIN revised and resent its request on January 25, 2017. CNJR responded in a pleading dated February 14 but actually sent February 17, 2017. CNJR offered several questionable excuses for its failure to provide the requested information. Among them, CNJR based its refusal to respond on attorney-client privilege, attorney work product privilege, a claim that no further pleadings are authorized, that the requested documents relate to a potential transaction which is not yet subject to a Board proceeding, that the requested documents are neither relevant or likely to lead to the production of admissible evidence, and that the request is overly broad and unduly burdensome. CKIN filed its Motion to Compel on

February 22, 2017, to which CNJR waited until the last minute to file a response urging its denial.²

III. ARGUMENT

Simply stated, CNJR urges the Board to reject CKIN's Motion to Compel discovery on the grounds that it is untimely and irrelevant to the proceedings, that discovery is often not provided for in declaratory order proceedings, and that CKIN's request is vague and overly broad as well. CNJR is wrong on all counts and will address each one.

First, while CKIN initiated its Board proceedings on November 14, 2016, it did not know with any degree of certainty as to when or if CNJR would even appear in those proceedings. Had CKIN sought discovery from CNJR at that time, CNJR would likely have argued that CKIN was not entitled to any discovery from it as a nonparty.

Second, much of CKIN's alleged delay in initiating discovery was due to circumstances beyond CKIN's control. As CNJR's counsel might recall, the deadline for responses to CKIN's petition was extended from mid-December to December 27, to accommodate a request from counsel for the Town of North Judson ("the Town"). CKIN graciously agreed to that reasonable request.

² The email from CNJR counsel transmitting a copy to CKIN counsel was either transmitted or received at 11:44PM Tuesday evening March 14, 2017. A copy is attached. Assuming that the filing took place after 5PM that day, CNJR's reply would have been untimely.

Moreover, like many other lawyers CKIN's counsel was out of the office due to the holidays until January 3, 2017. Discounting any transmission error by CKIN, the passage of time from mid-November until late January can hardly be considered "egregious" in view of the numerous intervening federal holidays of Thanksgiving, Christmas, New Years, and Doctor Martin Luther King's Birthday. Inasmuch as declaratory petition proceedings frequently take the better part of a year, any delay to the consideration of this petition due to discovery is modest at best.

Third, CNJR berates CKIN for its alleged failure to seek the information sought here from the Town or the Hoosier Valley Railroad Museum ("HVRM") instead. CKIN has sought discovery from both CNJR and HVRM in its civil proceeding in Indiana. CNJR is obviously unaware that the Town of North Judson is seriously late in its efforts to provide CKIN with responses to its discovery requests and the HVRM has totally ignored the discovery requests propounded to it until today. Both have promised to respond next week.³

Fourth, CNJR suggests that CKIN is not entitled to discovery in this proceeding citing out of context a case where the Board stated that it does not often provide for discovery in declaratory proceedings. In fact, the Board has on many

³ See the email correspondence with Town attorney Rachel Arndt and HVRM counsel attached hereto.

other occasions allowed discovery in declaratory order proceedings.⁴ There is a significant distinction between the instant proceeding and *The Illinois State Toll Highway Authority* case referenced by CNJR and the *CSX* case cited therein.⁵ In denying discovery in *Illinois State Toll Highway Authority*, the Board noted that its environmental impact statement provided sufficient information for it to decide the case. In *CSX* the Board in denying discovery observed that *CSX* failed to indicate what relevant information it would obtain through its request.

Fifth, as to relevance, CNJR cites the very same precedent, *Waterloo Ry.—Adverse Aban.—Lines of Bangor & Aroostook R.R. & Van Buren Bridge Co. in Aroostook Cnty., Me.*, Docket No. AB 124 (Sub-No. 2), et al. (STB served Nov. 14, 2003), which CKIN also relied upon. There the Board required the production of certain requested information holding

“discovery must be “relevant to the subject matter involved in a proceeding” or be “reasonably calculated to lead to the discovery” of relevant evidence. The requirement of relevance means that the information might be able to affect the outcome of a proceeding. Under 49 CFR 1114.21(c), discovery also may be denied if it would be unduly burdensome in relation to the likely value of the information sought.” Slip op. at 2.

⁴ See, e.g., *Springfield Terminal Railway Company-Petition for Declaratory Order*, NOR 42108 (STB-served June 16, 2010) and *Finch Paper, LLC, Petition for Declaratory Order*, FD 35981 (STB-served January 18, 2017).

⁵ *The Illinois State Toll Highway Authority- Petition for Declaratory Order*, FD 36075 (STB-served January 17, 2017) and *CSX Transportation, Inc.-Petition for Declaratory Order*, FD 33388 (Sub-No. 101) (STB-served August 27, 2008).

While CNJR claims that CKIN's requests are overly broad and burdensome, it has not provided any explanation. Because CKIN believes that the number of relevant documents is small, it should be very easy for CNJR to comply with CKIN's request.

For the reasons stated in its Motion, CKIN believes that a comparison between its operating conditions and those contained in the proposed arrangements between CNJR and the Town and HVRM will demonstrate that the Town and HVRM effectively controlled and constrained CKIN's operations as a common carrier. Production of those documents will enhance the Board's ability to see whether or to what extent the Town and HVRM have been adversely affecting CKIN's ability to provide common carrier service.

IV. CONCLUSION

The documents sought here will shed light on the extent to which the Town and HVRM have constrained CKIN's ability to perform common carrier railroad service in a way that CNJR will not have to face if it becomes the Town's chosen railroad operator. CKIN's ability to provide common carrier service to its customers is the central issue in this proceeding. As the potential "heir apparent" for operating this railroad line, CNJR has a distinct interest in the outcome of this proceeding. For that reason alone discovery against it is appropriate. Accordingly,

CKIN urges the Board to order CNJR to provide the requested documents and/or to appoint an administrative law judge to resolve discovery disputes.

Respectfully submitted,



John D. Heffner
Strasburger & Price, LLP
1025 Connecticut Ave., NW
Suite 717
Washington, D.C. 20036
(202) 742-8607

Dated: March 17, 2017

Heffner, John D.

From: Thomas J. Litwiler <TLitwiler@fletcher-sippel.com>
Sent: Tuesday, March 14, 2017 11:43 PM
To: Heffner, John D.
Cc: tmcfarland@ameritech.net; rachel@peterson-waggoner.com; jfiorilla@capehart.com; 'cspitulnik@kaplankirsch.com'; sosit@kaplankirsch.com
Subject: AB-55 (Sub-No. 643X) and FD 36076
Attachments: TJL-CNJR Reply to CKIN Motion to Compel, 3-14-17.pdf

John,

Attached is a reply filed today in the above-captioned proceedings at the STB by Chicago & North Judson Railway Company. Hard copies have been mailed to you and each of the copied counsel.

Kind regards.

TJL

Thomas J. (T.J.) Litwiler
Fletcher & Sippel LLC
29 North Wacker Drive
Suite 920
Chicago, IL 60606-2832
(312) 252-1508
tlitwiler@fletcher-sippel.com

Heffner, John D.

From: Pennell, Stephen R. <SRP@stuartlaw.com>
Sent: Monday, March 06, 2017 10:10 AM
To: Powell Felix (ibcx@frontier.com)
Cc: Heffner, John D.; Stupich, David M.
Subject: FW: CKIN

fyi

From: rachel@peterson-waggoner.com [<mailto:rachel@peterson-waggoner.com>]
Sent: Monday, March 06, 2017 10:09 AM
To: Pennell, Stephen R.
Cc: Tom McFarland (mcfarland@aol.com); Jerry Huelat (jhuelat@hmkattorneys.com)
Subject: Re: CKIN

Stephen:

I am told that the town will be meeting in executive session to review and finalize. I should be able to have them to you within a week.

Sent from my iPad

On Mar 6, 2017, at 9:44 AM, Pennell, Stephen R. <SRP@stuartlaw.com> wrote:

The Town's responses the first and second set of discovery are now past due. Please let me know when you intend to serve the responses. If I have received them before the hearing on Thursday I will have to let the court know the Town's discovery responses are past due. Steve

Stephen Pennell
PARTNER

<image001.jpg>
300 Main Street, Suite 900 | P.O. Box 1010 | Lafayette, IN 47902-1010
P: 765.428.7034 | F: 765.742.8175 | srp@stuartlaw.com

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Stuart & Branigan LLP

Heffner, John D.

From: Pennell, Stephen R. <SRP@stuartlaw.com>
Sent: Wednesday, March 15, 2017 4:15 PM
To: Chuck Parkinson (cparkinson@hwllaw.com)
Cc: Heffner, John D.; rachel@peterson-waggoner.com
Subject: HVRM

In your letter of December 15, 2016 you requested an extension of time until February 15 to respond to CKIN's nonparty request for production of documents. The response of HVRM is now a month past due even with the extension. Please advise when I may expect to receive the documents we requested. Steve

Stephen Pennell
PARTNER



300 Main Street, Suite 900 | P.O. Box 1010 | Lafayette, IN 47902-1010
P: 765.428.7034 | F: 765.742.8175 | srp@stuartlaw.com

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Stuart & Branigin LLP

Heffner, John D.

From: Pennell, Stephen R. <SRP@stuartlaw.com>
Sent: Thursday, March 16, 2017 10:37 AM
To: Powell Felix (ibcx@frontier.com)
Cc: Heffner, John D.
Subject: FW: CKIN

From: Rachel Arndt [<mailto:rachel@peterson-waggoner.com>]
Sent: Thursday, March 16, 2017 9:19 AM
To: Pennell, Stephen R.
Cc: Tom McFarland (mcfarland@aol.com); Heffner, John D. (John.Heffner@strasburger.com)
Subject: Re: CKIN

Stephen:
We can have the Discovery to you by Tuesday of next week. So, Tuesday, March 21.

-Rachel Arndt

574-223-4292



Rachel Arndt
Peterson Waggoner & Perkins, LLP

On Wed, Mar 15, 2017 at 4:09 PM, Pennell, Stephen R. <SRP@stuartlaw.com> wrote:

The town is now seriously past due in responding to our requests for discovery. Please provide a firm date by which you will be ready to serve the town's responses. Steve

Stephen Pennell

PARTNER



300 Main Street, Suite 900 | P.O. Box 1010 | Lafayette, IN 47902-1010

P: [765.428.7034](tel:765.428.7034) | F: [765.742.8175](tel:765.742.8175) | srp@stuartlaw.com

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Stuart & Braughm LLP

Heffner, John D.

From: Pennell, Stephen R. <SRP@stuartlaw.com>
Sent: Friday, March 17, 2017 11:33 AM
To: Chuck Parkinson
Cc: Heffner, John D.; Powell Felix (ibcx@frontier.com)
Subject: RE: HVRM

Thank you for the response.

From: Chuck Parkinson [<mailto:cparkinson@hwllaw.com>]
Sent: Friday, March 17, 2017 11:23 AM
To: Pennell, Stephen R.
Subject: RE: HVRM

We are scanning the last of the responsive documents and will have them to you next week.

Thank you for your patience.

Charles F.G. Parkinson
HARRIS WELSH & LUKMANN
107 Broadway
Chesterton, Indiana 46304
(219) 926-2114 - phone
(219) 926-1503 - fax
www.hwllaw.com

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From: Pennell, Stephen R. [<mailto:SRP@stuartlaw.com>]
Sent: Wednesday, March 15, 2017 3:15 PM
To: Chuck Parkinson <cparkinson@hwllaw.com>
Cc: Heffner, John D. (John.Heffner@strasburger.com) <John.Heffner@strasburger.com>; rachel@peterson-waggoner.com
Subject: HVRM

In your letter of December 15, 2016 you requested an extension of time until February 15 to respond to CKIN's nonparty request for production of documents. The response of HVRM is now a month past due even with the extension. Please advise when I may expect to receive the documents we requested. Steve

Stephen Pennell
PARTNER



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Stuart & Branigin LLP

CERTIFICATE OF SERVICE

I, John D. Heffner, hereby certify that a copy of the foregoing Response of Chesapeake and Indiana Railroad Company to Chicago and North Judson Railway Company Reply was sent by electronic mail and first class US Mail to all parties of record in this proceeding.

Janet H. Gilbert
Thomas J. Litwiller
Fletcher & Sippel LLC
29 North Wacker Drive, Suite 920
Chicago, IL 60606

John K. Fiorilla
Capehart Scatchard
Attorneys at Law
8000 Midatlantic Drive
Suite 300S
Mount Laurel, New Jersey

Thomas F. McFarland
Thomas F. McFarland, P.C.
208 South LaSalle Street, Suite 1890
Chicago, IL 60604-1112

Rachel Arndt
Peterson, Waggoner & Perkins, LLP
125 East Tenth Street
Rochester, IN 46975

Charles Spitulaik
Steven L. Orsit
Kaplan Kirsch & Rockwell LLP
1001 Connecticut Avenue, NW, Suite 800
Washington, D.C. 20036

Louis E. Gitomer
600 Baltimore Avenue
Suite 301
Townson, Maryland 21204



John D. Heffner

Dated: March 17, 2017