

FLETCHER & SIPPEL LLC

ATTORNEYS AT LAW

29 North Wacker Drive
Suite 920
Chicago, Illinois 60606-2832

ROBERT A. WIMBISH
(312) 252-1504
rwimbish@fletcher-sippel.com

Phone: (312) 252-1500
Fax: (312) 252-2400
www.fletcher-sippel.com

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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

Dear Ms. Brown:

Enclosed for filing in the above-captioned proceeding is a **Response to**
Comments of the Cities of Fishers and Noblesville, Indiana, and Hamilton County, Indiana,
dated October 23, 2017.

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

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. FD 36137

**CITY OF FISHERS, CITY OF NOBLESVILLE, AND HAMILTON COUNTY, INDIANA
-- PETITION FOR PARTIAL REVOCATION OF EXEMPTION**

RESPONSE TO COMMENTS

Robert A. Wimbish
Fletcher & Sippel LLC
29 North Wacker Drive
Suite 920
Chicago, Illinois 60606-2832
(312) 252-1500

**ATTORNEY FOR CITY OF FISHERS,
CITY OF NOBLESVILLE, AND
HAMILTON COUNTY, INDIANA**

Dated: October 23, 2017

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. FD 36137

**CITY OF FISHERS, CITY OF NOBLESVILLE, AND HAMILTON COUNTY, INDIANA
-- PETITION FOR PARTIAL REVOCATION OF EXEMPTION**

RESPONSE TO COMMENTS

This proceeding was initiated by the Cities of Fishers and Noblesville, Indiana, and Hamilton County, Indiana (collectively, the “Owners”), who, on August 1, 2017, filed what they entitled as a “Petition for Partial Revocation of Exemption” (the “Revocation Petition”). The Owners seek to deploy an inactive railroad corridor that they own, and that has long been without freight service, for recreational purposes under the Surface Transportation Board’s (the “Board”) interim trails use procedures. Interested parties – many of them heedless of the applicable rules of agency procedure – offered various comments in response in the weeks following. At the Owners’ urging, the Board issued an order on September 22 (the “September 22 Order”) permitting comments on the Revocation Petition until October 12, 2017, and allowing the Owners until October 23, 2017, to respond.

Following is the Owners’ formal Response to the comments that have been filed throughout the course of this proceeding. As shown herein and in its previous filings, the Owners should be allowed to pursue their interim trails use objectives, and the Board should facilitate the Owners’ objectives through the most efficient regulatory process possible.

BACKGROUND

The Nickel Plate Line

In late 1991, Norfolk and Western Railway Company (“N&W”) secured Interstate Commerce Commission (“ICC”) authority to abandon roughly 37.56 miles of railroad line – the “Nickel Plate Line” – extending between Indianapolis, Indiana, and Tipton, Indiana. See Norfolk and Western Railway Company – Abandonment Exemption – Between Indianapolis and Tipton in Marion, Hamilton, and Tipton Counties, IN, Docket No. AB-290 (Sub-No. 117X), et al. (ICC decided Nov. 4, 1991). In that same 1991 decision, The Indiana Rail Road Company (“INRD”) was authorized to discontinue previously-licensed common carrier operations over the Nickel Plate Line (see id.), although INRD operations over the line continued until 2003.

In June of 1995, the Cities of Fishers and Noblesville acquired the Nickel Plate Line from N&W. Hamilton County joined Fishers and Noblesville as a joint owner of the Nickel Plate Line in 2006. The Owners delegated administrative oversight – but not ownership – of the railroad corridor to the Hoosier Heritage Port Authority (“HHPA”), a public entity sometimes incorrectly identified in online resources as the owner of the Nickel Plate Line.

HHPA contracted with the Indiana Transportation Museum (“ITM”) to run intrastate excursion trains over the Nickel Plate Line. ITM operations ended in 2015. No freight traffic has moved over the Nickel Plate Line in roughly 14 years, not since the termination of INRD service. Neither the Owners nor HHPA have contracted with a third party to provide common carrier service over the line, and, consequently, no third party entity has ever invoked the Board’s “modified certificate” or class exemption procedures (at 49 C.F.R. part 1150, parts C and D, respectively) to conduct freight operations over the corridor.

The Owners have decided that the inactive Nickel Plate Line would best serve the community for the foreseeable future as a recreational resource. The Owners have agreed to invoke the STB's trails use procedures, whereupon the Nickel Plate Line would be designated as a "rail trail." The Owners contemplate that the corridor would be used for recreational purposes, and, through the HHPA, the Owners are also negotiating with an operator who has proposed a tourist train operation on a portion of the to-be-rail-banked line. The Owners filed with the Board on August 1, 2017, a "Petition for Partial Revocation of Exemption" (the "Revocation Petition") as may be necessary for the Owners to advance their trail use plans.

The Revocation Petition and Response

The Owners have invoked the Board's procedures in order to – (1) establish that the Nickel Plate Line was authorized for abandonment but is not fully abandoned; (2) confirm that the Nickel Plate Line remains subject to the Board's ongoing jurisdiction; (3) clarify that, under the circumstances of the Nickel Plate Line acquisition, the Owners are not common carriers and are exempt from Board regulation; and (4) depending upon the Board's resolution of the foregoing three jurisdictional issues, obtain the Board's permission and guidance concerning the path to achieving their interim trails use objectives, including, if necessary, a partial revocation of their Board-exempt status.

Many interested parties have responded to the Revocation Petition, a number of which are individuals from the local area. They urge the Board to bar the Owners from pursuing their trails use plans. The vast majority oppose trails use, preferring to see the entire Nickel Plate Line track remain intact so that it may once again host intrastate excursion train operations over most of its length. (Several of those opposed to trails use claim – falsely, as the Owners have pointed out in their Rebuttal filing of August 31, 2017 (the "Rebuttal") – that their views were

not considered in the local decision making process that preceded the filing of the Revocation Petition.) Although such an outcome is very unlikely to produce the result they intend, the trails use opponents frequently request that the Board deny the Revocation Petition.

THE REQUESTED RELIEF

The Board Should Identify the Path to Interim Trails Use

The facts of this case, although similar to those of the modified certificate termination cases (of which Tillamook Bay and Sammamish,¹ discussed below, are representative) and to the unique Caldwell Railroad Commission² partial revocation case, are not quite like any other that the Owners are aware of. Agency precedent or regulations offer no clearly-prescribed path to interim trails use. If, however, the Board agrees to facilitate the Owners' interim trails use goal, the Owners can conceive of three alternative paths as follows:

- The Board rules that, since the Owners are exempt from STB regulation, they may deploy the Nickel Plate Line as they have proposed without the need to resort to the trails use process, and that, in so doing, the line would still remain subject to the Board's jurisdiction unless or until the Owners subsequently advise the agency that they wish to remove the property from the Board's jurisdiction.
- The Board rules that the Owners, in the absence of a modified certificate operation, may invoke the Board's interim trails use procedures directly, and without the need for any intervening regulatory process. If it believes it necessary, the Board could waive elements of its interim trails use regulations that might implicate an abandonment proceeding as a trails use prerequisite.
- The Board conditions the Owners' trails use objectives upon completion of a three-step process of partial revocation (which would be granted at the conclusion

¹ Port of Tillamook Bay Railroad – Modified Rail Certificate, Docket No. FD 31676 (STB served Jul. 26, 2016) (“Tillamook Bay”); Sammamish Transp. Co. – Notice of Interim Trail Use & Termination of Modified Certificate, Docket No. FD 33398 (Sub-No. 1) (STB served Feb. 26, 1998) (“Sammamish”).

² Caldwell Railroad Commission – Exemption from Subtitle IV, Docket No. FD 32659 (Sub-No. 2) (STB served Sep. 8, 2015) (“Caldwell Railroad Commission”).

of this proceeding), followed by invocation of the Board's abandonment procedures, followed, in turn, by invocation of the Board's trails use regulations.

As they have pointed out before, where there is no terminating modified certificate operation, the Owners should be entitled to invoke the Board's trails use procedures directly. Because Common Carrier Status and 49 C.F.R. part 1150, subpart C indicate that the Board's role with respect to the Nickel Plate Line is ministerial, either of the first two paths would seem most in keeping with agency policy and regulations.

Although arguably unnecessary and certainly more regulatory, the Board could condition the Owners' trails use objectives upon completion of the above-described three-step process in keeping with the Caldwell Railroad Commission analog discussed in the Revocation Petition. And while this option is more onerous when compared to a scenario where termination of a modified certificate operation is the predicate to trails use, the Owners are willing to follow this path if they must, as evidenced by the Petition for Partial Revocation itself.

ARGUMENT

Threshold Legal and Jurisdictional Issues

It appears that virtually all parties agree that their ends – whether trails use or full preservation of track and corridor for some sort of excursion train operation – are best achieved by the Board confirming its jurisdiction over the Nickel Plate Line. However, the Owners fundamentally disagree with the trails use opponents on whether the Owners are, or should be, deemed to be common carriers subject to 49 U.S.C. subtitle IV. And they also disagree upon whether, in light of longstanding precedent, the Board may or could compel the Owners to retain the Nickel Plate Line in its current state, and to provide common carrier service over it.

Because the Nickel Plate Line was authorized for abandonment at a time when the ICC did not require formal notice of abandonment consummation (which under current rules is considered decisive as to the legal status of trackage), the agency has explained that it looks to various indicia of abandonment to make a jurisdictional determination.³ Here, the Owners have demonstrated in the absence of any competing evidence that the Nickel Plate Line's abandonment was not, and never has been, consummated. If the Board agrees, then the Nickel Plate Line remains as it was – a railroad line subject to the Board's jurisdiction.

Without question, the ICC authorized the abandonment of the Nickel Plate Line in 1991. When Fishers and Noblesville took title to the Nickel Plate Line in 1995, virtually all of the track was in place, and INRD continued to operate over the southern half of the corridor. The Owners know of no explicit abandonment "consummation." These factors support a "not fully abandoned" determination. Trails use opponents have provided no evidence supporting the competing proposition that the line was fully abandoned at the time of purchase or thereafter.⁴

Because the Nickel Plate Line remains within the Board's jurisdiction, the Board would aid all concerned by clarifying the Owners' legal status before this agency. Although they own railroad property (the Nickel Plate Line), longstanding agency precedent and corresponding regulations establish that the Owners are not common carriers, and that they are exempted fully

³ See, e.g., Baros v. Texas Mexican Ry. Co., 400 F.3d 228, 236 (5th Cir. 2005); Birt v. STB, 90 F.3d 580, 585 (D.C. Cir. 1996); Becker v. STB, 132 F.3d 60, 62 (D.C. Cir. 1997); RLTD Railway Corporation--Abandonment Exemption--In Leelanau County, MI, Docket No. AB-457X (STB served Aug. 23, 1996).

⁴ Only Brian Landress has questioned whether the Nickel Plate Line may be fully abandoned, stating that it is not clear to him whether the line has been fully abandoned, equivocating as follows: "At the end of the day the line is either fully abandoned or approved for abandonment. The evidence provided by the Owners in the request does not and cannot substantiate either position. It must be one or the other and the Board is the governing authority with rights to make that decision." Brian Landress, Response to Rebuttal (filed September 5, 2017) at 5.

from Board regulation. Specifically, because the Nickel Plate Line was authorized for abandonment but not fully abandoned when Fishers and Noblesville acquired it (as the facts demonstrate), then the Owners are non-carriers under Common Carrier Status of States, State Agencies, 363 I.C.C. 132 (1980) aff'd sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982) (“Common Carrier Status”).

In Common Carrier Status, the ICC observed that its mandate at that time required it “to cooperate with each State and the officials of each State on transportation matters.”⁵ In addition, the ICC “found persuasive” State arguments that – (1) “no common carrier status should attach when [States or State subdivisions] acquire rail line” previously authorized for abandonment”; (2) a State or State subdivision should incur a common carrier status “only if it operates a rail line;” and (3) an ICC “finding that States incur a common carrier obligation merely by owning a rail line [would be] contrary to established Commission policy and contrary to the purpose of 49 U.S.C. subtitle IV.”⁶ Addressing State acquisitions of rail lines authorized for abandonment, the ICC stated as follows:

Our mandate to promote transportation is best served by following the policy that mere ownership of a rail line by a State does not create common carrier status . . . A State will be considered a common carrier if it operates a rail line itself.

Id. at 137-38. In the process of articulating this policy, the ICC established a “modified certificate of public convenience and necessity” process now set forth at 49 C.F.R. part 1150, subpart C that, that to this day reaffirms Common Carrier Status by stating that:

The acquisition by a State [or State subdivision] of a line approved for abandonment and not yet fully abandoned is exempted from the Board’s

⁵ Common Carrier Status, 363 I.C.C. at 139 (quoting from a portion of the rail transportation policy of 49 U.S.C. § 10101, as then codified).

⁶ Id. at 137.

jurisdiction. If the State intends to operate the line itself, it will be considered a common carrier.

49 C.F.R. § 1150.22.

In acquiring the Nickel Plate Line, the Owners have never intended to be regarded as railroad common carriers, whether individually or collectively, and they have never “held themselves out” to the public to provide common carrier service upon reasonable request. The same can be said for HHPA.⁷ The Owners did not seek ICC authority to acquire the Nickel Plate Line, evidence that they did not regard themselves as engaging in an ICC-regulated transaction by which they would become subject to the ICC’s (and now the Board’s) regulatory regime. No interested party has presented any evidence to the contrary, and no one seriously has contended that the Owners or HHPA have led anyone to believe that they were willing and able to provide common carrier service over the Nickel Plate Line.⁸ Instead, some of the trails use opponents appear to question the logic of Common Carrier Status, the continued vitality of that precedent, or its application to the Owners and to the Nickel Plate Line under the circumstances.

⁷ See, e.g., Vincent v. United States, 58 A.2d 829, 831 (D.C. Mun. App., 1948) (a holding out to the general public to provide common carriage requires that there be a public offering; a communication that service is available to those members of the public who may wish to use it); Hanson Natural Resources Company – Non-Common Carrier Status – Petition for Declaratory Order, Docket No. FD 32248, slip op. at 16 (ICC served Dec. 5, 1994) (“Hanson”), slip op. at 16 (“The principal test is whether there is a bona fide holding out coupled with the ability to carry for hire.”); Southern Pac. Transp. Co. – Aban. Exempt. – In Los Angeles Cty., CA, 8 I.C.C.2d 495, 506 (1992) (same); see also Ass’n of P&C Dock Longshoremen v. Pittsburgh & C. Dock Co., 8 I.C.C.2d 280, 290 (1992) (stating that to be a rail carrier, entity must both conduct rail operations and hold out that service to the public)

⁸ Three businesses have come forward in the later phase of this proceeding to “demand” or “request” rail service from the Owners and/or HHPA, and have shared their alleged interest in railroad service with the Board. Those filings will be addressed in later discussion.

The Board's Application of *Common Carrier Status*

The handful of trails use opponents that have undertaken genuine legal argument have articulated neither administrative precedent nor any overarching regulatory policy supporting the proposition that Common Carrier Status cannot or does not apply here. They have not explained why the Owners should be regarded as common carriers. In fact, while trails use opponents would have the Board actively thwart the Owners interim trails use objectives, Common Carrier Status and the Board's handling of analogous "modified certificate" operations show that the Board assumes a limited, ministerial role in connection with State-owned railroad lines acquired post-abandonment authorization. That directly-related precedent supports the Board facilitating the Owners' trails use efforts.

The Board's modified certificate procedures (the progeny of Common Carrier Status) entail a ministerial, virtually self-executing entry and exit process whereby an entity selected to operate a line owned by a State that has been abandoned or authorized for abandonment may file a "notice for a modified certificate of public convenience and necessity" pursuant to 49 C.F.R. § 1150.23 to commence common carrier service. The modified certificate operator "may commence [service] immediately upon the filing" of the notice. The Board's duty is merely to review the content of the notice to ascertain that it is complete, and that, if so, issue a modified certificate notice. 49 C.F.R. § 1150.23(a).

Similarly, where the modified certificate operator's contract has expired or it otherwise seeks to end its operations, it need only give the Board 60 days advance notice of its intent to terminate pursuant to 49 C.F.R. § 1150.24. The Board can neither exercise discretion to "authorize" or "permit" the commencement or termination of operations where the operator has

correctly invoked of the procedures, nor can it compel the continuation of operations after the 60-day termination notice period has expired.

The Board consistently has regarded the termination of common carrier operations under a modified certificate as a vehicle for the line owner's negotiation of interim trails use arrangements under 49 C.F.R. § 1152.29.⁹ Also, it has been long understood that the Board's facilitation of interim trails use arrangements also is a ministerial agency function. The Board cannot "permit" or "deny" interim trails use arrangements where the line owner has agreed to negotiate terms. In the case of Board-issued notices of interim trails use ("NITU") flowing from the termination of a modified certificate operation, the Board does not (and, by regulation, cannot) require the line owner to comply with the agency's formal abandonment procedures (it is categorically exempt), nor has the Board demanded that the line owner demonstrate an absence of need for common carrier service as a trails use prerequisite in such cases.

If the Owners had installed a modified certificate operator whose operation was now ending, the path to trails use would be evident. Nevertheless, the logic behind the modified certificate regulation indicates that the Owners, who have not installed a modified certificate operator, should not be treated any differently by the Board than if they were acting now at the end of a modified certificate operation. Surely the Owners should not have to concoct a modified certificate operator and then await the termination of that carrier's operating contract (and invocation of the section 1150.24 termination process) to avail themselves of a trails use arrangement. And, while one option would be for the Owners to invoke the Board's abandonment procedures as a means to trails use, the agency's Congressional de-regulatory

⁹ See, e.g., Tillamook Bay"); Sammamish; and Wis. & Calumet R.R. – Notice of Interim Trail Use & Termination of Modified Certificate, Docket No. FD 30724 (Sub-No. 1) (ICC served Aug. 8, 1989).

mandate supports a Board decision permitting the Owners to invoke the trails use procedures¹⁰ directly without the need to resort to the hollow formality of an abandonment proceeding.

The Board Should Recognize the Owners' Non-carrier Status

Agency precedent establishes that neither the Owners nor their agent (HHPA) are invested with a common carrier obligation. The Board's modified certificate regulations – which would be available here had the Owners decided that there was sufficient interest in railroad service – provide for unilateral termination of service. It would be hard to justify imposing any more rigorous obligations on the Owners than on a modified certificate operator, particularly where the Owners have never held themselves out to be rail common carriers. Nevertheless, trails use opponents recently have taken to implying – the argument itself never having been fully developed – that the Owners are evading a common carrier obligation owed to shippers. And they have taken to suggesting that the Board should rely on an allegedly emerging need for freight rail service as justification to block trails use. But, again, there is no legal basis for holding the Owners to any common carrier obligation, nor is there any precedent supporting the proposition that the Board may – (1) compel a State owner of a railroad line like this one either to arrange for service through a third party or provide it itself, or, for that matter, (2) block invocation of the trails use statute.

Recognizing, perhaps, the deficiency in arguing that the Board should intervene to save an intrastate excursion train operation from the legitimate prerogatives of the Nickel Plate Line's municipal owners, the trails use opponents have tapped three would-be freight shippers, each claiming to be interested in restored service after roughly 14 years of Nickel Plate Line freight service inactivity. None of the businesses that have come forward is represented by

¹⁰ It may help to keep in mind here that both the trails use statute and the corresponding trails use regulations fall outside of the scope of subtitle IV.

counsel. Two of the potential freight customers – Stone Spectrum (“Stone”) and Crown Technology, Inc. (“Crown”) – have purported to request or demand service. Both incorrectly assume that either the Owners or HHPA, or both, are subject to the common carrier obligation set forth at 49 U.S.C. § 11101.

The Owners admit that they are unsure of what to make of the recently-proffered freight shipper filings. While each would-be shipper opposes interim trails use, the filings fail to demonstrate that the Board should order the Owners to restore the Nickel Plate Line to service and provide for common carrier freight transportation.¹¹ If, on the other hand, the requests or demands for service are simply to be taken at face value, then the Owners respond that they do not have any such common carrier obligation, and they respectfully decline for that reason to arrange for the restoration of freight service.

Beyond that, the Stone, Crown, and Kokomo Grain (“Kokomo”) letter filings are reminiscent of the sort of speculative suggestions that the Board and practitioners regularly appearing before it encounter in railroad line abandonment proceedings.¹² These industry’s

¹¹ It may be that these businesses and those who likely have resorted to recruiting them to participate in this proceeding are hoping to use these bogus service demands as a (misinformed) basis for later invalidating the Owners’ possible future invocation of the Board’s two-year-out-of-service abandonment procedures.

¹² See, e.g., Mid-Michigan R.R., Inc. – Abandonment Exemption – in Kent, Ionia, & Montcalm Counties, Mi., AB-364 (Sub-No. 14X) (STB served Sep. 26, 2008), slip op. at 4-5 (“In many abandonment cases, shipper or community groups base their opposition on potential development of new business. But speculation about future traffic is not a sufficient basis upon which to deny or revoke an abandonment authorization. See CSX Transportation, Inc. – Abandonment Exemption – In Bell County, KY and Claiborne County, TN, Docket No. AB-55 (Sub-No. 478X), slip op. at 5-6 (ICC served Aug. 5, 1994). See also CSX Transportation, Inc. – Abandonment – Between Bloomington and Montezuma, In Parke County, IN, Docket No. AB-55 (Sub-No. 486), slip op. at 9-10 (STB served Sept. 13, 2002), *aff’d*, Montezuma Grain Co., LLP v. STB, 339 F.3d 535 (7th Cir. 2003). Here, as discussed above, [the shipper’s] planned use of the rail line is highly speculative, and, given that the line has carried no traffic at all for years, the rail traffic that [it] claims to anticipate is supported neither by the record before us nor by the line’s history”); Union Pac. R.R. Co. –

claims that they “require” freight service are not credible, and the limited efforts of each to press its case for railroad service reveals its true degree of interest. Having emerged so late in this proceeding, each of the three were likely recruited at the last minute as make-weights by other trails use opponents who recognize the deficiencies in their excursion train-centric arguments. The Owners do not recall any of them – and Stone and Crown are established businesses in the community – having contacted HHPA or the municipalities in the past to press for the restoration of railroad service. Moreover, the traffic claims are simply too qualified to be credible.¹³ Finally, none of the three attempts to prove that their limited traffic prospects would make freight service on the line remunerative.¹⁴

Kokomo, evidently not an active industry along the Nickel Plate Line, suggests that the line “could generate as many as 1,900 carloads per year” of agricultural commodities if freight service were to resume. The Owners, however, understand that such grain traffic would depend upon the presence of a suitable elevator or similar such truck-to-rail transfer facility along

Discontinuance – in Utah County, Utah, AB-33 (Sub-No. 209) (STB served Jan. 2, 2008), slip op. at 3.

¹³ Stone says it wants to shift “some” of its stone traffic from truck to rail, estimating that it would ship “100 + carloads” of stone traffic (presumably per year). Offering no specifics, Stone claims to have been “attempting to establish freight service for nearly four years.” Letter Comments of Stone Spectrum (filed October 2, 2016). (Again, the Owners are unaware of any such “attempts.”) Stone gives no traffic commitments; does not explain why or how, at such modest carload volumes, it would realize a cost savings over trucks; and never bothers to prove that its traffic would be remunerative to a rail operator. In similar fashion, Crown’s one-page letter comments, which track the format and content of Stone’s, are decidedly vague and non-committal. Crown claims it “could” receive and ship certain liquids and dry materials, adding that it “would take some time [9 months at the outset] to shift traffic to rail,” depending upon adjustments to vendor “supply chains.” Letter Comments of Crown Technology, Inc. (filed October 5, 2017).

¹⁴ While the Board might consider whether excursion train revenues could compensate for modest freight service income (if any freight traffic happened to materialize), the Owners do not intend to allow for the resumption of excursion operations on the southern end of the Nickel Plate Line, and, of course, the Board has no authority to compel the Owners to host intrastate excursion train service.

the line, and Kokomo does not indicate that any such facility now exists or is to be built. Also, while Kokomo claims that restored rail service on the Nickel Plate Line would be convenient for local grain producers, it appears that this grain is moving today to existing elevators on other rail lines, and that the carload volumes that Nickel Plate Line traffic theoretically would generate would result in traffic diversions from other lines (possibly including other short lines in the area) which appear to be handling local grain harvests satisfactorily. Without any commitment to locate a loading facility on the Nickel Plate Line nor any traffic guarantee, Kokomo's self-serving estimate of 1,900 carloads is no more meaningful than two or 200,000 carloads.

Re-regulating (if Necessary) with Precision under Section 10502

If the Owners must proceed under the three-step process, they have requested that their exemption be lifted only so far as is necessary to enable them to arrive at an interim trails use arrangement, no more and no less. As the Owners pointed out in their Revocation Petition:

In assessing whether to revoke an exemption – either entirely or, as here, in limited part – the Board must consider the statutory standard set forth at 49 U.S.C. § 10502(d), which provides that the agency may revoke an exemption “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 [49 U.S.C. § 10101].” Also, “[t]he Board will revoke an exemption if a petitioner has demonstrated conduct that frustrates the [rail transportation policy] and the Board has determined that the reinstated regulatory provisions could ameliorate the alleged harms.” Caldwell R.R. Commission – Exemption from 49 U.S.C. Subtitle IV, Docket No. FD 32659 (Sub-No. 1) (STB served Nov. 26, 2014), slip op. at 2.

Revocation Petition at 7. The Owners have shown in earlier filings that such limited relief would advance the rail transportation policy of section 10101.

The trails use opponents manifest divergent views on the Owners' Revocation Petition. Many argue that the Revocation Petition should be denied. But implicit in that line of argument is that the Owners should remain fully exempt – an outcome the trails use opponents probably do not want. It is not at all clear what denial of the partial revocation request would

accomplish, or whether denial would secure the trail use opponents' aims. In one scenario, the Board could deny the Revocation Petition on the basis that such agency action is unnecessary for the Owners to invoke the trails use process. Even if the denial were intended to bar the Owners' trails use plans, such action assures *none* of the following outcomes (insofar as the Owners would remain exempt from Board regulation): (1) restoration of excursion train operations; (2) initiation of freight service; or (3) preservation of the Nickel Plate Line's trackage.

Other trails use opponents contend that the Owners' Revocation Petition does not go far enough – that the Owners should either be made fully subject to subtitle IV or at least subject to all provisions of subtitle IV that might otherwise flow from a conventional abandonment proceeding, including, for example, 49 U.S.C. §§ 10904 (offers of financial assistance) and 10905 (public use conditions). Those advocating for *more* regulation of the Owners have not presented a coherent case for why additional regulation is needed, or why or how such regulation would advance the rail transportation policy in keeping with the section 10502 revocation standards. In fact, trails use opponent calls for a broader (or complete) revocation conflict with the longstanding, de-regulatory policies guiding Common Carrier Status and the modified certificate procedures.

Trails use opponents arguing for broadened regulation of the Owners tend to frame their requests on baseless, mean-spirited claims that regulation is needed to protect against local government abuse, supposed dishonesty among involved elected officials, insufficient regard for the merits of excursion trains or the Nickel Plate Line's history, or some combination of the three.¹⁵ None supports use of the Board's section 10502 discretion to override the

¹⁵ Some have suggested that the Board should bar trails use, because a trail would thwart the possible future re-deployment of the corridor for light rail transit purposes. Nothing could be further from the truth. Consistent with the trails use statute itself – 16 U.S.C. § 1247(d) –

judgment of the Owners, who have made a careful and reasoned decision about how this inactive railroad corridor can, for the time being, best be deployed to serve the public interest. A few have cooked up a more recent theory that broader revocation would prompt the Owners to accommodate an allegedly emerging community of fledgling railroad shippers, but that meritless argument and the empty claims of the proffered shippers have been addressed above. In sum, there is no basis to revoke of the Owners' current exemption beyond that requested by the Owners themselves, if indeed *any* revocation is necessary to accomplish their trails use goals.

The Indiana Transportation Museum

ITM appears to be the only opponent to be represented here by counsel. ITM has requested the following Board action: (1) an abeyance of the proceeding until at least October 20 (since superseded by the Board's September 22 Director's Order); (2) "[s]eek relief in the state courts for the destruction of a public asset; damages for non-operation of its excursions; and receivership over the assets (rail line)"; (3) allow time for potential freight customers to come forward; and (4) a Board-conducted field hearing.¹⁶ The ITM filing and the federal district court petition that it attached to its filing are peculiar, but it appears that ITM's main objective is to suggest that the Board should postpone any action of its own pending federal court action. No such procedural delay or postponement of agency action is warranted.

ITM had requested a court-issued injunction under which, as best the Owners can tell, ITM would have been re-installed on the Nickel Plate Line over the Owners' objection. The

interim trails use would preserve the corridor for such possible future uses. Light rail transit would be a use consistent with interim trails use, should the Owners determine at some future point that the transit option is both practicable and in keeping with the local public interest.

¹⁶ ITM also claims that the Owners "have denied numerous freight customers the opportunity to engage interstate commerce along this line." ITM Brief (filed September 14, 2017) at 2. ITM offers no support for this false allegation.

federal district court pleading, seeking a temporary restraining order and similar such injunctive relief, was filed on August 7, 2017, and was dismissed by the court on October 20, 2017. This was, incidentally, ITM's second attempt at forcing itself back on the Nickel Plate Line by way of civil litigation – the court having denied ITM's initial effort as improperly plead.

The Owners are Responsible and Informed Decision Makers

Many of the trails use opponents urge the Board to override local decision makers, alleging in openly-hostile fashion that the leadership of Fishers, Noblesville, and Hamilton County have colluded illegally in opting for trails use. They claim that the community leaders conspired to deprive excursion train advocates of a full and fair opportunity to be heard. The Owners responded to these scurrilous and false accusations in their Rebuttal, explaining that the decision making process leading to this proceeding violated no state laws and deprived no one of substantive due process.

The most recent variant on this allegation states that one or more of the involved communities violated state “Open Door Law.”¹⁷ The Owners deny any violation of state law in reaching their decision to seek to rail bank the Nickel Plate Line, and no violation of such laws, including the aforementioned Open Door Law, has been advanced in state court, much less proven. Such issues of alleged state law violations – much like ITM's poorly-articulated (and recently-dismissed) federal court action – are not the province of this agency, and this Board is not well-suited to rule on the merits of state law claims, were they ever to be formally presented here for adjudication. The Board should disregard the allegations, innuendo and hyperbole, and decide this matter on the *facts* presented.

¹⁷ See Comments of Save the Nickel Plate, Inc. (filed October 12, 2017) at unnumbered page 4.

The leaders of the three municipalities remain committed to their collective plan for interim trails use, convinced that such a deployment of the inactive transportation resource best serves the current and foreseeable interests of the public. The Owners have arrived at their plan of action after careful deliberation and analysis. In fact, their plan intends to provide for an accommodation of the interests of excursion train advocates, but simply does not go as far as those advocates would have liked . . . not that any dispute over the preferable scope of excursion train operations should be of any concern to the Board here. Finally, the Owners have decided upon interim trails use motivated by what they believe will deliver the greatest public good. In so doing, the Owners will commit resources to improving the recreational utility of the corridor. There are no “inside deals,” and neither the Owners nor the leaders of the municipalities will benefit monetarily in executing the trails use plan.

The Owners previously have explained that, at bottom, the trails use opponents would have the Board override the prerogative of the municipal owners of the Nickel Plate Line, and order that the corridor may not be deployed as local elected officials have seen fit to do in the furtherance of the public interest. The Owners respectfully submit that Common Carrier Status purposely ceded discretion over the disposition of rail lines such as this one to the public owners with minimal, if any, retention of agency oversight or second-guessing.

A Field Hearing is Unnecessary

The Board’s September 22 Order left open the possibility of a field hearing in this case. The record, however, is complete, and the Owners respectfully submit that a field hearing is unwarranted and unnecessary, and would unduly tax limited agency resources. A field hearing would be unlikely to provide a greater illumination of the relevant legal and regulatory issues,

and would most likely merely duplicate the substance of the written comments that have been offered. For these reasons, the Board should decline to hold a field hearing.

If the Owners Must Pursue Abandonment – What Happens Next?

The Owners have offered three alternative paths to interim trails use, only one of which would require the involved three-step process of partial revocation of the Owners' exemption, followed by an abandonment exemption notice proceeding, followed by invocation of the trails use regulations. If the Board should prescribe the abandonment process as a necessary next step, it is reasonable to expect a virtual replay of arguments and opposition to trails use that have been tendered here from many of the same interested parties.

Rail line abandonments, particularly those qualifying for the class exemption process, are, of course, governed by strict rules of procedure. As relevant here, 49 C.F.R. part 1152, subpart F, provides that an abandonment qualifying for handling under the class exemption will take effect 50 days from the date of filing, unless stayed. The scattershot responses that probably would result from the filing of the Owners' abandonment notice (if required) is likely once again to require the Board's procedural intervention, as it did here on September 22.

To that end, should the Board grant the Owners' partial revocation request and advise the Owners that they must seek abandonment authority as an essential step to trails use, the Board should also consider in its decision adding up-front guidance to interested parties concerning the governing rules of procedure, including when and how interested parties opposed to trails use – and intending to use the abandonment process as another opportunity to re-litigate whether the Board should sanction trails use in the first place – may participate. For that matter, it would assist all concerned for the Board to confirm in advance that the Owners qualify to use

the abandonment class exemption procedures, and that a more regulatory abandonment process is not required.

CONCLUSION

For 37 years, this agency has embraced an overarching policy that States and State Subdivisions (such as the Owners) are not to be deemed to be railroad common carriers where they acquire railroad lines (such as the Nickel Plate Line) that have been authorized for abandonment and where they do not operate the subject railroad line themselves. Specifically, under Common Carrier Status and the modified certificate regulations promulgated in that decision, the Owners are exempt from subtitle IV as non-carriers. Moreover, for the reasons set forth above, the Nickel Plate Line remains a line of railroad subject to the Board's jurisdiction, and the Owners urge the Board to so confirm in its decision. Under the agency's modified certificate procedures, an operator with which the State owner contracts to provide service is permitted to condition its provision of service upon shipper compliance with established terms, and that operator is free to terminate service upon giving the Board the requisite 60-day advance notice. If a modified certificate operator is granted such flexibility and ease of entry and exit, then surely the owner of such a line should be equally free, if not more so, to pursue the arrangements it considers best for the railroad corridor it owns.

For the foregoing reasons, the Owners respectfully request that the Board facilitate their trails use objectives, provide guidance as to the recommended path to achieve that end, and, in the event that the Board prescribes the regulated approach of a formal abandonment proceeding, that it provide all interested parties (many of whom may seek once again to

participate, and many of whom also would appear to misunderstand elements of the abandonment process) guidance on the abandonment process.

Respectfully submitted,

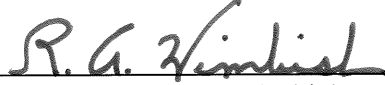
By: 
Robert A. Wimbish
Fletcher & Sippel LLC
29 North Wacker Drive
Suite 920
Chicago, Illinois 60606-2832
(312) 252-1500

**ATTORNEY FOR CITY OF FISHERS, CITY
OF NOBLESVILLE, & HAMILTON COUNTY,
INDIANA**

Dated: October 23, 2017

CERTIFICATE OF SERVICE

I hereby certify that, on this 23rd day of October, 2017, a copy of the foregoing **Response to Comments** 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