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August 31, 2017

244254

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

ENTERED
Office of Proceedings
August 31, 2017
Part of
Public Record

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 **Motion for Leave to File a Rebuttal and Reply to Requests for an Extension of Time and Rebuttal of the Cities of Fishers and Noblesville, Indiana, and Hamilton County, Indiana**, dated August 31, 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**

REPLY TO REQUESTS FOR AN EXTENSION OF TIME AND REBUTTAL

Robert A. Wimbish
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**ATTORNEY FOR CITY OF FISHERS,
CITY OF NOBLESVILLE, AND
HAMILTON COUNTY, INDIANA**

Dated: August 31, 2017

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. FD 36137

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BACKGROUND

On August 1, 2017, the City of Fishers, Indiana, the City of Noblesville, Indiana, and Hamilton County, Indiana (collectively, the “Owners”) jointly filed a petition (the “Petition”) with the Surface Transportation Board (the “Board”) seeking partial revocation of the exemption they enjoy collectively as state subdivisions and joint owners of a railroad line between Indianapolis and Tipton, Indiana (the “Line”) previously authorized for abandonment but not fully abandoned. The Owners seek the requested, and carefully-limited, revocation to facilitate rail banking the Line pursuant to the National Trails System Act, 16 U.S.C. § 1247(d) (the “Trails Act”), and the Board’s interim trails use regulations at 49 C.F.R. § 1152.29. Among other things, the Petition demonstrated that partial revocation would be consistent with the Rail Transportation Policy of 49 U.S.C. § 10101.

The Petition has triggered expressions of support for an excursion train operator that once operated over the Line– the Indiana Transportation Museum (“ITM”) – and, by extension, for the restoration of isolated passenger train operations over the entire Line. Those supporting ITM specifically and excursion operations generally object to the Owners’ decision to

pursue a plan under which the entire Line would be rail banked and deployed in part for non-ITM excursion train service and in part as a recreational trail. In particular, the Owners have decided that, if permitted to proceed with rail banking, the roughly northern half of the rail corridor's trackage from Noblesville northward to Tipton will be reserved for excursion passenger trains to be run by a newly-selected excursion train operator. South of Noblesville, the Owners have planned for a recreational trail, which they anticipate would involve the removing track. Both uses of the railroad corridor are permissible under rail banking.

The Owners appreciate the interest in, and enthusiasm for, excursion trains. But those opposing the Petition are asking the Board overrule the decisions of local government officials in order to protect non-common carrier passenger operations that are not within the Board's jurisdiction and that are not the Board's concern. Rather, the Board should resist the call to intervene in a local issue that is within the discretion of those elected to act on behalf of the involved municipalities.

PROCEDURAL MATTERS

A. The record in this proceeding should be closed.

Several individuals and a handful of organizations dedicated to recreational passenger train service (collectively, the "Opponents") have come forward, and continue to come forward, to oppose the Petition. Some of the responsive filings have been tendered after the customary 20-day deadline for replies to a filing such as the Petition. See 49 C.F.R. § 1104.13(a). The Owners expect that other replies to the Petition may yet be filed by interested parties unfamiliar with the Board's procedures. Without overstating the significance of the

Opponent's occasional non-observance of Board procedures,¹ the Owners respectfully urge the Board to close the record at this time and to act on the Petition with appropriate alacrity.

B. The Board should deny requests for an extension of the reply comment period.

Linda Kraatz ("Kraatz"), an individual, and the Hoosier Rails to Trails Council, Inc. ("HRTC") separately have requested an extension of time to enable those opposed to rail banking to develop and present additional evidence and argument, and to allow them to better understand the Petition. HRTC asks for a three-month extension of time for replies; Kraatz does not specify for how long she believes the deadline should be extended. Neither Kraatz nor HRTC contacted counsel for the Owners before submitting an extension request.

The Owners oppose an extension. The comments filed thus far echo two common themes. Specifically, the Opponents – (1) object to the Owners' rail banking efforts because such action is likely to result in removal of some of the Line's trackage, thereby foreclosing the near-term possibility of restoring intrastate passenger excursion service to the entire Line; and (2) accuse the Owners of not affording the public sufficient notice and input into the decision-making process leading to the filing of the Petition. Allowing interested parties time to elaborate upon these points or to invite others to make the same arguments adds nothing to the relevant legal analysis – whether the Owners have demonstrated that the requested partial exemption is warranted under the applicable regulatory standards and agency policy – and would instead merely delay action on the Petition.

¹ In that regard, the Owners have been monitoring the Board's website for replies to the Petition that may not have been served upon counsel for the Owners. The Owners have been vigilant to identify and account for all interested parties to this proceeding and for all replies filed, in light of instances of inadequate service.

The Owners also oppose as unnecessary HRTC's request for a field hearing. The written record that exists at this time is sufficient for the Board to address the merits of the Petition, and is adequate to determine whether to grant the Owners' Petition.

REBUTTAL

A. The material facts of this case and legal status of the Line are not seriously disputed.

There is little, if any, meaningful dispute over the facts of the case or the status of the Line. Some of the Opponents appear to dispute that the Owners are exempt from Board regulation, and question whether the policies behind Common Carrier Status of States, State Agencies, 363 I.C.C. 132 (1980) ("Common Carrier Status") aff'd sub nom. Simmons v. ICC, 697 F.32d 326 (D.C. Cir. 1982) apply here, but the largely uncontroverted facts are as follows:

- In the early 1990s, Norfolk and Western Railway Company and Indiana Rail Road ("INRD") jointly sought and obtained Interstate Commerce Commission authority, respectively, to abandon and to discontinue common carrier service over the Line. 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).
- Roughly four-and-a-half years later, the Owners acquired the Line, at which point the Line's trackage remained in place (some of the track at the far northern and southern ends of the Line has since been removed during the course of the Owners' ownership).
- Although it obtained discontinuance authority some 12 years prior, INRD continued to operate over a portion of the Line between Indianapolis and Noblesville until 2003, at which point freight service on the Line ceased.
- There has been no freight service over the Line for 14 years. However, until 2015, the Owners permitted ITM to operate intrastate passenger excursion trains over the Line. Such excursion operations did not connect with any interstate service due in part to the absence of trackage at the north and south ends of the Line that historically had connected the Line to the interstate rail network.

The facts demonstrate that the Owners – state subdivisions all – acquired the Line as railroad property authorized for abandonment but not fully abandoned. As such, Common Carrier Status dictates that, although the Line may be a railroad line subject to the Board’s jurisdiction (and therefore may enjoy certain protections under federal law), the Owners, who have never operated trains or held themselves out to provide common carrier service, are exempt from Board regulation.² Here, unlike in some other cases of state subdivision acquisition of a rail line authorized for abandonment, the Owners have never appointed a third party to provide freight service under the Board’s modified certificate provisions at 49 U.S.C. part 1150, subpart C, mainly due to the absence of meaningful freight service demand. Yet, if the Owner’s had appointed a modified certificate operator, the formal termination of that arrangement would have been the vehicle for the interim trails use outcome that the Owners seek to achieve now.

B. The Opponents arguments against the Petition are unavailing.

The Opponents want the Line preserved as is as a means to compel the Owners to deploy the entire Line in recreational excursion train service. But the Board must not be, and cannot be, a means to the Opponents’ end. There is no precedent to support Board intervention in local decision-making processes to force the public owners of lines long devoid of any freight business to preserve a rail corridor in the furtherance of non-jurisdictional, non-common carrier passenger train operations. Rather, the Board must be guided by the Rail Transportation Policy of section 10101, and there is no basis under that policy to deny the Owners’ Petition, much less to order the Owners to restore excursion train operations over all or any portion of the Line.

² Some of the Opponents may misunderstand the distinction between the legal and jurisdictional status of the Line as a railroad line, and the Owner’s status as non-carrier public entities in ownership of railroad property that has been authorized for abandonment but that has not been fully abandoned. See, e.g., Reply Comments of James R. Kopkey (filed August 15, 2017) (“Kopkey Reply”) at unnumbered page 3.

The regulatory concepts enunciated in Common Carrier Status, and which underlie the Petition, are admittedly rather esoteric, and so it is understandable that certain of the Opponents advance theories that are not in keeping with agency practice and precedent. For example, one opponent argues that the Owners should have been required to obtain regulatory authority to acquire the Line.³ Common Carrier Status, however, clearly provides otherwise. Another of the Opponents, argues that the Petition is deficient for lacking an Environmental and Historic Report (“E&HR”),⁴ although an E&HR is not required at this time, and might not be required at a later juncture if the Petition is granted.

The Opponents frequently maintain that the Board should forbid the Owners from abandoning the Line, asserting, among other things, that passenger excursion revenue might meet or exceed the costs of preserving and maintaining the track. Such arguments are premature and misplaced. The Board has not yet granted the requested partial exemption, nor has it instructed the Owners that they must seek renewed abandonment authority as a prerequisite to interim trails use. If abandonment authority is required, the Owners will utilize the Board’s two-year-out-of-service class exemption procedures at 49 C.F.R. § 1152.50. Under class exemption, potential intrastate passenger excursion train service and revenues do not factor.

The Opponents do not squarely address the standard for partial revocation of the Owner’s existing exemption. Instead, they maintain that rail banking under the Trails Act is undesirable, compared to restoring excursion train operations over the entire Line. But the Board does not have jurisdiction over intrastate passenger excursion operations,⁵ and the agency has no

³ Id.

⁴ Reply Comments and Request for Extension of Time of Linda Kraatz (filed on August 21, 2017) at 1.

⁵ See, e.g., Magner–O’Hara Scenic Railway, et al. v. ICC, 692 F.2d 441 (6th Cir.1982); Denver

statutory mandate to protect excursion train operations. The Opponents are asking the Board to intervene on their behalf to instruct the leaders of Fishers, Noblesville, and Hamilton County that, rather than facilitating the communities' interim trails use plans – which the Owners have demonstrated in their Petition would be an outcome in keeping with the rail transportation policy of 49 U.S.C. § 10101 – the Board will require the Owners to retain the track in the interest of excursion train operations favored by a discrete contingent of area residents and train enthusiasts.

While excursion passenger trains are a plausible recreational resource, they are not universally welcome,⁶ and the decision here as to whether to preserve the entire Line for excursion trains or to dedicate only a portion of the Line (or none of it) for such use is a local matter. Simply put, discussion of the relative merits of excursion trains versus alternative uses of the rail corridor does not belong before this agency. In objecting to the Petition as contrary to their excursion train preferences, or in objecting (as some of the Opponents do) to the very concept of interim trails use, the Opponents do not present arguments pertinent to the Board's analysis, and, accordingly, the Petition's merits are substantively unchallenged.

C. The Owners provided for meaningful and adequate public input.

The Opponents take issue with the Owners' decision-making process, alleging insufficient opportunity to convince the Owners to embrace their preferences for the Line. Such arguments presume that the Board should be the arbiter of local decision-making processes, and

& Rio Grande Railway Historical Foundation d/b/a Denver & Rio Grande Railroad, L.L.C. – Petition for Declaratory Order, Docket No. FD 35496 (STB served Feb. 23, 2012); Fun Trains, Inc. – Operation Exemption – Lines of CSX Transp., Inc. & Fla. Dep't of Transp., Docket No. FD 33472 (STB served Mar. 5, 1998); Allegany Central Railroad – Application for a Modified Certificate of Public Convenience and Necessity, Docket No. FD 31371 (ICC decided Feb. 23, 1989).

⁶ See, e.g., Ballard Terminal Railroad Company, L.L.C. – Acquisition and Operation Exemption – Woodinville Subdivision, Docket No. FD 35731, et al. (STB served Dec. 30, 2014); Napa Valley Wine Train – Petition for Declaratory Order, 7 I.C.C.2d 954 (1991).

that it should second-guess the adequacy of the Owner's efforts to disclose their plans and allow for meaningful public input. The Opponents' allegations are not for the Board to resolve.

The allegations are also not well-founded. The public was given meaningful opportunities to comment on rail banking in local fora, and there is no evidence that the opponents' opinions were disregarded.⁷ The path leading to the Owners' decision to pursue rail banking of the Line was open, transparent, and in accordance with Indiana law. The Owners undertook robust public engagement before reaching a decision regarding the future of the railroad corridor.

Of note, the Owners conducted comprehensive public engagement prior to deciding on July 31, 2017, to rail bank the Line, even though such solicitation of public input was not required under Indiana law. Specifically:

- On February 28, 2017, the Owners publicly announced their intention to pursue rail banking at a press conference in Fishers.
- Following that announcement, the Owners wrote to residents and businesses adjacent to the railroad advising them of upcoming opportunities to engage community leaders on the Owner's rail banking plans.
- Also on February 28, 2017, the Owners posted a website dedicated to educating the public about the rail banking process and ownership of the railroad, and to address frequently asked questions.⁸
- Fishers and Noblesville jointly hosted listening sessions on March 21 and 23, 2017, affording interested members of the public opportunities to share their views on rail banking with community leaders. In addition to executive leadership, the Owners were accompanied by members of their public safety, engineering, and parks and recreation departments to ensure comprehensive engagement.

⁷ In fact, the Owners carefully considered the arguments of excursion train enthusiasts, and, in an effort to accommodate both excursion train and recreational trail advocates, adopted a plan to reserve the northern portion of the rail banked corridor for passenger excursion operations.

⁸ <http://www.fishers.in.us/npt> and <https://nickelplatetrail.com>

Following such notice to the public and after extending interested parties the opportunity to share their views on the Owner's plans, the Owners took official action on public business at a duly-noticed meeting held on July 31, 2017, again in keeping with Indiana law. Of note here, Indiana's Open Door Law ("ODL")⁹ requires in most cases that official action of public entities such as Fishers, Noblesville and Hamilton County be undertaken openly in order that the public may be fully informed of their actions. To satisfy the provisions of the ODL, a majority of a governing body must gather to take official action on public business. Also, before a gathering such as the one that took place on July 31, 2017 can occur, the involved public entity (or entities, in this case) must give notice of intended public action, and the meeting and decision making session must be open to the public.¹⁰

The Owners gave notice of their July 31, 2017 joint public meeting on July 26, 2017, well in advance of the ODL's 48-hour requirement. During the public meeting, the governing bodies representing Line ownership passed a joint-resolution authorizing rail banking of the Line pursuant to the Trails Act and the Board's interim trails use regulations. In sum, the public was extended full and fair opportunities to participate the in the process leading to the Owner's decision to pursue rail banking, and this process was accomplished in a manner wholly consistent with Indiana law. Opponents' disagreement with the outcome of that process neither negates the validity of the process nor provides any basis for the Board's denial of the Petition.

CONCLUSION

For the foregoing reasons, the Owners respectfully request that the Board deny the requests of certain Opponents for an extension of time to allow more time for the presentation of

⁹ Ind. Code §5-14-1.5-1.

¹⁰ See Ind. Code §§ 5-14-1.5-2(c), 5-14-1.5-5 (public notice of the date, time, and place of a meeting shall be given at least 48 hours in advance).

evidence and argument, close the record as of the date of this filing, and facilitate the Owner's transportation corridor-preserving plans by granting the subject Petition promptly.

Respectfully submitted,

By: R. A. Wimbish

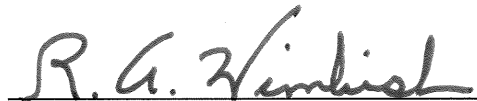
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**ATTORNEY FOR CITY OF FISHERS, CITY
OF NOBLESVILLE, & HAMILTON COUNTY,
INDIANA**

Dated: August 31, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August, 2017, a copy of the foregoing **Reply to Requests for an Extension of Time and Rebuttal** 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