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Office of Proceedings
November 2, 2017
Part of
Public Record

Ann D. Begeman
Acting Chairman
Office of Proceedings Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 20024

November 1, 2017

Re: **Docket No. FD 36137**
City of Fishers, City of Noblesville, and Hamilton County, Indiana
Petition for Partial Revocation of Exemption

Dear Ms. Beggeman:

Enclosed for filing to the above-captioned proceeding, please find a Motion to Suspend and Investigate filed on behalf of Save the Nickel Plate, Inc.

If you have any questions, please let me know. Thanks for your consideration.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Logan Day", with a stylized flourish at the end.

Logan Day
On behalf of Save the Nickel Plate Inc.

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**

MOTION TO SUSPEND AND INVESTIGATE

Dated: November 1, 2017

Pursuant to 49 U.S. Code § 1321, Save the Nickel Plate, Inc. hereby requests that the Surface Transportation Board (“Board”) suspend the above-captioned proceeding and investigate all of the filings and claims submitted by the City of Fishers, City of Noblesville, and Hamilton County (“Owners”), and other participants. The requested suspension and investigation will provide the Owners with their desired Board-administrated control over the proceeding and will also provide for a structured manner in dealing with the many claims and comments submitted by opponents and supporters of the Owners’ objectives and petition. This process would not prejudice the Owners as it would fairly address all concerns in this proceeding.

BACKGROUND

On August 1, 2017, the Owners petitioned the Board seeking Partial Revocation of [Abandonment] Exemption of a 37 mile railroad line locally known as the Historic Nickel Plate

Railroad (the "Line"), extending from Indianapolis, Indiana, to Tipton, Indiana.

On September 22, 2017, the Board issued a decision in response to multiple requests pertaining to the proceeding carried out as part of the Owners' petition to the Board. As a part of the Board's decision they granted, in part, an extension of time to file reply comments to the proceeding. The deadline for submissions was extended to October 12, 2017.

Since the passing of the submission deadline, additional comments have been filed both in opposition to and in favor of the trails use plan outlined in the Owners' petition. The inclusion of these late-filed comments has drawn criticism from both the petitioners and some of the commenters. Members of Save the Nickel Plate, Inc. ("STNKP") believe that the Board can see the need to exert its control and authority in the furtherance of this proceeding, with the goal of discovering additional documentation and facts pertaining to the ongoings of the Line in question.

As a vast majority of opponents have pointed out, the process by which the Owners have facilitated their objectives with this Line has not and does not meet the standards or expectations of residents who have entrusted the care of public property to their elected officials. While the attorney representing the Owners has persistently asserted that the proper means of public input and feedback have been gathered throughout the process, they've failed to present any facts, data, documentation, or other substantive evidence to support those claims.

ARGUMENTS FOR BOARD AUTHORITY

While there is no precedent or regulatory authority provided to the Board to protect the previous intrastate passenger excursion train operations of the railroad, we assert that this proceeding has presented multiple other lawful reasons and mechanisms for the Board to exert its authority. Specifically we look at:

1. The current abandonment status of the railroad.
2. The structure and assumptions of railbanking provisions.
3. The expressed interest of freight users along the line.
4. The participation and interest of viable railroad operators.
5. The unspecified need for expediency.

ABANDONMENT

In the initial filing, the Owners stated that the subject Line was previously owned by Norfolk and Western ("N&W") and operated by the Indiana Railroad ("INRD"). Through jointly filed individual petitions for exemption, N&W obtained authority to abandon the Line and INRD obtained discontinuance authority. The Owners' admit that "perhaps due in part to INRD's continued operations, the Owners have found no notice of abandonment consummation for the Line." The Owners go on to state that at the time of purchasing the Line, they "did not seek - and were not required to seek - authority to acquire the Line because it had been approved for abandonment." Therefore, the Owners believe that they collectively enjoy an abandonment exemption over the Line and argue that, as political subdivisions of the State of Indiana, "were, and presently remain, exempted from the STB's (and, before that, the ICC's) jurisdiction and the otherwise applicable provisions of Title 49, Subtitle IV of the United States Code as non-carriers."

The Owners' interpretation of 49 C.F.R. part 1152.29 seems to extend the reach of that provision beyond the actual text outlining the authority of the Board. Specifically, 49 C.F.R. part 1152.29 exempts States [and political subdivisions thereof] from Board jurisdiction when acquiring lines that have been abandoned or approved for abandonment, but it does not generally or specifically state that the exemption from Board jurisdiction goes any further than the acquisition itself. We believe that the Owners' use of this regulation as justification for why the Board has no jurisdiction over the current proceeding is a flawed argument with no basis in the referenced Code of Federal Regulations.

According to 49 C.F.R. part 1152.29 (e)(2), if, after 1 year from the date of service of a decision permitting abandonment, consummation has not been effected by the railroad's filing of a notice of consummation, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. Therefore, STNKP asserts that this Line, though approved for abandonment by the Interstate Commerce Commission [now the Board] but having never seen an abandonment consummation by N&W, is considered to be a fully active railroad remaining under the Board's authority and jurisdiction.

RAILBANKING

The Owners have clearly outlined their intentions to "railbank" the line pursuant to 49 C.F.R. 1152.29. All local publicity of the project has described it as a trail connecting the Cities of Fishers and Noblesville; from 96th St., across 146th St. and terminating at Pleasant St. The premise of this trail is that it would serve as a direct connection between both cities. However, in order that pedestrian and other slow moving traffic may safely cross the four lane intersection at 146th St., a grade separation achieved by building a bridge would be required. The same

provisions that allow for railbanking and Interim Trails Use agreements in 49 C.F.R. 1152.29, also prohibits the rail corridor owners from building permanent structures along the right-of-way in order that the corridor is preserved for potential continuance of rail service.

Not only have the municipal Owners failed to include the cost of a bridge (which was included in their project estimate) in the publicized cost of the trail, but they've also failed to clearly articulate any other means of diverting or redirecting pedestrian traffic across this extremely busy thoroughfare. Some clarification needs to be sought on exactly how the Owners intend to achieve their objectives under the provisions and restrictions of railbanking.

The very purpose of railbanking is to preserve a disused rail so that it may return to future rail service upon the request by a viable railroad operator. The argument presented by the Owners is self-defeating in that it suggests that their objectives are to preserve the corridor for future rail use via railbanking, while simultaneously, viable rail operators and users are standing ready to use the line. Should the Owners' petition be granted and they be allowed to railbank, it would seem that the trails agreement could be immediately nullified by a common carrier railroad operator seeking to resume service along the corridor. But to allow this line to be railbanked while both operators and users have submitted comments stating that they are interested and willing to utilize the line, is antithetical to the purpose and creation of railbanking as a mechanism for preserving railroad corridors. If a viable use exists today, the Owners, nor the Board (by facilitating the Owners' objective) should stand in the way of allowing the Line to serve its intended purpose.

FREIGHT USERS

As mentioned above, potential freight users along the Line have participated in this proceeding expressing a genuine and marked interest in utilizing freight service. While the

Owners stated that they've never held themselves out to be common carriers, their refusal to serve as responsible stewards of the Line shouldn't harm freight users' access to rail as a viable and competitive form of transporting their commodities and finished goods.

Pursuant to 49 U.S. Code § 10501, the Board is given specific authority and jurisdiction over interstate railroad carriers and remedies with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities as well as the construction, acquisition, operation, abandonment, or discontinuance of railroad lines. We believe this authority extends to the foregoing proceeding and subject Line, given the level of community and business interest in retaining the railroad line for various types of rail operation.

RAILROAD OPERATORS

In conjunction with the previous discussion of freight users, various railroad operators have also come forward with an interest in serving customers, both passenger and freight, along the line. In a comment previously submitted to the proceeding by STNKP, evidence was provided showing that the Owners publicly rejected the top scoring railroad operator proposal ,submitted to the Hoosier Heritage Port Authority, due to an objection with having freight running through their communities. Without restating any previous arguments, we would like to highlight that Iowa Pacific, the Indiana Transportation Museum, and the Indianapolis Metropolitan Railway were three rail organizations which came forward to offer passenger and/or freight service along the line. At this point there are customers along the Line and railroad operators willing to serve them.

UNNECESSARY EXPEDIENCY

Since the initial petition and throughout subsequent filings with the Board, the Owners have insisted on an expedited process to achieve their objectives. With respect to the overwhelming amount of opposition towards the Owners' petition, it should be expected that the Board would be compelled to investigate the lingering question of why the Owners seek to move this proceeding along so fast amid so much confusion and opposition. Given the objection of so many relevant, local stakeholders, it is incumbent on the Board to ask the critical questions regarding a Line that STNKP believes still remains under the Board's authority.

CONCLUSION

In conclusion, STNKP respectfully believes that the Board should find the subject Line to be under its authority and that there is inadequate evidence to support facilitating the Owners' objectives, especially in an expedited manner. Therefore, we petition the Board to suspend and investigate this proceeding prior to issuing any decision which may adversely affect the opportunities for common carrier rail service along this corridor.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Logan J. Day', with a stylized, cursive script.

Logan J. Day
Group Facilitator

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