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July 7, 2017

By e-filing

Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20024

Re: Docket No. AB-55 (Sub-No. 643X), *CSX Transportation, Inc. -- Abandonment
Exemption -- in La Porte, Porter and Starke Counties, IN*

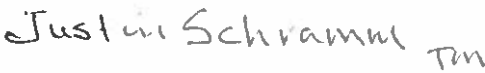
Finance Docket No. 36076, *Chesapeake and Indiana Railroad Company, Petition
for Declaratory Relief*

Dear Ms. Brown:

Hereby transmitted is a Reply in Opposition to (1) Petition For Reconsideration and (2)
Motion To Strike for filing with the Board in the above referenced matter.

Respectfully submitted,


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July 7, 2017

Page 2

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BEFORE THE
SURFACE TRANSPORTATION BOARD

CSX TRANSPORTATION, INC. --	)	
ABANDONMENT EXEMPTION -- IN	)	DOCKET NO.
LAPORTE, PORTER, AND STARKE	)	AB-55 (SUB-NO. 643X)
COUNTIES, IN	)	
	)	
CHESAPEAKE AND INDIANA	)	FINANCE DOCKET
RAILROAD COMPANY -- PETITION	)	NO. 36076
FOR DECLARATORY ORDER	)	

**REPLY IN OPPOSITION TO (1) PETITION FOR
RECONSIDERATION AND (2) MOTION TO STRIKE**

TOWN OF NORTH JUDSON, INDIANA
204 Keller Avenue
North Judson, IN 46366

Replicant

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DATE FILED: July 7, 2017

BEFORE THE
SURFACE TRANSPORTATION BOARD

CSX TRANSPORTATION, INC. --	)	
ABANDONMENT EXEMPTION -- IN	)	DOCKET NO.
LAPORTE, PORTER, AND STARKE	)	AB-55 (SUB-NO. 643X)
COUNTIES, IN	)	
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CHESAPEAKE AND INDIANA	)	FINANCE DOCKET
RAILROAD COMPANY -- PETITION	)	NO. 36076
FOR DECLARATORY ORDER	)	

**REPLY IN OPPOSITION TO (1) PETITION FOR
RECONSIDERATION AND (2) MOTION TO STRIKE**

Pursuant to 49 C.F.R. § 1104.13(a), the Town of North Judson, Indiana (the Town) hereby replies in opposition to a Petition for Reconsideration (Petition) and Motion to Strike (Motion) filed by Chesapeake and Indiana Railroad Company (CKIN) on June 20, 2017.^{1/}

**THE PETITION AND MOTION SHOULD BE
REJECTED AS FILED OUT-OF-TIME WITHOUT LEAVE**

The Board decision to which the Petition and Motion are directed was served on May 31, 2017, not on June 1, 2017 as alleged at page 2 of the Petition. Pursuant to 49 C.F.R. § 1115.3(e), the due date for the Petition and Motion was 20 days thereafter, i.e., June 19, 2017. The Petition and Motion were filed after that due date without leave from the Board for such late filing. The Petition and Motion are thus susceptible to rejection.

^{1/} The 20-day period for filing a reply under 49 C.F.R. § 1104.13(a) begins on the date that the pleading to which the reply is directed was filed, not on the date that the pleading was due.

DECISIONAL STANDARDS

CKIN's Petition seeks to overturn a Board decision that refused to reopen a Board decision that had been entered 12 years before reopening was sought. *CSX Transp., Inc. -- Aband. Exempt. -- in LaPorte, Porter, and Starke Counties, IN*, 2004 WL 7092541 (Docket No. AB-55 [Sub-No. 643X], decision served May 14, 2004) (2004 decision). Reopening of such a vintage decision could only have been granted on narrow grounds of fraud, mistake, or ministerial error. *Napa Valley Wine Train, Inc. -- Pet. for Declar. Order*, 4 ICC 2d 720, 729, n. 10 (1988). In refusing to reopen the 12-year-old decision, the Board found it unnecessary to consider those grounds because it found that CKIN's Petition was not supported even under broader grounds of new evidence, changed circumstances, or material error (decision served May 31, 2017 at 4, n. 6). The Town submits that the decisional grounds for CKIN's Petition for Reconsideration of the Board's denial of reopening cannot be broader than the grounds that applied to the decision that denied reopening, i.e., fraud, mistake or ministerial error.

CKIN wrongly contends that material error is a ground for reconsideration of a refusal to reopen a decision (Petition at 6). The United States Supreme Court has stated explicitly to the contrary. *ICC v. Locomotive Engineers*, 482 US 270, 278 (1987). Reconsideration of a refusal to reopen is cognizable on the ground of new evidence or changed circumstances, but only on a highly deferential basis. Thus, in *ICC v. Locomotive Engineers, supra*, the Supreme Court said (*id*):

... (O)verturning the refusal to reopen requires 'a showing of the clearest abuse of discretion', *United States v. Pierce Auto Freight Lines*, 327 US 515, 534-535 [1946]. . .

Accord: *Village of Barrington v. STB*, 758 F.3d 326, 329 (7th Cir, 2004).

A Board refusal to reopen does not constitute a clear abuse of discretion when proffered new evidence would not require the Board to reverse its initial determination. *City of South Bend v. STB*, 566 F.3d 1166, 1171 (DC Cir, 2009).

ARGUMENT

I. CKIN’S PETITION DOES NOT SHOW FRAUD, MISTAKE, MINISTERIAL ERROR, OR A CLEAR ABUSE OF DISCRETION IN THE BOARD’S DECISION THAT REFUSED TO REOPEN THE 2004 DECISION

Once the appropriate decisional standards are understood, CKIN’s Petition for Reconsideration is required to be denied because the Petition does not come close to satisfying any of the narrow grounds for granting a request for reconsideration of a Board refusal to reopen a decision.

CKIN’s Petition does not allege nor show that the Board’s decision served May 31, 2017 was tainted by fraud, or mistake, or by ministerial error. Nothing in the Board’s decision suggests the existence of any impropriety of those kinds.

CKIN’s Petition fails to establish a clear abuse of discretion in the Board’s decision served May 31, 2017. A key finding in that decision is that reopening the 2004 decision would not permit the Board to void the OFA acquisition, nor require the Town to sell the rail line to CKIN, as was CKIN’s purpose in seeking reopening (decision served May 31, 2017 at 6). Nothing in CKIN’s Petition challenges that finding. Thus, the reopening here sought by CKIN would not serve a legitimate interest of CKIN.

The alleged new evidence set forth at pages 11-13 of CKIN’s Petition appears to be designed to show that the passenger operator “exercised substantial control over how the Town

administered the railroad.” (Petition at 13).^{2/} Assuming the existence of such control solely for the sake of argument, it would be immaterial to the Board’s decision served May 31, 2017 unless such control impeded CKIN’s freight operations or adversely affected freight traffic volume. On the contrary, the Board correctly found that there was no evidence to support a determination that the Town or the passenger operator interfered with CKIN’s freight service (decision served May 31, 2017 at 5), and that freight traffic increased significantly throughout the time of the Town’s ownership and the passenger carrier’s operation of the rail line (*id* at 5-6).

Thus, the proffered new evidence would not require the Board to reverse its initial determination refusing to reopen the 2004 decision. That being the case, it follows that the Board did not clearly abuse its discretion in refusing to reopen that decision. *City of South Bend v. STB*, *supra*, 566 F.3d at 1171.

II. THE REGULATIONS CITED BY CKIN DO NOT SUPPORT ITS MOTION TO STRIKE

CKIN cites 49 C.F.R. § 1104.8 and 49 C.F.R. § 1104.17 as authority for filing of its Motion to Strike. Those regulations do not support CKIN’s Motion. 49 C.F.R. § 1104.8 authorizes the Board to strike redundant, irrelevant, immaterial, impertinent, or scandalous matter. There is no contention nor showing by CKIN that any evidence filed by the Town or the passenger operator is includable in those categories of objectionable matter. CKIN acknowledged as much when it contended that there is no reason why that regulation should not

^{2/} It is highly questionable whether the asserted new evidence establishes such control. Most of the evidence establishes animosity between CKIN and the passenger operator that does not involve the Town at all.

also cover material misrepresentations (Motion at 10). Of course, CKIN's wishing that the regulation was broader than it is does not make it so.

A review of 49 C.F.R. § 1104 reveals that there is no 49 C.F.R. § 1104.17 that was cited by CKIN at page 10 of its Motion. Obviously, therefore, CKIN's mistaken citation cannot support its Motion.

Even if there had been a legal basis for the filing of CKIN's Motion, that Motion is legally deficient because CKIN's criticism of the Town's evidence goes to the weight to be afforded such evidence, not to its admissibility. *See* 49 C.F.R. § 1114.1.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated, the Petition for Reconsideration and the Motion to Strike should be denied.

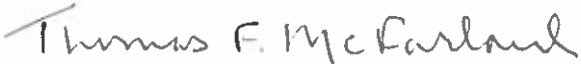
Respectfully submitted,

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DATE FILED: July 7, 2017

CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2017, I served a copy of the foregoing Reply in Opposition to (1) Petition for Reconsideration and (2) Motion To Strike by e-mail and first-class, U.S. mail, postage prepaid, on the following:

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