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October 9, 2018

246474

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
October 9, 2018
Part of
Public Record

Re: Docket No. AB-290 (Sub-No. 117X)
*Norfolk and Western Railway Company – Abandonment Exemption –
Between Indianapolis and Tipton in Marion, Hamilton, and Tipton Counties, Ind.*

EXPEDITED CONSIDERATION REQUESTED

Dear Ms. Brown:

The City of Fishers, Indiana (“Fishers”), the City of Noblesville, Indiana (“Noblesville”), and Hamilton County, Indiana (“Hamilton County”) – collectively, as the “Owners” – and the City of Indianapolis, Indiana (“Indianapolis”), hereby respond to the joint filing (the “Stay Request”) tendered on September 25, 2018, by Save the Nickel Plate, Inc. (“STNKP”) and Richard Vonnegut, Jr. (“Vonnegut”). STNKP and Vonnegut urge the Board to stay action on three pending petitions for issuance of notices of interim trails use (“NITU”). In short, the Stay Request is deficient and unwarranted. Rather, Surface Transportation Board action granting the NITU petitions is long overdue.

In May of this year, the Owners were advised by way of an Entire Board decision that they could proceed straightaway with plans to pursue trails use arrangements for the subject Nickel Plate Line under the Board’s interim trail use regulations at 49 C.F.R. § 1152.29. City of Fishers, City of Noblesville, & Hamilton County, Ind. – Petition for Partial Revocation of Exemption, Docket No. FD 36137 (STB served May 31, 2018), slip op. at 7 (“Fishers Petition”). In keeping with the Board’s instruction, Fishers, Noblesville, and Indianapolis each promptly invoked the Board’s trails use procedures to negotiate trails use arrangements with the Owners for separate but contiguous portions of the railroad corridor. Fishers, Noblesville, Indianapolis, and, indeed, the Owners proceeded as they did recognizing that the “Board’s role in rail banking/interim trail use is essentially ministerial,” and is generally limited to ensuring that

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applicable procedural requirements (including the willingness of the line owner to negotiate an interim trails use arrangement with the would-be trails sponsor) are satisfied.¹

To date, the Board has, without explanation, withheld execution of the “essentially ministerial” act of issuing the requested NITUs, thereby thwarting trails use objectives that the Owners have planned to implement for well over a year. As the record reflects, interests opposing the Owners’ trails use objectives and advocating for preservation of the tracks for purposes of excursion train operations, including US Rail Holdings, LLC (“USRH”), have argued that the Board should postpone action on the NITU petitions. In particular, nearly *four months ago*, USRH filed what it had styled as a motion for a “preliminary injunction.” To date, that injunction request remains pending. The agency has not informed the parties of when it expects to act, nor has it thus far protected against extraneous filings like those that complicated the Fishers Petition proceeding unnecessarily.²

Now, STNKP (a frequent participant in these proceedings whose interest in excursion train service is well known) and Vonnegut, represented by shared legal counsel, urge the Board to “stay further action” in this proceeding, pending the resolution of recently-filed state court complaints in Marion and Hamilton Counties accusing the Owners of violating Indiana’s Open Door Law. The Stay Request is a frivolous attempt to frustrate the interim trails use process to the advantage of excursion train enthusiasts. The claims contained in the lawsuits initiated by STNKP and Vonnegut are time-barred and unfounded. The Owners’ decision to rail bank the Nickel Plate Line was made in strict conformity with Indiana law. For these reasons, the Owners are responding aggressively to the recent pleadings, and will seek costs and fees from STNKP and Vonnegut when the Owners prevail. See Fishers September 25, 2018 letter to STNKP counsel, dated September 25, 2018, attached hereto.

¹ Beaufort Railroad Company, Inc. – Modified Rail Certificate, Docket No. FD 34943 (STB served Jul. 21, 2009) (“Beaufort Railroad”), slip op. at 8 (citing to Georgia Great Southern – Abandon & Discontin. Of Service – GA, 6 S.T.B. 902, 907 (2003); Idaho Northern et al. – Abandonment & Discon. Exemption, 3 S.T.B. 50, 59 (1998); Iowa Power, Inc. – Construction Exemption – Council Bluffs, IA, 8 I.C.C.2d 858 (1990); Iowa Southern Railroad Company – Exemption – Abandonment, 5 I.C.C.2d 496 (1989), aff’d Goos v. ICC, 911 F.2d 1283 (8th Cir. 1990); Citizens Against Rails-to-Trails v. STB, 267 F.3d 1144 (D.C. Cir. 2001)).

² The Owners are aware of two recent filings by Cody Phipps, residing in Columbus, Indiana, some 50 miles from the southern end of the Nickel Plate Line, seeking here to revisit issues that were dispensed with in Fishers Petition. The Phipps filings are procedurally inappropriate, and the Owners will not respond to them substantively.

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The STNKP/Vonnegut Stay Request is devoid of any mention of the criteria under which the Board may grant an injunction, and it does not attempt to address those criteria. Accordingly, the Stay Request must be denied. STNKP/Vonnegut point out that each has requested that the respective state court enjoin the owners from pursuing trails use efforts. Those state courts have not granted the injunctive relief that STNKP/Vonnegut seek. The Stay Request does not explain why the Board should be expected to block local trails use efforts when the state courts addressing the allegations upon which the Stay Request are premised do not.

Unless and until the Board acts, the Owners will continue to be forced to expend taxpayer dollars defending frivolous lawsuits and filings before this agency initiated by organizations and individuals whose interest in the future of the line has nothing to do with the Board's statutory mandates, and everything to do with the recreational purpose(s) to which the Nickel Plate Line may be dedicated. Finally, the above-cited Beaufort Railroad proceeding is instructive. In that case, two parties filed formal stay requests with the Board, seeking to enjoin state agency efforts to commit a modified certificate railroad line to interim trails use. The petitions for stay of the trails use efforts in that case were filed on June 19 and 30, 2009, respectively. The Board thoroughly addressed the stay criteria and denied the requested injunctive relief in a decision served on July 21, 2009, just over a month from the date the initial stay request was filed. The similarities between Beaufort Railroad and this proceeding should not be lost on the Board, considering that the Board's July 2009 decision in that case was cited to in the Fishers Petition decision.

Respectfully submitted,



Robert A. Wimbish

Counsel for City of Indianapolis, Indiana; City of Fishers, Indiana; City of Noblesville, Indiana; and Hamilton County, Indiana

Enclosure (City of Fishers letter)

cc: All parties of record



September 25, 2018

SENT VIA E-MAIL

Terry Tolliver
Brattain Minnix Garcia
One Indiana Square
Indianapolis, IN 46204
terry@bmgindy.com

*Re: Save The Nickel Plate, Inc. v. City of Fishers Board of Public Works & Safety,
et. al. 29D03-1809-PL-008614*

Dear Mr. Tolliver,

It was a pleasure meeting you on September 19, 2018 to discuss the above-referenced lawsuit (the "Complaint") against the City of Fishers ("Fishers"), the City of Noblesville, and the Hamilton County Commissioners. As we discussed, the Complaint fails to state a claim upon which relief can be granted. Therefore, Fishers requests that your client, Save the Nickel Plate, Inc. ("STNKP") voluntarily dismiss its Complaint. Before spending additional time and resources responding to the Complaint, Fishers agreed to provide STNKP with a further understanding of its position. In support of Fishers' request for dismissal, please consider the following:

I. BACKGROUND

a. The Owners' Decision to Railbank the Nickel Plate Railroad was Open, Transparent, and in Accordance with Indiana Law.

Fishers, the City of Noblesville ("Noblesville") and Hamilton County, Indiana ("County") are collectively the owners ("Owners") of the Nickel Plate Railroad (the "Line"), which extends from Tipton to Indianapolis, Indiana. After years of underutilized activity, the Owners began publicly discussing the conversion of the Line into a linear, recreational trail pursuant to the Federal Trails Act.

In contrast to STNKP's erroneous assertions, **and although not required by Indiana law**, the Owners hosted, participated in, and facilitated robust public engagement prior to making the decision to railbank the Line. Specifically, on February 28, 2017, the Owners held a press



conference and publicly announced their decision to consider railbanking. Immediately thereafter, the Owners sent letters to residents and businesses adjacent to the Line inviting them to attend public engagement forums with community leaders to discuss railbanking. On the same day, the Owners established a website dedicated to educating the public about the railbanking process, ownership of the Line, and addressing frequently asked questions. Fishers and Noblesville hosted joint-listening sessions on March 21, 2017 and March 23, 2017, respectively, during which the public could ask questions, provide comment and generally interact with community leaders concerning the Line. In addition to Mayor Fadness, Mayor Ditslear, and the County Commissioners, the Owners were also represented at the public forums by members of their public safety, engineering, and parks and recreation departments to ensure comprehensive engagement with the public. **Again, none of these public efforts were required by Indiana law.**

After five months of public engagement, on July 31, 2017, the Owners, in a duly noticed, public meeting conducted in strict compliance with Indiana law, voted to pursue railbanking. Shortly thereafter, the Owners submitted a petition to the Federal Surface Transportation Board ("STB") seeking railbanking authority, which was approved by the STB on May 31, 2018. See City of Fishers, City of Noblesville, & Hamilton County, Ind. – Petition for Partial Revocation of Exemption, Docket No. FD 36137. After receiving authority to railbank the Line, Fishers, Noblesville, and the City of Indianapolis petitioned the STB to become trail sponsors for approximately twenty-two (22) miles of the Line extending from downtown Noblesville to downtown Indianapolis.

b. STNKP's Frivolous Claims Have Been Denied in Multiple Venues.

To date, STNKP has attempted to frustrate and undermine the Owners' policy decision to railbank the line by submitting multiple records requests, filing complaints with Indiana's Public Access Counselor ("PAC"), filing claims before the STB, and now, filing the subject, frivolous Complaint. At every turn, Fishers has expended significant resources responding to STNKP, and at every turn, STNKP's claims have been found meritless.

STNKP has filed three (3) formal complaints with Indiana's Public Access Counselor ("PAC"), all of which, have been summarily dismissed. In fact, the PAC held that Fishers fully complied with the Access to Public Records Act ("APRA") when it **acted in a manner superior**



to the spirit of the law by producing records responsive to a complex and imprecise request. *See* 17-FC-182; *see also* 17-FC-271 (where the PAC held that Fishers did not violate the APRA when it produced over 300 pages of documents). Most recently, the PAC dismissed STNKP's untimely ODL complaint that directly relates to the Complaint. *See* 18-FC-111.¹

Despite STNKP's numerous filings with the STB, the STB held that the Owners may pursue railbanking. *See* City of Fishers, City of Noblesville, & Hamilton County, Ind. – Petition for Partial Revocation of Exemption, Docket No. FD 36137. Although not a named party, STNKP has also participated in State and Federal actions brought against Fishers and the Owners. *See* *Indiana Transportation Museum v. City of Fishers, et al.*, Cause No. 29C01-1805-PL-4029; *Indiana Transportation Museum, Inc. v. Hoosier Heritage Port Authority v. City of Fishers, et al.*, Cause No. # 1:17-cv-02373-JMS-MPB; *Indiana Transportation Museum v. Hoosier Heritage Port Authority, et al.*, Cause No. 29C01-1805-PL-3969). Again, each of those actions were dismissed or decided in favor of the Owners.

Rather than respect the decisions of the Owners, as reinforced and confirmed by the PAC, the STB, and state and federal courts, STNKP has filed yet another baseless Complaint that will cause the Owners to expend significant tax dollars to defend.

II. STNKP'S COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

a. STNKP's Open Door Law Claims are Time Barred.

STNKP's claims are untimely and therefore will be dismissed in accordance with Ind. Code §5-14-1.5-7(b). On or around August 7, 2018, STNKP filed a complaint with the PAC alleging that Fishers violated the Open Door Law ("ODL") during its July 31, 2017 public meeting.² As previously stated, the PAC dismissed this untimely complaint in accordance with Ind. Code §5-14-5-7 (formal complaint must be brought within 30 days after a person receives notice of fact that a meeting was held).

Similarly, the Complaint is untimely. Ind. Code §5-14-1.5-7(b)(2) provides, in relevant part, that

¹ I have attached copies of the PAC's Orders for your reference.

² The meeting was jointly held between the City of Fishers Board of Public Works & Safety, the City of Noblesville Board of Public Works & Safety, and the Hamilton County Commissioners.



... any action to declare any policy, decision, or final action of a governing body void, or to enter an injunction which would invalidate any policy, decision, or final action of a governing body, based on violation of this chapter before the action is commenced, shall be commenced:

...
(2) ... **within 30 days** of either: (A) the date of the act or failure to act complained of; or (B) **the date that the plaintiff knew or should have known that the act or failure to act complained of had occurred; whichever is later.** If the challenged policy, decision, or final action is recorded in the memoranda or minutes of a governing body, a plaintiff is considered to have known that the act or failure to act complained of had occurred not later than the date that the memoranda or minutes are first available for public inspection.

(emphasis added). The City of Fishers Board of Public Works & Safety ("Board") approved the minutes of the July 31, 2017 meeting during its duly noticed public meeting on August 14, 2017. Therefore, under Indiana law, STNKP is charged with knowing that the alleged act or failure to act complained of had occurred on August 14, 2017. Because STNKP failed to bring its ODL claims by or before September 14, 2017, the claims are barred. See City of Jeffersonville v. Env'tl. Mgmt. Corp., 954 N.E.2d 1000, 1011 (Ind. Ct. App. 2011) (where party waived its ODL claims when it failed to commence action within 30 days of the date the party should have known that the act or failure to act complained of had occurred).

b. STNKP's Claim That It Had a Right to Be Heard at Fishers' September 10, 2018 Public Meeting Is Unfounded.

The ODL does not guarantee the right to speak at public meetings. See Opinion of the Public Access Counselor 08-FC-149, citing Brademas v. South Bend Cmty. Sch. Corp., 783 N.E.2d 745, 751 (Ind. Ct. App. 2003), *trans. denied*, 2003. The intent of Indiana's ODL is that official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed. Ind. Code § 5-14-1.5-1. Accordingly, except as provided in section 6.1 of the ODL, all meetings of the governing bodies of public agencies must be open at all times **for the purpose of permitting members of the public**



to observe and record them. Ind. Code § 5-14-1.5-3(a). (emphasis added). *See Opinions of the Public Access Counselor 08-FC-149 and 10-FC-240.* As evidenced by its presence at the September 10, 2018 public meeting, STNKP was afforded proper notice and the opportunity to observe the meeting in accordance with the ODL.

Moreover, Indiana law does not require a public hearing when awarding a professional services agreement. On September 10, 2018, the Board held a regularly scheduled, duly noticed public meeting. Among other items considered at the meeting, the Board entertained and approved two (2) professional services agreements for providing master planning services for the Nickel Plate Trail (i.e., hosting public information forums, branding, marketing, and design). Both professional services agreements were awarded in response to a public process – a request for proposals (“RFP”) - whereby Fishers publicly invited offerors, pursuant to Ind. Code §5-22-9 *et. seq.*, to submit proposals for providing comprehensive master planning services for Fishers’ portion of the trail.³

In general, not only does Indiana law not require a public hearing before awarding a professional services agreement, but it allows professional services agreements to be approved administratively. **Above and beyond Indiana law**, Fishers’ internal policies require certain professional services agreements to be approved by its Board as opposed to the Mayor, although Indiana law allows the latter. Accordingly, the Board approved the professional services agreements in accordance with Indiana law.

III. STNKP’S CONTINUED LITIGIOUSNESS SUBJECTS IT TO ATTORNEY’S FEES.

a. *STNKP is Not Entitled to Fees or a Civil Penalty for Its Claims.*

STNKP cannot recover fees or a civil penalty for its ODL claims. Ind. Code §5-14-1.5-7(f) provides that a plaintiff (absent emergency circumstances) is not eligible for the awarding of attorneys’ fees, court costs, and other reasonable expenses if the plaintiff filed the action without first seeking and receiving an informal inquiry response or advisory opinion from the public access counselor. Similarly, a court may only assess a civil penalty for ODL claims if the plaintiff first obtained an advisory opinion from the PAC before filing a civil action. STNKP’s untimely ODL

³ The Complaint mistakenly references Ind. Code §36-9-6.1 *et. seq.*, which involves the creation of a special taxing district for certain thoroughfare projects, the appropriation of property for certain thoroughfare projects, and the utilization of the thoroughfare fund created by the special taxing district.



claims were dismissed by the PAC, and therefore, its claims are not eligible for fees or a civil penalty.

b. STNKP May Be Responsible for Fishers' Fees.

Despite the absence of any facts supporting its erroneous claims, STNKP filed the subject Complaint. Because the Complaint is wholly absent of any allegations upon which relief can be granted, Fishers may be entitled to reasonable attorney's fees, court costs, and other reasonable expenses of litigation for frivolous and vexatious claims. See Ind. Code §5-14-1.5-7(f)(2); see also Ind. Code §34-52-1-1. While sanctions of attorney's fees against STNKP may be worthless, because of its financial status, please note that the award of attorney's fees for frivolous litigation may be entered against an attorney. See Kahn v. Cundiff, 543 N.E.2d 627 (Ind. 1989).

IV. CONCLUSION

The Complaint fails to state a claim upon which relief may be granted. While STNKP disfavors the public policy decision made by locally elected officials, the process of making that local decision was made in strict conformity with federal and state law. Taxpayers should not be forced to fund defense costs for frivolous litigation. For the reasons provided herein, Fishers requests the Complaint be dismissed with prejudice on or before **October 3, 2018**. If dismissal does not occur, Fishers will move for Summary Judgement and, subsequently, the award of fees and costs.

Very Truly Yours,

Christopher P. Greisl
City Attorney

Enclosures

Cc: Bryan Babb (via email)
Mike Howard (via email)