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January 19, 2018

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 **Reply of the Cities of Fishers and Noblesville, Indiana, and Hamilton County, Indiana, to Late-Filed Comments**, dated and filed on January 19, 2018.

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/flr
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 LATE-FILED COMMENTS

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

Dated: January 19, 2018

**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 LATE-FILED COMMENTS

The Cities of Fishers and Noblesville, Indiana, and Hamilton County, Indiana (collectively, the “Owners”) hereby tender their Reply to various interested parties that have late-filed comments in the above-captioned exemption revocation proceeding after the deadline prescribed by the Surface Transportation Board (the “Board”) on September 22, 2017. In so doing, the Owners understand that they are entitled under the order served on January 5, 2018 (the “January 5 Order”) to reply to the substance of any and all comments filed in response to the Owner’s Petition after October 12, 2017.¹

I. FACTUAL AND PROCEDURAL OVERVIEW

The Owners believe that, at this juncture of the proceeding, providing a detailed background of the case is largely unnecessary, the complicated procedural history of the proceeding to this point notwithstanding. That case background is thoroughly detailed in the Owners’ earlier filings. Suffice to say here that the Owners possess railroad assets (including

¹ The Owners believe that the January 5 Order entitles them also to respond to filings that may have been dated and received by the Board before October 12, 2017, but that were procedurally deficient (for lack of appropriate service upon counsel for the Owners and the like) until such procedural deficiencies subsequently were excused by the January 5 Order. With very limited possible exception, however, the Owners will limit the scope of the present Reply to comments posted to the Board’s website on or after October 13, 2017.

right-of-way) – the subject “Line” – which they acquired from Norfolk and Western Railway Company (“N&W”) following Interstate Commerce Commission authorization for N&W to abandon the Line. Two of the three current Owners – the Cities of Fishers and Noblesville – purchased the Line in 1995; Hamilton County was added later. Rail service continued over the Line thereafter until The Indiana Rail Road Company ended operations in 2003, evidently pursuant to discontinuance authority that it had secured several years prior. There have been no freight operations on the Line since 2003, and the Owners are unaware of any requests for the restoration of freight service at any time from 2003 until several weeks after they invoked the STB’s procedures last year to pursue interim trails use arrangements for the Line.

In acquiring the Line as they did, the Owners have presumed that they are categorically exempt from Board regulation and that they are not common carriers pursuant to 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”). Neither the Owners nor their designee for purposes of overseeing the Line, Hoosier Heritage Port Authority, have ever held themselves out to the public to provide common carrier service.

The Owners’ August 1, 2017 “Petition for Partial Revocation of Exemption” (the “Petition”) seeks Board guidance, and, if necessary, the appropriate regulatory relief to enable the Owners to pursue interim trails use arrangements pursuant to 16 U.S.C. § 1247(d) and the Board’s regulations at 49 C.F.R. § 1152.29. The Owners believe that partial revocation of the categorical exemption that they understand that they currently possess pursuant to Common Carrier Status should not be a necessary predicate for invocation of the Board’s trails use procedures. While the path to trails use would have been clear under agency precedent if the Owners were terminating a modified certificate operation contemporaneously with the invocation

of the trails use procedures, the facts here (no contemporaneous termination of a modified certificate operation) leave the path to interim trails use unclear. The Director's Orders to date reveal a grasp of the issues, and the end result that the Owners desire.

II. RESPONSE TO LATE-FILED COMMENTS

The comments responding to the Petition (or to subsequent filings in the record) generally oppose the Owners' trails use plans, and that is equally true of the late-filed comments from interested parties such as Save the Nickel Plate, Inc. ("STNKP"); The Quikrete Companies ("Quikrete"); Mayor Kitchell of Logansport, Indiana ("Kitchell"); and U.S. Rail Corporation ("USRC"). Like the trails use opponents who submitted timely comments, those who have offered filings after the October 12 deadline have different views of how the Board should resolve the matter in their collective favor. The Board has aptly remarked upon the "spectrum" of interests in its January 5 Order. Some, such as Linda Kraatz ("Kraatz"), urge the Board to deny the Petition, which would either leave the Line as it exists today (and would leave the Owners free to remove the track), or the Petition could be denied as moot in light of an STB ruling that an abandonment is unnecessary to pursue trails use in this case (as is discussed further below). Others, such as the Hoosier Rails to Trails Council, Inc. ("HRTC"), appear to argue either that – (a) the Owners are not – or never were – exempted from Board regulation pursuant to Common Carrier Status; or (b) the Board should go beyond the revocation relief sought in the Petition, and order that the Owners are subject to the full array of Board regulation going forward as railroad common carriers. Finally, others, such as USRC and its co-filer, Indiana Transportation Museum ("ITM"), argue that the Board should grant the Petition, provided, however, that the agency also extends the partial revocation to include 49 U.S.C. § 10904.

Certain of the post-deadline filings do not warrant a response from the Owners here. Specifically, the Owners previously responded to the substance of STNKP's November 2, 2017 Motion to Suspend and Investigate, and the Board denied STNKP's motion in its January 5 Order. Similarly, Kraatz' November 6, 2017 Motion to Extend the Comments Deadline has been denied, so a further reply is unnecessary. Additionally, the Owners already have responded to their satisfaction to Kitchell's late filings of October 24, 2017, and November 6, 2017, by way of letter replies on October 27, 2017 and November 8, 2017, respectively. None of the other late filings to which the Owners will respond here, aside from the USRP/ITM joint comment, warrant extensive discussion.

Quikrete cares more about the "fair train" and trail safety than it does about possible freight rail service restoration

Quikrete filed a one-page letter comment addressed to Acting Chairman Ann Begeman and posted to the Board's website as of October 13, 2017. Like other would-be shippers on the line, Quikrete has intervened without legal counsel (suggesting something of the limited interest it truly has in the possible restoration of rail service). Quikrete acknowledges that it stopped using rail service over the Line some 15 years ago, resorting to the use of trucks exclusively thereafter. Quikrete never claims to have reached out to the Owners over the past several years to see rail service on the Line resume, and the Owners are unaware of any such expressions of interest from Quikrete prior to the initiation of this proceeding. Quikrete's highly-qualified statement of interest in the restoration of rail service ("if competitive rates were available") takes up two lines of Quikrete's one-page comment, and Quikrete never even estimates how much of its truck traffic it would or could divert to rail if service were restored.

More telling is that Quikrete devotes more than double the space in its full-page comments to lamenting the loss of the "fair train" – the passenger excursion trains operated

periodically in the past by ITM. Quikrete thereby reveals that its principal motivation has little if anything to do with freight service options. Finally, Quikrete commits far more text to trail safety concerns in the event of trails use than it does to its rail service needs. In short, Quikrete's asserted interest in rail service is dubious and speculative when measured against the issues to which it devoted more attention – excursion trains and trails use safety.

Indiana Transportation Museum and U.S. Rail Corporation ignore potentially guiding precedent regarding the appropriate path to trails use

Aside from being woefully and inexplicably late, the November 13, 2017 joint comments of ITM/USRC (the “Joint Comments”) are useful to a point.² ITM and USRC implicitly concede, in keeping with the Owners’ past filings, that the Line is subject to ongoing Board jurisdiction as a line of railroad. They also implicitly concede that the Owners are currently subject to a “blanket exemption” (Joint Comments at 4), again as the Owners consistently have contended. ITM and USRC also allow that a path to a possible trails use outcome would be to follow the regulatory formula of Caldwell Railroad Commission – Exemption from Subtitle IV, Docket No. FD 32659 (Sub-No. 2) (STB served Sep. 8, 2015) (“Caldwell”). However, unlike the Owners, ITM and USRC insist that the Caldwell approach is *the* path to trails use. Moreover, while ITM and USRC seem generally to support the Owner’s request for partial revocation, ITM and USRC argue that the Owners’ future, post-revocation use of the Board’s abandonment procedures must be subject to the offer of financial assistance (“OFA”) provisions of 49 U.S.C. § 10904 (and the corresponding regulations at 49 C.F.R. § 1152.27), from which the Owners specifically requested to remain exempt.

² ITM/USRC are, incidentally, the only interested parties, aside from the Owners, to have retained experienced railroad regulatory counsel.

While Caldwell, a unique case based upon unique facts, may inform the Board's decision here, the facts of that case are not the same as here – the circumstances in Caldwell are analogous, strictly speaking. A key distinction, of course, is that the Owners acquired the Line after it had been authorized for abandonment, while the Caldwell Railroad Commission's line had never before been authorized for abandonment. Accordingly, the modified certificate procedures at 49 C.F.R. part 1150, subpart C, were unavailable to any railroad operator that the Caldwell Railroad Commission may have elected to install on its line. But the modified certificate procedures are, and have been, available to any operator that the Owners' might have agreed to install on this Line.

We know from other cases, of which Tillamook Bay and Sammamish³ are examples, that an owner of a line over which a third-party carrier has provided service pursuant to a modified certificate is entitled to invoke trails use upon the effectiveness of the modified certificate operator's notice of termination of operations pursuant to 49 C.F.R. § 1150.24, and that the line owner need not invoke the Board's abandonment procedures in such a case. The only potentially significant distinction between cases such as Tillamook Bay and the facts here are that the Owners do not have the benefit of a contemporaneous termination of modified certificate operations, although it is not clear why that distinction should matter. Both lines of cases – Tillamook Bay on the one hand and Caldwell Railroad Commission on the other – could inform the outcome here. But it is disingenuous at best for ITM and USRC to advocate for the

³ 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”).

Caldwell outcome, arguing that an abandonment proceeding is a necessary prerequisite to trails use, while ignoring the Tillamook Bay precedent or failing to distinguish that line of cases.

In keeping with the general premise of the ITM/USRC Joint Comment, following the Tillamook Bay line of cases appears to be correct. If indeed an abandonment proceeding is a prerequisite to the Owner's trails use objectives, as ITM/USRC contend, then an abandonment proceeding for this Line exists – 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). Because Caldwell involved a publicly-owned line for which there had not been advance abandonment authorization, it may apply only to its unique fact set, but not here. So, while ITM and USRC may be correct that the Caldwell process may be of guidance as an analogous case, further analysis shows that it is certainly not the only, or even the most apt or logical, approach to trails use under present facts.

Even if the Board were to adopt the Caldwell process as controlling, there is inadequate basis to require the Owners to subject themselves to the OFA procedures were they to elect to proceed with abandonment. There is no genuine need for freight rail service on the line. In this filing and in previous submissions, the Owners have pointed out that none of the would-be shippers has substantiated need, and that all of the brief, vague letter filings offered by on-line industries (and the timing of the same) indicate that each industry was recruited as a make-weight for preserving the entire Line for passenger train excursion services. Surely USRC, a rail carrier holding company represented here by seasoned counsel, could have consulted with the shippers and secured traffic commitments in advance in the course of due diligence and to prove genuine

need, particularly for a rail line that has seen no freight service in more than a decade. But USRC evidently hasn't done any of that, relying instead on speculation and bald assertion.

Moreover, ITM and USRC certainly have not proven that a more expansive revocation is warranted under the applicable legal standard. As an earlier decision in the Caldwell proceeding states:

“[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. Technically, ITM and USRC are not “petitioners,” and so their request for an expanded revocation is procedurally deficient, but, beyond that, they have failed to address the applicable revocation standard, and have not demonstrated under that standard that Board action is needed to ameliorate “alleged harms.”

Finally, were ITM, USRC and allied interests to prevail on the application of Caldwell here, and if the Board were to be persuaded to extend partial revocation to include section 10904, there is no assurance that such an outcome would lead to an abandonment proceeding. As USRC would know, the Owners are not obligated to pursue abandonment. It is possible that the Owners will re-evaluate their options in the event of an unfavorable decision that leaves them exposed to a sham OFA. On that note, in advancing the public interest, the Owners could elect to withdraw an abandonment were an OFA to be filed which, in the Owner's view, demonstrated token commitment to freight service as a pretense for preserving the line for excursion trains and blocking interim trails use.

Save the Nickel Plate jumps to unsupported conclusions; asks the same of the Board

STNKP's late-filed "evidence" of November 20, 2017, hardly warrants a response. STNKP would have the Board infer from a routine news report that the City of Fishers is somehow engaged in facilitating local economic development against the community's interests, and that its larger plans are all guided by the Owners' allegedly overarching trails use objectives. STNKP is asking the Board to leap to unfounded conclusions of conspiracy. Furthermore, STNKP's suggestion that the Board should be swayed by Fishers' supposed chutzpa in designating the inactive Line as the "Nickel Plate Trail" for planning purposes reveals more about STNKP than it does the Owners. STNKP's efforts to sensationalize the trivial is simply part of a larger campaign among the trails use opponents to falsely and baselessly accuse the Owners of connivance at every possible juncture. The Board should find that STNKP's November 20 filing contains nothing of probative value.

Mike Bowen asks the Board for guidance on next-step issues

For its part, the November 8, 2017 comments of Mike Bowen ("Bowen") consist of two parts. First, it holds forth on attorneys, the Owners' allegedly "trivial" interest in adherence to agency procedure, the value of certain Congressional letters of support for the Owners, and the asserted accuracy of Mayor Kitchell's comments, among other things. Bowen appears to be opposed to trails use, but he does not articulate a legal basis for this outcome. In the second part of his comments, Bowen inquires about Board-administered interim trails use arrangements. The Owners respectfully disagree with Bowen's various observations, and he is wrong in claiming that Logansport, Indiana, is located on the Line. (Logansport is located on a north-south rail route of which the Line historically was a part, but Logansport is some 50 route miles north of the "Line" itself – specifically, that part of the former Nickel Plate route that is

held by the Owners and is the subject of this proceeding.) The Owners do not object to Bowen's interim trails use inquiries, but also believe that it is premature for them to offer any input of their own.

Karen Lynn Williams rehashes false accusations, and appears to be asking for relief that the Board lacks authority to grant

Finally, on December 27, 2017, Karen Lynn Williams (Williams) offered her input on the proceeding. In so doing, Williams repeats the frequent (and false) allegation that the Owners have failed to provide and account for public input on the Owners' interim trails use objectives. In previous filings, the Owners have refuted this allegation, showing that their decisions for the future deployment of the Line were reached after appropriate notice and comment. The Owners respectfully disagree with trails use opponents regarding whether either interim trails use or the restoration of excursion train operations best advances the public interest at this time, but, more fundamentally, trails use opponents are wrong to conclude that, because their particular viewpoint ultimately was not embraced, they have been ignored.

Individuals such as Williams would have the Board second-guess and override the prerogative of local elected officials with respect to the disposition of inactive, municipally-owned transportation assets. Moreover, the Owners understand that, what many individual commenters would have the Board do is not merely to invalidate the Owners' decision to pursue trails use (as allegedly contrary to the public interest), but also to mandate the restoration of passenger excursion train operations over the entire Line. As the Board well knows, however, even if the agency were to take the unusual step of second-guessing the public policy determinations of local elected officials, the agency lacks authority to order the restoration of excursion passenger train operations on the Line.

III. THE RECORD IS NOW CLOSED

The Owners appreciate the efforts of the Board to impose order on this proceeding, and they do not envy the challenges the agency has faced in attempting to accommodate public input without completely abandoning applicable rules of practice and procedure. The Board has made clear that upon the filing of this Reply the record in this case will close and that no further filings will be accepted. The Owners hope that interested parties will respect the Board's January 5 Order, but it is possible that some may not. In the event that any existing or new interested party submits comments after the closing of the record (with or without requesting leave to do so), the Owners hereby state in advance that, unless they specifically advise otherwise by separate expression, they object to any such post-Reply filing that may be proffered, and expect that any such filing will be rejected.

IV. A COMMONLY-SHARED INTEREST IN EXPEDITIOUS BOARD ACTION

The Owners believe that all interested parties to this proceeding, (individuals, railroad museum operators, elected officials, and the rest) desire prompt agency consideration of, and action upon, the issue of whether and/or how the Owners may pursue interim trails use for the Line. The Owners believe that by declaring the record definitively closed as of the filing of this Reply, the Board is demonstrating its commitment to move ahead expeditiously on the Owners' requested relief and on any outstanding motions filed in opposition. The Owners urge the Board again to proceed promptly to a merits decision. For that reason, and to demonstrate its own interest in and commitment to an expeditious outcome, the Owners have resolved to present this Reply well in advance of the deadline provided.

V. CONCLUSION

Once again, the Owners respectfully request that the Board facilitate their interim trails use objectives, and provide guidance as expeditiously as possible with regard to the appropriate path to achieve that end.

Respectfully submitted,

By: 

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

Dated: January 19, 2018

CERTIFICATE OF SERVICE

I hereby certify that, on this 19th day of January 19, 2018, a copy of the foregoing **Reply to Late-Filed 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