

Sept 02, 2017
Brian Landress
294 S. 9th St.
Noblesville, IN 46060
Brian.Landress@gmail.com

244261

ENTERED
Office of Proceedings
September 5, 2017
Part of
Public Record

To: Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings Surface Transportation Board
395 E. Street, S.W., Room 1034
Washington, DC 20024

Re: STB Docket No. FD 36137
City of Fishers, City of Noblesville, and Hamilton County, Indiana ("Owners")
Petition for Partial Revocation of Exemption

Dear Ms. Brown:

Enclosed for filing to the above-captioned proceeding are an original and ten copies of written comment regarding the "Petition for Partial Revocation of Exemption" filed on August 1, 2017 and the "Rebuttal" filed on August 31, 2017 with the Surface Transportation Board ("the Board"). A copy of this comment has also been served on the attorney, Robert A. Wimbish, who is representing the collective Owners, of a railroad line in Indiana.

I am a resident of Noblesville / Hamilton County and would like to provide the following comments in response to the "Motion for Leave to File for Rebuttal" and "Reply to request for an Extension of Time and Rebuttal" filed by the Owners counsel Robert Wimbesh on behalf of the "Owners".

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

Response to Rebuttal FD_36137_0_244254

Procedural Matters

The record in this proceeding should remain open to allow sufficient time for input

A. Owners conflict with STB policy as outlined by 49 U.S. Code § 10101

In the petition the Owners subscribe to being State agencies. As these agencies are public and not private they have an obligation to represent the citizens they serve. Most if not all of the comments provided to the Board on this docket are from individuals or organizations residing in Noblesville or Fishers and Hamilton County. The STB has set out a clear process for comments to be provided by the public on any filing with the STB. As would be expected the public is doing the best it can to follow this process however cannot be expected to be experts on transportation law as the Owners' counsel is. The Board should view the rebuttal provided by the Owners to be representative of the approach to avoid the public throughout the process. The Owners continued attempts to belittle and down play the views of the public is unfortunate.

A review of the comments collectively provided by the public show excellent thought, relevant backup material and references to the issues discussed. The public is not required to make legal positions as part of the comment process. As shown explicitly in the comments and material submitted, the Owners have taken direct measures to avoid the public through both evasive and unethical means. This is contrary and in direct conflict with STB policy as outlined in 49 U.S. Code § 10101 sub-section (9) to encourage **honest and efficient management of railroads**; and subsection (12) to prohibit predatory pricing and practices, to avoid undue concentrations of market power, and to **prohibit unlawful discrimination**;

The Owners are asking the Board not to frustrate the policy under this docket in approving the partial exemption request however, the Owners are in direct conflict with this policy themselves. The Owners are clearly demonstrating a means of avoiding the public and requesting exceptions that only fast track an already biased process. The Board should review and make decisions on this matter with this approach of the Owners in mind as this is relevant to STB policy and Owners intent.

B. Request for an extension

As noted in the rebuttal, two requests for an extension have been filed on 08/21/2017. These requests are made on the fact the State entities (Noblesville, Fishers and Hamilton County) required to accommodate information requests, such as those made under FOIA regulations as

governed by the State of Indiana, and the Owners are one in the same. Given this, some of the State entities have been incredibly slow to respond to requests that might include information not helpful to the Owners desire to gain rail banking approval. The extension request was made in line with STB policy and the 180 day extension is appropriate to accommodate completion, review and comment of those pending information requests.

In addition, if the Board accepts the Owners request for submission of the rebuttal as submitted on 08/31 the public should be given sufficient time to evaluate the rebuttal and provide further comment accordingly.

REBUTTAL

A. Contrary to the Rebuttal, the material facts have been disputed and deserve due consideration

As the public is not an expert on transportation and rail policy the public looks to the Board to represent the interests of the public to take appropriate steps to interpret and make decisions. The public's comments and points are multi-faceted and should not be over simplified or simply dismissed as the Owners are suggesting in the rebuttal. The comments should be included as part of a full analysis the Board will perform. The key point I would draw the Board's attention to is the continued nature of the request to benefit the Owners in every way possible through stretching interpretation of prior rulings and U.S. Code while harming the public interest. The Owner has made several assumptions in its position that only the Board is authorized to evaluate and rule on.

- I. **The Owners assume it is a foregone conclusion the line is not already considered to be fully abandoned.** The exemption request made by the Owners goes through great lengths and re-summarizes those points in the rebuttal to make this case. However, given the abandonment took place prior to the requirement for a formal notice of abandonment consumption, in-depth research and fact review will be required by the Board to determine if in fact the line is already considered fully abandoned. As was the decision in a case very similar to this request, under Docket No. AB 590 (Sub-No. 1X) – Maryland Transportation Exemption – Abandonment Exemption, it was determined the Board did not have jurisdiction due to the fact full abandonment already occurred and dismissed the request. The decision stated, “In considering all of these facts, we find that

the Line owner's actions, viewed in their entirety, are consistent with abandonment. There are numerous indications here demonstrating that this is no longer an active rail line within the national rail system. If the Line owner had a continuing intent to provide rail service on the Line, we would expect to see some evidence demonstrating that intent during the nearly 40 years since the State acquired it."

The Owners exemption request clearly outlines very little has occurred on the line for over 25 years other than some overlap use by INRD through 2003 (overlap use is not clearly documented or substantiated and is in question) and excursion trains operated by the ITM for 15 years the Owner purports is not governed under STB regulations.

If in fact the line contemplated under this request is determined by the Board to be fully abandoned the premise of the request is significantly impaired as there is no path to avail key provisions such as rail banking and interim trail use procedures. If full abandonment has occurred the Owners have already lost substantial right of way rights to underlying or adjoining land owners and will need to work through other means outside the STB to achieve the desired initiative.

At the end of the day the line is either fully abandoned or approved for abandonment. The evidence provided by the Owners in the request does not and cannot substantiate either position. It must be one or the other and the Board is the governing authority with rights to make that decision.

II. The Owner assumes if the line is considered approved for abandonment they can selectively choose which provisions of 49 C.F.R. apply due to the State exemption under Common Carrier Status.

The Owner is making a case for its own benefit not supported by 49 C.F.R. regulation. The Owner in this case has two options; (a) Exempt themselves fully under the State classification under the Common Carrier Status and not fall under the jurisdiction of the STB or (b) request the State Common Carrier status be revoked in full and place themselves under the full jurisdiction of the STB.

The Owner should not be permitted to selectively request exemption for the elements that benefit them and choose not to take part in processes that do not benefit them. For example, the Owners make the case they should:

- Not be required to go through the full abandonment process as outlined in STB process
- Remain exempt from the Board's jurisdiction for the purposes of 49 U.S.C. § 10904 (**offers of financial assistance**) and Board regulations 49 C.F.R. § 1152.27 and 49 U.S.C. § 10905 (**public use conditions**) and 49 C.F.R. § 1152.28
- as an alternate approach be granted exemption from all regulations except 49 U.S.C. § 10903, 49 C.F.R. part 1152, subpart F and 49 C.F.R. § 1152.29.

The case noted in, Docket No. FD 32659 (Caldwell Railroad Commission) did in fact request a partial exemption of Subtitle IV in order to rail bank a small segment of the line. In this matter the Board ultimately approved the partial exemption to allow for the abandonment process but did not exempt CRC from any other part of the normal abandonment process.

Many of the comments provided under this docket have indicated the Owner should not be granted narrow exemptions only to achieve their objectives but rather should be required to (if partial exemption is approved) go through the abandonment process in full.

III. **The Owners assume they have rights to leverage 49 C.F.R. § 1152.50 for abandonment**

There is evidence in the public forum that the Owners purposely and inappropriately suspended the current operator, ITM, from the line in 2015. Evidence has been produced and referenced in the public comments under this docket that false reports and statements were made by the Owners. These statements were designed to inflate minor issues typically resolved in due course to major issues ultimately suspending ITM's rights on the line since late 2015. In retrospect, it is clear the Owners took this action in order to leverage the simpler provisions under 49 C.F.R. § 1152.50 to abandon the line. There is pending litigation between the ITM and Owners that should be resolved prior to this request being considered. While the litigation is pending and if ITM prevails the

Owners may not leverage the provisions outlined in 49 C.F.R. § 1152.50 to abandon. While this filing has not yet been made by the Owners for abandonment under 49 C.F.R. § 1152.50 it was referenced as intended in the rebuttal so is pertinent to the resolution of this request. The Owners should not be afforded the benefit of this provision nor granted a partial revocation of exemption at this time given the potentially unlawful suspension of ITM.

The Owners assertion that provisions of 49 C.F.R. § 1152.50 are fully satisfied is incorrect, 49 C.F.R. § 1152.50 (b) specifically states to satisfy this exemption provision there can be “no formal complaint filed by a user of rail service on the line (or a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Board or any U.S. District Court or has been decided in favor of the complainant within the 2-year period. The complaint must allege (if pending), or prove (if decided) that the carrier has imposed an illegal embargo or other unlawful impediment to service.”

IV. The Owners assume viable proposals received from perspective operators under the RFP should not be considered in an abandonment process

The Owners performed a request for proposal to identify operators that could run on the line. The results of the RFP process are documented and can be summarized in two areas:

- **The RFP process was biased by the owners:**
 - i. 4 out of 5 proposals submitted included proposals that would leverage the full line as it exists today not requiring the need for rail banking. These proposals included financially viable firms with the means to support the full line operation. *See attached RFP proposals provided by the HHPA on July 18, 2017 submitted by Indiana Transportation Museum, Hoosier Heritage Railroad, Indianapolis Metropolitan Railway Company and Iowa Pacific Railroad.*
 - ii. The Owners opted to select the only proposal that accommodated a partial use of the line (North only) thus allowing the Owners to rail bank the unused portion referenced in the request under this docket. This proposal noted directly the lack of viability of a partial line option and is highly unlikely to

succeed. *See attached RFP proposal submitted by Nickel Plate Heritage Railroad.*

- iii. Comments provided as part of the public submission under this docket show emails of the selected operator prior to the RFP noting that a proposal for only part of the line is not financially viable.
- iv. The Owners went against the recommendation of the appointed governing body, Hoosier Heritage Port Authority (HHPA), who selected the Iowa Pacific Holdings proposal as the first choice operator in the RFP. *See attached, RFP Scoring Tabulation for Hoosier Heritage Port Authority dated July 18, 2017*

- **The RFP process included viable proposals that would be relevant to 49 U.S.C. § 10904 (offers of financial assistance).**

If the full abandonment process proceeds one or more of the firms that submitted full line proposals under the RFP will likely submit under the abandonment process to further their interest. If a more viable option is made available through the abandonment process that maintains the full line versus triggering a rail bank option those proposals should be pursued as a priority under 49 U.S. Code § 10101. This protects the interests of the Board and the public by maintaining a viable rail line that will provide benefit to the region into the foreseeable future and no public funding. Given this, the Owners request to exempt from 49 U.S.C. § 10904 should be denied.

V. The Owners assume an approach to public input that is one-way and check the box is acceptable under STB policy and Indiana Law.

The meetings and notices as outlined in the rebuttal did take place. However, what the Owner is not saying is they simply had the meetings, went home and disregarded everything they heard. I personally attended the sessions held on March 21st in Fishers and March 23rd in Noblesville. These sessions were not designed to share views but only to check a box. In the Fishers session there was no forum for the public to provide input. This was a one way engagement of signage, marketing materials and city employees pushing the trail option. There was no forum for discussion of the rail or counter balance information made available.

I also attended the Noblesville session which was revised from the Fishers session. The Noblesville meeting was attended by 200+ residents the majority of which advocated for a rail approach. Some attendees were given the opportunity to speak to the Owners. Out of 17 speakers 15 advocated for the rail and 2 for the trail.

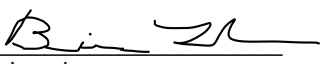
In addition, I also attended several board meetings held by Hoosier Heritage Port Authority as the RFP process moved forward. The public (non-executive) segment of these meetings were entirely scripted, held no information for the public, no public questions were permitted and the HHPA demonstrated this would be a closed door process. I personally sent an email to all HHPA board members advocating for transparency in the process. I received a response that said they could not respond due to pending litigation with the ITM. This has been a common yet inappropriate response to shield the Owners from public engagement.

Throughout this process it has been clear the HHPA and the Owners have demonstrated a complete lack of desire to engage the public in any way other than those that would make this appear as though public input was incorporated. Following notice guidelines but failing to operate in the spirit of transparency and engagement with the public does not constitute compliance with Indiana State Law as purported in the Owners rebuttal.

CONCLUSION

Based on all the comments provided by the public on this docket to date and the foregoing reasons noted in this comment I request the Board consider approval of the extension requests as made on 08/21/2017. In addition I urge the Board to exercise its authority and obligation under **49 U.S. Code § 10101** to ensure the process is unbiased, ethical and representative of the obligations the State, Owners and STB have to protect the greater interests of the public and rail transit.

Respectfully Submitted,

By: 
Brian Landress
294 S. 9th St.
Noblesville, IN. 46060
**RESIDENT AND CITIZEN OF
NOBLESVILLE AND HAMILTON
COUNTY**

Dated: September 02, 2017

I certify that these comments have been provided to the Applicant's Attorney of Record via email. /S/
Brian Landress.



brian landress <brian.landress@gmail.com>

HHPA feedback

3 messages

brian landress <brian.landress@gmail.com>

Thu, Jul 13, 2017 at 12:42 AM

To: Goconnor@noblesville.in.us, weingardtj@fishers.in.us, george@fishers.in.us, bradley.davis@hamiltoncounty.in.gov, james.neal@hamiltoncounty.in.gov, pethtele@fishers.in.us, jbeery@noblesville.in.us, obergfell@usiconsultants.com, Rhonda Klopfenstein <rhondask@frontier.com>

All,

I'm sending this note to all members of the HHPA board and scoring committee as a form of public input.

It was unfortunate the public was not permitted to provide feedback or ask questions at the board meeting held earlier this week. The meeting was attended by more than 75 residents who took time out of their schedule to be there. The reality is, most residents left with a sense of frustration due to the lack of information and engagement. The board should understand that going through the agenda with almost no dialog, leaving no time for comment / questions and providing no acknowledgement to a room full of attendees only further builds barriers and distrust within the community. The HHPA is a government entity as an extension of the cities / county it represents and should operate in the same way. For example, having no published contact info other than the Executive Director and no online documentation does little to promote a sense of openness with the community.

As you know, there are varying degrees of interests from the public coming out to the meetings. While there are advocates from many different perspectives **the public is seeking transparency**. Right now the unfortunate perception in lieu of information is back door deals are being worked.

Given this, I would urge this board to **ensure that whatever option is ultimately selected by the committee that sufficient insight and material be made available to the community in addition to city/county leaders that provides a backdrop for that decision**. As with any RFP the output material should be sufficient to demonstrate at a minimum; the RFP process was adhered to from end to end and why the selected option was optimal to all those considered.

At the board meeting it was noted the score card and all RFP submissions would be provided with the decision. That's great, but as with any RFP those elements on their own do not tell the full story and leave much to speculation. Some output suggestions (coming from a private business perspective) would be to:

- provide a rolled up score card that shows all respondents scores side by side
- provide commentary in each section that shows what differentiated each submission. Identify key hits and misses.
- Confirm the final rank order of all the submissions and which were short listed (top 2, 3, ...)
- Note additional interviews and diligence performed with the short listed submissions and any key learnings
- provide a summary presentation that quantifies key differentiating factors that drove the final top selection from the short list - the more hard facts the better
- provide guidance of how aligned the committee was on the final selection
- distribute the material ahead of any public forums so the community is able to show up with informed questions
- the more info the better

Perhaps this level of output was already going to be included but the public perception so far is that would not be the approach. At the end of the day there is no doubt, more info drives more questions. However, it is on rare occasion RFPs end up in the ditch when there is full transparency throughout the process.

I appreciate you taking a moment to absorb this feedback and wish the committee the best as the RFP process is finalized.

The community looks forward to the results, final outputs and dialog.

(if any email address was incorrect or a committee / board member was missed please forward on).

Sincerely,
Brian Landress
concerned and engaged citizen
brian.landress@gmail.com

John Beery <JBeery@noblesville.in.us>

Thu, Jul 13, 2017 at 8:54 AM

To: brian landress <brian.landress@gmail.com>, Greg O'Connor <GOConnor@noblesville.in.us>, "weingardtj@fishers.in.us" <weingardtj@fishers.in.us>, "george@fishers.in.us" <george@fishers.in.us>, "bradley.davis@hamiltoncounty.in.gov" <bradley.davis@hamiltoncounty.in.gov>, "james.neal@hamiltoncounty.in.gov" <james.neal@hamiltoncounty.in.gov>, "pethtele@fishers.in.us" <pethtele@fishers.in.us>, "obergfell@usiconsultants.com" <obergfell@usiconsultants.com>, Rhonda Klopfenstein <rhondask@frontier.com>

Mr. Landress,

Thank you for the email. Due to pending litigation issues initiated by an outside parties against the HHPA, our attorney has advised us to withhold any comment.

If you recall at the meeting, there was action taken to receive a fifth proposal that had a problem with delivery so that proposal could be considered in the process. The delivery issue was found to be of no fault of the submitter.

I believe that you should receive a response to your email, but in all fairness to all who submitted proposals, the RFP process, and the reviewers, I cannot make any further comment.

Regards,

John Beery, PE, PTOE, PTP

Noblesville City Engineer

Phone: (317) 776-6330

Fax: (317) 776-6322

From: brian landress [mailto:brian.landress@gmail.com]

Sent: Thursday, July 13, 2017 12:43 AM

To: Greg O'Connor <GOConnor@noblesville.in.us>; weingardtj@fishers.in.us; george@fishers.in.us; bradley.davis@hamiltoncounty.in.gov; james.neal@hamiltoncounty.in.gov; pethtele@fishers.in.us; John Beery <JBeery@noblesville.in.us>; obergfell@usiconsultants.com; Rhonda Klopfenstein <rhondask@frontier.com>

Subject: HHPA feedback

[Quoted text hidden]

brian landress <brian.landress@gmail.com>

Thu, Jul 13, 2017 at 1:42 PM

To: John Beery <JBeery@noblesville.in.us>

Cc: Rhonda Klopfenstein <rhondask@frontier.com>, obergfell@usiconsultants.com

Thank you Mr Beery, I appreciate the feedback and sensitivity of an ongoing RFP process. I'm hopeful the board can leverage the feedback as the process proceeds forward. Given the level of public interest I'm sure it's of no surprise this will be one of the most heavily scrutinized RFPs this year.

Brian

[Quoted text hidden]

RFP Scoring Tabulation for Hoosier Heritage Port Authority
Request for Railroad Operator

Proposed Operator	Fishers Member 1 Eric Pethtel	Fisher Member 2 David George	Fishers Member 3 John Weingardt	Noblesville Member 1 John Beery	Noblesville Member 2 Greg O'Connor	Hamilton County Member 1 Brad Davis	Hamilton County Member 2 Glen Schwartz	Hamilton County Member 3 Jim Neal	Weighted Scores Total	Final Rank
	Total Score	Total Score	Total Score	Total Score	Total Score	Total Score	Total Score	Total Score	Total Scores	Rank
Indiana Transportation Museum	10	20	15	-10	-20	55	200	55	325	3
Hoosier Heritage Railroad	20	25	-15	-65	-70	55	-100	105	-45	5
Nickel Plate Heritage Railroad	110	20	115	20	20	50	-80	105	360	2
Indianapolis Metropolitan Railway Company	55	25	25	0	-10	65	-40	115	235	4
Iowa Pacific Railroad	80	15	-10	5	40	115	165	165	575	1

Signature: 
 Michael Obergfell

Website Link to Redacted Proposals and Individual Scoresheets:
<http://www.hamiltoncounty.in.gov/1224/HHPA-RFP-Operator-Results>

Title: HHPA President

Date: July 18, 2017