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December 15, 2003

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D. C. 20423

ENTERED
Office of Proceedings

DEC 15 2003

Part of
Public Record

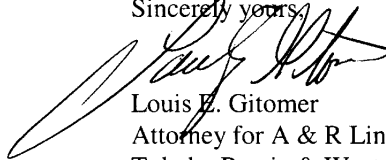
RE: ~~Docket No. AB-847 (Sub-No. 2X), Toledo, Peoria & Western Railway~~
~~Corporation-Discontinuance Exemption-(Between Kenneth and Winamac) in~~
~~Cass and Pulaski Counties, IN~~
Docket No. AB-855 (Sub-No. 1X), A & R Line, Inc.-Abandonment Exemption-
(Between Kenneth and Winamac) in Cass and Pulaski Counties, IN -209628

Dear Secretary Williams:

Enclosed are the original and 10 copies of a Response and three computer diskettes.
Please time and date stamp the additional copy of this letter and the response and return them
with our messenger. Thank you for your assistance.

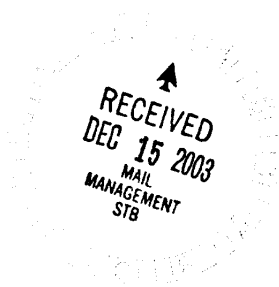
If you have any questions, call or email me.

Sincerely yours,



Louis E. Gitomer
Attorney for A & R Line, Inc. and
Toledo, Peoria & Western
Railway Corporation

Enclosures



BEFORE THE
SURFACE TRANSPORTATION BOARD

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Office of Proceedings

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~~Docket No. AB-847 (Sub-No. 2X)~~

TOLEDO, PEORIA & WESTERN RAILWAY CORPORATION-DISCONTINUANCE
EXEMPTION-(BETWEEN KENNETH AND WINAMAC) IN CASS AND PULASKI
COUNTIES, IN

Docket No. AB-855 (Sub-No. 1X)

- 209628

A & R LINE, INC.-ABANDONMENT EXEMPTION-(BETWEEN KENNETH AND
WINAMAC) IN CASS AND PULASKI COUNTIES, IN

RESPONSE TO PULASKI COUNTY

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TOLEDO, PEORIA & WESTERN
RAILWAY CORPORATION

Dated: December 15, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD

~~Docket No. AB-847 (Sub-No. 2X)~~

TOLEDO, PEORIA & WESTERN RAILWAY CORPORATION—DISCONTINUANCE
EXEMPTION—(BETWEEN KENNETH AND WINAMAC) IN CASS AND PULASKI
COUNTIES, IN

Docket No. AB-855 (Sub-No. 1X)

A & R LINE, INC.—ABANDONMENT EXEMPTION—(BETWEEN KENNETH AND
WINAMAC) IN CASS AND PULASKI COUNTIES, IN

RESPONSE TO PULASKI COUNTY

Toledo, Peoria & Western Railway Corporation ("TP&W") and A & R Line, Inc. ("A&R"), collectively Petitioners, respond to the Additional Response filed November 24, 2003 (the "Additional Response") by the Board of Commissioners – Pulaski County ("Pulaski County").

The Surface Transportation Board (the "Board") granted an exemption for the abandonment and discontinuance of the rail line between milepost 5.1W near Kenneth and the end of the line at milepost 21.0W near Winamac, in Cass and Pulaski Counties, IN (the "Line"), and the request for trail use by Indiana Trails Fund, Inc. ("Indiana Trails").¹ *Toledo, Peoria & Western Railway Corporation—Discontinuance Exemption—in Starke and Pulaski Counties, IN,*

¹ Petitioners note that Kokomo Grain Company ("Kokomo Grain") has filed an offer of financial assistance ("OFA") to acquire the Line. It is Petitioners belief that Pulaski County's immediate concerns will be mooted if Kokomo Grain acquires the Line through the OFA process, and that it

STB Docket No. 847 (Sub-No. 1X) (STB served November 18, 2003) (the “*Decision*”). As Pulaski County’s pleading was filed after service of the *Decision*, Petitioners respectfully urge the Board to treat Pulaski County’s filing as a petition to reopen filed under 49 C.F.R. § 1115.4. *See Rutherford Railroad Development Corporation—Abandonment Exemption—in Rutherford County, NC*, STB Docket No. AB-567 (Sub-No. 1X) (STB served February 8, 2001).

Pulaski County reiterates its concern that the cost of removing or cleaning up old trestles or bridges may become the responsibility of Pulaski County. Pulaski County requests a condition that “requires either the railroad or the not-for-profit organization to be bonded against such an event or that funds be escrowed for that purpose or that the clean-up costs would be an obligation of the railroad organization or the not-for-profit group as a protection to the taxpayers and property owners of this area.”

Petitioners contend that the *Decision* resolved Pulaski County’s concerns, and therefore the Board does not have to reopen the *Decision* or impose additional conditions.

BACKGROUND

Petitioners filed a Petition for Exemption (the “Petition”) under 49 U.S.C. § 10502 for TP&W’s discontinuance of service over and A&R’s abandonment of A&R’s entire rail line from the prior approval requirements of 49 U.S.C. § 10903. The Board issued a notice of the filing. *Toledo, Peoria & Western Railway Corporation—Discontinuance Exemption—in Starke and Pulaski Counties, IN*, STB Docket No. 847 (Sub-No. 1X) (STB served August 20, 2003).

The Line was formerly a main line of The Pennsylvania Railroad Company, which was transferred to the Consolidated Rail Corporation (“Conrail”) in 1976 as part of the Final System

may be administratively efficient for the Board to withhold action on Pulaski County’s pleading until the completion of the OFA process.

Plan. Conrail sold the Line to the Winamac Southern Railway Company (“WSRY”) in 1993. *Winamac Southern Railway Company—Acquisition and Operation Exemption—Lines of Consolidated Rail Corporation*, ICC Finance Docket No. 32257 (ICC served April 7, 1993). WSRV sold the Line to A&R in 1995, but continued to operate over the Line. *A. & R. Line, Inc.—Acquisition Exemption—Winamac Southern Railway Company*, ICC Finance Docket No. 32694 (ICC served July 6, 1995). Cargill Incorporated (“Cargill”) acquired the stock in A&R from Mr. Frick² in 1997, to ensure service to its grain elevator in Winamac at milepost 20.0W (the “Winamac Elevator”). *Cargill, Incorporated—Acquisition of Control Exemption—A & R Line, Inc. and J.K. Line, Inc.*, STB Finance Docket No. 33458 (STB served September 19, 1997). Also in 1997, TP&W leased the Line and began to operate over it. *Toledo, Peoria & Western Railway Corporation—Lease and Operation Exemption—A & R Line, Inc.*, STB Finance Docket No. 33482 (STB served October 16, 1997). Once it closed the Winamac Elevator, Cargill sold A&R to RailAmerica, Inc. (“RailAmerica”) and TP&W.³ *RailAmerica, Inc., et al.—Control and Merger Exemption—A&R Line, Inc., and J.K. Line, Inc.*, STB Finance Docket No. 34269 (STB served December 12, 2002). Prior to selling the Line, Cargill removed the rail yard in Winamac and the track serving the Winamac Elevator.

On August 20, 2003, Pulaski County filed comments and on August 26, 2003, the Indiana Department of Transportation filed a letter protest to the proposed abandonment. On September 25, 2003, Petitioners replied. A late-filed request for imposition of a public use condition and

² Mr. Frick acquired control of A&R in 1995. *Daniel R. Frick—Continuance in Control Exemption—J.K. Line, Inc., Winamac Southern Railway Company, and A. & R. Line, Inc.*, ICC Finance Docket No. 32693 (ICC served July 6, 1995).

³ RailAmerica is TP&W’s corporate parent.

issuance of a notice of interim trail use (NITU) was filed by the Indiana Trails, which included a statement of willingness to assume financial responsibility.

After considering all of the facts and arguments, the Board served the *Decision*, which granted the Petition.

ARGUMENT

Petitioners contend that Pulaski County has not met the criteria for reopening by demonstrating new evidence, material error or a substantial change of circumstances. Indeed, Pulaski County continues to raise the same arguments that were properly addressed in the *Decision*.

In the Additional Response, Pulaski County states that the Board received the Indiana Trails trail use request on August 10, 2003, prior to Pulaski County filing its comments. The existence of the request for trail use by Indiana Trails is neither new evidence nor a change of circumstances. Material error was not addressed in the Additional Response.

Petitioners contend that there are limits on the conditions the Board can impose on trail use, and that the *Decision* imposed a condition addressing bridge and culvert maintenance after abandonment.

In trail use proceedings, the Board acts in a ministerial capacity and that “questions related to whether and how the right-of-way should be used as a trail are not matters for the Board’s consideration.” *Union Pacific Railroad Company—Abandonment—Wallace Branch, ID*, STB Docket No. AB-33 (Sub-No. 70) (STB served November 14, 2000), at 2. The Board has also rejected a financial responsibility test in advance of authorizing trail use. *Central Kansas Railway, Limited Liability Company—Abandonment Exemption—in Marion and McPherson Counties, KS*, STB Docket No. AB-406 (Sub-No. 6X) (STB served December 18,

1998). The Board relies on the railroad to determine the ability of the trail user to meet its responsibilities because of the railroad's potential exposure. *Id.* and *Idaho Northern & Pacific Railroad Company—Abandonment and Discontinuance Exemption—in Washington and Adams Counties, ID*, STB Docket No. AB-433 (Sub-No. 2X) (STB served April 1, 1998). Petitioners contend that the Board properly served the Notice of Interim Trail Use in this proceeding.

Next, the Board imposed conditions on Petitioners intended to address Pulaski County's concerns. The Board imposed "an environmental condition that addresses bridge and culvert maintenance activities following abandonment." *Decision* at 5. Petitioners are bound to comply with conditions imposed in the *Decision* and will comply with all of the conditions the Board has imposed.

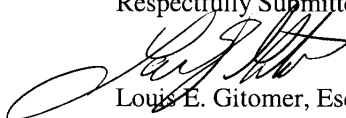
Finally, Petitioners would like to point out that this issue will be moot if the OFA filed by Kokomo Grain results in the sale of the Line by Petitioners to Kokomo Grain under the OFA process.

CONCLUSION

Pulaski County's reiteration of its concern about removal of structures on the Line does not warrant reopening of the *Decision*. The Board has already addressed the issue. Petitioners respectfully request the Board to deny Pulaski County's Additional Response.

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Respectfully Submitted,



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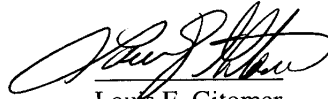
Dated: December 15, 2003

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this Response was mailed via first class mail, postage prepaid, on December 15, 2003, to the following parties:

Indiana Department of Transportation
100 N. Senate Ave
IGC-N Room N901
Indianapolis, IN 46204-2219

Board of Commissioners-Pulaski County
Courthouse – Room 200
112 East Main Street
Winamac, IN 46996



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December 15, 2003