

December 7, 2005

By Messenger

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001



RE: Docket No. 33476, *C&NC, L.L.C. - Acquisition Exemption - Indiana High-Rail Corporation*; Docket No. 33475, *C&NC Railroad Corporation - Lease and Operation Exemption - Lines of Norfolk and Western Railway Company and Indiana Hi Rail Corporation*

Dear Secretary Williams:

Please find enclosed for filing the original and ten (10) copies of the Motion to Strike filed on behalf of Whitewater Valley Railroad, Inc. in the above referenced proceeding. Also enclosed is a diskette with a copy of the Motion in Word format.

An extra copy of this filing is enclosed for stamping and returning to our offices.

Should you have any questions regarding the foregoing, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink that reads "Karyn A. Booth".

Karyn A. Booth
Jeffrey O. Moreno

Enclosures

Office of the
Secretary
Surface Transportation Board
Washington, D.C.

Before the
SURFACE TRANSPORTATION BOARD



DOCKET NO. 33476

C&NC, L.L.C. -- Acquisition Exemption -- Indiana High-Rail Corporation

DOCKET NO. 33475

C&NC RAILROAD CORPORATION -- LEASE AND OPERATION EXEMPTION -- LINES
OF NORFOLK AND WESTERN RAILWAY COMPANY AND INDIANA HI RAIL
CORPORATION

**MOTION TO STRIKE BY
WHITEWATER VALLEY RAILROAD**

On December 1, 2005, C&NC Railroad Company ("C&NC") filed a "Rebuttal Statement of Facts and Argument" in this proceeding. This filing is a reply to a reply, which is prohibited by 49 C.F.R. § 1104.13(c). C&NC neither acknowledges the existence of this rule nor presents any grounds for waiving the rule. For the foregoing reasons, Whitewater Valley Railroad (hereinafter "Whitewater") asks the Board to strike C&NC's rebuttal.

If the Board denies this Motion to Strike, Whitewater asks the Board to consider the following brief points in response to various omissions, factual misstatements, and legal distortions made by C&NC, which if left uncorrected could be prejudicial to Whitewater:

1. C&NC Omission. The most striking fact about C&NC's rebuttal is what it does not address. While C&NC extensively discusses the 49 U.S.C. § 10907(g)(1) exemption, it completely ignores Whitewater's arguments concerning the Board's lack of acquisition and abandonment authority over industrial lead track in 49 U.S.C. § 10906. The reason for this omission is obvious. C&NC itself has conceded that the Connersville Segment was industrial lead track. Whitewater Reply at 10, note 5, and Exhibit 14, p. 2. Thus, to highlight this fact, C&NC would have to concede that IHRC could have abandoned the Connersville Segment prior to conveying the line to Whitewater. Furthermore, because no federal action is implicated by

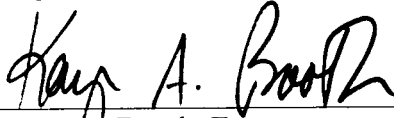
§ 10906 (unlike a § 10502 exemption), there was no need to comply with the National Environmental Policy Act ("NEPA"), which C&NC contends is still a requirement for abandonments under the § 10907(g)(1) exemption. C&NC Rebuttal at 4.

2. C&NC Rebuttal, page 1. C&NC contends that IHRC's election under 49 U.S.C. § 10907(g)(1) to be exempt from all but a single provision of the rail regulations in Title 49, U.S.C., was personal to IHRC and did not extend to subsequent purchasers of the Connersville line segment. C&NC cites to no precedent supporting its position, and to Whitewater's knowledge, this issue has never been decided by the Board or the ICC. In any event, Whitewater does not contend that the exemption passed to it as a subsequent purchaser, but that the exemption permitted abandonment of the Connersville Segment without Board approval. C&NC does not challenge this point.
3. C&NC Rebuttal, pages 2-3. C&NC relies heavily on the ICC's decision in ICC Finance Docket No. 32523, Sagamore National Corp. – Acquisition and Operation Exemption – of Indiana Hi-Rail Corp. Order to Show Cause, 1994 ICC Lexis 203 (Oct. 28, 1994), for the proposition that IHRC waived its § 10907(g)(1) exemption. The only basis cited for this conclusion is the Board's statement that "Thus Hi-Rail is on notice that it remains obligated to continue to provide and fulfill its common carrier obligations." Somehow, C&NC construes this statement to mean that the ICC intended to re-impose the common carrier obligation on all IHRC lines, including the exempt Connersville Segment. C&NC cites to no authority for the ICC even to take such action, since this was a Congressionally granted exemption rather than an exemption within the ICC's discretion under 49 U.S.C. § 10502. In addition, a reading of the full decision reveals that this was a general statement by the ICC that IHRC retained all of its *existing* common carrier obligations. The ICC did not impose new obligations on the exempt Connersville line segment, and there is no indication that this issue was even presented to the ICC for consideration.
4. C&NC Rebuttal, page 4. C&NC contends that IHRC did not abandon the Connersville Segment because it did not comply with NEPA, to which the § 10907(g)(1) exemption does not extend. But C&NC relies solely upon an ICC advisory opinion, attached as Exhibit A to C&NC's rebuttal, that does not even address abandonments under the § 10907(g)(1) exemption. The exemption at issue in that advisory opinion was granted under former 49 U.S.C. § 10505. Moreover, the advisory opinion does not state that the exempt line could not be abandoned without an ICC environmental review, but concludes only that "If you abandon absent a Commission environmental review, you risk violation of Federal law." Thus, even if C&NC's contention is otherwise accurate, IHRC still could abandon the Connersville Segment, subject to potential prosecution for ignoring NEPA. As evidenced by the Sagamore decisions cited by C&NC, IHRC's compliance with ICC regulations was very sloppy, to say it best, and its failure to comply with NEPA would be consistent with that characterization. However, as stated in Point #1, above, NEPA would not apply to abandonments of industrial leads, which C&NC has conceded is the appropriate classification for the Connersville Segment. Therefore, IHRC was not required to comply with NEPA when it abandoned the Connersville Segment.

5. C&NC Rebuttal, pages 4-6. C&NC contends that Whitewater's analysis as to whether IHRC retained a "residual common carrier" obligation when it sold the Connersville Segment to Whitewater is irrelevant. C&NC's claim is based upon its overly broad reading of the Sagamore decisions, which is addressed in Point #3, above. In addition, C&NC contradicts itself on page 6 by claiming that "The only way Whitewater's 1989 acquisition of the Connersville segment could be accomplished without ICC authority was if IHRC retained an implied permanent easement over that segment to provide common carrier rail service to Cohen Bros." A permanent easement is precisely how a residual common carrier obligation is retained. Thus, the cases cited by Whitewater on the residual common carrier obligation are highly relevant.
6. C&NC Rebuttal, page 6. C&NC cites to Indiana state law on implied easements and railroad abandonments to support its claim that C&NC acquired an implied permanent easement over the Connersville Segment from IHRC. State law is irrelevant, since the Board's jurisdiction over these matters is exclusive. 49 U.S.C. § 10501(b). Indeed, the Indiana law on abandonments cited by C&NC is inconsistent with federal law, since abandonment does not require the removal of rails, switches, ties, etc., which the Indiana law does require. An implied easement also would be inconsistent with the Board's jurisdiction to authorize easement transactions. The only relevant law, therefore, is that developed by the Board.

For the foregoing reasons, Whitewater asks the Board to strike C&NC's December 1, 2005 rebuttal, or in the alternative, to accept Whitewater's response.

Respectfully submitted,



Karyn A. Booth, Esq.

Jeffrey O. Moreno, Esq.

THOMPSON HINE LLP

1920 N Street, N.W., Suite 800

Washington, D.C. 20036

(202) 331-8800

*Attorneys for Respondent Whitewater
Valley Railroad, Inc.*

December 7, 2005

CERTIFICATE OF SERVICE

I hereby certify that this 7th day of December, 2005, I served a copy of the foregoing Motion to Strike by overnight mail to the following address:

Richard R. Wilson, P.C.
A Professional Corporation
127 Lexington Avenue, Suite 100
Altoona, PA 16601

A handwritten signature in black ink, appearing to read 'Aimee L. DePew', written over a horizontal line.

Aimee L. DePew