

**BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, D.C.**

The Indiana Rail Road Company -- Trackage
Rights Exemption -- CSX Transportation, Inc.

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Finance Docket No. 35137

**REPLY OF THE INDIANA RAIL ROAD COMPANY TO THE
PETITION TO REVOKE FILED BY UTU AND BLET**

John H. Broadley
John H. Broadley & Associates, P.C.
1054 31st Street NW, Suite 200
Washington, D.C. 20007
Tel. 202-333-6025
Fax 301-942-0676
E-mail jbroadley@alum.mit.edu

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The Indiana Rail Road Company (“INRD”), by its undersigned attorneys, hereby replies to the Petition to Revoke filed by the United Transportation Union (“UTU”) and the Brotherhood of Locomotive Engineers and Trainmen (“BLET”) with respect to the notice of exemption filed on April 29, 2008 by INRD for a trackage rights agreement between INRD and CSX Transportation, Inc. (“CSXT”).

BACKGROUND

1. The Trackage Rights Agreement

At the end of April 2008 INRD and CSXT entered into a trackage rights agreement (“Agreement”) whereby CSXT granted to INRD limited local trackage rights to operate loaded and empty coal trains over CSXT’s CE&D Subdivision between Sullivan and Carlisle, IN, a distance of approximately 10 miles.¹ INRD’s main line connects with the CSXT CE&D line at Sullivan. At Carlisle, Sunrise Coal Company has recently constructed a new coal rail loadout and associated loop tracks connecting to CSXT’s line.

¹ The CE&D Subdivision is part of CSXT’s main line between Chicago, IL and Nashville, TN.

The Agreement limits INRD to operating coal trains between Sunrise Coal Company on CSXT's line and Indianapolis Power & Light's ("IPL") Harding Street Generating Station at Indianapolis, IN on INRD's line, and Hoosier Energy's Merom Plant, at Merom, IN, also on INRD's line west of Sullivan. IPL's Harding Street Generating Station is 105 rail miles from Sullivan over INRD's main line, so the total rail distance from Sunrise is approximately 115 miles, 10 miles on the CSXT line and 105 miles on the INRD line. Hoosier Energy's Merom Plant is 5 miles west of Sullivan on the INRD line, so the total rail distance from Sunrise is approximately 15 miles, 10 miles on the CSXT line and 5 miles on the INRD line. *See Verified Statement of Thomas G. Hoback* ¶ 22. ("*Hoback V.S.*")

The Agreement contains industry-standard conditions requiring the trackage rights tenant (INRD) to comply with the operating rules and radio standards of the landlord (CSXT), and confirming the landlord's exclusive managerial rights over its line, including its right to move crippled trains of its tenant and its right to decide whether or not to seek abandonment of the line. *Hoback V.S.* ¶ 17.

The business and operational rationale for serving the Sunrise to Harding Street Generating Station traffic and the Sunrise to Merom Plant traffic through trackage rights is obvious on its face. The Merom move is only 15 miles end to end and the Harding Street Generating Station move is only 115 miles end to end. From a business perspective, operating either of these short coal moves as joint line moves would not be feasible and CSXT has expressed no interest in participating in the moves as a line haul carrier. The cost of introducing a second carrier into the move for no operational benefit would undermine the economics of each of these short moves. It is also likely that putting a second carrier into the move would degrade

service and equipment utilization because of interchange delays. *Hoback V.S.* ¶ 22, *Verified Statement of Harold Leitze* ¶ 7. (“*Leitze V.S.*”)

The operational difficulties presented by a joint line move which would require an interchange at Sullivan are also formidable. There are no interchange facilities at Sullivan where large unit coal trains could be interchanged off the main line of each carrier. CSXT’s CE&D Subdivision forms part of its main north-south line between Chicago and Nashville and is heavily used. An interchange that occurred on the CSXT main line or one of its passing sidings would be disruptive to traffic on that line, and an interchange on INRD’s single track main line would similarly disrupt operations on INRD. *Hoback V.S.* ¶¶ 23 and 24. From both a business and an operational perspective, INRD decided it could best serve its customers at Harding Street Generating Station and the Merom Plant by seeking trackage rights over the 10 miles of CSXT’s line between Sullivan and Sunrise. Once CSXT’s capacity expansion program on the CE&D was completed, CSXT was willing to enter into a trackage rights agreement to permit INRD to use CSXT’s line for this short-distance traffic which CSXT could not feasibly serve. *Hoback V.S.* ¶¶ 16 and 25.

2. Procedural Status

INRD filed a Notice of Exemption pursuant to 49 CFR 1180.2(d)(7) on April 29, 2008. A copy of the Agreement was attached to the Notice of Exemption as required by the regulations and all other information required by the regulations was provided. The exemption became effective on May 30, 2008 and INRD commenced rail service to Sunrise using its trackage rights over CSXT shortly thereafter.

UTU and BLET filed a Petition to Revoke the exemption with the Board on June 19, 2008. The Petition to Revoke contends that the notice of exemption contained false or

misleading information in that it did not disclose that CSXT owns 85% of the common stock of INRD's parent, Midland United Corporation. UTU and BLET contend that there is a "substantial identity of interest" between INRD and CSXT and that the Board has declared a notice of exemption void *ab initio* in such circumstances, citing *Sagamore National Corporation--Acquisition and Operation Exemption--Lines of Indiana Hi-Rail Corporation*, Finance Docket No. 32523 (ICC Served Jun 29, 1994) (*Sagamore National*). UTU and BLET argue that this transaction is governed by *Sagamore National* because CSXT owns 85% of INRD.

UTU and BLET also argue that the transaction is a "sham" because CSXT retains exclusive control of the management and operation of the line over which INRD has trackage rights under the Agreement, citing the various provisions of the Agreement that confirm the landlord's exclusive right to manage its property, that require the trackage rights tenant to comply with CSXT's safety rules, operating rules and other regulations when operating on CSXT's line, and that require the trackage rights tenant's employees be qualified to operate on CSXT's line. UTU and BLET conclude that:

Based on these all-encompassing controls over INRD's operations over this Line, this transaction is obviously a sham that was devised to avoid the more expensive collective bargaining agreement in effect on CSXT. The ownership interest and these numerous requirements in the trackage rights agreement that provide CSXT total control over this service demonstrate that there is a substantial identity of interest between the parties.

ARGUMENT

1. The Notice of Exemption contained neither false nor misleading information.

UTU and BLET point to no information contained in the Notice of Exemption that was either false or misleading. The information contained in the Notice was precisely the

information the Board's regulations contained in 49 CFR Part 1180 require. Moreover, the fact that CSXT indirectly owns 85% of INRD is scarcely a secret. The Board approved CSXT's acquisition of a controlling stock interest in Midland United Corporation, INRD's parent, in 1996 in Finance Docket No. 32892, *CSX Corp. and CSX Transp.--Control--The Indiana R. R. Co.*, 1996 WL 648610 (S.T.B.) (STB served Nov. 7, 1996), ("*CSXT Control*").

The ICC took the common sense position that filing a notice of exemption constitutes a representation by the filing party that the transaction meets the requirements of the class exemption. When the transaction fails to meet the requirements of the class exemption, it may be rejected. The ICC and the Board have applied this analysis to class exemptions of many types, including exempt non-carrier line acquisition under 49 U.S.C. 10901, and 49 CFR 1150.31, *Sagamore National Corporation--Acquisition and Operation Exemption Lines of Indiana Hi-Rail Corporation*, 1994 WL 460569 (I.C.C.), (ICC Finance Docket No. 32523) served August 26, 1994 (*Sagamore National*), exempt abandonments under 49 U.S.C. 10903 and 49 CFR Part 1152 Sub-Part F, *Wisconsin & Southern Railroad Co.--Abandonment Exemption--in Dodge County, WI*, 1994 WL 273852 (I.C.C.), (ICC AB-383 Sub-No. 2X) served June 22, 1994, and exempt trackage rights agreements under 49 U.S.C. 11323 and 49 CFR 1180.2(d)(7), *Southern Pacific Transp. Co.--Trackage Rights Exemption--Houston Belt & Term. Ry. Co.*, 1998 WL 887190 (S.T.B.), (STB Finance Docket No. 33461) served December 21, 1998.

INRD will demonstrate that the Agreement meets the requirements of the class exemption contained in 49 CFR 1180.2(d)(7) and is not subject to rejection.

2. The Agreement is subject to 49 U.S.C. 11323 and qualifies for the class exemption under 49 CFR 1180.2(d)(7).
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49 U.S.C. 11323(a) provides, in part:

(a) The following transactions involving rail carriers providing transportation subject to the jurisdiction of the Board under this part may be carried out only with the approval and authorization of the Board:

* * *

(6) Acquisition by a rail carrier of trackage rights over, or joint ownership in or joint use of, a railroad line (and terminals incidental to it) owned or operated by another rail carrier.

The class exemption applies to (49 CFR 1180.2(d)(7)):

Acquisition of trackage rights and renewal of trackage rights by a rail carrier over lines owned or operated by any other rail carrier or carriers that are: (i) based on written agreements, and (ii) not filed or sought in responsive applications in rail consolidation proceedings.

The class exemption for trackage rights agreements is applicable, by its terms, if the following conditions are met:

1. the trackage rights tenant (INRD) is a rail carrier,
2. the trackage rights landlord (CSXT) is a rail carrier,
3. the trackage rights landlord either owns or operates the lines that are subject to the trackage rights agreement,
4. there is a written trackage rights agreement, and
5. the trackage rights are not filed or sought in a responsive application in a rail consolidation proceeding.

The Petition to Revoke does not state precisely which of the prerequisites to application of the trackage rights class exemption are not met. However, the Petition to Revoke cannot fairly be construed to challenge the fact that the landlord (CSXT) owns and operates the line that is subject to the Agreement, or that there is a written trackage rights agreement. Nor can the Petition to Revoke be construed as contending that these trackage rights are sought in a responsive application in a rail consolidation proceeding. The two remaining pre-requisites for

application of the class exemption are that the tenant (INRD) be a rail carrier and that the landlord (CSXT) be a rail carrier. Again, we cannot fairly construe the Petition to Revoke as challenging CSXT's status as a rail carrier or INRD's status as a rail carrier. The UTU petition must be founded on the proposition that INRD is in fact the same carrier as CSXT -- that in the language of 49 CFR 1180.2(d)(7), CSXT is not an "other rail carrier."

In *CSXT Control* the Board authorized CSXT to acquire *control* of INRD, it did not authorize CSXT to *merge* with INRD. The applicants in *CSXT Control* specifically stated that (*id.* at p.3):

For the foreseeable future, applicants' operating plan calls for INRD to be maintained as a separate subsidiary operating and performing services essentially in the same manner as it does today. Applicants state that existing services and schedules will be maintained and that there are no present plans to close any existing interline routes or to alter or cancel any existing divisions with connecting carriers. . . .

If CSXT at some point should decide to merge with INRD and form a single carrier including INRD's lines, it would need approval and authorization from the Board to do so. 49 U.S.C. 11323 specifically provides that:

The following transactions involving rail carriers providing transportation subject to the jurisdiction of the Board under this part may be carried out only with the approval and authorization of the Board:

(1) Consolidation or merger of the properties or franchises of at least 2 rail carriers into one corporation for the ownership, management, and operation of the previously separately owned properties.

* * *

(3) Acquisition of control of a rail carrier by any number of rail carriers.

The fact that the Board has authorized *control* of one carrier by another does not eliminate the statutory requirement in 49 U.S.C. 11323(a)(1) for Board approval of their

subsequent merger. See e.g. *Seaboard Coast Line R.R.--Merger Exemption--Louisville & N. R.R.*, Finance Docket No. 30054 (ICC served Nov. 8, 1982); *Baltimore & O. R.R. and Chesapeake & O. Ry.--Merger Exemption*, Finance Docket No. 31033 (ICC served May 22, 1987); and *Chesapeake & O. R.R. and CSX Transportation, Inc.--Merger Exemption*, Finance Docket No. 31106 (ICC served Sep. 18, 1987). The significant point for this case is that the Board did not authorize the merger of CSXT and INRD to form a single rail carrier, and subsequent to CSXT's acquisition of control the two rail carriers have operated independently of each other as they represented to the Board they would do. CSXT and INRD are in law and fact separate rail carriers. See *CSXT Control* at 3.

The Verified Statement of Mr. Thomas G. Hoback, president of INRD, makes it clear that INRD and CSXT are not only legally separate rail carriers but are managed and operated as separate rail carriers. As Mr. Hoback points out, INRD is financially independent of CSXT and obtains its own short term and long term financing without the guarantee or support of CSXT or any of its affiliates. *Hoback V.S.* ¶¶ 7, 8, 9. INRD operates as a separate carrier running its own trains with its own employees. It maintains its own lines and equipment, it dispatches its own trains and markets its own services. *Hoback V.S.* ¶ 10. INRD's management is similarly separate from CSXT. No CSXT employees perform managerial functions at INRD. *Hoback V.S.* ¶¶ 11-12.

There is no basis for ignoring the plain fact that CSXT and INRD are separate rail carriers with separate management, separate financial arrangements, and separate operating arrangements. The two entities are connected by CSXT's 85% ownership interest in INRD and the associated right to three members on INRD's five man board. Neither an 85% investment interest nor the ability to elect a majority of a board of directors, nor Board approval of control is

a basis for ignoring the separate entity status of the two rail carriers for purposes of the trackage rights class exemption where the two carriers are in fact managed and operated separately. The Board has had no difficulty applying the class exemption to trackage rights agreements where the carriers involved are far more closely related than INRD and CSXT. See e.g. *Norfolk Southern Ry. Co.--Trackage Rights Exemption--Norfolk and Western Ry. Co.*, 1996 WL 71965 (S.T.B.), STB served Feb. 21, 1996, where Norfolk Southern used the class exemption for a trackage rights agreement permitting it to operate over 12 miles of N&W track in order to expedite movement of Norfolk Southern dedicated auto parts trains to a Ford Motor Company plant located on N&W's line. N&W was, of course, wholly owned by Norfolk Southern.

3. The terms of the Agreement do not make the transaction a “sham.”

UTU argues that the following facts concerning the Agreement make it a “sham”:

- CSXT has exclusive control of the management and operation of the CSXT line over which INRD has trackage rights;
- All communications on the CSXT line by INRD trains must be on CSXT radio frequencies;
- INRD cannot hold CSXT liable for any delay, injury or damages whatsoever due to CSXT's own neglect of the line;
- INRD trains must follow all CSXT safety rules, operating rules, and other regulations when on the CSXT line;
- INRD employees who operate on the CSXT line must be qualified under CSXT rules and can be excluded from the Line by CSXT for violation of these CSXT rules;
- If INRD's trains cannot move on the CSXT line, for whatever reason, CSXT can move these trains on its own and at INRD's expense;
- CSXT can abandon the CSXT line and act for INRD by discontinuing its right to operate over the line at the STB.

UTU and BLET conclude that “in sum, CSXT essentially controls INRD's entire operation over the Line.”

Of course CSXT controls INRD's operation over the line -- *it is CSXT's line* and INRD is only a tenant by license. INRD does not own the line or lease it. It does not maintain it or dispatch it. Its sole right is as a licensee to operate on the CSXT line pursuant to the terms of the Agreement. Its right to be there is dependent upon the consent of the landlord, *as is the case in every trackage rights agreement subject to the class exemption.*

The foregoing terms of the Agreement quoted by UTU and BLET are essentially industry standard terms in trackage rights agreements. *Hoback V.S.* ¶¶ 17-18. They are industry standard terms for a good reason. For safety reasons only one entity can manage and control a line of railroad at a time. There would be chaos if both the landlord and the tenant had a concurrent right to manage and control the line. No responsible rail carrier would enter into such an agreement either as a tenant or as a landlord. *Hoback V.S.* ¶¶ 19-20.

The purpose of radio communication on a line is for the train crews to be able to communicate with each other, with the dispatchers responsible for dispatching the line, and with roadway workers, and also to broadcast warnings from track-side devices. If the trackage rights tenant's trains did not use the landlord's radio frequencies, they could not communicate with the landlord's trains, dispatchers or roadway workers, nor could they hear the landlord's track-side warnings. A requirement that the tenant use the landlord's radio frequencies is a plain and obvious safety requirement.

Requiring the trackage rights tenant's trains to observe the landlord's operating and safety rules and other regulations, requiring the tenant railroad's crews to be qualified on the landlord's rules, and authorizing the landlord to remove the tenant's employees if they do not conform to those rules is an obvious safety measure. This proposition is so obvious and safety-

related that it is astonishing that attorneys for two operating craft unions could seriously contemplate any other arrangement.

Certain commercial terms are included in the Agreement. The commercial terms in the Agreement are also close to industry standard terms.² *Hoback V.S.* ¶ 20. The trackage rights landlord typically does not want to be a guarantor of the availability of the line to the trackage rights tenant and does not want to commit to maintain the lines to a specified level. The trackage rights landlord also typically wants the right to remove crippled tenant trains from the line to avoid disruption of its own service. Trackage rights landlords typically want to foreclose the tenant from interfering with its disposition of the line.

In sum, it would be difficult to find a trackage rights agreement exempted under the class exemption that does not have all or almost all of the terms cited by UTU and BLET as evidence that the transaction is a “sham.” If the inclusion of terms of this type is evidence of that a trackage rights agreement is a “sham,” then almost all trackage rights agreements fall into that category. This “sham” argument based on industry-standard safety and commercial terms in the Agreement is obviously nonsense which the Board should reject.

4. The analysis in *Sagamore National* is inapplicable to a trackage rights exemption.

Sagamore National, the case relied on by UTU and BLET, dealt with a proposed acquisition of a line by a non-carrier under 49 U.S.C. 10901 and the non-carrier class exemption at 49 CFR 1150.31. The requirements for a transaction to qualify for application of 49 U.S.C.

² There is a wider diversity of commercial terms in trackage rights agreements than safety related ones. There are trackage rights agreements that impose performance and other commercial requirements on the landlord. These agreements typically reflect the relative economic influence of the two. See, e.g. *Union Pacific R.R. Co.--Trackage Rights Over Chicago and Northwestern Transp. Co.*, 7 I.C.C.2d 177 (1990) (requiring trackage rights landlord to maintain tracks at FRA Class 5 or better).

10901(a)(4) and the class exemption for non-carrier line acquisitions are not the same as the requirements for the trackage rights class exemption under 49 CFR 1180.2(d)(7).

In order for an entity to qualify to acquire a line from a carrier under 49 U.S.C. 10901(a)(4), it must be a “*person other than a rail carrier.*” If the acquiring party is not a “person other than a rail carrier” (or eliminating the double negative, if the acquiring party is a rail carrier) 49 U.S.C. 10901(a)(4) does not apply.

The Board has an extensive set of precedents to determine whether an entity newly created by a rail carrier or by a holding company controlling other rail carriers is a “person other than a rail carrier,” or whether the transaction is a sham designed to transfer the line to another rail carrier under section 10901 without a labor protection obligation and to avoid the use of 49 U.S.C. 11323 where labor protection is mandatory. In such cases the Board’s two part test looks at (i) whether the non-carrier was created to purchase the line for legitimate and substantial business purposes and not solely to avoid labor protection, and (ii) whether the indicia of independence establish that the non-carrier subsidiary is sufficiently independent of carriers with which it is affiliated. *See Mountain Laurel R.R. Co.--Acquisition and Operation Exemption--Consolidated Rail Corp.*, 1998 WL 249172 (S.T.B.), STB served May 15, 1998; and 1998 WL 470634 (S.T.B.), STB served Aug. 12, 1998), (*Mountain Laurel*).

The Board also has held that in order to qualify as a “person other than a rail carrier” under 49 U.S.C. 10901(a)(4), the *acquiring entity* must be independent of, and not controlled by, the *selling carrier*. *See Michigan Central Ry.--Acquisition and Operation Exemption--Lines of Norfolk Southern Ry. Co.*, 2007 WL 4926363 (S.T.B.), STB served Dec. 10, 2007 (*Michigan Central*).

In *Sagamore National*, the Commission summed up the issue (*id.* at p.4) (emphasis added):

In cases in which a transaction is alleged to be a sham, we look for indicial that the new company is independent of any rail corporate parents or siblings and require that the new company demonstrate its independence from the seller. An attempt by a carrier to reincarnate itself in a new corporation, possessed of its former rail assets and shorn of troublesome obligations such as collective bargaining agreements, would constitute the use of the Commission's processes merely to allow railroads to escape their labor agreements. *We have no objection to corporate restructuring, and indeed we have established a class exemption to facilitate them at 49 CFR 1180.2(d)(3). But such restructurings are subject to mandatory labor protection at section 11347 of the Act.*

The statute requiring STB approval of trackage rights agreements applies both to trackage rights agreements between completely independent and unaffiliated carriers, and also to trackage rights agreements between commonly controlled carriers. Labor interests are protected from carrier abuse by the statutory requirement of labor protective conditions in such cases.

This is not a transaction under 49 U.S.C. 10901 where the acquiring entity must be a non-carrier and where there is no labor protection, but a trackage rights agreement subject to 49 U.S.C. 11323 where both sides of the transaction must be rail carriers and where labor protection is mandatory. The Board must impose labor protective conditions on the transaction (49 U.S.C. 11326) and has no jurisdiction to exempt the transaction from labor protection. 49 U.S.C. 10502(g). In its notice of exemption, INRD stated (as required by the regulations) that it agreed to imposition of the labor protective conditions generally imposed in trackage rights proceedings as found in Norfolk and Western Ry. Co. - Trackage Rights - BN, 354 I.C.C. 605 (1978), as modified by Mendocino Coast R. Inc. -- Lease and Operate, 360 I.C.C. 653 (1980). The Board duly imposed these conditions. *The Indiana Rail R. Co.--Amended Trackage Rights Exemption--CSX Transp. Inc.*, 2008 WL 2140794 (S.T.B.), May 22, 2008, (STB Finance Docket No. 35137).

In sum, the analysis in *Sagamore National*, in *Mountain Laurel*, and in *Michigan Central* has been directed at determining whether the acquiring entity qualifies as a “non-carrier” (or a “person other than a rail carrier”) under 49 U.S.C. 10901(a)(4). The Board has insisted that acquiring entity be financially and managerially independent of its rail carrier affiliates or their holding companies (*Mountain Laurel*), and not controlled by the transferor (*Michigan Central*.) There is no comparable requirement in 49 U.S.C. 11323 that one side of a transaction be a noncarrier, and the Board itself has specifically recognized that transactions under 49 U.S.C. 11323 can take place within a corporate family. Indeed, it has provided a specific exemption for such transactions. 49 CFR 1180.2(d)(3). *Sagamore National* at 4. If transactions under 49 U.S.C. 11323 *within a corporate family* are valid and subject to the exemption in 49 CFR 1180.2(d)(3), it would be bizarre if a trackage rights agreement between two rail carriers with separate ownership interests were not similarly subject to 49 U.S.C. 11323(a)(6) and the trackage rights class exemption of 49 CFR 1180.2(d)(7).

5. The facts in *Sagamore National* are entirely different from those in this case.

While the analysis in *Sagamore National* is, as argued above, completely inapplicable to a trackage rights exemption, the facts in the *Sagamore National* case are entirely different from those in this case. In *Sagamore National* UTU submitted an affidavit to the effect that the president of Hi-Rail (the transferor) was also the president of Saganat (the “non-carrier” acquiring entity); the notice of exemption in that case showed that the addresses of Hi-Rail and Saganat were the same; and UTU made further allegations that two senior officials of Hi-Rail constituted the majority of the Board of Saganat, that Saganat and Hi-Rail had the same general counsel, the same executive vice-president, the same office manager, that a former AVP Operations of Hi-Rail was a vice president of Saganat and that other former managerial

employees of Hi-Rail held comparable positions in Saganat. In the face of these allegations Saganat failed to present any factual details that would tend to refute the Director of the Office of Proceedings' decision that the transaction did "not appear to be an arm's length sale to a third party purchaser as contemplated by this class exemption."

The contrast between the Hi-Rail -- Saganat relationship and the INRD -- CSXT relationship could not be starker. While CSXT is a majority shareholder in Midland United Corporation, INRD's parent, Thomas G. Hoback owns 15% of the company.³ *Hoback V.S.* ¶ 2. There is clearly not an identity of financial interests between INRD and CSXT. Thus, if CSXT were to enter into a transaction not at arm's length which had the effect of transferring assets or income to INRD, it would be enriching Mr. Hoback at the expense of CSXT's stock holders. On the other hand, if CSXT used its control to cause INRD to enter into a less than arm's length transaction which had the effect of transferring assets or income to CSXT, it would be enriching CSXT stockholders at the expense of Mr. Hoback. As Mr. Hoback notes in his Verified Statement, such conduct on CSXT's part would have an adverse effect on him and business relationships between INRD and CSXT are conducted at arm's length. *Hoback V.S.* ¶ 12.

While three of the five directors of INRD are nominated by CSXT, none of them are directors of CSX Corporation or of CSXT (*Hoback V.S.* ¶ 11), and all of them are subject to the provisions of the Indiana Corporation Law which requires directors to make decisions in the best interests of the corporation on whose board they sit. IC 23-1-35-1 provides:

³ For convenience we will refer to INRD without further reference to Midland United Corporation with the understanding that CSXT's 85% ownership interest is in Midland United Corporation and Thomas G. Hoback's 15% ownership interest is similarly in Midland United Corporation and that Midland United Corporation owns 100% of INRD. The same persons sit on the Midland United Board as sit on the INRD Board.

(a) A director shall, based upon facts then known to the director, discharge the duties as a director, including the director's duties as a member of a committee:

(1) in good faith;

(2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(3) in a manner the director reasonably believes to be in the best interests of the corporation.

Manifestly, INRD and CSXT do not share the same officers, nor is the president of CSXT the president of INRD, nor do the companies share the same general counsel, nor are any of the senior management personnel of INRD either officers or employees (present or past) of CSXT. *Hoback V.S.* ¶ 11. As Mr. Hoback describes in his verified statement, INRD is financially independent of CSXT and does not rely on CSXT for either short term financing or for long term financing or for support of short or long term financing and does not participate in CSXT cash management activities. *Hoback V.S.* ¶¶ 7-9. INRD also is operationally independent of CSXT, operating its own trains with its own employees, maintaining its own equipment and track with its own employees, and dispatching its own lines with its own employees. *Hoback V.S.* ¶ 10.

The contrast between the relationship between Indiana Hi-Rail and Saganat and the relationship between INRD and CSXT is stark. Even if the standards outlined by the Commission in *Sagamore National* applied to this trackage right transaction between INRD and CSXT (which they do not), the relationship between INRD and CSXT is at arm's length and would satisfy those standards.

6. The Agreement was entered into for legitimate transportation reasons and was not a "sham" to avoid CSXT's collective bargaining agreements.

A subtext in the UTU and BLET Petition to Revoke is that the Agreement was entered into for the improper purpose of avoiding the more expensive CSXT collective bargaining

agreements and not for a legitimate transportation reason. An examination of the following documents shows that this is not the case:

- The Agreement itself,
- The Verified Statement of Thomas G. Hoback, president of INRD (*Hoback V.S.*),
- The Verified Statement of Brent K. Bilsland, President of Sunrise Coal, LLC (*Bilsland V.S.*),
- The Verified Statements of Harold Leitze, Coal and Transportation Manager for IPL (*Leitze V.S.*), and
- The Verified Statement of Lonnie Hefner, Interim Departmental Manager of Fuels for Hoosier Energy (*Hefner V.S.*)

The business and transportation story begins with IPL adding flue gas desulphurization to its Harding Street Generating Station making it possible to use cheaper high sulphur coal from Sunrise Coal Company's Carlisle mine. IPL negotiated for some time with CSXT and INRD to determine the most efficient way to transport coal to Harding Street once Carlisle completed construction of new loading facilities. Prior to the trackage rights agreement, IP&L trucked approximately 80,000 tons of coal a month to a load out at the Lewis Loading Dock on INRD's line. According to Mr. Leitze, several benefits accrue to the shipper from the trackage rights arrangement. INRD can now provide direct rail service from Carlisle to the Harding Street Generating Station, there is a substantial cost saving by eliminating the need to truck the coal to an offsite loading dock and pay for transloading services. On the operational side, the mine can accommodate 100 car unit trains whereas Lewis Dock could only handle 60 car trains. Mr. Leitze notes as well that forcing IP&L's trains to sit and wait while the railroads exchange crews and/or locomotives to travel the last 12 miles does not make sense. *Leitze V.S. passim.*

The next part of the business and transportation story is told by Brent K. Bilsland, the president of Sunrise Coal LLC. According to Mr. Bilsland, Sunrise considered many options to

gain access to INRD, such as building beltline conveyors, developing a rail build out, and trucking coal to a siding built on INRD. These were expensive and would have had a significant environmental impact. The INRD trackage rights option was clearly the most cost effective according to *Bilsland*. *Bilsland* V.S. ¶ 3.

In reliance on INRD's access to the Carlisle mine over the trackage rights, Sunrise has spend \$5.6 million to build rail facilities. Before the trackage rights, coal destined for IP&L moved 30 miles by truck to a rail siding where it was dumped and reloaded with a front end loader into INRD rail cars. Hoosier's coal was shipped 13 miles by truck to the Merom Generating Station. The trackage rights have permitted Sunrise to shift 1.8 million tons of coal per year from truck transport to rail. *Bilsland* V.S. ¶¶ 4-5.

Prior to the trackage rights Hoosier Energy obtained approximately 25,000 tons of coal per month from Sunrise by trucking it to Merom. The INRD trackage rights now make it possible to carry this coal rail-direct the 15 miles from Sunrise to Merom. *Hefner* V.S. ¶¶ 4-5.

Finally, turning to the Agreement, it is obvious that it has been narrowly tailored to permit INRD to serve these two coal moves -- Sunrise to IPL's Harding Street Generating Station and Sunrise to Hoosier Energy at Merom. Contrary to the suggestion in the Petition to Revoke that the Agreement is a device to avoid CSXT's more expensive collective bargaining agreements, it is in fact a means of transporting coal efficiently by rail that previously was trucked approximately 13 highway miles to Merom and 30 miles to the Lewis Loading Dock for transfer to INRD rail cars and movement by rail to IPL's Harding Street Generating Station in Indianapolis.

CONCLUSION

For the foregoing reasons, the Board should enter an order:

1. Finding that the Agreement qualifies for the trackage rights exemption in 49 CFR 1180.2(d)(7); and

2. Denying the Petition to Revoke.

Respectfully submitted,

THE INDIANA RAIL ROAD COMPANY

By: _____/S/_____⁴
John Broadley
One of its attorneys

John Broadley
John H. Broadley & Associates, P.C.
1054 31st Street, NW, Suite 200
Washington, D.C. 20007
Tel. 202-333-6025
Fax 301-942-0676
E-mail jbroadley@alum.mit.edu

Dated : July 8, 2008

⁴ Document filed electronically.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of July 2008 I served a copy of the foregoing Amended Verified Notice of Exemption by causing copies thereof to be deposited in the United States mail, postage prepaid, addressed to the following:

Steven C. Armbrust, Esq. Counsel CSX Transportation, Inc. 500 Water Street Jacksonville, FL 32202	Daniel R. Elliott, III Associate General Counsel United Transportation Union 14600 Detroit Avenue Cleveland, OH 44107
	Harold A. Ross Acting General Counsel Brotherhood of Locomotive Engineers and Trainmen 23195 Stoneybrook Drive North Olmstead, OH 44070

Dated: July 8, 2008

_____/S/_____⁵
John Broadley

⁵ Document filed electronically.

The Indiana Rail Road Company -- Trackage Rights Exemption -- CSX Transportation, Inc.

5. In 1994 CSX Transportation, Inc. acquired an indirect non-controlling interest in INRD by purchase of stock in Midland United Corporation, the owner of 100% of the stock of INRD, and in 1996 CSX Transportation, Inc. acquired an indirect controlling interest in INRD

by acquisition of a controlling interest in Midland United Corporation. *See Finance Docket No. 32892, CSX Corp.--Control--The Indiana R.R. Co.* I retain a 15% interest in INRD through my stock ownership in Midland United Corporation.

6. In 2006 INRD acquired an additional line in Illinois, Indiana and Kentucky from Soo Line permitting it to provide service to Chicago, IL, Terre Haute, IN, and Louisville, KY. *See Finance Docket No. 34783, The Indiana R.R. Co.--Acquisition--Soo Line R.R.Co.*

Financial Independence of INRD

7. Although CSXT indirectly controls INRD through its 85% ownership interest in Midland United Corporation, INRD is completely independent financially from CSXT. INRD has a line of credit with Wachovia Bank, N.A. which it uses to finance day to day operations. That line of credit is not guaranteed or otherwise supported by CSXT or any of its affiliates.

8. INRD financed the acquisition of the Soo Line Company property in 2006 with a term loan facility from Wachovia Bank, NA. That loan was not guaranteed or otherwise supported by CSXT or any of its affiliates.

9. INRD does not participate in any CSXT financial or cash management activities.

Operational Independence

10. INRD has complete operational independence from CSXT. INRD employees operate INRD trains, maintain INRD's locomotives and equipment, maintain INRD's track and dispatch INRD's railroad. INRD's rail operations are conducted to further its own interests and not those of CSXT or any other entity.

Managerial Independence

11. INRD's management is independent of CSXT, although INRD's management reports to a board of directors which contains a majority (3 of 5) of CSXT nominated

individuals. The CSXT nominated directors are CSXT employees, though not directors of CSXT or CSX Corporation. The INRD board of directors is obligated to manage INRD in the interest of all its shareholders and not in the interests of CSXT alone. The INRD board of directors in fact has managed INRD in the interests of all its shareholders and not in the interest of CSXT alone. No present or past CSXT employees work in INRD senior management.

12. Because of my minority shareholder position I would be immediately and adversely affected if CSXT were to use its control of the INRD board of directors to subordinate the interests of INRD to the interests of CSXT.

Sullivan to Carlisle Trackage Rights

13. INRD serves several electric power plants, including one owned by Indianapolis Power & Light in Indianapolis (IP&L) (the “Harding Street Generating Station”) and one owned by Hoosier Energy at Merom, Indiana (the “Merom Plant”). IP&L and Hoosier Energy have been changing the coal sources for these plants as coal from older mines is exhausted and as scrubbing units are installed permitting the environmentally sound use of lower cost higher sulfur coal. Both IP&L and Hoosier Energy have begun to source coal from the new Sunrise Coal Company mine at Carlisle, IN.

14. The Sunrise mine is located on CSXT’s north-south line in Sullivan County, IN, approximately 10 miles south of the connection between CSXT’s line and INRD’s east west line between Indianapolis and Newton, IL. Until recently the Sunrise mine did not have a rail connection to CSXT’s line.

15. Hoosier Energy moved coal by truck from the Sunrise mine to its generating station at Merom, IN which is located on INRD’s line west of Sullivan, IN. Indianapolis Power & Light moved coal by truck from the Sunrise mine to a load-out at the Lewis Loading Dock

located on INRD's line and from there INRD moved the coal by rail to the Harding Street Generating Station.

16. INRD attempted to enter into a trackage rights agreement with CSXT to permit INRD's trains to operate between the INRD/CSXT connection at Sullivan and the Sunrise mine at Carlisle. CSXT was reluctant to enter into such an agreement until the capacity expansion program on its line between Chicago and Nashville was completed. Once CSXT had additional capacity on the line, it entered into a standard trackage rights agreement with INRD that permits INRD trains to operate from the INRD/CSXT connection at Sullivan over the CSXT line to and from the connection to the Sunrise mine.

17. The trackage rights agreement is a standard CSXT trackage rights agreement and is virtually indistinguishable from similar trackage rights agreements entered into by other Class I and other railroads:

- When INRD trains operate on CSXT's line, they are subject to CSXT's operating rules and to CSXT's dispatching control.
- INRD employees who operate over the CSXT line must be qualified to do so.
- CSXT retains exclusive control of the operation and management of the line and is solely responsible for the maintenance of the line.
- While CSXT is obligated to use commercially reasonable efforts to maintain the line in condition for the use contemplated, it does not guarantee that the line will be in such a condition and is not liable to INRD if it is not.
- In the event an INRD train breaks down on the CSXT line, CSXT has the right to take actions needed to remove the train from CSXT's line at INRD's expense.

18. Terms such as this appear in virtually every trackage rights agreement I have seen in my 30 years in the rail industry. Most of the terms are essential to the safe operation of the trains of the tenant railroad (INRD) over the lines of the landlord (CSXT), and others are to protect the landlord from costs and liability that might result from the operation of the trains of another railroad over its line.

19. It would result in chaos and lead to almost certain accidents if the trains of a trackage rights tenant operating on trackage rights granted by a landlord were not obligated to use the landlord's radio frequencies and comply with the instructions of the landlord's dispatcher. Almost all trackage rights agreements contain such provisions.

20. As a commercial matter almost all trackage rights landlords insist on retaining the right to abandon their line (and to require the trackage rights tenant to discontinue its trackage rights) if they do so. They also insist on being protected against liability to the tenant for interruptions in service on the line, and almost all trackage rights landlords insist on being able to clear their lines of stalled tenant trains at the tenant's expense.

21. In sum, this is a garden variety trackage rights agreement giving INRD a limited right to operate on the CSXT line and giving and preserving to CSXT rights which are essential for safe operation and indistinguishable from rights the landlord retains under other trackage rights agreements used throughout the rail industry.

Interchange Service Option

22. Providing rail service between Sunrise mine and Merom generating station and between Sunrise mine and Harding Street Generating Station through interchange service is not economically feasible. The distance over CSXT's line between Sunrise and the connection with INRD is only 10 miles, so CSXT's share of the route would only be very short. The distance to

Merom from the connection of INRD and CSXT is only 5 miles, so a very short rail move (15 miles) would be split between two carriers. The distance from the connection of INRD and CSXT to the Harding Street Generating Station is only 105 miles, which, though longer than the route to Merom, is still a very short haul (115 miles) to be shared between two carriers. Historically, Hoosier Energy at Merom has relied on mines close to the plant and has moved a large quantity of coal to the plant by truck. Since INRD bought the line serving Merom in 1990, we have increased the rail market share. A joint line service would not be competitive over the short distance involved.

23. A joint line service between CSXT and INRD for moving coal from the Sunrise mine to Merom and from the Sunrise mine to Harding Street Generating Station is not operationally feasible. CSXT was originally reluctant to enter into a trackage rights agreement because it did not have adequate capacity on its north-south line which I understand carries between 25 and 30 trains per day. CSXT upgraded the capacity of the line by adding a long passing siding near Carlisle and upgrading other passing sidings in southern Indiana. My understanding of CSXT's operation is that in order to move coal trains and empties between Carlisle and an interchange with INRD at Sullivan it would have to deadhead a crew by taxi from Evansville, about 80 miles south of Carlisle. The crew would move the train the ten miles from Carlisle to interchange with INRD at Sullivan and then be returned to Evansville by taxi.

24. An additional problem with a joint line service is that there are no interchange facilities that could be used to interchange trains between CSXT and INRD at Sullivan. CSXT does have a passing siding north of Sullivan which is used to interchange 1 to 2 grain trains per week with INRD. This use, however, takes the passing siding out of service and degrades CSXT's line capacity which it has recently increased. Not only does it take the passing siding

out of service while it is occupied by the grain trains, it interferes with traffic on the north south line as grain trains slow to enter the siding, and as the grain trains accelerate leaving the siding. Interchange alternatives such as an interchange on CSXT's main line are out of the question because of the volume of traffic on that line. In addition, an interchange on INRD's main line would be disruptive to INRD traffic which at that location is on average 8 trains per day. Realistically, to operate the service to IP&L's Harding Street Generating Station and/or Hoosier Energy's Merom plant on a joint line basis, an interchange track would need to be built at considerable cost.

25. INRD's purpose in obtaining the trackage rights over CSXT's line was to permit INRD to provide single line rail service from Sunrise mine to two of its largest customers, Indianapolis Power & Light and Hoosier Energy. The trackage rights agreement was negotiated at arm's length with CSXT. It was not the purpose of the trackage rights to circumvent any labor obligations of CSXT and so far as I am aware it does not do so. INRD's train crews are represented by the Brotherhood of Locomotive Engineers & Trainmen with which INRD has a collective bargaining agreement. INRD has acknowledged in its notice of exemption that labor protective conditions apply to the trackage rights exemption and the Board imposed labor protective conditions on the transaction. Obviously it was not the purpose of the trackage rights agreement to circumvent labor protective conditions.

Verification
Under 28 U.S.C. 1746

I verify under penalty of perjury that the foregoing is true and correct. I further verify that I am authorized to sign this Verified Statement.

Dated

July 8, 2008

Thomas G. Hoback

Thomas G. Hoback
President and Chief Executive Officer
The Indiana Rail Road Company

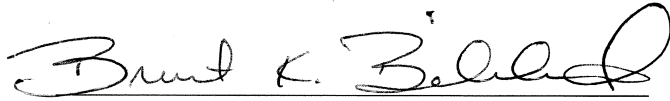
	)	
The Indiana Rail Road Company -- Trackage	)	
Rights Exemption -- CSX Transportation, Inc.	)	Finance Docket 35137
	)	
	)	

1. I am Brent K. Bilsland, President of Sunrise Coal, LLC.
2. I report directly to Sunrise's Board of Managers, of which I am one of the five board members. I am ultimately responsible for all of our 160 employees and the financial performance of our mining company.
3. Sunrise began working on obtaining rail access to the Carlisle Mine in 2005. We signed a coal sales contract with Indianapolis Power and Light (IP & L) in 2006 with the intent to move our coal to their Harding Street plant, served by INRD. We considered many options to gain access to The Indiana Rail Road Company (INRD), such as building beltline conveyors, developing a rail build out and trucking coal to a siding built on the INRD. However, all of these options required a great deal of new infrastructure to be built and would have had significant environmental impacts. Thus, the INRD gaining trackage rights to the CSX was clearly the most cost effective alternative.
4. INRD trackage rights also enabled Sunrise to sell coal to Hoosier Energy. Hoosier is moving our coal to their Merom Generating Station, which is served by INRD. Thus, the INRD trackage rights are essential to the success of Sunrise as this allows Sunrise to cost effectively reach both IPL's Harding Street plant and Hoosier's Merom Generating Station. These two plants will make up two thirds of our mine's production. Sunrise would not have spent \$5.6 MM in rail facilities without INRD's trackage rights.
5. Prior to the INRD trackage rights, IPL's coal moved 30 miles by truck to a rail siding. The coal was dumped and reloaded with an end loader onto INRD rail cars. Hoosier's coal was shipped by truck 13 miles to their Merom Generating Station. The INRD trackage rights have allowed Sunrise to shift 1.8 MM annual tons (150,000 tons / Month) from truck transport to rail transport.
6. All of Sunrise's coal bids are evaluated on a delivered basis. Thus, INRD's trackage rights provide a substantial cost savings to Sunrise, Sunrise's utility customers and ultimately the electric consumers.

Verification
Under 28 U.S.C. 1746

I verify under penalty of perjury that the foregoing is true and correct. I further verify that I am authorized to sign this Verified Statement.

Dated: July 3, 2008

A handwritten signature in black ink, appearing to read "Brent K. Bilsland", written over a horizontal line.

Brent K. Bilsland
President
Sunrise Coal, LLC

**BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, D.C.**

The Indiana Rail Road Company -- Trackage
Rights Exemption -- CSX Transportation, Inc.

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) Finance Docket 35137
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VERIFIED STATEMENT OF Harold Leitze

1. I am Harold Leitze, Coal and Transportation Manager for Indianapolis Power & Light Company ("IPL"). IPL is an investor-owned electric utility providing electric service to the city of Indianapolis, IN and surrounding parts of central Indiana.

2. I am responsible for the procurement of coal, limestone, and transportation services for IPL, ensuring compliance with contractual terms and conditions, and the scheduling of deliveries to IPL's three electric generating stations in Indiana.

3. In 2007 IPL finished construction of a new flue gas desulfurization system at its Harding Street Generating Station in Indianapolis. IPL entered into a new coal supply contract with Sunrise Coal Co for high sulfur coal from its Carlisle Mine in Sullivan County, Indiana. IPL had been negotiating with CSXT and INRD for some time to determine the most efficient way to transport this coal to Harding Street once Carlisle completed construction of its new rail loading facilities.

4. The Harding Street Station is served by the INRD.

5. Prior to the INRD trackage rights arrangement with CSXT, the coal moved by truck to a loadout at the Lewis Loading Dock owned by Foertsch Construction Company. Approximately 80,000 tons per month were moved by road to the load out.

6. INRD can now provide rail service direct from Carlisle to Harding Street. There is a substantial cost savings by eliminating the need to truck the coal to an offsite loading dock, pay for transloading services and then ship by rail. In addition, the mine can accommodate 100 car unit trains whereas the Lewis Dock could only handle 60 car trains making the entire move more efficient.

7. IPL strongly encouraged and supports the use of trackage rights between INRD and CSXT. Forcing IPL's trains to sit and wait while the railroads have to exchange crews and/or locomotives to travel the last 12 miles does not make sense.

Verification
Under 28 U.S.C. 1746

I verify under penalty of perjury that the foregoing is true and correct. I further verify that I am authorized to sign this Verified Statement.

Dated 7-1-08

Harold Lutz
Name and Title and Company

COAL AND TRANSPORTATION MANAGER
INDIANAPOLIS POWER & LIGHT COMPANY

**BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, D.C.**

The Indiana Rail Road Company -- Trackage
Rights Exemption -- CSX Transportation, Inc.

Finance Docket 35137

VERIFIED STATEMENT OF LONNIE HEFNER

1. I am Lonnie Hefner, Interim Department Manager, Fuels
2. I am responsible, within assigned authority, for the procurement and transportation of fuels and other bulk material associated with power plant operation, with emphasis on economy, availability and quality. Further responsibilities include the performance and specification compliance of bulk material suppliers and transporters of those bulk materials.
3. Sunrise mine to Hoosier Energy at Merrom.
4. Sunrise Mine and Hoosier Energy are both served by INRD.
5. Prior to the INRD trackage rights the coal moved by truck to Hoosier Energy over county and state highway roads. Approximately 25,000 tons per month were moved by road to the station. The INRD trackage rights into the Sunrise mine make it possible to remove this coal from the highways and run it rail direct.
6. INRD can now provide service rail direct. There is a substantial cost savings by eliminating the need to truck.

**Verification
Under 28 U.S.C. 1746**

I verify under penalty of penalty of perjury that the foregoing is true and correct. I further verify that I am authorized to sign this Verified Statement.

Dated 7/2/08

Lonnie Hefner, Dept. Mgr. Fuels
Name and Title and Company
Hoosier Energy LLC, Inc