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VIA ELECTRONIC FILING

Ms. Cynthia Brown
Chief, Office of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, D.C. 20423-0001

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ENTERED
Office of Proceedings
June 1, 2015
Part of
Public Record

Re: **Docket No. AB-43 (Sub-No. 189X)**
Illinois Central Railroad Company –
Abandonment Exemption – In Champaign County, Ill.

Dear Ms. Brown:

On May 19, 2015, Topflight Grain Cooperative (“Topflight”) tendered an appeal (the “Appeal”) of the May 11, 2015 order of the Acting Director of the Office of Proceedings (the “AD Order”) rejecting Topflight’s late-filed notice of intent to file an offer of financial assistance to acquire the railroad line that is the subject of the above-referenced abandonment proceeding. Topflight asserts in its Appeal (filed pursuant to 49 C.F.R. §§ 1011.2(a)(7)) that the AD Order should be overturned in the interest of averting alleged manifest injustice. Illinois Central Railroad Company (“IC”) hereby replies in opposition to the Appeal,¹ because, as explained below, the AD Order is not, and an Entire Board decision upholding the AD Order would not be, manifestly unjust to Topflight. To the contrary, a decision overturning the AD Order would be prejudicial to IC and contrary to the dictates of the STB-administered offer of financial assistance (“OFA”) statute and corresponding regulations.

To review:

- The Board issued a notice of exempt abandonment in this proceeding on its website and in the Federal Register on April 10, 2015. That notice stated explicitly that a notice of intent (“NOI”) to file an OFA would be due by no later than April 20, 2015.
- Topflight filed its NOI on April 30, 2015. In tacit acknowledgment of the late filing, Topflight simultaneously filed what it styled as a “Petition to Reopen” the proceeding.

¹ IC understands that the deadline for filing its reply to Topflight’s Appeal would have been May 31, 2015, but for the fact that the 31st fell on a weekend. Pursuant to 49 C.F.R. § 1104.7(a), IC has tendered its filing on the first available weekday after the 31st.

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Topflight knew at the time of filing that its NOI was late, but neither the NOI nor the Petition to Reopen provided any reason or justification for the late filing.

- IC replied on May 6, 2015, explaining that it did not consent to a waiver of the Board's strict OFA deadlines. IC asked the Board not to accept Topflight's NOI.
- Topflight filed a sur-reply not permitted under the Board's rules² on May 8, 2015, in defense of its late-filed NOI, which the Acting Director appears nevertheless to have added to the record and to have considered before issuing the AD Order.
- The AD Order rejected the NOI, noting that – (1) late-filed NOIs customarily are not accepted over the abandoning carrier's objection (as is the case here); and (2) collectively, the NOI, Petition to Reopen and Topflight's May 8 sur-reply provided no reason why Topflight's NOI was late and could not have been filed by the April 20 deadline (adding that the filings did not justify acceptance of the late-filed NOI).

By rule, Topflight's appeal of the AD Order is not favored and would be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice.³ Topflight relies exclusively on the "manifest injustice" prong of the exacting section 1011.6(b) standard. Pointing to facts and circumstances presented for the first time in its Appeal, Topflight argues that it would be unjust for the Board to reject its late-filed NOI. But even if it were appropriate for the Board to consider Topflight's excuse for its late-filed NOI for the first time on Appeal, Topflight has not shown that it has been or would be treated unjustly by enforcement of the OFA deadlines.

In the Appeal, Topflight explains that it overlooked and misunderstood the procedural deadlines, particularly the NOI deadline, set forth in the Board's April 10 Notice. But Topflight has not established that such oversight amounts to an exceptional circumstance under section 1011.2(a)(7) to warrant an appeal. In fairness to both sides, this is not the time for Topflight to present such arguments. By waiting until its Appeal to argue for Board acceptance of its procedurally-defective NOI, Topflight confounds the agency's "orderly disposition of cases,"⁴ particularly considering the strict procedural deadlines protecting abandoning carriers facing a possible OFA.

² 49 C.F.R. § 1104.13(c).

³ 49 C.F.R. § 1011.6(b).

⁴ Pyco Industries, Inc. – Feeder Line Application – Lines of South Plains Switching, Ltd. Co., Docket No. FD 34890 (STB served Jun. 11, 2010), slip op. at 8 ("The orderly disposition of cases by the Board requires that parties make their arguments at the appropriate time").

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Returning to the Board's appeal standard, there is nothing manifestly unjust in requiring Topflight to explain with particularity at the time it late filed its NOI why the Board should accept that filing anyway. In fact, Board precedent supports the proposition that a would-be offeror seeking to invoke the OFA process bears the burden of establishing up front that its late filing is justified and should be excused.⁵ IC submits that the reasoning set forth in UP-Lafayette County and other Board decisions vigorously protecting the OFA process control here.

Counter to Topflight's arguments, granting the Appeal would be manifestly unjust to IC, not Topflight, because such a decision would reward Topflight for prolonging the abandonment process, while simultaneously depriving IC of the relative certainty and protections that the Board's longstanding OFA regulations and deadlines assure. Moreover, the Entire Board precedent that would be created were Topflight's appeal to be granted would invite abuse of the OFA process and related mischief in future abandonment cases.

Aside from explaining that it had overlooked the applicable NOI deadline, Topflight argues for a radical OFA policy shift, and makes other arguments and allegations irrelevant to the OFA process. To begin with, Topflight suggests, without supporting precedent, that the Board should balance the late-filed NOI against the alleged non-urgency of the abandoning carrier's efforts to dispose of the rail line. Neither the OFA statute nor the Board's regulations support such a relative balancing standard (to say nothing of the arbitrary and capricious results that likely would flow from application of it), and such a dangerous standard would push abandoning carriers to undertake the most abbreviated and rushed combined environmental and historic report process possible, which strikes IC as irresponsible and contrary to the policies and expectations of the National Environmental Policy Act and National Historic Preservation Act. Taken to its logical conclusion, Topflight's proposed balancing standard for late-filed OFAs would seem to necessitate a change in the Board's abandonment rules to require an abandoning carrier, at a minimum, to plead urgency in its abandonment filing in order to rely on the OFA deadlines set forth at 49 C.F.R. § 1152.27.

The balance of Topflight's Appeal has no bearing on the OFA process. Specifically, Topflight briefly offers its version of past discussions regarding unsuccessful efforts to preserve and (later) to restore of service on the line and/or to purchase the line. Topflight's take on pre-abandonment-filing history has nothing to do with the simple facts that – (1) Topflight's NOI was filed late; (2) Topflight knew its NOI was filed late; and (3) Topflight did not ask at the time to have

⁵ See Union Pacific Railroad Company – Abandonment Exemption – In Lafayette County, Mo., Docket No. AB-33 (Sub-No. 297X) (“UP-Lafayette County”) (STB served Jul. 22, 2011) (in response to an appeal of a Director's Order rejecting a late-filed OFA, the Board rejected the appellant's manifest injustice argument, stating as follows: “[The offeror] failed to timely file an OFA or a petition for additional time to do so. Even were we to consider anew [the offeror's] petition for extension of time to file an OFA, it would be denied. The statute, at 49 U.S.C. § 10904, imposes strict time limits for the filing of an OFA, and the abandoning carrier opposed the request for extension. Allowing the late filing of an OFA over the owning rail carrier's objection would be contrary to Congress's direction to streamline the abandonment and OFA process”) (citations omitted).

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its late filing excused so that the NOI might be accepted. The background information does not show that that it would be manifestly unfair to hold Topflight to clearly-articulated OFA deadlines.

In sum, Topflight's Appeal is doubly disfavored. The Board's regulations specifically do not favor appeals such as this one. Also, assuming Topflight were to overcome such regulatory disfavor to obtain re-visitation of the merits of the AD Order, it must then overcome Entire Board precedent (and Congressional policy underpinning such precedent) weighing heavily against granting the particular deadline waiver that Topflight is seeking over IC's objection. Here, there are no exceptional circumstances weighing in favor of a reversal of the AD Order, and there is no evidence of manifest injustice arising from the agency's adherence to its OFA regulations and precedent. Rather, granting Topflight's appeal would introduce uncertainty and delay into an OFA process that, due to predictable and closely-controlled procedural deadlines, is designed to be reliable and expeditious. Prolonging this abandonment proceeding would, if anything, be contrary to law and manifestly unjust to IC. For these reasons, Topflight's Appeal should be denied. IC requests that the Board act promptly in disposing of Topflight's appeal in order to eliminate any uncertainty over whether IC may act on the abandonment authority it presumes it already possesses.

Respectfully submitted,



Robert A. Wimbish
Attorney for Illinois Central Railroad Company

cc: All parties of record