

# FLETCHER & SIPPEN LLC

ATTORNEYS AT LAW

29 North Wacker Drive  
Suite 920  
Chicago, Illinois 60606-2832

Phone: (312) 252-1500  
Fax: (312) 252-2400  
www.fletcher-sippel.com

ROBERT A. WIMBISH  
(312) 252-1504  
rwimbish@fletcher-sippel.com

May 6, 2015

## 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  
May 6, 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:

Illinois Central Railroad Company (“IC”) hereby replies to the “Petition to Reopen” and “Notice of Intent to File Offer of Financial Assistance,” both filed by Topflight Grain Cooperative (“Topflight”) in the above-referenced abandonment docket on April 30, 2015 (subsequently corrected via supplemental filing on May 4, 2015). As discussed below – (1) Topflight’s reopening request should be denied; (2) Topflight’s Notice of Intent should not be accepted; and (3) IC’s abandonment class exemption should be permitted to take effect as currently scheduled on May 12, 2015.

As background, IC invoked the Board’s class exemption procedures to abandon the subject rail line between Bondville and Seymour, in Champaign County, IL, by way of a “two-year-out-of-service” notice filed on March 23, 2015. The Board served notice of the proposed abandonment in the *Federal Register* on April 10, 2015. In keeping with 49 C.F.R. § 1152.27(c)(2), the Board’s abandonment notice provided that formal notices of intent to file an offer of financial assistance (“OFA”) would be due no later than April 20, 2015. IC received one informal inquiry from a prospective OFA offeror called Chessie Logistics (“C-Log”) within a few days of the STB-issued abandonment notice, but C-Log never notified the Board of its intent to proceed with an OFA.<sup>1</sup> A second entity, Topflight, contacted IC by email regarding a possible OFA on April 27, 2015, as indicated in Topflight’s Petition to Reopen. Topflight submitted its formal Notice of Intent on April 30, 2015, and served IC with a copy of that filing the same day – 10 days after the section 1152.27(c)(2) deadline. (In the interest of full disclosure, shortly after receipt of Topflight’s Notice of Intent, IC had planned on allowing the OFA process to go

<sup>1</sup> Were C-Log to come forward at this late date to pursue an OFA for the subject line, IC similarly would object to C-Log’s procedurally-defective effort.

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forward despite Topflight's late arrival, but IC later advised Topflight that it would not consent to an OFA under the circumstances.)

In tacit acknowledgement that its Notice of Intent was late-filed, Topflight has requested that this abandonment proceeding be reopened. The Petition to Reopen, a device evidently intended here to restore Topflight's access to the OFA process, should not be granted. Topflight has failed to recite or address the standards for reopening a proceeding – material error, new evidence, or substantially changed circumstances. See 49 C.F.R. § 1152.25(e)(4). In any event, none of the three reopening standards is met here. There is no hint of administrative error, no new evidence, and the only arguable changed circumstance is that Topflight, on its own initiative, elected well after the applicable deadline to pursue an OFA, which is no basis for reopening. It is not clear what a successful reopening would accomplish anyway, since reopening by itself would not be enough to override the Board's OFA deadlines.

IC believes that Topflight's Petition to Reopen may have been intended to function as a request for a waiver of the section 1152.27(c)(2) deadline or as a motion for leave to late file. But if either is the case, then IC objects to any such waiver or leave, and, accordingly, Topflight's late-filed Notice of Intent should not be accepted. As the Board is well aware, the strict deadlines applicable to the OFA process (regardless of the procedures the railroad has invoked to obtain abandonment authority) are designed to protect the abandoning carrier from undue delay in the disposition of assets that are not remunerative. Also, contrary to Topflight's assertions in both its Petition to Reopen and its Notice of Intent, a reopening or a waiver would be prejudicial to IC because either would delay IC's disposition of uneconomical assets.<sup>2</sup>

As this agency long has recognized, the OFA statute at 49 U.S.C. § 10904 reflects Congressional balancing of competing policy considerations (between providing a path for preserving rail lines for continued rail service and prolonging to the abandoning railroad's detriment the retention of uneconomical assets targeted for liquidation).<sup>3</sup> These same policy

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<sup>2</sup> The Board need not address the issue if it declines Topflight's apparent request for permission to late file, but, for the record, IC also objects to Topflight's request for a 30-day tolling of the OFA process for the same reason it has objected to reopening or waiver of the notice of intent deadline.

<sup>3</sup> 1411 Corporation – Abandonment Exemption – In Lancaster County, PA, et al., Docket No. AB-581X, slip op. at 5 (STB served May 30, 2002) (“The underlying rationale of the OFA provision . . . represents an accommodation of the conflicting interests of railroads that desire to unburden themselves quickly of unprofitable lines, and shippers that desire continued rail service”) (citing Hayfield Northern R. Co. v. Chicago & N.W. Tr. Co., 467 U.S. 622, 630 (1984)), aff'd sub nom., Borough of Columbia v. Surface Transp. Bd., 342 F.3d 222 (3d Cir. 2003).

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considerations have framed the Board's carefully-considered OFA regulations and strict procedural timeframes, which is why the Board consistently has declined to accept late-filed notices of intent where the abandoning carrier has not consented to their acceptance<sup>4</sup> (and IC is unaware of any case where, under similar circumstances, this agency has permitted the late filing of a formal notice of intent to file an OFA). Even assuming that the Board were to consider the merits of Topflight's request to have the Board accept its Notice of Intent, Topflight has not explained why its failure to observe to a deadline clearly set forth in the *Federal Register* notice should be excused.

There is no basis for reopening this abandonment proceeding, and a waiver of the Section 1152.27(c)(2) deadline for tendering a formal notice of intent to file an OFA is unwarranted and opposed by IC. For these reasons, the Board should deny Topflight's request to late file its Notice of Intent, and it should permit IC's rail line abandonment class exemption to take effect as currently scheduled on May 12, 2015.

Respectfully submitted,



Robert A. Wimbish

Attorney for Illinois Central Railroad Company

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cc: All parties of record

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<sup>4</sup> See, e.g., General Railway Corporation d/b/a Iowa Northwestern Railroad – Abandonment Exemption – In Osceola and Dickinson Counties, IA, Docket No. AB-1067 (Sub-No. 2X), slip op. at 2 (STB served October 24, 2008) (“Allowing the late filing of [a notice of intent to file] an OFA over the owning rail carrier’s objection would be contrary to Congress’s direction to streamline the abandonment and OFA process. See Aban. and Discon. of R. Lines and Transp. Under 49 U.S.C. 10903, 1 S.T.B. 894, 909-10 (1996) (in enacting the Interstate Commerce Commission Termination Act of 1995, Congress shortened the time for the Board to process OFAs under 49 U.S.C. 10904); Railroad Ventures, Inc. v. STB, 299 F.3d 523, 531 (same). Thus, the Board does not normally allow extensions of time for filing OFAs when the rail-line owner objects. See, e.g., Mid-Michigan Railroad, Inc. – Abandonment Exemption – In Kent, Ionia, and Montcalm Counties, MI, STB Docket No. AB-364 (Sub-No. 14X) (STB served Sept. 26, 2008), slip op. at 5”).