

Strasburger

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May 4, 2015

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BY E-FILING

Ms. Cynthia T. Brown
Chief of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, N.W.
Washington, D.C. 20423

238311
ENTERED
Office of Proceedings
May 4, 2015
Part of Public Record

RE: Docket No. AB-1232, Town of North Judson, Indiana—Adverse Discontinuance of Service—in LaPorte, Porter, and Strake Counties, IN

Dear Ms. Brown:

On behalf of the Chesapeake & Indiana Railroad, Inc. (“CKIN”), I am e-filing a copy of its Reply and Opposition to the Petition for Waiver and Exemption filed on April 16, 2015, by the Town of North Hudson, IN. It is my impression that our Reply is actually due May 6, 2015. CKIN intends to vigorously oppose any application filed by the Town for Adverse Discontinuance of CKIN’s rail service on this line.

Sincerely yours,



John D. Heffner

Enclosure

cc: All parties

6809801.1/SP/25194/0101/050415

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**STB Docket No. AB-1232
TOWN OF NORTH JUDSON, INDIANA
- ADVERSE DISCONTINUANCE OF SERVICE -
IN LAPORTE, PORTER, AND STARKE COUNTIES, IN**

**CHESAPEAKE AND INDIANA RAILROAD, INC.'s
REPLY AND OPPOSITION TO
PETITION FOR WAIVER AND EXEMPTION**

Respectfully submitted
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Due: May 5, 2015

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SURFACE TRANSPORTATION BOARD**

**STB Docket No. AB-1232
TOWN OF NORTH JUDSON, INDIANA
- ADVERSE DISCONTINUANCE OF SERVICE -
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INTRODUCTION

On April 16, 2015, the Town of North Judson, Indiana (“the Town”) petitioned the Board for exemption from certain statutory provisions of the ICC Termination Act (“the ICCTA”) and waiver of certain regulatory requirements that govern the filing of applications for abandonment of railroad lines and discontinuance of railroad service. The Town filed this request in support of an adverse discontinuance application it plans to submit seeking the termination of service by the incumbent carrier, the Chesapeake and Indiana Railroad, Inc. (“CKIN”). CKIN intends to protest the Town’s application and urges the Board to deny certain of the Town’s exemption and waiver requests as unwarranted.

BACKGROUND

The Town originally acquired the subject 33.97 miles of railroad line between MP CF 0.23 at LaCrosse and MP 15.23 at Wellsboro and between MP 212.55 at North Judson and MP 230.92 at Malden, IN (hereafter “the Line”) in 2004 through an offer of financial assistance under 49 U.S.C. §10904.¹ The Town used funding largely provided by the Indiana Department of Transportation (“INDOT”) and LaPorte, Porter, and Starke Counties to finance that acquisition. Upon consummation of its acquisition, the Town acquired a common carrier obligation pursuant to Board authority. *Cf.*, 49 CFR §1152.27(f) (2); *City of Austin, TX—Acquisition –Southern Pacific Transportation Company*, FD 30861(A) (ICC served Nov. 4, 1986).² Rather than provide service in its own right, the Town issued an RFP soliciting operating proposals and picked CKIN to provide common carrier service pursuant to a 5 year Railroad Operating Agreement.³ Apparently

¹ *CSX Transportation, Inc.-Abandonment Exemption-In LaPorte, Porter, and Starke Counties, IN*, STB docket No. AB-55 Sub-No. 643X (STB served May 14, 2004).

² Contracting out that obligation to CKIN left the Town with a “residual common carrier obligation,” one that would ripen into a full obligation should CKIN be removed from the Line, *Common Carrier Status of States, State Agencies, et al.*, 363 I.C.C. 132 (1980).

³ *Chesapeake & Indiana Railroad Company, Inc.—Operation Exemption—The Town of North Judson, IN*, FD 34529 (STB served Aug. 20, 2004).

satisfied with CKIN's performance, the Town subsequently extended CKIN's service by entering into two amendments to that agreement.⁴

The current term expires on December 31, 2015, and the Town has indicated that it will enter into a new agreement with an as of yet unidentified or unknown party it describes as "an experienced Class III rail operator." Because CKIN's shippers are apparently satisfied with its service and CKIN's successful marketing efforts have finally made the Line profitable, CKIN has no desire to terminate its service. Nevertheless the Town is petitioning for this relief as a prelude to filing an adverse discontinuance application so it can remove CKIN contrary to the wishes of CKIN's customers.

THE TOWN'S WAIVER AND EXEMPTION REQUESTS

The Town would have the Board believe that its requests for waiver and exemption from various agency requirements normally applicable to so-called adverse discontinuance cases are *pro forma* matters that are appropriate here. More specifically, the Town wants the Board to see this proceeding as a "plain vanilla" one involving a mere change in operators. *See*, Town of North Judson "Petition for Waiver and Exemption in Conjunction With Prospective Application For Adverse Discontinuance of Service" (hereafter "the Petition") at 2. But that characterization is inaccurate.

⁴ Amendment One extended the term to July 31, 2012, and Amendment Two extended the term to December 31, 2015.

As noted above, the Town is a common carrier in its own right having acquired the former CSX line under the financial assistance provisions of the abandonment statute. To the best of CKIN's knowledge, the Town has not formally begun the process for soliciting interest by short line railroad operators, a process that took months to accomplish back when CKIN was selected as the Line's operator in 2004. Indeed, the only candidate of which CKIN is aware that desires to operate the Line is the Hoosier Valley Railroad Museum, Inc. ("the Museum"). CKIN has served discovery requests on counsel for the Town. It anticipates that the discovery responses will demonstrate that neither the Town nor the Museum has the requisite qualifications or experience for operating a common carrier railroad. Should the Board approve the Town's application, all rail service on the Line could cease to the detriment of the two on-line customers and the three counties who funded this acquisition along with INDOT. Accordingly, the Town's application is really one for an adverse abandonment and should be judged by that precedent. With that background, CKIN responds to each of the Town's requests.

1. System Diagram Map. Were this a true "discontinuance" case involving a change in operators, waiver of the System Diagram Map ("SDM") requirement might be appropriate. The purpose of the SDM requirement is to give affected shippers and communities sufficient time to plan for a potential termination of rail service so that they can challenge the abandonment or make

alternate transportation arrangements. *Cf., Rail Abandonments-Offers of Financial Assistance*, 1 I.C.C.2d 950, 952-3 (1985).

At the time that CKIN initiated rail service in 2004, the Line's economics were marginal at best. It was formerly part of a through CSX (former Chesapeake & Ohio Railroad) line between Cincinnati and Chicago that had been abandoned in segments, eliminating its historic base of overhead traffic. By the time the Town acquired it, the Line was handling about 363 car loads per year.⁵ Through the efforts of the shippers, including significant capital investment in facilities, coupled with the marketing efforts of CKIN, traffic has now grown to over 3000 car loads per year for the past several years. Accordingly, retention of the additional time mandated by the SDM requirement is necessary to give the customers along with INDOT and the Counties that funded the acquisition the planning time needed to determine what strategies to take regarding the Line's future.

2. Rail Line Attributes. CKIN does not oppose the Town's requests for waiver of the requirements of 49 CFR §1155.22(b)-(e) regarding condition of the properties, service performed, revenue and cost data, and community impact.

Nevertheless, it does note and will show in its protest to be filed at a later date that

⁵ 2004 Request for Proposal at page 4. The Board's abandonment decision suggests that the Line was handling about 123 carloads per year at the time CSX's abandonment request was approved. *CSX Transportation, Inc.-Abandonment Exemption-In LaPorte, Porter, and Starke Counties, IN*, STB docket No. AB-55 Sub-No. 643X slip op. at 1-2 (STB served Feb. 20, 2004).

the Town and the Museum have both been actively involved in contracting for publicly funded upgrades to the Line's infrastructure so they are knowledgeable about its physical condition.

3. Environmental and Historical Impacts. CKIN opposes the Town's request to be exempted from these requirements. As noted above, this proceeding is tantamount to an adverse abandonment instead of a discontinuance. There is a real possibility that service could terminate without a knowledgeable and competent operator able to continue operations after Dec. 31, 2015. CKIN also notes that INDOT obtained some of its acquisition financing from the Federal Highway Administration premised on preserving the Line as a historic resource. CKIN submits as exhibit A to this filing a photograph of a historically significant but seriously deteriorated interlocking tower on the Line that the Museum and Town were tasked with preserving. The Board should require the Town to comply with its environment and historic regulations.

4. Filing, Notice, and Posting Requirements. Perhaps the most egregious of the Town's exemption and waiver requests is its desire to have this combined Petition for Exemption and Waiver serve as the Notice of Intent under 49 CFR §1150.20, thereby shortening the shipper and community notification time from up to three months to 30 days. The Board should reject that request for the very same reasons that apply to the SDM waiver request.

Moreover, CKIN observes that the Town's request is disingenuous and misleading as well. In support of its attempt to merge these two requirements, it cites Board precedent allowing the waiver petition to function as a notice of intent. What it conveniently neglects to mention is that none of the requests in the cited cases were opposed by the incumbent carrier unlike here.⁶

CKIN does not object to the Town's notice and posting request so long as it serves the parties shown in its Certificate of Service.

5. Offers of Financial Assistance and Public Use Conditions. CKIN objects to a waiver of the statutory offer of financial assistance provision of 49 U.S.C. §10904 insofar as it would preclude the Line's two customers from continuing to use CKIN - their carrier of choice - by making an offer to contract with CKIN for continued service. CKIN has no objection to waiving the public use condition provision of 49 U.S.C. §10906 as it desires to continue service rather than preserve the Line for some public use.

⁶ Cases cited by the Town include *Riverview Trenton Railroad Company—Adverse Abandonment—in Wayne County, Mich.*, Docket No. AB 1230, slip op. at 3 (STB served April 10, 2015) (“Riverview does not oppose these requests”); *Lackawaxen-Honesdale Shippers Assn.—Adverse Discontinuance of Operating Authority—in Wayne and Pike Counties, PA*, Docket No. AB 1110, slip op. at 4 (STB served January 23, 2014) (“The Petitioners’ request for waiver of the requirements of 49 C.F.R. § 1152.20(a)(1) and (b)(1) is unopposed and will be granted.”); and *Paulsboro Refining Company, LLC—Adverse Abandonment—In Gloucester County, NJ*, Docket No. 1095, slip op. at 2 (STB served July 26, 2012) (“SMS does not oppose PRC’s requests concerning the system diagram map.” That applicant did not appear to have asked to merge the notice and waiver provisions).

6. Exemption Criteria. CKIN disputes the Town's claim that the statutory provisions for which the exemption is sought are not necessary to carry out the rail transportation policy of 49 U.S.C. §10101 or are necessary for the protection of shippers on the Line from abuse of market power. For the reasons cited above, CKIN fears that granting an exemption from the statutory SDM and offer of financial assistance provisions will jeopardize rail service to the two on-line shippers. Congress inserted these provisions in ICCTA to ensure that shippers would have sufficient protections so that they could make appropriate plans to preserve their transportation options. While granting the exemptions will expedite regulatory procedures, the Town has failed to show how the public interest would be served or how sound economic conditions in the rail industry will be advanced. The exemptions should be denied.

7. Federal Register Notice. CKIN has no general objection to allowing the Town to use a different form of notice other than that specified at 49 CFR §1152.21. However, the form of notice attached to the Petition is unacceptable. CKIN attaches to this filing the text of an acceptable notice.

Respectfully submitted,



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Due: May 5, 2015

EXHIBIT A





**CHESAPEAKE & INDIANA RAILROAD'S
PROPOSED DRAFT FEDERAL REGISTER
NOTICE**

**STB Docket No. AB-1232
Petition for Waiver and Exemption
APPENDIX 1**

On or about _____, 2015, the Town of North Judson, Indiana (the Town) intends to file with the Surface Transportation Board (STB), Washington, DC 20423, an Application for Adverse Discontinuance of Service by Chesapeake & Indiana Railroad Company, Inc. (CKIN) over a line of railroad owned by the Town that extends between Milepost CF 0.23 at or near North Judson and Milepost 230.92 at or near Malden, a total distance of approximately 33.37 miles in LaPorte, Porter, and Starke Counties, Indiana (the Rail Line). The Rail Line traverses through United States Postal Service ZIP Codes 46382, 46383, 46348, 46366, 46340, and 46390. The Rail Line includes the stations of LaCrosse, Wellsboro (connection to CSX Transportation, Inc.), North Judson, Malden, Hanna, English Lake, Union Mills, and Thomaston (connection to Norfolk Southern Railway Company). Based on information in the Town's possession, the Rail Line does not contain federally granted rights-of-way. Any documentation in the Town's possession will be made available promptly to those requesting it

The Application for Adverse Discontinuance of Service is being filed to terminate CKIN's federal operating authority over the Rail Line because the Town, as owner of the Rail Line, had decided not to renew its Operating Agreement with CKIN when that Agreement expires by its terms on December 31, 2015.

The interest of railroad employees will be protected by the labor protective conditions imposed in *Oregon Short Line Railroad – Abandonment, Goshen Branch*, 360 ICC 91 (1979).

Any interested person, after the Application is filed on or about _____, 2015, may file with the STB written comments concerning the proposed adverse discontinuance, or

protests against it. Persons who may oppose the discontinuance but who do not wish to participate fully in process by appearing at any oral hearings or by submitting verified statements of witnesses, containing detailed evidence, should file comments. Persons opposing the proposed adverse discontinuance who do wish to participate actively and fully in the process should file a protest. Protests must contain that party's entire case in opposition (case in chief) including the following:

- (1) Protestant's names, address and business
- (2) A statement describing protestant's interest in the proceeding, including:
 - (i) A description of protestant's use of the line;
 - (ii) If protestant does not use the line, information concerning the group or public interest it represents;
 - (iii) If protestant's interest is limited to the retention of service over a portion of the line, a description of the portion of the line subject to protestant's interest (with milepost designations if available).
- (3) Specific reasons why protestant opposes the application including information regarding protestant's reliance on the involved service [this information must be supported by affidavits of persons with personal knowledge of the facts(s)]
- (4) Any rebuttal of material submitted by applicant.

In addition, a commenting party or protestant may provide a statement of position and evidence regarding:

- (i) Environmental impact;
- (ii) Impact on rural and community development;

(iii) Prospective use of the right-of-way for interim trail use and rail banking under 16 U.S.C. 1247(d) and §1152.29.

A protest may demonstrate that: (1) the protestant filed a feeder line application under 49 U.S.C. §10907; (2) the feeder line application involves any portion of the rail line involved in the abandonment or discontinuance application; (3) the feeder line application was filed prior to the date the abandonment or discontinuance application was filed; (4) the feeder line application was pending before the Board.

Written comments and protests will be considered by the Board in determining what disposition to make of the application. The commenting party or protestant may participate in the proceeding as its interests may appear.

If an oral hearing is desired, the requester must make a request for an oral hearing and provide reasons why an oral hearing is necessary. Oral hearing must be filed with the Board no later than 10 days after the application is filed.

Those parties filing protests to the proposed discontinuance should be prepared to participate actively either in an oral hearing or through the submission of their entire opposition case in the form of verified statements and arguments at the time they file a protest. Parties seeking information concerning the filing of protests should refer to 49 C.F.R. §1152.25.

Written comments and protests, including all requests for trail use conditions, should indicate the proceeding designation STB No. AB-1232 and must be filed with the Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, Washington, DC 20423-0001, no later than 45 days after the date on when the Application is filed. Interested persons may file a written comment or protest with the Board to become a party to this discontinuance proceeding. A copy of each written comment or protest shall be served upon the

representatives of the applicant, Rachel Arndt, Peterson Waggoner & Perkins, LLP, 125 E Tenth Street, Rochester, IN 46975, (574) 223-4292 and Thomas F. McFarland, Thomas F. McFarland, P.C., 208 South LaSalle Street, Suite 1890, Chicago, IL 60606-1112, (312) 236-0204. The original and 10 copies of all comments or protests shall be filed with the Board with a certificate of service. Except as otherwise set forth in part 1152, each document filed with the Board must be served on all parties to the discontinuance proceeding. 49 C.F.R. §1104.12(a).

A copy of the application is being sent by first class mail to representatives of CKIN, the active shippers on the Rail Line; the carriers with whom the Rail Line connects; the Counties through which the Rail Line traverses; the Governor of Indiana; and the Indiana Department of Transportation. In addition, a copy of the application will be deposited any agency station through which business for the Rail Line is received or forwarded (at LaCrosse, IN).

A copy of the Notice of Intent will be published at least once per week for three consecutive weeks in newspapers of general circulation in each County through which the Rail Line traverses.

CERTIFICATE OF SERVICE

I, John D. Heffner, have served a copy of the Reply and Opposition to the Petition for Waiver and Exemption by first class United States Mail and electronic mail on this 5th day of May, 2015:

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/s/ John D. Heffner
John D. Heffner

Dated: May 5, 2015