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May 10, 2004

Via messenger, hand delivery

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

Re: STB Docket No. AB-290 (Sub-No. 168X), Norfolk and Western Railway
Company - Abandonment Exemption - Between Kokomo and Rochester In
Howard, Miami and Fulton Counties, IN

Dear Mr. Williams:

Enclosed please find the original and ten copies of the reply of Norfolk Southern Railway Company to the petitions for reconsideration of William C. Friend, Steven Furnivall, Linda Schanlaub and Sam Hoover in the above matter. Also enclosed is an extra copy of the letter to be date stamped as received by the Board and returned to us in the enclosed stamped, self-addressed enveloped.

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ccs w/ encl. via messenger, personal hand delivery
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Very truly yours,

James R. Paschall

Mr. Vernon A. Williams
AB-290, Sub-No. 168X
May 10, 2004
Cover Letter Page 2 of 2

via Federal Express or airborne courier w/encl.
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cc: Mr. J. T. Moon

BEFORE THE
SURFACE TRANSPORTATION BOARD



STB DOCKET NO. AB-290 (Sub-No. 168X)

NORFOLK AND WESTERN RAILWAY COMPANY
- ABANDONMENT EXEMPTION -
BETWEEN KOKOMO AND ROCHESTER
IN HOWARD, MIAMI AND FULTON COUNTIES, IN

NORFOLK SOUTHERN RAILWAY COMPANY'S
REPLY TO PETITIONS FOR RECONSIDERATION
OF WILLIAM C. FRIEND, STEVEN FURNIVALL, LINDA SHCANLAUB
AND SAM HOOVER

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May 10, 2004

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket No. AB-290 (Sub-No. 168X)

Norfolk and Western Railway Company - Abandonment Exemption -
Between Kokomo and Rochester in Howard, Miami and Fulton Counties, IN

Norfolk Southern Railway Company's
Reply to Petitions for Reconsideration of
William C. Friend, Steven Furnivall, Linda Schanlaub and Sam Hoover

Norfolk Southern Railway Company ("NSR"), successor by merger to Norfolk and Western Railway Company ("NW"), submits the following Reply to the Petitions for Reconsideration of the Board's Decision and Notice of Interim Trail Use or Abandonment ("NITU") served March 10, 2004 in this proceeding.¹ Those petitions were filed on March 30, 2004, and supplemented on April 19, 2004, collectively by William C. Friend, Steven Furnivall and Linda Schanlaub ("Friend, et al.") and separately on April 19, 2004 by Sam Hoover ("Hoover")(together, "Petitioners"). The Board's further decision of April 6, 2004 permitted Friend, et al. to file supplemental evidence by April 19, 2004 and set a May 10, 2004 due date for replies to the petition,

¹NW was merged into NSR, effective September 1, 1998, pursuant to a Board decision served August 31, 1998 in STB Finance Docket No. 33648, *Norfolk Southern Railway Company--Merger Exemption--Norfolk and Western Railway Company*. Any reference in this Reply to NSR with respect to the ownership, use or operation of the Line before the merger date should be considered a reference to NW. Any inadvertent reference to NW taking any action with respect to the ownership, use or operation of the Line after the merger date should be taken as a reference to its successor, NSR.

but did not extend the date for filing petitions for reconsideration. Because of the date of their filing, Hoover's Petition and that part of the Supplemental Evidence to the Petition of Friend, et al., that raised issues not contained in the Friend, et al., March 30, 2004 petition must be considered as petitions to reopen and to revoke an exemption. NSR requests that the Board deny the petitions and the relief requested by Petitioners, particularly their request for revocation of the NITUs issued in the Board's March 10, 2004 and May 14, 1996 decisions.

In the March 10, 2004 decision and NITU, the Board modified the decision and NITU served in this docket on May 14, 1996. In that 1996 decision, the Board (1) exempted NW's proposed abandonment of 38.4 miles of railroad line between Milepost (MP) I-57.2 at Kokomo, IN and MP I-95.6 at Rochester, IN, in Howard, Miami, and Fulton Counties, IN (the "Line" or "Subject Line"), from the prior approval requirements of 49 U.S.C. 10903 and (2) issued a NITU for the segment of the Line between MP I-57.2 at Kokomo and MP I-74.2 at Peru, IN (Southern Segment).² The March 10, 2004 decision and NITU modified the May 14, 1996 decision to the extent necessary for NW and the trail manager, Indiana Trails Fund, Inc. (ITF), to implement interim trail use/rail banking for most of the Northern Segment of the Line extending between MP I-75.5 at Peru, IN, and MP I-95.6 at or near Rochester, IN (Northern Trail Segment), for a period of 180 days from the service date of the decision and NITU (until September 6, 2004).

ITF and NSR, in fact, had executed a written trail use agreement and contract to

²Names used for various segments and sub-segments of the Line in this Reply and the locations and major significance of those line segments or sub-segments are

convey the right-of-way for both the Kokomo-Peru (southern) and Peru-Rochester (northern) segments of the trail, dated August 31, 1998. At all relevant times, except with respect to a small abandoned segment between MP I-74.2 and MP I-75.5 ("Northern Peru Segment"), NW/NSR acted with the intention not to abandon any other part of the Line. Rather NSR has continuously intended to transfer the remaining right-of-way not still used for railroad purposes to ITF or the City of Peru for interim trail use. NSR has retained a small segment of the right-of-way that is used in connection with and is almost entirely part of the right-of-way of NSR's active east-west main line between MP I-72.8 and MP I-74.2 at Peru, IN ("Southern Peru Railroad Segment")³

ITF and NW/NSR acted in compliance with the essential requirements of the Trails Act in agreeing to, and in actually conveying, both the Southern Trail Segment

identified and explained in some detail in the next section of the text.

³As explained in detail below and in the verified statement of John T. Moon, II, the Southern Peru Segment between MP I-72.7 and MP I-74.2 was also excluded from the interim trail use agreement with ITF but not because it was abandoned or NW/NSR intended to abandon it. A 0.1-mile sub-segment of right-of-way of the Southern Peru Segment between MP I-74.7 and MP I-74.8 was to be conveyed on or about January 15, 1999 to the City of Peru for trail, walkway and park purposes and remains the subject of an open NSR Real Estate file. The remainder of the right-of-way of the Southern Peru Segment between MP I-72.8 and MP I-74.2, the Southern Peru Railroad Segment, was retained by NSR for railroad purposes. All of the Southern Peru Railroad Segment is in the right-of-way of NSR's active east-west main line through Peru, except for 0.1-mile of right-of-way in the old Kokomo-Rochester line right-of-way between MP I-72.8 and I-72.9 that is immediately adjacent to the east-west right-of-way and is used by NSR for vehicle access to the east-west main line. NSR's February 17, 2004 letter to the Board referring to the Southern Peru Segment as part of a segment between MP I-72.7 and MP I-75.5 at Peru that NSR had intended to or actually had abandoned was incorrect as to the MP I-74.7 to MP I-74.8 and inaccurate as to the Southern Peru Railroad Segment except as to NSR's discontinuance of north-south rail service over that segment. The Southern Peru Railroad Segment has been retained by NSR in connection with the operation of, and as part of the right-of-way of, NSR's active east-

and the Northern Trail Segment to ITF for interim trail use. However, they overlooked the Board's May 14, 1996 direction for ITF to re-apply for a NITU for the segment of the line between MP I-74.2 at Peru, IN and MP I-95.6 at Rochester, IN (Northern Segment) after the U. S. Bankruptcy Court would terminate Indiana Hi-Rail Corporation's (IHRC's) trackage rights over that Northern Segment of the Line. While ITF did not make this request until several years after the Board's May 14, 1996 decision, it was not necessary to do so for the valid establishment of interim trail use on the Line because NW/NSR and ITF had complied with the essential requirements of the Trails Act in reaching the 1998 agreement and closing the 1999 conveyance. The NITU request was timely because NSR had not consummated abandonment of any portion of the Line except the Northern Peru Segment prior to the date ITF made the request and NSR supported it. See *Birt v. STB*, 90 F.3d 580, 588-90 (D.C. Cir. 1996); *Grantwood Village v. Missouri Pac. R.R. Co.*, 95 F.3d 654, 659 (8th Cir. 1996) cert. denied, 519 U.S. 1149 (1997); STB Docket No. AB-303 (Sub-No. 13X), *Wisconsin Central Ltd. - Abandonment Exemption - In Brown County, WI*, served February 17, 2000.

ITF's February 17, 2004 letter to the Board that requested the issuance of a NITU for the Northern Segment (minus the Northern Peru Segment between MP I-74.2 and MP I-75.5) was meant to correct the technical oversight of not asking for the issuance of a further NITU applicable to that segment, not to permit the negotiation and execution of an interim trail use agreement and conveyance after the Line had been abandoned. The interim trail use and right-of-way sale and donation agreement was

west main line through Peru, IN.

reached and the conveyance was made long ago. It is well settled that the Board can issue a NITU in response to a late-filed request, or reinstate a NITU negotiation period that has expired, if the railroad has not consummated abandonment of the subject line. The interim trail use agreement and conveyance to ITF of the Trail Segments of the Line's right-of-way conclusively demonstrate NSR's continuous intention to convey the Trail Segments of the Line included in the agreement and conveyance for trail use, not to abandon them.

NSR supported ITF's request for issuance of the further NITU in a February 17, 2004 letter to the Board. NSR contends, as does ITF, that the Board retained jurisdiction to issue the March 10, 2004 NITU because at no time after the effective date of the May 14, 1996 decision and NITU did NSR intend to or act to consummate abandonment of any segment of the Line except the Northern Peru Segment between MP I-74.2 and MP I-75.5.

The relevant facts are set forth in detail in the Verified Statement of John T. Moon, II, which is submitted as part of this Reply, and in the previous decisions of the Board in this case. The facts are recited in this introduction and NSR's argument to the extent necessary to introduce the subject of the proceeding and to support NSR's argument concerning resolution of the issues now under consideration in this docket.

Names Used for Various Segments and Sub-Segments of the Line in this Reply; Their Locations.

The history of the Subject Line and the issues raised in this proceeding require repeated references to various segments, or sub-segments, of the Line. The locations

of these segments, their relationship to adjacent segments and their status, use and disposition since the effective date of the Board's May 14, 1996 NITU are important. In the 1996 decision, the Board referred to the Line's two segments, which are divided at Peru, IN, as the northern segment and the southern segment. Consideration of the issues raised by the petitions requires reference not only to the location and status of these segments of the Line, but also to the location and status of relevant sub-segments of those segments. This introduction has already demonstrated that these references are probably better made by naming the segments and sub-segments rather than by repeatedly referring to mileposts or even locations, some of which apply to more than one sub-segment. In an effort to provide easier identification of the various relevant segments or sub-segments of the Subject Line, NSR refers to these segments and sub-segments of the Line or its right-of-way in this Reply as follows:

1. The "Southern Segment" is between MP I-57.2 at Kokomo IN and MP I-74.2 at Peru, IN. Within this segment, we shall refer to certain sub-segments as:

A. The "Kokomo Segment" is between MP I-57.2 and MP I-58.5 at Kokomo, IN. The Kokomo Segment has never abandoned or reclassified as industrial track. It was continuously operated or was under a common carrier obligation to be operated by Central Railroad Company of Indianapolis (CERA) pursuant to a 1989 lease of lines from NW until it was sold to CERA as a line of railroad in 2002, which it remains to date.

B. The "Southern Trail Segment" between MP I-58.5 at Kokomo, IN, where it connects with CERA's line of railroad through the Kokomo Segment, and MP I-

72.7 at Peru, IN, where it could still connect with NSR's line of railroad as explained below. This Southern Trail Segment was conveyed by NSR to ITF pursuant to an August 31, 1998 written agreement in deeds transferred in a closing on January 21, 1999.

C. The "Southern Peru Segment" is between MP I-72.7 and MP I-74.2 at Peru, IN. The Southern Peru Segment which in turn consists of:

a. A 0.1-mile segment of right-of-way between MP I-72.7 and I-72.8 that NW intended to convey to the City of Peru for trail, walkway and park purposes on January 15, 1999 but which is still the subject of an open NSR Real Estate file;

b. A 0.1-mile segment of the old north-south right-of-way adjacent to the NSR east-west main line between MP I-72.8 and I-72.9 that NSR has retained for railroad purposes to provide vehicle access to that main line; and

c. A 1.3-mile segment between MP I-72.9 and MP I-74.2 at Peru, IN that is within the right-of-way of NSR's active east-west main line. Sub-segments b and c that have been retained by NSR for railroad purposes are identified as the "Southern Peru Railroad Segment." The "Southern Peru Railroad Segment" has been abandoned only in the sense that NSR will no longer provide north-south rail service through Peru along this segment unless the Southern Trail Segment is ever restored and reconnected to the east-west main line. It has been retained by NSR for

railroad purposes as part of NSR's active east-west line of railroad right-of-way or for the purpose of access to that right-of-way. In fact, some of the track has even been kept in place to aid in NSR's east-west operations through Peru.

2. The "Northern Segment" is between MP I-74.2 at Peru, IN and MP I-95.6 at Rochester, IN. We shall refer to two sub-segments of this segment as:

A. The "Northern Peru Segment" between MP I-74.2 and MP I-75.5 at Peru, IN that has been abandoned by NSR; and,

B. The "Northern Trail Segment" between MP I-75.5 at Peru, IN and MP I-95.6 at Rochester, IN, where it borders on, and thus connects with, the active line of a common carrier railroad, Fulton County Railroad, which in turn connects with an active NSR railroad line at MP I-108.6 at Argos, IN.

We will also need to refer to the "Rochester-Argos Segment" or "Fulton County Railroad Segment" between MP I-95.6 at Rochester, IN and MP 108.6 at Argos, IN. CERA discontinued service under its former lease of the Rochester-Argos Segment pursuant to an exemption from the Board in a related STB docket, and IHRC discontinued its trackage rights and further lease of the segment, or stated differently, they were terminated, in the IHRC bankruptcy case. However, NSR did not abandon the Rochester-Argos Segment or even petition for exemption or apply for authority to the Board to abandon it. Rather, NSR sold the Rochester-Argos Segment to the predecessor or parent of Fulton County Railroad, which is now a common carrier railroad under the jurisdiction of the STB, pursuant to an exemption granted by the

Board to Fulton County, LLC in 1997, as detailed below. Thus, the Rochester-Argos Segment is not part of the Northern Segment, but is an active rail line that is part of the national rail system. It connects with the Northern Trail Segment, at Rochester, IN. The Rochester-Argos Segment which comprises the line of the Fulton County Railroad also continues to connect with an active NSR line at Argos, IN where Fulton County Railroad interchanges rail traffic with NSR.

Corrections To or Clarifications of NSR's February 17, 2004 Letter to the STB.

NSR's February 17, 2004 letter to the Board, which was filed February 20, 2004 in this docket, contained a summary of the background facts of this matter that were deemed important to support Indiana Trail Funds, Inc.'s (ITF) February 17, 2004 letter to the Board. ITF's letter requested that the Board issue the further NITU served by the Board on March 10, 2004. NSR's February 17, 2004 letter was based on a review of one NSR department's files and one or two recollections of a person familiar with the proceeding. Regrettably, the letter contained certain non-material inaccuracies or ambiguities that Mr. Moon's verified statement corrects or clarifies. These corrections and clarifications are summarized immediately below. The corrections and clarifications add support to ITF's position with respect to trail use of the Southern Trail Segment as well as the Northern Trail Segment. They also provide further support for the Board's continuing jurisdiction over this matter and for the Board's March 10, 2004 Decision and NITU.⁴ To the extent the errors or inaccuracies in this letter have any relevance at all,

⁴Despite the harmless, non-material error in NSR's February 17, 2004 letter with

they are similar to the minor mis-statements or mis-descriptions in *Birt v. STB*, 90 F.3d 580, reh'g denied 98 F.3d 644 (D.C. Cir. 1996) that were held not to be dispositive when weighed against all of the other evidence in the proceeding and the actual actions of the railroad with respect to continuing trail use negotiations.

ITF's Trail Use and Right-of-Way Acquisition Was Pursuant to a Written Agreement, Dated August 31, 1998

The NW-ITF trail use agreement and contract to transfer both the Southern Trail Segment and the Northern Trail Segment of the Line's right-of-way from NSR to ITF in fact was a written agreement, dated August 31, 1998, not an oral agreement.⁵ This agreement was reached within the negotiation period specified in the Board's decision served March 27, 1998 that extended to September 27, 1998 the trail use negotiation period originally established in the Board's May 14, 1996 NITU and reinstated in the Board's February 7, 1997 decision recognizing the end of the OFA proceeding. JTM Exhibit 8. A copy of the August 31, 1998 agreement is attached to Mr. Moon's statement as JTM Exhibit 10.

The previous NSR statement characterizing the agreement for trail use and

respect to the decision of the Board and ultimate outcome of this proceeding, NSR nonetheless regrets the additional work and confusion caused to the parties and Board by the necessity to correct and clarify ambiguous or inaccurate statements that may have engendered additional argument in this proceeding. The material facts and conclusions and relevant legal principles stated in the letter are correct and the decision and NITU issued by the Board in response to ITF's letter that was supported by this letter was also correct.

⁵It now appears that the agreement to transfer the 0.1-mile segment between MP I-72.7 and I-72.8 to the City of Peru for trail and public (park) purposes may have been the oral agreement recalled in connection with transfer of part of the right-of-way under the Trails Act in this proceeding.

conveyance of the Trail Segments being an oral agreement, based on an incorrect recollection, is a non-material error since NSR's continuous intention, and ultimate action, was to transfer the Trail Segments of the right-of-way that were conveyed to ITF for the purpose of interim trail use. However, the existence of a written interim trail use and purchase and sale agreement that was executed within the extended negotiation period established by the Board's decision served March 27, 1998 in this docket lends additional evidence of NW/NSR's intention with respect to the Trail Segments and additional support to the timeliness of the interim trail use agreement and conveyance.

The Kokomo Segment Between MP I-57.2 and MP I-58.5 Was Not Reclassified as Industrial Track; It Has Continuously Been and Remains a Line of Railroad

The handwritten undated, unsigned file notation of NSR's initial plan to reclassify the Kokomo Segment as industrial track that was cited in NSR's February 17, 2004 letter, stands alone in NSR's files. The notation does not accurately reflect either NSR's actual intention concerning the further use of the Kokomo Segment or, even more importantly, NSR's and CERA's actions with respect to the status and use of that segment. These intentions and actions are shown by the documents and actions detailed in or appended to Mr. Moon's statement.

NSR may have initially planned to reclassify the Kokomo Segment as industrial track, but that plan became inconsistent with both the intent and actions of NW/NSR and CERA from before the service date of the Board's May 14, 1996 decision until today. In late 1995, after the filing of the petition for exemption in this and the related docket, and before the effective date of the Board's May 14, 1996 decision and NITU, NW and CERA had determined that it was necessary for CERA to continue to lease and

operate, and eventually to acquire, the Kokomo Segment as a line of railroad because of Chrysler Corporation's plan to locate a new vehicle transmission assembly plant on this Kokomo Segment.

Thus, the 1.3-mile Kokomo Segment was never reclassified, but was retained as a line of railroad to serve Chrysler if it required rail service. This Kokomo Segment was retained and operated by CERA under its lease of certain other remaining active NW lines of railroad in this area that were not part of the Line. Ultimately, the Kokomo Segment was conveyed as a line of railroad to CERA in 2002 as part of the sale of NW's line between MP I-51.5 near Marion, IN and MP I-58.5 at Kokomo, IN to CERA. This line sale was made pursuant to an option to purchase in CERA's amended original lease of lines in the area, including the Kokomo Segment, as further confirmed by CERA and NW in a March 1996 memo and a letter agreement dated May 15, 1998. See JTM Exhibits 2, 9 and 12.

NSR's February 17, 2004 letter to the STB itself could not have effected a reclassification of the Kokomo Segment as industrial track because NSR had not owned the Kokomo Segment since June 2002.

The statement in the NSR February 17, 2004 letter concerning reclassification of the Kokomo Segment as industrial track was a non-material error because even if that track, which remains in place and available for use in serving the Chrysler Corporation plant at Kokomo, had been reclassified, it would afford the trail a direct connection to the national rail system. This is further explained below in the general section concerning the continuing connection of the Southern Trail Segment to the national rail

system.

NSR Intended to Quitclaim the Line Segment Between MP I-72.7 and MP I-72.8 to the City of Peru for Trail or Other Public Use; Transaction Scheduled for January 15, 1999 But Closing Failed to Occur; Continuing NSR Intention and Existence of NITU Would Still Allow Transfer to the City or ITF for Trail Use

Notwithstanding NSR's undated, unsigned notation in one file, NSR intended to donate or quitclaim a 0.1-mile portion of the Southern Peru Segment between MP I-72.7 and I-72.8 that borders on the Southern Trail Segment to the City of Peru for trail, walkway and park use. The transaction did not close, but NSR's Real Estate Department has maintained an open file for the transaction to this day. The proposed transfer of this segment for trail use and the continuing open NSR Real Estate file reflecting work in furtherance of this intention, including the record of a proposed January 15, 1999 closing, clearly demonstrates NSR's intention to transfer this 0.1-mile segment for trail use, not to abandon it.

ITF does not need a potential connection to the national rail system at both ends of its trail. In that sense, the error in the NSR February 17, 2004 about abandonment of this 0.1-mile segment of the Southern Peru Segment is irrelevant to the conclusion that the Southern Trail Segment still connects to the national rail system. The correct status of this segment, of course, is important as to whether the Southern Trail Segment also could still be reconnected to the national rail system at Peru and to this portion of the Southern Peru Segment's ultimate disposition.

Right-of-Way for Line Between Approximately MP I-72.8 and MP I-74.1 (Southern Peru Railroad Segment) Was Retained by NSR Since It Is Used For and Is Nearly Entirely Within the Same Right-of-Way As An Active NSR Line of Railroad

The Southern Peru Railroad Segment, retained by NSR, begins at the northern end of the 0.1-mile segment just discussed, at MP I-72.8. While NSR may have expressed an intention neither to transfer this segment to ITF nor to provide further north-south railroad service over it, NSR has not entirely abandoned it, but has retained this Segment for use in the operation of its active east-west line. All of this Southern Peru Railroad Segment except the 0.1-mile segment between MP I-72.8 and I-72.9, which was part of the old north-south right-of-way, is and always has been actually within and a part of the east-west right-of-way of NSR's active east-west main line through Peru. Regardless whether the north-south line is considered abandoned between MP I-72.8 and MP I-74.2, the east-west line that occupies or uses this portion of the right-of-way for active railroad operations is not abandoned. NSR has not given up or abandoned its active use for railroad purposes of the entire right-of-way between these mileposts. (The east-west line has overlapping "D" line mileposts that also apply to the Southern Peru Railroad Segment within this same right-of-way.)

Therefore, it is important with regard to the proximity of the Southern Trail Segment to an active line of railroad at Peru and to the status of the Southern Peru Railroad Segment to clarify that NSR has retained this segment. Thus, NSR's active right-of-way and property used for the purpose of railroad operations on its east-west main line is only 0.1-mile removed from the northern end of the Southern Trail Segment. Given the status of that 0.1-mile segment, in addition to its connection with the national, or interstate, railroad network at its southern end at MP I-58.5 at Kokomo, ITF's Southern Trail Segment could be re-connected to an active line of railroad just 0.1-mile

from the current northern end of the Southern Trail Segment if trail use is established on that intervening 0.1-mile segment, or ITF otherwise acquires it or an easement over it that includes possible restoration of the railroad line. Trail use of the intervening 0.1-mile of right-of-way still could be accomplished under the NITU issued in the Board's May 14, 1996 decision in line with NSR's intention to transfer that 0.1-mile segment to the City of Peru for trail use.

It is also important from NSR's perspective to clarify that although the north-south right-of-way of the Southern Peru Railroad Segment may have been "abandoned," it has only been abandoned for the purpose of providing north-south rail service. It remains in active use as part of NSR's east-west main line. NSR's wishes to remove any doubt that to the extent any portion of the Southern Peru Railroad Segment is held by NSR by easement rather than fee ownership, it has not reverted to any reversionary interest holder because it is still used for active railroad operations as part of the senior, east-west railroad right-of-way through Peru.

Summary of Petitioner's Arguments and NSR's Reply

The petitioners present a variety of lengthy arguments for reconsideration of the May 10, 2004 decision and revocation of the NITUs in this docket. They present few different arguments, however, but simply suggest non-material variations on a few basic points. The actual number of different arguments can be easily identified and reduced to a brief summary as follows.

Petitioners argue that the Board has lost jurisdiction to issue a NITU in this proceeding and should revoke previously issued NITUs based on assertions that NW

consummated abandonment of various segments of the Line or the entire Line, that the Trail Segments of Line conveyed to ITF had not been properly railbanked, principally because they allegedly had been severed from the national (or interstate) rail system, that the Board's decision effects a retroactive taking of property, and that the trail manager or user is unfit to operate the Trail Segments of the right-of-way as a recreational trail.

Petitioners arguments fail in this case. The facts as presented in the accompanying Verified Statement of John T. Moon, II, and this introduction and argument, as well as the relevant law, regulations and decisions applicable to those facts, support the Board's continuing jurisdiction in this case and the issuance of the NITUs. These facts also support the validity of the interim trail use agreement for, and the conveyances to ITF of, both the Northern Trail Segment and the Southern Trail Segment. In summary, the facts and law demonstrate that the Board still had jurisdiction to issue the March 10, 2004 NITU and not to revoke the May 14, 1996 NITU. This conclusion is adequately based on the fact that NSR did not intend to, and did not, consummate the abandonment of any part of the Line except the Northern Peru Segment, the parties complied with the essential requirements for establishing interim trail use of both Trail Segments and the Trail Segments continue to connect to the national rail system. Since Petitioners' alleged reversionary interests could never have vested, the Board could not have effected a retroactive taking of their property interests in the Trail Segment right-of-way (if any). To the extent Petitioners have been deprived of any compensable interest in the right-of-way, their remedy is to bring a claim against

other things, all of the issues raised in connection with the continuing validity of the NITU and interim trail use of the Southern Trail Segment were not raised until the April 19, 2004 filing.

It is far too late for the Petitioners to petition for reconsideration of the Board's decision and NITU of March 14, 1996. Any issue with respect to that decision and NITU must be raised by petition to reopen. Petitioners have not shown any material error, new evidence or substantially changed circumstances to support a petition to reopen either of the decisions and to revoke the exemptions and NITUs in this proceeding.

Petitioners Lack Standing to Challenge the NITU With Respect to the Southern Segment

Petitioners have not shown that they have any actual or potential interest with respect to the Southern Segment of the Line that would support their standing to petition for revocation of the NITU with respect to the Southern Segment nor have they shown that they might benefit from any relief that the Board could order with respect to the issuance of the NITU pertaining to that segment. The petitions should be dismissed with respect to the Southern Segment due to the Petitioners' lack of standing and failure

procedure affords late petitioners an opportunity to seek relief, an argument that a late-filed petition for reconsideration should be accepted as such rather than as a petition to reopen, due to insufficient notice of filings at the Board or of Board decisions, cannot be sustained. It would be even more difficult for parties represented by counsel and engaged in litigation (in this case, with ITF) concerning the same issues that are within the Board's jurisdiction to sustain such an argument in favor of allowing late-filed petitions for reconsideration due to late notice, even if the Board would grant the request, or could do so contrary to the Board's own procedures and precedents. Moreover, the Board's regulations do not require personal notice of abandonment filings or interim trail use requests to adjoining landowners or parties that claim to be reversionary fee interest holders in railroad right-of-ways, even if those parties could be

to state a claim upon which relief can be granted.

The NITU Issued by the Board on March 10, 2004 Is Within The Board's Jurisdiction and Has Not Been Issued Too Late; NSR Has Not Consummated Abandonment of the Line, Except for the Northern Peru Segment.

Because NSR has not consummated the abandonment of any portion of the Line except the Northern Peru Segment, and has always intended that the remaining portions of the Line except the Southern Peru Railroad Segment be transferred to ITF (or the City of Peru as to a 0.1-mile segment) for interim trail use and has acted in accordance with that intention, the Board has retained jurisdiction to issue a NITU applicable to the Trail Segments and the 0.1-mile segment between MP I-72.7 and MP I-72.8. See *Birt v. STB*, 90 F.3d 580, 588-90 (D.C. Cir. 1996); *Grantwood Village v. Missouri Pac. R.R. Co.*, 95 F.3d 654, 659 (8th Cir. 1996) cert. denied, 519 U.S. 1149 (1997). NSR has not wavered in its position to negotiate an interim trail use agreement in this case or taken any action that could constitute abandonment of any segment of the Line except the Northern Peru Segment. Thus, the Board still has jurisdiction over the Line and can issue a NITU with respect to all of it, except the Northern Peru Segment. See STB Docket No. AB-448 (Sub-No. 1X), *SF&L Railway, Inc. - Abandonment Exemption - In Ellis and Hill Counties, TX*, served July 30, 1996.

The Board's May 14, 1996 Decision Did Not Require NW to Abandon the Northern Segment If ITF Did Not Apply for a NITU for That Segment Within 10 Days of the Termination of IHRC's Trackage Rights or of NW's Notice to ITF of That Termination.

The Board's May 14, 1996 decision permitted, but did not require, NSR to

identified.

abandon the Northern Segment if ITF did not apply for a NITU for that segment within 10 days of NSR's notice to ITF that IHRC's trackage rights on the Northern Segment had been terminated. Not only is the language of the Board's order permissive ("may abandon"), but it is well-established that authority to abandon a line of railroad granted to a railroad by the Board through decision and order or exemption is permissive, not mandatory. STB Docket No. AB-303 (Sub-No. 13X), *Wisconsin Central Ltd. - Abandonment Exemption - In Brown County, WI*, served February 17, 2000. In order for a railroad abandonment to be completed, the railroad must take further action to exercise the abandonment authority or, stated differently, to consummate the abandonment.

Prior to the effective date of the Board's regulation requiring consummation of abandonments through a railroad providing a letter of consummation of abandonment to the Board within a certain time period, railroads could take as little or as much time as they needed or desired to consummate abandonment of a railroad line pursuant to ICC or STB authority. Consummation of the abandonment was a matter of the railroad's intent with respect to the line. STB Docket No. AB-33 (Sub-No. 86), *Union Pacific Railroad Company - Abandonment - In Morgan County, CO (Julesburg Subdivision)*, served January 30, 1997.

Neither NW nor NSR Intended To Or Did Abandon Most of the Line; the Trail Segments Are Connected to the National, or Interstate, Rail Network.

Neither NW nor NSR intended to abandon, nor did abandon, any segment of the Line, except the Northern Peru Segment between MP I-74.2 and MP I-75.5. The Northern Trail Segment and the Southern Trail Segment each remain bordering on and

connected to the national, or interstate, rail network on at least one end. Therefore, the Board retained jurisdiction to issue a NITU with respect to the remainder of the Line's right-of-way on March 10, 2004. The facts and authority in support of these conclusions are discussed in detail in the following sections and the Verified Statement of John T. Moon, II.

Under the Law and Regulations Applicable to This Case, Exercise of Railroad Line Abandonment Authority or Exemption, Or Consummation of A Railroad Line Is Determined by the Intent of the Railroad To Permanently Abandon The Line Or Part of It.

The petition for exemption in this case was filed, and the Board's May 14, 1996 decision was served, before the Board amended its regulations to provide that a railroad must consummate abandonment of a railroad line that had been authorized by Board decision or exemption by sending a letter of consummation to the Board within a specified period of time.⁷ Therefore, the determination whether NSR has consummated the abandonment of all or any portion of the Line is made by examining NW/NSR's intent with respect to abandonment of the Line. This intent is found mainly in the railroad's actions and relevant documents. STB Docket No. AB-33 (Sub-No. 86), *Union Pacific Railroad Company - Abandonment - In Morgan County, CO (Julesburg Subdivision)*, served January 30, 1997.

The Facts and Relevant Case Law Show That NSR Did Not Intend To Abandon and Did

⁷That time is one year from the service date of the Board's decision or notice (approximately 11 months from the effective date) or within 60 days of the removal of all legal or Board-imposed conditions that might impede or prevent consummation of the abandonment. Upon petition, the Board may extend the consummation period.

Not Abandon Any Part of the Line Except The Northern Peru Segment Between MP I-74.2 and MP I-75.5.

The facts of this case are similar to *Birt v. STB*, 90 F.3d 580, reh'g denied 98 F.3d 644 (D.C. Cir. 1996) and STB Docket No. AB-33 (Sub-No. 86), *Union Pacific Railroad Company - Abandonment - In Morgan County, CO (Julesburg Subdivision)*, served January 30, 1997 and several other cases that sustain the Board's authority to issue a NITU. As in those cases, the Board must find that it has continuing jurisdiction to issue the NITU in this case.

The Continuous Use of the Kokomo Segment by CERA, the Expressed Intention of CERA and NW With Respect to Keeping That Segment In Active Service At All Relevant Times and the 2002 Sale by NSR to CERA of That Segment As A Line of Railroad Shows That NW and NSR Did Not Intend To, and Did Not, Abandon or Reclassify The Track and That The Southern Trail Segment Remains Connected to An Active Line of Railroad That Is Part of the National Rail System At Its Southern End.

As explained in detail in the Verified Statement of John T. Moon, II, notwithstanding the sole and incorrect handwritten, unsigned and undated file notation in one NSR file, any plan that NSR may have had to abandon or reclassify the Kokomo Segment was changed in late 1995 when Chrysler advised the railroads of that company's plan to locate a vehicle transmission assembly plant along the Kokomo Segment. NSR's intention, and CERA's intention and agreement, to keep the Kokomo Segment in operation as an active line of railroad is expressed in the May 29, 1996 CERA memo, also sent to NSR and the May 15, 1998 letter agreement between CERA's corporate parent, RailTex, Inc., and NW. CERA and NW/NSR agreed on more than one occasion not to abandon the Kokomo Segment but to leave it in place as an active line of railroad under CERA's lease of NSR lines in the area. The parties also

agreed that CERA would purchase the Kokomo Segment from NW as part of a larger line purchase transaction by CERA.

In June 2002, NSR sold the line between MP I-51.5 near Marion, IN and I-58.5 at Kokomo, IN to CERA as a "line of railroad" to the cut point of Southern Trail Segment, as the deed plainly shows. JTM Exhibit 12. Regardless of CERA's reason for, or oversight that resulted in, CERA not including the Kokomo Segment in its Petition for Exemption to the Board to acquire and operate the Marion-Kokomo Segment and related lines, NSR transferred the Kokomo Segment to CERA as a line of railroad in accordance with the agreement and intention of the parties. Neither NSR nor CERA has ever consummated an abandonment of the Kokomo Segment. NSR never reclassified the Kokomo Segment as industrial track nor does it believe CERA has done so or would have any reason or basis to do so. The fact that the Kokomo Segment was omitted from CERA's petition cannot result in either its abandonment or reclassification without further approval or exemption by the Board.

As NSR shows in detail below, even if NSR had reclassified the Kokomo Segment as industrial track, that track would still connect the southern end of the Southern Trail Segment to the national rail system, notwithstanding Petitioners' arguments to the contrary.

The Interim Trail Use Agreement and Conveyance of the Northern Trail Segment and the Southern Trail Segment by NSR to ITF Demonstrates NSR's Intent Not to Abandon Those Segments But to Transfer Them to ITF For Interim Trail Use; NSR Did Not Contract for Salvage of Material On the Line Until After the Conveyance of the Trail Segments to ITF.

NSR's actual written agreement with the trail manager, ITF, to transfer a railroad

right-of-way to ITF for interim trail use and the conveyance of the Trail Segments of the right-of-way from the railroad to the trail manager that specifically states that the conveyance is pursuant to the National Trails System Act obviously is utterly inconsistent with an intention by NSR to abandon, rather than railbank the subject right-of-way through interim trail use by ITF. The ICC and STB have recognized in many cases that a railroad's willingness to enter into a trail use agreement shows that it does not intend to consummate abandonment of a line. *Birt v. STB*, 90 F.3d 580, reh'g denied 98 F.3d 644 (D.C. Cir. 1996); STB Docket No. AB-402 (Sub-No 3X), *Fox Valley & Western Ltd. - Abandonment Exemption - In Portage and Waupaca Counties, WI*, served March 28, 1996, *SSW Ry. Co. - Aban. In Smith and Cherokee Counties, TX*, 9 I.C.C. 2d 406, 410-411 (1992).

Petitioners argue that an ambiguous and undoubtedly non-technical reference to the main track in the right-of-way being conveyed to ITF as "now abandoned" in the parcel description in the deeds from NSR to ITF should be taken as showing that NW had consummated abandonment of the Line. Petitioners do not take into account the clearly expressed intent of the parties in the deeds themselves that the conveyance is subject to the provisions of the National Trails System Act. When the implication that this so-called admission of abandonment would be construed as negating and undermining the clearly expressed intent of the parties in the operative language of the deed is considered, the argument is refuted by its failure to consider the whole document and the resulting utter illogic of its conclusion. The intent of the parties to transfer the right-of-way for interim trail use is apparent in the deeds, at least when the

plain references to the Trails Act and this docket are taken into consideration. This argument is similar to the one rejected by the Court of Appeals in *Birt v. STB*, 90 F.3d 580, reh'g denied 98 F.3d 644 (D.C. Cir. 1996) where casual or sloppy use, or misuse, of the word "abandoned" did not negate the other, more persuasive evidence of the railroads intent with respect to the abandonment or interim trail use of the line.

Salvage of the track and material on a line of railroad approved for abandonment is a factor that has been considered in the determination of whether a railroad had demonstrated an intent to abandon the line, although it does not demonstrate a conclusive intent. Contrary to the incorrect recollections of the Petitioners,⁸ NSR did not salvage the material on this Line prior to the execution of a trail use agreement with ITF. NSR did not even execute an effective contract with the salvage contractor until after not only the execution of the interim trail use agreement and contract to convey both the Northern Trail Segment and Southern Trail Segment to ITF, but until after the date the Trail Segments were actually conveyed to ITF. The salvage contract also was executed after the scheduled date of the postponed and uncompleted conveyance of the segment between MP I-72.7 and MP I-72.8 to the City of Peru. See JTM Exhibit 10. Salvage of

⁸We certainly can understand how incorrect recollections can occur and cannot be too critical of Petitioners for those recollections in this case. Nonetheless, when better evidence of contrary facts comes to light, those contrary facts must be considered the accurate facts. Conclusions based on the incorrect recollections must give way if they are inconsistent with the actual facts. Similarly, undated and unsigned handwritten notations, apparently also based on incorrect recollections in a conversation, also must give way to better evidence of actual facts and intentions. The appropriate conclusions will be those support by the facts. The incorrect recollections can be considered mistakes that should be corrected, but certainly can not be admissions upon which legal conclusions can be based in contradiction to the overwhelming weight and

rail and track materials by the railroad on a line approved for interim trail use or abandonment is just as consistent with the railroad's intent to transfer a right-of-way for interim trail use as it is with abandonment of the railroad line, regardless when the salvage takes place in relation to the interim trail use agreement, much less the closing of the conveyance. However, when the salvage contract is signed after not only the execution of the agreement for interim trail use but after the actual conveyance of the right-of-way for interim trail use, the timing of the salvage of the track and material certainly cannot be taken as establishing the railroad's intention to abandon the right-of-way, or refuting its obvious intention to transfer that right-of-way for interim trail use.

In no way are the facts and circumstances of this case similar to *Becker v. STB*, 132 F.3d 60 (D. C. Cir. 1997). Here, NSR always agreed to trail use negotiation requests, never indicated in any way that it intended to terminate trail use negotiations or abandon any segment of the Line except the Northern Peru Segment, did not contract to salvage the Line until after it had reached a written interim trail use and sale agreement and even conveyed the Trail Segments to ITF and has kept the possibility of the conveyance of the 0.1-mile segment between MP I-72.7 and MP I-72.8 alive. See *Birt v. STB*, 90 F.3d 580, 588-90 (D.C. Cir. 1996), reh'g denied 98 F.3d 644 (D.C. Cir. 1996) and STB Docket No. AB-303 (Sub-No. 13X), *Wisconsin Central Ltd. - Abandonment Exemption - In Brown County, WI*, served February 17, 2000, which dealt with facts more closely analogous to those in this case.

NSR's Retention and Use of the Southern Peru Railroad Segment and the Location of Almost All of That Segment Shows NSR's Intention to Retain, and Its

persuasiveness of evidence to the contrary.

Actual Retention of, The Right-of-Way of That Segment As Part of An Active East-West Line of Railroad, Even if Rail Service Over the Subject North-South Rail Line Has Been Discontinued or "Abandoned."

NSR has discontinued or "abandoned" the Southern Peru Railroad Segment in the sense of relinquishing its common carrier service obligation to provide north-south service on that segment. However, NSR has retained the Southern Peru Railroad Segment for railroad purposes in the operation of its active east-west main line through Peru, IN. In fact, almost all of the right-of-way of this segment is the original right-of-way of the east-west main line which was built by the senior railroad to locate through Peru. This means that the Southern Trail Segment is only 0.1-mile from the national rail network at its northern end at Peru and could still re-connect to it at that location. It also means that NSR continues to use the right-of-way of the Southern Peru Railroad Segment for railroad purposes and has not abandoned it. Therefore, no part of the Southern Peru Railroad Segment that NSR holds by easement (if any) rather than by fee title may be considered totally abandoned or as having reverted to any potential contingent reversionary interest holders.

The Trail Segments Have Been Continuously Connected to the National, or Interstate, Rail System.

The Southern Trail Segment has been continuously connected to the active line of railroad of the CERA at MP I-58.5 at Kokomo, IN. Even if the Kokomo Segment had been reclassified as industrial track, the connection of the trail to that track, and the connection of that track to a line of railroad that is part of the national railroad system, would afford the trail a connection to the national rail system and would permit the trail

to be reconveyed to a railroad for restoration of rail service as part of the national rail system.

The Southern Trail Segment also could still be connected to the national rail system at Peru, IN because of its proximity to the Southern Peru Railroad Segment that is part of NSR's active east-west main line. Trail use, and later restoration of railroad service, over the 0.1-mile segment between the Southern Trail Segment and the Southern Peru Railroad Segment can still be accomplished, as previously noted.

The Northern Trail Segment has at all times been continuously connected to the active line of railroad of the Fulton County Railroad at Rochester, IN. That railroad in turn connects and interchanges traffic with NSR at Argos, IN.

The Southern Trail Segment Has Been and Remains Continuously Connected to the National Railroad System at Kokomo, IN.

NSR has demonstrated in detail above that the Kokomo Segment was not abandoned by NW/NSR, or even reclassified as industrial track. Therefore, the Southern Trail Segment connects with and borders on a continuously active and current line of railroad that is part of the interstate rail network at Kokomo, IN. Several documents support this conclusion. The 2002 deed from NSR conveying to CERA the "line of railroad" between MP I-51.5 and MP I-58.5 recites and confirms it. CERA's omission of the Kokomo Segment from its petition to the Board for exemption to acquire and operate the remainder of the line conveyed in the 2002 deed, which it had already been operating for many years under lease, does not negate the status of the Kokomo Segment as a line of railroad. Especially in the absence of any reference to its reclassification in the petition, its omission from that petition also cannot effect a

reclassification of the Kokomo Segment as industrial or other excepted track.

None of the National Trails System Act, the Interstate Commerce Commission Termination Act, STB, ICC or court decisions or the Board's regulations require that a right-of-way being used for interim trail use must continue to connect to the national rail system through a line of the railroad that conveyed the right-of-way to the trail sponsor, only that it remain possible for rail service over the trail right-of-way to be restored and for the restored track to be reconnected to the national rail system. No law, regulation or decision requires that rail service over the railbanked right-of way be undertaken by the railroad that conveyed the right-of-way for interim trail use, even though that railroad may initially retain that right and may need to convey it to another railroad, or party that will become a railroad, in order for that party to restore service over the right-of-way. Indeed, the precedent concerning railroads that ultimately restore service over a railbanked right-of-way is contrary to such a limitation. STB Docket No. AB-289 (Sub-No 1), *Georgia Great Southern Division, South Carolina Central Railroad Co., Inc. - Abandonment and Discontinuance Exemption - Between Albany and Dawson, In Terrell, Lee and Dougherty Counties, GA*, served May 16, 2003; *Norfolk and W. Ry. Co. - Aban. - Between St. Mary's and Minister in Auglaize County, OH*, 9 I.C.C. 2d 1015 (1993); *Iowa Power - Const. Exemption - Council Bluffs, IA*, 8 I.C.C. 2d 858, 866-67 (1990).

Even If NSR Had Reclassified the Kokomo Segment As Industrial Track, That Track Would Still Connect the Southern End of the Southern Trail Segment to the National Rail System.

Petitioners' argument that industrial lead track or other excepted track under 49

U.S.C. 10906 cannot connect a trail to the national rail network is absurd on its face. If such tracks can move freight cars to lines of railroad over which those cars can move to locations along the national rail system, the tracks connect a trail that borders the end of the excepted track right-of-way to the national rail system. Restoration of the track on the trail would connect that track to track upon which cars could be moved over the national rail system.

The possibility that excepted track could be abandoned in the future without STB approval or exemption pursuant to 49 U.S.C. 10906 is no more relevant to whether such track actually, physically and currently connects a trail that borders on that track to the national rail system than the possibility that a line of railroad bordering on a trail could be abandoned in the future (with Board authority or exemption). It would be equally possible, and accurate, to speculate that a railroad would convert the excepted track to line of railroad than to predict that the railroad would abandon the track. Until the railroad actually does abandon the track, it connects to and is part of the national, or interstate, rail system.

To assert that the status of an existing track or even a right-of-way still owned by the railroad, does not connect a trail that borders on it to the national rail system is to ignore the plain facts that currently exist. Thus, even if a railroad abandoned an excepted track or a line of railroad bordering on a trail, if the railroad owned the abandoned right-of-way in fee and retained it or conveyed it to a trail sponsor, and that right-of-way in turn bordered on the national rail system, the trail would still connect to the national rail system and rail service over it could be restored. The possible

connection to the national rail system would only end if the railroad did not own the property in fee and no longer used it for railroad purposes, or sold that right-of-way to a non-railroad third party other than a trail sponsor and both no railroad use of the property continued and the third party did not grant the trail manager an easement that would continue to connect the trail to the national rail system and permit restoration of rail service on it.

No law or regulation prevents the possibility of a railroad restoring an active railroad line on the right-of-way of an abandoned line that it continues to own, or over which for some reason it maintained an easement, and reinitiating rail service on that line. In the alternative, nothing would prevent the railroad from selling the right-of-way owned in fee to a trail sponsor or to a third party that would grant the trail sponsor a sufficient easement up to the point where that right-of-way meets the national rail system, even after the line had been abandoned.

Moreover, it is not even accurate to characterize excepted track, such as industrial track, as beyond the Board's jurisdiction. While a railroad may take certain actions with respect to such track, such as abandonment under 49 U.S.C. 10906, without prior Board approval or exemption, the track nonetheless comes within the Board's jurisdiction and is part of the national rail system if it connects with a line of railroad. See *United Transp. Union v. STB*, 183 F.3d 606, 612 (7th Cir. 1999). The Board is simply without authority to exercise that jurisdiction with respect to the track as to transactions concerning it that are otherwise regulated by the Board under Chapter 109 of Subtitle IV of Title 49 of the U.S. Code.

The Southern Trail Segment Still Could Be Connected to the National Rail System at Peru, IN.

We have shown in detail above that the Southern Trail Segment could be connected to the Southern Peru Railroad Segment that is part of the NSR's east-west main line that in turn is part of the national rail system at Peru, IN. NSR would merely need to convey the 0.1-mile segment between MP I-72.7 and MP I-72.8, which it never intended to abandon but rather to convey for trail use to the City of Peru, to the City or to ITF for trail use. Since NSR never intended to abandon this segment, and has kept an open Real Estate file for the potential conveyance, a conveyance of this segment for interim trail use remains possible.

The Northern Trail Segment Has Been and Remains Continuously Connected to the National Rail Network at Rochester, IN.

Petitioners' description of the status of the Northern Trail Segment is at best misleading. They present the impression that the Rochester-Argos Segment is the private line of Wilson Fertilizer and Grain Company by not mentioning that it is the line of the Fulton County Railroad. As is clearly shown by the Board's decision in the Fulton County, LLC acquisition and operation proceeding, the Rochester-Argos Segment is the line of a common carrier railroad, Fulton County Railroad, that borders on the Northern Trail Segment at Rochester, IN and connects with NSR at Argos, IN. The number of shippers on the line and the relationship of principals of Wilson Fertilizer and Grain to Fulton County Railroad has no bearing on the status of the line as a common carrier that is part of the national railroad system. As a common carrier, with no exemption from the provisions of Title 49, Subtitle IV of the U.S. Code being granted to it by the

Board, Fulton County Railroad has a common carrier obligation and would need to respond to a reasonable request for rail service from any potential railroad payment located adjacent to any location along the line.

As noted above, there is no requirement in the National Trails System Act, the Interstate Commerce Commission Termination Act, STB, ICC or court decisions or the Board's regulations that a right-of-way being used for interim trail use must continue to connect to the national rail system through the railroad that conveyed the right-of-way to the trail sponsor. There is also no requirement that restoration of rail service over the railbanked right-of way be undertaken by the railroad that conveyed the right-of-way for interim trail use.

ITF and NSR Have Complied With the Essential Requirements of the Trails Act to Establish Interim Trail Use and Railbanking of the Trail Segments.

The Board's function under the National Trails System Act is ministerial. This not only means that the Board has no discretion with respect to issuance of a NITU if a NITU request meets the requirements of the Trails Act and the Board's regulations. If a trail sponsor that meets the minimum criteria under the Trails Act and the Board's regulations requests a NITU for a rail line that is the subject of an abandonment proceeding but has not yet been abandoned and the railroad that has initiated the abandonment agrees, the Board must issue a NITU. If the railroad does not agree to the issuance of a NITU in a particular proceeding, the Board cannot issue one in that proceeding. *Goos v. ICC*, 911 F.2d 1283 (8th Cir. 1990)

The Board's limited role means that the Board must find that interim trail use and

railbanking has been established if the parties have agreed upon, and even instituted, interim trail use, if the railroad did not consummate abandonment of the line before entering into the agreement and the Trails Act criteria have been met. *Jost v. STB*, 194 F.3d 79, 89 (D.C. Cir. 1999); *Buffalo Township v. Jones*, 813 A.2d 659 (Pa. 2002). The Board must make this finding, and issue a late-requested NITU, whether or not the Board has issued a NITU with respect to the line on which the interim trail use has been validly established or a previously issued NITU has expired. The Board can issue the NITU when the interim trail use agreement is brought to the Board's attention as long as the Line has not been abandoned, and the trail use agreement itself is conclusive evidence that the railroad did not intend to abandon the line. *Birt v. STB*, 90 F.3d 580, reh'g denied 98 F.3d 644 (D.C. Cir. 1996); STB Docket No. AB-402 (Sub-No 3X), *Fox Valley & Western Ltd. - Abandonment Exemption - In Portage and Waupaca Counties, WI*, served March 28, 1996, *SSW Ry. Co. - Aban. In Smith and Cherokee Counties, TX*, 9 I.C.C. 2d 406, 410-411 (1992).

The Trails Act imposes no time limit on the issuance of a NITU if the Trails Act criteria are met. STB Docket No. AB-303 (Sub-No. 13X), *Wisconsin Central Ltd. - Abandonment Exemption - In Brown County, WI*, served February 17, 2000. The Board's only role is to confirm that the trail sponsor agrees to assume full responsibility for the trail and to keep the property available for the reactivation of rail service. STB Docket No. AB-289 (Sub-No 1), *Georgia Great Southern Division, South Carolina Central Railroad Co., Inc. - Abandonment and Discontinuance Exemption - Between Albany and Dawson, In Terrell, Lee and Dougherty Counties, GA*, served May 16, 2003.

The Board's Decisions and NITUs in This Docket and ITF's Interim Trail Use of the Right-of-Way Do Not Effect a Retroactive Taking of Petitioners' Interest in the Right-of-Way; To the Extent Petitioners' Contingent Reversionary Interest, Which Has Never Vested, Is Impaired by Interim Trail Use of the Line, Any Remedy To Which They May Be Entitled Must Be Sought by a Claim Against the United States in the U. S. Court of Claims.

Since NSR never consummated abandonment of any part of the Line's right-of-way except the Northern Peru Segment, any contingent interest Petitioners may hold in the right-of-way never vested in them. Therefore, the Board's decisions and NITUs, and the interim trail use of the Trail Segments, could not effect a retroactive taking of Petitioners' property, because they had no vested interest to take. It is well-established that to the extent the issuance of a NITU and resulting interim trail use of a property impairs a reversionary interest or constitutes any sort of taking of a party's contingent, reversionary interest in a right-of-way, the aggrieved party's only recourse to a remedy is to file a claim against the United States in the U. S. Court of Claims under the Tucker Act. *Preseault v. ICC*, 494 U.S. 1 (1990). All other state and federal remedies are not available to the party with the alleged or contingent reversionary interest. *Dave v. Rails-To-Trails Conservancy*, 79 F.3d 940, 942 (9th Cir. 1996); *Louisiana-Pacific Corp. v. Texas Dept. of Trans*, 43 Supp.2d 708 (E.D. Tex. 1999).

Petitioners Have Not Shown That The NITUs Should Be Revoked Based on ITF's Lack of Qualification To Be The Trail Manager.

Petitioners have not shown that the NITUs should be revoked based on ITF's lack of qualification to be the trail manager. Indeed, Petitioners' quarrel with ITF seems to have resulted from ITF's efforts to protect the trail from Petitioners' encroachments or

otherwise unauthorized actions with respect to the right-of-way. That effort appears to be the opposite of neglecting trail management responsibilities. The Board's role in authorizing a party to be an interim trail sponsor, and its evaluation of the minimal criteria that the sponsor must meet, is quite limited. Moreover, the Trails Act does not require a trail to be developed in any particular way or over any specific time period. See STB Docket No. AB-406 (Sub-No. 6X), *Central Kansas Railway, Limited Liability Company - Abandonment Exemption - In Marion and McPherson Counties, KS*, served May 8, 2001. Petitioners have not shown that ITF fails to continue to meet these minimum criteria. At this point in the existence and development of the trail on both Trail Segments, NSR believes it is more appropriate for ITF to address this issue in detail and we understand that they intend to do so.

CONCLUSION

For the foregoing reasons, NSR requests that the Board deny the Petitions for Reconsideration of the Board's decision and NITU served March 10, 2004 of William C. Friend, Steven Furnivall, and Linda Schanlaub and of Sam Hoover filed in this proceeding on March 30, 2004 and April 19, 2004, as supplemented, and deny any relief requested by Petitioners, including revocation of the NITU issued in the Board's decision and NITU served March 10, 2004 decision and previous Board decisions and NITUs, including the decision and NITU served May 14, 1996, in this proceeding.

Respectfully submitted



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Filed: May 10, 2004

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. AB-290 (Sub-No. 168X)

NORFOLK AND WESTERN RAILWAY COMPANY
- ABANDONMENT EXEMPTION -
BETWEEN KOKOMO AND ROCHESTER
IN HOWARD, MIAMI AND FULTON COUNTIES, IN

VERIFIED STATEMENT
OF
JOHN T. MOON, II
MANAGER – STRATEGIC PLANNING
NORFOLK SOUTHERN RAILWAY COMPANY

My name is John T. Moon, II. I am employed as a Manager in the Strategic Planning Department of Norfolk Southern Railway Company ("NSR", successor to Norfolk and Western Railway Company ["NW"]). I began my railroad career in 1972 as a part-time Service Attendant (while an undergraduate student) for the former Southern Railway Company ("SR", predecessor in name to NSR). After receiving an MBA in Transportation from the University of Tennessee in 1977, I joined SR's Transportation Department as a supervisory officer. After holding several such positions (e.g., Assistant Trainmaster, Trainmaster), I joined SR's Transportation Planning Department in 1985. I transferred to the Strategic Planning Department in 1993. The Strategic Planning Department plans, negotiates, coordinates and helps implement NSR transactions involving its route structure (e.g., line sales, leases, abandonments, trackage rights, interim trail use agreements). I have participated in the planning,

negotiation, co-ordination and completion of transactions pertaining to the portion of NW's former Indianapolis – Michigan City line extending between Kokomo, Indiana, and Argos, Indiana that are relevant to this proceeding, since June 1995. Thus, I have personal knowledge of the subject matter of this proceeding. I also have reviewed files of the NSR Strategic Planning, Real Estate and Law Departments concerning the transactions described in this Verified Statement.

This Verified Statement is part of NSR's Reply to the Petitions for Reconsideration, as supplemented, of William C. Friend, Steven Furnivall and Linda Schanlaub and of Sam Hoover ("Petitioners"), filed on March 30, 2004 and April 19, 2004, in this Surface Transportation Board ("STB" or "Board") docket, No. AB-290 (Sub-No. 168X). I have read Petitioners' filings and attachments.

I would like to emphasize certain facts, explained in more detail in the chronology after the itemized listed below facts immediately below. These facts that show 1) since before the effective date of the decision and NITU served May 14, 1996, NSR did not intend and has not intended to abandon, and did not abandon, any of the Subject Line between Milepost (MP) I-57.2 at Kokomo, IN and MP I-74.2 at Peru, IN ("Southern Segment") and between MP I-75.5 at Peru, IN and MP I-95.6 at Rochester, IN ("Northern Trail Segment"), 2) NSR did not reclassify the sub-segment of the Southern Segment of the line between MP I-57.2 and MP I-58.5 at Kokomo, IN (the "Kokomo Segment") as industrial lead track and it has continuously remained a line of railroad operated, and since 2002 owned, by Central Railroad Company of Indianapolis (CERA); 3) ITF's two Trail Segments remain connected to the interstate rail network at least at

one end of each segment; and 4) the facts support the jurisdiction of the STB to issue the decision and NITU served March 10, 2004 and to continue the decision and NITU served May 14, 1996. These facts are:

* The line abandonment, discontinuance, lease and sale transactions involving all or part of the NW line of railroad between MP I-51.5 near Marion, IN and MP I-108.6 at Argos, IN originated in a 1992 agreement between NW, CERA and Indiana Hi-Rail Corporation (IHRC). The parties first asked for an exemption to implement the line abandonment and discontinuance transactions from the Board's predecessor agency, the Interstate Commerce Commission ("ICC") in 1994. NW apparently originally considered reclassifying the Kokomo Segment (between MP I-57.2 and MP I-58.5) as industrial track, but that intention was changed as long ago as late 1995 when NW and CERA learned that Chrysler Corporation desired to locate a vehicle transmission assembly plant along the Kokomo Segment. This changed intention was referenced in writing, including in correspondence between NSR and CERA and between CERA and Fulton County Railroad, as early as May 1996. NSR took no action to reclassify the Kokomo Segment on the effective date of the Board's May 14, 1996 decision and NITU or at any time thereafter. The Kokomo Segment was continuously leased to CERA from 1989 until it was sold to CERA as part of the sale of the line of railroad between MP I-51.5 near Marion, IN and MP I-58.5 at Kokomo, IN in 2002 (under an option to purchase in the lease and a further, 1998 agreement). CERA had become first a RailTex company and then a RailAmerica company by the

time the line sale transaction closed. The only reference in NSR files that I discovered or believe exists concerning reclassification of the Kokomo Segment after late 1995 was in an undated, unsigned file note that was apparently based on inaccurate information mentioned in a conversation. Unfortunately, the incorrect information in that note was submitted, for what it was worth, in NSR's February 17, 2004 letter to the STB. This obscure reference to reclassification of the Kokomo Segment is not consistent with other correspondence, memos or transaction documents with respect to that segment or actions taken with respect to that segment. I personally wrote letters or drafted documents inconsistent with either the abandonment or the reclassification of the Kokomo Segment. I have found no letter or other record showing that NSR notified the Board of any reclassification of the Kokomo Segment or took any action that could constitute reclassification of that segment. From the time Chrysler began to discuss rail service to its new plant location along the Kokomo Segment, has NSR continuously intended that the Kokomo Segment remain as part of an active line of railroad, operated by CERA, and subject to CERA's common carrier obligation to serve Chrysler upon reasonable demand for rail service.

* The Kokomo Segment continues to exist as a line of railroad, has track on the right-of-way, and would be required for CERA to provide rail service to the Chrysler Corporation auto transmission assembly plant that was located along the Kokomo Segment after the discussions with the railroads in late 1995. The end point of the Kokomo Segment at MP I-58.5 is at the exact cut point and

milepost where the Indiana Trails Fund, Inc. (ITF) trail on the Southern Segment begins. The 2002 conveyance of the line or railroad between MP I-51.5 and MP I-58.5 from NSR to CERA, further described below, refers to the property conveyed as a "line of railroad" and indicates that it ends at the southerly boundary of the property conveyed to ITF in January 1999. That 1999 conveyance followed an August 31, 1998 written trail use and purchase and sale agreement between NSR and ITF.

* The northern end of the ITF trail on the Northern Trail Segment, at MP I-95.6, is at the exact cut point and milepost where the line of railroad of the former Fulton County, LLC., predecessor to Fulton County Railroad, Inc., a common carrier with STB operating authority, as well as successor to a former short-line railroad at Rochester called Fulton County Railroad, meets ITF's trail. (To clarify that this entity is a railroad, I will usually refer to it as "Fulton County Railroad" unless the context requires reference to "Fulton County, LLC.") In 1997, Fulton County Railroad, while it was Fulton County, LLC, a non-carrier, purchased from NW the NW line between MP I-95.6 at Rochester, IN and MP I-108.6 at Argos, IN and became a common carrier railroad subject to STB jurisdiction. The Rochester-Argos Segment was formerly included in the lease of lines from NW to CERA, with IHRC having local access trackage rights over the segment. Fulton County Railroad connects with NSR at Argos, IN and is an NSR "handling line." While Fulton County Railroad may have corporate connections with Wilson Fertilizer & Grain Company, or have overlapping officers or principals, it is a

common carrier subject to STB jurisdiction with a common carrier obligation. Fulton County Railroad's line is a line of railroad connected to the interstate rail network at Argos, IN, not merely a private track of Wilson Fertilizer & Grain. Whatever Fulton County Railroad's use of the southernmost segment of its line, that line is still part of a line of railroad subject to STB jurisdiction and a common carrier obligation.

* Correspondence and other documents from 1996 through 1998 show that NW and ITF negotiated for an interim trail use agreement over and right-of-way conveyance of the entire line between Kokomo, IN and Rochester, IN, although a small segment of line at Peru, IN ultimately was excluded from the final agreement and transaction. The negotiations between NW and ITF and the preparation of documents occurred continuously and without impasse from the time an Offer of Financial Assistance to acquire the line was deemed withdrawn in late 1996 to the date on which the parties reached a written interim trail use and purchase and sale agreement, on August 31, 1998. While the lack of notification to the STB has raised an issue pertaining to the agreement with respect to the Northern Segment, NW's and ITF's continuous negotiations from 1996 until the date of agreement on August 31 1998 clearly show that NW/NSR had no intention to abandon any portion of the line until it was subsequently determined intent to exclude a small segment of line between MP I-74.2 and MP I-75.5 at Peru, IN (Northern Peru Segment) from the final agreement and to abandon that segment. Thus, the STB retained jurisdiction over this

unabandoned Northern Trail Segment and properly issued the decision and NITU served March 10, 2004.

* A further segment of line between MP I-72.7 and MP I-74.2 (Southern Peru Segment) also was excluded from the interim trail use agreement and conveyance to ITF, but not because the segment was intended to be abandoned or has been abandoned. NW intended to convey the portion of the Southern Peru Segment between MP I-72.7 and MP I-72.8 to the City of Peru for trail, walkway and other public use (park) purposes and could still convey it to the City or ITF under the NITU since this small segment was never intended to be abandoned and the NITU is still in effect. NW continues to use the portion of the Southern Peru Segment between MP I-72.8 and MP I-72.9 for railroad purposes, to provide access to the main line for crew changes and other railroad work. The remainder of the Southern Peru Segment, between MP I-72.9 and I-74.2, was upon the right-of-way of the active NSR east-west main line through Peru, IN. We shall refer to the sub-segment between MP I-72.8 and MP I-74.2 at Peru, IN as the "Southern Peru Railroad Segment." The original owner or user of the right-of-way of that segment, and the senior railroad on the right-of-way, was the railroad operating the east-west main line that is still active, the Wabash Railway Company, an NW and NSR predecessor. Thus, the right-of-way upon which the Southern Peru Railroad Segment is located is still the right-of-way of an active NSR line of railroad. Only the north-south service on that line, not the east-west service, or the right-of-way itself, could be abandoned under the exemption in

this proceeding. NSR would not jeopardize or limit its operation of the east-west operation by acting otherwise. In fact, some of the track of the former north-south line remains in use for the east-west line.

* The intersection and overlapping right-of-way of NSR's active east-west main line between Lafayette, IN and Fort Wayne, IN and the Kokomo, IN-Rochester, IN line at Peru, IN previously referred to as the Southern Peru Railroad Segment (between MP I-72.9 and MP I-74.2) is depicted on JTM Exhibit 13. This exhibit is a drawing of the railroad lines at this location in Peru that was prepared in 1990 in connection with a proposed interchange agreement between NW, which leased and operated the Wabash before it was merged into NW, and IHRC.

While NSR did not convey the Southern Peru Segment between MP I-72.7 and MP I-74.2 to ITF, it also did not abandon it. It continues to retain and use the Southern Peru Railroad Segment between MP I-72.8 and MP I-74.2 as part of the active east-west main line. Except for 0.1-mile, the Southern Peru Segment is still used for railroad purposes and is part of an active railroad right-of-way that is part of the national rail system. Thus, the statement in NSR's February 17, 2004 letter to the STB describing the line segment between MP I-72.7 and MP I-75.5 as abandoned, was accurate only as to the Northern Peru Segment and to the extent that the statement may have referred to the discontinuance of north-south rail service on the Southern Peru Railroad Segment. Furthermore, NSR had always intended for the 0.1-mile of right-of-way on the Southern Peru

Segment between MP I-72.7 and MP 72.8 that did not remain in active railroad use to be conveyed for trail and public use.

* Contrary to the statement in NSR's February 17, 2004 letter to the Board, which was based on a search of only certain Law Department files and an incorrect recollection, NSR and ITF reached a written agreement for the sale of all of the line to be conveyed to ITF under the National Trails System Act. NW and ITF executed this agreement as of August 31, 1998, before the NITU negotiation period in the Board's decision served March 27, 1998 expired on September 27, 1998. A copy of this agreement was retrieved from NSR's Real Estate Department files and is attached as JTM Exhibit 10.

* The agreement between NSR and ITF was reached, and in fact the conveyance of the Trail Segments to ITF was closed, before NSR executed a contract to salvage the track and materials on the line. That salvage contract did not include the salvage of any rail or material on the Kokomo Segment between MP I-57.2 and MP I-58.5, on that portion of the Southern Peru Railroad Segment between MP I-73.5 and MP I-74.1 or on any part of the Argo-Rochester Segment north of the northern boundary of the Northern Trail Segment, because this segment was never intended to be abandoned and had become Fulton County Railroad property.

* The reference in the deed descriptions to the line segments conveyed to ITF as "a portion of the former Norfolk and Western Railway Company's right of way for its main track (now abandoned) as it ran between Indianapolis and

Michigan City, Indiana" was a short hand reference that cannot mean that NSR did abandon or intended to abandon the line segment for regulatory purposes. In fact, it makes no sense to conclude that a deed that specifically states that the donation and quitclaim of the property conveyed by the deed is "pursuant to Section 8(d) of the National Trails System Act" and the STB decisions in this docket that expresses the clear intention of the parties as to this transaction is undermined or negated by the off-hand and at best ambiguous use of the parenthetical expression "(now abandoned)" with reference to the former main track on the subject right-of-way in the parcel description. Indeed, it is more logical to suggest that if the phrase means anything other than as a general description, it refers to the abandonment of the "main track" not to the right-of-way for interim trail use and possible railroad reactivation purposes. While it would have been preferable for the real estate engineer who prepared the parcel description not to have used an expression that might be wrongly construed because it has a technical meaning in some contexts, these words do not change the overall intent, context, or the substance of the transaction shown by the explicit references to the National Trails System Act in the portion of the deeds prepared by a real estate lawyer.

* Pursuant to an option to purchase in its former lease of NW lines in the area, the intent of the CERA memo of May 29, 1996 (JTM Exhibit 2), the NW-RailTex letter agreement of May 15, 1998, and a further agreement of September, 1998, CERA acquired the NSR line between MP I-51.5 and MP I-

58.5 at Kokomo, IN, as a "line of railroad." This status is clearly stated in the deeds to CERA. The deed and pertinent parcel description is attached as JTM Exhibit 12. I do not know why CERA petitioned the Board for an exemption to acquire and operate the line only between MP I-51.8 and I-57.2. I might surmise that CERA (RailAmerica) thought it had sufficient authority with respect to the operation of the Kokomo Segment between MP I-57.2 and MP I-58.5 if it did not exercise the discontinuance authority previously granted to it by the Board through an exemption as to the entire line, including that segment or perhaps it was a mere clerical error in picking up the milepost from a former pleading. CERA did attach relevant documents, including a redacted version of the NSR-RailTex letter agreement dated May 15, 1998. For the notice of exemption as issued by the Board, see the decision in STB Finance Docket No. 34221, served July 12, 2002.

The following chronology containing additional details of documents or actions with respect to the line, and the attached Exhibits, further explains the facts and conclusions stated above. These facts show that the Board is fully justified in retaining jurisdiction over the entire Line, except the Northern Peru Segment, and in issuing the decision and NITU served March 10, 2004 and retaining the NITU served May 14, 1996.

On July 5, 1989, NW leased two lines, totaling 121.82 miles, between: (1) milepost I-41.0 at Tipton, IN and milepost I-108.60 at Argos, IN; and (2) milepost TS-152.22 at Marion, IN (near MP I-51.5 on the Tipton-Argos line) and milepost TS-206.44 at Frankfort, IN to Central Railroad Company of Indianapolis ("CERA"). The ICC

authorized this transaction in an exemption served July 25, 1989 in ICC Finance Docket No. 31470. On October 16, 1989, NW consented to CERA's plan to grant IHRC local-access trackage rights between MP I-74.2 at Peru, IN and MP I-108.6 at Argos, IN. The ICC authorized these rights by an exemption granted in ICC Finance Docket No. 31541, served November 17, 1989.

In ICC Finance Docket No. 31896, served July 25, 1991, Federal Register date July 26, 1991, the ICC exempted the acquisition of The Central Railroad Company of Indianapolis and The Central Railroad Company of Indiana by Central Properties, Inc., a non-carrier holding company.

On August 28, 1992, NW, CERA and IHRC agreed to restructure the leases for and operation of the NW lines included in the 1989 transaction and ultimately to abandon the line between Kokomo, IN and Rochester, IN. In the first filing that resulted from this transaction, IHRC filed for an exemption to lease and operate NW's line between MP I-95.6 at Rochester, IN and MP I-108.6 at Argos, IN, where that line connects with another active NSR line. The ICC authorized this transaction through an exemption in ICC Finance Docket No. 32162, served March 31, 1993.

Also in line with the 1992 agreement, NW, CERA and IHRC (under the name of Sagamore National Corporation dba Wabash & Erie Railroad) made a combined filing for exemption with the ICC on August 29, 1994 for authority to execute the other transactions contemplated in the 1992 agreement. CERA sought to discontinue the portion of its lease of the NW lines between MP I-57.2 near Kokomo, IN and MP I-108.6 near Argos, IN (retaining the Tipton, IN-Kokomo, IN segment). Sagamore (IHRC)

sought to discontinue its trackage rights over the portion of the NW line leased by CERA between MP I-74.2 at Peru, IN and MP I-95.6. As noted above, IHRC had already received an exemption to lease the NW line between MP I-95.6 at Rochester, IN and MP I-108.6 at Argos, IN. NW sought an exemption in order to abandon the Line between MP I-57.2 near Kokomo, IN and MP I-95.6 near Rochester, IN. In a decision in ICC Docket Nos. AB-289 (Sub-No. 1), AB-290 (Sub-No. 149X) and AB-336 (Sub-No. 3X), served November 22, 1994, the ICC rejected the combined filing because the parties tendered only one filing fee. Shortly before and after this decision, Sagamore and IHRC filed bankruptcy petitions on November 15, 1994 and December 9, 1994, as further explained below.

On March 21, 1995, NW and CERA submitted a joint petition to the ICC in Docket Nos. AB-289 (Sub-No. 3X) and AB-290 (Sub-No. 168X). This petition essentially re-filed the NW and CERA petitions for exemption for abandonment and discontinuance for the lines included in the 1994 filings. The case had become complicated by the development that continued to complicate the matter thereafter. Soon after the ICC's decision served November 22, 1994, IHRC and its parent corporation, Sagamore National Corporation, filed bankruptcy petitions in *In Re: Sagamore National Corporation and Indiana Hi Rail Corporation*, Case No. IP94-08502-RLB-11, filed November 15, 1994 and December 9, 1994, and consolidated December 19, 1994. Thus, IHRC's rights and lease allowing its operation over the NW line segments between Peru and Rochester, IN (the Northern Segment) and between Rochester and Argos, IN came under the jurisdiction of the U. S. Bankruptcy Court.

This development not only removed the STB's complete control of the overall transaction in the proceedings, but delayed NSR and CERA from taking the actions for which the Board granted them exemptions. Further delay in concluding the matter, and the interim trail use agreement and conveyance, was later caused by the processing of an Offer of Financial Assistance that was ultimately withdrawn.

Nonetheless, NW proceeded to act in accordance with the case as filed. By letter of September 29, 1995, NW advised the ICC that NW would negotiate with ITF for interim trail use of the Line between MP I-57.2 at Kokomo, IN and MP I-95.7 at Rochester, IN (undoubtedly I-95.6 was intended as there is no other reference in any documents in the files to "I-95.7"). In other words, NW was willing to negotiate for trail use for the entire Line that was subject to the abandonment petition, including the Kokomo Segment (MP I-57.2 to MP I-58.5). See JTM Exhibit 1.

In late 1995, NW entered into an agreement with Chrysler Corporation which was constructing a new transmission assembly plant on the Kokomo Segment near MP I-58.2. NSR decided to keep rail service available to Chrysler at this location and not to abandon the Kokomo Segment upon the ICC or STB grant of the petition for exemption that would permit abandonment of the entire Line. NW, and CERA, decided not to amend CERA's discontinuance filing applicable to the entire Line, including the Kokomo Segment. However, the parties had formed the intention that rail service over the Kokomo Segment would continue to be available to Chrysler through CERA's retention of the segment under its lease of the Line between Kokomo and Marion, and ultimately, through its acquisition of the Kokomo Segment as part of a line of railroad when CERA

acquired the longer line segment from MP I-51.5 near Marion to Kokomo (MP I-58.5).

On March 13, 1996, ITF submitted an executed Offer and Agreement for Purchase of Real Estate pertaining to the entire line segment between MP I-57.2 and MP I-95.6 to NW for execution. NW declined to execute this agreement not because it intended to abandon the Line but because execution of an agreement was premature, because the Kokomo Segment was to be retained as a line of railroad and should not have been included and because NW needed to consider the disposition, if any, of the segments at Peru, especially the Southern Peru Segment.

The Board's decision and NITU served May 14, 1996 in Docket No. AB-289 (Sub-No. 3X), and Docket No. AB-290 (Sub-No. 168X), authorized NW to abandon that portion of the subject line between Milepost I-57.2 at or near Kokomo, IN and Milepost I-74.2 at Peru, IN (the Southern Segment, including the Kokomo Segment and Southern Peru Segment), to discontinue service over the segment of the line between Milepost I-74.2 at Peru, IN and Milepost I-95.6 at or near Rochester, IN (the Northern Peru Segment and Northern Segment) and to abandon the latter northern segment(s), "provided that the abandonment process as to this segment may not be completed until IHRC's [Indiana Hi-Rail Corporation's] discontinuance of its trackage rights has been authorized." (Sheet 5, paragraph 2 of May 14, 1996 decision.) CERA was permitted, but not required, to discontinue its operations over the Line. In fact, as pointed out, CERA did not discontinue service over the Kokomo Segment.

Also, in the decision and NITU served May 14, 1996, the STB accepted the requests for a negotiation condition for interim trail use/rail banking of the subject Line

that were timely filed by ITF and the Hoosier Rails to Trails Council (HRTTC), a related organization supporting ITF's request and plan for interim trail use), but issued the NITU only as to the Southern Segment (including the Kokomo Segment and Southern Peru Segment), over which IHRC did not have trackage rights. In view of the continued existence of the IHRC trackage rights over the Northern Segment (Peru-Rochester) of the Line, and the fact that IHRC and its assets were under the jurisdiction of the U. S. Bankruptcy Court, the Board required NW to inform HRTTC and ITF if and when IHRC's trackage rights over the Northern Segment were terminated. Then, ITF and NSR could negotiate for interim trail use and railbanking for that segment, as well as for the Southern Segment of the line, if they so chose. The STB stated that ITF should re-file the trail use negotiation condition request as to the Peru-Rochester segment (Northern Segment) after IHRC's trackage rights were terminated. The STB indicated that the Board would issue a NITU for the Northern Segment of the Line "if and when we are so notified" of the trackage rights discontinuance. (Sheet 6, paragraph 7 of May 14, 1996 decision.)

On sheet 4 of the May 14, 1996 decision, the Board stated: "To facilitate our action on the request for trail use, N&W must inform the trail user if and when IHRC's trackage rights are discontinued. We reserve jurisdiction to impose a trail use condition if an appropriate request is made following IHRC's discontinuance. If no trail use condition is sought within 10 days after N&W notifies the trail user of IHRC's discontinuance, then N&W *may* complete the abandonment process as to that portion of the line." The Board placed no time limit on its reservation of jurisdiction. The Board

did not require that notification or a request for a NITU must be made within 10 days after NW notified ITF of the termination of IHRC's rights and lease. The Board merely permitted NW to abandon the Northern Segment of the Line if ITF, or NW itself, no longer wished to negotiate for interim trail use of it.

NW (NSR) did notify the trail user of the discontinuance of the trackage rights, as best shown by the subsequent negotiations and interim trail use and purchase agreement between NW and ITF. NW did not intend to exercise or consummate and did not consummate the abandonment of any segment of the Subject Line except the Northern Peru Segment. Instead, NW negotiated an interim trail use agreement and right-of-way conveyance with ITF with respect to the Southern Segment (except the Kokomo Segment that was retained as an active line of railroad and the Southern Peru Segment that was to be conveyed in small part for trail and public use but mostly retained as part of an active railroad right-of-way) and the Northern Segment (except for the Northern Peru Segment) of the line.

The interim trail use and purchase and sale agreement between NW and ITF and subsequent conveyances from NSR to ITF included connections to active railroad lines that are part of the national rail system at the end points of the Southern Segment at MP I-58.5 and the Northern Segment at MP I-95.6. The Southern Trail Segment also could be reconnected to the national rail network at Peru by the reactivation of the 0.1-mile segment of Line that NSR intended to convey to the City for trail and public park use but which remains the subject of an open NSR Real Estate file. The remainder of the Southern Peru Segment remains in railroad use as the Southern Peru Railroad

Segment. But for a 0.1-mile part of that segment which is used for access, the segment is actually part of the right-of-way of an active line of railroad between Lafayette, IN and Fort Wayne main line that has overlapping east-west mileposts ("D" line).

On May 23, 1996, Wilson Fertilizer & Grain Company and Fulton County Railroad Company submitted to the Board an Offer of Financial Assistance ("OFA") for acquisition of "all or part of" the line that was the subject of STB Docket No. AB-290 (Sub-No. 168X). To permit the OFA procedure to be completed, the STB partially revoked/stayed its May 14, 1996, decision in a decision served July 3, 1996.

On May 28, 1996, NSR Director of Strategic Planning Steve Eisenach and I agreed with Central Railroads' President Chris Burger that the Kokomo Segment (between MP I-57.2 and MP I-58.5) would not be abandoned in order to retain sufficient track for CERA to serve the new Chrysler plant. Mr. Burger memorialized this agreement in a memo dated May 29, 1996 that was distributed to NSR. See JTM Exhibit 2.

On July 8, 1996, the attorney for CERA wrote to the attorney for Wilson Fertilizer & Grain and Fulton County Railroad to advise him that despite the continued inclusion in the abandonment proceeding of the Kokomo Segment ("the line segment between MP I-58.5 and I-57.2"), that segment "would not be abandoned in order to preserve the opportunity to provide rail service to a shipper located between those mileposts." See JTM Exhibit 3.

The Board served a decision setting the terms and conditions for acquisition of the line under the OFA on September 26, 1996. Wilson Fertilizer & Grain and Fulton

County Railroad did not accept the terms and conditions for acquisition of the Line under the OFA as set by the STB by the Board's October 7, 1996 deadline. Therefore, the offer was considered withdrawn.

On October 7, 1996, Mr. Richard Vonnegut, President of ITF wrote a letter to the Secretary of the Board pertaining to ITF's trail use request in this docket. He gave notice of ITF's continued interest in purchasing the entire Line that was the subject of the abandonment but did not use any formal language. See JTM Exhibit 4. The Board did not mention this letter in its next decision, which was served February 7, 1997.

On November 27, 1996, Howard R. Cohen, then attorney for ITF, wrote to Robert Cooney, the NSR attorney who had handled the STB proceedings concerning the subject Line for NW. Mr. Cohen stated that he had enclosed a copy of a letter to the STB requesting an additional 180 days for NW to negotiate with ITF "with respect to the acquisition of approximately 38.4 mile corridor from Kokomo to Rochester, IN." JTM Exhibit 5. Mr. Cohen's letter to the Board, in which he does not explicitly mention the location and mileposts of the Line as he did in his letter to Mr. Cooney, and thus did not express ITF's continuing intention with respect to the entire Line specifically, or raise a question about the scope or extent of ITF's request with the Board, is JTM Exhibit 6.

In a decision in AB-290 (Sub-No. 168X), served February 7, 1997, the STB confirmed that Wilson Fertilizer & Grain and Fulton County Railroad had not accepted the terms set by the Board in the OFA proceeding. Therefore, the STB vacated the stay of the decision and NITU that had been served May 14, 1996 which the Board had issued in a decision served July 3, 1996. The STB noted that the trail use negotiation

period for the line segment included in the May 14, 1996 decision and NITU could continue until April 5, 1997. Therefore, the Board denied ITF's NITU extension request made in Mr. Cohen's November 27, 1996 letter as premature.

In a decision served April 3, 1997 in AB-290 (Sub-No. 168X), the Board extended the trail use negotiation period to October 2, 1997.

In a decision served September 30, 1997 in AB-290 (Sub-No. 168X), the Board extended the trail use negotiation period to March 31, 1998.

On October 3, 1997, IHRC filed with the Board the U. S. Bankruptcy Court Trustee's Amended Plan of Reorganization of September 5, 1997 (the "Plan"). This Plan amended the original Plan of Reorganization dated December 12, 1996. Among the terms, the Plan provided for "IHRC's discontinuance of the IHRC operating trackage rights between mileposts I-74.2 and I-108.6, permitting NW's abandonment between I-58.5 and I-95.6 . . .".⁹ The STB decision referenced in footnote 1 confirms the filing of

⁹The action of the parties in this matter may have been influenced in some way by the following statement in the Board's decision in STB Finance Docket No. 33491, *Indiana Hi-Rail Corporation Trustee's Amended Plan of Reorganization and Disclosure Statement*, served December 12, 1997:

The one remaining transaction is the first one listed in the Plan, the transaction cited above as the subject of the Board's November 5, 1997 order rejecting the Trustee's filing. That transaction is described as:
"1) IHRC's discontinuance of the IHRC operating trackage rights, between mileposts I 74.2 and I 108.6, permitting NW's abandonment between I-58.5 and I-95.6, and IHRC's discontinuance of the lease between mileposts TS-144.2 and TS-152.22, which previously expired by its terms on May 3, 1993."

The Board's order of November 5, 1997, fully explains why the record in this case is insufficient to permit the Board to issue an advisory opinion on this transaction. Nothing in the material submitted on November 17, 1997, sheds any light on the transactions or

the Plan with the STB, so I do not attach a copy of that Plan to this statement, but can provide it for the record if necessary.

On October 8, 1997, Fulton County, LLC filed a notice of exemption in STB Finance Docket No. 33477, which provided for "FC's" acquisition and operation of the portion of the NW line between MP I-95.6 at Rochester, IN and MP I-108.6 at Argos, IN. By this time, the IHRC plan to relinquish its lease of the line in the bankruptcy proceeding had been released. (Fulton County, LLC and its successor, Fulton County Railroad, Inc. ("FCRR"), is [or was] owned by Wilson Fertilizer & Grain or its principal(s).) FCRR remains as a common carrier and an active railroad north from MP I-95.6, the cut point with the Northern Trail Segment, to MP I-108.6 where the FCRR line connects with another active NSR line. No portion of the Rochester-Argos, IN line has ever been abandoned by NW/NSR or FCRR. The intervention of a public street or other crossing between the visible end of the trail and the beginning of the FCRR track in no way would prevent the restoration of rail service over the Northern Trail Segment as no segment of the right-of-way of the Northern Trail Segment and bordering Rochester-Argos Segment is not technically subject to STB jurisdiction as an interim trail and potentially restored line of railroad or an active line of railroad.

Petitioners state that the railroad line between Rochester and Argos is owned by Wilson Fertilizer and Grain. Their failure to mention that the (apparently related) Fulton County Railroad, a railroad common carrier, operates, if not owns, the line and has a

otherwise provides any information that would enable us to render an opinion. Without a record on which to base an opinion, we are unable to issue an advisory opinion as to this transaction.

common carrier obligation to serve any customers along that line gives the misleading impression that the Rochester-Argos Segment is a private rail line. However, Fulton County, LLC, as succeeded by FCRR, requested no exemptions from or special status under Title 49, Subtitle IV, of the U. S. Code. FCRR quite clearly became a common carrier railroad that must provide service upon reasonable request to any shipper that is or may be located on the line as a result of its acquisition of the line under the Board's decision in STB Finance Docket No. 33477. Even if FCRR uses the end of the line at Rochester, IN for car storage, it still has a common carrier obligation to serve that segment and it is part of the national railroad network that could be used as a connection for the Northern Trail Segment to that network.

On November 13, 1997, the U. S. Bankruptcy Court ordered, among other things, that IHRC's discontinuance of its Peru-Rochester-Argos trackage rights and lease (over the Northern Segment and the Rochester-Argos Segment) would be effective at 11:59 PM on December 17, 1997. The court also ordered that the closing for Fulton County LLC's acquisition of the Rochester-Argos line would occur on December 18, 1997 and Fulton County LLC's commencement of operations over the line would begin at 12:01 a.m. on December 19, 1997. The Bankruptcy Court noted that its Order of November 13, 1997 that including the foregoing provisions was forwarded to the STB on November 14, 1997.

I returned to my office after handling the closing of the Fulton County Railroad and other IHRC-related transactions in Indianapolis, Indiana on December 18, 1997. On the advice of counsel, I notified ITF via telephone that IHRC's discontinuances

pertaining to the Northern Segment of the Line had been effected in accordance with the Bankruptcy Court's November 13, 1997 Order. I transmitted a copy of the Bankruptcy Court Order to ITF's then counsel via facsimile. ITF informed me that ITF also would be acting on behalf of the Hoosier Rails to Trails Council in the proposed acquisition of the entire Kokomo-Rochester Line by ITF. I told ITF at this time that the milepost limits of the proposed trail use agreement and right-of-way conveyances to ITF would need to be changed. The Southern Segment of the Line between MP I-58.5 at Kokomo and MP I-72.7 at Peru and the Northern Segment of the line between MP I-75.5 at Peru and MP I-95.6 at Rochester would be the Trail Segments included in the interim trail use agreement and conveyance. The Kokomo Segment would not be included because it was being retained as an active line of railroad for use by CERA to serve Chrysler's new plant. The Southern Peru Segment would not be included because a small segment was to be conveyed to the City of Peru for similar trail use in a park and the remainder of that segment was to be retained by NSR for railroad purposes because it was adjacent to and almost entirely located on an active railroad right-of-way (Southern Peru Railroad Segment). The Northern Peru Segment would not be included due to other plans for its disposition that were being developed. As noted, NW's/NSR's busy Detroit-St Louis/Kansas City (Lafayette-Fort Wayne, IN) mainline tracks parallel and cross the Kokomo-Rochester line in the same right-of-way as almost all of the Southern Peru Segment in Peru, IN. Moreover, NSR uses the tracks at this location, and 0.1 mile of the old right-of-way for road access, to exchange operating crews on east-west trains. NW intended that the two Trail Segments to be conveyed to

ITF definitely would remain connected to the national, or interstate, rail network at the cut points and mileposts where active railroad common carriers were (and still are) in possession of active railroad lines south of MP I-58.5 at Kokomo and north of MP I-95.6 at Rochester. Through use of the 0.1-mile intended to be conveyed to the City of Peru, the Southern Trail Segment could also be reconnected to the national rail system at Peru.

On January 23, 1998, the Bankruptcy Court gave notice of the confirmation of IHRC's Chapter 11 plan by an order entered on January 15, 1998. JTM Exhibit 7. I am not sure whether this order has significance in this docket in view of the Bankruptcy Court's November 13, 1997 Order and December 18, 1997 actions and transactions under that Order, referred to above. It is nonetheless a further indication of the termination of IHRC's rights over the Northern Segment and Rochester-Argos Segment.

In a decision served March 27, 1998 in AB-290 (Sub-No. 168X), the STB extended the trail use negotiation period to September 27, 1998. I attach a copy of this decision as JTM Exhibit 8 since it gives the history of the interim trail use negotiating periods and was the last STB decision in this docket until the STB's decision served March 10, 2004.¹⁰

On April 29, 1998, RailTex, Inc., petitioned the STB in Finance Docket 33585 for an exemption to permit it to acquire CERA through acquisition of its non-carrier parent

¹⁰The milepost limits are stated in the opening paragraph of the decision but their significance apparently was overlooked by ITF and NSR. At this time, all of the NSR in-house attorneys who regularly practiced before the STB were spending all or almost all of their time on the Conrail Control proceeding and transaction.

holding company, Central Properties, Inc. In a decision served June 26, 1998, the STB granted the exemption, effective July 16, 1998.

Due to CERA's pending sale to RailTex, CERA was unwilling to complete the line purchase transactions proposed in 1996 under which NSR would have included the Kokomo Segment in the planned purchase by CERA of the NW line between MP I-51.5 and MP I-58.5 and related lines. The Kokomo Segment still remained included in the active lines covered by NW's lease of lines to CERA, however. In order to confirm the planned transactions, on May 15, 1998, RailTex and NW executed an agreement which, among other things, confirmed the continued inclusion of the Kokomo Segment in the lines leased from NW by CERA, provided for CERA's discontinuance of the other segments of its leased line that were covered by the May 14, 1996 STB decision and provided for CERA's exercise of its option to purchase the remaining active line segments included in the lease, specifically including the Kokomo Segment. This letter agreement, authored by me, which is quite significant in showing the intention of the parties and the basis for their later actions with respect to the Kokomo Segment, contains this important paragraph on pages 1 and 2:

1) The NW-owned sub-segment between mileposts I-57.1 and I-58.5 (at/near Kokomo, Indiana) shall be included in the Lease. (Although NW has received abandonment authority pertaining to its line between mileposts I-57.2 and I-95.6, NW will not presently abandon the sub-segment between mileposts I-57.2 and I-58.5, and CERA will operate this sub-segment to provide rail service to a potential shipper.)

Because CERA submitted a redacted version of this letter to the STB in its petition for an exemption to effect the line purchase, due to the confidential information contained in some of the paragraphs in the letter, I submit only that redacted version as JTM Exhibit

9, but can submit the entire letter subject to a confidentiality arrangement if necessary. The redacted version of the letter is actually sufficient to show NW's intention to include the Kokomo Segment as part of the remaining active lines included in the lease and in the proposed later conveyance of active lines to CERA. This letter agreement again shows NW's lack of intent to abandon the Kokomo Segment.

Any agreement for the State of Indiana or a local municipality to temporarily pave over the rails at locations on the Kokomo Segment between MP I-57.2 and I-58.5 on account of Daimler-Chrysler not presently utilizing rail service for its transportation needs at the new transmission assembly plant (as discussed in the Verified Statement of Tedd G. Armstrong) would have been entered into by CERA. We have no record of NW entering into any agreement of this nature. Regardless, CERA has never filed to abandon the Kokomo Segment after acquiring it from NSR and would be required to restore it should Chrysler, or any other potential shipper on the segment, make a reasonable demand for rail service that required use of the line. Occasionally carriers will allow the paving over of crossings on dormant, but not abandoned, railroad lines or at the unused end of a stub-end railroad line in order to accommodate local governments and the general public, but these agreements are only made conditional upon the right of the railroad to immediately restore or require restoration of the track if it is required to provide rail service upon reasonable request (usually at the other party's expense because they are being accommodated by the agreement). The ICC and STB have recognized the propriety of this practice of paving over crossings on a dormant line if the line can be promptly restored at these locations. The ICC/STB has made clear

that such actions in no way constitute an abandonment of a rail line because they are done without authority or exemption from the Board. A line can only be abandoned after the railroad receives authority or an exemption to do so from the STB.

Contrary to the statement in NSR's February 17, 2004 letter, which was based on the absence of the document from one department's files and an incorrect recollection, on August 31, 1998, ITF and NSR executed a written Contract of Purchase and Sale pertaining to the anticipated interim trail use and conveyance of the two Trail Segments of line, which was retrieved from NSR Real Estate Department files. I described this above in the paragraph concerning my conversations with ITF after the closings of the transactions involving (or resulting from) the sale or other disposition of lines formerly used, leased or controlled by IHRC on December 18, 1997. The purchase and sale/interim trail use agreement between NSR and ITF is attached as JTM Exhibit 10.

Pursuant to a notice of exemption filed in STB Finance Docket No. 33648, *Norfolk Southern Railway Company--Merger Exemption--Norfolk and Western Railway Company*, served August 31, 1998, NSR merged NW into NSR, effective September 1, 1998.

The conveyance of the two Trail Segments of the Line as described in the August 31, 1998 agreement from NSR to ITF was closed on January 21, 1999. As I previously stated, the NSR Real Estate Engineer who prepared the property description portion of each involved deed incorrectly, or at least confusingly, included the phrase "now abandoned" in reference to the former main track on the right-of-way conveyed to ITF. The NSR Real Estate Counsel who prepared the body of each deed correctly referred

to the donation and quitclaim of the line as subject to the National Trails System Act and the decisions in this ICC/STB docket number. I do not attach the three deeds since they are attached to Petitioners' April 19, 2004 filing as Exhibits 1, 2 and 3. I do emphasize that each of the donation and quitclaim deeds in these exhibits states that the donation and quitclaim of the property from NSR to ITF is "pursuant to Section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d) and orders of the Interstate Commerce Commission and Surface Transportation Board pursuant thereto in the proceeding whose docket number is AB-290 (Sub-No. 168X)...." As I said above, it would make no sense and would be an unreasonable conclusion for the clear purpose of the parties in inserting this Trails Act language in the operative part of the deed to be negated or otherwise undermined by the ambiguous use of the phrase (now abandoned) in reference to the main track in the parcel description of the deed.

The only arguable gap between property retained by NW as part of the active east-west main line railroad right-of-way in the Southern Peru Railroad Segment and the northern end of the right-of-way on the Southern Trail Segment might be the 0.1-mile of right-of-way on the Southern Peru Segment between approximately MP I-72.7 and MP I-72.8.¹¹ The City of Peru desired to obtain some of the property near the track at this location for trail, walkway or other public purposes in a park. The conveyance of this small segment for trail use could still be accomplished because NSR never intended to abandon it and its Real Estate file, and the NITU, are still open. This

¹¹NSR records also show a private crossing for the benefit of Bryan Manufacturing was granted over this segment of the right-of-way. Of course, there are

segment would provide for a connection between the Southern Trail Segment and the active NSR east-west main line of railroad at Peru that has been retained by NSR (Southern Peru Railroad Segment). The transaction with the City was scheduled to close before NSR executed a contract for salvage of the material on the Line, on January 15, 1999, but for reasons not reflected in my file, NSR Real Estate records do not show that the transaction closed. They still indicated on May 7, 2004 that the file was open. In view of NSR's intention to convey this segment for trail and public (park) walkway use rather than to abandon it, and its continuation of an open file on the matter that indicates this intention had never changed, it appears to me that NSR could still convey this 0.1-mile segment to the City or even to ITF for trail use under the NITU for the Southern Segment. That conveyance would permit the ITF trail over the Southern Trail Segment to connect to the national rail network at the Peru as well as the Kokomo ends of the ITF trail.

Thus, the more thorough investigation of the files, records and maps of all involved NSR departments shows that the statement in NSR's February 17, 2004 to the Board that the abandonment of the subject line was exercised as to that segment between MP I-72.7 and MP I-72.8 is incorrect because it had been NSR's intention, which we find no evidence of having been changed, to convey that 0.1-mile segment to the City of Peru for trail, walkway and other public use. Furthermore, the remainder of the Southern Peru Segment to MP I-74.2 is the Southern Peru Railroad Segment. The only sense in which it is "abandoned" is that north-south traffic cannot flow over it. That

thousands of public and private crossings of the active rail lines in the country.

segment remains in use for railroad purposes and is almost entirely within the right-of-way of an active NSR east-west main line of railroad. That right-of-way contained the main line of the senior railroad at the location and NSR continues to occupy and hold all of it, regardless of the status of the north-south line.

I attach pertinent pages from NSR's contract for salvage and dismantling of much of the Line between NSR and its salvage contractor as JTM Exhibit 11. This contract is clearly dated January 22, 1999, the day after the Trail Segments of the Line were conveyed to ITF. The contract has specifications as revised November 6, 1998. The southerly limit of the Line subject to the work described in the specifications to this salvage contract is MP I-58.5. The contract clearly does not include the Kokomo Segment between MP I-57.2 and I-58.5. It also does not include a large portion of the Southern Peru Railroad Segment between MP I-73.5 and MP I-74.1. Thus, the removal of the rails and material from those segments of the Subject Line from which they were removed occurred after January 22, 1999. Ms. Schanlaub's Verified Statement of April 19, 2004, is clearly incorrect when it states that salvage activity on this Line was completed in 1997. It is not likely that the contractor would have agreed to pay for the acquisition of the track and material to be removed without verifying that most or all of it was still on the Line. Nonetheless, if any small segments of track were removed from any portion of the Line before January 22, 1999 without this coming to NSR's attention, the amount of track or other salvage removed had to have been small in view of the contractor's lack of objection to the salvage contract terms. Any such removal of track or material (if any) was done without NW/NSR's agreement or consent and would have

been no evidence of an intention by NW or NSR to abandon any portion of the Line before conveyance of the Trail Segments to ITF and the 0.1-mile Segment at Peru to the City of Peru.

The closing of the conveyance of the Trail Segments of the Line to ITF also included assignment of "third party" agreements that permitted certain uses of the right-of-way not incompatible with railroad operations from NW/NSR to ITF. These agreements would have included those pertaining to the properties described by Petitioners. (In addition to the milepost errors contained in the Verified Statement of Mr. Donald J. Tribbett, Mr. Tribbett did not refer to or take into account the effect of any of these "third party" agreements on the properties of the Petitioners.) If those agreements were not incompatible with railroad use of the right-of-way, they are not incompatible with interim trail use. Moreover, they would continue to be in force unless they are terminated or have expired in accordance with their terms.

In a decision served January 10, 2000 in STB Finance Docket No. 33813, the STB granted an exemption to RailAmerica, Inc. and RailTex, Inc., that authorized RailAmerica to acquire direct control of RailTex and indirect control of RailTex's 17 domestic Class III rail carriers, including CERA.

On or about June 14, 2002, CERA filed a notice of exemption, to become effective on or after June 21, 2002, for the acquisition and operation of 31.66 miles of NSR line, including the line segment between Mileposts I-51.8 near Marion, IN and I-57.2 at Kokomo, IN. In view of the deed described in the next paragraph and attached as JTM Exhibit12, as well as my earlier statements in the May 15, 1998 letter

agreement, I do not know why these mileposts rather than those stated in the deed, which included the Kokomo Segment, were used. The STB's notice of exemption with respect to this and the remainder of the transaction was served July 12, 2002 in STB Finance Docket No. 34221. I surmised above that the difference might be due either to the thought that CERA already had authority to operate the Kokomo Segment under its previously approve lease including that segment or to an error in picking up the mileposts from an earlier petition or document.

I attach as JTM Exhibit 12 my cover letter of June 21, 2002 and a copy of a quitclaim deed from NSR to CERA (RailAmerica) and the property description covering the portion of the line between Mileposts I-51.5 (near Marion) and I-58.5 at Kokomo, IN that was conveyed to CERA by NSR at that time. As noted, this conveyance was in accordance with the option to purchase in CERA's original lease of NW lines in the area and with the May 15, 1998 letter agreement and September 1998 agreement with RailTex, CERA's then parent company, as referenced above. (The other line descriptions in this deed are omitted from the exhibit since they are not included in this case.) Significantly, this property description for the conveyance of NSR property in Howard County, Indiana to CERA states that the "line of railroad" being conveyed is between Milepost 51.5 "to a point on the track centerline at the southerly boundary of that property conveyed to Indiana Trails Fund in a deed dated January 21, 1999..." Clearly this conveyance of an active line of railroad, on which track continues to exist, to CERA borders at its northern end on the exact cut point and milepost where ITF's trail over the Southern Trail Segment ends at its southern end.

In conclusion, my Verified Statement shows that at no time did NSR intend to abandon or did it actually abandon any portion of the Trail Segments of the Line that it conveyed to ITF, that the end points of those Trail Segments at MP I-58.5 and MP I-95.6 have at all times been at the cut point and milepost of the intersection of the Trail Segments with active lines of railroad connected to the interstate rail network and owned or otherwise controlled by common carriers subject to the jurisdiction of the STB, that NSR did not arrange for salvage of the Line until after it had made not only the agreement for interim trail use and purchase and sale of the Trail Segments of the Line with ITF, but had closed the conveyance of those segments to ITF, that at all times since the STB's decision and NITU served May 14, 1996 in this proceeding, NSR has acted consistently with not abandoning any portion of the Line, including the Kokomo Segment or any portion of the Southern Peru Segment, except for the Northern Peru Segment, but instead NSR has acted with the consistent purpose of conveying the remaining segments of the line to ITF for interim trail use except for 0.1-mile expected to be conveyed to the City of Peru for the same purpose and except for that part of the Southern Peru Railroad Segment that is retained for railroad purposes in connection with and mostly as part of the right-of-way of an active NSR railroad line. These purpose to convey the 0.1-mile segment at Peru for trail and public purposes and the retention of the Southern Peru Railroad Segment by NSR also still afford ITF the possibility of connecting the Southern Trail Segment with the national, or interstate, rail network at the trail's northern end at Peru as well as with its southern end at Kokomo.

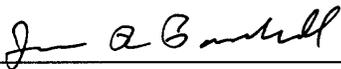
CERTIFICATE OF SERVICE

I, James R. Paschall, certify that I have this 10th day of May 2004 served, or arranged for service of, copies of the foregoing Reply of Norfolk Southern Railway Company to the petitions for reconsideration of William C. Friend, Steven Furnivall and Linda Schanlaub and of Sam Hoover in STB Docket No. AB-290 (Sub-No. 168X), Norfolk and Western Railway Company - Abandonment Exemption - Between Kokomo and Rochester In Howard, Miami and Fulton Counties, IN upon the attorneys for the Petitioners in this proceeding,

Mr. Nels Ackerson
Sommer, Barnard, Ackerson, P.C.
1666 K Street
Suite 1010
Washington, D. C. 20006

Mr. Donald J. Tribbett
Starr, Austen, Tribbett, Myers & Miller
201 South Third Street
Logansport, IN 46947

by personal service to the office of Mr. Ackerson and by Federal Express or other airborne courier service to Mr. Tribbett.



James R. Paschall

May 10, 2004



Norfolk Southern Corporation
Law Department
Three Commercial Place
Norfolk, Virginia 23510-2191

Robert J. Cooney
Senior General Attorney

JTM Exhibit 1

Writer's Direct Dial Number

(804) 629-2838

September 29, 1995

Mr. Vernon A. Williams, Secretary
Interstate Commerce Commission
12th Street and Constitution Avenue, N.W.
Washington, D. C. 20423

Re: Docket No. AB-289 (Sub-No. 3X), *Central Railroad Company of Indianapolis - Discontinuance of Service Exemption - Between Kokomo and Argos in Howard, Miami, Fulton and Marshall Counties, IN* and Docket No. AB-290 (Sub-No. 168X), *Norfolk and Western Railway Company - Abandonment Exemption - Between Kokomo and Rochester in Howard, Miami and Fulton Counties, IN*

Dear Mr. Williams:

As per Mr. Fernandez's request, this is to formally advise the Commission that Norfolk and Western Railway Company is willing to enter into negotiations with Indiana Trails Fund, Inc., for trails use of the Kokomo, Milepost 57.2, to Rochester, Milepost 95.7, segment of the line proposed for abandonment in the above-captioned proceeding.

Very truly yours,

Robert J. Cooney

RJC/sg

cc: Mr. John Fernandez
ICC Staff

Mr. Richard Vonnegut, Jr.
Indiana Trails Fund, Inc.

Mr. L. B. Mansfield
NS Real Estate

CENTRAL RAILROADS
 P.O. BOX 554, KOKOMO, INDIANA 46903
 TELEPHONE (317) 459-3198 FAX (317) 457-4107

JTM Exhibit 2

CHRIS BURGER
 PRESIDENT & CEO

MEMO TO FILE

DATE: May 29, 1996
 SUBJECT: Kokomo To Rochester Abandonment

RECEIVED
 MAY 31 1996
 BELMONT
 McFARLAND & BERMAN

On Tuesday, May 28, Steve Eisenach and I discussed the pending abandonment and retention of track to serve Chrysler.

We agreed upon abandoning the track north of Milepost 58.5. This will retain sufficient track to serve Chrysler should they in the future decide that they need rail service. I explained the need to retain this amount of track based upon Chrysler's plan to design a track which would access the plant from the north thereby requiring additional headroom.

Steve will suggest to NS's marketing people that they work with Norfolk Southern to see what traffic opportunities there may be.

On Wednesday, May 29, I conveyed the above information to Tom McFarland. He will work with NS and notify Wilson, the Fulton County Railroad and presumably the Surface Transportation Board that the actual abandonment (removal of tracks) will commence at Milepost 58.5 and extend northward. It was agreed that this would not prejudice our ability to negotiate with Chrysler for an agreement concerning ownership, maintenance, etc., of the track from highway 31 north.



cc: J. Johnson
 R. Morgan
 S. Eisenach
 T. McFarland ✓

LAW OFFICES
McFARLAND & HERMAN
20 NORTH WACKER DRIVE-SUITE 1330
CHICAGO, ILLINOIS 60606-2902
TELEPHONE (312) 236-0204
FAX (312) 201-9695

THOMAS F. MCFARLAND, JR.

STEPHEN C. HERMAN

July 8, 1996

By UPS Overnight

Richard R. Wilson, Esq.
Vuono, Lavelle & Gray
2310 Grant Building
Pittsburgh, PA 15219

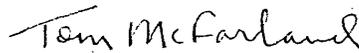
Re: Docket No. AB-289 (Sub-3X), *Central Railroad Company of Indianapolis -- Discontinuance of Service Exemption -- between Kokomo and Argos in Howard, Miami, Fulton and Marshall Counties, IN*
and
Docket No. AB-290 (Sub-No. 168X), *Norfolk and Western Railway Company -- Abandonment Exemption -- between Kokomo and Rochester in Howard, Miami and Fulton Counties, IN*

Dear Richard:

Reference is made to the STB's decision served July 3 accepting for filing Wilson Fertilizer's OFA for the rail line involved in the above matter.

This also confirms our prior telephone conversation in which I advised that the line segment between Milepost Nos. 58.5 and 57.2 (1.3 miles) near Kokomo will not be abandoned notwithstanding being encompassed within the abandonment exemption issued in the STB's decision served June 7. That exemption will not be implemented in order to preserve the opportunity to provide rail service to a shipper located between those designated milepost numbers. In view of that situation, you indicated that Wilson Fertilizer would not be likely to seek acquisition of that 1.3-mile segment. Consequently, you are urged to exclude that 1.3-mile segment in the event that you agree with N&W on a purchase or if you request the STB to fix terms and conditions for a purchase.

Very truly yours,



Thomas F. McFarland, Jr.
*Attorney for Central Railroad
Company of Indianapolis*

TMcF:kl:423

78

cc: Bob Cooney, by UPS overnight
Chris Burger, by first-class mail

Dick Wilson (412) 471-1800

JTM Exhibit 4

7 Oct 1996
7 OCTOBER 1996

VERNON WILLIAMS
SECRETARY
SURFACE TRANSPORTATION BOARD
12TH & CONSTITUTION AVE, NW
WASHINGTON, DC 20423

RE: DOCKET NO. AB-290 (SUB-NO. 168-X) NORFOLK AND
WESTERN RAILWAY COMPANY ABANDONMENT EXEMPTION
REQUEST BETWEEN KOKOMO AND ROCHESTER IN HOWARD,
MIAMI, AND FULTON COUNTIES, INDIANA

MR. SECRETARY:

As president of the Indiana Trails Fund (ITF), and vice-president of the Hoosier Rails to Trails Council, I am writing this letter to both the Surface Transportation Board and the Norfolk and Western Railway (Norfolk) to express continued interest in negotiating to preserve all or any part of the (former rail-) transportation corridor between Rochester and Kokomo in Indiana for railbanking (so that in the short run there will be a trail, and in the long run that it may possibly return as a rail-transportation corridor.

To clarify, the ITF is the 501-c-3 legal/financial Indiana not-for-profit corporation which will negotiate and hold the corridor in question. HRTC is the membership group which will build and direct public support for creating the rail-trail.

By "continued interest" I am referring to communication with both groups. HRTC communication originates from the fall of 1994 during the triple filing on this line by Norfolk and Western, Central Railroad Company of Indianapolis, and Hi-Rail. Although this filing was suspended, Norfolk offered the vacated corridor to HRTC for \$45,000, which was accepted. (To be noted is that HRTC did file for public use condition and interim trail use on the second Norfolk filing on this line.) The second filing is Docket No. AB-289 (Sub-No. 3x), and became effective on July 11th, 1996.

The ITF interest originates from its request for public use condition and interim trail use which was filed on or about August 18th 1995, and affirmed as filed timely in Docket No. AB-289 (Sub-No. 3x). ITF continues to warrant the set aside of forty five thousand dollars (\$45,000) for the purchase of the (former rail-) transportation corridor, as it has since August 31st, 1995.

ITF understands that Wilson Grain, of Rochester, has expressed an interest in purchasing the rail and rail operations, and that this higher and better use of rail facilities supersedes trail building. However, at this time it is unclear of the extent to which Wilson Grain actually will purchase the line - all or part?

ITF wishes to commence negotiations for all or part of the line now such that if Wilson Grain does not purchase, and all or part of the corridor becomes available, it will be under contract before the deadline date of December 11th 1996.

Hence, the Indiana Trails Fund offers to purchase the Norfolk interest in said corridor without rails for public use and interim trail use in the amount of \$45,000.00 spanning 38.4 miles, comprised of 17 miles from Kokomo (mile post I-57.4) to Peru (mile post I-74.2) and 21.4 miles from Peru (milepost I-74.2) to Rochester (milepost I-95.6), or such available segment(s) within, at ITF discretion in the amount prorated at \$45,000.00/38.4 miles or \$1171.875 per mile of linear corridor.

Thank-you,

Richard Vonnegut / Howard Cohen, counselor

LOCKE REYNOLDS

JTM Exhibit 5

Counsellors at Law

1000 Capital Center South
201 North Illinois Street
Indianapolis, Indiana 46204
(317) 237-3800
Telefax (317) 237-3900

THEODORE L. LOCKE
(1891-1981)
HUGH E. REYNOLDS
(1900-1968)
EMERSON BOYD
(1914-1986)

Writer's Direct Dial Number

237-3872

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LLOYD H. MILLIKEN, JR.
JAMES S. HARAMY
WILLIAM V. HUTCHENS
JAMES J. McGRATH
DAVID S. ALLEN
DAVID M. HASKETT
MICHAEL A. BERGIN
DAVID T. KASPER
STEPHEN J. DUTTON
STEVEN J. STRAWBRIDGE
THOMAS L. DAVIS
ROBERT A. FANNING
RANDALL R. RIGGS
ALAN S. BROWN
MICHAEL D. MORIARTY
GLENN T. TROYER
PAUL S. MANNWEILER
MARK J. ROBERTS
KEVIN CHARLES MURRAY
JULIA BLACKWELL GELINAS
MICHAEL T. BINDNER
MICHAEL J. SCHNEIDER

KIM F. EBERT
DAVID ELLIOTT JOSE
TERRENCE L. BROOKIE
RICHARD A. HUSER
JEFFREY B. BAILEY
PAUL G. REIS
THOMAS J. CAMPBELL
DIANE PARSONS EMSWILLER
BURTON M. HARRIS
HOWARD R. COHEN
CHARLES B. BALDWIN
A. JAMES RICHARDSON
THOMAS W. FARLOW
CRAIG A. WOOD
JEFFREY S. DIBLE
JEFFREY R. GAITHER
KARL M. KOONS III
JULIA F. CROWE
STEPHEN L. VAUGHAN
JAMES DIMOS
DEANNA A. DEAN-WEBSTER
DAVID S. KLINESTIVER
KRISTEN K. ROLLISON

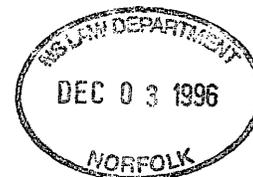
THOMAS R. SCHULTZ
TODD J. KAISER
ERICA A. RIEGNER
KEVIN C. SCHIEFLER
ARIANE S. JOHNSON
PETER H. POGUE
JOHN H. DAERR
JAMES O. WAANDERS
JOHN K. McDAVID
LISA D. TOBIN
ROBERT W. WRIGHT
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SUSAN E. CLINE
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OF COUNSEL
WILLIAM B. WEISELL
WILLIAM H. VOBACH
ROBERT C. RIDDELL
RODNEY E. CORSON

November 27, 1996

Robert Cooney
Senior General Attorney
Norfolk & Western Railway Company
3 Commercial Plaza
Norfolk, Virginia 23510



Re: Indiana Trails Fund, Inc.
Our File No. 5572/30561

Dear Bob:

Enclosed please find my letter to the Surface Transportation Board requesting an additional 180 days to negotiate with the Indiana Trails Funds, Inc. with respect to the acquisition of approximately 38.4 mile corridor from Kokomo to Rochester, Indiana. After you have reviewed my letter, I would appreciate if you would give me a call to discuss some of the technical issues involved in the request. Thank you kindly for your attention and assistance.

Very truly yours,

LOCKE REYNOLDS BOYD & WEISELL

Howard R. Cohen
Howard R. Cohen

HRC/ddp
Enclosure

cc: Richard Vonnegut
Tom Ambler

195319

LOCKE REYNOLDS**Counsellors at Law**

1000 Capital Center South
201 North Illinois Street
Indianapolis, Indiana 46204
(317) 237-3800
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(1891-1981)
HUGH E. REYNOLDS
(1900-1968)
EMERSON BOYD
(1914-1986)

Writer's Direct Dial Number

237-3872

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OF COUNSEL
WILLIAM B. WEISELL
WILLIAM H. VOBACH
ROBERT C. RIDDELL
RODNEY E. CORSON

November 27, 1996

VIA FEDERAL EXPRESS

Mr. Vernon A. Williams, Secretary
Surface Transportation Board
U.S. Department of Transportation
Case Control Branch, Room 1324
12th & Constitution Avenue, NW
Washington, DC 20423

Re: Docket No. AB-290 (Sub-No. 168X)
Norfolk & Western Railroad Company - 38.4 Mile Abandonment
Exemption Between Milepost I-57.2 at or near Kokomo and
Milepost I-95.6 at or near Rochester in Howard, Miami, and
Fulton Counties, Indiana

Dear Mr. Williams:

The Indiana Trails Fund, Inc., an Indiana not-for-profit corporation, respectfully requests a 180-day extension from the Surface Transportation Board for negotiating trail use. The Notice of Interim Trail Use (NITU) in this proceeding was served on May 14, 1996, and the exemption was effective on June 13, 1996, unless stayed or a formal expression of intent to file an OFA was filed. An OFA was filed by Wilson Fertilizer and Grain Company ("Wilson") on May 23, 1996. Wilson failed to complete the purchase of the line in accordance with the Board's order of September 26, 1996. The Indiana Trails Fund, Inc. is continuing its negotiations with the Norfolk & Western Railway Company ("Norfolk"). It is respectfully requested that such additional 180-day period be provided. The requested extension is necessary because despite best efforts, the Indiana Trails Fund, Inc. and Norfolk have been unable to proceed with negotiations due to the intervening OFA which failed to conclude due to the non-performance by Wilson. However, negotiations have recommenced, and the parties believe that the negotiations can be concluded during such additional 180-day period hereby requested. I am authorized by Norfolk to advise the Board that Norfolk agrees to the proposed 180-day extension of the negotiating period. This can be confirmed by contacting Robert Cooney, Senior General Attorney,

Mr. Vernon A. Williams, Secretary
November 27, 1996
Page 2

Norfolk & Western Railway Company, 3 Commercial Plaza, Norfolk,
Virginia 23510, phone number 804-629-2838.

Ten copies of this request accompany the original. An additional
copy of this request is provided together with a self-addressed
stamped envelope, and we would appreciate it if that copy could be
returned to us after it has been file marked.

Very truly yours,

LOCKE REYNOLDS BOYD & WEISELL



Howard R. Cohen
Attorney for Indiana Trails Fund,
Inc.

HRC/ddp
Enclosures

cc: Robert Cooney

195237

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
46 EAST OHIO STREET ROOM 116
INDIANAPOLIS IN 46204

In re:

SAGAMORE NATIONAL CORPORATION
SSN: NA EIN: 35-1921892
PKA INDIANA HI-RAIL CORP.
AKA SAGANAT
4301 STATE ROAD 1, NORTH
CONNERSVILLE, IN 47331

Case No.

94-08502-B-V-11

Debtor(s)

NOTICE OF CONFIRMATION UNDER CHAPTER 11

TO: ALL CREDITORS AND PARTIES IN INTEREST

YOU ARE HEREBY NOTIFIED THAT pursuant to Rule 3020 and Rule 2002(f)(7) of the Federal Rules of Bankruptcy Procedure, the order of confirmation of Chapter 11 plan was entered in the above-captioned case on 01/15/98.

Dated: 01/23/98

JOHN A. O'NEAL, CLERK
U.S. BANKRUPTCY COURT

VAN-09/SF11290 (4/95)

29068
DO

SERVICE DATE - MARCH 27, 1998

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB-290 (Sub-No. 168X)

NORFOLK AND WESTERN RAILWAY COMPANY--ABANDONMENT
EXEMPTION--BETWEEN KOKOMO AND ROCHESTER IN HOWARD,
MIAMI, AND FULTON COUNTIES, IN

Decided: March 24, 1998

On May 14, 1996, a decision and notice of interim trail use or abandonment (NITU) was served authorizing a 180-day period for the Hoosier Rails-to-Trails Council, Inc. (HRTTC), and Indiana Trails Fund, Inc. (ITF), to negotiate an interim trail use/rail banking agreement with Norfolk and Western Railway Company (N&W) for the segment of the line between milepost I-57.2 at or near Kokomo, IN, and milepost I-74.2 at Peru, IN. Because of the pendency of an offer of financial assistance to purchase the line, which was not consummated, the exemption did not become effective until October 7, 1996. On that date the initial 180-day negotiating period began, but before it expired on April 5, 1997, it was extended to October 2, 1997, by decision served April 3, 1997, and again to March 31, 1998, by decision served September 30, 1997.

On March 20, 1998, ITF filed a request to extend the negotiation period for an additional 180 days. ITF states that despite diligent attempts, the parties have been unable to conclude negotiations, and that the additional time is needed for them to do so. By letter also filed March 20, 1998, N&W states that it has not consummated the abandonment of the line and that it consents to the extension request.

Because N&W is willing to continue trail use negotiations with ITF and an extension of the negotiation period will promote the establishment of trail use and rail banking consistent with the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), the requested extension of the negotiation period under the NITU will be granted. The purpose of the Trails Act is to preserve rail corridors for possible reactivation of rail service by permitting and encouraging their interim use as recreational trails. See Policy Statement on Rails to Trails Conversions, Ex Parte No. 274 (Sub-No. 13B) (ICC served Feb. 5, 1990).

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

Docket No. AB-290 (Sub-No. 168X)

1. ITF's request to extend the negotiation period under the NITU for an additional 180 days is granted.
2. The negotiation period under the NITU is extended to September 27, 1998.
3. This decision is effective on its service date.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams
Secretary



Norfolk Southern Corporation
Strategic Planning
Three Commercial Place
Norfolk, Virginia 23510-2191
757 629-2887

John T. Moon, II
Manager
Strategic Planning Dept.

Writer's Direct Dial Number

(757) 629-2667

FAX: (757) 533-4884

May 15, 1998

Via Facsimile 210-841-7693

Mr. Greg B. Petersen
Vice President - Corporate Development
RailTex, Inc.
4040 Broadway, Suite 200
San Antonio, Texas 78209

Dear Greg:

This Letter Agreement confirms the understandings which were reached (at our meeting of April 29, 1998) between Norfolk Southern Railway Company and its subsidiaries including, but not limited to, Norfolk and Western Railway Company ("NW") (collectively, "NS") and RailTex, Inc. ("RailTex") pertaining to the planned acquisition (the "Transaction") by RailTex of the stock of Central Properties, Inc. ("CPI") which owns the Central Railroad of Indiana ("CIND") and operates the Central Railroad of Indianapolis ("CERA") over certain lines-of-railroad owned by NW and leased to CERA.

In accordance with the July 5, 1989, Lease and Option to Purchase Agreement which was supplemented on October 31, 1990, on January 3, 1992, and on August 28, 1992, between NW and CERA (the "Lease"), CERA currently leases two lines of railroad from NW, between mileposts I-41.0 (at/near Tipton, Indiana) and I-57.1 (at/near Kokomo, Indiana) and between mileposts TS-152.22 (at/near Marion, Indiana) and TS-206.44 (at/near Frankfort, Indiana). In accordance with the provisions of this Letter Agreement, NW agrees to the further assignment of the Lease to Rail-TeX as the new operator of the CERA.

Effective on the date that the Surface Transportation Board ("STB") permits the Transaction between RailTex and CPI to become effective ("Effective Date"), CERA and NW agree to further supplement the Lease as follows:

- 1) The NW-owned sub-segment between mileposts I-57.1 and I-58.5 (at/near Kokomo, Indiana) shall be included in the Lease. (Although NW has received abandonment authority pertaining to its line between mileposts I-57.2 and

Mr. Greg B. Petersen
Vice President - Corporate Development
RailTex, Inc.
May 15, 1998
Page 2

I-95.6, NW will not presently abandon the sub-segment between mileposts I-57.2 and I-58.5, and CERA will operate this sub-segment to provide rail service to a potential shipper.)

- 2) The NW-owned sub-segment between mileposts I-41.0 (at/near Tipton, Indiana) and I-51.8 (at/near Kokomo, Indiana) and the NW-owned sub-segment between mileposts TS-183.7 (at/near Kokomo, Indiana) and TS-206.44 (at/near Frankfort, Indiana) shall be excluded from the Lease. Prior to Effective Date, CERA shall have filed the appropriate documentation with, and received regulatory authority from, the STB to permit the discontinuance of CERA's lease and operation of the two sub-segments described in this Item 2 and to provide for the change in control anticipated to occur as part of the Transaction. (To the extent deemed necessary by NW, NW will file documents with the STB supporting CERA's discontinuance[s] anticipated in this Item 2.) The option to purchase provision of the Lease will not apply to the sub-segments removed from the Lease in accordance with this Item 2.
- 3) The rental contained in the Lease will be reduced on a pro-rata basis to reflect the mileage removed from the Lease in Item 2. Any lease payments owed to NW by CERA (due to a shortfall in the total cars handled in the account of NS) for calendar year 1998 will be waived by NS.

Also prior to Effective Date, the following arrangements will be in place:

- 4) NW and CERA will enter into an agreement providing for the interchange of cars on CERA-leased tracks at/near Kokomo, Indiana ("NW/CERA Interchange").
- 5) NS and CERA will enter into a "handling-line" agreement providing for CERA's movement of NS shipments moving to/from customers located on CERA.
- 6) The July 6, 1989, Interchange Agreement between NW and CERA, as amended, governing interchange between NW and CERA at Tipton and Frankfort, Indiana, will be terminated.

GP

Mr. Greg B. Petersen
Vice President - Corporate Development
RailTex, Inc.
May 15, 1998
Page 3

- 7) The July 7, 1989, Trackage Rights Agreement between NW and CERA providing CERA with access to the interchange tracks at Tipton, Indiana, will be terminated. Prior to Closing Date, CERA shall have filed the appropriate documentation with, and received regulatory authority from, the STB to permit the discontinuance of CERA's trackage rights described in this Item 7.
- 8)

Mr. Greg B. Petersen
Vice President - Corporate Development
RailTex, Inc.
May 15, 1998
Page 4

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Vice President - Corporate Development
RailTex, Inc.
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Page 5

After the Effective Date or if the transaction anticipated in
STB Docket 33388 is concluded, the following will apply:

- 9) NW, at its sole option, can relocate the NW/CERA
Interchange from Kokomo, Indiana, to Marion, Indiana,
upon giving thirty (30) days written notice to CERA. In
this event, all arrangements provided for in this Letter

Mr. Greg B. Petersen
Vice President - Corporate Development
RailTex, Inc.
May 15, 1998
Page 6

Agreement shall remain in effect except that the handling line charges for KGC shipments from Kokomo and Sunboy, Indiana, respectively, will be reversed (if applicable) and that the Interchange Agreement pertaining to the NW/CERA Interchange will be supplemented to reflect the change.

- 10) NW, at its sole option, can remove the sub-segment between mileposts TS-152.22 and TS-157.4 (including the trackage rights between mileposts TS-153.1 and TS-153.4 and NW's interest in the Marion Semi Belt) from the Lease by giving CERA thirty (30) days written notice. Within thirty (30) days of CERA's receipt of such notice, CERA will file all required documents with the STB to effect the discontinuance of this sub-segment. If the sub-segment described in this Item 10 is so removed from the Lease, NW will grant CERA trackage rights (at no charge to CERA) to reach any customer located on this sub-segment that is served by CERA as of the date of this Letter Agreement.
- 11) In the event that NW receives STB authority to abandon and salvage any of the lines included in the Lease, NW may apply any net salvage proceeds to any track changes at Marion, Indiana, which are deemed necessary by NW to improve the relocated NW/CERA Interchange. Unless agreed otherwise by NW and CERA, NW will bear the cost of any such track changes at Marion.
- 12) If, in accordance with Item 10 above, NW notifies CERA of the changes to the Lease which are anticipated to occur after Closing Date, CERA's option to purchase that is contained in the Lease will be changed to reflect a purchase price of \$1.00 provided that CERA agrees to a liquidated damages provision (10-year declining balance based on the net liquidated value of the sub-segments that continue to be included in the Lease) which will apply if Rail-Tex abandons, discontinues, sells, leases, or otherwise relinquishes control of CERA. Prior to CERA's exercise of the option to purchase as revised by this Item 12, NW and CERA will jointly determine if any of the sub-segments then still included in the Lease should be abandoned; in the event that NW receives STB authority to abandon and salvage any such sub-segments, NW will retain all net salvage proceeds.

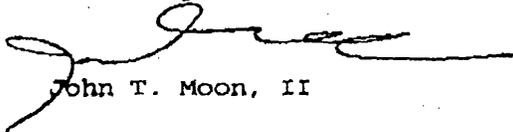
GP

Mr. Greg B. Petersen
Vice President - Corporate Development
RailTex, Inc.
May 15, 1998
Page 7

- 13) The proportional relationship of the handling line charges to be provided for in Item 5 above to the NS rates for shipments moving to or from the CERA Stations shall remain constant even if Rail-Tex abandons, discontinues, sells, leases, or otherwise relinquishes control of CERA.
- 14) In the event that the transaction envisioned in STB Docket No. 33388 is completed, Item 4 of the October 20, 1997, agreement between NS and CPI grants CERA first right of negotiation for the Marion - Red Key line-of-railroad providing that NS decides to divest the same. On the same terms, NS will also give CERA first right of negotiation if NS decides, at its sole option and subject to specific approval of on-line or affected shippers, to divest the Kokomo - Frankfort line-of-railroad or the industrial/terminal trackage adjacent to, and including, Goodman Yard at Marion, Indiana. The provisions of this Item 14 shall not apply if NW disposes of any portion of the Kokomo - Frankfort line south/west of milepost TS-205.0.

Please indicate your concurrence with the above items by executing in the space provided below, keeping the signed version for your files and transmitting a facsimile of the fully executed Letter Agreement to me at the above-listed receiver number for further handling.

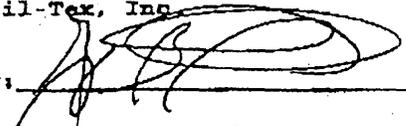
Sincerely,



John T. Moon, II

AGREED AND ACCEPTED:

Rail-Tex, Inc.

By: 

Title: VICE PRESIDENT

Date: 5/15/97

GP

JTM Exhibit 10

CONTRACT OF PURCHASE AND SALE

This Contract of Purchase and Sale (hereinafter "Agreement"), dated the 31st day of August, 1998, between NORFOLK AND WESTERN RAILWAY COMPANY, a Virginia corporation, hereinafter called "Seller"; and

INDIANA TRAILS FUND, INC., an Indiana nonprofit corporation, hereinafter called "Purchaser";

WITNESSETH:

1. Seller agrees to sell to Purchaser and Purchaser agrees to purchase from Seller, subject to the terms and conditions hereinafter set forth, the land and improvements of Seller in Howard, Miami and Fulton Counties, Indiana, consisting of approximately 34.3 miles of abandoned right of way, more or less, from Milepost I-58.5 at or near Kokomo to Milepost I-72.7 at or near Peru and from Milepost I-75.5 at or near Peru to Milepost I-95.6 at or near Rochester, being the same property as will be railbanked by Seller in STB proceeding AB-290 (Sub-No. 168X), together with (i) all servitudes, easements, appurtenances and hereditaments appertaining thereto, and (ii) all improvements, structures, landscaping, and appurtenances situated thereon (hereinafter collectively referred to as "Premises"). At closing, the Seller shall also deliver to Purchaser the original valuation maps, charts, drawings and available surveys pertaining to the Premises.

2. The purchase price for said Premises is FORTY-FIVE THOUSAND AND NO/100 DOLLARS (\$45,000.00).

3. The earnest money to bind this Agreement, receipt of which is hereby acknowledged, is FOUR THOUSAND FIVE HUNDRED AND NO/100 DOLLARS (\$4,500.00), which amount shall be credited toward the total price at closing. The earnest money may be retained by Seller if Purchaser, through no fault of Seller, shall fail to close in accordance with the terms of this Agreement. The parties acknowledge that it is impossible to estimate more precisely the damages which might be suffered by Seller upon Purchaser's default. Seller's retention of said earnest money together with all interest thereon is not intended as a penalty, but as full liquidated damages. It is expressly understood and agreed that this Agreement is predicated upon Seller's receipt of a Certificate of Abandonment or similar authorization from the Surface Transportation Board that permits Seller to discontinue rail services on the Premises, and in the event such authorization is not obtained, this Agreement will be terminated and the earnest money promptly refunded to Purchaser. Seller will promptly advise Purchaser of all developments with respect to such authorization.

4. At closing, the Seller shall convey the Premises to Purchaser by quitclaim deed, under Section 8(d) of the National Trails Acts, 16 U.S.C. § 1247(d), reserving an easement for rail and cross tie removal, subject to the following:

- (a) General real estate taxes for the year of closing and subsequent years not yet due and payable;
- (b) Applicable zoning laws and regulations; and
- (c) All easements, conditions, reservations, leases, licenses and restrictions as may appear of record or be apparent by an inspection of the Premises.

5. (a) The Purchaser shall have thirty (30) days after the date of this Agreement to examine title to the Premises and to furnish Seller with a written statement of objections affecting the marketability of said title. Seller shall have thirty (30) days after receipt of such objections to satisfy them. If Seller does not satisfy such objections within the prescribed time, then, at Purchaser's option evidenced by written notice to Seller, Purchaser may either (i) terminate this Agreement, or (ii) waive any or all objections not cured by Seller and proceed to close hereunder without diminution in price. In the event this Agreement is terminated, Purchaser shall be entitled to a refund of the earnest money, without interest, and neither party shall be liable to the other for damages on account of the termination. Marketable title as used herein shall mean title which a title insurance company licensed to do business in the State of Indiana will insure at its regular rates subject only to standard exceptions and those stated in paragraph 4 of this Agreement.

(b) Seller expressly covenants that before closing it will secure whatever releases are required to free the Premises from all mortgages. If for any reason Seller is unable to secure said releases, this Agreement shall terminate and Seller shall return the earnest money to Purchaser without interest, and neither party shall be liable to the other for damages.

6. The closing shall be held at a mutually agreed upon location and time within one hundred-twenty (120) days of the date of this Agreement. At closing:

- (a) Seller shall deliver to Purchaser the duly executed and acknowledged deed conveying the Premises to Purchaser as provided in paragraph 4 hereof and a deed or deeds of release to release the lien of any mortgage or trust that may apply to the Premises.
- (b) Purchaser shall pay to Seller the purchase price specified in paragraph 2 herein for the purchase of said Premises, said payment to be made at closing in cash or by certified or cashier's check or by wire transfer.
- (c) General real estate taxes for the then current year relating to said Premises and rents, if any, shall be prorated as of the closing date and shall be so adjusted at closing. If the closing shall occur before the tax rate is fixed for the then current year, the apportionment of taxes shall be upon the basis of the tax rate for the next preceding year applied to the latest

assessed valuations. All special taxes or assessments due subsequent to the closing date shall be paid by Purchaser.

- (d) Possession shall be delivered at closing.
- (e) Seller shall pay for the deed preparation, transfer taxes and Seller's attorney's fees.
- (f) Purchaser shall pay for all other closing costs, taxes, filing fees and Purchaser's attorney's fees.
- (g) Purchaser and Seller will execute all documents required by Indiana law, including a Sales Disclosure Form.

7. (a) Purchaser and its employees and agents shall, until the sale contemplated herein has been completed or this Agreement has been terminated or has expired by limitation, have the right and permission, after the date of this Agreement, to enter upon said Premises or on any part thereof at all reasonable times for the purpose of inspecting, examining, surveying, making soil tests, borings, percolation tests and other necessary tests for engineering and planning for development and determination of surface, sub-surface and topographic conditions; PROVIDED, HOWEVER, and notwithstanding any other provision of this Agreement, Purchaser agrees to indemnify and hold Seller (which word, for the purposes of this paragraph 7.(a), shall be deemed to include any corporation controlling, controlled by or under common control with Seller, together with the officers, employees, agents and servants of any of them) harmless from and against any claims or liability for injuries to (including death of) persons or damage to or loss of property, real or personal, or expense in any manner connected with said undertakings hereunder and at Seller's option to defend any lawsuit brought against said Seller on account of any such claims and to pay any judgment against Seller resulting from any suit, whether or not any such claim, demand or suit purports to arise from the negligence of Seller or otherwise, and Purchaser shall also indemnify and hold harmless Seller from and against loss or damage occasioned by such entry, including, without limitation, any mechanic's liens or claims that may be filed or asserted against said property of Seller by contractors, sub-contractors or materialmen performing such work for the Purchaser.

(b) If, as a result of Purchaser's inspection as provided above or any other determination or analysis of the Premises by Purchaser, Purchaser discovers any geotechnical conditions concerning the Premises which render it unsuitable for Purchaser's purposes or reveal the existence of toxic/hazardous chemicals and waste substances, or the presence of asbestos, in such quantities as to give rise to possible liability under federal, state or local environmental laws and regulations, Purchaser shall have ninety (90) days after the date of this Agreement to furnish Seller with a written statement of said geotechnical conditions affecting the suitability of the Premises for Purchaser's purposes or which give rise to possible liability under federal, state or local environmental laws and regulations. Seller shall have thirty (30) days, after receipt of such

notice, to remedy such conditions, but shall be under no obligation so to do, and if Seller fails to remedy such conditions within the prescribed time, then, at Purchaser's option evidenced by written notice to Seller, Purchaser may either (i) terminate this Agreement, or (ii) waive any or all objections not cured by Seller and proceed to close hereunder without diminution in price. In the event this Agreement is terminated, Purchaser shall be entitled to a refund of the earnest money, without interest, and neither party shall be liable to the other for damages on account of the termination.

8. Purchaser and Seller each represent that no real estate commissions are due and owing to any party with respect to this transaction. Both parties hereby agree to indemnify and save harmless the other from and against any and all claims or liability for real estate commissions arising out of this transaction attributable to the indemnifying party.

9. In the event the conveyance contemplated hereunder shall constitute a subdivision, and if as a prerequisite to the recording of such conveyance it shall become necessary to comply with applicable subdivision ordinances and regulations, Purchaser agrees that it will, with reasonable diligence, arrange and pay for the filing of any necessary plat with the appropriate authorities. Purchaser will assume the entire cost of whatever streets, sewers, and utilities are required in connection with such subdivision, and will do all other acts and file such other papers as may be necessary to obtain any and all required approvals thereof. Seller agrees to execute such documents and plats as are reasonably necessary to accomplish such subdivision. All costs, expenses and attorney's fees incurred in complying with any such subdivision ordinances and regulations, including, without limitation, dedication and installation of streets, sewers, and utilities, shall be borne solely by Purchaser and Purchaser agrees that Purchaser will indemnify and save Seller harmless from any and all claims, demands, suits, costs or expenses arising or in any way growing out of any failure by Purchaser to fully comply with such subdivision ordinances and regulations.

10. This Agreement may not be assigned by Purchaser to any other party without the written consent of Seller, which consent may be withheld for any reason, except in the case of an assignment to an entity of which Purchaser has a controlling interest or is the general partner, or a governmental unit or an assignee that a governmental unit has asked Purchaser to assign this Agreement to, subject to the requirements of the National Trails Acts, such consent shall not be unreasonably withheld. Seller expressly reserves the right to assign or delegate all or any part of Seller's rights and duties hereunder with respect to all or any portion of the Premises to one or more third parties, including a qualified intermediary as defined by Treasury Regulation Section 1.1031 (K)-1(g) (4).

11. (a) Purchaser agrees to purchase the Premises "as is" and acknowledges that Seller has not made any express or implied representation or warranty with respect to the condition or suitability of the Premises, including, but not limited to, the condition of the soil, the presence of hazardous materials, substances, wastes or other environmentally regulated substances, or other contaminants in the soil or improvements -- whether known or unknown

(referred to herein as "contamination of the Premises") and other physical characteristics. Purchaser shall perform at its own expense and rely solely upon its own independent investigation concerning the physical condition of the Premises (including, but not limited to, an environmental assessment) and compliance of the Premises with any applicable law and regulations.

(b) Seller has not and does not hereby make any express or implied representation or warranty or give any indemnification of any kind to Purchaser concerning the Premises, its condition or suitability or its compliance with any statute, ordinance or regulation, including, but not limited to, those relating to the environment. Purchaser acknowledges that neither Seller nor any of its agents or representatives have made, and Seller is not liable for, or bound in any manner by, any express or implied warranties, guarantees, promises, statements, inducements, representations or information pertaining to the Premises or any part thereof, the physical condition, size, zoning, income potential, expenses or operation thereof, the uses that can be made of the same or in any manner or thing with respect thereof, including, without limitation, any existing or prospective leasing or occupancy of all or any part thereof.

(c) Purchaser hereby agrees that, following its purchase of the Premises, Purchaser will protect, indemnify and hold harmless Seller from and against any and all damages, penalties, fines, claims, demands, causes of action, liens, suits, liabilities, costs (including, without limitation, cleanup and remedial action costs), judgments, and expenses (including, without limitation, attorney's and experts' fees and expenses) of every kind and nature suffered by, incurred by (whether voluntarily or by court or administrative order or direction) or asserted against Seller or Purchaser as a direct or indirect result of any hazardous materials, substances, wastes or other environmentally regulated substances located on, in or under the Premises and introduced after the closing.

12. If, at any time prior to the closing hereunder, any action or proceeding is filed under which the Premises, or a substantial portion thereof, may be taken pursuant to any law, ordinance or regulation or by condemnation or the right of eminent domain, then, at the option of either Seller or Purchaser, (a) this Agreement shall be terminated and the earnest money, without interest, shall be returned to Purchaser or (b) this Agreement shall remain in full force and effect and Seller, at the time of closing hereunder, shall transfer and assign to Purchaser all of Seller's right, title and interest in any proceeds received or which may be received by the taking, or a sale in lieu thereof, said option to be exercisable by either party by delivering to the other written notice of such exercise on or before the thirtieth day following the day on which the respective party receives notice that such suit has been filed.

13. Before closing, Purchaser will not place any advertising or promotional signs on said Premises or on any of Seller's other property without the written consent of Seller.

14. This Agreement embodies the entire agreement between the parties and cannot be varied except by the written agreement of the parties. No representation, promise, or inducement

not included in this Agreement shall be binding upon the parties hereto.

15. Time is of the essence of this Agreement.

16. Any notice required or permitted to be delivered hereunder shall be deemed to be delivered, whether or not actually received, when deposited in the United States Postal Service, postage prepaid, registered or certified mail, return receipt requested, addressed to Seller or Purchaser, as the case may be, at the address set forth below.

Seller:

Purchaser:

Mr. C. V. Baker, Director
Real Estate and Contract Services
Norfolk Southern Corporation
One Georgia Center, Suite 1702
600 West Peachtree Street, NW
Atlanta, GA 30308-3603

Indiana Trails Fund, Inc.
47 South Pennsylvania Street
P. O. Box 402
Indianapolis, IN 46206-0402

With copy to:

With copy to:

Kimber M. Culpepper, Esq.
Real Estate Counsel
Real Estate and Contract Services
Norfolk Southern Corporation
One Georgia Center, Suite 1702
600 West Peachtree Street, NW
Atlanta, GA 30308-3603

Howard R. Cohen, Esq.
Locke Reynolds Boyd & Weisell
1000 Capital Center South
201 North Illinois Street
Indianapolis, IN 46204

17. All the terms and conditions of this Agreement are hereby made binding on the successors and permitted assigns of both parties hereto.

18. This Agreement shall be governed by and construed in accordance with the laws of the State of Indiana.

19. This Agreement shall not be effective or binding until fully executed by the parties hereto.

20. This Agreement will survive closing.

21. If any provision of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of the provisions of this Agreement shall remain in full force and effect and shall in no way be affected, impaired or invalidated.

22. Words of any gender used in this Agreement shall be held and construed to include any other gender, and words in the singular number shall be held to include the plural, and vice versa, unless the context requires otherwise.

EXECUTED in duplicate, each part being an original, as of the day and year set forth above.

NORFOLK AND WESTERN RAILWAY COMPANY

By

DMC SC [Signature]
Real Estate Manager

INDIANA TRAILS FUND, INC.

By

[Signature]
Director

KMC:swm
1006321.cps/3-24-98
Revised 8-11-98
NSSALEK2.w61

Sales Order Number: S0147899

JTM Exhibit 11

Contract Number: TR0187

File Number: WLK-Retirements-IN-802

SALVAGE CONTRACT

THIS CONTRACT made and entered into as of January 22, 1999, by and between Norfolk Southern Corporation ("Railway") and Azcon Corporation ("Purchaser");

WITNESSETH:

For and in consideration of the mutual promises, undertakings and covenants hereinafter set forth, the parties hereto, intending to be legally bound, hereby agree as follows:

1. Sale and Removal of Salvage Materials

Purchaser agrees to purchase from Railway and Railway agrees to sell Purchaser, AS IS, WHERE IS, IN PLACE AND WITHOUT WARRANTY OF ANY KIND, EXPRESS OR IMPLIED, OF FITNESS OR MERCHANTABILITY OR OTHERWISE, all of Railway's right, title and interest in and to certain used materials (the "Salvage Materials"). This Agreement has five exhibits, Exhibits "A", "B", "C", "D" and "E", the terms of all of which are a part of this Agreement and which are incorporated into this Agreement by reference. The overall project which is the subject of this Agreement is set forth by "Exhibit A", the Specifications to the project. The nature and extent of the Salvage Materials is described in Exhibit "B". The materials which are to be kept by Railway and not sold to Purchaser are set forth in Exhibit "C". Exhibit "D" sets forth the payment schedule; and Exhibit "E" set forth the insurance requirements for the Purchaser.

2. Purchase Price and Payment

As consideration for the sale of the Salvage Materials, Purchaser shall remove the Salvage Materials as hereinafter provided and shall perform all other work and obligations specified herein. As additional consideration for the sale of the Salvage Materials, Purchaser shall pay to Railway the sum of \$510,000.00 less \$40,000.00 for the repurchase of specified track material payable by Railway to contractor for a net amount of \$470,000.00 in accordance with the payment schedule set forth on Exhibit D hereto (the "Purchase Price").

3. Title, Security Interest and Risk of Loss

Each piece of Salvage Material shall become the property of Purchaser upon the completion of the following three events:

- (I) The execution of the Contract by Railway.

Sales Order Number: S0147899
Contract Number: TR0187
File Number: WLK-Retirements-IN-802

- (ii) Final designation of Salvage Materials as described in Section 4(c) below.
- (iii) Receipt by Railway of payment set forth in Exhibit "D", provided, however, that passage of title shall not in any manner extinguish, alter, or affect any lien, possessory interest or other rights of Railway as seller in possession and the parties agree that Railway shall have a security interest in the Salvage Materials to secure performance and payment of Purchaser's remaining obligations hereunder and, provided further, however, that the title to each piece of Salvage Material not removed in accordance herewith shall revert to Railway automatically upon the completion, termination or abandonment of Purchaser's operations hereunder or upon breach of any condition or covenant hereof by Purchaser, and no part of the Purchase Price shall be refunded to Purchaser on account thereof. All risk of loss as to the Salvage Materials shall pass to Purchaser upon the execution hereof by Railway and Railway shall not be responsible for any loss of or damage to Salvage Materials thereafter. Purchaser shall pay regular tariff charges for any Salvage Materials transported over Railway's lines for Purchaser's account.

4. Location and Scope of Work

(a) The work to be performed by Purchaser will consist generally of the removal of all Salvage Materials comprising that portion of retired and abandoned Railway line consisting of approximately 30.1 track miles of 90 lb jointed rail and OTM; 4.0 track miles of 100 lb jointed rail and OTM; 2.0 track miles of 110 lb jointed rail and OTM; 0.3 track miles 112 lb jointed and welded rail and OTM; 0.1 track miles of 132 lb jointed rail and OTM in the main line; and 1.9 track miles of light rail and OTM in side tracks from Kokomo to Peru and Peru to Rochester, IN as outlined in Exhibit A. All work to be performed is more fully described and shall be subject to the specifications, drawings, terms and conditions in Exhibit "A" & "B".

(b) Promptly after the execution of this Contract by both parties and the furnishing of insurance policies or certificates as provided herein, and not later than thirty (30) days from the date of this Contract, Purchaser shall begin to dismantle and remove, at Purchaser's sole cost and expense, all of the Salvage Materials. All work shall be performed strictly in accordance with the specifications and conditions set forth in Exhibit "A" & "B".

Sales Order Number: S0147899
Contract Number: TR0187
File Number: WLK-Retirements-IN-802

IN WITNESS WHEREOF the parties hereto have made and executed this Contract as of the date first above written.

NORFOLK SOUTHERN RAILWAY COMPANY

By R. C. Stuck, Jr.

ASSISTANT VICE PRESIDENT
MATERIAL MANAGEMENT

AZCON CORPORATION

By Edward B. Donahue

(Title) Vice President - Azcon

(PRINTED NAME) Edward B. Donahue

Specifications - Revised November 6, 1998

Exhibit A

Kokomo to Peru & Peru to Rochester, Indiana

MP I-58.5 to MP I-73.5 and MP I-74.1 to MP I-95.6

The project consists of the "where-is, as-is" sale of approximately 30.1 track miles of jointed 90-lb. rail and OTM; 4.0 track miles of jointed 100-lb. rail and OTM; 2.0 track miles of jointed 110-lb. rail and OTM; 0.3 track miles of jointed and welded 112-lb. rail and OTM; and 0.1 track miles of jointed 132-lb. rail and OTM in the main line; and 1.9 track miles of light rail and OTM in side tracks. These inventory quantities are derived from accounting records and are subject to on site verification by the Contractor. Portions of the line may be missing or partially dismantled.

Project Limits

The south end of the project is the point of curvature in a 1 degree curve to the right near Kokomo (Cassville) at *MP I-58.5*. This point is roughly 0.5 miles north of County Route 450W. The excluded portion at Peru begins at the point 500 track feet southeast of the derail located southeast of the switch in the active Ft. Wayne, IN to Decatur, IL line and near mileposts D-203 on the active track and I-73.5 on the abandoned line. The excluded portion continues on the opposite side of the active line to the point one rail length south of the Elwood Road (Ninth St.) road crossing near milepost I-74.1. The track through Elwood Street is to be removed and the pavement is to be restored. The north end of the project is the point one full rail length north of the north edge of County Route 290, North Wabash Street. The Contractor will construct an earth mound capable of stopping a railroad car at both the north and south ends and the two ends at Peru.

Track Material

All material is being sold "as-is, where-is". The Contractor is to remove and retain all rail, OTM, crossties and possibly remaining bridge material within the limits of the track segment while performing certain work and returning certain material back to the Railroad as part of the repurchase agreement. There is a chance the bridges will remain in place for a recreational trail. The Contractor is responsible for removal of all stockpiled or loose crossties on the Railroad property. No type of creosoted material will be buried on Railroad property. Included in this removal, are any ties still in the roadbed without rail or OTM at the old IMC yard site in Peru. Milepost signs are to remain in place as future reference points. Ballast is to remain and be smoothed out to a level surface and no ballast is to be removed from the roadbed.



Norfolk Southern Corporation
Strategic Planning
Three Commercial Place
Norfolk, Virginia 23510-2191
757 629-2857

John T. Moon, II
Manager
Strategic Planning
(757) 629-2667
(757) 533-4884 FAX

JTM Exhibit 12

June 21, 2002

VIA COURIER

Mr. Todd Cecil
Vice President - Real Estate
RailAmerica, Inc.
4040 Broadway, Suite 200
San Antonio, TX 78209

Dear Mr. Cecil:

Enclosed, please find original of Quitclaim Deed from Norfolk Southern Railway Company to Central Railroad Company of Indianapolis pertaining to the two lines-of-railroad (Howard and Grant Counties, Indiana) between Mileposts TS-157.44 and TS-183.64 and between Mileposts I-51.5 and I-58.5 which are being conveyed effective 11:59pm today.

Under separate cover, you will receive valuation maps, original title documents and NSR's original counterparts of the various leases and agreements which are being assigned.

If you have any questions, I can be reached at the above-listed direct-dial telephone.

Sincerely,

A handwritten signature in black ink, appearing to be "John T. Moon, II".

Enclosure

cc: Ms. Sandy Franger

Operating Subsidiary: Norfolk Southern Railway Company

QUITCLAIM DEED

THIS INDENTURE WITNESSETH, that the Grantor, NORFOLK SOUTHERN RAILWAY COMPANY, a corporation organized and existing under the laws of the State of Virginia, having its principal office in Norfolk, Virginia, for and in consideration of the sum of ONE AND NO/100 DOLLARS (\$1.00) and other valuable considerations, in hand paid, and pursuant to authority given by the Board of Directors of said corporation, and to the extent that Grantor's right, title, and interest permits and subject to the following terms and conditions, QUITCLAIMS unto the CENTRAL RAILROAD COMPANY OF INDIANAPOLIS, an Indiana corporation whose tax mailing address is 497 Circle Freeway Drive, Cincinnati, Ohio 45246, its successors and assigns, Grantee, all of its interest in the following described Real Estate situated in the County of Howard and in the County of Grant, State of Indiana, to-wit:

See Exhibit A, which exhibit is attached hereto and incorporated herein by this reference.

TOGETHER with, in "As is, Where is" condition and without warranty of any kind (express or implied), including but not limited to that of merchantability, habitability, and fitness for any particular purpose, all of Grantor's right, title, and interest in and to the road bed, ballast, main track, sidings, connecting and industrial tracks, depots, yards, storage and parking areas, culverts, bridges, tunnels, buildings, structures, communication and signal facilities, fixtures and all other railway appurtenances located upon or being appurtenant to and extending from the subject property.

RESERVING unto Grantor, its successors and assigns, a permanent and exclusive easement for the installation, maintenance and utilization of fiber optic, signal and other communications lines, as well as any facilities incident thereto, over, under, across and through

the subject property.

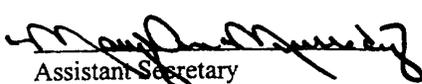
FURTHER RESERVING unto Grantor, its successors and assigns, a permanent and exclusive easement for the installation, construction, maintenance, utilization and replacement (including, but not limited to ingress and egress) of signboards over, under, across and through the subject property.

SUBJECT, however, to any conditions, restrictions, leases, reservations, licenses or easements, whether or not of record.

BY ACCEPTANCE OF THIS DEED, Grantee agrees to accept the subject property "AS IS," "WHERE IS," and without warranty (express or implied) of any kind, including, but not limited to fitness for a particular purpose, habitability and merchantability. Grantee further acknowledges that Grantor has not made any representation or warranty of any kind with respect to the condition or suitability of the property, including, but not limited to the environmental condition of the property.

IN WITNESS WHEREOF, Norfolk Southern Railway Company has caused its corporate name to be hereunto subscribed and its corporate seal to be hereunto affixed this 12th day of ^{June} ~~March~~, 2002.

ATTEST:


Assistant Secretary

NORFOLK SOUTHERN RAILWAY
COMPANY



By 
Real Estate Manager

STATE OF GEORGIA)
) SS:
COUNTY OF FULTON)

Before me, the undersigned, a Notary Public in and for said County and State, personally appeared the within named S. G. Portnell and Mary Ann Mullady, known to me to be the Real Estate Manager and Assistant Secretary, respectively, of Norfolk Southern Railway Company, a corporation, and acknowledged the execution of the foregoing deed for and in the name of and on behalf of said corporation as their free and voluntary act and deed and as the voluntary act and deed of said corporation.

WITNESS my hand and seal, this 12th day of March, 2002.

My commission expires Notary Public, Fayette County, Georgia
My Commission Expires May 21, 2002

Sharon W. Mull
Notary Public

This instrument prepared by:
B. L. Mason, Esq.
Norfolk Southern Corporation
Suite 1702, One Georgia Center
600 West Peachtree Street, NW
Atlanta, Georgia 30308-3603

Howard County, Indiana

All right, title or interest of the grantor in that line of railroad being a portion of the right of way for the main track of Norfolk Southern Railway Company, as it runs between Peru and Tipton, Indiana and being more particularly described as follows:

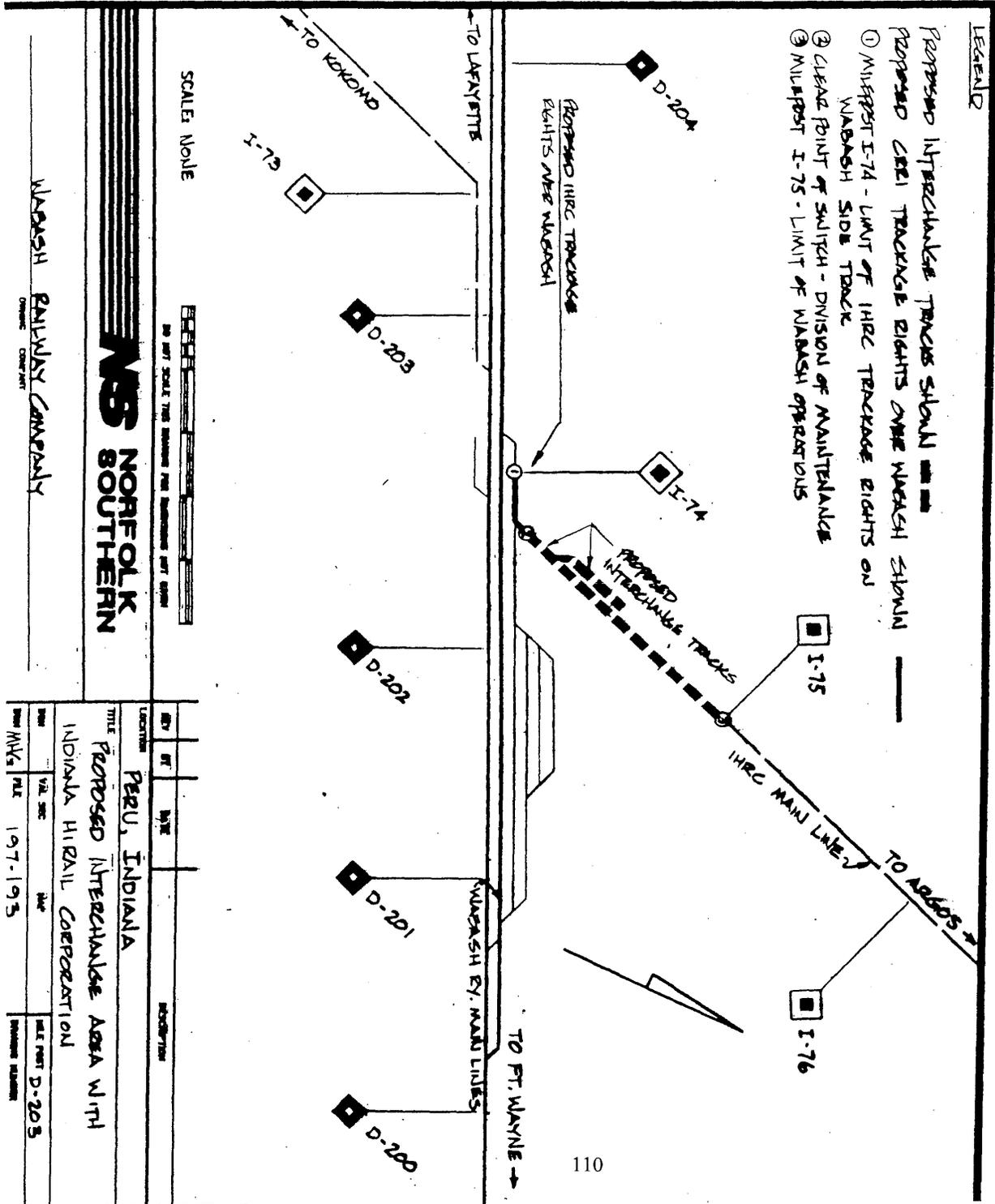
Beginning at a point on the track centerline at the southeasterly boundary of U.S. 31 Bypass, said point being located at railroad valuation station 2718+50, more or less (Milepost 51.5); thence, in a northwesterly and northwardly direction with a strip of land of varying width, through

Section 7 and the West $\frac{1}{2}$ of Section 6, Township 23-North, Range 4-East; the Northeast $\frac{1}{4}$ of Section 1, Township 23-North, Range 3-East; the East $\frac{1}{2}$ of Section 36, the East $\frac{1}{2}$ of Section 25, the East $\frac{1}{2}$ of Section 24, and the Southeast $\frac{1}{4}$ of Section 13, Township 24-North, Range 3-East; the West $\frac{1}{2}$ of Section 18, and the West $\frac{1}{2}$ of Section 7, Township 24-North, Range 4-East

a distance of 37,030 feet to a point on the track centerline at the southerly boundary of that property conveyed to Indiana Trails Fund in a deed dated January 21, 1999, located at railroad valuation station 3088+80 (Milepost 58.5).

Said portion of railroad being substantially as shown on railway valuation maps V14-Ind/23 through V14-Ind/S25-b and V15-Ind/2 through V15-Ind/ 4 inclusive, hereto attached and made a part hereof.

ED REPROGRAPHICS 306681



LEGEND

- Proposed Interchange Tracks shown
- Proposed Wabash Side Track shown
- ① Milepost I-74 - Limit of IHRC Trackage Rights on Wabash Side Track
- ② Clear Point of Switch - Division of Maintenance
- ③ Milepost I-75 - Limit of Wabash Operations

SCALE: NONE

NO NET SCALE THIS DRAWING FOR DIMENSIONS NOT GIVEN

NBS NORFOLK SOUTHERN

WABASH RAILWAY COMPANY
OWNING COMPANY

REV.	BY	DATE	DESCRIPTION
<p>LOCATION: PERU, INDIANA</p> <p>TITLE: PROPOSED INTERCHANGE AREA WITH INDIANA HIRAIL CORPORATION</p>			
DATE	VAL. SEC.	DATE	NET PART
197-1-93			D-205