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June 28, 2010

## **BY E-FILING**

Cynthia T. Brown  
Chief of the Section of Administration, Office of Proceedings  
Surface Transportation Board  
395 E Street, SW  
Washington, DC 20423-0001

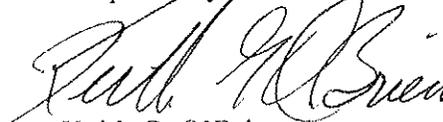
RE: *Escanaba & Lake Superior Railroad Company – Abandonment Petition for  
Exemption – Line in Ontonagon and Houghton Counties, MI,  
STB Docket No. AB-415 (Sub-No. 2X)*

Dear Ms. Brown:

In connection with the above-docketed proceeding, attached hereto is a Motion to Reject or Strike, filed on behalf of Escanaba & Lake Superior Railroad Company.

If there are any questions about this matter, please contact me directly, either by telephone: 202-663-7852 or by e-mail: kobrien@bakerandmiller.com.

Respectfully submitted,



Keith G. O'Brien

Enclosures

**BEFORE THE  
SURFACE TRANSPORTATION BOARD  
WASHINGTON, DC**

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**STB Docket No. AB-415 (Sub-No. 2X)**

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**ESCANABA & LAKE SUPERIOR RAILROAD COMPANY  
– ABANDONMENT EXEMPTION –  
LINE IN ONTONAGON AND HOUGHTON COUNTIES, MI**

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**MOTION TO REJECT OR STRIKE**

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**June 28, 2010**

**Attorneys for Escanaba & Lake  
Superior Railroad Company**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD  
WASHINGTON, DC**

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**STB Docket No. AB-415 (Sub-No. 2X)**

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**ESCANABA & LAKE SUPERIOR RAILROAD COMPANY  
– ABANDONMENT EXEMPTION –  
LINE IN ONTONAGON AND HOUGHTON COUNTIES, MI**

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**MOTION TO REJECT OR STRIKE**

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Escanaba & Lake Superior Railroad Company (“ELS”) urges the Board to reject or to strike in its entirety a document (hereinafter the “Letter”) tendered by Heartland Business Bank, f/k/a Wisconsin Business Bank (“Heartland”) and heretofore deemed by the Board to constitute a formal submission of comments in opposition to ELS’s abandonment petition for exemption (the “Petition”). As will be shown herein, Heartland’s Letter was not intended as a formal filing, does not satisfy the basic requirements of a formal filing, is exceedingly untimely (and inexcusably so) in light of the procedural schedule previously adopted by the agency, and, under the circumstances, constitutes an egregious abuse of the Board’s processes. Although the Board’s acceptance of the Letter would suborn abuse of agency processes and noncompliance with its regulations relating to filing, if the Board nevertheless accepts the Letter as a formal filing, then ELS offers herewith a substantive response, demonstrating that Heartland’s arguments – which probably are motivated by personal animus against ELS’s principal – are utterly specious, unsupported, and without merit.

**BACKGROUND**

On April 9, 2010, ELS filed with the Board the subject Petition to abandon a 42.93-mile rail line extending between Sidnaw and Ontonagon, MI (the “Line”). The Petition included a detailed

request for expedited consideration. On April 27, 2010, the STB, consistent with its policy of processing such abandonment proceedings within 110 days (shaped by the Offer of Financial Assistance – “OFA” – provisions at 49 U.S.C. 10904), issued a notice (the “Notice”), also published in the Federal Register, advising the public of the abandonment proceeding, directing that formal comments on the Petition be filed by no later than May 12, 2010, and stating that the Board intended to issue a decision on the merits by or before July 28, 2010.

As the Board’s records reflect, until recently at least, that the Board acknowledged receiving only one formal comment in this proceeding, and that was a request for a public use condition (“PUC”) and interim trail use filed on May 12<sup>th</sup> by the Michigan Department of Natural Resources (“MDNR”).<sup>1</sup>

As is relevant to Heartland’s recent attempt to involve itself in this proceeding, ELS has been for some time embroiled in collection litigation with Heartland. This litigation pertains to loans on which ELS admittedly is in default because of the sudden loss of traffic on the Line. ELS made no secret of this fact in its Petition, having explained that this circumstance was the central reason why ELS needed to abandon the subject rail line (and liquidate the associated rail assets), and why it needed to do so quickly. See Petition at 20-21.

In an effort to substantiate the railroad’s good faith efforts to liquidate unneeded and uneconomical assets to repay amounts owed to Heartland, and in the process improve the railroad’s overall financial health, ELS informed Heartland of its preparation of the Petition long before it was filed. Most importantly, ELS, through its local counsel, supplied Heartland with a link from which

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<sup>1</sup> Within the past several days, and well after the May 12 deadline for comments in this proceeding, the Board, as reflected on its website, has added to the docket letter submissions filed by Ontonagon County and Heartland.

it could download a copy of the Petition on April 9 (the very day it was filed). And on May 4, 2010, ELS supplied Heartland with an electronic copy of the Board's Notice.<sup>2</sup>

Shortly after June 9, 2010, well after the record in this proceeding had closed, ELS received Heartland's Letter. ELS inferred from the absence of a certificate of service, the failure to evidence service on all parties (notably, MDNR), the exceedingly late date of Heartland's submission, and the absence of any explanation for Heartland's appearance in this proceeding at this juncture that Heartland intended its Letter to be treated as correspondence. Because correspondence offered by a party represented by legal counsel and intended to address the merits of a proceeding with a long-closed record is itself an affront to the orderly processing of Board matters, ELS had intended to respond to the Letter in kind by way of a letter of its own, not a formal filing.

On June 18, in connection with the preparation of a letter response to Heartland's Letter, ELS's Washington counsel contacted staff in the Board's Office of Proceedings for the simple purpose of confirming that the Board had in fact received the Letter. Recognizing that documents sent to the Board via USPS (the manner in which Heartland sent the Letter to ELS) can take many extra days to actually arrive at the agency, ELS did not wish to reply by letter to Heartland's submission without first confirming that the Board had indeed received the document. As of the morning of June 18, the Letter was not posted on the Board's website, suggesting to counsel that either the Board *had* received the Letter but (as ELS would have thought appropriate) had deemed the submission to be correspondence (correspondence to the Board is typically not posted on the Board's website), or that the Board had not yet received the Letter at all. Upon contacting the

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<sup>2</sup> On those respective dates, ELS supplied copies of the Petition and Notice to Randolph ("Randy") Osstyn, the undersigned counsel on Heartland's Letter. Evidence of ELS's actions updating Heartland regarding the railroad's activity before the STB are attached hereto as Exhibit A. As further information and as reflected in the Exhibit A documents, ELS supplied Heartland on April 9 with an Internet website to which ELS had uploaded the entire Petition, and from which Heartland and any other interest party could download its own copy of the Petition.

Office of Proceedings, ELS counsel learned that the Board had received the Letter on June 15, and was informed that the Office of Proceedings had not yet processed the submission.

To ELS's astonishment, Heartland's Letter was posted to the Board's website on June 18 (moments after ELS's contact with the Office of Proceedings), reflecting a filing date of June 15. ELS understands that the Board took the added step of listing Heartland as an official "party of record" in this proceeding either later in the day on the 18<sup>th</sup> or on June 21<sup>st</sup>.

### **ARGUMENT**

ELS urges the Board to recognize that it erred in allowing the Letter to be accepted as a formal filing in this proceeding, and, accordingly, to expunge the Letter from the record. Moreover, the Board should not sanction Heartland's attempt to influence these proceedings, and to disrupt without excuse or explanation the orderly processing of this abandonment request, particularly under the circumstances here.

#### **1. The Letter is not a formal filing and should be rejected.**

To begin with, the Letter reflects the intent of Heartland's counsel that the document be received as correspondence, and not as a formal filing. Heartland itself describes its submission as "a letter," and makes no mention of the Board's April 27 request for comments (due by May 12), although it was well aware of the Notice and the May 12 deadline. See Letter at 2. This is telling evidence of Heartland's view of the communication. Moreover, the Letter lacks any of the trappings of a formal filing, and therefore is procedurally defective on its face. A filing must adhere to the Board's regulations to be accepted, but those rules were not followed in the case of the Letter. As relevant here, to be accepted as a formal filing, the original submission (if not filed electronically) must be accompanied by ten copies, it must be filed within the time limits prescribed by the Board, and it must have sufficient evidence of contemporaneous service on all other parties

of record (usually accomplished by a certificate of service appended to the filing). See 49 CFR 1104.3, 1104.6, and 1104.12.

While ELS does not know if Heartland supplied 10 copies of the Letter (ELS doubts that it did, or that it bypassed the requirement by making an electronic filing), the Letter clearly lacks a certificate of service or any other evidence of contemporaneous service upon MDNR. Moreover, the Letter was deemed “filed” by the Board more than a month after the official close of the record on May 12, and therefore is not timely pursuant to either the Board’s procedural schedule or 49 CFR 1104.6.

The above-discussed procedural defects should be grounds enough for rejection of the Letter. But, while an interested party – even one represented by counsel – truly intending to submit formal comments might be excused under certain circumstances for its ignorance of STB formal filing procedures, there is no excuse here whatsoever for Heartland’s attempt to influence the processing of this case by offering a letter potentially bearing on the merits of the Petition over one month after formal comments were due to be filed. In this regard, *whether intended as a formal filing or as correspondence*, Heartland has acted in bad faith by addressing the merits of the proceeding at this late stage, especially where, as here, it has been aware of the Petition from the outset, and has offered no justification or explanation whatsoever for its late appearance.

**2. If intended and viewed as a filing, the Letter is not timely and must be stricken.**

As explained in the preceding background section, Heartland has long been aware of ELS’s abandonment plans. ELS advised Heartland of the Petition on the day it was filed (and on that date supplied Heartland with a link from which it could download its own copy of the entire Petition), and ELS informed Heartland of the STB’s Notice within days of the April 27 service date. ELS took such steps to substantiate its efforts to liquidate unproductive assets and thereby satisfy its debt obligations to Heartland. ELS did not anticipate that Heartland would object to the abandonment –

ELS had no reason to believe it would.<sup>3</sup> In any event, Heartland had more than adequate time and information to determine when and how to formally present its views for the record.

Heartland offers no explanation for the late date of its Letter. Indeed, if the Letter had been meant as a formal filing, customary practice would have been for Heartland to request leave to late file. Heartland, however, says nothing to explain why, despite its awareness of the May 12 comment deadline, it has waited until June 15 to share its views on the merits of the Petition.

Especially where, as here, the Board has but a limited procedural time frame to complete a proceeding, the Board should be careful to uphold the integrity of its processes and ensure the fluid processing of its docket. The Heartland Letter, if indeed it is still regarded by the Board as a formal filing, is untimely in the extreme, and constitutes an abuse of the Board's processes. For this reason, if (again) the Letter is still regarded as a formal filing or as a genuine, but defective, attempt to effect a formal filing, then it must be stricken from the record.

Either the Letter is an impermissible end-run around the Board's formal comments procedures (that is, it is eleventh-hour correspondence attempting to get before Board staff arguments and assertions on the merits of the Petition that Heartland knew it was time-barred from placing in the record), or it is offered as a formal filing (and is therefore an inexcusable attempt to flaunt the Board's processes). If the former, then the Board must reject the Letter outright. If the latter, then the Letter must be stricken in the interest of protecting the integrity of Board processes. Either way, if the Board rejects the Letter or strikes it from the record, then the Board need not read further. But if the Board opts to set new precedent by honoring the Heartland's Letter while preparing a decision on ELS's Petition, then, and only then, would ELS insist in the interest of

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<sup>3</sup> The documents attached as Exhibit A, reflect ELS's attempt to keep Heartland's counsel in the loop with respect to the STB proceeding. An examination of the communications and their evident context reflect that ELS did not contemplate or expect that Heartland would participate in this proceeding, particularly as an opponent to the abandonment.

fairness that the Board consider ELS's response to the substance of the Letter (offered immediately below).

**3. The Letter lacks substance, and provides no basis for denying the Petition (if the Letter is not rejected or stricken).**

ELS does not deny that it is in default on certain loan instruments under which Heartland is the creditor. ELS is taking prompt action to remedy the default, most obviously by seeking authority to abandon the Line and liquidate the track and track material, which, as the Petition reflects, have a value well in excess of what is currently owed to Heartland.<sup>4</sup> The Petition demonstrates clearly that abandonment of the Line is fully in accord with the public interest, will enable ELS to satisfy its debt obligations, and will permit ELS to improve its overall financial position and its overall competitiveness in the transportation industry. There is absolutely no record evidence to the contrary.

In its Letter, however, Heartland states that it intends to foreclose on the *entire* railroad and put all of ELS's assets up for auction. In so doing, Heartland states as follows: "*It is proposed* that a potential bidder would want to purchase the Railroad operation in its entirety as an ongoing entity." Letter at 2 (emphasis added). In the context of this tellingly passive voice comment, Heartland does not identify who it is, if anyone, that might seek to acquire the entirety of the ELS system as currently constituted, and it offers no evidence to support its bald assertion that the ELS system would be worth more as a going concern *with* the Line preserved.<sup>5</sup> Heartland's argument, as

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<sup>4</sup> ELS disputes the amount the Heartland claims it is owed in the Letter (\$2.5 million). Due to recent Heartland sweeps of ELS bank accounts, in which Heartland secured virtually every penny of the revenue ELS had earned from the coal stockpile movements from the closed Smurfit-Stone paper mill (Petition at 7-8), the actual amount owed is far less than the figure Heartland has quoted.

<sup>5</sup> Perhaps Heartland believes that it could benefit from serving as a broker of the rail property, cutting side deals with would-be purchasers of the ELS system. If Heartland is already contacting potential bidders, though, ELS is unaware of it.

provocative as it may be, is utterly false. It is not only unsupported by any evidence, but it runs counter to the extensive record evidence that ELS supplied in support of its Petition.

In its Petition, ELS offered detailed evidence that the subject rail line has become a wasting and moribund asset, the continued retention of which would be financially ruinous to ELS. As such, the subject rail line from Sidnaw to Ontonagon has no going concern value, contrary to Heartland's hollow claim, and it follows that retention of the line only reduces the overall going concern value of the ELS system. In the face of considerable record evidence to the contrary, Heartland states, without a shred of evidence, that "[t]he railroad has more value as a going concern in its present state," adding that abandonment of the Line and that "selling assets would be detrimental to [Heartland's] position as a first lien holder." *Id.* ELS is mystified by these claims, not only because they are wholly unsupported, but also because, in the absence of any backing information, they are illogical.

Heartland does not explain why it has concluded that abandonment of the Line would reduce the going concern value of the entire ELS system. More curious is the fact that Heartland does not explain why it wants to foreclose on the entire ELS system when the Petition shows that the Line's net liquidation value ("NLV") is by itself more than enough to satisfy ELS's outstanding debt obligations to Heartland. If Heartland meant to dispute the Line's unprofitability, it does not say so. The Letter merely *implies* that Heartland believes the line could be profitable (indeed a provocative statement if it had any support), allowing the reader to infer that perhaps Heartland knows something about the Line's future traffic prospects that no one else does. If Heartland intended to dispute the Line's NLV, it has not made its position clear. Heartland's arguments and innuendo ultimately beg the following questions: If Heartland does not even attempt to rebut substantial record evidence of the Line's unprofitability, and it does not bother to dispute that the Line's NLV is more than sufficient to cover ELS's debt obligations to Heartland, then why does Heartland

maintain that its interests can only be served by liquidation of the entire ELS system, which would be valued at many times what Heartland is owed? And if Heartland is truly genuine in its position that acting on the Petition is contrary to its interests, then why has it waited until now to say anything?

Sadly, assuming that the Board still views the Letter as formal comments, ELS is left to respond to, and to speculate about, Heartland's innuendo.

**4. Heartland's purpose is to antagonize ELS at the expense of the Board's processes.**

The absence of any supporting evidence in Heartland's Letter is by design. Heartland knows that its arguments cannot be supported and ultimately lack merit. ELS submits that, had Heartland been more forthcoming, such additional information would have exposed Heartland's ulterior motives in this proceeding, which have nothing to do with the Line itself, rail service in general, or any other issue within the purview of the Board.

After all of this time, why would Heartland wait until *a month* after the close of the record to attempt to influence the Board? ELS is not absolutely certain, but it has a guess. Specifically, and to be candid, although the litigation between ELS and Heartland continues apace, and although ELS is making good faith efforts to remedy its acknowledged breach of its loan agreements with Heartland, it appears that there is and has been considerable enmity between Heartland's officers and ELS's sole owner and president, John Larkin. ELS believes that the relationship among these individuals has so deteriorated recently that Heartland has decided to "get even" by attempting to derail the abandonment process before the STB. In short, Heartland's letter is but the latest in an escalating war of words that may now, by the Board's possible acceptance of the Letter, spill over to this agency.

If Heartland's tactics here were genuine, then it would not have waited until now to share its views, and it would have put forth an effort to support its claim that the proposed abandonment is

contrary to Heartland's interests. (This is the first that ELS has heard of Heartland's objection to the proposed abandonment. ELS had heretofore understood that its actions, though viewed with some suspicion by Heartland, were consistent with efforts to resolve the ongoing collection action.) If the Board takes the bait by giving Heartland's Letter any more weight than it deserves, which, frankly, is none, then the agency will probably invite into this proceeding – quite unnecessarily – a squabble that ultimately has no bearing on the merits of the Petition.

**5. Heartland wants to seize all of ELS's rail assets, believes it can do so without the Board approval, and so the Board must make clear that transactions involving lines of railroad must be approved by the Board in advance.**

It is important to note that Heartland has articulated its threat to foreclose on the entire ELS system (and thereby disenfranchise Mr. Larkin), so that all of the rail assets may be sold at auction to the highest bidder. Not coincidentally, blocking the subject abandonment would thwart ELS's efforts to satisfy its debt obligations, and would open the door for Heartland to press for a possible system-wide foreclosure, and thereby subject shippers to severe uncertainty regarding future service. Aside from the fact that Heartland seeks a remedy completely disproportionate to the debt it is owed, the prospect of foreclosure and sale of ELS's assets raise serious questions of whether such transactions could occur without prior STB approval. When ELS has raised its concerns about STB processes, Heartland has stated in ongoing litigation that, as long as the court orders such foreclosure, neither it nor any other acquiror of ELS rail lines would have to obtain advance STB permission to take control of ELS's property. Heartland has also maintained that, upon its acquisition of the ELS lines, it would not need advance authority of the Board to liquidate those assets if it so chose. Heartland has even questioned whether ELS needs to obtain abandonment authority to liquidate the Line.

ELS has advised Heartland and the courts that, even if Heartland's total system foreclosure argument had any merit (and it does not), no one may acquire ELS rail lines, including, for the

moment, the Line, absent advance Board approval pursuant to 49 U.S.C. 10901 or (in the case of an existing carrier) 10902, or an exemption from the formal requirements of those provisions. ELS has also advised that liquidation of any ELS rail lines may not occur without authority from the Board. The state court now handling the pending litigation – the matter was very recently remanded from federal court back to state court – has not yet indicated whether it agrees with Heartland’s position or not, which leaves ELS deeply concerned that the court might direct the transfer of some or all of ELS’s rail lines without regard for the essential role of Board regulation in any such process.

For these reasons, ELS respectfully urges, in the interest of the orderly disposition of the pending litigation between ELS and Heartland, that the Board in this proceeding issue a statement to clarify that, even in the event of foreclosure – (1) no transfer of any or all of ELS’s rail lines may take place absent appropriate authority pursuant to 49 U.S.C. 10901 or 10902, or an exemption from those formal provisions; and (2) no rail lines may be liquidated unless the owner of those rail lines first obtains authority to abandon them pursuant to 49 U.S.C 10903, or obtains an exemption from those provisions. ELS is deeply concerned that, without such a clear statement from the Board, Heartland will continue its attempt to persuade the state court that the Board’s processes are unnecessary in either case.

### **CONCLUSION**

Heartland has been aware of the ELS’s plans to abandon the Line even before the Petition was filed. ELS effectively supplied Heartland with a copy of the Petition on the very same day it was filed, and it informed Heartland of other relevant developments in this matter as they have unfolded. Now, a month after the close of the record, Heartland seeks to weigh in on the proceeding. Why? ELS believes that Heartland’s Letter is motivated by personal enmity among Heartland officers and ELS’s owner. We are convinced that the Letter’s main purpose is to threaten ELS, and that, if Heartland has any genuine interest in the outcome of this proceeding at all,

Heartland is motivated to impede the Board's processes and thereby pave the way for possible system-wide foreclosure, thus disenfranchising ELS's sole owner.

Heartland's Letter was not intended to be, and does not qualify as, a formal filing. It is, if anything, an impermissible attempt to bypass the Board's procedures and, in the process, to influence and complicate the outcome of this proceeding. As such, it is under the circumstances an affront to the orderly processing of abandonment proceedings, and ought not to be sanctioned. For those reasons, the Letter should be rejected out of hand.

If despite its obvious procedural defects, the Board nevertheless upholds the Letter as a formal filing, it must strike the Letter as untimely because Heartland has not made even the slightest effort to excuse or explain its exceedingly late appearance in this case.

Even if the Board were to compromise its processes and consider the Letter, then as ELS has made clear, the Letter is nothing but innuendo and a short collection of provocative but entirely unsupported statements running counter to the detailed evidence of record. As such, the Letter should have absolutely no bearing on this case.

If anything, the Letter, like Heartland's stated position in its litigation with ELS, demonstrates Heartland's contempt for Board processes and controlling statutes. Heartland has stated elsewhere that it does not intend to comply with federal laws governing the sale and/or liquidation of rail lines if it is permitted to foreclose on some or all of ELS's rail assets, and that it would not expect others to do so either. This is deeply troubling to ELS and to its shippers, because if the state court should be so persuaded, then any attempted, but unauthorized, transfers and/or liquidation of rail lines would cause serious confusion and could result in service disruptions. For this reason, ELS urges a preliminary Board statement in this proceeding that any attempt by Heartland to – (1) acquire ELS rail lines, (2) sell them to third parties, or (3) dispose of such rail lines would all require advance Board approval, and may not take place without such approval.

In short, for the reasons set forth above the Letter must be rejected, or, if considered to be a formal filing, then stricken from the record.

Respectfully submitted,



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Dated: June 28, 2010

Attorneys for Escanaba & Lake Superior  
Railroad Company



"Robert L. Bach"  
<RBach@Felhaber.com>  
06/23/2010 03:28 PM

To "RWimbish@bakerandmiller.com"  
<RWimbish@bakerandmiller.com>,  
"KObrien@bakerandmiller.com"  
cc  
bcc  
Subject FW: E&LS petition for abandonment

Well, I was a good boy and did as I was told on April 9, 2010.

Bob

**From:** Bob L. Bach  
**Sent:** Friday, April 09, 2010 3:18 PM  
**To:** LBalen@HTLF.com; Randy@osstynlaw.com  
**Subject:** E&LS petition for abandonment

Randy and Lou, Attached is a copy of the petition for abandonment filed with the Surface Transportation Board today.

Randy, I'll call you on Monday to discuss several items, including the filing attached, the conf. call on Tuesday with the Magistrate, setting up a conf. call with you and Lou with the Washington attorneys and other matters.

I'm also attaching a link in the event you can't open this attachment.

<http://rcpt.yousendit.com/851005285/d63e4fc344d18f88f2803a35d1d2612e>

Don't stay up all weekend reading this.:-)

Best regards,

Bob Bach

ATTORNEYS  
WEBSITE

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"Robert L. Bach"  
<RBach@Felhaber.com>  
06/23/2010 02:48 PM

To ""KObrien@bakerandmiller.com""  
<KObrien@bakerandmiller.com>,  
"RWimbish@bakerandmiller.com""  
cc  
bcc

Subject FW: E&LS abandonment

Keith and Rob, This is an email to HBB and their counsel.

Bob

**From:** Bob L. Bach  
**Sent:** Tuesday, May 04, 2010 2:48 PM  
**To:** LBalen@HTLF.com; Randy@osstynlaw.com  
**Subject:** E&LS abandonment

Gentlemen, For your information, I am attaching the STB notice of abandonment petition.

It is my understanding that at least one major shipper(Louisiana Pacific) is filing a letter in support of this. I think GE will do so as well.

So far there has been no objection filed. Final decision is scheduled for July 28, though that could be altered depending on whether there are any serious objection is filed.

Bob Bach

ATTORNEYS  
WEBSITE

**Robert L. Bach**  
**Attorney**

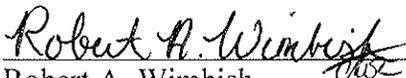
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## CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Motion to Reject or Strike by mailing copies of the same via prepaid first class mail to all parties of record in this proceeding.

Dated at Washington, D.C. this 28<sup>th</sup> day of June, 2010.

  
Robert A. Wimbish