

**Before the
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
April 13, 2023
Part of
Public Record

STB Docket No. NOR 42176

**VICTOR INSULATORS, INC. V. FINGER LAKES RAILWAY CORP. AND
ONTARIO CENTRAL RAILROAD CORPORATION**

**JOINT MOTION TO DISMISS OF FINGER LAKES RAILWAY CORP. AND
ONTARIO CENTRAL RAILROAD CORP.**

Eric M. Hocky
CLARK HILL PLC
Two Commerce Square
2001 Market Street
Suite 2620
Philadelphia, Pa 19103
(215) 640-8523
ehocky@clarkhill.com

Justin J. Marks
CLARK HILL PLC
1001 Pennsylvania Ave., N.W.
Suite 1300 South
Washington, DC 20004
(202) 772-0916
jmarks@clarkhill.com

*Counsel for Finger Lakes Railway
Corp. and Ontario Central Railroad
Corp.*

Dated: April 13, 2023

Before the
SURFACE TRANSPORTATION BOARD

STB Docket No. NOR 42176

**VICTOR INSULATORS, INC. V. FINGER LAKES RAILWAY CORP. AND
ONTARIO CENTRAL RAILROAD CORPORATION**

**JOINT MOTION TO DISMISS OF FINGER LAKES RAILWAY CORP. AND
ONTARIO CENTRAL RAILROAD CORP.**

Finger Lakes Railway Corp. (“FGLK”) and Ontario Central Railroad Corp. (“ONCT”) respectfully submit this joint motion to dismiss asking the Board to: (1) dismiss FGLK from this proceeding; (2) dismiss all allegations and requests for relief sought by Victor Insulators, Inc. (“VI”) that would take effect after April 10, 2023; and (3) dismiss all remaining allegations and requests for relief sought by VI because VI has not sufficiently alleged any monetary or non-monetary damages.

On December 27, 2022, Victor Insulators, Inc. (“VI”) filed a complaint alleging that Finger Lakes Railway Corp. (“FGLK”) was in violation of 49 U.S.C. §§ 11101(a) and 10744 (“Original Complaint”). On February 9, 2023, FGLK and ONCT requested, and the Board granted, a protective order (the “Protective Order”). On February 9, 2023, FGLK and ONCT also filed a joint motion to dismiss the VI Original Complaint, and on March 1, 2023, VI filed a reply to the FGLK/ONCT motion to dismiss (the “VI Reply”). In the VI Reply, VI requested leave to amend the Original Complaint to name ONCT as a co-defendant. On March 20, 2023, FGLK/ONCT filed a letter agreeing to the requested leave to add ONCT as a defendant. FGLK and ONCT further agreed with VI’s position that the type of clay being shipped to VI (the only commodity VI receives via rail) is not an exempt commodity. On March 24, 2023, VI filed an

Amended Complaint, stating in its cover letter that it is incorporating and replacing the Original Complaint.

In consideration of the ONCT and FGLK March 20 letter and VI's March 24 Amended Complaint, FGLK and ONCT respectfully request permission to withdraw their February 9, 2023 joint motion to dismiss the Original Complaint. In its place, ONCT and FGLK submit this joint motion to dismiss the Amended Complaint. FGLK and ONCT are contemporaneously filing a joint answer to the Amended Complaint.

I. Background

The rail line that is the subject of the VI Amended Complaint is the ONCT rail line that extends between Shortsville, NY and Victor, NY (the "Victor Rail Line"). The Victor Rail Line is owned by the County of Ontario, NY (the "County") and is leased to ONCT to operate as a rail common carrier.

The County acquired the Victor Rail Line from the Trustee of the Lehigh Valley Railroad, the Penn Central Railroad Corporation, and the New York Department of Transportation in 1981¹ after the former Lehigh Valley rail line (Line 1022) was not designated for transfer to Consolidated Rail Corporation under the U.S. Railway Association ("USRA") Final System Plan ("FSP"). The County also similarly acquired a piece of the adjacent Penn

¹ *Ontario Central Railroad Corporation Notice for a Modified Certificate of Public Convenience and Necessity* (USRA Lines 1022 and 98; Victor and Shortsville Connections), para. 3 (filed Oct. 5, 1981). A copy of the ONCT Notice, along with a copy the ICC's Decision, are attached hereto as Exhibit A for ease of reference. The 1981 Notice and ICC Decision show the railroad as "Ontario Central Railroad Corporation"; however, the correct corporate name is "Ontario Central Railroad Corp."

Central rail line (Line 98) that served the VI facility (following construction of a new spur to connect Line 1022 to the VI facility).²

Originally, ONCT operated the Victor Rail Line as a designated operator, and then in 1981 when the County acquired the line, ONCT was granted authority by the Interstate Commerce Commission (“ICC”) to operate under a Modified Certificate pursuant to a 1981 lease with the County.³ The lease between the County and ONCT describes the Victor Rail Line as extending from Milepost 370.9 at Victor, NY to Milepost 358.3 at Shortsville NY. The spur to the VI facility is located at approximately Milepost 369.2.

Under the then-effective modified certificate regulations at 49 C.F.R. §1120A (1981), ONCT obtained a common carrier obligation. However, public-entity owners, such as the County, that acquired rail lines designated for abandonment under the Final System Plan, did not acquire a common carrier obligation. Under the modified certificate regulations then (and now in 49 C.F.R. §1150 Subpart C), operators under a modified certificate are exempt from the general requirements of 49 U.S.C. §10901 and §10903 governing the startup and termination of operations, and must only comply with the Board’s regulations governing modified certificates.

FGLK acquired control of ONCT in 2007.⁴ FGLK did not acquire the right to provide common carrier service on the Victor Rail Line.

² The reports of USRA with respect to Line 1022 and Line 98 are attached hereto as Exhibit B. *United States Railway Association, Final System Plan for restructuring Railroads in the Northeast and Midwest Region pursuant to the Regional Rail reorganization Act of 1973*, Volume II at 258-59, and 288-89 (July 26, 1975).

³ *Ontario Central Railroad Corporation – Modified Rail Certificate*, ICC Finance Docket No. 29761 (ICC served Nov. 3, 1981). See Exhibit A.

⁴ *Finger Lakes Railway Corp.- Control Exemption – Ontario Central Railroad Corp.*, STB Finance Docket No. 35062 (served Oct. 5, 2007).

In November 2021, ONCT determined that the segment of the Victor Rail Line between Milepost 366.5 and the end of the line Milepost 370.9 (the “Out-of-Service Segment”) had defects, needed substantial maintenance and rehabilitation and was no longer capable of safe operation and placed the segment “out-of-service.” ONCT also placed the spur that serves the VI facility out of service because of a similar need for substantial repairs.⁵ Moreover, the limited traffic (five carloads in 2022) of VI, the only freight customer on the segment, does not produce adequate revenue to justify its rehabilitation.⁶ ONCT did not formally embargo the Out-of-Service Segment, although it would have been justified in doing so, in part because doing so would have prevented shippers from being able to continue shipping cars to VI. (Under an embargo, ONCT’s only arguable obligation would have been to arrange for delivery of product that was in the process of being shipped at the time of the embargo.) ONCT also considered terminating service of the Out-of-Service Segment based on the lack of traffic, the lack of any potential new customers, and based on ONCT’s understanding of the proposed redevelopment plans of the Town and Village of Victor that would benefit if service over the Out-of-Service Segment were terminated and the tracks were removed.⁷

ONCT informed VI that the segment was being taken out of service, but to reduce the potential harm to VI, ONCT voluntarily agreed to transload any cars of clay that were *en route* to VI, as well future deliveries of cars of clay. Between November 15, 2021, and March 31, 2023,

⁵ Contrary to VI’s assertions, it is not only the spur that is not operational and out of service, but also the portion of the Victor Rail Line where the spur connects. See Complaint, ¶¶ 15-16.

⁶ VI acknowledges that the only product it is currently receiving by rail is a single type of clay (STCC 3295232). Complaint, ¶11. Despite the touted increased demand for VI’s products over the past couple of years (Complaint, ¶12), VI only received five carloads of clay in 2022.

⁷ VI acknowledges it is aware of the Town’s plans. See Amended Complaint, ¶36.

ONCT transloaded seven rail cars of clay headed inbound to the VI facility and absorbed the cost of the transload and the truck delivery.⁸

During this time ONCT and the County have been discussing an amended and restated lease for the ONCT Line. Under the terms of the proposed amended and restated lease, which has been approved by the County subject to final negotiations of some remaining details, the rail operations on the Out-of-Service Segment is to be terminated by ONCT and removed from the leased property. Accordingly, on February 9, 2023, ONCT filed a notice of partial termination (abandonment) for the Out-of-Service Segment in ICC Finance Docket No. 29761. Under the Board's regulations at 49 C.F.R. §1150.24, the termination became effective in 60 days – April 10, 2023. ONCT will continue to provide service over the balance of the Victor Rail Line covered by the Modified Certificate and owned by the County, that being between Mileposts 366.5 and 358.3 near the Village of Shortsville, New York.

Even if the allegations asserted by VI in the Amended Complaint were true, ONCT has acted to limit any damages to VI. Further, ONCT has agreed to incorporate into the amended and restated lease with the County a provision for ONCT to arrange for the future transloading and delivery of clay billed to ONCT or FGLK stations with no additional transportation charges to VI following the effective date of the termination (abandonment). ONCT is agreeing to provide the transloading and delivery service for up to 12 carloads of clay per year (more than double what VI has received in recent years) until such time as a controlling interest in VI is sold or transferred. ONCT is willing to do this, even though it no longer has any obligation to do so now that the termination of operations over the Out-of-Service Segment has become effective.

⁸ The shipments destined to VI move from remote origins over the lines of FGLK and then to the ONCT Line for delivery to VI. Currently, ONCT/FGLK have arranged for the VI shipments to be transloaded at an available location on FGLK.

VI, not convinced that the ONCT transloading and delivery service is a benefit to VI, filed the Amended Complaint asserting that each of ONCT and FGLK “has violated, and is continuing to violate, 49 U.S.C. § 11101(a) by failing to provide transportation or service upon reasonable request.” Amended Complaint, Count 1, VI further alleges that ONCT and FGLK each “has violated, and is continuing to violate, 49 U.S.C. § 10744 by entering into an arrangement to prevent the carriage of freight from being continuous from the place of shipment to the place of destination when the stoppage is not made in good faith for a necessary purpose and with the intent of avoiding continuous carriage.” Amended Complaint, Count 2. As set forth herein, and in the separate answer being filed contemporaneously, the facts and the law do not support VI’s claims.

II. Legal Framework

Under 49 U.S.C. § 11701(b), the “Board may dismiss a complaint it determines does not state reasonable grounds for investigation and action.” The Board will dismiss a complaint when it determines “that there is no basis on which [it] could grant the relief sought.”⁹ Where the Board lacks jurisdiction to grant the relief sought, a motion to dismiss should be granted.¹⁰

⁹ *Brampton Enterprises, LLC d/b/a Savannah Re—Load Norfolk Southern Railway Co.* STB Docket No. NOR 42118, slip op. 3, (served Mar. 16, 2011).

¹⁰ *See CSX Transp., Inc. – Abandonment Exemption – in Summit County, OH* STB Docket No. AB 55 (Sub-No. 631X) *et al.* slip op. at 6 (served May 12, 2004)(The Board could not order a reinstitution of service on an abandoned line.); *See also CSX Transp., Inc. – Abandonment – between Bloomington and Montezuma, in Parke County, IN*, ICC Docket No. AB 55 (Sub-No. 486) *et al.*, slip op. at 10 (served Sept. 13, 2002). *Consolidated Rail Corp. – Abandonment Exemption – in Erie County, NY*, STB Docket No. AB-167 (Sub-No. 1164X), *et al* slip op. at 10 (served Oct. 7, 1998).

III. Argument

- A. *The Board should dismiss FGLK from this proceeding because it is ONCT and not FGLK that holds the common carrier authority to operate the Victor Rail Line, including the Out-of-Service Segment.*

FGLK requests that the Board dismiss all claims in the Amended Complaint against FGLK because ONCT, and not FGLK, was the only rail carrier with authority to operate the Victor Rail Line, including the Out-of-Service Segment. Therefore, the Board lacks jurisdiction to grant any of the relief that VI is requesting with respect to FGLK. FGLK's request is consistent with Board precedent where a party files a complaint against a corporate parent.¹¹

As discussed above, ONCT has/had the common carrier obligation to operate the Victor Rail Line, including the Out-of-Service Segment. ONCT, not FGLK, is the party that entered into a lease with the County to provide service over the Victor Rail Line. While FGLK obtained authority from the Board to control ONCT, it did not receive any authority to provide common carrier service on or over the Victor Rail Line.¹² As such, FGLK does not have any common carrier obligation with respect to customers located along the Victor Rail Line, including VI. It is axiomatic, therefore, that the Board does not have jurisdiction over FGLK to impose the relief requested by VI because FGLK does not have, and never had, any obligation to provide rail service over the Victor Rail Line. Consequently, the Amended Complaint against FGLK should be dismissed.

VI clearly understands that ONCT and not FGLK hold the authority from the Board to operate the Out-of-Service Segment. For this reason, VI asserts that FGLK *should* have a

¹¹ *CSX Corp. and CSX Transp., Inc. – Adverse Abandonment Application – Canadian National RY Co. and Grand Trunk Western R.R. Inc.* STB Docket No. AB-31 (Sub-No. 38), slip op. at 3 (served Feb. 1, 2002) (dismissed proceeding filed against corporate parent CN).

¹² *Finger Lakes Railway Corp. – Control Exemption – Ontario Central Railroad Corp.*, STB Finance Docket No. 35062 (served Oct. 5, 2007).

common carrier obligation because FGLK controls and manages the operations of ONCT and allegedly holds itself out as the operator of the Victor Rail Line. Amended Complaint ¶¶9-11. VI acknowledges that FGLK does not hold a modified certificate to operate the Victor Rail Line. Amended Complaint ¶12. However, VI asserts that “[b]y holding itself out as operator, FGLK has given the public the reason to believe the traditional abandonment processes would apply if service were to be abandoned over the Victor Rail Line.” Amended Complaint ¶13.

VI is requesting that the Board impose the ONCT common carrier obligation on to ONCT’s parent company FGLK to avoid the Board’s regulations for the termination of rail service provided under a modified certificate under 49 C.F.R. §1150.24. The fact that ONCT and FGLK share corporate leadership, employees, and branding does not transfer the common carrier liability of ONCT to FGLK for the Victor Rail Line or the Out-of-Service Segment. Indeed, FGLK when it acquired authority to control ONCT stated in its petition to acquire control of ONCT, that as part of its control, it intended to “provide equipment and even employees” to ONCT.¹³ But FGLK did not request authority for FGLK to provide common carrier service or otherwise indicate that ONCT would not be continuing to provide the common carrier service.

VI’s claim that FGLK was holding itself out to provide service over the Victor Rail Line to VI and that VI believed FGLK was providing the service is belied by the waybills applicable to the deliveries of clay that VI received in 2021 and 2022 (both before and after the segment

¹³ See *Finger Lakes Railway Corp. – Control Exemption – Ontario Central Railroad Corp.*, at 5, filed July 9, 2007.

serving VI was put in out-of-service status).¹⁴ The waybills all show ONCT in the route as the delivering carrier, and do not show FGLK in the route.

- B. *The Board should dismiss any VI prayer for relief that would be applicable to the Out-of-Service Segment after April 10, 2023 because the ONCT notice to partially terminate its Modified Certificate removes the Out-of-Service Segment from Board jurisdiction.*

ONCT/FGLK respectfully request that the Board dismiss the prayers for relief that would apply after April 10, 2023, because the Board no longer has jurisdiction over ONCT's operations of the Out-of-Service line after that date. As discussed above, on February 9, 2023, ONCT filed (and served) a notice of intent to terminate service over the Out-of-Service Segment of the Victor Rail Line. Pursuant to 49 C.F.R. §1150.24, the termination of service became effective after 60 days (as of April 10, 2023),

VI requests, “[p]ursuant to 49 U.S.C. § 11101(a), the Board should order ONCT/FGLK to make necessary repairs and to restore service to provide common carrier service on the Rail Line to Victor Insulators' Facility.” Amended Complaint ¶48. However, the Board no longer has jurisdiction to order the relief that VI is requesting.

Termination of a rail line operated under a modified certificate falls under 49 C.F.R. §1150.24. Under section 1150.24, the duration of service “may be determined in the contract between the State [including political subdivisions of a State] and the operator.” Under section 1150.24, a carrier can terminate service over a modified certificate line provided that it gives 60 days’ notice of its intent to do so. ONCT filed a notice of partial termination with respect to the Out-of-Service Segment on February 9, 2023. Accordingly, as of April 10, 2023, ONCT no

¹⁴ Copies of the waybills from 2021 and 2022 are attached hereto as Exhibit C. Because the waybills include shipper / shipment information they have been marked as “Highly Confidential” under the Protective Order. However, because VI is the consignee, copies are being provided to counsel for VI.

longer has any common carrier obligation with respect to the Out-of-Service Segment. As such, any claims by VI for continued or future service should be dismissed because the Board lacks jurisdiction to grant the relief sought.

VI's Amended Complaint appears to acknowledge this truth, "[t]he filing of the Notice of Intent does not relieve ONCT/FGLK of its obligation to provide service upon reasonable request *prior to the effective date* of its Notice of Intent to terminate service (i.e., April 9, 2023)."¹⁵

Amended Complaint ¶28 (emphasis added).

C. *The Board should dismiss VI's claims for damages because ONCT mitigated VI's damages by transloading and delivering VI's in-bound freight at no additional transportation charges to VI.*

The Board should dismiss VI's claims for damages because ONCT mitigated VI's damages by paying to have the in-bound freight transloaded and transported to the VI facility at no additional transportation charges to VI (or VI's shipper). Further, as discussed above, ONCT is committing in its restated lease with the County to do so beyond the termination of service date.

As stated above, the Board's legal standard allows it to dismiss a complaint it determines does not state reasonable grounds for investigation and action.¹⁶ And the Board will dismiss a complaint when it determines "that there is no basis on which we could grant the relief sought."¹⁷

ONCT and FGLK understand that under appropriate circumstances, the Board may award

¹⁵ As noted above, ONCT calculates the effective date of the notice of intent to be April 10, 2023.

¹⁶ 49 U.S.C. § 11701(b).

¹⁷ *Brampton Enterprises, LLC d/b/a Savannah Re—Load Norfolk Southern Railway Co.* STB Docket No. NOR 42118, slip op. 3, (served Mar. 16, 2011).

damages for an improper embargo during a period prior to abandonment.¹⁸ ONCT and FGLK do not agree that the circumstances here warrant an award for damages.

ONCT acknowledges that it stopped providing direct service over the Out-of-Service Segment, and did not immediately impose an embargo (as ONCT believes it would have been entitled to do). However, ONCT continued to provide service to the VI facility via transloading and trucking delivery. VI has not set forth any specific damages that it has suffered as a result of the transloading and delivery. Under these circumstances, the Board has no basis for action because ONCT mitigated VI's damages by voluntarily transloading and transporting via truck, all clay received for delivery to VI's facility at no additional transportation charge

VI's allegations span from November 2021 to April 10, 2023 – approximately 17 months. Amended Complaint ¶¶28-29. In those 17 months, only seven rail cars of clay were shipped to VI. (No carloads of clay have been received for delivery this year since a single car was received on January 6, 2023.) To determine whether the Board should order ONCT to pay VI damages for violating 49 U.S.C §11101 when it transloaded and delivered the material in these seven rail cars, the Board should conduct a fact-specific balancing test to determine whether the actions of ONCT were reasonable.¹⁹ The relevant factors the Board evaluates include:

- the cost of repairs necessary to restore service,
- the amount of traffic on the line,
- the carrier's intent,
- the length of the service cessation, and
- the financial condition of the carrier.²⁰

¹⁸ See *CSX Transp., Inc. – Abandonment Exemption – in Summit County, OH* STB Docket No. AB 55 (Sub-No. 631X) *et al.* slip op. at 6 (served May 12, 2004).

¹⁹ *Groome & Assocs., Inc. & Lee K. Groome v. Greenville Cnty. Econ. Dev. Corp.*, STB Docket No. 42087, slip op. at 12 (served July 27, 2005).

²⁰ *Id.* slip op at 12.

The Board does not apply these factors as a formula. “Rather, [the Board’s] objective is to determine whether the carrier’s actions, including its failure to serve, are reasonable under the circumstances.”²¹

Application of the Board’s balancing test indicates that ONCT’s cessation of direct rail service was reasonable under the circumstances, and accordingly VI’s claims for damages should be dismissed.

1. *The cost to restore service cannot be justified considering the amount of traffic on the line.*

The VI facility is located on the Out-of-Service Segment which spans 3.37 miles of track and requires substantial rehabilitation. The cost to rehabilitate the common carrier portion of the Out-of-Service Segment is estimated by ONCT to be \$328,500. ONCT estimates that the industrial spur will cost an additional \$72,000 to rehabilitate. The cost to inspect the Out-of-Service Segment, if it were rehabilitated, is estimated to be \$6,000 per year. In 2022, VI received only 5 rail carloads of rail traffic, all of which were transloaded and delivered to VI’s facility at ONCT’s expense.²² ONCT’s revenues on each carload is approximately [REDACTED] per car.²³ Thus, the revenues available to ONCT from VI’s traffic would not justify the costs of inspection and ongoing maintenance, let alone almost any rehabilitation cost, even the reduced amounts alleged by VI to be necessary to rehabilitate the spur. Amended Complaint, ¶22 (\$20,000 - \$30,000 based on an informal estimate). Considering the relatively few railcars that VI has received, this factor does not justify the rehabilitation of the Out-of-Service Segment.

²¹ *Id.*

²² One of the cars was received in 2021 but not transloaded until 2022. A sixth car was received by FGLK in interchange on December 30, 2022, but was rejected because of a broken outlet pipe.

²³ FGLK receives similar revenues for handling the cars over its connecting lines of railroad.

2. *ONCT did not act with an intent to drive shippers off the Out-of-Service Segment when it stopped operating over the segment in November 2021.*

The Board factors a carrier's intent and the length of the cessation when balancing the reasonableness of a cessation of service or an embargo of a line. In retrospect, ONCT perhaps should have either embargoed the Out-of-Service Segment or sooner issued a notice of partial termination (abandonment) under section 1150.24 instead of transloading and delivering VI's inbound rail cars at ONCT's cost.

In total, ONCT transloaded 7 VI cars between November 15, 2021 to March 31, 2023. ONCT would not have absorbed the transloading and delivery costs if its intention were to drive VI away from rail service. Indeed, one of the reasons that it did not embargo or terminate service over the Out-of-Service Segment was to allow VI to continue to receive product by rail and truck-transfer while the fate of the Out-of-Service Segment was being determined. Moreover, ONCT has agreed to continue transloading and delivering clay for VI even after its service over the Out-of-Service Segment terminates (if VI decides to continue to use the service). This is certainly not a sign that ONCT is trying to drive away VI's business.

Moreover, there would be no benefit to driving away VI's business as there might be if ONCT were attempting to justify an abandonment under 49 U.S.C. §10903 and 49 C.F.R. Part 1152. In this instance, ONCT was entitled to terminate service by simply providing the notice required under 49 C.F.R. §1150.24, and ONCT did not need to rely on a lack of demand for freight by customers located on the Out-of-Service Segment.

Because there was no wrongful intent, VI's claims under 49 U.S.C. §10744 should be dismissed.

3. *ONCT should not be required to expend financial resources on rehabilitating a money-losing segment of rail line.*

The Board considers the financial condition of the carrier as a factor in determining the reasonableness of a cessation of service or an embargo. The Board will give weight to a carrier's "strapped financial condition" in considering the reasonableness of service or an embargo.²⁴ Conversely, the fact that a "carrier has sufficient funds does not, by itself, mean that expensive repairs would be financially justified or legally necessary for a money-losing line that a carrier seeks to abandon."²⁵ In applying this analysis to the reasonableness of a CSX embargo, the Board concluded that CSX, a large carrier with financial resources and the ability to make repairs to a damaged bridge should not "be penalized for not" making repairs to a money-losing line it ultimately intended to abandon.²⁶

ONCT is a very small Class III railroad operation. Even ONCT's parent company FGLK, while bigger, is a Class III short line railroad, and is considered a small business. The business model of FGLK and ONCT is based on helping their customers expand their rail-served businesses. They seek to grow their business by focusing on carload business. They are not interested in losing carloads to motor carriage or to drive away business. ONCT, under the control of FGLK, has spent years trying to attract additional business to the Out-of-Service Segment, but without success. FGLK and ONCT could not successfully serve their remaining customers if they were forced to invest money in rehabilitation, maintenance and operation of a segment of line, like the Out-of-Service Segment, that loses money and has no prospects for becoming profitable. ONCT and FGLK clearly do not have the resources of "a large carrier with

²⁴ *Id.* slip op. at 9.

²⁵ *Id.*

²⁶ *Id.*

the financial resources” of CSX, and even if they did, the Board’s precedent does not support an investment in the Out-of-Service Segment.

A balancing analysis of the Board’s factors weighs in favor of the decision not to rehabilitate the Out-of-Service Segment. ONCT’s error, if there was one, was not to embargo or partially terminate the Modified Certificate in November 2021. Despite the lack of formal action, an analysis of the factors indicates that ONCT has acted, and continues to act, reasonably towards VI.

IV. Conclusion

For the foregoing reasons, ONCT and FGLK respectfully request that the Board (1) dismiss FGLK as a defendant from the Amended Complaint; (2) dismiss those prayers for relief that ask the Board to order rehabilitation and operations over the Out-of-Service Segment because the Board now lacks jurisdiction to do so; and (3) dismiss VI's request for damages because ONCT did not act with wrongful intent, and mitigated any damages that may have been caused by ONCT's transloading and delivery (at its own cost) of the VI material.

Respectfully submitted,

/s/ Eric M. Hocky

Eric M. Hocky
CLARK HILL PLC
Two Commerce Square
2001 Market St.
Suite 2620
Philadelphia, PA 19103
(215) 640-8523
ehocky@clarkhill.com

Justin J. Marks
CLARK HILL PLC
1001 Pennsylvania Ave. N.W.
Suite 1300 South
Washington, DC 20004
(202) 772-0916
jmarks@clarkhill.com

*Counsel for Finger Lakes Railway Corp.
and Ontario Central Railroad Corp.*

Dated: April 13, 2023

VERIFICATION

I, Michael V. Smith, President of Finger Lakes Railway Corp. and of Ontario Central Railroad Corp., verify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file the foregoing document.

Executed on April 13, 2023.

A handwritten signature in dark ink, appearing to read 'M. V. Smith', is positioned above a horizontal line.

Michael V. Smith

EXHIBIT A

FD-29761

(F)

CLOSED FILE C

SERVICE DATE

NOV 3 1981

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 29761

ONTARIO CENTRAL RAILROAD CORPORATION--OPERATIONS--BETWEEN
SHORTSVILLE AND VICTOR, NY

Modified Rail Certificate

October 23, 1981

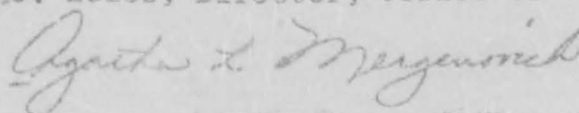
NOTICE:

By letter of September 30, 1981, a notice was filed by the Ontario Central Railroad Corporation (ONCT) for a modified rail certificate of public convenience and necessity under 49 C.F.R. 1120A. As of that date, this carrier is authorized to continue to provide service between Shortsville and Victor, NY (USRA lines 1022 and 98 and connections).

The line is owned by the County of Ontario, NY. It was previously operated by ONCT as a designated operator (D-OP-33).

This notice shall be served upon the Association of American Railroads (Car Service Division) as agent of all railroads subscribing to the car-service and car-hire agreement, and upon the American Short Line Railroad Association.

By the Commission, Gary J. Edles, Director, Office of Proceedings.



AGATHA L. MERGENOVICH
Secretary

INTERSTATE COMMERCE COMMISSION

SERVICE DATE

11/13/81

DOCKET NO.

SERVICE OF PROCESS

TOTAL NUMBER SERVED

ADDITIONAL CASES TO BE SERVED

INITIALS OF CLERK MAKING SERVICE

On the above date a copy of the attached

- ☐ ENTIRE COMMISSION DECISION (EC) ☒ NOTICE ☐ INITIAL DECISION (ID)
☐ ORAL HEARING ASSIGNMENT ☐ DIVISION DECISION (D)
☐ CERTIFICATE, PERMIT, LICENSE ☐ REVIEW BOARD DECISION (RB)
☐ MODIFIED PROCEDURE ASSIGNMENT (MP) ☐ OTHER

was sent to the parties listed below and those shown on the attached list or order^{1/}

REGIONAL MANAGING DIRECTORS: ☒ 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐ 6

ADDITIONAL INFORMATION

FD029761/0000/
SERGEANT W. WISE
65 BROAD ST.
ROCHESTER

17487 SCSS

NY 14614

FD029761/0000/
ONTARIO CENTRAL RR. CORP.
65 BROAD ST.
ROCHESTER

32787 SCSS

NY 14614

^{1/}For certain Modified Procedure and other Orders, the service list may be printed on the reverse of the Order.

ICC-1042 (3/80)

FD- 29761

(F)

CLOSED FILE

J

BRANCH, TURNER & WISE
ATTORNEYS AND COUNSELORS AT LAW
65 BROAD STREET
ROCHESTER, NEW YORK 14614

JOHN W. BRANCH
SERGEANT W. WISE
CHARLES S. TURNER
CAROLINE W. BRANCH
WILLIAM D. SHELDON, JR.
FRANK H. LLOYD, JR.
WILLIAM F. DEWART, JR.
DAVID J. LARSON

OF COUNSEL
STEPHEN MAY

(716) 546-8426

September 30, 1981

Secretary of the Interstate
Commerce Commission
12th Street and Constitution Ave. NW
Washington, DC 20423

Attn: Mr. Richard Kelly

Re: Ontario Central Railroad Corp. (ONCT)
NOTICE FOR A MODIFIED CERTIFICATE OF
PUBLIC CONVENIENCE AND NECESSITY
USRA Lines 1022 and 98; Victor and
Shortsville Connections

FD-29761
FILED
OCT 5 1981
INTERSTATE
COMMERCE COMMISSION

Dear Sir:

The Ontario Central Railroad Corp. (hereinafter referred to as ONCT) presently providing rail service on the captioned USRA lines and connections as Designated Operator, D-OP 33 pursuant to Certificate from the Commission dated September 26, 1979 intends to continue to provide such rail service under Modified Certificate of Public Convenience and Necessity. ONCT hereby makes application for such modified certificate and submits the following information in support thereof:

1. ONCT is a domestic corporation incorporated pursuant to Section 5 of the Railroad Law of the State of New York with its principal office and mailing address - P.O. Box 248, Sodus, New York 14551.

(i) Officers and directors:

Joseph Kaminski, Jr.
Brown-Boveri
280 Maple Avenue
Victor, NY 14554

Chairman of the Board/Director

David M. Beers
219 Goodrich Avenue
Syracuse, NY 13210

President/Director

Lawrence Ellis
Stoda Corporation
18 Garfield Street
Auburn, NY 13021

Director

INTERSTATE
COMMERCE COMMISSION
RECEIVED
OCT 5 1981
2
ADMINISTRATIVE SERVICES

September 30, 1981

Richard Ball
Iron City Sash & Door
Co., Inc.
10 Victor Mendon Rd.
Victor, NY 14564

Secretary/Treasurer/Director

Thomas C. McTighe, Jr.
32 Lake Lea Road
Rochester, NY 14617

Director

Roger C. Avery
Chairman, Ontario County
Development Comm.
183 North Pearl Street
Canandaigua, NY 14424

Director

Sergeant W. Wise
26 Del Rio Drive
Rochester, NY 14618

Assistant Secretary/Counsel/Director

2. Regarding prior abandonment see Commission proceeding - D-OP 33
- 9/26/79.

3. The County of Ontario has negotiated the acquisition of the captioned lines from the Trustee of the Lehigh Valley Railroad, the Penn Central Railroad Corporation and the NYDOT. Ontario County is leasing the operation and maintenance of the lines to ONCT under agreement dated April 1981 which agreement is being modified to comply with requirements of the NYDOT. The agreement runs for five years with a provision for renewal for an additional period of five years. A certified copy of the final agreement will be forwarded to the Commission as soon as it is available.

4. The continuation of the rail service to be performed by ONCT is as described in ONCT's application dated September 11, 1979.

5. Ontario County is not to be regarded as a subsidizer of ONCT.

6. The continued rail service offered and the applicable rates, charges, and conditions will be described in tariffs published by ONCT pursuant to the Commission's rules.

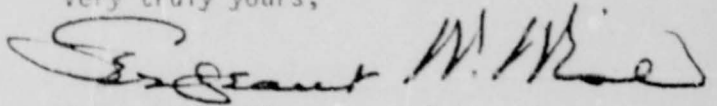
Please contact the undersigned if you have any questions with respect to the foregoing or should you require additional information to expedite

Page 3.

September 30, 1981

your processing of this notice and application for a Modified Certificate of Public Convenience and Necessity.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Sergeant W. Wise". The signature is fluid and cursive, with the word "Sergeant" written in a smaller, more compact script than the name "W. Wise".

Sergeant W. Wise, Counsel for the
Ontario Central Railroad Corp.

SWW/fg

cc: Joseph Kaminski, Jr.
D.M. Beers

EXHIBIT B

1973 operating information :

Number of round trips per year.....	156
Estimated time per round trip (hours).....	3.5
Locomotive horsepower.....	2,000
Train crew size.....	4

Public Comments on Preliminary System Plan

Several witnesses pointed out that the USRA did not address the issue of the Lehigh Valley sidings at Auburn which Lehigh Valley serves via trackage rights over Line 95.

New York DOT pointed out that, while Auburn will continue to receive service from the east, the Auburn sidings are not strong enough to support the larger Penn Central locomotives.

New York DOT stressed that USRA should credit the Lehigh Valley traffic as "overhead" to Line 95 or should state specifically that ConRail service will be provided to all customers at Auburn.

Columbia Rope Co. reported that the Lehigh Valley handled 734 carloads over the line in 1974. Although the Preliminary System Plan would provide service to Auburn from Syracuse, there is a 10 mile per hour limit on that segment of track.

Columbia Rope stated that one half of Line 95 has been completely renovated with New York DOT funds at a cost of almost \$500,000.

According to the Cayuga County Planning Board the line is in good condition and requires no upgrading.

Rose State Custom Service, Inc. reported that it shipped 32 carloads in 1973 from the Relius siding. O'Hara Machinery, also at Relius, shipped 2 carloads that year.

The Lehigh Valley handled the following cars between Cayuga and Auburn in 1974: Agway Feed, 253 carloads; Agway Soil, 36 carloads; P&R, 56 carloads; Finger Lakes Bottling, 41 carloads; New York State Electric and Gas Corp., 5 carloads; Lyod Eldren, 4 carloads; Bero Construction, 14 carloads; Alco Products, 42 carloads; Hemingway, 3 carloads; Auburn Prison, 2 carloads; Kruger Feed, 2 carloads; Consolidated Scrap, 26 carloads; Owasco Co. Club, 1 carload; and Columbia Rope Co., 249 carloads.

Information for Line-Transfer Decision

Revenue received by PC.....	\$195,183
Average revenue per carload.....	\$234

Variable (avoidable) cost of continued service:

Cost incurred on the branch line.....	101,040
Cost of upgrading branch line to FRA	
Class I: (1/10 of total upgrading cost)	0
Cost incurred beyond the branch line.....	123,554
Total variable (avoidable) cost.....	224,594

Net contribution (loss): total.....	(29,411)
Average per carload.....	(35)

This line would require no upgrading to meet requirements of the Federal Railroad Administration's minimum safety standards (Class I track, which has a maximum safe operating speed of 10 m.p.h.).

This line was reanalyzed using PC traffic at Relius and LV traffic at Auburn, and ConRail (merged) operations, revenues, and cost. The result was a net contribution of \$9,071.

Disposition

This portion of the Auburn Branch shall be transferred to the Consolidated Rail Corp.

PITTSFORD RUNNING TRACK

USRA Line No. 96

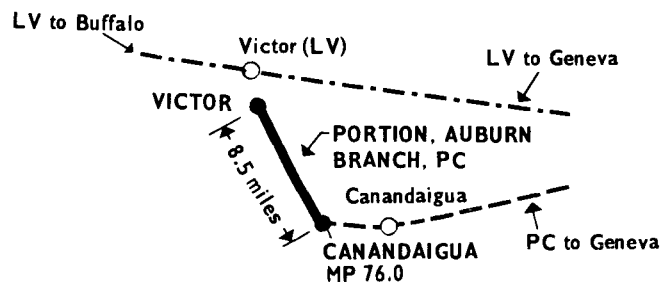
Penn Central

The Pittsford Running Track, extending from *Pittsford* (Milepost 93.9) to *Brighton, N.Y.* (Milepost 98.6), a distance of 4.7 miles, in Monroe County, N.Y., a line which was recommended for inclusion on page 616 of the Preliminary System Plan, shall be transferred to the Consolidated Rail Corp.

PORTION OF THE AUBURN BRANCH

USRA Line No. 98

Penn Central



This portion of the Auburn Branch, formerly part of the New York Central RR, extends from *Canandaigua* (Milepost 76.0), to *Victor, N.Y.* (Milepost 84.5), a distance of 8.5 miles, in Ontario County, N.Y. A continuation of this line runs from Canandaigua to Syracuse.

Traffic and Operating Information

Stations (with their 1973 carloads) served by this line:

Victor	241
Total carloads generated by the line.....	241
Average carloads per week.....	4.6
Average carloads per mile.....	28.4
Average carloads per train.....	4.8

1973 operating information:

Number of round trips per year.....	50
Estimated time per round trip (hours).....	2.0
Locomotive horsepower.....	2,000
Train crew size.....	4

Public Comments on Preliminary System Plan

Victor Insulators Division of ITE Imperial Corp. (ITE) reported that its records show revenues for this line in 1973 of \$167,400.20 and in 1974 of \$275,625.

ITE also pointed out that traffic over the line could be increased by the construction of a short connecting track to USRA Line No. 1022 at Victor, allowing all shippers in Victor and Farmington to retain service.

ITE estimated that the new line would move 103,430 tons per year and produce revenues of \$2,797,870. No upgrading would be required. The four shippers on Line 1022 that could be served by Line 98 and their carloads per year are as follows: Agway, 31 carloads; Iron City, 44 carloads; Victor Farm Home Center, 50 carloads; and Ryan Homes, 215 carloads. A potential shipper on the Line No. 1022 segment would be Hartman Engineering, which could generate an additional 35 carloads per year.

ITE reported that it ships 239 carloads per year over Line 98.

Georgia-Pacific Corp. recently purchased 17 acres of property in Victor for the construction of a 100,000-square foot building products distribution center. The company reported that the current recession has delayed its construction plans but the facility should be completed in 1977. When operational, the facility will generate between 900 and 1,100 carloads per year.

ITE noted that it also ships 130 piggyback carloads out of Rochester. If the ITE Victor plant loses rail service, it will have to close and these piggyback shipments will be lost to the rail system.

The United Transportation Union noted that the line is 10.5 miles long, not 8.5 as stated by USRA.

Information for Line-Transfer Decision

Revenue received by PC.....	\$86,190
Average revenue per carload.....	\$358
Variable (avoidable) cost of continued service:	
Cost incurred on the branch line.....	67,969
Cost of upgrading branch line to FRA Class I: (1/10 of total upgrading cost).....	0
Cost incurred beyond the branch line.....	71,156
Total variable (avoidable) cost.....	139,125
Net contribution class: total.....	(52,935)
Average per carload.....	(220)

This line would require no upgrading to meet the requirements of the Federal Railroad Administration's

minimum safety standards (Class I track, which has a maximum safe operating speed of 10 m.p.h.).

This line is 8.5 miles long as was indicated in the RSPO testimony.

It was suggested that the LV traffic at Victor be added to this line. There is no physical connection now and the construction of such a connection can be handled under Title IV of the Act.

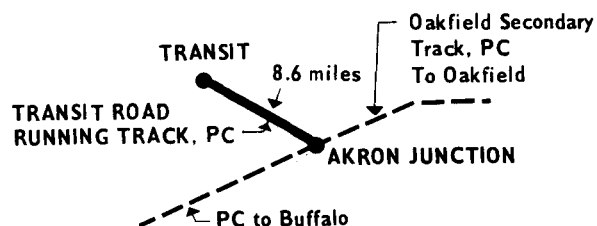
Georgia-Pacific has purchased property at Victor, but construction has *not* begun, and there is no firm indication of when construction actually will be started.

Testimony concerning the status of shippers at Canandaigua was received. These shippers will continue to receive service from ConRail.

Service to this line generated a loss of \$52,934 in 1973. Recovery of this loss would require approximately a fourfold increase in traffic or a 61-percent rate increase.

Disposition

This portion of the Auburn Branch is *not* designated for transfer to Consolidated Rail Corp. and is available for subsidy pursuant to section 304 of the Act. Public officials have recommended that certain rail rights-of-way be used for other public purposes if rail service is discontinued. For line-specific recommendations, see section C of this appendix.

TRANSIT ROAD RUNNING TRACK**USRA Line No. 100/101****Penn Central**

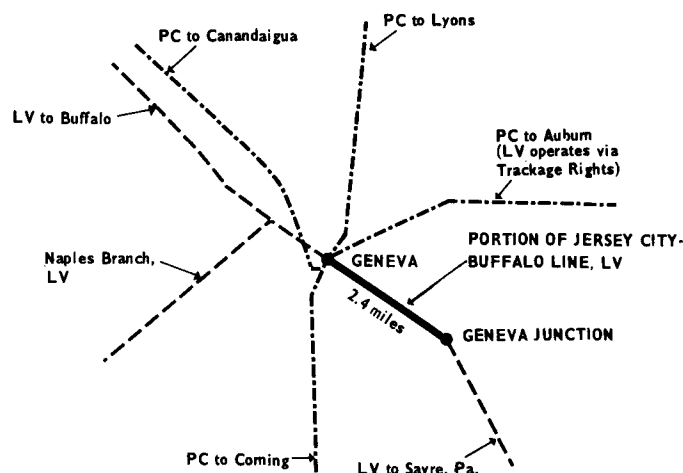
The Transit Road Running Track, formerly part of the New York Central RR, extends from *Akron Junction* (Milepost 17.9) to *Transit, N.Y.* (Milepost 26.5), a distance of 8.6 miles, in Erie County, N.Y. This line connects at Akron Junction with the Oakfield Secondary Track of the PC.

Traffic and Operating Information

Stations (with their 1973 carloads) served by this line:

Clarence Center.....	294
Transit.....	19

Total carloads generated by the line..... 313



extend southward from Geneva Junction and westward from Geneva (see Line Nos. 1020 and 1022). Connections with other lines at Geneva are: the LV Naples Branch, the PC Auburn Branch (see Line Nos. 1001 and 671) and the PC Corning Branch.

Public Comments on Preliminary System Plan

The United Transportation Union stated that this line along with traffic generated by Geneva should be considered as part of Line No. 1020.

Nabisco, Inc., has a major distribution center at Geneva which handled 2,140 carloads in 1974. Nabisco stated that its grocery product line at Geneva has been expanded this year, and it expects to handle 2,800 carloads in 1975 with continued growth in the future.

Information for Line-Transfer Decision

This line does not directly serve any shippers but is used to serve USRA Segment Nos. 1020 and 1022. The portion of Line No. 1020 from Geneva Junction to Kendaia was reanalyzed and will be included in Con-Rail. Therefore, this line must be retained.

Disposition

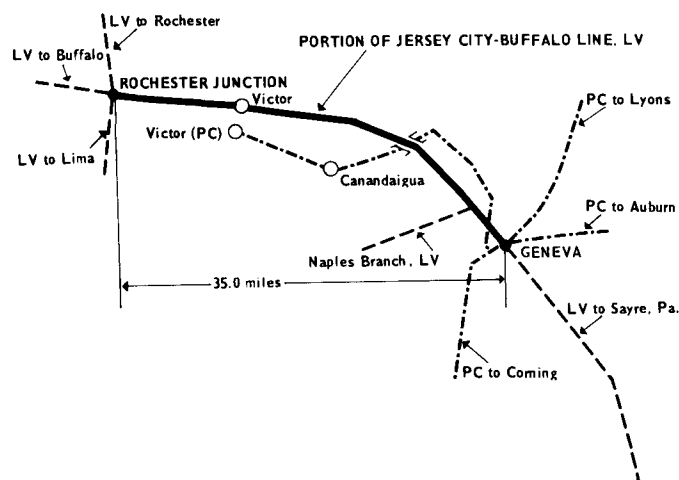
This portion of the Jersey City-Buffalo line shall be transferred to the Consolidated Rail Corp.

PORTION OF JERSEY CITY-BUFFALO LINE

USRA Line No. 1022

Lehigh Valley

This portion of the Jersey City-Buffalo line extends from Geneva (Milepost 344.5) to Rochester Junction, N.Y. (Milepost 379.5), a distance of 35.0 miles, in Ontario and Monroe Counties, N.Y. Continuations of this line extend southward from Geneva (see Line No. 1021)



and westward from Rochester Junction (see Line No. 1025). Connections at Geneva are: the LV Naples Branch (see Line No. 1001) and the PC Auburn (see Line No. 671) and Corning Branches (the LV operates via trackage rights over the PC Auburn Branch). This line also connects with the LV Rochester Branch at Rochester Junction (see Line No. 1000).

Traffic and Operating Information

Stations (with their 1973 carloads) served by this line:

Manchester	335
Farmington	2
Victor	342

Total carloads generated by the line	679
Average carloads per week	13.1
Average carloads per mile	19.4
Average carloads per train	4.4

1973 operating information:

Number of round trips per year	156
Estimated time per round trip (hours)	9.0
Locomotive horsepower	1,200
Train crew size	4

Public Comments on Preliminary System Plan

The Texgas Corp. (division of Allied Chemical Corp.), propane gas distribution center at Manchester, received 58 privately owned 38,000-gallon tank carloads of propane gas in 1974.

Iron City Sash & Door Co. stated that it has 32 employees whose jobs are dependent upon continued rail service. Most of Iron City's suppliers do not have facilities to ship by truck.

R. B. Crowell & Son, Inc., at Manchester shipped 34 carloads in 1972, 22 carloads in 1973 and 49 carloads in 1974, all of which were grain shipments to Baltimore. They would have cost \$15,600 more if shipped by truck. R. B. Crowell suggested that its section of Line No. 1022 could be made a spur of the PC line from Geneva to Canandaigua.

ITE Imperial Corp. recommended that a connecting track be constructed to link shippers in Farmington and Victor to Line No. 98, the PC line from Victor to Canandaigua. ITE stated that the Farmington and Victor traffic would make Line No. 98 viable.

Ryans Homes reported it shipped 175 carloads in 1973, 215 in 1974, and expects to ship 330 carloads in 1977.

Consideration must also be given to the total revenue that would be lost to ConRail if this line is not included in the Final System Plan. In 1973, the 3,163 cars on this line generated a total revenue of \$1,236,445; only \$403,853 was attributed to the line.

Information for Line-Transfer Decision

Revenue received by LV.....	\$88,701
Average revenue per carload.....	<u>\$131</u>
Variable (avoidable) cost of continued service:	
Cost incurred on the branch line.....	334,713
Cost of upgrading branch line to FRA Class I: (1/10 of total upgrading cost)	0
Cost incurred beyond the branch line....	50,058
Total variable (avoidable cost).....	<u>384,771</u>
Net contribution (loss) : total.....	(296,070)
Average per carload.....	(436)

This line would require no upgrading to meet the requirements of the Federal Railroad Administration's minimum safety standards (Class I track, which has a maximum safe operating speed of 10 m.p.h.).

Geneva traffic was erroneously credited to this segment in the PSP. None of the Geneva shippers is within the milepost limits. These shippers will continue to receive service.

It was suggested that the LV traffic at Victor be added to the PC traffic at Victor (Line No. 98). There is no connection between the two lines and construction of such a connection would require more than 2 miles of track. The level of the involved traffic does not justify the required expenditure.

Service to this line generated a loss of \$296,070 in 1973. Recovery of this loss would require approximately an eightfold increase in traffic or a 334-percent rate increase. Although the shippers served by this line have provided information indicating some traffic growth, the projected traffic level is significantly less than that required for viability.

Disposition

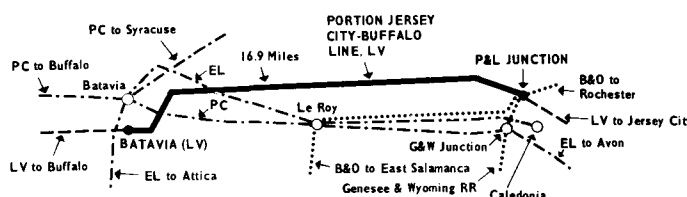
This portion of the Jersey City-to-Buffalo line is *not* designated for transfer to Consolidated Rail Corp. and is available for subsidy pursuant to section 304 of the

Act. Public officials have recommended that certain rail rights-of-way be used for other public purposes if rail service is discontinued. For line-specific recommendations, see section C of this appendix.

PORTION OF THE JERSEY CITY-BUFFALO LINE

USRA Line No. 1023

Lehigh Valley



This portion of the Jersey City-Buffalo line extends from *P. & L. Junction* (Milepost 394.1) to *Batavia, N.Y.* (Milepost 411.0), a distance of *16.9 miles*, in Genesee, Monroe and Livingston Counties, N.Y. At *P. & L. Junction* the line continues eastward to Geneva (see Line Nos. 1025 and 1022), and at Batavia it continues westward to Buffalo (see Line No. 1024). At *P. & L. Junction* the line connects with the Genesee & Wyoming RR and the Rochester Branch of the Baltimore & Ohio. Batavia is also served by the PC and EL.

Traffic and Operating Information

Stations (with their 1973 carloads) served by this line:

Batavia	312
Total carloads generated by the line.....	312
Average carloads per week.....	6.0
Average carloads per mile.....	18.5
Average carloads per train	3.0
1973 operating information:	
Number of round trips per year.....	104
Estimated time per round trip (hours).....	7.0
Locomotive horsepower.....	1,500
Train crew size.....	4

Public Comments on Preliminary System Plan

International Salt Co. is located on the Genesee and Wyoming Railroad (G&W) at Retsof. The G&W connects with the EL at Greigsville, with the PC (Line 112) at G&W Junction, and with the LV (Line 1023) at P&L Junction. International Salt noted that if EL becomes a part of ConRail, G&W customers will no longer have a choice of connecting lines.

The LV noted that 4,996 carloads of International Salt's traffic were interchanged at P&L Junction in 1973 and 6,799 carloads in 1974. With the exception of 182 carloads in 1973, this traffic moved east over

EXHIBIT C

[contents of Exhibit C have been redacted]

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of April, 2023, I caused a copy of the foregoing Joint Motion to Dismiss to be served on the persons listed below by email as indicated.

Allison E. Bartlett
Harter Secrest & Emery LLP
1600 Bausch & Lomb Place, Rochester, NY
14604-2711
abartlett@hselaw.com

George Heltz
6966 Morgan Circle
Victor, NY 14564
heltzgeorge@gmail.com

Douglas A. Fisher
P.O. Box 30592
Rochester, NY 14603
dglsfshr@gmail.com

/s/ Eric M. Hocky

Eric M. Hocky
CLARK HILL PLC
Two Commerce Square
2001 Market St.
Suite 2620
Philadelphia, PA 19103
(215) 640-8523
ehocky@clarkhill.com