

July 11, 2017

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BY E-FILING

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

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243937

ENTERED
Office of Proceedings
July 11, 2017
Part of
Public Record

**RE: STB Docket No. AB-55 (Sub-No. 643X), CSX Transportation, Inc.,
In La Porte, Porter and Starke Counties, IN
Petition to Reopen Offer of Financial Assistance Proceeding**

**FD 36076, Chesapeake And Indiana Railroad Company
Petition for Declaratory Relief**

Dear Ms. Brown,

I am writing on behalf of the Chesapeake and Indiana Railroad Company ("CKIN") to respond to the "Reply in Opposition" submitted by the Town of North Judson dated July 7, 2016, in this increasingly acrimonious proceeding.

Rather than respond to the substantive arguments that CKIN has made on account of newly obtained evidence received from discovery responses, all the Town could do is (1) ask for CKIN's pleading to be rejected as late filed and (2) argue that the regulation's narrow standard of "redundant, irrelevant, immaterial, impertinent, or scandalous matter" does not cover material misrepresentations.

In the interest of all complete record and as a matter of fairness and due process, CKIN respectfully petitions the Board for leave to accept as timely its petition for reconsideration as well as this letter. To the extent that the Board

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views the Town's letter as a "Motion to Strike", it should treat CKIN's letter as an appropriate and allowable response. 49 CFR 1104.13(a).

As the Board will note, the decision denying CKIN's petition was a "late release" dated May 31, 2017. Accordingly, I did not see it until late that day or even the following morning. I advised the client of the decision the next morning. The Board's regulation merely states that "Petitions must be filed within 20 days after the service of the action or within any further period (not to exceed 20 days) as the Board may authorize." 49 CFR 1115.3(e). It does not indicate whether the time begins to run on the day of the decision's issuance or the next day as the first day for the "20-day clock." In view of the late release, CKIN's Petition was filed on the afternoon of June 20, 2017, 20 twenty-four hour days following the decision's release.

Additionally, CKIN notes that had it requested a one day delay for its submission, the Board would likely have granted that request. It also notes that when the Town had asked CKIN to consent to an extension to respond to its Petition to Reopen and for Declaratory Relief until December 27, 2016, CKIN was more than happy to accommodate that request. Finally, CKIN advises the Board that the Town has been extremely tardy in its responses to CKIN's pleadings and discovery request in the civil litigation and CKIN has been more than patient with the Town in that litigation.

CKIN's review of the agency's website indicates that other parties litigating matters before the Board have interpreted 49 CFR 1115.3(e) as CKIN has with the result that "20-day clock" did not start to run until the day *after* the decision was released. For example, in FD 35832, *CSX Transportation, Inc.-Petition for Declaratory Order*, CSX sought reconsideration of a Board decision issued on July 31, 2015. CSX's reconsideration petition was dated August 20, 21 calendar days after the issuance of the Board decision. August 19 was a Wednesday and not a holiday so this is not a case where the due date fell on a weekend or holiday with the result the pleading was due the next business day. A review of the pleading, the resulting reconsideration decision, and the filings made in the case do not

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indicate any request for an extension to permit the August 20 filing. Copies of the relevant pages of CSX's petition are attached.

A review of rules of practice of the federal courts and other federal agencies indicates that the due date for a decision served on May 31 would also be June 20 if June 20 is a weekday. For example, Rule 6 of the Federal Rules of Civil Procedure provides:

“(a) Computing Time. The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

(1) Period Stated in Days or a Longer Unit. When the period is stated in days or a longer unit of time:

(A) *exclude* [emphasis supplied] the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.” FRCP §6(a)(1)(A).

Similarly, the rules of practice of another federal licensing agency, the Federal Communications Commission, state:

“(a) Purpose. The purpose of this rule section is to detail the method for computing the amount of time within which persons or entities must act in response to deadlines established by the Commission. It also applies to computation of time for seeking both reconsideration and judicial review of Commission decisions. In addition, this rule section prescribes the method for computing the amount of time within which the Commission must act in

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response to deadlines established by statute, a Commission rule, or Commission order.”

“(b)General Rule - Computation of Beginning Date When Action is Initiated by Commission or Staff. Unless otherwise provided, the first day to be counted when a period of time begins with an action taken by the Commission, an Administrative Law Judge or by members of the Commission or its staff pursuant to delegated authority is *the day after the day* on which public notice of that action is given. See § 1.4(b) (1)-(5) of this section. Unless otherwise provided, all Rules measuring time from the date of the issuance of a Commission document entitled “Public Notice” shall be calculated in accordance with this section.” 47 CFR §1.4.

Accordingly, it would be normal for any attorney to assume that the due date for CKIN’s petition for reconsideration is June 20, the date of its filing. Furthermore this proceeding does not involve any sort of emergency where time could be regarded as “of the essence.” Accepting CKIN’s filing on June 20 instead of June 19 will not delay these proceedings or broaden the issues. Indeed it will be consistent with the spirit of the Board’s policy that “the rules will be construed liberally to secure just, speedy, and inexpensive determination of the issues presented.” 49 CFR 1100.3.

Turning to the merits, CKIN has clearly established that the Town’s submissions along with those of the Hoosier Valley Railroad Museum range from internally inconsistent to false. CKIN could not have furnished this information at an earlier date because of the delays it encountered in obtaining discovery responses from these two parties. Had the Board had the benefit of this information, CKIN contends it would have ruled differently. As a minimum it would and should have instituted a proceeding to learn more about the impact their actions have had on CKIN’s ability to perform its common carrier service. Moreover, the Town’s only response to these inconsistencies and misrepresentations is that the Board is powerless to act insofar as these allegations

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do not fit within the narrow categories of “redundant, irrelevant, immaterial, impertinent, or scandalous matter.”

CKIN appreciates the Board’s time and attention to this request.

Sincerely yours,



John D. Heffner

Its counsel

cc: service list

CERTIFICATE OF SERVICE

I, John D. Heffner, hereby certify that a copy of the foregoing "Reply to Town of North Judson was sent by electronic mail to all parties of record in this proceeding.

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John D. Heffner

Dated: July 11, 2017



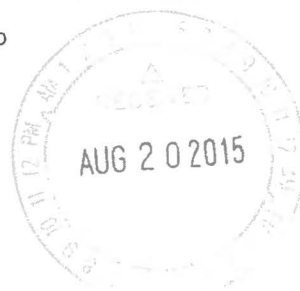
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August 20, 2015

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By Hand-Delivery

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

ENTERED
Office of Proceedings
August 20, 2015
Part of
Public Record

Re: CSX Transportation, Inc. – Petition for Declaratory Order
STB Finance Document No. 35832

Dear Ms. Brown:

Enclosed for filing in the above-referenced matter is an original and ten copies of CSX Transportation, Inc.'s ("CSXT's") Petition for Reconsideration and/or Clarification along with three disks containing the Petition in pdf searchable format. Our check for \$300.00 for the cost of filing is also enclosed.

Please date-stamp the extra copy and return it to our messenger. Thank you for your assistance in this matter. If you have any questions, please contact the undersigned.

Sincerely,

Marc A. Korman

Enclosures

FILED
August 20, 2015
Surface Transportation Board

FEE RECEIVED
August 20, 2015
Surface Transportation Board

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35832

AUG 20 2015

CSX TRANSPORTATION, INC.
—PETITION FOR DECLARATORY ORDER

CSX TRANSPORTATION, INC.'S PETITION FOR
RECONSIDERATION AND/OR CLARIFICATION

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Counsel to CSX Transportation, Inc.

Dated: August 20, 2015

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 35832

**CSX TRANSPORTATION, INC.
– PETITION FOR DECLARATORY ORDER**

**CSX TRANSPORTATION, INC.’S PETITION FOR
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Counsel to CSX Transportation, Inc.

Dated: August 20, 2015

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35832

CSX TRANSPORTATION, INC.
– PETITION FOR DECLARATORY ORDER

CSX TRANSPORTATION, INC.'S PETITION FOR
RECONSIDERATION AND/OR CLARIFICATION

I. INTRODUCTION

CSX Transportation, Inc. ("CSXT") hereby requests that the Surface Transportation Board ("STB" or "Board") reconsider, or clarify, its July 31, 2015 Decision ("Decision") denying CSXT's Petition for a Declaratory Order.

In its Decision, the Board correctly stated that "there is abundant case law addressing preemption of state and local claims involving railroad design, construction, and maintenance." *Id.* at 3. Indeed, after CSXT filed its Petition, the Board issued its well-reasoned and directly applicable decision in *Thomas Tubbs, et al. – Petition for Declaratory Order*, Docket No. 35792 (served Oct. 31, 2014) ("*Tubbs*"). Addressing nearly identical claims, the Board declared those state claims categorically preempted by the ICC Termination Act ("ICCTA"), 49 U.S.C. § 10501(b). CSXT respectfully submits that it is unquestionably clear that under *Tubbs*, HAMP's state law claims for negligence, trespass, nuisance, and inverse condemnation are also categorically preempted because,