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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. AB-55 (Sub-No. 643X)

ENTERED
Office of Proceedings
January 13, 2017
Part of
Public Record

**CSX TRANSPORTATION, INC.—ABANDONMENT EXEMPTION—
IN LAPORTE, PORTER AND STARKE COUNTIES, IN**

**CHESAPEAKE AND INDIANA RAILROAD COMPANY
PETITION TO REOPEN
OFFER OF FINANCIAL ASSISTANCE PROCEEDING**

FD 36076

**CHESAPEAKE AND INDIANA RAILROAD COMPANY
PETITION FOR DECLARATORY RELIEF**

**PETITION FOR LEAVE TO FILE A REPLY
AND PETITIONER'S REPLY TO RESPONDENTS**

Submitted by

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Due: January 17, 2017

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I.

INTRODUCTION

On November 14, 2016, Chesapeake and Indiana Railroad Company (“CKIN” or “Petitioner”), a Class III short line railroad operating in the State of Indiana, filed a Petition seeking reopening of the above-captioned offer of financial assistance (“OFA”) proceeding and/or declaratory relief. There CKIN sought this relief because it believed that the 2004 acquisition and ownership of a line of railroad by the Town of North Judson (“the Town”) under the OFA procedures was

contrary to the requirements of 49 U.S.C. §10904(d)-(f) as well as the rail transportation policy (“RTP”) goals of the ICC Termination Act (“ICCTA”) and the policies of the Board. Accordingly, it asked the Board to void the Town’s acquisition of the line and to order the Town to sell the line to CKIN at a price to be established through Board-supervised negotiations. Alternatively, CKIN requested that the Board institute an investigation to determine whether the Town’s ownership and administration of the line violate the RTP goals and Board precedent. Should the rail carrier selected by the Town to replace CKIN as its operator seek authority by a class exemption, CKIN requested that the Board reject that exemption as controversial and therefore not suitable for the expedited class exemption procedures of 49 CFR§ 1151.31.

Four parties have replied in opposition including the Town, the Indiana Department of Transportation (“INDOT”), the Chicago & North Judson Railway Company (“CNJR”),¹ and the Hoosier Valley Railroad Museum (“HVRM”).² CKIN submits with this Reply the rebuttal verified statement of its president Powell Felix.

CKIN believes that this case warrants Board intervention. Not only does the case present a question of first impression, whether the Board can require the

¹ A noncarrier and newly established affiliate of Lake State Railway, a Michigan-based Class III short line railroad.

² Collectively “Respondents.”

reconveyance of a line improperly acquired under its offer of financial assistance procedures. But it also presents a unique issue involving the conflicting needs and priorities between excursion passenger service and common carrier freight service.

CKIN has served a request for documents upon one party, CNJR, and requests the opportunity to submit additional evidence or argument as appropriate upon receiving CNJR's documents.

II. PETITION FOR LEAVE TO FILE A REPLY

CKIN acknowledges that Board procedures generally do not allow parties to file a "reply to a reply." However, the Board has frequently waived that rule allowing parties to submit a rebuttal in the interest of compiling a complete record. *City of Woodinville, Wash.-Petition for Declaratory Order*, FD 35905 (STB served Oct. 7, 2015). Such is the case here. Respondents' pleadings contain so many inaccurate and conflicting statements that CKIN urges the Board to accept this filing to set the record straight.

III. STATEMENT OF FACTS

Inasmuch as IBCX's Petition had presented a thorough recitation of the facts, they will only be repeated here to the extent necessary for the Board's understanding of this dispute. This proceeding involves a 32.97 mile long rail line ("the Line") formerly owned and operated by CSX Transportation ("CSX") that

extends from milepost CF 0.63, at LaCrosse, to milepost CF 15.23, at Wellsboro, and from milepost CI 212.55, at North Judson, to milepost CI 230.92, at Malden, in LaPorte, Porter and Starke Counties, IN. After CSX had obtained authority to abandon the Line, the Town acquired it in 2004 through an OFA representing that it desired to continue common carrier railroad service over it and selected CKIN as its operator. CKIN and the Town negotiated an Operating Agreement (“the 2004 Operating Agreement”) that was extended through December 31, 2015, and more recently through August 15, 2016, when it expired. The 2004 Operating Agreement granted CKIN the exclusive right to provide local common carrier freight service and gave the Hoosier Valley Railroad Museum (“HVRM”) the right to use the Rail Line in common with CKIN, consistent with safety, liability and regulatory considerations, for passenger excursion operations. To finance that acquisition, the Town used \$1,500,000 of Transportation Enhancement Funds provided in substantial part by the Federal Highway Administration to INDOT with \$300,000 furnished by the predecessor of Co-Alliance, Inc. (“Co-Alliance”), the principal on-line customer, and the balance by three counties served by the Line.

This arrangement continued on a satisfactory basis until 2014 when the relationship between CKIN and the Town deteriorated. *See* the initial verified statement of Powell Felix VS (“Felix VS”) at 2, attached hereto. In the

Spring of 2015, the Town advised CKIN that it would not renew the 2004 Operating Agreement upon its expiration and would seek a replacement operator. CKIN refused to terminate operations or seek discontinuance authority with the result that the Town initiated an adverse discontinuance proceeding by filing a petition for waiver with the Board and providing notice of a future application.³

Ultimately, CKIN and the Town agreed to mediate their dispute with Co-Alliance participating in the mediation session as well. The mediation resulted in a settlement document identified (“the Mediation Agreement”) CKIN believes the spirit (but not the wording) of the Mediation Agreement was that the Town would lease the Line to Co-Alliance for a new 10 year term. Co-Alliance would assume responsibility for contracting with a rail operator for the Line, and Co-Alliance’s preference was to attempt to negotiate new terms and conditions for CKIN to remain as the operator of the Line. Felix VS at pages 3-4. A Supplement to the Mediation Agreement also extended the 2004 Operating Agreement through August 15, 2016, allowing the Town to satisfy state requirements for a Request for Proposal solicitation, complete lease negotiations, and allow the lessee to obtain operating authority. But it was understood that the RFP would be written so narrowly as to favor Co-Alliance as the favored bidder. Felix VS at pages 3-4.

³ The Town has yet to file the Adverse Discontinuance Application. It states at page 12 of its Reply that it will file the application should CKIN refuse to terminate operations voluntarily.

On June 15, the Town initially published the RFP with a July 1 deadline for responses. Four entities including Co-Alliance submitted bids. Co-Alliance was not selected as one of the two finalists. Lake State, which had not previously expressed any interest in operating the Line, was.⁴ While the RFP purported to require the Town to consider the transportation requirements of Co-Alliance and other freight shippers located on the Line now or in the future, the RFP process appeared to elevate the needs and desires of HVRM for access to the Line for its excursion service over those of freight customers.

On October 31, 2016, CKIN initially filed suit against the Town in LaPorte County challenging the RFP process as improper and biased against its interest and contrary to the spirit of the Mediation Agreement.⁵ After CKIN amended the suit to add a tort claim, the LaPorte County Circuit Court denied the Town's motion to transfer venue to Starke County, IN.

IV. ARGUMENT IN RESPONSE TO POSITIONS OF THE OPPONENTS

⁴ Subsequently, Town chose one finalist, Lake State.

⁵ Initially the suit alleged that the Town allowed HVRM to dictate the carrier selection process *putting its needs above those of common carrier rail service and the on-line freight customers*, and *that it is entitled to substantial damages from the Town upon non-renewal or termination of the 2004 Operating Agreement*. A copy of the amended complaint is attached hereto as Exhibit A.

As noted above, four entities have challenged CKIN's request for relief as discussed below. While Co-Alliance has yet to take a position or formally participate in this proceeding, it had previously stated its satisfaction with CKIN's service.⁶ Moreover, Co-Alliance had stated in its RFP response that it desired to contract with CKIN to provide service as its agent if its lease proposal was accepted and if a satisfactory operating agreement could be reached. Co-Alliance RFP Response at pages 1 and 8, attached as Exhibit 3.

Indiana DOT. The gist of INDOT's position is that the Town's acquisition of the Line was in full compliance with Board OFA procedures and that CKIN's Petition presents no "new evidence" or "changed circumstances" warranting a reopening. More particularly, INDOT urges that the approval basis for an OFA is whether a continuation or restoration of freight service is likely to result not whether the OFA's primary purpose is the continuation of freight service. INDOT also asserts that there must be or must have been a "material misrepresentation" for the Board to be able to reopen a consummated OFA proceeding after the passage of a substantial period of time and no such misrepresentation or abuse of the Board's processes have been shown.

CKIN concedes that passenger service could be a basis for a successful OFA when considered as part of an overall service package including freight service.

⁶ See, Co-Alliance letter dated June 30, 2015, to the Board submitted as Exhibit 2 to the Petition and attached here as Exhibit 2.

Furthermore, the passage of 12 years is a long period of time between the date of consummation and an attempt to reopen it. However, INDOT's simplistic position overlooks the specific facts of this dispute. As Mr. Felix has stated, relations between CKIN, the Town, and HVRM were fairly harmonious until 2014. Prior to then, there was no need to question the purpose behind the Town's acquisition or challenge it at an earlier date. Rather this dispute must be viewed both from the context of current events as described at more length below and a comparison between the contractual arrangements that were in place between CKIN and the Town and those proposed to be put in place between CNJR, the Town, and HVRM. Felix RVS at 1.

The Town of North Judson. The Town asserts that a much narrower standard applies to reopening an OFA transaction consummated many years ago, namely whether there was fraud, mistake, or ministerial error. The long recognized and usual grounds for reopening a Board proceeding, namely new evidence, changed circumstances, or material error, will not suffice it believes. Claiming that no such fraud, mistake, or ministerial error exists to justify a reopening, the Town's reply argument contains numerous inaccurate assertions. For example, in support of its argument that parties acquiring rail lines through OFA's need administrative finality to insure that their investment will not be undermined, the Town states that it "has expended substantial sums in building up the rail traffic on

the line.” Not so. In fact, it was a very successful marketing effort by CKIN that resulted in the growth of on line traffic from a few hundred carloads in 2004 to the 4,000 plus handled today. The increase was due in part to CKIN establishing a connection to Norfolk Southern Railroad thereby providing customers with access to two Class I railroads, working closely with Co-Alliance to develop new markets for its grain, and obtaining state and federal funds to upgrade the railroad infrastructure including track upgrades to handle 286,000 pound freight cars. While the Town supported these efforts, it was CKIN that did the hard work. Rebuttal Verified Statement of Powell Felix VS (“Felix RVS”) at 3.

The Town also suggests that CKIN is using the wrong procedure to wrest the Line from it. Rather CKIN understands the Town to say that it should have filed a feeder line application under 49 U.S.C. §10907 not a petition for reopening or revocation. Superficially that sounds like an interesting idea. However, as counsel for the Town is well aware, a feeder application is a procedure intended for forcing an incumbent railroad providing an inadequate level of service to sell its line for proper compensation to a purchaser that will provide a better quality of service.⁷ The problem with this suggestion is that Co-Alliance has stated its satisfaction with the incumbent service provider, CKIN. *See* Co-Alliance letter dated June 30,

⁷ *Pyco Industries, Inc. – Feeder Line Application- Lines of South Plains Switching, Ltd. Co., Et Al*, FD 34890 (STB served Aug. 31, 2007).

2015, and Co-Alliance letter dated April 14, 2016 addressed to Rachel Arndt.⁸

While the Town does have a residual common carrier obligation by reason of its OFA acquisition,⁹ it provides no rail service and lacks the means to provide rail service. The Town again relies on fantasy to suggest that its efforts have “created a significant going concern value by increasing traffic and revenues so dramatically” and that it should be entitled to fair compensation for its efforts.

In fact, as the Board will recall, the 2004 acquisition was financed by INDOT using federal highway funds, the three counties, and a predecessor of Co-Alliance. The Town had “no skin in that game.” Subsequent rehabilitation was financed by a mixture of federal, state, local, and CKIN funds. To the extent that the Town contributed such funds, those were derived from revenues that CKIN paid the Town for its use of the Line under the revenue sharing provisions of the 2004 Agreement. And once again, any increase in going concern value from growing traffic and freight revenues is a function of CKIN’s hard work and Co-Alliance’s traffic. Felix RVS at 3.

The Town suggests that CKIN’s Petition is an indirect attempt to avoid paying the Town for the value of the Line as it would be required to under a feeder application. That’s false. CKIN is prepared to pay for the Line at a price to be

⁸ Attached hereto as Exhibits 2 and 4.

⁹ *CSX Transportation, Inc.-Abandonment Exemption-In Laporte, Porter, and Starke Counties, IN*, Docket AB-55 (Sub-No. 643X) (STB served May 14, 2004).

established through Board-supervised negotiations reflecting both the value of the assets and any improvements made by parties other than itself. Obviously it should not be expected to pay for any enhanced going concern value generated by its successful marketing efforts. Most likely, CKIN's payment would be to INDOT, the three counties, and Co-Alliance as the Town does not appear to have supplied any of the financing. Felix RVS at 1, 8.

The Town's *State of Maine* argument misinterprets CKIN's point. CKIN fully recognizes the fact that when the Town acquired the Line under the OFA procedures, it became a common carrier. *See*, note 8, page 10, *supra*. Rather the Town has violated the *State of Maine* doctrine and the ICCTA's common carrier obligation by giving HVRM an oversized voice in the administration of the Line, in effect contracting out its common carrier obligation to an unauthorized entity. As Mr. Felix has explained in his statement, the Town has allowed HVRM to operate excursion trains in violation of the settlement and without first consulting CKIN or Co-Alliance for their operational needs and by giving HVRM a role in drafting the 2015 Railroad Operating Agreement. Felix RVS at 2-4.

Finally, the Town argues that it is premature to determine whether the replacement operator, CNJR, can use the class exemption procedures for operating authority. The Town may be correct insofar as the Town has indicated that the replacement carrier will not seek operating authority until the Town files and wins

its adverse discontinuance proceeding. But more importantly, should CKIN prevail in its civil litigation against the Town, the Town may never get the opportunity to decide who gets to operate the railroad in the future.

While the Town claims the CKIN's Petition is "defective as a matter of law"¹⁰ and should be denied without any need to resolve factual disputes, it "in an abundance of caution" goes to the effort of submitting a verified statement by Town Council member Wendy Hoppe. Powell Felix addresses Ms. Hoppe's many factual misstatements and inaccuracies in his rebuttal statement at 6, 7.

Chicago & North Judson Railway. CNJR filed a short five page comment accompanied by an "Operating Protocols Agreement" dated December 22, 2016, and signed by HVRM but not by CNJR, and another document entitled "Joint Freight and Tourist Passenger Operating Protocols" between CNJR and HVRM. Simply put, CNJR asserts that "reasonable accommodation of common carrier freight and passenger excursion operations on the Line is not the conundrum that CKIN would create. CKIN would wholeheartedly agree with CNJR *if* it had the sort of agreement and operating protocols with HVRM that CNJR appears to have. Indeed, there is nothing incompatible between common carrier freight service and rail passenger service generally if the right operating procedures and contractual arrangements are in place. Felix RVS at 4, 8.

¹⁰ Town's Reply at 13.

As Mr. Felix notes in his rebuttal statement comparing the provisions of the 2004 Operating Agreement and the draft 2015 Railroad Operating Agreement with the Operating Protocols Agreement and the Joint Freight and Tourist Passenger Operating Protocols, they are very different documents. CKIN has long sought to have HVRM execute a written agreement delineating liabilities and responsibilities between it, the Town, and CKIN. Counsel for CKIN specifically remembers having such a telephone conversation months ago with counsel for the Town on this very topic and being told that one was being drafted. Moreover, CKIN's insurance broker had advised CKIN that HVRM's insurance would not provide CKIN with proper protection in the event of an accident involving HVRM absent a written agreement granting HVRM a right of access to the Line. Felix RVS at 4-6. CKIN has been waiting for such an agreement for as much as 18 months. Furthermore, CNJR had obtained the sort of protections and liability allocation arrangements with HVRM that HVRM's railroad counsel had refused to even consider in a conversation with CKIN counsel. CNJR asserts that it does not know the reason or reasons for the inability or unwillingness to develop these kinds of cooperative and mutually beneficial arrangements. And neither does CKIN. So the bottom line is that if CKIN had been afforded the same conditions that the Town and HVRM have granted CNJR, nothing in those arrangements would have

elevated the needs and desires of passenger excursion interests over the need for common carrier freight service. But such is not the case.

Hoosier Valley Railroad Museum. HVRM devotes its argument and the accompanying verified statement of its Treasurer Mark Knebel to a series of factual issues including train and track safety, HVRM's use of the Line and impact on shipper service, HVRM's involvement in the RFP process for lessee selection, and the new operating protocols. CKIN realizes that these "he said...she said" factual disputes are generally not matters for the STB's consideration. CKIN merely raised them initially and on rebuttal here to show how the Town's administration of the Line has adversely affected CKIN's ability to perform common carrier freight service and elevated HVRM's needs over shipper needs for reliable freight service. While Mr. Felix addresses these matters in more detail in his statement, CKIN offers the following observations:

- HVRM would have the Board believe that its operations are safe beyond reproach and that all blame lies with CKIN. In fact, CKIN will submit under seal a confidential legal opinion prepared for settlement purposes by James Helenhouse, Esq., of the same law firm that is representing CNJR in this matter. The opinion concludes that the derailment was caused by HVRM's negligence in overloading the tender of a steam locomotive hauling an excursion train, not CKIN track maintenance. The opinion also questions the safety of using open air rail cars fitted with benches for passengers. Mr. Felix references at page 5 of his initial verified statement attached hereto a recent incident involving a fire on and evacuation from an HVRM train that could have had severe safety consequences.
- HVRM challenges CKIN's statement that HVRM has "unfettered rights" to operate passenger service on the Line. HVRM claims that

in 2016 it was limited to operating just 73 trains on only 31 days. HVRM is correct in this assertion but it failed to explain why. The Mediation Agreement entered into between CKIN, the Town, and Co-Alliance specifically states that there shall be no passenger service during the extension period in this Agreement. The May 12, 2016, Supplement further provides that HVRM shall not provide any passenger service outside the North Judson to English Lake segment except with the written consent of both the Town and CKIN.

Furthermore, HVRM must submit written requests to the Town and CKIN at least 30 days in advance of a trip and only two requests will be entertained. Copies of these documents are attached hereto as Exhibits 5 and 6. During that period CKIN voluntarily and as a showing of its good faith accommodated HVRM requests on several occasions. HVRM's dissatisfaction with the restrictions imposed by those agreements should be addressed to the Town rather than to it.

- HVRM states that it has never received any complaints regarding freight interference from a shipper. Why would it? HVRM is not in the business of hauling freight and has no relationship with the on line customers. However, CKIN's customers have expressed concerns over passenger-related interference on their freight service. *See*, April 14, 2016 Co-Alliance letter to Rachel Arndt, pages two and three. Exhibit 4.
- HVRM claims it has had NO [emphasis supplied] role in selecting a new operator for the Line. A review of evidence filed in this proceeding including Ms. Hoppe's own statement suggests otherwise. The Amended RFP specifically states at sec. 5.1 that the Town may invite members from the Museum and the North Judson Railroad Committee essentially consisting of HVRM Secretary Mark Knebel to participate in the review of some or all of the sections of the proposals.¹¹ Town attorney Rachel Arndt stated in a letter to Paul Didelius of Frontier Rail, an unsuccessful bidder to operate the Line, that Town Representative Mark Knebel is authorized to share the proposed operating agreement with Mr. Knebel.¹² And Ms. Hoppe states in paragraphs 19 and 20 of her statement that HVRM was given a "small role" in selection following the formal RFP process and that

¹¹ Pertinent pages attached as Exhibit 7.

¹² November 20, 2015, letter attached as Exhibit 8.

HVRM was allowed to provide input in the process; however, the carrier the Town selected was not HVRM's top choice.¹³

Finally, CKIN notes with interest Mr. Knebel's assertion that the protocols agreed to by HVRM and the proposed new operator [CNJR] would make its operations "not profitable enough" (in his words), those protocols confirm that "this can be done."¹⁴ CKIN agrees. Had those very protocols been in effect between CKIN and HVRM, this proceeding might never have been instituted by CKIN. Felix RVS at 8.

Before concluding, CKIN wants to focus once again on the relationship between common carrier freight service and excursion passenger service. CKIN believes that the Town and HVRM have improperly elevated passenger needs over freight service. The significance of the evidence presented about the relationship between CKIN and HVRM and the future relationship between CNJR and HVRM illustrates how CKIN's ability to provide common carrier service became subordinate to HVRM's operations. The new CNJR/HVRM relationship makes clear that HVRM's service will be subordinate to CNJR's ability to provide common carrier service and that is a central issue in this dispute. While Co-Alliance has not formally participated in these proceedings, it has made its views known in its letters dated June 30, 2015, and April 14, 2016, where it states "the

¹³ Pertinent pages attached as Exhibit 9.

¹⁴ Pertinent pages attached as Exhibit 10.

Town has the ultimate responsibility to ensure that the statutory common carrier obligation to provide freight service is fulfilled.” Moreover, Co-Alliance asserted there its position that enabling common carrier freight service is the primary function of this line of railroad in the eyes of the STB in line of the Town’s OFA acquisition. Furthermore, Co-Alliance had advocated execution of a written agreement between the Town, the operating carrier, and HVRM controlling freight and passenger operations some 8 months before the December 22 Operating Protocol Agreement was prepared.¹⁵

V. CONCLUSION

After considering the positions taken by the Respondents and the views expressed by Co-Alliance in the above-referenced letters, CKIN moves the Board to accept this Reply and the Rebuttal Statement of Powell Felix and to reopen the OFA proceeding, revoke the Town’s authority to acquire the Line, and to direct the Town to convey it to CKIN at a price to be established through Board-supervised negotiations. Alternatively, CKIN should institute a proceeding and investigation to determine whether the Town’s ownership and administration of the Line satisfy ICCTA’s rail transportation policy goals and the Board’s common carrier precedent. Should Lake State seek operating authority by means of a class

¹⁵ See footnote 13, *supra*.

exemption, CKIN requests that the Board reject that exemption on the grounds that this matter is controversial.

Respectfully submitted,



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Due: January 17, 2017

CERTIFICATE OF SERVICE

I, John D. Heffner, hereby certify that a copy of the foregoing Chesapeake & Indiana Railroad Company Petition to Re-Open and Petition For Declaratory Relief dated January 17th, was sent by electronic mail to all parties of record in this proceeding.

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John D. Heffner

Dated: January 17, 2017

VERIFIED STATEMENT OF R. POWELL FELIX

I, R. Powell Felix, President of Chesapeake and Indiana Railroad Company, being duly sworn, does hereby depose and state the following:

I want to open by stating that the first several years of the operations were full of challenges, but also relative cooperation between Chesapeake and Indiana Railroad Company (CKIN) and the Town of North Judson (Town) including the Hoosier Valley Railroad Museum (HVRM). This mutual cooperation was essential in preventing the outright abandonment of the rail line. The Town and HVRM did contribute "sweat equity" toward the initial coalition that banded together to acquire the rail line. The resulting funding of the purchase saw Indiana DOT, LaPorte County Coop (predecessor to Co-Alliance), Porter County, LaPorte County and Starke County all make direct funding contributions to the acquisition. CKIN was selected through an initial RFP process that correctly envisioned that CKIN's financial contribution would come through staying with the operation through the initial money losing years. The RFP that selected CKIN was also predicated on a multi-governmental agency to be formed to be administrator of the ownership aspects of the rail line, similar to other such "port authority" entities in Indiana. A last minute glitch of having to quickly close on the purchase prior to having this port authority structure in place resulted in the deed from CSX being made out to the Town, even though the Town had not directly contributed any funds into the acquisition pot.

Post-acquisition, the focus was initially on simple survival, resurrecting a rail line suffering from deferred maintenance and inadequate traffic. The initial relationship between CKIN and HVRM was far from adversarial. For example, CKIN moved several pieces of acquired rolling stock into HVRM at no cost and there was reciprocity shown when HVRM permitted CKIN to borrow a HVRM flat car for maintenance of way use. As traffic began to grow, this required increased investment by the primary customer, Co-Alliance, in their facilities. Likewise, CKIN began increasing investment in the track infrastructure, brought in additional locomotives and hired more employees.

The original Railroad Operating Agreement (ROA) was not flawed, having been drafted to serve as a framework, not to predict the future. It encouraged the capital investment by both Co-Alliance and CKIN, with CKIN counting on the stated provisions of the ROA to fairly compensate CKIN for the capital investment in items such as ties and rail that obviously could not be removed if, or when, CKIN was no longer the operator. The ROA was renewed twice after its initial

term without acrimony among CKIN, the Town or HVRM. It is important to note that the Town was essentially passive in the administration of the ROA. The heavy lifting of growing the traffic and making the requisite capital investments fell squarely to Co-Alliance and CKIN.

The Town was represented by elected representatives, and over several years, there were more new representatives that had not been involved in the initial effort to save the rail line from abandonment, or the drafting of the ROA. CKIN was able to accommodate HVRM passenger operations since the primary point of overlapping contact was limited to only LaCrosse. Over time, HVRM increasingly sought to expand their operations beyond the North Judson to LaCrosse segment. Unfortunately, CKIN did not observe the hoped for development of maturity in HVRM's operating ability that would warrant expanded operations. A telling example of this was when HVRM elected to operate a special passenger train beyond LaCrosse to Wade Tower, even though the passenger train knowingly traversed what was then Excepted Track per FRA standards. The FRA became aware of this incident and has since pointedly stated no passenger operations on Excepted Track in subsequent waivers granted HVRM by FRA.

A turn for the worse in the CKIN – HVRM relationship occurred when there was a minor injury to two HVRM passengers in an incident in 2011. The incident pointed to the need for all the parties to upgrade their efforts to ensure passenger safety. Normally, very minor injuries such as this would be settled without recourse to the courts, and it would be incumbent upon HVRM to work with their insurer to foster that outcome. Nonetheless a lawsuit was filed, and shortly before the expiration of the statute of limitations, CKIN was named by plaintiffs as an additional defendant in 2013. This resulted in CKIN discovering the inadequacies of the liability insurance coverage of HVRM. It also pointed to the need to update items in the initial ROA, including the fact that HVRM, while mentioned within the ROA, was not a party to the ROA.

One might think that the Town and CKIN would share the same concerns about the clear inadequacy of HVRM's liability insurance, since the Town, as the owner of the rail line, has exposure to claims similar to CKIN. CKIN had voluntarily raised its liability coverage limit from the \$5 million level initially required in the ROA to the \$10 million level. This increase is more costly than the required minimum, but necessary and simply prudent business. Yet the Town refused to support repeated requests by CKIN to have HVRM, with the greater exposure to

potential liability of carrying passengers, increase their insurance limits beyond \$2 million. CKIN was left alone with the knowledge that, regardless of the nature of any incident that resulted in a liability claim, the sue everyone mentality, left CKIN with the bullseye on our back with the much higher limits.

The intransigence of the Town to address the issue of HVRM's inadequate liability insurance level and corresponding coverage level continued to sour the relationship among the parties. Further complicating the issue was the increasing demands of HVRM to expand its operation beyond North Judson to LaCrosse. HVRM wanted to operate to Malden and Hanna, never mind that getting to those locations would require passenger operations on FRA Excepted Track. In spite of the fact CKIN had spent the past decade investing in improving over half the freight handling portion of the rail line (Wellsboro to Malden) from Excepted Track level to the higher FRA Class 1 track status, this was not sufficient progress to satisfy HVRM nor the Town.

There is no question that CKIN would wish to have all the entire rail line improved to Class 1 track standards. However, there are additional requirements for upkeep of the infrastructure. CKIN was also charged with keeping the many bridges on the rail line repaired to accommodate 286,000 pound load capacity necessary for competitive freight movement. Siding capacity had to expand from train lengths of 65 cars, which existed when the ROA was first signed, to the new standard of 90 cars. All this required capital investment, which CKIN continued to make. CKIN's revenue from freight, coupled at times with direct contributions from Co-Alliance, was leveraged with partial grant funding from INDOT to address some of these needs.

The Town was well aware of the traffic growth, and the greatly enhanced infrastructure that this effort of Co-Alliance and CKIN were producing. Train frequency was greatly increased to accommodate the extra traffic. CKIN made every attempt to explain to the Town that the good fortune of increased freight traffic would require greater coordination of accommodating HVRM passenger movements. There are operational complexities that simply cannot be overlooked. For example, even supposing the track from LaCrosse to Malden met Class 1 standards and could accommodate HVRM passenger trains, there is but a single siding at Malden (other than private trackage within the Co-Alliance facility), and no other sidings between LaCrosse and Malden. When Malden is loading a unit train, much of the train must remain on the main track, preventing HVRM from reversing their locomotive from one end of their train to the other as

is accomplished at LaCrosse. Thus, HVRM would either have to back their train the 8 miles from Malden to LaCrosse, or CKIN could have no trains at Malden. The suggestion that CKIN can easily accommodate scheduling trains to avoid any potential conflicts with expanded passenger operations ignores the real world reality of railroading. Forgotten by the Town and HVRM is the fact that it is ultimately the increased freight traffic that has generated the funding used to upgrade and maintain the rail line in the first place. It is not the revenue from passenger ticket sales.

CKIN has not, and does not, contend that tourist passenger operations should be excluded from the rail line. However, simplistic protocols that represent that the operation of a passenger train involves but a few minutes of track occupancy time is not reflective of reality. The Board is well versed in this aspect, having to deal with the same issue concerning Amtrak and the freight railroads it operates upon. Contrary to HVRM's representations to the FRA in their waiver request, CKIN does regularly and frequently operate on weekends.

At this point I should inject that I have no predisposition against passenger or tourist operations on any of Indiana Boxcar's railroads. I have been a member of the Whitewater Valley Railroad, a tourist railroad based in Connersville, Indiana, since the 1970's. I've personally visited and rode on scores of various passenger and tourist operations throughout the nation. Last year, CKIN's affiliated railroad, the Youngstown and Southeastern Railroad, hosted a rail fan event sponsored by NARCOA. I support the entire railroad industry, both freight and passenger. The freight railroads I am involved with are for-profit businesses, and it is not unreasonable for them to require safety, regulatory compliance, and liability coverage of passenger operations that wish to share the same tracks.

This brings CKIN to the stipulation in the Mediation Agreement, executed and approved by the Town, that stated no passenger trains shall operate during the extension of the ROA term. Clearly this was directed at HVRM, but not out of malice. At the time the Mediation Agreement was negotiated in December 2015, HVRM's liability insurance had not changed in several years, remaining at the \$2 million level with policy language not providing reasonable coverage to either CKIN or the Town. The intent of the item in the Mediation Agreement was to require addressing these deficiencies before the passenger operations resumed. Notwithstanding the requirement to address the insurance deficiencies, HVRM proceeded to publish their 2016 schedule. The first conflict to arise was the Easter weekend passenger train that came down to the wire in meeting the

insurance mandate. Just 4 days prior to the HVRM event, CKIN received a Certificate of Liability Insurance from HVRM indicating the coverage amount had been increased to the requisite \$10 million level, and CKIN permitted the HVRM train to operate. It was not until after this Easter weekend event that CKIN learned that, while the insurance amount had changed, the underlying policy remained the same and did not afford CKIN the required coverage that is usual and customary for passenger operations on freight railroads. According to our insurance broker, what was missing and was necessary to protect CKIN from claims against HVRM was a written agreement giving HVRM a right of access to the Town's rail line.

CKIN was very disappointed at the lack of willingness by HVRM to address the insurance coverage issue, or even to execute any written agreement with CKIN that would spell out the legal relationship between the two parties sharing the same track. Yet HVRM, with the support of the Town, continued to advertise their train schedule and bombard CKIN with notices of their intended operations over track shared with CKIN. CKIN was being painted as the bully for not permitting the passenger trains to operate, even though the Mediation Agreement was extended, due the Town's failure to progress a RFP with the same provision prohibiting passenger operation. Thus, on May 3, 2016, CKIN provided the FRA with the requisite notice of physical separation of CKIN's freight operation from HVRM's passenger operations with the installation of a locked derail at English Lake. This permitted HVRM to conduct their passenger trains on what had been the primary segment of their scheduling. CKIN was not required to make this accommodation, yet even after making another in a long line of such concessions, once again, HVRM publicly blamed CKIN as an obstructionist to their operations.

CKIN was quite surprised to see the Operating Protocols Agreement (OPA) submitted by the Chicago & North Judson Railroad in this proceeding. Given HVRM's refusal to execute any agreement directly with CKIN in spite of years of request to do just that, HVRM now presents a signed agreement addressing the host of areas that were never previously acknowledged by HVRM. Indeed, while the Exhibit One to the OPA oversimplifies matters and might need additional work if implemented in conjunction with CKIN, the base agreement is essentially as satisfactory for CKIN as it may be for CNJR.

The submission of the OPA does pose some telling questions that should be considered in the present CKIN filing. CKIN's first question would be, is the

document a draft or a completed agreement? The opening paragraph indicates it is dated as December 22, 2016 and the "In Witness Whereof ..." closing indicated the document is effective as of the December 22, 2016 date. This language is contradicted with Item 1 of the OPA.

Item 11 of the OPA stipulates the requirements for liability insurance coverage and includes an important specific requirement of HVRM that "... the policy is primary and non-contributory ...". Those are important words for providing liability coverage and they affect the nature of coverage. HVRM's previous insurance policies provided to CKIN have never contained this condition, despite CKIN repeatedly asking for such coverage. The difference is such coverage would be material in incidents such as occurred in September 2016, where HVRM had the fire and evacuation of the passenger train. While that incident, may or may not have resulted in any injury to passengers, it highlights CKIN's legitimate safety concerns about HVRM and underscores the need for the insurance coverage provided (or "proposed") under the OPA.

As CKIN has been a certificate holder of HVRM's insurance, CKIN noted that the last Certificate of Liability Insurance provide to CKIN was dated March 15, 2016, with the expiration date of November 18, 2016. When CKIN inquired of HVRM's insurance broker if CKIN was no longer to be considered a certificate holder, a new Certificate of Insurance naming CKIN as the certificate holder was sent dated January 9, 2017 and indicating coverage through November 18, 2017. However, there is no indication of any policy change whereby the coverage type stipulated in the OPA even exists, let alone extends to CKIN. This begs the question of, why is HVRM offering CNJR a materially different form of insurance coverage than that requested, but never offered to CKIN? A follow up to that question might be that since CKIN suspects the "primary and non-contributory" coverage format offered in the OPA requires a higher premium, is HVRM even financially capable of providing the OPA level coverage?

What does not surprise CKIN about the OPA is the ability of HVRM, and the Town for that matter, to make very different representations to please different audiences. Getting a consistent answer from the Town and HVRM, and the commitment to abide by that answer, has frustrated CKIN over the past several years. CKIN now sees this same level of inconsistency being brought forth by the Town and HVRM into the present proceeding.

Ms. Wendy Hoppe for the Town and Mr. Mark Knebel for HVRM have both submitted verified statements in this proceeding. Consistent with what CKIN has

been dealing with over the years, there are material differences in the facts they present, both within the same verified statement, and between the two verified statements.

CKIN will highlight just some of the more glaring inconsistencies. In Ms. Hoppe's Item 6 she states, "However, the Council is the owner of the line and has not given HVRM decision making authority over the line and has not ceded control of the line to HVRM." Item 10 of the verified statement states, "It is true HVRM began searching for a replacement operator." Does this suppose that selection of the operator for the line is a minor task that can be sublet to HVRM? It also confirms that while there was the pretense of an open bidding RFP process, the decision that CKIN would be considered to remain as the operator, or any bidder such as Co-Alliance that might even considering retaining CKIN as its operator, was not to be considered since CKIN was not a "replacement" operator. HVRM had made that very determination in 2015, and the Town merely affirmed HVRM's replacement determination, regardless if the Town's ultimate choice was not HVRM's "top choice" (Hoppe VS Item 20).

In Item 11 of Ms. Hoppe's verified statement she notes, "However, it became apparent to the Town that Frontier believed that it had been chosen as the replacement operator of the line." Clearly this is the same Frontier that HVRM had solicited in HVRM's search for a replacement operator. The Town would have the Board believe that the Town was minimally aware of the HVRM solicitation and selection of a replacement operator, when in fact, it was the Town that stated to the Board in the Town's submission dated June 8, 2015 (Reply In Opposition To Motion To Compel Responses To Interrogatories And Request For Production, page 6) that the Town had chosen a replacement operator instead of CKIN.

The verified Statement of Mr. Knebel, while full of disparaging and incorrect statements about CKIN, nonetheless continues to flatly contradict the Town's position as stated by Ms. Hoppe. The statements in Items 15 and 16 of Mr. Knebel's verified statement are not only contradicted by CKIN, but by the Town's own admissions by Ms. Hoppe, including those above cited. In Item 12 of his verified statement, Mr. Knebel would also have the Board believe that HVRM's involvement in the outcome of the replacement operator of the rail line was passive, responding to "unsolicited visits" of prospective operators. The Board should not ignore the complete lack of mention of the involvement of Frontier in Mr. Knebel's verified statement.

CKIN wishes to make the Board aware of the fact the involvement of HVRM and Frontier Rail is much deeper than presented in the verified statements. CKIN has attached to this statement a waybill issued by the Union Pacific dated June 17, 2016 covering the shipment of an operating SD-45 type locomotive from a railroad subsidiary of Frontier Rail destined to HVRM. CKIN became aware of this locomotive when CSX attempted to interchange it to CKIN in July 2016. CKIN attempted to clarify the situation of this eyebrow raising movement, including who would be the freight payor for the movement to be provided by CKIN. Failing to get any believable answers regarding this movement, CKIN declined to accept the locomotive. It should be noted that this locomotive was billed months after the Town states that it indicated to Frontier that Frontier had not previously been chosen as the replacement operator. The billing date also happens to coincide nicely with the Town's RFP process, and Frontier was a bidder under the RFP.

Finally, CKIN will state for the record that it is willing, and financially able, to conclude a purchase of the rail line if permitted by the Board. The amount of the purchase and to whom any funds would flow remain open for determination. CKIN has already made considerable financial contributions to the success of the rail line as a common carrier. CKIN is not presenting its filing as a disgruntled former operator, rather CKIN is attempting to prevent usurpation of the fate of the line to favor passenger over freight. CKIN can and will work with a responsible passenger operator to share the benefits and obligations derived from the line.

CKIN would not have been before the board in this proceeding except for the undeniable role granted to, or ceded to, HVRM by the Town over the past few years. CKIN is not contesting that passenger operations were never contemplated at the time of the OFA proceeding. Nor is CKIN contending that it is impossible to permit passenger operation in conjunction with CKIN's common carrier obligation for freight service. What CKIN is contesting is that the primary purpose of the OFA has become tourist passenger, not freight. CKIN has succeeded in fulfilling that role and the primary customer, Co-Alliance, has concurred in that fact. The Town represented to the Board that its acquisition of the line through the OFA process was for freight use consistent with the OFA requirements. Those representations are now called into question by CKIN. The acquiescence of the Town to having HVRM as the master of the rail line is not consistent with CKIN, nor a replacement operator, fulfilling the freight mandate.

In conclusion I thought a brief comparison between selected provisions of the 2004 Operating Agreement, the drafted but never executed 2015 Railroad Operating Agreement, and the Operating Protocol Agreement (OPA) between the Chicago & North Judson Railway (CNJR) and HVRM would illustrate clearly the control that the Town has allowed HVRM to have over CKIN's operations:

<u>Topic</u>	<u>2004 Agreement</u>	<u>Draft 2015 Agreement</u>	<u>OPA</u>
FRA Track std	FRA Class I	FRA Class I to be raised to Class II after a period of time	FRA Class I
Allocation of liability Between Frt and Pass	On CKIN	On CKIN	On HVRM
Power to suspend For HVRM breach	No provision	No provision	CNJR can
Frt/pass Interference	CKIN may not impede pass opns		CNJR can terminate Pass for Interference
Insurance	CKIN to have \$5mil Silent on HVRM	CKIN to have \$10M/\$20M Silent on HVRM	HVRM to have \$10m/\$20M coverage

VERIFICATION

STATE OF INDIANA)

)

COUNTY OF FAYETTE)

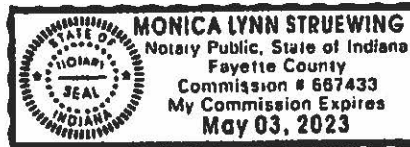
R. Powell Felix, being duly sworn according to law, hereby deposes and states that he holds the position of President with applicant/petitioner, is authorized to make this Verification, had read the foregoing document, and knows the facts asserted therein are true and accurate as stated, to the best of his knowledge, information, and belief.

R Powell Felix

Subscribed to and sworn to before me, a Notary Public, in and for the County of Fayette
in the State of IN, this 12th day of 2017.

Monica L Struwing
Notary Public

My Commission expires:



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CONSIGNEE
HOOSIER VALLEY RAILROAD MUSE
507 MULBERRY ST
NORTH JUDSON IN 46366

SHIPPER
PACIFIC ETHANOL
71335 RAIL LOOP DR
BOARDMAN OR 97818

FREIGHT BILL PARTY
LAKE RAILWAY
396 GRAIN TERMINAL ROAD
BURBANK WA 99323

Shipper's weight agreemen CSXT 6051
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UNDER OWN POWER//C//ID=XTOK336

PRICE AUTHORITY

TS 6051 CSXT
PR 159185 OTMQ

VERIFICATION

STATE OF)

)

CITY OF)

R. Powell Felix

_____, being duly sworn according to law, hereby deposes and states that (s)he holds the position of President with applicant/petitioner, is authorized to make this Verification, had read the foregoing document, and knows the facts asserted therein are true and accurate as stated, to the best of (her)his knowledge, information, and belief.

R Powell Felix

Subscribed to and sworn to before me, a Notary Public, in and for the County of Fayette in the State of IN, this 10th day of November.

Monica L. Struewing
Notary Public

My Commission expires:



EXHIBIT A



Stephen R. Pennell
765.428.7034
srp@stuartlaw.com

December 6, 2016

Via Certified Mail – Return Receipt Requested

LaPorte Circuit Clerk
LaPorte Circuit Courthouse
813 Lincolnway, Ste. 105
LaPorte, IN 46350

**RE: The Chesapeake and Indiana Railroad Company, Inc. v. Incorporated Town
of North Judson
LaPorte Circuit Court
Cause No. 46C01-1610-PL-001774**

Dear Clerk:

In regard to the above-captioned matter, please find enclosed an original and one copy of our First Amended Complaint and a CCS Entry Form regarding the above-referenced case.

Pursuant to Trial Rule 5(F), I would appreciate your showing the enclosed filed as of the date of mailing and returning a file marked copy to our office in the self-addressed stamped envelope provided for your convenience.

Sincerely,

A handwritten signature in black ink, appearing to read "Stephen R. Pennell".

Stephen R. Pennell

SRP/slb

Enclosure(s)

cc: Rachael Arndt, Esq.
Jerry E. Huelat, Esq.

864842

STATE OF INDIANA	)	IN THE LAPORTE CIRCUIT COURT
	) SS:	
COUNTY OF LAPORTE	)	CAUSE NO.: 46C01-1610-PL-1774
THE CHESAPEAKE AND INDIANA	)	
RAILROAD COMPANY INC.	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
INCORPORATED TOWN OF	)	
NORTH JUDSON	)	
	)	
Defendant.	)	

PLAINTIFF'S FIRST AMENDED COMPLAINT

Plaintiff, The Chesapeake and Indiana Railroad Company, Inc. (hereinafter "CKIN"), by counsel, pursuant to Indiana Trial Rule 15(A), states as follows for its First Amended Complaint against Defendant the Incorporated Town of North Judson (hereinafter referred to as the "Town"):

1. CKIN filed its Complaint against the Town on October 31, 2016.
2. According to this Court's records, the Town has not filed a responsive pleading to the Complaint.
3. Pursuant to Indiana Trial Rule 15(A), CKIN hereby files its First Amended Complaint.

Parties

4. CKIN is a for-profit domestic corporation incorporated in the State of Indiana, with its principal place of business in Fayette County, Indiana.
5. The Town is a town located in Wayne Township, Starke County, Indiana.

Factual Allegations

6. Pursuant to Title 36 of the Indiana Code, the Town is governed by a town council (hereinafter the "Town Council").

7. CKIN is a Class III common carrier short-line railroad which operates in the State of Indiana.

8. The rail line that is the subject of this First Amended Complaint (the "Rail Line") extends from milepost CF 0.63, at LaCrosse, to milepost CF 15.23, at Wellsboro, and from milepost CI 212.55, at North Judson, to milepost CI 230.92, at Malden, a total of 32.97 miles of trackage in LaPorte, Porter and Starke Counties, IN.

9. Because a majority of the Rail Line is located in LaPorte County, LaPorte County is a county of preferred venue under Trial Rule 75(A)(2).

10. In 2003, the Rail Line's previous owner, CSX Transportation, sought authority from the federal Surface Transportation Board ("STB") under the I.C.C. Termination Act (hereinafter "ICCTA") to abandon certain trackage including the Rail Line.

11. The Town partnered with several public and private entities including, but not limited to, LaPorte County, Porter County, and Starke County for the purpose of raising funds to purchase the Rail Line.

12. Pursuant to Section 10904 of the ICCTA, the Town, using funds provided by the State of Indiana and other sources, submitted an Offer of Financial Assistance (the "OFA") to purchase the Rail Line.

13. In the OFA, the Town represented that it desired to continue common carrier railroad service over the Rail Line.

14. Thereafter, the Town acquired the Rail Line and solicited proposals for an operator for the Rail Line. By acquiring the Line under the OFA procedures the Town became a common carrier railroad subject to the STB's jurisdiction under 49 U.S.C. Subtitle IV.

15. In 2004, the Town selected CKIN as its contract operator; the Town and CKIN entered into a certain Operating Agreement (the "Operating Agreement") dated August 31, 2004. A true and accurate copy of the Operating Agreement is attached to this First Amended Complaint as Exhibit "A".

16. By formal amendment, the initial term of the Operating Agreement was extended to December 31, 2015. Ex. A, Amendments One and Two.

17. Pursuant to the Operating Agreement, Hoosier Valley Railroad Museum, Inc. (hereinafter "HVRM"), a 501(c)(3) nonprofit domestic corporation incorporated in the State of Indiana, has the right to operate a passenger excursion service over the Rail Line "consistent with safety, liability and regulatory considerations, for passenger excursion operations pursuant with Preservation and Educational goals." Ex. A at 4.

18. During the initial term of the Operating Agreement, CKIN worked diligently to repair the Rail Line and to the rebuild the Rail Line's traffic base.

19. In doing so, CKIN made significant capital expenditures ("Capital Expenditures") to the Rail Line including repairing, rebuilding and maintaining the Rail Line.

20. As a result of the Capital Expenditures, the value of the Rail Line increased.

21. Under CKIN's stewardship, annual traffic on the Rail Line increased approximately twelve fold.

22. The principal customer of the Rail Line is Co-Alliance, LLP ("Co-Alliance"), an agribusiness with its corporate headquarters in Hendricks County.

23. Co-Alliance owns two grain elevators located along the Rail Line; one elevator is located in the Town of Union Mills (MP 15.0), and the second is located at Malden (MP 230.8).

24. Since the initial term of the Operating Agreement, Co-Alliance has invested approximately \$20,000,000 in its facilities located at Union Mills and Malden.

25. Co-Alliance and CKIN have worked harmoniously to repair, rebuild, and maintain the Rail Line.

26. Beginning in 2014, a dispute arose between CKIN, the Town, and HVRM.

27. Namely, CKIN disagreed with the Town and HVRM concerning HVRM's use of the Rail Line and HVRM's obligations under the Operating Agreement.

28. On March 6, 2015, the Town, through its counsel, provided notice to CKIN of the Town's intent to terminate the Operating Agreement (the "termination notice"). The termination notice stated that the Agreement would be terminated at the end of the December 31, 2015 term.

29. The ICCTA requires rail operators to seek authority from the federal Surface Transportation Board ("STB") to discontinue service before they can actually terminate operations.

30. As a result, CKIN could not immediately terminate operations after receiving the termination notice.

31. On April 16, 2015, the Town initiated discontinuance proceedings at the STB by filing a petition to waive certain discontinuance requirements. The STB granted most but not all of the Town's requests.

32. In the Waiver Notice, the Town stated that it intended to replace CKIN and enter into a new railroad operating agreement with a new operator.

33. Prior to filing the Waiver Notice, the Town did not publish a Request for Proposal to find a successor operator.

34. On information and belief, the Town engaged in discussions with one or more potential operators for the Rail Line prior to publishing a Request for Proposal.

35. Prior to the expiration of the term, CKIN and the Town disagreed over the respective rights of the parties upon the termination of the Operating Agreement.

36. Specifically, Section 10 of the Operating Agreement, entitled "Capital Expenditures by CKIN", provides that "[n]on-removable property improvements paid for wholly or in part by CKIN shall become the property of the Town, subject to any claim by CKIN as to remaining Book Value of such improvement at the non-renewal expiration or termination" of the Operating Agreement. Ex. A at 8-9.

37. CKIN and the Town disagreed over the character, valuation and calculation of the Capital Expenditures.

38. CKIN and the Town further disagreed over whether the Town could terminate the Operating Agreement.

39. In an attempt to resolve the dispute over the Capital Expenditures and the future service on the Rail Line, CKIN, Co-Alliance and the Town engaged in mediation on December 9, 2015.

40. CKIN, Co-Alliance and the Town entered into a Mediation Agreement dated December 9, 2015 and thereafter supplemented by the Supplement to December 9, 2015 Mediation Agreement which became effective on May 13, 2016. True and accurate copies of the Mediation Agreement, and the Supplement to the December 9, 2015 Mediation Agreement are attached to this First Amended Complaint as Exhibit "B" and Exhibit "C", respectively.

41. Although not specifically stated in the Mediation Agreement, it was the understanding of the parties' representatives that Co-Alliance would be selected as the lessee of the Rail Line. However, Indiana law required the Town to issue a request for proposals ("RFP") to solicit bid proposals.

42. If the Town selected Co-Alliance as the lessee of the Rail Line, CKIN would forgo its claims against the Town related to the Capital Expenditures.

43. The Town agreed to accept the Mediation Agreement at the meeting of the Town Council on December 21, 2015.

44. When a governmental entity leases or otherwise transfers real property, Indiana law obligates all governmental entities to comply with applicable procedures related to RFPs and the selection of proposals as set forth in I.C. § 36-1-11-1 *et seq.*

45. On June 15, 2016, the Town published the RFP for the Rail Line (the "June 15 RFP").

46. The Town admitted that it had selected a replacement operator prior to publishing the June 15 RFP.

47. In the June 15 RFP, the Town published certain confidential information belonging to CKIN and concerning traffic on the Rail Line (the "Confidential Information").

48. Under the Operating Agreement, the Town is obligated to maintain the confidentiality of Confidential Information. Ex. A at 19.

49. The disclosure of Confidential Information under Section 27 is an event of default under the Operating Agreement. Ex. A at 19.

50. The Confidential Information includes information for which 49 U.S.C. § 11904(b) prohibits rail carriers such as the Town from disclosing without the consent of the affected rail customers which was never given.

51. The Town's disclosure of the Confidential Information to rail carrier bidders competing with CKIN violated 49 U.S.C. § 11904.

52. The Town admitted that it improperly disclosed the Confidential Information and promised CKIN to take certain remedial measures including the recipients' return and destruction of confidential information; preparation of an apology letter and preparation and return of an affidavit identifying any parties to whom recipients provided that information.

53. The recipients and the Town failed to cooperate with this request.

54. On June 17, 2016, the Town published an amended RFP for the Rail Line (the "Amended RFP").

55. The Town's RFP, and the Town's selection of a proposal, are subject to I.C. § 36-1-11-1 *et seq.*

56. The Town has statutory authority to lease real property only if the Town Council determines that such lease would "be in the best interest of the disposing agent's political subdivision or agency and the public."

57. The Town Council, as disposing agent, was obligated to lease the Rail Line to the "highest and best bidder".

58. During an RFP process, "eligible offerors must be accorded fair and equal treatment."

59. The Amended RFP contained several requirements for operators.

60. Specifically, a respondent is obligated to have a net worth in excess of two million dollars (\$2,000,000).

61. Further, a respondent should “be able to demonstrate that respondent has owned, leased or operated at least three (3) shortline railroads for at least a three (3)-year duration.”

62. The Town allowed HVRM, a party with an interest in the outcome of the RFP process, to participate in the carrier selection process.

63. Co-Alliance submitted its bid (the “Bid Proposal”) in conjunction with CKIN with CKIN to be Co-Alliance’s contractor operator subject to CKIN and Co-Alliance reaching a new operator agreement for the Rail Line.

64. The Town informed Co-Alliance the Bid Proposal would not be accepted.

65. Under I.C. § 36-1-11-4(d), a bid submitted in response to a request for proposal is “open to public inspection.”

66. The Town has nevertheless refused to provide Co-Alliance and CKIN with copies of the other bids that were submitted.

67. On or around July 21, 2016, the Town Council publicly announced that it had selected a proposal from Lake State Railway.

68. CKIN is asserting tort claims against the Town for the Town’s statutory violations of 49 U.S.C. § 11904, and I.C. § 36-1-11-1 *et seq.* (collectively referred to as the “Tort Claims”).

69. Under Indiana law, if a governmental entity fails to approve a tort claim in its entirety or reach a settlement within 90 days after the filing of a tort claim, that tort claim is deemed to be denied. I.C. § 34-13-3-11.

70. On September 6, 2016, CKIN mailed notice of the Tort Claims. A copy of CKIN’s tort claim notice is attached to this First Amended Complaint as **Exhibit “D”**.

71. Thus, if the Town did not respond to the Tort Claims notice on or before December 5, 2016, the Town is deemed to have denied the Tort Claims.

72. As of the date of the filing of this First Amended Complaint, the undersigned counsel has not received correspondence from the Town which either approves of or denies the Tort Claims.

73. The Town and CKIN have also not reached a settlement concerning the Tort Claims.

74. Under Section 9 of the Agreement, the Town is obligated to establish a "Capital Improvement and Maintenance Fund" (hereinafter the "Capital Improvement Fund"). Ex. A at 7-8.

75. Under Section 15 of the Agreement, CKIN is obligated to contribute a portion of the freight revenue it derives from operation of the Rail Line to the Capital Improvement Fund. Ex. A at 11-12.

76. The Town holds proceeds of the Capital Improvement Fund in trust for "the sole purpose of providing track, bridge, and property maintenance and improvements" to the Rail Line (all of which are collectively referred to hereinafter as "Track Maintenance") Ex. A at 8.

77. The Agreement expressly prohibits the Town from using proceeds of the Capital Improvement Fund for "Town purposes beyond preservation and maintenance of the Rail Line." Ex. A at 8.

78. Pursuant to Section 15 of the Agreement, CKIN is ready, willing and able to make contributions to the Capital Improvement Fund in the amount of \$39,750.

79. CKIN believes the Town will use additional contributions to the Capital Improvement Fund for Town purposes beyond Track Maintenance.

80. CKIN desires to deposit its contributions to the Capital Improvement Fund in an escrow account until it receives further direction from this Court.

COUNT I: BREACH OF CONTRACT

81. CKIN realleges and reaffirms each and every rhetorical paragraph contained in this First Amended Complaint, and incorporates the same herein by reference.

82. The Mediation Agreement obligated all parties to act in good faith. Ex. B at 1.

83. On information and belief, CKIN believes the Bid Proposal was the highest and best proposal submitted to the Town to operate the Rail Line.

84. On information and belief, Lake State Railway did not satisfy the criteria of the Amended RFP.

85. In reviewing proposals for the Rail Line, the Town did not afford the Bid Proposal equal treatment.

86. In reviewing the Bid Proposal, the Town failed to act in good faith.

87. The Town's rejection of the Bid Proposal constituted a breach of the Mediation Agreement.

88. As a direct, proximate result of the Town's breach of the Mediation Agreement, CKIN suffered damages in an amount to be proven at trial.

COUNT II: ANTICIPATORY BREACH OF CONTRACT

89. CKIN realleges and reaffirms each and every rhetorical paragraph contained in this First Amended Complaint, and incorporates the same herein by reference.

90. Under Section 10 of the Operating Agreement, CKIN is entitled to damages upon termination or expiration of the Operating Agreement. In relevant part, Section 10 provides,

Non-removable property improvements paid for wholly or in part by CKIN shall become the property of the Town, *subject to any claim by CKIN as to remaining*

Book Value of such improvement [emphasis supplied] at the non-renewal expiration or termination of this Agreement by either party....Book Value shall be the difference between Cost of Improvement less Depreciation at straight-line, half-year convention, calculated to the end of the previous calendar year prior to contract expiration or termination. Remaining Book Value shall be paid to CKIN only in the event of non-renewal or termination of this Agreement, regardless of cause.

Ex. A at 8-9.

91. CKIN made non-removable property improvements on the Rail Line ("Capital Expenditures").

92. The Capital Expenditures were paid for wholly or in part by CKIN.

93. Pursuant to the Operating Agreement, CKIN is entitled compensation from the Town for the Capital Expenditures upon the termination of the Operating Agreement according to the valuation formula set forth therein.

94. The Town informed CKIN that the Town would not pay CKIN amounts owed to CKIN for Capital Expenditures upon termination of the Operating Agreement.

95. Specifically the Town communicated it would not pay CKIN amounts for the Capital Expenditures according to the formula described in the Operating Agreement.

96. In so informing CKIN that the Town would not pay to CKIN for the Capital Expenditures, the Town breached the Operating Agreement.

97. As a direct, proximate result of the Town's anticipatory breach of the Operating Agreement, CKIN will suffer damages in an amount to be proven at trial.

COUNT III: BREACH OF CONTRACT

98. CKIN realleges and reaffirms each and every rhetorical paragraph contained in this First Amended Complaint, and incorporates the same herein by reference.

99. In relevant part, Section 27 of the Operating Agreement provides that the Town will be in default if the Town “discloses to any person or persons not directly associated with Town, all or any portion of Confidential Documents that CKIN provides Town under this Agreement”. Ex. A. at 19.

100. The Town nevertheless disclosed the Confidential Documents to the public and unauthorized third parties in the June 15 RFP.

101. The Town’s disclosure of the Confidential Documents constituted an event of default and a breach of the Operating Agreement.

102. As a direct and proximate result of the Town’s breach of the Operating Agreement, CKIN suffered damages in an amount to be proven at trial.

COUNT IV: BREACH OF CONTRACT

103. CKIN realleges and reaffirms each and every rhetorical paragraph contained in this First Amended Complaint, and incorporates the same herein by reference.

104. The Mediation Agreement and supplement thereto contemplated that the Town would follow all statutory procedures applicable to the RFP process. Ex. C.

105. The Town breached the Mediation Agreement by failing to follow the statutory RFP requirements.

106. As a direct and proximate result of the Town’s breach of the Mediation Agreement, CKIN suffered damages in an amount to be proven at trial.

COUNT V: DECLARATORY RELIEF

107. CKIN realleges and reaffirms each and every rhetorical paragraph contained in this First Amended Complaint, and incorporates the same herein by reference.

108. The Agreement does not allow the Town to use proceeds of the Capital Improvement Fund for purposes other than for Track Maintenance. Ex. A at 8.

109. On information and belief, the Town has used proceeds of the Capital Improvement Fund for purposes other than for Track Maintenance.

110. On information and belief, if CKIN makes additional contributions to the Capital Improvement Fund, the Town will use such contributions for purposes other than for Track Maintenance.

111. Pursuant to Ind. Code § 34-14-1-1 *et seq.* and Indiana Trial Rule 57, this Court has the authority to grant declaratory relief to any person interested in a written contract or whose rights, status, or other legal relations are affected by a contract.

112. An actual controversy exists between the Town and CKIN as to the proper use of the Capital Improvement Fund.

113. CKIN is a party to the Agreement and seeks declaratory relief as to the proper construction of the Agreement.

114. CKIN requests the Court grant declaratory relief which prohibits the Town from using the Capital Improvement Fund for any purpose other than for Track Maintenance.

COUNT VI: DAMAGES FOR VIOLATION OF RFP PROCESS

115. CKIN realleges and reaffirms each and every rhetorical paragraph contained in this First Amended Complaint, and incorporates the same herein by reference.

116. The Town was subject to all applicable Indiana statutory procedures in selecting a bidder during the RFP process.

117. The Amended RFP failed to comply with applicable statutory procedures under Indiana law.

118. The Town, through the Town Council, violated Indiana law by failing to select the highest and best bidder.

119. The Town, through the Town Council, violated Indiana law by failing to properly consider the Proposed Bid or otherwise afford the Proposed Bid equal treatment.

120. In exercising its authority during the RFP process, the Town improperly delegated its authority to HVRM.

121. In exercising its authority during the RFP process, the Town acted arbitrarily, capriciously, and otherwise contrary to the statutory RFP process.

122. The disclosure of Confidential Information to other bidders including Lake State Railway in the June 15 RFP prejudiced CKIN.

123. On information and belief, Lake State Railway unlawfully accessed and utilized the Confidential Information in formulating its bid for the Rail Line.

124. As a direct and proximate result of the Town's failure to comply with the statutory RFP process, CKIN suffered damages in an amount to be proven at trial.

COUNT VII: DAMAGES FOR UNLAWFUL DISCLOSURE OF CONFIDENTIAL INFORMATION

125. CKIN realleges and reaffirms each and every rhetorical paragraph contained in this First Amended Complaint, and incorporates the same herein by reference.

126. A rail carrier that knowingly discloses information described in 49 U.S.C. § 11904(b) violates 49 U.S.C. § 11904.

127. As owner of the Rail Line and as a rail carrier subject to 49 U.S.C. Subtitle IV, the Town is subject to 49 U.S.C. § 11904.

128. CKIN provided to the Town certain information including the Confidential Information.

129. The Confidential Information contains data described in 49 U.S.C. § 11904(b).

130. The June 15 RFP included data protected by 49 U.S.C. § 11904.

131. The Town knowingly distributed the Confidential Information to certain private parties including Lake State Railway in the June 15 RFP.

132. By unlawfully disclosing the Confidential Information, the Town violated 49 U.S.C. § 11904.

133. Through the disclosure of the Confidential Information, the Town's agents also violated 49 U.S.C. § 11906, which provides for criminal penalties for persons acting on behalf of a "rail carrier."

134. The Town failed to take adequate and appropriate remedial steps concerning its disclosure of the Confidential Information.

135. As a direct and proximate result of the Town's disclosure of the Confidential Information, the Town gave other bidders including Lake State Railway an unfair and unlawful advantage to participate in the RFP process.

136. As a direct and proximate result of the Town's disclosure of the Confidential Information, CKIN suffered damages in an amount to be determined at trial.

WHEREFORE, Plaintiff, The Chesapeake and Indiana Railroad Company, Inc., prays the Court enter a judgment in its favor and against the Town of North Judson as follows:

1. Award Plaintiff damages in the amount owed by Defendant Town of North Judson under the Operating Agreement, plus pre-judgment and post-judgment interest, costs, and reasonable attorney's fees;

2. Award Plaintiff damages for the Defendant Town of North Judson's breaches of the Operating Agreement, plus pre-judgment and post-judgment interest, costs, and reasonable attorney's fees;
3. Award Plaintiff damages for the Defendant Town of North Judson's breach of the Mediation Agreement, plus pre-judgment and post-judgment interest, costs, reasonable attorney's fees;
4. Declare that the Capital Improvement Fund may not be used for any purpose other than for repair and maintenance of the Rail Line;
5. Allow the Plaintiff to deposit contributions to the Capital Improvement Fund into an escrow account maintained by this Court or an appropriate custodian;
6. Award Plaintiff damages for the Defendant Town of North Judson's violation of statutory requirements applicable to the RFP process, plus pre-judgment and post-judgment interest, costs, reasonable attorney's fees;
7. Award Plaintiff damages for the Defendant Town of North Judson's unlawful disclosure of Confidential Information, plus pre-judgment and post-judgment interest, costs, reasonable attorney's fees; and
8. All other relief as is just and proper in the premises.

Respectfully Submitted,



Stephen R. Pennell (5683-79)
David M. Stupich (32166-79)
STUART & BRANIGIN LLP
300 Main Street, Suite 900
Lafayette, Indiana 47902
srp@stuartlaw.com
Phone: (765) 423-1561
Fax: (765) 742-8175
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

On this 6 day of December, 2016, the undersigned certifies that a copy of the foregoing pleading or paper was served upon:

Rachel A. Arndt
125 East Tenth Street
Rochester, IN 46975

by depositing the same in the United States mail in envelopes properly addressed and with sufficient first class postage affixed.



Stephen R. Pennell

871783_1

EXHIBIT 1



238732

ENTERED
Office of Proceedings
July 1, 2015
Part of
Public Record



June 30, 2015

By UPS overnight mail

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E. Street, S.W.
Washington, DC 20024

Re: Docket No. AB-1232, *Town of North Judson, Indiana – Adverse Discontinuance of Service—in LaPorte, Porter and Starke Counties, IN*

Dear Ms. Brown:

Co-Alliance, LLP (“Co-Alliance”), the primary freight rail shipper¹ located along the railroad line that is the subject of the referenced proceeding, asks that this letter be added to the record for the purpose of providing the Board with additional factual information related to the filings in this proceeding to date..

I. Identity of Co-Alliance and General Background

Co-Alliance is an 8,000 member farmer-owned cooperative. It is the seventh largest privately held company in the state of Indiana, with over \$1.1 billion in revenue in 2013. Our partners have been serving the needs of mid-western farmers in Indiana, Michigan and Ohio since the 1920s. Co-Alliance owns two grain elevators located along the Rail Line described in the Petition for Waiver and Exemption in Conjunction with Prospective Application for Adverse Discontinuance of Service (“Petition”) filed in this docket by the Town of North Judson, Indiana. One elevator is located in the town of Union Mills, IN and the second in the town of Malden, IN. In 2014, the Union Mills and Malden grain elevators provided grain handling and grain marketing services to approximately 688 local farmers and landlords.

¹ There is one other shipper on the line that averages 20 rail cars per year.



The Union Mills facility, in addition to providing grain services, also is a bulk fertilizer hub for farmers in the region. Over the last decade, Co-Alliance has invested approximately \$20 million dollars in the facilities at Malden and Union Mills to increase storage capacity and efficiencies. Accordingly, any actions concerning freight rail operations over the Rail Line, and who provides those operations, directly affects Co-Alliance and the farmers we serve.

In 2003, when CSX originally planned to decommission this rail line, LaPorte County Co-Op (now a partner in Co-Alliance) financially participated in saving the rail line, and was the largest private contributor of funds for its purchase by the Town of North Judson in 2004, providing \$300,000. The Chesapeake and Indiana Railroad (CKIN) has been the line's operator since the acquisition. The CKIN primarily provides the means for Co-Alliance's grain commodities to be transported to interchanges with CSX Transportation and the Norfolk Southern Railway for distribution out to national and international markets. Co-Alliance has been pleased with the level of service we have received from CKIN and our relationship with this carrier.

II. The Rapid Growth in Grain Shipping on the Rail Line

The use of the Rail Line for freight rail transportation has increased rapidly since the town purchased it in 2004 and CKIN took over as the operator. The number of grain cars Co-Alliance has shipped utilizing CKIN has increased from 506 cars in 2005 to 3282 cars in 2014, a 600% increase in grain traffic in a period of nine (9) years. Based on an average of 3700 bushels per car, in 2014:

- 12,143,400 bushels of grain were railed out of the two grain elevators;
- At a conservative average price of \$4.50/per bushel, this equates to approximately \$54,645,300 in locally grown grain that farmers rely upon this rail line to get to market.

CKIN has applied for grants and made capital contributions and as a result has provided the following during Co-Alliance's expansive grain handling and marketing growth in the region:

- adding additional tracks;
- upgrading bridges to accommodate 286,000 lb. gross jumbo rail cars; and

- adding a junction spur greatly facilitating connection to the Norfolk Southern where previously facilities had been captive to CSX.

III. Future Needs of Co-Alliance and Local Farmers:

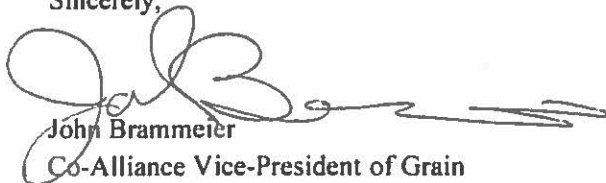
In order for Co-Alliance to continue to thrive in the grain industry, we must have a rail operator of the Rail Line that is knowledgeable about the rail transportation of grain and has an established reputation and experience in negotiating rates for agricultural commodities with the mainline carriers. As stated, Co-Alliance has been pleased with the expertise and rail service supplied by the CKIN since it began operating over the Rail Line in 2004. However, we understand that one outcome of this proceeding could be a change in rail operators over the Rail Line. We have two primary concerns with this potential outcome. First, many short line railroad operators have little to no expertise in agricultural economics and dealing with main line railroads. To not have this expertise in a short line operator if CKIN is replaced could have a very negative financial impact to the regional farming community. Small swings in freight prices when looking at over 12 million bushels of grain can have a devastating impact to the local farmer's bottom-line. Specifically, Co-Alliance and the farmers it serves need the following criteria in any short line railroad operator:

1. It is essential that the short line operator have existing and well-established relationships with the NS and CSX on grain commodity shipping.
2. A contractual commitment to service 7 days a week during daylight hours, essentially two work crew shifts available for both Union Mills and Malden when needed, this is especially essential in snow and ice conditions which comprises some of the busiest time for grain shipments.
3. A contractual commitment to two crews, one crew available for Malden and one crew available for Union Mills to move cars for loading and unloading.
4. An operator who will make available their locomotive mechanic to provide work on the Co-Alliance owned locomotive housed at Malden.
5. Proven history and experience in handling logistics of up to 270 cars at one time on a short line this size.
6. A contractual commitment for at least three power sources capable of pulling a fully loaded 90 jumbo car trains.
7. An operator who puts safety first and maintains the rail line to the standards required by regulators.

Co-Alliance's second concern is the potential uncertainty over the timing of any change in operators. It would be extremely detrimental to our business if any change even to an operator that met the foregoing criteria was not planned and conducted in a fashion that ensured that there are no disruptions in the service levels and exposure to markets we currently enjoy with the CKIN both during and after any transition to a new operator. Interruptions in service of any duration would be unacceptable. Moreover, grain markets are traded on a futures basis and Co-Alliance is already purchasing and selling grain at dates many months into the future. In order to be able to do that successfully, Co-Alliance must have a rail carrier that understands the complex economics of this market and can price its rates accordingly.

In conclusion, Co-Alliance has been satisfied with the service of CKIN over the Rail Line. The uncertainty associated with the possible termination of CKIN's service and the experience levels of the replacement rail carriers the Town of North Judson and The Hoosier Valley Railroad Museum have considered to date, along with uncertainties over the process and timing of any change, make it very difficult for Co-Alliance to plan for the future. Regardless of the outcome of this proceeding, it is vital to the continued success of Co-Alliance's grain business, and for the farmers in the region who rely upon the Union Mills and Malden grain elevators, that any railroad who operates over the Rail Line continue to provide the current high levels of service and expertise in grain transportation that Co-Alliance currently enjoys.

Sincerely,



John Brammeier
Co-Alliance Vice-President of Grain

Cc: Thomas P. McFarland, Esq.
John D. Heffner, Esq
(both by first class, U.S. mail and e-mail.)

EXHIBIT 2

CO-ALLIANCE, LLP'S RESPONSE TO TOWN OF NORTH JUDSON SHORTLINE RAILROAD
REQUEST FOR PROPOSAL (RFP)
ORIGINALLY ISSUED JUNE 15, 2016; AMENDED JUNE 17, 2016

1.0 INTRODUCTION

Co-Alliance, LLP is one of the largest, most successful agribusiness and energy marketing and supply cooperatives in the Midwest. We are a partnership of five established co-ops with community roots extending back to the 1920s. Our two elevators along the rail line serve over 211 local farmers with individual shipping volumes in excess of 10,000 bushels of grain per year. Our business model allows us the unique ability to provide personalized, local service while still being large enough to offer our customers competitive prices and products. Co-Alliance proudly serves the areas of Energy, Agronomy, Grain Marketing, and Swine and Animal Nutrition. We are headquartered in Avon, Indiana and have more than 50 locations across Indiana, Michigan, and Ohio.

One of Co-Alliance's partners, LaPorte County Co-op, was the single largest private investor when the rail line was originally purchased by the Town of North Judson from CSX. LaPorte's contribution was an investment of \$300,000 towards the line's purchase. Co-Alliance brings a long history of being a well-run financially successful cooperative. Co-Alliance will bring its business acumen to the rail line and contiguous counties in areas of finance, risk management, capital investments, maintenance management and agricultural industry connections.

In this Response, Co-Alliance is proposing to lease all of the tracks covered by the RFP except the section extending from English Lake (Mile Post 217.8) to North Judson (Mile Post 212.55) (hereafter, the "Leased Line"). The Leased Line constitutes the tracks that are used primarily for freight railroad service, along with occasional passenger service from English Lake to Lacrosse. Co-Alliance's proposal contemplates that the Town would continue to own the segment from English Lake to North Judson, and the use and maintenance of that track would be primarily by the HVRM pursuant to agreements between it and the Town. Co-Alliance and its operator would coordinate with HVRM on such matters as car storage on HVRM's tracks (RFP Section 4.2.2) and scheduled passenger service.

If Co-Alliance is chosen as the selected lease holder, it will assume the Town's underlying common carrier obligation to provide freight service over the Leased Line, and, like the Town, Co-Alliance will fulfill that obligation by contracting with an experienced rail line operator for the day-to-day operation and maintenance of the Leased Line. Co-Alliance has engaged in discussions with the existing operator – the Chesapeake and Indiana Railroad ("CKIN") – as possibly continuing to fulfill this role going forward. However, Co-Alliance will be the primary contact for the Town of North Judson. Co-Alliance will approach the coordination of the use of the line by the operator for freight service, and the HVRM for excursion service, in a straightforward, transparent, professional manner in compliance with applicable law, and will at minimum hold twice yearly planning sessions meetings between all parties where maintenance, scheduling, grant proposals and finances are openly discussed.

operation and maintenance costs); and (2) a flat yearly lease payment of \$10,000 to the Town of North Judson over the 10 year term of the lease. This proposal is expressly contingent upon Co-Alliance being able to reach agreement with its designated rail operator, and also contingent on the terms and conditions of other agreements Co-Alliance contemplates the affected parties entering into. In addition, see paragraph 4.2.3 wherein Co-Alliance specifically agrees to fund the Malden to LaCrosse rail line repairs.

4.2.2 Financial Information

Should Co-Alliance be selected as the Leased Line lease holder, it will select a rail road operator that has demonstrated ability to conduct operations as indicated in the RFP and that has demonstrated financial solvency and sustainability. Co-Alliance would fully anticipate that any Lease Agreement the parties agree to would contain termination clauses if the Town's earning and maintenance expectations were not being fulfilled by the lease holder and its operator. Co-Alliance directs the Town to Co-Alliance's financial statements provided in response to 4.1.3 which fully supports Co-Alliance's financial ability to back and sustain its obligations of lease payments and proportional and agreed maintenance obligations during the course of the lease. Co-Alliance has an extensive history of successfully working with other parties in joint ventures including but not limited to: Kankakee Valley Propane, LLC, Harvestland Co-Op, Michiana Agra, LLC Agronomy Services, LLP, Monticello Energy, LLC, and Northwind Pork, LLC.

Co-Alliance has had discussions with our insurance providers about obtaining the coverage limits as outlined in the RFP (\$20-million dollars/\$10-million dollars per occurrence). Our insurance brokers have indicated that they cannot provide us with a valid estimate regarding insurance premiums until a lease is close to final form; however they have estimated that \$20-million in coverage will cost at minimum \$50,000 per year. Once we are able obtain reliable premium estimates they will be incorporated into financial projections and will be provided to the Town. In order to complete the extensive rail road insurance application, Co-Alliance will also need to have finally selected its chosen rail line operator. Co-Alliance is agreeable to having the Town of North Judson named as an additional named insured on the Co-Alliance rail line insurance policy. Co-Alliance will commit, even though exact yearly premiums are yet unknown, to carrying at least \$10 million dollars in insurance coverage. However, Co-Alliance is not willing to indemnify the Town of North Judson over and above insurance policy limits for claims that arise from the operations of the HVRM on the Leased Line unless Co-Alliance is granted full operational control over the activities of the HVRM on the Leased Line.

If Co-Alliance and the CKIN are able to come to terms on a Railroad Operating Agreement, Co-Alliance will require that CKIN waive any and all prior capital improvement claims regarding the rail line and the Town as a condition to entering into the agreement. This is significant as it will end the possibility of the litigation regarding this matter between CKIN and the Town. Litigation at this point will cause greater uncertainty and delays in much-needed maintenance for the rail line and grant applications, which will have a potentially very harmful impact on the rail line, the Town, local-area farmers, Co-Alliance and the community.

EXHIBIT 3



THE FOUNDRY BUILDING

1055 THOMAS JEFFERSON STREET NW SUITE 500 WASHINGTON, DC 20007
TELEPHONE: 202/342-5200 FACSIMILE: 202/342-5219

RICHARD BAR
BRENDAN COLLINS
STEVEN JOHN FULLMAN
EDWARD D. GREENBERG
KATHARINE FOSTER MEYER
DAVID K. MONROE
TROY A. ROLI
DAVID P. STREET
KEITH G. SWIRSKY
THOMAS W. WILCOX
CHRISTOPHER B. YOUNGER

SVETLANA B. LYUBCHENKO

MINNESOTA OFFICE:
700 TWILVE OAKS CENTER DRIVE, SUITE 204
WAYZATA, MN 55391
(T) 952/449-8817 (F) 952/449-0614

WRITER'S DIRECT E-MAIL ADDRESS
TWILCOX@GKGLAW.COM

WRITER'S DIRECT DIAL NUMBER
202 342-5248

April 14, 2016

VIA E-MAIL

Rachel A. Ardnt, Esq.
Peterson, Waggoner & Perkins, LLP
125 East Tenth Street
Rochester, IN 46975

Dear Rachel:

This letter responds on behalf of Co-Alliance to your email to me and Elizabeth South of April 11, 2016. Co-Alliance very much appreciates you keeping them apprised of the Town of North Judson's ongoing efforts concerning the potential lease of the North Judson rail line, the plans of the Hoosier Valley Railroad Museum ("HVRM") to schedule passenger excursions on the line from time to time, and other ongoing issues concerning the rail line.

As you know, Co-Alliance has taken an active role starting last summer to help the Town, the Chesapeake and Indiana Railroad, Inc. ("CKIN"), and HVRM try to resolve several issues between them concerning the operation and maintenance of the rail line. As the largest freight rail shipper on this line, Co-Alliance has a vested interest in efficient and reliable freight rail operations continuing over it into the future. Co-Alliance's efforts have included participating in a mediation proceeding between the Town and CKIN in December, 2015 in

Lafayette. This mediation resulted in a written Mediation Agreement that, in pertinent part, extended the current Railroad Operating Agreement between the Town and CKIN to May 15, 2016.

Over the past several weeks, Co-Alliance has become concerned that the Town has not yet issued the Request for Proposals for a Lease Agreement ("RFP") called for under the Mediation Agreement, even though Co-Alliance has a general understanding of the reasons for the delay. While Co-Alliance intends to and expects to respond to a RFP if and when it is issued, it does not believe it is realistic for the Town to believe that a RFP process can be completed and a lease negotiated with any party – including Co-Alliance should it be selected as a potential lessee – by May 15. Co-Alliance understands that the Town may be pursuing measures that could shorten the RFP process, or perhaps eliminate it all together. However, we believe concluding all of the tasks associated with even a revised leasing process cannot be accomplished by May 15. For example, that process will also entail the negotiation of agreements with the freight operator of the line and HVRM governing their respective use of the line. It is unrealistic to believe that these additional tasks could also be accomplished by May 15 when the agreement between CKIN and the Town is set to expire.

Co-Alliance anticipates it will tender approximately 1750 loaded rail cars for shipment between May 1 and August 1. This translates to approximately 20 trains of 90 rail cars from May 1 to the end of July. These movements will be part of the company's standard practice of clearing out its grain inventories before the Fall harvest, and so it is critically important that rail service to its two facilities not be interrupted or diminished during this time. Accordingly, while Co-Alliance remains fully committed to trying to help all of the affected parties reach a common understanding on the operation of the line going forward, Co-Alliance must at this time protect its interests by demanding assurance from the Town that Co-Alliance will continue to receive freight rail service after May 15 at the same levels it is currently receiving from CKIN.

As the owner of a line of railroad subject to the jurisdiction of the Surface Transportation Board ("STB"), the Town has the ultimate responsibility to ensure that the statutory common carrier obligation to provide freight rail service is fulfilled. Presently, the Town is fulfilling that obligation through its Railroad Operating Agreement with CKIN, and Co-Alliance is satisfied with that service. Co-Alliance therefore recommends that the most efficient way to provide the assurances we seek given the compressed time frame is for the Town and CKIN to further extend their Railroad Operating Agreement while the potential lease and other current issues are worked out. If a simple extension of the current agreement is not possible, then we seek assurances that the Town will allow CKIN to continue to operate over the line under other terms and conditions that enable CKIN to continue to provide rail freight service over the line after May 15 until the various issues are resolved. In Co-Alliance's opinion, time is now too short for the Town

Rachel A. Ardnt, Esq.
April 14, 2016
Page 3

to feasibly and practicably change short line operators of the line by May 15 without substantially disrupting service to Co-Alliance.

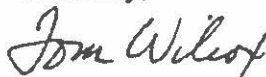
The foregoing being said, while Co-Alliance must have reliable freight rail service over at least the next 90 days, it strongly urges the Town to commence the RFP process or an alternative process to possibly lease the line at the earliest practicable time so the current uncertainties regarding the parties' respective rights and obligations can be resolved.

Finally, Co-Alliance has supported and will continue to support passenger excursion movements on the line, but only to the extent that passenger excursion traffic does not interfere with CKIN's or another rail operator's fulfillment of the obligation to provide freight service. Enabling common carrier freight rail service is the primary function of this line of railroad in the eyes of the STB in light of the Town's acquisition of it through the agency's Offer of Financial Assistance process. Co-Alliance again strongly recommends that going forward the Town (and/or its lessee), the railroad operator, and HVRM should jointly enter into a written agreement that clearly sets forth how and when the line will be used for freight and passenger excursion traffic, so the parties can all plan accordingly and the latter does not interfere with the former in violation of STB rules and precedent. Should Co-Alliance be offered the opportunity to lease the line from the Town such an agreement with the operator and HVRM will be a prerequisite to any lease agreement it executes with the Town.

In closing, Co-Alliance asks that the Town provide the requested assurance of continued service at the earliest opportunity, but no later than April 22. If the Town is not able or willing to provide this assurance by that date, Co-Alliance will be forced to explore the remedies available to it at the STB to ensure that it will continue to receive the rail service its facilities require after May 15, 2016.

Please do not hesitate to call me if you have any questions or wish to discuss anything in this letter

Sincerely,



Thomas W. Wilcox

cc: Mr. Powell Felix, CKIN
John Heffner, Esq.
Thomas McFarland, Esq.
Elizabeth South, Esq.
(all via email)

EXHIBIT 4

EXHIBIT 4

Confidential legal opinion of James Helenhouse, Esq. filed under seal

EXHIBIT 5

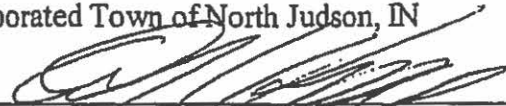
MEDIATION AGREEMENT

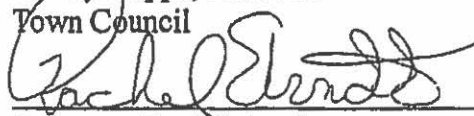
Parties appear this 9th day of December, 2015 for Mediation. The parties agree as follows:

- 1) The Town shall, within 60 days, of January 1, 2016, publish a Request for Proposals for a Lease Agreement wherein the Town will lease the rail line.
- 2) Request for Proposals will be due from interested Lessees within 30 days after publication.
- 3) The Town will select a Lessee and finalize a Lease Agreement 30 days after Requests for Proposals are received.
- 4) The parties agree that the current Operating Agreement dated August 31, 2004, including all extensions, shall be extended until May 15, 2016. The parties agree that there shall be no passenger service during the extension period in this Agreement.
 - a. In the event that a Lease Agreement is finalized between the Town and a Lessee, CKIN and the Town will voluntarily terminate the August 31, 2004 Operating Agreement. All parties will act in good faith.
- 5) The parties acknowledge and agree that this Mediation Agreement is contingent upon final approval of all parties, including a final vote accepting this Agreement by the full Board of the Town of North Judson at a Regular Meeting which is scheduled for December 21, 2015.
- 6) All revenue shares must be expended as per the Operating Agreement.

The Incorporated Town of North Judson, IN

By:


Wendy Noppe, President
Town Council

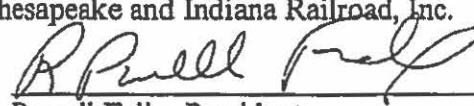

Attorney: Rachel Arndt

12/9/2015
Date

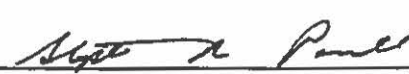
12-9-15
Date

The Chesapeake and Indiana Railroad, Inc.

By:


Powell Felix, President

12-8-15
Date


Attorney: Stephen R. Pennell

12-9-15
Date

Co-Alliance

By:


Attorney: Elizabeth South

12-9-15
Date

#795566

EXHIBIT 6

SUPPLEMENT TO DECEMBER 9, 2015 MEDIATION AGREEMENT

The Town of North Judson ("The Town"), The Chesapeake and Indiana Railroad, Inc. ("CKIN"), and Co-Alliance (herein after collectively ("the Parties")) entered into a Mediation Agreement dated December 9, 2015, a copy of which is attached hereto. The Mediation Agreement in part extended the term of the August 31, 2004 Railroad Operating Agreement between The Town and CKIN to May 15, 2016, except that there would be no passenger service over any segment of the North Judson Line during the extended period.

Due to changes in circumstances since the execution of the Mediation Agreement on December 9, 2015, the Parties hereby agree to the following extension of the Mediation Agreement and further extension of the Railroad Operating Agreement, as further amended herein below:

1) The Mediation Agreement and term of the Railroad Operating Agreement are hereby extended up to and including August 15, 2016 ("the Extension).

2) The Town agreed to accept the Mediation Agreement at the meeting of The Town Board on December 21, 2015.

3) The Town has drafted and voted to accept a Request for Proposal ("RFP") which would authorize The Town to lease the rail line. In order to assist The Town with the RFP process, The Town has retained the services of an Appraiser and has hired Mr. David Gogol to assist The Town with the RFP process.

4) The Town intends for the RFP process to be completed within 60 to 90 days from RFP issuance, and CKIN agrees to cooperate with the Town during the RFP process. The Town's expectation is to select a lessee and finalize a lease agreement within 30 days after the completion of the RFP process, but no later than August 15, 2016.

5) CKIN filed a letter with the Federal Railroad Administration ("FRA") on or about May 3, 2016 advising that CKIN is no longer responsible for the North Judson to English Lake segment of the rail line under 49 C.F.R. Part 213. The Town and CKIN recognize and agree that The Town shall be responsible for the inspection and maintenance of that segment of the rail line under 49 C.F.R. Part 213 after May 3, 2016. If The Town permits the Hoosier Valley Rail Museum ("HVRM") to operate passenger service over that segment of the line after May 3, 2016, The Town will be solely responsible for any violations of FRA rules.

6) The Town and CKIN agree that the Railroad Operating Agreement is amended by this Supplement to the Mediation Agreement to reflect the changes in responsibilities set forth in subparagraph (5).

7) During the extension period (May 15 to August 15), the Town agrees that it will not permit the HVRM to operate any passenger service outside the North Judson to English Lake segment except with the written consent of both The Town and CKIN at their sole discretion. The Town further agrees that it will require that any requests for operation of such passenger service by HVRM during the extension period must be submitted to The Town and

CKIN in writing at least 30 days in advance of the proposed trip. Only two requests will be entertained.

8) In the event that a Lease Agreement is finalized between the Town and a Lessee, CKIN and the Town will voluntarily terminate the Railroad Operating Agreement. All parties will act in good faith.

9) To the extent that the Mediation Agreement, the Railroad Operating Agreement, any Agreements between The Town and INDOT, and any Agreements between The Town and HVRM conflict with the provisions of the ICC Termination Act ("ICCTA"), the ICCTA will preempt those Agreements and State or local law.

10) The Parties agree that the Indiana Courts will have jurisdiction to enforce this Mediation Agreement, and that any interpretation of this Agreement shall be in accordance with Indiana law.

11) This Supplement to the Mediation Agreement shall become effective upon approval of The Town's Council and execution by CKIN and Co-Alliance.

The Incorporated Town of North Judson, IN

By:

Wendy Hoppe, President
Town Council

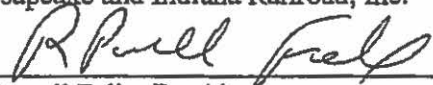
Date

Attorney: Rachel Arndt

Date

The Chesapeake and Indiana Railroad, Inc.

By:


Powell Felix, President

5-12-16
Date

Attorney: Stephen R. Pennell

Date

Co-Alliance

By:

Attorney: Elizabeth South

Date

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The Incorporated Town of North Judson, IN

By:

Wendy Hoppe, President
Town Council

Date

Attorney: Rachel Arndt

Date

The Chesapeake and Indiana Railroad, Inc.

By:

Powell Felix, President

Date

Attorney: Stephen R. Pennell

Date

Co-Alliance

By:

Attorney: Elizabeth South

Date

5/11/2016

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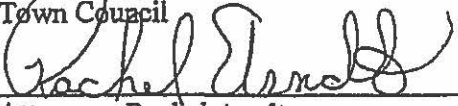
10) The Parties agree that the Indiana Courts will have jurisdiction to enforce this Mediation Agreement, and that any interpretation of this Agreement shall be in accordance with Indiana law.

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The Incorporated Town of North Judson, IN

By:


Wendy Noppe, President
Town Council

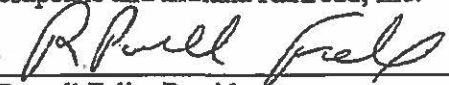

Attorney: Rachel Arndt

May 12, 2016
Date

May 13, 2016
Date

The Chesapeake and Indiana Railroad, Inc.

By:


Powell Felix, President

5-12-16
Date

Attorney: Stephen R. Pennell

Date

Co-Alliance

By:

Attorney: Elizabeth South

Date

EXHIBIT 7

**TOWN OF NORTH JUDSON SHORTLINE RAILROAD
REQUEST FOR PROPOSALS (RFP)**

June 15, 2016

AMENDED June 17, 2016

Pursuant to Section 3.5.2 of the RFP, the Town is amending the below RFP and is redistributing it to all known parties of interest and posting it for public inspection. This amended RFP supersedes any previous version and replaces all previous versions it in totality.

1.0 INTRODUCTION

Through the issuance of this Request for Proposals ("RFP") the Town of Judson (the "Town" or "North Judson") is hereby soliciting competitive proposals from potential entities capable of entering into a lease of the Rail Line (defined below) from the Town (the "Lease Transaction"), while promoting economic development in the Town and surrounding counties. This RFP is not a solicitation for proposals to privatize the Rail Line, as the Town will retain ownership of the Rail Line. But rather, the Town seeks to benefit from an entity that can better leverage the private sector's railroad and real estate experience, economic and community development experience and capital access in partnership with the Town. In addition, the Town desires to improve the speed and efficiency of communication between the operator of the Rail Line and the Town.

The selected lessee (the "Lessee") will be expected to collaborate with the Town as well as the Counties of Starke, Porter and LaPorte, counties through which the Rail Line passes. In addition, the Rail Line currently provides rail services that benefit the Hoosier Valley Railroad Museum (the "Museum") and on-line shippers, Co-Alliance, LLP ("Co-Alliance") and Kova Ag Products ("Kova"). Finally, the Rail Line is operated under a Railroad Operating Agreement between the Town and Chesapeake and Indiana Railroad, Incorporated (CKIN), dated as of August 31, 2004 (the "Operating Agreement"). Respondents may work with any rail line operator and the selected Lessee will have the right to negotiate the terms of any necessary contract as it deems appropriate and in the best interest of the Town.

Each respondent should submit a plan to lease the Rail Line pursuant to a lease agreement with a term up to ten (10) years and that complies with any directive by the Surface Transportation Board (STB)(the "Lease Agreement") and coordinate with the operator of the Rail Line, to create and execute economic development strategies using the Rail Line that benefit the Town and surrounding counties. A respondent should highlight in its proposal its experience leasing railroad-related real estate as well as creating and executing economic development solutions that are innovative, creative and feasible.

2.0 OVERVIEW

2.1. Rail Line History

Proposals by corporations must be executed in the corporate name by an individual authorized to sign. The corporate address must be shown below the signature. Proposals by partnerships must include the official business address of the partnership and the state/country of organization must be shown below the signature. Proposals by a joint venture must be similarly executed by all joint venture partners. Unsigned proposals will be considered non-responsive.

4.4 Statutory Requirements

This RFP is intended to comply with IND. CODE § 36-1-11-12, IND. CODE § 5-3-1 and other applicable federal and state laws. Pursuant to Ind. Code § 36-1-11-12, the Town is authorized to use this RFP process. ~~Indiana law prohibits the Town from leasing the Rail Line to any "ineligible person," defined in IND. CODE § 36-1-11-16 as a person who owes delinquent taxes, special assessments, penalties, interest or costs directly attributable to a prior tax sale on a tract of real property listed on the delinquent list under IND. CODE § 6-1.1-24-1, or a person who is an agent of an ineligible person.~~ All eligible respondents must be accorded fair and equal treatment with respect to any opportunity for discussion and revisions of proposals.

4.5 Security

~~The Town may require that the Lessee provide security for performance of its obligations under the Lease Agreement, including through a guaranty, letter of credit and/or an operation, and performance bond. Respondent shall demonstrate its ability to obtain an instrument of security sufficient to cover a ten (10)-year lease arrangement should it be selected as the Lessee.~~

5.0. CRITERIA FOR SELECTION

5.1. Overview of Selection Process

The Town will review the proposals and may invite selected members from the Museum, the North Judson Railroad Committee, shippers on the line and/or the Town attorneys to participate in the review of some or all of the sections of the proposals. Respondents may ~~be asked to submit~~ more detailed written information regarding operational and business planning as well as participate in an interview, or be available for a physical inspection of the property at the convenience of the Town. The chosen respondent will be invited to enter into a Lease Agreement with the Town of North Judson.

5.2. Ranking of Selection Criteria

The categories of the Selection Criteria and their relative weight are as follows:

<u>Issue/section</u>	<u>Pct.</u>
Qualifications of Respondent*	30%
Economic and Community Development	30%
Operations	20%

EXHIBIT 8

PETERSON WAGGONER & PERKINS, LLP

Partners
TED A. WAGGONER
T. ANDREW PERKINS

ATTORNEYS AT LAW
125 East Tenth Street
Rochester, Indiana 46975-1736
(574) 223-4292 ~ FAX (574) 223-4701
www.peterson-waggoner.com

Associate
RACHEL A. ARNDT
Retired
ROBERT E. PETERSON

November 20, 2015

VIA Email: pd@frontierrail.com

Dear Paul:

I am writing in response to your November 18, 2015 email requesting information regarding the status of operations on the rail line owned by the Town. I have forwarded your email thread along to all member of the Board. I did forward your October 14, 2015 email to the Town Council Members when I received it last month.

The Town remains interested in Frontier as a replacement operator for the rail line. The Town remains impressed with your operation and hopes that Frontier will remain interested in the prospect of operating the rail line once the STB litigation draws to a conclusion. You are correct that the Town showed enthusiasm for your company and what Frontier has to offer. The Council authorized the Town Representative, Mark Knebel, to share the proposed operating agreement with you so that you can review it. That was felt to be an appropriate move considering both your interest and the fact that the operating agreement is a document accessible to any interested operator.

The Council is currently involved in complex federal litigation, as I know that you know, and am sure you can appreciate. It is true that the Council felt ready to make a selection for a replacement operator and that it represented as much in an early STB filing. However, it is important that you know that at no time did the Town make a final vote selecting an operator. Any representation that a final vote had occurred and that Frontier had been selected was made without the knowledge or authorization of the Town Council. In addition, the Council has been encouraged by its legal counsel not to make a selection until farther along in the STB process.

There are several reasons for not making a final selection. The first is that the Council does not want to move forward in selecting a replacement operator only to find that it is unable to honor a service agreement should the STB litigation result in an unfavorable ruling for the Town. Second, the Council prefers to not make a complicated matter more complicated by involving another operator until it is advised to do so by legal counsel. Third, the Town will be submitting to Mediation in this matter, and has agreed not to select a replacement operator until Mediation is complete.

It is true that it is likely that Frontier may be asked to submit additional documentation prior to the Town making a final selection. That is not meant to be interpreted as a lack of interest by the Town, or as anything other than the Town following proper procedure. As I explained some time ago, in doing additional research regarding the procedure for selecting an operator, I located a statutory requirement whereby a municipal corporation like the Town must first publish requests for proposals prior to selecting and finalizing an operating agreement. I am exceedingly glad that the Town did not make a final vote on selecting Frontier when it did because it is my opinion that not having first published requests for proposals would have made any finalized operating agreement between Frontier and the Town voidable at best and void at worst. It is my understanding that either you or another representative from Frontier confirmed this requirement with Tom McFarland.

I want to take a moment to discuss your invitation to meet at my office. My hesitancy in doing so should not be taken personally. My opinion is that since I am only legal counsel for the Town, it is inappropriate for me to meet with anyone interested in being a service provider for the Town. The reason is that first, I am not a decision maker. I do not vote. Second, I want to avoid the appearance of impropriety by creating in the mind of either the Council Members or the Public that I am advising the Town to either accept or reject a proposed contract or operating agreement because I have had meetings outside of the presence of the Council with anyone.

I hope this helps to offer clarity and an appropriate update. To avoid any future misrepresentations regarding the status of litigation, I ask that you contact either me or Wendy Hoppe, our Council President.

Respectfully,

PETERSON WAGGONER & PERKINS, LLP



Rachel A. Arndt

cc: Council Members

EXHIBIT 9

apparent position in this matter.

18. It is true that the Town's initial filing indicated that an operator had been chosen. However, the filing was made before the Town determined that an RFP process would be required. It was also filed prior to Mediation in this matter.
19. The Town denies that the RFP process was defective. HVRM was given a small role advisory role in selection following the formal RFP process. Further, after CKIN advised the Town that the RFP had released confidential information, the Town worked with Co-Alliance, CKIN, HVRM, and all others who had been provided the RFP to stop the dissemination of the information. Specifically, the Town issued an amended RFP with explicit instructions to disregard the original RFP. The Town also updated its RFP response requirements to include an Amended Non-Collusion Affidavit that all who submitted responses were to have included. All who submitted a response supplied an Amended Non-Collusion Affidavit, except for Co-Alliance, as evidenced by Exhibits 5-8.
20. HVRM was allowed to provide input. HVRM's role was clearly identified and disclosed in the RFP. The Town considered HVRM's input, but ultimately selected a successful respondent that was not HVRM's top choice.
21. The Town's RFP did not favor unfettered passenger operations over the entire Rail Line, nor did it favor the same while disregarding freight operations or safety. The Town's RFP attempted to maintain or expand freight operations while also maintaining and expanding passenger operations. The Town believes that both goals can be met with parties who will cooperate with each other and collaborate in an effective and professional manner.


Wendy J. Hoppe

EXHIBIT 10

Verified Statement of Mark Knebel

Mark Knebel being duly sworn deposes and states as follows

My name is Mark Knebel and I am Secretary of the Hoosier Valley Railroad Museum Inc. (HVRM). HVRM is an Indiana non-profit corporation which operates a railroad museum and static display site in North Judson, Starke County, Indiana. HVRM operates excursion tourist passenger service between North Judson and LaCrosse, Indiana on the railroad owned by the Incorporated Town of North Judson.

1. In May of 2006, HVRM began conducting seasonal tourist operations between North Judson and LaCrosse, Indiana. Chesapeake and Indiana Railroad Company (CKIN) a Class III Railroad which had an agreement with the owners of the line was responsible to maintain the areas over which HVRM operates to no less than Class 1 track standards.
2. Contrary to the statement of Powell Felix, HVRM's concern for safety and its focus on safety is exceptional.
3. HVRM continues to have its railroad operations and equipment inspected by the Federal Railroad Administration inspectors at least twice a year and continues to have a clean bill of health regarding the safety of its equipment including locomotives and all the safety procedures and training which is done by HVRM.
4. HVRM has a safety program for its employee/volunteers including administration of rules tests and a FRA approved engineer and conductor certification program. HVRM operates under General Code of Operating Rules (GCOR) and tests its employee/volunteers regarding the applicable rules to its operations on an annual basis.
5. The only waivers obtained by HVRM from the FRA are waivers involving the age of their fleet (caboose more than 50 years old), glazing on one of their historic locomotives, and the application of the periodic drug and alcohol testing rules which the FRA waived

because of the infrequency of HVRM operations at slow speed and engineer for an hour program throttle time waiver. As the FRA letter regarding waivers attached to Mr. Felix's statement indicated these waivers were found by the FRA to be "in the public's interest and consistent with railroad safety."

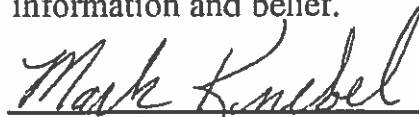
6. CKIN on the other hand is not a Safety First operation as Mr. Felix claims. Its track work has been shoddy and the attached reports of the FRA on inspections conducted in 2014 after HVRM operating crews refused to operate over track which had allegedly been repaired by CKIN See Exhibit A attached. HVRM had an independent inspector also inspect this track (with the town's blessing) and he too found the work shoddy. See Exhibit B attached. Mr. Felix seems to be upset regarding dealing with HVRM ever since HVRM had requested that the FRA inspect the track.
7. Regarding the personal injury which took place in 2011 referred to by Mr. Felix, the result of depositions taken in that matter showed that the cause of the accident was not the operations of HVRM but the track conditions which were and are the responsibility of CKIN.
8. HVRM has only expected CKIN to live up to its responsibilities in its 2004 operation agreement with North Judson and insisted that they maintain track to Class 1 standards, CKIN takes the position that they should not have to operate pursuant to the agreement they signed.
9. HVRM has never had unfettered rights to passenger service on the line. In fact in 2016 HVRM only operated on 31 or so days and operated 73 trains on those 31 or so days.

10. To HVRM's knowledge there has never during all the years that HVRM has operated its tourist trains been an operating conflict between the freight service operated by CKIN and HVRM's trains. Nor has there been any complaint received by shippers on the line regarding HVRM's operations.
11. Regarding the proposed railroad operating agreement sent to CKIN in 2014, the agreement was drafted by the Town attorneys with requested input from HVRM and its attorney. Other than information regarding it's operations, HVRM did not have any say in what was included in the agreement. It should also be noted the 2014 agreement was never signed or agreed to by the parties.
12. When prospective operators of the line were doing their due diligence and determining whether or not to reply to the RFP, several made unsolicited visits to HVRM and asked questions about the line. HVRM answered those questions to the best of its ability. Some of these prospective operators later responded to the RFP.
13. HVRM provided to the Town at the town's request information it had regarding the various grants received on behalf of the railroad which had been applied for by CKIN, were provided by shipper and HVRM contributions. HVRM did not supply any other information regarding the alleged moneys owed CKIN by the town under Section 10 of the agreement.
14. HVRM was not involved in foiling and had no knowledge of the "grand bargain" which according to Mr. Felix CKIN alleges was apparently an agreement to write an RFP which was slanted to permitting CKIN through its customer Co-Alliance to continue to operate the line.
15. HVRM had no input in the administration of the RFP or in selecting a new operator of the line.
16. HVRM had no input regarding the bid process and had no "overbearing" hand in the bid process.

18. The most recent RFP by North Judson provides that within agreed upon protocols HVRM could operate over all of the line which meets Class I standards. While CKIN apparently feels that this would make its operations not profitable enough, protocols agreed between HVRM and the proposed new operator of the line confirm that this can be done. A copy of the new protocols are attached hereto as Exhibit C.

VERIFICATION

Mark Knebel, being duly sworn according to law deposes and states that he holds the position of Secretary with Hoosier Valley Railroad Museum, Inc. is authorized to make this Verification, has read the foregoing document, and knows the facts asserted therein are true and accurate as stated, to the best of my knowledge, information and belief.



Mark Knebel

Sworn to Subscribed before me a Notary Public this 21st day of
December, 2016



Notary Public L. CHARLES LUKMANN III
RESIDENT OF COCONA COUNTY, IN
MY COMMISSION EXPIRES: 1/5/24