

Before the
SURFACE TRANSPORTATION BOARD

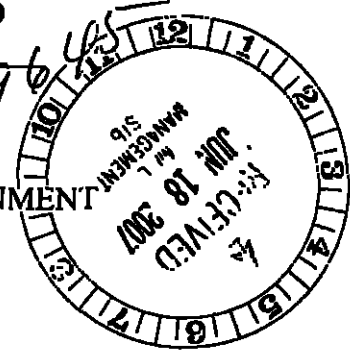
DOCKET NO AB 865-X

HONEY CREEK RAILROAD, INC -ABANDONMENT
IN HENRY COUNTY, IN

and

DOCKET NO FD 34869

HONEY CREEK RAILROAD, INC.
PETITION FOR DECLARATORY ORDER



**MOTION TO REOPEN AB 865-X AND RECONSIDER DECISIONS THEREIN, AND
TO CONSOLIDATE AB 865-X AND FD 34869**

FILED

JUN 25 2007

**SURFACE
TRANSPORTATION BOARD**

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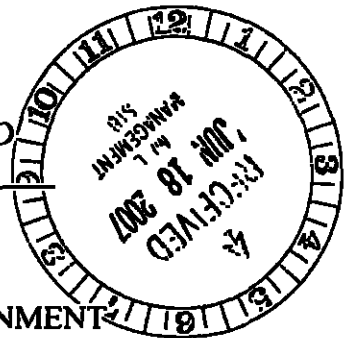
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JUN 25 2007

**SURFACE
TRANSPORTATION BOARD**

Dated June 18, 2007

Before the
SURFACE TRANSPORTATION BOARD



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IN HENRY COUNTY, IN

and

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PETITION FOR DECLARATORY ORDER

**MOTION TO REOPEN AB 865-X AND RECONSIDER DECISIONS THEREIN, AND
TO CONSOLIDATE AB 865-X AND FD 34869**

Pursuant to 49 U S C 722 and 49 C F R § 511 18, Gary L Roberts, Roberts Pipeline Construction Company, Inc., and Roberts Construction, Inc ("Roberts"), by and through counsel, moves the Board to reopen abandonment proceeding of Honey Creek Railroad, Inc ("HCR"), docketed at AB 865-X, reconsider the Board's decision granting HCR abandonment authority, and consolidate the abandonment proceeding at AB 865-X and HCR's petition for declaratory order, docketed at FD 34869

HCR filed a notice of exemption with this Board under 49 CFR 1152 Subpart F-Exempt Abandonments to abandon its approximately 5.9-mile line of railroad, between Sulphur Springs and New Castle, in Henry County, Indiana. The abandonment proceeding was docketed at AB 865-X. In a decision served August 20, 2004, the Board

granted HCR abandonment authority and stated that HCR would have to exercise it and file a notice of consummation by August 20, 2005. Subsequently, by decision served September 20, 2004, the Board reopened the proceeding and imposed interim trail use and public use conditions. But no agreements were ever reached regarding those conditions.

On July 11, 2005, HCR filed a request to extend by 180 days the time to file its notice of consummation. The Board granted the HCR's petition, setting the due date for filing a notice of consummation to February 16, 2006, which the Board subsequently extended three more times to February 11, 2008 at HCR's request.

In HCR's repeated petitions for extension of time, the only reason HCR presented to support its position was that HCR needs to maintain the status quo in the abandonment proceeding pending resolution of a lawsuit filed in the Henry County Circuit Court in Indiana and a legal issue subsequently referred to the Board by the state court. At the same time, HCR expressly stated to the Board that it has concluded the abandonment proceeding except filing the consummation letter. According to HCR, absent the filing of the consummation letter, its rail line cannot be considered abandoned and, therefore, the Board retains jurisdiction over the line.

In the state proceeding referenced in HCR's petitions for extension of time, HCR raised state tort law claims against Roberts. Shortly after Roberts answered the complaint, HCR successfully moved the court to refer to the Board the issue of whether the rail line at issue has been abandoned. As a result, HCR petitioned the Board for a declaratory order on the issue and its petition has been docketed in the Board's Finance Docket No. 34869. In this petition, HCR asked this Board to decide whether it has

exercised its Board-granted abandonment authority so that the Board has no jurisdiction over the rail line. In answering this question, the Board must address whether the rail line at issue is currently subject to its question. The Board may also want to address whether it had jurisdiction at the time of its original August 2004 order.

In order to file a response to the HCR's petition seeking declaratory relief, Roberts moved the Board to allow the parties to conduct discovery, arguing that discovery was necessary to prove that *de facto or de jure* abandonment had occurred before HCR's 2004 request for abandonment authority, or before the occurrence of the actions at issue in the state proceeding underlying the HCR's declaratory petition. Over HCR's opposition, the Board granted Roberts the requested extension, reasoning that "Roberts' extension request to conduct discovery and file a reply is reasonable."

As extensively discussed in the memorandum in support of this motion, the facts produced during discovery and applicable governing law establish that the Board has no jurisdiction over the line at issue for two independent reasons. First, the rail line is a spur, thus its abandonment is not subject to the Board's regulation as a matter of law. Second, HCR has *de facto and/or de jure* abandoned the line and therefore the Board is divested of jurisdiction over the line upon abandonment.

Given the reasoning that the line at issue is a spur and that the line had been abandoned *de facto* before HCR's filing for notice of exemption, the Board had no jurisdiction to grant HCR abandonment authority. Thus, Roberts moves this Board to reopen the HCR's abandonment proceeding and reconsider its decisions granting HCR abandonment authority.

Further, because the issues and the arguments presented in this motion to reopen AB 865-X and reconsider the decisions therein are the same as those in HCR's declaratory petition docketed at FD 34869, Roberts moves this Board to consolidate AB 865-X and FD 34869 under 49 C F R § 511.18

Dated June 18, 2007

Respectfully submitted,
ACKERSON KAUFFMAN FEX, PC

By 
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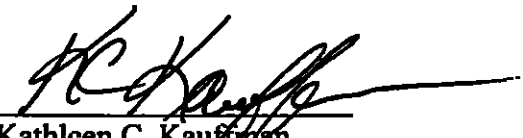
CERTIFICATE OF SERVICE

I hereby certify that I have this 18th day of June, 2007 served a copy of the Motion To Reopen Ab 865-X And Reconsider Decisions Therein, And To Consolidate Ab 865-X And Fd 34869 upon the following via first class United States Mail, postage prepaid:

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