

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

246847

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Docket No. AB-55 (Sub-No. 785X)

**CSX TRANSPORTATION INC.-DISCONTINUANCE OF SERVICE
EXEMPTION-IN VERMILLION COUNTY, IL.**

**PETITION OF VERMILLION VALLEY RAILROAD
TO REJECT AND/OR STAY**

Submitted by
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Dated: November 30, 2018

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I.
INTRODUCTION

Pursuant to 49 CFR 1152.50(d)(3), Vermillion Valley Railroad (“VVRR”) files its Petition to Reject and/or Stay the above-captioned notice of exemption for discontinuance of rail service on a line of railroad (“the Line”) owned by CSX Transportation, Inc. (“CSX”). The Line identified as the Woodland Subdivision is approximately 3.6 miles long and extends between MP QSK 0.0 and MP QSK 3.6 in Vermillion County, IL. The basis for VVRR’s Petition is that CSX’s notice contains *materially false information* with respect to the status of the subject line. As a result, this exemption is void *ab initio*. Moreover, permitting discontinuance without giving VVRR an opportunity to purchase the subject trackage whether through an offer of financial assistance (“OFA”) or through voluntary negotiations would be contrary to the rail transportation policy of the ICC Termination Act (“ICCTA”). VVRR also requests that the Board offer Board-supervised mediation.

II. BACKGROUND

VVRR is one of several profitable Class III short line common carrier railroads owned by short line holding company, Indiana Boxcar. It was established in 2003 and received an exemption from the Board in FD 34340 to provide service over 5.91 miles of railroad on the east side of Danville, IL. The Line is on the west side of Danville. VVRR has long desired to acquire the Line and the related yard in order to serve several nearby potential customers. It needs the yard in order to stage trains including unit trains to serve these customers. It has submitted several purchase proposals to CSX including one in 2017 that was resubmitted again in 2018 that included a purchase price. CSX responded by stating that it would consider VVRR's offer once it completed its current round of sales to short line railroads. Although VVRR does not hold trackage rights connecting the Line with its existing operation east of the Illinois-Indiana state line, its purchase proposal included those trackage rights.

The Line was formerly part of a through route between Indianapolis, IN, and Peoria, IL, owned and operated by the Peoria & Eastern subsidiary of the New York Central Railroad. It subsequently became a line operated by the Penn Central Railroad, Consolidated Rail Corporation, and, after CSX's acquisition of its portion of Conrail, by CSX. Major portions of the original through route have been abandoned pursuant to Board or Interstate Commerce Commission authority.

In 2012 CSX filed a notice of exemption with the Board to abandon the segment between MP QSK 3.6 and MP QSK 4.0 in order to accommodate a highway project with the result that the subject discontinuance exemption covers the last segment of this line west of a junction with a line shown on the attached map as the “QSD Line.” The fact that CSX has chosen to file this discontinuance notice confirms that the Line is subject to Board entry and exit jurisdiction under 49 U.S.C. §10901 *et seq.*

The current course of events took place in October 2018, when VVRR personnel observed that a contractor hired by CSX was busily engaged in removing track from the Line and the associated yard. VVRR’s President notified the STB of this unauthorized salvage activity and the STB in turn contacted CSX. CSX promised that it would restore one through track by or about November 2 and CSX’s counsel has now represented that CSX has restored a through track. Technically speaking, this may be correct. However, the “restored” line appears to be missing usable ties and tie plates and may be out of gauge. Although VVRR’s general manager cannot perform a physical inspection without access allowed by CSX, he believes the “restored” line would be incapable of holding a train, or even a rail car. Moreover, to the best of VVRR’s knowledge CSX has not restored the track that had been removed from the Line between approximately MP QSK 2.0 and MP QSK 2.5 or the joint bars that had been removed from portions of the

western end of the Line in apparent preparation for salvage of additional track.

CSX has now resumed salvaging what remains of the track and the yard.

In support of these facts, VVRR is submits with this Petition a verified statement from its witness James Montgerard attesting to these facts along with photos showing the salvage activity.

III.

CSX's NOTICE CONTAINS MATERIALLY FALSE INFORMATION

As a general proposition, the Board regards any class exemption as void *ab initio* if the notice contains false or misleading information. Failure to disclose material information can render a notice misleading by omission, and therefore void *ab initio*. See, e.g., *Save the Rock Island Committee, Inc. v. St. Louis Southwestern Railway Co.*, Docket No. AB-39 (Sub-No. 18X) (ICC served Apr. 1, 1994); and *U S Rail Corp.—Lease & Operation Exemption—Shannon G., a N.J. LLC*, FD 35042, slip op. at 3-4 (STB served Oct. 8, 2008). Material means the transaction would not have otherwise qualified for an exemption. *Berkshire Scenic Ry. Museum, Inc. v. ICC*, 52 F.3d 378, 381 (1st Cir. 1995).

Here the misleading information is CSX's representation that the Line is intact or, to the extent previously dismantled, has been recently been restored. On pages 4-5 of the notice, CSX stated

“[o]nce discontinuance is authorized, CSX will remove the signals but leave the remaining infrastructure in place to preserve the corridor in case business returns. Since service on the Line is being discontinued and not

abandoned and CSX is retaining the Line for future reactivation if demand for rail service resumes, the Line is not available for public purposes.

Further, on pages 5-6 of the notice CSX states that it “is not salvaging the track and materials on the Line.”

Here CSX or its contractor began the process of removing tracks comprising the Line before it prepared and filed the discontinuance notice. So the statements that it was “leaving the remaining infrastructure in place” and “not salvaging the tracks” were falsehoods. *Montgerard V.S.* But the fact remains that the remaining track was removed even if CSX recently restored it.

IV. THE BOARD HAS THE POWER TO REQUIRE CSX TO RESTORE THE TRACKS

The Board has the power to require CSX to restore the Line until such time as CSX seeks and obtains the lawful right to abandon it. *Cf., Central Oregon & Pacific Railroad, Inc.—Coos Bay Rail Line, STB Finance Docket No. 35130* (STB served Apr. 11, 2008, cited as *Corp*) (the Board has the power to compel a railroad that ceased providing service absent its approval to restore service) and *Colorado Wheat Administrative Committee, et al v. V and S Railway, LLC*, NOR 42140 (slip op. at 7, STB served May 7, 2015) (parties should not be permitted to remove track until they have received abandonment authority, and issuing an injunction against

dismantling and removing any tracks or related assets).¹ *Colorado Wheat* is exactly on point and requires that CSX restore the Line absent abandonment approval.

In a proceeding related to the *Colorado Wheat* case, *V and S Railway, LLC-Discontinuance Exemption-In Pueblo, Crowley, Kiowa, and Otero Counties, Colo.*, AB-603 (Sub. No. 4X)(slip op., STB served Jan. 15, 2016, cited as *V&S*), after the injunction was issued, V&S initially sought abandonment authority for that line by filing for abandonment by the class exemption procedure in 49 CFR § 1152.50. The Board asked the applicant to provide additional information and held the matter in abeyance pending receipt of the information. Then V&S then sought to amend the notice as one for discontinuance under the very same procedure used here. In view of the history of the Towner Line litigation, the Board rejected the discontinuance notice stating:

“In general, the notice of exemption process is an expedited means of obtaining Board authorization in certain classes of transactions that ordinarily do not require greater regulatory scrutiny, as defined in the Board’s regulations. Notices that raise significant unresolved issues or questions that require detailed scrutiny may be rejected. Given the history of the Towner Line, and the implications a discontinuance would have for the pending complaint case involving the Western Segment (citation omitted), the streamlined notice of exemption process is inappropriate for the discontinuance authority sought here. In particular, the issues raised in the complaint proceeding regarding the removal of track on the Western

¹ The Board has noted that removal of track before obtaining abandonment authority is unlawful. In Ex Parte 678, *Consummation of Rail Line Abandonments, Et Al.*, STB served April 23, 2008, slip op. at 4 (“In some cases railroads have taken actions affecting rail property without first seeking abandonment authority. When this occurs on inactive lines, we generally do not discover these actions until after the fact when the carrier seeks abandonment authority. Such actions are unlawful”).

Segment would need to be resolved if V&S sought discontinuance authority rather than abandonment authority, and the resolution of those issues would affect not just the Western Segment, but the entire Towner Line.

Under these circumstances, if V&S chooses not to seek abandonment authority by supplementing its Original Notice and instead seeks discontinuance authority, V&S must file a petition for exemption or an application. Either of these processes would allow the more comprehensive review that is needed here, including consideration of the arguments raised in KCVN's petition to reject and whether V&S should be permitted to discontinue service." Slip op. at 3-4.

Under *Corp* and *Colorado Wheat* the Board has the power to compel CSX to restore the previously salvaged portions of the Line, and under *V&S* should reject CSX's notice as controversial and unsuitable here. Should CSX wish to abandon the Line or discontinue service over it, CSX should be required to file an individual petition for exemption or a formal application in order to give the Board a sufficient opportunity to consider this unusual termination of service request.

V.

THIS CASE PRESENTS FACTS REQUIRING A THOROUGH INVESTIGATION BY THE BOARD

This proceeding is unusual. Typically carriers use the out of service abandonment/discontinuance class exemption for lines which have not seen service in some period of time and for which the likelihood of future service is fairly remote. Here VVRR sees a business opportunity to use the subject line and yard as a staging area to develop new freight business for both it and, ironically, CSX. Had CSX sought abandonment instead of discontinuance approval by means of the

class exemption of 49 CFR §1152.50, VVRR would likely be protected as it could file an offer of financial assistance to purchase the Line and the related yard. By characterizing the termination request as one for “discontinuance”, CSX has effectively deprived VVRR of that opportunity. While VVRR could theoretically submit an offer to “subsidize” continued service by attempting to compel CSX to lease it the Line and what remains of the yard, it is unclear whether this offer would pass regulatory muster. Accordingly, CSX’s strategy, even if technically applicable, violates at least the spirit of Board policy if not the law itself. As the Board has stated on numerous occasions, “[t]he function of the Board’s regulatory authority with respect to abandonments or discontinuance of rail service is to provide the public with a degree of protection against the unnecessary discontinuance, cessation, interruption, or obstruction of available rail service.”

Waterloo Ry.—Adverse Aban.—Lines of Bangor & Aroostook R.R. in Aroostook Cty., Me., AB 124 (Sub-No. 2) et al., slip op. at 5 (STB served May 3, 2004).

VI.

ALTERNATIVELY THE BOARD SHOULD STAY THESE PROCEEDINGS

The out of service discontinuance class exemption at 49 CFR § 1152.50(d)(3) specifically contemplates that the Board could stay these proceedings. In determining whether to grant a stay, the Board considers: (1) whether petitioner is likely to prevail on the merits; (2) whether petitioner will be irreparably harmed in the absence of a stay; (3) whether issuance of a stay would

substantially harm other parties; and (4) whether issuance of a stay would be in the public interest. *Wash. Metro. Area Transit Comm. v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977); *Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958); *Am. Chemistry Council v. Ala. Gulf Coast Ry.*, NOR 42129, slip op. at 4 (STB served May 4, 2012). For the reasons stated above, VVRR believes Board precedent compels the agency to reject the subject discontinuance exemption notice thereby satisfying the likelihood of success standard. Allowing this exemption to take effect would irreparably harm VVRR and the shippers that it proposes to serve. The harm is immediate because the salvage efforts are ongoing. Restoring the salvaged track would be prohibitively expensive for VVRR or its potential customers. *Colorado Wheat* at 4. Conversely, postponing its effective date would not harm CSX or any other parties as it has waited at least two years to terminate service. Finally, the public interest warrants a grant of a stay in order to preserve the Line for future rail service to the public.

VII.

VVRR REQUESTS THAT THE BOARD OFFER MEDIATION

In view of the unusual nature of this proceeding and the unnecessarily acrimonious relationship that appears to have developed between the parties, VVRR believes that Board sponsored mediation would be very useful here and requests that the Board make such services available to the parties. VVRR would be willing to participate in such a mediation.

VIII.
CONCLUSION

VVRR requests that the Board reject CSX's discontinuance notice on the grounds that it is void *ab initio* in that it contains false and misleading information and that it is controversial and therefore unsuitable for expedited consideration. Moreover, the Board should require CSX to restore the Line as a through route. Alternatively, VVRR requests that the Board stay the exemption to permit a more thorough examination of the pertinent facts. Should CSX wish to pursue this matter, it should be required to do so by an individual petition for exemption or a formal application.

Respectfully submitted,


John D. Heffner
Clark Hill PLC

1001 Pennsylvania Ave., N.W.
Suite 1300 South
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(202) 572-8629

Dated: November 30, 2018

CERTIFICATE OF SERVICE

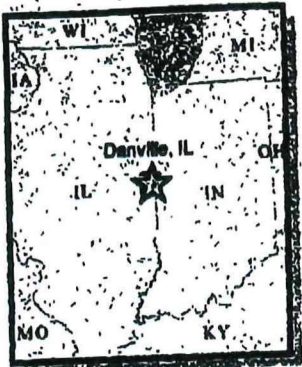
I, hereby certify that on the 30th day of November, a copy of the foregoing "Petition of Vermillion Valley Railroad to Reject and/or Stay" was sent by U.S. Mail to the following Parties of Record:

Louis E. Gitomer, Esq.
Melanie B. Yasbin, Esq.
Law Offices of Louis E. Gitomer
600 Baltimore Avenue, Suite 301
Towson, MD 21204

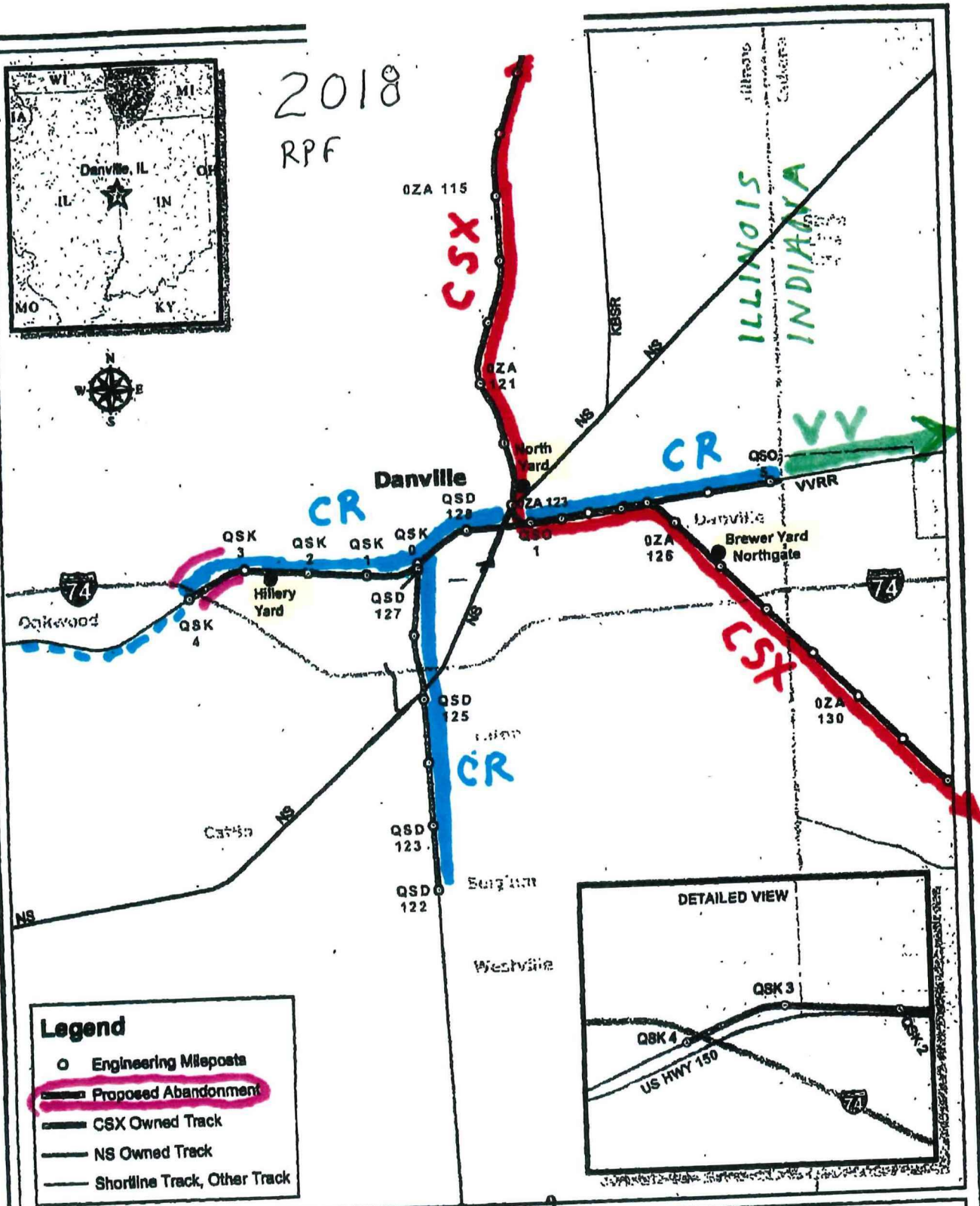
Attorneys for: CSX TRANSPORTATION, INC.


John D. Heffner

Dated: November 30, 2018

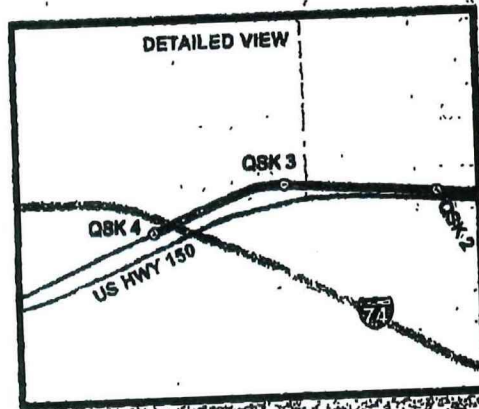


2018
RPF



Legend

- Engineering Mileposts
- Proposed Abandonment
- CSX Owned Track
- NS Owned Track
- Shortline Track, Other Track



Creation Date: June 21, 2011
S:\P\176\163\163-00000-163-1049488

CSX Transportation, Inc. Proposed Abandonment Chicago Division- Woodland Subdivision

QSK 3.6 to QSK 4
Total Distance of 0.4 Mile
Danville, Vermilion County, Illinois
STB Docket No. AB 55 (Sub-No. 714X)

0 2
Miles

CSX Real Property, Inc.
S-153-04002

VERIFIED STATEMENT
OF JAMES MONTGERARD

James Montgerard, being duly sworn, deposes and states as follows:

My name is James Montgerard. I am the general manager for four Class III short line common carrier railroads owned by short line holding company, Indiana Boxcar. These carriers include the Vermillion Valley Railroad ("VVRR"). My responsibilities with VVRR include all aspects of railroad operations and maintenance including supervision of train and maintenance crews. I have served in this position for 4 plus years. My railroad industry experience totals 15 years with carriers owned by Indiana Boxcar starting as an engineer, then a train master, and finally as general manager.

On November 21, 2018, VVRR president Powell Felix directed me to inspect the track and facilities on the subject line of railroad known as the Woodland Subdivision. This includes a former rail yard known as the Hillery Yard. I am well familiar with this line going back to when it was originally owned by Consolidated Rail Corporation. I inspected this property on foot and by car from adjacent property and public rights of way so as to avoid trespassing on CSX property. Here are my observations.

- The original mainline has had the rail removed from approximately MP QSK 2.0 West to approximately MP QSK 2.5 (about where the switch to Harmattan Mine used to be).

- At the west switch into the yard the joint bars have been removed.
- At Henning Rd. the joint bars have been removed on either side of the road crossing.
- The mainline appears to be intact west of Henning Road to end of track although I cannot confirm this without trespassing due to extreme overgrowth on the mainline.
- The mainline appears intact from Wyton (MP QSK 0.0) west to approximately MP QSK 2.
- The Yard lead appears to be intact from the east switch west to the east ladder switch where it becomes the passing track (PT). This track was in generally poor condition 15 years ago when I was last on it. The Diesel Track and Caboose Track are still in place.
- From the east ladder switch the PT is somewhat in place west to the west switch, although it is in unusable condition due to tie removal when the east ladder was removed and long term lack of maintenance.
- In addition, several years ago a drunk driver who was trying to elude the authorities jumped across the main and landed on the PT knocking it out of alignment by several feet. It was never repaired.
- The east ladder has been removed severing any continuity that tracks 1-7 once had.

- Most of the west ladder was removed a few years ago.
- I do understand that CSX claims that a through track remains from MP QSK 0.0 to MP QSK 3.6. However, CSX has not restored the mainline along the yard. Looking at the remaining PT and yard lead from a distance off CSX's property, the track does not appear to have usable ties, does not appear to have tie plates fully installed and secured, and the rail appears to be out of gauge in some places. I suspect it would be incapable of holding a train or even a rail car, and thus I disagree that a through track remains for the full length of the line to be discontinued.
- However, upon inspecting the project today 11/30 it appears that the scrappers have installed some rail where the switches were at both ends of the PT. It appears to be spiked and bolted.

I am attaching to my statement a copy of Conrail's ZIT map and photographs illustrating the salvage activities.

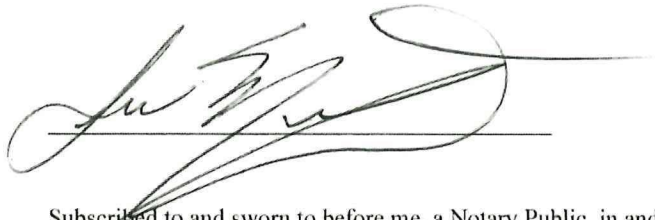
VERIFICATION

STATE OF Illinois)

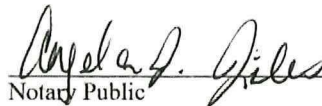
)

CITY OF Pratt)

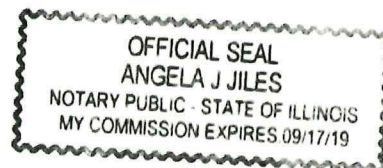
JAMES MONTGOMERY being duly sworn according to law, hereby deposes and states that (s)he holds the position of Gen. Manager with applicant/petitioner, is authorized to make this Verification, had read the foregoing document, and knows the facts asserted therein are true and accurate as stated, to the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



Subscribed to and sworn to before me, a Notary Public, in and for the County of Pratt
in the State of Illinois, this 30th day of November.

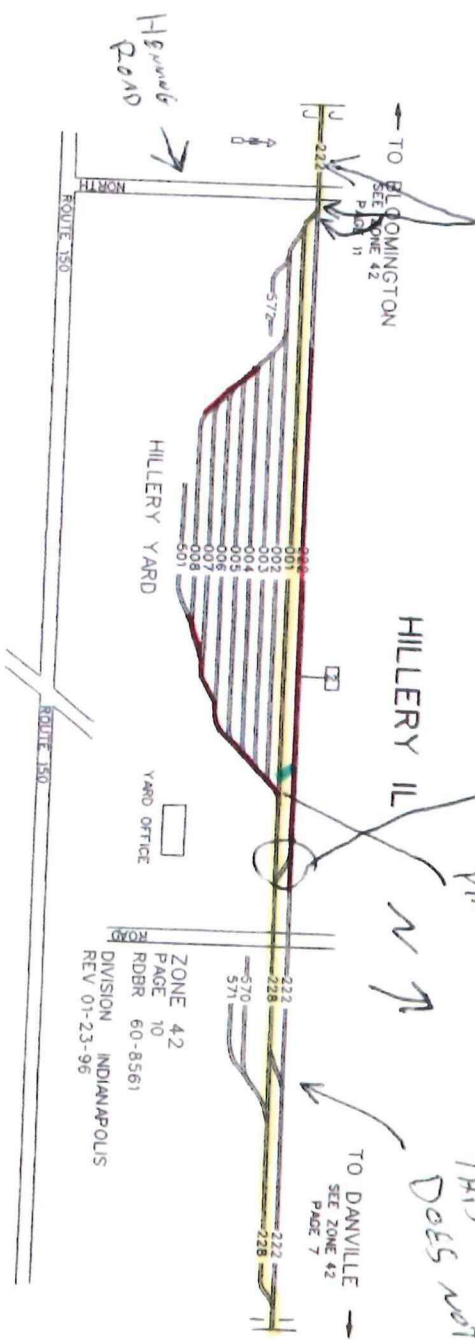

Notary Public

My Commission expires: 9/17/19



11-28-18

[Signature]



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THIS CROSSOVER IS ACTUALLY WEST
SHOW IN BLUE
THIS CROSSOVER
DOES NOT EXIST

TRAC 222 IS THE MAIN
TRAC 228 IS THE YARD LEAD
TRAC 001 IS THE PASSING TRACIT

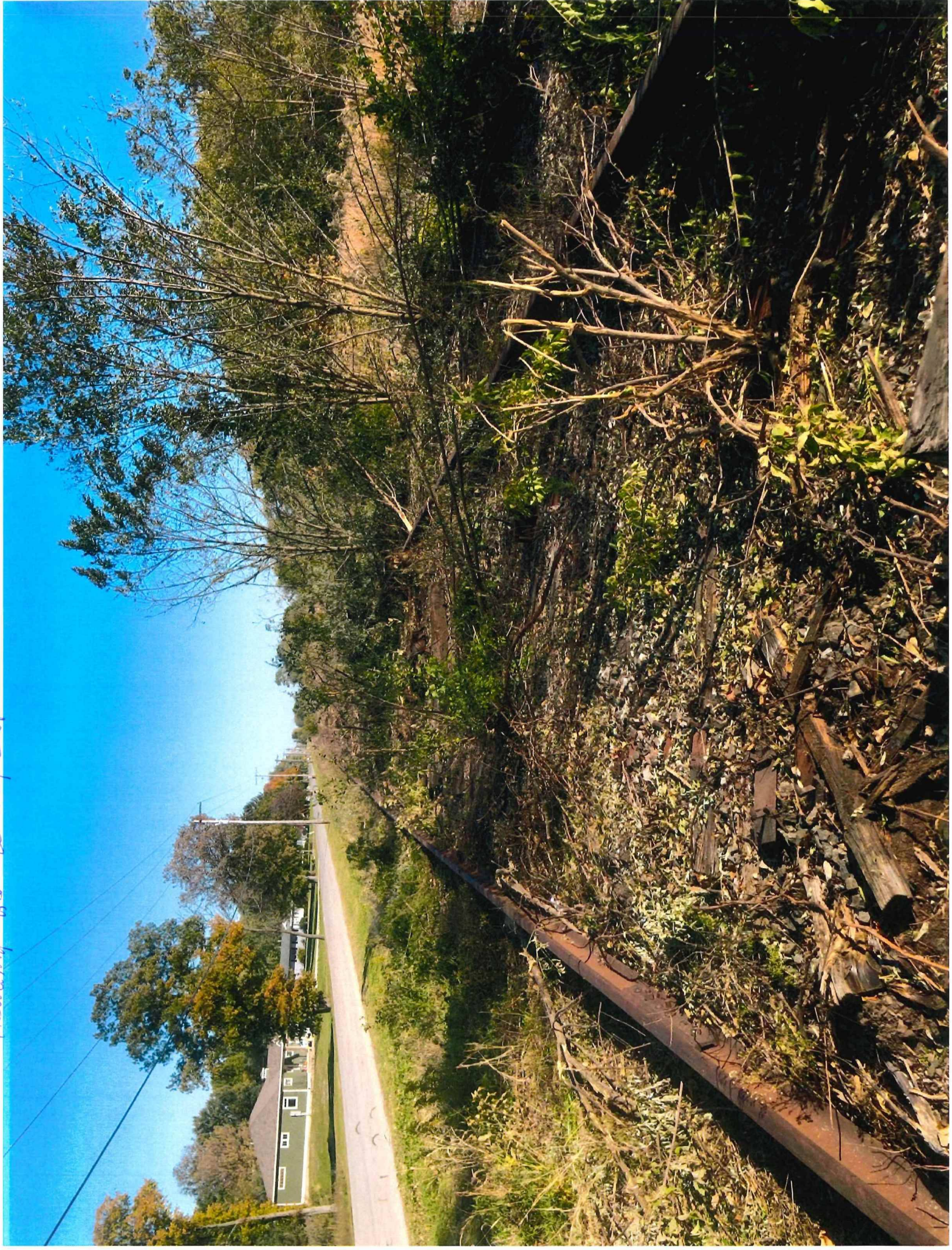
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= THEORETICAL THROUGH ROUTE.





Heavenly Rd looking East



Appx Map 3-5 looking west





Appx WP 3.5 looking East

