

DOCKET No. NOR 42176

Date: March 1, 2023

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

VICTOR INSULATORS, INC.	)	
	)	DOCKET No. NOR 42176
<i>Complainant,</i>	)	
	)	
v.	)	
	)	
FINGER LAKES RAILWAY CORP.	)	
	)	
<i>Defendant.</i>	)	

**REPLY IN OPPOSITION
OF VICTOR INSULATORS, INC TO
DEFENDANT FINGER LAKES RAILWAY CORP. AND
ONTARIO CENTRAL RAILROAD CORP.'S
MOTION TO DISMISS**

Victor Insulators, Inc. ("VI") hereby submits this Reply in Opposition to the Motion to Dismiss filed by Finger Lakes Railway Corp. ("FGLK") and Ontario Central Railroad Corp. ("ONCT") on February 9, 2023. In support of this Reply in Opposition, VI has attached the Verified Statement of Ira Knickerbocker, CEO of VI. (Attachment A).

PRELIMINARY STATEMENT

On December 27, 2022, VI filed a complaint (the "Complaint") against FGLK pursuant to 49 U.S.C. § 11101, 49 U.S.C. § 11701(b), 49 U.S.C. § 11704, and 49 C.F.R. Part 1111. The Board granted extensions until February 9, 2023 for FGLK to file a response.

On February 9, 2023, FGLK joined with ONCT and filed a joint Motion to Dismiss the Complaint (the “Motion”). FGLK and ONCT (collectively the “Railroad Parties”) argued that the Complaint should be dismissed because (1) FGLK is not the party servicing VI, (2) the Complaint concerns an exempt commodity, (3) even though ONCT should have embargoed the Victor Rail Line (as defined in the Complaint), its cessation of service was reasonable under the circumstances, and (4) ONCT has worked to minimize inconveniences experienced by VI. The Railroad Parties also argued that any claims for continued or future service should be dismissed as moot, because, on the same day as filing its Motion, ONCT filed a notice of partial termination of services of the Victor Rail Line with the Board.

For the reasons set forth below, the Board should deny the Railroad Parties’ Motion because the Complaint clearly states “reasonable grounds for investigation and action.” 49 U.S.C. § 11701(b).

In addition, given that ONCT has voluntarily joined FGLK in the Motion, VI respectfully requests the Board grant VI leave to amend the Complaint to the extent necessary to add ONCT as an official party to this proceeding and to incorporate the arguments raised herein to fully adjudicate the issues between the parties.

ARGUMENT

A. FGLK Failed to Answer the Complaint within the Required Time Period.

The Complaint was filed on December 27, 2022. Thereafter, FGLK made two requests to extend their time to reply, which VI consented to, and ultimately extended FGLK’s time to respond until February 9, 2023. Under Board regulations, “an *answer must be filed* with the Board within 20 days after the service of the complaint or within such additional time as the Board may provide. The defendant must serve copies of the answer upon the complainant and any other defendant.” 49 C.F.R. § 1111.5(c) (emphasis added). In addition, “an answer to a

complaint . . . may be accompanied by a motion to dismiss the complaint . . .” 49 C.F.R. § 1111.6. Here, the Railroad Parties filed a motion to dismiss, but have not filed an answer to accompany such motion. “A motion to dismiss may accompany the answer to a complaint . . . but the filing of a motion to dismiss does not relieve the defendant of its obligation to answer the complaint or comply with other procedural requirements.”¹ Finally, 49 C.F.R. § 1111.5(e) states: “Failure to answer complaint. Averments in a complaint are admitted when not denied in an answer to the complaint.” By failing to answer the Complaint, the averments of the Complaint are deemed admitted and FGLK has defaulted in the present action.

Notwithstanding the foregoing, although no pleading was filed, in order to ensure an opportunity to respond to this Motion, VI is responding to the Railroad Parties’ Motion within 20 days of its filing (February 9, 2023). See 49 C.F.R. §1104.13(a) (“A party may file a reply or motion addressed to any pleading within 20 days after the pleading is filed with the Board, unless otherwise provided.”)

B. The Railroad Parties Cannot Meet the Board’s High Standard for Granting Motions to Dismiss and Thus the Motion to Dismiss Must be Denied.

To survive a motion to dismiss, a complainant need only plead sufficient facts to establish a prima facie case for relief; the Board may dismiss a complaint only if it “does not state reasonable grounds for investigation and action.” 49 U.S.C. § 11701(b).² “When reviewing a motion to dismiss, the Board views all alleged facts in the light most favorable to the complainant.”³ The Board has “stated frequently that motions to dismiss are disfavored and

¹ *PCI Transportation, Inc. v. Fort Worth & Western Railroad Company*, S.T.B. Docket No. NOR 42094 (Sub-No. 1), at 1 (S.T.B. served February 5, 2007).

² *Terminal Warehouse, Inc. v. CSX Transp., Inc.*, S.T.B. Docket No. NOR 42086, at 7 (S.T.B. served May 12, 2004).

³ *BNSF Ry. Co. -- Terminal Trackage Rights -- Kansas City Southern Ry. Co., et al.*, S.T.B. Docket No. FD 32760 (Sub-No. 46), at 5 (S.T.B. served May 4, 2018).

rarely granted.”⁴ If a complaint states a reasonable basis for further Board consideration, a motion to dismiss must be denied as the Board has a “duty to investigate the complaint.”⁵ A claim does not need to allege enough facts to establish a clear violation by the defendant; it needs to only provide sufficient grounds for further investigation, and the party seeking dismissal must demonstrate that “there is no basis on which [the Board] could grant the relief sought.”⁶

For the reasons stated herein, the Railroad Parties fall far short of meeting this very high standard and their Motion must be denied.

C. FGLK Holds Itself Out as Operator of the Victor Rail Line and the Board Should Grant Leave to Amend the Complaint to Add ONCT as a Defendant to the Extent Deemed Necessary.

- a. ONCT Received Notice of the Complaint and Would not be Prejudiced if the Board were to Grant Leave to Amend the Complaint to Add ONCT as an Official Party to this Proceeding.

The Railroad Parties argue that because “VI improperly filed its Complaint against FGLK” the Complaint should be dismissed. Motion at 12. As a preliminary matter, while the Complaint names FGLK and not ONCT as a defendant, this omission was based upon a reasonable belief that FGLK was the operator of the Victor Rail Line. Given that ONCT joined in FGLK’s Motion, in addition to the discussion below, it is clear that ONCT received notice of the Complaint and has not been prejudiced by this omission. To the extent necessary to fully adjudicate these issues, VI requests the Board’s permission to amend the Complaint to name ONCT as a co-defendant and to make any other necessary amendments as to each Railroad

⁴ *Entergy Ark., Inc. v. Union Pac. R.R.*, S.T.B. Docket No. NOR 42104, at 3 (S.T.B. served Dec. 30, 2009).

⁵ *Brampton Enters., LLC v. Norfolk S. Ry.*, S.T.B. Docket No. NOR 42118, at 4 (S.T.B. served Mar. 16, 2011).

⁶ *Sierra R.R. Co. v. Sacramento Valley R.R. Co., et al.*, S.T.B. Docket No. NOR 42133, at 3 (S.T.B. served Apr. 23, 2012).

Parties' relationship with the Victor Rail Line and Spur in question consistent with the allegations in their Motion. 49 C.F.R. § 1104.11; 49 C.F.R. § 1111.3(a).

b. FGLK Holds Itself Out as Operator of the Victor Rail Line.

The Complaint should not be dismissed against FGLK because FGLK holds itself out as operator of the Victor Rail Line and controls ONCT. The Railroad Parties' Motion additionally argues that ONCT, not FGLK, is the entity that holds a common carrier obligation over the line. The Railroad Parties state that FGLK, as ONCT's parent company, merely "controls ONCT and manages the operation of ONCT," and thus "FGLK does not have any common carrier obligation with respect to customers located along the Victor Line." Motion at 1-2, 7, 10.

While FGLK may be a separate corporate entity from ONCT, the two are operationally one and the same. There is abundant evidence that FGLK has held itself out to be a common carrier with a common carrier obligation along the Victor Rail Line. For example, FGLK's "System Map" clearly indicates that FGLK operates along the line that services VI.⁷ In addition, it appears that ONCT does not operate a website advertising its freight services and FGLK's website makes no distinction between the operations of FGLK and ONCT (and simultaneously indicates that FGLK operates the Victor Rail Line). Customers seeking freight services from ONCT presumably must communicate through FGLK as no contact information for ONCT freight services is included. FGLK and ONCT also share the same upper level corporate executives (such as the President, Michael Smith) and attorneys.⁸

Moreover, various public records surrounding the redevelopment plans within the Town and Village of Victor include references to discussions with FGLK, rather than ONCT, regarding

⁷ "FGLK System Map and Abandoned Routes", WWW.FINGERLAKESRAILWAY.COM
<https://fingerlakesrail.com/System%20Maps/FGLK%20System%20Map%20with%20Abandoned%20Railroad%20Lines-Routes.pdf> (last visited Feb. 28, 2023).

⁸ See Motion to Dismiss cover page and verification page.

rail operations over the Victor Rail Line. For example, representatives of FGLK – not ONCT – appeared at various local municipal board meetings discussing service over the Victor Rail Line.⁹ Thus, FGLK has clearly held itself out to the public as operator of the Victor Rail Line.

Because FGLK controls ONCT and has held itself out as operator of the Victor Rail Line, VI had reasonable belief to name FGLK in the Complaint, and for the reasons discussed herein and to fully adjudicate the issues, the Complaint should not be dismissed against FGLK.

c. By Holding Itself Out as Operator of the Victor Rail Line, FGLK has Assumed a Common Carrier Obligation to Customers on the Victor Rail Line.

The Railroad Parties argue that ONCT is the operator of the Victor Rail Line, and that while FGLK controls ONCT, FGLK is not the operator and therefore does not hold a common carrier obligation to VI. The Railroad Parties argue that FGLK has no common carrier obligation over the line that serves VI and that “VI does not have any right to bring the Complaint against FGLK for the failure to provide service on reasonable request because FGLK has no obligation to provide such service.” Motion at 7. While the Railroad Parties may be correct that the Board did not provide FGLK “any authority to operate the ONCT Line” (*Id.*), FGLK has nonetheless assumed a common carrier obligation over the line by routinely holding out to the public as the operator over the line.

There is no statutory definition of the term “common carrier.” However, generally, “common carrier” is understood to refer “to a person or entity that *holds itself out to the general public as engaged in the business of transporting persons or property from place to place for*

⁹ See, e.g., Victor Street Connectivity and Access Plan Steering Committee #5 Meeting Minutes (August 30, 2022), <https://www.victorny.org/430/Victor-Connectivity-Project>.

compensation.”¹⁰ “The criteria used to determine whether or not an entity is a common carrier by railroad is a “willingness and an ability to hold out to perform rail service to the public.”¹¹

Based on the information set forth above, it is clear that FGLK has held itself out as the operator of the Victor Rail Line, both through its own official website and through multiple public meetings. See Attachment A (Verified Statement of Ira Knickerbocker). It has, therefore, held itself out as an operator available to perform common carrier rail service to the public on the line for compensation upon reasonable request, and therefore, has voluntarily assumed common carrier obligation to customers on the Victor Rail Line.¹² Even if FGLK was not “on paper” the entity operating over the Victor Rail Line, for all intents and purposes, FGLK was the operator of the Victor Rail Line and should be held to owe a common carrier obligation to VI. As a result, the Complaint against FGLK should not be dismissed.

D. The Railroad Parties’ Motion Incorrectly States that the Shipments Contain an Exempt Commodity.

The shipments of clay to VI are not an exempt commodity, and therefore, are indeed subject to Board regulation. The Railroad Parties correctly point out that 49 C.F.R. § 1039.11 exempts several types of clay from Board regulation, however, the specific type of clay at issue is an exception to the exemption.

The relevant regulation specifies that “[t]he Standard Transportation Commodity Code (STCC) numbers that identify the exempted commodities are those listed in effect on the

¹⁰ *American Orient Express Railway Co. LLC – Petition for Declaratory Order*, S.T.B. Docket No. FD 34502, at 4 (S.T.B. served Dec. 29, 2005) (emphasis added).

¹¹ *Wisconsin & Michigan Railway Co. -- Discontinuance of Service Exemption -- In Ashland and Iron Counties, WI and Gogebic County, MI*, I.C.C. Docket No. AB-440X, at 4 (I.C.C. served Sept. 21, 1995).

¹² *Honey Creek Railroad, Inc. -- Petition for Declaratory Order*, S.T.B. Docket No. FD 34869, at 7-8 (S.T.B. served June 4, 2008) (even though entity only served one shipper on the line, the Board determined that the entity held a common carrier obligation because it operated under a joint tariff and received compensation for its services).

effective date of the tariff cited, *and shall embrace all commodities assigned additional digits.*” 49 C.F.R. § 1039.11(a) (emphasis added). The regulations exempt commodities with STCC number beginning with “32” which include “clay, concrete, glass or stone products.” *Id.* The regulation then lists several exceptions to the exemption including “3295 Nonmetallic earths or minerals, ground or treated in any manner except 3295215.” Thus, all commodities designated with codes beginning with 3295, except for 3295215, are exceptions to the exemption offered under 49 C.F.R. § 1039.11(a). Given that the shipments of clay at issue are classified under STCC 3295232, they are not exempt commodities (i.e., it is an exception to the exemption) and remain subject to Board regulation.

E. Even if ONCT is Exempt from the Abandonment Proceeding Requirements in 49 U.S.C. § 10901 and § 10903, FGLK/ONCT is Still a Common Carrier Subject to Other Applicable Requirements.

a. ONCT Must Comply with Applicable Requirements outside of 49 U.S.C. § 10901 and § 10903.

Based on the facts set forth in the Motion, ONCT need not seek the approval of the Board to terminate service on the line because the operation of a rail line under a modified certificate is not subject to the abandonment proceeding requirements of 49 U.S.C. § 10903. 49 C.F.R. § 1150.22. However, despite this, ONCT (and FGLK) is still a common carrier and “incurs all benefits and responsibilities under 49 U.S.C. subtitle IV.” 49 C.F.R. § 1150.22. Thus, ONCT/FGLK is required to provide service upon reasonable request. The fact that ONCT has since filed a Notice to of Intent to Partially Terminate Service¹³ does not relieve it of liability for its failure to provide service.

b. Other Requirements Pertaining to Discontinuance of Service Should Still Apply.

¹³ *Ontario Central Railroad Corp. -- Operations Between Shortsville and Victor, NY -- Notice of Intent to Partially Terminate (Abandon) Service*, I.C.C. Docket No. FD 29761 (filed Feb. 9, 2023).

Based on the facts set forth in the Motion, ONCT may terminate its *service on the line*, by providing 60 days' notice of its intent to terminate the service to the Board and VI. 49 C.F.R. § 1150.24. ONCT's notice is ambiguous, however, because it indicates the intent to "terminate (abandon) service" over a 4.4-mile segment of the Victor Rail Line.¹⁴ However, to the extent that ONCT believes its notice of intent to terminate service on the line also simultaneously serves as notice to permanently abandon the line, it is mistaken. There is a significant difference between "'abandonment' of a rail line and 'discontinuance' of service."¹⁵

Board regulations provide for an abbreviated offer of financial assistance ("OFA") process for rail lines not part of the Final System Plan. 49 C.F.R. § 1152.27(n)(1). As the Railroad Parties indicate, the line in question is not part of the Final System Plan. Motion at 2. Thus, while ONCT need not obtain the Board's approval to terminate service on the line, the Victor Rail Line should still be subject to the abbreviated OFA process "to provide an opportunity for rail service continuation." 49 C.F.R. § 1152.27(n)(1). This regulation clearly states that "[t]he Board will generally apply the OFA procedures in this section (49 C.F.R. § 1152.27) for class exemptions *to summary abandonment and discontinuance notices...*"

In order to abandon the line, it is the *owner of the line* that must submit notice to the Board. See 49 C.F.R. § 1152.27(n)(1) ("To provide an opportunity for rail service continuation through offers of financial assistance, however, *the owner of the line* must give not less than 60 days' notice of a discontinuance, and beginning 120 days after discontinuance, not less than 30 days' notice of abandonment.") (emphasis added). Additionally, "[n]otice is to be sent *by the*

¹⁴ See *Ontario Central Railroad Corp. -- Operations Between Shortsville and Victor, NY -- Notice of Intent to Partially Terminate (Abandon) Service*, I.C.C. Docket No. FD 29761, at 1 (filed Feb. 9, 2023).

¹⁵ *Preseault v. ICC*, 494 U.S. 4, 25, n.3 (1990).

line owner to the Board, the governor and transportation agencies and the government of each political subdivision of each state in which such rail properties are located and to each shipper who has used the rail service during the previous 12 months.” *Id.* (emphasis added). As conceded in its Motion, ONCT is merely the operator of the line. The County of Ontario, New York (the “County”) is the owner of the line. Motion at 1. To date, the County has not provided notice to VI (nor presumably to the Board) of its intent to abandon the line as required.

Because ONCT is not subject to the normal abandonment process given the operation of the line under a modified certificate, the OFA process for summary abandonments and discontinuances should be applied to allow any interested party to continue operating the line that serves VI.¹⁶

This is particularly true given the fact that FGLK has held itself out as operator of the Victor Rail Line. By holding itself out as operator, FGLK has muddied the reality of what actions are actually required for termination of services and any eventual abandonment of the Victor Rail Line. Unlike ONCT, FGLK has not indicated that it ever applied for or obtained a modified certificate, which is the status allowing ONCT to bypass the statutorily required abandonment process. Without a modified certificate, FGLK would not be exempt from 49 U.S.C. § 10901 and § 10903, and by holding itself out as operator, has given the public reason to

¹⁶ Under the abbreviated OFA process the Board is required to file a notice within twenty days in the Federal Register regarding ONCT’s notice to terminate. 49 C.F.R. § 1152.27(b)(2)(ii). Within ten days of this notice in the Federal Register, any party interested in filing an OFA is required to file an intent to file an OFA with the Board. 49 C.F.R. § 1152.27(c)(2)(i). Any interested party will then have until thirty days after the Board’s notice in the Federal Register to file an OFA. 49 C.F.R. § 1152.27(b)(2)(ii); (c)(2)(ii)(B).

believe the traditional abandonment processes would apply if service were to be abandoned over the Victor Rail Line.¹⁷

As a result of the foregoing, ONCT's notice to terminate its service on the line is noted, but the issue of service termination and permanent abandonment of the rail line are separate and distinct issues. If and when the County files an intent to abandon the line, to preserve the critical rail transportation upon which VI depends, other interested rail carriers ought to be given the opportunity to submit OFAs.

F. ONCT/FGLK's Failure to Provide Service to VI was Unreasonable.

Despite the Railroad Parties' arguments to the contrary, the facts support a finding by the Board that ONCT/FGLK failed to provide service upon reasonable request to VI. "Liability under the common carrier obligation may be temporarily suspended if the carrier has in place a lawful embargo."¹⁸ As an initial point, while the Railroad Parties' Motion correctly identifies the factors of the balancing test used by the Board when determining whether a common carrier's embargo was unlawful, we note that ONCT never filed an embargo.

Per the American Association of Railroads, an embargo "must be used" "[w]hen necessary to restrict [t]raffic movements, for periods in excess of 24 hours."¹⁹ Embargoes are meant to be temporary in nature and it is prohibited to use an embargo to "[r]estrict business

¹⁷ *Wisconsin & Michigan Railway Co. -- Discontinuance of Service Exemption -- In Ashland and Iron Counties, WI and Gogebic County, MI*, I.C.C. Docket No. AB-440X, at 8 (I.C.C. served Sept. 21, 1995) ("Shippers rely on the fact that a rail operator must get Commission authority to discontinue service and the owner of a rail line must get authority to abandon the line. If shippers depend on a line that appears to be the same as any other, only to discover that protection against abandonment does not exist, they may, with justification, believe that they have been misled.").

¹⁸ *Groome & Assocs., Inc. and Lee K. Groome v. Greeneville Cnty. Econ. Dev. Corp.*, S.T.B. Docket No. NOR 42087, at 11 (S.T.B. served July 27, 2005).

¹⁹ Association of American Railroads, *Circular TD-1*, PUBLIC.RAILINC.COM, <https://public.railinc.com/sites/default/files/documents/TD-1.pdf> (last visited Feb. 28, 2023).

growth” or “[a]s a permanent measure to control traffic.”²⁰ Service on the line has now been stopped for over a year (since November 2021); certainly longer than 24 hours. The Railroad Parties simply gloss over this requirement by stating “ONCT perhaps should have either embargoed the Out-of-Service Segment or sooner issued a notice of partial termination (abandonment).” Motion at 9.

Even if ONCT/FGLK had filed an embargo – which it did not – such an embargo would have been unlawful under the application of the following factors: (1) the cost of repairs necessary to restore service; (2) the amount of traffic on the line; (3) the carrier’s intent; (4) the length of the service cessation; and (5) the financial condition of the carrier. When looking at the factors, the Board does not apply them in a formulaic way, rather, its “objective is to determine whether the carrier’s actions are reasonable under the circumstances.”²¹ The Board must consider each factor with no single factor dispositive to the analysis.

While the cost of repairs and the amount of traffic on a line are part of the Board’s analysis, “...an embargo may not be justified solely on the grounds that to continue to provide service would be inconvenient or less profitable.”²² The Railroad Parties argue that because the revenue earned from VI’s placed orders is allegedly less than the Railroad Parties’ approximate cost of repairs, they are not required to make repairs because the “cost to restore service cannot be justified.” Motion at 8. The Board must weigh whether the costs of repairs are “substantial”, and not what the Railroad Parties appear to argue – that the cost of repairs are unjustified simply

²⁰ *Id.*

²¹ *Bolen-Brunson-Bell Lumber Co., Inc. v. CSX Transp., Inc.*, S.T.B. Docket No. FD 34236, at 4 (S.T.B. served May 15, 2003).

²² *Decatur Cnty. Commrs. v. Surface Transp. Bd.*, 308 F.3d 710, 720 (7th Cir. 2002) (internal quotation marks and citation omitted).

because the profits from VI's orders do not exceed the cost of repairs.²³ Additionally, unlike the rail carrier in *Groome & Assocs., Inc. & Lee K. Groome v. Greenville Cnty. Econ. Dev. Corp.*²⁴, the Railroad Parties have provided no indication that they are seeking, or have sought, outside funding to repair the line (such as from federal government infrastructure grants, local government grants or funds, or financial assistance from shippers or other rail lines).

Embargoes properly filed with the American Association of Railroads “will automatically expire one year after the effective date of issuance” unless a request is made for reissuance.²⁵ “Usually, where the embargo is a long one, and the cost of repairs not substantial, invalid embargoes (and consequently unlawful abandonments) have been found.”²⁶ “The length of an embargo must be examined in the context of how long it would take to arrange for and complete the necessary repairs and what actions the carrier has taken while the line is embargoed.”²⁷ Here, there is no evidence that the Railroad Parties have made any attempts to repair the line over the last approximately fifteen months of stopped service (nor have they shown evidence indicating that the required repairs would have required an embargo of this length). Unlike in *Bolen-Brunson-Bell Lumber Co.*, the Railroad Parties have not taken prompt action with respect to the line's status, as evidenced by the Railroad Parties filing a notice of termination only when confronted with the Complaint, long after the line was apparently placed “out-of-service.”

²³ *Id.*

²⁴ S.T.B. Docket No. NOR 42087, at 4, 15 (S.T.B. served July 27, 2005).

²⁵ Association of American Railroads, *Circular TD-1*, PUBLIC.RAILINC.COM, <https://public.railinc.com/sites/default/files/documents/TD-1.pdf> (last visited Feb. 28, 2023).

²⁶ *Overbrook Farmers Union Coop. Assoc. -- Petition for Declaratory Order -- Violation of 49 U.S.C. 11101(a)*, I.C.C. Docket No. FD 31166, at 14-15 (I.C.C. served Feb. 3, 1989).

²⁷ *Bolen-Brunson-Bell Lumber Co., Inc. v. CSX Transp., Inc.*, S.T.B. No. FD 34236, at 8 (S.T.B. served May 15, 2003).

In looking at the carrier's intent, the question is "did the railroad allow the line segment to deteriorate and remain in non-operating condition in order to hasten abandonment of the service?"²⁸ A carrier may not "use an embargo as a means of effecting an unauthorized, de facto abandonment, or driving traffic off of a line to support an abandonment application."²⁹ Here, ONCT/FGLK did not even bother to embargo the line. Rather, it simply decided to permanently discontinue service without following any regulatory procedure. That is, until the present Complaint was filed, arguably in an attempt to make this proceeding moot and to relieve itself of any liability for its unlawful failure to provide service and comply with its common carrier obligation.

While the Railroad Parties may not have specifically intended to drive VI's operations out of business, they certainly intended to terminate rail service and prevent VI from receiving any future rail service, all without going through the necessary procedures. It is curious that the Railroad Parties knew that the Out of Service Segment "had defects, needed substantial maintenance and rehabilitation and was no longer capable of safe operation" in November 2021, but the Railroad Parties allowed the track to languish and fall deeper into disrepair until February 2023. Motion at 3. The Railroad Parties attempt to argue that they had no intent to act in bad faith in placing the line "out-of-service" because "one of the reasons that it did not embargo or terminate service over the Out-of-Service Segment was to allow VI to continue to receive product by rail and truck-transfer. Moreover, ONCT has agreed to continue transloading and delivering clay for VI even after its service over the Out-of-Service Segment terminates." Motion at 9. Providing for "alternative arrangements to assure uninterrupted rail service for

²⁸ *Decatur Cnty. Commrs. v. Surface Transp. Bd.*, 308 F.3d 710, 716 (7th Cir. 2002).

²⁹ *Bolen-Brunson-Bell Lumber Co., Inc. v. CSX Transp., Inc.*, S.T.B. No. FD 34236, at 7 (S.T.B. served May 15, 2003).

originating/terminating traffic” can be evidence of a rail carrier’s good faith intent.³⁰ However, the Railroad Parties did not provide uninterrupted service, and instead provided an impractical truck transloading process which threatens to compromise the product and VI’s operations due to the potential for contamination and has resulted in delivery delays and lost product³¹ – hardly an alternative solution that would “mitigate any harm arising from [a] failure to resume rail operations.”³² Contrary to the Railroad Parties’ argument, this “alternative” does VI no favors – it has cost VI product, time, and money and is no replacement for the obligation of ONCT/FGLK to provide rail service to VI.

As soon as a rail carrier knows that it will not be resuming service, it should begin the abandonment or discontinuance process, or in this case, notify that it intends to terminate service.³³ Given that ONCT/FGLK never filed an embargo, and did not formally issue a notice of its intent to terminate service until the same day that it filed its Motion, ONCT/FGLK’s failure to provide service upon reasonable request is inherently unreasonable.

G. FGLK/ONCT Inexplicably Identify Estimated Cost of Repairs as “Confidential” or “Highly Confidential”.

In connection with this Reply, VI is filing a challenge to the Railroad Parties’ designation of certain information marked as either “confidential” or “highly confidential”. As a threshold matter, we note that to date, VI (and its attorneys) have not signed a copy of the undertakings

³⁰ See *Decatur*, 308 F.3d at 716 (Unlike the situation in *G.S. Roofing Products*, alternative rail transportation was available for the entire time in which CIND stopped operating over the embargoed segment.).

³¹ Complaint at ¶¶ 23-24.

³² *Decatur*, 308 F.3d at 718.

³³ Cf. *Groome & Assocs., Inc. and Lee K. Groome v. Greeneville Cnty. Econ. Dev. Corp.*, S.T.B. Docket No. NOR 42087, at 15 (S.T.B. served July 27, 2005) (“But by June 2001, it was, or should have been, apparent to GCEDC that plans for funding and operating the line would not succeed. At that point, even in the unusual circumstances of this case, GCEDC should have known that it was time to seek to end its obligation to provide service, and it was unreasonable for it not to begin the abandonment or discontinuance process”).

required to see the redacted data in order to prevent an argument that such information already in our possession must be kept strictly confidential. The information redacted from the public version of the Railroad Parties' Motion includes three specific figures: (1) the cost to repair the spur servicing VI, (2) the cost to repair the approximately 4.4-mile portion of the Victor Rail Line which ONCT intends to terminate service over, and (3) the revenue ONCT receives from VI.

There is nothing to support that estimated costs of repair should be kept confidential. Indeed, such information is routinely publicly disclosed in proceedings challenging unlawful cessations of service, such as the case here.³⁴ Moreover, Bruce Habberfield, FGLK Manager of Business Development, previously provided Ira Knickerbocker (CEO of VI) rough cost estimates of repair via email, and never mentioned that such information should be confidential. Around this same time, Mr. Habberfield also indicated that the Victor Rail Line remained operational and that it was only the Spur servicing VI's facility that required repair to return to service. By marking such information as confidential, and thereby, precluding the public from seeing such information, it impedes potentially interested parties from making informed offers to continue service over the terminated portion. This further shows the Railroad Parties' intent to obstruct continuous service to VI. The Railroad Parties have a clear incentive to avoid disclosing this information to the public, as it has indicated on numerous occasions that it intends to take the rails along the Victor Rail Line and use them elsewhere.³⁵ As the Railroad Parties have stated in their Motion, they do not own the rails. Thus, their statements simply do not match up. If the

³⁴ See, e.g., *Decatur Cnty. Commrs. v. Surface Transp. Bd.*, 308 F.3d 710 (7th Cir. 2002); *Groome & Assocs., Inc. and Lee K. Groome v. Greeneville Cnty. Econ. Dev. Corp.*, S.T.B. Docket No. NOR 42087 (S.T.B. served July 27, 2005); *Bolen-Brunson-Bell Lumber Co., Inc. v. CSX Transp., Inc.*, S.T.B. No. FD 34236 (S.T.B. served May 15, 2003).

³⁵ Complaint at ¶ 29.

Railroad Parties had no intention of preventing continuous service to VI, why would they already have plans to use the rails (which they do not own) elsewhere, long before filing any kind of notice of their intention to terminate service over the line.

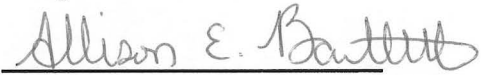
H. Conclusion

Based on the foregoing, the Board should deny the Railroad Parties' Motion because there are reasonable grounds for investigation and action. 49 U.S.C. § 11701(b).

Respectfully submitted,

VICTOR INSULATORS, INC.
280 Maple Avenue
Victor, New York 14564

Complainant


HARTER SECREST & EMERY
LLP

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Attorneys for Complainant

ATTACHMENT A

1. My name is Ira Knickerbocker, CEO of Victor Insulators, Inc. ("VI") in Victor, New York. I have been working with Victor Insulators in various roles since 1972. I have been CEO since approximately 2006 and as such I am responsible for overseeing all operations of VI.
2. I have had direct conversations with representatives of Finger Lakes Railway Corp. ("FGLK") and/or Ontario Central Railroad Corp. ("ONCT") regarding cessation of rail service to the VI facility in Victor, NY.
3. I make this statement in support of both VI's Reply in Opposition to FGLK and ONCT's Motion to Dismiss and VI's Motion to Challenge Designation of Information as Confidential and/or Highly Confidential Pursuant to Protective Order.
4. Through my conversations with FGLK and/or ONCT, there are regularly no clear distinctions between the two entities. I have received emails from representatives of FGLK,

including Bruce Habberfield (Manager of Business Development) regarding my service and estimated cost of repairs. In addition, I have had numerous discussions with FGLK and/or ONCT representatives regarding rail service to VI's facility.

5. The website for FGLK includes a system map which clearly indicates that FGLK operates along the line serving VI's facility. In addition, I attended a public meeting on August 30, 2022 (the Victor Street Connectivity and Access Plan Steering Committee #5) regarding potential redevelopment plans in the Town and Village of Victor, New York ("Victor") where representatives of FGLK have made statements regarding the future of rail operations in Victor.

6. In November 2021, Bruce Habberfield of FGLK provided me with rough estimated costs to repair the spur serving VI's facility. In addition, he also provided rough estimated costs that would be required in the future to the Victor Line.

7. In November 2021, Bruce Habberfield also informed me that the main line remained operational and that estimated costs to repair the main line were something that would need to be done in the future. He indicated that only the spur serving VI was being shut down. At no time during our conversations regarding estimated costs of repair did Bruce Habberfield or other FGLK/ONCT representatives indicate that the information was to be treated as confidential.

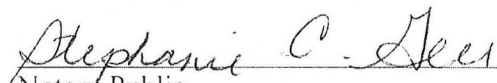
VERIFICATION

STATE OF NEW YORK)
COUNTY OF ONTARIO) ss

I, Ira Knickerbocker, verify under penalty of perjury that I have read the foregoing Verified Statement of Ira Knickerbocker, that I know the contents thereof, and that the same are true and correct.


Ira Knickerbocker
CEO, Victor Insulators, Inc.

Sworn to and subscribed
before me this day of March 1, 2023


Notary Public

STEPHANIE C GEER
NOTARY PUBLIC-STATE OF NEW YORK
No. 01GE6351516
Qualified in Ontario County
My Commission Expires 12-05-2024

CERTIFICATE OF SERVICE

I hereby certify that I have this 1st day of March 2023, caused copies of the foregoing Reply in Opposition of Victor Insulators, Inc to Defendant Finger Lakes Railway Corp. and Ontario Central Railroad Corp.'s Motion to Dismiss to be served by email as follows:

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

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