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February 8, 2008

VIA E-FILING

The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

Re: STB Docket No. AB-156 (Sub-No. 26X)
Delaware and Hudson Railway Company, Inc. d/b/a Canadian Pacific
Railway Company – Abandonment Exemption – In Albany County, NY

By letter filing received by the Board on January 22, 2008 ("January 22 Filing"), the Mayor of the Village of Green Island, New York ("Mayor") has challenged the R. Freedman & Son's ("Freedman") legitimate exercise of the Board's offer of financial assistance ("OFA") provisions at 49 U.S.C. 10904 and 49 CFR 1152.27 to acquire a rail line that Delaware and Hudson Railway Company, Inc. d/b/a Canadian Pacific Railway Company ("D&H") has proposed to abandon in the above-referenced proceeding. Freedman hereby responds to the Mayor's letter filing to – (1) reinforce that Freedman's efforts to acquire the subject rail line (the "Line") further the policy objectives of the OFA process, and (2) show that the Mayor has failed to establish any appropriate basis for rejecting Freedman's offer to acquire the Line.

The Mayor argues that Freedman's OFA has been made in bad faith (and, thus, is not bona fide), is contrary to the public interest, and is precluded by a settlement agreement between Freedman and the Village of Green Island (the "Village"). While Freedman will show that each of the Mayor's accusations is baseless (and, in some cases, entirely untrue), the January 22 2008 Filing is procedurally defective because it is not timely and therefore should be rejected out-of-hand.

For months, the Mayor has been aware of Freedman's efforts to acquire the Line. Specifically, on May 18, 2007, Tony Dawson, Freedman's president, sent the Mayor an e-mail alerting her to Freedman's decision to pursue acquisition of the Line through the

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Board's OFA processes.¹ One day earlier, on May 17, 2007, Freedman had filed its notice of intent to submit an OFA to acquire the Line. Neither the Mayor nor D&H objected to Freedman's notice of intent. The Board accepted Freedman's notice of intent in a decision in this proceeding served on June 15, 2007 (the "June 15 Decision").

Subsequently, on November 13, 2007, James M. Reilly, counsel representing Freedman in regard to settlement issues with the Village, advised Village counsel, Robert Feller, that Freedman had secured commitments to finance acquisition of the Line and that the OFA filing deadline was close at hand.² On November 30, 2007, following an extended tolling of the OFA procedures to permit D&H to accumulate and forward to Freedman information related to the Line's net liquidation value, Freedman filed its OFA, which the Board accepted pursuant to a decision served on December 5, 2007 (the "December 5 Decision"). Negotiations ensued between Freedman and D&H, and the parties have advised the Board that they have reached an agreement in principal that ultimately would permit Freedman to purchase the Line at a mutually acceptable price.³

Despite learning last May of Freedman's plans to acquire the Line, the Mayor has waited until late January of 2008 to object to Freedman's OFA. Assuming that the Mayor is entitled to participate in this proceeding at all, she has forfeited her two opportunities to address in a timely fashion the merits and the legitimacy of Freedman's OFA – first in May of 2007, when Freedman gave notice of its intent to file an OFA, and then again in early December, following the filing of Freedman's OFA. As noted above, the Mayor has been aware of Freedman's interest in acquiring the Line and its efforts before the Board toward that objective since at least May 18, 2007, the day after Freedman filed its notice of intent with the Board, so the Mayor cannot claim ignorance of the rail line abandonment⁴ and related OFA proceeding.

¹ A copy of that e-mail contact is attached hereto as Exhibit A.

² A copy of that e-mail contact is attached hereto as Exhibit B.

³ In light of the parties' joint request, the Board issued a decision on December 28, 2007, extending the OFA negotiating period until March 31, 2008, at which time, if the parties are unable to arrive at final terms, either party may request the Board to prescribe terms and conditions for the sale of the Line.

⁴ Even before Mr. Dawson contacted the Mayor to alert her to Freedman's OFA plans, D&H and the Board's Section of Environmental Analysis ("SEA") had contacted the Village concerning D&H's preparation and filing of the subject abandonment notice of exemption. See SEA's Environmental Assessment ("EA"), served in this proceeding on June 6, 2007. In fact, that EA, developed with the input of the Village, noted Freedman's notice of intent to file an OFA.

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In effect, the Mayor is now asking the Board to revisit its June 15 Decision and December 5 Decision, and, in so doing, reject Freedman's OFA. Accordingly, under conventional Board procedure, for the Mayor to obtain the relief she is requesting, her January 22 Filing would have to be construed either as an appeal of initial Board decisions pursuant to 49 CFR 1115.2, or, in the alternative, as a petition to reopen an administratively final Board action pursuant to 49 CFR 1115.4.⁵ The Mayor is far too late to file an appeal of the initial decisions issued by Director Konschnik on June 15 and December 5 of 2007, and, by rule, those decisions are now both actions of the entire Board, which are subject to the appellate procedures at 49 CFR 1115.3 and 1115.4. See 49 CFR 1115.2(e) and (g). Thus, the Board could act upon the Mayor's January 22 Filing only if it were to be construed as a petition to reopen administratively final actions pursuant to 49 CFR 1115.4, and then only if the Mayor had made the requisite showing (in detail) that reopening was appropriate to address material Board error, new evidence, or substantially changed circumstances. Of course, the Mayor has made no such showings, and so her request for Board action should be denied so that final purchase negotiations between Freedman and D&H may continue unabated.

Dispensing for the moment with the fact that the Mayor fails to recite, much less apply, the standards for reopening in her January 22 Filing, there is neither material error nor new evidence nor changed circumstances to warrant reopening the Board's June 15 or December 5 Decisions. There is nothing in the January 22 Filing to suggest that the Board erred in accepting Freedman's OFA on the basis of the record then before it. Furthermore, the information conveyed in the January 22 Filing has been in the Mayor's possession ever since Freedman gave notice of its intent to file an OFA. As such, the information in the Mayor's January 22 Filing, newly-presented here, is not newly-discovered and thus cannot form the basis for reopening.⁶ Finally, nothing in the Mayor's January 22 Filing could reasonably be construed to suggest that circumstances bearing on this matter have changed materially since Freedman advised the Mayor of Freedman's plans to pursue acquisition of the Line through the OFA process.

But even if the Board were to overlook the glaring procedural defects in the Mayor's January 22 Filing and address the merits of her request to reject Freedman's OFA, the facts do not warrant halting the OFA process. Freedman's interests in pursuing

⁵ Both the June 15 Decision and the December 5 Decisions are Director's Orders, issued by Mr. David Konschnik, Director of the Board's Office Proceedings and, thus, an employee of the Board under section 1115.2.

⁶ "For purposes of reopening, 'new evidence' means evidence that was not reasonably available to the parties before the agency's original decision. See Platnick Bros., Inc. v. Norfolk & Western Ry. Co., 367 I.C.C. 782, 785 (1983); Friends of Sierra R.R. Inc. v. ICC, 881 F.2d 663, 667 (9th Cir. 1989)." Norfolk Southern Railway Company – Abandonment Exemption – In Norfolk and Virginia Beach, VA, STB Docket No. AB-290 (Sub-No. 293X) (STB served Dec. 6, 2007).

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an OFA are legitimate, its offer to acquire the Line is bona fide, and Freedman can and would enjoy the benefits of preserving its rail service option by acquiring the Line. Moreover, as also will be shown, Freedman is not seeking through the OFA to escape the legitimate exercise of state and/or local regulation by virtue of its acquisition of the Line.⁷ Finally, Freedman is not violating any agreements with the Village or with any other entity in acquiring the Line, nor is Freedman physically precluded from enjoying the benefits of future rail service over the Line.

Freedman, a past user of the Line, has already made the requisite showings to initiate the OFA process, and it has established its financial responsibility to proceed with a negotiated purchase of the Line. In fact, Freedman and D&H have already reached an agreement in principal that should lead shortly to Freedman's ultimate acquisition of the Line through a designated corporate affiliate (as discussed below). As Freedman has made clear, Freedman's ultimate objective in acquiring the Line is to preserve its rail service option, which Freedman will do so at considerable expense to itself. As a threshold matter, Freedman has already articulated a valid, transportation-based justification for seeking to acquire and preserve the Line, and its OFA is inherently bona fide. Indeed, Freedman's effort to preserve the Line in the interest of future rail service is wholly in keeping with Congressional policy underlying the OFA process. Specifically, as the Board has recently stated: "The OFA provisions reflect a Congressional desire to preserve, whenever possible, any prospect for continuing or resuming rail freight service on corridors that would otherwise be abandoned. See Redmond-Issaquah R.R. Pres. Ass'n v. STB, 223 F.3d 1057, 1061-63 (9th Cir. 2000)."⁸

The Mayor, however, suggests that Freedman is using the OFA process merely to attain common carrier status and to secure thereby a "statutory exemption from local zoning and land use restrictions, including hours of operation" for its existing, non-rail industrial activities at its facility adjacent to the Line. January 22 Filing at 1. Freedman denies that its use of the OFA process is any such subterfuge. In fact, Freedman has determined that, for practical purposes, it would be better for it not to be deemed a rail

⁷ Some of the materials included with the Mayor's January 22 Filing express concern about whether Freedman would be able to ensure safe operation of the Line following acquisition under the OFA process. Freedman is aware of the current condition of the track on the Line, has conferred with railroad operating experts regarding the track restoration and maintenance costs that would have to be incurred to ensure safe operation of the Line, and Freedman has budgeted accordingly to account for such costs of restoring service. In any event, Freedman understands that operations over the Line must be conducted in full accordance with all applicable federal safety regulations pertaining to the operation of railroads (including track maintenance).

⁸ The Kansas City Southern Railway Company – Abandonment Exemption – Line in Warren County, MS, STB Docket No. AB-103 (Sub-No. 21X), et al., slip op. at 3 (STB served Dec. 12, 2007).

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common carrier, and so it will create a new corporate affiliate (not yet named) which it will designate to acquire the Line. Such a transaction is permitted under 49 CFR 1152.27(i), and this to-be-created Freedman affiliate will in due course make an appropriate substitution of purchasers filing to the Board in cooperation with Freedman. Because Freedman will structure the proposed transaction so as to avoid becoming a rail common carrier, the Mayor's concern that Freedman would use its ownership of the Line to evade state and local regulation is misplaced and her argument on the matter is moot.

Freedman also denies that it is in any way contractually precluded from seeking to acquire the Line either through the OFA process or outside of it. None of the materials that the Mayor has included with its January 22 Filing prove the existence of a settlement provision (or any other binding agreement for that matter) whereby Freedman has committed not to acquire the Line. In fact, the Mayor could not prove the existence of any such provision, because no such provision exists. In any event, the claims raised by the Mayor require the evaluation and interpretation of materials that the Mayor alleges form a contract between the Village and Freedman, but the Board is not the appropriate forum for addressing such matters.

Finally, the Mayor questions the legitimacy of Freedman's OFA by asserting that the berms installed (or to be installed) on Freedman's property pursuant to the aforementioned settlement agreement would prevent Freedman from building a new side track from its facility to a connection with the Line. In response to this allegation, Freedman has consulted with the track expert it had retained for purposes of supporting its OFA track valuation estimate, Mr. Anthony H. Jewell of Indus-Rail Co., and Peter Dearness, president of the New England Southern Railroad Company. Having inspected the premises in connection with the Mayor's allegation, Mr. Jewell and Mr. Dearness advise that they believe it will be possible to install such a siding track. But even assuming arguendo that the berms would block the path of such a side track, Freedman would still have the benefit of having rail transportation service over the Line, which is directly adjacent to Freedman's Green Island facilities. If no side track could be built because of the berms, Freedman nevertheless could arrange for the unloading and/or loading of cars via a transload operation which could be located on the Line itself, although, admittedly, transloading would be less desirable than side track access. Either way, issues related to the berms along the Freedman property would not override Freedman's interest in the Line, and it would still seek to acquire the Line.

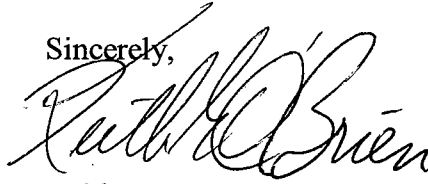
As shown above, the Mayor has provided no basis for the Board to reopen and revisit its decision accepting Freedman's OFA or to order the termination or suspension of Line sale negotiations between Freedman and D&H (which has quite clearly expressed its willingness to complete a sale of the Line to Freedman). Indeed, the Mayor's January 22 Filing should be rejected outright. Although the Mayor has overlooked the appropriate procedures for reopening the Board's June 15 and December 5 Decisions, the Board must not do so. Rather, the Board must adhere to its appellate procedures at 49

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CFR Part 1115, especially since the Mayor has failed anywhere to excuse or explain her exceedingly late arrival on the scene. But even if the Board were to assess the merits of the Mayor's filing, Freedman has demonstrated that the Mayor's claims lack substance and do not justify a post hoc rejection of Freedman's OFA. For all of these reasons, the Mayor's January 22 Filing should be rejected or denied.

If there are any questions about this matter, please contact me directly, either by telephone: (202) 663-7852 or by email: kobrien@bakerandmiller.com.

Sincerely,

A handwritten signature in black ink, appearing to read "Keith G. O'Brien", written in a cursive style.

Keith G. O'Brien

cc: Anthony Dawson
W. Karl Hansen
James M. Reilly
All Parties of Record

From: Tony Dawson [<mailto:TonyDawson@rkfreedman.com>]
Sent: Friday, May 18, 2007 2:11 PM
To: mayor@villageofgreenisland.com
Subject: FW: VGI Rail Line

Mayor,

I recently learned that the rail road has filed for abandonment of track, in abandonment filed with STB it states that they are negotiating a sale to VGI for development.

As I am sure you are aware I have been talking to the CP (D&H) for several years in efforts to resume rail service to our facility, most recent correspondence I had was with Gerry Edwards on 2-15-07.

I feel obligated to let you know where RKF stands on rail situation (I have attached Formal Notice of Intent to File Offer of Assistance, filed by my attorney) and suggest that we schedule time to discuss if you would like.

Please review and let me know.

Thanks,

Tony

Keith Obrien/bakermiller
02/08/2008 01:36 PM

To kobrien@bakerandmiller.com
cc
bcc
Subject Fw: VGI Rail Line

From: <mayor@villageofgreenisland.com>
Date: Fri, 18 May 2007 16:41:01
To: "'Tony Dawson'" <TonyDawson@rkfreedman.com>
Subject: RE: VGI Rail Line

Tony,

Thank you for giving us a heads up. I would really like to talk to you about this. I will be at a Power Authority conference next week (Monday to Thursday). I will give you a call next Friday and see when you might have some time to talk about this.

Thanks,

Ellen

PS: Thanks very much for your generous donation to the Concert Series. I hope you get to stop by and enjoy the music and good company!!! I'll send you a schedule.

James M. Reilly

From: James M. Reilly
Sent: Tuesday, November 13, 2007 5:03 PM
To: rfeller@bsk.com
Cc: Tony Dawson
Subject: VGI/Freedman

Bob, as you probably know, Tony is in the process of purchasing the rail line that serviced its business. He considers it a necessary step for long range growth of the business. I believe that the village may have other plans, and Tony has advised the mayor and indicated a willingness to talk. Tony has a commitment to finance the acquisition of the line, and there is a short deadline to file papers. That deadline means that, if there is to be a meeting about the rail line, it should occur prior to thanksgiving.

If not, there is still the settlement agreement to finish. That one is now back with you and only a few points to wind up. If we need another meeting to put those points to rest, I think that we should schedule it now for early December.

Jim Reilly
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