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October 22, 2008

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Hand Delivery

Ms. Anne Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20024

ENTERED
Office of Proceedings
OCT 22 2008
Part of
Public Record

AB-1067
SUB-NO. 2

**Re: General Railway Corporation d/b/a Iowa Northwestern Railroad –
Abandonment Exemption – In Osceola and Dickinson Counties, Iowa**

Dear Ms. Quinlan:

Enclosed for filing in the above-referenced matter are the original and ten (10) copies of General Railway Corporation's Motion to Dismiss Notice of Intent to File Offer of Financial Assistance. A Certificate of Service is attached to the Motion

Please time and date stamp the additional copy of this letter and the Motion, and return them with our courier. Thank you for your assistance. Please do not hesitate to contact me if you have any questions.

Sincerely,

A handwritten signature in cursive that reads 'Andrew E. Porter'.

Edward J. Fishman
Andrew E. Porter
Attorneys for General Railway
Corporation

Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. AB 1067 (2X)



**GENERAL RAILWAY CORPORATION D/B/A IOWA NORTHWESTERN RAILROAD
- ABANDONMENT EXEMPTION -
IN OSCEOLA AND DICKINSON COUNTIES, IOWA**

**MOTION TO DISMISS
NOTICE OF INTENT TO FILE
OFFER OF FINANCIAL ASSISTANCE**

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Public Record**

General Railway Corporation, doing business as the Iowa Northwestern Railroad ("IANW"), hereby moves to dismiss the "Notice of Intent to File Offer of Financial Assistance" filed by the Dickinson Osceola Railroad Authority ("DORA") in this proceeding on the grounds that it was filed nine (9) days after the deadline established in 49 C.F.R. § 1152.27(c)(2)(i), that DORA has not provided any compelling reason for the Board to ignore its regulatory deadlines, and that acceptance of the late-filed Notice of Intent will prejudice IANW's interests and cause unwarranted delay in these abandonment proceedings.

IANW filed a notice of exemption to abandon an approximately 36.9-mile line of railroad extending between milepost 215.4, west of Mackenzie Junction, and milepost 252.3 west of Braaksma, in Dickinson and Osceola Counties, IA (the "Line"). The notice was published in the Federal Register on September 25, 2008. The Federal Register notice stated that the exemption would become effective on October 25, 2008 provided no formal expression of intent to file an offer of financial assistance ("OFA") was received.

Under 49 CFR § 1152.27(c)(2)(i), notices of intent to file an OFA must be filed within 10 days of the Federal Register publication of the abandonment exemption notice. The Federal Register notice in this proceeding clearly stated that any expressions of intent to file an OFA were due by October 6, 2008. DORA filed its notice of intent to file an OFA on October 15,

2008, nine (9) days after the deadline established in the Board's regulations, and without a valid excuse for its lack of compliance with the deadline.¹

The STB has allowed late-filed notices of intent when the abandoning railroad has not objected. Union Pacific Railroad Company – Abandonment Exemption – In Fulton and Peoria Counties, IL, Docket No. AB-33 (Sub-No. 262X) (STB decided August 21, 2008) (notice filed four days late and not opposed by railroad was accepted, another party already had timely filed a notice); CSX Transportation, Inc. – Abandonment Exemption – In Harlan County, KY, Docket No. AB-55 (Sub-No. 667X) (STB decided June 8, 2006) (notice filed one day late due to delivery error and not opposed by railroad was accepted, additional notice filed seventeen days late and not opposed by railroad was accepted); CSX Transportation, Inc. – Abandonment Exemption – In Allegany County, MD, Docket No. AB-55 (Sub-No. 659X) (STB decided September 23, 2005) (notice filed six days late due to newly retained counsel and not opposed by railroad was accepted).

However, IANW strongly objects to DORA's late-filed notice of intent to file an OFA in this proceeding. The Board and its predecessor have rejected late-filed notices of intent where the abandoning railroad objects as IANW does here. See, e.g., Bad Water Line – Abandonment Exemption – In Fremont County, WY, Docket No. AB-346X (ICC decided April 5, 1991) (rejecting notice filed 7 days late and opposed by the railroad); Missouri – Kansas – Texas Railroad Company – Abandonment Exemption – In St. Charles, Warren, Montgomery, Callaway, Boone, Howard, Cooper and Pettis Counties, MO Docket No. AB-102 (Sub-No. 13) (ICC decided April 16, 1987) (rejecting notice filed 10 days late and opposed by the railroad). The Board should adhere to such precedent here.

In fact, the Board is required under its regulations to "reject any pleading filed after its due date unless good cause is shown why the pleading is filed late." 49 C.F.R. § 1152 25(d)(5). IANW is not aware of any compelling reason why DORA should be given the right to ignore the

¹ DORA's counsel claims that he was "in the midst of litigation" and therefore "unable to finalize plans with [DORA]" for filing the Notice of Intent by the required deadline. DORA does not claim lack of notice or any other compelling reason for missing the deadline.

deadline set forth in the Board's regulations and introduce unwarranted delay in this expedited class exemption proceeding. DORA has not demonstrated that it has any likely intention of acquiring and operating rail service on the Line. On the contrary, DORA describes its interest here as the desire "to review its options." There is no indication that DORA would even be willing to pay the \$1,500 filing fee required to file an actual OFA in this proceeding.

DORA vaguely states that it has been contacted by shippers that desire service on the Line, but fails to reveal the identity of any such purported shippers, when such alleged contacts were made, or the volume and type of traffic that such purported shippers would be in a position to tender to the operator of the Line. There has been no rail service on the Line for many years, the line is stub-ended to the west and has provided no through access to the east for quite some time because of a prolonged UP embargo, and none of the former shippers on the Line have made a reasonable request for rail service in the recent past. Thus, it is extremely unlikely that DORA would be able to resume rail service on the Line.

In fact, DORA's late-filed notice of intent is the latest in a series of complaints, challenges and lawsuits initiated by DORA, the Cooperative Elevator Association and the Iowa Central Railroad against IANW with respect to its ownership, operating rights and more recent effort to obtain abandonment authority on the Line.² All of those complaints have been rejected by the Board and the courts. See, e.g., General Railway Corporation, d/b/a Iowa Northwestern Railroad—Exemption for Acquisition of Railroad Line—In Osceola and Dickinson Counties, IA, STB Finance Docket No. 34867 (STB served June 15, 2007); General Railway Corporation, d/b/a Iowa Northwestern Railroad—Exemption for Acquisition of Railroad Line—In Osceola and Dickinson Counties, IA, STB Finance Docket No. 34867 (STB served July 13, 2007).³

If DORA's late-filed notice of intent is accepted, along with its request to further toll the

² IANW notes that DORA's counsel in the instant proceeding has been involved in many of those challenges, at times on behalf of other parties.

³ It is clear from DORA's Petition for Leave that DORA has not accepted the terms of those decisions. It refers to itself as "still, arguably, [the Line's] owner" even though the Board rejected this position in F.D. 34867. DORA appears unwilling to come to terms with those prior decisions, and therefore the risk that it has filed the OFA for ulterior motives is substantial.

period for submitting an OFA by an additional 30 days, it would prejudice and cause unfair delay to IANW's effort to obtain abandonment authority on the Line. DORA's request would introduce a significant delay in a class exemption proceeding, where the procedures are designed to expedite the abandonment process. It also prolongs IANW's potential exposure to liability and other risk factors until abandonment authority is obtained.

The acceptance of DORA's late-filed notice of intent also would force IANW to expend the time and resources necessary to prepare and gather the information requested by DORA and respond to any further OFA-related pleadings and proceedings in this matter. These are significant costs to IANW because, as has been well documented in the record, there has been no rail service on the Line for many years and IANW has been fending off unsuccessful challenges to its ownership of and operating authority on the Line from DORA and related parties during that entire time period. It is time for this assault on IANW to stop. These costs would have to be incurred by IANW for the sole benefit of DORA, even though DORA has expressed only a vague interest in reviewing "its options" on the Line and has not identified any shippers that would be ready, willing and able to use the Line for rail service.

For these foregoing reasons, DORA's late-filed "Notice of Intent to File Offer of Financial Assistance" should be dismissed and rejected by the Board.

Respectfully submitted,

By: 

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**ATTORNEYS FOR GENERAL
RAILWAY CORPORATION**

Date: October 22, 2008

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Motion to Dismiss Notice of Intent to File Offer of Financial Assistance* was served by first-class mail, postage prepaid, upon the following on this 22th day of October, 2008:

Daniel A. LaKemper
Attorney for Dickinson Osceola Railroad Association
P.O. Box 185
Morton, Illinois 61550



Andrew E. Porter