

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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GREAT LAKES BASIN )  
TRANSPORTATION, INC. -- ) FINANCE DOCKET  
AUTHORITY TO CONSTRUCT AND ) NO. 35952  
OPERATE A RAIL LINE IN INDIANA, )  
ILLINOIS AND WISCONSIN )

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**MOTION (1) FOR ADOPTION OF NO-BUILD ALTERNATIVE  
IN THE ENVIRONMENTAL IMPACT STATEMENT AND  
(2) FOR A RECOMMENDATION TO THE BOARD THAT  
A FORMAL CONSTRUCTION APPLICATION BE FILED**

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Protestants

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DATE FILED: July 14, 2016

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Pursuant to the Board's request for comments on the scope of environmental review contained in a Notice of Intent to Prepare an Environmental Impact Statement (EIS) served on March 19, 2016, (Notice) as amended by decision served on June 10, 2016, Protestants against the proposed track construction listed on the cover page hereof (Protestants) hereby move (1) that the Office of Environmental Assessment (OEA) adopt the no-build alternative in the EIS (i.e., that authority for track construction be denied); and (2) that OEA recommend to the Board that Great Lakes Basin Transportation, Inc. (GLBT) be required to file a formal application under 49 U.S.C. § 10901 and 49 C.F.R. § 1150.1 *et seq.* for authority to construct the proposed track, instead of a petition for exemption from those requirements.

**IDENTITY AND INTEREST OF RAR**

Protestants represent citizens from all walks of life in Wisconsin, Illinois, and Indiana (all three States in which construction of trackage is proposed), who would be directly or indirectly adversely affected by the proposed GLBT track construction. Protestants include, but are not limited to, land and property owners, farmers, small business owners, educators, retirees, parents,

and others, all of whom are greatly concerned about the impact of the GLBT proposal on safety, the environment, health, taxes, cemeteries and churches, schools, property values, the need and public convenience, divided farm fields and farm crossings, hazardous materials, derailments, water quality, fauna and flora, recreational activities, hunting, road closures, emergency preparedness, and other serious concerns. Protestants share a position of unequivocal opposition to the proposed GLBT track construction.

Rock Against The Rail, LLC (RAR) is a Wisconsin limited liability corporation. RAR is domiciled at Clinton, Rock County, Wisconsin. Clinton is located on the route of the proposed GLBT rail line approximately 15 miles south of the northern terminus of the proposed line at Milton, WI. RAR represents the interests of numerous citizens of Rock County, WI who are opposed to the proposed track construction. Attached to this Motion as Appendix 1 are petitions seeking to stop the GLBT project that contain 2,124 signatures of residents of Rock County, WI.

Block GLB Railroad, LaSalle County, IL; Kankakee County, IL Block GLB; Citizens Against the GLB Railroad, Boone County, IL; and RAILED, LaPorte, Porter, and Lake Counties, IN are unincorporated ad hoc groups of opponents of the proposed track construction who are residents of the Illinois and Indiana Counties that are identified in their names.

### **PROTESTANTS' MOTIONS**

#### **I. OEA Should Adopt The No-Build Alternative In The Environmental Impact Statement**

##### **1. The Statutory Standard**

Pursuant to 49 U.S.C. § 10901(c), the Board is to authorize a proposed track construction unless the Board finds that such construction would be “inconsistent with the public

convenience and necessity (PC&N)". The quoted phrase was adopted in the ICC Termination Act of 1995 (ICCTA). Prior to that amendment, a track construction was to be approved if it would be "consistent with the public convenience and necessity (PC&N)."

There is no indication in the legislative history of 49 U.S.C. § 10901(c) that any change in the PC&N standard was intended by ICCTA. Instead, it appears that the change from "consistent with PC&N" to "not inconsistent with PC&N" requires that an opponent of track construction go forward with evidence that the proposal would be inconsistent with PC&N, whereas previously the rail carrier-applicant was required to go forward with PC&N evidence. Protestants are ready, willing, and able to sustain that burden.

## **2. The National Policy In Favor Of Safety And Board Safety Regulations**

The PC&N standard is not defined in 49 U.S.C. § 10901. In that circumstance, the Board is to apply that standard with reference to the national rail policies set out in 49 U.S.C. § 10101. As related to rail track construction, safety is paramount. Although the Federal Railroad Administration (FRA) regulates rail safety on a day-to-day basis, rail safety in conjunction with track construction is squarely within the Board's jurisdiction.

It is a national rail policy "to operate facilities and equipment without detriment to the public health and safety." 49 U.S.C. § 10101(8), emphasis added. Another such policy is "to promote a safe and efficient rail transportation system". 49 U.S.C. § 10101(3), emphasis added. Yet another such policy is "to encourage . . . safe and suitable working conditions in the railroad industry." 49 U.S.C. § 10101(11), emphasis added.

In light of those policies, the Board's environmental regulations require evidence of safety, i.e. 49 C.F.R. § 1105.7(e)(7):

Describe any effects of the proposed action on public health and safety (including delay time at railroad grade crossings).

Another Board environmental safety regulation provides (49 C.F.R. § 1105.7(e)(11)(vi)):

Describe the effects, including impacts on essential public services (e.g., fire, police, ambulance, neighborhood schools, public roads and adjoining properties) in communities to be traversed by the line.

**3. Board Precedent - Decision Denied Track Construction Based On Evidence And Analysis Of Unsafe Conditions In An Environmental Impact Statement**

Relying on evidence and analysis set out in an Environmental Impact Statement, the Board's predecessor, the Interstate Commerce Commission (ICC), denied an application for authority to construct track on the ground that serious harm to public safety outweighed minimal transportation benefits from the new rail line. *Construction and Operation -- Indiana & Ohio Ry. Co.*, 9 ICC 2d 783, 790-791 (1993) ("I&O").

In explaining the relationship between safety and PC&N, the ICC said (at 788):

The construction of a rail line may pose a significant risk to public safety, both in the building of the line and the subsequent operations over it. Thus, it is entirely appropriate to factor public safety concerns into our § 10901 analysis of whether the public convenience and necessity require or permit construction of a line. Moreover, where, as here, the evidence before us shows that the public safety concerns are significant and cannot be adequately mitigated, we may find that the adverse public safety consequences outweigh the transportation benefits of the proposed line.

The ICC treated its decision as precedent-setting, viz. (9 I.C.C.2d at 786):

This is the first time we have denied a construction application based on evidence and analysis set out in an Environmental Impact Statement. We believe that this explanation will provide useful guidance to the public in future cases involving construction of rail lines.

\* \* \*

. . . A decision here will give the public valuable guidance on how the Commission weighs environmental and public safety concerns in rail construction cases.

The ICC denied authority to construct the track (9 I.C.C.2d at 791):

. . . (A)s the final EIS and draft EIS explain, the location of this line would create public safety problems that cannot be adequately mitigated. Thus, this is a case where public safety concerns outweigh the transportation benefits of the proposed line, and therefore, the application is denied.

Thus, based on evidence of serious harm to public safety that outweighs minimal transportation benefits of the proposed GLBT rail line, OEA can and should adopt the No-Build Alternative in the Draft EIS and in the Final EIS.

#### **4. Serious Harm To Public Safety**

The present case fits squarely within the precedent of the *I&O* decision. There would be serious harm from track construction to public safety at private farm crossings, at public grade crossings, and from unacceptable delay of emergency vehicles that cannot be adequately mitigated.

##### **A. Unsafe Private Farm Crossings**

Research undertaken by Protestants reveals that the proposed rail line would split 728 fields into two parts (copy of study is attached as Appendix 2). Many of those fields are active farms. Thus, the proposed track construction would necessarily result in hundreds of new private farm crossings as farmers would be required to cross the railroad tracks with farm implements and livestock in order to utilize acreage on both sides of the tracks.

Not only would the number of farm crossings drastically increase, but the danger at each such additional crossing would be greatly magnified because of the proposed railroad operations.

Thus, according to GLBT's own testimony: the railroad ROW to be crossed would be 200 feet wide, in contrast to usual ROW width of 100 feet; train speed would be up to 70 mph, in contrast to usual train speeds of 10 mph to 40 mph; up to 110 trains per day (a train every 13 minutes) would be transported over the crossings, in contrast to a small fraction of that number at most crossings. Appendix 2 attached to this Motion shows that there would be numerous crossings at sharp angles that would result in significantly reduced visibility at farm crossings for both farmers and train personnel.

In short, unsafe conditions at these new farm crossings would lead to catastrophes waiting to happen as farmers would attempt to guide slow-moving farm implements and/or livestock across the 200-foot ROW with a train every quarter hour bearing down at 70 mph at crossings having substantially impeded sight lines. In that respect, see "How Trains Can Be Silent Killers," attached hereto as Appendix 3. GLBT's trains would not be expected to slow or stop at these numerous crossings because to do so would substantially reduce total train time, which is a major selling point for GLBT.

**B. Unsafe Public Grade Crossings**

The inherent danger of public grade crossings is well known and widely documented. At a time when State and local government agencies are attempting to close public grade crossings, or at least limit their number, GLBT's track construction would add more than 200 new public grade crossings.

The dangerous railroad operations identified above would also increase unsafe conditions at public grade crossings. Thus, 200-foot ROW width, 70 mph train speed, 110 trains per day,

and acute angles of many crossings would combine to have a serious adverse effect on public and private safety.

It is no answer to contend that the public is adequately protected at grade crossings by flashing lights, gates, and bells. In 2015, Illinois, one of the States affected by the GLBT proposal, ranked second in the United States in highway-rail fatalities, with nearly 25 percent of collisions occurring at crossings having active warning devices, including lights, gates, and bells. Substantial numbers of motorists attempt to cross railroad tracks after warning signals are activated and gates are down in place. Attached to this Motion as Appendix 4 is a copy of an article headed "IL House Passes Bill To Double Fines For Driving Around Railroad Gates" that provides support for the foregoing allegations.

**C. Unsafe Conditions Resulting From Blocked Crossings Impeding Emergency Vehicles**

In addition to the foregoing, public safety would be seriously compromised because emergency vehicles, such as ambulances, fire trucks, and police cars would experience crucial delays awaiting the passage of up to 110 trains per day at the numerous new grade crossings that would be spawned by the GLBT proposal.

Attached to this Motion as Appendix 5 is a copy of an FRA Report issued in August, 2006, headed "Impact of Blocked Highway/Rail Grade Crossings on Emergency Response Services". As set out in the Executive Summary of that Report on page 3:

While every minute can be precious in an emergency, crossings blocked for extended periods of time are a much greater problem than simply having to wait while a train passes through a crossing. A variety of railroad operational issues, described in this report, can lead to trains stopping in a position that blocks a crossing. Given the growth of both rail and highway traffic, it is likely that the problem of blocked crossings will increase in the future.



The Board should be highly sensitive to excessive wait time at public grade crossings in view of the public furor recently voiced in *CSX Transportation, Inc. -- Acquisition of Operating Easement -- Grand Trunk Western Railroad Company*, STB Docket No. FD 35522, decision served June 22, 2016.

The GLBT proposal, resulting in such a massive increase in the number of grade crossings in the 3-State area, would dramatically increase incidents of blocked crossings impeding emergency vehicles.

**D. Summary Regarding Serious Harm To Public Safety**

The adverse effect of the proposed track construction on safety at numerous new private farm crossings; at numerous new public grade crossings; and at blocked crossings impeding emergency vehicles, combine to dictate a finding that the GLBT proposal would cause serious harm to public safety. OEA is respectfully requested to so find. We will file more detailed evidence of unsafe conditions if and when GLBT files its application for construction authority.

**5. Minimal Transportation Benefits**

According to GLBT, the principal purpose of the proposed rail line is to provide rail carriers with more efficient options to route trains around the Chicago terminal (Notice at 6). However, the GLBT proposal has been met with disinterest and indifference on the part of the supposed rail carrier beneficiaries of the rail line. One reason for that is that the CREATE Program has provided, and is continuing to provide, many of the transportation benefits claimed by the GLBT proposal. The upshot is that there would be minimal transportation benefits from the GLBT proposal.

**A. Disinterest And Indifference Of Class I Rail Carriers**

Norfolk Southern Railway Company has stated publicly that it would not be a user of the GLBT route. Union Pacific Railroad Company has stated publicly that it will not move forward with a discussion on potential use of the GLBT route. Canadian National Railway Company would not be expected to use the GLBT route because its recently acquired EJ&E affiliate already provides a route bypassing the Chicago terminal.

None of the other Class I rail carriers servicing Chicago has come forward to support the GLBT proposal.

**B. CREATE Program Providing Equal Or Superior Benefits**

There is minimal public need for the proposed GLBT route because the CREATE Program has provided, and is continuing to provide transportation benefits that are equal or superior to the benefits claimed by GLBT. CREATE is a public-private partnership between freight railroads, the U.S. Department of Transportation, the Illinois Department of Transportation, the City of Chicago, Metra, and Amtrak. First announced in 2003, the CREATE Program consists of 70 projects spanning a range of infrastructure improvements at and near the Chicago rail terminal. One major goal of CREATE is to provide additional capacity to accommodate heavy traffic volumes, as well as to improve connections between rail lines.

As particularly pertinent in the present case, a study commissioned by the CREATE partners in 2015 determined that as a result of CREATE improvements to that date, the time for an intermodal or manifest train to pass through the Chicago terminal has been reduced by 35 percent, and for unit trains, the reduction has been 25 percent. Those reductions have undoubtedly continued and accelerated. CREATE's total economic benefit as of the beginning

of 2015 was \$28.3 billion from reduced travel times, fuel savings, and safety improvements.

Attached to this Motion as Appendix 6 is a copy of CREATE Program Status Check, February 20, 2015, which supports the foregoing facts.

In sum, the CREATE Program is accomplishing that which is needed to relieve congestion in the Chicago terminal.

**6. Serious Harm To Public Safety Outweighs Minimal Transportation Benefits**

In consideration of all of the foregoing, and on the authority of the *I&O* precedent, OEA should adopt the No-Build Alternative in the EIS because it has been shown that serious harm to public safety from the proposed track construction outweighs the minimal transportation benefits that would result from the rail line.

**7. Additional Factors Will Dictate A Determination That The Proposed Track Construction Would Be Inconsistent With PC&N**

There are additional factors that will be raised in response to GLBT's construction application that will dictate a determination that the construction proposal would be inconsistent with PC&N. One such factor is the likely inability of GLBT to financially justify the staggeringly high cost of the proposal in light of the Board's financial requirements set out in 49 C.F.R. § 1150.6.

Another factor is GLBT's proposal to make a nonrail use of a 50-foot width of the right-of-way, i.e., for transmission of electricity. The Board cannot lawfully authorize that nonrail use. Authority to transmit electricity must be sought in the States in which such transmission would occur. *See, e.g.,* Right-of-Ways and Easements for Electric Facility Construction in Wisconsin, Public Service Commission of Wisconsin; and Illinois Administrative Code, Title 83, Section

305.40, Application to Illinois Commerce Commission for installation and extension of electricity.

Land for rights-of-way to be acquired by GLBT by means of eminent domain would be held as easements for railroad purposes, not as marketable fee simple title. *See Central Michigan Ry. Co. -- Abandonment*, 7 I.C.C.2d 557 (1991), where the ICC said (at 567):

Marketable title means held by warranty deed or quitclaim deed without restrictions or reversionary language . . . Thus, the ALJ correctly excluded from its calculations those parcels held through condemnation . . .

An easement held “for railroad purposes” does not include land that is completely unrelated to rail use. *See Pipes, Wires, and Bicycles*, 27 Ecol. Law Quarterly 351, 423 (2000) (“The rule [permitting use of railroad right-of-way land that is incidental to rail use] requires that the use must be ‘incidental’, not completely unrelated to rail use . . .”).

Accordingly, under both Federal law and the law in the three States in which GLBT would operate, GLBT would not be able to lawfully condemn land outside the usual 100-foot right-of-way width on the theory that use of such land for the provision of electricity would be incidental to rail use.

## **II. OEA Should Recommend To The Board That GLBT Be Required To File A Formal Construction Application**

Where, as here, a rail line proposed to be constructed is lengthy and there is widespread intense opposition to the proposal, the proponent of the track construction should be required to file a formal application under 49 U.S.C. § 10901 and 49 C.F.R. § 1150.1, *et. seq.*, for authority for the track construction, not a petition for exemption. *Ozark Mountain Railroad --*

*Construction Exemption*, 1994 WL 698676 at \*4-6 (ICC Finance Docket No. 32204, decision served December 15, 1994 (“*Ozark*”).

In *Ozark*, the Board’s predecessor, the Interstate Commerce Commission (ICC), revoked an exemption that would have permitted a track construction and operation without the detailed scrutiny that results from formal application procedure. The ICC explained its rationale for revocation as follows (*Ozark, supra*, 1994 WL 698676 at \*5):

When we granted *Ozark* a conditional exemption, we were not aware of the substantial public opposition to the proposal that has since materialized. . .

Our decision to revoke the conditional exemption . . . reflects the fact that we have received information raising serious concerns about the impact of the project on the people who live in the area. This information indicates that the application process rather than the exemption process, is the more appropriate vehicle for the Commission to use in considering whether to approve the proposed construction and operation. . .

The filing of a formal application for construction and operation has become standard procedure where a rail line would be lengthy and complex, and where there would be significant public opposition. See, e.g., *Dakota, MN & Eastern RR -- Construction -- Powder River Basin*, 3 S.T.B. 847 (1998) (new 262.03-mile rail line vigorously opposed by local interests); and *Tongue River RR Co. -- Const. & Oper. -- Ashland - Decker, MT*, 1 STB 809 (1996) (41-mile rail line widely and vocally opposed).

The proposed new track in the present case fits squarely within that procedural precedent. The proposed new track would be approximately 278 miles in length. The complexity of the proposed track is shown by its up-to-70 mph train speed and the plan to operate up to 110 trains over it per day, among other unique characteristics.

The volume and intensity of opposition to the proposal is so strong as to be unprecedented. Consider the following from a Chicago Tribune article on June 3, 2016 headed “Railroad Support For GLBT Project Unclear”:

“Opposition to GLBT has been fierce across three states and opponents have flooded the STB with letters against the project in what a representative there has called an unprecedented response to the project.”

The opposition to the GLBT proposal is widespread and diverse, i.e.:

- (1) **Wisconsin**  
Rock Against the Rail, LLC  
Clinton Community School District  
Rock County Board  
Town of Bradford  
Town of Harmony  
Town of Johnstown  
Town of Clinton  
La Prairie Township  
Rock County Unit of Wisconsin Towns Association  
Village of Clinton  
Town of Lima  
Rock County Farm Bureau  
Rock Prairie Grange  
Wisconsin State Grange  
Town of Sharon  
State Representative Amy Loudbeck  
Town of Fulton
  
- (2) **Illinois**  
Block GLB Railroad, LaSalle County, IL  
Citizens Against the GLB, Boone County, IL  
Grundy County Against the GLBRR  
Ogle County Community Against GLB  
Kankakee County, IL Block GLB  
City of Belvidere  
Boone County  
Village of Capron  
Chicago Metropolitan Agency for Planning

(2) **Illinois (cont.)**

Boone County Pamona Grange  
Flora Community Grange  
Seward Township  
Town of Grant Park  
Garnder-South Wilmington Township High School Dist. 73  
Kankakee County Republican Central Committee  
Grundy County  
Grundy County Farm Bureau  
Illinois Beef Association  
LaSalle County  
Adams Township  
Earl Township  
Community Unit School Dist. No. 2, Seneca, IL  
Earlville Community School Dist., Earlville, IL  
Lee County  
Alto Township  
City of Rochelle  
Ogle County District One Representatives  
Dement Township Planning Commission  
Creston Community Consolidated School Dist. 161  
Monroe Township  
Ogle-Lee Fire Protection District  
Lynnville-Scott White Rock Fire Protection Dist.  
Rockville Township  
Salina Township  
Kankakee Valley Historical Society  
Herscher Community Unit School Dist. No. 2, Herscher, IL  
LaSalle County Farm Bureau  
COBS Preservation Partnership, Kirkland, DeKalb County, IL

(3) **Indiana**

Residents Against Invasion of Land by Eminent Domain, Porter County  
LaPorte County Against GLBRR  
RAILED LaPorte, Porter, and Lake Counties, IN  
State Rep. Michael Aylesworth  
State Sen. Rick Niemeyer  
Purdue University Northwest  
Lake County  
Lake County Plan Commission  
Lake County Park Board  
Lake County Soil and Water Conservation District  
West Creek Township

- (3) **Indiana (cont.)**  
Cedar Creek Township  
Eagle Creek Township  
Tri-Creek School Corp. Board, Lowell, IN  
Tri-Creek Ambulance Board  
Calumet Astronomical Board  
Porter County  
Porter County Planning Commission  
Porter County Storm Board  
Porter County Assessor  
Town of Westville  
Town of Lowell  
Indian Trail Grange #2361, Lowell, IN  
Indiana State Senator Ed Charbonneau

Based on the length and complexity of the proposed track construction and the widespread intense local opposition to the proposal, OEA should adhere to the *Ozark* precedent by recommending to the Board that GLBT be required to file a formal application under 49 U.S.C. § 10901 and 49 C.F.R. § 1150.1 *et seq.* for authority to construct and operate the proposed rail line.

#### **CONCLUSION AND REQUESTED RELIEF**

WHEREFORE, for the reasons stated, OEA should adopt the No-Build Alternative in the Environmental Impact statement, and recommend to the Board that GLBT be required to file a formal application for authority to construct the proposed trackage under 49 U.S.C. § 10901 and 49 C.F.R. § 1150.1 *et seq.*, rather than a petition for exemption from such formal application procedure.



Respectfully submitted,

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*Attorney for Protestants*

DATE FILED: July 14, 2016

**CERTIFICATE OF SERVICE**

I hereby certify that on July 13, 2016, I served the foregoing document, Motion (1) For Adoption Of No-Build Alternative In The Environmental Impact Statement and (2) For A Recommendation to the Board That A Formal Construction Application Be Filed, (1) on the Attorney for GLBT, Jay Johnson, Esq., Venable, LLP, 575 Seventh Street, N.W., Washington, DC 20004; and (2) on the Office of Environmental Assessment of the Surface Transportation Board, Attention: Victoria Rutson, 395 E Street, S.W., Washington, DC 20423, both by UPS overnight mail.

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Thomas F. McFarland