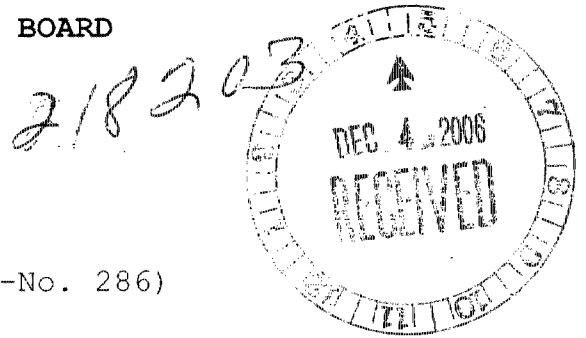


ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD



STB Docket No. AB-290 (Sub-No. 286)

NORFOLK SOUTHERN RAILWAY COMPANY
-ADVERSE ABANDONMENT-
ST. JOSEPH COUNTY, IN

PETITION TO REJECT APPLICATION
SUBMITTED BY
THE CHICAGO, LAKE SHORE & SOUTH BEND RAILWAY COMPANY

ENTERED
Office of Proceedings

DEC 4-2006

Part of
Public Record

Respectfully submitted,

John D. Heffner
John D. Heffner, PLLC
1920 N Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 263-4180

Counsel for The Chicago, Lake Shore
& South Bend Railway Company

Dated: December 4, 2006

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



STB Docket No. AB-290 (Sub-No. 286)

NORFOLK SOUTHERN RAILWAY COMPANY
-ADVERSE ABANDONMENT-
ST. JOSEPH COUNTY, IN

**PETITION TO REJECT APPLICATION
SUBMITTED BY
THE CHICAGO, LAKE SHORE & SOUTH BEND RAILWAY COMPANY**

INTRODUCTION

On November 21, 2006, the City of South Bend, IN, the Brothers of the Holy Cross, and the Sisters of the Holy Cross (hereafter "the Applicants") jointly filed an application dated November 17, 2006, seeking the adverse abandonment of a line of railroad owned and operated by Norfolk Southern Railway Company ("NS") in St. Joseph County, IN.¹ For the reasons stated below and pursuant to 49 CFR 1104.10 and 49 CFR 1117.1, Petitioner The Chicago, Lake Shore & South Bend Railway Company ("CLSSB") urges the Board to reject this application as noncompliant.

¹ The line extends 3.7 miles between Milepost UV 0.0 and Milepost UV 2.8 and between Milepost ZO 9.6 and Milepost ZO 10.5.

By now, the Board is well familiar with the efforts of CLSSB to acquire and operate the subject line of railroad² and the efforts by Applicants to prevent that transaction from occurring. In view of CLSSB's stated desire to acquire the subject line of railroad, it has standing to challenge this application as defective and to submit a protest at a later date in accordance with the Board's regulations.

REASONS FOR REJECTION

The Board must reject the subject application for failure to comply with the following requirements:

1. Failure to serve the Notice of Intent on the Board by certified mail. 49 CFR 1152.20(a)(1).
2. Failure to provide evidence, by certification, contemporaneous service list, or other means of the service of the Notice of Intent on the parties specified in 49 CFR 1152.20(a)(2)(ii) (except as to significant users and rail labor organizations which requirements were waived).

² On June 14, 2006, CLSSB filed a notice of exemption to acquire and operate the subject railroad in STB FD No. 34893. It withdrew that notice without prejudice. On November 20, 2006, it filed a new notice of exemption to acquire and operate the same line in STB FD No. 34960. Those notices involve substantially the same trackage as this abandonment proceeding.

3. Failure to satisfy the time limit requirements of 49 CFR 1152.20(b)(1) and (3).

As a general proposition, administrative agencies are required to follow their own rules. See, e.g., In re Bankers Trust Co., 61 F.3d 465, 469 (6th Cir. 1995) ("At bottom, federal regulations should be adhered to and given full force and effect of law whenever possible"; U.S. ex rel. Farese v. Lurther, 953 F.2d 49, 52 (3d cir. 1992) ("An agency must follow its own regulations, which have the force of law."; and Marshall v. Lansing, 839 F.2d 933, 943 (1988) ("[P]rinciples of due process require an agency to follow its own regulations, which have the force of law.")). Here Applicants sought and obtained waiver of some requirements. However, they neglected to seek and were not excused from the following three requirements identified above and discussed below. The Board has no choice but to reject the application as procedurally defective. Applicants' professed 11th hour desire for speed cannot override the constitutional right of due process.

Failure to serve the Notice of Intent on the Board by certified mail. 49 CFR 1152.20(a)(1).

The Board's regulations state simply "[A]pplicant must serve its Notice of Intent on the Board, by certified letter, in the format prescribed by sec. 1152.21." CLSSB

has carefully examined the original Notice of Intent dated October 5, 2006, and the revised Notice dated October 30, 2006, and cannot find any evidence that they were mailed to the Board by *certified mail* as the regulation requires.³ Furthermore, CLSSB has checked the Board's website everyday to see whether or not the Notice was served on the Board by any means of delivery and can state with authority none has been filed. CLSSB attaches as Exhibit B a copy of the website listings of all filing in this proceeding as of December 4, 2006. Moreover, in response to an assertion in Applicants' reply to CLSSB's petition to strike the October 30 Notice of Intent, CLSSB has reviewed the sample of Notice of Intent submitted to the Board in its September 13 Petition for waiver and exemption. The purported notice does not include any sort of service list or certificate of service and the only party shown on the September 13 Petition certificate of service is counsel for NS. Copy of certificate attached as Exhibit C.

**Failure to provide evidence, by certification,
contemporaneous service list, or other means of the
service of the Notice of Intent on the parties
specified in 49 CFR 1152.20(a)(2)(ii) (except as to**

³ Copy attached as Exhibit A.

significant users and rail labor organizations which requirements were waived).

The Board's regulations state "[A]pplicant must serve, by first class mail (unless otherwise specified), its Notice of Intent upon..." The regulation then goes on to identify 12 parties, one of whom - the Governor - gets service by certified mail. While Applicants' September 13 Petition sought a waiver of and the Board's decision excused Applicants from complying with the requirement for serving substantial rail users and duly certified rail labor organizations, the Board's decision is silent as to all other parties. See, Exhibit B. CLSSB has again examined the draft Notice of Intent as well as the October 30 Notice of Intent and cannot find any sort of certificate of service or other service list showing service on these parties by any form of mail (other than NS in the September 13 Petition).

Failure to satisfy the time limit requirements of 49 CFR 1152.20(b)(1) and (3).

The Board's rules state that "[T]he Notice of Intent must be served at least 15 days, but not more than 30 days, prior to the filing of an abandonment application...[T]he Notice must be filed with the Board either concurrently

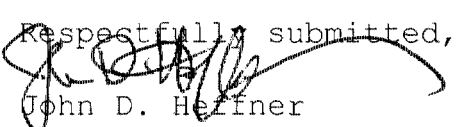
with service or when the Notice is first published
(whichever occurs first)."

Applicants suggest in their Reply to CLSSB's Petition to Reject the Notice of Adverse Abandonment dated November 13, 2006, that the fact that they filed the text of their Notice with the Board in the September 13 Petition and the Board found that text to be in "substantial compliance" dispelled any doubt as to a filing on the Board. No way. Even assuming the inclusion of the draft Notice in the September 13 Petition made it valid, over 60 days has elapsed between the date of that filing and the November 21 application filing date.

CONCLUSION

For the reasons stated above, the Board should reject the instant adverse abandonment application as procedurally deficient..

Respectfully submitted,


John D. Heffner
John D. Heffner, PLLC
1920 N Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 263-4180

Counsel for the Chicago, Lake Shore
& South Bend Railway Company

Dated: December 4, 2006

EXHIBIT A

map or narrative together with a description of such a line and any appurtenant facilities and of their condition.

§ 1152.15 Reservation of jurisdiction.

49 U.S.C. 10903(c)(1) authorizes the Board, at its discretion, to provide for designation of lines as "potentially subject to abandonment" under standards which vary by region of the United States, by railroad, or by group of railroads. The Board expressly reserves the right to adopt such varying standards in the future.

Subpart C—Procedures Governing Notice, Applications, Financial Assistance, Acquisition for Public Use, and Trail Use

§ 1152.20 Notice of intent to abandon or discontinue service.

(a) *Filing and publication requirements.* An applicant shall give Notice of Intent to file an abandonment or discontinuance application by complying with the following procedures:

(1) *Filing.* Applicant must serve its Notice of Intent on the Board, by certified letter, in the format prescribed in § 1152.21. The Notice shall be filed in accordance with the time requirements of paragraph (b) of this section.

(2) *Service.* Applicant must serve, by first-class mail (unless otherwise specified), its Notice of Intent upon:

- (i) Significant users of the line;
- (ii) The Governor (by certified mail) of each state directly affected by the abandonment or discontinuance. (For the purposes of this section "states directly affected" are those in which any part of the line sought to be abandoned is located).
- (iii) The Public Service Commission (or equivalent agency) in these states;
- (iv) The designated state agency in these states;
- (v) The State Cooperative Extension Service in these states;
- (vi) The U.S. Department of Transportation (Federal Railroad Administration);
- (vii) Department of Defense (Military Traffic Management Command, Transportation Engineering Agency, Railroads for National Defense Program);

(viii) The U.S. Department of Interior (Recreation Resources Assistance Division, National Park Service);

(ix) The U.S. Railroad Retirement Board;

(x) The National Railroad Passenger Corporation ("Amtrak") (if Amtrak operates over the involved line);

(xi) The U.S. Department of Agriculture, Chief of the Forest Service; and

(xii) The headquarters of all duly certified labor organizations that represent employees on the affected rail line.

(3) *Posting.* Applicant must post a copy of its Notice of Intent at each agency station and terminal on the line to be abandoned. (If there are no agency stations on the line, the Notice of Intent should be posted at any agency station through which business for the involved line is received or forwarded.)

(4) *Newspaper publication.* Applicant must publish its Notice of Intent at least once during each of 3 consecutive weeks in a newspaper of general circulation in each county in which any part of the involved line is located.

(b) *Time limits.* (1) The Notice of Intent must be served at least 15 days, but not more than 30 days, prior to the filing of the abandonment application;

(2) The Notice must be posted and fully published within the 30-day period prior to the filing of the application; and

(3) The Notice must be filed with the Board either concurrently with service or when the Notice is first published (whichever occurs first).

(c) *Environmental and Historic Reports.* Applicant must also submit the Environmental and Historic Reports described at §§ 1105.7 and 1105.8 at least 20 days prior to filing an application.

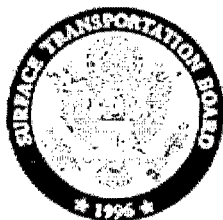
[61 FR 67883, Dec. 24, 1996, as amended at 68 FR 67810, Dec. 4, 2003]

§ 1152.21 Form of notice.

The Notice of Intent to abandon or to discontinue service shall be in the following form:

STB No. AB _____ (Sub-No. _____)
 Notice of Intent to Abandon or to Discontinue Service
 (Name of Applicant) gives notice that on or about (insert date application will be filed

EXHIBIT B



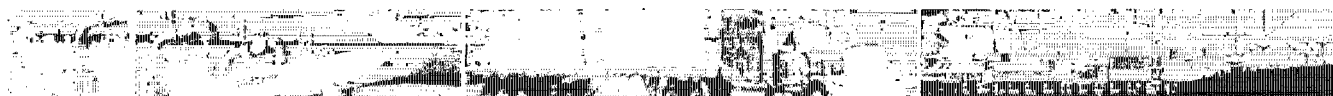
Surface Transportation Board



Results of Search

[E-FILING](#) | [E-LIBRARY](#) | [RAIL CONSUMERS](#) | [INDUSTRY DATA](#) | [ENVIRONMENTAL MATTERS](#) | [PUBLIC INFO](#)

click arrows to sort Filing Date ↓		Doc. No.	Filed For ▲	Filing Type ▲	click arrows to sort ID ↓
11/21/2006		AB 290 256	City Of South Bend, Indiana	Application	<u>218117</u>
11/16/2006		AB 290 286	Sisters Of The Holy Cross	Reply	<u>218099</u>
11/13/2006		AB 290 286	Chicago, Lake Shore And South Bend Railway Company	Reply	<u>218073</u>
10/03/2006		AB 290 286	Chicago, Lake Shore And South Bend Railway Company	Reply	<u>217734</u>
09/26/2006		AB 290 226	City Of South Bend, Indiana	Reply	<u>217638</u>
09/20/2006		AB 290 286	Norfolk Southern Railway Company	Reply	<u>217577</u>
09/13/2006		AB 290 286	Sisters Of The Holy Cross	Petition For Waiver	<u>217551</u>


[help](#) | [FAQs](#) | [FOIA](#) | [privacy](#) | [disclaimers](#) | [contact us](#)


U.S. Department of Transportation

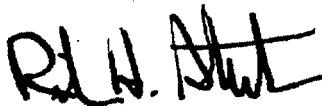
FIRST GOV

EXHIBIT C

Certificate of Service

I, Richard H. Streeter, do hereby certify that a true copy of the foregoing Petition was served this 6th day of September, 2006, by first-class mail, postage prepaid, and by e-mail as designated, on the following named individuals:

James R. Paschall
Senior General Attorney
Greg E. Summy
General Solicitor
Norfolk Southern Railway Company
Three Commercial Place
Norfolk, VA 23510

A handwritten signature in black ink, appearing to read "R.H. Streeter", written over a horizontal line.

Richard H. Streeter

CERTIFICATE OF SERVICE

I, John D. Heffner, certify that a copy of the Petition to Reject Application, was served on December 4, 2006 by hand-deliver and first-class mail to the following:

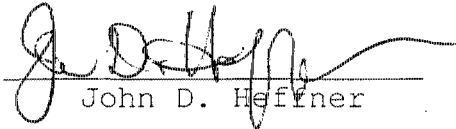
James R. Paschall
Senior General Attorney
Norfolk Southern Corp.
Law Department
Three Commercial Place
Norfolk, VA 23510-9241

Mr. Jeffrey M. Jankowski
Deputy City Attorney
227 West Jefferson Boulevard
South Bend, IN 46601

Ms. Sandra M. Seanor
Executive Director
Michiana Council of Governments
227 West Jefferson Boulevard
South Bend, IN 46601

Sister Joy O'Grady, President
Sister of Holy Cross
501 Bertrand Hall - St Mary's
Notre Dame, IN 46556-5000

Mr. Richard H. Streeter (hand-deliver)
Barnes and Thornburg, LLP
750 17th Street, NW - Suite 900
Washington, DC 20006-4675


John D. Heffner