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BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C. 20423

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



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

218099

JOINT REPLY TO PETITION TO REJECT NOTICE OF ADVERSE ABANDONMENT

Come now the City of South Bend, Indiana, the Brothers of Holy Cross, Inc. and the Sisters of the Holy Cross, Inc. (collectively "Applicants") and file their joint reply to the Petition to Reject Notice of Adverse Abandonment filed by the Chicago, Lake Shore & South Bend Railway Company ("CLS&SB").¹ By its petition, CLS&SB claims that Applicants have failed to comply with the requirements of 49 C.F.R. § 1152.20 governing the Notice of Intent to file an abandonment application.

It is respectfully submitted that Applicants have complied with the requirements of section 1152.20 and with the Board's October 26, 2006 Decision, which granted various waivers regarding the Notice of Intent, including the wording, posting, service on significant users (of which there are none), and service on labor organizations. *See*, slip op. at p. 3.

The Board denied waiver of the publication requirements. *Id.* at p. 4. In order to comply with the Board's Decision, the Notice of Intent was duly published in the *South Bend Tribune* during three consecutive weeks, namely on November 3, 2006, November 10, 2006 and

¹ The petition was brought to Applicants' counsel's attention by the Board's counsel and was copied thereafter from the Board's web site. Although CLS&SB's counsel has certified that a copy was served on the undersigned counsel for the Sisters of the Holy Cross, Inc. by first-class mail on November 13, 2006, counsel has not received service as of this date. CLS&SB's certificate of service also reveals that counsel for CLS&SB has violated the Board's Rules of Practice by communicating with the Sisters of the Holy Cross, Inc., even though the Sisters are known to be represented by the undersigned counsel.

November 13. A copy of the published Notice of Intent, which indicates that the application will be filed on or about November 13, 2006, is attached hereto.

The Board also denied the request for waiver of the requirement that Applicants submit an environmental and historic report at least 20 days prior to filing an application. Applicants' Combined Environmental and Historic Report was properly forwarded to all parties on the Environmental Contacts List consistent with the Board's October 26, 2006 Decision and the requirements of 49 C.F.R. Part 1105.

The Board also denied the request that it waive the trail use provisions. The published Notice, as well as the revised Notice of Intent, includes information regarding the trail use provisions of 49 C.F.R. 1152.29, even though the Board did not expressly require inclusion of such information in its October 26, 2006 Decision.

CLS&SB has also complained that Applicants did not serve the Board. That contention is frivolous as it ignores the fact that Applicants' Notice of Intent was hand-delivered to the Board and filed with the Petition for Waiver and Exemption on September 6, 2006. Thereafter, the Board carefully reviewed said Notice of Intent and declared that it was in "substantial compliance with the requirements of 49 CFR 1152.21." Decision served October 26, 2006.

On October 30, 2006, Applicants, who had previously served their original Notice of Intent on the parties listed in § 1152.20(a)(2), served, by first-class mail, a revised Notice of Intent on all entities listed at 49 C.F.R. 1152.21(a)(2).² In addition, a courtesy copy of the revised Notice of Intent was served on CLS&SB even though it is not a significant user of the lines in question and has no ownership interest in said lines. Indeed, CLS&SB is little more than

² Applicants acknowledge that the revised Notice that was served on the parties listed at 49 C.F.R. § 1152.(a)(2) states that the Adverse Abandonment would be filed on or about October 24, 2006. That inadvertent error was duly corrected in the Notice that was published in the South Bend Tribune. Under these circumstances, any error in the Notice of Intent would be immaterial, harmless and non-prejudicial.

an officious intermeddler that is intent upon harassing the Applicants and causing unnecessary delay and needlessly increasing the cost of litigation.

The Board should declare that CLS&SB lacks standing. In the first place, it is not the owner of the lines that are the subject of the Application that will be filed on November 17, 2006. Nor is it a potential shipper. Instead, as the Board's records reflect, it is a rejected suitor that is intent upon disrupting the orderly abandonment of the dormant lines of railroad that are the subject of this proceeding. Simply stated, CLS&SB cannot point to any overriding Federal interest that would be served by allowing it to participate in this proceeding.

Last, even if it were to be assumed that Applicants' failure to file a copy of their revised Notice of Intent with the Board is not in full compliance with its regulations, the Board should exercise its discretion and find that such failure will not prejudice it or any potential party that has a substantive interest. As the Supreme Court reiterated in *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 539 (1970), it is well settled that:

it is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party.

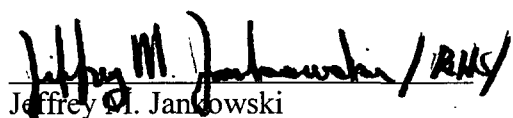
The Board's discretion is also codified at 49 C.F.R. § 1100.3, which provides that the "rules will be construed liberally to secure just, speedy and inexpensive determination of the issues presented." Given the lack of any prejudice to CLS&SB or any other entity, the Board should not require Applicants to file a redundant Notice of Intent and should proceed with the adjudication of the adverse abandonment application.

Although CLS&SB has appointed itself as the caretaker of the Board's regulations, it cannot demonstrate any prejudice to itself. As reflected by the attachment to its petition, it

received a copy of the revised Notice of Intent. Moreover, it will receive a copy of the application when it is filed with the Board. Because CLS&SB cannot show any prejudice to itself, and because the Board has been at all relevant times aware of the fact that Applicants are going to file their Adverse Abandonment following publication of the Notice of Intent in a local newspaper of general circulation, the Board's procedures have not been materially or adversely impacted by the inadvertent failure to file a copy of the revised Notice of Intent with the Board at an earlier date.

For all the above-stated reasons, the Board should find that Applicants have substantially complied with the provisions of 49 C.F.R. 1152.20 and should deny CLS&SB's petition.

Respectfully submitted,



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Dated: November 16, 2006

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C. 20423
STB Docket No. AS 280 (Sub-No. 286)
NORFOLK SOUTHERN RAILWAY COMPANY
ADVERSE ABANDONMENT
ST. JOSEPH COUNTY, IN
NOTICE OF ADVERSE ABANDONMENT
OF THE CITY OF SOUTH BEND, THE BROTHERS
OF THE HOLY CROSS, INC. AND THE SISTERS OF
THE HOLY CROSS, INC.

The City of South Bend, the Brothers of Holy Cross, Inc. and the Sisters of the Holy Cross, Inc. (hereinafter "Applicants") give notice that on or about November 13, 2006, they intend to file with the Surface Transportation Board ("the Board"), Washington, D.C. 20423, an application seeking the adverse abandonment of approximately 3.7 route miles of railroad between MP UV0.0 and MP UV2.8 and between MP Z09.6 and MP Z010.5, including an industrial spur line that extends from MP Z09.6 in an easterly direction, all of which is located in St. Joseph County, IN. The affected railroad lines are situated in U.S. Postal Service Zip Codes 46601, 46616, 46617, 46628, 46629 and 46658; they traverse no other U.S. Postal Zip Codes. Although the lines include no active stations, there is a dormant station located at Notre Dame, IN.

The reasons for the proposed abandonment include the absence of rail service over the lines for over ten (10) years and the lack of any foreseeable future need for rail service.

The City intends to acquire or condemn the right-of-way that lies within the City for public use. The line between MP UV0.0 and MP UV2.8 crosses 17 streets in the city of South Bend, including Lincoln Way West, which carries over 23,000 vehicles per day, and Indiana 933, which carries over 28,000 vehicles per day. A portion of that line and the line between MP Z09.6 and MP Z010.5 traverse the properties and campuses of the Sisters of the Holy Cross, Inc. ("Sisters") and the Brothers of the Holy Cross, Inc. ("BOHC"). The lines that traverse their campuses have been dormant for over a decade. Because of the lines' dormant status, the Sisters and Brothers assert a claim under Indiana law to a reversionary interest to portions of the right-of-way. Based on information in the possession of the Applicants, the lines do not contain federally granted rights-of-way. Any documentation relating to this abandonment in the Applicants' possession will be made available promptly to those requesting it.

The public record of the Board contains a system diagram map for Norfolk Southern Railway Company. However, the lines do not appear on that system diagram map as being potentially subject to abandonment.

The application, when filed, can be viewed following the filing on the Board's webpage, www.stb.dot.gov, or a copy can be secured from Applicants' counsel, whose name and address appear below. The application will include Applicants' entire case for abandonment.

Any interested person, after the application is filed on or about September 1, 2006, may file with the Surface Transportation Board its protest of, or written comments concerning, the proposed abandonment identifying them by the proceedings' docket numbers. These filings are due 45 days from the date of filing of the application. All interested persons should be aware that following any abandonment of rail service and salvage of the line, portions of the line may be suitable for interim trail use. Any request for a trail use condition under 16 U.S.C. 1247(d) Section 1152.29 of the Board's rules must also be filed within 45 days from the date of filing of the application. Persons who may oppose the abandonment, but who do not wish to participate fully in the process by appearing at any oral hearings or by submitting verified statements of witnesses containing detailed evidence, should file comments. Persons opposing the proposed abandonment that do wish to participate actively and fully in the process should file a protest. Protests must contain that party's entire case in opposition including the following: (1) the protestant's name, address and business, (2) the protestant's interest in the proceeding, including their use of the line or the public interest represented, (3) the protestant's reasons for protesting or commenting on the proposed abandonment, including their reliance on the involved service, and (4) any rebuttal of material submitted in the application.

Protests or comments need to be notarized or verified, and an unbound original and ten copies are required to be filed with the Secretary of the Board, at 1925 K Street, N.W., Washington, D.C. 20423-001, together with a certificate of service attesting that copies of the comments or protests have been served on Applicants' counsel in this matter, Jeffrey M. Jankowski, Deputy City Attorney, 1400 County-City Building, 227 W. Jefferson Boulevard, South Bend, IN, 46601-1830 and Richard H. Streeter, Barnes & Thornburg LLP, Suite 900, 750 17th Street, N.W., Washington, D.C. 20006. Except as otherwise set forth in 49 C.F.R. 1152, each document filed with the Board must be served on all parties to the abandonment proceeding. Protests and comments will be considered by the Board in determining what disposition to make of the application. A commenting party or protestant may participate in the proceeding as its interests may appear.

If an oral hearing is desired, the requester must make a request for an oral hearing and provide reasons why an oral hearing is necessary. Oral hearing requests must be filed with the Board no later than 10 days after that application is filed.

Those parties filing protests to the proposed abandonment should be prepared to participate actively either in an oral hearing or through the submission of their entire opposition case in the form of verified statements and arguments at the time they file a protest. Parties seeking information concerning the filing of protests should refer to 49 C.F.R. 1152.25.

Persons seeking further information concerning abandonment procedures may contact the Board's Office of Public Service at (202) 885-1592 or refer to the part of the abandonment regulations at 49 C.F.R. 1152.1, at 282, which can be viewed at www.stb.dot.gov/nara.cfr.

If an environmental assessment (EA) (or environmental impact statement (EIS), if necessary) is prepared by the Section of Environmental Analysis, it will be served upon all parties of record and upon any agencies or other persons who commented during its preparation. Any other persons who would like to obtain a copy of the EA (or EIS) may contact the Section of Environmental Analysis. EAs in these abandonment proceedings normally will be made available within 33 days of the filing of the application. The deadline for submission of comments on the EA will generally be within 30 days of its service. The comments received will be addressed in the Board's decision. A supplemental EA or EIS may be issued where appropriate.

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Certificate of Service

I, Richard H. Streeter, do hereby certify that a true copy of the foregoing Petition was served this 16th day of November, 2006, by first-class mail, postage prepaid, and by e-mail as designated, on the following named individuals:

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

Richard H. Streeter