

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

JOINT REPLY TO PETITION TO REJECT APPLICATION

Come now the City of South Bend, Indiana, the Brothers of Holy Cross, Inc. and the Sisters of the Holy Cross, Inc. (collectively “Applicants”), by and through counsel of record, and file their joint reply to the Petition to Reject Application submitted by the Chicago, Lake Shore & South Bend Railway Company (“CLS&SB”). By its petition, CLS&SB repeats its earlier claims that Applicants failed to comply with various requirements of 49 C.F.R. § 1152.20 governing the Notice of Intent to file an abandonment application.¹

It is respectfully submitted that Applicants have complied with the requirements of section 1152.20 and with the Board’s October 26, 2006 Decision in this docket (“*October 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, October Decision*, slip op. at p. 3.

In its latest Petition, CLS&SB once again complains that Applicants failed to serve the Notice of Intent on the Board by certified mail. CLS&SB’s contention is spurious and should be

¹ *See*, CLS&SB Petition to Reject Notice of Intent of Adverse Abandonment, filed November 13, 2006. The Applicants filed a timely response thereto on November 16, 2006.

rejected. In the first place, Applicants served the Notice of Intent on the Board by hand-delivery, which is even better than certified mail in that the Board's date stamp confirms receipt.

Second, as reflected by its Reply to Applicants' Petition for Waiver, CLS&SB was aware at all relevant times that the Board was served with a copy of the Notice of Intent. Indeed, at p. 5 of its Reply, CLS&SB specifically stated that:

Notice of Intent. CLSSB has no objection to allowing Petitioners to use their proposed notice instead of the Board's except insofar as references to the offer of financial assistance and environmental and historic provisions have been deleted. CLSSB would require that these references be retained and Petitioners comply with these provisions.

In its October Decision, the Board rejected CLS&SB's demand that references to the offer of financial assistance provisions be included in the Notice of Intent. *October Decision*, slip op. at p. 6. Furthermore, when Applicants, on October 30, 2006, served their Revised Notice of Adverse Abandonment on the various parties identified at 49 C.F.R. § 1152.20(a)(2)(ii), as well as on CLS&SB, they included references to the environmental and historic provisions as required by the Board's *October Decision*.

Although CLS&SB contends that Applicants failed to serve the various entities listed in 49 C.F.R. § 1152.20(a)(2)(ii), that contention is rebutted by the Certificate of Service, signed by Jeffrey M. Jankowski, Deputy City Attorney, City of South Bend, Indiana. *See*, Attachment A hereto. Mr. Jankowski's Certificate conclusively demonstrates that all persons and agencies which are required to be served pursuant to 49 C.F.R. § 1152.20(a)(2)(ii) were served. CLS&SB has not presented any evidence to show that the parties listed on Mr. Jankowski's Certificate were not served. That no certificate of service was included with the courtesy copy of the Notice that was served on CLS&SB's counsel is of no moment.

In its latest petition, CLS&SB attempts to mislead the Board when it claims (Petition at 5) that “the only party shown on the September 13 (sic) Petition certificate of service is counsel for NS.” That certificate, which was signed by Richard H. Streeter and dated September 6, 2006, accompanied the Petition for Waiver and Exemption. That particular pleading is not covered by the provisions of 49 C.F.R. § 1152.20(a)(2)(ii). Hence, the only party that needed to be served was NSR, which was done.

The Revised Notice of Adverse Abandonment was served on all required entities on October 30, 2006. The Adverse Abandonment Application was duly filed on November 17, 2006. On November 20, 2006, the Board waived the filing fee. In short, the Application was filed “at least 15 days, but not more than 30 days” following service of the Revised Notice.

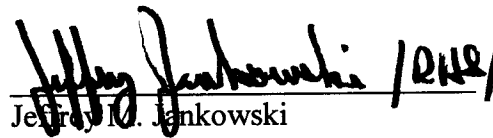
Last, the lower court cases cited by CLS&SB for the proposition that, as a general proposition, an agency must follow its own regulations are inapposite. While that may be true as a general principle, the Supreme Court has made it crystal clear that an agency has discretion to relax or modify its procedural rules. 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.” The rules governing the abandonment process are procedural rules. 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.

Respectfully submitted,

Handwritten signature of Jeffrey M. Jankowski in black ink, with a horizontal line underneath.

Jeffrey M. Jankowski
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South Bend, IN 46601
Counsel to the
City of South Bend, IN
tele: (574) 235-9241
fax: (574) 235-9892

Handwritten signature of Richard H. Streeter in black ink, with a horizontal line underneath.

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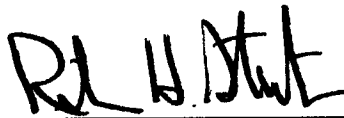
Dated: December 6, 2006

Certificate of Service

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

John D. Heffner, PLLC (j.heffner@verizon.net)
1920 N Street, N.W.
Suite 800
Washington, D.C. 20036

James R. Paschall (james.paschall@nscorp.com)
Greg E. Summy (greg.summy@nscorp.com)
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

ATTACHMENT A

STB AB 290 (Sub-No. 286)

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ST. JOSEPH COUNTY, IN

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the following individuals / agencies were served with a true and complete copy of the Revised Notice of Adverse Abandonment by United States Certified Mail on the 30th day of October, 2006:

Mitch Daniels
Office of the Governor
Statehouse
Indianapolis, IN 46204-2797

David W. Hadley, Commissioner
Indiana Utility Regulatory Commission
Indiana Government Center South
302 West Washington Street, Ste E-306
Indianapolis, IN 46204

Thomas Sharp, Commissioner
Indiana Department of Transportation
100 N. Senate Avenue, Room IGCN 755
Indianapolis, IN 46204

Purdue University Cooperative Extension
Services
St. Joseph County CES
336 County City Building
227 W. Jefferson Boulevard
South Bend, IN 46601-1870

Joseph H. Boardman, Administrator
Federal Railroad Administration
1120 Vermont Avenue, NW
Mail Stop 10
Washington, DC 20590

Military Surface Deployment and Distribution
Command (SDDC)
200 Stovall Street
Alexandria, VA 22332-5000

William Cooper, Director
Transportation Engineering Agency
Railroads for National Defense Program
720 Thimble Shoals Blvd., Suite 130
Newport News, VA 23606-4537

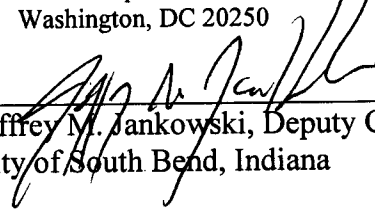
National Park Service - Recreation Resources
Assistance Division
U.S. Department of Interior
P.O. Box 37127
Washington, DC 20013-7127

Fran P. Mainella, Director
National Park Service
1849 C Street, NW
Washington, DC 20240

Steven A. Bartholow, General Counsel
U.S. Railroad Retirement Board
844 North Rush Street
Chicago, IL 60611-2092

Chief Dale Bosworth
USDA Forest Service
1400 Independence Avenue, SW
Washington, DC 20250

November 15, 2006


Jeffrey M. Jankowski, Deputy City Attorney
City of South Bend, Indiana