

ISAAC T. WARREN  
ASSOCIATE



211350

June 14, 2004

Vernon Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20423

IWARREN@JONESKELLER.COM



Re: Petition of the Lake Superior & Ishpeming Railroad Company for Reconsideration  
of the Board's Decision, Served May 26, 2004, and For Further Relief

Dear Secretary Williams:

On May 11, 2004, The Lake Superior & Ishpeming Railroad Company ("LS&I") filed a petition seeking an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10903 to abandon and/or discontinue service on a line of railroad known as the Republic Subdivision in Marquette County, in the Upper Peninsula of Michigan. By a decision served May 26, 2004, the Board rejected the petition in its entirety. LS&I now submits an original and ten (10) copies of a Petition for Reconsideration of the Board's Decision, served May 26, 2004, and For Further Relief pursuant to 49 C.F.R. § 1152.25. The Certificate of Service and draft Federal Register Notice is attached to the Petition.

This Petition for Reconsideration was originally filed electronically on June 10, 2004, however, the Surface Transportation Board's electronic filing system does not allow for the requisite fees to be filed. Please file the Petition for Reconsideration of the Board's Decision, served on May 26, 2004, and For Further Relief in Docket No. AB-68 (Sub-No. 4X), effective as of June 10, 2004, the original date of filing. Enclosed is a check in the amount of \$200 for the applicable filing fee.

**FEE RECEIVED**

JUN 15 2004

**SURFACE  
TRANSPORTATION BOARD**

Very truly yours,

Isaac T. Warren

Encs.

cc: Peter Ray  
Ken Simmons, Esq.  
Bob Clark

**FILED**

JUN 15 2004

**SURFACE  
TRANSPORTATION BOARD**

**ENTERED  
Office of Proceedings**

**JUN 15 2004**

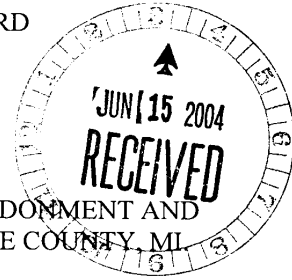
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Public Record**

211350

BEFORE THE SURFACE TRANSPORTATION BOARD  
WASHINGTON, D.C.

DOCKET NO. AB-68 (Sub. No. 4X)

LAKE SUPERIOR & ISHPEMING RAILROAD COMPANY - ABANDONMENT AND  
DISCONTINUANCE OF SERVICE EXEMPTION - IN MARQUETTE COUNTY, MI



PETITION OF THE LAKE SUPERIOR & ISHPEMING RAILROAD COMPANY FOR  
RECONSIDERATION OF THE BOARD'S DECISION, SERVED MAY 26, 2004, AND  
FOR FURTHER RELIEF

LAKE SUPERIOR & ISHPEMING  
RAILROAD COMPANY  
P.O. Box 200  
Ishpeming, MI 49849

*Petitioner*

Edward T. Lyons, Jr.  
JONES & KELLER, P.C.  
1625 Broadway, Suite 1600  
Denver, CO 80202

*Attorney for Petitioner*

ENTERED  
Office of Proceedings

JUN 15 2004

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Public Record

**FILED**

JUN 15 2004

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TRANSPORTATION BOARD

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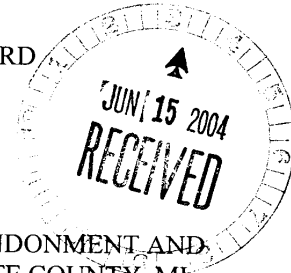
SURFACE  
TRANSPORTATION BOARD

DATED: June 10, 2004

BEFORE THE SURFACE TRANSPORTATION BOARD  
WASHINGTON, D.C.

DOCKET NO. AB-68 (Sub. No. 4X)

LAKE SUPERIOR & ISHPEMING RAILROAD COMPANY - ABANDONMENT AND  
DISCONTINUANCE OF SERVICE EXEMPTION - IN MARQUETTE COUNTY, MI.



**PETITION OF THE LAKE SUPERIOR & ISHPEMING RAILROAD COMPANY FOR  
RECONSIDERATION OF THE BOARD'S DECISION, SERVED MAY 26, 2004, AND  
FOR FURTHER RELIEF**

The Lake Superior & Ishpeming Railroad Company (the "LS&I") hereby respectfully petitions the Board to reconsider its decision in this proceeding, served May 26, 2004, rejecting the LS&I's petition for an abandonment and/or discontinuance of service exemption, and to grant the further relief described below.

**I. INTRODUCTION**

On May 11, 2004, LS&I filed a petition seeking an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10903 to abandon and/or discontinue service on a line of railroad known as the Republic Subdivision in Marquette County, in the Upper Peninsula of Michigan. By a decision served May 26, 2004, the Board rejected the petition in its entirety.

The Board rejected the petition based on its determination that since LS&I owns only a one-third interest in the first of the three segments of the subject line of railroad, between LS&I Jct. and Landing Jct., the Board "cannot process the request for abandonment authorization as to that segment because CN [Canadian National Railway Company], the owner of the remaining two-thirds interest, is not a party to the proceeding." (Decision, sheet 1). Even in the absence of CN joining in an

abandonment proceeding, however, the Board recognized that, “[a]lternatively, LS&I has the option of filing for discontinuance of service only on the first segment and for abandonment of the second and third segments (LS&I’s request as to all three segments could be embraced in a single filing).” (*Id.*, sheet 2). Despite the fact that the perceived problem with the petition dealt only with the form of relief sought with respect to the first segment of the line, and despite the Board’s recognition that authorization for discontinuance of service on that segment and authorization to abandon the remainder of the line would be the appropriate form of relief, the Board rejected the petition in its entirety. (*Id.*).

## **I. GROUNDS FOR REOPENING PROCEEDING**

Reconsideration of the decision rejecting the petition is warranted for two reasons: (1) because in taking that action the Board committed material error, and (2) changed circumstances since the petition was filed will obviate the concerns about processing the petition that were cited by the Board. These grounds for reconsideration will be discussed separately below.

### **a. The Board Committed Material Error in Rejecting the Petition**

The Board committed material error when it rejected the entire petition on the grounds that LS&I should have sought authorization for discontinuance of service, rather than abandonment, as to the first segment of the line between LS&I Jct. and Landing Jct. This was based upon an erroneous interpretation of the petition. In reaching that determination, the Board overlooked the fact that LS&I’s petition expressly sought the *alternative* relief of an exemption for discontinuance of service, in lieu of abandonment, as to the first segment of the line. After noting that the 1963 agreement between LS&I and CN, which governs the ownership, use, and abandonment of the jointly owned track, provides that if LS&I were to abandon its use of the track, and CN desires to

continue to use the track, CN must purchase LS&I's interest, the Petition for Exemption goes on to state:

If CN does acquire LS&I's interest in the joint track, this section of the line would not be dismantled and salvaged, and the exemption sought by LS&I with respect to this part of the line could properly be construed as one for discontinuance of service, rather than abandonment. Due to the present uncertainty concerning CN's intention, LS&I is accordingly seeking such relief as may be appropriate based on the final record in this proceeding – either by way of exemption for abandonment of the joint track or discontinuance of service on this section of the line.

Petition. pp.3-4 (sheets 6-7 of consecutively paginated filing) (emphasis added).

Thus, contrary to the Board's erroneous treatment of the petition as one seeking abandonment authorization only, LS&I's petition expressly requested, at least as to the first segment of the line, an exemption in the alternative, either for discontinuance of service *or* abandonment, depending on which form of relief the Board might deem appropriate based on the record as finally developed. At the same time, abandonment authorization was sought for the second and third segments of the line, which are wholly owned by LS&I. The petition that was rejected is thus fully consistent with the type of petition the Board held that LS&I had the "option" to file, namely one "for discontinuance of service . . . on the first segment and for abandonment of the second and third segments . . . embraced in a single filing." (*Id.*, sheet 2).

Where, as here, a reasonable reading of the petition as originally filed would have recognized that, at least as to the first segment of the line, an exemption was being sought for discontinuance of service, rather than an abandonment, if that was what the Board deemed to be the appropriate relief in the circumstances, it was error to dismiss the petition on the grounds that only an abandonment authorization was being requested. The Board's Rules of Practice require that such

a petition “be construed liberally to secure just, speedy and inexpensive determination of the issues presented.” It would not be just – much less speedy and inexpensive – to require LS&I to file a new petition which would at most only make more explicit what should have been evident in the first instance. Such pursuit of form over substance has not been typical of procedure before this agency or its predecessor. *Compare, e.g., Yolo Shortline Railroad Company--Lease and Operation Exemption--Port of Sacramento*, F.D. No. 34114, decided January 31, 2003, at sheet 2 n. 3 (treating a party’s erroneously styled petition to revoke as instead a petition to reject in order to conform to the relief actually sought). Nor would it comport with Congress’ mandate to the Board (i) “to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required . . .” and (ii) “to reduce regulatory barriers to entry into and exit from the industry . . .” 49 U.S.C. § 10101(2) and (7). Adherence to these basic tenets of the rail transportation policy warrants reinstatement of the erroneously dismissed petition.

**b. Changed Circumstances also Warrant Reconsideration**

In deciding not to process the petition, even as to the two segments of the line in connection for which it was recognized that LS&I had the “option” of seeking abandonment authorization, it is apparent that the Board was concerned about the possible effect that an abandonment of the second segment of the line, between Landing Jct. and Humboldt Jct., might have on CN’s overhead trackage rights on this segment. In this respect, the Board noted that even if LS&I received abandonment authority for the second segment, “it would not be able immediately to consummate abandonment of that segment because of CN’s trackage rights authority over the line. For LS&I to consummate the abandonment, CN would first have to make a filing with the Board requesting discontinuance

of its trackage rights, obtain discontinuance authority, and then exercise the authority.” (Decision, sheet 2 n. 2).

First, LS&I wishes to make it clear that it was never its intent to take action detrimental to CN, nor to proceed unilaterally. To the contrary, as the petition for exemption filed in this proceeding demonstrates, LS&I sought CN’s cooperation when it gave CN written notice six months ago that it intended to abandon its limited operation on the line. The notice was in accordance with the 1990 trackage rights agreement in which the parties had expressly provided for LS&I’s right to abandon the trackage at any time “without concurrence” of CN, and which gave CN the right to continue its overhead operation by purchasing the track for its “net liquidation value” as defined.<sup>1</sup> CN’s option to purchase the track for its salvage value, which would fully protect the interests of CN and its shippers, was not an option to thwart LS&I’s right to abandon, however. After waiting what appeared to be more than a reasonable time for CN to respond, LS&I took the specific action contemplated by the parties’ agreement and filed its petition to exempt the abandonment. The assumption was that CN was prepared to honor the agreement and purchase the involved segment of line after abandonment by LS&I was authorized.

Circumstances have changed in an important way since that filing. CN has now advised LS&I that it would like additional time to pursue a possible alternative to purchasing the line segment in question. As described by CN, this would involve a potential arrangement with a short line carrier now operating in the area that would provide an alternative route for the overhead traffic CN is now handling on this segment of LS&I’s line. If CN had sought additional time for this

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<sup>1</sup> See Trackage Agreement, Exhibit 7 to Petition for Exemption, paragraph 24 at page 13 (sheet 73 of consecutively paginated filing).

purpose before the petition was filed, LS&I would have been willing to postpone the filing. Unfortunately, this did not occur. Even now, however, despite the expenses that already been incurred, and in order to demonstrate its continuing desire to cooperate, LS&I has advised CN that it is willing to defer temporarily its abandonment of the involved segment of the line in exchange for CN's commitment to evaluate the alternatives that are available to it and notify LS&I within a reasonable time how it desires to proceed. CN has indicated that it will proceed as expeditiously as possible to rationalize its operations in the area in light of LS&I's goal of abandoning and/or discontinuing its operations on the entire Republic Subdivision at the earliest practicable date.

LS&I submits that these developments lend further support to the present petition for reconsideration. Thus, if the prior action is reconsidered and the exemption petition is reinstated by the Board for consideration on its merits, a much streamlined abandonment request will be presented. In this regard, consistent with the accommodation that has been reached with CN, LS&I will seek leave to withdraw both of the controversial parts of the original filing<sup>2</sup> and seek abandonment authorization at this time only as to the third segment of the line, between Humboldt Jct. and Republic, with respect to which there can be no question concerning LS&I's present right to abandon. As the petition that was originally filed makes clear, no local or overhead traffic has moved over this segment of the line for more than five years, and maintenance has been deferred.

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<sup>2</sup> Although, as discussed above, there should be no real obstacle to proceeding with an exemption for discontinuance of service on the first segment of the line, between LS&I Jct. and Landing Jct., it would make no economic sense to do so at this time in light of LS&I's decision to defer, for the time being, the abandonment of the adjacent second section over which CN enjoys trackage rights. As long as LS&I must continue to incur the cost of maintaining the second section, on which it has no traffic, it would be counterproductive to give up the little bit of revenue that it earns on the first segment, without which the amount of LS&I's loss in keeping the Republic Subdivision in service would be even greater.

Although this segment could therefore be separately abandoned under the class exemption procedure provided for by 49 CFR § 1152.50, it was included as part of the overall abandonment and/or discontinuance authorization sought in this proceeding in order to present a complete picture of the situation. Abandonment of at least this unused segment of the Republic Subdivision is clearly justified at the present time based on the facts submitted in support of the original petition in this proceeding.<sup>3</sup> It would serve no legitimate regulatory purpose, LS&I submits, to require it to start the exemption process all over again and pay another filing fee simply to complete the abandonment of this long dormant segment of line.

### **III. RELIEF REQUESTED**

The Board is therefore requested to reconsider its decision, served May 26, 2004, and thereupon grant the following additional relief:

1. Vacate the Board's Decision, served May 26, 2004, and reinstate the Petition for Exemption filed by LS&I on May 11, 2004;
2. Grant LS&I leave to withdraw those parts of the Petition for Exemption which seek an exemption authorizing (1) the abandonment/and or discontinuance of service on the first segment of the Republic Subdivision extending from LS&I Jct. (milepost 69.52) west approximately 4.1 miles to Landing Jct. (milepost 73.6) and (2) the abandonment of the second segment of the Republic Subdivision extending from Landing Jct. west approximately 12 miles to Humboldt Jct. (milepost 85.6);

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<sup>3</sup> As the petition sets forth, it would cost approximately \$280,000 to refurbish this totally superfluous segment of the line. Since there is no prospect for productive future use of the involved track, it would plainly be consistent with the stated objectives of the rail transportation policy to relieve LS&I of the expense of owning and maintaining track that produces no revenue and allow it to apply its assets more productively elsewhere on its system.

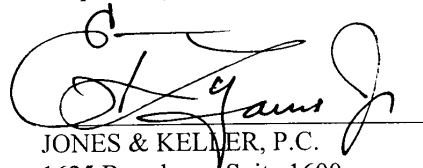
3. Cause notice of the revised Petition for Exemption to be published in the Federal Register in the form accompanying the present petition for relief;

4. Enter a decision granting LS&I exemption authority to abandon the third segment of the Republic Subdivision extending from Humboldt Jct. (milepost 85.6) to the end of the track at Republic Mine (milepost 94.5); and

5. Grant LS&I such further or different relief as the Board may deem appropriate.

DATED this 10th day of June, 2004.

Respectfully Submitted,



JONES & KELLER, P.C.  
1625 Broadway, Suite 1600  
Denver, Colorado 80202  
Telephone: (303) 573-1600

ATTORNEY FOR PETITIONER

**CERTIFICATION**

I certify that I have this 10<sup>th</sup> day of June, 2004, served copies of the Petition of the Lake Superior & Ishpeming Railroad Company for Reconsideration of The Board's Decision, Served May 26, 2004, and for Further Relief upon all parties of record in this proceeding, by first class mail, postage prepaid on the following:

US Department of Agriculture  
Natural Resources Conservation  
Soil Conservation Service  
3001 Coolidge Rd., Suite 250  
East Lansing, MI 48823-6362

William Homrich  
Michigan Department of Transportation  
Freight Services Safety Division  
PO Box 30050  
Lansing, MI 48909-7550

Governor of the State of Michigan  
State Capitol Building  
Lansing, MI 48913

International Rail Brokers, Inc.  
12163 Washburn  
Detroit, MI 48204

Terry L. Linger  
UPTRAN  
818 North Harrison  
East Lansing, MI 48823

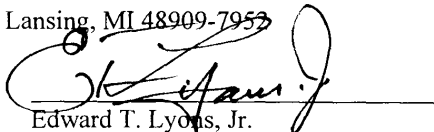
Michigan Department of TPTN  
Bureau of Urban & Public TPTN  
PO Box 30028  
Lansing, MI 48909-7528

Michigan Public Service Commission  
PO Box 30221  
Lansing, MI 48909-7721

US Army Corps of Engineers  
Attn: NCECO-L  
PO Box 1027  
Detroit, MI 48231-1027

Bureau of History, Dept. of State  
Historic Preservation Officer  
717 W. Allegan Street  
Lansing, MI 48918-1800

Philip Wells  
Michigan Department of Natural Resources  
PO Box 30452  
Lansing, MI 48909-7952

  
Edward T. Lyons, Jr.  
JONES & KELLER, P.C.  
1625 Broadway, Suite 1600  
Denver, Colorado 80202  
Telephone: (303) 573-1600

STB No. AB-68 (Sub-No.4X)

*Notice of Petition for Exemption to Abandon*

On May 11, 2004, the Lake Superior & Ishpeming Railroad Company filed with the Surface Transportation Board, Washington, D.C. 20423, a petition for exemption for the abandonment of approximately 8.9 miles of a line of railroad known as the Republic Subdivision, extending from Humboldt Jct. (milepost 85.6) to the end of the track at Republic Mine (milepost 94.5), which traverses through United States Postal Service ZIP Code 49879, a distance of approximately 8.9 miles, in Marquette County, Michigan. The portion of the Republic Subdivision for which the abandonment exemption request was filed includes the stations of Humboldt Jct. (milepost 85.65), Humboldt (milepost 87.47) and Republic Mine (milepost 94.33).

The line does not contain federally granted rights-of-way. Any documentation in the railroad's possession will be made available promptly to those requesting it.

The interest of railroad employees will be protected by the conditions imposed in *Oregon Short Line R. Co. - Abandonment - Goshen*, 360 I.C.C. 91 (1979).

Any offer of financial assistance will be due no later than 10 days after service of a decision granting the petition for exemption.

All interested persons should be aware that following abandonment of rail service and salvage of the line, the line may be suitable for other public use, including interim trail use.

Any request for a public use condition and any request for trail use/rail banking will be due no later than 20 days after notice of the filing of the petition for exemption is published in the Federal Register.

Persons seeking further information concerning abandonment procedures may contact the Surface Transportation Board or refer to the full abandonment or discontinuance regulations at 49 CFR Part 1152. Questions concerning environmental issues may be directed to the Board's Section of Environmental Analysis.

An environmental assessment (EA) (or environmental impact statement (EIS), if necessary) prepared by the Section of Environmental Analysis 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 60 days of the filing of the petition. The deadline for submission of comments on the EA will generally be within 30 days of its service.