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ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD



STB Docket No. AB-290 (Sub-No. ²⁸⁶~~275~~)

NORFOLK SOUTHERN RAILWAY COMPANY-ADVERSE ABANDONMENT

IN ST. JOSEPH COUNTY, IN

PETITION FOR WAIVER AND EXEMPTION

REPLY OF
CHICAGO, LAKE SHORE & SOUTH BEND RAILWAY COMPANY

Respectfully submitted,

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INTRODUCTION

On September 13, 2006, the City of South Bend ("the City"), the Brothers of Holy Cross, Inc. ("BOHC"), and the Sisters of the Holy Cross, Inc. ("Sisters") (collectively "Petitioners") filed a document entitled "Petition for Waiver and Exemption in connection with an "adverse application" it intends to file in the near future for abandonment of a rail line owned by Norfolk Southern Railway Company ("NSR"). Chicago, Lake Shore & South Bend Railway Company ("CLSSB"), a newly established short line railroad company, submits this reply and comments in partial opposition to this Petition.

BACKGROUND

This proceeding involves a line of railroad currently owned by NSR and formerly owned and operated by Consolidated Rail Corporation ("Conrail"). The subject line extends 3.2 miles between MP UV 0.0 and MP UV 2.8 and between MP Z09.6 and MP Z010.5¹ and includes any ownership interest in a spur leading to Notre Dame University. It was formerly part of a through route extending between Niles, MI, and South Bend, IN.² The line was acquired by NSR in 1998 as part of its acquisition of the assets and common carrier operations of Conrail. NSR has never provided any service over this line.

During the Fall of 2005 and Spring of 2006, CLSSB and NSR conducted active and vigorous negotiations for CLSSB's acquisition of the Line resulting in an asset purchase agreement that was prepared by the NSR law department. In anticipation of the fact that NSR officials would shortly sign a final agreement, CLSSB filed a verified notice of exemption with the Board on June 14, 2006, for authority to

¹ The mileposts were revised per letter to the Board dated September 26, 2006, from Petitioners' counsel.

² Conrail abandoned the segment north of MP 9.6 in 1984 pursuant to authority granted in Docket AB-167 (Sub-No. 672N), Conrail Abandonment in Berrian County, MI, and St. Joseph County, IN (served August 31, 1984).

acquire and operate the Line.³ CLSSB did so with full recognition of the fact that it would spend substantial funds reconnecting this track to the national rail system and rehabilitating the Line for use as a common carrier railroad. CLSSB had obtained a serious expression of interest from a coal supplier to Notre Dame University ("Notre Dame") to use the Line for moving inbound coal to Notre Dame's on-campus power plant. As the volume of coal increases, the existing transload operation becomes less suitable for the long term. CLSSB's acquisition and operation of the Line would permit the return to rail movements of inbound coal that currently move by rail to a transload facility in South Bend at which point the coal is placed in trucks for movement to Notre Dame. This project was undertaken with the cooperation and encouragement of NSR's coal marketing department that had provided the coal supplier with rates and CLSSB with a switching allowance. In addition, CLSSB was and still is actively engaged in marketing the line for other rail freight movements.

³ This notice was reviewed and approved before filing by the NSR law department. CLSSB's notice covered the line between MP UV0.0 and MP UV2.8 and between MP ZO9.48 and MP ZO9.9 including any ownership interest in the spur leading to Notre Dame University in the City of South Bend, IN. The Board styled this case as The Chicago Lake Shore And South Bend Railway Company - Acquisition and Operation Exemption - Norfolk Southern Railway Company, STB Finance Docket No. 34893.

On July 6, 2006, the Board served a decision exempting CLSSB's acquisition and operation of the Line. Starting on or about that date the City, the BOHC, and the Sisters deluged the Board with a veritable flood of protests and petitions to revoke. After its substantial negotiations with and support from NSR, CLSSB was surprised to receive a filing from NSR asking the Board dismiss this proceeding. CLSSB then withdrew its notice of exemption on August 31, 2006.

CLSSB's Comments

In its Petition, Petitioners seek a wide variety of regulation waivers and exemptions to facilitate the filing of their adverse abandonment application. Some of these are reasonable and CLSSB has no objection or even no opinion at all. However, Petitioners have made several requests that CLSSB strenuously opposes. CLSSB also joins NSR in urging the Board to reject any waiver or exemption request that is inconsistent with Board precedent or policy. In particular, CLSSB urges the Board to scrutinize carefully any request for exemption from the offer of financial assistance provisions as well as any request for any relaxation of compliance with the Board's environmental and historic rules. CLSSB's comments on Petitioners' specific requests are as follows:

Waiver of filing fees. CLSSB has no comment to the extent that waiver is made by the City. BOHC and the Sisters should be held to the same filing fee requirement as even the smallest short line railroad.

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.

Waiver of 49 CFR 1152.20(a) (2), service on significant rail users. CLSSB has no objection.

Waiver of 49 CFR 1150.20(a) (2) (xii), service on duly certified labor organizations. CLSSB has no objection.

Waiver of 49 CFR 1152.20(a) (3), posting at stations. CLSSB has no objection as to posting but would require full newspaper publication.

Waiver of 49 CFR 1152.20(a) (4), newspaper publication. CLSSB vehemently objects to this request. Newspaper publication is not onerous and will ensure that the public is fully aware of Petitioner's proposed abandonment. Petitioners state they are willing to send copies of their application to NSR, Notre Dame University, and "all parties

listed in 49 CFR 1152(a)(2)(ii-xi)." There is no such regulation. A copy should also be sent to CLSSB.

Waiver of 49 CFR 1152.20(c), service of Environmental and Historic Report. CLSSB is adamantly opposed to this request. Because the elimination of this rail corridor would have tremendous adverse implications for the use of rail as a more environmentally friendly, energy efficient mode of transportation than truck, waiver of this requirement would not allow the Board to fulfill its responsibilities under both the ICCTA's Rail Transportation Policy goals and the National Environmental Policy Act. Rather Petitioners should be required to expose their abandonment proposal to full public scrutiny just as they believe CLSSB's proposal should be given a similar review. The specific issue to be reviewed is the relative environmental and energy advantages and disadvantages of the permanent removal of the option to use rail service now and in the future. CLSSB does not believe that relaxing compliance with these statutory mandates would pass judicial muster.

Content of the application. 49 CFR 1152.22(a)(4) and (5) and 1152.24(e)(1) and also 49 CFR 1152.10-14 (Petition at page 8, footnote 2), generally pertaining to system diagram map requirements: CLSSB strongly objects to a

waiver of 49 CFR 1152.22(a)(4) requiring a detailed map. This requirement is not onerous and is necessary to inform the public. CLSSB has no objection to the other requests.

Content of the application. 49 CFR 1152.22(b)-(d), description of property and service and presentation of revenue and cost data. CLSSB has no objection.

Content of the application. 49 CFR 1152.22(f), disclosure of information relating to environmental impacts. CLSSB strongly objects for the same reasons stated in connection with the requirement to prepare an Environmental and Historic Report.

Content of the application. 49 CFR 1152.22(i), Federal Register notice. CLSSB has no objection to allowing Petitioners to use their proposed Federal Register 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 required to comply with these provisions.

Exemption from public use, trails, and OFA conditions under 49 U.S.C. 10502. CLSSB has no objection to exempting Petitioners from compliance with or allowing waivers from provisions dealing with public use conditions and rail trails. CLSSB is unalterably opposed to any attempt to

seek a waiver from the OFA provisions of 49 U.S.C.

10904(d)-(f).

In that regard, CLSSB notes that the Board has a "statutory duty to preserve and promote continued rail service." Western Stock Show Ass'n - Abandonment Exemption - in Denver, CO, 1 S.T.B. 13 (1996). The Board and the Interstate Commerce Commission before it have granted exemptions from the offer of financial assistance provisions of 49 U.S.C. 10904 from time to time, but only when the right-of-way is needed for a valid public purpose and there is no overriding public need for continued rail service.⁴ Other than some generalized statements about safety considerations, the Petitioners here cite no specific public purpose for which they would use the railroad right of way.⁵ Moreover, CLSSB will provide

⁴ See K. & E Railway Company--Abandonment Exemption--In Alfalfa, Garfield, and Grant Counties, OK, and Barber County, KS, STB Docket No. AB-480X (STB served Dec. 31, 1996) slip op. at 4, citing Southern Pacific Transportation Company--Discontinuance of Service Exemption--In Los Angeles County, CA, Docket No. AB-12 (Sub-No. 172X), et al., (ICC served Dec. 23, 1994); Missouri Pacific Railroad Company--Abandonment--In Harris County, TX, Docket No. AB-3 (Sub-No. 105X) (ICC served Dec. 22, 1992); Chicago & North Western Transportation Company--Abandonment Exemption--In Blackhawk County, IA, Docket No. AB-1 (Sub-No. 226X), et al., (ICC served July 14, 1989); and Iowa Northern Railway Company--Abandonment--In Blackhawk County, IA, Docket No. AB-284 (Sub-No. 1X) (ICC served Apr. 1, 1988).

⁵ In New York Cross Harbor R.R. v. Surface Transp. Bd., 374 F.2d 1177 (D.C. Cir. 2004), the Court of Appeals vacated and remanded a Board decision granting an adverse abandonment over the railroad's opposition noting that the adverse abandonment applicant had not established any specific public purpose.

evidence of a continuing need for rail freight service should it file an OFA.⁶ CLSSSB does not believe that the Board's consideration of this Petition is the time to address the contents of its offer. However, due process and plain fairness requires that CLSSSB be given a chance to present its case for an offer of financial assistance at the appropriate time rather than being foreclosed at this early date.

Request for expedited consideration. Petitioners' request for expedited consideration of its waiver request is unjustified. The normal process for abandonment-related waivers is for the Applicant to wait about 30 days for a decision after requesting a waiver and then to file its application once the Board renders a decision on the request. Petitioners here not only want the Board to grant their request within 10 days of the date of filing without giving members of the public a chance to comment.⁷ Their proposed October 2 application filing date appears to make a virtual mockery of the Notice of Intent requirement. Inasmuch as the Board's abandonment regulations require

⁶ Here there are existing traffic movements. CLSSSB would return to rail transportation coal that currently moves by highway over city streets.

⁷ Because Petitioners' waiver request is dated September 5, the September 15 date provides a mere 10 days. Since the Board did not treat the Petition as filed until September 13, the September 15 date would give even less opportunity for comment and Board consideration.

that the notice be filed, served, and published at least 15 and no more than 30 days before filing the application, Petitioners may not file their application until they first filed, serve, and publish their Notice of Intent and wait the 15-30 day period prescribed by the Board's regulations. The Board should reject any premature application. 49 CFR 1152.20(b).

Petitioners have not provided any other justification for expeditious consideration of their request. This railroad line has been out of service at least since the time of NSR's acquisition of Conrail in the later 1990's. Up until CLSSB expressed an interest in acquiring this line, there was no change in its status. Rather the only change was the fact that someone, namely CLSSB, expressed an interest in buying, rehabilitating, and restoring it to service that awakened Petitioners out of their slumber. Petitioners have shown no reason why they can't wait a little longer so that the rights of all interested parties can be heard.

CONCLUSION

Accordingly, CLSSB requests that the Board carefully consider the views of the public in determining whether to grant Petitioners' request and deny any requests that would

relieve Petitioners from providing the public with a complete understanding of their proposal. Further, CLSSB urges the Board to deny Petitioners' request to be exempted from its environmental and historic requirements as well as the Financial Assistance provisions of 49 U.S.C. 10904. Finally, the Board should deny Petitioners' request for expedited consideration.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John D. Heffner", with a long horizontal flourish extending to the right.

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Dated: October 3, 2006

CERTIFICATE OF SERVICE

I, John D. Heffner, certify that a copy of the Petition For Waiver and Exemption Reply of Chicago, Lake Shore & South Ben Railway Company was served on October 3, 2006 to the following:

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