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ORIGINAL

PUBLIC VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 34960

THE CHICAGO, LAKE SHORE AND SOUTH BEND
RAILWAY COMPANY
-- ACQUISITION AND OPERATION EXEMPTION --
NORFOLK SOUTHERN RAILWAY COMPANY



PETITION TO REVOKE AND STAY EXEMPTION

REPLY OF
THE CHICAGO, LAKE SHORE AND SOUTH BEND RAILWAY COMPANY

Respectfully submitted

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Pursuant to 49 CFR 1104.13(a), The Chicago, Lake Shore & South Bend Railway Company ("CLSSB") replies to the Petition to Revoke and Stay the Notice of Exemption jointly filed on November 22, 2006, by the City of South Bend, IN ("South Bend"), along with the Brothers of Holy Cross, Inc. ("Brothers") and the Sisters of the Holy Cross, Inc. ("Sisters") (collectively "the Petitioners"). CLSSB urges the Board to reject as untrue Petitioners' assertions pertaining to the acquisition by CLSSB of the subject line of railroad, to find that CLSSB filed its Notice of Exemption on November 20, 2006,¹ in good faith, and to

¹ Hereafter cited as the November 20 Notice of Exemption.

reject Petitioners' unsubstantiated and inappropriate request for sanctions against CLSSB.

BACKGROUND

CLSSB is a noncarrier that was established in 2005 in the expectation of acquiring and operating a short segment of out of service railroad track owned by Norfolk Southern Railway Company ("NS"). In June 2006, CLSSB believed that it had reached an agreement with NS to permit it to file a Notice of Exemption with the Board. In documents submitted with the confidential version of this Reply and subject to imposition of a protective order, CLSSB will show that it believed that receipt of a signed purchase agreement between it and NS was imminent. It will also show that the parties had reached an understanding on all essential terms of the transaction and that NS officials and lawyers had reviewed and approved the filing of CLSSB's earlier exemption notice on June 14, 2006.

Immediately after CLSSB's filing, various parties including the City of South Bend, the Sisters, and the Brothers deluged the Board with Petitions, Protests, and letters asserting the evils that would occur if this small entrepreneur-owned company were permitted to acquire, rehabilitate, and resume service over 3.2 miles of railroad. Towards that end, documents that CLSSB is

submitting under seal will show that City officials dissuaded the University of Notre Dame from using rail transportation over the subject line to move coal to the University power plant and to continue trucking the coal over city streets. Moreover, CLSSB has reason to believe that one or more of the Petitioners lobbied NS to drop its plan to sell this line to CLSSB.

After NS wrote the Board on August 15, 2006, suggesting that it dismiss CLSSB's earlier exemption request, CLSSB asked the Board to withdraw its notice without prejudice. The Board granted that request in a Decision served on September 11, 2006.

Meanwhile, Petitioners initiated procedures leading to the eventual abandonment of this line by filing a Petition for Waiver and/or Exemption in connection with their stated desire to adversely abandon NS' rail line.² Thereafter, Petitioners prepared and sent CLSSB a Notice of Intent to Abandon dated October 5, 2006 (revised and redated October 30, 2006), and filed an Adverse Abandonment Application with the Board on November 21, 2006.³

CLSSB continued to talk with NS which appeared willing to reconsider the sale if Petitioners' opposition could be

² That Petition was filed on September 7, 2006, and granted in part and denied in part by decision served October 26, 2006.

³ Dated November 17, 2006. CLSSB filed a Petition to Reject the Adverse Abandonment Application on December 4, 2006.

diffused. Towards that end, CLSSB met with officials of South Bend as well as those of the Brothers and the Sisters on October 18, 2006, in a good faith effort to resolve their differences. Moreover, CLSSB broached with NS lawyers the possibility of filing a new notice of exemption in early November that would be effective upon reaching an agreement with NS.

ARGUMENT

Stripped down to its bare essentials, Petitioners' argument is that CLSSB's exemption request is nothing more than a subterfuge and an attempt to delay the Board's "orderly" processing of their Adverse Abandonment Application. CLSSB's actions, Petitioners demand, require the Board to award Petitioners attorneys' fees for responding to CLSSB's filings. Petitioners assertions are unfounded and its claim unwarranted. CLSSB's shall address each one of Petitioners' arguments *seriatim*:

1. Existence of an agreement. Petitioners would have the Board believe that CLSSB never has had and never will have an agreement with NS to acquire and operate the subject rail line, and any representations by CLSSB as to the existence of an agreement constitute false and misleading representations.

In response, CLSSB submits under seal evidence of an agreement in the form of written correspondence and emails with NS. Whether or not these documents can be regarded as a binding contract is a matter which a court may need to resolve. Nevertheless, they illustrate enough of a mutual desire to proceed with a transaction to show that CLSSB filed the exemption notices in good faith.

Going back to September 2005, NS officials had advised CLSSB that it and CLSSB had reached an agreement as to all essential terms and that, as soon as the standard contract documents could be prepared, a closing would be scheduled. Exhibit __. The transaction then encountered some delays, some on CLSSB's part, and some on NS' part. Between December 2005 and the Spring of 2006, the parties exchanged several drafts of a purchase and sale agreement. By June 2006, both parties were satisfied that they were ready to sign a purchase and sale agreement. NS authorized CLSSB to file an exemption notice with the STB and in fact reviewed and approved CLSSB's draft filing and advised CLSSB that the actual closing would have to be delayed for two months so that NS could provide the appropriate notice to its unions. Exhibits __ and __. Even after the prospects for moving coal by rail vanished (see discussion immediately

below), NS was still willing to sell the line to CLSSB as the email attached as Exhibit __ attests.

2. Lack of an executed purchase and sale agreement does not preclude the filing of an acquisition exemption.

Petitioners suggest that the lack of a signed purchase and sale agreement precluded CLSSB from filing the November 20 Notice of Exemption. That notion is directly contrary to STB precedent. The Board has consistently held that a noncarrier seeking to acquire a rail line does not need to have an executed agreement in order to seek Board approval. See, e.g., BNSF Railway Company-Acquisition and Operation-State of South Dakota, STB FD No. 34667, served March 3, 2005; MVC Transportation, LLC-Acquisition Exemption-P&LE Properties, Inc., STB FD No. 34462, served October 20, 2004; and Missouri Central Railroad Company-Acquisition and Operation-Lines of Union Pacific Railroad Company, STB FD No. 33508, served Sept. 14, 1999. The underlying reason is that Board authority is permissive, and the parties can only consummate the transaction once they, in fact, have reached agreement. Securing an exemption eliminates one obstacle to closing but obtaining the seller's agreement is the other. CLSSB will only be able to acquire the subject

line once it finally reaches an agreement with NS and not before.

3. Traffic Demand. Petitioners represented in their abandonment application that there is no traffic on the line as well as no prospects for future traffic.

Petitioners' statement is patently false. The University of Notre Dame currently receives by truck the equivalent of [deleted] rail car loads of coal per year. This traffic presently moves by rail from its origin on NS to a transload facility on NS in South Bend. From there it moves by truck over city streets to Notre Dame.

CLSSB's promoters approached Notre Dame officials and Buckeye Coal, the supplier, and persuaded them to return to using an all rail movement over NS and CLSSB. NS concurred in the proposed move and agreed to pay CLSSB a switching allowance for its part of the haul. Moreover, NS was so anxious to handle this traffic that it insisted that the coal could only be routed NS to CLSSB. The sale agreement required CLSSB to pay NS a per car penalty for every car that moved by another carrier (the Chicago, South Shore & South Bend Railroad). NS eventually agreed to relax this "paper barrier" on any traffic other than coal that CLSSB could develop. See, Exhibits __ and __.

As soon as City officials learned of the plan to move Notre Dame coal by rail, they used threats and intimidation to persuade Notre Dame officials not to avail themselves of CLSSB's service. Copies of correspondence between City officials and Notre Dame representatives evidencing these efforts are attached hereto as Exhibits __ and __. Furthermore, not content with Notre Dame's promise to avoid using CLSSB's service, City officials then pressed NS to drop the sale. Sometime during the late Summer or early Fall of 2006, NS got "cold feet" about selling the line to CLSSB. However, NS still communicated its willingness to sell the line if CLSSB could resolve its political differences with the City. See Exhibit __.

4. The pending adverse abandonment application precludes the filing of the November 20 Notice of Exemption.

That assertion is false for two reasons. First, Petitioners have not successfully invoked the Board's abandonment jurisdiction. For reasons stated in detail in the Petition to Reject filed concurrently herewith, Petitioners' Notice of Intent is defective and the Board therefore lacks jurisdiction to process the Adverse Abandonment Application. Consequently, there is no pending abandonment to preclude the filing of the November 20

Notice of Exemption. Second, CLSSB knows of no decision that precludes a party from filing an exemption to acquire a line proposed for or subject to abandonment. The very fact that CLSSB is willing to invest its money to advance its proposal demonstrates that traffic is expected to move on the line and that it should not be abandoned.

5. CLSSB has no standing in the adverse abandonment proceeding.

Perhaps the most outrageous substantive statement in Petitioners' pleading is its assertion in footnote 2 on page 3, "[i]t is respectfully submitted that [CLSSB] lacked and continues to lack standing in the adverse abandonment proceeding." This statement, if true, illustrates the totally self-righteous attitude of Petitioners towards rail transportation in South Bend. Petitioners would have the Board abrogate its role as the arbiter of the public convenience and necessity in violation of law. Cf., New York Cross Harbor R.R. v. Surface Transp. BD, 374 F.3d 1177, 1185 (2006) ("More importantly, the STB itself-not New York City-is to determine the public convenience and necessity"). How can the STB do its job if would be protestants are forbidden from submitting comments on the proposed adverse abandonment?

Clearly CLSSB or its promoters as citizens of northern Indiana have a right to challenge this abandonment by identifying procedural deficiencies and by protesting the abandonment consistent with the Board's procedures. To deny CLSSB that right violates basic fairness, the Administrative Procedure Act, and constitutional due process. Indeed, Petitioners would make a mockery of the Board's abandonment procedures that contemplate the filing of protests and statements in opposition by all members of the public. 49 CFR 1152.25(c).

6. CLSSB filed its November 20 Notice of Exemption in Good Faith.

Petitioners would have the Board believe that they acted in a "disingenuous and misleading" manner in resubmitting their Notice of Exemption on November 20, 2006.

Once again, Petitioners are bending the facts to suit their own purposes. As noted earlier, NS had advised CLSSB that it would consider selling the line if CLSSB could persuade the Petitioners to drop their opposition. Towards that end, CLSSB accepted Petitioners' invitation to meet in good faith in South Bend on October 18, 2006, to hear and hopefully resolve Petitioner's objections. CLSSB honestly believed that it could satisfy some of Petitioners'

concerns and over time resolve any remaining concerns to let the project go forward. In fact, CLSSB had agreed to grant the Brothers certain easement and license rights upon its acquisition. See documents attached as Exhibits ___ through ___.

Normally CLSSB would prefer not to identify by name counsel in these proceedings. Because Petitioners have made the matter of its discussions with NS counsel an issue, CLSSB reluctantly states that the NS counsel with whom it reviewed the pertinent text of the November 20 Notice was James Paschall, Esq. Specifically, CLSSB counsel asked Mr. Paschall if he had any objection to the following language:

"The Chicago, Lake Shore And South Bend Railway Company ...anticipates reaching an agreement with Norfolk Southern Railway Company ..., owner of the subject railroad, for the CLSSB to purchase and operate about 3.2 route miles of railroad 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 (sic) in the City of South Bend, IN."

Mr. Paschall advised that he had no problem with that language, that NS' counsel Greg Summy was on vacation that week and would not return until Dec. 4, and that he doubted that his client would participate in these proceedings, either supporting or opposing CLSSB's request.

Accordingly, CLSSB was most surprised to read Petitioners' statement on page 4 of its Petition to Revoke that it had conferred with unidentified NS counsel as to the status of an agreement and that no agreement had been executed.⁴ Regarding that assertion, CLSSB asked Mr. Paschall whether he had any conversations with Petitioners' counsel on November 21. He stated that he had no conversations with Petitioners' counsel, that co-counsel Greg Summy was out of the office for a couple of weeks of vacation, and that he was unaware of any other conversations between NS counsel and counsel for Petitioners.

7. Petitioners *ad hominem* attacks on CLSSB's official and counsel are unnecessary, unwarranted and merely serve to distract the Board from the essential issues in this proceeding.

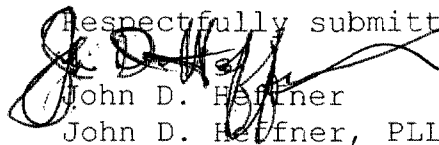
Citing to the Board's Canons of Ethics and the Federal Rules of Civil Procedure, Petitioners urge that CLSSB's actions of filing "misleading and untruthful Verified Notices of Exemption" constitute such an "abuse of process" by CLSSB to warrant an award of attorney fees for time spent by Petitioners' counsel preparing responses. The

⁴ CLSSB consultant Gary Landrio believes that he saw a copy of a sale agreement that was executed by NS but not signed by CLSSB.

request is wholly without precedent. Such statements by Petitioners not only go beyond the bounds of zealous representation but constitute the sort of uncivil, unprofessional conduct that is becoming increasingly common in the legal profession. These assertions have no basis in fact and merely serve to distract the Board and the parties from the substantive issues. The simply fact is that CLSSB filed its two Notices of Exemption in good faith believing that it could acquire the subject rail line. There is no basis for the imposition of sanctions.

CONCLUSION

For the reasons articulated above, the Board should allow the November 20, 2006, exemption to take effect and permit the transaction to be consummated once CLSSB has entered into the final, binding contract with NS. As a matter of transportation policy, it should not allow NIMBY(not in my backyard) groups to torpedo rail transportation transactions contemplated by the buyer and seller for which a need is evident.

Respectfully submitted,

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Dated: December 5, 2006

CERTIFICATE OF SERVICE

I, John D. Heffner, certify that a copy of the Petition to Revoke and Stay Exemption, was served on December 5, 2006 by hand-deliver and first-class mail to the following:

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