

Before the
SURFACE TRANSPORTATION BOARD
Washington, D.C. 20423

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The Chicago, Lake Shore and South Bend Railway)
Company--Acquisition and Operation Exemption--)
Norfolk Southern Railway Company)

F.D. Docket No. 34960

Reply to Motion of the Chicago, Lake Shore and South Bend Railway Company
for a Protective Order Pursuant to 49 CFR 1104.14

This Reply to the Motion for a Protective Order is jointly filed on behalf of the City of South Bend, Indiana ("City"), Brothers of Holy Cross, Inc. ("Brothers") and the Sisters of the Holy Cross, Inc. ("Sisters") (collectively referred to hereinafter as "Respondents"). By its motion, the Chicago, Lake Shore and South Bend Railway Company ("CLS&SB") seeks a protective order covering certain unidentified documents. That motion should be denied for the reasons hereinafter stated.

In the first place, CLS&SB has not identified any documents that it believes are entitled to be kept confidential and not made part of the public docket. Nor has it identified any basis for claiming that the unidentified documents are confidential and proprietary. Furthermore, although perhaps unbeknownst to CLS&SB's counsel, certain of the documents that may have been designated as being confidential, including drafts of the proposed Purchase and Sales Agreement, were previously forwarded to entities who were not bound by any confidentiality agreement, including counsel for Respondents. Hence, any claim of confidentiality with regard to such documents is out the window.

The documents that CLS&SB seeks to have covered by the Protective Order include "proprietary email and written correspondence between CLSSB and Norfolk Southern Railway Company in connection with the sale of the subject rail line." Motion at p. 1. In its Reply to the Petition to Revoke and Stay filed by Respondents, CLS&SB has also alluded to certain correspondence, e-mails and draft documents that well may track the early stage of negotiations between Norfolk Southern Railway Company ("NSR") and CLS&SB. It has not, however, produced any fully executed agreement that would have bound NSR to the sale of the lines or, more importantly, would provide the Board with any jurisdiction to compel NSR to sell the lines to CLS&SB. Therefore, CLS&SB cannot demonstrate that any of the unidentified documents would be germane to any issue that is legitimately before the Board.

As NSR advised the Board on August 15, 2006, "no agreement has been or will be executed between the Chicago, Lake Shore and South Bend Railway Company with respect to the transaction that is the subject of this proceeding."¹ Apparently, CLS&SB now seeks to introduce documents of some sort that would pre-date NSR's notice to the Board. Such documents supposedly would show that NSR and CLS&SB were at one time engaged in negotiations that would have allowed CLS&SB to acquire the subject lines from NSR. However, given NSR's advice that no agreement was finalized, any such documents would not demonstrate that a final agreement was reached and duly executed.

In any event, such documents would not support the false and misleading statement in CLS&SB's latest verified notice that it "anticipates reaching an agreement with Norfolk Southern Railway Company." STB FD Docket No. 34960, *The Chicago, Lake Shore and South Bend Railway Company -- Acquisition and Operation Exemption -- Norfolk Southern Railway*

¹ Letter to Honorable Vernon A. Williams, Secretary, STB from James R. Paschall, dated August 15, 2006 (filed in STB FD No. 34893, *The Chicago, Lake Shore and South Bend Railway Company - Acquisition and Operation Exemption - Norfolk Southern Railway Company*).

Company, filed November 21, 2006, at p. 3. As was previously explained at page 4 of the Petition to Revoke that was filed by the undersigned with the Board on November 22, 2006:

After conferring with counsel for NSR on November 21, 2006, the undersigned are authorized to state that NSR adheres to its prior representation that no agreement has been executed between NSR and CLS&SB. The undersigned are further authorized to state that counsel for CLS&SB was advised within the past week that NSR continues to adhere to that position. The undersigned are also authorized to state that counsel for CLS&SB was specifically advised several months ago by NSR that unless CLS&SB could reach an agreement with City, Brothers and Sisters, NSR would not sell the Lines to CLS&SB.²

As was also explained (*id*):

By way of further background, on October 18, 2006, John Heffner, counsel for CLS&SB, and Robert S. Harris, an officer of CLS&SB, met with representatives of City, Brothers and Sisters in South Bend, Indiana to discuss the possibility of reaching an agreement that would allow CLS&SB to acquire the Lines. At the conclusion of that meeting, Messrs. Heffner and Harris were informed by the undersigned that no agreement would be reached and that City, Brothers and Sisters would be filing an adverse abandonment application immediately following receipt of the Board's decision regarding the previously filed Petition for Waiver and Exemption. Nothing has changed since October 18, 2006.

Because nothing has changed in the interim, there is no legitimate basis whatsoever for CLS&SB to continue to claim that it anticipates reaching an agreement with NSR. Hence, the verified notice of exemption is void *ab initio*. See, 49 C.F.R. § 1150.35.

Second, as stated at p. 1 of its Motion, CLS&SB also seeks to reveal "correspondence with the City of South Bend, IN, seeking to discourage the University of Notre Dame from using CLSSB's proposed rail service." CLS&SB also claims that it possesses documents that "will

² On November 21, 2006, Richard H. Streeter attempted to reach James R. Paschall. After being advised that Mr. Paschall was on vacation, Mr. Streeter and Jeffrey M. Jankowski personally spoke with Greg Summy, General Solicitor, NSR, regarding CLS&SB's statement in its November 20, 2006 Notice of Exemption that it "anticipates reaching an agreement" with NSR to purchase and operate the lines of railroad that are the subject of this controversy. On November 22, 2006, after Mr. Summy advised Mr. Streeter that NSR had authorized the use of the above-quoted language, it was filed with the Board.

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." CLS&SB Reply filed December 5, 2006 at p. 4. There is no basis for claiming that any such correspondence is confidential. Plainly, if such correspondence is in CLS&SB's possession, it had to have been published and is in the public domain.

Furthermore, such correspondence, as a matter of statutory law, would be subject to full disclosure under the Indiana Access to Public Records Act, IC 5-14-3, *et seq.* Hence, a protective order would be contrary to public policy and would not prevent the legitimate release of the correspondence to any citizen who requested it under Indiana law.

The City also wishes to make it crystal clear that while it can advise the University of Notre Dame of the City's concerns regarding any project that may adversely impact the City, it cannot force or pressure the University of Notre Dame to take any action that the University determines is not in its own best interest. The University does not report to or answer to the City. It has its own President and Board of Directors who serve as its decision makers. Because no symbiotic relationship exists between the City and the University, each one must be considered its own entity with its own constituents and decision makers. CLS&SB is simply wrong if it believes otherwise.

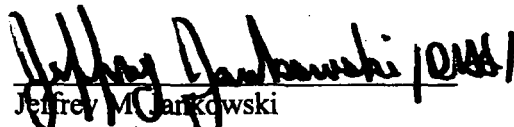
The Board and the parties in opposition should not be forced to continue wasting scarce assets in order to respond to CLS&SB's thinly veiled attempt to create standing in the pending adverse abandonment proceeding involving the lines of railroad that it had hoped to purchase from NSR in order to operate a vintage trolley car operation through the City and the campuses of the Brothers and Sisters. As the Board is well aware, the City, along with the Brothers and the Sisters, filed an adverse abandonment application with the Board on November 17, 2006, which

has been assigned STB Docket AB 290 (Sub-No. 286), *Norfolk Southern Railway Company in St. Joseph County, IN*. The instant motion is but a rear guard action that is being taken with the intent to disrupt the Board's governing procedures. In order to bring an immediate halt to such activities, the Board is requested once again to reject summarily CLS&SB's Verified Notice of Exemption on the grounds that it is void *ab initio*.

Conclusion

For all the above-stated reasons, the Board should deny the Motion seeking the entry of a Protective Order.

Respectfully submitted,



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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 Reply to Motion 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:

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