

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

218 315

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

F.D. Docket No. 34960

Motion to Strike Confidential Designation Of Various Documents In
Reply of The Chicago, Lake Shore and South Bend Railway Company
to Petition to Revoke and Stay Exemption

This Motion to Strike Confidential Designation 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"). It must be emphasized that not one of the documents that has been introduced by the Chicago, Lake Shore and South Bend Railway Company ("CLS&SB") in this proceeding post-dates CLS&SB's voluntary withdrawal of its initial exemption filing.¹ That withdrawal was in response to Norfolk Southern Corporation's August 15, 2006 letter advising the Board "that 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."² As a result, not one of the documents is germane to any issue that is legitimately before the Board in this proceeding and that is within the Board's statutory jurisdiction. Nor do any of the documents

¹ See Letter to Hon. Vernon A. Williams from John Heffner, dated August 31, 2006, in STB F.D. No. 34893, The Chicago, Lake Shore & South Bend Railway Company -- Acquisition and Operation Exemption -- Norfolk Southern Railway Company.

² Letter to Honorable Vernon A. Williams from James R. Paschall, in STB F.D. No. 34893, The Chicago, Lake Shore & South Bend Railway Company -- Acquisition and Operation Exemption -- Norfolk Southern Railway Company.

substantiate CLS&SB's claim in this proceeding that it "anticipates reaching an agreement with Norfolk Southern Railway Company."³

Background

On December 4, 2006, CLS&SB filed a Motion for a Protective Order covering certain "proprietary email and written correspondence between CLSSB and Norfolk Southern Railway Company in connection with the sale of the subject rail line."⁴ Respondents immediately filed a reply to the motion challenging the confidentiality of the unidentified documents. By Decision served December 14, 2006, the Board's Secretary granted CLS&SB's motion. Although the Secretary declined to rule on the arguments raised by Respondents in their Reply to Motion for Protective Order, he specifically noted that:

The arguments of City, Sisters and Brothers to the contrary are premature. After receipt of CLS&SB's materials designated as confidential and the opportunity to view them consistent with the terms of this protective order, City, Sisters, and Brothers will have the opportunity to argue to the Board that all or a portion of the materials have been misclassified.

The subject documents, which were duly provided to the undersigned counsel for the Respondents on December 15, 2006 after they signed the prescribed Undertaking, are attached as Exhibit A through Exhibit L to CLS&SB's Reply to the Petition to Revoke and Stay filed December 5, 2006.⁵ A review of the documents has revealed that, with certain exceptions, they do not contain any confidential information and have long been in the public domain.

³ Verified Notice of Exemption, filed November 20, 2006, at p. 2.

⁴ CLS&SB Motion at p. 1.

⁵ Respondents Petition to Revoke and Stay Exemption was filed on November 22, 2006. Later that day, the Board entered its Decision staying the notice of exemption pending further order of the Board.

Respondents challenge the materiality of CLS&SB's Exhibit A, Exhibit B and Exhibit C on the ground that they are not germane to any issue in this proceeding. However, they will not contest the confidential nature of those documents.

In order to ensure that the Undertaking should not be applied to any information that is not confidential, Respondents request the Board to strike the "confidential" label that CLS&SB has placed on the following documents. As shall be explained in detail, the following documents are already part of the public domain and have been misclassified by CLS&SB, or they do not include any confidential information.

CLS&SB Exhibit G. This is a letter dated June 13, 2006, addressed to various employees and officials of the University of Notre Dame from the President of the City of South Bend Common Council. This letter is a public notice of the agenda for an open meeting of the Committee of the Whole that was scheduled for June 15, 2006. As reflected at page 3 of that document, it was hand-delivered or faxed to all members of the South Bend Common Council, the Mayor of South Bend, members of the Indiana Congressional delegation, the Chamber of Commerce and the Michiana Council of Governments, as well as several other entities. Plainly, this public notice is not a confidential document.

CLS&SB Exhibit F. This is a letter, dated June 1, 2006, addressed to Mr. John Affleck-Graves from Stephen J. Luecke, Mayor of South Bend. The letter summarizes some of the many legitimate concerns that the City of South Bend has with the CLS&SB's project. If CLS&SB were to be believed, this would constitute "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 Motion at p. 1. Even if that allegation were true, which it is not, there is no basis for claiming that this correspondence is confidential. In the first place, this letter was

attached to the public notice of the open meeting of the Committee of the Whole and, on or about June 13, 2006, was forwarded to the same entities and individuals reflected at page 3 of the notice, including CLS&SB's consultant, Gary Landrio. Plainly, such correspondence has been in the public domain for several months and is not confidential.

Furthermore, even if it had not been previously distributed, 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 prevent the legitimate release of the correspondence to any citizen who requested it under Indiana law.

CLS&SB Exhibit H. This is an e-mail, dated June 23, 2006, from an employee of Stone Consulting to John Heffner, Esq. The e-mail contains quotes of comments made by John Affleck-Graves that had been printed in an article in the South Bend Tribune dated June 22, 2006, entitled "Notre Dame drops coal-by-rail option." A copy of that article was previously filed by Brothers with the Board on August 2, 2006. Once again, there is nothing confidential about comments published in the local newspaper.

Given verbal threats that have been subsequently conveyed to counsel regarding potential litigation, the inquiry [] should not be deemed to be confidential. Plainly, an inquiry of that nature contains no "confidential" information and should not be treated as such. In short, the Board should declare that Exhibit H is not entitled to protection as a confidential document.⁶

CLS&SB Exhibit I. This document purports to be the Meeting Notes and Issue Summary of a May 30, 2006 meeting held at the Holy Cross Brothers Provincial Offices. The

⁶ It is noted that Exhibit H is not mentioned in the public version of the Petition to Revoke.

notes were prepared and distributed by Philip Panzica, R.A. It is Brothers' position that these notes, which are already in its possession, have been distributed on an indiscriminate basis with no intent that they be treated as confidential. Hence, at this time, there is no basis for claiming retroactively that they are confidential.

CLS&SB Exhibits J, K and L consist of a transmittal letter, dated July 14, 2006, signed by Dick Mintz, who is co-counsel to Brothers and Sisters, and addressed to Gary Landrio, Stone Consulting & Design, Inc., along with drafts of Permanent Easements and Licensing Agreements. These draft documents, which were generated by counsel for Brothers and are in Brothers' possession, were not intended to be treated as confidential documents, nor were they treated as confidential documents by Brothers or their counsel.

Equally important, these drafts were never finalized as Brothers, after further consideration, determined that it was not in Brothers' best interests to cave in to the pressure that was generated by CLS&SB's premature filing on June 14, 2006 of its Verified Notice of Exemption, docketed with the Board as STB F.D. No. 34893, *The Chicago, Lake Shore and South Bend Railway Company -- Acquisition and Operation Exemption -- Norfolk Southern Railway Company*. It goes without saying that Brothers had an absolute legal right to reconsider its position and to petition the government for relief from a project that would threaten the well being of Brothers' campus.

CLS&SB Exhibits D and E appear to be isolated pages from a draft of a proposed Purchase and Sale Agreement that was prepared by NSR, dated "12-2-05," and labeled "*For Discussion Purposes Only*." It is unknown whether these pages were drafted by CLS&SB or NSR. Although perhaps unbeknownst to CLS&SB's counsel, the December 2, 2006 draft of the proposed Purchase and Sales Agreement was previously forwarded on June 12, 2006 to counsel

for Respondents for their use. See Exhibit A hereto. No instruction was given that the draft was to be treated as confidential, nor did counsel for Respondents agree to treat the draft agreement as confidential. Hence, CLS&SB's belated claim of confidentiality with regard to the unexecuted "PURCHASE AND SALE AGREEMENT" bearing the notation "*NS DRAFT of 12-2-05: For Discussion Purposes Only*" document is baseless. In order to avoid any future controversy regarding the *NS DRAFT*, the Board should declare that, because it was previously forwarded to Respondents' counsel for their use, it is **not** subject to the Protective Order.

It is agreed that the third and fourth sentences of Paragraph C in Exhibits D and E, as well as the fifth sentence of that same Paragraph, which is hand written, are not included in the draft that was provided to counsel for Respondents. Although the draft that was provided to Respondent's counsel for their use on a non-confidential basis is not entitled to protection, those sentences in the copies of the pages attached to CLS&SB's Petition to Revoke may be subject to the Protective Order.

In addition, whereas the second sentence of that same Paragraph C (in the draft that was provided to Respondents' counsel for their use on a non-confidential basis) states that "Payment of the Purchase price shall be made in cash, by certified or cashier's check, or by wire transfer on the Closing Date," the second sentence of Paragraph C in the draft pages filed with CLS&SB's Petition to Revoke contains some modified language. The language in the drafts that are attached as Exhibits D & E may be subject to the Protective Order.

At page 8 of its Reply Petition, CLS&SB says that:

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.

The foregoing contention begs the question. In the first place, NSR has advised the Board that no agreement was ever finalized with CLS&SB. See, Exhibit B hereto. Second, there is nothing in the pages that CLS&SB has submitted that would substantiate CLS&SB's interpretation. Indeed, the language is contradictory with regard to any supposed relaxation of any "paper barrier." The language in Exhibit D reads one way, while the language in Exhibit E reads the opposite way. As a result, there is no basis to draw any conclusion from these draft documents.

In the final analysis, none of the documents attached to CLS&SB's reply to Respondents' Petition to Revoke would be germane to any issue that is legitimately before the Board. Nor do these documents 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 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.⁷

⁷ 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.

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.

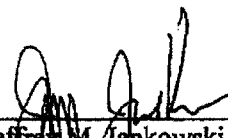
Because nothing has changed in the interim, there is no legitimate basis whatsoever for CLS&SB to continue to claim that it anticipates reaching an agreement with NSR. Hence, Respondents repeat their position that the verified notice of exemption is void *ab initio*. See, 49 C.F.R. § 1150.35.

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 21, 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*.

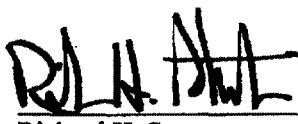
Conclusion

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

Respectfully submitted,



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



Richard H. Streeter
Richard L. Mintz
Richard J. Deahl
Barnes & Thornburg LLP
750 17th Street, N.W., Suite 900
Washington, D.C. 20006
Counsel to the Brothers of Holy Cross, Inc.
and Sisters of the Holy Cross, Inc.
tele: (202) 408-6933
fax: (202) 289-1330

Dated: December 19, 2006

Certificate of Service

I, Richard H. Streeter, do hereby certify that a true copy of the foregoing Reply to Motion was served this 19th 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



Richard H. Streeter