

2/9/07

WILLIAM T. SLOVER
MICHAEL J. LOFTUS
JOHN W. LESENE
KEVIN J. HOWE
ROBERT D. JUSKIEWICZ
CHRISTOPHER A. WILKS
FRANK J. PERCINIZZI
ANDREW H. EDWARDS III
DITTA A. PROHL
DANTE M. JAYE
STEPHANIE M. PISANELLO

OF COUNSEL
DONALD G. AVERY

SLOVER & LOFTUS
ATTORNEYS AT LAW
1224 SEVENTEENTH STREET, N.W.
WASHINGTON, D.C. 20036-3003

TELEPHONE
(202) 347-7170

FAX
(202) 347-3519

WHITTAKER'S E-MAIL
abov@slover-andloftus.com

April 27, 2007

By E-filing

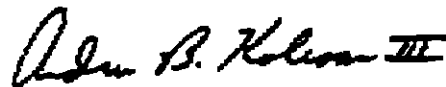
The Hon. Vernon A. Williams, Secretary
Surface Transportation Board
395 L Street, S.W.
Washington, DC 20423-0001

Re: STB Docket No. AB-534 (Sub-No. 3X)
Lake State Railway Company
Abandonment Exemption Rail
Line in Otsego County, Michigan

Dear Secretary Williams

Enclosed for filing in the above-referenced proceeding please find a copy of the Reply of Lake State Railway Company to the Protest of the City of Gaylord

Sincerely,



Andrew B. Kolesar III
An Attorney for Lake State
Railway Company

Enclosure

cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

In the Matter of:

LAKE STATE RAILWAY COMPANY
ABANDONMENT EXEMPTION RAIL
LINE IN OISEGO COUNTY, MICHIGAN

)
)
)
) Docket No. AB-534
) (Sub-No 3X)
)
)

**PETITIONER'S REPLY TO PROTEST
OF THE CITY OF GAYLORD**

Of Counsel.

Slover & Loftus
1224 Seventeenth St., N.W.
Washington, D.C. 20036
(202) 347-7170

Dated: April 27, 2007

LAKE STATE RAILWAY COMPANY
750 North Washington Ave.
Saginaw, MI 48607

By Kelvin J. Dowd
Andrew B. Kolesar III
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Attorneys and Practitioners

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

In the Matter of:

LAKE STATE RAILWAY COMPANY –
ABANDONMENT EXEMPTION – RAIL
LINE IN OTSEGO COUNTY, MICHIGAN

)
)
)
) Docket No. AH-534
) (Sub-No. 3X)
)
)
)

**PETITIONER'S REPLY TO THE PROTEST
OF THE CITY OF GAYLORD**

On March 28, 2007, Lake State Railway Company ("Lake State") filed a Verified Petition for Exemption relating to the proposed abandonment of approximately 4.15 miles of underutilized and unprofitable rail line within Otsego County, Michigan (the "Line"). On April 9, 2007, the City of Gaylord, Michigan (the "City") filed a Protest in opposition to Lake State's Petition. In support of its Protest, the City submitted a letter from the President of Northern Energy, Inc. ("Northern Energy"), which is a shipper on the Line, affirming that the City's statements "as they relate to our company are true and accurate statements of fact."

Significantly, the City's Protest does not meaningfully address the central question of whether the Line's costs exceed its revenues, and thus the Protest does not provide any basis for denying Lake State's Petition for Exemption. Instead, the Protest

Gaylord did not serve a copy of its Protest upon Lake State, contrary to the Board's regulations.

largely amounts to a recitation of the City's hopes regarding business development in the area. As the Board has recognized, however, "a railroad cannot be required to continue operating at a loss based on mere hope of economic growth." See Docket No. AB-512X, Sierra Pacific Industries - Abandonment Exemption In Amador County, CA (STB served Feb. 25, 2005) ("Sierra Pacific"), at 5 (granting petition for exemption despite the filing of protests by various regional interests). Moreover, to the extent that the City's Protest actually addresses issues of substantive relevance, the Protest confirms the arguments made by Lake State in its Petition that the only realistic prospects for development (and increased traffic) in the Gaylord area are along the recently constructed spur to the southwest of the Line, rather than along the Line itself.

Lake State will address the City's various arguments, in turn.

ARGUMENT

A. Revenues and Costs

The City's Protest is notable for the nearly complete absence of any discussion of the revenues and costs associated with Lake State's operations over the Line. In fact, the only vague reference to this central issue appears in a brief comment on page 4 of the City's Protest. Therein, the City briefly recounts Lake State's demonstration that the Line does not generate adequate revenues, and the City "feel[s]" that this statement is "completely false." Id. at 4. The only support that the City

identifies for its comment is that “[c]urrent railway cars per year on this line are 142” and that the Line “has seen an over 100% increase [in traffic] in the past eight years.” Id.

Lake State’s Petition includes traffic, revenue, and cost data for the Line showing that the traffic on the Line does not cover its costs. See Petition, V.S. Gamble at 4-12. The City does not dispute any of Lake State’s evidence regarding the revenues or costs associated with the Line, but instead, merely cites one traffic volume figure that appears in Lake State’s Petition. See Sierra Pacific at 4 (“The petitioners have offered uncontested evidence indicating that, since 1999, the cost of owning and operating the line has far exceeded the revenues generated by the line.”) ² As Lake State demonstrated in its Petition, the revenues associated with these 142 annual carloads are insufficient to cover the Line’s various costs.

As for the City’s comment regarding traffic increases on the Line over a period of eight years, Lake State submits that it should not be faulted for past success in increasing the Line’s traffic levels where, despite those efforts, and the diligent work of local industrial development, the current volume of traffic on the Line still is not adequate to permit a profitable operation.

² See also AB-406 (Sub. No. 14X), Central Kansas Ry. – Abandonment Exemption – In Sedgwick County, KS (SIB served April 10, 2001) (granting petition for exemption despite protests), AB-33 (Sub-No. 148X), Union Pacific R.R. – Abandonment Exemption – In Croos County, OR (SIB served Oct. 30, 2000) (granting petition for exemption despite protests and finding that traffic could be transloaded from other locations).

B. Potential Development Both On and Off the Line

The City's Protest includes a number of references to traffic development both on and off the Line. As to the potential for development at sites along the Line, the City merely offers the suggestion that traffic "could" materialize along vacant or underutilized parcels as to which no development plans currently exist. See, e.g., Protest at 4 ("The City also feels that there are significant opportunities for more traffic to develop on this line."), id. ("Otsego County currently has no plans for [a 17.1 acre parcel located along the Line] and the right type of development could well take advantage of the rail line."), id. ("There are also several commercially owned undeveloped tracts of land along this railway line that are either vacant or could be reassembled with existing other underutilized commercial properties"). As indicated above, STB precedent does not support the denial of a Petition for Exemption based on the local government authority's unsubstantiated "hope" of future economic development. See Sierra Pacific at 5; id. ("The mere prospect of future shippers locating at MIC's facility and generating traffic on the line does not justify denying the petition for exemption.")

Alternatively, as to the question of development off the Line, the City attempts to dispute Lake State's claim of economic harm by emphasizing that there is a realistic prospect for the purchase of the former Georgia Pacific property that is located some distance to the southwest of the Line. See Protest at 5. This property is located along the new rail spur in the vicinity of Gaylord that was constructed in 2006. The

City's comments regarding this property are substantially more optimistic than its vague assertions regarding potential on-line development. See, e.g., Protest at 5 ("It is also a known fact that a number of companies are still very interested in the Georgia Pacific facilities"); id. ("All of the companies currently in discussion with Georgia Pacific see the rail spur as an integral part of their future plans"). As Lake State explained in its Petition, this new rail spur is far more "integral" to the future development of the Gaylord area than the line that is the subject of Lake State's petition. The City's comments confirm this fact.

C. Passenger Service

In its Petition, Lake State indicated that passenger transportation along the Line had ceased in the 1950s. See Petition at 12. In its Protest, the City observes that a single excursion train operated over the Line last Fall, and that there is the possibility of another excursion trip in June of 2007. See Protest at 2-3; id. at 7 ("Both the Chamber of Commerce and the Gaylord Otsego Tourist & Convention Bureau have even held recent discussions about the possibilities of tourist-based passenger service being

¹ The City seems to suggest in its Protest that alternative rail service options for Northern Energy along the new rail spur can only be regarded as potentially beneficial if Lake State provides property for Northern Energy's use. Protest at 2 ("They have not responded to requests for assistance to . . . construct . . . access roads or points for off loading. They indicate locations are available, but on private properties.") Lake State respectfully submits that there is no basis for such a suggestion.

reestablished”), id. (“The plan was to bring tourists up to Gaylord from the Grayling area to experience shopping and dining opportunities in our downtown.”)

Lake State does not dispute the City’s comment that a single excursion train operated over the Line in 2006. The statement in Lake State’s Petition regarding passenger service was provided in accordance with 49 C.F.R. § 1152.22(g) and was intended to encompass the regular, ongoing movement of passenger or commuter traffic over the Line. Lake State respectfully submits that, under Board precedent, an annual excursion train does not mandate the continuation of rail service. See, e.g., Sierra Pacific at 4 (“ACTC’s claim that the possible restoration of passenger rail service requires a more probing examination is without merit. Even if future passenger rail service were not speculative, there is simply no statutory basis for requiring a freight carrier to retain service on a line in order to facilitate future passenger rail service.”)

D. Northern Energy’s Expectations

The City’s Protest also includes discussion of Northern Energy’s expectations regarding the recent investments that Northern Energy made to improve its facilities in Gaylord. See Protest at 3, 6. Specifically, the City recounts that “in the Spring of 2006 [Northern Energy] completed construction on a 6,000 square foot warehouse to increase operations at their Gaylord location.” Id. at 6. According to the City, Northern Energy made this investment “only after conference with their (sic) customer services representatives at Lake State.” Id.

Lake State respectfully submits that the City's comments are not relevant to the instant inquiry. The City does not contend that Lake State committed to maintain railroad service to Northern Energy for some period of time, much less that the parties entered into a formal contract in this regard. The City does not indicate what the specific discussions between the parties at their "conference" entailed, or whether the proposed abandonment would render the new Northern Energy facility useless. To the contrary, the only specific information recounted by the City with regard to the impact of the abandonment on Northern Energy is that it may experience a \$0.36 to \$0.40 per gallon cost increase on its oil and lubricant shipments. See Protest at 5. The City does not include any evidence supporting this supposed cost increase, or any evidence addressing the impact of such an increase on Northern Energy's operations.

F. Truck Traffic

Finally, the City's Protest includes the statement that "Northern Energy, Inc estimates that if rail shipping its removed that the City can expect to see nearly 300 more trucks a year coming into this facility just adjacent to our downtown." Protest at 7. Presumably, by its term "this facility," the City is referring to the rail spur located to the southwest of Gaylord. Notably, the City does not include any explanation of the calculation of this 300 truck per year figure.

Lake State respectfully submits that since nearly all of the traffic that it delivers on the Line currently is transloaded onto trucks for ultimate delivery, the

relocation of that transloading point to a location more distant from downtown Gaylord (i.e., either the new rail spur or some other location) will have a beneficial impact on the City. In fact, the City comments on this same page 7 of its Protest that it is possible that shippers along the Line will obtain supplies from outside the Gaylord community. See Protest at 7. As such, the City is arguing both that truck traffic in Gaylord will disappear, and that truck traffic in Gaylord will rise to a level that will increase the maintenance and repair costs for the state and local roads. These inconsistent outcomes cannot both occur.

CONCLUSION

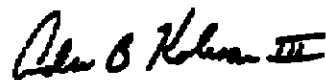
For the foregoing reasons, the Board should reject the City's Protest and grant Lake State's Petition for Exemption.

Respectfully submitted,

Lake State Railway Company
750 North Washington Ave
Saginaw, MI 48607

OF COUNSEL:

SLOVER & LOFTUS
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

By: Kelvin J. Dowd
Andrew B. Kolesar III 
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Date: April 27, 2007

Attorneys for Lake State
Railway Company

CERTIFICATE OF SERVICE

I hereby certify that this 27th day of April, 2007, I have caused copies of the foregoing Reply to be served by first-class mail, postage prepaid, upon the parties of record to this proceeding.


Andrew B. Kolesar III