

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

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 For Leave to Supplement Reply of the
Chicago, Lake Shore and South Bend Railway Company

The City of South Bend, Indiana ("City"), Brothers of Holy Cross, Inc. ("Brothers") and the Sisters of the Holy Cross, Inc. ("Sisters"), by and through the undersigned counsel, file their reply to the Motion for Leave to Supplement filed on behalf of The Chicago, Lake Shore and South Bend Railway Company ("CLS&SB"). The Board should deny CLS&SB's motion on the grounds that the material sought to be introduced is untimely, irrelevant and immaterial.

By its letter dated August 15, 2006, submitted in STB Finance Docket No. 34893, *The Chicago Lake Shore and South Bend Railway Company—Acquisition and Operation Exemption—Norfolk Southern Railway Company*, Norfolk Southern Corporation ("NS") advised the Board that "no agreement has been or will be executed between the Chicago, Lake Shore and South Bend Railway Company [and NS]" that would permit CLS&SB to acquire the line of railroad that is the subject of this proceeding. *See* Attachment A hereto. Nothing has changed since that date.

In its Verified Notice of Exemption filed November 20, 2006, CLS&SB stated that it "anticipates reaching an agreement with Norfolk Southern Railway Company ("NSR")." For the reasons set forth in their Petition to Revoke and Stay Exemption filed November 22, 2006,

that statement was attacked by City, Brothers and Sisters as being false and misleading. In an attempt to counter those arguments, CLS&SB now seeks to introduce a letter, dated September 22, 2005, which it suggests is evidence of the existence of a sale agreement. That letter is not a sales agreement by any stretch of the imagination. Hence, it is reiterated that the Verified Statement contains false and misleading information.

The bottom line is that when CLS&SB submitted its Verified Notice of Exemption on November 20, 2006, it knew that there was no binding, fully executed and dated agreement for sale between CLS&SB and either NS or NSR. More importantly, CLS&SB also knew that it had no real hope of being able to force NS or NSR into selling the line to it.

The September 22, 2005 letter that CLS&SB is seeking to introduce does not change the underlying situation one iota. That letter was written eleven months before NS notified the Board that it would not enter into any agreement with CLS&SB. Even if the September 2005 letter could be viewed as a tentative agreement, there is no evidence of record that a binding sales agreement was ever executed and consummated. Indeed, CLS&SB cannot show the basic elements of any contract, namely an offer, acceptance and consideration. Because CLS&SB cannot produce a binding, fully executed and dated agreement between itself and NS or NSR, the Board should not remove the stay and issue a decision granting CLS&SB an exemption.

Furthermore, as CLS&SB has been forced to concede, the Board is not the proper forum for the interpretation of private contractual agreements. The Board and its predecessor have long recognized that the courts are the proper forum for the interpretation of such private agreements.

Northwestern Pacific Railroad Company—Change in Operators Exemption—North Coast Railroad Authority, Sonoma-Marin Area Rail Transit District and Northwestern Pacific Railway Co., LLC, STB Finance Docket 35073, slip op. at 3 (STB served September 7, 2007); *Saginaw*

Bay Southern Railway Company—Acquisition and Operation Exemption—Rail Line of CSX Transportation, Inc., STB Finance Docket No. 34729, slip op. at 3 (STB served May 5, 2006); *Ohio Valley Railroad Company—Petition to Restore Switch Connection and Other Relief*, STB Finance Docket No. 34608, slip op. at 6 (STB served Feb. 23, 2005) and cases cited therein; *Burlington Northern, Inc.—Trackage Rights*, 347 I.C.C. 210, 213 (1974); *McConville Coal Co. v. Iowa S. U. Co.*, 172 I.C.C. 627, 632 (1931) (“the commission will not undertake to enforce, interpret, or determine the legal effect of an agreement”). Plainly, even if CLS&SB could somehow conjure up the non-existent sales agreement, this Board would not be the proper forum to interpret it. Given the consistent line of precedent, CLS&SB’s request to supplement the record should be denied on the grounds that the evidence it seeks to submit is immaterial and lacks probative value with regard to the issue of whether CLS&SB and its counsel had reason to state, under oath, that the CLS&SB “anticipates reaching an agreement with Norfolk Southern Railway Company.” Viewed in the light most favorable to CLS&SB, the most that the tendered letter can show is that at one point in time in 2005, CLS&SB may have had an expectancy that it might in the future enter into an agreement with NS. However, as demonstrated by NS’ August 15, 2006 letter to the Board, that expectancy was dashed months before CLS&SB filed the Verified Notice on November 20, 2006.

Conclusion

For all the above-stated reasons, there is no reason to allow CLS&SB to supplement the record. There is nothing to substantiate CLS&SB’s baseless suggestion that the September 22, 2005 letter evidences the existence of a binding agreement with NS or NSR. That letter is clearly mooted and trumped by the August 15, 2006 letter in which NS officially notified the

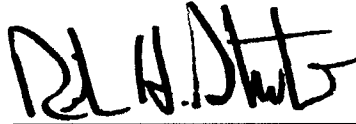
Board that "no agreement has been or will be executed between [it and] the South Bend Railway Company." Therefore, the Board should summarily deny CLS&SB's motion.

Respectfully submitted,



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Dated: October 2, 2007

Attachment A



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August 15, 2006

via fax 202 565-9004
and original and 10 copies via mail

Honorable Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001

Re: STB Finance Docket No. 34893, The Chicago, Lake Shore and South
Bend Railway Company - Acquisition and Operation Exemption - Norfolk
Southern Railway Company

Dear Mr. Williams:

Norfolk Southern Railway Company submits this letter to advise 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. Therefore, the proceeding is moot. As a result, NSR suggests it may be dismissed by the Board.

CLS&SB should not be criticized for submitting the notice early inasmuch as the parties were working to complete the tentative transaction. CLSSB wished to proceed with the transaction and reactivation of the rail line quickly upon reaching and executing a final agreement with NSR. The Board's notice of exemption was permissive, not mandatory, and did not require that the agreement be reached before CLSSB submitted the notice of exemption to the Board. The Board's notice served July 6, 2006 also does not now require that the transaction be consummated.

Very truly yours,

A handwritten signature in cursive script, appearing to read 'James R. Paschall'.
James R. Paschall

Honorable Vernon A. Williams
STB Finance Docket No. 34893
August 15, 2006
Page 2 of 2

cc: via fax 202 296-3939

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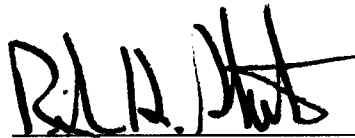
Certificate of Service

I, Richard H. Streeter, do hereby certify that a true copy of the foregoing Reply was served this 2nd day of October, 2007, by first-class mail, postage prepaid, and by e-mail as designated, on the following named individuals:

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A handwritten signature in black ink, appearing to read 'R.H. Streeter', is written over a horizontal line.

Richard H. Streeter