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Part of
Public Record

October 3, 2007

via DHL Express

Honorable Vernon A Williams, Secretary
Surface Transportation Board
395 E Street, S W
Washington, DC 20024

Re STB Finance Docket No 34960, The Chicago, Lake Shore and South Bend Railway Company - Acquisition and Operation Exemption - Norfolk Southern Railway Company - Reply and Motion for Leave to File Reply and Additional Statement of Norfolk Southern Railway Company

Dear Mr Williams

Norfolk Southern Railway Company submits this Reply to the Petition to Revoke and Stay Exemption - Motion for Leave to Supplement Reply of The Chicago, Lake Shore and South Bend Railway Company (CLSSB), filed September 14, 2007 and Motion for Leave to File Reply and Additional Statement

Very truly yours,


James R Paschall

cc via DHL Express
Mr John D Heffner
1920 N Street, NW
Suite 800
Washington, DC 20036

Attorney for the Chicago, Lake Shore and South Bend Railway Company

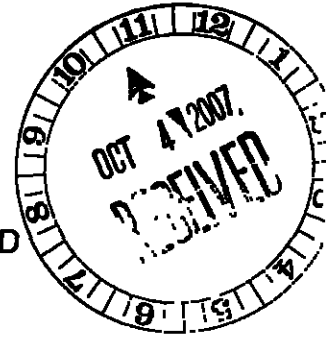
Honorable Vernon A Williams
STB Finance Docket No 34960
October 3, 2007
Page 2 of 2

cc via DHL Express

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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

REPLY AND MOTION FOR LEAVE TO FILE REPLY AND
ADDITIONAL STATEMENT OF NORFOLK SOUTHERN RAILWAY COMPANY

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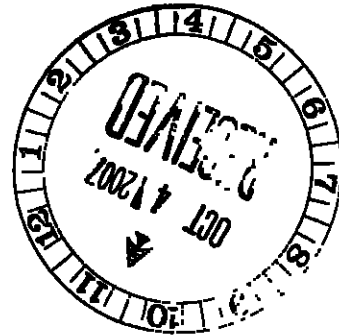
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Attorneys for
Norfolk Southern Railway Company

Dated October 3, 2007

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

Reply and Motion for Leave to File Reply and
Additional Statement of Norfolk Southern Railway Company

On September 14, 2007, the Chicago, Lake Shore and South Bend Railway Company (CLSSB), filed a Motion for Leave to Supplement its Reply of December 5, 2006 to the Petition to Revoke and Stay the Exemption filed November 22, 2006 by the City of South Bend, IN, the Brothers of the Holy Cross, Inc , and the Sisters of the Holy Cross, Inc in the subject proceeding Norfolk Southern Railway Company (NSR) does not oppose CLSSB's motion for leave to file the supplemental reply to its reply to the Petition to Revoke and Stay the Exemption However, if CLSSB's additional filing is accepted and considered by the Board, NSR requests that in the interest of a complete record and in fairness to NSR,¹ which could be prejudiced by an incomplete record in

¹NSR has made no previous submissions in this docket NSR believes CLSSB's submission presents an incomplete picture of the parties' dealings and should not stand in the record alone and without the context of NSR's supplemental information and explanation NSR does not agree with CLSSB's characterization of the September 22, 2005 letter from NSR's Mr Paul Greene to CLSSB as it is out of context NSR does not agree with the conclusion obviously drawn by CLSSB from that letter However, NSR was not a party to the pleadings asking for sanctions and negatively characterizing CLSSB's submissions and does not now join in those requests and characterizations

this matter, that the Board grant NSR leave to file this "reply" and additional statement that explains the September 22, 2005 letter from Mr Paul L Greene of Norfolk Southern to Mr Robert Harris, President of CLSSB, which is submitted by CLSSB in its September 14, 2007 filing, the full context in which the letter was written and the entire course of the parties' dealings on a potential agreement NSR thus moves that the Board accept this reply and verified statement into the record in this proceeding

In his September 22, 2005 letter, Mr Greene stated that "there is an agreement" for NSR "to sell the Niles Industrial Track" at South Bend, IN to CLSSB CLSSB's point is that this shows "the existence of an agreement to sell to CLSSB the line that is the subject of this proceeding " Mr Greene explains the entire content and meaning of the letter which shows that the parties had agreed on major tenets of a deal but not on a final agreement, that the letter was requested by CLSSB for particular purposes and that the course of the parties' negotiations, mainly after the date of the letter, showed that the parties had not made a final agreement as of September 22, 2005

Mr Greene explains that, as the letter states, "[b]oth parties have agreed to the general terms of the Transaction Summary, which outlines the major tenets of the deal structure," not that they had reached a full and final agreement on all the terms of the transaction Mr Greene's letter also stated that the parties still had to prepare and execute standard contract and closing documents The letter also noted that certain maintenance and operation issues were still to be worked out Mr Greene also stated that the Transaction Summary containing the major tenets of the deal structure also stated that a final agreement was subject to NSR and CLSSB top management

approval, which the parties knew was yet to be obtained

Mr. Greene points out in detail that the parties subsequently negotiated on several key issues, including payment terms, certain indemnity proposals, agreements with third parties that might concern the property and other agreement provisions

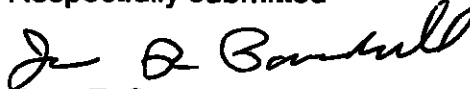
From the beginning, the parties were aware that the Sisters of the Holy Cross had removed some track from a short but essential segment of the right-of-way and apparently claimed an interest in that key segment. The parties at first thought this was a mistake or misunderstanding. Subsequently they learned that in a settlement agreement affirmed in an unpublished opinion in Indiana litigation concerning property interests in abandoned Conrail rights-of-way, continuing Conrail had disclaimed interest in this segment of the right-of-way that had been the subject of an unpublished Conrail abandonment notice. Just before the parties became aware of this settlement, a CLSSB official, Mr. John Hankey, had expressed the need for the inclusion of this segment in the right-of-way in order for the proposed operation of the Line to be viable.² Mr. Hankey's statement, and the subsequent public disclaimer of interest in receiving rail transportation service over the Line by the University of Notre Dame, the only apparent customer located on the Line, clearly indicated that no final agreement could be reached that would achieve the purposes of the proposed deal.

²In May 2006, CLSSB General Manager John Hankey wrote e-mails in which he described the track segment as "understood to be part of the transaction we are about to complete. There needs to be track there again, because we were counting on it as part of our (sic) operating plan. Once we have established that point beyond a shadow of a doubt, then we can consider alternatives." He also described the track as necessary "to accommodate existing and planned traffic" on the Line.

NSR requests that the Board accept this motion and Mr. Greene's verified statement into the record in this proceeding if the Board accepts CLSSB's further filing of September 14, 2007 submitting Mr. Greene's letter to Mr. Harris. In the interest of the Board having a complete record on the transaction that is the subject of this proceeding and in fairness to NSR which might be prejudiced if the further explanation and information were not also in the record, the Board should only accept CLSSB's submission if the Board also accepts this submission.

NSR does not submit this filing in order to join in the previous requests of other parties for sanctions or in order to characterize CLSSB's submission for any purpose. NSR makes this submission simply in the interest of having a complete and accurate record that contains all facts that might affect interested parties in this proceeding.

Respectfully submitted,



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Dated: October 3, 2007

CERTIFICATE OF SERVICE

I certify that the foregoing motion in STB Finance Docket No 34960 has been served on Mr John D Heffner, 1920 N Street, NW, Suite 800, Washington, DC 20036, Mr Jeffrey M Jankowski, Deputy City Attorney, 227 West Jefferson Blvd , South Bend, IN 46601 and Mr Richard H Streeter, Barnes and Thornburg, LLP, Suite 900, 750 17th Street, N W , Washington, DC 20006-4675, on October 3, 2007, by DHL Express, prepaid


James R Paschall

Dated October 3, 2007

STB Finance Docket No 34960, The Chicago, Lake Shore and South Bend Railway Company - Acquisition and Operation Exemption - Norfolk Southern Railway Company

VERIFIED STATEMENT OF PAUL L GREENE

My name is Paul L. Greene. I am Manager Marketing, Norfolk Southern Corporation, Three Commercial Place, Norfolk, VA, 23510. Between December 1, 1998 and May 1, 2007, I was Manager Strategic Planning for Norfolk Southern Corporation. In that capacity, I negotiated with Chicago, Lake Shore and South Bend Railway Company ("CLSSB") representatives concerning the possible sale by Norfolk Southern Railway Company ("NSR") to CLSSB of a portion of the Niles Industrial Track at South Bend, IN ("Line"). CLSSB's Notice of Exemption in this case describes the Line as including an approximately 3.2-mile segment of the Line between milepost UV 0 0 and milepost UV 2 8 and between milepost ZO 9 48 and milepost ZO 9 9, including any ownership interest in the spur track leading to the University of Notre Dame.¹

CLSSB has submitted my September 22, 2005 letter to CLSSB's Mr. Harris.

¹My September 22, 2005 letter to Mr. Harris refers to the latest draft of the parties' Transaction Summary for the proposed transaction, dated July 15, 2005, which identifies the Line as follows: "The milepost markers for this transaction are UV0 0 to UV2 8 and ZO9 3 to ZO10 6, which includes any ownership of NSR of the spur leading into Notre Dame University. The parties recognize and understand that approximately 600' of track has been removed from the Niles IT." The parties later determined that the Line could not be restored on the right-of-way between mileposts ZO 9 30 and ZO 9 48 because the Indiana Toll Road now intersects the right-of-way at milepost ZO 9 48. CLSSB recognized this circumstance and modified its filing accordingly. I discuss below the subsequent discovery of a previous Conrail abandonment notice that included the short but important segment between approximately milepost ZO 9 48 and approximately milepost 9 60. CLSSB modified another end point from milepost ZO 10 6 in the Transaction Summary to milepost ZO 9 9 because of missing track on that segment of the right-of-way and their apparent lack of need for the remaining segment. However, we have found that only the segment of the Line between approximately mileposts ZO 10 50 and ZO 10 60, was included in a different Conrail abandonment notice, and have nothing in the file that appears to shed any doubt on the status of the right-of-way between milepost ZO 10 31 and milepost ZO 9 9, which appears to remain railroad property.

concerning the proposed sale of the Line by NSR to CLSSB CLSSB submits the letter to show "the existence of an agreement to sell to CLSSB the line that is the subject of this proceeding " CLSSB mainly relies upon the first sentence in the letter but does not quote it out of context The full context of the letter shows that this sentence is not an unqualified statement that the parties had entered into a final agreement concerning the sale of the Line The letter goes on to state that the parties were in agreement on the "general terms of the Transaction Summary," not on a final agreement for the sale of the Line The letter noted the existence of unresolved issues that required handling and the need to prepare and execute a sales agreement and final closing documents The letter as a whole shows the parties had not reached a final agreement on the transaction as of that date

The draft Transaction Summary of July 15, 2005 included the statement that "This transaction is subject to necessary senior management approvals at both parties " My letter did not state that NSR senior management had approved a final agreement Both parties knew that no detailed, final agreement had yet been drafted My statement only meant that CLSSB's acquisition of the Line, if it occurred, would be under an agreement that included the general terms of the Transaction Summary upon which the parties had agreed

My September 22, 2005 letter obviously can not be considered to constitute a final agreement in itself The letter also can not be fairly interpreted to state that the parties had reached a detailed, full and final agreement on the proposed transaction

I sent the September 22, 2005 letter to Mr Harris at the request of CLSSB's consultant, Mr Gary Landrio, and of Mr Harris himself Mr Landrio suggested

language for the letter. The letter was intended to be a "comfort letter" concerning the seriousness and progress of the pending deal. I understood that Mr. Harris and Mr. Landrio believed that they would be more likely to convince third parties to seriously discuss CLSSB's acquisition and operation of the Line if they could show that NSR was serious about concluding a deal with NSR and that the parties could be expected to conclude the deal.

I have observed and have had experience in transactions in which the parties may have agreed upon key terms but ultimately could not conclude the transactions due to inability to agree upon details or related agreements, failure to meet conditions or changed circumstances. Despite the progress of the parties on the deal, I recognized *and stated in the letter that details needed to be worked out and that a final contract and closing documents needed to be prepared and executed*². On the same day that the letter was written, September 22, 2005, I discussed the matter with Mr. Landrio and reminded him that there were some unresolved issues. I noted that, hopefully, we could work through them.

Subsequent developments and negotiations between the parties that took place soon after the date of my letter show that a full and final agreement on the transaction had not been reached or completed. On October 13, 2005, Mr. Landrio himself requested changes in the terms of the proposed transaction. Mr. Landrio requested that CLSSB not be required to pay the entire purchase price at closing. Instead, he asked that CLSSB be permitted to pay part of the price, with interest, six months after closing.

²At that time, the parties also had to agree on an interchange agreement and certain economic and accounting terms before the transaction could be completed.

In December, 2005, Mr Landrio asked that this term be modified so that the second payment would be made nine months after closing On October 13, 2005, Mr Landrio also proposed a change in mileposts Past removal of track from the right-of-way alerted him to the possibility that the milepost designations did not match the existing right-of-way, but he apparently determined that the mileposts could be adjusted without nullifying the possibility that CLSSB could acquire enough right-of-way for its intended operation Mr Landrio also asked that all revenue-generating agreements pertaining to the right-of-way of the Line be transferred to CLSSB ³ Mr Landrio asked for further changes in the transaction relating to the possible existence of any agreements between NSR and third parties that might hinder or prevent train operations over the Line

On November 2, 2005, CLSSB's attorney proposed significant new language on indemnification for third party claims and concerning a payment provision for inclusion in the final agreement He also indicated that he would be sending a mark up of the entire draft agreement for NSR's review, which he promptly did That redline version proposed about a dozen other changes in the draft agreement Some of these were substantive Later, on March 2, 2006, I spoke with Mr Landrio and explained to him that in order to obtain NSR management approval for the final agreement, the agreement probably would need to include language that would give NSR a right of first refusal to repurchase the line in the event CLSSB decided to sell or abandon it ⁴

³We took some of CLSSB's proposed changes under consideration but immediately declined to make this requested change

⁴CLSSB's representatives later expressed agreement with the concept although our file does not indicate whether the parties ever reached final agreement on the language of this

Clearly, the parties had no final agreement as of September 22, 2005. Moreover, they did not subsequently conclude a final agreement because they did not come to agreement on some of CLSSB's proposed changes and because the parties knew that issues concerning third party claims of ownership of the part of the right-of-way of the Line between approximately mileposts ZO 9 48 and ZO 9 60 needed to be resolved. These claims had become a major problem that might prevent CLSSB from instituting viable operations over the Line. Thus, they stood in the way of a final sale agreement.

As early as May of 2005, when NSR and CLSSB were discussing the possible sale of the Line by NSR to CLSSB, CLSSB representatives advised that they had discovered that the Sisters of the Holy Cross at St. Mary's College previously⁵ had *contractors remove about 600 feet of track from the Line's right-of-way⁶ adjacent to the campus* when the contractor removed spur track from the campus. We had believed this portion of the right-of-way, between approximately mileposts ZO 9 48 and ZO 9 60, was part of the Conrail property acquired by NSR in 1999. CLSSB and NSR had thought the right-of-way at this location was still part of the Line or at least was still railroad property and that the track removal may have been made in error. Track remained on the right-of-way between these mileposts when NSR acquired Conrail

provision

⁵In a letter to the Board dated July 10, 2006 in STB Finance Docket No. 34893, the Sisters stated that the track actually had been removed "approximately four years ago."

⁶The track in contention was between approximately mileposts ZO 9 48 and ZO 9 65, which is between the Sister's power house and the frog of the switch leading to the University of Notre Dame spur track. CLSSB needed some room at this location for turning trains and possibly for temporary storage of cars in transit.

property in this area in 1999 and for some years thereafter⁷ Nonetheless, the Sisters' contractor's removal of the track presented an issue concerning the ownership and status of the segment of the Line between approximately mileposts ZO 9 48 and ZO 9 60 The parties needed to resolve this issue before they could conclude the transaction and enter into a final agreement on sale of a right-of-way that would result in a viable future railroad operation on the Line by CLSSB

We formally contacted the Sisters in writing about the possible restoration of the track on the right-of-way adjacent to their property by NSR or CLSSB on October 14, 2005⁸ Thus, CLSSB was aware of the issue concerning the Sisters' asserted interests in this segment of the right-of-way, first raised in May 2005, was still open at the time I sent the September 22, 2005 letter

The Sisters' attorney sent a reply letter to me on December 21, 2005 They stated that they were investigating the Sisters' property interest in the right-of-way Our files show that we received no further written response from these attorneys by May 20, 2006 On or about that date, however, I spoke with one of the Sisters' local counsel, who advised that they believed the railroad had been abandoned adjacent to the

⁷The decision in *Conrail Abandonment in South Bend Between Milepost 10 5 and Milepost 11 8, St Joseph County, IN*, ICC Docket No AB-167 (Sub-407N), 47 FR 24228, June 3, 1982, in which the ICC gave notice that the Commission had issued a certificate authorizing Conrail to abandon its rail line between milepost 10 5 and milepost 11 8 in the County of St Joseph, IN, a total distance of 1 3 miles, effective on April 22, 1982, is available on the Lexis web site

⁸We thought that we should make significant progress on the transaction before presenting the matter to the Sisters inasmuch as the status of the right-of-way at this location might be of minor concern in the absence of a plan to reactivate service on the Line Workload issues and some uncertainty about who should contact the Sisters also had some bearing on the timing of our letter to the Sisters

Sisters' property and that they would get back to us if there was a reason to do so

On June 14, 2006, the Sisters' counsel provided Mr Landrio with a copy of the unpublished decision of the Montgomery County Indiana Circuit Court, filed January 25, 2005, in *Lewellen v Consolidated Rail Corporation*. The court approved a settlement agreement in that case⁹ in which Conrail disclaimed all right, title and interest to certain segments of former line of railroad, including that important segment of the Line adjacent to the Sister's property between mileposts ZO 9 48 and ZO 9 60¹⁰

On May 22, 2006, Mr Landrio sent me an e-mail that contained a further exchange of e-mails on May 20, 2006 between CLSSB General Manager John Hankey and Mr Landrio. In one of those e-mails, Mr Hankey stated "My sense at this point is that we want to define the issues in very narrow terms. There was track there which we understood to be part of the transaction we are about to complete. There needs to be track there again, because we were counting on it as part of our (sic) operating plan. Once we have established that point beyond a shadow of a doubt, then we can consider alternatives. But for the time being, I don't think we can give an inch regarding the principle (sic) issue that there ought to be 16 car lengths of track and a switch on property we are about to purchase as an in-service, but inactive, railroad."

Mr Hankey stated in a later e-mail that day "And I would argue that I will need

⁹After examining the court decision and appended settlement agreement, NSR determined that Conrail had received a NERSA abandonment exemption to abandon the line between "a point near Milepost 3 1 on the north side of U S Highway 12 in the City of Niles in Berrien County, MI to the switch serving St Mary's College at Douglas Road near Milepost 9 6 in the City of Notre Dame, in St Joseph County, IN" in an unprinted decision in ICC Docket No AB-167 (Sub-No 672N), *Conrail Abandonment in Berrien County, MI and St Joseph County, IN*. This decision does not appear to be available on the Lexis web site in either the ICC/STB or Federal Register categories

every inch of that right of way for coal cars, coal loads, and as a switching lead during game times. Seriously--I have run out dozens of scenarios on paper, to scale, and I can make a plausible case from a purely operations standpoint that I need track back on that RoW to accommodate existing and planned traffic."

Quite clearly, the Sisters' interest in this critical segment of right-of-way, which the parties confirmed a few weeks later through the subsequently received unpublished court opinion concerning the settlement agreement in the *Lewellen* case, in which Conrail disclaimed interest in this segment of the right-of-way, undermined the viability of the proposed CLSSB operation and thus of the entire transaction. As I noted above, within the previous month, CLSSB's people themselves had stated that the operation upon which the transaction was premised could not be conducted without track along the right-of-way adjacent to the Sisters' property between approximately mileposts ZO 9 48 and ZO 9 60. Thus, the outstanding unresolved issue concerning this segment of the right-of-way and these further developments in which the parties received information confirming the Sisters' interest in it showed no final agreement was reached between NSR and CLSSB. Indeed, we had to view the e-mail communications from CLSSB that contained Mr. Hankey's statements about the necessity of including the right-of-way between mileposts ZO 9 48 and ZO 9 60 as part of the transaction as stating that a final agreement could not be concluded without the inclusion of that segment in the transaction. We no longer had a basis or argument to accomplish this.

On or about June 22, 2006, NSR learned through newspaper reports that the University of Notre Dame had withdrawn support for the transaction and had disclaimed

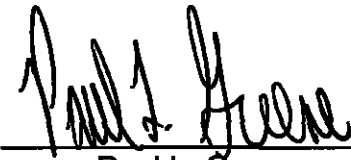
¹⁰The case was handled by local counsel for "continuing" Conrail

interest in receiving shipments of coal via rail over the Line. Most or all of the revenue expected to be earned from the operation of the Line would have come from rail deliveries of coal to the University. With an essential part of the right-of-way now clearly unavailable for inclusion in the transaction and the University disclaiming any interest in receiving coal shipments over the Line, and with certain other proposed changes in the terms of the transaction remaining outstanding, no final agreement between the parties had been or now could be reached. Both a critical part of the subject matter of the deal, the availability of the segment of the Line adjacent to the Sisters' property as part of the right-of-way conveyance, and the main economic basis for the deal itself, prospective coal shipments to the University of Notre Dame, had disappeared. The transaction not only could not be completed for the right-of-way that the parties originally thought was available when they began discussions and prepared the Transaction Summary but the transaction also no longer had an economic rationale because of the disclaimer of interest in railroad transportation service by the only definite potential railroad customer that is located along the Line.

VERIFICATION

Commonwealth of Virginia)
) ss
City of Norfolk)

Paul L. Greene makes oath and says that he is Manager Marketing for Norfolk Southern Corporation, Norfolk, Virginia, that he has knowledge of the facts and matters stated in the foregoing verified statement in STB Docket Finance Docket No 34960, and that all representations set forth therein as to those matters are true and correct to the best of his knowledge, information, and belief



Paul L. Greene

Subscribed and sworn to before me, a notary public
in and for the State and City above named, this
3rd day of October 2007

My commission expires April 30, 2011
Registration # 338984

