

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

VERIFIED REPLY OF
THE CHICAGO, LAKE SHORE AND SOUTH BEND RAILWAY COMPANY
TO REPLY, MOTION, AND ADDITIONAL STATEMENT
OF NORFOLK SOUTHERN RAILWAY COMPANY

Respectfully submitted

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Dated: November 16, 2007

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INTRODUCTION

Pursuant to the Board's order served on November 6, 2007, The Chicago, Lake Shore & South Bend Railway Company ("CLSSB") responds to the "Reply and Motion for Leave to File Reply and Additional Statement" submitted by Norfolk Southern Railway Company ("NSR") on October 3, 2007. CLSSB's response is required on the issues of whether the parties had reached an understanding in principle if not an enforceable agreement for CLSSB to purchase the subject rail line,¹ whether CLSSB's exemption filing in this proceeding accurately depicted the existence of such an

¹ Commonly known as the Niles Secondary Track or the Niles Industrial Track

understanding or agreement, and whether an abandoned segment of track was necessary for the purchase to be operationally feasible. CLSSB submits with and in support of this filing the verified statements of its President Robert Harris and its General Manager John Hankey.

BACKGROUND

What began as a very simple proposal by CLSSB to acquire and operate about 3 miles of out of service but legally "active" (nonabandoned) former Consolidated Rail Corporation ("Conrail") track in South Bend, IN, has mushroomed into a *cause celebre* thanks to the efforts of the City of South Bend, the Brothers of the Holy Cross, and the Sisters of Holy Cross (hereafter the "Petitioners").² By now the Board is well familiar with these proceedings, so CLSSB will only reiterate the facts necessary for an understanding of this complicated and unnecessarily rancorous proceeding.

Believing it had reached an agreement with NSR, CLSSB originally filed a verified notice of exemption with the Board in Finance Docket No. 34893 on June 14, 2006, to acquire the subject rail line.³ The Board duly published

² CLSSB refers to these parties as the Petitioners because they have petitioned to revoke CLSSB's exemption requests.

³ The track to be acquired consisted of 3.2 continuous route miles of railroad between MP UV 0.0 and MP UV 2.8 and between MP ZO 9.48 and MP ZO 9.9 including any ownership interest in the spur leading to Notre

notice of the exemption on July 6, 2006. Petitioners filed numerous written requests, first individually and

eventually collectively, seeking to revoke the proposed exemption. After NSR, acting under intense political pressure from the City of South Bend, wrote the Board a letter requesting dismissal of the exemption, CLSSB voluntarily asked the Board for and received permission to withdraw its exemption notice.⁴

Meanwhile, on November 21, 2006, Petitioners filed an application with the Board for the adverse abandonment of the subject trackage.⁵

On November 20, 2007, CLSSB filed a new notice of exemption in this docket in the hope that it could persuade NSR to sell the line. Towards that end, CLSSB had met with representatives of Petitioners on October 18, 2006, and continued a dialog with both NSR and the Petitioners. This time CLSSB was careful to represent in its notice that it "anticipates reaching an agreement" with NSR for the sale of the line. Again Petitioners challenged CLSSB's notice as containing "false and misleading information." The Board subsequently entered a "housekeeping stay" in the

Dame University in the City of South Bend, IN. Note that MP UV 2.8 and MP 9.9 are at the same location.

⁴ Permission granted by decision served September 11, 2006.

⁵ In STB Docket No. AB-290 Sub-No. 286, Norfolk Southern Railway Company - Adverse Abandonment - St. Joseph County, IN

acquisition proceeding on account of the adverse abandonment proceeding.⁶ By now the record in the adverse abandonment proceeding is closed pending a decision.

ARGUMENT

1. CLSSB maintains that it has reached an enforceable agreement with NSR for the sale of the line and its notices of exemption were accurate in every respect.

As CLSSB explained in its "Supplement", its President, Robert Harris, had received a copy of a letter from NSR's Paul Greene confirming the existence of an agreement to sell the line at his Indiana residence. At that time Mr. Harris was working on a project in Colorado and did not see a need to have the letter forwarded. After Mr. Harris' arrival in Indiana in August 2007, CLSSB submitted the letter to the Board both to refute Petitioner's unwarranted and baseless allegations that CLSSB has attempted to deceive the Board and to show that there is indeed an agreement between the parties. CLSSB filed this letter solely for these reasons. Harris VS at 2.

Whether or not the parties in fact had an *enforceable* agreement is not a matter for the Board to decide. The Board, and the Interstate Commerce Commission before it, have consistently held that the interpretation and

⁶ By decision served November 22, 2006.

enforcement of contracts is a matter outside the Board's jurisdiction and one for courts and arbitration panels to resolve. Cf. 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) (Board is not proper forum to resolve private contractual disputes).

Petitioners' argument that the lack of a signed purchase and sale agreement precluded CLSSB from filing its Notices of Exemption is directly contrary to agency precedent. The Board has consistently held that an entity seeking to acquire a rail line does not need to have an executed agreement in order to seek Board approval. See, e.g., BNSF Railway Company-Acquisition and Operation-State of South Dakota, STB FD No. 34667, served March 3, 2005; MVC Transportation, LLC-Acquisition Exemption-P&LE Properties, Inc., STB FD No. 34462, served October 20, 2004; and Missouri Central Railroad Company-Acquisition and Operation-Lines of Union Pacific Railroad Company, STB FD No. 33508, served Sept. 14, 1999. The underlying reason is that Board authority is permissive, and the parties can only consummate the transaction once they, in fact, have reached agreement. Securing an exemption eliminates one obstacle to closing but obtaining the seller's agreement is

the other. CLSSB will only be able to acquire the subject line once it reaches an agreement with NSR.

The bottom line is that Petitioners' revocation arguments have no basis in fact or law.

2. CLSSB's proposed acquisition does not require the missing piece of track to be operationally feasible

The second element of CLSSB's response concerns whether or not a segment of track that was removed between MP ZO 9.48 and MP ZO 9.6 was necessary for the transaction to be operationally feasible. As CLSSB's witness John Hankey explains in the attached statement the answer is unequivocally "no." Hankey VS at 2.

As background, the subject rail line originally linked downtown South Bend with Niles, MI. Subsequently, Conrail abandoned this line from Niles to the switch serving St. Mary's College at Douglas Road in Notre Dame, IN, at approximately MP ZO 9.6 after receiving ICC permission sometime in the 1980's.⁷ When NSR acquired its share of the Conrail assets and operations in 1999, it thought it had acquired the trackage between downtown South Bend and MP ZO 9.48. However, CLSSB and NSR both believe that a contractor employed by the Sisters of the Holy Cross removed track on a 600' foot long segment of the Line

⁷ See discussion in footnote 9 of NSR's Reply.

between approximately MP ZO 9.48 and ZO 9.65. In addition, an Indiana court also approved a settlement of litigation⁸ involving Conrail in which Conrail agreed to disclaim all right, title, and interest in certain segments of railroad between MP ZO 6.0 at the Indiana/Michigan State Line and the switch serving St. Mary's College which was located at MP ZO 9.48 with the result that NSR could not convey this segment. But NSR still could convey the segment that begins near Angela Boulevard at MP ZO 10.31 and extends to MP ZO 9.48 including the spur that served the University of Notre Dame power plant.

Mr. Greene cites an exchange of emails between CLSSB consultant Gary Landrio⁹ and CLSSB General Manager John Hankey as to the necessity of the missing track between MP ZO 9.48 and MP 9.65. Mr. Greene takes Mr. Hankey's statements out of context. Hankey VS at 2. Mr. Hankey was telling Mr. Landrio that, *as a matter of negotiating strategy* [emphasis supplied], he needs this trackage for his operating plan. Hankey VS at 4. But Mr. Greene ignored the following text from Mr. Hankey:

"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 out (sic) operating plan.

⁸ Lewellen v. Consolidated Rail Corporation identified at page 15 of Mr. Greene's testimony.

⁹ With Stone Consulting and Design

Once we have established that point (that no track exists) beyond a shadow of a doubt, *then we can consider alternatives* [emphasis supplied]. But for the time being, I don't think we can give an inch regarding the principle (sic) issue..."

Hankey VS at 5.

As Mr. Hankey explains in his statement, acquisition of the segment north of MP ZO 9.65 would be optimal for use as a "tail track" for switching trains into or out of the power plant as well as car storage, but it is not *essential*. Hankey VS at 6. As the aerial view attached to Mr. Hankey's testimony shows, CLSSB could accept a shorter tail track between roughly MP ZO 9.65 and MP ZO 9.6 that could accommodate about four cars. Id. In addition, sufficient room exists on the right of way to add an additional storage track. Id. CLSSB anticipates that it would handle about 800 cars per year or 16 cars once per week at the inception of operations. Accordingly, the existing track - while not optimal - would be adequate. Hankey VS at 7.

The last point Mr. Greene raises goes to the financial viability of this operation. Specifically, Mr. Greene asserts that "most or all of the revenue expected to be earned from the operation of the Line would have to come from rail deliveries of coal to the University." He would have the Board believe that with the segment of track

between MP ZO 9.48 and MP ZO 9.6 unavailable for inclusion in the transaction and the University now unwilling¹⁰ to receive coal by rail over the line, this transaction is financially unviable.

NSR's suggestions ignore the fact that energy and environmental considerations are changing on an almost daily basis how America thinks about the use of truck versus rail transportation. Notre Dame's coal supplier which bears the transportation costs still remains anxious to ship by rail direct to the power plant. NSR's comments also ignore CLSSB's plan to operate a passenger service over a part of the line. Hankey VS at 7-8. And NSR itself had asked CLSSB if it would still be interested in acquiring the line without the coal traffic.¹¹

NSR implies that some showing of traffic potential is a prerequisite for filing a notice of exemption. It is not. Requiring such a "public convenience and necessity" test runs contrary to the deregulatory intent of the Staggers Rail Act and the I.C.C. Termination Act. In adopting the class exemption process for noncarrier acquisition and operation of rail lines in 1985, the I.C.C. considered and rejected requests for more economic and

¹⁰ Due to intense political pressure from the each of the Petitioners.

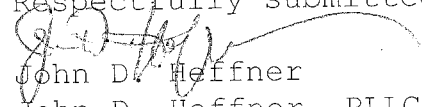
¹¹ See email from NSR counsel Greg Summy attached hereto as Exhibit A.

operating information. Class Exemption-Acq.& Oper. Of R. Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810, 817(1985).

CLSSB understands that NSR is at the forefront of a movement by several larger railroads to require short line railroads to submit more information about their transactions. But to date that movement represents a proposal not a regulation. And there is no requirement to show that sufficient traffic exists to support a "viable" operation in order to obtain an exemption for the acquisition and operation of a rail line. Were that the case, many of today's successful short line railroads would never have gotten off the ground. Isn't the essence of "deregulation" to give private parties an opportunity to substitute marketplace regulation for government fiat?

In conclusion, CLSSB urges the Board to reject Petitioners' efforts to thwart the start up of this rail line, to let NSR sell to CLSSB all of its right, title, and interest in the railroad, and to let the marketplace decide the future of this railroad.

Respectfully submitted



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Counsel for The Chicago, Lake Shore
& South Bend Railway Company

Dated: November 16, 2007

EXHIBIT A

John Heffner

From: "Summy, Greg E." <greg.summy@nscorp.com>
To: "john heffner" <j.heffner@verizon.net>; "Bob Harris" <echocanyonranch@gmail.com>; <garylandrio@stoneconsulting.com>; <"randall D. Gustafson"@stoneconsulting.com>
Cc: "Greene, Paul L." <Paul.Greene@exchange.nscorp.com>
Sent: Monday, June 26, 2006 7:55 AM
Subject: RE: reply to City's petition to revoke

John: One question I have concerns the news reports indicating that ND is now not interested in the direct delivery of coal to its facility. If that's the case, is your client still interested in the deal?

Greg E. Summy
General Solicitor
Norfolk Southern Corporation
(757) 533-4890
Fax: (757) 533-4872
greg.summy@nscorp.com

This confidential message may be privileged.

From: john heffner [mailto:j.heffner@verizon.net]
Sent: Friday, June 23, 2006 3:47 PM
To: Bob Harris; garylandrio@stoneconsulting.com; "randall D. Gustafson"@stoneconsulting.com
Cc: Summy, Greg E.
Subject: reply to City's petition to revoke

I have prepared the attached reply to the City's petition to revoke. Although not due until about July 13, I'd like to file in Monday or Tuesday if possible. Please review and get back to me with any changes. By the time I had talked with this Jeff Jankowski he had calmed down considerably, we were able to have a very civil conversation. I think the City would have to retain counsel with STB experience if it wants to pursue this matter any further. I'm also inclined to think the STB would not look favorably upon the City filing another petition to revoke presenting new grounds for revocation after it blew its initial petition. John

11/16/2007

Verified Statement of Robert S. Harris

Robert S. Harris, being duly sworn, deposes and states as follows:

My name is Robert S. Harris. My current address is 404 Franklin, Porter, IN 46304. I have been in the residential real estate business since May, 1993, in Grand Junction, Colorado; our recent projects have operated under the name Echo Canyon Land & Cattle Co., LLLP. Since May, 2005, I have been president of The Chicago, Lake Shore and South Bend Railway Co., LLC (CLSSB).

During September, 2005, I had asked Gary Landrio of Stone Consulting to get from Norfolk Southern (NSR) a letter stating that in fact we were working toward an agreement to purchase the Niles Industrial Track. CLSSB had been promised an agreement for review two months earlier, and I felt that it was unwise to continue to spend capital toward a purchase without at least a letter of intent to sell from NSR. As a real estate investor, I was accustomed to a different set of protocols where the buyer presents a written contract offer, receives acceptance from the seller, and then the buyer presents a check for earnest money to be held in escrow. At the time of acceptance, the buyer would then begin the period of due diligence. Earlier, I had offered both a written contract offer and earnest money to Paul Greene at NSR, but he indicated that this was not necessary.

By September, I was becoming uneasy with this arrangement as I was spending capital on due diligence without any assurance from NSR that they were willing to sell CLSSB anything. In a typical real estate transaction, where the contract so specifies, the purchaser can force specific performance from the seller if he was satisfied with the property, title, etc., but the seller suddenly decided not to sell. I was not willing to have

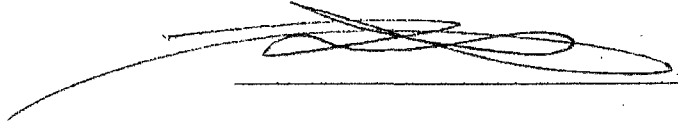
CLSSB continue with the process of due diligence where CLSSB could conceivably spend a considerable sum, be happy with the property, title, etc., and then find that CLSSB had no recourse to force NSR to the closing table. To avoid that end, I wanted at least a letter from the seller, NSR, stating that they were willing to sell CLSSB the Niles Industrial Track. NSR sent it.

By the time the letter was received, I was back in Colorado. Mail sent to my address in Indiana is collected, and forwarded by a family member, if required. Aware of the contents of the letter from Norfolk Southern, I asked that it be filed. Soon after, we resumed our due diligence. Upon my return to Indiana, on August 1, 2007, I retrieved the letter and forwarded it to counsel, John Heffner. CLSSB submits the letter now to show that in fact, as the letter states clearly, I was assured that “based on our meeting of May 17th and the subsequent approval of Norfolk Southern’s Tactical Line Management Team, there is an agreement to sell the Niles Industrial Track to The Chicago, Lake Shore and South Bend Railway Company, LLC.” CLSSB submitted this letter to make it clear at this time to all parties that despite any claims otherwise, that we have an agreement, and that CLSSB fully expects to close on the purchase of the Niles Industrial Track.

VERIFICATION

STATE OF Indiana
CITY OF Porter) SS

Robert S. Harris being duly sworn according to law,
hereby deposes and states that (s)he is authorized to make the
Verification, has read the foregoing document, and knows the
facts asserted therein are true and accurate as stated, to the
best of (her)his knowledge, information and belief.



Subscribed and sworn to before me, a Notary Public, in and for
the City of Porter in the State of Indiana, this 16th
day of Nov. 2007

Lisa M. King
Notary Public

My Commission expires:

7-17-2011

VERIFIED STATEMENT OF JOHN P. HANKEY

John P. Hankey, being duly sworn, deposes and states as follows:

My name is John P. Hankey. My current address is 836 Mill Creek Road, Arnold, Maryland 21012. Since 1993, I have been engaged as a self employed historian and railroad transportation consultant. In general my work involves railway preservation, historic railroad operations, and heritage railroad equipment conservation and operation. My clients have included Class I railroads, major railroad museums, government agencies, and individual preservation efforts. My qualifications include advanced academic study, extended experience in the operating department of a Class I railroad, and nearly 40 years experience in all aspects of heritage railroading.

From the inception of the Chicago Lake Shore & South Bend Railroad ("CLSSB") project, I had been involved as an advisor and planner. The project represented a synthesis of my professional training and experience. It comprised substantial railroad, preservation, and heritage operations components. A primary objective was to create a community resource in which efficient freight operations helped make possible a variety of historic railroad operations. Pending its formal organization and staffing, I agreed to

serve as interim General Manager. My activities for the company included strategic planning and project design, coordination with principal consultants Stone Consulting and Design, meetings with the University of Notre Dame ("UND"), City of South Bend, and potential shippers, and the customary duties associated with the creation of a short line railroad.

I have read the "Reply and Motion for Leave to File Reply and Additional Statement" submitted by Norfolk Southern Railway Company ("NSR") on October 3, 2007 and the accompanying verified statement of NSR witness Paul Greene and have been asked to comment. Specifically, I have been asked whether NSR's ability to convey a segment of track that was removed between MP ZO 9.48 and MP ZO 9.6 from the subject track¹ was necessary for the transaction to be operationally feasible. The answer is unequivocally "no." The several hundred feet of track in question did not in any way compromise the feasibility or potential success of the project.

In his statement Mr. Greene cites an exchange of emails between CLSSB consultant Gary Landrio² and me as to the necessity of the missing track between

¹ Commonly known as the Niles Secondary Track.

² With Stone Consulting and Design

MP ZO 9.48 and MP 9.6. Perhaps Mr. Greene either did not have the full context available, or possibly he inadvertently took my statement out of context. My comments to Mr. Landrio reflected our understanding of the best information available to us and our ongoing discussions with NSR. According to everything we had been told, the proposed transaction was to include the track and parcel of land in question. At some point before we began talks with NSR, the Sisters of the Holy Cross had apparently hired a contractor to remove the track as part of a motel complex they planned.

I believe that any prudent manager or railroad planner, when faced with that situation, would take all necessary steps to safeguard the property to be acquired. In the absence of evidence to the contrary, and with a good-faith belief that the parcel extending between MP 9.48 and MP 9.6 was to convey with the balance of the property, Mr. Landrio and myself discussed how to be certain that the parcel was part of the conveyance, and how to notify the Sisters of the Holy Cross that this was at the very least an uncertain and clouded title issue. I am certain that all parties involved understand the longstanding practice of railroads to vigorously defend what they understand as their rights of way and operating franchise from

encroachment or loss. Our position was straightforward: We believed, in good faith, that that portion of railroad would convey with the balance of the property. We believed, in good faith and based on the information available to us, that the Sisters of the Holy Cross had inappropriately removed track which would have conveyed as part of the sale. We desired to have the status quo ante restored. If there were compelling reasons otherwise, we were prepared to accept an alternative settlement which permitted the Order to complete its project while making the CLSSB whole.

However, and this also is prudent planning and policy, we could not rule out the possibility that title to that parcel had conveyed separately or had reverted upon abandonment of the rest of the Niles Secondary. The Sisters of the Holy Cross could not themselves produce a clear title or documentation, yet they were also convinced that they had cause to remove the track and incorporate the right of way into their proposed development. At all times, we were prepared to respect the evidence and either cede the property to the Sisters—or reincorporate it into the operating plan for CLSSB.

In the full context of my discussions with Mr. Landrio, I was suggesting that as a matter of negotiating strategy, the CLSSB should take the position that it

required this trackage for its operating plan. That was based partly on the real utility of the track in question for our proposed operating plan. It was also in response to the contention of the Sisters of the Holy Cross that the section of the track was obviously disused and that they "needed it" to accommodate their proposed motel development. Mr. Greene seems to have overlooked, or misinterpreted, the following text from me:

"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 (that no track exists) beyond a shadow of a doubt, *then we can consider alternatives* [emphasis supplied]. But for the time being, I don't think we can give an inch regarding the principle (sic) issue..."

It was never our intention to treat harshly or unfairly with the Sisters of the Holy Cross, and I believe we conveyed that to them clearly. But neither could we afford to simply permit the Order to occupy, and effectively seize, a portion of the right of way to which they had no apparent title and for which we had valid operational plans. If it had proved out that the parcel was to convey with the rest of the railroad, our ultimate proposal would have been to exchange the parcel the Sisters of the Holy Cross needed for equivalent square footage

alongside the existing primary right of way. CLSSB would have used that equivalent property as a buffer and potentially for parking or a second track.

The acquisition of the segment north of MP ZO 9.48 would have been optimal for use as a "tail track" for switching trains into or out of the UND (University of Notre Dame) power plant, for car storage, and as a storage track for the UND football and special events trains that we discussed with UND officials. Because the track space in the existing coal yard was so restricted, and because of the lack of a suitable run around track, simple prudence required us to vigorously contest what we believed to be an encroachment, however well-intentioned or ill-advised.

At no time did we regard the entire length of that track as *essential*. To assert that we did, or would have, seriously misconstrued our internal discussions. No competent railroad planner or operator would regard such a relatively insignificant length of track as essential to the overall success of the larger project. As the aerial view attached to my testimony shows, CLSSB could have accepted a shorter tail track between roughly MP ZO 9.65 and MP ZO 9.6 that would accommodate three to five coal cars.

Sufficient room also existed on the right of way to add additional storage tracks. We had discussed with UND officials the possibility of adding a second track along Douglas Road to handle these same operating issues. CLSSB anticipated that it would initially handle about 800 cars per year to the UND power plant, or roughly 16 cars per week at the inception of operations. Accordingly, the existing track and the portion extending between MP 9.48 and MP 9.6 - while not optimal - would have been useful.

There was another passenger-related reason to retain the track between MP 9.48 and MP 9.6. CLSSB principals had discussed at great length with UND officials the idea of running passenger specials during the Fall Football Season and on other special occasions. These might have operated from the Chicago area to a connection with CLSSB over the tracks of the Chicago, South Shore & South Bend Railroad, a commuter rail operation managed by the Northern Indiana Commuter Transit District. Alternatively, they might have accessed the CLSSB over NSR tracks from a variety of origination points. These trains would have terminated near UND's coal yard, where passengers would disembark into waiting busses to complete the trip to the stadium. The tail track would have worked well for the storage of passenger equipment for these specials pending departure at

the end of the games. It also could have handled other occasional passenger movements such as private car specials or alumni specials. Especially on game days or when multiple special trains were present, storing equipment as close to UND as possible would have avoided deadhead moves and greatly facilitated safe and efficient operations.

I wish to reiterate several points in the strongest possible terms. During the entire period these discussions were taking place, everyone involved with the CLSSB project worked in good faith, and with honesty and sincere good intent, with Norfolk Southern and the University of Notre Dame. At every point that seemed appropriate, we apprised the City of South Bend and consistently received little or no response. We acted on the best information we had at the time, and had to rely almost exclusively on NSR for data as to the ownership, status, and availability of all segments of the proposed acquisition.

Acting on that information, and with clear evidence that the Sisters of the Holy Cross had removed existing track and were planning to occupy the right of way between MP 9.48 and MP 9.6 with a private commercial development, we had many discussions as to how to protect that segment of track. Mr. Landrio spoke several times with the Sisters and their representatives, and they never were able to

definitively establish that they had clear title to the parcel in question. It was both true, and an appropriate negotiating strategy, to state that the parcel in question was important to the proposed operating plan. Because the turnout to that track needed only minor repair, relaying the track would have dramatically increased operating flexibility at the outset at relatively low cost.

But at no time could anyone have seriously understood that the overall viability of the project hinged on acquiring that few hundred feet of track. That assertion defies common sense, is belied by the evidence, and is contrary to the spirit of cooperation and common purpose which characterized the discussions between CLSSB, NSR, and UND. I am chagrined and dismayed that the assertions are being made at all, and must protest in the strongest possible terms.

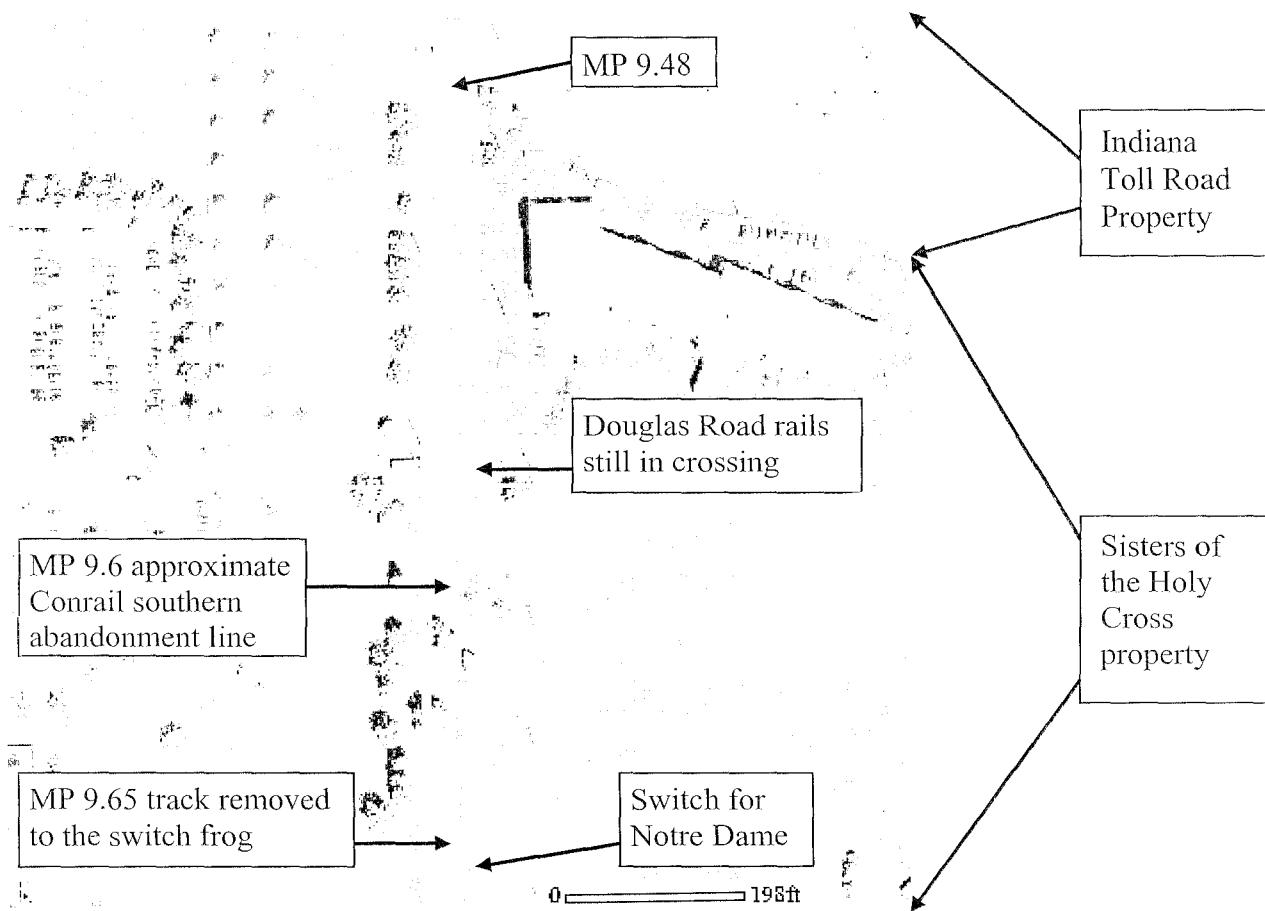


Figure 2 aerial view of missing trackage next to the Inn at St. Marys,



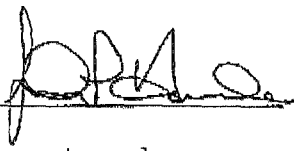
Figure 1 Douglas Rd. extension looking north to Toll Road, note rails still in crossing



Figure 3 Looking south from road crossing to damaged switch

"Pursuant to 28 U.S.C. 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: Nov. 15, 2007.



[signature]

CERTIFICATE OF SERVICE

I, John D. Heffner, certify that a copy of the Verified Reply of The Chicago, Lake Shore and South Bend Railway Company to Reply, Motion, and Additional Statement of Norfolk Southern Railway Company was served on November 16, 2007 to the following:

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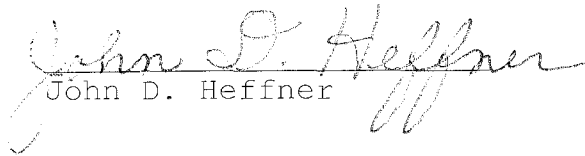
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