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SERVICE DATE – JANUARY 23, 2007

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-290 (Sub-No. 286)

NORFOLK SOUTHERN RAILWAY COMPANY—ADVERSE ABANDONMENT—  
ST. JOSEPH COUNTY, IN

Decided: January 22, 2007

The Chicago, Lake Shore and South Bend Railway Company (CLS&SB) has filed petitions seeking rejection of a notice of intent to file an adverse abandonment application and the application itself. The notice and the application were filed by the City of South Bend, St. Joseph County, IN (the City), the Brothers of Holy Cross, Inc. (the Brothers), and the Sisters of the Holy Cross, Inc. (the Sisters) (collectively, Applicants). The petitions to reject will be denied.

BACKGROUND

In a petition filed on September 13, 2006, the Applicants sought exemptions from several statutory provisions and waivers of certain Board regulations in connection with the filing of a third-party or adverse application for the abandonment of service over approximately 3.2 miles of railroad lines near South Bend, IN.<sup>1</sup> Accompanying the petition were a draft notice of intent to file an adverse abandonment application and a draft Federal Register notice.

Replies were filed by Norfolk Southern Railway Company (NSR), the owner of the 3.2 miles of lines, and by CLS&SB. On September 26, 2006, Applicants filed a reply and an amended notice of intent, which expanded the proposed abandonment at NSR's request. As amended, the proposed adverse abandonment includes approximately 3.7 miles of railroad lines (the Lines). The amended notice also included a number of other changes.

The amended notice was filed only with the Board. It was, however, published in the South Bend Tribune on November 3, 2006, November 10, 2006, and November 13, 2006. The notices published in the Tribune stated that the application would be filed on or about November 13, 2006, a statement the Applicants say "corrects" the projected October 24, 2006 filing date given in the notice filed with the Board on September 26, 2006.

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<sup>1</sup> In a decision served in this proceeding on October 26, 2006, we granted in part and denied in part Applicants' exemption and waiver requests.

On November 13, 2006, CLS&SB filed a petition to reject Applicants' notice of intent. CLS&SB contends that the notice of intent to file the adverse abandonment application and the adverse abandonment application itself must be rejected because Applicants failed to comply with the Board's rules at 49 CFR 1152 in a number of respects.

Applicants replied to the petition to reject on November 16, 2006. The Applicants say that, on October 30, 2006, they served, by first class mail, a notice of intent on the parties listed at 49 CFR 1152.20(a)(2), to the extent the service requirement was not waived by the October 26 decision. A courtesy copy of the notice of intent, according to Applicants, was also served on CLS&SB. Accompanying the Applicants' reply was a copy of the notice that was published on November 13, 2006.

On November 21, 2006, Applicants filed their adverse abandonment application. Included with the application was a notarized affidavit affirming that the notice of intent was served on the parties listed at 49 CFR 1152.20(a)(2) by first class mail on October 30, 2006. Also included was a verified statement affirming that, as required by 49 CFR 1152.20(a)(4), the notice of intent was published in the South Bend Tribune, a newspaper of general circulation.

CLS&SB filed a petition to reject the application on December 4, 2006, for the same basic reasons set out in its petition to reject the notice of intent. Applicants replied on December 6, 2006.

## DISCUSSION AND CONCLUSIONS

CLS&SB contends that the notice of intent to file the adverse abandonment application and the adverse abandonment application itself must be rejected because Applicants failed to comply with the Board's rules at 49 CFR 1152. Specifically, CLS&SB asserts that Applicants failed: (1) to send the notice of intent to the Board by certified mail, as required by 49 CFR 1152.20(a)(1); (2) to provide evidence of having served the notice of intent on the parties listed at 49 CFR 1152.20(a)(2); (3) to file the notice of intent with the Board concurrently with service on the parties, as required by 49 CFR 1152.20(b)(3); and (4) to satisfy the time limit requirements of 49 CFR 1152.20(b)(1)-(3).

Issue (1) Section 1152.20(a)(1) provides that notices of intent to abandon or discontinue service are to be served on the Board by certified letter. Applicants delivered their amended notice of intent to the Board by hand, and it was date-stamped by the Board on September 26, 2006. This hand delivery satisfied the requirement that the Board be served.

Issues (2) and (3) A notice of intent to abandon or discontinue service must be served on the parties listed at 49 CFR 1152.20(a)(2) and filed with the Board either concurrently with service on the parties or when the notice of intent is first published, whichever occurs first. See 49 CFR 1152.20(b)(3). The filed notice of intent should be accompanied by a certificate of service on the parties listed at 49 CFR 1152.20(a)(2). Applicants filed their amended notice of intent before we ruled on their petition for exemptions and waivers. They subsequently served the revised notice of intent on the parties listed at 49 CFR 1152.20(a)(2) on October 30, 2006, just after we ruled on their petition for exemptions and waivers. Applicants failed to file the

revised notice of intent concurrently on the Board as required by section 1152.20(b)(3) and did not file evidence of having served the revised notice of intent on the parties listed at 49 CFR 1152.20(a)(2) until they filed their adverse abandonment application on November 21, 2006.

Applicants' failure to file the revised notice of intent concurrently on the Board did not, however, result in harm or prejudice to the interests of the parties. Nor did Applicants' failure to submit evidence of having served the notice of intent on the parties listed at 49 CFR 1152.20(a)(2) in a timely manner. Neither NSR nor CLS&SB have been deprived of the ability to participate in this proceeding at any step, and there is no indication that there exists any other party who was harmed in any way.

Forcing Applicants to refile their notice of intent in such circumstances and after notice of the filings of the adverse abandonment application had been served and published would delay the proceeding and result in increased costs without conferring any benefit on the public or on interested parties. We have the discretion to construe our rules "liberally to secure just, speedy and inexpensive determination of the issues presented." See 49 CFR 1100.3. It is appropriate, in this instance, to exercise that discretion where there has been no harm or prejudice to the interests of the parties.

Issue (4) Finally, 49 CFR 1152.20(b)(1) provides that the notice of intent be served at least 15 days, but not more than 30 days, before the filing of the application. Although Applicants failed to file the revised notice of intent with the Board, they served the revised notice on the parties listed at 49 CFR 1152.20(a)(2) on October 30, 2006. They then filed the adverse abandonment application on November 21, 2006. Thus, the revised notice of intent was served well within the 15- to 30-day time period specified in section 1152.20(b)(1).

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petitions to reject are denied.
2. This decision is effective on its service date.

By the Board, Chairman Nottingham, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams  
Secretary