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SERVICE DATE – FEBRUARY 14, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34960

THE CHICAGO, LAKE SHORE AND SOUTH BEND RAILWAY COMPANY—  
ACQUISITION AND OPERATION EXEMPTION—NORFOLK SOUTHERN RAILWAY  
COMPANY

Decided: February 13, 2008

In this decision, we are denying the petition filed by the City of South Bend, IN (the City), and two religious orders (the Orders), the Sisters of the Holy Cross, Inc., and the Brothers of Holy Cross, Inc. (collectively, Petitioners), to revoke or reject the notice of exemption that would allow the transfer of the line at issue here from a rail carrier to a noncarrier. Additionally, we are vacating an earlier stay of the effective date of this exemption. In a decision issued today in STB Docket No. AB-290 (Sub-No. 286), Norfolk Southern Railway Company—Adverse Abandonment—St. Joseph County, IN (NSR—Abandonment), we are also denying the City's and the Orders' application for authority for an adverse (involuntary) abandonment of the line at issue here.

BACKGROUND

In a verified notice of exemption filed on November 20, 2006, The Chicago, Lake Shore and South Bend Railway Company (CLS&SB) invoked the class exemption at 49 CFR 1150.31 to purchase from Norfolk Southern Railway Company (NSR) and operate approximately 3.2 miles of rail line (the Line) between milepost UV 0.00 and milepost UV 2.80 and between milepost ZO 9.48 and milepost ZO 9.90, including any ownership interest in a spur leading to the University of Notre Dame (the University), in and near the City.<sup>1</sup> The exemption was scheduled to become effective on November 27, 2006.

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<sup>1</sup> On June 14, 2006, CLS&SB had filed another notice of exemption to purchase and operate this same Line. See The Chicago, Lake Shore and South Bend Railway Company—Acquisition and Operation Exemption—Norfolk Southern Railway Company, STB Finance Docket No. 34893 (STB served July 6, 2006) (71 FR 38447). Petitions to revoke were filed by the City and the Orders. After the University announced that it would continue to receive coal at its power plant by truck, NSR informed the Board that it would not sell the Line to CLS&SB. CLS&SB subsequently requested leave to withdraw that notice of exemption without prejudice, which was granted in a decision served on September 11, 2006.

On November 22, 2006, the City and the Orders filed a petition to revoke or reject, and a request to stay the effective date of, the notice of exemption. The day before, the City and the Orders filed an application seeking Board authority for the adverse abandonment of 3.7 miles of NSR line, embracing most of the Line at issue here. See NSR—Abandonment. CLS&SB filed a reply to the petition on December 5, 2006. The effective date of the exemption was stayed pending further order of the Board in a decision in this proceeding served on November 22, 2006. Notice of the exemption was subsequently served and published at 71 FR 76426 on December 20, 2006, but the exemption's effective date remained stayed.

On September 14, 2007, CLS&SB filed a motion for leave to supplement its December 5, 2006 reply with an NSR letter dated September 22, 2005. According to CLS&SB, the letter confirms the existence of an agreement for NSR to sell the Line to CLS&SB. Petitioners filed a reply in opposition to CLS&SB's motion to supplement on October 2, 2007. NSR filed a reply on October 4, 2007, stating that it does not oppose CLS&SB's motion to supplement. NSR requested, however, that the Board accept its reply if CLS&SB's motion to supplement is granted. Attached to NSR's reply was a verified statement by an NSR executive.

In the verified statement, the NSR executive testified that the portion of the ZO line between milepost ZO 9.48 and milepost ZO 9.60 had been abandoned by NSR's predecessor, Consolidated Rail Corporation (Conrail), and had been removed. According to the NSR executive, CLS&SB had stated that, without this abandoned track, the service it proposes to provide pursuant to this acquisition and operation exemption would not be viable.

In a decision served on November 6, 2007, the Director of the Board's Office of Proceedings directed CLS&SB to respond to NSR's filing. CLS&SB filed a response on November 16, 2007, which included verified statements by both its president and general manager. In that response, CLS&SB asserts that the NSR executive, in questioning the viability of the service CLS&SB proposes to provide pursuant to this acquisition and operation, overlooked or misinterpreted certain statements by CLS&SB's general manager. CLS&SB maintains, without conceding that track between milepost ZO 9.48 and milepost ZO 9.60 has been abandoned, that the acquisition of this track is not essential to the overall viability of the service it proposes to provide over the Line. On November 26, 2007, Petitioners filed a reply objecting to the Board's November 6, 2007 decision and various statements in CLS&SB's response. CLS&SB filed a motion to strike Petitioners' reply on December 4, 2007.

#### PRELIMINARY MATTER

CLS&SB's motion for leave to supplement will be denied. A copy of the NSR letter that is the subject of CLS&SB's motion was previously submitted by CLS&SB as Exhibit A of its December 5, 2006 reply to the City's and the Orders' petition to revoke or reject and request to stay. Although we are denying CLS&SB's motion to supplement, we will accept into the record NSR's reply to CLS&SB's motion to supplement and CLS&SB's response. The NSR letter is already in the record, and NSR's reply and CLS&SB's response will provide the Board with a more complete and accurate record.

CLS&SB's motion to strike Petitioners' November 26 reply will also be denied. Although the Board directed CLS&SB to respond to NSR's filing, it will not prejudice CLS&SB or otherwise be inappropriate to give Petitioners the opportunity to submit a reply.

### DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10901, a noncarrier such as CLS&SB may acquire and operate a rail line only if the Board finds that the proposal is not inconsistent with the "public convenience and necessity." Under 49 U.S.C. 10502 and 49 CFR 1121, a party may request an exemption from the formal application procedures of section 10901, on the grounds that full regulatory scrutiny is not necessary to carry out the rail transportation policy, 49 U.S.C. 10101, and that either the exemption is limited in scope or regulation is not needed to protect shippers from an abuse of market power.

Petitioners contend that CLS&SB's notice of exemption contains false and misleading information and is therefore void *ab initio*. See 49 CFR 1150.32. They assert that they met with CLS&SB representatives on October 18, 2006, and, at the conclusion of the meeting, informed those representatives that they would not agree to CLS&SB's purchase of the Line, and would soon file an application for its adverse abandonment. Further, Petitioners assert that, on November 21, 2006, they conferred with counsel for NSR, and he authorized them to state that NSR: (1) adheres to its prior representation that no agreement has been executed with CLS&SB; and (2) advised CLS&SB months earlier that it would not sell the Line to CLS&SB unless CLS&SB reached an agreement with Petitioners. Accordingly, Petitioners claim that it was disingenuous, misleading, and untruthful for CLS&SB to state in its verified notice of exemption that it "anticipates reaching an agreement with Norfolk Southern Railway Company."

CLS&SB denies that the November 20 notice of exemption contains false or misleading information. According to CLS&SB, the final terms of its agreement to purchase the Line from NSR had been reached by June 2006. The transaction stalled, CLS&SB claims, after officials of the City pressed NSR to drop the sale and persuaded the University not to use rail service to deliver coal to its power plant. CLS&SB claims that, even after the University announced that it would continue using truck service to receive coal at its power plant, NSR "communicated its willingness to sell the [L]ine if [CLS&SB] could resolve its political differences with the City." CLS&SB Reply to Pet. to Revoke and Stay, at 9.

CLS&SB insists that, at the time it filed the November 20 notice of exemption, it "honestly believed it could satisfy some of Petitioners' concerns and over time resolve any remaining concerns to let the project go forward." CLS&SB Reply to Pet. to Revoke and Stay, at 11-12. And before it filed the notice of exemption, CLS&SB asserts that it asked NSR's counsel whether he had any objections to the statement in the notice that CLS&SB anticipates reaching an agreement with NSR for the sale of the Line and that NSR's counsel advised that he had no problem with this language.

Petitioners suggest that the exemption should be denied because CLS&SB does not have, and will not likely obtain, NSR's agreement to complete the transaction. NSR suggests that the

proposed acquisition and operation exemption may not be viable without the portion of track between milepost ZO 9.48 and milepost ZO 9.60 that Conrail allegedly abandoned.

Conrail was granted authority to abandon a 6.5-mile line extending south from milepost 3.1 near Niles, MI, “to the switch connection serving St. Mary’s College . . . near Milepost ZO 9.6 in the City of Notre Dame [sic].” See Conrail Abandonment in Berrien County, MI and St. Joseph County, IN, Docket No. AB-167 (Sub-No. 672N) (ICC served Aug. 31, 1984) (Conrail Abandonment). The spur serving the University’s power plant is located on the ZO line at or near milepost ZO 9.65, which is just south of the 6.5-mile line that was at issue in Conrail Abandonment. Thus, the proposed acquisition and operation would give CLS&SB direct access to the spur serving the University’s power plant, regardless of whether the track between milepost ZO 9.48 and milepost ZO 9.60 has been abandoned.

Petitioners do not dispute that the proposed acquisition and operation would give CLS&SB direct access to the spur serving the University’s power plant. CLS&SB maintains that its acquisition of the track between milepost ZO 9.48 and milepost ZO 9.60 would be desirable but is not essential to the overall viability of the service it proposes to provide over the Line. Accordingly, while the record is not clear as to whether NSR remains willing proceed with the proposed transaction, we do not find sufficient support in the record to conclude that the proposed acquisition and operation would not be viable if the track on the ZO line between milepost ZO 9.48 and milepost ZO 9.60 has been abandoned.<sup>2</sup>

Moreover, an executed agreement is not a prerequisite for a noncarrier seeking to invoke the class exemption to acquire and operate a rail line. Board authorization is permissive and may not be exercised unless an agreement is ultimately reached by the parties to the transaction.<sup>3</sup> Thus, if NSR eventually enters into an agreement with CLS&SB, then CLS&SB would be able to acquire and operate the Line pursuant to this exemption. On the other hand, if NSR declines to execute an agreement, CLS&SB would not be able to exercise this authority.

The fact that a notice of exemption is filed before the parties have reached a final agreement does not mean that it contains false or misleading information.<sup>4</sup> CLS&SB’s

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<sup>2</sup> Nor do we make any determination here as to NSR’s contention that the authorized abandonment of the ZO line between milepost 9.48 and milepost ZO 9.60 was consummated by Conrail following issuance of the decision in Conrail Abandonment.

<sup>3</sup> See, e.g., BNSF Railway Company—Acquisition and Operation Exemption—State of South Dakota, STB Finance Docket No. 34667 (STB served Mar. 3, 2005); MVC Transportation, LLC—Acquisition and Operation Exemption—P&LE Properties, Inc., STB Finance Docket No. 34462 (STB served Oct. 20, 2004).

<sup>4</sup> See Class Exemption for the Acquisition and Operation of Rail Lines, 1 I.C.C.2d 810, 817 (1985), aff’d mem. Illinois Commerce Com’n. v. ICC, 817 F.2d 145 (D.C. Cir. 1987).

statements may have been overly optimistic, but that does not make them either false or misleading. We find no grounds to reject the notice of exemption or to treat it as void ab initio.<sup>5</sup>

Petitioners also contend that the notice of exemption constituted an abuse of process. Asserting that there were “no good grounds” for filing the notice, Petitioners claim that CLS&SB intended to interfere with the orderly processing of their adverse abandonment application and to circumvent the Board’s decision served October 26, 2006, in NSR—Abandonment, disallowing the filing of offers of financial assistance, pursuant to 49 U.S.C. 10904. In this regard, Petitioners claim that CLS&SB’s verified notice of exemption violated the Board’s Canons of Ethics, 49 CFR 1103 Subpart B, in a number of respects. Petitioners request an award of attorney fees for the time they spent in responding to CLS&SB’s notice of exemption.

CLS&SB denies that the notice of exemption was filed in an effort to delay the orderly processing of NSR—Abandonment. In this regard as well, CLS&SB asserts that the notice was filed in good faith and in the belief that it could satisfy Petitioners’ concerns.

The Board addressed Petitioners’ argument that the notice was intended to undercut their application for adverse abandonment by staying the exemption’s effective date to give interested parties the opportunity to submit additional information. Our decision issued today in NSR—Abandonment, denying the City’s and the Orders’ adverse abandonment application, eliminates that argument as a basis for rejecting or revoking CLS&SB’s notice of exemption.

Accordingly, Petitioners have failed to support rejection or revocation of CLS&SB’s notice of exemption and have not demonstrated that the notice of exemption violated the Board’s canons of ethics. Therefore, the relief sought by Petitioners, including their request for an award of attorney fees, will be denied.

Based on our action here and in NSR—Abandonment, we see no reason to continue to stay the effective date of the exemption in this proceeding. Accordingly, the stay of its effective date will be vacated.

Pursuant to the Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 193, 121 Stat. 1844 (2007), nothing in this decision authorizes the following activities at any solid waste rail transfer facility: collecting, storing or transferring solid waste outside of its original shipping container; or separating or processing solid waste (including baling, crushing, compacting and shredding). The term ‘solid waste’ is defined in section 1004 of the Solid Waste Disposal Act, 42 U.S.C. 6903.

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<sup>5</sup> This is not a case containing statements that falsely assert that a party is a member of a class entitled to invoke a class exemption. See, e.g., Save the Rock Island Committee, Inc. v. St. Louis Southwestern Railway Co., Docket No. AB-39 (Sub-No. 18X) (ICC served Apr. 1, 1994) (rejecting notice invoking 2-year out of service class exemption because the carrier did not meet the standards set out in the class exemption).

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

It is ordered:

1. CLS&SB's motion for leave to supplement the record is denied.
2. NSR's reply to CLS&SB's motion to supplement, including the verified statement by an NSR executive, and CLS&SB's response to that filing are accepted into the record.
3. CLS&SB's motion to strike Petitioners' reply is denied.
4. The petition to revoke or reject the notice of exemption is denied.
5. The request for an award of attorney fees is denied.
6. The stay of the effective date of the exemption is vacated.
7. This decision is effective on its service date.

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

Anne K. Quinlan  
Acting Secretary