

37619
SEC

SERVICE DATE – DECEMBER 14, 2006

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

MOTION FOR PROTECTIVE ORDER

Decided: December 13, 2006

On November 20, 2006, The Chicago, Lake Shore and South Bend Railway Company (CLS&SB) filed a verified notice of exemption pursuant to 49 CFR 1150.31 et seq. to purchase from Norfolk Southern Railway Company (NSR) and to operate approximately 3.2 miles of rail line (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 leading to the University of Notre Dame, in the City of South Bend, IN (City). The exemption was scheduled to become effective on November 27, 2006. City, Sisters of the Holy Cross, Inc. (Sisters), and Brothers of Holy Cross, Inc. (Brothers), on November 22, 2006, filed a petition to revoke, and a request for a housekeeping stay of the effective date of, the exemption.

CLS&SB had previously filed a verified notice of exemption to acquire and operate this same Line in The Chicago, Lake Shore and South Bend Railway Company—Acquisition and Operation Exemption—Norfolk Southern Railway Company, STB Finance Docket No. 34893 (STB served and published at 71 FR 38447 on July 6, 2006). Petitions to revoke were filed by City, Sisters, and Brothers. After NSR informed the Board that it would not sell the Line and suggested that the exemption be dismissed, CLS&SB requested leave to withdraw the notice of exemption without prejudice. That request was granted in a decision served on September 11, 2006.

In a related matter, on November 21, 2006, City, Sisters, and Brothers filed an adverse abandonment application in Norfolk Southern Railway Company—Adverse Abandonment—St. Joseph County, IN, STB Docket No. AB-290 (Sub-No. 286).¹ On

¹ CLS&SB filed a petition to reject the notice of intent to file the adverse abandonment application in STB Docket No. AB-290 (Sub-No. 286) on November 13, 2006. City, Sisters, and Brothers filed a reply on November 16, 2006. CLS&SB also filed a petition to reject the adverse abandonment application on December 4, 2006, to
(continued...)

November 22, 2006, the Chairman stayed the effective date of the notice of exemption in this proceeding pending clarification of the record and further Board order, because the adverse abandonment application includes the entire Line at issue in the notice of exemption.

On December 4, 2006, CLS&SB filed a motion for a protective order under 49 CFR 1104.14 to make available to the Board under seal certain confidential documents and information in connection with this proceeding.² Such confidential documents allegedly include proprietary email and written correspondence between CLS&SB and NSR in connection with the sale of the subject rail line as well as correspondence with officials of the City of South Bend, IN, allegedly seeking to discourage the University of Notre Dame from using CLS&SB's proposed rail service.

On December 6, 2006, City, Sisters, and Brothers filed a joint reply in opposition to the motion for a protective order. They argue that CLS&SB did not identify with specificity the documents that it wishes to keep confidential and not be part of the public docket, or indicate any basis for claiming that the documents are confidential and proprietary. City, Sisters, and Brothers also argue that there is no basis for CLS&SB's claim that certain documents, including correspondence are or should be deemed confidential because some may already have been made public while others may not be germane to any issue legitimately before the Board. Lastly, they assert that some materials, as a matter of Indiana state law, would be subject to full disclosure.

Good cause exists to grant the motion for protective order. Issuance of the protective order will ensure that confidential information will be used solely for this proceeding and not for other purposes. Accordingly, the motion for protective order will be granted. The arguments of City, Sisters and Brothers to the contrary are premature. After receipt of CLS&SB's materials designated as confidential and the opportunity to view them consistent with the terms of this protective order, City, Sisters, and Brothers will have the opportunity to argue to the Board that all or a portion of the materials have been misclassified. The Board will address those arguments as appropriate.

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

(...continued)

which City, Sisters, and Brothers replied on December 6, 2006. A ruling on the petitions to reject will be made in a future decision.

² A proposed protective order and undertaking were included with the motion.

It is ordered:

1. CLS&SB's motion for a protective order is granted. The documents and information in connection with this proceeding will be kept under seal by the Board and not placed in the public docket or otherwise disclosed to the public, unless otherwise ordered by the Board.
2. The Protective Order and Undertaking contained in the Appendix to this decision are adopted.
3. This decision is effective on its service date.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

APPENDIX

PROTECTIVE ORDER

1. For purposes of this Protective Order, “Confidential Information” means the data and documents furnished by CLS&SB in connection with the above-captioned matter.
2. Confidential Information shall be provided to any employee, agent, counsel, or consultant of any party to this proceeding only pursuant to this Protective Order and only upon execution and delivery to CLS&SB of the attached Undertaking. Confidential Information shall be used solely for the purpose of this and any related Board proceedings, or any judicial review proceeding arising therefrom, and not for any other business, commercial, or other competitive purpose.
3. Confidential Information shall not be disclosed in any way or to any person without the written consent of CLS&SB or an order of the Board, solely for use in connection with this and related Board proceedings, or any judicial review proceeding arising therefrom, provided that such person has been given and has read a copy of this Protective Order and agrees to be bound by its terms by executing the attached Undertaking prior to receiving access to this information.
4. Any documents containing Confidential Information must be destroyed, and notice of such destruction must be served on CLS&SB at the completion of this and any related Board proceedings, or any judicial review proceeding arising therefrom, whichever comes last.
5. If the Board retains the Confidential Information, it shall, in order to keep it confidential, treat the information in accordance with the procedure set forth at 49 CFR 1104.14.
6. If any party intends to use Confidential Information at hearings in this proceeding or in any related Board proceedings, or in any judicial review proceeding arising therefrom, the party shall submit any documents setting forth or revealing such Confidential Information to the Board, or the reviewing court as appropriate, under seal, and shall accompany such submission with a written request to the Board or the court to (i) restrict attendance at the hearing during discussion of such Confidential Information, and (ii) restrict access to the portion of the record or briefs reflecting discussion of such Confidential Information in accordance with the Protective Order.
7. All parties must comply with all of the provisions stated in this Protective Order unless good cause, as determined by the Board, is shown by any party to warrant suspension of any of the provisions herein.
8. All parties must file simultaneously a public version of any Confidential submission filed with the Board.

UNDERTAKING

CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order governing the filing of Confidential Information by The Chicago, Lake Shore & South Bend Railway Company (CLS&SB) in STB Finance Docket No. 34960, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any data or information obtained under this Undertaking, or to use or permit the use of any techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and preservation of evidence and argument in STB Finance Docket No. 34960 or any judicial review proceedings taken or filed in connection therewith. I further agree not to disclose any data or information obtained under this Protective Order to any person who is not also bound by the terms of this order and has executed an Undertaking in the form hereof.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that CLS&SB shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Signed: _____

Position: _____

Affiliation: _____

Dated: _____