

**SOMMER BARNARD ACKERSON**  
ATTORNEYS, PC

210432

March 30, 2004



Via Hand Delivery

The Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20423-0001

Re: Docket No. AB-290 (Sub-No. 168X),  
Norfolk and Western Railway Company – Abandonment Exemption –  
Between Kokomo and Rochester in Howard, Miami, and Fulton Counties, IN

Dear Secretary Williams:

Attached please find one duly-executed original accompanied by ten copies *plus* a 'File Copy' of the Petition for Reconsideration of William C. Friend, Steven Furnivall and Linda Schanlaub and Affidavit of Steven D. Furnivall (only copy – original to be submitted at later date) for filing with the Surface Transportation Board. Kindly time-stamp the 'File Copy' and return it to the undersigned by hand.

Thank you for your consideration.

Respectfully submitted,

Linda Alston  
Secretary to the Firm

CF/la

Attachments

cc: William C. Friend (With Attachment)  
Steven Furnivall (With Attachment)  
Ken Spangler (With Attachment)  
Linda Schanlaub (With Attachment)

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ENTERED  
Office of Proceedings  
MAR 31 2004

BEFORE THE  
SURFACE TRANSPORTATION BOARD



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RE: NORFOLK AND WESTERN RAILWAY :  
COMPANY – ABANDONMENT EXEMPTION – : Docket No. AB-290  
BETWEEN KOKOMO AND ROCHESTER IN : Sub-No. 168X  
HOWARD, MIAMI, AND FULTON COUNTIES, IN :

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**PETITION FOR RECONSIDERATION OF  
WILLIAM C. FRIEND, STEVEN FURNIVALL AND LINDA SCHANLAUB**

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Nels Ackerson  
Cecilia Fex  
Elaine Panagakos  
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1666 K Street  
Suite 1010  
Washington, DC 20006  
Telephone: (202) 833-8833  
Facsimile: (202) 833-8831

*Counsel for Petitioners*

Dated: March 30, 2004

ENTERED  
Office of Proceedings  
MAR 31 2004  
FEDERAL  
Surface Transportation Board

Pursuant to 49 C.F.R. § 1115.3, Petitioners, William C. Friend, Steven Furnivall, and Linda Schanlaub, who are owners of land underlying the subject railroad right-of-way, respectfully seek reconsideration of the Surface Transportation Board's (the "Board") Decision and Notice of Interim Trail Use or Abandonment served on March 10, 2004 (the "March 10 NITU"). The March 10 NITU involved material error in at least two respects: (1) it purports to exercise jurisdiction over a segment of right-of-way as to which abandonment has concededly been consummated; and (2) it purports to exercise jurisdiction over a second, larger segment of railroad right-of-way which has been severed from the interstate rail network, and over which, accordingly, the Board has no jurisdiction pursuant to 49 U.S.C. § 10501.

The bases for Petitioners' requested relief are set forth in more detail below.

#### **SUMMARY OF FACTUAL BACKGROUND**

By decision served May 14, 1996, the Board granted the request for exemption of Norfolk and Western Railway Company ("N&W"), the predecessor of Norfolk Southern Railway Company ("NSR"), for N&W to abandon 38.4 miles of rail line between milepost I-57.2 at or near Kokomo and milepost I-95.6 at or near Rochester, in Howard, Miami, and Fulton Counties, Indiana. Also pending before the Board at that time was the request of Indiana Trails Fund, Inc. ("ITF"), together with Hoosier Rails-To-Trails Council, Inc., for the issuance of a NITU for the entire line. The May 14, 1996 decision granted that request only as to the segment of the line between milepost I-57.2 and I-74.2 at Peru, because the remaining portion of the line between milepost I-74.2 and milepost I-95.6 was subject to the trackage rights of Indiana Hi-Rail Corporation ("IHRC"), then operating as a Chapter 11 debtor under the jurisdiction of the U.S. Bankruptcy Court for the Southern District of Indiana. Noting that the abandonment process could not be completed as to that portion of the line until IHRC's discontinuance of its trackage

rights was authorized by the Bankruptcy Court, the May 14, 1996 decision indicated that a trail use condition could be imposed as to that portion *if* an appropriate request were timely made. Specifically, the Board stated: "To facilitate our action on the request for trail use, N & W must inform the trail user if and when IHRC's trackage rights are discontinued. We reserve jurisdiction to impose a trail use condition if an appropriate request is made following IHRC's discontinuance. *If no trail use condition is sought within 10 days after N & W notifies the trail user of IHRC's discontinuance, then N & W may complete the abandonment process as to that portion of the line.*" (Emphasis added.)

In its February 17, 2004 letter to the Board, NSR admits that the Bankruptcy Court entered its order of confirmation of IHRC's Chapter 11 Plan, which included discontinuance of the trackage rights at issue here, on January 15, 1998; states that "NSR and ITF obviously were aware of the developments with respect to the IHRC bankruptcy and proceeded to negotiate for trail use;" and admits that the intervening six years passed without any request for trail use as to the portion of the line between milepost I-74.2 and milepost I-95.6 being presented to the Board, purportedly due to "oversight."

### ARGUMENT

**1. The March 10 NITU Errs In Purporting To Exercise Jurisdiction Over Abandoned Right-of-Way**

In its letter to the Board of February 17, 2004, NSR makes specific reference to a document in its files that states the following about the subject rail line: "I-57.2 to I-58.5, reclassify as industrial track; I-58.5 to I-96.5 . . . transfer to Indiana Trails Fund; *I-72.7 - I-75.5 exception to trails group - fully abandoned. Advised STB.*" 2/17/04 NSR letter to Board at 4 (emphasis added). The entire segment of the line between mileposts I-72.7 and I-75.5, therefore, has been conceded by NSR to be abandoned. In the March 10 NITU, however, the Board states

that abandonment was consummated only as to the segment of the line between I-74.2 and I-75.5 (the “admittedly abandoned segment”) – apparently because NSR, later in its letter, requested that the Board issue a NITU “which would cover the Peru-Rochester segment, except for the portion between Mileposts I-74.2 and I-75.5, which NSR has abandoned.” 2/17/04 NSR letter to Board at 5. The fact remains, however, that the segment of the line between I-72.7 and I-74.2, which is part of the southern portion of the line covered by the May 14, 1996 NITU, is now known to have been abandoned. Inasmuch as the May 14, 1996 NITU, as modified by the March 10 NITU, constitutes an ongoing exercise of jurisdiction by the Board over an abandoned segment of right-of-way, it is a material error that should be corrected upon reconsideration.

**2. The March 10 NITU Errs In Purporting To Exercise Jurisdiction Over Right-of-Way Which Has Been Severed From the Interstate Rail Network**

Pursuant to the applicable provisions of 49 U.S.C. § 10501, the Board has jurisdiction over “transportation by rail carrier” “between a place in a State and a place in the same or another State *as part of the interstate rail network.*” (Emphasis added.) The Board has “correctly determined that it does not have jurisdiction over lines that are no longer part of the national rail system.” *RLTD Railway Corp v. Surface Transportation Board*, 166 F.3d 808, 813 (6th Cir. 1999).

Whether the abandoned segment of the right-of-way discussed in Section 1 is the full abandoned segment or only the admittedly abandoned segment, the result of the abandonment is to sever the connection of the right-of-way north of milepost I-75.5 from the interstate rail network to the south. Petitioners submit herewith evidence that the portion of the right of way extending northward from milepost I-75.5, through Miami County and encompassing three or more miles in Fulton County, has also become disconnected from the national rail system to the north. This is because the tracks have been removed from a point south of Big Hill in the

Northeast Quarter of Section 21 of Township 30 North, Range 3 East, west of County Road 300 East (Wabash Road), to the south. Affidavit of Steven D. Furnivall, ¶ 5. The removal took place at a time before the March 10 NITU was issued, and before its issuance was even requested. *Id.* at ¶ 6. Thus, the right of way is disconnected from the interstate rail system to the north, as well as the south.

What is left, therefore, is a segment of right-of-way which is entirely within the state of Indiana and is entirely disconnected from the interstate rail network. The Board lacks jurisdiction over this segment of right-of-way. The March 10 NITU accordingly should, upon reconsideration, be vacated as to that segment.

**3. An Extension of Time For Further Development of This Petition Is Warranted**

Petitioners and their counsel were not served with the March 10 NITU, and first learned of its existence on March 25, 2004. They have included with this Petition only such information as they have been able to substantiate with evidence in the very short time frame they have had to prepare and file it in time for the March 30th deadline. NSR has acknowledged that this matter is an “old” one which has been brought back before the Board due to an “oversight.” 2/17/04 NSR letter to STB. As noted above, the original NITU in the matter was issued on May 14, 1996.

Under these circumstances, and given the lengthy and complicated history of the matter, Petitioners respectfully suggest that an extension of time is warranted. Petitioners accordingly request an additional twenty (20) days in which to submit evidence and/or arguments on the issues presented in this Petition, and on any additional issues that may prove relevant to the matter on which reconsideration is sought.

**CONCLUSION**

For the foregoing reasons, Petitioners respectfully request that the Board (1) reconsider and vacate the March 10 NITU; and (2) grant Petitioners an additional twenty (20) days in which to submit further evidence and arguments.

Date: March 30, 2004

Respectfully submitted

**SOMMER BARNARD ACKERSON, PC**

By   
Nels Ackerson

Nels Ackerson  
Cecilia Fex  
Elaine Panagakos  
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*Counsel for Petitioners*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 30th day of March, 2004, I served a copy of the  
Petition for Reconsideration of William C. Friend, Steven Furnivall and Linda Schanlaub  
by facsimile on the following:

Richard Vonnegut  
President  
Indiana Trails Fund  
Post Office Box 402  
Indianapolis, Indiana 46206-0402  
Facsimile: (317) 237-9425

James R. Paschall  
General Attorney  
Norfolk Southern Corporation  
Law Department  
Three Commercial Place  
Norfolk, Virginia 23510-9241  
Facsimile: (757) 533-4872

  
Nels Ackerson

BEFORE THE SURFACE TRANSPORTATION BOARD

STB Docket No. AB-290 (Sub-No. 168X)

NORFOLK AND WESTERN RAILWAY COMPANY-  
ABANDONMENT EXEMPTION- BETWEEN KOKOMO AND ROCHESTER  
IN HOWARD, MIAMI, AND FULTON COUNTIES, IN



**AFFIDAVIT OF STEVEN D. FURNIVALL IN SUPPORT  
OF PETITION FOR RECONSIDERATION**

STATE OF INDIANA        )  
                                  ) ss.  
COUNTY OF FULTON     )

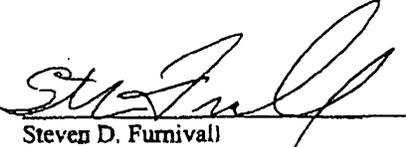
I, Steven D. Furnivall, being first duly sworn on oath, state as follows:

1. I am over the age of 21, understand the taking of an oath, and am competent to give this affidavit. The matters set forth in this affidavit are based upon my personal knowledge.
2. I own Green Oak Antiques which is in Fulton County and located at 4166 East 300 South, Rochester, Indiana 46975.
3. My property is adjacent to the portion of the Norfolk and Western Railroad line extending between milepost I-75.5 near Peru, Indiana and milepost I-95.6 near Rochester, Indiana, just south of Big Hill ("Norfolk and Western line"), which was included in the amended decision and notice of interim trail use or abandonment (NITU) that was served March 10, 2004.
4. My counsel requested I make this affidavit to confirm where the Norfolk and Western line is disconnected from the national rail system south of Big Hill.
5. The Norfolk and Western line is disconnected from the national rail system at a

point south of Big Hill in the Northeast Quarter of Section 21 of Township 30 North, Range 3 East, west of County Road 300 East (Wabash Road) where the tracks have been removed to the south.

6. The tracks in question were removed before January, 1, 2004.

IN WITNESS WHEREOF, I have hereunto set my hand, this 30<sup>th</sup> day of March, 2004.

  
Steven D. Furnival

Sworn to and subscribed before me this 30<sup>th</sup> day of March, 2004.

  
Notary Public for the State of Indiana

Harriet E. Provost, Notary Public  
residing in Fulton County, Indiana

My Commission Expires:  
4/11/2009