

216852

JOHN D. HEFFNER, PLLC

1920 N STREET, N.W.

SUITE 800

WASHINGTON, D.C. 20036

(202) 263-4180

FAX (202) 296-3939

j.heffner@verizon.net

ENTERED
Office of Proceedings

JUN 26 2006

Part of
Public Record



June 26, 2006

BY HAND

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

**RE: STB Finance Docket No. 34893, The Chicago,
Lake Shore And South Bend Railway Company
- Acquisition And Operation Exemption -
Norfolk Southern Railway Company**

Dear Mr. Williams:

On June 14, 2006, I submitted a verified notice of exemption for the acquisition and operation of 3.2 miles of railroad in and around South Bend, IN, on behalf of The Chicago, Lake Shore And South Bend Railway Company ("CLS&SB") in the above-captioned proceeding. Yesterday, I learned that the City of South Bend had filed a letter purporting to be a "Petition to Revoke" premised on "false and misleading statements" the City alleges CLS&SB's notice contains. This letter constitutes CLS&SB's reply and amendment.

More specifically, the City alleges that CLS&SB's notice is misleading in two respects. First, it states that the notice and Exhibit C (the caption summary) refer to "Notre Dame University in the City of South Bend." Apparently and unknown to the undersigned counsel as well as Norfolk Southern officials who reviewed this filing before submission, the correct name for the school is "The University of Notre Dame" and it is located in Clay Township, IN, outside the City's corporate limits. CLS&SB appreciates the City's action in bringing this inadvertent and immaterial error to its attention and asks the Board to amend the notice of exemption to reflect this change. I am enclosing an amended page three of the notice and Exhibit C to reflect these changes.

Second, the City urges the Board to revoke CLS&SB's notice because it improperly describes the subject rail line as "active" inasmuch as it has been described as out of service for at least 10 years, track has been ripped out at grade crossings with rails and ties missing, grade crossings have been paved over, the bridge over the St. Joseph River is said to be missing, and the line is overgrown with vegetation.

Inasmuch as the City is obviously unfamiliar with Surface Transportation Board precedent, it misunderstands the distinction between "active" and "abandoned" rail lines. Under STB and Interstate Commerce Commission precedent, a rail line will be regarded as "active" for jurisdictional purposes unless it has been approved for abandonment and the abandonment has been consummated. See, e.g., Black v. I.C.C., 762 F.2d 106, 112 (D.C. Cir. 1985) ("abandonment...is characterized by an intention of the carrier to cease permanently or indefinitely all transportation service on the relevant line.") and Common Carrier Status of States, State Agencies, 363 I.C.C. 132, 135 (1980) ("when a rail line has been fully abandoned, it is no longer a (sic) rail line and the transfer of the line is not subject to our jurisdiction. However, when a line has not been fully abandoned, the transfer is subject to our jurisdiction").

To the best of CLS&SB's and Norfolk Southern's knowledge, Consolidation Rail Corporation [the line's former owner] never sought abandonment authority, let alone consummated that authority. Although a line could have been unused for 200 years with 50-foot high weeds growing in the middle of the track, it is still an "active" line for STB regulatory purposes until the carrier takes the proper steps to obtain and then consummate abandonment authority. CLS&SB's characterization of the line as "active" was and still is correct.

Moreover, the City fails to show any other basis for revocation of the sought exemption. As a general matter, the Board and the ICC have consistently held that an exemption may be revoked "when it finds that application of a provision of this subtitle to the person, class, or transportation is necessary to carry out the transportation policy of sec. 10101a of this title. Thus, the standard for revoking an exemption is whether regulation is needed to carry out the rail transportation policy. The party seeking revocation has the burden of proof, and petitions to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted. Minnesota Comm. Ry., Inc. - Trackage Exempt. - BN RR. CO., 8 I.C.C.2d 31, 35 (1991) and

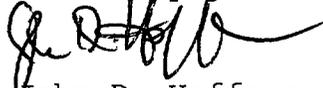
cases cited therein. Typically, the Board revokes (or rejects) an exemption where the notice contains *materially* false or misleading information, the applicant has utilized the wrong regulatory procedure, the applicant is misusing Board procedures for a sham transaction, the transaction is very controversial requiring a more detailed record, or there is a *demonstrated* need for regulation. Id. at 37; The Land Conservancy of Seattle & King County -- Acquisition & Operation Exemption -- The Burlington Northern & Santa Fe Ry. Co., STB Finance Docket No. 33388 (STB served Sept. 26, 1997) (Board will revoke an exemption "[t]o protect the integrity of our processes"); Riverview Trenton Railroad Company -- Acquisition and Operation Exemption -- Crown Enterprises, Inc., STB Finance Docket No. 33980 (STB served Feb. 15, 2002) (controversial proceeding not suitable for class exemption); SF&L Railway, Inc.-Acquisition And Operation Exemption-Toledo, Peoria And Western Railway Corporation, et al, STB Finance Docket No. 33995 (STB served October 17, 2002) (abuse of class exemption process); and Finance Docket No. 32407 (ICC served April 22, 1994) (material misstatements of fact and controversial proceeding).

Here the City neither asserts nor proves any of these established bases for challenging an exemption. It has failed in its burden of proof. Its Petition should be denied.

To the extent the City has legitimate concerns with the resumption of railroad service, CLS&SB is both willing and anxious to meet and work with City officials. CLS&SB would welcome a constructive dialogue.

Please date stamp and return one copy of this letter.

Sincerely yours,



John D. Heffner
Counsel

cc: Jeffrey M. Jankowski, Esq.
Mr. Robert Harris
Mr. Gary Landrio
Greg E. Summy, Esq.

Statement of Agreement(s)

49 CFR 1150.33(c)

The Chicago, Lake Shore And South Bend Railway Company ("CLS&SB") has reached an agreement with Norfolk Southern Railway Company ("NSR"), owner of the subject railroad, for CLS&SB to purchase and operate about 3.2 route miles of railroad between MP UV0.0 and MP UV2.8 and between MP ZO9.48 and MP ZO9.9 including any ownership interest in the spur leading to the University of Notre Dame in Clay Township, near the City of South Bend, IN.

CLS&SB plans to close after all applicable notice periods have run, more than seven days from the date of filing this notice, and commence operations at a later date.

Operator of the Property

49 CFR 1150.33(d)

In all cases anticipated by this Notice, and as described in the transaction summary provided below, CLS&SB will hold itself out to provide common carrier rail freight service over the subject rail facilities.

Brief Summary of Transaction

49 CFR 1150.33(e)

This exemption involves the purchase and operation of NSR's line by a new class III short line railroad [CLS&SB]. As a result of this transaction, CLS&SB will furnish service formerly provided by Consolidated Rail Corporation ("Conrail") prior to its acquisition by NSR and CSX Transportation. See, STB FD. No. 33388, CSX Corp. et al. - Control - Conrail Inc. et al.,

EXHIBIT C

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 34893

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

VERIFIED NOTICE OF EXEMPTION
PURSUANT TO 49 U.S.C. 10901 and 49 CFR 1150.31

NOTICE OF ACQUISITION AND OPERATION OF RAIL LINE
INFORMATION REQUIRED BY 49 CFR 1150.31

The Chicago, Lake Shore And South Bend Railway Company ("CLS&SB"), a newly established noncarrier, has filed a Verified Notice of Exemption under 49 CFR 1150.31 to purchase and operate the following railroad line currently owned by Norfolk southern Railway Company ("NSR"). The subject rail lines consist of 3.2 miles of railroad between MP UV0.0 and MP UV2.8 and between MP Z09.48 and MP Z09.9 including any ownership interest in the spur leading to the University of Notre Dame in Clay Township near the City of South Bend, IN.

CLS&SB plans to consummate this transaction after any applicable notice periods.