

218498

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C. 20423

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

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

REPLY COMMENTS AND ARGUMENT IN SUPPORT OF
ADVERSE ABANDONMENT APPLICATION OF THE
CITY OF SOUTH BEND, THE BROTHERS OF HOLY CROSS, INC. AND THE SISTERS
OF THE HOLY CROSS, INC.

Jeffrey M. Jankowski
Deputy City Attorney
227 West Jefferson Blvd.
South Bend, IN 46601
Counsel to the
City of South Bend, IN
tele: (574) 235-9241
fax: (574) 235-9892

Richard H. Streeter
Richard L. Mintz
Richard J. Deahl
Barnes & Thornburg LLP
750 17th Street, N.W., Suite 900
Washington, D.C. 20006
Counsel to the Brothers of Holy Cross, Inc.
and Sisters of the Holy Cross, Inc.
tele: (202) 408-6933
fax: (202) 289-1330

Date: January 22, 2007

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF UNCONTESTED FACTS	2
ARGUMENT	4
Applicable Legal Standards	4
A. Abandonment is permitted by the present and future PC&N	5
B. Abandonment is consistent with the goals of the Rail Transportation Policy	10
Reply Comments of Norfolk Southern Railway Company	13
A. NSR has not asked the Board to deny the adverse application in this proceeding	13
B. The facts herein satisfy the rigid standards identified by the Board (and by NSR) for evaluation of adverse abandonment applications	15
Protest of CLS&SB	18
A. The CLS&SB's Protest lacks credibility	18
B. CLS&SB's claim that it is the authorized and exempted operator of the line is specious	20
C. CLS&SB's reliance on proposed vintage trolley operations to oppose the abandonment of the Line is irrelevant	22
D. CLS&SB's procedural contentions lack merit	25
Comment of Allen L. Stevens Jr.	25
SEA Environmental Assessment	26
CONCLUSION	29
CERTIFICATE OF SERVICE	30

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C. 20423

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

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

REPLY COMMENTS AND ARGUMENT IN SUPPORT OF
ADVERSE ABANDONMENT APPLICATION OF THE
CITY OF SOUTH BEND, THE BROTHERS OF HOLY CROSS, INC. AND THE SISTERS
OF THE HOLY CROSS, INC.

Come now the City of South Bend, the Brothers of Holy Cross, Inc. and the Sisters of the Holy Cross, Inc. (hereinafter collectively referred to as "Applicants"), by and through counsel of record, and file their Reply Comments in support of their Adverse Abandonment Application. Applicants seek a finding that the public convenience and necessity require or permit the abandonment of approximately 3.7 miles of railroad located in St. Joseph County, Indiana. Specifically, Applicants seek approval from the Board for the adverse abandonment of two lines of railroad owned by Norfolk Southern Railway Company ("NSR").¹ The subject lines extend from Milepost UV 0.0, which is located in a semi-industrial area in the western portion of the City, to Milepost UV 2.8 and from MP ZO 9.6 to Milepost ZO 10.5 (collectively referred to as "the Line" or the "Notre Dame lead"). As reflected by the attached maps, the individual lines connect with one another at MP UV2.8, which is located on the Brothers' campus, and thereafter

¹ As recognized in *Consolidated Rail Corp. v. I.C.C.*, 29 F.3d 706, 710 (D.C. Cir. 1994), "There is no requirement ...that the application [for abandonment] be made by the carrier whose operations are sought to be abandoned. *Thompson v. Texas Mexican Ry.*, 328 U.S. 134, 145, 66 S.Ct. 937, 944, 90 L.Ed. 1132 (1946), and, in fact, the [STB] may grant an application even when the carrier objects. *Modern Handcraft, Inc.*, 363 I.C.C. 969, 972 (1981)." Although NSR, which is the owning carrier, has urged the Board not to expand the holding in *Modern Handcraft*, it has not protested the abandonment of the Line or requested the Board to deny the application.

terminate on the Sisters' campus. As NSR has explained, the lines have been treated as a "3.7-mile dead-end branch line or industrial lead track since at least 1982 [and] has been referred to as the Niles Industrial Track, the South Bend Secondary Track, and in whole or in part, the Notre Dame lead."² Should the Board authorize the abandonment of the Line, an industrial spur located on the Sisters' campus will also be abandoned.³

STATEMENT OF UNCONTESTED FACTS

It is respectfully submitted that the following facts have been established by Applicants and/or NSR and are incontestable.

- NSR acquired the Line from Consolidated Rail Corporation ("Conrail") on June 1, 2001. NSR Reply Comments at p. 5.
- No rail service has been provided by NSR over the Line since that date. *Id.*
- No rail service was provided by Conrail over the Line for at least 4 or 5 years before it was acquired by NSR. *Id.*
- The mainline switch to the Line from NSR's Chicago mail line was intact until some time after June 1, 2004. *Id.* at p. 7.
- Track had been disconnected past the clearance point at an earlier date. *Id.*
- The Line was severed from the national rail system on the north end of the line by two Conrail abandonments, namely *Conrail Abandonment in South Bend Between Milepost 10.5 and Milepost 11.8, St. Joseph County, IN*, ICC Docket No. AB-167 (Sub-No. 407N) (ICC served April 22, 1982) and *Conrail Abandonment in Berrien County, MI and St. Joseph County, IN*, ICC Docket No. AB-167 (Sub-No. 672N) (ICC served August 31, 1984). *Id.* at p. 7, n.5.
- The Line is in poor condition and would need to be rehabilitated in order to restore service over it because of the Line's long period of non-use. *Id.* at p. 7.
- Segments of the track have been removed. *See* Photographs submitted with Applicants' Application as Attachment C.

² NSR Reply Comments at p. 5, n.1.

³ The Board has no statutory authority over the abandonment of a spur line. *See*, 49 U.S.C. § 10906. The easements that underlie the industrial spur, which are rooted in an agreement, dated October 27, 1903, have expired as a matter of contract law. The 1903 agreement specifically provides, as herein pertinent, that "[i]f the use of said premises for the purposes herein specified should be discontinued [the premises] shall thereby be discharged and freed from such easement, and revert without reconveyance ... as fully and unreservedly as though said easement never existed." Because railroad operations were discontinued several years ago, the underlying real property has been freed from such easement.

- Segments of the track have been paved over at road crossings. *Id.*; *see also* NSR Reply Comments at p. 7.
- Coal traffic moved over the Line to the University of Notre Dame (“Notre Dame”) until about the mid-1990s. *Id.* at n. 2.
- Notre Dame currently receives coal for its on-campus power plant via NSR rail movement to a transload facility in the South Bend area for final delivery to the campus via truck. *Id.* at p. 6.
- NSR has located no written record that confirms that its representatives ever solicited traffic for movement over the Line to the University or any other party. *Id.*
- NSR had retained the Line in order to have a sufficient period of time in which to determine whether restored service over the Line might become feasible. *Id.*
- As late as the summer of 2006, NSR had contemplated selling the Line to The Chicago, Lake Shore & South Bend Railway Company (“CLS&SB”). NSR Reply Comments at p. 6.
- In June 2006, Notre Dame publicly announced that it would not alter the manner in which it currently receives coal for its on-campus power plant. *Id.* *See also*, Applicants’ Attachment I.
- Because Notre Dame is the only potential rail customer that is currently located on the Line, NSR decided that its public announcement negated the objective of the proposed sale to CLS&SB. NSR Reply Comments at pp. 6-7.
- Following the public announcement that Notre Dame would not support future shipments of coal over the Line, NSR advised the Board that it would not sell the line to CLS&SB with whom NSR had been negotiating. NSR Reply Comments at p. 7.
- No shipper has appeared in this proceeding to indicate that it has a need for future rail service.
- No receiver of rail traffic has appeared in this proceeding to indicate that it has a need for future rail service.
- On November 20, 2006, CLS&SB filed a Verified Notice of Exemption in which it claimed that it “anticipates reaching an agreement with Norfolk Southern Railway Company (‘NSR’), owner of the subject railroad,” so that it could purchase and operate the Line. *See*, STB F.D. 34960, *The Chicago, Lake Shore and South Bend Railway Company -- Acquisition and Operation Exemption -- Norfolk Southern Railway Company*.
- On November 22, 2006, the Board, by Chairman Nottingham, ordered that “[t]he effective date of the notice of exemption in this proceeding is stayed pending further order of the Board.” *See* Attachment J, STB Decision, Docket No. F.D. 34960, *The Chicago, Lake Shore and South Bend Railway Company -- Acquisition and Operation Exemption -- Norfolk Southern Railway Company*.
- Because the stay has not been lifted by the Board, the notice of exemption has not become effective.

- There is no evidence that NSR has any intention of selling the Line to CLS&SB.
- As of this date, NSR is the sole owner of the Line.
- No entity other than NSR is authorized to operate the Line.

ARGUMENT

Applicable Legal Standards

Under 49 U.S.C. § 10903(d), the standard governing any application to abandon or discontinue service over a line of railroad, including an adverse abandonment, is whether the present or future PC&N require or permit the proposed abandonment. In implementing this standard, the Board must balance the competing benefits and burdens of abandonment on all interested parties, including the railroad, the shippers on the line, the communities involved, and interstate commerce generally. See, *New York Cross Harbor R.R. v. STB*, 374 F.3d 1177, 1180 (D.C.Cir. 2004) (“*Cross Harbor*”); *City of Cherokee v. ICC*, 727 F.2d 748, 751 (8th Cir. 1984). The Board must also take the goals of the Rail Transportation Policy (“RTP”), set forth at 49 U.S.C. § 10101, into consideration in making its public interest determinations.

As the Board explained in *Seminole Gulf Railway, L.P.--Adverse Abandonment--In Lee County, FL*, STB Docket No. AB-400 (Sub-No. 4) (STB served November 17, 2004) (“*Seminole Gulf*”):

We have exclusive and plenary jurisdiction over abandonments, including adverse abandonments, in order to protect the public from an unnecessary discontinuance, cessation, interruption, or obstruction of available rail service. See *Modern Handcraft, Inc.--Abandonment*, 363 I.C.C. 969, 972 (1981) (*Modern Handcraft*). Accordingly, we preserve and promote continued rail service where the carrier has expressed a desire to continue operations and has taken reasonable steps to acquire traffic. See *Chelsea Property Owners--Abandonment--Portion of the Consolidated Rail Corp.'s West 30th Street Secondary Track in New York, NY*, 8 I.C.C.2d 773, 779 (1972) (*Chelsea*), *aff'd*, *Consolidated Rail Corp. v. ICC*, 29 F3d 706 (D.C. Cir. 1994) (*Conrail*). On the other hand, we do not allow our jurisdiction to be used to shield a carrier from the legitimate processes of State law where no overriding Federal

interest exists. *See CSX Corporation and CSX Transportation, Inc.--Adverse Abandonment Application--Canadian National Railway Company and Grand Trunk Western Railroad, Inc.*, STB Docket No. AB-31 (Sub-No. 38) (STB served February 1, 2002).

If we conclude that the PC&N do not require or permit continued operations over the track by the carrier in question, our decision removes that shield, thereby enabling the applicant to pursue other legal remedies to force the carrier off the line. *Conrail*, 29 F.3d at 709; *Modern Handcraft*, 363 I.C.C. at 972. But in applying our balancing test, we note that significant weight has been given to the fact that there is a potential for continued operations and the carrier has taken reasonable steps to attract traffic. *See Cross Harbor*, 374 F.3d at 1186; *Conrail*, 29 F.3d at 711, *aff'd Chelsea*, 8 I.C.C.2d at 778. In abandonment cases, the applicant has the burden of proof.

It is respectfully submitted that the facts in this case, even when the most conservative standards are applied, support the adverse abandonment of the Line. As Applicants stated in their application, and as NSR has confirmed, the Line has lain dormant for at least ten years. Hence, there is no current activity over the Line. Even more important, Applicants and NSR agree that there is no competent evidence of any future need for the Line that would warrant denying the adverse abandonment application.

A. Abandonment is permitted by the present and future PC&N.

There is overwhelming evidentiary support for a finding that the PC&N require or permit the abandonment of the Line. As conclusively demonstrated by the uncontested facts, no railroad operations have been conducted over the Line for over a decade, or in the words of NSR, since "about the mid-1990's."⁴ And as NSR has candidly admitted, "NSR has located no written record that confirms that its representatives ever solicited traffic for movement over the Line to the University or any other party."⁵

⁴ NSR Reply Comments at p. 5, n.2.

⁵ *Id.*

In fact, although NSR has requested the Board to take a conservative approach, it has not asked the Board to deny this application. Equally important, no shipper has appeared in this proceeding to complain about the lack of rail service or to request the Board to deny the application because it anticipates future rail shipments. Therefore, there is no demonstrated need or any likelihood that there would be any need for future rail service that would warrant retaining the tracks.

Given the foregoing, this case bears no resemblance to cases such as *Cross Harbor*; *Seminole Gulf*; *Salt Lake City Corporation--Adverse Abandonment--in Salt Lake City, UT*, STB Docket No. AB-33 (Sub-No. 183)(STB, March 6, 2002) ("*Salt Lake*"); or any other precedent where the Board or the ICC denied abandonment authority after finding that the owning carrier had expressed a desire to continue operations and taken reasonable steps to acquire traffic. Unlike the situation in any of those cases, the record herein is devoid of any competent evidence that NSR wishes to *initiate* operations or that it has taken any steps to acquire traffic that it would transport over the Line.

Unlike many of the previous adverse abandonment cases, the adverse abandonment of the Line will not have any adverse impact or cost to NSR. As reflected by NSR's decision to remove the switch from its Chicago mainline, the Line did not fit within NSR's immediate needs or future plans. Moreover, given NSR's expressed reasons for terminating negotiations with CLS&SB,⁶ NSR is convinced that restored service over the Line is not feasible.

CLS&SB, which is a non-carrier, says that it should be provided an opportunity to acquire the Line and operate it.⁷ Although CLS&SB insists that Buckeye Materials, Inc.

⁶ See NSR Reply Comments at p. 6.

⁷ Although CLS&SB has expressed its confidence in the availability of future traffic, it has utterly failed to carry its burden of submitting competent evidence to support that confidence. This factor serves to distinguish the instant situation from that in *Wisconsin Dept. of Transp. - Aband. Exempt.*, ICC F.D. No. 31303, slip op. at 4-5 (December

("Buckeye")⁸ and the University of Notre Dame support restoration of rail service, CLS&SB is not authorized or qualified to speak for either Buckeye or Notre Dame.

If Notre Dame truly felt that restoration of rail service was in its best interest, it would have vigorously supported CLS&SB months ago. It did not do so. Instead, in June 2006, Notre Dame publicly announced that it would continue to receive coal via trucks, a practice it has followed for the past decade.⁹ Moreover, Notre Dame had the opportunity, along with any other potential shipper, to oppose the instant application and support CLS&SB's position. It did not do so. Hence, the record is devoid of any evidence that Notre Dame either opposes abandonment or supports CLS&SB. The same is true with respect to Buckeye.

As NSR has explained, Notre Dame's public announcement caused NSR management to conclude that Notre Dame's decision "effectively negated the objective" of the potential sale of the line.¹⁰ In other words, NSR's highly competent and efficient management concluded that without Notre Dame's active support, there is no traffic to sustain financially viable rail service. No one pressured NSR management to reach that reasoned decision. Given Notre Dame's obvious decision that it would not oppose the abandonment, NSR's reasoning, which reflects years of experience in the rail industry, should be respected by the Board.

5, 1988) ("*Wisdot*"). As the ICC subsequently explained in *Chelsea Property Owners - Aban. - The Consol. R.*, 8 I.C.C.2d 773, 778-79 (1992), *aff'd sub nom Consolidated Rail Corp. v. I.C.C.*, 29 F.3d 706 (D.C. Cir. 1994) ("*Chelsea*"), in *Wisdot*, "{T}he carrier has expressed its confidence in the availability of future traffic, and has submitted evidence to support that confidence" (emphasis added). Therefore, even if CLS&SB had standing to place itself in NSR's shoes, which it does not, it has no demonstrated, competent shipper support to back up its hearsay contentions.

⁸ Although CLS&SB refers to "Buckeye Materials, Inc," its consultant, John P. Hankey, refers to the company as Buckeye Industrial Minerals.

⁹ CLS&SB's repeated accusation that Notre Dame was intimidated by City officials into withdrawing support is patently absurd and wholly unsupported by any evidence.

¹⁰ NSR Reply Comments at p. 6; *see also*, Applicants' Attachment K, Letter to Vernon A. Williams from James R. Paschall, dated August 15, 2006, filed in STB F.D. 34893, The Chicago, Lake Shore and South Bend Railway Company-Acquisition and Operation Exemption-Norfolk Southern Railway Company.

Given the total absence of *any* shipper support for future rail service, as well as the absence of rail service for over a decade, the instant proceeding fits snugly within the narrow line of cases in which the Board and the ICC authorized adverse abandonments. As the D.C. Court observed in *Cross Harbor*, 374 F.3d at 361, the Board has consistently authorized adverse abandonments when: (i) “[n]o shipper will lose rail service as a result of the abandonment” (citing *Norfolk & Western Railway Company - Abandonment Exemption*, 3 S.T.B. 110, 119 (1998)); (ii) “no shippers have protested the [adverse abandonment] application” (citing *CSX Corporation and CSX Transportation, Inc.--Adverse Abandonment Application--Canadian National Railway Company and Grand Trunk Western Railroad, Inc.*, STB Docket No. AB-31 (Sub-No. 38) (STB served February 1, 2002)); (iii) there is an “absence of future traffic prospects” (citing *Chelsea Property Owners - Aban. - The Consol. R.*, 8 I.C.C.2d 773, 791 (1992), *aff’d sub nom Consolidated Rail Corp. v. I.C.C.*, 29 F.3d 706 (D.C. Cir. 1994) (“*Chelsea*”)); and (iv) the objection “comes from the carrier itself - not from shippers” (citing *Modern Handcraft, Inc.--Abandonment*, 363 I.C.C. 969, 972 (1981) (*Modern Handcraft*)). Here, of course, not even the carrier is objecting to the abandonment of the Line.

The Board is also required to consider and balance (i) the needs of the community and (ii) interstate commerce generally. *Cross Harbor*, 374 F.3d at 1183. Because coal will continue to make its way to Notre Dame via the transload facility as it has done for the past decade, the abandonment will not have any impact on those movements. In addition, because no other shipper has expressed any interest in having rail service over the Line, there is no basis for claiming that interstate commerce, NSR or any individual shipper will be adversely affected.

Applicants fully recognize that in cases where the operating carrier shows that a line is being actively operated, the Board will give little weight to public concerns regarding safety,

traffic and quality of life. *See, e.g., Salt Lake*. However, in cases such as this, where the owner of the line has concluded that future rail operations are not feasible, where no rail operations have been conducted for over a decade, where the owning carrier is not opposing abandonment, where multiple road crossings have been paved over, where a portion of the Line's right-of-way has been fenced off and used for a junk yard,¹¹ and where no shippers are protesting the abandonment, the conclusion must be reached that no overriding Federal interest in interstate commerce exists. In the absence of any overriding Federal interest, local and public concerns and purposes are entitled to substantial weight and justify the Board's withdrawing its jurisdiction over a moribund, unused line of railroad.

In this case, the Applicants have shown that the unused right-of-way, following its purchase from NSR (or the reversion of certain well-defined segments thereof),¹² is needed for various public purposes, including the installation of "a massive storm sewer development effort that will meet the Federal Government's mandate for separated storm and sanitary sewer systems."¹³ Andrew R. Laurent, Economic Development Specialist for the City of South Bend, has explained that "[c]ost estimates show that using the rail line alignment, instead of laying the sewer under city streets, would allow for a multi-million dollar savings."¹⁴ Such productive use of the right-of-way far outweighs its dormant condition, which unfortunately encourages its use as a trash receptacle and a place to grow weeds. While that might not be a compelling factor if a

¹¹ By using the hybrid map feature that is provided at www.google.com, the Board can view the junked cars that are being stored on the right-of-way. In addition, the steel fence is featured in Applicants' Attachment C, Photographs RR013, RR014a - RR014c (looking northward on Longley Ave.) and RR014e (looking southward on Werwinski St.).

¹² Applicants agree with NSR that the final resolution of the reversionary interests will be made outside of this proceeding. *See* NSR Reply Comments at p. 9.

¹³ V.S. Laurent, at ¶ 12, Attachment F to Application.

¹⁴ *Id.*

credible showing had been made that a need exists for future, revitalized rail service, no such showing has been made.

The City also intends to use the segment of the Line that it will purchase from NSR as a trail after it completes the installation of the sewer line. While CLS&SB has criticized the City's intentions and claimed that it too would make room for a trail if it were to acquire the Line, those contentions lack credibility. While it would be possible to maintain a trail where the right-of-way is 100 feet across, the deck of the railroad bridge across the St. Joseph River is only 8 feet wide.¹⁵ Hence, continued rail operations over the bridge of any sort would not be compatible with a recreational trail. The Board's attention is invited to photographs of the bridge across the St. Joseph River that conclusively show that there is not enough room on the bridge to operate a train and simultaneously maintain a trail.¹⁶ Therefore, in order to have a recreational trail that crosses the river, it would be necessary to cease all rail operations over the bridge.

As was explained in the Application, the Brothers are currently involved in expanding the facilities of the retirement village. Once again, it is respectfully submitted that the use of the rail corridor for this purpose is the highest and best future use of the land, which, if necessary, would be purchased from NSR at a mutually agreed upon price.¹⁷

B. Abandonment is consistent with the goals of the Rail Transportation Policy

Not only is abandonment of the Line permitted by the present and future PC&N, it is consistent with the goals of the RTP. In the first place, the Board is required "to encourage

¹⁵ Mr. Harris has claimed "that the right-of-way of the Lines is 100' wide over most of its length." V.S. Harris at p. 4. By way of clarification, Applicants note that the right-of-way between MP ZO 9.6 and Milepost ZO 10.5 is only 60 feet wide. The right-of-way for the industrial spur is only 50 feet wide.

¹⁶ See Applicants' Attachment C, Photographs RR023, RR024 and RR025b.

¹⁷ CLS&SB's suggestion (CLS&SB Protest at p. 20, *emphasis in original*) that the "real motivation of the Brothers and the Sisters is to allow them to acquire NS property for little or no money" is undeserving of a reply as it is unfounded, inappropriate and lacks candor.

honest and efficient management of railroads.” 49 U.S.C. § 10101(9). It is not an accident that no rail service has been provided over the Line for over a decade. Rather, the lack of rail service reflects the fact that Conrail and NSR management concluded that there was no need or financial incentive to rehabilitate the track.¹⁸ That conclusion is supported by the lack of any evidence that any shipper during the past decade has requested rail service. Nor has any shipper filed a complaint with the Board or the courts in which it contended that NSR or Conrail had failed to honor the common-carrier obligation.¹⁹ These factors compel the conclusion that shippers who may have used rail service over the Line in the distant past have had no need for rail service for the past ten to twelve years.

The record also shows that NSR, after acquiring the Line in 1999, made the informed business decision that, because there were no remaining shippers on the Line, there was no need to maintain the Line while it allowed “a sufficient period of time [to pass in order] to determine whether restored service over the Line might become feasible.”²⁰ NSR’s judgment is borne out by the lack of any credible evidence of any past, present or future need for rail service over the Line.

The abandonment of this unused and dilapidated line of track would also be consistent with the RTP’s directive that it is the policy of the United States Government to reduce regulatory barriers to “exit from the industry.”²¹ Once again, Applicants stress that NSR has not opposed the abandonment of the Line. Instead, it has only requested the Board to “reach a

¹⁸ As NSR has admitted, “the Line is in poor condition and would need to be rehabilitated in order to restore service over it because of the Line’s long period of non-use.” NSR Reply Comments at p. 7.

¹⁹ The absence of any complaints regarding the adequacy of rail service was favorably mentioned by the Board as justification for its authorizing the adverse abandonment in *Norfolk & W. Ry. Co.--Aban. Exem. -- Cinn., Hamilton County, OH*, 3 S.T.B. 110, 119 (1998).

²⁰ NSR Reply Comments at p. 7.

²¹ 49 U.S.C. § 10101(7).

decision on the merits in accordance with the facts, as set out by the Applicants and corrected or otherwise amended by NSR and any other credible presentation."²² Had NSR opposed this abandonment, it would have made that opposition crystal clear.

The NTP also states that it is the policy of the United States to operate transportation facilities and equipment without detriment to the public health and safety.²³ It is respectfully submitted that operation of vintage trolley cars over the NSR's main line to Chicago would not be consistent with this policy. As will be discussed in detail *infra*, in order to provide trolley service between the Notre Dame campus and the Northern Indiana Commuter Transportation District (NICTD) station at the South Bend Regional Airport,²⁴ it would be necessary for CLS&SB to operate over the NSR's main line. As an alternative, because there is no other track that currently links the Notre Dame lead and the NICTD line, it would have to assemble its own right-of-way over and construct several thousand feet of new track.

In the first place, if it were to operate over the NSR's Chicago main line, it would be necessary to electrify NSR's main line, which is not going to happen without NSR's consent. Second, no evidence exists that NSR would subject itself to the potential liability that would accompany the operation of vintage trolley cars over one of NSR's busiest lines. Third, CLS&SB has not addressed whether such operations would be prohibited by Federal Railroad Administration safety regulations, even if NSR would agree to allow vintage trolley cars to operate on its main Chicago line and NICTD would allow them to operate over its line.²⁵

²² NSR Reply Comments at p. 57.

²³ 49 U.S.C. § 10101(8).

²⁴ According to CLS&SB, it "would provide trolley service between the UND campus and the Northern Indiana Commuter Transit (sic) District (NICTD) station at the South Bend Regional Airport." CLS&SB Protest at p. 14, n.13.

²⁵ It is believed that CLS&SB's proposed trolley operation would fit within the definition of either a "commuter passenger train service on standard gage track which is part of the general railroad system of transportation" or a

In summary, the abandonment of the Line is consistent with the RTP. There is nothing unique about the abandonment of this particular track that presents any challenge to the long term viability of the national rail infrastructure. There are no industries located on the line that would be deprived of service, nor is the track needed for any other legitimate transportation need, either on a local or a national basis.

Reply Comments of Norfolk Southern Railway Company

A. NSR has not asked the Board to deny the adverse application in this proceeding. Although NSR has submitted a lengthy discussion of the principles and legal precedents that underlie adverse abandonment applications, NSR has not protested the instant application or requested the Board to deny it. As its Conclusion confirms, NSR has requested only that “the Board evaluate the subject application and reach a decision on the merits in accordance with the facts, as set out by the Applicants and corrected or otherwise amended by NSR and any other *credible* presentation, and with the law, principles and discussion” set forth in its Reply Comments.²⁶

To the extent that NSR’s Reply Comments can be viewed as an invitation for the Board to revisit over 60 years of precedent in order to curtail and eliminate the filing of adverse abandonment applications by governmental and/or reversionary interests, the Board should decline that invitation. At no time has Congress (much less the ICC or the Board) sought to overturn the Supreme Court’s explicit recognition that “[t]here is no requirement . . . that the application [for abandonment] be made by the carrier whose operations are sought to be abandoned.” *Thompson v. Texas Mexican Ry*, *supra*, 328 U.S. at 145. The Board should

²⁶ “short-haul rail passenger train service in a metropolitan or suburban area.” 49 CFR 238.3(a)(1) or (2). As such, it would be subject to FRA’s Passenger Equipment Safety Standard at 49 C.F.R. Part 238, especially if CLS&SB were to operate over a line that it would not own. *See, e.g.*, 49 C.F.R. § 238.203(d).

²⁶ NSR Reply Comments at p. 57 (emphasis added).

continue to recognize that while it may give substantial weight to the long-term viability of the national rail system, it must balance the competing benefits and burdens of abandonment on all interested parties, including the railroad, the shippers on the line, the involved communities, and interstate commerce generally.²⁷

NSR's basic position is that the Board should not further expand the principles set forth in *Modern Handcraft* and should adhere to the principles and standards articulated by the Court of Appeals in *New York Cross Harbor*, and by the ICC and STB in their decisions that are consistent with *New York Cross Harbor*. Because a strict application of the *New York Cross Harbor* standards to the facts in this case will entitle the Applicants to receive a favorable decision, there is no need to expand the *Modern Handcraft* principles in order to grant the instant application.

In *New York Cross Harbor*, the Board was faced with a situation where the New York Cross Harbor Railroad ("Cross Harbor") was actively conducting operations over a line of railroad owned by New York City. While it had suffered the recent loss of some traffic, Cross Harbor had actively solicited business from new customers and was in the process of rebuilding its traffic. Despite the fact that multiple shippers supported Cross Harbor and opposed the abandonment, the Board literally ignored their interests. This caused the Court to find that the Board erroneously failed to adhere to its own precedents by not balancing all of the competing interests and instead gave paramount importance to the interests of the City of New York. As the

²⁷ The statutory public convenience and necessity standard cannot be read to be only the "railroads' convenience and necessity." While NSR suggests (Reply Comments at p. 41) that only a railroad can have an interest in the right-of-way, that position erroneously ignores the legal interests that are held by the owners of reversionary interests. If NSR's position were to be adopted, it would allow railroads to negate the reversionary interests created by the legal instruments that, in the first instance, allowed them to occupy the real property on which the track is constructed. This would be so even when the track is no longer needed for any public purpose related to the carrier's operations, as is the case herein. Recognizing this fundamental basic inequity, the Board has consistently stated that "we do not allow our jurisdiction to be used to shield a carrier from the legitimate processes of State law where no overriding Federal interest exists." *Seminole Gulf* and cases cited therein.

Court determined, that caused the Board to deviate, without adequate explanation, from its past precedents.

The undisputed facts in this case bear absolutely no resemblance to those in *Cross Harbor*. As a result, even if the very conservative standards favored by NSR are applied, a proper balancing of the various interests that is consistent with the well-recognized principles and standards established by past ICC and Board precedents compels the conclusion that the public convenience and necessity require and permit abandonment of the Line.

B. The facts herein satisfy the rigid standards identified by the Board (and by NSR) for evaluation of adverse abandonment applications. NSR contends that an adverse abandonment application should not be granted “until a line has been dormant for a very long period of time.”²⁸ As NSR has observed:

The length of time that the subject line had remained dormant in each case where the agency granted adverse abandonment or discontinuance applications were: at least 12 years (*Modern Handcraft*), at least 10 years (*Chelsea*) and at least 11 years (*NW-GTW*).²⁹

In this case, it is uncontested that the Line has been dormant for at least a decade, and likely longer. As NSR has admitted, the last movements of coal appear to have moved in the mid-1990’s.³⁰ Thus, abandonment would be consistent with the time frames established by the above-cited cases.

NSR also contends that adverse abandonment applications should not be granted if there is credible evidence of a potential for future rail service, “especially if the line has been inactive for only a few years and insufficient time has passed to make the future need for the use of the

²⁸ NSR Reply Comments at p. 46.

²⁹ NSR Reply Comments at p. 47.

³⁰ NSR Reply Comments at p. 5, n.2.

line clearer.”³¹ NSR also says that the “types of potential rail service that should prevent adverse abandonment of a line of railroad might include potential for reactivated service *if* previously rail-served industries reasonably might provide rail traffic again in the future”³² and *if* the situation involves one in which “traffic has been recently solicited or specific traffic appears to be available or possibly available to the railroad.”³³

The record herein does not support either contingency. In the first place, NSR admits that it “has located no written record that confirms that its representatives ever solicited traffic for movement over the Line to the University or any other party.”³⁴ Second, NSR does not identify any industries that reasonably might again provide rail traffic in the future. In fact, just the opposite is true. As the Board is aware, and as NSR has admitted, there is only one former shipper on the line that might have provided support for future rail traffic. That shipper is Notre Dame. However, Notre Dame has publicly announced that it will not use rail service for direct shipments of coal to its campus.³⁵ Because Notre Dame has not protested the instant application and has not filed comments in support of continued rail service, there is not a shred of credible evidence of record to support a finding that Notre Dame would provide future rail traffic.

The absence of credible evidence of any future need underlies NSR’s business judgment to terminate negotiations to sell the Line to CLS&SB. In the absence of explicit, hard evidence that Notre Dame has changed its position, the Board must adhere to its consistent, past practice

³¹ NSR Reply Comments at pp. 48-49.

³² NSR Reply Comments at p. 49 (emphasis added).

³³ NSR Reply Comments at p. 48.

³⁴ NSR Reply Comments at p. 6.

³⁵ See, Applicants’ Attachment I.

of finding that it would be “inappropriate to substitute our judgment for [the carrier’s] business judgment.”³⁶

NSR also says that the Board should consider credible evidence of the potential to use the line for storage of loaded or empty cars, for detour movements, potential use as a passing track, or as additional through track to increase capacity through the area.³⁷ While consideration of such purposes may be appropriate in some instances, that is not the case herein. NSR does not even bother to suggest that this dead-end track could be used for any such purposes. Thus, there is no evidence of record that would support a finding that the Line could be used for any of the foregoing purposes.

Indeed, NSR admits that it voluntarily exercised its business judgment by removing the mainline switch from its Chicago main line to the Notre Dame lead. Removal of the switch demonstrates that NSR management has itself concluded that use of the Notre Dame lead for the *identified purposes was extremely infeasible, if not impossible. If that were not the case, NSR would not have incurred the expense of removing the unneeded switch.*³⁸ Once again, the Board should not substitute its judgment for NSR’s business judgment.

NSR also complains that the Board’s “*de facto* abandonment” reference in *Modern Handcraft* has caused confusion and falsely encouraged adverse abandonment applicants. This does not apply to the instant application. The Board is reminded that Applicants, by letter dated September 26, 2006, amended their Notice of Intent to omit any reference to a “*de facto*”

³⁶ *Salt Lake*, slip op. at p. 8.

³⁷ As NSR readily admits, the Line has been severed on its north end from the national rail system by previous Conrail abandonments. Hence, it would be impossible to use the track for detour movements, as a passing track or as additional through track.

³⁸ The truncated nature of the track and the residential neighborhoods through which the Line passes also militates against the use of the track as an active storage yard for loaded and unloaded cars. Plainly, the potential liability that would accompany such uses in a residential area would cause intelligent rail management to think more than twice before using the Line for any such purposes.

abandonment. Furthermore, the Applicants herein have not pursued or relied upon that concept at any subsequent stage of the proceeding. In short, NSR's comments regarding a *de facto* abandonment are irrelevant and immaterial and have no bearing on the facts and/or the legal positions advocated by Applicants in this case.

NSR's comments regarding offers of financial assistance, public use conditions and trail use conditions are also superfluous. The Board's October 26, 2006 Decision speaks for itself. As a point of clarification, Applicants have not invoked the Board's trail use provisions of 49 C.F.R. 1152.29. If the application is granted and after the abandonment is consummated, City intends to purchase NSR's fee interests in the right-of-way through arms' length bargaining, which would transfer the fee interests to City and obviate the need to railbank the right-of-way. After installing the new storm sewer, City would create the new trail.

Protest of CLS&SB

A. The CLS&SB's Protest lacks credibility. The Protest filed by CLS&SB should be disregarded in its entirety on the grounds that it lacks any probative evidentiary support. Both the Protest and the supporting statements are littered with hearsay and admitted speculation that have not and cannot be verified. Most importantly, not a single shipper has stepped forward to testify that it needs rail service over the Line and would use CLS&SB if the abandonment application were to be denied and CLS&SB was able to reach an agreement with NSR to acquire the Line.

The unsupported speculation that permeates CLS&SB's Protest is summarized in the baseless statement that:

As Mr. Harris relates, South Bend's current Mayor and some members of the City Council actively and aggressively oppose rail service restoration. They have actively lobbied and in some cases intimidated others from supporting rail service restoration. Harris

VS at 6-7. Certain very vocal city officials persuaded those favoring rail service to keep quiet. They intimidated UND officials, specifically Paul Kempf and John Affleck-Graves, and persuaded them to change their position over use of rail. CLSSB believes that these officials persuaded NS to renege on its agreement to sell the line to CLLSB.³⁹

While referencing Harris' statement that "it is my understanding that the Mayor's Office sent representatives to the community centers to *tell* them to be in opposition," CLS&SB ignores Harris' concession that "I **have not tried to verify this.**" V.S. Harris at p. 7 (emphasis added). The Board cannot rely on the testimony of a witness who admits that he has not tried to verify the supposed facts about which he purports to testify. Nor can the Board rely on the arguments made in CLS&SB's Protest that are based on Harris' unfounded speculation.

There is no evidence to support CLS&B's unfounded claims that Paul Kempf, the Director of Utilities at Notre Dame, and John Affleck-Graves, Notre Dame's Executive Vice President, were intimidated by City officials into changing their position over use of rail.⁴⁰ If CLS&SB had any credible evidence to support its speculative comments, it should have introduced it.

Nor can CLS&SB substantiate its claim that City officials "persuaded NS to renege on its agreement to sell the line to CLSSB."⁴¹ CLS&SB has not identified any City official who would have been able to persuade NSR to back out of the tentative deal. Nor has it identified the NSR officials who were the City officials' supposed targets. In response, Applicants state that they

³⁹ CLS&SB Protest at pp 16-17.

⁴⁰ In fact, CLS&SB cannot demonstrate that Notre Dame ever "changed" its position at all. In the June 22, 2006 newspaper article that announced that Notre Dame "has no intention of entering into an agreement" with CLS&SB, Affleck-Graves categorized CLS&SB's talks with Notre Dame's utility services manager and business department representatives as being "extremely tentative." Applicants' Attachment I, Margaret Fosmoe, *Notre Dame drops coal-by-rail option*, South Bend Tribune, June 22, 2006. Affleck-Graves is also quoted as saying that "I think it would be pushing the point to say we've been in discussions" with CLS&SB.

⁴¹ CLS&SB Protest at p. 17; *see also, id.* at p. 3 ("local officials pressured NS to abrogate that agreement and withdraw its support for the sale. Verified Statement of Robert Harris (Harris VS) at 3.")

are not aware of any communications by any City official to NSR officials, much less any communication that would have influenced NSR's business decision to terminate its negotiations with CLS&SB.

B. CLS&SB's claim that it is the authorized and exempted operator of the line is specious. In its Protest, CLS&SB says that it is "the authorized and exempted operator of the line that is the subject of this adverse abandonment application"⁴² It also says that Applicants are seeking the "adverse abandonment of an out-of-service line where the carrier is not the current owner but a party authorized to acquire and restore it to active rail service."⁴³ These audacious contentions have no legal or factual basis and must be rejected.

In the first place, CLS&SB did not reach a final agreement with NSR to acquire the line.

As NSR has explained in its Comments filed in this proceeding:

In summer 2006, NSR was negotiating a possible sale of the Line to a potential short line operator, the Chicago, Lake Shore & South Bend Railway (CLS&SB). CLS&SB proposed to restore the delivery of coal by direct rail service to the University. NSR was apprised that CLS&SB received a favorable response from the University to the proposed reinstatement of service over the Line for direct delivery of coal to it. While the University may have discussed restoration of service over the Line with CLS&SB, the University apparently made no commitments to request direct coal delivery. The University's public withdrawal of its support for the proposed operation before the NSR and CLS&SB concluded their transaction effectively negated the objective of that transaction.⁴⁴

Second, although CLS&SB has taken advantage of and abused the Board's class exemption procedures in an attempt to create the appearance of standing in this proceeding, CLS&SB has not been "authorized" to acquire the lines. Instead, its recent Verified Notice of

⁴² CLS&SB Protest at p. 7.

⁴³ *Id.* at 8.

⁴⁴ NSR Comments at pp. 5-6. *See also*, Letter to Vernon A. Williams from James R. Paschall, dated August 15, 2006, served in STB FD 34893, The Chicago, Lake Shore & South Bend Railway Company - Acquisition and Exemption - Norfolk Southern Railway Company.

Exemption, filed November 20, 2006, never became effective as it was stayed by the Board by Decision served November 22, 2006.⁴⁵ Given CLS&SB's erroneous comment that "[o]n December 20, 2006, the Board published a notice of the acquisition exemption (which was effective 7 days after filing or November 27, 2006)," it appears that CLS&SB has either failed to notice that the Board stayed the effective date of the exemption or is simply confused as to the legal effect of the Board's stay, which has never been lifted and remains in effect.

In addition, there is good cause to argue that the notice is void *ab initio* on the grounds that the statement that CLS&SB "anticipates reaching an agreement with NS" is false and misleading. As Applicants have previously demonstrated, there is no basis for that statement.⁴⁶ Hence, at best, it can be said that CLS&SB has filed a notice of exemption that would have permitted it to acquire the lines *if* it had been able to reach an agreement with NSR, which it has not done. Therefore, NSR continues to be the *sole* authorized carrier and operator.⁴⁷

Third, CLS&SB, which was recently incorporated, is a railroad in name only. It has no trained rail employees and no rail equipment other than some vintage trolley cars. Furthermore, with the exception of Mr. Landrio, who claims to have established a number of short line railroads, the other individuals do not appear to have any operating experience in the freight rail industry.

⁴⁵ STB F.D. No. 34960, *The Chicago, Lake Shore and South Bend Railway Company--Acquisition and Operation Exemption--Norfolk Southern Railway Company*, Decision served November 22, 2006. Applicants' Attachment J.

⁴⁶ Rather than repeat the arguments in their *Petition to Revoke and Stay Exemption in STB Docket FD No. 34960, The Chicago, Lake Shore and South Bend Railway Company--Acquisition and Operation Exemption--Norfolk Southern Railway Company*, Applicants' arguments therein are incorporated herein by reference.

⁴⁷ Applicants will agree with CLS&SB's comment (Protest at p. 8) that this proceeding presents significant policy implications going beyond the facts of this proceeding. Without question, this proceeding highlights the myriad of problems that result when the Board's class exemption procedures are abused by filing "verified notices" that contain false and misleading statements and then using those void notices to bootstrap further false and misleading arguments in other proceedings. The Board should not tolerate such activities.

C. CLS&SB's reliance on proposed vintage trolley operations to oppose the abandonment of the Line is irrelevant. Recognizing that no shipper has appeared to support the contention that its freight rail operations are needed, CLS&SB postulates that a need exists for its vintage trolley car operations. While the collection of vintage trolley cars may be a fascinating hobby for a real estate developer with no railroad operating experience, it has no bearing on any issue that is legitimately before the Board in this proceeding. Indeed, CLS&SB's proposed suburban, electrified trolley operation would not fit within the definition of a "rail carrier" under 49 U.S.C. § 10102(5).⁴⁸

At the outset, CLS&SB is forced to concede that trolley service between the Notre Dame campus and downtown South Bend "is not CLSSB's intended market."⁴⁹ Instead, CLS&SB says that it would "provide trolley service between the UND campus and the Northern Indiana Commuter Transit (sic) District (NICTD) station at the South Bend Regional Airport."⁵⁰ This necessarily assumes that CLS&SB would reach an agreement with NICTD. However, as Gerald Hanas, the General Manager of the Northern Indiana Commuter Transportation District ("NICTD"), has explained, "[n]o administrative or engineering discussions have taken place to determine the feasibility of such an operation."⁵¹

Mr. Harris also says that the Line presents CLS&SB with the "means of directly linking the currently operated interstate commuter operations of the Northern Indiana Commuter

⁴⁸ As defined therein, "rail carrier" means a person providing common carrier railroad transportation for compensation, but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation."

⁴⁹ CLS&SB Protest at p. 14, n.13. Although CLS&SB disclaims any intent to operate into downtown South Bend, it nevertheless attached various news articles and letters to the editor to the Harris Verified Statement in an attempt to leave the impression that a need exists to provide transportation for students from Notre Dame to downtown South Bend, the College Football Hall of Fame and the Amtrak station. That is not possible. The truth of the matter is that the Line terminates at a point that not only is a lengthy cab ride from downtown South Bend, but is in an area that CLS&SB has described as "blighted and substantially vacant land." CLS&SB Protest at p. 18.

⁵⁰ CLS&SB Protest at p. 14, n.13, citing V.S. Harris at p. 3.

⁵¹ V.S. Hanas at ¶ 6 (Applicants' Attachment L).

Transportation District (NICTD) with the University of Notre Dame campus.⁵² Harris also says that "NICTD currently has two distinct groups of riders that use NICTD services directly to the campus, students departing for Chicago on Friday afternoons, and returning on Sunday evenings."⁵³ That statement is not true. NICTD's commuter rail services terminate at its station that is located at the South Bend airport. As Hanas has also explained:

To the extent that the foregoing statement suggests that NICTD provides services "directly to the campus," it is misleading. The students must travel to the airport from the campus by some means other than NICTD's commuter rail service. Second, NICTD does not operate charter trains directly to the campus. These special trains terminate either along Westmoor St. between Sheridan and Bendix, or at the Airport terminal and passengers then take private over-the-road coaches or city transit buses to Notre Dame.⁵⁴

CLS&SB's misleading comments should be ignored by the Board. There is no existing track that would allow either NICTD or CLS&SB to reach the Notre Dame campus directly from the NICTD station at the South Bend Airport without operating over the NSR main line. In order to link the Notre Dame lead with the NICTD lines, it would be necessary either to build a new line or obtain permission from NSR to operate the vintage trolley cars over NSR's main Chicago line for over a mile.⁵⁵

If it were to operate over NSR's line, CLS&SB would also have to obtain NSR's permission to electrify NSR's line. Although Applicants will not speak for NSR, they will suggest that, without even reaching the electrification issue, it is highly doubtful that NSR would permit CLS&SB to operate vintage trolley cars over its heavily trafficked main Chicago line in

⁵² V.S. Harris at p. 3. *See also*, CLS&SB Protest at p. 14, n.13.

⁵³ V.S. Harris at p. 3.

⁵⁴ V.S. Hanas at ¶ 4.

⁵⁵ As Mr. Laurent has noted, "[t]here is no information in the record that either NICTD or NSR would allow CLS&SB to operate over their tracks. V.S. Laurent at ¶8 (Applicants' Attachment M).

order to reach the South Shore line over which the NICTD commuter operations between Chicago and the South Bend airport are conducted.⁵⁶

At this time, there is no other way to link the Notre Dame lead with the NICTD line. In his Reply Verified Statement, Mr. Laurent explains that the existing NICTD line ends at the former Amtrak Station at Meade Street, which is located in the far western edge of South Bend. This location is approximately 4,000 feet to the west of the end of the spot where the Notre Dame lead at one time intersected with the NSR line.⁵⁷ As Gerald Hanas has also explained, there "currently is no means of linking the NICTD operations with the proposed vintage trolley car operations that CLS&SB seems to propose."⁵⁸

For CLS&SB to reach the point where the NICTD line terminates a few feet to the east of the former Amtrak station, "CLS&SB would have to assemble the land that would be used to link the two rail systems and improve the existing Notre Dame lead to passenger rail standards."⁵⁹ As Mr. Laurent has noted, after assembling the land, it then would be necessary for CLS&SB to build and electrify several thousand feet of new track in order to hit the spot where the NICTD track terminates at the former Amtrak station.⁶⁰ No estimate has been provided regarding the cost of the construction and electrification of these new lines.

Even if NICTD may have indicated a willingness to consider operating its trains over the Line to the northern end of the line on the Notre Dame campus, there is nothing of record to show that NICTD agreed with CLS&SB's scheme. In particular, although Mr. Hankey says that

⁵⁶ While the Board lacks jurisdiction over excursion passenger service, it also lacks jurisdiction to compel NSR to allow NICTD to operate over its track. Moreover, the Board also lacks jurisdiction to compel either NSR or NICTD to allow CLS&SB to operate its vintage trolley cars over their lines.

⁵⁷ Reply V.S. Laurent at ¶ 5.

⁵⁸ V.S. Hanas at ¶ 3.

⁵⁹ V.S. Hanas at ¶ 5.

⁶⁰ V.S. Laurent at ¶¶ 4 - 7, inclusive.

"[o]n at least ten occasions each year, and potentially as many as twenty, NICTD would operate multiple special trainsets from Chicago to the UND campus," that contention has been disputed by NICTD's General Manager. As Mr. Hanas has explained, nothing in that magnitude was "discussed with or accepted by NICTD."⁶¹ In summary, even if CLS&SB could somehow force NSR to sell the Notre Dame lead to it, that would not guarantee CLS&SB the ability to reach the NICTD station at the South Bend airport.⁶²

D. CLS&SB's procedural contentions lack merit. CLS&SB's renewed arguments that Applicants failed to comply with certain of the Board's governing regulations are specious. As explained in detail in Applicants' Joint Reply To Petition To Reject Application, the Applicants fully complied with the Board's governing regulations.⁶³ Even if they had not done so, the Board may freely relax its procedural rules in the absence of demonstrated, "substantial prejudice to the complaining party." *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 539 (1970). *See also*, 49 C.F.R. § 1100.3, "[t]he rules will be construed liberally to secure just, speedy and inexpensive determination of the issues presented." Not only was CLS&SB able to participate fully in this proceeding, but it has wholly failed to demonstrate any prejudice whatsoever. Hence, the Board should reject its baseless procedural contentions.

Comment of Allen L. Stevens Jr. ("Stevens").

At the outset, Mr. Stevens does not purport to be a shipper. Moreover, he is not a member of the affected community. His address is Union Mills, Indiana, which is located nearly an hour from South Bend in La Porte County, Indiana.

⁶¹ V.S. Hanas at ¶ 7.

⁶² The instant record is devoid of any evidence regarding the potential cost of assembling the needed right-of-way, or the building and electrifying the track that would allow CLS&SB to reach the NITCD line.

⁶³ CLS&SB Protest at pp. Rather than repeat the arguments made in the Joint Reply, they are incorporated herein by reference. For the convenience of the Board, a copy of the Joint Reply is attached as Applicants' Attachment N

In his Comment, Stevens purports to calculate the number of trucks used to transport coal to Notre Dame from the NSR transload site in South Bend and voices concerns regarding the environmental impact of continuing the use of trucks to deliver coal to the University of Notre Dame ("Notre Dame").⁶⁴ As the Board's Section of Environmental Analysis has determined, because the diversion of coal to Notre Dame occurred over a decade ago, abandonment of the Lines will not result in diversion of any rail traffic to trucks.

Even if his alleged facts were to be taken at face value, Stevens' Comment ignores several other salient facts. First, Notre Dame made the decision to continue to receive its coal via truck. Second, there is no ignoring the fact that Notre Dame has received coal for over a decade via truck without any apparent concerns being voiced by Mr. Stevens. Third, the citizens of South Bend who have filed Comments with the Board and who have a legitimate interest in the issue unanimously support Applicants. Given their proximity to the lines, it is respectfully submitted that their concerns are paramount to those of an officious intermeddler who has no apparent ties to the South Bend community.

SEA Environmental Assessment.

On December 22, 2006, the Board's Environmental Assessment ("EA") was served. The EA directed Applicants to complete the Section 106 process of the National Historic Preservation Act and to report back to the Section of Environmental Analysis regarding any consultations with the Indiana Department of Natural Resources, Division of Historic Preservation & Archaeology (SHPO) and any other Section 106 consulting parties.

⁶⁴ Because Mr. Stevens does not disclose the source of his information regarding the amount of coal used by Notre Dame, his calculations cannot be validated. Moreover, CLS&SB has claimed that such information is confidential and proprietary and has redacted it from the letter submitted by Mr. Hankey. Last, because Notre Dame has not submitted any information, the record is devoid of any probative evidence regarding the tonnage of coal that it receives via truck.

By letter dated January 10, 2006 (sic), the SHPO announced that it had determined that it had identified several "properties within the probable are of potential effects ... that ... may meet the criteria of eligibility for inclusion in the National Register of Historic Places."⁶⁵ Applicants have determined that none of the listed properties are located within the right-of-way. The Munro House, at 1213 Diamond Avenue, and the Metcalf House, at 1201 Diamond Avenue, are located on real property that abuts the right-of-way. However, neither structure will be impacted in any fashion by removal of the track. This is confirmed by Catherine Hostetler, Director of the Historic Preservation Commission of South Bend and St. Joseph County. As she has explained in her Reply Verified Statement:

Neither the Munro House at 1213 Diamond Avenue (Site # 141-598-25629) nor the Metcalf House at 1201 Diamond Avenue (Site # 141-598-25631) will be impacted. Both of these houses are situated to the east of the right-of-way. They should also be re-evaluated as to their rating as "Significant". To the west, there is a vacant stretch of unimproved land, which I believe would facilitate the removal of the track.⁶⁶

Applicants note that one property that has been identified by the SHPO, the Northern Indiana College at 1600 Washington Avenue, no longer exists. As Ms. Hostetler has also confirmed based on her personal review of that location, "[t]hat structure is no longer in existence as it was razed several years ago."⁶⁷ Applicants have no knowledge as to the date that the structure was demolished.

The Holy Cross Roman Catholic Church and School at 1050 Wilbur Street are located several hundred yards from the right-of-way and are separated from the track by "a substantial

⁶⁵ Letter to Richard Streeter from Ron McAhron (see Attachment O hereto).

⁶⁶ Reply V.S. Hostetler at ¶ 3 (Applicants' Attachment P hereto).

⁶⁷ Reply V.S. Hostetler at ¶ 2. As is conclusively demonstrated, the SHPO did not perform any on-site studies, but merely relied on out-dated written information.

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C. 20423

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

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

REPLY COMMENTS AND ARGUMENT IN SUPPORT OF
ADVERSE ABANDONMENT APPLICATION OF THE
CITY OF SOUTH BEND, THE BROTHERS OF HOLY CROSS, INC. AND THE SISTERS
OF THE HOLY CROSS, INC.

Jeffrey M. Jankowski
Deputy City Attorney
227 West Jefferson Blvd.
South Bend, IN 46601
Counsel to the
City of South Bend, IN
tele: (574) 235-9241
fax: (574) 235-9892

Richard H. Streeter
Richard L. Mintz
Richard J. Deahl
Barnes & Thornburg LLP
750 17th Street, N.W., Suite 900
Washington, D.C. 20006
Counsel to the Brothers of Holy Cross, Inc.
and Sisters of the Holy Cross, Inc.
tele: (202) 408-6933
fax: (202) 289-1330

Date: January 22, 2007

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF UNCONTESTED FACTS	2
ARGUMENT	4
Applicable Legal Standards	4
A. Abandonment is permitted by the present and future PC&N	5
B. Abandonment is consistent with the goals of the Rail Transportation Policy	10
Reply Comments of Norfolk Southern Railway Company	13
A. NSR has not asked the Board to deny the adverse application in this proceeding.....	13
B. The facts herein satisfy the rigid standards identified by the Board (and by NSR) for evaluation of adverse abandonment applications	15
Protest of CLS&SB.....	18
A. The CLS&SB's Protest lacks credibility	18
B. CLS&SB's claim that it is the authorized and exempted operator of the line is specious.....	20
C. CLS&SB's reliance on proposed vintage trolley operations to oppose the abandonment of the Line is irrelevant	22
D. CLS&SB's procedural contentions lack merit.....	25
Comment of Allen L. Stevens Jr.....	25
SEA Environmental Assessment	26
CONCLUSION.....	29
CERTIFICATE OF SERVICE	30

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C. 20423

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

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

REPLY COMMENTS AND ARGUMENT IN SUPPORT OF
ADVERSE ABANDONMENT APPLICATION OF THE
CITY OF SOUTH BEND, THE BROTHERS OF HOLY CROSS, INC. AND THE SISTERS
OF THE HOLY CROSS, INC.

Come now the City of South Bend, the Brothers of Holy Cross, Inc. and the Sisters of the Holy Cross, Inc. (hereinafter collectively referred to as "Applicants"), by and through counsel of record, and file their Reply Comments in support of their Adverse Abandonment Application. Applicants seek a finding that the public convenience and necessity require or permit the abandonment of approximately 3.7 miles of railroad located in St. Joseph County, Indiana. Specifically, Applicants seek approval from the Board for the adverse abandonment of two lines of railroad owned by Norfolk Southern Railway Company ("NSR").¹ The subject lines extend from Milepost UV 0.0, which is located in a semi-industrial area in the western portion of the City, to Milepost UV 2.8 and from MP ZO 9.6 to Milepost ZO 10.5 (collectively referred to as "the Line" or the "Notre Dame lead"). As reflected by the attached maps, the individual lines connect with one another at MP UV2.8, which is located on the Brothers' campus, and thereafter

¹ As recognized in *Consolidated Rail Corp. v. I.C.C.*, 29 F.3d 706, 710 (D.C. Cir. 1994), "There is no requirement ...that the application [for abandonment] be made by the carrier whose operations are sought to be abandoned. *Thompson v. Texas Mexican Ry.*, 328 U.S. 134, 145, 66 S.Ct. 937, 944, 90 L.Ed. 1132 (1946), and, in fact, the [STB] may grant an application even when the carrier objects. *Modern Handcraft, Inc.*, 363 I.C.C. 969, 972 (1981)." Although NSR, which is the owning carrier, has urged the Board not to expand the holding in *Modern Handcraft*, it has not protested the abandonment of the Line or requested the Board to deny the application.

terminate on the Sisters' campus. As NSR has explained, the lines have been treated as a "3.7-mile dead-end branch line or industrial lead track since at least 1982 [and] has been referred to as the Niles Industrial Track, the South Bend Secondary Track, and in whole or in part, the Notre Dame lead."² Should the Board authorize the abandonment of the Line, an industrial spur located on the Sisters' campus will also be abandoned.³

STATEMENT OF UNCONTESTED FACTS

It is respectfully submitted that the following facts have been established by Applicants and/or NSR and are incontestable.

- NSR acquired the Line from Consolidated Rail Corporation ("Conrail") on June 1, 2001. NSR Reply Comments at p. 5.
- No rail service has been provided by NSR over the Line since that date. *Id.*
- No rail service was provided by Conrail over the Line for at least 4 or 5 years before it was acquired by NSR. *Id.*
- The mainline switch to the Line from NSR's Chicago mail line was intact until some time after June 1, 2004. *Id.* at p. 7.
- Track had been disconnected past the clearance point at an earlier date. *Id.*
- The Line was severed from the national rail system on the north end of the line by two Conrail abandonments, namely *Conrail Abandonment in South Bend Between Milepost 10.5 and Milepost 11.8, St. Joseph County, IN*, ICC Docket No. AB-167 (Sub-No. 407N) (ICC served April 22, 1982) and *Conrail Abandonment in Berrien County, MI and St. Joseph County, IN*, ICC Docket No. AB-167 (Sub-No. 672N) (ICC served August 31, 1984). *Id.* at p. 7, n.5.
- The Line is in poor condition and would need to be rehabilitated in order to restore service over it because of the Line's long period of non-use. *Id.* at p. 7.
- Segments of the track have been removed. *See* Photographs submitted with Applicants' Application as Attachment C.

² NSR Reply Comments at p. 5, n.1.

³ The Board has no statutory authority over the abandonment of a spur line. *See*, 49 U.S.C. § 10906. The easements that underlie the industrial spur, which are rooted in an agreement, dated October 27, 1903, have expired as a matter of contract law. The 1903 agreement specifically provides, as herein pertinent, that "[i]f the use of said premises for the purposes herein specified should be discontinued [the premises] shall thereby be discharged and freed from such easement, and revert without reconveyance ... as fully and unreservedly as though said easement never existed." Because railroad operations were discontinued several years ago, the underlying real property has been freed from such easement.

- Segments of the track have been paved over at road crossings. *Id.*; *see also* NSR Reply Comments at p. 7.
- Coal traffic moved over the Line to the University of Notre Dame (“Notre Dame”) until about the mid-1990s. *Id.* at n. 2.
- Notre Dame currently receives coal for its on-campus power plant via NSR rail movement to a transload facility in the South Bend area for final delivery to the campus via truck. *Id.* at p. 6.
- NSR has located no written record that confirms that its representatives ever solicited traffic for movement over the Line to the University or any other party. *Id.*
- NSR had retained the Line in order to have a sufficient period of time in which to determine whether restored service over the Line might become feasible. *Id.*
- As late as the summer of 2006, NSR had contemplated selling the Line to The Chicago, Lake Shore & South Bend Railway Company (“CLS&SB”). NSR Reply Comments at p. 6.
- In June 2006, Notre Dame publicly announced that it would not alter the manner in which it currently receives coal for its on-campus power plant. *Id.* *See also*, Applicants’ Attachment I.
- Because Notre Dame is the only potential rail customer that is currently located on the Line, NSR decided that its public announcement negated the objective of the proposed sale to CLS&SB. NSR Reply Comments at pp. 6-7.
- Following the public announcement that Notre Dame would not support future shipments of coal over the Line, NSR advised the Board that it would not sell the line to CLS&SB with whom NSR had been negotiating. NSR Reply Comments at p. 7.
- No shipper has appeared in this proceeding to indicate that it has a need for future rail service.
- No receiver of rail traffic has appeared in this proceeding to indicate that it has a need for future rail service.
- On November 20, 2006, CLS&SB filed a Verified Notice of Exemption in which it claimed that it “anticipates reaching an agreement with Norfolk Southern Railway Company (‘NSR’), owner of the subject railroad,” so that it could purchase and operate the Line. *See*, STB F.D. 34960, *The Chicago, Lake Shore and South Bend Railway Company -- Acquisition and Operation Exemption -- Norfolk Southern Railway Company*.
- On November 22, 2006, the Board, by Chairman Nottingham, ordered that “[t]he effective date of the notice of exemption in this proceeding is stayed pending further order of the Board.” *See* Attachment J, STB Decision, Docket No. F.D. 34960, *The Chicago, Lake Shore and South Bend Railway Company -- Acquisition and Operation Exemption -- Norfolk Southern Railway Company*.
- Because the stay has not been lifted by the Board, the notice of exemption has not become effective.

- There is no evidence that NSR has any intention of selling the Line to CLS&SB.
- As of this date, NSR is the sole owner of the Line.
- No entity other than NSR is authorized to operate the Line.

ARGUMENT

Applicable Legal Standards

Under 49 U.S.C. § 10903(d), the standard governing any application to abandon or discontinue service over a line of railroad, including an adverse abandonment, is whether the present or future PC&N require or permit the proposed abandonment. In implementing this standard, the Board must balance the competing benefits and burdens of abandonment on all interested parties, including the railroad, the shippers on the line, the communities involved, and interstate commerce generally. *See, New York Cross Harbor R.R. v. STB*, 374 F.3d 1177, 1180 (D.C.Cir. 2004) (“*Cross Harbor*”); *City of Cherokee v. ICC*, 727 F.2d 748, 751 (8th Cir. 1984). The Board must also take the goals of the Rail Transportation Policy (“RTP”), set forth at 49 U.S.C. § 10101, into consideration in making its public interest determinations.

As the Board explained in *Seminole Gulf Railway, L.P.--Adverse Abandonment--In Lee County, FL*, STB Docket No. AB-400 (Sub-No. 4) (STB served November 17, 2004) (“*Seminole Gulf*”):

We have exclusive and plenary jurisdiction over abandonments, including adverse abandonments, in order to protect the public from an unnecessary discontinuance, cessation, interruption, or obstruction of available rail service. *See Modern Handcraft, Inc.--Abandonment*, 363 I.C.C. 969, 972 (1981) (*Modern Handcraft*). Accordingly, we preserve and promote continued rail service where the carrier has expressed a desire to continue operations and has taken reasonable steps to acquire traffic. *See Chelsea Property Owners--Abandonment--Portion of the Consolidated Rail Corp.'s West 30th Street Secondary Track in New York, NY*, 8 I.C.C.2d 773, 779 (1972) (*Chelsea*), *aff'd, Consolidated Rail Corp. v. ICC*, 29 F3d 706 (D.C. Cir. 1994) (*Conrail*). On the other hand, we do not allow our jurisdiction to be used to shield a carrier from the legitimate processes of State law where no overriding Federal

interest exists. See *CSX Corporation and CSX Transportation, Inc.--Adverse Abandonment Application--Canadian National Railway Company and Grand Trunk Western Railroad, Inc.*, STB Docket No. AB-31 (Sub-No. 38) (STB served February 1, 2002).

If we conclude that the PC&N do not require or permit continued operations over the track by the carrier in question, our decision removes that shield, thereby enabling the applicant to pursue other legal remedies to force the carrier off the line. *Conrail*, 29 F.3d at 709; *Modern Handcraft*, 363 I.C.C. at 972. But in applying our balancing test, we note that significant weight has been given to the fact that there is a potential for continued operations and the carrier has taken reasonable steps to attract traffic. See *Cross Harbor*, 374 F.3d at 1186; *Conrail*, 29 F.3d at 711, *aff'd Chelsea*, 8 I.C.C.2d at 778. In abandonment cases, the applicant has the burden of proof.

It is respectfully submitted that the facts in this case, even when the most conservative standards are applied, support the adverse abandonment of the Line. As Applicants stated in their application, and as NSR has confirmed, the Line has lain dormant for at least ten years. Hence, there is no current activity over the Line. Even more important, Applicants and NSR agree that there is no competent evidence of any future need for the Line that would warrant denying the adverse abandonment application.

A. Abandonment is permitted by the present and future PC&N.

There is overwhelming evidentiary support for a finding that the PC&N require or permit the abandonment of the Line. As conclusively demonstrated by the uncontested facts, no railroad operations have been conducted over the Line for over a decade, or in the words of NSR, since "about the mid-1990's."⁴ And as NSR has candidly admitted, "NSR has located no written record that confirms that its representatives ever solicited traffic for movement over the Line to the University or any other party."⁵

⁴ NSR Reply Comments at p. 5, n.2.

⁵ *Id.*

In fact, although NSR has requested the Board to take a conservative approach, it has not asked the Board to deny this application. Equally important, no shipper has appeared in this proceeding to complain about the lack of rail service or to request the Board to deny the application because it anticipates future rail shipments. Therefore, there is no demonstrated need or any likelihood that there would be any need for future rail service that would warrant retaining the tracks.

Given the foregoing, this case bears no resemblance to cases such as *Cross Harbor; Seminole Gulf; Salt Lake City Corporation--Adverse Abandonment--in Salt Lake City, UT*, STB Docket No. AB-33 (Sub-No. 183)(STB, March 6, 2002) ("*Salt Lake*"); or any other precedent where the Board or the ICC denied abandonment authority after finding that the owning carrier had expressed a desire to continue operations and taken reasonable steps to acquire traffic. Unlike the situation in any of those cases, the record herein is devoid of any competent evidence that NSR wishes to *initiate* operations or that it has taken any steps to acquire traffic that it would transport over the Line.

Unlike many of the previous adverse abandonment cases, the adverse abandonment of the Line will not have any adverse impact or cost to NSR. As reflected by NSR's decision to remove the switch from its Chicago mainline, the Line did not fit within NSR's immediate needs or future plans. Moreover, given NSR's expressed reasons for terminating negotiations with CLS&SB,⁶ NSR is convinced that restored service over the Line is not feasible.

CLS&SB, which is a non-carrier, says that it should be provided an opportunity to acquire the Line and operate it.⁷ Although CLS&SB insists that Buckeye Materials, Inc.

⁶ See NSR Reply Comments at p. 6.

⁷ Although CLS&SB has expressed its confidence in the availability of future traffic, it has utterly failed to carry its burden of submitting competent evidence to support that confidence. This factor serves to distinguish the instant situation from that in *Wisconsin Dept. of Transp. - Aband. Exempt.*, ICC F.D. No. 31303, slip op. at 4-5 (December

("Buckeye")⁸ and the University of Notre Dame support restoration of rail service, CLS&SB is not authorized or qualified to speak for either Buckeye or Notre Dame.

If Notre Dame truly felt that restoration of rail service was in its best interest, it would have vigorously supported CLS&SB months ago. It did not do so. Instead, in June 2006, Notre Dame publicly announced that it would continue to receive coal via trucks, a practice it has followed for the past decade.⁹ Moreover, Notre Dame had the opportunity, along with any other potential shipper, to oppose the instant application and support CLS&SB's position. It did not do so. Hence, the record is devoid of any evidence that Notre Dame either opposes abandonment or supports CLS&SB. The same is true with respect to Buckeye.

As NSR has explained, Notre Dame's public announcement caused NSR management to conclude that Notre Dame's decision "effectively negated the objective" of the potential sale of the line.¹⁰ In other words, NSR's highly competent and efficient management concluded that without Notre Dame's active support, there is no traffic to sustain financially viable rail service. No one pressured NSR management to reach that reasoned decision. Given Notre Dame's obvious decision that it would not oppose the abandonment, NSR's reasoning, which reflects years of experience in the rail industry, should be respected by the Board.

5, 1988) ("*Wisdot*"). As the ICC subsequently explained in *Chelsea Property Owners - Aban. - The Consol. R.*, 8 I.C.C.2d 773, 778-79 (1992), *aff'd sub nom Consolidated Rail Corp. v. I.C.C.*, 29 F.3d 706 (D.C. Cir. 1994) ("*Chelsea*"), in *Wisdot*, "{T}he carrier has expressed its confidence in the availability of future traffic, and has submitted evidence to support that confidence" (emphasis added). Therefore, even if CLS&SB had standing to place itself in NSR's shoes, which it does not, it has no demonstrated, competent shipper support to back up its hearsay contentions.

⁸ Although CLS&SB refers to "Buckeye Materials, Inc.," its consultant, John P. Hankey, refers to the company as Buckeye Industrial Minerals.

⁹ CLS&SB's repeated accusation that Notre Dame was intimidated by City officials into withdrawing support is patently absurd and wholly unsupported by any evidence.

¹⁰ NSR Reply Comments at p. 6; *see also*, Applicants' Attachment K, Letter to Vernon A. Williams from James R. Paschall, dated August 15, 2006, filed in STB F.D. 34893, *The Chicago, Lake Shore and South Bend Railway Company-Acquisition and Operation Exemption-Norfolk Southern Railway Company*.

Given the total absence of *any* shipper support for future rail service, as well as the absence of rail service for over a decade, the instant proceeding fits snugly within the narrow line of cases in which the Board and the ICC authorized adverse abandonments. As the D.C. Court observed in *Cross Harbor*, 374 F.3d at 361, the Board has consistently authorized adverse abandonments when: (i) “[n]o shipper will lose rail service as a result of the abandonment” (citing *Norfolk & Western Railway Company - Abandonment Exemption*, 3 S.T.B. 110, 119 (1998)); (ii) “no shippers have protested the [adverse abandonment] application” (citing *CSX Corporation and CSX Transportation, Inc.--Adverse Abandonment Application--Canadian National Railway Company and Grand Trunk Western Railroad, Inc.*, STB Docket No. AB-31 (Sub-No. 38) (STB served February 1, 2002)); (iii) there is an “absence of future traffic prospects” (citing *Chelsea Property Owners - Aban. - The Consol. R.*, 8 I.C.C.2d 773, 791 (1992), *aff’d sub nom Consolidated Rail Corp. v. I.C.C.*, 29 F.3d 706 (D.C. Cir. 1994) (“*Chelsea*”)); and (iv) the objection “comes from the carrier itself” - not from shippers” (citing *Modern Handcraft, Inc.--Abandonment*, 363 I.C.C. 969, 972 (1981) (*Modern Handcraft*)). Here, of course, not even the carrier is objecting to the abandonment of the Line.

The Board is also required to consider and balance (i) the needs of the community and (ii) interstate commerce generally. *Cross Harbor*, 374 F.3d at 1183. Because coal will continue to make its way to Notre Dame via the transload facility as it has done for the past decade, the abandonment will not have any impact on those movements. In addition, because no other shipper has expressed any interest in having rail service over the Line, there is no basis for claiming that interstate commerce, NSR or any individual shipper will be adversely affected.

Applicants fully recognize that in cases where the operating carrier shows that a line is being actively operated, the Board will give little weight to public concerns regarding safety,

traffic and quality of life. *See, e.g., Salt Lake*. However, in cases such as this, where the owner of the line has concluded that future rail operations are not feasible, where no rail operations have been conducted for over a decade, where the owning carrier is not opposing abandonment, where multiple road crossings have been paved over, where a portion of the Line's right-of-way has been fenced off and used for a junk yard,¹¹ and where no shippers are protesting the abandonment, the conclusion must be reached that no overriding Federal interest in interstate commerce exists. In the absence of any overriding Federal interest, local and public concerns and purposes are entitled to substantial weight and justify the Board's withdrawing its jurisdiction over a moribund, unused line of railroad.

In this case, the Applicants have shown that the unused right-of-way, following its purchase from NSR (or the reversion of certain well-defined segments thereof),¹² is needed for various public purposes, including the installation of "a massive storm sewer development effort that will meet the Federal Government's mandate for separated storm and sanitary sewer systems."¹³ Andrew R. Laurent, Economic Development Specialist for the City of South Bend, has explained that "[c]ost estimates show that using the rail line alignment, instead of laying the sewer under city streets, would allow for a multi-million dollar savings."¹⁴ Such productive use of the right-of-way far outweighs its dormant condition, which unfortunately encourages its use as a trash receptacle and a place to grow weeds. While that might not be a compelling factor if a

¹¹ By using the hybrid map feature that is provided at www.google.com, the Board can view the junked cars that are being stored on the right-of-way. In addition, the steel fence is featured in Applicants' Attachment C, Photographs RR013, RR014a - RR014c (looking northward on Longley Ave.) and RR014e (looking southward on Werwinski St.).

¹² Applicants agree with NSR that the final resolution of the reversionary interests will be made outside of this proceeding. *See* NSR Reply Comments at p. 9.

¹³ V.S. Laurent, at ¶ 12, Attachment F to Application.

¹⁴ *Id.*

credible showing had been made that a need exists for future, revitalized rail service, no such showing has been made.

The City also intends to use the segment of the Line that it will purchase from NSR as a trail after it completes the installation of the sewer line. While CLS&SB has criticized the City's intentions and claimed that it too would make room for a trail if it were to acquire the Line, those contentions lack credibility. While it would be possible to maintain a trail where the right-of-way is 100 feet across, the deck of the railroad bridge across the St. Joseph River is only 8 feet wide.¹⁵ Hence, continued rail operations over the bridge of any sort would not be compatible with a recreational trail. The Board's attention is invited to photographs of the bridge across the St. Joseph River that conclusively show that there is not enough room on the bridge to operate a train and simultaneously maintain a trail.¹⁶ Therefore, in order to have a recreational trail that crosses the river, it would be necessary to cease all rail operations over the bridge.

As was explained in the Application, the Brothers are currently involved in expanding the facilities of the retirement village. Once again, it is respectfully submitted that the use of the rail corridor for this purpose is the highest and best future use of the land, which, if necessary, would be purchased from NSR at a mutually agreed upon price.¹⁷

B. Abandonment is consistent with the goals of the Rail Transportation Policy

Not only is abandonment of the Line permitted by the present and future PC&N, it is consistent with the goals of the RTP. In the first place, the Board is required "to encourage

¹⁵ Mr. Harris has claimed "that the right-of-way of the Lines is 100' wide over most of its length." V.S. Harris at p. 4. By way of clarification, Applicants note that the right-of-way between MP ZO 9.6 and Milepost ZO 10.5 is only 60 feet wide. The right-of-way for the industrial spur is only 50 feet wide.

¹⁶ See Applicants' Attachment C, Photographs RR023, RR024 and RR025b.

¹⁷ CLS&SB's suggestion (CLS&SB Protest at p. 20, emphasis in original) that the "real motivation of the Brothers and the Sisters is to allow them to acquire NS property for little or no money" is undeserving of a reply as it is unfounded, inappropriate and lacks candor.

honest and efficient management of railroads.” 49 U.S.C. § 10101(9). It is not an accident that no rail service has been provided over the Line for over a decade. Rather, the lack of rail service reflects the fact that Conrail and NSR management concluded that there was no need or financial incentive to rehabilitate the track.¹⁸ That conclusion is supported by the lack of any evidence that any shipper during the past decade has requested rail service. Nor has any shipper filed a complaint with the Board or the courts in which it contended that NSR or Conrail had failed to honor the common-carrier obligation.¹⁹ These factors compel the conclusion that shippers who may have used rail service over the Line in the distant past have had no need for rail service for the past ten to twelve years.

The record also shows that NSR, after acquiring the Line in 1999, made the informed business decision that, because there were no remaining shippers on the Line, there was no need to maintain the Line while it allowed “a sufficient period of time [to pass in order] to determine whether restored service over the Line might become feasible.”²⁰ NSR’s judgment is borne out by the lack of any credible evidence of any past, present or future need for rail service over the Line.

The abandonment of this unused and dilapidated line of track would also be consistent with the RTP’s directive that it is the policy of the United States Government to reduce regulatory barriers to “exit from the industry.”²¹ Once again, Applicants stress that NSR has not opposed the abandonment of the Line. Instead, it has only requested the Board to “reach a

¹⁸ As NSR has admitted, “the Line is in poor condition and would need to be rehabilitated in order to restore service over it because of the Line’s long period of non-use.” NSR Reply Comments at p. 7.

¹⁹ The absence of any complaints regarding the adequacy of rail service was favorably mentioned by the Board as justification for its authorizing the adverse abandonment in *Norfolk & W. Ry. Co.--Aban. Exem. – Cinn., Hamilton County, OH*, 3 S.T.B. 110, 119 (1998).

²⁰ NSR Reply Comments at p. 7.

²¹ 49 U.S.C. § 10101(7).

decision on the merits in accordance with the facts, as set out by the Applicants and corrected or otherwise amended by NSR and any other credible presentation.”²² Had NSR opposed this abandonment, it would have made that opposition crystal clear.

The NTP also states that it is the policy of the United States to operate transportation facilities and equipment without detriment to the public health and safety.²³ It is respectfully submitted that operation of vintage trolley cars over the NSR’s main line to Chicago would not be consistent with this policy. As will be discussed in detail *infra*, in order to provide trolley service between the Notre Dame campus and the Northern Indiana Commuter Transportation District (NICTD) station at the South Bend Regional Airport,²⁴ it would be necessary for CLS&SB to operate over the NSR’s main line. As an alternative, because there is no other track that currently links the Notre Dame lead and the NICTD line, it would have to assemble its own right-of-way over and construct several thousand feet of new track.

In the first place, if it were to operate over the NSR’s Chicago main line, it would be necessary to electrify NSR’s main line, which is not going to happen without NSR’s consent. Second, no evidence exists that NSR would subject itself to the potential liability that would accompany the operation of vintage trolley cars over one of NSR’s busiest lines. Third, CLS&SB has not addressed whether such operations would be prohibited by Federal Railroad Administration safety regulations, even if NSR would agree to allow vintage trolley cars to operate on its main Chicago line and NICTD would allow them to operate over its line.²⁵

²² NSR Reply Comments at p. 57.

²³ 49 U.S.C. § 10101(8).

²⁴ According to CLS&SB, it “would provide trolley service between the UND campus and the Northern Indiana Commuter Transit (sic) District (NICTD) station at the South Bend Regional Airport.” CLS&SB Protest at p. 14, n.13.

²⁵ It is believed that CLS&SB’s proposed trolley operation would fit within the definition of either a “commuter passenger train service on standard gage track which is part of the general railroad system of transportation” or a

In summary, the abandonment of the Line is consistent with the RTP. There is nothing unique about the abandonment of this particular track that presents any challenge to the long term viability of the national rail infrastructure. There are no industries located on the line that would be deprived of service, nor is the track needed for any other legitimate transportation need, either on a local or a national basis.

Reply Comments of Norfolk Southern Railway Company

A. NSR has not asked the Board to deny the adverse application in this proceeding.

Although NSR has submitted a lengthy discussion of the principles and legal precedents that underlie adverse abandonment applications, NSR has not protested the instant application or requested the Board to deny it. As its Conclusion confirms, NSR has requested only that “the Board evaluate the subject application and reach a decision on the merits in accordance with the facts, as set out by the Applicants and corrected or otherwise amended by NSR and any other *credible* presentation, and with the law, principles and discussion” set forth in its Reply Comments.²⁶

To the extent that NSR’s Reply Comments can be viewed as an invitation for the Board to revisit over 60 years of precedent in order to curtail and eliminate the filing of adverse abandonment applications by governmental and/or reversionary interests, the Board should decline that invitation. At no time has Congress (much less the ICC or the Board) sought to overturn the Supreme Court’s explicit recognition that “[t]here is no requirement ... that the application [for abandonment] be made by the carrier whose operations are sought to be abandoned.” *Thompson v. Texas Mexican Ry.*, *supra*, 328 U.S. at 145. The Board should

“short-haul rail passenger train service in a metropolitan or suburban area.” 49 CFR 238.3(a)(1) or (2). As such, it would be subject to FRA’s Passenger Equipment Safety Standard at 49 C.F.R. Part 238, especially if CLS&SB were to operate over a line that it would not own. *See, e.g.*, 49 C.F.R. § 238.203(d).

²⁶ NSR Reply Comments at p. 57 (emphasis added).

continue to recognize that while it may give substantial weight to the long-term viability of the national rail system, it must balance the competing benefits and burdens of abandonment on all interested parties, including the railroad, the shippers on the line, the involved communities, and interstate commerce generally.²⁷

NSR's basic position is that the Board should not further expand the principles set forth in *Modern Handcraft* and should adhere to the principles and standards articulated by the Court of Appeals in *New York Cross Harbor*, and by the ICC and STB in their decisions that are consistent with *New York Cross Harbor*. Because a strict application of the *New York Cross Harbor* standards to the facts in this case will entitle the Applicants to receive a favorable decision, there is no need to expand the *Modern Handcraft* principles in order to grant the instant application.

In *New York Cross Harbor*, the Board was faced with a situation where the New York Cross Harbor Railroad ("Cross Harbor") was actively conducting operations over a line of railroad owned by New York City. While it had suffered the recent loss of some traffic, Cross Harbor had actively solicited business from new customers and was in the process of rebuilding its traffic. Despite the fact that multiple shippers supported Cross Harbor and opposed the abandonment, the Board literally ignored their interests. This caused the Court to find that the Board erroneously failed to adhere to its own precedents by not balancing all of the competing interests and instead gave paramount importance to the interests of the City of New York. As the

²⁷ The statutory public convenience and necessity standard cannot be read to be only the "railroads' convenience and necessity." While NSR suggests (Reply Comments at p. 41) that only a railroad can have an interest in the right-of-way, that position erroneously ignores the legal interests that are held by the owners of reversionary interests. If NSR's position were to be adopted, it would allow railroads to negate the reversionary interests created by the legal instruments that, in the first instance, allowed them to occupy the real property on which the track is constructed. This would be so even when the track is no longer needed for any public purpose related to the carrier's operations, as is the case herein. Recognizing this fundamental basic inequity, the Board has consistently stated that "we do not allow our jurisdiction to be used to shield a carrier from the legitimate processes of State law where no overriding Federal interest exists." *Seminole Gulf* and cases cited therein.

Court determined, that caused the Board to deviate, without adequate explanation, from its past precedents.

The undisputed facts in this case bear absolutely no resemblance to those in *Cross Harbor*. As a result, even if the very conservative standards favored by NSR are applied, a proper balancing of the various interests that is consistent with the well-recognized principles and standards established by past ICC and Board precedents compels the conclusion that the public convenience and necessity require and permit abandonment of the Line.

B. The facts herein satisfy the rigid standards identified by the Board (and by NSR) for evaluation of adverse abandonment applications. NSR contends that an adverse abandonment application should not be granted “until a line has been dormant for a very long period of time.”²⁸ As NSR has observed:

The length of time that the subject line had remained dormant in each case where the agency granted adverse abandonment or discontinuance applications were: at least 12 years (*Modern Handcraft*), at least 10 years (*Chelsea*) and at least 11 years (*NW-GTW*).²⁹

In this case, it is uncontested that the Line has been dormant for at least a decade, and likely longer. As NSR has admitted, the last movements of coal appear to have moved in the mid-1990’s.³⁰ Thus, abandonment would be consistent with the time frames established by the above-cited cases.

NSR also contends that adverse abandonment applications should not be granted if there is credible evidence of a potential for future rail service, “especially if the line has been inactive for only a few years and insufficient time has passed to make the future need for the use of the

²⁸ NSR Reply Comments at p. 46.

²⁹ NSR Reply Comments at p. 47.

³⁰ NSR Reply Comments at p. 5, n.2.

line clearer.”³¹ NSR also says that the “types of potential rail service that should prevent adverse abandonment of a line of railroad might include potential for reactivated service *if* previously rail-served industries reasonably might provide rail traffic again in the future”³² and *if* the situation involves one in which “traffic has been recently solicited or specific traffic appears to be available or possibly available to the railroad.”³³

The record herein does not support either contingency. In the first place, NSR admits that it “has located no written record that confirms that its representatives ever solicited traffic for movement over the Line to the University or any other party.”³⁴ Second, NSR does not identify any industries that reasonably might again provide rail traffic in the future. In fact, just the opposite is true. As the Board is aware, and as NSR has admitted, there is only one former shipper on the line that might have provided support for future rail traffic. That shipper is Notre Dame. However, Notre Dame has publicly announced that it will not use rail service for direct shipments of coal to its campus.³⁵ Because Notre Dame has not protested the instant application and has not filed comments in support of continued rail service, there is not a shred of credible evidence of record to support a finding that Notre Dame would provide future rail traffic.

The absence of credible evidence of any future need underlies NSR’s business judgment to terminate negotiations to sell the Line to CLS&SB. In the absence of explicit, hard evidence that Notre Dame has changed its position, the Board must adhere to its consistent, past practice

³¹ NSR Reply Comments at pp. 48-49.

³² NSR Reply Comments at p. 49 (emphasis added).

³³ NSR Reply Comments at p. 48.

³⁴ NSR Reply Comments at p. 6.

³⁵ See, Applicants’ Attachment I.

of finding that it would be “inappropriate to substitute our judgment for [the carrier’s] business judgment.”³⁶

NSR also says that the Board should consider credible evidence of the potential to use the line for storage of loaded or empty cars, for detour movements, potential use as a passing track, or as additional through track to increase capacity through the area.³⁷ While consideration of such purposes may be appropriate in some instances, that is not the case herein. NSR does not even bother to suggest that this dead-end track could be used for any such purposes. Thus, there is no evidence of record that would support a finding that the Line could be used for any of the foregoing purposes.

Indeed, NSR admits that it voluntarily exercised its business judgment by removing the mainline switch from its Chicago main line to the Notre Dame lead. Removal of the switch demonstrates that NSR management has itself concluded that use of the Notre Dame lead for the identified purposes was extremely infeasible, if not impossible. If that were not the case, NSR would not have incurred the expense of removing the unneeded switch.³⁸ Once again, the Board should not substitute its judgment for NSR’s business judgment.

NSR also complains that the Board’s “*de facto* abandonment” reference in *Modern Handcraft* has caused confusion and falsely encouraged adverse abandonment applicants. This does not apply to the instant application. The Board is reminded that Applicants, by letter dated September 26, 2006, amended their Notice of Intent to omit any reference to a “*de facto*”

³⁶ *Salt Lake*, slip op. at p. 8.

³⁷ As NSR readily admits, the Line has been severed on its north end from the national rail system by previous Conrail abandonments. Hence, it would be impossible to use the track for detour movements, as a passing track or as additional through track.

³⁸ The truncated nature of the track and the residential neighborhoods through which the Line passes also militates against the use of the track as an active storage yard for loaded and unloaded cars. Plainly, the potential liability that would accompany such uses in a residential area would cause intelligent rail management to think more than twice before using the Line for any such purposes.

abandonment. Furthermore, the Applicants herein have not pursued or relied upon that concept at any subsequent stage of the proceeding. In short, NSR's comments regarding a *de facto* abandonment are irrelevant and immaterial and have no bearing on the facts and/or the legal positions advocated by Applicants in this case.

NSR's comments regarding offers of financial assistance, public use conditions and trail use conditions are also superfluous. The Board's October 26, 2006 Decision speaks for itself. As a point of clarification, Applicants have not invoked the Board's trail use provisions of 49 C.F.R. 1152.29. If the application is granted and after the abandonment is consummated, City intends to purchase NSR's fee interests in the right-of-way through arms' length bargaining, which would transfer the fee interests to City and obviate the need to railbank the right-of-way. After installing the new storm sewer, City would create the new trail.

Protest of CLS&SB

A. The CLS&SB's Protest lacks credibility. The Protest filed by CLS&SB should be disregarded in its entirety on the grounds that it lacks any probative evidentiary support. Both the Protest and the supporting statements are littered with hearsay and admitted speculation that have not and cannot be verified. Most importantly, not a single shipper has stepped forward to testify that it needs rail service over the Line and would use CLS&SB if the abandonment application were to be denied and CLS&SB was able to reach an agreement with NSR to acquire the Line.

The unsupported speculation that permeates CLS&SB's Protest is summarized in the baseless statement that:

As Mr. Harris relates, South Bend's current Mayor and some members of the City Council actively and aggressively oppose rail service restoration. They have actively lobbied and in some cases intimidated others from supporting rail service restoration. Harris

VS at 6-7. Certain very vocal city officials persuaded those favoring rail service to keep quiet. They intimidated UND officials, specifically Paul Kempf and John Affleck-Graves, and persuaded them to change their position over use of rail. CLSSB believes that these officials persuaded NS to renege on its agreement to sell the line to CLLSB.³⁹

While referencing Harris' statement that "it is my understanding that the Mayor's Office sent representatives to the community centers to *tell* them to be in opposition," CLS&SB ignores Harris' concession that "I have not tried to verify this." V.S. Harris at p. 7 (emphasis added). The Board cannot rely on the testimony of a witness who admits that he has not tried to verify the supposed facts about which he purports to testify. Nor can the Board rely on the arguments made in CLS&SB's Protest that are based on Harris' unfounded speculation.

There is no evidence to support CLS&B's unfounded claims that Paul Kempf, the Director of Utilities at Notre Dame, and John Affleck-Graves, Notre Dame's Executive Vice President, were intimidated by City officials into changing their position over use of rail.⁴⁰ If CLS&SB had any credible evidence to support its speculative comments, it should have introduced it.

Nor can CLS&SB substantiate its claim that City officials "persuaded NS to renege on its agreement to sell the line to CLSSB."⁴¹ CLS&SB has not identified any City official who would have been able to persuade NSR to back out of the tentative deal. Nor has it identified the NSR officials who were the City officials' supposed targets. In response, Applicants state that they

³⁹ CLS&SB Protest at pp 16-17.

⁴⁰ In fact, CLS&SB cannot demonstrate that Notre Dame ever "changed" its position at all. In the June 22, 2006 newspaper article that announced that Notre Dame "has no intention of entering into an agreement" with CLS&SB, Affleck-Graves categorized CLS&SB's talks with Notre Dame's utility services manager and business department representatives as being "extremely tentative." Applicants' Attachment I, Margaret Fosmoe, *Notre Dame drops coal-by-rail option*, South Bend Tribune, June 22, 2006. Affleck-Graves is also quoted as saying that "I think it would be pushing the point to say we've been in discussions" with CLS&SB.

⁴¹ CLS&SB Protest at p. 17; *see also, id.* at p. 3 ("local officials pressured NS to abrogate that agreement and withdraw its support for the sale. Verified Statement of Robert Harris (Harris VS) at 3.")

are not aware of any communications by any City official to NSR officials, much less any communication that would have influenced NSR's business decision to terminate its negotiations with CLS&SB.

B. CLS&SB's claim that it is the authorized and exempted operator of the line is specious. In its Protest, CLS&SB says that it is "the authorized and exempted operator of the line that is the subject of this adverse abandonment application"⁴² It also says that Applicants are seeking the "adverse abandonment of an out-of-service line where the carrier is not the current owner but a party authorized to acquire and restore it to active rail service."⁴³ These audacious contentions have no legal or factual basis and must be rejected.

In the first place, CLS&SB did not reach a final agreement with NSR to acquire the line.

As NSR has explained in its Comments filed in this proceeding:

In summer 2006, NSR was negotiating a possible sale of the Line to a potential short line operator, the Chicago, Lake Shore & South Bend Railway (CLS&SB). CLS&SB proposed to restore the delivery of coal by direct rail service to the University. NSR was apprised that CLS&SB received a favorable response from the University to the proposed reinstatement of service over the Line for direct delivery of coal to it. While the University may have discussed restoration of service over the Line with CLS&SB, the University apparently made no commitments to request direct coal delivery. The University's public withdrawal of its support for the proposed operation before the NSR and CLS&SB concluded their transaction effectively negated the objective of that transaction.⁴⁴

Second, although CLS&SB has taken advantage of and abused the Board's class exemption procedures in an attempt to create the appearance of standing in this proceeding, CLS&SB has not been "authorized" to acquire the lines. Instead, its recent Verified Notice of

⁴² CLS&SB Protest at p. 7.

⁴³ *Id.* at 8.

⁴⁴ NSR Comments at pp. 5-6. *See also*, Letter to Vernon A. Williams from James R. Paschall, dated August 15, 2006, served in STB FD 34893, The Chicago, Lake Shore & South Bend Railway Company - Acquisition and Exemption - Norfolk Southern Railway Company.

Exemption, filed November 20, 2006, never became effective as it was stayed by the Board by Decision served November 22, 2006.⁴⁵ Given CLS&SB's erroneous comment that "[o]n December 20, 2006, the Board published a notice of the acquisition exemption (which was effective 7 days after filing or November 27, 2006)," it appears that CLS&SB has either failed to notice that the Board stayed the effective date of the exemption or is simply confused as to the legal effect of the Board's stay, which has never been lifted and remains in effect.

In addition, there is good cause to argue that the notice is void *ab initio* on the grounds that the statement that CLS&SB "anticipates reaching an agreement with NS" is false and misleading. As Applicants have previously demonstrated, there is no basis for that statement.⁴⁶ Hence, at best, it can be said that CLS&SB has filed a notice of exemption that would have permitted it to acquire the lines *if* it had been able to reach an agreement with NSR, which it has not done. Therefore, NSR continues to be the *sole* authorized carrier and operator.⁴⁷

Third, CLS&SB, which was recently incorporated, is a railroad in name only. It has no trained rail employees and no rail equipment other than some vintage trolley cars. Furthermore, with the exception of Mr. Landrio, who claims to have established a number of short line railroads, the other individuals do not appear to have any operating experience in the freight rail industry.

⁴⁵ STB F.D. No. 34960, *The Chicago, Lake Shore and South Bend Railway Company--Acquisition and Operation Exemption--Norfolk Southern Railway Company*, Decision served November 22, 2006. Applicants' Attachment J.

⁴⁶ Rather than repeat the arguments in their Petition to Revoke and Stay Exemption in STB Docket FD No. 34960, *The Chicago, Lake Shore and South Bend Railway Company--Acquisition and Operation Exemption--Norfolk Southern Railway Company*, Applicants' arguments therein are incorporated herein by reference.

⁴⁷ Applicants will agree with CLS&SB's comment (Protest at p. 8) that this proceeding presents significant policy implications going beyond the facts of this proceeding. Without question, this proceeding highlights the myriad of problems that result when the Board's class exemption procedures are abused by filing "verified notices" that contain false and misleading statements and then using those void notices to bootstrap further false and misleading arguments in other proceedings. The Board should not tolerate such activities.

C. CLS&SB's reliance on proposed vintage trolley operations to oppose the abandonment of the Line is irrelevant. Recognizing that no shipper has appeared to support the contention that its freight rail operations are needed, CLS&SB postulates that a need exists for its vintage trolley car operations. While the collection of vintage trolley cars may be a fascinating hobby for a real estate developer with no railroad operating experience, it has no bearing on any issue that is legitimately before the Board in this proceeding. Indeed, CLS&SB's proposed suburban, electrified trolley operation would not fit within the definition of a "rail carrier" under 49 U.S.C. § 10102(5).⁴⁸

At the outset, CLS&SB is forced to concede that trolley service between the Notre Dame campus and downtown South Bend "is not CLSSB's intended market."⁴⁹ Instead, CLS&SB says that it would "provide trolley service between the UND campus and the Northern Indiana Commuter Transit (sic) District (NICTD) station at the South Bend Regional Airport."⁵⁰ This necessarily assumes that CLS&SB would reach an agreement with NICTD. However, as Gerald Hanas, the General Manager of the Northern Indiana Commuter Transportation District ("NICTD"), has explained, "[n]o administrative or engineering discussions have taken place to determine the feasibility of such an operation."⁵¹

Mr. Harris also says that the Line presents CLS&SB with the "means of directly linking the currently operated interstate commuter operations of the Northern Indiana Commuter

⁴⁸ As defined therein, "rail carrier" means a person providing common carrier railroad transportation for compensation, but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation."

⁴⁹ CLS&SB Protest at p. 14, n.13. Although CLS&SB disclaims any intent to operate into downtown South Bend, it nevertheless attached various news articles and letters to the editor to the Harris Verified Statement in an attempt to leave the impression that a need exists to provide transportation for students from Notre Dame to downtown South Bend, the College Football Hall of Fame and the Amtrak station. That is not possible. The truth of the matter is that the Line terminates at a point that not only is a lengthy cab ride from downtown South Bend, but is in an area that CLS&SB has described as "blighted and substantially vacant land." CLS&SB Protest at p. 18.

⁵⁰ CLS&SB Protest at p. 14, n.13, citing V.S. Harris at p. 3.

⁵¹ V.S. Hanas at ¶ 6 (Applicants' Attachment L).

Transportation District (NICTD) with the University of Notre Dame campus.”⁵² Harris also says that “NICTD currently has two distinct groups of riders that use NICTD services directly to the campus, students departing for Chicago on Friday afternoons, and returning on Sunday evenings.”⁵³ That statement is not true. NICTD’s commuter rail services terminate at its station that is located at the South Bend airport. As Hanas has also explained:

To the extent that the foregoing statement suggests that NICTD provides services “directly to the campus,” it is misleading. The students must travel to the airport from the campus by some means other than NICTD’s commuter rail service. Second, NICTD does not operate charter trains directly to the campus. These special trains terminate either along Westmoor St. between Sheridan and Bendix, or at the Airport terminal and passengers then take private over-the-road coaches or city transit buses to Notre Dame.⁵⁴

CLS&SB’s misleading comments should be ignored by the Board. There is no existing track that would allow either NICTD or CLS&SB to reach the Notre Dame campus directly from the NICTD station at the South Bend Airport without operating over the NSR main line. In order to link the Notre Dame lead with the NICTD lines, it would be necessary either to build a new line or obtain permission from NSR to operate the vintage trolley cars over NSR’s main Chicago line for over a mile.⁵⁵

If it were to operate over NSR’s line, CLS&SB would also have to obtain NSR’s permission to electrify NSR’s line. Although Applicants will not speak for NSR, they will suggest that, without even reaching the electrification issue, it is highly doubtful that NSR would permit CLS&SB to operate vintage trolley cars over its heavily trafficked main Chicago line in

⁵² V.S. Harris at p. 3. *See also*, CLS&SB Protest at p. 14, n.13.

⁵³ V.S. Harris at p. 3.

⁵⁴ V.S. Hanas at ¶ 4.

⁵⁵ As Mr. Laurent has noted, “[t]here is no information in the record that either NICTD or NSR would allow CLS&SB to operate over their tracks. V.S. Laurent at ¶8 (Applicants’ Attachment M).

order to reach the South Shore line over which the NICTD commuter operations between Chicago and the South Bend airport are conducted.⁵⁶

At this time, there is no other way to link the Notre Dame lead with the NICTD line. In his Reply Verified Statement, Mr. Laurent explains that the existing NICTD line ends at the former Amtrak Station at Meade Street, which is located in the far western edge of South Bend. This location is approximately 4,000 feet to the west of the end of the spot where the Notre Dame lead at one time intersected with the NSR line.⁵⁷ As Gerald Hanas has also explained, there "currently is no means of linking the NICTD operations with the proposed vintage trolley car operations that CLS&SB seems to propose."⁵⁸

For CLS&SB to reach the point where the NICTD line terminates a few feet to the east of the former Amtrak station, "CLS&SB would have to assemble the land that would be used to link the two rail systems and improve the existing Notre Dame lead to passenger rail standards."⁵⁹ As Mr. Laurent has noted, after assembling the land, it then would be necessary for CLS&SB to build and electrify several thousand feet of new track in order to hit the spot where the NICTD track terminates at the former Amtrak station.⁶⁰ No estimate has been provided regarding the cost of the construction and electrification of these new lines.

Even if NICTD may have indicated a willingness to consider operating its trains over the Line to the northern end of the line on the Notre Dame campus, there is nothing of record to show that NICTD agreed with CLS&SB's scheme. In particular, although Mr. Hankey says that

⁵⁶ While the Board lacks jurisdiction over excursion passenger service, it also lacks jurisdiction to compel NSR to allow NICTD to operate over its track. Moreover, the Board also lacks jurisdiction to compel either NSR or NICTD to allow CLS&SB to operate its vintage trolley cars over their lines.

⁵⁷ Reply V.S. Laurent at ¶ 5.

⁵⁸ V.S. Hanas at ¶ 3.

⁵⁹ V.S. Hanas at ¶ 5.

⁶⁰ V.S. Laurent at ¶¶ 4 - 7, inclusive.

"[o]n at least ten occasions each year, and potentially as many as twenty, NICTD would operate multiple special trainsets from Chicago to the UND campus," that contention has been disputed by NICTD's General Manager. As Mr. Hanas has explained, nothing in that magnitude was "discussed with or accepted by NICTD."⁶¹ In summary, even if CLS&SB could somehow force NSR to sell the Notre Dame lead to it, that would not guarantee CLS&SB the ability to reach the NICTD station at the South Bend airport.⁶²

D. CLS&SB's procedural contentions lack merit. CLS&SB's renewed arguments that Applicants failed to comply with certain of the Board's governing regulations are specious. As explained in detail in Applicants' Joint Reply To Petition To Reject Application, the Applicants fully complied with the Board's governing regulations.⁶³ Even if they had not done so, the Board may freely relax its procedural rules in the absence of demonstrated, "substantial prejudice to the complaining party." *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 539 (1970). *See also*, 49 C.F.R. § 1100.3, "[t]he rules will be construed liberally to secure just, speedy and inexpensive determination of the issues presented." Not only was CLS&SB able to participate fully in this proceeding, but it has wholly failed to demonstrate any prejudice whatsoever. Hence, the Board should reject its baseless procedural contentions.

Comment of Allen L. Stevens Jr. ("Stevens").

At the outset, Mr. Stevens does not purport to be a shipper. Moreover, he is not a member of the affected community. His address is Union Mills, Indiana, which is located nearly an hour from South Bend in La Porte County, Indiana.

⁶¹ V.S. Hanas at ¶ 7.

⁶² The instant record is devoid of any evidence regarding the potential cost of assembling the needed right-of-way, or the building and electrifying the track that would allow CLS&SB to reach the NICTD line.

⁶³ CLS&SB Protest at pp. Rather than repeat the arguments made in the Joint Reply, they are incorporated herein by reference. For the convenience of the Board, a copy of the Joint Reply is attached as Applicants' Attachment N

In his Comment, Stevens purports to calculate the number of trucks used to transport coal to Notre Dame from the NSR transload site in South Bend and voices concerns regarding the environmental impact of continuing the use of trucks to deliver coal to the University of Notre Dame ("Notre Dame").⁶⁴ As the Board's Section of Environmental Analysis has determined, because the diversion of coal to Notre Dame occurred over a decade ago, abandonment of the Lines will not result in diversion of any rail traffic to trucks.

Even if his alleged facts were to be taken at face value, Stevens' Comment ignores several other salient facts. First, Notre Dame made the decision to continue to receive its coal via truck. Second, there is no ignoring the fact that Notre Dame has received coal for over a decade via truck without any apparent concerns being voiced by Mr. Stevens. Third, the citizens of South Bend who have filed Comments with the Board and who have a legitimate interest in the issue unanimously support Applicants. Given their proximity to the lines, it is respectfully submitted that their concerns are paramount to those of an officious intermeddler who has no apparent ties to the South Bend community.

SEA Environmental Assessment.

On December 22, 2006, the Board's Environmental Assessment ("EA") was served. The EA directed Applicants to complete the Section 106 process of the National Historic Preservation Act and to report back to the Section of Environmental Analysis regarding any consultations with the Indiana Department of Natural Resources, Division of Historic Preservation & Archaeology (SHPO) and any other Section 106 consulting parties.

⁶⁴ Because Mr. Stevens does not disclose the source of his information regarding the amount of coal used by Notre Dame, his calculations cannot be validated. Moreover, CLS&SB has claimed that such information is confidential and proprietary and has redacted it from the letter submitted by Mr. Hankey. Last, because Notre Dame has not submitted any information, the record is devoid of any probative evidence regarding the tonnage of coal that it receives via truck.

By letter dated January 10, 2006 (sic), the SHPO announced that it had determined that it had identified several "properties within the probable are of potential effects ... that ... may meet the criteria of eligibility for inclusion in the National Register of Historic Places."⁶⁵ Applicants have determined that none of the listed properties are located within the right-of-way. The Munro House, at 1213 Diamond Avenue, and the Metcalf House, at 1201 Diamond Avenue, are located on real property that abuts the right-of-way. However, neither structure will be impacted in any fashion by removal of the track. This is confirmed by Catherine Hostetler, Director of the Historic Preservation Commission of South Bend and St. Joseph County. As she has explained in her Reply Verified Statement:

Neither the Munro House at 1213 Diamond Avenue (Site # 141-598-25629) nor the Metcalf House at 1201 Diamond Avenue (Site # 141-598-25631) will be impacted. Both of these houses are situated to the east of the right-of-way. They should also be re-evaluated as to their rating as "Significant". To the west, there is a vacant stretch of unimproved land, which I believe would facilitate the removal of the track.⁶⁶

Applicants note that one property that has been identified by the SHPO, the Northern Indiana College at 1600 Washington Avenue, no longer exists. As Ms. Hostetler has also confirmed based on her personal review of that location, "[t]hat structure is no longer in existence as it was razed several years ago."⁶⁷ Applicants have no knowledge as to the date that the structure was demolished.

The Holy Cross Roman Catholic Church and School at 1050 Wilbur Street are located several hundred yards from the right-of-way and are separated from the track by "a substantial

⁶⁵ Letter to Richard Streeter from Ron McAhron (see Attachment O hereto).

⁶⁶ Reply V.S. Hostetler at ¶ 3 (Applicants' Attachment P hereto).

⁶⁷ Reply V.S. Hostetler at ¶ 2. As is conclusively demonstrated, the SHPO did not perform any on-site studies, but merely relied on out-dated written information.

DOCKET NO. AB 290 (Sub-No. 286)

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

ATTACHMENT I

**MARGARET FOSMOE, *Notre Dame drops coal-by rail option,*
South Bend Tribune, June 22, 2006.**

SouthBendTribune.com

Discover what's in it for you



Email This Story

About My Account Log Out

June 22, 2006

Notre Dame drops coal-by-rail option

In keeping with city's wishes, university will stay with truck delivery

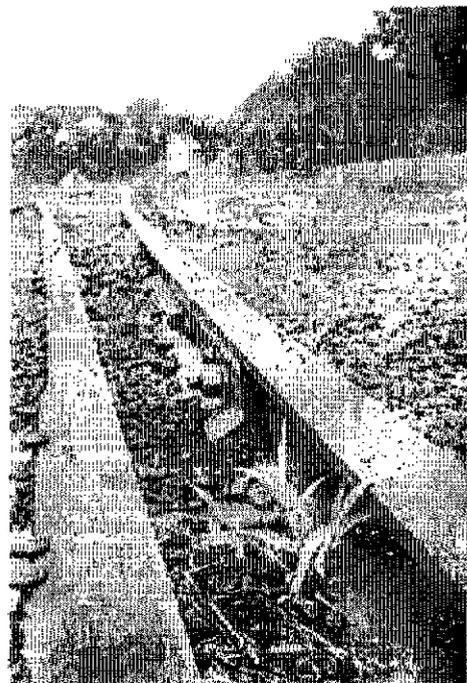
By MARGARET FOSMOE
Tribune Staff Writer

SOUTH BEND -- The University of Notre Dame has no plans to establish a business contract with a company that hopes to buy and reopen an old rail line running from the city's west side to campus.

"The university has no intention of entering into an agreement with the South Bend short-line railway company to deliver coal," John Affleck-Graves, Notre Dame's executive vice president, said on Tuesday. "Now and in the foreseeable future, we'll have our coal delivered by truck."

Representatives of the Chicago, Lake Shore & South Bend Railway Co. had some "extremely tentative" talks with Notre Dame's utility services manager and business department representatives in the past two or three years, Affleck-Graves said. "I think it would be pushing the point to say we've been in discussions," he said.

South Bend Railway representatives are



A railroad line still leads into the coal storage area at the University of

considering buying the closed rail line from Norfolk Southern and reopening it to transport coal and other materials to businesses in South Bend. Passenger service might be added later, they said.

Notre Dame, although the university's coal shipments now arrive by truck.

Tribune Photo/SHAYNA BRESLIN

Rail company representatives told city officials that Notre Dame was one of the potential customers.

South Bend Mayor Stephen Luecke and council members are opposed to the idea, citing safety and quality-of-life concerns. The old rail line cuts through residential neighborhoods across the west side and would have 17 at-grade street crossings without flashing lights or automatic gates.

Affleck-Graves said he met with the mayor six or eight months ago to discuss the idea. As a steward of the university and its resources, Affleck-Graves said he is obligated to listen to any proposal that might increase the efficiency and economy of Notre Dame.

Luecke made it clear he views reopening the rail line as a bad idea, Affleck-Graves said.

"I assured the mayor at that stage that if the city and the county were strongly opposed to the railroad proposal, the university would not go forward," Affleck-Graves said.

Notre Dame officials have worked hard over the years to build a strong relationship with the city, the county and local residents. "We would not do anything to damage that relationship," Affleck-Graves said.

That doesn't mean that the university always will agree with local governmental officials on every matter, he said. But in the case of the railroad proposal, Notre Dame will yield to the wishes of the local community, he said.

Most of the energy used on the Notre Dame campus for heating, cooling and electricity is generated by coal burned in the campus power plant. The campus uses 80,000 tons of coal annually. The piles of coal are stored on university property along Douglas Road, near where the old rail line ends.



Affleck-Graves

Until about 10 years ago, when the rail line went out of service, coal shipments were delivered directly to campus by train. The coal now arrives in South Bend via railroad at a site on South Olive Street and is trucked to campus -- about 3,000 truckloads a year.

While the distribution varies from year to year, on average 85 percent of Notre Dame's energy comes from coal, 10 percent from natural gas and 5 percent from fuel oil.

If the rail line reopened, the city supported it, safety issues were addressed and neighborhood residents didn't mind it, Notre Dame would consider using rail service

again for coal deliveries, depending on the cost, Affleck-Graves said.

"Given the opposition to it, this is an easy decision for us to continue with truck delivery," he said.

Affleck-Graves said South Bend Railway never presented a formal proposal or contract to Notre Dame.

The company also has said that reopening the rail line could raise the possibility of passenger trains delivering Chicago fans directly to campus for Notre Dame football games.

If the rail line were to reopen and city officials and the Chamber of Commerce thought passenger trains to campus on football Saturdays would be a good thing for the community, the university would be interested in exploring the idea. But Notre Dame doesn't plan to pursue such a proposal itself, Affleck-Graves said.

"Generally, we have a good, strong, working relationship with the city and the county," he said, "and it's our intention to maintain that."

Staff writer Margaret Fosmoe:

mfosmoe@sbtinfo.com

(574) 235-6329

Our Privacy Policy and Direct Notice To Parents

Contact the southbendtribune.com Web staff.
News coverage and editorial content provided by
the South Bend Tribune unless otherwise specified.
Copyright © 1994-2005 South Bend Tribune

DOCKET NO. AB 290 (Sub-No. 286)

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

ATTACHMENT J

**STB Decision, Docket No. F.D. 34960, *The Chicago, Lake Shore and
South Bend Railway Company -- Acquisition and Operation
Exemption -- Norfolk Southern Railway Company, November 22,
2006.***

37565
CO

SERVICE DATE - LATE RELEASE NOVEMBER 22, 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

Decided: November 22, 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 is 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.

On September 13, 2006, City, Sisters, and Brothers jointly sought exemptions and waivers in connection with a proposed third party or adverse abandonment application related to this matter. The Board subsequently granted those requests in part and denied them in part. See Norfolk Southern Railway Company—Adverse Abandonment—St. Joseph County, IN, STB Docket No. AB-290 (Sub-No. 286) (STB served Oct. 26, 2006). The adverse abandonment application was filed on November 21, 2006.¹

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. A ruling on the petition to reject will be addressed in a future decision.

Notwithstanding that NSR previously withdrew its offer to sell to CLS&SB the Line at issue here, CLS&SB states in the latest notice filing, without more, that it anticipates reaching an agreement with NSR on the proposed sale. Because the adverse abandonment application in STB Docket No. AB-290 (Sub-No. 286) includes the entire Line at issue in CLS&SB's notice of exemption in this proceeding, the effective date of CLS&SB's notice of exemption will be stayed to give interested persons an opportunity to submit additional information clarifying the matters at issue here.

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

It is ordered:

1. The effective date of the notice of exemption in this proceeding is stayed pending further order of the Board.
2. This decision is effective on the date of service.
3. A copy of this decision will be served on Norfolk Southern Railway Company.

By the Board, Charles D. Nottingham, Chairman.

Vernon A. Williams
Secretary

DOCKET NO. AB 290 (Sub-No. 286)

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

ATTACHMENT K

Letter to Vernon A. Williams, Secretary, Surface Transportation Board, from James R. Paschall, Senior General Attorney, Norfolk Southern Corporation, dated August 15, 2006, filed in STB F.D. 34893, The Chicago, Lake Shore and South Bend Railway Company-Acquisition and Operation Exemption-Norfolk Southern Railway Company.



Norfolk Southern Corporation
Law Department
Three Commercial Place
Norfolk, Virginia 23510-9241

James R. Paschall
Senior General Attorney

Writer's Direct Dial Number
(757) 629-2759
fax (757) 533-4872

August 15, 2006

via fax 202 565-9004
and original and 10 copies via mail

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

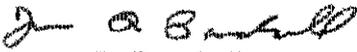
Re: STB Finance Docket No. 34893, The Chicago, Lake Shore and South
Bend Railway Company - Acquisition and Operation Exemption - Norfolk
Southern Railway Company

Dear Mr. Williams:

Norfolk Southern Railway Company submits this letter to advise the Board that no agreement has been or will be executed between the Chicago, Lake Shore and South Bend Railway Company with respect to the transaction that is the subject of this proceeding. Therefore, the proceeding is moot. As a result, NSR suggests it may be dismissed by the Board.

CLS&SB should not be criticized for submitting the notice early inasmuch as the parties were working to complete the tentative transaction. CLSSB wished to proceed with the transaction and reactivation of the rail line quickly upon reaching and executing a final agreement with NSR. The Board's notice of exemption was permissive, not mandatory, and did not require that the agreement be reached before CLSSB submitted the notice of exemption to the Board. The Board's notice served July 6, 2006 also does not now require that the transaction be consummated.

Very truly yours,


James R. Paschall

Honorable Vernon A. Williams
STB Finance Docket No. 34893
August 15, 2006
Page 2 of 2

cc: via fax 202 296-3939
Mr. John D. Heffner
1920 N Street, NW
Suite 800
Washington, DC 20036

Attorney for the Chicago, Lake Shore and South Bend Railway Company

via fax 574 235-9892
Mr. Jeffrey M. Jankowski
Deputy City Attorney
227 West Jefferson Blvd.
South Bend, IN 46601

via fax 574 287-1840
Ms. Sandra M. Seanor
Executive Director
Michiana Council of Governments
227 West Jefferson Blvd.
South Bend, IN 46601

via fax 574 284-5779
Sister Joy O'Grady President
Sisters of the Holy Cross
501 Bertrand Hall - St. Mary's
Notre Dame, IN 46556-5000

via fax 202 289-1330
Mr. Richard H. Streeter
Barnes and Thornburg, LLP
Suite 900
750 17th Street, N.W.
Washington, DC 20006-4675

Attorney for the Brothers of the Holy Cross, Inc.

DOCKET NO. AB 290 (Sub-No. 286)

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

ATTACHMENT L

**VERIFIED STATEMENT GERALD HANAS
GENERAL MANAGER
NORTHERN INDIANA COMMUTER TRANSPORTATION
DISTRICT**

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C. 20423

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

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

AFFIDAVIT OF GERALD HANAS CONCERNING THE ADVERSE
ABANDONMENT APPLICATION OF THE
CITY OF SOUTH BEND, THE BROTHERS OF HOLY CROSS, INC. AND THE
SISTERS OF THE HOLY CROSS, INC.

1. My name is Gerald Hanas. I am the General Manager of the Northern Indiana Commuter Transportation District (NICTD). My business address is 33 East US Highway 12, Chesterton, Indiana 46304. I have been employed by NICTD since 1977.
2. I am presenting this Affidavit in response to certain comments made by The Chicago, Lake Shore & South Bend Railway Company in its Protest filed January 5, 2007 in the above-captioned proceeding. I will also respond to certain statements set forth in the Verified Statements of Robert S. Harris and John Hankey, which are attached to CLS&SB's Protest as Exhibits A and C. This affidavit is not a statement in support of or in opposition to the adverse abandonment application.
3. NICTD is the owner and operator of the South Shore Line. As herein pertinent, the South Shore operates a rail commuter service between the City of Chicago and the South Bend Regional Airport. The South Shore commuter line is located several miles to the west of the Notre Dame lead, which is the line of railroad that is the subject of the above-captioned proceeding. NICTD currently is working closely with the South

Bend Regional Airport in order to relocate its line to the west side of the airport terminal. That project when completed will reduce the travel time to Chicago by at least ten minutes. It would also increase the distance between the terminus of the Notre Dame lead and our main line track.

3. At page 3 of his Verified Statement, Mr. Harris says that "there should be considerable Federal interest in this operation as it is a means of directly linking the currently operated interstate commuter operations of the Northern Indiana Commuter Transportation District (NICTD) with the University of Notre Dame campus." There currently is no means of linking the NICTD operations with the proposed vintage trolley car operations that CLS&SB seems to propose.

4. In that same paragraph, the statement is made that "NICTD currently has two distinct groups of riders that use NICTD services directly to the campus, students departing for Chicago on Friday afternoons, and returning on Sunday evenings, and charter trains destined for University of Notre Dame home football games." To the extent that the foregoing statement suggests that NICTD provides services "directly to the campus," it is misleading. The students must travel to the airport from the campus by some means other than NICTD's commuter rail service. Second, NICTD does not operate charter trains directly to the campus. These special trains terminate either along Westmoor St. between Sheridan and Bendix, or at the Airport terminal and passengers then take private over-the-road coaches or city transit buses to Notre Dame.

5. Mr. Harris also says at page 3 that "NICTD has indicated a willingness to consider operating their trains over the lines directly to north end of the campus near the power plant where historically riders on Michigan Central and New York Central System

football specials disembarked." In order for NICTD to consider operating trains over the Notre Dame lead, CLS&SB would have to assemble the land that would be used to link the two rail systems and improve the existing Notre Dame lead to passenger rail standards.

6. I must also challenge the statement at page 14, note 13 of CLS&SB's Protest that "CLS&SB would provide trolley service between the UND campus and the Northern Indiana Commuter Transit District (NICTD) station at the South Bend Regional Airport." No administrative or engineering discussions have taken place to determine the feasibility of such an operation.

7. On page 2 of a letter addressed to Robert Harris from John P. Hankey, attached to CLS&SB's Protest as Exhibit C, Mr. Hankey states that in discussions with NICTD, the CLS&B identified new traffic of between 10-20 multi-unit train sets per year between Chicago and UND campus. The order of magnitude of 10-20 multiple unit train sets was not discussed with or accepted by NICTD.

8. I trust that this Affidavit corrects the record with respect to representations attributed to NICTD, and that we neither oppose nor support the adverse abandonment petition.

FURTHER SAYETH THE AFFIANT NOT.

Verification

I, Gerald Harnas, hereby declare under penalty of perjury that the above and foregoing statement is true and accurate to the best of my knowledge and belief. Executed on January 19, 2007.


Gerald R. Harnas

DOCKET NO. AB 290 (Sub-No. 286)

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

ATTACHMENT M

**REPLY VERIFIED STATEMENT ANDREW R. LAURENT
ECONOMIC DEVELOPMENT SPECIALIST
CITY OF SOUTH BEND, INDIANA**

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C. 20423

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

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

REPLY VERIFIED STATEMENT OF ANDREW R. LAURENT IN SUPPORT OF
ADVERSE ABANDONMENT APPLICATION OF THE
CITY OF SOUTH BEND, THE BROTHERS OF HOLY CROSS, INC. AND THE SISTERS
OF THE HOLY CROSS, INC.

1. My name is Andrew R. Laurent, BUPD, BS. I am the Economic Development Specialist for The City of South Bend ("the City"). I have previously provided the Board with a Verified Statement in this proceeding. The purpose of this statement is to reply to certain statements and representations made by Mr. Robert S. Harris in his Verified Statement dated January 4, 2007. I will also reply to certain comments in the Protest filed by The Chicago, Lake Shore & South Bend Railway Company.

2. CLS&SB says that if the Line were not abandoned and if it were permitted to purchase the Line it would "provide trolley service between the UND campus and the Northern Indiana Commuter Transit District (NICTD) station at the South Bend Regional Airport and would allow NICTD to operate football and other special trains on its line to reach UND." CLS&SB Protest at p. 14, n.13, citing V.S. Harris at p. 3. Because NICTD owns and operates the South Shore Line between South Bend, Indiana and Chicago, Illinois, it would be necessary for CLS&SB to enter into an operating or trackage rights agreement in order for such services to be provided. No representation of such an agreement has been made to the City.

3. Mr. Harris says that the Line presents CLS&SB with the "means of directly linking the currently operated interstate commuter operations of the Northern Indiana Commuter Transportation District (NICTD) with the University of Notre Dame campus." V.S. Harris at p. 3. Mr. Harris also says that "NICTD currently has two distinct groups of riders that use NICTD services directly to the campus, students departing for Chicago on Friday afternoons, and returning on Sunday evenings." V.S. Harris at p. 3. That statement is not true. NICTD does not provide any transportation services directly to the University of Notre Dame campus as Mr. Harris suggests. Instead, NICTD's commuter rail services between Chicago and South Bend terminate at its station that is located at the South Bend airport, which is located on the west side of the City of South Bend several miles from Notre Dame.

4. On May 4, 2005, I received an e-mail from Dick Balas, who was employed by Stone Consulting & Design, Inc. He attached a copy of a "drawing with 3 options for the connection of CLS&SB's line to the original South Shore Railway." A copy of the e-mail and the drawing is attached hereto. Assuming that CLS&SB's trolleys would not be allowed to operate on the NSR's line, the drawing shows that several thousand feet of new construction would be required before CLS&SB would be able to connect with the inactive portion of the line.

5. The original line of the South Shore Railway to which Mr. Balas referred is a line that terminates at the former Amtrak Station, which is located on the far west side of South Bend near the intersection of North Meade Street and Orange Street. Rough calculations using the City's Geographic Information System show that the point where the NICTD line terminates is approximately 4,000 feet to the west of the point where the Notre Dame lead used to intersect with the main line of the Norfolk Southern Railway. There is no existing track that would

connect the Notre Dame lead directly to the terminus of the original South Shore line. As a result, it would be necessary either to construct a new line or negotiate an agreement with NSR that would allow CLS&SB to operate its vintage trolleys over the NSR double track Chicago main line.

6. From the point where it terminates at the former Amtrak station, the NICTD track, which is no longer in active use, extends in a westerly direction another 6,000 feet to the point where it connects with the active NICTD track from Chicago that leads to the South Bend airport. Assuming that CLS&SB could not operate its vintage trolleys over the NSR lines to the point of interchange with the NICTD track, CLS&SB would have to travel approximately 10,300 feet over a combination of new track and the inactive NICTD track to reach NICTD's active line.

7. It is my further understanding that in order for CLS&SB to operate its vintage trolleys from the north end of the Notre Dame campus to the point where it would connect with the active NICTD track that leads to the NICTD station at the South Bend airport, it would have to electrify the entirety of that track. CLS&SB has provided no information regarding the cost of electrifying either the existing track or the track that it would be required to construct.

8. There is no information in the record that either NICTD or NSR would allow CLS&SB to operate over their tracks. However, if CLS&SB were able to convince NSR that it should be allowed to operate its vintage trolley cars over NSR's main line, it would also have to electrify the NSR line from the termination of the Notre Dame lead to the point of interchange with NICTD, which is also located several hundred feet to the west of the former Amtrak station.

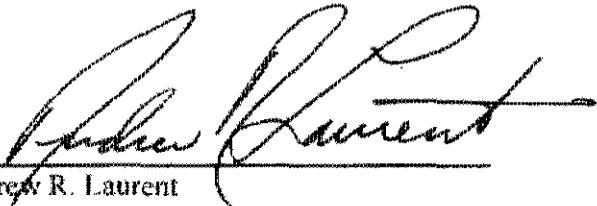
9. I am not privy to any agreement between CLS&SB and NSR or NICTD.

FURTHER SAYETH THE AFFIANT NOT.

VERIFICATION

I, Andrew R. Laurent, hereby declare under penalty of perjury that the above and foregoing statement is true and accurate to the best of my knowledge and belief.

Executed on January 17, 2007.



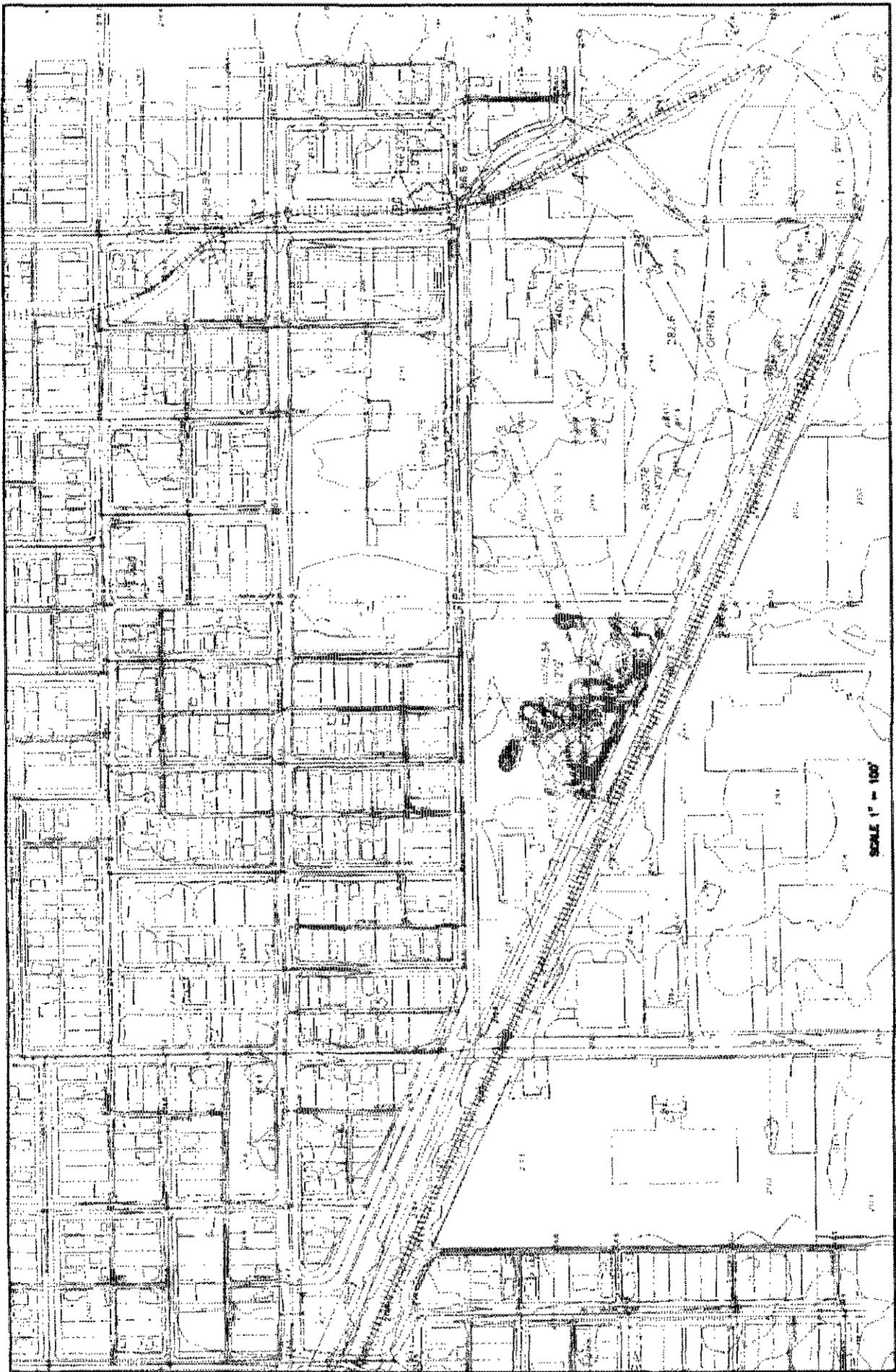
Andrew R. Laurent

Richard Streeter - Drawing with 3 Options

From: "Dick Balas" <dickbalas@stoneconsulting.com>
To: <alaurent@ci.south-bend.in.us>
Date: 5/4/2005 3:16 PM
Subject: Drawing with 3 Options
CC: "Gary Landrio" <garylandrio@stoneconsulting.com>

Andy,
per Gary this is the drawing with 3 options for the connection of the railroad to the original South Shore Railway.

Dick Balas
Design Dept. Manager
Stone Consulting & Design, Inc.
814-726-9870



SCALE 1" = 100'

DOCKET NO. AB 290 (Sub-No. 286)

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

ATTACHMENT N

**JOINT REPLY TO PETITION TO REJECT APPLICATION
FILED BY APPLICANTS, DATED DECEMBER 6, 2006**

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C. 20423

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

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

JOINT REPLY TO PETITION TO REJECT APPLICATION

Come now the City of South Bend, Indiana, the Brothers of Holy Cross, Inc. and the Sisters of the Holy Cross, Inc. (collectively "Applicants"), by and through counsel of record, and file their joint reply to the Petition to Reject Application submitted by the Chicago, Lake Shore & South Bend Railway Company ("CLS&SB"). By its petition, CLS&SB repeats its earlier claims that Applicants failed to comply with various requirements of 49 C.F.R. § 1152.20 governing the Notice of Intent to file an abandonment application.¹

It is respectfully submitted that Applicants have complied with the requirements of section 1152.20 and with the Board's October 26, 2006 Decision in this docket ("*October Decision*"), which granted various waivers regarding the Notice of Intent, including the wording, posting, service on significant users (of which there are none), and service on labor organizations. *See, October Decision*, slip op. at p. 3.

In its latest Petition, CLS&SB once again complains that Applicants failed to serve the Notice of Intent on the Board by certified mail. CLS&SB's contention is spurious and should be

¹ See, CLS&SB Petition to Reject Notice of Intent of Adverse Abandonment, filed November 13, 2006. The Applicants filed a timely response thereto on November 16, 2006.

rejected. In the first place, Applicants served the Notice of Intent on the Board by hand-delivery, which is even better than certified mail in that the Board's date stamp confirms receipt.

Second, as reflected by its Reply to Applicants' Petition for Waiver, CLS&SB was aware at all relevant times that the Board was served with a copy of the Notice of Intent. Indeed, at p. 5 of its Reply, CLS&SB specifically stated that:

Notice of Intent. CLSSB has no objection to allowing Petitioners to use their proposed notice instead of the Board's except insofar as references to the offer of financial assistance and environmental and historic provisions have been deleted. CLSSB would require that these references be retained and Petitioners comply with these provisions.

In its October Decision, the Board rejected CLS&SB's demand that references to the offer of financial assistance provisions be included in the Notice of Intent. *October Decision*, slip op. at p. 6. Furthermore, when Applicants, on October 30, 2006, served their Revised Notice of Adverse Abandonment on the various parties identified at 49 C.F.R. § 1152.20(a)(2)(ii), as well as on CLS&SB, they included references to the environmental and historic provisions as required by the Board's *October Decision*.

Although CLS&SB contends that Applicants failed to serve the various entities listed in 49 C.F.R. § 1152.20(a)(2)(ii), that contention is rebutted by the Certificate of Service, signed by Jeffrey M. Jankowski, Deputy City Attorney, City of South Bend, Indiana. See Attachment A hereto. Mr. Jankowski's Certificate conclusively demonstrates that all persons and agencies which are required to be served pursuant to 49 C.F.R. § 1152.20(a)(2)(ii) were served. CLS&SB has not presented any evidence to show that the parties listed on Mr. Jankowski's Certificate were not served. That no certificate of service was included with the courtesy copy of the Notice that was served on CLS&SB's counsel is of no moment.

In its latest petition, CLS&SB attempts to mislead the Board when it claims (Petition at 5) that "the only party shown on the September 13 (sic) Petition certificate of service is counsel for NS." That certificate, which was signed by Richard H. Streeter and dated September 6, 2006, accompanied the Petition for Waiver and Exemption. That particular pleading is not covered by the provisions of 49 C.F.R. § 1152.20(a)(2)(ii). Hence, the only party that needed to be served was NSR, which was done.

The Revised Notice of Adverse Abandonment was served on all required entities on October 30, 2006. The Adverse Abandonment Application was duly filed on November 17, 2006. On November 20, 2006, the Board waived the filing fee. In short, the Application was filed "at least 15 days, but not more than 30 days" following service of the Revised Notice.

Last, the lower court cases cited by CLS&SB for the proposition that, as a general proposition, an agency must follow its own regulations are inapposite. While that may be true as a general principle, the Supreme Court has made it crystal clear that an agency has discretion to relax or modify its procedural rules. As the Supreme Court reiterated in *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 539 (1970), it is well settled that:

it is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party.

The Board's discretion is also codified at 49 C.F.R. § 1100.3, which provides that the "rules will be construed liberally to secure just, speedy and inexpensive determination of the issues presented." The rules governing the abandonment process are procedural rules. Given the lack of any prejudice to CLS&SB or any other entity, the Board should not require Applicants to file

a redundant Notice of Intent and should proceed with the adjudication of the adverse abandonment application.

Respectfully submitted,



Jeffrey U. Jankowski
Deputy City Attorney
227 West Jefferson Blvd.
South Bend, IN 46601
Counsel to the
City of South Bend, IN
tele: (574) 235-9241
fax: (574) 235-9892



Richard H. Streeter
Richard L. Mintz
Richard J. Deahl
Barnes & Thornburg LLP
750 17th Street, N.W., Suite 900
Washington, D.C. 20006
Counsel to the Brothers of Holy Cross, Inc.
and
Sisters of the Holy Cross, Inc.
tele: (202) 408-6933
fax: (202) 289-1330

Dated: December 6, 2006

Certificate of Service

I, Richard H. Streeter, do hereby certify that a true copy of the foregoing Joint Reply to Petition was served this 6th day of December, 2006, by first-class mail, postage prepaid, and by e-mail as designated, on the following named individuals:

John D. Heffner, PLLC (j.heffner@verizon.net)
1920 N Street, N.W.
Suite 800
Washington, D.C. 20036

James R. Paschall (james.paschall@nscorp.com)
Greg E. Summy (greg.summy@nscorp.com)
General Solicitor
Norfolk Southern Railway Company
Three Commercial Place
Norfolk, VA 23510



Richard H. Streeter

ATTACHMENT A

STB AB 290 (Sub-No. 286)

JOINT REPLY TO PETITION TO REJECT APPLICATION

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C. 20423

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

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the following individuals / agencies were served with a true and complete copy of the Revised Notice of Adverse Abandonment by United States Certified Mail on the 30th day of October, 2006:

Mitch Daniels
Office of the Governor
Statehouse
Indianapolis, IN 46204-2797

David W. Hadley, Commissioner
Indiana Utility Regulatory Commission
Indiana Government Center South
302 West Washington Street, Ste E-306
Indianapolis, IN 46204

Thomas Sharp, Commissioner
Indiana Department of Transportation
100 N. Senate Avenue, Room 10CN 755
Indianapolis, IN 46204

Purdue University Cooperative Extension
Services
St. Joseph County CES
336 County City Building
227 W. Jefferson Boulevard
South Bend, IN 46601-1870

Joseph H. Boardman, Administrator
Federal Railroad Administration
1120 Vermont Avenue, NW
Mail Stop 10
Washington, DC 20590

Military Surface Deployment and Distribution
Command (SDDC)
200 Stovall Street
Alexandria, VA 22332-5000

William Cooper, Director
Transportation Engineering Agency
Railroads for National Defense Program
720 Thimble Shoals Blvd., Suite 130
Newport News, VA 23606-4517

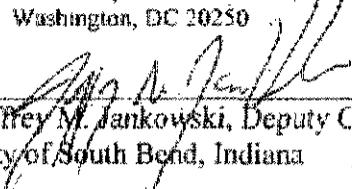
National Park Service - Recreation Resources
Assistance Division
U.S. Department of Interior
P.O. Box 37127
Washington, DC 20013-7127

Fran P. Mainella, Director
National Park Service
1849 C Street, NW
Washington, DC 20240

Steven A. Bartholow, General Counsel
U.S. Railroad Retirement Board
844 North Rush Street
Chicago, IL 60611-2092

Chief Dale Bosworth
USDA Forest Service
1400 Independence Avenue, SW
Washington, DC 20250

November 15, 2006


Jeffrey M. Jankowski, Deputy City Attorney
City of South Bend, Indiana

DOCKET NO. AB 290 (Sub-No. 286)

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

ATTACHMENT O

**LETTER TO RICHARD STREETER FROM RON McAHRON
ACTING DEPUTY STATE HISTORIC PRESERVATION
OFFICER**

DNR Indiana Department of Natural Resources

Division of Historic Preservation & Archaeology • 402 W. Washington Street, W274 • Indianapolis, IN 46204-2739
Phone 317-232-1646 • Fax 317-232-0693 • dhp@dnr.in.gov



January 10, 2006

Richard Streeter
Barnes & Thornburg, LLP
750 17th Street N.W., Suite 900
Washington, D.C. 20006-4675

Federal Agency: Surface Transportation Board ("STB")

Re: Additional information regarding abandonment of 3.2 miles of railroad between MP UV 0.0 and MP UV2.8 and between MP Z09.6 and MP Z010.5 (STB Docket #AB-290 [Sub-No. 286]; DHPA #1005)

Dear Mr. Streeter:

Pursuant to Section 106 of the National Historic Preservation Act (16 U.S.C. § 470f) and 36 C.F.R. Part 800, the staff of the Indiana State Historic Preservation Officer ("Indiana SHPO") has conducted an analysis of the materials dated October 31, 2006, and received on November 1, 2006, for the above indicated project in South Bend, Portage Township, St. Joseph County, Indiana.

In terms of archaeological resources, prehistoric site 12Sf3, is located within the proposed project area and appears potentially eligible for inclusion in the National Register of Historic Places. It does not appear that the rail removal will affect significant intact deposits of this site. However, all portions of the site outside or under the railroad must be avoided by all proposed project activities or subjected to further archaeological investigations.

Also, be advised that if any archaeological artifacts or human remains are uncovered during construction, demolition, or earthmoving activities, state law (Indiana Code 14-21-J-27 and 29) requires that the discovery must be reported to the Department of Natural Resources within two (2) business days. In the event that artifacts or features are discovered during the implementation of the Federally assisted project, activity, or program and a plan has not been developed, it is the Federal agency's responsibility to make reasonable efforts to avoid, minimize or mitigate adverse effects in accordance with 36 C.F.R. § 800.13.

In regard to buildings and structures, we have identified the following properties within the probable area of potential effects, and we believe that they may meet the criteria of eligibility for inclusion in the National Register of Historic Places:

- Munro House at 1213 Diamond Avenue (Site #141-598-25629)
- Metcalf House at 1201 Diamond Avenue (Site #141-598-25631)
- Holy Cross R.C. Church and School at 1050 Wilbur Street (Site #141-598-25769)
- Northern Indiana College at 1600 Washington Avenue (Site #141-598-32032)

Additionally, we have identified the South Bend Brewing Association at 1636 Lincolnway West (Site #141-597-24220 per the *South Bend, St. Joseph County Interim Report*), which was listed in the National Register of Historic Places on September 16, 2001, within the probable area of potential effects.

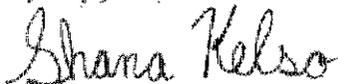
However, based on the information provided to our office, we believe that there will not be any alterations to the characteristics of the above identified historic properties qualifying them for inclusion in or eligibility for the National Register (see 36 C.F.R. § 800.16[i]).

Upon completing its own identification and evaluation efforts, it would be appropriate for the STB to analyze the information that has been gathered from the Indiana SHPO, the general public, and any other consulting parties and make the necessary determinations and findings. Refer to the following comments for guidance:

- 1) If the STB believes that a determination of "no historic properties affected" accurately reflects its assessment, then it shall provide documentation of its finding as set forth in 36 C.F.R. § 800.11 to the Indiana SHPO, notify all consulting parties, and make the documentation available for public inspection (36 C.F.R. §§ 800.4(d)(1) and 800.2(d)(2)).
- 2) If, on the other hand, the STB finds that a historic property may be affected, then it shall notify the Indiana SHPO, the public and all consulting parties of its finding and seek views on effects in accordance with 36 C.F.R. §§ 800.4(d)(2) and 800.2(d)(2). Thereafter, the STB may proceed to apply the criteria of adverse effect and determine whether the project will result in a "no adverse effect" or an "adverse effect" in accordance with 36 C.F.R. 800.5.

A copy of the revised 36 C.F.R. Part 800 that went into effect on August 5, 2004, may be found on the Internet at www.achp.gov for your reference. If you have questions about our comments, please call our office at (317) 232-1646. Questions about archaeological issues should be directed to Cathy Draeger or Dr. Rick Jones. Questions about historic buildings or structures pertaining to this project should be directed to Shana Kelso.

Very truly yours,



Ron McAhron
Acting Deputy State Historic Preservation Officer

RM/CUD/SNK:snk

cc: Elaine K. Kaizer, Surface Transportation Board

DOCKET NO. AB 290 (Sub-No. 286)

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

ATTACHMENT P

**REPLY VERIFIED STATEMENT CATHERINE D. HOSTETLER
DIRECTOR OF THE HISTORIC PRESERVATION
COMMISSION OF SOUTH BEND AND ST. JOSEPH COUNTY,
INDIANA**

BEFORE THE
SURFACE TRANSPORTATION BOARD

WASHINGTON, D.C. 20423

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

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

REPLY VERIFIED STATEMENT OF CATHERINE D. HOSTETLER IN SUPPORT OF
ADVERSE ABANDONMENT APPLICATION OF THE
CITY OF SOUTH BEND, THE BROTHERS OF HOLY CROSS, INC. AND THE SISTERS
OF THE HOLY CROSS, INC.

1. *My name is Catherine D. Hostetler. I am the Director of the Historic Preservation Commission of South Bend and St. Joseph County. I have reviewed the letter addressed to Richard Streeter from Ron McAhron, Acting Deputy State Historic Preservation Officer, dated January 10, 2006 (sic), regarding certain properties that are allegedly within the probable area of potential effects. I have been requested by Applicants to respond to that letter. Based on my own personal review of the right-of-way, I concur in the ultimate conclusion that removal of the track from the right-of-way will not alter the characteristics of any of the five properties identified by the State Preservation Officer. In fact, it is my firm opinion that rehabilitating these tracks and then opening them to active use will have a detrimental affect not only on these sites but on the entire area.*

2. One of the identified properties is the "Northern Indiana College at 1600 Washington Avenue (Site #141-598-32032)". That structure is no longer in existence as it was razed several years ago. See attached photographs.

3. The building occupied by the South Bend Brewing Association at 1636 Lincolnway West (Site #141-597-24220) will not be impacted. This is a late 19th Century building. As confirmed by Applicants' photographs of the former Lincolnway crossing (Photographs RR015c and RR015d), the remaining track structure is not located adjacent or even near to the historic structure cited by the State Preservation Officer. Applicant's photographs also show that the track has already been removed or covered over with asphalt from the Lincolnway crossing.

4. The Holy Cross Roman Catholic Church and School at 1050 Wilbur Street (Site #141-598-25769) will not be impacted. The buildings meet the criteria of eligibility for inclusion in the National Register of Historic Places but there is a substantial parking lot that separates the right-of-way from the buildings.

5. Neither the Munro House at 1213 Diamond Avenue (Site # 141-598-25629) nor the Metcalf House at 1201 Diamond Avenue (Site #141-598-25631) will be impacted. Both of these houses are situated to the east of the right-of-way. They should also be re-evaluated as to their rating as "Significant". To the west, there is a vacant stretch of unimproved land, which I believe would facilitate the removal of the track. Photographs of the houses are attached.

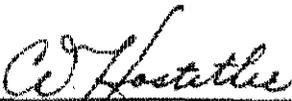
6. Based on my own review of relevant records and my personal inspection of all of the listed properties, no historic properties will be affected as a result of the removal of the track from the right-of-way.

FURTHER SAYETH THE AFFIANT NOT.

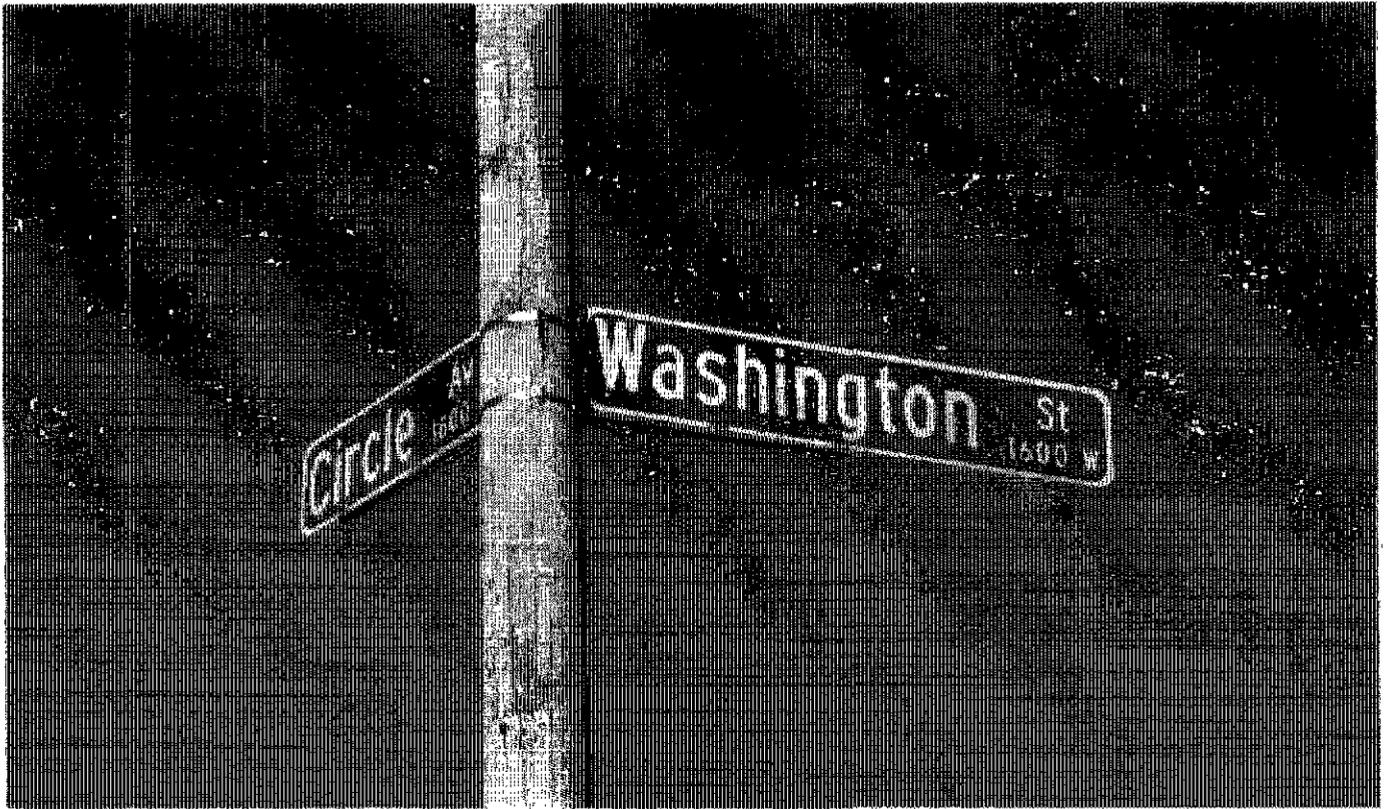
VERIFICATION

I, Catherine D. Hostetter, hereby declare under penalty of perjury that the above and foregoing statement is true and accurate to the best of my knowledge and belief.

Executed on January 19, 2007.



Catherine D. Hostetter

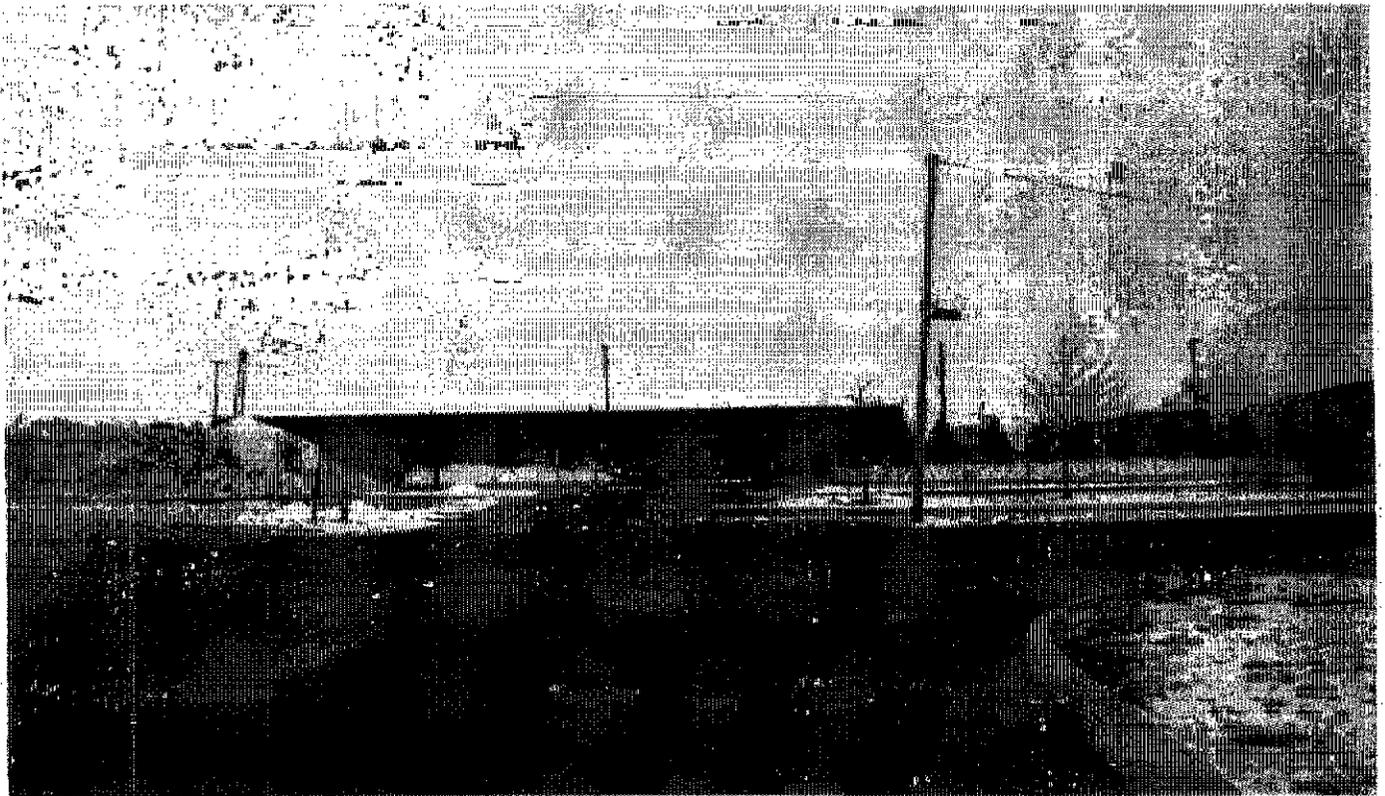


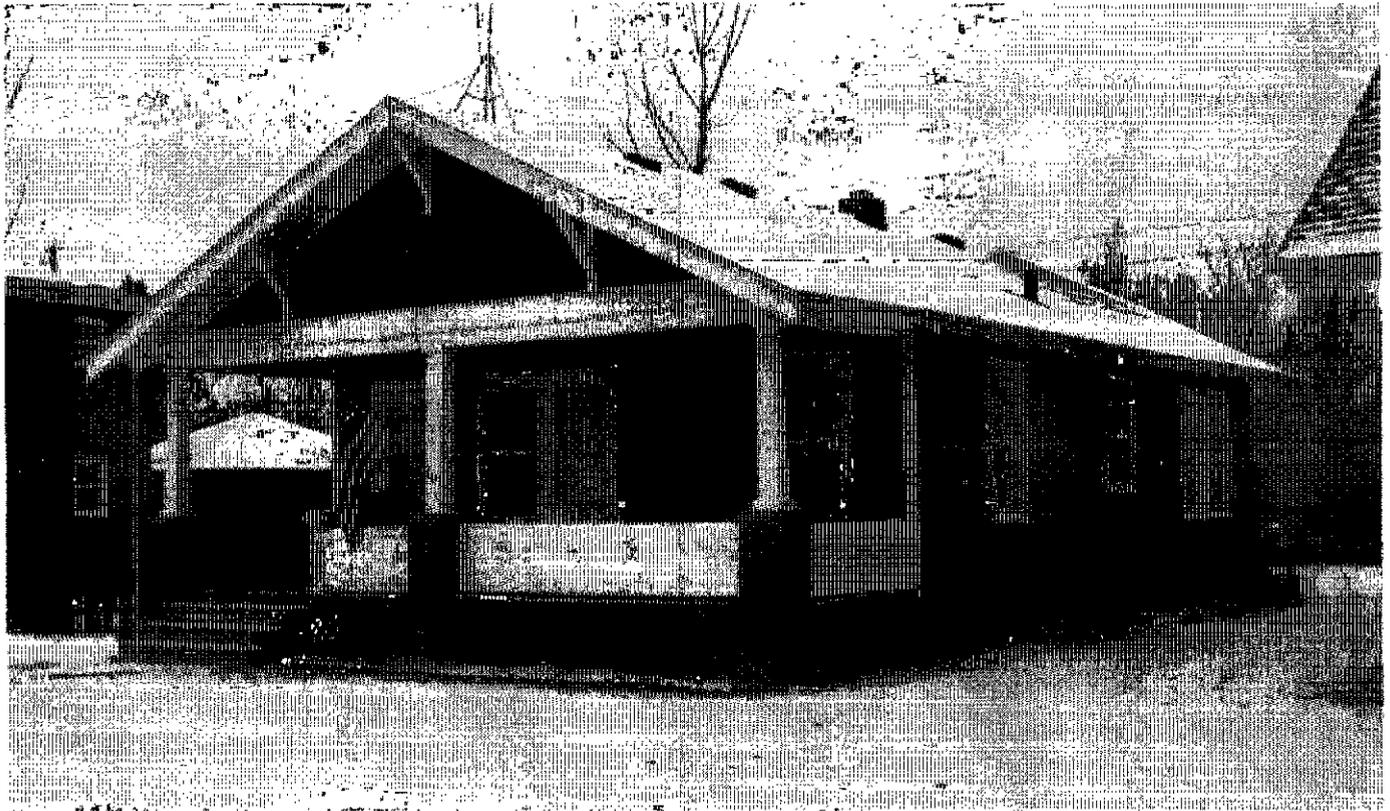
Former College of Commerce location. Jan. 19, 2007



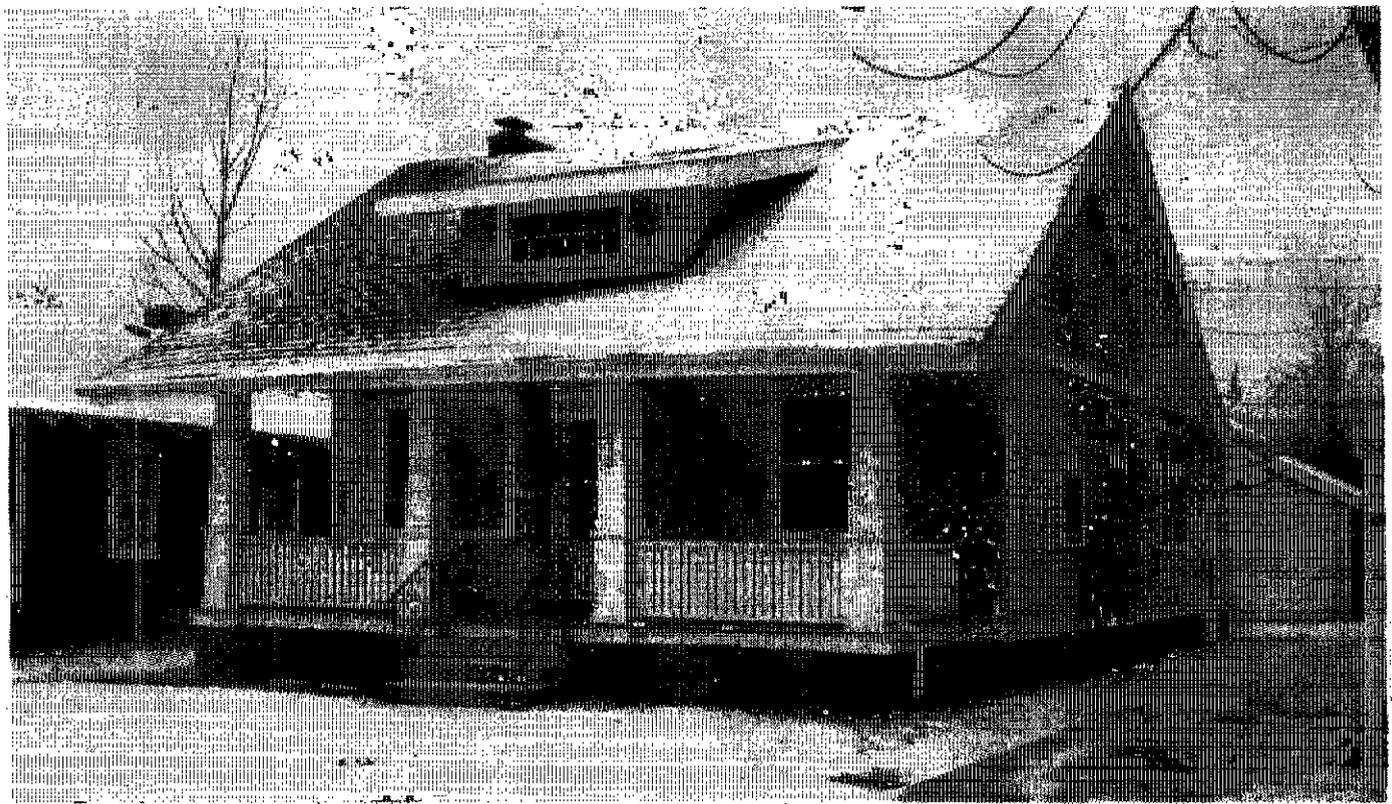


College of Commerce location





1201 Diamond Ave. Jan. 19, 2007



1213 Diamond Ave. Jan. 19, 2007