

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 Joint Reply to the Environmental Comments of The Chicago, Lake Shore & South Bend Railway Company (“CLS&SB”), filed January 22, 2007. As the Board will discover, CLS&SB’s environmental filing is a subterfuge that has been used to repeat many of the same arguments CLS&SB made in its Protest.

First, CLS&SB repeats the argument that it is feasible to return coal traffic to rail that was diverted to truck over a decade ago.¹ Once again, CLS&SB cannot show that the University of Notre Dame has bought into its scheme. If Notre Dame truly believed that restoration of rail service to its power plant 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.

¹ CLS&SB Comments at p. 3.

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, nor did any other potential shipper do so. As a result, there is no evidence whatsoever that CLS&SB's alleged plan to rehabilitate and electrify the Line would cause Notre Dame or any other shipper to use CLS&SB's freight service, even if CLS&SB had the financial ability to rehabilitate and electrify the line.²

Second, as SEA correctly observed, abandonment of the Line would not alter the status quo in terms of the environment. When, as is the case herein, no traffic has moved over a line of railroad for a substantial number of years and when the former rail traffic was diverted to trucks at least ten years ago, there is no direct link between the abandonment of the line and any adverse environmental impact associated with the current mode of transportation. SEA properly recognized this fundamental principle when it determined that the proposed abandonment would not "result in the diversion of rail traffic to truck traffic that could result in significant impacts to air quality or the local transportation network."³

Third, CLS&SB once again erroneously contends that the Board has "grant[ed] CLSSB an exemption to acquire and operate the subject line of railroad."⁴ The Board's December 20, 2006 Decision did **not** grant CLS&SB an exemption to acquire and operate the subject line. In fact, the Board, by Decision of the Chairman served November 22, 2006, stayed the effective date of the Notice of Exemption filed by CLS&SB. Because that stay has never been lifted, the Notice of Exemption has never become effective.

² See *infra* at pp. 3-4.

³ SEA Decision at p. 3.

⁴ CLS&SB Comments at pp. 2-3 and p. 9.

Fourth, while CLS&SB has attempted, by way of a generalized world-wide study of energy use, to quantify what it terms the “energy impact of returning the South Bend truck haul to rail,”⁵ it ignores the crucial factor that any energy impact has resulted and will continue to result from the shippers’ reasoned business decision to use trucks instead of rail. CLS&SB is free to criticize that determination and speculate that the future electrification of the Line might be a better way to go. However, there is nothing that CLS&SB can do to compel former rail shippers to alter their current mode of operations and use its services. The shippers’ lack of support for CLS&SB conclusively demonstrates that the former rail shippers do not have any desire or need for future freight rail service. That lack of need cannot be overcome by CLS&SB’s self-serving, private interest in wanting to operate vintage trolley cars over the track.

Fifth, CLS&SB’s proposed mitigation in the form of an alleged “sustainable energy-efficient, pollution-free, safe, electrified railroad operation” has not been demonstrated to be economically or operationally feasible. Even if it might be possible to rehabilitate what remains of the track to the point where a loaded coal train could be safely operated by expending less than \$500,000, there is *no* evidence of record regarding the estimated cost of electrifying the line. According to a 1991 study performed by a Rail Electrification Task Force created by the Southern California Regional Rail Authority and the Los Angeles County Transportation Commission, the cost of electrifying a mile of track is \$4 million per mile.⁶ More recently, the per-mile cost of electrifying has been said to be “\$3 million per track mile.”⁷ If an estimated cost

⁵ CLS&SB Comments at pp. 7-8.

⁶ Jessica Stern, *Electrifying news for California - freight and commuter railroad*, Railway Age, March, 1992.

⁷ New Jersey Association of Railroad Passengers, *Response to New Jersey Transit’s Letter of May 19, 2006, addressed to Mrs. Rose Heck*, June 19, 2006 (Attachment A hereto). Based on an informal response to an inquiry made by undersigned counsel of NICTD regarding the estimated per-mile cost of electrification, the estimated per mile cost to electrify a modern medium density urban system is around \$4 million per mile. This rough estimate can be broken into the following components: overhead catenary (“OCS”) \$1.2 million, traction power substations (“TPSS”) \$1.3 million, with track, communication and signals estimated to cost around \$1.5 million per mile.

of \$3 million per-track-mile is applied herein, the cost would exceed \$9 million to electrify the line from milepost 0.0 to its termination at the Notre Dame campus.

That estimate does not include consideration of the cost of assembling the corridor and electrifying the additional mileage to reach the line of the Northern Indiana Commuter Transportation District (“NICTD”). If CLS&SB were to reach an agreement with NICTD that would allow such operations, the cost would exceed \$12 million.⁸ Simply put, the movement of special trains to a handful of Notre Dame home football games, even when coupled with a weekly trainload of coal, would not warrant the expenditure of well over \$12 million to rehabilitate and electrify the Line. Hence, CLS&SB’s calculations regarding the reduction of vehicle miles traveled for three football games and fuel savings associated with such movements are nothing more than mere conjecture and lack any real substance.⁹

Sixth, it is respectfully submitted that SEA’s analysis is consistent with agency precedent in which it has been recognized that when an abandonment is approved, “environmental concerns regarding reinstatement of service are not a factor.” *Chelsea Property Owners -- Abandonment -- The Consolidated Rail Corp.*, 8 I.C.C.2d 773, 793, n.24 (1992), *aff’d sub nom Consolidated Rail Corp. v. I.C.C.*, 29 F.3d 706 (D.C. Cir. 1994).¹⁰ Application of this principle is particularly appropriate in cases such as this when no shipper has indicated any need for future rail service over the Lines *and* when the protesting entity is little more than a newly formed corporate shell with no experience in operating a railroad.

⁸ Any consideration of this scheme is premature. As the record reflects, NICTD has stated that “[n]o administrative or engineering discussions have taken place to determine the feasibility of such an operation.” Affidavit of Gerald Hanas, at ¶ 6, filed January 22, 2007.

⁹ CLS&SB Environmental Comments at p. 7.

¹⁰ In *Chelsea*, following the release of SEA’s EA, the owning rail carrier and others requested the ICC to prepare an environmental impact statement to consider a waste hauling proposal as an alternative to abandonment. That request was denied.

Seventh, CLS&SB's environmental contentions and statistics fail to mention multiple factors, including noise. As Applicants have previously noted, the Line crosses 17 streets in South Bend before entering the campuses of the Brothers and Sisters and Notre Dame.¹¹ In the absence of whistle-free barricades, CLS&SB would be required to sound its horn at each crossing. Given the close proximity of the street crossings in the residential neighborhoods in which the Lines are located, a continuous horn blast would occur for ten to fifteen minutes as the train would rumble through the neighborhood streets. It can also be assumed that operation of the vintage trolley cars would also add to the noise.

Equally important, while CLS&SB has briefly mentioned the public crossings, it ignores the fact that trains would pass through residential backyards and sideyards. As many of the photographs submitted with the application reflect, most of the right-of-way in the City is not fenced or separated from the adjoining property by any barricades. The same is true of the right-of-way that passes through the campuses of the Brothers and Sisters.

CLS&SB has also failed to provide the Board with any statistical data reflecting the increased vehicle emissions that would result from vehicles having to idle while waiting for the coal trains and trolleys to cross two of the busiest streets in South Bend, Lincoln Way West (23,000 vehicles) and Indiana 933 (28,000 vehicles). Nor has CLS&SB mentioned the safety implications of vehicles trying to "beat the train" if barricades and crossing guards are not installed at every crossing.

Finally, even if CLS&SB's statements regarding fuel consumption and air quality were statistically correct,¹² that would not overcome the simple fact that CLS&SB cannot compel any

¹¹ See V.S. Laurent at ¶ 11, dated November 9, 2006.

¹² Because the truck traffic generated by the delivery of coal from the transload facility to Notre Dame constitutes less than one tenth of one per cent of the daily vehicular traffic along Indiana Highway 933, the environmental impact of the truck traffic is miniscule at best.

shipper to divert its shipments from truck to rail. In the absence of any probative evidence of any future need for service, there is no requirement, statutory or otherwise, that dormant, unused track be maintained indefinitely in the hope that in the future that a shipper might request rail service. While the continuation of rail *service* is of prime importance, the maintenance of rail *lines* is not an overriding goal of congressional policy. As the D.C. Circuit recognized in *Consolidated Rail Corp. v. I.C.C.*, *supra*, 29 F.3d at 712, “if line maintenance is the overriding goal of congressional policy, adverse abandonment should no longer be available.” Here, not only would no current rail service cease as a result of the adverse abandonment of the Line, but there is no credible evidence of any future need for rail service.

Conclusion

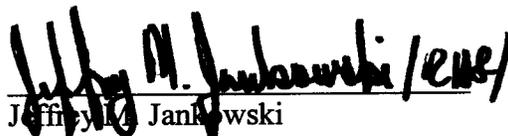
In conclusion, SEA did not swallow the Applicants’ position “hook line and sinker.” Rather, SEA correctly recognized that because “there has been no rail service over the lines for at least ten years, ...the proposed abandonment would not ... result in the diversion of rail traffic to truck traffic that could result in significant impacts to air quality or the local transportation network.”¹³ Moreover, while CLS&SB would have the Board engage in hypothetical, speculative musings regarding future environmental and energy impacts if CLS&SB is not allowed to force its services on the former rail shippers, the lack of any shipper support, coupled with the fact that Norfolk Southern Corporation has repeatedly stated that it will not sell the Line to CLS&SB,¹⁴ requires the Board to affirm SEA’s conclusions. To do otherwise would require

¹³ SEA Decision at p. 3.

¹⁴ 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; *see also*, Applicants’ Attachment Q, Jamie Loo, Railway company hasn’t given up, South Bend Tribune, December 21, 2006 (“Norfolk Southern spokesman Rudy Husband said Wednesday the company still has no plans to sell the tracks [to CLS&SB]. ‘We will not reconsider and we will not sell the line to them,’ he said.”)

the Board to base its decision on unsupported conjecture and unbridled speculation regarding what might have been *if* CLS&SB had been able to attract any shipper support.

Respectfully submitted,



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

Dated: January 29, 2007

CERTIFICATE OF SERVICE

I, Richard H. Streeter, do hereby certify that a true copy of the foregoing Reply was served this 29th day of January, 2007, by first-class mail, postage prepaid, and by e-mail as designated, on the following named parties of record:

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

Judith A. Robert
1739 Riverside Drive
South Bend, IN 46616

James Conley
The Point at North Shore Woods Association
1704 W. North Shore Drive
South Bend, IN 46617

James K. McConnell
1737 Belmont Avenue
South Bend, IN 46615



Richard H. Streeter

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

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

ATTACHMENT Q

**JAMIE LOO, *Railway company hasn't given up,*
South Bend Tribune, December 21, 2006**

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December 21, 2006

Railway company hasn't given up

It's fighting city's application for abandonment of old tracks.

By JAMIE LOO
Tribune Staff Writer

SOUTH BEND -- The Chicago, Lake Shore and South Bend Railway, which attempted to buy and reactivate old tracks this summer, has apparently not given up its efforts.

The city of South Bend, Brothers of the Holy Cross and Sisters of the Holy Cross jointly filed an application with the federal Surface Transportation Board to begin formal abandonment proceedings Nov. 21. The public has until Jan. 5 to comment.

According to the Nov. 21 application, the city may consider using the rail alignment for a storm sewer line to avoid digging up city streets or use it for part of a pedestrian trail. The tracks are also delaying a construction

Where to comment

To comment on the abandonment proceedings, contact the federal Surface Transportation Board. Include the docket number for the case. The CLS&SB Railway case is FD 34960. Comments can be sent to the Surface Transportation Board, 1925 K Street NW, Room 700, Washington, DC 20423.

For more information, go to www.stb.dot.gov, or call (202) 565-1592.

project at the Brothers of the Holy Cross and could interfere with development on the Sisters of the Holy Cross property.

South Bend Railway is fighting the abandonment proceedings and claims it "anticipates reaching an agreement with Norfolk-Southern Railway Company," according to Surface Transportation Board filings to buy the line.

South Bend Railway wants to use the old rail line for passenger and freight service through the city's west side and up to the University of Notre Dame. The plans drew public opposition over the summer and were derailed in August after Norfolk Southern Railway, which owns the line, said it refused to sell the tracks.

Norfolk Southern sent a letter to the Surface Transportation Board Aug. 15 advising the board that "no agreement has or will be executed" with South Bend Railway.

Norfolk Southern spokesman Rudy Husband said Wednesday the company still has no plans to sell the tracks.

"We will not reconsider and we will not sell the line to them," he said.

Husband said Norfolk Southern plans to file paperwork with the Surface Transportation Board on this case in January.

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