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January 14, 2010

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

VIA ELECTRONIC FILING

Re: STB Docket No. AB-I036 *The City of Chicago, Illinois--Adverse
Abandonment--Chicago Terminal Railroad in Chicago, IL*

Dear Ms. Brown,

Accompanying this transmittal letter is an original Motion to Strike and Request for a Cease and Desist Order with supporting documents and Certification of Service upon all parties of record which we are filing in behalf of Chicago Terminal Railroad in this proceeding.

Very truly yours,
John D. Heffner, PLLC


By: James H. M. Savage
Of Counsel

*Attorneys for Respondent
Chicago Terminal Railroad*

cc: All parties of record

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Office of Proceedings
JAN 14 2010
Part of
Public Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. AB-1036

**THE CITY OF CHICAGO, IL
ADVERSE ABANDONMENT
CHICAGO TERMINAL RAILROAD IN CHICAGO, IL
CHICAGO TERMINAL RAILROAD'S MOTION
TO STRIKE AND REQUEST FOR A CEASE AND DESIST ORDER**

Submitted By:

John D. Heffner
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Counsel for
Chicago Terminal Railroad

Dated: January 14, 2010

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**THE CITY OF CHICAGO, IL
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**CHICAGO TERMINAL RAILROAD'S MOTION
TO STRIKE AND REQUEST FOR A CEASE AND DESIST ORDER**

INTRODUCTION

On January 13, 2010, the City of Chicago, Illinois ("the City") filed a Notice of Intent To File An Application for Adverse Abandonment ("the Notice") with the Board stating that it intends to file an application on or about February 1, 2010, seeking the adverse abandonment of two short segments of track owned and operated by Movant, the Chicago Terminal Railroad ("CTM"). As explained in detail in the accompanying verified statement of its Superintendant John M. Sorrel, CTM has learned that the City has unlawfully salvaged some of the track constituting the line of railroad that is the subject of the City's adverse abandonment application. Accordingly and pursuant to sections 1104.8, 1104.10, and 1104.13 and 1117.1 of its Rules of Practice, CTM moves the Board to strike the Notice of

Intent as inappropriately filed, require the City to rebuild and restore to operation the subject track and to issue a cease and desist order against the City from any further abandonment of CTM's lines without Board authorization.

ARGUMENT

Section 1104.13 of the Board's Rules of Practice, 49 CFR 1100 *et seq*, provides that the Board may entertain a motion directed at any pleading within 20 days after the pleading is filed with the agency. Sections 1104.8 and 1104.10, respectively, allow the Board to strike objectionable matter from any document, if not the document itself, and to reject a deficient document. Section 1117.1 provides for a party to seek relief not otherwise provided for. Section 1117.1 requires the petitioner to provide a short statement of the grounds upon which the board's jurisdiction is based, a short statement of the claim showing that the petitioner is entitled to relief, and a demand for the relief the petitioner believes is appropriate.

CTM's Motion is both timely and appropriate insofar as it is directed at a pleading, the Notice, which was filed Tuesday January 12, 2010. CTM wants the Board to reject or strike, as the case might be, the City's Notice as the appropriate sanction for the City's unauthorized salvaging of CTM's rail

line. Alternatively, in the event the Board believes it has the jurisdiction to consider the City's application,¹ CTM requests that the Board issue a cease and desist order against the City to deter it and other parties from dismantling railroad lines that are not their property. CTM believes that the Board has a basis for granting this relief insofar as the Board maintains that it has the jurisdiction to entertain adverse abandonment requests filed by parties such as landowners and public agencies that seek to abandon rail lines they do not own. *See, City of South Bend, IN, et al v. Surface Transportation Board, et al*, 566 F.3d 1166 (D.C. Cir. 2009) ("*City of South Bend*") and *N.Y. Cross Harbor R.R. v. STB*, 374 F.3d 1177 (D.C. Cir. 2004). CTM believes that it is entitled to the requested relief. It owns and operates the subject railroad line and has a common carrier obligation to provide service over it. *Chicago Terminal Railroad—Acquisition and Operation Exemption—Soo Line Railroad Company d/b/a Canadian Pacific Railway*, STB Finance Docket No. 34968, served December 22, 2006.

¹ There is a serious question as to whether the Board even has the jurisdiction to entertain the City's application in the first place. In *City of South Bend*, two members of the D.C. Circuit questioned whether the Board's abandonment statute permits third parties such as a City of South Bend to file adverse abandonment petitions in view of the strong statutory language limiting the ability to file such applications to a **railroad** [emphasis supplied]. Although the Court directed the parties to brief that issue, it did not need to answer that question inasmuch as it denied the City's petition for review of the Board's denial of its application. *See*, slip op. at 5-6 of the decision and page 1 of the concurring opinions.

Moreover, the law, as interpreted by the Board, provides that the City may not abandon a line of railroad except upon authorization granted by the Board. 49 U.S.C. 10903(a)(1). The Board has previously held that a carrier may not abandon a line of railroad or cease providing service over it absent agency approval. Typically, the Board will issue a show cause order or a cease and desist order to prevent the unauthorized activity. *See, e.g., Central Oregon & Pacific Railroad, Inc.- Coos Bay Rail Line*, STB Finance Docket No. 35130, served April 11, 2008 (unauthorized cessation of service); *Suffolk & Southern Rail Road LLC- Lease and Operation Exemption-Sills Road Realty, LLC*, STB Finance Docket No. 35036 (served October 12, 2007) (unauthorized construction of railroad).

In STB Docket No. AB-103 (Sub-No. 21X), *The Kansas City Southern Railway Company-Abandonment Exemption--Line in Warren County MS*, served February 22, 2008, the Board said, "We have even held that a carrier may remove track, as long as no shipper seeks service and as long as the carrier is prepared to restore the track should it receive a request for service [citation omitted]" In one of the strongest cases requiring the restoration of track, in this instance as a result of a washout, *Interstate Commerce Commission v. The Baltimore and Annapolis Railroad Company*, 398 F. Supp. 454 (D. Md. 1975), that Court entered a preliminary

injunction requiring the railroad to rebuild the line, unless and until it applied for and received the authority to abandon the line, which the railroad subsequently did.

In support of its motion, CTM attaches the verified statement of its Superintendent John M. Sorrel documenting this abandonment. Mr. Sorrel's statement includes photographs of where the track was removed on the Lakewood Avenue Line between Diversey Parkway and Schubert Street.

CTM urges the Board to act forcefully here to protect service to CTM's customers as well as to protect the integrity of its abandonment process. While CTM intends to sue the City in the Illinois courts to recover the value of its property and other damages and to vigorously contest the merits of the application in its Protest, Board action is also required to protect the public interest: the common carrier obligation of railroads and to discourage other potential adverse abandonment applications from salvaging railroad lines without first obtaining Board authority.

CONCLUSION

Accordingly, CTM requests that the Board strike or reject the City's Notice of Intent until it rebuilds and restores the subject track to service and further that it issue a cease and desist order to the City to require it to refrain from any further abandonment of CTM's lines without Board authorization.

Respectfully submitted,



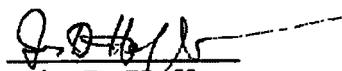
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(202) 296-3334

Counsel for
Chicago Terminal Railroad

Dated: January 14, 2010

CERTIFICATE OF SERVICE

I, John D. Heffner, hereby certify that I have this 14th day of January 2010 served a copy of Chicago Terminal Railroad's Motion to Strike and Request for a Cease and Desist Order upon counsel for the City of Chicago by first class U.S. Mail and fax or email transmission.


John D. Heffner

**VERIFIED STATEMENT
OF
JOHN M. SORREL**

John Sorrel, being duly sworn, deposes and states as follows:

My name is John Sorrel. My business address is 2511 Pratt Avenue, Elk Grove Village, IL 60007. I am employed by the Chicago Terminal Railroad (“CTM”) as Superintendent of Operations. Prior to joining CTM, I served for 20 years in the United States Army including service in the Railroad Division of its Transportation Corps on both active military duty and as a member of the Army Reserve. My background also includes 10 years with the Mid-Continent Railway Museum as Superintendent of Operations.

I left the museum to join CTM as its Superintendent of Operations. As such, I function as CTM’s general manager responsible for the company’s day-to-day operations including supervision of employees, crew training, spotting and pulling of rail cars, maintenance for track and right of way, of rail cars, and locomotives. In short, I am in charge of all aspects of CTM’s operations, engineering, and maintenance activities.

I have prepared this statement in connection with the “adverse application” filed by the City of Chicago (“the City”) to abandon a line of railroad alternatively known as the Peerless Branch or the Lakewood

Segment in the City of Chicago.¹ Our counsel has provided me with a document known as a “Notice of Intent to File An Application For Adverse Abandonment” that the City submitted to the Surface Transportation Board on January 12, 2010, advising that the City would be seeking Board approval to abandon the subject line of railroad between West Diversey and West Schubert Streets around February 1, 2010.

My purpose in submitting this statement at this early date is to advise the Board that the City entered upon privately owned property for the purpose of dismantling CTM’s track structure. I believe the City may have done this as much as several months ago, although I did not learn of this action until December 1, 2009, when I inspected the right of way and took the pictures submitted with my statement. Furthermore, I have been advised by counsel that a railroad line may not be abandoned until the party seeking the abandonment has first sought and then obtained appropriate authorization by the Board. The City has not, as yet, done this.

In connection with this Statement, I am attaching several photographs depicting the subject line and the City’s salvage activities. The first page of pictures marked as Attachment 1 contains three views of the Lakewood Segment. The two pictures on the left side of page one show the line

¹ I note that the City of Chicago refers to it in its Notice of Intent as “the Lakewood Segment”

looking north. The now removed siding formerly served the plant of Peerless Candy Company. Up until its removal CTM used this track to store cars for other customers pending the shippers' ability to receive them for loading or unloading. The single picture on the right hand side of the page depicts the Lakewood Segment looking to the South. The picture appended to my statement as Attachment 2 depicts the now removed track from the Peerless plant looking south and does the picture appended as Attachment 3. Note the City placed straw over the track as a prelude to preparing the right of way for planting grass between the sidewalk and the street.

The City's action has damaged CTM insofar as the railroad has lost the ability to store rail cars in advance of the customer's ability to accept them at its siding for loading. Moreover, CTM had planned to use this track for future transloading operations. Those plans have now been frustrated. The shipping public has also been hurt because the City's illegal actions have hampered CTM's ability to meet its common carrier obligation to its customers. CTM is dismayed at the City's actions and intends to file suit in civil court for the destruction of its property and loss of earning power.

Accordingly, CTM moves the Board to strike the Notice of Intent as inappropriately filed, require the City to rebuild and restore to operation the

subject track and to issue a cease and desist order against the City from any further abandonment of CTM's lines without Board authorization.

VERIFICATION

STATE OF Ill.)
CITY OF EUGROVE)

SS

JOHN M. SORREN, being duly sworn according to law,
hereby deposes and states that (s)he is authorized to make this Verification,
has read the foregoing document, and knows the facts asserted therein are
true and accurate as stated, to the best of (her) his knowledge, information,
and belief.

John M Sorren

Subscribed to and sworn to before me, a Notary Public, in and for the City of
EUGROVE in the State of Ill., this 1 day of Dec 09.

Vickie Fornkahl
Notary Public

My commission expires: 6-28-12



ATTACHMENT 1

