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December 3, 2004

By UPS overnight mail
(Monday delivery)

Vernon A. Williams, Secretary
Surface Transportation Board
Case Control Unit, Suite 713
1925 K Street, N.W.
Washington, DC 20423-0001

Re: Docket No. AB-290 (Sub-No. 252X), *Norfolk Southern Railway Company --
Abandonment Exemption -- in Nottoway, Prince Edward, Cumberland and
Appomattox Counties, VA*

Dear Mr. Williams:

Enclosed please find an original and 10 copies of Reply In Opposition To Motion For
Leave To File A Reply To Reply, for filing with the Board in the above referenced matter.

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DEC 15 2004

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Very truly yours,

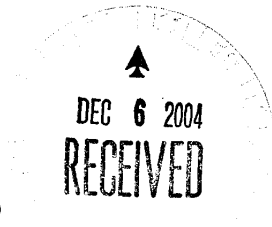
Tom McFarland

Thomas F. McFarland
Attorney for SMI Rebar

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BEFORE THE
SURFACE TRANSPORTATION BOARD

NORFOLK SOUTHERN RAILWAY)
COMPANY -- ABANDONMENT) DOCKET NO. AB-290
EXEMPTION -- IN NOTTOWAY,) (SUB-NO. 252X)
PRINCE EDWARD, CUMBERLAND)
AND APPOMATTOX COUNTIES, VA)



**REPLY IN OPPOSITION TO MOTION
FOR LEAVE TO FILE A REPLY TO REPLY**

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DUE DATE: December 6, 2004

BEFORE THE
SURFACE TRANSPORTATION BOARD

NORFOLK SOUTHERN RAILWAY	)	
COMPANY -- ABANDONMENT	)	DOCKET NO. AB-290
EXEMPTION -- IN NOTTOWAY,	)	(SUB-NO. 252X)
PRINCE EDWARD, CUMBERLAND	)	
AND APPOMATTOX COUNTIES, VA	)	

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DEC 6 2004
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**REPLY IN OPPOSITION TO MOTION
FOR LEAVE TO FILE A REPLY TO REPLY**

Pursuant to 49 C.F.R. § 1104.13(a), SMI REBAR (SMI) hereby submits this reply in opposition to a request, filed in behalf of Norfolk Southern Railway Company (NS) on November 15, 2004, for leave to file a reply to SMI's Reply Statement in Opposition to NS's Petition for Exemption of Abandonment.

BACKGROUND

On September 30, 2004, NS filed a Petition for Exemption of Abandonment of certain rail lines in Virginia ("Petition"). On November 9, 2004, SMI filed a Reply Statement in Opposition to that Petition. ("Reply Statement").

On November 15, 2004, NS filed a letter with the Board in the nature of a reply to SMI's Reply Statement ("NS Reply"). The NS Reply was not accompanied by a motion for leave to file it. However, a request was made in the body of the Reply that the Board accept the Reply for filing (NS Reply at 2-3), viz.:

In its discretion, the Board has construed its rules liberally to permit petitioners to respond to opposition statements when the response addresses points raised by the opposing party, does not seek to introduce new evidence, helps to clarify the record or the arguments, identifies important errors or mis-statements in the opposing statement, and is submitted soon after the opposing statement is filed so that the Board's handling of the proceeding will not

be unduly delayed or hindered (footnote omitted). Such a limited and timely response permits the opposing party an opportunity to promptly address points raised in the response if it chooses, again without unduly affecting the processing of the proceeding. This letter meets those criteria and will assist the Board in reaching a just determination of the issues on the most complete and accurate possible record. The Board has accepted responses of this type even without a formal request or motion to do so. Nonetheless, NSR hereby formally requests that the Board exercise its discretion to accept into the record and to consider this letter in response to SMI's opposition statement and its further letter in this matter in order to correct and complete the record.^{3/}

* * *

^{3/} Precedent for such responses includes *Union Pacific Railroad Company -- Abandonment Exemption -- in Rio Grande and Mineral Counties, CO*, STB Docket No. AB-33 (Sub-No. 132X) (STB served June 22, 2004); *CSX Transportation, Inc. -- Abandonment Exemption -- (Between Memphis and Cordova) in Shelby County, TN*, STB Docket No. AB-55 (Sub-No. 590X) (STB served Dec. 12, 2001), one of the cases cited by SMI; *Buffalo & Pittsburgh Railroad, Inc. -- Abandonment Exemption -- In Erie and Cattaraugus Counties, NY*, STB Docket No. AB-369 (Sub-No. 3X) (STB served Sept. 18, 1998); *Tulare Valley Railroad Co. -- Abandonment and Disc. Ex. -- In Tulare and Kern Counties, CA*, STB Docket No. AB-397 (Sub-No. 5X) (STB served Feb. 21, 1997) and several other recent cases.

REPLY

THE NS REPLY SHOULD BE REJECTED

Neither the Board's general exemption procedures nor its abandonment exemption procedures provides for the filing of replies to replies in opposition to petitions for exemption. See 49 C.F.R. § 1121.4. On the contrary, under 49 C.F.R. § 1104.13(c), such replies to replies are expressly prohibited. Consequently, when a reply to a reply statement is filed, the reply should be rejected as procedurally impermissible.

The Board enforced that prohibition in an abandonment exemption context in *Central R. Co. of Indiana - Aban. Exempt. -- in Dearborn, Decatur, Franklin, Ripley and Shelby Counties*,

IV, 1998 STB LEXIS 121 (STB Docket No. AB-459 [Sub-No. 2X], decided May 4, 1998 (“CIND case”). In that case, the Board rejected a reply filed by the rail carrier petitioner to a reply statement in opposition to a petition for exemption of abandonment. The Board explained its rationale, as follows (1998 STB LEXIS 121, at *5):

We also will reject a reply filed by CIND on April 30, 1998. Although styled a rebuttal, the pleading is a reply to protestants’ reply to CIND’s petition, and as such is prohibited by 49 CFR 1104.13(c). CIND filed its petition knowing that our procedures provide only for the filing of a petition and a reply thereto. Had CIND wished to assure itself the right to rebut a filing in opposition to its abandonment request, it could and should have filed a formal application . . .

The decisions cited in footnote 3 on page 3 of the NS Reply, in which the Board accepted replies to opposition statements for filing, involved situations where consideration of the replies would not be harmful to opposing parties because the petitions for exemption of abandonment were denied in each instance. Thus, in *Buffalo & Pittsburgh R.R. Inc. -- Aband. Exempt. -- in Erie and Cattaraugus Counties, NY*, 1998 STB LEXIS 247 (STB Docket No. AB-369 [Sub-No. 3X], decided Sept. 17, 1998, the Board, in accepting the rail carrier’s reply for filing, emphasized that opposing parties would not be prejudiced (1998 STB LEXIS 247, at *4), viz.:

. . . More importantly, in light of our disposition of this matter, the objecting parties -- whose interests in this regard our regulations seek to protect -- will not be harmed in any way by our consideration of these pleadings . . .

To our knowledge, the Board has never accepted for filing a reply to a reply in opposition to a petition for exemption of abandonment over the objection of an opposing party in a proceeding in which the petition for exemption of abandonment was granted. Here, the Board should follow its well-reasoned disposition of this issue in the *CIND* case by rejecting NS’s reply to reply statement.

RESPONSE

If the Board decides not to enforce the rule against replies to replies by rejecting NS's Reply, the Board in fairness should give consideration to the following short response.

NS's Reply fails to establish that the case at hand is not governed by the principle that a petition for exemption of abandonment is to be denied where abandonment is opposed and it is not evident that rail line revenues are marginal in comparison to the costs of operating the line. There is no support in precedent nor logic for NS's contention that the principle does not apply unless there is more than one opponent of abandonment. (NS Reply, at 4-6). The key to this element of the principle is the effectiveness of the opposition -- that is, whether the opposition persuasively challenges the showing of revenues and costs in the Petition, or, as here, successfully demonstrates the absence of sufficient support for the alleged revenues and costs, such that the Board is unable to reach an informed decision on the merits. The opposition of multiple protestants may not provide such a persuasive challenge. The opposition of a sole protestant may well provide that effective challenge, as it has here. The number of opponents is immaterial. The content of the opposition is what counts.

NS makes several attempts to avoid the second element of the controlling legal principle, but its efforts are unsuccessful. First, NS attempts to reverse the burden of proof. Thus, at page 6 of the Reply, NS states:

... SMI does not and cannot establish that NSR's revenues are 'marginal in comparison to the costs of operating the line' in this case ...

Similarly, at page 7 of the Reply, NS states:

... SMI does not present a contrary showing (that this is a marginal case) ...

The Board should not be fooled. As the proponent of the exemption, NS clearly has the burden to establish that rail line revenues are marginal in comparison to operating costs. In order to sustain that burden, NS was required by 49 C.F.R. § 1121.3(a) to provide “its case-in-chief, along with its supporting evidence, workpapers, and related documents” (emphasis added). Supporting evidence means “sufficient workpapers and supporting documents to present a complete or prima facie case” *Aban. and Discon. of R. Lines and Transp. under 49 U.S.C. 10903*, 1 S.T.B. 896, 906 (1996). A proponent of abandonment has the burden of “producing the detailed evidence called for by the Commission’s abandonment regulations, covering every principal element of its case-in-chief for abandonment.” *Illinois Central Gulf R. Co. - Abandonment*, 363 I.C.C. 93, 101 (1980) (emphasis added). The following from *Abandonment Regulations - Costing*, 5 I.C.C.2d 123, 133 (1988), aptly identifies what must be provided to sustain an abandonment proponent’s burden to establish a prima facie case (emphasis in original):

In order to minimize the potential for controversy, our rules will require that the parties in abandonment and subsidy proceedings fully support and substantiate all forecasts of revenue, costs, and asset values. This support and substantiation would include the submission of all underlying source records and/or an explanation of the rationale and key assumptions used to develop the forecast amounts . . . Similarly, we expect all dollar amounts shown in the Forecast Year column of Exhibit 1 to be fully supported, even those amounts which agree with those shown in the Base Year column of that Exhibit.

The Petition for Exemption of Abandonment filed by NS does not even come close to providing the full support and substantiation for revenues, costs and asset values required by the Board’s abandonment regulations. Thus, there is not an iota of underlying support nor

substantiation in that Petition nor in the workpapers for the contention that the High Bridge requires renewal at a cost in the high six figures.

As a substitute for evidentiary support, NS offers only feeble rationalizations. Thus, NS says that it would not be routing traffic away from the High Bridge if that bridge did not need immediate significant rehabilitation and maintenance, and that any bridge that is well over 90 years old will need substantial rehabilitation and maintenance to remain in service. (NS Reply at 8). That is a far cry from evidentiary support and substantiation. Moreover, NS's statements lack credibility in light of the following statement in NS's own Petition for Exemption of Abandonment (at 28, note 15):

... This rerouting of overhead traffic actually reduced the need for immediate rehabilitation of the High Bridge ...

NS characterizes the effect of its inclusion of \$796,500 of bridge rehabilitation costs in operating costs (on-branch costs for maintenance of way and structures) as "quibbling over a few thousand dollars". (NS Reply at 8). NS argues that in spreading that rehabilitation cost over 10 years, its costing was conservative because it could have included the entire rehabilitation cost in the forecast year. (NS Reply at 8-9). NS is wrong on that score. A capital cost for bridge or track rehabilitation is not to be charged against a rail line in one year. *Illinois Central Gulf R. Co. - Abandonment*, 363 I.C.C. 729, 731 (1980); *Baltimore and Ohio R. Co. Abandonment*, 360 I.C.C. 681, 682 (1980). Nor is there a rational basis for charging that cost against the line over a 10-year period. The rehabilitation cost should be amortized over the expected life of the asset -- a period of more than 90 years given the current life of the High Bridge. Much more than "a few

thousand dollars” of operating costs are at issue here. But the overriding point is that the bridge rehabilitation cost is unsupported, so that no amortization of cost is permissible.

NS then argues that even without inclusion of bridge rehabilitation costs in operating costs, the rail line would not be profitable on either an avoidable cost or economic cost basis. (NS Reply at 8-9). However, that argument assumes that sufficient support and substantiation were provided for all other operating costs and economic costs. SMI’s Reply Statement showed that not to be the case -- for off-branch costs (at 5), for maintenance costs (at 6), for return on value of locomotives and freight cars (at 6-7), and for valuation of all track assets (at 6). This is not “quibbling” over a few more thousand dollars. The forecast year off-branch costs amount to nearly \$100,000. That cost seems to be extraordinarily high for a short 80-mile off-branch haul from Petersburg, VA for most of the 158 forecast year carloads. However, the Board has no way of verifying that cost because the NS Petition for Exemption does not identify any of the off-branch service units, nor reflect the calculation of off-branch costs. The NS Reply is silent on that omission, even in the face of the specific challenge in SMI’s Reply Statement. In fact, NS’s Reply does not address SMI’s challenge to the absence of support and substantiation for any of the other cost categories and valuations identified above.

NS argues that it is enough to satisfy the burden of proof that its revenues and costs were prepared in the prescribed Board format, were accompanied by some workpapers and explanations, and were derived from company records and accounts. (NS Reply at 10). NS complains that “SMI appears to be suggesting that every item be accompanied by a verification by the person that keeps the account or by some sort of detail far in excess of the Board’s requirements even in application proceedings.” (*Id.*).

NS's argument reflects a failure to grasp both the effect of the controlling legal principle and SMI's position in this proceeding. If a prospective petitioner for exemption of abandonment has reason to believe that its petition will be unopposed or not effectively opposed, of course it need not submit detailed revenue, cost and valuation evidence in order to justify an exemption for abandonment. However, if the prospective petitioner has reason to believe that its petition will be effectively opposed or if there is reasonable doubt about the prospect for effective opposition, the prospective petitioner would be well advised to provide detailed evidence of that nature. SMI does not argue for verification of statements, nor for detail in excess of that required in formal abandonment proceedings, but rather for essential support and substantiation for revenue, cost and valuation evidence. As the Board has made clear time after time in denying petitions for exemption of abandonment in which revenue, cost and valuation evidence was insufficiently supported and substantiated, such denial is required as a matter of law because the Board would be unable to reach an informed decision without reliable evidence. *See, e.g., San Joaquin Valley R. Co. - Aband. Exempt. -- in Kings and Fresno Counties, CA*, 1997 STB LEXIS 114 (Docket No. AB-398 [Sub-No. 4X], decided May 9, 1997), where the Board said (at *9):

In this case there is clearly insufficient information for us to make an informed decision on the merits of the proposed abandonment exemption. SJVR has not provided a breakdown of operating revenues and costs (with supporting detail) for the \$130,520 in revenues generated in 1995 . . .

In sum, in light of NS's failure to have provided support and substantiation for essential elements of the revenues, costs and return on value in its petition for exemption of abandonment, the present case is essentially indistinct from the long line of decisions cited by SMI in which the Board refused to grant exemptions for abandonment where the evidence was insufficient for the

Board to make an informed decision on the statutory standards for exemption. Accordingly, NS's Petition for Exemption of Abandonment should be denied, without prejudice to the filing of a formal abandonment application under 49 C.F.R. § 1152.22.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated, NS's request for leave to file a reply to a reply should be denied, i.e., the NS Reply should be rejected. If the NS Reply is not rejected, the foregoing response by SMI should be accepted into the record.

Respectfully submitted,

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Protestant

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Attorney for Protestant

DUE DATE: December 6, 2004

CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2004, I served the foregoing document, Reply In Opposition To Motion For Leave To File A Reply To Reply, on James R. Paschall, Esq., General Attorney, Norfolk Southern Corporation, Law Department, Three Commercial Place, Norfolk, VA 23510-9241, by UPS overnight mail (Monday delivery).

Thomas F. McFarland

Thomas F. McFarland