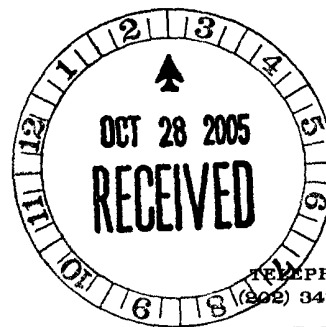


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Honorable Vernon Williams
Secretary
Surface Transportation Board
1925 K Street NW
Washington, DC 20423

215063

Re: Docket No. AB-290 (Sub-No. 236X), The Cincinnati, New Orleans and Texas Pacific Railway Company-Abandonment Exemption-in Roane County, TN

Dear Secretary Williams:

Enclosed for filing in the captioned proceeding please find an executed original and 10 copies of the "Petition for Leave to Intervene and File Reply Out of Time, and Verified Reply of Horsehead Corp. in Conditional Opposition to Abandonment and Waiver." In the interests of avoiding any further delay in filing, a scanned and electronically transmitted copy of the verification page is included; the executed original verification page is being sent by express and will be filed on Monday or Tuesday of next week.

An additional copy of this letter and filing is enclosed. Please mark that copy to indicate your receipt of the filing, and return the copy to our messenger.

Thank you for your cooperation in this matter.

Sincerely,

Donald G. Avery
An attorney for Horsehead Corp.

cc: Parties of record
Franklin Industries, Inc.

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BEFORE THE
SURFACE TRANSPORTATION BOARD

THE CINCINNATI, NEW ORLEANS)
AND TEXAS PACIFIC RAILWAY COMPANY)
-ABANDONMENT EXEMPTION)
-IN ROANE COUNTY, TN)

Docket No. AB-290
(Sub-No.236X)

ENTERED
Office of Proceedings

OCT 28 2005

Part of
Public Record

**PETITION FOR LEAVE TO INTERVENE
AND FILE REPLY OUT OF TIME,
AND VERIFIED REPLY OF HORSEHEAD CORP.
IN CONDITIONAL OPPOSITION TO ABANDONMENT AND WAIVER**

The Horsehead Corp. ("HC") respectfully petitions the Surface Transportation Board ("STB" or "Board") pursuant to 49 C.F.R. § 1117.1 for leave to intervene and file this, its Reply in Conditional Opposition to the captioned Petition for Exemption after the due date for such replies specified in the Board's Notice served September 2, 2005. In support of its petition for leave, HC submits that its failure to file on a timely basis was due to excusable neglect,¹ and that inasmuch as a final decision on the exemption petition is not due until December 2, no party will be prejudiced by HC's

¹In particular, HC's prior discussions with the CNOTP and Franklin Industries (the intended buyer of the line following its abandonment) were conducted entirely at the local level by employees of HC's local Rockwood, TN facility, who were unfamiliar with STB procedures. It was not until the CNOTP sent HC a draft letter agreement regarding the abandonment, which was subsequently forwarded to corporate counsel for review, that HC senior management became aware (through its counsels' investigation) that this proceeding was already pending, and that the due date specified for replies had already passed. Given the lack of prejudice to any other interested parties from the lateness of HC's intervention, the delay under these circumstances clearly constitutes excusable neglect under applicable precedents, and justifies

delay in filing. Moreover, HC's vital interest in continued rail service over the line proposed for abandonment and sale, and hence in the outcome of this proceeding, is conceded by the CNOTP (*Petition for Exemption* filed August 15, 2005, at 5) and was acknowledged by the Board in its Environmental Assessment served October 14 (at 1). Simply stated, if the HC facility on the line in question were ever to lose rail service, it would have to close.

Verified Reply

In its Petition, the CNOTP represents (at page 5) that agreement has been reached among the interested parties on the preservation of rail access for HC, and that accordingly the CNOTP expects no opposition from HC to its proposed abandonment of the line. This is only partially correct. It is true that HC does not oppose the *sale* of the subject line to Franklin in and of itself, nor does HC oppose Franklin's subsequent operation of its private railroad over the line. However, the CNOTP presently operates over the line as a common carrier, and as such its service to HC cannot be discontinued without STB authorization. Moreover, if abandonment or discontinuance were approved, HC would have a right to protect its access to rail service by submitting an Offer of Financial Assistance ("OFA") to acquire the CNOTP's interest in the line. *Those statutory protections for HC's rail service will be lost if the proposed abandonment, and the accompanying request for waiver of the Board's OFA regulations, are approved.*

waiving the filing date specified in the September 2 Order to the extent necessary to accept this

Accordingly, HC is compelled at this point to oppose the CNOTP's abandonment exemption and waiver request, and ask that both be denied. HC would not oppose the sale if it were subject to a reserved easement for common carrier rail operations retained by the CNOTP (in which case, presumably, no abandonment or discontinuance requiring STB approval would be involved).

HC is not unalterably opposed to the proposed abandonment, *provided* the parties can reach agreement on suitable contractual protections to replace the statutory protections that would be lost with approval of the abandonment. By the same token, HC is willing to forego its right to submit an OFA for the line when and if the instant petition for exemption is approved, if the essence of the OFA protections can be preserved through private agreement among the parties. Discussions to that end are currently underway among the parties, and if complete agreement is reached, HC will promptly withdraw its Opposition to the abandonment and OFA waiver request. Unless and until that happens, however, HC respectfully requests (a) that the CNOTP's petition for an exemption to permit abandonment of the line be rejected; and (b) that if abandonment is nonetheless approved over HC's objections, that CNOTP's request for waiver of the OFA regulations be denied so that HC may submit an OFA to acquire the CNOTP's interest in the line, and thereby protect its access to vital rail service.

filing. *See Pioneer Investment Services Co. v. Brunswick Assocs.*, 507 U.S. 380, 395 (1993).

Conclusion

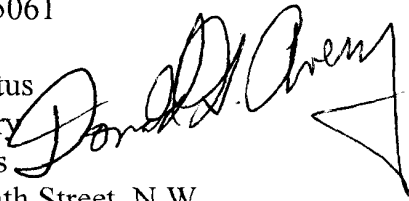
For the reasons set forth in this Verified Conditional Reply, HC respectfully requests that the Board deny the CNOTP's petition for exemption, and in any case deny the CNOTP's request for waiver of the Board's OFA regulations.

Respectfully submitted,

By: Ali Alavi
Vice President – Corporate Administration,
General Counsel & Secretary
Horsehead Corp.
300 Frankfort Road
Monaca, PA 15061

Of Counsel:

Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

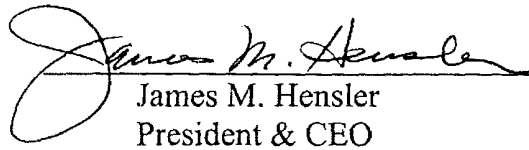
C. Michael Loftus
Donald G. Avery 
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Dated: October 28, 2005

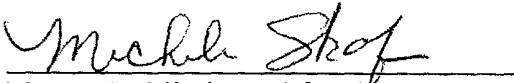
Attorneys for Petitioner Horsehead Corp.

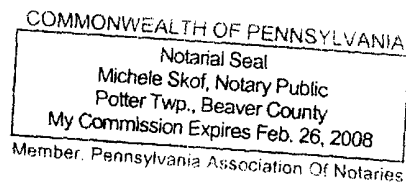
Verification

James M. Hensler, being duly sworn, deposes and says that he has read the foregoing "Petition for Leave to Intervene and File Reply Out of Time, and Verified Reply in Conditional Opposition," knows the contents thereof, and that the same are true as stated to the best of his knowledge, information, and belief.


James M. Hensler
President & CEO

Subscribed and sworn to this 28th day of
October, 2005.


Notary Public in and for the
Commonwealth of Pennsylvania



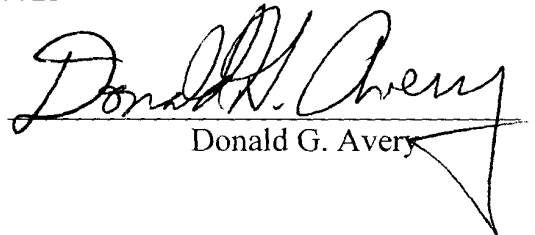
My commission expires Feb 26, 2008

Certificate of Service

I hereby certify that on this 28th day of October, 2005, I have caused copies of the foregoing "Petition for Leave to Intervene and File Reply Out of Time, and Verified Reply in Conditional Opposition" to be served by overnight express upon the following individuals:

James R. Paschall, Esq.
Norfolk Southern Railway Company
Three Commercial Place
Norfolk, VA 23510-2191

Mr. Kevin Dunn
Franklin Industries, Inc.
10583 Highway 70 East
Crab Orchard, TN 37723


Donald G. Avery