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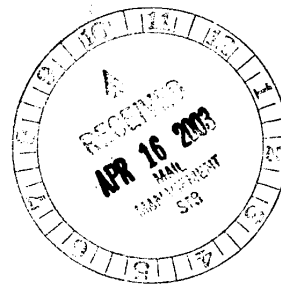
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**GC&E** GOLLATZ  
GRIFFIN  
& EWING  
ATTORNEYS - AT - LAW

April 15, 2003  
VIA: UPS Overnight

Hon. Vernon A. Williams, Secretary  
Surface Transportation Board  
Attn: Mercury Building, #711  
1925 K Street, N.W.  
Washington D.C. 20423-001

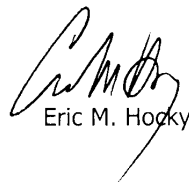
Re: Docket No. NOR 42078  
Norfolk Southern Railroad Company-  
Petition for Declaratory Order-  
Interchange with Reading Blue Mountain &  
Northern Railroad Company  
**Reply to Petition for Waiver**



Dear Secretary Williams:

Enclosed for filing are the original and ten copies of the Reply to Petition for Waiver being filed on behalf of Reading Blue Mountain & Northern Railroad Company. Please time-stamp the extra copy of this letter to indicate receipt, and return it to me in the stamped, self-addressed envelope provided for your convenience.

Respectfully,

  
Eric M. Hocky

Enclosures

cc: Richard A. Allen, Esquire (via overnight)

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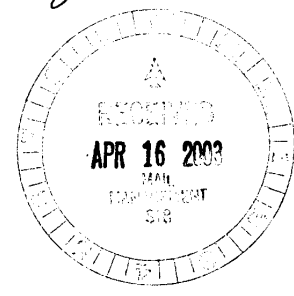
GOLLATZ, GRIFFIN & EWING, P.C.

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PHILADELPHIA

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BEFORE THE  
**SURFACE TRANSPORTATION BOARD**

Docket No. NOR 42078

**NORFOLK SOUTHERN RAILWAY COMPANY  
- PETITION FOR DECLARATORY ORDER -  
INTERCHANGE WITH READING BLUE MOUNTAIN & NORTHERN  
RAILROAD COMPANY**

**REPLY TO PETITION FOR  
WAIVER AND LEAVE TO FILE**

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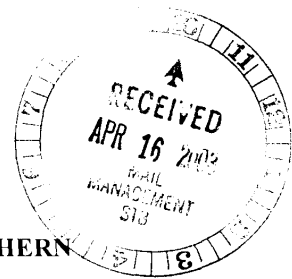
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Attorneys for Reading Blue Mountain & Northern  
Railroad Company

Dated: April 15, 2003

BEFORE THE  
SURFACE TRANSPORTATION BOARD  
Docket No. NOR 42078

**NORFOLK SOUTHERN RAILWAY COMPANY  
- PETITION FOR DECLARATORY ORDER -  
INTERCHANGE WITH READING BLUE MOUNTAIN & NORTHERN  
RAILROAD COMPANY**



**REPLY TO PETITION FOR  
WAIVER AND LEAVE TO FILE**

Norfolk Southern Railway Company ("NSR") commenced this proceeding by filing an expedited petition for a declaratory order and injunctive relief (the "Declaratory Order Petition") seeking to prevent Reading Blue Mountain & Northern Railroad Company ("RBMN") from exercising its contractual rights to terminate the Lehighton Interchange Agreement, and from satisfying its interchange obligations by designating facilities at Penobscot Yard. RBMN responded within the shortened time period of eight days required by the Board. NSR now seeks to extend the filings by seeking a waiver of the Board's regulations and leave to file a "surreply." RBMN files this reply requesting that the Board deny the waiver request and close the record after RBMN's Reply to Petition for Declaratory Order (the "Declaratory Order Reply").

The Board's regulations at 49 C.F.R. §1104.13(c) clearly provide that: "A reply to a reply is not permitted." NSR has not provided sufficient reasons for the Board to waive this requirement.

The regulations contemplate that a petitioner will present its full case in chief at the time of its initial filing. NSR now seeks to respond to and correct what it perceives are misstatements of fact in RBMN's Declaratory Order Reply. NSR Waiver Petition at 1-2. The proposed NSR Surreply is little more than an effort to have the proverbial second bite at the apple. Having failed to make its case in the Declaratory Order Petition, NSR now seeks to re-argue and supplement the record by "correcting" the evidence RBMN has presented. However, there will always be facts, and the characterization of such facts, over which the parties will

disagree.<sup>1</sup> Factual disputes can, and will, continue indefinitely. Thus, this cannot be the sole reason for granting waivers from the Board's regulations.

NSR also attempts to justify its filing by claiming that RBMN has sought additional affirmative relief to which it needs to respond. RBMN has merely proposed a return to the six day per week level that characterized the Conrail/NSR - RBMN Lehighton interchange from August 1996 until NSR unilaterally reduced the service to three days per week in Fall 2001. This proposal is presented as an alternative for the Board to consider if the Board does not want to allow RBMN to shift the interchange at this time. Further, a return to six day a week interchange is nothing more than a true return to the *status quo ante* that NSR claims that it desires.

NSR had its opportunity to present its case to the Board, and failed because its positions are not consistent with the discussions its personnel were having with respect to the parties' interchange arrangements. Importantly, NSR is not challenging the following essential facts or the legal issues that flow from them: NSR, as the successor to Conrail, and RBMN are parties to the Lehighton Interchange Agreement. The Lehighton Interchange Agreement specifically allows either party to terminate the agreement on 30 days notice. The parties have been unable to agree on a common interchange. RBMN gave the required notice to terminate the Lehighton Interchange Agreement. RBMN designated operationally feasible facilities at Penobscot Yard to receive interchange traffic from NSR. The Board must now determine (1) whether it is going to vitiate the private contractual agreement of the parties by allowing NSR to frustrate the termination clause, (2) whether, in the absence of an agreement on interchange, each party has the duty under 49 U.S.C. §10742 to designate reasonable interchange facilities to receive traffic from the other, and (3) whether RBMN's designation of Penobscot satisfies that

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<sup>1</sup> Indeed, as noted below, RBMN believes that NSR has misstated facts in its Surreply, and if the Board allows the filing of the Surreply, RBMN is requesting the opportunity to respond to those errors.

obligation. Thus, the record is sufficient to allow the Board to determine the issues, and the Petition for Waiver should be denied.

The Board's regulations contemplate a petition and reply, allowing the respondent to close the record. Thus, if, despite the foregoing arguments, the Board determines to accept NSR's surreply, it should also consider the following rebuttal.

### **Rebuttal to Surreply**

NSR's attempts to "correct" the record are full of its own errors and mischaracterizations:

1. NSR, while never specifically denying that its trackage rights trains operate by Penobscot Yard every day or that its operating personnel support the change, implies Penobscot is not operationally feasible. It does so by citing to Mr. Michel's letter of January 2002 citing the need for substantial infrastructure improvements at Penobscot. NSR Surreply at 2-3. It ignores that since the time of that letter, much of the work at Penobscot has been completed. At this time the location does *not* require substantial infrastructure improvements to accommodate the NS delivery of cars. In fact, Penobscot can accommodate NSR and the delivery of cars today. Should NSR agree to conduct all interchange operations at Penobscot, RBMN would seek to add track capacity at the yard. The work needed for the additional capacity can be completed in approximately one week,<sup>2</sup> or over the next few weeks while interchange occurs. The fact that Mr. Kuiper has not reviewed the RBMN facilities or plans (NSR Surreply, Kuiper V.S. at 2) is of no moment; he has certainly had plenty of notice of the proposed change, and the time and opportunity to do so.

2. Contrary to NSR's characterization (NSR Surreply at 3), M&H Jct., not Lehighton, represents the true junction point of the two railroads. It is at M&H Jct. that the trains

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<sup>2</sup> RBMN agreed to the extension until April 30 to give itself the needed time to complete the improvements after a Board decision denying NSR its relief and allowing RBMN to provide interchange at Penobscot.

move north over RBMN's Lehigh Line, or northwest to Hazelton over NSR's Ashmore Secondary. The reason interchange was established at Lehighton was the lack of facilities at M&H Jct. Lehighton is 11 miles south of M&H Jct. RBMN's closest customer is 22 miles north of M&H Jct. Thus, RBMN runs over 33 miles to pick up interchange cars from NSR at Lehighton. In fact, the only reason RBMN comes to Lehighton is to accommodate the NSR interchange.

3. It is not irrelevant that NSR first proposed Penobscot for interchange as a means of restoring the desired level of interchange frequency. NSR Surreply at 4. It directly contradicts the NSR assertion in the Declaratory Order Petition that the idea originated with RBMN. Further, it demonstrates that the shift is clearly reasonable from an operating perspective.

4. In contrast to Mr. Kuiper's characterization of the discussions with RBMN (NSR Surreply at 3-4), RBMN stands by its assertions that Mr. Glass told Mr. Kuiper that RBMN would not be willing to pursue a move to Penobscot if NSR were going to insist on revenue reductions for RBMN. Mr. Kuiper indicated that was not the case. It was only after more than two weeks of delays that Kuiper indicated there might be concerns raised by someone in NSR's commercial groups.

5. Mr. Kuiper now suggests that six day per week interchange service has never been justified. NSR Surreply at 5-6. However, he does not deny that for over five years Conrail and NSR provided that level of service, or that NSR unilaterally decided to change the level of service. Further, it is noteworthy that Mr. Kuiper did not tell Mr. Glass in their February discussions that the traffic levels did not justify more frequent interchange. Instead, he suggested Penobscot since he could interchange seven days a week using the trackage rights trains. Mr. Kuiper had the opportunity, as did his superior, to inform RBMN that they did not believe there was a need for additional interchange. This reduction of interchange frequency is a matter of concern to RBMN and its customers, even if it is not to NSR or Mr. Kuiper.

In the Surreply, NSR claims that RBMN has overstated its legal position - that NSR doesn't claim that a carrier can *never* change an interchange. NSR Surreply at 1. Taking NSR at its written word, there are only two ways for an interchange to be altered. One is if both parties agree. The other is by action of the Board after a full hearing about the relative merits of different locations and terms. By inference, NS argues that a clear contractual provision permitting termination is meaningless. A party can cancel an interchange agreement, but it remains in effect unless the other party accepts the cancellation or the Board prescribes a new location. Thus, RBMN can either do what NS wants, or spend the time and money to litigate the issue of interchange location at the Board. Given the relative size and resources of the parties, the purpose of such a suggestion is clear.

NSR also uses its Surreply to attempt to muddy the legal issues before the Board. NSR implies that before the Board should permit a change in the interchange location it must not only determine that RBMN's facilities are operationally feasible, but that it must also establish new commercial relationships between the parties. However, this is clearly not the case. Neither Section 10742 nor the Lehighton Interchange Agreement (nor any standard interchange agreement for that matter) include any reference to commercial terms between the carriers involved. *Cf. New York, Chicago & St. Louis Railroad Company v. New York Central Railroad*, 314 ICC 344, 345 (1961) (discussing the issues to be considered in determining the reasonableness of designated facilities).

Finally, NSR portrays RBMN's attempts to change the interchange location as risking service to customers. According to NSR, the only possible outcome to an RBMN termination of the interchange agreement without a mutual agreement on a new location, is that there is no interchange and interline service halts. However, this ignores the alternative suggested by RBMN and required by statute: Each party designates reasonable facilities for interchange. NSR delivers cars to the facilities designated by RBMN at Penobscot; RBMN delivers cars to reasonable facilities designated by NSR. The only impediment to continued

service is NSR's refusal to abide by the termination, and to interchange as contemplated by 49 U.S.C. §10742.

### **Conclusion**

For the reasons set forth above, RBMN requests that the Board deny the Petition for Waiver and close the record. If not, RBMN requests that the Board accept the rebuttal set forth herein. In either event, RBMN further requests that the Board grant the relief requested by RBMN in its Reply to Petition for Declaratory Order.

Respectfully submitted,



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Attorneys for Reading Blue Mountain and Northern  
Railroad Company

Dated: April 15, 2003

### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Reply was served by overnight courier upon:

Richard A. Allen, Esq.  
Zuckert, Scoutt & Rasenberger, LLP  
999 Seventeenth Street, N.W.  
Suite 600  
Washington, DC 20006-3939

Dated: April 15, 2003

  
Eric M. Hocky