

ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

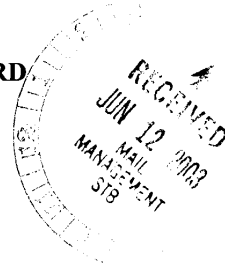
DOCKET NO. 42079

AG PROCESSING INC

v.

NORFOLK SOUTHERN RAILWAY COMPANY

MOTION FOR LEAVE TO FILE REPLY TO
NORFOLK SOUTHERN OPPOSITION



ENTERED
Office of Proceedings

JUN 12 2003

Part of
Public Record

Andrew P. Goldstein
John M. Cutler, Jr.
McCarthy, Sweeney & Harkaway, P.C.
Suite 600
2175 K Street, N.W.
Washington, DC 20037
(202) 775-5560

Attorneys for
Ag Processing Inc

Dated: June 12, 2003

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. 42079

AG PROCESSING INC

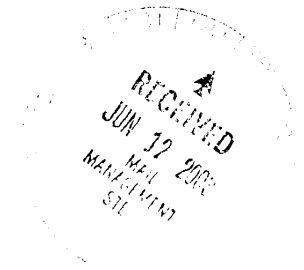
v.

NORFOLK SOUTHERN RAILWAY COMPANY

**MOTION FOR LEAVE TO FILE REPLY TO
NORFOLK SOUTHERN OPPOSITION**

On May 29, 2003, Ag Processing Inc ("AGP") filed a Complaint and Petition for Injunctive Relief in this docket, challenging the decision by Norfolk Southern Railway Company ("NS") that it will no longer honor order bills of lading or provide order/notify service on its system. In its Petition, AGP argued that the accepted standards for injunctive relief are met here. In its "Opposition to the Petition for Injunctive Relief," NS relied most heavily on its contention that AGP will not be irreparably injured by NS's decision because AGP allegedly can protect itself through alternatives to the use of order bills of lading. This argument is central to NS's Opposition. However, the argument is factually erroneous and misleading.

AGP is aware of 49 CFR 1104.13(c), generally prohibiting replies to replies. However, AGP is also aware that, absent a finding of irreparable injury, injunctive relief



rarely will be granted. Under the circumstances, AGP has no choice but to seek leave to file the attached Reply to Norfolk Southern's Opposition.

The Board has recognized on several occasions that relaxation of Rule 1104.13(c) can be warranted by the resulting benefits to the Board and the public interest. For example, in its decision served March 11, 2003 in Finance Docket No. 30186 (Sub-No. 3), Tongue River Railroad Co. -- Construction and Operation -- Western Alignment, the Board granted a motion like this one, finding that the reply "helps provide a complete record, clarifies the arguments, will not prejudice any party and ... cannot be said to unduly prolong the proceeding." Decision at 3.

Here, too, acceptance of the attached reply will help provide a complete record and clarify the arguments, which were abbreviated in the original filings due to the haste with which the parties needed to act. In addition, NS will not be prejudiced but should benefit from an explanation of the adverse impacts on AGP (and possibly other shippers) of NS's proposed remedy for the harms cited in AGP's Petition.

Finally, the effective date of NS's tariff change has passed, and the STB's decision will necessarily be rendered while AGP is deprived of the benefits it enjoyed under the status quo ante. While prompt Board action is desirable, this is not a case in which the record must be closed, even if it is incomplete, to meet a fixed deadline. Moreover, NS published its tariff change and abandoned a practice that has been in effect for decades, with little or no prior consultation with affected parties. That tariff took effect just 12 days ago. NS should not be heard to claim that consideration of the attached reply must be denied on the ground that this proceeding would be unduly prolonged. The issues in-

involved are narrow and AGP's tendered reply is germane to a correct understanding of the issues.

Wherefore, the Board should accept and consider the attached Reply to Norfolk Southern's Opposition notwithstanding Rule 1104.13(c).

Respectfully submitted,

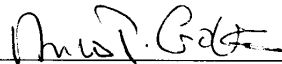


Andrew P. Goldstein
John M. Cutler, Jr.
McCarthy, Sweeney & Harkaway, P.C.
Suite 600
2175 K Street, N.W.
Washington, DC 20037
(202) 775-5560

Attorneys for
Ag Processing Inc

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served by telecopier and first-class mail on counsel for Norfolk Southern Railway Company this 12th day of June, 2003.



Andrew P. Goldstein