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May 30, 2003

BY HAND

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423

ENTERED
Office of Proceedings

MAY 30 2003

Part of
Public Record



Re: Finance Docket No. 42079, Ag Processing Inc v. Norfolk Southern Railway Company

Dear Secretary Williams:

Enclosed for filing in the above matter are the original and 10 copies of Norfolk Southern's Opposition To The Petition For Injunctive Relief. Please date-stamp and return to our messenger the two additional copies of this pleading

Sincerely,

Scott M. Zimmerman

Enclosures

EXPEDITED CONSIDERATION REQUESTED

Before the
Surface Transportation Board

Docket No. 42079



Ag Processing Inc

v.

Norfolk Southern Railway Company

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Office of Proceedings

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**Norfolk Southern Railway Company's
Opposition To The Petition For Injunctive Relief**

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May 30, 2003

Before the
Surface Transportation Board

Docket No. 42079

Ag Processing Inc
v.
Norfolk Southern Railway Company



**Norfolk Southern Railway Company's
Opposition To The Petition For Injunctive Relief**

Norfolk Southern Railway Company ("NSR") hereby opposes Ag Processing Inc's Petition For Injunctive Relief. By its petition, Ag Processing Inc. ("AGP") seeks the extraordinary remedy of preliminarily enjoining the effectiveness of an NSR tariff provision scheduled to take effect on Sunday, June 1, 2003, pending the Board's consideration of the merits of a formal complaint challenging the reasonableness of that provision.¹

The petition for injunctive relief itself was filed, concurrently with the formal complaint, yesterday afternoon – barely 24 hours ago, and less than 30 hours before the Board would have to act to prevent the challenged tariff provision from taking effect. AGP gave NSR no indication that it would seek this extraordinary interim remedy until yesterday, the very day it filed -- even though, by its own admission, AGP concluded "approximately a week ago" that a consensual

¹ To be clear, this Opposition pertains solely to AGP's petition for injunctive relief. It is not, and should not be construed as, a response or answer to the underlying formal complaint. NSR will address the merits of the formal complaint in an appropriate manner in due course.

resolution of this matter was unlikely. See Petition, Exh. 2 at 5-6. The post-11th hour timing of AGP's injunction petition has greatly prejudiced NSR's ability to mount a timely response, and indeed, AGP asserts that the Board should stop the tariff provision from taking effect before June 1 even without any response by NSR. See Petition at 13.

But the petition fails to demonstrate that AGP faces any imminent crisis justifying the "emergency relief" it seeks. The harm AGP claims it will suffer if the tariff provision is not preliminarily enjoined is not irreparable; indeed, it can be avoided through the use of other tariff mechanisms still available to AGP. Moreover, the alleged harm is overstated, and the "evidence" AGP offers is nothing more than sheer speculation. On the other hand, NSR has undertaken the proposed tariff change because the situation that the proposed rule is intended to address has caused, and continues to cause, NSR significant difficulty. In sum, AGP has failed to meet the heavy burden required of one seeking preliminary injunctive relief, and the petition therefore should be denied.

The Legal Standard

In the ICC Termination Act of 1995 (ICCTA), Congress eliminated the express power that had been held by the STB's predecessor to suspend rates, rules and practices under the former 49 U.S.C. § 10707. AGP, however, seeks an injunction under 49 U.S.C. § 721(b)(4), a new provision created in ICCTA that provides that the Board may, "when necessary to prevent irreparable harm, issue an appropriate order without regard to [the Administrative Procedure Act]." The

Board has construed "an appropriate order" to include injunctions. See, e.g., *DeBruce Grain, Inc. v. Union Pacific R.R. Co.*, 2 S.T.B. 773 (1997).

Preliminary injunctive relief is a drastic remedy not to be granted unless the moving party clearly carries burden of persuasion as to all prerequisites. See, e.g., *U.S. v. Jefferson County*, 720 F.2d 1511 (11th Cir. 1983).

Since preventing irreparable harm is the sole purpose articulated in the statute for which Board action under § 721(b)(4) is permitted, if a complained-of act would not cause irreparable harm, then there can be no Board order "necessary" to prevent it. Moreover, the legislative history of ICCTA repeatedly indicates that the harm to be addressed by an order under § 721(b)(4) must be not only irreparable, but imminent as well. See H.R. Rep. No. 422, 104th Cong., 1st Sess. 168-69, 170 (1995).

ARGUMENT

A. AGP has failed to meet the high standard for demonstrating it would suffer imminent, irreparable harm if NSR's tariff provision is not preliminarily enjoined.

The Board has held, in the similar context of considering a stay pending judicial review, that the moving party's claimed injury must be "both certain and great." *Contracts For Transportation Of Property*, Ex Parte No. MC-198, 1992 MCC Lexis 77 at *16 (June 16, 1992) (quoting *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)). It cannot be merely speculative. See *id.* at *16. Furthermore, a mere loss of revenue is not the type of harm that is considered

irreparable, unless it is shown that the losses would force the moving party out of business or are inevitable. *Id.* at *15.

AGP has failed to provide evidence that it would suffer imminent, irreparable harm. It has provided only speculation. That speculation, moreover, pertains to the supposed effect of NSR's tariff change on exactly *one* unnamed AGP customer. AGP presents no evidence that that one customer has ever failed to pay for a shipment, and it presents no more than speculation concerning whether its customer could alter its payment policies to meet other tariff options available to it (see discussion below).

Even taking AGP's speculation as fact, it is clear that the supposed financial impact to AGP of not enjoining the new tariff provision is much less than it would like to suggest. AGP repeatedly raises the specter of losing annual revenues of \$4 million per year, yet its own figures belie that assertion. AGP admits that NSR's tariff change would affect, at most, the 3 or 4 cars a week that it says it ships to NSR destinations under order bills of lading. See Petition, Exh. 2, ¶ 4. AGP later acknowledges that, if the NSR tariff change goes into effect, it has alternative courses of action that AGP itself estimates would cost "an estimated \$500 to \$2,000 per car." *Id.*, Exh. 2, ¶ 11. Thus, by its own estimate, AGP speculates that the economic impact to it would be, at most, \$416,000 per year (4 cars per week x \$2,000 x 52 weeks), and could be as low as \$78,000 per year (3 cars a week x \$500 x 52 weeks). Additionally, those figures assume that this proceeding (and thus the injunction) would last a full year; if the

proceeding were resolved quicker than that, the cost to AGP could be even lower.

In contrast, AGP, which touts itself as "the largest 'cooperative' soybean processing company in the world," (see *About AGP*, available at http://www.agp.com/about_us.shtml), enjoyed sales in fiscal year 2002 of more than \$1.8 billion.²

Thus, even treating AGP's speculation as fact, the financial harm it predicts does not come *close* to reflecting the sort of imminent, business-threatening harm that would justify the extraordinary remedy of preliminary injunctive relief.

But more importantly, any alleged harm to AGP is not irreparable because even when NSR's Rule 560(2) takes effect, AGP will have available to it other mechanisms to protect its ability to receive payment from the consignee for goods AGP ships before those goods are delivered to the consignee. For example, rather than using the Order/Notify mechanism that is eliminated in the new Rule 560(2), a shipper such as AGP can simply use a straight bill of lading and name itself as the consignee. Thereafter, while the goods are in transit, AGP can request payment from the consignee; once payment is received, AGP then could issue a change in the consignee to reflect the true consignee, thus permitting delivery. If that change in consignee is made before the goods arrive at destination, there would be no charge for the change; if the change were made

² See AGP's 2002 annual report, available at: <http://www.agp.com/news/2002/AnnualMeeting/AnnualReport/agpannual2002.pdf>.

after arrival at destination, while still held by NSR, a diversion charge of \$198 per car would apply. See NS Tariff 8002-A, Item 2070.

B. None of the Other Traditional Factors In The Injunctive Relief Analysis Compel Imposition of An Injunction

None of the other three factors AGP relies upon – likelihood of success on the merits, lack of harm to NSR, and where the public interest lies – compel the conclusion that an injunction must be granted pending resolution of this matter on the merits. The claims AGP has asserted in its Formal Complaint go to the reasonableness, or unreasonableness, of NSR's action in promulgating the new tariff rule. Deciding whether a particular action is reasonable or not requires a full examination of all the facts and circumstances involved after the parties have had an opportunity to present full evidentiary cases. It is not something that can be confidently predicted strongly one way or the other at this early stage, particularly when NSR has had no practical opportunity to present any evidence whatsoever.

Moreover, NSR is taking steps to eliminate the Order/Notify mechanism because it does, indeed, impose unnecessary and costly burdens on NSR. The Order/Notify system arose historically in a world in which railroads employed large forces of freight agents scattered throughout the country, and relied on the physical transfer, by hand or mail, of original Order/Notify bill of lading documents between the railroad, banks, and the shipper. The personnel and processes to maintain that kind of decentralized system are no longer in place, and continuing to try to fit the concept of the Order/Notify system into the operational and administrative structure of today imposes administrative costs on NSR that are

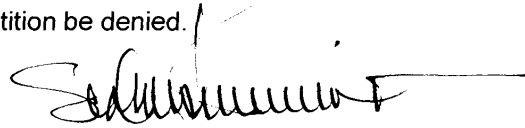
unnecessary in light of the fact that, as discussed above, a shipper such as AGP has other more efficient mechanisms available to it to accomplish the same goal.

Finally, AGP presents no evidence of a pervasive public need to preliminarily enjoin the effectiveness of NSR's tariff provision.

CONCLUSION

NSR respectfully requests that the petition be denied.

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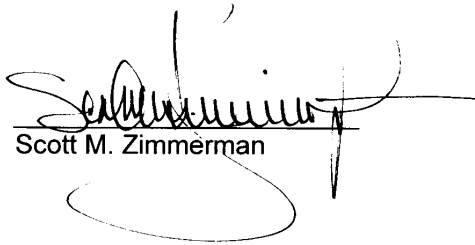
Attorneys for Norfolk Southern Railway Company

May 30, 2003

CERTIFICATE OF SERVICE

I certify that on May 30, 2003 a true copy of Norfolk Southern Railway
Company's Opposition To The Petition For Injunctive Relief was served by hand
delivery upon:

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