

SIDLEY AUSTIN BROWN & WOOD LLP

CHICAGO
DALLAS
LOS ANGELES
NEW YORK
SAN FRANCISCO
SEATTLE

1501 K STREET, N.W.
WASHINGTON, D.C. 20005
TELEPHONE 202 736 8000
FACSIMILE 202 736 8711
www.sidley.com
FOUNDED 1866

BEIJING
HONG KONG
LONDON
SHANGHAI
SINGAPORE
TOKYO

WRITER'S DIRECT NUMBER
(202) 736-8071

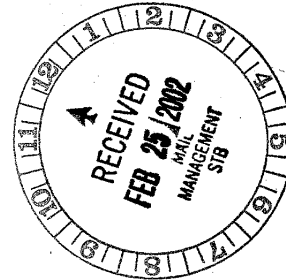
WRITER'S E-MAIL ADDRESS
csadler@sidley.com

204831

February 25, 2002

By Hand Delivery—Original and 10 Copies

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Room 700
1925 K Street, N.W.
Washington, D.C. 20423



Re: **STB Finance Docket No. 33928: Norfolk Southern Corporation and
Norfolk Southern Railway Company - Construction and Operation –
In Indiana County, PA**

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding are the originals and 10 copies each of the "Norfolk Southern Opposition to Motion of Horst E. Kunig for an Extension of Time, Motion to Strike, or, in the Alternative, Petition to Reply" and "Norfolk Southern Corporation and Norfolk Southern Railway Company Reply to the Comments of Horst E. Kunig." Also enclosed is a computer disk containing the text of the filings in WordPerfect 8.0 format.

Please contact me should you have any questions on this matter.

ENTERED
Office of the Secretary
FEB 26 2002
Part of
Public Record

Respectfully submitted,

Constance A. Sadler
Constance A. Sadler

Enclosures

cc: Joseph Dettmar, Office of Proceedings
Victoria Rutston, Chief, SEA
Phillis Johnson-Ball, SEA

BEFORE THE
SURFACE TRANSPORTATION BOARD

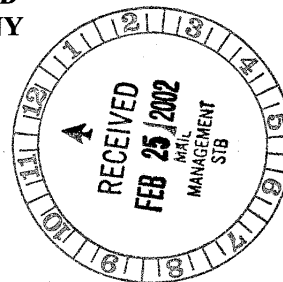
Finance Docket No. 33928

NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY
-- CONSTRUCTION AND OPERATION --
IN INDIANA COUNTY, PA

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NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN
RAILWAY COMPANY OPPOSITION TO MOTION OF HORST E. KUNIG FOR
AN EXTENSION OF TIME, MOTION TO STRIKE, OR, IN THE
ALTERNATIVE, PETITION TO REPLY

Joseph C. Dimino
John V. Edwards
Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510-2191
(757) 629-2838
(757) 533-4872 (fax)

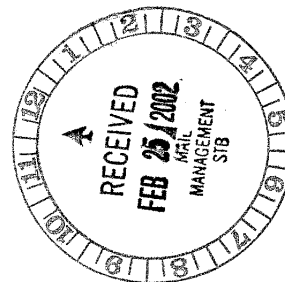
Constance A. Sadler
Sidley Austin Brown & Wood, LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8071
(202) 736-8711 (fax)

*Attorneys for Norfolk Southern Corporation and
Norfolk Southern Railway Company*

February 25, 2002

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 33928



**NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN
RAILWAY COMPANY OPPOSITION TO MOTION OF HORST E. KUNIG FOR
AN EXTENSION OF TIME, MOTION TO STRIKE, OR, IN THE
ALTERNATIVE, PETITION TO REPLY**

INTRODUCTION

Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively "Norfolk Southern") hereby oppose the motion by Horst E. Kunig ("Kunig") to submit comments, more than two weeks after the period of comments, in the above-referenced proceeding.¹ Good cause does not exist for the requested extension. Further, Norfolk Southern moves the Surface Transportation Board ("Board") to strike, pursuant to 49 C.F.R. 1104.8, the tendered Kunig Petition dated February 12, 2002. It contains several misstatements of fact and law. It advances immaterial arguments.

¹ Kunig's submittal is self-styled as a "Petition". The caption of the document does not, however, alter the fact that Kunig's "Petition" and the accompanying "Support for Petition" are public comments on the December 27, 2001 NS application for construction and operation ("Application") in this proceeding, as solicited by the Board in its January 22, 2002 notice of filing of the application and request for public comments. Kunig's comments are significantly beyond the period set by the STB for public comments, however captioned. NS did not receive a copy of Kunig's comments until February 19, 2002, 19 days after the close of the comment period established by the STB.

Further, it unnecessarily impugns the veracity of persons submitting verified statements on behalf of Norfolk Southern. Moreover, it raises again issues that were argued nearly a year ago. The administrative process is not advanced by requiring the Board to engage its limited resources to address the Kunig Petition. If, however, the Board does accept the Kunig Petition, Norfolk Southern moves the Board to accept the attached reply in order to complete and correct the record.

ARGUMENT

I. The Kunig Petition was Submitted Unnecessarily After the Period for Comments had Expired.

On the day the Application was filed, December 27, 2001, Norfolk Southern sent a public version copy to Kunig by Express Mail. On January 10, 2002, in compliance with the local newspaper notice publication requirement of 49 C.F.R. §1510.10(f), NS caused to be printed in the *Indiana Gazette*, the newspaper of general circulation in Indiana County, Pennsylvania, notice of the filing of the Application, a summary of its contents, and the date (January 31, 2002) by which all public comments must be filed with the Board. The Board subsequently issued an order on January 22, 2002 and published in the Federal Register (67 Fed. Reg. 2954-2955) a notice which again explained that public comments on the Application were to be filed no later than January 31, 2002, with any reply by NS to be filed by February 5, 2002. Kunig did not request extra time in order to develop his response to the Application, 49 C.F.R. Section 1104.7(b), and he failed to meet the Board's deadline by over two weeks.

The Board has used its discretion in the past to permit the submission of comments outside of an established procedural schedule in order to complete the record. As demonstrated below, however, the response submitted by Kunig shows that Kunig did not have good cause for an extension of time in which to respond. Admitting the Kunig Petition would not serve to complete the record or aid the Board in its deliberations. Instead, the Kunig Petition serves only to delay the progress of this proceeding and to use up valuable and limited administrative resources.

Kunig's explanation for submitting his comments so late is belied by the response he eventually submits. Kunig claims that the Board's order, and the procedural regulations it was based upon, "is unreasonable, as it does not permit due diligence analyzing the complicated subject matter in greater detail." Because it is based upon an incorrect reading of the relevant Federal statute, inapplicable state statutes and a definite misunderstanding of the facts, no good cause exists for extending the time for comments in this proceeding in order to accept the Kunig Petition, and it should be stricken.

II. The Kunig Petition Contains Several Misstatements of Fact and Law.

Several statements of fact and law contained in the Kunig Petition are wrong or otherwise misleading. As a result, the arguments based on these statements are irrelevant and immaterial to the matters before the Board.

For example, Kunig is incorrect in stating that "Under 49 U.S.C. Section 10901(b) NS is required to document that the activities for which, NS has applied for a construction permit, are 'necessary and in the public interest'." Section 10901(b) does not provide a

standard for the review of an application for construction authority.² Instead, the relevant provision for the Board's consideration is Section 10901(c), which states:

The Board shall issue a certificate authorizing activities for which such authority is requested in an application filed under subsection (b) unless the Board finds that such activities are inconsistent with the public convenience and necessity.

Kunig's arguments arising out of his misreading of the statute are not relevant.

Kunig also states that "NS has already given notice (NS Application page 33) that it will seek to terminate existing agreements with other carriers" that could lead to a monopoly for NS to transport coal. On page 33 of the Public Version of the Application (page 34 of the Highly Confidential Version), however, NS specifically states:

NS has not filed any related application with this application. The traffic NSR proposes to move over the new Southern Route currently moves over the Northern Route. NSR has access to the Northern Route by means of trackage rights over two line segments and the lease of a third. Until NSR has met certain contractual conditions, NSR cannot terminate those agreements. It is possible, but not certain, that NSR will seek discontinuance authority for its operations over the Northern Route at a later date. Any such authority will be sought in its own right at a later time.

The premise of Kunig's arguments is based upon this incorrect interpretation of the plain statements made by NS in the Application, and Kunig's arguments are thus irrelevant and immaterial to this proceeding.

The Kunig Petition alleges that "In fact, as of this date NS has acquired all property through the exercise of the power of eminent domain, when it initiated legal

² Section 10901(b) states in its entirety: "A proceeding to grant authority under subsection (a) of this section begins when an application is filed. On receiving the application, the Board shall give reasonable public notice, including notice to the Governor of any affected State, of the beginning of such proceeding."

proceedings against property owners.” This is simply not true. Most of the property acquired for the project has been acquired through voluntary negotiation with the owners.

As described in the following Section, the Kunig Petition misreads the law with regard to the use of eminent domain in the Commonwealth of Pennsylvania, but the Petition further compounds this error by implying that Norfolk Southern has committed “theft” of property in Pennsylvania by abusing the Commonwealth’s court-based eminent domain process and that the alleged “theft” by NS “raises the question whether the Verifications provided by NS in its application are indeed correct.” It is to this allegation that we now turn.

III. The Kunig Petition Unnecessarily Impugns the Veracity of Persons Submitting Verified Statements on Behalf of Norfolk Southern.

On the subject of the use of the eminent domain powers, the Kunig Response states that:

The “exercise of the power of eminent domain appears to be in contravention to law. 15 Pa. C.S.A. § 1511(c), which states

‘The powers conferred under subsection (a) may be exercised to condemn property outside the limits of any street, highway, water or other public way or place for the purpose of erecting poles or running wires or other aerial electric, intrastate aerial telephone or aerial telegraph facilities only after the Pennsylvania Public Utility Commission, upon application of the public utility corporation, has found and determined, after notice and opportunity of hearing, that the service to be furnished by the corporation through the exercise of those powers is necessary or proper for the service, accommodation, convenience or safety of the public’ (emphasis added).

Emphasis in original. On its face, this provision is inapplicable because by its very terms it applies only to aerial electric, telephone or telegraph facilities. The provision nevertheless is used by Kunig to support a claim that the Board's processes have been misused by Norfolk Southern in eminent domain proceedings in Pennsylvania, to imply that Norfolk Southern has engaged in "theft." Kunig then leverages his unsupportable allegation of "theft" to question the veracity of persons submitting in this proceeding verified statements on behalf of Norfolk Southern.³ The credibility of persons submitting verified statements on behalf of an applicant may be relevant to Board proceedings, but the Board should not permit its processes to be used unfairly and unnecessarily in this manner.

IV. The Kunig Petition Raises Again Issues Already Addressed in Prior Submissions.

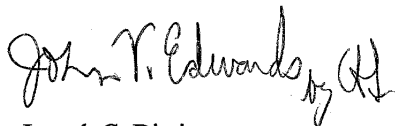
Kunig argues that Norfolk Southern "effectively prevents challenging the validity of the application by the public" by seeking to keep commercially sensitive information from reaching its competitors and by requiring persons who wish to view Highly Confidential information to agree to keep the information confidential pursuant to the Protective Order governing this proceeding. Notwithstanding the unusual nature of this argument (or, indeed, any compelling explanation by Kunig as to why this restriction commonly applied in commercial matters before the Board is especially burdensome as applied to him), issues regarding the Protective Order were fully briefed nearly a year

³ Kunig was a party to no eminent domain proceedings. No portion of his property will be acquired or used by Norfolk Southern for the construction of the Southern Route.

ago. *See*, Kunig, Inc. Motion to Rescind, dated May 7, 2001; Norfolk Southern Response to Kunig, Inc. Motion to Rescind, dated May 22, 2001.

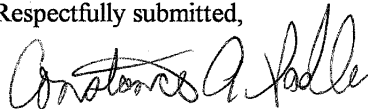
CONCLUSION

Norfolk Southern respectfully submits that the foregoing demonstrates that the Board has ample reason to deny Kunig's motion to accept his untimely response and to strike the Kunig Petition. It was filed far outside of the time permitted by the Board's procedural order and regulations, without good cause shown. As it is based on a misreading of the relevant laws and misunderstandings, it adds nothing to consideration by the Board of the issues relevant to review of Norfolk Southern's Application. However, should the Board decide to accept the Kunig Petition, Norfolk Southern respectfully requests that it further accept the attached Reply. This Reply would serve to complete and correct the record with regard to the matters set forth above.



Joseph C. Dimino
John V. Edwards
Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510-2191
(757) 629-2838
(757) 533-4872 (fax)

Respectfully submitted,



Constance A. Sadler
Sidley Austin Brown & Wood, LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8071
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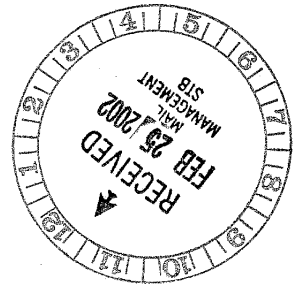
Attorneys for Norfolk Southern Corporation
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Dated: February 25, 2002

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**NORFOLK SOUTHERN CORPORATION
AND NORFOLK SOUTHERN RAILWAY COMPANY
REPLY TO THE COMMENTS OF HORST E. KUNIG**

Joseph C. Dimino
John V. Edwards
Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510-2191
(757) 629-2838
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