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August 20, 2015

ENTERED
Office of Proceedings
August 20, 2015
Part of
Public Record

E-Filed

Chief, Section of Administration
Surface Transportation Board
395 E. Street, SW
Washington, DC 20423

Re: Petition of Norfolk Southern Railway Company for Expedited Declaratory Order
FD No. 35949

Dear Sir/Madam:

Attached is the State of Delaware's Motion to Extend Time for Reply for filing in connection with the above-captioned matter. Counsel to Norfolk Southern has indicated that they will consent to this request.

Please let me know if you have any questions or concerns regarding this matter.

Sincerely,

/s/ Jennifer R. Noel

Jennifer R. Noel
Deputy Attorney General

JRN:hs
Enclosure

 GRANTED Office of Proceedings	DECISION ID NO.: <u>44696</u>
	DECIDED DATE: <u>8/21/15</u>
	SERVICE DATE: <u>08/24/2015</u>
	APPROVED: <u>Rachel D Campbell</u> Director
	☒ <u>extended to 10/23/15</u>

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket No. FD 35949

NORFOLK SOUTHERN RAILWAY COMPANY
PETITION FOR EXPEDITED DECLARATORY RELIEF

MOTION TO EXTEND TIME FOR REPLY

The State of Delaware (“Delaware”) hereby submits this Motion to Extend Time for Reply in response to the Petition for Declaratory Order filed on August 4, 2015 (the “Petition”), in the above- referenced docket by Norfolk Southern Railway Company (“Norfolk Southern” or the “Railroad”).

Pursuant to the Board’s rules at 49 C.F.R. § 1104.13(a), a reply to Norfolk Southern's petition would be due no later than August 24, 2015. Because Norfolk Southern's representations and assertions raise a number of factual questions that Delaware must investigate in order to fully respond to the Petition, Delaware respectfully requests an extension of time of 60 days, to October 23, 2015, to file a Reply to Norfolk Southern's Petition, and to conduct discovery in accordance with 49 C.F.R. §1114.21, et. seq. This extension of time will enable Delaware to respond fully to the legal and factual issues presented, so that the Board may have a fully developed record on which to base its decision.

Background

The petition at issue here concerns SB 135, a statute that was duly enacted by the Delaware legislature to address issues raised by Delaware citizens regarding quality of life, property values and environmental safety (the “Statute”). The Statute is particularly intended to limit the noise and pollution that is presented when a locomotive is left to idle for long periods of

time between the hours of 8:00 p.m. and 7:00 a.m. for non-essential purposes on property that is not zoned for industrial use. As noted by Norfolk Southern, idling is not prohibited if it results from any one of five specific reasons set out in the Statute.

Norfolk Southern represents in its petition that there are many reasons why they might idle trains, including to maintain the air line throughout the train, as a result of unforeseen circumstances, such as personnel shortages or network congestion, and when the temperature drops below 35 degrees Fahrenheit in order to protect their equipment. Pet. at 2-3; *See also* Exhibit A - Affidavit of Baron K. Emery (“Emery Affidavit”). Norfolk Southern represents that when it allows a locomotive to idle, that act amounts to “transportation” by a “rail carrier” as defined in the Interstate Commerce Commission Termination Act (“ICCTA”). Pet. at 4; *See also* Emery Affidavit. Based on these representations, Norfolk Southern asserts that the Delaware statute effectively seeks to “manage” rail operations, and as a result, the Statute is preempted by the ICCTA. Pet. at 6, 11, 14.

Argument

Pursuant to the Board’s rules at 49 C.F.R. § 1104.13(a), a reply to any pleading must be filed within 20 days after the Petition is filed, unless otherwise provided. However, under 49 C.F.R. § 1104.7(b), the Board has discretion to extend the time period for replies upon request and with good cause.

Good cause exists here. Norfolk Southern’s representations regarding the impact that the Statute will have on their operations require further investigation before a complete response can be given. For example, while Norfolk Southern makes much of the Statute’s impact on their operations, *see e.g.*, Pet. at 3, 6-7, most of the reasons for which it suggests that it idles trains seem to fall within the exceptions specifically provided in the Statute. Delaware believes that,

once these facts are discovered and disclosed, Norfolk Southern's claims of preemption will be found to lack merit. However, until it has a chance to more fully investigate this matter, Delaware will not be able to fully present its case to the Board.

Presently, Delaware does not have access to all of the information. The need to fully develop the record is particularly important here given Delaware's significant interest in its ability to regulate and enforce its state laws to address compelling local quality of life, health and safety issues. Providing additional time for Delaware to conduct discovery pursuant to the Board's regulations at 49 C.F.R. §1114.21, et. seq, will allow Delaware to fully and properly address Norfolk Southern's claims, and will allow the Board to make a decision informed by a fully developed record.

The undersigned counsel spoke with counsel to Norfolk Southern who have agreed that they will not oppose an extension of time for Delaware to respond to the Petition.

WHEREFORE, and in view of the foregoing, Delaware respectfully requests the Board extend the time for responding to the Petition to October 23, 2015.

Respectfully submitted,

/s/ Jennifer R. Noel
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Dated: August 20, 2015

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served a copy of the foregoing MOTION TO EXTEND TIME FOR REPLY, upon the following parties of record in this proceeding by first-class mail with postage prepaid and properly addressed:

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Dated: August 20, 2015