

205055

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

Finance Docket No 33928

Norfolk Southern Corporation and
Norfolk Southern Railway Company



BRIEF IN SUPPORT OF
AMENDED PETITION TO SUMMARILY DISMISS NORFOLK SOUTHERN CORPORATION'S
APPLICATION FOR CONSTRUCTION PERMIT

Horst E. Kunig, Ph. D.
President
Kunig, Inc.
P. O. Box 192
Saltsburg, PA 15681-0192

724-639-3657 Tel
724-639-9681 Fax

dated March 23, 2002

Cc Constance A. Sadler
Counsel for Norfolk Southern Corporation
And Norfolk Southern Railway Company
Sidley and Austin
1501 K Street, N. W.
Washington, DC 20005

ENTERED
Office Secretary
MAR 27 2002
of
Public Record

Background

According to 49 U.S.C. Section 10901 (c),

"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. Such certificate may approve the application as filed, or with modifications, and may require compliance with conditions (other than labor protection conditions) the Board finds necessary in the public interest".

In its application Norfolk Southern Corporation (NS) states (Exhibit I, entitled Summary Notice):

"The purpose of the construction and rehabilitation is to provide "more efficient and effective service" to the Reliant Energy Keystone Generating Plant at Shelocta, Pennsylvania".

Thus, NS offers "more efficient and effective service" in support to demonstrate public convenience and necessity.

Kunig argued in his Petition, filed February 12, 2002, that "efficient and effective service" is inconsistent with demonstration of necessity as required by 49 U.S.C. Section 10901 (c). Kunig, therefore, petitioned the Board to deny the construction permit.

Kunig also expressed concern in the same Petition, that approval of NS's application would create a monopoly.

NS responded to Kunig's concern of monopoly in a filing with the Surface Transportation Board (STB) on February 25, 2002 on page 7 as follows:

"Moreover, NS is the only rail carrier currently moving substantial coal to the facility, it moves only about half of the total requirements of that facility. While NS expects to be able to increase the volume of coal it delivers to the Keystone Plant with greater capacity afforded by the Southern Route, that increase is not projected to account for the Plant's total coal transport needs". (emphasis added).

NS's admission of "transporting only half of the total requirements" of the Keystone Plant constitutes new matter. It is suitable to prove unambiguously, that the new service NS proposes

is in fact inefficient. NS, thus, disproves its own claim of offering more efficient service . As a consequence, NS demonstrates to the Board that its activities, for which it seeks approval, are inconsistent with public convenience and necessity, as further described below.

Test to Demonstrate Inconsistency of NS's Application with Necessity

The following facts are quoted from documents in the public domain:

Fact 1: "The Keystone Plant receives between 4.5 and 5 Million tons coal per year, delivered by a combination of truck and rail". (page 32, application)

Fact 2: "Half of Keystone's total coal requirements (that is, according to fact 1, 2.25 to 2.5 Million tons coal) are moved presently via the existing Northern Route". (NS Reply on February 25, 2002 to Kunig's Petition).

Fact 3: "Again assuming a constant coal supply requirement by Keystone Plant , if NS transports an additional 1,000,000 tons of Pittsburgh Seam coal per year via the new Southern Route, an estimated 43,480 roundtrip truck movement would be removed from the local roadways each year, eliminating 1,793,913 truck miles". (page 10, exhibit L, application)

Fact 4: "Total volume per train under current operations (Northern Route) is 10,800 tons loaded on 100 cars per train". (page 29, application).

Fact 5: "NS believes that it will be able to deliver [] tons of coal to the Keystone Plant over the Southern Route, operating approximately five trains per week in each direction ...", (page 11, application).

Conclusions derived from the facts above:

Facts 1, 2, and 3 demonstrate:

NS's need to transport coal consists of no more than 2.5 Million tons, presently supplied over the existing Northern Route, and an additional 1 Million tons in replacement of truck-delivered coal for a total not exceeding 3.5 Million tons per year.

Facts 2 and 4 demonstrate:

Currently, NS supplies 2.5 Million tons of coal at a loading capacity of 10,800 tons per train via the existing Northern Route. 2.5 Million tons needed by the Plant divided by 10,800 tons per one train requires the use of 231 trains per year. Logistics dictates that

accomplishing the movement of 2.5 Million tons on 231 trains requires to run some trains on consecutive days. For example, 1.05 Million tons may be moved by running one train a day for 97 days. (10,800 tons multiplied by 97 equals 1.05 Million). Subtracting 97 days from 365 days a year, there are 268 days left or 134 days, if the remaining 1.45 Million (2.5 tons minus 1.05 tons) are shipped every other day. (10,800 tons multiplied by 134 yields 1.45 tons).

Present practice, thus, substantiates the possibility of moving at least one train a day for 97 on consecutive days. Present practice also proves NS's assertion of limited shipment capacity via the Northern Route to completely satisfy the Power Plant's demands as false, as trains may be operated daily for the entire year.

The running of 231 trains per year out of the proven possibility to run 365 trains per year demonstrates that presently available capital equipment is used only at an efficiency 231 days out of 365 days or 63 %.

The efficiency of present operation using existing capital equipment is only 63 % !

Facts 2, 3, and 4 demonstrate:

The Power Plant's demands of 3.5 Million tons (2.5 Million tons presently supplied plus an additional 1 Million tons to substitute truck-delivered coal) can be satisfied by running 324 trains (324 trains multiplied by 10,800 tons per train equals 3.5 Million tons). Running one train a day for 324 days out of 365 days equates with an efficiency of 89 %.

Simply increasing the frequency of shipments using existing capital equipment improves efficiency to 89 % !

Fact 5 demonstrates:

Operating five trains per week at a loading capacity of 14,040 tons per train over the new Southern Route equates with operating 260 trains out of 365 days a year, which would supply 3.65 Million tons of coal per year at an efficiency of 72 %. However, the supply of 3.65 Million tons of coal per year exceeds the maximal requirements of the Power Plant of only 3.5 Million tons of coal per year. Trains need to run only 249 days out of 365 days to ship 3.5 Million tons a year. The actual efficiency under realistic conditions therefore

declines to 68 %.

Operation using new capital equipment over the new rail line, the Southern Route, has an efficiency of only 68 %. The efficiency of the new Southern Route (68 %) is less than the efficiency of the existing Northern Route (89 %), when optimally used.

These simple conclusions prove the falsehood of NS's assertion to provide more efficient and effective service. Thus, NS, by its own admissions, proves that its proposed new service is inconsistent with necessity. From a business standpoint, it stretches the process of human logic to comprehend the significant expenditure for new capital equipment when existing capital equipment can satisfy all needs. This suggests the existence of ulterior motives, which NS has not disclosed.

Test to Demonstrate Inconsistency of NS's Application with Public Convenience

Convenience is defined as "suitability of performing an action or fulfilling a requirement" (Webster Ninth New Collegiate Dictionary). Absent necessity to construct a new rail line, there is no need to fulfill a requirement. Thus, NS demonstrates in its application, that the proposed new service is inconsistent with public convenience, as a matter of principle.

On page 23 in Table 7 of the last column of the application NS provides financial data under the heading "Total Present Value of Benefits". The public is disenfranchised to validate these data on account of the Protective Order. However, presuming correctness of the data, the benefits accrue exclusively in behalf of NS and not in behalf of the public. Absent a benefit to the public, there is no need for fulfilling the requirement to construct a new rail line, which would define convenience. Again, NS demonstrates in its application that the proposed new service is inconsistent with public convenience.

Test of Correctness of Information in NS's Application

15 Pa. C.S.A. § 1511 (a), entitled Additional powers of certain public utility corporation - General rule states:

"A public utility corporation shall, in addition to any other power of eminent domain conferred by any other statute have the right to take, occupy and condemn property for one or more of the following principle purposes or ancillary purposes reasonable

necessary or appropriate for the accomplishment of the principal purpose;

- (1) the transportation of passengers or property or both as common carrier by means of elevated street way, ferry, inclined plane railway, railroad, street railway, or underground street railway, track-less trolley omnibus or by any combination of such means". (emphasis added).

15 Pa. C.S.A. § 1511 (c), entitled Additional powers of certain public utility corporation - Public Utility Commission approval 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).

Subsection (a) grants NS the right of condemnation of property by eminent domain proceedings. However, subsection (c) does not permit the exercise of the power of eminent domain until the Public Utility Commission has determined that the service is necessary. In practice, the Pennsylvania Public Utility Commission defers this decision to STB and concurs with STB's findings.

An advertisement in the Indiana Evening Gazette on February ^{9th/96} 2, 2001, shown in Exhibit 1, attached to this Petition, proves that NS has already exercised the power of eminent domain and condemned property, specifically citing subsection (a) as basis for the condemnation. This is in contravention to 15 Pa. C.S.A. § 1511 (c), as STB has not granted NS a construction permit at this time, which would attest to the necessity of NS's proposed new service.

In a Conemaugh Township meeting, held on April 9, 2001 under the auspice of Pennsylvania State Representative Jeff Coleman, NS was made aware that the February 2, 2001 exercise of the power of eminent domain was in contravention to 15 Pa. C.S.A. § 1511 (c). Counsel for NS

responded: "Obviously, we do not see eye to eye in this regard. Ultimately, a judge has to decide this matter". It suggests, that NS appears to be oblivious to observe the laws until forced by judicial decision. Anarchy is the trademark of a lawless society.

Kunig also asserted unlawful exercise of the power of eminent domain in his Petition, filed with STB on February 25, 2002. NS responded in its filing with STB on February 25, 2002 on pages 6 and 7 by properly reciting 15 Pa. C.S.A. § 1511 (c). However, subsequently, NS claims: "On its face, this provision is inapplicable because by its very terms it applies only to aerial electric, telephone or telegraph facilities". Thus, NS ignores the reference of subsection (c) to subsection (a), which specifically applies to railroads. Such an oversight burdens the credibility of NS's application.

On page 8 of NS's Reply to Comments by Horst E. Kunig, filed February 25, 2002 with STB, NS states: "Most property acquired by NS for this project has been acquired through voluntary agreement with landowners at negotiated prices". The fact that all landowners were initially subjected to eminent domain proceedings attests to their unwillingness to sell property to NS. Only after intensive coercion did they agree to sell, resulting in some cases in mental anguish, pain and suffering. The truthfulness of NS's assertion, cited above, in proceedings with STB is therefore challenged.

Summary

NS failed to provide evidence in support of its application to demonstrate public convenience and necessity. To the contrary, it has demonstrated that its proposed activities are inconsistent with public convenience and necessity, further designed to exclusively benefit NS. Citing additionally NS's eminent domain actions, which appear to be in contravention of law, no further public funds should be expended, considering the significant amounts already spent by STB and the Pennsylvania Public Utility Commission in anticipation of a meaningful application. All further considerations of NS's application should cease and the application should be summarily dismissed. In the alternative, NS should be required to resubmit a proper application as required under 49 U.S.C. Section 10901 (c) for inspection by the public.

Respectfully submitted,

H. Kunig

Certificate of Service

The undersigned hereby certifies to have caused to send the original and 10 copies of this Petition to The Honorable Vernon A. Williams, Secretary of the Surface Transportation via US Express Mail EE413393868US, one copy to Norfolk Southern Railroad Company, Attention Constance Sadler, Esquire on March 23, 2002 by First Class Mail, and additional copies to whom it may concern.

G. R. W. J.

**NOTICE
IN THE COURT OF
COMMON PLEAS
INDIANA COUNTY,
PENNSYLVANIA
NO. 10081 C.D. 2001
IN REM**

In the Matter of Proceeding by NORFOLK SOUTHERN RAILWAY COMPANY, a Virginia corporation, registered to do business in Pennsylvania, for the Condemnation of The Land and Property of DANIEL L. POMPOSINI, and SUSAN POMPOSINI, his wife; ALDO M. POMPOSINI; W.L. POMPOSINI, a/k/a WESLEY L. POMPOSINI; DAVID A. POMPOSINI, and CHRISTY POMPOSINI, his wife; and TARA K. POMPOSINI.

NOTICE OF CONDEMNATION
TO: DANIEL L. POMPOSINI and SUSAN POMPOSINI, his wife; ALDO M. POMPOSINI; W.L. POMPOSINI, a/k/a WESLEY L. POMPOSINI; DAVID A. POMPOSINI and CHRISTY POMPOSINI, his wife; and TARA K. POMPOSINI.

In accordance with §1-405 of the Pennsylvania Eminent Domain Code, as amended, 26 P.S. §405, Norfolk Southern Railway Company notifies you that:

1. The caption of this case is as set forth above.

2. A Declaration of Taking was filed on January 15, 2001, in the Court of Common Pleas of Indiana County, Pennsylvania, at the above-captioned name and term number.

3. The names of the condemnees to whom this notice is directed are set forth above.

4. The Condemnor is Norfolk Southern Railway Company, a Virginia corporation, that is registered to do business in Pennsylvania, with a registered address of c/o CT Corp. Systems, 1515 Market Street, Philadelphia, Pennsylvania 19102, and a place of business at 425 Holiday Drive, Suite 200, Pittsburgh, Pennsylvania 15220.

5. This condemnation is undertaken pursuant to and authorized by §1511 of Article B, Chapter 15, Subchapter A of the Pennsylvania Business Corporation Law of 1988, as amended, 15 Pa.C.S.A. §1511.

6. The Declaration of Taking was authorized by a Resolution/Consent of the Board of Directors of Norfolk Southern Railway Company, adopted on October 23, 2000. The record of such action may be examined at the Virginia offices of the Condemnor at Three Commercial Place, Norfolk, Virginia, 23510-9241. A copy of the Resolution/Consent is also attached to the Declaration of Taking as an exhibit and therefore is on file and may be examined at the Indiana County Prothonotary's Office, Indiana County Courthouse, 825 Philadelphia Street, Indiana, Pennsylvania, 15701, at the above-captioned docket number.

7. The purpose of the condemnation is for accommodating and accomplishing the construction and operation of a new line of railroad over the property that is being taken.

8. Your property has been condemned. An identification/description of your property that has been condemned is as follows:

All that certain piece or parcel of land, located in the Township of Conemaugh, County of Indiana,

tion is for accommodating and accomplishing the construction and operation of a new line of railroad over the property that is being taken.

9. Your property has been condemned. An identification/description of your property that has been condemned is as follows:

All that certain piece or parcel of land, located in the Township of Conemaugh, County of Indiana and Commonwealth of Pennsylvania, bounded and described as follows:

BEGINNING at a set stone known as "Musser Forest" and W.L. Pomposini, being

1.68 feet left of Centerline

Station 535+96.58; thence

North 45 degrees 04 minutes

47 seconds East a distance of

337.73 feet to an iron pin;

thence South 29 degrees 50

minutes 19 seconds West a

distance of 161.41 feet to an

iron pin 80.00 feet right of

Centerline Station 537+61.36;

thence along a curve to the

right having a radius of

1990.08 feet, a length of

420.40 feet, a chord length of

419.86 feet and a chord bearing

of South 35 degrees 53

minutes 29 seconds West to

an iron pin at the property

line of Daniel Pomposini et

al. and Mildred Bedick;

thence by the line of

Pomposini et al. and Bedick

North 33 degrees 24 minutes

20 seconds West a distance

of 56.07 feet to a point on the

line of Musser Forest prop-

erty; thence by the line of

Musser Forest and Daniel

Pomposini et al. North 31 de-

grees 13 minutes 50 seconds

East a distance of 227.70 feet

to a set stone being the place

of beginning. SAID parcel

contains 0.71 acres, more or

less, and is part of the prop-

erty assessed as Indiana

County Tax Assessment Par-

cel No. 16-19-109.

9. The nature of the title ac-

quired is fee simple or absolute

title excluding, however, all the oil

and gas associated with the prop-

erty. As a result of the Declaration

of Taking, any title that you may

have had in the property, exclud-

ing, however, all the oil and gas

associated with the property, has

been divested and lodged in Nor-

folk Southern Railway Company.

10. A plan showing the con-

demned property has been filed

and may be inspected at the Indi-

ana County Recorder of Deeds Of-

11. Just compensation is made or secured by an open-end bond without surety pursuant to §403(a) of the Eminent Domain Code, 26 Pa. Stat. Ann. §1-403(a), which the Condemnor filed with the Declaration of Taking. A copy of the bond is attached to the Declaration of Taking as an exhibit and therefore is on file and may be examined at the Indiana County Prothonotary's Office, Indiana County Courthouse, 825 Philadelphia Street, Indiana, Pennsylvania, 15701 at the above-captioned docket number.

12. If you wish to challenge the power or the right of Norfolk Southern Railway Company to appropriate the condemned property, the sufficiency of the security for just compensation to you, the procedure followed by Norfolk Southern Railway Company, or the Declaration of Taking, you must file Preliminary Objections in court to the term and number described above within thirty (30) days after the date of publication of this Notice.

Bonya, Gazza & DeGory, LLP
Attorneys for Condemnor
143 South Sixth Street
Indiana, PA 15701