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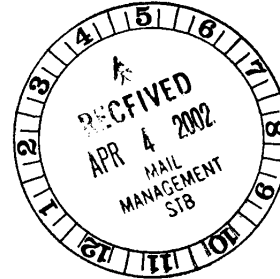
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April 4, 2002



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 is the original and 10 copies of the "Norfolk Southern Corporation and Norfolk Southern Railway Company Motion to Strike Amended Petition by Horst E. Kunig to Summarily Dismiss Norfolk Southern Corporation's Application for Construction Permit". Also enclosed is a computer disk containing the text of the filing in WordPerfect 8.0 format.

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

Respectfully submitted

Constance A. Sadler

Enclosures

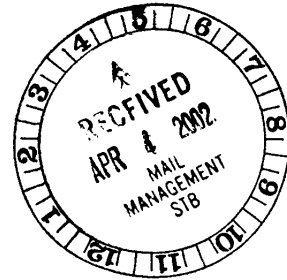
cc: Joseph Dettmar, Office of Proceedings
Victoria Rutston, Chief, SEA
Phillis Johnson-Ball, SEA

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 33928

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



**NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY
COMPANY MOTION TO STRIKE AMENDED PETITION BY HORST E. KUNIG TO
SUMMARILY DISMISS NORFOLK SOUTHERN CORPORATION'S APPLICATION
FOR CONSTRUCTION PERMIT**

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April 4, 2002

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 33928

**NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY
COMPANY MOTION TO STRIKE AMENDED PETITION BY HORST E. KUNIG TO
SUMMARILY DISMISS NORFOLK SOUTHERN CORPORATION'S APPLICATION
FOR CONSTRUCTION PERMIT**

INTRODUCTION

Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, "Norfolk Southern" or "NS") hereby move to strike "Kunig's Amended Petition to Summarily Dismiss Norfolk Southern Corporation's Application for Construction Permit" and "Brief in Support of Amended Petition to Summarily Dismiss Norfolk Southern Corporation's Application for Construction Permit" (collectively, "Kunig Amended Petition"), dated March 23, 2002, filed by Horst E. Kunig ("Kunig") in this docket. Kunig purports to submit his self-styled "amended petition" based on "new evidence" derived from Norfolk Southern's timely response on February 25, 2002 to his original petition.

This newest filing by Kunig was submitted far out of time. It is not based on any new evidence. To the extent it purports to address Norfolk Southern's response to Kunig's previous "Petition and "Support for Petition" ("Kunig Petition"), served upon NS on February 19, 2002, it

is an impermissible reply to a response. Kunig's Amended Petition places before the Board arguments based on the same set of facts and the same misinterpretations of law as form the basis for his previous submissions. For all of these reasons, Kunig's Amended Petition must be stricken and the non-environmental portion of this proceeding closed.

This most recent filing by Kunig, received by the Board on March 25, 2002 and by NS on March 28, 2002, is Kunig's second response to NS' December 27, 2001 application for construction and operation ("Application") in this proceeding. It purports to be in response to the February 25, 2002 Norfolk Southern opposition to the Kunig Petition, motion to strike and, in the alternative, petition to reply. Norfolk Southern Corporation and Norfolk Southern Company Opposition to Motion of Horst E. Kunig for an Extension of Time, Motion to Strike, or, in the Alternative, Petition to Reply, dated February 25, 2002 ("NS Response to Kunig Comments"). Kunig also filed a May 7, 2001 motion seeking, *inter alia*, to rescind a decision by the Board granting a protective order in this docket, to which Norfolk Southern replied. Norfolk Southern Response to Kunig, Inc.'s Motion to Rescind, dated May 22, 2001.

Norfolk Southern will tender no response to this latest Kunig submission, should the Board choose to accept it into the record, for each of the arguments advanced by Kunig have been previously addressed by NS or by the Board in this docket.

ARGUMENT

Kunig's newest filing is premised upon the same facts in the Application that were available to him in December 2001¹ and he advances -- now three months later and nearly two months beyond the comment period -- no new claims that are cognizable by the Board. As was the case in the earlier out-of-time Kunig Petition, the present filing by Kunig contains numerous misstatements of fact and law, advances immaterial arguments and impugns the veracity and motives of Norfolk Southern in filing the Application and, apparently, in not simply agreeing with the positions he advances. Further, Kunig again raises issues that he argued to the Board a year ago.

Kunig presents no good cause for the Board to reopen the comment period on the Application or to otherwise consider his Amended Petition. Despite the assertion to the contrary, Kunig's Amended Petition is not based on "new evidence".² Kunig's disregard for the Board's procedural schedule, and his efforts repeatedly to argue the same issues to the Board, should compel the Board to strike the latest iteration of comments filed by Kunig and to close the record pending the Board's decision on the Application.³

¹ On the same day that the Application was filed with the Board, NS sent to Kunig by express courier a copy of the Public Version of the Application.

² Kunig claims that "NS' admission of 'transporting only half of the total requirements' of the Keystone Plant constitutes new matter", but Kunig is incorrect. Norfolk Southern's application repeatedly discusses the fact that trucks deliver substantial amounts of coal to the plant, so the premise of Kunig's argument is invalid. See, Application at pages 9-11, page 11 note 10, page 14, and passim. Further, in Kunig's first set of comments on the Application, Kunig discusses this very topic in detail. See Kunig Petition.

³ There will, of course, be ample opportunity for public comment upon issuance of the Environmental Assessment in this docket by the Board's Section of Environmental Analysis (SEA). Such comments, however, are to be limited to environmental considerations; the

Norfolk Southern does not believe that it is either necessary or appropriate to respond further to the arguments advanced in Kunig's Amended Petition. Norfolk Southern previously addressed the allegations and interpretations of fact and law argued by Kunig in his Amended Petition as pertains to his misunderstanding of the legal standard under 49 U.S.C. §10901(c), NS Application, at 12; NS Reply to Kunig Comments, *supra*, at 5-6. NS further demonstrated that the proposed Southern Route would meet even the misperceived standard described by Kunig. *Id.*, at 6; NS Application at Exhibit N (Public Version), at 4-5, 11-14. Norfolk Southern also earlier dispelled Kunig's theory of the creation of monopoly power. NS Reply to Kunig Comments, *supra*, at 7; NS Application, at 23. Norfolk Southern has already demonstrated that, even if the arguments were cognizable by the Board (which they are not), Kunig's arguments regarding Pennsylvania statutory law are based on a misreading of the language establishing the powers of the Pennsylvania Public Utility Commission, and on the mischaracterization of Norfolk Southern's lawful acquisition of property through voluntary purchase agreements and through the exercise of eminent domain. NS Reply to Kunig Comments, *supra*, at 8.

Kunig's misconceptions about the substantial public benefits associated with the Southern Route and misinformation about railroad operations over the Northern Route have been addressed extensively in earlier NS submissions. See, e.g., NS Application at 15-17, 27-28, 36, Exhibit D at 12-13, Exhibit N at 4-5, 11-14, 18-24; NS Reply to Kunig Comments, *supra*, at 6. NS has also responded to Kunig's continuing objections to the protective order imposed by the

environmental comment period established by SEA is not intended to provide yet another opportunity for making new or rehashed arguments pertaining to non-environmental issues.

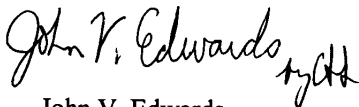
Board. NS Response to Kunig, Inc. Motion to Rescind, dated May 22, 2001; NS Reply to Kunig Comments, dated February 25, 2002, at 3-4.

Indeed, Norfolk Southern has in previous submissions adequately countered each of the factual and legal foundations underlying the arguments made by Kunig in his Amended Petition.⁴ The facts set forth by NS in the Application and relevant to the Board's consideration of the merits of the Application have not changed. Norfolk Southern stands by the statements contained in its Application and by the supporting arguments it has previously made to the Board.

⁴ While not intended as an exhaustive recitation of the record by which NS has addressed the factual and legal predicates for the issues raised once again by Kunig in his Amended Petition, the foregoing are offered as examples of the explanations and counter-arguments submitted by NS refuting similar statements and allegations earlier made by Kunig.

CONCLUSION

Norfolk Southern respectfully submits that the foregoing demonstrates that the Board should strike Kunig's Amended Petition. As is the case with respect to the earlier Kunig Petition submitting out-of-time comments on the Application, the Amended Petition is based on misreadings and misunderstandings of the relevant laws and facts which have not changed since the Application was filed by NS three months ago. Despite assertions to the contrary, the Amended Petition is not based on new evidence. No purpose would be served by the Board's consideration of the arguments offered up again by Kunig. Norfolk Southern respectfully requests that the Board issue an order striking Kunig's newly-filed Amended Petition.



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Respectfully submitted,



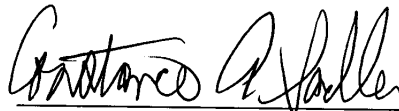
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Attorneys for Norfolk Southern Corporation
and Norfolk Southern Railway Company

Dated: April 4, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of April, 2002, I have caused to be served a true and correct copy of the foregoing "Motion to Strike Amended Petition by Horst E. Kunig to Summarily Dismiss Norfolk Southern Corporation's Application for Construction Permit", filed by Norfolk Southern Corporation and Norfolk Southern Railway Company in Finance Docket No. 33928, to the persons on the attached list by first-class mail or more expedient service.


Constance A. Sadler

Dated: April 4, 2002

Service and Copy List

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