

207492

SIDLEY AUSTIN BROWN & WOOD LLP

CHICAGO
DALLAS
LOS ANGELES
NEW YORK
SAN FRANCISCO

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

BEIJING
GENEVA
HONG KONG
LONDON
SHANGHAI
SINGAPORE
TOKYO

WRITER'S DIRECT NUMBER
(202) 736-8532

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

March 31, 2003

BY HAND DELIVERY - ORIGINAL AND 10 COPIES

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

MAR 31 2003

Re: 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 original and 10 copies of the “Norfolk Southern Corporation and Norfolk Southern Railway Company Opposition to the Petition and Motion Dismiss Application FD 33928, Petition and Motion to Dismiss Environmental Assessment, Petition to Reopen Scoping Process and Clarification to Petition and Motion Dismiss Application FD 33928, Petition and Motion to Dismiss Environmental Assessment, Petition to Reopen Scoping Process by Horst E. Kung.” Also enclosed is a computer diskette containing the text of the filing in WordPerfect 6.0 format.

Norfolk Southern respectfully requests leave of the Board, due to ministerial error, to file this pleading two business days beyond the general filing date. This brief extension would not result in prejudice to any party with respect to the matters addressed herein.

ENTERED
Civil Proceedings
APR 1 2003
Part of
Public Record

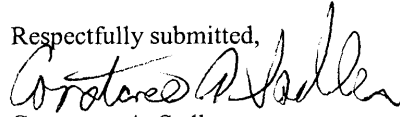
SIDLEY AUSTIN BROWN & WOOD LLP

WASHINGTON, D.C.

The Honorable Vernon A. Williams
March 31, 2003
Page 2

Thank you to your attention to this matter, and please contact me should you have any questions.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Constance A. Sadler", written in a cursive style.

Constance A. Sadler

Enclosure

cc: Joseph Detmar
Victoria J. Rutson, 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

RECEIVED
MAR 31 2003
U.S. DEPT. OF TRANSPORTATION

NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN
RAILWAY COMPANY OPPOSITION TO THE PETITION AND MOTION DISMISS
APPLICATION FD 33928, PETITION AND MOTION TO DISMISS
ENVIRONMENTAL ASSESSMENT, PETITION TO REOPEN SCOPING PROCESS
AND CLARIFICATION TO PETITION AND MOTION DISMISS APPLICATION FD
33928, PETITION AND MOTION TO DISMISS ENVIRONMENTAL ASSESSMENT,
PETITION TO REOPEN SCOPING PROCESS BY HORST E. KUNIG

James A. Squires
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

March 31, 2003

ENTERED
Clerk's Office
MAR 31 2003
Part of
Public Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 33928

**NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN
RAILWAY COMPANY OPPOSITION TO THE PETITION AND MOTION DISMISS
APPLICATION FD 33928, PETITION AND MOTION TO DISMISS
ENVIRONMENTAL ASSESSMENT, PETITION TO REOPEN SCOPING PROCESS
AND CLARIFICATION TO PETITION AND MOTION DISMISS APPLICATION FD
33928, PETITION AND MOTION TO DISMISS ENVIRONMENTAL ASSESSMENT,
PETITION TO REOPEN SCOPING PROCESS BY HORST E. KUNIG**

INTRODUCTION

Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, NS) hereby oppose the Petition and Motion Dismiss Application FD 33928, Petition and Motion to Dismiss Environmental Assessment, Petition to Reopen Scoping Process (Petition and Motion), dated March 3, 2003, and filed by Horst E. Kunig with the Surface Transportation Board (Board or STB) on March 7, 2003, as well as Mr. Kunig's Clarification to Petition and Motion Dismiss Application FD 33928, Petition and Motion to Dismiss Environmental Assessment, Petition to Reopen Scoping Process (Clarification to Petition and Motion), dated March 14, 2003, which has not yet been entered by the Board in this docket. Good cause does not exist to grant the Petition and Motion or the Clarification to Petition and Motion.

ARGUMENT

The Petition and Motion and the Clarification to Petition and Motion are the latest in a series of filings by Horst E. Kunig opposing the December 27, 2001 NS application submitted to the Board in this proceeding (Application). In the Application, NS seeks approval by the Board to construct and operate a new 5.26-mile rail line, to be known as the Saltsburg Connection, in Indiana County, Pennsylvania. Mr. Kunig's Petition and Motion and Clarification to Petition and Motion address a number of issues, all of which fall into one of three categories: 1) additional comments on the Environmental Assessment (EA) submitted nearly three months after the December 19, 2002 close of the EA public comment period; 2) objections to the NS Application, most of which have previously been argued to the STB by Mr. Kunig and to which NS has responded in previous filings with the Board; and 3) challenges to Pennsylvania law matters not before the Board.

The majority of the subject matter addressed by Mr. Kunig in the Petition and Motion and the entirety of the Clarification to Petition and Motion pertain to the first category -- additional late comments on the EA. Mr. Kunig again challenges the authority of the Board's Section of Environmental Analysis (SEA) to fulfill its environmental review obligations through an EA. In the current filing, Mr. Kunig argues that any land needed for the rail construction should have been acquired by NS prior to filing its Application, and that SEA thus improperly prepared an EA in this proceeding before all land acquisition had been completed. There is not a scintilla of support for this novel argument in either the National Environmental Policy Act (NEPA) or the Board regulations governing rail construction applications and implementation of NEPA.

Mr. Kunig once again argues various alleged deficiencies related to SEA's authority to act on behalf of the Board to prepare an EA in this proceeding. Those arguments are also without merit, as delegation to SEA of authority to implement and interpret the NEPA process applicable to Board actions is clearly established by the Board regulations at 49 CFR 1105.2.

The Petition and Motion and the Clarification to Petition and Motion include several allegations concerning the environmental impacts of the Saltsburg Connection, which if constructed is projected to result in a decrease in the amount of Central Pennsylvania hauled to the Keystone Plant via truck and an increase in the transport of Pittsburgh Seam coal by rail. Mr. Kunig's assertions are no more than additional late-filed comments on the EA, submitted in further disregard for the comment period deadline of December 19, 2002. They should be addressed, if necessary, by SEA in the context of its environmental evaluation of the proposed Saltsburg Connection. Thus the portions of Mr. Kunig's Petition and Motion and the Clarification to Petition and Motion pertaining to fuel consumption, the environmental benefits of truck-to-rail coal traffic diversion, comparisons of the relative environmental benefits of the Northern Route and the Southern Route and the scope and sufficiency of SEA's environmental evaluation of the proposed NS rail project rest appropriately with SEA in its responsibility for implementation of the Board's NEPA obligations. Because the Board has delegated responsibility for such environmental issues to SEA, the issues argued by Mr. Kunig are matters for SEA rather than the Board to consider and NS will not herein respond to those portions of the Petition and Motion and the Clarification to Petition and Motion.

Mr. Kunig once again objects to the Board's protective order in this docket permitting a public and a highly confidential version of the Application to be filed by NS. The arguments advanced by Mr. Kunig in the current Petition and Motion concerning the protective order and the treatment of confidential information carry no more weight than his previous arguments on these issues. *See*, Kunig Letter Request to STB, dated February 26, 2001, Kunig, Inc. Motion to Rescind, dated May 7, 2001, and Kunig Petition, dated February 12, 2002; *see also*, NS Response to February 26, 2001 Kunig Letter Request to STB, dated March 16, 2001, NS Response to Kunig, Inc.'s Motion to Rescind, dated May 22, 2001, and NS Opposition to Motion of Horst E. Kunig for an Extension of Time, Motion to Strike, or, in the Alternative, Petition to Reply and NS Reply to the Comments of Horst E. Kunig, dated February 25, 2002. NS rests on its previous arguments regarding this issue.

In the second category of arguments propounded by Mr. Kunig in the Petition and Motion -- challenges to the Application's satisfaction of the requirements for issuance of a certificate of public convenience and necessity -- Mr. Kunig argues that the NS Application does not satisfy the three-part test generally applied by the Board in reviewing such applications, as set out in Great Salt Lake and Southern Railroad, L.L.C. - Construction and Operation - In Tooele County, UT, STB Finance Docket No. 33824 (served December 15, 2000) slip op. at 5. In challenging the Application's satisfaction of the first prong of the STB test, Mr. Kunig misconstrues the standard use of the terms shipper and customer in STB parlance and instead refers to the *transporters* (railroad and trucking companies). Mr. Kunig's arguments make no sense when this mistaken impression is corrected.

The last prong of the Board's test (the public interest test) is clearly met by the proposed project, as rail service to the sole existing shipper along the new rail line will be improved with the availability of the Saltsburg Connection to reach the Keystone Plant, and no other rail service customers will be disadvantaged by the new NS rail service.

The third category of issues included in the Petition and Motion fall outside the authority of the STB to address and are not relevant to the Board's consideration of the Application. As in previous filings (*see*, Kunig, Inc. Motion to Rescind, dated May 7, 2001, Kunig Petition, dated February 12, 2002, Kunig Amended Petition to Summarily Dismiss NS Application for Construction Permit, dated March 23, 2002, Supplemental Petition by Sandra M. Becker, William R. Becker and Horst E. Kunig to Summarily Dismiss NS' Application for Construction Permit or, in the Alternative to Reopen the Public Comment Period, dated October 12, 2002; *see also*, NS Response to Kunig, Inc.'s Motion to Rescind, dated May 22, 2001, NS Opposition to Motion of Horst E. Kunig for an Extension of Time, Motion to Strike, or, in the Alternative, Petition to Reply and NS Reply to the Comments of Horst E. Kunig, dated February 25, 2002, NS Motion to Strike Amended Petition by Kunig to Summarily Dismiss NS Application for Construction Permit, dated April 4, 2002, and NS Response to Supplemental Petition by Sandra M. Becker, William R. Becker and Horst E. Kunig to Summarily Dismiss NS' Application for Construction Permit or, in the Alternative to Reopen the Public Comment Period, dated November 12, 2002), Mr. Kunig again misinterprets Pennsylvania statutory provisions pertaining to the power of eminent domain and the application of 15 Pa.C.S.A. Section 1511(c) to the construction of a new rail line by a railroad. See, Petition and Motion at 2. The Board, of

course, is not the proper forum to consider state law provisions on eminent domain.

Nevertheless, NS has previously demonstrated the fallacy of Mr. Kunig's arguments with respect to the applicability of the Pennsylvania eminent domain requirements cited by Mr. Kunig, as noted in the NS November 12, 2002 Response to the Supplemental Petition by Sandra M. Becker, William R. Becker and Horst E. Kunig to Summarily Dismiss Norfolk Southern Corporation's Application for Construction Permit or, in the Alternative to Reopen the Public Comment Period. No more need be said about the issue.

Mr. Kunig also argues to the Board that NS is not entitled to CMAQ funds to recover a portion of the Saltsburg Connection project construction costs, and further argues that without CMAQ funding the NS Saltsburg Connection construction project is not financially fit. See, Petition and Motion at 4, 6-7. Interpretation of the requirements for assessing CMAQ funding eligibility is not before the Board. Regardless, NS has clearly stated that the Application is premised upon the assumption that the construction project would be funded in its entirety from the NS capital budget, without taking into consideration potential CMAQ funding of a portion of the construction costs. See, Application at 13, fn. 12. The Application squarely meets the financial tests applied by the Board without considering any outside sources of funding.

Mr. Kunig concludes his Petition and Motion with a variety of motions and other requests, none of which have any validity or purpose other than to further delay processing of this application. His motion to dismiss the EA and to require NS to prepare an EIS to study alternate modes of power generation and alternate modes of transportation seeks action that is clearly

beyond the authority of the Board to order and is not required by NEPA. Mr. Kunig also seeks a warranty by NS that pollution does not occur in Clarksburg. Although this motion is absurd on its face, it also fails to recognize that, as described in the EA, SEA's analysis of environmental impacts included a thorough assessment of such impacts to Clarksburg. Next, Mr. Kunig argues that the EA presents significant new information dramatically altering the outcome of the environmental evaluation and that reopening of the scoping process is mandatory. This is nonsensical and untrue. Mr. Kunig had ample opportunity to comment on the EA, the proposed Saltsburg Connection project has not been altered since the Application was filed, and there is no cause for reopening of the environmental review scoping process under NEPA to assess the potential environmental impacts of the proposed Saltsburg Connection project. Finally, Mr. Kunig moves to expand the scope of the environmental review to ascertain that no conflict of interest exists among coal producers, shippers, and recipients of coal. An assertion of a conflict of interest among the coal producers (mining companies), the coal purchaser (Keystone Plant) and the coal transporters (NS and trucking companies) is patently absurd. The owners of the Keystone Plant decide what types and sources of coal will be used at the plant, from whom and at what price the coal will be purchased and how delivery will be arranged. Similarly, the coal producers, NS and the trucking companies each decide if the price offered by the Keystone Plant for their coal or their coal transport services is acceptable. These are arm's length commercial transactions and the terms of any contracts are negotiated freely by the parties. Conflict of interest is not a credible concern under these circumstances.

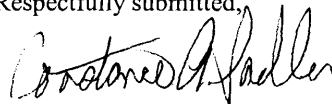
CONCLUSION

For the reasons stated above, Norfolk Southern respectfully submits that the Petition and Motion and the Clarification to Petition and Motion by Horst E. Kunig be denied by the Board.



James A. Squires
John V. Edwards
Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510-2838
(757) 629-2838
(757) 533-4872 (fax)

Respectfully submitted,



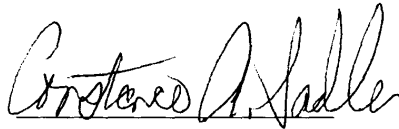
Constance A. Sadler
Sidley Austin Brown & Wood, LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8071
(202) 736-8711 (fax)

Attorneys for Norfolk Southern Corporation and
Norfolk Southern Railway Company

March 31, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of March, 2003, I have caused to be served a true and correct copy of the foregoing "Opposition to the Petition and Motion Dismiss Application FD 33928, Petition and Motion to Dismiss Environmental Assessment, Petition to Reopen Scoping Process and Clarification to Petition and Motion Dismiss Application FD 33928, Petition and Motion to Dismiss Environmental Assessment, Petition to Reopen Scoping Process by Horst E. Kunig", 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.

A handwritten signature in cursive script, reading "Constance A. Sadler". The signature is written in dark ink and is positioned above the printed name.

Constance A. Sadler

Dated: March 31, 2003

Service and Copy List

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

The Honorable John P. Murtha
U.S. House of Representatives
Washington, D.C. 20510

The Honorable Mark Schweiker
Governor of Pennsylvania
225 Main Capitol Building
Harrisburg, PA 17120

Pennsylvania Attorney General Mike Fisher
16th Floor, Strawberry Square
Harrisburg, PA 17120

The Honorable Samuel H. Smith
House Box 202020
Harrisburg, PA 17120-2020

The Honorable Jeff Coleman
House Box 202020
Harrisburg, PA 17120-2020

The Honorable Richard A. Geist
House Box 202020
Harrisburg, PA 17120-2020

The Honorable Donald C. White
618 Philadelphia Street
Indiana, PA 15701

Supervisor Thomas Kier
Conemaugh Township Supervisors' Office
16980 Rt. 286 Highway West
Saltsburg, PA 15681-8023

Supervisor James Pierce
Conemaugh Township Supervisors' Office
16980 Rt. 286 Highway West
Saltsburg, PA 15681-8023

Supervisor John Weimer
Conemaugh Township Supervisors' Office
16980 Rt. 286 Highway West
Saltsburg, PA 15681-8023

Robin Cribbs
Secretary
Conemaugh Township Supervisors' Office
16980 Rt. 286 Highway West
Saltsburg, PA 15681-8023

The Honorable Bradley L. Mallory
Secretary, Department of Transportation
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

The Honorable Glen R. Thomas
Chairman, Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Francis L. Olliver
95 Rose Road
Saltsburg, PA 15681

William and Sandra Becker
25 Bedick Road
Saltsburg, PA 15681

Richard R. Wilson, Esq.
127 Lexington Avenue, Suite 100
Altoona, PA 16601