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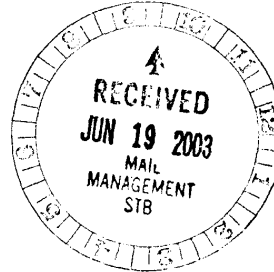
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BY HAND DELIVERY

Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: *Ag Processing Inc. v. Norfolk Southern Railway Company,*
Finance Docket No. 42079

Dear Secretary Williams:

Enclosed for filing in this proceeding are the original and 10 copies each of (1) Norfolk Southern Railway Company's Opposition To AGP's Motion For Leave To File, and (2) Norfolk Southern Railway Company's Surreply To AGP's Petition For Injunctive Relief.

Please date-stamp and return to our messenger the enclosed extra two copies of each document. Many thanks for your assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott M. Zimmerman", with a long horizontal flourish extending to the right.

Scott M. Zimmerman

cc: Andrew P. Goldstein, Esq. (by hand)

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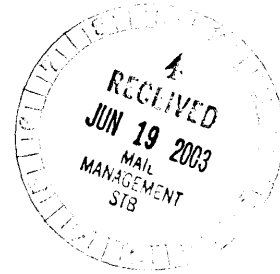
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Before the
Surface Transportation Board

Docket No. 42079

Ag Processing Inc
v.
Norfolk Southern Railway Company



**Norfolk Southern Railway Company's
Surreply To AGP's Petition For Injunctive Relief**

Norfolk Southern Railway Company ("NSR") submits the following brief surreply in response to the "Reply Of Ag Processing Inc To Norfolk Southern Opposition," filed by AGP on June 12, 2003.¹

AGP's Reply is most notable—indeed, remarkable—for what it *fails* to rebut.

In its Opposition to AGP's motion for injunction, NSR pointed out that under 49 U.S.C. § 721(b)(4), a party seeking injunctive relief *must* demonstrate

¹ As stated in NSR's accompanying opposition to AGP's motion for leave to file a reply, NSR asks that the Board accept this Surreply, waiving, under 49 C.F.R. § 1110.9, the "no reply to a reply" rule of 49 C.F.R. § 1104.13(c), in the event the Board accepts AGP's otherwise-unauthorized Reply of June 12, 2003.

irreparable harm, because remedying such harm is the only purpose for which relief under that statute can be granted. NSR Opposition at 4. NSR further explained that, under applicable precedent, the claimed irreparable harm must be both *certain* and *great*; it cannot be merely speculative. *Id.* Moreover, mere loss of revenue is not the kind of injury that typically will be held to constitute “irreparable harm.” *Id.* at 4-5. In its Reply, AGP fails to dispute, much less refute, any of these principles.

NSR asserted in its Opposition that AGP’s own motion showed that the claimed injury that AGP feared is neither certain nor great. First, NSR pointed out that AGP’s claim of irreparable harm was entirely speculative, and that that speculation was based upon the imagined impact on exactly *one* unnamed AGP customer. NSR Opposition at 5. In Reply, AGP does not rebut that fact, but rather confirms it. See AGP Reply at 4 (referring to a single “present bankrupt customer”). As to that one customer, NSR noted that AGP had presented no evidence that the customer had ever failed to pay for a shipment and had presented no more than speculation that it would ever do so in the future. NSR Opposition at 5. Again, in Reply, AGP has failed to produce any evidence to support its speculation that this one customer will ever fail or refuse to pay for AGP shipments, despite being practically invited by NSR’s Opposition to do so. On that basis alone, AGP’s Reply thus reinforces the conclusion that AGP’s concern is merely hypothetical, and does not meet the requirement that “irreparable harm” must be certain, and not speculative.

Again, irreparable harm must be not only certain, but great. NSR's Opposition demonstrated that, contrary to the impression AGP sought to create, AGP's own estimate of the cost it would incur was, in the context of a company the size of AGP, *de minimis*. AGP itself acknowledged that even if its fears were realized, only *one* AGP customer, and only about 3-4 cars a week, might be affected; and, as NSR pointed out, AGP's own figures showed that the cost to AGP could be as low as \$78,000 per year. To AGP—a \$1.8 billion a year company—AGP's own cost estimate, taken at face value, does not begin to approach the viability-threatening level that is required before mere economic loss can be considered irreparable harm. Again, in Reply, AGP provides *no* new evidence that contradicts its previous estimate or NSR's conclusions about it.

In sum, AGP's Reply does not even attempt to refute, much less succeed in refuting, the legal principles and arguments asserted in NSR's Opposition demonstrating AGP's failure to prove that *certain* and *great* harm would result to it in the absence of an injunction. It does not even come close. For those reasons alone, AGP's petition for injunction should be denied.

Moreover, what AGP actually does say in its Reply also fails to advance its position. AGP's reply is limited to raising certain perceived objections to an alternative course of action that NSR outlines in its Opposition.² AGP's

² Under that alternative approach, instead of using an Order/Notify bill of lading, AGP instead could use a straight bill of lading and name itself as the consignee and request payment from the consignee while the goods are in transit; once payment is received, AGP then could change the bill of lading to reflect the true consignee, thus permitting delivery. See NSR Opposition at 6-7.

objections, however, fail to prop up either the anticipated magnitude, or the likelihood, of harm to AGP in the absence of an injunction.

1. AGP first complains that any change in the name of the consignee would have to be approved by NSR's Central Yard Operations. AGP Reply at 3. That is true, but immaterial. Although AGP asserts that there is no assurance that such approval would be given or if so, how quickly, AGP offers no evidence to suggest that obtaining clearance would pose any difficulty. Indeed, the fact is that such requests are common and approval is routinely given. All that is involved in approving the request for a change in consignee is to verify that the information given is correct.

2. Second, AGP asserts that Item 2070 of NS Tariff 8002-A appears to impose a \$198 charge for changes to an original shipping document, contrary to NSR's assertion that such a change could be made without charge prior to arrival at destination. AGP Reply at 3. AGP is not correct. Item 2070 (A) 1 provides for a charge of \$198 for a change in consignee "when more than one change is made prior to arrival at destination." In other words, the customer gets one free change in consignee prior to arrival at destination. A charge is imposed only if there is a *second* change in consignee before the car arrives at destination, or if the change is made "after arrival of car at actual destination or the destination serving yard location, but prior to actual or constructive placement." NS imposes a charge in the latter case because, in the absence of a location to deliver the car, NS must place it on a hold track. Once final instructions are issued, the car is switched from the hold track and reclassified for

the final destination customer. The charge covers the cost of the additional handling required. AGP's assertion that Item 2070 (A) 4 would impose a charge on even the first change in consignee because it is a "change[]" to an original shipping document" is not correct. Changes in consignee are specifically governed by part (A) 1 of Item 2070, not part (A) 4.

3. Next, AGP claims that NSR's alternative approach "may" create "contractual complications" for AGP, as the freight billing instructions "might" be viewed as conflicting with the terms of AGP's soybean contract, which in turn allegedly "could" expose AGP to liability for freight charges under NS Condition of Carriage 1-E Rule 250. AGP Reply at 4. On its face, this concern is, again, sheer speculation. Furthermore, whatever "complications" might result from the provisions of AGP's contracts with its customers (to which NS, of course is not privy) could presumably be eliminated by revisions to those contracts.

4. AGP also argues that if it names itself as the consignee and the customer fails or refuses to pay for the shipment, demurrage would accrue at destination for the account of AGP, creating a "substantial increase in the unrecoverable risk exposure" of AGP. AGP Reply at 4. But although any demurrage that accrued would be for AGP's account, any such risk would be entirely within AGP's control and within AGP's power to prevent; if AGP wished to avoid demurrage, it could simply divert the car promptly before demurrage began to accrue. AGP effectively acknowledges that the risk of incurring demurrage charges is within its own control, when it notes that it can divert a car if and when "AGP determines that its demurrage exposure is rising above

unacceptable levels.” AGP Reply at 4. If it chooses, AGP can determine that any demurrage exposure is unacceptable and can act accordingly by diverting or reconsigning the traffic before demurrage begins to accrue.

Furthermore, demurrage represents a reimbursement for costs associated with the non-movement of railroad cars. AGP simply wants to impose the risk of that cost on NSR, rather than on itself, when it results from non-payment by AGP’s own customer. AGP offers no persuasive reason why NSR, rather than AGP, should bear that risk.

5. Finally, AGP asserts that if it diverts a car to a different location, the original intended customer “may” be able to claim that AGP did not perform on its contract of sale because the cars were never tendered for delivery, and that if the cars were re-billed to another buyer, additional freight charges will apply. AGP Reply at 4-5. First, any such contractual argument would be significantly undermined since any failure to tender the car for delivery would come only if, and only after, the customer had evidenced an inability or refusal to pay for the shipment. Second, while additional freight charges could apply in diverting cars to a new destination, those charges do not add to AGP’s previous estimate of the per-car cost to it of NSR’s action, they are already encompassed within it; the per-car cost that AGP alleged in its petition for injunction it could incur took into account anticipated diversion charges and additional freight charges to the new destination. See AGP Petition For Injunctive Relief, Exhibit 2 at ¶ 11. But, as already discussed above and in NSR’s Opposition, those costs do not even

approach the business-threatening level that would be necessary before they could be considered to constitute "irreparable harm."

CONCLUSION

As shown here and in NSR's Opposition dated May 30, 2003, AGP has failed to meet the heavy burden necessary to prove entitlement to the extraordinary remedy of injunctive relief. NSR therefore respectfully requests that AGP's motion for injunctive relief be denied.

Respectfully submitted,



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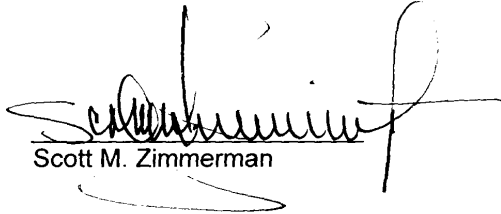
Attorneys for Norfolk Southern Railway Company

June 19, 2003

CERTIFICATE OF SERVICE

I certify that on June 19, 2003 a true copy of Norfolk Southern Railway Company's Surreply to AGP's Petition For Injunctive Relief was served by hand delivery upon:

Andrew P. Goldstein, Esq.
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Washington, DC 20037



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