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Before the
Surface Transportation Board

Docket No. 34435



AMEREN ENERGY GENERATING COMPANY
— CONSTRUCTION AND OPERATION EXEMPTION —
IN COFFEEN AND WALSHVILLE, IL

**NORFOLK SOUTHERN RAILWAY COMPANY'S
NOTICE OF APPEARANCE AND INITIAL COMMENTS**

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Dated: May 24, 2004

Before the
Surface Transportation Board

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AMEREN ENERGY GENERATING COMPANY
— CONSTRUCTION AND OPERATION EXEMPTION —
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**NORFOLK SOUTHERN RAILWAY COMPANY'S
NOTICE OF APPEARANCE AND INITIAL COMMENTS**

On May 5, 2004, the Surface Transportation Board (“Board”) instituted a proceeding to review the petition, filed on February 5, 2004, by Ameren Energy Generating Company (“Ameren”), on behalf of itself and its newly created subsidiary, the Coffeen and Western Railroad Company (“Coffeen”), for Ameren to construct, and for Coffeen to operate, an approximately 13-mile rail line between Ameren’s Coffeen Power Plant to connections with the Union Pacific Railroad Company (“UP”) and The Burlington Northern and Santa Fe Railway Company (“BNSF”) near Walshville, IL (this Finance Docket No. 34435 proceeding is hereinafter referred to as the “Build-out Proceeding”). Norfolk Southern Railway Company (“Norfolk Southern”) hereby notes its appearance in this Build-out Proceeding. Norfolk Southern also takes this opportunity to present an initial comment on one important factor underlying the issues to be evaluated.¹

As the Board acknowledges in its May 5, 2004 decision, the Build-out Proceeding is associated with two other proceedings: (1) Finance Docket No. 34497, Coffeen and Western

Railroad Company – Lease and Operation Exemption – Near Coffeen, Illinois (“Coffeen Notice of Exemption”); and (2) Finance Docket No. 34498, Ameren Corporation – Control Exemption – Coffeen and Western Railroad Company (“Common Control Exemption”).² The creation of a common carrier – Coffeen – provides Ameren a useful vehicle to prosecute its Build-out Petition because it provides Ameren with a common carrier to operate over what may otherwise be a private line not necessarily subject to certain elements of Board jurisdiction.

The Coffeen Notice of Exemption, filed on April 15, 2004, consists of a verified notice of exemption submitted pursuant to 49 C.F.R. § 1150.31, et seq. It states that Coffeen will acquire from Ameren, pursuant to a lease agreement not executed at the time of the verified notice, approximately 1,000 feet (0.2 route miles) of track. In the notice, Coffeen states that it will become a common carrier railroad on that track, and that any existing or new shipper may request service on that 1,000 feet of track. Coffeen does not anticipate that it would begin operations over the 1,000-foot line until after the Build-out Proceeding has been completed.

The Coffeen Notice of Exemption further notes that Coffeen may never operate over the track. Instead, Coffeen may hire another common carrier to operate over the track, and the track proposed to be constructed pursuant to the Build-out Proceeding, in its stead. Of course, Coffeen acknowledges that it would retain a residual common carrier authority should it decide to proceed in this manner.

Norfolk Southern acknowledges that Ameren likely will be able to obtain required approvals to pursue a build-out. This filing is not intended to suggest otherwise. But while the

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Norfolk Southern notes that a procedural schedule has yet to be developed, and so assumes that these initial comments are timely filed.

² The Board published decisions in both the Coffeen Notice of Exemption proceeding and the Common Control Exemption proceeding on May 10, 2004.

creation of Coffeen as a common carrier provides a convenient vehicle for progressing a build-out, it is troubling. It presents yet another example of how the Board's 49 C.F.R. § 1150.31 notice of exemption procedures seem to be used in a manner never intended by the Board. Perhaps it is time for the Board to re-evaluate those procedures.

It is hard to discern the facts in this case from the pleadings filed by Ameren and Coffeen. Of course, this is not atypical of other notices of exemption, particularly those filed pursuant to 49 C.F.R. § 1150.31.

The map submitted with the Coffeen Petition for Exemption is not clear, but the track being leased to Coffeen by its parent seems to be entirely within the confines of the parent's facility. In any event, the track being leased from Coffeen's parent will consist of a line of only 1,000 feet.³ Certainly there is question as to whether any customer other than its parent could ever locate on that line, and whether the railroad could ever make good on its assertion that it willingly would provide service for both the existing shipper (its parent) and "any ... new shipper" on the line.

There is no way to determine whether Coffeen will ever operate over the line. Coffeen does not state that it owns any equipment, and states no intention to acquire any. Coffeen does not state that it has any employees to provide rail common carrier service, nor does it state any intention to hire any such employees. In fact, it states that a very real possibility exists that it may never operate over the line. Instead, Coffeen states that it may hire another common carrier to operate over the line. Although Norfolk Southern does not know this to be the case, we believe that this operation is likely to be pursuant to a trackage rights agreement with UP or

³ It is interesting to visualize line-haul movement over a 1,000-foot railroad, particularly if the train involved either has to originate or terminate on that line. The train set currently serving the Ameren facility is in the range of 5,000 feet long.

BNSF that permits either or both of those carriers to traverse the line solely for the purpose of serving Ameren.

Finally, the Board's regulations do not require Coffeen to provide to the Board or the public any of the underlying agreements that permit Coffeen access to the property. Unlike the Board's notice of exemption procedures for trackage rights (49 C.F.R. § 1180.2(d)(7)), nothing requires Coffeen to submit to the Board the underlying lease agreement that Coffeen states it is drafting for it and its parent to execute. (Compare 49 C.F.R. § 1180.4(g)(i) and 1180.6(a)(7)(ii), requiring the submission of the executed agreement, with 49 C.F.R. § 1150.33(c), requiring only a statement that an agreement has been reached or details about when an agreement will be reached.)⁴ There likely will never be an opportunity for the Board or the public to determine whether that agreement truly provides for the development of a real common carrier on the 1,000-foot stretch of track.

No doubt Ameren and Coffeen can address each of these issues. It may be that some or all of the 1,000 feet of right of way is/will be outside of the gates of the Ameren facility. Of course, the Coffeen Notice of Exemption is not presented as a "related application" that is contingent upon approval of the Build-out Petition,⁵ so the merits of that notice of exemption should be judged only on the matters alleged in the Notice of Exemption, which provides only for a 1,000-foot line of railroad.

⁴ In developing this exemption process, the Board's predecessor (the Interstate Commerce Commission (the "ICC")) stated that "[t]he proposed regulations do not require that the agreement itself be submitted, because information contained in the agreement is not needed for processing a class exemption." Ex Parte No. 392 (Sub-No. 1), Class Exemption for the Acquisition and Operation of Rail Lines under 49 U.S.C. 10901, 1985 ICC Lexis 239 (August 16, 1985) ("NOPR") at *9 n.11. Experience since that time indicates that a review of the underlying agreement may be useful.

⁵ See the Coffeen Notice of Exemption, fn. 2.

Coffeen could commit to hiring another carrier to be an operator to perform Coffeen's common carrier service, and thus avoid any need for having its own employees or equipment.⁶ Alternatively, Coffeen may state that it has no intention of hiring employees or acquiring equipment. Instead, it may commit to granting either or both of BNSF and UP local trackage rights and retain for itself a residual common carrier obligation. Now that the issue has been raised, Coffeen and Ameren may design a lease agreement that permits Coffeen's independence from Ameren.

Norfolk Southern does not recite these issues as an attack on the underlying Build-out Petition, but instead as an expression of concern over the vehicle – the development of a common carrier pursuant to 49 C.F.R. § 1150.31 – through which the Build-out Petition is advanced. This vehicle has been used by others to advance agendas not envisioned by the Board's predecessor when the regulations were developed.⁷ Some file notices to claim ICCTA preemption over state and local environmental regulations.⁸ Others file to obtain access to the

⁶ Although Norfolk Southern believes it is clear that this approach would require the submission to the Board of a notice or petition to appoint an operator (particularly when the operator takes over all aspects of the operation, including the marketing, rate setting and so-called "back office" obligations such as accounting and billing as well as the rail operations), Norfolk Southern is aware that others in the railroad community do not share this view. The Board may wish to clarify this as well. If the Board does require review of this type of action, then at that time the Board could review the issue of whether the operator was in "control" of the shell railroad or instead merely a contractor.

⁷ See, e.g., NOPR at *5 - *6: "Our experience shows that these types of exemption proposals generally maintain the status quo, and have not changed the competitive situation. In the past we have found that the vital interests of shippers, communities, and carriers have been served by the exemptions, because the resulting operations ensure the continuation of rail service that might otherwise be lost. Finally, we have concluded that an abuse of market power does not result from the grant of individual exemptions, because no change in operations results, only a change in the operator." The Board may not be able to make the same observations today that the ICC made in 1985.

⁸ In publishing the final rule, the ICC stated that "[w]e note that, as a practical matter, State and local governments receive actual notice well before the proposal is filed [with the ICC]. Local interests are often involved in the early stages of these proposals and frequently provide

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rail industry's interline settlement program. Others file to take other advantage of a freight common carrier rail carrier status without being a bona fide freight rail carrier.⁹

Norfolk Southern does not have the basis to file a petition for revocation of the notice of exemption filed in Finance Docket No. 34497. Nor does Norfolk Southern have, at this point in the proceedings, a basis to address concerns the Board might have with regard to the petition for exemption filed in Finance Docket No. 34435. Norfolk Southern, however, does have a growing concern over the use and misuse of the Board's notice of exemption procedures to create a new common carrier under questionable circumstances in order to provide a vehicle for non-carriers to take advantage of the Board's jurisdiction.

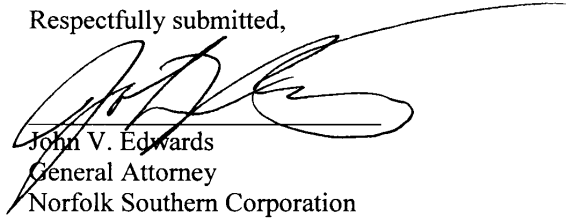
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funding and loan guarantees." Ex Parte No. 392 (Sub-No. 1), Class Exemption for the Acquisition and Operation of Rail Lines under 49 U.S.C. 10901, 1 I.C.C.2d 810, 816 (1985). This assumption does not seem to be operative today.

⁹ One example currently before the Board involves the various notices submitted by Mr. Riffin: (1) STB Finance Docket No. 34375, James Riffin, dba NCRR L.L.C. – Construction, Operation and Trackage Rights Exemptions – in Baltimore County, MD, filed July 7, 2003 (decision granting withdrawal served July 16, 2003); (2) STB Finance Docket 34484, James Riffin, dba the Northern Central Railroad – Acquisition and Operation Exemption – in York County, PA and Baltimore County, MD, filed March 8, 2004 (decision revoking exemption served April 20, 2004); and (3) STB Finance Docket 34501, James Riffin, dba The Northern Central Railroad – Acquisition and Operation Exemption – in York County, PA, filed April 28, 2004 (action pending before the Board). In the earliest notice, Mr. Riffin specifically stated that he wanted to obtain STB jurisdiction in order to progress a dinner excursion train program.

Much has changed in the two decades since the ICC propounded these procedures. The Board's notice of exemption procedures do not require the type of information to be submitted that would make otherwise inappropriate use of the procedures readily apparent, particularly as these procedures are being used today. Perhaps the Board would consider a review of those procedures in light of the concerns raised herein.

Respectfully submitted,



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Dated: May 24, 2004

CERTIFICATE OF SERVICE

I certify that on May 24, 2004, a true copy of "Norfolk Southern Railway Company's Notice of Appearance and Initial Comments" was served by overnight courier upon the both of the following:

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