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June 2, 2004

211181



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

**Re: Ameren Energy Generating Company - Construction and
Operation Exemption - In Coffeen and Walshville, IL
S.T.B. Finance Docket No. 34435**

Dear Secretary Williams:

Please accept for filing an original and 11 copies of Coffeen and Western Railroad Company's Reply to Initial Comments of Norfolk Southern. Please acknowledge receipt and filing of the enclosed material by date-stamping the eleventh copy of this letter and returning it to the individual making this filing for return to me.

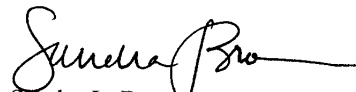
If there are any questions concerning this letter, please contact me at 202-274-2959.

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Yours very truly,


Sandra L. Brown

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34435

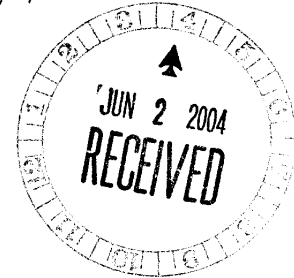
AMEREN ENERGY GENERATING COMPANY
- CONSTRUCTION AND OPERATION EXEMPTION -
IN COFFEEN AND WALSHVILLE, IL

COFFEEN AND WESTERN RAILROAD COMPANY'S
REPLY TO INITIAL COMMENTS
OF NORFOLK SOUTHERN

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Attorneys for Ameren Energy Generating
Co. and Coffeen and Western
Railroad Company.

June 2, 2004

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34435

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

**COFFEEN AND WESTERN RAILROAD COMPANY'S
REPLY TO INITIAL COMMENTS OF NORFOLK SOUTHERN**

On February 5, 2004, the Ameren Energy Generating Company ("AEGC"), on behalf of a railroad to be formed which is now known as Coffeen and Western Railroad Company ("CWRC"), filed a petition with the Surface Transportation Board ("STB" or "Board"), seeking an exemption from the prior approval requirements of 49 U.S.C. § 10901 for the construction and operation of a rail line, approximately thirteen (13) miles in length, between Ameren's Coffeen Power Plant in the vicinity of Coffeen, Illinois to a connection with the Union Pacific Railroad ("UP") and a separate connection to the Burlington Northern Santa Fe Railway ("BNSF") both in the vicinity of Walshville, Illinois ("Build-out Proceeding").

On May 5, 2004, the Board instituted a proceeding to review the petition.¹ On May 26, 2004, Norfolk Southern Railway Company ("Norfolk Southern") noted for the first time its

¹ *Ameren Energy Generating Co - Construction and Operation Exemption - in Coffeen and Walshville, IL*, F.D. No. 34435 (STB served May 5, 2004). CWRC is perplexed as to why the Board instituted a proceeding in this matter at the end of the 90-day exemption timeframe. No opposition has been raised in this matter and this build-out meets every aspect of the rail transportation policy. While CWRC recognizes that the Board has faced scrutiny in other recent construction cases, CWRC urges the Board to not back off, nor give the impression it is backing off, of the well established and Congressional mandated commitment to support rail construction, particularly in cases where shippers are investing their own means to enhance competitive options.

appearance in this Build-out Proceeding, and presented initial comments on one issue (“NS Comments”). The issue commented upon by Norfolk Southern, that the Board should re-evaluate its licensing exemption procedures, is not appropriately raised in this proceeding. CWRC’s construction petition is a clear example of the type of construction the Board has approved to promote transportation policy and competitive options for shippers. Norfolk Southern’s comments would be better served by raising them in a separate proceeding regarding general Board policy.

In response to Norfolk Southern’s comments, CWRC respectfully requests that the Board strike or disregard as irrelevant Norfolk Southern’s initial comments, beyond those associated with its initial appearance. CWRC recognizes the Board has a preference for accepting materials in the interest of having a complete record. Therefore, if the Board chooses not to formally strike the initial comments, CWRC asserts that none of the issues raised by Norfolk Southern are relevant and cannot be used as a basis for any subsequent Board decisions in this proceeding nor in Finance Docket Nos. 34497 and 34498.²

DISCUSSION

I. Norfolk Southern’s Comments are Irrelevant

CWRC respectfully asserts that the comments of Norfolk Southern are irrelevant and inappropriately raised in this proceeding. In its response, Norfolk Southern admits it: (1) does not have the basis to file a petition for revocation of the lease exemption in Finance Docket No. 34497; (2) does not have a basis to address Ameren’s petition for exemption in Finance Docket No. 34435; and (3) does not intend to “attack” the build-out petition filed on February 5, 2004 in

² *Coffeen and Western Railroad Co. - Lease and Operation Exemption - Near Coffeen, IL*, F.D. No. 34497 (STB served May 10, 2004) and *Ameren Corp. - Control Exemption - Coffeen and Western Railroad Co.*, F.D. No. 34498 (STB served May 10, 2004).

the present proceeding. *See* NS Comments at 6 and 7. Norfolk Southern has admitted that its arguments are irrelevant to this proceeding.³

Furthermore, while CWRC does not believe it has the responsibility to respond to any of NS's inquiries regarding the separate proceedings in Finance Docket Nos. 33497 and 34498, CWRC does want to respond to NS's assertion that the common carrier authority authorized to CWRC in Finance Docket No. 33497 is somehow providing Ameren, via CWRC, with authority that it would not otherwise obtain. This is simply not true. The STB's precedent is clear that CWRC, as the railroad that will receive the construction authority in this Build-out Proceeding, will have a common carrier obligation to provide service to other shippers on the line. Even if CWRC contracts with another carrier to provide service after the line is constructed, CWRC will, at all times, retain a residual common carrier obligation for the line.⁴ CWRC's authority will be

³ The irrelevance of NS's comments is so clear that the standard for a motion to strike the comments is easily met. *See* 49 C.F.R. § 1104.8 ("The Board may order that any redundant, irrelevant, immaterial, impertinent, or scandalous matter be stricken from any document.").

⁴ NS's comments also seem to take issue with the fact that CWRC may never operate on the line and instead may choose to contract with another carrier to operate the line. *See* NS' Comments at 4 and 6. NS expressed a concern that certain facts are often unknown in the exemption process. However, not only is hiring another operator a commonly accepted practice in build-out cases, the practice does not conflict with the fact that the Board's authority is permissive and not mandatory. Accordingly, this would permit any carrier to get STB authority and then not use the authority -- a much further undisclosed step past what NS appears to be concerned with here. *See Kansas City Southern Railway Co. - Trackage Rights Exemption - Gateway Western Railway Co. and Gateway Eastern Railway Co.*, F.D. No. 33780 (STB served Sept. 16, 1999) ("Our view in this respect is consistent with longstanding precedent holding that authority granted by the Board is permissive, not mandatory."); *see also Western Fuels Service Corp. v. Burlington Northern and Santa Fe Railway Co.*, F.D. No. 33321 (STB served July 28, 1997) ("Our grants of authority . . . are permissive.").

no different for the build-out track than the leased track.⁵

In summary, Norfolk Southern is primarily concerned with general issues surrounding exemption proceedings. Norfolk Southern raises these concerns in several places while specifically discounting its own ability to raise these claims in CWRC's proceedings.⁶ Such verbiage indicates Norfolk Southern recognizes that these are, in fact, general concerns, and should be addressed in a different docket. If Norfolk Southern has true concerns in this area, it should request a rulemaking to reopen the class exemption proceeding establishing such procedures.⁷

II. The Coffeen Build-out Construction Projects Meets the Rail Transportation Policy

One of the fundamental points not recognized in Norfolk Southern's pleading nor in the Board's decision to institute a proceeding in this case is that it is the Board's general policy to approve rail construction projects. CWRC's application is just the type of project the Board is required to approve as it promotes the national rail transportation policy and provides competitive options for shippers.

⁵ CWRC hopes that NS's comments on this issue are not a precursor to an NS attempt to challenge CWRC's status and authority to invoke 49 U.S.C. § 10901(d) since the STB's precedent permitting a shipper created carrier such as CWRC to invoke the crossing authority in Section 10901(d) is well-established.

⁶ See NS Comments at 6. (In relation to notice of exemption procedures, Norfolk Southern states, "[p]erhaps it is time for the Board to re-evaluate those procedures." See *id.* at 4. Norfolk Southern states its "expression of concern over the vehicle . . . used by others to advance agendas not envisioned by the Board's predecessor.")

⁷ See Class Exemption for the Acquisition and Operation of Rail Lines under 49 U.S.C. § 10901, 1985 ICC Lexis 239, Ex Parte No. 392 (1985).

Without repeating all of the strong arguments made by AEGC for CWRC in its February 5, 2004 Petition, it is worth repeating some of the long-standing precedent that supports rail construction and shipper build-outs like the one proposed here. Just a few of the statements in support of rail construction include:

- “[i]t is our aim to eliminate the barriers to entry through new construction to the greatest extent possible to facilitate investment initiatives and expand rail service;”⁸
- “[t]he creation of additional rail service and additional competition via rail line construction benefits the public;” and “there is now a presumption that construction projects will be approved;”⁹
- “in enacting the ICC Termination Act of 1995 . . . Congress intended to facilitate rail construction by changing the statutory standard from requiring approval if the agency finds that a project is consistent with the public convenience and necessity (PC&N) to requiring approval unless the agency finds the project is inconsistent with the PC&N. Under this new standard, proposed rail construction projects are to be given the benefit of the doubt. (citations omitted);”¹⁰ and
- “the Board is statutorily required to approval all construction of new rail lines.”¹¹

⁸ *Class Exemption for Rail Construction Under 49 U.S.C. 10901*, Ex Parte No. 392 (Sub--No. 3), slip op. (ICC served May 29, 1987).

⁹ *Class Exemption for the Construction of Connecting Tracks Under 49 U.S.C. § 10901*, 1 S.T.B. 75, 79 (1996) (emphasis added).

¹⁰ *The Burlington Northern and Santa Fe Railway Company – Construction and Operation Exemption – Seadrift and Kamey, TX*, F.D. No. 34003, slip op. at 5 (STB served June 19, 2001) (emphasis added).

¹¹ *See National Rail Infrastructure Financing Proposals: Hearing Before the Subcomm. on Railroads, House Comm. on Transp. and Infrastructure*, 108th Cong. (2003) (statement of Roger Nober, Chairman, Surface Transportation Board).

Construction of the proposed rail line is precisely the kind of project the Board had in mind when it encouraged new entrants into the marketplace and emphasized less regulatory control over actions that would facilitate investment initiatives and expand rail service. In addition, granting an exemption for the construction proposed herein will create a benefit seemingly intended to be created by the ICC, *i.e.*, a shipper seeking to better itself by building-out in order to gain access to additional carriers. See *Public Service Company of Colorado – Construction Exemption – Pueblo County, CO*, F.D. No. 33862 (STB served Aug. 23, 2000) and *Midwest Generation, LLC–Exemption From 49 U.S.C. 10901– For Construction In Will County, IL*, F.D. No. 34060 (STB served March 21, 2002). Granting an exemption in this case would further the principles that form the backbone of the Board’s ideology and the national rail transportation policy. Accordingly, the Board should grant this exemption which will increase the bargaining power of an otherwise captive shipper and provide competitive rail service options for the Coffeen Power Plant.

By instituting a proceeding in this uncontested case, the Board is giving the impression that it is backing away from promotion of competitive rail service. The Board should instead be rewarding shippers that take matters into their own hands in an attempt to increase competitive options. Delay in granting the exemption petition and issuing a conditional decision subject to the environmental review contravenes the principles upon which the Staggers Act was established by inhibiting the development of a sound national transportation system, by deterring

competition via rail construction, and by not giving rail construction the benefit of the doubt.¹² Accordingly, failure to grant the exemption in this proceeding is contrary to the Congressional intention and the established principles of the Board.

CONCLUSION

For the foregoing reasons, CWRC respectfully requests the Board to strike Norfolk Southern's comments as irrelevant. In the alternative, if the Board chooses not to strike such comments, CWRC requests that the comments be disregarded and not used as a basis for any subsequent Board decision in this proceeding.

Respectfully submitted,

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¹² Delaying the issuance of a decision on the conditional transportation-related aspect of this proceeding is inconsistent with the Board's precedent of handling these cases in a two-step process. This process permits railroads to use the preliminary decision to further certain types of arrangements and minimize delay, while also fully considering the environmental aspects during the second phase. Under this established process, all interested parties are protected because no construction can begin until the final decision is issued. *See* Press Release, Surface Transportation Board, Surface Transportation Board Reviewing Unprecedented Number of Rail Line Construction Proposals (Dec. 31, 2001).

CERTIFICATE OF SERVICE

This is to certify that on this 2nd day of June, 2004, I served the following party of record, by overnight delivery, a true and accurate copy of the CWRC's Reply to Initial Comments of Norfolk Southern:

John V. Edwards
General Attorney
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510


Rebecca Roback