

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
RESPONSE TO AMEREN'S AND COFFEEN'S
MOTION TO STRIKE NORFOLK SOUTHERN'S INITIAL COMMENTS**

John V. Edwards
General Attorney
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510
(757) 629-2838
(757) 533-4872 (fax)
john.edwards@nscorp.com

Attorney for Norfolk Southern Railway Company

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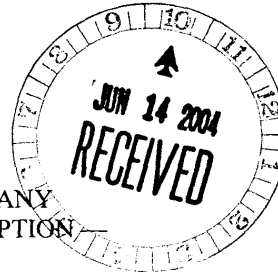


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On May 5, 2004, the Surface Transportation Board ("Board") instituted a proceeding to review the petition, filed on February 5, 2004, by Ameren Energy Generating Company ("Ameren"), on behalf of itself and its newly created subsidiary, the Coffeen 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"). On May 26, 2004, Norfolk Southern Railway Company ("Norfolk Southern") noted its appearance and submitted initial comments ("Norfolk Southern Initial Comments").

On June 2, 2004, Coffeen filed a motion to strike¹ Norfolk Southern's initial comments ("Motion to Strike"), labeling them in general as "irrelevant." The Coffeen motion to strike is not justified and should be denied.

Coffeen also asserts, and apparently asks the Board to find, that Norfolk Southern's initial comments "cannot be used as a basis for any subsequent Board decisions in this proceeding nor in Finance Docket Nos. 34497 and 34498." Reply at 4.² The Coffeen request for a declaration that Norfolk Southern's initial comments cannot form the foundation for any subsequent Board action is unusual, if not unprecedented, and given that this request is unsupported by Coffeen either by facts or law, it should be denied. To claim, as Coffeen implicitly does, that the Board cannot seek procedural clarifications from Ameren or Coffeen in this proceeding or open a new proceeding based on the concerns raised by Norfolk Southern in its initial comments is an extraordinary position that should be rejected by the Board.

As Norfolk Southern clearly stated in its initial filing, Norfolk Southern believes that the Board's 49 C.F.R. § 1150.31 notice of exemption procedures can be abused and that the Board ought to consider requiring procedures to make sure that the exemption is used for the purposes for which it was intended. There has been and is no suggestion by Norfolk Southern that the use by Ameren of these processes Build-Out Petition is the result of malice intent. In fact, in this submission Norfolk Southern suggests a simple modification to Ameren's Build-Out Petition that should pose no problem for Ameren and Coffeen (or any other party in a similar position) to

¹ Although Coffeen (apparently on behalf of itself and its parent) filed what it labels a "reply," Coffeen specifically moves the Board to strike Norfolk Southern's comments. See Motion to Strike at 4.

² The Build-out Proceeding is associated with, but not formally related to, two other proceedings: (1) Finance Docket No. 34497, Coffeen and Western Railroad Company – Lease and Operation Exemption – Near Coffeen, Illinois, served May 10, 2004 ("Coffeen Notice of
(continued on next page . . .)

implement so as to progress a legitimate build-out proposal, but one that will maintain the integrity of the exemption process.

Discussion

In its initial comments, Norfolk Southern noted that Ameren was using the creation of a common carrier – Coffeen – as 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. Norfolk Southern noted that the “common carrier” would control only approximately 1,000 feet (0.2 route miles) of track, apparently entirely within the Ameren facility, may not ever actually operate on the track, own equipment or hire railroad operating employees, but nevertheless offered to serve, as a common carrier, any shipper that was able to locate on that short stretch of track. Finally, Norfolk Southern noted that 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, so there likely will never be an opportunity for the Board or the public to determine the basis upon which Coffeen has access to the 1,000-foot stretch of track.

Norfolk Southern noted that it did not have the basis to file a petition for revocation of the notice of exemption filed in Finance Docket No. 34497, nor, 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. Coffeen interprets this to mean that “Norfolk Southern has admitted that its arguments are irrelevant to this proceeding.” Coffeen Motion to Strike at 5.

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Exemption”); and (2) Finance Docket No. 34498, Ameren Corporation – Control Exemption – Coffeen and Western Railroad Company, served May 10, 2004 (“Common Control Exemption”).

This is far from the truth. Further, neither Coffeen's policy nor procedural arguments support striking Norfolk Southern's initial comments.

Coffeen argues that Board policy supports striking Norfolk Southern's initial comments. Coffeen claims that "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." Coffeen Motion to Strike at 6. Obviously Ameren and Coffeen take issue with the Board instituting a proceeding in this case, and argue that by exercising its regulatory oversight obligations "the Board is giving the impression that it is backing away from promotion of competitive rail service." Coffeen Motion to Strike at 8. Norfolk Southern does not agree with Coffeen's characterization of the Board's actions. Norfolk Southern believes that as the Board pursues a general policy in favor of approval of rail construction projects, it still functions as a regulatory board and therefore cannot disregard fundamental flaws in a proposal presented to it, or ignore misuse of its procedures to progress those construction projects.

Further, for Ameren and Coffeen to argue that Norfolk Southern's concerns are not relevant in this build-out proceeding either presupposes approval and actual construction of the proposed build-out or assumes the legitimacy of the creation of the common carrier proposed in the Coffeen Notice of Exemption. As to the former (presupposing approval and construction), the Board's general policy in favor of approval of rail construction projects does not translate into automatic approval, and implementation, of the proposed build-out. Although it is highly unlikely, the Board could withhold its approval of the proposed build-out. Even if approved, the proposed build-out may not come to be constructed. Coffeen's Notice of Exemption is not presented as a related application that would be approved only if the Build-Out Petition is

approved and the proposed build-out constructed³ – it very clearly and explicitly is presented as a stand-alone proposal purportedly creating a common carrier regardless of the outcome of the Build-Out Petition.⁴ Therefore, Ameren and Coffeen must rely on the legitimacy of the creation of the common carrier solely over the track described in the Coffeen Notice of Exemption. If there was no effort to address the concerns raised in Norfolk Southern’s Initial Comments and either the Board denied the Build-out Petition or, if the Board approved the petition, Ameren failed to construct the build-out, then the Board could face the creation of a purported stand-alone common carrier on 1,000 feet of track located entirely within the confines of the Ameren facility.

Coffeen disputes none of the facts asserted that undermine its claim to being a common carrier. Coffeen does not specify where the 1,000-foot track is located, nor whether any shipper could possibly locate on the line. Coffeen does not clarify whether it has or anticipates having any employees or equipment. Coffeen does not offer to produce the lease it claims to be drafting for it and its parent to execute. Instead, Coffeen simply refuses to address any of the issues raised and states categorically that it “does not believe it has the responsibility to respond...” Motion to Strike at 5. But, as demonstrated above, the creation of this apparent common carrier on the 1,000-foot track is precisely the issue. (Coffeen seems to recognize this distinction when

³ In fact, given the notice of exemption process, the proposed creation of Coffeen as a common carrier railroad is not “approved” by the Board at all. The Board’s publication of notices submitted pursuant to 49 C.F.R. § 1150.31 is largely a ministerial action. Often they go unchallenged, not because there is not basis for such a challenge but for other reasons. In any event, an unchallenged publication of a notice should not be precedent in another proceeding.

⁴ See, Coffeen Notice of Exemption at 3, n.2: “Common carrier authority will be established on formerly private track and any existing or new shipper may request service on the line. * * * [Coffeen] may later hire another common carrier to operate on the track in conjunction with the proposed new track in FD No. 34435. Any additional regulatory needed will be sought at the appropriate time and [Coffeen] acknowledges that it will retain at least a residual common carrier authority for this track if such additional authority is sought.”

it states that its “authority will be no different for the build-out track than the leased track.”

Reply at 5-6.)

Coffeen (and others) seems to believe that strict, but narrow, compliance with the requirements of the 49 C.F.R. § 1150.31 notice of exemption procedures automatically entitles it to common carrier status. Coffeen fails to recognize that those procedures were put into place to exempt certain transactions from the regulatory requirements normally involved in the construction, acquisition or operation of actual railroad lines, and that those procedures were put into place to cover the creation of bona fide common carrier railroads, not as a vehicle to obtain Board jurisdiction to progress other agendas.⁵

Coffeen also seems to believe that certain activities gain regulatory legitimacy simply because they have been practiced without challenge.⁶ Coffeen argues that “hiring another operator [is] a commonly accepted practice in build-out cases....” Reply at 5. Coffeen claims that practice is acceptable because Coffeen “will retain a residual common carrier obligation for the line.” Reply at 5 n.4. But Coffeen cannot hire another operator to perform its common

⁵ The requirements of 49 C.F.R. § 1150, Subpart A (Applications Under 49 U.S.C. 10901) clearly demonstrate the underlying intent. Those requirements include, among other things, the submission of facts demonstrating that the applicant is either a common carrier or has been organized to implement a proposal for which approval is being sought which would create a common carrier railroad, a statement indicating who will operate the line (and a requirement that the operator join the application if the applicant is not to be the operator), and operational detail including detail as to the equipment and operating personnel. Notices of Exemption submitted pursuant to 49 C.F.R. § 1150.31 are not in a category separate and apart. They are intended to cover the same transactions covered by 49 C.F.R. Part 1150 Subpart A, but in a more expedited manner.

⁶ The simple fact that a practice has developed (such as one short line carrier hiring another carrier to operate its line without complying with regulatory requirements) does not legitimize that practice in terms of the law. Coffeen’s arguments in its motion to strike along this line (Coffeen Motion to Strike at 5, n.4), raise further questions about Coffeen’s intent to ever return to the Board should it decide to let others operate the track in its stead, notwithstanding its conditional claim in the notice of exemption that it will return to the Board for any additional

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carrier service,⁷ and Coffeen cannot retain a residual common carrier obligation, if Coffeen has no common carrier obligation to begin with. And it is the creation of this common carrier over the line described in Finance Docket No. 34497 that Ameren has chosen as a vehicle for the prosecution of the build-out to be progressed in the Finance Docket No. 34495 Build-Out Petition.⁸

While there are parties who use the exemption procedure as part of their pursuit of a build-out, there are others who file for common carrier status who would use exemption process to obtain ICCTA preemption over state and local environmental and permitting laws, obtain access to state and local governmental funding reserved for railroads, take advantage of the industry's interline settlement processes and leverage access over the lines of bona fide carrier lines to use their facilities at no cost. Either Ameren and Coffeen, or the Board, could make simple adjustments to the proposed build-out proposal to address the concerns raised (simply making the creation of a common carrier over the in-plant trackage related to and contingent

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authority at the appropriate time and if such authority is needed (Coffeen Notice of Exemption at 3, n.2).

⁷ Although covered under 49 C.F.R. 1150.31(a)(1) is an acquisition by a noncarrier of rail property that would be operated by a third party, Ameren is not invoking the notice of exemption procedures for this purpose. Its stated purpose is to cause the non-carrier Coffeen to become a common carrier over the 1,000-foot track. If Coffeen were to be determined to be a common carrier, then having another common carrier operate Coffeen's lines would require STB regulatory attention.

⁸ Curiously, Coffeen argues that the fact that the Board's authority is permissive, not mandatory, should adequately address the issue of the bona fides of a carrier with no employees or equipment. Coffeen Motion to Strike at 4. Whether the authority to be granted by the Board is permissive or mandatory is not the issue and is, in fact, not relevant to the concerns raised. Here Coffeen urges the Board to issue common carrier authority to, and take jurisdiction over, a company with no employees and no equipment, no intention to acquire any employees or equipment, no intention to operate, no existing or potential future shippers other than its parent, and consisting of only 1,000 feet of track which cannot sustain common carrier operations, simply to use it as a mere vehicle to obtain a status to invoke other aspects of the Board's jurisdiction to which it may or may not be entitled.

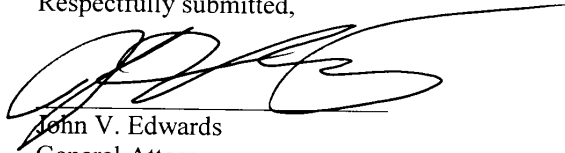
upon the approval and construction of the build-out line would go a long way to addressing these concerns), while adjustments to other proposals may not be so easy. But that does not diminish in any way the relevance of the expressed concerns to the particular proceeding now pending before the Board in this docket.

Again, Norfolk Southern does not recite its concerns as an attack on the underlying Build-out Petition. In fact, Norfolk Southern has proposed certain minor modifications that will help progress the proposed build-out.

But Norfolk Southern does have concerns over the vehicle – the development of a common carrier pursuant to 49 C.F.R. § 1150.31 – that is used by Ameren and Coffeen in the Build-out Petition, and by others for other purposes, generally not those envisioned by the Board’s predecessor when the regulations were developed. Coffeen suggests a rulemaking to reopen the class exemption proceeding that established the class exemption procedures. See Coffeen Motion to Strike at 6. Regardless of whether that rulemaking is instituted, however, and regardless of the purpose behind Ameren’s and Coffeen’s use of the Board’s procedures, there is a fundamental flaw in the proposal by Ameren to progress its build-out proposal by means of the creation of a purported stand-alone common carrier over 1,000 feet of its track lying entirely within the confines of its facility.

The concerns raised are easy to address and Norfolk Southern urges Ameren and Coffeen to do so. In the absence of action by Ameren and Coffeen, Norfolk Southern urges the Board to do so. In any event, Norfolk Southern urges the Board to deny Coffeen's Motion to Strike its initial comments as not relevant.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'J. Edwards', is written over a horizontal line.

John V. Edwards
General Attorney
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510
(757) 629-2838
(757) 533-4872 (fax)
john.edwards@nscorp.com

Attorney for Norfolk Southern Railway Company

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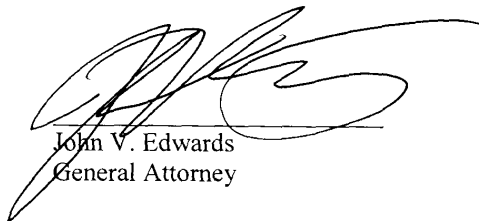
CERTIFICATE OF SERVICE

I certify that on June 9, 2004, a true copy of "Norfolk Southern Railway Company's Response to Ameren's and Coffeen's Motion to Strike Norfolk Southern's Initial Comments" was served by overnight courier upon the following:

Sandra L. Brown
Rebecca Roback
Troutman Sanders LLP
401 Ninth Street, N.W.
Suite 1000
Washington, D.C. 20004
(202) 274-2959
(202) 654-5603 (fax)

and by regular mail upon the following:

James A. Sobule
Ameren Services Corporation
P.O. Box 66149 (MC 1310)
St. Louis, MO 63166-6149
(314) 554-2276



John V. Edwards
General Attorney