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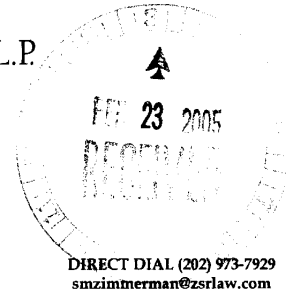
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213394

SCOTT M. ZIMMERMAN



February 23, 2005

BY HAND DELIVERY

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

Re: Finance Docket No. 34649, *New York & Greenwood Lake
Railway—Feeder Line Acquisition—A Line of Norfolk Southern
Railway Company*

Dear Secretary Williams:

I enclose for filing in this proceeding an original and 10 copies of the "Reply Of Norfolk Southern Railway Company In Opposition To The Appeal Of The New York & Greenwood Lake Railway."

Sincerely,

A handwritten signature in black ink, appearing to be 'Scott M. Zimmerman', written over a horizontal line.

Scott M. Zimmerman

cc (by fax and mail, w/encl.): Fritz R. Kahn, Esq.

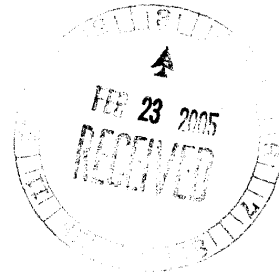
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Public Record

Before the
Surface Transportation Board

Finance Docket No. 34649



NEW YORK & GREENWOOD LAKE RAILWAY
— FEEDER LINE ACQUISITION —
A LINE OF NORFOLK SOUTHERN RAILWAY COMPANY

**REPLY OF NORFOLK SOUTHERN RAILWAY COMPANY
IN OPPOSITION TO THE APPEAL
OF THE NEW YORK & GREENWOOD LAKE RAILWAY**

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Attorneys for Norfolk Southern Railway Company

February 23, 2005

Before the
Surface Transportation Board

Finance Docket No. 34649

NEW YORK & GREENWOOD LAKE RAILWAY
— FEEDER LINE ACQUISITION —
A LINE OF NORFOLK SOUTHERN RAILWAY COMPANY

**REPLY OF NORFOLK SOUTHERN RAILWAY COMPANY
IN OPPOSITION TO THE APPEAL
OF NEW YORK & GREENWOOD LAKE RAILWAY**

Norfolk Southern Railway Company (“NSR”) hereby opposes the appeal filed February 14, 2005 (“Appeal”) by the New York & Greenwood Lake Railway (“NYG&L”). That Appeal challenges the decision of the Director of the Office of Proceedings served February 4, 2005 (“Decision”) rejecting the feeder line application filed by NYG&L on January 6, 2005.

In its application, NYG&L relied exclusively on the so-called “SDM standard” for feeder line applications, which provides that “[a] rail line is eligible for forced sale if it appears in category 1 or 2 of the owning railroad’s system diagram map (but the railroad has not filed an application to abandon the line).” 49 C.F.R. §1151.1; *see* 49 U.S.C. §10907(b)(1)(A)(ii). In the Decision, the Director rejected NYG&L’s application because he concluded that NYG&L had failed to show that the line it sought to acquire

had appeared in category 1 or 2 of NSR's system diagram map ("SDM"). He rejected NYG&L's assertion that a newspaper notice printed in the Newark, NJ Star Ledger on September 20, 2003, is an actual Norfolk Southern SDM. Rather, the Director held, "it is the diagram of the carrier's system filed with the Board that is the actual SDM," and he concluded, correctly, that because there is no evidence that Norfolk Southern ever filed with the Board an SDM showing the subject line in category 1 or 2, NYG&L's feeder line application must be rejected for failing to satisfy the SDM standard.

On appeal, NYG&L does not argue that NSR has ever filed with the Board an SDM showing the subject line in category 1 or 2, and it cannot make any such showing because NSR has never done so. Instead, NYG&L is forced to rely again, as it did in its reply to NSR's motion to reject the feeder line application, on its erroneous assertion that the Star Ledger newspaper notice is actually a full-fledged, amended NSR system diagram map, thus (according to NYG&L) satisfying the SDM statutory prerequisite for forced sale under the feeder line statute. That assertion, however, is no more correct now than when the Director properly rejected it.

As discussed previously in NSR's February 3, 2005 Rebuttal, and as the Director correctly found, under the statute and regulations, a carrier's operative and legally effective SDM is necessarily the one on file with the Board, not maps of a portion of the carrier's system that may be published in a newspaper. Under 49 U.S.C. §10903(c)(2), the system diagram map is just what the name implies: "a *complete* diagram of the transportation system operated, directly or indirectly, by the rail carrier" (emphasis supplied) – not a map of a mere fragment of that system. *See also* 49 C.F.R. §1152.10(a) ("Each carrier shall prepare a diagram of *its rail system* on a map" (emphasis supplied)).

Further, the SDM must “identify *each* railroad line,” throughout the carrier’s system, “for which the rail carrier plans to file an application to abandon or discontinue. . . .” 49 U.S.C. §10903; *see also* 49 C.F.R. §1152.10(a) (a carrier’s SDM is to designate “all lines it its system” by specified categories). Moreover, the Board’s implementing regulations further specify the contents of a carrier’s “system diagram map,” including a requirement that lines in different categories be color-coded, and require that such maps and amendments and updates thereto be filed with the Board. 49 C.F.R. §§ 1152.10, 1152.12 and 1152.13. The Star Ledger newspaper notice satisfies none of these criteria: It is not a map of the complete Norfolk Southern system, it does not identify “each railroad line” in NSR’s system by category, it does not identify “each railroad line for which NSR plans to file an application to abandon or discontinue,” it is not color-coded, and it was never filed with the Board. In short, it is a newspaper notice (albeit, as NSR has explained, an erroneous one), not an SDM.

Additionally, as noted in NSR’s Rebuttal, the conclusion that a carrier’s SDM is the one that is on file with the Board is the only one that makes sense as a policy matter, as it is clearly necessary to ensure uniform and proper public notice and certainty. For example, a carrier could hardly file an abandonment application and avoid rejection pursuant to 49 C.F.R. §1152.13(c) as to a line that at one time in the past was the subject of a published notice and map in a newspaper, but which did not appear in a SDM filed with the Board subsequent to the newspaper publication. If it were otherwise, the public would have no reliable way to determine what a railroad’s effective and operative SDM is.

Moreover, as NSR showed in its prior submissions, in March 2004 (that is, well after the 2003 newspaper notice and long before NYG&L filed its feeder line application) NSR *did* file with the Board an actual, amended SDM that does *not* include the subject line in category 1 or 2. Moreover, at the request of NYG&L, *NSR provided that SDM to NYG&L's president on March 23, 2004*, as NYG&L itself admits. *See Appeal at 2 n.3.* That SDM is the one that was in effect when NYG&L filed its feeder line application on January 6, 2005 (and, in fact, remains in effect today).

NYG&L's only response to these facts is to assert that "there is nothing in the Board's records to support the Decision's finding that NSR's amended System Diagram Map was filed with the Board in March 2004." *Appeal at 2.* That, too, is simply incorrect. First, NSR's March 26, 2004 transmittal letter, which was attached as an exhibit to NSR's February 3, 2005 rebuttal filing (and is attached again here for convenience as Exhibit 1) plainly shows two STB date-stamps: one indicating its intake at the Board on March 29, 2004 at approximately 10:30 a.m., the other noting that the filing was entered as part of the public record by the Office of Proceedings on March 30, 2004. The document also shows, in the upper left corner, the two hand-written filing identification numbers assigned to it. That evidence is more than sufficient to demonstrate that the filing took place.

NYG&L further asserts that "no such [transmittal] letter appears on the Board's website." *Appeal at 2.* Again, NYG&L is mistaken. First, nothing in the Board's regulations requires a document to be posted on the Board's website in order to be considered as having been filed with the Board. *Cf.* 49 C.F.R. §1104.6 (describing the requirements for timely filing). Second, the fact of the matter is that, even today, the

filing *does*, indeed, appear on the Board's website,¹ thus corroborating (although no additional corroboration is necessary) that the filing occurred as NSR stated.

NYG&L asserts that its counsel was "assured" by "the Board's staff" both before NYG&L filed its feeder line application and again following service of the Director's Decision, that "the only System Diagram Map which NSR had filed with the Board was one which it filed in May 1997." Appeal at 2. NYG&L does not identify who gave such an assurance or what the basis for that assurance was, but it is inconsistent with the evidence just described that demonstrates conclusively that the filing occurred.² Furthermore, the SDM that NSR filed in May 1997 (which was amended by the SDM filed on March 29, 2004) also did not show the subject line in category 1 or 2, so this alleged communication from the Board's staff is irrelevant to NYGL's feeder line application in any event.

¹ The document may be retrieved from the website by, for example, searching for either of the two filing identification numbers, or by searching for documents in docket SDM 290 or SDM 859, or by searching for all documents filed on March 29, 2004. The copy of the cover letter attached to this Reply as Exhibit 1 was downloaded from the STB's website today, as indicated by today's date in lower right-hand corner of Exhibit 2.

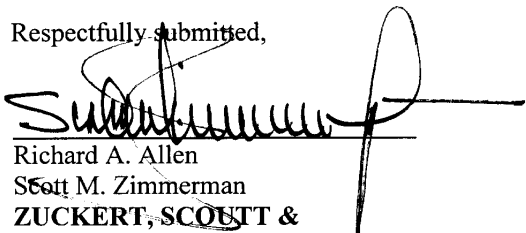
² Even if such an "assurance" was given, it does not help NYG&L, because such an "assurance" does not satisfy the statutory SDM prerequisite for forced sale under the feeder line statute; what matters is whether there actually is an SDM on file that includes the subject line in category 1 or 2.

CONCLUSION

NSR has never filed any SDM showing the subject line in category 1 or 2. For that reason, NYG&L's feeder line application does not, and cannot, meet the criteria for applications under the SDM standard. The Director's Decision rejecting the application was correct, and NYG&L's Appeal should be denied.

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Respectfully submitted,



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~~Scott~~ M. Zimmerman
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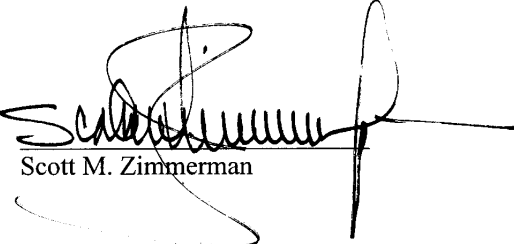
*Attorneys for
Norfolk Southern Railway Company*

February 23, 2005

CERTIFICATE OF SERVICE

I certify that on February 23, 2005, a true copy of the foregoing "Reply Of
Norfolk Southern Railway Company In Opposition To The Appeal Of The New York &
Greenwood Lake Railway" was served by facsimile and first class U.S. Mail, postage
prepaid, upon:

Fritz R. Kahn
Fritz R. Kahn, P.C.
1920 N Street, NW
8th Floor
Washington, D.C. 20036-1601



Scott M. Zimmerman



2/06/28
Norfolk Southern Corporation
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James R. Paschall
General Attorney

Writer's Direct Dial Number
(757) 629-2759

March 26, 2004



VIA AIRBORNE EXPRESS

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

Re: STB Docket No. AB-290 - Abandonment of Rail Lines and Discontinuance of Service -
Norfolk Southern Railway Company and
STB Docket No. AB-859 - Abandonment of Rail Lines and Discontinuance of
Service - Pennsylvania Lines, LLC
Amendment to the System Diagram Map

Dear Mr. Williams:

In accordance with the Board's regulations published at 49 CFR § 1152.10 et seq.,
Norfolk Southern Railway Company and operating subsidiaries and Pennsylvania Lines, LLC are
amending their System Diagram Map.

NSR expected to file this map at an earlier date and thus labeled it "September 2003."
We encountered unexpected delays in completing and receiving certifications for all the required
newspaper notices and postings. We have changed the map from our original draft in order to
leave three lines in Category 5 that we at first had planned to move to Category 1. Newspaper
notices for these lines were published on various dates. We now expect that any filings with
respect to these lines will be notices or petitions for exemption rather than applications, and that
the exemption sought for one or more of the lines will be for discontinuance of service, not
abandonment. Thus, we do not wish to file an official, operative system diagram map listing
these lines in Category 1.

Enclosed are three copies of the amended system diagram map and the updated line
descriptions. Also enclosed is a copy of the service list as well as an Affidavit of Service and
Publication. Please date-stamp the duplicate copy of this letter and return it in the self-
addressed, stamped envelope.

Very truly yours,

James R. Paschall

JRP:kch
Enclosures
cc(w/encl.):

Mr. Joseph H. Dettmar
Deputy Director
Rail Section, Office of Proceedings
Surface Transportation Board
Washington, D. C. 20423

ENTERED
Office of Proceedings

MAR 30 2004

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EXHIBIT 2

SURFACE TRANSPORTATION BOARD FILING DOCUMENT

Filing Information

Docket Number: **SDM_290_0**

Case Title: **NORFOLK AND WESTERN RAILWAY COMPANY; NORFOLK SOUTHERN RAILWAY COMPANY;**

General Filing Type: **AMEND/MODIFY/SUPPLEMENT**

Filed On: **03/29/2004 12:00:00 AM**

Filed For: **Norfolk Southern Railway Company**

Filing Attachments

PDF Attachment:  - 210425.pdf

WordPerfect Attachment:

Size of PDF File: **2.68 MB**

Approximate download time at 28.8 kb: **15 Minutes**

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