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April 3, 2006

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Washington, DC 20423

Re: Finance Docket No. 34839, *Norfolk Southern Railway Company—Control and Consolidation Exemption—Algers, Winslow and Western Railway Company*

Dear Secretary Williams:

Enclosed is the Reply. This Reply is being e-filed..

Respectfully submitted,



Louis E. Gitomer

Counsel for the Indiana Southern Railroad, Inc.

Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34839

NORFOLK SOUTHERN RAILWAY COMPANY
—CONTROL AND CONSOLIDATION EXEMPTION—
ALGERS, WINSLOW AND WESTERN RAILWAY COMPANY

INDIANA SOUTHERN RAILROAD, INC. REPLY TO MOTION OF NORFOLK SOUTHERN
CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY FOR LEAVE TO
AMEND PETITION FOR EXEMPTION AND TO FILE A REPLY TO REPLIES

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Attorneys for:
INDIANA SOUTHERN RAILROAD, INC.

Dated: April 3, 2006

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The Indiana Southern Railroad, Inc. (“ISRR”) submits this reply to the Motion of Norfolk Southern Corporation (“NSC”) and Norfolk Southern Railway Company (“NSR”) for Leave to Amend Petition for Exemption and to File a Reply to Replies (the “Motion”).¹ ISRR respectfully requests the Surface Transportation Board (the “Board”) to deny the Motion to Reply and to reject the Petition for Exemption From 49 U.S.C. § 11323 (the “Petition”) filed by NSR on February 14, 2006, because it is even clearer from the Motion that NSR failed to file a case-in-chief as required by 49 C.F.R. § 1121.3(a).

NSR is seeking an exemption in order to obtain control by acquiring the outstanding 50 percent of the stock of the Algiers, Winslow and Western Railway Company (the “AWW”) that it does not own and then merge AWW into NSR. Replies to the Petition in opposition and requesting conditions on this anticompetitive transaction were filed by ISRR, Hoosier Energy Rural Electric Cooperative, Inc., Indianapolis Power and Light Company (“IPL”), PSI Energy,

¹ ISRR will refer to the request to amend the Petition as the “Motion to Amend” and the request

Inc. (“PSI”), and Solar Sources, Inc. and Solar Sources Underground, LLC (“Solar”).

NSC and NSR request two types of relief in the Motion. First, NSC seeks to join the Petition as a party obtaining control of AWW. Second, NSC and NSR seek leave to file a prohibited reply to a reply contrary to the Board’s rules at 49 C.F.R. § 1104.13(c).

1. Joinder of NSC.

As suggested by ISRR in its reply filed on March 16, 2006, NSC and NSR now agree that NSC is a necessary party to the Petition. NSC seeks leave to join the Petition to lawfully obtain control of AWW. ISRR does not oppose the Motion to Amend to include NSC as a necessary party. However, the Motion to Amend demonstrates that NSC and NSR failed to present their case-in-chief in the Petition as required by the Board’s rules. 49 C.F.R. § 1121.3(a).

2. Motion to Reply.

ISRR opposes the Motion to Reply. NSR elected to file the Petition. NSR could have filed an application pursuant to 49 C.F.R. 1180.2(b) or (c), and been assured of a right to file rebuttal. Instead, NSR filed the Petition, and did not include the information required by the Board’s rules for railroad control and merger transactions. See 49 C.F.R. § 1180.6 and .8. As NSC and NSR recognize (Motion at 1, 4, and 5), a reply to a reply is not permitted by the Board’s rules at 49 C.F.R. 1104.13(c).

NSC and NSR argue that they “could not have anticipated these filings because they are based on factual inaccuracies and offer no legally cognizable objections to the AWW transaction.” Motion at 1. NSC and NSR did not anticipate the filings because it did not bother to discuss the proposed transaction prior to filing the Petition with ISRR. NSC and NSC are also

to reply as the “Motion to Reply.”

wrong that there are no “legally cognizable objections.” The reduction of a shippers options from two independent rail carriers to one is well recognized by the Board. The elimination of an independent 19-mile long Class III railroad is not the same as the merger of a long haul Class I railroad.

In all but one instance of the precedent that NSC and NSR cite in support of their request to file a reply to reply, ISRR would welcome the result. The Board did not address section 1104.13(c) and did not consider the filing submitted in *MVC Transportation, LLC–Acquisition Exemption–P&LE Properties, Inc.*, STB Finance Docket No. 34462 (STB served October 20, 2004) (“MVC”). In *Union Pacific Railroad Company–Abandonment Exemption–in Rio Grande and Mineral Counties, CO*, STB Docket No. AB-33 (Sub-No. 132X) (STB served June 22, 2004) (“UP”), the Board considered a petition to reopen, permitted a reply to reply by the petitioner (to which a reply had been filed), and denied the petition to reopen. *CSX Transportation, Inc.–Abandonment Exemption–in Summit County, OH*, STB Docket No. AB-55 (Sub-No. 631X) (STB served May 12, 2004) (“CSXT”), involved a petition to revoke a class exemption where the petitioner filed a reply to reply that was permitted so that no party would be prejudiced, and then the Board denied the relief sought by the petitioner. In a request to waive the 60-day labor notice under 49 C.F.R. 1150.42(e), the Board accepted the rebuttal of petitioner, which was not opposed. *Reading Blue Mountain and Northern Railroad Company–Lease and Operation Exemption–Norfolk Southern Railway Company and Pennsylvania Lines LLC*, STB Finance Docket No. 34048 (STB served August 1, 2001) (“RBMN”). Here, the request by NSC and NSR to file a reply to reply is opposed by ISRR. In *Jefferson Terminal Railroad Company–Acquisition and Operation Exemption–Crown Enterprises, Inc.*, STB Finance Docket No. 33950

(STB served March 19, 2001) (“*Jefferson*”), a petition to revoke a notice of exemption was granted after the petitioner’s reply to reply was accepted and the respondent’s reply considered.

In *MVC*, the Board did not consider the reply. In *UP* and *CSXT*, the Board accepted a reply to reply, which had been responded to, and then denied the relief sought by the party that filed the reply to reply. The *RBMN* reply to reply was unopposed and involved a procedural matter. Even though the reply to reply was permitted in *Jefferson* and the petitioning party prevailed, the Board revoked an exemption because there were “substantial factual and legal issues” and “so that any further proceedings ... would be handled under a more searching process.” *Id.* at 5.

In the abandonment petition for exemption where a reply to reply was permitted and the abandonment exemption was granted, the Board permitted a further response in opposition. *Norfolk Southern Railway Company—Abandonment Exemption—in Nottoway, Prince Edward, Cumberland, and Appomattox Counties, VA*, STB Docket No. AB-290 (Sub-No. 252X) (STB served January 18, 2005).

In this proceeding, NSR filed the Petition, and should have been well aware of the Board’s rules requiring that “A party filing a petition for exemption shall provide its case-in-chief, along with its supporting evidence, workpapers, and related documents at the time it files its petition.” 49 C.F.R. § 1121.3(a). Now, after substantial opposition has arisen, NSC and NSR seek to submit a substantial reply to reply showing that the opposition “contain[s] various factual inaccuracies and they are based on legal and policy contentions that are directly contrary to well established Board precedents”. Motion at 5. If NSR has such information available, it certainly should have been presented as its case-in-chief in the Petition. NSR ignored the requirements of

section 1121.3(a). Essentially, NSC and NSC seek to file the case-in-chief in the reply to reply instead of having properly filed it in the Petition.

ISRR opposes the Motion to Reply, not only because it is contrary to section 1104.13(c), but because it will ratify NSR's decision to ignore the Board's rules at section 1121.3(a), and deny due process to ISRR and the other parties to this proceeding. ISRR respectfully requests the Board to deny the Motion to Reply and reject the Petition for failure to comply with the Board's rules.

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INDIANA SOUTHERN RAILROAD, INC.

Dated: April 3, 2006

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of April, 2006, I caused a copy of this Reply, to be served on counsel for all Parties of Record by first class mail, postage prepaid.

Louis E. Gitomer