

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34839

NORFOLK SOUTHERN RAILWAY COMPANY – CONTROL AND CONSOLIDATION –
ALGERS, WINSLOW AND WESTERN RAILWAY COMPANY

PETITION FOR EXEMPTION FROM 49 U.S.C § 11323

**MOTION FOR LEAVE TO REPLY TO THE SUPPLEMENTAL EVIDENCE AND
ARGUMENT FILED BY NORFOLK SOUTHERN CORPORATION AND NORFOLK
SOUTHERN RAILWAY COMPANY**

Introduction

Pursuant to 49 C.F.R. § 1117.1, the Indianapolis Power and Light Company (“IPL”) respectfully requests leave from the Board to reply to the additional evidence and arguments made by Norfolk Southern Railway Corporation and Norfolk Southern Railway Company (collectively, “NS”) in NS’s filing made on April 11, 2006 in the above-captioned docket (“Supplemental Evidence”). This Motion follows the letter submitted to the Board on behalf of IPL on April 12, 2006 suggesting that the Board on its own motion grant IPL and the other parties of record the right to respond to NS’s filing, a suggestion the Board has apparently declined to take. The Supplemental Evidence combined with the initial petition for exemption (“Petition”) filed in this proceeding on February 14, 2006 constitute NS’s true attempt to present a case-in-chief in support of its request that the proposed transaction be exempted from the full requirements of 49 U.S.C. § 11323. The Supplemental Evidence sets forth numerous factual

assertions and legal arguments regarding IPL, the other parties of record in this proceeding,¹ and the effect of the proposed transaction on railroad competition. Nearly all of this new evidence and argument could have and should have been included in the original Petition. If granted permission to reply, IPL will demonstrate that many of the factual assertions pertaining to IPL, its coal transportation options, and its coal supply alternatives are incorrect and unsupported. Accordingly, IPL hereby requests that the Board issue a decision permitting IPL to reply to NS's Supplemental Evidence. Given the nature and scope of the Supplemental Evidence, the right to reply should be extended to all parties of record. IPL is aware of the request for establishment of a procedural schedule filed by the Indiana Southern Railroad, Inc. ("ISRR") on April 21, 2006 in this docket. While IPL does not object to ISRR's request, IPL notes that its primary concern is that the new legal and factual allegations made by NS pertaining to IPL not be permitted to go un rebutted. For itself only, IPL notes that at the present time it could be prepared to file a reply to the Supplemental Evidence prior to May 29, 2006, the date for replies requested by ISRR.

Argument

On February 14, 2006, NS filed a petition for exemption under 49 U.S.C. § 10502 to acquire the remaining 50% of the Algiers, Winslow and Western Railway Company ("AWW"). Over the ensuing several weeks, IPL and the other parties of record raised significant concerns about the reduction in competition that would result from the NS acquisition. On March 27, 2006, NS claimed that it could not have anticipated these concerns and asked for and eventually received permission from the Board to make its Supplemental Evidence filing.

Under the Board's rules governing petitions for exemption, a party that desires a transaction to be exempted from the formal application requirements of 49 U.S.C. § 11323 must

¹ In addition to NS and IPL, other parties of record are PSI Energy, Inc., Indiana Southern Railroad, Inc., and Solar Sources Underground, LLC.

“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). These rules do not provide for any additional filings by the petitioner. Accordingly, the onus is squarely on the petitioner to err on the side of anticipating any opposition to its exemption request. Furthermore, under these procedures, interested parties such as IPL are entitled to respond to the petitioner’s evidence. 49 C.F.R. §§ 1121.4(a) and 1104.13(a). In its Supplemental Evidence, NS has introduced additional evidence and arguments regarding the competitive effects of the proposed transaction that could have and should have been included in the original Petition. Had NS complied with the Board’s regulations, IPL and the other parties could have responded to such evidence and arguments in the normal course of the proceeding. For example, the Supplemental Evidence includes a variety of new factual allegations and verified testimony regarding the coal supply market and transportation options in southern Indiana. See Supplemental Evidence at 2-3, 12-13, 23, and Doug Evans Verified Statement at 4-6. Some of these new factual allegations directly pertain to IPL, such as the inference that IPL has access to “60 coal mines and several truck transload facilities,” and that IPL has unrestricted truck transload facilities located in Petersburg and Maysville, Indiana, thereby obviating the need for any service by the AWW. Supplemental Evidence at 12. These and other factual allegations regarding the effect of this transaction on the Indiana coal industry and coal transportation alternatives of IPL and other shippers should have been included in the original Petition. By including them in a supplement accompanied with a request that no party should be permitted to respond to them, NS is circumventing the Board’s rules governing petitions for exemption. IPL must be permitted to respond to NS’s allegations that IPL’s business practices and coal transportation supply alternatives will be unaffected by the reduction in competition resulting from the proposed transaction.

The Supplemental Evidence also includes an affidavit from the General Manager of the AWW, the railroad that NS proposes to acquire. This is exactly the sort of evidence that should have been included in the original Petition, and IPL should be given an opportunity to reply to it. Lastly, a reply is necessary due to the incongruities in the new NS arguments, such as the new NS contention that the proposed transaction is merely “end-to-end,” an assertion which conflicts with prior NS evidence describing part of the AWW line as parallel to NS. Compare Supplemental Evidence at 1, 2, and 7 to Petition at 4. In the Petition, NS cited a single Board decision stating that “as a general matter, single-line service is superior to join-line [sic] service.”² In the Supplemental Evidence, NS has offered four pages of new purported legal justification for why the transaction should be exempted because it is an “end-to-end consolidation.” This justification should have been included in the original Petition, thereby providing IPL and other parties an opportunity to challenge it.

IPL is aware that the Board’s procedures prohibit replies to replies, 49 C.F.R. § 1104.13(c), but the Board has granted exceptions to the rule in cases like this, where the additional information will provide a more complete record and no party will be prejudiced. *Lamoille Valley Railroad Company – Abandonment and Discontinuance of Trackage Rights Exemption – In Caledonia, Washington, Orleans, Lamoille, and Franklin Counties, VT*, Docket No. AB-444 (Sub-No. 1X) at 2 (served January 24, 2005); *Vermont Railway, Inc. – Petition for Declaratory Order*, Docket No. 34364 at 1 (served January 4, 2005). The Board should also grant this Motion out of basic fairness. Under standard procedures governing petitions for exemption, both the petitioner and commenting parties such as IPL are allowed one filing each. Now that NS has made two filings in support of its position, the latter of which greatly expands

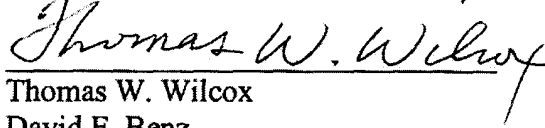
² *CSX Corp. and CSX Transp., Inc., Norfolk Southern Corp. and Norfolk Southern Railway Co. – Control and Operating Leases/Agreements – Conrail Inc. and Consolidated Rail Corp.*, Docket No. 33388, Decision No. 89, slip op. at 60 (served July 20, 1998).

upon the original, IPL and the other parties of record should also be allowed to make a second filing in order to reply to the new evidence and arguments put forth by NS. This will also ensure that the Board has a complete record for decision.

Conclusion

For the reasons set forth in this Motion, IPL hereby respectfully requests that the Board (1) grant leave for IPL and the other parties of record to reply to the Supplemental Evidence filed by NS, and (2) issue a decision establishing the date by which such replies should be filed.

Respectfully submitted,



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April 24, 2006

CERTIFICATE OF SERVICE

I hereby certify that I have this 24st day of April 2006, caused copies of the foregoing Motion of Indianapolis Power and Light Company for Leave to Reply to the Supplemental Evidence Filed by the Norfolk Southern Corporation and Norfolk Southern Railway Company to be served by hand or United States Mail upon counsel for all parties of record in Finance Docket No. 34839, as follows:

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