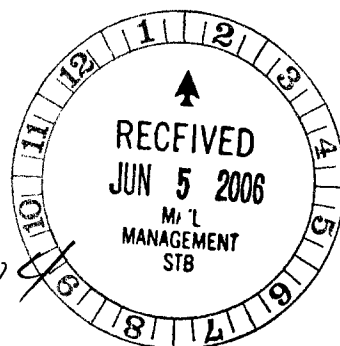


UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD



Docket No. AB-290 (Sub-No. 254X) 216704
Norfolk Southern Railway Company –
Petition for Exemption – Discontinuance of Service –
Between Halls Ferry Junction, NC and Badin, NC in Stanly County, NC;

Docket No. AB-290 (Sub-No. 274X) 216705
Yadkin Railroad Company –
Petition for Exemption – Discontinuance of Service and Operating Rights Under Lease –
Between Halls Ferry, NC and Badin, NC in Stanly County, NC [Re-styled];

Docket No. AB-149 (Sub-No. 2) 216706
Winston-Salem Southbound Railroad Company –
Petition for Exemption – Discontinuance of Service and Operating Rights Under Lease –
Between Whitney, NC and Badin, NC in Stanly County, NC [Re-styled]

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REPLY AND PROTEST OF ALCOA INC.
IN OPPOSITION TO PETITION FOR EXEMPTION

I. Introduction and Summary

Alcoa Inc. ("Alcoa") hereby replies to the amended combined Petitions for Exemption ("Petition") filed by Norfolk Southern Railway Company ("NS") on behalf of itself, Winston-Salem Southbound Railway Company ("WSSB"), and Yadkin Railroad Company ("YRC") (collectively, "NS"¹ or "Petitioners") in these proceedings on April 25, 2006. Petitioners seek to discontinue service on 11.11 miles of rail line owned by and leased from Alcoa between Halls Ferry Junction and Badin in Stanly County, North Carolina ("the Line"). Alcoa, the only identified shipper on the Line (and also owner of the Badin Works facilities), vigorously opposes

¹ The Line is leased by WSSB, which is 50 percent-owned by NS. Petition at 10, 14 n.12. WSSB authorized NS to file the Petition for Exemption and YRC is wholly owned by NS. Petition at 6, 7 n.2. Therefore, NS controls or speaks for Petitioners in this proceeding. Alcoa thus frequently refers herein to Petitioners jointly and interchangeably as "NS," just as NS has done. Petition at 8 n.4.

the Petition and respectfully requests that it be denied as in violation of the Interstate Commerce Act, procedures of the STB applicable to abandonments and discontinuances, and longstanding ICC and STB policies. The Board should deny the Petition because:

- (1) Alcoa is currently shipping over the Line;²
- (2) NS asks the Board to void or modify pre-1940 leases governing Petitioners' rights over Alcoa's track through this proceeding, a matter which is both outside of the Board's jurisdiction and contrary to longstanding policy;
- (3) Costs claimed by NS are incurred either under agreed-upon contracts between NS and Alcoa (and for the most part not incurred pursuant to tariffs over which the Board exercises jurisdiction), or under tariff, and under either scenario NS has made no showing of being unable to raise rates if necessary to make rail service profitable at the end of the termination dates of the current contracts, whether or not it is profitable today. Moreover, Mr. O'Connor's Verified Statement shows that the traffic to and from Badin is profitable;
- (4) NS has failed to maintain the Line despite its admitted contractual obligation under applicable leases and its duty as a common carrier,³ and therefore it impermissibly relies in part on these largely past-due maintenance costs in attempted justification of discontinuance of service;⁴
- (5) Resolution of the complex facts at issue, as demonstrated by NS's Petition, requires formal discovery not generally provided for in exemption proceedings; and

² Petition at 15; *compare* 49 C.F.R. § 1152.50(b) (providing that an exemption is proper if no traffic has moved over the Line in the last two years).

³ Petition at 14 (discussing maintenance obligations under lease agreements; *id.* at 14 n.13, describing "the currently required rehabilitation or maintenance of the Line"); and *id.* at 28 (describing common carrier status).

⁴ Petition at 88 (discussing poor track conditions on Halls Ferry-Whitney segment of the Line due to lack of timbering and surfacing work over 16-year period); *id.* at 43, describing lack of maintenance over Whitney-Badin segment of the Line.

(6) NS appears to be abusing the exemption procedure to avoid the applicable Section 1152⁵ formal abandonment and discontinuance procedures to deprive Alcoa (a) of an adequate opportunity to participate, (b) of discovery, and (c) of a reasonable opportunity to show that the Line in question should not be taken out of service.

II. Background and National Importance of Operations on the Line

Badin is located on the Yadkin River in northeastern Stanly County, in the south central section of North Carolina. Badin is an incorporated community with a population of approximately 1800. Alcoa began producing aluminum in Badin, at its Badin Works facilities, in August 1916 after purchasing the holdings of a French entity which had started work on a smelter. Badin Works (or "the Plant") is located on approximately 123 acres of land and consists of two "potlines," an electrode plant which produces anodes and cathodes, casting facilities, a machine shop and various offices and utility buildings.

The Badin Works smelter operations produce primary aluminum by an electrolytic process developed by Charles Martin Hall in 1886. During normal production, approximately 70% of the metal produced at the Plant is shipped in either molten form or in special forms including coils, particle or high purity, directly to customers or other business units for further processing. The remainder of the metal is shipped in ingot form to the metal market. During almost eight decades, the Plant imported by rail annually thousands of tons of alumina and aluminum fluoride weekly, and also exported by rail cast molten aluminum. The smelter operations continued until the current curtailment began in August of 2002.⁶

⁵ 49 C.F.R. Part 1152.

⁶ Verified Statement of Mark A. Stiffler at 2.

Integral to the smelter process was the Plant's anode operations, which continued beyond the curtailment of the smelter process to late 2004.⁷ Anodes are material to the smelter operations because without them the electrolyte part of the smelter process would not work. The Plant imported tons of coal tar pitch, coke, and fluid coke on a weekly basis by rail in order to make the anodes needed for the smelter operations.⁸

In addition to the smelter and anode operations, the Plant also produces high-purity 99.99% pure aluminum at Badin Works.⁹ The Plant has done so since the 1960s and continues to do so today. The high-purity process requires the Plant to import by rail aluminum, melt it down, purify it, and then solidify it once more. The Plant must import these metals from smelters in Canada and Northern New York. Rail service is also used to transport some of the high-purity aluminum out of the Plant. The high-purity aluminum is sold internally to Alcoa's Rockdale and Davenport facilities and to third-parties in Europe and Japan for manufacturing items such as paints, pigments, and memory disks and for aircraft applications. The products of those operations are sold to defense contractors and aerospace manufacturers, such as Airbus and Boeing.¹⁰

For most if not all of at least the recent decades of rail service, Alcoa (which NS describes as a "large and valued customer" of NS, Petition at 9 n.5)¹¹ and NS, as well as Alcoa and CSX, have agreed upon the terms and conditions of rail transportation to Badin Works without resort to the Board or its predecessor the Interstate Commerce Commission for

⁷ Verified Statement of Z. Thomas Gibson, Jr. at 1.

⁸ *Id.*

⁹ Verified Statement of Mark A. Stiffler at 1; Verified Statement of Z. Thomas Gibson, Jr. at 1.

¹⁰ Verified Statement of Mark A. Stiffler at 1; Verified Statement of Z. Thomas Gibson, Jr. at 2.

¹¹ NS's statement at 9 n.5 of the Petition appears to recognize the historically positive relationship between Alcoa and NS, and the revenues earned by NS through servicing Alcoa as a "large and valued customer." In fact, "[t]hroughout the many years of smelting operations at the Plant, Norfolk Southern benefited greatly from the high volumes of operations there, reflected in a lease between Alcoa and Norfolk Southern's predecessor entered into in 1916. . ." Verified Statement of Mark A. Stiffler at 2.

regulatory relief. Therefore, most rail service is provided under contracts that NS or CSX or other railroads have willingly entered into, and which the STB has said, over and over again, are not within the jurisdiction of the STB.¹²

NS has derived considerable economic benefit from Alcoa's business associated with Badin Works for many years, until smelting operations there were curtailed.¹³ It is now a fact that shipments have been reduced over the Line (but not eliminated, as the Petition concedes) due to global economic circumstances that have rendered the Badin smelter at least temporarily uneconomic to operate as a smelter. As a result, NS's revenues from Alcoa's operations at Badin have necessarily been reduced, along with NS's costs.¹⁴ Despite reduction in traffic levels, Alcoa continues to rely upon rail service to and from the Plant so it can ensure that high-purity metal operations continue and that it can resume smelter operations when it needs to in the future.

Alcoa is the only shipper on the Line at issue.¹⁵ As described above, NS does not own the Line; Alcoa does.¹⁶

III. Grounds for Protest of Exemption or Discontinuance of Service

A. Alcoa Is Currently Shipping over the Line.

¹² E.g., "The Board only has jurisdiction over a railroad's common carriage rates, not rates governed by a rail transportation contract negotiated by the shipper and railroad. 49 U.S.C. 10709." Ex Parte No. 661, Rail Fuel Surcharges (STB served March 14, 2006).

¹³ Verified Statement of Mark A. Stiffler at 2.

¹⁴ See, e.g. Verified Statement of Tom O'Connor at 14 ("The NS analysis of the cost of operation is clearly overstated in light of the volume data submitted by NS. It definitely does not require over 250 crews or service three times per week to move less than 217 cars. Service costs were clearly overstated by NS."); *id.* at 15 ("Moreover interviews with Alcoa staff based at Badin indicate that the NS crew "outlaws," or exceeds the hours of service limitations on daily work several times per month. This indicates that extensive service is provided by that NS crew on behalf of other customers. The on and off branch costs should be allocated accordingly.")

¹⁵ Petition at 12.

¹⁶ Petition at 10. Under STB procedures, in a determination whether to permit abandonment or discontinuance, the STB considers "opportunity costs" incurred due to the fact that keeping a line in rail service obviously prevents would-be buyers of the real estate from using the real property on which the Line is located to justify abandonment or discontinuance. 49 C.F.R. § 1152.32(p). Accordingly, NS incurs no "opportunity costs" by having to keep the Line in service rather than allow the underlying real estate to be sold for a more valuable use.

NS concedes that Alcoa traffic continues to move over the Line, stating that it carried 112 carloads of Alcoa traffic over the Line in the specified Base Year.¹⁷ During that period, NS states that it also moved 173 cars of CSX haulage traffic over the Whitney-Badin segment.¹⁸ NSR does not assert that traffic has ceased or will cease on the Line. While traffic levels have slowed, Alcoa continues to require the use of the Line to transport crucial commodities.¹⁹ There have been shipments over the Line in 2006 and Alcoa currently plans to continue to ship over the Line.²⁰

As demonstrated by the continued shipments on the Line, the present proceeding stands in contrast to the majority of exemption proceedings before the Board where the line at issue has had no traffic for at least two years. In these proceedings, the STB exempts rail carriers from the formal abandonment and discontinuance procedures required by 49 U.S.C. § 10903 through its general exemption authority under 49 U.S.C. § 10502. The Board thus promulgated regulations specifying that a proposed abandonment or discontinuance will be exempt from the formal abandonment procedures if a "carrier certifies that no local traffic has moved over the line for at least 2 years and any overhead traffic on the line can be rerouted over other lines . . ."²¹ As stated above and shown in the Verified Statements of Mr. Stiffler, Mr. Gibson and Mr. O'Connor, there has been regular traffic over the Line in the past two years, and therefore the Petition should be denied for that reason alone.

The STB has granted exemptions from its abandonment and discontinuance proceedings where traffic had not ceased entirely for over two years in relatively noncomplex cases involving carriers abandoning their own lines. The Board has not, however, granted an exemption to

¹⁷ Petition at 16.

¹⁸ *Id.*

¹⁹ Verified Statement of Mark A. Stiffler at 1; Verified Statement of Z. Thomas Gibson, Jr. at 2.

²⁰ Verified Statement of Mark A. Stiffler at 2.

²¹ 49 C.F.R. § 1152.50(b).

discontinue service over an active line that a carrier leases under an agreement which apportions maintenance responsibilities, and that the carrier knows will be subject to protest—let alone a leased line with active traffic with multiple carriers. To the contrary, the Board has denied petitions for exemption where traffic continues to move on the line, the carrier knows that (because of this active traffic or even potential for active traffic) its petition will likely be protested or alleged facts or costs are in dispute, as in the current proceeding.²² The fact that traffic continues on the Line, especially when coupled with the other issues detailed herein, demonstrates that this is not a suitable circumstance for discontinuance of service, nor is it suitable for an exemption from the formal discontinuance proceedings.

B. Petitioners Seek to Have the Board Void or Modify Private Contracts Outside of the Board's Jurisdiction and in Disregard of Longstanding ICC and STB Policy.

By requesting that the Board grant Petitioners an exemption to discontinue service over the Line, NS in effect asks the Board to void or modify the lease agreements between Alcoa, YRC, and WSSB.²³ The leases remain in effect, of course, because it is necessary for NS to serve Badin Works. For Petitioners to terminate the leases, 60 days' notice of the date of termination is required, and no current notice of termination has been received by Alcoa. Accordingly, Petitioners have not sought to terminate the lease agreements outside of this proceeding.²⁴ Were Petitioners to do so without having performed the necessary ordinary maintenance on the Line they might well be subject to a breach-of-contract action against NS for

²² See, e.g., *Wyoming and Colorado RR Co.—Abandonment Exemption—In Carbon County, WY*, STB Docket No. AB-307X (served Nov. 9, 2004), at 4; *The Burlington Northern and Santa Fe Railway Co.—Abandonment of Chicago Area Trackage in Cook County, IL*, STB Docket No. AB-6 (Sub-No. 382X) (served Sept. 17, 1999), at 5-6.

²³ Petition at 26 n.27 ("The Segments were private lines when leased and will become private lines again when the leases are terminated and Petitioners' operations over them are discontinued.").

²⁴ Although NS purported to give Alcoa notice in 2004 that it would terminate the leases after the required 60-day period, it later notified Alcoa that it would have to postpone termination of the leases to a later date in 2004. Thereafter, and until the present time, NS has continued to provide service to the Plant, thereby obviously demonstrating that it has never actually terminated the leases or even given effective notice of any intent to do so.

failure to perform necessary maintenance.²⁵ Although, as we will show, the Board has no jurisdiction over the leases between Alcoa and NS, the Board certainly has authority over Petitioners, as common carriers, to determine if they carried out their past obligations to perform necessary maintenance for continued operations.²⁶ In any event, Petitioners *must* exercise their option to terminate the leases *before* seeking any needed authority for discontinuance, or an exemption thereof, from the Board.

The apparent reason that NS would proceed in this reversed order is to garner an affirmative defense to a potential future claim that NS did not maintain the Line as required by the lease agreements and is thus liable to Alcoa for partial breach of the agreements.²⁷ To have a federal administrative agency permit discontinuance over the Line would allow NS to claim in civil litigation that, by order of the federal government, it need not comply with the provisions of the leases governing its operations over and maintenance of the Line. Presumably, NS believes that a discontinuance would provide a defense to any claim that NS partially breached the leases, as is clearly established herein. However, the STB cannot be used as a shield²⁸ by NS because STB policy prohibits the requested action.

²⁵ *Railroad Ventures, Inc.—Abandonment Exemption—Between Youngstown, OH, And Darlington, PA, in Mahoning and Columbiana Counties, OH, and Beaver County, PA*, STB Docket No. AB-556 (Sub-No. 2X) (served Dec. 13, 2004) (finding that a rail carrier “did not perform maintenance on the line or provide service, notwithstanding its common carrier obligation to do so.”).

²⁶ In other words, NS failed to do maintenance on the Line for a substantial period of years, and now seeks to use the lack of maintenance on the Line as a basis for discontinuance. That is improper; the Board should not countenance a carrier's failure to comply with FRA track standards and lease obligations to perform necessary maintenance as a basis for being relieved of its obligations. To permit that would be akin to permitting the child who kills his or her parents to plead for the mercy of the court as an orphan.

²⁷ Were NS to now give notice to Alcoa that it will terminate the leases, that might trigger an action in North Carolina to determine if NS may do so without performing the maintenance it is required to perform under the leases. In that action, NS could be found to be in breach of contract, and therefore be unable to extricate itself from the leases until and unless it performs the necessary maintenance that, by NS's own admission, it has not performed to date. Petition at 21 (stating that Halls Ferry-Whitney Segment “requires immediate rehabilitation to FRA Class I standards”). In contrast, NS admits that the Whitney-Badin Segment needs no extraordinary rehabilitation in the Forecast Year. Petition at 22 n.23.

²⁸ “Where no overriding Federal interest in interstate commerce exists, the agency will not permit its jurisdiction to be used to shield a railroad from the legitimate processes of state law...” *Tacoma Eastern Ry. Co.—Adverse*

Beginning with its interpretation of *Thompson v. Texas Mexican Ry. Co.*²⁹ in *Delaware & H. R. Corp. Trackage Agreement Modification*,³⁰ the STB's predecessor consistently recognized that it could not "use any of its powers under section 5(2) and 5(9) of the Interstate Commerce Act (later recodified in section 11343 of title 49)³¹ to interfere with a valid contract that was entered into prior to the enactment of the Transportation Act of 1940, before that contract had been lawfully terminated."³² In *Delaware*, the ICC determined that it lacked jurisdiction to entertain an abandonment application because the railroad parties had entered into an agreement in 1898 providing for trackage rights that remained in effect at the time the Delaware & Hudson Railroad Corporation applied for abandonment authority in 1953. Further, the ICC refused to decide on a rental provision in the trackage agreement that would bear on the abandonment decision:

Before any decisive action may be taken it is necessary that the legal effect of the controversial language in the agreement be determined. The interpretation thereof is purely a question of law for the courts and it would be inappropriate in such a proceeding as this for us to express our views for the court's guidance on a purely legal question. We think that we should adhere to our often repeated declaration that we will not undertake to interpret or enforce contracts.³³

In *Delaware*, the ICC created a precedent that is dispositive in these proceedings, as well having established a long-standing policy regarding its reluctance to interfere with private agreements. The holding in *Delaware* requires termination of the lease agreements between

Discontinuance of Operations Application—A Line of City of Tacoma in Pierce, Thurston, and Lewis Counties, WA, STB Docket No. AB-548, at 6 (STB served Nov. 13, 1998).

²⁹ 328 U.S. 134 (1946).

³⁰ 290 I.C.C. 103 (1953).

³¹ Section 11343 of Title 49 of the U.S. Code has since been generally recodified in 49 U.S.C. § 11323. It provides authority to the STB over certain trackage rights, leases and contracts as established by the Interstate Commerce Act, Transportation Act of 1940, and subsequent Acts of Congress.

³² *The Western Stock Show Ass'n—Abandonment Exemption—In Denver, CO*, 1 S.T.B. 113, 134 (1996) (citing to and clarifying the holding of the ICC in *Delaware & H. R. Corp.*).

³³ 290 I.C.C. at 109.

Petitioners and Alcoa before the Board may entertain any request for exemption or discontinuance.

Here, the leases were entered into in 1916, well before the passage of the Transportation Act of 1940. Neither the ICC nor the STB ever approved the lease agreements because the leases predate any ICC authority to do so (Petition at 15 n.17) and the leases remain in force without having been terminated or renewed. These facts alone are sufficient for the Board to determine that it lacks jurisdiction over the leases.

Closer examination of *Delaware* provides yet more evidence of its direct bearing on the present proceeding. As in *Delaware*, the Board's decision to permit discontinuance (which is no different in legal effect for these purposes than is abandonment) here would first involve interpretation of "controversial language" in the agreement. As is clear from the facts as stated both by NS and Alcoa, NS's filing of the Petition follows extended controversy over NS's responsibility for maintenance under the leases, which may have given rise to the Petition.³⁴ If the Board were to entertain the Petition as now drafted, based in part on the leases, the Board would not be able to avoid interpretation of the "ordinary" and "extraordinary" maintenance provisions in the lease agreements, because the provisions therein relate to proper allocation of NS's claimed avoidable costs for rehabilitation, repair, maintenance and operation of the Line.³⁵ Accordingly, if the Board holds that it does not have authority over the leases, it should indicate that NS, in order to extricate itself from its obligation to perform ordinary maintenance under the

³⁴ See, e.g., Petition at 14 n.13, which encapsulates NS's position on continuing disputes regarding maintenance and related operating costs under the lease agreements. Alcoa establishes herein and through the Verified Statement of Mr. O'Connor that NS's claimed avoidable losses from maintenance and operating costs are significantly affected by Petitioners' failure to maintain the line over extended, highly profitable periods and therefore cannot be claimed as current or future costs.

³⁵ NS admits that "the language of the lease requires YRC to perform ordinary maintenance...." Petition at 15 n.13.

leases, should be required to seek declaratory relief from a court as to whether it has performed the maintenance on the Line that is required of it before invoking the STB's processes.

Even if the Board could avoid interpretation of the maintenance provisions in the leases, it would unavoidably engage in interpreting the provisions requiring Petitioners to provide Alcoa with notice of termination of the lease agreements, because Petitioners have not provided proper notice to Alcoa or otherwise sought relief from its obligations under the leases.³⁶ Granting Petitioners' requests for exemption and discontinuance would thus be tantamount to reforming or voiding the termination provision in the leases. NS cannot argue that filing of the Petition provides the requisite notice because the leases specify that Petitioners must serve upon Alcoa, in writing, notice to discontinue service *and* terminate the lease before they may discontinue operation of the Line. Any argument that NS may first be granted exemption and discontinuance authority and then provide notice to Alcoa under the lease agreements ignores the possibility that STB action granting discontinuance may be misconstrued by a court as a *de facto* modification of Petitioners' contractual duty to operate over the Line. The lease agreements state that Petitioners are obligated to operate over the Line, yet an STB decision granting exemption and discontinuance would mean that Petitioners would not be obligated to operate over the Line. Both of these cannot be true at the same time.³⁷ Thus *Delaware*.

Had Petitioners and Alcoa signed the lease agreements after Congress granted the ICC authority over trackage rights and lease agreements, the Board would be free to modify the terms of the leases in such a way that might permit the Board to entertain a petition for exemption and discontinuance at this time. Numerous ICC and STB decisions set forth the Board's ability to

³⁶ Under *Delaware* and *Texas Mexican*, Petitioners are required to notify Alcoa of this intention *before* they may seek to discontinue service on the Line.

³⁷ The same holds true even if the Board were to condition discontinuance authority on the termination of the lease agreements. Even with a completely open-ended timeframe for consummation, the Board's decision to permit discontinuance would deem service over the Line unnecessary, in conflict with terms of the lease agreements.

interpret, modify, or even enforce agreements that it approved by order pursuant to its statutory authority.³⁸ In these decisions, the ICC and STB have consistently recognized the limitation on their authority acknowledged by *Delaware*. Moreover, even where the ICC and STB have refused to apply *Delaware* because the carrier and rail owner entered into an agreement under order after 1940, the ICC and STB have generally invoked their "often repeated declaration that we will not undertake to interpret or enforce contracts."³⁹ Thus, even if the Board were to overrule *Delaware* and exercise jurisdiction in the present case, the Board cannot decide the Petition without engaging in significant interpretation of the contracts between Alcoa and NS. The disputed contractual provisions that the Board must interpret to decide whether to grant or deny the Petition are discussed further herein.

The fact that the agreement in *Delaware* was a trackage rights agreement and the agreements here are leases is immaterial. Courts and the Board have historically discussed leases and trackage rights agreements interchangeably because these contracts provide the same basic function: to provide a carrier access to rail owned by a different entity. Indeed, in the *Texas Mexican* case from which the ICC based its holding in *Delaware*, the Supreme Court recognized the functional congruence of trackage rights agreements and leases, stating that "trackage agreements, like leases of railroads tracks and facilities, are means by which railroad

³⁸ See, e.g., 290 I.C.C. 103 at 111; 1 S.T.B. 113.

³⁹ 290 I.C.C. 103 at 111. See, e.g., *Tacoma Eastern Ry. Co.—Adverse Discontinuance of Operations Application—A Line of City of Tacoma in Pierce, Thurston, and Lewis Counties, WA*, STB Docket No. AB-548 (STB served Mar. 3, 1999), at 10 ("The Board will not undertake to interpret or enforce operating agreements or contracts."); 1 S.T.B. 113, at 46-48 (discussing the Board's desire for negotiated resolution of trackage rights agreement issues "outside of a proceeding before a Federal agency"); *Chicago and North Western Transp'n Co. v. Peoria and Pekin Union Ry. Co.*, 360 I.C.C. 168 (1979) ("Since the matter involves a negotiated contract, however, we stress that we would hesitate to exercise this power [to modify the agreement] unless it is necessary to the fulfillment of our statutory duty. Moreover we would allow a period for a negotiated resolution between the parties if possible."); *Application of the Chicago and North Western Transp'n Co. for Abandonment of the Chicago, Rock Island, and Pacific R.R. Co. Operations between McClelland and Council Bluffs, Iowa*, 354 I.C.C. 205 (1978) ("While we have the power to modify the terms of the trackage rights agreement, we realize that if we were to do so we would be modifying the terms of a contract which was entered into following negotiation and agreement upon the terms in the contract. We hesitate to exercise this power...").

systems have been assembled."⁴⁰ The lease agreements at issue are, in fact, trackage agreements and agreements governing the operations and maintenance of the Line. The leases, having predated Federal authority over trackage rights and leases, thus implicate the *Texas Mexican* and *Delaware* holdings in the same way as the agreements in those cases.

As established above, the Board cannot exercise jurisdiction over the Petition for exemption and discontinuance without running afoul of *Texas Mexican* and *Delaware*. The lease agreements predate 1940 and were entered into before the ICC had authority over the approval of the agreements. Further, there can be no question that the Petition ultimately asks the Board to reform or void provisions in the lease agreements regarding Petitioners' rights and responsibilities over Alcoa's tracks. NS thus requests that the Board act outside of its jurisdiction over exemptions and discontinuances to do "indirectly what [it] may not do directly,"⁴¹ in contradiction of its statutory authority, past decisions, and long-standing policy.

C. The STB Should Ignore Any Claims of Losses on the Lines, Because NS and Other Carriers Either Agreed to the Applicable Rates or Have Great Latitude to Change Their Rates Without Regulatory Interference

Mr. O'Connor's Verified Statement describes the contracts under which NS and its subsidiaries and affiliates haul traffic to and from Badin.⁴² These contracts, covering the majority of traffic that has moved and continues to move on the Line to or from Badin, govern the service provided to Alcoa and the rates for that service. The Board has typically declined to exercise its jurisdiction over contracts where the rate for service has been negotiated by the carrier and shipper.⁴³ In the present instance, NS and Alcoa have negotiated and agreed to a rate

⁴⁰ 328 U.S. 134 at 142-43.

⁴¹ *Tacoma Eastern Ry. Co.*, STB Docket No. AB-548; 1 S.T.B. 113.

⁴² Verified Statement of Tom O'Connor at 9-11.

⁴³ "The Board only has jurisdiction over a railroad's common carriage rates, not rates governed by a rail transportation contract negotiated by the shipper and railroad. 49 U.S.C. 10709." Ex Parte No. 661, Rail Fuel Surcharges (STB served March 14, 2006).

for the majority of traffic moving on the Line and are free to negotiate rates for continued service upon expiration of the contracts.⁴⁴ Mr. O'Connor's Verified Statement indicates that the inbound and outbound NS traffic realizes an average Revenue to Variable Cost Ratio of 167%, which is more than adequate to fully cover NS's costs on the Line, and thus generates a return for NS and the other railroads involved.⁴⁵ NS and the other railroads may not be heard to complain that such rates are unprofitable, and further may address any additional revenue needs they perceive through negotiations with Alcoa upon expiration of the existing contracts. Accordingly, neither NS nor any other Petitioner has "unavoidable" losses.

Further, even if that traffic did not move under preexisting contracts, and for the traffic under tariff, NS could effectively adjust the revenue it receives under tariff from operations over the Line, thus making discontinuance unnecessary and inappropriate. The Board is well-aware of the rate freedom that railroads have under 49 U.S.C. § 10701a(c) to charge "any rate" unless the Board receives a complaint and determines that the rate is unreasonably high and prescribes a maximum reasonable rate. NS has not shown why the exemption procedures are appropriate for a line over which traffic is still moving, as established in the Petition and below, when it operates under negotiated contracts with Alcoa and can otherwise resolve any revenue issues through its freedom to charge "any rate" to Alcoa.

D. Petitioners Have Failed to Perform Ordinary Maintenance on the Line and, Therefore, Cannot Claim these Expenses as Avoidable Costs.

Petitioners operate over the Line under the terms of the leases entered into with Alcoa in 1916.⁴⁶ Under the leases, Petitioners are unambiguously obligated to maintain the Line in a

⁴⁴ Verified Statement of Mark A. Stiffler at 3; Verified Statement of Z. Thomas Gibson, Jr. at 3.

⁴⁵ Verified Statement of Tom O'Connor at 8.

⁴⁶ The lease agreements referred to herein are attached as pages 221-31 of the Petition.

condition suitable for rail shipments. The leases specify that WSSB and YRC are responsible for maintenance of the Line, excepting certain extraordinary maintenance.⁴⁷

With respect to the Halls Ferry Junction to Whitney segment of the Line, YRC is responsible for "ordinary maintenance thereof as may be necessary to keep the track, roadbed and superstructure thereof, as originally built, in such condition as will permit the safe and convenient operation thereof . . ."⁴⁸ With respect to the Whitney to Badin segment of the Line, WSSB and YRC are responsible for "ordinary maintenance thereof as may be necessary, to keep the track, roadbed, and superstructure thereof, or as rehabilitated by the Lessor as hereinafter provided, in such condition as will permit the safe and convenient operation thereof by the Lessees . . ."⁴⁹ Alcoa retained responsibility for "betterments" and "extraordinary maintenance" that might be caused by "ponding of water, landslides, fire, Acts of Providence" or other similar causes.⁵⁰

Petitioners, by their own admission, have not maintained the Line despite their agreement to do so under the leases.⁵¹ According to NS's Director of Strategic Planning, the Halls Ferry Junction to Badin track "is in excepted status and parts of it are operated at speeds below 10 mph."⁵² While NS states that it operates the Line as "excepted status" track, it calculates maintenance and rehabilitation costs based on Class 1 safety standards.⁵³ It is therefore unclear whether NS argues that it should have been maintaining the Line to Class 1 standards, as contemplated by Federal Railroad Administration regulations and the STB's abandonment procedures, or as excepted status track, as NS avers that is the status to which it has been

⁴⁷ Petition at 14, 222-23, 226-27.

⁴⁸ Id. at 222.

⁴⁹ Id. at 227.

⁵⁰ Id. at 222, 227.

⁵¹ See, e.g., Petition at 15 n.13 (admitting that Petitioners have duty to perform ordinary maintenance over the Line); Verified Statement of Z. Thomas Gibson, Jr. at 2.

⁵² Id. at 112.

⁵³ See Verified Statement of Stephen H. Morrell, Petition at 85.

maintaining the track. It is, however, certain that Petitioners are obligated to keep the Line in the condition under which it was leased and fit for "safe" and "convenient" operation under the lease agreements. The operational limit placed on excepted status track⁵⁴ may prevent convenient (*e.g.*, movement over the Line at even 10 mph) operation for NS. Moreover, NS's claim that the Halls Ferry-Whitney segment "requires immediate rehabilitation . . . if it is to remain in service" makes crystal-clear NS's belief that the identified segment of track is now, or soon will be, unsafe for operation.

The Petition evidences that, whether unsafe and inconvenient or otherwise, the current state of the Line is a product of NS's neglect of its duty of ordinary maintenance over an extended period. Mr. O'Connor's Verified Statement details NS's neglect of ordinary maintenance on the Line, providing pictorial examples.⁵⁵ The examples of neglected maintenance shown through Mr. O'Connor's photographs are confirmed by NS's statements in its Petition, including that the last time it performed any timbering or surfacing work on the Halls Ferry-Whitney segment of the Line was in 1989, more than 16 years ago.⁵⁶ As a result, NS admits, "the track has now reached a level of tie deterioration that requires a significant quantity of replacement crossties."⁵⁷ NS has not performed any timbering and surfacing work on the Whitney-Badin segment of the Line since 1983, although it maintains that this section of line "has not deteriorated as in the Halls Ferry to Whitney segment."⁵⁸ NS does not contend that timbering and surfacing work is extraordinary, or even that it is only a "rehabilitation" cost. To the contrary, NS includes timbering and surfacing work as a cost of scheduled "program work"

⁵⁴ See 49 C.F.R. § 213.4(d)(1).

⁵⁵ Verified Statement of Tom O'Connor at 31-38.

⁵⁶ Verified Statement of Stephen H. Morrell, Petition at 87 and 88. Mr. O'Connor's Verified Statement demonstrates that most or all of the ties on the Line require replacement and that what was lacking here was ordinary maintenance, not extraordinary maintenance affecting only a portion of the Line.

⁵⁷ Verified Statement of Stephen H. Morrell, Petition at 87.

⁵⁸ *Id.*

maintenance and establishes regular intervals for this work to be performed over the next ten years.⁵⁹

Under the cycle established for timbering and surfacing in NS's maintenance schedule (which NS uses to establish its avoidable costs over the next ten years), NS would perform timbering and surfacing work at least three times in eight years for the Halls Ferry Junction-Whitney segment and three times in ten years for the Whitney-Badin segment. Had NS previously maintained the line in accordance with this maintenance cycle, NS should have performed timbering and surfacing work on the Halls Ferry Junction-Whitney segment six times in the 16-year period that it admits it did no maintenance at all. Under its schedule for the Whitney-Badin segment, NS should have performed timbering and surfacing work at least seven times in the 22-year period that it admits it did no maintenance.

Alcoa does not endorse NS's proposed maintenance cycle for timbering and surfacing, but recognizes that NS attributes substantial costs to current and future timbering and surfacing work that should, by NS's judgment, be performed on a regular schedule. Had NS fulfilled its duty to perform maintenance under the lease agreements, NS's current and future cost calculations for both rehabilitation and maintenance would be significantly lower. There can be no doubt that neglected maintenance means more expensive maintenance in the future. As NS demonstrates, neglected maintenance has brought about the need for a significant "rehabilitation" of the Halls Ferry Junction-Whitney segment of the line. These "rehabilitation" and maintenance costs would be significantly reduced had NS not breached its duty of ordinary maintenance under the lease agreements.⁶⁰

⁵⁹ Id. at 90.

⁶⁰ Mr. O'Connor concludes in his Verified Statement, at 30, that had NS fulfilled its obligation of ordinary maintenance, its current maintenance and rehabilitation costs would be significantly less.

Neither the STB nor any court or other tribunal has determined that the current poor condition of the Line (which NS admits implicitly by referring to maintenance issues associated with the Line) is due to anything but the failure of NS to perform ordinary maintenance on the Line. Nor has NS established that any of the maintenance described within the Petition is needed as a result of Acts of God,⁶¹ landslides, fire, or other similar causes, as required by the leases. It is highly inappropriate for NS to implicitly criticize Alcoa for refusing to pay for maintenance of the Line "regardless of whether or not the maintenance may be characterized as extraordinary."⁶² NS cannot expect Alcoa to perform maintenance that NS is obligated to perform under a binding contract, or to absorb the costs of maintenance that was clearly NS's responsibility.

Under the law of contract as it applies to the lease agreements, maintenance is presumed to be ordinary maintenance unless NS shows that it is extraordinary maintenance as contemplated by the lease agreements; that is why it is called "extraordinary."⁶³ Further, Petitioners have a duty to maintain the Line as common carriers⁶⁴ providing service over the Line.⁶⁵ Maintenance of the Line is therefore the responsibility of NS unless it can demonstrate otherwise. NS cannot do so in these proceedings, because it argues that "the characterization of

⁶¹ Referencing the Verified Statement of Stephen H. Morrell, NS states that: "Mr. Morrell also indicates that in numerous places, cuts were made through hills when the Halls Ferry-Whitney Segment of the Line was constructed. This leads to poor drainage, adversely affecting soil stability and tie condition. It is reasonable to conclude the parties which entered into the 1916 leases providing that the lessor, which had built the Line, would fund extraordinary maintenance related to 'ponding of water' understood from the beginning that this would be a greater than normal maintenance problem." Petition at 34. Mr. Morrell's testimony states only that "cuts were made through hills which has led to poor drainage" and that this is a factor affecting the track geometry. Verified Statement of Stephen H. Morrell, Petition at 87. Mr. Morrell provides no indication as to whether poor drainage led to ponding, and if it did, the degree to which any ponding may have affected track geometry on the Line and where (and in how many locations) track on the Halls Ferry Junction-Whitney segment may have been affected.

⁶² Petition at 14 n.13.

⁶³ *Spodek v. Postmaster General*, 43 Fed. Appx. 390 (Fed. Cir. 2002) (presumption of ordinary maintenance in accordance with a lease, absent evidence from the party failing to perform such maintenance that it was beyond the ordinary maintenance required by the lease).

⁶⁴ See Petition at 28.

⁶⁵ See, e.g. *Railroad Ventures, Inc.—Abandonment Exemption—Between Youngstown, OH, And Darlington, PA, in Mahoning and Columbiana Counties, OH, And Beaver County, PA*, STB Docket No. AB-556 (Sub-No. 2X) (STB served Dec. 13, 2004) (finding that a carrier "did not perform maintenance on the line or provide service, notwithstanding its common carrier obligation to do so.")

the rehabilitation of the Halls Ferry-Whitney Segment, in whole or in part, is not an issue under the circumstances."⁶⁶ NS is therefore "hoist by its own petard;" and it cannot ask the STB to make a finding about a matter which NS claims is not an issue herein. Accordingly, the maintenance described in the Petition must be assumed to be "ordinary" maintenance.

Having neglected its ordinary maintenance obligation in breach of the leases, as established above, NS cannot now rely on these neglected expenses that should have been incurred in the past to excuse its current and future obligation to service the Line. To allow this would be to sanction NS's breach of its lease agreements with Alcoa and in effect reward NS for its failure to perform necessary maintenance on the Line. NS has not adequately maintained the Line, so it could not possibly use maintenance or rehabilitation costs as a reason for needing to discontinue service. Rather, as explained herein, it is the reverse: NS appears to be using the exemption process to have the Board inadvertently create a *defense* to any effort by Alcoa to enforce the leases between Alcoa and NS which requires that the Line be adequately maintained.

E. Resolution of the Complex Facts at Issue Requires Discovery.

In a more formal discontinuance-of-service proceeding, Alcoa would be entitled to discovery. Discovery would likely be informative in that it would demonstrate that NS is well-aware of its responsibility to maintain the Line and its failure to do so adequately. Discovery may also provide conclusive evidence that NS chose to rely on this effort to seek an exemption from more formal discontinuance-of-service procedures to avoid detection of its failure to maintain the Line and its strategy for avoiding STB scrutiny of that failure. Further, discovery would aid in the resolution of fundamental disputed facts such as the on-branch costs that NS claims in its Petition.⁶⁷ Discovery would also provide a better understanding of the additional

⁶⁶ Petition at 14 n.13.

⁶⁷ Mr. O'Connor summarizes NS's overstatement of on-branch costs in his Verified Statement at 6-7.

financial burden Alcoa would incur if shipments to and from Badin had to be made via truck or transloading.⁶⁸

The complexity of the facts at issue make an exemption proceeding particularly susceptible to the masking of issues, such as overstatement of costs or inadequate maintenance of the Line in breach of the lease agreements, and resulting impermissible allocation of costs associated with that maintenance. The complexity of the facts at issue, as NS notes, stem in part from the long-term shipping relationship involving numerous contractual and other arrangements between NS and Alcoa. Despite its Petition requesting an informal exemption proceeding, NS is aware of the complexity of this proceeding, and states in its Petition that "[t]his case has the additional complication that all material past facts may not be known because of the duration of the lease."⁶⁹ This, of course, makes discovery all the more important because the Board should be aware of all material facts to the extent they may be discoverable.

Even if discovery did not produce documents or other information from NS clearly admitting what is alleged herein, a formal proceeding would allow Alcoa a more appropriate opportunity to present analysis of NS's alleged avoidable costs and demonstrate that the condition of the Line is not adequate. NS has conceded this inadequacy in the Petition but has not provided material evidence explaining why it has neglected the Line over the past two decades despite its obligation to maintain the Line. Thus, the Board is lacking material information necessary to its decision. Courts have recognized that exemptions are to be made "only in a limited class of cases where the transaction is small or the shippers are protected."⁷⁰ Alcoa believes that the facts as known to Alcoa put the present case outside of this limited class

⁶⁸ Mr. O'Connor's Verified Statement indicates that, according to interviews with Alcoa employees, transloading rail shipments from rail to truck would cause a burden of approximately \$400,000 annually for Alcoa. Verified Statement of Tom O'Connor at 17.

⁶⁹ Petition at 25 n.27.

⁷⁰ *Redden v. ICC*, 956 F.2d 302 (D.C. Cir. 1992).

of cases and that discovery would further demonstrate that NS should not be allowed to discontinue service on the Line.

F. Use of Exemption Procedures to Avoid Formal Proceeding and Litigation.

Despite presenting *pro forma* claims of losses, NS logically has also failed to prove that it is losing money on the Line to the Plant. It does not follow logically that NS, which does not own the Line and has not been expending money to maintain the Line, would find its profitable service to Alcoa plummet into a state of continuing losses. NS has shown that traffic has declined, but has provided nothing that would explain why its operating costs have increased as compared to its revenues from movements on the Line. As Mr. O'Connor's Verified Statement shows, NS has miscalculated its costs. It also may be relying upon costs associated with late-performed ordinary maintenance to allege unavoidable losses.

If NS is in fact losing money, it has nevertheless failed to show why a temporary reduction in traffic, after years of presumably highly profitable traffic, justifies discontinuance of service by the only railroad serving the plant, particularly in an exemption proceeding.⁷¹ Despite NS's current claims of losses, standard URCS analysis shows that the traffic is profitable and "calls into serious question the basis for the NS [P]etition requesting service discontinuance, particularly one based on an exemption."⁷² It is simply illogical, if NS neither owns the Line nor

⁷¹ Although NS claims to have *pro forma* losses associated with the Line in its Verified Statements and elsewhere in the Petition, the claims are implausible, because NS neither owns the Line, nor has it been doing the necessary maintenance on the Line by its own admission. It moved 88 carloads of freight over the Line in 2005, so the notion that the losses on the Line were \$250,000 or more is highly implausible, especially because the transportation provided by NS to Alcoa is under contract. To illustrate, NS claims less than \$10,000 in revenue for those 88 carloads; it defies reason that NS could incur losses of \$250,000 or more on those 88 carloads. There is clearly something highly implausible or incorrect with NS's calculations or methodology. Moreover, to the extent NS is providing haulage service to CSX, as the Petition explains, NS and CSX must have agreed to the fee paid to NS for that haulage, and again it seems highly implausible that NS would have agreed to haulage at a great loss. The law has long been that the *division* of revenues between rail carriers on a movement is not considered to be the shipper's business; therefore, the rail carriers should not have any basis for claiming at the STB that their *division* of revenue on a movement is insufficient. Even if it were, that would be a matter of NS's own doing.

⁷² Verified Statement of Tom O'Connor at 8.

has maintained it, that NS should have *any* losses on the Line. In fact, by operating over the Line without performing ordinary maintenance over an extended period, NS has, in effect, created a windfall for itself. Stated otherwise, it is not clear why discontinuing service to the Plant will save NS any money whatsoever, as compared to its costs today. If NS operates over the Line, it has expenses associated with it, and revenues; if it does not operate over it, it should not have any significant expenses associated with the Line. Thus, Alcoa can only conclude that NS requests discontinuance authority under the exemption process to avoid disclosing material facts through discovery that would be detrimental to its position. Therefore, and as explained above, NS appears to be attempting to misuse the STB as a shield from potential private litigation.

Alcoa's concern that NS may be using the exemption process as a shield is not simply a product of NS's filing of the Petition. When Alcoa raised the issue of NS's failure to maintain the Line as required by the leases, communications between NS and Alcoa about this matter largely ended. In December 2004, for example, the undersigned left a voice-mail message with counsel for NS who signed the Petition, Mr. Paschall, asking him to call the undersigned to discuss issues concerning potential discontinuance-of-service proceedings at the STB and a potential dispute between the two Companies under the leases for the Line, but NS never returned the undersigned's call.⁷³ The next communication from NS to the undersigned concerning rail service to Alcoa's Badin Works was the service of the Petition.⁷⁴

⁷³ The reference in text is to a call in December 2004 from the undersigned, and in-house counsel for Alcoa (Mr. Katila), to inform NS counsel that Mr. Katila would be retiring at the end of 2004 and that both the undersigned and Mr. Katila would appreciate a status report on NS's previously stated intention to "abandon" the Line. NS counsel never returned that call. There was an earlier call, in approximately August 2004, between the undersigned, Mr. Katila, and NS counsel, in which this matter was discussed. NS counsel was quite cordial and professional in the earlier call, as he has always been in dealings with the undersigned, from which we can only infer that NS would not allow its counsel to give Alcoa or the undersigned any information about the timing, proposed procedure, or the substance of NS's efforts to abandon or discontinue service on the Line. Such a conclusion is consistent with the assertion herein that NS is attempting to use the exemption process to avoid the more formal processes of the Board, given that it knew that Alcoa had already retained outside counsel to advise it concerning this issue (see NS's Certificate of Service, stating that it was providing service to the undersigned), and knowing that Alcoa's rights in

NS recites the fact that it has not received a definitive statement from Alcoa about the status of the Badin Works.⁷⁵ However, NS did not provide advance notice to the undersigned of the filing of its Petition herein, and to the best of the knowledge of the undersigned, did not so notify Alcoa.⁷⁶ This late notice is contrary to the STB policy currently at issue in Ex Parte No. 647, where the STB proposes to require that shippers be given at least 40 days' notice of petitions to exempt lines of Class II and Class III railroads from more detailed regulatory scrutiny.⁷⁷ The Line in question here, being one leased to or operated by either YRC or WSSB, appears to fall under that proposal. NS's Petition thus appears to be contrary to the current intention of the STB to provide *prior notice* to shippers of efforts to abandon lines or discontinue service by utterly failing to provide notice to the undersigned or to Alcoa of NS's intentions before filing the Petition.

It would appear that NS is attempting to "game the system" to obtain an expedited decision from the Board authorizing the exemption for leverage in any negotiations with Alcoa about incurring maintenance costs for the Line, or as a defense in any court action that may be brought to require NS to abide by its obligations under the leases to maintain the Line adequately.

this matter (including discovery and an adequate time to prepare, secure witnesses and relevant evidence, and prepare legal argument) could only be provided in a more formal proceeding. NS should not be allowed to prevail through ambush.

⁷⁴ NS recites in the Petition, at 18 n.16, communications between NS and Mr. Robert G. Uffelman of Alcoa about Alcoa's operations at the Plant. Mr. Uffelman was away on medical leave at that time, and is now retired, which may explain why NS did not hear further from him, despite the implied suggestion in note 16 that Mr. Uffelman did not respond to NS's desire for further information about the status of the Badin Works.

⁷⁵ Petition at 18 n.16.

⁷⁶ Compare Ex Parte No. 647, *Class Exemption for Expedited Abandonment Procedure for Class II and Class III Railroads* (served January 19, 2006) at 20.

⁷⁷ Id.

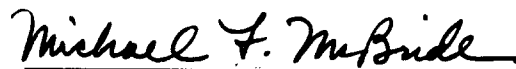
IV. Relief Requested in Protest of Combined Amended Petition for Exemption

NS is not entitled to discontinue service over the Line, nor be granted an exemption from the formal process to do so, because there is ongoing traffic on the Line, Alcoa continues to need rail service on the Line, and NS is in violation of its obligations under the leases to maintain the Line. The Board may need to permit Alcoa to have discovery from NS to make a proper factual determination in the circumstances. Accordingly, Alcoa hereby requests that the Petition for Exemption be denied without prejudice to NS being allowed to file a formal petition for discontinuance of service on the Line under the more formal procedures of the STB, with an adequate opportunity for discovery permitted to Alcoa and any other interested parties.

V. Conclusion

Accordingly, Alcoa hereby requests that the STB deny Petitioners' amended combined Petition for Exemption without prejudice to NS being allowed to seek discontinuance of service through more formal means.

Respectfully submitted,



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Attorneys for Alcoa Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have served, this 5th day of June, 2006, the foregoing pleading, by First-Class mail, postage prepaid, on James R. Paschall, Esq., Senior General Attorney, Norfolk Southern Railway Company, Three Commercial Place, Norfolk, VA 23510.

Michael F. McBride
Michael F. McBride

1

VERIFIED STATEMENT OF MARK A. STIFFLER

My name is Mark A. Stiffler. I am the Manager of Alcoa Inc.'s Asset Planning and Management Group and I have held that position since the Group was formed two years ago. Since September of 2005, our Group has become responsible for the Badin Works Plant in Badin, North Carolina (the "Plant"). As part of those responsibilities, we determined how the Plant will operate today and maintain the facility for future potential restart.

The Plant is currently operating a one-of-a-kind operation called R-214 process which produces high-purity metal. It is the only plant of its kind within Alcoa and has produced high-purity metal since Alcoa developed the process in the 1950s.

The high-purity metal is used by Alcoa internally and externally for sale to third parties. Among other uses, this high-purity metal is an essential component in critical aerospace industry parts that are fabricated at Alcoa's Davenport, IA facility. Davenport products are used by defense contractors and aerospace manufacturers, such as Airbus and Boeing. Given the importance of this high-purity metal, Alcoa has continued and at the present time, plans to continue manufacture high-purity metal at the Plant.

Rail service is critical to the Plant's operation. Without it, Alcoa cannot operate its R-214 process economically, because trucking heavy loads of bulk material necessary for the manufacturing process is far more expensive. Further, Alcoa receives shipments of these necessary materials for the Plant under a negotiated contract with Norfolk Southern Railway Company.

In addition to continuing its high-purity metal operations at the Plant, Alcoa currently maintains the Plant at a condition in which it can restart its smelter operations. Smelter operations may resume at the Plant, based on market conditions for aluminum and power in the

United States. Smelting operations occurred at the Plant for many years, until market conditions required suspension of those activities at the Plant in 2002. Throughout the many years of smelting operations at the Plant, Norfolk Southern benefited greatly from the high volumes of operations there, reflected in a lease between Alcoa and Norfolk Southern's predecessor entered into in 1916 to provide rail service to the Plant over land owned by Alcoa (and still owned by Alcoa).

Rail service is also critical to the Plant's smelter operations. All alumina and most of the carbon products for that process are imported by rail and a healthy percentage of the aluminum that the plant produces is exported by rail. Given the hundreds of thousands of tons of materials that have been and would be shipped in and out of the Plant annually, it is impossible to run the smelter operations utilizing trucking service alone. In sum, Alcoa needs rail service to and from the Plant so it can ensure that its high-purity metal operations continue and that it can resume smelter operations if it needs to in the future.

Mr. Thomas O'Connor was retained by Alcoa to present expert testimony on the claims of Norfolk Southern Railway Company about revenues, costs, volumes of rail shipments into and out of the Badin Plant, and the maintenance issues concerning the rail lines into the Badin Plant. Mr. O'Connor's testimony presents the data on the rail shipments into and out of the Badin Plant over the last several years.

I urge the Surface Transportation Board to deny Norfolk Southern's Petition for Exemption so as to require it to continue to serve our Badin Plant, because Alcoa and its customers depend on that rail service and the high-purity aluminum produced at the Badin Plant. Moreover, although smelting operations are now curtailed, Alcoa has not made a final decision whether to resume smelting operations at the Badin Plant. Accordingly, Alcoa depends on the

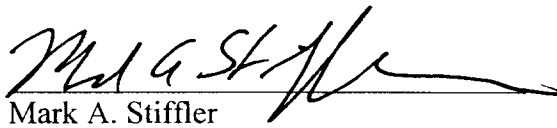
availability of rail service at Badin with respect to any decision whether to resume smelting operations there.

Cost should not be an issue in the STB's determination, because (a) Norfolk Southern does not own the rail lines at issue in this proceeding, Alcoa does, so there should be no capital (or "opportunity") costs to NS associated with those Lines, (b) any maintenance which may be required (and note that NS admits that none is needed in the "Forecast Year" from Whitney to Badin) is required of NS in any event under a lease with Alcoa dating to 1916, under which NS must provide ordinary maintenance, and (c) any claims of operating "losses" are both being rebutted by Mr. O'Connor, and are in any event claims that the STB should not consider. The STB should not consider those claimed losses because the traffic into and out of Badin moves largely by contract rates NS agreed to, and should not be heard now to complain about those contract rates. As for any traffic that moves under tariff, NS, I am advised, has substantial rate freedom, with minimal regulation by the STB, and therefore NS cannot show that those losses are unavoidable.

VERIFICATION

I, Mark A. Stiffler, verify under penalty of perjury that I am the Manager of Alcoa Inc.'s Asset Planning and Management Group, that I have read the foregoing document and know its contents, and that the same is true and correct to the best of my knowledge and belief. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on May 31, 2006


Mark A. Stiffler

2

VERIFIED STATEMENT OF Z. THOMAS GIBSON, JR.

My name is Z. Thomas Gibson, Jr. I am employed by Alcoa Inc. ("Alcoa") at the Badin Works Plant (the "Plant") in North Carolina as the Environmental Health Safety and Public Strategy Manager. I have worked at the Plant from 1974 to 1977 and then again from 1985 to present. During those times, I have occupied various positions, such as Process Engineer, Potroom Superintendent, and Facility Manager which have allowed me to experience all aspects of the Plant's operations, including its need for rail service.

In August 1916, the smelter operations began by producing aluminum through an electrolyte process and continued to do so until the operations were curtailed in August of 2002. During that almost eight-decade time period, the Plant imported by rail thousands of tons of alumina, aluminum fluoride, calcined coke, and petroleum pitch weekly and also exported by rail cast aluminum ingot.

Integral to the smelter process, was the Plant's anode operations which continued beyond the curtailment of the smelter process to late 2004. Anodes are a critical component to the smelter operations because without them the electrolytic smelting process would not work. The Plant imported tons of coal tar pitch, coke, and fluid coke on a weekly basis by rail in order to make the anodes needed for other smelter operations.

In addition to the smelter and anode operations, the Plant also produces high-purity (i.e., 99.99% pure) aluminum. The Plant has done so since the 1960s and continues to do so today. The high-purity process requires the Plant to import by rail aluminum, melt it down, purify it, and then solidify it once more. Alcoa has developed its own process called R-214 to produce 99.99% pure aluminum. In order for the R-214 process to work, only certain quality metals can be used, such as metals with low-impurity levels. Given the uniqueness of the metals needed,

the Plant needs to import these metals from smelters in Canada and Northern New York. Given the distance to the Badin plant, it is more cost-effective to do so by rail service rather than by trucks. Rail service is also used to transport some of the high-purity aluminum out of the Plant.

The high-purity aluminum is sold internally to Alcoa's Rockdale, Texas and Davenport, Iowa facilities and to third parties in Europe and Japan. It is used for manufacturing items such as paints, pigments, memory disks and for aircraft applications, which are sold to defense contractors and aerospace manufacturers, such as Airbus and Boeing.

In violation of their contract with Alcoa, Norfolk Southern Railway Company, Winston-Salem Southbound Railway Company, and Yadkin Railroad Company (collectively, "NS") have done little to maintain the line for the past ten or more years. However, Alcoa has at its own cost, provided an office space for NS personnel management operations and provided NS with storage for NS locomotives at the Plant.

Mr. Thomas O'Connor was retained by Alcoa to present expert testimony on the claims of NS about revenues, costs, volumes of rail shipments into and out of the Badin Plant, and the maintenance issues concerning the rail lines into the Badin Plant. Mr. O'Connor's testimony presents the data on the rail shipments into and out of the Badin Plant over the last several years and his observations about the lack of maintenance on the lines.

The Badin Plant also uses truck deliveries, but cannot depend on truck deliveries alone, because there have been several instances in recent times when, due to the inability to obtain truck transportation because of driver shortages or other factors, rail service was the only option Alcoa had for transportation.

I urge the Surface Transportation Board to deny NS's Petition for Exemption so as to require it to continue to serve our Badin Plant, because Alcoa and its customers depend on that

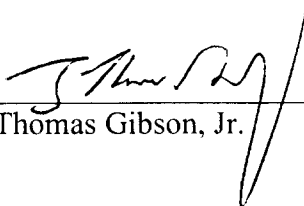
rail service and the high-purity aluminum produced at the Badin Plant. Moreover, although smelting operations are now curtailed, Alcoa has not made a final decision whether to resume smelting operations at the Badin Plant. Accordingly, Alcoa depends on the availability of rail service at Badin with respect to any decision whether to resume smelting operations there.

Cost should not be an issue in the STB's determination, because (a) Norfolk Southern does not own the rail lines at issue in this proceeding, Alcoa does, so there should be no capital (or "opportunity") costs to NS associated with those Lines, (b) any maintenance which may be required (and note that NS admits that none is needed in the "Forecast Year" from Whitney to Badin) is required of NS in any event under a lease with Alcoa dating to 1916, under which NS must provide ordinary maintenance, and (c) any claims of operating "losses" are both being rebutted by Mr. O'Connor, and are in any event claims that the STB should not consider. The STB should not consider those claimed losses because the traffic into and out of Badin moves largely by contract rates NS agreed to, and should not be heard now to complain about those contract rates. As for any traffic that moves under tariff, NS, I am advised, has substantial rate freedom, with minimal regulation by the STB, and therefore NS cannot show that those losses are unavoidable.

VERIFICATION

I, Z. Thomas Gibson, Jr., verify under penalty of perjury that I am the EHS & Public Strategy Manager, that I have read the foregoing document and know its contents, and that the same is true and correct to the best of my knowledge and belief. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on May 31, 2006



Z. Thomas Gibson, Jr.

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Economic and Management Consultants

June 2, 2006

STB Docket No. AB-290 (Sub-No. 254X), (Sub-No. 274X) and STB Docket No. AB-149 (Sub-No. 2)

**UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD**

Docket No. AB-290 (Sub-No. 254X)

Norfolk Southern Railway Company –

Petition for Exemption – Discontinuance of Service –

Between Halls Ferry Junction, NC and Badin, NC in Stanly County, NC;

Docket No. AB-290 (Sub-No. 274X)

Yadkin Railroad Company –

Petition for Exemption – Discontinuance of Service and Operating Rights Under Lease

Between Halls Ferry, NC and Badin, NC in Stanly County, NC [Re-styled];

Docket No. AB-149 (Sub-No.2)

Winston-Salem Southbound Railroad Company –

Petition for Exemption – Discontinuance of Service and Operating Rights Under Lease

Between Whitney, NC and Badin, NC in Stanly County, NC [Re-styled]

SK Analysis of The Norfolk Southern Petition For Exemption

Dated April 24, 2006

Verified Statement of

Tom O'Connor

Vice President

Snavely King Majoros O'Connor & Lee, Inc.

1220 L St NW

Washington DC

June 2, 2006

Verified Statement of Tom O'Connor

1111 14th St N.W. ■ Suite 300 Washington, DC 20005 ■ 202 371-949

I. Introduction

My name is Tom O'Connor. I am Vice President of Snavely King Majoros O'Connor & Lee, Inc. ("Snavely King" or "SK"), an economic and management consulting company which focuses on transportation and utilities. Snavely King was retained by Alcoa, Inc. ("Alcoa") to carry out analyses of the NS, et al. Petition and the 11.1 mile Halls Ferry Junction to Badin, NC line at issue. We will refer to Petitioners as "NS" for convenience. Specifically, Snavely King examined the claims of Norfolk Southern Railway Company as to revenues, costs, volumes of rail shipments to and from the Badin Plant, and the maintenance issues concerning the Halls Ferry Junction to Badin rail lines. Snavely King also reviewed data on the rail shipments to and from the Badin Plant over the last several years. The results of its review are detailed in this statement, which was prepared by Tom O'Connor, Vice President of Snavely King Majoros O'Connor & Lee and presents the results of our analyses.¹

We welcome this Surface Transportation Board (STB or Board) proceeding which provides an opportunity to express our views on the discontinuance requested by the Norfolk Southern Railway (NS).

Snavely King has been in business for more than 36 years, serving transportation clients including railroads, shippers and government agencies, in the United States, Canada and Europe.

This STB proceeding provides much needed discussion and analysis of this premature request for a service discontinuance. Providing rail services is an issue

¹ Appendix A includes a summary of my qualifications.

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of vital concern to railroad shippers and to their customers; many of whom are largely dependent on rail transportation.

The STB has long recognized the serious impact of service discontinuance on rail shippers and the customers and communities they serve. These concerns are well placed. Over the course of my career I have analyzed hundreds of line segments which were being considered for abandonment. Service discontinuance or line abandonment is a far reaching decision, which is often difficult to mitigate or reverse. Thus the burden of proof properly rests with the entity petitioning for abandonment or discontinuance.

In my statement I show that the NS has failed to meet its obligations to provide ordinary maintenance on the Badin line. We also show that significant rail traffic has used the line in past years and now uses the line. The authorizing lease and the long-standing Federal Railroad Administration (FRA) regulations both require adequate maintenance of the line, particularly the line's track structure².

Maintenance of the line's track structure is a key to this case. As the Federal Railroad Administration has reported,³ one third of all railroad accidents are attributable to track defects. Based on FRA's accident/incident statistics for the five-year period of 1996-2000, hundreds of incidents annually were attributed to track as a primary cause.

² See Exhibit, Appendix C to our Report for a summary of FRA safety responsibilities, and Track Safety Standards.

³ Source: US DOT, FRA Railroad Research and Development Program Section 4.4 Track and Structures.

While the track-related accident rate was relatively steady during the 1990's, the reported damage grew significantly, doubling from \$55 million in 1993 to \$111 million in 2000. As the reported damage figures only include direct property damage, the full cost of these accidents is estimated to be about 2 to 3 times higher.

We have found clear evidence of the failure of Norfolk Southern to maintain the line at minimal FRA Track Class I standards (maximum speed 10 miles per hour). As part of our recommendations, we suggest a remedy for this situation based on Norfolk Southern meeting the long standing maintenance obligations of its lease and its obligations to provide safe and reliable service.

II. General Approach

Our approach to this assignment includes examining the structural components of the NS Petition. These structural components are inter-related; all are required to produce accurate and responsive evidence.

We reflect the findings of our structural analysis of the NS petition in my verified statement. We also reflect the findings of the on-site inspection of the Badin line, conducted on May 25 and 26, 2006; as well as our cost and revenue analysis of the line's operation.

A. Assumptions

We begin with the assumptions. We test whether they are reasonable and whether they are over used to the exclusion of reliance on readily available data.

B. Data

We examine the data for completeness, accuracy and lack of bias.

C. Methodology

We examine the methodology for appropriateness of design and implementation as well as for completeness, accuracy and lack of bias. Importantly we have also applied a standard Surface Transportation Board (STB) Uniform Railroad Costing system (URCS) analysis to the shipments at issue. This tests the reasonableness of the methodology applied by NS.

D. Findings

We examine the NS findings to assess whether they are supported by the data and methodology and as to whether they are consistent with the assumptions. Again we look for completeness, accuracy and lack of bias.

E. Conclusions

We examine the NS conclusions to assess whether they are supported by the data and methodology and as to whether they are consistent with the findings

F. Recommendations

We examine both ours and the NS recommendations, to evaluate whether they are consonant with the data and methodology and as to whether they flow logically from the findings and conclusions.

III. Summary and Overview

Following the approach outlined above, I have analyzed the Norfolk Southern Petition filed on April 24, 2006, as received from Counsel on April 25. I found the NS Petition deficient to varying degrees in all of these structural components, from assumptions to recommendations. My overall conclusion is that the NS Petition is

incomplete, flawed by omissions and is of limited value to the finder of fact in this case.

A. NS has Failed to conduct Ordinary Maintenance

One of the fundamental facts is the failure of NS to provide ordinary maintenance on this line, despite its obligation to do so. Another fundamental fact is that traffic, most of it remunerative, is still moving on the line, continuing a pattern that has persisted for decades.

B. The NS cost model is Seriously Flawed

We have examined the model submitted by NS as part of its petition and found a number of defects including:

- ☐ **Overstatement of the on branch car days.** The absence of demurrage revenue in the financial statements of the NS model conflicts with the apparently assumed parameter of 7.5 car days on branch. In fact interviews with Alcoa managers on site at Badin confirmed that minimizing demurrage costs was a standing goal. This was done by limiting cardays on branch to levels well below 7.5 days.
- ☐ **Overstatement of the crew time on branch .** The time ascribed to switching at the Badin plant overstates the time the NS locomotive was operating within the plant perimeter, as recorded in logs maintained by the plant security forces.
- ☐ **Inclusion of locomotive and crew time switching other traffic without recognition of corresponding revenues.** Interviews with Alcoa managers on site at Badin indicated that the locomotive did sufficient work elsewhere beyond Badin that the crew timed out on hours of service limits and the locomotive failed to return to its storage site at Badin. This reportedly occurs several times per month.

- ❑ **Overstatement of crew starts.** The number of crew starts included by NS (251) exceeds the number of carloads reported by NS for 2005 (217). This clearly generates an overstatement of the costs.
- ❑ **Overstatement of days per week the branch is served.** The NS model assumed service 5 days per week and NS discussed reducing the service to three days per week. The logs maintained by the plant security forces showed that during 2005 an NS crew was on site slightly more than two days per week. It may be feasible to operate with even less frequency of rail service.
- ❑ **Reloading of box cars may be understated.** The experience at Badin suggests that reloading is feasible for box cars on certain lanes. Neither the NS on branch model nor the unadjusted URCS model may adequately reflect these cost savings.
- ❑ **The inadequate track maintenance by NS likely impeded efficient operations.** Direct observation and interviews on branch with NS maintenance forces confirmed that NS was doing minimal maintenance and basically "just fighting fires." The failure to conduct ordinary or routine maintenance inevitably impedes efficiency.
- ❑ **The NS cost model fails completely to reflect two key on branch installations provided free to NS by Alcoa.** For many years Alcoa has provided a dedicated office building for use by NS. The NS personnel have long worked at that facility on duties ranging beyond the Badin works. For many years Alcoa has also provided a locomotive storage site for use by NS.

While more defects in the NS model could be enumerated, the defects already listed indicate clearly that the NS model is neither accurately designed nor applied. The results of the NS model do not even come close to supporting the burden of proof which NS bears.

C. The Rail traffic is profitable

Applying unadjusted URCS costs we estimate that the Inbound and outbound NS traffic realizes an average Revenue to Variable Cost Ratio (R/VC) of 167%. An R/VC ratio of 167% is clearly profitable. This is well above the 135% average R/VC computed by the STB for all rail freight in 2004, the most recent year for which such data is available. Our understanding is that the rates provided by Alcoa typically included a fuel surcharge and we have treated the revenue as including fuel surcharges. To the extent the NS or other carriers applied a fuel surcharge over and above the rates specified in the applicable contracts and tariffs, the R/VC would be greater.

Similarly, applying unadjusted URCS costs we estimate that the Inbound and outbound CSX traffic realizes an average Revenue to Variable Cost Ratio (R/VC) of 128%. While less than the R/VC on NS shipments, the estimated CSX R/VC is only slightly below the 135% average R/VC computed by the STB for all rail freight in 2004. Moreover we note that CSX is not a petitioner, so the profitability of its shipments are not germane to the case.

As with NS, we have treated the CSX revenue as including fuel surcharges. To the extent the CSX or other carriers applied a fuel surcharge over and above the rates specified in the applicable contracts and tariffs, the R/VC would be greater. Moreover the NS Petition shows \$55 paid to NS for haulage of the CSX carloads between Whitney and Badin. We have assumed that this haulage fee was absorbed by CSX. Like the fuel surcharge, if the haulage fees are in addition to the through rate, the R/VC ratios would be greater.

The fact that standard URCS analyses shows that the traffic is largely profitable calls into serious question the basis for the NS petition requesting service discontinuance, particularly one based on an exemption.

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Based on interviews with plant management on site, during much of the time the line has been in service the plant operated at 100% capacity. The plant has also experienced periods during which it operated at reduced capacity. Examples of reduced capacity periods include 1986 to 1988 and 1995 to 2001.

These fluctuations in capacity must be viewed against the background of the plant's operation since 1916. It would be inadvisable to prematurely reach a service discontinuance decision; particularly when NS is requesting an exemption from the standard abandonment process. As we show in this filing much of the NS petition relies on assumptions rather than facts. When those facts are properly considered; the only course is continued service and denial of the NS petition for a discontinuance based on an exemption.

Badin has access to both CSX and NS points. This is important since it enables Alcoa to include supply sources located on both NS and CSX. The data show Alcoa has made extensive use of both NS and CSX served points in supplying the inbound material used at the Badin Works. This flexibility helps Alcoa remain competitive.

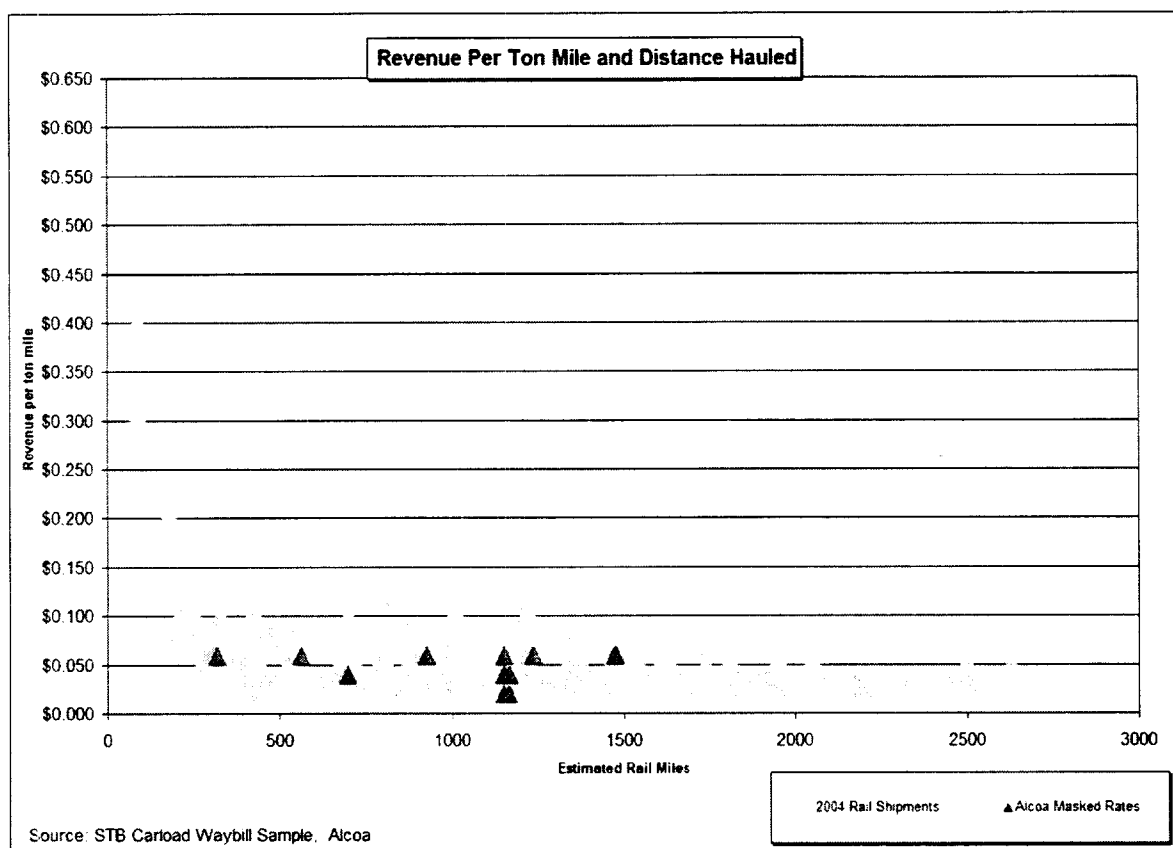
D. The Badin Traffic is Transported as Agreed in the Market

As we show in our evidence the majority of the traffic using the Badin line is carried under contract, or under agreed price quotes. By definition the traffic carried under contract or agreed price quotes moves at market rates agreed to by NS, and reflecting the haulage rights also agreed to by NS and CSX. It would be precipitous and clearly inadvisable for the Board to allow NS to pre-empt those contracts with a discontinuance based on an exemption.

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Moreover, if rates are a basis for the discontinuance, using the STB Public Use Waybill Sample in the following chart we show that many similar shipments over similar distances move at higher rates. In this chart both the Alcoa rates have been aggregated and, like the Waybill Sample rates, the Alcoa rates have been "masked" to preserve confidentiality. The data indicates potential for rate increases. This would be a more accessible and much less draconian measure than service discontinuance. Here again we see a pattern of NS seeking regulatory intervention to unilaterally revise market decisions. The Board has wisely chosen to rely primarily on the market. The NS petition invites an inadvisable detour from that path.

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As noted above, we have also reviewed the costs of the shipments, relying on standard URCS costs as issued by the Board. URCS costs remove the weight of the unperformed NS ordinary maintenance. URCS costs also eliminate transforming that unjustified accumulation of unperformed NS ordinary maintenance into a bill for extraordinary rehabilitation cost to be presented to Alcoa.

When the shipments into and out of Badin are viewed on this more reasonable basis we find that the overall pattern is that virtually all of those shipments provide solid cost coverage and a good contribution to the bottom line.

IV. Analysis of NS Petition.

The NS defects we found in each area and the data and analyses which we either have conducted to remedy those defects or which we have specified or requested for that purpose are further developed throughout this verified statement.

A. Assumptions

NS relies on assumptions throughout the Petition. Some assumptions are of course necessary to the development of an analysis. However NS extends the use of assumptions beyond what is either reasonable or productive.

We found instances in which NS has either misunderstood some of the abandonment procedure assumptions or misapplied them. In several instances NS assumes concurrence of others in statements, which have not been previously presented and are, at best, weakly supported. In still other instances NS assumptions are linked and compounded in a series of increasingly tenuous subjunctives.

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Instances of the defective use of assumptions occur repeatedly, including on the following pages. We cite the page number in the NS petition and briefly summarize the defect:

18: NS assumes based on various press releases that Alcoa will expand production elsewhere and reduce production levels at the Badin plant

19: NS assumes based on a press report that a contract to supply anodes to Venco Coke may not have been renewed and extrapolates this to long term reduction in production levels at the Badin plant

22: NS assumes that Alcoa would be able to haul rail traffic by truck in North Carolina based on the existence of trucking companies in Iowa.

23: NS first assumes that no Offer of Financial Assistance (OFA) would be necessary since Alcoa already owns the line and could set up as operating the line.

61: NS later inconsistently assumes no Offer of Financial Assistance (OFA) could be filed but appears to base this on an assumption as to the law that would apply if ALCOA did not or would not establish itself as operating the line.

25: NS assumes that "the substance" of its evidence and argument shows that the NS petition should be granted.

Comment As indicated above, all of the cited assumptions are defective. Some are defective in several respects.

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B. Data

Data is a basic building block in analysis. We found many instances in which NS misinterpreted or mischaracterized the data or over reached with its use of the data.

The NS model is flawed by erroneous assertions, which adversely or incorrectly characterize the data or facts.

25: In a series of assumptions NS asserts that NS may have undertaken to perform ordinary maintenance of the line because NS believed those costs would be covered by revenue from common carrier regulated rates.

Comment: As our photographs show, NS has failed to perform ordinary maintenance of the line for many years.

28 and 29: NS asserts that the railroads serving the line should be allowed to ignore the statutory requirement to list the line on their system diagram map or to submit a full application for approval and STB authorization of the service discontinuances.

Comment: The NS assertions are clearly invalid. STB approval of abandonment or discontinuance of a rail line is required as a check on unilateral decision making by a railroad which can have irreversible adverse consequences for the shipper and the surrounding region. NS and its affiliate railroads should follow the statutory requirement to list the line on their system diagram map and to submit a full application for approval and STB authorization of the service discontinuances. The railroads have ignored the law as if it did not apply to them. It does.

- Instances in which NS analysis was not based on facts or not based on complete facts.

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29: NS states that the railroad carload volume on the line has declined over 90 percent since 2001. In 2005 the NS moved "only 88 carloads of traffic".

Comment: The NS analysis of the cost of operation is clearly overstated in light of the volume data submitted by NS. It definitely does not require over 250 crews or service three times per week to move less than 217 cars. Service costs were clearly overstated by NS.

32: NS states that there is no overhead traffic on the line and implies that this can be ruled out as a use of the line.

Comment: The NS fails to present any evidence that overhead traffic could not move over the line. This defect is all the more evident since NS admits it has failed to file the system density maps for the line which, among other aspects, address the line's potential from a system perspective.

□ Instances in which NS analysis was based on misinterpretations of the facts.

29: NS states that the line "requires immediate rehabilitation estimated to cost \$516,602." NS further states that they would not be able to recover this cost.

Comment: The NS estimate of one time rehabilitation cost is the accumulated result of NS's long term failure to maintain the line at minimally acceptable standards. Interviews with Alcoa staff based at Badin indicate that the NS has done little maintenance on the line for the past ten years. We further examined the distinctions in maintenance of the segments. We note that the Whitney to Badin segment was described by NS as not needing "extraordinary maintenance" which NS says the Halls Ferry to Whitney segment needs.

32: NS states that it operates "local train service over the line and provides switching service to Alcoa at Badin, NC on a 5 day per week basis despite reduced traffic levels."

Comment: The NS has overstated the current level of service it provides on the line. While crews may originate on the line they are clearly doing so to serve other customers not on the line. Moreover interviews with Alcoa staff based at Badin indicate that the NS crew "outlaws", or exceeds the hours of service limitations on daily work several times per month. This indicates that extensive service is provided by that NS crew on behalf of other customers. The on and off branch costs should be allocated accordingly. Even at 3 days per week NS has overstated the service provided to Alcoa and thus has overstated the costs.

34: NS recognizes the need for track maintenance but vaguely ascribes failure to maintain the line to engineering decisions made prior to 1920 and rainfall and "puddling" since 1920.

Comment: The NS has mischaracterized engineering decisions made in the last century and NS speculations as to the intent of parties in 1916 as somehow absolving NS for its failure to properly maintain the line in recent decades.

C. Methodology

The methodologies used by NS often rely on incomplete facts. In some instances NS has presented only part of the picture. The estimates of on branch costs and the recharacterization of deferred track maintenance as rehabilitation costs are just two examples of the NS cost overstatement.

NS shows several such defects in its analytical methodology. The fairness, reasonableness and accuracy of the NS analyses are clearly areas of concern for the finder of fact.

D. Findings

The application of the analytical methodologies to the data leads one to findings. By this stage in the process errors and gaps in data and methodology can either be removed by judicious review or they can be compounded. Unfortunately we observe that the errors found in NS's data and methodology have permeated their findings.

E. Conclusions

In considering NS's conclusions we reflect on whether the facts were accurately analyzed and whether the conclusions are fairly drawn. In our preliminary analyses of the situation I found that:

- The costs of rail service to the line have been overstated by NS in its Petition for discontinuance.
 - NS has overstated the service required to meet the needs of the on branch traffic. This has caused significant overstatement in the operating costs of the line.
 - NS has mischaracterized its deferred and uncompleted maintenance as rehabilitation costs. This incorrectly attempts to shift the burden of past NS neglect of its agreed normal maintenance obligations to Alcoa.
 - The agreements between NS and Alcoa clearly state the NS obligations to carry out normal maintenance. The failure of NS to meet its obligations is shown in the deterioration of the line.
- Given that Petitioners have the burden of proof, the STB should not conclude that the traffic is unprofitable without conducting a more formal abandonment/discontinuance proceeding in which discovery would be available.

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- Transloading rail shipments from rail to truck would cause a burden estimated at about \$400,000 annually for Alcoa, based on my interviews with Alcoa employees.
 - This annual cost burden is comparable to the one time cost of the NS deferred track maintenance responsibility which NS has attempted to shift to Alcoa.
- The opportunity costs generally associated with the line have been borne by Alcoa as owner of the property. Costs associated with track and land ownership are rightly removed from the analysis.
- NS has failed to recognize in its analysis significant costs borne by Alcoa, costs which benefited NS for years.
 - These costs include Alcoa provision of office space for NS personnel managing NS operations well beyond the line
 - These costs also include Alcoa provision of a storage site for NS locomotives at Badin
- Based on my review I conclude that NS has overstated, mischaracterized and incorrectly omitted facts from its analysis.
 - These errors of omission and commission and misinterpretation call the NS petition into question and make it inadvisable for the STB to grant the petition.
- The evidence and conclusions are clearly sufficient to deny an exemption.

F. Recommendations

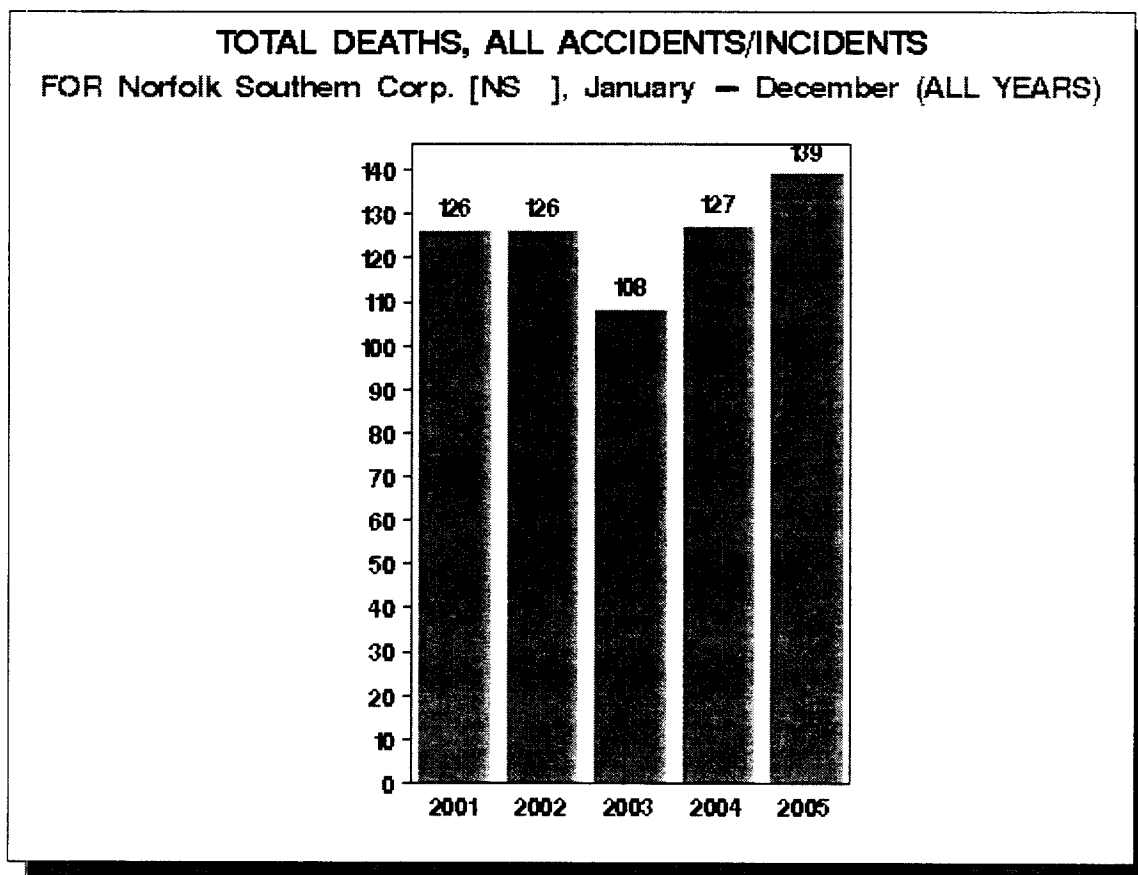
Finally we consider whether the NS recommendations are reasonable and supported by the facts and analysis. Our analysis shows that the NS Petition falls seriously short of the mark.

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V. Track Maintenance and Safety

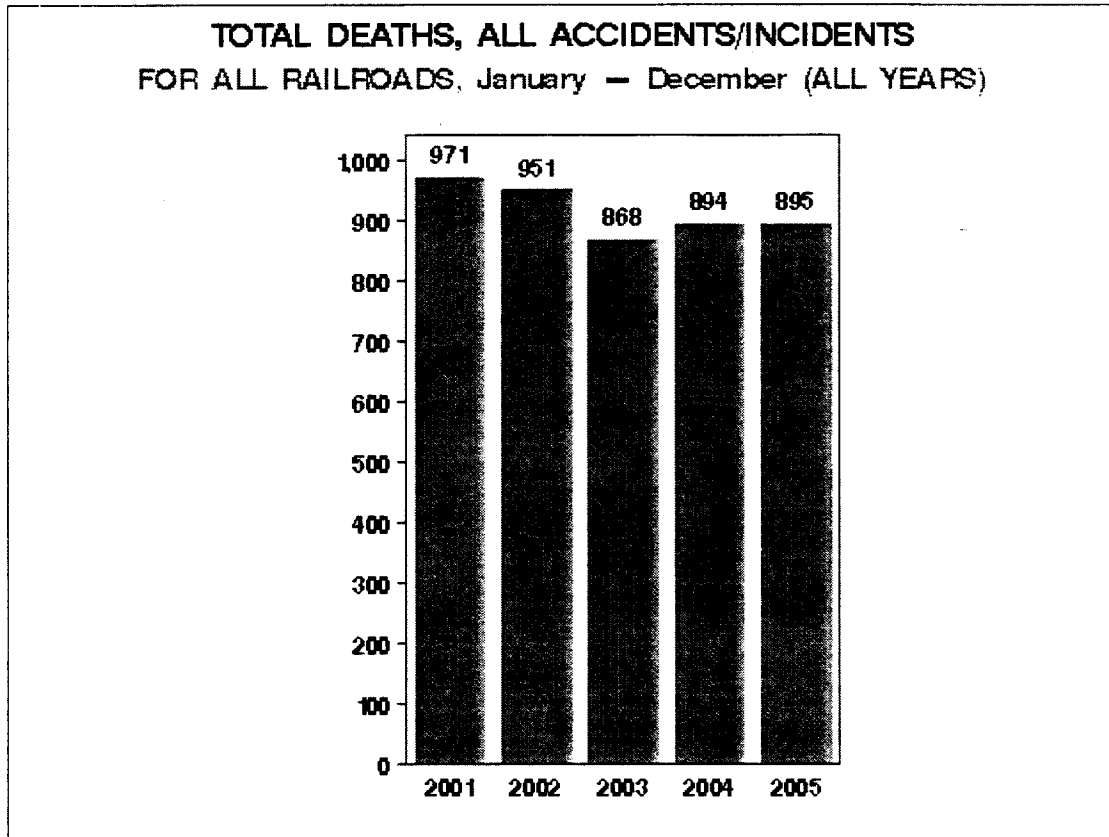
One of the fundamental issues involved with adequate track maintenance is safety. It seems useful to briefly review the record. The following chart shows deaths from all causes in recent years:



Source: Federal Railroad Administration.

The 126 deaths reported by NS in 2001 were followed by the same level in 2002. Since 2002 the death toll declined in 2003 and then has climbed steadily. The following chart shows the comparable data for all major US railroads: BNSF, UP, GTW, IC, NS, CSX, KCS and Amtrak.

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Source: Federal Railroad Administration.

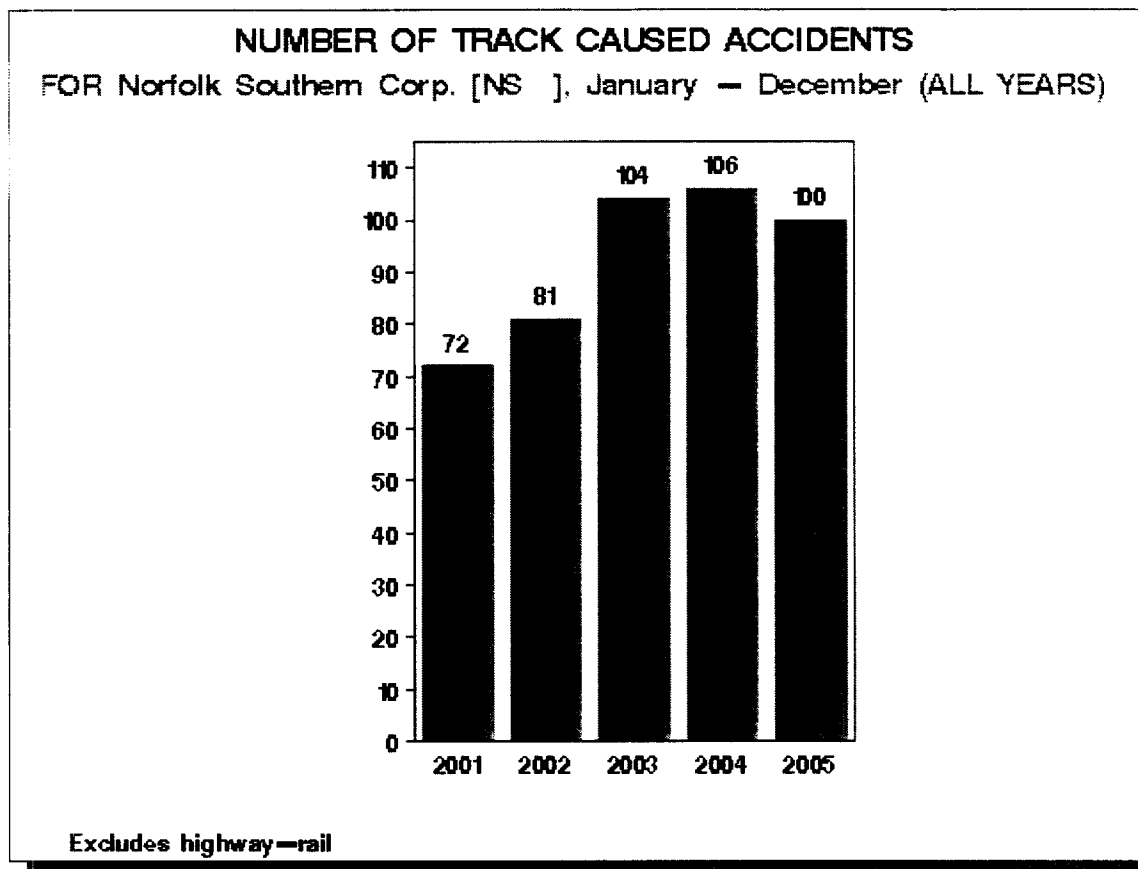
The following chart shows the pattern for track-caused accidents during the same period:

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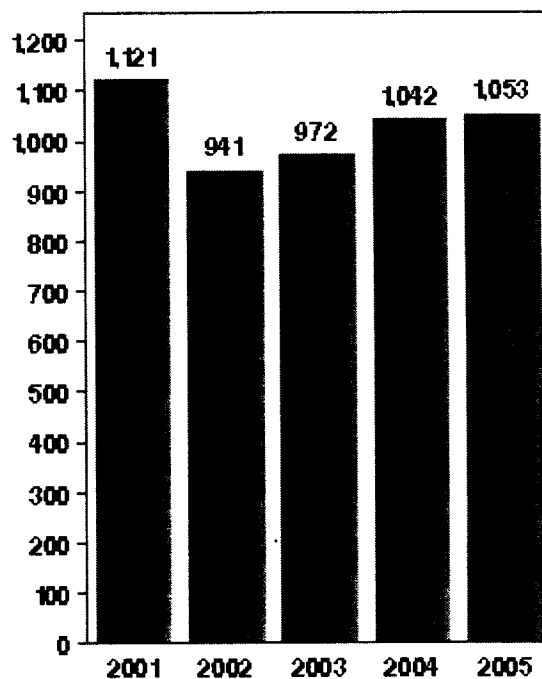


Source: Federal Railroad Administration.

After increases in 2002, 2003 and 2004, track caused accidents reported by NS declined in 2005. The following chart shows the record for all major US railroads: BNSF, UP, GTW, IC, NS, CSX, KCS and Amtrak; during the same period.

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**NUMBER OF TRACK CAUSED ACCIDENTS
FOR ALL RAILROADS, January — December (ALL YEARS)**



Excludes highway-rail

Source: Federal Railroad Administration

The following chart, compiled by FRA, reports casualties by railroad during the period 2000 through 2004.

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Railroad Safety Statistics - Annual Report 2004

TABLE I-4 TOTAL CASUALTIES BY RAILROAD

Railroads	Fatalities					Non-Fatal		
	2000	2001	2002	2003	2004	2000	2001	2002
Alton & Southern	-	-	-	-	-	22	8	-
Atlanta RR Corp.	1	-	-	-	-	50	57	-
Amtrak	131	189	126	118	128	1,412	1,527	1,455
Amtrak & Amtrak	-	-	-	-	-	26	15	-
Cardinal Northern Indiana RR	151	126	149	135	143	1,463	1,485	1,244
East River of Chicago	-	-	-	-	-	5	10	-
Central Eastern Assets	1	3	2	1	1	56	58	-
CSX Transportation	124	143	120	134	139	1,324	1,119	8
Delaware & Hudson	4	5	2	1	1	49	52	-
Delaware, Maryland & Eastern	1	-	-	-	-	12	17	-
Delaware, Maryland & Iron Range	-	-	-	-	-	38	32	-
Edin, North & Eastern	-	-	-	-	-	32	38	-
Florida East Coast	22	18	24	18	17	46	27	-
Grand Canyon Railway	-	-	-	-	-	28	48	-
Grandview Rail System	3	1	-	3	1	29	16	-
Grand Trunk Western RR	4	3	5	6	1	120	96	-
Harbor Branch	4	1	-	-	-	7	10	-
Illinois Central	17	26	18	9	10	223	188	1
Illinois Chicago & Eastern RR	6	5	2	3	1	68	48	-
Indiana Harbor Belt	2	2	-	-	-	43	42	-
Kansas City Southern	24	21	21	16	21	143	126	1
Long Island Rail Road	17	10	9	7	4	414	382	1
M/D Rail of Rail Comm	1	1	-	-	-	19	7	-
Mass Bay Transit Auth	1	1	1	6	4	103	118	1
Montreal, Maine & Atlantic	-	-	-	-	-	-	-	-
Norfolk Southern	4	3	6	1	4	476	466	3
Montana Rail Link	3	2	1	1	-	22	28	-
Northern Indiana Comm Trans	-	-	-	-	-	15	16	-
Northeast RI Reg Comm	5	17	23	16	12	283	388	1
New Jersey Transit Rail	21	32	16	8	17	274	218	1
Norfolk Southern Corp.	118	126	126	108	127	778	658	8
Piedmont & Atlantic	-	1	1	-	1	16	9	-
Port Authority of New York	1	2	1	-	-	199	158	1
Pennsylvania Comm San Mateo City	14	12	5	10	9	25	22	-
Port Terminal RR Assn	-	-	-	-	-	11	11	-
Southern CA Reg Rail Auth.	1	1	9	19	9	81	124	-
Southeastern RA Trans	1	3	4	-	-	279	252	1
So. Line	1	6	8	8	0	166	166	1
Texas Mexican	1	-	1	1	4	27	16	-
Texas RR Assn of St. Louis	-	-	-	-	-	8	12	-
Union Pacific	204	211	221	207	205	1,954	1,877	1,561
Union RR (Pittsburgh)	-	-	-	-	-	21	25	-
Whelan Central Ind.	11	11	6	5	4	161	121	-
Whelan & Lake Erie	-	-	-	-	-	19	18	-
Whelan & Southern RR	2	-	-	-	-	38	36	-
Other Railroads	29	29	26	31	26	1,180	947	8
Total	937	971	951	867	858	11,643	10,965	11,111

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FRA reported the following major causes of track defects in 2004.

Railroad Safety Statistics - Annual Report 2004

[illegible]

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Railroad Safety Statistics - Annual Report 2004

TABLE 5-9 TRAIN ACCIDENTS BY SPECIFIC CAUSE AND TYPE, 200

MAJOR CAUSE= Track Defects

Cause	Total		Type of Accident			Type of Track		
	Cas	%	Cas	Der	DEA	Main	Yard	Other
Misaligned rail-head contour	10	0.3	10			4		4
Transverse contour defect	78	2.1	78			28	34	16
Vertical profile head	39	1.1	39			17	16	6
Worn rail	11	0.2	11			2	2	7
Rail Corrosion - Dry rail, freshly ground rail	11	0.2	11			2	2	7
Other rail and joint bar defects	24	0.4	24			6	7	11
Broken defective	1	0.0	1					1
Ground rail loose/broken or misaligned	1	0.0	1					1
Railhead grinding wear, worn or broken	1	0.0	1					1
Rebar worn, broken, malfunctioning	1	0.0	1					1
Broken yard track defects	1	0.0	1					1
Spring/power switch mechanism malfunction	1	0.0	1					1
Switch rail worn, broken, disconnected	1	0.0	1					1
Switch (head on) wheel mechanism defect	1	0.0	1					1
Switch contact, operation or safety defect	4	0.1	4					4
Switch damaged or out of adjustment	31	0.9	31			21		10
Switch lag/crank broken	1	0.0	1					1
Switch out of adj. assembly anchoring	1	0.0	1					1
Switch point worn or broken	5	0.1	5			5		2
Switch rail worn, bent, broken, etc.	3	0.1	3					3
Turnout frog (or pad) worn, or broken	1	0.0	1					1
Turnout frog (or pad) (worn) worn/broken	1	0.0	1					1
Turnout frog (or pad) worn, or broken	1	0.0	1					1
Switch frog broken part of a track rail	3	0.1	3					3
Other frog, switch, crosspiece defect	9	0.3	9					9
Bridge misalignment or failure	2	0.0	2					2
Flangeless crossed	2	0.0	2					2
Engineering design or construction	4	0.1	4					4
Galvanic system defect	24	0.7	24			2	2	20
Other way and structure defect	6	0.2	6			2	2	2
Total	1,010	28.7	596	40	354	463	188	

At a more detailed level, data compiled by the Federal Railroad Administration identified the top 20 Track causes of Derailments on main tracks and yard tracks during the period 1995 through 2000. We examined the incidence of these types of defects on the Badin line maintained by NS. We also considered the FRA Track Standards (Volume 49 CFR Part 213) excerpts of which are included in this statement as Appendix IX.

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Our findings are as follows:

Top 20 Track causes of Derailments Main Tracks 1995 through 2000				
	Cause	Count	%	Examples found on Badin line 5/25-26/06
1	Wide Gage (defective/missing crossties	207	11.1	Many
2	Track Alignment Irregular- buckled	173	9.2	Some
3	Transverse Compound Fissure	156	8.3	Some
4	Cross Level of Track Irregular -not at joints	120	6.4	Some
5	Cross Level of Track Irregular - joints	114	6.1	Many
6	Detail Fracture Shelling Head Check	108	5.8	Many
7	Broken base of rail	98	5.2	
8	Vertical split Head	89	4.8	
9	Switch point worn or broken	86	4.6	
10	Roadbed settled or soft	75	4	Many
11	Head and Web Separation outside joint bar limit	63	3.4	

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Top 20 Track causes of Derailments Main Tracks 1995 through 2000

Cause		Count	%	Examples found on Badin line 5/25-26/06
12	Other Rail and joint bar defects	57	3	Many
13	Track Alignment Irregular not buckled	39	2.1	Many
14	Joint bar broken	34	1.8	
15	Worn rail	31	1.7	Very Many
16	Wide gage - spikes other rail fasteners	30	1.6	Very Many
17	Other track geometry defects	29	1.5	Many
18	Washout/ rain/ slide damage to tracks	30	1.6	Many
19	Superelevation improper	27	1.4	
20	Broken weld	26	1.4	

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Top 20 Track causes of Derailments Yard Tracks 1995 through 2000

	Cause	Count	%	Examples found on Badin line 5/25-26/06
1	Wide Gage (defective/missing crossties	577	24	Many
2	Switch point worn or broken	323	13.4	Some
3	Broken base of rail	150	6.2	
4	Switch damaged or out of adjustment	148	6.1	
5	Transverse Compound Fissure	125	5.2	
6	Switch point gap between switch point and stock rail	106	4.4	
7	Wide gage - spikes other rail fasteners	98	5.2	Many
8	Head and Web Separation outside joint bar limit	76	3.2	
9	Vertical split Head	73	3	
10	Other frog switch track appliance defect	56	2.3	
11	Cross Level of Track Irregular -not at joints	47	2	Many

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Top 20 Track causes of Derailments Yard Tracks 1995 through 2000

Cause		Count	%	Examples found on Badin line 5/25-26/06
12	Detail Fracture Shelling Head Check	43	1.8	Many
13	Wide gage due to worn rails	41	1.7	Many
14	Other rail and Joint bar defects	41	1.7	Very Many
15	Roadbed settled or soft	30	1.6	Very Many
16	Cross Level of Track Irregular - joints	37	1.5	Many
17	Other track geometry defects	36	1.5	Some
18	Defective or missing cross ties	33	1.4	Very many
19	Worn Rail	26	1.1	Many
20	Retarder worn broken or malfunctioning	24	1	

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VI. Detailed Report of Findings and Observations on Badin Line

The following photographs were taken by Tom O'Connor during a two day inspection of the Badin line from the Badin Works at Badin, NC to Halls Ferry Junction, NC. The photographs taken on May 25, 2006 were taken while accompanied by Randall Kiser of Alcoa. The photographs taken on May 26, 2006 were taken while accompanied by Gary Wagoner of Alcoa. The defects are indicative of the track condition observed throughout the line. The observations lead inevitably to the conclusion that the line has not had ordinary maintenance in recent years.

The photographs highlight track structure defect types identified by the Federal Railroad Administration (FRA) as being one of the top 20 causes of derailments.⁴

The conclusion is clear: the NS has failed to carry out ordinary maintenance on the Badin line.

The failure of NS to carry out minimally adequate maintenance is a breach of the lease requirements as well as a serious and persistent shortcoming with respect to the FRA Track Safety Standards. The criteria used to identify the defects noted in this section are based on the FRA Track Safety Standards. A listing of the items covered in 49 CFR 213 and selected items bearing on the specific track defects is included in Appendix C to this report.⁵ NS mischaracterizing its failure to perform ordinary maintenance as rehabilitation costs to be borne by Alcoa compounds the error.

⁴ Source: Track Safety Standards Compliance Manual, US Department of Transportation, Office of Safety Assurance and Compliance, Washington, DC, January 1, 2002

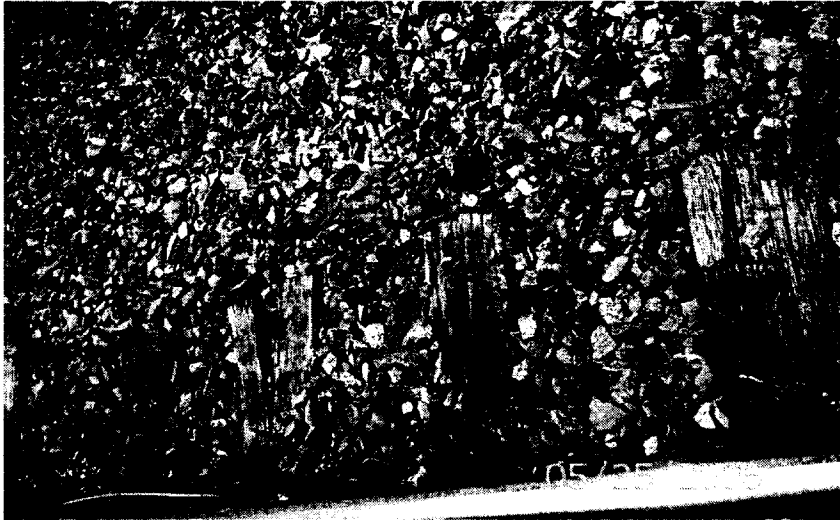
⁵ See Appendix C of the accompanying report for a summary of key portions of the FRA Track Safety Standards drawn from 49 CFR part 213.

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Had NS merely fulfilled its obligation of ordinary maintenance, its current estimates of maintenance and rehabilitation costs would be significantly reduced. Routine ordinary maintenance seeks to hold the track structure in serviceable condition. Failure to catch small problems can and often does lead to major problems. We observed the effects of that process on the Badin line.

NS is certainly aware of the situation. Their track maintenance people inspect the Badin line using a "high rail" vehicle on a weekly basis. Although aware of what is needed, NS has chosen not to do routine maintenance like tie replacement, as the photographic record amply demonstrates. This ill-advised maintenance practice creates and intensifies the need for major rehabilitation

A. Wide Gage (defective/missing crossties)



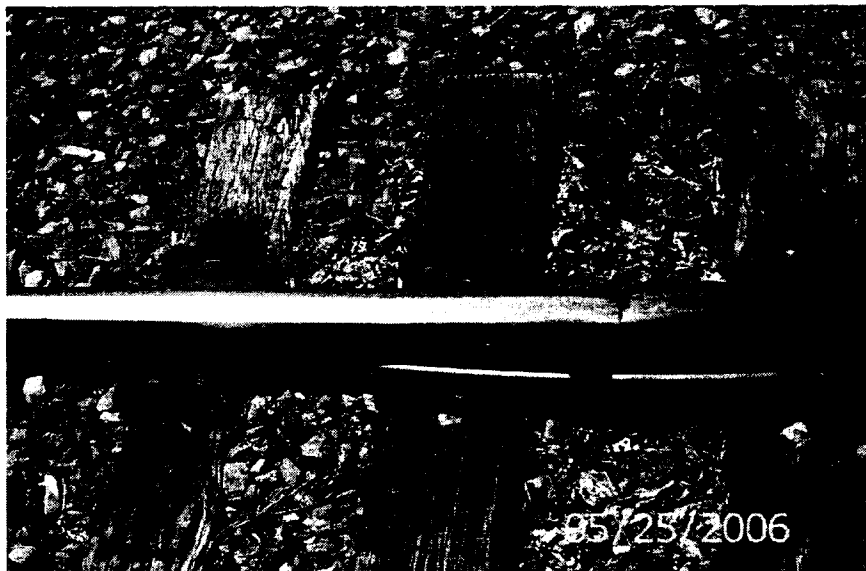
- ☐ The ties have disintegrated and submerged into the ballast. They no longer adequately support the rail or the adjacent rail joint.



- ☐ One of the tie plates beneath the rail joint has slipped out of position and a gap has developed.



- The tie has disintegrated and submerged into the ballast. The tie spacing is too great and may indicate a missing tie. The remaining ties no longer adequately support the rail. The head of the rail shows signs of engine wheel burn and shelling and loss of steel.



- The tie adjacent to the rail joint has disintegrated and sunk into the ballast. The rail joint is compressed and shows degradation.

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- ☐ The ties beneath the rail joint have disintegrated and moved out of position. Adjacent ties have disintegrated and provide inadequate support for the rail joint. The ties within 24 inches of the rail joint no longer adequately support the rail or the rail joint.



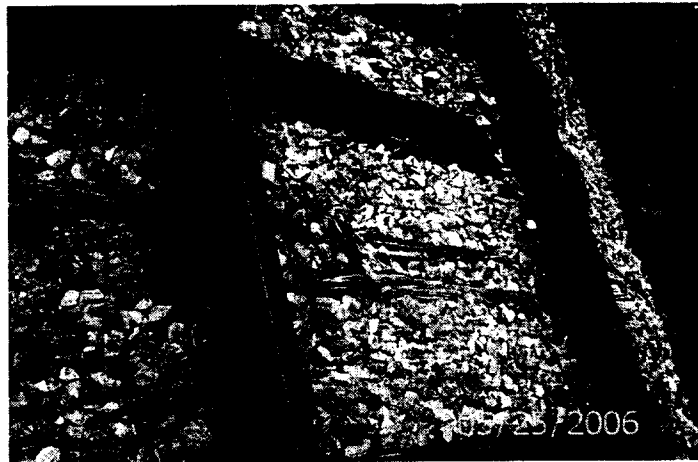
- ☐ The tie has disintegrated and the spikes have worked loose or have been removed. The tie no longer adequately supports the rail.

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- ☐ The tie has disintegrated and submerged into the ballast. It no longer supports the rail, which is suspended above the tie.



- ☐ The tie is heavily degraded by dry rot and no longer adequately supports the rail.

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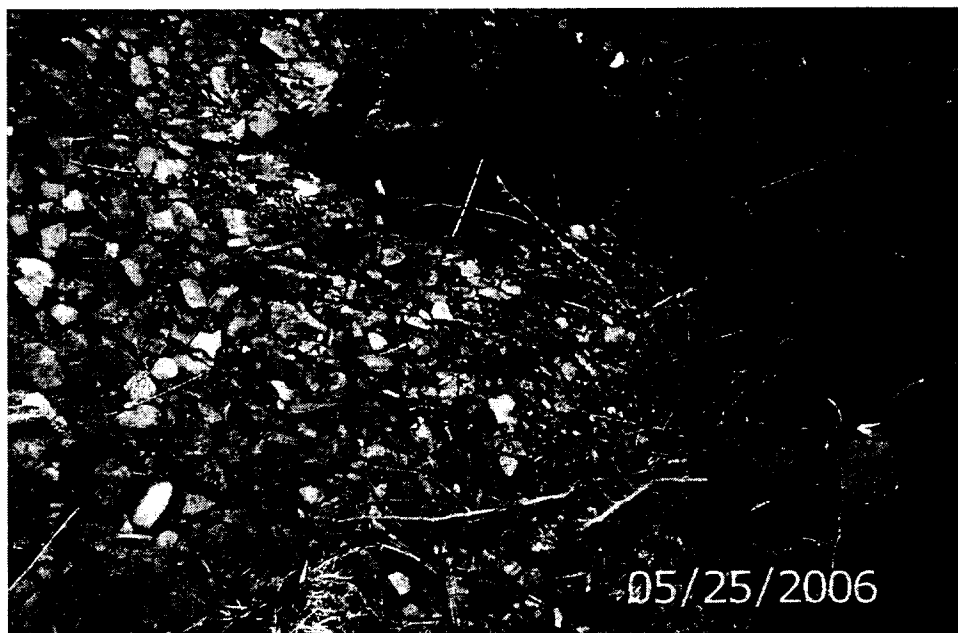
B. Roadbed settled or soft



- ☐ The ties have submerged into the ballast and some have disintegrated.

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C. Washout/ rain/ slide damage to tracks



- ☐ On this track which is adjacent to a lake, small areas of erosion when untreated can lead to major weaknesses in the track structure

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D. Wide gage - spikes other rail fasteners



- The tie plates are no longer supporting the rail and are cutting into the tie. The rail joint has been compressed and has moved out of alignment. A gap has developed between the rail and the tie, allowing further degradation of the track structure.



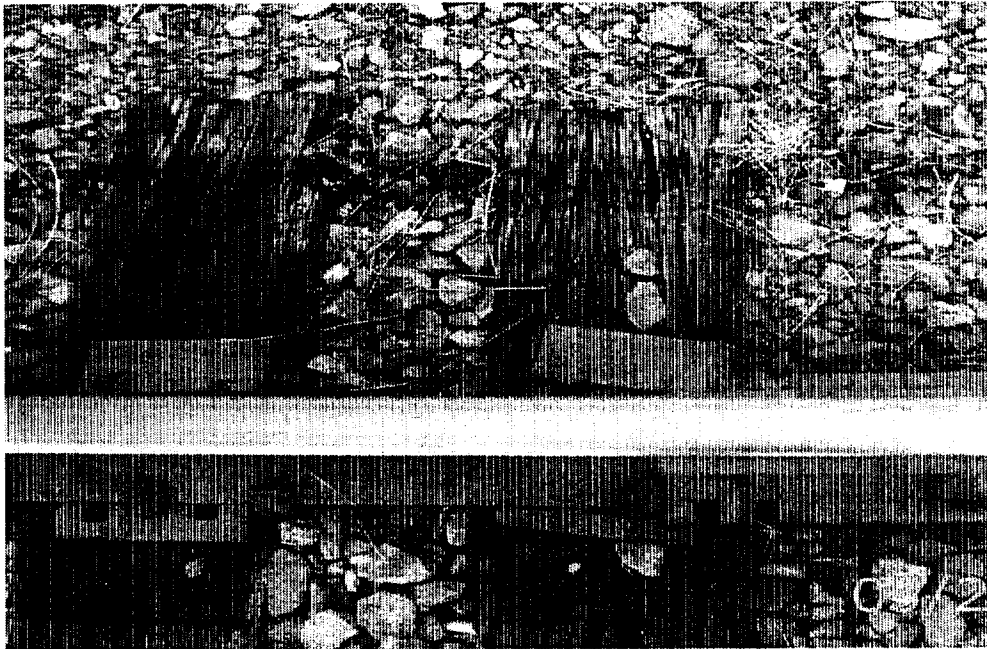
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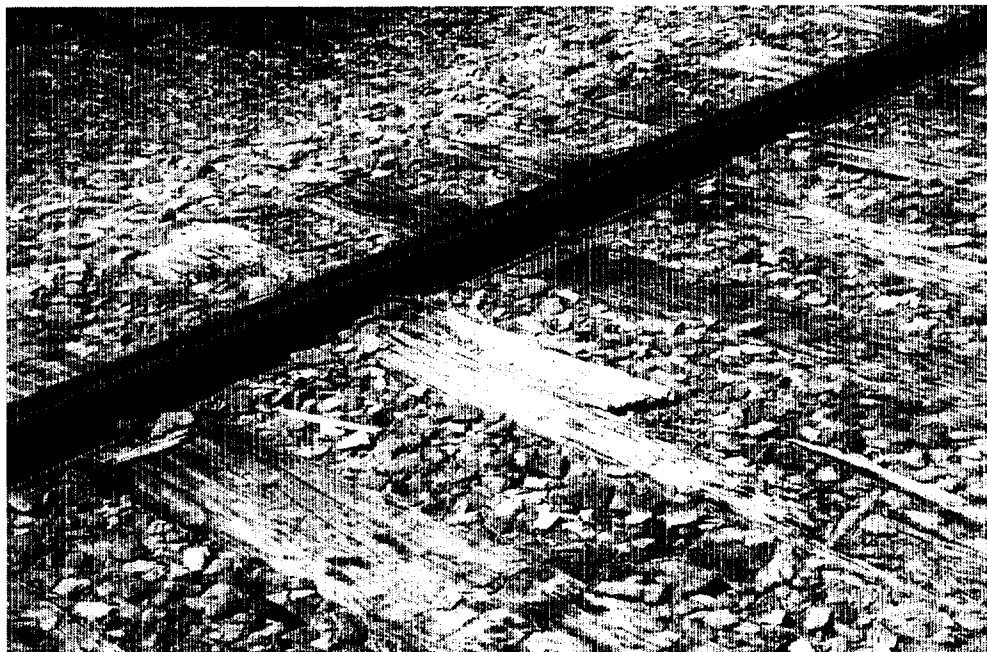
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E. Other rail and joint bar defects



F. Defective or missing cross ties



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- ☐ The NS model is flawed by erroneous assertions, which adversely or incorrectly characterize the data or facts.
- ☐ As the preceding photographs show, NS has failed to perform ordinary maintenance of the line for years.

G. Locomotive storage site provided to NS by Alcoa



- ☐ The NS cost model makes no mention of and grants no recognition to the Locomotive storage site at Badin which Alcoa has provided free for many years to NS

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H. The Badin office provided free to NS



- ❑ The NS cost model makes no mention of and grants no recognition to the office building at Badin which Alcoa has provided free for many years to NS
- ❑ This office building at Badin has been provided free to NS by Alcoa for many years, including maintenance, heating and cooling... It directly overlooks the locomotive storage site, also provided free for many years to NS by Alcoa.

VII. Conclusion

I found the Norfolk Southern Petition filed on April 24, 2006 deficient to varying degrees in all of its structural components, from assumptions to recommendations.

The evidence shows that the NS has failed to meet its obligations to provide ordinary maintenance on the Badin line. The authorizing lease and the long-standing Federal Railroad Administration (FRA) regulations both require NS to conduct adequate maintenance of the line, particularly the line's track structure⁶. NS has failed to meet these obligations.

The evidence also shows that significant rail traffic has used the line in past years and now uses the line; traffic which is profitable when evaluated using the STB URCS cost methodology. The STB should not conclude that the issue traffic is unprofitable without conducting a complete and formal abandonment/discontinuance proceeding in which discovery is available.

The defects in the NS analysis we have identified indicate clearly the NS analysis is neither accurately designed nor applied. The NS analysis falls significantly short of supporting the burden of proof which NS bears.

My conclusion is that NS analyses have failed to support and the facts fail to justify abandonment of the line or discontinuance of service, much less granting an exemption from the rigorous proofs required.

⁶ See Exhibit, Appendix C to our Report for a summary of FRA safety responsibilities, and Track Safety Standards.

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VERIFICATION

I, Tom O'Connor, verify under penalty of perjury that I am the Vice President of Snavelly King Majoros O'Connor & Lee, Inc., that I have read the foregoing document and know its contents, that the same was prepared by me or at my direction and that the same is true and correct to the best of my knowledge and belief. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on June 2, 2006



Tom O'Connor

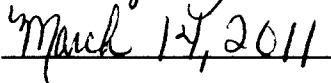
District of Columbia) ss.

Subscribed and sworn to before me by Tom O'Connor on this 2nd day of June, 2006

Angel Finch Notary Public



My commission expires:


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VIII. Appendix A

Capabilities and Experience of

Tom O'Connor

Snavelly King Majoros O'Connor & Lee

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- This section sketches some of the highlights of Tom O'Connor's background and strengths, focusing on experience in the following areas:
 - Rail Line Abandonment
 - Transportation Cost Methodologies
 - Network planning and design
 - Litigation and arbitration
 - Negotiations
 - Operations analysis
 - Analysis of rail operations including mergers and divestitures

The presentation of capabilities is developed in two principal parts:

- Attachment I, which includes Tom O'Connor's resume, covers the broader range of assignments.
- Attachment II sketches his litigation experience, including a brief summary of the cases in which he has testified.

In each of these, rail transportation and rail cost analysis is one of the prominent themes. Much of this experience centers on rail line abandonment methodologies, issues and related rail system design.

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Attachment I

Resume of

Tom O'Connor

Vice President

Snavelly King Majoros O'Connor & Lee, Inc.

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☐ Experience

Snavelly King Majoros O'Connor & Lee, Inc., Washington, DC

• **Vice President (1988-Present)**

Mr. O'Connor has more than twenty-five years experience in business and economic analysis. His experience includes key and increasingly responsible management and policy positions with government agencies and private industry.

Mr. O'Connor has authored a series of guidelines on transportation negotiations and contracting and has conducted transportation negotiations and contracting seminars for a wide range of clients. Mr. O'Connor has also designed and helped lead transportation contract negotiations resulting in tens of millions in cost savings.

Mr. O'Connor has also appeared as an expert witness on rail line abandonment cases and in rail rate litigation, achieving millions of dollars in savings for the client. He has served many clients as an expert advisor on the Rail cost Adjustment Factor (RCAF).

He has also created and managed numerous computerized management and regulatory systems to address complex problems and is a widely recognized expert on costing and economics. He has appeared as an expert on the ICC-STB rail abandonment regulations. He also developed the most widely used line economic analysis system in the US rail industry; the United States Railway Association Light Density Line Analysis system.

He has also conducted analyses of tug and barge operations, both inland and off shore, for governmental and private sector clients.

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Mr. O'Connor has conducted analyses for the Government of Canada used to shape policy for freight transportation and studies for the U.S. Government used to shape Freight and Passenger Transport Policy, including in depth analyses of Amtrak.

For the Government of Bulgaria, in the Balkans, he developed the Master Plan for Management Information Systems, including telecom and computer facilities designed to operate, measure, manage and monitor both rail freight and rail passenger operations of the Bulgarian State Railways, in Bulgaria and the Balkan Peninsula.

Mr. O'Connor has analyzed more than 45 rail merger scenarios and cases. He has provided expert testimony before state and federal courts and commissions in the U.S. and Canada on economic and policy issues. He has also testified as an expert on computerized transportation analytical systems, rail operations, anti trust issues and transportation economics and costing. Mr. O'Connor has served as an impartial and expert monitor of data and processes at issue in litigation on transportation.

Mr. O'Connor has also conducted management audits, focused on identifying the cause and effect relationships underlying claimed cost incidence. The management audits were directed toward testing the cost basis of claims asserted by major railroads.

Mr. O'Connor also has experience in telecoms spanning the period since 1995. During this period, on a succession of government and commercial projects, Mr. O'Connor directed and participated in the review, design and operation of telecoms systems.

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He also designed and developed the business and operations plan for an Eastern European telecoms startup company, BDZCOM. Mr. O'Connor designed and presented the plan and conducted liaison with international commercial, banking and government interests in the United States and Europe.

DNS Associates Inc., Washington, DC

- **Vice President (1982 - 1988)**

Mr. O'Connor directed and participated in numerous projects including merger analyses, transportation infrastructure analyses, plant and network rationalization and feasibility studies.

He designed and implemented mainframe and microcomputerized systems for analyzing rail, truck and barge logistics. The computerized cost systems Mr. O'Connor created are in widespread use throughout the United States and Canada.

Mr. O'Connor also advised the U.S. Rail Accounting Principles Board (RAPB) on the costing aspects of regulatory reform policies. The RAPB mission included advising the ICC as to the inclusion of productivity in the RCAF.

He provided expert testimony on coal rates, computerized data bases and cost systems and rail cost issues before the Interstate Commerce Commission.

Association of American Railroads, Washington, DC

- **Assistant Vice President, Economics (1979 - 1982)**

Managing a large staff of professionals, Mr. O'Connor designed and managed major economic analysis projects. He helped formulate industry economic policy positions culminating in the Staggers Rail Act of 1980. He submitted expert testimony on behalf of the railroad industry in numerous cases before the Interstate Commerce

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Commission and state regulatory commissions. He also appeared regularly in national forums on economic issues.

Mr. O'Connor directed the most significant computerized industry Costing System project in 40 years, URCS, the cost system now used by all major US railroads. Mr. O'Connor's staff was responsible for development of the Rail Cost Adjustment Factor (RCAF). He also conducted industry seminars on URCS and related economic issues.

Mr. O'Connor also testified before the Interstate Commerce Commission on the design and application of the pathbreaking URCS rail cost system since adopted by the Commission and the rail industry.

He also directed development and installation of a commercial computerized economic and market analysis system now used by virtually all major US railroads.

Consolidated Rail Corporation, PA

- **Assistant Director, Cost & Economics (1977 - 1979)**

Managing a staff of about 30 professionals, Mr. O'Connor was responsible for all Conrail management and regulatory cost analyses in both freight and passenger areas, including line abandonments. He testified before the ICC on the development of line subsidy standards now widely used in the US railroad industry.

He also finalized the design, installed and managed Contribution Simulator and Calculator (COSAC), a computerized internal management economic analysis system at Conrail. The COSAC system uses specific management accounting data to develop economic costs. COSAC replaced earlier systems and was used to guide virtually all transportation management decisions, including competitive market initiatives, consolidations, line abandonments and service discontinuance.

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Mr. O'Connor also participated in cost allocation negotiations between Amtrak and Conrail on cost sharing of joint facilities on the North East corridor. He initiated and directed profit maximization and plant rationalization programs. He also designed and implemented computerization and improvement of a wide range of economic and cost analysis systems used to manage and turn around this multi-billion dollar corporation.

R.L. Banks & Associates Inc., Washington, DC

- **Consultant (1976 - 1977)**

Mr. O'Connor conducted and directed numerous transportation- related projects in the U.S. and Canada ranging from national logistics analyses to site-specific studies. He specialized in costing systems and appeared as an expert witness on such systems in a precedent setting proceeding before a Canadian Crown Commission.

U.S. Railway Association, Washington, DC

- **Manager, Local Rail Service Planning (1974 - 1976)**

In a project of unprecedented scope and historic impact, Mr. O'Connor developed, computerized, and implemented the light density lines cost analysis system, which defined Conrail. This system was used to reach asset disposition and line service decisions for thousands of miles of railroad. He served as liaison with congressional staffs and shipper groups, as well as federal, state, and local governments, and planning agencies. The system he created was a major element in the design and implementation of the streamlined Midwest-Northeast regional rail system. Mr. O'Connor subsequently appeared as an expert witness to present and defend the operation of the USRA costing system.

Interstate Commerce Commission,

- **Economist, Washington, DC (1973-1974)**

Mr. O'Connor served as a staff economist and authored a report analyzing industry investment patterns and ICC regulatory policy, including ICC use of cost evidence.

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A. Education

- University of Massachusetts, Amherst, B.A. Economics
- University of Wisconsin, Graduate Course Work, Economics
- University of Delaware, Graduate Course Work, Business Management
- The American University, Graduate Course Work, Computer Science

B. Professional Organizations

- Transportation Research Board
 - Past Chairman of the Transportation Regulation Committee
- Transportation Research Forum
 - Past President of the Cost Analysis Chapter
- National Defense Transportation Association
 - Past Member of Board of Directors, National Capital Chapter

C. Academic honors

- Phi Kappa Phi academic honors society
- Phi Beta Kappa academic honors society

D. Military

- U.S. Army; Sergeant, Combat Engineers

E. Security Clearance

- Secret

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Attachment II

Summary of Expert Testimony

of

Tom O'Connor

Vice President

Snavelly King Majoros O'Connor & Lee, Inc.

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Tom O'Connor is Vice-President of Snavely King Majoros O'Connor & Lee (Snavely King), an economic and management consulting company. He has been engaged in the business of economic analysis for more than twenty-five years, beginning in 1973 as an economist with the Interstate Commerce Commission (now the Surface Transportation Board) and later in economic consulting and management positions of increasing responsibility with the United States Railway Association, Conrail, the Association of American Railroads and, from 1982 through 1988 with DNS, Associates and since 1988 with Snavely King Majoros O'Connor & Lee, (Snavely King), an economic and management consulting company focusing on telecommunications and transportation. Mr. O'Connor was Vice President at DNS Associates and has been Vice President and principal of Snavely King since joining the firm.

He has provided testimony in a number of proceedings before courts and regulatory commissions in the United States and Canada including:

- Interstate Commerce Commission,
- Surface Transportation Board,
- United States Railway Association,
- Regulatory Commission in New York
- Regulatory Commission in Indiana
- Regulatory Commission in Pennsylvania
- State Court in Indiana
- State Court in Montana,
- State Court in Virginia,
- Arbitration Panel in New York
- Mediation Panel in Massachusetts
- Mediation Panel in Washington DC
- Canadian Crown Commission.
- US District Court for Eastern District of Virginia,
- US District Court for Arizona

Tom O'Connor's practice centers on transportation with specific focus on negotiations and infrastructure issues including rationalization and redesign of the

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railroad infrastructure in the US as well as rebuilding of the railway infrastructure in Eastern Europe.

Mr. O'Connor's work in Eastern Europe focused on both transportation and telecommunications.

Tom O'Connor Testimony in Federal Regulatory Cases

- ❑ The comparative merits of the Interstate Commerce Commission's Uniform Rail Costing System (URCS) and Cost Center Accounting submitted to the ICC on behalf of the US Railroad industry in February 1980 in Docket No. 37203.
- ❑ The economics and computer technology of the Light Density Line Methodology used to define Conrail, submitted to USRA before a special hearing in 1980.
- ❑ Computerized transportation database design and use. Verified statement was submitted to ICC on behalf of the US Railroad industry in Nov 1980 in Ex Parte No. 385.
- ❑ The comparative merits of two regulatory rail-costing systems, URCS and the predecessor rail costing system, Rail Form A, submitted to the ICC on behalf of the US Railroad industry in March 1981, in Ex Parte 399.
- ❑ Testimony on the Preliminary 1979 Rail Cost Study as released by the ICC, calling for adopting and improving URCS. This was submitted to the ICC on behalf of the US Railroad industry in Docket No. 37203 in February 1982.
- ❑ Rail costing using Rail Form a costs applied to service units generated by a computerized rail network model. This verified statement was submitted to

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the ICC on behalf of a shipper located in Nevada in July 1985 in ICC Docket Nos. 37809 and 37815S.

- ☐ Rail costing, also using Rail Form A costs applied to service units generated by computerized network model. This verified statement was submitted to ICC on behalf of a shipper located in Nevada in November, 1986 in Docket No. 37809, 37815S.
- ☐ Stand Alone Rail Costing, for use in rate reasonableness, using service units developed with a series of computerized network model. This verified statement was submitted to the ICC on behalf of the Association of American Railroads in September, 1988 in Docket No. 38239S
- ☐ Rail merger conditions, developed using rail costs and a computerized network model. This verified statement was submitted to the ICC in March 1994 in Finance Docket No. 21215 (Sub. No. 5)
- ☐ The effects of computerized methods on rail operations and costs. This verified statement was submitted to the ICC on behalf of Coletto Creek Utility in July 1994 in Docket No. 41242.
- ☐ The cost of rail coal transportation using URCS costs and A Stand Alone Network. This verified statement was submitted to the ICC on behalf of West Texas Utilities in April 1995 in Docket No. 41191.
- ☐ Further testimony on the cost of rail coal transportation using URCS costs and a Stand Alone Network. This verified statement was submitted to the ICC on behalf of West Texas Utilities in July 1995 in Docket No. 41191.
- ☐ Oral Argument on the effects of the BN-SF merger on rail costs and service presented before the full Commission in August 1995 on behalf of Universal Forest Products in Finance Docket No. 32549.

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- ☐ The effects of the UP-SP merger on costs, infrastructure and operations. Verified statement was submitted to ICC on Behalf of Kansas City Southern Railroad in March 1996 in Finance Docket No. 32760.
- ☐ Competitive truck transportation market. Joint Verified Statement with James Wells was submitted to Surface Transportation Board (STB) on behalf of TJ MAXX on June 22, 1998 in Docket No. 41192
- ☐ The investment plans of UP-SP to remedy effects of the UP-SP merger. Verified statement was submitted to STB on Behalf of Kansas City Southern Railroad in June, 1998 in Finance Docket No. 32760 UP-SP Merger Oversight Proceeding
- ☐ The Arkansas and Missouri Railroad Request For Discontinuance Waiver Filed on Behalf of Kansas City Southern Railroad. Verified statement was submitted to Surface Transportation Board (STB) in November 1998 in Finance Docket No. 32670.
- ☐ Further testimony on the competitive truck transportation market. Joint Verified Statement with James Wells was submitted to Surface Transportation Board (STB) on behalf of TJMAXX in January, 1999 in Docket No. 41192
- ☐ Rail Merger Guidelines to develop new and improved merger analysis processes. Verified statements were submitted to Surface Transportation Board (STB) on behalf of OxyChem, Oxy Vinyls, BASF and Williams Energy Services in May 2000 in Ex Parte 582.
- ☐ Reply Testimony on Rail Merger Guidelines to develop new and improved merger analysis processes. Reply Verified statements were submitted to

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Surface Transportation Board (STB) on behalf of OxyChem, Oxy Vinyls, BASF and Williams Energy Services in June 2000 in Ex Parte 582.

- ❑ Testimony on STB Rate Guidelines in small Shipment Cases. Verified statement was submitted to Surface Transportation Board (STB) on behalf of SK clients in STB Ex Parte 646 in June 2004.
- ❑ Oral Testimony on STB Rate Guidelines in small Shipment Cases. Oral Testimony was presented to the full Surface Transportation Board to Surface Transportation Board (STB) on behalf of SK clients in STB Ex Parte 646 in July 2004.
- ❑ Testimony on STB Stand Alone Costs focusing on alternatives. Comments submitted to Surface Transportation Board (STB) on behalf of SK in STB Ex Parte 657 in April 2005.
- ❑ Oral Testimony on STB Stand Alone Costs focusing on alternatives. Presented to Surface Transportation Board (STB) on behalf of SK in STB Ex Parte 657 in April 2005.
- ❑ Testimony on the first ever STB Small Shipment Rate Case. Comments submitted to Surface Transportation Board (STB) on behalf of BP Amoco in STB Docket NOR 42093 in May-June 2005. The case was resolved successfully through mediation.

Tom O'Connor -- State, Regional and Canadian Testimony

- ❑ Expert testimony centering on the costs of providing transportation to Medicaid care recipients. This testimony involved design and development of computerized costing models of highway transportation models. The evidence was central to resolution of long standing issues. This evidence

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was developed and submitted on behalf of Medicaid transportation providers and was accepted by the Court in Marion Superior Court in the State of Indiana in Cause No. 49D01 9309 MI952 on November 21, 2005. Oral testimony was presented in October, 2005. The case was decided in favor of the client.

- Expert antitrust testimony centering on the availability of construction materials. This was submitted in an antitrust case and was filed on behalf of Solcon in Solcon Constructions adv. Asphalt Busters Case No. CIV 01 01269 PHX ROS, United States District Court for the District of Arizona. This evidence was developed and submitted in May 2003.
- Expert testimony centering on commuter railroad operations and costs. This testimony involved design and development of computerized costing models of commuter rail operations. The evidence was central to arbitration to resolve subsidy disputes between New York and Connecticut. This evidence was developed and submitted on behalf of Metro North Commuter Railroad in August 1996 with oral testimony presented in February 1997. The case was decided successfully in favor of the client.
- Expert testimony centering on the effects of a series of explosions on transportation operations and costs. This was submitted on behalf of Washington construction Company in a damages case filed by Burlington Northern Railroad in state court in Montana, First Judicial District Court, and Cause Number ADV 91-1885. The case went to a jury trial and was decided successfully in favor of the client in September 1993.
- Expert antitrust testimony centering on computerized network models. This was submitted in an antitrust case filed on behalf of Geoplex in U.S. District

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Court for the Eastern District of Virginia, Geoplex Corporation v. CACI, Inc. Civil Action No. 89-610-A. This evidence was developed and submitted in November 1989.

- Expert testimony centering on transportation operations and costs. This was submitted on behalf of the Canadian provinces of Alberta, Manitoba and Saskatchewan before a Canadian Crown Commission in a series of hearings held in Winnipeg, Manitoba and Regina, Saskatchewan in 1976. This led to an historic change in Canadian transportation regulation.
- In addition to these cases Mr. O'Connor has also submitted testimony on rail costs and operations before State regulatory commissions in Indiana, Pennsylvania and New York.

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□ Appendix B: Abandonment and Discontinuance Regulations

Surface Transportation Board, DOT

(b) If the Board finds that one or more applicants are financially responsible parties, it shall determine whether or the involved line or line segment is a qualified line. A line is a qualified line if:

(1) Either:

(a) The public convenience and necessity require or permit the sale of line or line segment; or

(b) The line or line segment is classified in Category 1 or 2 of the owning carrier's system diagram and:

(i) The traffic level on the line or line segment sought to be acquired was less than 3 million gross ton-miles of traffic per mile in the preceding calendar year; (Note: This finding will not be required for applications filed after October 1, 2005.)

(ii) If the Board finds that one or more financially responsible parties have offered to buy a qualifying line or line segment, the Board shall set the price at the cost of the line or line segment as determined by the Board. The Board may, in its discretion, require the applicant to provide a cash or cash equivalent security to cover all the financial obligations of the line or line segment, including but not limited to the payment of freight, taxes, and other obligations, and the applicant shall provide such security to the Board. The Board may, in its discretion, require the applicant to provide a cash or cash equivalent security to cover all the financial obligations of the line or line segment, including but not limited to the payment of freight, taxes, and other obligations, and the applicant shall provide such security to the Board.

(c) If knowledge rights are sought in the application, the Board shall proceed on the grounds of public use, and shall determine the fair value rights, if the parties have not agreed.

(d) If the applicant requests the Board to set joint rates or divisions and the line carried less than 3 million gross ton-miles of traffic per mile during the preceding calendar year, the Board shall proceed to 49 U.S.C. 10502, section 10502, joint rates and divisions based on the evidence of record in the proceeding. Unless specifically requested to do so by the selling carrier, the Board will not set the rate for the selling railroad's share of the joint rate at less than the applicable level for the year in which the acquisition is made, set by 49 U.S.C. 10706(d)(2), which limits Board maximum rate-making jurisdiction to rates above price ratios.

price ratios.

PART 1152—ABANDON DISCONTINUANCE C AND RAIL TRAN UNDER 49 U.S.C. 109

Subpart A—Gen

Sec.

1152.1 Purpose and scope

1152.2 Definitions

Subpart B—System I

1152.10 System diagram and

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§ 1152.1) Subject E [Reserved]

Subject F—General Accounting and Discontinuance of Service and Track-Right Rights

§ 1152.2 General Accounting and Discontinuance of Service and Track-Right Rights

Subject G—General Rules Applicable to Accounts for Discontinuance of Service or Track-Right Rights Under the 49 U.S.C. 10502 Discontinuation Procedures

§ 1152.3 Special Rules

Authority: 49 U.S.C. 10501, 49 U.S.C. 10502 and 49 U.S.C. 10503; 49 U.S.C. 10504 and 49 U.S.C. 10505; 49 U.S.C. 10506 and 49 U.S.C. 10507; 49 U.S.C. 10508 and 49 U.S.C. 10509; 49 U.S.C. 10510 and 49 U.S.C. 10511; 49 U.S.C. 10512 and 49 U.S.C. 10513; 49 U.S.C. 10514 and 49 U.S.C. 10515; 49 U.S.C. 10516 and 49 U.S.C. 10517; 49 U.S.C. 10518 and 49 U.S.C. 10519; 49 U.S.C. 10520 and 49 U.S.C. 10521; 49 U.S.C. 10522 and 49 U.S.C. 10523; 49 U.S.C. 10524 and 49 U.S.C. 10525; 49 U.S.C. 10526 and 49 U.S.C. 10527; 49 U.S.C. 10528 and 49 U.S.C. 10529; 49 U.S.C. 10530 and 49 U.S.C. 10531; 49 U.S.C. 10532 and 49 U.S.C. 10533; 49 U.S.C. 10534 and 49 U.S.C. 10535; 49 U.S.C. 10536 and 49 U.S.C. 10537; 49 U.S.C. 10538 and 49 U.S.C. 10539; 49 U.S.C. 10540 and 49 U.S.C. 10541; 49 U.S.C. 10542 and 49 U.S.C. 10543; 49 U.S.C. 10544 and 49 U.S.C. 10545; 49 U.S.C. 10546 and 49 U.S.C. 10547; 49 U.S.C. 10548 and 49 U.S.C. 10549; 49 U.S.C. 10550 and 49 U.S.C. 10551; 49 U.S.C. 10552 and 49 U.S.C. 10553; 49 U.S.C. 10554 and 49 U.S.C. 10555; 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49 U.S.C. 10780 and 49 U.S.C. 10781; 49 U.S.C. 10782 and 49 U.S.C. 10783; 49 U.S.C

- Appendix C; FRA Safety Responsibilities

THE FEDERAL RAIL SAFETY PROGRAM⁷

A. Rail Safety Jurisdiction

The Federal Railroad Administration (FRA) is the component of the Department of Transportation responsible for administering Federal railroad safety laws. The broad safety authority of the FRA encompasses railroad safety practices, equipment, and reporting. FRA is also responsible for inspecting railroad operations for compliance with Federal safety requirements. Federal rail safety statutes are found in Subtitle V of Title 49, U.S. Code. In addition, FRA administers a number of railroad development programs, such as the high-speed rail research and development program, the rail infrastructure programs, and federal oversight of Amtrak, which are discussed separately in this document.

Federal regulation of railroad safety practices began in the late 19th century, when statutes governing specific aspects of railroad equipment were enacted and regulatory authority was vested in the ICC. When the Department of Transportation (DOT) was created in 1966, all safety responsibilities of the ICC were transferred to DOT. In 1970, the Federal Railroad Safety Act was enacted, giving DOT comprehensive authority over rail carriers' safety practices and equipment.

⁷ Source: US House Committee On Transportation And Infrastructure; Subcommittee On Railroads 109th Congress January 2005

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Prior to 1988, FRA had no jurisdiction over railroad employees – only the carriers themselves. As a result of the 1987 Conrail-Amtrak collision, in Chase, Maryland, (caused by a drug-impaired engineer), Congress amended the safety laws through the Rail Safety Improvement Act of 1988 to give FRA direct jurisdiction over railroad employees in safety-sensitive positions.

The 1988 legislation also required FRA to adopt and implement a system of engineer certification or licensing. Previously, all aspects of engineer training and qualification (including physical standards) had been left solely to the rail carriers.

The Federal Railroad Administration is divided into headquarters and field office staff. Headquarters staff provide administrative and policy support for all FRA activities. They are also responsible for issuing standards, procedures and regulations, as well as for imposing and collecting civil penalties for rail safety violations, and for collecting and disseminating railroad accident and incident data. The FRA Administrator has the authority to issue emergency orders that impose specific safety requirements in order to alleviate a potential threat to safety. There are approximately 240 employees in FRA headquarters.

Field staff consists primarily of safety inspectors who are divided into the following disciplines: hazardous materials, operating practices, motive power and equipment, track, and signal and train control. Safety inspectors are responsible for inspecting the nation's 170,000 miles of railroad track, as well as for ensuring that the railroads and their 200,000 employees are in compliance with all other federal rail safety regulations. There are approximately 400 federal rail safety inspectors employed in FRA's eight regions. In addition, 32 states have a total of 145 rail safety inspectors who inspect railroads for compliance with federal safety requirements.

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In addition to the federal safety regulatory and inspection program, the FRA administers a safety research and development program. The goal of the research and development program is to provide science and technology support for rail safety rulemaking and enforcement and to stimulate technological advances. The FRA owns the Transportation Test Center (TTC) near Pueblo, Colorado, where much of the research and development activities take place. The TTC is operated by the Association of American Railroads under a long-term contract

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□ PART 213--TRACK SAFETY STANDARDS

[Code of Federal Regulations]
[Title 49, Volume 4]
[Revised as of October 1, 2005]
[CITE: 49CFR213.1] [Page 92-94]

TITLE 49--TRANSPORTATION

CHAPTER II--FEDERAL RAILROAD ADMINISTRATION, DEPARTMENT OF
TRANSPORTATION

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Appendix A to Part 213--Maximum Allowable Curving Speeds

Appendix B to Part 213--Schedule of Civil Penalties

Appendix C to Part 213--Statement of Agency Policy on the Safety of Railroad Bridges

Authority: 49 U.S.C. 20102-20114 and 20142; 28 U.S.C. 2461, note; and 49 CFR 1.49(m).

Source: 63 FR 34029, June 22, 1998, unless otherwise noted.

(a) This part prescribes minimum safety requirements for railroad Track that is part of the general railroad system of transportation. The requirements prescribed in this part apply to specific track conditions existing in isolation. Therefore, a combination of track conditions, none of which individually amounts to a deviation from the requirements in this part, may require remedial action to provide for safe operations over that track. This part does not restrict a railroad from adopting and enforcing additional or more stringent requirements not inconsistent with this part.

(b) Subparts A through F apply to track Classes 1 through 5. Subpart G and 213.2, 213.3, and 213.15 apply to track over which trains are operated at speeds in excess of those permitted over Class 5 track.

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PART 213--TRACK SAFETY STANDARDS--Table of Contents

Subpart A--General

Sec. 213.4 Excepted track.

A track owner may designate a segment of track as excepted track

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provided that--

(a) The segment is identified in the timetable, special instructions, general order, or other appropriate records which are available for inspection during regular business hours;

(b) The identified segment is not located within 30 feet of an adjacent track which can be subjected to simultaneous use at speeds in excess of 10 miles per hour;

(c) The identified segment is inspected in accordance with 213.233(c) and 213.235 at the frequency specified for Class 1 track;

(d) The identified segment of track is not located on a bridge including the track approaching the bridge for 100 feet on either side, or located on a public street or highway, if railroad cars containing commodities required to be placarded by the Hazardous Materials Regulations (49 CFR part 172), are moved over the track; and

(e) The railroad conducts operations on the identified segment under the following conditions:

(1) No train shall be operated at speeds in excess of 10 miles per hour;

(2) No occupied passenger train shall be operated;

(3) No freight train shall be operated that contains more than five cars required to be placarded by the Hazardous Materials Regulations (49 CFR part 172); and

(4) The gage on excepted track shall not be more than 4 feet 10 1/4 inches. This paragraph (e)(4) is applicable September 21, 1999.

(f) A track owner shall advise the appropriate FRA Regional Office at least 10 days prior to removal of a segment of track from excepted status.

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PART 213_TRACK SAFETY STANDARDS--Table of Contents

Subpart A_General

Sec. 213.5 Responsibility for compliance.

(a) Except as provided in paragraph (b) of this section, any owner of track to which this part applies who knows or has notice that the track does not comply with the requirements of this part, shall--

- (1) Bring the track into compliance;
- (2) Halt operations over that track; or
- (3) Operate under authority of a person designated under Sec. 213.7(a), who has at least one year of supervisory experience in railroad track maintenance, subject to conditions set forth in this part.

(b) If an owner of track to which this part applies designates a segment of track as "excepted track" under the provisions of Sec. 213.4, operations may continue over that track without complying with the provisions of subparts B, C, D, and E of this part, unless otherwise expressly stated.

(c) If an owner of track to which this part applies assigns responsibility for the track to another person (by lease or otherwise), written notification of the assignment shall be provided to the appropriate FRA Regional Office at least 30 days in advance of the assignment. The notification may be made by any party to that assignment, but shall be in writing and include the following--

- (1) The name and address of the track owner;
- (2) The name and address of the person to whom responsibility is assigned (assignee);
- (3) A statement of the exact relationship between the track owner and the assignee;
- (4) A precise identification of the track;
- (5) A statement as to the competence and ability of the assignee to carry out the duties of the track owner under this part; and
- (6) A statement signed by the assignee acknowledging the assignment to him of responsibility for purposes of compliance with this part.

(d) The Administrator may hold the track owner or the assignee or both responsible for compliance with this part and subject to penalties under Sec. 213.15.

(e) A common carrier by railroad which is directed by the Surface Transportation Board to provide service over the track of another railroad under 49 U.S.C. 11123 is considered the owner of that track for the purposes of the application of this part during the period the directed service order remains in effect.

(f) When any person, including a contractor for a railroad or track owner, performs any function required by this part, that person is required to perform that function in accordance with this part.

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PART 213_TRACK SAFETY STANDARDS--Table of Contents

Subpart A_General

Sec. 213.9 Classes of track: operating speed limits.

(a) Except as provided in paragraph (b) of this section and Sec. Sec. 213.57(b), 213.59(a), 213.113(a), and 213.137(b) and (c), the following maximum allowable operating speeds apply--

[In miles per hour]

Over track that meets all of the requirements prescribed in this part for--	The maximum allowable operating speed for freight trains is--	The maximum allowable operating speed for passenger trains is--
Excepted track.....	10	N/A
Class 1 track.....	10	15
Class 2 track.....	25	30
Class 3 track.....	40	60
Class 4 track.....	60	80
Class 5 track.....	80	90

(b) If a segment of track does not meet all of the requirements for its intended class, it is reclassified to the next lowest class of track for which it does meet all of the requirements of this part. However, if the segment of track does not at least meet the requirements for Class 1 track, operations may continue at Class 1 speeds for a period of not more than 30 days without bringing the track into compliance, under the authority of a person designated under Sec. 213.7(a), who has at least one year of supervisory experience in railroad track maintenance, after that person determines that operations may safely continue and subject to any limiting conditions specified by such person.

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PART 213_TRACK SAFETY STANDARDS--Table of Contents

Subpart A_General

Sec. 213.17 Waivers.

(a) Any owner of track to which this part applies, or other person subject to this part, may petition the Federal Railroad Administrator for a waiver from any or all requirements prescribed in this part. The filing of such a petition does not affect that person's responsibility for compliance with that requirement while the petition is being considered.

(b) Each petition for a waiver under this section shall be filed in the manner and contain the information required by part 211 of this chapter.

(c) If the Administrator finds that a waiver is in the public interest and is consistent with railroad safety, the Administrator may grant the exemption subject to any conditions the Administrator deems necessary. Where a waiver is granted, the Administrator publishes a notice containing the reasons for granting the waiver.

PART 213_TRACK SAFETY STANDARDS--Table of Contents

Subpart B_Roadbed

Sec. 213.33 Drainage.

Each drainage or other water carrying facility under or immediately adjacent to the roadbed shall be maintained and kept free of obstruction, to accommodate expected water flow for the area concerned.

CITE: 49CFR213.31]

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PART 213--TRACK SAFETY STANDARDS--Table of Contents

Subpart B--Roadbed

Sec. 213.31 Scope.

This subpart prescribes minimum requirements for roadbed and areas immediately adjacent to roadbed.

PART 213--TRACK SAFETY STANDARDS--Table of Contents

Subpart D--Track Structure

Sec. 213.101 Scope.

This subpart prescribes minimum requirements for ballast, crossties, track assembly fittings, and the physical conditions of rails.

PART 213--TRACK SAFETY STANDARDS--Table of Contents

Subpart D--Track Structure

Sec. 213.115 Rail end mismatch.

Any mismatch of rails at joints may not be more than that prescribed by the following table--

Class of track	Any mismatch of rails at joints may not be more than the following--	
	On the tread of the rail ends (inch)	On the gage side of the rail ends (inch)
Class 1 track.....	1/4\	1/4\
Class 2 track.....	1/4\	3/16\
Class 3 track.....	3/16\	3/16\
Class 4 and 5 track.....	1/8\	1/8\

TITLE 49--TRANSPORTATION

CHAPTER II--FEDERAL RAILROAD ADMINISTRATION, DEPARTMENT OF

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TRANSPORTATION

PART 213_TRACK SAFETY STANDARDS--Table of Contents

Subpart D_Track Structure

Sec. 213.139 Spring rail frogs.

(a) The outer edge of a wheel tread shall not contact the gage side of a spring wing rail.

(b) The toe of each wing rail shall be solidly tamped and fully and tightly bolted.

(c) Each frog with a bolt hole defect or head-web separation shall be replaced.

(d) Each spring shall have compression sufficient to hold the wing rail against the point rail.

(e) The clearance between the holddown housing and the horn shall not be more than one-fourth of an inch.

PART 213--TRACK SAFETY STANDARDS--Table of Contents

Subpart B--Roadbed

Sec. 213.33 Drainage.

Each drainage or other water carrying facility under or immediately adjacent to the roadbed shall be maintained and kept free of obstruction, to accommodate expected water flow for the area concerned.

Subpart B_Roadbed

Sec. 213.37 Vegetation.

Vegetation on railroad property which is on or immediately adjacent to roadbed shall be controlled so that it does not--

(a) Become a fire hazard to track-carrying structures;

(b) Obstruct visibility of railroad signs and signals:

(1) Along the right-of-way, and

(2) At highway-rail crossings; (This paragraph (b)(2) is applicable September 21, 1999.)

(c) Interfere with railroad employees performing normal trackside duties;

(d) Prevent proper functioning of signal and communication lines; or

(e) Prevent railroad employees from visually inspecting moving equipment from their normal duty stations.

PART 213_TRACK SAFETY STANDARDS--Table of Contents

Subpart C_Track Geometry

Sec. 213.53 Gage.

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(a) Gage is measured between the heads of the rails at right-angles to the rails in a plane five-eighths of an inch below the top of the rail head.

(b) Gage shall be within the limits prescribed in the following table--

Class of track	The gage must be at least--	But not more than--
Excepted track.....	N/A.....	4[foot]10\1/4\<inch>.
Class 1 track.....	4[foot]8<inch>...	4[foot]10<inch>.
Class 2 and 3 track.	4[foot]8<inch>..	4[foot]9\3/4\<inch>.
Class 4 and 5 track.	4[foot]8<inch>..	4[foot]9\1/2\<inch>.

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Subpart C_Track Geometry

Sec. 213.55 Alignment.

Alignment may not deviate from uniformity more than the amount prescribed in the following table:

See Sec. 213.55 Alignment.

Subpart C_Track Geometry

Sec. 213.57 Curves; elevation and speed limitations.

(a) The maximum crosslevel on the outside rail of a curve may not be more than 8 inches on track Classes 1 and 2 and 7 inches on Classes 3 through 5. Except as provided in Sec. 213.63, the outside rail of a curve may not be lower than the inside rail. (The first sentence of paragraph (a) is applicable September 21, 1999.)

(b)(1) The maximum allowable operating speed for each curve is determined by the following formula--
TR22JN98.001

Where--

V = Maximum allowable operating speed (miles per hour).

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E = Actual elevation of the outside rail (inches).\1\

\1\ Actual elevation for each 155 foot track segment in the body of the curve is determined by averaging the elevation for 10 points through the segment at 15.5 foot spacing. If the curve length is less than 155 feet, average the points through the full length of the body of the curve.

D = Degree of curvature (degrees).\2\

\2\ Degree of curvature is determined by averaging the degree of curvature over the same track segment as the elevation.

(2) Table 1 of Appendix A is a table of maximum allowable operating speed computed in accordance with this formula for various elevations

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and degrees of curvature.

(c) (1) For rolling stock meeting the requirements specified in paragraph (d) of this section, the maximum operating speed for each curve may be determined by the following formula--

Where--

V_{max} = Maximum allowable operating speed (miles per hour).

E_a = Actual elevation of the outside rail (inches).

D = Degree of curvature (degrees).

(2) Table 2 of Appendix A is a table of maximum allowable operating speed computed in accordance with this formula for various elevations and degrees of curvature.

(d) Qualified equipment may be operated at curving speeds determined by the formula in paragraph (c) of this section, provided each specific class of equipment is approved for operation by the Federal Railroad Administration and the railroad demonstrates that:

(1) When positioned on a track with a uniform 4-inch superelevation, the roll angle between the floor of the equipment and the horizontal does not exceed 5.7 degrees; and

(2) When positioned on a track with a uniform 6 inch superelevation, no wheel of the equipment unloads to a value of 60 percent of its static value on perfectly level track, and the roll angle between the floor of the equipment and the horizontal does not exceed 8.6 degrees.

(3) The track owner shall notify the Federal Railroad Administrator no less than 30 calendar days prior to the proposed implementation of the higher curving speeds allowed under the formula in paragraph (c) of this section. The notification shall be in writing and shall contain, at a minimum, the following information--

(i) A complete description of the class of equipment involved, including schematic diagrams of the suspension systems and the location of the center of gravity above top of rail;

(ii) A complete description of the test procedure and instrumentation used to qualify the equipment and the maximum values for wheel unloading and roll angles which were observed during testing;

(3) The test procedure may be conducted in a test facility whereby all the wheels on one side (right or left) of the equipment are alternately raised and lowered by 4 and 6 inches and the vertical wheel loads under each wheel are measured and a level is used to record the angle through which the floor of the equipment has been rotated.

(iii) Procedures or standards in effect which relate to the maintenance of the suspension system for the particular class of equipment; and

(iv) Identification of line segment on which the higher curving speeds are proposed to be implemented.

(e) A track owner, or an operator of a passenger or commuter service, who provides passenger or commuter service over trackage of more than one track owner with the same class of equipment may provide

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written notification to the Federal Railroad Administrator with the written consent of the other affected track owners.

(f) Equipment presently operating at curving speeds allowed under the formula in paragraph (c) of this section, by reason of conditional waivers granted by the Federal Railroad Administration, shall be considered to have successfully complied with the requirements of paragraph (d) of this section.

(g) A track owner or a railroad operating above Class 5 speeds, may request approval from the Federal Railroad Administrator to operate specified equipment at a level of cant deficiency greater than four inches in accordance with Sec. 213.329(c) and (d) on curves in Class 1 through 5 track which are contiguous to the high speed track provided that--

(1) The track owner or railroad submits a test plan to the Federal Railroad Administrator for approval no less than thirty calendar days prior to any proposed implementation of the higher curving speeds. The test plan shall include an analysis and determination of carbody acceleration safety limits for each vehicle type which indicate wheel unloading of 60 percent in a steady state condition and 80 percent in a transient (point by point) condition. Accelerometers shall be laterally-oriented and floor-mounted near the end of a representative vehicle of each type;

(2) Upon FRA approval of a test plan, the track owner or railroad conducts incrementally increasing train speed test runs over the curves in the identified track segment(s) to demonstrate that wheel unloading is within the limits prescribed in paragraph (g)(1) of this section;

(3) Upon FRA approval of a cant deficiency level, the track owner or railroad inspects the curves in the identified track segment with a Track Geometry Measurement System (TGMS) qualified in accordance with Sec. 213.333 (b) through (g) at an inspection frequency of at least twice annually with not less than 120 days interval between inspections; and

(4) The track owner or railroad operates an instrumented car having dynamic response characteristics that are representative of other equipment assigned to service or a portable device that monitors on-board instrumentation on trains over the curves in the identified track segment at the revenue speed profile at a frequency of at least once every 90-day period with not less than 30 days interval between inspections. The instrumented car or the portable device shall monitor a laterally-oriented accelerometer placed near the end of the vehicle at the floor level. If the carbody lateral acceleration measurement exceeds the safety limits prescribed in paragraph (g)(1), the railroad shall operate trains at curving speeds in accordance with paragraph (b) or (c) of this section; and

(5) The track owner or railroad shall maintain a copy of the most recent exception printouts for the inspections required under paragraphs (g)(3) and (4) of this section.

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PART 213--TRACK SAFETY STANDARDS--Table of Contents

Subpart D--Track Structure

Sec. 213.103 Ballast; general.

Unless it is otherwise structurally supported, all track shall be supported by material which will --

- (a) Transmit and distribute the load of the track and railroad rolling equipment to the subgrade;
- (b) Restrain the track laterally, longitudinally, and vertically under dynamic loads imposed by railroad rolling equipment and thermal stress exerted by the rails;
- (c) Provide adequate drainage for the track; and
- (d) Maintain proper track crosslevel, surface, and alignment.

Subpart D--Track Structure

Sec. 213.109 Crossties.

(a) Crossties shall be made of a material to which rail can be securely fastened.

(b) Each 39 foot segment of track shall have--

(1) A sufficient number of crossties which in combination provide effective support that will--

(i) Hold gage within the limits prescribed in Sec. 213.53(b);

(ii) Maintain surface within the limits prescribed in Sec. 213.63; and

(iii) Maintain alignment within the limits prescribed in

Sec. 213.55.

(2) The minimum number and type of crossties specified in paragraphs (c) and (d) of this section effectively distributed to support the entire segment; and

(3) At least one crosstie of the type specified in paragraphs (c) and (d) of this section that is located at a joint location as specified in paragraph (f) of this section.

(c) Each 39 foot segment of: Class 1 track shall have five crossties; Classes 2 and 3 track shall have eight crossties; and Classes 4 and 5 track shall have 12 crossties, which are not:

(1) Broken through;

(2) Split or otherwise impaired to the extent the crossties will allow the ballast to work through, or will not hold spikes or rail fasteners;

(3) So deteriorated that the tie plate or base of rail can move laterally more than 1/2 inch relative to the crossties; or

(4) Cut by the tie plate through more than 40 percent of a ties' thickness.

(d) Each 39 foot segment of track shall have the minimum number and type of crossties as indicated in the following table (this paragraph (d) is applicable September 21, 2000).

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Class of track	Tangent track and curves [1e]2 degrees	Turnouts and curved track over 2 degrees
Class 1 track.....	5	6
Class 2 track.....	8	9
Class 3 track.....	8	10
Class 4 and 5 track.....	12	14

(e) Crossties counted to satisfy the requirements set forth in the table in paragraph (d) of this section shall not be--

- (1) Broken through;
- (2) Split or otherwise impaired to the extent the crossties will allow the ballast to work through, or will not hold spikes or rail fasteners;
- (3) So deteriorated that the tie plate or base of rail can move laterally $\frac{1}{2}$ inch relative to the crossties; or
- (4) Cut by the tie plate through more than 40 percent of a crosstie's thickness (this paragraph (e) is applicable September 21, 2000).

(f) Class 1 and Class 2 track shall have one crosstie whose centerline is within 24 inches of each rail joint location, and Classes 3 through 5 track shall have one crosstie whose centerline is within 18 inches of each rail joint location or, two crossties whose centerlines are within 24 inches either side of each rail joint location. The relative position of these ties is described in the following diagrams:

Each rail joint in Classes 1 and 2 track shall be supported by at least one crosstie specified in paragraphs (c) and (d) of this section whose centerline is within 48 inches shown above.

Each rail joint in Classes 3 through 5 track shall be supported by either at least one crosstie specified in paragraphs (c) and (d) of this section whose centerline is within 36 inches shown above, or:

Two crossties, one on each side of the rail joint, whose centerlines are within 24 inches of the rail joint location shown above.

(g) For track constructed without crossties, such as slab track, track connected directly to bridge structural components and track over servicing pits, the track structure shall meet the requirements of paragraphs (b)(1)(i), (ii), and (iii) of this section.

[63 FR 34029, June 22, 1998; 63 FR 46102, Aug. 28, 1998]

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Subpart D_Track Structure

Sec. 213.113 Defective rails.

(a) When an owner of track to which this part applies learns, through inspection or otherwise, that a rail in that track contains any of the defects listed in the following table, a person designated under Sec. 213.7 shall determine whether or not the track may continue in use. If he determines that the track may continue in use, operation over the defective rail is not permitted until--

- (1) The rail is replaced; or
- (2) The remedial action prescribed in the table is initiated.

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[GRAPHIC] [TIFF OMITTED] TN28SE98.059

Notes A. Assign person designated under Sec. 213.7 to visually supervise each operation over defective rail.

A2. Assign person designated under Sec. 213.7 to make visual inspection. After a visual inspection, that person may authorize operation to continue without continuous visual

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supervision at a maximum of 10 m.p.h. for up to 24 hours prior to another such visual inspection or replacement or repair of the rail.

B. Limit operating speed over defective rail to that as authorized by a person designated under Sec. 213.7(a), who has at least one year of supervisory experience in railroad track maintenance. The operating speed cannot be over 30 m.p.h. or the maximum allowable speed under Sec. 213.9 for the class of track concerned, whichever is lower.

C. Apply joint bars bolted only through the outermost holes to defect within 20 days after it is determined to continue the track in use. In the case of Classes 3 through 5 track, limit operating speed over defective rail to 30 m.p.h. until joint bars are applied; thereafter, limit speed to 50 m.p.h. or the maximum allowable speed under Sec. 213.9 for the class of track concerned, whichever is lower. When a search for internal rail defects is conducted under Sec. 213.237, and defects are discovered in Classes 3 through 5 which require remedial action C, the operating speed shall be limited to 50 m.p.h., or the maximum allowable speed under Sec. 213.9 for the class of track concerned, whichever is lower, for a period not to exceed 4 days. If the defective rail has not been removed from the track or a permanent repair made within 4 days of the discovery, limit operating speed over the defective rail to 30 m.p.h. until joint bars are applied; thereafter, limit speed to 50 m.p.h. or the maximum allowable speed under Sec. 213.9 for the class of track concerned, whichever is lower.

D. Apply joint bars bolted only through the outermost holes to

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defect within 10 days after it is determined to continue the track in use. In the case of Classes 3 through 5 track, limit operating speed over the defective rail to 30 m.p.h. or less as authorized by a person designated under Sec. 213.7(a), who has at least one year of supervisory experience in railroad track maintenance, until joint bars are applied; thereafter, limit speed to 50 m.p.h. or the maximum allowable speed under Sec. 213.9 for the class of track concerned, whichever is lower.

E. Apply joint bars to defect and bolt in accordance with Sec. 213.121(d) and (e).

F. Inspect rail 90 days after it is determined to continue the track in use.

G. Inspect rail 30 days after it is determined to continue the track in use.

H. Limit operating speed over defective rail to 50 m.p.h. or the maximum allowable speed under Sec. 213.9 for the class of track concerned, whichever is lower.

I. Limit operating speed over defective rail to 30 m.p.h. or the maximum allowable speed under Sec. 213.9 for the class of track concerned, whichever is lower.

(b) As used in this section--

(1) Transverse fissure means a progressive crosswise fracture starting from a crystalline center or nucleus inside the head from which it spreads outward as a smooth, bright, or dark, round or oval surface substantially at a right angle to the length of the rail. The distinguishing features of a transverse fissure from other types of fractures or defects are the crystalline center or nucleus and the nearly smooth surface of the development which surrounds it.

(2) Compound fissure means a progressive fracture originating in a horizontal split head which turns up or down in the head of the rail as a smooth, bright, or dark surface progressing until substantially at a right angle to the length of the rail. Compound fissures require examination of both faces of the fracture to locate the horizontal split head from which they originate.

(3) Horizontal split head means a horizontal progressive defect originating inside of the rail head, usually one-quarter inch or more below the running surface and progressing horizontally in all directions, and generally accompanied by a flat spot on the running surface. The defect appears as a crack lengthwise of the rail when it reaches the side of the rail head.

(4) Vertical split head means a vertical split through or near the middle of the head, and extending into or through it. A crack or rust streak may show under the head close to the web or pieces may be split off the side of the head.

(5) Split web means a lengthwise crack along the side of the web and extending into or through it.

(6) Piped rail means a vertical split in a rail, usually in the web, due to failure of the shrinkage cavity in the ingot to unite in rolling.

(7) Broken base means any break in the base of the rail.

(8) Detail fracture means a progressive fracture originating at or near the surface of the rail head. These fractures should not be confused with transverse fissures, compound fissures, or other defects

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which have internal origins. Detail fractures may arise from shelly spots, head checks, or flaking.

(9) Engine burn fracture means a progressive fracture originating in spots where driving wheels have slipped on top of the rail head. In developing downward they frequently resemble the

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compound or even transverse fissures with which they should not be confused or classified.

(10) Ordinary break means a partial or complete break in which there is no sign of a fissure, and in which none of the other defects described in this paragraph (b) are found.

(11) Damaged rail means any rail broken or injured by wrecks, broken, flat, or unbalanced wheels, slipping, or similar causes.

(12) Flattened rail means a short length of rail, not at a joint, which has flattened out across the width of the rail head to a depth of $\frac{3}{8}$ inch or more below the rest of the rail. Flattened rail occurrences have no repetitive regularity and thus do not include corrugations, and have no apparent localized cause such as a weld or engine burn. Their individual length is relatively short, as compared to a condition such as head flow on the low rail of curves.

(13) Bolt hole crack means a crack across the web, originating from a bolt hole, and progressing on a path either inclined upward toward the rail head or inclined downward toward the base. Fully developed bolt hole cracks may continue horizontally along the head/web or base/web fillet, or they may progress into and through the head or base to separate a piece of the rail end from the rail. Multiple cracks occurring in one rail end are considered to be a single defect. However, bolt hole cracks occurring in adjacent rail ends within the same joint must be reported as separate defects.

(14) Defective weld means a field or plant weld containing any discontinuities or pockets, exceeding 5 percent of the rail head area individually or 10 percent in the aggregate, oriented in or near the transverse plane, due to incomplete penetration of the weld metal between the rail ends, lack of fusion between weld and rail end metal, entrapment of slag or sand, under-bead or other shrinkage cracking, or fatigue cracking. Weld defects may originate in the rail head, web, or base, and in some cases, cracks may progress from the defect into either or both adjoining rail ends.

(15) Head and web separation means a progressive fracture, longitudinally separating the head from the web of the rail at the head fillet area.

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Subpart D_Track Structure

Sec. 213.115 Rail end mismatch.

Any mismatch of rails at joints may not be more than that prescribed by the following table--

Class of track	Any mismatch of rails at joints may not be more than the following--	
	On the tread of the rail ends (inch)	On the gage side of the rail ends (inch)
Class 1 track.....	\1/4\	\1/4\
Class 2 track.....	\1/4\	\3/16\
Class 3 track.....	\3/16\	\3/16\
Class 4 and 5 track.....	\1/8\	\1/8\

Subpart D_Track Structure

Sec. 213.121 Rail joints.

(a) Each rail joint, insulated joint, and compromise joint shall be of a structurally sound design and dimensions for the rail on which it is applied.

(b) If a joint bar on Classes 3 through 5 track is cracked, broken, or because of wear allows excessive vertical movement of either rail when all bolts are tight, it shall be replaced.

(c) If a joint bar is cracked or broken between the middle two bolt holes it shall be replaced.

(d) In the case of conventional jointed track, each rail shall be bolted with at least two bolts at each joint in Classes 2 through 5 track, and with at least one bolt in Class 1 track.

(e) In the case of continuous welded rail track, each rail shall be bolted with at least two bolts at each joint.

(f) Each joint bar shall be held in position by track bolts tightened to allow the joint bar to firmly support the abutting rail ends and to allow longitudinal movement of the rail in the joint to accommodate expansion and contraction due to temperature variations. When no-slip, joint-to-rail contact exists by design, the requirements of this paragraph do not apply. Those locations when over 400 feet in length, are considered to be continuous welded rail track and shall meet all the requirements for continuous welded rail track prescribed in this part.

(g) No rail shall have a bolt hole which is torch cut or burned in Classes 2 through 5 track. For Class 2 track, this paragraph (g) is applicable September 21, 1999.

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(h) No joint bar shall be reconfigured by torch cutting in Classes 3 through 5 track.

Subpart D_Track Structure

Sec. 213.123 Tie plates.

(a) In Classes 3 through 5 track where timber crossties are in use there shall be tie plates under the running rails on at least eight of any 10 consecutive ties.

(b) In Classes 3 through 5 track no metal object which causes a concentrated load by solely supporting a rail shall be allowed between the base of the rail and the bearing surface of the tie plate. This paragraph (b) is applicable September 21, 1999.)

Subpart D--Track Structure

Sec. 213.127 Rail fastening systems.

Track shall be fastened by a system of components which effectively maintains gage within the limits prescribed in Sec. 213.53(b). Each component of each such system shall be evaluated to determine whether gage is effectively being maintained.

Subpart D_Track Structure

Sec. 213.133 Turnouts and track crossings generally.

(a) In turnouts and track crossings, the fastenings shall be intact and maintained so as to keep the components securely in place. Also, each switch, frog, and guard rail shall be kept free of obstructions that may interfere with the passage of wheels.

(b) Classes 3 through 5 track shall be equipped with rail anchoring through and on each side of track crossings and turnouts, to restrain rail movement affecting the position of switch points and frogs. For Class 3 track, this paragraph (b) is applicable September 21, 1999.)

(c) Each flangeway at turnouts and track crossings shall be at least 1 1/2 inches wide.

Subpart D_Track Structure

Sec. 213.135 Switches.

(a) Each stock rail must be securely seated in switch plates, but care shall be used to avoid canting the rail by overtightening the rail braces.

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(b) Each switch point shall fit its stock rail properly, with the switch stand in either of its closed positions to allow wheels to pass the switch point. Lateral and vertical movement of a stock rail in the switch plates or of a switch plate on a tie shall not adversely affect the fit of the switch point to the stock rail. Broken or cracked switch point rails will be subject to the requirements of Sec. 213.113, except that where remedial actions C, D, or E require the use of joint bars, and joint bars cannot be placed due to the physical configuration of the switch, remedial action B will govern, taking into account any added safety provided by the presence of reinforcing bars on the switch points.

(c) Each switch shall be maintained so that the outer edge of the wheel tread cannot contact the gage side of the stock rail.

(d) The heel of each switch rail shall be secure and the bolts in each heel shall be kept tight.

(e) Each switch stand and connecting rod shall be securely fastened and operable without excessive lost motion.

(f) Each throw lever shall be maintained so that it cannot be operated with the lock or keeper in place.

(g) Each switch position indicator shall be clearly visible at all times.

(h) Unusually chipped or worn switch points shall be repaired or replaced. Metal flow shall be removed to insure proper closure.

(i) Tongue & Plain Mate switches, which by design exceed Class 1 and excepted track maximum gage limits, are permitted in Class 1 and excepted track.

Subpart F_Inspection

Sec. 213.233 Track inspections.

(a) All track shall be inspected in accordance with the schedule prescribed in paragraph (c) of this section by a person designated under Sec. 213.7.

(b) Each inspection shall be made on foot or by riding over the track in a vehicle at a speed that allows the person making the inspection to visually inspect the track structure for compliance with this part. However, mechanical, electrical, and other track inspection devices may be used to supplement visual inspection. If a vehicle is used for visual inspection, the speed of the vehicle may not be more than 5 miles per hour when passing over track crossings and turnouts, otherwise, the inspection vehicle speed shall be at the sole discretion of the inspector, based on track conditions and inspection requirements. When riding over the track in a vehicle, the inspection will be subject to the following conditions--

(1) One inspector in a vehicle may inspect up to two tracks at one time provided that the inspector's visibility remains unobstructed by any cause and that the second track is not centered more than 30 feet from the track upon which the inspector is riding;

(2) Two inspectors in one vehicle may inspect up to four tracks at a time provided that the inspectors' visibility remains unobstructed by

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any cause and that each track being inspected is centered within 39 feet from the track upon which the inspectors are riding;

(3) Each main track is actually traversed by the vehicle or inspected on foot at least once every two weeks, and each siding is actually traversed by the vehicle or inspected on foot at least once every month. On high density commuter railroad lines where track time does not permit an on track vehicle inspection, and where track centers are 15 foot or less, the requirements of this paragraph (b)(3) will not apply; and

(4) Track inspection records shall indicate which track(s) are traversed by the vehicle or inspected on foot as outlined in paragraph (b)(3) of this section.

(c) Each track inspection shall be made in accordance with the following schedule--

Class of track	Type of track	Required frequency
Excepted track and Class 1, 2, and 3 track.	Main track and sidings.	Weekly with at least 3 calendar days interval between inspections, or before use, if the track is used less than once a week, or twice weekly with at least 1 calendar day interval between inspections, if the track carries passenger trains or more than 10 million gross tons of traffic during the preceding calendar year.
Excepted track and Class 1, 2, and 3 track.	Other than main track and sidings.	Monthly with at least 20 calendar days interval between inspections.
Class 4 and 5 track.....		Twice weekly with at least 1 calendar day interval between inspections.

(d) If the person making the inspection finds a deviation from the requirements of this part, the inspector shall immediately initiate remedial action.

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Note to Sec. 213.233: Except as provided in paragraph (b) of this section, no part of this section will in any way be construed to limit the inspector's discretion as it involves inspection speed and sight distance.

Subpart F--Inspection

Sec. 213.237 Inspection of rail.

(a) In addition to the track inspections required by Sec. 213.233, a continuous search for internal defects shall be made of all rail in Classes 4 through 5 track, and Class 3 track over which passenger trains operate, at least once every 40 million gross tons (mgt) or once a year, whichever interval is shorter. On Class 3 track over which passenger trains do not operate such a search shall be made at least once every 30 mgt or once a year, whichever interval is longer. (This paragraph (a) is applicable January 1, 1999.

(b) Inspection equipment shall be capable of detecting defects between joint bars, in the area enclosed by joint bars.

(c) Each defective rail shall be marked with a highly visible marking on both sides of the web and base.

(d) If the person assigned to operate the rail defect detection equipment being used determines that, due to rail surface conditions, a valid search for internal defects could not be made over a particular length of track, the test on that particular length of track cannot be considered as a search for internal defects under paragraph (a) of this section. (This paragraph (d) is not retroactive to tests performed prior to September 21, 1998.

(e) If a valid search for internal defects cannot be conducted for reasons described in paragraph (d) of this section, the track owner shall, before the expiration of time or tonnage limits--

- (1) Conduct a valid search for internal defects;
- (2) Reduce operating speed to a maximum of 25 miles per hour until such time as a valid search for internal defects can be made; or
- (3) Remove the rail from service.

Subpart F_Inspection

Sec. 213.241 Inspection records.

(a) Each owner of track to which this part applies shall keep a record of each inspection required to be performed on that track under this subpart.

(b) Each record of an inspection under Sec. Sec. 213.4, 213.233, and 213.235 shall be prepared on the day the inspection is made and signed by the person making the inspection. Records shall specify the track inspected, date of inspection, location and nature of any deviation from the requirements of this part, and the remedial action

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taken by the person making the inspection. The owner shall designate the location(s) where each original record shall be maintained for at least one year after the inspection covered by the record. The owner shall also designate one location, within 100 miles of each state in which they conduct operations, where copies of records which apply to those operations are either maintained or can be viewed following 10 days notice by the Federal Railroad Administration.

(c) Rail inspection records shall specify the date of inspection, the location and nature of any internal defects found, the remedial action taken and the date thereof, and the location of any intervals of track not tested per Sec. 213.237(d). The owner shall retain a rail inspection record for at least two years after the inspection and for one year after remedial action is taken.

(d) Each owner required to keep inspection records under this section shall make those records available for inspection and copying by the Federal Railroad Administration.

(e) For purposes of compliance with the requirements of this section, an owner of track may maintain and transfer records through electronic transmission, storage, and retrieval provided that--

(1) The electronic system be designed so that the integrity of each record is maintained through appropriate levels of security such as recognition of an electronic signature, or other means, which uniquely identify the initiating person as the author of that record. No two persons shall have the same electronic identity;

(2) The electronic storage of each record shall be initiated by the person making the inspection within 24 hours following the completion of that inspection;

(3) The electronic system shall ensure that each record cannot be modified in any way, or replaced, once the record is transmitted and stored;

(4) Any amendment to a record shall be electronically stored apart from the record which it amends. Each amendment to a record shall be uniquely identified as to the person making the amendment;

(5) The electronic system shall provide for the maintenance of inspection records as originally submitted without corruption or loss of data;

(6) Paper copies of electronic records and amendments to those records, that may be necessary to document compliance with this part shall be made available for inspection and copying by the Federal Railroad Administration at the locations specified in paragraph (b) of this section; and

(7) Track inspection records shall be kept available to persons who performed the inspections and to persons performing subsequent inspections.

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