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Before The
Surface Transportation Board

Finance Docket No. 35157

PETITION OF THE CITY OF ALEXANDRIA, VIRGINIA
FOR DECLARATORY ORDER

**RESPONSE OF NORFOLK SOUTHERN RAILWAY COMPANY TO
PETITION OF ALEXANDRIA FOR LEAVE TO FILE A REPLY TO A REPLY,
RESPONSE AND MOTION TO STRIKE**

Gary A. Bryant
WILLCOX & SAVAGE, P.C.
One Commercial Place, Suite 1800
Norfolk, Virginia 23510
(757) 628-5500
(757) 628-5566 Facsimile

John V. Edwards
Senior General Attorney
NORFOLK SOUTHERN
CORPORATION
Three Commercial Place
Norfolk, Virginia 23510-2191
(757) 629-2838

*Attorneys for Norfolk Southern
Railway Company*

July 15, 2008

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A REPLY TO A REPLY, RESPONSE AND MOTION TO STRIKE**

On July 11, 2008, the City of Alexandria, Virginia (the "City") filed with the Surface Transportation Board ("STB" or "Board"): (1) a Petition of the City of Alexandria, Virginia, for Leave to File a Reply to a Reply ("Petition") and (2) a Reply of the City of Alexandria, Virginia, to Norfolk Southern's Response to Petition for Declaratory Order and Motion to Strike Extraneous Material ("Reply"). In sum, the City seeks leave to file a reply to a reply, submits that reply, and moves to strike from Norfolk Southern's previously filed response certain material that the City considers to be extraneous. Provided Norfolk Southern Railway Company ("Norfolk Southern") is permitted to file this Response to clarify issues raised for the first time by the City in the Reply, Norfolk Southern does not object to the filing of the Reply.¹ Norfolk Southern strongly opposes the motion to strike.

¹ To the extent the Board determines that this pleading is a Reply, Norfolk Southern seeks leave to submit the same. As with the City's reply, we note that permitting Norfolk Southern to submit a reply will not prejudice any party because the Board has not yet issued any rulings in this proceeding. Allowing Norfolk Southern to submit these

INTRODUCTION AND SUMMARY

As the result of an inadvertent clerical error, which occurred shortly after Norfolk Southern opened its Van Dorn Street transloading facility (the "Facility"), Norfolk Southern Bulk Tariff 9328 was mistakenly amended to include the City of Alexandria among the locations covered by the tariff. That error was corrected as soon as it was brought to Norfolk Southern's attention. The City argues that the erroneous reference to Alexandria should be considered as an indication that the Facility is controlled by the independent contractor that operates the Facility on behalf of Norfolk Southern. The City also argues that "Norfolk Southern's self-serving characterization" of its contractual relationship with RSI Leasing, Inc. ("RSI" or "Contractor") should not be dispositive of that arrangement. In making these arguments, the City chooses to ignore both the nature of the tariff, which defines the relationship between Norfolk Southern and its shippers, not the relationship between Norfolk Southern and its contractor, and the language of the applicable contract (the "RSI Agreement"), which defines, in fact, the contractor relationship. Norfolk Southern submits that its agreement with RSI, which has been previously submitted to the STB, will speak for itself.

The City argues that Norfolk Southern, in describing the background of the proceeding, has submitted "extraneous material" that the Board should strike from the record. *Not so.* As Norfolk Southern will show, the information it provided responds directly to allegations made by the City.

There is no need for discovery in this proceeding. The Board has what it needs to decide the issues on the pleadings.

clarifications, however, will assist the Board in resolving this matter by correcting the record and clarifying the issues properly before the Board. See Petition at 2.

Finally, the City attempts to reargue the issue of whether a Department of Transportation ("DOT") regulation means that, as a matter of law, Norfolk Southern (as a railroad) is not permitted to operate an ethanol transloading facility, thereby making it dispositive that the relationship between RSI and Norfolk Southern is one governed by a lease and not by a facility operating agreement. Again, not so. Norfolk Southern explained why it was not in violation of the cited DOT regulation and demonstrated why the issue was a red herring. The Board need not decide whether Norfolk Southern is violating any DOT regulation with regard to the Facility to make a determination as to whether the Facility is being operating by or on behalf of Norfolk Southern.

DISCUSSION

Tariff 9328-D and the RSI Agreement

On page 5 of its reply, the City points out that Norfolk Southern has made changes to Bulk Transfer Tariff 9328. Bulk Transfer Tariff 9328, which governs certain shipper-railroad matters, is generally applicable to what is referred to as a Thoroughbred Bulk Transfer ("TBT") terminal location on Norfolk Southern rail lines *not* operated by Norfolk Southern contractors. As a tariff, the document governs the relationship between shippers and the railroad, not between the railroad and its contractor or licensee. The relationship between the railroad and a lessee, contractor or licensee (whatever the operating relationship) is instead governed by an agreement between those parties.

The version of Bulk Transfer Tariff 9328 that was in effect at the time that the RSI Agreement was signed, and in effect at the time the Alexandria facility began

operations – Bulk Transfer Tariff 9328-C² – did not, and should not have included Alexandria. Shortly after the Facility was opened, Bulk Transfer Tariff was reissued as Bulk Transfer Tariff 9328-D,³ primarily to increase certain charges and rates but also to make other minor corrections, including changes in the locations to which the tariff applied. Through error, Alexandria was added to the list of terminals covered by the tariff. However, as soon as the error was discovered, a new tariff (Bulk Transfer Tariff 9328-E) eliminating Alexandria was posted.

The fact that the error occurred (and has now been corrected), does not alter the underlying fact that the relationship between RSI and Norfolk Southern is governed by the RSI Agreement, not the tariff (which again governs the relationship between the railroad and the shipper, and provides the shipper information concerning about shipping to TBTs at the identified locations). The RSI Agreement, which is at issue in this proceeding, clearly sets up a contractor relationship between Norfolk Southern and RSI.

Furthermore, the RSI Agreement does not, as Alexandria claims, “expressly incorporate[]” Bulk Transfer Tariff 9328. Instead, the RSI Agreement requires:

Contractor [to] perform all of the activities required to transload the Product from rail tank cars ... including but not limited to the following: i. Perform, and ensure shipper compliance with, Tariff 9328-C, or any successor or replacement thereof.

RSI Agreement at 2. Further, the RSI Agreement provides that:

As Railway's contractor, Contractor shall not be responsible for demurrage, car hire or transportation charges for the movement of the Product to and from the Facility. Contractor shall be responsible to act as

² Bulk Transfer Tariff 9328-C, issued September 20, 2006, effective October 15, 2006, as supplemented by Supplement No. 1, issued August 10, 2007, effective August 30, 2007.

³ Bulk Transfer Tariff 9328-D, issued April 17, 2008, effective June 1, 2008. Note that for at least part of the time the Facility was open, Bulk Transfer Tariff 9328-D was not even effective.

a third party billing agent on Track Occupancy Charges applicable pursuant to Bulk Tariff 9328.

Most telling, however, is Appendix B to the RSI Agreement, which requires RSI to:

Obtain a copy of Tariff NS 9328-C Bulk Distribution Tariff and ... be governed by such rules *applicable to the [facility] operation...*

Appendix B, Section (A) (emphasis added).

RSI is providing, on behalf of Norfolk Southern and in Norfolk Southern's name, an integrated part of the transportation service that Norfolk Southern markets to its valued customers. In doing so, Norfolk Southern expects that it will be performed by competent, trained individuals. Norfolk Southern expects that those individuals will be provided with the proper equipment to perform the work that RSI is hired to do. Finally, Norfolk Southern has built into the relationship the legal and financial protections that are necessary to protect itself against the negligence of the contractor in performing the services it has agreed to perform.⁴

⁴ This latter point – requiring some protection and insurance to be provided by the contractor – is no different than one expects from any other contractor, for example a painter who comes to one's house. The City claims that the RSI Agreement requires RSI "to indemnify Norfolk Southern for all claims and liability arising out of RSI's use of the Facilities", Reply at 4-5, but that is incorrect – both in characterizing the matter as "RSI's use" and in the extent of RSI's required indemnification. The RSI Agreement speaks for itself, but RSI is required to indemnify Norfolk Southern for: (a) the consequences of the acts or omissions of any subcontractor that RSI hires (Section 1(C)); (2) failure of RSI to perform the required employee background checks (Section 1(G)); (3) injury to RSI's employees, except to the extent caused by Norfolk Southern (Section 3(A)(1)(a)); (4) injury or property damage, unless caused by Norfolk Southern (Section 3(A)(1)(b)); and (5) failure of the Contractor to comply with its obligations under the RSI Agreement. RSI is required to carry Workers' Compensation Insurance, Employers' Liability Insurance, Commercial General Liability Insurance, Automobile Liability Insurance and, if RSI were to lease or otherwise use Norfolk Southern equipment, risk property insurance. Section 3(C). The fact that the RSI Agreement contains a plat description of the facility to be operated "like a description of the demised premises in a lease" is without legal significance whatsoever.

This is not, as asserted by the City at page 5 of its Reply, "self-serving characterizations of its arrangement with RSI" that Norfolk Southern relies upon to demonstrate that its arrangement with RSI is one of a contractor and not a lessee. Instead, Norfolk Southern has provided *the governing agreement*, which will clearly demonstrate that the arrangement between Norfolk Southern and RSI is one of a contractor and not a lessee. In this connection, the following provisions are particularly significant:

- The Railroad, not RSI as the contractor, determines what services are to be provided: "Contractor shall also provide any additional services which are determined in Railroad's sole but good faith judgment to be reasonably necessary for the efficient operation of the Terminal." Section 1(b).
- The Railroad, not RSI as the contractor, determines when the Facility is to operate: "Railway reserves the right in its sole discretion to change the hour [sic] of operation of its facility and to require Contractor to perform its services on any day and at any time of the day." Appendix B, Section (Q).
- RSI as the contractor is prohibited from acting other than as Railroad's contractor: "Contractor shall not use the Facility other than for the purposes set forth in this contract, and shall not use the Facility to transload rail cars placed at the Facility by parties other than Railway." Section 1(C).
- The compensation to RSI for its services as the contractor at the Facility are limited to what Norfolk Southern pays RSI; Norfolk Southern chooses what it will charge the customer for the services provided: "Railway covenants and agrees to pay, and Contractor agrees to accept, as full compensation for all services provided hereunder by Contractor and all obligations assumed hereunder by Contractor the amounts or rates of compensation set forth in Appendix C. *Without limiting the generality of the foregoing, the compensation shown in Appendix C includes all activities covered by the Transload Process Trailer and all Assessorial Yard Services, and Contractor shall not be entitled to any additional compensation for any such services.*" Section 2 (emphasis supplied).
- If Norfolk Southern decides to stop performing ethanol transloading at the Facility, it may do so without input from RSI: "Notwithstanding anything in this Agreement to the contrary, if Railway decides, as a matter of business judgment and in its sole discretion, that the continued operation of the Terminal as a rail-highway intermodal facility for the transloading of the

Product is not justified and that it will cease using the Terminal as a rail-highway intermodal facility for the transloading of the Product, Railway may terminate this Agreement upon at least thirty (30) days prior written notice to Contractor... ” Section 5(D).

- Norfolk Southern has full and unfettered rights to enter and inspect the Facility. Section 6.

The mistake that occurred when Alexandria was erroneously added to Bulk Transfer Tariff 9328 has no bearing whatsoever on the relationship between RSI and Norfolk Southern. That relationship, which is explicitly defined in the agreement between RSI and Norfolk Southern, makes it absolutely clear that RSI has agreed to operate the Facility on behalf of Norfolk Southern as Norfolk Southern’s contractor.

Motion to Strike

The City claims that substantial portions of Norfolk Southern’s Response (specifically, pages 2-3, 4-10 and 23, together with Exhibits A, C-O, Q & R) are not relevant to the question of control over the transloading operation and should be stricken. Norfolk Southern disagrees.

On June 17, 2008, the City filed with the Board a petition for declaratory order. The City claimed that Norfolk Southern made certain representations, that the City relied upon those representations, and that those representations were false. Petition, pages 2-3, 7 (“Norfolk Southern claims that the ethanol transloading operation is being conducted by or on behalf of the railroad [but] the facts of the operation demonstrate otherwise.”). The City made representations to the Board about the location of the Facility, the layout and capacities of the Facility, as well as the operations of the Facility. Id. at pages 3-4. The City made representations about whether Norfolk Southern communicated with

regard to the Facility Id. at 4. The City made representations about what the railroad knew about the City's firefighting capacity. Id. at 4. Finally, the City made representations implying that Norfolk Southern was withholding information from the City that made the intervention of the Board necessary. Id. at 5. Without more, the foregoing Norfolk Southern is permitted to complete the record with regard to all of these matters.

The City, however, goes much further and makes representations that Norfolk Southern has been withholding information from the City. Norfolk Southern is permitted to inform the Board that just the opposite is true.

Norfolk Southern submits that the City's past behavior involving this facility *is relevant* to whether the City is using this Board's processes improperly. For example, the City characterizes Norfolk Southern's lawsuit against the City as "extraneous" without reference to what that lawsuit involved. Reply at 3. Norfolk Southern filed a lawsuit against the City seeking protection against the City's avowed efforts to shut down its rail facility by whatever means possible, including what Norfolk Southern views as an abuse of its regulatory powers. The City claimed, for example, that an ordinance that, on its face, covered only the movement of construction materials, supplies and equipment, and dirt and debris, covered the bulk movement of ethanol. It then modified that ordinance for the publicly stated purpose of asserting control over access to the Facility with the objective of shutting it down. The federal court suit was in the City's hands the day *before* the City filed its petition with the Board.

Far from being "extraneous", Norfolk Southern believes that the behavior detailed in that law suit, as well as the other facts that Norfolk Southern has put before the Board,

demonstrates that the City is willing to, and has, (mis)used the processes available to it.

"The Board has a responsibility to protect the integrity of its processes," and must not permit its process to be used "in improper ways." STB Finance Docket No. 34501,

James Riffin d/b/a The Northern Central Railroad – Acquisition and Operation

Exemption – in York County, PA, served February 23, 2005, slip op. at 6. In this case, the facts show that, despite Norfolk Southern's efforts to work with the City over the course of two years, the City has enunciated an intention to use whatever means are at its disposal to close the Norfolk Southern facility down.

Lack of Relevance of Cited DOT Regulation

Once again, Alexandria claims that a DOT regulation – specifically 49 C.F.R.

§174.304 – prohibits railroads from transporting Class 3 flammable liquids in tank cars unless the movement of the tank car begins on a private track and ends on a private track.

"[I]t is equally clear that the railroad itself cannot lawfully offer the services actually provided at the Facility, unless it has relinquished all responsibility and control over those services to a private party, which is not a rail carrier and whose operation is not subject to federal preemption." Reply at 8. Obviously, and for the reasons set forth in its Response, Norfolk Southern disagrees. But that does not matter. As Norfolk Southern stated in its Response:

In any event, it is not for the STB to decide whether the City has correctly argued that 49 C.F.R. §174.304 prohibits a railroad from operating a facility for the transloading of a Class 3 flammable liquid. It is the DOT - not the STB - that has the power to enforce regulations issued under HMTA. The question of whether the rail carrier is complying with any DOT regulation that applies (or not) to the Facility is not relevant to the question of whether the Facility is operated by or on behalf of a rail carrier.

The City takes a different view. Reply at 8.

The law with regard to concurrent jurisdiction over railroad operations is well settled. See, e.g., STB Finance Docket No. 34914, DesertXpress Enterprises, LLC – Petition for Declaratory Order, served June 27, 2007 (“DesertXpress”). In DesertXpress, the Board found that it had “exclusive jurisdiction over the planned new facility, and operations [of DesertXpress,] and the Federal preemption under section 10501(b) attaches.” Id., slip op. at 4. This finding then meant that other Federal statutes, including “the regulation of railroad safety under the Federal Railroad Safety Act, will apply to this proposal. However, state permitting and land use requirements that would apply to non-rail projects ... will be preempted.” Id., slip op. at 5. The question of whether Norfolk Southern is complying with a DOT regulation that may or may not apply to the Alexandria Facility is, in any event, totally irrelevant to the question of whether the Facility is operated by or on behalf of Norfolk Southern.

CONCLUSION

The City has asked for the institution of a declaratory order proceeding. None is needed. The relevant facts set forth herein are undisputed, supported with documentation or come from the City itself. There is no need for additional fact development by the parties. The parties agree as to the relevant law. Under those circumstances, the Board need not institute a declaratory order proceeding. It has what it needs to decide the issue presented to it – whether the Facility is leased to RSI or whether the Facility is, instead, operated by and on behalf of Norfolk Southern, with RSI its contractor.

The City seeks "a declaratory order finding that the [Facility] does not constitute 'transportation by rail carrier'...." Petition at 2. The Board should decline to provide that order because such a finding would be contrary to the facts and the law.

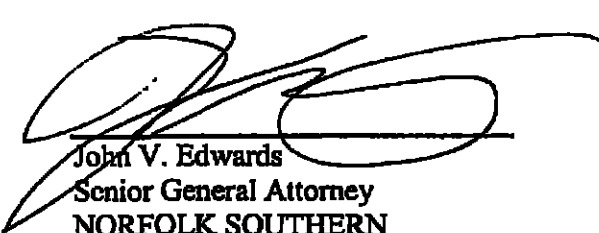
The City has asked the Board to determine that "the City's proper regulatory authority" over the Facility is not preempted by federal jurisdiction. In its Reply, the City still does not define what it means by that term. In any event, at least one aspect of that regulatory authority (the attempt to regulate the Facility by regulating access thereto) was put into question before a U.S. Federal District Court prior to the submission of the City's Petition to the Board. The Board need not reach that issue.

The City has asked the Board to strike several portions of Norfolk Southern's Response. The Board should decline to do so.

Respectfully submitted,

Gary A. Bryant
WILLCOX & SAVAGE, P.C.
One Commercial Place, Suite 1800
Norfolk, Virginia 23510
(757) 628-5500
(757) 628-5566 Facsimile

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John V. Edwards
Senior General Attorney
NORFOLK SOUTHERN
CORPORATION
Three Commercial Place
Norfolk, Virginia 23510-2191
(757) 629-2838

*Attorneys for Norfolk Southern
Railway Company*

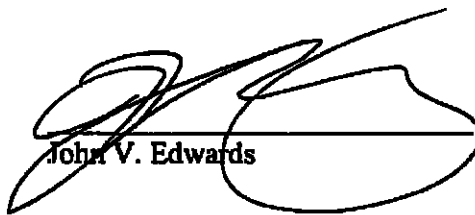
Certificate of Service

I hereby certify that on this fifteenth day of July, 2008, I have caused to be served, by U.S. Mail, postage prepaid, or more expeditious means, to the persons listed below, a copy of the Response of Norfolk Southern Railway Company to the Petition of Alexandria for Leave to File a Reply to a Reply, Response and Motion to Strike.

Ignacio B. Pessoa
Christopher P. Spera
Office of the City Attorney
301 King Street
Suite 1300
Alexandria, VA 22314
703-838-4433

Charles A. Spitulnik
W. Eric Pilsk
Allison I. Fultz
Kaplan Kirsch & Rockwell LLP
1001 Connecticut Avenue, N.W.
Suite 905
Washington, D.C. 20036
202-955-5600

Dated: July 15, 2008



John V. Edwards