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July 24, 2015

VIA E-FILING

Cynthia T. Brown, Chief
 Section of Administration, Office of Proceedings
 Surface Transportation Board
 395 E Street, SW
 Washington DC 20423-0001

Re: *Norfolk Southern Railway Company – Acquisition and Operation -
 Certain Rail Lines of the Delaware and Hudson Railway Company, Inc.,
 STB Docket FD 35873¹*

Dear Ms. Brown:

Norfolk Southern Railway Company (“NSR”) hereby replies in opposition to the motion to strike filed July 6, 2015 by Samuel J. Nasca, for and on behalf of SMART/Transportation Division, New York Legislative Board. As set forth in this reply, the motion should be either stricken as an unlawful reply to a reply or denied.

Respectfully submitted,

William A. Mullins
 Attorney for Norfolk Southern Railway Company

cc: Parties of Record

¹ Embraces FD 34209 (Sub-No. 1), Norfolk Southern Railway Trackage Rights Exemption – Delaware & Hudson Railway Company, Inc., and FD 34562 (Sub-No. 2), Norfolk Southern Railway Trackage Rights Exemption – Delaware & Hudson Railway Company, Inc. Counsel for Nasca incorrectly lists Sub-No. 1 twice.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35873¹

NORFOLK SOUTHERN RAILWAY COMPANY

– ACQUISITION AND OPERATION –

**CERTAIN RAIL LINES OF THE DELAWARE AND HUDSON RAILWAY
COMPANY, INC.**

REPLY IN OPPOSITION TO MOTION TO STRIKE

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**Attorneys for Norfolk Southern
Railway Company**

July 24, 2015

¹ **Embraces FD 34209 (Sub-No. 1), Norfolk Southern Railway Trackage Rights Exemption – Delaware & Hudson Railway Company, Inc., and FD 34562 (Sub-No. 2), Norfolk Southern Railway Trackage Rights Exemption – Delaware & Hudson Railway Company, Inc.**

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NORFOLK SOUTHERN RAILWAY COMPANY

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**CERTAIN RAIL LINES OF THE DELAWARE AND HUDSON RAILWAY
COMPANY, INC.**

REPLY IN OPPOSITION TO MOTION TO STRIKE

Norfolk Southern Railway Company (“NS”) files this reply to the motion to strike (“Motion”) filed by Samuel J. Nasca, for and on behalf of SMART/Transportation Division, New York Legislative Board. The Motion should either be rejected as an unlawful reply to a reply contrary to 49 C.F.R. § 1104.13(c) or denied in its entirety.

As an initial matter, knowing full well that replies to replies are prohibited, counsel for Nasca uses the veneer of a motion to strike to circumvent this prohibition and reply to the merits of the arguments raised in NS’s June 24, 2015 filing (NS-20) replying to Nasca’s June 4, 2015 petition for reconsideration. The Motion does not seek to strike any material from NS-20 by arguing that such material was redundant, irrelevant, immaterial, impertinent, scandalous, untimely, or procedurally deficient, all of which can be grounds for striking a pleading or portions of a pleading. See 49 C.F.R. § 1104.8 (objectionable matter); E.I. Dupont de Nemours and Co. v. Norfolk Southern Ry. Co., NOR No. 42125, 2014 STB LEXIS 71, at *49 (STB served Mar. 24, 2014) (granting a motion to strike an unauthorized new evidentiary filing which was in

violation of the Board's procedures); Union Pacific R.R. Co. – Aban. Exemption – in Lafayette County, MO, AB No. 33 (Sub-No. 297X), 2011 STB LEXIS 353, at *7 (STB served July 22, 2011) (noting that under the “Board’s regulations, ‘redundant, irrelevant, immaterial, impertinent, or scandalous matter’ may be stricken from any document”). Rather, the Motion sets forth NS’s reply arguments with respect to Nasca’s legal standing and the use of New York Dock, as modified by Wilmington Terminal,¹ provides rebuttal to those NS arguments, and then asks that those portions of NS-20 that are contrary to Nasca’s rebuttal arguments be stricken. Nasca provides no legal justification or precedent for striking NS’s arguments. Clearly, Nasca cannot strike any portion of NS-20 simply because it contains argument contrary to his position. Instead, the Board should see Nasca’s Motion for what it is – an unlawful reply to reply. As such, pursuant to 49 C.F.R. § 1104.10, the Board should summarily reject the filing.²

With respect to the merits raised in the Motion, Nasca is simply incorrect that he has standing in this proceeding. Precedent clearly supports the notion that Nasca has no legal standing in this proceeding. Indeed, United Transportation Union v. ICC, 891 F.2d 908 (D.C. Cir. 1989), cert. denied, 497 U.S. 1024 (1990) (“UTU v. ICC”), cited by Nasca, actually supports NS’s position.³ In UTU v. ICC, the Court of Appeals for the D.C. Circuit found that Patrick Simmons, the Illinois Legislative Director of the UTU (the predecessor to SMART/TD), had no

¹ New York Dock Ry. – Control – Brooklyn Eastern District Terminal, 360 I.C.C. 60, aff’d, New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979), as modified by Wilmington Terminal R.R. – Purchase & Lease – CSX Transportation, Inc., 6 I.C.C.2d 799, 814-26 (1990), aff’d sub nom. Railway Labor Executives’ Ass’n v. ICC, 930 F.2d 511 (6th Cir. 1991).

² Even if Nasca’s Motion is not rejected as an unlawful reply to a reply, the Board should still deny Nasca’s requested relief because, as noted above, there is no legal justification for striking any portion of NS-20 solely on the basis that it contradicts Nasca’s unmeritorious arguments.

³ The other cases cited by Nasca on page 3 simply stand for the proposition that an individual need not have standing to bring a complaint under 49 U.S.C. § 11701. This is not a complaint proceeding brought under § 11701 so those cases are inapplicable.

standing to pursue an appeal. The court reached this conclusion notwithstanding that the record was sufficient to support the notion that Mr. Simmons was acting on behalf of the actual union, not just in his own name. In fact, the court specifically noted that if Mr. Simmons were in fact acting only on his own behalf as an individual, he would have no standing. 891 F.2d 908, 909 (“Simmons does not even have putative standing as an individual”). Here, Nasca is acting on his own behalf as an individual and his lack of standing is therefore clear. Throughout this proceeding, counsel for Nasca has continuously asserted that he is the attorney for Samuel J. Nasca – the individual.⁴ Counsel nowhere has asserted or asserts here that he is the attorney for the New York State Legislative Board of SMART/TD itself or acting on behalf of SMART/TD. He only asserts he is counsel for Samuel J. Nasca, an individual. As an individual, Nasca has no standing in this proceeding.⁵

Unlike UTU v. ICC, there is no indication in the record that Nasca is acting on behalf of the union itself or is authorized by the union to participate in this proceeding. At most, counsel asserts that the SMART/TD constitution and practices specify that the “usual customary procedure for appearance before public agencies⁶ involving changes proposed for carrier services to the public is through the legislative board,” but then notes that these usual procedures are subject to modification. Motion at 3, n. 3. First, the Board cannot assess whether these

⁴ Note carefully that counsel only states that Nasca’s title is “New York State Legislative Director” and nowhere asserts that he is counsel for the New York State Legislative Board itself or for SMART/TD. Motion at 1, n. 1.

⁵ Even if Nasca were acting on behalf of the New York State Legislative Board itself, or even the union, he has not shown any injury in fact that would rise to the level of standing as set forth in UTU v. ICC and its discussion regarding Mr. Simmons, who held a similar position and title as Nasca except with the Illinois State Legislative Board rather than the New York State Legislative Board.

⁶ No definition is provided for “public agencies.” Given that Nasca works for the New York State Legislative Board, one must wonder whether “public agencies” in the course of the “usual practice” means legislative bodies.

statements are true because the constitution and practices have not been placed into the record and the statement was not verified. Second, Nasca seems to admit that his appearance before the Board is not the “usual customary procedure.” Although he notes that the usual procedures can be modified, it has not been established that the union has authorized Nasca to represent it in this proceeding or whether the usual procedures have in fact been modified.⁷ Given the factual record and the nature of counsel’s representation, it is clear that Nasca is participating in this proceeding only in his own name; and in accordance with UTU v. ICC, Nasca has no standing. As such, there is no basis to strike any portion of NS-20 related to Nasca’s lack of standing.

With respect to the merits of the labor protection standard arguments, Nasca erroneously claims that New York Dock, as modified by Wilmington Terminal is hardly a “precedent at all.” Motion at 4. Nasca and his counsel may not like the precedent, and Nasca’s counsel has been fighting against it for years, but it is still precedent and good law regardless of how many times it has been used in a Class I/Class II proceeding. Indeed, while Nasca has presented an interesting history of pre-Wilmington Terminal use of New York Dock, Nasca does not cite to one post-Wilmington Terminal precedent involving a Class I line acquisition, like the current proceeding, where New York Dock, as modified by Wilmington Terminal, was not imposed. Nasca himself admits that “Class I carriers today use New York Dock, as modified by Wilmington Terminal, for line acquisitions, in lieu of New York Dock, standing alone.” Motion at 6-7. New York Dock, as modified by Wilmington Terminal, also applies regardless of whether the purchase

⁷ Even assuming arguendo that Nasca is actually authorized to represent the New York State Legislative Board, there is nothing in the record to indicate that the New York State Legislative Board is authorized to participate in front of the Board on behalf of SMART/TD or can represent that union’s interests before federal agencies.

agreement requires preferential hiring.⁸ As such, Nasca is incorrect in his continued assertion that New York Dock, standing alone, should have been imposed, and there is no basis to strike any portion of NS-20 dealing with the labor protection issues.

In conclusion, the Motion should be rejected as an unlawful reply to a reply. If not rejected, then NS is entitled to reply to it on the merits. On the merits, Nasca has not established any basis for striking any portions of NS-20. In fact, precedent establishes that Nasca has no standing to pursue his claims and the Board did not commit material error in imposing New York Dock, as modified by Wilmington Terminal.

Respectfully submitted,

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Attorneys for Norfolk Southern Railway
Company

July 24, 2015

⁸ Contrary to Nasca's implication, the Asset Purchase Agreement ("APA") did not contain a requirement for NS to provide preferential hiring. Section 5.04 of the APA discusses employee hiring rights.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of “Reply In Opposition To Motion To Strike” (NSR-22) in STB Finance Docket No. 35873, by first class mail, properly addressed with postage prepaid, or via more expeditious means of delivery, upon all parties of record.



William A. Mullins
Attorney for Norfolk Southern Railway Company

July 24, 2015