

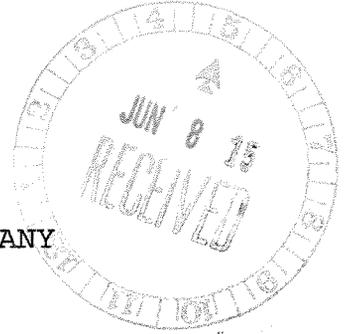
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June 8, 2015  
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Public Record

Before the  
SURFACE TRANSPORTATION BOARD

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Ex Parte No. 727

PETITION OF NORFOLK SOUTHERN RAILWAY COMPANY  
TO INSTITUTE A RULEMAKING PROCEEDING  
TO ADDRESS ABUSES OF BOARD PROCESS



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COMMENTS  
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June 8, 2015

Attorney for Samuel J. Nasca

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Preliminary Statement

Samuel J. Nasca,<sup>1/</sup> for and on behalf of SMART/Transportation Division, New York State Legislative Board (SMART/TD-NY), submits these comments in response to the Petition of Norfolk Southern Railway Company To Institute a Rulemaking Proceeding to Address Abuses of Board Process, filed May 26, 2015 (NSR Petition), and to the letter-comments by an individual practitioner,<sup>2/</sup>

The petition for rulemaking should be summarily denied. The Board should not adopt the sole practitioner's suggestion that the Board hold open its docket for 60 days to receive further responses to the Norfolk Southern Railway Company (NSR) petition for rulemaking.

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<sup>1/</sup>New York State Legislative Director for SMART/TD, with offices at 35 Fuller Road, Albany, NY 12205.

<sup>2/</sup>Michael F. McBride, Esq. (Washington, DC).

## ARGUMENT

### I. THE NSR PETITION CLEARLY IS DIRECTED TO INFLUENCE PENDING STB CASE IN WHICH NSR IS THE ONLY CLASS ONE RAIL CARRIER BENEFICIARY

1. Limited Scope of proposed Rule. The proposed rule is of limited scope, and not of widespread application to the transportation industry. The NSR petition is directed only to the Offer of Financial Assistance (OFA) feature of railroad lines proposed for abandonment or discontinuance. (NSR Pet. 19-20). See: 49 CFR 1152.27; 49 U.S.C. 10904.

Moreover, the claim of OFA "abuse" is directed specifically only to two individuals or their controlled entities, namely, James Riffin (NSR Pet., 5-9,11,18) and Eric Strohmeier or CNJ Rail. (NSR Pet.6-9,11).

2. Limited Complainant. The petition to correct "OFA Abuse" has been filed by only one complainant, namely, NSR. The NSR petition is authored and signed by counsel recently employed on the STB staff.

3. Pending Proceedings. The NSR petition is believed to mention only one pending proceeding, doing so at three places in the petition, and in which NSR has a major and active interest, namely, Finance Docket No. 35873, Norfolk Southern Ry. Co.- Acquisition and Operation-Certain Rail Lines of the Delaware and Hudson Ry. Co., Inc. (NSR Pet. 6n.3, 8, 8-9).

II. THE NSR PETITION IS IMPROPER,  
PARTICULARLY SO AT THIS TIME.

1. Interest of SMART/TD-NY. Samuel J. Nasca is an active participant, on behalf of SMART/TD-NY, in the pending F.D. No. 35873, Norfolk Southern Ry. Co.-Acquisition and Operation-Certain Rail Lines of the Delaware and Hudson Ry. Co., Inc., supra. The proceeding is pending reconsideration. SMART/TD-NY has not been a party to OFA procedures, and has no present intent to become such in related proceedings,<sup>3/</sup> but may have an interest in OFA issues, if such may somehow come to affect the outcome on the merits.

However, SMART/TD-NY considers it improper for NSR to complain about present OFA procedures undergoing or to undergo review in current proceedings, but now at the same time to go outside the process through institution of a general rulemaking directed to perhaps the same OFA procedures.

2. Statement of Counsel. The attached statement of counsel is directed to the propriety of establishing quasi-discipline procedures to be administered, either initially or finally, by Sections of Offices of the Board.

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<sup>3/</sup>AB-156 (Sub-No. 27), Delaware & Hudson Ry. Co., Inc.-Discontinuances.

CONCLUSION

The Board should summarily deny the NSR petition.

Respectfully submitted



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June 8, 2015

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Certificate of Service

I hereby certify I have served a copy of the foregoing upon counsel for Norfolk Southern Railway Company, and Michael F. McBride by first class mail postage-prepaid.

Washington DC



Gordon P. MacDougall

STATEMENT OF GORDON P. MacDOUGALL

I am an attorney admitted to practice before the Interstate Commerce Commission in 1957, and engaged continually thereafter in matters before that agency and its successor, Surface Transportation Board, as well as before other federal and state transportation regulatory bodies.

The proposal by Norfolk Southern Railway Company (NSR) asks to institute a rulemaking specifically directed to Offer of Financial Assistance procedures, designated to adopt a process to deem a person or entity "an abusive filer, a filer for harassment purposes, one who lacks standing or a cognizable interest in a proceeding, or a not financially responsible party," and to require pre-approval by Board staff before filing in Board proceedings. The NSR petition would establish a presumption in the OFA process that offerors who have previously been found not financially responsible or have been bankrupt are not financially responsible; and require information at the outset that an offeror can provide the represented financial support, or disallow the filing of an OFA.

The NSR proposal comes at a time its application, FD No. 35873, to acquire some 282.5 miles of so-called "D&H South Lines" has incurred the opposition of some 10 parties, and has anticipated OFA proposals in a related 670-mile discontinuance case, AB-156 (Sub-No. 27).

The petition of rulemaking should be immediately denied and the proceeding not allowed to proceed. Although NSR may wish to please STB staff with such rules, such would be a wrong departure from prior practice. Immediately before abolition of the Office of the Secretary in 2009, complaints involving improper practitioner procedures frequently were handled informally by the agency's Secretary--an individual directly responsible to the Chairman and Board, rather than to a Staff Section or Office, the latter often initially responsible with the merits of an proceeding. In even earlier years, ethical matters were initially considered by agency's Bureau of Inquiry and Compliance, or the Bureau of Enforcement.

Unfortunately, the Board abolished its Secretary, devolving powers to its Sections or Offices, unlike other agencies retaining their Secretary, such as F.C.C., F.M.C., F.E.R.C., S.E.C., Etc.

An alternative is to establish an advisory panel within the Association of Transportation Law Professionals (ATLP), although this may not prove satisfactory until such time as the ATLP should revise its procedures and mission.

I have served as past President, and held other positions in the local ATLP Chapter's predecessor. Unfortunately, the present leadership and membership do not appear directed toward restoration of the original functions of the agency's Bar.

The instant NSR proposal is unnecessary and is directed to a minimal objective, outside NSR's desire to perhaps achieve litigation success. Moreover, it would be most improper and dangerous to give STB Staff the power to administer the ethics of its adjudicatory proceedings.