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March 4, 2015

237883

**VIA E-FILING**

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

ENTERED  
Office of Proceedings  
March 4, 2015  
Part of  
Public Record

Re: *Norfolk Southern Railway Company – Acquisition and Operation -  
Certain Rail Lines of the Delaware and Hudson Railway Company, Inc.,  
STB Docket FD 35873*

Dear Ms. Brown:

Enclosed is Norfolk Southern Railway Company's ("NS") "Reply in Opposition to Samuel J. Nasca's Petition for Leave to File Petition to Strike and/or for Alternative Relief and Reply in Opposition to Samuel J. Nasca's Petition to Strike and/or for Alternative Relief" (NS-15) in response to the pleadings filed by Samuel J. Nasca on behalf of SMART/Transportation Division, New York State Legislative Board in the above referenced proceeding. If there are any questions concerning this filing, please contact me at the address and phone listed above or at [wmullins@bakerandmiller.com](mailto:wmullins@bakerandmiller.com).

Respectfully submitted,



William A. Mullins  
Attorney for Norfolk Southern Railway Company

Enclosures

cc: Parties of Record

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**FINANCE DOCKET NO. 35873**

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**NORFOLK SOUTHERN RAILWAY COMPANY**

**- ACQUISITION AND OPERATION -**

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

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**REPLY IN OPPOSITION TO SAMUEL J. NASCA'S PETITION ON BEHALF OF THE  
SMART/TRANSPORTATION DIVISION, NEW YORK STATE LEGISLATIVE BOARD  
FOR LEAVE TO FILE PETITION TO STRIKE AND/OR FOR ALTERNATIVE RELIEF  
AND SAMUEL J. NASCA'S PETITION ON BEHALF OF THE  
SMART/TRANSPORTATION DIVISION, NEW YORK STATE LEGISLATIVE TO  
STRIKE AND/OR FOR ALTERNATIVE RELIEF**

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**March 4, 2015**

**Attorneys for Norfolk Southern  
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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**FINANCE DOCKET NO. 35873**

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**NORFOLK SOUTHERN RAILWAY COMPANY**

**- ACQUISITION AND OPERATION -**

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**INTRODUCTION**

Norfolk Southern Railway Company ("NS") hereby replies in opposition to both Samuel J. Nasca's Petition for Leave to File Petition to Strike and/or for Alternative Relief ("Petition for Leave") and Samuel J. Nasca's Petition to Strike and/or for Alternative Relief ("Petition to Strike"), both filed on behalf of SMART/Transportation Division, New York State Legislative Board ("SMART/TD-NY") on February 13, 2015. SMART/TD-NY's Petition for Leave asks the Surface Transportation Board ("Board") to grant SMART/TD-NY leave to submit its Petition to Strike three days after the deadline for filing motions to strike, which, under 49 C.F.R. § 1104.13, was February 10, 2015. Petition for Leave at 2. SMART/TD-NY's Petition to Strike asks the Board to strike what SMART/TD-NY characterizes as an "unauthorized submission by applicant" NS. Petition to Strike at 2. The alleged "unauthorized submission" is NS's pleading entitled "Additional List Of Supporting Parties And Submission Of Statements In Support Of The Transaction" (NS-13) filed on January 21, 2015. In the alternative, if the Board does not strike NS-13 from the record,

SMART/TD-NY's Petition to Strike requests that the Board accept its supplemental submission (Exhibit A-1 to its Petition to Strike)<sup>1</sup> as part of the record. Petition to Strike at 2. SMART/TD-NY has not established that the Board should grant it leave to late-file its Petition to Strike; and further, both the primary and alternative requests in its Petition to Strike are meritless. As such, the Board should deny both SMART/TD-NY's Petition for Leave and SMART/TD-NY's Petition to Strike.

## ARGUMENT

### I. SMART/TD-NY'S PETITION FOR LEAVE SHOULD BE DENIED BECAUSE SMART/TD HAS NOT SHOWN GOOD CAUSE AND GRANTING THE PETITION WOULD PREJUDICE PARTIES TO THIS PROCEEDING.

In determining whether to accept a late-filed reply, the Board considers whether the moving party had a legitimate reason for filing late<sup>2</sup> and whether its acceptance of the late filing would prejudice parties to the proceeding.<sup>3</sup> SMART/TD-NY's Petition to Strike was filed late. However,

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<sup>1</sup> Exhibit A-1 is comprised of an article and a discussion group webpage related to rail service in Chicago, Illinois. In the Application (NS-1) that is the subject of this proceeding, NS seeks Board approval for its acquisition and operation of 282.55 miles of Delaware and Hudson Railway Company, Inc.'s ("D&H") rail lines in Pennsylvania and New York ("D&H South Lines") and for its modification of existing trackage rights over D&H lines in New York, collectively the "Transaction" as further set forth in the Application. The Transaction is not related to Chicago area service.

<sup>2</sup> See Norfolk Southern Railway Co. – Abandonment Exemption – in Marietta, Lancaster County, PA, STB Docket No. AB 290 (Sub-No. 328X) (STB served Mar. 5, 2014) (finding good cause to extend the time to file a notice when the carrier "provided an adequate justification for its delay," including, among other factors, a transition of personnel); Saratoga and North Creek Railway, LLC – Operation Exemption – Tahawus Line, STB Docket No. FD 35559 (STB served May 14, 2012) (finding good cause to grant leave for a late-filed reply when the party had contacted the Board's Office of Public Assistance, Governmental Affairs, and Compliance and was incorrectly informed that it had 20 days to file, rather than 10); Tri-State Brick and Stone of New York, Inc., and Tri-State Transportation, Inc. – Petition for Declaratory Order, STB Docket No. FD 34824 (STB served Feb. 12, 2008) (finding good cause when the party late-filed its reply due to the illness of counsel).

<sup>3</sup> E.g., New York City Economic Development Corp. – Adverse Abandonment – New York Cross Harbor Railroad, Inc., in New York, NY, STB Docket No. AB-596 (STB served Dec. 21, 2001) ("Board regulations and case law permit extension of time for filing when good cause is shown and no party will be prejudiced by the delayed submission"). See Saratoga and North Creek Railway, LLC – Operation Exemption – Tahawus Line, STB Docket No. FD 35559 (STB served May 14, 2012) (finding good cause to grant leave for a late-filed reply, noting that the carrier "is not

SMART/TD-NY has not shown good cause for the Board to accept its late-filed Petition to Strike, and granting its Petition for Leave would prejudice the parties to this proceeding.

SMART/TD-NY provides no legitimate explanation for its late-filed reply. Given its active participation in this proceeding,<sup>4</sup> SMART/TD-NY clearly was and continues to be aware of the applicable filing deadlines, even acknowledging in its Petition for Leave that motions to strike “were due February 10, 2015.” Petition for Leave at 2. SMART/TD-NY claims that “the numerous filings on or about January 21, 2015, and thereafter, in support of the control transaction . . . created considerable confusion” and forced SMART/TD-NY “to evaluate whether to seek to strike some of this improper material . . . and/or to seek alternative relief of its own by submitting additional information.” Petition for Leave at 3. However, these circumstances did not alter the deadline for filing a reply to any pleading under 49 C.F.R. § 1104.13. Further, SMART/TD-NY’s failure to make a timely decision regarding whether to strike allegedly improper material and/or seek alternative relief because of its “confusion” does not constitute good cause under Board precedent, as cited above. Additionally, granting SMART/TD-NY’s Petition for Leave would prejudice numerous other parties to this proceeding who have requested the Board’s “expedited review and

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prejudiced by the late filing of the reply”). In determining whether its acceptance of a late-filed reply would be prejudicial, the Board considers whether the motion for leave is opposed by other parties to the proceeding. See SF&L Railway, Inc. – Acquisition and Operation Exemption – Toledo, Peoria, and Western Railway Corporation between LaHarpe and Peoria, IL; Kern W. Schumacher and Morris H. Kulmer – Continuance in Control Exemption – SF&L Railway, Inc., STB Docket No. FD 33995 (STB served Dec. 21, 2001) (granting an unopposed motion for leave to file a late pleading).

<sup>4</sup> Prior to filing its Petition for Leave and Petition to Strike, SMART/TD-NY made five other submissions before the Board in this proceeding: (1) Opposition Statement; (2) Notice of Intent to Participate; (3) Certificate of Service; (4) combined Reply to Classification as Minor Transaction, Reply to Petition to Establish Procedural Schedule, Reply to Motion for Protective Order, and Petition to Consolidate Proceedings; and (5) Petition for Reconsideration.

approval” of the Transaction in order to realize its benefits.<sup>5</sup> Thus, SMART/TD-NY’s Petition for Leave should be denied and its Petition to Strike should be rejected as untimely.

**II. SMART/TD-NY’S PETITION TO STRIKE SHOULD BE DENIED BECAUSE NS’S JANUARY 21 SUBMISSION (NS-13) WAS TIMELY AND PROPER AND DID NOT PREJUDICE SMART/TD-NY.**

SMART/TD-NY’s Petition to Strike seeks to exclude from the record NS-13, which consists of 46 additional statements from shippers, short lines, public agencies, and elected officials in support of NS’s acquisition and control of the D&H South Lines. The sole basis for the Petition to Strike is that NS’s filing was “unauthorized” because it contains supporting statements rather than opposition statements. Petition to Strike at 3. However, SMART/TD-NY mistakenly construes the January 21, 2015 deadline to apply only to opposition statements. In fact, nothing in the Board’s procedural orders in this proceeding prohibited the filing of supporting statements on or before January 21.

In a decision served January 14, 2015, the Board broadly stated that it was “extend[ing] the deadline for comments on the application” from January 15 to January 21 “to ensure that all parties have adequate time to comment on NSR’s application.” When first adopting a procedural schedule for this proceeding in a decision served December 22, 2014, the Board specified that the January 15 deadline applied to “[a]ll comments,” and in its January 14 decision, the Board did not limit the applicability of its extension only to opposition comments or to parties opposed to the Transaction.<sup>6</sup> Rather, the deadline was extended to ensure that “all” parties were afforded the opportunity to “comment” on NS’s application. Thus, NS’s filing of NS-13 on January 21, 2015 was timely and proper under the Board’s procedural orders in this proceeding. SMART/TD-NY’s claims that NS’s

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<sup>5</sup> See comments in NS-5, filed December 8, 2014, and NS-13, filed January 21, 2015.

<sup>6</sup> Although the January 15 and, as extended, January 21 deadline also applied to “any other evidence and argument in opposition to the application,” this did not prohibit the submission of “[a]ll comments” to the Application.

filing was brazen or improper, and that NS-13 should be rejected and stricken from the record, are simply unfounded.

Furthermore, NS's filing of NS-13 did not prejudice SMART/TD-NY. Even assuming that SMART/TD-NY were correct in its mistaken belief that NS was not permitted to file statements in support of the Transaction on or before January 21, NS clearly could file such statements by March 31, 2015, the due date for "[r]esponses to comments, protests, requests for conditions, and other opposition[, and] . . . [r]ebuttal in support of the application." The fact that NS filed the 46 additional supporting statements from shippers, short lines, public agencies, and elected officials before the March 31 deadline actually provided SMART/TD-NY with advance notice of the statements and ensured a more accurate record at an earlier stage in this proceeding. Both of these clearly work to SMART/TD-NY's favor.

In sum, there is no basis for striking NS-13 under the Board's procedural timeline for this proceeding; and, because the comments in NS-13 would have become a part of the record on March 31 if not January 21, SMART/TD-NY is not prejudiced by NS's earlier filing, and the Board's earlier acceptance, of such comments.<sup>7</sup>

**III. THE ALTERNATIVE RELIEF THAT SMART/TD-NY SEEKS IS IMPROPER AND ITS EXHIBIT A-1 SHOULD BE EXCLUDED FROM THE RECORD PURSUANT TO 49 C.F.R. § 1104.8.**

If the Board maintains NS-13 as part of the record, which it should, SMART/TD-NY requests that the Board accept its supplemental submission (Exhibit A-1 to its Petition to Strike) as part of the record. Petition to Strike at 6. However, unlike NS's submission in support of the

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<sup>7</sup> NS's reply, as set forth in Part II, also applies to the Objections and Request for Condition filed on January 21, 2015, and the letter filed January 28, 2015, both on behalf of CNJ Rail Corporation ("CNJ"). In these pleadings, CNJ challenged the Board's procedural schedule and NS's submission of supplemental supporting statements in NS-5 and NS-13 based on the mistaken assumption that the January 21 deadline applied only to "*opposing* statements."

Transaction, which is unquestionably relevant, the information that SMART/TD-NY seeks to include in the record is not related to the Transaction as it involves rail operations in Chicago. As such, oddly enough, SMART/TD-NY's Petition to Strike seeks either to (1) exclude from the record relevant and timely-filed information, namely, 46 statements from shippers, short lines, public agencies, and elected officials in support of NS's acquisition and control of the D&H South Lines, or (2) include in the record late-filed information regarding Chicago service that is wholly irrelevant to the Transaction before the Board, and which should be excluded from the record pursuant to 49 C.F.R. § 1104.8.

Under 49 C.F.R. § 1104.8, the Board may strike from the record any "irrelevant, immaterial, impertinent, or scandalous matter."<sup>8</sup> The information contained in SMART/TD-NY's Exhibit A-1 should not be admitted as part of the record in this proceeding, pursuant to 49 C.F.R. § 1104.8. Exhibit A-1 consists of a news article on Chicago operations and comments on the news article from a discussion group webpage. Service problems, agreements among carriers, and any other issues or actions dealing with Chicago are "irrelevant, immaterial, [and] impertinent" to this Transaction, which relates only to rail lines in Pennsylvania and New York.<sup>9</sup> Further, blog entries regarding Chicago service issues, Canadian Pacific Railway Ltd. management, and speculations about conspiratorial agreements among the railroads do not constitute evidence appropriate for the record and are "scandalous" at best, particularly since SMART/TD-NY itself acknowledges the lack of authority of the bloggers who could include "just plain rail fans." Petition to Strike at 6. Accordingly, SMART/TD-NY's request for alternative relief should be denied.

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<sup>8</sup> See Bituminous Coal – Hiawatha, Utah, to Moapa, Nevada; Aggregate Volume Rate on Coal – Acco, Utah, to Moapa, Nevada, 1990 ICC LEXIS 416 (Dec. 19, 1990) (granting a motion to strike evidence relating to an enlarged stand-alone railroad configuration that was beyond the scope of the Board's decision, noting that such evidence "is irrelevant to the issues currently before us and must be considered not pertinent").

<sup>9</sup> See, *supra*, note 1.

**CONCLUSION**

As explained above, SMART/TD-NY lacks good cause to warrant a grant of its Petition for Leave, and therefore, its Petition to Strike should be rejected as untimely. The Petition to Strike also should be denied because NS's January 21 filing of NS-13 was timely and proper and did not prejudice any party to this proceeding. Further, SMART/TD-NY's request for alternative relief should be denied as an improper attempt to submit irrelevant and impertinent information about Chicago into the record of this proceeding, which involves a line acquisition and trackage rights modifications in Pennsylvania and New York.

Respectfully submitted,



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Attorneys for Norfolk Southern Railway  
Company

March 4, 2015

**CERTIFICATE OF SERVICE**

I hereby certify that I have served a copy of NS's "Reply in Opposition to Samuel J. Nasca's Petition for Leave to File Petition to Strike and/or for Alternative Relief and Reply in Opposition to Samuel J. Nasca's Petition to Strike and/or for Alternative Relief" 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

March 4, 2015