

Before The  
Surface Transportation Board

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Finance Docket No. 35157

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224164

PETITION OF THE CITY OF ALEXANDRIA, VIRGINIA  
FOR DECLARATORY ORDER

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**LIMITED REPLY OF NORFOLK SOUTHERN RAILWAY COMPANY TO  
REPLY OF THE CITY OF ALEXANDRIA TO DECISION SERVED  
NOVEMBER 6, 2008**

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Norfolk Southern Railway Company ("Norfolk Southern") provides this limited reply to the Reply of the City of Alexandria, Virginia to the Decision that the Surface Transportation Board ("STB" or the "Board") served November 6, 2008. Norfolk Southern addresses certain mischaracterizations of evidence and matters raised for the first time by the City.

A. Mischaracterization of the Evidence.

The City mischaracterizes RSI's role in the construction of the Facility. The City claims that "NSR consulted with RSI numerous times during construction of the Facility ... to ensure that the infrastructure would support *its business plans*." City Reply at 5. The City fails to submit evidence that the goal of the consultation was to support RSI's "business plans" rather than simply to secure the input of RSI, who has an expertise in ethanol transloading, to make sure that Norfolk Southern was constructing the Facility correctly.

The City mischaracterizes Norfolk Southern's control over its contractor's actions, ignoring testimony of RSI that it must consult Norfolk Southern repeatedly over operations "because of the fact that we're not the ultimate decision-maker " Minnehan at 45-46 (attached hereto). While Norfolk Southern does not perform the actual transloading, the record is clear that Norfolk Southern controls the Facility and its contractor.

The City mischaracterizes the financial responsibility for the transloading. The City cites a section in the RSI Contract that provides that, if a customer sues Norfolk Southern for a botched transload, RSI will be responsible for damages. City Reply at 8. Because Norfolk Southern controls the Facility, it has ultimate responsibility for the transloading. That is why Norfolk Southern must have an indemnity provision in its contract with RSI, its contractor. This does not make RSI ultimately financially responsible for the transloading, it makes RSI ultimately responsible to be competent at the job Norfolk Southern has hired it to perform on Norfolk Southern's behalf. Moreover, Norfolk Southern pays RSI the exact same per gallon amount for each gallon RSI transloads, regardless of the compensation that Norfolk Southern is able to negotiate with the shipper. If Norfolk Southern fails to price the bundled transportation service in a manner to recover its costs, it is Norfolk Southern that suffers, not RSI.

**B. New and Irrelevant Matters.**

Much is made by the City as to business relationships and activities elsewhere on the Norfolk Southern system. *See, e.g.*, City's Reply at 4 ("RSI operates transloading facilities adjacent to Norfolk Southern rails in Buffalo, NY; Baltimore, MD; Grand

Rapids, MI; Petersburg, VA; and Somerset, KY.”) Further, the City raises for the first time, and asserts as relevant, the motive for the contractual relationship between Norfolk Southern and RSI. City Rcply at 4 (“That NSRC’s role in the Facility is minimal is made evident at a global level by its frank acknowledgement that the Contract is designed to take advantage of the federal preemption provisions of the ICCTA.”).<sup>1</sup>

Notwithstanding the fact that the City has mischaracterized the minuscule amount of evidence it has submitted with regard to these matters, Norfolk Southern asserts that the contractual relationships between RSI and Norfolk Southern at other locations, and the motive for choosing one business structure over another at a certain location, is not relevant to a determination of whether 49 USC 10501(b) applies to the operations at the Alexandria facility. Indeed, if railroad decision-makers failed to understand, and take into account, the legal implications (as well as tax, staffing, operational and economic implications) of proposed business arrangements, they would be derelict. The fact that a railroad has chosen to proceed in one manner at one location, or taken into account the legal regimen in which the industry exists as one factor in choosing how to proceed in a different manner at another location, is not relevant to application of the test of whether 49 U.S.C. 10501(b) applies at the Norfolk Southern ethanol transload facility at Alexandria, Virginia.

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<sup>1</sup> The City fails to note that the business relationship at Alexandria was the product of several factors, only one of which was the legal regimen that would govern the operational, regulatory and commercial aspects of the facility. Further, it cannot creditably argue that Norfolk Southern should be faulted for entering an arrangement that gives it complete control over the Facility and, at the same time, argue that Norfolk Southern has no control over the Facility.

**C. Core Competency and the Party Performing the Physical Operations.**

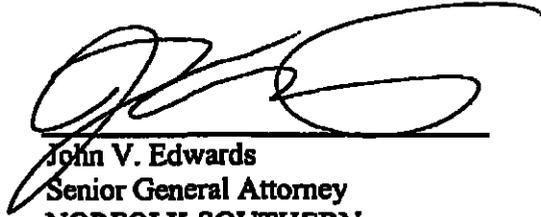
The bulk of the City's argument is that RSI does the physical transloading, which is outside of NSRC's "core competency." This simply is not relevant to whether a service provided by a railway company constitutes transportation for the purpose of applying the provisions of 49 USC 10501(b).

The Board and courts have repeatedly found covered by the provisions of 49 USC 10501(b) services that are other than "moving trains" and that these services may be performed by persons other than direct employees of the railroad. *See, e.g.,* STB Finance Docket No. 34444, *Town of Milford, MA – Petition for Declaratory Order*, slip op. at 3 (served August 12, 2004) (railroad's "planned transloading activities would fall within the statutory definition of transportation" but "for transloading activities to qualify for preemption, they must be offered by a rail carrier (*either directly or through its agent*)") (emphasis added). Indeed, the test arising out of the seminal *Hi Tech* series of cases specifically provides that transportation services need not be actually performed by rail carrier employees, and certainly does not anticipate an examination of whether the service provided is the "core competency" of the particular railroad in question. STB Finance Docket No. 34192 (Sub-No. 1), *Hi Tech Trans, LLC – Petition for Declaratory Order*, slip op. at 5 (served August 14, 2003) ("To come within the preemptive scope of 49 U.S.C. 10501(b), [the] activities [under scrutiny] must be both: (1) transportation; and (2) performed by, *or under the auspices of*, a rail carrier"). Therefore, the bulk of the City's Reply – the laundry list of actual activities undertaken by Norfolk Southern's

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contractor and the mischaracterization of NSRC's oversight of the contractor's activities  
– is not relevant to the Board's decision in this proceeding.<sup>2</sup>

Respectfully submitted,



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December 9, 2008

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<sup>2</sup> The City makes much of RSI's role of matching trucks to available rail cars. Each rail car, of course, handles the ethanol of a certain shipper. That ethanol is sold by the producer to a specified receiver. The ethanol is not fungible and to be provided to the first receiver in the gates, but instead is to be provided to the specified receiver. As RSI is performing the actual transloading in to the trucks, it only makes sense that RSI handle the logistics as to which ethanol-filled rail car needs to be spotted in order to put the correct ethanol into the correct truck. Moreover, the fact that Norfolk Southern has delegated such on the ground logistics to its contractor does not change the testimony that Norfolk Southern has control over the Facility and the transloading operation.

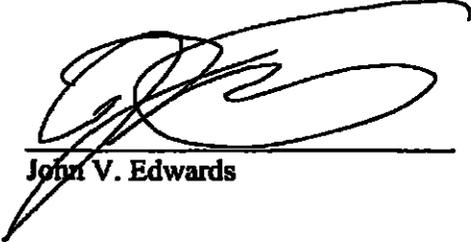
**Certificate of Service**

I hereby certify that on this ninth day of December, 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 this Limited Reply of Norfolk Southern Railway Company to the Reply of the City of Alexandria to the Decision Served November 6, 2008.

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**Dated: December 9, 2008**

  
\_\_\_\_\_  
**John V. Edwards**

1 UNITED STATES DISTRICT COURT  
2 FOR THE DISTRICT OF VIRGINIA  
3 ALEXANDRIA DIVISION  
4  
5 -----X  
6 NORFOLK SOUTHERN RAILWAY, :  
7 Plaintiff, : Case Number  
8 vs. : 1:08-CV-618  
9 CITY OF ALEXANDRIA, et al., :  
10 Defendants. :  
11 -----X  
12 CITY OF ALEXANDRIA, :  
13 Counterclaim Plaintiff, :  
14 vs. :  
15 NORFOLK SOUTHERN RAILWAY COMPANY, : Case Number  
16 Counterclaim Defendant, : 1:08-CV-618  
17 and :  
18 RSI LEASING, INC., :  
19 Third-Party Defendant. :  
20 -----X

21 CONFIDENTIAL 30(b)(6) DEPOSITION OF RSI LEASING,  
22 INC., THROUGH KELLEY MINNEHAN

Alexandria, Virginia  
Wednesday, September 17, 2008

REPORTED BY:  
CARMEN SMITH

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1 Deposition of KELLEY MINNEHAN, called for  
2 examination pursuant to notice of deposition, on  
3 Wednesday, September 17, 2008, in Alexandria,  
4 Virginia, at the Alexandria City Hall, 301 King

5           A     Correct.

6           Q     The other piece of compensation that's

7 mentioned in the contract is just a rate per gallon

8 of ethanol that's transloaded; is that correct?

9           A     Correct.

10          Q     Do I have that right?

11          A     Correct.

12          Q     How was the volume measured?

13          A     Through meters off the pumps.

14          Q     Just -- are they measured on a per-truck

15 basis or on a daily basis?

16          A     Per truck.

17          Q     And then how is that billed to Norfolk

18 Southern? Is it weekly, daily, monthly?

19          A     To the best of my knowledge, weekly.

20          Q     In terms of daily dealings with Norfolk

21 Southern regarding the Van Dorn yard, who is your

22 primary point of contact?

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1           A     Mike webb.

2           Q     Do you know, does -- and I can ask him

3 when we talk to him later, but do you know if

4 Mr. Rosenthal has a primary point of contact?

5           A     Originally, I instructed him to run

6 everything through myself, from the standpoint

7 Anthony -- Tony Rosenthal was a new employee, so

8 trying to give him some guidance and let me deal

9 with the Norfolk Southern, because of my experience.

10           A     Since then, a lot of items do come up, and

11 I have him go correctly to either Andrew Lynch or  
12 Tony Rosenthal.

13 But on a daily basis, I mean, you'll find  
14 Tony, he has been involved interacting with a number  
15 of Norfolk Southern employees on many items. So he  
16 has direct contact, for example, just the other day,  
17 with Hugh Cilley. I mean, he'd had direct contact  
18 with Dave Schoendorfer. He's had direct contacts.

19 And all these contacts are our company  
20 going to the Norfolk Southern for advice on how they  
21 want it handled. We are not a decisionmaking.  
22 We're just there to basically, I got to raise my

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1 hand, can I go to the bathroom. That's how that  
2 facility operates.

3 Q In terms of the actual transloading  
4 operations --

5 MR. BRYANT: Just for the record, I think  
6 earlier you said Tony Rosenthal would go to Andrew  
7 Lynch or Tony Rosenthal.

8 THE WITNESS: Mike Webb.

9 MR. PILSK: Thank you.

10 MR. BRYANT: That's going to be in there.

11 MR. PILSK: Thank you.

12 BY MR. PILSK:

13 Q In terms of the actual daily transloading  
14 operations, do you have an understanding of what  
15 Norfolk Southern's involvement is in the actual  
16 transloading?

17           A     They rely on us on the actual  
18 transloading. That's what we are there for. We're  
19 the contractor that they have hired to do the  
20 transfer of the product from the railcar to the  
21 truck.  
22           Q     Okay. And does RSI have any involvement

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1 with the shippers?  
2           A     No. The only involvement, and you'll hear  
3 this from Tony, which more on a daily operational  
4 basis, is where -- you know, how many loads, you  
5 know, how many loads are going to go to Springfield  
6 or Fairfax. That would be a scheduler that that's  
7 his job on a daily basis to say what volume goes  
8 where.  
9           Q     Okay. Have you had any discussions with  
10 Norfolk Southern about the haul permits that the  
11 city has issued?  
12          A     Yes. I received copies of those in the  
13 mail within the last 30 days, sent an e-mail to Doug  
14 McNeil, saying why am I getting these. I --  
15               MR. BRYANT: Maybe we'd better be specific  
16 about what haul permits you're talking about,  
17 because there have been some new ones issued. That  
18 may be what he's talking about. I don't know if  
19 that's what you're talking about.  
20               BY MR. PILSK:  
21           Q     Well, my general question was generally,  
22 and I think the answer is yes, you've had