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January 23, 2009

VIA Electronic Filing

Anne K. Quinlan, Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D. C. 20024

Re: STB Docket No. AB-290 (Sub. No. 210X), Norfolk Southern Railway Company - Abandonment - In Atlanta, Fulton County, Georgia - Notice of Exemption - Reply to National Railroad Passenger Corporation's (Amtrak's) Motion to Supplement Petition to Intervene in Support of Stay Sought by Georgia Department of Transportation

Dear Ms. Quinlan:

Enclosed for electronic filing with the Board in the captioned proceeding is Norfolk Southern Railway Company's reply to National Railroad Passenger Corporation's (Amtrak's) Motion to Supplement Petition to Intervene in Support of Stay Sought by Georgia Department of Transportation, filed January 21, 2009 in this proceeding.

Very truly yours,

A handwritten signature in cursive script, appearing to read 'James R. Paschall'.

James R. Paschall

Enclosures

cc: Parties shown on certificate of service

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. AB-290 (SUB-NO. 210X)
NORFOLK SOUTHERN RAILWAY COMPANY
- ABANDONMENT EXEMPTION -
IN ATLANTA, FULTON COUNTY, GEORGIA

NORFOLK SOUTHERN RAILWAY COMPANY'S REPLY
TO NATIONAL RAILROAD PASSENGER CORPORATION'S
MOTION TO SUPPLEMENT PETITION TO INTERVENE IN SUPPORT OF STAY
SOUGHT BY GEORGIA DEPARTMENT OF TRANSPORTATION

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January 23, 2009

Before the
Surface Transportation Board

STB Docket No. AB-290 (Sub-No. 210X)

Norfolk Southern Railway Company
- Abandonment Exemption -
In Atlanta, Fulton County, Georgia

Norfolk Southern Railway Company's Reply
To National Railroad Passenger Corporation's (Amtrak's)
Petition To Intervene In Support Of Stay Sought By Georgia Department Of
Transportation

This is Norfolk Southern Railway Company's ("NSR") reply to the National Railroad Passenger Corporation's ("Amtrak's") January 21, 2009 "Motion to Supplement Petition to Intervene in Support Stay sought by the Georgia Department of Transportation" ("GA DOT") in this proceeding. NSR requests that Amtrak's motion be denied because (1) the motion has been superseded by the Board's decision, served January 21, 2009, in which the Chairman entered a temporary stay in this proceeding, (2) the Board has given Amtrak and GA DOT the opportunity to present further information and argument in which the material in the motion can be incorporated and has given NSR and the Atlanta Development Authority¹ the right to reply to the Amtrak

¹In the Chairman's decision on the petition for stay served January 21, 2009, the Board granted the petition to intervene of the Atlanta Development Authority (the "Authority"), a corporate body public and politic of the State of Georgia and instrumentality of the City of Atlanta, which is the current record owner of the real estate underlying the right-of-way. The Authority intends to develop the property as part of the Atlanta BeltLine project, a public use project described in earlier filings in this proceeding that includes potential light rail use of the corridor.

and GA DOT filings, (3) Amtrak could have presented the information and argument in the motion in its already late filing of January 15, 2009, (4) the motion is a last-minute reply to a reply and (5) the underlying facts in the case cited by Amtrak distinguish that case from this case and, despite some superficial similarities, generally do not support Amtrak's argument that it needs a stay to proceed with its application to acquire NSR's passenger service easement for the subject line under the statutory principle that the acquisition is necessary and critical to Amtrak's provision of intercity passenger service.

NSR filed a notice of exemption under 49 U.S.C. § 10502 and 49 CFR § 1152.50 for the abandonment of a 4.30-mile railroad line between mileposts DF 633.10 and DF 637.40, in Atlanta, Fulton County, Georgia (the "Line") and a concurrent petition for exemption from the Offer of Public Assistance ("OFA") and public use provisions of 49 U.S.C. §§ 10904 and 10905. The Board served the Notice of Exemption, with an effective date of January 22, 2009, on December 23, 2008. No formal expression of intent to file an offer of financial assistance (OFA) was filed by the January 2, 2009 due date. No request for a public use condition was filed by the January 12, 2009 due date. Thus, although the Board stated in its further decision of January 21, 2009 which imposed certain conditions on the exemption² that a decision on the merits of NSR's

² The Board provided that: (1) consult with the National Geodetic Survey (NGS) and notify NGS at least 90 days prior to beginning salvage activities that could disturb or destroy any of the seven geodetic station markers; and (2) retain its interest in and take no steps to alter the historic integrity of all historic properties including sites, buildings, structures and objects within the project right-of-way that are eligible for listing or are listed in the National Register until the section 106 process of the NHPA has been completed, report back to SEA regarding any consultations with the SHPO and the public, and not file its consummation notice or initiate any salvage activities related to abandonment (including removal of tracks and ties) until the section 106 process has

Petition for Exemption would be served in a separate decision, the petition for exemption has become moot.

The Board's January 21, 2009 stay decision requires Amtrak and GA DOT to promptly submit information, argument and authority to justify continuance of the stay. Amtrak should not be granted an indefinite stay based upon a last-minute pleading (and effectively a reply to a reply at that) to which NSR and the Authority may not have an adequate opportunity to reply. At best, NSR and the Authority must reply hastily in a document prepared quickly in order to have some response in the record in the event the Board unexpectedly considers Amtrak's further motion outside the procedural schedule in the stay decision. The Board should resolve the remaining issue(s) related to the stay as identified by the Board in the January 21, 2009 decision only after the completion of the prompt and reasonable procedure already established by the Board for the handling of the issues has been followed. The Board then can consider the further submissions of the parties on the points specified in the decision.

Amtrak's latest filing raises new arguments but they are based on information and precedent available to Amtrak for its January 15, 2009 late filing. Amtrak gives no reason why the ICC decisions in proceedings in which Amtrak was a party could not have been cited and considered previously.³

been completed and the Board has removed this condition. The extraordinary condition concerning salvage effectively provides Amtrak further relief in the nature of a stay under the circumstances of this proceeding even if it merely gives Amtrak the benefit for the purposes of negotiation for use of the right-of-way.

³ In any event, Amtrak can cite these cases again in its January 28 filing if Amtrak believes that citation of these precedents is responsive to the Board's January 21, 2009

A reply to a reply is not permitted under the Board's rules of practice, 49 CFR 1104.13(c). The Amtrak motion to supplement the previous late-filed Amtrak petition following NSR's and the Authority's replies to that petition is effectively a reply to those replies.

This case differs from the Wayne County, MI case cited by Amtrak.⁴ In that case, the 0.98-mile line (the "Wall Track") that was the subject of the abandonment proceeding was operated unprofitably, but still was in active service when Conrail filed the abandonment application. The City of Detroit supported Amtrak's acquisition of the Wall Track in that proceeding whereas the City of Atlanta, through the Authority, opposes Amtrak's acquisition of the subject Line. Amtrak had already made two written offers to acquire the Wall Track, but we have found no previous written offer from Amtrak or GA DOT to acquire the subject Line based on a quick file search and canvass of NSR personnel who should have knowledge of the matter. Indeed, Amtrak's interest in the subject Line in this proceeding was expressed just six days prior to the Board's decision concerning the petition for stay.

More remarkable may be a similarity between the Wall Track case and this one. Amtrak represented in both cases that a track that it did not currently use was critical and necessary for it to provide intercity rail passenger service and to reach a proposed

order.

⁴ *National Railroad Passenger Corporation - Conveyance of Conrail Line in Wayne County, MI*, ICC Finance Docket No. 30898 (ICC served various dates including December 15, 1986, December 2, 1986 and October 6, 1986), which was related to *Conrail Abandonment in Wayne County, MI*, ICC Docket No. AB-167 (Sub-No. 947N) (ICC Decided various dates including January 28, 1987, December 15, 1986, November

future passenger station. Yet, only 13 days after the service date of the second of the two ICC decisions in the Wall Track acquisition proceeding, ICC Finance Docket No. 30898, that were appended to Amtrak's motion in this case, the Commission dismissed the proceeding at Amtrak's request. We know that this request for dismissal was not based on a settlement between Conrail and Amtrak or a private acquisition of the Wall Track by Amtrak because the ICC considered the competing OFA of Great Lakes Railway Company ("GLRC") in a later decision in *Conrail Abandonment In Wayne County, MI; In The Matter Of An Offer Of Financial Assistance*, ICC Docket No. AB-167 (Sub-No. 947N) (ICC decided January 28, 1987). The Commission had deferred consideration of GLRC's OFA pending disposition of Amtrak's acquisition application. GLRC's OFA would have been moot if Amtrak had acquired the Wall Track. Amtrak's apparent interest in this Line is not as timely or substantial as it was in the Wall Track and the City does not support the acquisition of the subject Line. Amtrak's precedent provides little indication that Amtrak will acquire NSR's interest in the Line in this case.

If Amtrak can not respond satisfactorily and convincingly to the Board's requests for information and authority in this proceeding, Amtrak should not be granted a stay in order to have 45 or more additional days to prepare an application to condemn NSR's interest in the Line. Amtrak would have to satisfy similar criteria for a favorable order from the Board in the acquisition case, especially since its case here is not as compelling as it appears to have been in the Wall Track case that Amtrak dropped without proceeding with its filings, after having made similar representations.

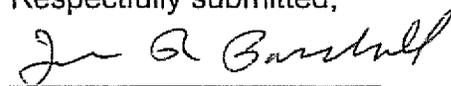
26, 1986, September 29, 1986).

NSR and the Authority previously have provided argument, information and citations supporting denial of a stay in this proceeding. In view of these previous submissions and the Board's further procedural schedule in this case, NSR does not repeat those arguments and authorities here. NSR merely notes that they further support both a denial of an indefinite stay and adherence to a procedural schedule that proceeds to a prompt and final disposition of this proceeding.

NSR will respond to the requested schedule and merits of Amtrak's related filing in STB Finance Docket No. 35215, *National Railroad Passenger Corporation – Application Under 49 U.S.C. 24311(c) To Condemn Certain Rail Carrier Property and Request for Establishment of Procedural Schedule* in a separate reply.

For the foregoing reasons, NSR requests that the Board deny Amtrak's motion without prejudice to Amtrak's right to resubmit any relevant information or argument in the filing that the Board has directed Amtrak to file on January 28, 2009.

Respectfully submitted,



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Dated: January 23, 2009

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply to Petition to Intervene in Support of Stay was served upon the following parties, by e-mail attachment on January 23, 2009:

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