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March 4, 2010

VIA HAND DELIVERY

James J. McNulty, Secretary
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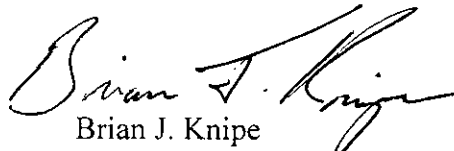
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Re: *Pennsylvania State Legislative Board United Transportation Union v. Norfolk Southern Railway Company*, Docket No. C-00019522

Dear Secretary McNulty:

Enclosed for filing on behalf of Norfolk Southern Railway Company are the original and nine (9) copies of the *Reply Brief of Norfolk Southern Railway Company*. Copies have been served in accordance with the attached Certificate of Service.

Very truly yours,



Brian J. Knipe

For BUCHANAN INGERSOLL & ROONEY, P.C.

BJK/paf

Enclosures

cc: The Honorable Wayne L. Weismandel (via hand delivery and e-mail w/encl. (Reply Brief in Word format))
Joseph P. Sirbak, II, Esq.
Certificate of Service

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania State Legislative Board United :
Transportation Union :
v. : Docket No. C-00019522
Norfolk Southern Railway Company :

**REPLY BRIEF OF NORFOLK
SOUTHERN RAILWAY COMPANY**

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Dated: March 4, 2010

Pursuant to the ALJ's Scheduling and Briefing Order of February 3, 2010, Norfolk Southern¹ files this Reply Brief responding to the arguments raised in the Union's Main Brief submitted on February 26, 2010.² Norfolk Southern's Main Brief anticipated and addressed the majority of issues raised in the Union's Main Brief and Norfolk Southern will not needlessly reiterate its prior arguments herein. Instead, Norfolk Southern responds only to those few subjects warranting additional discussion.

A. The Union's Argument That 49 C.F.R. § 218.99 Does Not Cover the Subject Matter of the 1973 Order Relies on a Legal Standard Applicable To an Entirely Different Statute.

The Union contends that the 1973 Order and 49 C.F.R. § 218.99(e)(3) do not cover the same subject matter because "the Commission's current order does not regulate or attempt to regulate the equipment, namely shove lights..." (Union Main Brief at 2). This argument is copied directly from the Commonwealth Court's *inapposite opinion in Consolidated Rail Corp. v. Pa. P.U.C.*, No. 852 C.D. 2001 (Pa. Commw. March 11, 2002) ("*Conrail*"), attached to the Union's pre-hearing comments as Exhibit D. In *Conrail*, the Court considered whether the 1973 Order was preempted by the Locomotive Boiler Inspection Act, 49 U.S.C. §

¹ Unless otherwise specified herein, capitalized terms shall have the same meanings attributed to them in Norfolk Southern's Main Brief.

² On the date that Reply Briefs were to be filed, the Union filed and served by e-mail a modified version of its Main Brief, to be substituted for the actual Main Brief filed and served by the Union on February 26, 2010, which the Union now contends was a "rough draft." Norfolk Southern has prepared its Reply Brief to respond to the Main Brief as originally filed by the Union. It would obviously and unfairly prejudice Norfolk Southern to expect Norfolk Southern to respond to a new version of the Union's Main Brief, submitted on the very date that Reply Briefs are due. Accordingly, Norfolk Southern respectfully requests that the ALJ strike, or at the very least disregard, the Union's untimely "final" version of its Main Brief. Insofar as the Union contends that the only difference between the two versions is "correcting typographical errors," the Union would not be prejudiced if the untimely "final" version of its Main Brief was disregarded.

20701, *et seq.* (the “LBIA”).³ As the LBIA does not contain an express preemption provision comparable to 49 U.S.C. § 20106, the *Conrail* Court relied on Supreme Court precedent holding that the LBIA was intended to “occupy the field” with respect to the “design, the construction and the material of every part of a locomotive.” *Id.* at 8-9.

The LBIA is both more narrowly focused than the FRSA – in that it regulates only the “parts and appurtenances” of locomotives, rather than every area of rail safety – and simultaneously much broader than the FRSA in its preemptive effect, completely occupying its field of the physical design of locomotives. Critically, the LBIA does not contain exceptions to federal preemption where (i) the Secretary has not yet issued a regulation under the authority of the LBIA covering the subject matter of a competing state regulation or (ii) the competing state regulation is necessary to address an essentially local safety hazard, is not incompatible with the federal regulation, and does not unduly burden interstate commerce. In other words, although both statutes have preemptive effect, the preemption analyses under the respective statutes are entirely different. A state regulation will only escape the complete preemptive effect of the LBIA if it does not relate to the design, construction, or material of a locomotive or its parts and appurtenances.

In *Conrail*, the carrier argued that the 1973 Order was preempted by the LBIA because it required a radio in the locomotive (as well as a radio in the possession of the trainman riding the leading end of the shove movement). *Conrail*, slip op. at 8. The Court held that radios

³ The Commonwealth Court explicitly did **not** address any issues concerning the FRSA. *See id.* at 6-7 (“The sole claim raised by Conrail in this appeal is that the PUC erred in denying its exceptions, and adopting the ALJ’s Recommended Decision on Remand, because the LBIA preempts the PUC’s jurisdiction over the subject of the 1973 Order”); and at 8, n.12 (“As a corollary to this claim, Conrail also alleges in the Argument portion of its brief that the FRSA preempts the PUC’s jurisdiction over the subject of the 1973 Order. ... However, as this preemption claim was not raised in the petition for review filed in this case, nor in the Statement of Questions Presented portion of Conrail’s brief, it will not be considered in this appeal”).

were already required to be present in locomotives and the 1973 Order merely regulated the “use” of that locomotive equipment – not its design, construction, or material. *Id.* at 10-11. The *Conrail* Court had no reason to consider whether a federal regulation covered the subject matter of the 1973 Order and certainly did not consider an essentially local safety hazard exception, which simply does not exist under the LBIA. For that reason, the Union’s attempt to apply the reasoning of the *Conrail* decision to the instant case – to be decided under an entirely separate preemption analysis – misses the mark. Moreover, the Commission should not allow the Union’s unfortunate conflation of the standards under the LBIA and the FRSA and its misstatement of the actual holding of the *Conrail* Court through a conspicuously vague reference to the Court’s analysis of “Federal Railroad Regulatory Statutes,” *see* Union Main Brief at 8, to distract from the correct FRSA standards.

B. 49 C.F.R. § 218.99 Plainly Addresses the Practice of a Trainman Riding the Lead End of a Shove Movement and the Safety Concerns Addressed by the Practice.

The Union repeatedly argues that 49 C.F.R. § 218.99(e)(5) “merely grants the permission to use shove lights” and “does not address the local regulatory requirement on having a human being riding on the leading and [sic] of a shoving action in the Conway railroad yard.” (Union Main Brief at 9, 13) (*See also* Union Main Brief at 14) (“the most recent federal regulatory pronouncement in the area is, at best, silent with respect to the specific Commission requirement now being challenged. The federal regulation makes no specific reference to placing a person on the leading end of a shoving movement in railroad yards in general, or in Conway in particular”). To the contrary, § 218.99(e)(5) specifically allows shove lights to be used **in lieu of** visual point protection. The FRA’s contemporaneously-published explanation of

§ 218.99(e)(5) makes clear that it intended shove lights to serve as an alternative to physically riding the lead rail car in a shove movement:

The length of the departure tracks is a factor in deciding whether to allow shove light systems to be used in lieu of point protection because employees would probably walk or **ride the side of a car** to provide point protection and lengthy departure tracks would expose employees to injury risk for a longer period than if the tracks were shorter. In conclusion, FRA's observations corroborated AAR's assertion that if employees were required to provide point protection by **riding the side of a car** or walking along the departure tracks, there would be an increased risk of injuries.

See Railroad Operating Rules: Program of Operational Tests and Inspections; Railroad Operating Practices: Handling Equipment, Switches and Fixed Derails, 73 Fed. Reg. 33888 at 33892 (Jun. 16, 2008), attached as Appendix B to Norfolk Southern's Main Brief.

To the extent the Union argues that § 218.99 does not cover the subject matter of the 1973 Order because it does not address the provision of point protection by means of riding the lead end car during a shove movement, the Union is simply wrong – § 218.99(e)(5) was designed expressly to allow rail carriers like Norfolk Southern to use shove lights **in lieu of** having a trainman physically ride the lead end car in a shove movement. On the other hand, to the extent that the Union argues that § 218.99(e)(5) does not cover the subject matter of the 1973 Order because it does not mention either the 1973 Order or Conway Yard in particular, the Union fundamentally misconstrues the coverage prong of § 20106, which requires only that the federal regulation address the **same general safety concern** addressed by the competing state regulation. See *Burlington Northern & Santa Fe Ry. Co. v. Doyle*, 186 F.3d 790, 796 (7th Cir. 1999). Such an interpretation would permit the exception to swallow the rule and would completely eviscerate Congress' intent in enacting § 20106 since the rail safety regulations

adopted by the FRA are necessarily nationally uniform standards – not standards expressly directed at any particular rail yard, stretch of track, or competing state regulation.⁴

C. Prior Proceedings Concerning the 1973 Order Did Not Address the Question of Federal Preemption Under 49 U.S.C. § 20106 Presented Here.

The Union’s continued attempts to incorporate by reference prior proceedings relating to the 1973 Order are inappropriate because, as thoroughly explained at Section V(C)(2) of Norfolk Southern’s Main Brief, the existence of an essentially local safety hazard at Conway Yard is a question of first impression before the Commission. (*See* NS Main Brief at 18-22). By way of example, the Union contends that “it is significant to note that the **basis** for the Commission’s [1973 Order] was local in nature ...” (*see* Union Main Brief at 2) (emphasis added) without detailing what specific factors constituted the Commission’s “basis” or how those

⁴ The Union further misstates Chief Judge Sheridan’s holding in *National Association of Regulatory Commissioners v. Coleman*, 399 F. Supp. 1275 (M.D. Pa. 1975), *aff’d* 542 F.2d 11 (3d Cir. 1976). The Union cites *Coleman* for the proposition that federal preemption is not to be lightly presumed. (Union Main Brief at 13-14). Citing pronouncements of the Supreme Court, the *Coleman* Court did recognize that, at a macro level, federal regulation should not be presumed to preempt all state regulation unless there is a “clear manifestation” of Congress’ intent to do so. *Coleman*, 399 F. Supp. at 1278-79. However, with respect to rail safety regulations of the FRA, such as are at issue in the present case, the *Coleman* Court found just such a clear manifestation:

In view of the regulatory scheme established in the aforementioned sections of the Federal Railroad Safety Act and the specific statutory language of Section 434 [the predecessor to § 20106, containing essentially identical language], it is apparent that one of *the primary objectives of the Act is to establish a nationally uniform system of regulation in the rail safety field. Congress viewed the multiplicity of state regulations as not being conducive to railroad safety and, equally important, as unduly burdening interstate commerce by subjecting the railroads to fifty different sets of regulations dealing with rail safety. The legislative history as well as the statutory language evidences a total preemptive intent.*

Coleman, 399 F.Supp. at 1279 (emphasis added).

factors might support a finding of an essentially local safety hazard under the proper 49 U.S.C. § 20106 analysis more than thirty-six years after entry of the 1973 Order.

Even more revealing is the Union's block quotation of Judge Porterfield's reasoning in 1999. (Union Main Brief at 7). Judge Porterfield opined as to the "perils to human health and welfare" that could arise at Conway Yard and concluded that there was "an overall greater risk or potential risk of injury" if there was no trainman riding the lead end of a shove movement. (*Id.*). In contrast, the issue presently before the Commission is **not** whether replacing the practice of a trainman riding the lead end of a shove movement with a modern, failsafe shove light system will increase or decrease safety at Conway Yard – the FRA already has determined conclusively that both methods provide the requisite degree of safety. The sole issues relevant to the Commission's current § 20106 preemption analysis are (i) whether 49 C.F.R. § 218.99(e)(5) covers the subject matter of the 1973 Order, (ii) whether the 1973 Order is necessary to address an essentially local safety hazard, as that term of art has come to be defined, (iii) whether the 1973 Order and 49 C.F.R. § 218.99(e)(5) are "not incompatible," and (iv) whether continued operation of the 1973 Order would pose an undue burden on interstate commerce. *See* 49 U.S.C. § 20106. Judge Porterfield's 1999 Recommended Decision, like the remaining procedural history of the 1973 Order relied upon by the Union, addresses **none** of these issues now before the Commission.⁵

⁵ The Union also cites the Commission's Order in 1974, which removed from the original 1973 Order the requirement that the Trustees of Penn Central install a system of track circuits and signals at Conway Yard, as suggesting that the parties previously stipulated that a system conceptually similar to the shove light system now proposed would not enhance safety. (Union Main Brief at 5). This argument is yet another red herring. The 1973 Order originally required that the Trustees of Penn Central utilize a trainman riding the lead end of a shove movement **and** install a system of track circuits and signals. At the hearing, Norfolk Southern presented testimony that at the eleven classification yards where shove lights currently are in use, none also follow the practice of having a trainman ride the lead end of the shove movement. (Tr. at 170).

D. None of the Safety Hazards Propounded by the Union are Essentially Local.

As an initial matter, Norfolk Southern notes that it is challenging to create a comprehensive list of all local conditions upon which the Union relies because the Union's Main Brief fails to provide any useful citations to the record. The Union's entire Main Brief contains only a few blanket citations to the 2-day hearing held on February 18 and 19, 2010, usually tacked on at the end of paragraphs of argument. With one exception, the Union's citations to the hearing transcript refer to all pages covering the witnesses' entire sworn testimony, not to any particular page or pages of testimony on which the Union purports to rely. This lack of proper citation calls into question the accuracy of the factual averments contained in the Union's Main Brief. By way of minor example, the Union suggests in its Main Brief that the lead end car in a shove movement would be 1 3/4 miles from the engine (Union Main Brief at 17), while the witnesses at the hearing unanimously estimated the length as 1 1/2 miles (Tr. at 128 (Sykes); 194, 203 (Kaufman); 287 (Dunlevy); and 306 (Krosky)). The difficulties created by the Union's lack of proper citation to the record are exacerbated by the Union's utter failure to comply with any part of Paragraph 5 of the ALJ's February 3, 2010 Scheduling and Briefing Order. The Union's Main Brief does not contain a Statement of the Questions Involved and was not

Moreover, the FRA has determined that shove lights now may be used "in lieu of" visual point protection. Apparently, the Commission did not conclude in 1973 that riding the lead end of a shove movement and track circuits were almost entirely redundant means of addressing the same safety concern – ensuring that the departure track was unoccupied and that shove movements did not run out beyond the designated clearance point. Both parties agreed that it was completely unnecessary to implement both measures and, for underlying reasons not apparent on the face of the Order, chose to request that the Commission grant the Trustees of the Penn Central relief from the requirement of installing track circuits and signals. The Commission's Order of 1974 is of no relevance to Norfolk Southern's ability to install a system of shove lights **in lieu of** visual point protection now that the FRA explicitly has granted rail carriers the right to choose which method of protection to utilize in classification yards like Conway Yard.

accompanied by (i) proposed findings of fact, (ii) proposed conclusions of law, or (iii) proposed ordering paragraphs.⁶

Nevertheless, the Union's Main Brief appears to raise several characteristics that it claims are "local" to Conway Yard: (i) the fact that Conway is a "huge," "complex," and "massive" railroad classification yard subject to congestion, particularly as it relates to Conway Yard now operating as a "one hump" yard, (ii) "unique" weather such as snow, ice, and fog, (iii) the presence of debris, which might include "hazardous materials" as well as "all manner of freight imaginable," (iv) Conway Yard's proximity to the Ohio River and several residential communities, (v) curves in the departure track, and (vi) the past elimination of yardmaster positions. (UTU Main Brief at 3-5, 12, 15).⁷ As detailed at length in Norfolk Southern's Main

⁶ Although the Union failed to file separate proposed ordering paragraphs, the Conclusion to its Main Brief includes an improper prayer for relief, requesting that the Commission amend the 1973 Order to impose additional requirements on Norfolk Southern at Conway Yard. (*See* Union Main Brief at 20). This is the first time the Union has raised this request, which was never considered at the hearing, nor supported by any evidence. The request flagrantly exceeds the scope of this proceeding as directed by the Commission's Order referring this matter to hearing, namely the limited question of whether the 1973 Order is preempted by the Federal Regulation at 49 C.F.R. § 281.99. *See* Order entered January 14, 2010 at 7. Further, the Union cannot request an amendment of a Commission Order through a brief. Instead, it must file a petition for amendment in accordance with 52 Pa. Code § 5.572 and 66 Pa.C.S. § 703(g). For all these reasons, the Union's improper and untimely prayer for relief should be disregarded.

⁷ The Union cites to the existence of a "restricted speed" rule at Conway Yard as **circumstantial evidence** of unspecified hazards at Conway Yard, not as a local safety hazard in its own right. (Union Main Brief at 11-12). At the hearing, counsel for the Union characterized "restricted speed" as a "term of art under the federal regulatory framework." (Tr. at 126). Restricted speed is in fact a defined operating practice in the rail industry. *See* 49 C.F.R. § 214.7 (defining "restricted speed" as "a speed that will permit a train or other equipment to stop within one-half the range of vision of the person operating the train or other equipment, but not exceeding 20 miles per hour, unless further restricted by the operating rules of the railroad"). The FRA's regulations apply the concept of "restricted speed" in a variety of contexts. *See* 49 C.F.R. § 214.321 (protection of roadway workers); 49 C.F.R. § 214.327 (same); 49 C.F.R. § 232.407 (restricted speed where there is a loss of communication with a "two way end of train device"); 49 C.F.R. § 236.204 (restricted speed as a baseline signaling aspect); 49 C.F.R. § 236.512 (same); 49 C.F.R. § 240.309 (reporting incidents related to exceeding restricted speed). Mr. Kaufman likewise testified at the hearing that restricted speed may apply on "open track."

Brief, each of these characteristics are typical of other classification yards around the country. Conway Yard falls squarely in the middle of other Norfolk Southern classification yards, all of which also currently are operating as “one hump” yards, in terms of size and volume of traffic. The Union was unable to identify any freight unique to Conway Yard and the record is replete with examples of hazardous materials handled at other classification yards. Many other classification yards are located in close proximity, or adjacent to, rivers and residential communities. Conway Yard’s curves in the departure track are not unique, and the Union’s witnesses were unable to opine on how the duties of yardmasters at Conway Yard compared with the duties of yardmasters at other yards. The Union repeatedly refers to “local conditions” at Conway Yard (Union Main Brief at 18-19) but cannot demonstrate how such “local conditions” are “essentially local,” *i.e.* of such a **nature that they are not capable of being addressed through federal regulation.**

Instead, the Union falls back on a curious argument that:

[I]t is axiomatic in American law that each piece of real estate is in itself unique and cannot be duplicated or replicated in any other location. Other parcels, other railroad yards, may be similar to Conway but there is no other spot on earth that is the same as Conway.

(Union Main Brief at 19). The Union’s argument might resonate at common law for purposes of demanding specific performance on a contract for the sale of real estate, for example, but has no application to the § 20106 preemption analysis. The question under the essentially local safety hazard prong of the exception to § 20106 preemption is not whether the real estate upon which a

(Tr. at 205). Although there is scant evidence in the record pertaining to restricted speed, it is clear that restricted speed is not peculiar to Conway Yard but is in fact an industry-wide operating practice that has no bearing whatsoever on whether an essentially local safety hazard exists at Conway Yard.

rail yard sits is unique, which in some sense it certainly must be, but rather whether the hazards present at that rail yard are of an essentially local nature.

Even the Union recognizes the ramifications of its argument that “[r]ailroad yards are inherently dangerous places” and “are dangerous to live near and they are dangerous workplaces as well.” (Union Main Brief at 19). Insofar as the alleged hazards at Conway Yard are identical to hazards at comparable rail yards in Ohio and Illinois,⁸ for example, the Union contends that those rail yards too could be made subject to state regulation to address those “local conditions.” (Union Main Brief at 18) (“The fact is that the local conditions that were the subject of a [sic] testimony at the hearing on the instant matter in railroad yards other than Conway are quite likely exactly the kinds of local conditions that would permit local regulation even in the face of existing Federal regulatory standards”). However, the Union’s proposed solution would turn § 20106 on its head. With respect to hazards that are regional or national in character (and therefore capable of being addressed through national standards), rail carriers would be subject to different regulatory schemes in all fifty states – the precise harm that § 20106 was enacted to avoid. If a “local condition” or hazard is common to rail yards throughout the country, it can not be essentially local.

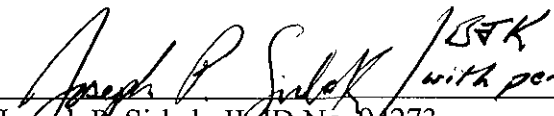
Finally, apart from what could be gleaned from its discussion of whether § 218.99(e)(5) covers the subject matter of the 1973 Order, the Union makes no effort to satisfy its burden of proving that § 218.99(e)(5) and the 1973 Order are “not incompatible” and likewise fails to suggest how continued operation of the 1973 Order would not constitute an undue burden on interstate commerce.

⁸ At the hearing, Norfolk Southern displayed as demonstrative exhibits aerial photographs of rail yards comparable to Conway Yard in Columbus, Ohio and Elkhart, Indiana, not Evanston, Illinois.

E. Conclusion

For all of the reasons stated herein, as well as in Norfolk Southern's Main Brief, Norfolk Southern respectfully requests that the ALJ issue a Recommended Decision holding that the 1973 Order is preempted by 49 C.F.R. § 218.99(e)(5) and adopting Norfolk Southern's proposed Ordering Paragraphs.

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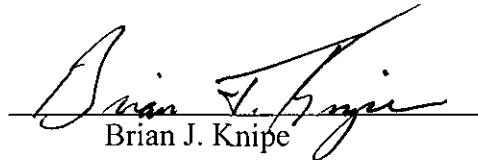
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I hereby certify that I have this day served a copy of the foregoing document in accordance with the requirements of 52 Pa. Code § 1.54 et seq. (relating to service by a participant).

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Dated: March 4, 2010


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