

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
WAYNE L. WEISMANDEL  
ADMINISTRATIVE LAW JUDGE

IN RE: :  
 :  
PENNSYLVANIA STATE LEGISLATIVE BOARD, :  
UNITED TRANSPORTATION UNION : DOCKET No. C-00019522  
 :  
v. :  
 :  
NORFOLK SOUTHERN RAILWAY COMPANY :

***REPLY BRIEF OF THE  
PENNSYLVANIA STATE LEGISLATIVE BOARD,  
UNITED TRANSPORTATION UNION***

Pursuant to paragraph 3 of the Scheduling and Briefing Order issued on or about February 3, 2010, the Pennsylvania State Legislative Board of the United Transportation Union files the instant Reply Brief.

The essence of Norfolk Southern's Main Brief is a broadly based effort to suggest and impose upon the Commission the concept that the past nearly 37 years of history of operations regarding the guiding of shoving movements in the Conway Railroad Yard simply does not exist. It does so by attempting to ignore the factual matrix under which the original 1973 Order of the Commission was adopted in the face of then-existing federal regulatory and statutory framework which Norfolk Southern's predecessor-in-interest argued, at that time, were preemptive of state regulation. It attempts to do so by asserting that the burden of proof in the instant matter rests with the Pennsylvania State Legislative Board of the United Transportation Union despite the *vita voce* Order

of the Administrative Law Judge placing the burden of proof and the burden of going forward on Norfolk Southern Railroad. It does so by evading the essential fact that it is Norfolk Southern, not the PSLB UTU, that seeks a change in the status quo. It does so by characterizing the Union's legitimate and credible factual evidence, educed at the hearing on the instant matter with respect to actual happenstances at the Conway Yard as "scare tactics" aimed at "distracting the Commission . . ." And, it does so by attempting to describe potentially unsafe local conditions at other railroad yards in other parts of the country as being substantially the same as those in Conway Yard and therefore not essentially local at Conway at all. All of this, in Norfolk Southern's Main Brief, is buttressed by a barrage of citation to unpersuasive or inapposite case law predominantly applicable to other jurisdictions.

The reality is that the existence of obstructions on railroad tracks outside of the proposed circuited shovelight area in the nature of stray railroad cars, so-called "shop cars," debris, damaged rail, railroad yard workers, etc. cannot be determined absent railroad personnel serving as the "eyes" of the engineer operating in a shoving movement in the Conway Yard. The fact that Norfolk Southern has chosen to congest Eastbound and Westbound shoving movements into a single hump, non-separated, operation in a railroad yard that was designed to be a two hump operation with a substantial geographic separation of the Eastbound and Westbound shoving activities creates an additional local, Conway Yard based hazard.

When we recognize additionally that, in its capacity as the Operator of the Conway Yard, Norfolk Southern has chosen to slash approximately 60% or more of the per shift yardmasters who are responsible for superintending shoving movements in the

Conway Yard, yet another, and separate, local safety issue indigenous to the operation of shoving movements at the Conway Railroad Yard is clear. It is critical to note in this regard that while the number of yardmasters has been so reduced, the evidence supplied by Norfolk Southern does not indicate that there has been a concurrent diminution of the amount of freight activity passing through the Conway Yard that equals a corollary 60% decrease in responsibility for the yardmaster. This is of course significant, because in proposing to do away with the 1973 Order's requirement of a yard employee guiding the shoving movement from the leading end of the shove, Norfolk Southern proposes, at the Conway Yard, to impose yet additional responsibilities on the remaining two yardmasters working on each shift whose numbers were reduced from five yardmasters that has existed when Norfolk Southern and its predecessors operated Conway as a two hump yard. Nor has Norfolk Southern produced any evidence in this regard that would indicate some technological advance in the method by which yardmasters are expected to do their job and perform their duties that would somehow make this unique operational activity at Conway acceptably safe and consistent with locally safe practices.

To all of this must be added the realities of the weather conditions that affect Conway Yard, the proximity of the Conway Yard to residential communities, school buildings and yards, commercial activities, medical activities, and natural resources all of which are unique to the geographic location and situation of the Conway Yard and we have yet another critical bundle of local conditions which require state regulation in order to protect safety and security with respect to Conway Yard operations.

Each of these safety concerns, each of these items of security at the Conway Yard fall plainly within the ambit of the well-recognized exception to federal preemption in the area of railroad safety as essentially local conditions regarding which the state may regulate because regulation of them, at least in the context of the existing 1973 Order, is not in direct violation of a law, regulation or order of the Government of the United States and, given the nearly 37 year existence of the requirement requiring a yard employee to guide the leading end of a shoving movement in the Conway Yard, it cannot now be seriously argued that the minimally invasive regulatory impact of the existing Commission Order unduly burdens interstate commerce.

What is of dramatically equal import is the essential fact that the whole of this multiplicity of safety and security issues locally present at the Conway Yard is exponentially greater than the sum of these individual parts. While one or two of these existing conditions may, standing alone, not cry out quite as loudly for the continuation of the modest, permissible, existing Commission regulatory activity which dates back to 1973, when we add all of them together we are confronted with an ineluctable need to continue to minimally impose limited requirements to reduce these essentially local safety and security conditions.

On page 32 of Norfolk Southern's Main Brief, there is a discussion indicating, based on the testimony of Darnell Wood, Norfolk Southern's sole rebuttal witness, in which much is attempted to be made of Mr. Wood's "shock" and "disgust" regarding the testimony of Adam Kaufman about such things as cars being regularly left on departure tracks without the knowledge of the yardmaster. In this regard, Norfolk Southern notes that, "[T]he FRA conducts frequent inspections at Conway Yard and Conway Yard has

never been cited for having a car on a departure track without the knowledge of the yardmaster . . .” The fact is that there is nothing to report by yard employees or by the FRA. Cars existing on such tracks are a common operating practice. If crews stop to report every single unsafe condition as implied by Mr. Wood’s testimony, no freight would ever be moved; there would simply be a stack of reports at the end of a work day. More significantly however, Norfolk Southern does not cite to any FRA regulation or order for which the operator of Conway Yard has been cited for cars being on the tracks of departure yards without the knowledge of a yardmaster. And, quite significantly, they cannot cite to any such regulation or order of the FRA because none exists. There simply is nothing for the FRA to cite in this regard.

On page 32 of Norfolk Southern’s Brief there is also a suggestion that the Union’s witnesses, Mr. Kaufman and Mr. Kroskey are not credible and are inconsistent because they identified the existence of shop cars being left on departure tracks in two different time frames. The reality is that Mr. Kaufman and Mr. Kroskey do not work together and, as such, their testimony in this regard was with regard to separate incidences and remains eminently credible.

With respect to Norfolk Southern’s suggestion at page 33 of its Main Brief that yardmaster, Gregory Murphy, testified that there are “[N]o factors at Conway Yard that make it more likely for cars to be left inadvertently on the departure tracks without the knowledge of the yardmaster than at any other rail classification yard,” Mr. Murphy’s testimony in this regard is wildly mischaracterized. His testimony was simply that he was not aware of conditions at other classification yards. He certainly did not testify to the concept that there were no such other factors. Such mischaracterizations and mis-

directions are the essence of the argument put forward by Norfolk Southern. Since they are incapable of factually refuting the sworn testimony of Union witnesses, despite being the operator of that yard, they resort to mischaracterizations and assault on the credibility of witnesses who testified honestly and thoroughly at the hearing on this matter. On page 34 of the Norfolk Southern Brief, there is a strong suggestion that virtually all of the switches in the Conway Yard are located in the Western portion of the yard and as such there will be some capacity for a trainman to visually monitor the shoving movement in order to watch it as the leading end of the shove travels through the switches and back to the shovelight. It goes on to suggest, rather strongly, in this regard with respect to switches, that there simply is no hazard associated with removing trainmen from riding the leading end of a shove movement to watch the switches because in the shovelight system contemplated at Conway Yard, (asserted in Norfolk Southern's Brief to be two 400 foot sections at the end of the track) because switches will each have been visually inspected from the ground not from a moving train prior to the shove movement commencing. The fact is that not all switches are located in the Western portion of the yard. The trainmen monitoring the shove movement will not be able to see the lead end of the shove as it travels back to the shovelight. Additionally, assuming the move goes through the Freedom Interlocking, the crew member must watch the interlocking signal until the move passes the signal. He or she cannot be located at the shovelight at the same time. One of the switches is located well within the departure yard and terminates into an adjacent track. (See Transcript of Testimony of Brian Sikes at page 78 and Transcript of Testimony of Adam Kaufman at page 212.) Norfolk Southern Conway Yard Superintendent Darnell Wood suggested in this regard

that he would lock the **switches** yet the testimony makes clear that there is only such switch in the Freedom Interlocking that is well within the departure yard and runs into an adjacent track and because of that specific design condition at Conway, regardless of how the switch is lined, a movement can run through the switch and into the side of cars on the adjacent track. This description is regarding track numbers 902 and 903, one of which actually runs into the other. (See Transcript of Testimony of Darnell Wood at page 472.) A lock on this sole switch deep in the yard where one track ends and runs directly into another will not be protective of anything.

On pages 36 and 37 of Norfolk Southern's Brief, in its attempt to describe that weather conditions at Conway are not unique, Norfolk Southern cites to the testimony of Brian Sikes at Transcript pages 130 – 131 in asserting that the shovelight design planned for Conway Yard would be of a height that would accommodate snow on the ground. First we must recognize, based on the testimony of Charles Weir, that the shovelight system installed in the Allentown Yard was rendered inoperative recently because the snow exceeded the height of the shovelights that had been installed in that yard. More significant, however, is that if the shovelight signal is itself erected in the walkway that is reserved for the ingress and egress of railroad crews that are required to walk in that space, the direction of the shovelight signal is itself a new and additional local safety hazard. Equally significant, while there is no argument that snow for example or other weather conditions for that matter, are not local to the Conway Yard, it is respectfully submitted that because of the geography of the Conway Yard, the topography of the Conway Yard, the proximity of the Conway Yard to residential communities, school facilities, commercial activities, and natural resources coupled with the realloca-

tion of activities within the yard without a reconfiguring of the yard and the increased burden of duties now imposed on the reduced crew of yardmasters, the existence of snow and other weather conditions creates a unique local impact on the safety and security of activities in the Conway Yard.

We must also explore related federal regulatory requirements. 49 CFR, Ch II, Section 220.49 of the Federal Railroad Administration regulatory framework addresses the topic of radio communication used in shoving, backing or pushing movements. That section states, in pertinent part,

When radio communication is used in connection with the shoving, backing or pushing of a train, locomotive, car or on track equipment, the employee directing the movement shall specify the distance of the movement and the movement shall stop in one-half the remaining distance unless additional instructions are received . . .

In other words the FRA radio rules require that the distance to be moved is provided to the engineer and if the engineer does not hear any further transmission after moving half of the designated distance, he is required to stop the move immediately. Since, based upon the testimony of Norfolk Southern's sole witness in its case in chief and its rebuttal witness, the proposed shovelight operation at Conway would be under the general direction of an overworked yardmaster and a single trainman who is somewhere on the ground, it will be impossible for the engineer to shove the draft of cars assigned to him any further than beyond the first radio based direction because the engineer will not be in a position to visually determine or otherwise see how much room is left. Thus, if as indicated in the testimony of Norfolk Southern's witnesses, the shoving movement with the shovelight system in operation at Conway with the installation of shovelights as described, the only conclusion could be that such shoving movements would take place

in violation of FRA radio rules. Contextually, of course, that is not particularly shocking, because Norfolk Southern already has testified, as noted in the PSLB UTU Main Brief, that its own local operating rules with respect to restrict speed operations in the Conway Yard must either be violated or ignored because they require a shoving movement to be stopped within half of the sight distance of the crew and, with the elimination of the yard personnel on the leading end of the shove, that local rule cannot be the subject of perspective compliance. If the trainman on the ground at the shovelight cannot provide sight distance information to the engineer, based on the FRA radio rule, the engineer cannot move. If the trainman on the ground is instructed to ignore the rule and tell the engineer to keep shoving, the trainman and the engineer will both be violating the FRA radio rule and, if the trainman is told to initiate the move and await a shovelight signal to advise when the move is to be stopped, there is no possible way to determine if radio contact has been maintained. It is precisely for this reason that the engineer is required to be able to stop within half the distance given in initiating the shoving movement if he is not provided with further instructions. That is the method to assure that radio contact is maintained.

In a broadly arrayed effort at creating a fog of confusion over the issues to be determined in this matter, Norfolk Southern obfuscates and candidly intentionally or negligently misleads the reader. For example, on page 1 of its Brief, in its Summary of Argument, Norfolk Southern asserts that the 1973 Order has been interpreted by the Commission to prohibit it from installing a shovelight system. Yet, the prior recommended decision of Administrative Law Judge Porterfield adopted by the Commission and affirmed by the Commonwealth Court of Pennsylvania specifically indicates that

there is no prohibition on the installation of shovelflights by the operator of the Conway Railroad Yard. Indeed, this very topic was the subject of much conversation on the first day of the hearings in the instant matter and was specifically the subject of a colloquy between the ALJ and Norfolk Southern witness Brian Sikes. At page 3 of its Brief, Norfolk Southern suggests that its installation of seamless ribbon rail is somehow a safety enhancement. The fact is, under the restricted speed requirement in the yard of 10 miles per hour, ribbon rail only does what it alluded to in the testimony of Darnell Wood at Transcript page 474. It insures a smoother movement of trains over the track. What does this mean? It means that the joints have been removed and therefore eliminate certain tightening and maintenance activities. It also means that welded rail, without joints, removes the noise alert provided by the cars passing over each joint thereby to some degree compromising safety.

At page 3 of Norfolk Southern's Main Brief, Norfolk Southern makes an assertion, based upon transcript testimony at pages 234 and 286 – 287 that trainmen riding on the leading end of a shoving movement pursuant to the Commission's 1973 Order are "hanging on the side of the leading rail car, approximately five feet off the ground . . ." If this is true and to be believed, Norfolk Southern officials have testified and later confirmed through the testimony of Conway Yard Superintendent, that they are in violation of federal rules with respect to railroad safety compliance standards. 49 CFR Ch. II at Section 231.4.

### **CONCLUSION**

For the reasons stated herein, the relief requested in the Main Brief of the Pennsylvania State Legislative Board of the United Transportation Union should be granted.

Respectfully submitted,

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By \_\_\_\_\_  
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Dated: March 4, 2010

**CERTIFICATE OF SERVICE**

I, IRWIN W. ARONSON hereby certify that I have this date caused a copy of the foregoing Reply Brief of the Pennsylvania State Legislative Board of the United Transportation Union to be served upon parties of interest in this matter by serving a copy via email to each of the following:

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Dated: March 4, 2010