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March 5, 2010

VIA HAND DELIVERY

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
Harrisburg, PA 17120

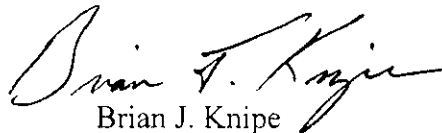
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PA PUC
SECRETARY'S BUREAU

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 three (3) copies of the *Motion of Norfolk Southern Railway Company to Strike the Untimely "Final Version" of the Main Brief of the Pennsylvania State Legislative Board United Transportation Union, and to Strike Late-Filed Supplements to the Main Brief*. Copies are being 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.)
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 :

NOTICE TO PLEAD

To: Irwin W. Aronson, Esq.
Willig Williams & Davidson
Suite 504
212 Locust Street
Harrisburg PA 17101

Pursuant to 52 Pa. Code § 5.103, you are hereby notified that you have **twenty (20) days** from the date of service of this Motion to respond.

Joseph P. Sirbak / with permission

Joseph P. Sirbak, ID No. 94273
Buchanan, Ingersoll & Rooney, PC
50 S. 16th Street, Suite 3200
Philadelphia, PA 19102
Telephone: (215) 665-8700
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Date: March 5, 2010

Attorneys for Norfolk Southern Railway
Company

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**MOTION OF NORFOLK SOUTHERN RAILWAY COMPANY TO STRIKE
THE UNTIMELY "FINAL VERSION" OF THE MAIN BRIEF OF THE
PENNSYLVANIA STATE LEGISLATIVE BOARD UNITED
TRANSPORTATION UNION, AND TO STRIKE LATE-FILED
SUPPLEMENTS TO THE MAIN BRIEF**

TO ADMINISTRATIVE LAW JUDGE WAYNE L. WEISMANDEL:

Norfolk Southern Railway Company ("Norfolk Southern") hereby moves to strike an untimely "final" version of the Main Brief of the Pennsylvania State Legislative Board United Transportation Union ("Union") and four (4) late-filed portions of the Union's Main Brief, none of which were filed and served until March 4, 2010, the very date Reply Briefs were due in this matter. The late-filed portions of the Union's Main Brief include the Union's Statement of the Case, Statement of Questions Involved, Summary of Argument, and Proposed Ordering Paragraphs. These are significant Commission-mandated sections of a Main Brief in which the Union advocates its litigation position.

By improperly filing a "final" version of its Main Brief, as well as significant portions of its Main Brief which had been omitted from the first version it filed and served, in the reply phase of this expedited proceeding — in which the Administrative Law Judge ("ALJ") has indicated the intention to issue an Initial Decision by no later than March 25, 2010 — the Union has flagrantly disregarded the Commission's regulations and an Order of the ALJ, and deprived Norfolk Southern of the ability to respond. To prevent Norfolk Southern from being unfairly

prejudiced, Norfolk Southern respectfully requests that the ALJ strike and disregard the untimely "final version" of the Union's Main Brief and the aforementioned late-filed portions of Amtrak's Main Brief. In support of this Motion, Norfolk Southern states the following:

I. INTRODUCTION

1. This is an expedited proceeding in which the Commission has directed that a Recommended Decision be issued in order for the Commission to consider this matter no later than at its May 6, 2010 Public Meeting. In his Prehearing Conference Order issued January 20, 2010, the ALJ indicated the intention to issue an Initial Decision by no later than March 25, 2010.

2. The Commission's regulation regarding the content and form of briefs provides, in pertinent part, that main briefs must contain the following sections:

(a) Briefs must contain the following:

(1) A concise **statement** or counter-statement **of the case**.

* * *

(3) An argument preceded by a **summary**

* * *

(b) Briefs must also contain the following, **if and as directed by the presiding officer**:

(1) A statement of the **questions involved**.

(2) Proposed **findings of fact** with references to transcript pages or exhibits where evidence appears, together with proposed **conclusions of law**.

(3) Proposed **ordering paragraphs** specifically identifying the relief sought.

52 Pa. Code § 5.501(a), (b) (Emphasis added).

3. On February 3, 2010, the ALJ issued a Scheduling and Briefing Order ("Briefing Order") setting February 26, 2010 as the deadline for Main Briefs and March 4, 2010 as the deadline for Reply Briefs. The Briefing Order restated the requirements for Main Briefs, and the ALJ specifically directed the inclusion of the sections set forth in 52 Pa. Code § 5.501(b)(1)-(3):

5) That all Briefs shall comply with the requirements of 52 Pa. Code §§ 5.501 and 5.502 and, in addition to the mandatory contents set forth in 52 Pa. Code § 5.501(a), **Main Briefs shall contain:**

i) A statement of the questions involved.

ii) Proposed findings of fact with references to transcript pages or exhibits where supporting evidence appears.

iii) Proposed conclusions of law with references to supporting statute or regulation provisions or supporting case law citation.

iv) Proposed ordering paragraphs specifically identifying the relief sought.

Ordering Paragraph 5 (Emphasis added).

4. The Briefing Order further commanded "That a Brief not filed and served on or before the date fixed therefor will not be accepted for filing, except by special permission of the presiding Administrative Law Judge." Ordering Paragraph 7.

5. Evidentiary hearings were held before the ALJ on February 18 and 19, 2010. At the close of the hearings, the ALJ again alerted the parties to the requirements for Main Briefs in this proceeding:

JUDGE WEISMANDEL: Let me be very quick, then, about this. I want to give you a little additional guidance for your briefs.

I will remind you that there is a scheduling and briefing order in this matter dated February 3, 2010. **I want to reiterate the things that, particularly Order Paragraphs 5, 6 and 7, I need you to comply with those order paragraphs when you do your briefs.** The record will close in this matter at 4:30 on March 4th which is the day that reply briefs are due.

Tr. at 531:16-25 (Emphasis added).

6. On February 26, 2010, the parties filed and served their Main Briefs. Norfolk Southern's Main Brief met each and every requirement of the above referenced Commission regulation and Briefing Order.

7. In contrast, the Union's Main Brief included only three (3) sections: an "Introduction, Factual History and Procedural Posture," an "Argument," and a "Conclusion."

8. On March 4, 2010, the parties filed and served their Reply Briefs. On the very day Reply Briefs were due, the Union filed and served, without seeking special permission of the ALJ, a "final" version of its Main Brief. Counsel for the Union represented that the version of its Main Brief filed on the February 26, 2010 deadline was merely a "rough draft." On March 4, 2010, the Union also separately filed and served, without seeking special permission of the ALJ, four (4) additional untimely portions of its Main Brief: (1) a Statement of the Case, (2) a Statement of Questions Involved, (3) a Summary of Argument, and (4) Proposed Ordering Paragraphs. Given the late time of the Union's filings, Norfolk Southern's Reply Brief could not respond to statements made in any of these late-filed submittals.

II. MOTION TO STRIKE

9. The ALJ should strike and disregard (1) the untimely "final" version of the Union's Main Brief and (2) the late-filed sections of the Union's Main Brief, all of which were filed and served for the first time on the deadline for Reply Briefs. The Union's untimely filing

plainly violates Paragraph 5 of the Briefing Order and, by actually filing the untimely supplements to its Main Brief with the Commission after the date fixed therefor, the Union blatantly disregarded Paragraph 7 of the Briefing Order. The ALJ has indicated the intention of issuing an Initial Decision by no later than March 25, 2010. By withholding significant, Commission-mandated portions of its Main Brief until the very day Reply Briefs were due, the Union has prejudiced Norfolk Southern by precluding Norfolk Southern from presenting arguments in response.

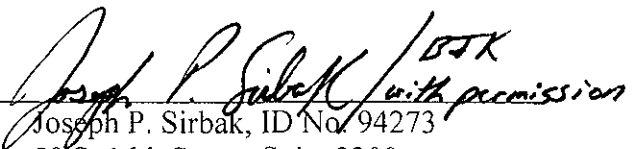
10. Withholding sections of a main brief that advocate a party's position until the deadline for reply briefs is little different from the practice of reserving arguments for a reply brief.¹ Under Pennsylvania law, issues raised for the first time on reply brief are deemed waived. *See, e.g., Commonwealth v. Collins*, 598 Pa. 397, 433, 957 A.2d 237, 259 (2008); *Commonwealth v. Wharton*, 571 Pa. 85, 811 A.2d 978, 990 (2002). Because the “final” version of the Union’s Main Brief and the additional late-filed portions of the Union's Main Brief were filed and served for the first time on the very day reply briefs were due, it is appropriate to strike them from the record.

¹ Courts have described the practice of reserving arguments for a reply brief as impermissible “sandbagging.” *Student Fin. Corp. v. Royal Indem. Co. (In re Student Fin. Corp.)*, 2004 U.S. Dist. LEXIS 4952, *8 n.4 (2004); *South Coast Air Quality Management Dist. v. E.P.A.*, 554 F.3d 1076, 1081 (D.C. Cir. 2009).

WHEREFORE, for the foregoing reasons, Norfolk Southern Railway Company respectfully requests that the ALJ grant this Motion and strike and disregard the untimely “final” version of the Union’s Main Brief and the following late-filed portions of the Main Brief of the Pennsylvania State Legislative Board United Transportation Union: (1) a Statement of the Case, (2) a Statement of Questions Involved, (3) a Summary of Argument, and (4) Proposed Ordering Paragraphs.

Respectfully submitted,

BUCHANAN INGERSOLL & ROONEY, P.C.

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Dated: March 5, 2010

Attorneys for
Norfolk Southern Railway Company

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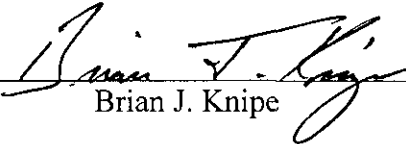
CERTIFICATE OF SERVICE

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).

Via Hand Delivery and E-mail

Irwin W. Aronson, Esq.
Willig Williams & Davidson
Suite 504
212 Locust Street
Harrisburg PA 17101

Dated: March 5, 2010



Brian J. Knipe

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