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DIRECT DIAL NUMBER:
March 15, 2010

VIA HAND DELIVERY

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SECRETARY'S BUREAU

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

Re: Docket No. C-00019522

Dear Secretary McNulty:

Enclosed herewith please find the original and eight copies of each of the following documents: *Answer of Pennsylvania State Legislative Board United Transportation Union* to Motion of Norfolk Southern Railway Company for the Admission of Evidence of Documents; and Response of Pennsylvania State Legislative Board United Transportation Union to 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.

I am, by copy of this correspondence and the enclosures herewith serving a copy of the same upon Administrative Law Judge Wayne L. Weismandel and Brian J. Knipe, Esquire, counsel for Norfolk Southern Railway Company.

Very truly yours,

IRWIN W. ARONSON

IWA/mjr
Enclosure
cc: Administrative Law Judge Wayne Weismandel
Brian Knipe, Esquire
Donald W. Dunlevy

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

RESPONSE OF PENNSYLVANIA STATE LEGISLATIVE BOARD UNITED TRANSPORTATION UNION TO 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

TO ADMINISTRATIVE LAW JUDGE WAYNE L. WEISMANDEL:

The Pennsylvania State Legislative Board of the United Transportation Union (hereinafter "PSLB UTU") hereby responds to the Motion of Norfolk Southern Railway Company (hereinafter "Norfolk Southern") to strike, as untimely, a Main Brief filed on behalf of PSLB UTU which made corrections to inadvertent typographical errors, but made no substantive modifications to the initially filed version of the same document, along with required, non-advocacy, sections of the PSLB UTU's Main Brief which were filed and served on or about March 4, 2010. The PSLB UTU opposes the Motion of Norfolk Southern to strike these documents and states in support thereof as follows:

1. This is an expedited proceeding possessed of dramatically compressed schedules imposed upon the Administrative Law Judge as well as counsel of record in which the Commission has directed that a Recommended Initial Decision be issued in order for the Commission to consider this matter no later than at its May 6, 2010 public

meeting. In the pre-hearing conference order issued by the Administrative Law Judge, on or about January 20, 2010, the Administrative Law Judge indicated an intention to issue his Initial Decision no later than March 25, 2010.

2. The Pennsylvania Public Utility Commission's regulations at 52 Pa. Code §5.501 articulates the required content and form of briefs to be filed with the Commission and states in pertinent part that main briefs must contain the following sections:

> (a) Briefs must contain the following:
>
> (1) A concise statement or counterstatement of the case . . .
>
> (3) An argument preceeded 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.

3. On or about February 3, 2010, Administrative Law Judge Wayne L. Weismandel issued a scheduling and briefing order setting February 26, 2010 as the deadline for the filing of Main Briefs and March 4, 2010 as the deadline for the filing of Reply Briefs. In the said scheduling and briefing order the Administrative Law Judge specifically directed the inclusion of the requirements of 52 Pa. Code §§5.501 and 5.502 including a requirement that 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

(Paragraph 5 of the February 3, 2010 scheduling and briefing order.)

4. The scheduling and briefing order also contains, at its paragraph 7, an assertion that a brief not filed and served on or before the date fixed therefore will not be accepted for filing, except by special permission of the presiding Administrative Law Judge.

5. On or about February 26, 2010, the PSLB UTU filed its Main Brief with the Commission and contemporaneously served its Main Brief on Opposing Counsel and the Administrative Law Judge via electronic mail. Additionally, the PSLB UTU served hard copies of its Main Brief on both counsel of record and the Administrative Law Judge by United States Mail.

6. On March 4, 2010 the PSLB UTU filed its Reply Brief in the instant matter and contemporaneously served a true and correct copy of its Reply brief on counsel of record and the Administrative Law Judge by way of electronic mail. Additionally, counsel for PSLB UTU served a hard copy of its Reply Brief on opposing counsel of record and the Administrative Law Judge via United States Mail.

7. On March 4, 2010, contemporaneous with the filing of its Reply Brief, counsel for the PSLB UTU realized that he had inadvertently filed a draft copy and not the final version of the PSLB UTU's Main Brief in his February 26, 2010 filing. That draft

copy contained several typographical errors and did not have appended to it the Statement of the Case, Statement of Questions Involved, Summary of Argument, Proposed Ordering Paragraphs, Proposed Findings of Fact and Proposed Conclusions of Law.

8. Upon recognizing this error, counsel for PSLB UTU immediately filed with the Commission a true and correct copy of its Main Brief with solely typographical, and no substantive, corrections. Contemporaneously, counsel for PSLB UTU served a true and correct copy of this typographically corrected version of its Main Brief on opposing counsel and the Administrative Law Judge via electronic mail with an explanation as described herein regarding the discovery of the inadvertent filing and service of other than the final version of the Main Brief on behalf of PSLB UTU.

9. On that same date, March 4, 2010, counsel for the PSLB UTU also filed separate individual documents in the nature of the Statement of the Case, the Statement of Questions Involved, the Summary of Argument, and the Proposed Ordering Paragraphs which were intended to have been appended to the PSLB UTU Main Brief but were inadvertently omitted due to the erroneous filing by counsel for the PSLB UTU of a draft, instead of the final version, of its Main Brief. At that time, despite them having been prepared, counsel for the PSLB UTU intentionally did not file or serve copies of Proposed Findings of Fact and Proposed Conclusions Law as, unlike the submitted Statement of the Case, Statement of Questions Involved, Summary of Argument and Proposed Ordering Paragraphs, which are not advocacy documents, counsel for PSLB UTU sees the Proposed Findings of Fact and Proposed Conclusions of Law as potentially being viewed advocacy documents and, out of a desire to avoid any potential for prejudice to Norfolk Southern Railway Company, given the expedited scheduling of the

instant matter, chose not to untimely file these otherwise required appendices to its Main Brief.

10. On or about March 5, 2010, Norfolk Southern Railway Company filed and served the instant Motion to Strike.

11. Counsel for PSLB UTU recognizes, with clarity, his inadvertent, but nonetheless significant, failure as described above, to timely file the final version of its Main Brief with the required included sections. The Administrative Law Judge, the Office of Administrative Law Judge, the Pennsylvania Public Utility Commission and counsel for Norfolk Southern have counsel for the PSLB UTU's most sincere and humble apology and regret for this inadvertent and unintentional error. Moreover, counsel for the PSLB UTU wishes to make clear that he in no way intended any disrespect to opposing counsel, the Administrative Law Judge, the Office of Administrative Law Judge, the Commission or any of its processes and procedural requirements.

12. The errors of counsel described herein should not be utilized as the basis upon which the substantive rights of the PSLB UTU are compromised or measured. This is so because the documents filed and served on March 4, 2010 contained no substantive modifications with respect to the Brief and were not in the form of advocacy documents with respect to the other items that were to have been included with the Main Brief. As indicated previously, counsel for the PSLB UTU intentionally did not file a late submission of Proposed Findings of Fact or Proposed Conclusions of Law inasmuch as those documents could reasonably be construed as advocacy documents which, at least in the abstract, could have had the potential to have compromised, Norfolk Southern Railway Company by denying them a reasonable opportunity to respond.

13. Assuming, arguendo, that Norfolk Southern believes any of the filings associated with the Main Brief of the PSLB UTU that were filed on March 4, 2010 are in the nature of an advocacy document to which it wishes to reply, the PSLB UTU would not oppose a request by Norfolk Southern of the Administrative Law Judge for special permission to do so.

14. PSLB UTU did not put forth any new, novel or previously unarticulated arguments or positions in its filing of the documents described in this response to Norfolk Southern's Motion to Strike the various filings of the PSLB UTU. As such, nothing in the final version of the PSLB UTU's Main Brief or the additional late filed portions of the PSLB UTU's Main Brief raised any issues for the first time and therefore should not appropriately be described as having done so nor should any issues therefore be deemed to have been previously waived. The timing of the filings complained of by Norfolk Southern in its instant motion are, at most a harmless error in the context of the instant proceedings.

15. Based upon the representations herein, PSLB UTU respectfully requests permission of the presiding Administrative Law Judge for its filings of March 4, 2010 to stand as submitted and not be stricken.

16. PSLB UTU further requests permission of the Administrative Law Judge to immediately file the proposed findings of fact and proposed conclusions of law which were inadvertently not appended to its Main Brief as described herein.

17. A copy of the Main Brief of PSLB UTU as filed on March 4, 2010 is attached hereto as Exhibit A for the ease of reference of all concerned.

WHEREFORE, for the foregoing reasons, Pennsylvania State Legislative Board United Transportation Union respectfully requests that the Administrative Law Judge dismiss the Motion of Norfolk Southern Railway Company to Strike and Disregard as Untimely Filed the Final Version of the Union's Main Brief and the additional portions of the PSLB UTU's Main Brief including the Statement of the Case, Statement of Questions Involved, Summary of Argument and Proposed Ordering Paragraphs. And further, that the PSLB UTU be permitted to file proposed findings of fact and proposed conclusions of law which were inadvertently not appended to the timely filing of its Main Brief. Finally, but most significantly, counsel for PSLB UTU respectfully apologizes to counsel for Norfolk Southern and the Administrative Law Judge for his failure to properly file the Main Brief of the PSLB UTU in the instant matter with all of the required elements.

Respectfully submitted,

WILLIG, WILLIAMS & DAVIDSON
212 Locust Street, Suite 504
Harrisburg, PA 17101
(717) 221-1000

By _____
IRWIN W. ARONSON
PA REG. NO. 36921

Dated: March 15, 2010

EXHIBIT A

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	:	

BRIEF OF THE PENNSYLVANIA STATE LEGISLATIVE BOARD, UNITED TRANSPORTATION UNION

Introduction, Factual History and Procedural Posture

The Pennsylvania State Legislative Board of the United Transportation Union (hereinafter, PSLB UTU) submits the following brief regarding the Commission's *sua sponte* Reconsideration Order in the above-captioned matter.

The instant matter arises in the context of a Reconsideration Order issued by the Pennsylvania Public Utility Commission (hereinafter "Commission" or "PUC") on or about January 14, 2010 essentially based upon the June 16, 2008 issuance and publication, by the Federal Railroad Administration ("FRA"), of a modification to previously existing regulations regarding shoving operations which now permits the use of shove light track circuitry systems that meet certain technical and design requirements. 49 C.F.R. §218.99. The question raised by the Commission relates to the potential that this updated regulatory publication by the FRA may preempt or otherwise affect the requirements set forth in the Commission's 1973 Order. It is respectfully submitted,

based upon the testimony and documentary evidence adduced at the evidentiary hearings on the matter conducted before the Administrative Law Judge (hereinafter "ALJ") on February 18 and 19, 2010, that the publication of the most recent iteration of the FRA regulation regarding shoving operations is broad based in its scope and while generally preemptive with respect to the field it occupies it is not completely preemptive of the uniquely local basis for the Commission's 1973 Order. This is so because the latest iteration of the Federal regulatory framework, by its own terms, contemplates an exception to its own preemptive effect with respect to uniquely local safety and/or security conditions. It is respectfully suggested as well that the Commission's current order does not regulate or attempt to regulate the equipment, namely shove lights, the specifications of which are articulated in the current federal regulatory framework. It instead, by implication, neither attempts to limit nor expand the nature or the type of equipment utilized in a shove light system, but merely addresses the uniquely local work practices at Conway Yard associated with shoving movements in that railroad yard. In this regard, it is significant to note that the basis for the Commission's August 1, 1973 Order was local in nature, unique and exclusive to shoving operations in the Conway Railway Yard in Western Pennsylvania. That Order of the Commission was entered subsequent to the Reconsideration by the Commission of an Emergency Order issued by the Commission in June of 1973 requiring that a trainman equipped with a dependable means of communication with the engineman and/or a means of stopping the reverse shoving movement be positioned on the lead car of every train or draft of cars which is shoved into advance and relay yards during the entire reverse movement. This Order of the Commission was based exclusively upon the local conditions existing at the Conway Yard.

The Conway Yard, located geographically Northwest of Pittsburgh is, according to the testimony in that 1973 proceeding and without modification through and including the date of the instant submission, a huge and complex railroad classification yard, which extends for more than seven miles on the East Bank of the Ohio River. At its widest point, the Yard spans nearly 100 tracks. At Conway, freight destined to and from both the Eastern Seaboard and the Midwest and beyond, as well as intermediate points, is presently pushed onto a single hump (the Conway Yard was designed and put into service as a two hump yard in the early 1950s, one for eastbound trains and one for westbound trains, and the current operator of the yard, Norfolk Southern, eliminated one of those humps without further redesign of the yard so as to have both east and west bound trains made up on a single hump) where railroad cars are scanned, weighed and dropped by gravity onto various tracks located in the classification yards. The cars are then assembled by yard crews that couple onto varying numbers of cars on any number of classification tracks followed by the backward pushing or "shoving" by a locomotive engine of what is then a nearly complete, but un-inspected, train onto one of tracks that are known as the departure track. At that location, additional cars are typically added and forward moving locomotive power and air pressure for braking is attached to the train following the coupling of air hoses. Those operations in the massive yard known as Conway, take place in congested close quarters subjected to the unique weather conditions of Western Pennsylvania including, but not limited to, snow and ice conditions, fog, the presence of various forms of debris associated with operations in a massive railroad yard through which all manner of substances ranging from hazardous materials, to grain, to coal, to automobiles and all manner of freight imaginable, are moved.

Those movements inevitably, because of the close and congested quarters and the massive amount of traffic moving uniquely through the Conway Classification Yard result, in among other things, substantial spillage, and dumping of transported products in and about the Yard in general. The yard, itself, is geographically situated, as mentioned above, immediately adjacent to the Ohio River on one side and adjacent to several residential communities on the other as well as either end. The physical location of those communities relative to the Conway Yard place private homes, medical facilities, houses of worship, athletic fields and schools with children and their teachers all within several hundred feet of all the activity and all of the various substances passing through this rail classification yard. (See testimony of Adam Kaufman, Transcript pp 187-269, testimony of Robert A. Krosky, Jr., Transcript pp294-352, and testimony of Gregory Murphy, Transcript pp 352-403.) In the Yard itself, multiple people are working 24 hours per day 7 days per week, not only on the train make up and assembly activities, but in all manner of maintenance and administrative duties in areas adjacent to and in otherwise close proximity to shoving movements in the Conway Yard. (See testimony of Adam Kaufman, Transcript pp 187-269, testimony of Robert A. Krosky, Jr., Transcript pp294-352, testimony of Gregory Murphy, Transcript pp 352-403 and rebuttal testimony of Darnell Wood, Transcript pp 423-529.)

The activities and operations taking place at the Conway Yard that gave rise to the 1973 Commission Order which is the subject of the instant Reconsideration Order, remain essentially unchanged, except to the degree they have become more congested as a result of the current operator's decision to consolidate all east and west movements on to a single hump without any substantial redesign of the Conway Yard to ac-

commodate that material alteration of local Conway Yard conditions. Those activities and operations have repeatedly been reviewed by the Commission in the context of the instant Order and various companion applications filed by various successors to the Penn Central Transportation Company. The first of those was filed in 1974 and, in conformity with a stipulation entered by the parties, including the operator of the Conway Yard, resulted in an Order of the Commission in which a modification of the 1973 Order was promulgated. That modification retained the requirements of a trainman being positioned on the lead car of a shoving movement equipped with a reliable means of communication. Ultimately at that time the Commission's modified Order stated in pertinent part that the predecessor to the Norfolk Southern Railway Company and the Railroad Brotherhoods were unanimous in their opinion that track circuits and signals would not enhance the safety of the operations at Conway. (For ease of reference a true and correct copy of the July 9, 1973 Staff Notes of the Commission giving rise to the Commission's August 1, 2973 Order is attached to the PLSB UTU comments previously submitted in this matter as Exhibit A and a true and correct copy of the Commission's Order in the instant matter of June 25, 1974 is attached to that same submission as Exhibit B.)

In 1981, the Consolidated Rail Corporation (Conrail) in its capacity in successor in interest of the Penn Central Transportation Company petitioned the Pennsylvania Public Utility Commission to rescind and modify the Commission's Orders of August 1, 1973 and June 25, 1974 in the instant matter. Again, based upon the unique conditions at the Conway Yard and the Commission's recognition of the need to preserve safe local activities at Conway, no modification of the 1973 and 1974 Orders of the Commis-

sion regarding the positioning of the trainmen at the lead end of a shoving movement in the Conway Yard equipped with dependable communications equipment, was made (a true and correct copy of the June 5, 1981 Petition of Conrail and the Answer of the Pennsylvania State Legislative Board of the UTU is appended as Exhibit C to the PLSB UTU comments previously submitted in this matter for the ALJ's ease of reference.)

In November of 1995, Conrail filed an Application for Approval of the Installation of Shove Lights at the Conway Yards and, in July of 1996 Conrail Amended that Petition to change its Application for such permission solely with respect to the type of shove lights it proposed to install. Various Conway Yard on-site inspections and hearings before an Administrative Law Judge of the Office of Administrative Law Judges of the Pennsylvania Public Utility Commission took place. The 1995 and 1996 Applications of Conrail contained two related proposals; the first was the installation of two differing kinds of shove light systems at the Conway Yard including active circuitry on the final 1750 feet of track in each of the then two existing hump yards. The second was seeking permission for a rescission or modification of the 1973 PUC local conditions safety-based Order requiring that a trainman be positioned on the lead end of shoving movements equipped with a dependable communications device. Ultimately in that proceeding the Administrative Law Judge put forth a recommended decision denying both aspects of the applications in their entirety to which Conrail filed exceptions. That recommended decision and Order was originally published on January 15, 1999. Significantly, in that 1999 recommended decision of the Administrative Law Judge a portion of his reasoning was not the subject of the Commission's remand. That reasoning, based upon the unique local conditions that continued to exist in 1999, some 26 years subse-

quent to the Commission's initial Order in the instant matter, articulated, in pertinent part, as follows:

> It is difficult to imagine all of the perils to human health and welfare that can arise in a large, complex classification rail yard such as the Conway Yard. Personnel properly or improperly being in and moving a foot within the Conway Departure Yards with unattended rail cars moving about presents an overall greater risk or potential risk of injury than a person riding a rail car as, in effect, a lookout. A set of human eyes and informed judgment are capable of advising a locomotive engineer of a range of important and relevant matters that may not be reflected by an odometer or a broken track circuit. . . .

On September 27, 2000, after additional hearings on remand, the Administrative Law Judge issued a successor Recommended Decision which was adopted by the Commission and ultimately affirmed, on appeal, by a unanimous panel of the Commonwealth Court of Pennsylvania. In that decision, the Administrative Law Judge engages in a substantial discussion of the comity between federal statutory and regulatory activities and local, state-based interests in the preservation of uniquely local safety standards with respect to the Conway Yards. In its review of the Opinion and Order of the Pennsylvania Public Utility Commission terminating Conrail's application proceeding and closing the record by the Commission's adoption of the ALJ's Recommended Decision on Remand captioned as Consolidated Rail Corp. v. Pennsylvania Public Utility Commission, No. 852 C.D. 2001, _____ Pa. Cmwlth. ____, the Court reiterates the description of the Conway Yard articulated in the August 1, 1973 Order in the instant matter in its publication of the Opinion on March 11, 2002. In that Commonwealth Court opinion, a copy of which is appended to the PLSB UTU comments previously submitted in this matter as Exhibit D, the sole issue raised by Conrail before the Court was a fed-

eral preemption question. In its discussion the Commonwealth Court articulates that federal courts have recognized that provisions of Federal Railroad Regulatory Statutes and their associated regulations ***do not*** preempt state or local regulations relating to the use of a part or appurtenance of a locomotive that is required by federal law or regulation. The Court then concludes that *regulating the use of equipment, such as shove lights in the instant matter, is distinct from regulating the equipment itself.* The Court concludes that the 1973 Order in the instant matter merely requires Conrail "[T]o promulgate an operating instruction requiring that, without exception, a trainman, provided with a dependable means of communication with the engineer and/or a method of stopping the movement, be positioned on the lead car of every train or draft of cars which is shoved into the Eastward Advance and Relay Yard or into the Westward Advance and Relay Yard . . ." The Court then articulates the gravamen of the comity between Federal Railroad Regulation and State Railroad Regulation. The decision of the Court teaches, "[B]ecause, at most, the 1973 Order '[N]either limits nor expands the type of equipment with which locomotives are required to be equipped, it neither interferes with the goals of the LBIA [the Locomotive Boiler Inspection Act] nor substantially interferes with its implementation . . .' (citations omitted.) Thus the LBIA does not preempt the PUC's jurisdiction over the subject of its 1973 Order, (citations omitted) and Conrail's claim to the contrary is meritless. Accordingly, the Order of the PUC is affirmed." (A true and correct copy of the Decision of the Commonwealth Court is appended to the PLSB UTU comments previously submitted in this matter as Exhibit D.)

Turning to the instant Reconsideration Order of the Commission, the precise language of the commentary associated with the June 16, 2008 Federal Railroad Admini-

stration ("FRA") updated regulation is clear. 49 CFR §218.99. At page 13 in that commentary, it states "this is an action with preemptive effect, subject ***to a limited exception for essentially local safety hazards*** its requirements will establish a uniform federal standard that must be met . . ." (Emphasis supplied.) Again, on page 14 of the commentary associated with the above noted revised FRA regulation it states in pertinent part that it "[P]reempts any state law, regulation or order covering the same subject matter except a provision necessary to eliminate or reduce an essentially local safety or security hazard that is not incompatible with the Federal Law, Regulation or Order . . ."

It is interesting to note in this regard that the FRA revision of the regulatory framework regarding shove lights merely grants the permission to utilize shove lights that are configured in conformity with the regulatory standards in railroad classification yards, presumably such as Conway. It does not occupy the field regarding local safety conditions or hazards and the most plain articulation of that fact is found in the commentary to the regulations itself as quoted above. It is equally interesting to note that in the Recommended Decision and Order on Remand of the Administrative Law Judge in the Application Proceedings commenced in 1995, that is the September 27, 2000 Recommended Decision and Order of the Administrative Law Judge which was adopted by the Commission, the Administrative Law Judge states, at page 20, "by not disturbing the 1973 Order, the Commission is not preventing Conrail from doing exactly what it proposes to do by the Amended Application. If Conrail believes that it is operationally desirable for the locomotive engineer to have available the exact number of feet to the effective end of the track and to know if a track circuit has been broken, possibly by the presence of a rail car or other obstruction, then it does not need the Commission's ap-

proval to install the proposed telemetry system [shove light system]. The record does not persuasively show that the information provided by the telemetry system is ***the only information*** that a locomotive engineer should have available during a shove movement in the 600 and 900 series track [the Conway Yard]. The 600 and 900 series tracks accommodate shove movements that may be 1.0 to 2.5 miles in length. (For comparison, the 700 series tracks are only about the length of 20 rail cars.) The proposed telemetry system [shove lights] provides limited information for only the last 1,750 feet of track in a shove movement. The Commission's 1973 Order, by contrast, provides that the ***entire*** shove movement will be monitored from the lead car and that the person riding the lead car will have a dependable means of communication available in order to relay track and other information to the locomotive engineer."

The reasoning of the Administrative Law Judge in his Recommended Decision on Remand is equally persuasive and appropriate in the analysis by the ALJ of the comity of the current Federal Regulatory structure with respect to shove lights and the Commission's August 1973 Order related to the unique safety conditions present at the Conway Yard in Western Pennsylvania.

It is respectfully submitted that while the new iteration of the FRA regulatory framework with respect to shove lights may preempt the Pennsylvania PUC from prohibiting the installation of shove lights at the Conway Yard and from specifying the technical and design aspects of a shovel light circuitry system, it certainly does not preempt the Public Utility Commission from continuing to regulate in the field of local safety hazards by requiring that a trainman be positioned on the lead car of every draft of cars for shoving operations in the Conway Yard and that such an individual be equipped with

dependable communications equipment in order to communicate with the engineman or alternatively stop the shoving movement.

It must be noted as well that the conditions at the Conway Yard are so unique that the current successor in interest to the Penn Central Transportation Corporation, Norfolk Southern Railroad Company, has promulgated an operating rule that has been in effect ***since Monday, August 4, 2008*** (approximately two months subsequent to the FRA Regulatory action that underlies the instant matter) applicable solely to the Conway Yard requiring that operations conducted in that Yard be exclusively conducted at "restricted speed." (See testimony of Norfolk Southern witness Brian Sykes at Transcript p.127 and of PSLB UTU witness Adam Kaufman at Transcript pp 204-205.) (A true and correct copy of that Operating Rule is appended as Exhibit E to the PLSB UTU comments previously submitted in this matter.) That restricted speed rule does not merely limit track speed to a maximum of 10 miles per hour, it also requires, very specifically, that restricted speed be defined as a "speed that will permit stopping within half the range of vision short of train, engine, obstruction, railroad car, men or equipment fouling track, any signal requiring a stop, derail or switch lined improperly and looking out for broken rail but not exceeding 15 miles per hour. (***NOTE:*** The provisions of Restricted Speed do not solely provide protection for workers or equipment working on or near the tracks; it protects the closely situated local community assets and the Ohio River from the potential dangers of the Conway Yard operation as well.)

Moreover, with respect to the recognition by Norfolk Southern of the unique nature of safety issues at the Conway Yard, we need merely review the testimony of Darnell Wood, Sr., which is replete with assertions of his ability and his actual imple-

mentation of rules that are unique to the operations and safety of the Conway Yard. (See transcript of testimony PP 423 – 530). The most fundamental problem with that scenario however is that any rules locally promulgated by Norfolk Southern or its managerial agents are rules that can be modified, revoked or withdrawn by Norfolk Southern or its managerial agents.

Thus, it is clear that even Norfolk Southern recognizes the unique nature of safety hazards in the Conway Yard, not only with respect to all the activity, litigation and decisional law with related to the 1973 Commission Order at issue in the instant matter, but even with respect to its internally promulgated operating rules for the Conway Yard *published subsequent to the promulgation of the FRA regulatory modification giving rise to the instant Reconsideration Order.* In order to operate at a speed that will permit stopping within half the distance of the range of vision, there must physically be someone on the leading end of a shoving movement to have that range of vision, particularly when shoves take place in a yard that is geographically bound, not only by weather conditions, residential communities, schools and a major waterway, but by curves and bends over its several mile length and with unique areas of congestion associated with operations at Conway.

Argument

The Federal Railroad Safety Act, 49 U.S.C.A Sections 20101 et seq., preempts State and local laws, regulations, orders or standards related to railroad safety in a generalized sense. There are 2 exceptions to the total federal preemptive reach in this area of the law. First, the State, and its administrative agencies such as the Pennsylvania

Public Utility Commission, may adopt, or continue in force, any law, regulation or order related to railroad safety until the federal government prescribes a regulation or issues an order covering the subject matter of the state requirement. In the instant matter it is respectfully suggested that the regulation at issue promulgated in 1973 by the commission, falls within that well-recognized exception found in Section 20106 of the Federal Railroad Safety Act because the current Federal regulatory framework that is at issue in this case deals exclusively with the minimum requirements of electronic shove light systems and does not address the local regulatory requirement on having a human being riding on the leading end of a shoving action in the Conway railroad yard. Under this aspect of the federal regulatory framework, since there is no FRA regulation specifically addressing the issue of under what circumstances a State agency may require an individual to be positioned at the leading end of a shoving movement in a railroad yard, it cannot be said that the Commission is preempted from regulatory activity in this arena or that the existing Federal regulatory framework occupies that particular field.

In this regard, the case of *National Association of Regulatory Utility Commissioners v. Coleman*, 399 F. Supp. 1275, (M.D. Pa . 1975), aff'd 542 F.2d 11 (3d Cir.1976) is instructive. In that matter the Court teaches that presumption of the exercise of Federal supremacy must not be taken lightly. It goes on to indicate that there must be a clear manifestation in the federal regulatory framework to supersede the capacity of the State to exercise power. And, in a plain articulation of the appropriate analysis, the *National Association* Court asserts with clarity that Federal regulation of a field of commerce may not be deemed preemptive of state regulatory power unless the nature of the regulated subject matter permits no other conclusion. *Id.* at 1278. Where, as here, there is no pre-

cise or specific federal pronouncement with respect to the elimination of the Commission required operating rules requiring a person to be guiding the leading end of shoving movements in the Conway Yard, even if a shove light system is installed at Conway, it cannot be said that Federal preemption exists under the first exception to federal preemption under the federal statutory and regulatory framework. It is respectfully submitted that we need not analytically pursue the concept any further. The factual record and a reading of the law make it abundantly clear that 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; it cannot be said that such a requirement is preempted. Since the current Commission order, which dates back to 1973, falls into this exception it must be allowed to stand.

This is precisely the analysis employed by the Commonwealth Court of Pennsylvania in *Monongahela Connecting R.R. Co. versus Pennsylvania Public Utility Commission*, 45 Pa. Commw. 164, 404 A. 2d 1376 (1979). It is respectfully submitted that the instant matter is analytically indistinguishable from the *Monongahela* case.

There is a second exception to Federal preemption in the area of railroad safety matters. 49 U. S. C. A. Section 20106 also contemplates that a State may adopt or continue in force additional or more stringent laws, regulations or orders related to railroad safety or security when the law, regulation or order is necessary to eliminate or reduce an essentially local safety or security hazard, is not incompatible with a law, regulation,

or order of the United States, and does not unreasonably burden interstate commerce. This exception is driven by the unique facts associated with the State's regulatory effort. In the instant matter the record is abundantly clear that the Conway Yard is affected by a multiplicity of unique conditions ranging from its proximity to residences and school yards, to its being situated on the banks of the Ohio River, to its own unique geography with a requirement that shoving movements be undertaken over curving sections of track, to the weather conditions and seasonal changes affecting Beaver County, Pennsylvania, to the many local issues recognized by the Commission through its decades of analysis of the very issue presently before the ALJ. To those conditions which are obvious, even to the casual observer, we must add several stark realities that were made clear at the February 18 and 19, 2010 hearing. The Conway Yard was designed as a two hump facility. In recent years, while its architecture and even its operations were not substantially modified, utilization of one of the two humps was simply eliminated by Norfolk Southern. Based on the testimony of Gregory Murphy, a yardmaster at Conway, confirmed in substantial measure by the testimony of Darnell Wood, a rebuttal witness who serves as Norfolk Southern's superintendent at the Conway Yard, at least three yardmaster positions have been eliminated at Conway in conjunction with the elimination of one hump. The result is that the duties of managing east and west traffic in the Conway Yard that had been assigned to 5 or more people per shift are now the responsibility of only 2 people and those 2 people are compelled to manage those duties with respect to eastbound and westbound traffic that is no longer separated in the geographic fashion that it previously existed. The testimony of Mr. Murphy leads ineluctably to the conclusion that the yardmaster's duties are already impossible and a proposal to

assign additional duties to the yardmaster in conjunction with the installation of a shove light system further compromises local safety.

A great deal of time was spent at the hearing with Norfolk Southern's rebuttal witness testifying with respect to the close proximity of drafts of railroad cars on tracks adjacent to the tracks on which shoving movements take place. Mr. Wood's testimony in this regard was aimed at suggesting a concern for the safety of railroad personnel riding on the leading end of the shove. This testimony is interesting for several reasons. First, the close quarters about which Mr. Wood articulates such a concern are the same as those in which maintenance personnel are compelled to work in the Conway Yard. Moreover, Mr. Wood asserted, with absolute clarity, that he has the capacity to adopt and promulgate rules regarding safety at the Conway Yard. In the fog of Mr. Woods shock over a number of facts which he claimed were unknown to him prior to the hearing, he curiously neglected to mention that as Norfolk Southern's chief rulemaker at Conway he is presently possessed of the capacity to direct that no shoving movements take place in the Conway Yard until after adjacent railroad tracks have been cleared. This simple requirement, one clearly within the ambit of Mr. Wood's authority, would immediately and effectively eliminate the putative safety concern he articulates for individuals riding on the leading and of a shoving movement in conformity with the current Commission order.

On the subject of local Conway Yard safety alternatives, the testimony of PSLB UTU witness Donald Dunlevy is even more compelling with respect to local safety concerns. As Mr. Dunlevy indicated, there are several alternatives to eliminating the safety

hazards associated with shoving movements at the Conway Yard. One of those would be to simply stop engaging in shoving movements and instead attach a locomotive to the leading end of the draft of cars being made up as a train. Alternatively, in an effort to ameliorate the safety concerns expressed by Norfolk Southern with respect to the placement of the individual assigned to guide the shoving movement by being on the leading end of the shove, the operator could place that individual on a shoving platform or a caboose. Either of these alternatives could employ the added safety benefit of having a sealed beam light to illuminate the trackage ahead of the leading end of the shoving movements. Mr. Dunlevy offered yet a fourth alternative, that being to position an individual in the workspace adjacent to the track on which the shoving activity is taking place and directing that person to walk alongside of the shoving movement while it is ongoing. Each of these alternatives continues the recognition by the Commission of unique local safety concerns associated with blind shoving movements in the Conway Yard, local safety concerns for the local community and local safety concerns for the well-being of railroad yard workers and employees of vendors working in and about the Conway Yard. As was clear from the testimony of railroad engineer Robert A. Kroskey, Jr., the employee on the leading end of shoving movements in the Conway Yard are his "eyes." As an engineer, absent those eyes he has no ability to see around curves, into congested areas, 1 ¾ miles ahead of his position on railroad track sections that may or may not be circuited with a shove light system.

In its limited case in chief, Norfolk Southern spent a substantial amount of time attempting to suggest that weather conditions, proximity to communities, curved sections of track, etc. exist in several other large classification yards in which shove lights

are utilized to the exclusion of the Pennsylvania requirement of personnel staffing the leading end of shoving movements in the Conway Yard. The purpose of this testimony presumably was to suggest that the geographic and topographic conditions at Conway are not unique or local in character but are the norm in railroad classification yards in other parts of the country. Setting aside for the moment the reality that a several minute analysis of an aerial photograph is not particularly instructive with respect to the actual conditions on the ground in Columbus, Ohio or Evanston, Illinois, we must recognize a much more elegantly essential fact. There is nothing in the record in this case which indicates that anyone ever analyzed or reviewed the uniquely local conditions in those railroad yards, and others, which would give rise to recognition of the need to reduce the essentially local safety and/or security hazards present in those railroad yards. The fact is that the local conditions that were the subject of the 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. For the purposes of the instant record, we simply do not and will not know. What we do know is that conditions with respect to weather, geography and topography, as well as conditions with respect to work rules and assignments at Conway, taken as a whole, create an essentially local safety hazard that is amenable to state regulation that is not incompatible with federal law or regulations promulgated thereunder. That is precisely the basis upon which the existing regulatory framework which is the subject of the instant challenge has lived comfortably for so many years without unreasonably burdening interstate commerce and without running afoul of federal preemption concerns. Railroad yards are inherently dangerous places. They are

dangerous to live near and they are dangerous workplaces as well. That having been said, it 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. Season the inherently dangerous nature of railroad yards with the unique nature of the parcel of ground on which the Conway Yard exists and the local practices and conditions associated with the operation of the Conway Yard, ranging from the elimination of the separate eastbound and westbound operations that had been contemplated from that railroad yard's inception, to the multiplicity of decisions by the Yard's operator to undertake and refuse to undertake certain practices which objectively provide a greater measure of safety, and we have a stew of local conditions that make themselves amenable to state regulation such as that which presently exists. Thus, even if there was an analytical rejection of the reality that the state regulation at issue falls within the first exception to the federal preemption standard discussed above, it is abundantly clear that sufficient unique local conditions exist at Conway which, when combined with one another, create a local safety and security hazard that permits state regulation such as that which has existed with respect to shoving movements in the Conway Yard since 1973.

Conclusion

For the reasons set forth herein and based upon the legal authority cited in this brief it is respectfully suggested that a determination be made that the existing Pennsylvania Public Utility Commission order is not preempted by federal law or regulation and

should not be in any way diminished. Moreover, the Pennsylvania State Legislative Board of the United Transportation Union respectfully urges a modification of the existing order that would require, prior to the institution of a shoving motion in the Conway Yard, that railroad tracks adjacent to such a shoving motion be cleared and that the individual assigned to work in guiding a shoving motion in the Conway Yard be provided with a conforming caboose or shoving platform on which to be positioned while performing the duties of guiding the shoving action. Such provisions will further assure locally safe operating practices and serve to further protect both Conway Yard employees as well as the individuals, communities and natural resources adjacent to the Conway Yard.

Respectfully submitted,

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Dated: February 26, 2010

CERTIFICATE OF SERVICE

I, IRWIN W. ARONSON hereby certify that I have this date caused a copy of the foregoing Response Of Pennsylvania State Legislative Board United Transportation Union To 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 to be served upon parties of interest in this matter by serving a copy via United States First Class Mail, postage prepaid, to each of the following:

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Dated: March 15, 2010