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April 6, 2010

VIA HAND DELIVERY

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

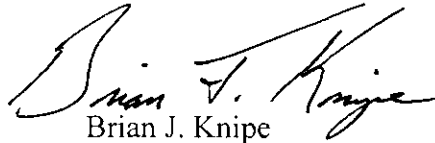
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SECRETARY'S BUREAU

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 nine (9) copies of the *Exception of Norfolk Southern Railway Company*. 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.)
Cheryl Walker Davis, Esq., Director, Office of Special Assistants (via hand delivery
w/encl. including Word 6.0 format on disk)
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 :

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EXCEPTION OF NORFOLK SOUTHERN RAILWAY COMPANY

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Attorneys for Norfolk Southern Railway Company

Dated: April 6, 2010

I. INTRODUCTION

Norfolk Southern Railway Company ("Norfolk Southern") **supports** the Recommended Decision ("R.D.") of Administrative Law Judge Wayne L. Weismandel ("ALJ"). The ALJ recommended that Ordering Paragraph 3 of the Pennsylvania Public Utility Commission's ("Commission") Order dated August 1, 1973 at Complaint Docket No. 19522¹ ("1973 Order") be rescinded in its entirety. R.D. at 39. Specifically, the ALJ properly concluded that the federal regulation at 49 C.F.R. § 218.99(e)(5) preempts Ordering Paragraph 3 of the 1973 Order. R.D. Conclusion of Law ("COL") 27, 28. The ALJ also correctly determined that there is no applicable exception to federal preemption under the Federal Railroad Safety Act because there are no essentially local safety hazards at the Conway Yard. R.D. COL 51. The R.D. reflects a careful analysis and application of federal preemption law, and a thorough and thoughtful consideration of all the evidence adduced at hearing. Therefore Norfolk Southern respectfully requests that the Commission adopt the ALJ's recommendations without modification.

While Norfolk Southern fully supports the ALJ's recommendations, Norfolk Southern is compelled to raise one issue on exceptions, concerning the allocation of the burden of proof on the federal preemption question. While this aspect of the R.D. ultimately did not impact the ALJ's conclusions, Norfolk Southern must raise it to ensure this issue is preserved in case of an appeal of this matter to the Commonwealth Court, *see, e.g., Springfield Township v. Pennsylvania Public Utility Commission*, 676 A.2d 304, 309 (Pa. Commw. Ct. 1996), or in case Norfolk Southern must litigate questions of federal preemption in future proceedings before the Commission. Norfolk Southern does not consider this to be a serious error in the R.D., so much as an issue on which the Commission may provide valuable guidance for future cases. Although

¹ *Co-Operative Legislative Committee, Railroad Brotherhoods in the State of Pennsylvania, Russell H. Harris, William G. Daniels and Joseph H. Reiser v. George P. Baker, Richard C. Bond, Jervis Langdon, Jr. and Willard Wirtz, Trustees of the Property of the Penn Central Transportation Company, Debtor*, Complaint Docket No. 19522.

Norfolk Southern takes exception to this single issue, Norfolk Southern emphasizes that it is fully supportive of the ALJ's recommendations, and urges the Commission to adopt them without modification.

II. EXCEPTION

Norfolk Southern Exception 1: When deciding questions of federal preemption under Section 20106 of the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20106, the burden of proving an exception to federal preemption should be placed on the party opposing preemption. (R.D. at 3, 13, 32 (COL 2); Norfolk Southern M.B. at 10-11)

Because this proceeding was initiated by the Commission *sua sponte*, there is no clear "proponent of a rule or order" to bear the burden of proof under Section 332(a) of the Public Utility Code ("Code"), 66 Pa.C.S. § 332(a). Therefore, the ALJ allocated the burden of proof on all issues to Norfolk Southern, as the party advocating the entry of a Commission order rescinding the 1973 Order. *See* R.D. at 3 (citing 66 Pa.C.S. § 332(a)). While this ruling is understandable given the context, it puts the party seeking a finding of preemption in the difficult position of having to prove a negative with respect to an affirmative defense raised by those opposing preemption. At hearing, the party opposing preemption, the Pennsylvania State Legislative Board United Transportation Union, alleged the existence of several essentially local safety hazards at Conway Yard as a defense to federal preemption, and in each instance Norfolk Southern needed to prove that the purported safety hazard did not exist or was not unique to Conway Yard. Clarification by the Commission of the proper allocation of the burden of proof in these proceedings would be invaluable going forward.

Norfolk Southern respectfully submits that the burden of proof in these cases of federal preemption should be allocated in accordance with the analytical framework employed by federal courts in addressing FRSA preemption under Section 20106. That is, pursuant to 49 U.S.C. § 20106, "[i]t is the burden of the party advocating preemption under § 20106(a)(2) to

show that a federal law, regulation, or order covers the same subject matter as the state law, regulation, or order it seeks to preempt." *Duluth, Winnipeg & Pacific Ry. Co. v. City of Orr*, 529 F.3d 794, 797 (8th Cir. 2008) ("*Duluth*"). Once that showing is made, however, "the burden shifts to the party resisting preemption to prove that the state law, regulation, or order meets all three requirements of the savings clause in § 20106(a)(2)." *Duluth* at 797; *BNSF Ry. Co. v. Swanson*, 533 F.3d 618, 621 (8th Cir. 2008).

Applying that framework to this case, Norfolk Southern would bear the burden of proving that the federal regulation at 49 C.F.R. § 218.99(e)(5) and the 1973 Order cover the same subject matter. Once that burden is met, the burden of proof should shift to the party opposing preemption to prove (i) an essentially local safety hazard, (ii) that 49 C.F.R. § 218.99(e)(5) and the 1973 Order are not incompatible, **and** (iii) that continued operation of the 1973 Order would not unduly burden interstate commerce.

Application of this analytical framework is completely consistent with the Public Utility Code. Even assuming that Norfolk Southern is the proponent of an order in proceedings such as this which are initiated by the Commission *sua sponte*, Section 332(a) of the Code provides that the proponent of a rule or order has the burden of proof "[e]xcept as may be otherwise provided in section 315 (relating to burden of proof) or other provisions of this part **or other relevant statute . . .**" 66 Pa.C.S. § 332(a) (emphasis added). In this proceeding, both the Commission's Reconsideration Order entered on November 9, 2010 and the Commission's Order entered January 14, 2010 which referred this matter to the Office of Administrative Law Judge for expedited hearing and issuance of a Recommended Decision identify 49 U.S.C. § 20106 as the applicable "other relevant statute."

III. CONCLUSION

As explained above, Norfolk Southern supports the ALJ's recommendations, commends the ALJ's well-reasoned determinations and weighing of all the evidence presented at hearing, and urges the Commission to adopt the ALJ's recommendations without modification. In order to preserve the issue for a possible appeal to Commonwealth Court or potential litigation in future proceedings before the Commission, Norfolk Southern respectfully requests that the Commission clarify that the burden of proof in cases involving questions of federal preemption under the FRSA should be allocated consistent with the analytical framework employed by the federal courts in addressing FRSA preemption under Section 20106.

Respectfully submitted,

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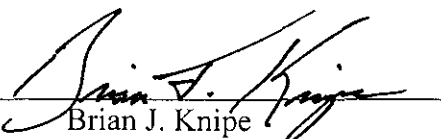
CERTIFICATE OF SERVICE

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

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212 Locust Street
Harrisburg PA 17101

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