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2010 FEB - 1 PM 4: 03

February 1, 2010

**VIA HAND DELIVERY**

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

Re: *Co-Operative Legislative Committee, Railroad Brotherhoods in the State of Pennsylvania v. George F. Baker, Richard C. Bond, Jervis Langdon, Jr. and Willard Wirtz, Trustees of the Property of the Penn Central Transportation Company, Debtor, Docket No. A-2008-2078319*

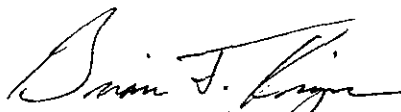
Dear Secretary McNulty:

On behalf of Norfolk Southern Railway Company, I have enclosed for filing the original and three (3) copies of each of the following:

1. Notice of Appearance of Joseph P. Sirbak, Esq.
2. Notice of Appearance of Brian J. Knipe, Esq.
3. Prehearing Conference Memorandum of Norfolk Southern Railway Company

A hard copy of each document has been provided to the parties in the manner indicated on the attached Certificates of Service. Please contact me if you have any questions.

Very truly yours,



Brian J. Knipe

For BUCHANAN INGERSOLL & ROONEY PC

BJK/paf

Enclosures

cc: Honorable Wayne L. Weismandel (via hand delivery, w/encls.)  
Certificate of Service

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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Co-Operative Legislative Committee, Railroad :  
Brotherhoods in the State of Pennsylvania :

v. :

Docket No. C-00019522

George F. Baker, Richard C. Bond, Jervis :  
Langdon, Jr. and Willard Wirtz, Trustees of the :  
Property of the Penn Central Transportation :  
Company, Debtor :

**INITIAL PREHEARING CONFERENCE MEMORANDUM OF  
NORFOLK SOUTHERN RAILWAY COMPANY**

TO ADMINISTRATIVE LAW JUDGE WAYNE L. WEISMANDEL:

Norfolk Southern Railway Company (Norfolk Southern) hereby submits this Initial Prehearing Conference Memorandum in compliance with the Prehearing Conference Order issued by Administrative Law Judge Wayne L. Weisman del on January 20, 2010.

**I. BACKGROUND**

Effective June 16, 2008, the Federal Railroad Administration (FRA) issued a rule governing "Shoving or Pushing Movements," in which an engine in a railroad yard pushes a draft of cars from a classification track to a departure track where drafts are coupled to form trains. Specifically, the new regulation, 49 C.F.R. § 218.99, permits a railroad yard to substitute a system of shove lights as a means of determining if a railroad track is clear before proceeding with a shove movement, in place of requiring an employee to ride the lead car. On September 18, 2009, Norfolk Southern filed an action in federal district court, seeking a declaration that a Commission order entered on August 1, 1973 at Complaint Docket No. 19522 (1973 Order), which requires an employee to ride the lead car in shove moves in Conway Yard in Beaver

County, Pennsylvania, is federally preempted.<sup>1</sup> On November 9, 2009 the Commission, on its own motion, issued a Reconsideration Order to determine if it is appropriate to amend or rescind the 1973 Order due to federal preemption by 49 C.F.R. § 218.99.

In response to the Reconsideration Order, the Commission received comments from Norfolk Southern (which operates the Conway Yard subject to the 1973 Order<sup>2</sup>) and the Pennsylvania State Legislative Board of the United Transportation Union on the question of whether an amendment or rescission of the 1973 Order is warranted as a result of the promulgation of 49 C.F.R. § 218.99. In its comments, Norfolk Southern explained that this matter presents a strictly legal question of federal preemption. Norfolk Southern requested that the Commission find that the 1973 Order is federally preempted as a matter of law and rescind it, because Congress has declared that regulations regarding railroad safety shall be nationally uniform and 49 C.F.R. § 218.99 covers the subject matter of shoving operations, and because the 1973 Order is incompatible with 49 C.F.R. § 218.99 and unreasonably burdens interstate commerce. In an Order entered January 14, 2010, the Commission referred this matter to the Office of Administrative Law Judge to determine whether the 1973 Order is preempted under federal law.

## **II. COUNSEL**

Norfolk Southern requests that for purposes of the service list in this proceeding, communications to Norfolk Southern's attorneys be addressed as follows:

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<sup>1</sup> This action is pending in the United States District Court for the Western District of Pennsylvania at Docket No. 2:09-cv-835.

<sup>2</sup> Norfolk Southern is the indirect successor in interest to the Trustees of the Property of the Penn Central Transportation Company (Penn Central), which was the operator of the Conway Yard in 1973. The 1973 Order directed Penn Central to promulgate operating instructions that drafts of railroad cars should be shoved or pushed on tracks in the Conway Yard only when a trainman is positioned on the lead car.

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Norfolk Southern respectfully requests that all communications to Norfolk Southern concerning this proceeding, including any communications intended for any of the witnesses identified in Section V of this Prehearing Conference Memorandum, all of whom are Norfolk Southern employees, be directed to Norfolk Southern's attorneys.

### **III. PROCEDURAL SCHEDULE**

Norfolk Southern concurs with the procedural schedule attached to the Prehearing Conference Order.

### **IV. ISSUES**

The primary issue in this proceeding is whether the 1973 Order is federally preempted by the Federal Railroad Safety Act, which allows a State to “adopt or continue in force a law, regulation, or order related to safety...until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement.” The Secretary of Transportation, through the FRA, promulgated a regulation on June 16, 2008 by amending 49 C.F.R. § 218.99. Because both 49 C.F.R. § 218.99 (as amended) and the 1973 Order cover the subject of how to determine a railroad track is clear before proceeding with a shove movement, the 1973 Order is federally preempted. This is strictly a legal question, and therefore the evidence Norfolk Southern presents in its direct case will focus on the background

necessary to decide the legal questions presented, including an explanation of the history and operations of the Conway Yard and the impact of the 1973 Order.

When federal and state railroad safety laws cover the same subject matter, as in this proceeding, a party opposing preemption may contend that there is an essentially local safety hazard, as an affirmative defense to federal preemption. To the extent another party seeks to raise an affirmative defense to federal preemption at hearing, such as an alleged essentially local safety hazard unique to Conway Yard, Norfolk Southern reserves the right to present rebuttal evidence in opposition to the affirmative defense.

#### **V. WITNESSES**

At this time, Norfolk Southern expects to call the following witnesses in presenting its direct case:

1. Darnell W. Wood, Sr.: Norfolk Southern Terminal Superintendent, Conway Terminal, Rte. 65, Conway Yard, Conway, Pennsylvania 15027, (412) 893-5166. In support of Norfolk Southern's position on the federal coverage over the subject matter of the 1973 Order, Mr. Wood will present testimony and exhibits on the history of Conway Yard, the present operations of Conway Yard, the impact of the 1973 Order on operations, and Norfolk Southern's plan for installing shove lights.
2. James Alexander: Norfolk Southern Chief Engineer, Communications and Signals, Northern Region, 1200 Peachtree Street NE, Mailbox 123, Atlanta, Georgia 30309, (404) 529-1093. In support of Norfolk Southern's position on the federal coverage over the subject matter of the 1973 Order, Mr. Alexander will present testimony on the operation of shove lights.

To the extent another party presents evidence in support of an affirmative defense to federal preemption, such as an alleged essentially local safety hazard that makes Conway Yard unique among railroad classification yards, Norfolk Southern reserves the right to call rebuttal

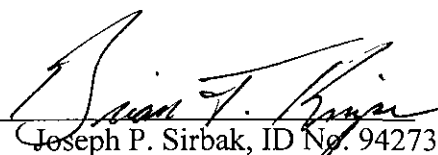
witnesses, and to recall the witnesses that testified in support of its direct case. The following are additional witnesses Norfolk Southern reserves the right to call in presenting a rebuttal case:

3. James Young: Norfolk Southern Assistant Division Superintendent – Pittsburgh Division, Foster Plaza Building 2, 425 Holiday Drive, Pittsburgh, Pennsylvania 15220, (412) 893-7074. To rebut evidence of an alleged essentially local safety hazard unique to Conway Yard, Mr. Young would present rebuttal testimony regarding the history of the Conway Yard and operations at comparable rail yards.

Norfolk Southern reserves the right to substitute witnesses or add witnesses, as appropriate, depending upon the issues raised and witnesses presented by other parties to this proceeding.

Respectfully submitted,

BUCHANAN INGERSOLL & ROONEY, P.C.

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Dated: February 1, 2010

Attorneys for  
Norfolk Southern Railway Company

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Co-Operative Legislative Committee, Railroad :  
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**CERTIFICATE OF SERVICE**

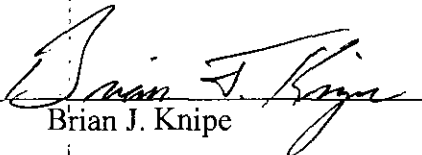
I hereby certify that I have this day served a copy of the foregoing documents in accordance with the requirements of 52 Pa. Code § 1.54 et seq. (relating to service by a participant).

**Via First-Class U.S. Mail**

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the United Transportation Union  
c/o David Dunlevy  
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Harrisburg PA 17101-1162

United Transportation Union  
14600 Detroit Avenue  
Cleveland OH 44107-4250

Irwin Aronson Esquire  
Willig Williams & Davidson  
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