BEFORE THE
SURFACE TRANSPORTATION BOARD

NORFOLK SOUTHERN RAILWAY COMPANY -- ABANDONMENT EXEMPTION -- IN NOTTOWAY, PRINCE EDWARD, CUMBERLAND AND APPOMATTOX COUNTIES, VA	)))))	DOCKET NO. AB-290 (SUB-NO. 252X)

STATEMENT IN OPPOSITION TO PETITION FOR EXEMPTION OF ABANDONMENT

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DUE DATE: November 9, 2004

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SURFACE TRANSPORTATION BOARD

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Pursuant to the Board's procedural decision in this proceeding, served October 20, 2004, SMI Rebar (SMI) hereby submits this Statement in Opposition to a Petition for Exemption of Abandonment (Petition) filed by Norfolk Southern Railway Company (NS) on September 30, 2004. SMI submits the following in support of its opposition to the Petition.

STATEMENT OF POSITION

In a long line of decisions identified hereinafter, the Board and its predecessor have consistently found that an exemption for abandonment is procedurally impermissible where, as here, abandonment is strenuously opposed and it is not evident that rail line revenues are marginal in comparison to the costs of operating the line. As a matter of procedural due process, therefore, the Petition is required to be denied, without prejudice to the filing of an abandonment application under 49 C.F.R. § 1152.22.

IDENTITY AND INTEREST OF SMI

SMI is a significant user of the rail line proposed for abandonment. In the base year ended March 31, 2004, SMI received 136 carloads of steel bars or sheet steel at its facility on the

rail line at Farmville, VA. NS has acknowledged that SMI's use of the rail line is increasing. (Petition at 18).

In the event of abandonment of the rail line, SMI would experience a very substantial increase in freight charges on the traffic that it currently receives by rail. That increased cost would be very harmful to SMI's overall financial condition. The harm to SMI from abandonment would be far more serious than harm to NS from continued operation of the line. SMI would provide evidence to show that the increased cost that it would incur as a result of abandonment would constitute a much greater percentage of its overall net income than the percentage of NS's net income represented by the loss claimed by NS from operating the rail line proposed for abandonment. That greater harm to SMI would bear heavily in the weighing process to determine the ultimate merits of abandonment, but, as noted, that process is not to be reached unless and until NS files an appropriate abandonment application.

THE GOVERNING LEGAL PRINCIPLE

The governing legal principle is that as a matter of procedural due process of law, a petition for exemption of abandonment is to be denied where abandonment is strenuously opposed and it is not evident from the petition that rail line revenues are marginal in comparison to the costs of operating the line. Denial of the petition for exemption does not mean that the rail line cannot be lawfully abandoned. It means only that abandonment must be evaluated in a formal proceeding, rather than by means of informal exemption procedure. The governing legal principle has been consistently applied in a long line of decisions to deny petitions for exemption of abandonment, viz.:

(1) *CSX Transp., Inc. -- Aband. Exempt. -- in Grant, Delaware, Henry, Randolph and Wayne Counties, IN*, 1989 ICC LEXIS 297 (Docket No. AB-55 [Sub-No. 282X], decided Oct. 6, 1989);

(2) *Boston & Maine Corp. -- Aband. Exempt. -- in Hartford and New Haven Counties, CT*, 1996 STB LEXIS 361 (Docket No. AB-32 [Sub-No. 75X], decided Dec. 20, 1996);

(3) *San Joaquin Valley R. Co. -- Aband. Exempt. -- in Kings and Fresno Counties, CA*, 1997 STB LEXIS 114 (Docket No. AB-398 [Sub-No. 4X], decided May 9, 1997);

(4) *Id., affirmed* at 1999 STB LEXIS 121, (decided March 3, 1999);

(5) *Tulare Valley R. Co. -- Aband. and Discon. Exempt. -- in Tulare and Kern Counties, CA*, 1997 STB LEXIS 37 (Docket No. AB-397 [Sub-No. 5X], decided Feb. 13, 1997);

(6) *Id., affirmed* at 1998 STB LEXIS 76, (decided Feb. 24, 1998);

(7) *Central R. Co. of Indiana -- Aband. Exempt. -- in Dearborn, Decatur, Franklin, Ripley and Shelby Counties, IN*, 1998 STB LEXIS 121 (Docket No. AB-459 [Sub-No. 2X], decided May 4, 1998);

(8) *Gauley River RR, LLC -- Aband. & Discon. of Serv. -- in Webster and Nicholas Counties, WV*, 1999 STB LEXIS 345 (Docket No. AB-559 [Sub-No. 1X], decided June 16, 1999),

(9) *The Burlington N. & S.F. Ry. Co. -- Aband. of Chicago Area Trackage in Cook County, IL*, 1999 STB LEXIS 553 (Docket No. AB-6 [Sub-No. 382X], decided Sept. 17, 1999);

(10) *CSX Transp., Inc. -- Aband. Exempt. -- (between Memphis and Cordova) in Shelby County, TN*, 2001 STB LEXIS 943 (Docket No. AB-55 [Sub-No. 590X], decided Dec. 11, 2001.

The rationale for the legal principle was best explained in *Central R. Co. of Ind. -- Aband. Exempt. -- in Dearborn, Decatur, Franklin, Ripley and Shelby Counties, IN*, *supra*, 1998 STB LEXIS 121 at 26-27, viz., emphasis added:

> The petition for exemption procedure for abandonment is primarily intended to be used to expedite decisions and minimize regulatory burdens in uncontested or noncontroversial proceedings. <u>It should not be used in proceedings like the one before us where detailed analysis of revenues and costs is necessary</u>. Detailed revenue and cost analysis is generally reserved for the application process, which provides for a recordbuilding process and for Board analysis by requiring workpapers and other information needed to make an

> informed decision. This is not a case in which it is clear that revenue from local and overhead traffic is minimal compared to the cost of operating the line. Rather, a detailed analysis of revenue and cost evidence, and the resolution of various issues enumerated above, is required to determine the profit/loss of the line . . .

APPLICATION OF THE LEGAL PRINCIPLE TO NS'S PETITION

The legal principle identified above applies with full force to NS's Petition because SMI (and perhaps others) is in strenuous opposition to abandonment of the Burkeville-Farmville segment (the Segment), and because it is by no means evident that the revenues from operating the Segment are marginal compared to the costs of providing the service. As demonstrated below, the selective, self-serving revenue and cost information submitted by NS does not resolve serious issues regarding profitability of the Segment under the Board's costing regulations. A detailed analysis of revenues and costs for the Segment is necessary for the Board to reach an informed decision on the merits of abandonment of the Segment. Such an analysis is required to be performed in conjunction with a formal abandonment application, not by means of accelerated, informal exemption procedure. Consequently, the Petition should be denied as to the Segment, without prejudice to the filing of an abandonment application.

As brought out in more detail below, much of NS's economic case for abandonment hinges on its contention that the High Bridge at Milepost N144.87 requires rehabilitation and unusually high maintenance costs. That is certainly the crux of NS's case for abandonment of the Segment, on which the High Bridge is located. Thus, NS contends that rehabilitation of that Bridge at a cost of $871,200 is required in order for the Bridge to remain in operation in the forecast year. (Petition at 14-15).

There is not a shred of evidence in support of that contention in the NS Petition nor in any of its workpapers. There is no supporting testimony about the physical condition of that Bridge -- no bridge inspection reports, no photographs, no identification of alleged materials and labor required for renewal. There is no question that a wholly unsupported allegation of that nature cannot form a rational basis for an exemption for abandonment of the Segment.

That unsupported allegation also taints NS's evidence on profitability of the Segment. Thus, a workpaper at page 90 of Exhibit 3 of the Petition shows that NS simply plugged that wholly unsupported bridge rehabilitation cost into its on-branch costs for maintenance of way and structures (for convenience of reference, a copy of that page is attached to this Statement as Appendix 1). A total of $796,500 in bridge renewal costs has thus been charged against the Segment as "normalized maintenance." That radically skews the 10-year average of track and bridge maintenance expenses that was charged against the Segment in the forecast year. An exemption for abandonment of the Segment cannot be rationally granted when wholly unsupported bridge rehabilitation costs are disguised as normalized maintenance costs that unduly inflate avoidable costs and skew Segment profitability.

By no means is that the only element of revenues and costs in the NS Petition that is insufficiently supported to warrant an exemption for abandonment. The Petition does not provide support for NS's calculation of off-branch costs, which appear to be unusually high for the Segment, especially in view of NS's contention that it experiences only a relatively short off-branch haul from Petersburg, VA on the great majority of Segment traffic. There are no workpapers that provide supporting detail for an URCS calculation of NS's off-branch unit costs. Workpapers at pages 95-97 of Exhibit 3 of the Petition are basically illegible in the copy of the

Petition that was supplied to SMI. There is no identification nor explanation whatsoever of NS's off-branch service units. In a word, NS's off-branch costs are entirely unsupported.

There is no support in the Petition nor in the workpapers for the substantial cost of $27,000 per mile for ditching in NS's normalized maintenance costs. (Appendix 1 attached hereto). This is not an alleged one-time cost for ditching, but rather a substantial cost applied <u>every year</u> for the 10-year period covered by NS's workpaper. <u>At $27,000 per mile every year, ditches along the Segment would be huge unneeded holes in the ground</u>. That wholly unsupported cost cannot be relied on to grant an exemption for abandonment of the Segment.

None of the other costs for normalized maintenance in the Segment is supported by any evidence of actual experience on the Segment or on any NS rail line of similar traffic volume. (*See*, Petition, Ex. 3, p. 90 -- Appdx. 1 hereof). Thus, for example, there is no support in actual experience for the cost of $1,173 per mile for "general track repair" charged against the Segment. If that is an NS system average, it may well significantly overstate costs in view of the relatively light traffic volume on the Segment.

There are numerous additional costs in the Petition that are entirely unsupported and unexplained. For example, there is no evidence in the Petition nor any workpaper that provides support for the unit costs for rail, OTM, turnouts or crossties on page 89 of Exhibit 3 of the Petition. No finding of opportunity costs would be legitimate without an evidentiary basis for those major elements of Segment valuation.

The foregoing is not an exhaustive listing of revenue and cost issues that require resolution in an abandonment proceeding. As one example of the numerous additional issues,

there is no support for the replacement value of the locomotive and freight cars used to project costs for equipment depreciation and return on value.

Moreover, the Petition fails to consider changes in the forecast year traffic pattern that would materially affect revenues and costs for the Segment. Thus, the Petition is based on continued rail service of 3 trips per week over the Segment. (Petition, Ex. 3, p. 84). SMI and other shippers at Farmville may well be willing to accept less frequent service if it would increase rail line profitability, and thus result in continued operation of the Segment. Similarly, the Petition assumes that the great majority of SMI's traffic would continue to originate on CSX Transportation, Inc., but SMI might well be willing to take more traffic from NS origins if that would increase Segment profitability and the prospect for its continued operation. Those considerations raise additional revenue and costs issues that are required to be resolved in a formal abandonment proceeding.

In summary, it is not at all clear from the Petition that the Segment cannot be operated profitably in the forecast year. That being the case, exemption procedure is inappropriate for consideration of abandonment of the Segment. The Petition should be denied without prejudice to the filing of a formal application for abandonment of the Segment.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, premises considered, the Petition for Exemption is required to be denied.

Respectfully submitted,

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Protestant

/s/
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Attorney for Protestant

DUE DATE: November 9, 2004

(NM)
10 MPH
CLASS I NO OVERHEAD TRAFFIC

NORMALIZED MAINTENANCE PROJECTION
2004 to 2013
Burkeville - Farmville - Scenario II

MILEPOSTS N 134.10 149.10 15.00 MILES MAIN TRACK

	REHABILATION			2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
ROUTINE WORK	-												
INSPECTION		$234	PER MILE	3,500	3,500	3,500	3,500	3,500	3,500	3,500	3,500	3,500	3,500
GENERAL TRACK REPAIR		$1,173	PER MILE	17,600	17,600	17,600	17,600	17,600	17,600	17,600	17,600	17,600	17,600
RAIL TESTING		$72	PER MILE	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100
VEGETATION CONTROL		$228	PER MILE	3,400	3,400	3,400	3,400	3,400	3,400	3,400	3,400	3,400	3,400
BRIDGE REPAIRS			BRIDGE DEPT.	14,000	14,000	14,000	14,000	14,000	14,000	14,000	14,000	14,000	14,000
ROUTINE SUBTOTAL				$39,600	$39,600	$39,600	$39,600	$39,600	$39,600	$39,600	$39,600	$39,600	$39,600
PROGRAM WORK													
RAIL RENEWAL	0	$470,000	PER MILE										
TIMBER AND SURFACE	0	67,000	PER MILE										
SURFACING	0	11,000	PER MILE										
BRUSH CUTTING	0	$508	PER MILE			7,600			7,600			7,600	
DITCHING	0	$599	PER MILE	27,000	27,000	27,000	27,000	27,000	27,000	27,000	27,000	27,000	27,000
BRIDGE RENEWAL - CAPITAL	0		BRIDGE DEPT.			20,000	338,500	338,500					
- EXPENSE			BRDIGE DEPT.			2,500	48,500	48,500					
PROGRAM SUBTOTAL				$27,000	$27,000	$57,100	$414,000	$414,000	$34,600	$27,000	$27,000	$34,600	$27,000
MAINTENANCE TOTAL				$66,600	$66,600	$96,700	$453,600	$453,600	$74,200	$66,600	$66,600	$74,200	$66,600

MAINTENANCE SUMMARY:

	ROUTINE WORK RDWY	ROUTINE WORK BRIDGE	PROGRAM WORK ROADWAY	PROGRAM WORK BRIDGE	LINE TOTAL	
TEN YEAR PROJECTED TOTAL =	256,000	140,000	292,800	796,500	$1,485,300	
ANNUAL COST FOR LINE =	25,600	14,000	29,280	79,650	$148,530	ANNUAL NORMALIZED
ANNUAL COST PER MILE =	1,707	933	1,952	5,310	$9,902	PER MILE NORMALIZED

Appendix 1

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2004, I served the foregoing document, Statement In Opposition To Petition For Exemption Of Abandonment, by e-mail to James R. Paschall, Esq., Attorney for Norfolk Southern Railway Company, at jrpascha @nscorp.com, with copy by mail to James R. Paschall, Esq., General Attorney, Norfolk Southern Corporation, Law Department, Three Commercial Place, Norfolk, VA 23510-9241.

/s/

Thomas F. McFarland