



KAPLAN KIRSCH ROCKWELL

July 11, 2008

E-filing

Hon. Anne Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

**Re: Petition of the City of Alexandria, Virginia, for Declaratory Order
Finance Docket No. 35157**

Dear Ms. Quinlan:

I am enclosing the following documents for filing in the above-captioned proceeding:

1. Petition of the City of Alexandria, Virginia, for Leave to File a Reply to a Reply;
and
2. Reply of the City of Alexandria, Virginia, to Norfolk Southern's Response to
Petition for Declaratory Order and Motion to Strike Extraneous Material

The City of Alexandria asks the Board to consider the Motion to Strike regardless of how it rules on the Petition for Leave to File a Reply to a Reply.

Thank you for your attention to this matter.

Sincerely,

W. Eric Pilsk

Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket Number 35157

**PETITION OF THE CITY OF ALEXANDRIA, VIRGINIA
FOR DECLARATORY ORDER**

**PETITION OF
THE CITY OF ALEXANDRIA, VIRGINIA
FOR LEAVE TO FILE A REPLY TO A REPLY**

Communications with respect to this
document should be addressed to:

Dated: July 11, 2008

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ATTORNEYS FOR THE CITY OF
ALEXANDRIA, VIRGINIA

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket Number 35157

**PETITION OF THE CITY OF ALEXANDRIA, VIRGINIA
FOR DECLARATORY ORDER**

**PETITION OF
THE CITY OF ALEXANDRIA, VIRGINIA
FOR LEAVE TO FILE A REPLY TO A REPLY**

Pursuant to 49 C.F.R. §1117.1, the City of Alexandria, Virginia (the “City”), by counsel, hereby files this Petition for Leave to File a limited Reply to the Response of Norfolk Southern Railway Company to Petition for Declaratory Order, filed in this proceeding on July 2, 2008 (the “NS Response”). The Reply also includes a Motion to Strike Extraneous Material from the NS Response and the City asks the Board to consider that Motion regardless of how it rules on the Petition for Leave to File a Reply to a Reply.

Although the Board’s rules do not permit the submission of a reply to a reply (49 C.F.R. §1104.13(c)) as a matter of right, good cause exists to permit the City to submit a brief reply to the NS Response. The NS Response contains a number of misleading statements of facts and issues and further attempts to inject extraneous issues into this matter. The City is compelled to respond to those assertions and to strike them in order to correct the record and clarify the proper scope of this proceeding.

For example, the NS Response relies in large part on arguments about the City’s alleged political motives in filing this action and its position on locating an ethanol transloading facility

near residential areas. Those assertions are both false and irrelevant. As Norfolk Southern readily admits, the only issues in this case relate to the relationship between Norfolk Southern and RSI Leasing, Inc. (“RSI”), which operates the ethanol transloading facility at issue, and who controls the transloading operation. Political rhetoric about the City’s purported motives in filing this lawful action is both irrelevant and unwarranted. The City’s Reply responds to those statements to correct the false and misleading impression of the facts and issues the NS Response attempts to create.

Similarly, the NS Response is based on conclusory statements and selected documents to support the notion that Norfolk Southern and not RSI, the occupant of the subject site, operates the transloading facility. The facts of this case, including the agreement between Norfolk Southern and RSI attached to the NS Response, undercut those assertions and demonstrate that further discovery is necessary to resolve this matter. Moreover, a recent tariff issued by Norfolk Southern and incorporated by reference into Norfolk Southern’s agreement with RSI, which Norfolk Southern fails to attach to its Response, further illustrates that RSI controls the transloading operation, not Norfolk Southern. The City’s Reply brings these new facts to the Board’s attention in order to correct Norfolk Southern’s misleading and incomplete statement of the facts and issues.

The City’s Reply does not raise any new legal issues. The only new facts it introduces are facts that Norfolk Southern is aware of but did not disclose to the Board, even though those facts are plainly material to the issues before the Board. Permitting the City to submit a Reply will not prejudice any party because the Board has not yet issued any rulings in this proceeding. Allowing the City to Reply will, however, assist the Board in resolving this matter by correcting the record and clarifying the issues properly before the Board.

WHEREFORE, and in view of all of the foregoing, the City respectfully requests that this Board grant its Petition for Leave to File a Reply to the Response of Norfolk Southern to Petition for Declaratory Order. Further, the City respectfully requests that this Board rule on the City's Motion to Strike Extraneous Material regardless of how it rules on the Petition for Leave to File a Reply to a Reply.

Dated: July 11, 2008

Respectfully submitted,



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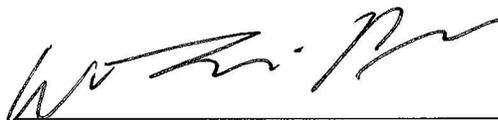
ATTORNEYS FOR THE CITY OF
ALEXANDRIA, VIRGINIA

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of July, 2008, a copy of the foregoing Petition of the City of Alexandria, Virginia, for Leave to File a Reply to a Reply was served by first class mail, postage prepaid, upon the following:

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W. Eric Pilsch

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket Number 35157

**PETITION OF THE CITY OF ALEXANDRIA, VIRGINIA
FOR DECLARATORY ORDER**

**REPLY OF THE CITY OF ALEXANDRIA, VIRGINIA, TO
NORFOLK SOUTHERN'S RESPONSE TO PETITION FOR DECLARATORY ORDER
AND MOTION TO STRIKE EXTRANEOUS MATERIAL**

Dated: July 11, 2008

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ATTORNEYS FOR THE CITY OF
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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket Number 35157

**PETITION OF THE CITY OF ALEXANDRIA, VIRGINIA
FOR DECLARATORY ORDER**

**REPLY OF THE CITY OF ALEXANDRIA, VIRGINIA, TO
NORFOLK SOUTHERN'S RESPONSE TO PETITION FOR DECLARATORY ORDER
AND MOTION TO STRIKE EXTRANEOUS MATERIAL**

The City of Alexandria (the "City") hereby replies to the Response of Norfolk Southern Railway Company's Response to the City's Petition for a Declaratory Order and moves to strike extraneous material from Norfolk Southern's Response. The City is today filing a Petition for Leave to File a Reply to a Reply, and is tendering this reply in anticipation of a favorable ruling on that Petition.

In its Petition for a Declaratory Order, the City seeks the Board's determination of a clear legal question: whether the City may regulate an ethanol transloading operation at the Van Dorn Street Yard (the "Facility") in the City that appears to be operated exclusively by a non-railroad entity, RSI Leasing, Inc. ("RSI"), located on right-of-way owned by Norfolk Southern Railway Company ("Norfolk Southern"). The City has a strong interest in regulating the transloading operation because it involves ethanol, a Class 3 flammable liquid, in close proximity to homes, a school and a park. This proceeding is similar to that in the Board's recent decision in Finance Docket No. 35057, *Town of Babylon and Pinelawn Cemetery – Petition for Declaratory Order*, (Service Date February 1, 2008). As the Board held in *Town of Babylon*, this kind of inquiry is fact-intensive because it turns on the nature of the relationship between the railroad and the non-

railroad, specifically who controls the transloading operation. In order to answer this question, the City and the Board must review documents and information in Norfolk Southern's possession which the City may only obtain through a discovery order issued by the Board.

In its Response to the City's Petition for a Declaratory Order, Norfolk Southern attempts to cut off this factual inquiry by presenting a misleading picture of the facts. First, Norfolk Southern argues that the City is motivated by some political animus directed at Norfolk Southern. Response of Norfolk Southern Railway Company to Petition for Declaratory Order, STB Finance Docket No. 35157 (Service Date July 7, 2008) ("NS Response"), 2-3, 4-10, 23. In support of this argument, Norfolk Southern goes to great lengths to create the impression that the City is "anti-Norfolk Southern," including statements from City officials, print-outs of a City web page regarding the ethanol transloading facility, a copy of a lawsuit filed by Norfolk Southern against the City and other extraneous material. *See* NS Response at 4-10.

Norfolk Southern's argument is both false and irrelevant. Norfolk Southern has operated in the City for many years, and the City has not had any substantial issues with those operations, including operations at the Van Dorn Yard. With the introduction of an ethanol transloading facility into an area in close proximity to homes, a school, a park and several major transportation facilities that could operate on a 24/7 basis, however, the City is presented with a serious health and safety issue. The City seeks to address that issue through appropriate legal means, including seeking declaratory relief from this Board. The strongly expressed views of City officials who desire to regulate that facility does not in any way mean that the City's Petition lacks merit or is in any way improper. To the contrary, the City has instituted this proceeding to pursue an entirely lawful and orderly process to affirm its regulatory authority.

Norfolk Southern's cries of political animus are red herrings that have no place in these proceedings.

As Norfolk Southern states, the only issue in this proceeding is the relationship between Norfolk Southern and RSI and who controls the transloading operation. *See* NS Response at 19. The City's position on the desirability of locating the ethanol transloading operation near neighborhoods and other residential land uses are simply irrelevant to that issue. Norfolk Southern's heated rhetoric and attempts to clutter the record with documents related to the City's position on the ethanol transloading facility are entirely extraneous to the question of control over the transloading operation and should be stricken from the Response and disregarded. Specifically, pages 2-3, 4-10, 23 of the NS Response and Exhibits A, C-O, Q & R should be stricken and otherwise disregarded as irrelevant.

Second, Norfolk Southern offers conclusory statements about selected documents which purport to establish its relationship with RSI, the operator of the Facility, in the hope that the Board will forego more detailed scrutiny of the actual ethanol transloading operation. NS Response at 2, 13. In particular, Norfolk Southern relies heavily on the assertion that its relationship with RSI is defined by a contract, not a lease. Under *Town of Babylon*, however, such conclusory statements and reliance on matters of form are not dispositive. *Town of Babylon* at 4. In fact, the agreement between Norfolk Southern and RSI (the "RSI Agreement") attached to the NS Response raises more questions than it answers as to crucial issues concerning control and operation of the Facility. For example, the RSI Agreement requires RSI (1) "to perform all activities required to transload [ethanol] from rail tank cars" (RSI Agreement Sec. 1.A(ii)), (2) to maintain insurance in favor of Norfolk Southern (RSI Agreement Sec. 3.C(i)(c)) and (3) to indemnify Norfolk Southern for all claims and liability arising out of RSI's use of the Facilities

(RSI Agreement Secs. 3.A and 3.B). The RSI Agreement also, like a description of the demised premises in a lease, includes a plat establishing the geographic limits of the area to which the Agreement applies.

Moreover, the RSI Agreement, page 2 and page 9, expressly incorporates bulk “Tariff 9328-C, or any successor or replacement thereof.” On April 17, 2008, Norfolk Southern canceled Tariff 9328-C and replaced it with Tariff 9328-D, which, for the first time, expressly applies to the Alexandria facility. Tariff 9328-D, a copy of which is attached as Exhibit 1, provides that the listed terminals

are operated by an independent terminal operator (the “Terminal Operator”). The purpose of this tariff is to advise NS shippers of the services they may expect when utilizing a [terminal] and the services of a Terminal Operator, but arrangements for service at a [terminal] should be made between the shipper and the Terminal Operator.

Ex. 1, Tariff 9328-D, page 4. The tariff further provides that “Charges for unloading of railcars to trucks and unloading trucks to railcars at a [terminal] *will be determined on an individual basis by the Terminal Operator . . .*” (emphasis added) subject to maximum charges set forth in the tariff. *Id.* at 7. These unloading charges, as determined by the independent operator, “will be billed to the shipper or beneficial owner by the Terminal Operator. . . ,” not the railroad. *Id.* at 8.

Under *Town of Babylon*, these multiple indicia of independent operational control by RSI, including control over pricing for its services, suggest that RSI, not Norfolk Southern, controls the Facility. Indeed, RSI itself has publicly acknowledged that it is the operator of the facility. Clearly, reliance on Norfolk Southern’s self-serving characterizations of its arrangement with RSI is not dispositive. Accordingly, discovery is necessary to fully explore and determine the relevant facts as to whether Norfolk Southern or RSI controls the Facility and whether, as a result, the Facility is subject to STB jurisdiction.

Finally, Norfolk Southern attempts to further deflect the need for discovery by arguing that the City's citation to 49 C.F.R. § 174.304, which prohibits rail transportation of Class 3 hazardous materials except under certain specific circumstances relating to ownership and control of the material at trackside, is not the controlling regulation. On its face, Section 174.304 does apply and prohibits precisely the kind of activity Norfolk Southern purports to be engaged in, unless RSI or some other party is a consignee and the transloading takes place on a private track (*i.e.*, track not owned or controlled by a railroad). That is the point of the City's citation to the regulation – to demonstrate that the ethanol transloading operation is not a railroad operation. Norfolk Southern's arguments about the definition of "transloading" are simply irrelevant because the operative language of Section 174.304 relates to the nature of the receiving party as a consignee with a private track or permanent storage tanks. The word "transloading" does not appear in the regulation and is irrelevant to the applicability of the regulation.

Moreover, the regulation cited by Norfolk Southern, 49 C.F.R. § 174.67, is general and sets forth generic requirements related to hazardous materials. In contrast, Section 174.304 is precise and applies specifically to "Class 3 (flammable liquid) materials in tank cars." Because ethanol is a Class 3 hazardous material arriving at the Facility in tank cars, Section 174.304 plainly applies. It is axiomatic that a general provision cannot override a specific provision, as Norfolk Southern argues. Further, 49 CFR 174.304 is part of Subtitle B of Title 49, to which the definitions set forth in 49 CFR 171.8 apply. That section provides the following definitions relevant to interpreting 49 CFR 174.304:

Bulk packaging means a packaging, other than a vessel or a barge, including a transport vehicle or freight container, in which hazardous materials are loaded with no intermediate form of containment and which has: (1) A maximum capacity greater than 450 L (119 gallons) as a receptacle for a liquid;
(2) A maximum net mass greater than 400 kg (882 pounds) and a maximum capacity greater than 450 L (119 gallons) as a receptacle for a solid; or
(3) A water capacity greater than 454 kg (1000 pounds) as a receptacle for a gas as defined in §173.115 of this subchapter.

Transport vehicle means a cargo-carrying vehicle such as an automobile, van, tractor, truck, semi trailer, tank car or rail car used for the transportation of cargo by any mode. Each cargo-carrying body (trailer, rail car, etc.) is a separate transport vehicle.

Unloading incidental to movement means removing a packaged or containerized hazardous material from a transport vehicle, aircraft, or vessel, or for a bulk packaging, emptying a hazardous material from the bulk packaging after the hazardous material has been delivered to the consignee when performed by carrier personnel or in the presence of carrier personnel or, in the case of a private motor carrier, while the driver of the motor vehicle from which the hazardous material is being unloaded immediately after movement is completed is present during the unloading operation. (Emptying a hazardous material from a bulk packaging while the packaging is on board a vessel is subject to separate regulations as delegated by Department of Homeland Security Delegation No. 0170.1 at 2(103).) **Unloading incidental to movement includes transloading. (Emphasis added.)**

Transloading means the transfer of a hazardous material by any person from one bulk packaging to another bulk packaging, from a bulk packaging to a non-bulk packaging, or from a non-bulk packaging to a bulk packaging for the purpose of continuing the movement of the hazardous material in commerce.

Accordingly, it is clear the definition of *unloading* includes *transloading*, contrary to Norfolk Southern's rather tortured assertions. Since both the RSI Agreement and Tariff 9328-D acknowledge that hazardous material unloading and transloading are subject to 49 CFR Part 105, *et seq.*, it is equally clear that the railroad itself cannot lawfully offer the services actually provided at the Facility, unless it has relinquished all responsibility and control over those

services to a private party, which is not a rail carrier and whose operation is not subject to federal preemption.

In any event, even the regulatory material cited by Norfolk Southern underscores the critical point that an ethanol transloading operation, even if permitted, may be carried out by a railroad *or* a non-railroad and that regulation of transloading operations involving hazardous materials may be beyond the jurisdiction of the STB. That is the issue the City is asking the Board to decide in this proceeding. Accordingly, the Petition should be granted and discovery permitted.

Conclusion

For the foregoing reasons, the City of Alexandria respectfully requests the Board to grant its Petition, allow the City to take discovery in this matter and strike the extraneous material from Norfolk Southern's Response.

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corporation of Virginia
By Counsel



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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of July, 2008, a copy of the foregoing Petition of the City of Alexandria, Virginia, for Leave to File a Reply to a Reply was served by first class mail, postage prepaid, upon the following:

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