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October 6, 2004

BY HAND DELIVERY

Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: Finance Docket No. 34561, Canadian Pacific Railway Company—
Trackage Rights Exemption—Norfolk Southern Railway
Company—Buffalo, NY; Finance Docket No. 34562, Norfolk
Southern Railway Company—Trackage Rights Exemption—
Delaware and Hudson Railway Company, Inc.—Between Saratoga
Springs, NY and Binghamton, NY; Docket No. AB-156 (Sub-No.
25X), Delaware & Hudson Railway Company, Inc.—
Discontinuance of Trackage Rights—Between Lanesboro, PA and
Buffalo, NY.

Dear Secretary Williams:

I enclose for filing in the above-captioned proceedings an original and 10 copies of a
Reply of Norfolk Southern Railway Company in Opposition to Petition to Stay Operation of
Exemption.

Sincerely,


Richard A. Allen

Encl.

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Public Record

Before The
Surface Transportation Board

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Finance Docket No. 34561

2/2/79

CANADIAN PACIFIC RAILWAY COMPANY-TRACKAGE RIGHTS
EXEMPTION-NORFOLK SOUTHERN RAILWAY COMPANY-BUFFALO, NY

Finance Docket No. 34562

2/2/80

NORFOLK SOUTHERN RAILWAY COMPANY-TRACKAGE RIGHTS
EXEMPTION-DELAWARE AND HUDSON RAILWAY COMPANY, INC.
BETWEEN SARATOGA SPRINGS, NY, AND BINGHAMTON, NY

Docket No. AB-156 (Sub-No. 25X)

-2/2/81

DELAWARE AND HUDSON RAILWAY COMPANY, INC.-DISCONTINUANCE
OF TRACKAGE RIGHTS-BETWEEN LANESBORO, PA, AND BUFFALO, NY

**REPLY OF NORFOLK SOUTHERN RAILWAY COMPANY
IN OPPOSITION TO PETITION TO STAY OPERATION OF EXEMPTIONS**

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OCT 06 2004

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Public Record

Attorneys for Norfolk Southern Railway Company

Dated: October 6, 2004

Before The
Surface Transportation Board

Finance Docket No. 34561

CANADIAN PACIFIC RAILWAY COMPANY-TRackage RIGHTS
EXEMPTION-NORFOLK SOUTHERN RAILWAY COMPANY-BUFFALO, NY

Finance Docket No. 34562

NORFOLK SOUTHERN RAILWAY COMPANY-TRackage RIGHTS
EXEMPTION-DELAWARE AND HUDSON RAILWAY COMPANY, INC.
BETWEEN SARATOGA SPRINGS, NY, AND BINGHAMTON, NY

Docket No. AB-156 (Sub-No. 25X)

DELAWARE AND HUDSON RAILWAY COMPANY, INC.-DISCONTINUANCE
OF TRackage RIGHTS-BETWEEN LANESBORO, PA, AND BUFFALO, NY

**REPLY OF NORFOLK SOUTHERN RAILWAY COMPANY
IN OPPOSITION TO PETITION TO STAY OPERATION OF EXEMPTIONS**

Norfolk Southern Railway Company ("NSR") files this reply in opposition to the Petition to Stay Operation of Exemptions filed by Samuel Nasca, New York Legislative Director for the United Transportation Union ("UTU") on October 5, 2004.

Petitioner seeks a stay of the effective date of two notices of exemption filed on October 1, 2004: (1) the Verified Notice of Exemption filed by NSR in STB Finance Docket No. 34562 seeking authority for NSR to acquire overhead trackage rights over 155 miles of D&H's line between Binghamton and Saratoga Springs, NY; (2) a Verified Notice of Exemption filed by Canadian Pacific Railway Company ("CP") in STB Finance Docket No. 34561 seeking an exemption authorizing CP to acquire certain trackage rights over lines of NSR in Buffalo, NY by assignment from CP's subsidiary,

Delaware & Hudson Railway Company, Inc. ("D&H"). Petitioner also asks the Board to consolidate those proceedings with a third proceeding filed on October 1, 2004, a petition for exemption filed by D&H seeking an exemption authorizing D&H to discontinue its operation of trackage rights over NSR's Southern Tier line between Buffalo, NY and Binghamton, NY, Docket No. AB-156 (Sub-No. 25X). NSR submits that there is no merit to petitioner's request to stay operation of the notices exemptions in either Finance Docket No. 34561 or Finance Docket No. 34562 and that there is no basis for consolidating any of the three proceedings. This reply, however, will focus on the petition's request to stay the Verified Notice of Exemption filed by NSR in Finance Docket No. 34562 (hereafter, the "Notice"). The Notice was filed pursuant to the class exemption in 49 C.F.R. §1180.2(d)(7).

ARGUMENT

The petition provides the Board with no basis for staying the effectiveness of the Notice. The requirements for issuing a stay are well established, and the Board and its predecessor, the Interstate Commerce Commission ("ICC"), have consistently held that granting a stay is an extraordinary remedy that should rarely be granted. As the Board stated in *Canadian Pacific Limited, et al.—Purchase and Trackage Rights—Delaware & Hudson Railway Company (Arbitration Review)*, Finance Docket No. 31700 (Sub-No. 13), served November 6, 1998:

The standards governing disposition of a petition for stay are: (1) whether petitioner is likely to prevail on the merits on appeal; (2) whether petitioner will be irreparably harmed in the absence of a stay; (3) whether issuance of a stay would substantially harm other parties; and (4) whether issuance of a stay is in the public interest. *Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir.

1977); and *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921 (D.C. Cir. 1951).

Petitioner *asserts* that these standards are met in this case, but he provides no persuasive support for that assertion.

I. The Transaction Will Not Cause Irreparable Injury.

Petitioner's principal contention is that a stay is needed to prevent irreparable injury because NSR's acquisition of overhead trackage rights between Binghamton and Saratoga Springs will have adverse effects, including the loss of jobs, on UTU employees of NSR and D&H. Petition at 6-7. There is no reasonable basis for that speculation, however, and NSR believes it is unfounded. As stated in the Notice, NSR anticipates that there will be a net increase of at least two NSR positions as a result of this transaction, and petitioner does not dispute that statement. While D&H will address the impact on its employees, there is no reason to expect that NSR's overhead trackage operations between Binghamton and Saratoga Springs will result in any job losses for D&H's employees. NSR's rights are overhead rights only, and will not divert any traffic currently handled by D&H.

More importantly, if there were any adverse effects on employees, they would not be irreparable. As stated in the Notice:

Any employees who are adversely affected by the acquisition of the trackage rights that are the subject of this Notice are entitled to protection under the conditions imposed in Norfolk and Western Railway Co. —Trackage Rights—Burlington Northern, Inc., 354 I.C.C. 605 (1978), as modified by Mendocino Coast Railway, Inc.—Lease and Operate—California Western Railroad, 360 I.C.C. 653 (1980).

The very purpose of those standard labor protective conditions are to provide what the Board, and the ICC before it, have consistently determined to be appropriate conditions

to protect the interests of employees adversely affected by a railroad's acquisition of trackage rights over the lines of another railroad. Under those conditions, which NSR presumes the Board will impose, the employees of NSR and D&H will have the right to a specified period of notice from the railroads before the trackage rights are exercised,¹ to negotiate agreements implementing the protective conditions with the carriers, and to receive monetary benefits if they are adversely affected by the transaction.

Petitioner has provided no basis for distinguishing NSR's overhead trackage rights between Binghamton and Saratoga Springs from the myriad other trackage rights acquisitions that have been authorized routinely pursuant to the categorical exemption established by 49 C.F.R. §§ 1180.2(d)(7). Nor has petitioner addressed or refuted the determination of the ICC and the Board that a railroad's acquisition of overhead trackage rights rarely, if ever, warrants regulatory review and should therefore be categorically exempted from regulatory requirements, subject only to a notice filing requirement. As the ICC said when it established that exemption, regulation of overhead trackage rights is not necessary to carry out the rail transportation policy, because:

Transactions that permit only bridge rights will maintain the competitive balance among carriers, preserve shippers' existing transportation choices, give shippers access to alternative routes with shorter, faster, or otherwise improved routing, and increase the operational efficiency of the participating carriers.

Railroad Consolidation Procedures – Trackage Rights Exemption, 1 I.C.C.2d 270, 275-76 (1985). Petitioner's concern about the possible adverse effects on employees (who will be fully protected by the *N&W/Medicino Coast* conditions) provides no basis for

¹ Because the conditions require carriers to provide notice to employees at least 20 days before commencing authorized trackage rights operations, there is no basis for petitioner's suggestion that NSR could commence those operations "to the surprise and prejudice of parties." Petition at 6.

denying or staying the application of the class exemption to NSR's overhead trackage rights between Binghamton and Saratoga Springs. If it did, the class exemption could never be used whenever there was a possibility, or a claim, that employees might be adversely affected.

II. Petitioner is Not Likely to Succeed on the Merits.

Other than his claim of adverse effects on employees, petitioner's only apparent argument on the legal merits of the two exemption notices is his claim that they are part of a larger transaction that petitioner says "involves a significant transaction for carrier consolidation under 49 U.S.C. § 11323(a)(2)," (Petition at 7) which would require *New York Dock* protective conditions. There is no basis for this claim.

First, the Memorandum of Understanding referred to by petitioner has been superseded by agreements filed with or referenced in the notices of exemption and the petition for exemption filed on October 1, 2004 and has no further force or effect with respect to those transactions. All of the agreements that are subject to the Board's jurisdiction (the trackage rights agreements) have been filed with the Board, and the Board can determine for itself that those agreements qualify for the exemption in 49 C.F.R. § 1180.2(d)(7).

Second, it is apparent from those agreements and the filings that the transactions involved are ordinary operational agreements among carriers designed to improve the efficiency of their operations, and do not involve any carrier consolidations. NSR's acquisition of trackage rights between Binghamton and Buffalo is not contingent on any other transaction; it is a separate, stand-alone transaction, and it clearly qualifies for the

exemption in 49 C.F.R. 1180.2(7)(d). There is no basis for staying the effectiveness of the Notice.

III. A Stay Would Substantially Harm Norfolk Southern.

Contrary to petitioner's unsupported assertion, a stay of the effectiveness of its Notice would substantially harm NSR. It would delay NSR's ability to exercise trackage rights that NSR believes will improve the efficiency of its operations, and it would impose unnecessary regulatory burdens on NSR that the exemption in 49 C.F.R. §1180.2(d)(7) was specifically established to eliminate.

IV. The Public Interest Does Not Support a Stay.

There is no basis for petitioner's claim that the transactions contemplated by the now-superseded Memorandum of Understanding are "anticompetitive." On the contrary, as D&H explained in its Petition for Exemption in Docket No. AB-156 (Sub-No. 25X), the transactions will increase the efficiency of D&H and its parent, CP, and therefore their competitiveness, without depriving any customer of D&H and CP access to those carriers.

In any event, petitioner's claim pertains not to NSR's acquisition of overhead trackage rights between Binghamton and Saratoga Springs, but only to the discontinuance of D&H's current trackage rights operations between Buffalo and Binghamton. That discontinuance and its effects, however, will be fully considered by the Board in deciding whether to grant D&H's petition for exemption. NSR's Notice of Exemption presents no competitive issues whatever. To the contrary, the contemplated overhead trackage rights transaction will "maintain the competitive balance among carriers" and "preserve shippers' existing transportation choices" while improving operating efficiencies, thus

promoting several elements of the rail transportation policy. *See Railroad Consolidation Procedures – Trackage Rights Exemption*, 1 I.C.C.2d 270, 275-76 (1985).

CONCLUSION

The Petition to Stay Operation of Exemptions should be denied.

Respectfully submitted,



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Attorneys for Norfolk Southern Railway Company

Dated: October 6, 2004

CERTIFICATE OF SERVICE

I certify that on October 6, 2004, a true copy of the foregoing "Reply of Norfolk Southern Railway Company in Opposition to Petition to Stay Operation of Exemptions" was served by hand delivery upon:

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A handwritten signature in cursive script, reading "Richard A. Allen", written over a horizontal line.

Richard A. Allen