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February 1, 2005

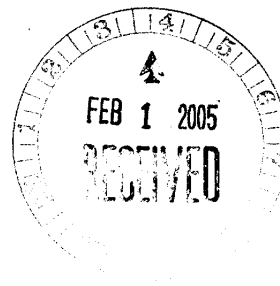
By Hand Delivery

The Honorable Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423

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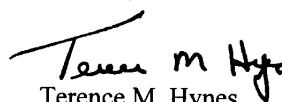
Re: Docket No. AB-156 (Sub-No. 25X), *Delaware and Hudson Railway Company, Inc. - Discontinuance of Trackage Rights - Between Lanesboro, PA, and Buffalo, NY*

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are an original and ten (10) copies of the Motion of Canadian Pacific Railway Company and Delaware and Hudson Railway Company, Inc., to Dismiss the Offer of Financial Assistance filed by CNJ Rail Corporation on January 18, 2005 (the "Motion"). A diskette containing an electronic version of the Motion is also enclosed.

Please acknowledge receipt of the Motion for filing by date-stamping the enclosed extra copies and returning them via our messenger. If you have any questions, please contact the undersigned counsel.

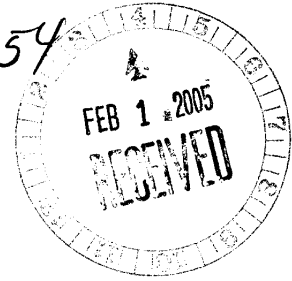
Sincerely,


Terence M. Hynes
Gabriel S. Meyer

TMH:aat
Enclosures

213154

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



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

**STB DOCKET NO. AB-156 (SUB-NO. 25X), DELAWARE AND HUDSON RAILWAY
COMPANY, INC. – PETITION FOR EXEMPTION – DISCONTINUANCE OF
TRACKAGE RIGHTS BETWEEN LANESBORO, PA AND BUFFALO, NY, IN
SUSQUEHANNA COUNTY, PA AND BROOME, TIOGA, CHEMUNG, STEUBEN,
ALLEGANY, LIVINGSTON, WYOMING, ERIE AND GENESEE COUNTIES, NY**

**MOTION OF CANADIAN PACIFIC RAILWAY COMPANY AND
DELAWARE AND HUDSON RAILWAY COMPANY, INC.
TO DISMISS OFFER OF FINANCIAL ASSISTANCE**

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Dated: February 1, 2005

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**STB DOCKET NO. AB-156 (SUB-NO. 25X), DELAWARE AND HUDSON RAILWAY
COMPANY, INC. – PETITION FOR EXEMPTION – DISCONTINUANCE OF
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**MOTION OF CANADIAN PACIFIC RAILWAY COMPANY AND
DELAWARE AND HUDSON RAILWAY COMPANY, INC.
TO DISMISS OFFER OF FINANCIAL ASSISTANCE**

INTRODUCTION

Pursuant to 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27(c)(1), Canadian Pacific Railway Company (“CPRC”) and its affiliate, Delaware and Hudson Railway Company, Inc. (“D&H”), hereby submit this Motion to Dismiss the Offer of Financial Assistance (the “Offer” or “OFA”) filed in the above-captioned proceeding by CNJ Rail Corporation (“CNJ”). Through its Offer, CNJ seeks to “purchase” the overhead trackage rights on Norfolk Southern Railway Company’s (“NSR’s”) line between Binghamton, NY and Buffalo, NY that were the subject of D&H’s Petition for Exemption in this proceeding. The Board should dismiss CNJ’s Offer, for several reasons.

First, the OFA procedures set forth at 49 U.S.C. § 10904 do not authorize the “purchase” of trackage rights that have been discontinued. In its January 19, 2005 Decision granting D&H’s Petition for Exemption (“the *January 19 Decision*”), the Board explicitly held that “[b]ecause this is a discontinuance proceeding and not an abandonment, we need not consider offers of financial assistance (OFA) to acquire the line for continued rail service, trail use requests, or

requests to negotiate for public use of the line.” *January 19 Decision* at 14. Rather, the Board correctly stated, the only form of OFA available in this discontinuance proceeding is an offer to subsidize continued rail operations by D&H. *Id.*

The Board’s holding is amply supported by STB/ICC precedent. The ICC has squarely held that “a party cannot use the OFA procedures in 49 U.S.C. [10904] to acquire trackage rights.” *See* Docket No. AB-31 (Sub-No. 29), *The Grand Trunk Western R. Co. – Abandonment – In Clark, Madison and Fayette Counties, OH* (decided March 23, 1990) at 1, n.2 (citing *The Staten Island R. Co. – Abandonment and Discontinuance of Service – In Richmond County, NY* (not printed; served February 22, 1985)). The Board likewise has stated repeatedly that the relief available under Section 10904 in connection with trackage rights discontinuance proceedings is limited to offers to subsidize the discontinuing carrier’s operations. *See, e.g.,* Docket No. AB-55 (Sub-No. 641X), *CSX Transportation Inc. – Discontinuance Exemption -- In Knox County, TN* (served January 2, 2004); Docket No. AB-565 (Sub-No. 15), *New York Central Lines, LLC -- Discontinuance Exemption -- in Henry County, IN* (served December 5, 2003); Docket No. AB-55 (Sub-No. 615X), *CSX Transportation Inc. – Discontinuance Exemption – Between East of Memphis and Cordova in Shelby County, TN* (served July 17, 2002); Docket No. AB-511 (Sub-No. 2X), *Central Railroad Company of Indianapolis -- Discontinuance Exemption -- In Grant County, IN* (served January 28, 2002).

The Board’s pronouncements regarding the scope of OFA relief available in trackage rights discontinuance cases are consistent with the well-established principle that the Board may not compel one carrier to grant trackage rights over its lines to a second carrier, except as a condition to its approval of a railroad consolidation pursuant to 49 U.S.C. § 11323. *See, e.g., St. Joe Paper Co. v. Atlantic Coast Line R. Co.*, 347 U.S. 298 (1954); Finance Docket No. 28905,

Boston and Maine Corporation – Trackage Rights – Over Consolidated Rail Corporation Between Rotterdam Jct., NY and Buffalo, NY (decided June 20, 1979). In the present case, the owner of the line at issue (NSR) will continue to operate the line itself, and it objects to the transfer of D&H's trackage rights to CNJ. *See* Norfolk Southern Railway Company's Motion To Reject Offer Of Financial Assistance, filed January 31, 2005 at 3. The Board may not force an unwilling landlord (NSR) to permit CNJ to substitute itself for D&H on the lines over which D&H has been authorized to discontinue service.

The fact that the trackage rights at issue were originally granted as part of the Final System Plan ("FSP") that created Conrail does not warrant a different conclusion. As the *January 19 Decision* recognized, the FSP "was not the final word as to the structure of railroad operations in the Northeast for all time," and its architect (USRA) clearly understood that railroad operations in the region served by the Southern Tier Line would change over time. *January 19 Decision* at 11-12. Indeed, the division of Conrail between NSR and CSX Transportation ("CSXT") in 1998 fundamentally altered the nature of rail competition in the Northeast, and reduced D&H's significance as a bridge carrier in the region. *Id.* at 2,10. For that reason, the *January 19 Decision* rejected the notion that the FSP requires preservation of D&H's overhead trackage rights on the Southern Tier Line. *Id.* at 11-12.

CNJ's OFA does not offer a subsidy for continued trackage rights operations by D&H. Rather, CNJ wants to "purchase" D&H's trackage rights and commence its own operations between Binghamton and Buffalo, NY. CNJ's proposal is not authorized by § 10904, and its OFA should therefore be rejected.

Second, CNJ's OFA should be dismissed because it seeks – indeed, it is dependent upon – the acquisition of trackage rights and commercial access rights that were not part of the

discontinuance at issue in this proceeding. For example, CNJ's Offer includes the segment between Milepost 210.9 $\pm$ and Milepost 217.0 $\pm$ in the vicinity of Binghamton, NY. CNJ Offer at 1. However, that segment was intentionally excluded from D&H's discontinuance proposal, because D&H needs to use that segment in connection with its ongoing operations in Binghamton. See *January 19 Decision* at 5, n.8. CNJ likewise seeks authority to purchase "a reasonable amount of yard space in Binghamton, NY" (CNJ Offer at 1), even though D&H never proposed to discontinue operations at any yard facility in Binghamton. CNJ also requests "commercial access to all present and future industries located on former [Conrail] lines in the Buffalo Terminal Area" (CNJ Offer at 1-2), notwithstanding the fact that D&H will not discontinue service to any Buffalo area shipper. CNJ's offer also seeks to "purchase" trackage rights within the Buffalo terminal area that D&H has assigned to CPRC.¹

Section 10904 does not authorize the Board to grant an offeror ancillary trackage rights and/or competitive access to shippers whose service is not affected by a proposed abandonment or discontinuance. See, e.g., Docket No. AB-1 (Sub-No. 205X), *Chicago and North Western Transportation Co. – Abandonment Exemption – Mason City, IA* (decided November 20, 1987) at 14-15. The discontinuance transaction authorized by the *January 19 Decision* does not involve a cessation of rail service to any Buffalo area shipper. To the contrary, D&H's arrangements with NSR preserve its ability to access Buffalo customers via switching, just as D&H does today. *January 19 Decision* at 3; D&H Petition for Exemption, filed October 1, 2004 at 6. Nor will D&H discontinue its use of any yard facilities (or the segment between Milepost 210.9 $\pm$ and Milepost 217.0 $\pm$) in Binghamton. Accordingly, there is no basis for approving CNJ's Offer to "purchase" a right to operate those lines and facilities.

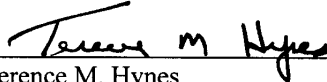
¹ The acquisition of those Buffalo area trackage rights by CPRC was exempted from regulation pursuant to the Notice filed by CPRC in Finance Docket No. 34561.

Finally, CNJ's Offer should be dismissed because D&H does not have the right to "sell" trackage rights over the Southern Tier Line to CNJ. The April 25, 1979 Agreement (the "1979 Agreement") under which D&H operates on the Southern Tier Line states explicitly that D&H may not "assign or transfer" its rights without the prior written consent of NSR. *See* 1979 Agreement, ¶ 7.09. Moreover, ¶ 7.05 of the 1979 Agreement provides that, upon discontinuance of operations by D&H over any line governed by the Agreement, "this Agreement shall terminate" with respect to the discontinued line.² Accordingly, D&H lacks the legal ability to assign or transfer to CNJ the right to exercise trackage rights over the Southern Tier Line on the terms and conditions set forth in the 1979 Agreement.

CONCLUSION

For all of the foregoing reasons, CPRC and D&H respectfully request that the Board dismiss CNJ's Offer of Financial Assistance.

Respectfully submitted,



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Dated: February 1, 2005

² Consistent with ¶ 7.05 of the 1979 Agreement, D&H executed a "Partial Termination of Trackage Rights Agreement" dated September 30, 2004, which acknowledges that D&H's rights with respect to the lines that were the subject of D&H's Petition for Exemption would terminate upon STB authorization of the proposed discontinuance. *See* Summary of Documents filed by CPR, D&H and NSR on October 12, 2004, Tab 2.

CERTIFICATE OF SERVICE

I hereby certify that, on this 1st day of February, 2005, I served the foregoing
Motion of Canadian Pacific Railway Company and Delaware and Hudson Railway Company,
Inc. to Dismiss Offer of Financial Assistance, by causing copies thereof to be delivered to:

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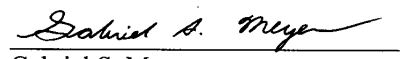
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