

237183

237184

237185

ORIGINAL

Before the

SURFACE TRANSPORTATION BOARD

ENTERED

Office of Proceedings

December 9, 2014

Part of

Public Record

Finance Docket No. 35873

NORFOLK SOUTHERN RAILWAY COMPANY-ACQUISITION AND OPERATION
-CERTAIN RAIL LINES OF THE DELAWARE AND HUDSON RAILWAY

Finance Docket No. 34209 (Sub-No. 1)

NORFOLK SOUTHERN RAILWAY COMPANY-TRACKAGE RIGHTS EXEMPTION-
DELAWARE AND HUDSON RAILWAY COMPANY, INC.

✓ Finance Docket No. 34562 (Sub-No. 1)

NORFOLK SOUTHERN RAILWAY COMPANY-TRACKAGE RIGHTS EXEMPTION-
DELAWARE AND HUDSON RAILWAY COMPANY, INC.

REPLY TO CLASSIFICATION AS MINOR TRANSACTION, REPLY
TO PETITION TO ESTABLISH PROCEDURAL SCHEDULE, REPLY
TO MOTION FOR PROTECTIVE ORDER, and PETITION TO
CONSOLIDATE PROCEEDINGS



GORDON P. MacDOUGALL
1025 Connecticut Ave. N.W.
Washington DC 20036

December 9, 2014

Attorney for Samuel J. Nasca

Before the
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35873

NORFOLK SOUTHERN RAILWAY COMPANY-ACQUISITION AND OPERATION
-CERTAIN RAIL LINES OF THE DELAWARE AND HUDSON RAILWAY

Finance Docket No. 34209 (Sub-No. 1)

NORFOLK SOUTHERN RAILWAY COMPANY-TRACKAGE RIGHTS EXEMPTION-
DELAWARE AND HUDSON RAILWAY COMPANY, INC.

Finance Docket No. 34562 (Sub-No. 1)

NORFOLK SOUTHERN RAILWAY COMPANY-TRACKAGE RIGHTS EXEMPTION-
DELAWARE AND HUDSON RAILWAY COMPANY, INC.

REPLY TO CLASSIFICATION AS MINOR TRANSACTION, REPLY
TO PETITION TO ESTABLISH PROCEDURAL SCHEDULE, REPLY
TO MOTION FOR PROTECTIVE ORDER, and PETITION TO
CONSOLIDATE PROCEEDINGS

Preliminary Statement

Samuel J. Nasca,^{1/} for and on behalf of SMART/Transportation Division, New York State Legislative Board (SMART/TD-NY), submits this pleading seeking relief in advance of the 30-day issuance by the Surface Transportation Board (STB, or Board) of the agency's decision whether to accept the principal application (FD 35873). The aforesaid 30-day period does not expire until December 26,

^{1/} New York State Legislative Director for SMART/TD, with offices at 35 Fuller Road, Albany, NY 12205.

2014.^{2/} This SMART/TD-NY pleading is not meant to substitute for whatever opportunity may be provided to respond to any Board Federal Register notice and/or decision.

SMART/TD is the collective bargaining representative for certain persons employed by Norfolk Southern Railway Company (NS), and by Delaware and Hudson Railway Company, Inc. (D&H). SMART/TD is successor to United Transportation Union (UTU).

Samuel J. Nasca, as UTU Legislative Director for New York, was an active participant in F.D. 34209 (served Dec. 3, 2002)^{3/}, and in F.D. No. 34562 (served Jan. 19, 2005).^{4/}

The Board should find the proposed transaction is not "minor" as it would constitute one of regional or national transportation significance within 49 U.S.C. 11325(a)(2), and the Board's regulations; the petition to establish NS's procedural schedule should be denied or revised; the motion for protective order should be denied. The Board should consolidate F.D. 35873 with the notices of exemption in F.D. Nos. 34209 (Sub-No. 1) and 34562 (Sub-No. 1),

^{2/} Petitioner does not agree with NS that the Board's decision is due December 17, 2014 (Pet. to Est. Proc. Sch., App. A); Although the NS pleading was filed November 17, the proposed application was amended and not completed until November 25. Accordingly, the Board's decision, with publication in the Federal Register, is due December 26, 2016. Cf. 49 U.S.C. 11325(a); F.R.Civ.P. §6; 49 CFR 1104.7.

^{3/} Considered together with F.D. 34551, Norfolk Southern Railway-Trackage Rights Exemption-Reading Blue Mountain & Northern Railroad Co.

^{4/} Combined with F.D. 34561, Canadian Pacific Railway-Trackage Rights Exemption-Norfolk Southern Railway, and AB-156 (Sub No. 25), Delaware & Hudson Railway-Discontinuance of Trackage Rights-Betw. Lanesboro, PA and Buffalo, NY. The instant NS pleading (NS-1, Vol. 1) is somewhat confused concerning the Jan. 19, 2005 date for F.D. 34562. Cf. p.10n.4; p.12n.7.

and provide for rejection/revocation, or redesignation as petitions for exemption.

ARGUMENT

1. Classification of Transaction. The transaction proposed in F.D. No. 35873 is not in any sense "minor." The term "minor" is not statutory, Cf. 49 U.S.C. 11325, but was created by the agency. The proposed transaction in the instant case comes within the significance meaning of 49 U.S.C. 11325(a)(2), (c). The case is of regional and national transportation significance--the applicable classification for the proposed transaction. Cf. 49 CFR 1180.2(b).

Delaware & Hudson Railway is a wholly-owned subsidiary of Canadian Pacific Railway, the latter having revenue for its rail entities approximating that which would qualify as a Class I carrier. The NS and Canadian Pacific are highly competitive transportation entities. The Board cannot find the proposed transaction will not clearly have any anti-competitive effects, the condition necessary to avoid the Board finding a significant transaction. Moreover, NS has not established that any anticompetitive effects can be clearly outweighed by the anticipated contribution to the public interest in meeting significant transportation needs.^{5/}

^{5/}NS acknowledges an argument can be made that the transaction has some anticompetitive effects, but NS contends these are outweighed by the "public benefits" of the transaction. (NS-1, Vol. 1, pp. 16, 74n.4). But "public benefits" are not a substitute for "public interest." The latter term, "public interest" is the statutory requirement. 49 U.S.C. 11324(d)(2). The NS-1 projects a disastrous effect upon rail employees--only 150 of D&H 254 employees covered by a collective bargaining agreement on lines involved with the transaction are projected to be continued by NS. The interest of

(Continued.....)

The proposed transaction satisfies the regional or national criteria so as to be labeled significant. The involved rail transportation is not only concentrated in Eastern Trunk Line territory, involving two industrial states (New York and Pennsylvania), but extends westward beyond the Buffalo gateway, as well as eastward into New England. The transaction is of regional and national transportation significance.

2. NS Proposed Procedural Schedule. The NS procedural schedule should be revised to reflect the significant classification of the transaction. 49 CFR 1180.4. Thereafter, the Board should solicit comments on the procedural schedule. 49 CFR 1180.4(b)(4)(i). In addition, provision should be made for oral hearing, as suggested by the governing statute. 49 U.S. 11324(a).

3. NS Proposed Protective Order. The Board should depart from its practice of withdrawing information from public access. From an examination of the NS pleadings thus far, it is clear that the deleted information has been deemed excessively secret.

4. Consolidation. The NS application acknowledges it is related to F.D. 34209 (Sub-No. 1) and to F.D. No. 34562 (Sub-No. 1). (NS-1, p.120). Portions of each notice of exemption are

rail employees). is part of the "public interest" required to be considered by the Board, in addition to the imposition of minimum protective conditions if an application is granted. United States v. Lowden, 308 U.S. 225 (1939). Likewise, employees are to be considered in determining the "public convenience and necessity." Great Northern Railway Co. Discontinuance of Service, 307 I.C.C. 59 (1959). Illinois Commerce Commission v. United States, 317 F.Supp. 1217 (N.D. Ill. 1971) (three-judge).

included in the application. (NS-1, 121-125, 127-32). The Board should consolidate the two notices of exemption with the application. However, since the two notices are self-executing, the Board should reject or revoke the two notices, or on the Board's own motion, the agency should deem both notices as petitions for exemption. It is essential that the status quo be maintained pending the Board's disposition of the entire transaction.

5. Employee Protection. NW would have the Board impose the so-called Wilmington Terminal conditions. (NS-1, 46). These conditions are inadequate, and were not designed for the type of transaction and related actions contemplated herein. This is not a typical line sale and trackage rights. Rather, for many of the lines in the proposed transaction, NS and D&H both operate and/or have ownership over the same trackage. On the present record, it is suggested that New York Dock are the appropriate conditions required by 49 U.S.C. 11326(a).

Respectfully submitted,



GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

December 9, 2014

Attorney for Samuel J. Nasca

Certificate of Service

I hereby certify I have served a copy of the foregoing upon all parties of record by first class mail postage-prepaid.

Washington DC



Gordon P. MacDougall