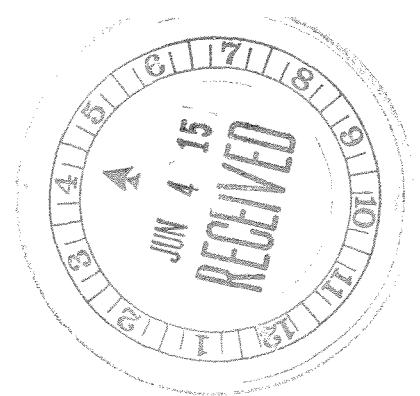


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Before the
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35873 ^{*/}

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

PETITION FOR RECONSIDERATION

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June 4, 2015

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*/Embraces also FD 34209 (Sub-No. 1), Norfolk S. Ry. Trackage
Rights Exemption-Delaware & Hudson Ry., and FD 34562 (Sub-No. 1),
Trackage Rights Exemption-Delaware & Hudson Ry.

PREFACE AND SUMMARY OF ARGUMENT

This is a petition for reconsideration of the Board's two-member 37-page line purchase decision dated and served May 15, 2015. The petition is directed in large part to the improper New York Dock-Wilmington Terminal employee conditions imposed for employees who may be adversely affected by the Board's approval of Norfolk Southern Railway Company (NSR) acquisition of 282.5-miles of line owned by Delaware & Hudson Railway (D&H).

Petitioner is SMART-TD/NY, representing certain railroad engineers, conductors, brakemen, and switchmen employed by NSR, D&H, and Canadian Pacific Railway Company (CP), primarily in New York and Pennsylvania.

The Board's May 15, 2015 decision constitutes material error, of which several important items are:

1. The decision errs in imposing the New York Dock-Wilmington Terminal employee conditions rather than the New York Dock employee conditions.

2. The decision errs in misunderstanding Wilmington Terminal as not requiring pre-consummation agreements for D&H and NSR employees with their respective managements.

3. The decision errs in failing to recognize the NRS-D&H purchase agreement, and the application, require NSR offer of hiring D&H employees affected by the transaction, taking the transaction out of New York Dock-Wilmington Terminal, in favor of New York Dock, and requires a pre-consummation agreement.

4. The decision errs in not requiring evidence required by 49 CFR 1180.6(a)(2)(v) for NSR and D&H employees prior to approving the transaction.

PREFACE AND SUMMARY OF ARGUMENT
(Continued)

5. The decision errs in finding D&H is not an applicant, or an initiating applicant; and the decision subsequently and inconsistently then finds D&H to be an applicant.

6. The decision errs in failing to include findings for the impact of the D&H Discontinuances upon the transaction.

7. The decision errs in failing to impose Oregon Short Line employee protection for discontinuances associated with the track-age rights noticed in Finance Docket Nos. 34209 (Sub-No. 1) and 34562 (Sub-No. 1).

PREFACE AND SUMMARY OF ARGUMENT
(Continued)

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CERTAIN RAIL LINES OF THE DELAWARE AND HUDSON RAILWAY COMPANY,
INC.

PETITION FOR RECONSIDERATION

Preliminary Statement

Samuel J. Nasca, ^{1/} for and on behalf of SMART/Transportation Division, New York State Legislative Board (SMART/TD-NY), submits this Petition for Reconsideration, of the Decision (No. 6), by the Surface Transportation Board (STB or Board), dated and served May 15, 2015, in the captioned proceeding. The contents of this Petition are deemed embraced also in the Petition for Stay, filed contemporaneously with this Petition for Reconsideration, both due and dated June 4, 2015. (Decision, 37 Cond. 14).

*/Embraces also FD 34209 (Sub-No. 1), Norfolk S. Ry. Trackage Rights Exemption-Delaware & Hudson Ry., and FD 34562 (Sub-No. 1), Trackage Rights Exemption-Delaware & Hudson Ry.

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

The Board should grant reconsideration, and deny the application. If the Board nevertheless approves the transaction, it should impose the New York Dock employee protection conditions for the purchase transaction, and Oregon Short Line for the discontinuance embraced in the two trackage rights transactions.

The 37-page Board decision, although discussing the claims of nine other objecting parties, nowhere sets forth the impact upon railroad employees if the proposed acquisition and operation of the 282.5-mile D&H South lines, and the 670 miles of D&H trackage rights, are transferred from the Canadian Pacific Railway Company (CP) subsidiary, Delaware & Hudson Railway Company, Inc. (D&H), to Norfolk Southern Railway Company (NSR), or in the case of the trackage rights, embraced in AB-156 (Sub-No. 27), discontinued all together. Instead, burrowed within the decision, the STB's labor concern is confined to the protective conditions claimed to be applicable to address any employee adverse impacts which may result from the acquisition and operation (purchase). (Decision, 28-30). The only labor heading is a three sentence conclusion. (Decision, 35-36). Accordingly, this petition for reconsideration is organized to deal first with employee impact and protection issues, and next briefly with the related findings and conclusions dealing with the proposed 670-mile D&H discontinuances.

I. THE DECISION ERRS IN ITS ABSENCE OF FINDINGS
AND CONCLUSIONS ON EMPLOYEE IMPACT AND THE
REQUIRED EMPLOYEE PROTECTION.

1. The Evidence. The Decision acknowledges that applications under §11323 must include the effect upon employees

in considerable detail.^{2/} (Decision 4). However, the Board now excuses NSR's failure to provide only limited information concerning anticipated adverse impact upon D&H employees, finding that D&H is not an applicant, although D&H counsel initially claimed D&H to be an applicant. (Decision, 5).^{3/}

Ironically, NSR argues, artfully, that it did provide all the information required by 49 CFR 1180.6(a)(2)(v), including information regarding impacts on D&H employees. (Decision, 4). It is clear that the NSR information did not include all, or even the most important, D&H employee information required by the Board's regulations. (Appl., Vol. I, 46-47, 79, 118-19).^{4/}

Although the STB's decision is silent on employee impact, the limited information which NSR did furnish is devastating for D&H employees. Some 254 D&H employees would be adversely affected; however, NSR has committed to offer employment to 150 of these D&H

^{2/}49 CFR 1180.6(a)(2)(v). "...the effect of the proposed transaction upon applicant carriers' employees (by craft or class), the geographic points where the impact will occur, the time frame of the impact (for at least 3 years after consolidation), and whether any employee protection agreements have been reached."

^{3/}The Board's finding that its regulations do not include D&H as an applicant runs counter to the agency's steadfast interpretation to the contrary over the years. The Decision's statement that in some previous applications "both" sides to a transaction have submitted the information, although not required, ignores the reality of the actual practice and construction of the involved regulation over the decades. The Board gives no citation to the contrary, among many dozens of such cases. (Decision, 5-6).

^{4/}The NSR and D&H employee data are in three lump sum categories, i.e. transportation, mechanical, and engineering. The critical missing data, particularly for D&H employees, concerns the class or craft, the location where the impact will occur, and the time frame of the impact. See: 49 CFR §1180.6(a)(2)(v). D&H does not file annual or other reports with the STB. The CP is the Class 1 reporting carrier.

employees, with 104 D&H employees left to exercise seniority elsewhere or perhaps seek employment on other (and distant) points on CP. (Ibid.). In any event, without the NSR job offers, displacement or dismissal allowances would be a considerable D&H and/or NSR liability. (Appl., 46, 79, 118-19). To the extent possible, NSR intends to give preferential hiring to D&H employees in staffing increased NSR operations. (Appl. Vol. I, 119). Moreover, on November 17, 2014, in a joint CP-NSR press release, the two carriers advised the public, that NSR would offer employment to about 150 D&H employees.^{5/} The NSR employment commitment is not gratuitous, but is an important condition to the NSR-D&H purchase agreement. (Appl. NS-1, Vol. II, 42):

§5.04 Employee Hiring Rights. Buyer may offer employment effective on the Closing Date, to all On-Line employees, including employees who are absent due to vacation, family leave, short-term disability or other approved leave of absence. Buyer shall advise seller of all meetings with On-Line Employees prior to the Closing Date, shall consult with Seller as to the manner in which such meetings will be held and such employment offers extended and shall permit representatives of Seller to attend any such meetings.

The NS-D&H purchase agreement mandates cooperation so as to mitigate the cost of labor protection, (Ibid.):

§5.05 Labor Protection. Both before and after the Closing, Buyer and Seller shall cooperate to mitigate Labor Protection. Buyer and Seller shall be responsible for Labor Protection resulting from the transactions consummated hereby as set forth in this Section, irrespective of which Party bears the burden of Labor Protection by statute or otherwise.

The absence of the required D&H employment data makes it

^{5/} Although not of record, the Board may take official notice of the three-page joint public announcement, attached hereto as App. 1.

difficult to estimate the remaining D&H system employment following the NSR-D&H sale transaction and accompanying 670-mile D&H discontinuances. The sketch maps in the application indicate few D&H operations will remain--principally those in the Albany-Schenectady, Saratoga Springs, Mechanicville, area, and the line from that area to Rouses Point, NY, near the Canadian border, over which NSR also enjoys trackage rights. (Appl. NS-1, Vol. I, 105, 107).

The Decision errs in its failure to enter findings concerning the impact of the NSR purchase upon D&H employees. Apart from NSR's specific aggregate acknowledgement that 254 D&H employees will be adversely affected, the silence of NSR in not listing the crafts and classes involved, the impact locations, and time frames, is apparent from the Board's conclusion to find its rules do not require such evidence, inasmuch as the Board finds D&H is not an applicant. The absence of employee information, particularly that for D&H, mandates by itself denial of the application. The Board's public interest determination--entered under 49 U.S.C. 11324(d) (2) (Decision, 14)--labor being an important part of the public interest as confirmed by U.S. Supreme Court rulings--cannot be sustained without employee evidence--evidence required by the Board's own rules. This error may also be considered, infra at 14-18, as a possible alternative to denial by reopening the proceeding for such D&H and other information.

2. Employee Protection. The Decision finds that the appropriate employee protective conditions for the NSR-D&H acquisition transaction are those set forth in New York Dock, as modified by Wilmington Terminal. (Decision, 29-30, 35-36). The

Board reasons that since the transaction is a line sale under 49 U.S.C. 11323(a)(2), New York Dock-Wilmington Terminal is the applicable standard regardless of the size of the involved railroads or the bargaining status of the employees. (Decision, 29). The decision rejected the SMART/TD-NY position urging the applicable employee conditions are New York Dock, standing alone, as the transaction is factually different from Wilmington Terminal. (Decision, 28).

(a) Wilmington Terminal/Pre-consummation Agreements. The Board says it has imposed Wilmington Terminal. But the Board, in fact, has not adhered to important Wilmington Terminal terms. The initial glaring error is that the STB in this case, without explanation, has added a sentence not appearing in the text of Wilmington Terminal. The Board now claims that consummation of the transaction cannot be delayed pending negotiation of the required employee agreements. The non-existent sentence added by the Board is underlined. (Decision, 29):

Wilmington Terminal modifies the New York Dock conditions by providing that no umbrella agreement is required for line sales under 49 U.S.C. §11323. Under Wilmington Terminal, each side of the transaction negotiates with its own employees: seller negotiating solely with seller's employees, and buyer negotiating solely with buyer's employees. Id. In addition, the negotiation of the respective employee agreements cannot delay the consummation of a line sale transaction. (emphasis supp.).

The Board has completely usurped the contrary language of Wilmington Terminal, and would deprive employees of their rights under 49 U.S.C. 11326(a). The actual language of Wilmington Terminal requires the agreement (or arbitration) prior to consum-

mation of the transaction. Wilmington Terminal sets forth the seller's pre-consummation requirement. 6 I.C.C.2d at 814-15:

After thoroughly considering this matter, we have concluded that in line sale cases under §11343 the seller must (1) provide full New York Dock protection to its affected employees; (2) arrive at an implementing agreement or agreements with them prior to consummation; and (3) impose no penalty for their decision not to take similar jobs under the rates of pay and work rules offered by the buyer. (emphasis supp.).

The buyer is subject to the same negotiation and agreement requirement prior to consummation, but little more unless provided by contract. 6 I.C.C.2d at 815:

The buyer must provide full New York Dock protection to its own employees and arrive at an implementing agreement or agreements with them prior to consummation. Unless otherwise provided by contract, the buyer's only obligation to the seller's employees will be to inform them of any availability of, and the terms and conditions of, employment. The buyer must fully inform the seller's employees of these prospects prior to consummation.

The Board's addition of a sentence to Wilmington Terminal, so as to permit consummation prior to finalizing agreements with the carriers' employees, brings to mind the disgraceful situation where NSR's predecessor, Southern Railway Company, as well as certain I.C.C. Staff, misread employee conditions in Southern Ry. Co.-Control-Central of Georgia Ry. Co., as to permit consummation in advance of protective arrangements, and elimination of certain longstanding protective conditions.^{6/}

^{6/} For the I.C.C.'s recitation of the unfortunate events, See: Appendix B to the cited decision. 331 I.C.C. 151, at 189-94 (1967).

(b) Wilmington Terminal-Umbrella Agreements. The Board is correct in finding Wilmington Terminal modifies New York Dock in that no umbrella agreement ordinarily is required for line sales under 49 U.S.C. §11323. (Decision, 29). However, the Board errs in its failure to acknowledge the pertinent wording in Wilmington Terminal that makes an exception to the non-requirement for an umbrella agreement where, as here, a contract mandates the buyer to hire seller employees made available by the transaction. The unless otherwise provided by contract language, making Wilmington Terminal inapplicable in contract situations, is set forth in Wilmington Terminal itself, as recited in the excerpt quoted immediately above, beginning at line, 4, "Unless otherwise provided by contract...." 6 I.C.C.2d at 814. Here, as noted, supra at 4-5, the NSR-D&H contract provides that NSR & D&H will participate in making job offers to D&H employees, and the NSR application sets forth the understanding that NSR will make job offers to 150 of the estimated 254 D&H employees who stand to be displaced or dismissed.^{7/} Accordingly, the contract and understanding between NSR and D&H for preferential hiring, takes employee protection out from under the Wilmington Terminal modification of New York Dock, supra, 4-5.

The separate opinion of ICC commissioner Lamboley noted the obvious that where the buy/sell agreement provided the buyer would offer employment to seller's employees, it logically follows that to facilitate achieving an implementing agreement, both buyer and

^{7/}SMART/TD-NY considers the joint public announcement that NS intends to hire 150 employees may have had an ameliorating effect upon local community opposition in New York to the transaction.

seller, as well as all interested employees and/or their representatives, are necessarily required to participate in the procedures. Wilmington Terminal, 6 I.C.C.2d 799, 829-34 (1990).

SMART/TD-NY does not suggest that D&H employees take all their D&H collective bargaining agreements with them to their new employment with NSR. The NSR employees may be affected by the absorption of D&H personnel. NSR and its unions may have provisions in their CBAs dealing with new employees. Moreover, SMART/TD is the CBA agent for employees on both D&H and NSR properties, such as to assist in resolution of any conflicting situations. NSR may not have complete discretion in the hiring and integration of D&H and NSR personnel.

The New York Dock employee conditions, standing alone, are appropriate in this proceeding for the line sale, whereas the Wilmington Terminal modification would be most inappropriate, especially since there is agreement for buyer to give job offers to a considerable number of seller's employees. If on reconsideration the Board nevertheless approves the application, it should be conditioned upon New York Dock. Furthermore, the Board should hold NSR to the representations made in its application concerning employee protection.

II. THE DECISION ERRS IN NOT PROVIDING EMPLOYEE
PROTECTION FOR THE DISCONTINUANCE OF NSR
TRACKAGE RIGHTS IN F.D. Nos. 34209/34562

The Board's decision authorizes NSR to "revise" two trackage rights operations, by discontinuing segments over which NSR has trackage rights, without the imposition of the standard Oregon Short Line employee conditions. (Decision, 29-30).

NSR's proposal involves two trackage rights acquired over D&H in 2002 and 2004. NSR's notice would discontinue the major portion of such rights, and leave remaining two short segments for continued operation. F.D. No. 34209 (Sub-No. 1) involves the Sunbury-Mechanicville line, over which NSR acquired trackage rights in 2002, where NSR will discontinue the Sunbury-Schenectady trackage rights segment, but will continue its trackage rights over the Schenectady-Mechanicville segment. (Decision, 28) (Appl. Vol. II, 130-52). F.D. No. 34562 (Sub-No. 1) involves the Saratoga Springs-East Binghamton line, over which NSR acquired trackage rights in 2004, where after discontinuance, NSR will continue the trackage rights between Saratoga and Schenectady. (Decision, 28) (Appl. Vol. II, 153-75).

The Board's decision denies the SMART/TD-NY request for Oregon Short Line employee conditions for the NSR discontinuances in F.D. Nos. 34209 (Sub-No.1) and 34562 (Sub-No. 1), on the ground, adopting NSR's argument, that the discontinuance portion of the two lines will be acquired in F.D. No. 35873 as part of the purchase, with NSR employees covered by the New York Dock-Wilmington Terminal employee conditions in that case. The decision finds that NSR does not need discontinuance authority for trackage rights that will be subsumed in a line sale transaction, citing Union Pac.R.R.-Amendment of Trackage Rights Exemption-BNSF Ry. (FD 30868 (Sub-No. 1) (July 20, 2006). (UP-Amend-BNSF). The Board adds that it imposes employee conditions on trackage rights when a carrier is exiting a market, whereas NSR by purchasing the segments would be enhancing its rights over the lines. (Decision, 28, 29-30). The decision imposes the N&W/Mendocino employee conditions

in the event NSR in the future discontinues the remaining two trackage rights segments. (Decision, 28,36).

The Board errs in not imposing employee protection conditions at this time for the NSR trackage rights discontinuances, the standard being Oregon Short Line. (Decision, 28). The long-maintained practice of the agency is not to embrace ancillary line acquisitions, abandonments, trackage rights, and other coordinations which are part of a line sale, merger, or control transaction, into the overall New York Dock employee conditions. The provisions of the various employee conditions for the various railroad operation changes are different in a number of respects. The NSR operation of a line under trackage rights may be quite different under line ownership, with differing employee impacts and at different time frames. For the consistent practice in this regard, see: Union Pacific/Southern Pacific Merger, 1 S.T.B. 233, 238, 452-54, 545-54 (1996); Burlington Northern Et Al--Merger-Santa Fe Pacific Et Al., 10 I.C.C.2d 661, 758-59 (1996); CSX Corp.Et Al.-Control-Conrail Inc. Et Al., 3 S.T.B. 196, 371-78 (1998); Norfolk Southern Corp.-Control-Norfolk & W. Ry. Co., 366 I.C.C. 173, 230-31 (1982). The Board's action deviates from settled treatment of employee conditions without adequate explanation.

The Board's citation to UP-Amend-BNSF is of no help to the Board in this instance. The citation is to an unopposed notice of exemption for the amendment of trackage rights which were never used or the agreement consummated, "UP states it has never used or consummated its right to operate over this track." UP-Amend-BNSF, 71 Fed. Reg. 41314 (July 20, 2006). Thus, there never was occasion

to consider Oregon Short Line issues. The carriers simply amended their trackage rights agreement, prior to use or consummation, and refiled notice of an amended agreement. Moreover, there is no indication from the STB's Office of Proceedings notice that a line sale was even involved.

The reviewing court has taken the STB to task for denying Oregon Short Line conditions where a proposed discontinuance was embraced within a trackage rights notice, a situation virtually identical with that in this NSR-D&H transaction. United Transp. Union v. Surface Transp. Bd., 363 F.3d 465 (D.C. Cir. 2004).

III. LACK OF THE EMPLOYEE DATA AFFECTS MORE THAN CONDITIONS; IT REQUIRES APPLICATION DENIAL.

In addition to employee protection, the issue of employee impact is part of the "public interest" or "public convenience and necessity" to be considered in determining whether to approve the transaction under the 49 U.S.C. §11324(d)(2) public interest standard, and also in carrying out the employee concerns in the rail transportation policy. 49 U.S.C. §10101(11). I.C.C. v. Railway Labor Assn., 315 U.S. 373 (1942); United States v. Lowden, 308 U.S. 225 (1939). Unless the required §1180.6(a)(2)(v) information is of record, by means of the application or otherwise, the application cannot be approved under the public interest test.

The Board declined to require applicant to offer evidence concerning the impact anticipated on D&H employees from the transaction in the detail specified by the standard employee information statement required for applications involving a purchase, lease, or contract to operate property of another rail

carrier by any number of rail carriers under 49 U.S.C. §11323(a)(-2).^{8/} The Board's required employee data for class 1 rail carrier line purchase, as here, is 49 C.F.R. 1180.6(a)(2)(v) (2014ed). Decision, 4n.6). However, the decision stated the employee information is only required of an "applicant," which the Board said means the parties initiating a transaction; and the Board finds NSR is the party initiating the transaction, so that NSR is the applicant, not D&H. (Decision, 4). Accordingly, the Board found D&H employee data under 49 CFR 1180.6(a)(2)(v) to be unnecessary. (Decision, 2-4). The Board added that the NSR application as filed was complete with respect to required employee impact information under §1180.6(a)(2)(v). The Board's employee information action constitutes material error.

(a) The Non-Applicant Excuse. The Board's ruling that only NSR is required to give the applicants' employment data, on the theory that only NSR initiated the transactions underlying the proceedings, is a lame excuse, and contrary to the agency's long-maintained practice. Over the many decades the buyer and seller, as well as merger and other consolidation candidates, have always considered themselves included in applicants' §1180.6(a)(2)(v) employee data, even though the application may be prepared by only one of the parties to the involved inter-carrier agreement seeking agency approval. Here, although the Board states NSR is the party initiating the transaction, such that D&H is not an applicant

^{8/}The Board's decision refers to the transaction as an application seeking approval under §11323-25 for the "acquisition and operation" of rail line. (Decision, 1, 36). This is incorrect. The term is not mentioned in § 11323-25. The term is embraced in 49 U.S.C. §10902 for a class II or class III rail carrier to acquire and operate a line.

(Decision, 5), in actual fact NSR, D&H, and CP requested permission to confer with each other in furnishing data in these proceedings, which the Board granted. (SMART/TD-NY Opp. Stmt., 4 n.5) (Jan. 21, 2015).

In this very proceeding, D&H considered itself an applicant under the Board's rules, when controversy arose, by formal filing on December 24, 2014, as the decision acknowledges. (Decision, 4 & n.4). See: ID 237328. Moreover, the term "applicant" in the Board's consolidation rules has the meaning of multiple entities, as "parties" which would include both NSR and D&H. 49 CFR 1180.3(a):

§1180.3 Definitions

(a) Applicant. The term applicant means the parties initiating a transaction, but does not include a wholly owned direct or indirect subsidiary of an applicant if that subsidiary is not a rail carrier.

The Board errs in changing its practice of considering both carrier parties to a line purchase as the applicant initiating a transaction, and thus requiring compliance with the Board's rule, 49 CFR 1180.6(a)(2)(v), concerning employee impact information. The Decision cites no examples comparable to the instant proceeding where the agency found either the buyer or seller carrier not to be a party initiating the transaction.^{2/}

^{2/}The decision's reference to the Board's initial acceptance of the application in F.D. No. 35087, Canadian National Railway Company and Grand Trunk Corporation-Control-EJ&E West Company (Nov. 26, 2007) is not to the contrary. (Decision, 5-6). Although one of the applicants (Grand Trunk Corporation) was a non-carrier, but an applicant, the entity to be controlled, EJ&E West Company, was a non-carrier. There was no mention about whether the latter was likewise an applicant; however, EJ&E West Company controlled a carrier, Elgin Joliet & Eastern Railway Company.

The Board's action here is arbitrary and capricious in finding D&H is not an initiating party to the proceeding. It takes two parties to initiate a contract. The application claims no NSR employees would be adversely affected, yet some 254 D&H employees are to be affected.

(b) Inconsistent Position. Contrary to its finding D&H is not an applicant early on in the decision (Decision, 3-6), the Board subsequently in its decision finds to the contrary, and that more than one applicant exists, mentioning "their application." (Decision, 37-Cond. No. 8). Clearly, the STB's opposite conclusions on the applicant and the meaning thereof require a thorough reconsideration of the ultimate conclusions and findings (Ibid.):

8. Applicants must adhere to their representations that they will implement the two voluntary commercial agreements discussed in their application, the Transitional Divisions and Routing Agreement and the Direct Short Line Access Agreement.

The two agreements entered into by NSR and D&H NSR and D&H are important and, as stated in the decision, are part of "their application." (Appl. Vol. II, 102-13, 114-20). (Decision, 18-19 37).

The Board's contradictory directive to "the applicants" in its ultimate order belies the capricious conduct of the agency.

(c) Other Consequences. The Board's error in denying applicant status to an initiating carrier party in a transaction where the carrier is ruled not to have initiated the transaction, can be very damaging to the interest of railroad employees in many agency consolidation proceedings. The STB's general consolidation rules state the Board is required to provide protection for the rail

employees of applicants. 49 CFR 1180.1(e) (2014ed). Under this standard the Board would not be required to accord protection for D&H employees. The Board's policy is not to give protective conditions for non-applicant employees in consolidation transactions. For citations, see: CSX Corp. Et Al.-Control-Conrail Inc. Et Al., 3 S.T.B. 196, 332 (1998).^{10/}

(d) Lack of D&H Data. The Decision finds that SMART/TD-NY failed to establish any deficiency in the employee impact information submitted with the application; the Board adds that the application included information about impacts on D&H employees. (Decision, 6 & n.14). NSR argues that it provided all of the labor impact information required under 49 CFR §1180.6(a)(2)(v), including information regarding impacts on D&H employees. (Decision, 4).

The Board's finding that SMART/TD-NY did not establish any deficiency in D&H data is grossly incorrect and capricious. SMART/TD-NY pointed out early, in its January 5, 2015 petition for reconsideration, particularly the missing §1180.6(a)(2)(v) information, and the need for this information for union representatives as well as for communities. (SMART/TD-NY, 1/5/15, 4-5).

SMART/TD-NY in its January 21, 2015 Opposition Statement, renewed its request for the critical D&H employee data. (SMART/TD-NY, 1/21/15, 6-7). It is essential that employee representatives have more D&H employment data than the lump sum of 254 persons to be adversely affected. As required by the Board's long-maintained employee regulations, data as to craft or class, the work loca-

^{10/} Railway employee organizations do not agree with this policy, and have challenged it, with success in joint terminals. Cf. Black v. Interstate Commerce Commission, 814 F.2d 769 (D.C. Cir. 1987).

tions, and the time frames, are necessary for the collective bargaining representatives, as for the Board itself.

The absence of relevant employee information requires denial of the application for failure to enable necessary statutory and subsidiary findings under 49 U.S.C. 11324(d) (2).

IV. THE POSSIBLE USE OF THE CLASS EXEMPTION
FOR THE 670-MILE D&H DISCONTINUANCES
DOES NOT WARRANT EXCLUSION FROM FINDINGS

The Board states both NSR and D&H appear to acknowledge that the 670-Mile D&H D&H discontinuances over nine lines involving seven carriers are not completely unrelated to the NSR's acquisition of 282.5-mile D&H lines. Yet the Board declines to consider the impact of the D&H discontinuances upon its findings in the instant proceeding. The decision reasons that since the D&H discontinuances could be accomplished independently under a class exemption, and the fact that a number of the D&H trackage rights have not been utilized in recent years, there is no cause to consider the 670-mile discontinuances in the instant proceeding. (Decision, 15-17).

The Board errs in failing to consider the impact of the D&H discontinuances. They affect the competitive and employee effects of NSR and D&H. The fact that the discontinuances could be accomplished independently is no basis for exclusion. Simply because the discontinuances "could" be made effectively does not mean they "would" without the NSR purchase. In like manner, the fact that lines have not seen recent use does not imply that the lines do not serve as a restraint for competitive lines.

The Board's lack of findings, including employee impacts,

with consideration of the D&H discontinuances constitutes material error.

CONCLUSION

The Board should grant reconsideration for its May 15, 2015 decision, and thereafter deny the application. If not denied, the Board should impose the New York Dock and Oregon Short Line conditions for the protection of employees.

Respectfully submitted,



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June 4, 2015

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Certificate of Service

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

Washington DC


Gordon P. MacDougall

News / Norfolk Southern and the Delaware & Hudson propose rail line transaction to support rail service and the economy in the Northeast

NORFOLK SOUTHERN AND THE DELAWARE & HUDSON PROPOSE RAIL LINE TRANSACTION TO SUPPORT RAIL SERVICE AND THE ECONOMY IN THE NORTHEAST

Norfolk, VA., and Calgary, Alberta - Nov 17, 2014

NORFOLK, VA., and CALGARY, ALBERTA – Norfolk Southern Corp. (NS) and the Delaware & Hudson Railway Co. (D&H), a subsidiary of Canadian Pacific Railway (CP) today announced a proposed transaction under which NS would acquire 282.55 miles of D&H rail line between Sunbury, Pa., and Schenectady, N.Y. The \$217 million sale, subject to approval by the U.S. Surface Transportation Board, would benefit customers, competition, and jobs in the northeastern United States.

"Acquiring this portion of the D&H provides for a more efficient rail transportation system by consolidating freight operations with a single carrier," said NS CEO Wick Moorman. "Aligning the D&H track with Norfolk Southern's 22-state network allows us to connect businesses in central Pennsylvania, upstate New York and New England with domestic and international markets while enhancing the region's competitive rail and surface transportation market."

The lines to be acquired connect with NS' network at Sunbury, Pa., and Binghamton, N.Y., and would give NS single-line routes from Chicago and the southeastern United States to Albany, N.Y., and NS' recently built Mechanicville, N.Y., intermodal terminal. NS also would gain an enhanced connection to its joint venture subsidiary Pan Am Southern, which services New England markets. Additionally, NS would acquire D&H's car shop in Binghamton along with other facilities along the corridor.

"As we have stated in recent months, we've been in the process of negotiating the final details for the potential sale of the southern portion of our D&H line," said CP CEO E. Hunter Harrison. "We are pleased to find a prospective buyer in Norfolk Southern."

As part of the transaction, NS would retain and modify overhead trackage rights on the line between Schenectady, Crescent, and Mechanicville, N.Y., as well as Saratoga Springs, N.Y. The D&H would retain local access to serve customers in Schenectady and would maintain its access to shippers in Buffalo.

NS intends to retain its current employees and offer employment to about 150 D&H employees currently working in this area. Any adversely affected employees will be entitled to standard labor protections.

"This acquisition would preserve good-paying railroad jobs and set the stage for economic growth," said John Friedmann, NS vice president of strategic planning. "Absent this transaction and its efficiencies, we are concerned that rail service along much of New York's Southern Tier would be threatened with losing a crucial link to New England."

NS has submitted an application for the transaction to the U.S. Surface Transportation Board. The rail companies are proposing a schedule that would lead to approval during the second quarter of 2015.

Norfolk Southern Corporation (NYSE: NSC) is one of the nation's premier transportation companies. Its Norfolk Southern Railway Company subsidiary operates approximately 20,000 route miles in 22 states and the District of Columbia, serves every major container port in the eastern United States, and provides efficient connections to other rail carriers. Norfolk Southern operates the most extensive intermodal network in the East and is a major transporter of coal, automotive, and industrial products.

Canadian Pacific (TSX:CP)(NYSE:CP) is a transcontinental railway in Canada and the United States with direct links to eight major ports, including Vancouver and Montreal, providing North American customers a competitive rail service with access to key markets in every corner of the globe. CP is growing with its customers, offering a suite of freight transportation services, logistics solutions and supply chain expertise. Visit cpr.ca to see the rail advantages of Canadian Pacific.

This news release contains certain "forward-looking statements" within the meaning of applicable securities laws relating, but not limited, to NS' proposed acquisition of a portion of D&H's rail line, CP's and NS' operations, priorities and plans, anticipated financial performance, business prospects, planned capital expenditures, programs and strategies. These forward-looking statements also include, but are not limited to, statements concerning expectations, beliefs, plans, goals, objectives, assumptions and statements about possible future events, conditions, and results of operations or performance. Forward-looking statements may contain statements with words such as "anticipate", "believe", "expect", "plan" or similar words suggesting future outcomes.

Undue reliance should not be placed on forward-looking statements as actual results may differ materially from the forward-looking statements. Forward-looking statements are not a guarantee of future performance. Among other risks, there can be no guarantee that the acquisition will be completed within the anticipated time frame or at all or that the expected benefits of the acquisition will be realized. By their nature, CP's and NS' forward-looking statements involve numerous assumptions, inherent risks and uncertainties that could cause actual results to differ materially from the forward-looking statements, including but not limited to the following factors: the occurrence of any event, change or other circumstances that could give rise to the termination of the agreement between CP and NS; the outcome of any legal proceedings that may be instituted against CP or NS and others following announcement of this agreement; the inability to complete the acquisition due to the failure to satisfy the conditions to the acquisition; risks that the proposed transaction disrupts current plans and operations; the ability to recognize the benefits of the acquisition; legislative, regulatory and economic developments, including regulation of rates; changes in business strategies; general North American and global economic, credit and business conditions; risks in

agricultural production such as weather conditions and insect populations, the availability and price of energy commodities, the effects of competition and pricing pressures, industry capacity; shifts in market demand; inflation; changes in taxes and tax rates; potential increases in maintenance and operating costs; labor disputes and potential difficulties in employee retention as a result of the acquisition; risks and liabilities arising from derailments, transportation of dangerous goods; timing of completion of capital and maintenance projects; currency and interest rate fluctuations; effects of changes in market conditions; various events that could disrupt operations, including severe weather, droughts, floods, avalanches and earthquakes as well as security threats and governmental responses thereto, and technological changes. The foregoing list of factors is not exhaustive.

These and/or other factors are detailed from time to time in reports filed by CP with securities regulators in Canada and the United States and in reports filed by NS with the SEC. Reference should be made to "Management's Discussion and Analysis" in CP's annual and interim reports, Annual Information Form and Form 40-F. Reference should also be made to NS' Annual Report on Form 10-K for the year ended December 31, 2013. Readers are cautioned not to place undue reliance on forward-looking statements. Forward-looking statements are based on current expectations, estimates and projections and it is possible that predictions, forecasts, projections, and other forms of forward-looking statements will not be achieved by CP or NS or will be delayed or materially altered. Except as required by law, CP and NS undertake no obligation to update publicly or otherwise revise any forward-looking statements, whether as a result of new information, future events or otherwise.

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