

ORIGINAL

Before the  
SURFACE TRANSPORTATION BOARD



*DID# 0102001001* Finance Docket No. 34209 *205911*

NORFOLK SOUTHERN RAILWAY COMPANY--TRACKAGE RIGHTS  
EXEMPTION--DELAWARE AND HUDSON RAILWAY COMPANY--  
BETWEEN SUNBURY, PA AND MECHANICSVILLE, NY

*DID# 0102001002* Finance Docket No. 34225 *205920*

NORFOLK SOUTHERN RAILWAY COMPANY--TRACKAGE RIGHTS  
EXEMPTION--READING BLUE MOUNTAIN AND NORTHERN RAILROAD  
COMPANY--BETWEEN LEHIGHTON YARD AND DUPONT, PA

PETITION TO REJECT/REVOKE, AND PETITION<sup>\*/</sup>  
TO STAY OPERATION OF EXEMPTIONS

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

July 23, 2002

Attorney for Samuel J. Nasca

<sup>\*/</sup> Expedited handling is requested as the exemptions are published to become effective Friday, July 26, 2002, with employees advised the exemptions may become operative August 1, 2002.

Before the  
SURFACE TRANSPORTATION BOARD

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Preliminary Statement

Samuel J. Nasca,<sup>1/</sup> for and on behalf of United Transportation Union-New York State Legislative Board (UTU-NY), submits this petition to reject and/or revoke the notices of exemption by which Norfolk Southern Railway Company (NS) would (1) in Finance Docket No. 34209, operate by trackage rights over the line of Delaware and Hudson Railway Company, Inc. d/b/a Canadian Pacific Railway (CPR), between Sunbury, PA, and Mechanicsville, NY, a distance of 284.6 miles, and (2) in Finance Docket No. 34225, operate by trackage rights over the line of Reading Blue Mountain and North-

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<sup>1/</sup> New York State Legislative Director for United Transportation Union, with offices at 35 Fuller Road, Albany NY 12205.

ern Railroad Company (RBMN), between Lehighton Yard and Dupont, PA, a distance of 56.7 miles.

The two proceedings are interrelated, as acknowledged by NS. (F.D. No. 34209, Notice, 4; F.D. No. 34225, Notice, 3-4). The color-coded map for the NS/CPR trackage rights (F.D. No. 34209) is attached as Appendix 1; the color-coded map for the NS/RBMN trackage rights (F.D. No. 34225) is attached as Appendix 2. The Board on its own initiative should consolidated the two proceedings.

Both notices of exemption were filed July 5, and became effective July 12, 2002, pursuant to the trackage rights class exemption.<sup>2/</sup> However, both notices state the trackage rights will become effective no sooner than the latter of (1) the effective date of the Notice, or (2) the expiration of any labor notice period to which NS may be subject. The notices state NS is agreeable to the so-called N&W Trackage employee conditions,<sup>3/</sup> which provide a minimum 20-day notice period. NS posted notices for certain employees on July 5, 2002, as set forth in Appendix 3. Accordingly, UTU-NY presumes the NS notices call for exercise of the trackage rights no sooner than Friday, July 26, 2002. NS personnel have advised UTU-NY that the carrier does not plan to

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<sup>2/</sup> 49 CFR § 1180.2(d)(7), .4(g); Railroad Consolidation Procedures, 1 I.C.C.2d 270 (1985), rev. den. Illinois Commerce Com'n v. ICC, 819 F.2d 311 (D.C. Cir. 1987).

<sup>3/</sup> Norfolk and Western Ry. Co.-Trackage Rights-BN, 354 I.C.C. 605 (1978), mod. Mendocino Coast Ry., Inc.-Lease and Operate, 360 I.C.C. 653 (1980).

implement the rights prior to August 1, 2002.<sup>4/</sup>

#### Relief Requested

The Board should reject the two notices for failure to comply with the Board's rules governing the filling of notices under the trackage rights class exemption. If the notices are not rejected because the defects have been cured or otherwise, the exemptions should be revoked. The revocation should extend to the imposition of the so-called New York Dock employee conditions in lieu of N&W Trackage. Pending disposition of this petition for partial revocation, the Board should stay the operation of the exemptions.

#### Discovery Request

UTU-NY has served a request for discovery, which is attached hereto. 49 CFR § 1121.2. Upon completion of discovery, UTU-NY will supplement this petition to revoke. 49 CFR § 1121.2, 1121.3(c).

#### I. THE NOTICES SHOULD BE REJECTED.

The notices should be rejected for failure to comply with the Board's regulations. First, NS failed to provide the agreements entered into, and proposed to be entered into, pertaining to the proposed transaction. 49 CFR § 1180.6(a)(7)(ii). For example, the trackage rights agreement with Delaware and Hudson Railway Company, Inc. d/b/a Canadian Pacific Railway (CPR), recites agreements

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<sup>4/</sup> UTU-NY does not believe the 20-days notice period to be applicable. Instead, the 90-day New York Dock notice period and the required prior implementing agreement govern these transactions.

dated May 5, 1998, April 11, 1999, and June 16, 1999, leading to a Northeast U.S. Restructuring Agreement ("Restructuring Agreement"), pursuant to a Term Sheet dated February 13, 2002. (F.D. No. 34209, Ex. 2, 1-2). Indeed, the NS/CPR trackage rights agreement is part of the Restructuring Agreement. (Ibid., §§ 1.1, 1.2, 2.1, 5.6, 7.2, 12.1, 12.2, 12.3). Moreover, even the NS/RBMN trackage rights agreement is tied to the Restructuring Agreement between NS and CPR. (F.D. No. 34225, Ex. 2, 1; § 21(d)). The failure of NS to file the Restructuring Agreement, along with the ancillary agreements mentioned in the trackage rights agreements, is in violation of Board's specific rules for the trackage rights class exemption, and is cause for rejecting the two notices.

Second, NS has submitted a redacted copy of the agreement with RBMN in F. D. No. 34225, Notice, Ex. 2. Protestant UTU-NY is unaware of any petition or request for confidentiality. 49 CFR § 1114.21, et seq. Indeed, protestant desires to review the unredacted material, which is not even on file with the agency as part of the required NS filing.

## II. THE EXEMPTIONS SHOULD BE REVOKED.

The exemptions should be revoked so as to impose the New York Dock (NYD) employee conditions.<sup>5/</sup> It is clear that the Restructuring Agreement constitutes a major transaction, involving construction, haulage, trackage rights, and abandonment. The equitable treatment of affected employees involves more than a summary 20-days notice and consummation prior to reaching an implementing

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<sup>5/</sup>New York Dock Ry.-Control-Brooklyn Eastern Dist, 360 I.C.C. 60 (1979), aff'd New York Dock Ry. v. U.S., 609 F.2d 83 (2d Cir. 1979).

agreement. Rather, the full 90-days notice period and a pre-consummation implementing agreement are required.

The breath of the impact upon NS employees is indicated by NS's N&W Trackage notice, dated July 5, 2002, and attached as Appendix 3: Elimination of 21 positions at Renovo, PA, and 6 positions at Olean, NY; redirect 12 positions between Buffalo and Binghamton, NY, and establish crews for 12 persons at Binghamton, with 4 extra board positions.

The maps submitted with the NS notices (Appendix 1; Appendix 2) do not set forth present routing between Buffalo and Enola/Allentown over the NS line via Olean-Renovo-Williamsport-Sunbury. The elimination of NS employees at Renovo suggests discontinuance of all service at that point, amounting to a de facto abandonment.

The essence of the trackage rights agreements is not only to reroute Buffalo-Enola/Allentown traffic in favor of Binghamton, but also to permit NS to acquire trackage rights over CPR between Sunbury- Binghamton-Mechanicsville, with the diversion of traffic potential from CPR haulage. Similarly, CPR haulage for NS over the RBMN route between Dupont and Lehighton will be positioned for substitution by NS operating over RBMN by trackage rights.

CPR(D&H) UTU representatives were not served with any N&W Trackage notice, unlike the notice given NS employees in Appendix 3. Likewise, RBMN employees represented by UTU were not afforded notice.

Appendix 4 is a synopsis of press releases issued July 2, 2002, by NS and CPR, and placed on the UTU's website. Appendix 5 is an item issued July 10, 2002 by the Journal of Commerce, indicating initial diversion of two manifest trains between

Buffalo and Allentown. These trains are Nos. 40 and 41, presently operating via Renovo, PA. Appendix 6 is the July 2, 2002 CPR press release, indicating new construction, and the modification of existing trackage and haulage agreements.

It is apparent to UTU-NY, as it should be to the Board, that the Restructuring Agreement, of which the instant trackage rights filings are merely a component, obviously constitutes part of the division of Consolidated Rail Corporation between CSX Transportation, Inc. and NS. The May 5, 1998 arrangement mentioned in the NS/CPR Agreement (F.D. No. 34209, Notice, Ex. 2, 1), was entered into prior to the June 4, 1998 oral argument in F.D. No. 33388, CSXT/NS-Control-Conrail. Accordingly, the Restructuring Agreement, and the involved trackage rights, should come under the employee conditions prescribed in F.D. No. 33388, which are NYD. Of course, the Restructuring Agreement itself comes within 49 U.S.C. 11323, and is subject to NYD.

The Board may revoke an exemption where the employee protective conditions are inadequate, without addressing elements under the rail transportation policy, by virtue of 49 U.S.C. 10502(g). The Board should do so here. The exemptions should be revoked, so as to impose NYD employee conditions.

### III. THE OPERATION OF THE EXEMPTIONS SHOULD BE STAYED.

The operation of the exemptions should be stayed pending determination of this petition to reject/revoke. UTU-NY has a high probability of success on the merits that this major restructuring comes under NYD, rather than N&W Trackage.

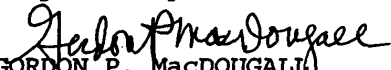
The injury to employees by failure to accord NYD is obvious. Loss of living standards cannot be recompensed by damages at a later date. The differing level of protection is mandated precisely because damages cannot afford an adequate remedy for losses pending determination of benefits. If compensation were an adequate remedy, there would never be a need for pre-consummation implementing arrangements, and for a longer notice period.

#### CONCLUSION

The Board should reject the notices of exemption; if not rejected, the exemptions should be revoked so as to impose NYD employee conditions.

The operation of the exemptions should be stayed pending decision on the petition to reject/revoke.

Respectfully submitted,

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

July 23, 2002

Attorney for Samuel J. Nasca

#### Certificate of Service

I hereby certify I have served a copy of the foregoing upon counsel for NS, John V. Edwards, Three Commercial Place, Norfolk VA 23510, by first class mail postage-prepaid, and with telephone advice.

Washington DC

  
Gordon P. MacDougall

LAW OFFICES  
GORDON P. MACDOUGALL  
1028 CONNECTICUT AVE. N. W.  
WASHINGTON, D. C. 20036

TELEPHONE  
AREA CODE 202  
228-9708

July 23, 2002

Mr. John V. Edwards  
Norfolk Southern Corporation  
Three Commercial Place  
Norfolk VA 23510

Re: STB F.D. No. 34209, NS-Tr.Rts.-D&H Ry.  
STB F.D. No. 34225, NS-Tr.RTs.-RBMN RR

Dear Mr. Edwards:

This is to request a copy of the agreements listed in F.D. No. 34209, Notice, Ex. 2, pp. 1-2, dated May 5, 1998, April 11, 1999, June 16, 1999, and Northeast U.S. Restructuring Agreement (together with Term Sheet dated February 13, 2002).

Please designate any portions of the agreements you wish to claim confidentiality, and we can attempt an understanding on this score.

You are requested to furnish these documents no later than August 7, 2002. 49 CFR 1114.26(b), 1114.30(a). If you desire not to mail these materials, they may be produced for my copying at my office.

If you have any question concerning this discovery request which you believe I may be able to answer or if I otherwise can be of assistance, please let me know.

Very truly yours,



**MAP WILL BE SCANNED  
AT A LATER DATE**

**MAP WILL BE SCANNED  
AT A LATER DATE**

## NORFOLK SOUTHERN RAILWAY COMPANY

## NOTICE TO EMPLOYEES

July 5, 2002

Norfolk Southern Railway Company (NSR) has filed with the Surface Transportation Board (STB) in STB F.D. No. 34209, pursuant to the provisions of 49 CFR Parts 1180.2(d)(7) and 1180.4(g), a verified Notice of Exemption for the grant of overhead trackage rights over approximately 284.6 miles of the Freight Main Line lines of the Delaware and Hudson Railway Company, Inc. d/b/a Canadian Pacific Railway (CPR), between Norfolk Southern's connection with CPR at MP 752.0 near Sunbury, Pennsylvania and CPR's connection with the Guilford Rail System (GTI) at milepost 467.40 at Mechanicville, New York.

In a related transaction, NSR has also filed with the STB in STB F. D. No. 34225, also pursuant to 49 C.F.R. Parts 1180.2(d)(7) and 1180.4(g), a Verified Notice of Exemption for the grant of overhead trackage rights over approximately 56.7 miles of the Lehigh Line of The Reading Blue Mountain and Northern Railroad Company (RBMN), between MP 119.3 in Leighton Yard and MP 175.5 in Dupont, Pennsylvania.

The purpose of these transactions is to permit NSR to more efficiently access and serve customers in New York State, the New England United States and Eastern Canadian rail market (STB F.D. No. 34209) and to efficiently route traffic between Allentown, PA and points in New York State (STB F.D. No. 34225).

Implementation of this transaction is expected to eventually result in the following rearrangement of forces:

**Reductions:**

Eliminate pool at Renovo and release eight engineers and eight conductors;

Eliminate the Renovo extra boards consisting of two engineers and three conductors;

Eliminate three helper assignments at Olean, NY consisting of three engineers and three conductors;

At Buffalo, redirect six engineers and six conductors to service between Buffalo and Binghamton.

**Additions:**

Establish a pool of six crews at Binghamton for service between Binghamton/Allentown and Binghamton/Enola consisting of six engineers and six conductors;

Establish extra list consisting of two engineers and two conductors at Binghamton.

Any employee who should be adversely affected will be entitled to the employee protective conditions customarily prescribed by the STB in transactions of this type. These requirements are described in its decisions in *Norfolk and Western Ry. Co.-Trackage Rights-BN*, 354 I.C.C. 605 (1978) as modified in *Mendocino Coast Ry. Inc. - Lease and Operate*, 360 I.C.C. 653 (1980).

This notice is served pursuant to Article I, Section 4 of the applicable conditions.

/s/ H. R. Mobley  
Assistant Vice President Labor Relations  
Norfolk Southern Railway Company

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UTU-NY  
Appendix 3

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*The Voice of Transportation Labor*  
**UNITED TRANSPORTATION UNION**

## **CPR, NS streamline in northeast U.S.**

CALGARY, Alberta and NORFOLK, Va. -- Norfolk Southern Corporation (NS) and Canadian Pacific Railway (CPR) said yesterday (July 2) that CPR has granted NS trackage rights between Sunbury, Pa., and Mechanicville, N.Y., as part of a continuing joint effort by both companies to improve freight service to upstate New York, northern Pennsylvania and New England.

"This agreement is part of our mission to build strong strategic partnerships with North American railways that deliver value to customers and shareholders alike," said Fred Green, CPR's Senior Vice President of Marketing & Sales. "The agreement is in line with CPR's strategy to maximize the value of its network in the Northeastern U.S. by creating additional traffic density on our Delaware & Hudson (D&H) lines, which will aid in improving the financial performance of the D&H substantially."

"This agreement further improves our competitive routes between New England and the Midwest and Southeast," said Jim McClellan, Norfolk Southern's senior vice president Strategic Planning. "We also gain a new, direct and efficient route between central New York state and points south."

To accommodate the increase in traffic, a new passing siding will be constructed on CPR's D&H line at Clarks Summit, Pa. CPR, NS and the Commonwealth of Pennsylvania will jointly fund the \$2-million project. Additionally, the new agreement modifies existing trackage and haulage agreements.

The agreement expands on the successful partnership between NS and CPR in the northeast. In 1998, NS and CPR completed a \$12-million upgrade of the Sunbury Line between Sunbury and Scranton. In 2001, CPR and NS introduced a new intermodal service between the Port of New York/New Jersey, Montreal and Toronto.

Canadian Pacific Railway is North America's first transcontinental railway, and is the only

transcontinental carrier with direct service to the U.S. Eastern Seaboard. CPR's 14,000-mile network serves the principal centres of Canada, from Montreal to Vancouver, as well as the U.S. Midwest and Northeast regions, and links North America with Europe and the Pacific Rim. Alliances with other carriers extend CPR's market reach beyond its own network in the U.S., and into the major business centres of Mexico. For more information, visit CPR's website at <http://www.cpr.ca>.

Norfolk Southern Corporation is a Virginia-based holding company with headquarters in Norfolk. It owns a major freight railroad, Norfolk Southern Railway Company, which operates approximately 21,500 route miles in 22 states, the District of Columbia and the province of Ontario. For more information, visit Norfolk Southern's website at <http://www.nscorp.com>.

July 3, 2002

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The Journal of Commerce

**Press the Print button on browser to print  
this page**

## **Norfolk Southern acquires Pa. trackage rights**

Updated 3:37 p.m. ET, Wed Jul 10, 2002

JoC ONLINE

In a move that helps streamline its operations in the northeast, Norfolk Southern has reached an agreement with the Reading Blue Mountain & Northern Railroad that will give it trackage rights over more than 50 miles of track in northeast Pennsylvania.

The deal grants NS access to approximately 56.7 miles of RBM&N track from Lehighton to Dupont Junction.

The move coincides with the recent agreement between NS and CP Rail that gives NS trackage rights over CP's Delaware & Hudson Freight Main Line between Sunbury, Pa. and Mechanicville, N.Y.

The trackage rights will allow NS to operate trains directly between Allentown, Pa. and Binghamton, N.Y., both sites of large classification yards.

Norfolk Southern initially plans to reroute two manifest freight trains between Buffalo, N.Y. and Allentown by utilizing the trackage rights over CP Rail's D&H line from Binghamton to Dupont Junction, then over the RBM&N from Dupont Junction to Lehighton, where the trains return to NS rails.

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UTU-NY  
Appendix 5

CANADIAN  
PACIFIC  
RAILWAY  
Logo: 1996

## Canadian Pacific Railway And Norfolk Southern Streamline Operations In Northeast US

July 2, 2002  
Calgary, AB and Norfolk, VA

Norfolk Southern Corporation (NYSE: NSC) and Canadian Pacific Railway (NYSE/TSE: CP) today announced that CPR has granted Norfolk Southern Railway Company (NS) trackage rights between Sunbury, Pennsylvania and Mechanicville, New York. The granting of trackage rights is part of a continuing joint effort by both companies to improve freight service to upstate New York, northern Pennsylvania and New England. <?xml:namespace prefix = o ns = "urn:schemas-microsoft-com:office:office" />

"This agreement is part of our mission to build strong strategic partnerships with North American railways that deliver value to customers and shareholders alike," said Fred Green, CPR's Senior Vice President of Marketing & Sales. "The agreement is in line with CPR's strategy to maximize the value of its network in the Northeastern U.S. by creating additional traffic density on our Delaware & Hudson (D&H) lines, which will aid in improving the financial performance of the D&H substantially."

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U.S., and into the major business centres of Mexico.

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**MEDIA CONTACTS:**

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**Phone: (514) 395-7591**

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**Rudy Husband,**  
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Close

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