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August 9, 2002

Via Overnight Courier

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

ENTERED
Office of Proceedings

AUG 12 2002

Part of
Public Record

Re: STB F.D. No. 34209, Norfolk Southern Railway Company – Trackage Rights Exemption–
Delaware and Hudson Railway Company, Inc.

Re: STB F.D. No. 34225, Norfolk Southern Railway Company – Trackage Rights Exemption–
The Reading Blue Mountain and Northern Railroad Company

Dear Secretary Williams:

Enclosed for filing please find an original and ten copies of the Response of Norfolk Southern Railway Company to UTU-NY's Petition to Reject/Revoke, and Petition to Stay Operation of Exemptions, submitted in the above-referenced proceedings. The original of this filing is clipped, but all copies have been stapled. Also submitted are three 3.5-inch IBM-compatible floppy diskettes, each with an electronic copy of this filing capable of being read by WordPerfect 9.0. These diskettes are labeled with the Docket Number as well as the title to the proceeding. An additional copy of the Response also is enclosed. Please indicate receipt and filing by time-stamping this extra copy and returning it in the enclosed self-addressed stamped envelope.

Sincerely,

John V. Edwards

Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34209

206017



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

FINANCE DOCKET NO. 34225

206018

NORFOLK SOUTHERN RAILWAY COMPANY
-- TRACKAGE RIGHTS EXEMPTION --
READING BLUE MOUNTAIN AND NORTHERN RAILROAD COMPANY

RESPONSE OF NORFOLK SOUTHERN RAILWAY COMPANY
TO UTU-NY'S PETITION TO REJECT/REVOKE, AND PETITION
TO STAY OPERATION OF EXEMPTIONS

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Dated: August 12, 2002

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34209

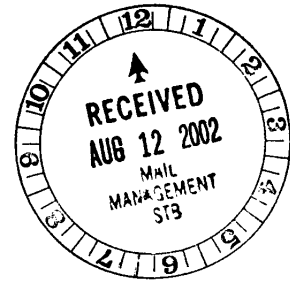
**NORFOLK SOUTHERN RAILWAY COMPANY
-- TRACKAGE RIGHTS EXEMPTION --
DELAWARE & HUDSON RAILWAY COMPANY, INC.**

FINANCE DOCKET NO. 34225

**NORFOLK SOUTHERN RAILWAY COMPANY
-- TRACKAGE RIGHTS EXEMPTION --
READING BLUE MOUNTAIN AND NORTHERN RAILROAD COMPANY**

**RESPONSE OF NORFOLK SOUTHERN RAILWAY COMPANY
TO UTU-NY'S PETITION TO REJECT/REVOKE, AND PETITION
TO STAY OPERATION OF EXEMPTIONS**

Norfolk Southern Railway Company ("Norfolk Southern") hereby submits to the Surface Transportation Board ("STB" or "Board") a response to the petition (the "UTU-NY Petition") of the Samuel J. Nasca, for and on behalf of United Transportation Union – New York State Legislative Board ("UTU-NY"), to reject or revoke operation of exemptions filed in two separate dockets – Finance Docket No. 34209, Norfolk Southern Railway Company – Trackage Rights Exemption – Delaware and Hudson Railway Company – Between Sunbury, PA and Mechanicville, NY, and in Finance Docket No. 34225, Norfolk Southern Railway Company – Trackage Rights Exemption – Reading Blue Mountain and Northern Railroad Company – Between Lehighton Yard and Dupont,



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PA. These two proceedings have not been consolidated, but the UTU-NY Petition addresses both proceedings, at times without distinction, and therefore for administrative convenience Norfolk Southern addresses the UTU-NY Petition in its entirety in this joint Response. The UTU-NY Petition is without merit and should be rejected for the reasons set forth herein.

I. Background of the Proceeding

In one of these separate proceedings, Finance Docket No. 34209, Norfolk Southern submitted a verified notice of exemption, pursuant to 49 C.F.R. Parts 1180.2(d)(7) and 1180.4(g), to permit Norfolk Southern to acquire and exercise overhead trackage rights (the "CPR Trackage Rights") over approximately 284.6 miles of the Freight Main Line 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, PA and CPR's connection with the Guilford Rail System at milepost 467.40 at Mechanicville, NY. Norfolk Southern attached to that notice an unredacted copy of the CPR Trackage Rights agreement. In the recitals, that CPR Trackage Rights agreement mentioned three haulage agreements that CPR and Norfolk Southern had previously entered into (one executed in 1998 and two executed in 1999). It further mentioned a so-called "Restructuring Agreement" between CPR and Norfolk Southern, as well as the term sheet that provided the basis for the Restructuring Agreement. The Norfolk Southern notice of exemption in Finance Docket No. 34209 did not include a copy of the Restructuring Agreement.

In Finance Docket No. 34225, Norfolk Southern filed a verified notice of exemption, also pursuant to 49 C.F.R. Parts 1180.2(d)(7) and 1180.4(g), to permit Norfolk Southern to acquire and

exercise overhead trackage rights (the "RBMN Trackage Rights") over approximately 56.7 miles of the Lehigh Line of Reading Blue Mountain and Northern Railroad Company ("RBMN"), between MP 119.3 in Lehighton Yard and MP 175.5 in Dupont, PA. Norfolk Southern attached to that notice a copy of the RBMN Trackage Rights agreement from which certain compensation provisions were redacted.

In each case, the trackage rights are based upon a written agreement and is not filed or sought in a responsive application to a rail consolidation proceeding. Accordingly, each agreement is exempt from the prior approval requirements of 49 U.S.C. Section 11323.

On July 23, 2002, UTU-NY filed a single Petition to Reject/Revoke, and Petition to Stay Operation of Exemptions in both Finance Docket No. 34209 and in Finance Docket No. 34225. The UTU-NY Petition generally alleges that the notices should be rejected for failing to comply with the Board's rules. If any alleged defects are cured,¹ the UTU-NY Petition nevertheless argues that the exemption be revoked, and that New York Dock protective conditions be imposed, and that regardless, the Board should stay the operation of the exemptions, allegedly because the Restructuring Agreement contemplated a "major transaction." The UTU-NY Petition sought consolidation of the two proceedings.

On July 24, 2002, Norfolk Southern submitted a limited response ("NSR Limited Reply") solely to the question of whether the Board should impose a stay. Norfolk Southern reserved the right

¹ As discussed in this Response, if the notice submitted in Finance Docket No. 34225 was defective insofar as certain compensation terms were redacted, that failure has been cured. Further, if the notice submitted in Finance Docket No. 34209 was defective because the Restructuring

to respond to the merits of the UTU-NY Petition in a subsequent pleading.

On July 25, 2002, the Board published a Notice of Exemption in Finance Docket No. 34209. The Board also published a separate Notice of Exemption in Finance Docket No. 34225. Also on July 25, 2002, the Board served a Decision denying the stay requested by UTU-NY. The Board did not consolidate the two proceedings.

Later on July 25, 2002, UTU-NY filed with the Board a notice that UTU-represented Norfolk Southern employees had reached an implementing agreement with Norfolk Southern regarding the transactions covered by Finance Docket No. 34209 and Finance Docket No. 34225, but noting that "the situation with respect to UTU-represented employees of the Delaware and Hudson Railway Company and the Reading Blue Mountain and Northern Railroad Company, remain pending and unresolved."²

On August 6, 2002, Norfolk Southern submitted a Petition for Protective Order in Finance Docket No. 34209. With that petition, Norfolk Southern submitted an unredacted and a redacted version of the Restructuring Agreement.³ Also on August 6, 2002, Norfolk Southern submitted a Petition for Protective Order in Finance Docket No. 34225. With that petition, Norfolk Southern submitted an unredacted version of the RBMN Trackage Rights agreement.

Agreement was not submitted, that failure has been cured.

² Norfolk Southern understands that CPR provided notice to its employees of the CPR Trackage Rights, and that RBMN provided notice to its employees of the RBMN Trackage Rights. In each case, the notice indicated that there was no anticipated impact upon the employees of the respective companies. Norfolk Southern has provided copies of these notices to counsel for UTU-NY.

³ The unredacted version of the CPR-Norfolk Trackage Rights Agreement was submitted with the original Notice of Exemption.

II. Argument

The UTU-NY Petition argues that the class exemption granted originally by the Board's predecessor, the Interstate Commerce Commission, see, Ex Parte No. 282 (Sub-No. 9), Railroad Consolidation Procedures – Trackage Rights Exemption, 1 I.C.C.2d 270 (1985), aff'd sub nom. Illinois Commerce Comm'n v. ICC, 819 F.2d 311 (1987), subsequently adopted by the Board, should be revoked as to the CPR Trackage Rights and the RBMN Trackage Rights, on the basis that the Restructuring Agreement constitutes a major transaction. UTU-NY Petition at 5. Pursuant to 49 U.S.C. 10502(d), "The Board may revoke an exemption, to the extent it specifies, when it finds that application in whole or in part of a provision of this part ... is necessary to carry out the transportation policy of section 10101 of this [Title 49]." "Labor interests may raise issues concerning the appropriate level of labor protection in a petition for revocation." Finance Docket No. 32772, The New York, Susquehanna and Western Railway Corp. – Trackage Rights Exemption – Onondaga County Industrial Develop. Agency (served August 7, 2001) ("NYS&W"). Under the Board's precedent, "the petitioner seeking to revoke an exemption must meet its burden of proof by articulating reasonable, specific concerns to satisfy the revocation criteria." Id. The UTU-NY Petition does not meet the stringent standard for the revocation of the class exemption in either of these two proceedings.

The class exemption at issue, found at 49 C.F.R. Section 1180.2(d)(7), exempts from the Board's prior approval trackage rights agreements that are based upon a written agreement that is not filed or sought in a responsive application in a railroad consolidation proceeding. Based upon the

powers of then 49 U.S.C. Section 10505,⁴ the ICC found that regulation of this class of transactions is not necessary to carry out the rail transportation policy:⁵

Transactions that permit only bridge rights^[6] 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. Improving operating efficiencies will help ensure the continued development of sound rail transportation systems, foster sound economic conditions, encourage efficient management, and promote energy conservation.

Railroad Consolidation Procedures, 1 I.C.C.2d at 275-76.

Further, the ICC found that prior approval was not required to protect shippers from the abuse of market power. Id. at 276-77. "Abandonment threats will not result from exemption of trackage rights" because the routing of overhead traffic is a matter of railroad managerial discretion and "shippers do not lose any rights to raise the issue of improper diversion of overhead traffic at the time that a railroad seeks abandonment."⁷ Id. Finally, the ICC found that "Transactions that permit bridge

⁴ Former Section 10505, much as Section 10502 does today for the Board, provided that the ICC could exempt from its prior review a transaction if the ICC found that (1) regulation was not necessary to carry out the rail transportation policy found in then 49 U.S.C. Section 10101a, and (2) either (a) the transaction was of limited scope or (b) regulation was not necessary in order to protect shippers from the abuse of market power.

⁵ In all relevant ways, the RTP set forth in current 49 U.S.C. Section 10101 is the same to that set forth in the former 49 U.S.C. Section 10101a as it existed in 1985 when the class exemption was implemented.

⁶ Although the exemption was granted with regard to trackage rights agreements regardless of whether the rights are local or bridge, the CPR Trackage Rights and the RBMN Trackage Rights are both bridge (overhead) trackage rights.

⁷ The UTU-NY Petition alleges that "The elimination of NS employees at Renovo suggests discontinuance of all service at that point, amounting to a de facto abandonment." UTU-NY Petition at 6. The allegation is without merit, as Norfolk Southern is not intending to discontinue all services

rights are clearly limited in scope.” Id. at 277.

Each of the CPR Trackage Rights and the RBMN Trackage Rights meet these criteria. Except with regard to the an unsubstantiated and misdirected alleged threat of abandonment (see note 7 below), UTU-NY does not even argue that the Board should withdraw the class exemption with regard to the CPR Trackage Rights or the RBMN Trackage Rights based upon the original class exemption standards.

Instead, UTU-NY merely argues that the class exemption should be revoked “so as to impose the New York Dock (NYD) employee conditions,” on the basis that the Restructuring Agreement “constitutes a major transaction.” UTU-NY Petition at 5 (referring to the conditions imposed in New York Dock Ry. – Control – Brooklyn Eastern District, 360 I.C.C. 60 (1970), aff’d New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979)). The UTU-NY Petition argues that the “equitable treatment of affected employees involves more than a summary 20-days notice and consummation prior to reaching an implementing agreement. Rather, the full 90-days notice period and a pre-consummation implementing agreement are required.” UTU-NY Petition at 5-6. UTU-NY points to the anticipated impact on Norfolk Southern employees as a basis for this claim.

UTU-NY’s allegations, however, are without merit. CPR provided notice to its employees that it anticipated no impact from implementation of the CPR Trackage Rights. RBMN provided notice to its employees that it anticipated no impact from implementation of the RBMN Trackage

to the Renovo area, and any discontinuance over or abandonment of this line of railroad would require the prior approval of the Board. Neither discontinuance nor abandonment authority has been sought.

Rights. Perhaps the most powerful evidence that UTU-NY's arguments are without merit, however, come from the actions of the UTU itself. The Norfolk Southern employees represented by the UTU have already entered into an implementing agreement regarding the CPR Trackage Rights and regarding the RBMN Trackage Rights, and that implementing agreement was entered into explicitly pursuant to the employee protective conditions set forth in Norfolk and Western Ry. Co. – Trackage Rights – Burlington Northern, 354 I.C.C. 605 (1978), as modified by Mendocino Coast Ry, Inc. – Lease and Operate, 360 I.C.C. 653 (1980).

The UTU-NY Petition also alleges that “the Restructuring Agreement ... obviously constitutes part of the division of Consolidated Rail Corporation between CSX Transportation, Inc. and NS.” UTU-NY Petition at 7. The only basis for this claim is the fact that the Restructuring Agreement modifies a haulage agreement that was entered into on May 5, 1998, prior to the June 4, 1998 oral argument in the Conrail Control Proceeding.⁸ Id. But the mere fact that Norfolk Southern and CPR entered into the 1998 haulage agreement during the pendency of the Conrail Control Proceeding does not mean that that agreement, or the Restructuring Agreement,⁹ constitutes a part of the transaction under scrutiny in that proceeding.

Neither the CPR Trackage Rights nor the RBMN Trackage Rights is related to or arises out of the Conrail Control Proceeding other than to the extent that Norfolk Southern is exercising the rights that it received in that proceeding to operate the assets of Conrail that were allocated to Pennsylvania

⁸ CSX Corp./Norfolk Southern Corp. – Control and Operating Leases/Agreements – Conrail Inc., 3 S.T.B. 196 (1998).

⁹ As previously noted, the section of the Restructuring Agreement that affects the May 5, 1998

Lines LLC.¹⁰ That tenuous nexus is not sufficient to claim that these agreements constitute part of the division of Conrail such that implementation of those agreements “should come under the employee conditions prescribed in F.D. No. 33388, which are NYD.” UTU-NY Petition at 7.

Finally, UTU-NY makes the one sentence conclusory statement that “Of course, the Restructuring Agreement itself comes within 49 U.S.C. 11323, and is subject to NYD.” The preponderance of the Restructuring Agreement deals with matters that do not require any action by the Board, and even considered as a whole the Restructuring Agreement does not constitute control described under 49 U.S.C. Section 11323.

The Restructuring Agreement provides for the revision of compensation under the existing 1979 trackage rights agreement governing D&H’s rights over certain Conrail lines, including the Southern Tier. The ICC has already determined that minor modifications to previously existing trackage rights agreements do not require regulatory approval. See, Railroad Consolidation Procedures, 1 I.C.C.2d 270, 273, n.5 (citing American Train Dispatchers Assn v. Chicago and North Western Trans. Co., 360 I.C.C. 457 (1979) and American Train Dispatchers Assn v. Union Pacific Railroad Co., 363 I.C.C. 143 (1980)). Simplification of the compensation structure in the 1979 D&H trackage rights agreement, “does not expand, lessen, alter or otherwise impact on the rights or privileges of the carrier parties or on their respective common carrier obligations to third persons to effect transportation and to provide adequate transportation facilities in performance of service to the

haulage agreement merely simplifies the compensation structure found in that agreement.

¹⁰ RBMN is not a party to the Restructuring Agreement. Further, it did not enter into a settlement agreement with Norfolk Southern in the Conrail Control Proceeding.

public.” American Train Dispatchers, 363 I.C.C. at 148.

The same could be asserted in the case of the simplification of the compensation structure in the 1998 and 1999 haulage agreements if those agreements were otherwise subject to the jurisdiction of the Board, which they are not. See, Simmons v. I.C.C., 871 F.2d 702 (7th Cir. 1989), reh’g denied; ICC Finance Docket No. 32549, Burlington Northern Inc. – Control and Merger – Santa Fe Pacific Corp. (served April 20, 1995) (“The haulage rights do not, in and of themselves, constitute a transaction subject to our jurisdiction under 49 U.S.C. 11343.”) (referring to the statutory predecessor to the current 49 U.S.C. 11341.)

The Restructuring Agreement provides for the allocation of the cost of funding for capacity improvements that may be needed in the future. Parties are free to agree – without Board prior consent – to the funding of capacity improvements of mutual benefit over lines that they both use.

The Restructuring Agreement provides an option for CPR to obtain trackage rights over a line operated by Norfolk Southern should CPR desire to exercise that option. CPR has not exercised, and may never exercise, that option. When and if it does, however, the trackage rights Norfolk Southern grants would be based upon an agreement not yet drafted or executed, but which would be submitted to the Board pursuant to its regulations, and subject to its review and imposition of standard labor protection conditions.

The Restructuring Agreement sets forth a plan for operating trains over certain routes subsequent to the implementation of the CPR Trackage Rights agreement. The ICC once said that it was an “established principle that the routing of overhead traffic and the selection of alternative routes is a matter of managerial discretion.” Railroad Consolidation Procedures, 1 I.C.C.2d at 277.

Carriers may and do make routing decisions and agreements every day, and must be permitted to do so, without the prior approval and scrutiny of the regulatory process. This time the routing decision happened to be included in the Restructuring Agreement.

Certainly the Restructuring Agreement covers a variety of matters of interest between Norfolk Southern and CPR, but the fact that it involves several different matters does not make it a control proceeding requiring the approval of the Board pursuant to 49 U.S.C. Section 11321. Cf., Finance Docket No. 34014, Canadian National Railway Co. – Trackage Rights Exemption – Bangor and Aroostook Railroad Company and Van Buren Bridge Co., (served June 25, 2002), slip op. at 2 (discussing three inter-related agreements executed by the parties thereto, only two of which were submitted to the Board for its approval or exemption therefrom). Moreover, even if it did (which it does not), it does not constitute, as UTU-NY alleges, a major transaction involving the control or merger involving two or more Class 1 railroads.¹¹ See 49 C.F.R. Section 1180.2(a).

III. Conclusion

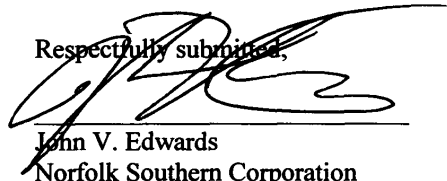
The UTU-NY Petition seeks to revoke the exemptions applicable to the separate CPR Trackage Rights (Finance Docket No. 34209) and RBMN Trackage Rights (Finance Docket No. 34225). Any potential defects in the notices filed by Norfolk Southern in those two proceedings have been cured. The agreements underlying and associated with the CPR Trackage Rights do not

¹¹ The CPR Trackage Rights agreement and the RBMN Trackage Rights agreement are both trackage rights agreements subject to 49 U.S.C. Section 11321, but which are classified as an exempt transaction pursuant to 49 C.F.R. Section 1180.2, as discussed further herein.

constitute a major transaction under the Board's regulations, nor do they require the imposition of any protective conditions other than that already imposed in the Board's Notice of Exemption served on July 25, 2002, in Finance Docket No. 34209. The agreement underlying the RBMN Trackage Rights does not constitute a major transaction under the Board's regulations, nor does it require the imposition of any protective conditions other than that already imposed in the Board's Notice of Exemption served on July 25, 2002, in Finance Docket No. 34225. None of the agreements at issue here form a part of the Conrail Transaction approved by the Board in Finance Docket No. 33388.

For all the foregoing reasons, the UTU-NY Petition must be denied.

Respectfully submitted,



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Dated: August 12, 2002

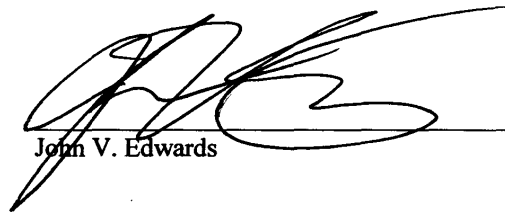
CERTIFICATE OF SERVICE

I, John V. Edwards, hereby certify that I have caused to be served the foregoing Response of Norfolk Southern Railway Company to UTU-NY's Petition to Reject/Revoke, and Petition to Stay Operations of Exemptions by overnight courier to:

Gordon P. MacDougall
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorney for Samuel J. Nasca, UTU-NY

Dated this 9th day of August, 2002.



John V. Edwards