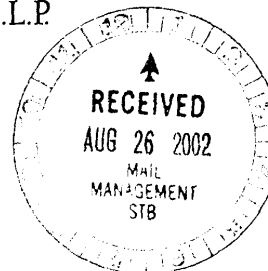


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August 26, 2002

BY HAND DELIVERY

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

Re: STB Finance Docket No. 34209, *Norfolk So. Ry. Co.—Trackage Rights
Exemption—Delaware and Hudson Ry. Co.*

STB Finance Docket No. 34225, *Norfolk So. Ry. Co.—Trackage Rights
Exemption—Reading Blue Mountain and Northern Ry. Co.*

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceedings on behalf Norfolk Southern Railway Company are the original and ten copies of Norfolk Southern's Opposition To The Motion To Compel And To Extend Time For Filing Supplemental Petition To Revoke. Also enclosed is a 3.5-inch computer disk containing the text of the enclosed pleading in WordPerfect 5.0 format.

Kindly date-stamp the enclosed additional 2 copies of the pleading and return them to our messenger.

Sincerely,

Scott M. Zimmerman

Enclosures

cc (w/enc.): Gordon P. MacDougall, Esq.

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Office of Proceedings
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Public Record

Before the
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 34209



NORFOLK SOUTHERN RAILWAY COMPANY—TRACKAGE RIGHTS EXEMPTION—
DELAWARE AND HUDSON RAILWAY COMPANY—BETWEEN SUNBURY, PA AND
MECHANICVILLE, NY

STB Finance Docket No. 34225

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

**NORFOLK SOUTHERN'S OPPOSITION
TO THE MOTION TO COMPEL AND TO EXTEND TIME FOR FILING
SUPPLEMENTAL PETITION TO REVOKE**

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**NORFOLK SOUTHERN'S OPPOSITION
TO THE MOTION TO COMPEL AND TO EXTEND TIME FOR FILING
SUPPLEMENTAL PETITION TO REVOKE**

INTRODUCTION

Norfolk Southern Railway Company ("NS") hereby opposes the motion of the United Transportation Union-New York State Legislative Board ("UTU-NY") dated August 12, 2002 asking the Board to compel NS to produce certain documents and to extend the time for UTU-NY to file a supplemental petition to revoke NS' notices of exemption in the two captioned cases.¹

UTU-NY's motion is baseless and should be denied. UTU-NY purportedly seeks the documents in connection with its pending petition to revoke NS' notices of exemption for two

¹ The two cases have not been consolidated but have been addressed together in the motion to compel and elsewhere. For administrative convenience, we do so here as well.

trackage rights agreements. As we will show, however, the documents at issue have no conceivable relevance to any issue raised by UTU-NY's petition to revoke the notices of exemption. Furthermore, UTU-NY's petition to revoke is transparently without merit and should not be permitted to form the basis of a fishing expedition through which UTU-NY or its counsel obtains access to highly commercially-sensitive agreements that have no relevance to the relief UTU-NY seeks.

BACKGROUND

The course of events in these proceedings is set forth in detail in NS' August 12, 2002 "Response Of Norfolk Southern Railway Company To UTU-NY's Petition To Reject/Revoke, And Petition To Stay Operation of Exemptions," and may be briefly summarized.

On July 5, 2002, NS filed in Finance Docket No. 34209 a verified notice of exemption to permit it to acquire and exercise overhead trackage rights over certain lines of the Delaware and Hudson Railway Company, Inc. d/b/a/ Canadian Pacific Railway ("CPR"). The recitals of the associated trackage rights agreement ("CPR trackage rights agreement") mention three haulage agreements between CPR and NS, one executed in 1998 and two executed in 1999, as well as a "Restructuring Agreement" entered into by CPR and NS in 2002. Also on July 5, 2002, NS filed in Finance Docket No. 34225 a verified notice of exemption to permit it to acquire and exercise overhead trackage rights over certain lines of the Reading Blue Mountain and Northern Railroad Company ("RBMN"). The associated trackage rights agreement ("RBMN trackage rights agreement") references the Restructuring Agreement.

On July 23, 2002, UTU-NY filed a single Petition to Reject/Revoke, and Petition to Stay Operation of Exemptions in both proceedings. Also on July 23, counsel for UTU-NY

wrote to NS requesting copies of the 1998 and 1999 haulage agreements and the Restructuring Agreement (and its associated Term Sheet).

On July 24, 2002, Norfolk Southern submitted a limited response addressed solely to the question of whether the Board should impose a stay, and reserving the right to respond to the merits of the UTU-NY Petition in a subsequent pleading.

On July 25, 2002, the Board published Notices of Exemption in Finance Docket Nos. 34209 and 34225 and issued a decision denying UTU-NY's request to stay the proceedings. That same day, UTU-NY notified the Board that UTU and NS had reached agreement on an implementing agreement with respect to the trackage rights at issue in both dockets. That implementing agreement was entered into expressly pursuant to the *Norfolk & Western/Mendocino Coast* employee protective conditions,² the same protective conditions identified in NS' notices of exemption.

On August 6, 2002, Norfolk Southern filed petitions for protective order in the two dockets, as well as unredacted and redacted versions of the Restructuring Agreement (in Finance Docket 34209) and an unredacted copy of the RBMN trackage rights agreement (in Finance Docket 34225). The Board entered protective orders in the two proceedings by orders served August 16, 2002.

On August 12, 2002, UTU-NY filed the motion to compel to which NS hereby responds. In its motion to compel, UTU-NY seeks production of:

(1) the Haulage Agreement between NS and CPR dated May 5, 1998;

² *Norfolk & Western Ry. Co.—Trackage Rights—Burlington Northern*, 354 I.C.C. 605, 610-15 (1978), as modified by *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653, 664 (1980).

- (2) the Intermodal Haulage Agreement between NS and CPR dated April 11, 1999;
- (3) the Interim Haulage Agreement between NS and CPR dated June 16, 1999; and
- (4) an unredacted copy of the Restructuring Agreement (along with the Term Sheet dated February 13, 2002).

With respect to the Restructuring Agreement and related Term Sheet, the motion to compel is moot. NS agreed to produce the unredacted Restructuring Agreement if appropriate protective measures were put into place to protect the highly sensitive terms of the Restructuring Agreement from improper use and disclosure, and on August 16, 2002, the Board issued protective orders in the two proceedings. NS has designated the Restructuring Agreement (and the related Term Sheet) "Highly Confidential" under the newly-entered protective orders. Thus, the unredacted Restructuring Agreement and Term Sheet will be made available to outside counsel for UTU-NY if and when counsel executes the required Highly Confidential undertaking.

In light of the foregoing, the present discovery dispute reduces to the issue of production of the three listed NS-CPR haulage agreements. As to those agreements, for the reasons that follow, the motion to compel is baseless and should be denied.

ARGUMENT

THE MOTION TO COMPEL SHOULD BE DENIED AS TO THE THREE 1998 AND 1999 HAULAGE AGREEMENTS BECAUSE THEY ARE IRRELEVANT TO THE ISSUES RAISED BY UTU-NY.

Under the Board's rules, discovery in connection with a petition to revoke an exemption is permitted only as to non-privileged matters "relevant to the subject matter" involved. 49 C.F.R. § 1114.21(a); 49 C.F.R. § 1121.2.

The three NS-CPR haulage agreements do not meet this standard, as they are not relevant to the issues raised in UTU-NY's petition to revoke.³

UTU-NY argues that the exemptions should be revoked "so as to impose New York Dock (NYD) employee conditions." Pet. to Reject/Revoke at 5. In support of that view, UTU-NY argues, first, that the Restructuring Agreement constitutes a major transaction, the breadth of which indicates that *New York Dock* is required. See *id.* at 5-6. That argument is manifestly baseless for several reasons. First, as explained in NS' Response to the Petition to Reject/Revoke at 7-10, it is clear from the face of the Restructuring Agreement that it is not remotely "a control or merger involving two or more class I railroads," (49 C.F.R. § 1180.2(a); nor is there any basis for UTU-NY's claim that it is a part of the Conrail transaction, which the Board approved four years ago.⁴

³ In its petition to reject/revoke, UTU-NY first asserted that "the failure of NS to file the Restructuring Agreement, along with the ancillary agreements [*i.e.*, the haulage agreements] mentioned in the trackage rights agreements, is in violation of the Board's specific rules for the trackage rights class exemption, and is cause for *rejecting* the two notices." UTU-NY Pet. to Reject/Revoke, at 5 (emphasis supplied). The Board, however, in its decision in these proceedings ("Decision") served July 25, 2002 denying UTU-NY's petition for a stay, held that "[w]hen NS submits the Restructuring Agreement and the redacted material in the NS/RBMN trackage rights agreement [which NS since has done], the basis for UTU-NY's petition to reject the notice should be removed." Decision at 3. Thus, the Board already has determined, in effect, that the haulage agreements are not relevant to the issue of *rejection* of the notices. The balance of this response, therefore, will address only issues related to UTU-NY's petition to *revoke* the exemptions.

⁴ Furthermore, as discussed below, even if, for the sake of argument, the Restructuring Agreement were a "major transaction," or somehow part of the Conrail transaction, there would be no basis for any claim that the CPR and RBMN trackage rights agreements now at issue require the imposition of *New York Dock* conditions. Trackage rights that were part of the Conrail transaction were subject to *Norfolk & Western/Mendocino Coast*, the same conditions identified in the notices of exemption for the CPR and RBMN trackage rights and agreed to in the implementing agreement between UTU and NS.

For purposes of the present discovery dispute, however, the most important point is that the 1998 and 1999 haulage agreements are not relevant or necessary to a determination of the issue. Even assuming, for the sake of argument, that the question of whether the Restructuring Agreement constitutes a “major transaction” is pertinent at all to the issue of revoking the CP and RBMN trackage rights exemptions, the 1998 and 1999 haulage agreements sought by UTU-NY have no bearing on the question. The only document needed to discern the breadth of the Restructuring Agreement, and its status as a “major transaction” (or not), is the Restructuring Agreement itself.

UTU-NY argues that the “essence” of the two trackage rights agreements at issue involves the “diversion of traffic potential from CPR haulage.” Pet. to Reject/Revoke at 6. *See also* Mot. To Compel at 4 (asserting that CPR and RBMN “will be deprived of business presently handled in haulage for NS, or otherwise naturally belonging to their employers”). That argument, however, does not demonstrate that the contents of the haulage agreements are relevant to whether *New York Dock* should be imposed in connection with the trackage rights agreements. First, as NS already has pointed out, the notices that NS understands CPR and RBMN provided to their employees regarding the CPR and RBMN trackage rights agreements, respectively, indicate that there is no anticipated impact upon the employees of CPR or RBMN. Moreover, even if a loss of haulage traffic were to result, the extent of that loss would not be discernable from the text of the haulage agreements. Furthermore, haulage agreements do not require Board approval, and a change in the level of haulage traffic would not warrant the imposition of enhanced labor protection in any event. *Cf. Simmons v. ICC*,

871 F.2d 702, 712 (7th Cir. 1989) (Establishment of haulage agreement does not compel imposition of labor protection).

UTU-NY additionally asserts 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,” and, for that reason, “the Restructuring Agreement and the involved trackage rights, should come under the employee conditions prescribed in F.D. No. 33388, which are NYD.” Pet. to Reject/Revoke at 7.

Both the premise and the conclusion of this argument are manifestly incorrect. As already pointed out in NS’ Response to the Petition to Reject/Revoke (at pp. 10-11), neither of the two trackage rights agreements at issue in these proceedings arises out of the Conrail transaction, other than to the extent that NS is exercising its rights to operate the Conrail assets allocated to Pennsylvania Lines LLC. UTU-NY’s sole basis for asserting a connection between the trackage rights agreements and the Conrail transaction goes as follows: (1) the trackage rights agreements are a component of the Restructuring Agreement; (2) the Restructuring Agreement mentions the three haulage agreements; (3) one of the three haulage agreements was entered into on May 5, 1998. This tenuous chain of reasoning does not even imply, much less demonstrate, that the CPR and RBMN trackage rights agreements are part of the Conrail transaction.

Moreover, even assuming, for the sake of argument, that the Restructuring Agreement and the CPR and RBMN trackage rights agreements *were* somehow “connected” to, or arose out of, the Conrail transaction, there would be no basis for the conclusion that *New York Dock*

conditions should be imposed in connection with the CPR and RBMN trackage rights agreements in any event. Contrary to UTU-NY's assertion, *see* Pet. to Reject/Revoke at 7, in the Board's decision approving the Conrail transaction the Board did *not* apply *New York Dock* to the various trackage rights authorizations, exemptions and conditions that were part of the Conrail transaction. Instead, in accord with its consistent practice in many previous major transactions, the labor protection the Board imposed on the related trackage rights was *Norfolk & Western/Mendocino Coast*, the same protection specified in the notices of exemption at issue in these proceedings. *See CSX Corp. et al.—Control and Operating Leases/Agreements—Conrail Inc. et al.*, Finance Docket No. 33388, Decision No. 89, Ordering Paragraph No. 79, 3 S.T.B. 196, 394-95 (served July 23, 1998). There is no basis whatever for concluding that different conditions should be imposed on the present CPR and RBMN trackage rights, particularly in view of the fact that UTU has concluded an implementing agreement with NS in connection with those trackage rights that applies *Norfolk & Western/Mendocino Coast*.⁵

In short, the 1998 and 1999 haulage agreements are plainly irrelevant to the relief UTU-NY seeks even if they could establish some tenuous connection between the CPR and RBMN trackage rights agreements and the Conrail transaction (which they do not), because "Conrail-relatedness" is not relevant to proving or disproving entitlement to *New York Dock*.

For the same reason, UTU is incorrect in contending that *New York Dock* is required in connection with the CPR and RBMN trackage rights agreements because, UTU claims, the Restructuring Agreement is a "major transaction" (Pet. to Reject/Revoke at 5) and because

⁵ UTU claims that its entering into the implementing agreements does not moot its petition because there are allegedly unresolved issues between UTU and CPR and RBMN. Any such issues, however, provide no basis for UTU's present petition against NS.

“the Restructuring Agreement itself comes within 49 U.S.C. § 11323, and is subject to NYD.”

Id. at 7. As the Board’s decision approving the Conrail transaction shows, even if the Restructuring Agreement were a major transaction or were subject to § 11323 (neither of which is the case), *New York Dock* conditions would not be appropriate for related trackage rights. But again, more importantly for purposes of UTU-NY’s motion to compel, the 1998 and 1999 haulage agreements are completely irrelevant to the question of whether the Restructuring Agreement is a “major transaction” or is subject to § 11323; again, those questions are wholly determinable from the Restructuring Agreement itself.

It is important to keep in mind that the subjects of the notices of exemption at issue in these cases are not the 1998 and 1999 haulage agreements, nor, indeed, the Restructuring Agreement. They are, rather, the 2002 CPR and RBMN trackage rights agreements. The issue that UTU-NY asks the Board to determine is whether those two trackage rights agreements require the application of *New York Dock*. Complete, unredacted copies of those agreements have been provided to the Board and are available to outside counsel for UTU-NY under the terms of the protective orders entered by the Board in these cases. Moreover, not only are the trackage rights agreements themselves available, but the unredacted Restructuring Agreement is available as well. Given (1) the clear lack of merit to UTU-NY’s Petition to Reject/Revoke (as shown in NS’ previous Response to it), (2) the availability of the two trackage rights agreements actually at issue here, (3) the additional availability of the Restructuring Agreement, and (4) the clear lack of relevance of the 1998 and 1999 haulage agreements, UTU-NY’s motion to compel should be denied. That protective orders have been entered in these proceedings should not serve as justification for permitting discovery of

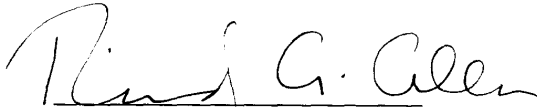
haulage agreements that are several steps removed from the trackage rights agreements actually at issue and irrelevant to the question of the degree of labor protection those trackage rights agreements require.

UTU-NY's motion also seeks an extension of the time within which UTU-NY may file a supplemental petition. *See* Mot. to Compel at 4. As already discussed, the unredacted versions of the CPR and RBMN trackage rights agreements and the Restructuring Agreement are already available to UTU-NY's outside counsel, and UTU-NY is not entitled to discovery of the haulage agreements due to their lack of relevance to the issues before the Board. Any extension of time, therefore, is unnecessary and should be denied.

CONCLUSION

For the foregoing reasons, UTU-NY's motion should be denied.

Respectfully submitted,



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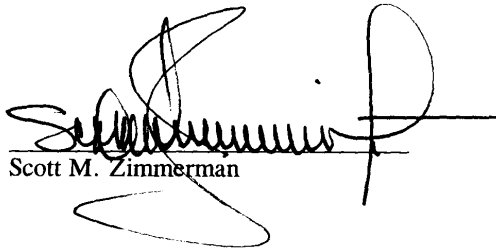
August 26, 2002

CERTIFICATE OF SERVICE

I certify that on August 26, 2002, a true copy of "Norfolk Southern's Opposition To The Motion To Compel And To Extend Time For Filing Supplemental Petition To Revoke" was served by hand delivery upon:

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Attorney for UTU-NY



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