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October 6, 2004

The Honorable Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423

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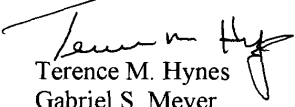
Re: STB Docket No. 34561, Canadian Pacific Railway Company – Trackage Rights Exemption – Norfolk Southern Railway Company, Buffalo, NY;
STB Docket No. 34562, Norfolk Southern Railway Company—Trackage Rights Exemption—Delaware and Hudson Railway Company, Inc. between Saratoga Springs, NY and Binghamton, NY; — 212177
Docket No. AB 156 (Sub No. 25X), Delaware and Hudson Railway Company, Inc.—Discontinuance of Trackage Rights between Lanesboro, PA, and Buffalo, NY 212178

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceedings are an original and ten (10) copies of Canadian Pacific Railway Company's Reply in Opposition to Petition to Stay Operation of Exemptions ("Reply"). A diskette containing an electronic version of the Reply is also enclosed.

Please acknowledge receipt of the Reply for filing by date-stamping the enclosed extra copies of the Reply and returning them via our messenger. If you have any questions, please contact the undersigned counsel.

Sincerely,


Terence M. Hynes
Gabriel S. Meyer

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DC1 729522v1 October 6, 2004 (04:19pm)

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Finance Docket No. 34561 - 2/2/76

**CANADIAN PACIFIC RAILWAY COMPANY-TRACKAGE RIGHTS
EXEMPTION-NORFOLK SOUTHERN RAILWAY COMPANY-BUFFALO, NY**

Finance Docket No. 34562 2/2/77

**NORFOLK SOUTHERN RAILWAY COMPANY-TRACKAGE RIGHTS
EXEMPTION-DELAWARE AND HUDSON RAILWAY COMPANY, INC.
BETWEEN SARATOGA SPRINGS, NY, AND BINGHAMTON, NY**

Docket No. AB-156 (Sub-No. 25X) 2/2/78

**DELAWARE AND HUDSON RAILWAY COMPANY, INC.-DISCONTINUANCE
OF TRACKAGE RIGHTS-BETWEEN LANESBORO, PA, AND BUFFALO, NY**

**REPLY OF CANADIAN PACIFIC RAILWAY COMPANY AND
DELAWARE AND HUDSON RAILWAY COMPANY, INC. IN OPPOSITION
TO PETITION TO STAY OPERATION OF EXEMPTIONS**

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Dated: October 6, 2004

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 34561

**CANADIAN PACIFIC RAILWAY COMPANY-TRACKAGE RIGHTS
EXEMPTION-NORFOLK SOUTHERN RAILWAY COMPANY-BUFFALO, NY**

Finance Docket No. 34562

**NORFOLK SOUTHERN RAILWAY COMPANY-TRACKAGE RIGHTS
EXEMPTION-DELAWARE AND HUDSON RAILWAY COMPANY, INC.
BETWEEN SARATOGA SPRINGS, NY, AND BINGHAMTON, NY**

Docket No. AB-156 (Sub-No. 25X)

**DELAWARE AND HUDSON RAILWAY COMPANY, INC.-DISCONTINUANCE
OF TRACKAGE RIGHTS-BETWEEN LANESBORO, PA, AND BUFFALO, NY**

**REPLY OF CANADIAN PACIFIC RAILWAY COMPANY AND
DELAWARE AND HUDSON RAILWAY COMPANY, INC. IN OPPOSITION
TO PETITION TO STAY OPERATION OF EXEMPTIONS**

INTRODUCTION

Canadian Pacific Railway Company ("CPRC") and its affiliate, Delaware and Hudson Railway Company, Inc. ("D&H"), hereby submit this Reply in opposition to the Petition To Stay Operation of Exemptions filed in the above-captioned proceedings on October 5, 2004 by Samuel J. Nasca, for and on behalf of United Transportation Union – New York State Legislative Board ("UTU-NY"). For the reasons set forth in this Reply, UTU-NY's Petition should be denied.

I. GOVERNING STANDARD

The standards governing the Board's consideration of a petition for a stay are well-established. The petitioner must demonstrate: (1) a strong likelihood that it will prevail on the merits of the dispute; (2) that it will suffer irreparable harm in the absence of a stay; (3) that

other interested parties will not be substantially harmed in the event of a stay; and (4) that the public interest supports granting the stay. *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Norfolk Southern Railway Co.—Trackage Rights Exemption—Delaware and Hudson Railway Company*, STB Finance Docket No. 34225, 2002 STB LEXIS 442, LEXIS op. at *5-6, served July 25, 2002; *Minnesota Northern Railroad, Inc.—Trackage Rights Exemption—Burlington Northern and Santa Fe Railway Co.*, STB Finance Docket No. 33337, 1997 STB LEXIS 2983, LEXIS op. at *4-5, served Jan. 14, 1997. A stay is an “extraordinary remedy,” and as such, a party seeking a stay must demonstrate that it has met each of the four required elements. *Norfolk Southern Railway Co.*, LEXIS op. at *5. The Board is reluctant to issues stays in straight-forward trackage rights matters. Cf. The Kansas City Southern Railway Co.—Trackage Rights Exemption, STB Finance Docket No. 33780, 1999 STB LEXIS 435, LEXIS op. at *2, served July 20, 1999.¹

To meet this burden, a petitioner must provide “sufficient evidence and argument necessary to convince the Board that [it is] likely to prevail in [its] argument” *Keokuk Junction Railway Co.—Acquisition and Operation Exemption*, STB Finance Docket No. 34143, 2001 STB LEXIS 965, LEXIS Op. at *6, served Dec. 26, 2001. With regard to the irreparable harm element, a party must demonstrate that the threat of harm is “both irreparable and imminent.” *Sault Ste. Marie Bridge Co.—Acquisition and Operation Exemption*, STB Finance

¹ The Board granted a stay, holding:

The trackage rights agreement at issue is different enough from typical trackage rights agreements to cause us to want to examine it further. In particular . . . the agreement provides for a transfer of management and operation of all of the [the carrier’s] trackage under certain conditions. Such a transfer would appear to involve more than trackage rights (and thus might go beyond our trackage rights exemption), and could well require further authorization from us under section 11323. Id.

Docket No. 33290, 1997 STB LEXIS 2989, LEXIS Op. at *12, served Jan. 24, 1997. The Board has held that where potential harm to employees can be remedied through use of monetary measures, the harm is not irreparable. *See Keokuk Junction Railway Co.—Acquisition and Operation Exemption*, LEXIS Op. at *7, served Dec. 26, 2001.

A petitioner must also provide evidence to demonstrate that no harm would be inflicted upon other interested parties in the event of a stay. The Board has recognized that a stay can result in harm to the rail carrier seeking to conclude its transaction through use of the exemption process. *Id.*, *Sault Ste. Marie Bridge Co. —Acquisition and Operation Exemption*, LEXIS Op. at *14-15. Finally, with regard to the public interest element, the Board has held, “It is in the public interest to permit carriers to transact business among themselves absent a showing of harm to the public.” *Keokuk Junction Railway Co.—Acquisition and Operation Exemption*, LEXIS Op. at *8.

II. UTU-NY HAS FAILED TO MAKE THE REQUISITE SHOWING FOR ISSUANCE OF A STAY

A. UTU-NY Is Not Likely To Succeed On The Merits Of Its Challenge To The Notices Of Exemption.

UTU-NY’s Petition fails to make the requisite showing that UTU-NY is likely to prevail on the merits of a petition to revoke the class exemptions in either Finance Docket No. 34561 or Finance Docket No. 34562. The Notice in Finance Docket No. 34561 involves the acquisition by CPRC of purely “overhead” trackage rights on NSR’s lines in the Buffalo terminal area. Likewise, the Notice in Finance Docket No. 34562 involves the acquisition by NSR of “overhead” trackage rights on D&H’s line between Saratoga Springs, NY and Binghamton, NY. As the ICC observed in promulgating the class exemption upon which the challenged Notices are based, overhead trackage rights transactions do not warrant formal regulation because such rights “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.” *Railroad Consolidation Procedures—Trackage Rights Exemption*, 1 I.C.C.2d 270, 275-276 (1985) (“*Trackage Rights Class Exemption*”). The ICC also held that overhead trackage rights are, by definition, limited in scope (regardless of the length of track involved) and do not pose a threat of any abuse of market power. *Id.* at 277-278. UTU-NY’s Petition fails to articulate any reason why these conclusions are not equally applicable to the overhead trackage rights at issue here, nor does the Petition identify any other grounds upon which the subject exemptions might be revoked.

UTU-NY’s assertion that the exemptions should be revoked because the Notices are “merely part of a single MOU [Memorandum of Understanding]” (UTU-NY Pet. at 7) is both factually incorrect and legally irrelevant. As the Notices filed by CPRC and NSR, respectively, in Finance Docket Nos. 34561 and 34562 demonstrate, the overhead trackage rights at issue here are based upon two separate and distinct trackage rights agreements, one between CPRC and NSR (relating to CPRC’s overhead rights in Buffalo, NY) and the other between NSR and D&H (relating to the NSR’s overhead rights between Saratoga Springs, NY and Binghamton, NY). *See* Finance Docket No. 34561, CPRC Notice of Exemption, Exhibit 2; Finance Docket No. 34562, NSR Notice of Exemption, Exhibit 2. Those agreements – and not the MOU upon which UTU-NY’s assertions are based – are the source of the trackage rights at issue here. Indeed, each of these trackage rights agreements explicitly states that it “contains the entire understanding of the Parties hereto with respect to the subject matter and supercedes any and all other agreements.” *See* Finance Docket No. 34561, CPRC Notice of Exemption, Exhibit 2, Agreement Section 22(b) (emphasis added); Finance Docket No. 34562, NSR Notice of Exemption, Exhibit 2, Agreement, Section 22(b) (same).

Moreover, implementation of the trackage rights and haulage arrangements between NSR and D&H in the Rouses Point, NY – Binghamton, NY corridor are not in any manner dependent upon implementation of the trackage rights, haulage rights, and proposed discontinuance of D&H's current operations in the Buffalo, NY – Binghamton, NY corridor. *See* Docket No. AB-156 (Sub-No. 25X), *Delaware and Hudson Ry. Co., Inc. Discontinuance of Trackage Rights*, Petition for Exemption at 8, n.4; Finance Docket No. 34561, CPRC Notice of Exemption, Exhibit 2, Agreement Section 22(n) (CPRC trackage rights agreement made contingent upon consummation of discontinuance of D&H Southern Tier trackage rights, but not NSR Saratoga Springs – Binghamton trackage rights agreement); Finance Docket No. 34562, NSR Notice of Exemption, Exhibit 2, Agreement, Section 22(n) (NSR Saratoga Springs – Binghamton trackage rights agreement made contingent upon consummation of haulage and terminal services agreements, but not CPRC trackage rights agreement). The mere fact that the parties may have reached an agreement in principle to grant these rights at the same time (and memorialized their agreement in principle as to both grants in the same non-binding MOU) is simply irrelevant. Contrary to UTU-NY's unsupported assertion, the grant to CPRC of overhead trackage rights in the Buffalo area by NSR, and D&H's grant of overhead trackage rights to NSR between Saratoga Springs and Binghamton are two separate and distinct transactions that are governed by different agreements.

UTU-NY's further claim that the overhead trackage rights that are the subject of the challenged notices are "highly anti-competitive" (UTU-NY Petition at 8) is specious. In particular, UTU-NY's suggestion (UTU-NY Pet. at 8) that the effect of the various trackage rights, haulage and switching arrangements entered into among CPRC, D&H and NSR would be to eliminate "rail competition across New York State (UTU-NY Pet. at 8) is nonsense. The markets served by the Southern Tier line are intensely competitive. The division of Conrail

authorized by the Board in *CSX Corp., et al. and Norfolk Southern Corp., et al. – Control and Operating Leases – Conrail, Inc. et al.*, 3 S.T.B. 196, 387 (1998) (“*Conrail Control*”) introduced two vigorous Class I rail competitors (CSXT and NSR) to markets that had previously been served exclusively by Conrail (with limited competition by D&H for bridge traffic only). As a result of the *Conrail Control* transaction, D&H faces direct rail competition from NSR (which owns and operates the Southern Tier line) as well as CSXT (which operates the parallel former Conrail route between Buffalo and Albany, NY). The territory served by the Southern Tier line also benefits from extensive motor carrier competition. *See CPR/D&H Control*, 7 I.C.C. 2d at 114 (U.S. Northeast is “criss-crossed with one of the densest highway networks in the world”). In these circumstances, no carrier is (or would be) in a position to engage in an abuse of market power as a result of the arrangements entered into among CPRC, D&H and NSR.

Moreover, UTU-NY’s claim that those arrangements would leave shippers with only one “active” rail carrier in the territory served by the Southern Tier is wrong. As D&H’s Petition for Exemption in amply demonstrates, the proposed discontinuance will not reduce the number of competitive rail options available to any shipper. D&H will continue actively to market service via the Southern Tier line, and will retain exclusive control over the rates at which those services are offered. Collectively, the arrangements preserve D&H’s commercial access to every customer that D&H can access today (or would have the right to access in the future), as well as the right to interchange traffic with every carrier with which D&H can interchange traffic today.

In short, UTU-NY’s Petition fails to articulate any basis upon which the Board could reasonably find that UTU-NY is likely to succeed in revoking the class exemptions in this case.

B. Denial Of A Stay Will Not Cause Irreparable Harm.

Based upon the governing standards set forth in Part I of this Reply, UTU-NY has utterly failed to make the showing required for issuance of a stay in this case.

No employees will suffer irreparable harm if a stay is denied.

CPRC will not exercise its new overhead trackage rights in the vicinity of Buffalo until such time as D&H is authorized to discontinue its trackage rights over the Southern Tier line. No employees of either D&H or NSR can be affected by either those trackage rights or the discontinuance until the Board has acted on D&H's Petition for Exemption in Docket No. AB-156 (Sub-No. 25X), the carriers have given notice to their employees, and D&H has obtained implementing agreements such as may be required by the *Oregon Short Line* protective conditions imposed on the discontinuance. (CPRC itself has no U.S. employees who could be affected by the acquisition of the new trackage rights.) The Board will have an adequate opportunity, in the proceeding that has been commenced by the filing of D&H's Petition for Exemption, to consider any issues that employees of either carrier might raise regarding the effects of that transaction.

As for the acquisition by NSR of trackage rights from Saratoga Springs to Binghamton, the simple fact is that no D&H employees represented by the United Transportation Union will be adversely affected. Indeed, there will be no adverse effect on any D&H employees as a result of NSR's new overhead trackage rights. There will be no job abolishments or reduction in D&H employment at the East Binghamton Yard as a result of that transaction. Under its new switching services agreement with NSR, D&H will perform switching and block swapping for NSR using D&H's East Binghamton Yard employees.

Nevertheless, UTU-NY's Petition asserts that "[t]here will be a severe impact upon D&H employees if the NS trackage rights are allowed to become effective," (UTU-NY Pet. at 7), suggesting implicitly that D&H employees who now work on the line between Binghamton and Saratoga Springs will lose work when NSR begins its trackage rights operation. This is not true. The new NSR trackage rights will enable NSR to move only NSR-CN interline traffic that is not

currently carried on the line between Saratoga Springs and Binghamton, NY. When NSR begins the exercise of those new trackage rights, D&H will also begin its haulage of the same traffic between Rouses Point and Saratoga Springs.² The effect will be an increase in D&H traffic and an increase in D&H employment. D&H intends to establish six new road service positions at Saratoga Springs (including three conductor positions that will be filled by UTU-represented employees) to handle the traffic increase. See D&H Petition for Exemption at 15.

As for NSR employment, NSR explained, in its Notice of Exemption, that its acquisition of trackage rights will result in a net gain in that carrier's train and engine service positions.

Moreover, employees of either carrier who are adversely affected by the transaction will be entitled to protection under the conditions adopted in *Norfolk and Western Railway Co. – Trackage Rights—Burlington Northern, Inc.*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Railway, Inc.—Lease and Operate—California Western Railroad*, 360 I.C.C. 653 (1980). Those conditions give employees the right to negotiate an appropriate implementing agreement and, in the event they are adversely affected, to obtain relief that would be retroactive to the date on which they were adversely affected. The Board has made clear that there is no irreparable harm where employees have the benefit of the labor protective conditions in such circumstances. Nor does it matter that in this case, employees are contending (however implausibly) that the appropriate protective conditions should be the *New York Dock* conditions rather than the *Norfolk & Western/Mendocino Coast* conditions. *Norfolk Southern Ry.—Trackage Rights Exemption—Delaware & Hudson Ry.*, STB Finance Docket No. 34209, 2002 STB LEXIS, LEXIS op. at *6, served July 25, 2002 (Board finds that union failed to show irreparable harm by

² NSR's Notice of Exemption explains (at page 4) that "[t]he trackage rights covered by this Notice may be used by NSR for the overhead movement between Saratoga Springs, NY and Binghamton, NY of trains handled by D&H for the account of NSR between Saratoga Springs, NY and Rouses Point, NY pursuant to a haulage agreement between NSR and D&H, and, in the case of D&H's Binghamton terminal trackage, including D&H's East Binghamton Yard, for other movements."

arguing that exempt trackage rights transaction should be subject to *New York Dock* conditions, not standard *N&W-Mendocino Coast* conditions, and that employees would suffer reduction in living standards because of transaction, explaining: "It is not clear that there would be any loss at all"; there "is no difference between New York Dock and Mendocino economic benefits"; and "any economic harm that might occur would not constitute irreparable harm."); *Portland & Western R.R.--Lease and Operation Exemption--Burlington Northern & Santa Fe Ry.*, STB Finance Docket No. 34255, 2002 STB LEXIS 788, LEXIS op. at *4, served December 26, 2002 (Decision by Chairman) (union failed to show that employees would likely suffer irreparable harm absent stay, because if it were later found that the transaction was subject to 49 U.S.C. § 11323 and the labor protective conditions required by that provision, "the compensation and benefits would relate back to any harm suffered by employees at the beginning of the transaction"), *appeal denied*, 2002 STB LEXIS 803, served December 31, 2002; *Keokuk Junction Ry.--Acquisition and Operation Exemption--West End of Toledo, Peoria and Western Ry.*, STB Finance Docket No. 34143, 2001 STB LEXIS 965, LEXIS op. at *7, served December 26, 2001 (no irreparable harm shown because, in the event transaction were later found to be subject to protective conditions, "the compensation and benefits would relate back to any harm suffered by employees at the beginning of the improper transaction"); *Minnesota Northern R.R.--Trackage Rights Exemption--Burlington Northern & Santa Fe Ry.*, STB Finance Docket No. 33337, 1997 STB LEXIS 2983, LEXIS op. at *4, served January 14, 1997 (union does not show irreparable harm by contending that protective conditions "do not fully compensate for the injuries" employees assertedly would suffer as a result of trackage rights transaction; the protective conditions "establish the protection we require to be afforded employees absent a showing that extraordinary protection is required"; moreover, "any financial injury can be compensated and is neither immediate nor irreparable").

Moreover, there is no doubt that the Board has adequate authority to restore the status quo in the highly unlikely event it should decide to disallow the trackage rights transaction.

Portland & Western R.R.--Lease and Operation Exemption--Burlington Northern & Santa Fe Ry., STB Finance Docket No. 34255, 2002 STB LEXIS 803, LEXIS op. at *3, served December 31, 2002 (“there is no irreparable harm in this matter since there is no aspect of this transaction that could not be unwound by the Board in a decision on the merits based on a fully developed record”).

C. Issuance Of The Stay Would Be Contrary To The Public Interest.

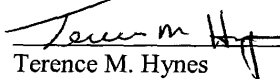
Staying implementation of the overhead trackage rights that are the subject of NSR’s Notice in Finance Docket No. 34562 would be contrary to the public interest. Without those rights, NSR and D&H could not implement the haulage arrangement under which D&H will handle CN-NSR interline traffic for NSR’s account between Rouses Point, NY and Saratoga, Springs, NY, because NSR would lack the trackage rights required for it to bridge the gap between Saratoga Springs and NSR’s lines in Binghamton, NY. The trackage rights and haulage arrangement between D&H and NSR will create a substantially shorter route for CN-NSR interline traffic moving between Quebec and the Maritime Provinces, on the one hand, and the Eastern United States, on the other hand. NSR and CN currently must handle that traffic via an interchange at Buffalo, NY, a route that is approximately 300 miles longer than the proposed haulage/trackage rights route via Rouses Point, NY. The Board (and the ICC before it) “have long recognized that operating arrangements designed by carriers to promote more efficient or economical operations promote the national [rail] transportation policy and should be encouraged.” Finance Docket No. 30703, *Soo Line R. Co.—Joint Use of Lines—Chesapeake and Ohio Ry. Co.* (August 22, 1986) (“*Soo Joint Use*”) at 9 (emphasis added). Moreover, as explained in D&H’s Petition for Exemption, these arrangements will benefit D&H by providing

a significant new source of bridge traffic for its system. D&H Petition for Exemption at 8. The stay requested by UTU-NY would undermine the public interest by thwarting the ability of D&H and NSR to implement arrangements that will improve the efficiency of their operations, enhance service to shippers, and assist D&H in its efforts to attain profitability.

III. CONCLUSION

For all of the foregoing reasons, CPRC and D&H respectfully request that the Board deny UTU-NY's Petition to Stay Operation of Exemptions in its entirety.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that, on this 6th day of October, 2004, I served the foregoing Opposition of Canadian Pacific Railway and Delaware and Hudson Railway Company, Inc.'s to the Petition to Stay Exemptions by causing a copy thereof to be hand-delivered to:

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and by prepaid First Class Mail, to the following parties:

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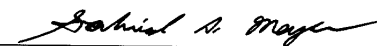
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