

Before The
Surface Transportation Board

Finance Docket No. 34561

61779

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

Finance Docket No. 34562

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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)

617793

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

**SUMMARY OF DOCUMENTS FILED BY NORFOLK SOUTHERN RAILWAY
COMPANY, CANADIAN PACIFIC RAILWAY COMPANY AND DELAWARE
AND HUDSON RAILWAY COMPANY, INC.**

Pursuant to the October 7, 2004 order of the Board in these proceedings, Norfolk Southern Railway Company ("NSR"), Canadian Pacific Railway Company ("CPRC") and Delaware and Hudson Railway Company, Inc. ("D&H") are filing herewith a Memorandum of Understanding dated June 30, 2004 ("MOU") and the following definitive agreements, all entered into on September 30, 2004:

Buffalo-Binghamton Corridor Agreements

Partial Termination of Trackage Rights Agreement

Surrender of SK Yard Lease

Partial Assignment of Trackage Rights

Restated Buffalo Trackage Rights Agreement

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Southern Tier Haulage Services Agreement

Bison Yard Terminal Services Agreement

Rouses Point-Binghamton Corridor Agreements

Saratoga-East Binghamton Trackage Rights Agreement

Rouses Point-Saratoga Springs Haulage Services Agreement

East Binghamton Yard Terminal Services Agreement.

Per the Board's October 7, 2004 order, these documents are being filed under seal and will be made available to interested parties pursuant to the terms of the protective orders issued by the Board on October 8, 2004¹. Copies of the agreements from which certain highly confidential terms have been redacted will be designated Confidential, and their use will therefore be limited to these proceedings only. Unredacted versions will be designated Highly Confidential, and access to them will be limited to outside counsel and consultants of parties who provide appropriate confidentiality undertakings.

We set forth below, in Part I, an overview of the MOU, and in Part II, a brief description of the definitive agreements identified above.

I. Overview of the MOU²

On June 30, 2004, NSR, CPRC and CPRC's subsidiaries, D&H and the Soo Line Railroad Company ("SOO"), entered into an MOU stating their intention to enter into various agreements to improve operational efficiency and service to customers. A general summary of the agreements contemplated by the MOU was publicly announced

¹ See Decisions served October 8, 2004 in Finance Docket No. 34562 and Finance Docket No. 34561.

² The following summary of the MOU, and the summaries of the definitive agreements set forth in Part II, are for convenience only; they do not supersede, alter or amend the agreements to which they refer, nor should they be relied upon as evidence of the legal interpretation of such agreements.

on the same date through press releases.³ The terms of certain definitive agreements executed on September 30, 2004 pursuant to the MOU were described to the Board in the Petition for Exemption filed by D&H on October 1, 2004 in Docket No. AB-156 (Sub-No. 25X), in which D&H seeks authority to discontinue its trackage rights operations between Lanesboro, PA and Buffalo, NY.

The MOU was not a legally binding agreement, and it did not convey any operating rights to any of the parties to that document. To the contrary, the MOU expressly provided that “none of the Parties shall have any binding, legal obligation hereunder unless and until definitive agreements incorporating the understandings contained in this Memorandum of Understanding have been executed and delivered by the Parties.” MOU, Section IX. N. The MOU contemplated that the parties would negotiate such definitive agreements, and that, “[w]hen executed, the Definitive Documentation shall supersede this MOU as to the element to which it relates.” MOU, Section IX. F. Thus, the MOU was not itself a binding agreement, but was only a statement of the parties’ general intent and a road map for further negotiations.

The MOU contemplated that the parties would negotiate binding agreements relating to railroad operations in three geographic areas: over NSR’s lines between Detroit, MI and Chicago, IL; over NSR’s Southern Tier Line between Buffalo, NY and Binghamton, NY; and over D&H’s line between Binghamton, NY and Rouses Point, NY.

With respect to the first, the MOU contemplated that NSR would grant overhead trackage rights to SOO over NSR lines between Detroit and Chicago, and that NSR

³ These press releases were attached to the Petition To Stay Operations filed on October 5, 2004 by Samuel Nasca, New York Legislative Director of the United Transportation Union (hereafter “Petition for Stay.”)

would agree to make various capacity improvements in connection with those rights. MOU, Section I. It also contemplated that NSR would provide haulage services to SOO between Detroit and Chicago during the period required to make such capacity improvements. *Id.*

With respect to the second, the MOU contemplated that D&H would discontinue its operations using trackage rights over NSR's Southern Tier line; that NSR would provide haulage services to D&H over that line; that D&H would assign certain of its trackage rights in the Buffalo area to CPRC (to enable CPRC to reach NSR's Bison Yard for the purpose of physical interchange with NSR in Buffalo); that NSR would provide switching services to CPRC/D&H in the Buffalo area, so that no current (or potential future) customer of CPRC/D&H, or current (or potential future) carrier interchanging traffic with D&H, would lose commercial access to D&H; and that D&H would discontinue the use of NSR's SK Yard in Buffalo.

With respect to the third, the MOU contemplated that NSR would use its best efforts to reach an agreement with CN to reroute CN-NSR interline traffic moving between Quebec and the Canadian Maritime provinces, on the one hand, and the Eastern United States, on the other hand, from its current routing via Buffalo and NSR's Southern Tier to a more efficient (and 300-mile-shorter) routing via Rouses Point, NY and D&H's line between Rouses Point and Binghamton, NY. To that end, the MOU contemplated that NSR would acquire trackage rights over D&H's line between Saratoga Springs, NY and Binghamton, NY and that D&H would provide haulage services to either CN or NSR to move the rerouted CN-NSR interline traffic between Rouses Point and Saratoga Springs, where it would be received by NSR and moved via the new trackage rights to

Binghamton. The MOU also contemplated that D&H would provide certain blocking and switching services for NSR at D&H's East Binghamton Yard in conjunction with these trackage rights and haulage agreements. NSR would continue to switch traffic to and from its customers in the Binghamton area, but would do so out of D&H's East Binghamton Yard. MOU, Sections V, VI.

The MOU contemplated that all of the operating arrangements referred to in the MOU would be implemented at the same time, and that if any non-standard condition unacceptable to any party were imposed on any of those arrangements, that party could elect to accept the condition, appeal the condition or reject (collectively) all of the arrangements described in the MOU. However, in the subsequent negotiations that produced the definitive documents, the parties reached a different agreement with respect to the timing of implementing the various operating agreements, and the effect of a failure of one arrangement on the parties' obligation to implement the others. Specifically, the parties agreed that the transactions embodied in the Rouses Point – Binghamton Corridor Agreements would be implemented as soon as the class exemption relating to NSR's acquisition of overhead trackage rights was effective (and any conditions imposed on the acquisition complied with), regardless of whether the transactions contemplated by the Buffalo – Binghamton Corridor Agreements and/or SOO's proposed acquisition of trackage rights on NSR's Detroit-Chicago line were ultimately consummated. *See* Attachment 9, Rouses Point – Saratoga Springs Haulage Agreement, Section 16.14 (consummation dependent upon consummation of Saratoga – East Binghamton Trackage Rights Agreement and East Binghamton Yard Terminal Services Agreement, but not on consummation of Buffalo – Binghamton Corridor

Agreements or SOO Detroit – Chicago trackage rights); Attachment 8, Saratoga – East Binghamton Trackage Rights Agreement, Section 23(n) (same); Attachment 10, East Binghamton Yard Terminal Services Agreement, Section 14(o) (same).

Likewise, the Buffalo-Binghamton Corridor Agreements expressly provide that the transactions contemplated by those agreements will be implemented upon STB approval or exemption of D&H's proposed discontinuance of trackage rights in Docket No. AB-156 (Sub-No. 25 X) and CPRC's acquisition of overhead trackage rights in Finance Docket No. 34561 (and compliance with any conditions imposed on such approvals or exemptions), regardless of whether the Rouses Point – Binghamton Corridor Agreements and SOO's proposed acquisition of trackage rights over NSR's Detroit-Chicago line are ultimately consummated. *See* Attachment 6, Southern Tier Haulage Agreement, Section 16.14 (consummation dependent upon consummation of Restated Buffalo Trackage Rights Agreement, Bison Yard Terminal Services Agreement, Partial Assignment of Trackage Rights Agreements, Surrender of SK Yard Lease, and discontinuance of D&H's trackage rights over the Southern Tier line, but not on consummation of Rouses Point – Binghamton Corridor Agreements or SOO Detroit – Chicago trackage rights); Attachment 5, Restated Buffalo Trackage Rights Agreement, Section 22(n) (same); Attachment 7, Bison Yard Terminal Services Agreement, Section 14(o) (same).

NSR and SOO have not yet reached a definitive agreement regarding SOO's proposed acquisition of trackage rights on NSR's Detroit – Chicago line. Nevertheless, the parties intend to implement the arrangements contemplated by the Rouses Point – Binghamton Corridor Agreements and the Buffalo – Binghamton Corridor Agreements,

in each case as soon as the conditions precedent to consummation of those arrangements are met, regardless of whether NSR and SOO have executed an agreement with respect to the Detroit – Chicago Corridor.

As the foregoing discussion shows, the terms of the definitive Rouses Point – Binghamton Corridor Agreements and the Buffalo – Binghamton Corridor Agreements depart in significant respects from the general understandings set forth in the MOU.

Each of the definitive agreements contains an integration clause providing that that agreement “contains the entire understanding of the Parties hereto with respect to its subject matter and supersedes any and all other agreements and understandings between the Parties.” (Emphasis added)⁴ Thus, the MOU has been superseded, and has no further significance, with respect to the transactions contemplated by the Rouses Point – Binghamton Corridor Agreements and the Buffalo – Binghamton Corridor Agreements. Moreover, consummation of the arrangements contemplated by the Rouses Point – Binghamton Corridor Agreements is not in any manner dependent or contingent upon consummation of the arrangements contemplated by the Buffalo – Binghamton Corridor Agreements. Conversely, consummation of the arrangements contemplated by the Buffalo – Binghamton Corridor Agreements is not in any manner dependent or contingent upon consummation of the arrangements contemplated by the Rouses Point – Binghamton Corridor Agreements.

In sum, as NSR, CPRC and D&H said in their oppositions to the Petition for Stay, with respect to the transactions effected by the trackage rights agreements that are the

⁴ See Rouses Point – Saratoga Springs Haulage Agreement, Section 16.02; Saratoga-East Binghamton Trackage Rights Agreement, Section 23(b); East Binghamton Yard Terminal Services Agreement, Section 14(b); Southern Tier Haulage Agreement,

subject of the two Notices of Exemption filed on October 1, 2004 and by the other agreements referenced in those Notices of Exemption and in D&H's Petition for Exemption, the MOU has been superseded and has no further force and effect. In examining those agreements (including the MOU) that are being filed herewith, the Board should have no difficulty in determining that they provide for ordinary overhead trackage rights (the subject of the notices of exemption), and other common operational arrangements among railroads (not the subject of the Board's regulatory jurisdiction), in each case designed to improve efficiency and service to customers.

II. Overview of Definitive Agreements

1. Partial Termination of Trackage Rights Agreement.

By this agreement, D&H terminates, and NSR agrees to the termination of, D&H's trackage rights over NSR's Southern Tier Line between Milepost 198.8 $\pm$ in Lanesboro, PA and CP Coles at Milepost 210.9 $\pm$ in Binghamton, NY; between Milepost 217.0 $\pm$ in Binghamton, NY and Milepost 419.8 $\pm$ in Buffalo NY (including tracks into NSR's Bison Yard for interchange with NSR); over NSR's Bison Running Track between Milepost 419.8 $\pm$ and Milepost 423.3 $\pm$ in Buffalo, NY; and over NSR's Howard Street Running Track between Milepost 420.15 $\pm$ and Milepost 422.3 $\pm$ in Buffalo, NY. These terminated trackage rights were acquired by D&H pursuant to an April 25, 1979 agreement between D&H and NSR's predecessor in interest, Consolidated Rail Corporation ("Conrail") (the "1979 Agreement"). The agreement provides that the termination will be effective on a date mutually agreed by the parties, which shall not be before the effective date of the exemption of the discontinuance of trackage rights that is

Section 16.02; Restated Buffalo Trackage Rights Agreement, Section 22(b); Bison Yard Terminal Services Agreement, Section 14(b).

the subject of D&H's Petition for Exemption in Docket No. AB-156 (Sub-No. 25X) (including compliance with any conditions imposed by the STB in that proceeding).

2. Surrender of SK Yard Lease.

By this agreement, D&H surrenders its right to use the SK Yard in Buffalo, NY in connection with its trackage rights over NSR's Southern Tier Line. In 1984, D&H agreed to a request by Conrail to shift D&H's yard operations from Bison Yard (which D&H then shared with Conrail) to SK Yard. This agreement also provides that the surrender of the lease will be effective on a date mutually agreed by the parties, which shall not be before the effective date of the exemption of the discontinuance of trackage rights that is the subject of D&H's Petition for Exemption in Docket No. AB-156 (Sub-No. 25X) (including compliance with any conditions imposed by the STB in that proceeding).

3. Partial Assignment of Trackage Rights.

By this agreement, D&H, with NSR's consent, would assign to CPRC its trackage rights in the vicinity of Bison Yard, specifically: between Milepost 413.0 $\pm$ and 419.8 $\pm$, including tracks into Bison Yard for physical interchange with NSR; over NSR's Bison Running Track between Milepost 419.8 $\pm$ and Milepost 423.3 $\pm$; and over NSR's Howard Street Running Track between Milepost 420.15 $\pm$ and Milepost 422.3 $\pm$. This assignment also will be effective on a date mutually agreed by the parties, which shall not be before the effective date of the exemption of the discontinuance of trackage rights that is the subject of D&H's Petition for Exemption in Docket No. AB-156 (Sub-No. 25X) (including compliance with any conditions imposed by the STB in that proceeding).

4. Restated Buffalo Trackage Rights Agreement.

This agreement restates the business terms upon which CPRC will exercise its overhead trackage rights in Buffalo.

5. Southern Tier Haulage Services Agreement.

By this agreement, NSR agrees to provide haulage services to D&H over NSR's Southern Tier Line between Buffalo and Binghamton, NY.

6. Bison Yard Terminal Services Agreement.

This agreement designates NSR's Bison Yard in Buffalo, NY as the point of interchange between CPRC or D&H, on the one hand, and Norfolk Southern, on the other hand, at Buffalo, and as the point of delivery for cars handled by NSR for the account of CPRC/D&H under the Southern Tier Haulage Services Agreement. It also provides that NSR will perform certain switching services for the account of CPRC or D&H, including switching of cars to/from industries in the Buffalo Terminal Area, and switching cars to/from points of interchange with other railroads with which D&H interchanges traffic today. NSR's provision of services under this agreement will begin on a date mutually agreed between NSR and D&H, but not before the effective date of the exemption of the discontinuance of trackage rights that is the subject of D&H's Petition for Exemption in Docket No. AB-156 (Sub-No. 25X) (including compliance with any conditions imposed by the STB in that proceeding).

7. Saratoga-East Binghamton Trackage Rights Agreement.

Under this agreement D&H grants NSR trackage rights generally between D&H's Saratoga Yard at Saratoga Springs, NY and D&H's East Binghamton Yard in

Binghamton, NY. More specifically, the pertinent lines are (i) between D&H's Saratoga Yard, located at Milepost 37.10 $\pm$ of D&H's Canadian Main Line in Saratoga Springs, NY, and the point of connection between D&H's Canadian Main Line and D&H's Freight Main Line at CPF 480, located at Milepost 21.70 $\pm$ of D&H's Canadian Main Line (which point is also Milepost 480.36 $\pm$ of D&H's Freight Main Line), plus designated tracks inside Saratoga Yard (the foregoing referred to as "D&H Segment A") (ii) between CPF 480 and CPF 611 at Milepost 611.15 $\pm$ of D&H's Freight Main Line in Binghamton, NY (the foregoing referred to as "D&H Segment B"); and (iii) between CPF 611 and Milepost 620.20 $\pm$ of D&H's Freight Main Line in Binghamton, NY, along with such additional tracks within East Binghamton Yard as designated by D&H (the foregoing referred to as the "Binghamton Terminal Segment").

The rights are generally overhead only (except for certain other specified uses permitted on the Binghamton Terminal Segment), and apply only to NSR trains having a prior or subsequent movement on D&H's line between Saratoga Springs and Rouses Point, NY pursuant to the Rouses Point – Saratoga Haulage Agreement (described below). Under the agreement, NSR operations will commence on a date mutually agreed by NSR and D&H, but not before the effective date of any STB authorization or exemption of the rights covered by NSR's Notice of Exemption in Finance Docket No. 34562 (and compliance with any STB-imposed conditions in connection with that exemption).

8. Rouses Point-Saratoga Springs Haulage Services Agreement.

In this agreement, D&H has agreed to provide haulage services for NSR for traffic moving over D&H's line between a point of connection with CN at Rouses Point,

NY and D&H's Saratoga Yard at Saratoga Springs, NY. These haulage services are for traffic in NSR's account moving between the lines of CN and Saratoga Springs, where the traffic will be delivered to (or received from) NSR for handling by NSR between Saratoga Springs and Binghamton, NY pursuant to the Saratoga – East Binghamton Trackage Rights Agreement. The agreement provides that the haulage services shall commence on a date mutually agreed by the parties but not before the effective date of any STB authorization or exemption of the rights covered by NSR's Notice of Exemption in Finance Docket No. 34562 (and compliance with any STB-imposed condition(s) in connection with that exemption).

9. East Binghamton Yard Terminal Services Agreement.

By this agreement, NSR and CPRC/D&H have agreed to make D&H's East Binghamton Yard the point of interchange between NSR and CPRC/D&H in Binghamton, NY. The agreement details where and how the interchange is to take place. It also provides that D&H will provide certain switching, classification and blocking services for NSR in East Binghamton Yard. NSR, however, will switch cars between East Binghamton Yard and the facilities of NSR's customers in the Binghamton area. This agreement also provides that it shall become effective on a date mutually agreed by the parties but not before the effective date of any STB authorization or exemption of the rights covered by NSR's Notice of Exemption in Finance Docket No. 34562 (and

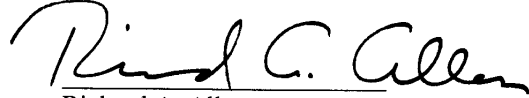
compliance with any STB-imposed conditions in connection with that exemption).

Respectfully submitted,



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October 12, 2004

CERTIFICATE OF SERVICE

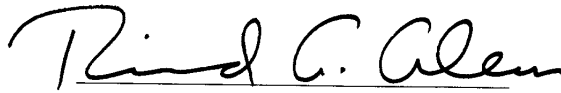
I certify that on October 12, 2004, a true copy of the foregoing "Summary of Documents filed by Norfolk Southern Railway Company, Canadian Pacific Railway Company and Delaware and Hudson Railway Company, Inc." by hand delivery upon:

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and by first class mail, postage prepaid upon

Daniel R. Elliott, III
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A handwritten signature in cursive script, reading "Richard A. Allen", written over a horizontal line.

Richard A. Allen