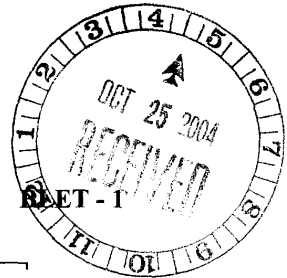


FILED
OCT 25 2004
SURFACE
TRANSPORTATION BOARD

REPORT TO THE SURFACE TRANSPORTATION BOARD



In the Matters of:

STB Finance Docket No. 34561

212335

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

STB Finance Docket No. 34562

212336

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

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

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

ENTERED
Office of Proceedings
OCT 25 2004
Part of
Public Record

PETITION TO REVOKE EXEMPTIONS AND TO STAY TRANSACTIONS

The Brotherhood of Locomotive Engineers and Trainmen, A Division of the Rail Conference of the International Brotherhood of Teamsters ("BLET") petitions the Board to revoke the exemptions sought by the carriers in these proceedings.¹ What these three proceedings represent is a clever effort by the Canadian Pacific Railway Company (CPR), its wholly-owned and controlled subsidiary Delaware and Hudson Railway Company (D&H), and the Norfolk

¹ While these proceedings have not been consolidated by the Board, the changes they seek to implement are all part of one consolidated transaction. The proceedings should be consolidated and considered as one for that very reason. In any event, until there is such a consolidation, the BLET will file its pleadings in all three.

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OCT 25 2004

U.S. DEPARTMENT OF
TRANSPORTATION BOARD

Southern Railway Company (NSR) to split a major intercorporate transaction into component parts in order to hide the anti-competitive effects and to deprive the employees who will be affected of the levels of protection to which they otherwise would be entitled.

Section 10101(1) of Title 49 establishes the elements of national rail transportation policy that are implicated in these proceedings. They include “(4) to ensure the development and continuation of a sound rail transportation system *with effective competition among rail carriers* and with other modes, *to meet the needs of the public* and the national defense;” and “(12) to prohibit predatory pricing and practices, *to avoid undue concentrations of market power*, and to prohibit unlawful discrimination.”

NSR and CPR invoke Section 10502 of Title 49 to undertake their trackage rights acquisitions as exempt transaction. Section 10502 requires that the Board exempt particular transactions from the usual approval requirements *only* when “the Board finds that the application in whole or in part of a provision of this part – (1) is not necessary to carry out the transportation policy of section 10101 of this title; and (2) either - (A) the transaction or service is of limited scope; or (B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.” In other words, the Board is not required to, and should not, exempt a transaction from the usual approval requirements when the Board finds that the application of its usual approval requirements *is* not necessary to carry out the transportation policy of section 10101 of this title; and the transaction or service is *not* of limited scope or the application in whole or in part of the provision *is* needed to protect shippers from the abuse of market power. Here, as we show below, the exemption standards of Section 10502 have not been met.

What is happening here is that three carriers are intent on effecting a major corporate restructuring of operations that will have effects far beyond New York State. If permitted to proceed, this will immediately effect an operational sea change in how rail traffic traverses the heart of upstate New York. Presently, D&H runs freight operations about 22 miles from Lanesboro, PA to Binghamton, NY, then from Binghamton west to Buffalo about 203 miles on NSR's Southern Tier Line, and from there to connect with CSXT on NSR's Bison Running Track and Howard Street Running Track. D&H proposes to discontinue those New York rail freight operations and turn them over to NSR.

NSR proposes to acquire from D&H overhead trackage rights on D&H's Freight Main Line and Canadian Main Line (from Saratoga Springs south through Binghamton), so as to enable it to operate in and out of Binghamton on the D&H lines over which D&H now operates.

To complete the transaction, CPR will acquire from D&H the overhead trackage rights D&H possesses, but only for a limited purpose. As explained in CPR's Verified Notice of Exemption, CPR will be permitted to use these rights

only to deliver to, and receive from NSR at NSR's Bison yard in Buffalo, NY (i) traffic interchanged between CPRC and NSR at Buffalo, NY; (ii) CPRC/D&H through traffic that will be handled by NSR between Buffalo, NY, and Binghamton, NY pursuant to a haulage agreement between NSR and D&H, and (iii) traffic that will be switched by NSR for the account of D&H (or CPRC) between Bison yard, on the one hand, and industries or points of interchange with other carriers in the Buffalo Terminal Area to which D&H has commercial access², on the other hand, pursuant to a switching agreement between NSR and D&H.

D&H will surrender all of its rail freight business on these routes to NSR. Essentially, D&H is surrendering to NSR the right to operate over the Southern Tier. Yes, it will be able to

² Presumably CSXT.

access customers via switching at the Buffalo terminal and to interchange traffic with other rail carriers, but the actual carriage and delivery of freight will no longer be a D&H operation. NSR will be taking over those operations.

NSR also will begin operations with its own equipment and crews over D&H lines south from Saratoga Springs, NY, through Binghamton, some 301 miles. D&H presently provides this service; it will effectively be supplanted here too.

The magnitude of the combined transactions was forecast by CPR in 2003. As described in the Carriers' June 30, 2004 press release (Attachment A):

CPR announced in June 2003 it was restructuring its northeastern U.S. operations and was seeking proposals for ways to increase freight volumes, reduce operating costs and improve earnings. CPR's northeastern U.S. network is operated as the Delaware and Hudson Railway.

The transactions that are now before the Board are the result of NSR's response to CPR's request for proposals.

On October 1, 2004, the CPR and NSR issued a joint press release that describes the currently-proposed transactions and evidences why they should not be considered by themselves. They said: "The filings [the Board is now considering] arise from *a series of transactions* announced by CPR and NSR on June 30, 2004, involving trackage rights, freight haulage and yard services." (Emphasis added). Attachment B. The particulars were set forth as follows:

Under the filings, NSR is seeking STB authority for new trackage rights to operate its trains on CPR's Delaware and Hudson Railway subsidiary between Saratoga Springs and Binghamton, N.Y. CPR is seeking STB authority to discontinue trackage rights under which the Delaware and Hudson Railway currently operates its trains on NSR track between Binghamton and Buffalo, N.Y. Along with the trackage rights:

CPR will move NSR freight traffic between Rouses Point and Saratoga Springs

under a freight haulage arrangement;

NSR will move CPR traffic between Buffalo and Binghamton under a freight haulage arrangement;

NSR will provide yard switching services for CPR freight cars in Buffalo; and

CPR will provide yard switching services for NSR freight cars in Binghamton .

The two railways also announced on June 30 that NSR would create a new route between Detroit and Chicago. The route, which is expected to be open in 2005, will be the shortest rail route between the two cities, providing CPR with a faster, lower-cost lane between two of North America 's biggest transportation hubs.

All of these operational changes (and more) are laid out in the Memorandum of Understanding that the Board has required the Carriers to file. In their recently filed petitions and notices the Carriers have not placed before the Board the Detroit-Chicago component of the deal, but there should be no mistake that that part of the restructuring will happen also. As they say in their most recent press release, they intend to implement that part of the overall rearrangement shortly.

Further, the MOU that the Carriers have filed divulges other elements of the overall restructuring. The changes presented by the instant proceedings are just a part of what they've agreed to accomplish. The confidentiality requirements prevent us from describing those other changes, but we direct the Board's attention to the entirety of what the MOU refers to collectively as the "Transaction" and urge the Board to scrutinize the proposed changes here in the context of the "Transaction." The instant proceedings clearly are only part of the picture.

The Carriers say that 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." Summary of Documents, p. 3. Consequently, they say, because the ultimate terms of the various restructuring actions are embodied in free-standing contracts, the MOU is of no significance here. The Board

should reject this suggestion. The "road map" has been drawn; while the parsing out of some of the details may be an ongoing chore, the fact remains that the road map is expansive and the Board should not consider each individual route in isolation.

Despite what NSR has said previously in these cases (Reply of [NSR] in Opposition to Petition to Stay Operation of Exemptions, p. 6), the MOU plainly reveals that these are not business deals that are independent of one another. One would not know the totality of the circumstances from the simple "Overview" of the MOU contained in their Summary of Documents; perhaps that is their plan. But scrutiny by the Board of the MOU itself will conclusively prove that the transactions covered in the petitions and notice in these proceedings are not the "ordinary operational agreements" the Carriers say they are.

NSR is being disingenuous, to say the least, when it asserts the transactions "do not involve any carrier consolidations." (*Id.*). Its June 30 joint press release with CPR says:

CPR and NSR *will consolidate* freight marshalling at yards in Buffalo and Binghamton, N.Y.:

CPR will cease yard operations in Buffalo, shifting all freight marshalling to the NSR yard there.

Similarly, NSR will shift its yard operations in Binghamton to CPR's East Binghamton yard.

Furthermore, these are not "separate, stand-alone transaction[s]" as NSR asserts. Rather the documents filed under seal show they are part of an integrated whole in which the carriers intend to restructure their respective operations throughout the Northeast. Presenting them separately to the agency cannot alter the reality of the situation. The carriers are trying to pull the Board's leg by suggesting otherwise.

By entering into separate contracts for each of the components of their overall restructuring, the Carriers hope to convince the Board that what they intend to undertake are separate deals with separate consideration, none of which require more than minimal Board oversight or scrutiny. See, e.g., Reply of [CPR and D&H] in Opposition to Petition to Stay Operation of Exemptions, p. 4-5. Artful contract drafting, however, cannot obscure what really is going on.

CPR and D&H say that “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.” Reply of [CPR and D&H] in Opposition to Petition to Stay Operation of Exemptions, p. 6. But the Board can and should reasonably ask whether such marketing has any worth when D&H’s ability to provide service is dependent upon the addition of a haulage service fee (due to NSR) to what D&H otherwise charges. D&H will no longer be operating its own trains. The Board’s examination of the Transaction as described in the MOU should lead to an Order that the Carriers lay all of their cards on the table and reveal the full breadth of the operational changes they intend to accomplish.

The carriers would trivialize this series of transactions so as to avoid dealing with the serious effect they will have on the employees. There are 25 D&H agreement employees whom D&H says will be affected by the discontinuance it currently proposes. Eight are represented by BLET. They are locomotive engineers who operate trains across the Southern Tier from Buffalo to Binghamton, between Binghamton and Saratoga Springs, and at the SK Yard. All of their positions will be abolished. But far more will be affected if the entirety of the Carriers’ intentions are carried out.

CPR's Notice states that employees affected by its acquisition of trackage rights should be afforded protection under the N&W/Mendocino Coast conditions.³ NS's Notice states that employees affected by its acquisition of trackage rights should be afforded the same protection. D&H states in its Petition that the Oregon Short Line conditions⁴ are sufficient to protect the interests of its employees who are affected by its proposed discontinuance.

Section 11323(a)(2) provides that "a purchase, lease, or contract to operate property of another rail carrier by any number of rail carriers" is a transaction that "may be carried out only with the approval and authorization of the Board." 49 U.S.C. § 11323(a)(2). The employee protective conditions required in a Section 11323 transaction are the New York Dock conditions; those conditions require an implementing agreement to be in place before a transaction occurs and employees' jobs are eliminated. Apparently, that is one thing the Carriers want to avoid.

If the Carriers are permitted to proceed with these transactions, which are only elements of a much larger overall "Transaction," without full Board consideration of their effects on shippers, employees, and the general public, the purpose of the exemption process will be warped in order to serve only the private business purposes of NSR and CPR. What they propose would effectively remove D&H from the transportation picture in New York.

The Board has already announced that it will be examining the D&H discontinuance petition more closely. And CPR has announced that it will not proceed with its trackage rights

³ 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).

⁴ Oregon Short Line R.R. and Union Pacific R.R. - Abandonment - Goshen, 360 I.C.C. 91 (1979).

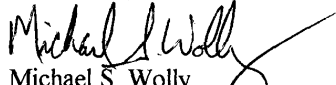
transaction until that discontinuance is approved. Because all of these transactions are part of an integrated whole, the Board should stay the third part of the currently-proposed tri-fold rearrangement as well -- the NSR acquisition of trackage rights over the D&H.

In these circumstances, the Board should:

A. Revoke the exemptions that NSR and CPR have invoked in Dockets 34561 and 34562.

B. Stay the trackage rights exemption sought by NSR in Docket 34562 until the Board considers and resolves D&H's petition for exemption in Docket AB-156 (Sub-No. 25X) to discontinue its trackage rights on the Southern Tier.⁵

Respectfully submitted,

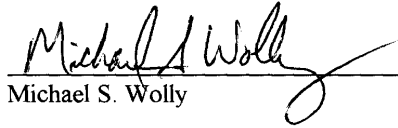


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Attorney for BLET

⁵ NSR says that it will not wait for the Board to approve D&H's petition for exemption in Docket AB-156 (Sub-No. 25X) before proceeding. Because, as we have shown, all of these transactions are interrelated and part of a much larger corporate restructuring, the Board should not let any of the Carriers implement it piecemeal. Because CPR has stated that it will not proceed until the Board has acted on D&H's petition, there is no need for us to ask for a stay in that proceeding at this time.

CERTIFICATE OF SERVICE

This is to certify that a copy of the attached Petition was served upon counsel for all known parties of record by hand-delivery or first class mail, postage prepaid, this 25th day of October 2004.


Michael S. Wolly

June 30, 2004

CPR and NSR Move to Improve Performance of Northeastern Rail Network

CALGARY – Canadian Pacific Railway (CPR) and Norfolk Southern Railway (NSR) today signed a memorandum of understanding for an exchange of trackage rights, freight haulage and yard services that will increase operational efficiency and enhance rail service to customers.

CPR (TSX/NYSE: CP) announced in June 2003 it was restructuring its northeastern U.S. operations and was seeking proposals for ways to increase freight volumes, reduce operating costs and improve earnings. CPR's northeastern U.S. network is operated as the Delaware and Hudson Railway.

"This agreement with NSR opens up new opportunity to move our northeastern U.S. franchise into a position of profitability," Rob Ritchie, President and Chief Executive Officer of CPR, said. "We expect the changes will generate higher traffic volumes and revenues, greater productivity and lower operating costs."

David R. Goode, Norfolk Southern Chairman, President and Chief Executive Officer, said, "This is an excellent example of railroads cooperating to better serve our customers. We will be able to jointly provide transportation solutions that will improve efficiency and quality of service for both carriers in the northeast U.S."

Under the agreement, CPR and NSR will consolidate freight marshalling at yards in Buffalo and Binghamton, N.Y.:

- CPR will cease yard operations in Buffalo, shifting all freight marshalling to the NSR yard there.
- Similarly, NSR will shift its yard operations in Binghamton to CPR's East Binghamton yard. There are three major components to the new trackage rights and freight haulage arrangements between CPR and NSR:
- CPR will be able to move NSR freight traffic between Rouses Point and Saratoga Springs, N.Y., under a haulage arrangement. NSR will operate its own trains over CPR's line between Saratoga Springs and Binghamton, N.Y., under a trackage rights arrangement. The arrangements will generate higher revenue for CPR and provide NSR with a substantially shorter route to Quebec and the Maritime provinces.
- CPR's freight traffic between Binghamton and Buffalo, N.Y., will move in NSR trains under a haulage arrangement, replacing a trackage rights agreement under which CPR operated its own trains between the two cities. The arrangement will reduce CPR's operating costs and generate additional revenue for NSR.
- CPR will operate over a new NSR route using existing rail lines between Detroit and Chicago under a trackage rights agreement. It will be the shortest rail route between the two cities and will provide CPR with a faster, lower-cost lane.

"CPR's challenge remains to take this part of our network to a level of profitability that will make it self-sustaining," Mr. Ritchie said. "We are prepared to examine additional measures that, in concert with our NSR agreement, will further optimize our assets and drive up profitability."

New trackage rights arrangements and the discontinuance of trackage rights require approval of the U.S. Surface Transportation Board.

Mr. Ritchie will hold a conference call with analysts and reporters today at 3:30 p.m. Eastern time to discuss details of the agreement with NSR. The telephone numbers for the call are 1-800-814-4857 or 416-640-1907. Callers should dial in 10 minutes prior to the call. A telephone replay of the call will be available through July 7 at 1-877-289-8525 or 416-640-1917, pass code 21056014 followed by the pound key. The call will also be webcast live on CPR's website, www.cpr.ca. To access the webcast, click on Investor Information and choose Investor Presentations. The webcast will be archived through July 30.

Canadian Pacific Railway is a transcontinental carrier operating in Canada and the U.S. Its 14,000-mile rail network serves the principal centres of Canada, from Montreal to Vancouver, and the U.S. Northeast and

http://www.nscorp.com/nscorphtml/releases04/ne_rail.html

ATTACHMENT A

10/25/2004

CPR and NSR Move to Improve Performance of Northeastern Rail Network

Page 2 of 2

Midwest regions. CPR feeds directly into America's heartland from the East and West coasts. Alliances with other carriers extend its market reach throughout the U.S. and into Mexico. Canadian Pacific Logistics Solutions provides logistics and supply chain expertise worldwide. For more information, visit CPR's website at www.cpr.ca.

Norfolk Southern Railway operates 21,500 routes miles in 22 states, the District of Columbia and Ontario, serving every major container port in the eastern United States and providing superior connections to western rail carriers. NSR operates the most extensive intermodal network in the East and is the nation's largest rail carrier of automotive parts and finished vehicles. For more information, visit NSR's website at www.nscorp.com.

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News Releases

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Canadian Pacific Railway and Norfolk Southern Railway Seek U.S. Regulatory Authority for Trackage Rights Arrangements

CALGARY, ALBERTA— Canadian Pacific Railway (CPR) and Norfolk Southern Railway (NSR) today filed with the United States Surface Transportation Board (STB) seeking authority for trackage rights arrangements that will improve operational efficiency and enhance rail service in the U.S. Northeast.

The railways said today's filings are an important milestone in implementing improvements that will benefit shippers in the Northeastern U.S. market. The filings arise from a series of transactions announced by CPR and NSR on June 30, 2004, involving trackage rights, freight haulage and yard services.

Under the filings, NSR is seeking STB authority for new trackage rights to operate its trains on CPR's Delaware and Hudson Railway subsidiary between Saratoga Springs and Binghamton, N.Y. CPR is seeking STB authority to discontinue trackage rights under which the Delaware and Hudson Railway currently operates its trains on NSR track between Binghamton and Buffalo, N.Y.

Along with the trackage rights:

- CPR will move NSR freight traffic between Rouses Point and Saratoga Springs under a freight haulage arrangement;
- NSR will move CPR traffic between Buffalo and Binghamton under a freight haulage arrangement;
- NSR will provide yard switching services for CPR freight cars in Buffalo; and
- CPR will provide yard switching services for NSR freight cars in Binghamton.

The two railways also announced on June 30 that NSR would create a new route between Detroit and Chicago. The route, which is expected to be open in 2005, will be the shortest rail route between the two cities, providing CPR with a faster, lower-cost lane between two of North America's biggest transportation hubs.

Canadian Pacific Railway is a transcontinental carrier operating in Canada and the U.S. Its 14,000-mile rail network serves the principal centers of Canada, from Montreal to Vancouver, and the U.S. Northeast and Midwest regions. CPR feeds directly into America's heartland from the East and West coasts. Alliances with other carriers extend its market reach throughout the U.S. and into Mexico. Canadian Pacific Logistics Solutions provides logistics and supply chain expertise worldwide. For more information, visit CPR's Web site at www.cpr.ca. Norfolk Southern Railway operates 21,500 route miles in 22 states, the District of Columbia and Ontario, Canada, serving every major container port in the eastern United States and providing superior connections to western rail carriers. NSR operates the most extensive intermodal network in the East and is the nation's largest rail carrier of automotive parts and finished vehicles. For more information, visit NSR's Web site at www.nscorp.com.

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ATTACHMENT B