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

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Re: Finance Docket No. 34561, Canadian Pacific Railway Company—
Trackage Rights Exemption—Norfolk Southern Railway - 212345
Company—Buffalo, NY; Finance Docket No. 34562, Norfolk
Southern Railway Company—Trackage Rights Exemption— 212346
Delaware and Hudson Railway Company, Inc.—Between Saratoga
Springs, NY and Binghamton, NY; Docket No. AB-156 (Sub-No. 212347
25X), Delaware & Hudson Railway Company, Inc.—
Discontinuance of Trackage Rights—Between Lanesboro, PA and
Buffalo, NY.

Dear Secretary Williams:

I am writing on behalf of Norfolk Southern Railway Company ("NSR") in regard to a "Petition to Revoke the Class Exemption For the Two Notices," filed by Samuel Nasca, New York Legislative Director of the United Transportation Union ("UTU-NY"), and a "Petition to Revoke Exemptions and To Stay Transactions" filed by the Brotherhood of Locomotive Engineers and Trainmen ("BLET"). Both petitions were filed late yesterday afternoon and both seek revocation of exemptions in two of the above-captioned proceedings, Finance Docket No. 34561 and Finance Docket No. 34562. The exemptions will result from notices of exemption filed in the two proceedings on October 1, 2004 and they are scheduled to become effective on October 27, 2004 at the expiration of a housekeeping stay issued by the Board on October 7, 2004.

Both Petitions were served on me after the close of business yesterday. The UTU-NY petition does not reiterate UTU-NY's earlier request for stay of the exemptions or request an extension of the housekeeping stay. The BLET petition does request a stay of the exemption sought by NSR in Finance Docket No. 34562 until the Board acts on the petition for exemption sought by Delaware and Hudson Railway Company, Inc. ("D&H") in Docket No. AB-156 (Sub-No. 25X). BLET, which had not previously made any substantive filing in these proceedings,

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does not explain why BLET waited until less than two days before the exemptions are to become effective to file its request for a stay, inasmuch as BLET has been on notice of the exemptions since October 1 and was provided copies of all the pertinent agreements on October 12, 2004. These 11th-hour filings obviously do not provide NSR or Canadian Pacific Railway Company ("CPR") sufficient time to file complete responses to the petitions to revoke before the exemptions are scheduled to go into effect. NSR intends to file a more complete response to them in due course, but wishes to make the following brief points here in response to the BLET request to extend the stay in Finance Docket No. 34562 beyond October 27, which NSR submits would be entirely unwarranted.

First, nothing in either petition to revoke supports an extension of the stay. The criteria for revoking exemptions, of course, are completely different from the standards for imposing a stay. As NSR noted in its opposition to the petition to stay filed earlier by UTU-NY, a stay is an extraordinary, rarely-granted remedy that requires the party seeking a stay to show not only that it has a strong likelihood of success on the merits (in this case, of the petitions to revoke) but *also* that it will suffer irreparable injury in the absence of a stay, that the public interest supports a stay and that a stay will not cause substantial harm to other parties.

BLET has met none of those requirements. BLET can make no plausible case that the employees it represents will suffer irreparable injury. Like UTU-NY, BLET's only claim is that the transactions at issue require *New York Dock* labor protective conditions rather than *Norfolk & Western/Mendicino* conditions. But, as the Board has noted on many occasions, the economic benefits of both sets of conditions are the same. *See, e.g.*, STB Finance Docket No. 34209, *Norfolk Southern Railway Company—Trackage Rights Exemption—Delaware and Hudson Railway Company, Inc.* (served July 25, 2002) at n. 2 (by Chairman Morgan, denying stay request).

Furthermore, there is no reason to believe that the transaction involved in Finance Docket No. 34562 – NSR's acquisition of overhead trackage rights over the D&H between Binghamton, NY and Saratoga Springs, NY – will have any adverse effect on NSR or D&H employees. As NSR explained in its opposition to UTU-NY's stay petition, this transaction is part of an expected rerouting of overhead Canadian National traffic over D&H's line between Rouses Point, NY and Binghamton, NY that will reduce the current routing of that traffic (via Buffalo, NY over NSR's Southern Tier line) by 330 miles. This is expected to result in a net *increase* of two NSR positions, and it will result in traffic new to the D&H lines, and so should have a positive effect on employees of both railroads. BLET provides no basis for disputing these points.

With respect to the transaction involved in Finance Docket No. 34561 – CPR's acquisition of trackage rights in Buffalo, NY by assignment from its subsidiary, D&H – as explained in the Notice of Exemption in that proceeding, the parties will not consummate that transaction until after the Board has ruled on the petition for exemption filed in Docket No. AB-156 (Sub-No. 25X), in which D&H seeks authority to discontinue its trackage rights over NSR's

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Southern Tier between Binghamton and Buffalo. Extending the stay in that transaction, therefore, is not only unwarranted but unnecessary, as BLET evidently recognizes, since it does not request a stay in that proceeding.

Extending the stay in Finance Docket No. 34562, however, would not only harm NSR and D&H but would be decidedly contrary to the public interest, because it would delay consummation of a transaction that will significantly improve the efficiency of railroad operations, increase business for D&H and probably result in increased railroad employment. Nothing in either petition to revoke refutes these facts.

Finally, there is no likelihood (much less a "strong likelihood," *see, e.g., Norfolk Southern Railway Company* at 3) that UTU-NY and BLET will prevail on the merits of their petitions to revoke the exemption. BLET's petition merely reiterates the claim made by UTU-NY in its Petition to Stay Operation of Exemptions, filed on October 5, 2004: namely, that the two trackage rights exemptions are "only elements of a much larger overall 'Transaction'" which BLET claims is a transaction involving a "purchase, lease, or contract to operate property of another rail carrier by any number of carriers" under 49 U.S.C. § 11323(a)(2) and which BLET argues therefore requires imposition of *New York Dock* conditions. BLET Pet. at 8.

Pursuant to the Board's October 7, 2004 order, NSR, CPR and D&H, on October 12, 2004 filed not only the MOU but also nine definitive agreements, which were entered into after, and superseded, the MOU and served unredacted copies of them on counsel for UTU-NY and BLET pursuant to the protective order issued by Board on October 8, 2004. Counsel for BLET has had two weeks to review these agreements, but, significantly, nothing in BLET's just-filed Petition to Revoke Exemptions and Stay Transaction identifies anything in those agreements that would support BLET's claim that any of them, singly or collectively, entail transactions requiring imposition of *New York Dock* conditions.

BLET asserts that "all of these transactions are part of an integrated whole" (BLET Pet. at 9), but that claim is both misleading and irrelevant. While the various transactions may have been developed contemporaneously, it is manifestly not the case that the definitive agreements that were ultimately negotiated are dependent on each other. On the contrary, as NSR, CPR and D&H explained in their public Summary of Documents filed on October 12, 2004, the agreements associated with NSR's acquisition of Binghamton-Saratoga Springs trackage rights (which are involved in Finance Docket No. 34562) are not dependent on the authorization or consummation of the agreements associated with the Buffalo-Binghamton Corridor (which are involved in Finance Docket No. 34561 and Docket No. AB-156 (Sub-No. 25X)). NSR and D&H intend to implement the former agreements as soon as possible and without regard to when or whether the latter agreements are ever authorized or implemented.

More importantly, NSR, CPR and D&H have made all of the agreements available to the Board and to UTU-NY and BLET, and the Board can determine for itself that none of the agreements, singly or collectively, remotely constitute a "purchase, lease or contract to operate

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property of another rail carrier by any number of carriers" under 49 U.S.C. § 11323(a)(2).¹ BLET's petition offers no reasons or arguments supporting its contrary contention. Nor does it provide any basis for concluding that the trackage rights that NSR will obtain pursuant to the agreement filed with the Notice of Exemption in Finance Docket No. 34562 are anything other than ordinary trackage rights under 49 U.S.C. § 11323(a)(6), which qualify for the class exemption in 49 C.F.R. § 1180.2(d)(7) and for which the Board has long held that the appropriate protective conditions are the *Norfolk and Western/Mendicino* conditions.

Finally, the MOU was filed with the Board in a "confidential" and "highly confidential" manner, and provided to the parties, all pursuant to a protective order proposed by NSR, CPR and D&H and unopposed by UTU-NY or BLET. Although UTU-NY requests removal of the confidentiality designations, it provides no reasoning to support its request. The MOU contains confidential and highly confidential information dealing with potential transactions still under negotiation by the parties. It has been made available to the parties, and nothing precludes UTU-NY or BLET from making any arguments to the Board that either deem relevant to their respective cases. The request to declassify the MOU should be denied.

Sincerely,



Richard A. Allen

cc:

Terence M. Hynes, Esq.
Gordon MacDougall, Esq.
Michael S. Wolly, Esq.
Daniel R. Elliot, III, Esq.

¹ There is thus no basis for BLET's suggestion (Pet. at 7) that the Board has not required the carriers to "lay all their cards on the table and reveal the full breadth of the operations changes they intend to make."