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November 5, 2004

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

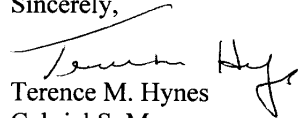
Re: Docket No. AB-156 (Sub-No. 25X) Delaware And Hudson Railway
Company, Inc.-Discontinuance Of Trackage Rights-Between Lanesboro,
PA, And Buffalo, NY

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are an original and ten (10) copies of the Reply Of Canadian Pacific Railway Company And Delaware And Hudson Railway Company, Inc. In Opposition To Appeal Of United Transportation Union-New York Legislative Board filed on November 1, 2004. 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 and returning them via our messenger. If you have any questions, please contact the undersigned counsel.

Sincerely,


Terence M. Hynes
Gabriel S. Meyer

TMH:aat
Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

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



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**REPLY OF CANADIAN PACIFIC RAILWAY COMPANY AND
DELAWARE AND HUDSON RAILWAY COMPANY, INC.
IN OPPOSITION TO APPEAL OF UNITED TRANSPORTATION
UNION-NEW YORK LEGISLATIVE BOARD**

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Dated: November 5, 2004

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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 APPEAL OF UNITED TRANSPORTATION
UNION-NEW YORK LEGISLATIVE BOARD**



Canadian Pacific Railway Company (“CPRC”) and Delaware and Hudson Railway Company, Inc. (“D&H”) submit this reply in opposition to the Appeal (the “UTU-NY Appeal”) filed in the above-captioned proceeding on November 1, 2004 by Samuel J. Nasca, New York State Legislative Director for United Transportation Union (“UTU-NY”) from the decision served by the Director, Office of Proceedings (“DOP”) on October 21, 2004 (the “*October 21 Decision*”). UTU-NY contends that the DOP erred in failing to schedule a public hearing on D&H’s Petition for Exemption (the “D&H Petition”), and by indicating in the *October 21 Decision* that the Board plans to issue its decision in this matter by January 19, 2005. (UTU-NY Appeal at 3-5.) UTU-NY also asks the Board to extend the date for filing replies to the D&H Petition by 40 days, to December 20, 2004. (UTU-NY Appeal at 5-6.) For the reasons set forth below, the UTU-NY Appeal should be denied in its entirety.

The Board’s regulations at 49 CFR § 1011.6(b), under which the UTU-NY Appeal was filed, state that “[a]ppeals are not favored and will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice.” *Id.* The requirements of this regulation are “stringent.” Finance Docket No. 33388, *CSX Corp. and CSX Transportation, Inc., Norfolk Southern Corp. and Norfolk Southern Railway Co.—Control and Operating*

Leases/Agreements—Conrail Inc. and Consolidated Rail Corp. (served May 8, 1998). The UTU-NY Appeal does not identify any exceptional circumstance warranting the requested relief, nor does it demonstrate any error in the *October 21 Decision*.

Public Hearing. UTU-NY contends that the DOP erred by failing to provide for a public hearing on the D&H Petition. (UTU-NY Appeal at 3-5.) This contention has no merit. The Board's Rail Exemption Procedures (49 C.F.R. § 1121) do not provide for a public hearing in connection with an individual petition for exemption. Rather, those regulations contemplate that the Board may, in its discretion, "(i) [d]irect that additional information be filed; or (ii) [p]ublish a notice in the *Federal Register* requesting public comments." 49 C.F.R. § 1121.4(c)(1). In the instant case, the Board did both. The *October 21 Decision* was published in the *Federal Register* (69 Fed. Reg. 61904), and invited interested parties to file replies to the D&H Petition on or before November 10, 2004. In addition, the Board's *October 7 Decision* imposing a housekeeping stay in connection with the notices of exemption filed by CPRC and Norfolk Southern Railway Company ("NSR"), respectively, in Finance Docket Nos. 34561 and 34562, required D&H, CPR and NSR to submit to the Board, and to make available to interested parties, the documents that contain the terms of the trackage rights, haulage and switching arrangements referenced in D&H's Petition. The DOP's failure to go even further, and to schedule a public hearing on D&H's Petition, was not "error" – to the contrary, it was fully consistent with the Board's Rail Exemption Procedures.

UTU-NY's Appeal does not identify any disputed issue of material fact that would justify a public hearing in this case. *See, e.g.,* Ex Parte No. 282 (Sub-No. 3A), *Railroad Consolidation Procedures – Expedited Processing*, 363 I.C.C. 767, 771 (1980) ("in order to justify the use of time consuming oral hearings, a material factual dispute should be one requiring oral hearing to resolve"); Finance Docket No. 32760, *Union Pacific Corp. et al. – Control and Merger –*

Southern Pacific Rail Corp. et al, (served October 19, 1995) (no oral hearing provided in procedural schedule where not necessary to resolve issues of disputed fact). UTU-NY's opposition to the D&H Petition is based primarily on its claim that the proposed discontinuance of D&H's overhead trackage rights is in reality a "consolidation" transaction, and that the *New York Dock* labor protective conditions, rather than the *Oregon Short Line* conditions uniformly imposed in discontinuance proceedings, ought to be imposed in this case. UTU-NY's characterization of the transaction, and its arguments regarding the applicability of the *New York Dock* conditions, present essentially legal issues that do not require a public hearing to resolve. On the basis of a review of the documents submitted in response to the *October 7 Decision*, the Chairman concluded that the arrangements between D&H and NSR are "routine operational agreements designed to improve the efficiency of the railroads' operations and do not involve any carrier consolidations." See Finance Docket No. 34561, et al., *Canadian Pacific Railway Company -- Trackage Rights Exemption -- Norfolk Southern Railway Company* (served October 27, 2004) ("*October 27 Decision*") at 4. UTU-NY's Appeal does not identify any specific dispute of fact that can be resolved only by conducting a public hearing in this case.

UTU-NY's unsupported assertions that the proposed discontinuance would "eliminate D&H as a competitor to CSXT and NSR" and "leave D&H at the mercy of NSR" (UTU-NY Appeal at 4) do not provide any justification for conducting a public hearing. D&H's Petition demonstrated that the proposed discontinuance of overhead trackage rights on the Southern Tier Lines, and its haulage and switching arrangements with NSR in the Buffalo-Binghamton Corridor, will promote (not harm) competition by improving the efficiency of D&H service and assisting D&H in its efforts to attain profitability. D&H Petition at 8-11, 13. The Chairman agreed that "[t]he arrangements, as laid out in D&H's exemption, preserve D&H's commercial access to every customer that D&H can access today, as well as the right to interchange traffic

with every carrier that D&H can interchange traffic with today.” *October 27 Decision* at 4. UTU-NY’s Appeal does not identify any disputed fact that would (if proved by UTU-NY) warrant a different conclusion.

No shipper has requested a public hearing on D&H’s Petition. The Owego Harford Railway, Inc. (“OHRY”), a carrier with which D&H interchanges traffic on the Southern Tier, has filed a protest expressing concern about the potential impact of the proposed discontinuance on the interchange service available to OHRY and its customers. *See* Protest of Owego Harford Ry. Co., filed October 20, 2004 (“OHRY Protest”). However, OHRY does not ask the Board to hold a public hearing on D&H’s proposal.¹

UTU-NY’s further contention that a public hearing is needed to evaluate the impact of the proposed discontinuance on D&H employees and determine whether the *Oregon Short Line* conditions ought to be imposed in this case is likewise incorrect. The number (and crafts) of D&H agreement employees who may be affected by the proposed discontinuance are set forth in the D&H Petition (at 14-15). UTU has not presented any disputed fact with respect to those figures. Moreover, there is no merit at all to UTU-NY’s assertion that the statement “the interest of railroad employees will be protected by the conditions set forth in Oregon Short Line R. Co.- Abandonment – Goshen, 360 I.C.C. 91 (1979)” set forth in the *October 21 Decision* (at 2) “is a

¹ OHRY’s suggestion that the proposed discontinuance would deprive it (and its customers) of access to competitive rail service from D&H (OHRY Protest at 4) is wrong. As the Board has recognized (*October 27 Decision* at 4), D&H will continue to interchange traffic (via its haulage arrangement with NSR) with every carrier with which it interchanges traffic today, including OHRY. D&H currently serves the OHRY interchange at Owego “as traffic requires.” (OHRY Protest at 2.) The haulage and switching arrangements with NSR will enable D&H to provide at least the same level of service to OHRY in the future. As OHRY acknowledges (OHRY Protest at 2, 4), its interchange with D&H has declined in recent years to as little as 35 cars annually, while OHRY’s total traffic volume has remained constant. These figures indicate that OHRY has increased its interchange with NSR, at the expense of D&H. OHRY’s proposal (OHRY Protest at 8) that D&H be required to continue trackage rights operations between Binghamton and Owego, NY in order to physically interchange a handful of cars per week with OHRY is utterly inefficient.

prejudgment, and also is absolutely incorrect” (UTU-NY Appeal at 4). The very same language is routinely found in notices issued by the STB in abandonment or discontinuance exemption cases. *See, e.g.*, Docket No. AB-33 (Sub-No. 221X), *Union Pacific Railroad Company – Abandonment Exemption – In Santa Clara County, CA* (served August 30, 2004) (“*UP Abandonment*”); Docket No. AB-6 (Sub-No. 409X), *The Burlington Northern and Santa Fe Ry. Co. – Abandonment Exemption – In Jefferson, Thayer, and Nuckolls Counties, NE and Republic County, KS* (served April 28, 2004) (“*BNSF Abandonment*”); Docket No. AB-55 (Sub-No. 643X), *CSX Transportation, Inc. – Abandonment Exemption – In Laporte, Porter and Starke Counties, IN* (served November 21, 2003) (“*CSXT Abandonment*”); Docket No. AB-847 (Sub-No. 1X), *Toledo, Peoria & Western Ry. Co. – Discontinuance Exemption – In Starke and Pulaski Counties, IN* (served August 20, 2003) (“*TP&W Discontinuance*”); Docket No. AB-486 (Sub-No. 2X), *The Kyle Railroad Co. – Discontinuance Exemption – In Smith, Phillips and Norton Counties, KS* (served September 15, 2000) (“*Kyle Railroad Discontinuance*”). In each of these cases (except *UP Abandonment*, in which a final decision has not yet been issued) the Board did, in fact, impose the *Oregon Short Line* conditions. The reason is obvious – the *Oregon Short Line* conditions have been the appropriate conditions for abandonment and discontinuance cases for 24 years. Imposing those conditions in the instant proceeding will afford D&H employees affected by the proposed discontinuance the statutory protection to which they are entitled.

In short, UTU-NY has not shown that the DOP’s failure to provide for a public hearing in the *October 21 Decision* constituted a “clear error of judgment,” or that a hearing is required to prevent “manifest injustice.”

Alleged Time Limit to Investigation. There is no substance to UTU-NY’s claim that the DOP committed a “clear error of judgment” by indicating that the Board would issue a final decision in this proceeding by January 19, 2005 (UTU-NY Appeal at 5). As an initial matter,

January 19 is simply the anticipated date for decision. The Board would not be precluded from taking additional time to reach its decision if the parties were to raise substantial issues requiring more time for review and analysis. At the same time, by including an anticipated decision date, the *October 21 Decision* promotes the interests of fairness and efficiency by notifying the public of the expected timeframe for Board action on D&H's Petition.

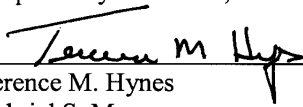
UTU-NY's reliance on the statutory deadline for STB action under 49 U.S.C. § 10502 is misplaced. Section 10502(b) prescribes a maximum period of nine months for STB review of a proposed exemption; it does not require that the Board take the full nine months to decide every case. To the contrary, the very purpose of the exemption statute is to enable the Board to implement its mandate to "minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions." *See* 49 U.S.C. § 10101(2). The Board routinely issues decisions in exemption cases involving proposed abandonments and discontinuances of operations in fewer than nine months. Indeed, the anticipated decision date set forth in the *October 21 Decision* is consistent with the Board's actual experience in other recent abandonment/discontinuance exemption proceedings. *See, e.g., BNSF Abandonment* (final decision 110 days after petition filed); *CSXT Abandonment* (final decision 109 days after petition filed); *TP&W Discontinuance* (final decision 110 days after petition filed); *Kyle Railroad Discontinuance* (final decision 109 days after petition filed). In light of these precedents, UTU-NY's assertion that the DOP's specification of a 110-day procedural schedule in this case represents a "clear error of judgment" is wrong. UTU-NY's appeal on this issue is a transparent attempt to delay implementation of operating changes that will improve the efficiency of D&H's operations and enhance its chances to attain profitability, and should be denied.

Extension of Time to File Replies to D&H Petition. UTU-NY's Appeal includes what amounts to a petition for a 40-day extension of the date for filing replies to D&H's Petition (UTU-NY Appeal at 5-6). UTU-NY has had notice of the D&H Petition since October 1, 2004. The November 10 deadline affords UTU-NY (and other interested parties) 20 days from the date of the *October 21 Decision* – and 40 days from the date of the D&H Petition – to comment on the proposed discontinuance. This comment period is consistent with the time routinely allotted for responsive pleadings in exemption proceedings involving line abandonments or discontinuance of operations. *See, e.g., BNSF Abandonment* (replies to petition due 20 days after STB notice, and 40 days after date of petition); *CSXT Abandonment* (replies to petition due 20 days after STB notice, and 38 days after date of petition); *TP&W Discontinuance* (replies to petition due 20 days after STB notice and 40 days after date of petition); *Kyle Railroad Discontinuance* (replies to petition due 20 days after STB notice, and 38 days after date of petition). UTU-NY does not explain why the same comment period would not be sufficient in this case, nor does UTU-NY proffer any evidence showing that adherence to the schedule established by the *October 21 Decision* would result in manifest injustice or impose an unusual burden on it. The extension requested by UTU-NY – which would effectively double the reply period to 80 days – appears to be designed solely to delay this proceeding and to forestall implementation of the proposed discontinuance. UTU-NY's request for an extension until December 20, 2004 should be denied.

CONCLUSION

For all of the foregoing reasons, CPRC and D&H respectfully request that the Board deny the UTU-NY Appeal in its entirety.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that, on this 5th day of November , 2004, I served the foregoing Reply of
Canadian Pacific Railway Company and Delaware and Hudson Railway Company, Inc. In
Opposition to the Appeal of United Transportation Union – New York State Legislative Board
by causing a copy thereof to be hand-delivered to:

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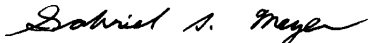
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