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RICHARD A. ALLEN



November 5, 2004

212457

BY HAND DELIVERY

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

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

Dear Secretary Williams:

I enclose for filing in the above captioned proceeding an original and 10 copies of
Norfolk Southern Railway Company's Opposition to the Appeal of UTU-NY.

Sincerely,

Richard A. Allen

Encl.

cc: (w/encl) All Parties of Record

ENTERED
Office of Proceedings
NOV - 5 2004
Part of
Public Record

212457

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



**NORFOLK SOUTHERN RAILWAY COMPANY'S
OPPOSITION TO THE APPEAL OF UTU-NY**

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Norfolk Southern Railway Company ("NSR") hereby opposes the appeal filed on November 1, 2004 by Samuel J. Nasca, New York State Legislative Director for the United Transportation Union ("UTU-NY"), to the decision served October 21, 2004 in this proceeding ("Decision"). NSR, as an interested party of record to this discontinuance proceeding, directs the Board's attention to the opposition filed (or to be filed shortly) by the Delaware & Hudson Railway Company ("D&H"), the petitioner here, but offers as well the following brief comments.

In its appeal, UTU-NY asserts that the Decision errs in not assigning this matter for public hearing and in announcing that a final decision on D&H's petition for exemption would be issued by January 19, 2005, rather than upon expiration of the maximum nine-month period permitted under 49 U.S.C. §10502. UTU-NY also asks that the November 10, 2004 deadline for parties to file replies to the petition that is the subject of this proceeding be extended for an additional 40 days, to December 20, 2004.

UTU-NY's assertions of error are without merit. Further, the requested extensions of the deadlines in the Decision are unnecessary and would disserve the shipping public and the carriers by unduly delaying consideration (and, we hope, approval) of the requested exemption, which is part of a series of operational measures in Buffalo and along the Southern Tier that, as Chairman Nober has noted, are "designed to improve the efficiency of the railroads' operations" to the benefit of the shipping public. *See Canadian Pacific Railway Company — Trackage Rights Exemption — Norfolk Southern Railway Company*, Finance Docket No. 34561, slip op. at 4 (served October 27, 2004).

Under 49 C.F.R. § 1011.6(b) appeals from decisions of Board staff acting under delegated authority "are not favored" and will be granted "only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice." No such circumstances are present here.

Oral hearing. There are no exceptional circumstances requiring oral hearing in this case, and the absence of a provision for oral hearing is not only *not* a "clear error in judgment," it is entirely consistent with the procedure established in the Board's regulations for consideration of petitions for exemption. Those procedures do not provide for oral hearings, and for good reason. An oral hearing is a time-consuming and usually burdensome and expensive process. *See, e.g., Ex Parte No. 282 (Sub-No. 3A), Railroad Consolidation Procedures—Expedited Processing*, 363 I.C.C. 767, 771 (1980). Requiring an oral hearing to determine whether a transaction should be exempted from the regulatory process would largely defeat the utility of the exemption procedure.

That procedure, set out at 49 C.F.R. §1121.4, provides that exemption proceedings “are informal, and public comments are generally not sought” at all in such proceedings. The regulations do provide that, under certain circumstances, the Board may, in its discretion, (i) direct that additional information be filed, or (ii) publish a notice in the Federal Register requesting additional comments.” 49 C.F.R. §1121.4(c). In this case, the Board already has exercised both of those options: (1) In the Board’s order served October 7, 2004 in Finance Dockets 34561 and 34562, the Board directed NSR, D&H and Canadian Pacific Railway Company to file the Memorandum of Understanding describing the transactions contemplated by those parties (which includes the trackage rights discontinuance at issue in this proceeding) and other documents updating or superseding that MOU; and (2) the Decision under appeal here permits the submission of public comments on or before November 10, 2004. UTU-NY has not shown, and there is no warrant for concluding, that the Board’s exercise of *both* discretionary information-gathering mechanisms provided for in its regulations is not sufficient in this case.

Final decision date. The Decision states that “[a] final decision will be issued by January 19, 2005.” UTU-NY asserts that “there is no sound basis” for such a determination now, and, citing the 9-month provision of 49 U.S.C. §10502(b), asserts that under that provision, the final decision date “would be” (thus apparently implying that it *must* be), July 1, 2005. UTU-NY’s interpretation of the 9-month provision is wrong and its assertion that establishing an earlier target date is “clear error” is baseless.

First, nothing in the plain language of §10502(b) requires the Board to spend a full 9 months considering an exemption petition if it does not need to do so. The provision states that a proceeding shall be completed “*within* 9 months after it is begun”

(emphasis added); the 9-month period is thus merely an intended *maximum*, not a required review period. To interpret the 9-month provision as a required review period would undermine the very purpose of the exemption procedure to streamline and expedite the review process. Cf. *Norfolk Southern Railway Company – Purchase Exemption – Union Pacific Railway Company*, Finance Docket No. 33609, slip op. at 5 and n.11 (STB served November 10, 1999) (noting that the analogous provision in §10502(b) requiring the Board to decide whether to initiate a proceeding “within 90 days” after receiving an application serves as an “outer limit;” to interpret the provision as compelling consideration for a full 90 days would cause delay that “would defeat the purpose of a exemption in a case such as this, because the exemption proceeding could take as long as the approval process from which the carrier seeks to be exempted.”).

Second, the January 19, 2005 date in the Decision, resulting in an anticipated review period of approximately three months following the institution of the proceeding on October 21, 2004, is fully consistent with the practice in other recent exemption cases. See, e.g., *Union Pac. R.R. Co.—Abandonment Exemption—In Brown and Doniphan Counties, KS*, STB Docket No. AB-33 (Sub-No. 220X) (proceeding initiated in a decision served October 1, 2004; final decision anticipated by December 30, 2004); *The Indiana Rail Road Co.—Abandonment and Discontinuance of Trackage Rights Exemption—In Monroe County, IN*, STB Docket No. AB-295 (Sub-No. 5X) (proceeding initiated in a decision served August 1, 2003; final decision anticipated by, and ultimately served on, October 31, 2003); *Central Railroad Co. of Indianapolis—Discontinuance Exemption—In Grant County, IN*, STB Docket No. AB-511 (Sub-No. 2X) (proceeding initiated in a

decision served October 30, 2001; final decision anticipated by, and ultimately served on, January 28, 2002).

Finally, although we believe there will be no need for the Board to do so (and there certainly is no need to do so now), there is nothing in the statute that would prohibit the Board from extending the January 19, 2005 date (not to exceed the 9-month limit) at a future time if necessary.

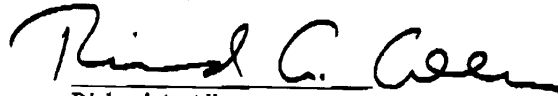
Forty-day extension of November 10, 2004 comment deadline. In addition to an oral public hearing, UTU-NY requests an additional 40-day extension of the Decision's deadline for comments, from November 10 to December 20, 2004. UTU-NY offers no reason whatsoever for this request, simply asserting baldly that the November 10 deadline provides "obviously too short a period of time" for parties to submit comments.

UTU-NY's request is totally unwarranted and should be denied. The broad outline of the carriers' plans and the pendency of this specific proceeding have been public knowledge for more than a month, since D&H filed its petition with this Board on October 1, 2004. Finally, the MOU and other definitive agreements have been available to interested parties, under the Board's protective order, since October 12, 2004. Thus, under the present November 10 deadline, interested parties already will have had a full 40 days from the initiation of this proceeding, and nearly a full month after the availability of the relevant documents, to file their comments. UTU-NY offers no reason, and there is none, why that period of time is not entirely sufficient. There is no warrant whatsoever for any extension of time, much less the extraordinary 40-day extension UTU-NY seeks.

CONCLUSION

For the foregoing reasons, UTU-NY's appeal should in all respects be denied.

Respectfully submitted,



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November 5, 2004

CERTIFICATE OF SERVICE

I certify that on November 5, 2004, a true copy of the foregoing "Norfolk Southern Railway Company's Opposition to the Appeal of UTU-NY" was served by hand delivery upon:

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