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212498



November 10, 2004
BY HAND-DELIVERY

Surface Transportation Board
Office of the Secretary
Case Control Unit
1925 K Street, NW
Washington, DC 20423-0001

ENTERED
Office of Proceedings

NOV 10 2004

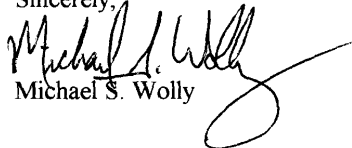
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Public Record

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

Dear Mr. Williams:

Pursuant to the Board's Rules, please find enclosed for filing an original and 10 copies of Comments of the Brotherhood of Locomotive Engineers and Trainmen in the above-referenced Docket. We enclose an electronic copy of same on 3.5" disk in WordPerfect format. Thank you.

Sincerely,


Michael S. Wolly

Enclosures

cc w/ encl.: All counsel of record

212498

BEFORE THE SURFACE TRANSPORTATION BOARD

BLET - 2

In the Matter of:

STB 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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COMMENTS OF BLET

The Brotherhood of Locomotive Engineers and Trainmen, A Division of the Rail Conference of the International Brotherhood of Teamsters ("BLET") opposes the application of Delaware and Hudson Railway Company ("D&H") to discontinue the trackage rights that are the subject of this proceeding. D&H obtained those trackage rights as part of the Final System Plan of the United States Railway Association in 1976. The purpose of giving D&H the Southern Tier trackage rights was to assure the benefits of continued competition across that part of New York State. Since that time, D&H's operations have assured shippers that they would not be subject to a closed market insofar as moving their goods from Buffalo to Binghamton was concerned. If D&H is permitted to give up its Southern Tier trackage rights, and hence its operations across the Southern Tier, the customers D&H serves will become the captive of Norfolk Southern Railway Company (NSR) as D&H would be leaving the market.

This is evident from the filings of Canadian Pacific Railway Company (CPR) in Finance Docket 34561 and of NSR in Finance Docket 34562. This proceeding is part of a three-pronged

effort by the CPR, D&H, and NSR to split a major intercorporate transaction into component parts in order to hide the anti-competitive effects of the three transactions taken together. It also will, if approved, deprive the employees who will be affected of the levels of protection to which they otherwise would be entitled.

Even though the Board has denied the BLET's petition to stay the exemptions sought by CPR and NSR, the Board still must determine whether to permit D&H to discontinue its freight operations over the lines in question, thereby clearing the way for the CPR and NSR transactions to proceed. In its decision denying a stay, the Board stated that

D&H's petition for exemption states that the proposed discontinuance would not reduce the number of competitive rail options available to any shipper. The 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.

We submit that the Board's evaluation must examine what D&H has said in light of the overall circumstances. D&H does not identify any rail option other than NSR that would be open to shippers. As for itself, D&H will be reduced to middleman status only as to its existing clients on the line. We submit that this is not a "competitive" rail option for the shippers. The Board should ask why a shipper would rely on D&H any further in these circumstances. The answer to that question is that a shipper would have no incentive to incur the additional expense of relying on D&H for any service on this route. Yes, D&H will be able to do what it says, but the cost of engaging D&H to do it would be an unnecessary one for its former customers.

We respectfully submit that the Board erred in stating that "it appears that the transactions...do not involve any carrier consolidations." The carriers openly announced that they are consolidating all of their freight marshaling operations in Buffalo and Binghamton. NSR is

taking over everything in Buffalo, where CPR will cease yard operations, and CPR will be taking over all NSR yard operations in Binghamton. NSR and CPR are on the path to ultimate consolidation of operations in the Northeast. The Memorandum of Understanding that they have filed with the Board is the "road map." If the Board lets them parse it out in stages, the exemption process will be abused.

We urge the Board to closely examine the MOU, particularly the highly confidential pages, so that the whole picture can be exposed for what it is. While we are proscribed from describing the terms of the MOU in any detail, we particularly direct the Board's attention to the numerous *quid pro quos* it recites, the variety of multifaceted, interrelated corporate and transportation changes it describes that are designed to accomplish the carriers' overall purpose, and the process described in Section VIII on pages 13-14. The MOU and its related exhibits lay out in explicit detail how the carriers desire and intend to proceed. The documents reveal that D&H's petition is not some isolated event to which short shrift need be given.

In weighing the instant application, the Board must consider whether national rail transportation policy will be furthered by allowing D&H to do what it requests. Section 10101(1) of Title 49 establishes the elements of national rail transportation policy that are implicated here. 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." If D&H is permitted to discontinue its rail freight operations as requested, these purposes will be ill-served.

Furthermore, employees of D&H who will be adversely affected will not enjoy the right to have an implementing agreement in place before the transaction and likely will not be afforded the ability to transfer across carrier lines to continue working at the same locations where they are employed by D&H now. Were the New York Dock conditions applicable, as they are for major consolidations, mergers and acquisitions, this problem could be ameliorated.¹

For all these reasons, D&H's petition should be denied.

Respectfully submitted,



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¹ 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.

CERTIFICATE OF SERVICE

This is to certify that a copy of the attached Comments was served upon all known parties of record by first class mail, postage prepaid, this 10th day of November 2004.



Michael S. Wolly