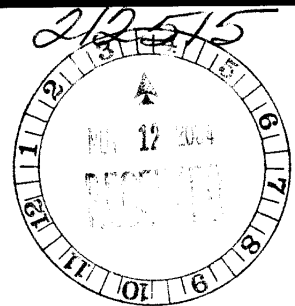


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November 12, 2004

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

Re: Finance Docket No. 34561, Canadian Pacific Railway Company—  
Trackage Rights Exemption—Norfolk Southern Railway  
Company—Buffalo, NY; Finance Docket No. 34562, Norfolk  
Southern Railway Company—Trackage Rights Exemption—  
Delaware and Hudson Railway Company, Inc—Between Saratoga  
Springs, NY and Binghamton, NY.

Dear Secretary Williams:

I enclose for filing in the above-captioned proceedings, an original and 10 copies of a  
Reply of Norfolk Southern Railway Company In Opposition to Petitions to Revoke Exemptions.

Sincerely,

*Richard A. Allen*

Richard A. Allen

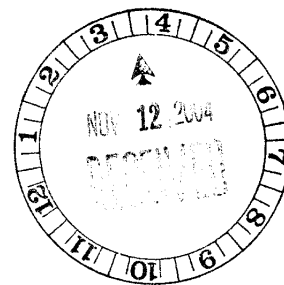
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Part of  
Public Record

cc: All parties of record

Before The  
Surface Transportation Board



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Finance Docket No. 34561

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

Finance Docket No. 34562

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

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**REPLY OF NORFOLK SOUTHERN RAILWAY COMPANY  
IN OPPOSITION TO PETITIONS TO REVOKE EXEMPTIONS**

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*Attorneys for Norfolk Southern Railway Company*

Dated: November 12, 2004

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Finance Docket No. 34561

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

Finance Docket No. 34562

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

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**REPLY OF NORFOLK SOUTHERN RAILWAY COMPANY  
IN OPPOSITION TO THE PETITIONS TO REVOKE EXEMPTIONS**

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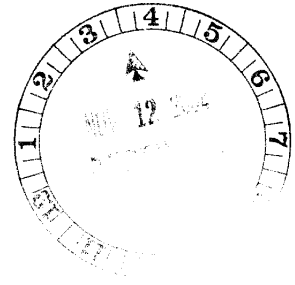
Norfolk Southern Railway Company ("NSR") files this reply in opposition to the Petition to Revoke Exemptions filed by Samuel Nasca, New York Legislative Director for the United Transportation Union ("UTU-NY") and Petition to Revoke Exemptions and To Stay Transactions filed by the Brotherhood of Locomotive Engineers and Trainmen ("BLET"); both petitions were filed on October 25, 2004.<sup>1</sup>

**Background and Chairman Nober's Denial of Stay Motions**

Petitioners ask the Board to revoke exemptions that resulted from two notices of exemption filed on October 1, 2004: (1) a Verified Notice of Exemption filed by NSR in STB Finance Docket No. 34562 invoking the class exemption for NSR's acquisition of overhead trackage rights over 155 miles of Delaware and Hudson Railway Company, Inc.

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<sup>1</sup> The proceedings involving the notices of exemption that are the subject of the UTU-NY and BLET petitions have not been consolidated. UTU-NY and BLET nevertheless have each filed only one petition covering both proceedings. NSR similarly has combined its response, but for administrative convenience only.



("D&H") track between Binghamton and Saratoga Springs, NY; and (2) a Verified Notice of Exemption filed by Canadian Pacific Railway Company ("CPRC") in STB Finance Docket No. 34561 invoking the class exemption for CPRC's acquisition of overhead trackage rights over lines of NSR in Buffalo, NY by assignment from D&H, CPRC's subsidiary. Petitioners also ask the Board to consolidate those proceedings with a third proceeding filed on October 1, 2004, a petition filed by D&H seeking an exemption authorizing D&H to discontinue its operation of trackage rights over NSR's Southern Tier line between Buffalo, NY and Binghamton, NY, Docket No. AB-156 (Sub-No. 25X).

As explained in previous filings by NSR, CPRC and D&H, the notice of exemption filed in Finance Docket No. 34562 is related to 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 rerouting is expected to result in a net increase of two NSR jobs, and it will result in traffic new to the D&H lines, and so should have a positive effect on employment on both railroads.

The notice of exemption filed in Finance Docket No. 34561 is related D&H's proposed discontinuance of Southern Tier trackage rights and certain haulage and switching arrangements with NSR in the Buffalo-Binghamton corridor. The trackage rights covered by this notice of exemption will not be exercised until after the Board has acted on D&H's discontinuance petition.

Petitioners previously moved to stay the effectiveness of the trackage rights exemptions, but these motions were denied by Chairman Nober in a decision issued on

October 27, 2004.<sup>2</sup> In that decision, which also considered the arguments in the two petitions to revoke the exemptions, Chairman Nober found that “it appears that the transactions involved are routine operational agreements designed to improve the efficiency of the railroads’ operations and do not involve any carrier consolidations.” October 27 Decision at 3. Accordingly, Chairman Nober concluded that the petitioners’ central argument supporting revocation had no strong likelihood of success on the merits. *Id.* Chairman Nober also rejected petitioners’ arguments that the transactions would reduce competition in the territory served by NSR’s Southern Tier Line. *Id.* at 4.

As a result of the Chairman’s decision, the two exemptions became effective on October 27, 2004. NSR expects to begin exercising its trackage rights between Binghamton and Saratoga Springs pursuant to the exemption in Finance Docket No. 34562 on or about November 19, 2004. CPRC cannot exercise its trackage rights in Buffalo until after the Board has granted D&H’s petition for exemption in AB-156 (Sub.-No.25X).

### **ARGUMENT**

There is no substance to petitioners’ arguments in support of their petitions to revoke the exemptions in Finance Docket No. 34561 and Finance Docket No. 34562, as Chairman Nober perceived when he rejected them in his decision declining to stay the exemptions.

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<sup>2</sup> Previously, on October 7, 2004, Chairman Nober had issued a housekeeping stay of the effectiveness of the exemptions until October 27, 2004 and ordered NSR, CPR and D&H to file with the Board and make available to parties a Memorandum of Understanding (“MOU”) dated June 30, 2004 among NSR, CPRC and D&H and various definitive agreements resulting from and superseding the MOU, which the carriers did on October 12, 2004.

Under 49 U.S.C. § 10502(d), an exemption may be revoked only if the Board “finds that application in whole or in part of a provision of this part to the person, class, or transportation is necessary to carry out the transportation policy of section 10101 of this title.” *See also, e.g., Timber Rock Railroad, Inc. – Lease Exemption – The Burlington Northern and Santa Fe Railway Company*, Finance Docket No. 34503, slip op. at 2 (served October 7, 2004) (“*Timber Rock*”). The Board has also held that an exemption may be revoked if it has been shown to have been granted on the basis of false information or an abuse of the Board’s processes. *See SF&L Railway, Inc.-Acquisition And Operation Exemption-Toledo, Peoria And Western Railway Corporation Between La Harpe And Peoria, IL*, Finance Docket No. 33995, slip op. at 10 (served October 17, 2002). To justify revocation, a petitioner must demonstrate “reasonable, specific concerns addressing the revocation criteria.” *Timber Rock*, slip op. at 2. Petitioners make no claim of misrepresentations, and they have not shown that application of provisions of Part A of Subtitle IV of Title 49 of the United States Code is required to carry out the transportation policy of 49 U.S.C. § 10101.

The principal argument in both petitions to revoke is that the transactions warrant the imposition of *New York Dock* employee protective conditions rather than the *Norfolk & Western/Mendocino Coast Line* conditions that the Board consistently imposes in cases involving the acquisition of trackage rights. UTU-NY Pet. at 12-13; BLET Pet. at 8. This argument is incorrect. UTU-NY’s petition does not explain the basis for its contention and offers no statutory or decisional authority supporting it. Although its earlier petition for a stay argued that the transactions are integral parts of a broader transaction involving a “purchase, lease, or contract to operate property of another rail

carrier by any number of carriers,” and thus are governed by 49 U.S.C. § 11323(a)(2), UTU-NY’s Petition to Revoke has abandoned that contention and now recognizes that the transactions involve the acquisition of trackage rights, and thus are subject to 49 U.S.C. § 11323(a)(6). *See* UTU-NY Pet. at 3 (asserting that “application of 49 U.S.C. 11323(a)(6) is necessary to carry out the policy of 49 U.S.C. 10101.”).

BLET’s Petition to Revoke argues that the transactions are subject to § 11323(a)(2) (BLET Pet. at 8), but it provides no support for that claim. Neither the trackage rights agreements filed with the notices of exemption nor any of the other agreements that NSR, CPRC and D&H filed with the Board and provided to BLET’s attorney on October 12, 2004 constitute a “purchase, lease or contract to operate the property of a carrier by any number of carriers,” as Chairman Nober correctly found, based on his review of the documents, when he declined to stay the effectiveness of the exemptions. As he noted, the transactions at issue are “routine operational agreements designed to improve the efficiency of the railroads’ operations” that “do not involve any carrier consolidations.” Decision at 3. The petitions to revoke provide no reason for altering that conclusion.

UTU-NY implies that it is unable fully to address the import of the MOU because it was provided to UTU-NY’s attorney on a confidential basis pursuant to a Board protective order (UTU-NY. Pet. at 11), but that implication is baseless. UTU-NY can make any arguments it wants to the Board about the MOU; it simply has made no arguments.

UTU-NY and BLET also argue that the trackage rights exemptions effected in Finance Docket Nos. 34561 and 3456 are both integrally related to the petition for

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discontinuance sought in Docket AB-156 (Sub-No. 25X) and other transactions contemplated in the MOU (UTU-NY Pet. at 10-12; 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 all 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.

In any event, as Chairman Nober found, both sets of trackage rights – NSR's rights between Binghamton and Saratoga Springs and CPRC's in Buffalo (which CPRC cannot implement until the Board rules on D&H's discontinuance petition) – are simply “routine operational agreements designed to improve the efficiency of the railroads’ operations . . . .” The Board and the ICC have long and consistently held that *Norfolk & Western/Mendocino* conditions, not *New York Dock* conditions, appropriately protect the interests of employees in transactions involving trackage rights and the joint use of lines. *See, e.g., Norfolk Southern Railway Company—Consolidation of Operations—CSX Transportation, Inc.*, ICC Finance Docket No. 33299 (served November 26, 1993) ; *Joint Use By CSX Transportation, Inc. and Burlington Northern Railroad Company of*

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*Facilities in Memphis, TN—Petition For Exemption Under 49 U.S.C. 1050*, ICC Finance Docket No. 31448 (served June 19, 1989).

There is no basis for petitioners' claims that the transactions entail a "major regional restructuring" (UTU-NY Pet. at 7) or a "major corporate restructuring of operations" (BLET Pet. at 3). They involve no transfers of property and no consolidation of separate carriers under common control. Nor is UTU-NY correct in saying that they involve a "yard consolidation at Buffalo." UTU-NY Pet at 8. NSR's trackage rights between Binghamton and Saratoga Springs does not relate to Buffalo at all. CPRC's acquisition of trackage rights in Buffalo from its subsidiary, D&H, will merely allow CPRC to bring its trains to and from NSR's Bison Yard, as D&H has in the past. Neither CPRC nor D&H will perform any yard functions in Bison Yard.

In any event, it is irrelevant for purposes of employee protective conditions what the transactions are labeled. In *Norfolk Southern Railway Company—Consolidation of Operations—CSX Transportation, Inc.*, ICC Finance Docket No. 33299, the ICC squarely held that *Norfolk & Western/Mendocino* conditions, not *New York Dock*, conditions were appropriate in a case involving an exchange of trackage rights and haulage and switching arrangements between two carriers that the carriers themselves and the ICC described as a "consolidation of operations." The ICC in that case agreed with the proposition that "as the proposed consolidation involves only trackage rights, joint use of lines, and a lease, the appropriate employee protective conditions to impose in this proceeding are those set forth in Mendocino." Slip op. at 4.

Similarly, in *Norfolk Southern Railway Company—Trackage Rights Exemption—Delaware&Hudson Railway Company, Inc.*, STB Finance Docket No. 34209 (served

December 3, 2002), the Board specifically found that *Norfolk & Western/Mendocino* conditions, not *New York Dock* conditions, are appropriate for trackage rights that arose out of an agreement between carriers that was labeled a "Restructuring Agreement." The Board said: "[T]he Restructuring Agreement covers matters solely related to trackage rights, for which only the Norfolk and Western conditions are imposed." Slip op. at 5.

Nor is there any basis for the petitioners' claim that any of the transactions are anticompetitive. On the contrary, as D&H explained in its Petition for Exemption in Docket No. AB-156 (Sub-No. 25X), the transactions will increase the efficiency of D&H and its parent, CPRC, and therefore their competitiveness, without depriving any customer of D&H and CPRC access to those carriers. As Chairman Nober found: "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." Decision served October 27 at 4. The State of New York has expressed the same opinion in its reply, filed on November 10, 2004, to D&H's discontinuance petition in Docket No. AB-156 (Sub-No. 25X), which states: "NYDOT is satisfied that if implemented in accordance with the operative agreements, the subject transactions should not result in a reduction in freight transportation options currently available to D&H shippers, or a diminution of the current capabilities of carriers other than NS to interchange traffic with D&H." NY Reply at 3.

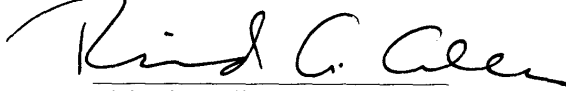
Furthermore, NSR's acquisition of trackage rights between Binghamton and Saratoga Springs and the anticipated rerouting of CN traffic to D&H's line between

Rouses Point and Binghamton will result in a substantial increase in the traffic now handled by D&H in New York State. BLET's claim that the transactions will "effectively remove D&H from the transportation picture in New York" (BLET Pet. at 8) is therefore baseless.

### CONCLUSION

The Petitions to Revoke Exemptions should be denied.

Respectfully submitted,



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*Attorneys for Norfolk Southern Railway Company*

Dated: November 12, 2004

**CERTIFICATE OF SERVICE**

I certify that on November 12, 2004, a true copy of the foregoing "Reply of Norfolk Southern Railway Company in Opposition to Petitions to Revoke Exemptions" was served by hand delivery upon:

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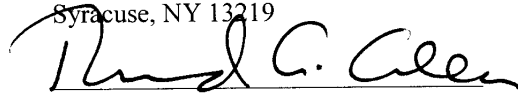
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