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December 3, 2004



The Honorable Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423

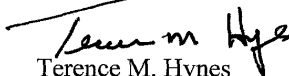
Re: Docket No. AB-156 (Sub-No. 25X), *Delaware and Hudson Railway Company, Inc.—Discontinuance of Trackage Rights—Between Lanesboro, PA, and Buffalo, NY*

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. to Motion for Leave to File Statement in Support of Comments of BLET ("Reply"), filed on November 18, 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,

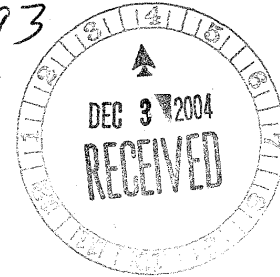

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Enclosures

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**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.
TO MOTION FOR LEAVE TO FILE STATEMENT
IN SUPPORT OF COMMENTS OF BLET**

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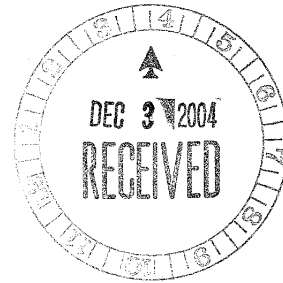
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Canadian Pacific Railway Company ("CPRC") and Delaware and Hudson Railway Company, Inc. ("D&H") submit this Reply to the "Motion For Leave To File Statement In Support Of Comments Of BLET" ("BLET Motion") filed in the above-captioned proceeding on November 18, 2004 by The Brotherhood of Locomotive Engineers and Trainmen ("BLET").

The BLET Motion fails to articulate any legitimate reason for granting the relief that BLET seeks. Like other parties to this proceeding, BLET has had notice of D&H's Petition for Exemption (the "D&H Petition") since October 1, 2004. The November 10 deadline for filing responses to the D&H Petition afforded BLET fully 40 days to prepare its comments on the proposed discontinuance.¹ BLET does not explain why it could not comply with the schedule prescribed by the Board. Rather, the BLET Motion vaguely asserts (without elaboration) that

¹ The 40-day comment period provided for by the Board's *October 21 Decision* in this case is commensurate with the time routinely allotted for responsive pleadings in exemption proceedings involving line abandonments or discontinuance of operations. See, e.g., 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) (replies to petition due 20 days after STB notice, and 40 days after date of petition); Docket No. AB-55 (Sub-No. 643X), *CSX Transportation, Inc. - Abandonment Exemption - In LaPorte, Porter and Starke Counties, IN* (served November 21, 2003) (replies to petition due 20 days after STB notice, and 38 days after date of petition); Docket No. AB-847 (Sub-No. 1X), *Toledo, Peoria & Western Ry. Corp. - Discontinuance Exemption - In Starke and Pulaski Counties, IN* (served August 20, 2003) (replies to petition due 20 days after STB notice and 40 days after date of petition).

BLET's would-be declarant "was unable to have this statement available by the date for filing Comments." BLET Motion at 1. Nor did BLET request an extension of time in which to file its comments prior to the due date (as did UTU-NY).² Moreover, the "Declaration of M.D. Twombly" ("Twombly Declaration") that BLET seeks to file out of time consists of little more than conclusory statements regarding the supposed inconsistency of the D&H Petition with the terms of the 3R Act and the Final System Plan ("FSP") that created Conrail. BLET does not explain why this material – which is essentially legal argument – could not have been presented by BLET's counsel in its Comments filed on November 10, 2004. In these circumstances, BLET has not demonstrated good cause for permitting it to submit additional testimony in support of its Comments.

In any event, the Twombly Declaration is premised upon a patently erroneous characterization of both the trackage rights that were granted to the former Delaware and Hudson Railway Company ("Old D&H") by the FSP, and the haulage rights that D&H holds pursuant to its arrangements with Norfolk Southern Railway Company ("NSR"). Mr. Twombly – whose declaration does not establish that he possesses any particular expertise with respect to the 3R Act or the FSP – contends that D&H's proposed discontinuance of train operations on the Southern Tier lines would somehow "circumvent the intent of the [3R] Act, Final System Plan." (Twombly Decl., ¶ 7.) Mr. Twombly bases this contention on his "understanding" that the FSP trackage rights "are a transferable right to any future owner of the D&H property," while the haulage rights that D&H has obtained from NSR are not transferable. (Twombly Decl., ¶ 8). Mr. Twombly is wrong on both counts.

² In a decision served on November 10, 2004 (the "*November 10 Decision*"), the Board denied UTU-NY's extension request on the grounds that UTU-NY had not adequately demonstrated why such an extension was necessary "particularly in light of the fact that it has been on notice of the petition since at least October 1, 2004." *November 10 Decision* at 2. As similar conclusion is warranted with respect to BLET's request for a retroactive extension of the time to reply to the D&H Petition.

The FSP contained no provision making the trackage rights granted therein freely transferable. Indeed, Conrail objected vigorously when the bankruptcy Trustee of Old D&H proposed to assign the FSP trackage rights to D&H in connection with D&H's acquisition of rail assets from the bankruptcy estate of Old D&H in 1990. D&H was able to acquire the FSP trackage rights only after the ICC took the extraordinary step of overriding the terms of certain trackage rights agreements between Conrail and Old D&H. *See* Finance Docket No. 31700, *Canadian Pacific Limited, et al. – Purchase and Trackage Rights – Delaware & Hudson Ry. Co.*, 7 I.C.C. 2d 95, 118 (1990) (“*CPR/D&H Control*”) (ICC “requires” transfer of FSP rights to D&H “regardless of any language contained in the agreements implementing those requirements purporting to limit transferability”). Moreover, the FSP contained no requirement that the trackage rights granted to Old D&H be operated in perpetuity. In connection with D&H's acquisition of Old D&H's rail assets, the Federal Railroad Administration (“FRA”) negotiated an Indenture Agreement with CPRC pursuant to which FRA agreed to compromise Old D&H's indebtedness to it in consideration for D&H's pledge to continue operations on certain lines, including the Southern Tier trackage rights route, for a period of ten years (until 2001). *See CPR/D&H Control*, 2 I.C.C. 2d at 105, 111. No such arrangement would have been necessary if the FSP had mandated that any future owner of Old D&H's rail assets operate the FSP trackage rights indefinitely. Mr. Twombly's assertion that D&H's Southern Tier haulage rights are not transferable (and, therefore, would not preserve competition in the event of a future sale of D&H) is flatly contradicted by the language of D&H's agreement with NSR. *See* Summary of Documents filed by CPRC, D&H and NSR on October 12, 2004, Tab 6, Southern Tier Haulage Services Agreement, § 11.03.³

³ Mr. Twombly's claim that the Buffalo area trackage rights to be assigned to CPRC would not be transferable is likewise incorrect. *See* Summary of Documents filed by CPRC, D&H and NSR on October 12, 2004, Tab 5, Restated Buffalo Trackage Rights Agreement, § 16.

Mr. Twombly's uninformed assertions regarding the impact of D&H's proposed discontinuance on the rail competition envisioned by the FSP ignore the substantial increase in competition in the region that resulted from the division of Conrail authorized by the Board in *CSX Corp., et al. and Norfolk Southern Corp., et al. – Control and Operating Leases – Conrail, Inc. et al.*, 3 S.T.B. 196, 387 (1998) ("*Conrail Control*"). As a result of that transaction, D&H faces direct rail competition from both NSR (which owns and operates the Southern Tier) and CSXT (which operates the parallel former Conrail route between Buffalo and Albany, NY). Thus, the rationale for granting the FSP trackage rights – a Conrail rail monopoly throughout much of the Northeast – no longer exists today. Rather, the markets served by D&H's Southern Tier trackage rights are intensely competitive. Contrary to Mr. Twombly's assertions, the haulage and switching arrangements that D&H has made with NSR will promote competition by improving the efficiency of D&H's service and assisting D&H in its efforts to attain profitability. The State of New York agrees with D&H that the proposed discontinuance does not threaten any competitive harm to shippers. *See* Reply of the State of New York to Petition for Exemption, filed November 10, 2004 at 3, ¶ 3.

Mr. Twombly's suggestion (Twombly Decl. ¶ 15) that CPRC may be operating trains in the Buffalo area today without appropriate regulatory authorization is also incorrect. CPRC obtained overhead trackage rights between the Canadian border and SK Yard in Buffalo in Finance Docket No. 31805, *Canadian Pacific Limited and D&H Corporation – Trackage Rights Exemption – Consolidated Rail Corporation*, (served December 26, 1990). The Restated Buffalo Trackage Rights Agreement between CPRC and NSR that is the subject of Finance Docket No. 34561 is designed to accomplish two additional purposes: (1) to extend CPRC's operating authority beyond SK Yard to and into NSR's Bison Yard, and (2) to enable CPRC and NSR to restate the business terms governing CPRC's future exercise of those trackage rights.

Finally, Mr. Twombly appears to suggest that D&H's employees enjoy some form of protected status because they assertedly were former Erie Lackawanna employees that Old D&H hired from Conrail in accordance with the FSP. (Twombly Decl., ¶¶ 13, 14.) In doing so, Mr. Twombly confuses D&H with the unaffiliated bankrupt debtor (Old D&H) from which CPRC acquired the rail assets that are today operated by D&H. D&H is not a successor (corporate or otherwise) of Old D&H. Pursuant to the terms of the Bankruptcy Court order authorizing the sale of Old D&H's rail assets, D&H acquired those assets "free and clear of any and all liens, claims, encumbrances, charges and interests."⁴ D&H did not assume any obligation of Old D&H except those that were explicitly set forth in its acquisition agreement with the Trustee of Old D&H. The obligations assumed by D&H did not include any potential obligations of Old D&H under its arrangements with its employees. Moreover, to the extent that employees of Old D&H represented by BLET had any claims against Old D&H arising out of their employment with that railroad, those claims were finally compromised and settled under an implementing agreement that was approved by the Bankruptcy Court in 1991.⁵ D&H hired its own work force in 1991, and its obligations to its employees in connection with the proposed trackage rights discontinuance will be governed exclusively by the *Oregon Short Line* conditions.

In any event, Mr. Twombly's assertion that D&H employees ought to be able to "follow their work" to NSR's Bison Yard is premised upon the (incorrect) assumption that D&H will continue to have yard switching operations in Buffalo upon consummation of the proposed

⁴ *In re Delaware & Hudson Railway Co.*, Bankruptcy Case No. 88-352 (D. Del., June 8, 1990), Order Authorizing the Sale of Substantially All of the Assets of the Delaware and Hudson Railway Company, Pursuant to 11 U.S.C. § 363(b), the Assignment of Certain Previously Assumed Contracts Pursuant to 11 U.S.C. § 365, Free and Clear of All Liens, Encumbrances, Charges and Interests, and the Incurring of Secured Debt Pursuant to 11 U.S.C. § 364(d), at p.15, ¶ 7.

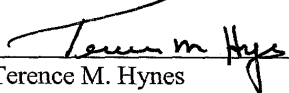
⁵ *In re Delaware & Hudson Railway Co.*, Bankruptcy Case No. 88-352 (D. Del., January 15, 1991), Order Approving Compromise and Settlement of Claims of Members of the United Transportation Union, et al.

discontinuance. As CPRC/D&H have previously explained, when D&H ceases to conduct rail operations over the Southern Tier, there will no longer be any "D&H yard operations" at Buffalo. Nor is there any basis for Mr. Twombly's assertion that D&H work "is being given to Canadian CPR employees" (Twombly Decl. ¶ 14). CPRC employees will perform the very same train operations that they perform today, except they will operate from the Canadian border to Bison Yard, rather than to SK Yard, for purposes of interchange.

CONCLUSION

For all of the foregoing reasons, CPRC and D&H respectfully request that the Board deny the BLET Motion.

Respectfully submitted,


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Attorneys for Canadian Pacific Railway
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December 3, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of December 2004 I served the foregoing Reply of Canadian Pacific Railway Company and Delaware and Hudson Railway Company, Inc. to Motion for Leave to File Statement in Support of Comments of BLET by causing a copy thereof to be hand-delivered to:

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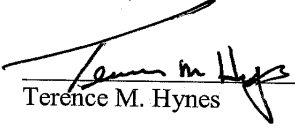
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