

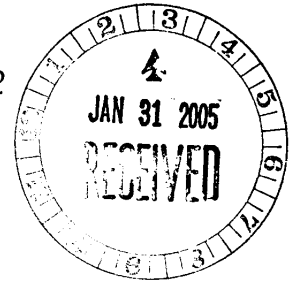
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213137

January 31, 2005

BY HAND DELIVERY

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

ENTERED
Office of Proceedings

JAN 31 2005

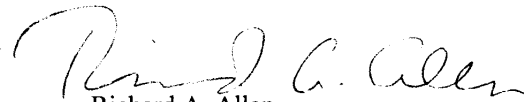
Part of
Public Record

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 Motion to Reject Offer of Financial Assistance.

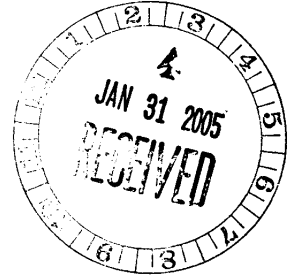
Sincerely,


Richard A. Allen

Encl.

cc: (w/encl) All Parties of Record

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
MOTION TO REJECT OFFER OF FINANCIAL ASSISTANCE**

Norfolk Southern Railway Company ("NSR") hereby moves the Board to reject the offer of financial assistance ("OFA") filed on January 18, 2005 by the CNJ Rail Corporation ("CNJ") pursuant to 49 U.S.C. §10904(c) and 49 C.F.R. § 1152.27(c)(1). CNJ's OFA seeks to purchase certain overhead trackage rights formerly held by the Delaware and Hudson Railway, Inc. ("D&H") over NSR's Southern Tier line between Buffalo and Binghamton, N.Y. Most but not all of the trackage rights that CNJ wishes to acquire were terminated by agreement of NSR and D&H,¹ and in a decision served January 19, 2005, the Board granted D&H's petition to exempt its discontinuance of service pursuant to the terminated rights.

¹ See "Partial Termination of Trackage Rights Agreements" dated September 30, 2004 between NSR and D&H, filed with the Board on October 12, 2004 subject to a protective order issued by the Board. As discussed below, CNJ's OFA seeks acquisition of rights over some portions of the Southern Tier that have not been terminated by NSR and D&H or discontinued by D&H and rights over trackage in Buffalo that have been assigned to Canadian Pacific Railway Company. For these reasons, the OFA is operationally as well as legally defective.

The Board should reject CNJ's OFA for the simple reason that OFA procedures cannot be used to "purchase" trackage rights that are being discontinued. This is clear from the plain language of the statute that CNJ invokes. Section 10904(c) provides in pertinent part:

Within 4 months after an application is filed under section 10903, any person may offer to *subsidize or purchase the railroad line* that is the subject of such application.

Emphasis supplied. The statute only authorizes offers to purchase rail lines (in the case of abandonments) or offers to subsidize continued service by the carrier authorized to discontinue service (in the case of discontinuances). Under no circumstances does it authorize offers to acquire trackage rights or give the Board the authority to require the owning carrier to grant such rights to an offeror.

Furthermore, an OFA to purchase, whether property or operating rights, is in any event unavailable in this case, which involves only an authorized discontinuance, not an abandonment. As the Board specifically stated in its decision served January 19, 2005 granting D&H's exemption petition, only offers to subsidize continuing service by the discontinuing carrier are authorized in discontinuance cases. In that decision, the Board stated:

Because this is a discontinuance proceeding and not an abandonment, we need not consider offers of financial assistance (OFA) to acquire the line for continued rail service, trail use requests, or requests to negotiate for public use of the line. However, the OFA provisions *for a subsidy to provide continued rail service (i.e. overhead trackage rights) apply to discontinuance of trackage rights.*

Slip op. at 14 (emphasis supplied). This determination is in accord with other decisions that only subsidy offers are appropriate in discontinuance cases. *See, e.g., CSX*

Transportation, Inc.—Discontinuance—at Memphis, in Shelby County, TN, STB Docket No. AB-55 (Sub No. 618), served July 30, 2002; *Perry County Port Authority d/b/a/ Hoosier Southern Railroad—Discontinuance Exemption—In Spencer County, IN*, STB Docket No. AB-554X, served October 19, 1998.

These rulings reflect the Board’s recognition that in cases where (1) a carrier wishes to retain a line, (2) the circumstances justify relieving that carrier or another carrier of the legal obligation to continue service, but (3) a third party wishes to pay for continued service under the OFA procedures, there is no justification for forcing the carrier owning the line to sell the line to the third party or for allowing the third party to provide the service over the owner’s objection.

Those reasons apply fully in this case. Here, the carrier owning the line, NSR, wishes to retain the line and, indeed, to continue operating over it, and the Board has determined that the circumstances justify relieving D&H of its legal duty to provide service pursuant to its former trackage rights. Even if there were a need for continuing the service being discontinued, and even if CNJ were willing and able to pay for it,² there would still be no justification for allowing CNJ, rather than NSR or D&H, to provide the service.

Moreover, even if the Board had the statutory authority and even if the discontinuing carrier did not object — neither of which is true here — it would be completely unwarranted as a matter of policy to use the OFA process to force the transfer of trackage rights to third party offerors in trackage rights discontinuance proceedings.

² Although both of these are highly questionable propositions in light of the circumstances discussed in the Board’s January 19, 2005 decision, the Board need not resolve them for present purposes in view of the manifest absence of legal authority for the OFA.

The Board has no general authority to force the transfer of one party's trackage rights over the lines of another carrier to a third party in the absence of a control proceeding. Trackage rights are negotiated among carriers, and the identity of the tenant carrier is usually a highly material consideration for the granting carrier in deciding whether to grant trackage rights and the scope of those rights. For that reason, the now-terminated trackage rights agreement between NSR and D&H contained a provision, typical of most trackage rights agreements, prohibiting their assignment without the express written consent of the owner of the track. NSR has not consented, and does not consent, to the transfer of the trackage rights formerly held by D&H to CNJ. It would be entirely inappropriate as a matter of policy, therefore, to require NSR to transfer to CNJ, a completely unknown entity apparently consisting of a single individual, a set of rights previously granted to D&H, a major regional carrier.³

Although the foregoing legal considerations should be dispositive, we also note that the OFA rests on a number of incorrect factual assumptions about the trackage rights that were terminated and discontinued. First, CNJ seeks trackage rights over a segment of track between MP 210.9 and MP 217.0 near Binghamton that D&H still possesses and has not been authorized to discontinue. Second, CNJ seeks to acquire trackage rights in Buffalo that were discontinued by D&H but also assigned to and acquired by D&H's parent, Canadian Pacific Railway Company ("CP") pursuant to a Notice of Exemption filed in Finance Docket No. 34561, *Canadian Pacific Railway Company—Trackage*

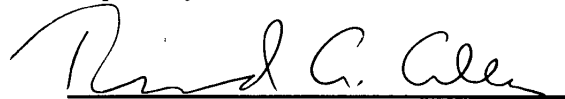
³ It is immaterial that the trackage rights at issue were originally developed as part of the Final System Plan. As the Board observed in its January 19, 2005 decision, "USRA, the architect of that plan, envisioned that the Final System Plan was not the final word as to the structure of railroad operations in the Northeast for all time, and that future changes were sure to occur in response to evolving economic conditions." Slip op. at 11-12.

*Rights Exemption—Norfolk Southern Railway Company.*⁴ CNJ can have no plausible basis for claiming to acquire trackage rights that have been assigned to and are being operated by another carrier.⁵ In view of these facts, even if CNJ acquired all of the trackage rights that D&H has been authorized to discontinue and that have not been assigned to CP, CNJ would be unable to transport through traffic between Buffalo and Binghamton.

CONCLUSION

The Board should reject the OFA filed by CNJ on January 18, 2005.

Respectfully submitted,



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January 28, 2005

⁴ These include overhead rights between MP. 413.0 and 419.8, between MP 419.8 and MP 423.3, and between MP 420.15 and MP 422.3.

⁵ CNJ also appears to be seeking to acquire rights that go far beyond the trackage rights that D&H was authorized to discontinue, including “commercial access to all present and future industries on former CRC lines in the Buffalo Terminal Area (as defined by the USRA) reciprocal switching agreements related thereto and interchange rights to all present and future railroads whose lines connect with the Southern Tier Lines her in issue and with all rail carriers serving the Buffalo area.” CNJ OFA at 1-2. OFA procedures do not give the Board authority to grant rights to the offeror beyond what is being abandoned or discontinued. *See, e.g., Chicago and Northwestern Transportation Company—Abandonment Exemption—Mason City, IA*, ICC Docket No. AB-1 (Sub-No. 205X), served November 10, 1987.

CERTIFICATE OF SERVICE

I certify that on January 31, 2005, a true copy of the foregoing "Norfolk Southern Railway Company's Motion To Reject Offer of Financial Assistance" was served by first class mail, postage prepaid, upon:

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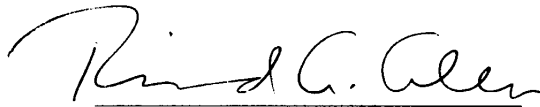
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