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SURFACE
TRANSPORTATION BOARD

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February 10, 2005

The Honorable Vernon A. Williams
Secretary, Surface Transportation Board
Mercury Building, Room 700
1925 K Street, N.W.
Washington, D.C. 20423

ENTERED
Office of Proceedings

FEB 15 2005

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Via Federal Express

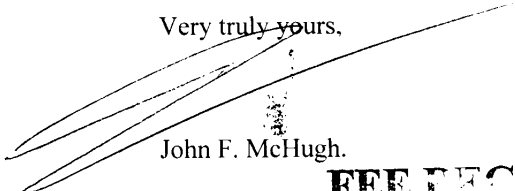
Re: DOCKET NO. AB-156 (Sub – No. 25X), Delaware and
Hudson Railway, Inc.-Discontinuance of Trackage Rights
Between Lanesboro, PA and Buffalo, NY.

Honorable Sir:

Enclosed please find for filing the original and ten copies of the Appeal of the Decision of the Office of Proceeding Dismissing the Offer of Financial Assistance filed by CNJ Rail Corporation, as well as the certificate of service and a 3 ½ " floppy disk containing the same material.

Thank you for your attention to this matter.

Very truly yours,


John F. McHugh.

Cc: Mr. Terrence M. Hynes
Sidley, Austin, Brown, & Wood, LLP.
1591 K Street N.W.
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FEB 14 2005

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Eric B. Lee
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FILE 11

CERTIFICATE OF SERVICE

Certificate of Service

I hereby certify that on this 10th day of February 2005, I served the foregoing
Appeal of the Office of Proceedings by causing a copy thereof to be delivered by prepaid
First Class Mail to the following parties:

Mr. Fred Green, Executive Vice President
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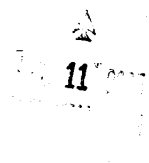
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BEFORE THE SURFACE TRANSPORTATION BOARD

DOCKET NO. AB-156 (Sub – No. 25X)

DELAWARE AND HUDSON RAILWAY, INC.-DISCONTINUANCE OF
TRackage RIGHTS-BETWEEN LANESBORO, PA AND BUFFALO, NY.

IN THE MATTER OF AN OFFER OF FINANCIAL ASSISTANCE

ENTERED
Office of Proceedings

FEB 15 2005

APPEAL OF THE DECISION OF THE OFFICE OF PROCEEDING DISMISSING
THE OFFER OF FINANCIAL ASSISTANCE FILED BY CNJ RAIL CORPORATION

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Public Record

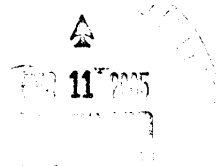
The CNJ Rail Corporation has made an offer to purchase the trackage rights which the Delaware and Hudson seeks to abandon between Binghamton, New York and Buffalo, New York. The Office of Proceedings has dismissed the offer as the offer does not exactly match the rights the D&H seeks to abandon. A term of the offer is a request for trackage rights to logical interchange points in terminal areas. The Board has no authority to dismiss an Offer of Financial Assistance due to the terms set forth in the offer.

Providing rail carriers with a means of quickly relieving themselves of unprofitable services was a goal of Staggers Rail Act. That act however introduced the obligation on the part of a rail carrier seeking to rid itself of disfavored services to offer such services for sale. The goal of the act was the expansion of and preservation of a privately owned, viable, national rail system disciplined by competition. Preservation of lines and services wherever possible by transfer of operations to willing parties became an obligation of the Board (then the Interstate Commerce Commission) and of all

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participants in the industry. Hayfield Northern Railroad Company v. Chicago and North Western Transportation Company, 467 U.S. 622, 633-631 (1984).

The relevant section of that Act is now 49 USC §10905. Entitled "Offers of financial assistance to avoid abandonment and discontinuance," §10905 governs the procedures to be followed when a person seeks to prevent an abandonment usually by purchasing the abandoning carrier's line. §10905 sets forth the Board's role in the process of evaluating such an offer. The Board shall publish in the Federal Register its findings that the public convenience and necessity require or permit abandonment or discontinuance of a particular railroad service. Within 10 days following the publication, any person may offer to pay the carrier a subsidy or offer to purchase the line. Neither the language of the act nor that of the regulations promulgated under the Act makes any distinction between an abandonment of a line of railway or of trackage rights. An offer of Financial Assistance is defined only once in the Act or the Regulations and it is an offer to subsidize a service or an offer to purchase.

The Act provides only a limited role for the Board once an offer has been submitted. Indeed, pursuant to 49 U.S.C. §10905(c) if the Board finds, within 15 days, that the offer is by "a financially responsible person (including a government authority)" and that the offer of assistance meets prescribed standards, i.e. that it is by a financially responsible person who has the intention of operating the line for not less than two years, it "shall postpone the issuance of a certificate authorizing abandonment or discontinuance." (emphasis added). Under §10905(d) if thereafter the person offering assistance and the carrier "fail to agree on the amount or terms of the subsidy or purchase, either party may, within 30 days after the offer is made, request that the Board establish

the conditions and amount of compensation ... within 60 days,"(emphasis added) §10905(e), and this decision "shall be binding on both parties, except that the person who has offered to subsidize or purchase the line may withdraw his offer within 10 days of the Board's decision." § 10905(f)(2). If the offer is withdrawn, "the Board shall immediately issue a certificate authorizing the abandonment or discontinuance."

In its determination of the terms the Board " ...shall determine the price and other terms of sale, ... (including, unless otherwise mutually agreed, all facilities on the line or portion necessary to provide effective transportation services)..." Therefore the statute makes it clear that the creation of a viable working railroad is the goal. It is respectfully submitted that the line must include all of the line to logical terminals and interchange points as they are "...necessary to provide effective transportation services."

Here, the Office of Proceedings has dismissed the offer as it includes an offer to purchase trackage rights over tracks not within the abandonment petition. These tracks however are part of the lines needed to reach the lines D&H seeks to abandon from other carriers both at Binghamton, N.Y. and particularly at Buffalo. Such access at either end of the trackage rights was imposed on Conrail by the United States Railway Administration within the Final System Plan to assure access by D&H, and via the D&H the Boston and Maine, to carriers operating west of Buffalo which did not own the Southern Tier. See United States Railway Association, Final System Plan, July 26, 1975 pg. 19-20. If CNJ obtained just the portion of the rights D&H seeks to abandon, its service would be confined to moving cars between the Class III carriers interchanging with the line with trackage rights extending to the outskirts but not into either Buffalo or Binghamton. Indeed CNJ would have no right to even reach a side track upon which to

serve local customers in either terminal City and as the property is owned by Norfolk Southern, CNJ would have no right to even build a yard to serve either city. The Courts have held that the Board's rejection of an offer to purchase the entire line where the abandonment involves only a portion of that line is error..

When segmentation of transportation lines is involved, we consider whether the segmentation satisfies three conditions: (1) does the proposed segment have logical termini?; (2) does the segment have substantially independent utility?; and (3) will abandonment of the disputed segment foreclose alternate treatment of the remaining segments? The satisfaction of these three criteria tends to ensure that carriers will not abuse the out-of-service exemption by carving out one segment of a line in an attempt to make the remainder of the line useless and subject imminently to abandonment. We must, of course, be vigilant to detect and restrain the latter phenomenon should it appear.

Caddo Antoine and Little Missouri R. Co. v. U.S. 95 F.3d 740, 748 (8th Cir. 1996)

Therefore, it is respectfully submitted that the decision of the Office of Proceedings is in error and should be reversed.

Indeed, the law seeks to preserve rail services and thus an offer which seeks to create a complete railroad rather than an unworkable fragment of a railroad, is consistent with the letter and purpose of the law, id. The decision of the Office of Proceedings would allow a carrier seeking to abandon a line in a manner to bar access to competition to do so in such a manner that an offer of financial assistance could create only a carrier without terminals and that is contrary to the purposes of the Act. This is precisely the abuse cited by the 7th Circuit which does not allow a carrier to segment a line so that it can not be retained in service by a financially responsible person. Id.

Inclusion of workable interchange tracks and connections to the national rail system is a necessary part of any acquisition of a line from a Class I. Paper or other barriers which bar such access are discouraged. Indeed, both Norfolk Southern and

Canadian Pacific have signed an agreement with the Short Line Railroad Association insuring termination of paper barriers and allowing trackage rights with terminal areas to reach friendly carriers for all new business. Thus, the offer here in issue contains provisions which the D&H has already agreed to assuming that CNJ becomes a party to the Short Line Railroad Agreement, which it has every intention of doing.

However, in any case, the inclusion of access to yard and interchange tracks needed to operate the line is merely a term of the offer. It is not subject to review by the Board unless CNJ and D&H can not reach an agreement within the statutory deadlines imposed in the Act. Then either party may request that the Board establish the conditions and amounts of compensation. Thus, the role of the Board is never to reject an offer due to the conditions requested. The Board's only role, at this stage of the proceedings, is to determine if the offer is by a financially responsible person who intends to operate the line for not less than two years. It is first for the parties to attempt to negotiate the terms on which the D&H will accept the offer.

The Office of Proceedings also states that it would reject the offer in any case as it pertains to trackage rights and not to a line of railroad, citing Chicago and Northwestern Transportation Company – Abandonment- In Oneida and Vilas Counties, WI, and Gogebic County, MI, 363 I.C.C. 979 (1981) as support for that long standing precedent. That case holds that an offer of financial assistance received after the ten day post decision period has passed must be rejected. That decision did not involve trackage rights. It does hold that the statute must be strictly construed. The statute allows an offer of financial assistance, subsidy or purchase, to be made in any abandonment or discontinuance proceeding. As trackage rights, are an interest in land short of ownership

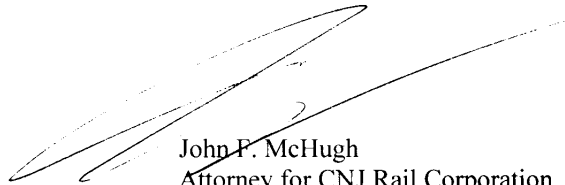
in general use all through the nations railway network. See: Keokuk Junction Railway Company-Feeder Line Acquisition- Line of Toledo, Peoria and Western Railway between La Harpe and Hollis, Il. F.D. No. 34335 (Feb 7, 2005) Page 8 such rights are as much a line as a track owned in fee. They are an asset similar to a lease which can be transferred and indeed D&H in its current motion complains that it has already assigned trackage rights in Buffalo to the Canadian Pacific Railway as a part of the transaction in issue.

Cases cited by Delaware and Hudson in its petition to dismiss the OFA indicate that a party can not seek trackage rights which are in addition to the trackage being abandoned. In cases cited an OFA had included trackage rights to reach a friendly connection. See: Grand Trunk Western R. Co. – Abandonment - in Clark, Madison and Fayette Counties, OH, Docket No. AB-31 (Sub-No. 29)(decided March 23, 1990). Footnote 2 (“...these proceedings can not be used to acquire new connections; only the status quo is endured”) However, those cases did not, as does this, involve segmentation of the line subject to abandonment so as to remove its terminals. No argument was made that such rights were part of the whole line which must be restored to the line to render the railroad viable. Caddo Antoine and Little Missouri R. Co. v. U.S., supra. Indeed, an offer to purchase the trackage rights which are the subject to an abandonment proceeding is not in issue in any case cited by either objecting carrier.

It is therefore respectfully requested that the Board reverse the decision of the Office of Proceedings. The time schedules set by statute having been interrupted by this decision and appeal, the Board should then set a briefing schedule for the petitions filed by Norfolk Southern and by Delaware and Hudson seeking dismissal of the offer as it

applies to trackage rights. It is further requested that as operation via a haulage agreement is a well accepted means for a common carrier to fulfill its obligations under the act as well as under the common law, that the Delaware and Hudson be entitled to stop running its trains while this proceeding is pending but that the rights not be abandoned.

Dated, New York, N.Y.
February 10, 2005



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