

BEFORE THE SURFACE TRANSPORTATION BOARD

2/3357

DOCKET NO. AB-156 (Sub – No. 25X)

FEB 18 2005

RECEIVED

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

ENTERED
Office of Proceedings

FEB 18 2005

Part of
Public Record

IN THE MATTER OF AN OFFER OF FINANCIAL ASSISTANCE

REPLY OF CNJ RAIL CORPORATION TO THE PETITION OF THE
CANADIAN PACIFIC RAILWAY COMPANY DELAWARE AND
HUDSON RAILWAY COMPANY TO DISMISS OFFER OF FINANCIAL
ASSISTANCE

The CNJ Rail Corporation has timely 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 Canadian Pacific Railway (CPR), the parent of the Delaware and Hudson (D&H) has petitioned the Surface Transportation Board (the Board) for an order dismissing the Offer¹. The petition does not state grounds upon which the Board may lawfully act. Pursuant to 49 U.S.C §10904 the Board has no authority to dismiss an Offer of Financial Assistance because it is an offer to purchase a right to operate trackage rights. The Board has held that the

¹ Norfolk Southern, the track owner has also petitioned the Board separately on the same grounds.

provisions of this statute are to be strictly construed. Chicago and Northwestern Transportation Company – Abandonment- In Oneida and Vilas Counties, WI, and Gogebic County, MI, 363 I.C.C. 979 (1981). The absence of any exclusion of trackage rights from the provisions providing for purchase as an Offer of Financial Assistance is conclusive.

49 U.S.C. § 10904 is titled Offers of financial assistance to avoid abandonment and discontinuance (emphases added). The relevant language states:

(b) Any rail carrier which has filed an application for **abandonment or discontinuance** shall provide promptly to a party considering an offer of financial assistance and shall provide concurrently to the Board--

...

c) 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. Such offer shall be filed concurrently with the Board. If the offer to **subsidize or purchase** is less than the carrier's estimate stated pursuant to subsection (b)(1), the offer shall explain the basis of the disparity, and the manner in which the offer is calculated.

...

(e) Except as provided in subsection (f)(3), if the rail carrier and a financially responsible person (including a governmental authority) 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.

...

(B) No subsidy arrangement approved under this section shall remain in effect for more than one year, unless otherwise mutually agreed by the parties.

Nowhere in this language is there any support for the view that abandonment of a track and a discontinuance of a service are to be treated differently.

Indeed, the interpretation of the act urged by Petitioner is inconsistent with the principals underlying the Boards jurisdiction. The Board only has jurisdiction over railway services, not all railroad property. Rail property which is not part of the nation's rail transportation system is not under the jurisdiction of the Board, See Hayfield Northern Railroad Company v. Chicago and North Western Transportation Company 467 U.S. 622.633 (1984), Montezuma Grain Co., LLP v. Surface Transp. Bd. 339 F.3d 535, 540 (9th Cir. 2003). The goal of the Act is to regulate and preserve service. The link between the service and ownership of the rail line is purely incidental.

A rail carrier's common carrier obligations extend to any customer reached by the carrier's services, not just to the edges of the real property the carrier owns. That obligation can be fulfilled by the carrier itself or it can be fulfilled by using trackage rights National R.R. Passenger Corp. v. Boston and Maine Corp. 503 U.S. 407,424 (1992) or by other means Decatur County Com'rs v. Surface Transp. Bd. 308 F.3d 710, 721 (7th Cir. 2002) The rail carriers obligation is to provide rail services within

the service area on reasonable terms to any customer seeking such service and willing to pay the reasonable fee for the service.

The rights CNJ seeks to acquire by purchase were imposed on the fee owner of the Southern Tier line by the United States Railway Association as part of the Final System Plan. Final System Plan, United States Railway Association (USRA) July 26, 1975, Vol. 1 pg. 18-20, 234. First offered to the Chessi System in fee, the trackage rights on line from Binghamton to Buffalo were then granted to D&H when the Chessi's rejection of the offer of the retained Erie Lackawanna lines East of Sterling, Ohio caused the entire rail system in most of New York State to be included in Conrail by default. East of Buffalo only the Delaware and Hudson and the western tip of the Boston and Maine provided trunk line service in the State. Greatly expanding the role of the Delaware and Hudson was deemed critical to maintaining some level of competition in the East. To accomplish that the USRA granted the D&H trackage rights to friendly connections both to the west at Buffalo and to the South at Potomac Yard in Alexandria, Va. Id Thus, the existence of the rights in issue were imposed by law and were deemed critical to the public interest.

The discontinuance petition of the Delaware and Hudson, granted by the Board which precipitated this Offer of Financial Assistance to be made,

allowed the discontinuance of the statutory trackage rights. The D&H will continue to provide service via a haulage agreement, a private contract. As haulage is a fully adequate means of meeting a carrier's service obligations, See, ex. Engelhard Corp. v. Springfield Terminal Ry. Co. 193 F.Supp.2d 385,387 (D. Mass. 2002) and often co-exist with underlying trackage rights, See ex. Howard v. Surface Transp. Bd. 389 F.3d 259, 262 (1st Cir 2004), the petition to abandon the trackage rights granted by the Board is far in excess of any action needed to serve the public convenience and necessity. The haulage agreement alone could have reduced the D&H's costs without terminating trackage rights deemed essential by the USRA.

The Board is bound by its precedents New York Cross Harbor R.R. v. Surface Transp. Bd., 374 F.3d 1177, 1182 (D.C. Cir. 2004). Therefore it must be mindful of the world it must regulate before setting one. Trackage rights, are an interest in land short of ownership in general use throughout the nation's 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. As is set forth above, no binding precedent exists for the ruling Canadian Pacific Seeks. As will be shown below, the cases cited in favor of the proposition, to the extent they deal with the issue at all, contain only dicta

for they are all cases which did not involve an offer to purchase actually made of the trackage rights being discontinued.

Some guidance on this issue can be gained from the Final System Plan which created the trackage rights here in issue. In that Document the USRA dealt extensively with the issue of its authority to transfer lines operated by, but not owned by, railroads in liquidation. See, Final System Plan Vol. 1 pgs. 227-228. There, consistent with CNJ's position here, lines operated by the insolvents whether leased from solvent owners or owned by solvent subsidiary carriers were deemed to be within the USRA statutory authority and were transferred into the Final System Plan. Thus, operation and not ownership was the key to jurisdiction there and it is the key to this Board's jurisdiction and to the scope of §10904.

Significant portions of the nation's rail freight network operate on trackage rights including many lines entering major cities where public commuter agencies own the lines, See ex. Final System Plan, supra, Vol 1. Pgs. 45-46. Extensions of freight services have also been imposed by the Board using trackage rights to provide competition or to avoid reductions in competition as a condition on major mergers. Indeed 49 U.S.C. §11324 grants the Board broad authority to impose such trackage rights.

c) The Board shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public

interest. The Board may impose conditions governing the transaction, including the divestiture of parallel tracks **or requiring the granting of trackage rights and access to other facilities**. Any trackage rights and related conditions imposed to alleviate anticompetitive effects of the transaction shall provide for operating terms and compensation levels to ensure that such effects are alleviated...

Inherent in the power to create rights, such as those here in issue, is the power to transfer them to preserve the services the Board or Congress deemed critical to the public convenience and necessity.

Two major studies by well respected planning think tanks have projected an increase in freight traffic by 2020 which is well beyond the capacity of either the current railway system or the highway system particularly in urban areas, Freight Rail's Potential to Reduce Traffic Congestion, Wendell Cox, Texas Public Policy Institute, (2003), Freight-Rail Bottom Line Report, American Association of State Highway and Transportation Officials (2000). At a meeting of transportation practitioners and executives co-sponsored by the Board and the Association for Transportation Law, Logistics and Policy, on October 6, 2004, the inability of the private rail industry to raise sufficient capital to finance needed increases in capacity was fully explored in the presence of members of the Board. The conclusions of that discussion are well understood facts of which the Board may take judicial notice. The full ability to preserve needed services by transferring them to new management which brings

capital, energy and new ideas to the industry is critical to achieving the national goal of maintaining a rail system capable of avoiding the catastrophe of congestion, air pollution, massive public expenditures and economic paralysis inherent in the current predictions or future freight traffic growth. The Board must maintain its ability to deal with this problem in a manner which may, at times, be inconsistent with the interests of existing carriers. This ability cannot be jeopardized by the decision urged by Canadian Pacific here which would remove a large fraction of the nations rail services from the protection afforded by §10904. This is a greater threat as a decision that an offer to purchase a rail service provided by trackage rights would exclude strategically located services from such preservation efforts, 49 U.S.C. §10904 is the tool the Board needs to keep in full force in a world where major carriers seek to minimize competition, to funnel all traffic onto as few lines as possible and to move terminals away from urban centers, all to maximize return on investment and to husband scarce capital. All of these current trends of major carriers, imposed by their poor capital performance, are inconsistent with the public interest in maintaining capacity. The Board cannot let any of its ability to protect that interest slip away by the decision urged here.

The Southern Tier is a clear example of a valuable line rendered useless by owners whose sole goal is not to operate it but to keep it out of the hands of any effective competition. It is a hilly line with significant amounts of curvature. However, it was the main line of the last of the eastern majors to go bankrupt, being added to the Final System Plan at the last minute. Its demise was due in large measure to Penn Central's refusal to serve and then the destruction of the Erie-Lackawanna's connection to New England removing the about 124,435 cars a year handled via Maybrook and the Poukeepsie Bridge prior to that merger, see New York, N. H. & H. R. Co. v. U. S. 289 F.Supp. 418,444 (SDNY 1968), precisely the type of event the Act is supposed to prevent, most recently exemplified by the decision in 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). Thus, as an independent line, despite its physical problems the Southern Tier out performed its larger competitors. It was a victim of vandalism, not of the market.

Today, the line is owned by Norfolk Southern (NS). It is not used except as a patch in NS's circuitous service to Buffalo from the North Jersey New York City market via Harrisburg or Allentown and as part of a north south route to Buffalo. The CSXT River Line, which ultimately serves the

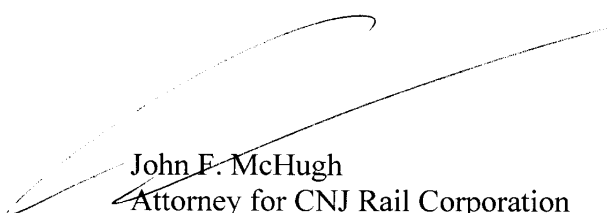
same terminals as the Southern Tier, largely single track through the populous North Jersey-New York, New York City Suburbs and beyond, has sufficient traffic to create a public nuisance due to blocked grade crossings caused by its fleeting of trains and its gathering of trains in the few multiple track segments remaining, while the Southern Tier remains idle. The decisions by the two major carriers, one not to use the line and thus, yield the traffic to the other and the other not to use its access to the New York Susquahanna and Western which operated from its junction with CSXT at Little Ferry, N.J. to Syracuse, N.Y. using trackage rights on the Southern Tier from Maybrook, N.Y. to Binghamton, to relieve the problem on the River Line, is not preserving capacity or even utilizing existing capacity to attract more traffic to the railway system. A decision by the Board to exempt trackage rights from preservation efforts would render such decisions by carriers final on strategically located sections of the rail system, particularly important to urban centers, with no ability for anyone, including governmental entities, to intervene to preserve and rationalize the rail system. Clearly such a decision would fly in the face of the clear intent of Congress in the Staggers Act and carried forward into the ICCTA. Such a decision would not be in the public interest.

Cases cited in the Petition are either not on point or are dicta. In 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 states in relevant part (“...these proceedings can not be used to acquire new connections; only the status quo is endured”). The issue was not an offer to purchase just the line in issue, but to purchase trackage rights to a connection the line did not originally have. CNJ does seek trackage rights in addition to the line abandoned, but those are just the same rights deemed necessary by the USRA to provide the line with access to connections in both terminal cities. CNJ’s offer is consistent with the prohibition of segmentation of a line set forth in Caddo Antoine and Little Missouri R. Co. v. U.S. 95 F.3d 740, 748 (8th Cir. 1996) as well as with the requirements of 49 U.S.C. §§11102 and 11103. Other cases cited merely mention a lack of need to entertain offers of financial assistance in discontinuance proceedings where no such offer was received. These decisions constitute dicta and are not binding on the Board.

The record here establishes that trackage rights are an asset similar to a lease which can be transferred, See The New York Susquehanna and Western Railway Corporation—Trackage Rights Exemption—Onondaga County Industrial Development Agency and Consolidated Rail Corporation,

Finance Docket No. 32772. (August 2, 2001). Indeed Canadian Pacific complains in its petition that some of the rights CNJ seeks in Buffalo and Binghamton have already been assigned to it. Rights in property which can be assigned are a transferable interest which can be sold. No logical distinction between service via a line or trackage rights exists. Therefore, under the strict construction mandate of Chicago and Northwestern Transportation Company – Abandonment- In Oneida and Vilas Counties, WI, and Gogebic County, MI. supra, an offer to purchase must be entertained if made by a financially responsible person pursuant to 49 U.S.C. § 10904.

Dated, New York, N.Y.
February 17, 2005



John F. McHugh
Attorney for CNJ Rail Corporation
6 Water Street
New York, N.Y. 10004
212-483-0875

CERTIFICATE OF SERVICE

At New York, N.Y. I hereby certify that on this 17th day of February 2005, I served the foregoing Reply to the Petition of Canadian Pacific Railway Company and Delaware and Hudson Railway Company by causing a copy thereof to be delivered by prepaid First Class Mail to the following parties:

Mr. Fred Green, Executive Vice President
Canadian Pacific Railway, Ltd.
Gulf Canada Square
401-9th Avenue, S.W.
Calgary, Alberta Canada
(403) 319 – 7555 Phone

Mr. Terrence M. Hynes
Sidley, Austin, Brown, & Wood, LLP.
1591 K Street N.W.
Washington, D.C. 20005

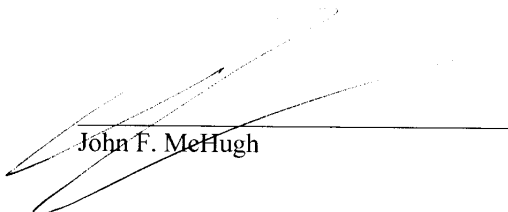
Mr. Richard A. Allen
Zuckert, Scoutt, & Rasenberger, LLP.
888 17th Street, N.W. Suite 700
Washington, D.C. 20006

Mr. Michael S. Wolly
Swerdling, Paul, Kahn, & Wolly, P.C.
1025 Connecticut Avenue, N.W. Suite 410
Washington, D.C. 20005

Mr. Kelvin J. Dowd
Slover and Loftus
1224 17th Street, N.W.
Washington, D.C. 20036-3003

Mr. Daniel R. Elliott, III
United Transportation Union
14600 Detroit Avenue
Cleveland, Ohio 44107

Eric B. Lee
Owego Harford Railway, Inc.
415 Woodland Road
Syracuse, NY 13219



John F. McHugh