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February 22, 2005

BY HAND DELIVERY

ENTERED
Office of Proceedings

FEB 22 2005

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Public Record

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

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 Response In Opposition To The Appeal Of CNJ Rail
Corporation.

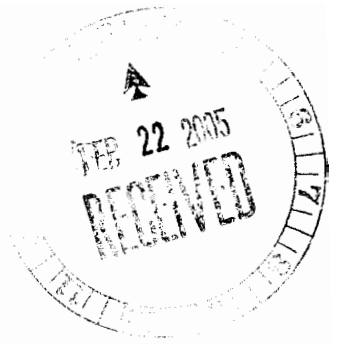
Sincerely,

Scott M. Zimmerman

Encl.

cc: (w/encl) All Parties of Record

213376
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

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**NORFOLK SOUTHERN RAILWAY COMPANY'S
RESPONSE IN OPPOSITION TO THE APPEAL
OF CNJ RAIL CORPORATION**

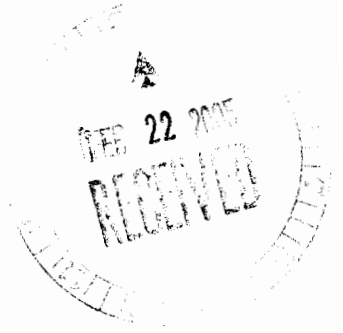
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February 22, 2005

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
RESPONSE IN OPPOSITION TO THE APPEAL
OF CNJ RAIL CORPORATION**

Norfolk Southern Railway Company ("NSR") hereby submits the following response in opposition to the "Appeal Of The Decision Of The Office Of Proceeding Dismissing The Offer Of Financial Assistance Filed By CNJ Rail Corporation," dated February 10, 2005 and filed February 14, 2005 ("Appeal"). In its Appeal, CNJ Rail Corporation ("CNJ") asks the Board to reverse the decision of the Director of the Office of Proceedings ("Decision") served February 3, 2005 rejecting the offer of financial assistance ("OFA") filed by CNJ. CNJ's appeal is without merit and should be denied.

In its OFA, CNJ seeks to "purchase," and assume operation of, the Delaware & Hudson Railway Company ("D&H") trackage rights being discontinued in this proceeding as well as certain other rights outside the geographic scope of the discontinuance. In the Decision, the Director of the Board's Office of Proceedings found the OFA "fundamentally flawed" and rejected it:

The OFA is fundamentally flawed and must be rejected. First, it should be noted that CNJ is seeking to acquire through the OFA process

rights that are geographically broader than those for which D&H obtained discontinuance authority. Second, and more importantly, even if the OFA had not exceeded the geographical limits of the trackage rights authorized for discontinuance, the OFA would have to be rejected because, in the January 19 decision, the Board, following longstanding precedent, stated that OFAs for discontinuance of trackage rights are limited to subsidies to provide continued rail service. Here, as CNJ is not seeking to subsidize D&H's operations under the trackage rights, the OFA process is not available to it. The Board strictly construes the OFA provisions. Chicago and North Western Transp. Co. — Abandonment, 363 I.C.C. 979, 980 (1981). The OFA will therefore be rejected.

Decision, slip op. at 2. Thus, the primary basis for rejection was that “the OFA process is not available” to CNJ because “CNJ is not seeking to subsidize D&H's operations under the trackage rights,” but rather acquire and operate the rights itself, a purpose not permitted by the OFA statute. Additionally, the Decision notes that the OFA improperly seeks to acquire rights geographically broader than the rights being discontinued. On both counts, the Decision is correct and CNJ's arguments to the contrary are wrong.

A. The Director's determination that OFAs in cases of discontinuance may only be for subsidizing the discontinuing carrier's operations, not for the offering carrier itself to acquire and operate the discontinued rights, follows longstanding Board precedent, as the Decision notes. *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); *Norfolk Southern Ry. Co.—Discontinuance Exemption—In Hudson County, NJ*, STB Docket No. AB-290 (Sub-No. 212X) (served January 28, 2002); *Central Of Tennessee Railway And Navigation Co., Inc.—Discontinuance Of Service Exemption—In Bastrop, Burnet, Lee, Llano, Travis And Williamson Counties, TX*, STB Docket No. AB-501 (Sub-No. 3X), slip op. at 3 and n.3 (served August 11, 2000) (“Because this is a discontinuance proceeding and not an abandonment, we need not consider OFAs to

acquire the line for continued rail service,” whereas “OFAs to subsidize continued rail service, however, do apply to discontinuances”); *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). The Board followed this precedent in its decision served January 19, 2005 in this proceeding, when it said:

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.

January 19 Decision, slip op. at 14 (emphasis supplied). The Director correctly followed this Board directive by rejecting CNJ’s OFA because it contemplated, in this discontinuance case, not a subsidy for D&H to continue operating its trackage rights itself, but an outright acquisition of those rights by CNJ for its own operation.

CNJ responds to this by arguing, in effect, that the Board should alter its longstanding interpretation and application of the OFA statute to permit the “purchase” of trackage rights that are being discontinued. Appeal at 6. This argument, however, is contrary to the plain language of the OFA statute, which provides: “Within 4 months after an application is filed under section 10903, any person may offer to *subsidize or purchase the rail line* that is the subject of such application.” 49 U.S.C. § 10904(c) (emphasis supplied). The statute only authorizes offers to purchase rail lines that are being abandoned or offers to subsidize continued rail service by the carrier seeking authority to abandon or discontinue that service. It does not authorize offers to purchase trackage rights; one may not purchase something that is merely being discontinued.

CNJ makes the further implausible argument that the statute's reference to "purchase the rail line" should be construed to include purchases of trackage rights because, CNJ asserts, "such rights are as much a line as a track owned in fee" and are "an asset similar to a lease which can be transferred . . ." Appeal at 6. It is not plausible to assume, however, that Congress intended that the phrase "purchase the rail line" to include purchases of trackage rights that a carrier is seeking to discontinue over a line owned by another carrier, and CNJ offers no legislative history or other authority to support its novel construction.

Moreover, there are strong policy reasons supporting the Board's longstanding interpretation of §10904 as permitting OFAs for purchase only in cases of abandonment and not in discontinuance cases. As NSR noted in its motion to dismiss CNJ's OFA, 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. Furthermore, it would be entirely inappropriate as a matter of policy to allow an entity with whom the track owner never negotiated, and over the track owner's objection, to assume the rights and privileges that the track owner previously negotiated and granted to another entity. CNJ in its appeal does not even address these policy arguments, much less rebut them.

In sum, CNJ provides no reason why the Board should overrule its consistent interpretation of § 1904 as permitting only offers to subsidize continued service by the discontinuing carrier in discontinuance cases. It only makes the bald assertion that the

OFA statute “allows an offer of financial assistance, subsidy or purchase, to be made in any abandonment or discontinuance proceeding,” and that “[t]he 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.” Appeal at 5. To the contrary, however, 49 U.S.C. §10904(d)(1) provides that, in order to postpone an abandonment or discontinuance, the Board must conclude that the proffered OFA pertains to “that part of the railroad line to be abandoned or over which *all rail transportation is to be discontinued . . .*”¹ Thus, under §10904(d), the financial responsibility of the offeror is not the only issue properly before the Board at this stage of the proceedings; the scope of the OFA is as well. The Board’s regulations are not to the contrary: While 49 C.F.R. §1152.27(e)(2) provides that “the Board will review each offer submitted to determine if a financially responsible person has offered assistance,” nothing in that passage suggests that the Board (or the Director, by delegation) cannot make the necessary threshold determination whether the offeror’s submission in fact constitutes a valid “offer” under the statute to begin with. Indeed, §1152.27(e)(2) also states, more broadly, that the Director may make the initial determination whether an offeror’s submission “satisf[ies] the standards of 49 U.S.C. §10904(d) . . .”

B. As to the secondary basis cited in the Decision for rejection of the OFA — that the OFA rights sought are broader than those being discontinued—CNJ’s arguments are equally unavailing. CNJ asserts that “[t]he Courts have held that the Board’s rejection of an offer to purchase the entire line where the abandonment involves only a

¹ Indeed, the italicized language provides a clear basis for rejecting CNJ’s OFA, since the OFA does *not* pertain to a line to be abandoned or over which “all rail transportation” is to be discontinued; NSR is not discontinuing its own rail operations over the line. See *Norfolk Southern Railway Company’s Motion To Reject Offer of Financial Assistance*, filed January 31, 2005, at 3.

portion of that line is error,” citing *Caddo Antoine and Little Missouri R. Co. v. United States*, 95 F.3d 740, 748 (8th Cir. 1996). But CNJ’s reliance on *Caddo Antoine* is misplaced. That case is completely inapposite, because it does not involve the OFA statute at all. Rather, the statute at issue there is the feeder line statute at 49 U.S.C. §10907 (formerly §10910). That distinction is significant, as the court itself noted in *Caddo Antoine*. In that case, the Court’s holding that the Board must consider Caddo Antoine’s application to purchase the entire Norman Branch, rather than just the northern segment of it, was based in part on the feeder line statute’s reference to purchase of “a particular railroad line.”² The Court expressly distinguished that language, which reflects the intent to encompass the entirety of a rail line, from the language Congress used in other contexts contemplating transactions that can involve only a “part” or a “portion” of a line, including the OFA statute. *See Caddo Antoine*, 95 F.3d at 744 (noting that, in contrast to the feeder line statute’s “particular railroad line” language, the OFA statute — then at §10905(b)(1), (d)(1), and (f)(4) and now at §10904(b)(1), (d)(1), and (f)(4)— “relate[s] to offers of financial assistance to maintain service on all or a ‘portion’ or ‘part’ of an abandoned railroad line.”).

Thus, *Caddo Antoine* fails to support CNJ’s assertion that the Board must accept its OFA encompassing rights geographically broader than the trackage rights being discontinued. That case, and CNJ’s entire discussion (at pp. 3-5 of its Appeal) of the “segmentation” of lines, the need to include “workable interchange tracks and connections,” and to “create a complete railroad” rather than an “unworkable fragment,” are entirely inapplicable here because they pertain to a statute – the feeder line statute – that applies only to entire “lines” of railroad (in contrast to the OFA statute, which can be

² *See* §10907(b)(1)(A)(i) (formerly §10910(b)(1)(A)(i)).

applied to mere “portions” or “parts” of a line) and which implicates underlying policies different from those underlying the OFA statute.³

In contrast, as NSR noted in its motion to reject the OFA (at p. 5 n.5), precedent that *does* pertain to the statute actually at issue here — the OFA statute — establishes that those procedures do *not* give the agency authority to grant rights to the offeror beyond what is being abandoned or discontinued. *See Chicago and Northwestern Transportation Company—Abandonment Exemption—Mason City, IA*, ICC Docket No. AB-1 (Sub-No. 205X) (served November 10, 1987). The Director’s Decision here is fully in accord with that principle.

After filing its Appeal of the Decision on February 14, CNJ on February 18, 2005 filed two additional documents with the Board, which we obtained from the Board’s offices only today: a “Reply Of CNJ Rail Corporation To The Petition Of The Norfolk Southern Railway Company To Reject Offer Of Financial Assistance,” (“Reply To NSR”) and a “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.” These filings were rendered moot by the Director’s Decision of February 3, 2005. In any event, they raise essentially the same arguments as in CNJ’s Appeal, which are fully addressed above. We note here only three brief points. First, taking CNJ at its word that, as stated in its Reply To NSR (at 5), “haulage is a fully adequate means of meeting a carrier’s service obligations,” that concession completely undermines CNJ’s entire argument for “purchasing” D&H’s trackage rights over the

³ The OFA statute comes into play in connection with line segments as to which the Board has determined, by virtue of its grant of abandonment or discontinuance authority, that circumstances do not require continuation of rail service. The feeder line statute, in contrast, comes into play often in connection with an effort to displace an incumbent operator that is under-serving shippers on a line.

Southern Tier, since NSR has agreed to perform haulage for D&H. *See* Petition For Exemption at 5-6. Indeed, the Board has concluded that because of CSX's service through New York and the effect of intermodal competition, "there will be sufficient competition" in the area "[e]ven without the haulage arrangement here." *January 19, 2005 Decision*, slip op. at 11.⁴

Second, CNJ's continued heavy reliance on the *Final System Plan* in its Reply to NSR (*see* pp. 4, 6) is misplaced, as that Plan "was not the final word as to the structure of railroad operations in the Northeast for all time." *January 19, 2005 Decision*, slip op. at 12.

Third, the lengthy discourse on rail capacity in CNJ's Reply to NSR, including its assertion (at p. 8) that if left standing, the Director's Decision "would remove a large fraction of the nations [sic] rail service from the protection afforded by §10904," utterly ignores that the Board has concluded that "the OFA provisions for a subsidy to provide continued rail service (i.e., overhead trackage rights) apply to discontinuances of trackage rights." *January 19, 2005 Decision*, slip op. at 14.

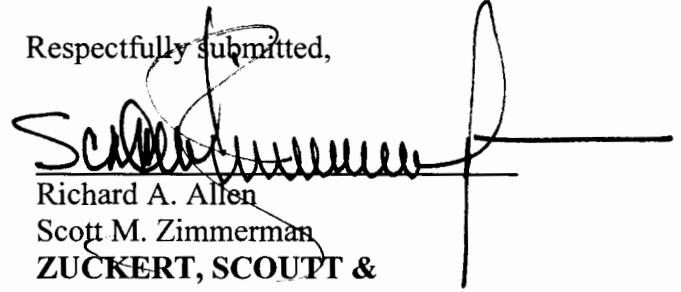
⁴ Neither that finding, nor any other aspect of the *January 19, 2005 Decision*, was challenged by any party prior to the Board's February 14, 2005 deadline for reopening.

CONCLUSION

For the foregoing reasons, NSR respectfully requests that CNJ's Appeal be denied.

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February 22, 2005

CERTIFICATE OF SERVICE

I certify that on February 22, 2005, a true copy of "Norfolk Southern Railway Company's Response In Opposition To The Appeal Of CNJ Rail Corporation" was served by first class mail, postage prepaid, upon:

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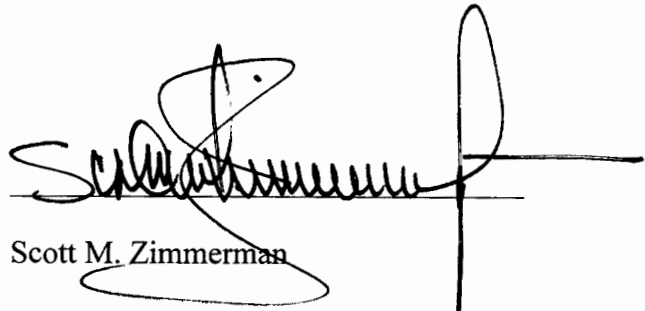
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