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February 22, 2005

By Hand Delivery

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

213377

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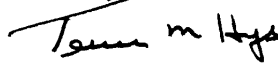
Re: Docket No. AB-156 (Sub-No. 25X), *Delaware and Hudson Railway Company, Inc.—Discontinuance of Trackage Rights—Between Lanesboro, PA, and Buffalo, NY*

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. ("Reply") in Opposition to the Appeal of the Decision of the Office of Proceedings Dismissing the Offer of Financial Assistance, filed by CNJ Rail Corporation on February 14, 2005. 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,



Terence M. Hynes
Gabriel S. Meyer

Enclosures

213377
BEFORE THE
SURFACE TRANSPORTATION BOARD

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Docket No. AB-156 (Sub-No. 25X)

DELAWARE AND HUDSON RAILWAY COMPANY, INC. – PETITION FOR
EXEMPTION – DISCONTINUANCE OF TRACKAGE RIGHTS BETWEEN
LANESBORO, PA AND BUFFALO, NY, IN SUSQUEHANNA COUNTY, PA AND
BROOME, TIOGA, CHEMUNG, STEUBEN, ALLEGANY, LIVINGSTON, WYOMING,
ERIE AND GENESEE COUNTIES, NY

REPLY OF CANADIAN PACIFIC RAILWAY COMPANY AND
DELAWARE AND HUDSON RAILWAY COMPANY, INC. IN OPPOSITION
TO CNJ RAIL CORPORATION'S APPEAL OF THE DECISION OF THE OFFICE
OF PROCEEDINGS DISMISSING THE OFFER OF FINANCIAL ASSISTANCE

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Dated: February 22, 2005

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Docket No. AB-156 (Sub-No. 25X)

**DELAWARE AND HUDSON RAILWAY COMPANY, INC. – PETITION FOR
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**REPLY OF CANADIAN PACIFIC RAILWAY COMPANY AND
DELAWARE AND HUDSON RAILWAY COMPANY, INC. IN OPPOSITION
TO CNJ RAIL CORPORATION'S APPEAL OF THE DECISION OF THE OFFICE
OF PROCEEDINGS DISMISSING THE OFFER OF FINANCIAL ASSISTANCE**

INTRODUCTION

Pursuant to 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27(c), Canadian Pacific Railway Company ("CPRC") and its affiliate, Delaware and Hudson Railway Company, Inc. ("D&H"), hereby submit this Reply to the Appeal of the Decision of the Office of Proceedings Dismissing the Offer of Financial Assistance filed in the above-captioned proceeding by CNJ Rail Corporation ("CNJ") on February 11, 2005 (the "CNJ Appeal"). CNJ's Offer of Financial Assistance ("OFA") sought to "purchase" overhead trackage rights on certain lines of Norfolk Southern Railway Company ("NSR") between Binghamton, NY and Buffalo, NY ("Southern Tier Line") that were the subject of D&H's Petition for Exemption in this proceeding. In its February 3, 2005 decision (the "*Director's Decision*"), the Director of the Office of Proceedings rejected CNJ's Offer to purchase D&H's trackage rights on the grounds that the OFA sought to acquire rights that are geographically broader than the lines over which D&H proposed to discontinue its trackage rights operations, and that, in any event, OFA's in trackage rights discontinuance proceedings are limited to offers of subsidy to provide continued rail service.

Director's Decision at 2. CNJ has failed to demonstrate any error in the *Director's Decision*, and its Appeal should be denied.

The *Director's Decision* holding that OFA procedures do not permit the “purchase” of discontinued trackage rights is consistent with longstanding ICC/STB precedent. As CNJ acknowledges, *Chicago & NW Transp. Co.—Abandonment—In Oneida and Vilas Counties, WI, and Gogebic County, MI*, 363 I.C.C. 979, 980 (1981), requires that Section 10904 be “strictly construed.” The Board has consistently construed Section 10904 as prohibiting offers to “purchase” trackage rights that are the subject of a discontinuance proceeding. The rationale for that construction of Section 10904 was explained by the ICC in Docket No. AB-1(Sub-No. 205X), *Chicago & NW Transp. Co.—Abandonment Exemption—Mason City, IA* (decided Nov. 20, 1987) (“*Mason City Abandonment*”):

In light of the extraordinary powers 49 U.S.C. 10905 [currently § 10904] gives the Commission to dictate the terms of a purchase agreement to an unwilling railroad, we have determined that we must *strictly construe* the statute

Our examination of 49 U.S.C. [10904] leads us to conclude that we cannot authorize trackage rights as part of a section [10904] transfer. There is no language in section [10904] specifically dealing with trackage rights. By contrast 49 U.S.C. 10910 [feeder line statute, recodified as 10907] which also provides for forced sales to financially responsible persons, allows us, upon the offeror's request, to provide the “acquiring carrier trackage rights to allow a reasonable interchange with the selling carrier or to move power equipment or empty rolling stock between noncontiguous feeder lines operated by the acquiring carrier.” 49 U.S.C. [10907(d)]. We must assume that if Congress wanted us to impose trackage rights in offer of financial assistance proceedings it would have provided us with specific language like that found in section [10907]. We note that the language of both these sections was developed in the Staggers Rail Act of 1980.

Mason City Abandonment (citing Docket No. AB-167 (Sub-No. 56N), *Conrail—Abandonment of the Cairo Branch in Illinois—In the Matter of an Offer of Financial Assistance* (not printed;

served Mar. 4, 1983) (emphasis added)). The reasoning of *Mason City Abandonment* has been followed in a long line of decisions holding that discontinued trackage rights may not be “purchased” pursuant to the OFA process.¹ The *Director’s Decision* is fully consistent with these precedents.

The *Director’s Decision* also correctly concluded that CNJ’s request for access to a variety of main line tracks, yard facilities and customer facilities that were not included in D&H’s discontinuance proposal was not permitted. CNJ cites no case in which the Board (or the ICC) has required a carrier, pursuant to the OFA provisions, to grant access to ancillary lines and facilities that are not part of the subject discontinuance. Rather, CNJ baldly 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 portion of that line is error.” *CNJ Appeal* at 4. However, the case cited by CNJ in support of that proposition, *Caddo Antoine and Little MO RR Co. v. U.S.*, 95 F.3d 740 (8th Cir. 1996), is inapposite, for several reasons.

First, *Caddo* involved a disputed rail line acquisition under the 49 U.S.C. § 10907 (formerly § 10910), the so-called “feeder line” provision – not an OFA pursuant to Section 10904. As *Mason City Abandonment* indicates, the scope of the Board’s authority to order trackage rights or other ancillary rights under Section 10904 is far narrower than its authority to do so under Section 10907.

Second, *Caddo* is distinguishable from the present case in several critical respects. In *Caddo*, the disputed line segments were likely to be abandoned unless they were transferred to a

¹ See, e.g., Docket No. AB-55 (Sub-No. 641X), *CSX Transportation Inc.—Discontinuance Exemption—In Knox County, TN* (served Jan. 2, 2004); Docket No. AB-565 (Sub-No. 15), *New York Central Lines, LLC—Discontinuance Exemption—in Henry County, IN* (served Dec. 5, 2003); Docket No. AB-55 (Sub-No. 615X), *CSX Transportation Inc.—Discontinuance Exemption—Between East of Memphis and Cordova in Shelby County, TN* (served July 17,

new carrier pursuant to the feeder line program. *Caddo*, 95 F3d at 740. By contrast, the ancillary lines and customer facilities to which CNJ seeks access in its OFA have not been abandoned by D&H, nor will service over those lines (or to those customer facilities) be discontinued. Rather, D&H will use those lines in connection with its ongoing operations, and D&H will continue to access Buffalo-area shippers via switching provided by NSR (as D&H does today). *See January 19 Decision* at 5, n.8. NSR also provides service on those lines (and to those customers).

Third, the court's ruling in *Caddo* was premised on the fact that the line at issue was a "unitary operation" which had been improperly segmented by the carrier in order to avoid serving less profitable shippers while retaining service to a single, more profitable customer. *Caddo* at 747. By contrast, D&H's discontinuance of trackage rights over a portion of the Southern Tier Line will not result in a loss of rail service by any shipper – rather, D&H's arrangements with NSR enable it to continue to offer service to all current D&H customers, and to interchange traffic with all carriers that it can interchange traffic today. Moreover, CNJ's OFA seeks to acquire lines and facilities that are not part of D&H's Southern Tier trackage rights. For example, CNJ seeks the right to use a portion of D&H's yard facilities in Binghamton and Buffalo, NY. However, those yards were not part of the rail lines over which D&H's predecessor acquired trackage rights under the Final System Plan. Rather, D&H's East Binghamton Yard is (and always has been) part of D&H's proprietary system. Likewise, D&H's right to use SK Yard in Buffalo, NY derived from a February 1, 1984 lease agreement with Conrail, not from the Final System Plan. *See Summary of Documents filed by CPRC, D&H and NSR on October 12, 2004, Tab 3.* The collection of ancillary trackage rights and access rights

2002); Docket No. AB-511 (Sub-No. 2X), *Central Railroad Company of Indianapolis—Discontinuance Exemption—In Grant County, IN* (served Jan. 28, 2002).

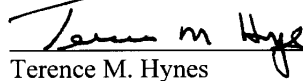
that CNJ seeks to cobble together in its OFA are not part of a "unitary" line of railroad.

Accordingly, CNJ's reliance upon *Caddo* is misplaced.

CONCLUSION

For the foregoing reasons, CPRC and D&H respectfully request that the Board dismiss CNJ's Appeal of the Decision of the Office of Proceedings Dismissing the Offer of Financial Assistance.

Respectfully submitted,



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Dated: February 22, 2005

CERTIFICATE OF SERVICE

I hereby certify that, on this 22nd day of February, 2005, I served the foregoing
Reply of Canadian Pacific Railway Company and Delaware and Hudson Railway Company, Inc.
in Opposition to CNJ Rail Corporation's Appeal of the Decision of the Office of Proceedings
Dismissing the Offer of Financial Assistance, by causing copies thereof to be delivered to:

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