

ORIGINAL

Before the
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 35019

WESTERN NEW YORK & PENNSYLVANIA RAILROAD, LLC-LEASE AND
OPERATION EXEMPTION-CERTAIN ASSETS OF NORFOLK SOUTHERN RAILWAY
COMPANY AND CHAUTAUQUA, CATTARAUGUS, ALLEGANY AND STEUBEN
SOUTHERN TIER EXTENSION RAILROAD AUTHORITY

PETITION TO REMOVE PROCEEDING ^{*/}
FOR DISPOSITION BY THE BOARD OR A MEMBER

ENTERED
Office of Proceedings
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Public Record

GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

Attorney for Samuel J. Nasca

July 25, 2007

*/ Expedited handling requested.

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SURFACE TRANSPORTATION BOARD

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Protestant, Samuel J. Nasca,^{1/} for and on behalf of United Transportation Union-New York State Legislative Board (UTU-NY), petitions the Surface Transportation Board (Board), that it remove this proceeding from the Director-Office of Proceedings (DOP), for disposition by the Board itself, or by a Member of the Board. 49 CFR 1011.3-7. This action may be taken by the Chairman, or by the Board, supra.

The necessity for this petition is the failure of the DOP to take timely action to permit UTU-NY access to the agreements underlying the noticed transaction. This has been the result of the failure by DOP to issue an unopposed protective order to permit discovery.

^{1/} New York State Legislative Director for United Transportation Union, with offices at 35 Fuller Road, Albany, NY 12205.

Background

1. Western New York & Pennsylvania Railroad, LLC, a class III carrier (WNYP),^{2/} on May 17, 2007, filed its notice of exemption to lease and operate the line of Norfolk Southern Railway Company (NSR) between Machias Junction, NY, and Driftwood, PA, along with the Farmer's Valley Secondary, and the Olean branches, a total distance of approximately 98.3 miles. The exemption was noticed June 1, and published June 6, 2007. 72 Fed. Reg. 31365-6.

2. Problems arose in connection with the provision of the required 60-days advance notice to employees. The Board on June 26, 2007, denied WNYP's petition for waiver of the employee notice requirement, and ruled that the notification date was June 4, such that the exemption would not become effective until 60 days thereafter, which would be August 3, 2007. The Board in its June 26 decision stated that its action denying the waiver served to moot the UTU-NY request for a 60-day stay, and that UTU-NY had not provided justification for a stay beyond that date.

3. UTU-NY sought production of the agreement(s) governing the transaction, both informally and by written request on June 15, 2007. When this was not forthcoming, UTU-NY on June 26, 2007, filed a motion to compel. The Board some 20 days later, on July 16, 2007, granted the UTU-NY motion to compel subject to a protective order, and opined that WNYP did not appear to be refusing to provide access or was using dilatory tactics.

^{2/} WNYP, along with B&H Rail Corp., and Ontario Central Railroad, is an affiliate of Livonia, Avon & Lakeville Railroad (LAL).

4. UTU-NY on July 16, renewed its request for the governing agreements. (Attach. 1). The following day, July 17, 2007, WNYP filed its motion for a protective order. Some 8 days have transpired without action by the Board.

5. This proceeding is related to the petition for exemption in Finance Docket No. 35044, Buffalo & Pittsburgh Railroad, Inc.- Lease and Operation Exemption-Norfolk Southern Railway Company, filed July 3, 2007, wherein Buffalo & Pittsburgh Railroad, Inc. (BPRR), seeks to lease and operate the NSR line between Buffalo (Gravity), NY, and Machias, NY. This is the segment adjacent and connecting to the line WNYP proposes to acquire between Machias Junction, NY, and Driftwood, PA in the instant Finance Docket No. 35019.^{3/} On July 10, 2007, BPRR filed its motion for protective order, which was granted 6 days later on July 16, 2007.

ARGUMENT

1. The delaying action of DOP in dealing with UTU-NY access to the underlying agreement(s) is inexcusable. The 60-day employee notice requirement is to prevent just the sort of tactics being employed in this proceeding. By contrast, in Finance Docket No. 35044, involving BPRR, the Board issued a protective order in 6 days, whereas in the instant Finance Docket No. 35019, the Board has taken 20 days to rule on an unopposed motion to compel, and

^{3/} Although the notice in Finance Docket No. 35019 speaks of Machias Junction, NY, whereas the petition in Finance Docket No. 35044 speaks of Machias, NY, an examination of both documents indicates that the endpoint of each proposed acquisition is at MP 44.7 on the NSR Buffalo line.

then allows another 8 days to transpire without taking action on an unopposed motion for protective order.

2. Although the transaction in Finance Docket No. 35044 (north of Machias, NY) is not to take place prior to August 24, 2007, that in Finance Docket No. 35019 (south of Machias, NY), has presently been authorized by the Board to be consummated August 3, 2007, only a week away.

3. The action of DOP is not only prejudicial to the preparation of a petition to revoke, due to time constraints, but also serves to obscure an overall view of the entire transaction--NSR proposes to transfer its operation between Buffalo, NY, and Driftwood, PA. The mandatory employee protection provisions of 49 U.S.C. §10902(d) are clearly involved in Finance Docket No. 35044, inasmuch as BPRR is a Class II carrier, whereas on its face employee protection would appear precluded in Finance Docket No. 35019 since WNYP is a Class III carrier. However, BPRR presently has rights between Machias Junction, NY, and Emporium and Driftwood, PA. UTU-NY believes the Board has an obligation to fully explore the transaction as an attempt to circumvent mandatory employee protection. The Board should note that BPRR is apart of the GWI family of carriers, with far greater resources than the LAL carriers.^{4/}

4. Protestant urges the handling of this proceeding by DOP has demonstrated the proceeding should be removed from DOP management, and placed under direct control of the Board, or an individ-

^{4/} Indeed, LAL is in the process of divesting one of its several carriers. Cf. Finance Docket No. 35062, Finger Lakes Railway Corp.-Control-Ontario Central Railroad Corp. (filed July 9, 2007).

ual Member. The Board's predecessor employed the single-commissioner technique in a number of situations.

5. On its own motion, the Board may wish to extend its stay of the exemption until at least August 24, 2007.

Respectfully submitted,



GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

July 25, 2007

Attorney for Samuel J. Nasca

Certificate of Service

I hereby certify I have served a copy of the foregoing upon counsel for WNYP by personal service to Kevin M. Sheys, 1601 K Street, N.W. Washington, DC 20006.

Washington DC



Gordon P. MacDougall

LAW OFFICES
GORDON P MACDOUGALL
1055 CONSTITUTION AVE, N W
WASHINGTON, D C 20006

TELEPHONE
AREA CODE 202
223-0708

July 16, 2007

Kevin M. Sheys
K&L Gates
1601 K Street, N.W.
Washington DC 20006

BY HAND

Re: Finance Docket No. 35019
Western New York & Pennsylvania Railroad-Lease & Operation.-
Norfolk Southern Railway Company and Southern Tier Extension
Railroad Authority Between Machias, NY, and Driftwood, PA.

Dear Mr. Sheys:

In light of today's decision by the STB in the captioned proceeding, this letter is to renew my request for a copy of the agreement(s) between WNYPA and NSR for lease and operation of properties set forth in the WNYPA notice of exemption.

Attached is a copy of the agreement signed June 25, 2007, and handed you that day, regarding protection for the documents, patterned upon Finance Docket No. 34255 per your suggestion.

Your prompt response to this renewed request would be appreciated.

Very truly yours,

Gordon P MacDougal

cc: S.J. Nasca

APPENDIX
Agreement
PROTECTIVE ORDER

1. For purposes of this Protective Order *Agreement*

(a) "Confidential Documents" means documents and other tangible materials containing or reflecting Confidential Information.

(b) "Confidential Information" means traffic data (including but not limited to waybills, abstracts, study movement sheets, and any documents or computer tapes containing data derived from waybills, abstracts, study movement sheets, or other data bases, and cost work papers); the identification of shippers and receivers in conjunction with shipper-specific or other traffic data; the confidential terms of contracts with shippers or carriers; confidential financial and cost data; divisions of rates, trackage rights compensation levels and other compensation between carriers; and other confidential or proprietary business or personal information.

(c) "Designated Material" means any documents designated or stamped as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" in accordance with paragraph 2 or 3 of this Protective Order and any Confidential Information contained in such materials. *Agreement*

(d) "Proceedings" means those before the Surface Transportation Board ("Board") concerning the transaction in STB Finance Docket No. ~~34255~~ 35019, and any related proceedings before the Board, and any judicial review proceedings arising from STB Finance Docket No. ~~34255~~ 35019 or from any related proceedings before the Board.

35019

2 If any party to these Proceedings determines that any part of a document it submits, discovery request it propounds, discovery response it produces, transcript of a deposition or hearing in which it participates, or pleading or other paper to be submitted, filed, or served in these Proceedings contains Confidential Information or consists of Confidential Documents, then that party may designate and stamp such Confidential Information and Confidential Documents as "CONFIDENTIAL." Any information or documents designated or stamped as "CONFIDENTIAL" shall be handled as provided for hereinafter

3. If any party to these Proceedings determines that any part of a document it submits, discovery request it propounds, discovery response it produces, transcript of a deposition or hearing in which it participates, or pleading or other paper to be submitted, filed, or served in these Proceedings

contains shipper-specific rate or cost data; divisions of rates, trackage rights compensation levels, or other compensation between carriers; or other competitively sensitive or proprietary information, then that party may designate and stamp such Confidential Information as "HIGHLY CONFIDENTIAL." Any information or documents so designated or stamped shall be handled as provided hereinafter

~~4. Information and documents designated or stamped as "CONFIDENTIAL" may not be disclosed in any way, directly or indirectly, or to any person or entity except to an employee, counsel, consultant, or agent of a party to these Proceedings, or an employee of such counsel, consultant, or agent, who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth at Exhibit A to this Protective Order. *Approved*~~

5. Information and documents designated or stamped as "HIGHLY CONFIDENTIAL" may not be disclosed in any way, directly or indirectly, to any employee of, or represented by, a party to these Proceedings, or to any other person or entity except to an outside counsel or outside consultant to a party to these Proceedings, or to an employee of such outside counsel or outside consultant, who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth at Exhibit B to this Protective Order. *Approved*

6. Any party to these Proceedings may challenge the designation by any other party of information or documents as "CONFIDENTIAL" or as "HIGHLY CONFIDENTIAL" by filing a motion with the Board or with an administrative law judge or other officer to whom authority has been lawfully delegated by the Board to adjudicate such challenges

35019 7. Designated material may not be used for any purposes, including without limitation any business, commercial or competitive purposes, other than the preparation and presentation of evidence and argument in STB Finance Docket No. 34255, any related proceedings before the Board, and/or any judicial review proceedings in connection with STB Finance Docket No. 34225 and/or with any related proceedings 35019

8. Any party who receives Designated Material in discovery shall destroy such materials and any notes or documents reflecting such materials (other than file copies of pleadings or other documents filed with the Board and retained by outside counsel for a party to these Proceedings) at the earlier of: (1) such time as the party receiving the materials withdraws from these Proceedings, or (2) the completion of these Proceedings, including any petitions for reconsideration, appeals, or remands.

9. No party may include Designated Material in any pleading, brief, discovery request or response, or other document submitted to the Board, unless the pleading or other document is submitted under seal, in

a package clearly marked on the outside as "Confidential Materials Subject to Protective Order." See 49 CFR 1104.14. All pleadings and other documents so submitted shall be kept confidential by the Board and shall not be placed in the public docket in these Proceedings except by order of the Board or of an administrative law judge or other officer in the exercise of authority lawfully delegated by the Board.

10. No party may include Designated Material in any pleading, brief, discovery request or response, or other document submitted to any forum other than the Board in these Proceedings unless: (1) the pleading or other document is submitted under seal in accordance with a protective order that requires the pleading or other document to be kept confidential by that tribunal and not be placed in the public docket in the proceeding, or (2) the pleading or other document is submitted in a sealed package clearly marked "Confidential Materials Subject to Request for Protective Order," and is accompanied by a motion to that tribunal requesting issuance of a protective order that would require the pleading or other document be kept confidential and not be placed in the public docket in the proceeding, and requesting that if the motion for protective order is not issued by that tribunal, the pleading or other document be returned to the filing party.

11 No party may present or otherwise use any Designated Material at a Board hearing in these Proceedings, unless that party has previously submitted, under seal, all proposed exhibits and other documents containing or reflecting such Designated Material to the Board or to an administrative law judge or other officer to whom relevant authority has been lawfully delegated by the Board, and has accompanied such submission with a written request that the Board, administrative law judge, or other officer: (a) restrict attendance at the hearing during any discussion of such Designated Material, and (b) restrict access to any portion of the record or briefs reflecting discussion of such Designated Material in accordance with this Protective Order

12 If any party intends to use any Designated Material in the course of any deposition in these Proceedings, that party shall so advise counsel for the party producing the Designated Material, counsel for the deponent, and all other counsel attending the deposition. Attendance at any portion of the deposition at which any Designated Material is used or discussed shall be restricted to persons who may review that material under the terms of this Protective Order. All portions of deposition transcripts or exhibits that consist of, refer to, or otherwise disclose Designated Material shall be filed under seal and be otherwise handled as provided in paragraph 9 of this Protective Order. *Agreed*

13. To the extent that materials reflecting Confidential Information are produced by a party in these Proceedings, and are held and/or used by the receiving person in compliance with paragraphs 1, 2, or 3 above, such production, disclosure, holding, and use of the materials and of the data that the materials contain are deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. 11904 or of any other relevant provision of the ICC Termination Act of 1995

14. All parties must comply with all of the provisions of this Protective ~~Order~~^{Agreement} unless the Board or an administrative law judge or other officer exercising authority lawfully delegated by the Board determines that good cause has been shown warranting suspension of any of the provisions herein.

15. Nothing in this Protective ~~Order~~^{Agreement} restricts the right of any party to disclose voluntarily any Confidential Information originated by that party, or to disclose voluntarily any Confidential Documents originated by that party, if such Confidential Information or Confidential Documents do not contain or reflect any Confidential Information originated by any other party

EXHIBIT B

dated June 26, 2007

**UNDERTAKING
HIGHLY CONFIDENTIAL MATERIAL**

I, Gordon P. MacDougall, am outside [counsel] [consultant] for United Transp. Union-NY State Leg. Bd for whom I am acting in this proceeding. I have read the Protective Order served on December 16, 2002, governing the production and use of Confidential Information and Confidential Documents in STB Finance Docket No. 34255, understand the same, and agree to be bound by its terms. I agree not to use or to permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in STB Finance Docket No. 34255, any related proceedings before the Surface Transportation Board (Board), or any judicial review proceedings in connection with STB Finance Docket No. 34255 and/or with any related proceedings. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Highly Confidential undertakings in the form hereof.

35019 *agreement* *agreement*

I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any information or documents designated or stamped as "HIGHLY CONFIDENTIAL," that I will take all necessary steps to ensure that said information or documents be kept on a confidential basis by any outside counsel or outside consultants working with me; that under no circumstances will I permit access to said materials or information by employees of, or represented by, my client or its subsidiaries, affiliates, or owners; and that at the conclusion of this proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting information or documents designated or stamped as "HIGHLY CONFIDENTIAL," other than file copies kept by outside counsel of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this undertaking and that Applicants or other parties producing confidential information or confidential documents shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in

connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.



OUTSIDE [COUNSEL] [CONSULTANT]

Dated. June 25, 2007