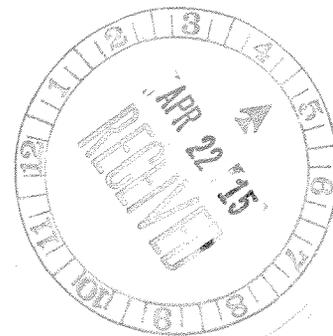


ORIGINAL



Before the  
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35873<sup>1/</sup>

NORFOLK SOUTHERN RAILWAY COMPANY-ACQUISITION AND OPERATION-  
CERTAIN RAIL LINES OF THE DELAWARE AND HUDSON RAILWAY COMPANY,  
INC.

238258

MOTION TO COMPEL  
PRODUCTION OF CHICAGO  
LEASE AGREEMENT

ENTERED  
Office of Proceedings  
April 22, 2015  
Part of  
Public Record

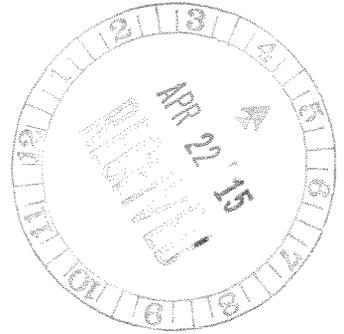
GORDON P. MacDOUGALL  
1025 Connecticut Ave., N.W.  
Washington DC 20036

April 22, 2015

Attorney for Samuel J. Nasca

1/Embraces also Finance Docket No. 34209 (Sub-No. 1), Norfolk S. Ry.-Trackage Rights Exemption-Delaware & Hudson Ry.; Finance Docket No. 34562 (Sub-No. 1), Norfolk SD. Ry.-Trackage Rights Exemption-Delaware & Hudson Ry.

Before the  
SURFACE TRANSPORTATION BOARD



Finance Docket No. 35873<sup>2/</sup>

NORFOLK SOUTHERN RAILWAY COMPANY-ACQUISITION AND OPERATION-  
CERTAIN RAIL LINES OF THE DELAWARE AND HUDSON RAILWAY COMPANY,  
INC.

MOTION TO COMPEL  
PRODUCTION OF CHICAGO  
LEASE AGREEMENT

Preliminary Statement

Samuel J. Nasca,<sup>3/</sup> for and on behalf of SMART/Transportation Division, New York State Legislative Board (SMART/TD-NY), submits this motion to compel production of the track lease agreement, for the Old Hammond Industrial Track, between Norfolk Southern Railway Company (NS) and Indiana Harbor Belt Railroad Company (IHB) in the vicinity of Chicago, IL, for which a notice of exemption was filed March 16, 2015 at the Surface Transportation Board (STB, or Board) and, in turn, by the STB served April 1, 2015. Finance Docket No. 35910, Indiana Harbor Belt Railroad Company-Lease and Opera-

<sup>2/</sup>Embraces also Finance Docket No. 34209 (Sub-No. 1), Norfolk S. Ry.-Trackage Rights Exemption-Delaware & Hudson Ry.; Finance Docket No. 34562 (Sub-No. 1), Norfolk SD. Ry.-Trackage Rights Exemption-Delaware & Hudson Ry.

<sup>3/</sup>New York State Legislative Director for SMART/TD, with offices sat 35 Fuller Road, Albany NY 12205.

tion Exemption-Rail Line of Norfolk Southern Railway Company.

(NS/IHB). 80 Fed. Reg. 17541. (Apr. 1, 2015). (Atta. 1).

Counsel for SMART/TD-NY initiated discussion for copy of the NS/IHB track agreement on March 24, 2015, with follow-up written request on April 8, 2015 (Atta. 2), but received formal denial for the NS/IHB agreement on April 13, 2015. (Atta. 3).

The Board should grant the discovery request for copy of the NS/IHB track lease agreement. 49 CFR 1114.21-31.

1. Timeliness. NS objects to the request for lease agreement, asserting there are no procedural opportunities for additional filing or comments by SMART/TD-NY in this proceeding. (Atta. 2, final para.). NS is patently incorrect, as the agency's rules provide that a petition to reopen for new evidence may be filed at any time. 49 CFR 1115.4.

2. Relevance. NS objects to production of the lease agreement, claiming that the NS/IHB track agreement is not relevant to this FD 35873 proceeding, asserting that FD 35873 has no connection with or involvement in the Chicago operations that are the subject of the FD 35910 proceeding.<sup>4/</sup>

Apart from the challenge of timeliness, which warrants no reply, this motion is addressed to the second item--relevance--raised by NS in opposition to discovery.

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<sup>4/</sup>There are no known responses at the STB regarding the NS/IHB notice of exemption. Lease agreements traditionally have been filed with the agency, perhaps under seal or subject to protective order. Here, the lease was not filed with the notice of exemption.

THE CHICAGO LEASE AGREEMENT IS  
RELEVANT TO THIS PROCEEDING AND  
MAY LEAD TO ADMISSIBLE EVIDENCE

1. Chicago Background. The instant application for NS to acquire 282.55 miles of railroad line owned or operated by Delaware and Hudson Railway Company (D&H) was filed November 17, 2014. (NS/D&H). In the six-month period immediately prior thereto, the Chicago railroad area had been experiencing considerable congestion, causing serious railroad delays. The Board became concerned with the problem, instituting a proceeding on April 1, 2014, Ex Parte No. 724, United States Rail Service Issues, in which an initial hearing was held April 10, 2014 at Washington, DC. STB personnel, directed by the agency's Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC), and more particularly its Rail Customer and Public Assistance Program (RCPA), was assigned to assist in resolution of the Chicago problem, by canvassing railroad industry officials, shippers, and community leaders at informal and confidential meetings.

SMART/TD-NY in its February 13, 2015 filing, set forth various STB press releases involving the informal and confidential contacts made by OPAGAC-RCPA at points in the U.S. Midwest, and elsewhere. (SMART/TD-NY, Ex. B, 2/13/15; ID 237740, 21-26).

The STB's Ex Parte No. 724 investigation centered primarily upon performance by Canadian Pacific Railway Company (CP),<sup>5/</sup> and

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<sup>5/</sup>D&H is a wholly-owned subsidiary of CP. CP in acquiring D&H assets and trackage rights was considered a Class 1 railroad. Canadian Pacific Ltd.-Pur. & Trackage-D&H Ry.Co., 7 I.C.C.2d 95, 99 (1990). D&H personnel employed in the U.S. are paid by CP, not D&H, checks. (SMART/TD-NY, 1/21/15, V.S. Nasca, at 5-6; ID 237594, at 15-16).

its U.S. affiliates (CP), and also with BNSF Railway Company (BNSF).

The concern regarding CP was with regard to the Chicago gateway, CP complaining about interchange handling at yards maintained by the Belt Railway Company of Chicago (BRC), and by Indiana Harbor Belt Railway Company (IHB). The SMART/TD-NY filing on February 13, 2015, pointed to some eight CP reports involving Chicago, filed pursuant to Ex Parte No. 724.<sup>6/</sup>

The STB's hearing held September 4, 2014 at Fargo, ND, indicated active inquiry about Chicago from the STB Members, including efforts to improve CP's situation with BRC and IHB, and failure of CP to participate in CTCO. (STB Ex Parte No. 724 Fargo, ND Hearing Tr. 111-14). CP's CEO, E. Hunter Harrison, as reported in Railway Age, Nov. 4, 2014, at 9-10, stated that highly congested areas such as Chicago can be improved only by mergers. The CP official gave other interviews indicating CP could resolve the congestion problems at Chicago. See: SMART/TD-NY, Feb. 13, 2015, Ex. A-1 (ID 237740, at 12-20).

2. Importance of CP 502. CP and NS provided an improved Detroit-Chicago route for handling CP traffic to carry out the October 14, 2004 memorandum of understanding developed in connection with CP's restructuring of its Northeastern U.S. lines with D&H and NS in Docket No. AB-156 (Sub-No. 25), Delaware and Hudson Railway Company, Inc.-Discontinuance of Trackage rights-Between Lanesboro, PA and Buffalo, NY. (served Jan. 19, 2005). These new trackage rights were specifically made to CP 502 and CP 509 at

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<sup>6/</sup>See: SMART Pet., 2/13/15, ID 237740, at 8.

Chicago, and were established in Finance Docket No. 34709, Soo Line Railroad Company-Trackage rights Exemption-Norfolk Southern Railway Company. 70 Fed. Reg. 36696. (June 24, 2005). The STB's notice of exemption specifically named and identified CP 502 and 509.<sup>7/</sup>

The CP 502 route at Chicago for CP traffic, and its relationship to the instant FD 35873 proceeding, is described by SMART/TD-NY in its Opposition Statement (V.S. Nasca), filed January 21, 2015. (SMART/TD-NY, 1/21/15, ID 237594, at 10, 21, 23, 25, 27, 29).

CP 502 is located near East Chicago, IL, and serves as a point for connection.

The instant NS/D&H application mentions CP 502, but all is under seal as "highly confidential." (FD 35873, Appl., Vol. 2 at 50) (Highly Confidential version).

3. Importance of FD 35910. The IHB notice of exemption in FD 35910, dated March 13 and filed March 16, 2015, contains a November 10, 2014 sketch of the involved 0.9-mile NS trackage slated for lease to IHB.<sup>8/</sup> The trackage lies in the vicinity of CP 502. The STB's notice observed the lease does not contain any provision or arrangement that may limit future interchange of traffic with a third-party connecting carrier. 80 Fed. Reg. 17541-

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<sup>7/</sup> The STB's notice of exemption in F.D. No. 34709 is included in SMART/TD-NY, Opposition Stmt., at 10 (1/21/15). ID 235794, at 10.

<sup>8/</sup> SMART/TD-NY has no current information as to the ownership interests of IHB, other than set forth in the Conrail break-up. See: CSX Corp. Et Al.-Control-Conrail Inc. Et Al., 3 S.T.B. 196, 290 (1998).

42.9/

It is likely that the alternative remedies involving CP 502, and other remedies, also indicated under seal in the NS/D&H application, together with the added IHB trackage to be acquired by IHB, by improving movement at and through Chicago, may avoid any necessity for approval of the NS/D&H transaction with its damaging impact upon rail transportation in the U.S. Northeastern area presently served by D&H. In addition, the lease involved in FD 35910 may be a form of inducement or other factor for the instant NS/D&H transaction and/or its related Docket No. AB-156 (Sub-No. 27), D&H Discontinuances, filed March 19, 2015.

4. National Importance. The instant NS/D&H, and related D&H Discontinuances, are more constitute than regional impact and interest, as they would affect the structure of the entire U.S. rail industry. The recent April 14, 2015 meeting of the STB's Railroad Energy Transportation Advisory Committee (RETAC), held at the STB's Washington, DC offices, indicated considerable questioning and comment concerning current and anticipated developments at Chicago. The STB membership today is not at full strength, the current personnel all coming from the region west of the Missouri River, with relatively few and new experience at the agency. The former 11-member ICC was concerned with regional balance, and rivalries became confrontational at times. For perhaps the most notable background examination of conflicts involving the economic effects of regional imbalance within the ICC, see: Mansfield, Harvey C., The Lake Cargo Coal Rate Controversy, 141-94 (Columbia,

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9/The STB's notice of exemption is App. 3 hereto.

1932) .10/

SMART/TD-NY suggests the agency might best use caution pending restoration of full complement.

CONCLUSION

The Board should grant this motion for discovery of the lease agreement noticed in F.D. No. 35910.

Respectfully submitted,



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

April 22, 2015

Attorney for Samuel J. Nasca

Certificate of Service

I hereby certify I have served a copy of the foregoing upon all parties of record by first class mail postage-prepaid.

Washington DC



Gordon P. MacDougall

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10/For another view, see: Leonard, William N., Railroad Consolidation Under the Transportation Act of 1920, 271-81 (Columbia, AMS, 1945).

44376

SERVICE DATE - APRIL 1, 2015

DO

FR-4915-01-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

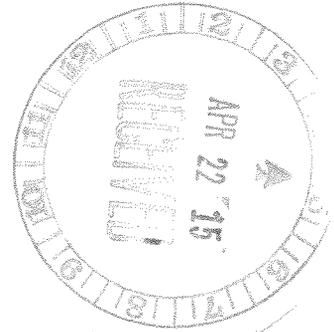
[Docket No. FD 35910]

Indiana Harbor Belt Railroad Company—Lease and Operation Exemption—Rail Line of  
Norfolk Southern Railway Company

Indiana Harbor Belt Railroad Company (IHB), a Class III rail carrier, has filed a verified notice of exemption under 49 C.F.R. § 1150.41 to lease from Norfolk Southern Railway Company, and to operate, a 0.87-mile line of railroad (including branch lines) known as the Old Hammond Industrial Track, between milepost UO 0.03 and milepost UO 0.9 (including the underlying right-of-way between milepost UO 0.06 and milepost UO 0.9) in Cook County, Ill.

IHB certifies that the projected annual revenues as a result of this transaction will not result in the creation of a Class II or Class I rail carrier and will not exceed \$5 million. According to IHB, the lease does not contain any provision or agreement that may limit future interchange of traffic with a third-party connecting carrier.

The proposed transaction may be consummated on or after April 15, 2015, the effective date of this exemption (30 days after the verified notice was filed). If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. § 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the



exemption. Petitions to stay must be filed by April 8, 2015 (at least seven days prior to the date the exemption becomes effective).

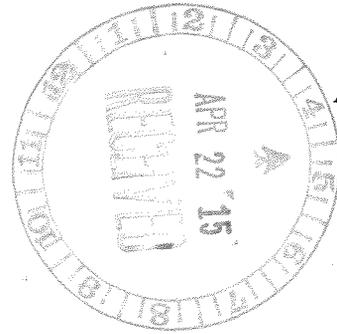
An original and 10 copies of all pleadings, referring to Docket No. FD 35910, must be filed with the Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001. In addition, a copy of each pleading must be served on applicant's representative, Roger A. Serpe, General Counsel, Indiana Harbor Belt Railroad Company, 55 W. Monroe Street, Suite 1600, Chicago, IL 60603.

Board decisions and notices are available on our website at "WWW.STB.DOT.GOV."

Decided: March 27, 2015.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

LAW OFFICES  
GORDON P. MACDOUGALL  
1025 CONNECTICUT AVE, N. W.  
WASHINGTON, D. C. 20036



TELEPHONE  
AREA CODE 202  
223-9738

April 8, 2014

William A. Mullins  
2401 Pennsylvania Ave., N.W.  
Suite 300  
Washington DC 20037

Re: STB Finance Docket No. 35873  
Norfolk Southern Railway Company-Acquisition and Operation-  
Certain Rail Lines of The Delaware and Hudson Railway Company

Dear Mr. Mullins:

This is a discovery request in connection with the captioned proceeding, and is on behalf of Samuel J. Nasca, New York State Legislative Director for SMART-Transportation Div.

I desire a copy of the lease agreement between Norfolk Southern Railway Company and Indiana Harbor Belt Railroad Company, described in the recent Finance Docket No. 35910, filed with the Surface Transportation Board, and which the Board served and published April 1, 2015. 80 Fed. Reg. 17541-42.

This request was discussed by telephone with IHB counsel, Roger A. Serpe, who indicated on March 24, 2015, the matter would be brought to the attention of Norfolk Southern Railway Company, as a party to the lease agreement.

I have not since heard from Mr. Serpe, but he explained he was quite busy with forthcoming pre-retirement obligations and arrangements with the carrier.

It is desired to examine and copy the lease as soon as feasible, no later than this coming Monday, April 13, 2015, at your office or mine in Washington, DC.

Your early advice would be appreciated.

Very truly yours,

A handwritten signature in cursive script, appearing to read 'Gordon P. MacDougall'.

# BAKER & MILLER PLLC

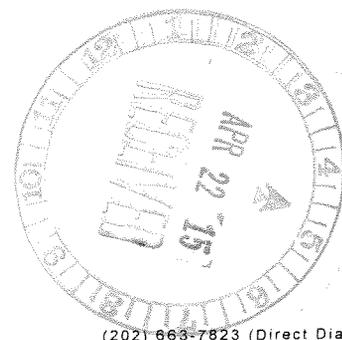
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WILLIAM A. MULLINS



E-Mail: [wmullins@bakerandmilller.com](mailto:wmullins@bakerandmilller.com)

April 13, 2015

## VIA HAND DELIVERY

Mr. Gordon P. MacDougall  
1025 Connecticut Ave, N.W.  
Washington, D.C. 20036

Re: *Norfolk Southern Railway Company – Acquisition and Operation -  
Certain Rail Lines of the Delaware and Hudson Railway Company, Inc.*, STB  
Docket No. FD 35873

Dear Mr. MacDougall:

I am in receipt of your letter dated April 8, 2014, which I received on April 10, 2015. Your letter claims to be a discovery request in connection with the above proceeding and filed on behalf of Samuel J. Nasca, New York State Legislative Director for SMART-Transportation Division. You have requested a copy of the lease agreement between Norfolk Southern Railway Company (“NS”) and Indiana Harbor Belt Railroad Company (“IHB”), which was the subject of the April 1, 2015 Federal Register Notice published at 80 Fed. Reg. 17541 in FD 35910.

As you know, I do not represent either NS or IHB in FD 35910, although I do represent NS in the above captioned proceeding. Because you filed your request in FD 35873, I did discuss your request with NS. I am writing to inform you that NS objects to production of the lease agreement. The IHB/NS lease is not relevant to the FD 35873 proceeding, which has no connection with or involvement in the Chicago operations that are the subject of the FD 35910 proceeding. Furthermore, as there are no further procedural opportunities for additional filings or comments by your client in the FD 35873 proceeding, the discovery period is complete. As such, there is no legal requirement to provide you with the lease, even if it were relevant to this proceeding, which it is not.

Respectfully submitted,

William A. Mullins

Attorney for Norfolk Southern Railway Company

cc: Maquiling Parkerson  
Roger Serpe