

BAKER & MILLER PLLC

ATTORNEYS and COUNSELLORS

2401 PENNSYLVANIA AVENUE, NW
SUITE 300
WASHINGTON, DC 20037

TELEPHONE: (202) 663-7820

FACSIMILE: (202) 663-7849

WILLIAM A. MULLINS

(202) 663-7823 (Direct Dial)

E-Mail: wmullins@bakerandmiller.com

December 30, 2014

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Office of Proceedings

December 30, 2014

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VIA E-FILINGCynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001Re: *Norfolk Southern Railway Company – Acquisition and Operation -
Certain Rail Lines of the Delaware and Hudson Railway Company, Inc.*, STB
Docket FD 35873

Dear Ms. Brown:

Norfolk Southern Railway Company (“NS”) writes in opposition to the request filed by CNJ Rail Corporation to reject NS’s Application (NS-1) filed on November 17, 2014 and the request to extend the procedural schedule set forth in the Board’s December 16, 2014 decision. As an initial matter, CNJ’s request should be rejected outright on the basis that CNJ has no legal standing in this proceeding. CNJ is not a carrier, shipper, government entity, or any other party that (1) may suffer an injury in fact, *i.e.* it does not have a protected interest that is (a) concrete and particularized, and (b) actual or imminent, as opposed to conjectural or hypothetical; (2) has not shown that its alleged injury can be traceable to NS’s acquisition of the line as opposed to a yet to be filed discontinuance request not currently before the Board; and (3) has not shown that it’s alleged injury is likely as opposed to mere speculation.¹ Lujan

¹ Indeed, CNJ has previously already admitted that at best, the alleged competitive harm that may occur is not based upon actual traffic patterns or actual rail routings, but rather is speculative in nature and contingent on a series of future events that might occur and that might somehow be foreclosed if the Transaction occurs. Furthermore, the two potential real parties in interest, Alma Realty and Pace Glass, have, as of today, withdrawn from participation in the proceeding.

v. Defenders of Wildlife, 112 S. Ct. 2130 (1992). Having no legal standing, its request should be rejected outright.

Its request should also be rejected because the failure to publish notice of the acceptance or rejection of the Application in the *Federal Register* by December 17, 2014 (i.e. the end of the 30th day after the filing of the Application) was harmless error, if error at all, particularly with respect to CNJ.² CNJ has suffered no injury or harm due to the failure of the Board to ensure that the *Federal Register* deadline was met.³ Indeed, CNJ had actual knowledge, as opposed to knowledge through the *Federal Register*, of the filing of the Application. CNJ made several filings in this proceeding relatively shortly after the Application was filed and more than a week before the Board was required to even publish notice in the *Federal Register*. CNJ has known about the application, reviewed the Application, filed comments about the Application, and requested it be rejected all before any other party was to receive *Federal Register* notice and all before any comments needed to be filed. The notion that CNJ was somehow harmed by the failure to technically meet the *Federal Register* deadline or somehow needs more time to review the Application before deciding to participate is preposterous on its face.

For similar reasons, CNJ's request to extend the procedural schedule should be rejected. Because filings made at the Board are publicly posted to the Board's website, parties, such as CNJ, have had ample notice of the Application since November 17, 2014. By the January 15, 2015 deadline for parties to file comments, parties will have had approximately 60 days to review the Application, formulate an analysis, and file comments.

² Friends of Iwo Jima v. National Capital Planning Comm'n, 176 F.3d 768 (4th Cir. 1999)(upholding agency action despite the agency's failure to comply with a requirement to publish timely notice of relevant meetings in the Federal Register because the procedural error was harmless.); Columbia Venture LLC v. South Carolina Wildlife Federation, 562 F.3d 290, 294-95 (4th Cir. 2009)(per curiam)(holding that the Federal Emergency Management Agency's failure to timely publish in the Federal Register was harmless error). See also PDK Laboratories Inc. v. U.S. D.E.A., 362 F.3d 786, 799 (D.C. Cir. 2004)("If the agency's mistake did not affect the outcome, if it did not prejudice the petitioner, it would be senseless to vacate and remand for reconsideration."); Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 659 (2007)(finding that an inaccurate Federal Register notice stating that Endangered Act Species Act consultation was "required" was harmless error when consultation had already occurred).

³ The Board's publication on its website of its decision accepting the Application, which occurred by end of the 30th day, constitutes adequate notice to the public and provides more than full compliance with the intent and spirit of 49 U.S.C. 11325(a), which is to provide the public notice of the Board's decision to either accept or reject a filed application.

This is significantly more than the 30 days contemplated by the statute.⁴ As such, no party has been harmed by the fact that the publication in the *Federal Register* of the Board's December 16, 2014 decision did not come until December 22, 2014.

Respectfully submitted,



William A. Mullins
Attorney for Norfolk Southern Railway Company

cc: Parties of Record

⁴ The 30 day *Federal Register* statutory publication notice requirement has been in existence since the passage of the Staggers Act in 1980. At that time, publication in the *Federal Register* was oftentimes the only means by which the public was informed of the filing of an application and the Board's treatment of that application. With the passage of ICCTA, and the Board's "open door" website policy, which was adopted shortly thereafter and publishes filings, as well as decisions, 49 U.S.C. §11325(a) is basically an obsolete and outdated statute whose full intent and purpose is now fully carried out through the Board's electronic website practices. Failure to technically meet the 30 day *Federal Register* publication requirement does not prejudice any party. Nonetheless, if the Board determines that it should give additional time to any party for the filing of comments or requests for conditions, NS does not object to an extension of the filing deadline to January 21, 2015 as long as all other filing deadlines remain the same.