

ORIGINAL

237379

Before the  
SURFACE TRANSPORTATION BOARD

ENTERED  
Office of Proceedings  
January 5, 2015  
Part of  
Public Record

\_\_\_\_\_  
1/  
Finance Docket No. 35873

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

\_\_\_\_\_  
PETITION FOR RECONSIDERATION  
\_\_\_\_\_

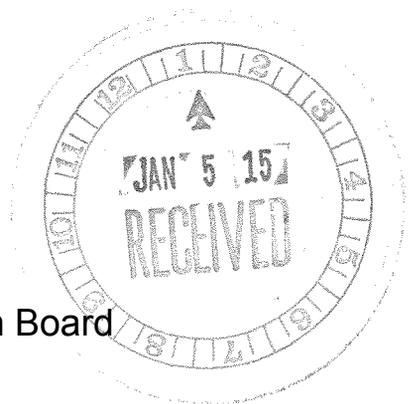
GORDON P. MacDOUGALL  
1025 Connecticut Ave., N.W.  
Washington DC 20036

Attorney for Samuel J. Nasca

January 5, 2015

FILED  
January 5, 2015  
Surface Transportation Board

FEE RECEIVED  
January 5, 2015  
Surface Transportation Board



\_\_\_\_\_  
1/Embraces also FD 34209 (Sub-No. 1), Norfolk S. Ry. Trackage Rights Exemption-Delaware & Hudson Ry., and FD 34562 (Sub-No. 1), Trackage Rights Exemption-Delaware & Hudson Ry.

Before the  
SURFACE TRANSPORTATION BOARD

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

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

PETITION FOR RECONSIDERATION



Samuel J. Nasca<sup>2/</sup> for and on behalf of SMART/Transportation Division, New York State Legislative Board (SMART/TD-NY), submits this petition for reconsideration of the Decision by the Surface Transportation Board (STB or Board), dated and served December 16, 2014, in this proceeding. 79 Fed. Reg. 76446-51 (Dec. 22, 2014).

The Decision accepted the application, by applicant Norfolk Southern Railway Company (NSR, or applicant) to acquire control of 282.55 miles of rail line owned by Delaware and Hudson Railway Company, Inc. (D&H), a wholly owned indirect subsidiary of Canadian Pacific Railway Company (CP). In addition to this Control Transaction, the Decision embraces NSR's proposal to remove trackage

1/Embraces also FD 34209 (Sub-No. 1), Norfolk S. Ry. Trackage Rights Exemption-Delaware & Hudson Ry., and FD 34562 (Sub-No. 1), Trackage Rights Exemption-Delaware & Hudson Ry.

2/ New York State Legislative Director for SMART/TD, with offices at 35 Fuller Road, Albany, NY 12205.

from two related trackage rights agreements under which D&H previously had granted rights to NSR, but which NSR would now purchase under the "Control Transaction."

The Decision finds the application is complete, and that the Control Transaction is a minor transaction based upon a preliminary-but not final-determination that the Control Transaction will not have any anticompetitive effects and that, to the extent any anticompetitive effect exist, they will clearly be outweighed by the transaction's anticipated contribution to the public interest in meeting significant transportation needs, citing 49 CFR 1180.2-(b) (1) (c).

Upon reconsideration, the Board should find that D&H is to be treated as an applicant, not merely NSR. This will require the active participation by D&H, and require D&H to actively assist in the development of the record and the protection of its employees who may be adversely affected by the Control Transaction. In connection with bringing D&H into the merits of the Control Transaction, revision is necessary for the procedural schedule. (Decision, App. A).

The criteria set forth for reconsideration of the Board's December 16, 2014 Decision are new evidence and material error. The new evidence is D&H's December 24, 2014 acknowledgement that is an applicant; material error is the absence of required applicant employee impact information, particularly that for D&H. Suggested relief if not rejection of the application, is to require employee impact submission, accompanied by an extension of time in the Schedule for opposition submissions.

## ARGUMENT

### THE DECISION ERRS IN ITS FINDINGS AND SCHEDULE BY FAILURE TO CONSIDER D&H AS A NECESSARY APPLICANT.

The STB's decision is captioned as an "Acquire and Operate" proposal, whereas the text of the decision uses the term "Control" transaction. An "acquire and operate" proposal normally comes under 49 U.S.C. §10901 or §10902, and involves a single carrier as the "applicant," but this control transaction does not come under the §10901-§10902 "acquire and operate" provisions. The instant control transaction is brought under §11323, and involves two applicants. Indeed, D&H on December 24, 2014, advised the Board that D&H, as a transferor of lines in a minor transaction, is to be considered an applicant.<sup>3/</sup>

Required Employee Impact Data. If D&H had more fully participated as an applicant in the application filed November 17, considerable additional information would have been required to have been filed. In particular, the important showing of labor impact, to be detailed by class or craft, the geographic point where the impacts would occur, and time frames, are absent from the instant application, and are devoid of any information on this score from any D&H personnel. See: 49 CFR 1180.6(a)(2)(v).

Applicant NSR estimates that over 100 D&H employees, presently working on the involved lines projected for transfer will not be offered employment by NSR, and will need to exercise seniority elsewhere on D&H or CP lines, suffering displacement or dismissal.

---

<sup>3/</sup> Additional citations are 49 CFR 1180.3(b); 49 CFR 1180.3(j)(5).

This job loss and/or adverse impact will not only affect D&H personnel, but also the communities in which they reside. The Board regularly requires employee reports from Class I rail carriers, such that NSR is aware of the task. 49 CFR 1246.1. The absence of required information for all applicant carrier employees necessitates, in itself, a modification of the Proceeding Schedule. This data cannot be furnished on rebuttal, for employee representatives, such as S.J. Nasca and others, need this information beforehand. Moreover, the multiplicity of employee organizations and crafts likely prevent an all overall employee impact at various locations, absent participation by all applicant carriers. The duty to come forward with the required employee impact information is required for a prima facie case. The exclusion of employee impact information, particularly that facing D&H employees, requires that the proceeding come to halt until there is compliance on this score, and that the Schedule be modified accordingly.<sup>4/</sup>

Lack of Urgency. There was no claim that expeditious handling of the application is required. The Applicant NOR filed its schedule request on November 17, 2014, but made no claim or desire for expedited handling. The Board's December 16 decision says NOR made a request for an expedited procedural schedule. Decision, at 11. This simply is not so. The December 16 decision

---

<sup>4/</sup> The Application's minimal D&H information is set forth at NS-1, pp. 46, 58, 79, 118-19. The employee classifications are impossible for analysis, as are the absence of locations, supra NS-1, at 118-19. The December 16 decision merely recites NSR counsel argument on employee impact, which is unsupported. Decision at 5.

basically rubber stamped the NSR procedural schedule, irrespective of any unspecified need.

There is no sound reason for the drastic expedited handling of the application. We deem it prejudicial. The service list has not yet issued, so the public is unsure the identities of all those likely to be participants--and thus consider possible positions or division of tasks. By its related December 22 publication of the December 16 Decision in the Federal Register, persons had only 7 days to consider participation in the proceeding, and even less actual time due to mail receipt of the December 22 Federal Register, and the mandated December 29 mail receipt of responses at the Board's offices.

Due Process. The unwarranted expedited schedule, with only 10 days remaining in which to file submissions in opposition--and all of the parties unknown, and with applicants accorded from January 15 until March 31, in which to submit rebuttal, serves to deny the public due process.

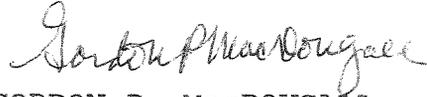
We are aware a number of parties have raised similar issues concerning the hearing schedule and due process, with which we are in accord. The time constraints have run concurrently with the holiday season and, moreover, severe weather in western New York State delayed effective consultation with railroad employee representation for a two-week period in mid-November.

#### CONCLUSION

On reconsideration, if the Board does not reject the application as incomplete, the Board should require that applicants supplement their application to include the required employee

impact information or exhibit, and that the Board extend the January 15, 2015 schedule date for opposition comments, for 30 days after the employee information is filed with the Board.

Respectfully submitted,



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

January 5, 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