

Before the
SURFACE TRANSPORTATION BOARD



Docket No. AB-156 (Sub-No. 27X)

DELAWARE AND HUDSON RAILWAY COMPANY, INC.
DISCONTINUANCE OF TRACKAGE RIGHTS EXEMPTION
IN BROOME COUNTY, NY; ESSEX, UNION, SOMERSET,
HUNTERDON, and WARREN COUNTIES, NJ; LUZERNE,
PERRY, YORK, LANCASTER, NORTHAMPTON, LEHIGH,
CARBON, BERKS, MONTGOMERY, NORTHUMBERLAND,
DAUPHIN, LEBANON, and PHILADELPHIA COUNTIES,
PA; HARFORD, BALTIMORE, ANNE ARUNDEL, and PRINCE 239107
GEORGE'S COUNTIES MD; THE DISTRICT OF COLUMBIA,
and ARLINGTON COUNTY, VA.

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PETITION TO REVOKE

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PETITION TO REVOKE

Preliminary Statement

Samuel J. Nasca,^{1/} for and on behalf of SMART/Transportation
Division, New York State Legislative Board (SMART/TD-NY), submits
this Petition to Revoke the Board's Notice of Exemption in the
captioned proceeding, dated April 3, 2015 (served April 8), 80
Fed. Reg. 18937-38 (Apr. 8, 2015), as supplemented June 29, 2015
(served July 2), 80 Fed. Reg. 38273-74 (July 2, 2015).

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

Background

The July 2, 2015 notice of exemption is asserted to be a republication and correction of an earlier notice of exemption, filed March 19, 2015, by Delaware and Hudson Railway Company, Inc. (D&H), and thereafter issued by the Surface Transportation Board (STB or Board) dated April 3, 2015 (served April 8), for the discontinuance by the D&H of its trackage rights over 670 miles embracing nine lines owned and/or operated by some seven other rail carriers. 80 Fed. Reg. at 18937n.1. (Apr. 8, 2015). The Board on April 16, 2015 (served April 17), issued a decision indicating it would coordinate certain matters with the pending Finance Docket No. 35873.^{2/} (Decision, 4/17/2015). Several petitions seeking to revoke the April 8, 2015 discontinuance exemption were filed separately on April 20, 2015 by objecting parties, including SMART/TD-NY.

The Board on May 13, 2015, apparently in response to filings by others than SMART/TD-NY, directed that D&H submit a supplement to its March 19, 2015 notice of exemption, and that all deadlines are no longer operative. The Board indicated that parties need not re-file their previous filings, but may supplement such pleadings in light of additional D&H information. (Decision, 5/13/15, 2).

D&H on June 15, 2015 filed a supplement to its March 19, 2015 notice of exemption, with additional information, in accordance with the Board's May 13, 2015 directive, resulting in the Board's

2/Norfolk Southern Railway-Acquisition and Operation-Certain Rail Lines of the Delaware & Hudson Railway.

issuance and republication of notice of exemption dated June 29, 2015 (served July 2), embracing new and corrected information.^{3/}

Closely following the Board's July 2, 2015 second publication of the notice of exemption, and without awaiting supplemental responsive filings by the parties, the Board on July 9, 2015 (served July 10), denied the SMART/TD-NY April 20, 2015 petition to revoke the first exemption notice, which had been published April 8, 2015.^{4/}

This second SMART-TD/NY petition to revoke, in part, the exemption published by the Board on April 8, 2015, as supplemented by Board publication July 2, 2015, is primarily directed to the invalidity of the out-of-service abandonment/discontinuance class exemption, which the Board nevertheless now claims to have been extended so as to authorize, standing alone, the summary discontinuance of overhead trackage rights for handling overhead traffic.

Critical information has become available since the Board's publication of its April 8 and July 2, 2015 exemption notices, much of which has come from other parties and from D&H itself, to warrant revocation of the class exemption for the trackage rights transactions. A petition to revoke an exemption can be filed at

^{3/80} Fed. Reg. 38273-74 (July 2, 2015).

^{4/}The Board also in its July 10, 2015 decision, along with other matters, denied the pending April 20, 2015 petition to revoke filed by James Riffin.

any time.^{5/} After revocation, if D&H desires to proceed, it should file the requisite application(s) or petition(s) for exemption.^{6/}

Revocation is warranted because the provisions of 49 U.S.C. 10903 are necessary to carry out the transportation policy of 49 U.S.C. 10101. The Board's out-of-service class exemption for abandonment of line and/or discontinuance of operation is not applicable to the discontinuance of trackage rights proposed by Delaware and Hudson Railway Company, and even if applicable would be adverse to proper regulation of rail transportation, such that revocation is required to carry out the rail transportation policy. 49 U.S.C. 10101, 10502.

D&H's Discontinuance Proposals

The D&H notices, filed under the out-of-service abandonment/discontinuance class exemption, and as published by the Board, seek summary discontinuance of its apx. 670 miles of line of overhead and local trackage rights over 9 lines owned and/or operated by seven other rail carriers, as follows, 80 Fed. Reg. 18937 and 38273:

^{5/}SMART/TD-NY notes that one party to this proceeding filed separate petitions for each of the April 8 and July 2 notice publications, with additional responsive information from other parties.

^{6/}It should be noted that the related Finance Docket No. 35873, Norfolk Southern Railway Company-Acquisition and Operation-Certain Rail Lines of the Delaware and Hudson Railway Company is being handled under application procedures, rather than the controversial class exemption selected by D&H.

- (1) In Binghamton, NY
- (2) In Wilkes-Barre, PA
- (3) between Hudson (Plains) and Buttonwood, PA
- (4) between Sunbury and Harrisburg, PA
- (5) between Harrisburg, PA and Potomac Yard, VA,
via Perryville, MD
- (6) between Harrisburg and Philadelphia, PA
via Reading, PA
- (7) between Reading and Allentown, PA
- (8) between Dupont and Allentown, PA
- (9) between Allentown, PA and Oak Island, NJ

The eleven trackage rights agreements between D&H and the seven other carriers, to serve the above lines, are summarily listed in the D&H's 3/19/15 notice, but not published by the Board. (D&H Notice Ex B, 3/19/15). The initial D&H and Board notices give no showing of the breakdown between "local" and "overhead" mileage constituting the 670 miles of trackage rights to be discontinued. However, D&H in its second notice and in various pleadings directed to other parties, has indicated that of the 670 miles, only 10 miles are "local" rights in the Philadelphia area, being "local terminal trackage," with the remaining 660 miles of trackage being "overhead" rights. (D&H Reply, 5/11/15, 2, ID 238359, 2; D&H Reply, 6/2/15, 2, ID 238523, 3; D&H Supp. Notice, 6/15/15, 1, ID 238627, 3).

The 660 miles of overhead trackage rights are asserted by D&H to stem from competitive concerns of the Final System Plan (FSP), promulgated by the United States Railway Association (USRA). D&H made this clear from its May 8 and June 2, 2015 filings. (D&H Reply, 5/8/15, 19 ID 238352, 25); D&H Reply, 6/2/15, 2, ID 238523, 3):

On March 19, 2015, D&H filed its Notice of Exemption to discontinue approximately 670 miles of trackage rights in five states and the District of Columbia. Six hundred sixty miles of those trackage rights are overhead only and derived from two agreements with Conrail from the late 1970s authorized by the United States Railway Association's Final System Plan.

See also: CPR's James D. Clements, at 2. ID 238352, 19; and Canadian Pacific Ltd.-Pur. & Trackage-D&H Ry. Co., 7 I.C.C.2d 95, 103 (1990). The FSP is not a rail consolidation proposal approved by the Board or its predecessor ICC. The FSP stands on a much higher level. The U.S. Congress decreed the FSP is deemed approved if neither chamber passed a resolution stating it did not favor the plan. See: 3-R Act, §208. 87 Stat. 999 (1974).

Present D&H Service

Although this proceeding is concerned with the Board's so-called "out-of-service" class exemption, it is important to recognize that "out of service" is a term of art.^{7/} From an actual standpoint, SMART/TD-NY members advise at least three of the nine lines embraced in the Board's notice handle active D&H freight traffic. These are line No. 3 between Hudson (Plains) and Buttonwood; No. 4 between Sunbury and Harrisburg; and No. 7 between Dupont and Allentown. Line No. 3 is serviced Monday through Friday; lines No. 4 and 7 are served daily. In addition to

^{7/} Illinois Commerce Commission v. ICC, 787 F.2d 616, 620n.2 (D.C.Cir.1986).

local freight, the trains involved may be identified as Nos. 258, 259, 458, and 459.

D&H counsel in a responsive pleading claims that D&H presently operates over approximately 115 miles of the 670 miles of subject trackage, but at locations not given in complete detail. (D&H Reply, 5/8/15, at 9; ID 238352, 10).

I. THE DISCONTINUANCE NOTICES ARE
NOT A VALID EXERCISE OF THE
THE OUT-OF-SERVICE CLASS EXEMPTION

The STB's publication and authorization for the D&H's class exemptions for the out-of-service discontinuance of trackage rights are not valid under 49 U.S.C. 10903 and the related Board regulations authorizing the out-of-service class exemption for abandonment of line and discontinuance of operation, irrespective of whether the Board should ultimately determine that discontinuance of trackage rights could be interpreted as discontinuance of operation under trackage rights so as perhaps to come within 49 U.S.C. 10903.

A. Discontinuance of Trackage Rights Under §10903. The language of §10903 does not include provisions for abandonment or discontinuance of trackage rights, or even the term "trackage rights." A brief history of §10903 may be helpful on this score. The STB's predecessor, Interstate Commerce Commission, first received abandonment of line authority by Transportation Act of 1920. 49 U.S.C. 1(18)-(20). Discontinuance of operation was not included in 1(18)-(20) at that time. However, the discontinuance of all operation over a rail line was construed to constitute an

abandonment of line. For a collection of cases, see: I.C.C. v. Baltimore and Annapolis Railroad Company, 398 F.Supp. 454, 461-64 (D.Md.1975). Subsequently, Congress in 1976 expressly placed discontinuance of operation within §10903. 4-R Act, P.L. 94-210, §802, 90 Stat. 127 (1976), recodified, Revised Interstate Commerce Act, P.L. 95-473, 92 Stat. 1403-4 (1978).

Although Congress in 1940 authorized the ICC to grant track-age rights, 49 U.S.C. 5(2)(a)(ii), it did not amend §10903 or otherwise specifically provide for the abandonment or discontinuance of trackage rights. The prevailing technique employed by the ICC was not to permit the abandonment or discontinuance of track-age rights, but to authorize the abandonment of operations under trackage rights. For example, see: Abandonment By C., R.I. & P. Ry., 131 I.C.C. 421, 429 (1927). Cf. Thompson v. Texas Mexican R. Co., 328 U.S. 134, 145-46 (1946).

When the former ICC in 1983 first established the two-year out-of-service class exemption for abandonment of lines, it expressly did not embrace discontinuance of service or trackage rights. Exemption of Out of Service Rail Lines, 366 I.C.C. 885, 891 (1983). Subsequently, after two court remands, and with several dissenting commissioners, the ICC extended the class exemption for abandonments to embrace discontinuances and trackage rights. Exemption of Out of Service Rail Lines, 1 I.C.C.2d 55 (1984); 2 I.C.C.2d 146 (1986).

B. STB/D&H Notices Improper. The Board's two class exemption discontinuance notices state D&H seeks to discontinue

its local and overhead trackage rights. (STB Notice, 4/8/15; STB Notice, 7/2/15. The STB's language tracked that in the first D&H notice. (D&H Notice, 2, 3/19/15; ID 237999, 30):

D&H seeks to discontinue its overhead and local trackage rights on lines of railroad owned and/or operated by.....seven named rail carriers.

The Board's two notices went on to say D&H was entitled to summarily invoke the exemption to allow discontinuance of local and overhead trackage rights because D&H certified no local traffic has moved over the lines for at least 2 years and any overhead traffic on the lines can be rerouted over other lines-- again tracking the D&H notice, citing the Board's out-of-service class exemption regulations. 49 CFR 1152.50(b).^{8/}

SMART/TD-NY challenged the first Board notice on the basis that it would permit the discontinuance of overhead traffic, and would convert the class exemption so that overhead traffic would be the primary concern, rather than local service terminations, for which the class exemption was intended. (SMART Pet. to Revoke, 4/20/15, at 4-6. ID 238237 4-6).

D&H in its response, acknowledged the thrust of the SMART/TD-NY argument on the discontinuance of overhead traffic, but argued that such is not improper, pointing out that the impact on overhead traffic in the ordinary line abandonment case is usually not

^{8/} The Board also mentioned (1) the requirement that formal complaint had not been filed at the agency or in federal court regarding cessation of service during the two-year period and decided in favor of complainant; and (2) newspaper publication and notice to governmental agencies had been made.

a factor to consider. D&H cited the ICC's decision entered after court remand from the out-of-service abandonment case (787 F.2d 616), that the ICC is concerned with the potential "harm to shippers and communities located on the line, or who are otherwise dependent on the line for their service and not with the impact on overhead traffic. Exemption of Out of Service Rail Lines, 2 I.C.C.2d 146, 150 (1986). (D&H Reply, 5/8/15, 9-11; ID 238352, 10-12).

D&H concluded that the Board has repeatedly found the discontinuance of overhead trackage rights to be of a limited scope which does not require detailed scrutiny. D&H cites five ICC/STB decisions approving exemptions for such discontinuances, but none of these were class discontinuance exemptions; instead, the D&H citations were processed as petitions for exemption, under different guidelines.^{9/} (D&H Reply, 5/8/15, 10-11; ID 238352, 11-12).

The Board on July 10, 2015, ruled that D&H did not err in using the two-year class exemption for the discontinuances. Surprisingly, the Board found, contrary to D&H, that D&H does not seek to discontinue overhead traffic on the involved lines. Instead, the Board said D&H seeks to discontinue local trackage rights over which there has been no local service, but that over-

^{9/} D&H's gave five docket citations; however the final two citations are given in a combined report. Southern Ry. Co. & Norfolk So. Corp. - Pur. IL.C.RR, 5 I.C.C.2d 842 (1989), rev. den. United Transp. Union v. U.S., 905 F.2d 462 (D.C.Cir.1990).

head traffic can be rerouted over other lines.^{10/} This amazing discontinuance of trackage rights, but "non-discontinuance of service" novel theory by the Board, is set forth in full below. (STB Decision, 7/10/15, at 6:

Contrary to SMART/TD-NY's claims, D&H did not err in using the two-year out-of-service class exemption for the discontinuances at issue here. D&H does not seek to discontinue overhead traffic on the lines subject to this proceeding. Instead, consistent with the class exemption regulations, D&H seeks to discontinue trackage rights over which, it certifies, there has been no local service in at least two years and any overhead traffic can be rerouted. 49 C.F.R. §1152.50(b). (emphasis supp.)

The STB's finding that D&H does not seek to discontinue its overhead traffic on the lines, but wishes to discontinue its overhead trackage rights, is balderdash. The STB is engaging in word-play. D&H throughout the proceeding has associated discontinuance of trackage rights with the discontinuance of traffic, using the words interchangeably. For example, D&H in its May 8, 2015 reply to petition to toll time for an OFA, indicated this relationship at pp. 1-2 (ID 238352, 54-55):

The trackage rights to be discontinued include 660 miles of overhead trackage rights and 10 miles of local traffic rights in the Philadelphia area. The majority of the trackage rights have not been used to move either overhead or local traffic in over a decade.....

^{10/}It is unclear whether "other lines" refer to D&H lines or to those of other rail carriers. It is understood D&H refers to lines of other carriers.

See also:

As to the rest, D&H has not moved local traffic in more than two years and its continued operation of overhead traffic is no longer justifiable. (D&H Reply, 5/8/15, at 2; ID 238352, 3).

The majority of the 670 miles of trackage rights have not been used in more than a decade for either overhead or local traffic. (D&H Reply, 5/11/15, at 2; ID 238359, 4).

C. Special Circumstances. The resulting confusion concerning the nature of the out-of-service class exemption for discontinuance of trackage rights in the instant massive D&H discontinuance proposal, requires revocation of the exemption so as to carry out the rail transportation policy objectives. The discontinuance of trackage rights, per se does not come under §10903, even though the acquisition of trackage rights may be approved under §11323(a)(6).

Special circumstances are present requiring revocation. It is suggested that the discontinuance of operation of a line of rail under trackage rights might be approved, but it is the "operation" or "service" which is the matter of concern, not the existence of "rights." Such is the confusion of the two concepts which help prevent an orderly resolution of issues.

The out-of-service class exemption for discontinuance of D&H overhead trackage rights handling D&H traffic, is inapplicable under the circumstances presented.

II. REVOCATION OF THE EXEMPTION IS NECESSARY DUE TO THE ORIGIN AND APPROVAL OF THE OPERATIONS

The history and nature of the acquisition and approval of the involved operations under the trackage rights requires that the Board not alter the present scheme through summary class exemption methodology; instead, the Board should require an evidentiary proceeding under the petition for exemption or abandonment process.

As indicated throughout this petition to revoke, the involved very extensive set of operations under trackage rights was established by the USRA Final System Plan, and was deemed approved by the Congress. To be sure, there have been changes in the involved region, but they have not been shown to have substantially altered the need for the competitive status of D&H. If the fundamental role of the D&H lines is to be altered by the STB, such should be accomplished through an extensive examination of the relevant facts, and not by means of a class exemption that has not and will not lend itself to development of an adequate record.

The present state of affairs was set up by the Congress. The STB is an arm of the Congress. The major alterations as suggested by the D&H notices of exemption require more than summary disposition. The class exemption for the D&H discontinuance transactions should be revoked.

CONCLUSION

The class exemption should be revoked for the proposed discontinuance of trackage rights.

Respectfully submitted,



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August 28, 2015

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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



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