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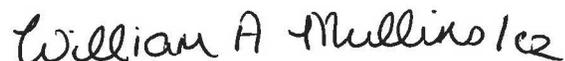
Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: *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 Georges Counties, MD; The District of Columbia; and Arlington County, VA, STB Docket No. AB-156 (SUB-NO. 27X)*

Dear Ms. Brown:

Enclosed is Norfolk Southern Railway Company's "Reply to James Riffin's Motion to Consolidate" in response to the April 20, 2015 motion filed by Mr. Riffin in the above captioned proceeding. If there are any questions concerning this filing, please contact me at the address and phone listed above or at wmullins@bakerandmilller.com.

Respectfully submitted,



William A. Mullins
Attorney for Norfolk Southern Railway Company

Enclosures

cc: Parties of Record

**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 GEORGES
COUNTIES, MD; THE DISTRICT OF COLUMBIA; AND ARLINGTON COUNTY, VA,**

REPLY TO JAMES RIFFIN'S MOTION TO CONSOLIDATE

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**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
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REPLY TO JAMES RIFFIN'S MOTION TO CONSOLIDATE

INTRODUCTION

On November 17, 2014, Norfolk Southern Railway Company ("NS") submitted an application for a Minor Transaction ("Application") in FD No. 35873 seeking approval for NS's acquisition and operation of 282.55 miles of Delaware and Hudson Railway Company, Inc.'s ("D&H") rail lines located in Pennsylvania and New York and for certain other related actions (collectively referred to as the "Transaction Proceeding"). In the Application, NS noted that D&H would seek discontinuance authority for certain trackage rights that D&H had determined were not economically justified. Evidentiary matters in the Transaction Proceeding concluded on March 31, 2015, and the Board is scheduled to issue a final decision on the merits on May 15, 2015.

On March 19, 2015, consistent with what NS had disclosed generally in its Application, D&H filed a Notice of Exemption in AB-156 (Sub-No. 27X) seeking discontinuance authority

for approximately 670 miles of trackage rights on lines located in New York, New Jersey, Pennsylvania, Maryland, the District of Columbia, and Virginia (“Discontinuance Proceeding,” and collectively with the Transaction Proceeding, the “Proceedings”). On April 20, 2015, in the current proceeding, James Riffin filed a Motion to Consolidate (“Motion”) the Proceedings.¹ NS hereby files this Reply to Mr. Riffin’s Motion.² Consistent with the Board’s decision in the Transaction Proceeding served December 16, 2014 (the “Dec. 16 Decision”) and the Board’s prior precedent, Mr. Riffin’s Motion should be denied.

ARGUMENT

In its Dec. 16 Decision in FD 35873, the Board rejected arguments that the Application should have included D&H’s discontinuance requests. The Board stated that the “D&H trackage rights run over NSR lines that are not part of the D&H Short [*sic*] Lines at issue in this Control Transaction. Therefore, the Board need not address these trackage rights in this proceeding.” *Id.* at 10. Thus, the Board has already determined that the Proceedings are independent proceedings

¹ On April 22, Samuel J. Nasca submitted a Petition To Revoke And For Stay Of Exemption (“Petition To Revoke”) in this proceeding that also requested consolidation (see Petition To Revoke at 6). Mr. Nasca cited no precedent or even argument as to why consolidation was appropriate. For the same reasons articulated herein, Mr. Nasca’s request for consolidation should be denied.

² As the Motion is directed at a pending related proceeding involving NS, NS believes that it can file these reply comments as a matter of right without officially intervening. Nonetheless, if necessary, NS requests that the Board grant NS the right to intervene pursuant to 49 CFR §1112.4 because doing so would not unduly disrupt the procedural schedule; would not unduly broaden the scope of the issues raised in this proceeding; and NS has a strong interest in ensuring that the Transaction proceeding is not delayed pending resolution of the Discontinuance Proceeding. See [Eighteen Thirty Group, LLC – Acquisition Exemption Line of Railroad in Allegany County, MD](#); [Georges Creek Railway, LLC – Operation Exemption – Line of Railroad in Allegany County, MD](#); [Duncan Smith and Gerald Altizer – Continuance in Control](#); FD Nos. 35438, 35437, and 35436 (STB served April 4, 2012); and [V&S Railway, LLC – Petition for Declaratory Order – Railroad Operations in Hutchison, Kansas](#), FD 35459 (STB served February 17, 2011).

that should be judged on their own merits and Mr. Riffin has presented no argument or justification as to why the Board should determine otherwise now.³

The Board has, on rare occasions, consolidated related proceedings when doing so would not complicate the procedural aspects of the two Proceedings.⁴ More commonly, however, is for the Board to deny consolidation. For example, the Board has denied consolidation of related proceedings, even when the same line and parties were involved, when two different statutory standards applied to the different proceedings. See Union Pacific Railroad Company – Petition for Declaratory Order, STB Docket No. 34090 (STB served Nov. 9, 2001). Clearly, the procedural and statutory elements applicable to the Transaction Proceeding and the Discontinuance Proceeding are entirely different and consolidation would not serve a useful purpose.⁵ Indeed, the Board can and will make an independent decision on whether the

³ Indeed, Mr. Riffin argues that the proceedings are intertwined because “[a]ll of the conditions requested [in FD 35873] involve the [discontinuance of] trackage rights that are the subject of AB 156 (Sub No. 27X).” Motion at 1. However, his statement is only correct inasmuch as all of the conditions he requested in the Transaction Proceeding involve the trackage rights being discontinued in the current proceeding. Other parties requested conditions not related to the trackage rights discontinuance. The Proceedings should not be consolidated solely because Mr. Riffin says they should be.

⁴ Ashley Creek Phosphate Company v. SF Phosphates Limited Company, et. al., STB Docket No. 40810, 1992 MCC LEXIS 191 (STB served Dec. 29, 1992)(granting consolidation because using an identical ratemaking methodology for both complaints involving the same complainant would be advantageous and would actually simplify the procedural schedule). Here, consolidation would actually complicate and delay the Transaction Proceeding, especially given that the record is closed and a decision is shortly to be issued.

⁵ See Clyde S. and Sandra Forbes and CSF Acquisition, Inc. – Control Exemption – Lamoille Valley Railroad Company and Twin State Railroad Corporation; New Hampshire and Vermont Railroad Company – Lease, Operation, and Acquisition Exemption – Boston and Maine Corporation FD 31545, FD 31547, 1991 ICCLEXIS 232 (STB served October 1, 1991). The Interstate Commerce Commission (ICC) denied consolidation of two simultaneous proceedings, which would create a regional rail network out of a segment of track owned by the Boston & Maine Corporation and track controlled by the Northern Vermont Corporation. However, since the proceedings were related, the ICC issued a common decision.

Discontinuance Proceeding qualifies for the two-year notice of exemption process based upon the applicable regulations and standards. Such a decision does not depend on whatever decision is made with respect to the Transaction.

Further, simply because there is a relationship between the Transaction Proceeding and the Discontinuance Proceeding does not justify consolidation. For example, in 2005, when Canadian Pacific Railway Company acquired certain trackage rights over NS, NS acquired trackage rights over D&H, and D&H filed for discontinuance of various trackage rights agreements, the Board rejected the United Transportation Union-New York Legislative Board request for consolidation, notwithstanding the fact that the proceedings were related.⁶ In that case, the Board stated that “how the parties regard transactions for negotiating or other purposes is distinct from whether the transactions should be considered [to be a single transaction].” 2005 D&H Discontinuances at *10-*19 (STB served Jan. 19, 2005). Similarly, any relationship between the Proceedings is not enough of a justification to warrant consolidation.

Moreover, consolidating the Proceedings would only serve to delay the Board’s decision in the Transaction Proceeding and would provide Mr. Riffin with yet another opportunity to repeat his already-rejected arguments. The record in the Transaction proceeding is complete. That record includes a full discussion and analysis of the competitive effects of the discontinuances; arguments which Mr. Riffin himself analyzed and provided comment. Having already had an opportunity to provide argument about the competitive effects of the

⁶ See Delaware And Hudson Railway Company, Inc. – Discontinuance Of Trackage Rights – In Susquehanna County, PA and Broome, Tioga, Chemung, Steuben, Alleghany, Livingston, Wyoming, Erie and Genesee Counties, NY; Canadian Pacific Railway Company – Trackage Rights Exemption – Norfolk Southern Railway Company; Norfolk Southern Railway Company – Trackage Rights Exemption – Delaware And Hudson Railway Company, Inc., AB-156 (Sub-No. 25X), FD 34561, FD 34562, 2005 STB LEXIS 24 (STB served Jan. 19, 2005) (“2005 D&H Discontinuances”).

discontinuances, no useful purpose would be accomplished by consolidating these two proceedings and allowing yet another round of arguments about the very same issues. Rather, consolidation would simply serve to delay the Transaction,⁷ complicate the procedural record, and prevent the shippers and short lines, which have almost unanimously supported the Transaction, from enjoying the benefits of NS ownership. Having fully participated in the Transaction proceeding and presented his arguments, he should not be given another bite at the apple. If he has further arguments to be made, those should be made in the context of the Discontinuance Proceeding and within the procedural and statutory elements applicable thereto.

CONCLUSION

Consolidation is inappropriate because different regulatory standards apply to each of the Proceedings. Consolidation has not been justified, would serve no useful purpose, and would unnecessarily delay the Board's decision on the Transaction. Therefore, NS respectfully asks that the Board deny the Motion.

Respectfully submitted,



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Attorneys for Norfolk Southern Railway
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May 8, 2015

⁷ Nasca's Petition To Revoke admits that consolidation would serve to "mandate a more lengthy period for ultimate decision" in the Transaction proceeding. Petition To Revoke at 6.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing "Reply to James Riffin's Motion to Consolidate" in AB-156 (Sub-No. 27X), by first class mail, properly addressed with postage prepaid, or via more expeditious means of delivery, upon all persons required to be served as set forth in 49 C.F.R. § 1180.4(c)(5) and all parties of record.

William A. Mullins

William A. Mullins
Attorney for Norfolk Southern Railway Company

May 8, 2015