

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB DOCKET NO. AB-156 (SUB-NO. 27X)

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DELAWARE AND HUDSON RAILWAY COMPANY, INC.  
—DISCONTINUANCE OF TRackage RIGHTS EXEMPTION—  
IN BROOME COUNTY, N.Y.; MIDDLESEX, ESSEX, UNION, SOMERSET, HUNTERDON,  
AND WARREN COUNTIES, N.J.; CUMBERLAND, CHESTER, LUZERNE, PERRY, YORK,  
LANCASTER, NORTHAMPTON, LEHIGH, CARBON, BERKS, MONTGOMERY,  
NORTHUMBERLAND, DAUPHIN, LEBANON, AND PHILADELPHIA COUNTIES, PA.;  
CECIL, HARFORD, BALTIMORE, ANNE ARUNDEL, AND PRINCE GEORGE'S  
COUNTIES, AND BALTIMORE CITY, MD.; THE DISTRICT OF COLUMBIA; AND  
ARLINGTON COUNTY, AND THE CITY OF ALEXANDRIA, VA.

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REPLY TO PETITION TO REOPEN / REVOKE THE EXEMPTION

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Dated: August 12, 2015

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REPLY TO PETITION TO REOPEN / REVOKE THE EXEMPTION

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**INTRODUCTION**

Delaware and Hudson Railway Company, Inc. ("D&H") provides this Reply to the Petition to Reopen / Revoke the Exemption (the "Petition") filed on July 23, 2015 by CNJ Rail Corporation and Eric S. Strohmeyer (the "CNJ Parties") in the above matter. The concerns raised in the voluminous<sup>1</sup> Petition are based on unfounded speculation and raise issues that are immaterial to D&H's discontinuance of trackage rights under the 2-year out of service class exemption. Petitioners articulate no valid basis under the Board's rules for reopening or revocation of the exemption. Accordingly, the Board should reject the Petition.

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<sup>1</sup> The Board should strike the Petition which far exceeds the Board's 20-page limit for such petitions. See 49 CFR 1115.3(d) and 1115.4.

## ARGUMENT

The Board's standard for revocation and reopening sets a high bar:

Under 49 U.S.C. 10502(d), an exemption may be revoked, in whole or in part, if the Board finds that: (1) it contains false and/or misleading information, (2) regulation is necessary to carry out the rail transportation policy of 49 U.S.C. 10101 or (3) revocation is necessary to ensure the integrity of the Board's processes. . . . [U]nder 49 CFR 1115.3(b), the petitioner must specify whether revocation is supported by material error, new evidence, or substantially changed circumstances. The petitioner has the burden of proof and must articulate reasonable, specific concerns to satisfy the revocation criteria.

*N.Y. Cent. Lines, LLC—Abandonment Exemption—In Montgomery and Schenectady Counties, NY*, STB Docket No. AB-565 (Sub-No. 14X), slip op. at 3 (STB served Jan. 22, 2004) (citations omitted). Consistent with the statute, the Board's "analysis focuses on the sections of the rail transportation policy related to the underlying statutory section from which the exemption is sought." *Bulkmatic R.R. Corp.—Acquisition and Operation Exemption—Bulkmatic Transport Co.*, Finance Docket No. 34145, slip op. at 8 n.15 (STB served Nov. 19, 2002) (citations omitted). To warrant revocation of an exemption, in whole or in part, a petitioner must show that regulation is necessary to carry out the rail transportation policy of 49 U.S.C. § 10101. The party seeking to revoke the exemption has the burden of proof, and a petition to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and regulation of the transaction is necessary. *Minn. N. R.R., Inc.—Exemption—Acquisition and Operation of Rail Line and Incidental Trackage Rights from Burlington N. R.R. Co.*, Docket No. 33315, slip op. at 5 (STB served Aug. 14, 1997) (citing *CSX Transp., Inc.—Aban.—In Randolph County, WV*, 9 I.C.C.2d 447, 449 (1992)).

The CNJ Parties fail to meet this standard for revocation of an exemption. The Petition provides no evidence, new or old, that either D&H's Notice or the Supplement contains false or misleading information or places the integrity of the Board's processes at risk.

Most importantly, the Petition fails to demonstrate that regulation is necessary to carry out the rail transportation policy. No competitive or other harm that will result from the discontinuance of D&H trackage rights is even alleged and, as the Board has already observed, none will occur. *See* Docket No. FD 35873, Decision No. 6, slip op. at 14-16, 20-21 (STB served May 15, 2015). No issue identified by the CNJ Parties as requiring resolution by the special court and no alleged inaccuracy or technical defect in D&H's June 15, 2015 Supplement affect the conclusion that D&H's discontinuance of the subject trackage rights will result in no harm. In fact, the rail transportation policy, which seeks to reduce the regulatory burden on exits from the industry, requires denial of the Petition. *See, e.g.*, 49 U.S.C. § 10101(2), (7), (15) (rail transportation policy seeks to minimize the need for Federal regulatory control over rail transportation system, to reduce regulatory barriers to entry and exit, and to provide for the expeditions handling and resolution of all proceedings).

**1. Alleged Uncertainty Regarding the Scope of D&H Rights and Status of the Conrail Segments Is Immaterial.**

According to the CNJ Parties, there is uncertainty as to the scope and nature of D&H's operating authority that was conferred in the Final System Plan ("FSP"), as well as the status of some of the Conrail line segments over which D&H received operating rights. The CNJ Parties assert that the exemption must be revoked and that these issues must be resolved by the special court established by Congress to resolve issues related to the FSP. The CNJ Parties are wrong.

That D&H's rights are overhead rights only over 660 of the 670 miles of trackage rights that are being discontinued in this proceeding is not genuinely in dispute. The evidence that the

CNJ Parties cite, a verified statement submitted in a previous proceeding by a D&H witness and the agreements granting those rights, are consistent with D&H's representations in this proceeding. While the CNJ Parties speculate that D&H's rights might be broader than mere trackage rights, they present no actual evidence that supports their theory.

The CNJ Parties make much of the alleged uncertainty as to the precise location of the long-since abandoned Conrail line segments and the status of D&H trackage rights but fail to articulate why this information would be relevant in this trackage rights discontinuance proceeding. In fact, it is entirely immaterial whether D&H received or retained trackage rights over any of the segments that Conrail abandoned decades ago. If D&H's trackage rights were in fact extinguished or discontinued at that time, then there is no need for them to be discontinued in this proceeding. On the other hand, if D&H retained its dormant and unusable trackage rights authority over these segments, then D&H is entitled to discontinue them in this proceeding under the class exemption as D&H has not operated over the line segments in at least 2 years. As D&H explained in its Supplement, it included the abandoned Conrail segments merely out of an abundance of caution and as a matter of good housekeeping to provide a complete record.

## **2. Alleged Defects in Maps Provide No Basis for Revocation or Reopening.**

The CNJ Parties allege that the maps that D&H submitted with its June 15 Supplement are inaccurate. The Petition asserts discrepancies between the routes described in the Notice's Exhibit B and what is depicted on the map, as well as what the FSP allegedly granted to D&H. D&H disagrees that the maps are not accurate for the purposes of this discontinuance proceeding. The maps sufficiently correspond with the route descriptions and adequately depict the subject rail lines. These maps were produced by D&H based on a variety of sources including publicly available government publications such as the New Jersey Department of

Transportation's June 20, 2014 Railroad Network map.<sup>2</sup> The maps reflect the available information regarding the current location of the lines over which D&H was granted trackage rights and, due to changed circumstances in the past three and one half decades, do not necessarily correspond to the same locations as when the various agreements granting D&H trackage rights were executed. The CNJ Parties have not provided evidence that establishes that the maps are not sufficiently accurate.<sup>3</sup> The alleged inaccuracies in the maps are *de minimis* and, even if present, have misled no one, including the CNJ Parties. They certainly would not merit either reopening or revocation under the standard articulated above.

Additionally, the CNJ Parties contend that reopening or revocation is required because the maps do not strictly comply with the technical requirements of the Board's regulations such as the requirement that each map be drawn to scale with the scale identified on it. However, the maps are at least consistent with, if not exceed in terms of detail, the custom and practice before the Board in this category of proceeding and provide sufficient information as to the location of the subject lines. Indeed, few maps submitted in abandonment and discontinuance proceedings fully comply with all the technical requirements of the regulation. The requirement that maps include the scale for example, is generally honored in the breach. If failure to indicate the scale were a basis for revocation or reopening, numerous exemptions would be at risk. Fortunately, it is not. *Cf. L.B. Foster Co.—Petition for Declaratory Order—Certain Rates and Practices of C&H Nationwide, Inc., d/b/a C&H Transp. Co.*, No. 40306, 1993 WL 453423, at \*4 (ICC served Nov. 5, 1993) (rejecting "overly strict reliance on technicalities."); *See also* 49 C.F.R. § 1100.3

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<sup>2</sup> <http://www.state.nj.us/transportation/gis/maps/railroads.pdf>

<sup>3</sup> The map requirement was established in order to aid the Board in its decision-making. *New Requirement That Maps Be Submitted in All Abandonment Exemption Proceedings* (49 C.F.R. Part 1152), 7 I.C.C.2d 255 (July 9, 1991). D&H's maps are more than sufficient to serve that purpose in this Class Exemption proceeding.

("The rules will be construed liberally to secure just, speedy and inexpensive determination of the issues presented").

**3. The Notice of Exemption Contains No False or Misleading Information.**

Finally, the CNJ Parties argue that certain information in the Notice of Exemption is false and misleading. The CNJ Parties challenge the veracity of the description of the ownership of the subject lines, a statement indicating that certain track has been removed on an abandoned line segment, and an alleged representation regarding how recently D&H operated over a line segment in New Jersey. None of these alleged misstatements support the conclusion that the Notice of Exemption contains false or misleading information.

D&H's description of the ownership of the lines was based on the information in the ICC's October 5, 1990 decision in Finance Docket No. 31700 that authorized Canadian Pacific Limited's acquisition of Delaware & Hudson Railway Company. Notably the Board's regulations at 49 C.F.R. § 1150 Subpart F do not require that a notice of exemption refer to current ownership of the line where trackage rights are to be discontinued. *Cf. N.H. Cent. R.R., Inc.—Lease and Operation Exemption—Line of the N.H. Dep't of Transp.*, Finance Docket No. 35022, slip op. at 3 (STB served Dec. 11, 2007) (regulations for exempt transactions, at 49 CFR § 1150, subpart E, do not require that a notice of exemption refer to any existing operators on a rail line to be acquired). In any event, even assuming the CNJ Parties are correct, inclusion of a former owner does not render the information that D&H provided false or misleading.

Next, CNJ Parties contend that D&H's description of the line segment west of Glen Gardner, NJ as having been removed is "purely FALSE," but provide no competent evidence to support that contention. CNJ Parties purport to base this claim on their examination of the Board's historical records. Such records are not a reliable source for whether the track on an abandoned rail line was removed and do not constitute evidence of the physical status of the line.

Moreover, the CNJ Parties do not actually contend that the rail line remains intact, only that some portion still exists. Petition at 25. Even if a portion of the trackage on that line does remain, it does not render false and misleading the statement in Exhibit B of D&H's Notice of Exemption. It is also immaterial to D&H's discontinuance of trackage rights in this proceeding.

**CONCLUSION**

For the foregoing reasons, D&H respectfully requests that the Board deny the Petition in all respects.

Respectfully submitted,

Dated: August 12, 2015



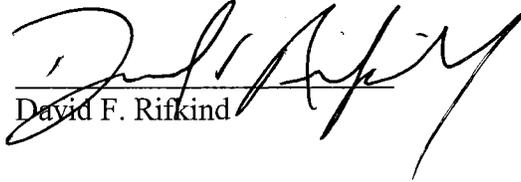
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**CERTIFICATE OF SERVICE**

I hereby certify that I have caused the foregoing Reply to be served by First Class Mail and by e-mail where an e-mail address is included on the Board's official service list, on August 12, 2015 to parties of record.

  
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