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December 10, 2014

**VIA E-FILING**

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

Re: *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:

Enclosed is Norfolk Southern Railway Company's "Reply To Opposition To Procedural Schedule And Motion To Reject Application" filed by CNJ Rail Corporation (NS-6) to be submitted in the above referenced proceeding. If there are any questions concerning this filing, please contact me at the address and phone listed above or at [wmullins@bakerandmiller.com](mailto:wmullins@bakerandmiller.com).

Respectfully submitted,



William A. Mullins  
Attorney for Norfolk Southern Railway Company

Enclosures

cc: Parties of Record

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**FINANCE DOCKET NO. 35873**

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**NORFOLK SOUTHERN RAILWAY COMPANY**

**- ACQUISITION AND OPERATION -**

**CERTAIN RAIL LINES OF THE DELAWARE AND HUDSON RAILWAY  
COMPANY, INC.**

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**REPLY TO OPPOSITION TO PROCEDURAL SCHEDULE AND  
MOTION TO REJECT APPLICATION**

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**December 10, 2014**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**NORFOLK SOUTHERN RAILWAY COMPANY**

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**REPLY TO OPPOSITION TO PROCEDURAL SCHEDULE AND  
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**INTRODUCTION**

On November 17, 2014, Norfolk Southern Railway Company (“NS” or “Applicant”) submitted a Minor Application (NS-1) 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 (the “D&H South Lines”) and for approval of certain other related actions, collectively the “Transaction” as further explained and set forth in the Application. Concurrently with the Application, NS submitted a procedural schedule consistent with treatment of the Application as a minor transaction. No shipper, government agency, political official, short line railroad, or any other railroad opposes the treatment of the Transaction as a minor transaction. In fact, quite the contrary; not only is there a lack of opposition, but as NS submitted into the record on December 8, 2014, over 78 parties representing a broad range of interests, including shippers representing approximately two-thirds of the number of carloads/intermodal containers moving over the D&H South Lines, short lines including the largest connecting short line, and the Pennsylvania DOT, support the Transaction and its treatment as a minor transaction; and, a significant number of

those parties have submitted statements requesting expedited review and approval of the Transaction. NS-5.<sup>1</sup>

Only two parties have submitted filings in opposition to the treatment of the Transaction as a minor transaction: CNJ Rail Corporation (“CNJ”), a company owned and controlled by Eric Strohmeyer, is well known to the Board and often participates in a disparate and diverse number of proceedings, often times with Mr. James Riffin;<sup>2</sup> and a filing by counsel for Samuel J. Nasca, for and on behalf of SMART/Transportation Division, New York State Legislative Board.<sup>3</sup> CNJ’s request to designate the Transaction as significant or to reject the Application as incomplete should be denied. CNJ’s assertions are speculative at best and no shipper supports its claims. CNJ also has failed to provide any evidence or cite to any precedent that would require the Transaction to be redesignated from minor to significant or be rejected outright. Finally, CNJ will have a full opportunity to present its argument, even under a minor designation.

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<sup>1</sup> Earlier today, the Vermont Agency of Transportation and the State of Maine Department of Transportation provided NS with copies of letters in support of the Transaction and informed NS that such letters will be filed with the STB.

<sup>2</sup> See Delaware and Hudson Railway, Inc. – Discontinuance of Trackage Rights Exemption – in Susquehanna County, PA and Broome, Tioga, Chemung, Steuben, Allegany, Livingston, Wyoming, Erie, and Genesee Counties, NY, AB-156 (Sub-No. 25X) (STB served Mar. 30, 2005) (“D&H Discontinuance”); Maryland Transit Administration – Petition for Declaratory Order, FD 34975 (STB served Sept. 19, 2008); Eric Strohmeyer and James Riffin – Acquisition and Operation Application – Valstir Industrial Track in Middlesex and Union Counties, NJ, FD 35527 (STB served Oct. 20, 2011 and May 14, 2012); Consolidated Rail Corporation – Abandonment Exemption – in Hudson County, NJ, AB-167 (Sub-No. 1190X) (STB served May 17, 2010); Consolidated Rail Corporation – Abandonment Exemption – in Philadelphia, PA, AB 167 (Sub-No. 1191X); CSX Transportation, Inc. – Discontinuance of Service Exemption – in Philadelphia, PA, AB 55 (Sub-No. 710X); Norfolk Southern Railway Company – Discontinuance of Service Exemption – in Philadelphia, PA, AB 290 (Sub-No. 552X) (STB served Mar. 14, 2012).

<sup>3</sup> CNJ’s filing was served on NS counsel via email on December 8, 2014. Samuel J. Nasca, for and on behalf of SMART/Transportation Division, New York State Legislative Board, apparently filed in opposition to NS’s proposed procedural schedule on December 9, 2014, but this pleading was not served on NS until today. To the extent that Nasca raises similar arguments to those made by CNJ, NS’s response set forth herein will be similarly applicable to his filing. However, given the late nature of the filing, NS will attempt to address any Nasca-specific issues in a subsequent filing.

**I. CNJ DOES NOT REPRESENT ANY SHIPPER INTERESTS AND HAS NO FINANCIAL STAKE IN THE PROCEEDING**

CNJ is not a shipper, a rail carrier regulated by the STB, or a private operating railroad. Nor does it have any financial connection or standing with respect to the Transaction. Indeed, a review of prior STB cases and public records seems to indicate that CNJ conducts no actual rail operations or rail related business at all; certainly none connected to the Transaction.<sup>4</sup> CNJ claims to be concerned about the loss of competitive options for the transportation of municipal solid waste (“MSW”) or recycled glass from Oak Island Yard over potential routings involving the Delaware-Lackawanna R.R. Co., Inc. (“DL”) and D&H. Yet, CNJ presents no support for any of its assertions from any other party. No potential or existing shippers at Oak Island Yard have filed in opposition to the treatment of the Transaction as minor. Nor has DL. This is not surprising as there are no shipments of MSW or recycled glass over the routings suggested by CNJ nor are there any indications that such shipments are even feasible in the future.<sup>5</sup> CNJ’s unsupported assertions, based upon theoretical and non-existent routings, should be sufficient to deny CNJ’s request to reject the Application or to convert the Transaction from minor to significant.<sup>6</sup> CNJ’s request is

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<sup>4</sup> Maryland Transit Administration – Petition for Declaratory Order, FD 34975 (STB served Sept. 19, 2008) (“Notwithstanding the name it has chosen, CNJ does not own any rail assets or conduct any rail operations. CNJ’s filing did not describe its interest in this proceeding.”).

<sup>5</sup> D&H does not have contiguous operating rights between Oak Island and Sunbury, PA, nor between Oak Island and Easton, PA. In fact, D&H last went to Oak Island in June 2012 (NS-1 at 28), so even if a shipper came forward today to move MSW from Oak Island, the D&H routing would not seem to be a viable competitive option.

<sup>6</sup> See also Consolidated Rail Corporation – Abandonment Exemption – in Hudson County, NJ, AB-167 (Sub-No. 1190X) (STB served May 17, 2010) (rejecting CNJ’s offer of financial assistance because its evidence was “lacking”); Consolidated Rail Corporation – Abandonment Exemption – in Philadelphia, PA, AB 167 (Sub-No. 1191X); CSX Transportation, Inc. – Discontinuance of Service Exemption – in Philadelphia, PA, AB 55 (Sub-No. 710X); Norfolk Southern Railway Company – Discontinuance of Service Exemption – in Philadelphia, PA, AB 290 (Sub-No. 552X) (STB served Mar. 14, 2012) (rejecting CNJ’s offer of financial assistance because its offer “lacks merit”).

simply yet another attempt to gain, through regulatory action, rights for itself that it cannot gain through the commercial market.<sup>7</sup> Moreover, CNJ's requests should also be denied for several additional reasons.

## II. CNJ HAS FAILED TO MEET THE STANDARD FOR REJECTION OF A TRANSACTION AS A MINOR TRANSACTION

Citing no precedent, CNJ argues that the transaction should be treated as a significant transaction because:

(1) in essence, the proposed transaction involves two Class I rail carriers, i.e., NS and Canadian Pacific Railway Company (CP), which controls DH; and (2) the proposed transaction would have extensive and serious anticompetitive effects in a defined region comprising Northeastern Pennsylvania, New Jersey, and Southern New York, which, unless ameliorated by means of pro-competitive conditions resulting from responsive applications, would not be clearly outweighed by the transaction's contribution to the public interest in meeting transportation needs.

CNJ Reply and Motion at 2-3. Neither reason withstands scrutiny.

### A. The Transaction Is Not Automatically a Significant Transaction

The Transaction involves the purchase of a line by NS, a Class I carrier, from D&H, a Class II carrier. Even assuming for the sake of argument that D&H were a Class I carrier, simply because a transaction involves two Class I carriers does not mean the transaction automatically qualifies as a significant transaction. 49 C.F.R. § 1180.2(b) states that a transaction that does not involve the control or merger of two or more Class I railroads can either be significant or minor. All parties agree that the Transaction does not involve the "control or merger" of two Class I carriers. As such, under the Board's regulations and precedent, the Transaction can be either significant or minor – even if it does involve two Class I carriers.

### B. The Transaction Is Not Of Regional Or National Significance

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<sup>7</sup> See D&H Discontinuance at 3 ("CNJ may not use the forced sale provisions of section 10904 to obtain trackage rights that NS does not want to give it.").

The Transaction is not of regional or national transportation significance, as that phrase is used in 49 U.S.C. § 11325(a)(2) and (c), so as to justify re-designation from minor to significant. All parties agree that the Transaction is not of national transportation significance. Nor is it of “regional transportation significance” as that phrase is used in the statute or in precedent. As an initial matter, contrary to CNJ’s assertion, the Transaction does not “broadly realign rail service in the Territory” (CNJ Reply and Motion at 3) nor does it propose a “realignment of rail service in a broad area of the country” (*Id.* at 4). These statements ignore the fact that this is not a “realignment” of rail service but rather an “alignment” of service with ownership. As the Application thoroughly sets forth, NS is already the majority user of the lines involved in the Transaction and most of the traffic is NS traffic. The alleged “realignment” has already occurred as a result of market forces. There simply is no broad realignment or significant restructuring of rail service that would occur as a result of the Transaction.

Likewise, the Transaction does not involve a “Territory” or a “broad area of the country.” Rather, the Transaction involves only 282.55 miles of line in a small part of two states in the Northeast. CNJ cites no precedent finding that such a small transaction should be treated as a “significant” transaction. In fact, the Board previously has found that two transactions in precisely the same region of the country – where such transactions were larger in scope and had greater impacts than this Transaction – constituted minor transactions. CSX Transportation, Inc. and Delaware and Hudson Railway Company, Inc. – Joint Use Agreement, FD 35348 (STB served May 27, 2010) (involving approximately 345 miles of track and a similar geographic scope); Norfolk Southern Railway Company, Pan Am Railways, Inc., et al. – Joint Control And Operating/Pooling Agreements – Pan Am Southern LLC, FD 35147 (STB served June 26, 2008) (involving 438 route miles of track and trackage rights and five states).

Other transactions outside of the Northeast, some much larger in scope and size, also have been found to be minor transactions; and, these were mergers not simple line acquisitions. See e.g., Canadian National Railway, Inc., et al. – Control – Wisconsin Central Transportation Corporation, et al., FD 34000 (STB served May 9, 2001) (involving acquisition of over 2,464 route miles); Kansas City Southern – Control – Texas Mexican Railway Company, et al., FD 34342 (served Nov. 29, 2004) (involving acquisition of 536 route miles); Canadian National Railway Company, et al – Control – Duluth, Missabe and Iron Range Railway Company, et. al., FD 34424 (served Dec. 1, 2003) (involving 370 combined route miles). There is simply no justification for converting the Transaction to significant when there is clear precedent that transactions of similar, if not larger, scope and size have been treated as minor transactions, especially when only two parties have raised unsupported concerns or argued that the Transaction is of such regional significance that it needs to be designated as significant.

C. The Transaction Is Clearly Not Anticompetitive And Has Significant Public Benefits

Under 49 C.F.R. § 1180.2(b)(1) and (2), the Board will treat a transaction as “not significant” if the transaction clearly will not have any anticompetitive effects, or if there are anticompetitive effects, these effects will clearly be outweighed by the transaction’s anticipated contribution to the public interest in meeting significant transportation needs. According to CNJ, the “proposed transaction would have extensive and serious anticompetitive effects” in the Northeast region. CNJ Reply and Motion at 2. As evidence of these purported “extensive and serious anticompetitive effects,” CNJ points to one location – Oak Island Yard at Newark, NJ – where alleged *potential* MSW traffic and recycled glass might not be able to utilize some *theoretical* routings involving the DL and D&H and claims that the loss of these routings constitutes a 2-to-1 reduction of competition. Other than mere assertions by CNJ’s counsel involving potential traffic and theoretical routings, CNJ provides no evidence that traffic has, can, or will be routed this

way or that the loss of this potential routing is anticompetitive so as to justify the relief it requests.<sup>8</sup> Interestingly, CNJ's map shows the presence of CSX at Oak Island, which makes it a 3-2 point – if it is affected by the Transaction at all.

CNJ does not provide any evidence or precedent that the mere assertion of an anticompetitive effect at one location warrants a re-designation from minor to significant. This is in stark contrast to the significant empirical and verified evidence presented by Mr. John Friedmann and Dr. Curtis Grimm that the Transaction “clearly will not have any anticompetitive effects.” Application, Vol. I, VS Friedmann at 73; VS Grimm at 92. There simply is no evidentiary support for the proposition set forth in CNJ's request.<sup>9</sup>

Furthermore, CNJ completely ignores the alternative prong for finding that a transaction is a minor transaction. In essence, this test (49 C.F.R. § 1180.2(b)(2)) states that even if there may be anticompetitive effects, the transaction will still be considered a minor transaction if the anticompetitive effects will be clearly outweighed by the public benefits of the transaction. Assuming for purposes of argument that CNJ's proposition can be verified and that it rises to the

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<sup>8</sup> In a related and similar proceeding involving Mr. Strohmeyer himself, the Board, upheld by the Court of Appeals, has found that mere speculations and assertions do not justify the types of relief requested. Lowe v. STB, 2013 U.S. App. LEXIS 22325 (D.C. Cir. 2013) (Upholding the Board's rejection of an offer of financial assistance noting that the evidence submitted by Messrs. Strohmeyer, Lowe, and Riffin was “only speculative evidence of future demand,” as none of the potential shippers cited had formally requested service and the municipal solid waste incinerator claimed to need rail service had not even been approved for construction, and noting that “no actual shipper opposed Norfolk Southern's request”).

<sup>9</sup> As an initial matter, it should be pointed out that Oak Island Yard is not a 2-1 point given the presence of NS, D&H, and CSX, as indicated by CNJ's own diagram. Moreover, a quick review of the D&H and NS traffic tapes for traffic moving to/from Oak Island Yard by NS's expert Mr. Bengt Mutén revealed a strong presence of CSX and minimal participation by D&H. There were no D&H originations and terminations at this station in 2013. In 2012, D&H did originate some small amounts of traffic at Oak Island, but none of it terminated on the D&H. Almost all of that traffic was interchanged to CSX and terminated in Niagara Falls, NY or interchanged to and terminated on NS in New Lexington, OH. CSX and NS will of course continue to serve Oak Island in a post-Transaction environment.

level of an anticompetitive effect for this one location and any potential shippers, this singular anticompetitive effect does not outweigh the substantial public benefits of the Transaction as set forth in the Application, the verified statement of Mr. Friedmann, and the support letters signed by 78 shippers, short lines, and the Departments of Transportation of each of Pennsylvania and Maine. CNJ does not even attempt to prove or assert otherwise. As such, even granting CNJ all benefit of the doubt with respect to its anticompetitive claims, the Transaction still qualifies as a minor transaction pursuant to 49 C.F.R. § 1180.2(b)(2).

### **III. THE APPLICATION IS COMPLETE**

Without citing any precedent, CNJ claims that the Application should be “rejected” because it is incomplete. The basis for this rejection is that related trackage rights discontinuances to be filed by D&H were not filed with the Application. This is a curious and incorrect position. Even CNJ admits that NS has no legal authority to file discontinuances on D&H’s behalf. These are trackage rights that NS has granted to D&H and only D&H can file for their discontinuance.<sup>10</sup> The only transactions for which NS can request authority have been set forth in the Application, and these include the line purchase and the modifications of existing NS trackage rights. There is no allegation or assertion that the Application is incomplete with respect to the regulated activities for which NS can and is seeking STB authorization.

CNJ also ignores the fact that under the draft Asset Purchase Agreement, D&H is obligated to seek discontinuance of certain trackage rights, but both NS and D&H recognize that the Board

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<sup>10</sup> CSX Transportation, Inc. – Trackage Rights Exemption – Norfolk Southern Railway Company, FD 35516 (served June 14, 2011) (“There is no indication, however, that CSXT has authorized NSR to act on its behalf. That alone is a sufficient basis to reject the notice. [citations omitted] Additionally, it is at least unusual, if not unprecedented, for the grantor of trackage rights to file such a notice, as it is not the grant but the acquisition of the trackage rights that requires Board authorization.”). Similarly, the holder of the trackage rights must file for discontinuance, since only the holder of the trackage rights by Board authority can ask for the removal of that authority.

can deny those discontinuances. In that event, NS still has the option to proceed with the Transaction. There is no mandatory cancellation of the Transaction if the discontinuances are denied. In effect, there are two regulated transactions -- NS's acquisition and D&H's discontinuances, neither of which is wholly dependent upon the other.<sup>11</sup> CNJ will have a full opportunity to make whatever arguments it desires to make, including any competitive arguments, when D&H files for its discontinuances; and, CNJ will be able to seek appropriate conditions or protections in that proceeding, just as it can do in this proceeding.

Finally, CNJ has set forth a series of questions with respect to the discontinuances and claims that it "cannot effectively evaluate the transaction at present because the extent of the discontinuances is unknown." CNJ Reply and Motion at 6. This is simply false. On page 28 of the Application, NS sets forth precisely the NS lines over which D&H currently has trackage rights that will be involved in D&H's discontinuances. Thus, CNJ has the information to answer its own questions as to what trackage rights D&H will discontinue and retain. Furthermore, while not required to do so, NS presented a competitive analysis, presented by Dr. Grimm, which accounted for the competitive impacts of the various discontinuance and the termination of the marketing and haulage rights. CNJ can perform a similar analysis. NS has given full disclosure of what it intends to do and what D&H intends to do as well. If CNJ believes those discontinuances impact this Transaction, it can raise those issues in this proceeding.

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<sup>11</sup> Likewise, as noted in footnote 24 of the Application, if NS's Application is denied but D&H's discontinuances granted, D&H will continue to have the ability to exercise its discontinuance authority. D&H is free to exercise its authority or reject it. In the end, both NS and D&H will make their own independent economic judgments on whether to proceed with their portions of the various actions contemplated in the draft Asset Purchase Agreement if one is granted and another denied.

#### IV. CNJ WILL HAVE A PROCEDURAL OPPORTUNITY TO PRESENT ITS EVIDENCE AND REQUEST A CONDITION

Finally, CNJ claims that the Transaction should be designated as significant in order to permit “the filing of the essential responsive applications necessary to avoid or lessen the anticompetitive regional impacts of the proposed transaction.” CNJ Reply and Motion at 4. CNJ misunderstands the role of a responsive application versus a request for a condition. It is true that “responsive applications” cannot be filed in a minor transaction, but one need not file a responsive application to seek a condition to ameliorate anticompetitive impacts. A party is free to file a request for a condition, which can be a request for trackage or other rights over particular lines to resolve a competitive concern.

This issue was specifically addressed in 2001 in Canadian Nation Railway Company, Grand Trunk Corporation, And WC Merger Sub, Inc. – Control – Wisconsin Central Transportation Corporation, Wisconsin Central Ltd., Fox Valley & Western Ltd., Sault Ste. Marie Bridge Company, And Wisconsin Chicago Link Ltd., FD 34000 (STB served June 15, 2001), where the Board made clear that parties can request trackage rights and other similar remedies as “requests for a condition” without the need to file a responsive application.

If an interested party can demonstrate that the harms that would be caused by an unconditioned CN/WC transaction can best be remedied by relief such as trackage rights or inclusion, such relief -- which would ordinarily be sought by responsive application, see 49 CFR 1180.3(h) -- is not prohibited simply because the CN/WC application has been accepted as a minor transaction.

\* \* \*

Great Lakes (and any other interested party) will have the opportunity in their June 25, 2001 filings to attempt to show harm to competition and seek appropriate relief.

Nothing we say here should be taken to indicate any view on our part as to whether any such relief should or should not be granted. What we say reflects nothing more than our conviction that, although we have accepted the CN/WC application as a minor transaction, every interested party must be given a full and fair opportunity to seek relief that the party contends is necessary to remedy the harms that the party

believes would otherwise be caused by an unconditioned CN/WC transaction, which does not necessitate the requested waiver.

Id., 2001 STB LEXIS 560, \*4-5. Accordingly, it is not necessary to re-designate the Transaction as significant in order to allow CNJ to file any evidence of competitive harm and request, as a competitive fix, trackage rights or some other form of relief. Designation of the Transaction as minor does not therefore prejudice CNJ in anyway.

### CONCLUSION

Other than CNJ and Nasca, there is no opposition to treatment of the Transaction as a minor transaction. In fact, since its relatively recent announcement, the proposed Transaction already has garnered significant public support from a broad range of shippers, short lines, and governmental entities. CNJ's request to either re-designate the Transaction as significant or reject the Application outright should be denied. CNJ represents no party with a direct interest in this proceeding, its claims are speculative and unsupported, and its arguments are contrary to STB precedent.

Respectfully submitted,

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Attorneys for Norfolk Southern Railway Company

December 10, 2014

**VERIFICATION**

I, Bengt Mutén, verify under penalty of perjury that I have read Norfolk Southern Railway Company's "Reply To Opposition To Procedural Schedule And Motion To Reject Application" and that the facts stated therein in footnote 9 are true and correct.

A handwritten signature in black ink, appearing to be 'Bengt Mutén', written over a horizontal line.

Bengt Mutén



**CERTIFICATE OF SERVICE**

I hereby certify that I have served a copy of the foregoing "Reply To Opposition To Procedural Schedule And Motion To Reject Application" (NS-6) in STB Finance Docket No. 35873, 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 present parties of record.



William A. Mullins  
Attorney for Norfolk Southern Railway Company

December 10, 2014