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May 12, 2015

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.,
FD 35873*

Dear Ms. Brown:

Enclosed is Norfolk Southern Railway Company's ("NS") "Reply to Samuel J. Nasca's Motion to Compel Production of Chicago Lease Agreement" (NS-17) in response to the April 22, 2015 "Motion to Compel Production of Chicago Lease Agreement" filed by Samuel J. Nasca on behalf of SMART/Transportation Division, New York State Legislative Board 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.

Respectfully submitted,



William A. Mullins
Attorney for Norfolk Southern Railway Company

Enclosures

cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35873

NORFOLK SOUTHERN RAILWAY COMPANY

- ACQUISITION AND OPERATION -

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

**REPLY IN OPPOSITION TO SAMUEL J. NASCA'S MOTION TO COMPEL
PRODUCTION OF CHICAGO LEASE AGREEMENT**

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**Attorneys for Norfolk Southern
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May 12, 2015

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35873

NORFOLK SOUTHERN RAILWAY COMPANY

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PRODUCTION OF CHICAGO LEASE AGREEMENT**

INTRODUCTION

Norfolk Southern Railway Company (“NS”) hereby replies in opposition to the April 22, 2015 “Motion to Compel Production of Chicago Lease Agreement” (“Motion”) filed by Samuel J. Nasca on behalf of SMART/Transportation Division, New York State Legislative Board. The Motion asks the Surface Transportation Board (“Board”) to order NS to produce a lease agreement between Indiana Harbor Belt Railroad Company (“IHB”) and NS involving track known as the Old Hammond Industrial Track located in the vicinity of Chicago and which is the subject of an entirely separate and wholly unrelated transaction in which IHB sought authority to lease the Old Hammond Industrial Track.¹ Rather than filing discovery in that proceeding, the Motion seeks to compel the discovery of that lease in this proceeding. The Board should deny the Motion. The IHB-NS lease is not relevant to this proceeding; and even if it were relevant, there are no further procedural opportunities for additional filings at this time for which any

¹ Indiana Harbor Belt Railroad Company – Lease and Operation Exemption – Rail Line of Norfolk Southern Railway Company, FD 35910, 80 Fed. Reg. 17541 (April 1, 2015).

arguments related to the lease could be presented. It is also untimely because there is no pending petition to reopen.

ARGUMENT

I. THE IHB-NS LEASE IS NOT RELEVANT TO THIS PROCEEDING.

In Board proceedings, parties are entitled to discovery regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding. To be relevant, “means that the information might be able to affect the outcome of a proceeding.”² Nasca bears the burden of establishing that production of the lease might affect the outcome of this proceeding.³ Nasca has not met that burden. Any information contained within the lease would not affect the outcome of this proceeding.

As the Board is aware, in this proceeding, NS has sought approval for its acquisition and operation of 282.55 miles of Delaware and Hudson Railway Company, Inc.’s (“D&H”) rail lines in Pennsylvania and New York, in addition to modification of certain existing trackage rights over D&H lines (collectively, the “Transaction”). The Transaction relates to operational changes in Pennsylvania and New York.

Rather than arguing how the lease might affect the outcome of this Transaction so as to justify a relevancy argument, Nasca instead devotes four pages of argument to discussing issues related to the Chicago rail service issues, including Chicago area congestion, the Board’s institution of the EP No. 724 Proceeding, CP and NS’s execution of a memorandum of

² Waterloo Ry.—Adverse Aban.—Lines of Bangor and Aroostook R.R. and Van Buren Bridge Co. in Aroostook Cnty., Me., AB 124 (Sub-No. 2), et al. (STB served Nov. 14, 2003).

³ See Sierra Railroad Co. and Sierra Northern Railway v. Sacramento Valley Railroad Co., LLC, McClellan Business Park, LLC, and County of Sacramento, FD 42133 (STB served Apr. 19, 2012) (denying a Motion to Compel where movant did not show that information sought would be relevant in determining the issue before the Board).

understanding developed in connection with CP's restructuring of its Northeastern US lines with D&H and NS in 2005,⁴ and the alleged national importance of this Transaction. Motion at 4-8. After pontificating on these unrelated Chicago issues, Nasca finally gets to the point and claims that the lease "may avoid the necessity for approval of the NS/D&H transaction" or that the lease "may be a form of inducement or other factor for the NS/D&H transaction." Motion at 7. Neither of these statements are true or accurate, but even if they were, production of the precise terms of the lease would not affect the outcome of this proceeding. Nasca can make his points, and has, without the need to view the particular terms of the agreement.

Clearly, Nasca is concerned about Chicago rail operations, but concern over Chicago operations without connecting any such concerns to the operational and competitive impacts of the Transaction does not justify compelling production of the IHB-NS lease agreement. Having failed to demonstrate why the specific terms of the lease are relevant to this proceeding or how the changes in Chicago will somehow impact the competitive or operational evidence already provided in this Transaction, the Motion must be denied. See Appl. of the Nat'l R. R. Passenger Corp. Under 49 US C. § 24308(a)-Can. Nat'l Ry., FD 35743, 2014 STB LEXIS 94, at *14-15 (STB served Apr. 15, 2014) ("Nat'l Passenger") (denying motion to compel production of operating agreements where such agreements were unlikely to produce evidence relevant to the subject matter of the proceeding); Nat'l Passenger, slip op. at 9-10 (STB served Sept. 23, 2014) (denying a motion to compel in part because the movant, "failed to establish the relevance of documents," and failed to "demonstrate[] that such documents [we]re relevant to the issue in th[e] proceeding").

⁴ Delaware and Hudson Railway Company, Inc. – Discontinuance of Trackage Rights – Between Lanesboro, PA and Buffalo, NY, AB-156 (Sub-No. 25) (STB served Jan. 19, 2005)

II. THE MOTION IS UNTIMELY BECAUSE THE EVIDENTIARY PERIOD IS CLOSED AND THERE IS NO PENDING PETITION TO REOPEN

The Motion should also be denied because it is untimely. The discovery period in the proceeding has concluded, and there are no further procedural opportunities for Nasca to submit additional filings. Under the procedural schedule published by the Board, the end of the evidentiary record occurred on March 31, 2015, which satisfies the requirement in 49 U.S.C. §11325(d)(2) that the Board conclude any evidentiary proceedings by the 105th day after publication of the Federal Register notice, which occurred on December 22, 2014. Thus, even if the lease was relevant, which it is not, the record is complete and any arguments related to the lease are not timely.

Perhaps acknowledging that his Motion is untimely, Nasca nonetheless claims his Motion is timely because he could file a petition to reopen based upon new evidence at any time. While the lease may or may not be relevant in the context of a petition to reopen, Nasca has not filed such a petition to reopen nor has he filed discovery in the context of such a petition. Until such a petition is filed and discovery sought in that context, the Motion remains untimely, especially when the evidentiary period here is closed and the decision on the merits is set to be issued in less than a week. There is simply no reason to compel production of a document that cannot be submitted until there is a pending motion for which the document might be relevant.

Furthermore, even if Nasca were to file a petition to reopen, to justify production, he would still have to explain in much more detail the respects to which actions being undertaken in Chicago would somehow result in a different outcome in this proceeding in order to justify production of the lease. Instead, here, and at best, he has only offered conjecture, not evidence to support his Motion. Such conjecture does not show that the lease might affect the outcome of this proceeding so as to justify its production, even in the context of a petition to reopen.

CONCLUSION

In conclusion, the Board should deny the Motion. Nasca has failed to demonstrate that the IHB-NS lease is relevant to this proceeding. In addition, because the evidentiary record is complete, it would be futile to require production of the lease when there are no further procedural opportunities for additional filings based upon that lease. Finally, until such time as there is a pending motion to reopen and relevant discovery filed, the Motion is premature and untimely.

Respectfully submitted,

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Attorneys for Norfolk Southern Railway
Company

May 12, 2015

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of "Reply to Samuel J. Nasca's Motion to Compel Production of Chicago Lease Agreement" (NS-17) in STB Finance Docket No. 35873, by first class mail, properly addressed with postage prepaid, or via more expeditious means of delivery, upon all parties of record.


William A. Mullins
Attorney for Norfolk Southern Railway Company

May 12, 2015