

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-156 (Sub-No. 25X)

DELAWARE AND HUDSON RAILWAY COMPANY, INC. — DISCONTINUANCE OF TRACKAGE RIGHTS — IN SUSQUEHANNA COUNTY, PA AND BROOME, TIOGA, CHEMUNG, STEUBEN, ALLEGANY, LIVINGSTON, WYOMING, ERIE, AND GENESEE COUNTIES, NY

STB Finance Docket No. 34561

CANADIAN PACIFIC RAILWAY COMPANY — TRACKAGE RIGHTS EXEMPTION — NORFOLK SOUTHERN RAILWAY COMPANY

STB Finance Docket No. 34562

NORFOLK SOUTHERN RAILWAY COMPANY — TRACKAGE RIGHTS EXEMPTION — DELAWARE AND HUDSON RAILWAY COMPANY, INC.

Decided: January 19, 2005

This decision grants a petition for exemption to discontinue trackage rights in STB Docket No. AB-156 (Sub-No. 25X), subject to the standard labor protective conditions in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979) (Oregon Short Line), and denies petitions to revoke the exemptions for trackage rights in STB Finance Docket Nos. 34561 and 34562.¹ The carriers involved here have entered into a series of operational agreements — some of which require our authorization and some of which do not — to streamline and enhance their operations in U.S. rail corridors. Although the agreements were apparently negotiated as a single package, the set of transactions for each corridor stands on its own. Collectively, these transactions do not involve a consolidation or corporate restructuring that would require our authorization. Because none of these transactions are anticompetitive or otherwise contrary to the public interest, we will deny the petitions to

¹ While the above-captioned cases embrace three distinct proceedings, they involve the same parties, and overlapping issues and geographical boundaries. For that reason, and because of the common issues that cut across all three cases, while not consolidated, they are being dealt with in one decision for administrative convenience.

revoke the trackage rights transactions, and we will permit the discontinuance to go forward, all of which are subject to the appropriate labor protective conditions.

BACKGROUND

Delaware & Hudson Railway Company, Inc. (D&H), a subsidiary of Canadian Pacific Railway Company (CP),² is a financially struggling carrier that operates in the Northeast United States. As pertinent here, through trackage rights and switching arrangements with other carriers, D&H handles freight for its own account and also acts as an overhead “bridge” carrier on the so-called Southern Tier Line. The Southern Tier Line refers to lines of Norfolk Southern Railway Company (NS) between Binghamton and Buffalo, NY, and connecting tracks in Buffalo. D&H currently interchanges traffic directly with the following carriers whose lines connect to, or are accessed by D&H, via the Southern Tier Line: (1) NS at SK Yard, Buffalo; (2) CSX Transportation, Inc. (CSX) at Frontier Yard, Buffalo; (3) Buffalo and Pittsburgh Railroad at South Buffalo, NY; (4) Buffalo Southern Railroad at South Buffalo; (5) South Buffalo Railroad at South Buffalo; (6) New York & Lake Erie Railroad at South Buffalo; (7) Depew, Lancaster & Western Railroad Co. at Depew, NY; (8) Rochester & Southern Railroad at Silver Springs, NY; (9) Wellsboro & Corning Railroad Company at Gang Mills, NY; and (10) Owego Harford Railway, Inc. (OHRY) at Owego, NY. Additionally, D&H has commercial access to industries in the Buffalo Terminal Area via switching by NS and CSX.

The trackage rights and switching privileges with other carriers, originally granted to D&H’s predecessor, arose out of the “Final System Plan” formulated in the 1970s by the United States Railway Association (USRA) to preserve a competitor to the then-newly formed Consolidated Rail Corporation (Conrail) in certain areas of the Northeast. However, the acquisition and division of Conrail in 1998 and 1999 by and between NS and CSX³ reduced D&H’s role as a bridge carrier for both north-south and east-west traffic by producing direct competition from NS over the Southern Tier Line and indirect competition from CSX over a parallel route between Buffalo and Albany. In addition, D&H faces ongoing intermodal competition from motor carriers. Although D&H/CP continue to serve Buffalo area industries through switching, D&H’s current trackage rights operations on the Southern Tier Line consist of only one train per day in each direction.

Given its limited use of the Southern Tier trackage rights, D&H began exploring other ways that it and its parent (CP) could make their operations more efficient. Given NS’s ownership of several

² In this decision, D&H and CP will sometimes be referred to collectively as D&H/CP.

³ See CSX Corp. et al. — Control — Conrail Inc. et al., 3 S.T.B. 196 (1998) (Merger Dec. No. 89), clarified and modified (Decision No. 96) (STB served Oct. 19, 1998), aff’d sub nom. Erie-Niagara Rail Steering Comm. v. STB, 247 F.3d 437 (2d Cir. 2001).

lines and facilities in the area, NS was in a position to help D&H achieve its objectives. At the same time, NS had operational issues of its own — its operations between eastern U.S. points and the Quebec/Canadian Maritime provinces are inefficient and circuitous — and those issues could be addressed by D&H, which owns lines in the Rouses Point, NY area that could be used to help NS rationalize those trans-border operations.

Accordingly, to help NS achieve its objective, and to improve the efficiency of D&H's operations, preserve its market reach, and enhance its prospects of achieving profitability, D&H, CP (along with another U.S. subsidiary, the Soo Line Railroad Co.) and NS entered into a Memorandum of Understanding (MOU) on June 30, 2004, with respect to a variety of transactions covering the parties' operations in the Northeast and Mid-Atlantic, as well as in the Chicago-Detroit corridor. The parties subsequently entered into definitive agreements governing transactions in the Buffalo-Binghamton and Rouses Point-Binghamton corridors. As noted above, some of these transactions (such as trackage rights) require our authorization, whereas others (such as haulage arrangements) do not.

As pertinent here, the Buffalo-Binghamton cluster of agreements provide for D&H to discontinue its trackage rights over NS's line between Lanesboro, PA, and Buffalo, including the Southern Tier Line; NS to provide haulage services for D&H over the Southern Tier; D&H to assign certain of its trackage rights in and around NS's Bison Yard in Buffalo to its parent (CP) to permit interchange with NS; NS to provide switching services to D&H in Buffalo to preserve D&H's commercial access to customers and connecting carriers; and D&H to give up its lease at NS's SK Yard in Buffalo.

The Rouses Point-Binghamton cluster of agreements provide for NS to reroute Canadian National Railway Co. (CN)-NS interline traffic moving between Quebec/Canadian Maritime provinces and the Eastern United States from its current Buffalo-Binghamton routing to a more efficient (and 300-mile shorter) Rouses Point-Binghamton routing; D&H to provide haulage services to NS between Rouses Point and Saratoga Springs, NY; NS to acquire trackage rights over D&H between Saratoga Springs and Binghamton; and D&H to provide blocking and switching services for the CN-NS interline traffic, on behalf of NS, in Binghamton.

The upshot of these various agreements is that D&H will give up its light-density trackage rights over the Southern Tier Line while either it or its parent (CP) will continue to serve all of their local customers that originate or terminate traffic in the Buffalo and Binghamton area, and, at least for now, the overhead customers that use the Southern Tier Line to move their traffic to and from points beyond; and NS will be able to interchange with CN over a shorter, more efficient route.

A. Procedural History

By separate notices filed in STB Finance Docket Nos. 34561⁴ and 34562⁵ on October 1, 2004, NS and CP invoked the class exemption procedures of 49 CFR 1180.2(d)(7) and 1180.4(g) to obtain Board authorization of certain trackage rights. United Transportation Union-New York Legislative Board (UTU-NY) and the Brotherhood of Locomotive Engineers and Trainmen, a Division of the Rail Conference of the International Brotherhood of Teamsters (BLET), have filed

⁴ In STB Finance Docket No. 34561, CP invoked the class exemption to acquire, by assignment from its affiliate, D&H, overhead trackage rights over the following lines in Buffalo: (1) NS's Southern Tier Line at milepost 413.0± and the western end of the Southern Tier Line at milepost 419.8± (including tracks into NS's Bison Yard), a distance of approximately 6.8 miles; (2) NS's Bison Running Track between the point of connection with the Southern Tier Line at milepost 419.8± and the point of connection with the lines of CSX at milepost 423.3±, a distance of approximately 3.5 miles; and (3) NS's Howard Street Running Track between the point of connection with the Bison Running Track at milepost 420.15± and the point of connection with the lines of CSX at milepost 422.3±, a distance of approximately 2.15 miles, for a total distance of approximately 12.45 miles in Buffalo. CP has informed the Board that these overhead trackage rights will not be implemented until D&H is authorized to discontinue the overhead trackage rights covered by its petition for exemption in STB Docket No. AB-156 (Sub-No. 25X).

⁵ In STB Finance Docket No. 34562, NS invoked the class exemption to acquire, from D&H, overhead trackage rights over the following lines: (1) between milepost 37.10± of D&H's Canadian Main Line in Saratoga Springs, NY, and the point of connection between D&H's Canadian Main Line and D&H's Freight Main Line at CPF 480, located at milepost 21.70± of D&H's Canadian Main Line, a distance of approximately 15.4 miles; (2) D&H's Freight Main Line between milepost 480.36± and milepost 611.15± in Binghamton, NY, a distance of approximately 130.79 miles; and (3) D&H's Freight Main Line between milepost 611.15± and milepost 620.20± (including tracks into and within D&H's East Binghamton Yard) in Binghamton, a distance of approximately 9.05 miles, for a total distance of approximately 155.24 miles. NS intended to commence operating pursuant to these trackage rights in November 2004.

petitions to revoke the trackage rights exemptions, which became effective on October 27, 2004.⁶ On November 12, 2004, CP and D&H, jointly, and NS filed replies to the petitions to revoke.

Also, by petition filed on October 1, 2004 in STB Docket No. AB-156 (Sub-No. 25X),⁷ D&H seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to discontinue overhead trackage rights over approximately 229.5 miles of railroad line owned and operated by NS between Lanesboro, PA, and Buffalo, NY.⁸ UTU-NY, BLET, and OHRY, a Class III rail carrier⁹ that connects with the Southern Tier Line and interchanges with both NS and D&H, oppose the petition. The State of New York, acting by and through the New York Department of Transportation (NYDOT), supports the petition.

⁶ Ordinarily, the notices would have become effective on October 8, 2004 (7 days after they were filed). However, in a decision served on October 7, 2004, the Board temporarily stayed the effective dates of the exemption authority in those proceedings, until October 27, 2004, to allow for the orderly consideration of a pending stay request. In a decision served on October 27, 2004, petitions to stay the effectiveness of the trackage rights exemptions were denied and the exemptions became effective.

⁷ Notice of this filing was served and published in the Federal Register on October 21, 2004 (69 FR 61904).

⁸ D&H seeks authorization to discontinue rail freight operations via overhead trackage rights over the following lines between Lanesboro, PA, and Buffalo: (1) NS's line between milepost 189.8+ in Lanesboro and CP Coles at milepost 210.9+ in Binghamton; (2) NS's Southern Tier Line between milepost 217.0+ in Binghamton, and milepost 419.8+ in Buffalo; (3) NS's Bison Running Track between the point of connection with the Southern Tier Line at milepost 419.8+ and the point of connection with the lines of CSX at milepost 423.3+ in Buffalo (including NS's SK Yard, which D&H currently operates under an agreement between D&H and Conrail dated February 1, 1984), a distance of approximately 3.5 miles; and (4) NS's Howard Street Running Track between the point of connection with the Bison Running Track at milepost 420.15+ and the point of connection with the lines of CSX at milepost 422.3+, a distance of approximately 2.15 miles. D&H will retain trackage rights over NS's line between milepost 210.9+ and milepost 217.0+ in Binghamton because D&H requires the use of that segment for ongoing operations in the Binghamton terminal area.

⁹ Class III carriers are those with annual operating revenues of not more than \$20 million, in 1991 dollars. 49 CFR 1201, General Instruction 1-1.

B. Positions of the Parties

1. The Unions.

The Unions argue that the transactions in these three proceedings are three components of a larger consolidation or coordination of properties among NS, CP and D&H that amounts to a major regional restructuring of properties and operations, requiring a single application for Board authorization rather than a series of separate exemptions. They point to the MOU as demonstrating that these transactions are all interdependent.

The Unions express concern that jobs will be lost due to the proposed discontinuance and certain changes to yard operations associated with that discontinuance. Their view is that the standard Oregon Short Line employee protective conditions that apply to discontinuances and the N&W/Mendocino¹⁰ conditions that apply to trackage rights arrangements — both of which provide benefits, including wage protection for up to 6 years, to adversely affected employees — do not fully protect employees from job losses. The Unions argue that, if we authorize these transactions, we must impose the New York Dock¹¹ employee protective conditions that apply to consolidations.

The Unions further argue that the various transactions should not be allowed to occur at all because they are anticompetitive. UTU-NY asserts that converting D&H trackage rights to haulage rights (i.e., having NS carry goods for shippers on D&H's behalf) is not sufficient to retain D&H as a competitor to NS in the Northeast. And both UTU-NY and BLET assert that permitting the discontinuance of trackage rights would contravene Congressional intent to maintain competition in this region, as evidenced by the Final System Plan's grant of trackage rights over this property. BLET also argues that D&H employees should be permitted to follow their work to NS and that CP is now operating into Buffalo unlawfully.

2. Owego Harford Railway, Inc.

OHRV interchanges traffic with D&H at Owego, NY, and with NS at other locations. The traffic interchanged with D&H has included rock salt, scrap metal, and LPG gas, and has ranged between 35 and 889 carloads annually over the last 3 years. OHRV would like D&H to continue

¹⁰ Norfolk and W. Ry.—Trackage Rights—BN, 354 I.C.C. 605, 610-15 (1978) (N&W), as modified in Mendocino Coast Ry.—Lease and Operate, 360 I.C.C. 653, 664 (1980), aff'd sub nom. Railway Labor Exec. Ass'n v. United States, 675 F.2d 1248 (D.C. Cir. 1982) (Mendocino).

¹¹ New York Dock Ry.—Control—Brooklyn Eastern Dist., 360 I.C.C. 60 (1979), aff'd sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979).

direct operations at Owego rather than a haulage arrangement. OHRY argues that the discontinuance should be disallowed so that shippers and connecting Class III carriers would not be limited to service by only one Class I rail carrier (NS).¹²

3. The Proponent Railroads.

The proponent railroads (D&H, NS, and CP) acknowledge that they do not intend for the CP Buffalo-Binghamton trackage rights over NS in STB Finance Docket No. 34561 to be used until the effective date of the discontinuance of D&H's trackage rights proposed in STB Docket No. AB-156 (Sub-No. 25X). But the railroads assert that those transactions are independent of the NS Saratoga Springs-Binghamton trackage rights over D&H in STB Finance Docket No. 34562. Moreover, the railroads assert that each of these transactions has a different purpose. The CP trackage rights in the Buffalo-Binghamton corridor would allow CP to bring its trains to and from NS's Bison Yard to continue providing local shippers with the type of service they have historically been receiving. The NS acquisition of trackage rights in the Saratoga Springs-Binghamton corridor would simply reroute certain CN-NS traffic from a much longer routing via Buffalo to a shorter, more efficient route between Rouses Point and Binghamton.

The proponent railroads argue that the new trackage rights arrangements would result in increased, not diminished, competition, because they would ultimately improve the efficiency and profitability of D&H and enhance NS's operations that connect with CN. CP/D&H assert that the Final System Plan did not require perpetual operation of the Southern Tier Line trackage rights.

The proponent railroads argue that the Oregon Short Line and N&W/Mendocino conditions provide the appropriate levels of labor protection to be imposed on these transactions, that those conditions provide the same substantive protections as the New York Dock conditions, and that the net effect of both trackage rights transactions would be to add jobs on the respective railroads. Finally, CP/D&H dispute both BLET assertions regarding D&H employees following their work and CP's operations into Buffalo.

4. New York Department of Transportation.

NYDOT states that, after reviewing the documents submitted in this proceeding, it is satisfied that, if implemented in accordance with the operative agreements, the proposed discontinuance of trackage rights should not result in a reduction in freight transportation options currently available for

¹² Class I carriers are those with annual operating revenues of at least \$250 million, in 1991 dollars. 49 CFR 1201, General Instruction 1-1.

D&H shippers or a diminution of the current capabilities of carriers other than NS to interchange traffic with D&H.

PRELIMINARY MATTERS

UTU-NY has requested that the MOU, which was filed under seal, be made available to the public. This request will be denied, because UTU-NY, which has access to the MOU under the protective order issued in this proceeding on November 7, 2004, has not explained why the MOU should be made public.

We declined to hold an oral hearing in this proceeding in a decision served on November 10, 2004. However, we grant BLET's motion (which CP and D&H oppose) for leave to file a statement in support of its November 10 comments. We are satisfied that no party will be prejudiced and that accepting BLET's statement provides a more complete record.

We also grant UTU-NY's motion to strike footnote 12 of the D&H/CP November 12, 2004 reply, which UTU-NY states incorrectly describes the internal structure of the UTU. The footnote may be stricken, as it would not add to our understanding of the issues presented.

DISCUSSION AND CONCLUSIONS

A. The Broader Railroad Restructuring Argument

Ordinarily new trackage rights arrangements require Board authorization under 49 U.S.C. 11323(a)(6) (or exemption under 49 U.S.C. 10502, which CP and NS have sought), and Board authorization is also needed for a discontinuance of trackage rights under 49 U.S.C. 10903 (or an exemption under section 10502, which D&H has sought). These transactions, while filed separately, were clearly regarded by the parties to the MOU as related and, to some degree, interdependent. As a result, the Unions argue that the entire series of transactions covered by the MOU constitutes a single, broader railroad restructuring requiring Board authorization.

How the parties regard transactions for negotiating or other purposes is distinct from whether the transactions should be considered as a carrier consolidation as set forth under section 11323 of the Interstate Commerce Act.

Regarding the Unions' contention that, taken as a whole, these constitute a single transaction, many business deals involving multiple parties and multiple properties can be contingent on all of the pieces actually falling into place simply because the quid pro quo negotiated between the parties would be disrupted if any component part were removed. Here, while the discontinuance over the Southern

Tier Line and one of the two trackage rights transactions are closely related geographically, they are distinct from the Rouses Point-Binghamton agreements, which are designed to enhance NS's efficiency with respect to CN-NS traffic that has not previously been handled by D&H.

Even if we agreed with the Unions to review the matter as a whole, that would not end the inquiry. The Board would still have to determine whether the matter would be encompassed by the statutory provisions the Unions raise. The Unions would have us conclude that, considered as a whole, the transaction would fall within the provisions of subsections 11323(a)(1) or (a)(2). We do not agree.

Section 11323 sets forth six specific situations when Board approval is required for a transaction. UTU-NY argues that these transactions fall under subsection (a)(1). Subsection (a)(1) applies only to a consolidation or merger of the properties or franchises of at least two rail carriers into one corporation for combined ownership, management, and operation of the previously separately owned properties. BLET argues that these transactions should be taken as a whole and the entire matter considered pursuant to subsection (a)(2), which applies to a "purchase, lease or contract to operate the property of a carrier by any number of carriers." There is no purchase or lease of a rail line here. Nor do any of the agreements constitute a contract to operate within the meaning of subsection (a)(2), which involves an agreement of one carrier to take over the operation of **another carrier's line** for that carrier. See Canadian Nat'l Ry. — Contract to Operate — Grand Trunk W. R.R., Finance Docket No. 32640 (ICC served Apr. 18, 1995). Such a contract is different from a trackage rights arrangement, which is expressly covered by subsection (a)(6) and which does not involve the tenant operating the host carrier's line on the host carrier's behalf. Under the haulage agreement, NS will move traffic for D&H's account, but it will be doing so **over its own line**; it will not be operating a D&H line for D&H. Thus, these transactions do not come within the scope of subsection (a)(2).

In 1988, our predecessor agency, the Interstate Commerce Commission (ICC), considered an issue similar to that raised here — whether a series of leases and trackage rights transactions undertaken by Guilford Transportation Industries, Inc. (GTI) and its rail carrier subsidiaries pursuant to the class exemption procedures amounted to the equivalent of a rail carrier consolidation. D&H Ry. — Lease & Trackage Rights Exempt. — Springfield Term., 4 I.C.C.2d 322 (1988) (Springfield Terminal). However, similar to our conclusion here, in Springfield Terminal the ICC did not find the transactions to be the equivalent of a larger railroad consolidation under section 11323, despite the interrelated nature of those transactions. 4 I.C.C.2d at 328.

Finally, UTU-NY asserts that there will be a combination of facilities at Buffalo because D&H, upon discontinuance of its trackage rights in the Buffalo area, will discontinue use of the SK Yard leased from NS. But these operational modifications do not come within the scope of any part of section 11323(a).

Therefore, no matter how the Board views the transactions proposed here – either as distinct or related transactions – the Board would still have to consider the trackage rights requests pursuant to 49 U.S.C. 11323(a)(6) and the discontinuance of trackage rights request pursuant to 49 U.S.C. 10903.

B. The Request to Revoke the Trackage Rights

The Unions seek revocation of the authority for the trackage rights, which are covered by a class exemption. Under 49 U.S.C. 10502(d) and the terms of the class exemption, we may revoke the exemption with respect to these proceedings if necessary to carry out the Rail Transportation Policy set forth in 49 U.S.C. 10101. In considering whether to do so, we look to the statutory provisions that apply without the exemption. Minnesota Comm. Ry. Inc. — Trackage Exempt. — BN RR. Co., 8 I.C.C.2d 31, 35-36 (1991). In this case, the pertinent statutory provision is 49 U.S.C. 11324(d), under which we must approve the transaction unless we find that a substantial lessening of competition would likely result and that the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

The discontinuance of the trackage rights at issue here was precipitated in part by robust competition in the Southern Tier that has developed since the NS/CSX acquisition and division of Conrail, to the point that D&H's share of traffic in that area has shrunk to only one trainload per day. CP's trackage rights will promote the efficiency of its operations in Buffalo, and NS's trackage rights will shorten the routing and improve the efficiency of CN-NS interline traffic moving between Eastern Canada and the Eastern United States. In so doing, the new trackage rights will further competition in the Buffalo-Binghamton and Rouses Point-Binghamton corridors. There is nothing in the record to support claims to the contrary, and the area's local shippers, who will continue to be served through the trackage rights, have not expressed any concerns or opposition to the new arrangements.

The Unions argue that the new trackage rights arrangements are anticompetitive because they will facilitate D&H's discontinuance of its current trackage rights over the Southern Tier Line. Whether the discontinuance of the current D&H trackage rights should be allowed is a separate issue, discussed below. But even if we were persuaded that the current D&H trackage rights should not be discontinued, it would not be necessary or appropriate to disallow these new trackage rights, which would not be anticompetitive but would instead protect or enhance service to shippers.

C. The Request For Discontinuance

We turn now to the proposed discontinuance of D&H's current trackage rights over the Southern Tier Line. Under 49 U.S.C. 10502, we must grant the requested exemption if we find that: (1) regulation is not necessary to carry out the Rail Transportation Policy set forth in section 10101; and (2) either (a) the transaction or service is of limited scope or (b) regulation is not necessary

to protect shippers from an abuse of market power. The Unions contend that we should not grant the exemption, but we are persuaded that the statutory criteria are met and that the discontinuance should be allowed.

Significantly, we find that denying the exemption is not necessary to protect shippers from an abuse of market power. The trackage rights to be discontinued are for overhead traffic only; D&H will be able to continue to serve all of its local customers (customers whose traffic originates or terminates in the Buffalo area) through switching, and all overhead shippers to which it has commercial access via the Southern Tier Line will continue to receive D&H service under the haulage agreement so long as D&H and NS continue that arrangement. Board authorization is not required for the initiation or termination of a haulage arrangement,¹³ because such arrangements are entirely voluntary on the part of the carriers and no regulatory rights and responsibilities are created that would require the carriers to keep the arrangement in place. Nevertheless, the agency has recognized that haulage rights can mitigate the impact of a trackage rights discontinuance.¹⁴

Even without the haulage arrangement here, we are satisfied that there will be sufficient competition in the region through CSX's service over a parallel line across New York, and through intermodal competition. The net effect will be positive, increasing efficiency of rail service in some corridors, and no area will be left without adequate transportation options. NYDOT is satisfied with the competitive field that these transactions will produce, and no shippers have opposed the proposed discontinuance. The region is better served with a stronger D&H than with a carrier that would continue to struggle financially if it were required to continue operations over lines with minimal traffic. And the efficiencies gained by the remaining carriers in the area will enable them to better meet significant transportation needs.

The Unions next argue that the D&H trackage rights on the Southern Tier Line must be preserved because they were initially developed as part of the Final System Plan. However, USRA,

¹³ See KNRECO, Inc., d/b/a Keokuk Junction Railway Acquisition and Operation Exemption — The Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 30918 (ICC served Apr. 28, 1988) (car haulage agreement between rail carriers does not constitute trackage rights agreement and does not require regulatory authorization), aff'd sub nom. Simmons v. I.C.C., 871 F.2d 702 (7th Cir. 1989).

¹⁴ See Burlington Northern Railroad Company — Abandonment and Discontinuance of Trackage Rights Exemption — In Greene, Sumter, Choctaw, Washington, and Mobile Counties, AL, Docket No. AB-6 (Sub-No. 347X) (ICC served July 15, 1993); Burlington Northern Railroad Company — Discontinuance of Trackage Rights Exemption — Between East Dubuque, IL and Dubuque, IA, Docket No. AB-6 (Sub-No. 340X) (ICC served Sept. 10, 1992).

the architect of that plan, envisioned that the Final System Plan was not the final word as to the structure of railroad operations in the Northeast for all time, and that future changes were sure to occur in response to evolving economic conditions.¹⁵ We do not believe that this discontinuance will alter the current competitive landscape in a significant way. Nevertheless, to ensure that the all of the shippers and connecting carriers to which D&H has commercial access via the Southern Tier Line are aware of these transactions, we will require D&H to serve a copy of this decision on them within 5 days of the service date of this decision and certify to us that it has done so.

Finally, requiring more detailed regulatory scrutiny of this proposal is not necessary to carry out the Rail Transportation Policy. Requiring D&H to prepare a full application under section 10903 would be costly to the already financially strapped D&H and would contravene the policy in section 10101(7) to reduce regulatory barriers to exit. Moreover, granting this exemption will foster sound economic conditions and encourage efficient railroad management (see section 10101(9)) by allowing D&H to be relieved of its responsibility to continue financially marginal overhead trackage rights operations.

D. Employee Protective Conditions

Under 49 U.S.C. 10502(g), we may not use our exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. It is well settled that the standard conditions that we impose for discontinuance of trackage rights are the Oregon Short Line conditions,

¹⁵ See U.S.R.A. Final System Plan, Vol. I, Part I, Introduction and Summary, p. 5-6 (1975) (emphasis in original):

USRA's outline of ConRail's operating plan . . . is just that—an outline. It represents a best estimate of how the Association believes the system initially should be set up, although 10 years from now it easily could look very different. Indeed, the Association *could not* make such final determinations, for shippers and other carriers in the Region, acting on their own business instincts and exercising their transportation options, continually will make decisions that will alter any “definitive” plans USRA might adopt at this time.

. . . .

In the longer term, after the ConRail system is established, further sales, mergers, and consolidations of facilities may be desirable. ConRail should not be structured so as to preclude future changes in the industry structure of the Region, if such future changes ultimately are found desirable.

and for trackage rights authorizations they are the N&W/Mendocino conditions.¹⁶ These conditions recognize that these types of transactions can result in the dismissal or displacement of some employees. To mitigate the economic harm to employees, the conditions guarantee affected employees their current wages for up to 6 years. Some employees may have to relocate to retain these protections, but if they do, they are provided with moving expenses as well as other benefits. While we understand that employees and their families often prefer not to relocate, we find no special circumstances here that might call into question the appropriateness of the standard conditions.

The Unions argue that we should impose New York Dock conditions here rather than the Oregon Short Line and N&W/Mendocino conditions. Their position, however, rests on their contention that these three transactions together constitute a railroad restructuring requiring Board authorization under section 11323, an argument we have rejected.

There have been, on rare occasions, extraordinary circumstances in which we or our predecessor, the ICC, have imposed modified or enhanced labor protective conditions on rail carrier transactions. In Springfield Terminal, for example, the ICC enhanced the labor protection that would normally be imposed on lease or trackage rights transactions by adding the requirement that an implementing agreement be negotiated prior to implementation of the transactions. 4 I.C.C.2d at 328-31. The ICC did so because it found that GTI had proceeded in a manner that had undermined GTI's credibility, that GTI had failed to keep its employees fairly apprised of their rights, and that the employees had been substantially injured as a result. 4 I.C.C.2d at 323. Such an extraordinary situation is not present here.

Finally, BLET seeks greater protection for affected employees in this case based on the history of these lines. BLET asserts that, under the Regional Rail Reorganization Act of 1973, D&H's predecessor was required to hire former Erie Lackawanna employees to operate trains via trackage rights over Conrail's Southern Tier Line, and those employees gave up positions on Conrail to follow the work to D&H. If this work is now to be performed by NS, as Conrail's successor, BLET reasons

¹⁶ See, e.g., Indiana & Ohio Ry.—Trackage Rights Exemption—West Centr. Ohio Port Auth., STB Finance Docket No. 34629, at 1 (STB served Dec. 27, 2004); Wisconsin & Southern R.R.—Trackage Rights Exemption—Wisconsin Centr. Ltd., STB Finance Docket No. 34621, at 2 (STB served Dec. 20, 2004) (trackage rights authorizations); The Indiana Rail Road Co.—Abandonment & Discontinuance of Trackage Rights Exemption—In Monroe County, IN, STB Docket No. AB-295 (Sub-No. 5X), at 4 (STB served Oct. 31, 2003); South Orient R.R.—Abandonment & Discontinuance of Trackage Rights—Between San Angelo and Presidio, TX, 3 S.T.B. 743, 762 (1998); CSX Transp., Inc.—Abandonment Exemption—In Raleigh County, WV, STB Docket Nos. AB-55 (Sub-No. 552X) & AB-290 (Sub-No. 201X), at 5 (STB served Mar. 23, 1998) (trackage rights discontinuances).

that NS should be required to let the D&H employees on the line now follow their jobs to NS and join NS's seniority districts with full rights retained and seniority unimpaired. The transfer of operations to D&H to which BLET alludes, however, was the product of a Congressionally imposed regional restructuring of numerous bankrupt Northeastern and Midwestern carriers to form Conrail. The transactions here are not comparable, and BLET has provided no justification for taking such extraordinary action here.

E. Other Matters

BLET also asserts that the CP trackage rights transaction will legitimize CP's current allegedly unauthorized operations into Buffalo. But as CP notes, its trackage rights between the Canadian border and SK Yard were approved in Canadian Pacific Limited and D&H — Trackage Rights Exemption — Consolidated Rail Corporation, Finance Docket No. 31805 (ICC served Dec. 26, 1990).

Because this is a discontinuance proceeding and not an abandonment, we need not consider offers of financial assistance (OFA) to acquire the line for continued rail service, trail use requests, or requests to negotiate for public use of the line. However, the OFA provisions for a subsidy to provide continued rail service (i.e., overhead trackage rights) apply to discontinuances of trackage rights.

This proceeding is exempt from environmental reporting requirements under 49 CFR 1105.6(c)(6) (discontinuance of trackage rights where the line will continue to be operated) and from historic reporting requirements under 49 CFR 1105.8(a) (because exempted by 49 CFR 1105.6(c)(6)). Therefore, this decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition to reconsider our November 10, 2004 decision in STB Docket No. AB-156 (Sub-No. 25X) is denied.
2. UTU-NY's petition to consolidate these proceedings is denied.
3. UTU-NY's motion for public disclosure of the MOU is denied.
4. UTU-NY's and BLET's petitions to revoke the notices of exemption in STB Finance Docket Nos. 34561 and 34562 are denied.
5. UTU-NY's motion to strike is granted.

6. BLET's November 18, 2004 motion to supplement the record is granted.

7. Under 49 U.S.C. 10502, we exempt from the prior approval requirements of 49 U.S.C. 10903 the discontinuance of overhead trackage rights by D&H as described above, subject to the employee protective conditions in Oregon Short Line R. Co. — Abandonment — Goshen, 360 I.C.C. 91 (1979).

8. D&H is directed to serve a copy of this decision on all customers and connecting carriers to which D&H has commercial access to via the Southern Tier Line within 5 days after the service date of this decision and to certify to us that it has done so.

9. An OFA under 49 CFR 1152.27(b)(2) to subsidize continued rail service in STB Docket No. AB-156 (Sub-No. 25X) must be received by the railroad and the Board by January 28, 2005, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by the filing fee, which has increased to \$1,200, effective October 31, 2004. See Regulations Governing Fees for Services Performed in Connection with Licensing and Related Services — 2004 Update, STB Ex Parte No. 542 (Sub-No. 1) (STB served Oct. 1, 2004).

10. OFAs and related correspondence to the Board must refer to STB Docket No. AB-156 (Sub-No. 25X). The following notation must be typed in bold face on the lower left-hand corner of the envelope: **“Office of Proceedings, AB-OFA.”**

11. Provided no OFA to subsidize continued rail service has been received, the exemption in STB Docket No. AB-156 (Sub-No. 25X) will be effective on February 18, 2005. Petitions to stay must be filed by February 3, 2005. Petitions to reopen must be filed by February 14, 2005.

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.
Commissioner Mulvey commented with a separate expression.

Vernon A. Williams
Secretary

Commissioner Mulvey, commenting:

While I vote to approve the draft decision before us today, I am concerned about the procedures used by the railroads to obtain authorization for their operating arrangements, especially the trackage rights transactions here. I find that these dealings, when viewed collectively, constitute a significant engagement among the carriers that will undeniably affect a number of their employees and possibly the rail competitive landscape of southern New York State. I am concerned that the interrelated nature of and the significance of these transactions— though complying with the letter of law—might violate the spirit of the class exemption for trackage rights agreements. Because the parties to the MOU clearly regarded the transactions as related and, to some degree, interdependent, I call into question the argument that the discontinuance is limited in scope. It would have been preferable if the railroads had filed formal applications for approval of these transactions, and if the Board had held a hearing in these proceedings.