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SEC

SERVICE DATE - AUGUST 3, 1999

SURFACE TRANSPORTATION BOARD

Decision

STB Finance Docket No. 33771

DELAWARE AND HUDSON RAILWAY COMPANY, INC.--TRackage  
RIGHTS EXEMPTION--CSX TRANSPORTATION, INC. AND  
NEW YORK CENTRAL LINES LLC

MOTION FOR PROTECTIVE ORDER

Decided: August 2, 1999

As reflected by a verified notice of exemption filed June 18, 1999, in STB Finance Docket No. 33771, CSX Transportation, Inc. (CSXT) and New York Central Lines LLC (NYC) have agreed to grant overhead trackage rights to Delaware and Hudson Railway Company, Inc. (D&H), over lines generally between Schenectady, NY, and Fresh Pond Junction, NY. The lines are owned by NYC and leased to CSXT.<sup>1</sup> The transaction was scheduled to be consummated on or after June 25, 1999. Notice of the exemption was served and published in the Federal Register (64 FR 36968) on July 8, 1999.

By motion filed on July 20, 1999, D&H seeks a protective order under 49 CFR 1104.14 for a Trackage Rights Agreement, submitted under seal, between CSXT and NYC. According to D&H, the proposed protective order is necessary to protect the commercially sensitive data contained in the Trackage Rights Agreement.<sup>2</sup>

On July 27, 1999, CSX Corporation and CSXT (collectively CSX), filed a reply to the motion for protective order. CSX states that, while it has no objection to the application of the requested protective order on the general public, it does object to the extension of the protective order to CSX and its personnel, if that is the intent of D&H's filing. In response to CSX's reply, on

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<sup>1</sup> The scope of these rights and their terms were established by the Board in CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company--Control and Operating Leases/Agreements--Conrail Inc. and Consolidated Rail Corporation, STB Finance Docket No. 33388, Decision Nos. 89, 109, and 123 (STB served July 23, 1998, Dec. 18, 1998, and May 20, 1999, respectively).

<sup>2</sup> D&H initially requested that the Trackage Rights Agreement be designated as highly confidential information, and that only parties to this action who have signed the highly confidential undertaking receive access to the Trackage Rights Agreement. D&H did not initially include a proposed protective order with its motion but did include a proposed highly confidential undertaking.

July 28, 1999, D&H filed a clarification of the motion for protective order. D&H states that it was not its intention to have the protective order apply to the parties to the trackage rights agreement, and that the protective order was intended to apply only to third parties who might wish to obtain access to the agreement.

On July 30, 1999, D&H filed a motion to supplement its motion for protective order filed on July 20, 1999. D&H states that the proposed Protective Order, including a Confidential Undertaking, were inadvertently omitted from the original motion, and has submitted the proposed Protective Order and Confidential Undertaking with this filing. D&H further adds that the proposed Protective Order makes clear that the parties to the Trackage Rights Agreement that is the subject of the instant proceeding are not subject to the constraints of the protective order, and that the designation of the Trackage Rights Agreement is changed from Highly Confidential to Confidential.

The motion, as clarified and supplemented, conforms with the Board's rules at 49 CFR 1104.14 governing requests for protective orders to maintain confidentiality of materials submitted to the Board. Accordingly, the motion for a protective order will be granted, subject to the Protective Order and Undertaking contained in the Appendix. Issuance of the protective order ensures that the railroad's confidential information will be used solely for this proceeding and not for other purposes. As clarified by D&H, CSX and its personnel, and parties to the subject Trackage Rights Agreement, are exempt from the provisions of the protective order.

It is ordered:

1. D&H's motion for a protective order is granted, and the Protective Order and Undertaking in the Appendix to this decision are adopted.
2. As clarified by D&H in its July 28, 1999 motion, and further clarified in its July 30, 1999 supplemental motion, parties to the subject Trackage Rights Agreement do not have to comply with the provisions of the Protective Order.
3. The confidential Trackage Rights Agreement submitted in STB Finance Docket No. 33771 will be kept under seal by the Board and not placed in the public docket or otherwise disclosed to the public, unless the attached Undertaking is executed and the terms of the Protective Order are followed, or unless otherwise ordered by the Board.

STB Finance Docket No. 33771

4. This decision is effective on its service date.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams  
Secretary

APPENDIX

PROTECTIVE ORDER

1. For the purposes of this Protective Order, “confidential information” means the Trackage Rights Agreement between Delaware and Hudson Railway Company, Inc. (D&H), CSX Transportation, Inc. (CSXT), and New York Central Lines LLC (NYC), dated July 12, 1999, and filed July 20, 1999, in STB Finance Docket No. 33771.

2. The confidential information shall be used for the purpose of this and any related Board proceedings, or any judicial review proceeding arising therefrom, and not for any other business, commercial, or other competitive purpose.

3. The confidential information shall not be disclosed in any way or to any person without the written consent of D&H and CSXT and NYC or an order of the Board, except to a person who has executed and agrees to be bound by the terms of the attached Confidential Undertaking prior to receiving access to the confidential information.

4. Any pleading or other document submitted to the Board which contains confidential information must be submitted in accordance with 49 CFR 1104.14, with the notation, “contains confidential information subject to Protective Order, STB Finance Docket No. 33771.”

5. If any party intends to use the confidential information at hearings in this proceeding or in any related Board proceedings, or in any judicial review proceeding arising therefrom, the party shall submit any documents setting forth or revealing such confidential information to the Board, or the reviewing court as appropriate, under seal, and shall accompany such submission with a written request to the Board or the court to (i) restrict attendance at the hearing during discussion of such highly confidential information, and (ii) restrict access to the portion of the record or briefs reflecting discussion of such confidential information, to the parties entitled to view such information in accordance with this Protective Order.

6. Any documents containing the confidential information must be destroyed, and notices of such destruction must be served on the Board at the completion of this and any related Board proceedings, or any judicial review proceeding arising therefrom.

7. All parties, except corporations who are parties to the Trackage Rights Agreement, must comply with all of the provisions stated in this Protective Order unless good cause, as determined by the Board or an appropriate reviewing court, is shown by any party to warrant suspension of any of the provisions hereof.

UNDERTAKING — CONFIDENTIAL MATERIAL

I, \_\_\_\_\_, am \_\_\_\_\_ for \_\_\_\_\_, for whom I am acting in this proceeding. I have read the Protective Order served on \_\_\_\_\_, 1999, governing the executed Trackage Rights Agreement (Trackage Rights Agreement) between Delaware and Hudson Railway Company, Inc. (D&H) and CSX Transportation, Inc. (CSXT) and New York Central Lines LLC (NYC) in STB Finance Docket No. 33771, understand the same, and agree to be bound by its terms. I agree not to use or to permit the use of any Confidential Information obtained from the Trackage Rights Agreement, or to use or to permit the use of any information learned as a result of receiving that document, for any purpose other than the preparation and presentation of evidence and argument in STB Finance Docket No. 33771, any related proceedings before the Surface Transportation Board, or any judicial review proceedings in connection with STB Finance Docket No. 33771 and/or with any related proceedings. I further agree not to disclose any Confidential Information obtained from the Trackage Rights Agreement except to persons who are also bound by the terms of the Protective Order and who have executed Undertakings in the form hereof.

I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of the Trackage Rights Agreement, which is designated or stamped as “CONFIDENTIAL,” that I will take all necessary steps to assure that the Trackage Rights Agreement and its contents be kept on a confidential basis by any outside counsel or outside consultants working with me, that under no circumstances will I permit access to said materials or information by employees of my client or its subsidiaries, affiliates, or owners, and that, at the conclusion of this proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any copies of the Trackage Rights Agreement or documents containing or reflecting information therefrom other than file copies, kept by outside counsel, of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that D&H shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

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Dated: \_\_\_\_\_