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SERVICE DATE - LATE RELEASE OCTOBER 7, 2004

SURFACE TRANSPORTATION BOARD

DECISION

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: October 7, 2004

This decision grants a housekeeping stay of the effective dates of the exemptions in these proceedings.¹

BACKGROUND

By separate notices filed in these proceedings on October 1, 2004, pursuant to 49 CFR 1180.2(d)(7) and 1180.4(g), Norfolk Southern Railway Company (NSR) and Canadian Pacific Railway Company (CPRC) invoked the Board's class exemption to obtain Board authorization of certain trackage rights. Under the class exemption procedures, the notices would become effective on October 8, 2004 (7 days after the exemptions were filed).

CPRC invoked the class exemption to acquire, by assignment from its affiliate, Delaware and Hudson Railway Company, Inc. (D&H), overhead trackage rights over the following lines in Buffalo, NY: (1) NSR's Southern Tier Line at milepost 413.0± and the western end of the Southern Tier Line at milepost 419.8± (including tracks into NSR's Bison Yard), a distance of approximately 6.8 miles; (2) NSR'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 Transportation, Inc. (CSXT) at milepost 423.3±, a distance of approximately 3.5 miles; and (3) NSR'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 CSXT at milepost 422.3±, a distance of approximately 2.15 miles, a total distance of approximately 12.45 miles in Buffalo, NY. NSR has informed the Board that this transaction will not take place until the effective date of any required Board approval of the petition for exemption filed by D&H in

¹ These proceedings have not been consolidated and are being dealt with here in one decision solely for administrative convenience.

STB Docket No. AB-156 (Sub-No. 25X), Delaware and Hudson Railway Company — Discontinuance of Trackage Rights Between Lanesboro, PA and Buffalo, NY in Susquehanna County, PA and Broome, Tioga, Chemung, Steuben, Allegany, Livingston, Wyoming, Erie, and Genesee Counties, NY, filed on October 1, 2004 (D&H petition for exemption).

NSR 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 total 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, NY, a distance of approximately 9.05 miles, a total distance of approximately 155.24 miles. NSR will commence service on a date mutually agreed in writing between NSR and D&H, but not prior to the effective date of the notice.

In the D&H petition for exemption, D&H seeks authorization to discontinue rail freight operations via trackage rights over the following lines between Binghamton and Buffalo, NY: (1) NSR's line between milepost 189.8± in Lanesboro, PA and CP Coles at milepost 210.9± in Binghamton, NY; (2) NSR's Southern Tier Line between milepost 217.0± in Binghamton, NY and milepost 419.8± in Buffalo, NY; (3) NSR'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 Transportation, Inc. (CSXT) at milepost 423.3± in Buffalo, NY, a distance of approximately 3.5 miles; and (4) NSR'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 CSXT at milepost 422.3±, a distance of approximately 2.15 miles, a total distance of approximately 12.45 miles in Buffalo, NY.

By petition filed on October 5, 2004, Samuel J. Nasca, on behalf of the United Transportation Union - New York State Legislative Board (UTU-NY), requests that the Board consolidate the three proceedings,² stay the implementation of the notices of exemption pending disposition of its forthcoming petitions to revoke, and pending disposition of the D&H petition for exemption to discontinue operations between Buffalo and Binghamton, NY. By petition filed on October 7, 2004, the United Transportation Union also seeks a stay of the effectiveness of the trackage rights exemptions in these proceedings and incorporates by reference the petition for stay filed by UTU-NY.

² The proceedings will not be consolidated. See supra note 1.

As grounds for the stay, UTU-NY maintains that (1) its requests for revocation are likely to succeed on their merits and (2) employees will be irreparably injured if NSR and CPRC are allowed to implement their trackage rights without the prior labor agreement required under New York Dock Ry. — Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) (New York Dock). UTU-NY maintains that the two notices are part of a larger series of transactions memorialized in a single Memorandum of Understanding (MOU) which also embraces D&H's proposed discontinuance of service between Buffalo and Binghamton, in addition to several haulage arrangements and trackage rights between other points. UTU-NY asserts that the MOU must be made part of the record because it evidences a significant transaction for carrier consolidation under 49 U.S.C. 11323(a)(2) that would require the labor protective conditions available under New York Dock.

NS, and CPRC and D&H, jointly, filed replies in opposition to the UTU-NY petition for stay on October 6, 2004. Both replies state that there is no basis for staying the effective dates of the notices. According to the railroads, the transactions will not cause irreparable injury to UTU-NY employees. Moreover, NS asserts that the MOU has been superseded by the trackage rights agreements themselves and other agreements, and therefore, has no further effect. CPRC and D&H simply assert that the MOU is irrelevant.

DISCUSSION AND CONCLUSIONS

A housekeeping stay of the effective dates of the exemptions is appropriate to allow the Board and UTU-NY time to consider the issues presented in the stay petition in a more orderly fashion. Even though the railroads assert that the MOU is superseded or not relevant, UTU-NY has requested access to the MOU and it will be given the opportunity to review it. Accordingly, CPRC, D&H, and NSR will be required to file the MOU, and any other documents updating or superseding the MOU, with the Board by October 12, 2004. If the parties wish, they may file the documents under seal, with a request for a protective order. This proceeding will be stayed until October 27, 2004, to allow for review of these documents, filing of petitions to revoke, and the Board's consideration of the stay request.

It is ordered:

1. The effective date of the notices of exemption in STB Finance Docket Nos. 34561 and 34562 are stayed until October 27, 2004.
2. CPRC, D&H, and NSR shall file the MOU, and any other documents updating or superseding the MOU, with the Board by October 12, 2004.

3. This decision is effective on its service date.

By the Board, Roger Nober, Chairman.

Vernon A. Williams
Secretary