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March 31, 2015

**VIA ELECTRONIC FILING**

Cynthia T. Brown  
Chief of the Section of Administration  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423

Re: STB Finance Docket No. 35873  
Norfolk Southern Railway Company – Acquisition and  
Operations – Certain Rail Lines of the Delaware and Hudson  
Railway Company, Inc.

Dear Ms. Brown:

Enclosed for filing in the above-referenced proceeding are the Reply Comments of Delaware and Hudson Railway Company, Inc.

Please contact me if you have any questions.

Sincerely,

STINSON LEONARD STREET LLP

A handwritten signature in blue ink, appearing to read "David F. Rifkind".

David F. Rifkind

DFR/pva

Enclosure

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 COMMENTS OF  
DELAWARE AND HUDSON RAILWAY COMPANY, INC.**

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Attorneys for Delaware and Hudson  
Railway Company, Inc.

Dated: March 31, 2015

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**REPLY COMMENTS OF  
DELAWARE AND HUDSON RAILWAY COMPANY, INC.**

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Delaware and Hudson Railway Company, Inc. (“D&H”) submits these Reply Comments in support of the Application for a Minor Transaction filed by Norfolk Southern Railway Company (“NSR”) on November 17, 2014 (the “Application”) seeking Board authority to acquire from D&H and to operate 282.55 miles of D&H rail lines located in New York and Pennsylvania (the “D&H South Lines”). Further, D&H submits these Reply Comments to respond to the requests for conditions submitted by the Saratoga & North Creek Railroad (SNCR), the New York State Department of Transportation (“NYDOT”), the East of the Hudson Rail Service Task Force, Inc. (“EHTF”), and Samuel J. Nasca on behalf of the SMART/Transportation Division, New York Legislative Board (“Nasca”).<sup>1</sup>

These Reply Comments are supported by the Verified Statements of James D. Clements and Kristan McMahon.

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<sup>1</sup> In this reply, D&H addresses requests for condition that, if granted, would negatively impact D&H. PPL Energyplus, LLC; CNJ Rail Corporation; and the GWI Subsidiaries each requested conditions. Those requests are addressed in NSR’s reply filing with which D&H concurs.

## INTRODUCTION

D&H supports the Application which, as NSR explained, strengthens competition in the Northeast and generates substantial public benefits. Application at 11. The acquisition of the D&H South Lines by NSR (the “Transaction”) will provide NSR with a direct single-line route in the Northeast enabling it to compete more effectively against its primary competitor in the region, CSXT.

Further, the Transaction will allow for more efficient operations. Approximately 80% of the traffic moving over the D&H South Lines today moves on NSR’s account. Application at 13, 72. Thus, the Transaction will align ownership of the rail line with the majority user of the line. This alignment will afford the majority user of the lines control over operations, maintenance and future investments in the lines. This should enable NSR to realize operating efficiencies, to better utilize its investments, including at its intermodal terminal at Mechanicsville, and promote capital investments that are consistent with its priorities and needs.

Additionally, as explained in the Application, the Transaction will strengthen D&H as a carrier and a competitor. While D&H has vigorously sought to compete on the subject rail lines, it has been disadvantaged by changes in the competitive landscape in the Northeast, including the division of Conrail assets between CSXT and NSR. *See* Verified Statement of James D. Clements (“Clements V.S.”), at 2. On the D&H South Lines, D&H faces two strong rail competitors that enjoy significant advantages over D&H. As a result, D&H’s share of the traffic on the D&H South Lines has diminished and the economics of its existing operations are

marginal at best.<sup>2</sup> This Transaction will allow D&H to focus resources and capital where it is better able to compete for traffic. *Id.*

Most importantly, as explained in the Application, the Transaction will improve rail competition in the Northeast to the benefit of all, while causing competitive harm to none. There are no 2-to-1 shippers and no shipper has identified any specific harm. It is for these reasons the Application enjoys wide support among shippers and other interested parties. The Board has received statements from more than 125 shippers, short-lines, government agencies and elected officials urging the Board to approve the Application.

The Board has also received statements from SNCR, NYDOT and EHTF that, while supportive of the Transaction, seek imposition of conditions. *See Comments and Request for Relief of the Saratoga & North Creek Railway*, filed January 20, 2015 (“SNCR Comments”); New York State Department of Transportation’s *Comments and Request for Conditions*, filed January 15, 2015 (“NYDOT Comments”); *Application of the East of Hudson Rail Freight Service Task Force, Inc. to Appear and File Out of Time a Request for Modification Of The Proposed Transaction to Include Transfer of Delaware and Hudson’s Trackage Rights from Mechanicsville, N.Y. to an Interchange with the New York and Atlantic Railway at Fresh Pond, Jt. Queens County, NY.*, filed January 20, 2015 (“EHTF App.”). It is well settled law that the Board may impose conditions only to address competitive harm caused by the transaction and

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<sup>2</sup> In addition, the vast majority of D&H’s connecting trackage rights have become irrelevant and are no longer economically justified and the subject of a separate proceeding. *Del. and Hudson Ry. Co., Inc.—Discontinuance of Trackage Rights Exemption—In Broome County, NY; Essex, Union, Somerset, Hunterdon, and Warren Counties, NJ; Luzerne, Perry, York, Lancaster, Northampton, Lehigh, Carbon, Berks, Montgomery, Northumberland, Dauphin, Lebanon, and Philadelphia Counties, PA; Harford, Baltimore, Anne Arundel, and Prince George’s Counties, MD; The District of Columbia; and Arlington County, VA*, Docket No. AB-156 (Sub-No. 27X), filed March 19, 2015 (“*D&H Trackage Rights Discontinuance*”).

not to remedy pre-existing concerns. *See e.g., Norfolk S. Ry. Co., Pan Am Ry., Inc., et al.—Joint Control and Operating/Pooling Agreements—Pan Am S. LLC*, Finance Docket No. 35147, slip op. at 5-6 (served March 10, 2009) (“*NSR/Pan Am Transaction*”). The requests here, however, seek to address pre-existing concerns which are neither caused nor exacerbated by the Transaction. Indeed, none of the requested conditions involve rail lines that are part of the Transaction. Accordingly, the Board should deny these requests for conditions.

In addition, the Board received requests for conditions from one of D&H’s labor unions as well as from the state legislative director of another labor organization. *See Comment of District Lodge 19 of the International Association of Machinists and Aerospace Workers, AFL-CIO*, filed January 21, 2015; Samuel J. Nasca’s *Opposition Statement*, filed January 21, 2015. D&H agrees with the request from District Lodge 19 of the International Association of Machinists and Aerospace Workers, AFL-CIO (“IAM”) to the extent it seeks approval of the Transaction subject to the Board’s standard employee protective conditions, *i.e., New York Dock*, as modified by *Wilmington Terminal*. D&H disagrees with the request from Nasca for non-standard employee protective conditions as unwarranted. Nasca’s opposition to the Application and request for condition is based on vague, unsubstantiated and inaccurate claims. Imposition of standard employee protective conditions provides employees with ample protection.

## ARGUMENT

### **I. The Conditions Sought by SNCR, NYDOT and EHTF Do Not Address an Effect of the Transaction**

It is a “well established rule that conditions are not be imposed except to remedy a transaction-related harm such as a significant loss of competition or the loss by another rail carrier of the ability to provide essential services.” *CSX Corp. and CSX Trans., Inc., Norfolk S. Corp. and Norfolk S. Ry. Co. —Control and Operating Leases/Agreements—Conrail Inc. and*

*Consol. Rail Corp.* (“*Conrail*”), Finance Docket No. 33388 (Sub-No. 91), Decision No. 5, slip op. at 157 (served Feb. 2, 2001). Thus, the Board requires that a party requesting a condition establish, at a minimum, that it will suffer competitive harm as a direct result of a transaction.

To be granted, a condition must first address an effect of the transaction. We will not impose conditions “to ameliorate longstanding problems which were not created by the [transaction],” nor will we impose conditions that “are in no way related either directly or indirectly to the involved [transaction].

*Burlington N. et al. – Merger – Santa Fe Pac. et al.*, 10 I.C.C. 2d 661, 730 (1995), *aff’d sub nom. W. Resources, Inc. v. STB*, 109 F.3d 782 (D.C. Cir. 1997) (quoting *Burlington N., Inc. – Control and Merger – St. Louis- San Francisco Ry.*, 360 I.C.C. 784, 952 (1980), *aff’d sub nom. Mo. - Kan. -Tex. R.R. v. United States*, 623 F.2d 392 (5<sup>th</sup> Cir.), *cert. denied*, 451 US 1017 (1981)). See also *Can. Nat’l Ry. Co. and Grand Trunk Corp.—Control—Duluth, Missabe and Iron Range Ry. Co., et al.*, Finance Docket No. 34434, slip op. at 14 (served April 9, 2004) (“in evaluating claims of competitive harm...harms caused by the merger must be distinguished from pre-existing disadvantages that other railroads, shippers, or communities may have been experiencing that are not ‘merger-related’”). The Board has consistently rejected “proposals to remedy perceived pre-existing problems, such as service failures, lack of investment, failure to pay bills, and failure to establish interchanges with other carriers or to route enough traffic through the interchanges that already exist.” *NSR/Pan Am Transaction*, slip op. at 5-6. See also *Genesee & Wyoming Inc.—Control—RailAmerica, Inc., et al.*, Finance Docket No. 35654, Decision No. 5 (served Dec. 20, 2012) (rejecting requests for conditions because they address concerns that pre-date the transaction and are not exacerbated by it). SNCR/NYDOT’s and EHTF’s requests each seek relief for pre-existing concerns and, therefore, must be rejected.

## **A. SNCR/NYDOT**

SNCR and NYDOT, under the guise of requesting relief from a purported transaction-related competitive harm, ask the Board to award SNCR the extraordinary right to interchange traffic with NSR in D&H's Saratoga Springs Yard. SNCR, however, is unaffected by the sale of the D&H South and certainly will suffer no competitive harm as a result of the Transaction. The concerns it and NYDOT raise regarding competitive harm pre-date the Transaction and will not be – indeed since SNCR currently moves virtually no freight traffic, cannot be – exacerbated by the Transaction. While SNCR will suffer no harm as a result of the Transaction, the condition that SNCR requests could cause substantial harm to D&H operations.

### **1. SNCR Is Not Harmed By The Transaction**

As D&H's Assistant Superintendent explains in his verified statement, SNCR is a stub-ended short-line rail carrier that connects to the D&H mainline north of Saratoga Springs at CPC 38. Verified Statement of Kristan McMahon ("McMahon V.S."), at 2. In 2011, SNCR and D&H executed an interchange agreement that grants SNCR operating rights over approximately 3.2 miles of the mainline for the sole purpose of interchanging freight traffic with D&H at D&H's Saratoga Springs Yard. SNCR connects to no other rail carriers. Currently, it primarily operates passenger excursion trains, including service between Saratoga Springs and a local ski resort. *Id.* Virtually no freight traffic moves over the line and the "new" traffic that SNCR hopes to move via NSR "is traffic that has not moved by rail in as many as about 25 years." SNCR Comments at 5. Although SNCR, with D&H's cooperation and support, has tried to develop freight business from the aggregate and other shippers located on the line, it has been unsuccessful to date. McMahon V.S. at 2.

SNCR's rail connection with D&H at CPC 38, the Saratoga Springs Yard, and the trackage between these two points are located approximately 20 miles north of the rail line NSR will be acquiring from D&H in the Transaction. Accordingly, if the Application is approved and the Transaction consummated, SNCR will experience no change in how it connects to the national rail system. *Id.* It will continue to connect to the D&H at Saratoga Springs and continue to have operating rights over the D&H mainline for the sole purpose of interchanging freight traffic with D&H at Saratoga Springs Yard. Although NYDOT asserts that the Transaction will "render the D&H a bottleneck carrier to any domestic traffic originating or terminating on the SNCR" (NYDOT Comments at 2), the reality is that D&H is already a bottleneck rail carrier, at least so far as SNCR is concerned. Indeed, SNCR blames the absence of rail freight traffic on the fact that D&H *is* a bottleneck carrier. SNCR Comments at 4. Thus, SNCR's predicament plainly pre-exists and is not exacerbated by the Transaction.

Moreover, robust intermodal, intramodal and source competition – not D&H's participation in the route – is the primary reason that virtually no freight traffic currently moves by rail over SNCR. As both SNCR and NYDOT freely acknowledge, the commodity mix that potentially could move by rail is "subject to significant competition from trucks." NYDOT Comments at 3; SNCR Comments at 2. In addition to truck competition, there is rigorous source competition, particularly with respect to aggregates, from other producers in the area. Some of the producers have access to barge and/or rail in addition to truck service. In working with SNCR, as well as with shippers that D&H serves directly, D&H encounters significant competition in its efforts to develop freight rail business. Even in single carrier moves, *i.e.*, where D&H serves both origin and destination, D&H has found it difficult to compete for aggregate shipments. Likewise, D&H and SNCR have been unable to develop aggregate

business where D&H is able to serve the destination. *McMahon V.S.* at 2. Thus there is no reason to believe that SNCR would be any more successful if it interchanged directly with NSR.<sup>3</sup>

In any event, the Board's role "is to protect competition, not competitors." *Conrail*, Decision No. 96, slip op. at 19 (served Oct. 19, 1998). It would be improper to use the Board's conditioning power to address pre-existing conditions in the hope of improving SNCR's ability to compete.

SNCR, while implicitly acknowledging that the relief it seeks falls outside the normal scope of the Board's conditioning power, nonetheless asks the Board to grant its request based on what it describes as a "'policy' documented in short line transactions that the Board approved in the past several years of examining restrictive 'paper barriers.'" SNCR Comments at 5. Assuming such policy exists, it would be wholly inapplicable here where neither a short-line transaction nor a so-called "paper barrier" is at issue.<sup>4</sup> The simple fact is that SNCR lacks a direct connection to NSR.<sup>5</sup> Accordingly, to the extent a "barrier" exists to SNCR directly interchanging with NSR, it is a physical barrier, not a paper barrier.

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<sup>3</sup> It is also unlikely that eliminating D&H from the route would improve the economics of the movement. It appears that NSR has made no representations regarding the rates it would charge. Moreover, SNCR appears to assume erroneously that it would be able to use D&H's mainline track and yard without charge. Clearly, D&H would be entitled to compensation for the use of its facilities.

<sup>4</sup> The term "paper barrier" generally refers to an "interchange commitment" which is defined in the Board's rules as "a provision or agreement that may limit future interchange with a third-party connecting carrier, whether by outright prohibition, per-car penalty, adjustment in the purchase price or rental, positive economic inducement, or other means." 49 CFR § 1150.33(h).

<sup>5</sup> Both NSR and SNCR access D&H's Saratoga Springs Yard pursuant to separate and unrelated agreements with D&H entered into for the respective parties' operating convenience and efficiency in interchanging traffic with D&H. To construe such agreements as creating a "paper barrier" would vastly expand the regulatory definition of a "paper barrier" and could have significant negative unintended consequences.

## 2. The Adverse Impact of the Requested Condition on D&H Operations Is Potentially Severe

SNCR is wrong when it claims that the requested condition would “not adversely affect” D&H’s operations. SNCR Comments at 5. Saratoga Springs Yard currently operates at between 70-80% capacity. McMahon V.S. at 3. The yard currently handles daily four Amtrak trains, three local switch jobs, and four road trains. It is used to stage crude oil and ethanol trains and to store rail cars, ballast cars and maintenance-of-way equipment. Allowing third parties to access and operate within the yard would undoubtedly adversely impact D&H operations by consuming capacity needed to operate efficiently, and by reducing D&H’s ability to plan and manage operations and volumes. *Id.* That impact would be particularly severe if SNCR estimates that it would interchange approximately 62 cars a day with NSR turn out to be correct.<sup>6</sup> SNCR Comments, Verified Statement of Justin Gonyo (“Gonyo V.S.”) at 3. SNCR’s traffic would consume the approximate 60-car daily operating capacity for the West Yard<sup>7</sup> where SNCR claims the interchange could be accommodated, and would consume a third of the Saratoga Springs Yard’s total 180-car daily operating capacity.<sup>8</sup> McMahon V.S. at 3-4.

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<sup>6</sup> SNCR estimates that it will interchange “five days per week 52 weeks per year ... about 31 cars in each direction.” SNCR Comments, Gonyo V.S. at 3 (emphasis added). Based on SNCR’s estimate, the total number of cars that would be interchanged annually totals approximately 16,000 (5 days/week = 260 days/year x 62 cars = 16,120).

<sup>7</sup> The “West Yard” refers to the yard tracks located on the west side of the mainline.

<sup>8</sup> As a general rule of thumb, daily operating capacity is approximately half of standing capacity. McMahon V.S. at 3. Thus, since the West Yard’s standing capacity is approximately 120 cars, its daily operating capacity is approximately 60 cars. Likewise, since the total Saratoga Springs Yard standing capacity is approximately 360 cars, the daily operating capacity is approximately 180 cars. However, much of the yard capacity, including West Yard capacity, is unavailable for interchange because D&H uses the West Yard for a variety of activities including staging trains and storing rail cars, ballast cars and maintenance-of-way equipment. *Id.*

Additionally, the proposed interchange activity likely would require that NSR block D&H's mainline while it sets out empty cars and lifts loaded cars for SNCR. *McMahon V.S.* at 4. Once the train is built, NSR would continue to block the mainline pending completion of federally mandated airbrake testing. Such testing can take an hour or more to perform in cold weather. This blockage would cause significant disruption to both D&H's yard and mainline operations.<sup>9</sup> *Id.*

Accordingly, the Board should deny SNCR's request for condition.

**B. East of the Hudson Rail Service Task Force, Inc.<sup>10</sup>**

EHTF asks that the Board condition the Transaction on the transfer of D&H's east of the Hudson trackage rights to NSR. EHTF does not ask for this condition based on any competitive harm related to this transaction and identifies no such harm. Rather, EHTF's request is essentially a request for reconsideration of the Board's 1998 decision in the Conrail/CSX/NS control proceeding rejecting a proposal that would have given NSR access to east of the Hudson shippers in favor of a haulage or trackage rights agreement between CSXT and D&H. *Conrail*, Decision No. 89, 3 S.T.B. 196, 283, 1998 WL 456510 (S.T.B.) at \*53 (served July 23, 1998). As such, EHTF's request has no place in this proceeding. Additionally, EHTF's request is based on inaccurate information and is itself anticompetitive.

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<sup>9</sup> Also, it is unlikely that the flow of traffic, if it materializes as SNCR predicts, would be evenly spread throughout the year. Thus, the demands on the Saratoga Springs Yard capacity would likely, on occasion, exceed 62 cars a day.

<sup>10</sup> Who the EHTF represents is uncertain. While it once represented a 24 member Congressional delegation, according to its former chairman, U.S. Representative Jerrold Nadler, this representation has ended. *Response by Congressman Jerrold Nadler to Late-filed Notice of Intent to Participate and Related Application Submitted by the East of Hudson Rail Freight Service Task Force, Inc.*, filed March 26, 2015 ("Nadler Response"), at 6-7.

**1. EHTF's Request Is Nothing More Than a Request for Reconsideration of the Board's 1998 Conrail Decision**

Prior to *Conrail*, east of the Hudson was served by a single carrier, Conrail. In *Conrail*, various entities representing east of the Hudson shipper interests asked the Board to introduce competition on the line either by enlarging the west of the Hudson Shared Access Area (SAA) to include New York City and Long Island or by granting another carrier trackage rights east of the Hudson between Selkirk and Fresh Pond, New York. These interests asserted that “it is unfair that the transaction benefits shippers west of the Hudson with new two-carrier service, but does not confer similar advantages on shippers east of the Hudson.” *Id.*, 3 S.T.B. at 279, 1998 WL 456510 (S.T.B.) at \*50. The Board, in an unusual departure from its policy of not using its conditioning powers to significantly enhance competition, granted relief. *Id.*, 3 S.T.B. at 283, 1998 WL 456510 (S.T.B.) at \*53. Specifically, the Board required that CSXT and D&H negotiate either an unrestricted haulage agreement or trackage rights east of the Hudson. The Board explained that the condition was intended “to restore a modicum of the competition that was lost in the financial crisis that led to the formation of Conrail.” *Id.* Notably, the Board rejected the option that would have given east of the Hudson shippers access to NSR, citing “serious operational problems with introduction of any additional rail service in the New York metropolitan area east of the Hudson.” *Id.*, 3 S.T.B. at 279, 1998 WL 456510 (S.T.B.) at \*50. These problems included low density freight rail traffic, truck competition, extremely limited excess rail infrastructure, heavy passenger traffic volumes, and a severely constrained ability to expand rail capacity. *Id.*, 3 S.T.B. at 280, 1998 WL 456510 (S.T.B.) at \*50.

EHTF leaves no doubt that it seeks to address a longstanding condition that is unrelated to the Transaction. EHTF asserts that “[t]he conditions which caused the Board to deem such relief appropriate in the Conrail case have not changed” and that the “solution selected by the

Board [in *Conrail*] has proved ineffective.” EHTF App. at 4. EHTF identifies no competitive harm that will result from this Transaction, however. Nor will there be any harm. D&H’s east of the Hudson trackage rights are outside the geographic zone of this Transaction. Following consummation of the Transaction, D&H will continue to serve shippers east of the Hudson via haulage service on CSXT.

## **2. EHTF’s Request is Based on Erroneous Information**

EHTF’s claims regarding the state of competition east of the Hudson, in addition to being irrelevant to the Board’s consideration of NSR’s Application to acquire and operate other rail lines, are wrong. D&H competes vigorously on the east of the Hudson corridor and continues to move freight in regular service. *See* Clements V.S. at 4. In 2010, D&H and CSXT entered into a Joint Use Agreement. *Id.* *See CSX Transp., Inc. and Del. and Hudson Ry. Co., Inc.—Joint Use Agreement*, Finance Docket No. 35348, Decision No. 6 (served Oct. 22, 2010) (“*Joint Use*”). Pursuant to that agreement, D&H currently operates regularly in each direction between Albany and Fresh Pond via CSXT-provided haulage service. The fact that D&H operates via haulage service does not suggest that D&H is not interested in competing. In fact, D&H entered into the haulage arrangement because it strengthened its ability to compete. Clements V.S. at 4.

In 2010, D&H and CSXT continued to face many of the same challenges that in 1998 prompted the Board to require that CSXT negotiate either a haulage or trackage rights agreement with D&H; namely, low traffic densities, limited excess capacity and expansion opportunities, heavy passenger traffic and strong intermodal and intramodal competition. Under the circumstances, the parties determined that haulage would be more economical and efficient than

for D&H to continue to operate under the terms of its trackage rights agreement.<sup>11</sup> By operating via haulage service, D&H and CSXT have been able to realize economies of density and reduce the number of trains operating in this busy corridor. Clements V.S. at 4. At the time, the Board correctly predicted that the Joint Use Agreement “will enhance intermodal and intramodal competition by facilitating more efficient, cost saving operations for both CSXT and D&H.” *Joint Use*, at 6.

These same challenges persist today. The November 2014 Cross Harbor Freight Program Tier 1 Draft Environmental Impact Statement (“DEIS”) identifies four barriers to expanded freight service east of the Hudson: conflicts with passenger rail service (including the 40 Amtrak and 160 Metro-North trains that operate on a typical weekday on the line used by CSXT and D&H ), clearance issues, weight restrictions and the need to expand yards and terminals. *See* DEIS [http://www.panynj.gov/about/CHFP\\_draft\\_Tier\\_1\\_EIS/05\\_Transportation.pdf](http://www.panynj.gov/about/CHFP_draft_Tier_1_EIS/05_Transportation.pdf) at 5-21-25. Substituting NSR for D&H will not address these underlying challenges and could make them worse.

Nor will substituting NSR for D&H introduce more competition. NSR already accesses east of the Hudson via the New York and New Jersey Railroad (“NYNJR”). *See Response by the New York New Jersey Rail, LLC to the Late-filed Notice of Intent to Participate and Related Application Submitted by the East of Hudson Rail Freight Service Task Force, Inc.*, filed March 26, 2015 (“NYNJR Response”). Although EHTF discounts the NYNJR’s access as failing to have introduced competitive service as hoped, the facts show differently. According to both the NYNJR and U.S. Representative Jerrold Nadler, who chaired EHTF from inception until June

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<sup>11</sup> D&H retains the right to terminate its use of the haulage and reactivate trackage rights operations. Clements V.S. at 4.

2014, recent federal and Port Authority of New York and New Jersey (“Port Authority”) investments in NYNJR have created a competitive southern gateway. Since 2008, when the Port Authority acquired NYNJR, revenue traffic has increased four-fold to 4,000 cars a year and that number is projected to increase to as much as 78,000 cars a year. NYNJR Response at 6. NYNJR is building to meet this future growth by investing in new equipment and infrastructure, and entering into various operating, interchange and interline agreements. *Id.* at 6-8. As these investments come on line, competition east of the Hudson will become even stronger. Thus, EHTF’s purported need for a new solution for east of the Hudson is unfounded.

### **3. The Requested Condition Would Reduce Competition**

Ironically, it is the very condition that EHTF seeks -- and not the Transaction -- that is anti-competitive. Under the requested condition, D&H would no longer be a competitor east of the Hudson and into the New York metropolitan area. Since NSR already serves the New York metropolitan area via the NYNJR, transferring D&H’s trackage rights east of the Hudson to NSR would simply reduce the number of carriers competing in the market. *See* Clements V.S. at 5. Also, CSXT’s ability to compete likely would be diminished as the cost saving and efficiency benefits of the Joint Use Agreement would be lost.<sup>12</sup>

Accordingly, the Board should deny EHTF’s request for condition.

## **II. Employee Protective Conditions**

One of the unions representing D&H employees and the state legislative director for another organization filed comments in this proceeding. District Lodge 19 of the International Association of Machinists and Aerospace Workers, AFL-CIO (“IAM”) filed comments

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<sup>12</sup> The haulage arrangement is one aspect of the Joint Use Agreement which is also interconnected to other agreements. Thus, transferring D&H’s trackage rights would impact more than the east of the Hudson route. *See* Clements V.S. at 4-5.

requesting that, if the Board approves the Transaction, it do so subject to *New York Dock* as modified by *Wilmington Terminal*. Sam Nasca, a state legislative director acting on behalf of the SMART/Transportation Division New York State Legislative Board<sup>13</sup> filed comments in opposition to the Transaction asserting that straight New York Dock employee protective conditions are required.

In its Application, NSR stated its assumption that any D&H employees who are adversely affected by the Transaction will be entitled to the benefits provided in the labor protective conditions set forth in *New York Dock Ry.—Control—Brooklyn E. District Terminal*, 360 I.C.C. 60, as modified by *Wilmington Terminal R.R. —Purchase & Lease—CSX Transp. Inc.*, I.C.C.2d 799, 814-26 (1990). Application at 36. IAM agrees with NSR. Likewise, D&H agrees with NSR that *New York Dock* as modified by *Wilmington Terminal* applies. This result is called for by the STB's consistent line of decisions regarding line sales involving a Class I carrier as purchaser. See *CSX Transp., Inc. —Acquisition & Lease Exemption—Pittsburgh & Lake Erie R.R.*, Finance Docket No. 31827, 1991 ICC LEXIS 148 (served June 26, 1991); *Can. Pac. Ltd, et al. —Control—Davenport, Rock Island & N. W. Ry.*, Finance Docket No. 32579 (embracing *Burlington N. R.R.—Acquisition—Certain Lines of Davenport, Rock Island & N. W. Ry.*, Finance Docket No. 32579 (Sub-No. 1)), 1995 ICC LEXIS 19 (served Feb. 8, 1995); *Consol. Rail Corp. and CSX Transp., Inc. —Acquisition & Operation—Nicholas, Fayette & Greenbrier R.R.*, Finance Docket No. 32845, 1996 STB LEXIS 332 (served June 20, 1996); *CSX Transp., Inc. —Acquisition—Certain Rail Lines of Ind. Hi-Rail Corp.*, Finance Docket No. 32905, 1996 STB LEXIS 349 (served July 31, 1996); *Union Pac. R.R. —Acquisition and Operation Exemption—*

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<sup>13</sup> While SMART/Transportation Division represents conductors employed by D&H, neither Nasca nor the New York State Legislative Board negotiates agreements with D&H on behalf of these employees.

*San Pedro R.R. Operating Co., LLC*, Finance Docket No. 35666, 2012 WL 3877054 (S.T.B.) (served Sept. 7, 2012); *BNSF Ry. —Acquisition and Operation Exemption—Neb. Ne. Ry.*, Finance Docket No. 35644, 2012 WL 5081390 (S.T.B.) (served Oct. 18, 2012); *Union Pac. R.R. —Acquisition and Operation Exemption—Brownsville & Matamoros Bridge Co.*, Finance Docket No. 35791, 2014 WL 980196 (S.T.B.) (served March 13, 2014). *Cf. Mass. Coastal R.R.—Acquisition—CSX Transp., Inc.*, Finance Docket No. 35314, slip op. at 1, 2010 WL 1994318 (S.T.B.) at \*1 (served May 19, 2010) (“In approving line sales under §§ 11323-25 that involve a Class I rail carrier, the appropriate employee protective conditions under §11326(a) are *New York Dock* as modified by *Wilmington Terminal*”).

Nasca’s assertion that the Board should depart from standard employee protective conditions is premised on inaccurate and unfounded claims. For example, Nasca attempts to construe the Transaction as being between two Class I carriers. It is not. It is a straightforward line acquisition involving a Class I carrier and a Class II carrier.

Nasca also argues that the Transaction will have broad regional anti-competitive effects based on the termination of D&H trackage rights to Oak Island, Philadelphia and Washington, DC. Nasca ignores the critical fact that D&H has not been able to compete using these trackage rights for some time.<sup>14</sup> *See* *Clements V.S.* at 2-3. It has been several years since D&H last moved local traffic over any of the subject trackage rights. *Id.* at 3. In fact, D&H has not used the Harrisburg-Perryville-Washington, DC trackage rights since before the Conrail split. To the extent D&H has used any of the trackage rights in the last two years, it has been for overhead

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<sup>14</sup> As of March 11, 2015, it has been more than two years since D&H last moved local traffic over any of the trackage rights identified in the Application, making them eligible for discontinuance under the notice of exemption procedures at 49 CFR § 1152.50. Accordingly, on March 19, 2015, D&H filed a Notice of Exemption to discontinue the subject trackage rights. *See D&H Trackage Rights Discontinuance.*

traffic only and are being discontinued in a separate proceeding under the two-year out-of-service exemption. In light of this, the notion that discontinuance of these moribund trackage rights would negatively affect competition is farfetched. As Dr. Curtis Grimm's analysis shows, there is no competitive harm as a result of the discontinuance of these trackage rights.

Application at 16-17, 38-41; Verified Statement of Dr. Curtis Grimm at 4, 8-10. In any event, these rights are not economically justified and likely would be discontinued regardless of the Transaction. Clements V.S. at 2.

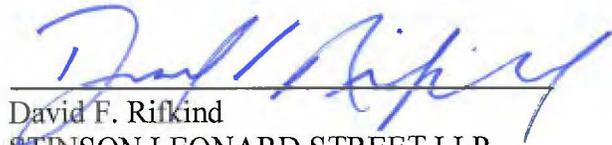
To the extent that Nasca alleges that the Transaction will have other anti-competitive effects, the allegations are unsupported. He identifies no shipper that would suffer competitive harm and his claims stand in stark contrast to the overwhelming expressions of support by shippers.

## CONCLUSION

The Transaction will strengthen competition in the Northeast and strengthen D&H. No shipper will suffer competitive harm as a result of the Transaction and therefore the imposition of conditions, other than standard employee protective conditions, is not warranted. Accordingly, the Board should reject SNCR/NYDOT's, EHTF's and Nasca's requests for conditions and approve NSR's Application.

Dated: March 31, 2015

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that I have caused the foregoing Reply to be served by First Class Mail and by e-mail where an e-mail address is included on the Board's official service list, on March 31, 2015 to parties of record.



David F. Rifkind

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**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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**VERIFIED STATEMENT OF JAMES D. CLEMENTS**

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My name is James D. Clements. I am employed by Canadian Pacific Railway Company (“CP”) in the capacity of Vice President Strategic Planning and Transportation Services. My office is in Calgary, Alberta. I have been employed by CP since 1994 and have occupied my present position since 2014. During my employment with CP, I have served in a variety of positions in planning, operating, commercial, and administrative roles, including Financial Analyst, Director US Grain Marketing and Sales, and General Manager – Car Management. Since 2013, my responsibilities have included tactical and strategic asset acquisitions, line rationalization, and other strategic transactions to preserve and improve the efficiency and capacity of CP’s system including its indirectly owned subsidiaries such as the Delaware and Hudson Railway Company, Inc. (“D&H”). In my prior positions, including as Director, Mines, Metals and Aggregates and as General Manager – Car Management, I participated in the operations of D&H. As a result, I am familiar with the various rail networks in the Northeast United States and the operational and marketing arrangements between D&H and Norfolk Southern Railway Company (“NSR”) including the proposed transaction where NSR seeks STB

authority to acquire and operate 282.55 miles of D&H rail lines in New York and Pennsylvania (the “D&H South Lines”). I provide this statement in support of the Reply Comments of Delaware and Hudson Railway Company, Inc.

The proposed transaction will strengthen D&H as a carrier and a competitor. Although D&H has vigorously sought to compete on the D&H South Lines, it has been disadvantaged by changes in the competitive landscape in the Northeast, including the division of Consolidated Rail Corporation (“Conrail”) between CSXT and NSR in 1998. Since the Conrail acquisition by CSXT and NSR, D&H has faced two strong rail competitors on the D&H South Lines, each which enjoy significant advantages over D&H. As a result, D&H’s share of the traffic on the D&H South Lines has diminished and the economics of D&H’s existing operations have become marginal at best. In addition, the vast majority of D&H’s connecting trackage rights with the D&H South Lines have become irrelevant and no longer economically justified. Accordingly, the transaction will allow D&H to focus its resources and capital where it is better able to compete for traffic.

The majority of D&H’s trackage rights that connect to the D&H South Lines were obtained as part of the Final System Plan with the goal of allowing D&H to compete effectively with the newly formed Conrail. Ensuing changes in the past three decades, however, have had the effect of eliminating the utility of those trackage rights for D&H and on March 19, 2015, D&H filed a Notice of Exemption to discontinue the trackage rights affected by the proposed transaction.

For example, D&H’s trackage rights between Harrisburg and Potomac Yards allowed it to interchange traffic with the Southern Railway. After the Southern merged with the Norfolk and Western Railway, NSR reduced D&H’s participation in traffic either by shifting the

interchange north to New York and Pennsylvania, or eliminating D&H from the route altogether. The subsequent Conrail acquisition effectively eliminated any residual utility to those rights and D&H has not operated between Harrisburg and Potomac Yards in more than a decade.

Similarly, the trackage rights between Allentown and Oak Island ostensibly established D&H as a competitor to Conrail for New York and New Jersey port traffic. Once again, the division of Conrail put D&H at a significant disadvantage to compete for such traffic. D&H has handled no intermodal or carload traffic from Oak Island since June 2012 when the operator of a construction and debris transloading facility declared bankruptcy. D&H also no longer operates over its trackage rights to and within Philadelphia due to its continual loss of traffic to rail and intermodal competitors. D&H handled minimal traffic over these trackage rights in 2012 and no traffic since March 11, 2013.

Although D&H continues to operate over its trackage rights between Dupont and Allentown and between Sunbury and Harrisburg, due to the factors discussed above, the volumes have diminished significantly. The diminishing volumes prevent D&H from realizing operating efficiencies from economies of density, which results in high operating costs. Not coincidentally, D&H interchanges the vast majority of the traffic that it moves between Dupont and Allentown with NSR. D&H's traffic between Sunbury and Harrisburg is similarly low volume, carload traffic and D&H fills the excess capacity on the trains it operates with NSR haulage traffic.

I understand that the East of the Hudson Rail Service Task Force, Inc. (EHTF) is requesting that the Board condition approval of the Transaction on the transfer of D&H's east of the Hudson trackage rights to NSR. I am familiar with these trackage rights, and D&H's east of the Hudson operations generally.

The trackage rights and D&H's east of the Hudson operations are not affected by the sale of the D&H South Lines. Following implementation of the sale, D&H will continue to utilize its east of the Hudson rights and to compete for traffic using those rights.

The concerns that EHTF raises in asking for this condition long pre-date this Transaction. In fact, they were raised in the 1998 Conrail proceedings in which the Board approved the division of Conrail assets between CSXT and NSR. In approving that transaction, the Board required that CSXT give D&H either unrestricted haulage or trackage rights between Selkirk and Fresh Pond, New York. Although D&H and CSXT initially entered into a trackage rights agreement rather than a haulage agreement, D&H and CSXT entered into a Joint Use Agreement in 2010 that substituted CSXT haulage service for D&H's operation of its own trains over trackage rights east of the Hudson.

Before 2010, D&H and CSXT had for years experienced low traffic densities, excess capacity and limited expansion opportunities, heavy passenger traffic and strong intra and intermodal competition on the east of Hudson corridor. Under the circumstances, the parties determined that haulage would be more economical and efficient than for D&H to continue to operate under the terms of its trackage rights agreement. The Joint Use Agreement allows D&H and CSXT to realize economies of density and reduce the number of trains operating in this otherwise busy rail corridor. Although the Joint Use Agreement allows D&H to better compete for traffic moving on the east of Hudson corridor and to move freight in regular service at significant cost savings, D&H's trackage rights can be reactivated at any time pursuant to the terms of the agreement.

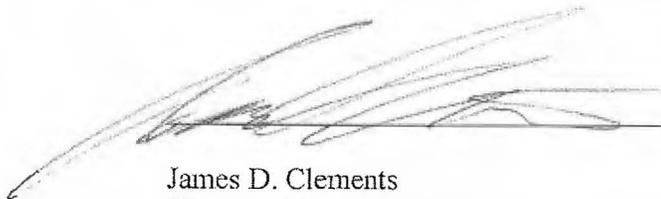
It is important to note that D&H's haulage rights east of the Hudson are dependent on the existence of D&H's trackage rights and that its haulage rights are linked to other arrangements

between CSXT and D&H. For example, the Joint Use Agreement also provides haulage rights to CSXT over the D&H Canadian Main Line north to Montreal. These rights were part of the consideration for D&H's east of the Hudson haulage rights. The transfer of D&H's east of the Hudson trackage rights would likely unravel the Joint Use Agreement. This would mean the loss of the haulage rights and have consequences for the other operating arrangements.

Based on my knowledge, background and experience, the transfer of D&H's trackage rights to NSR would harm competition. It would simply substitute one carrier for another on the east of Hudson corridor and would neither increase efficiency, improve service nor lower freight rates for shippers. Because NSR already has access to the New York metropolitan area, it would in fact have the effect of decreasing competition for rail freight moving to and from the area.

## VERIFICATION

I, James D. Clements, declare under penalty of perjury that I am authorized to make this verification on behalf of Delaware and Hudson Railway Company, Inc., and that the information included in the foregoing statement is true and correct to the best of my knowledge and belief.



James D. Clements  
Vice President Strategic Planning and Transportation Services  
Canadian Pacific Railway Company

Dated: March 31, 2015

**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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**VERIFIED STATEMENT OF KRISTAN McMAHON**

---

My name is Kristan McMahon. I am an employee of the Delaware & Hudson Railway (D&H) d/b/a Canadian Pacific. I have been employed on the D&H since January 2000. Currently, I am the Assistant Superintendent for the D&H. My responsibilities include management and oversight of rail operations on the D&H in the northeastern United States including in the Saratoga Springs Yard. Between February 2011 and January 2015, I served as D&H's Road Foreman of Engines. I have also served as a Terminal Supervisor for the Binghamton Terminal, Locomotive Engineer, and a Conductor. In the course of my employment, I have become familiar with the facilities and operations on the D&H, specifically including in the Saratoga Springs Yard, and with the Saratoga & North Creek Railroad (SNCR) including efforts to develop freight business.

I understand that the SNCR and the New York State Department of Transportation have asked the Board to condition approval of the sale to NSR of D&H's rail lines south of Schenectady subject to a requirement that SNCR and NSR be allowed to use the Saratoga Springs Yard to interchange directly. The purpose of my statement is to describe the current

connection between SNCR and D&H and its relationship to the proposed line sale, and explain the potential impact that such a condition would have on D&H operations.

The SNCR is a stub-ended short line railroad which operates between North Creek and Saratoga Springs. The SNCR physically connects to D&H's Canadian Main Line (CML) in Saratoga Springs at milepost 38.2. Milepost 38.2 is located just north of Saratoga Station and approximately 3.2 miles north of DH's Saratoga Springs Yard near Milepost 35. SNCR connects to no other rail carriers.

Currently, SNCR primarily operates passenger excursion trains between Saratoga Station and North Creek. These operations include a winter "Snow Train" which provides service to a ski resort at Gore Mountain and the holiday season themed "Polar Express."

Although SNCR, with D&H's cooperation and support, has tried to develop freight business from the aggregate and other shippers located on the line, it has been unsuccessful to date and has moved virtually no freight. These efforts to develop freight traffic have encountered vigorous competition from trucks as well as from barge, other rail carriers and, particularly with respect to aggregates, from other sources. Indeed, even where D&H serves the shipper and destination directly, it has encountered significant competition.

In 2011, SNCR and D&H executed an interchange agreement that grants SNCR operating rights over approximately 3.2 miles of the CML for the sole purpose of interchanging freight traffic with D&H in Saratoga Springs Yard. D&H granted these operating rights to SNCR for operating convenience and efficiency. NSR also has trackage rights to Saratoga Springs Yard for the sole purpose of interchanging traffic with D&H. Like SNCR's rights, these rights were granted for operating convenience and efficiency.

SNCR's rail connection with D&H at CPC 38, the Saratoga Springs Yard, and the trackage between these two points are located approximately 20 miles north of Schenectady. The rail line that NSR is acquiring from D&H extends from Schenectady south to Sunbury, PA (the "D&H South Lines"). The sale to NSR of the D&H South Lines will have no effect on how SNCR connects to the D&H.

Currently, Saratoga Springs Yard operates at between 70-80% capacity. The yard handles daily four Amtrak trains, three local switch jobs, and four road trains. It is used to stage crude oil and ethanol trains and to store rail cars, ballast cars and maintenance-of-way equipment.

Allowing third parties to access and operate within the Saratoga Springs Yard would undoubtedly adversely impact D&H operations. It would consume yard capacity that is needed to conduct efficient yard operations. It would reduce D&H's ability to plan and manage yard operations and to control volumes and would reduce D&H's ability to maximize use of its existing assets and to invest prudently in capacity expansion.

The impact on D&H operations would be particularly severe if SNCR were to interchange approximately 62 cars-a-day with NSR as SNCR estimates. According to SNCR, the West Yard (i.e., the yard tracks located on the west side of the mainline) can accommodate the direct interchange between it and NSR. However, while the West Yard has a standing capacity of approximately 120 cars, its daily operating capacity is approximately 60 cars (as a general rule of thumb, operating capacity is half of standing capacity). SNCR's interchange traffic would consume the entire daily operating capacity for the West Yard and a third of the Saratoga Springs Yard's total daily operating capacity of approximately 180 cars. Much of the

West Yard capacity is already being used to stage crude oil and ethanol trains and to store rail cars, ballast cars and maintenance-of-way equipment.

Also, the interchange between SNCR and NSR would likely disrupt operations on the CML. It is likely that NSR would block the CML while it sets out empty cars and lifts loaded cars for SNCR. Once the train was built, NSR would continue to block the CML pending completion of federally mandated airbrake testing. In my experience, such testing can take an hour or more to perform in cold weather. This blockage would cause significant disruption to both D&H's yard and mainline operations.

**VERIFICATION**

I, Kristan McMahon, declare under penalty of perjury that I am authorized to make this verification on behalf of Delaware and Hudson Railway Company, Inc., and that the information included in the foregoing statement is true and correct to the best of my knowledge and belief.



---

Kristan McMahon  
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Dated: March 31, 2015