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June 24, 2015

VIA E-FILING

Cynthia T. Brown, Chief
 Section of Administration, Office of Proceedings
 Surface Transportation Board
 395 E Street, SW
 Washington DC 20423-0001

Re: *Norfolk Southern Railway Company – Acquisition and Operation -
 Certain Rail Lines of the Delaware and Hudson Railway Company, Inc.,
 STB Docket FD 35873¹*

Dear Ms. Brown:

Norfolk Southern Railway Company (“NSR”) hereby replies in opposition to the three petitions for reconsideration filed by Samuel J. Nasca, for and on behalf of SMART/Transportation Division, New York Legislative Board, PPL EnergyPlus, LLC, and CNJ Rail Corp. and Eric S. Strohmeyer in the above referenced proceedings. As set forth in this reply, none of the parties have met the standards for reconsideration and their petitions should be denied.

Respectfully submitted,

William A. Mullins
 Attorney for Norfolk Southern Railway Company

cc: Parties of Record

¹ Embraces FD 34209 (Sub-No. 1), Norfolk Southern Railway Trackage Rights Exemption – Delaware & Hudson Railway Company, Inc., and FD 34562 (Sub-No. 2) Norfolk Southern Railway Trackage Rights Exemption – Delaware & Hudson Railway Company, Inc. Counsel for Nasca incorrectly lists Sub-No. 1 twice.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35873¹

NORFOLK SOUTHERN RAILWAY COMPANY

– ACQUISITION AND OPERATION –

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

REPLY IN OPPOSITION TO PETITIONS FOR RECONSIDERATION

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June 24, 2015

¹ Embraces FD 34209 (Sub-No. 1), Norfolk Southern Railway Trackage Rights Exemption – Delaware & Hudson Railway Company, Inc., and FD 34562 (Sub-No. 2) Norfolk Southern Railway Trackage Rights Exemption – Delaware & Hudson Railway Company, Inc.

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PREFACE AND SUMMARY OF ARGUMENT

Norfolk Southern Railway Company (“NS” or “Applicant”) files this Reply to three petitions for reconsideration (“Petitions” or “Petitioners”) of the Surface Transportation Board’s (“Board”) May 15, 2015 decision (“Decision No. 6”) approving NS’s acquisition and operation of 282.55 miles of the rail lines of Delaware and Hudson Railway Company, Inc. (“D&H”) located in Pennsylvania and New York (“D&H South Lines”) and modifications of certain existing trackage rights (collectively deemed the “Transaction”). As Decision No. 6 correctly explained and discussed, the Transaction results in no anticompetitive effects and produces significant public interest benefits. There are no shippers located on the D&H South Lines who will see their competitive options reduced from 2-to-1; nor are there any origin/destination corridors that will see a 2-to-1 reduction in competition. The Board was also correct in finding that the Transaction produces significant public interest benefits through operating efficiencies, improved maintenance, better incentives for investment, and more reliable and sustainable

service.³ None of the Petitioners have shown that the Board committed material error or that new evidence or changed circumstances warrant reconsideration of Decision No. 6.⁴

Of the three Petitions filed, only one was filed by a shipper (PPL EnergyPlus, LLC (“PP&L”)); but, PP&L is not even located on the D&H South Lines, moves no traffic over the D&H South Lines, and currently is solely-served by NS. Further, PP&L does not object to the Transaction, but only seeks reconsideration for the impermissible purpose of improving its pre-Transaction competitive situation rather than preserving it. The other two Petitions were filed by parties who lack standing in the current proceeding and raise numerous issues that have already been addressed by the Board. Nasca is not the collective bargaining representative for the D&H and NS employees on the D&H South Lines, represents no actual employee who may be adversely impacted by Transaction, and simply repeats arguments regarding the type of information provided in NS’s Application and the applicable employee protection standards – arguments that the Board has fully discussed and properly rejected. CNJ Rail Corp. and Eric S. Strohmeyer (collectively, “CNJ”),⁵ as recognized many times by the Board, does not appear to own any rail assets or conduct any rail operations and has not demonstrated its interest in this

³ The Transaction received widespread support from over 125 parties representing a broad range of interests, including shippers responsible for approximately 70% of the traffic on the D&H South Lines, all of the connecting short lines, and various governmental officials and agencies in the Northeast, including numerous New York and Pennsylvania Congressmen and both U.S. Senators from Pennsylvania. Likewise, since the Board issued Decision No. 6, no shipper located on the D&H South Lines, short line, labor union, D&H or NS employee, or government official or agency has objected to the Board’s decision, requested a stay, or sought reconsideration. These parties have a clear interest in ensuring the prompt consummation of the Transaction.

⁴ A petition for reconsideration will be granted under 49 C.F.R. § 1115.3(b) only upon a showing that the “prior action will be affected materially because of new evidence or changed circumstances” or that the “prior action involves material error.”

⁵ CNJ’s Petition also violates the procedural requirements under 49 C.F.R. § 1115.3(d) and should have been rejected on that basis.

proceeding. Most of CNJ's arguments are not directed at the Transaction, but instead are non-germane arguments related to D&H's proceeding to discontinue certain trackage rights ("D&H Discontinuances"),⁶ a separate proceeding which does not impact the competitive or public interest benefits analysis for the Transaction. To sum, none of the Petitioners have met the required burden for reconsideration. Therefore, the Board should reject all three Petitions.

I. PPL ENERGY PLUS, LLC HAS NOT DEMONSTRATED MATERIAL ERROR TO WARRANT EVEN LIMITED RECONSIDERATION.

PP&L petitions for limited reconsideration of Decision No. 6 alleging that the Board committed a material error in drafting its build-out condition by: (1) stating that trackage rights over NS will be granted only to D&H, instead of allowing PP&L to choose the carrier to receive such trackage rights; and (2) stating that the Board will grant such trackage rights contingent upon PP&L's build-out, instead of requiring NS to grant such trackage rights. As to the first point, the PP&L Petition should be rejected because PP&L impermissibly seeks to improve its pre-Transaction competitive position by gaining access to CSX Transportation, Inc. ("CSX") where today it only has the option to build-out to access D&H. As to the second point, the Board can remedy PP&L's concerns, without reconsidering the entire Decision No. 6, by issuing a simple clarification.

A. PP&L Is Only Entitled To D&H Trackage Rights Under Its Build-Out Condition To Preserve Its Pre-Transaction Competitive Position.

PP&L's Petition impermissibly seeks to improve PP&L's pre-Transaction competitive position. As explained in NS-16, PP&L's Montour Plant is currently served by only one Class I

⁶ See Del. & Hudson Ry. Co.—Discontinuance Of Trackage Rights Exemption—In Broome Cnty., N.Y.; Essex, Union, Somerset, Hunterdon, & Warren Cntys., N.J.; Luzerne, Perry, York, Lancaster, Northampton, Lehigh, Carbon, Berks, Montgomery, Northumberland, Dauphin, Lebanon, & Philadelphia Cntys., Pa.; Harford, Baltimore, Anne Arundel, & Prince George's Cntys., Md.; the District of Columbia; & Arlington Cnty, Va., AB No. 156 (Sub-No. 27X).

carrier, NS; and, PP&L's putative build-out option enables it to reach only D&H. Thus, consistent with Board precedent that build-out conditions should only preserve a shipper's pre-transaction competitive options, PP&L is only entitled to gain access to D&H via its build-out condition. See, e.g., Burlington Northern Inc. and Burlington Northern R.R. Co. – Control and Merger – Santa Fe Pacific Corp. and the Atchison, Topeka and Santa Fe Ry. Co., FD No. 32549, 1995 ICC LEXIS 214, at *174-75 (ICC served Aug. 23, 1995) (“BN/SF”) (noting that the conditioning power is only “used to preserve competitive options (not to expand them)”).

PP&L argues that it should have the freedom to designate which carrier will receive trackage rights from NS to serve its Montour Plant because there are no assurances that D&H service will be available in the future. PP&L Petition at 6. PP&L asserts that CSX would be a logical recipient of such trackage rights because it is a “large and strong competitor of NS’ with a positive and expansionist future, including in the Northeast.” PP&L Petition at 7. However, it is not relevant to the Board’s analysis regarding PP&L’s build-out condition that CSX may be a stronger competitive option than D&H. CSX currently does not serve the Montour Plant, and pre-Transaction, PP&L’s proposed build-out would only enable access to D&H. PP&L does not have a build-out opportunity to a CSX line. Accordingly, PP&L is not entitled to a build-out condition that would grant it post-Transaction access to either CSX or D&H. Providing an alternative to use either carrier would place PP&L in a more favorable competitive position than it enjoys today.

Although PP&L cites BN/SF for the proposition that shippers may choose which carrier receives trackage rights pursuant to a build-out condition, PP&L Petition at 8, that case does not support PP&L’s argument. In BN/SF, the shipper was exclusively served by the Atchison, Topeka and Santa Fe Railway (“SF”) but had a build-out option to the Burlington Northern

Railroad (“BN”). Because BN and SF were merging, the Board had to find a non-affiliated carrier to whom to award the trackage rights in order to preserve the shipper’s build-out option. Because there were “three class I railroads not affiliated with applicants (UP, SP, and KCS) operating near [the shipper’s] Sooner Station,” the ICC required applicants to grant trackage rights to one of the three unaffiliated Class I railroads, to be selected by the shipper. BN/SF, at *175. Doing so allowed the shipper to use either the merged BNSF or build-out to an interchange point to a non-affiliated carrier.

In the instant case, NS and D&H are not merging. As D&H is the only potential alternative carrier for PP&L pre-Transaction, then with the build-out condition, D&H should remain the only potential alternative. Like the shipper in BN/SF, PP&L will have the choice to either use NS or the unaffiliated D&H. Giving PP&L the right to choose CSX would give it three competitive options when today it only has two. Thus, it was not material error for the Board to preserve PP&L’s existing pre-Transaction competitive options by granting only D&H trackage rights to serve PP&L’s Montour Plant, contingent on PP&L’s build-out.

B. PP&L’S Concern About The Wording of Decision No. 6 Is Not Material Error And, If Necessary, Can Be Clarified Without Reconsideration.

In Decision No. 6, the condition did say that “the Board” would grant D&H trackage rights upon PP&L’s completion of the build-out, rather than ordering NS, as the Applicant, to grant D&H trackage rights. Compare BN/SF, at *175 (requiring applicants to grant trackage rights to another carrier). This distinction is not material, because regardless of how the Board expressed its order, PP&L is entitled to use D&H trackage rights and NS would be required to grant them when PP&L completes its build-out. Thus, there was no material error because PP&L’s pre-Transaction competitive option is preserved. Nonetheless, if the Board desires to clarify its meaning, NS does not object to having the Board clarify that NS must grant trackage

rights to D&H from the point of the build-out to Schenectady, if PP&L actually constructs the build-out. Such clarification would not require reconsideration of Decision No. 6.

II. NASCA HAS NOT DEMONSTRATED MATERIAL ERROR TO WARRANT RECONSIDERATION.

Nasca petitions for reconsideration of Decision No. 6, alleging that the Board committed a material error by: (1) imposing New York Dock, as modified by Wilmington Terminal⁷ employee protection standards for the Transaction rather than New York Dock standards; (2) interpreting Wilmington Terminal as not requiring pre-consummation agreements for D&H and NS employees; (3) imposing N&W/Mendocino⁸ employee protection standards for NS's modification of certain existing trackage rights rather than Oregon Short Line⁹ standards; (4) accepting NS's Application as complete with respect to labor impact information; (5) finding that D&H is not an applicant, required to submit labor impact information regarding its employees; and (6) failing to consider the effect of the D&H Discontinuances on the Transaction in this proceeding.

As an initial matter, it is worth restating that Nasca has no standing in this proceeding. As described in NS-19, Nasca is not the collective bargaining agent representing SMART-Transportation Division ("SMART-TD") employees, the actual labor union representing some of

⁷ New York Dock Ry. – Control – Brooklyn Eastern District Terminal, 360 I.C.C. 60, *aff'd*, New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979), *as modified by* Wilmington Terminal R.R. – Purchase & Lease – CSX Transportation, Inc., 6 I.C.C.2d 799, 814-26 (1990), *aff'd sub nom. Railway Labor Executives' Ass'n v. ICC*, 930 F.2d 511 (6th Cir. 1991).

⁸ Norfolk and Western Ry. – Trackage Rights – Burlington Northern, Inc., FD No. 28387, 354 I.C.C. 605 (ICC served June 6, 1978), *as modified by* Mendocino Coast Ry., Inc. – Lease and Operate – California Western R.R., FD No. 28256, 360 I.C.C. 653 (ICC served Feb. 6, 1980), *aff'd sub nom., Railway Labor Executives' Ass'n v. United States*, 675 F.2d 1248 (D.C. Cir. 1982).

⁹ Oregon Short Line R.R. and the Union Pacific R.R. Co. – Abandonment Portion Goshen Branch Between Firth and Ammon, in Bingham and Bonneville Counties, Idaho, AB No. 36 (Sub-No. 2), 360 I.C.C. 91 (ICC served Feb. 9, 1979).

the railroad employees on the D&H South Lines, but rather the New York State Legislative Board of SMART-TD. It is unclear whether this Legislative Board speaks for its union members.¹⁰ No union representative who actually bargains on behalf of D&H employees or NS employees has objected to the Transaction or requested reconsideration nor has any potentially adversely affected employee requested reconsideration.¹¹ Further, it is important to note that Nasca raises no new issues in his Petition. Nasca simply repeats prior arguments about employee protection standards and NS's Application—arguments which the Board has already dismissed. See Decision No. 6; Decision No. 7. See also NS-7; NS-11; NS-15; NS-19.

Nasca's petition should be rejected. The Board followed its long-standing precedent by imposing New York Dock, as modified by Wilmington Terminal in this line purchase transaction, and it was not material error to do so. With respect to the other issues, the Board was correct to find that NS's Application was complete with respect to the required labor information and that NS is the sole Applicant for the Transaction. Finally, the D&H Discontinuances have no bearing on the competitive or labor impact of the Transaction.

A. Board Precedent Dictates That New York Dock, As Modified By Wilmington Terminal And N&W/Mendocino Are The Appropriate Employee Protection Standards.

1. Employee Protection Standards for the Line Acquisition.

Board precedent establishes that New York Dock, as modified by Wilmington Terminal applies for the Transaction. Nasca cites no new evidence to support his Petition. Instead, Nasca

¹⁰ Given that SMART-TD has reached an implementing agreement with NS, it is clear that Nasca does not represent the union or its employees with respect to the issues in this proceeding.

¹¹ A union that did actually file comments in the proceeding, District Lodge 19 of The International Association of Machinists And Aerospace Workers, AFL-CIO, which represents certain mechanical employees that NS intends to hire, requested the imposition of New York Dock, as modified by Wilmington Terminal. This request is supported by NS and was adopted by the Board.

merely claims that the Board committed material error by following its own employee protection precedent. Clearly, that reasoning does not justify reconsideration.

Nasca misinterprets Wilmington Terminal.¹² Nasca argues that the Transaction is a consolidation because NS and D&H have agreed to cooperate to facilitate the hiring of D&H employees by NS¹³ and because NS stated that it intends to hire 150 D&H employees. Nasca Petition at 9. However, neither of those facts converts this line purchase transaction into a consolidation. Furthermore, he does not cite one case standing for the proposition that a line purchase transaction requires New York Dock or that the Wilmington Terminal modification does not apply because the buyer has contractually assumed some costs of employee protection—because no such precedent exists.

The relevant inquiry in determining the appropriate employee protection standard is the structure and nature of the transaction. The Transaction is a simple line purchase under § 11324(d), so the appropriate employee protection standard is New York Dock, as modified by Wilmington Terminal. E.g., Massachusetts Coastal R.R., LLC – Acquisition – CSX Transp., Inc., FD No. 35314, 2010 STB LEXIS 208, at *2-3 (STB served May 19, 2010) (“In approving lines sales under §§ 11323-25 that involve a Class I rail carrier, the appropriate employee protection conditions under § 11326(a) are New York Dock, as modified by Wilmington Terminal. We note that whether or not the Board cites to Wilmington Terminal in approving line sales, the modification is to apply unless expressly stated otherwise.”). See also Decision No. 6 (citing Wilmington Terminal, at 815-16) (stating that “New York Dock applies to 49 U.S.C. §

¹² Nasca interprets the ICC’s statement that “[u]nless otherwise provided by contract, the buyer’s only obligation to the seller’s employees will be to inform them of any availability of, and the terms and conditions of, employment” to mean that if parties contractually agree on labor issues, then Wilmington Terminal does not apply. Nasca Petition at 8. Only a strained reading of this language taken out of context would support that notion.

¹³ Section 5.04 of the Asset Purchase Agreement discusses employee hiring rights.

11323 transactions involving ‘consolidations’ (e.g., merger or common control) in which at least one entity will cease to exist as a separate entity,” and noting that here, D&H, the seller, will continue to exist). Thus, the Board correctly relied on its own well-established precedent in applying New York Dock, as modified by Wilmington Terminal to the Transaction.

Lastly, the Board has already addressed Nasca’s argument that any necessary implementing agreements must be reached prior to consummation, see Nasca Petition at 7, in its decision issued on June 12, 2015, denying Nasca’s petition for a stay (“Decision No. 7”). In Decision No. 7, the Board stated that “it is clear throughout Decision No. 6, including its employee protection discussion and the relevant ordering paragraph, that the Board imposed the requirements of New York Dock as modified by Wilmington Terminal without any qualification or alteration.” The Board stated unequivocally that “[t]o the extent that parties are concerned that the Board’s meaning in Decision No. 6 is ambiguous or unclear, this decision should provide clarity” that New York Dock, as modified by Wilmington Terminal is the appropriate employee protection standard. Thus, there was no material error by the Board in applying the employee protection standards for the Transaction.

2. Employee Protection Standards for the Trackage Rights Modifications.

Nasca also wrongly challenges N&W/Mendocino as the applicable employee protection standard for NS’s modification of certain existing trackage rights. Nasca argues that Oregon Short Line is the appropriate employee protection standard for a proposed discontinuance embraced within a trackage rights notice. Nasca Petition at 13. However, NS does not seek discontinuance authority with respect to its trackage rights modifications, as any existing trackage rights that may be excluded from the amended trackage rights agreements will be subsumed within NS’s larger acquisition of the D&H South Lines. As the Board noted in

Decision No. 6, NS will be “in fact enhancing its rights over those lines, rather than exiting or discontinuing service in a market.” See, e.g., CSX Transp., Inc. and Delaware and Hudson Ry. Co., Inc.—Joint Use Agreement, FD No. 35348, 2010 STB LEXIS 598, at * 27-28 (STB served Oct. 22, 2010) (applying N&W/Mendocino instead of Oregon Short Line, because D&H was not effectively discontinuing service on the segment and “service and competition will be enhanced,” where (1) D&H would continue to serve the segment via CSX trains; (2) a joint use agreement maintained its trackage rights, which could be reactivated at its sole discretion”).

Although Nasca argues that the Board does not embrace ancillary trackage rights into the overall New York Dock employee protections, Nasca Petition at 12, Nasca cites no precedent involving a line acquisition where Oregon Short Line was imposed.¹⁴ Likewise, Nasca’s reliance on United Transportation Union v. Surface Transportation Board, 363 F.3d 465 (D.C. Cir. 2004) is unfounded. See Nasca Petition at 13. In reply to the D.C. Circuit’s decision, the Board modified its final decision in Railroad Consolidation Procedures—Exemption for Temporary Trackage Rights, EP No. 282 (Sub-No. 20), 2004 STB LEXIS 301 (STB served May 17, 2004) to state that N&W/Mendocino would protect any employee affected by the acquisition of temporary trackage rights and that Oregon Short Line would protect any employee affected by the discontinuance of the trackage rights. However, the Board’s decision dealt with temporary trackage rights which automatically terminate on a specified date. In contrast here, as noted above, there is no termination of any trackage rights by NS, and NS does not seek any discontinuance authority in connection with its modification of certain existing trackage rights. Therefore, “[i]mposition of Oregon Short Line protective conditions is unnecessary.” Decision No. 6.

¹⁴ All of the precedents cited by Nasca involve consolidations and mergers, not line purchases where the seller remains an active carrier and continues to operate in the market.

Further, the appropriate employee protection standard for NS's modification of trackage rights is not material, for several reasons. First, there will not be any adverse labor impact on any NS employees as a result of the trackage rights modifications, as any NS employees now operating over the D&H South Lines via the trackage rights will continue to operate over them as part of the acquisition. Indeed, NS will be hiring employees, not terminating them, and if there are any adverse impacts on NS employees as a result of the Transaction, such employees would be entitled to employee protection under New York Dock, as modified by Wilmington Terminal. Similarly, any adverse labor impacts on D&H employees likely will result from the line acquisition, not NS's trackage rights modifications; and such employees will receive full employee protection under New York Dock, as modified by Wilmington Terminal. Finally, as discussed above, no actual NS or D&H employees or labor unions have objected to the employee protection standards set forth in Decision No. 6; and in fact, several implementing agreements have already been reached.¹⁵ Thus, there was no material error in Decision No. 6 regarding the applicable labor protection standards for NS's line acquisition and trackage rights modifications.

B. NS's Application Was Complete With Respect to Labor Impact Information, Given That D&H Is Not An Applicant.

To the best of NS's then-existing knowledge, the Application disclosed the number of potentially adversely impacted employees, categorized by craft, trade, and geographic location.¹⁶

¹⁵ NS has reached voluntary agreements with the Brotherhood of Maintenance of Way Employees Division of the International Brotherhood of Teamsters; the Brotherhood of Railroad Signalmen; the Brotherhood of Railway Carmen; and the Brotherhood of Locomotive Engineers and Trainmen, a division of the Rail Conference of the International Brotherhood of Teamsters, and most recently, SMART-TD.

¹⁶ NS's Application and Operating Plan noted that various crafts would be involved: transportation, mechanical, and engineering. The geographic location for these affected employees was described as on the D&H South Lines in New York and Pennsylvania. See, e.g., Application at 36, 118-19. 49 C.F.R. § 1180.6(a)(2)(v) requires no more detail than what was provided.

See Application at 46-47, 118-19. The Application also noted that labor implementing agreements had not been reached yet and described the employee protection standards that would apply for any adversely impacted employees. Thus, the Application was in full compliance with the requirements under 49 C.F.R. § 1180.6(a)(2)(v) regarding labor impact information.

No further degree of specificity is required of a minor transaction under the regulations. Indeed, NS made a reasonable estimate based upon the projected and anticipated impacts. It would not have been possible for NS to disclose exact employee impacts until the implementing agreements were in place and employees actually decided their next career moves. At the time of the Application, the extent of a transaction's impact on employees by craft, trade, and geographic location could only be estimated. In satisfaction of the regulations, NS provided its estimates in its Application.

Further, Nasca is wrong, yet again, to argue that D&H is an "applicant" required to submit labor impact information. See, e.g., NS-11. Although Nasca claims that it is "practice" for both parties to a line acquisition to be considered applicants, Nasca Petition at 15, Nasca cites no precedent in support of this statement. All of the cases cited by Nasca involve mergers and consolidations, where both parties are required to be applicants who must submit the necessary information.

However, in the context of this line acquisition transaction, only NS is required to be the Applicant because D&H is not required to obtain Board authority to sell the D&H South Lines. NS is the only party that needs authority from the Board and is the only party who needs to provide information relevant to that authority. Indeed, such a conclusion is fully consistent with prior precedent where only the party seeking Board authority was the "applicant." See, e.g., CSX Transp., Inc.—Acquisition of Operating Easement—Grand Trunk Western R.R. Co., FD

No. 35522, 2012 STB LEXIS 334 (STB served Sept. 12, 2012) (“CSX/Grand Trunk”) (finding that the minor application and labor impact information therein, filed only by the acquirer, was “in substantial compliance with the applicable regulations”); Illinois Central Corp. and Illinois Central R.R. Co.—Control—MidSouth Corp., MidSouth Rail Corp., MidLouisiana Rail Corp., and Southrail Corp., FD No. 31801 (ICC served Mar. 21, 1991) (same). Nasca cannot overturn this precedent by citing mere slips of the tongue by D&H¹⁷ and the Board.¹⁸ See Nasca Petition at 15-16.¹⁹

Even if D&H were deemed an Applicant, no additional information on the Transaction’s labor impact would have been disclosed in the Application, for the reasons stated above. Nor does the statute governing the approval of minor transactions require such information for the Board to approve this Transaction.²⁰ Further, as noted above, no actual D&H employees or labor

¹⁷ In a letter filed January 7, 2015, D&H expressly clarified: “under the Board’s rules, D&H, as the seller, is not an applicant from which information is normally required.”

¹⁸ While D&H may have called itself an applicant, it is not an applicant required to submit information, as clarified by D&H and Board precedent. Thus, any use by the Board of the word “Applicants” in connection with the Transaction does not carry the significance that Nasca wishes

¹⁹ It is not significant that 49 C.F.R. § 1180.3(a) defines an Applicant as the “parties” initiating the transaction. The rules, by definition, are “consolidation” rules governing mergers. In the merger context, both of the merging entities would likely be required to be “Applicants,” and as such, both are “parties” initiating the transaction. In the context of a line acquisition, there is only one party who needs to seek STB authority. While Nasca argues that the word “parties” in 49 C.F.R. § 1180.3(a) means both the buyer (NS) and seller (D&H), even in a line acquisition case, Nasca Petition at 15, he cites to no authority for such a proposition. In contrast, NS has provided two cases, cited above, where only one party was the applicant. Furthermore, it is just as reasonable and rationale, especially in the context of an application for a line acquisition where the seller needs no authority, that the word “parties” means the buyer (NS) and its various railroad carrier subsidiaries, especially given that the rules were directed at mergers and consolidations among various rail carriers, including their subsidiaries.

²⁰ Indeed, given that approval of this Transaction did not involve approval under the “public interest” standard of 49 U.S.C. § 11324(d)(2), but rather met the “competitive effect” standard of § 11324(d)(1), the Board need not even consider employee impacts in approving the Transaction under § 11324(d). Thus, even if Nasca were correct that the Application lacked sufficient labor

unions have objected to the Transaction on any grounds, let alone due to insufficient labor impact information; and, five implementing agreements have been reached to date. Any D&H employees adversely impacted by the Transaction will receive full employee protection under the applicable standards regardless of D&H's applicant status. Thus, it was not material error for the Board to conclude that D&H is not an applicant required to submit labor impact information.

C. The D&H Discontinuances Are Not Part Of The Transaction And Have No Bearing On Its Competitive Or Labor Impact.

As consistently maintained by NS and the Board, the D&H Discontinuances are not part of the Transaction. This proceeding only relates to NS's acquisition of the D&H South Lines and NS's modification of certain existing trackage rights. The Board "need not address these trackage rights in this proceeding" because the "trackage rights run over NSR lines that are not part of the D&H Short [*sic*] Lines at issue." Decision No. 6. As discussed more fully in Part III of this Reply, there is no "nexus" between the Transaction and the D&H Discontinuances that requires consolidation of the two separate proceedings. Even if true, Nasca's false statement that the D&H Discontinuances would not be effected absent the Transaction,²¹ Nasca Petition at 18, does not demand consolidation of the two proceedings. See, e.g., CSX/Grand Trunk (allowing an exchange of operating easements between two carriers to proceed in two separate proceedings, even though one exchange would not occur without the other). Thus, the D&H

impact information, which it did not, the Transaction would still have been approved, and the Board did not "err in its failure to enter findings concerning the impact of the NSR purchase upon D&H employees." Nasca Petition at 6. The Board need not make such findings in approving a transaction under §11324(d)(1). Furthermore, to the extent the Board also approved the Transaction under §11324(d)(2), the Board had more than sufficient information to consider employee impacts as part of its public interest analysis.

²¹ As noted in NS-16, D&H is filing for discontinuance authority with a two-year out-of-service notice of exemption, demonstrating that the D&H Discontinuances are not a result of the Transaction.

Discontinuances do not affect the “competitive and employee effects” of NS and D&H in this proceeding, as Nasca claims. See Nasca Petition at 18.

Further, even if the D&H Discontinuances did affect the Transaction, which they do not, this effect would not be material to Decision No. 6. First, the Board is not required to make findings on employee impacts under 49 U.S.C. § 11324(d)(1). Second, although not required to do so, NS fully considered the effect of the D&H Discontinuances in its competitive analysis of the Transaction and still found no true 2-to-1 effects or corridors. Nasca’s statement that “the fact that the lines have not seen recent use does not imply that the lines do not serve as a restraint for competitive lines,” Nasca Petition at 18, is wholly without merit. See, e.g., Canadian National Railway Co., Grand Trunk Corp., and WC Merger Sub, Inc. – Control – Wisconsin Central Ltd., Fox Valley & Western Ltd., Sault Ste. Marie Bridge Co., and Wisconsin Chicago Link Ltd., FD No. 34000, 2001 STB LEXIS 711, at *39 (STB served Sept. 7, 2001) (refusing to condition approval of the transaction on applicants’ agreeing not to cancel certain rights, noting that “an option that has not been used in 7 years appears to be ‘competitive’ only in the most theoretical sense”). Finally, any NS and D&H employees adversely affected by either NS’s line acquisition or NS’s trackage rights modifications, will receive full employee protection under either New York Dock, as modified by Wilmington Terminal or N&W/Mendocino. Likewise, any D&H employees adversely affected by the D&H Discontinuances will receive applicable employee protection as a result of that separate proceeding. Thus, it was not material error for the Board to consider the Transaction separately from the D&H Discontinuances.

III. CNJ RAIL CORP. AND STROHMEYER HAVE NOT DEMONSTRATED MATERIAL ERROR, NEW EVIDENCE, OR CHANGED CIRCUMSTANCES TO WARRANT RECONSIDERATION.

CNJ's petition for reconsideration of Decision No. 6, alleges that (1) there are substantially changed circumstances from the discovery of abandonment proceedings allegedly related to the D&H Discontinuances, and therefore the Transaction; and (2) the Board committed material error by not finding a "nexus" between the Transaction and the D&H Discontinuances. These assertions are unfounded and should be rejected.

As an initial matter, the Petition filed by CNJ should be stricken on procedural grounds. Under 49 C.F.R. § 1115.3(d), a petition for reconsideration "must not exceed 20 pages in length." The petition filed by CNJ has 27 pages, a count which swells to 75 pages including exhibits. Further, CNJ lacks standing in the current proceeding, as CNJ is neither a shipper, a STB regulated railroad, a private operating railroad, nor an entity with any demonstrated legitimate or financial stake in the Transaction.²² In addition, the CNJ Petition should be stricken because of its unsubstantiated derogatory comments regarding NS and D&H that are wholly without merit. See, e.g., CNJ Petition at 2, 9, 12.

Further, it is important to note that CNJ raises no new issues in its Petition. CNJ simply repeats prior arguments about consolidation of the two separate proceedings related to the Transaction and the D&H Discontinuances—arguments which the Board has already dismissed in accordance with its precedent. See Decision No. 6. Indeed, contrary to CNJ's Petition and as the Board has previously found, NS's Application was complete. The D&H Discontinuances were not required to be included therein, and regardless of the outcome of the D&H

²² Based on the public record, CNJ Rail appears to conduct no actual rail operations or rail-related business. See, e.g., Maryland Transit Administration – Petition for Declaratory Order, FD 34975 (STB served Sept. 19, 2008) ("CNJ does not own any rail assets or conduct any rail operations. CNJ's filing did not describe its interest in this proceeding.").

Discontinuances proceeding, such outcome does not change or affect in any manner the Board's approval of the Transaction under §11324(d).

A. NS Was Not Required To Include The D&H Discontinuances In Its Application.

As discussed above, the D&H Discontinuances are not part of the Transaction. In the current proceeding, NS is the sole Applicant seeking Board approval only for its acquisition of the D&H South Lines and its modification of certain existing trackage rights. This is not a merger or control proceeding where both the buyer and seller are applicants, and where all trackage rights, abandonments, and discontinuances for both parties must be included in the application. This is a simple line acquisition, and therefore, NS was under no legal obligation,²³ and had no legal authority, to file the D&H Discontinuances as part of its Application. NS itself has no abandonments or discontinuances in relation to the Transaction that were required to be disclosed in its Application.

Simply because two transactions are part of the same business agreement or are otherwise related does not mean that such transactions are required to be consolidated in one application. For example in CSX/Grand Trunk, the parties had agreed to exchange perpetual rail operating easements over portions of each other's lines. However, each party separately filed an application for authority to acquire the easement from the other party under 49 U.S.C. § 11323(a)(2); and, the proceedings were adjudicated in two separate dockets, even though the Board intended to adjudicate both easement acquisitions on parallel schedules toward the same final decision date. 2012 STB LEXIS 334, at *2. Similarly in the current proceeding, NS has

²³ NS was under no statutory or regulatory obligation to even disclose or discuss the D&H Discontinuances in its Application. It did so only to establish that the Transaction, even if considered in the context of the forthcoming D&H Discontinuances, would have no anticompetitive effects—a finding with which the Board agreed. In its Petition, CNJ presents no new evidence or changed circumstances that counter this fundamental conclusion of Decision No. 6.

filed an Application to acquire the D&H South Lines from D&H under § 11323(a)(2) and D&H has separately filed its notice of exemption to discontinue certain trackage rights. While the Transaction and the D&H Discontinuances may arise out of the same business agreement, NS had no obligation or power to seek authority for the D&H Discontinuances, and NS had no obligation to include the D&H Discontinuances in its Application. Just as each party in CSX/Grand Trunk did not need to seek authority for the other's contemporaneous acquisition of an operating easement as part of one application, NS and D&H did not have to consolidate their respective regulatory filings in one application, and, CNJ cannot point to any precedent standing for such a proposition.

Even if NS were required to disclose the D&H Discontinuances in its Application, which it was not, none of CNJ's arguments regarding the alleged omissions related to the D&H Discontinuances have merit. The R.J. Corman R.R. Co./Allentown Lines, Inc.—Abandonment Exemption, AB No. 550 (Sub-No. 3X) and the Consolidated Rail Corp.—Abandonment—Lehigh and Carbon Counties, PA, AB No. 167 (Sub-No. 541N) have no relation to the D&H Discontinuances. The Reply of R.J. Corman R.R. Co./Allentown Lines, Inc. to James Riffin's "Initial Comments", AB No. 550 (Sub-No. 3X) (filed June 10, 2015) clearly and logically demonstrates that D&H does not have unextinguished trackage rights over R.J. Corman Railroad Co.'s line between Allentown, PA and Whitehall, PA. Even CNJ acknowledges that "[n]o records have been found to confirm the theory" regarding a link between the D&H Discontinuances and Pennsylvania Lines, LLC—Abandonment Exemption—in Northampton County, PA, AB No. 859 (Sub-No. 1). CNJ Petition at 11. Thus, there are no "undisclosed" abandonment proceedings related to the D&H Discontinuances.

Furthermore, even assuming arguendo that CNJ 's arguments regarding the alleged omissions related to the D&H Discontinuances have merit, such omissions do not affect the Board's approval of the Transaction under §11324(d)(1). As Dr. Grimm's competitive analysis established, the Transaction results in no anticompetitive effects even considering the D&H Discontinuances, because such trackage rights are not competitive alternatives to existing NS routes. Simply put, it does not matter if the "proposed scope of the D&H discontinuance is far greater than what NS led everyone to believe," see CNJ Petition at 4, because the D&H Discontinuances are properly part of a separate proceeding and nothing in the D&H Discontinuances proceeding materially affects the competitive analysis of this proceeding. Thus, CNJ's alleged new evidence and changed circumstances do not have any bearing on the competitive findings of the Board's decision.²⁴ Thus, regardless of the outcome or the scope of the D&H Discontinuances proceeding, it was not material error for the Board to accept NS's Application and to approve the Transaction based on the record in this proceeding.

B. The Rejection Or Denial Of The D&H Discontinuances Does Not Create A "Joint Use" Arrangement.

CNJ wrongly alleges that an "indisputable nexus" was created by the May 13, 2015 decision in the D&H Discontinuances proceeding because the Board may have to "defend a decision in this proceeding, while there is still no resolution to the D&H proceeding." See CNJ Petition at 17-26. CNJ argues that if D&H retains its trackage rights, NS's voluntary haulage agreement with D&H, for the benefit of the connecting short lines like the Lehigh Valley Rail Management ("LVRM"), will become a joint use/consolidation agreement requiring Board approval. In support of this statement, CNJ cites CSX Transp., Inc. and Delaware and Hudson

²⁴ CNJ Rail's argument about jurisdictional limitations, see CNJ Petition at 12-17, are wholly irrelevant. The Board clearly has approval authority over the Transaction at issue in this proceeding.

Ry. Co., Inc.—Joint Use Agreement, FD No. 35348 (STB served Oct. 22, 2010) (“CSX/D&H”) and argues that regardless of whether NS asks for Board permission for joint use, stays portions of the Transaction related to LVRM until the D&H Discontinuances proceeding concludes, or removes the haulage agreement from the Board’s consideration, the Application would be “radically alter[ed].” CNJ Petition at 26.

CNJ is simply wrong and misconstrues applicable law. CSX/D&H dealt with a fundamentally different type of transaction from the Transaction. In CSX/D&H, the parties sought authority to enter into an actual “joint use agreement” which gave them equal operating and service rights over each other’s lines. CSX/D&H does not stand for the unrelated proposition that joint use authority must be obtained if one carrier has both haulage and trackage rights over another carrier’s line; nor does any other case. For example in BNSF Ry. Co.—Discontinuance of Trackage Rights Exemption—in Peoria and Tazewell Counties, Ill.; Toledo, Peoria & Western Ry. Corp.—Petition for Declaratory Order, AB No. 6 (Sub-No. 470X), 2011 STB LEXIS 194 (STB served Apr. 26, 2011), BNSF agreed to grant the Toledo, Peoria & Western Railway Corp. both haulage rights and overhead trackage rights on its line. However, this dual grant did not require joint use authority from the Board. Similarly, NS has both haulage and trackage rights over The Kansas City Southern Railway Co.’s Meridian Speedway, and even owns a minority stake in the company that owns the line; but, no joint use authority was required. Kansas City Southern, The Kansas City Southern Ry. Co., and Meridian Speedway LLC – Exemption for Transactions Within a Corporate Family; Norfolk Southern Ry. Co. – Trackage Rights Exemption – Meridian Speedway LLC – Between Meridian, MS And Shreveport, LA; The Kansas City Southern Ry. Co. – Trackage Rights Exemption - Meridian Speedway; FD Nos. 34821, 34822, - 34823 (STB served Apr. 6, 2006) (transactions involving

joint ownership, haulage rights, and trackage rights over a rail line between Meridian, MS and Shreveport, LA approved via a series of exemption notices). Thus, the inability of D&H to obtain discontinuance authority in the separate proceeding, such that it would have both trackage and haulage rights, would not alter the nature of the current proceeding or the Board's consideration of the Transaction.²⁵ Thus, it was not material error for the Board to approve the Transaction, even though the D&H Discontinuances proceeding has not been resolved, as of the date of this reply.

CONCLUSION

Only three parties filed petitions for reconsideration of Decision No. 6 approving the Transaction. Of these three, only one is a shipper that is not even located on the D&H South Lines. None of the Petitioners have met the burden for reconsideration under 49 C.F.R. § 1115.3(d) by showing that the Board's decision has been materially affected by new evidence or changed circumstances or that the Board's decision involved material error.

In contrast to the three Petitioners, over 125 parties representing a broad range of interests support the Transaction. Five connecting short lines have even filed letters expressing their interest in prompt consummation of the Transaction since the Board released Decision No. 6. Five implementing agreements have been reached, and NS and D&H are working toward consummation of the Transaction. Any changes to Decision No. 6, especially changes that would require further delay or additional filings as requested by Nasca and CNJ, would only delay the benefits of the Transaction for shippers, employees operating on the D&H South Lines, connecting short lines, and the surrounding communities. In conclusion, in light of the fact that

²⁵ If the D&H Discontinuances are denied, to the extent D&H would be required to continue to provide common carrier service over any of the involved trackage rights lines, NS stands willing and able to work with D&H to provide competitive and efficient routings for any shippers desiring to continue to use D&H service.

none of the Petitioners have met the regulatory burden for reconsideration and in light of the public interest in prompt consummation of the Transaction, the Board should reject all three petitions for reconsideration.

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June 24, 2015

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of "Reply To Petitions For Reconsideration" (NSR-20) in STB Finance Docket No. 35873, by first class mail, properly addressed with postage prepaid, or via more expeditious means of delivery, upon all parties of record.



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June 24, 2015