

Before the
SURFACE TRANSPORTATION BOARD

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June 4, 2015
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NORFOLK SOUTHERN RAILWAY, INC.
- ACQUISITION -
CERTAIN LINES OF THE DELAWARE & HUDSON RAILWAY, INC.

FD 35873

CNJ RAIL CORPORATION

and

ERIC S. STROHMEYER

PETITION FOR RECONSIDERATION

Respectfully Submitted,

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Before the
SURFACE TRANSPORTATION BOARD

FD 35873

Norfolk Southern – Acquisition – Certain Lines of the Delaware & Hudson Railway, Inc.

Now comes your Petitioners, CNJ Rail Corporation (“CNJ”), and Mr. Eric S. Strohmeyer (“Intervener”), a corporate officer of CNJ, who jointly (“CNJ Parties”) and severally, respectfully seek reconsideration of the Board’s May 15th 2015 decision in the above captioned proceeding. Pursuant to the Board’s decision, Petitions for Reconsideration must be filed by June 4th, 2015. In accordance with that directive, this Petition is herein provided.

I. INTRODUCTION

In this proceeding, applicant Norfolk Southern Railway (“NS”) sought Board permission to purchase approximately 283 miles of railroad from the Delaware & Hudson Railway, Inc. (“D&H”). In its application, NS made a number of statements in support of its application and indicated that while the transaction also contemplated that the D&H would shortly be seeking discontinuance authority for well over 600 miles of operating rights as a part of the transaction, NS argued that the D&H’s discontinuance proceeding was a totally separate and unrelated transaction capable of being evaluated separate and apart from this current proceeding.

Despite vigorous protests from CNJ, and other parties in the proceeding, that the D&H proceeding needed to be addressed as a part of this proceeding, the Board agreed with NS. The Board accepted the incomplete application as “complete” and set forth a procedural schedule. For reasons unknown, the Board’s official Notice in the Federal Register of this transaction

failed to comply with the statutory requirements set forth in 49 U.S.C. § 11325(d)(1). To date, no notice of this proceeding, which complies with the statute, has ever been published in the Federal Register.

The above Federal Register transgression was but the first in, now, a series of continuing errors and oversights which plague this proceeding. Despite vigorous protests, parties seeking conditions in this proceeding were required to fashion their requests for conditions based on a limited and incomplete description of the proposed transaction. Not until March 19th 2015, when the D&H finally sought its own discontinuance transaction, did the public have notice and an opportunity to evaluate the veracity of the claims that NS made in its application, about the scope and effect of the D&H proceeding on the NS proceeding.

By waiting until all possible windows for submitting comments to the Board in this proceeding had closed, the D&H made sure no party had any time or opportunity to properly and fully evaluate the veracity of any of NS's representations to the Board, and then submit those findings and comments within the procedural schedule provided for in this proceeding. As outlined below, there were a number of reasons why NS did not want this to occur; for both NS **and D&H had lied, omitted, and otherwise significantly misrepresented this transaction to the Board, the public, and many other interested parties.**

Notwithstanding the devious and duplicitous actions of NS and the D&H in this proceeding, their illicit tactics might have proven successful but for the pompous glaring oversight made by the D&H in preparing its Notice of Exemption. It is that one critical misstep that now shall bring to light their illicit scheme. For the reasons set forth below, the CNJ Parties respectfully request that the Board vacate its May 15th 2015 decision and reject this transaction

as incomplete and contrary to law. In the event that the Board does neither, then the Board should provide CNJ the condition it sought in this proceeding.

II. CHANGED CIRCUMSTANCES

Up until the decision issued on May 13th 2015 by the Director of Proceedings in *Delaware and Hudson – Discontinuance of Trackage Rights* STB Docket# AB 156 (Sub No. 27 X), the likelihood that any party could successfully demonstrate conclusively the interconnectivity and the indisputable “nexus” between the proposed NS transaction in this proceeding, and the D&H’s anticipated discontinuance action, proved elusive. So long as the D&H transaction was adjudicated in “close proximity,” as opposed to “in concert with,” (i.e. consolidated with) the NS transaction, the fact that the transactions were critically linked, could not be demonstrated with any degree of certainty.

The Director’s May 13th 2015 decision changed all that. For that single decision set into motion a chain reaction which can now lead to parties clearly establishing why the two transactions needed to be presented in concert (consolidated), and be dealt with in one proceeding. As CNJ has vigorously argued from its very first pleading; the submitted application was incomplete, and the failure to submit the trackage rights discontinuance proceedings simultaneously, for evaluation, deprived all the parties, including the CNJ Parties, of due process. No party could properly evaluate the entire transaction and request appropriate conditions.

In addition, it was revealed that there are now two, and possibly three, additional transactions which are directly related to both this proceeding, and the D&H proceeding, which were hereto previously undisclosed by either NS or D&H. Such nefarious subterfuge of the

Board's procedures should never be tolerated. The failure to disclose these additional transactions is a gross abuse of the Board's processes.

The D&H Discontinuance Proceeding

In its application, NS gave a **general, extremely vague description** of the proposed D&H discontinuance proceeding. In addition, NS also flat-out misrepresented the nature of one part of its proposed acquisition. A side by side comparison of NS's description of what the D&H would seek to abandon, and what the D&H actually sought to abandon, reveals that the transactions clearly do not match. The proposed scope of the D&H discontinuance is **far greater** than what NS led everyone to believe.

The most notable difference (but not the only difference) between the two descriptions is the revelation that the D&H had not one, but two parallel routes between Lehighton, PA and Newark, NJ. This revelation caught everyone, including CNJ, by complete surprise, for nowhere in the NS transaction are such parallel routes described. Indeed, it was the very nature of those parallel routes, which may have caused the D&H to fail to properly identify all of the Zip Codes that the lines traverse.

The revelations regarding the Zip Code issue is but the tip of the proverbial "iceberg". The issue is actually far greater than just the issue of Zip Codes. It goes directly to the core of what the D&H certified that it had. In its notice, the D&H states that it intends to discontinue its trackage rights over a number of different carriers. However, the D&H failed to disclose all the names and locations of ALL the carriers its trackage rights currently encumbered. It failed to provide adequate descriptions of those lines. It reluctantly admits that it may not have a complete understanding of what it has the rights to run over. How is a party supposed to be able to

evaluate the transaction, when critical elements of the transaction cannot be precisely defined by the party requesting the Board to take action?

Furthermore, the D&H's Notice clearly omits certain tracks all together. A simple reading of the documents provided by the D&H in the proceeding, clearly identifies additional lines which the D&H notice clearly omits. In short, the issues with the D&H proceeding are far greater than just an issue of a few missing Zip Codes.

Attached as Exhibits 1 & 2, are two relevant documents which are presented to highlight just a small portion of the shortcomings in the D&H's Notice. Exhibit #1 is a copy of Exhibit B, which was attached to the D&H's Notice of Exemption. According to D&H's notice, the description of the rail lines over which service is to be discontinued, is supposed to be described therein.

However, in the Verified Statement of Mr. James Clement, which was provided in a supplemental pleading by the D&H, there is an attached excerpt from the original 1979 trackage rights agreement. A partial copy of said Verified Statement is hereto attached as Exhibit #2. Of critical note, the descriptions of certain lines in the 1979 agreement that appear to be clearly encumbered by D&H's trackage rights, do not appear at all in Exhibit B of the D&H's Notice.

Further adding fuel to the already raging fire which threatens to consume the D&H's Notice, in Mr. Clements' Verified Statement, he clearly admits that the D&H is currently moving overhead traffic over two of segments. The D&H is clearly trampling over the longstanding interpretation of the two-year out-of-service exemption. While the question of whether the D&H's use of the two-year out-of-service exemption is appropriate, may not be germane to this proceeding, it is important for the Board to realize that the question of whether the D&H's use of

the two-year out-of-service exemption is appropriate, will be raised in the D&H proceeding. If the transactions are truly separate, then it is inappropriate for the Board to decide that issue in this proceeding. For the Board to do so in this proceeding is material error.

These inconsistencies, errors and omissions have nothing to do with omissions of Zip Codes, which may, or may not, have been inadvertent. The D&H is omitting entire lines from their notice. The D&H is failing to properly identify lines. The D&H is inappropriately using the Board's two-year out-of-service exemption. And as set forth below, there appears to be additional nefarious reasons for these omissions.

RJ Corman Abandonment Proceeding

On May 1st 2015, the RJ Corman Railroad Company-Allentown Lines, Inc., filed a Petition for Exemption to abandon a segment of its line in Lehigh County, Pennsylvania. In *RJ Corman Railroad Company / Allentown Lines, Inc.- Abandonment Exemption* STB Docket# AB 550 (Sub No. 3X), RJ Corman gives a general description of the line, including mileposts. At first glance, this otherwise simple abandonment proceeding appears to be routine in just about every manner.

But for the curiosity of the Intervener, this proceeding would have gone largely unnoticed. Upon reviewing the line's description, it became apparent that the RJ Corman line was actually a part of the former Lehigh Valley mainline (USRA Line Code 0503A). Having recently reviewed the Verified Statement of Mr. Clements, and having the attached copy of the D&H Trackage Rights agreement, as well as Exhibit B of the D&H's Notice sitting upon the Intervener's desk, it did not take the Intervener too long to put two and two together. It was quite

apparent that the trackage rights the D&H was seeking to discontinue service over, also encumbered the trackage that RJ Corman was seeking to abandon.

A quick review of the D&H's Notice showed that the D&H's rights over the RJ Corman Line, were never described in the Notice. Attention then turned to what NS represented in this proceeding. NS never indicated nor disclosed in its application, that the D&H had trackage rights over the RJ Corman lines, that would be extinguished as a result of the discontinuance transaction.

Pursuant to the description attested to by the D&H in Exhibit B of its Notice (See item IV), the D&H sought to discontinue its rights:

“Between Milepost 85.8+/- in Freemansburg and Milepost 119.1 in Lehighton PA via Allentown over former LV lines, a distance of approximately 33.3 miles.”

The revelation was profound. The process of carefully scrutinizing the D&H Notice, began in earnest. The result led to more revelations about the scope and impact of the D&H Discontinuance Proceeding. The CNJ Parties could not believe that neither RJ Corman, nor the D&H, nor NS inadvertently missed this discrepancy. There had to be another reason.

The CNJ Parties' initial reaction was to assume that there likely must have been either an abandonment or discontinuance proceeding that had been previously overlooked. The Intervener was aware that the former LV mainline appeared to no longer be a through route. CNJ sent researchers to comb over old ICC records in the Board's Library to ascertain if there were any previous abandonment or discontinuance proceedings, that might explain the anomaly.

The results of that inquiry forever changed the nature of this proceeding in the minds of the CNJ Parties. The research revealed not one, but two additional proceedings that are clearly

affected by the D&H proceeding. It also revealed the need for a possible third proceeding as well. It also provided a clear motive as to why NS was so insistent on the Board treating this proceeding separate and apart from the D&H proceeding.

Undisclosed / related NS Abandonment Proceedings

CNJ researchers were successful in tracking down a number of abandonment and discontinuance proceedings which either: dealt with the D&H's trackage rights, or dealt with lines encumbered by D&H's trackage rights. The first of two highly relevant proceedings was a Conrail Abandonment Proceeding from 1982

ICC Docket# AB 167 (Sub No.# 541N)

CNJ researchers were able to locate a Conrail abandonment file in the Board's Library in Washington, DC, entitled: *Consolidated Rail Corporation – Abandonment – Lehigh and Carbon Counties PA* ICC Docket Number AB 167 (Sub No.# 541N). Copies of the Application (Exhibit # 3), the D&H's response to the application (Exhibit # 4), and the Commission's decision (Exhibit # 5), are attached hereto.

It appears that Conrail sought permission to abandon a portion of the Lehigh Valley Mainline. The D&H vigorously protested the abandonment and made it quite clear, that the D&H **would not** seek discontinuance of its trackage rights, and that Conrail's *permissive authority* could not abrogate the D&H's rights. This clearly produced a legal quagmire which the Commission's decision did not address. This dispute, which appears to remain in a perpetual state of deadlock for over 30 years, remains valid to this day.

It should be noted, that Norfolk Southern is Conrail's successor-in-interest in the Lehigh Valley Line, by virtue of NS's acquisition, and subsequent split, with CSX Transportation, of the

assets of Conrail. As such, the 30-year-old impediment to complete consummation of abandonment authority over the Lehigh Valley line, appears to remain. NS certified that there are no related abandonments with the proposed transaction. However, it clearly appears that there is at least one related abandonment, for unless the D&H is permitted to discontinue its rights, that impediment remains. If the D&H is granted the right to discontinue its trackage rights over that portion of the Lehigh Valley line that was the subject of Conrail's AB 167 (Sub. No. 541N) proceeding, then there is a related abandonment proceeding. (Two actually: Conrail's and RJ Corman's.) This issue should have been disclosed when NS' application was filed.

NS was obligated to disclose whether there were any related abandonments. NS **falsely certified** that there would be no related abandonments associated with the proposed transaction. NS should have disclosed the existence of this 30-year-old quagmire to the Board, long before now. There are going to be, in fact, multiple abandonments directly related to NS' proposed transaction. The associated abandonments have not been disclosed prior to now. They should have been disclosed in NS' application.

To further complicate the matter, it is not clear that the permissive authority granted to Conrail, could have been fully exercised, due to the lingering question of the D&H's trackage rights. In 1986, the statutory scheme through which the abandonment authority was granted, was subsequently repealed. This raises the question: If the authority to abandon a line could not be used, and the authority to abandon the line is subsequently repealed prior to the authority being consummated, does authority to abandon the line still exist? Or must a new abandonment proceeding be instituted?

Notwithstanding that argument, as discussed below, there clearly are issues which require presentation to the Special Court for its resolution. The issues regarding jurisdiction are discussed further below.

A Stranded Segment? or another illegal Conrail Abandonment disclosed?

The CNJ parties would like to point out one aspect that the revelation of the RJ Corman proceeding and Conrail proceedings highlight. It should be noted that there is a difference in the mileposts between the ending milepost of the RJ Corman proceeding, and beginning milepost in the Conrail proceeding. In *Consolidated Rail Corporation's Sales and Discontinuances*, STB Docket# EP 695, Conrail was ordered by the Board to disclose all line sales in which abandonment authority was not sought, from June 1st 1996, until May 13th, 2010.

The southern portion of the former Lehigh Valley mainline was sold to RJ Corman in August of 1996. Conrail appears to have at least attempted to seek prior abandonment authority for the segment of the line north of Milepost 98.0. Both RJ Corman's acquisition and abandonment proceedings reference the same milepost#: 96.709. No Conrail abandonment authority, or sale authority, can be found for the "missing" 1.3 mile segment between Milepost 96.709 and Milepost 98.0.

STB Docket# AB 859 (Sub No.# 1)

In reviewing Clements' Verified Statement, the CNJ parties took note of a second line of railroad expressly mentioned in the D&H trackage right agreement. Identified in the Trackage Rights Agreement as USRA line code 502F, the segment is annotated as beginning at "Saucon Yard". Of critical note, there is no milepost number associated with that location in the

agreement. It was noted that the transferring estate was the LC&N organization. The LC&N was the owner of the Lehigh and Susquehanna RR, a company long-leased to the former CRR of NJ.

This sent CNJ researchers scrambling to the Final System Plan to locate any references to USRA line code 502F. None have been found so far. This left quite a mystery. Where exactly was this line, and what did it intend to allow D&H to provide service to?

Historically, Saucon Yard was a significant rail yard and interchange location located in South Bethlehem, PA, where the former CNJ and Reading (“RDG”) railroads interchanged cars to the in-house railroad of the Bethlehem Steel Corporation, the Philadelphia Bethlehem and New England Railroad (“PB&NE”). The yard was located at or near Milepost 55 on USRA line code 0301. Of critical note: Other than transiting the PB&NE Railroad, there was no way to access Saucon Yard by rail, **other than** via the RDG Bethlehem Branch (Line Code 0301).

Historically, the CNJ accessed Saucon Yard via trackage rights over the RDG Bethlehem Branch. This revelation gave rise to the question: Might it have been possible for the CNJ’s trackage rights over the Bethlehem Branch, to have been assigned its own USRA line code number at some point in time? No records have been found to confirm the theory, but the idea remains a strong possibility that CNJ researchers continue to pursue.

On January 21, 2004, Pennsylvania Lines LLC (“PRR”), then a wholly owned subsidiary of NS, filed a Notice of Exemption to abandon a line of railroad in Northampton County, PA. In *Pennsylvania Lines, LLC – Abandonment Exemption – In Northampton County, PA*, STB Docket# AB 859 Sub No.#1, and related¹ proceedings, PRR and NS jointly sought to abandon / discontinue service to the northern-most portion of former USRA line Code 0301. With the

¹ See also: *Norfolk Southern – Discontinuance of Service Exemption*, STB Docket# AB 290 (Sub No.# 245X)

Board's approval of this abandonment, all rail access to Saucon Yard that was conveyed to Conrail pursuant to the Final System Plan, would cease to exist.

CNJ researchers have yet to determine where USRA line Code 502F is, or how it relates to Saucon Yard. Nevertheless, the clear mention of Saucon Yard in the D&H Trackage Rights Agreement identifies Saucon Yard as an ending point of the D&H's trackage rights. The historic Saucon Yard, was located solely on USRA line code 0301. If it is determined that USRA Line Codes 502F and 0301 are, in fact, one and the same line, then there remains an undisclosed impediment to consummation of the abandonment authority in the PRR / NS Proceedings as well.

CNJ believes that NS was clearly aware that significant issues arising from the D&H discontinuance proceeding, might have scuttled, or otherwise significantly impacted, this proceeding. As such, CNJ argues that the intentionally vague description of the proposed D&H transaction, the lack of specific details, and blatant misrepresentations, was a deliberate attempt by NS to deceive and mislead the Board.

III. JURISDICTIONAL LIMITATIONS

At this time, the CNJ Parties would like to briefly discuss the issue of jurisdiction, and in particular, subject matter jurisdiction of the Board. While it is long established and well-settled law, that Jurisdiction can be challenged at any time, and once challenged, must be decided, the Board's adjudication of this proceeding, may or may not give rise to the following jurisdictional challenges. To insure that no party can argue waiver of the argument, the CNJ Parties expressly reserve the right to challenge any decision of the Board in this proceeding on jurisdictional grounds at anytime, including in any judicial review arising out of this proceeding.

In this proceeding, in the D&H proceeding, in the RJ Corman proceeding, in the “suspended” Conrail proceeding, and in any additional proceedings likely to arise from the NS proceeding, there are, or likely will be, issues or findings of fact that this Board may determine or otherwise address, that may infringe or encroach upon, the exclusive jurisdiction of one of more of the following jurisdictions.

Special Court

In 1973, Congress passed the Regional Rail Reorganization Act. The purpose of the act was to establish an appropriate regulatory scheme to help the nation’s railroads, and in particular, 7 Class I railroads which served the northeastern part of the country. All of the carriers were all in reorganization. The nation’s rail network was in crisis. Congress created not only a new agency, the United States Railway Association (“USRA”), but also a new “Special Court,” to administer, review and adjudicate certain disputes and other legal matters that might arise out of the federal government’s involvement and efforts to reorganize and restructure railroads in the northeast United States.

Today, pursuant to 49 U.S.C. § 719(b)(1) and 719(b)(2), the functions and remaining responsibilities of the Special Court are now vested in the United States District Court for the District of Columbia. Today, disputes which arise that would have fallen within the exclusive jurisdiction of the “Special Court,” now reside exclusively in the DC District Court’s jurisdiction. Notwithstanding the changes made over the years, disputes can, and do, appear which require the input and guidance of the “Special Court”.

In this proceeding, and most certainly in the D&H Proceeding as well, significant disputes are emerging which will undoubtedly fall within the exclusive jurisdiction of the

“Special Court”. The Board may feel inclined, or more likely, feel pressure from other parties, to resolve certain “interpretation disputes.” The CNJ Parties are concerned that either NS or D&H, will attempt to strongly urge the Board to engage in matters, and resolve disputes, which are not within the Board’s jurisdiction.

It should be noted, the Board has previously been asked by parties to weigh in on matters in a dispute which encroached upon the Special Court’s exclusive jurisdiction. The result of the Board’s previous decision met with unpleasant results. In *Conrail v. STB et.al.* 571 F.3d. 13 (DC Circuit, 2009), the Court held that this Board lacked the jurisdiction to adjudicate the nature of conveyances made pursuant to the Final System Plan, holding that such determinations were within the exclusive jurisdiction of the Special Court.

While, at first glance, there appears to be no immediately apparent issues which give rise to questions which would invoke the jurisdiction of the Special Court in this proceeding, issues may well arise. On a practical note, it is **virtually guaranteed** that there will be issues which arise in the D&H proceeding, which will unquestionably touch upon the Special Court’s exclusive jurisdiction. To the extent that questions may arise in this proceeding, or any issues arise in the D&H proceeding which affect this proceeding, the CNJ Parties expressly reserve the right to question jurisdiction, and the impacts associated with that jurisdiction, at any time. No arguments, both present, or future, are waived.

Limitations on Discretion of the ICC in Conrail Abandonment Proceedings

While not necessarily itself a jurisdictional matter, it is also important to note the while the Interstate Commerce Commission held jurisdiction over all rail carriers, the Commission’s

role in adjudicating the disposition of certain matters regarding carriers in reorganization, was specifically limited by Congress, for a period of over 10 years.

Northeast Rail Services Acts of 1981 (NERSA)

While it is not expected to be a significant part of this proceeding, it is possible that the Board may find questions or disputes emerging that relate directly to the impacts of NERSA and the unique type of transactions that the statutory scheme authorized. NERSA set forth a series of unique events that, while not directly impacting this proceeding, will cast more fuel on the metaphorical “fire” which the D&H proceeding is rapidly becoming.

One additional item of critical note: The Board is the successor agency to the Interstate Commerce Commission. However, the legislation which abolished the USRA, appears to have dictated that whatever remaining responsibilities that the USRA may have had, shall be transferred to the Secretary of Transportation, and not to the Board. 45 U.S.C. § 1341 (a)(2) states:

“(2) On January 1, 1987, all powers, duties, rights, and obligations of such association relating to the Corporation under the Regional Rail Reorganization Act of 1973 (45 U.S.C. 701 et seq.) shall be transferred to the Secretary of Transportation.”

To the extent that the Board may feel compelled, obligated, or otherwise motivated to “step into” what might appear to be a “void” left by the abolishment of the USRA, the powers previously granted to the USRA, were clearly not transferred to the Board, but rather to the Secretary of Transportation.

This directive appears to be consistent with Congress's intent and handling of the Act. The USRA was specifically created to address many of the functions the Commission would have handled. The Commission's role in Conrail-related proceedings, was relegated to primarily a limited ministerial role. By transferring the USRA's authority to the Secretary, as opposed to the Commission, the same separation between the Commission and the unique role the USRA played in deciding matters related to Conrail, would be maintained.

Given what appears to be clearly defined roles set forth in the statute, and Congress's consistent separation of the powers of the Commission, from the parties charged with the oversight of Conrail, it would appear that the Board would lack the jurisdiction to adjudicate certain disputes wherein the Board might choose to substitute its views, in lieu of the input and participation the statute previously imposed on the USRA.

US Bankruptcy Court

At first glance, the CNJ Parties are sure the heading in the section captured the attention of all who read it. Pursuant to 28 U.S.C. § 1334, original and exclusive jurisdiction of all cases handled under Title 11 is vested in the district courts. While some may scoff at the notion such a jurisdictional question could possibly be raised in this proceeding, (unless, of course, it is raised in a negative manner directed at Mr. Riffin) questions regarding the Bankruptcy's Court exclusive jurisdiction can, and most likely will, get raised in the D&H proceeding. To the extent that an issue might affect this proceeding, CNJ reserves the right challenge the jurisdiction of this Board to address issues which are within the exclusive jurisdiction of the Bankruptcy Court.

The CNJ parties will soon be filing a response in the D&H proceeding in which it will be more extensively articulated how Bankruptcy Court jurisdictional issue will arise. In 1988, the

original corporate predecessor of the D&H filed for bankruptcy protection from its creditors as it sought to reorganize its finances. The 1991 acquisition of the D&H lines from the Trustee of the Debtor by today's D&H, not only included the subject line of this proceeding, but also the trackage rights that are the subject of the D&H proceeding as well.

The conveyance orders of the Bankruptcy Court, and any disputes or questions which may arise out of those order, are not within the exclusive jurisdiction of this Board, even if the assets or parties in the Bankruptcy proceeding might otherwise be within, or otherwise subject to, this Board's jurisdiction. For example, an issue such as what rail assets may, or may not have been in the Debtor's estate, and precisely what the conveyance order of the Court intended, or in fact conveyed, is not subject to the interpretation of this Board, but rather remains within the sole jurisdiction of the Bankruptcy Court.

IV. MATERIAL ERROR

While the Director of Proceeding's Decision on May 13th, 2015, appears to be directed toward attempting to correct minor technical defects, the decision actually stayed the effective date of the D&H proceeding. In short, there is no longer any legally effective discontinuance authority upon which the Board appears to have relied upon in its May 15th Decision. In short, it is material error.

The May 13th decision now casts doubt on NS' and D&H's argument that there is no interlocking nature, or "nexus", between the transactions. NS has argued that this transaction can be approved by the Board, even if the Board denies D&H the right to discontinue its trackage rights operations. Up until this point, the Board's treatment of the D&H discontinuance proceeding was obvious; the D&H proceeding appeared to be kept separate, but, for the *Board's*

administrative convenience, were being harmonized with the Board's treatment of this proceeding. There was no indication, up until now, that in reality, the Board would have to render a decision in this proceeding, when it was unclear if the D&H would receive its requested discontinuance authority.

The D&H proceeding is now on hold with obvious technical defects. The Director of Proceedings appears to believe these defects are limited solely to the omission of a few ZIP codes and minor notice issues. As enumerated in part above, the issues raised so far are but the very tip of the proverbial "iceberg". Had the Office of Proceedings held their May 13th decision for another 24 hours, the CNJ Parties would have submitted a pleading over 80 pages in length, which outlined a portion, but certainly not all, of the other egregious errors and omissions contained within the D&H's Notice.

As stated in the Intervener's Petition to Intervene, and as expanded upon above, there are so many issues in the D&H proceeding, that the CNJ Parties can actually split them into two groups. Half of issues can be litigated in Round I, and the remainder reserved for Round II, if needed. Since the Director's May 13th 2015 decision has effectively "reset" the clocks in the Discontinuance proceeding, the CNJ Parties will patiently wait until the D&H "corrects" the defects pointed out by Mr. Riffin. When, and if, a new Notice is set, the CNJ Parties will review the new notice, and make known to the Board, whether or not the CNJ Parties agree that all the errors and omissions were corrected. We are fairly confident the D&H will not even remotely come close to correcting them all.

As outlined above, there are a number of additional errors and omissions which have now come to light. The impact of the other related proceedings on the D&H proceeding will undoubtedly have an impact on this proceeding. The Intervener previously cautioned about

including any discussion of the pending D&H discontinuance proceeding in any decision contained in this proceeding.

CNJ Parties are fairly confident that, at least Mr. Riffin is likely to seek judicial review of any decisions he views as adverse to his interests. The D&H proceeding is so badly compromised, that the Board's initial decision to include discussion about the D&H proceeding, might now also be compromised as well. The CNJ Parties reiterate our previous position: any finding the Board might make which attempts to reference, or discusses the effects of the D&H discontinuance in this proceeding, could prove fatal given all the revelations which have come to light. In addition, there are a large number of new issues which now require resolution, that the Board simply lacks the jurisdiction to resolve.

The result of all these questions and uncertainties regarding the D&H discontinuance proceeding issues, cast serious doubt on whether the D&H may ever receive its authority. Given the Director's May 13th decision, it is no longer guaranteed that the D&H will receive discontinuance authority. Clearly the Director's decision of May 13th undermines the Board's May 15th finding, that the D&H had received authority, when obviously, it had not. With that revelation, it is appropriate to discuss the following issue:

The now indisputable "Nexus" between the two transactions is exposed

Before we discuss the "nexus", the undersigned will briefly recount what NSR has expressly sought permission from this Board to do. NS has:

1. Sought Board permission to acquire 282 miles of line from the D&H;
2. Indicated that NS intends to terminate a number of non-regulated haulage agreements which are outside of this Board's jurisdiction,;

3. Entered into, or will enter into, a number of new non-regulated haulage agreements, which are designed to mitigate any potentially anti-competitive impacts of the proposed sale; and
4. Partially disclosed another transaction, contemplated as a part of the transaction, but capable of standing alone on its own merits and thus, is sufficiently not related to this proceeding to warrant consolidation with this proceeding (D&H discontinuance proceeding).

NS has presented a very simple, straight forward transaction for the Board to review. A number of parties, including the CNJ Parties, have vigorously challenged the nature of the bifurcation of the transaction into two pieces (Items 1, 2, 3 in the NS proceeding, Item 4 in the D&H proceeding). NS has argued that nothing in items 1, 2, or 3 would be affected or altered, by any outcome of any decision, one way or the other, in item 4. To date, the Board appears to have agreed with that statement.

However, the Board, from the onset of this proceeding, appears to have never given much credence to the notion that the transactions are inextricably linked. That position might have been bolstered by the fact that Board precedent, if applied equally in the two decisions, and if those decisions were made in “close proximity” to one another, would not produce an apparent “nexus,” capable of defeating the Board’s broad discretion in such matters, if such findings were judicially reviewed. In short, if the Board addressed both issues separately, but in close proximity, the failure to consolidate the proceedings would not produce a result that a party could draw a bright line around, and highlight, as being either arbitrary, capricious, or contrary to law.

The Director’s decision of May 13th 2015 in the D&H proceeding, began the process of causing this proceeding to “drift away” from the D&H proceeding. The reality now is that the Board will now have to acknowledge that possibility, and quite possibly, have to potentially

defend a decision in this proceeding, while there is still no resolution to the D&H proceeding. It is an issue that this Agency should, and must, consider now.

With that, the CNJ Parties would like to direct the Board's attention to the 4 items outlined above, and pose a question: Is there anything in the record **which NS itself** has placed in the record, that might be affected, if there is no immediate resolution in the D&H proceeding in sight?

Before the question is answered, there are two highly relevant cases that the CNJ parties would like to bring to the Board's attention:

- *Delaware and Hudson Railway Company, Inc. – Discontinuance of Track Rights* STB Docket No. AB 156 (Sub No. 25) X (“D&H Discontinuance – NYS”)
- *CSX Transportation, Inc. and Delaware and Hudson Railway Co., Inc. – Joint Use Agreement* STB Docket No. FD 35348 (“CSX / D&H Joint Use”)

The two cases above are highly relevant to the Board's reconsideration of its decision.

In the first proceeding, the D&H sought to discontinue certain trackage rights agreements, and choose to replace those previously performed operations, with a non-regulated haulage agreement, in which NS would perform the work instead. It was made clear in that proceeding that the D&H wanted to rid itself of those unprofitable operations. After much contention, the transaction was approved. D&H exercised the authority it received, and lawfully terminated its rights, and then executed the non-regulated haulage agreements to replace the now-terminated trackage rights agreement.

In the second proceeding with CSX Transportation (“CSX”), D&H wanted to discontinue its own operations, which it also performed via trackage rights, and replace those rights with a haulage agreement with CSX. However, the D&H did not want to rid itself of its ability to

perform operations itself. Instead, it chose to retain its trackage rights for its use some day in the future, when economic conditions improved. The result of the transaction was a clear consolidation transaction, which required Board approval. Since the D&H retained the ability to perform the service it was asking to contract to CSX, Board approval of that transaction was required.

The difference between the two proceedings provides a nice contrast, and excellent precedent, to guide the Board's decision making process in this proceeding. Simply put, the Board's precedent allows for:

- Trackage rights to be discontinued and replaced with haulage agreements in discontinuance proceedings.
- Where trackage rights are retained, but the parties contemplate the use of a haulage agreement instead, then that transaction is a "consolidation" proceeding, which requires separate authority and approval for that agreement to be lawful.

Against that backdrop, it is now time to answer the question first posed above. The CNJ parties respectfully direct the Board's attention to the agreements **that NS itself placed in the record** and asked the Board to consider as a part of its proposed transaction.

In its application, NS lists a number of entities which it argues will be well-served by the various short-line agreements it has negotiated with a number of northeast short-lines; as a result, NS claims that there will be no reduction in competitive access for shippers, as a result of NS's acquisition of the D&H lines. NS claims that the inclusion of these agreements in the record, is vital to support NS's position that no shipper would lose competitive rail access as a result of the proposed acquisition. NS also makes clear that those agreements are haulage agreements, and are not regulated by the Board. NS claims that they are outside of the Board's jurisdiction, and are not subject to approval in this transaction.

One of those short-lines that NS lists as a participant to the short-line haulage agreement, is called Lehigh Valley Rail Management (“LVRM”). LVRM is the corporate successor to the Philadelphia, Bethlehem and New England RR, the common carrier railroad formerly owned by Bethlehem Steel. It is also the only one of the short-line participants to the haulage agreement which does NOT directly connect with the D&H line.

LVRM connects with the D&H by way of the trackage rights which are at issue in the discontinuance proceeding. They are not served directly from the line which is the subject of the NS application. If the D&H were required to retain its trackage rights for any reason, then the Board’s treatment and evaluation of this transaction must change. The nature of the haulage agreement in which LVRM is a participant, and which NS itself has introduced into the record, and which agreement NS claims is a vital part of their competition mitigation argument, materially changes the situation.

The adverse effects of the “Nexus”

In its application, NS has argued that the proposed D&H discontinuance of trackage rights, and the subsequent replacement of direct D&H service by the haulage agreement, is factually identical to the Board’s prior precedent in *D&H Discontinuance – NYS*. However, if the D&H, for whatever the reason might be, is barred from discontinuing its trackage rights, the facts change considerable, and no longer are identical to those in *D&H Discontinuance – NYS*. In fact, the cases become remarkably distinguishable. In *D&H Discontinuance – NYS*, the D&H **was able to actually discontinue its rights**. In the current D&H proceeding, there is no evidence at this stage that D&H will be able to discontinue its trackage rights.

Since the D&H at this point in time will clearly retain the ability to provide service via its own trackage rights, to LVRM, the expected use of the NS haulage arrangement, in lieu of the D&H providing the service itself via use of its own rights, effectively **turns the LVRM haulage agreement in a joint use / consolidation agreement, which requires Board approval.** Just like in *CSX-D&H Joint Use*, the haulage agreement which contemplates NS's movement of cars on behalf of the D&H, while the D&H retains the ability to provide service directly, is an agreement which requires approval. See: 49 U.S.C. § 11323 (a).

If the D&H retains its ability to provide service directly to LVRM, the facts of the case are virtually indistinguishable from those found in *CSX-D&H Joint Use*. It should be noted that NS has not indicated anywhere, or at any time in this proceeding, that it intends to seek Board approval of the short-line agreement as a part of this transaction. Such approval is not currently relief NS is seeking before the Board. NS's application never made any claims that in the event of the D&H not receiving discontinuance authority, NS would seek approval of the short-line agreement to the LVRM.

Before the Director's May 13th 2015 decision, it might have been argued that the D&H had approval to discontinue its trackage rights. Since the transaction is now in abeyance, the effective date of the exemption is no longer valid. There is a legal impediment to consummation and it is not guaranteed that the Board will permit discontinuance.

D&H's failure to properly file its Notice, will have a broad ranging impact upon the Board's decision in this proceeding. Parties in opposition to this transaction are certainly justified in asking for reconsideration of the decision in this proceeding, given the Director's May 13th, 2015 decision. Circumstances clearly changed when serious clouds began to arise over the D&H proceeding. That change occurred on May 13th. The Board elected to make a

decision in this proceeding on May 15th. Thus, it is appropriate to raise this issue now, upon reconsideration.

After this issue is placed in the record before the agency, CNJ expects either Mr. Riffin, or possibly the unions, to immediately seek Judicial Review. This issue is cut and dry; **if the D&H retains the right to serve LVRM at the time of a final decision in this proceeding, the haulage agreement needs approval.** The Transaction published in the Federal Register does not contemplate the applicant seeking such approval. It should be noted that the Board's decision does not address the need for NS and D&H to get approval for the LVRM haulage agreement in the event the D&H Discontinuance is not approved. That constitutes material error. It is contrary to both law and precedent.

It should be remembered, this was NS's own argument. They have claimed the only transaction they are seeking approval for, is the acquisition of 282 miles of line owned by the D&H. As for the other contemplated agreements, NS has represented that those agreements are outside of the Board's jurisdiction. Those agreements were only included in the NS's application to the extent that those agreements demonstrate there are no anticompetitive issues with the proposed acquisition of 282 miles of line. NS is expressly saying that those agreements do not require Board approval. But that argument only works if the D&H can, in fact, discontinue its trackage rights.

The issues created by the "Nexus" are fatal

At this point, NS can no longer cure this problem on its own. Any attempt to cure the problem would fatally harm its case, and significantly undermine the Board's previous decisions

in this proceeding. In order to correct the problem, NS needed to take one of three actions long ago. They needed to:

- Supplement the record, and ask for permission for joint use, in the event that the D&H transaction was not approved prior to, or simultaneously with, approval of NS's Application; or
- State that those portions of the transaction related to LVRM, would not be consummated until the D&H proceeding was concluded; or
- Move to remove the LVRM haulage agreement altogether from the Board's consideration of the minor transaction.

If done today, all three of those actions would radically alter significant portions of the original application. The original application was filed in November of last year. The completeness of the application was vigorously challenged at that time. The Board previously ruled it to be complete, and published a Notice (albeit a defective one) in the Federal Register regarding the transaction. Any one of the three actions above, would alter the nature of the transaction significantly, from what the world was told would happen in the Federal Register in 2014.

More importantly, any one of those actions destroys the NS argument that the transactions are not inextricably linked. As such, it can only be concluded that the entire transaction was not presented to the Board when the original application was filed, and, as such, was not complete when it was filed.

V. ARGUMENT

Given the materially changed circumstances regarding the D&H discontinuance proceeding, the subsequent revelations regarding omissions capable of jeopardizing this proceeding, the CNJ Parties would respectfully argue that the Board should now reconsider whether or not the LVRM haulage agreement, in light of the fact the D&H will all but certainly

retain its ability to provide service directly to LVRM, constitutes an arrangement between carriers which requires Board approval.

The Board should reconsider its “finding” on May 15th that the D&H discontinuance proceeding was “approved,” when two days before, the proceeding had been put on hold pending further order of the Board. You cannot say that you approved something, when you previously stayed the effective date of the supposedly “approved” transaction. To do so is material error.

The CNJ Parties respectfully argue that a clear “nexus” has now been established which inextricably links the two proceedings, and that the failure of the D&H to obtain discontinuance authority before the Board’s decision in this proceeding changes the nature of the LVRM haulage agreement, in such a manner as to alter the Board’s evaluation of this proceeding. We also argue that if NS seeks to amend, modify, or supplement the record, the original application could not have been “complete,” when it was filed in November of 2014, and thus must be rejected.

Wherefore, the CNJ Parties respectfully prays that the Board:

1. Accept this Petition for Reconsideration into the record,
2. Reject the NS application in this proceeding as incomplete, contrary to Board precedent, and contrary to Law.
3. Provide for any additional relief which is equitable and just to affect the foregoing requested relief.

On Behalf of the CNJ Parties,

Respectfully submitted,



June 4th, 2015

EXHIBIT # 1

Document is a copy of

“EXHIBIT B”

An attachment to a pleading submitted

on March 19th, 2015 in

STB DOCKET# AB 156 (Sub No.#27 X)

EXHIBIT B
Subject Trackage Rights

- I. Trackage rights acquired by agreement dated December 29, 1914 between Delaware and Hudson Company and Wilkes-Barre Connecting Railroad Company between Hudson (Plains), PA and Buttonwood, PA, a distance of approximately 5.05 miles. *See Can. Pac. Ltd., et al. – Purchase and Trackage Rights – Del. & Hudson Ry. Co.*, Finance Docket No. 31700, 7 I.C.C.2d 95, 102, 105, 127.
- II. Trackage rights over lines owned by Pocono Northeast Railway, Inc. between Union Junction and Hudson Yard in Wilkes-Barre, PA, a distance of approximately 3.0 miles. *See Can. Pac. Ltd., et al. – Purchase and Trackage Rights – Del. & Hudson Ry. Co.*, Finance Docket No. 31700, 7 I.C.C.2d 95, 103, 126.
- III. Overhead trackage rights acquired by agreement dated November 3, 1978 between Delaware and Hudson Railway Company and Consolidated Rail Corporation (“Conrail”) for a total distance of approximately 182.7 miles. *See Can. Pac. Ltd., et al. – Purchase and Trackage Rights – Del. & Hudson Ry. Co.*, Finance Docket No. 31700, 7 I.C.C.2d 95, 103, 126.
- Between Milepost 109.9 \pm in Rockville, PA and Milepost 113.3 \pm at Banks Tower, PA, a distance of approximately 4.3 miles
 - Between Milepost 88.8 \pm in Enola, PA and Milepost 90.4 \pm in Marysville, PA, a distance of approximately 1.6 miles
 - Between Milepost 90.4 \pm at Banks Tower, PA and Milepost 66.7 \pm in Wago Junction, PA, a distance of approximately 23.7 miles
 - Between Milepost 50.6 \pm in Wago Junction, PA and Milepost 33.7 \pm in Creswell (Port), PA, a distance of approximately 16.9 miles
 - Between Milepost 109.9 \pm in Rockville, PA and Milepost 104.6 \pm at State Street in Harrisburg, PA, a distance of approximately 5.3 miles
 - Between Milepost 98.9 \pm in Royalton, PA and Milepost 87.6 \pm in Shocks Mills, PA, a distance of approximately 11.3 miles
 - Between Milepost 39.7 \pm in Creswell (“Port”), PA and Milepost 0.3 \pm in Perryville, MD, a distance of approximately 39.4 miles
 - Between Milepost 59.5 \pm in Perryville, MD and Milepost 128.8 \pm in Landover, MD, a distance of approximately 70.3 miles
 - Between Milepost 128.8 \pm in Landover, MD and Milepost 138.7 \pm in Long Bridge, VA, a distance of approximately 9.9 miles
- IV. Overhead trackage rights acquired by agreement dated April 25, 1979 between Delaware and Hudson Railway Company and Conrail for a total distance of approximately 336 miles. *See Can. Pac. Ltd., et al. – Purchase and Trackage Rights – Del. & Hudson Ry. Co.*, Finance Docket No. 31700, 7 I.C.C.2d 95, 103, 126.
- Between Milepost 6.5 \pm in Oak Island, NJ and Milepost 85.8 \pm in Freemansburg, PA over former Lehigh Valley Railroad (“LV”) lines, a distance of approximately 79.3 miles

- Between Milepost 1.7± in Oak Island, NJ and Milepost 72.1± in Phillipsburg, NJ over former Central Railroad of New Jersey lines, a distance of approximately 67.0 miles. The line west of Glen Gardner, NJ was removed following construction of the I-78 extension near Alpha, NJ.
 - Between Milepost 85.8± in Freemansburg and Milepost 119.1± in Lehighton, PA via Allentown over former LV lines, a distance of approximately 33.3 miles
 - Between Milepost 88.2± at “R” Tower and Milepost 89.1± at CP Burns in Allentown, PA; between Milepost 35.4± at CP Burns and Milepost 1.1± at CP Pike near Reading, PA; between Milepost 61.4± at CP Reading in Reading, PA and Milepost 2.4± at CP Park in Philadelphia; and between Milepost 0.0± in Blandon, PA and Milepost 13.0± at Klapperthall Junction, PA over former Reading Company and Allentown Terminal Railroad lines, a distance of approximately 107.2 miles
 - Between Milepost 286.4 at CP Kase and Milepost 287.5 in Sunbury, PA and between Milepost 138.7 in Sunbury and Milepost 90.6 in Rockville, PA over former Penn Central lines, a distance of approximately 49.2 miles
- V. Overhead trackage rights acquired by agreement dated February 1, 1991 between Amtrak and D&H Corporation granting the right to operate over Amtrak’s trackage at Zoo Interlocking between the connections with Conrail’s Belmont Track and West Philadelphia Elevated Line in Philadelphia, a distance of approximately 4,000 feet. *See Can. Pac. Ltd. and D&H Corp. —Trackage Rights Exemption—Consol. Rail Corp.; Can. Pac. Ltd. and D&H Corp. —Trackage Rights Exemption—CSX Transp., Inc.; Can. Pac. Ltd. and D&H Corp. —Trackage Rights Exemption—Nat’l R.R. Passenger Corp., ICC Finance Docket Nos. 31851, 31852, 31853 (served April 11, 1991) (“Philadelphia Trackage Rights”).*
- VI. Local and overhead trackage rights acquired by agreement dated March 29, 1991 between Conrail and D&H Corporation granting supplemental trackage rights to use the “Joint Railroad Trackage” in Philadelphia, a total distance of approximately 3.2 miles. *See Philadelphia Trackage Rights.*
- Between the eastbound home signal at CP Penrose at Milepost 2.7± and the connection with CSXT’s Vandalia Street Branch at Milepost 5.9±
- VII. Overhead trackage rights acquired by agreement dated March 29, 1991 between Conrail and D&H Corporation granting supplemental trackage rights to use the “Philadelphia Trackage” in Philadelphia, a total distance of approximately 7.0 miles. *See Philadelphia Trackage Rights.*
- Overhead trackage rights between Belmont at Milepost 4.0± and the eastbound home signal at CP Penrose at Milepost 2.7±
 - Overhead trackage rights through Conrail’s Greenwich Yard from the connection with Conrail’s Harrisburg Line at Stadium to the Delaware Avenue Extension Track

- VIII. Local and overhead trackage rights in Philadelphia acquired by agreement dated March 29, 1991 between CSXT and D&H Corporation, a total distance of approximately 10.5 miles. *See Philadelphia Trackage Rights.*
- Overhead trackage rights between Conrail's connection with CSXT at Park Junction and the CSXT/Conrail eastward home signal at CP Penrose (the "Access Line"), a distance of approximately 5.45 miles
 - Overhead trackage rights between the CSXT/Conrail Divider Switch and the connection with the Delaware Avenue Extension Track at Moore Street (the "Vandalia Street Branch"), a distance of approximately 1.82 miles
 - Local and overhead trackage rights between the junction of the Access Line near CP Penrose with CSXT-owned trackage and the Divider Switch, a distance of approximately 3.23 miles
 - Overhead trackage rights between the Connection Track (if reconstructed) between Divider Switch and the turnout to the Delaware Avenue Extension Track
- IX. Local and overhead rights acquired by agreement dated March 29, 1991 among Conrail, CSXT, and D&H, a total distance of approximately 3.3 miles. *See Philadelphia Trackage Rights.*
- Over the Delaware Avenue Extension Track between Hoyt Street and South Street
 - Over the Belt Line Industrial Track from Stadium eastward for approximately 4,500 feet to the connection with the Vandalia Street Branch
 - All existing rail lines, lead tracks, spurs and facilities diverging from above trackage
- X. Overhead trackage rights acquired by agreement dated June 1, 1999 between D&H and NSR over the Harrisburg Line, the Reading Line, and the Reading Belt Branch, a total distance of approximately 62.5 miles. *See Del. and Hudson Ry. Co. d/b/a Can. Pac. Ry.—Trackage Rights Exemption—Norfolk S. Ry. Co., STB Finance Docket No. 33745 (STB served May 14, 1999).*
- Between CP Harris at Milepost 112.9 \pm in Harrisburg, PA, and CP Walnut at Milepost 58.6 \pm , in Reading, PA, a distance of approximately 54.3 miles
 - Between CP Wyomissing Junction at Milepost 9.4 \pm , and the connection with the Reading Belt Branch at CP Valley Junction at Milepost 8.7 \pm in Reading, PA, a distance of approximately 0.7 miles
 - Between CP Cumru at Milepost 11.0 \pm in Reading and CP Bird at Milepost 18.5 \pm in Birdsboro, PA, a distance of approximately 7.5 miles

XI. Overhead trackage rights pursuant to the agreement dated August 26, 2002 between D&H and Reading Blue Mountain and Northern Railroad Company ("RBMN") that were originally granted in the April 25, 1979 Conrail agreement and assigned to RBMN when it purchased the line from Conrail, a total distance of approximately 56.4 miles.

- Between Dupont, PA at Milepost 175.5± and Lehighon Yard at Milepost 119.3±

EXHIBIT # 2

Document is a copy of the main portion of the

Verified Statement of James D Clements

And includes a copy of

Exhibit # 2

which is referenced in the Verified Statement

An attachment to a pleading submitted

on May 8th, 2015 in

STB DOCKET# AB 156 (Sub No.#27 X)

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. AB-156 (SUB-NO. 27X)

DELAWARE AND HUDSON RAILWAY COMPANY, INC.
-- DISCONTINUANCE OF TRACKAGE RIGHTS EXEMPTION --
IN BROOME COUNTY, NY; MIDDLESEX, ESSEX, UNION, SOMERSET, HUNTERDON,
AND WARREN COUNTIES, NJ; LUZERNE, PERRY, YORK, LANCASTER,
NORTHAMPTON, LEHIGH, CARBON, BERKS, MONTGOMERY, NORTHUMBERLAND,
DAUPHIN, LEBANON, AND PHILADELPHIA COUNTIES, PA; CECIL, HARFORD,
BALTIMORE, ANNE ARUNDEL, AND PRINCE GEORGE'S COUNTIES, MD; THE
DISTRICT OF COLUMBIA; AND ARLINGTON COUNTY, VA

VERIFIED STATEMENT OF JAMES D. CLEMENTS

My name is James D. Clements. I am employed by Canadian Pacific Railway Company ("CP") as Vice President Strategic Planning and Transportation Services. 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. 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. I provide this statement in support of the D&H's Reply to Petitions to Revoke and Reply to Petition to Toll.

The majority of D&H's trackage rights that are the subject of this discontinuance proceeding were obtained as part of the Final System Plan with the intention of enabling 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 these trackage rights for D&H.

For example, the trackage rights between Harrisburg and Potomac Yards initially allowed D&H to interchange traffic with the Southern Railway. After the Southern merged with the Norfolk and Western Railway, however, D&H's participation in traffic was reduced when the interchange was shifted north to New York and Pennsylvania or in some cases eliminated altogether. The subsequent Conrail acquisition by Norfolk Southern and CSXT effectively eliminated any residual utility to those overhead trackage rights and D&H has not operated between Harrisburg and Potomac Yards in more than a decade.

Similarly, the trackage rights between Allentown, PA and Oak Island in Newark, NJ ostensibly established D&H as a competitor to Conrail for New York and New Jersey port traffic. The division of Conrail, however, put D&H at a significant disadvantage to compete for such traffic and D&H has handled no intermodal or carload traffic to or from Oak Island since June 2012. 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 in Pennsylvania, 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. Accordingly, the proposed trackage rights discontinuance will strengthen D&H as a carrier and a competitor by allowing D&H to focus resources and capital where it is better able to compete for traffic.

Attached hereto as Exhibit 1 is a chart of the 19 ZIP Codes that James Riffin ("Riffin") alleges were omitted from D&H's Notice of Exemption. As illustrated in the chart, D&H has not operated over lines in eleven of the ZIP Codes in more than a decade, and has not operated over the lines located in the two valid ZIP Codes in Middlesex County, NJ since June 2012. As to the remaining six ZIP Codes, it is my understanding that one is no longer a valid ZIP Code, two are associated with specific P.O. boxes, and the three Hudson County, NJ ZIP Codes concern lines over which D&H has no trackage rights.

As to the Hudson County ZIP Codes, D&H's overhead trackage rights to Oak Island over both the former Lehigh Valley Railroad ("LVRR") and Central Railroad of New Jersey ("CNJ") terminate in Newark, not Jersey City as Riffin asserts. Riffin's Petition ¶¶ 18-21 and Exhibit One pp. 39-44 incorrectly assume that Oak Island Jct at milepost 1.7 is located on CNJ's Main Line, USRA Line Code 0201. Attached hereto as Exhibit 2 is a true and correct copy of the pertinent provisions of the April 25, 1979 trackage rights agreement ("Agreement"), which granted D&H's trackage rights to Oak Island. Exhibit A to the Agreement identifies the CNJ endpoint as Oak Island Jct. at milepost 1.7 on USRA Line Code 0205. The excerpt of the July 26, 1975 Final System Plan attached hereto as Exhibit 3 identifies USRA Line Code 0205 as the Newark and Elizabethport Branch. CNJ's Newark and Elizabethport Branch trackage map attached hereto as Exhibit 4 indicates that Oak Island Jct. is located north of Newark Airport and

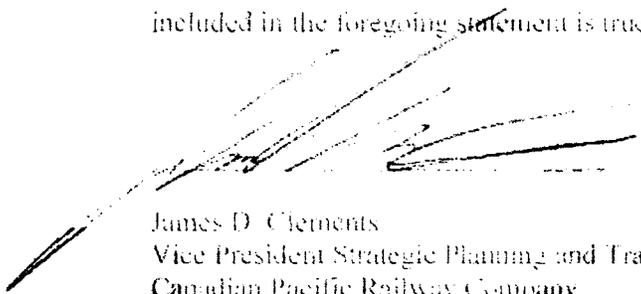
south of Wilson Avenue in the City of Newark. The LVRR timetable dated August 10, 1975 attached hereto as Exhibit 5 confirms that Oak Island Jct. (LVRR milepost 8.6) is west of Newark Bay. A current map of Newark, NJ attached hereto as Exhibit 6 clarifies that Newark Liberty International Airport and Wilson Avenue are located entirely within the city and entirely within Essex County, NJ.

All the ZIP Codes Riffin identified are included in the areas of circulation by D&H's newspaper notices.

D&H lacks the facilities at Oak Island to support the movement of municipal solid waste and silica from Oak Island that Riffin offers to subsidize in his Notice of Intent to File an Offer of Financial Assistance.

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: *May 8th*, 2015

EXHIBIT 2

M.D. 19696

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(THIS AGREEMENT made this 27th day of April, 1979
between CONSOLIDATED RAIL CORPORATION ("Conrail"), a corporation
of the Commonwealth of Pennsylvania, and DELAWARE AND HUDSON
RAILWAY COMPANY ("D&H"), a corporation of the State of Delaware.

RECITALS

A. The parties have acquired the right to conduct rail operations over certain lines of railroad hereinafter described ("Joint Lines") as provided in the Final System Plan of the United States Railway Association ("USRA") adopted pursuant to Section 206(c)(1)(B) of the Regional Rail Reorganization Act, as amended ("Rail Act").

B. The Joint Lines were conveyed to Conrail subject to operating rights granted to D&H either by the railroads in reorganization which had conducted rail operations over such properties prior to April 1, 1976, or by persons whose rail properties were operated or leased by railroads in reorganization which had conducted such operations.

C. The parties desire to set forth the terms and conditions for D&H's exercise of operating rights over the Joint Lines.

NOW, THEREFORE, in consideration of the foregoing and other good and valuable consideration, intending to be legally bound, the parties do hereby agree as follows:

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ARTICLE I

JOINT FACILITIES

Section 1.01. Description of Joint Lines. This Agreement shall set forth the terms and conditions of D&H's operation over the Joint Lines described in detail on Exhibit A and included in one of the following Joint Line Routes:

<u>Joint Line Route</u>	<u>Operating Rights Grantor</u>
Oak Island-Freemansburg	Trustees of Lehigh Valley Railroad Company, Debtor
Oak Island-Phillipsburg	Trustee of Central Railroad Company of New Jersey, Debtor
Freemansburg-Lehighton	Trustees of Lehigh Valley Railroad Company, Debtor
Lehighton-DuPont	Trustees of Lehigh Valley Railroad Company, Debtor and Lehigh Coal and Navigation Company, Debtor
Saucon-Lehighton	Lehigh Coal and Navigation Company
Allentown-Reading-Philadelphia	Trustees of Reading Company, Debtor and Allentown Terminal Railroad Company
Sunbury-Rockville	Trustees of Penn Central Transportation Company, Debtor and Trustees of Northern Central Railway Company, Debtor
Lanesboro-Hornell	Trustees of Erie Lackawanna Railway Company, Debtor
Hornell-Buffalo	Trustees of Erie Lackawanna Railway Company, Debtor.

The parties have been unable to agree upon the lines to be included in D&H's operating rights beyond Buffalo "FW" (MP 422.4)

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and shall make a continuing effort to resolve open questions concerning these lines. Either party may, upon prior notice to the other party, request USRA to restate the lines intended to be included in the operating rights designated to D&H beyond Buffalo "FW". The parties agree to be bound by such designation.

Section 1.02. Facility Changes, Additions and Removals.

Conrail shall not remove or shall not alter the Joint Lines if such alteration will increase D&H's cost of operating or the time required under normal conditions for D&H's trains to traverse the Joint Lines. Subject to the foregoing, Conrail may improve or add to the Joint Lines for its own benefit. D&H may request facility changes, additions and betterments to the Joint Lines. Conrail and D&H in good faith shall determine the proportion of benefit to each of them of facility changes, additions and betterments proposed by D&H and if such a determination can be agreed to by Conrail and D&H, each of them shall bear their proportionate cost of such facility changes, additions and betterments. If Conrail, in the exercise of its best business judgment, determines that its proportionate benefit from any such facility change, addition or betterment is less than the amount of the cost thereof which D&H believes should be borne by Conrail, Conrail shall nonetheless make such facility change, addition or betterment at D&H cost and expense if requested in writing by D&H.

ARTICLE II

JOINT LINE OPERATIONS - GENERAL

Section 2.01. Scope of Operations. D&H shall have the right to operate such rail service over the Joint Lines as it may deem necessary or advisable to provide efficient and economical transportation consistent with the Interstate Commerce Act and with its operating authority under the Rail Act including, without limiting the foregoing, pick-up and set-out of bad order cars, necessary repair and servicing of equipment, and the operation of trains, cars or vehicles for inspection and management purposes. D&H and Conrail shall interchange traffic at the Joint Line locations of Buffalo, Binghamton, DuPont, Allentown, Philadelphia, Harrisburg and Oak Island (intermodal only). D&H shall also have the right to interchange cars with other carriers, directly or through switching tariffs or haulage arrangements and to operate onto or off other carriers from points on the Joint Lines between Binghamton and Buffalo, New York; Attica and Groveland, New York; at and within the Buffalo, Black Rock and Niagara Falls, New York, terminal areas; including without limitation the right to interchange with and operate on or off the Philadelphia, Bethlehem and New England Railroad at Bethlehem, Pennsylvania and the Baltimore and Ohio Railroad (Chesie System) at Park Junction (Philadelphia), Pennsylvania. The parties agree, however, to request USRA to state whether D&H

is entitled, as an incident to the grant of its operating rights over the Joint Lines, to switch and classify its cars at intermediate points on the Joint Lines and to interchange cars with other carriers or operate onto or off other carriers at intermediate points on the Joint Lines other than those specified in this Section. The parties agree to be bound by USRA's determination. D&H shall not perform any local freight service on the Joint Lines except at stations published as D&H stations in the Official Open and Prepay Station List No. 93, I.C.C. No. A-58. Conrail shall have the right to admit other parties to the use of the Joint Lines with the prior consent of D&H whose consent shall not be withheld unreasonably.

Section 2.02. Employees.

(a) D&H shall operate its rail service over the Joint Lines with its own employees and at its sole expense subject to such Conrail rules, regulations and orders as shall be applicable to those lines provided that no employee shall engage in such operations over the Joint Lines until he or she shall have been successfully examined on applicable operating rules and regulations by D&H officers qualified by Conrail. This Agreement shall not require the re-qualification of any D&H officer or employee who has been successfully examined on or before the effective date of this Agreement.

(b) D&H shall also have the right to utilize and direct its own employees, at its sole expense, for any

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Section 7.10. Effective Date. This Agreement shall become effective on January 1, 1979, except that any outstanding disputes between the parties relating to events arising out of the operation of the Joint Lines between April 1, 1976 and the effective date of this Agreement shall be settled in accordance with the terms and conditions set forth in this Agreement.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals on the day and year first above written.

ATTEST:

CONSOLIDATED RAIL CORPORATION

K. W. F. ...
ASSISTANT SECRETARY

By: *Stuart M. Reed*
PRESIDENT

DELAWARE AND HUDSON RAILWAY COMPANY

R. S. Long

By: *[Signature]*
PRESIDENT & CHIEF
Executive Officer

JOINT LINES

U.S.R.A. Code	Conveying Carrier	From (MP)	To (MP)
<u>Oak Island - Freemansburg (LV)</u>			
0501	LV	Oak Island (6.5)	Newark Interchange (
0502A	LV	Newark Inter- change (11.4)	New Jersey/Pennsylva State Line (76.6)
0502A	LV	New Jersey/Penn- sylvania State Line (76.6)	Freemansburg (85.8)

Oak Island - Phillipsburg (CNJ)

0205	CNJ	Oak Island Jct. (1.7)	Elizabethport (5.5)
0201	CNJ	Elizabethport "FH" (8.9)	Phillipsburg (72.1)

Note: Line Segments 0501, 0502A, 0205 and 0201 are for the purpose of handling intermodal traffic including the right to LV's Oak Island intermodal facility and use of LV's Oak Island yard. The links are connective permitting use between Bethlehem Interlocking and Oak Island via either the LV or CNJ route

Freemansburg - Allentown - Lehighon (LV)

0502A	LV	Freemansburg (85.8)	Bethlehem Interlockin (88.6)
0502A	LV	Bethlehem Inter- locking (88.6)	Allentown (93.3)
0503A	LV	Allentown (93.3)	Lehighon (119.1)

Note: Line Segment 0502A includes the right to interchange with all railroads at Allentown/Bethlehem including the Philadelphia, Bethlehem and New England

Lehighon - Dupont (LV, LC&N)

0503A	LV	Lehighon (119.1)	Fraser (147.1)
0506	LV	Fraser (147.1)	Laurel Run (164.1)
0504	LC&N	Fraser (143.8)	Laurel Run (161.2)
0506	LV	Laurel Run (164.1)	DuPont (175.5)

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Saucon - Bethlehem Junction - Allentown Yard - Lehighon (LC&N)

0502F	LC&N	Saucon Yard	Bethlehem Junction (83.4)
0502F	LC&N	Bethlehem Junction (83.4)	Bethlehem (84.3)
0521	LC&N	Bethlehem (84.3)	Lehighon (114.7)

Note: Line Segment 0502F includes the right to interchange with all railroads at Allentown/Bethlehem, including the Philadelphia, Bethlehem and New England.

Line Segment 0521 includes the right to use Allentown Yard.

Allentown-Reading-Philadelphia (Reading and AT)

0502	AT	"R" Tower (88.2) (Including connecting track, E. Penn Jct.- Burn)	Burn (89.1)
0312	RDG	Burn (35.4) (same as AT Burn (89.1)	Pike (1.1)
0309	RDG	Park (2.4)	Falls (5.4)
0322B	RDG	Falls (5.4)	Reading (Belt Line Jct.) (61.4)
0339	RDG	Blandon (0.0)	Klappert Hall Jct. (13.0)

Sunbury - Rockville (PC, NC)

1314	PC	Kase (286.4)	Sunbury (287.5)
1314	NC	Sunbury (138.7)	Dauphin (93.4)
1314	PC	Dauphin (93.4)	Rockville (90.6)

Note: Line Segment 1314 links with line segments described in Article I, Joint Facilities of Agreement between the parties made November 3, 1978 covering lines between Rockville, Enola, Harrisburg, Perryville and Potomac Yard. Included is the right to interchange with Conrail at, and to use, Enola Yard

Lanesboro - Hornell (EL)

6303	EL	Lanesboro (189.8)	Binghamton "BD" (213.2)
6301	EL	Binghamton "BD" (213.2)	Hornell (331.8)

EXHIBIT A

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? of ?

Hornell - Buffalo (EL)

6401	EL	Hornell (331.8)	Buffalo "Union" (418.0)
6401	EL	Buffalo "Union" (418.0)	Buffalo "FW" (422.4)

Note: Line Segment 6401 includes (1) the right to use Bison Yard and to interchange with all railroads including Conrail at Buffalo, and (2) the right to interchange with existing or future railroads between Binghamton "BD" and Buffalo, except Conrail.

6443	EL	North Alexander (395.9)	Attica (401.0)
6441	EL	Groveland (360.2)	North Alexander (360.2)

Note: Line Segment 6441 includes the right to interchange with all connecting railroads.

Abbreviations:

(AT)	Allentown Terminal Railroad Company
(CNJ)	Trustee, Central Railroad Company of New Jersey, Debtor
(EL)	Trustees, Erie Lackawanna Railway Company, Debtor
(LC&N)	Lehigh Coal and Navigation Company
(LV)	Trustees, Lehigh Valley Railroad Company, Debtor
(NC)	Trustee, Northern Central Railway Company, Debtor
(PC)	Trustees, Penn Central Transportation Company, Debtor
(RDG)	Trustees, Reading Company, Debtor

EXHIBIT # 3

Document is a copy of the original application of the

Consolidated Rail Corporation

Which was previously submitted to the
Interstate Commerce Commission

ICC Docket Number AB 167 (Sub No.# 541N)

Submitted: Dec 9th, 1981

FILED
NOV 30 1981
INTERSTATE
COMMERCE COMMISSION

November 27, 1981

OFFICE OF THE
SECRETARY
RECEIVED
DEC 6 3 22 PM '81
SEP 10 1981

Mrs. Agatha L. Mergenovich
Secretary
Interstate Commerce Commission
12th and Constitution Avenues, NW
Washington, DC 20423

Subject: Application Under Section 308 of the Regional Rail
Reorganization Act of 1973, as enacted by Section
1156 of the Northeast Rail Service Act of 1981, for
abandonment of the Lehigh Secondary Track in the
State of Pennsylvania
Docket No. AB 167 (Sub. No. 45/N)

Dear Mrs. Mergenovich:

Enclosed for filing with the Commission are the original
and six copies of the above described application. This
application is submitted under Section 308 of the Regional
Rail Reorganization Act of 1973, as enacted by Section 1156
of the Northeast Rail Service Act of 1981.

Copies of the application have been served on the
agencies and major shippers designated on the attachment to
this letter.

Please stamp and return the enclosed extra copy of this
letter to acknowledge receipt.

Very truly yours,

Charles E. Neenan
CHARLES E. NEENAN
General Attorney
1336 Six Penn Center Plaza
Philadelphia, PA 19104
(215) 977-5017

RECEIVED
DEC 8 1981
CAPTURE & LIST

CHM:am

Before The
Interstate Commerce Commission

FILED
NOV 30 1981
INTERSTATE
COMMERCE COMMISSION

Application of Consolidated Rail :
Corporation Pursuant to Sections :
308(a) and (b) of the Regional Rail :
Reorganization Act of 1973, As :
Amended by Section 1156 of the :
Northeast Rail Service Act of 1981, :
for Approval of the Abandonment of :
the Lehigh Secondary Track :
in Lehigh and Carbon Counties in the :
State of Pennsylvania :

Docket No. AB 167
(Sub. No. 451N)

Charles E. Meehan
General Attorney
1128 Six Penn Center
Philadelphia, PA 19104
(215) 977-5017

November 27, 1981

Before The
Interstate Commerce Commission

Application of Consolidated Rail :
Corporation Pursuant to Sections :
308(a) and (b) of the Regional Rail :
Reorganization Act of 1973, as :
Amended by Section 1156 of the :
Northeast Rail Service Act of 1981, : Docket No. AB 167
for Approval of the Abandonment of : (Sub No. 451W)
the Lehigh Secondary Track :
in Lehigh and Carbon Counties in the :
State of Pennsylvania :

To the Interstate Commerce Commission, Washington D.C.:

1) The name of applicant is Consolidated Rail Corporation (Conrail). Correspondence relating to this application should be addressed to Charles E. Mechem, General Attorney, 1138 Six Penn Center, Philadelphia, Pennsylvania 19104.

2) Applicant is a common carrier by railroad subject to the former Interstate Commerce Act (now 49 USCA Subtitle IV) and to the Northeast Rail Service Act of 1981 (NERSA).

3) Conrail files this application pursuant to Sections 308(a) and (b) of the Regional Rail Reorganization Act of 1973 (RRA Act), as amended by Section 1156 of NERSA. A copy of said Section 1156 is attached hereto as Exhibit A.

4) By this application Conrail requests the Commission's approval of the abandonment of the line of rail described below:

Name Of Line: Lehighton Secondary Track

State in which located: State of Pennsylvania

County or Counties: Lehigh and Carbon Counties

Limits of proposed Catasauqua Lehighton
Abandonment: Milepost 98.0 Milepost 119.3

Length of line: 21.3 miles

The above-described line will hereafter be referred to as the Subject Line Delaware & Hudson Railway Company (D&H) has trackage rights over the Subject Line and also over a parallel Conrail line lying to the East. In recent months the latter line has been used by both railroads to a far greater extent than the Subject Line. Conrail is willing to sell the Subject Line to the D&H under the procedures and standards established by Section 1156 of NERSA in the event the D&H wishes to purchase the Subject Line.

5) Attached as EXHIBIT B is a map showing the location of the Subject Line.

6) Attached hereto as Exhibit C is a summary, or condensed statement, based on the most recent studies available to Conrail, setting forth (a) "revenues attributable", (b) an estimate of avoidable costs for the Subject Line, and (c) an estimate of the subsidy that would be required to keep the line in operation. Exhibit C includes an estimate of the cost of the work that would be required to preserve the Subject Line in FRA Class 1 condition. Attached hereto as Exhibit D is an estimate of

the value of the Subject Line, including the real estate value of the underlying right-of-way. Pursuant to Section 308(d) of the RRR Act the aforesaid revenue, cost, and subsidy information and valuation estimate will be furnished, on request, to any responsible person other than a recipient of this application who seriously desires to consider making an offer of financial assistance.

7) Within fifteen days after the filing of this application, persons desiring a more detailed statement setting forth the basis upon which the subsidy estimate was calculated, may request such information in writing. Such detailed statement will be furnished within fifteen days after receipt of the request.

8) Finally, if a financially qualified person seriously considering purchase of the subject line submits a request received by Conrail within 15 days after the date of filing of this application, Conrail, within 45 days after the request, will provide an appraisal of the real estate value of the line, together with any adjustments to the estimated subsidy that may be necessitated by the appraisal.

9) All requests for information specified in paragraphs 6, 7, and 8 should be made in writing to C. E. Nechem, Room 1138 Six Penn Center, Philadelphia, Pa. 19104. Copies of such requests should be sent to the Office of Proceedings, Room 4126, Interstate Commerce Commission, Washington, DC 20423.

10) Recipients of this application are advised that the staff of the Interstate Commerce Commission has notified Conrail that any person requesting information or assistance with respect to the abandonment provisions of the Northeast Rail Service Act may contact either the ICC Section of Finance (telephone 202-275-7245) or the Section of Rail Services Planning (telephone 202-275-0826).

11) Conrail believes that the environmental and EPCA requirements of 49 C.F.R. Sections 1108.7(c) and 1106.5(c) are inapplicable to proceedings under Sections 308(a) and (b) of the RRR Act inasmuch as the Commission is neither permitted nor required to exercise any judgment or discretion in acting upon such applications^{*} but rather is required to approve them except when subsidy offers meeting the requirements of 49 USCA Section 10905 have been tendered. In any event, the proposed abandonment is not expected to have any significant impact or effect on (a) transportation patterns, (b) local or regional land use plans, (c) coastal zone management areas, (d) wet lands, flood plains, or agricultural lands, (e) the development or transportation of energy resources, (f) the movement or recovery of recyclables, (g) energy consumption or distribution, (h) motor truck traffic on public highways, (i) wildlife, (j)

* See Commonwealth of Pennsylvania, et al v. Federal Maritime Commission, et al, 393 F.Supp. 795 (1975).

National or state parks or forests, (k) historic structures, (l) water courses or water supply, (m) culturally significant locations, or (n) public safety.

Accordingly, applicant believes that approval of the proposed abandonment will not constitute a major Federal action having a significant effect on the quality of the human environment.

WHEREFORE, Applicant requests that the Commission, within 90 days after the filing hereof, approve the abandonment of the Subject Line identified in Paragraph 4 above.

Respectfully submitted,



Charles E. Mechen
Counsel for
Consolidated Rail Corporation
1138 6 Penn Center Plaza
Philadelphia, PA 19104
(215) 977-5017

AREA MAP

CONSOLIDATED RAIL CORPORATION

LEHIGHTON SECONDARY TRACK

Catsasqua, MP 98.0, to Lehighton, MP 119.3

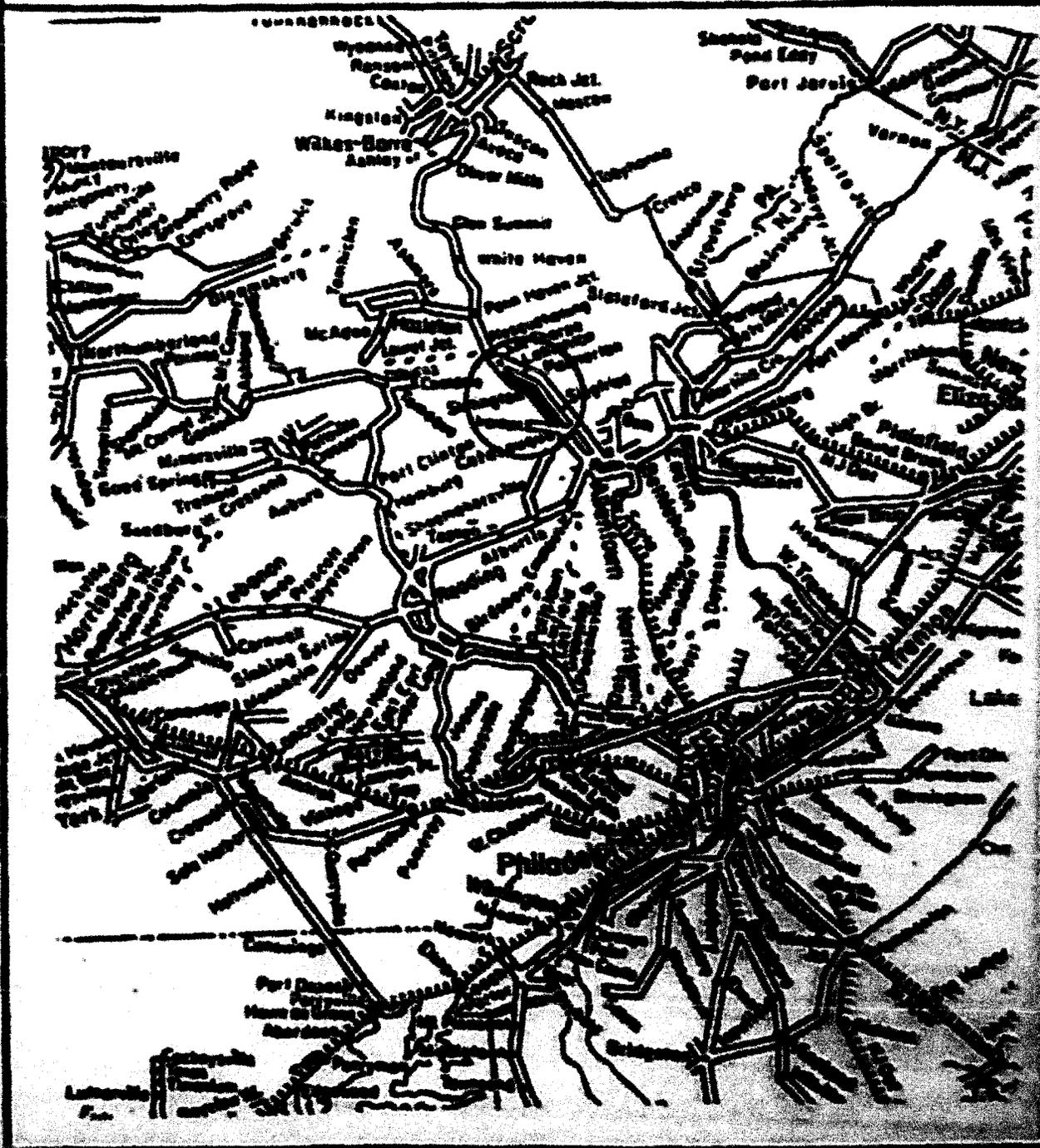


EXHIBIT # 4

Document is a copy of the original Reply of the

Delaware & Hudson Railway Company

Which was previously submitted to the
Interstate Commerce Commission

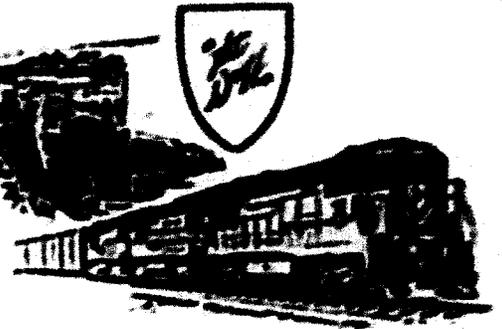
ICC Docket Number AB 167 (Sub No.# 541N)

Submitted: March 3rd, 1982

DELAWARE AND HUDSON RAILWAY COMPANY

ALBANY, NEW YORK 12207

INDEPENDENT
COMMERCE COMMISSION



Dependable Transportation Since 1823

KINGA M. LACIAPELLE

General Attorney

February 25, 1982

4
ADMINISTRATIVE SERVICES
MAIL UNIT

Mrs. Agatha L. Mergenovich
Secretary
Interstate Commerce Commission
12th and Constitution Avenue, N.W.
Washington, D.C. 20423

RE: CONSOLIDATED RAIL CORPORATION'S APPLICATION UNDER SECTION 308 OF THE REGIONAL RAIL REORGANIZATION ACT OF 1973, AS ENACTED BY SECTION 1156 OF THE NORTHEAST RAIL SERVICE ACT OF 1981, FOR ABANDONMENT OF THE LEHIGHTON SECONDARY TRACK IN THE STATE OF PENNSYLVANIA DOCKET NO. AB 167 (SUB-NO. 451N)

Dear Mrs. Mergenovich:

Enclosed please find original and six copies of Delaware and Hudson Railway Company's (D&H's) statement concerning the above application of Consolidated Rail Corporation (Conrail) to abandon the Lehigh Secondary Track.

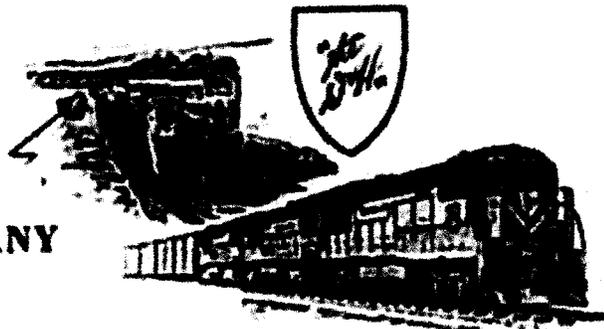
Such statement is filed with the Commission both to request relief and to call attention to the fact that D&H is a common carrier which has operating rights over the line in question pursuant to rights granted D&H under the Regional Rail Reorganization Act of 1973 (JR Act).

Very truly yours,

Encl.

DELAWARE AND HUDSON RAILWAY COMPANY

ALBANY, NEW YORK 12207



Dependable Transportation Since 1823

KINGA M. LACHAPPELLE

General Attorney

February 25, 1982

Mrs. Agatha L. Mergenovich
Secretary
Interstate Commerce Commission
12th and Constitution Avenue, N.W.
Washington, D.C. 20423

RE: CONSOLIDATED RAIL CORPORATION'S APPLICATION UNDER SECTION 308 OF THE REGIONAL RAIL REORGANIZATION ACT OF 1973, AS ENACTED BY SECTION 1156 OF THE NORTHEAST RAIL SERVICE ACT OF 1981, FOR ABANDONMENT OF THE LEHIGHTON SECONDARY TRACK IN THE STATE OF PENNSYLVANIA DOCKET NO. AB 167 (SUB-NO. 451N)

Dear Mrs. Mergenovich:

Enclosed please find original and six copies of Delaware and Hudson Railway Company's (D&H's) statement concerning the above application of Consolidated Rail Corporation (Conrail) to abandon the Lehigh Secondary Track.

Such statement is filed with the Commission both to request relief and to call attention to the fact that D&H is a common carrier which has operating rights over the line in question pursuant to rights granted D&H under the Regional Rail Reorganization Act of 1973 (3R Act).

Very truly yours,

Encl.

cc: Wayne Michel, Esq. *W Michel*
Room 5420
Interstate Commerce Commission

BEFORE THE
INTERSTATE COMMERCE COMMISSION

CONSOLIDATED RAIL CORPORATION'S
APPLICATION UNDER SECTION 308 OF
THE REGIONAL RAIL REORGANIZATION
ACT OF 1973, AS ENACTED BY SEC-
TION 1156 OF THE NORTHEAST RAIL
SERVICE ACT OF 1981, FOR ABANDON-
MENT OF THE LEHIGHTON SECONDARY
TRACK IN THE STATE OF PENNSYLVANIA

INTERSTATE
COMMERCE COMMISSION

ADMINISTRATIVE SERVICE
FEB 25 1982

DOCKET NO. AB 167 (SUB-NO. 451N)

STATEMENT OF
DELAWARE AND HUDSON RAILWAY COMPANY

Kings M. LaChapelle
Attorney for Delaware
and Hudson Railway Company
40 Beaver Street
Albany, New York 12207

Dated: February 25, 1982

BEFORE THE
INTERSTATE COMMERCE COMMISSION

CONSOLIDATED RAIL CORPORATION'S
APPLICATION UNDER SECTION 308 OF
THE REGIONAL RAIL REORGANIZATION
ACT OF 1973, AS ENACTED BY SEC-
TION 1156 OF THE NORTHEAST RAIL
SERVICE ACT OF 1981, FOR ABANDON-
MENT OF THE LEHIGHTON SECONDARY
TRACK IN THE STATE OF PENNSYLVANIA

DOCKET NO. AB 167 (SUB-NO. 451N)

STATEMENT OF
DELAWARE AND HUDSON RAILWAY COMPANY

Comes now Delaware and Hudson Railway Company (D&H) making this statement whereby it requests that the Commission in keeping with its authority to regulate the rail service over the Lehighton Secondary Track (Subject Line), restrict any proposed disposition by Consolidated Rail Corporation (Conrail) of the properties and appurtenances involved in the Application for Abandonment of the Subject Line, in the above designated proceeding.

1. D&H is a common carrier by rail subject to the jurisdiction of the Interstate Commerce Commission and to the

provisions of the Interstate Commerce Act (Title 49 U.S.C. Subtitle IV) with its principal office located at 40 Beaver Street, Albany, New York 12207.

2. Conrail is a common carrier by rail subject to the jurisdiction of the Interstate Commerce Commission and to the provisions of the Interstate Commerce Act (Title 49 U.S.C. Subtitle IV) with its principal offices located at 6 Penn Center Plaza, Philadelphia, Pennsylvania 19104.

3. D&H has operating rights over the Subject Line pursuant to trackage rights granted it by Conrail's predecessor in title the Trustees of the former Lehigh Valley RR Co. and Lehigh Coal and Navigation Company.

4. Title to the Subject Line was granted to Conrail subject to the trackage rights granted to D&H.

5. The rights were granted to D&H pursuant to provisions of the Regional Rail Reorganization Act of 1973 (JR Act) and were authorized by the Special Court as well as approved by the Commission.

6. On April 25, 1979 Conrail and D&H entered into a thirty year agreement specifying, among other items, the charges to be paid by D&H for operating over the Subject Line. A copy of said agreement will be filed should the Commission so require.

7. Pursuant to said agreement Conrail has the contractual duty to maintain the line.

8. Pursuant to the provisions of the Northeast Rail Service Act of 1981 (NERSA) Conrail seeks to abandon the Subject Line and in the event no offer of financial assistance is made, the Application is likely to be granted.

9. D&H does not specifically object to Conrail's abandonment of its own service over the line but D&H wants to make certain that neither the duties imposed on Conrail by the grant of trackage rights to D&H nor the duties undertaken by Conrail in the April 25, 1979 agreement are abrogated.

10. D&H as a carrier subject to the Commission's authority may not abandon its trackage rights over the Subject Line without permission and D&H is not seeking such permission.

11. Whatever Conrail may be permitted to do to dispose of the Subject Line to a potential purchaser under NERSA, and pursuant to NERSA's provisions by the Commission, must be conditioned by, and be subject to, D&H's existing rights in the Subject Line.

12. D&H makes this statement both to request relief and to clarify its position to Conrail, the Commission and to any potential purchaser, that D&H asserts its rights under the grant and does not intend that any existing D&H rights be impaired through the actions of Conrail or third parties.

13. Although Conrail under NERSA has wide latitude to abandon lines, discontinue service and dispose of property, Conrail can only dispose of its share of any property it owns. It does not have a right of exclusive possession of the track and appurtenances of the Subject Line. D&H's interests and rights in the continued integrity of the rail facility may not be abrogated.

14. The Commission, although it is limited in its authority to control Conrail's abandonment of any lines to which Conrail has unencumbered title, is not so limited with respect to D&H. The Commission retains its traditional authority under the Interstate Commerce Act (Now 49 U.S.C. Subtitle IV) to protect the integrity of D&H's rights and operations. In keeping with its authority, the Commission may restrict the disposition of property used or usable in interstate commerce by a carrier subject to its jurisdiction (D&H) even though the owner of the property (Conrail) in its capacity as owner may not be subject to Commission authority. The limitation on the Commission's jurisdiction over Conrail abandonments imposed by NERSA does not apply to the Commission's authority over Conrail as the owner of encumbered property used or usable in interstate commerce by another carrier. The purpose of NERSA was to lift the burden from Conrail of the necessity to render unprofitable common carrier service, not to free it from its contractual obligations as landlord.

Therefore, D&H requests that the Commission order Conrail to refrain from disposing of the Subject Line and to refrain from disposing of any rail properties or dismantling any facilities used or usable in rail service which are appurtenant to the Subject Line or lines over which D&H has statutory trackage rights, unless arrangements satisfactory to D&H and the Commission have been made to assure that D&H's operations over the Subject Line will be unimpaired.

Respectfully submitted
on behalf of Delaware and
Hudson Railway Company.

By _____
Kings M. LaChapelle
General Attorney

CERTIFICATE OF SERVICE

I hereby certify that I have this 12th day of February, 1981, served a copy of the foregoing document upon all parties listed below by first class mail, properly addressed with postage prepaid.

The Honorable, Richard L. Thornburgh
Governor, Commonwealth of Pennsylvania
State Capitol
Harrisburg, PA 17120

Pennsylvania DOT
1200 Transportation and Safety Bldg.
Harrisburg, PA 17120

Public Utilities Commission
P. O. Box 3265
Harrisburg, PA 17120

Rail Services Planning Office
1900 L. Street NW
Washington, DC 20036

Federal Railroad Administration
400 Seventh Street SW
Washington, DC 20036

Office of Proceedings, ICC
12th & Constitution Avenue, N.
Washington, DC 20423

Director, Extension Service
Dr. J. M. Beattie
Agrl. Administration Bldg.
Pennsylvania State University
University Park, PA 16802

Department of Interior
National Park Service
18th and C Streets, N.W.
Washington, D.C. 20240

Office of Special Counsel
Interstate Commerce Commission
Washington, D.C. 20415

Military Traffic Management Command
Massif Building - Room 720
STOP 105 MT-SA
Washington, D.C. 20315

National Railroad Passenger Corporation
400 North Capitol Street, N.W.
Washington, D.C. 20001

Railroad Retirement Board
844 Rush Street
Chicago, Illinois 60611

Railway Labor Executives' Association
Railway Labor Building
400 1st Street, N.W.
Washington, D.C. 20001

Charles E. Mechem
General Attorney
Consolidated Rail Corporation
1138 Six Penn Center Plaza
Philadelphia, Pennsylvania 19104

Pfizer Company, Inc.
Lehigh Gap R. D. 4
Slatington, PA 18080

Prince Manufacturing Company
700 Lehigh Street
Bowmanstown, PA 18030

Pennsylvania Plant Food
Lehighton, PA 19235

Eckman Lumber Company
R. D. #3
Lehighton, PA 18235

H. D. Hartman Lumber
Blakslee Boulevard
Lehighton, PA 18235

Whitehall Cement Company
5160 Main Street
Cementon, PA 18502

H. E. Orkin Company, Inc.
375 Cherry Street
Clatington, PA 18080

Blue Rock Materials
Clatington, PA 18080

A. J. Henry Lumber Company
50 West Park Avenue
Clatington, PA 18080

Keystone Lamp Mfg. Company
R. D. #4
Clatington, PA 18080

Kinga M. LaChapelle

Sworn to before me this
day of

Notary Public
State of New York

EXHIBIT # 5

Document is a copy of the Decision

of the

Interstate Commerce Commission

In

ICC Docket Number AB 167 (Sub No.# 541N)

Served : March 11th, 1982

INTERSTATE COMMERCE COMMISSION

MAR 11 1982

CERTIFICATE AND DECISION

Docket No. AB-167 (Sub-No. 451N)

CONRAIL ABANDONMENT BETWEEN CATASAUQUA AND LEIGHTON, PA

Decided: February 25, 1982

On November 30, 1981, Consolidated Rail Corporation (Conrail) filed an application pursuant to section 308 of the Regional Rail Reorganization Act of 1973^{1/} to abandon 21.3 miles of its rail line between Catasauqua (milepost 98.0) and Leighton (milepost 119.3) in Lehigh and Carbon Counties, PA.

Under section 308(b) the Commission must grant any application for abandonment filed by Conrail before December 1, 1981, within 90 days after the date such application is filed unless an offer of financial assistance is made pursuant to section 308(d) during that 90-day period. Because no offer of financial assistance has been received, the application is granted.

Congress has directed the Commission to appraise the net liquidation value of each Conrail line being abandoned. Under Section 308(e) any interested party would be able to purchase such a line at 75 percent of the value set by the Commission.

With its application Conrail submitted a statement that its estimate of the line's net liquidation value is \$1,556,528.

The Commission intends to adopt this estimate unless, within 15 days from date of service of this order, an interested party requests that the Commission independently appraise the line. If such a request is made, the Commission will, as soon as practicable, set a value for the line based on any information available. That determination will be published in the Federal Register and is not appealable. If no request is made the Commission will publish Conrail's estimate in the Federal Register.

If any interested parties have pertinent data on the net liquidation value of this line, they should submit it to the Commission's Section of Finance, Room 5414, 12th and Constitution Ave., NW., Washington, DC 20423.

^{1/} This section was added by the Northeast Rail Service Act of 1981. Pub. L. 97-35.

It is certified: Conrail is authorized to abandon the line described above.

It is ordered:

The certificate and decision are effective upon service.

By the Commission, Review Board Number 3, Members Krock, Joyce and Dowell.

(SFAL)

Agatha L. Mergenovich
Secretary

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of June, 2015, a copy of the CNJ Parties' Petition for Reconsideration, was served on all the Parties of Record noted below, via E-mail and / or First Class Mail.


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