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ENTERED
Office of Proceedings
June 9, 2015
Part of
Public Record

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June 9, 2015

VIA E-FILING

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

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

Dear Ms. Brown:

Norfolk Southern Railway Company (“NSR”) hereby replies in opposition to the stay request filed by Samuel J. Nasca, for and on behalf of SMART/Transportation Division, New York Legislative Board (“Nasca”) in the above referenced proceedings. As set forth in this reply, Nasca has not met the standards for issuance of a stay and the stay request should be denied.

Respectfully submitted,



William A. Mullins
Attorney for Norfolk Southern Railway Company

cc: Parties of Record

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

BEFORE THE
SURFACE TRANSPORTATION BOARD

FD 35873¹

NORFOLK SOUTHERN RAILWAY COMPANY

– ACQUISITION AND OPERATION –

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

REPLY IN OPPOSITION TO SAMUEL J. NASCA'S PETITION FOR STAY

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Railway Company

June 9, 2015

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

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35873

NORFOLK SOUTHERN RAILWAY COMPANY

– ACQUISITION AND OPERATION –

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

REPLY IN OPPOSITION TO SAMUEL J. NASCA’S PETITION FOR STAY

INTRODUCTION

Norfolk Southern Railway Company (“NSR”) hereby replies in opposition to the June 4, petition for stay (“Petition”)¹ filed by Samuel J. Nasca on behalf of SMART/Transportation Division (“SMART/TD”), New York State Legislative Board (“Nasca”). To justify a stay under Holiday Tours,² Nasca must meet four requirements: (1) there is a likelihood that he will prevail on the merits of any challenge to the action sought to be stayed; (2) the employees he alleges to represent will suffer irreparable harm in the absence of a stay; (3) other interested parties will not be substantially harmed by a stay; and (4) the public interest supports the granting of the stay.

¹ Throughout this proceeding, counsel for Nasca has failed to provide sequential numbering of its pleadings contrary to the Board’s regulations at 49 C.F.R. §1180.4(a)(2). As such, NSR will refer to the June 4 petition for stay as the “Petition.” In addition, Nasca’s counsel has also failed to file this Petition within the time frames of 49 C.F.R. § 1115.3(f). As such, it is untimely and should be rejected.

² Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977)(“Holiday Tours”); Virginia Petroleum Jobbers Ass’n v. Fed. Power Comm’n, 259 F.2d 921, 925 (D.C. Cir. 1958).

Nasca must meet all four requirements to justify a stay and has the burden of persuasion on the elements required for this extraordinary relief.³ Nasca does not meet any of the elements.

Nasca is unlikely to prevail on his argument that New York Dock, as opposed to New York Dock, as modified by Wilmington Terminal,⁴ is the appropriate level of labor protection in this line sale transaction. Regardless of any dicta contained within the Board's Decision No. 6 served on May 15, 2015 (Decision No. 6), the parties are required to follow the procedures laid out in New York Dock, as modified by Wilmington Terminal. Furthermore, because any adversely affected NSR or D&H employee will be entitled to labor protection, no employee will suffer irreparable harm. In contrast, a stay would actually harm the very employees Nasca claims to represent as it would delay the protection benefits to which these employees are entitled. A stay also would prevent shippers and shortlines from obtaining the benefits of the Transaction and postpone restoration of service as contemplated by NSR's operating plan. Finally, given that the Transaction is widely supported by shippers, shortlines, governmental entities, and almost all elected officials from Pennsylvania and New York, and has significant public benefits, the public interest favors denial of the stay.

³ On a motion for stay, "it is the movant's obligation to justify the . . . exercise of such an extraordinary remedy." Cuomo v. United States Nuclear Regulatory Comm'n, 772 F.2d 972, 978 (D.C. Cir. 1985). The parties seeking a stay carry the burden of persuasion on all of the elements required for such extraordinary relief. Canal Auth. of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974).

⁴ New York Dock Railway—Control—Brooklyn Eastern District Terminal, 360 I.C.C. 60, aff'd, New York Dock Railway v. United States, 609 F.2d 83 (2d Cir. 1979), as modified by Wilmington Terminal Railroad—Purchase & Lease—CSX Transportation, Inc., 6 I.C.C.2d 799, 814-26 (1990), aff'd sub nom. Railway Labor Executives' Ass'n v. ICC, 930 F.2d 511 (6th Cir. 1991).

ARGUMENT

To justify a stay under the Holiday Tours standard, Nasca must prevail on all four elements of the standard. Nasca has failed to meet any of the elements, let alone all four, so as to justify a stay.

(1) Likelihood Of Prevailing On The Merits

Nasca requests a stay in order to provide time for the Board to rule on his concurrently filed petition for reconsideration. Thus, the Petition for stay and the petition for reconsideration are inextricably linked. In the petition for reconsideration, Nasca argues that New York Dock, as opposed to New York Dock, as modified by Wilmington Terminal, is the appropriate labor protective standard. In effect, Nasca asks the Board to treat the Transaction as a consolidation, as opposed to a line sale. (Pet. For Reconsideration at 10). However, this is a line sale transaction. Nasca made this very same argument during the course of the proceeding; and, the Board considered, discussed, and rejected the argument. The Board correctly and rightly concluded that New York Dock, as modified by Wilmington Terminal, is the correct type of employee protection applicable to this Transaction and other line sale transactions. Decision No. 6 at 27-29. It was not material error for the Board to so conclude, and Nasca is unlikely to prevail on the merits of an argument that has already been rejected.

Nasca does not cite one case standing for the proposition that a line sale transaction requires New York Dock because there is no such precedent. Likewise, he cannot (and does not) cite one case standing for the proposition that because the buyer has agreed to cover the costs of labor protection as a matter of contract, that contract removes a line sale transaction from the New York Dock/Wilmington Terminal precedent. In a transaction, how the parties contractually allocate the costs of labor protection has no bearing on the type of labor protection imposed. It is

the structure and nature of the transaction that matters; not how the parties contractually allocate the costs of labor protection. As such, for this simple line purchase, New York Dock, as modified by Wilmington Terminal, is not “inappropriate” as Nasca claims, but, is actually required by precedent. As a result, Nasca is not likely to prevail on his fundamental argument that New York Dock should apply.

Nasca attempts to avoid this outcome by pointing to one-sentence dicta in the Board’s decision stating that “negotiation of the respective employee agreements cannot delay the consummation of a line sale transaction.” Decision No. 6 at 29. Nasca argues that this one sentence does not accurately reflect Wilmington Terminal, and therefore, a stay is justified.

Although Nasca’s argument with respect to this one sentence may be correct, this does not justify a stay. Under the Wilmington Terminal modification, implementing agreements, if required,⁵ are to be negotiated (and imposed by an arbitrator if that is necessary) before consummation. The sentence identified by Nasca is not a holding of Decision No. 6 and does not control, overrule, or modify the holding of Wilmington Terminal. It was New York Dock, as modified by Wilmington Terminal, which the Board imposed as the condition, Decision No. 6, Ordering ¶ 7, at 36, not New York Dock, as modified by Wilmington Terminal, and as further modified herein by NSR/D&H. As such, the procedures and processes under New York Dock, as modified by Wilmington Terminal, control regardless of the Board’s one-sentence dicta. The one sentence, even if not accurately drafted, does not justify a stay and can easily be clarified within the context of any decision denying the stay. Certainly the one sentence does not mean

⁵ While NSR intends to negotiate agreement with all unions, an implementing agreement may not be necessary with all crafts because certain crafts may not be adversely impacted.

that Nasca will prevail on its fundamental argument that New York Dock is the appropriate type of labor protection as opposed to New York Dock, as modified by Wilmington Terminal.

(2) Nasca Will Not Suffer Irreparable Harm

Counsel for Nasca speaks in terms of “railroad employees” being irreparably harmed, but no actual railroad employee or its union appears to support Nasca’s concerns. Nasca is not purporting to speak for SMART/Transportation Division (i.e., the relevant division of United Transportation Union, the actual union itself), but rather for the New York State Legislative Board of SMART/TD.⁶ Whether the New York State Legislative Board speaks for its members is unclear. Regardless, the New York State Legislative Board will not suffer irreparable harm nor will Nasca himself. Moreover, neither the national office of SMART/TD, nor any other actual union, specific craft, specific bargaining arm, or state division of the various railroad unions, has requested a stay. Without any specific evidence that Nasca himself or that the New York State Legislative Board of SMART/TD, which Nasca purports to represent, will suffer irreparable harm, Nasca has not met this prong of the four part Holiday Tours Test.

However, even if one assumes that Nasca has the authority to speak for “railroad employees,” no such railroad employees will be irreparably harmed by the Transaction. Nasca claims that some employees will lose their jobs or suffer a reduction in their standard of living, but such economic harm does not equate to irreparable harm, especially when such employees would likely be entitled to labor protection. Norfolk Southern Railway Company – Trackage Rights Exemption – Delaware And Hudson Railway Company, Inc. – Between Sunbury, PA and

⁶ There is a fundamental question as to whether Nasca represents railroad employees or simply represents himself. On its face, counsel for Nasca appears to represent Nasca as a person, not the union (i.e., Nasca’s counsel signs the pleadings as the “Attorney for Samuel J. Nasca”). If Nasca is the party of record, clearly, Nasca himself will not suffer “irreparable harm” and has not alleged that he would.

Mechanicville, NY; Norfolk Southern Railway Company – Trackage Rights Exemption – Reading Blue Mountain And Northern Railway Company – Between Lehighon Yard And Dupont, PA, FD Nos. 34209 and 34225, slip op. at 4 (STB served July 25, 2002)(“any economic harm that might occur would not constitute irreparable harm.”)

While Nasca does seem to acknowledge that monetary compensation will provide some relief, he still claims that such compensation is “insufficient.” Nasca does not explain why such monetary compensation is insufficient or how the insufficiency of such monetary compensation rises to the level of irreparable harm. In the end, it appears that Nasca simply disagrees with the level of labor protection imposed by the Board in this Transaction and that somehow the imposition of New York Dock, as modified by Wilmington Terminal, as opposed to imposition of New York Dock, is what creates the irreparable harm. Without any further evidence or explanation, however, such an argument is insufficient to support a finding of irreparable harm. See Western New York & Pennsylvania Railroad, LLC – Lease And Operation Exemption – Certain Assets Of Norfolk Southern Railway Company And Chautauqua, Cattaraugus, Allegany And Stueben Southern Tier Extension Railroad Authority, FD 35019, slip op. at 2 (STB served Aug. 6, 2006)(noting that mere assertions of the insufficiency of labor protective conditions is not enough to establish irreparable harm).

(3) Parties Will Be Harmed By Issuance Of A Stay

While Nasca claims to be representing the interests of railroad employees in seeking a stay, a stay, if granted, would actually harm the very same employees Nasca claims to represent. If an implementing agreement is required, which may well be the case with respect to D&H and its employees, the exact notices that Nasca complains about not yet being served will be delayed even further. This is because such notices cannot be served until the effective date of Decision

No. 6 has passed. Thus, further delay in the proceeding only further delays the service of the very notices that Nasca complains have not yet been served.

Further delay would also only postpone the certainty of employment and the awarding of any monetary remuneration required under the labor protective conditions. Indeed, NSR has already reached implementing agreements with four unions⁷ in accordance with Article I, Section 4 of the New York Dock protective conditions.

Issuance of a stay would also harm the shortlines and shippers who have supported the Transaction, as significant public interest benefits would also be delayed.⁸ As noted throughout this proceeding, shippers and shortlines have been affected by D&H's decision to reduce levels of service over the line, which NSR seeks to restore. A stay would simply delay the restoration of prior service levels. Even the Board noted that NSR, as a much larger carrier than D&H, is "better suited to own and operate these lines," has the "funds and incentive to purchase and invest," and will "ensure adequate investment and growth of traffic on the line." Decision No. 6 at 21. Issuance of a stay would only further delay these public benefits, harming shippers and shortlines, as well as D&H and NSR.

(4) The Public Interest Favors Denying The Stay

As noted, allowing the Transaction to go forward will result in significant public benefits and best serves the public interest. Denying the stay is the fastest and quickest way to ensure that employees continue to work or receive labor protection and that shippers and shortlines

⁷ NSR has reached voluntary agreements with the Brotherhood of Maintenance of Way Employees Division of the International Brotherhood of Teamsters; the Brotherhood of Railroad Signalmen; the Brotherhood of Railway Carmen; and the Brotherhood of Locomotive Engineers and Trainmen, a division of the Rail Conference of the International Brotherhood of Teamsters.

⁸ The Transaction received almost unanimous support from the shortline and shippers who use the line that NSR is buying. Approximately 127 parties filed comments in support of the Transaction.

benefit from reinvigorated service and renewed investment in the line, with corresponding benefits to the surrounding communities. Indeed, even though the shippers and connecting shortlines have only just heard about the stay request, NSR is beginning to receive letters opposing any such stay request.⁹

Numerous government agencies and elected officials also supported the Transaction. It was not opposed by any actual collective bargaining unit of any of the national unions, and has almost universal support among the connecting shortlines and shipping community. Clearly, the public would best be served by allowing the Transaction to go forward as soon as possible. While issuance of a stay only helps no one, except perhaps the self-interest of Nasca's counsel.

CONCLUSION

In conclusion, the Board should deny the Petition. Nasca must meet all four prongs of the Holiday Tours test to justify the extraordinary relief of a stay of the effective date. Nasca has failed to meet any of the four prongs. A stay is not in the best interests of the employees on the line, the shippers and the shortlines served by the line, and certainly not D&H's or NSR's interest. Therefore, Nasca's Petition for stay should be denied.

⁹ To date, NSR has received five letters from the North Shore family of shortlines, which includes the Lycoming Valley Railroad Company, Nittany & Bald Eagle Railroad Company, North Shore Railroad Company, Shamokin Valley Railroad Company, and Union County Industrial Railroad Company. These letters are attached as Exhibit A. NSR has requested that any interested shipper or party file future letters directly with the Board.

Respectfully submitted,

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John M. Scheib
Maquiling B. Parkerson
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Attorneys for Norfolk Southern Railway
Company

June 9, 2015

VERIFICATION

I, Christopher S. Decker, Director - Labor Relations, Norfolk Southern Railway Company, declare under penalty of perjury that I have read the foregoing Reply In Opposition To Samuel J. Nasca's Petition For Stay (NS-19) and that the statement of facts contained therein are true and correct to the best of my knowledge and belief.



Christopher S. Decker
Director – Labor Relations
Norfolk Southern Railway Company

Dated: June 9, 2015

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of "Reply to Samuel J. Nasca's Petition For Stay" (NS-19) in STB Finance Docket No. 35873, by first class mail, properly addressed with postage prepaid, or via more expeditious means of delivery, upon all parties of record.



William A. Mullins
Attorney for Norfolk Southern Railway Company

June 9, 2015

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35873

NORFOLK SOUTHERN RAILWAY COMPANY

– ACQUISITION AND OPERATION –

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

REPLY IN OPPOSITION TO SAMUEL J. NASCA'S PETITION FOR STAY

EXHIBIT A



LYCOMING VALLEY RAILROAD COMPANY



356 Priestley Avenue, Northumberland, PA 17857

Phone: (570) 473-7949

Fax: (570) 473-8432

June 9, 2015

VIA E-FILING

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

Re: Norfolk Southern Railway Company – Acquisition and Operation - Certain Rail Lines of the Delaware and Hudson Railway Company, Inc., STB Docket FD 35873

Dear Ms. Brown:

The Lycoming Valley Railroad Company filed a letter in support of Norfolk Southern's acquisition and operation of the D&H South Lines because the transaction would align ownership of the D&H South Lines with usage, create operating efficiencies, reinvigorate investment and service, and improve the reliability and sustainability of service. Any delay to the consummation of the transaction approved by the Board in its May 15, 2015, decision will delay these benefits. As such, the Lycoming Valley Railroad Company strongly opposes a stay in the proceeding.

Sincerely,

Gary R. Shields, President & CEO
Lycoming Valley Railroad Company

/GS

xc: SEDA-COG Joint Rail Authority
Norfolk Southern Railway Company

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



NITTANY & BALD EAGLE RAILROAD COMPANY



356 Priestley Avenue, Northumberland, PA 17857

Phone: (570) 473-7949

Fax: (570) 473-8432

June 9, 2015

VIA E-FILING

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

Re: Norfolk Southern Railway Company – Acquisition and Operation - Certain Rail Lines of the Delaware and Hudson Railway Company, Inc., STB Docket FD 35873

Dear Ms. Brown:

The Nittany & Bald Eagle Railroad Company filed a letter in support of Norfolk Southern's acquisition and operation of the D&H South Lines because the transaction would align ownership of the D&H South Lines with usage, create operating efficiencies, reinvigorate investment and service, and improve the reliability and sustainability of service. Any delay to the consummation of the transaction approved by the Board in its May 15, 2015, decision will delay these benefits. As such, the Nittany & Bald Eagle Railroad Company strongly opposes a stay in the proceeding.

Sincerely,

Gary R. Shields, President & CEO
Nittany & Bald Eagle Railroad Company

/GS

xc: SEDDA-COG Joint Rail Authority
Norfolk Southern Railway Company

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



NORTH SHORE RAILROAD COMPANY



356 Priestley Avenue, Northumberland, PA 17857

Phone: (570) 473-7949

Fax: (570) 473-8432

June 9, 2015

VIA E-FILING

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

Re: Norfolk Southern Railway Company – Acquisition and Operation - Certain Rail Lines of the Delaware and Hudson Railway Company, Inc., STB Docket FD 35873

Dear Ms. Brown:

The North Shore Railroad Company filed a letter in support of Norfolk Southern's acquisition and operation of the D&H South Lines because the transaction would align ownership of the D&H South Lines with usage, create operating efficiencies, reinvigorate investment and service, and improve the reliability and sustainability of service. Any delay to the consummation of the transaction approved by the Board in its May 15, 2015, decision will delay these benefits. As such, the North Shore Railroad Company strongly opposes a stay in the proceeding.

Sincerely,

Gary R. Shields, President & CEO
North Shore Railroad Company

/GS

xc: SEDA-COG Joint Rail Authority
Norfolk Southern Railway Company

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



SHAMOKIN VALLEY RAILROAD COMPANY



356 Priestley Avenue, Northumberland, PA 17857

Phone: (570) 473-7949

Fax: (570) 473-8432

June 9, 2015

VIA E-FILING

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

Re: Norfolk Southern Railway Company – Acquisition and Operation - Certain Rail Lines of the Delaware and Hudson Railway Company, Inc., STB Docket FD 35873

Dear Ms. Brown:

The Shamokin Valley Railroad Company filed a letter in support of Norfolk Southern's acquisition and operation of the D&H South Lines because the transaction would align ownership of the D&H South Lines with usage, create operating efficiencies, reinvigorate investment and service, and improve the reliability and sustainability of service. Any delay to the consummation of the transaction approved by the Board in its May 15, 2015, decision will delay these benefits. As such, the Shamokin Valley Railroad Company strongly opposes a stay in the proceeding.

Sincerely,

Gary R. Shields, President & CEO
Shamokin Valley Railroad Company

/GS

xc: SEDA-COG Joint Rail Authority
Norfolk Southern Railway Company

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



UNION COUNTY INDUSTRIAL RAILROAD COMPANY



356 Priestley Avenue, Northumberland, PA 17857

Phone: (570) 473-7949

Fax: (570) 473-8432

June 9, 2015

VIA E-FILING

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

Re: Norfolk Southern Railway Company – Acquisition and Operation - Certain Rail Lines of the Delaware and Hudson Railway Company, Inc., STB Docket FD 35873

Dear Ms. Brown:

The Union County Industrial Railroad Company filed a letter in support of Norfolk Southern's acquisition and operation of the D&H South Lines because the transaction would align ownership of the D&H South Lines with usage, create operating efficiencies, reinvigorate investment and service, and improve the reliability and sustainability of service. Any delay to the consummation of the transaction approved by the Board in its May 15, 2015, decision will delay these benefits. As such, the Union County Industrial Railroad Company strongly opposes a stay in the proceeding.

Sincerely,

Gary R. Shields, President & CEO
Union County Industrial Railroad Company

/GS

xc: SEDA-COG Joint Rail Authority
Norfolk Southern Railway Company

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