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January 7, 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:

Enclosed is Norfolk Southern Railway Company's "Reply To Nasca Petition For Reconsideration" (NS-11) in response to the January 5, 2015 pleading filed by Samuel J. Nasca, for and on behalf of SMART/Transportation Division, New York State Legislative Board in the above referenced proceeding. If there are any questions concerning this filing, please contact me at the address and phone listed above or at wmullins@bakerandmiller.com.

Respectfully submitted,



William A. Mullins
Attorney for Norfolk Southern Railway Company

Enclosures

cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35873

NORFOLK SOUTHERN RAILWAY COMPANY

- ACQUISITION AND OPERATION -

CERTAIN RAIL LINES OF THE DELAWARE AND HUDSON RAILWAY

REPLY TO NASCA PETITION FOR RECONSIDERATION

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January 7, 2015

**BEFORE THE
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NORFOLK SOUTHERN RAILWAY COMPANY

- ACQUISITION AND OPERATION -

CERTAIN RAIL LINES OF THE DELAWARE AND HUDSON RAILWAY

Norfolk Southern Railway Company (“NS”) hereby replies to the petition for reconsideration filed by Samuel J. Nasca (“Nasca”). Nasca requests reconsideration of the Board’s acceptance of the Application in order to treat D&H as an “applicant” and require the provision of additional information regarding labor impacts. In addition, Nasca complains that the Board’s procedural schedule violates due process, although not specifying what additional time is required. The Board should reject Nasca’s requests because Nasca has not met the standard for reconsideration. There is no new evidence requiring D&H to be an applicant and the labor impact information in the Application does not represent a material error. Nasca merely makes generalized and unsubstantiated statements that do not meet the standard for granting reconsideration.¹ Likewise, the procedural schedule is fully consistent with statutory requirements and Board precedent such that it does not violate due process.

¹ In the Board’s own words, “[w]here, as here, a petition alleges material error, a party must do more than simply make a general allegation; it must substantiate its claim of material error.” Union Pac. Corp., Union Pac. R.R. Co. and Missouri Pac. R.R. Co. – Control and Merger – Southern Pac. Rail Corp., Southern Pac. Transp. Co., St. Louis Southwestern Ry. Co., SPCSL Corp., and the Denver and Rio Grande Western R.R. Co., FD 32760 (STB served Dec. 30, 2014).

First, notwithstanding D&H's notice of intent to participate in which it called itself an "applicant," D&H is not an "applicant." D&H is not the party "initiating the transaction." See 49 C.F.R. § 1180.3(a). The only transactions in the Application for which Board approval is sought are NS's acquisition of a rail line from another carrier and NS's modification of certain existing trackage rights. As such, NS is the only party "initiating the transaction" in front of the Board and is the only "applicant" under the regulation. Further, D&H's calling itself an "applicant" does not make D&H an applicant, especially when D&H now has filed a letter clarifying that it did not intend to imply that it is an "applicant" required to provide information as part of the Application. As such, there is no "new evidence" that D&H should be considered an applicant.

Nasca admits that in a normal line purchase transaction under 49 U.S.C. § 10901 or § 10902, the only applicant is the purchaser. Nasca at 4. But Nasca claims that because this is a § 11323 transaction, a different standard governs and both the purchaser and the seller are required to be applicants. Nasca cites no precedent to support this argument, relying only on D&H's December 24, 2014, notice of intent to participate, which has now been clarified to reflect that D&H is not an applicant. Nasca at 4. As noted above, this argument is not consistent with the regulation; nor is it consistent with Board precedent where the only applicant was the purchaser in control transactions under § 11323. See, e.g., Canadian National Railway Company And Grand Trunk Corporation – Control – EJ&E West Company, FD 35087 (STB served Nov. 26, 2007); Illinois Central Corporation And Illinois Central Railroad Company – Control – MidSouth Corporation, MidSouth Rail Corporation, MidLouisiana Rail Corporation, And

Southrail Corporation, FD 31801 (ICC served Mar. 21, 1991).² As such, it is not material error for D&H not to be an applicant.

Second, Nasca's sole purpose for treating D&H as an applicant is to require D&H to provide additional information regarding labor impacts, "to be detailed by class or craft, the geographic point where the impacts would occur, and time frames." Nasca at 4. According to Nasca, the Application is deficient because the labor impacts are not sufficiently detailed. However, it was not material error for the Board to accept NS's labor impact analysis. NS provides the information required by 49 C.F.R. § 1180.6(a)(2)(v) in its Application. NS details how many employees, by class, currently work on the line and NS projects how many employees, by class, it will hire. See Application at 118-19. NS also defines the geographic point where the impacts will occur, stating that it considers employees "who operate over the lines involved in the Transaction." Application at 118. NS further addresses time frames, noting that labor impacts will occur upon consummation of the transaction and that no implementing agreement has yet been reached. Application at 46-47. Even if D&H were an applicant, the labor impact information provided in the Application would not have been different.³ Despite

² This makes sense as a matter of policy. As the Board has noted, because Board authority is permissive and not mandatory, it would be difficult, especially in the context of hostile takeovers where the acquirer does not enjoy the cooperation of the acquisition target, to require the target to be an applicant. Illinois Central Corporation And Illinois Central Railroad Company – Control – MidSouth Corporation, MidSouth Rail Corporation, MidLouisiana Rail Corporation, And Southrail Corporation, FD 31801 (ICC served Feb. 21, 1991); Rio Grande Industries, Inc. -- Purchase and Related Trackage Rights -- Soo Line Railroad Co. Line Between Kansas City, MO and Chicago, IL, FD 31505, slip op. at 5 (ICC served April 6, 1990); Georgia-Pacific Corp. & NM Acquisition Corp. -- Acquisition of Control Exemption -- Nonconnecting Railroads, FD 31564, slip op. at 2-3 (ICC served Dec. 7, 1989).

³ Nasca, understandably, would like more specific information; but until NS obtains Board approval and prepares to take over actual operations, neither NS, nor D&H for that matter, is in any position to provide more specific information regarding labor impacts than that already set forth. Of course, when NS begins to consummate the transaction, any potentially impacted employees will be fully informed of their status and will be entitled to labor protection in

stating that NS's information is "impossible for analysis," (Nasca at 5, n. 4), Nasca has not cited any precedent supporting this statement or his argument that the information provided by NS fails to comply with the regulation.

It should be noted that Nasca did not raise any of these arguments prior to the Board's acceptance of the Application. Not having raised these arguments previously, Nasca's self-styled "petition for reconsideration" is more akin to a petition to reopen and should be treated as such. See Norfolk And Western Railway Company – Abandonment Exemption – Between Kokomo And Rochester In Howard, Miami, and Fulton Counties, IN, AB-290 (Sub-No. 168X) (STB served May 4, 2005) (noting that petitioners cannot use a timely petition for reconsideration to raise arguments that could have been raised earlier and treating the petitioners' challenges as a petition to reopen). Petitions to reopen are subject to more stringent standards than petitions to reconsideration. As NS has explained herein, Nasca's petition does not meet the standards for reconsideration, and accordingly, it surely does not meet the standards to reopen.

Finally, Nasca takes issue with the "drastic expedited handling of the application" and claims that such an "unwarranted expedited schedule" denies the public due process (Nasca at 6), although Nasca suggests no remedy for these alleged deficiencies. Such embellished statements are not supported by further explanation from Nasca or by Board precedent. The Board's procedural schedule is no different than that provided by 49 U.S.C. § 11325 and schedules adopted in prior minor transactions. The Application was filed on November 17, 2014; parties had 30 days to review and comment on it (which Nasca in fact did, albeit raising different

accordance with 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).

arguments); and the Board accepted the Application and the proposed schedule via publication on its website on December 16, 2014 and via publication in the *Federal Register* on December 22, 2014. Upon its acceptance, the schedule provided Nasca with yet another full 30-day period to draft and file comments by January 15, 2015. As a result, Nasca has nearly double the 30-day period provided by statute to review the Application and file comments, especially considering that the Board posted the Application on its website soon after its filing and Nasca's counsel obtained a hand-delivered personal copy shortly thereafter.

Nor can Nasca claim that the schedule is prejudicial. Nasca has been fully aware of the proceeding and is an active participant. His counsel already has met personally with the undersigned counsel to obtain copies of the Application; and Nasca already has filed a reply to NS's Application, has filed his notice of intent to participate, and now has filed this petition for reconsideration. Accordingly, Nasca cannot claim that he has not had sufficient time to participate.⁴

In summary, Nasca has not established any new evidence or material error requiring reconsideration (or reopening) of the Board's decision to accept the Application. Nasca has not shown that case precedent or the regulations require D&H to be an applicant or require additional labor impact information beyond that set forth by NS in the Application. Instead, as NS has demonstrated herein, case precedent and regulations do not require D&H, as the seller of a rail line, to be an applicant and confirm that the labor impact information already provided by NS is sufficient. Furthermore, it was not material error, a violation of due process, or otherwise

⁴ As noted in NS-9 at n. 4, while not legally necessary, if the Board determines that it should give additional time to any party for the filing of comments or requests for conditions, NS does not object to an extension of the filing deadline to January 21, 2015 as long as all other filing deadlines remain the same.

prejudicial for the Board to adopt the existing procedural schedule because that schedule is fully consistent with the statute and affords parties ample time to comment on the Application.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I have this 7th day of January 2015 served a copy of the foregoing Reply To Nasca
Petition For Reconsideration upon all parties of record.



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