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September 14, 2015

239205

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Office of Proceedings  
September 14, 2015  
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Public Record

## **VIA E-FILING**

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

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:

Norfolk Southern Railway Company ("NS" or "Applicant") has reviewed the Petition For Declaratory Order filed on September 11, 2015 by the American Train Dispatchers Association ("ATDA").<sup>1</sup> The request to open up a declaratory order proceeding and to "stay" the Transaction during the pendency of such a proceeding should be denied. It is based upon a mischaracterization of the employee protective conditions imposed in this proceeding. It seeks, at virtually the last minute, to impede a rail asset purchase transaction that serves the public interest and will not adversely affect any ATDA-represented employees.

The dispute between ATDA and NS is a disagreement as to what the New York Dock conditions require.<sup>2</sup> Applicant has created four new positions at its Harrisburg Division

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<sup>1</sup> ATDA was not a party of record in the FD 35873 proceeding and has not requested intervention.

<sup>2</sup> In Decision No. 6, the Board imposed the conditions adopted in New York Dock Ry. – Control – Brooklyn Eastern District Terminal, 360 I.C.C. 60, aff'd, New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979), as modified by Wilmington Terminal R.R. – Purchase & Lease – CSX Transp., Inc., 6 I.C.C.2d 799 (1990), aff'd sub nom. Railway Labor Executives' Ass'n v. ICC, 930 F.2d 511 (6th Cir. 1991).

dispatching office to handle train dispatching over the “D&H South” rail lines that NS will acquire from the Delaware and Hudson Railway Company, Inc. (“D&H”) in the transaction that the Board approved in Decision No. 6. The new positions were filled on August 17, 2015, by ATDA-represented NS employees following the standard bidding process prescribed by the governing NS-ATDA labor agreement. For the past four weeks, these employees have been training for NS’s new operations, which are set to begin on September 19, 2015. ATDA contends that the New York Dock conditions required NS to enter into an “implementing agreement” with ATDA before creating these positions. In contrast, NS argues that it is self-evident that the protective conditions impose no such requirement, and that the carrier has complied with its obligations under the conditions.

The Board has repeatedly held that disputes over what the New York Dock conditions require must exclusively be resolved by arbitration under Art. I, § 11 of the conditions themselves. It is settled that when a labor union in the first instance petitions the Board for an order declaring that a carrier may not take some particular action in the absence of an implementing agreement, the union has come to the wrong place; its claim must first be submitted to arbitration. Kansas City Southern Industries, Inc., et al.--Control--Gateway Western Ry. Co., et al., FD 33311 (STB served December 4, 1997) (question whether employees were adversely affected by transaction so as to require negotiation of an implementing agreement must be submitted to arbitration under Art. I, § 11 of New York Dock conditions); Canadian National Ry. Co., et al.--Control--Wisconsin Central Transp. Corp., et al., FD 34000 (STB served June 6, 2008) (challenge by ATDA to carrier’s action taken without an implementing agreement must first be submitted to arbitration; citing Kansas City Southern Industries); Canadian Pacific Ry. Co.--Control--Dakota Minnesota & Eastern R.R. Corp., FD 35081 (Sub-No. 1) (STB served August 16, 2011) (“Disputes about whether a particular operational change requires an implementing agreement are to be addressed initially by arbitrators”; citing Kansas City Southern Industries). NS explained this to ATDA by letter of August 21, 2015 (reproduced as Exhibit 1 hereto). But in its September 11, 2015 Petition, ATDA does not so much as acknowledge the Board’s controlling decisions, even though ATDA itself was the unsuccessful litigant in one of those cases.

In this case, § 11 arbitration is already in progress. ATDA first sought to have NS participate in arbitration under Art. I, § 4(a) of the protective conditions. Such arbitration, however, is solely the mechanism by which an implementing agreement may be obtained when the same section requires an implementing agreement and the parties have been unable to negotiate one. When, as here, the dispute is over *the question whether § 4(a) applies at all*, the arbitration forum is provided by Art. I, § 11. Accordingly, when ATDA proposed inapplicable § 4(a) arbitration, NS invoked § 11 instead and designated its own member of the arbitration committee, an action that caused the § 11 proceeding to begin. See Exhibit 1, at 2. The next step will be the selection of a neutral arbitrator to chair the § 11 committee.

Given this standard, ATDA’s Petition should be denied. There is certainly no basis to open up a declaratory order proceeding, nor is there a basis to grant a stay. Indeed, ATDA does

not even refer to the Board's standards for grant of a stay, much less attempt to show how its request satisfies those standards. ATDA could not make such a showing if it tried.

There is no respectable argument supporting ATDA's position that NS needed to have an implementing agreement in order to establish its new dispatcher positions at Harrisburg, and NS expects that it will prevail in arbitration on that point. Under Art. I, § 4(a) of the protective conditions, an implementing agreement may be required only where a carrier takes action that may cause the dismissal or displacement of employees or a "rearrangement of forces." The creation of four new jobs in NS's Harrisburg office to handle incoming new work will not adversely affect any NS employees, and it will not create a need to reallocate employees among positions in the office. (In fact, NS has hired new dispatchers into its Harrisburg office.) Accordingly, ATDA would have no basis for contending in support of its stay request that it is likely to succeed on the merits of its claim against NS.

Likewise, ATDA plainly could not contend that a stay is warranted to prevent irreparable harm to the NS employees it represents. All of NS's employees unquestionably enjoy the benefits of the New York Dock conditions (as modified in Wilmington Terminal) and would be entitled to those benefits regardless of whether an implementing agreement is required in connection with a particular action that NS may take. If, contrary to all expectations, an ATDA-represented NS employee is adversely affected by the D&H South acquisition, the employee will be entitled to the monetary benefits provided by the employee protective conditions.

The grant of a stay would, in contrast, cause significant harm to NS and its prospective customers on the D&H South lines. NS has trained its employees (including dispatchers and others), deployed rolling stock and other resources, assigned management personnel to implementation of the line acquisition, and adjusted its marketing and service functions as necessary for an efficient start-up of operations over the new lines. NS is poised to begin maintaining the lines and operating the mechanical facilities it will acquire on the lines. Customers of the railroad have already made arrangements for service by NS. The switchover is planned for just five days from today; at this point, a delay would disrupt the arrangements that have already been made and impose needless costs on NS and the entities it will serve.

The Board found in Decision No. 6 (at 21-22) that consummation of the D&H South transaction will provide "very strong public benefits," permitting NS to provide safer and more efficient operations over those lines and strengthening competition in the Northeast. A stay of consummation now would be harmful to the public interest, and there is no legitimate reason for such action to be considered.

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For all of these reasons, the relief requested by ATDA's Petition is unsupported and unwarranted. The Petition should be denied.

Respectfully submitted,



William A. Mullins  
Attorney for Norfolk Southern Railway Company

cc: Parties of Record



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August 21, 2015

CD-20-1146

**By Email and U.S. Mail**

Mr. F. L. McCann, President  
American Train Dispatchers Association  
4239 West 150th Street  
Cleveland, OH 44135

Re: Surface Transportation Board Finance Docket No. 35873

Dear Mr. McCann:

This responds to your letter of August 17, 2015, which concerns Norfolk Southern Railway Company's establishment of four new train dispatcher positions at NSR's Harrisburg Division Dispatching Office. Those positions, which will handle train dispatching over rail lines to be acquired by NSR from the Delaware and Hudson Railway Company (the "D&H South lines"), were advertised by bulletin on August 9, 2015 and were filled by NSR train dispatchers in that office through the routine exercise of seniority, effective August 17, 2015, in accordance with the schedule agreement.

In your letter, you point out that on May 18, 2015, NSR had served a notice on ATDA pursuant to Art. I, section 4 of the *New York Dock* employee protective conditions, which were imposed by the Surface Transportation Board, subject to the *Wilmington Terminal* modification, in its decision approving NSR's acquisition of the D&H South lines. *Norfolk Southern Ry. Co.--Acquisition & Operation--Certain Rail Lines of Delaware & Hudson Ry. Co.*, Finance Docket No. 35873 (served May 15, 2015). You now purport to invoke arbitration under Art. I, section 4 of *New York Dock* with respect to NSR's May 18, 2015 notice.

You do not mention that by letter of August 7, 2015 to General Chairman Broyles, NSR withdrew the May 18, 2015 notice. There is no pending notice or proposal that could be subject to arbitration under *New York Dock* section 4.

On the merits, NSR's position is that the simple establishment of four new positions at the Harrisburg Division office, which will *not* cause the dismissal or displacement of any employee or the "rearrangement of forces," as the term is used in *New York Dock*, did

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not and does not require the service of a section 4 notice. Our service of a notice on May 18, 2015 does not suggest any different conclusion. As you know, that notice was intended to start a process that would culminate in a negotiated implementing agreement covering a broad rearrangement of dispatching duties within the Harrisburg Division office that we explained in detail to you and General Chairman Broyles, both prior to and following service of the notice. ATDA, however, ultimately refused to enter into a consensual implementing agreement covering that broad rearrangement, and NSR decided that it would, for now, simply create new positions at Harrisburg to handle the Carrier's immediate needs, an action that is fully consistent with the schedule agreement and does not implicate the *New York Dock* conditions at all. Because an implementing agreement was not a prerequisite to this action, NSR withdrew the May 18, 2015 notice.

As there is no pending section 4 notice and as section 4 by its own terms does not apply to the only action that NSR has taken at its Harrisburg Division office, your proposal that NSR join with ATDA in proceeding to section 4 arbitration, in order to obtain an implementing agreement authorizing that action, is outside the scope of the protective conditions and is respectfully declined.

We do agree, however, that at this point, NSR and ATDA have a dispute as to whether a *New York Dock* section 4 implementing agreement is required with respect to the establishment of four new train dispatcher positions at the Harrisburg Division office.

The *New York Dock* conditions themselves provide a means of resolving the parties' dispute. As the STB has repeatedly made clear, a claim that the protective conditions apply to a particular carrier action may appropriately be submitted to an arbitration committee constituted under Art. I, section 11 of *New York Dock*. *Kansas City Southern Industries, Inc., et al.--Control--Gateway Western Ry. Co., et al.*, Finance Docket 33311 (served December 4, 1997) (question whether employees were adversely affected by transaction so as to require negotiation of an implementing agreement must be submitted to arbitration under Art. I, section 11 of *New York Dock* conditions); *Canadian National Ry. Co., et al.--Control--Wisconsin Central Transp. Corp., et al.*, Finance Docket No. 34000 (served June 6, 2008) (ATDA's challenge to carrier's action taken without an implementing agreement must first be submitted to arbitration; citing *Kansas City Southern Industries*); *Canadian Pacific Ry. Co.--Control--Dakota Minnesota & Eastern R.R. Corp.*, Finance Docket No. 35081 (Sub-No. 1) (served August 16, 2011) ("Disputes about whether a particular operational change requires an implementing agreement are to be addressed initially by arbitrators"; citing *Kansas City Southern Industries*).

NSR therefore proposes that the parties submit their dispute to an arbitration committee created under Art. I, section 11 of the *New York Dock* conditions, as imposed in Finance Docket No. 35873. I am NSR's member of the section 11 arbitration committee.

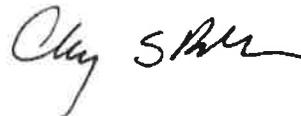
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NSR does not concur in the selection of the individual you have proposed in your August 17, 2015 letter to serve as neutral.

I want to reaffirm the commitments I made in my August 14, 2015 letter to General Chairman Broyles, in reply to his August 10, 2015 letter. Although NSR's establishment of new positions at Harrisburg to handle train dispatching over the D&H South lines will not adversely affect any employee, NSR acknowledges that should any of its train dispatchers be adversely affected by the D&H South acquisition, such employees would be entitled to monetary benefits in accordance with the protective conditions imposed by the STB. Additionally, if NSR in the future should propose actions that require the service of notice and negotiation of an implementing agreement under those protective conditions (not required in connection with the already-accomplished establishment of four new positions), NSR will fully comply with its obligations under the conditions.

Finally, as I also said in my August 14, 2015 letter, I would welcome an opportunity to discuss NSR's establishment of the four new positions and of potential means of resolving the parties' dispute regarding the interpretation and application of the *New York Dock* conditions. I offered to meet for this purpose on August 19, 2015, but that invitation was not accepted. I am available to meet with you or another ATDA representative in Norfolk, Virginia, on August 26, 2015, or at another mutually convenient time. I look forward to hearing from you about this matter.

Very truly yours,



cc: R. R. Broyles