

September 14, 2015

239207

BY ELECTRONIC FILING

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

ENTERED
Office of Proceedings
September 14, 2015
Part of
Public Record

Re: STB Finance Docket No. 35873
Norfolk Southern Railway Company - Acquisition and Operation - Certain Rail Lines of
the Delaware and Hudson Railway Company, Inc.

Dear Ms. Brown:

Soo Line Railroad Company ("Soo") has been served with a copy of the Petition for Declaratory Order filed on September 11, 2015, by the American Train Dispatchers Association ("ATDA"). Although Soo has not previously appeared in the above-captioned proceeding in any capacity, ATDA's petition seeks relief that would directly affect Soo and alleges acts or omissions by Soo with respect to its ATDA-represented employees.

The request to block the closing of the approved asset acquisition transaction is meritless and should be summarily denied, for four reasons:

First, it is black letter law that ATDA must arbitrate this dispute before coming to the Board. Soo endorses the legal points with respect to this issue made by applicant Norfolk Southern Railway Company ("NSR") in its letter that will be filed with the Board today. As NSR will explain, the Board has repeatedly held -- notably, in a leading case in which ATDA itself was the moving party -- that disputes over application of the Board's *New York Dock* employee protective conditions (which is what ATDA describes in its petition) must first be resolved in arbitration under Art. I, § 11 of the protective conditions, rather than being presented directly to the Board itself.

Second, this dispute is *already* in arbitration -- a fact that ATDA fails to mention in its petition. ATDA itself initiated an arbitration proceeding with Soo under Art. I, § 11 of the *New York Dock* conditions and asked the National Mediation Board ("NMB") to appoint a neutral arbitrator to serve on the arbitration committee, as § 11 contemplates. By letter to the NMB dated August 24, 2015 (reproduced as Exhibit A hereto), Soo agreed that the arbitration should move ahead, and agreed that, to this end, the NMB should assist the parties in the selection of a neutral. For many years, the standard procedure of the NMB, when asked to designate a neutral, has been to supply the parties with a list of potential neutrals from which

the parties make the actual selection by alternate strikes. At this writing, Soo and ATDA are awaiting receipt of the NMB's list.

Third, when the dispute is heard by the § 11 arbitration committee, Soo will demonstrate that there is no merit to the position taken by ATDA. Even assuming *arguendo* that the protective conditions imposed in the above-captioned proceeding apply to Soo (and they do not, because Soo is not a party to the underlying asset purchase agreement), Soo has not omitted to do anything that the protective conditions would require.

Soo currently dispatches trains operating over all the lines of the Delaware and Hudson Railway Company ("D&H"). When NSR acquires the D&H South lines, Soo will simply stop dispatching trains over those lines; as a result, one of Soo's dispatching desks at its Minneapolis Operations Center will have less work to do. ATDA contends that Soo cannot stop dispatching trains on the D&H South lines except in accordance with an "implementing agreement" reached with the union following notice, negotiation, and, if necessary, arbitration under Art. I, § 4(a) of the *New York Dock* conditions. The union's contention is plainly wrong. Section 4(a) requires service of a notice only when the carrier will be taking action that may cause its employees to be "dismissed" or "displaced" or cause what the provision calls a "rearrangement of forces." Reducing the work of a single dispatching desk will not cause any Soo employees to be dismissed or moved to other jobs.

Fourth, ATDA makes no attempt to satisfy the Board's stringent standards for the grant of a stay, and cannot satisfy those standards with respect to the D&H South transaction. ATDA will not succeed on the merits of its claim. As noted above, the protective conditions do not require an implementing agreement in the circumstances presented.

Moreover, there is no possibility that Soo's ATDA-represented employees will be irreparably harmed when the D&H South transaction goes forward. Soo does not expect that any of its train dispatchers will be adversely affected by the transaction. Nevertheless, by letter of July 29, 2015 (reproduced as Exhibit B hereto), intended to relieve ATDA's concerns, Soo unilaterally and unconditionally committed to ATDA that if any of its train dispatchers are adversely affected as a result of the transaction, Soo will provide each affected employee full monetary benefits equal to the benefits provided in the *New York Dock* conditions. Soo offered to reduce this commitment to an agreement; ATDA never responded to that offer, but the commitment is in effect and Soo is bound by it. (For its part, D&H has entered into implementing agreements with all the labor unions that actually represent its own affected employees.)

On the basis of the foregoing, Soo respectfully urges the Board to deny ATDA's request to block consummation of the D&H South transaction.

Ms. Cynthia T. Brown
September 14, 2015
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Sincerely,

Stinson Leonard Street LLP

/s/ David F. Rifkind
David F. Rifkind
Attorney for Soo Line Railroad Company

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2014 I have caused the foregoing response to request for information pursuant to 49 C.F.R. § 1152.27(a) to be served to the parties of record by First Class Mail and by e-mail where an e-mail address is included on the Board's official service list.

/s/David F. Rifkind
David F. Rifkind

PARTIES OF RECORD

Jeffery A. Bartos
(Jbartos@Geclaw.com)
Guerrieri, Clayman, Bartos & Parcelli, P.C.
1900 M Street, N.W., Suite 700
Washington, DC 20036

David Bernhardt
Maine Department of Transportation
16 State House Station
Augusta, ME 04333

Eugene H. Blabey
Western New York & Pennsylvania Railroad, LLC
3146 Constitution Avenue
Olean, NY 14760

David Brillhart
New Hampshire Depart Of Transportation
P.O. Box 483
Concord, NH 03302-0483

Honorable Robert P. Casey, Jr.
United States Senate
Washington, DC 20510

Honorable Chris Collins
1117 Longworth House Office Building
Washington, DC 20515

P. Scott Conti
75 Hammond Street
Worcester, MA 01610

Honorable Chris Gibson
House of Representatives
Washington, DC 20515

Kelvin J. Dowd
(Kjd@Sloverandloftus.com)
Slover & Loftus
1224 Seventeenth Street N.W.
Washington, DC 20036-3003

Susan Duckworth
(S_Duckworth@Nefreighttransfer.com)
Northeast Freight Transfer
321 Spruce Street, Suite 607
Scranton, PA 18503

Richard Edelman
(Redelman@Odsalaw.com)
Mooney, Green, Saindon, Murphy &
Welch
1920 L Street, N.W., Suite 400
Washington, DC 20036

Toby L. Fauver
Pennsylvania Department of
Transportation
Keystone Building 400 North Street
Harrisburg, PA 17104

Nathan R. Fenno
New York, Susquehanna & Western
Railway Corporation
1 Railroad Avenue
Cooperstown, NY 13326

L. Andrew Fleck
NI Industries, Inc.
5430 LBJ Freeway, Suite 1700
Dallas, TX 75240-2697

Frank Depaola
Ten Park Plaza
Suite 4160
Boston, MA 02116

Louis E. Gitomer
The Adams Building, Suite 301 600
Baltimore Avenue
Towson, MD 21204
Lou_Gitomer@Verizon.Net

Steven M. Golich
Celtic International
7840 Graphics Drive, Suite 100
Tinley Park, IL 60477

Pennsylvania Public Utility Commission
PO BOX 3265
Harrisburg, PA 17105-3265

Honorable Richard Hanna
U. S. House of Representatives
319 Cannon House Office Building
First Street & Independence Avenue, S.W.
Washington, DC 20515

John Heffner
(John.Heffner@Strasburger.com)
Strasburger & Price, LLP
1025 Connecticut Avenue, N.W., Suite 717
Washington, DC 20036

Honorable Brian M. Higgins
U. S. House of Representatives
319 Cannon House Office Building
First Street & Independence Avenue, S.W.
Washington, DC 20515

Eric M. Hocky
(EHocky@Thorpreed.com)
Clark Hill, PLC
One Commerce Square
2005 Market Street, Suite 1000
Philadelphia, PA 19103

Eric B. Lee
Owego Harford Railway, Inc.
415 Woodland Road
Syracuse, NY 13219

Randall C. Gordon
(ngfa@ngfa.org)
National Grain and Feed Association
1250 Eye St N.W., Suite 1003
Washington, DC 20005-3922

Gordon P. MacDougall
1025 Connecticut Avenue, N.W.
Suite 919
Washington, DC 20036-5444

Lawrence C. Malaki
(Lmalski@Pnrra.org)
Pennsylvania Northeast Regional
Railroad Authority
280 Cliff Street
Scranton, PA 18503

Keith D. Martin
(Keith.Martin@Dot.Ny.gov)
New York State Department
of Transportation
50 Wolf Road, 6th Floor
Albany, NY 12232

Terrence D. Matthews
JB Hunt Transport Services, Inc.
P.O. Box 130
Lowell, AR 72745-0130

Thomas McFarland
(Mcfarland@Aol.com)
Thomas F. McFarland, P.C.
208 South Lasalle Street, Suite 1890
Chicago, IL 60604

John McHugh
East Of Hudson Rail Freight Service
Task Force, Inc.
233 Broadway, Suite 2320
New York, NY 10279

Peter R. Leishman
(Mbrxnh1@Aol.com)
Milford-Bennington Railroad Co., Inc.
62 Elm Street
Milford, NH 03055

Kevin Moore
(Bletdiv191@Hotmail.com)
Brotherhood Of Locomotive Engineers &
Trainmen
3 Deer Hollow Road
Plaistow, NH 03865

William A. Mullins
(Wmullins@Bakerandmiller.com)
Baker & Miller PLLC
2401 Pennsylvania Ave, N.W., Suite 300
Washington, DC 20037

Raj Mukherji
(Asmmukherji@Njleg.org)
P.O. Box 1
Jersey City, NJ 07303

Sam Ninness
Thoroughbred Direct Intermodal Service, Inc.
5165 Campus Drive, Suite 400
Plymouth Meeting, PA 19462

Mike Radak
Hanjin Shipping America, L.L.C.
80 Route 4 East
Paramus, NJ 07652-4600

Honorable Thomas Reed, II
U.S. House of Representatives
1037 Longworth House Office Building
Washington, DC 20515

James Riffin
P. O. Box 4044
Timonium, MD 21094

Wayne A. Michel
Reading Blue Mountain &
Northern Railroad Company
P.O. Box 218
Port Clinton, PA 19549

Jeffery K. Stover
(Jstover@Seda-Cog.org)
Seda-Cog Joint Rail Authority
201 Furnace Road
Lewisburg, PA 17837

Vincent P. Szeligo
(Vszeligo@Wsmoslaw.com)
Wick Streiff Meyer O'Boyle & Szeligo PC
1450 Two Chatham Center
Pittsburgh, PA 15219-3427

Ben J. Tarbutton, III
Sandersville Railroad Company
P.O. Box 269
Sandersville, GA 31082

Honorable Paul Tonko
U.S. House of Representatives
2462 Rayburn House Office Building
Washington, DC 20515

Honorable Pat Toomey
United States Senate
248 Russell Senate Office Building
Washington, DC 20510

David J. Monte Verde
Delaware Lackawanna Railroad Co.
1 Mill Street, Suite 101
Batavia, NY 14020-3141

John B. Vermylen
Zerega (A. Zerega Sons, Inc.)
P.O. Box 241
Fair Lawn, NJ 07410

Joe Shefchik
PTI Logistics LLC
2701 Executive Drive
Green Bay, WI 54304

Charles A. Spitulnik
(Cspitulnik@Kaplankirsch.com)
Kaplan Kirsch & Rockwell LLP
1001 Connecticut Avenue, NW
Suite 800
Washington, DC 20036

Tom Malloy
Thoroughbred Direct Intermodal Services
5165 Campus Drive, Suite 400
Plymouth Meeting, PA 19462

John A. Boccadori,
PO BOX 347
Scranton, PA 18503

George H. Kleinberger
PO BOX 8002
Clifton Park, NY 12065-8002

Maryland State Clearinghouse Department Of
State Planning
301 West Preston Street
Baltimore, MD 21201-2365

New York Movers Tariff Bureau, Inc.
888 Seventh Avenue
New York, NY 10106-0201

Virginia Department Of Transportation
1221 East Broad Street
Richmond, VA 23219

Michael S. Wolly
ZWERDLING, PAUL, KAHN & WOLLY, P.C.
1025 Connecticut Avenue NW Suite 712
Washington, DC 20036
(mwolly@zwerdling.com)

Thomas W. Wilcox
(twilcox@gkglaw.com)
GKG Law, P.C.
Canal Square
1054 31st Street, N. W., Suite 200
Washington, DC 20007-4492

Sharon Clark
(Sharon.Clark@Perdue.com)
Perdue Agribusiness LLC
SVP Transportation & Regulatory Affairs
P.O. Box 1537
Salisbury, MD 21802

Jerrold Nadler
U. S House of Representatives
201 Varick Street, Suite 669
New York, NY 10014

Intrastate Rail Rate Authority - Virginia
Commonwealth Of Virginia
PO BOX 1197
Richmond, VA 23209-1197

Maryland Public Service Commission
Transportation Division
6 St Paul Centre
Baltimore, MD 21202

New Jersey Department Of Energy
1100 Raymond Blvd
Newark, NJ 07102-5205

Vermont Agency Of Transportation
One National Life Drive
Montpelier, VT 05633-0001

Douglas R. Nj Webb
Department Of Tptn.
1035 Parkway Avenue
Trenton, NJ 08618-2309

Strohmeyer, Eric S.
C/O Central Railroad Company Of
New Jersey Llc Cnj Rail Corporation
81 Century Lane
Watchung, NJ 07069
Cnjrrail@Yahoo.Com
Esstrohmeyer@Yahoo.Com



Myron W. Becker

Soo Line Railroad
Labor Relations
Suite 800
120 S. 6th St
Minneapolis, MN 55402

August 24, 2015

By Email and U.S. Mail

Roland Watkins
Director, Office of Arbitration Services
National Mediation Board
Washington, D.C. 20572

Re: Soo Line Railroad Company and American Train Dispatchers Association

Dear Mr. Watkins:

This responds to your letter of August 10, 2015, which invited me to comment on the letter submitted to the National Mediation Board by David W. Volz, Vice President of the American Train Dispatchers Association ("ATDA"), on July 28, 2015. ATDA represents train dispatchers employed by Soo Line Railroad Company ("Soo"). I am responding to Mr. Volz's letter on behalf of Soo.

In his letter, Mr. Volz states that ATDA and Soo have a dispute with regard to whether the Surface Transportation Board's *New York Dock* employee protective conditions apply to what he describes as "the relocation of the Train Dispatching of the D&H South Lines to the Norfolk Southern Railroad (NS)." In fact, Soo and ATDA do have a disagreement regarding the asserted applicability of the *New York Dock* conditions to certain matters at Soo's Minneapolis Operations Center. The parties have corresponded regarding the situation and have discussed it at length. However, ATDA continues to assert a position that is factually and legally unfounded.

ATDA's position is supposedly premised on a recent decision of the STB, *Norfolk Southern Ry. Co.-- Acquisition & Operation--Certain Rail Lines of Delaware & Hudson Ry. Co.*, Finance Docket No. 35873 (served May 15, 2015) (copy attached), in which the STB approved the acquisition by Norfolk Southern Railway Company ("NSR") of certain assets of Delaware and Hudson Railway Company ("D&H"), referred to generally as the "D&H South" lines. The transaction that is the subject of the STB proceeding is purely an asset purchase; there is no merger or acquisition of control of any carrier. The D&H South asset purchase agreement is between NSR and D&H alone; Soo is not a party to the transaction or to any other transaction with NSR involving D&H assets. NSR is the sole applicant in the STB proceeding. Soo and D&H are commonly controlled -- both are indirect subsidiaries of Canadian Pacific Railway Company

-- but Soo does not own or control D&H and is not selling any D&H assets to NSR. NSR is not affiliated with D&H, Soo, or Canadian Pacific Railway Company.

In his letter, Mr. Volz asserts that the STB has "approved the acquisition of the D&H South Lines by the NS from the SOO." As I have shown, that statement is incorrect.

In approving NSR's acquisition of assets from D&H (not Soo), the STB imposed employee protective conditions on those carriers, which are the conditions adopted in *New York Dock Ry.--Control--Brooklyn Eastern Dist. Terminal*, 360 I.C.C. 60 ("*New York Dock*"), *aff'd*, *New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979), as modified by *Wilmington Terminal R.R.--Purchase & Lease--CSX Transportation, Inc.*, 6 I.C.C.2d 799, 814-26 (1990) ("*Wilmington Terminal*"), *aff'd sub nom. Railway Labor Executives' Ass'n v. ICC*, 930 F.2d 511 (6th Cir. 1991). Soo was not a party in Finance Docket No. 35873, and the STB did not impose protective conditions on Soo in that proceeding.

Since 1993, train dispatching over the D&H territory, including the D&H South lines, has been performed by Soo train dispatchers working in a Soo facility (currently the Minneapolis Operations Center) under the terms of Soo's collective bargaining agreement with ATDA. D&H itself performs no train dispatching; employs no train dispatchers; and has no collective bargaining relationship with ATDA.

Following NSR's acquisition of the D&H South lines, Soo will no longer dispatch trains over those lines. This has no *New York Dock* implications. Work at the Minneapolis Operations Center will not be affected, except that the dispatching desk that currently handles the work of dispatching over D&H territory will have less of this work to perform. No Soo employees will be adversely affected by the event. Moreover, Soo has also committed to ATDA that in the event any Soo train dispatchers are adversely affected as a result of the D&H South transaction, such employees will be accorded monetary benefits equal to the benefits provided in the *New York Dock* conditions.

The claim that ATDA asserts on behalf of Soo's train dispatchers involves only Soo, and not NSR. The *Wilmington Terminal* modification to the *New York Dock* conditions, which the STB imposed in Finance Docket No. 35873, afford the seller's employees no claim as against the purchaser. Even if employees of D&H itself were, hypothetically, dispatching trains over the D&H South lines prior to the acquisition of those lines by NSR (which is not the case), those employees would have no potential claim against NSR. It follows that employees of Soo could have no such claim. And Mr. Volz does not purport to assert any such claim on behalf of Soo employees.

Although ATDA's characterization of the parties' current disagreement is wrong and no ATDA-represented employees of Soo will be adversely affected by any action contemplated by Soo in connection with the discontinuance of train dispatching over the D&H South lines (and will receive full monetary benefits if they should be adversely affected), the *New York Dock* conditions themselves provide a means of resolving the parties' disagreement. As the STB has repeatedly made clear, an

arbitration committee constituted under Art. I, section 11 of *New York Dock* may consider a claim that the protective conditions apply to a particular carrier action. *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 the *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) (question must first be submitted for 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*).

As Mr. Volz’s July 28, 2015 letter confirms, ATDA has submitted the parties’ disagreement to arbitration pursuant to Art. I, section 11 of the *New York Dock* conditions. Soo had previously hoped that upon further review of the situation and in view of the carrier’s commitment to provide monetary benefits to any of its employees who may be adversely affected, ATDA would abandon its demand for arbitration. ATDA, however, now asks the NMB to assist the parties in the selection of a neutral member of the section 11 committee. In the interest of resolving the parties’ dispute in the most direct manner and in keeping with the decisions of the STB, Soo agrees to proceed with arbitration before the section 11 committee. Accordingly, Soo agrees that the NMB should, in the usual fashion, offer the parties a list of potential neutrals.

Soo reserves all of its objections on the merits of the position asserted by ATDA, including but not limited to the objections reviewed in this letter. Soo will take the position in the section 11 proceeding that the arbitration committee must conclude that the *New York Dock* conditions do not apply to the parties’ disagreement concerning train dispatchers at Soo’s Minneapolis Operations Center. Soo has agreed to section 11 arbitration not because the *New York Dock* conditions apply to its employment of train dispatchers (they clearly do not), but because ATDA has *alleged* that the conditions apply, and the conditions themselves provide a means by which that allegation may be tested.

Soo does not subscribe to the so-called “Question” proposed for arbitration by ATDA. ATDA asks “Does NYD apply to the relocation of the Train Dispatching of the D&H South Lines from the SOO to the NS?” The question presented to the section 11 committee, however, must be defined by the decision of the STB in Finance Docket No. 35873, by the underlying asset purchase transaction to which NSR and D&H are the parties, and by the action contemplated by Soo itself.

Carrier’s statement of the issue now presented to the section 11 committee for arbitration is: “Do the *New York Dock* conditions, as modified by *Wilmington Terminal* and as imposed on NSR’s acquisition of

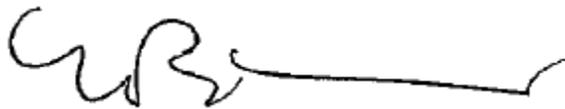
Roland Watkins
August 24, 2015
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the D&H South lines from D&H approved in STB Finance Docket No. 35873, apply to the anticipated reduction in train dispatching work at one desk in Soo's Minneapolis Operations Center?"

Soo designates Dale McPherson, Director Labor Relations of Soo, as its member of the section 11 arbitration committee. Mr. McPherson should be included on all correspondence.

Please do not hesitate to contact me or Mr. McPherson should you have any questions about this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'MB', followed by a long horizontal line extending to the right.

Myron Becker
Assistant Vice President-Labor Relations
Soo Line Railroad Company

cc: Dale McPherson, Soo
David W. Volz, ATDA
F.L. McCann, ATDA
G.E. Smith, ATDA



Canadian Pacific Plaza
120 South 6th Street
Minneapolis, MN 55402

July 29, 2015

Mr. David W. Volz
Vice President, ATDA
108 Tower Bluff
Cibolo, TX 78108-2308

Mr. Gordon Smith
General Chairman, ATDA
12C Oak Leaf Lane
Circle Pines, MN 55014-1776

Dear Sirs:

This relates to previously proposed changes in the Minneapolis Operations Center (“MOC”) of Soo Line Railroad Company (“Carrier”), and follows our correspondence and personal discussions regarding that matter.

As you know, Carrier’s letter to ATDA General Chairman Gordon Smith, dated June 16, 2015, which proposed changes at the MOC in accordance with provisions of the 1966 Mediation Agreement, has been withdrawn today. A copy of today’s letter to Mr. Smith, withdrawing the previous letter, is enclosed for your convenience.

ATDA has expressed concern regarding the effect, if any, that the contemplated sale of certain lines of Delaware and Hudson Railway Company, Inc. (“D&H South lines”) to Norfolk Southern Railway Company may have on Carrier’s employees in the MOC, which currently has responsibility for dispatching trains over the D&H South lines. Carrier does not expect that any train dispatchers at the MOC will be adversely affected by the sale of the D&H South lines and the consequent withdrawal from the MOC of the work of dispatching trains over those lines. However, Carrier seeks to relieve ATDA’s concerns and therefore commits that if any of Carrier’s train dispatchers are adversely affected as a result of the D&H South transaction, each affected employee will be entitled to full monetary benefits equal to the benefits provided in the Surface Transportation Board’s *New York Dock* protective conditions, for the full duration of individual protective periods as specified in those conditions. This commitment is unconditional. It is also without prejudice to the position Carrier may take in any contested proceeding regarding the applicability of the *New York Dock* conditions, as imposed on the D&H South transaction, to its employees.

In view of the facts that Carrier’s train dispatchers (1) will have no claim, under the protective conditions imposed by the STB on the D&H South transaction, to dispatching work to be performed by Norfolk Southern Railway Company, and (2) will be accorded full monetary benefits if they are adversely affected by the transaction, I do not know what further concerns

Messrs. Volz and Smith
July 29, 2015
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ATDA might have in connection with this matter. However, I remain available to discuss the matter at your convenience.

If you would prefer that Carrier's commitment be reduced to an agreement, I would be happy to accommodate.

Sincerely,

A handwritten signature in cursive script, appearing to read "Dale McPherson".

Dale McPherson
Director, Labor Relations
Soo Line Railroad Co.

CC: Myron Becker, AVP, Labor Relations

Enclosure:



July 29, 2015

Mr. Gordon Smith
General Chairman, ATDA
12C Oak Leaf Lane
Circle Pines, MN 55014-1776

Dear Mr. Smith:

This refers to Mr. Becker's letter dated June 16, 2015, wherein you were provided notice pursuant to Section 4 of the June 16, 1966 Mediation Agreement, of the Company's intent to make the job changes to existing dispatcher positions in the Minneapolis Operations Center on or after August 14, 2014.

Please be advised that the aforementioned notice is hereby withdrawn, effective immediately.

If you have any questions, please contact me at your convenience.

Sincerely,

A handwritten signature in black ink, appearing to read 'Dale McPherson', written over a large, light gray watermark that says 'DRAFT'.

Dale McPherson
Director, Labor Relations
Soo Line Railroad Company

CC: Michael White, GM Ops.
Robert A. Johnson, Sr. VP
Myron Becker, AVP-LR
David Volz, VP-ATDA