

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Finance Docket No. 35873

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**NORFOLK SOUTHERN RAILWAY COMPANY-ACQUISITION AND OPERATION-
CERTAIN RAIL LINES OF THE DELAWARE AND HUDSON RAILWAY COMPANY,
INC.**

**REPLY COMMENTS OF
DELAWARE AND HUDSON RAILWAY COMPANY, INC.**

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Dated: June 9, 2015

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**REPLY OF
DELAWARE AND HUDSON RAILWAY COMPANY, INC. TO
NASCA'S PETITION FOR A STAY**

Delaware and Hudson Railway Company, Inc. ("D&H") submits this Reply in opposition to Samuel J. Nasca's¹ ("Nasca") Petition for a Stay of the June 14, 2015 effective date of the Board's May 15, 2015 Decision approving Norfolk Southern Railway Company's ("NSR") Application to acquire the D&H South Lines (the "Decision"). Nasca fails to state a basis for staying the effective date of the Decision and therefore, the petition should be denied.

ARGUMENT

I. Standard.

Under 49 U.S.C. § 721(b)(4), the Board may issue an appropriate order, such as a stay, when necessary to prevent irreparable harm. A party seeking a stay must establish that (1) there is a likelihood that it will prevail on the merits of any challenge to the action sought to be stayed, (2) it will suffer irreparable harm in the absence of a stay, (3) other interested parties will not be substantially harmed, and (4) the public interest supports the granting of the stay. The Board typically does not grant a stay

¹ Samuel J. Nasca ("Nasca") purports to file "for and on behalf of SMART/Transportation Division, New York State Legislative Board." While SMART/Transportation Division represents conductors employed by D&H, neither Nasca nor the New York State Legislative Board represents D&H employees for purposes of bargaining with D&H.

under the traditional stay criteria unless it is necessary to prevent irreparable harm.

Denver & Rio Grande Ry. Historical Foundation – Petition for Declaratory Order, FD 35496, corrected Decision, slip op. at 2 (STB served Sep. 16, 2014) (citations omitted). A stay is an extraordinary remedy and rarely granted. The party seeking a stay carries the burden of persuasion on all of the elements required for such extraordinary relief. *Canal Authority of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974). A stay is an extraordinary remedy and should not be sought unless the requesting party can show that it faces unredressable actual and imminent harm that would be prevented by a stay. *See, e.g., Cuomo v. NRC*, 772 F.2d 972, 978 (D.C. Cir. 1985); *Suffolk & Southern Rail Road LLC—Lease and Operation Exemption—Sills Road Realty, LLC*, STB Finance Docket No. 35036, slip op. at 6 (STB served Dec. 20, 2007). A stay is not warranted here.

II. No Threat of Irreparable Harm Exists.

Nasca's primary basis for seeking a stay is his contention that the Decision authorizes D&H and NSR to consummate the transaction prior to negotiating implementing agreements with their respective employees, which Nasca asserts will result in irreparable harm to employees adversely affected by the transaction. Nasca's contention arises from the following sentence in the Board's discussion of the appropriate employee protective conditions: "In addition, the negotiation of the respective employee agreements cannot delay the consummation of a line sale transaction." Slip op. at 29. There is no basis for Nasca's supposed concern regarding this sentence, which neither authorizes nor was intended to authorize consummation of the transaction prior to the negotiation of such implementing agreements as may be required by the terms of the protective conditions imposed by the Board.

It is settled that the *New York Dock* protective conditions, as modified in *Wilmington Terminal* which the Board imposed on this transaction, require pre-consummation implementing agreements. See *Wilmington Terminal R.R., Inc.—Purchase and Lease—CSX Transp., Inc. Lines between Savannah and Rhine, and Vidalia and Macon, GA*, 6 I.C.C.2d 799, 814-15 (1990) ("*Wilmington Terminal*"). *New York Dock* of course, expressly requires such agreements before any change in operations that causes employees to be dismissed or displaced, or requires what the conditions call a "rearrangement of forces." See 360 I.C.C. 60, at 85 (Art. I, sec. 4(b)). In *Wilmington Terminal*, the ICC did not revise the language of *New York Dock* itself, but clarified the manner in which *New York Dock* should be applied in line sale cases. The ICC did not modify the *New York Dock* requirement for pre-consummation implementing agreements; indeed, the Commission expressly directed that in line sale cases the seller must arrive at an implementing agreement or agreements with its affected employees "prior to consummation"(6 I.C.C. 2d at 814), and the buyer must do so as well, (*id.* at 815; *see also id.* at 817). In the 25 years since the *Wilmington Terminal* decision, no one has doubted the continuing effect of the ICC's direction in this regard.

Of course, the Board did not intend to upset settled expectations and affect a significant change to its standard employee protective conditions, and to do so *sua sponte* and without discussion, in a single sentence in its approval Decision in this case. The carrier parties to the approved transaction have not interpreted the Decision the way Nasca purports to do.

The sentence at issue appears in the discussion and analysis section of the Decision and is not included as part of the Board's "order" approving NSR's application. The Board orders that its approval is subject to *New York Dock* as modified by *Wilmington Terminal*, and includes no modification of *Wilmington Terminal*. See Decision at 36. D&H intends to comply with the

protective conditions as imposed, including the requirement for pre-consummation implementing agreements with the unions representing adversely affected employees. Accordingly, there is no threat of irreparable harm to employees.

Moreover, Nasca's claim that the transaction must be stayed to avoid irreparable harm to employees ignores the fact that the Board's standard employee protective conditions protect against any such harm. Further, to the extent that Nasca challenges whether the Board has applied the appropriate employee protective conditions, Nasca has identified no harm that the Board could not remedy. Accordingly, a stay is not necessary to prevent irreparable harm.

III. Nasca is Unlikely to Succeed on the Merits.

As noted above, Nasca has misconstrued the Board's decision as modifying the *New York Dock* employee protective conditions as modified by *Wilmington Terminal*. While the Board may wish to clarify the language that Nasca finds problematic, that clarification would have no impact on the employee protective conditions ordered.

As to the other issues that Nasca raises in his Petition for Reconsideration, Nasca advances no new argument, evidence or authority to support reconsideration. Rather, Nasca simply repeats arguments that he made, often repeatedly, before the Board issued its decision. Accordingly, there is no reason to believe that Nasca's Petition for Reconsideration is likely to succeed on the merits.

IV. A Stay Would Not Be in the Public Interest.

In this proceeding, the Board found that "very strong public benefits would result from approving" the transaction. Decision, slip op. at 22. These include "transfer of control ... to a carrier with a greater ability and incentive to ensure adequate investment in and growth of traffic

on the line ... allowing NSR to provide more ... efficient operations” than under the current ownership structure; “strengthening competition in the Northeast” by “enabling NSR to more effectively compete with CSXT” and with other transportation modes “such as trucking and barge,” improving operating efficiencies on the D&H South Lines; and removing “inefficiencies plaguing NSR’s” double-stack intermodal operations, among other benefits. *Id.* at 21-22. Because of these very strong public benefits, shippers have overwhelmingly supported the transaction. A stay would cause inevitable delay to the parties’ ability to consummate the transaction, and consequently delay the delivery of those “very strong public benefits” to the shipping public, as well as to D&H and NSR. Accordingly, a stay is decidedly not in the public interest.

V. A Stay Would Cause Harm to D&H and Others.

A stay would prolong D&H operations on the D&H South lines which are of marginal economic benefit to D&H. It would delay D&H’s ability to redeploy capital more productively and to focus on areas where it can effectively compete. Likewise, it would further prolong the inefficiencies of NSR’s intermodal double-stack operations and delay NSR’s ability to provide more efficient and reliable operations on the D&H South, which would harm both NSR and its customers. Ironically, a stay could interfere with the process of negotiating implementing agreements with D&H’s unions, which is ongoing.²

² Nasca’s additional Verified Statement submitted in support of the Petition to Stay makes representations regarding communications with “Canadian Pacific Railway Company employees.” We presume that Nasca is referring to employees of D&H. His Verified Statement is certainly inaccurate with respect to D&H’s communications with its unions, including SMART-TD. Nasca does not negotiate agreements on behalf of D&H’s SMART-TD represented employees, or bargain with D&H on their behalf for any other purpose, and has not been involved in communications between D&H and SMART-TD about the transaction. In fact,

CONCLUSION

For the reasons stated above, Nasca's Petition for a Stay should be denied.

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Respectfully submitted,



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D&H has entered into an implementing agreement with one labor union and is currently involved in implementing agreement negotiations with SMART-TD and four other unions.

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing Reply to be served by First Class Mail and by e-mail where an e-mail address is included on the Board's official service list, on June 9, 2015 to parties of record.


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