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December 11, 2014

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 Request For Relief" (NS-7) in response to the 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
COMPANY, INC.**

REPLY TO REQUEST FOR RELIEF

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December 11, 2014

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- ACQUISITION AND OPERATION -

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REPLY TO REQUEST FOR RELIEF

INTRODUCTION

On November 17, 2014, Norfolk Southern Railway Company (“NS” or “Applicant”) submitted a Minor Application (NS-1) seeking approval for NS’s acquisition and operation of 282.55 miles of Delaware and Hudson Railway Company, Inc.’s (“D&H”) rail lines located in Pennsylvania and New York (the “D&H South Lines”) and for approval of certain other related actions, collectively the “Transaction” as further explained and set forth in the Application. Concurrently with the Application, NS submitted a procedural schedule consistent with treatment of the Application as a minor transaction. On December 9, 2014, Samuel J. Nasca, for and on behalf of SMART/Transportation Division, New York State Legislative Board (“SMART/TD”), filed what he characterized as a Reply to NS’s classification of the transaction, proposed procedural schedule, and motion for protective order (“Nasca Reply”). Despite characterizing the filing as a reply, SMART/TD’S filing

requests affirmative relief, and thus the “reply” is more properly characterized as a motion.¹

NS hereby replies to SMART/TD’s requests for relief and asks that the Board deny the relief.

I. SMART/TD HAS FAILED TO MEET THE STANDARD FOR RECLASSIFYING THE TRANSACTION AS A SIGNIFICANT TRANSACTION

As an initial matter, it should be noted that no shipper, government agency, political official, short line railroad, or any other railroad opposes the treatment of the Transaction as a minor transaction. In fact, quite the contrary; not only is there a lack of opposition, but to date, there are over 80 parties representing a broad range of interests, including shippers representing approximately two-thirds of traffic moving over the D&H South Lines, short lines including the largest connecting short line, the Pennsylvania Department of Transportation, the Vermont Agency of Transportation, and the State of Maine Department of Transportation, all of whom support the Transaction and its treatment as a minor transaction. Only CNJ Rail Corporation (“CNJ”)² and SMART/TD oppose the minor designation.

Like CNJ, SMART/TD claims that the Transaction is not a minor transaction because it constitutes a transaction of regional or national significance. For many of the same reasons as contained in NS-6, SMART/TD’s mere assertion that the Transaction is significant does not justify reclassifying the Transaction from minor to significant. The most that SMART/TD can argue is that D&H’s revenues would “approximately” qualify it as a Class I carrier³ and

¹ While the Board’s website shows the filing as being made on December 9, NS was not served a copy until December 10.

² NS replied to CNJ’s motion for reclassification of the Transaction on December 10, 2014, in NS-6. Due to the late filing and the untimely service of the Nasca Reply, NS is addressing specific issues included in the Nasca Reply in this response.

³ First, D&H is a Class II carrier; and, the revenues of its parent company are not imputed to it. Regardless of the Class I or Class II status of D&H, the Board does not need to address

thus the Transaction is between two Class I carriers; presumably thereby making it a significant transaction. But that is not the test to determine whether a transaction is minor or significant. If a transaction is between two Class I carriers (and let us assume for the sake of argument that D&H is a Class I carrier, which it is not) and that transaction does not involve the “merger or control” of those two carriers, then the transaction, whatever kind it is (and it happens to be a line purchase in this instance), is either significant or minor. According to the regulations (49 CFR 1180.2(b), such a transaction is not significant if a determination can be made either:

- (1) That the transaction clearly will not have any anticompetitive effects, or
- (2) That any anticompetitive effects of the transaction will clearly be outweighed by the transaction's anticipated contribution to the public interest in meeting significant transportation needs.

It does not matter if the transaction impacts hundreds of miles of track and numerous states (which of course this Transaction does not), if one of these two tests can be met, the transaction qualifies as a minor transaction.⁴

NS submits that the evidence of record clearly establishes that the transaction will not have any anticompetitive effects. Application, Vol. I, VS Friedmann at 73; VS Grimm at 92 (“[M]y conclusion is that the transaction as a whole is clearly not anticompetitive.”).

SMART/TD presents no evidence to dispute NS’s conclusion and does not identify any defects or omissions in NS’s competitive analysis. As such, based upon the evidentiary record

this claim because the Transaction is not a “merger or control” transaction. See CSX Transportation, Inc. and Delaware and Hudson Railway Company, Inc. – Joint Use Agreement, FD 35348 (STB served October 22, 2010), FN 14, p. 5 (“Regardless of the Class I or Class II carrier classification, there is no basis for treating this joint use arrangement as involving the merger or control of 2 or more Class I carriers.”).

⁴ Indeed, as previously noted in NS-6, there have been several transactions much larger in scope and size than the instant Transaction that have been found to be minor transactions.

as it stands, the Transaction is a minor transaction under the Board's regulations and precedents.

While the Board need not consider the second prong of § 1180.2(b), the evidentiary record also supports a finding that to the extent there are any anticompetitive effects (which there are none), those effects are outweighed by the Transactions "contribution to the public interest in meeting significant transportation needs." Other than the impacts on labor, SMART/TD points to no other deficiencies in NS's public interest discussion. One needs only to peruse the numerous support letters submitted in support of the Application to understand why the Transaction meets the significant transportation needs of the shipping public.

Further, SMART/TD overestimates the Transaction's impacts on labor.⁵ It is accurate that NS intends to offer employment, pursuant to its existing hiring practices and standards, to approximately 150 of the 254 active D&H employees under a collective bargaining agreement and who operate over the lines involved in the Transaction, but SMART/TD ignores the other part of that equation. As set forth in the Application, CP intends to retain any D&H South Employees not hired by NS, either for continued operations on D&H lines owned by CP following the Transaction or for operations with another CP-affiliated railroad. See Application, Vol. I, at 46; Operating Plan, at 10; VS Friedmann at 79. For the few employees not offered employment by NS, not retained by CP, or for any covered employee that may be adversely impacted by the Transaction, such employees qualify for labor protection consistent

⁵ Indeed, the Transaction preserves jobs with a Class I carrier, which otherwise might be lost under a regional or short line carrier's ownership, and possibly will increase jobs on the lines as a result of NS's intention to restore local service levels on the lines and NS dispatching the lines. NS-1 at 42.

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).⁶ As such, the impacts on labor will be minimal. Regardless, these minimal impacts on labor clearly do not require re-classification of the Transaction from minor to significant.

II. OTHER ISSUES

A. Timing Of Publication In Federal Register

Without citing any precedent, SMART/TD claims that the acceptance or rejection of the Application is not due until December 26, 2014, because the Application was “amended and not completed until November 25.” The November 25 pleading that SMART/TD claims

⁶ The pleading states that “[t]hese conditions are inadequate, and were not designed for the type of transaction and related actions contemplated herein [because] this is not a typical line sale and trackage rights.” (Nasca Reply at 6). Even SMART/TD acknowledges that the Transaction is not a merger or control case; explicitly calling it a “line sale case,” although it claims that it is not a typical line sale case. STB precedent makes clear that in line sale transactions involving at least one Class I carrier, the applicable labor protection standards are the New York Dock conditions as modified in Wilmington Terminal. See Massachusetts Coastal R.R.--Acquisition--CSX Transportation, Inc., FD 35314, 2010 STB LEXIS 208 (STB served May 18, 2010). Even though SMART/TD notes that “NS and D&H both operate and/or have ownership over the same trackage,” (Nasca Reply at 6), the Wilmington Terminal modification has been applied even in minor line sale transactions involving joint ownership of lines and swaps of trackage rights more complex than those involved in this Transaction. See, e.g., Canadian Pacific Limited, Canadian Pacific (U.S.) Holdings Inc., Soo Line Corporation And Soo Line Railroad Company – Control – Davenport, Rock Island And North Western Railway Company, FD 32579, 1995 ICC LEXIS 19 (ICC served Feb. 8, 1995) (transaction involving transition from joint ownership to sole ownership of lines, requiring the grant back of various trackage rights between the joint owners). SMART/TD does not point to any precedent holding that New York Dock, not modified by Wilmington Terminal, should apply in this Transaction.

to be an “amendment” was actually an “Errata.” The errata did not make any substantive changes to the Application or to anything required to be completed and set forth in an application. The errata merely corrected page citations and added the name of a short line on one page of an agreement where the short line was inadvertently omitted from that page but was specifically named elsewhere in the agreement. Such an errata was not an “amendment” of the Application. As such, the completed Application was filed on November 17, 2014, and the Board’s decision to accept or reject the Application is due on December 17, 2014.

B. Procedural Schedule

The Transaction qualifies as a minor transaction, and therefore, the procedural schedule should not be modified or changed to reflect the significant classification. The proposed procedural schedule is consistent with the statutory timeframes for minor transactions. Any delay or changes to that schedule, other than expediting the effective date of the final decision, would prejudice those shippers who already have supported the Transaction and have requested expedited consideration due to their desires to reap the benefits of NS ownership of the D&H South Lines.

C. Protective Order

SMART/TD asks the Board to “depart from its practice of withdrawing information from public access,” claiming that the “deleted information has has [sic] been deemed excessively secret.” Nasca Reply at 5. NS submitted a standard protective order for minor transactions that has been approved in countless transactions, seeking protection only for information that includes, or is based on, proprietary and commercially sensitive information. SMART/TD cites no precedent for adopting a different protective order. If SMART/TD

counsel has a problem with NS's redactions, it should first seek redress by addressing its requests to NS and D&H. Failing that, counsel is free to bring its concerns to the Board.

D. Consolidation

SMART/TD requests that NS's related trackage rights notices of exemption (FD 34209 (Sub-No. 1) and FD 34562 (Sub-No. 1)) be converted to a petition for exemption and consolidated with the Application. These notices were concurrently filed with the Application because they are NS transactions that are directly related to the Transaction. As such, they were required to be filed with the Application. While self-executing, the authorizations are only permissive in nature. NS cannot consummate those transactions under the draft Asset Purchase Agreement until it consummates the underlying Transaction. There is no policy justification for consolidation or for converting the notices to a petition for exemption. Such an approach also would be contrary to precedent where related trackage rights transactions that were part of larger minor transactions were handled as notices of exemption. See, e.g., Norfolk Southern Railway Company, Pan Am Railways, Inc., et al. – Joint Control And Operating/Pooling Agreements – Pan Am Southern LLC, FD 35147 (STB served June 26, 2008)(involved three related trackage rights notices of exemption).

CONCLUSION

SMART/TD wrongly argues that the Transaction should be reclassified as significant because it "approximately" involves two Class I's (which it does not), is not a typical line sale (which it is), and will have "disastrous" impacts on labor (which in actuality will be minimal). Yet, those are not the criteria for determining whether a transaction is minor or significant. The test for that determination involves an examination of the competitive impacts. SMART/TD ignores NS's verified statements that the Transaction is clearly not

anticompetitive and fails to identify any inadequacies in NS's competitive analysis. As such, there is no basis for reclassifying the Transaction from minor to significant. Likewise, for the reasons stated herein, there is no basis for granting the other forms of relief requested by SMART/TD. The Board should accept the Application as minor, adopt the proposed procedural schedule and proposed protective order, and consider the two trackage rights notices of exemption as separate proceedings.

Respectfully submitted,

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Attorneys for Norfolk Southern Railway
Company

December 11, 2014

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing "Reply To Request For Relief" (NS-7) in STB Finance Docket No. 35873, by first class mail, properly addressed with postage prepaid, or via more expeditious means of delivery, upon all persons required to be served as set forth in 49 C.F.R. § 1180.4(c)(5) and all present parties of record.


William A. Mullins
Attorney for Norfolk Southern Railway Company

December 11, 2014