

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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. TO
PETITIONS FOR RECONSIDERATION**

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Dated: June 24, 2015

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Delaware and Hudson Railway Company, Inc. (“D&H”) submits this Reply in opposition to the separate Petitions for Reconsideration of the Board’s May 15, 2015 Decision (the “Decision”) approving Norfolk Southern Railway Company’s (“NSR”) Application to acquire the D&H South Lines (the “Transaction”) that were filed by PPL EnergyPlus, LLC (“PPL”), CNJ Rail Corporation and Eric S. Strohmeyer (collectively, “CNJ”), and Samuel J. Nasca (“Nasca”)¹. None of the Petitions meet the standard for reconsideration and should therefore be denied.

ARGUMENT

I. Standard.

Under 49 C.F.R. § 1115.3(b), the Board will grant a petition for reconsideration only upon a showing that the prior action will be affected materially because of new evidence or changed circumstances or that the prior action involves material error. *Allegheny Valley R.R.—*

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.

Pet. for Declaratory Order, FD 35239, slip op. at 3 (STB served July 16, 2013). PPL and Nasca have each failed to demonstrate that the Decision constitutes material error and CNJ has failed to show either that the Decision constitutes material error or will be affected materially by alleged changed circumstances. The Board should deny the petitions accordingly. *See Reasonableness of BNSF Ry. Co. Coal Dust Mitigation Tariff Provisions*, Docket No. FD 35557 (STB served May 15, 2015) (denying request for reconsideration for failure to meet standard).

II. The Board Did Not Commit Material Error by Granting Trackage Rights to D&H in the Event That PPL Ever Builds a Connecting Track.

PPL seeks limited reconsideration of the Board's condition granting D&H trackage rights to serve PPL's coal-fired electric generating plant at Montour, PA ("Montour") in the event that PPL constructs track between Montour and the D&H South Lines. That plant is sole-served by NSR. Because the potential build-out option to access D&H service would have been foreclosed by the Transaction, PPL asked the Board to preserve its build-out option by granting trackage or haulage rights to CSXT in the event PPL constructs the build-out. As the Board correctly recognized, however, granting competitive access to CSXT would enhance PPL's post-transaction competitive options and is therefore beyond its conditioning power. See Decision at 35 ("[T]he Board's conditioning power is limited to preserving competitive options that may be foreclosed by a transaction not increasing competitive options for a specific carrier."). Instead the Board imposed a condition that preserved PPL's access to D&H by granting D&H trackage rights in the event it constructs the build-out, thereby preserving the pre-transaction competition status quo. In its Petition for Reconsideration, PPL asserts that the Board erred by not giving PPL the right to choose which carrier receives the trackage rights. In support, PPL cites supposed concerns regarding D&H's ability to provide a competitive alternative to NSR and relies on Board precedent in a merger proceeding. However, PPL's concerns regarding D&H's

future ability to serve PPL, are speculative, unfounded, and irrelevant and the merger precedent PPL cites is plainly distinguishable.

Under settled Board precedent, the Board's conditioning power is limited to addressing competitive harm that is a direct result of a transaction. *CSX Corp. and CSX Trans., Inc., Norfolk S. Corp. and Norfolk S. Ry. Co.—Control and Operating Leases/Agreements—Conrail Inc. and Consol. Rail Corp.* (“Conrail”), Finance Docket No. 33388 (Sub-No. 91), Decision No. 5, slip op. at 157 (served Feb. 2, 2001) (It is a “well established rule that conditions are not be imposed except to remedy a transaction-related harm such as a significant loss of competition or the loss by another rail carrier of the ability to provide essential services”). The Board will not use its conditioning power to address pre-existing concerns or concerns that are not related to the transaction.

To be granted, a condition must first address an effect of the transaction. We will not impose conditions “to ameliorate longstanding problems which were not created by the [transaction],” nor will we impose conditions that “are in no way related either directly or indirectly to the involved [transaction].

Burlington N. et al.—Merger—Santa Fe Pac. et al. (“BN/SF Merger”), 10 I.C.C. 2d 661, 730 (1995), *aff'd sub nom. W. Resources, Inc. v. STB*, 109 F.3d 782 (D.C. Cir. 1997) (*quoting Burlington N., Inc.—Control and Merger—St. Louis—San Francisco Ry.*, 360 I.C.C. 784, 952 (1980), *aff'd sub nom. Mo.—Kan.—Tex. R.R. v. United States*, 623 F.2d 392 (5th Cir.), *cert. denied*, 451 US 1017 (1981)). *See also Can. Nat'l Ry. Co. and Grand Trunk Corp.—Control—Duluth, Missabe and Iron Range Ry. Co., et al.*, Finance Docket No. 34434, slip op. at 14 (served April 9, 2004) (“[I]n evaluating claims of competitive harm...harms caused by the merger must be distinguished from pre-existing disadvantages that other railroads, shippers, or communities may have been experiencing that are not ‘merger-related’.”). Further, in exercising its conditioning authority, the Board narrowly tailors relief to place the affected party in the same position it

would have been without the transaction. *See, e.g., Burlington N. Inc. and Burlington N. R.R. Co. – Control and Merger – Santa Fe Pac. Corp. and the Atchison, Topeka and Santa Fe Ry. Co.*, 10 I.C.C. 2d 661, 745 (1995) (“*BN/SF*”). Nevertheless, PPL asks the Board to enhance its competitive position – which it cannot do.

PPL grounds its request on its supposed concern regarding D&H’s financial health and its ability to offer a competitive alternative in the event PPL constructs the build-out. Since the build-out does not currently exist, however, both PPL’s concerns and the build-out are entirely hypothetical. PPL has not provided D&H the opportunity to compete for this traffic. In the event that the build-out is constructed, D&H stands ready, willing and able to compete for the traffic. PPL’s concerns that D&H either would not or could not compete are unfounded and speculative.

Moreover, PPL’s concerns regarding D&H’s strength and ability to compete are also irrelevant as they are pre-existing concerns and are neither caused by nor will they be exacerbated by the Transaction. If anything, such concerns should be mitigated by the Transaction as currently conditioned. The consummation of the Transaction will strengthen D&H by allowing it to focus on areas where it can better compete, which, in turn, should better enable D&H to compete with NSR for the Montour traffic should PPL ever construct the build-out.

Although PPL claims that its circumstances are analogous to that of OG&E’s in the BN/Santa Fe merger proceeding, that is clearly not so. Prior to the BN/Santa Fe merger, OG&E was sole-served by Santa Fe with a potential build-out to BN. Because the competing carriers were merging, preserving OG&E’s competitive options required the ICC to grant trackage rights to the point of the build-out to another Class I carrier altogether. Under the specific facts in that

proceeding, the ICC concluded that allowing OG&E the option to choose which of the three remaining Class I carriers operating near OG&E plant would receive trackage rights, “preserve[d] the competitive status quo.” *BN/SF Merger*, 10 I.C.C. 2d at 745.

Unlike the BN/Santa Fe merger proceedings, this is a line-sale transaction following which the parties to the Transaction will continue to exist as independent competitors. Accordingly, awarding trackage rights to D&H in the event the build-out is constructed provides PPL with the same competitive options post-transaction that exist currently, thus preserving the competitive status quo. By contrast, giving PPL the right to choose which carrier receives trackage rights in the event of a build-out would enhance PPL’s competitive options by providing PPL with access to carriers that it cannot currently access. Such relief falls outside the Board’s conditioning power. Accordingly, PPL’s Petition for Reconsideration must be denied.

III. CNJ’s Petition is Without Merit and Should Be Denied.

CNJ’s lengthy Petition for Reconsideration (not including exhibits) distills to an argument that the Board should have considered D&H’s trackage rights discontinuance as part of this line acquisition proceeding because the two transactions are inextricably linked.² The Board has repeatedly rejected this argument and should do so again here.

According to CNJ, who is neither a rail carrier or a shipper, the Board’s May 13, 2015 decision in the discontinuance proceeding delaying the effective date of D&H’s Notice of Exemption constitutes “changed circumstances” that have revealed the inextricable linkage between the transactions. CNJ Petition at 3. Specifically, CNJ claims that the delay and supposed uncertainty regarding the effective date of the trackage rights discontinuance

² CNJ’s Petition for Reconsideration violates the Board’s procedural rules by exceeding the applicable page limit set forth in 49 CFR § 1115.3(d) and by making several wholly unfounded allegations that are “irrelevant, immaterial, impertinent, or scandalous” and should be excluded pursuant to 49 CFR § 1104.8.

exemption³ creates the possibility that D&H would enter into the haulage agreement to serve LVRM prior to the discontinuance of D&H's trackage rights over the same line. According to CNJ, "if the D&H retains the right to serve LVRM at the time of a final decision in this proceeding, the haulage agreements need [additional Board] approval." CNJ Petition at 25. There are several flaws in CNJ's argument.

Fundamentally, the concern raised by CNJ, even if valid, would not merit reconsideration. At best, CNJ has raised a technical and currently entirely hypothetical, procedural issue which, if necessary, could easily be addressed in due course and will not alter the approved Transaction. Accordingly, the discreet haulage/trackage rights technical issue CNJ raises has zero substantive bearing on the Board's consideration of the underlying merits of the Transaction.

Likewise, consolidation of the discontinuance proceeding with this proceeding would have had no substantive bearing on the Board's consideration of the underlying merits of the Transaction. The Board's consideration took into account D&H's trackage rights discontinuances. As the Board acknowledged, "NSR's competitive analysis ... accounted for the impacts of the D&H's discontinuances." Decision at 15. Notably, interested parties were afforded the opportunity to submit evidence in the record in this proceeding rebutting NSR's competitive analysis showing of no competitive harm. The Board served its April 16, 2015 decision extending the effective date of D&H's Notice of Exemption on all parties of record in this proceeding. D&H also served copies of its filings in the discontinuance docket on parties of record in this proceeding. Although a handful of parties asserted that the trackage rights

³ CNJ's petition is devoted nearly entirely to claimed irregularities in D&H's trackage rights discontinuance proceeding, Docket AB-156 (Sub-No. 27X) and speculative musings regarding potential jurisdictional issues raised in that proceeding. In the event that CNJ makes its claims and jurisdictional arguments in that proceeding, D&H will respond appropriately.

discontinuances would result in competitive harm, no party submitted any evidence whatsoever in either docket to support these bald assertions. Moreover, the fact that D&H has met the two year out-of-service exemption requirements for the discontinuances belies any claim of competitive harm. It also permits the discontinuance of D&H trackage rights regardless of whether the Board approved the line sale in this proceeding.

That said, the underlying premise of CNJ's argument – that additional authority would be required for D&H to enter into a haulage agreement to serve LVRM if it retains certain trackage rights – misconstrues Board precedent and is wrong. In *CSX Transp., Inc. and Del. and Hudson Ry. Co., Inc.—Joint Use Agreement*, Docket No. FD 35348 (STB served Oct. 22, 2010), CSXT and D&H sought approval of a Joint Use Agreement that provided CSXT operating rights over D&H rail line segments between Saratoga Springs and Rouses Point and between Albany and Saratoga Springs – line segments over which CSXT did not have trackage rights. The Joint Use Agreement also provided that D&H traffic would move via haulage between Albany-Fresh Pond and that D&H would retain but would not use its existing East of the Hudson trackage rights. *Id.*, slip op. at 4. Because the Joint Use Agreement provided for new, previously unauthorized operations over another carrier's lines, STB approval was required. The Board's decision in that proceeding neither created nor was dependent on a rule that Board authorization is required whenever a carrier opts to receive haulage service over a line where it also has an independent right to operate. As the Board has often recognized, including in this proceeding (Decision at 26), haulage agreements are not subject to Board approval. *See Del. and Hudson Ry. Co., Inc.—Discontinuance of Trackage Rights—In Susquehanna County, PA and Broome, Tioga, Chemung, Steuben, Allegany, Livingston, Wyoming, Erie, and Genesee Counties, NY*, Docket No. AB-156 (Sub-No. 25X), slip op. at 11 (STB served Jan. 19, 2005); *KNRECO, Inc., d/b/a Keokuk Junction*

Railway Acquisition and Operation Exemption—The Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 30918 (ICC served Apr. 28, 1988) (car haulage agreement between rail carriers does not constitute trackage rights agreement and does not require regulatory authorization), *aff'd sub nom. Simmons v. I.C.C.*, 871 F.2d 702 (7th Cir. 1989).

Further, the D&H trackage rights discontinuance is no longer in abeyance. On June 15, 2015, D&H submitted the supplemental information requested by the Board. Consequently, the scenario on which CNJ's concern is based is both hypothetical and unlikely.

CNJ has failed to demonstrate either material error or materially changed circumstances and therefore its Petition must be denied.

IV. The Board Should Deny Nasca's Petition for Reconsideration.

As D&H observed in its response to Nasca's Petition for Stay, 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 the Decision. These include Nasca's arguments that the Board should impose *New York Dock* employee protective conditions on this line-sale transaction, that the Board should have required NSR and D&H to provide additional data regarding employee impact which Nasca also repackages as an argument that the Board failed to make allegedly required findings regarding the Transaction's employee impacts, and that the Board should have considered D&H trackage rights discontinuances in this proceeding. These arguments, which are addressed by NSR in its reply, have been rejected repeatedly by the Board and do not raise a basis for reconsideration.

The Board's statutory obligations with respect to employee protection are plainly satisfied by the imposition of employee protective conditions applicable to line-sales such as this one, *i.e.*, *New York Dock* as modified by *Wilmington Terminal*. Nasca provides no basis for

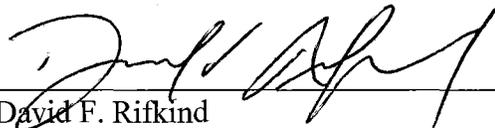
departing from this well-established STB precedent. Accordingly, Nasca's Petition for Reconsideration should be denied.

CONCLUSION

For the foregoing reasons, the Board should deny the Petitions for Reconsideration.

Dated: June 24, 2015

Respectfully submitted,



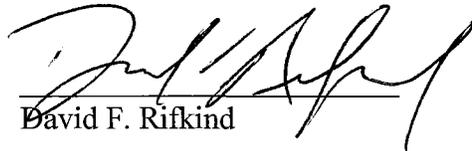
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CERTIFICATE OF SERVICE

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 24, 2015 to parties of record.



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