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December 8, 2014

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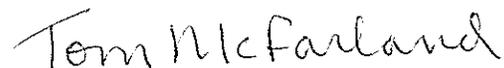
Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20024

Re: 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:

Hereby transmitted is a Reply in Opposition to Petition To Establish Procedural Schedule and Motion to Reject Application As Incomplete for filing with the Board in the above referenced matter.

Very truly yours,



Thomas F. McFarland
Attorney for Protestant

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cc: All parties of record

BEFORE THE
SURFACE TRANSPORTATION BOARD

NORFOLK SOUTHERN RAILWAY)
COMPANY -- ACQUISITION AND) FINANCE DOCKET
OPERATION -- CERTAIN RAIL LINES) NO. 35873
OF THE DELAWARE AND HUDSON)
RAILWAY COMPANY, INC.)

**REPLY IN OPPOSITION TO PETITION
TO ESTABLISH PROCEDURAL SCHEDULE
AND MOTION TO REJECT APPLICATION AS INCOMPLETE**

CNJ RAIL CORPORATION
81 Century Lane
Watchung, NJ 07069

Protestant

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Date Filed: December 8, 2014

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SURFACE TRANSPORTATION BOARD

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COMPANY -- ACQUISITION AND)	FINANCE DOCKET
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**REPLY IN OPPOSITION TO PETITION
TO ESTABLISH PROCEDURAL SCHEDULE
AND MOTION TO REJECT APPLICATION AS INCOMPLETE**

CNJ Rail Corporation (CNJ) hereby files this Reply in Opposition to a Petition for Establishment of a Procedural Schedule (Petition) and Motion to Reject Application as Incomplete, directed to an Application filed in behalf of Norfolk Southern Railway Company (NS) on November 17, 2014.

REPLY

CNJ disagrees strongly with NS's contention that its proposed acquisition and operation of rail lines of The Delaware and Hudson Railway Company, Inc. (DH) is properly classified as a minor transaction (Application Vol. 1 at 9-23). Instead, the Board should determine that the proposed transaction raises issues of regional transportation significance within the meaning of that term in 49 U.S.C. § 11325(a)(2) because (1) in essence, the proposed transaction involves two Class I rail carriers, i.e., NS and Canadian Pacific Railway Company (CP), which controls DH; and (2) the proposed transaction would have extensive and serious anticompetitive effects in a defined region comprising Northeastern Pennsylvania, New Jersey, and Southern New York, which, unless ameliorated by means of pro-competitive conditions resulting from responsive

applications, would not be clearly outweighed by the transaction's contribution to the public interest in meeting transportation needs.

An inappropriate determination that the proposed acquisition and operation is a minor transaction would unjustifiably preclude the filing of the essential responsive applications necessary to avoid or lessen the anticompetitive regional impacts of the proposed transaction (49 C.F.R. § 1180.4(d), "No responsive applications shall be permitted to minor transactions").

Accordingly, the Board should find that the proposed transaction is of regional transportation significance under 49 U.S.C. § 11325(a)(2); that applications inconsistent with the proposed acquisition and operation can be filed under 49 U.S.C. § 11325(c)(2) by the 60th day after publication of notice of the NS application; and that the full 180 days provided for in 49 U.S.C. § 11325(c)(3) for completion of evidentiary proceedings in matters of regional transportation significance should be adopted as part of the procedural schedule in this matter.

In addition the NS Application should be rejected as incomplete because it does not deal with discontinuance of DH trackage rights, which is an essential element of the acquisition and control transaction.

ARGUMENT

I. Regional Transportation Significance - Two Class I Rail Carriers

Leaving aside anticompetitive considerations, it is highly significant in the Northeast Pennsylvania, New Jersey and Southern New York Region that two Class I carriers, NS and CP, are proposing to broadly realign rail service in the Territory. While the proposed transaction is not technically "a merger or control of two Class I railroads," it is evident from 49 U.S.C. § 11325(b) that Congress intends that the Board take a closer look, and do a more thorough

review, when a proposed transaction is between two Class I rail carriers, as is the proposed NS-CP transaction. Surely, such a proposed transaction is not “minor”. At a minimum, such a proposed realignment of rail service in a broad area of the country is properly classified as a transaction of regional transportation significance. The Board should so find.

II. Regional Transportation Significance - Anticompetitive Effects

Attached is a drawing of rail lines in the Northeast Pennsylvania and New Jersey Region that illustrates anticompetitive effects of the proposed transaction that can be ameliorated by means of responsive applications.

As to transportation of municipal solid waste (MSW) from Oak Island Yard at Newark, NJ to Keystone Sanitary Landfill at Dunmore, PA on Delaware-Lackawanna R.R. Co., Inc. (DL), for which there is a realistic potential, rail lines owned by NS between Oak Island and point of connection to C&S Railroad at Lehighon, PA, and between Oak Island and point of connection to NS at Sunbury, PA,^{1/} over both of which DH has trackage rights, are 2-to-1 rail lines because if the proposed transaction were to be approved, the ability to route traffic over those lines via DH would be lost. In order to restore competition over those lines, a responsive trackage rights application by CNJ (or its newly-created affiliate) or by another rail carrier independent of NS would be required, or over the more direct line between Oak Island and Slateford Junction, PA if in the interest of rail efficiency, NS were to agree to trackage rights over its lines between Eastern, PA and Slateford Jct., PA.

^{1/} The segment between Oak Island and Port Reading, NJ is part of Conrail’s Shared Assets.

As to transportation of recycled glass from Oak Island to Chicago (Alsip), IL, for which there is a realistic potential, the NS rail line between Oak Island and point of connection to NS at Sudbury, PA, over which DH has trackage rights, is a 2-to-1 rail line because if the proposed transaction were to be approved, the ability to route traffic over that line via DH would be lost. In order to restore competition over that line, a responsive trackage rights application by CNJ or by another rail carrier independent of NS would be required.

III. The application (by its own admission) is incomplete

By NS's own admission, the application is incomplete and therefore should be rejected. In the application, NS makes reference to related discontinuance applications which it claims are related to the transaction. (*See* Footnote 3, page 10 of application). NS alleges that the anti-competitive effects of the transaction are discussed at length further in the application.

NS misses the point. Related filings need to be made at the same time so as to not prejudice any party and permit the entire transaction to be properly before the Board. Filing an application which only covers part of the transaction does not mean the transaction is sufficiently before the Board.

NS is only seeking permission to acquire a portion of the DH. NS cannot ask the Board to evaluate the effects of related discontinuances in an acquisition application. NS is not the party that will be seeking the relating abandonment/discontinuance authorities. NS is not DH, so if NS wants the Board to address the merits of those discontinuances as they relate to the application, then NS would need to file appropriate adverse discontinuance proceedings if they are indeed related to the transaction. To date, NS has not done so.

The NS application is only properly before the Board when it and all the related pleadings and dockets are before it. For the agency to permit issues to be argued for which it has not yet been asked to rule turns proper judicial procedure on its head. The Board should not permit this to occur.

CNJ and any other party cannot effectively evaluate the transaction at present because the extent of the discontinuances is unknown. For example:

- Is the DH discontinuing all of its trackage rights?
- Or maybe a portion of their rights?
- What trackage rights do they intend to retain?
- Are they planning to keep certain portions to lessen competitive impacts?

All of the above questions are unknown right now.

It is known at this time that there will be discontinuances which somehow directly relate to this transaction. If CNJ cannot deduce the full extent of the discontinuances and how those proceedings may relate to the NS Application, how can this Board evaluate them in the context of this proceeding when the alleged related matters are not yet before the Board?

IV. The proposed NS procedural schedule is misleading

In its proposed schedule, NS alleges that parties can file comments and protests to the application on January 16th. Only notices of participation are due in late December (26th). Omitted is the fact that, under the proposed NS procedural schedule, the Board's decision on whether to accept the application and treat it as a minor transaction would be made on December 17th.

The Board would be likely to accept the NS position that the transaction is minor if no one were to contest that allegation. However, after reading the proposed NS procedural schedule, the public would not realize that the period to challenge that allegation would have already passed with the decision to accept the application.

Parties opposing designation of minor transaction need to file their opposition by December 8, 2014, not January 16, 2015. Given the significance of this transaction to shippers in northeastern Pennsylvania, the Board, at a minimum should extend the procedural schedule to include sufficient time to properly evaluate whether the transaction is truly a minor transaction or a significant transaction. At a minimum, the Board should either reject the application as incomplete, or hold the proceeding in abeyance until the entire transaction is presented to the Board and sufficient time has been afforded parties to conduct appropriate due diligence and present argument on the competitive consequences of the transaction.

V. Anti-Competitive Effects

CNJ's primary concern is the foreclosure of competitive shipping lanes to and from various CSX gateways and various points in northeast PA. In particular, CNJ may well file a responsive application to address CNJ's other significant concern, the loss of effective two carrier competition between the New York/New Jersey area market and northeastern Pennsylvania. Since the DH's market reach is primarily via trackage rights, this creates even greater alarm for CNJ.

Currently, DH has exclusive control of its own terminal in the North Jersey market. The DH Oak Island terminal is located in Newark, NJ. The small, independently controlled facility permits DH to hold out to the public and directly originate and/or terminate traffic in the market.

DH can thus compete directly head to head against NS for traffic moving between New York-New Jersey and Northeast Pennsylvania.

The DH Oak Island terminal is in essence a line of railroad that is connected to the rest of the DH system via overhead trackage rights. CNJ's primary concern is competitive routing access to and from DL. Today, two rail shipping options exist for shippers.

Only a responsive application can address the 2 to 1 reduction in competition we are concerned over. In option #1, rail traffic can be tendered to NS at a number of NS terminals in the northern New Jersey. NS can move traffic to the DL railroad; interchanging the cars at Slateford Jct. PA. In option #2, rail traffic can be tendered to DH at Oak Island Terminal. The DH can transport the traffic in its own trains to their interchange point with the DL, which is Taylor Yard, located in Taylor, PA.

CONCLUSION

WHEREFORE, in consideration of the foregoing, the Board should find that:

- (1) the proposed acquisition and operation is a transaction of regional transportation significance;
- (2) responsive applications inconsistent with NS's Application can be filed by the 60th day after publication of notice of the filing of the NS Application; and
- (3) 180 days after such date of publication should be permitted for the conclusion of evidentiary proceedings on the NS Application.

The Board should reject the Application for the reasons stated herein.

Respectfully submitted,

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Watchung, NJ 07069

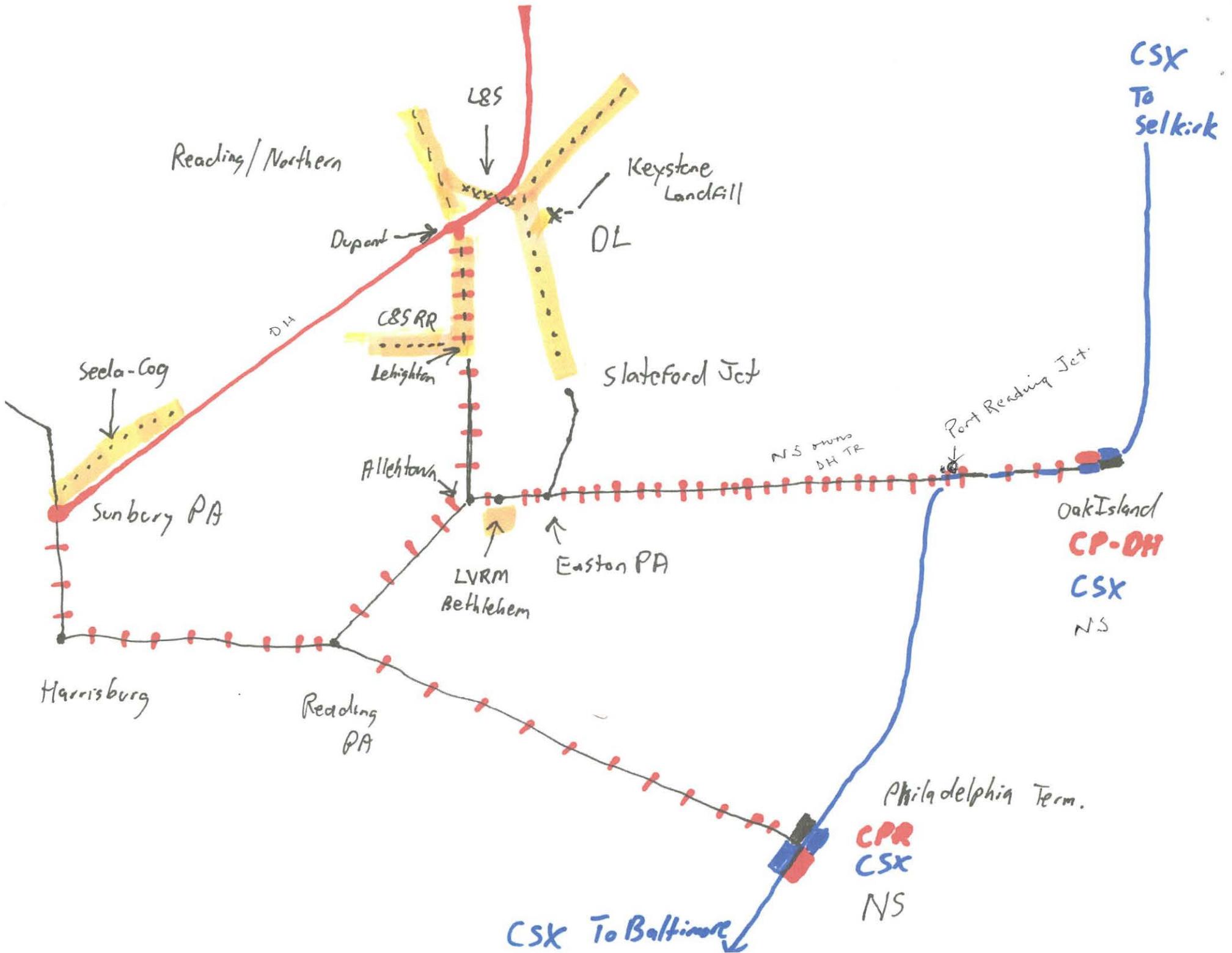
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Date Filed: December 8, 2014



CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2014, I served the foregoing document, Reply In Opposition To Petition To Establish Procedural Schedule and Motion To Reject Application As Incomplete on the following:

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