

BEFORE THE
SURFACE TRANSPORTATION BOARD

237484

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Part of
Public Record

NORFOLK SOUTHERN RAILWAY COMPANY

– ACQUISITION AND OPERATION –

CERTAIN RAIL LINES OF THE DELAWARE AND HUDSON RAILWAY
COMPANY, INC

COMMENTS AND REQUEST FOR CONDITIONS

Applicant Norfolk Southern Railway Co. (NS) proposes to acquire 282.55 miles of rail lines located in New York and Pennsylvania (“D&H South Lines”) from the Delaware & Hudson Railway Company, Inc. (“D&H”) (the “Transaction”). In related transactions, NS will retain and modify 17.45 miles of existing NS trackage rights over the D&H between Schenectady, NY and Mechanicville, NY and amending the Saratoga – East Binghamton Trackage Rights Agreement as necessary to retain a portion of the rights between Saratoga Springs, NY and Schenectady, NY. The New York State Department of Transportation (NYSDOT) has reviewed the record submitted in relation to the Transaction. Based upon that review, NYSDOT believes that the acquisition of the D&H South Lines by NS is in the public interest and that the Board should approve this minor transaction, with conditions.

COMMENTS

1. NYSDOT Supports the Transaction

NS is the majority user of the D&H South Lines, and the transaction will align ownership of the corridor with the majority user of the corridor. NYSDOT therefore believes that NS’ strong financial position will support the investment necessary in the D&H South Lines and give

NS a more secure and expanded rail network to compete in the Northeast and New England markets.

2. Potential Competitive Harm to The Saratoga & North Creek Railway, LLC (S&NC)

NYSDOT concurs with NS' assertion that the transaction will not result in a substantial lessening of competition or creation of a monopoly. NYSDOT is aware of no shippers that are physically served by both NS and D&H who would see a reduction in competitive alternatives as a result of this Transaction.

The record reveals one limited circumstance in which the transaction has the potential to restrain trade in freight surface transportation. S&NC operates a stub-ended branch line that connects with the D&H just north of Saratoga Springs, NY (at MP 38.2) and has trackage rights over the D&H for approximately 1.1 miles to allow interchange with the D&H at Saratoga Yard (MP 37.1).¹ The S&NC's only connection to the remainder of the interstate network is at Saratoga, and their only connection is with the D&H.

While the S&NC does not connect directly to the D&H South Lines, NYSDOT submits that S&NC will nonetheless be adversely impacted by the sale of the D&H South Lines to NS, to the detriment of shippers along their line. Sale of the D&H South Lines to NS will render the D&H a bottleneck carrier to any domestic traffic originating or terminating on the S&NC, which will significantly and adversely impact the ability of the S&NC to generate any traffic in the future. To illustrate the point, the routings available to any S&NC traffic interchanged with the D&H, post transaction, will be as follows:

¹ See Saratoga and North Creek Railway, LLC – Acquisition and Operation Exemption – Delaware and Hudson Railway Company, Inc., d/b/a Canadian Pacific, STB Docket No. FD 35500, (STB served Jun. 1, 2011)

- S&NC to Saratoga; D&H: Saratoga to Mohawk Yard for interchange with NS, a distance of approximately 17 miles²;
- S&NC to Saratoga; D&H: Saratoga to Selkirk, NY for interchange with CSX Transportation, Inc. (“CSX”), a distance of approximately 54 Miles³;
- S&NC to Saratoga; D&H: Saratoga to Whitehall, NY for interchange with Clarendon & Pittsford Railroad Co., a distance of approximately 44 miles; or
- The final alternative routing for S&NC traffic requires D&H to carry the traffic into Canada, incurring two border crossings and associated processing by U.S. and Canadian customs.

NYSDOT notes that the likelihood of any traffic moving between a point on the S&NC and point on the D&H, post Transaction, is extremely limited. There will never be more than 200 miles between the S&NC and any point served by the D&H (or reachable via haulage) and the commodity mix is subject to significant competition from trucks.

NYSDOT therefore believes that in the limited circumstance described above, the Transaction is likely to cause competitive harm to the S&NC and their customers.

3. The transfer of the D&H South Line to NS presents unique circumstances.

The Application states that this is not a control transaction, a joint use agreement, or a merger or consolidation of the properties of at least two rail carriers under 49 U.S.C. §11323(a)(1) and therefore D&H is not an applicant in this proceeding. The application further

² NS’ application does not clearly identify the location of the primary interchange point between D&H and NS after the transaction. For purposes of this analysis, NYSDOT has assumed it would occur at Mohawk Yard, which would provide D&H with the longest available line haul. The alternative location would be Saratoga Springs, in which D&H would have no line haul at all for S&NC traffic interchanged with NS.

³ This includes both commercial interchange with CSX as well a transfer of cars to CSX for haulage to New York City and interchange with the New York & Atlantic Railway at Fresh Pond Jct. pursuant to CSX Transportation, Inc. and Delaware and Hudson Railway Co., Inc. – Joint Use Agreement, STB Docket No FD 35348 (May 27, 2010)

states that D&H intends to file a related request for discontinuance authority “concurrent with the filing of this Application.”⁴ However, the D&H has acknowledged that as the transferor of the rail lines in a “minor” transaction, it is considered an applicant carrier pursuant to Board rules (49 CFR §1180.3(a)(1)), though not one from which information is normally required.⁵ When the selling carrier conveys less than their entire railroad operation, the transferor typically retains a contiguous, albeit smaller, railroad.⁶ That will not be the case here. The D&H possesses trackage rights over NS lines south of the D& South Lines as follows:

- From Lehighton to Allentown / Bethlehem, PA
- Allentown / Bethlehem, PA – Oak Island, NJ
- Sunbury – Harrisburg, PA
- Harrisburg – Reading – Philadelphia, PA
- Harrisburg – Perryville – Washington, DC

As the Application notes, “...once NS acquires the D&H South Lines, D&H will no longer physically connect with these trackage rights”⁷.

NYSDOT therefore believes that approval of the Transaction, in the absence of prior or concurrent Board authorization of the discontinuance of the D&H trackage rights, would constitute a de-facto abandonment of those rights, as D&H would have no means to physically connect with those line segments. NYSDOT therefore concludes that the D&H discontinuance actions must be considered as related transactions, and reviewed contemporaneously with NS’ Application.

⁴ Application, page 28.

⁵ See D&H Notice of Intent to Participate, filed December 24, 2014, as clarified by the D&H’s follow-up letter of January 7, 2015.

⁶ 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).

⁷ Application, page 28

Further, NS states in a footnote that it will seek to have certain trackage rights held by D&H over the Reading, Blue Mountain & Northern (“RBMN”) line between Taylor, PA and Lehigh, PA assigned to it⁸. T

NYSDOT believes that this would also appear to be another related transaction that is not presently before the Board for consideration.

NYSDOT’s REQUEST FOR CONDITIONS

Condition # 1 -- Mitigation of Potential Anti-Competitive impacts to S&NC

NYSDOT has identified a single anti-competitive impact from the Transaction, the sale of the D&H South Line to NS results in the D&H becoming a bottleneck carrier for all domestic S&NC traffic. NYSDOT believes that this impact can be effectively mitigated through the imposition of a condition on the Transaction by the Board.

The Board has authority to impose conditions on the sale of the D&H South Lines by D&H. The D&H, as transferor of the D&H South Lines, is an applicant carrier pursuant to 49 CFR §1180.3(b) and is “subject to the full range of our [the Board’s] conditioning power.”

Interchange with a second carrier at Saratoga Springs would provide the S&NC with a competitive routing for domestic traffic originating or terminating on the S&NC. Submissions before the Board suggest that interchange with a second carrier at Saratoga Springs is clearly feasible. NS has the right to operate into Saratoga Yard now for the purpose of interchange with the D&H today but NS does not have the rights to interchange with S&NC⁹. While not a true “paper barrier”, as both S&NC and NS negotiated their respective rights to interchange with D&H at Saratoga independently, the practical impact is the same – the S&NC and NS can

⁸ Application, p 28

⁹ See Norfolk Southern Railway Company – Trackage Rights Exemption – Delaware and Hudson Railway Company, Inc., STB Docket No FD 34562 (STB served Oct. 21, 2004)

physically connect with each other at Saratoga, but are contractually prohibited from interchange, creating a de-facto “paper barrier”¹⁰.

NYSDOT therefore requests that sale of the D&H South Lines to NS be conditioned upon elimination of the de-facto “paper barrier” between S&NC and NS and/or CSX, and that D&H be required to negotiate an agreement for use of their facilities at Saratoga Springs with the respective parties for the purpose of interchange.

Condition # 2 – D&H Discontinuance of Trackage Rights

As of the date of this filing, D&H has not filed the related requests for discontinuance authority associated with the trackage rights identified in the Application. In their “Reply To Opposition To Procedural Schedule and Motion to Reject Application” filed on December 10, 2014, NS asserts that only D&H can file these requests with the Board, and NYSDOT does not disagree.

Absent those filings by D&H, NYSDOT can make no assessment as to whether abandonment of those rights are economically justified independent of the Transaction, as alleged in the Application and approval of the Transaction would constitute a de-facto approval by the Board of the discontinuance of those rights.

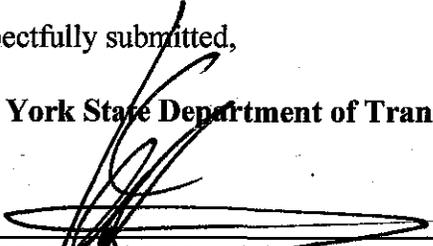
¹⁰ NYSDOT notes that CSX has similar overhead trackage rights over D&H to access Saratoga Yard for the purposes of interchange with D&H, pursuant to CSX Transportation, Inc. and Delaware and Hudson Railway Co., Inc. – Joint Use Agreement, STB Docket No FD 35348 (May 27, 2010), and is similarly prohibited from direct interchange with the S&NC.

CONCLUSION

NYSDOT therefore requests that the parties to the proceeding have an opportunity for meaningful review and comment on the D&H's pending application for discontinuance of their trackage rights prior to any decision on the merits of this Transaction by the Board¹¹.

Respectfully submitted,

New York State Department of Transportation

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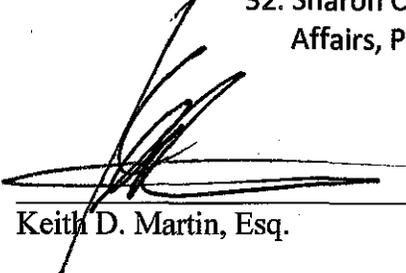
¹¹ To the extent that the D&H's application(s) for discontinuance of their trackage rights may qualify as exempt transaction pursuant to 49 CFR 1152.50 and are filed in a timely manner, such reviews may be accommodated within the procedural schedule adopted by the Board (STB Decision served December 16, 2014). Should this not be the case, and should NYSDOT determine that the associated discontinuance application(s) by the D&H materially impacts this Transaction, NYSDOT reserves the right to petition the Board to stay or reopen this proceeding to consider what would clearly be new evidence or changed circumstances.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing COMMENTS AND REQUEST FOR CONDITIONS was served via first-class US mail, postage prepaid, upon:

1. Jeffrey A. Bartos, Guerrieri, Clayman, Bartos & Parcelli, PC, 1900 M Street, NW, Suite 700, Washington, DC 20036
2. David Bernhardt, Commissioner, State of Maine Transportation Dept., 16 State House Station, Augusta, Maine 04333-0016
3. Eugene H. Blabey, Western New York & Pennsylvania Railroad, LLC, 3146 Constitution Ave., Olean, NY 14760
4. Honorable Robert P. Casey, US Senate, Washington, DC 20510
5. P. Scott Conti, 75 Hammond Street, Worcester, MA 01610
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Keith D. Martin, Esq.

Dated: January 14, 2015