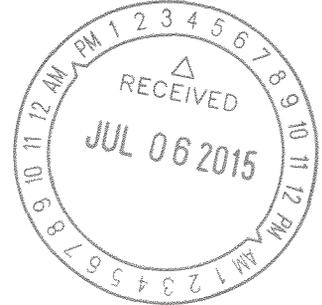


ORIGINAL

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.

238751

MOTION TO STRIKE

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July 6, 2015
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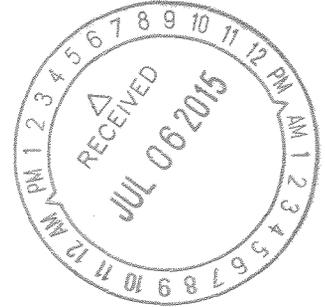
GORDON P. MacDOUGALL
1025 Connecticut Ave.
Washington DC 20036

July 6, 2015

Attorney for Samuel J. Nasca

*/Embraces also FD 34209 (Sub-No. 1), Norfolk Southern Railway-
Trackage Rights Exemption-Delaware & Hudson Railway; and FD
34562 (Sub-No. 1), Norfolk Southern Railway-Trackage Rights
Exemption-Delaware & Hudson Railway.

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.

MOTION TO STRIKE

Preliminary Statement

Samuel J. Nasca,^{1/} for and on behalf of SMART/Transportation Division, New York State Legislative Board (SMART/TD-NY), submits this Motion to Strike various statements set forth in the Reply in Opposition to Petitions for Reconsideration, filed June 24, 2015, by Norfolk Southern Railway Company (NSR).

The NSR Reply is directed to various objections against the Board's Decision No. 6, dated and served May 15, 2015; this Motion to Strike is directed to the NSR Reply (NS-20), at pp. 6-15, dealing with the SMART/TD-NY reconsideration matters.^{2/}

*/Embraces also FD 34209 (Sub-No. 1), Norfolk Southern Railway-Trackage Rights Exemption-Delaware & Hudson Railway; and FD 34562 (Sub-No. 1), Norfolk Southern Railway-Trackage Rights Exemption-Delaware & Hudson Railway.

1/New York State Legislative Director for SMART/TD, with offices at 35 Fuller Road, Albany NY 12205.

2/The NSR's Preface and Summary, at p. 2n.3, erroneously states that since Decision No. 6, no shipper on D&H south lines, labor union, D&H or NS Employee, or govt. agency has objected to the Board's decision, requested a stay, or sought reconsideration.

ARGUMENT

1. Standing of Nasca & SMART/TD-NY. NSR asserts Nasca has no standing in this proceeding, particularly since SMART/TD arguably has entered into a voluntary implementing agreement with NSR for NSR employees. (NSR Reply, at pp. 6-7 & n.10; p. 11n.15).

However, contrary to NSR, questions of standing are not involved in participation before agency proceedings, particularly at the former I.C.C. under the former 49 U.S.C. §13(2), and carried forward to this Board by the present 49 U.S.C. §11701. I.C.C. v. Baird, 194 U.S. 25, 39 (1904); Wirebound Box Mfrs. Assn., Inc., v. Aberdeen & R.R. Co., 216 I.C.C. 667, 668 (1936); Construction and Operation-Indiana & Ohio Ry. Co., 9 I.C.C.2d 783, 786 (1993). Moreover, Nasca appears in his representative capacity, as do other SMART/TD state legislative directors, and in so doing, speaks for SMART/TD. See: United Transp. Union v. ICC, 891 F.2d 908, 909n.1 (D.C. Cir. 1989), cert. den. 497 U.S. 1024. The SMART/TD constitution and practices specify that the usual and customary procedure for appearance before public agencies involving changes proposed for carrier services to the public is through the state legislative board; and the usual procedure for negotiating implementing agreements following STB decisions with prescription of employee conditions, is through the various carrier SMART/TD Committee of Adjustment.^{3/}

There is no legitimate issue concerning Nasca's participation for SMART/TD in this proceeding. The structure of the union is not

^{3/}These usual procedures are subject to modification in special or extraordinary circumstances as may be required..

a monolithic "top-down" organization, but rather has a form of separation of powers for more efficient management and democratic involvement. Representation in various state and federal proceedings is a matter for the union's internal organization, rather than subject to the whims and preferences of NSR. The Board should take the following action:

(a) The Board should strike NSR Reply, p. 6, final para., 1st sentence, "As an initial matter, it is worth restating that Nasca has no standing in this proceeding."

(b) The Board should strike NSR Reply, p. 7, first para., lines 2-3, "It is unclear whether this Legislative Board speaks for its union members."

(c) The Board should strike NSR Reply, p. 7, n. 10, "Given that SMART/TD has reached an implementing agreement with NS, it is clear that Nasca does not represent the union or its employees with respect to the issues in this proceeding."

2. Long-Standing Precedent Contention. NSR urges that the SMART/TD-NY petition for reconsideration should be rejected, on the ground the Board followed its long-standing precedent of New York Dock, modified by Wilmington Terminal, without Nasca giving a single citation that a line purchase requires New York Dock, or that Wilmington Terminal does not apply. (NSR Reply, at 7, 8).

Contrary to NSR, the New York Dock-Wilmington Terminal decision is not "long-standing" precedent. It is hardly a precedent at all, and is rarely still utilized by Class III carriers. There have been many line purchase transactions since the Washington Job Protection Agreement of 1936, and analogous ICC or STB

employee conditions have been imposed, such as Oklahoma, New Orleans and New York Dock. The most recent general review, and historical analysis of employee protection for inter-carrier transactions by the ICC, occurred in mid-1990. See: CSX Corp.-Control-Chessie and Seaboard C.L.I., 6 I.C.C.2d 717, 730-45 (1990). There should be no need for SMART/TD to cite any of the many line purchase decisions imposing New York Dock conditions, which is common knowledge to this agency.

The New York Dock modification by Wilmington Terminal did not arrive until 1991. The basic cause arose from the new short-lines created from lines cast off from the massive major carrier unifications in the 1960-90 period. These Class III carriers, many created by the non-carrier class exemption and without employee protection,^{4/} then commenced line acquisitions of their own. The Brandywine^{5/} and Wilmington Terminal^{6/} were early situations where two Class III carriers, each only 4 miles in length, sought pursuant to 49 U.S.C. 11323, to acquire much larger CSX lines having many more employees. The Class III carriers received relief from the New York Dock conditions concerning transfer of collective bargaining agreements (CBA) and the requirement for an umbrella agreement, resulting in the so-called New York Dock conditions as modified by Wilmington Terminal. The Class I carriers engaged in line acquisitions also sought relief from the CBA

4/Class Exemption-Acq. & Oper. of R. Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810 (1985)

5/Brandywine Valley R. Co.-Pur.-CSX Transp., Inc., 5 I.C.C.2d 764 (1989).

6/Wilmington Term. RR, Inc.-Pur. & Lease-CSX Transp., Inc., 6 I.C.C.2d 799 (1990).

transfer and umbrella agreement conditions, but ran up against negotiation of employee hiring conditions where the acquisition agreement provided the buyer carrier would accord preferential hiring for seller employees, a common contract item aimed at reducing employee protection payment liabilities.^{7/} The result was the continued imposition of straight New York Dock provisions minus CBA transfer, but inclusion of employee hiring conditions included in the umbrella-type arbitration process. A concurrent example at the time is Southern Ry. Co. & Norfolk So. Corp.- Pur. IL.C.RR, 5 I.C.C.2d 842 (1989), rev.den. United Transp. Union v. U.S., 905 F.2d 463 (D.C.Cir. 1990) (Southern/IC).^{8/}

Although it might be feasible to impose a hiring condition as part of New York Dock-Wilmington Terminal in individual Class 1 carrier line acquisitions, it would seem preferable to simply impose New York Dock alone.^{9/} Enactment of 49 U.S.C. 10902 in 1995 as part of ICCTA, only 4 years after Wilmington Terminal, has rendered Wilmington Terminal virtually useless for Class II or Class III carrier line acquisitions. Class Exem. For Acq. Or Oper. Under 49 U.S.C. 10902, 1 S.T.B. 95 (1996). Only Class I carriers today use New York Dock as modified by Wilmington Terminal for

7/ The hiring condition also tended to ameliorate any public, state agency, and community opposition to the transaction.

8/Cited with approval in Wilmington Terminal, 6 I.C.C.2d at 814. See also: Railway Labor Executives' Ass'n v. ICC, 930 F.2d 511, 519&n.6 (6thCir. 1991).

9/ Some examples where the agency has used New York Dock with modifications in carrier line acquisitions are: Rio Grande Industries, Et Al.-Pur. & Track.-CMW Ry. Co., 5 I.C.C.2d 952 (1989); Indiana R. Co.-Acq. & Oper.-Illinois Central R. Co., 6 I.C.C.2d 1004 (1990).

line acquisitions, in lieu of New York Dock, standing alone.^{10/}

Congress in facilitating Class II and III carrier line acquisitions by removing them from §11323-25, and substantially modifying employee protection for such transactions, did not thereby intend to modify employee protection for Class I line acquisitions remaining under §11323-25.

The Board should take the following action:

(d) The Board should strike NSR Reply, p. 7, para. 2: "Nasca's petition should be rejected. The Board followed its long-standing precedent by imposing New York Dock, as modified by Wilmington Terminal in this line purchase transaction, and it was not material error to do so."

CONCLUSION

The Board should strike the portions of the NSR Reply, filed June 24, 2015, dealing with the standing of Samuel J. Nasca, and rejection of Nasca's petition for reconsideration, cited herein as (a), (b), (c), and (d).

Respectfully submitted,



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July 6, 2015

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^{10/}The Board's reference in Decision No. 6 at 29, to the employee protection revision in Mass. Coastal 2010, along with NSR's Reply at 8, also to Mass. Coastal 2010, appears the known exception since ICCTA to the use of 49 U.S.C. §11323-25 for line sales by other than a Class 1 applicant. As a Class III carrier, Mass. Central was eligible for §10902, but may have been reluctant to part with §11323-25 owing to uncertainty over "easement" as "property."

Certificate of Service

I hereby certify I have served as a copy of the foregoing
upon all parties of record by first class mail postage-prepaid.

Washington DC


Gordon P. MacDougall