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**BEFORE THE
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NORFOLK SOUTHERN RAILWAY COMPANY

- ACQUISITION AND OPERATION -

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

**APPLICATION FOR A
MINOR TRANSACTION**

VOLUME I

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LIST OF ACRONYMS USED IN APPLICATION

APA	Asset Purchase Agreement
BEA	Bureau of Economic Analysis Economic Area (BEA, 1995 version)
CN	Canadian National Railway
CP	Canadian Pacific Railway Company and its rail carrier operating subsidiaries
CSX	CSX Transportation, Inc.
D&H	Delaware and Hudson Railway Company, Inc.
FML	Freight Main Line
MP	milepost
NS	Norfolk Southern Railway Company
O-D	origin to destination
PAS	Pan Am Southern LLC
RBMN	Reading, Blue Mountain and Northern Railroad
STB	Surface Transportation Board

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**CERTAIN RAIL LINES OF THE DELAWARE AND HUDSON RAILWAY
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**APPLICATION FOR A
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INTRODUCTION

Concurrent with the filing of this Application, Norfolk Southern Railway Company (“NS” or “Applicant”), a Class I railroad, announced its intention to enter into an agreement with Delaware and Hudson Railway Company, Inc. (“D&H”)¹ that would, if approved by the Surface Transportation Board (“STB” or “Board”), result in NS becoming the owner of certain rail lines of D&H. The proposed transaction (the “Transaction,” which will be further defined herein) involves NS’s acquisition and operation of 282.55 miles of D&H rail lines located in Pennsylvania and New York (the “D&H South Lines”), including any and all other tracks related to or auxiliary to the acquired lines. NS also will retain and modify 17.45 miles of existing NS trackage rights over D&H’s line between MP 484.85 ± in the vicinity of Schenectady, NY and CPF 467 in the vicinity of Mechanicville, NY, including the right to use such track(s) within D&H’s Mohawk Yard as shall be designated from time to time by the D&H officer in charge of

¹ D&H is a wholly owned, indirect subsidiary of Canadian Pacific Railway Company (“CP”).

operations at Mohawk Yard, for the purpose of reaching NS's Mechanicville Terminal and interchanging with Pan Am Southern LLC ("PAS").² In addition, D&H will retain local access trackage rights to serve the General Electric facility at Schenectady, NY, generally located between milepost ("MP") 485 and MP 486. CP also will retain certain existing operating rights to operate within the limits of Buffalo, NY.³ NS also is amending the Saratoga-East Binghamton Trackage Rights Agreement, dated September 30, 2004, as necessary to retain the portion of its existing trackage rights between Milepost 37.10 ± of D&H's Canadian Main Line in Saratoga Springs and CPF 484 at Schenectady, NY⁴

This Transaction clearly qualifies as a minor transaction under 49 C.F.R. § 1180.2(c). Under § 1180.2, a transaction that does not involve two or more Class I railroads and is not of regional or national significance is considered to be minor if, based on the application itself, it appears that (1) the transaction would clearly not have anticompetitive effects, or (2) any anticompetitive effects would clearly be outweighed by the transaction's contribution to the

² The underlying trackage rights which are being modified and amended were authorized in Norfolk Southern Railway Company – Trackage Rights Exemption – Delaware And Hudson Railway Company, Inc., FD 34209 (STB served July 25, 2002). Accordingly, NS is seeking approval for the modifications occurring as a result of this Transaction in a concurrently filed Notice of Exemption. See FD 34209 (Sub-No. 1).

³ D&H will also seek authority to discontinue certain underutilized trackage rights, and D&H and NS likewise will terminate various marketing and rate agreements involving D&H operations south of Schenectady, NY (MP 485) and east of Buffalo, NY. The terminations of the marketing and rate agreements are not subject to the approval of the STB. The competitive and operational analysis contained within this Application nonetheless accounts for the impact of the D&H discontinuances and the terminations of the various marketing and rate agreements, notwithstanding that those transactions are not subject to the Board's approval.

⁴ The underlying trackage rights which are being modified and amended were authorized in Norfolk Southern Railway Company – Trackage Rights Exemption – Delaware And Hudson Railway Company, Inc., FD 34562 (STB served Oct. 21, 2004). Accordingly, NS is seeking approval for the modifications occurring as a result of this Transaction in a concurrently filed Notice of Exemption. See FD 34562 (Sub-No. 1).

public interest in meeting significant transportation needs. The Transaction does not involve two or more Class I railroads because D&H is not a Class I. Nor is the Transaction of regional or national significance. The Transaction affects only a small portion of Pennsylvania and New York, the two states in which the lines subject to this Transaction are located; and, prior transactions involving more miles of railroad in the same part of the country have been deemed not to have regional or national significance.⁵ The Transaction also will not result in any anticompetitive impacts, and actually will preserve and enhance competition between NS and other railroads and modes in the Northeast. Finally, the Transaction will generate substantial public benefits.

As detailed in the verified statements submitted as part of this Application, the Transaction will not result in a substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States. The Transaction is essentially end-to-end in nature, and there are no shippers that today are physically served by both NS and D&H who would see a reduction in competitive alternatives from 2-to-1 as a result of the Transaction. For those customers who today have access to NS and D&H routings over the D&H South Lines, NS and D&H voluntarily have agreed to take the added step to provide continued commercial access to both railroads.⁶

⁵ E.g., CSX Transp. Inc. and Delaware and Hudson Ry. Co., Inc.--Joint Use Agreement, FD 35348 (May 27, 2010) (involving approximately 345 miles of track) (“CSX/D&H Joint Use”); 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 438 route miles of track and trackage rights) (“NS/PAS”).

⁶ To preserve this access for these and other customers located on connecting short lines, NS and D&H voluntarily will enter into at closing two new commercial agreements. The first agreement will preserve existing contractual arrangements and applicable rate authorities for customers receiving service over the D&H South Lines until the expiration, renewal, or amendment of the applicable contract or rate authority. The second agreement is intended to ensure that shippers

Furthermore, NS's acquisition of the D&H South Lines actually will enhance competition in the Northeast surface transportation market. As the Board previously has found, there is substantial competition from other non-D&H railroads and from other modes of transportation in this part of the country.⁷ This competition will continue after the Transaction and will, in fact, be enhanced by giving NS a more secure and expanded rail network in the Northeast, thus enabling NS to compete more effectively against CSX, the dominant rail carrier in New York and New England.

Significantly, the proposed Transaction will generate substantial public benefits. To understand some of these benefits, it is important to recall the history of D&H. D&H is a carrier in the Northeast. Historically, D&H struggled financially under several different owners and declared bankruptcy in the late 1980's. In 1991, CP purchased it from the bankruptcy trustee. See Verified Statement of J.H. Friedmann ("Friedmann V.S."), at 3. However, significant changes in the competitive landscape since that acquisition have eroded the economic rationale for D&H's continued ownership of the D&H South Lines. Today, D&H primarily serves as a bridge carrier used by other railroads for both north-south and east-west traffic, particularly since the division of Conrail by and between NS and CSX. That division injected more rail competition into the Northeast by substituting the two carriers where there

located on short lines that today connect with both NS lines and the D&H South Lines will continue to have commercial access to both D&H/CP and NS routings and rates for any future traffic not covered by their existing contracts. See Verified Statement of J.H. Friedmann, at 7. Both agreements are attached in Volume II of this Application.

⁷ See Delaware And Hudson Railway Company, Inc. – Discontinuance Of Trackage Rights – In Susquehanna County, PA and Broome, Tioga, Chemung, Steuben, Alleghany, Livingston, Wyoming, Erie and Genesee Counties, NY; Canadian Pacific Railway Company – Trackage Rights Exemption – Norfolk Southern Railway Company; Norfolk Southern Railway Company – Trackage Rights Exemption – Delaware And Hudson Railway Company, Inc., STB Docket No. AB-156 (Sub-No. 25X), FD 34561, FD 34562, 2005 STB LEXIS 24, *22 (STB served Jan. 19, 2005) ("D&H Discontinuance").

had previously been only Conrail. NS and CSX enjoy significant advantages over D&H, including broader networks, superior routings, and higher densities. See Friedmann V.S., at 3. As a result, D&H's role as an independent carrier on the D&H South Lines has dwindled significantly over the years, as have its service offerings on the lines. Indeed today, approximately 80% of the traffic operated over the D&H South Lines is NS traffic. See Friedmann V.S., at 5. D&H alone, and even D&H with NS, have attempted other commercial measures (including prior haulage and joint marketing agreements) short of this Transaction to increase volumes on and improve the financial viability for D&H of the D&H South Lines. See Friedmann V.S., at 4. However, D&H's traffic volumes have continued to decrease, and D&H has decreased its service offerings on the lines accordingly. For example, D&H recently reduced its local service from five to three times a week. NS is concerned that the economics do not justify D&H's continued investment in, and maintenance and operation of, the D&H South Lines at the levels that NS believes are necessary and appropriate to support NS's traffic on the lines as well as to serve local traffic. See Friedmann V.S., at 4-5. The Transaction will align ownership of the D&H South Lines with the current majority user (NS); and, the economics on the D&H South Lines are expected to justify NS's investment in, and maintenance and operation of, the D&H South Lines at levels that support current and future traffic needs, as discussed more thoroughly throughout this Application. See also Friedmann V.S., at 12.

Given the history of D&H and the current economics of the D&H South Lines, the public benefits of the Transaction are obvious and substantial: (1) it benefits shippers on the D&H South Lines by aligning ownership of the D&H South Lines with the majority user of the lines (NS), which promotes operating efficiencies that should result in more reliable and sustainable

service on the lines; (2) it preserves and enhances competition in the Northeast transportation market by securing NS's route to New England and allowing NS to better utilize its PAS investments, thus allowing NS to compete more effectively against CSX and other modes, and by allowing D&H to focus on other markets where it has a stronger competitive presence, thus creating a more competitive D&H/CP system; and (3) it preserves and possibly increases jobs on the D&H South Lines by providing D&H employees on the lines with the opportunity for continued employment with NS and by restoring local service levels on the lines.

STATUTORY FRAMEWORK

The statutory criteria for regulatory consideration of the Transaction are provided in 49 U.S.C. §§ 11323-11325. NS's acquisition of the D&H South Lines, and its retention and modification of existing limited overhead trackage rights over D&H lines, are subject to the prior review and authorization by the Board pursuant to 49 U.S.C. §§ 11323(a)(2) and (a)(6). The Transaction does not involve the merger or control of two or more Class I railroads and is not a major transaction. Accordingly, this Transaction is governed by the standards of § 11324(d).

Transactions under § 11324(d) can be either significant, minor, or exempt. As an initial matter, it should be noted that absent the fact that the two carriers connect, the Transaction could have qualified for processing under the notice of exemption procedures. Indeed, there are many transactions far larger, more complex, and more controversial than this Transaction that have been considered and approved under the class exemptions procedures.⁸ Likewise, the

⁸ See I&M Rail Link, LLC – Acquisition and Operation Exemption – Certain Lines of Soo Line Railroad Company, et al., FD 33326, (STB served Apr. 2, 1997), aff'd sub nom; City of Ottumwa v. STB, 153 F.3d 879 (8th Cir. 1998); Mountain Laurel R.R. Co. – Acquisition and Operating Exemption – Consolidated Rail Corp., FD 31974 (STB served May 15, 1998); Sault

Transaction could have qualified for approval under the individual petition for exemption process under 49 U.S.C. § 10502 as the Transaction is (1) fully consistent with the transportation policy of §§ 10101(2), (4), (5), (8), (9), and (11); (2) limited in scope; and (3) regulation would not be required to protect shippers from the abuse of market power. NS chose not to proceed under the individual petition for exemption process because those timeframes and procedural processes are not well-defined and could take significantly longer than proceeding with a minor application. As such, NS has chosen to proceed under the minor transaction statutory standards.

The proposed Transaction more than qualifies as a “minor” transaction under 49 U.S.C. § 11324(d) and 49 C.F.R. § 1180.2(c) for the reasons set forth in this Application and as also discussed in the petition for the establishment of a procedural schedule filed contemporaneously with this Application. A transaction that does not involve two or more Class I railroads and is not of regional or national significance is considered to be minor if, based on the application itself, it appears that (1) the transaction would clearly not have anticompetitive effects, or (2) any anticompetitive effects would clearly be outweighed by the transaction’s contribution to the public interest in meeting significant transportation needs. The Transaction does not involve two or more Class I railroads because D&H is not a Class I carrier. Also, the Transaction affects only a small portion of Pennsylvania and New York, the two states in which the lines subject to this Transaction are located; and as noted above (see footnote 5, supra), the Board has determined that transactions involving more miles of railroad in the same part of the country did

Ste. Marie Bridge Co. – Acquisition and Operation Exemption – Lines of Union Pac. R.R. Co., FD 33290 (STB served July 7, 2000); Iowa, Chicago & Eastern Railroad Corporation-- Acquisition and Operation Exemption--Lines of I&M Rail Link, LLC, FD 34177 (STB served Jan. 21, 2003); Rapid City, Pierre & Eastern Railroad, Inc.—Acquisition and Operation Exemption Including Interchange Commitment—Dakota, Minnesota & Eastern Railroad Corporation, FD 35799 (STB served Mar. 27, 2014).

not have regional or national significance. Finally, as discussed further below, the Transaction will not result in any anticompetitive impacts and will generate substantial public benefits.

Pursuant to § 11324(d)(2), the STB's primary focus in reviewing this Transaction must be upon the probable competitive effects and the public benefits. In fact, the statute confirms that the STB must approve this Transaction unless it finds significant anticompetitive effects that outweigh the public benefits. Specifically, the standard is as follows:

(d) In a proceeding under this section which does not involve the merger or control of at least two Class I railroads, as defined by the Board, the Board shall approve such an application unless it finds that--

- (1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and
- (2) the anti-competitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

49 U.S.C. § 11324(d). Under this standard, to deny this Application, the Board first must find that there will be anticompetitive effects. Even if such anticompetitive effects exist, the Board still must approve this Application unless such anticompetitive effects outweigh the public benefits of the Transaction.

As detailed in the verified statements of Dr. Curtis Grimm, Professor and Charles A. Taff Chair of Economics and Strategy at the University of Maryland, Robert H. Smith School of Business; Mr. Bengt Mutén, Senior Consultant, IHS; and Mr. John H. Friedmann, NS Vice President of Strategic Planning, NS's acquisition of the D&H South Lines and retention of existing overhead trackage rights over D&H lines, and D&H's discontinuance of its trackage rights on NS's lines, will not result in a substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the U.S. NS's acquisition of the D&H South Lines is essentially an end-to-end transaction in the Northeast.

The D&H South Lines and NS's existing lines only connect in two locations: (1) at Sunbury, PA; and (2) at Binghamton, NY.⁹ There are no shippers in either of these two locations that are physically served by both NS and D&H. See *Friedmann V.S.*, at 6. In addition, the STB previously has found that this region of the U.S. has extensive surface transportation competition, not only from railroads but also from other modes of transportation.¹⁰ See also *Friedmann V.S.*, at 4. As such, no directly served shippers would see a reduction in competitive alternatives from 2-to-1 if NS acquires the D&H South Lines.

Likewise, there are no 2-to-1 corridors where shippers will see a reduction in their independent routing origin to destination ("O-D") options.¹¹ Some shippers are located on short lines that physically connect (or indirectly connect via trackage rights) with both the D&H South Lines and with NS. As an initial matter, because these shippers are served only by one short line railroad now and will continue to be served by that same short line railroad in a post-Transaction environment (where NS will continue to provide interchanges with D&H and others, as D&H

⁹ NS also can and does access the D&H South Lines via trackage rights over the Reading, Blue Mountain and Northern Railroad ("RBMN") at Dupont Junction, PA, which provides NS with an efficient, direct route to Allentown, PA.

¹⁰ See D&H Discontinuance.

¹¹ As discussed further, Dr. Grimm's analysis took a broad view by analyzing the competitive effects of not only the line acquisition but also the trackage rights discontinuances and the termination of various D&H and NS marketing and other agreements -- notwithstanding the fact that many of these agreements are outside of the Board's jurisdiction and that the parties can terminate, amend, or modify many of these agreements at any time in accordance with their terms without Board authorization. Thus, the competitive effects of the acquisition of the D&H South Lines, the discontinuance of D&H's trackage rights, and the termination or amendment of certain marketing, ratemaking, and haulage agreements all have been included in Dr. Grimm's analysis as if all of the actions undertaken therein were subject to the Board's approval and jurisdiction. His analysis looked at existing O-D independent routings, including routings involving D&H utilizing its trackage and marketing rights over NS and routings originating or terminating on short lines that may utilize either NS or D&H via commercial access, and accounts for the fact that those D&H trackage and other rights will be terminated if the Application is approved.

does today), Board precedent does not require NS to provide a competitive remedy, absent specific proof of competitive harm to the shippers.¹² Nonetheless, to determine whether there would be shippers located on the connecting short lines who might see a reduction in their independent routing options, Dr. Grimm's analysis examined whether shippers located on these connecting short lines truly had two independent routing options from origin to destination. Using an O-D analysis, Dr. Grimm found only four corridors where there might be a theoretical reduction in existing O-D independent routing alternatives from 2-to-1. But upon further examination of those O-D pairs, it was determined that the competitive effect of the Transaction on these corridors was de minimis because the corridors are not true 2-to-1 corridors due to the presence of CSX and Montreal, Maine & Atlantic (now Central Maine & Québec Railway) routings in the market.

Although there are no 2-to-1 points and no actual 2-to-1 corridors, and although Board precedent does not require a competitive remedy in such cases, D&H and NS voluntarily have agreed to enter into at closing two new commercial agreements (see footnote 6, supra). See also *Friedmann V.S.*, at 7. The first agreement will preserve existing contractual arrangements and applicable rate authorities for customers receiving service over the D&H South Lines until the expiration, renewal, or amendment of the applicable contract or rate authority. The second agreement is intended to ensure that shippers located on short lines that today connect with both NS lines and the D&H South Lines will continue to have commercial access to both D&H/CP

¹² Norfolk Southern Corp. and Norfolk Southern Ry. Co. – Control and Consolidation Exemption – Algers, Winslow and Western Ry. Co., FD 34839 (Feb. 15, 2007) (“Contrary to ISRR’s contention, this transaction does not represent a 2-to-1 situation. The mines are currently served by one carrier [a short line] and will continue to be served by only one carrier, NSR, after the transaction.”).

and NS routings and rates for any future traffic not covered by their existing contracts.¹³ In sum, the Transaction, especially in light of the commercial access agreement for certain short line customers, produces no anticompetitive effects.

On the other hand, because NS currently is the majority user of the D&H South Lines, the Transaction will align ownership with usage through NS's "stepping into the shoes" of D&H, which will produce several significant public benefits:

First, this Transaction will benefit shippers on the D&H South Lines. Without this Transaction, if current trends continue, there is a risk that D&H will reduce service and investment levels on the D&H South Lines to align with its decreasing share of the traffic on the lines.¹⁴ In fact, D&H already has reduced local service frequency on the D&H South Lines. See *Friedmann V.S.*, at 4; Operating Plan, Exhibit 15, at 7. If the Transaction is not approved and if NS does not acquire and operate the D&H South Lines, the alternative is not the status quo: a regional or short line railroad likely would purchase the lines. But given the low local carload density of the D&H South Lines, the traffic likely would not suffice to support a regional or short line railroad; and, this again would compromise NS's ability to operate over the D&H South Lines and thus compromise the overall quality of rail service available to shippers using the lines. See *Friedmann V.S.*, at 5. Thus, the Transaction is necessary to ensure the provision of competitive rail service. See *Friedmann V.S.*, at 4-5.

¹³ Notwithstanding these agreements, it is possible that some short lines may attempt to use this proceeding as an opportunity to gain additional access rights and privileges for themselves, as opposed to resolving a competitive harm to a shipper. The Board should be wary of such attempts by opportunistic short lines seeking to enhance their own revenues rather than preserve competition for shippers.

¹⁴ Because use of the D&H South Lines has deviated more and more from ownership over the years as NS's share of traffic on the lines has grown, there is a risk that D&H may not find it in its economic interest to invest in, maintain, and operate the lines at sufficient levels, in the absence of the Transaction. See *Friedmann V.S.*, at 4-5.

Shippers also should benefit since NS routes generally tend to be more efficient than D&H routes. For example, D&H shipments to Chicago cross the U.S.-Canada border twice, whereas NS shipments to Chicago would not have to cross the border at all. See *Friedmann V.S.*, at 10. In addition, shippers using the D&H South Lines will gain access to the larger NS rail network, which offers more single-line service options from origin to destination than the D&H/CP network. See *Friedmann V.S.*, at 10. Since NS already operates daily over the D&H South Lines via trackage and haulage rights, NS's acquisition and operation of the lines from D&H also should be a relatively seamless transition resulting in minimal disruption to shippers. See *Friedmann V.S.*, at 9, 12-13.

By aligning ownership with usage, the Transaction should result in more reliable and sustainable service for the benefit of shippers. For example, NS intends to increase levels of local service to at least five days per week versus D&H's three days per week. See *Friedmann V.S.*, at 13; Operating Plan, Exhibit 15, at 7. As detailed in the attached Operating Plan, Exhibit 15, the Transaction also will give NS the ability to improve blocking patterns, allowing NS to consolidate redundant train movements and eliminate the need for some yard interchanges in order to optimize all traffic flows on the lines. See Operating Plan, Exhibit 15, at 4, 7. The Transaction also will give NS greater flexibility and control over train consists. Today, NS contractually is required to give D&H a certain level of traffic by commodity over the D&H South Lines in haulage; but this requirement will be eliminated through the Transaction. See Operating Plan, Exhibit 15, at 5. By aligning ownership with usage, the Transaction further promotes operating efficiencies by eliminating the need to coordinate with another carrier regarding dispatching, transit times, maintenance schedules, capital investment needs, safety plans, and marketing. See *Friedmann V.S.*, at 9; Operating Plan, Exhibit 15, at 8. By

implementing one set of operating, maintenance, capital investment, and safety standards, NS believes it can increase average train speed, reduce dwell time, and implement a more reliable scheduled service. See *Friedmann V.S.*, at 9.

Currently, the need to coordinate movements with multiple carriers also forces D&H to limit the maximum train size between Binghamton, NY and Mechanicville, NY to 8,000 feet, forcing NS to hold-back traffic or secure a specific exemption from D&H. But as a result of the Transaction, NS will be able to schedule longer and more efficient trains on this segment, reducing delays and inefficiencies for shippers. See *Friedmann V.S.*, at 10. NS also will be able to make decisions related to maintenance schedules and capital investment needs in a manner that best supports traffic flows over the line. Currently, NS and D&H often disagree over maintenance standards and capital investment needs because NS operates a significant amount of intermodal traffic whereas D&H traffic is primarily carload, which has different demands than intermodal traffic. See *Friedmann V.S.*, at 9. In addition, removing D&H as an overhead carrier will eliminate hand-offs between the two carriers and create more single-line service, which should improve network fluidity, increase car supply availability, and create operating efficiencies for the particular benefit of intermodal and automotive shippers in the PAS corridor, as discussed further in Section 1180.6(a)(1)(iii) of this Application. See also *Friedmann V.S.*, at 10-11; Operating Plan, Exhibit 15, at 7-8. In sum, the Transaction aligns ownership of the D&H South Lines with usage, allowing NS to optimize traffic flows and removing the need to coordinate operations with another carrier that does not share the same priorities as NS, all of which should result in improved service for shippers.

Second, the Transaction not only promotes direct benefits for shippers on the D&H South Lines but also will enhance competition in the Northeast surface transportation market. NS's

acquisition of the D&H South Lines will better secure NS's route to, and expand NS's customer access in, the Northeast. See *Friedmann V.S.*, at 8. NS's acquisition of the D&H South Lines also will allow NS to utilize better its investments in PAS to gain efficiencies in intermodal transportation, as discussed further in Section 1180.6(a)(1)(iii) of this Application. See also *Friedmann V.S.*, at 10-12; Operating Plan, Exhibit 15, at 7-8. Both of these will allow NS to compete more effectively against CSX, its primary rail competitor in New York and New England, and against other modes, such as barges and trucks. See *Friedmann V.S.*, at 8. Today, NS is at a disadvantage in the Northeast compared to CSX, because it does not have a single-line route into this region. Removing D&H as an intermediate carrier will allow NS to be more competitive in the Northeast, thus introducing strong rail-to-rail competition between two Class I carriers and enhancing rail competition with other carriers and other modes of transportation. See *Friedmann V.S.*, at 8. D&H also will emerge stronger, as the Transaction will allow it to eliminate underutilized, underperforming routes and focus on more successful routes in markets where it has a stronger competitive presence. See *Friedmann V.S.*, at 8. In sum, the Transaction will create a stronger NS as well as a stronger D&H, both of which will be able to compete more effectively against other railroads, including the regionally dominant CSX, and non-rail modes.

Finally, if the current trends continue, there is a risk that D&H will reduce service and investment levels on the D&H South Lines to align with its decreasing share of the traffic on the lines, with corresponding possible reductions in labor assignments. NS believes that the Transaction eliminates this risk. NS intends to hire, using its hiring practices and standards, approximately 150 of the current active D&H employees subject to a collective bargaining agreement who operate on the lines involved in the Transaction. *Friedmann V.S.* at 12. NS

anticipates that the remaining employees not hired by NS will be retained by D&H or offered positions with another CP-affiliated railroad. See *Friedmann V.S.*, at 12; Operating Plan, Exhibit 15, at 10. If there are any employees adversely affected by the Transaction, they will be entitled to the benefits of the employee protective conditions as imposed by the Board.

The D&H employees who will continue to operate on the D&H South Lines but under NS's employ will transition easily to post-Transaction operations and traffic, since operations over the D&H South Lines will remain largely the same and since the majority of traffic currently moving over the lines is NS traffic. See *Friedmann V.S.*, at 12. In addition, NS actually may create new jobs, since NS believes it can organically grow traffic on the D&H South Lines over the next five years. For example, NS intends to add local jobs on the lines to support restored levels of local service and to dispatch the lines. See Operating Plan, Exhibit 15, at 11. In sum, the Transaction preserves and possibly increases jobs on the D&H South Lines.

Clearly, the Transaction qualifies as a minor transaction. It has no anticompetitive effects -- even if one considers the impacts from actions not subject to the Board's approval or disapproval. Instead, the Transaction is pro-competitive by enhancing NS's and D&H's ability to compete against CSX, other rail carriers, and other modes of transportation. Furthermore, even if one assumes the theoretical possibility that there may be some lessening of competition through the elimination of theoretical independent O-D routing options, such effects are clearly outweighed by the Transaction's substantial anticipated contributions to the public interest in meeting significant transportation needs. As such, the Transaction is a "minor" transaction, should be accepted as such, and should be approved.¹⁵

¹⁵ Accepting the Application as a "minor" application is fully consistent with prior transactions involving minor applications, some of which were much larger in scope and effect than the

SPECIFIC INFORMATION REQUIRED BY THE REGULATIONS

SECTION 1180.6

SECTION 1180.6(a)

TITLE AND COUNSEL

Title: Finance Docket No. 35873, Norfolk Southern Railway Company – Acquisition And Operation – Certain Rail Lines Of The Delaware & Hudson Railway Company, Inc.

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proposed Transaction. See e.g., Canadian National Railway, Inc., et al. – Control – Wisconsin Central Transportation Corporation, et al., FD 34000 (STB served May 9, 2001) (involved acquisition of over 2,464 route miles); Kansas City Southern – Control – Texas Mexican Railway Company, et al., FD 34342 (STB served Nov. 29, 2004) (involved acquisition of 536 route miles); Canadian National Railway Company, et al – Control – Duluth, Missabe and Iron Range Railway Company, et. al., FD 34424 (STB served Dec. 1, 2003) (involved 370 combined route miles); NS/PAS (involved 438 route miles of track and trackage rights); CSX/D&H Joint Use (involved approximately 345 miles); Consolidated Rail Corporation and CSX Transportation, Inc. - Acquisition and Operation - Nicholas, Fayette and Greenbrier Railroad Company, FD 32845 (STB served Feb. 15, 1996) (involved 143 miles); Natchez Trace Railroad - Purchase and Lease - CSX Transportation, Inc. Lines Between Wellington and Anniston, AL and Talladega and Gantt's Jct., AL, FD 31487 (ICC decided Nov. 2, 1989) (involved 42 miles); The Indiana Rail Road Company – Acquisition – Soo Line Railroad Company, FD 34783 (STB served Jan. 13, 2006) (involved 92 miles). Concurrent with the filing of this Application, NS also has filed a Petition for Procedural Schedule (NS-2) requesting the Board to adopt a procedural schedule consistent with a minor application.

SECTION 1180.6(a)(1)

**DESCRIPTION OF THE PROPOSED TRANSACTION INCLUDING
REFERENCES TO EXHIBITS AND AGREEMENTS**

Concurrent with the filing of this Application, NS announced its intention to enter into an agreement with D&H whereby NS would acquire and operate certain D&H rail lines located in Pennsylvania and New York (the “D&H South Lines”), including any and all other tracks related or auxiliary to the acquired lines. NS also would retain and modify certain existing overhead trackage rights over D&H’s line between Schenectady and Mechanicville, NY, including use of Mohawk Yard, for the purpose of reaching NS’s Mechanicville Terminal and interchanging with PAS. In addition, D&H would retain certain local access trackage rights to serve the General Electric facility at Schenectady, NY, generally located between MP 485 and MP 486. D&H’s parent, CP, will retain certain other existing operating rights to operate within Buffalo, NY. Further pursuant to the proposed Asset Purchase Agreement (“APA”), D&H agrees to seek termination of its agreements, or portions thereof, that provide operating and commercial access south of South Schenectady, NY (MP 485) and east of the Buffalo, NY area (including the Joint Line Marketing Agreement and certain other haulage agreements). In addition, agreements, or portions thereof, that grant D&H and its parent CP access in Buffalo,¹⁶ as well as NS’s continued use of D&H trackage rights to reach Saratoga Springs, NY, are being modified to preserve said access.¹⁷ At closing, NS will pay D&H US \$217 million in cash.

¹⁶ Post-Transaction, D&H will have no physical operations in the Buffalo area. D&H’s parent, CP, will retain its operations in the Buffalo area, and the various agreements between NS, D&H, and CP are being amended to reflect this reality.

¹⁷ NS’s amendment of the Saratoga-East Binghamton Trackage Rights Agreement, dated September 30, 2004, is being filed in FD 34562 (Sub-No. 1), and a copy of that notice of exemption and amendment are included herein.

In particular, Applicant submits this Application pursuant to 49 U.S.C. §§ 11321-11325 and seeks prior review and authorization by the Board pursuant to 49 U.S.C. §§ 11321(a), 11323(a)(2), and 11323(a)(6) for the following specific aspects of the transaction (collectively, the following elements that require specific Board approval constitute the “Transaction”).¹⁸

1. NS’s acquisition and operation of approximately 267.15 route miles of the D&H Freight Main Line (“FML”) between Sunbury/Kase, PA (MP 752) and Schenectady, NY (MP 484.85),¹⁹ and 15.40 miles of the Voorheesville Running Track (“Track”) between Voorheesville Junction (MP A 10.9) and Delanson, NY (MP 499/MP A 26.3),²⁰ for a total of 282.55 miles of D&H lines (collectively, the “D&H South Lines”), including without limitation side tracks, sidings, and spur tracks; all rights-of-way, buildings, and structures (including without limitation the Binghamton Shop facilities) associated with the D&H South Lines; all leases, agreements, permits, licenses, and rights associated

¹⁸ D&H is seeking the necessary consents from third parties as required to assign existing agreements from D&H to NS where the assignments of such agreements would be necessary for NS to carry out the Transaction if approved by the Board. NS will invoke override authority to obtain those consents if necessary.

¹⁹ Although D&H is selling the portion of the lines at Schenectady, D&H is retaining local access trackage rights to serve the General Electric (“GE”) facility at Schenectady, generally located between MP 485 and MP 486. The GE facility currently is served by D&H and CSX, and will remain so after the Transaction. No authority is required for D&H to retain these rights. See e.g. Grand Trunk Western Railroad Company – Acquisition Of Operating Easement – CSX Transportation, Inc., FD 35661 (STB served Feb. 8, 2013) (approving transaction where seller retained trackage rights without the need to file additional authority for the retention of such rights).

²⁰ D&H has leased the Track to SMS Rail Lines of New York, LLC (“SMS”), a Class III carrier. See SMS Rail Lines of New York, LLC – Lease and Operation Exemption – Delaware and Hudson Railway Company, Inc. Line in Albany County, NY, FD 35083 (STB served Oct. 5, 2007). SMS serves the Northeastern Industrial Park located in the Town of Guilderland, Albany County, NY. SMS will continue to operate the Track under the existing lease following the Transaction, and NS will merely replace D&H as lessor. Post-Transaction, SMS will continue to interchange with CSX and will gain access to NS in place of D&H.

with the D&H South Lines; and as set forth in the APA, any and all other tracks related or auxiliary to the D&H South Lines;²¹

2. NS's retention and modification of 17.45 miles of existing NS trackage rights over D&H's line between MP 484.85 ± in the vicinity of Schenectady, NY and CPF 467 in the vicinity of Mechanicville, NY, including the right to use such track(s) within D&H's Mohawk Yard as shall be designated from time to time by the D&H officer in charge of operations at Mohawk Yard, for the purpose of reaching NS's Mechanicville Terminal and interchanging with PAS;²² and
3. NS's amendment of the Saratoga-East Binghamton Trackage Rights Agreement, dated September 30, 2004, as necessary to retain the portion of its existing trackage rights so between Milepost 37.10 ± of D&H's Canadian Main Line in Saratoga Springs and CPF 484 at Schenectady, NY.²³

Related to NS's filing, D&H will be filing for authority to discontinue its trackage rights over certain NS rail lines. As part of the negotiations leading to the proposed Transaction, D&H has determined that its trackage rights on certain NS lines are not economically justified and should be discontinued.²⁴ Indeed, several of these trackage rights have not been used in years

²¹ While many of these elements are part of the draft APA and overall Transaction, no STB authority is required for NS's acquisition and operation of yard, spur, industrial, team, or side track. 49 U.S.C. § 10906. In addition to what is noted above, NS also will acquire and operate Taylor Yard in the Scranton/Wilkes Barre, PA area and Oneonta Yard in Oneonta, NY. D&H's East Binghamton Yard will be operated in conjunction with NS's existing yard at that location; and as noted, NS also will acquire and operate the D&H mechanical shop facilities at Binghamton.

²² See FD 34209 (Sub-No. 1).

²³ See FD 34562 (Sub-No. 1).

²⁴ As will be set forth in D&H's request for the discontinuance of the trackage rights, D&H's trackage rights operations are not economically justified. As such, D&H's discontinuance of

and others have been used only for purposes of interchanging with NS. Additionally, once NS acquires the D&H South Lines, D&H will no longer physically connect with these trackage rights. D&H's trackage rights over the following NS lines are involved in D&H's request for discontinuance authority:

1. From Lehighton to Allentown/Bethlehem, PA: Used several times a week currently.²⁵
2. Allentown/Bethlehem, PA – Oak Island, NJ: Not used since June 2012.
3. Sunbury – Harrisburg, PA: Used daily for NS interchange.
4. Harrisburg – Reading – Philadelphia, PA: Not used since early 2013.
5. Harrisburg – Perryville – Washington, DC area: Not used since before the Conrail split.

The following agreements between NS and D&H will be terminated in accordance with their terms. These agreements are in the form of voluntary haulage, ratemaking, and marketing agreements. As their entry was not subject to prior Board authorization and approval, likewise their termination is outside of the Board's prior approval process.

1. Haulage Agreement dated May 5, 1998, which provides NS with haulage rights over D&H's lines for carload traffic between Harrisburg, PA and Mechanicville, NY, and between Binghamton, NY and Mechanicville, NY.
2. Haulage Agreement dated April 11, 1999, which provides NS with haulage rights over D&H's lines for intermodal traffic between Harrisburg, PA and Binghamton, NY, and D&H's intermodal terminals at Taylor, PA and Albany, NY, and between Harrisburg, PA and Mechanicville, NY, and between Binghamton, NY and Mechanicville, NY.

those rights should be granted regardless of whether the Transaction presented in this Application is granted or denied; although if the Transaction is denied, D&H may decide not to exercise its permissive authority to discontinue its trackage rights. As the trackage rights are not economically justified, the discontinuance of those rights, and competitive impact, if any, resulting therefrom, are not caused by NS's acquisition of the D&H South Lines, which is the subject of this Application. Nonetheless, Dr. Grimm's O-D analysis included the impact caused by the discontinuance of these trackage rights.

²⁵ D&H connects with these trackage rights via trackage rights over the RBMN line between Taylor, PA and Lehighton, PA, which rights NS will seek to have assigned to it.

3. Joint Line Marketing Agreement dated October 21, 1997.

The following Exhibits are included in the Application, Volume I:

1. Exhibit 1 – Various maps related to the Transaction, including an NS system map.
2. Exhibit 15 – Operating Plan – Minor.
3. The trackage rights notice of exemption filed in FD 34209 (Sub No. 1) for NS's retention and modification of its 17.45 miles of existing NS trackage rights over D&H's line between MP 484.85 ± in the vicinity of Schenectady, NY and CPF 467 in the vicinity of Mechanicville, NY, including the right to use such track(s) within D&H's Mohawk Yard as shall be designated from time to time by the D&H officer in charge of operations at Mohawk Yard, for the purpose of reaching NS's Mechanicville Terminal and interchanging with PAS.
4. The trackage rights notice of exemption filed in FD 34562 (Sub-No. 1) for NS's amendment of the Saratoga-East Binghamton Trackage Rights Agreement, dated September 30, 2004, as necessary to retain the portion of its existing trackage rights between Milepost 37.10 ± of D&H's Canadian Main Line in Saratoga Springs and CPF 484 at Schenectady, NY.

At this time, it appears that there could be other agreements going back to the Final System Plan or D&H's bankruptcy that may be modified, amended, or otherwise terminated. To the extent such agreements are subject to the jurisdiction of the STB, D&H or, if appropriate, NS will file with the appropriate regulatory authorities, as necessary, to effectuate any changes, amendments, or modifications to any existing jurisdictional agreements.

The following Exhibits are included in the Application, Volume II:

2. Exhibit 2 – Agreements (all drafts)
 - a. Asset Purchase Agreement
 - b. The Two New Commercial Agreements
 - c. Trackage Rights Agreement for FD 34209 (Sub-No. 1)
 - d. Trackage Rights Agreement for FD 34562 (Sub-No. 1)

SECTION 1180.6(a)(1)(i)

BRIEF SUMMARY OF TRANSACTION; IDENTIFICATION OF APPLICANTS AND PERSONS TO WHOM CORRESPONDENCE WITH RESPECT TO THIS APPLICATION SHOULD BE ADDRESSED

The Applicant is Norfolk Southern Railway, a Class I railroad. NS, as the Applicant, is seeking authority pursuant to 49 U.S.C. §§ 11321 and 11323(a)(2) to acquire and operate certain D&H rail lines, and pursuant to 49 U.S.C. § 11323(a)(6), to retain and modify existing overhead trackage rights over certain D&H lines in the Albany, NY area. NS has more than 30,000 employees and operates approximately 21,000 route miles in 22 states and the District of Columbia. See map at Exhibit 1A. NS is a wholly owned subsidiary of Norfolk Southern Corporation, a publicly-held non-carrier holding company.

Because 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), D&H is not an applicant. However, concurrent with the filing of this Application, D&H intends to file a related request seeking discontinuance authority for its trackage rights over certain NS lines, as described more fully above in response to Section 1180.6(a)(1).

The business address and telephone number of the Applicant is listed below:

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SECTION 1180.6(a)(1)(ii)

**PROPOSED TIME SCHEDULE FOR
CONSUMMATION OF TRANSACTION**

NS proposes to consummate the purchase of D&H as soon as a Board decision approving this Application and authorizing the proposed Transaction becomes effective. As set forth in its Petition for Procedural Schedule filed contemporaneously herewith, Applicant requests that the Board adopt its proposed procedural schedule.

SECTION 1180.6(a)(1)(iii)

**PURPOSE SOUGHT TO BE
ACCOMPLISHED BY THE PROPOSED TRANSACTION**

The primary purposes for the Transaction are to (1) benefit shippers through improved service and increased operating efficiencies; (2) preserve and enhance competition in the Northeast surface transportation market; and (3) preserve and possibly increase jobs on the D&H South Lines by integrating D&H employees with NS operations and by organically growing traffic on the lines.

The Transaction will bring substantial public benefits to shippers – starting with improved service. By aligning ownership of the D&H South Lines with the primary user (NS), the Transaction ensures that investment in, operation and maintenance of, and service levels on the D&H South Lines will be provided at the necessary and appropriate levels to support existing NS and D&H traffic on the lines, as well as any future organic traffic growth. Relatedly, the Transaction also eliminates the risk that the D&H South Lines will be owned by a carrier, whether D&H or a regional or short line railroad, for which a reduction in service and investment levels in the lines would be economically justified to the detriment of shippers. See *Friedmann V.S.*, at 4-5. D&H already has reduced the frequency of local service on the D&H South Lines. See *Friedmann V.S.*, at 4; Operating Plan, Exhibit 15, at 6. In contrast, NS intends to increase and restore local service. See *Friedmann V.S.*, at 13; Operating Plan, Exhibit 15, at 7.

Shippers also should benefit since NS routes generally tend to be more efficient than D&H routes and the larger NS rail network offers more single-line service options from origin to destination than the D&H/CP network. See *Friedmann V.S.*, at 10. By removing D&H as an overhead carrier and eliminating hand-offs between NS and D&H, the Transaction also will create more single-line service, which should improve network fluidity and increase car supply availability. See *Friedmann V.S.*, at 10. By eliminating the need to coordinate movements with multiple carriers, NS also will be able to schedule longer and more efficient trains between Binghamton and Mechanicville. See *Friedmann V.S.*, at 10. In addition, the Transaction will give NS the ability to improve blocking patterns and control train consists, allowing NS to consolidate redundant train movements and eliminate some interchanges in order to optimize traffic flows on the line. See Operating Plan, Exhibit 15, at 4, 8. The Transaction further

promotes operating efficiencies by eliminating the need to coordinate and cooperate with another carrier regarding dispatching, transit times, maintenance schedules, capital investment needs, safety plans, and marketing. See *Friedmann V.S.*, at 9; Operating Plan, Exhibit 15, at 8. By implementing one set of operating, maintenance, capital investment, and safety standards, NS believes it can increase average train speed, reduce dwell time, and implement a more reliable scheduled service. See *Friedmann V.S.*, at 9. NS also will be able to make decisions related to maintenance schedules and capital investment needs in a manner that best supports traffic flows over the line. See *Friedmann V.S.*, at 12. All of this will allow NS to provide more reliable and sustainable service to shippers using the D&H South Lines.

A key example of how the Transaction will result in improved operating efficiency and service capacity involves time-sensitive automotive and intermodal traffic moving in the NS-PAS corridor. See *Friedmann V.S.*, at 10-12; Operating Plan, Exhibit 15, at 7-8. The D&H South Lines are essentially end-to-end with the NS system, as there are only two points where the D&H South Lines connect with NS-owned lines: (1) at Sunbury, PA; and (2) at Binghamton, NY. Today, NS can connect with its joint venture partner, PAS,²⁶ at Mechanicville, NY by utilizing its trackage and haulage rights over the D&H South Lines between Sunbury, Binghamton, and Mechanicville. But doing so involves the coordination of three railroads – NS, D&H, and PAS. The Transaction will significantly reduce D&H’s role in these movements and will remove certain other commercial restrictions on NS’s traffic, giving NS greater ability to manage its connection to PAS and to better utilize its intermodal and automotive facilities there.

²⁶ PAS is operated as a joint venture between NS and Boston and Maine Corporation, and an important part of its traffic portfolio is service-sensitive automotive and intermodal traffic. This joint venture was approved in NS/PAS.

The PAS terminal at Mechanicville, NY has facilities for “fileting” incoming double-stack intermodal trains (i.e., converting them into single-stack trains by removing the top containers) and also for “toupeeing” incoming single-stack trains (i.e., converting them into double-stack trains by placing containers on top of the single container). The Mechanicville facilities, which opened in 2012, made it possible for NS to efficiently convert double-stack trains to single-stack trains capable of passage to the Ayer, MA intermodal terminal and to convert single-stack trains originating in Ayer to double-stack trains. For the first time, NS could move double-stack trains, which are the most efficient form of intermodal transportation, between western locations and the Northeast.

However, since the Mechanicville facilities opened, NS has been unable to consistently achieve the intended efficiencies of its fileting/toupeeing capabilities, due in part to the operating complications from having three railroads involved in the movement of intermodal trains. By reducing D&H’s role and improving NS’s ability to manage operations into and out of the terminal, including staging and prioritizing trains, NS believes that it can more consistently achieve the promised efficiencies of the Mechanicville facilities. In turn, these changes are expected to improve the consistency of operations and service for automotive and intermodal traffic moving in this corridor. See *Friedmann V.S.*, at 11-12; Operating Plan, Exhibit 15, at 7-8.

The Transaction also will not diminish competitive rail options for any shippers using the D&H South Lines. As noted above, the Transaction is essentially end-to-end in nature and the D&H South Lines and NS-owned lines only connect in two locations: Sunbury and Binghamton. There are no shippers in either of those two locations that are physically served by both NS and D&H so that such shippers would see a reduction in competitive alternatives from 2-to-1. See *Friedmann V.S.*, at 6. Likewise, any shippers on the D&H South Lines,

including those located on connecting short lines, who currently interline with D&H, CP, CN, or CSX, will continue to have that option. The Transaction simply will substitute NS connections and interchange points with CP, CN, CSX, and other carriers for D&H's connections with those carriers. See *Friedmann V.S.*, at 9-10. The interchange point may change, but the ability to interchange will remain.

All customers who receive service over the D&H South Lines pursuant to an existing contract or rate authority will continue to receive service pursuant to those rate authorities until they expire or are renewed or amended as a result of a commercial agreement that NS and D&H are voluntarily entering into at closing. Further, customers located on short line railroads that today have direct access or indirect access via trackage rights to both NS and D&H will continue to have access to both carriers. NS and D&H are voluntarily entering into a commercial agreement to preserve these competitive options for these customers. See *Friedmann V.S.*, at 7.

Not only will there be no loss of competitive rail options, but shippers also will benefit from enhanced competition in the Northeast surface transportation market as a result of the Transaction. See *Friedmann V.S.*, at 8. Today, NS is at a competitive disadvantage in the Northeast because it does not have a single-line route into this region. The Transaction will better secure NS's route to, and expand NS's customer access in, the Northeast, which will allow NS to compete more effectively against CSX (its primary rail competitor in the region) and other modes of transportation. The Transaction also will significantly improve NS's connection to its PAS investments, allowing NS to gain efficiencies in intermodal and automotive transportation which will further improve its ability to compete against CSX and other modes. D&H also will emerge stronger as a result of the Transaction as it will eliminate

underutilized, underperforming routes and will be able to focus on more successful routes in markets where the carrier enjoys a stronger competitive presence. Thus, the Transaction will introduce strong rail-to-rail competition between two Class I carriers in the Northeast and enhance existing rail competition with other carriers and alternative modes.

Finally, NS intends to hire, using its hiring practices and standards, approximately 150 of the current active D&H employees subject to a collective bargaining agreement who operate on the lines involved in the Transaction.²⁷ See *Friedmann V.S.*, at 12; Operating Plan, Exhibit 15, at 10-11. Since operations over the D&H South Lines will remain largely the same, and since the majority of traffic currently moving over the lines already is NS traffic, D&H employees on the lines will transition easily to post-Transaction operations and traffic. See *Friedmann V.S.*, at 12. NS anticipates that the remaining employees not hired by NS will be retained by D&H or offered positions with another CP-affiliated railroad. Any employees who are adversely affected by the Transaction will be entitled to the employee protective conditions in accordance 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). In addition, NS actually may create new jobs on the D&H South Lines, since NS believes it can organically grow traffic on the lines over the next five years. For example, NS intends to add local jobs on the lines to support increased and restored levels of local service

²⁷ NS reserves the right to decline to hire any individual D&H employee, in accordance with its hiring practices and standards.

and to dispatch the lines. See Operating Plan, Exhibit 15, at 11. Thus, the Transaction benefits those currently employed on the D&H South Lines.

SECTION 1180.6(a)(1)(iv)

NATURE AND AMOUNT OF NEW SECURITIES AND OTHER FINANCIAL ARRANGEMENTS

The proposed Transaction will not require the issuance of any new securities or any other financial arrangement requiring the Board's prior approval. As consideration for the sale of D&H, NS will pay D&H US \$217 million in cash.

SECTION 1180.6(a)(2)

PUBLIC INTEREST JUSTIFICATIONS

The provisions of 49 C.F.R. § 1180.6(a)(2) address, in general, issues which are specifically relevant only to major rail consolidation applications under 49 U.S.C. § 11324(b). The decisional criteria under 49 U.S.C. § 11324(d), which apply to minor and significant transactions, are more limited than those applicable to major mergers and focus solely upon whether the transaction will lessen competition and whether any anticompetitive effects outweigh the public interest in meeting significant transportation needs. Nonetheless, as set forth in the various witness verified statements and discussed throughout this Application, there are substantial anticipated contributions to the public interest in meeting significant transportation needs which clearly outweigh any lessening of competition, assuming any such anticompetitive effects exist.

(i) **Effect of the Proposed Transaction on Competition.**

As detailed in the verified statements of Dr. Grimm, Mr. Mutén, and Mr. Friedmann, contained herein, the Transaction itself will have no anticompetitive effects because there are no customers served directly by both D&H and NS on the D&H South Lines and there are no actual 2-to-1 corridors. NS's acquisition of the D&H South Lines is essentially an end-to-end transaction. The D&H South Lines and NS lines only connect in two locations: (1) at Sunbury, PA; and (2) at Binghamton, NY. There are no shippers in either of those locations that are physically served by both NS and D&H. As such, no such shippers would see a 2-to-1 reduction in competitive alternatives if NS acquires the D&H South Lines. See Friedmann V.S., at 6; Verified Statement of C. Grimm ("Grimm V.S."), at 9-10.

Furthermore, NS and D&H voluntarily have agreed to enter into at closing two new commercial agreements (see footnote 6, supra). See also Friedmann V.S., at 7. The first ensures that shippers with existing contracts or rate authorities will continue to receive the benefits of those contracts and rate authorities until those rate authorities expire or are renewed or amended. The second provides continued commercial access for shippers located on short lines that currently connect with both the D&H South Lines and NS lines.²⁸

Even taking the broadest possible view of competition by examining the cumulative effects of the Transaction, the discontinuance of trackage rights, and the termination or alteration of marketing and other agreements that are not within the Board's jurisdiction, there is not a substantial lessening of competition, creation of a monopoly, or restraint of trade in freight

²⁸ As NS's purchase of the D&H South Lines would not result in any actual 2-to-1 shippers, whether analyzed at points or via O-D pairs, these agreements are above and beyond what is required by Board precedent. As such, NS's acquisition of the D&H South Lines, which is the only Transaction (plus the minor retentions and modifications of trackage rights) subject to the Board's jurisdiction and approval in this Application, has no anticompetitive effects.

surface transportation in any region of the U.S.²⁹ In fact, even if one looks far beyond the limits of the Board's jurisdiction and examines the competitive effects arising from the discontinuance of trackage rights and the termination of non-jurisdictional agreements (in addition to the D&H South Lines acquisition), there still is no substantial lessening of competition.

To determine whether the Transaction as a whole, looking at the totality of all actions, whether subject to the Board's jurisdiction or not, might create some reduction in the independent competitive routing options available to shippers, Dr. Grimm, assisted by Mr. Mutén, examined the totality of all competitive effects resulting from the D&H South Lines acquisition, the trackage rights discontinuances, and the termination of the marketing and haulage arrangements. Dr. Grimm's analysis adopts a structural approach consistent with the U.S. Department of Justice's Horizontal Merger Guidelines and examines competitive effects in broader economic and strategic terms. This approach provides a more expansive assessment of the impact of a rail transaction on market structure than simply counting the number of railroads before and after a transaction at any one given point or station and goes well beyond merely delineating 2-to-1 shippers at a specific station or even a specific shipper facility. Such an approach is commonplace for assessing mergers in other industries and other countries.

Dr. Grimm's statement outlines his methodology, but in general, the first step was to define the relevant markets -- for example, rail traffic to/from all of the origin-destination

²⁹ D&H and NS have a number of marketing and haulage agreements with each other that provide some customers with commercial access to both NS and D&H and that are not subject to the Board's jurisdiction. While some of these agreements will be terminated, the competitive effects, if any, from the termination of voluntary marketing and haulage agreements are not subject to the Board's conditioning powers. Indeed, the Board already has expressly found that one of these agreements between D&H and NS is not subject to its jurisdiction and that the competitive effects arising from its termination are not actionable See D&H Discontinuance. Indeed, the parties could terminate these agreements in accordance with their terms at any time without Board approval.

corridors that could be impacted by the transaction. For this purpose, Dr. Grimm looked at BEA to BEA³⁰ corridors and all of the various combinations of rail routings in those corridors – regardless of whether those routings were by direct access, through haulage or marketing agreements, or via service from a connecting short line. After developing the database of all existing BEA to BEA routings, the second step was to analyze the market structure prior to the transaction as indicated by the existence of the various routings and the commodities flowing between the origin-to-destination pairs and the relevant market shares of the participants. The third step was to analyze the change in market structure in a given market from the transaction. If the structure was substantially more concentrated following the transaction, there was a strong presumption of competitive harm.

Dr. Grimm’s initial analysis, which some have argued in prior proceedings is overly broad and overstates anticompetitive effects, shows that even if one analyzes the competitive effects from the D&H South Lines acquisition, the trackage rights discontinuances, and the termination of the marketing and haulage agreements (without accounting for remedies created by the new commercial agreement) as part of one large Transaction, there would be only de minimis competitive effects and the Transaction would clearly not be anticompetitive. Likewise, it would not result in a substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the U.S.³¹

³⁰ Bureau of Economic Analysis Economic Area (BEA, 1995 version). The STB carload waybill sample uses BEA’s in its data analysis.

³¹ In prior proceedings, several parties have argued that a BEA to BEA analysis overstates anticompetitive effects because it treats all rail shippers within a given BEA as having access to all railroads serving that BEA. Dr. Grimm explains why he believes a BEA to BEA analysis is the proper geographic market for purposes of a competitive analysis. As Dr. Grimm points out, this is the same methodology that has been used and accepted by the Department of Justice. Considering that its use here has only produced four corridors that, on first blush, could result in

Dr. Grimm's initial analysis produced four corridors that would appear to be 2-to-1 corridors. However, upon further examination of these 2-to-1 corridors and after discussions with Mr. Mutén and Mr. Friedmann, Dr. Grimm determined that shippers/receivers utilizing these 2-to-1 routings would see only de minimis competitive effects as a result of the Transaction. These four corridors do not have true 2-to-1 independent competitive alternatives so as to make the Transaction anticompetitive. In three of the four corridors, CSX has independent routings which will not be impacted by the Transaction; and in the fourth corridor, Central Maine & Québec Railway serves as a bottleneck carrier in all routings so that the corridor is more of a 1-to-1 instead of a 2-to-1. As a result, Dr. Grimm concluded that even if one accounts for the discontinuance of the trackage rights and termination of the haulage and marketing agreements, the Transaction is not anticompetitive and only has de minimis competitive effects.

Indeed, it is important to note that none of the de minimis competitive effects result from the acquisition of the D&H South Lines or the retention and modification of NS's existing trackage rights, which are the only parts of the Transaction subject to the Board's approval pursuant to this Application. Rather, to the extent there are any competitive effects, these effects result from the termination of the privately negotiated marketing and haulage agreements which are not subject to the Board's authority or result from the discontinuance of the D&H trackage rights which are not economically justified and qualify for discontinuance authority whether or not the parties consummate the Transaction.

a reduction of independent routing options from 2-to-1, the Transaction clearly is not anticompetitive, even if one accounts for the competitive effects caused by the discontinuance or termination of the various trackage, marketing, and haulage agreements. Indeed, upon further examination, it was determined that even these four corridors were not true 2-to-1 corridors.

Furthermore, even if there are de minimis competitive effects, those limited effects, if they exist at all, do not outweigh the strong public interest benefits of this Transaction, which have been extensively discussed in this Application and include: (1) benefiting shippers by ensuring the appropriate levels of investment in and service on the D&H South Lines as necessary to support NS traffic, current D&H traffic, and projected organic growth on the lines and by aligning ownership with use, allowing NS to optimize traffic flows and capture operating efficiencies, all of which are expected to result in more reliable and sustainable service for shippers on the D&H South Lines; (2) increasing competition in the Northeast surface transportation market by creating a stronger NS and a stronger D&H who are positioned to compete more effectively in the Northeast against other railroads, including the regionally dominant CSX, and other forms of non-rail competition like trucks and barges; and (3) benefiting those employed on the D&H South Lines by preserving jobs on the lines that might otherwise be lost under continued D&H or a regional or short line carrier's ownership and by possibly increasing jobs on the lines from restored local service levels and dispatching the lines.

These are precisely the types of benefits that the Board previously has recognized in accepting and approving transactions as minor transactions. See Genesee & Wyoming Inc. - Control - RailAmerica, Inc., et al., FD 35654 (STB served Sept. 5, 2012) (noting applicants' statement that the acquiring party is committed to improving customer service when characterizing the transaction as minor); 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) (granting transaction a minor status due in part to applicants' statement that the transaction would result in enhancements to the existing infrastructure of the acquired lines); Fortress Investment Group LLC, et al. - Control - Florida

East Coast Railway, LLC, FD 35031 (STB served June 21, 2007) (citing potential improvements in transit times – i.e., an increase in average train speed, reductions in dwell time, and more reliable scheduled train service – among reasons for granting minor status); The Indiana Rail Road Company (INRD) - Acquisition - Soo Line Railroad Company, FD 34783 (STB served Jan. 13, 2006) (finding increased operating efficiency a factor in concluding that transaction was minor); Paducah & Louisville Railway, Inc. - Acquisition - CSX Transportation, Inc., FD 34738 (STB served Aug. 25, 2005) (citing operating economies, improved service, and improved financial viability among the reasons for granting the transaction minor status); Illinois Central Corporation, et al. - Control - CCP Holdings, Inc., et al., FD 32858 (STB served May 14, 1996) (better car supply availability and increased financial soundness of acquired railroads cited as benefits which helped characterize the transaction as minor); CSX Corporation and CSX Transportation, Inc. - Control - The Indiana Rail Road Company, FD 32892 (STB served Aug. 2, 1996) (finding potential for improved marketing a factor in classifying transaction as minor); Burlington Northern Santa Fe Corporation, et al. - Control - Washington Central Railroad Company, FD 32974 (STB served July 17, 1996) (finding increased operating efficiency a factor in concluding that transaction was minor).

Finally, even though there are no 2-to-1 shippers and no true 2-to-1 corridors, D&H and NS will enter into at closing two new agreements (see footnote 6, supra). The first ensures that shippers with existing contracts or rate authorities will continue to receive the benefits of those contracts and rate authorities until they expire or are renewed or amended; and the second preserves commercial access for shippers on short lines that currently connect with both the D&H South Lines and with NS lines. See *Friedmann V.S.*, at 7. D&H and NS voluntarily will take this step even though there are no anticompetitive effects from the Transaction. See

Friedmann V.S., at 6. Indeed, the Transaction not only will preserve, but actually will enhance, competition between and among railroads and other modes in the Northeast. See Friedmann V.S., at 8. As a result of the absence of anticompetitive effects and the presence of substantial pro-competitive effects resulting from the Transaction, the Transaction clearly qualifies as a minor transaction and should be accepted as such and approved by the Board.³²

(ii) Financial Considerations.

At closing, NS will pay D&H US \$217 million in cash. Applicant expects that consummation of the proposed Transaction will result in operating expense savings of approximately \$2.7 million annually. See Friedmann V.S., at 12; Operating Plan, Exhibit 15, at 8.

(iii) Effect Of Increase In Total Fixed Charges Resulting From The Transaction.

Because the Transaction will be financed with available cash, the Transaction will not result in any new debt or an increase in NS's annual interest expense. NS's cash payment to D&H will not adversely affect NS's operations or financial position.

(iv) Effect Of The Transaction Upon The Adequacy Of Transportation Service To The Public.

For the reasons discussed above, in the Operating Plan, Exhibit 15, and in Mr. Friedmann's verified statement, the proposed Transaction will improve the adequacy of transportation service to the public. The Transaction will benefit shippers on the D&H South Lines. Without this Transaction, if current trends continue, there is a risk that D&H will reduce service and investment levels on the D&H South Lines to align with its decreasing share of the

³² Because this Transaction will not have any anticompetitive effects, it is unnecessary to determine the applicability of 49 C.F.R. § 1180.2(b)(2). Nonetheless, even assuming there are some anticompetitive effects of the Transaction, the significant public interest benefits clearly outweigh any lessening of competition.

traffic on the lines. As a result of the Transaction, shippers will gain access to NS, a financially strong Class I carrier with more efficient routes and more single-line service options in its broader network. See *Friedmann V.S.*, at 10. In addition, transferring ownership of the D&H South Lines to NS should be a relatively seamless process with minimal service disruption to shippers, given that NS already operates daily over the D&H South Lines via trackage and haulage rights and is familiar with the line. See *Friedmann V.S.*, at 9, 12-13.

By aligning ownership of the D&H South Lines with the primary user (NS), the Transaction also should result in more reliable and sustainable service for shippers. For example, NS intends to increase and restore local service levels to at least five days per week versus D&H's three days per week. See *Friedmann V.S.*, at 13; Operating Plan, Exhibit 15, at 7. Removing D&H as an overhead carrier also will create more single-line service over the D&H South Lines, which should improve network fluidity and increase car supply availability. See *Friedmann V.S.*, at 10. The Transaction also will give NS the ability to improve blocking patterns and control train consists, allowing NS to optimize traffic flows on the line. See Operating Plan, Exhibit 15, at 4, 8.

Aligning ownership with usage further promotes operating efficiencies by eliminating the need to coordinate and cooperate with another carrier regarding dispatching, transit times, maintenance schedules, capital investment needs, safety plans, and marketing. See *Friedmann V.S.*, at 9; Operating Plan, Exhibit 15, at 7. By implementing one set of operating, maintenance, capital investment, and safety standards, NS expects to increase average train speed, reduce dwell time, and implement a more reliable scheduled service. See *Friedmann V.S.*, at 9. By eliminating the need to coordinate with another carrier, NS also will be able to schedule longer, more efficient trains between Binghamton and Mechanicville and will be able

to make maintenance and capital investment decisions in a manner that best supports traffic flows over the lines. See *Friedmann V.S.*, at 10. The benefits of the Transaction are described further in other sections of this Application, in the Operating Plan, Exhibit 15, and in Mr. Friedmann's verified statement.

(v) **Effect Of The Transaction On Employees.**

The effect of the Transaction on the employees of NS and D&H is addressed in Mr. Friedmann's verified statement and the attached Operating Plan, Exhibit 15. See *Friedmann V.S.*, at 12; Operating Plan, Exhibit 15, at 10-11. It is anticipated that no NS employees will be adversely affected by the Transaction. With respect to the 254 active D&H employees covered by collective bargaining agreements who operate over the lines involved in the Transaction, NS, applying its standard hiring practices, intends to hire approximately 150 of these employees. NS anticipates that the remaining employees not hired by NS will be retained by D&H or will be offered positions with another CP-affiliated railroad. Any NS or D&H employees adversely impacted by the Transaction will be entitled to labor protective conditions in accordance 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). In addition, NS actually may create new jobs on the D&H South Lines, since NS believes it can organically grow traffic on the D&H South Lines over the next five years. For example, NS intends to add local jobs on the lines to support increased levels of local service and to dispatch the lines. See Operating Plan, Exhibit 15, at 11.

No employee implementing agreements have been reached as of the date of this Application.

(vi) **Inclusion Of Other Railroads In The Territory.**

Inclusion is not a relevant statutory consideration in this proceeding because the Transaction proposed herein is a minor transaction.³³ Moreover, the proposed Transaction will not harm or cause the loss of essential services provided by any carrier, so there would be no public interest basis for ordering the inclusion in the Transaction of any carrier in the territory, even if such a criterion were considered.

SECTION 1180.6(a)(3)

OTHER SUPPORTING INFORMATION

The verified statements of the following individuals are submitted with this Application:

1. Dr. Curtis Grimm, Professor and Charles A. Taff Chair of Economics and Strategy at the University of Maryland, Robert H. Smith School of Business
2. Mr. Bengt Mutén, Senior Consultant, IHS
3. Mr. John H. Friedmann, Vice President - Strategic Planning, Norfolk Southern Corporation

In addition to the above verified statements, NS will supplement the record as appropriate with additional support statements from shippers or receivers, government entities, and short lines interested in the proposed Transaction.³⁴

³³ 49 C.F.R. § 1180.4(d)(i). Compare 49 U.S.C. § 11325(b)(2) and § 11325(c)(2) with 49 U.S.C. § 11325(d).

³⁴ Because the filing of this Application is occurring at the same time as the public announcement of the proposed Transaction, NS has not had an opportunity to collect such support statements prior to this filing. Nonetheless, NS expects to garner substantial shipper, government, and short line support.

SECTION 1180.6(a)(4)

OPINION OF COUNSEL

An Opinion of Counsel that the Transaction meets the requirements of the law and will be legally authorized and valid, if approved by the Board, is attached to this Application.

SECTION 1180.6(a)(5)

LIST OF STATES IN WHICH CARRIERS OPERATE

NS and its operating subsidiaries operate and own property in the States of Alabama, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia, and West Virginia. NS also operates in the District of Columbia.

D&H owns and operates over property in the States of New York and Pennsylvania as well as in Canada. D&H also has trackage rights in Maryland, New Jersey, New York, Pennsylvania, and the District of Columbia.

SECTION 1180.6(a)(6)

MAPS - EXHIBIT 1

Maps depicting the lines of NS and D&H and other rail lines in the territory and the principal geographic points in the region are attached hereto as Exhibit 1.

SECTION 1180.6(a)(7)(i)

NATURE AND TERMS OF THE TRANSACTION

Pursuant to the Transaction, NS will acquire and operate certain D&H rail lines located in Pennsylvania and New York, including any and all other tracks related or auxiliary to the acquired lines. In particular, NS seeks authority to acquire and operate approximately 267.15 route miles of the D&H Freight Main Line between Sunbury/Kase, PA (MP 752) and Schenectady, NY (MP 484.85), and 15.40 miles of the Voorheesville Running Track between Voorheesville Junction (MP A 10.9) and Delanson, NY (MP 499/MP A 26.3), for a total of 282.55 miles of D&H line (collectively, the “D&H South Lines”), including without limitation side tracks, sidings, and spur tracks; all rights-of-way, buildings, and structures (including without limitation the Binghamton Shop facilities) associated with the D&H South Lines; all leases, agreements, permits, licenses, and rights associated with the D&H South Lines; and as set forth in the APA, any and all other tracks related or auxiliary to the D&H South Lines.

In addition NS will retain and modify 17.45 miles of existing NS trackage rights over D&H’s line between MP 484.85 ± in the vicinity of Schenectady, NY and CPF 467 in the vicinity of Mechanicville, NY, including the right to use such track(s) within D&H’s Mohawk Yard as shall be designated from time to time by the D&H officer in charge of operations at Mohawk Yard, for the purpose of reaching NS’s Mechanicville Terminal and interchanging with PAS. NS’s modification of these existing trackage rights is included in the attached copy of the notice of exemption being filed in FD 34209 (Sub-No. 1). NS also is amending its existing trackage rights agreement as necessary to to maintain NS’s continued trackage rights between Milepost 37.10 ± of D&H’s Canadian Main Line in Saratoga Springs and CPF 484 at Schenectady, NY, and this trackage rights notice of exemption is being filed in FD 34562 (Sub-

No. 1). There may be other agreements, including agreements going back to the Final System Plan or D&H's bankruptcy, that may also be modified, amended, or otherwise terminated. To the extent such agreements are subject to the jurisdiction of the STB, D&H or, if appropriate, NS will file with the appropriate regulatory authorities, as necessary, to effectuate any changes, amendments, or modifications to any existing jurisdictional agreements.

At closing, NS will pay D&H US \$217 million in cash.

SECTION 1180.6(a)(7)(ii)

AGREEMENT - EXHIBIT 2

Submitted herewith as Exhibit 2, Volume II is a public version (redacted) copy of a draft APA currently being negotiated by NS and D&H, the two new commercial agreements, and any other executed or draft trackage rights agreements or amendments. The Highly Confidential versions of these agreements are likewise being submitted in a Highly Confidential version of Volume II under seal pursuant to the terms of the concurrent request for issuance of a Protective Order and on the basis that it will be treated as Highly Confidential under the proposed Protective Order. Consistent with the terms of the proposed Protective Order, NS has prepared two versions of Volume II -- a Public Version and a Highly Confidential Version -- and has filed the Public and Highly Confidential versions with the Board. There is only a Public Version of Volume I. Pursuant to the terms of the proposed Protective Order, as soon as the Board issues a Protective Order, parties may obtain a copy of the Highly Confidential Version of the Application upon execution of the appropriate Undertaking prescribed in the Protective Order.

SECTION 1180.6(a)(7)(iii)

INFORMATION REGARDING THE CONSOLIDATED ENTITY

The Transaction for which approval is sought in this Application does not involve a consolidation or merger. Accordingly, this subsection is not applicable.

SECTION 1180.6(a)(7)(iv)

COURT ORDER

This subsection is not applicable to this Application because neither a bankruptcy trustee, receiver, assignee, nor personal representative of NS or D&H is an Applicant herein.

SECTION 1180.6(a)(7)(v)

PROPERTY INVOLVED IN THE PROPOSED TRANSACTION

The property involved in the proposed Transaction does not involve all of the property of D&H. The D&H South Lines to be acquired by NS from D&H consist of 267.15 route miles of the Freight Main Line between Sunbury/Kase and South Schenectady and 15.40 route miles of the Voorheesville Running Track between Voorheesville Junction and Delanson. NS also will retain and modify 17.45 miles of existing NS trackage rights over D&H's line between MP 484.85 ± in the vicinity of Schenectady, NY and CPF 467 in the vicinity of Mechanicville, NY, including the right to use such track(s) within D&H's Mohawk Yard as shall be designated from time to time by the D&H officer in charge of operations at Mohawk Yard, for the purpose of reaching NS's Mechanicville Terminal and interchanging with PAS. NS also is amending the Saratoga-East Binghamton Trackage Rights Agreement, dated September 30, 2004, as necessary to retain the portion of its existing trackage rights between Milepost 37.10 ± of D&H's Canadian

Main Line in Saratoga Springs and CPF 484 at Schenectady, NY. In addition, NS will acquire three yards: East Binghamton Yard in Binghamton, NY; Taylor Yard in the Scranton/Wilkes Barre, PA area; and Oneonta Yard in Oneonta, NY. The specific property involved is further set out in the draft APA.

SECTION 1180.6(a)(7)(vi)

**PRINCIPAL ROUTES, TERMINI, POINTS OF INTERCHANGE
AND MILEAGE OF THE INVOLVED LINES**

NS seeks to acquire and operate 267.15 route miles of the D&H Freight Main Line between Sunbury/Kase, PA (MP 752) and Schenectady, NY (MP 484.85), and 15.40 miles of the Voorheesville Running Track between Voorheesville Junction (MP A 10.9) and Delanson, NY (MP 499/MP A 26.3).

NS-owned lines currently physically connect with the D&H South Lines at the following locations: Sunbury, PA and Binghamton, NY. NS currently interchanges with D&H at Buffalo, NY, Binghamton, NY, Allentown, PA, Harrisburg, PA, and at Mohawk Yard.

NS also will retain and modify 17.45 miles of existing NS trackage rights over D&H's line between MP 484.85 ± in the vicinity of Schenectady, NY and CPF 467 in the vicinity of Mechanicville, NY, including the right to use such track(s) within D&H's Mohawk Yard as shall be designated from time to time by the D&H officer in charge of operations at Mohawk Yard, for the purpose of reaching NS's Mechanicville Terminal and interchanging with PAS.

NS also is amending the Saratoga-East Binghamton Trackage Rights Agreement, dated September 30, 2004, as necessary to retain the portion of its existing trackage rights between Milepost 37.10 ± of D&H's Canadian Main Line in Saratoga Springs and CPF 484 at Schenectady, NY.

SECTION 1180.6(a)(7)(vii)

GOVERNMENT FINANCIAL ASSISTANCE

No governmental financial assistance is involved in the proposed Transaction.

SECTION 1180.6(a)(8)

ENVIRONMENTAL DATA

After examining the past and current traffic over the D&H South Lines, taking into account operational changes that will occur in a post-Transaction environment, and determining what traffic changes will occur over the various line segments and yards over a five year period through organic economic growth versus changes that could be attributed directly to the Transaction, NS has determined that under 49 C.F.R. § 1105.6(c)(2), the proposed Transaction is exempt from environmental reporting requirements. The proposed Transaction will not result in changes in carrier operations that exceed the thresholds established in 49 C.F.R. § 1105.7(e)(4) or (5). These thresholds are generally triggered if the transaction will result in either:

- (A) An increase in rail traffic of at least 100% (measured in gross ton miles annually) or an increase of at least 8 trains per day on any segment of rail line affected,
- (B) An increase in rail yard activity of at least 100% (measured by carload activity), or
- (C) An average increase of truck traffic of more than 10% of the average daily traffic or 50 vehicles a day on any affected road segment.

The thresholds will also be triggered if the action affects a nonattainment area under the Clean Air Act and will result in either:

- (A) An increase in rail traffic of at least 50% (measured in gross ton miles annually) or an increase of at least 3 trains per day on any segment of rail line affected,
- (B) An increase in rail yard activity of at least 20% (measured by carload activity), or
- (C) An average increase of truck traffic of more than 10% of the average daily traffic or 50 vehicles a day on any affected road segment.

As previously noted, D&H and NS currently operate over the D&H South Lines. Indeed, NS is already the primary user of the D&H South Lines, accounting for approximately 80% of traffic moving over the lines.³⁵ See *Friedmann V.S.*, at 5. Substituting NS for D&H will not result in a significant increase in traffic over the lines as NS simply intends to continue to operate its traffic and add D&H's existing traffic to its operations. D&H handled 45,681 carloads and intermodal units in the year 2013 over the D&H South Lines and NS handled 177,112 carloads and intermodal units in 2013, for a total of 222,793 carloads and intermodal units. In addition, there are no expected diversions from other rail carriers. Furthermore, all of the traffic expected post-Transaction can be accommodated under existing operations, with relatively minor changes as set forth in the Operating Plan, Exhibit 15.

Nonetheless, consistent with prior Board precedent, NS undertook an analysis of each line segment involved in the Transaction to determine, over a five year period, what traffic changes will occur over these various line segments. NS examined what traffic increases would be the result of normal, organic economic growth, and what additions to that growth could be attributed directly to the Transaction. NS forecasts an additional 63,292 carloads and intermodal

³⁵ The line segments analyzed by NS related to the line acquisition included Sunbury, PA – Taylor, PA, Taylor – Binghamton, NY, Binghamton – South Schenectady, NY, Lehighton, PA – Allentown, PA, and Sunbury – Harrisburg, PA. Those segments relevant to NS's trackage rights operations include South Schenectady – Mohawk, NY, Mohawk – Crescent, NY, Crescent – Mechanicville, NY, and Taylor/Dupont, PA – Lehighton.

units as a result of normal, organic economic growth in the year 2018 and an additional 44,930 carloads and intermodal units as a result of the Transaction in 2018. Based upon this data, NS has determined that under 49 C.F.R. § 1105.6(c)(2), the proposed Transaction is exempt from environmental reporting requirements. The proposed Transaction will not result in changes in carrier operations over any of the line segments involved that would exceed the thresholds established in 49 C.F.R. § 1105.7(e)(4) or (5).

Similarly, NS undertook an analysis of any changes that would occur in the rail yards involved in the Transaction over a five year period. The rail yards involved include East Binghamton Yard in Binghamton, NY; Taylor Yard in the Scranton/Wilkes Barre, PA area; Oneonta Yard in Oneonta, NY; and Mohawk Yard in the Albany, NY area. Only Mohawk Yard is in a nonattainment area. East Binghamton Yard handles approximately 343 carloads per day. Taylor Yard handles approximately 56 carloads per day. Oneonta Yard handles approximately 2 carloads per day. Mohawk Yard handles approximately 98 carloads per day. There will be some minor changes in the existing switching operations and train blocking occurring in these yards. However, the increase in traffic expected at any of these yards is not expected to exceed the thresholds. In 2018, NS projects additional activity as a result of organic and Transaction related growth at East Binghamton Yard of 37 carloads per day; at Taylor Yard, of 4 carloads per day; at Oneonta Yard, of 0 carloads per day; and at Mohawk Yard, a decrease of 10 carloads per day. Based upon this data, NS again has determined that under 49 C.F.R. § 1105.6(c)(2), the proposed Transaction is exempt from environmental reporting requirements. The proposed Transaction will not result in changes in activity at any of the yards involved that would exceed the thresholds established in 49 C.F.R. § 1105.7(e)(4) or (5).

Moreover, the Transaction is not expected to result in the increase of any truck traffic. If anything, the Transaction should make rail more efficient, resulting in less trucks, not more.

There are no plans for new construction of any connections, sidetracks, yard tracks, or other infrastructure. The existing infrastructure can accommodate the existing and anticipated traffic growth. The Transaction also will not substantially change the level of maintenance of railroad property. While NS will adopt its maintenance plan and capital investment schedule, which generally should result in better maintenance and track condition, at this time, NS has no plans for significant rehabilitation and improvement on the D&H South Lines. Even if there were, such rehabilitation and improvement plans would not be subject to environmental review by the Board.³⁶ As a result of the analysis that the proposed Transaction will not result in changes in carrier operations or yard activity that exceed the thresholds established in 49 C.F.R. § 1105.7(e)(4) or (5), no environmental report accompanies this Application.

Under 49 C.F.R. § 1105.8(b)(1) and (3), the proposed Transaction also is exempt from historic preservation reporting requirements. Rail operations will continue after NS's purchase of the D&H South Lines, and further STB approval will be required to abandon any service. NS has no plans to dispose of or alter properties subject to STB jurisdiction that are fifty years old or older. Accordingly, no historic report accompanies this Application.

³⁶ See Burlington Northern Santa Fe Corporation, et al. - Control - Washington Central Railroad Company, FD 32974 (STB served Oct. 25, 1996); Union Pacific Railroad Company - Petition for Declaratory Order - Rehabilitation of Missouri-Kansas-Texas Railroad Between Jude and Ogden Junction, TX, FD 33611 (STB served Aug. 21, 1998); Lee's Summit MO v. STB, 231 F.3d 39, 42-43 at n.3 (D.C. Cir. 2000); Salt Lake City Corporation - Adverse Abandonment - in Salt Lake City, UT, STB Docket No. AB-33 (Sub-No. 183) (STB served Mar. 8, 2002).

In conclusion, this Transaction is categorically excluded from analysis under the National Environmental Policy Act, 42 U.S.C. § 4332, and related laws because the action will have no significant effect on the human environment.

SECTION 1180.6(b) and (c)

These regulations call for certain information in connection with major and significant transactions and are not applicable to this minor Transaction.

SECTION 1180.7

MARKET ANALYSES

As noted in response to Section 1180.6(a)(2)(i), there are no anticompetitive effects that will result from the Transaction. However, NS retained Dr. Curtis Grimm and Mr. Bengt Mutén to undertake a more extensive competitive analysis that also included actions not subject to the Board's jurisdiction in order to supplement the competitive analysis set forth in Mr. Friedmann's verified statement. Dr. Grimm's analysis, which examined all of the competitive effects from all aspects of the Transaction, whether subject to the Board's jurisdiction or not, concludes that the Transaction is not anticompetitive and will not result in a substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the U.S. Mr. Friedmann has provided testimony that there are no shippers directly served by NS and the D&H South Lines who will see a reduction in competition from 2-to-1. See *Friedmann V.S.*, at 6. Likewise, as set forth in the Application, the Operating Plan, Exhibit 15, and Mr. Friedmann's verified statement, the Transaction generates substantial public benefits without any adverse effects on competition. See *Friedmann V.S.*, at 8-12; Operating Plan, Exhibit 15, at 7-9.

SECTION 1180.8

OPERATIONAL DATA

SECTION 1180.8(a) and (b)

These regulations call for certain information in connections with major and significant transactions and are not applicable to this minor Transaction.

SECTION 1180.8(c)

OPERATING PLAN/MINOR - EXHIBIT 15

An Operating Plan/Minor, prepared in accordance with 49 C.F.R. § 1180.8(c), is attached hereto as Exhibit 15. No significant changes in volumes, routings, patterns, or types of service are expected after the Transaction.

No adverse effects on commuter or other passenger service are anticipated. No lines will be downgraded, eliminated, or operated on a consolidated basis.

NS anticipates limited operating efficiencies as a result of the Transaction, but does expect some operating efficiencies to result primarily from the alignment of ownership of the D&H South Lines with the majority user (NS). This includes approximately \$2.7 million annual cost savings due to the elimination of haulage and trackage fees which are currently paid to D&H for use of the D&H South Lines and \$400,000 in annual cost savings attributable to more efficient operations at NS's intermodal facilities.

Other than the trackage rights discontinuance petition for exemption to be filed by D&H, there are no other abandonments or discontinuances contemplated in connection with the Transaction.

SECTION 1180.8(c)(1)

TRAFFIC DENSITIES

Applicant does not anticipate major changes in traffic density in the five years following the Transaction, although some minor increases in traffic due to organic growth are expected during that time as well as some minor traffic growth attributable to the Transaction itself. A table setting forth rail traffic, as measured by the average number of trains per day on the D&H lines which NS will acquire or gain trackage rights, in 2013 and five years later in 2018, is set forth in the Operating Plan, Exhibit 15. Any increases in traffic are not expected to result from diversions of rail traffic from other railroads.

SECTION 1180.8(c)(2)

IMPACTS ON COMMUTER OR PASSENGER RAIL

There is no scheduled passenger service over the D&H South Lines. Passenger service exists only on a portion of D&H lines in the Schenectady, NY area between MP 484.85 and MP 467.40 over which NS will retain and modify existing trackage rights. Even after the Transaction, NS will continue to be a tenant on this D&H line that hosts four Amtrak trains per day. NS's operating plan contemplates no additional passenger trains. Thus, NS does not anticipate any adverse effects on commuter or other passenger service operations as a result of the Transaction.

SECTION 1180.8(c)(3)

OPERATING ECONOMIES

As this is not a merger or amalgamation of two separate operations, NS does not anticipate substantial operating economies as a result of the Transaction, as the D&H South Lines are essentially end-to-end with the NS system. However, NS expects some operating efficiencies to result primarily due to the fact that the Transaction will align ownership of the D&H South Lines with the majority user.

First, NS currently pays D&H a haulage fee or a trackage rights fee for each car or unit moving over the D&H South Lines. NS anticipates approximately \$2.7 million annual cost savings from eliminating these trackage and haulage fees and instead operating the D&H South Lines itself. Such savings will permit NS to create an improved maintenance and capital investment schedule that better supports traffic flows over the line.

Second, aligning ownership with usage will give NS the ability to improve blocking patterns and control train consists in order to optimize traffic flows over the lines. As described in more detail in the attached Operating Plan, Exhibit 15, NS expects to consolidate redundant trains and avoid unnecessary interchanges, which promote increased operational efficiency and improved service levels.

Third, since both D&H and NS currently operate over the lines, the two carriers often engage in discussions and negotiations over dispatching, transit times, maintenance windows, capital investment needs, and safety plans; and they do not always agree, which has resulted in some disputes. By aligning ownership with usage, NS can implement one set of operating, maintenance, capital investment, and safety standards. NS believes this will allow it to provide more reliable and sustainable service for shippers.

In addition as described in more detail in this Application and in the attached Operating Plan, Exhibit 15, the Transaction will give NS a more efficient connection to its intermodal and automotive terminal facilities at PAS in Mechanicville, NY. This will allow NS to improve operational efficiency and service levels for time-sensitive automotive and intermodal traffic in the PAS corridor and is projected to result in an annual cost savings of \$400,000.

SECTION 1180.8(c)(4)

ANTICIPATED DISCONTINUANCES OR ABANDONMENTS

The Transaction subject to this Application will not involve any discontinuance of services or abandonment of rail lines. However, as noted above, D&H has determined to seek regulatory approval to discontinue various trackage rights that it currently has over certain NS lines. As NS understands, D&H has determined that its existing trackage rights operations are not economically justified and D&H most likely would file for discontinuance of some or all of these trackage rights irrespective of the Transaction.

SECTION 1180.4(g)(4)

INTERCHANGE COMMITMENT

D&H and NS do not intend to include, nor does the draft APA include, any provision that would limit NS's rights to interchange with any other carrier connecting to the D&H South Lines; and as such, the APA does not limit or restrict NS's ability to interchange with third party rail carriers. Accordingly, the provisions of 49 CFR § 1180.4(g)(4) are not applicable to the Transaction.

CONCLUSION

WHEREFORE, Applicant respectfully requests that the Board accept this Application for consideration and authorize the Transaction proposed herein.

Respectfully submitted,

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Attorneys for Norfolk Southern Railway Company

November 17, 2014

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Application in STB Finance Docket No. 35873, by first class mail, properly addressed with postage prepaid, upon all persons required to be served as set forth in 49 C.F.R. § 1180.4(c)(5), namely:

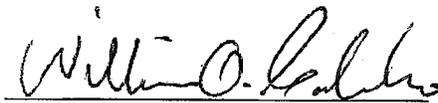
- i. The Governors of New York and Pennsylvania, the Public Service Commission of each state (the New York State Public Service Commission and the Pennsylvania Public Utilities Commission), and the Department of Transportation of each state (the New York State Department of Transportation and the Pennsylvania Department of Transportation) in which any part of the properties of the applicant carriers involved in the proposed transaction is situated;
- ii. The Secretary of the United States Department of Transportation;
- iii. The Attorney General of the United States; and
- iv. The Federal Trade Commission.

November 17, 2014


William A. Mullins
Attorney for Norfolk Southern Railway Company

**CERTIFICATION OF COUNSEL OF
NORFOLK SOUTHERN RAILWAY COMPANY**

I, William A. Galanko, hereby certify that I am Vice President – Law of Norfolk Southern Corporation (“NS”); and I hereby certify that John H. Friedmann is Vice President – Strategic Planning of NS and is duly authorized and designated to sign, verify, and file the foregoing Application on behalf of Norfolk Southern Railway Company.



**William A. Galanko
Vice President – Law
Norfolk Southern Corporation**

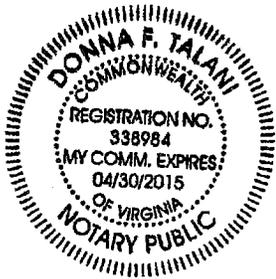
Subscribed and sworn to before me
this 11th day of November 2014.



Notary Public of the Commonwealth of Virginia

My commission expires:

April 30, 2015



SECTION 1180.6(a)(4)

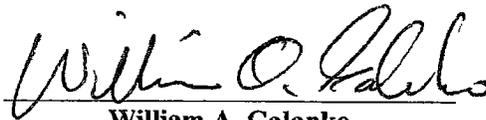
OPINION OF COUNSEL

I have reviewed the transaction described in this Application, the Articles of Incorporation, and the By-Laws of the Applicant. It is my opinion that the described transaction is within the corporate powers of Norfolk Southern Railway Company (“Applicant”) and that said Applicant is duly authorized to file this Application. It is my further opinion that the transaction meets the requirements of the law and will be legally authorized and valid, if approved by the Surface Transportation Board.

This opinion is given under the laws of the Commonwealth of Virginia, the corporate laws of Delaware, and the federal laws of the United States of America. It may be relied upon and considered only by the United States Surface Transportation Board, and not by any other person or for any purpose other than this Application.

This opinion is valid as of the date given. I shall not be responsible for supplementing or updating this opinion should circumstances change in the future. This opinion is being rendered in my capacity as attorney for Norfolk Southern Railway Company.

Respectfully submitted this 11th day of November 2014,



William A. Galanko
Vice President – Law
Norfolk Southern Corporation

**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.**

**APPLICATION FOR A
MINOR TRANSACTION**

VERIFIED STATEMENT OF JOHN H. FRIEDMANN

**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.**

VERIFIED STATEMENT OF JOHN H. FRIEDMANN

My name is John H. Friedmann. I am employed by Norfolk Southern Corporation (“NS”) in the capacity of Vice President Strategic Planning. My office is in Norfolk, Virginia. I have been employed by NS since 1994 and have occupied my present position since 2008. During my employment with Norfolk Southern, I have served in a variety of planning, operating, commercial, and administrative roles, including Assistant to the Chairman, Division Superintendent, and AVP Short Line Marketing. Since 2006, my responsibilities have included tactical and strategic asset acquisitions, line rationalization, and other strategic transactions to preserve and improve the efficiency and capacity of NS’s system. I have a Bachelor’s of Science in Industrial Management from Carnegie Mellon University and an MBA from the University of Pennsylvania. In my prior positions, I actively participated in the negotiations that resulted in the split of Conrail by and between NS and CSX Corporation (“CSX”), the agreements with Canadian Pacific Railway Company (“CP”) and Delaware and Hudson Railway Company, Inc. (“D&H”) executed in conjunction with the Conrail split, the formation of the joint venture

between NS and Pan Am Southern LLC (“PAS”), and the present transaction. As such, I am intimately familiar with the various rail networks in the Northeast and the operational and marketing arrangements between NS and D&H.

Based on my knowledge of NS’s and D&H’s networks, my various discussions with NS and D&H personnel, and certain analysis undertaken by NS, I believe the proposed acquisition (the “Transaction”) by NS of certain D&H assets (the “D&H South Lines”) represents the best possible outcome for all parties interested in the continued viability of the D&H South Lines, the efficient provision of rail service in the Northeast and New England, and the creation of two strong competitive rail systems in that region. I reach that conclusion for several reasons. First, D&H has a history of financial struggles; and, NS’s ownership of the D&H South Lines will bring financial stability, especially since NS traffic has become the predominant traffic on the lines. Second, there are no anticompetitive effects of the Transaction because there are no 2-to-1 shippers directly served by both NS and D&H. NS will continue to interchange with all connecting carriers and has no plans to close any gateways. Further, NS and D&H will enter into at closing two new commercial agreements that will preserve existing contractual arrangements and applicable rate authorities for customers receiving service over the D&H South Lines until the expiration, renewal, or amendment of the applicable contract or rate authority and ensure continued commercial access to D&H for shippers located on short lines that currently have connections with both D&H and NS. Third, there are substantial public benefits to this Transaction, including operational efficiencies and improved service; strengthened competition in the Northeast surface transportation market; improved financial viability; and adequate infrastructure maintenance and investment. None of these public benefits are likely to occur without aligning ownership with the predominant user of the lines (NS). In addition, the

Transaction will result in minimal adverse impact on employees and operational integration is expected to be relatively seamless given the extent of NS traffic already using the lines.

I. NS Ownership Provides Financial Stability.

A. Historical Background.

D&H has a prior history of financial struggles. In 1976, D&H, then a subsidiary of NS's predecessor Norfolk & Western Railway ("N&W"), emerged from the Final System Plan ("FSP") as the primary competitive option to the then-newly formed Conrail in certain areas of the Northeast, depending on friendly connections with predecessors of NS and CSX. Despite the intentions of the FSP, D&H was unable to provide meaningful competition to Conrail and struggled financially with low density on an over-extended, high-cost system. In 1984, Guilford Transportation Industries ("GTI") bought D&H from N&W for just \$500,000; but by 1988, GTI had placed D&H into bankruptcy. In 1991, CP eventually purchased D&H and made substantial capital infusions, provided greater marketing support, and utilized the synergies with adjacent CP lines. However, the acquisition and division of Conrail in 1999 by and between NS and CSX reduced D&H's role as a competitor in the Northeast, because most of the points served by D&H were now directly served by NS, CSX, or both carriers. NS and CSX have broader networks, superior routes, and higher density than D&H, making it extremely difficult for D&H to continue to compete on the D&H South Lines after the Conrail split, especially in the face of increased motor carrier competition.

Starting in 1999, D&H reinvented itself, again becoming largely an overhead carrier. The D&H South Lines became an important link in NS's access to PAS and other New England carriers, filling a hole in the NS system and providing a competitive alternative to CSX's

dominance in the region. Agreements between NS and D&H expanded over the years as NS and D&H sought to compete against Canadian National Railway (“CN”) and CSX.

B. NS And D&H Have Worked Over The Years To Find A Viable Solution For The D&H South Lines.

D&H has worked to find ways to make the D&H South Lines efficient and economically successful. Indeed, NS has participated in many of those efforts, including adding volumes to D&H, negotiating co-production agreements,¹ and improving D&H’s capacity. But those efforts have fallen short. D&H simply cannot act as an effective competitor against CSX, CN, and other modes given the competitive advantages that those carriers and modes enjoy over D&H, even with NS cooperation. As the Board noted in 2005 when D&H sought to discontinue unprofitable trackage rights in exchange for haulage agreements with NS for traffic on NS’s Southern Tier line between Binghamton, NY and Buffalo, NY, the Northeast surface transportation market would remain competitive even after D&H’s discontinuance of trackage rights. The Board stated that “[e]ven without the haulage arrangement here, we are satisfied that there will be sufficient competition in the region through CSX service over parallel lines across New York, and through intermodal competition.”² Likewise with respect to the current Transaction, the region will be better served by NS owning and operating the D&H South Lines.

C. Service Levels Likely Will Improve As A Result Of The Transaction.

Recently, D&H reduced its local service from five to three times per week to align with the decrease in its share of the traffic on the lines. NS is concerned that the economics do not justify D&H’s continued investment in, or maintenance or operation of, the D&H South Lines at the levels that NS believes are necessary and appropriate to support NS’s traffic on the lines,

¹ These agreements include various trackage and haulage rights agreements.

² D&H – Discontinuance of Trackage Rights (STB Docket No. AB-156 (Sub No. 25X) (Jan. 19, 2005).

serve local traffic and expected organic growth, and provide meaningful competition to CN, CSX, and other modes. NS believes that if the D&H South Lines are not purchased by a strong carrier with sufficiently aligned economic interests, then investment, maintenance, and service on the lines will suffer. This would not only imperil what little local traffic remains on the line, but it also would detrimentally impact NS's ability to operate over the lines and NS's time-sensitive intermodal and automotive service to Albany and New England.

It is important to emphasize that the D&H South Lines need to be purchased by a *strong* carrier like NS. In the absence of the Transaction, the alternative is not the status quo. If NS does not acquire the D&H South Lines, a regional or short line railroad likely would purchase the lines. However, the D&H South Lines have a low local carload density. This level of local traffic likely would not suffice to support a regional or short line railroad and would not justify the levels of investment, maintenance and service that NS believes are necessary to support NS's operations over the lines. This would compromise the overall quantity and quality of rail service available to shippers using the lines and NS's ability to compete effectively against CSX and other modes.

D. Today NS Is The Predominant User Of The D&H South Lines.

D&H today serves primarily as a landlord railroad of the D&H South Lines because NS has become the predominant user of these lines. Over the years, D&H's own use of major segments of the D&H South Lines largely has been supplanted by NS traffic moving pursuant to various haulage and trackage rights agreement. Today, NS traffic accounts for approximately 80% of carloads and intermodal units moving over the lines. In effect, NS is D&H's largest customer over the D&H South Lines. Integrating the D&H South Lines between Sunbury, PA and Schenectady, NY into the NS system simply would align ownership with the majority user.

This alignment has several public interest benefits, which I discuss below, including operational efficiencies and improved service, strengthened competition in the Northeast surface transportation market, improved financial viability, and adequate infrastructure maintenance and investment.

II. There Are No Anticompetitive Effects Of The Transaction, Existing Commercial Routing Options Will Be Preserved, And Competition Will Be Enhanced.

A. There Are No Anticompetitive Effects.

As part of the Transaction, NS will acquire and operate 282.55 miles of D&H rail lines between Sunbury, PA and Schenectady, NY (“D&H South Lines”), including any and all other tracks related or auxiliary to the acquired lines, and will retain and modify 17.45 miles of overhead trackage rights over D&H’s line near Albany, NY, including use of Mohawk Yard, for the purpose of reaching NS’s Mechanicville Terminal and interchanging with PAS. In addition, D&H will retain local access trackage rights to allow D&H to continue to serve the General Electric facility at Schenectady, NY, generally located between MP 485 and MP 486, and CP will retain certain existing operating rights to operate within the limits of Buffalo, NY.³

The Transaction will not result in any competitive harm to any shipper located on the D&H South Lines. The Transaction is essentially end-to-end in nature. The D&H South Lines and NS-owned lines only connect at two points: Sunbury and Binghamton. There are no shippers in either of those two locations that are physically served by both NS and D&H so that such shippers would see a reduction in competitive alternatives from 2-to-1.

³ After the Transaction, D&H will not have operations in the Buffalo area because NS and D&H are terminating the Southern Tier Haulage Agreement. CP will retain rights in Buffalo, NY.

B. Customers Will Continue To Have Commercial Access To Both NS And D&H/CP Routings

There are some customers that today have commercial access to both NS and D&H rates and routings. To preserve this access for these and other customers located on connecting short lines, NS and D&H voluntarily will enter into at closing two new commercial agreements. The first agreement will preserve existing contractual arrangements and applicable rate authorities for customers receiving service over the D&H South Lines until the expiration, renewal, or amendment of the applicable contract or rate authority. The second agreement is intended to ensure that shippers located on short lines that today connect with both NS lines and the D&H South Lines will continue to have commercial access to both D&H/CP and NS routings and rates for any future traffic not covered by their existing contracts.

In summary, there are no direct 2-to-1 customers who will see a reduction in their competitive alternatives, and any customers located on short lines that have commercial access to both NS and D&H will continue to have access to both NS and D&H/CP routing options after the Transaction. Thus, the Transaction will not result in a substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the U.S. There are clearly no anticompetitive impacts as would disqualify this Transaction from treatment as a minor transaction.⁴

⁴ Even if one viewed the two new commercial agreements between NS and D&H as not fully replicating or duplicating the existing competitive relationship between D&H and NS so that one could argue that there are some competitive effects, such minor competitive effects (which, in my opinion, do not exist) are clearly outweighed by the public benefits of Transaction as further discussed in this statement.

C. Competition In The Northeast Surface Transportation Market Will Actually Be Enhanced.

Not only will there be no loss of competitive rail options, but shippers also will benefit from the enhanced competition that the Transaction will generate in the Northeast surface transportation market. Today, NS is at a competitive disadvantage in the Northeast because it does not have a single-line route into this region. The Transaction will better secure NS's route to, and expand NS's customer access in, the Northeast, which will allow NS to compete more effectively against CSX (its primary rail competitor in the region) and other modes of transportation. As discussed further below, the Transaction also will improve NS's connection to its PAS investments, allowing NS to gain efficiencies in intermodal transportation which will further improve its ability to compete against CSX and other modes. Thus, the Transaction will introduce strong rail-to-rail competition between two Class I carriers in the Northeast and enhance existing rail competition between other rail carriers and alternative modes.

D&H also will emerge stronger as a result of the Transaction. Post-Transaction, D&H will be able to eliminate underutilized, uneconomic routes in order to focus on more successful routes in markets where D&H enjoys a stronger competitive presence. Thus, the Transaction will finally fulfill the goal of the FSP by creating a D&H poised to compete effectively with other railroads in the Northeast.

III. There Are Substantial Public Interest Benefits Of The Transaction.

A. Operational Efficiencies And Improved Service.

NS presently operates daily via haulage and trackage rights over all of the main line mileage involved in the Transaction. The D&H South Lines over which NS operates provide the connection in the NS system between Harrisburg, PA and the Southern Tier Line at Binghamton, NY and serve as a conduit connecting the NS system with PAS at Mechanicville, NY. As noted,

NS traffic represents the largest share of traffic over the lines. Since NS already operates daily over the D&H South Lines, NS's acquisition and operation of the lines from D&H should be a relatively seamless transition causing minimal disruption to shippers.

Transferring ownership of the lines to NS will eliminate the need for coordination and cooperation with another carrier regarding dispatching, transit times, maintenance schedules, capital investment needs, safety plans, and marketing, which issues have sometimes been contentious. By implementing one set of operating, maintenance, and safety standards, and aligning usage with operations for capital investment purposes, NS believes it can increase the average train speed over the lines, reduce dwell time, and implement a more reliable scheduled train service.

For example, NS operates a large amount of intermodal traffic over the D&H South Lines. Intermodal traffic generally is time-sensitive and requires certain track and operating conditions to facilitate expeditious movements. On the other hand, D&H traffic over the D&H South Lines is largely carload, which has different demands that may not justify maintaining the lines to the same levels as needed for intermodal freight. By eliminating the natural inefficiencies caused by having two railroads (with very different traffic mixes and operational demands) involved in every significant decision, shippers utilizing the D&H South Lines will benefit from improved service.

Shippers will also benefit from NS's strong balance sheet and competitive presence, without the loss of their existing commercial access. Indeed, any shippers on the D&H South Lines, including those on connecting short lines, who currently can use D&H or NS service to interline with other carriers (such as CP, CN, or CSX) will continue to have that option. The

Transaction simply substitutes NS service to the NS interchange points with those carriers for D&H interchange points – but, the ability for shippers to interchange will remain.

Shippers also will benefit from more efficient routings to larger markets, since NS routes generally tend to be more direct than D&H routes. For example, shipments to Chicago using D&H routes cross the U.S.-Canada border twice, but the same shipments using NS routes would not have to cross the border at all. Furthermore, shippers will benefit from increased single-line routing options, as the Transaction gives shippers access to the larger NS rail network, which offers more single-line service options from origin to destination than the D&H/CP network.

The Transaction also creates more single-line service on the D&H South Lines by eliminating hand-offs which are currently required by haulage and other agreements between NS and D&H for use of the D&H South Lines. This should improve network fluidity which in turn should improve car supply availability – an important benefit given the recent service problems experienced by some in the industry. In short, the Transaction will improve operational efficiency over the D&H South Lines.

As a particularly important example of the efficiencies that will be gained by the Transaction, I will point to NS's current service with PAS for intermodal and automotive traffic. The Transaction will permit NS to more effectively utilize the PAS intermodal and automotive terminal at Mechanicville, NY, built in 2012. The PAS terminal at Mechanicville has facilities for "fileting" incoming double-stack intermodal trains (i.e., converting them into single-stack trains by removing the top containers) and also for "toupeeing" incoming single-stack trains (i.e., converting them into double-stack trains by placing containers on top of the single container). The terminal was intended to permit NS to maximize its ability to move double-stack intermodal trains (the most efficient form of intermodal transportation) between western points and points in

eastern New York and New England.⁵ This restacking capability is essential to effectively competing with CSX's double-stack cleared, single-line route into New England.

However, since the Mechanicville facility opened in 2012, NS has been unable to consistently achieve the benefits of the file/toupee double-stack operation. This is due in large part to the challenges in coordinating intermodal train operations between three carriers - D&H, NS, and PAS. As a result, shippers have never fully benefitted from the operational efficiencies made possible with the PAS terminal. NS's acquisition of the D&H South Lines will reduce D&H's role and improve NS's ability to manage operations into and out of the terminal, including staging and prioritizing trains. This should facilitate NS's ability to realize the operational efficiencies and service improvements originally envisioned as part of the NS/PAS joint venture and construction of the Mechanicville terminal.

NS's acquisition of the D&H South Lines will improve service reliability for automotive traffic to the PAS facilities at Mechanicville, NY and Ayer, MA and for intermodal traffic to the PAS facilities at Mechanicville and Ayer and to the NS facility at Taylor, PA. NS's operating department projects that the benefits of the improvements in the efficiencies for intermodal traffic could generate upwards of \$400,000 in annual cost savings. These and other efficiencies should in turn allow NS to more consistently provide an effective rail alternative to the services currently provided by the other railroads in the region – particularly the regionally dominant CSX.

⁵ PAS's line from Mechanicville to the Ayer, MA intermodal terminal is restricted to single-stack trains by the Hoosick Tunnel. At Mechanicville, double-stack trains can be converted efficiently to single-stack for movement on to Ayer. Likewise, single-stack trains outbound from Ayer can be converted to high-efficiency double-stack trains.

B. Improved Financial Viability And Enhancements To The Existing Infrastructure.

Under existing operations, NS currently pays D&H a haulage fee or a trackage rights fee for each car or unit moving over the D&H South Lines. As a result of the Transaction, those haulage and trackage rights will be replaced by NS's ownership of the lines. It is estimated that the cost savings incurred by NS from eliminating these haulage and trackage rights fees to D&H for use of the lines, and instead operating and maintaining the D&H South Lines itself, will be approximately \$2.7 million per year. Such savings not only will improve the financial viability of NS, but also will permit NS to create and implement an improved maintenance schedule and capital investment program that is more in synch with the flow of traffic over the lines, which should ensure the sustainability of the existing infrastructure for future traffic on the lines.

C. Minimal Adverse Impact On Employees.

Of the current 254 D&H active employees under a collective bargaining agreement who operate over the lines involved in the Transaction, NS has committed to hire approximately 150 as part of the workforce necessary to operate the acquired lines and assets. I understand that the remaining D&H employees not hired by NS will be either retained by D&H or offered a position with a CP-affiliated railroad. The Operating Plan discusses in more detail NS's estimated employment needs following consummation of the Transaction. Because operations will remain largely unchanged, and because much of the traffic currently moving over the D&H South Lines is NS traffic, D&H crews will easily transition to post-Transaction operations and traffic.

D. Seamless Operational Integration.

The Transaction should result in the least disruption to shippers as NS is merely "stepping into the shoes" of D&H. Moreover, NS is familiar with operations over the D&H South Lines because it currently runs its own trains over the lines on a daily basis via trackage

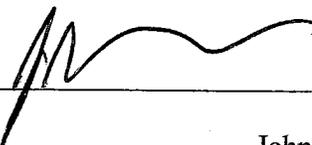
and haulage rights. NS intends to continue the existing D&H operating plan in terms of overhead train count and schedule, although NS intends to increase local service levels over D&H's current pattern. NS will manage the lines as part of its Harrisburg Division, headquartered in Harrisburg, Pennsylvania, and will dispatch from the divisional dispatching office in Harrisburg, instead of from D&H's dispatching center in Minneapolis, Minnesota.

CONCLUSION

In summary, the Transaction will not result in a substantial lessening of competition, creation of a monopoly, or the restraint of trade in any region of the country. There will be no shippers or receivers who see their competitive options reduced from 2-to-1. The Transaction also is expected to create more single-line service which promotes increased average train speed, reduced dwell time, and more reliable scheduled service; allow NS to capture operational efficiencies; improve both NS's and D&H's financial and competitive positions in the Northeast surface transportation market; and ensure continued sustainability of the D&H South Lines for current and future traffic flows. By aligning ownership with usage, NS's acquisition and operation of the lines also results in minimal adverse impact to D&H employees currently operating on the D&H South Lines and to shippers currently using the lines. As a result, the Transaction should be accepted by the Board as a minor transaction and approved.

VERIFICATION

I, John H. Friedmann, declare under penalty of perjury that I am authorized to make this verification on behalf of Norfolk Southern Railway Company, and that the information included in the foregoing statement is true and correct to the best of my knowledge and belief.



John H. Friedmann
Vice President – Strategic Planning
Norfolk Southern Corporation

Dated: November 11, 2014

**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

**APPLICATION FOR A
MINOR TRANSACTION**

VERIFIED STATEMENT OF CURTIS M. GRIMM

**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

VERIFIED STATEMENT OF CURTIS M. GRIMM

I. Introduction

My name is Curtis M. Grimm, and I am Professor and Charles A. Taff Chair of Economics and Strategy at the University of Maryland, Robert H. Smith School of Business, University of Maryland at College Park. I have been a member of this College since 1983. I received my B.A. in economics from the University of Wisconsin-Madison in 1975 and my Ph.D. in economics from the University of California-Berkeley in 1983. My Ph.D. dissertation investigated competitive impacts of railroad transactions.

In my background, I have extensively addressed public policy issues regarding transportation, including those examined in Interstate Commerce Commission ("ICC") and Surface Transportation Board ("STB") transaction and control proceedings. I have previously been employed by the Wisconsin Department of Transportation, the United States Interstate Commerce Commission, and the Australian Bureau of Transport and Communication, and I have provided consulting services to several other government agencies and private firms regarding transportation issues.

Pursuant to my background, I have extensively addressed public policy issues regarding transportation, including those examined in Interstate Commerce Commission (“ICC”) and Surface Transportation Board (“STB” or “Board”) merger and control proceedings. I have previously participated in several ICC and STB proceedings, including competing bids from Burlington Northern, Inc. (“BN”) and the Soo Line Railroad Company (“Soo Line”), Chicago, Milwaukee, St. Paul and Pacific Railroad Company (“Milwaukee Road”), and the Chicago and North Western Transportation Company (“CNW”) for the Green Bay and Western Railroad (“GBW”), the Burlington Northern/Santa Fe (BN/ATSF), the Union Pacific Corporation (“UP”)/Missouri Pacific Corporation (“MP”)/The Western Pacific Railroad Company (“WP”) merger (“UP/MP/WP merger”), the Wisconsin Central Transportation Corp. (“WCL”)/Fox Valley & Western Ltd. (“FV&W”) merger (“WCL/FV&W merger”), the UP/Southern Pacific Railroad Corporation (“SP”) merger (“UP/SP merger”), The Kansas City Southern Railway Company (“KCSR”)/ Gateway Western Railway Company (“GWWR”) merger (“KCSR/GWWR merger”), the KCSR/Texas Mexican Railway Company (“Tex Mex”)(“KCSR/Tex Mex merger”), and the Canadian Pacific Railway Company (“CP”)/Dakota, Minnesota, and Eastern (“DM&E”)(“CP/DME merger”). Specifically, I evaluated the competitive consequences of these transactions and provided testimony in the latter five cases.

My research has involved deregulation, competition policy, competitive interaction and management strategy, with a strong focus on transportation. This research has resulted in over 100 publications, including articles in leading journals such as *Journal of Law and Economics*, *Transportation Research*, *Transportation Journal*, *Logistics and Transportation Review*, *Academy of Management Journal*, *Management Science*, *Strategic Management Journal*, and *Journal of Management*. More than two dozen publications have dealt specifically with the

railroad industry, focusing mainly on deregulation, mergers, and competition issues. I have also co-authored four books or monographs. Further details may be found in the attached vita.

In summary, I have extensively researched and evaluated the competitive impacts of railroad mergers, and I have directly participated in several ICC and STB merger and control proceedings. In preparing my testimony in this proceeding, I have drawn on this experience and have analyzed a number of sources of data. A complete curriculum vitae is attached hereto as Appendix 1 to my statement.

II. Background And Summary Of Conclusions

As described in more detail elsewhere in the application, Norfolk Southern Railway Company (“NS” or “Applicant”) has announced its intention to enter into an asset purchase agreement with Delaware & Hudson Railway Company, Inc. (“D&H”), that would, if approved by the Surface Transportation Board (“STB”), result in NS becoming the owner of certain rail lines of D&H, a Class II railroad, which is a wholly owned, indirect subsidiary of Canadian Pacific Railway Company. The proposed transaction involves NS’s acquisition and operation of 282.55 miles of D&H rail lines located in Pennsylvania and New York (the “D&H South Lines”), including any and all other tracks related to or auxiliary to the acquired lines. NS also will retain and modify 17.45 miles of existing overhead trackage rights over D&H’s line near Albany, NY, including the right to use Mohawk Yard, to ensure NS’s continued access to NS’s Mechanicville Terminal and NS’s continued interchange with Pan Am Southern LLC (“PAS”). In addition, D&H will retain exclusive local access trackage rights to serve the General Electric facility at Schenectady, NY, generally located between milepost (“MP”) 485 and MP 486. D&H also will retain certain existing operating rights to operate within the limits of Buffalo, NY (collectively, the “Transaction.”).

I have been asked by NS to identify and discuss the potential 2-1 intramodal competitive impacts of the asset purchase agreement. I have been directed to take the broadest possible view of competition – by examining the effects of both the Transaction, the discontinuance of trackage rights, and the termination or alteration of marketing and other agreements that are not within the Board’s jurisdiction. Accordingly, with the assistance of Mr. Bengt Mutén, Senior Consultant at IHS Global, Inc., I have examined the potential 2-1 impacts of the transaction as a whole, looking at the totality of all actions resulting from the D&H South Lines acquisition, the trackage rights discontinuance, and the termination of the marketing and haulage arrangements.

My analysis has shown that the transaction as a whole has de minimis 2-1 impacts, which, when further examined convinced me that the transaction, as a whole, is clearly not anticompetitive. The Transaction, even accounting for the discontinuance of trackage rights and the termination or alteration of marketing and other agreements, will not result in a substantial lessening of competition, the creation of a monopoly, or a restraint of trade in freight surface transportation in any region of the United States.

III. A Structural Approach is the Appropriate Method to Analyze Competitive Effects

The STB, in having moved towards a policy emphasizing preserving and enhancing competition in rail mergers, has in fact moved towards a more structural approach with respect to reviewing rail mergers and consolidations. I have long supported such an approach and believe it is appropriate here. A structural approach evaluates transactions in broader economic and strategic terms and provides a more refined assessment of the impact of a transaction on market structure, as opposed to merely delineating “2-1” shippers at a specific station or even a specific shipper facility. Such a broader, structural approach is commonplace for assessing mergers in other industries and other countries.

To apply these standards to railroad mergers, it must first be understood that a railroad's "products" consist of the transportation of commodities between specific origin-destination pairs. A railroad is truly a multi-product firm, in that each origin-destination and type of commodity shipped can properly be regarded as a unique product. The first step in a structural approach focusing on potential reductions of intramodal competition is to define relevant markets. There are two critical issues in proceeding with the definition of relevant markets in a rail transaction case. The first is whether or not to include motor carrier traffic as a component of the product market. While truck clearly provides a competitive alternative to rail for some shippers in some specific markets, my analysis focuses on rail as the relevant product market. If the STB believes that truck traffic should be included in the relevant market, the competitive analysis herein would overstate the competitive impacts of the instant consolidation. The second step is to define the relevant geographic market. To define the geographic market dimensions of these rail corridors, I view each origin and destination as a Business Economic Area ("BEA"). In sum, I utilize a market definition of rail traffic between BEA pairs or corridors.¹

The rationale for the use of a BEA as a geographic market is that railroads within a given BEA compete in many ways – whether it be through direct or indirect competition. The basis for this statement can best be explained with a series of diagrams. Exhibit 1 presents three ways railroads could compete for a shipper's traffic in a given market. A shipper at industrial site #1

¹ There are substantial justifications for using a BEA to BEA analysis. Indeed, the methodology employed by the United States Department of Justice in the SF/SP case, *Santa Fe Southern Pacific Corp.--Control--SPT Co.*, 2 I.C.C. 2d 709 (1986), 3 I.C.C. 2d 926 (1987) ("SF/SP"), used a BEA to BEA analysis. Witness Pittman in his testimony and academic writings related to that case has explained why a BEA to BEA approach was appropriate. R.W. Pittman, "Railroads and Competition: The Santa Fe/Southern Pacific Merger Proposal," *The Journal of Industrial Economics*, 1990. The DOJ also used a similar approach in analyzing the UP/SP merger. As discussed later in more detail, in this case, I have found only four corridors that could be characterized as 2-to-1 corridors, and when competition in those corridors is examined further, I have determined that the transaction will not result in anticompetitive effects.

could receive *direct* service from Railroad A or Railroad B if both railroads' tracks traverse directly into the plant. Competition could also arise if the shipper can access Railroad A and B by *reciprocal switching*. In our example, the plant is served directly by Railroad A, which has a nearby junction with Railroad B. The two railroads have agreed that Railroad A will switch cars from industrial site #1 to the junction with Railroad B and enable the shipper to choose either railroad for the linehaul movement. (The agreement is reciprocal when the configuration is reversed for other shippers and Railroad B agrees to switch cars for Railroad A.) Finally, Railroad A and B could compete through a *terminal switching* railroad that they jointly own and that switches cars to its junction with either railroad. Terminal switching railroads provide a strong degree of competition between connecting Class I railroads because they operate independently of any carrier. They are found in many urban areas.

These forms of railroad competition are thought to be the most intense, but shippers captive to one railroad can also benefit from indirect competition supplied by a nearby carrier. Four examples are shown in exhibit 2. Industrial site #1 is now served only by Railroad B, but Railroad A is located in the vicinity. The shipper could ship its traffic to Railroad A by truck or by Railroad B, or locate a new facility on or build a spur line to Railroad A's line. All of these actions could be used as bargaining chips to obtain a lower rate from Railroad B or to get Railroad A to commit to a reduced rate. A shipper could also have captive plants located on both railroads (industrial site #2A is captive to Railroad A and industrial site #2B is captive to Railroad B), but the two plants' production levels are determined in part by rail rates charged to each plant. This could generate competition between Railroad A and B. These carriers could also be induced to compete if two shippers (industrial sites #3 and #4) were each served by one railroad and competed in the same product market. Finally, a shipper could be contemplating a

choice between locating at industrial site #5 or #6. Railroad A and B could be induced to compete for the shipper's traffic by offering (reduced) long-term contract rates to attract the shipper to locate on its line.

Shippers could also stimulate railroad competition in some cases through product or geographic competition. For example, an industrial site served only by Railroad A in a given market may be able to use a substitute product shipped from a different origin by Railroad B, or the site could obtain the same product from an alternative origin served by Railroad B. Exhibit 3 illustrates a situation where industrial site #7 is an electric utility captive to Railroad A in the Origin 1-Destination market, but the utility can substitute coal from origin 2 and enable Railroad B to compete for a portion of the linehaul.

The examination of types of shippers impacted by a loss of competition, as discussed above, supports a definition of rail markets as narrowly defined origin-destination pairs using BEA's. A final issue in defining rail markets is the complexity that many long-haul movements entail coordination by more than one carrier. It is common for connecting carriers to submit a single competitive bid for the entire movement. Therefore, competition is greatly enhanced when there are alternative, fully-independent routings available. If one firm participates in all of the routings, competition can be greatly hampered. In fact, the STB, and previously the ICC, have endorsed the principle that independence of routings is critical:

Competition between railroads generally requires the presence of two or more independent routes, that is, routes having no carriers in common. When a single carrier is a necessary participant in all available routes, *i.e.*, a bottleneck carrier, it can usually control the overall rate sufficiently to preclude effective competition.

Consolidated Papers, Inc., et al v. Chicago and North Western Transportation Co., et al, 7 I.C.C. 2d 330, 338 (1991).

Accordingly, in evaluating the potential 2-1 impacts of a transaction, I focus my attention on instances where the number of independent railroad routings is reduced from 2-to-1. The ICC's and STB's notion of independent routes set forth can be illustrated in the table below.

MEMPHIS TO SAN ANTONIO	
CURRENT RAIL ROUTES	MARKET SHARE FOR THAT
SP DIRECT	17%
UP DIRECT	31%
BN - UP	4%
CSX - UP	26%
NS - UP	22%

Prior to the UP/SP merger, there were five rail routings in the Memphis to San Antonio market, but only two independent routes: the one SP direct route and the four routes involving UP. The four UP routes constitute only one independent routing because UP is a bottleneck carrier for each of the four routes, leaving two independent competing routes pre-merger. After the UP/SP merger only one independent route remains, as UP/SP participates in each of the routes. Thus this BEA pair constituted a 2-to-1 market with regard to the UP/SP merger.

IV. Potential 2-1 Effects Of This Transaction: The Evidence

Using this methodology, NS asked me to examine the transaction as a whole, looking at the totality of all actions, to determine if there would be any 2-to-1 reductions in the independent competitive routing options available to shippers. Accordingly, working with Mr. Bengt Mutén, I examined the totality of all competitive effects resulting from the D&H South Lines acquisition, the trackage rights discontinuance, and the termination of the marketing and haulage arrangements as if all of the actions undertaken therein were subject to the Board's approval and

jurisdiction. Using the data provided to me by Mr. Mutén,² my analysis looked at existing O-D independent routings, including routings involving D&H utilizing its trackage and marketing rights over NS and routings originating or terminating on short lines that may utilize either NS or D&H via commercial access, and accounted for the fact that those D&H trackage and other rights will be terminated if the Application is approved. This analysis produced only four markets with potential 2-1 competitive effects from the transaction: BEA 1 (Bangor, ME) to BEA 7 (Rochester, NY); BEA 5 (Albany, NY) to BEA 7 (Rochester, NY); BEA 5 (Albany, NY) to BEA 8 (Buffalo, NY); and BEA 10 (New York, NY) to BEA 113 (Fargo, ND).

Market	Route	Tons
BEA 1 (Bangor, ME) to BEA 7 (Rochester, NY)	MMA CPD&H DHS ³ LAL	443
	MMA CPD&H DHS RSR	201
	MMA CN NS	444
BEA 5 (Albany, NY) to BEA 7 (Rochester, NY)	MMA CPD&H NS	91
	CSX NS	26
	VTR D&H DHS NS	61
	D&H DHS	70
BEA 5 (Albany, NY) to BEA 8 (Buffalo, NY)	NS	10
	CSX NS	540
	VTR D&H DHS BPRR	383
BEA 10 (New York, NY) to BEA 113 (Fargo, ND)	NS	15,290
	NS BNSF	81
	DHS D&H CP SOO	70

Upon further examination of these 2-to-1 routings and discussions with Mr. Mutén and NS, I determined that shippers/receivers utilizing these routings would see only a de minimis reduction in their competitive alternatives through the transaction. In fact, I determined that these corridors were not true 2-to-1 independent competitive alternatives in which there would be a lessening of

² Mr. Mutén's verified statement explains in further detail what data was used and the process undertaken to identify all possible O-D pairs within the U.S. that are involved in the transaction as a whole.

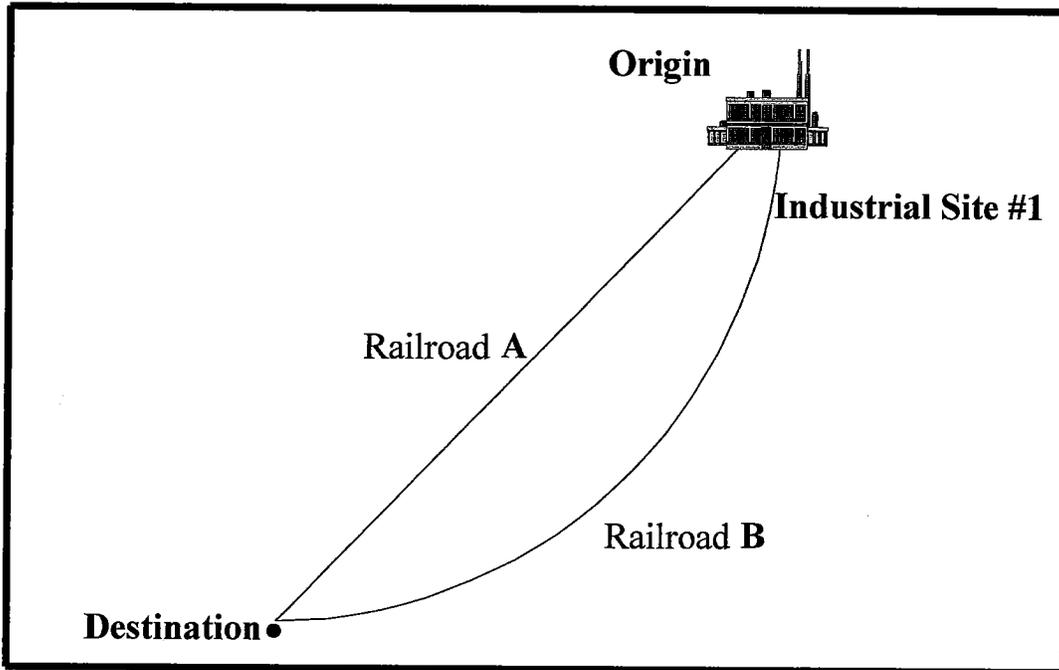
³ "DHS" refers to D&H traffic moving in haulage on NS's Southern Tier.

competition. This is because there exists independent alternatives to NS/DHS involving CSX, although the sample used for the analysis did not include any such CSX traffic for that particular year, notwithstanding the existence of CSX routings. In particular, for the latter three markets, there are direct routes involving CSX which would provide independent alternatives. In the first market, the Montreal, Maine and Atlantic Railway (MMA) participates in all of the routings, and arguably the market could be classified instead as a 1-1 market.

In summary, my conclusion is that the transaction as a whole is clearly not anticompetitive. The Transaction, even accounting for the discontinuance of trackage rights and the termination or alteration of marketing and other agreements, will not result in a substantial lessening of competition, the creation of a monopoly, or a restraint of trade in freight surface transportation in any region of the United States.

Exhibit 1: Competition Provided by Direct Railroad Service, Reciprocal Switching, and Terminal Switching

Shipper has direct service from two railroads.



Shipper has competitive service from two railroads via reciprocal switching.

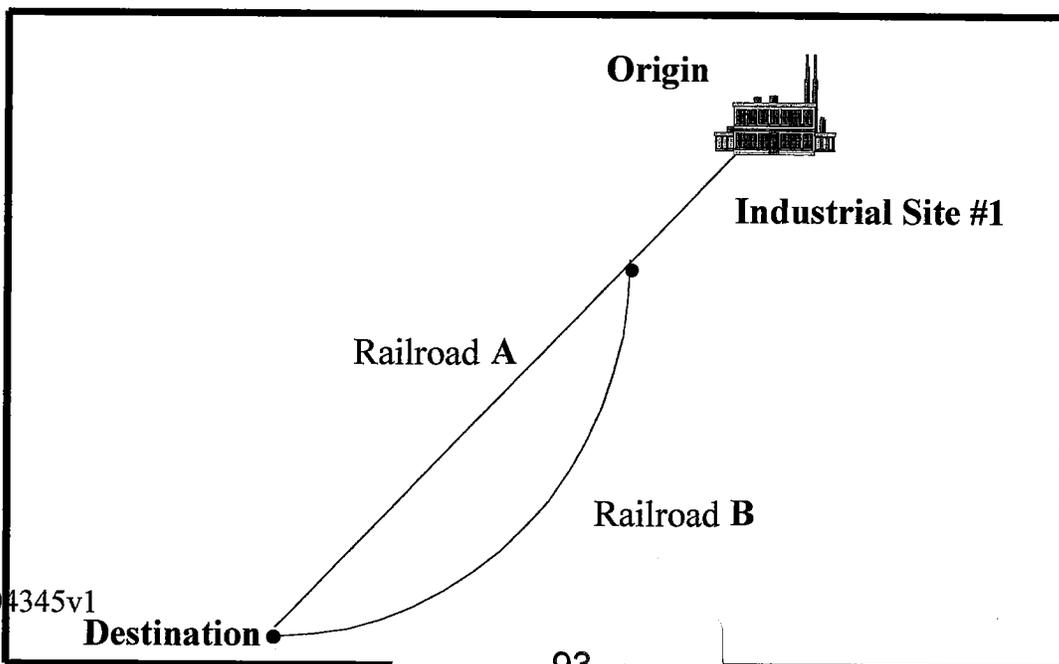


Exhibit 1: Continued

Shipper has competitive rail service from two railroads via a terminal switching railroad.

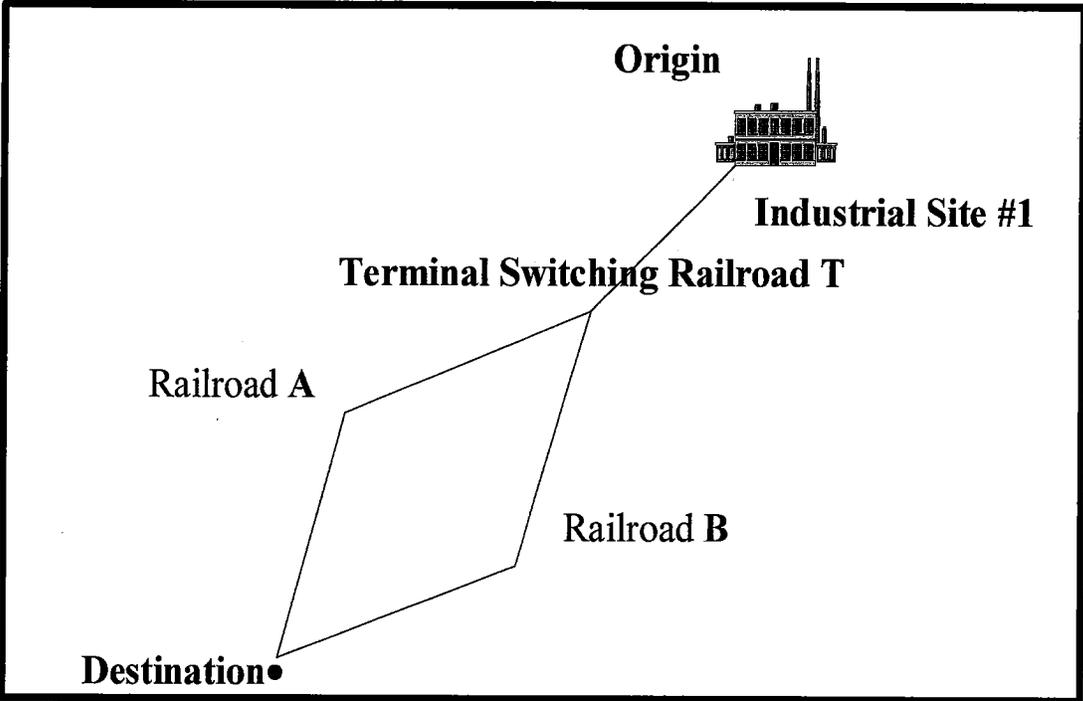
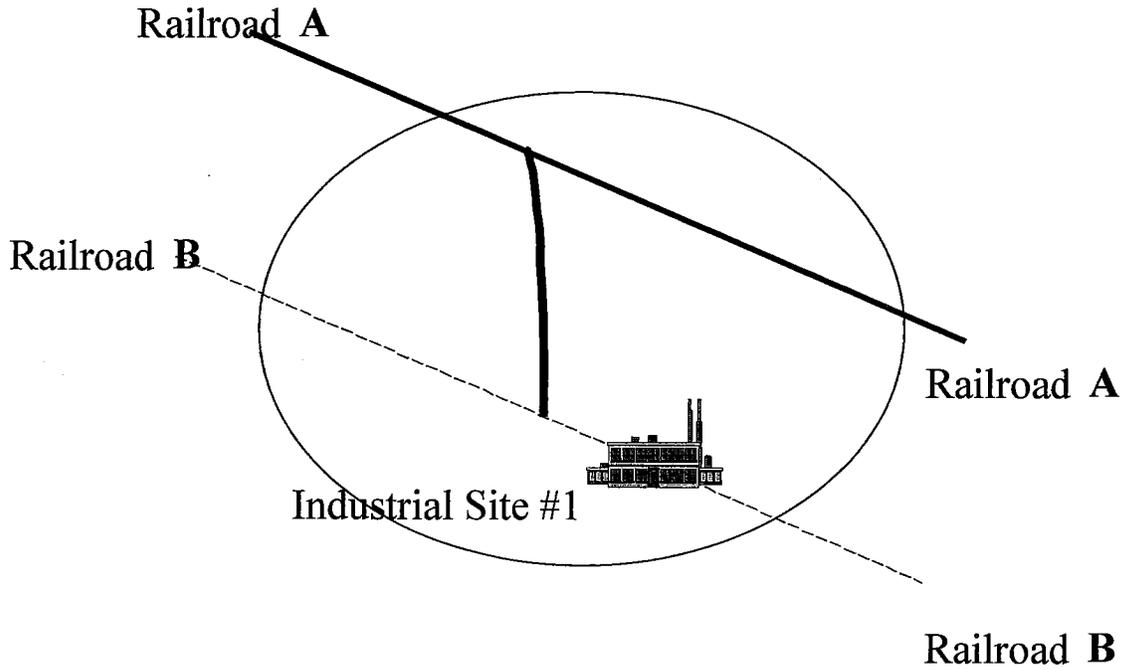


Exhibit 2: Competition Provided by Nearby Carriers

Shipper has physical access to only one railroad but is in proximity to the other.



Shipper has captive plants on both Railroads A and B lines.

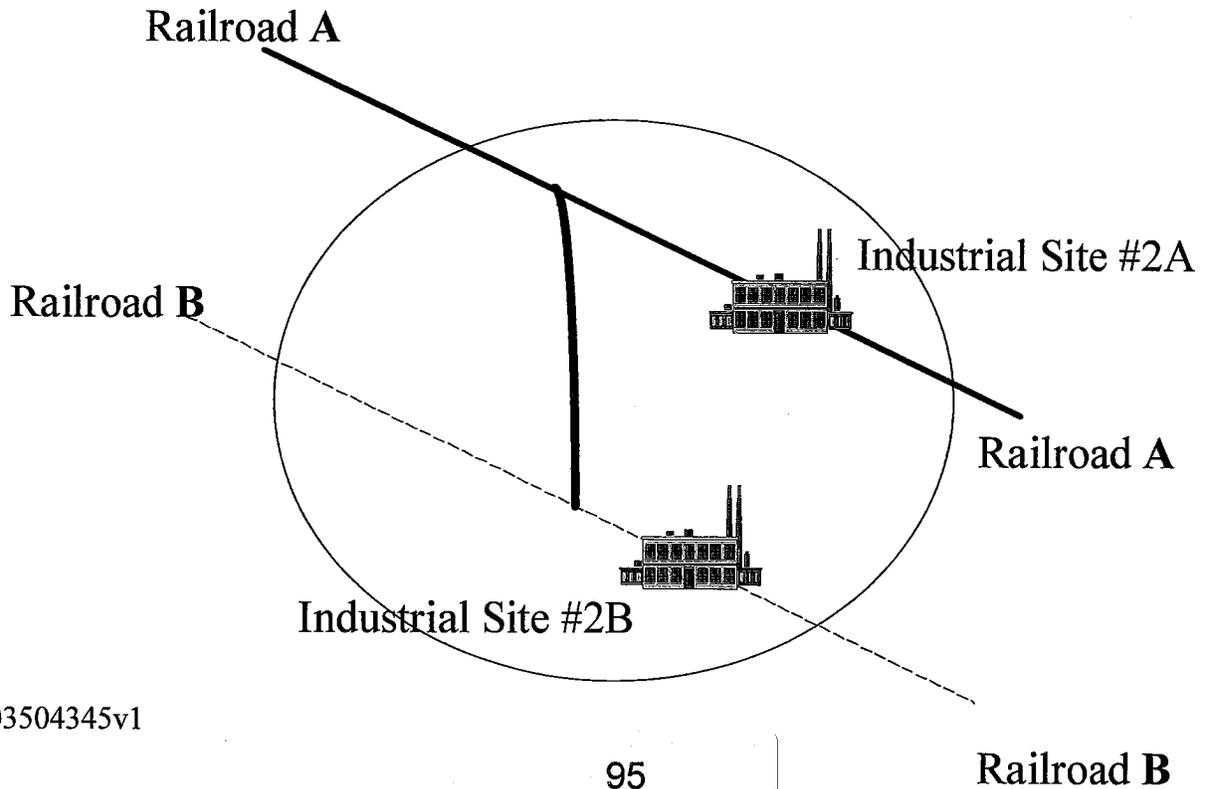
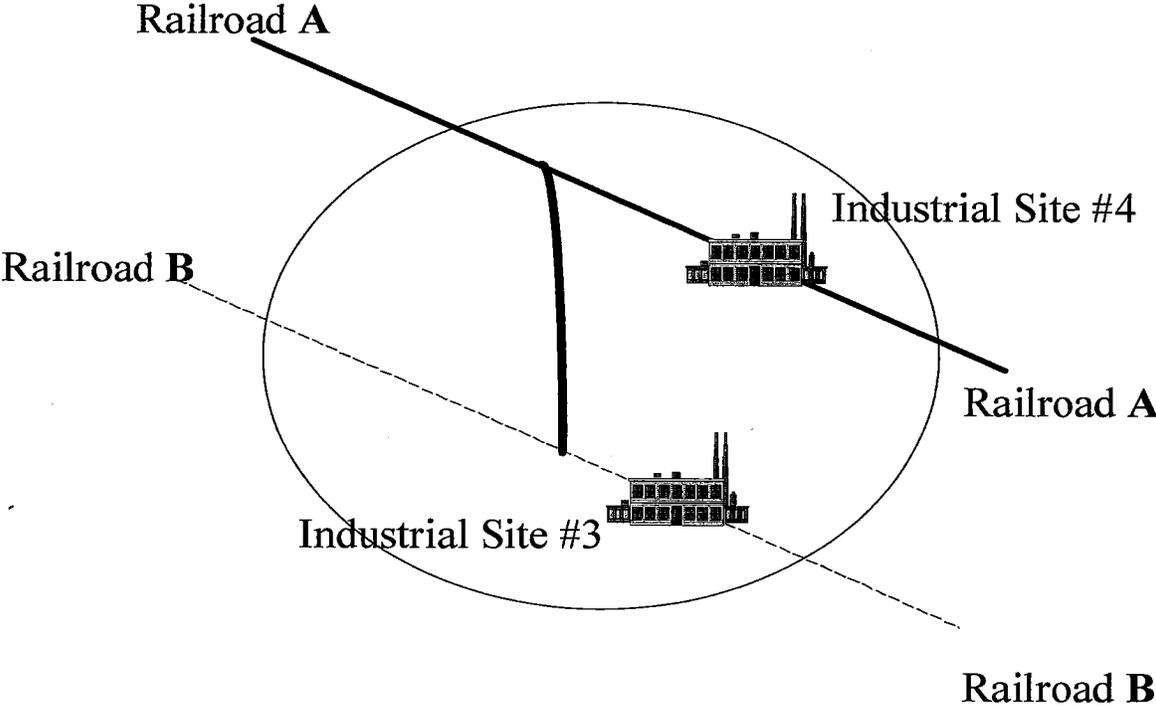


Exhibit 2: Continued

Shippers served by different railroads competing
in the same product market.



Shipper benefits from ex ante site location
competition.

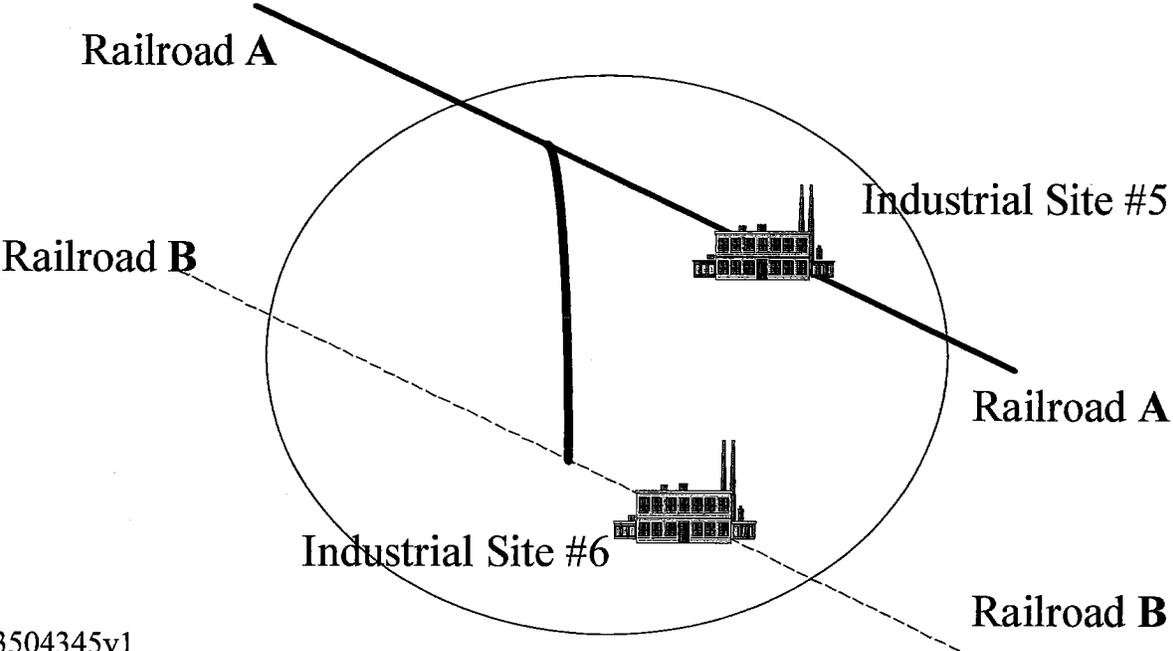
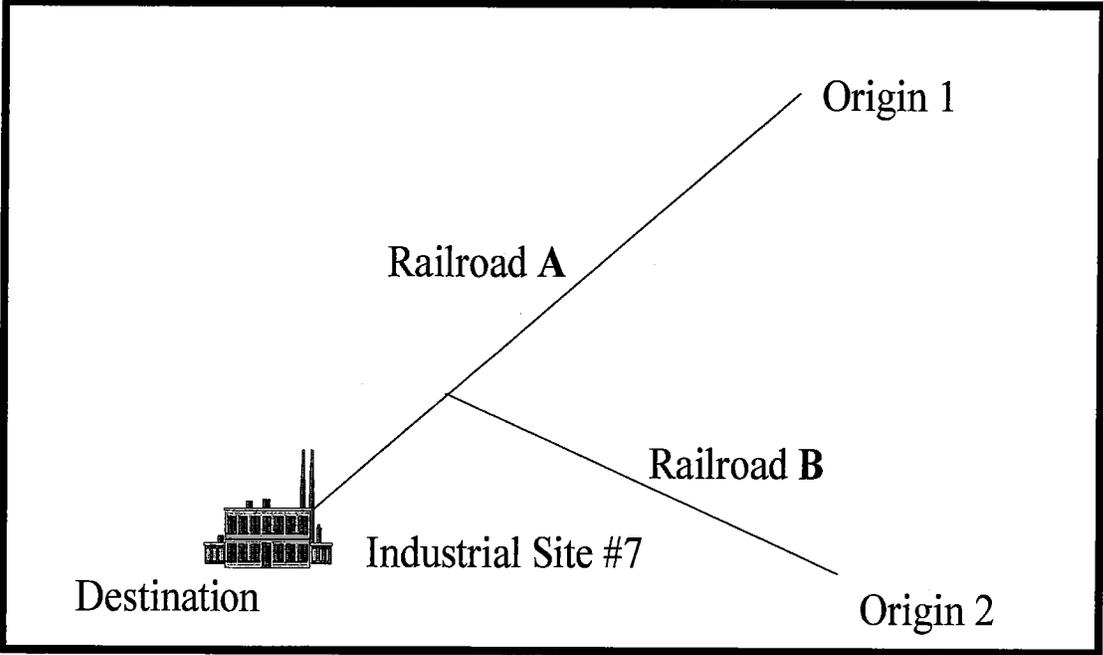


Exhibit 3: Geographic Competition

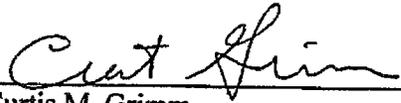
Shipper is served by only one railroad but can draw on alternative origins served by alternative railroads.



VERIFICATION

I, Curtis M. Grimm, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed this 5th day of November, 2014.


Curtis M. Grimm

**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

VERIFIED STATEMENT OF BENGT MUTÉN

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- ACQUISITION AND OPERATION -

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VERIFIED STATEMENT OF BENGT MUTÉN

Introduction

My name is Bengt Mutén. I am a Senior Consultant at IHS Global, Inc. (IHS), a provider of technical information, decision-support tools and related services with principal offices in Englewood, Colorado. Since I joined DNS Associates in June 1980, I have conducted numerous railroad traffic diversion studies for both strategic planning purposes and in support of merger and acquisition filings. My education includes an S.B. in Management from Massachusetts Institute of Technology, and an M.S. in Civil Engineering from University of California, Berkeley.

I provided summarized traffic data to Dr. Curtis M. Grimm for use in his competitive analysis. To do this, I assembled and combined railroad traffic data sets, and identified unique routes.

Data Sets

A number of datasets were combined, and duplicates excluded. This set summarized by origin and destination the Bureau of Economic Analysis Economic Area (BEA, 1995 version)¹ and route (carriers in the route in sequence), and net tons were accrued:

Norfolk Southern

Norfolk Southern provided a complete set of waybills for 2012. For each of those, the origin and destination BEA was added, primarily using the origin and destination Freight Station

¹ Economic Areas are intermittently revised. The STB uses the 1995 definitions with the Carload Waybill Sample, thus we used them for this analysis. For definitions of the Economic Areas, see Kenneth P. Johnson, "Redefinition of the BEA Economic Areas", *Survey of Current Business*, February 1995, downloaded from www.bea.gov/scb/pdf/regional/proj/1995/0295rea.pdf

Accounting Codes (FSAC). For a minority of records, the FSAC was not valid or did not match with the name or Standard Point Location Code (SPLC) on the waybill, in which case the BEA was derived from the best available field.

Most of the records included a route field, listing the carriers and junctions of the route in sequence. Where it was missing or did not match the other carrier information on the records, it was accepted or revised using the other information.

Delaware & Hudson

Delaware & Hudson (D&H) provided a complete set of the waybills for 2012 that originated, terminated, and/or were interchanged on the D&H South Lines. The route field was then modified to show D&H South Lines (D&H haulage on the Southern Tier is treated as D&H South Lines haulage) as a separate carrier from the remainder of the D&H route (if any). This is shown as DHS in Dr. Grimm's testimony.

IHS Transearch®

For his analysis, Dr. Grimm also needed information regarding traffic on carriers other than NS or D&H South Lines. IHS has a commercial database of US freight flows — Transearch. For this analysis, we used the rail data in IHS Transearch. This database is in turn developed from carrier data from some Class I railroads, supplemented by the STB Carload Waybill Sample Public Use File for the remaining traffic. In order to preserve shipper confidentiality, both the carrier data and the Public Use Files have had origin and destination information redacted in cases where there are not at least three freight stations originating or terminating the commodity in the BEA.

For Transearch any missing origin and destination BEA codes are estimated using production, consumption, and port information, combined with the territory, distance, intrastate and number of junctions fields in the waybill data. The Transearch rail data was adjusted for the known NS and D&H South Lines flows.

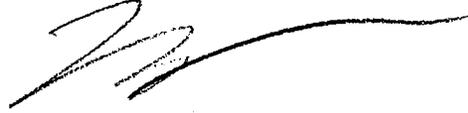
2-1 Flows

All BEA pairs where both NS and D&H South participated in traffic were examined. BEA pairs where traffic moved over routings not involving either NS or D&H South lines were excluded from consideration as 2-1 markets. For the remaining BEA pairs, routings were examined to determine 2-1 cases, as discussed in more detail by Dr. Grimm.

VERIFICATION

I, Bengt Mutén, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed this fifth day of November, 2014.



Bengt Mutén

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35873

NORFOLK SOUTHERN RAILWAY COMPANY

- ACQUISITION AND OPERATION -

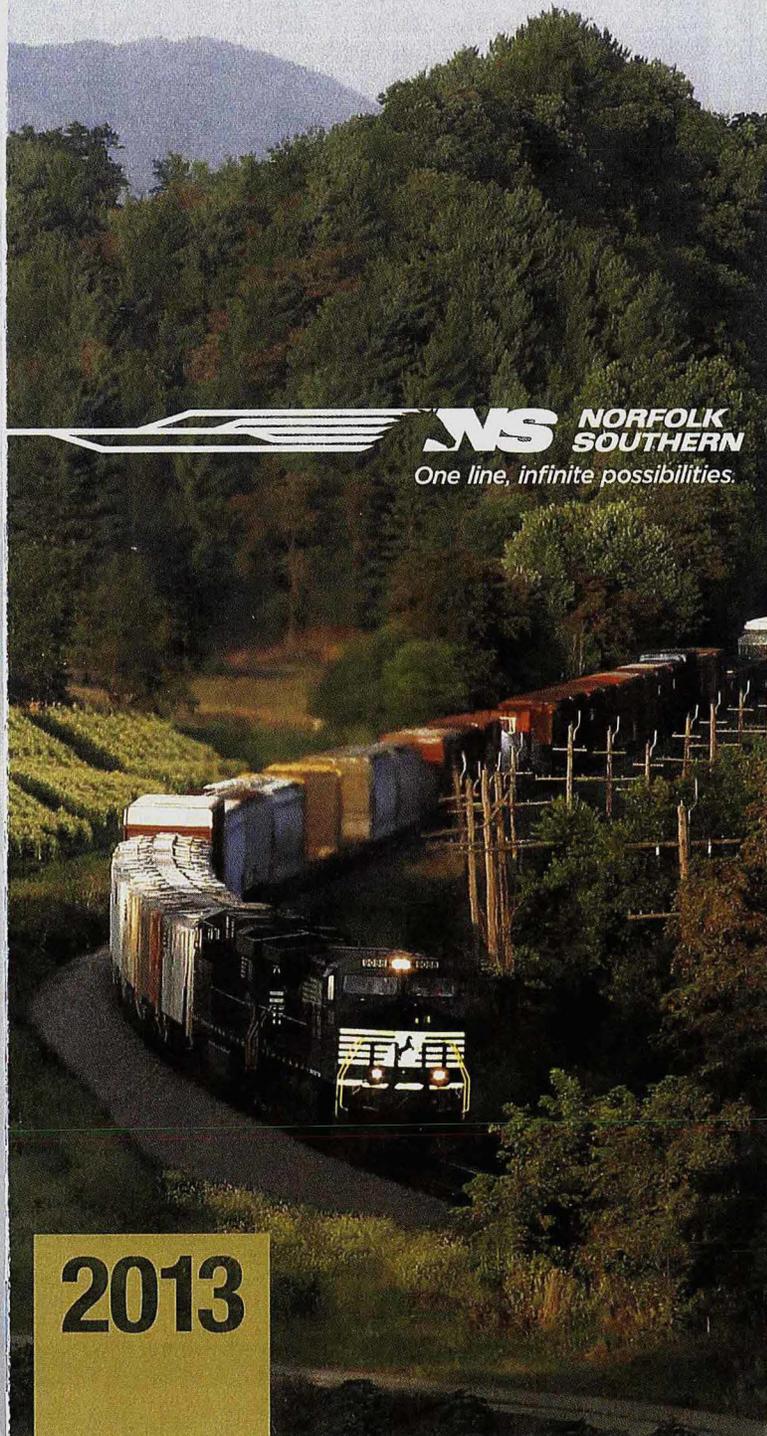
**CERTAIN RAIL LINES OF THE DELAWARE AND HUDSON RAILWAY
COMPANY, INC.**

**APPLICATION FOR A
MINOR TRANSACTION**

VOLUME I

MAPS - EXHIBIT 1

SYSTEM MAP



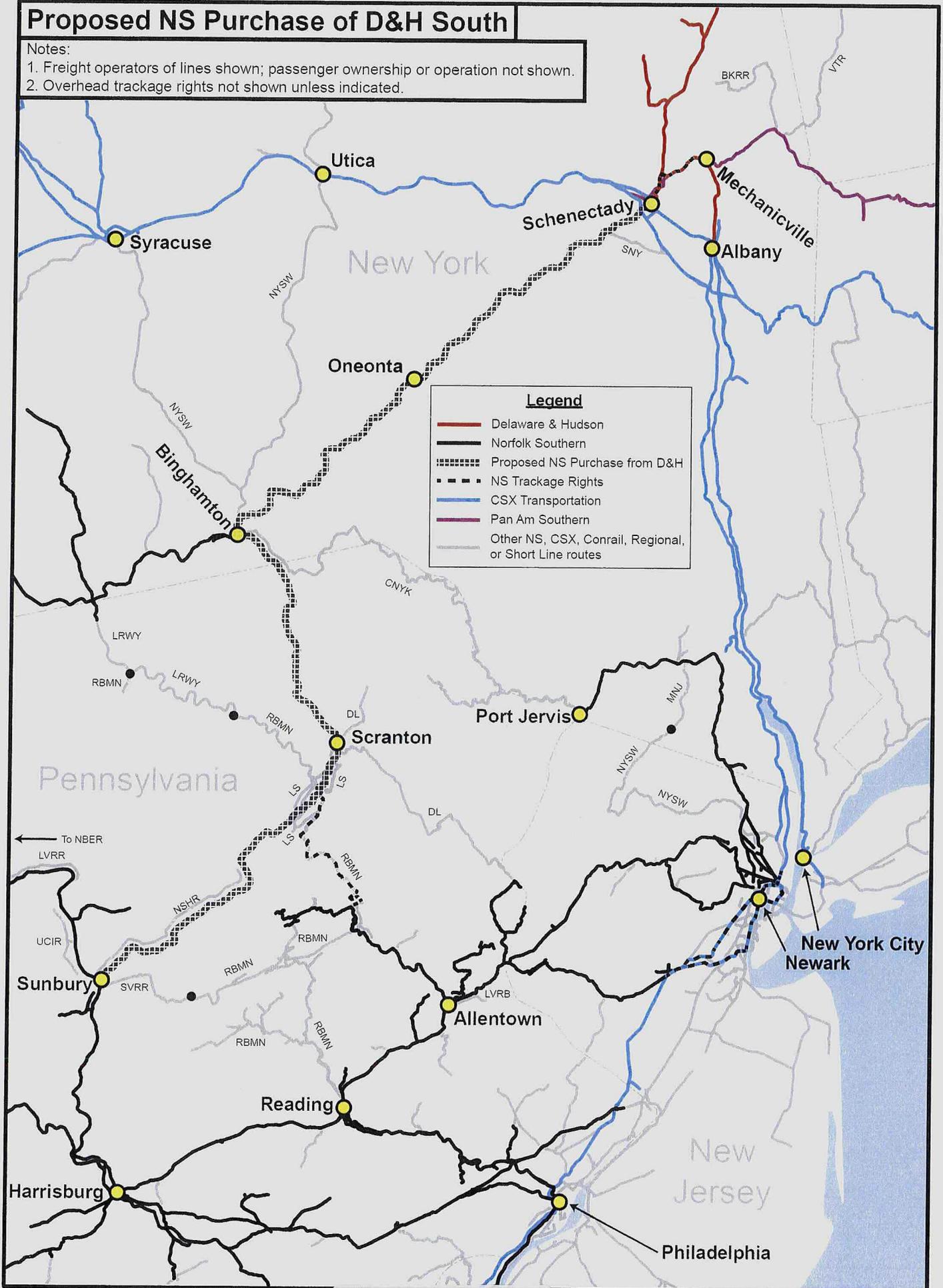
 **NS** NORFOLK
SOUTHERN
One line. infinite possibilities.

2013

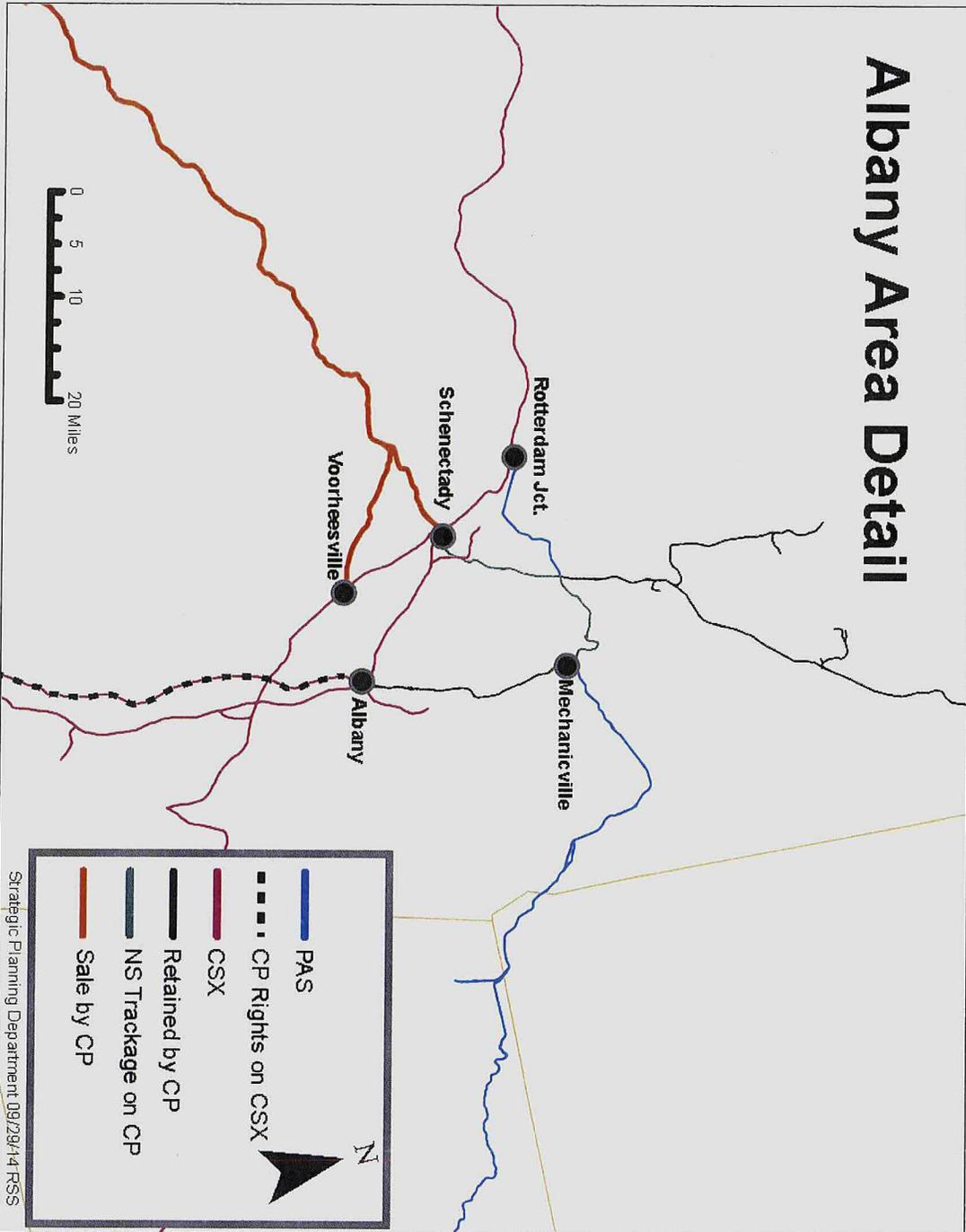
Proposed NS Purchase of D&H South

Notes:

1. Freight operators of lines shown; passenger ownership or operation not shown.
2. Overhead trackage rights not shown unless indicated.



Albany Area Detail

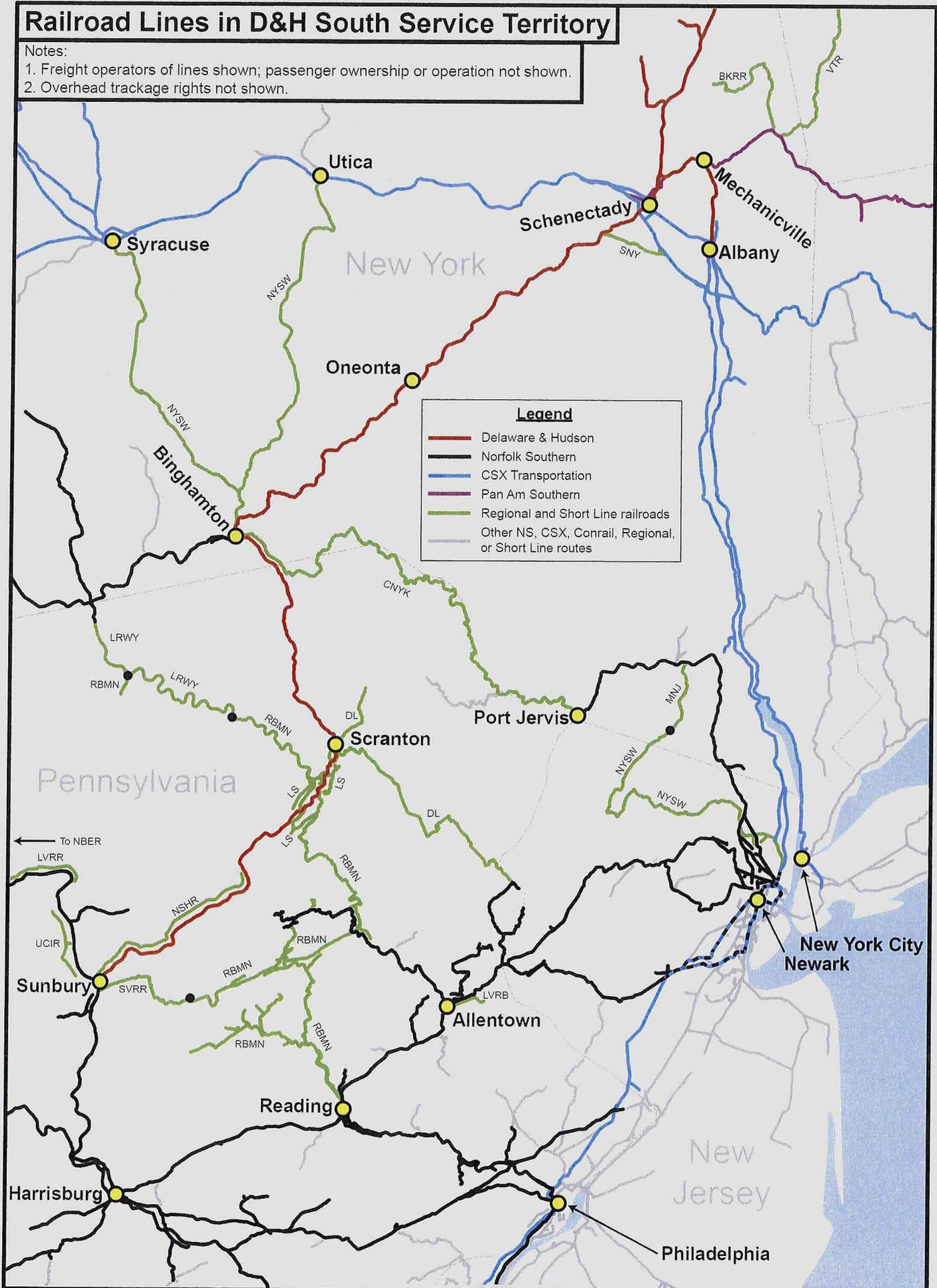


Strategic Planning Department 09/29/14 FSS

Railroad Lines in D&H South Service Territory

Notes:

1. Freight operators of lines shown; passenger ownership or operation not shown.
2. Overhead trackage rights not shown.



Legend

- Delaware & Hudson
- Norfolk Southern
- CSX Transportation
- Pan Am Southern
- Regional and Short Line railroads
- Other NS, CSX, Conrail, Regional, or Short Line routes

**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.**

**APPLICATION FOR A
MINOR TRANSACTION**

VOLUME I

AGREEMENTS

EXHIBIT 2

SUBMITTED IN VOLUME II

**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.**

EXHIBIT 15

OPERATING PLAN/MINOR TRANSACTION

Introduction

49 C.F.R. § 1180.8(c) requires the operating plan of applicants seeking Board approval for minor transactions to “[d]iscuss any significant changes in patterns or types of service as reflected by the operating plan expected to be used after the consummation of the transaction. Where relevant, submit information regarding the following:

- (1) Traffic level density on lines proposed for joint operations.
- (2) Impacts on commuter or other passenger service operated over a line which is to be downgraded, eliminated or operated on a consolidated basis.
- (3) Operating economies, which include, but are not limited to, estimated savings.
- (4) Any anticipated discontinuances or abandonments.”

I. Existing Operations And Projected Changes In Traffic Level Densities

A. Existing Operations

Norfolk Southern Railway Company (“NS”) will acquire from the Delaware and Hudson Railway Company, Inc. (“D&H”) and operate 282.55 miles of rail line in Pennsylvania and New York (the “D&H South Lines”). The D&H South Lines consist of 267.15 route miles of the D&H Freight Main Line (“FML”) between Sunbury, PA and South Schenectady, NY and 15.40 route miles of the Voorheesville Running Track¹ between Delanson, NY, where it joins the FML, and Voorheesville Junction, the end of

¹ Since 2007, D&H has leased this line to SMS Rail Lines of New York, LLC (“SMS”). See SMS Rail Lines of New York, LLC – Lease and Operating Exemption – Delaware and Hudson Railway Company, Inc. Line in Albany County, STB Finance Docket No. 35083 (STB served Oct. 5, 2007). SMS is a Class III carrier serving the Northeastern Industrial Park located in the Town of Guilderland, Albany County, NY. Following the Transaction, NS intends to assume the lease with SMS and simply replace D&H as the lessor.

the line. NS also will retain and modify 17.45 miles of existing NS trackage rights over D&H's line between MP 484.85 ± in the vicinity of Schenectady, NY and CPF 467 in the vicinity of Mechanicville, NY, including the right to use such track(s) within D&H's Mohawk Yard as shall be designated from time to time by the D&H officer in charge of operations at Mohawk Yard, for the purpose of reaching NS's Mechanicville Terminal and interchanging with PAS. NS also is amending the Saratoga-East Binghamton Trackage Rights Agreement, dated September 30, 2004, as necessary to retain the portion of its existing trackage rights between Milepost 37.10 ± of D&H's Canadian Main Line in Saratoga Springs and CPF 484 at Schenectady, NY. In addition, NS will acquire and operate D&H's Binghamton mechanical shop and three yards: (1) East Binghamton Yard in Binghamton, NY; (2) Taylor Yard in the Scranton/Wilkes Barre, PA area; and (3) Oneonta Yard in Oneonta, NY. NS will acquire no locomotives or rolling stock in connection with the Transaction.

As noted in the Application, both NS and D&H currently operate over the FML, mainly as an overhead route. NS is the majority user of the FML, operating daily over the line via trackage and haulage rights in order to interchange with connecting short lines and to reach interchange points with Pan Am Southern LLC ("PAS"), D&H, and Canadian National Railway ("CN") for movements to and from New England and Canada. D&H currently uses the FML to interchange traffic with NS and short lines for movements to and from Eastern Canada, the Northeast U.S., and the Mid-Atlantic U.S. NS currently interchanges with D&H at Buffalo, NY, Binghamton, NY, Allentown, PA, Harrisburg, PA, and at Mohawk Yard.

The following table shows the average number of total freight trains (both D&H and NS) per day in 2013 for each of the major line segments.

Current Rail Traffic (Average Trains/Day) on D&H Rail

<i>Rail Line Segment</i>	<i>Trains/Day</i>	<i>Railroad Dispatching</i>
Sunbury, PA – Dupont, PA	5	D&H
Dupont, PA – Binghamton, NY	9	D&H
Binghamton, NY – South Schenectady, NY	8	D&H

B. Post-Transaction Operations

As NS is the majority user of the D&H South Lines, the Transaction will align ownership of the line with usage. As such, NS does not anticipate any major changes in volumes, routings, patterns, or types of traffic and service in the five years following the consummation of the Transaction.² In general, the D&H traffic that currently moves over the line will be consolidated and harmonized into NS’s operations and train schedules; and, the existing mix of NS and D&H trains will become all NS trains.³ The trains will move in existing NS pool freight service based at Binghamton, NY.

The following table sets forth rail traffic, as measured by the average number of trains per day on the D&H lines which NS will acquire or gain trackage rights, in 2013

² It is anticipated that during this five-year period, there will be some minor increases in traffic; but, the majority of these increases will be the result of organic growth as opposed to Transaction-related growth.

³ NS will operate the FML as part of its Harrisburg Division, headquartered in Harrisburg, PA, and will dispatch the line out of its divisional dispatching office in Harrisburg.

and five years later in 2018. Any increases in traffic are not expected to result from diversions of rail traffic from other railroads.

Table 1.
Base Case and Post-Transaction (5-Year Projection) Rail Traffic (Trains/Day)^a
Line Segments to be Owned by NS

<i>Rail Line Segment</i>	<i>2013 Base Case (Trains/day)</i>	<i>2018 Projected Traffic (with Transaction)^b (Trains/day)</i>
Sunbury – Taylor/Dupont, PA	5	8
Taylor/Dupont, PA – Binghamton, NY	9	11
Binghamton – South Schenectady, NY	8	10
Lehighton – Allentown, NY*	7	6
Sunbury – Harrisburg, PA *	5	7
* <i>Segments already operated by NS</i>		

- a. *No passenger rail service operates over rail lines to be acquired by NS.*
- b. *These columns include all traffic on the line segments, including expected organic growth in traffic unrelated to the transaction.*
- * *Segments already operated by NS*

NS expects to implement an operating plan with essentially the same number of train counts on the various segments of the FML as currently exist. NS anticipates some consolidation of freight to reduce redundant trains, as the Transaction will allow NS to block traffic and control train consists to optimize traffic flows. Additionally, NS currently is contractually required to give D&H a certain level of traffic by commodity over the D&H South Lines in haulage. After the Transaction, NS will have greater flexibility and control over train consists, again allowing NS to eliminate inefficiencies

and optimize traffic flows. Thus, traffic flows over the D&H South Lines are expected to become more efficient as a result of the Transaction.

With respect to other overhead traffic currently moving over the D&H South Lines, NS simply will step into the shoes of D&H. Short lines that connect to the D&H South Lines will connect to NS after the Transaction, and in turn, NS will continue to provide interchanges with all connecting carriers, including D&H. Additionally, NS and D&H will enter into at closing a new commercial agreement that will allow shippers moving traffic under existing contracts and rate authorities to continue to move traffic pursuant to those arrangements post-Transaction until those contracts or rate authorities expire, are renewed, or amended. NS and D&H will enter into at closing a commercial access agreement to benefit shippers located on short lines that today connect to both NS lines and the D&H South Lines. These shippers will continue to have commercial access after the Transaction to D&H via NS haulage services over the lines with respect to future traffic not covered by existing contracts. Thus, shippers relying on the D&H South Lines will see little disruption as a result of the Transaction.

The Transaction will produce few changes at existing yards where NS and D&H interchange. Any changes that will occur are expected to result in service improvements. For example, the limited NS-D&H interchange traffic now switched at Mohawk Yard will be handled in run-through trains after the Transaction, resulting in fewer handlings and increased efficiency at Mohawk Yard. NS also will be able to eliminate the double handling of intermodal traffic at Binghamton bound to and from the intermodal terminal at Taylor, PA.

NS also expects to increase local service. For example, D&H recently reduced local service from five to only three days per week between Scranton and Sunbury in one direction. NS intends to restore local service to five days per week. NS plans to provide local service with two local jobs operating out of Taylor Yard and one local job operating out of East Binghamton Yard; and NS plans to increase the yard assignments at the D&H East Binghamton yard to three shifts seven days per week. These local assignments should allow NS to increase the frequency of service to local customers over what D&H currently provides.

NS plans to continue to maintain the FML to Federal Railroad Administration (“FRA”) Class III standards, which can handle the movement of railcars up to 286,000 pounds. The present condition of the FML is sound.⁴ There are no existing plans for new construction of any additional sidings, connections, or yard tracks. NS’s ownership of the line will enable it to coordinate its maintenance schedule and capital investment plans in a way that best supports the flow of traffic over the line.

C. Operating Economies And Benefits

Despite the minimal operating changes, the Transaction is expected to produce a number of public benefits that are discussed more fully in the Application and the Verified Statement of Mr. John Friedmann.

NS does not anticipate substantial operating economies as a result of the Transaction, given that the D&H South Lines are essentially end-to-end with the NS system. However, NS expects some operating economies primarily due to the fact that

⁴ Since NS currently operates trains over the line on a daily basis via trackage and haulage rights, NS is familiar with its condition.

the Transaction will align ownership of the D&H South Lines with the majority user. First, this alignment will result in an estimated \$2.7 million annual cost savings to NS, which represents the savings in annual haulage and trackage rights fees that NS currently pays to D&H for use of the line. Second, this alignment will give NS the ability to improve blocking patterns and control train consists in order to optimize traffic flows over the line. As described above, managing blocking patterns and train consists will allow NS to reduce redundant trains and avoid unnecessary interchanges. Third, this alignment will eliminate the need to negotiate and agree with another carrier upon the numerous issues regarding dispatching, transit times, maintenance schedules, capital investment needs, safety plans, and other operational issues, allowing NS to provide more reliable and sustainable service in a manner that best supports traffic flows over the line.

As an example of the type of operating economies that will be achieved through the Transaction, consider the traffic destined for New England markets via interchange with PAS. The D&H South Lines serve as a conduit, connecting the NS system with PAS. PAS is operated as a joint venture between NS and Boston and Maine Corporation, and an important part of its traffic portfolio is service-sensitive automotive and intermodal traffic. The PAS intermodal terminal at Mechanicville, NY has facilities to efficiently convert double-stack trains to single-stack trains capable of passage to the Ayer, MA intermodal terminal (“fileting”) and to convert single-stack trains originating in Ayer to double-stack trains (“toupeeing”). The PAS facilities enable NS to move double-stack trains, which are the most efficient form of intermodal transportation, between western locations and Albany.

However, since the Mechanicville facilities opened in 2012, NS has been unable to consistently achieve the intended efficiencies of its fileting/toupeeing capabilities, due in part to the operating complications from having three railroads involved in the movement of intermodal trains. Today, NS can connect with PAS only by utilizing its haulage and limited trackage rights over the D&H South Lines, which requires the coordination of NS, D&H, and PAS. The Transaction will significantly reduce D&H's role and provide NS with greater ability to manage operations, including staging and prioritizing trains out of the PAS terminal. With these changes, NS believes that it can more consistently achieve the promised efficiencies of the Mechanicville facilities.

As a significant amount of the traffic interchanged with PAS includes time-sensitive automotive and intermodal traffic, the Transaction generally should improve service for automotive traffic to the PAS facilities at Mechanicville, NY and Ayer, MA and generally should improve service for intermodal traffic to the PAS facilities at Mechanicville and Ayer and to the NS facility at Taylor, PA. These benefits for intermodal traffic are estimated at \$400,000 annually.

II. Impact On Commuter And Passenger Operations

There are no current passenger operations on the D&H South Lines to be acquired and operated by NS;⁵ and NS does not anticipate adding any passenger operations to these lines. As a result, the Transaction will have no effect on passenger operations.

⁵ Passenger service exists only on a portion of the D&H lines in the Schenectady, NY area over which NS will retain and modify existing trackage rights. Even after the Transaction, NS will continue to be a tenant on this D&H line that hosts four Amtrak trains per day.

III. Impact Of The Transaction On Labor.

Any employee of NS or D&H who is adversely affected by the Transaction will be entitled to the benefits of employee protective conditions as imposed by the Board. Two hundred fifty-four active D&H employees covered by collective bargaining agreements may be affected by the Transaction. Of this 254, NS intends to hire, pursuant to its existing hiring practices and standards, approximately 150 employees. As to employees not hired by NS, NS anticipates that these employees will be retained by D&H or offered positions with another CP-affiliated railroad. The following chart shows the number of current active D&H employees under collective bargaining agreements who operate over the lines involved in the Transaction, by type of employee:

<u>Type of Employee</u>	<u>Current D&H Employment</u>
Transportation	64
Mechanical	27
Engineering	160
Other ⁶	3
<u>Total</u>	254

It is anticipated that no NS employees will be adversely affected by the transaction. NS estimates that it will need to employ 157 people to support its newly-acquired operations over the D&H South Lines. The following chart breaks down NS's estimated employment needs, by type of employee:

⁶ This includes 2 Special Agents and 1 Supervisor B&B, which are non-agreement positions with NS.

<u>Type of Employee</u>	<u>Estimated NS Employment Needs</u>
Transportation	50
Mechanical	27
Engineering	80
Total	157

The 50 transportation employees estimated to be necessary for post-Transaction operations includes 4 employees to staff NS's dispatching desk for the D&H South Lines. NS also plans to add two local jobs, each requiring approximately 2 or 3 employees, to support its provision of increased and restored levels of local service following the Transaction. To the extent possible, NS intends to hire D&H employees to staff increased operations.

IV. Anticipated Discontinuances Or Abandonments

NS does not contemplate any abandonments or discontinuances as result of the Transaction. As noted in the Application, subject to Board authority, D&H does plan to discontinue its trackage rights over certain NS rail lines.

**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.**

**APPLICATION FOR A
MINOR TRANSACTION**

VOLUME I

RELATED TRANSACTIONS

FD 34209 (SUB-NO. 1) TRACKAGE RIGHTS NOTICE OF EXEMPTION

FD 34562 (SUB-NO. 1) TRACKAGE RIGHTS NOTICE OF EXEMPTION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET 34209 (SUB-NO. 1)

**NORFOLK SOUTHERN RAILWAY COMPANY -
TRACKAGE RIGHTS EXEMPTION - DELAWARE AND HUDSON RAILWAY
COMPANY, INC.**

NOTICE OF EXEMPTION

**Maquiling B. Parkerson
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Facsimile: (757) 533-4872**

**William A. Mullins
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Washington, DC 20037
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Fax: (202) 663-7849**

**Attorneys for Norfolk Southern Railway
Company**

November 17, 2014

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET 34209 (SUB-NO. 1)

**NORFOLK SOUTHERN RAILWAY COMPANY -
TRACKAGE RIGHTS EXEMPTION – DELAWARE AND HUDSON RAILWAY
COMPANY, INC.**

NOTICE OF EXEMPTION

Norfolk Southern Railway Company ("NS") submits this Notice of Exemption ("Notice"), pursuant to 49 C.F.R. § 1180.2(d)(7) and the procedures at 49 C.F.R. § 1180.4(g), to allow NS to retain approximately 17.45 miles of existing overhead trackage rights,¹ pursuant to a draft written trackage rights agreement (the "Agreement") between NS and Delaware and Hudson Railway Company, Inc. ("D&H"), a wholly owned, indirect subsidiary of Canadian Pacific Railway Company ("CP"). Per the Agreement, NS seeks to modify and retain approximately 17.45 miles of existing NS trackage rights over D&H's line between MP 484.85 ± in the vicinity of Schenectady, NY and CPF 467 in the vicinity of Mechanicville, NY, including the right to use such track(s) within D&H's Mohawk Yard as shall be designated from time to time by the D&H officer in charge of operations at Mohawk Yard.²

¹ The 17.45 miles of trackage rights which are being retained are a portion of the 284.6 miles of trackage rights originally authorized in Norfolk Southern Railway Company – Trackage Rights Exemption – Delaware And Hudson Railway Company, Inc., FD 34209 (STB served July 25, 2002).

² The proposed retention and modification of approximately 17.45 miles of existing overhead trackage rights is part of a simultaneously filed larger transaction, in which, NS has filed for acquisition and operation authority over 282.55 miles of D&H rail lines located in Pennsylvania and New York (the "D&H South Lines"), including any and all other tracks related to or auxiliary to the acquired lines. See Norfolk Southern Railway Company – Acquisition and

SECTION 1180.2 (d)(7)
GROUNDS FOR EXEMPTION

Under 49 C.F.R. § 1180.2(d)(7), the acquisition, renewal, or modification of trackage rights by a rail carrier over the lines owned or operated by any other rail carrier or carriers is exempt if the rights are: (i) based on a written agreement, and (ii) not filed or sought in a responsive application in rail consolidation proceedings. The trackage rights at issue in this proceeding are based upon a draft written agreement, a redacted version of which is attached hereto as Exhibit 2, and are not being sought in a responsive application in a rail consolidation proceeding.³ Thus, the Section 1180.2(d)(7) class exemption is applicable.

For a railroad to qualify for an exemption, it must file a verified notice of the transaction with the Board at least 30 days before the transaction is consummated indicating the proposed consummation date, and the notice must include the information required in § 1180.6(a)(1)(i)-(iii), (a)(5)-(6), and (a)(7)(ii), and indicate the level of labor protection to be imposed.⁴

SECTION 1180.6 (a)(1)(i)
SUMMARY OF PROPOSED TRANSACTION

Pursuant to a draft written Agreement between NS and D&H (attached hereto as Exhibit 2), NS seeks to retain approximately 17.45 miles of existing NS trackage rights over D&H's line between MP 484.85 ± in the vicinity of Schenectady, NY and CPF 467 in the vicinity of Mechanicville, NY, including the right to use such track(s) within D&H's Mohawk Yard as shall be designated from time to time by the D&H officer in charge of operations at Mohawk Yard. These rights are a portion of the 284.6 miles of trackage rights granted in

Operation – Certain Rail Lines of Delaware and Hudson Railway Company, Inc., FD 35873, filed concurrently with this Notice (the “Transaction”).

³ Pursuant to 49 C.F.R. § 1180.6(a)(7)(ii), NS will submit, within 10 days of its execution, an executed copy of the Agreement.

⁴ See 49 C.F.R. § 1180.4(g).

FD 34209. If the Transaction in FD 35873 is approved, the portion of NS's existing rights between Sunbury, PA and Schenectady, NY authorized in FD 34209 will be subsumed into NS's ownership of that portion of the line authorized in that Transaction. However, NS will continue to need and use the portion of the previously authorized trackage rights between Schenectady and Mechanicville. As such, NS is modifying and amending the end point of the line so that its trackage rights will now be between MP 484.85 ± in the vicinity of Schenectady, NY and CPF 467 in the vicinity of Mechanicville, NY, including the right to use such track(s) within D&H's Mohawk Yard as shall be designated from time to time by the D&H officer in charge of operations at Mohawk Yard, which will ensure NS's continued access to NS's Mechanicville Terminal and NS's continued interchange with Pan Am Southern LLC ("PAS").

Name, business address, and telephone number of Applicant:

Norfolk Southern Railway Company
Three Commercial Place
Norfolk, VA 23510
Tel: (757) 533-4939

Questions regarding this transaction are to be addressed to Applicant's representatives:

William A. Mullins
Crystal M. Zorbaugh
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SECTION 1180.6 (a)(1)(ii)
PROPOSED TIME SCHEDULE FOR CONSUMMATION

NS intends to consummate this transaction no sooner than December __, 2014 (the anticipated effective date of the transaction), or when the related proceeding filed in FD 35873 is approved and consummated, whichever is later.

SECTION 1180.6 (a)(1)(iii)
PURPOSE SOUGHT TO BE ACCOMPLISHED BY TRANSACTION

The trackage rights are necessary for NS's continued access to its Mechanicville Terminal and NS's continued interchange with Pan Am Southern LLC. The Agreement is related to a larger transaction whereby NS seeks authority to acquire certain rail lines owned by D&H in order to enhance competition and improve operating efficiencies and service.

SECTION 1180.6 (a)(5)
STATES IN WHICH PROPERTY OF THE APPLICANT IS SITUATED

NS owns rail lines in the following 22 states: Alabama, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia, and West Virginia.

SECTION 1180.6 (a)(6)
MAP

A map of the line subject to this transaction is attached hereto as Exhibit 1.

SECTION 1180.6 (a)(7)(ii)
AGREEMENT

A redacted version of the Agreement is attached as Exhibit 2, with highly confidential material redacted. An unredacted version of the Agreement will be provided to any party requesting it and upon issuance of an appropriate protective order.

SECTION 1180.4(g)(1)(i)
LABOR PROTECTIONS

NS does not anticipate any adverse labor impacts as a result of this transaction. However, NS agrees to imposition of the employee protective conditions established in Norfolk & Western Railway- Trackage Rights-Burlington Northern, Inc., 354 I.C.C. 605 (1978), as modified in Mendocino Coast Railway-Lease & Operate-California Western Railroad, 360 I.C.C. 653 (1980).

SECTION 1180.4(g)(2)(i)
CAPTION SUMMARY

A caption summary of this transaction suitable for publication in the Federal Register is attached hereto as Exhibit 3.

SECTION 1180.4(g)(3)
ENVIRONMENTAL AND HISTORIC PRESERVATION MATTERS

Under 49 C.F.R. §§ 1105.6(c)(4) and 1105.8(b)(3), the proposed acquisition of trackage rights is exempt from environmental reporting requirements, and historic preservation reporting requirements.

Respectfully submitted,

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November 17, 2014

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET 34562 (SUB-NO. 1)

**NORFOLK SOUTHERN RAILWAY COMPANY -
TRACKAGE RIGHTS EXEMPTION - DELAWARE AND HUDSON RAILWAY
COMPANY, INC.**

NOTICE OF EXEMPTION

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November 17, 2014

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FINANCE DOCKET 34562 (SUB-NO. 1)

**NORFOLK SOUTHERN RAILWAY COMPANY -
TRACKAGE RIGHTS EXEMPTION – DELAWARE AND HUDSON RAILWAY
COMPANY, INC.**

NOTICE OF EXEMPTION

Norfolk Southern Railway Company ("NS") submits this Notice of Exemption ("Notice"), pursuant to 49 C.F.R. § 1180.2(d)(7) and the procedures at 49 C.F.R. § 1180.4(g), to allow NS to retain a portion of its existing trackage rights between Saratoga and Binghamton, NY,¹ pursuant to a draft written Trackage Rights Agreement (the "Agreement") between NS and Delaware and Hudson Railway Company, Inc. ("D&H"), a wholly owned, indirect subsidiary of Canadian Pacific Railway Company. Per the Agreement, NS seeks to retain the portion of its existing trackage rights so as to maintain NS's continued trackage rights between Milepost 37.10 ± of D&H's Canadian Main Line in Saratoga Springs and CPF 484 at Schenectady, NY.²

¹ The portion of trackage rights which are being retained are a portion of the 155.24 miles of trackage rights originally authorized in Norfolk Southern Railway Company – Trackage Rights Exemption – Delaware And Hudson Railway Company, Inc., FD 34562 (STB served Oct. 21, 2004).

² The proposed retention and modification of these existing trackage rights is part of a simultaneously filed larger transaction, in which, NS has filed for acquisition and operation authority over 282.55 miles of D&H rail lines located in Pennsylvania and New York, including any and all other tracks related to or auxiliary to the acquired lines. See Norfolk Southern Railway Company – Acquisition and Operation – Certain Rail Lines of Delaware and Hudson Railway Company, Inc., FD 35873, filed concurrently with this Notice (the "Transaction").

SECTION 1180.2(d)(7)
GROUNDS FOR EXEMPTION

Under 49 C.F.R. § 1180.2(d)(7), the acquisition, renewal, or modification of trackage rights by a rail carrier over the lines owned or operated by any other rail carrier or carriers is exempt if the rights are: (i) based on a written agreement, and (ii) not filed or sought in a responsive application in rail consolidation proceedings. The trackage rights at issue in this proceeding are based upon a draft written agreement, a redacted version of which is attached hereto as Exhibit 2,³ and are not being sought in a responsive application in a rail consolidation proceeding. Thus, the Section 1180.2(d)(7) class exemption is applicable.

For a railroad to qualify for an exemption, it must file a verified notice of the transaction with the Board at least 30 days before the transaction is consummated indicating the proposed consummation date, and the notice must include the information required in § 1180.6(a)(1)(i)-(iii), (a)(5)-(6), and (a)(7)(ii), and indicate the level of labor protection to be imposed.⁴

SECTION 1180.6 (a)(1)(i)
SUMMARY OF PROPOSED TRANSACTION

Pursuant to a draft written Agreement by NS and D&H (attached hereto as Exhibit 2), NS seeks to retain and modify its existing NS trackage rights between Saratoga and Schenectady, NY. These rights are a small portion of the 155.24 miles of trackage rights granted in FD 34562. If the Transaction in FD 35873 is approved, the portion of NS's existing rights between Binghamton and Schenectady, NY authorized in FD 34562 will be subsumed into NS's ownership of that portion of the line authorized in that Transaction. However, NS will continue to need and use the portion of the previously authorized trackage rights between Schenectady

³ Pursuant to 49 C.F.R. § 1180.6(a)(7)(ii), NS will submit, within 10 days of its execution, an executed copy of the Agreement.

⁴ See 49 C.F.R. § 1180.4(g).

and Saratoga. As such, NS is modifying and amending the end point of the line so that its trackage rights will now be between Milepost 37.10 ± of D&H's Canadian Main Line in Saratoga Springs and CPF 484 at Schenectady, NY, rather than between Saratoga and Binghamton.

Name, business address, and telephone number of Applicant:

Norfolk Southern Railway Company
Three Commercial Place
Norfolk, VA 23510
Tel: (757) 533-4939

Questions regarding this transaction are to be addressed to Applicant's representatives:

William A. Mullins
Crystal M. Zorbaugh
BAKER & MILLER PLLC
2401 Pennsylvania Ave., NW, Suite 300
Washington, DC 20037
Tel: (202) 663-7820
Fax: (202) 663-7849

SECTION 1180.6 (a)(1)(ii)
PROPOSED TIME SCHEDULE FOR CONSUMMATION

NS intends to consummate this transaction no sooner than December __, 2014 (the anticipated effective date of the transaction), or when the related proceeding filed in FD 35873 is approved and consummated, whichever is later.

SECTION 1180.6 (a)(1)(iii)
PURPOSE SOUGHT TO BE ACCOMPLISHED BY TRANSACTION

The trackage rights are necessary for NS's continued access between Milepost 37.10 ± of D&H's Canadian Main Line in Saratoga Springs, CPF 480 at Saratoga and CPF 484 at Schenectady, NY. The Agreement is related to a larger transaction whereby NS seeks authority to acquire certain rail lines owned by D&H in order to enhance competition and improve operating efficiencies and service.

SECTION 1180.6 (a)(5)
STATES IN WHICH PROPERTY OF THE APPLICANT IS SITUATED

NS owns rail lines in the following 22 states: Alabama, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia, and West Virginia.

SECTION 1180.6 (a)(6)
MAP

A map of the line subject to this transaction is attached hereto as Exhibit 1.

SECTION 1180.6 (a)(7)(ii)
AGREEMENT

A redacted version of the draft Agreement is attached as Exhibit 2, with highly confidential material redacted. An unredacted version of the Agreement will be provided to any party requesting it and upon issuance of an appropriate protective order.

SECTION 1180.4(g)(1)(i)
LABOR PROTECTIONS

NS does not anticipate any adverse labor impacts as a result of this transaction. However, NS agrees to imposition of the employee protective conditions established in Norfolk & Western Railway- Trackage Rights-Burlington Northern, Inc., 354 I.C.C. 605 (1978), as modified in Mendocino Coast Railway-Lease & Operate-California Western Railroad, 360 I.C.C. 653 (1980).

SECTION 1180.4(g)(2)(i)
CAPTION SUMMARY

A caption summary of this transaction suitable for publication in the Federal Register is attached hereto as Exhibit 3.

SECTION 1180.4(g)(3)
ENVIRONMENTAL AND HISTORIC PRESERVATION MATTERS

Under 49 C.F.R. §§ 1105.6(c)(4) and 1105.8(b)(3), the proposed acquisition of trackage rights is exempt from environmental reporting requirements, and historic preservation reporting requirements.

Respectfully submitted,

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Attorneys for Norfolk Southern Railway Company

November 17, 2014

PUBLIC VERSION

**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.**

**APPLICATION FOR A
MINOR TRANSACTION**

VOLUME II

AGREEMENTS

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November 17, 2014

PUBLIC VERSION

**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.**

**APPLICATION FOR A
MINOR TRANSACTION**

VOLUME II

ASSET PURCHASE AGREEMENT - EXHIBIT 2

DRAFT

PUBLIC VERSION (redacted)

ASSET PURCHASE AGREEMENT

dated as of [_____,], 2014

between

Norfolk Southern Railway Company

and

Delaware and Hudson Railway Company, Inc.
(d/b/a CANADIAN PACIFIC),

Northern Coal and Iron Company

and

Wilkes-Barre Connecting Railroad Company

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ASSET PURCHASE AGREEMENT

THIS ASSET PURCHASE AGREEMENT, dated as of the ____ day of _____, 2014, between Norfolk Southern Railway Company, a Virginia corporation (~~–Buyer~~”), and Delaware and Hudson Railway Company, Inc., a Delaware corporation doing business as CANADIAN PACIFIC (~~–DHRC~~”), Northern Coal and Iron Company, a Pennsylvania corporation and wholly owned subsidiary of DHRC (~~–NCIC~~”), and Wilkes-Barre Connecting Railroad Company, a Pennsylvania corporation and wholly owned subsidiary of DHRC (~~–WBCR~~”). DHRC, NCIC and WBCR are referred to collectively herein as ~~–Seller~~” or the ~~–D&H Entities~~”.

RECITALS:

A. The D&H Entities own, control, operate or use certain railroad properties, rights-of-way and facilities relating to the Main Line and the Running Track. The Main Line and Running Track and any and all other tracks related or auxiliary to the Main Line and Running Track, including side tracks, sidings and spur tracks (collectively with the Main Line and the Running Track, the ~~–Line~~”), and all rights-of-way, buildings and structures (including the Binghamton shop facilities) associated with the Line, all as more specifically shown on the maps and real property descriptions attached as Exhibit A, are collectively referred to herein as the ~~–D&H South~~”.

B. The D&H Entities have been granted trackage and other rights associated with the D&H South pursuant to the D&H South Agreements (as defined in Section 2.01(a)(ii)).

C. Seller desires to sell and Buyer desires to purchase Seller’s interest in the D&H South, the D&H South Agreements and the other Acquired Assets referred to herein.

NOW, THEREFORE, in consideration of the mutual promises hereinafter set forth, the Parties hereby agree as follows:

I. DEFINITIONS

1.01 Defined Terms. As used herein, the following terms shall have the meanings specified in this Section 1.01 as follows:

–AAA” – As defined in Section 5.05(c).

–Acquired Assets” – As defined in Section 2.01(a).

–Addendum 3 to Master Interchange Agreement” – The Addendum to the master interchange agreement attached hereto as Exhibit [●].

–Affiliates” – As defined in Rule 12b-2 under the Securities Exchange Act of 1934, as amended.

–Agreement” – This Asset Purchase Agreement as the same may be amended or supplemented in accordance with the terms hereof.

–Assumed Obligations” – As defined in Section 2.03(b).

–Assumption Agreement” – The assumption agreement in the form of Exhibit [●] hereto.

–Average Labor Protection Expense” -- With respect to a given calendar year, an amount in dollars calculated by dividing Seller’s total Labor Protection expenses resulting from the transactions consummated at the Closing for such calendar year by the number of Seller’s employees who received Labor Protection payments during such calendar year.

–Bill of Sale” – The bill of sale in the form of Exhibit [●] hereto.

-Buyer” – Norfolk Southern Railway Company or any permitted assignee pursuant to Section 13.07.

-Buyer’s Employee Obligation” -- The lesser of (i) one hundred fifty (150) or (ii) an amount equal to seventy-four percent (74%) of Seller’s employees covered by one or more collective bargaining agreements who are active on the D&H South on the Closing Date.

-Buyer’s Objection Notice” – As defined in Section 4.03

-Claims” – As defined in Section 12.02.

-Closing” – As defined in Section 3.01.

-Closing Date” – As defined in Section 3.01.

-Code” – The Internal Revenue Code of 1986, as amended.

-Confidentiality Agreement” – The Confidentiality Agreement dated as of October 21, 2013, amongst Canadian Pacific Railway Company and Norfolk Southern Corporation, as amended by the foregoing parties on September 12, 2014.

-Contracts” – Contracts, agreements, easements, franchises, rights-of-way, licenses, leases, commitments, arrangements and understandings to which Seller is a party.

-CPRC” – Canadian Pacific Railway Company.

-Deeds” – Quit-claim deeds in the form of Exhibit [●] hereto.

-Deed Restriction” – As defined in Section 12.06(d).

-D&H Asset Purchase Agreement” – The Asset Purchase Agreement dated as of July 13, 1990 between DHRC (f/k/a D&H Corporation) and Francis P. Dicello, as Trustee of the Delaware and Hudson Railway Company.

-D&H Entities” – As defined in the Preamble.

~~–D&H South” – As defined in Recital A.~~

~~–D&H South Agreements” – As defined in Section 2.01(a)(ii).~~

~~–DHRC” – As defined in the Preamble.~~

~~–Direct Short Line Access Agreement” – The short line access agreement in the form attached hereto as Exhibit [●].~~

~~–Drop Dead Date” – Subject to Section 11.01, the latest of (i) [REDACTED]; or (ii) if the STB issues an Order that has conditions that are not Material Governmental Conditions on or prior to the date in clause (i) and the Closing has not occurred by such date, the term –Drop Dead Date” shall mean the earlier of (A) the expiration of the period reasonably determined by Buyer to be necessary to implement and satisfy any conditions contained in such Order, or (B) [REDACTED] or (iii) if the STB issues an Order without Material Governmental Conditions prior to the date set forth in clause (i), but such Order is stayed or enjoined pending judicial review prior to the date set forth in clause (i), the term –Drop Dead Date” shall mean the second (2nd) anniversary of the date on which such stay was imposed.~~

~~–Easement Agreement – Power Line” – An easement agreement in the Form of Exhibit [●].~~

~~–Encumbrances” – Any mortgage, pledge, option, lien, claim, security interest, agreement, easement, equitable interest, restriction, license, lease, right of reverter, right of entry, right of first refusal, encumbrance or charge (whether arising by contract or operation of law).~~

~~–End Date” – As defined in Section 5.10.~~

~~–Environmental Examination” – As defined in Section 4.01(b).~~

~~–Environmental Examination Period” – As defined in Section 4.01(b).~~

~~“Environmental Laws”~~ – Any federal, state, local or common law, rule, regulation, ordinance, code, order, decree, judgment, permit requirement, or other requirement of any Governmental Authority, in effect as of the date of this Agreement or at any time thereafter, relating to (i) the pollution or protection of the environment (including air, land, soil, surface waters, ground waters, stream and river sediments, and biota); or (ii) the use, generation, storage, treatment, disposal, processing, transportation (except for transportation as a common carrier), handling, release, emission or remediation of Hazardous Substances, including the Comprehensive Environmental Response, Compensation, and Liability Act (~~“Superfund”~~ or ~~“CERCLA”~~), 42 U.S.C. §§ 9601 et seq., the Resource Conservation and Recovery Act (~~“Solid Waste Disposal Act”~~ or ~~“RCRA”~~), 42 U.S.C. §§ 6901 et seq., the Clean Air Act, 42 U.S.C. §§ 7401 et seq., the Safe Drinking Water Act, 42 U.S.C. §§ 330f et seq., the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 et seq., the Hazardous Materials Transportation Act, 49 U.S.C. §§ 5101 et seq., and the Toxic Substances Control Act (~~“TSCA”~~), 15 U.S.C. §§ 2601 et seq.

~~“Environmental Liabilities”~~ – Claims, judgments, damages (including punitive damages), losses, penalties, fines, liabilities, Encumbrances, violations, costs and expenses (including attorneys’, consultants’ and engineering fees) of or arising from investigation, remediation, clean-up, corrective action, monitoring, or defense of any matter arising under any Environmental Laws (whether at law or in equity) or in any way relating to (i) the environment (including air, land, soil, surface waters, ground waters, stream and river sediments, and biota); (ii) the use, generation, storage, treatment, disposal, processing, transportation (except for transportation as a common carrier), handling, release, emission or remediation of Hazardous Substances; or (iii) impacts on human health and safety resulting from the foregoing, of whatever

kind or nature, whether or not resulting from the actual or alleged violation of or noncompliance with any Environmental Laws.

-Environmental Right of Entry Agreement” – The environmental right of entry agreement in the form attached hereto as Exhibit [●].

-ERISA” – The Employee Retirement Income Security Act of 1974, as amended, and the rules and regulations issued thereunder.

-ERISA Affiliate” – Any subsidiary or any trade or business (whether or not incorporated) under common control (as defined in Section 4001(b)(1) of ERISA) with the party in question.

-Excluded Assets” – All assets of Seller not expressly included in the Acquired Assets and the assets of Seller set forth on Exhibit [●].

-Excluded Shipper Contracts” - Any Contracts with a receiver or shipper for the movement of goods and traffic or ancillary services which is not a Shipper Contract.

-Existing Agreement” – Any agreement in effect as of the date of this Agreement or at any time prior to the Closing Date between Buyer, on the one hand, and Seller or its Affiliates, on the other hand, that governs rail operations of Buyer on the rail lines of Seller or Seller’s Affiliates.

-Final Equipment Value” – As defined in Section 2.04 (a).

-Final Statement” – As defined in Section 2.04(b).

-Facilities Services Agreements” – As defined in Section 2.01(a)(vii).

-FCC Tower Agreement” – The FCC tower agreement in the form attached hereto as Exhibit [●].

~~-Furniture and Small Tools and Equipment~~” – Furniture and small tools and equipment (other than information technology related equipment) located in facilities on the D&H South that are owned (not leased) by Seller. For the avoidance of doubt, where vehicles and maintenance equipment are listed in the schedules hereto which include a value, the value includes the small tools and equipment used in connection with such vehicles and equipment.

~~-Governmental Authority~~” – Any agency, board, bureau, court, commission, department, instrumentality, regulatory authority, or administration of any governmental body with jurisdiction over the applicable subject matter.

~~-Hazardous Substances~~” – All hazardous or toxic materials, substances, wastes, pollutants, contaminants, constituents or solid wastes, or terms of similar meaning, subject to regulation or defined under any Environmental Law.

~~-Immaterial Contracts~~” – All Contracts which are of a kind and on terms normally entered into by railroads in the ordinary course of their business, such as Pipe and Wire Crossing Agreements, Property Services Agreements, limited distribution tariff agreements, clearance agreements, side track agreements, road crossing agreements and the like, and which are not Overlap Contracts or Excluded Assets.

~~-Indemnified Party~~” – As defined in Section 12.04(a).

~~-Indemnifying Party~~” – As defined in Section 12.04(a).

~~-Independent Accountant~~” – [●].

~~-Inventories~~” – The engineering and mechanical inventories, tools, spare parts, fuel stored on the D&H South and lube oil of Seller of the type set forth on Exhibit [●], together with vendor managed inventories.

~~–Knowledge”, –knowledge”, –know”~~ and the like – With respect to Seller, all references herein to knowledge or know, shall mean the actual knowledge, after reasonable inquiry of direct reports, of (i) for purposes of Section 6.06 (Litigation), [REDACTED], (ii) for purposes of Section 6.09 (Status of Agreements), [REDACTED], and (iii) for purposes of Section 6.11 (Hazardous Materials) [REDACTED].

~~–Known Environmental Liabilities”~~ – As defined in Section 6.11(a).

~~–Labor Protection”~~ – Any and all costs, expenses and payments, including benefits, bonuses, allowances, and arbitration, administrative and litigation expenses, arising out of any agreement with, or claims or grievances made or lawsuits brought by or on behalf of, employees of Seller or their collective bargaining representatives, in each case pursuant to statute, employee protective conditions imposed by a Governmental Authority, a collective bargaining agreement or any agreement entered into with such employees or their collective bargaining representatives in connection with the transaction contemplated by this Agreement.

~~–Line”~~ – As defined in the recitals.

~~–Local Access Trackage Rights Agreement”~~ – The local access trackage rights agreement in the form attached hereto as Exhibit [●].

~~–Main Line”~~ – Seller’s Freight and Sunbury Subdivisions between Sunbury/CP Kase, PA (milepost CPF 752) and Schenectady, NY (milepost CPF 484.85).

~~–Material Adverse Effect”~~ – A material adverse effect on the ownership, use or operation of the Acquired Assets in substantially the same manner as the Acquired Assets were owned, used or operated by Seller prior to August 31, 2014; *provided, however*, that any such effect that results from (i) any action permitted, required or contemplated by this Agreement, (ii) any failure

to meet projections and forecasts, (iii) changes, events or occurrences arising from general business conditions or affecting the rail industry generally or (iv) the imposition of PTC on the D&H South, shall not be deemed to constitute a Material Adverse Effect.

–Material Governmental Condition” – A condition or obligation, or a combination of one or more conditions or obligations, attached to or included in the Order or otherwise imposed by a Governmental Authority which, for Seller or Buyer, would be reasonably expected in the aggregate to decrease estimated revenues and/or increase expenses or capital expenditures ■

■ The conditions and obligations referred to above include only those conditions and obligations that are imposed as part of the approval or exemption of the various transactions contemplated by this Agreement and exclude conditions and obligations imposed independent of those transactions and/or after Closing.

–Mineral Rights Allocation Agreement” – The agreement allocating the proceeds from the sale, lease or other disposition of mineral rights related to the Acquired Assets in the form of Exhibit [●] hereto.

–Modification and Restatement of 2002 Trackage Rights Agreement” – The modification and restatement of the 2002 trackage rights agreement in the form attached hereto as Exhibit [●].

–Modification and Restatement of Norfolk Southern/CP Agreement on Northeast U.S. Restructuring” – The modification and restatement of agreement between Buyer and CPRC on Northeast U.S. restructuring in the form attached hereto as Exhibit [●].

–NCIC” – As defined in the Preamble.

~~–New NS Employees”~~ -- Each and every former employee of Seller who (i) is among the On-Line Employees and (ii) accepts an offer of employment from Buyer as of or prior to the Closing.

~~–New Proceeding”~~ – As defined in Section 5.10.

~~–On-Line Employees”~~ – Those employees of Seller listed on Schedule [●] hereto.

~~–Operative Documents”~~ – Addendum 3 to Master Interchange Agreement, Assumption Agreement, Bill of Sale, Deeds, Direct Short Line Access Agreement, Easement Agreement – Power Line, FCC Tower Agreement, Local Access Trackage Rights Agreement, Mineral Rights Allocation Agreement, Modification and Restatement of 2002 Trackage Rights Agreement, Modification and Restatement of Norfolk Southern/CP Agreement on Northeast U.S. Restructuring, Release Agreement, Restated Bison Yard Terminal Services Agreement, Restated Buffalo Trackage Rights Agreement, Saratoga Springs—East Binghamton Trackage Rights Agreement, Termination Agreement, Transitional Divisions and Routing Agreement, all required affidavits and state transfer forms delivered at Closing, and the certificates in the forms attached hereto as Exhibits [●] and [●].

~~–Order”~~ – The order entered by the STB approving or exempting the various transactions contemplated by this Agreement; provided, however, that if more than one order is issued in connection with such contemplated transactions, all such orders shall for purposes of this Agreement, unless otherwise indicated, be referred to collectively as the ~~–Order”~~.

~~–Overlap Contracts”~~ – Contracts other than Shipper Contracts and Excluded Shipper Contracts that relate to the rail operations conducted on the Acquired Assets but also relate to other assets of Seller unrelated to the Acquired Assets (but excluding general corporate contracts

related to matters such as administration, sales, dispatch, information technology, human resources and like matters).

–Party” – Each of Buyer, on the one hand, and DHRC, NCIC and WBCR, on the other hand.

–Parties” – Collectively, Buyer, DHRC, NCIC and WBCR.

–Permits” – As defined in Section 2.01(a).

–Permitted Encumbrances” – Encumbrances set forth on Schedule 1.1(b) and (i) any general real estate Taxes or special assessments not yet due and payable; (ii) existing laws, orders and regulations, including applicable zoning laws and regulations; (iii) except as is otherwise provided in this Agreement, all tenancies, encumbrances, easements, rights, trackage rights, conditions, reservations, leases, licenses, permits, privileges, agreements, third-party agreements, covenants, conditions, restrictions, reservations, rights of re-entry and possibilities of reverter, whether or not of record or as may be apparent by an inspection or survey of the Real Property that affect the Real Property as of the Closing Date; (iv) whatever rights the public may have to the use of any roads, alleys, bridges or streets on or crossing the Real Property or streams, rivers, creeks and waterways passing under, across or through the Real Property; (v) all exclusions, reservations and covenants described in this Agreement; (vi) any pipes, wires, poles, cables, culverts, drainage courses or systems, or other facilities on or crossing the Real Property of a type normally granted in the ordinary course of business by railroads or normally pertaining to railroad properties, together with the rights, if any, of persons entitled to maintain, repair, renew, replace, use or remove the same; and (vii) any matters that may become or be deemed to be Permitted Encumbrances pursuant to Section 4.03(a).

-Permitted Use Period” – The six-month period following the Closing Date.

-Pipe and Wire Crossing Agreements” – Easements, license agreements, and/or rights of entry agreements, pertaining to above- and below-ground pipes, conduits, wires, cables, casings, innerducts and other appurtenant materials, equipment and facilities installed, maintained and operated on and through, and crossing generally perpendicular to, the rights-of-way and the roadbed of the Real Property, and other perpendicular crossings related to water, gas, sanitary sewer, storm sewer, pipelines, drains, ditches, irrigation, and conveyor facilities.

-Plan” – Any employee pension benefit plan (as defined in Section 3(2) of ERISA) maintained or contributed to by Seller or any ERISA Affiliate of Seller and insured by the Pension Benefit Guaranty Corporation under Title IV of ERISA.

-Preliminary Equipment Value” – [REDACTED]

-Proceeding” – Any suit, action (including regulatory action) or proceeding whether judicial or otherwise (including arbitration and any other alternative dispute resolution procedure).

-Property Services Agreements” – Easements, license agreements and/or rights of entry agreements pertaining to cell towers, antennas, radio, radar, fiber optics, utilities, power transmission facilities, siding agreements, laser transmission systems, wires, fibers, signboards, timber management and farm management on or under the Real Property.

-PTC” – As defined in Section 5.09.

-Purchase Price” – Subject to Sections 2.04 and 11.01, \$217,000,000.

[REDACTED]

[REDACTED]

[REDACTED]

-Real Property” – The real property, including fee simple and easement title to the D&H South held by Seller, together with all rights, privileges, members, licenses and easements appurtenant to the real property now or hereafter existing, described on Exhibit A.

-Real Property Interests” – Leases, licenses, permits or other interests in or right to enter upon real property, other than fee simple or easement title.

-Restated Bison Yard Terminal Services Agreement” – The restated Bison Yard terminal services agreement in the form attached hereto as Exhibit [●].

-Restated Buffalo Trackage Rights Agreement” – The restated Buffalo trackage rights agreement in the form attached hereto as Exhibit [●].

-Related Persons” – With respect to a Party or its Affiliates, any current and former employees, agents, officers, directors, managers, subsidiaries, shareholders, owners, members, partners, insurers, attorneys, predecessors, successors and assigns.

-Release Agreement” – The release agreement in the form of Exhibit [●] hereto.

-Response Deadline” – As defined in Section 4.03.

-Retention Period” – As defined in Section 12.06(a).

-Right of Entry Agreement” – The right of entry agreement in the form attached hereto as Exhibit [●].

-Running Track” – The Voorheesville running track between Delanson, NY (Milepost CPF 499/milepost 26.3) and Voorheesville Junction, NY (Milepost 10.9).

–Saratoga Springs-East Binghamton Trackage Rights Agreement” – The Saratoga Springs—East Binghamton trackage rights agreement in the form attached hereto as Exhibit [●].

–Scheduled Contracts” – As defined in Section 6.08.

–Seller” – As defined in the Preamble.

–Seller Released Parties” – As defined in Section 5.06(c).

–Seller’s Response Notice” – As defined in Section 4.03.

–Shipper Contracts” – As defined in Section 2.01(a)(vi).

–Shortfall Employees” – A number, if positive, calculated by subtracting the number of New NS Employees from Buyer’s Employee Obligation.

–Shortfall Offset” – With respect to a given calendar year, an amount in dollars, if positive, calculated by Seller within sixty (60) days of the end of such calendar year by multiplying the Average Labor Protection Expense for such calendar year by the number of Shortfall Employees.

–Soo” – As defined in Section 5.10.

–STB” – United States Surface Transportation Board.

–Tax Claims” – As defined in Section 5.08.

–Tax” or –Taxes” – All federal, state, local, foreign and other taxes, customs, duties, fees, levies, assessments or charges of any kind whatsoever, including all net income, gross income, gross receipts, sales, use, ad valorem, transfer, franchise, profits, license, withholding, payroll, employment, excise, estimated, severance, stamp, occupation, real or personal property, business, documentary, registration, filing, recordation, unemployment, worker's compensation, commercial rent, premium, windfall profits, deemed profits, lease, capital, production,

corporation, value added, bulk sale or other taxes, customs, duties, fees, levies, assessments or charges of any kind whatsoever, together with any interest and any penalties, additions to tax or additional amounts imposed by any Governmental Authority (domestic or foreign) regardless of whether disputed or whether related to the filing of a Tax Return (or the failure to file a Tax Return).

–Tax Return” – Any report, return, document, declaration or other information or filing (including any amendment thereto) with respect to Taxes required by law to be supplied to any Governmental Authority or to be collected or maintained, including information returns, any documents accompanying payments of estimated Taxes, or requests for the extension of time in which to file any such report, return, document, declaration or other information or filing.

–Termination Agreement” -- the agreement regarding the termination of certain operating agreements in the form attached hereto as Exhibit [●].

–Third Party Claims” – As defined in Section 12.04.

–Title Examination” – As defined in Section 4.03.

–Title Examination Period” – As defined in Section 4.03.

–Trademarks and Logos” – As defined in Section 5.07.

–Transferred Personal Property” – As defined in Section 2.01(b).

–Transitional Divisions and Routing Agreement” – The divisions and routing agreement in the form of Exhibit [●] hereto.

–Vehicle Leases” – As defined in Section 2.01(a)(ix).

–WARN Act” – Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101 et seq.

~~WBCR~~ – As defined in the Preamble.

1.02 Other Definitional Provisions. Unless otherwise stated, terms, phrases and expressions used in this Agreement (whether or not capitalized) which pertain to railroad operations and service shall have the meaning commonly given such terms under common usage and practice of the railroad industry in 2014. All personal pronouns used in this Agreement shall include the other genders whether used in the masculine or feminine or neuter gender, and the singular shall include the plural, and vice versa, unless the context otherwise requires. Terms such as ~~herein~~, ~~hereof~~, ~~hereby~~, ~~hereunder~~ and ~~hereinafter~~ refer to this Agreement as a whole and not to the particular sentence, paragraph or Section where they appear, unless the context otherwise requires. The term ~~including~~ shall mean, and shall be interpreted as though such term were, the phrase ~~including, without limitation,~~ in each place where such term appears. Whenever reference is made to a Section of this Agreement, such reference is to the Section as a whole, including all of the subsections and paragraphs of such Section, unless the reference is expressly made to a particular subsection or paragraph of such Section. All references in this Agreement to ~~\$~~ or ~~dollars~~ shall refer to the currency of the United States of America.

II. SALE AND PURCHASE OF ACQUIRED ASSETS; TRANSFER OF D&H SOUTH AGREEMENTS.

2.01 Sale and Purchase of Acquired Assets.

(a) Sale and Purchase of Acquired Assets. Subject to the terms and conditions hereof, Seller agrees to sell, transfer, assign, and convey to Buyer, and Buyer agrees to purchase from Seller for the Purchase Price, all right, title and interest of Seller in or to the Acquired Assets, subject in each case to Permitted Encumbrances and no other Encumbrances. Subject to

Section 2.02 and the first sentence of Section 2.01(c), the “Acquired Assets,” without duplication, consist of:

- (i) the Real Property described on Exhibit A;
- (ii) all rights under Contracts and Immaterial Contracts (excluding Shipper Contracts and car hire agreements) exclusively associated with the D&H South, including those set forth on Schedule 2.01(a)(ii) (“D&H South Agreements”);
- (iii) all operating rail property owned by Seller that relates to the operation or use of any portion of the D&H South, including the roadbed, rail, track (including the main track, side tracks, spur tracks, connecting tracks, yard tracks, industry tracks and team tracks), connections, ties, bridges, ballast, track fastening, railroad signs, fixed signaling and connecting apparatus, stations, culverts, structures, communications and signal facilities, parking and storage areas, depots, yards, shops, buildings (including the Binghamton, New York shop facilities), and all other improvements, fixtures and appurtenances owned, used, held for use or otherwise held by Seller;
- (iv) all Real Property Interests leased, used or held for use by Seller that relate to the operation or use of the D&H South, including those listed on Schedule 2.01(a)(iv) hereto, as the same may be updated on the Closing Date;
- (v) all permits, licenses, franchises, operating authorizations and approvals conferred, given, owned, acquired, appropriated, used or useful for any purpose which exclusively relate to the operation or use of any of the D&H South, including those listed on Schedule 2.01(a)(v) (collectively, the “Permits”);

(vi) all rights under those Contracts set forth on Schedule 2.01(a)(vi), as the same may be updated on the Closing Date (the “Shipper Contracts”);

(vii) all rights under miscellaneous facilities services Contracts for cleaning, lawn care, pest control, and other facilities services which relate exclusively to the D&H South, including those agreements set forth on Schedule 2.01(a)(vii) (the “Facilities Services Agreements”);

(viii) all rights under Overlap Contracts related to the D&H South;

(ix) all rights under the vehicle lease Contracts set forth on Schedule 2.01(a)(ix) (the “Vehicle Leases”); and

(x) the Transferred Personal Property.

(b) Transferred Personal Property.

The “Transferred Personal Property” consists of

(i) the maintenance of way equipment, machinery and other equipment set forth on Schedule [●] (which Schedule shall set forth book value to the extent available);

(ii) the equipment and machinery used to repair and maintain railroad rolling stock set forth on Schedule [●] (which Schedule shall set forth book value to the extent available);

(iii) the vehicles set forth on Schedule [●] (which Schedule shall set forth book value to the extent available);

(iv) Inventories; and

(v) Furniture and Small Tools and Equipment.

(c) Consents. Nothing in this Agreement or the documents to be executed and delivered at the Closing shall be deemed to constitute an assignment or an attempt to assign any permit, contract or other agreement to which Seller is a party, if the attempted assignment thereof without the consent of the other party to such permit, contract or other agreement would constitute a breach thereof or affect in any way the rights of Seller thereunder. Seller shall take all reasonable steps to secure consent, if required, to assign to Buyer each of the Scheduled Contracts. If any such consent shall not be obtained by Seller at or prior to Closing, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

2.02 Excluded Assets. It is expressly understood and agreed that, notwithstanding the provisions of Section 2.01, the Acquired Assets shall not include the Excluded Assets.

2.03 Purchase Price.

(a) Payment of Purchase Price. The Purchase Price for the Acquired Assets shall be payable from Buyer to Seller at Closing by wire transfer of immediately available funds prior to 11 a.m., Albany, New York time, to a bank account to be designated in writing by Seller to Buyer not less than three (3) business days prior to Closing.

(b) Assumed Obligations. As additional consideration for the Acquired Assets, Buyer shall assume the following obligations and liabilities of Seller (it being understood

and agreed that Buyer shall assume no obligation or liability of Seller for a Scheduled Contract [REDACTED] or Permit listed below that has not been properly assigned to Buyer in accordance with Section 2.01(c) (the "Assumed Obligations"):

(i) obligations and liabilities of Seller arising from and after, and attributable to the period commencing on and after, 12:01 a.m. Albany, New York time on the day immediately following the Closing Date under the D&H South Agreements;

(ii) obligations and liabilities of Seller arising from and after, and attributable to the period commencing on and after, 12:01 a.m. Albany, New York time on the day immediately following the Closing Date under Real Property Interests assigned to Buyer pursuant to Section 2.01(a)(iv);

(iii) obligations and liabilities of Seller arising from and after, and attributable to the period commencing on and after, 12:01 a.m. Albany, New York time on the day immediately following the Closing Date under each of the Permits;

(iv) except as provided in Sections 5.08 and 12.02 and except as provided in the Operative Documents or such other operating agreements as may be entered into from time to time covering Seller's operations over the D&H South after the Closing, all obligations, commitments and liabilities of Seller, of whatever nature, whether known or unknown, asserted or unasserted, fixed absolute or contingent, matured or unmatured, accrued or unaccrued, liquidated or unliquidated or due or to become due, which relate exclusively to the ownership, condition or operation of the Acquired Assets attributable to the period commencing on and after 12:01 a.m. Albany, New York time on the day immediately following the Closing

Date, including those arising under statutes, rules, regulations and effective or pending orders of Governmental Authorities;

(v) as between Seller and Buyer, except as provided in Sections 5.08 and 12.02 and except as provided in the Operative Documents or such other operating agreements as may be entered into from time to time covering Seller's operations over the D&H South after the Closing, all Environmental Liabilities arising before or after the Closing Date which arise out of or are related to the ownership or use of the Real Property and Acquired Assets, or the D&H South Agreements, including (A) any environmental contamination or other condition, or the presence of Hazardous Substances, on the Real Property or Acquired Assets, whether such contamination or Hazardous Substances are located on or under the Real Property or other Acquired Assets or have migrated or will migrate from or to the Real Property or other Acquired Assets, and (B) the handling, use, treatment, removal, storage, decontamination, cleanup, transport (except for transportation as a common carrier) or disposal of Hazardous Substances. (but excluding any Claims relating to or arising from Seller's potential liability where such liability relates to Seller's ownership or use of, or disposal or arranging for disposal of waste at, a property that is not part of the Acquired Assets or Real Property, and is not subject to the D&H South Agreements), whether such conditions and/or Environmental Liabilities are known or unknown, suspected or unsuspected, contemplated or uncontroverted;

(vi) all real estate Taxes that Buyer is obligated to assume under Section 2.04(c);

(vii) obligations of Seller arising from and after, and attributable to the period commencing on and after, 12:01 a.m. Albany, New York time on the day immediately following the Closing Date under the Shipper Contracts;

(viii) obligations of Seller arising from and after, and attributable to the period commencing on and after, 12:01 a.m. Albany, New York time on the day immediately following the Closing Date under the Overlap Contracts (to the extent they relate to the Acquired Assets); and

(ix) obligations of Seller arising from and after, and attributable to the period commencing on and after, 12:01 a.m. Albany, New York time on the day immediately following the Closing Date under the Facilities Services Agreements and Vehicle Leases.

2.04 Adjustments and Prorations.

(a) Items Subject to Adjustment.

(i) In order to facilitate the transfer to Buyer of the operation of the Acquired Assets, Buyer and Seller agree to the administration and proration procedures set forth on Exhibit [●] hereto. If any of the items of proration and adjustment set forth in Exhibit [●] are not capable of calculation within the time periods provided in Section 2.04(b) [REDACTED]

[REDACTED] or (y) is by its nature not capable of calculation within such time periods, then such item of proration and adjustment shall remain open and be adjusted between Buyer and Seller in accordance with this Section 2.04 promptly upon completion of such proceedings or upon such item becoming capable of calculation, as applicable. [REDACTED]

[REDACTED]

(ii) Following the Closing, Seller shall determine the value of the Transferred Personal Property (it being understood there will be no value assigned to Furniture and Small Tools and Equipment) delivered at Closing using its most recent records and reports from vendors on vendor managed inventory (the "Final Equipment Value"). The Final Equipment Value shall be calculated in a manner consistent with the process used to calculate the Preliminary Equipment Value (it being agreed there will be no value assigned to Furniture and Small Tools and Equipment). The Purchase Price will be increased to the extent the Final Equipment Value exceeds the Preliminary Equipment Value, and the Purchase Price will be reduced to the extent the Preliminary Equipment Value exceeds the Final Equipment Value. Such Purchase Price adjustment shall be included in the Final Statement.

(b) Determination of Adjustment. Within ninety (90) days after the Closing Date, Seller shall prepare a statement of adjustments to be made to the Purchase Price pursuant to Section 2.04(a) (the "Final Statement"). In the event that Seller and Buyer are unable to agree upon the Final Statement within thirty (30) days after receipt of the Final Statement by Buyer,

then the amount of the adjustments shall be determined by the Independent Accountant at the end of such thirty (30) day period. The determination by the Independent Accountant shall be conclusive and binding on the Parties, and shall be made within sixty (60) days after such adjustments are so submitted. Seller and Buyer shall each pay one-half of the fees and expenses of the Independent Accountant in making such determination. If such adjustments result in a balance due Seller, Buyer shall pay such balance to Seller by wire transfer of immediately available funds within fifteen (15) days after the date of determination of the Final Statement. If such adjustments result in a balance due Buyer, Seller shall pay such balance to Buyer by wire transfer of immediately available funds within fifteen (15) days after the date of determination of the Final Statement.

(c) Real Estate Taxes. Seller shall pay all Taxes assessed against the Acquired Assets (which for the avoidance of doubt will not include Taxes based on net income even if referred to as “real estate Taxes” or “property Taxes”) that are due and payable as of the Closing Date. Buyer shall assume and pay when due all such Taxes that become due and payable after the Closing Date. At Closing, Buyer and Seller shall each pay its share, prorated as of the Closing Date, of any such Taxes that are due and payable during the calendar year in which Closing occurs. If the relevant Tax statements have not been received prior to Closing, the Taxes shall be prorated based upon the most recent property tax statements, which proration shall be final and not subject to further adjustment based on receipt of actual property Tax statements or any audit. Buyer also assumes all payments in respect to any special assessment (or installment thereof) where the due date for payment is on or after the Closing, regardless of the date of the improvement.

2.05 Allocation of Purchase Price. For Tax purposes, Buyer and Seller agree the Purchase Price shall be allocated in the manner required by Section 1060 of the Code and applicable Treasury Regulations. In making such allocations the fair market values and related methodologies reflected on Exhibit [●] shall apply. Each Party shall file IRS Form 8594, Tax Returns and other filings and reports for Tax purposes with the allocation set forth on Exhibit [●] and shall not take any position which is inconsistent with such allocation.

III. CLOSING

3.01 Closing Date and Place. The closing of the purchase of the Acquired Assets (the ~~Closing~~) shall take place at the office of Stinson Leonard Street LLP, Minneapolis, Minnesota at 10:00 a.m. local time on a date agreed by Buyer and Seller within thirty (30) days after the later to occur of (a) the effective date of the Order without any Material Governmental Condition, and (b) the day on which all other conditions (other than the conditions set forth in Section 9.03 and Section 10.03 of this Agreement, which conditions shall have been satisfied or waived on the Closing Date) to each Party's obligations under Articles IX and X have been satisfied or waived as provided therein, or at such other day, time and place as the Parties may mutually agree (the ~~Closing Date~~). Buyer and Seller shall cooperate to facilitate recordation of Deeds by use of a title company to promptly record the Deeds following Closing. Seller agrees to promptly defend, remove, bond or otherwise dispose of any mortgage, deed of trust, security interest or other monetary lien encumbering the Acquired Assets during the period of time between (terminal dates included) the date of the last title searches conducted by Buyer and the date of recording of the Deeds and to hold harmless and indemnify Buyer against expenses, costs and attorney's fees

that may arise out of Seller's failure to so remove, bond or otherwise dispose of any such mortgage, deed of trust, security interest or other monetary lien.

3.02 Deliveries by Seller. At or prior to the Closing, Seller shall deliver to Buyer the following, with all instruments being duly executed:

- (i) Addendum 3 to Master Interchange Agreement.
- (ii) Assumption Agreement.
- (iii) Bill of Sale.
- (iv) Deeds for all real property, easements, rights-of-way and other similar interests in real property being conveyed by Seller.
- (v) Direct Short Line Access Agreement.
- (vi) Easement Agreement—Power Line.
- (vii) FCC Tower Agreement.
- (viii) Local Access Trackage Rights Agreement.
- (ix) Mineral Rights Allocation Agreement.
- (x) Modification and Restatement of 2002 Trackage Rights Agreement.
- (xi) Modification and Restatement of Norfolk Southern/CP Agreement on Northeast U.S. Restructuring.
- (xii) Release Agreement.
- (xiii) Restated Bison Yard Terminal Services Agreement.
- (xiv) Restated Buffalo Trackage Rights Agreement.
- (xv) Saratoga Springs—East Binghamton Trackage Rights Agreement.

- (xvi) Termination Agreement.
- (xvii) Transitional Divisions and Routing Agreement.
- (xviii) Seller Officers' Certificate in the form attached hereto as Exhibit

[•].

(xix) Affidavits that meet the requirements of Treasury Regulation § 1.1445-2(b)(2) and that attest to the non-foreign status of each of the D&H Entities.

(xx) Vehicle titles for vehicles included in the Acquired Assets.

(xxi) Any other documents reasonably requested by Buyer, or Buyer's title insurer, if any, to accommodate recording of the Deeds that are not inconsistent with the terms of this Agreement.

(xxii) Legal existence certificates and other evidence of the D&H Entities' power and authority as Buyer may reasonably request.

(xxiii) All required state transfer forms and affidavits of value, if any.

3.03 Deliveries by Buyer. At the Closing, Buyer shall deliver to Seller the following, with all instruments being duly executed:

- (i) The Purchase Price in the manner provided by Section 2.03(a).
- (ii) Addendum 3 to Master Interchange Agreement.
- (iii) Assumption Agreement.
- (iv) Bill of Sale.
- (v) Deeds.
- (vi) Direct Short Line Access Agreement.
- (vii) Easement Agreement – Power Line.

- (viii) FCC Tower Agreement.
- (ix) Local Access Trackage Rights Agreement.
- (x) Mineral Rights Allocation Agreement.
- (xi) Modification and Restatement of 2002 Trackage Rights Agreement.
- (xii) Modification and Restatement of Norfolk Southern/CP Agreement on Northeast U.S. Restructuring.
- (xiii) Release Agreement.
- (xiv) Restated Bison Yard Terminal Services Agreement.
- (xv) Restated Buffalo Trackage Rights Agreement.
- (xvi) Saratoga Springs—East Binghamton Trackage Rights Agreement.
- (xvii) Termination Agreement.
- (xviii) Transitional Divisions and Routing Agreement.
- (xix) Buyer Officers' Certificate in the form attached hereto as Exhibit [•].
- (xx) All required state transfer forms and affidavits of value, if any.

3.04 Third-Party Agreements. To the extent any third party requires a particular assignment document that has representations and warranties or indemnification provisions that are different from the terms of this Agreement, as between Buyer and Seller this Agreement shall control.

IV. ACCESS TO INFORMATION; CERTAIN RESTRICTIONS

4.01 Buyer's Investigation.

(a) To the extent permitted by law, Seller shall, subject to Sections 4.01(b) and 4.02 of this Agreement and at Buyer's sole cost and risk, permit Buyer and its counsel, accountants, consultants, and other authorized representatives and agents, to have reasonable access throughout the period prior to Closing to, and to make such reasonable investigations, inspections and testing (including surveys, structural and engineering investigations, and environmental tests, studies and analyses) of the assets, liabilities, property records, financial records, surveys, maps, engineering records, leases, contracts, licenses, title information, filings and other records, operations, real estate, facilities, improvements and properties of Seller relating to the Acquired Assets and the D&H South Agreements (other than commercially sensitive information as determined by Seller in its reasonable judgment and subject in each case to confidentiality provisions and if so subject, then only in accordance with the terms of such provisions) as Buyer may reasonably deem necessary or advisable in connection with this Agreement and the transactions contemplated hereby; *provided, however*, that Buyer shall give prior notice of its need for such access and investigations and all such access and investigations shall take place during normal business hours and shall not unreasonably interfere with the normal business of Seller; and *provided further* that Buyer and Buyer's agents shall not communicate with any Governmental Authority concerning the results of any sampling of soils or groundwater without Seller's advance written approval, unless such communication is required by applicable law, including Environmental Laws, in which case Buyer shall notify Seller as soon as possible in advance of such required communication.

(b) Buyer may conduct environmental inspections of the Real Property and Acquired Assets (the "Environmental Examination") from the date hereof until forty-five (45)

days from the date hereof (the ~~Environmental Examination Period~~). In the event Buyer desires to conduct intrusive sampling or testing at any particular location(s), including of soil, surface water or groundwater, as part of the Environmental Examination during the Environmental Examination Period, Buyer shall make such request to Seller, including a scope of work. Within seven (7) days of such request, Buyer and Seller shall jointly review the scope of work along with the results of any initial (nonintrusive) studies for such location(s) and shall jointly determine the necessity, and scope and design, of such intrusive sampling or testing based on Seller's Knowledge of the Real Property. In the event Buyer desires to perform such intrusive sampling or testing at a parcel of the Real Property but Seller does not concur after such consultation, then (i) in the event such parcel is not part of an operating railroad right of way, Seller and Buyer may agree to remove the parcel or relevant portion(s) thereof, as is practicable, from the Real Property to be conveyed pursuant to this Agreement, and in such case any corresponding exhibits hereto shall be modified accordingly, or (ii) the relevant parcel or portion(s) thereof, as the Parties may agree, will be included in the schedule of Known Environmental Liabilities and in the event any investigation, remediation, cleanup, corrective action, monitoring or defense of any matter arising under any Environmental Laws is required under Environmental Laws, or any Claims pertaining to Environmental Liabilities arise, during the Retention Period, including with respect to any conditions discovered by Buyer, then Section 12.02(e) shall apply, or (iii) Buyer, in its sole discretion after communication with Seller, may opt not to include the property in the schedule of Known Environmental Liabilities, or (iv) either Buyer or Seller may terminate this Agreement by written notice to the other within fifteen (15) days after Seller notifies Buyer that Seller will not allow the intrusive sampling, and in the event that a Party does not timely

terminate this Agreement, such Party shall be deemed to waive such right of termination and the property will not be included in the schedule of Known Environmental Liabilities. Except as provided to the contrary in the foregoing sentence, if the Environmental Examination (whether or not intrusive sampling or testing occurs) discloses existing conditions on or emanating from the Real Property or other Acquired Assets and related operations that constitute a violation of Environmental Laws or otherwise could reasonably be expected to give rise within the Retention Period to Claims pertaining to Environmental Liabilities in connection with the continued use of the Real Property and Acquired Assets for railroad purposes as they are currently used in all material respects, and Buyer reasonably estimates that each such violation or Claim would cost Buyer more than [REDACTED] to remediate or satisfy, and such conditions are not disclosed in documents and information made available to Buyer prior to the date of this Agreement, Buyer shall notify Seller of such conditions in writing, with supporting documentation, before the end of the Environmental Examination Period and such conditions shall be included in the schedule of Known Environmental Liabilities and in the event investigation, remediation, cleanup, corrective action, monitoring or defense of any matter arising under any Environmental Laws is required under Environmental Laws, or any Claims relating to Environmental Liabilities arise, during the Retention Period then Section 12.02(e) shall apply; provided that if Buyer so notifies Seller of any such condition to be included in the schedule of Known Environmental Liabilities, then Seller in its sole and absolute discretion may terminate this Agreement by written notice to Buyer within fifteen (15) days after receiving such notice and if Seller fails to so notify Buyer, Seller shall be deemed to waive such right and such conditions in Buyer's notice to Seller will be included in the schedule of Known Environmental Liabilities.

4.02 Confidentiality of Information. The Confidentiality Agreement shall survive execution and delivery of this Agreement, and the parties to the Confidentiality Agreement shall continue to comply with the terms thereof. In the event this Agreement is terminated, the obligations under the Confidentiality Agreement shall survive for two (2) years after such termination.

4.03 Post-Signing Due Diligence and Right to Terminate.

(a) Buyer may examine title and conduct surveys or other inspections of title (the ~~–Title Examination~~) to the Real Property and other Acquired Assets from the date hereof until sixty (60) days from the date hereof (the ~~–Title Examination Period~~). If the Title Examination discloses that Buyer has a reasonable belief that (i) Seller's title does not permit the operation and use of the Real Property and Acquired Assets to conduct railroad operations in the manner conducted by Seller or (ii) there are monetary liens on the Real Property or Acquired Assets, Buyer shall so notify Seller (the ~~–Buyer's Objection Notice~~) on or before the end of the Title Examination Period. Seller shall have fifteen (15) days from receipt of Buyer's Objection Notice (the ~~–Response Deadline~~) to notify Buyer whether Seller will agree to cause a matter to which Buyer has objected to be removed or corrected (~~–Seller's Response Notice~~). If Seller fails to send Seller's Response Notice on or before the Response Deadline, then Seller shall be deemed to have elected not to cause any objection to be removed or corrected as aforesaid.

If Seller elects (or is deemed to elect) not to cause any objection to be removed or corrected as aforesaid, Buyer may then, at its option, to be exercised on or before the earlier of fifteen (15) days after (a) receipt of Seller's Response Notice or (b) the Response Deadline, either (i) terminate this Agreement, in which event this Agreement (except for provisions that are

specifically identified as intended to survive such termination (including Section 4.02 and Section 11.05), without further action of the Parties, shall become null and void, and neither Party shall have any further rights or obligations under this Agreement, or (ii) elect to waive its objection, in which event such objection shall be deemed to be a Permitted Encumbrance and listed on Schedule 1.1(b). If Buyer fails to exercise its option within the time set forth in this paragraph, then Buyer shall be deemed to have elected to waive its objections and its right to terminate pursuant to this paragraph.

If Seller elects to cause any objection to be removed or corrected as aforesaid, then Seller shall have thirty (30) days or up to twenty (20) days before the scheduled Closing Date, whichever timeframe is shorter, to make a good faith effort to cure the objection and to notify Buyer of any cure of such objection or that Seller cannot cure such objection. If Seller fails to cure or thereafter elects not to cure such objection to the reasonable satisfaction of Buyer, Buyer may then, at its option, to be exercised in writing within fifteen (15) days after notice of cure by Seller or 15 days before the scheduled Closing Date, (i) terminate this Agreement, in which event this Agreement (except for provisions that are specifically identified as intended to survive such termination (including Section 4.02 and Section 11.05), without further action of the Parties, shall become null and void, and neither Party shall have any further rights or obligations under this Agreement, or (ii) elect to waive its objection, in which event such objection shall be deemed to be a Permitted Encumbrance and listed on Schedule 1.1(b). If Buyer fails to timely exercise its option to terminate pursuant to this paragraph, then Buyer shall be deemed to have elected to waive its objections and its right to terminate pursuant to this paragraph.

Notwithstanding anything to the contrary contained herein, Seller shall have no obligation to cure any objection, provided, however, Seller shall be obligated to remove, at Seller's sole cost and expense, (i) mortgages, deeds of trust, security interests and any other monetary liens encumbering the Real Property or any other Acquired Assets, regardless of whether or not such encumbrances are identified in Buyer's Objection Notice, and (ii) in accordance with this Section 4.03(a), any matters that Seller expressly agrees to remove in Seller's Response Notice. Subject to the terms and conditions of this Agreement, Seller shall convey all Acquired Assets to Buyer at Closing free and clear of any mortgages, deeds of trust, security interests and any other monetary liens.

V. ADDITIONAL UNDERTAKINGS AND AGREEMENTS

5.01 Removal of Excluded Assets; Proprietary Locks; Emergency Information.

(a) For a period commencing on the Closing Date and ending on the date which is 90 days thereafter, Buyer shall permit Seller at Seller's sole expense and risk to remove Excluded Assets located on, in or about the D&H South. In connection therewith, Buyer shall grant Seller reasonable access during normal business hours and upon reasonable prior notice for the purpose of removing Excluded Assets during such 90-day month period; provided that such removal or such access does not unreasonably interfere with the normal business of Buyer and provided that Seller, at Seller's expense, shall promptly repair any damage (other than *de minimis* damage) resulting from such activities. Any such removal shall be performed in a commercially reasonable manner and without damage (beyond *de minimis* damage) to any property of Buyer, and Buyer may require Seller to execute the Right of Entry Agreement prior to any entry onto property or right-of-way owned by Buyer to perform such removal.

(b) For a period commencing on the Closing Date and ending on the date that is three (3) business days thereafter, Buyer shall permit Seller to remove all switch and derail locks, provided that Seller shall (i) coordinate the removal of such switch and derail locks with Buyer, (ii) promptly repair at Seller's expense any damage (beyond *de minimis* damage) resulting from such removal and (iii) execute and deliver the Right of Entry Agreement prior to any entry onto property or right-of-way owned by Buyer to perform such removal.

(c) No later than seven days after the Closing Date, Buyer shall replace all emergency notification information posted on the D&H South, including grade crossings, with its own emergency contact information.

5.02 Post-Closing Access to Certain Records. From and after the Closing until the sixth anniversary of the Closing Date:

(i) Buyer will make available to Seller, under reasonable conditions, any records of Seller transferred to Buyer pursuant to this Agreement that are necessary for Seller's business or Tax purposes or the performance of obligations retained by Seller; and

(ii) Seller will cooperate with Buyer to make available to Buyer, under reasonable conditions, any records of Seller that are required by Buyer in the ownership or operation of the Acquired Assets or the performance of obligations assumed by Buyer, subject to any applicable confidentiality agreement.

5.03 WARN Act. Seller shall comply and cause compliance with the provisions of the WARN Act and any other federal, state or local laws regarding ~~plant closings,~~ ~~mass layoffs~~ or similar triggering events, or change of control, with respect to any employment loss (as defined in the WARN Act) to employees employed in operating the D&H South that occurs

before 12:01 a.m. Albany, New York time on the day immediately following the Closing Date. Buyer shall comply and cause compliance with the provisions of the WARN Act and any other federal, state or local laws regarding ~~plant closings,~~ ~~mass layoffs~~ or similar triggering events, or change of control, with respect to any employment loss (as defined in the WARN Act) to employees employed in operating the D&H South that occurs after 12:01 a.m. Albany, New York time on the day immediately following the Closing Date.

5.04 Employee Hiring Rights. Buyer may offer employment effective on the Closing Date, to all On-Line Employees, including employees who are absent due to vacation, family leave, short-term disability or other approved leave of absence. Buyer shall advise Seller of all meetings with On-Line Employees prior to the Closing Date, shall consult with Seller as to the manner in which such meetings will be held and such employment offers extended and shall permit representatives of Seller to attend any such meetings.

5.05 Labor Protection. Both before and after the Closing, Buyer and Seller shall cooperate to mitigate Labor Protection. Buyer and Seller shall be responsible for Labor Protection resulting from the transactions consummated hereby as set forth in this Section, irrespective of which Party bears the burden of Labor Protection by statute or otherwise.

(a) Buyer shall be responsible for (1) any Labor Protection applicable to (i) the New NS Employees and (ii) its own employees in place prior to the Closing, and (2) paying to Seller within ninety (90) days of the end of each calendar year, if and as applicable, the Shortfall Offset until such Labor Protection liability is extinguished.

(b) Seller shall be responsible for any Labor Protection applicable to its own employees or former employees other than the New NS Employees.

(c) Any dispute relating to this Section 5.05 shall be resolving by binding arbitration pursuant to the Commercial Arbitration Rules of the American Arbitration Association (“AAA”), except that the arbitrator will not have the power to award special, exemplary, consequential or punitive damages. [REDACTED] will be the Parties’ first choice to serve as arbitrator. If [REDACTED] is unavailable to serve as arbitrator, the dispute will be arbitrated by another person mutually agreed upon by the Parties (or a person with relevant subject matter expertise appointed by the AAA if the Parties cannot agree). If the dispute involves any allegation that any accounting required by this Agreement was not conducted properly, the arbitrator shall cause the accounting portion of such dispute to be resolved by the Independent Accountant after the arbitrator decides all other questions of fact and law raised in the arbitration. Statutes of limitation that would apply if claims under this Section were brought in a court will also apply in any arbitration. The enforcement of this arbitration provision shall be governed by the Federal Arbitration Act. Judgment on the final award may be entered in any court having jurisdiction.

5.06 Condition of Property.

(a) Buyer acknowledges and agrees that it has had or is entitled under this Agreement to have the opportunity to inspect the Real Property and other Acquired Assets and Seller’s records to evaluate the condition of the Real Property and other Acquired Assets and, if the Closing occurs, Buyer shall conclusively be deemed to have accepted the Real Property and other Acquired Assets in their present condition (including condition of title and environmental condition), and such property shall be conveyed at Closing to Buyer –AS IS, WHERE IS, WITH ALL FAULTS”, as more fully set forth in the introduction to Article VI, but subject to Sections

5.08 and 12.02 and any representations and warranties of Seller in this Agreement. Seller does not make any representation or warranty with respect to the environmental condition of the Real Property or other Acquired Assets except as set forth in Section 6.11, including with respect to surface and subsurface environmental conditions, whether latent or patent, the nonexistence of any Hazardous Substances, compliance by the Real Property or Seller with any Environmental Law, the existence of any Environmental Liabilities, or habitability or tenantability of the Real Property. Buyer recognizes that certain of the materials contained in certain assets comprising the Acquired Assets may be or contain Hazardous Substances, including batteries, creosote in railroad ties, asbestos in building materials, lubricating stations, and lead in paint used on bridges and other assets.

(b) Buyer's acceptance of title to the Real Property and other Acquired Assets shall represent Buyer's acknowledgment and agreement that: (i) Seller has not made nor has Buyer relied on any written or oral representation or warranty made by Seller, its agents or employees with respect to the condition or value of the Real Property or other Acquired Assets, except as set forth herein; (ii) Buyer has had an adequate opportunity to inspect the condition of the Real Property and other Acquired Assets, including any environmental testing, and to inspect documents applicable thereto, and Buyer is relying on such inspection and testing; (iii) the Real Property has been developed and operated as a railroad and for other industrial uses for many years, and the Real Property may be contaminated with Hazardous Substances as a result; (iv) some products and materials that were used in operating Seller's facilities will be left on the Real Property at Closing and, if intended to be discarded and not used, may need to be managed and disposed of in accordance with applicable Environmental Laws; and (v) the Real Property

includes underground storage tanks (and certain underground storage tanks which may have been removed without investigation), piping (above ground and underground piping), drainage mechanisms, and the like.

(c) Except to the extent of Seller's representations and warranties in this Agreement and except as otherwise provided in Sections 5.08 and 12.02, or as provided in the Operative Documents or such other operating agreements as may be entered into from time to time covering Seller's operations over the D&H South after the Closing, effective upon the Closing, and without further act, deed or instrument, Buyer, on behalf of itself and its Affiliates, hereby releases Seller, its Affiliates and their successors and assigns and their respective officers, directors, shareholders, employees, agents and representatives ("Seller Released Parties") from liability with respect to any existing or future Claims (including any liability Buyer may incur as a result of Third Party Claims) arising out of or relating to (i) the condition of the Real Property and other Acquired Assets, (ii) non-compliance with Environmental Law related to the Real Property and other Acquired Assets, and (iii) Environmental Liabilities related to the Real Property and other Acquired Assets, including any environmental contamination, or presence of Hazardous Substances on the Real Property or other Acquired Assets, whether such contamination or Hazardous Substances are located on or under the Real Property or other Acquired Assets or have migrated or will migrate from or to the Real Property or other Acquired Assets, and the handling, use, treatment, removal, storage, decontamination, cleanup, transport (except for transportation as a common carrier), or disposal of Hazardous Substances from the Real Property or other Acquired Assets (but excluding any Claims relating to or arising from Seller's potential liability where such liability relates to Seller's ownership or use of, or disposal

or arranging for disposal of waste at, a property that is not part of the Acquired Assets or Real Property, and is not subject to the D&H South Agreements), and Buyer hereby waives any cause of action (including any right of contribution) Buyer and its Affiliates had, has or may have against Seller Released Parties with respect to the foregoing, whether arising under common law, or federal, state or local statute, rule or regulation. The foregoing shall apply to any condition or noncompliance with Environmental Law, including any environmental condition, known or unknown, suspected or unsuspected, contemplated or un contemplated or any liability Buyer may incur as a result of Third Party Claims.

5.07 Trademarks and Logos.

(a) The Parties agree that during the Permitted Use Period, Buyer shall be entitled to continue to use Seller's name, trademarks and logos (~~Trademarks and Logos~~) on any inventory, packaging, schedules, displays, promotional materials, manuals, and other material included in the Acquired Assets, without any obligation on the part of Buyer to pay royalties or similar fees to Seller relating to such use.

(b) Buyer agrees that: (i) promptly after the Closing Date and prior to expiration of the Permitted Use Period, Buyer shall take commercially reasonable steps to remove any of Seller's Trademarks and Logos from the Acquired Assets; and (ii) immediately upon termination of the Permitted Use Period, Buyer shall cease and desist from all further use of Seller's Trademarks and Logos; provided, however, that Buyer may continue to use existing inventory included in Acquired Assets that incorporates or includes any of Seller's Trademarks and Logos. Notwithstanding anything herein, Buyer shall not use any of Seller's Trademarks and

Logos in any manner that might dilute, tarnish, disparage or reflect adversely on Seller or Seller's Trademarks and Logos.

5.08 Tax Matters.

(a) Except to the extent Taxes are allocated pursuant to Section 2.04(c), Seller shall indemnify Buyer and its Affiliates and hold them harmless from and against (i) any Claim attributable to any breach of or inaccuracy in any representation or warranty made in Section 6.10; (ii) any Claim attributable to any breach or violation of, or failure to fully perform, any covenant, agreement, undertaking or obligation in this Section 5.08 and (iii) except as set forth in Section 13.04, any and all liabilities of Seller and its Affiliates for Taxes, assessments, fees or charges, including any Taxes, assessments, fees or charges incurred in connection with the consummation of the transactions contemplated hereby, whether incurred prior to or after the Closing.

(b) Buyer agrees to give written notice to Seller of the receipt of any written notice by Buyer or any of Buyer's Affiliates which involves the assertion of any claim, or the commencement of any action, in respect of which an indemnity may be sought by Buyer pursuant to this Section 5.08 (a "Tax Claim"); provided, that failure to comply with this provision shall not affect Buyer's right to indemnification hereunder. Buyer shall control the contest or resolution of any Tax Claim; provided, however, that Buyer shall obtain the prior written consent of Seller (which consent shall not be unreasonably withheld or delayed) before entering into any settlement of a claim or ceasing to defend such claim; and, provided further, that Seller shall be entitled to participate in the defense of such claim and to employ counsel of its choice for such purpose, the fees and expenses of which separate counsel shall be borne solely by Seller.

(c) Notwithstanding anything in this Agreement to the contrary, the provisions of Section 6.10 and this Section 5.08 shall survive for the full period of all applicable statutes of limitations (giving effect to any waiver, mitigation or extension thereof) plus 120 days.

(d) To the extent that any obligation or responsibility pursuant to Article XII may overlap with an obligation or responsibility pursuant to this Section 5.08, the provisions of this Section 5.08 shall govern.

5.09 Positive Train Control.

(a) Buyer acknowledges that Positive Train Control (“PTC”) may be required by law to be implemented on the D&H South. Upon Closing (if it occurs at all) and subject to the conditions in Section 5.09(b)(iii), Buyer shall assume all risks related to such implementation, including all costs to install, maintain, and operate and license equipment and software necessary to implement and operate PTC on the D&H South, including such costs actually incurred by Seller prior to the Closing (including administrative and oversight costs, subject to a cap of [REDACTED]). Buyer acknowledges that Seller makes no representation regarding the implementation of PTC or compliance with PTC requirements.

(b) If PTC is required by law to be implemented on the D&H South, then:

(i) Seller and Buyer will cooperate on a plan for such installation, including Buyer providing its specifications to Seller;

(ii) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

(iii) Seller will be entitled to reimbursement for pre-Closing PTC installation costs under Section 5.09(a) only if Seller's installation plan and proposed expenditures are submitted to and approved by Buyer in advance of any installation work, which approval will not be unreasonably withheld or delayed; and

(iv) Seller shall deliver to Buyer an invoice for PTC installation costs actually incurred prior to the Closing, and, subject to Seller's compliance with the requirements of Section 5.09(b)(iii), Buyer shall pay such invoice within sixty (60) days of receipt.

(c) In the event this Agreement is terminated, Buyer shall pay Seller all reasonable costs incurred to convert to a PTC system meeting Seller's specifications (including administrative and oversight costs, subject to a cap of [REDACTED]).

5.10 Disputes Relating to Rail Operations.

(a) Subject to occurrence of the Closing and the immediately following sentence of this Section, neither Party nor its Affiliates shall at any time institute any new Proceeding against the other Party or its Affiliates or its or their Related Persons based on or otherwise arising from any bona-fide business practices or operating practices in effect as of the date hereof or any date prior thereto on any rail lines operated or otherwise used, either prior to or on the Closing Date, by DHRC related to the agreements set forth on Schedule 5.10- 1 hereto (any such Proceeding, a "New Proceeding"); provided that a New Proceeding does not include (i) any Proceeding related to derailments, casualties and other events and (ii) claims for damages that are incurred, and disputes that arise, after the Closing Date regardless of whether such claim or dispute is based on business practice or operating practice in effect as of the date hereof or any date prior hereto.

(b) If this Agreement is terminated by either Party under its terms pursuant to Article XI (the date of any such termination, the ~~End Date~~), then the restrictions set forth in the Section regarding New Proceedings shall no longer have any effect on and after the End Date. Seller and Buyer, on behalf of themselves and their Affiliates, agree that all applicable statutes of limitations and any similar statutes shall be tolled from the date hereof through any termination of this Agreement. In addition, all existing Proceedings set forth on Schedule 5.10-2 shall be stayed pending the Closing or termination of this Agreement pursuant to its terms.

■ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

5.11 [REDACTED]

■ [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

VI. SELLER'S REPRESENTATIONS AND WARRANTIES

THE SALE AND PURCHASE AND THE OTHER TRANSACTIONS CONTEMPLATED BY THIS AGREEMENT SHALL BE WITHOUT REPRESENTATION OR WARRANTY OF ANY KIND BY SELLER, EXCEPT FOR THE REPRESENTATIONS AND WARRANTIES OF SELLER SET FORTH HEREIN. WITHOUT LIMITING THE GENERALITY OF THE PRECEDING SENTENCE, SELLER DISCLAIMS ANY REPRESENTATION OR WARRANTY, EXPRESS OR IMPLIED, OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE WITH RESPECT TO THE ACQUIRED ASSETS. BUYER AND SELLER AGREE

THAT THE REAL PROPERTY AND THE ACQUIRED ASSETS ARE BEING CONVEYED "AS IS, WHERE IS, WITH ALL FAULTS." NOTWITHSTANDING ANYTHING CONTAINED IN THIS AGREEMENT TO THE CONTRARY, SELLER MAKES NO REPRESENTATION OR WARRANTY AS TO WHETHER, UPON CONSUMMATION OF THE TRANSACTIONS CONTEMPLATED HEREUNDER, THE ACQUIRED ASSETS WILL BE SUFFICIENT FOR BUYER'S PURPOSES. SELLER DOES NOT MAKE, AND EXPRESSLY DISCLAIMS, ANY REPRESENTATION OR WARRANTY REGARDING CONDITION OF TITLE, THE PHYSICAL CONDITION OR MAINTENANCE HISTORY OF THE D&H SOUTH, THE REAL PROPERTY, AND THE ACQUIRED ASSETS.

Seller represents and warrants to Buyer that, except as set forth in a Schedule to this Agreement, the statements contained in this Article VI are true and correct as of the date of this Agreement and will be true and correct as of the Closing as though made as of the Closing, except to the extent such representations and warranties are specifically made as of a particular date (in which case such representations and warranties will be true and correct as of such date). The Schedules shall be arranged in sections and subsections corresponding to the numbered and lettered sections and subsections contained in this Article VI. The disclosures in any Schedule shall qualify other sections and subsections in this Article VI only to the extent it is clear from a reading of the disclosure that such disclosure is applicable to such other sections and subsections.

6.01 Organization and Authority.

(a) DHRC is a corporation duly organized and validly existing and in good standing under the laws of the State of Delaware. NCIC is a corporation duly organized and

validly existing and in good standing under the laws of the Commonwealth of Pennsylvania. WBCR is a corporation duly organized and validly existing and in good standing under the laws of the Commonwealth of Pennsylvania. Each of the D&H Entities is duly qualified to do business in, and is in good standing under the laws of, each other state in which the ownership or lease of its property or the nature or conduct of its business or both makes such qualification necessary, except where the failure to be so qualified would not have a Material Adverse Effect.

(b) Each of the D&H Entities has the corporate power and authority to own, lease and operate the Acquired Assets and to carry on its business related thereto as now conducted.

(c) The execution, delivery and performance by each of the D&H Entities of this Agreement and of all other agreements and instruments called for hereunder, and the consummation by each of the D&H Entities of the transactions contemplated by this Agreement, and all such other agreements and instruments called for hereunder, have been duly and validly authorized by all necessary action of the boards of directors of the D&H Entities and by any other necessary corporate or shareholder action of the D&H Entities under applicable law, the respective charters and bylaws of the D&H Entities and otherwise (none of which actions have been modified or rescinded, and all of which actions are in full force and effect). This Agreement constitutes, and upon execution and delivery each other agreement and instrument called for hereunder will constitute, the legal, valid and binding obligation of each of the D&H Entities, enforceable against the D&H Entities in accordance with their respective terms, subject to applicable bankruptcy, insolvency, fraudulent conveyance, reorganization, moratorium and similar laws affecting creditors' rights and remedies generally and subject, as to enforceability, to

general principles of equity, including principles of commercial reasonableness, good faith and fair dealing (regardless of whether enforcement is sought in a proceeding at law or in equity).

6.02 No Conflicts; Consents of Third Parties. Except for those authorizations, consents, notices, waivers and approvals described in Schedule 6.02, the execution, delivery and performance of this Agreement by each of the D&H Entities will not (a) conflict with the respective charters or bylaws of the D&H Entities; (b) conflict with, result in a breach of, constitute (with or without due notice or lapse of time or both) a default under, result in the acceleration of obligations under, create in any party the right to terminate, modify or cancel, or require any notice, consent or waiver under, any Scheduled Contract; (c) violate any order, judgment, or decree, to which any of the D&H Entities is bound or to which the D&H South or any portion thereof or any of the Acquired Assets is subject; (d) constitute a violation by the D&H Entities of any law or regulation applicable to it; or (e) result in the creation of any Encumbrance upon any of the Acquired Assets. Except as set forth in Schedule 6.02, no authorization, consent, waiver of right of first refusal, or approval of, or designation, declaration or filing with, any Governmental Authority is required on the part of the D&H Entities in connection with Seller's execution, delivery, and performance of this Agreement; *provided that* no representation or warranty is made in this Agreement with respect to FCC licenses or related towers or operations.

6.03 Licenses and Permits. The Permits represent all material permits, licenses, franchises, operating authorizations, and approvals from Governmental Authorities or other parties necessary to own and operate the Acquired Assets lawfully in all material respects and in the manner in which they are now operated, and none thereof is invalid or in default in any

material respect and no proceeding is pending or threatened to revoke or limit in any respect any thereof; *provided that* no representation or warranty is made in this Agreement with respect to FCC licenses or related towers or operations. Except as set forth in Schedule 6.03, each material Permit (other than FCC Licenses) is assignable by Seller to Buyer without the consent or approval of any Governmental Authority or other party and will continue in full force and effect following the Closing.

6.04 Title to Acquired Assets.

(a) Seller owns or otherwise possesses sufficient real and personal property rights and interests (including, without limitation, trackage and operating rights) to carry on the operation and use of the Acquired Assets for railroad operations, subject in all cases only to Permitted Encumbrances. Except as set forth on Schedule 6.04, none of the D&H Entities has received any written notice of any existing, proposed or contemplated eminent domain Proceeding or plan that may adversely affect the Acquired Assets.

(b) Seller has valid title to the Transferred Personal Property free and clear of all Encumbrances.

6.05 Employment and Employee Benefit Matters.

(a) Seller and each ERISA Affiliate of Seller have fulfilled their obligations, if any, under the minimum funding standards of ERISA and the Code with respect to each Plan and are in compliance in all material respects with the applicable provisions of ERISA and the Code, except where such noncompliance would not have a Material Adverse Effect. No lien has arisen under ERISA or the Code with respect to any of the Acquired Assets, nor has any event occurred which could give rise to such a lien.

(b) Except as set forth in Section 5.05, Seller shall be solely responsible for all wages, medical and hospitalization benefits, sick pay, vacation pay, sickness and accident benefits, severance benefits, short and long term disability benefits, life insurance (and any other death benefits), pension benefits and other deferred compensation, and any and all other benefits under all employee benefit plans (as that term is defined in Section 3(3) of ERISA), in effect covering one or more of Seller's employees as of or prior to the Closing Date.

(c) Buyer will not have any obligation to participate in or to continue or to contribute to any employee contractual arrangement or employee benefit plan (as that term is defined in Section 3(3) of ERISA) maintained by or for Seller, including pension plans, medical plans, insurance plans, severance plans and welfare plans.

6.06 Litigation. Except as disclosed in Schedule 6.06 attached hereto, there is no action, suit, investigation, claim, arbitration or litigation pending or, to the knowledge of Seller, threatened against or affecting or involving the Acquired Assets, or the business, operations, value or use thereof or related thereto (excluding any such matter with Buyer and its Affiliates) or Seller's ability to perform its obligations under this Agreement, or any of the agreements and instruments called for hereunder, at law or in equity, before or by any court, arbitrator or other Governmental Authority that would affect Buyer's operations of the Acquired Assets after the Closing.

6.07 Absence of Certain Changes. Except as set forth on Schedule 6.07, since August 31, 2014, Seller has operated the Acquired Assets in the ordinary course and substantially consistent with past practice in all material respects and there has been no Material Adverse Effect.

6.08 List of Agreements. Schedules 2.01(a)(ii), 2.01(a)(iv) and 2.01(a)(vi) set forth a complete list of all D&H South Agreements, Real Property Interests being assigned to Buyer hereunder, and Shipper Contracts, other than Immaterial Contracts, which relate to the operation of the Acquired Assets and which (such contracts meeting the thresholds set below, the "Scheduled Contracts"):

(a) provide for payments of more than [REDACTED] or [REDACTED];

(b) grant another rail common carrier the right to use all or any portion of the D&H South (including yards(s) and other facilities) or the right to serve industries located on the D&H South;

(c) grant Seller the right to use all or any portion of the rail line, yard(s) or other facilities of another rail common carrier which relate exclusively to the D&H South;

(d) relate to trackage rights, haulage, interchange, joint facility, switching and similar matters which relate to the D&H South;

(e) are leases of real property that constitute any part or portion of the operating railroad right of way; or

(f) are leases of real property which relate to the D&H South that are not part of the operating railroad right-of-way and involve more than [REDACTED] with respect to a building or [REDACTED] with respect to land.

6.09 Status of Agreements. Seller has delivered to Buyer true and complete copies of all Scheduled Contracts, including all amendments thereto. Each of the Scheduled Contracts is presently in full force and effect in accordance with its terms, there has been during the last five

years and is continuing no material breach by Seller of any of the provisions of any of the Scheduled Contracts, and to Seller's Knowledge, there has been during the last five years and is continuing no material breach by any other party to any of those Scheduled Contracts of any of the provisions of any of the Scheduled Contracts and no condition exists that, with notice or lapse of time or both, would constitute a material breach by Seller or, to Seller's Knowledge, any other party to any of those Scheduled Contracts.

6.10 Taxes and Assessments. All material Tax Returns required to be filed by the D&H Entities relating to the Acquired Assets and their operation have been filed on a timely basis, and all such returns are true, complete, and correct in all material respects. There are no Encumbrances for any Tax on the Acquired Assets except for Taxes not yet due and payable. Except for any Taxes, assessments, fees or other charges (including any interest or penalties) due to any Governmental Authority that the D&H Entities are contesting in good faith or will contest through appropriate proceedings, the D&H Entities have paid all Taxes, assessments, fees or other charges (including any interest or penalties) due to any Governmental Authority to be paid with respect to the Acquired Assets which are due and payable on and as of the date of this Agreement (subject to any proration required by Section 2.04(c)) and shall (subject to any proration required by Section 2.04(c)) pay prior to the Closing Date all Taxes, and all such material assessments, fees or other charges (including any interest or penalties) due to any Governmental Authority which become due on or prior to the Closing Date with respect to periods prior to the Closing Date. In the case of any Taxes, assessments, fees or other charges (including any interest or penalties) that the D&H Entities in good faith are contesting or will

contest through appropriate proceedings, Seller shall (subject to any proration required by Section 2.04(c)) pay such amount as is determined in the proceeding.

6.11 Hazardous Materials.

(a) Except as listed on Schedule 6.11, to Seller's Knowledge there are no underground storage tanks in, on or under the Real Property or other Acquired Assets, including any presently owned or operated Real Property. To Seller's Knowledge, except for the matters specifically set forth on Schedule 6.11 under the heading "~~Known Environmental Liabilities~~" (the "~~Known Environmental Liabilities~~"), (i) there are no existing conditions on or emanating from the Real Property or other Acquired Assets and related operations that constitute a violation of Environmental Laws or otherwise could reasonably be expected to give rise after Closing to Claims pertaining to Environmental Liabilities in connection with the continued use of the Real Property or other Acquired Assets for railroad purposes as they are currently used in all material respects, (ii) and also except under circumstances as would not reasonably be expected to give rise after Closing to Claims pertaining to Environmental Liabilities in connection with the continued use of the Real Property or other Acquired Assets for railroad purposes as they are currently used in all material respects, Seller's handling, use, treatment, removal, storage, decontamination, cleanup, transport (except for transportation as a common carrier), or disposal of Hazardous Substances on or from the Real Property or other Acquired Assets prior to Closing was in compliance with Environmental Laws, and (iii) there are no pending or threatened Claims pertaining to Environmental Liabilities under the D&H South Agreements. For avoidance of doubt, the Parties agree that (x) the presence of contamination from past releases of Hazardous Substances does not constitute a violation of Environmental Laws within the meaning of Section

6.11(a)(i) and would constitute a breach of such representation only if such contamination is not identified as a Known Environmental Liability on Schedule 6.11 and could reasonably be expected to give rise after Closing to Claims pertaining to Environmental Liabilities in connection with the continued use of the Real Property or other Acquired Assets for railroad purposes as they are currently used in all material respects, and (y) contamination on the Real Property or other Acquired Assets caused by Seller's tenants or licensees or their respective agents or contractors, or the owners or occupants of adjacent properties, including the conditions being investigated pursuant to the right of entry agreements listed on Schedule 6.11, could not reasonably be expected to give rise after Closing to Claims pertaining to Environmental Liabilities within the meaning of Section 6.11(a)(i).

(b) The representations in this Section 6.11 are the exclusive representations of Seller with respect to environmental matters, Hazardous Substances, Environmental Laws, and Environmental Liabilities related to the D&H South and the D&H South Agreements.

6.12 Legal Compliance. Seller is currently owning and operating the Acquired Assets, including the D&H South, in compliance with each applicable law (including rules and regulations thereunder) of any Governmental Authority, except for any violations or defaults that, individually or in the aggregate, have not had a Material Adverse Effect. Seller has not received any written notice or communication from any Governmental Authority alleging material noncompliance with any applicable law, rule or regulation with respect to the ownership or operation of the Acquired Assets, including the D&H South. Buyer acknowledges that Seller makes no representation regarding the implementation of PTC or compliance with PTC requirements or FCC licenses or related tower operations.

6.13 Certain Business Relationships With Affiliates. Schedule 6.13 lists any agreements or other rights with respect to the Acquired Assets which will be in effect as of Closing whereby any Affiliate of Seller directly or indirectly (a) owns any property or right, tangible or intangible, which is used in and material to the Acquired Assets (excluding general corporate contracts related to matters such as administration, sales, dispatch, information technology, human resources and like matters) or (b) has any material claim or cause of action against Seller with respect to the Acquired Assets.

VII. BUYER'S REPRESENTATIONS AND WARRANTIES

Buyer represents and warrants to Seller that the statements contained in this Article VII are true and correct as of the date of this Agreement and will be true and correct as of the Closing as though made as of the Closing, except to the extent such representations and warranties are specifically made as of a particular date (in which case such representations and warranties will be true and correct as of such date).

7.01 Organization and Authority.

(a) Buyer is a corporation duly organized and validly existing and in good standing under the laws of the Commonwealth of Virginia. Buyer is duly qualified to do business in, and is in good standing under the laws of, each other state in which the ownership or lease of its property or the nature or conduct of its business or both makes such qualification necessary, except where the failure to be so qualified would not have a material adverse effect.

(b) Buyer has the corporate power and authority to own, lease and operate the Acquired Assets and to carry on its business as now conducted.

(c) The execution, delivery and performance by Buyer of this Agreement and of all other agreements and instruments called for hereunder, and the consummation by Buyer of the transactions contemplated by this Agreement, and all such other agreements and instruments called for hereunder, have been duly and validly authorized by all necessary corporate or shareholder action of Buyer under applicable law, the articles of incorporation and bylaws of Buyer and otherwise (none of which actions have been modified or rescinded, and all of which actions are in full force and effect). This Agreement constitutes, and upon execution and delivery each other agreement and instrument called for hereunder will constitute, the legal, valid and binding obligation of Buyer, enforceable against Buyer in accordance with their respective terms, subject to applicable bankruptcy, insolvency, fraudulent conveyance, reorganization, moratorium and similar laws affecting creditors' rights and remedies generally and subject, as to enforceability, to general principles of equity, including principles of commercial reasonableness, good faith and fair dealing (regardless of whether enforcement is sought in a proceeding at law or in equity).

7.02 No Conflicts; Consents of Third Parties. Except for approval of the STB, the execution, delivery and performance of this Agreement by Buyer will not (a) conflict with the articles of incorporation or bylaws of Buyer; (b) conflict with, result in a breach of, constitute (with or without due notice or lapse of time or both) a default under, result in the acceleration of obligations under, create in any party the right to terminate, modify or cancel, or require any notice, consent or waiver under, any lease, agreement, commitment, financing arrangement (including financial covenants) or other instrument to which Buyer is a party; (c) violate any order, judgment, or decree, to which Buyer or any of its Affiliates are bound; or (d) constitute a

violation by Buyer of any law or regulation applicable to it. Except for approval of the STB, no authorization, consent, waiver of right of first refusal, or approval of, or designation, declaration or filing with, any Governmental Authority is required on the part of Buyer in connection with the execution, delivery, and performance of this Agreement.

7.03 Litigation. There is no action, suit, investigation, claim, arbitration or litigation pending, or to the knowledge of Buyer, threatened against or involving Buyer at law or in equity before or by any court, arbitrator or other Governmental Authority as to which there is a reasonable possibility of an adverse determination that could have a material adverse effect upon the ability of Buyer to perform its obligations under this Agreement or any of the other agreements or instruments called for hereunder.

7.04 Information Provided. Except to the extent of Seller's representations and warranties set forth herein, Buyer represents and warrants that it is taking full responsibility for making its own evaluation of the physical condition of the D&H South, the Real Property, title to the Real Property and Encumbrances thereon, and the Acquired Assets, including the environmental condition of the property. Buyer also represents and warrants that it is making its own evaluation of projected revenues and operating results from the Acquired Assets and that Seller has not provided any estimates, projections, forecasts, plans, budgets or pro-forma information.

7.05 Financial Resources. Buyer has and will have at Closing the financial resources necessary to pay the Purchase Price and to consummate the transactions contemplated hereby without any financing by a third party.

7.06 Continued Operation. Buyer is purchasing the D&H South for continued railway operation and to provide rail service to customers on the D&H South.

VIII. PRECLOSING COVENANTS

8.01 Negative Covenants. From the date of this Agreement until the Closing, Seller shall not, and shall not permit any of its Affiliates to, without the prior written approval of Buyer, which approval will not be unreasonably delayed or withheld, do or agree to do any of the following:

(a) Sell, assign, lease, mortgage, pledge, grant any right or interest in, or otherwise transfer or dispose of, all or any part of its real or personal property rights which comprise, or operating rights that relate to, any part of the Acquired Assets, other than (i) the lease of Real Property which would not be required to be scheduled pursuant to Section 6.08(e) or (f), and entry into Pipe and Wire Crossing Agreements, which in any case, or in the aggregate, would not have a Material Adverse Effect; (ii) the sale of personal property, including sales of scrap or obsolete or duplicative property, in each case in the ordinary course of business of freight railroads and which in any case, or in the aggregate, would not have a Material Adverse Effect; (iii) entry into an easement agreement consistent with the Easement Agreement – Power Line with respect to the Real Property; or (iv) as allowed without consent due to the term thereof in (c) and (f) below;

(b) Grant any new trackage rights;

(c) Enter into operating rights or haulage rights over the Acquired Assets with a term exceeding two years;

(d) Amend or renew any Contracts relating to the Acquired Assets which individually, or in the aggregate, would have a Material Adverse Effect;

(e) Abandon any part of the rail lines included in the D&H South;

(f) Enter into any Contracts with shippers or receivers for movement of traffic which originates and terminates on the D&H South, which Contracts will be subject to assignment to Buyer hereunder, except for such Contracts that have a term of twelve (12) months or less; or

(g) Adopt any business practice to monetize or accelerate receipt of payments under Pipe and Wire Crossing Agreements and Property Services Agreements.

8.02 Affirmative Covenants. Pending and prior to the Closing Date, Seller shall:

(a) Use commercially reasonable efforts to preserve for Buyer Seller's relationships with suppliers, customers, employees and others having business relations with Seller which relate to the Acquired Assets;

(b) Operate the Acquired Assets in the normal and usual manner in all material respects and keep and maintain the Acquired Assets substantially in their present condition; and

(c) Remove all Encumbrances from the Acquired Assets, except for Permitted Encumbrances.

8.03 Amended Schedules. On or prior to the Closing Date, Seller shall promptly deliver to Buyer supplemental information concerning events or circumstances occurring subsequent to the date hereof that would, in Seller's reasonable judgment, cause the closing condition in Section 9.01 not to be met. No such supplemental information shall be deemed to

avoid or cure any misrepresentation or breach of warranty or constitute an amendment of any representation, warranty or statement in this Agreement or the applicable Schedule; provided that if such supplemental information relates to an event or circumstance occurring subsequent to the date hereof that would enable Buyer to terminate this Agreement as a result of the information so disclosed and Buyer does not exercise such termination right, then such supplemental information shall constitute an amendment of the representation, warranty or statement to which it relates for purposes of Article XII. In addition to the foregoing, Seller shall have the right to update the disclosure schedules to its representations and warranties, with the approval of Buyer not to be unreasonably withheld or delayed, to reflect matters that, individually and in the aggregate, are not material and such updated disclosure schedules shall constitute an amendment of the representation, warranty or statement to which it relates for purposes of Article XII.

8.04 Other Preparation. Prior to the Closing, Seller and Buyer shall prepare and enter into their respective information systems all necessary information for interline settlements and rate exchange network data.

8.05 Renewal of Agreements. Prior to the Closing, Seller and Buyer will renew the agreements between Seller and Buyer and their Affiliates set forth on Schedule 8.05.

IX. CONDITIONS PRECEDENT TO BUYER'S OBLIGATION TO CLOSE

The obligations of Buyer to purchase the D&H South and the Acquired Assets and to proceed with the Closing are subject, at the option of Buyer, to the satisfaction or waiver at or prior to the Closing of each of the following conditions:

9.01 Representations and Warranties. The representations and warranties of Seller made herein or in any agreement, instrument or document called for hereunder shall have been

true and correct as of the date of this Agreement or as of the date of such other agreement, instrument or document, as the case may be (except for such representations and warranties that speak as of an earlier date, which representations and warranties shall have been true and correct as of such earlier date), and shall be true and correct in all respects (where such representations or warranties contain materiality qualifiers) or in all material respects (where such representations or warranties do not contain materiality qualifiers), as the case may be, on the Closing Date as though such representations and warranties were made on and as of the Closing Date (except for such representations and warranties that speak as of an earlier date, which representations and warranties shall be true and correct in all respects or in all material respects, as the case may be, as of such earlier date); and Seller shall have performed and complied in all material respects with all covenants and agreements required by this Agreement to be performed or complied with by Seller on or prior to the Closing.

9.02 STB Conditions. The Order shall have been received and become effective and neither the STB nor any other Governmental Authority shall have imposed any Material Governmental Condition other than standard labor protective conditions customarily related to such transactions.

9.03 Documents at Closing. Seller shall have delivered to Buyer all agreements, instruments and documents required to be delivered by Seller to Buyer pursuant to Section 3.02.

9.04 No Governmental Action or Legal Proceedings. As of the Closing Date, no statute, rule, regulation, order, decree, directive, writ or judgment shall have been enacted, adopted, issued, promulgated or rendered by any government or by any Governmental Authority (and not subsequently dismissed, settled, withdrawn or terminated) which would as of the

Closing Date (a) prevent the consummation at Closing of or restrain or invalidate the transactions contemplated by this Agreement, and by each of the other material agreements and instruments called for hereunder, (b) materially interfere with or prohibit the continued effectiveness of such agreements and instruments or (c) prevent, limit, restrict or impair in any material respect the ownership, use or operation of the Acquired Assets by Buyer in a manner which would have a Material Adverse Effect.

9.05 Contractual Consents. Buyer shall have received the consents and approvals listed on Schedule 9.05.

X. CONDITIONS PRECEDENT TO SELLER'S OBLIGATION TO CLOSE

The obligations of Seller to sell, transfer, convey and deliver the Acquired Assets and to proceed with the Closing are subject, at the option of Seller, to the satisfaction or waiver at or prior to the Closing of each of the following conditions:

10.01 Representations and Warranties. The representations and warranties of Buyer made herein or in any agreement, instrument or document called for hereunder shall have been true and correct as of the date of this Agreement or as of the date of such other agreement, instrument or document, as the case may be (except for such representations and warranties that speak as of an earlier date, which representations and warranties shall have been true and correct as of such earlier date), and shall be true and correct in all respects (where such representations or warranties contain materiality qualifiers) or in all material respects (where such representations or warranties do not contain materiality qualifiers), as the case may be, on the Closing Date as though such representations and warranties were made on and as of the Closing Date (except for such representations and warranties that speak as of an earlier date, which representations and

warranties shall be true and correct in all respects or in all material respects, as the case may be, as of such earlier date); and Buyer shall have performed and complied in all material respects with all covenants and agreements required by this Agreement to be performed or complied with by Buyer on or prior to the Closing.

10.02 STB Conditions. The Order shall have been received and become effective and neither the STB nor any other Governmental Authority shall have imposed any Material Governmental Condition other than standard labor protective conditions customarily related to such transactions.

10.03 Documents at Closing. Buyer shall have delivered to Seller on or before the Closing Date all agreements, instruments and documents required to be delivered by Buyer to Seller pursuant to Section 3.03.

10.04 No Governmental Action or Legal Proceedings. As of the Closing Date, no statute, rule, regulation, order, decree, directive, writ or judgment shall have been enacted, adopted, issued, promulgated or rendered by any government or by any Governmental Authority (and not subsequently dismissed, settled, withdrawn or terminated) which would as of the Closing Date (a) prevent the consummation at Closing of or restrain or invalidate the transactions contemplated by this Agreement, and by each of the other agreements and instruments called for hereunder, or (b) materially interfere with or prohibit the continued effectiveness of such agreements and instruments.

10.05 Contractual Consents. Seller shall have received the consents and approvals listed on Schedule 10.05.

XI. RISK OF LOSS; DEFAULT; TERMINATION

11.01 Risk of Loss. Subject to the limitations hereinafter stated, the risk of loss or damage by fire or other casualty or cause to the Acquired Assets until the Closing shall be upon Seller. In the event of such loss or damage prior to the Closing, other than such damage or loss caused by Buyer's rail operations on the D&H South (which liability will be governed by the applicable Existing Agreement(s)), Seller shall promptly restore, replace or repair the damaged assets to their previous condition at Seller's sole cost and expense if Seller's reasonable cost estimate to repair such matter is less than [REDACTED] and the Closing Date (and if necessary, the Drop Dead Date) shall be extended until such repairs are completed by Seller. If Seller's reasonable cost estimate to repair such matter exceeds [REDACTED] and if Seller's reasonable time estimate to repair such matter is greater than thirty (30) days following the Closing Date, the Closing Date (and, if necessary, the Drop Dead Date) shall be extended until such repairs are completed by Seller (Seller agreeing to make such repairs as promptly as practicable). If Seller's reasonable cost estimate to repair such matter exceeds [REDACTED] and if Seller's reasonable time estimate to repair such matter is fewer than thirty (30) days following the Closing Date, Buyer shall repair such matter and the Closing shall not be delayed but the Purchase Price shall be reduced by the mutually agreed upon amount to repair such matters; provided, however, if Seller and Buyer cannot so agree on the estimated amount to repair such matter or the amount by which to reduce the Purchase Price, Buyer shall, after completion of such repairs, submit to Seller the actual costs of such repairs, including administrative and oversight costs (subject to a cap on administrative and oversight costs of [REDACTED]), and Seller shall promptly reimburse Buyer for such costs.

[REDACTED]

11.04 Mutual Agreement. This Agreement may be terminated at any time prior to the Closing Date upon the mutual written agreement of Buyer and Seller.

11.05 Effect of Termination. In the event of the termination of this Agreement as provided in this Article XI, this Agreement shall forthwith become null and void and of no further force or effect, except for provisions that are specifically identified as intended to survive such termination (including Section 4.02 and this Section 11.05).

XII. SURVIVAL; INDEMNIFICATION

12.01 Survival of Warranties and Covenants; Limitations; Exclusive Remedy.

(a) All representations and warranties made by Seller and Buyer in this Agreement and any Operative Document shall survive the execution and delivery of this Agreement and the Closing and shall remain operative and in full force and effect for a period of eighteen (18) months following the Closing Date, except the representations and warranties in (i) Sections 6.04 (Title to Acquired Assets), 6.05 (Employment and Employee Benefit Matters) and 6.11 (Hazardous Materials) shall survive for the applicable statute of limitations, (ii) Sections 6.01 (Organization and Authority), and 7.01 (Organization and Authority) shall survive indefinitely and (iii) Sections 5.08 (Tax Matters) and 6.10 (Taxes and Assessments) shall survive for the applicable period as set forth in Section 5.08(c).

(b) Neither Seller nor Buyer shall have any liability hereunder to each other for a breach of any representation or warranty in this Agreement or the Operative Documents until the amount of Claims (as hereinafter defined) that Seller or Buyer incurs or suffers by reason of or resulting from or in connection with such breaches of representations and warranties by the other exceeds ██████████ in the aggregate on a cumulative basis and then only to the extent such Claims by reason of or resulting from or in connection with such breaches exceed such amount on a cumulative basis. The foregoing limitations shall not apply to breaches of representations and warranties in Sections 5.08 (Tax Matters), 6.01 (Organization and Authority), 6.10 (Taxes and Assessments) and 7.01 (Organization and Authority).

(c) The aggregate amount Seller shall be required to indemnify for breach of Seller's representations and warranties under this Agreement or the Operative Documents shall

not exceed [REDACTED] on a cumulative basis except breaches of representations and warranties set forth in Sections 5.08 (Tax Matters), 6.01 (Organization and Authority), 6.04 (Title to Acquired Assets), 6.05 (Employment and Employee Benefit Matters) and 6.10 (Taxes and Assessments) shall not be subject to the [REDACTED] limitation set forth above. The aggregate amount Buyer shall be required to indemnify for breach of Buyer's representations and warranties under this Agreement or the Operative Documents shall not exceed [REDACTED] on a cumulative basis except breaches of representations and warranties set forth in Section 7.01 (Organization and Authority) shall not be subject to the [REDACTED] limitation set forth above.

(d) All covenants made by Buyer and Seller in this Agreement or pursuant hereto which by their terms are specifically intended to be performed from and after the Closing shall survive the Closing.

(e) Any claim for indemnification under this Agreement or the Operative Documents shall be reduced by any insurance payment received (or any previous indemnification refunded) provided that any indemnification payment made shall be promptly made notwithstanding any potential insurance recovery.

(f) Neither party shall be required to indemnify the other for punitive, special, exemplary, incidental or consequential damages and each party waives all rights of recovery with respect thereto, except to the extent such damages are required to be paid to a non-affiliated third party pursuant to a successful Third Party Claim.

(g) The Parties acknowledge and agree that their sole and exclusive remedy with respect to any and all claims (other than claims arising from fraud or criminal activity in connection with the transactions contemplated by this Agreement) for any breach of any

representation, warranty, covenant, agreement or obligation set forth herein or otherwise relating to the subject matter of this Agreement, shall be pursuant to the indemnification provisions set forth in Section 5.08, the specific performance provisions set forth in Section 13.17 and this Article XII. In furtherance of the foregoing, each Party hereby waives, to the fullest extent permitted under law, any and all rights, claims and causes of action for any breach of any representation, warranty, covenant, agreement or obligation set forth herein or otherwise relating to the subject matter of this Agreement it may have against the other Party and its Affiliates and each of their respective representatives arising under or based upon any law, except pursuant to the indemnification provisions set forth in Section 5.08 and this Article XII. Nothing in this Section 12.01 shall limit any person's right to seek and obtain any equitable relief to which any person shall be entitled or to seek any remedy on account of any Party's fraudulent or criminal conduct.

12.02 Indemnification by Seller. Subject to the limitations, conditions and provisions of this Article XII and the Operative Documents, or such other operating agreements as may be entered into from time to time covering Seller's operations over the D&H South after the Closing, Seller, jointly and severally, shall indemnify, defend and hold harmless Buyer, its Affiliates and their respective directors, officers, employees and agents, from, against and with respect to any and all demands, claims, actions or causes of action, suits, proceedings, investigations, assessments, losses, damages, liabilities, costs and expenses, including interest, penalties and attorneys' fees and disbursements, Third Party Claims, and other costs and expenses (collectively, "Claims"), asserted against, imposed upon or incurred directly or indirectly by Buyer, by reason of, resulting from, or in connection with (a) any breach of any

representation or warranty of Seller contained in this Agreement or the Operative Documents; (b) any noncompliance by Seller with any covenants, agreements or undertakings of Seller contained in this Agreement; (c) any liabilities, debts, or other obligations of Seller, or any Affiliates of Seller, or other persons or entities related to Seller, except as specifically assumed by Buyer in Section 2.03(b); (d) any bodily injury, personal injury, occupational disease (including asbestosis and hearing loss), employee injuries under the Federal Employers' Liability Act, worker's compensation and property damage arising from or relating to occurrences (or that portion of continuing occurrences) prior to Closing, excluding (i) any such matter resulting from Buyer's rail operations on the D&H South prior to Closing and (ii) Environmental Liabilities (and other matters covered by Section 5.06 and any related Claims for pain and suffering, mental distress, loss of consortium and similar matters and any related Claim for punitive damages); and (e) until the end of the Retention Period and subject to Section 12.06, the Known Environmental Liabilities.

12.03 Indemnification by Buyer. Subject to the limitations, conditions and provisions of this Article XII and the Operative Documents, or such other operating agreements as may be entered into from time to time covering Seller's operations over the D&H South after the Closing, Buyer shall indemnify, defend and hold harmless Seller, its Affiliates and their respective directors, officers, employees and agents from, against and with respect to all Claims asserted against, imposed upon or incurred directly or indirectly by Seller, by reason of, or resulting from, or in connection with (a) any breach of any representation or warranty of Buyer contained in this Agreement or the Operative Documents; (b) any noncompliance by Buyer with any covenants, agreements or undertakings of Buyer contained in this Agreement; (c) the

ownership, use and operation of the Acquired Assets by Buyer after Closing; and (d) the Assumed Obligations.

12.04 Conditions of Indemnification. The obligations and liabilities of Seller and of Buyer hereunder with respect to their respective indemnities pursuant to this Article XII, resulting from any claim or other assertion of liability by third parties (hereinafter called collectively, ~~Third Party Claims~~”), shall be subject to the following terms and conditions:

(a) The Party seeking indemnification (the ~~Indemnified Party~~”) must give the other Party (the ~~Indemnifying Party~~”) written notice of any such Claim within thirty (30) days after the Indemnified Party receives notice thereof, but failure to give notice in such period shall only relieve the Indemnifying Party of its indemnity obligations if and to the extent the delay materially prejudices the defense of such Claim.

(b) The Indemnifying Party shall have the right to promptly undertake, without conditions or reservation of rights, by counsel or other representatives of its own choosing and reasonably acceptable to the Indemnified Party, the defense of such Claim at the Indemnifying Party’s cost and risk.

(c) In the event that the Indemnifying Party shall elect not to undertake such defense, or within a reasonable time after notice of any such Claim from the Indemnified Party shall fail to defend, the Indemnified Party (upon further written notice to the Indemnifying Party) shall have the right on behalf of and for the account and risk of the Indemnifying Party to undertake the defense, compromise or settlement of such Claim by counsel or other representatives of the Indemnified Party’s own choosing. In such event, the Indemnifying Party shall pay to the Indemnified Party, in addition to any other sums required to be paid hereunder,

the costs and expenses incurred by the Indemnified Party in connection with such defense, compromise or settlement as and when such costs and expenses are so incurred.

(d) Anything in this Section 12.04 to the contrary notwithstanding, (i) if there is a reasonable probability that a Claim may materially and adversely affect the Indemnified Party, the Indemnified Party shall have the right, at its own cost and expense, to participate in the defense, compromise or settlement of the Claim, (ii) the Indemnifying Party shall not, without the Indemnified Party's written consent, settle or compromise any Claim or consent to entry of any judgment which does not include as an unconditional term thereof the giving by the claimant or the plaintiff to the Indemnified Party of a release from all liability in respect of such Claim in a form reasonably satisfactory to the Indemnified Party, (iii) in the event that the Indemnifying Party undertakes defense of any Claim, the Indemnified Party, by counsel or other representative of its own choosing and at its sole cost and expense, shall have the right to consult with the Indemnifying Party and its counsel or other representatives concerning such Claim, and the Indemnifying Party and the Indemnified Party and their respective counsel or other representatives shall cooperate with respect to such Claim, and (iv) in the event that the Indemnifying Party undertakes defense of any Claim, the Indemnifying Party shall have an obligation to keep the Indemnified Party informed of the status of the defense of such Claim and furnish the Indemnified Party with all documents, instruments and information that the Indemnified Party shall reasonably request in connection therewith. Notwithstanding the foregoing, in the event the Indemnifying Party undertakes the defense of any Claim, the Indemnified Party shall have the right to employ its own counsel at the Indemnifying Party's expense if the Indemnified Party shall have reasonably concluded and specifically notified the

Indemnifying Party that there may be one or more specific defenses available to it which are different from or additional to those available to the Indemnifying Party or there otherwise exists a conflict of interest between the Indemnified Party and the Indemnifying Party.

12.05 Other Indemnity Matters. The indemnities contained in Sections 12.02 and 12.03 shall be continuing (except that as to representations and warranties, the indemnity shall expire on the date the relevant representation and warranty ceases to survive pursuant to Section 12.01(a)); provided, however, that with respect to any claim for indemnification for which notice has been given to the Indemnifying Party within the period that the relevant representation and warranty survives, the indemnification period shall be extended until the final resolution of such claim.

12.06 Known Environmental Liabilities.

■ [REDACTED]

[REDACTED]

XIII. MISCELLANEOUS

13.01 Consents and Filings.

(a) Each of the Parties shall give or cause to be given all required notices and use its best efforts to obtain as soon as practicable after execution hereof, and prior to Closing, all licenses, permits, consents, waivers, approvals, authorizations, qualifications and orders of Governmental Authorities relating to the Acquired Assets as may be required in order to enable Buyer and Seller to perform their respective obligations under this Agreement, and each of the agreements and instruments called for hereunder, including (i) required or desired approvals, exemptions or actions, if any, by the STB with respect to Seller's sale and Buyer's purchase of the Acquired Assets, (ii) filings, notifications and consents, if any, required under certain state laws for Buyer's acquisition of the Acquired Assets, and (iii) any such filings or notification as may, from time to time, be required under the Hart-Scott-Rodino Antitrust Improvements Act; provided that except as mutually agreed by the Parties, all required filings and notices shall be

made no later than thirty (30) days from the date of this Agreement. Buyer and Seller shall cooperate and use their best efforts to respond as promptly as practicable to all inquiries received from the STB or other federal or state agencies for initial or additional information or documentation.

(b) Without limiting the generality of the foregoing, Buyer shall: (i) use its commercially reasonable efforts to take promptly any and all steps necessary to eliminate any objections or concerns asserted with respect to the transactions contemplated hereby by any Governmental Authority with jurisdiction over the enforcement of any laws applicable to Buyer's acquisition of the Acquired Assets so as to enable the Parties to consummate the transactions contemplated hereby prior to the Drop Dead Date, including but not limited to: entering into negotiations, providing information, making proposals, entering into and performing agreements or submitting to judicial or administrative orders; (ii) use commercially reasonable efforts to take promptly, in the event that a permanent or preliminary injunction or order has been issued in a judicial or administrative proceeding brought under any law by any Governmental Authority or any other party that would make consummation of the transactions contemplated at the Closing in accordance with the terms of this Agreement unlawful or that would prevent or delay such consummation prior to the Drop Dead Date, any and all reasonable steps necessary to vacate, modify or suspend such injunction or order so as to permit such consummation prior to the Drop Dead Date; and (iii) use commercially reasonable efforts to take promptly all other actions and do all other things necessary and proper to avoid or eliminate each and every impediment under any law (including the removal of any Material Governmental Condition) that may be asserted by any

Governmental Authority or any other party to the consummation of the transactions contemplated at the Closing in accordance with the terms of this Agreement.

(c) In connection with the foregoing paragraphs (a) and (b), the Parties shall cooperate and make commercially reasonable efforts to mitigate any competitive issues identified by Buyer concerning any short line railroad(s) that may be adversely affected by the transactions contemplated hereby to the extent such cooperation does not impose significant cost or expense on Seller.

13.02 Additional Actions and Documents. At or after the Closing, and without further consideration, Seller, at the expense of Buyer, shall deliver originals or copies of all Scheduled Contracts in its possession and Permits being assigned to Buyer pursuant to this Agreement and execute and deliver such further instruments of conveyance, assignment and transfer and take such other reasonable actions as Buyer may reasonably request in order to convey, assign and transfer to Buyer any of the Acquired Assets.

13.03 Brokers. Each Party represents and warrants to the other that such Party has not incurred any liability to any broker, finder or agent for any brokerage fees or commissions or finders' fees or commissions with respect to the transactions contemplated by this Agreement which will be a direct or indirect obligation of the other Party. Each Party agrees to indemnify, defend and hold harmless the other Party from and against any and all claims asserted against the other Party for any such fees or commissions claimed by any persons purported to act or to have acted for on or behalf of the indemnifying Party. The provisions of this Section 13.03 shall survive the Closing.

13.04 Expenses. Buyer and Seller shall share equally all deed Taxes (including any recordation fees that are in the nature of a Tax, e.g., a fee determined in part on the value of the property being transferred), transfer Taxes, sales Taxes, use Taxes, excise Taxes and similar charges in connection with the transactions contemplated hereunder (excluding items of Tax based in whole or in part on the income of Seller or based on any gain from the transactions contemplated hereby), and costs of the recordation or filing of the Deeds for the Acquired Assets, together with fees incidental to the transfer of the Acquired Assets and the lands upon which the D&H South is located. Buyer shall bear, discharge and pay the expense and cost of all regulatory requirements imposed on the transaction that are related to the rail system of Buyer or its Affiliates or the D&H South which are not a Material Governmental Condition. Seller shall bear, discharge and pay the expense and cost of all regulatory requirements imposed on the transaction that are related to the rail system of Seller or its Affiliates, excluding the D&H South which are not a Material Governmental Condition. Except as otherwise expressly provided herein, each Party shall pay its own expenses incident to this Agreement and the transactions contemplated hereunder, including all legal and accounting fees and disbursements, regulatory filing fees and costs of obtaining necessary consents.

13.05 Waiver. No delay or failure on the part of any Party in exercising any right, power or privilege under this Agreement, or under any other agreements or instruments given in connection with or pursuant to this Agreement shall impair any such right, power or privilege or be construed as a waiver of default or any acquiescence therein.

13.06 Successors and Assigns. This Agreement shall be binding upon, and inure to the benefit of, the respective successors and permitted assigns of the Parties.

13.07 Assignment. No Party shall assign this Agreement, in whole or in part, whether by operation of law or otherwise, without the prior written consent of the other Party; *provided that* Buyer may assign its rights hereunder to a direct or indirect wholly-owned subsidiary of Norfolk Southern Corporation; *provided further that* (i) such assignee shall assume Buyer's obligations hereunder by an instrument in form and substance satisfactory to Seller but such assignment and assumption shall not relieve Buyer of any obligation hereunder and (ii) Buyer shall fully and unconditionally guaranty, in a manner satisfactory to Seller, such assignee's obligations under this Agreement, the Operative Documents and any other agreement or instrument entered into between the Parties in connection with the transactions contemplated hereby. Notwithstanding the foregoing, after the Closing any of the D&H Entities may be merged into any direct or indirect wholly owned subsidiary of CPRC, and either or both of NCIC and WBCR may be liquidated or dissolved (with any remaining assets transferred to an Affiliate) and Buyer shall not have any claim in any such liquidation or dissolution, provided that any plan of merger or liquidation/dissolution, as the case may be, will provide that the obligations of DHRC, NCIC or WBCR, as the case may be, under this Agreement and any Operative Documents are duly assigned to and assumed by CPRC or a direct or indirect wholly owned subsidiary of CPRC.

13.08 Notices. All notices, demands, requests, or other communications which may be or are required to be given, served, or sent by any Party to any other Party pursuant to this Agreement shall be in writing and shall be mailed by a recognized overnight courier service, by first-class, registered or certified mail, return receipt requested, postage prepaid, or transmitted by hand delivery, or telegram, or facsimile transmission, addressed as follows:

(i) If to Seller:

Delaware and Hudson Railway Company, Inc.
c/o Canadian Pacific Railway Company
Building 1
7550 Ogden Dale Road SE
Calgary, Alberta T2C 4X9
Attention: Vice President Strategic Planning & Transportation
Services
Facsimile No.: (403) 319-6770

with a copy to:

Paul Guthrie, Esq.
Vice President of Law and General Counsel
c/o Canadian Pacific Railway Company
Building 1
7550 Ogden Dale Road SE
Calgary, Alberta T2C 4X9
Facsimile No.: (403) 319-3725

(ii) If to Buyer:

Norfolk Southern Railway Company
c/o Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510
Attention: Vice President Strategic Planning
Facsimile No: (757) 533-4884

with a copy to:

Norfolk Southern Railway Company
c/o Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510
Attention: Vice President Law
Facsimile No: (757) 823-5814

Each Party may designate by notice in writing a new address to which any notice, demand, request or communication may thereafter be so given, served or sent. Each notice, demand, request or communication which shall be mailed, delivered or transmitted in the manner

described above shall be deemed sufficiently given, served, sent and received for all purposes at such time as it is delivered to the addressee (with the return receipt, the delivery receipt or the affidavit of messenger being deemed conclusive, but not exclusive, evidence of such delivery) or at such time as delivery is refused by the addressee upon presentation.

13.09 Announcements. Buyer and Seller shall consult with one another with regard to all press releases and other announcements issued at or prior to Closing concerning the transactions contemplated by this Agreement except as necessary as a result of public disclosure requirements under applicable laws or the applicable rules and regulations of any Governmental Authority or stock exchange. Neither Buyer nor Seller shall issue prior to Closing any such press releases or other announcement or publicity without the prior written consent of the other Party.

13.10 Entire Agreement. This Agreement, including the Exhibits and Schedules hereto and other instruments and documents referred to herein or delivered pursuant hereto or in connection herewith, and the Confidentiality Agreement represent the entire understanding of the Parties, supersede all prior oral or written memoranda and agreements and understandings between the Parties with respect to the subjects herein, and may not be supplemented or amended, except by a written instrument executed by and delivered to each of the Parties designating specifically the terms and provisions so supplemented and amended.

13.11 Headings. Article, section and subsection headings contained in this Agreement are inserted for convenience of reference only, shall not be deemed to be a part of this Agreement for any purpose, and shall not in any way define or affect the meaning, construction or scope of any of the provisions hereof.

13.12 Conflicting Terms. In the event that any of the terms or provisions of this Agreement violate, conflict with or are inconsistent with any of the terms or provisions of any of the agreements and instruments referred to herein or delivered pursuant hereto or in connection therewith, the terms and provisions of this Agreement shall govern and control for all purposes thereunder and hereunder.

13.13 Limitation on Benefits. Nothing herein is intended to be for the benefit of any person or entity other than the Parties. It is the explicit intention of the Parties that no person or entity other than the Parties is or shall be entitled to bring any action to enforce any provision of this Agreement against any of the Parties, and the assumptions, indemnities, covenants, undertakings and agreements set forth in this Agreement, and all other documents or instruments called for hereunder shall be solely for the benefit of, and shall be enforceable only by, the Parties or their respective successors, legal representatives and assigns as permitted hereunder.

13.14 Severability. If any clause or provision of this Agreement, or the performance of any action related thereto, at the time such fulfillment or performance shall be due, shall be deemed by a court of competent jurisdiction to be unlawful or otherwise invalid or unenforceable, or to exceed the limit of validity prescribed by law, then the obligation to be fulfilled or performed shall be reduced to the limit of such validity; and if any clause or provision contained in this Agreement operates or would operate prospectively to invalidate any agreement, in whole or in part, then such clause or provision only shall be held ineffective, as though not herein or therein contained, and the remainder of this Agreement shall remain operative and in full force and effect.

13.15 Execution. To facilitate execution, this Agreement may be executed in as many counterparts as may be required; and it shall not be necessary that the signatures of, or on behalf of, each Party, or the signatures of all persons required to bind any Party, appear on each counterpart; but it shall be sufficient that the signature of, or on behalf of, each Party, or the signatures of the persons required to bind any Party, appear on one or more of the counterparts. All counterparts shall collectively constitute a single agreement. It shall not be necessary in making proof of this Agreement to produce or account for any particular number of counterparts; but rather any number of counterparts shall be sufficient so long as those counterparts contain the respective signatures of, or on behalf of, all of the Parties. Signatures delivered by facsimile or PDF shall be binding to the same extent as an original.

13.16 Governing Law; Jurisdiction.

(a) This Agreement shall be governed by, and construed in accordance with, the laws of the State of Delaware applicable to contracts executed in and to be performed in that State without regard to any conflicting choice of law principles of that (or any other) State. **ALL ACTIONS AND PROCEEDINGS ARISING OUT OF OR RELATING TO THIS AGREEMENT SHALL BE HEARD AND DETERMINED IN A STATE OR FEDERAL COURT IN THE STATE OF DELAWARE, AND THE PARTIES HEREBY IRREVOCABLY SUBMIT TO THE JURISDICTION OF SUCH COURTS IN ANY SUCH ACTION OR PROCEEDING AND IRREVOCABLY WAIVE THE DEFENSE OF AN INCONVENIENT FORUM TO THE MAINTENANCE OF ANY SUCH ACTION OR PROCEEDING.**

(b) Each of the Parties hereby waives to the fullest extent permitted by applicable law any right it may have to a trial by jury with respect to any litigation directly or indirectly arising out of, under or in connection with this Agreement or the transactions contemplated hereby. Each of the Parties (i) certifies that no representative, agent or attorney of any other Party has represented, expressly or otherwise, that such other Party would not, in the event of litigation, seek to enforce that foregoing waiver and (ii) acknowledges that it and the other Party have been induced to enter into this Agreement and the transactions contemplated hereby, as applicable, by, among other things, the mutual waivers and certifications in this Section 13.16.

13.17 Specific Performance. The Parties agree that irreparable damage would occur in the event that any provisions of this Agreement were not performed in accordance with their specific terms. It is accordingly agreed that the Parties shall be entitled to an injunction or injunctions to enforce specifically the performance of this Agreement in accordance with its terms. The foregoing is in addition to, and not in lieu of, any other rights a Party may have in respect of a breach of this Agreement, whether at law or in equity.

[Signatures on next page.]

IN WITNESS WHEREOF, each of the Parties has executed this Agreement or has caused this Agreement to be duly executed on its behalf, as of the day and year first above written.

DELAWARE AND HUDSON RAILWAY
COMPANY, INC.

By: _____
Its: _____

By: _____
Its: _____

NORTHERN COAL AND IRON
COMPANY

By: _____
Its: _____

By: _____
Its: _____

WILKES-BARRE CONNECTING
RAILROAD COMPANY

By: _____
Its: _____

By: _____
Its: _____

NORFOLK SOUTHERN RAILWAY
COMPANY

By: _____
Its: _____

Subject to the conditions to Closing in Article X being met, the undersigned confirms it will enter into the Operative Documents to which it is a party in the form attached to this Agreement.

CANADIAN PACIFIC RAILWAY
COMPANY

By: _____
Its: _____

By: _____
Its: _____

Document	Exhibit Reference
Description of Real Property/D&H South	A
Addendum 3 to Master Interchange Agreement	
Assumption Agreement	
Bill of Sale	
Deed	
Direct Short Line Access Agreement	
Easement Agreement – Powerline	
Environmental Right of Entry Agreement	
Excluded Assets	
FCC Tower Agreement	
Inventories	
Local Access Trackage Rights Agreement	
Mineral Rights Allocation Agreement	
Modification and Restatement of 2002	
Trackage Rights Agreement	
Modification and Restatement of	
Norfolk Southern/CP Agreement on	
Northeast U.S. Restructuring	
Prorations	
Release Agreement	
Restated Bison Yard Terminal Services	
Agreement	
Restated Buffalo Trackage Rights Agreement	
Right of Entry Agreement	
Saratoga Springs-East Binghamton Trackage	
Rights Agreement	
Tax Allocation	
Termination Agreement	
Transitional Divisions and Routing Agreement	
Seller Officers' Certificate	
Buyer Officers' Certificate	

Excluded Assets

(a) All railroad rolling stock, including locomotives, motive power, cars, cabooses, and end of train devices and their contents, owned, used, held for use or otherwise held by Seller in whatever condition including any heavy bad order, retired and scrap rolling stock.

(b) Except as specifically included in the Acquired Assets, all personal property (other than fixtures), including contents of buildings, owned, leased, used or held for use by Seller in connection with the operation or use of the D&H South, including contents of buildings, vehicles and the like, inventory (other than fuel inventory), tools, machines, supplies, switch and derail locks and other materials located along the right of way or in station grounds (including stores of rails and rail ties), radios, test equipment, radio communication systems for point to train and point to vehicle communications and all related licenses from the Federal Communication Commission.

(c) Office supplies, manuals and similar items of personal property of Seller located on, in or about the D&H South which are necessary for Seller's railway operations other than the D&H South.

(d) All telephone systems and components thereof which are not owned by Seller, copying machines, fax machines, data processing computers, computer terminals, cell phones, radios, modems, printers and associated hardware and software.

(e) Except as specifically included in the Acquired Assets, any maintenance of way equipment for rail relay, tie insertion or other heavy project work owned, leased, held, used, held for use, or otherwise held by Seller.

(f) All cash, restricted cash, cash equivalents, deposits, refunds, Tax refunds (provided that for purposes of real estate Taxes, Seller shall only be entitled to, and the Excluded Assets shall only include, Tax proceeds for which Seller was obligated to pay the real estate Taxes), insurance recoveries and choses in action and accounts receivable and prepaid expenses of Seller.

(g) Except to the extent expressly included in the Acquired Assets, all equipment, tools, machinery and supplies and other materials (other than fixtures) relating to or used for trackage, signal, structure, building and rolling stock repair and maintenance in connection with the operation or use of the D&H South or any of the Acquired Assets.

(h) All vehicles and maintenance vehicles and the contents thereof not set forth on Schedules 2.01(a)(ix) and 2.01(b)(iii).

(i) All collective bargaining agreements and other agreements between Seller and representatives of Seller's employees, all employment contracts between Seller and its employees, and all employee benefit plans of Seller and assets in Seller's employee benefit plans.

(j) All interchange agreements which are not listed on Schedule 2.01(a)(ii), all power run-through agreements, car hire agreements, and all trailer and container rental agreements.

(k) All real property described on Attachment A hereto.

(l) All (i) patents, patent disclosures, designs, algorithms and other industrial property rights; (ii) trademarks, service marks, trade dress, trade names, logos and corporate names, together with all of the goodwill associated therewith; (iii) copyrights (registered or unregistered), together with all authors' and moral rights (whether choate or inchoate, published or unpublished); (iv) mask works; (v) computer software (including source code (with all

comments and remarks, if any), object code, macros, scripts, objects, routines, modules and other components), data, data bases and documentation thereof; (vi) trade secrets and other confidential or proprietary information (including ideas, formulas, compositions, inventions (whether patentable or unpatentable and whether or not reduced to practice), know-how, products, processes, techniques, methods, research and development information and results, drawings, specifications, designs, technical and development plans and proposals, technical data and customer, prospect and supplier lists and information); (vii) all other intellectual and industrial property rights of every kind and nature and however designated, whether arising by operation of law, contract, license or otherwise; (viii) "technical data" as defined in 48 CFR § 27.401; (ix) copies and tangible embodiments thereof (in whatever form or medium); and (x) all registrations, applications (pending and in-process), renewals, extensions, continuations, divisions or reissues of any of the foregoing rights, now or hereafter in force (including all rights therein).

(m) All switch and derail locks.

(n) Insurance policies and contracts.

(o) Overlap Contracts to the extent not related to the D&H South, Excluded Shipper Contracts and general corporate contracts not directly related to rail operations on the Acquired Assets, including any and all debt instruments, notes, credit agreements, guarantees and similar financial contracts.

(p) All personnel and other records that Seller and its Affiliates are required by law to retain in its possession.

(q) Corporate minute books, stock books and other corporate and Tax records of Seller and its Affiliates and all assets, books, records, documents, lists and written materials relating to any corporate or centralized services and functions, including management, finance, accounting, billing, accounts receivable, accounts payable, Tax, information services, computer services, engineering, marketing, operations, customer relations, purchasing, inventory management, construction, insurance, payroll, employee benefit, computer, call center and other administrative services and functions.

(r) Rights with respect to environmental matters or environmental indemnification or with respect to indemnification, for matters and circumstances existing as of the Closing Date and for which Seller retains liability or indemnification obligations under this Agreement.

(s) Rights against third parties for any matter for which Seller is liable under Section 12.06 of the Agreement.

(t) Any other non-fixed asset.

(u) Revenues related to Pipe and Wire Crossing Agreements or Property Services Agreements received prior to the Closing Date (no matter what period the revenues relate to) or due and payable for any period prior to the Closing Date if paid after the Closing Date shall be paid to or retained by Seller.

(v) D&H Asset Purchase Agreement.

(w) All shares, membership interests or other equity interests in any entity, joint venture or subsidiary, including the outstanding shares of capital stock of NCIC and WBCR.

(x) Any lease of real property between NCIC and WBCR on the one hand and DHRC on the other hand (which shall be canceled prior to Closing) and any tax sharing agreement between Seller and any of its Affiliates.

(y) [REDACTED]

Excluded Real Property

The following real property:

All or a portion of the same property conveyed or devised to the Seller's predecessor known as the Delaware and Hudson Railway Company, Inc. by Deed of Consolidated Rail Corporation, a corporation of the Commonwealth of Pennsylvania, having an office at Six Penn Center Plaza, Philadelphia, Pennsylvania, 19104, dated December 29, 1982 and recorded in Liber 411 Page 592, together with the improvements, hereditaments and appurtenances thereto.

This foregoing parcel contains and is identified on Commonwealth of Pennsylvania, Department of Transportation plans as Parcel 10 Project No. 040362.

PUBLIC VERSION

**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.**

**APPLICATION FOR A
MINOR TRANSACTION**

VOLUME II

SHORT LINE AGREEMENTS

PUBLIC VERSION (REDACTED) - DRAFT

TRANSITIONAL DIVISIONS AND ROUTING AGREEMENT

This TRANSITIONAL ROUTING AND DIVISIONS AGREEMENT, dated as of the ____ day of _____, 2014, between Norfolk Southern Railway Company, a Virginia corporation (“Buyer”) and Delaware and Hudson Railway Company, Inc., a Delaware corporation, d/b/a CANADIAN PACIFIC (“Seller”); sometimes individually referred to as a “Party” and sometimes collectively referred to below as the “Parties”.

RECITALS

A. Buyer and Seller are parties to the Asset Purchase Agreement (“APA”) and related transaction documents pursuant to which Seller and Seller’s subsidiaries is selling to Buyer, and Buyer is purchasing from Seller and Seller’s Subsidiaries, certain railroad properties, rights and facilities relating to a rail line referred to as the “D&H South” as defined therein, and other assets.

B. CP and Buyer currently route certain traffic over the D&H South pursuant to existing rail transportation contracts, tariffs and other pricing authorities and desire to continue to route such traffic over the D&H South or via other routes and gateways as agreed upon by the Parties, in order to comply with the terms and conditions of existing pricing authorities and to provide for efficient rail service to rail customers.

C. The Parties wish to enter into arrangements for the efficient interchange of, and the allocation of revenue derived from, traffic moving pursuant to existing rail transportation contracts, tariffs and other pricing authorities.

PUBLIC VERSION (REDACTED) - DRAFT

NOW, THEREFORE, in consideration of the mutual promises hereinafter set forth, the Parties hereto hereby agree as follows:

I. DEFINITIONS

1.01 Defined Terms. As used herein, the following terms shall have the meanings specified in this Section 1.01 as follows:

“Closing Date” -- As defined in Section 3.01 of the APA.

“CP” means Canadian Pacific Railway Company and its affiliates and subsidiaries, including Seller, individually and collectively. For the sake of clarification, in this Agreement, references to trackage owned by or mileages attributable to CP exclude trackage miles included in the D&H South line.

“D&H South” -- As defined in Recital A of the APA.

“Existing D&H South Traffic” means traffic in the revenue waybill account of Seller or CP that (i) originates on, terminates on, or moves over the D&H South on the one hand, and originates on, terminates on, or moves over CP on the other hand; and (ii) moves subject to a rail transportation contract, tariff or other pricing authority in effect at the time of Closing, but only until such time as the applicable pricing authority expires, terminates, or is canceled, renewed or amended, other than an amendment pursuant to Section V of this Agreement. Upon expiration, termination, cancelation, renewal or amendment of such a pricing authority, other than an Amendment pursuant to Section V of this Agreement, the traffic moving thereunder shall cease to be Existing D&H South Traffic.

II. SCOPE

2.01 This Agreement applies solely to traffic that meets the definition of Existing D&H South Traffic. For the sake of clarity, this Agreement does not apply, and imposes no obligations on either Party with respect to the divisions and routing for, (i) new traffic; (ii) following the renewal or amendment of pricing authorities applicable to such traffic, traffic that at the time of Closing qualified as Existing D&H South Traffic; or (iii) traffic handled by Buyer pursuant the Direct Short Line Access Agreement between Buyer and CP.

III. DIVISIONS

3.01 Revenue Allocation - Existing D&H South Traffic Line-Haul and Fuel Surcharge Revenue. Except as provided herein or as otherwise agreed to in writing by the Parties, the Parties' share of line-haul and fuel surcharge revenue for Existing D&H Traffic shall be allocated between Buyer and Seller as follows:

- a) [REDACTED]
- [REDACTED]

[REDACTED]

b) [REDACTED]

c) The allocations set forth in this Section do not apply to traffic priced by CP and by Buyer on a Rule 11 basis.

3.02 Revenue Settlement. For all traffic subject to this Agreement, the Parties agree to settle revenues pursuant to the standard interline account settlement procedures of the Association of American Railroads (“AAR”) through the AAR’s Interline Settlement System, AAR Accounting Rules or such other methods as to which the Parties mutually agree.

PUBLIC VERSION (REDACTED) - DRAFT

IV. ROUTING

4.01 Except as otherwise agreed, Existing D&H South Traffic shall be interchanged pursuant to the Routing Protocol set forth in Schedule A.

V. ASSIGNMENTS OF RAIL TRANSPORTATION CONTRACTS AND AMENDMENTS TO TARIFF ROUTES

5.01 For rail transportation contracts for movements that originate on D&H South and will continue to route via Seller after the Closing Date:

- a) Seller will assign to Buyer contracts that have only D&H South origins to Buyer;
- b) Seller will partially assign to Buyer contracts that will have D&H South and Seller origins after the Closing Date.

5.02 For rail transportation contracts for movements that will no longer involve a movement on Seller after the Closing Date, Seller shall assign to Buyer Seller's interest in the contracts.

5.03 Notwithstanding anything to the contrary in this Section, each Party will assign or partially assign their respective interests in any rail transportation contracts consistent with the revenue allocation set forth in Section 3.01 and routing set forth in Section 4.01.

5.04 To the extent required for [i] each contract assigned or partially assigned pursuant to this Section, and [ii] Existing D&H South Traffic moving subject to a tariff, each Party shall establish new routes consistent with Section 4.01.

5.05 Except as otherwise agreed to by the Parties, each Party shall be individually and not jointly responsible for trackage rights payments, reciprocal switching and terminal charges which are incurred on its portion of an Existing D&H Traffic movement.

PUBLIC VERSION (REDACTED) - DRAFT

VI. SERVICE STANDARDS.

6.01 Buyer and Seller shall accept, handle and deliver interline traffic interchanged between them on a non-discriminatory basis.

VII. TERM AND TERMINATION

7.01 Tariff Traffic. As to Existing D&H South Traffic moving subject to tariff rates, this Agreement shall be in effect for a term beginning with the Closing Date and shall remain in effect for a period of one (1) year from the Closing Date.

7.02 Non-Tariff Traffic. As to Existing D&H South Traffic other than traffic moving subject to tariff rates, this Agreement shall be in effect for a term beginning with the Closing Date and shall remain in effect for a period of three (3) year from the Closing Date.

7.03 Early Termination. In the event that there is no longer Existing D&H South Traffic moving or likely to move (the "Termination Event"), either Party may seek to terminate this Agreement by providing written notice in accordance with Section 8.08 herein. Such notice shall certify that there is no Existing D&H South Traffic moving or likely to move. The receiving party shall have fifteen (15) days in which to reject the certification if it disagrees that the Termination Event has occurred. If the certification is not rejected, this Agreement terminates.

VIII. MISCELLANEOUS:

8.01 Applicable Law. This Agreement shall be construed and the rights of the Parties shall be governed and enforced in accordance with the laws of the State of Delaware, without regard to its conflict of laws jurisprudence.

PUBLIC VERSION (REDACTED) - DRAFT

8.02 Dispute Resolution. Any dispute arising among the Parties with respect to this Agreement shall be referred to their respective senior operating officers for resolution. In the event such officers are unable to resolve the dispute, any Party may commence litigation in a state or federal court in the State of Delaware. **THE PARTIES HEREBY IRREVOCABLY SUBMIT TO THE JURISDICTION OF SUCH COURTS IN ANY SUCH ACTION OR PROCEEDING AND IRREVOCABLY WAIVE THE DEFENSE OF AN INCONVENIENT FORUM TO THE MAINTENANCE OF ANY SUCH ACTION OR PROCEEDING. EACH OF THE PARTIES HEREBY WAIVES TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY WITH RESPECT TO ANY LITIGATION DIRECTLY OR INDIRECTLY ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT.**

8.03 Inurement and Assignment. This Agreement shall inure to the benefit of and be binding upon each of the Parties and their respective successors and assigns. Neither Party shall assign any of its rights, interests, or obligations under this Agreement to another party, including by operation of law, without the prior written consent of the other Party. Each Party may assign this Agreement to a parent or a controlled subsidiary without the consent of the other Party. .

8.04 Entire Agreement. This Agreement contains the entire agreement of the Parties with respect to the subject matter herein and supersedes all prior negotiations, agreements and understandings, oral or written, with respect thereto. No amendment or waiver of this Agreement shall be binding unless the Parties have agreed to such an amendment by an exchange of

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correspondence by letter, facsimile or electronic mail, indicating that each Party has agreed to the amendment to this Agreement.

8.05 Severability. If any clause or provision of this Agreement is declared by a court of competent jurisdiction to be invalid, illegal or unenforceable under any applicable law of any jurisdiction, that provision shall be severed from this Agreement insofar as that jurisdiction is concerned, and all the remaining provisions of this Agreement shall continue to have full force and effect in that jurisdiction as if the said clause or provision had never been included; provided that the original intent of the Parties to this Agreement is not affected by such severance, unless that intent itself shall be declared invalid, illegal or unenforceable.

8.06 Waiver. Any waiver at any time of a breach of any provision, condition, obligation or requirement of this Agreement shall extend only to the particular breach so waived and shall not impair or affect the existence of any provision, condition or requirement of this Agreement or the right of Seller or Buyer thereafter to avail itself of any breach, subject to such waiver.

8.07 Headings. All section headings are inserted for convenience of reference only and shall not affect any construction or interpretation of this Agreement.

8.08 Notice. Any notice required or permitted to be given by one Party to the other Party under this Agreement shall be deemed given on the date sent by certified mail, or by such other means as the Parties may mutually agree, and shall be addressed as follows:

(i) If to Seller:

Delaware and Hudson Railway Company, Inc.
c/o Canadian Pacific
Building 1

PUBLIC VERSION (REDACTED) - DRAFT

7550 Ogden Dale Road SE
Calgary, Alberta T2C 4X9
Attention: Director Interline Agreements
Facsimile No.: (403) 319-6770

with a copy to:

CP Legal Services
Canadian Pacific Railway Company
Building 1
7550 Ogden Dale Road SE
Calgary, AB T2C 4X9
Facsimile No. 403-319-3725
Attention: Vice-President, Legal Services

(ii) If to Buyer:

Norfolk Southern Railway Company
c/o Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510
Attention: Vice President Industrial Products
Facsimile No: (757) 533-4918

with a copy to:

Norfolk Southern Railway Company
c/o Norfolk Southern Corporation
1200 Peachtree Street NE
Atlanta, GA 30309
Attention: Director – Joint Facilities
Facsimile No: (757) 823-5927

8.09 Execution. This Agreement may be executed in one or more counterparts, any of which shall constitute an original and be fully binding on the party who executes same and all of which shall constitute a single Agreement. This Agreement may be executed by facsimile or e-mail transmission of an Adobe® file format document (also known as a PDF file) which shall have the same force and effect as original executed signature pages. Any party delivering an

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executed counterpart of this Agreement by facsimile or e-mail transmission of an Adobe® file format document also shall deliver an original executed counterpart of this Agreement, but the failure to deliver an original executed counterpart shall not affect the validity, enforceability, and binding effect of this Agreement.

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IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed
as of the day and year first above written.

WITNESS:

DELAWARE AND HUDSON RAILWAY
COMPANY, INC.

By: _____

As to Seller

WITNESS:

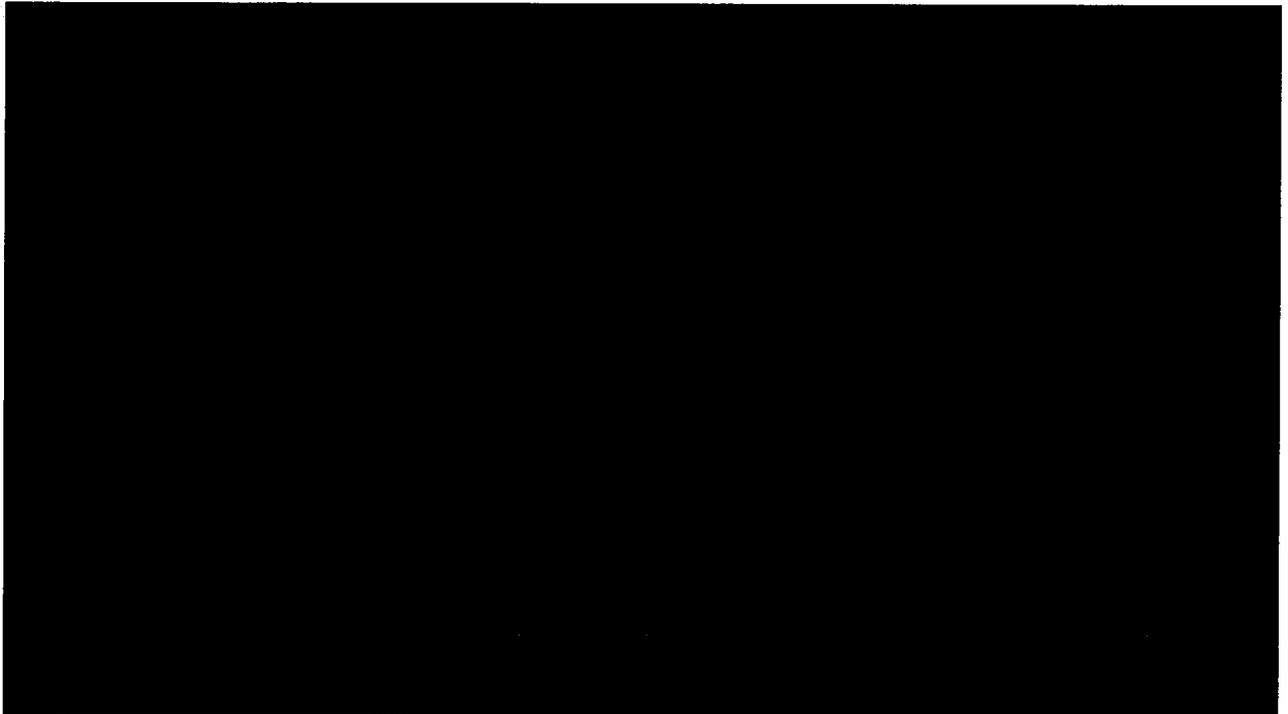
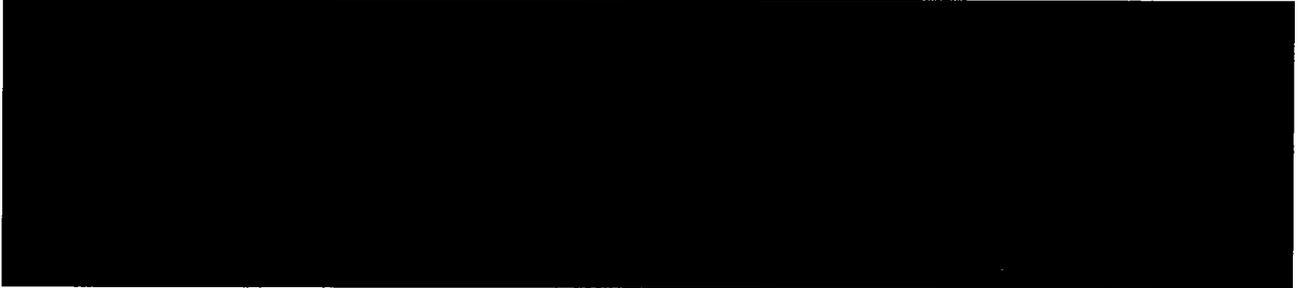
NORFOLK SOUTHERN RAILWAY COMPANY

By: _____

As to Buyer

Schedule A
Routing Protocol

Existing D & H South Traffic should be interchanged as follows:



DIRECT SHORT LINE ACCESS AGREEMENT

This Direct Short Line Access Agreement (this "Agreement") is entered into as of this ____ day of _____, 2014, by and between Norfolk Southern Railway Company, a Virginia corporation, on behalf of itself and its consolidated railroad operating subsidiaries and affiliates ("NSR") and Delaware and Hudson Railway Company, Inc., a Delaware corporation ("D&H"); sometimes individually referred to as a "Party" and sometimes collectively referred to below as the "Parties."

RECITALS

A. NSR and D&H are parties to the Asset Purchase Agreement ("APA") and related transaction documents pursuant to which D&H and its subsidiaries are selling to NSR, and NSR is purchasing from D&H and its Subsidiaries, certain railroad properties, rights and facilities relating to a rail line between Sunbury/CP Kase, PA (Milepost CPF 752) and Schenectady, NY (Milepost CPR 484.85), which is referred to as the "D&H South Line", (the "Transaction").

B. Prior to the Closing Date (as defined in the APA) of the Transaction, several short lines connect directly or indirectly via trackage rights to both D&H and NSR ("Direct Short Lines"). After the Closing Date, such short lines will only connect physically to NSR.

C. D&H's continued operations over the D&H South Line via trackage rights would not be economically viable due to the low volumes of traffic likely to move under this Agreement. Therefore, the Parties wish to enter into a haulage arrangement, pursuant to which NSR provides transportation services for traffic moving in D&H's revenue waybill account ("Haulage Services") over the D&H South Line, in order to preserve access to D&H for traffic moving to or from current stations located on such Direct Short Lines as of the Closing Date.

NOW, THEREFORE, in consideration of the following mutual promises, the Parties agree as follows:

SECTION 1. HAULAGE SERVICES

1.01 NSR shall haul Railcars (defined below) tendered by D&H in the revenue waybill account of D&H (the "D&H Haulage Cars") in NSR trains over the D&H South Line of railroad between the Parties' agreed upon point of interchange near Schenectady, NY, and the relevant interchange points near the following junctions with each Direct Short Line shown below (each specific segment referred to as "Subject Trackage"):

- (a) Reading Blue Mountain Railroad at Taylor, PA
- (b) Lycoming Valley Railroad, North Shore Railroad, Shamokin Valley Railroad, Nittany and Bald Eagle Railroad, and the Union County Railroad at Northumberland, PA
- (c) Delaware Lackawanna Railroad at Taylor, PA
- (d) Luzerne and Susquehanna Railroad at Avoca, PA
- (e) Lehigh Valley Rail Management LLC/ Philadelphia Bethlehem and New England Railroad at Bethlehem, PA.

- 1.02 NSR shall provide Haulage Services to D&H for the D&H Haulage Cars moving between Schenectady, NY and only those existing stations being served by each Direct Short Line as of the Closing Date of the Transaction.
- 1.03 "Railcars" shall include each loaded and empty railroad freight car (including standard flat cars not exceeding ninety-six (96) feet in length), dead-in-tow locomotive, caboose, or other similar equipment.

SECTION 2. MANAGEMENT AND OPERATIONS

- 2.01 D&H Haulage Cars shall be delivered by NSR to D&H and by D&H to NSR at Saratoga Yard in Saratoga Springs, NY, on yard track(s) designated by D&H's Yardmaster or other designated D&H authority in charge of Saratoga Yard, or at such other location(s) in the Schenectady to Saratoga Springs, NY, area as the Parties might agree. NSR's operation over D&H's tracks and yard facilities in connection with the delivery of D&H Haulage Cars to, or the receipt of D&H Haulage Cars from, D&H shall at all times be subject to the direction and control of the D&H officer in charge of such lines, and to applicable provisions of D&H's safety and operating rules, and shall be governed by the terms of the applicable trackage rights agreement between D&H and NSR and of Exhibit A- Addendum 3 to the Master Interchange Agreement, both of even date herewith.
- 2.02 D&H Haulage Cars shall be considered as physically delivered from one Party to the other Party when the provisions of the Association of American Railroads (hereinafter referred to as "AAR") Rules governing interchange of cars between carriers have been satisfied, and when the locomotives of the delivering carrier have been uncoupled from the D&H Haulage Cars.
- 2.03 NSR shall be responsible for making arrangements with each Direct Short Line for delivery and receipt of D&H Haulage Cars at designated facilities or such other agreed upon interchange locations at each junction for each Direct Short Line identified in Section 1.01(a).
- 2.04 NSR shall move D&H Haulage Cars using NSR locomotives and fuel and NSR crews, and shall provide substantially the same level of service as NSR provides for its own trains; provided, however, that the foregoing shall not constitute a service guarantee, and D&H shall have no claim against NSR for failure to provide such level of service.
- 2.05 Before any dimensional load or excess clearance Railcar is tendered by D&H for movement over the Subject Trackage, it shall first provide written notice to NSR's local designated representative, giving all pertinent physical facts, and requesting verification. NSR shall respond promptly either confirming the physical facts related to the proposed dimensional load or excess clearance D&H Haulage Car(s) or specifically identifying the physical facts which would interfere with a planned move. NSR shall be compensated for any special services required in order to accommodate dimensional loads, excess clearance D&H Haulage Cars, or other D&H Haulage Cars requiring special service handling as provided in Section 4. This Agreement does not obligate NSR to accept dimensional loads or excess clearance loads that cannot be moved safely, in NSR's sole

opinion, over the infrastructure as it exists at the time D&H desires to tender a dimension load or excess clearance Railcar; provided however, that in no event shall NS deny to D&H the ability to tender a specific Railcar for movement over the Subject Trackage and then subsequently grant approval for the same or similar movement over the same portion of the Subject Trackage in an NS train unless D&H receives timely notice that the limiting clearance or other reason for denial has been removed.

- 2.06 NSR and D&H each shall provide, via EDI transmission (or by such other means as may be mutually agreed by the Parties), information necessary for the further handling and movement of D&H Haulage Cars that are delivered by one Party to the other Party at Mohawk Yard. Each Party shall provide such information to the other Party prior to tendering any D&H Haulage Car for movement. Such information shall include, for each D&H Haulage Car:
- (a) Car initial and number.
 - (b) Loaded or empty.
 - (c) All required hazardous materials information.
 - (d) Such other information as Parties may agree to be necessary or convenient for the safe and efficient exchange and further movement of such D&H Haulage Cars.
- 2.07 NSR may make repairs to D&H Haulage Cars as may be necessary for safe transit while in NSR trains, and NSR may make adjustments to or transfers of lading from crippled, defective, or overloaded D&H Haulage Cars as, in its determination, may be necessary to move said D&H Haulage Cars safely. D&H shall reimburse NSR for the cost of such work at rates prescribed in, and submitted pursuant to, the Field and Office Manuals of the Interchange Rules of the AAR.
- 2.08 NSR shall have exclusive management and control over the movement of trains containing D&H Haulage Cars while on NSR's lines.

SECTION 3. CAR ACCOUNTING AND WAYBILLS

- 3.01 D&H shall include a haulage indicator on waybills it submits to NSR and shall instruct any connecting Direct Short Line to include a haulage indicator.
- 3.02 D&H shall furnish to NSR a car movement waybill for each Haulage Railcar delivered to NSR, indicating the off-junction.
- 3.03 D&H Haulage Cars shall at all times remain in the revenue waybill and car hire accounts of D&H while being transported in Haulage Service on NSR's lines. NSR shall not be entitled to any line haul revenue for the handling of D&H Haulage Cars, nor shall NSR participate in the routing of, nor appear in tariffs, waybills, or other shipping documents as a participating carrier in connection with, the movement of D&H Haulage Cars (except that NSR will show in the route of movement on waybills with a "haulage carrier role code" for transportation purposes only). As between NSR and D&H, D&H shall be responsible for and shall indemnify NSR against all mileage and car hire charges accruing on D&H Haulage Cars, and D&H shall report and pay, or arrange to have

reported and paid, all appropriate allowances and charges directly to the owner(s) of such D&H Haulage Cars.

SECTION 4. CHARGES AND ESCALATION

4.01 D&H shall pay to NSR the appropriate per car "Haulage Charge" shown in Appendix B for each loaded or empty D&H Haulage Car moving over the Subject Trackage pursuant to this Agreement. The Haulage Charges shown in Appendix A compensate NS for the line haul expenses, including crew, equipment, fuel, and maintenance expenses, plus the associated handling and switching costs at origin and destination interchanges, and at all intermediate terminals. If relevant, the Haulage Charge for articulated D&H Haulage Cars shall be calculated on the basis of one (1) Railcar for each four (4) axles. In addition to the Haulage Charge, D&H shall compensate NS for any special services necessary or advisable for the movement of dimensional loads and excess clearance Railcars at the rate of [REDACTED]

4.02 The Haulage Charges set forth in Subsection 4.01 shall be revised upward or downward, effective July 1 of each year, beginning July 1, 2016, to compensate for the increase or decrease in the cost of labor and material excluding fuel, as reflected in the final Annual Indexes of Chargeout Prices and Wage Rates (1977=100), included in the "AAR Railroad Cost Indexes" issued by the Association of American Railroads. In calculating the revision, the final "Material prices, wage rates and supplements combined (excluding fuel)" index for the East District shall be used.

4.03 The Haulage Charge shall be revised by calculating the percentage of increase or decrease, as the case may be, in the index figure for the calendar year ending on December 31 prior to the July 1 on which the adjustment is to be made related to the index for the previous calendar year, and applying that percentage to the then current Haulage Charge. By way of example: Assuming "A" to be the "Material prices, wage rates, and supplements combined (excluding fuel)" final index for the previous calendar year; "B" to be the "Material prices, wage rates and supplements combined (excluding fuel)" final index for the most recent calendar year; "C" to be the Haulage Charge; "D" to be the percentage of increase or decrease, the new revised Haulage Charge would be determined by the following formula:

(a) $(B-A) / A = D$

(b) $(C \times D) + C = \text{new revised Haulage Charge, July 1 of the year being escalated.}$

If the base for the AAR Railroad Cost Indexes issued by the AAR shall be changed from the year 1977, the Parties shall use revised historical index values that reflect the new base year in order to calculate revisions. If the AAR or any successor organization discontinues publication of the AAR Railroad Cost Indexes, an appropriate substitute for determining the percentage of increase or decrease shall be negotiated by the Parties.

4.04 The revised Haulage Charge shall never be less than the initial Haulage Charge set forth in Section 4.01 and Appendix A.

SECTION 5. MONTHLY STATEMENTS; INVOICES; AND PAYMENT OF BILLS

- 5.01 On or before the 15th day of each calendar month during the term of this Agreement, D&H shall prepare and deliver to NSR a statement setting forth the number of Railcars moved in Haulage Service and any special trains operated by NSR for D&H during the next to immediately preceding calendar month (the "Monthly Statement") as follows:
- (a) D&H shall deliver the Monthly Statement electronically to NSR's Manager, Miscellaneous Billing at nshaulage@nscorp.com. D&H may send hardcopies to the NS Waybill Processing Center, 1200 Peachtree Street, Atlanta, GA 30309.
 - (b) In its Monthly Statement, D&H shall provide a detailed list of the Railcars that moved during the subject month, which shall include, separately for each Railcar:
 - i. car initial and number,
 - ii. the points on or along the Subject Trackage between which such Railcar was handled by NSR,
 - iii. whether such Railcar was an articulated car,
 - iv. for each articulated Railcar, the number of axles on such Railcar,
 - v. whether such Railcar was a dimensional load or an excess clearance D&H Haulage Cars moving in a special train; and
 - vi. any other information relating to such Railcars that NSR may reasonably request in connection with accounting for Haulage Services.
 - (c) NSR shall prepare and deliver to D&H an invoice (the "Haulage Invoice"), computed in accordance with Section 4, for Haulage Services covered by that Monthly Statement. D&H shall make payment to NSR within thirty (30) days after the date of such Haulage Invoice.
- 5.02 The Parties shall reconcile any discrepancies in the billing and make any necessary adjustments in the next subsequent statement after such disputes are reconciled. If D&H disputes any portion of a Haulage Invoice, it shall nevertheless pay such Haulage Invoice in full (unless such dispute involves a material amount in relation to the total amount of such Haulage Invoice), subject to adjustment upon resolution of the dispute; provided, however, that (i) no exception to any charge in a Haulage Invoice shall be honored, recognized or considered if filed after the expiration of three (3) years from the date of the Haulage Invoice, and (ii) no invoice shall be rendered more than three (3) years (a) after the last day of the calendar month in which the expense covered thereby is incurred, or (b) in the case of charges disputed as to amount or liability, after the amount owed or liability therefor is established.
- 5.03 Each Party shall make its relevant records available for inspection by the other Party for period of three (3) years. All such inspections shall be conducted at the sole cost and expense of the Party requesting the inspection, and shall be conducted at reasonable intervals, locations, and times. Each Party agrees that all information disclosed to it or its representatives in connection with such inspection will be held in strictest confidence and

will not be disclosed to any third party (other than as required by applicable law or as permitted under Section 16).

- 5.04 Bills rendered pursuant to this Agreement, other than those set forth in Section 4 hereof, shall include direct labor and material costs, together with surcharges, overhead percentages, and equipment rentals in effect at the time any work is performed.

SECTION 6. LIABILITY

As between the Parties, responsibility for any loss or destruction of, or damage to, any property whatsoever, and any injury to or death of any person or persons whomever (including employees of D&H and NSR), resulting from, arising out of, incidental to or occurring in connection with this Agreement (“Loss or Damage”), shall be allocated as follows, without regard to considerations of fault or negligence (except as otherwise provided in Subsections 6.06 and 6.07):

- 6.01 For purpose of this Section 6, the following words shall have the meanings set forth in this Subsection 6.01:
- (a) “Equipment” means and is confined to cabooses, hi-rail vehicles, track inspection equipment and other non-revenue vehicles and machinery (other than locomotives) capable of being operated on railroad tracks that, at the time of an occurrence, are (i) being operated on the trackage upon which such occurrence takes place, or (ii) are on the trackage upon which such occurrence takes place, or on the adjoining right-of-way, for the purpose of maintenance or repair thereof or the clearing of wrecks thereon. “D&H Equipment” means Equipment operated by or in the account of D&H, and “NSR Equipment” means Equipment operated by or in the account of NSR.
 - (b) “D&H Traffic” refers to D&H Haulage Cars and D&H Equipment. “NSR Traffic” refers to Railcars moving in revenue and car hire account of NSR and NSR Equipment.
 - (c) “Foreign Railroad” means a railroad that is not a party to this Agreement.

6.02 Only NSR train involved.

- (a) Whenever Loss or Damage occurs with only an NSR train being involved, and that NSR train is handling (i) only D&H Traffic or (ii) both D&H Traffic and NSR Traffic, then:
 - i. D&H shall assume and bear all liability for Loss or Damage to D&H Traffic moving in such NSR train, and
 - ii. NSR shall assume and bear all liability for NSR Traffic moving in such NSR train.

- (b) If any other Loss or Damage, including without limitation Loss or Damage to employees or locomotives of the Parties (which employees and locomotives are hereby specifically excluded from the allocation subsection 6.02(a)) and any Loss or Damage to third party Railcars and Equipment, to trackage or to property (including the Subject Trackage), and any injury to or death of any other person or persons, so occurring shall be:
- i. borne solely by D&H if the involved NSR train is handling only D&H Traffic, or
 - ii. borne by each of NSR and D&H in proportion to the number of Railcars in such NSR train that are moving in that Party's revenue waybill or car hire account, if the NSR train is handling both NSR Traffic and D&H Traffic.

6.03 More than one train involved.

- (a) Whenever Loss or Damage occurs with more than one train, and one or more of such trains is handling (1) only D&H Traffic or (2) both D&H Traffic and NSR Traffic, then 1) D&H shall assume and bear all liability for Loss or Damage to D&H Traffic moving in such train(s), and 2) NSR shall assume all liability for NSR Traffic moving in such train(s).
- (b) In such event, any other Loss or Damage, including without limitation Loss or Damage to employees or locomotives of the Parties (which employees and locomotives are hereby specifically excluded from the allocation provided for in Subsection 6.03(a)) and any Loss or Damage to third party Railcars and Equipment, to trackage or to property (including the Subject Trackage), and any injury to or death of any other person or persons, so occurring shall be allocated between the Parties in the following manner:
- i. first, the total amount of such other Loss or Damage shall be allocated equally among the trains involved,
 - ii. then:
 - 1) all such Loss or Damage allocated to any train(s) which is (are) handling only D&H Traffic shall be borne solely by D&H,
 - 2) all such Loss or Damage allocated to any train(s) which is (are) handling only NSR Traffic shall be borne solely by NSR, and
 - 3) all such Loss or Damage which is allocated to any train(s) handling both NSR Traffic and D&H Traffic shall be shared and borne by each of NSR and D&H in proportion to the number of Railcars in such train that are moving in that Party's revenue waybill or car hire account.

- 6.04 For the purposes of assigning responsibility for Loss and Damage under this Section 6 as between the Parties, the trains of a Foreign Railroad shall be considered to be the trains of NSR. Further, any railcars, Equipment, or locomotives of any railroad not a Party to this Agreement moving in an NSR train shall be deemed to be the railcars, Equipment, or locomotives in the revenue waybill or car hire account of NSR.
- 6.05 Notwithstanding anything to the contrary in Subsections 6.02 through 6.04, when any damage to or destruction of the environment, including without limitation land, air, water, wildlife, and vegetation, then, as between themselves,
- (a) D&H shall be solely responsible for any damage or destruction to the environment and to third parties which results solely from a substance transported in D&H Traffic from which there was a release,
 - (b) NSR shall be solely responsible for any damage or destruction to the environment and to third parties which results solely from a substance transported in NSR Traffic and/or an NSR locomotive from which there was a release, and
 - (c) responsibility for damage or destruction to the environment and to third parties which results from one or more substances transported in D&H Traffic and NSR Traffic and/or an NSR locomotive from which there was a release shall be shared by the Parties in proportion to the total number of such Cars, Equipment or locomotives in the revenue waybill and car hire account of each Party from which there was such a release.
- 6.06 Notwithstanding anything to the contrary in this Section 6, whenever Loss or Damage occurs with one or more trains being involved, and one or more of the involved trains is handling (1) only D&H Traffic or (2) both D&H Traffic and NSR Traffic, such Loss or Damage is attributable solely to the gross negligence or willful or wanton misconduct of only one of the Parties, and such gross negligence or willful or wanton misconduct is the direct or proximate cause of such Loss or Damage, then the Party to which such gross negligence or willful or wanton misconduct is attributable shall assume all liability, cost, and expense in connection with such Loss or Damage. The Parties agree that, for purposes of this Subsection 6.06, "gross negligence or willful or wanton misconduct" shall be defined as "the intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another; such a gross want of care and regard for the rights of others as to justify the presumption of willfulness and wantonness."
- 6.07 Notwithstanding any provision of this Agreement, each Party shall be responsible for any Loss or Damage to the extent such Loss or Damage was caused by acts or omissions of that Party's employees while under the influence of drugs or alcohol. An FRA positive test for drugs or an FRA alcohol test of .04 or greater shall establish that an employee was "under the influence of drugs or alcohol," for the purposes of this Agreement.
- 6.08 Whenever circumstances require wrecking service or wrecking train service in connection with the subject of this Agreement, NSR shall arrange for such services to be

performed as promptly as reasonably possible, and the cost thereof shall be allocated as between the Parties in accordance with the terms of this Section 6.

- 6.09 If any suit or action shall be brought against any Party for Loss or Damage which under the provisions of this Agreement are in whole or in part the responsibility of the other Party, said responsible Party shall be notified in writing by the Party sued, and the Party so notified shall have the right and be obligated to take part in the defense of such suit and shall pay its share of the judgment and the costs and expense incurred in such suit in accordance with the terms of this Section 6.
- 6.10 In every case of death or injury suffered by an employee of NSR or D&H, when compensation to such employee or employee's dependents is required to be paid under any present or future state or federal worker's compensation, occupational disease, employers' liability, or other law, and one or more of the Parties under provisions of this Agreement is/are required to pay same or a portion of same in installments over a period of time, said Party or Parties shall not be released from paying any such future installment(s) by reason of the expiration or other termination of this Agreement prior to any of the respective date(s) upon which any such future installments are to be paid.
- 6.11 Whenever any liability, cost, or expense is assumed by or allocated to a Party under this Section 6, that Party shall (1) forever protect, defend, indemnify, and save harmless the other Party and its parent corporation, subsidiaries, and affiliates, and all of their respective directors, officers, agents, and employees from and against that liability, cost, and expense, regardless of whether such liability, cost, and expense was caused in whole or in part by the fault, failure, negligence, misconduct, malfeasance, or misfeasance of the indemnitees or their directors, officers, agents, or employees (except as specifically set forth in Subsections 6.07 and 6.08), and (2) defend such indemnitees against such claims with counsel selected by the responsible Party and reasonably acceptable to the indemnified Party.

SECTION 7. CLAIMS

- 7.01 Under no circumstances will either Party assert a claim for punitive or exemplary damages against the other Party related to the matters contemplated by this Agreement.
- 7.02 Each Party shall investigate, adjust, and defend all cargo related claims filed with it in accordance with 49 U.S.C. Section 11706 or 49 C.F.R. Section 1005, or in accordance with any applicable transportation contract filed pursuant to 49 U.S.C. Section 10709. The Parties shall agree between themselves on the most fair, practical and efficient arrangements for handling and administering freight loss and damage claims with the intent that (i) each Party shall be responsible for losses occurring to lading in its possession for the account of such Party and (ii) the Parties shall follow relevant Association of American Railroads (AAR) rules and formulas in providing for the allocation of losses which are either of undetermined origin or in cars handled in interline service by or for the account of the Parties.

- 7.03 All costs and expenses in connection with the investigation, adjustment, and defense of any claim or suit (other than cargo-related claims made against a Party by a customer whose traffic was moving in the revenue and/or car hire account of such Party) under Agreement shall be included as costs and expenses in applying the liability provisions of Section 6. However, each Party shall bear the salaries or wages of its full-time agents, full-time attorneys, and other full-time employees engaged directly or indirectly in such work.
- 7.04 No Party shall settle or compromise any claim, demand, suit, or cause of action (other than a cargo-related claim filed with it in accordance with 49 U.S.C. Section 11706 or 49 C.F.R. Section 1005, or in accordance with any applicable transportation contract filed pursuant to 49 U.S.C. Section 10709) for which the other Party has any liability under this Agreement without the concurrence of such other Party if the consideration for such settlement or compromise [REDACTED]

SECTION 8. COMPLIANCE WITH LAW

Each Party shall comply with all applicable laws, rules, regulations, and orders promulgated by any government or governmental agency, which affects the Haulage Services. If any fine, penalty, cost, or charge is imposed or assessed on or against either Party due to the other Party's non-compliance with any such laws, rules, regulations, or orders, such non-complying Party promptly shall reimburse and indemnify the other Party for or on account of any such fine, penalty, or cost (including all related expenses and attorney's fees), and to the extent feasible, such non-complying Party shall defend the interests of the other Party in any related legal proceeding free of expense to the other Party.

SECTION 9. TERM

- 9.01 This Agreement shall become effective on the Closing Date, as that term is defined in the APA (the "Commencement Date") and shall remain in full force and effect until mutually terminated by the Parties. The "Initial Term" of this Agreement shall be ten (10) years from the Commencement Date, and shall be renewable continuously thereafter for additional periods of five (5) years ("Additional Term(s)"). At the end of the Initial Term and each Additional Term, either Party may (i) extend this Agreement under the same terms and conditions for one Additional Term, or (ii) require renegotiation of the Agreement. In either case, the notice to continue the then-current terms and conditions or to require renegotiation shall be given by D&H or NSR, as the case may be, by giving the other Party advance written notice at least six (6) months prior to the expiration of the then-current term. If the Parties cannot agree upon the terms and conditions upon which the Haulage Services contemplated herein may be exercised by D&H during any Additional Term, then the then-existing terms and conditions will continue to apply during the subsequent Additional Term.
- 9.02 D&H shall have the right to terminate this Agreement upon giving NSR at least thirty (30) days" prior written notice of such termination.

9.03 In the event of any substantial failure on the part of either Party to perform its obligations under this Agreement and its continuance in such default for a period of sixty (60) days after written notice by certified mail from the non-defaulting Party, the non-defaulting Party shall have the right after first giving thirty (30) days' written notice thereof by certified mail, and notwithstanding any waiver of the non-defaulting Party of any prior breach thereof, to terminate this Agreement. The exercise of such right shall not impair the non-defaulting Party's rights under this Agreement or any cause of action it may have against the defaulting Party for the recovery of damages.

SECTION 10. FORCE MAJEURE

The obligations, other than payment obligations, of the Parties to this Agreement shall be subject to force majeure (which includes but is not be limited to strikes, riots, floods, accidents, Acts of God, and other causes or circumstances beyond the control of the Party claiming such force majeure as an excuse for nonperformance), but only as long as, and to the extent that, such force majeure shall prevent performance of such obligations. In the event that an event of force majeure impairs either Party's ability to fulfill its obligations to the other Party under this Agreement, said Party shall take all reasonable measures (including rerouting D&H Haulage Cars over alternate rail lines to the extent practicable) to restore performance of its obligations in a timely manner; provided, that if a detour is over NS's line, D&H shall compensate NS for the provision of service over such detour route at the rate prescribed by Section 4.01, and if such detour is over the lines of a carrier (or carriers) other than NS, D&H shall compensate NS for its pro-rata share of the additional costs incurred by NS in providing service via such detour routes.

SECTION 11. SUCCESSORS AND ASSIGNS

1.01 This Agreement shall inure to the benefit of and be binding upon each of the parties and their respective successors and assigns.

1.02 Neither Party may assign this Agreement, or any of its rights, interests or obligations hereunder, including by operation of law, without the prior consent in writing of the other Party. The consenting party may not unreasonably withhold, condition, or delay its consent. Each Party may assign this Agreement to a parent or controlled subsidiary without the consent of the other Party.

SECTION 12. NOTICE

Any notice required or permitted to be given by one Party to another under this Agreement shall be deemed given on the date sent by certified mail, or by such other means as the Parties may mutually agree, and shall be addressed as follows:

(a) If to NSR:

Director – Joint Facilities
Norfolk Southern Corporation
1200 Peachtree Street NE
Atlanta, GA 30309
Facsimile: (757) 823-5927

(b) If to D&H:

Canadian Pacific Railway Company
120 S. 6th Street, Suite 1000
Minneapolis, MN 55402
Facsimile: (612) 904-5981

with copies to:

Vice President - Operations
Canadian Pacific Railway Company
7550 Ogden Dale Road SE
Building 1
Calgary, AB T2C 4X9
Facsimile: (403) 319-7724

Vice-President, Legal Services
Canadian Pacific Railway Company
Building 1
7550 Ogden Dale Road SE
Calgary, AB T2C 4X9
Facsimile: (403) 319-3725

Either Party may provide notice of changes in the above addresses to the other Party by personal service or certified mail.

SECTION 13. CONFIDENTIALITY

Except as provided by law or by rule, order, or regulation of any court or regulatory agency with jurisdiction over the subject matter of this Agreement or a Party, or as may be necessary or appropriate for a Party to enforce its rights under this Agreement, during the term of this Agreement and during three (3) years after termination or expiration of this Agreement, the terms and provisions of this Agreement and all information to which access is provided or obtained hereunder will be kept confidential and will not be disclosed by either D&H or NSR to any Party other than D&H's and NSR's affiliates and their respective officers, employees, and attorneys of those affiliates, without the prior written approval of the other Parties, except as required by law.

SECTION 14. INDEMNITY COVERAGE

As a part of the consideration hereof, each Party agrees that each and all of its indemnity commitments in this Agreement in favor of the other Party shall extend to and indemnify the parent corporation, its subsidiaries and affiliates of such other Party, and all of their respective directors, officers, agents, and employees.

SECTION 15. EFFECT ON OTHER AGREEMENTS

All other rules, arrangements, and agreements between NSR and D&H which govern interchange of freight shipments and equipment between NSR and D&H including, but not limited to, administration and payment of freight claims, and collection and accounting for charges and revenues, shall continue to apply, except to the extent inconsistent with the terms and conditions of this Agreement.

SECTION 16. GENERAL PROVISIONS

- (a) This Agreement is for the exclusive benefit of the Parties and not for the benefit of any third party. Nothing herein contained shall be taken as creating or increasing any rights in any third party to recover by way of damages or otherwise against either of the Parties.
- (b) All section headings are inserted for convenience only and shall not affect any construction or interpretation of this Agreement.
- (c) This Agreement contains the entire understanding of the Parties with respect to movement of D&H Haulage Cars over the Subject Trackage, and it supersedes any and all other understandings between the Parties with respect to that subject matter.
- (d) No term or provision of this Agreement may be changed, waived, or terminated except by an instrument in writing signed by both Parties to this Agreement.
- (e) The failure of either Party to demand strict performance of any or all of the terms of this Agreement, or to exercise any or all rights conferred by this Agreement, shall not be construed as a waiver or relinquishment of that Party's right to assert or rely upon any such right in the future.
- (f) All words, terms, and phrases used in this Agreement shall be considered in accordance with the generally applicable definition or meaning of such words, terms, and phrases in the railroad industry.
- (g) If any term or provision is determined to be unenforceable, such determination shall affect that term or provision only and all of the other terms and provisions of this Agreement shall continue in full force and effect.
- (h) The termination or expiration of this Agreement shall not relieve nor release either Party from any obligations or liabilities accrued as of the time of such termination or expiration.
- (i) Nothing in this Agreement shall serve to create any new or additional obligation whatsoever between NSR and D&H with respect to railcar ownership.
- (j) The interpretation and performance of this Agreement shall be governed by the substantive and procedural laws of the State of Delaware, without giving effect to any choice or conflict of laws provision or rule (whether of the State of Delaware or any other

jurisdiction) that would cause the application of laws of any jurisdiction other than the State of Delaware.

- (k) Any dispute arising between the Parties with respect to this Agreement shall be referred to their respective senior operating officers for resolution. In the event such officers are unable to resolve the dispute, either Party may commence litigation in a state or federal court in the State of Delaware. **THE PARTIES HEREBY IRREVOCABLY SUBMIT TO THE JURISDICTION OF SUCH COURTS IN ANY SUCH ACTION OR PROCEEDING AND IRREVOCABLY WAIVE THE DEFENSE OF AN INCONVENIENT FORUM TO THE MAINTENANCE OF ANY SUCH ACTION OR PROCEEDING. EACH OF THE PARTIES HEREBY WAIVES TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY WITH RESPECT TO ANY LITIGATION DIRECTLY OR INDIRECTLY ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT.**
- (l) This Agreement is the result of mutual negotiations between the Parties hereto, neither of whom shall be considered the drafter for purposes of contract construction.
- (m) As used in this Agreement, whenever reference is made to the trains, locomotives, cars or equipment of, or in the account of, one of the Parties hereto, such expression means the trains, locomotives, cars and equipment in the possession of or operated by such Party and includes such trains, locomotives, cars and equipment which are owned by, leased to, or in the account of such Party.
- (n) Each definition in this Agreement includes the singular and the plural, and references in this Agreement to the neuter gender include the masculine and feminine where appropriate. References herein to any agreement or contract mean such agreement or contract as amended. As used in this Agreement, the word "including" means "without limitation", and the words "herein", "hereof" and "hereunder" refer to this Agreement as a whole. All dollar amounts stated herein are in United States currency.
- (o) This Agreement may be executed in any number of counterparts, each of which may be deemed an original for any purpose. Execution and delivery of this Agreement by facsimile transmission shall be deemed for all purposes to be due execution and delivery by the undersigned.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be duly executed as of the date first above written.

NORFOLK SOUTHERN RAILWAY COMPANY

By: _____

Title: _____

DELAWARE AND HUDSON RAILWAY COMPANY, INC.

By: _____

Title: _____

Appendix A

Per Car Haulage Charge

Shortline Initial	Shortline Name	Junction	Per Car Haulage Charge
DL	Delaware Lackawanna Railroad	Taylor, PA	██████
LS	Luzerne Susquehanna Railroad	Avoca, PA	██████
NSHR	North Shore Railroad	Northumberland, PA	██████
UCIR	Union County Railroad	Northumberland, PA	██████
NBER	Nittany Bald Eagle Railroad	Northumberland, PA	██████
SVRR	Shamokin Valley Railroad	Northumberland, PA	██████
LVRR	Lycoming Valley Railroad	Northumberland, PA	██████
RBMN	Reading Blue Mountain Railroad	Taylor, PA	██████

PUBLIC VERSION

**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.**

**APPLICATION FOR A
MINOR TRANSACTION**

VOLUME II

TRACKAGE RIGHTS AGREEMENT FOR FD 34209 (SUB-NO. 1)

**MODIFICATION AND RESTATEMENT OF
THE 2002 TRACKAGE RIGHTS AGREEMENT**

THIS MODIFICATION AND RESTATEMENT OF THE 2002 TRACKAGE RIGHTS AGREEMENT (“Agreement”) is made this ___ day of _____, 2014 by and between DELAWARE AND HUDSON RAILWAY COMPANY, INC., a Delaware corporation (“D&H”) and NORFOLK SOUTHERN RAILWAY COMPANY, a Virginia corporation (“NSR”). D&H and NS are sometimes referred to hereinafter individually as a “Party” and collectively as the “Parties”.

RECITALS

A. NSR and D&H are parties to the Norfolk Southern/CPR Agreement on Northeast U.S. Restructuring dated June 27, 2002 (the “2002 Restructuring Agreement”), pursuant to which D&H agreed to grant trackage rights over its lines, including the segment from Sunbury/CP-Kase (Milepost CPF 752.0) to D&H’s connection with Pan Am Southern, LLC in Mechanicville, NY (Milepost CPF 467.40) (the “2002 Trackage Rights”).

B. NSR and D&H are parties to a Trackage Rights Agreement dated June 27, 2002, which contains the terms and conditions that apply to NSR’s trackage rights over the line segments specified in the 2002 Restructuring Agreement.

C. NSR and D&H are parties to the Asset Purchase Agreement (“APA”), dated _____, 2014 and related transaction documents pursuant to which D&H is selling to NSR, and NSR is purchasing from D&H and its subsidiaries, certain railroad properties, rights and facilities relating to a rail line between Sunbury/CP Kase, PA (Milepost CPF 752) and Schenectady, NY (Milepost CPF 484.85) (the “Transaction”).

D. Pursuant to the APA the Parties have agreed to modify NSR’s existing 2002 Trackage Rights over D&H’s line of railroad between Schenectady, NY and Mechanicville, NY (the “D&H Line”).

E. The Parties wish to modify and restate the terms and conditions upon which NSR may operate over the D&H Line.

NOW, THEREFORE, in consideration of the following mutual promises, the Parties agree as follows:

SECTION 1. GRANT OF TRACKAGE RIGHTS

(a) On the terms and subject to the conditions herein provided, D&H hereby grants to NSR the non-exclusive right to operate its overhead trains, locomotives, cars and equipment with its own crews (such rights being referred to hereinafter as the “Subject Trackage Rights”) over the following D&H railroad line, as shown in detail on Exhibit A to this Agreement:

D&H’s Freight Main Line between MP 484.85 ± in the vicinity of Schenectady, NY and CPF 467 in the vicinity of Mechanicville, NY, including the right to use such track(s)

within D&H's Mohawk Yard as shall be designated from time to time by the D&H officer in charge of operations at Mohawk Yard.

(b) The trackage described in this Section 1 is referred to as the "Subject Trackage."

SECTION 2. USE OF SUBJECT TRACKAGE

(a) NSR's use of the Subject Trackage shall be in common with D&H and any other user(s) of the Subject Trackage, and the rights of D&H's and such other user(s) to use the Subject Trackage shall not be diminished by this Agreement.

(b) NSR may operate trains in either direction over the Subject Trackage.

(c) NSR may use the Subject Trackage solely for the purpose of the overhead movement of trains consisting entirely of cars in the revenue waybill account of NSR.

(d) NSR locomotives and crews operating over the Subject Trackage shall be equipped to communicate with D&H on radio frequencies normally used by D&H in directing train movements on the Subject Trackage.

(e) Procedures for qualification and occupancy of the Subject Trackage will be arranged by the local supervision of each carrier. NSR's operations over the Subject Trackage shall at all times be subject to the direction and control of the D&H operating officer in charge of the Subject Trackage and to applicable provisions of D&H's safety and operating rules.

(f) [REDACTED]

(g) NSR shall have the right to move in its own trains all dimensional loads and excess clearance rail cars which it may approve for movement over the Subject Trackage, subject to the clearance file ("Clearance File") maintained by D&H that is applicable to traffic of both Parties. D&H shall promptly inform NSR of any changes made to the Clearance File. Before any dimensional load or excess clearance rail car is proposed for movement by NSR under this Agreement, NSR shall first notify D&H in writing, giving all pertinent physical facts, and requesting verification. D&H shall respond promptly either confirming the physical facts related to the proposed dimensional load(s) or excess clearance rail car(s) or specifically identifying the physical facts which would interfere with a planned move. In no event shall D&H deny to NSR the ability to tender a specific rail car for movement over the Subject Trackage and then subsequently grant approval for the same or similar movement over the Subject Trackage in a D&H train unless NSR receives timely notice that the limiting clearance or other reason for denial has been removed. The Parties shall cooperate to accommodate all dimensional loads and excess clearance rail cars, subject to compensation to D&H in addition to the Trackage Rights Charges for any special services necessary or advisable for the movement thereof at the rate of [REDACTED], as escalated pursuant to the provisions of Section 5(b).

SECTION 3. RESTRICTIONS ON USE

(a) The Subject Trackage Rights are granted for the sole purpose of Norfolk Southern using the Subject Trackage to operate its trains in overhead movements. NSR trains may enter and exit the Subject Trackage only at Milepost 484.85 ± of D&H's Freight Main Line in Schenectady, and Milepost CPF 467 ± in Mechanicville. The points of ingress and egress designated in this Section 3(a) are referred to herein as the "End Points." NSR shall not have the right to enter or leave the Subject Trackage except at the End Points for the purpose of interchange with D&H at Mohawk Yard.

(b) NSR shall not perform any local freight service whatsoever at any point located on Subject Trackage.

(c) NSR shall not interchange any traffic with any other carrier, except with D&H at Mohawk Yard, at any point on or along, or at the End Points of, the Subject Trackage. NSR shall not have the right to serve existing or future shippers at facilities located on or along, or at the End Points of, the Subject Trackage.

(d) NSR shall not use any part of the Subject Trackage for the purpose of switching, storage or servicing cars or equipment, or the making or breaking up of trains, except as necessary for the handling of locomotives, cars or cabooses bad ordered en route; provided, that NSR may use such auxiliary Subject Trackage as may be designated by D&H for such purposes.

(e) NSR may not grant trackage rights of any nature on the Subject Trackage to other parties.

(f) Notwithstanding any other provision of this Agreement to the contrary, NSR may not permit or admit any third party to the use of all or any part of the Subject Trackage, nor may NSR contract or make any agreement to provide haulage over the Subject Trackage of trains, locomotives, cars or cabooses of any third party which, in the normal course of business, would not be considered as the trains, locomotives, cars or cabooses of NSR, or in any other way provide haulage service for other carriers over the Subject Trackage; provided, however, that this Section 3(f) shall not be construed to prohibit NSR from using the locomotives, cars and cabooses of another railroad as its own in NSR trains pursuant to a run-through agreement with any railroad, or a bona fide equipment lease.

(g) The Parties agree that rebilling of traffic in the Schenectady, NY area or the Mechanicville, NY area is not a permissible method of avoiding any direct traffic limitation set forth in this Agreement.

(h) This Agreement is not intended to, and shall not operate to, expand or contract any Party's existing commercial access to, or right to serve (directly or through switching) any particular shipper facility.

(i) The length of NSR trains (including locomotives and other motive power units) operating pursuant to this Agreement shall not exceed 9,200 feet, subject to compliance with operating policies applied to D&H's own trains. The maximum train length set forth in this

Section 3(i) may be adjusted by D&H and NSR from time to time consistent with D&H's governing operating practices and procedures.

(j) NSR's use of the Subject Trackage pursuant to this Agreement shall be subject to the following maximum volume limitation ("Maximum Volume Restriction"):

(i) [REDACTED]

(ii) [REDACTED]

(iii) If the Subject Trackage is unavailable to NSR due to a derailment, line outage or other interruption of service on the Subject Trackage, or if NSR experiences a derailment, an unintended line outage or other unintended interruption of service on its own lines connecting to, and necessary to reach, the Subject Trackage, in each case for a period of time (the "Outage Period") greater than twenty-four (24) hours, and no detour is available, then D&H shall cooperate and consult with NSR in order to address any resulting backlog of trains over a period of time ("Resolution Period") following the resolution of such derailment, line outage or other interruption of service (including the possibility of waiving the Maximum Volume Restriction set forth in this Section 3(j) for the Resolution Period as may be required to reduce such backlog of NSR trains), provided, however, that the Maximum Volume Restriction set forth in Section 3(j)(i) shall not be exceeded as measured over an average of the Outage Period plus the Resolution Period.

(k) If NSR develops further business such that additional NSR trains are required which necessitate the operation of trains in excess of the Maximum Volume Restriction ("Additional Trains"), NSR may request that D&H permit the operation of Additional Trains. D&H shall consider such a request in good faith and may in its discretion permit the operation of the number of Additional Trains specified by D&H. If D&H determines, through an Rail Traffic Controller capacity simulation (having regard to D&H's own present and future requirements and D&H's required reserve capacity), that facility changes, additions and betterments to D&H's line are necessary to accommodate the operation of Additional Trains ("Capacity Improvements"), D&H shall advise NSR of the required Capacity Improvements and the number of Additional Trains that would be permitted if the Capacity Improvements were constructed. If NSR wishes that the Capacity Improvements be made it shall request in writing that the Capacity Improvements be made by D&H at the sole cost and expense of NSR. If requested to do so by NSR, D&H shall construct the Capacity Improvements and upon completion of the construction of the Capacity Improvements and payment therefor by NSR, the Maximum Volume Restriction shall be amended to permit the operation of the number of Additional Trains specified by D&H.

SECTION 4. SERVICE STANDARDS

NSR shall provide D&H notice of the schedules for regularly scheduled NSR trains operating over the Subject Trackage, as well as any proposed modifications. NSR shall provide the Service Standards Committee at least seven (7) days prior written notice of such changes in NSR train schedules or frequencies, and notice as reasonably practicable in the case of train annulments and extra trains necessitated by sudden or seasonal surges in traffic volumes.

SECTION 5. COMPENSATION

(a) Generally.

(i) NSR shall compensate D&H for the use of the Subject Trackage by paying to D&H a sum computed by multiplying (a) the Trackage Rights Charges (as defined in Section 5(b) of this Agreement) by (b) the number of cars (loaded or empty) and locomotives moved over the Subject Trackage by (c) the miles of the Subject Trackage over which the cars and/or locomotives are moved (which are agreed to be 17.45 miles). In computing the compensation payable by NSR pursuant to this Section 5, cars that exceed ninety-six (96) feet in length shall be counted as one (1) car for each four (4) axles.

(b) The Trackage Rights Charges.

(i) The charge payable by NSR for use of the Subject Trackage shall initially be [REDACTED]

(ii) The Trackage Rights Charges shall be adjusted upward or downward effective July 1 each year, beginning July 1, 2016, to compensate D&H for one hundred percent (100%) of any increase or decrease in the cost of labor and material, excluding fuel, as reflected in the Annual Indexes of Charge-out Prices and Wage Rates (1977=100), Series RCR, included in "the AAR Railroad Cost Index" issued by the Association of American Railroads ("AAR"); provided, however, that the Trackage Rights Charges shall in no event be decreased to a level below those set forth in Section 5(b)(i) of this Agreement. In determining the amount (if any) of the annual adjustment, the final "Material prices, wage rates and supplements combined (excluding fuel)" index for the Eastern District shall be used, and the calendar year ending December 31, 2014 shall be deemed the "Base Calendar Year."

(iii) The first annual adjustment to the Trackage Rights Charges shall be computed by calculating the percentage of increase or decrease in the final index for the calendar year ending December 31, 2015, as related to the final index for the Base Calendar Year, and applying that percentage to the initial Trackage Rights Charges set forth in Section 5(b)(i). Subsequent annual adjustments will be computed by calculating the percentage of increase or decrease in the final index published for the calendar year immediately preceding the year in which the adjustment is to be applied, as related to the final index published for the Base Calendar Year, and applying that percentage to the initial Trackage Rights Charges set forth in Section 5(b)(i). By way of example, assuming "A" to be the "Material prices, wage rates and supplements combined

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(excluding fuel)” final index for the Base Calendar Year; “B” to be the “Material prices, wage rates and supplements combined (excluding fuel)” final index for the calendar year 2015; “C” to be the initial Trackage Rights Charges; “D” to be the percentage of increase or decrease, the adjusted Trackage Rights Charges to be applied on and after July 1, 2005 would be determined by the following formula:

(1) $(B - A) / A = D$

(2) $(C \times D) + C = \text{adjusted Trackage Rights Charges, effective July 1, 2016.}$

(iv) If the base for the “Annual Indices of Charge-out Prices and Wage Rates” issued by the AAR is changed from the year 1977, an appropriate revision shall be made in the base (established as herein provided) for the calendar year 1977. If the AAR or any successor organization discontinues publication of the “Annual Indices of Charge-out Prices and Wage Rates,” an equitable substitute for determining the annual percentage of increase or decrease shall be negotiated by the Parties. On or before the 15th day of each calendar month during the term of this Agreement, NSR shall prepare and deliver to D&H a statement setting forth the number of cars and miles operated on the Subject Trackage pursuant to this Agreement during the immediately preceding month (the “Monthly Statement”). The Monthly Statement shall be delivered to D&H’s Manager – Interline Agreement Management in electronic format, and shall contain a detailed list of the cars that moved during the subject month, which list shall include, for each car, the following information: (1) car initial and number, (2) the respective End Points that the car moved between, (3) whether the car exceeded ninety-six (96) feet in length; (4) for each car exceeding ninety-six (96) feet in length, the number of axles on such car; and (5) any other information relating to such cars that D&H may reasonably request in connection with accounting for the use of the Subject Trackage Rights. D&H shall develop and present to NSR an invoice (the “Use Invoice”) computed in accordance with Section 5(a) for use of the Subject Trackage Rights covered by that Monthly Statement. NSR shall make payment to D&H within thirty (30) days after the date of such Use Invoice.

(v) Any dispute regarding the amount of a Monthly Statement or Use Invoice shall be reconciled between the Parties, and any adjustment resulting from such reconciliation shall be reflected in a subsequent Use Invoice. If NSR disputes any portion of a Use Invoice, it shall nevertheless pay such Use Invoice in full (unless such dispute involves a material amount in relation to the total amount of such Use Invoice), subject to adjustment upon resolution of the dispute; provided, however, that (i) no exception to any charge in a Use Invoice shall be honored, recognized or considered if filed after the expiration of three (3) years from the date of the Use Invoice, and (ii) no invoice shall be rendered more than three (3) years (a) after the last day of the calendar month in which the expense covered thereby is incurred, or (b) in the case of charges disputed as to amount or liability, after the amount owed or liability therefor is established. Any claim for the adjustment of a Monthly Statement or Use Invoice shall be deemed to be waived if not made in writing within three (3) years after the date of the

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relevant Monthly Statement for statement adjustments and the date of the relevant Use Invoice for invoice adjustments.

(vi) NSR and D&H shall each have the right, at its own expense, to audit the records of the other Party pertaining to the use of the Subject Trackage Rights under this Agreement, and any Monthly Statement, Use Invoice or other invoice issued by NSR or D&H, respectively, pursuant to this Agreement, at any time within three (3) years of the date of the relevant Use Invoice or other invoice (as applicable) relating to use of the Subject Trackage Rights. All such audits shall be conducted at reasonable intervals, locations and times. Each Party agrees that, except as permitted by Section 19 of this Agreement, all information disclosed to it or its representatives in connection with such an audit will be held in strictest confidence and will not be disclosed to any third party (other than as required by applicable law). Any adjustment resulting from an audit conducted pursuant to this Section 5(b)(vii) with respect to which the Parties are in concurrence shall be reflected in a subsequent Use Invoice.

(vii) Invoices rendered pursuant to the provisions of this Agreement, other than Use Invoices and charges under Section 9(i), shall include direct labor and material costs, together with the surcharges, overhead percentages and equipment rentals as specified by D&H at the time any work is performed by D&H for NSR, or shall include actual costs and expenses, upon mutual agreement of the Parties.

SECTION 6. MAINTENANCE OF SUBJECT TRACKAGE

(a) D&H shall be solely responsible for the maintenance, repair and renewal of the Subject Trackage. D&H shall keep and maintain the Subject Trackage in reasonably good condition for the use herein contemplated, such condition not to be less than Federal Railroad Administration class specification the Subject Trackage was as of the Effective Date of this Agreement, subject to slow orders and the like, but D&H does not guarantee the condition of the Subject Trackage or that operations thereover will not be interrupted. D&H shall take reasonable steps to ensure that any interruptions will be kept to a minimum and shall use its best efforts to avoid such interruptions.

(b) D&H shall, in planning program maintenance of the Subject Trackage, take into account the schedule of NSR trains on the Subject Trackage as well as D&H trains. D&H shall from time to time throughout the term of this Agreement, advise NSR of its schedule for planned maintenance, and any revisions to such schedule, as soon as practicable after such maintenance plan is determined or revised. D&H shall further provide the designated officer of NSR with seven (7) days prior notice (or such lesser notice period as is reasonable in the circumstances) of substantial delays or line outages on the Subject Trackage due to planned maintenance.

SECTION 7. CONSTRUCTION AND MAINTENANCE OF CONNECTIONS

Existing connections or facilities, which are jointly used by the Parties hereto under existing agreements, shall continue to be maintained, repaired and renewed by and at the expense of the party or parties responsible for such maintenance, repair and renewal under such agreements.

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(a) If, in the opinion of NSR, a new or upgraded connection is required at a point of permitted entry or exit other than the endpoints, or, if in the opinion of NSR, other upgrading, including but not limited to switches, power switches, signals, communications, is required for operational efficiency, then D&H will, subject to its own operational needs, cooperate and NSR will be responsible for funding that construction/upgrading at actual cost or a cost mutually agreed to by NSR and D&H. Such construction/upgrading shall be progressed as follows:

(i) NSR or others shall furnish all labor and materials and shall construct such portions of the tracks located on the right-of-way of NSR or others, which connect the respective lines of the Parties.

(ii) D&H shall furnish all labor and material and shall construct such portions of the tracks located on the right-of-way operated by D&H, which connect the respective lines of the Parties. Upon termination of this Agreement, D&H may at its option remove any portion of trackage and appurtenances located on right-of-way, constructed as a result of this provision, at the sole cost and expense of NSR. D&H will release any salvage material removed to NSR or will credit NSR for the current fair market value of the salvage materials.

(iii) D&H will maintain, repair and renew the constructed/upgraded portions of the tracks located on the right of way operated by D&H that connect the respective lines of the Parties at the sole cost and expense of NSR.

SECTION 8. ADDITIONS, RETIREMENTS AND ALTERATIONS

(a) D&H, from time to time and at its sole cost and expense, may make changes in, additions and betterments to, or retirements from, the Subject Trackage as shall, in its judgment, be necessary or desirable for the economical or safe operation of the Subject Trackage or as shall be required by any law, rule, regulation, or ordinance promulgated by any governmental entity having jurisdiction. Such additions and betterments shall become a part of the Subject Trackage and such retirements shall be excluded from the Subject Trackage.

(b) If the Parties agree that changes in or additions and betterment to the Subject Trackage, including changes in communication or signal facilities, are required to accommodate NSR's operations beyond that required by D&H to accommodate its operations, D&H shall construct the additional or altered facilities and NSR shall pay to D&H the cost thereof, including the annual expense of maintaining, repairing and renewing such additional or altered facilities.

SECTION 9. MANAGEMENT AND OPERATIONS

(a) D&H shall have exclusive control of the management and operation (including dispatching) of the Subject Trackage. Operation and control, including dispatching, of the Subject Trackage shall be conducted in a manner as to afford each of the Parties, and any other present or future user of the Subject Trackage (or any portion thereof) the most economical and efficient movement of its traffic over the line. For the purposes of dispatching, NSR's and D&H's trains of the same class shall be treated with equal priority, with the four (4) classes of trains being:

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1. Passenger
2. Intermodal and automotive
3. Regular (unit and freight trains not scheduled to set off/pick up en route)
4. Other (includes trains and equipment that must operate at restricted speeds, i.e., local, work, or other such equipment movements);

provided, that in the event of a conflict, the D&H dispatcher shall be empowered to deviate from the priorities set forth herein in order to employ best practices to efficiently move all trains.

(b) D&H shall provide NSR with read-only access to D&H's Central Traffic Control screens covering the Subject Trackage in the offices of NSR designated by NSR. D&H shall be responsible for the cost of modifying its system to the extent necessary to provide NSR access to its Central Traffic Control screens, and NSR shall be responsible for the cost of the communications link with D&H and the costs to use such link incurred in NSR's offices. Such access, and the information derived therefrom, shall be restricted to NSR operating personnel, who shall only use said access, and the information derived therefrom, to monitor NSR train movements and for no other purpose, and shall further protect the confidentiality of the information derived therefrom.

(c) NSR shall comply with the provisions of the Federal Locomotive Inspection Act and the Federal Safety Appliance Act, as amended, and any other federal and state and local laws, regulations and rules respecting the operation, condition, inspection and safety of its trains, locomotives, cars and equipment while such trains, locomotives, cars, and equipment are being operated over the Subject Trackage. NSR shall indemnify, protect, defend, and save harmless D&H and its parent corporation, subsidiaries and affiliates, and all of their respective directors, officers, agents and employees from and against all fines, penalties and liabilities imposed upon D&H or its parent corporation, subsidiaries or affiliates, or their respective directors, officers, agents and employees under such laws, rules, and regulations by any public authority or court having jurisdiction, when attributable solely to the failure of NSR to comply with its obligations in this regard.

NSR in its use of the Subject Trackage shall comply in all respects with the safety rules, operating rules and other regulations of D&H, and the movement of NSR's trains, locomotives, cars, and equipment over the Subject Trackage shall at all times be subject to the orders of the transportation officers of D&H; provided, however, that such safety rules, operating rules, other regulations and orders of the transportation officers of D&H shall not unjustly discriminate between the Parties. D&H will not make any rule or restriction applying to NSR's trains that does not apply equally to D&H's trains. NSR's trains shall not include locomotives, cars or equipment which exceed the width, height, weight or other restrictions or capacities of the Subject Trackage as published in Railway Line Clearances (which shall not be more restrictive than those in effect as of the Effective Date of this Agreement), and no train shall contain locomotives, cars or equipment which require speed restrictions or other movement restrictions below the maximum authorized freight speeds as provided by D&H's operating rules and regulations, without the prior consent of D&H. The Parties shall make proper accommodation for exceptions, should that be reasonable, necessary and practicable. All NSR trains shall be powered to permit operation at posted speeds.

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(d) NSR shall make such arrangements with D&H as may be required to have all of its employees who shall operate its trains, locomotives, cars and equipment over the Subject Trackage qualified for operation thereover. D&H shall provide reasonable cooperation and assistance in the qualification of NSR operating (train and engine) crews for service over the Subject Trackage as soon as the date such crews and D&H personnel are available and the notice of exemption relating to the trackage rights governed by this Agreement has been filed with the U.S. Surface Transportation Board ("STB"). NSR shall pay to D&H, upon receipt of bills therefor, any cost incurred by D&H in connection with the qualification of such employees of NSR, as well as the cost of pilots furnished by D&H until such time as such NSR employees are deemed by the appropriate examining officer of D&H to be properly qualified for operation as herein contemplated. NSR or NSR supervisory personnel who have been qualified to operate over the Subject Trackage by an appropriate examining officer of D&H may qualify other NSR employees for operation of trains over the Subject Trackage.

(e) If any employee of NSR shall neglect, refuse or fail to abide by the instructions and restrictions governing the operation on or along the Subject Trackage, D&H shall so notify NSR. D&H shall have the right to require NSR promptly to withhold any NSR employees from service over the Subject Trackage pending the results of a formal investigation of the alleged neglect, refusal or failure. After the notice is given to NSR, D&H and NSR shall promptly hold a joint investigation, in which each of the Parties shall bear the expenses of its own employees and witnesses. Notice of such investigation to NSR employees shall be given by NSR officers. The investigation shall be conducted in accordance with any applicable terms and conditions of schedule agreements between NSR and its employees. If the result of such investigation warrants, such employee shall, upon written request by D&H, be restricted by NSR from service on the Subject Trackage, and NSR shall release and indemnify D&H from and against any and all claims and expenses because of such withdrawal.

(f) In the event that a NSR train shall be forced to stop on the Subject Trackage, due to any cause whatsoever (mechanical, crewing or otherwise) not resulting from an accident or derailment, and such train is unable to proceed, or if a NSR train fails to maintain the speed required by D&H on the Subject Trackage, or if in emergencies, bad ordered or otherwise defective cars are set out of a NSR train on the Subject Trackage, D&H shall have the option to furnish motive power or such other assistance (mechanical or otherwise) as may be necessary to haul, help or push such trains, locomotives or cars, or to properly move the disabled equipment off the Subject Trackage. NSR shall reimburse D&H for the cost of rendering any such assistance. If it becomes necessary to make repairs to or adjust or transfer the lading of such disabled or defective cars in order to move them off the Subject Trackage, D&H shall arrange for such work to be done, and NSR shall reimburse D&H for the cost thereof.

(g) Whenever NSR's use of the Subject Trackage requires rerailling, wrecking service or wrecking train service, D&H shall arrange for the provision of such service, including the repair and restoration of roadbed, the Subject Trackage and structures. The cost, liability and expense of the foregoing, including without limitation loss of, damage to, or destruction of any property whatsoever and injury to and death of any person or persons whomsoever or any damage to or destruction of the environment whatsoever, including without limitation land, air, water, wildlife, and vegetation, resulting therefrom shall be apportioned in accordance with the provisions of Section 11 hereof. All locomotives, cars, and equipment and salvage from the

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same so picked up and removed which is owned by or under the management and control of or used by NSR at the time of such wreck, shall be promptly delivered to it.

(h) If any cars, cabooses, or locomotives of NSR are bad ordered en route on the Subject Trackage and it is necessary that they be set out, those cars, cabooses or locomotives shall, after being repaired, be picked up by NSR. D&H may, upon request of NSR and at the expense of NSR, unless otherwise provided for in the Field and Office Manuals of the Interchange Rules of the AAR, furnish required labor and material to perform light repairs required to make such bad ordered equipment safe and lawful for movement, and billing for this work shall be at rates prescribed in, and submitted pursuant to, the Field and Office Manuals of the Interchange Rules of the AAR.

(i) NSR shall not have any claim against D&H for liability on account of loss or damage of any kind in the event the use of the Subject Trackage by NSR is interrupted or delayed at any time from any cause.

(j) D&H shall make best efforts to provide the designated officer of NSR with prompt notice of any unplanned substantial delays or line outages on the Subject Trackage, and shall promptly advise the designated officer of NSR of the resumption of normal service on the Subject Trackage.

SECTION 10. MILEAGE AND CAR HIRE

All mileage and car hire charges accruing on cars in NSR's trains on the Subject Trackage shall be assumed by NSR and reported and paid by it directly.

SECTION 11. LIABILITY

The responsibility between the Parties hereto for loss of, damage to, and destruction of any property whatsoever and injury to and death of any person or persons whomsoever, arising out of, incidental to or occurring in connection with this Agreement, also expressly including, without limitation, all liabilities arising after the Commencement Date hereof under FELA and environmental laws but excluding consequential damages of any Party hereto (which are always borne by the Party which sustained them) and excluding claims for exemplary and punitive damages, hereinafter referred to as "Damage," shall be apportioned as follows without regard to fault or negligence:

(a) If Damage occurs involving solely the trains, locomotives and Equipment, cars in the revenue account (including lading), or employees of one of the Parties, then that Party shall be solely responsible for such Damage, even if caused partially or completely by another party (including the other Party).

(b) If Damage occurs involving the trains, locomotives and Equipment, cars in the revenue account (including lading), and employees of both NSR and D&H, then (i) NSR and D&H each shall be solely responsible for any Damage to its own employees, locomotives and Equipment, and those cars in its own revenue account (including lading) (such cars (including lading) being referred to as "NSR Cars" and "D&H Cars," respectively, and collectively, the "Cars"), and (ii) the Parties shall each be responsible for 50 percent of the Damage to the Subject

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Trackage and associated facilities and any Damage sustained by third parties, regardless of the proportionate responsibility between them as to the cause of the Damage.

(c) For the purposes of assigning responsibility for Damage under this Section as between the Parties hereto, the trains of a third party or parties operating on the Subject Trackage shall be considered to be the trains of D&H.

(d) Notwithstanding anything to the contrary in Sections 11(a), (b) and (c), above, when any damage to or destruction of the environment, including without limitation land, air, water, wildlife, and vegetation, occurs with one or more trains of the Parties involved, then, as between themselves, the Parties agree that (i) NSR shall be solely responsible for any damage or destruction to the environment and to third parties which results solely from a substance transported in NSR Cars or NSR locomotives and NSR Equipment from which there was a release, (ii) D&H shall be solely responsible for any damage or destruction to the environment and to third parties which results solely from a substance transported in D&H Cars, or D&H locomotives and D&H Equipment from which there was a release, and (iii) NSR and D&H shall be responsible, in proportion to the total number of Cars, pieces of Equipment, and locomotives of each Party from which there was a release, for any damage or destruction to the environment and to third parties which results solely from one or more substances transported in both NSR Cars, NSR locomotives, and NSR Equipment and D&H Cars, D&H locomotives, and D&H Equipment from which there was a release.

(e) D&H and NSR each shall be responsible for the payment, handling, administration and disposition of all Damage for which it bears exclusive responsibility under this Section 11, and D&H and NSR shall have joint responsibility for the payment, handling, administration and disposition of all Damage for which they are jointly responsible under this Section 11. In assigning joint responsibility to both D&H and NSR, it is not intended that D&H and NSR will, in all instances, actually act jointly, but rather that they will agree between themselves on the most practical and efficient arrangement for handling, administering, and disposing of Damage for which they bear joint responsibility, with the objective of eliminating unnecessary duplication of effort and minimizing overall costs.

(f) Each Party covenants and agrees (i) to indemnify and save harmless the other Party from and against any payments which are the responsibility of such Party under this Agreement, and all expenses, including attorney's fees and expenses, and any other expenses of any court or regulatory proceeding, incurred by the indemnified Party in defending any claim for which the responsible Party is liable, and (ii) to defend such indemnified Party against such claims with counsel selected by the responsible Party and reasonably acceptable to the indemnified Party.

(g) Notwithstanding anything to the contrary in this Section 11, whenever Damage occurs with one or more trains being involved, and one or more of the involved trains is a NSR train, and such Damage is attributable solely to the gross negligence or willful or wanton misconduct of only one of the Parties to this Agreement, and such gross negligence or willful or wanton misconduct is the direct or proximate cause of such Damage, then the Party to which such gross negligence or willful or wanton misconduct is attributable shall assume all liability, cost and expense in connection with such Damage. The Parties agree that, for purposes of this

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Section 11(g), “gross negligence or willful or wanton misconduct” shall be defined as “the intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another; such a gross want of care and regard for the rights of others as to justify the presumption of willfulness and wantonness.”

(h) Notwithstanding any provision of this Section 11 to the contrary, each Party shall assume and bear all responsibility for any Damage caused by acts or omissions of any its employees while under the influence of drugs or alcohol. An FRA positive test for drugs or an FRA alcohol test of .04 or greater shall establish that an employee was “under the influence of drugs or alcohol,” for the purposes of this Agreement.

(i) If any suit or action shall be brought against either Party for Damage which under the provisions of this Agreement is in whole or in part the responsibility of the other Party, said other Party shall be notified in writing by the Party sued, and the Party so notified shall have the right and be obligated to take part in the defense of such suit and shall pay a proportionate part of the judgment and costs, expenses and attorneys' fees incurred in such suit according to its liability assumed hereunder.

(j) For purposes of determining liability under this Section 11, pilots furnished by D&H to NSR pursuant to this Agreement shall be considered to be the employees of NSR while such pilots are on board or getting on or off NSR trains.

(k) Each of D&H and NS shall indemnify and hold harmless the other Party against, any and all costs and payments, including benefits, allowances, and arbitration, administrative and litigation expenses, arising out of lawsuits, claims or grievances brought by or on behalf of its own employees or their collective bargaining representatives, either pursuant to employee protective conditions imposed by a governmental agency upon the agency's approval or exemption of this Agreement and operations hereunder or pursuant to a collective bargaining agreement. It is the Parties' intention that D&H and NS each shall bear the full costs of protection of its own employees under employee protective conditions that may be imposed, and of grievances filed by its own employees arising under its collective bargaining agreements with its employees.

(l) Notwithstanding any provision of this Agreement to the contrary, for the purpose of this Section 11, the word “Equipment” shall mean and be confined to (i) cabooses, (ii) vehicles and machinery which are capable of being operated on railroad tracks that, at the time of an occurrence, are being operated on the Subject Trackage, and (iii) vehicles and machinery that, at the time of an occurrence, are on the Subject Trackage or its right of way for the purpose of maintenance or repair thereof or the clearing of wrecks thereon.

SECTION 12. CLAIMS

(a) Under no circumstances will either Party assert a claim for punitive or exemplary damages against the other Party related to the matters contemplated by this Agreement.

(b) All costs and expenses in connection with the investigation, adjustment, and defense of any claim or suit (other than cargo-related claims made against a Party by a customer whose traffic was moving in the revenue and/or car hire account of such Party) under Agreement

shall be included as costs and expenses in applying the liability provisions of Section 11. However, each Party shall bear the salaries or wages of its full-time agents, full-time attorneys, and other full-time employees engaged directly or indirectly in such work.

(c) No Party shall settle or compromise any claim, demand, suit, or cause of action (other than a cargo-related claim filed with it in accordance with 49 U.S.C. Section 11706 or 49 C.F.R. Section 1005, or in accordance with any applicable transportation contract filed pursuant to 49 U.S.C. Section 10709) for which the other Party has any liability under this Agreement without the concurrence of such other Party if the consideration for such settlement or compromise [REDACTED]

(d) The Parties shall agree between themselves on the most fair, practical and efficient arrangements for handling and administering freight loss and damage claims with the intent that (i) each Party shall be responsible for losses occurring to lading in its possession for the account of such Party and (ii) the Parties shall follow applicable AAR rules and formulas in providing for the allocation of losses which are either of undetermined origin or in cars handled in interline service by or for the account of the Parties.

SECTION 13. TERM, DEFAULT AND TERMINATION

(a) This Agreement shall become effective ("Effective Date") as of the first date executed by each of the Parties. However, NSR operations over the Subject Trackage shall not commence until a date (the "Commencement Date") mutually agreed in writing between NSR and D&H, which shall not occur until the effective date of any required STB authorization or exemption of NSR's trackage rights granted by this Agreement (including compliance with any condition(s) imposed by the STB in connection with such approval or exemption).

(b) This Agreement shall remain in full force and effect until mutually terminated by the Parties. The Initial Term of this Agreement shall be twenty-five (25) years from the Commencement Date, and shall be renewable continuously thereafter for additional periods of ten (10) years ("Additional Term(s)"). At the end of the Initial Term, NSR may, at its option, (i) extend this Agreement under the same terms and conditions for one Additional Term, or (ii) require renegotiation of the Agreement. At the end of the first (and any subsequent) Additional Term, either NSR or D&H may extend the Agreement under the then-current terms and conditions, or require renegotiation of the agreement. In either case, the notice to continue the then-current terms and conditions or to require renegotiation shall be given by D&H or NSR, as the case may be, by giving the other Party advance written notice at least six (6) months prior to the expiration of the then-current term. The Parties shall take into consideration the relative economic positions of the Parties under this Agreement, and intent of the Parties, in each case at the time this Agreement was executed, as well as any significant operating, economic and/or technological changes that have occurred in the interim. If the Parties cannot agree upon the terms and conditions upon which the trackage rights granted herein may be exercised by NSR during such Additional Term, either Party may invoke mediation or other methods of non-binding alternative dispute resolution, in which the other Party agrees to participate in good faith. If the Parties are unable to agree to new terms and conditions, then the then-existing terms shall continue to apply during the subsequent Additional Term.

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(c) In the event that railroad operations, technology or other events create, in the view of one Party to this Agreement, a disparity such that the terms and conditions of this Agreement over time no longer reflect the intention of the Parties in a substantial and material way, and such disparity has a material and substantial adverse effect on said Party, that Party may give notice of such to the other Party, who shall negotiate in good faith modification of this Agreement in order to address and possibly remove said perceived disparity. Should the Parties fail to reach agreement with regard to such perceived disparity, the concerned Party may invoke mediation or other methods of non-binding alternative dispute resolution, in which the other Party agrees to participate in good faith.

(d) NSR shall have the right to terminate this Agreement upon giving D&H at least thirty (30) days prior written notice of such termination. Such termination shall be considered to be a termination of both this Agreement and the underlying right of movement.

(e) Termination of this Agreement shall not relieve or release either Party hereto from any obligations assumed or from any liability which may have arisen or been incurred by such Party under the terms of this Agreement prior to termination thereof.

(f) In the event of any substantial failure on the part of any Party to perform its obligations provided under the terms of this Agreement and its continuance in such default for a period of sixty (60) days after written notice thereof by certified mail from another Party, the non-defaulting Party shall have the right at its option, after first giving thirty (30) days written notice thereof by certified mail, and notwithstanding any waiver by such Party of any prior breach thereof, to file a lawsuit pursuant to Section 14 and seek damages and/or specific performance of the terms of this Agreement from the defaulting Party. In the case of a substantial default by NSR which continues after adjudication of such default through litigation described in Section 14, D&H may terminate this Agreement and the underlying right of movement if NSR fails to cure such substantial default within: (i) thirty (30) days of the receipt of notice of continued default in the case of such a default by NSR in an obligation to pay D&H, (ii) fourteen (14) days of the receipt of notice of continued default in the case of such a default under Section 3(b), (c), (d), (f), (g) or (h); and (iii) ninety (90) days of the receipt notice of continued default in the case of any other such default under this Agreement.

SECTION 14. DISPUTE RESOLUTION

Any dispute arising between the Parties with respect to this Agreement shall be referred to their respective senior operating officers for resolution. In the event such officers are unable to resolve the dispute, either Party may commence litigation in a state or federal court in the State of Delaware. **THE PARTIES HEREBY IRREVOCABLY SUBMIT TO THE JURISDICTION OF SUCH COURTS IN ANY SUCH ACTION OR PROCEEDING AND IRREVOCABLY WAIVE THE DEFENSE OF AN INCONVENIENT FORUM TO THE MAINTENANCE OF ANY SUCH ACTION OR PROCEEDING. EACH OF THE PARTIES HEREBY WAIVES TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY WITH RESPECT TO ANY LITIGATION DIRECTLY OR INDIRECTLY ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT.**

SECTION 15. ABANDONMENT

(a) D&H shall have the right, subject to securing any necessary regulatory approval or exemption, to abandon the Subject Trackage or any portion thereof (the "Abandonment Segment") during the Initial Term, or any Additional Term, of this Agreement. D&H shall provide NSR no less than ninety (90) days prior notice of its intention to seek to abandon any Abandonment Segment.

(b) If D&H elects to abandon an Abandonment Segment, D&H shall, not less than ninety (90) days prior to any submission to the Surface Transportation Board (or successor agency having jurisdiction over said abandonment) of an application or exemption for authority to abandon such Abandonment Segment, offer NSR the first right to purchase the Abandonment Segment for the fair market value of such Abandonment Segment at the time of purchase, and on such other terms and conditions as are customary with respect to line sales by D&H at the time. The fair market value shall be no less than the greater of the net liquidation value of such line or the going concern value of such line, as used and defined by applicable STB regulations. NSR shall have sixty (60) days ("Abandonment Notice Period") within which to advise D&H that it will exercise its right to purchase ("Exercise Notice"). If the Parties are unable to agree upon the fair market value of the Abandonment Segment that NSR wishes to purchase, either Party may refer the issue to mediation or binding arbitration before a single arbitrator who is a qualified expert on rail line value and appraisal ("ADR"). Any such arbitration shall be conducted on an expedited basis, with a selection of the arbitrator within forty-five (45) days of the initiation of arbitration, all submissions to be made by the Parties within ninety (90) days of the initiation of arbitration, and a decision to be rendered within thirty (30) days following the final submissions of the Parties.

(c) The Parties shall consummate the sale contemplated by this Section 15 within forty-five (45) days of the latest of: (a) the date of the final decision or order, should issues related to the sale proceed to ADR; (b) the execution of a purchase and sale agreement, should the Parties execute the same; and (c) the grant of authority, or exemption from the need to obtain a grant of authority, from any regulatory body having jurisdiction over the same.

(d) If NSR elects not to purchase the Abandonment Segment, it shall so advise D&H within the same sixty (60) day Abandonment Notice Period by delivering to D&H a notice of waiver of right to purchase said segment ("Waiver Notice"). Failure of NSR to provide D&H with either an Exercise Notice or a Waiver Notice within the aforesaid sixty (60) day period shall constitute a Waiver Notice.

(e) In the event of a Waiver Notice, NSR shall promptly file such application, petition or exemption notice as may then be required to obtain regulatory authority or exemption for the discontinuance of its trackage rights over the Abandonment Segment.

(f) A Waiver Notice shall constitute a waiver by NSR of its statutory rights, if any at the time of the abandonment, to purchase or otherwise subsidize operations over the Abandonment Segment pursuant to an offer of financial assistance or other applicable method.

SECTION 16. SUCCESSORS AND ASSIGNS

(a) This Agreement shall inure to the benefit of and be binding upon each of the parties and their respective successors and assigns.

(b) Neither Party may assign this Agreement, or any of its rights, interests or obligations hereunder, including by operation of law, without the prior consent in writing of the other Party. The consenting party may not unreasonably withhold, condition, or delay its consent. Each Party may assign this Agreement to a parent or controlled subsidiary without the consent of the other Party.

SECTION 17. NOTICE

Any notice required or permitted to be given by one Party to another under this Agreement shall be deemed given on the date sent by certified mail, or by such other means as the Parties may agree, and shall be addressed as follows:

If to D&H: Canadian Pacific Railway Company
120 S. 6th Street, Suite 1000
Minneapolis, MN 55402
Facsimile: (612) 904-5981

with copies to:

Vice President - Operations
Canadian Pacific Railway Company
7550 Ogden Dale Road SE
Building 1
Calgary, AB T2C 4X9
Facsimile: (403) 319-7724

Vice-President, Legal Services
Canadian Pacific Railway Company
Building 1
7550 Ogden Dale Road SE
Calgary, AB T2C 4X9
Facsimile: (403) 319-3725

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If to NSR: Norfolk Southern Railway Company
c/o Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510-2191
Attn: Executive Vice President Operations
Facsimile: (757) 823-5371

with a copy to:

Norfolk Southern Railway Company
c/o Norfolk Southern Corporation
1200 Peachtree Street, NE – Box 158
Attn: Director – Joint Facilities
Atlanta, Georgia 30309
Facsimile: (757) 823-5927

Either Party may provide changes in the above addresses to the other Party by personal service or certified mail.

SECTION 18. FORCE MAJEURE

The obligations, other than payment obligations, of the Parties to this Agreement shall be subject to force majeure (including strikes, riots, floods, accidents, Acts of God, acts of terrorism, and other causes or circumstances beyond the control of the Party invoking such force majeure as an excuse for nonperformance), but only as long as, and to the extent that, such force majeure shall reasonably prevent performance of such obligations by the affected Party. In the event that an event of force majeure impairs either Party's ability to fulfill its obligations to the other Party under this Agreement, said Party shall take all reasonable measures including providing routing over alternate rail lines to the extent practicable (subject to reimbursement for incremental costs), and granting the right to enter and exit the Subject Trackage at locations other than the End Points in the case of a necessary detour, to restore performance of its obligations in a timely manner.

SECTION 19. CONFIDENTIALITY

Except as provided by law or by rule, order, or regulation of any court or regulatory agency with jurisdiction over the subject matter of this Agreement, or as may be necessary or appropriate for a Party hereto to enforce its rights under this Agreement, during the Initial Term and any Additional Terms, the terms and provisions of this Agreement and all information to which access is provided or which is obtained hereunder will be kept confidential, and will not be disclosed by either Party to any person other than such Party's officers, employees, and attorneys, without the prior written approval of the other Party.

SECTION 20. INDEMNITY COVERAGE

As part of the consideration hereof, each Party hereby agrees that each and all of its indemnity commitments in this Agreement in favor of the other Party shall also extend to and

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indemnify the parent corporation, subsidiaries and affiliates of such other Party, and all of its directors, officers, agents and employees.

SECTION 21. REGULATORY APPROVAL

Upon execution of this Agreement by each of the Parties hereto, NSR shall promptly file with the STB, and diligently prosecute, an appropriate notice of exemption with respect to the trackage rights covered by this Agreement.

SECTION 22. GENERAL PROVISIONS

(a) This Agreement and each and every provision hereof are for the exclusive benefit of the Parties hereto and not for the benefit of any other person. Nothing herein contained shall be taken as creating or increasing any right of any other person to recover by way of damages or otherwise against any of the Parties hereto.

(b) This Agreement contains the entire understanding of the Parties hereto with respect to its subject matter and supersedes any and all other agreements and understandings between the Parties.

(c) No term or provision of this Agreement may be changed, waived, discharged or terminated except by an instrument in writing and signed by all of the Parties.

(d) Each definition in this Agreement includes the singular and the plural, and references in this Agreement to the neuter gender include the masculine and feminine where appropriate. References herein to any agreement or contract mean such agreement or contract as amended. As used in this Agreement, the word "including" means "without limitation", and the words "herein", "hereof" and "hereunder" refer to this Agreement as a whole. All dollar amounts stated herein are in United States currency.

(e) All words, terms and phrases used in this Agreement shall be construed in accordance with the generally applicable definition or meaning of such words terms and phrases in the railroad industry.

(f) The division of this Agreement into sections and subsections, and the insertion of headings and references are for convenience of reference only, and shall not affect the construction or interpretation of this Agreement. Unless the context otherwise requires, all references herein to sections are to sections in this Agreement.

(g) As used in this Agreement, whenever reference is made to the trains, locomotives, cars or equipment of, or in the account of, one of the Parties hereto, such expression means the trains, locomotives, cars and equipment in the possession of or operated by one of the Parties and includes such trains, locomotives, cars and equipment which are owned by, leased to, or moving in the trains of such Party. Whenever such locomotives, cars or equipment are owned or leased by one Party, but are in the possession of, or are being operated in a train of the other Party, such locomotives, cars and equipment shall be considered those of that other Party in whose possession or train such locomotives, cars and equipment are located.

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(h) This Agreement is the product of mutual negotiations of the Parties hereto, none of whom shall be considered the drafter for purposes of contract construction.

(i) No consent or waiver, expressed or implied, by a Party of any breach or default by the other Party in the performance by such other Party of its obligations hereunder shall be deemed or construed to be a consent to or waiver of any other breach or default in the performance hereunder by such other Party. Failure on the part of a Party to complain of any act or failure of the other Party or to declare the other Party in default, irrespective of how long such failure continues, shall not constitute a waiver by such first mentioned Party of its rights hereunder.

(j) If any provision of this Agreement or the application thereof to any Party hereto or to any circumstance shall be determined by a court of competent jurisdiction to be invalid or unenforceable to any extent or for any reason, the remainder of this Agreement or the application of the provisions thereof to such Party or circumstance, other than those determined to be invalid or unenforceable, shall not be affected thereby and shall be enforced to the fullest extent permitted by law, and the Parties shall promptly enter into such other agreement(s) as their respective legal counsel may deem appropriate in order to replace such invalid or unenforceable provisions in a manner which produces a result which is substantially equivalent to the terms of this Agreement in all material respects.

(k) Nothing herein shall be interpreted as creating an association, partnership, joint venture or other joint undertaking between NSR and D&H.

(l) The interpretation and performance of this Agreement shall be governed by the substantive and procedural laws of the State of Delaware, without giving effect to any choice or conflict of laws provision or rule (whether of the State of Delaware or any other jurisdiction) that would cause the application of laws of any jurisdiction other than the State of Delaware.

(m) This Agreement may be executed in several counterparts, each of which will be deemed an original, and such counterparts shall constitute one and the same instrument.

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IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be duly executed as of the date first above written.

WITNESS:

DELAWARE AND HUDSON RAILWAY
COMPANY, INC.

Title

By _____

WITNESS:

NORFOLK SOUTHERN RAILWAY
COMPANY

Title

By _____

EXHIBIT A

PUBLIC VERSION

**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.**

**APPLICATION FOR A
MINOR TRANSACTION**

VOLUME II

TRACKAGE RIGHTS AGREEMENT FOR FD 34562 (SUB-NO. 1)

RESTATED SARATOGA – SCHENECTADY TRACKAGE RIGHTS AGREEMENT

THIS TRACKAGE RIGHTS AGREEMENT (the “Agreement”) is made this 30th day of September, 2004 by and between NORFOLK SOUTHERN RAILWAY COMPANY, a Virginia corporation (“Norfolk Southern”) and DELAWARE AND HUDSON RAILWAY COMPANY, INC., a Delaware corporation (“D&H”). NSR and D&H are sometimes referred to hereinafter individually as a “Party” and collectively as the “Parties.”

RECITALS:

A. NSR and D&H are parties to the Saratoga-East Binghamton Agreement dated September 30, 2004 (the “2004 Agreement”), pursuant to which D&H granted to NSR, and NSR agreed to acquire from D&H, trackage rights over D&H’s line of railroad between D&H’s Saratoga Yard at Saratoga Springs, NY, on the one hand, and D&H’s East Binghamton Yard at Binghamton, NY, on the other hand.

B. NSR and D&H are parties to the Asset Purchase Agreement (“APA”), dated _____, 2014 and related transaction documents pursuant to which D&H is selling to NSR, and NSR is purchasing from D&H and its subsidiaries, certain railroad properties, rights and facilities relating to a rail line between Sunbury/CP Kase, PA (Milepost CPF 752) and Schenectady, NY (Milepost CPF 484.85) (the “Transaction”).

C. Pursuant to the APA, the Parties have agreed to modify NSR’s existing trackage rights granted in the 2004 Agreement over D&H’s line of railroad between Saratoga, NY and Schenectady, NY (the “D&H Line”).

D. The Parties wish to modify and restate the terms and conditions upon which NSR may operate over the D&H Line.

NOW, THEREFORE, in consideration of the following mutual promises, the Parties agree as follows:

SECTION 1. GRANT OF TRACKAGE RIGHTS

(a) On the terms and subject to the conditions herein provided, D&H hereby grants to NSR the right to operate its trains, locomotives, cars and equipment with its own crews (such rights being referred to hereinafter as the “Subject Trackage Rights”) over the following D&H railroad line, as shown in detail on Exhibit A to this Agreement:

D&H’s Saratoga Yard, located at Milepost 37.10 ± of D&H’s Canadian Main Line in Saratoga Springs, NY, and Milepost 484.85 + in the vicinity of Schenectady, NY, including the right to use such track(s) within Saratoga Yard as shall be designated from time to time by the D&H officer in charge of operations at Saratoga Springs, NY in connection with the operations permitted by this Agreement.

(b) The trackage described in this Section 1 is referred to as the “Subject Trackage.”

SECTION 2. USE OF SUBJECT TRACKAGE

(a) NSR's use of the Subject Trackage shall be in common with D&H, and D&H's right to use the Subject Trackage shall not be diminished by this Agreement.

(b) NSR may operate trains in either direction over the Subject Trackage.

(c) NSR may use the Subject Trackage solely for the purpose of the overhead movement between the End Points (as defined in Section 3(a) of this Agreement) of trains consisting entirely of cars in the revenue waybill account of NSR or for delivering or picking up D&H Haulage Cars (as that term is defined in the Direct Short Line Access Agreement between NSR and D&H of even date herewith), provided that such trains have either (i) a prior or subsequent movement on D&H's Canadian Main Line between Saratoga Yard and the point of connection between the lines of D&H and Canadian National Railway Company ("CN") at Rouses Point, NY, pursuant to that certain Rouses Point – Saratoga Haulage Agreement between NSR and D&H dated September 30, 2004 (such trains being referred to hereinafter as "NS-CN Interline Trains") or (ii) are to be interchanged with D&H at Saratoga Yard ("D&H Interchange Traffic").

(d) NSR locomotives and crews operating over the Subject Trackage shall be equipped to communicate with D&H on radio frequencies normally used by D&H in directing train movements on the Subject Trackage.

(e) Procedures for qualification and occupancy of the Subject Trackage will be arranged by the local supervision of each carrier. NSR's operations over the Subject Trackage shall at all times be subject to the direction and control of the D&H operating officer in charge of the Subject Trackage and to applicable provisions of D&H's safety and operating rules.

(f)

[REDACTED]

(g)

[REDACTED]

(h)

[REDACTED]

(i) NSR shall have the right to move in its own trains all dimensional loads and excess clearance rail cars which it may approve for movement over the Subject Trackage, subject to a clearance file (the "Clearance File") maintained by D&H and published in Railway Line Clearances (which shall not be more restrictive than those in effect as of the Effective Date of this Agreement) that is applicable to traffic of both Parties. D&H shall promptly inform NSR of any changes made to the Clearance File. Before any dimensional load or excess clearance rail car is proposed for movement by NSR under this Agreement, it shall first notify D&H in writing, giving all pertinent physical facts, and requesting verification. D&H shall respond promptly either confirming the physical facts related to the proposed dimensional load(s) or excess clearance rail car(s) or specifically identifying the physical facts which would interfere with a planned move. In no event shall D&H deny to NSR the ability to tender a specific rail car for movement over the Subject Trackage and then subsequently grant approval for the same or similar movement over the Subject Trackage in a D&H train unless NSR receives timely notice that the limiting clearance or other reason for denial has been removed. The Parties shall cooperate to accommodate all dimensional loads and excess clearance rail cars, subject to compensation in addition to the Trackage Rights Charges to D&H of [REDACTED] (the "Special Charges"). The Special Charges shall be adjusted using the same method used to adjust the Trackage Rights Charges, as described in Section 5(b).

SECTION 3. RESTRICTIONS ON USE

(a) The Subject Trackage Rights are granted for the sole purpose of NSR using the Subject Trackage to operate its trains in overhead movements. NS-CN Interline Trains may enter and exit the Subject Trackage only at (A) Milepost 37.10 +/- of D&H's Canadian Main Line in Saratoga Springs, NY, and (B) Milepost 484.85 +/- of D&H's Freight Main Line in Schenectady, NY.

(b) The points of ingress and egress designated in this Section 3(a) are referred to herein as the "End Points." NSR shall not have the right to enter or leave the Subject Trackage except at the End Points. [REDACTED]

(c) NSR may not, under any circumstances, operate trains on the Subject Trackage between Saratoga Springs, NY, on the one hand and Mechanicville, NY, on the other hand, pursuant to this Agreement.

(d) NSR shall not perform any local freight service whatsoever at any point located on Subject Trackage.

(e) [REDACTED]

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(f) NSR shall not have the right to serve existing or future shippers at facilities located on or along, or at the End Points of, the Subject Trackage.

(g) NSR shall not use any part of the Subject Trackage for the purpose of switching, storage or servicing cars or equipment, or the making or breaking up of trains, except as necessary for the handling of locomotives, cars or cabooses bad ordered en route; provided, that NSR shall use such auxiliary Subject Trackage as may be designated by D&H for such purposes.

(h) NSR may not grant trackage rights of any nature on the Subject Trackage to other parties.

(i) Notwithstanding any other provision of this Agreement to the contrary, NSR may not permit or admit any third party to the use of all or any part of the Subject Trackage, nor may NSR contract or make any agreement to provide haulage over the Subject Trackage of trains, locomotives, cars or cabooses of any third party which, in the normal course of business, would not be considered as the trains, locomotives, cars or cabooses of NSR, or in any other way provide haulage service for other carriers over the Subject Trackage; provided, that this Section 3(i) shall not be construed to prohibit NSR from using the locomotives, cars and cabooses of another railroad as its own in NSR trains pursuant to a run-through agreement with any railroad, or a bona fide equipment lease.

(j) The Parties agree that rebilling in the traffic at Saratoga Springs, NY area is not a permissible method of avoiding any direct traffic limitation set forth in this Agreement.

(k) This Agreement is not intended to, and shall not operate to, expand or contract any Party's existing commercial access to, or right to serve (directly or through switching), any particular customer facility. If, following the Commencement Date of this Agreement (as defined in Section 13(a) hereof), a new facility (including a transload facility) opens, or an existing facility expands or changes ownership (in each case, a "New Facility"), NSR's commercial access or right to serve such facility shall be the same as if such New Facility had existed prior to the Commencement Date of this Agreement, and shall be neither expanded nor reduced by this Agreement.

(l) The length of NSR trains (including locomotives and other motive power units) operating pursuant to this Agreement shall not exceed 7,000 feet, subject to compliance with operating policies applied to D&H's own trains and the length limitations set out in the Rouses Point – Saratoga Haulage Services Agreement. The maximum train length set forth in this Section 3(l) may be adjusted by the Parties from time to time consistent with D&H's governing operating practices and procedures.

(m) NSR's use of the Subject Trackage pursuant to this Agreement shall be subject to the following maximum volume limitations,(none of which may be exceeded at any time by NSR, each of which is referred to hereinafter as a "Maximum Volume Restriction"):

(i) [REDACTED]

(ii) [REDACTED]

(iii) If the Subject Trackage is unavailable to NSR due to a derailment, line outage or other interruption of service on the Subject Trackage, or on D&H's Canadian Main Line north of Saratoga Springs, NY or the CN lines connecting to D&H's Canadian Main Line at Rouses Point, NY, or if NSR experiences a derailment, an unintended line outage or other unintended interruption of service on its own lines connecting to, and necessary to reach, the Subject Trackage, in each case for a period of time (the "Outage Period") greater than twenty-four (24) hours, and no detour is available, then D&H shall cooperate and consult with NSR in order to address any resulting backlog of trains over a period of time ("Resolution Period") following the resolution of such derailment, line outage or other interruption of service (including the possibility of waiving the Maximum Volume Restrictions set forth in this Section 3(m) for the Resolution Period as may be required to reduce such backlog of NSR trains), provided, however, that the Maximum Volume Restriction set forth in Section 3(m)(i) shall not be exceeded as measured over an average of the Outage Period plus the Resolution Period.

(n) If NSR develops further business for interchange with CN at Rouses Point such that additional NS-CN Interline Trains are required which necessitate the operation of trains in excess of the Maximum Volume Restriction ("Additional Trains"), NSR may request that D&H permit the operation of Additional Trains. D&H shall consider such a request in good faith and may in its discretion permit the operation of the number of Additional Trains specified by D&H. If D&H determines, through a Rail Traffic Controller capacity simulation (having regard to D&H's own present and future requirements and D&H's required reserve capacity), that facility changes, additions and betterments to D&H's Canadian Main Line are necessary to accommodate the operation of Additional Trains ("Capacity Improvements"), D&H shall advise NSR of the required Capacity Improvements and the number of Additional Trains that would be permitted if the Capacity Improvements were constructed. If NSR wishes that the Capacity Improvements be made it shall request in writing that the Capacity Improvements be made by D&H at the sole cost and expense of NSR. If requested to do so by NSR, D&H shall construct the Capacity Improvements and upon completion of the construction of the Capacity Improvements and payment therefor by NSR, the Maximum Volume Restriction shall be amended to permit the operation of the number of Additional Trains specified by D&H.

SECTION 4. SERVICE STANDARDS

(a) NSR hereby acknowledges that D&H makes no guarantee as to the actual transit time for any NSR train, and there shall be no penalty imposed on D&H for failure to meet the anticipated transit time over any period of time, nor shall NSR have any right to seek damages from D&H on account of such failure. The Parties agree that this Section 4(a) addresses anticipated average transit time and Section 9(a) addresses dispatching, which are separate and distinct.

(b) NSR shall provide the D&H notice of the schedules for regularly scheduled NSR trains operating over the Subject Trackage, as well as any proposed modifications. NSR shall

provide D&H at least seven (7) days prior written notice of such changes in NSR train schedules, and notice as reasonably practicable in the case of train annulments and subject to the Maximum Volume Restrictions set forth in Section 3(m), extra trains necessitated by sudden or seasonal surges in traffic volumes.

SECTION 5. COMPENSATION

(a) Generally.

(i) NSR shall compensate D&H for the use of the Subject Trackage by by paying to D&H a sum computed by multiplying (a) the Trackage Rights Charges (as defined in Section 5(b) of this Agreement) by (b) the number of cars (loaded or empty) and locomotives moved over the Subject Trackage by (c) the miles of the Subject Trackage over which the cars and/or locomotives are moved (which are agreed to be 19.89 miles). In computing the compensation payable by NSR pursuant to this Section 5, cars that exceed ninety-six (96) feet in length shall be counted as one (1) car for each four (4) axles.

(b) Trackage Rights Charges.

(i) The charge payable by NSR for use of the Subject Trackage shall be [REDACTED], effective September 30, 2004, and escalated pursuant to the provisions of this Section 5(b).

(ii) The Trackage Rights Charges shall be adjusted upward or downward effective July 1 each year, beginning July 1, 2005, to compensate D&H for one hundred percent (100%) of any increase or decrease in the cost of labor and material, excluding fuel, as reflected in the Annual Indices of Charge-out Prices and Wage Rates (1977=100), Series RCR, included in "the AAR Railroad Cost Index" issued by the Association of American Railroads ("AAR"); provided, however, that the Trackage Rights Charges shall in no event be decreased to a level below those set forth in Section 5(b)(i) of this Agreement. In determining the amount (if any) of the annual adjustment, the final "Material prices, wage rates and supplements combined (excluding fuel)" index for the Eastern District shall be used, and the calendar year ending December 31, 2003 shall be deemed the "Base Calendar Year."

(iii) The first annual adjustment to the Trackage Rights Charges shall be computed by calculating the percentage of increase or decrease in the final index for the calendar year ending December 31, 2004, as related to the final index for the Base Calendar Year, and applying that percentage to the initial Trackage Rights Charges set forth in Section 5(b)(i). Subsequent annual adjustments will be computed by calculating the percentage of increase or decrease in the final index published for the calendar year immediately preceding the year in which the adjustment is to be applied, as related to the final index published for the Base Calendar Year, and applying that percentage to the initial Trackage Rights Charges set forth in Section 5(b)(i). By way of example, assuming "A" to be the "Material prices, wage rates and supplements combined (excluding fuel)" final index for the Base Calendar Year; "B" to be the "Material prices,

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wage rates and supplements combined (excluding fuel)” final index for the calendar year 2004; “C” to be the initial Trackage Rights Charges; “D” to be the percentage of increase or decrease, the adjusted Trackage Rights Charges to be applied on and after July 1, 2005 would be determined by the following formula:

(1) $(B - A) / A = D$

(2) $(C \times D) + C = \text{adjusted Trackage Rights Charges, effective July 1, 2005.}$

(iv) If the base for the “Annual Indexes of Charge-out Prices and Wage Rates” issued by the AAR is changed from the year 1977, an appropriate revision shall be made in the base (established as herein provided) for the calendar year 1977. If the AAR or any successor organization discontinues publication of the “Annual Indices of Charge-out Prices and Wage Rates,” an equitable substitute for determining the annual percentage of increase or decrease shall be negotiated by the Parties.

(v) On or before the 15th day of each calendar month during the term of this Agreement, NSR shall prepare and deliver to D&H a statement setting forth the number of cars and miles operated on the Subject Trackage pursuant to this Agreement during the immediately preceding month (the “Monthly Statement”). The Monthly Statement shall be delivered to D&H’s Manager – Interline Agreement Management in electronic format, and shall contain a detailed list of the cars that moved during the subject month, which list shall include, for each car, the following information: (1) car initial and number, (2) the respective End Points that the car moved between, (3) whether the car exceeded ninety-six (96) feet in length; (4) for each car exceeding ninety-six (96) feet in length, the number of axles on such car; and (5) any other information relating to such cars that D&H may reasonably request in connection with accounting for the use of the Subject Trackage Rights. D&H shall develop and present to NSR an invoice (the “Use Invoice”) computed in accordance with Section 5(a) for use of the Subject Trackage Rights covered by that Monthly Statement. NSR shall make payment to D&H within thirty (30) days after the date of such Use Invoice.

(vi) Any dispute regarding the amount of a Monthly Statement or Use Invoice shall be reconciled between the Parties, and any adjustment resulting from such reconciliation shall be reflected in a subsequent Use Invoice. If NSR disputes any portion of a Use Invoice, it shall nevertheless pay such Use Invoice in full (unless such dispute involves a material amount in relation to the total amount of such Use Invoice), subject to adjustment upon resolution of the dispute; provided, however, that (i) no exception to any charge in a Use Invoice shall be honored, recognized or considered if filed after the expiration of three (3) years from the date of the Use Invoice, and (ii) no invoice shall be rendered more than three (3) years (a) after the last day of the calendar month in which the expense covered thereby is incurred, or (b) in the case of charges disputed as to amount or liability, after the amount owed or liability therefor is established. Any claim for the adjustment of a Monthly Statement or Use Invoice shall be deemed to be waived if not made in writing within three (3) years after the date of the relevant Monthly Statement for statement adjustments and the date of the relevant Use Invoice for invoice adjustments.

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(vii) NSR and D&H shall each have the right, at its own expense, to audit the records of the other Party pertaining to the use of the Subject Trackage Rights under this Agreement, and any Monthly Statement, Use Invoice or other invoice issued by NSR or D&H, respectively, pursuant to this Agreement, at any time within three (3) years of the date of the relevant Use Invoice or other invoice (as applicable) relating to use of the Subject Trackage Rights. All such audits shall be conducted at reasonable intervals, locations and times. Each Party agrees that, except as permitted by Section 19 of this Agreement, all information disclosed to it or its representatives in connection with such an audit will be held in strictest confidence and will not be disclosed to any third party (other than as required by applicable law). Any adjustment resulting from an audit conducted pursuant to this Section 5(b)(vii) with respect to which the Parties are in concurrence shall be reflected in a subsequent Use Invoice.

(viii) Invoices rendered pursuant to the provisions of this Agreement, other than Use Invoices and charges under Section 9(i), shall include direct labor and material costs, together with the surcharges, overhead percentages and equipment rentals as specified by D&H at the time any work is performed by D&H for NSR, or shall include actual costs and expenses, upon mutual agreement of the Parties.

SECTION 6. MAINTENANCE OF SUBJECT TRACKAGE

(a) D&H shall be solely responsible for the maintenance, repair and renewal of the Subject Trackage. D&H shall keep and maintain the Subject Trackage in reasonably good condition for the use herein contemplated, such condition not to be less than Federal Railroad Administration class specification the Subject Trackage was as of the Effective Date of this Agreement, subject to slow orders and the like, but D&H does not guarantee the condition of the Subject Trackage or that operations thereover will not be interrupted. D&H shall take reasonable steps to ensure that any interruptions will be kept to a minimum and shall use its best efforts to avoid such interruptions.

(b) D&H shall, in planning program maintenance of the Subject Trackage, take into account the schedule of NSR trains on the Subject Trackage as well as D&H trains. D&H shall from time to time throughout the term of this Agreement advise NSR of its schedule for planned maintenance, and any revisions to such schedule, as soon as practicable after such maintenance plan is determined or revised. D&H shall further provide the designated officer of NSR with seven (7) days prior notice (or such lesser notice period as is reasonable in the circumstances) of substantial delays or line outages on the Subject Trackage due to planned maintenance.

SECTION 7. CONSTRUCTION AND MAINTENANCE OF CONNECTIONS

Existing connections or facilities, which are jointly used by the Parties hereto under existing agreements, shall continue to be maintained, repaired and renewed by and at the expense of the party or parties responsible for such maintenance, repair and renewal under such agreements.

(a) If, in the opinion of NSR, a new or upgraded connection is required at a point of permitted entry or exit other than the endpoints, or, if in the opinion of NSR, other upgrading,

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including but not limited to switches, power switches, signals, communications, is required for operational efficiency, then D&H will, subject to its own operational needs, cooperate and NSR will be responsible for funding that construction/upgrading at actual cost or a cost mutually agreed to by NSR and D&H. Such construction/upgrading shall be progressed as follows:

(i) NSR or others shall furnish all labor and materials and shall construct such portions of the tracks located on the right-of-way of NSR or others, which connect the respective lines of the Parties.

(ii) D&H shall furnish all labor and material and shall construct such portions of the tracks located on the right-of-way operated by D&H, which connect the respective lines of the Parties. Upon termination of this Agreement, D&H may at its option remove any portion of trackage and appurtenances located on right-of-way, constructed as a result of this provision, at the sole cost and expense of NSR. D&H will release any salvage material removed to NSR or will credit NSR for the current fair market value of the salvage materials.

(iii) D&H will maintain, repair and renew the constructed/upgraded portions of the tracks located on the right of way operated by D&H that connect the respective lines of the Parties at the sole cost and expense of NSR.

SECTION 8. ADDITIONS, RETIREMENTS AND ALTERATIONS

(a) D&H, from time to time and at its sole cost and expense, may make changes in, additions and betterments to, or retirements from, the Subject Trackage as shall, in its judgment, be necessary or desirable for the economical or safe operation of the Subject Trackage or as shall be required by any law, rule, regulation, or ordinance promulgated by any governmental entity having jurisdiction. Such additions and betterments shall become a part of the Subject Trackage and such retirements shall be excluded from the Subject Trackage.

(b) If the Parties agree that changes in or additions and betterment to the Subject Trackage, including changes in communication or signal facilities, are required to accommodate NSR's operations beyond that required by D&H to accommodate its operations, D&H shall construct the additional or altered facilities and NSR shall pay to D&H the cost thereof, including the annual expense of maintaining, repairing and renewing such additional or altered facilities.

SECTION 9. MANAGEMENT AND OPERATIONS

(a) D&H shall have exclusive control of the management and operation (including dispatching) of the Subject Trackage. Operation and control, including dispatching, of the Subject Trackage shall be conducted in a manner as to afford each of the Parties, and any other present or future user of the Subject Trackage (or any portion thereof) the most economical and efficient movement of its traffic over the line. For the purposes of dispatching, NSR's and D&H's trains of the same class shall be treated with equal priority, with the four (4) classes of trains being:

1. Passenger

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2. Intermodal and automotive
3. Regular (unit and freight trains not scheduled to set off/pick up en route)
4. Other (includes trains and equipment that must operate at restricted speeds, i.e., local, work, or other such equipment movements);

provided, that in the event of a conflict, the D&H dispatcher shall be empowered to deviate from the priorities set forth herein in order to employ best practices to efficiently move all trains.

(b) D&H shall provide NSR with read-only access to D&H's Central Traffic Control screens covering the Subject Trackage in the offices of NSR designated by NSR. D&H shall be responsible for the cost of modifying its system to the extent necessary to provide NSR access to its Central Traffic Control screens, and NSR shall be responsible for the cost of the communications link with NSR and the costs to use such link incurred in NSR's offices. Such access, and the information derived therefrom, shall be restricted to NSR operating personnel designated by the Services Standards Committee, who shall only use said access, and the information derived therefrom, to monitor NSR train movements and for no other purpose, and shall further protect the confidentiality of the information derived therefrom.

(c) NSR shall comply with the provisions of the Federal Locomotive Inspection Act and the Federal Safety Appliance Act, as amended, and any other federal and state and local laws, regulations and rules respecting the operation, condition, inspection and safety of its trains, locomotives, cars and equipment while such trains, locomotives, cars, and equipment are being operated over the Subject Trackage. NSR shall indemnify, protect, defend, and save harmless D&H and its parent corporation, subsidiaries and affiliates, and all of their respective directors, officers, agents and employees from and against all fines, penalties and liabilities imposed upon D&H or its parent corporation, subsidiaries or affiliates, or their respective directors, officers, agents and employees under such laws, rules, and regulations by any public authority or court having jurisdiction, when attributable solely to the failure of NSR to comply with its obligations in this regard.

(d) NSR in its use of the Subject Trackage shall comply in all respects with the safety rules, operating rules and other regulations of D&H, and the movement of NSR's trains, locomotives, cars, and equipment over the Subject Trackage shall at all times be subject to the orders of the transportation officers of D&H; provided, however, that such safety rules, operating rules, other regulations and orders of the transportation officers of D&H shall not unjustly discriminate between the Parties. D&H will not make any rule or restriction applying to NSR's trains that does not apply equally to D&H's trains. NSR's trains shall not include locomotives, cars or equipment which exceed the width, height, weight or other restrictions or capacities of the Subject Trackage, and no train shall contain locomotives, cars or equipment which require speed restrictions or other movement restrictions below the maximum authorized freight speeds as provided by D&H's operating rules and regulations, without the prior consent of D&H. The Parties shall make proper accommodation for exceptions, should that be reasonable, necessary and practicable. All NSR trains shall be powered to permit operation at posted speeds.

(e) NSR shall make such arrangements with D&H as may be required to have all of its employees who shall operate its trains, locomotives, cars and equipment over the Subject Trackage qualified for operation thereover. D&H shall provide reasonable cooperation and

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assistance in the qualification of NSR operating (train and engine) crews for service over the Subject Trackage as soon as the date such crews and D&H personnel are available and the notice of exemption relating to the trackage rights granted herein has been filed with the STB. NSR shall pay to D&H, upon receipt of bills therefor, any cost incurred by D&H in connection with the qualification of such employees of NSR, as well as the cost of pilots furnished by D&H until such time as such NSR employees are deemed by the appropriate examining officer of D&H to be properly qualified for operation as herein contemplated. NSR supervisory personnel who have been qualified to operate over the Subject Trackage by an appropriate examining officer of D&H may qualify other NSR employees for operation of trains over the Subject Trackage.

(f) If any employee of NSR shall neglect, refuse or fail to abide by the instructions and restrictions governing the operation on or along the Subject Trackage or the associated D&H property, D&H shall so notify NSR. D&H shall have the right to require NSR promptly to withhold any NSR employees from service over the Subject Trackage pending the results of a formal investigation of the alleged neglect, refusal or failure. After the notice is given to NSR, NSR and D&H shall promptly hold a joint investigation, in which each of the Parties shall bear the expenses of its own employees and witnesses. Notice of such investigation to NSR employees shall be given by NSR officers. The investigation shall be conducted in accordance with any applicable terms and conditions of schedule agreements between NSR and its employees. If the result of such investigation warrants, such employee shall, upon written request by D&H, be restricted by NSR from service on the Subject Trackage, and NSR shall release and indemnify D&H from and against any and all claims and expenses because of such withdrawal.

(g) In the event that a NSR train shall be forced to stop on the Subject Trackage, due to mechanical failure of NSR's equipment or any other cause (mechanical or otherwise) not resulting from an accident or derailment, and such train is unable to proceed, or if a NSR train fails to maintain the speed required by D&H on the Subject Trackage, or if in emergencies, bad ordered or otherwise defective cars are set out of a NSR train on the Subject Trackage, D&H shall have the option to furnish motive power or such other assistance (mechanical or otherwise) as may be necessary to haul, help or push such trains, locomotives or cars, or to properly move the disabled equipment off the Subject Trackage. NSR shall reimburse D&H for the cost of rendering any such assistance. If it becomes necessary to make repairs to or adjust or transfer the lading of such disabled or defective cars in order to move them off the Subject Trackage, D&H shall arrange for such work to be done, and NSR shall reimburse D&H for the cost thereof.

(h) Whenever NSR's use of the Subject Trackage requires rerailling, wrecking service or wrecking train service, D&H shall arrange for the provision of such service, including the repair and restoration of roadbed, the Subject Trackage and structures. The cost, liability and expense of the foregoing, including without limitation loss of, damage to, or destruction of any property whatsoever and injury to and death of any person or persons whomsoever or any damage to or destruction of the environment whatsoever, including without limitation land, air, water, wildlife, and vegetation, resulting therefrom shall be apportioned in accordance with the provisions of Section 11 hereof. All locomotives, cars, equipment and salvage from the same so picked up and removed which is owned by or under the management and control of or used by NSR at the time of such wreck, shall be promptly delivered to it.

(i) If any cars, cabooses, or locomotives of NSR are bad ordered en route on the Subject Trackage and it is necessary that they be set out, those cars, cabooses or locomotives shall, after being repaired, be picked up by NSR. D&H may, upon request of NSR and at the expense of NSR, unless otherwise provided for in the Field and Office Manuals of the Interchange Rules of the AAR, furnish required labor and material to perform light repairs required to make such bad ordered equipment safe and lawful for movement, and billing for this work shall be at rates prescribed in, and submitted pursuant to, the Field and Office Manuals of the Interchange Rules of the AAR.

(j) NSR shall not have any claim against D&H for liability on account of loss or damage of any kind in the event the use of the Subject Trackage by NSR is interrupted or delayed at any time from any cause.

(k) D&H shall make best efforts to provide the designated officer of NSR with prompt notice of any unplanned substantial delays or line outages on the Subject Trackage, and shall promptly advise the designated officer of NSR of the resumption of normal service on the Subject Trackage.

SECTION 10. MILEAGE AND CAR HIRE

All mileage and car hire charges accruing on cars in NSR's trains on the Subject Trackage shall be assumed by NSR and reported and paid by it directly.

SECTION 11. LIABILITY

The responsibility between the Parties hereto for loss of, damage to, and destruction of any property whatsoever and injury to and death of any person or persons whomsoever, arising out of, incidental to or occurring in connection with this Agreement, also expressly including, without limitation, all liabilities arising after the Commencement Date hereof under FELA and environmental laws but excluding consequential damages of any Party hereto (which are always borne by the Party which sustained them) and excluding claims for exemplary and punitive damages, hereinafter referred to as "Damage," shall be apportioned as follows without regard to fault or negligence:

(a) If Damage occurs involving solely the trains, locomotives and Equipment, cars in the revenue account (including lading), or employees of one of the Parties, then that Party shall be solely responsible for such Damage, even if caused partially or completely by another party (including the other Party).

(b) If Damage occurs involving the trains, locomotives and Equipment, cars in the revenue account (including lading), and employees of both NSR and D&H, then (i) NSR and D&H each shall be solely responsible for any Damage to its own employees, locomotives and Equipment, and those cars in its own revenue account (including lading) (such cars (including lading) being referred to as "NSR Cars" and "D&H Cars," respectively, and collectively, the "Cars"), and (ii) the Parties shall each be responsible for 50 percent of the Damage to the Subject Trackage and associated facilities and any Damage sustained by third parties, regardless of the proportionate responsibility between them as to the cause of the Damage.

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(c) For the purposes of assigning responsibility for Damage under this Section as between the Parties hereto, the trains of a third party or parties operating on the Subject Trackage shall be considered to be the trains of D&H.

(d) Notwithstanding anything to the contrary in Sections 11(a), (b) and (c), above, when any damage to or destruction of the environment, including without limitation land, air, water, wildlife, and vegetation, occurs with one or more trains of the Parties involved, then, as between themselves, the Parties agree that (i) NSR shall be solely responsible for any damage or destruction to the environment and to third parties which results solely from a substance transported in NSR Cars or NSR locomotives and NSR Equipment from which there was a release, (ii) D&H shall be solely responsible for any damage or destruction to the environment and to third parties which results solely from a substance transported in D&H Cars, or D&H locomotives and D&H Equipment from which there was a release, and (iii) NSR and D&H shall be responsible, in proportion to the total number of Cars, pieces of Equipment, and locomotives of each Party from which there was a release, for any damage or destruction to the environment and to third parties which results solely from one or more substances transported in both NSR Cars, NSR locomotives, and NSR Equipment and D&H Cars, D&H locomotives, and D&H Equipment from which there was a release.

(e) D&H and NSR each shall be responsible for the payment, handling, administration and disposition of all Damage for which it bears exclusive responsibility under this Section 11, and D&H and NSR shall have joint responsibility for the payment, handling, administration and disposition of all Damage for which they are jointly responsible under this Section 11. In assigning joint responsibility to both D&H and NSR, it is not intended that D&H and NSR will, in all instances, actually act jointly, but rather that they will agree between themselves on the most practical and efficient arrangement for handling, administering, and disposing of Damage for which they bear joint responsibility, with the objective of eliminating unnecessary duplication of effort and minimizing overall costs.

(f) Each Party covenants and agrees (i) to indemnify and save harmless the other Party from and against any payments which are the responsibility of such Party under this Agreement, and all expenses, including attorney's fees and expenses, and any other expenses of any court or regulatory proceeding, incurred by the indemnified Party in defending any claim for which the responsible Party is liable, and (ii) to defend such indemnified Party against such claims with counsel selected by the responsible Party and reasonably acceptable to the indemnified Party.

(g) Notwithstanding anything to the contrary in this Section 11, whenever Damage occurs with one or more trains being involved, and one or more of the involved trains is a NSR train, and such Damage is attributable solely to the gross negligence or willful or wanton misconduct of only one of the Parties to this Agreement, and such gross negligence or willful or wanton misconduct is the direct or proximate cause of such Damage, then the Party to which such gross negligence or willful or wanton misconduct is attributable shall assume all liability, cost and expense in connection with such Damage. The Parties agree that, for purposes of this Section 11(g), "gross negligence or willful or wanton misconduct" shall be defined as "the intentional failure to perform a manifest duty in reckless disregard of the consequences as

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affecting the life or property of another; such a gross want of care and regard for the rights of others as to justify the presumption of willfulness and wantonness.”

(h) Notwithstanding any provision of this Section 11 to the contrary, each Party shall assume and bear all responsibility for any Damage caused by acts or omissions of any its employees while under the influence of drugs or alcohol. An FRA positive test for drugs or an FRA alcohol test of .04 or greater shall establish that an employee was “under the influence of drugs or alcohol,” for the purposes of this Agreement.

(i) If any suit or action shall be brought against either Party for Damage which under the provisions of this Agreement is in whole or in part the responsibility of the other Party, said other Party shall be notified in writing by the Party sued, and the Party so notified shall have the right and be obligated to take part in the defense of such suit and shall pay a proportionate part of the judgment and costs, expenses and attorneys' fees incurred in such suit according to its liability assumed hereunder.

(j) For purposes of determining liability under this Section 11, pilots furnished by D&H to NSR pursuant to this Agreement shall be considered to be the employees of NSR while such pilots are on board or getting on or off NSR trains.

(k) Each of D&H and NS shall indemnify and hold harmless the other Party against, any and all costs and payments, including benefits, allowances, and arbitration, administrative and litigation expenses, arising out of lawsuits, claims or grievances brought by or on behalf of its own employees or their collective bargaining representatives, either pursuant to employee protective conditions imposed by a governmental agency upon the agency's approval or exemption of this Agreement and operations hereunder or pursuant to a collective bargaining agreement. It is the Parties' intention that D&H and NS each shall bear the full costs of protection of its own employees under employee protective conditions that may be imposed, and of grievances filed by its own employees arising under its collective bargaining agreements with its employees.

(l) Notwithstanding any provision of this Agreement to the contrary, for the purpose of this Section 11, the word “Equipment” shall mean and be confined to (i) cabooses, (ii) vehicles and machinery which are capable of being operated on railroad tracks that, at the time of an occurrence, are being operated on the Subject Trackage, and (iii) vehicles and machinery that, at the time of an occurrence, are on the Subject Trackage or its right of way for the purpose of maintenance or repair thereof or the clearing of wrecks thereon.

SECTION 12. CLAIMS

(a) Under no circumstances will either Party assert a claim for punitive or exemplary damages against the other Party related to the matters contemplated by this Agreement.

(b) All costs and expenses in connection with the investigation, adjustment, and defense of any claim or suit (other than cargo-related claims made against a Party by a customer whose traffic was moving in the revenue and/or car hire account of such Party) under Agreement shall be included as costs and expenses in applying the liability provisions of Section 11.

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However, each Party shall bear the salaries or wages of its full-time agents, full-time attorneys, and other full-time employees engaged directly or indirectly in such work.

(c) No Party shall settle or compromise any claim, demand, suit, or cause of action (other than a cargo-related claim filed with it in accordance with 49 U.S.C. Section 11706 or 49 C.F.R. Section 1005, or in accordance with any applicable transportation contract filed pursuant to 49 U.S.C. Section 10709) for which the other Party has any liability under this Agreement without the concurrence of such other Party if the consideration for such settlement or compromise [REDACTED]

(d) The Parties shall agree between themselves on the most fair, practical and efficient arrangements for handling and administering freight loss and damage claims with the intent that (i) each Party shall be responsible for losses occurring to lading in its possession for the account of such Party and (ii) the Parties shall follow applicable AAR rules and formulas in providing for the allocation of losses which are either of undetermined origin or in cars handled in interline service by or for the account of the Parties.

SECTION 13. TERM, DEFAULT AND TERMINATION

(a) This Agreement shall become effective (“Effective Date”) as of the first date executed by each of the Parties. However, NSR operations over the Subject Trackage shall not commence until a date (the “Commencement Date”) mutually agreed in writing between NSR and D&H, which shall not occur until the effective date of any required STB authorization or exemption of NSR’s trackage rights granted by this Agreement (including compliance with any condition(s) imposed by the STB in connection with such approval or exemption).

(b) This Agreement shall remain in full force and effect until mutually terminated by the Parties. The Initial Term of this Agreement shall be twenty-five (25) years from the Commencement Date, and shall be renewable continuously thereafter for additional periods of ten (10) years (“Additional Term(s)"). At the end of the Initial Term, NSR may, at its option, (i) extend this Agreement under the same terms and conditions for one Additional Term, or (ii) require renegotiation of the Agreement. At the end of the first (and any subsequent) Additional Term, either NSR or D&H may extend the Agreement under the then-current terms and conditions, or require renegotiation of the agreement. In either case, the notice to continue the then-current terms and conditions or to require renegotiation shall be given by D&H or NSR, as the case may be, by giving the other Party advance written notice at least six (6) months prior to the expiration of the then-current term. The Parties shall take into consideration the relative economic positions of the Parties under this Agreement, and intent of the Parties, in each case at the time this Agreement was executed, as well as any significant operating, economic and/or technological changes that have occurred in the interim. If the Parties cannot agree upon the terms and conditions upon which the trackage rights granted herein may be exercised by NSR during such Additional Term, either Party may invoke mediation or other methods of non-binding alternative dispute resolution, in which the other Party agrees to participate in good faith. If the Parties are unable to agree to new terms and conditions, then the then-existing terms shall continue to apply during the subsequent Additional Term.

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(c) In the event that railroad operations, technology or other events create, in the view of one Party to this Agreement, a disparity such that the terms and conditions of this Agreement over time no longer reflect the intention of the Parties in a substantial and material way, and such disparity has a material and substantial adverse effect on said Party, that Party may give notice of such to the other Party, who shall negotiate in good faith modification of this Agreement in order to address and possibly remove said perceived disparity. Should the Parties fail to reach agreement with regard to such perceived disparity, the concerned Party may invoke mediation or other methods of non-binding alternative dispute resolution, in which the other Party agrees to participate in good faith.

(d) NSR shall have the right to terminate this Agreement upon giving D&H at least thirty (30) days' prior written notice of such termination. Such termination shall be considered to be a termination of both this Agreement and the underlying right of movement.

(e) Termination of this Agreement shall not relieve or release either Party hereto from any obligations assumed or from any liability which may have arisen or been incurred by such Party under the terms of this Agreement prior to termination thereof.

(f) In the event of any substantial failure on the part of any Party to perform its obligations provided under the terms of this Agreement and its continuance in such default for a period of sixty (60) days after written notice thereof by certified mail from another Party, the non-defaulting Party shall have the right at its option, after first giving thirty (30) days written notice thereof by certified mail, and notwithstanding any waiver by such Party of any prior breach thereof, to file a lawsuit pursuant to Section 14 and seek damages and/or specific performance of the terms of this Agreement from the defaulting Party. In the case of a substantial default by NSR which continues after adjudication of such default through litigation described in Section 14, D&H may terminate this Agreement and the underlying right of movement if NSR fails to cure such substantial default within: (i) thirty (30) days of the receipt of notice of continued default in the case of such a default by NSR in an obligation to pay D&H, (ii) fourteen (14) days of the receipt of notice of continued default in the case of such a default under Section 3(d), (e), (g), (i), (j) or (k); and (iii) ninety (90) days of the receipt notice of continued default in the case of any other such default under this Agreement.

SECTION 14. DISPUTE RESOLUTION

Any dispute arising between the Parties with respect to this Agreement shall be referred to their respective senior operating officers for resolution. In the event such officers are unable to resolve the dispute, either Party may commence litigation in a state or federal court in the State of Delaware. **THE PARTIES HEREBY IRREVOCABLY SUBMIT TO THE JURISDICTION OF SUCH COURTS IN ANY SUCH ACTION OR PROCEEDING AND IRREVOCABLY WAIVE THE DEFENSE OF AN INCONVENIENT FORUM TO THE MAINTENANCE OF ANY SUCH ACTION OR PROCEEDING. EACH OF THE PARTIES HEREBY WAIVES TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY WITH RESPECT TO ANY LITIGATION DIRECTLY OR INDIRECTLY ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT.**

SECTION 15. ABANDONMENT

(a) D&H shall have the right, subject to securing any necessary regulatory approval or exemption, to abandon the Subject Trackage or any portion thereof (the "Abandonment Segment") during the Initial Term, or any Additional Term, of this Agreement. D&H shall provide NSR no less than ninety (90) days prior notice of its intention to seek to abandon any Abandonment Segment.

(b) If D&H elects to abandon an Abandonment Segment, D&H shall, not less than ninety (90) days prior to any submission to the Surface Transportation Board (or successor agency having jurisdiction over said abandonment) of an application or exemption for authority to abandon such Abandonment Segment, offer NSR the first right to purchase the Abandonment Segment for the fair market value of such Abandonment Segment at the time of purchase, and on such other terms and conditions as are customary with respect to line sales by D&H at the time. The fair market value shall be no less than the greater of the net liquidation value of such line or the going concern value of such line, as used and defined by the STB. NSR shall have sixty (60) days ("Abandonment Notice Period") within which to advise D&H that it will exercise its right to purchase ("Exercise Notice"). If the Parties are unable to agree upon the fair market value of the Abandonment Segment that NSR wishes to purchase, either Party may refer the issue to mediation or binding arbitration before a single arbitrator who is a qualified expert on rail line value and appraisal ("ADR"). Any such arbitration shall be conducted on an expedited basis, with a selection of the arbitrator within forty-five (45) days of the initiation of arbitration, all submissions to be made by the Parties within ninety (90) days of the initiation of arbitration, and a decision to be rendered within thirty (30) days following the final submissions of the Parties.

(c) The Parties shall consummate the sale contemplated by this Section 15 within forty-five (45) days of the latest of: (a) the date of the final decision or order, should issues related to the sale proceed to ADR; (b) the execution of a purchase and sale agreement, should the Parties execute the same; and (c) the grant of authority, or exemption from the need to obtain a grant of authority, from any regulatory body having jurisdiction over the same.

(d) If NSR elects not to purchase the Abandonment Segment, it shall so advise D&H within the same sixty (60) day Abandonment Notice Period by delivering to D&H a notice of waiver of right to purchase said segment ("Waiver Notice"). Failure of NSR to provide D&H with either an Exercise Notice or a Waiver Notice within the aforesaid sixty (60) day period shall constitute a Waiver Notice.

(e) In the event of a Waiver Notice, NSR shall promptly file such application, petition or exemption notice as may then be required to obtain regulatory authority or exemption for the discontinuance of its trackage rights over the Abandonment Segment.

(f) A Waiver Notice shall constitute a waiver by NSR of its statutory rights, if any at the time of the abandonment, to purchase or otherwise subsidize operations over the Abandonment Segment pursuant to an offer of financial assistance or other applicable method.

SECTION 16. SUCCESSORS AND ASSIGNS

(a) This Agreement shall inure to the benefit of and be binding upon each of the parties and their respective successors and assigns.

(b) Neither Party may assign this Agreement, or any of its rights, interests or obligations hereunder, including by operation of law, without the prior consent in writing of the other Party. The consenting party may not unreasonably withhold, condition, or delay its consent. Each Party may assign this Agreement to a parent or controlled subsidiary without the consent of the other Party.

SECTION 17. NOTICE

Any notice required or permitted to be given by one Party to another under this Agreement shall be deemed given on the date sent by certified mail, or by such other means as the Parties may agree, and shall be addressed as follows:

If to D&H: Canadian Pacific Railway Company
120 S. 6th Street, Suite 1000
Minneapolis, MN 55402
Facsimile: (612) 904-5981

with copies to:

Vice President - Operations
Canadian Pacific Railway Company
7550 Ogden Dale Road SE
Building 1
Calgary, AB T2C 4X9
Facsimile: (403) 319-7724

Vice-President, Legal Services
Canadian Pacific Railway Company
Building 1
7550 Ogden Dale Road SE
Calgary, AB T2C 4X9
Facsimile: (403) 319-3725

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If to NSR: Norfolk Southern Railway Company
c/o Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510-2191
Attn: Executive Vice President Operations
Facsimile: (757) 823-5371

with a copy to:

Norfolk Southern Railway Company
c/o Norfolk Southern Corporation
1200 Peachtree Street, NE – Box 158
Attn: Director – Joint Facilities
Atlanta, Georgia 30309
Facsimile: (757) 823-5927

Either Party may provide changes in the above addresses to the other Party by personal service or certified mail.

SECTION 18. FORCE MAJEURE

The obligations, other than payment obligations, of the Parties to this Agreement shall be subject to force majeure (including strikes, riots, floods, accidents, Acts of God, acts of terrorism, and other causes or circumstances beyond the control of the Party invoking such force majeure as an excuse for nonperformance), but only as long as, and to the extent that, such force majeure shall reasonably prevent performance of such obligations by the affected Party. In the event that an event of force majeure impairs either Party's ability to fulfill its obligations to the other Party under this Agreement, said Party shall take all reasonable measures, including providing routing over alternate rail lines to the extent practicable (subject to reimbursement for incremental costs), and granting the right to enter and exit the Subject Trackage at locations other than the End Points in the case of a necessary detour, to restore performance of its obligations in a timely manner.

SECTION 19. CONFIDENTIALITY

Except as provided by law or by rule, order, or regulation of any court or regulatory agency with jurisdiction over the subject matter of this Agreement, or as may be necessary or appropriate for a Party hereto to enforce its rights under this Agreement, during the Initial Term and any Additional Terms, the terms and provisions of this Agreement and all information to which access is provided or which is obtained hereunder will be kept confidential; and will not be disclosed by either Party to any person other than such Party's officers, employees, and attorneys, without the prior written approval of the other Party.

SECTION 20. INDEMNITY COVERAGE

As part of the consideration hereof, each Party hereby agrees that each and all of its indemnity commitments in this Agreement in favor of the other Party shall also extend to and

indemnify the parent corporation, subsidiaries and affiliates of such other Party, and all of its directors, officers, agents and employees.

SECTION 21. REGULATORY APPROVAL

Upon execution of this Agreement by each of the Parties hereto, NSR shall promptly file with the STB, and diligently prosecute, an appropriate notice of exemption with respect to the trackage rights granted to it herein.

SECTION 22. GENERAL PROVISIONS

(a) This Agreement and each and every provision hereof are for the exclusive benefit of the Parties hereto and not for the benefit of any other person. Nothing herein contained shall be taken as creating or increasing any right of any other person to recover by way of damages or otherwise against any of the Parties hereto.

(b) This Agreement contains the entire understanding of the Parties hereto with respect to its subject matter and supersedes any and all other agreements and understandings between the Parties.

(c) No term or provision of this Agreement may be changed, waived, discharged or terminated except by an instrument in writing and signed by all of the Parties.

(d) Each definition in this Agreement includes the singular and the plural, and references in this Agreement to the neuter gender include the masculine and feminine where appropriate. References herein to any agreement or contract mean such agreement or contract as amended. As used in this Agreement, the word "including" means "without limitation", and the words "herein", "hereof" and "hereunder" refer to this Agreement as a whole. All dollar amounts stated herein are in United States currency.

(e) All words, terms and phrases used in this Agreement shall be construed in accordance with the generally applicable definition or meaning of such words terms and phrases in the railroad industry.

(f) The division of this Agreement into sections and subsections, and the insertion of headings and references are for convenience of reference only, and shall not affect the construction or interpretation of this Agreement. Unless the context otherwise requires, all references herein to sections are to sections in this Agreement.

(g) As used in this Agreement, whenever reference is made to the trains, locomotives, cars or equipment of, or in the account of, one of the Parties hereto, such expression means the trains, locomotives, cars and equipment in the possession of or operated by one of the Parties and includes such trains, locomotives, cars and equipment which are owned by, leased to, or moving in the trains of such Party. Whenever such locomotives, cars or equipment are owned or leased by one Party, but are in the possession of, or are being operated in a train of the other Party, such locomotives, cars and equipment shall be considered those of that other Party in whose possession or train such locomotives, cars and equipment are located.

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(h) This Agreement is the product of mutual negotiations of the Parties hereto, none of whom shall be considered the drafter for purposes of contract construction.

(i) No consent or waiver, expressed or implied, by a Party of any breach or default by the other Party in the performance by such other Party of its obligations hereunder shall be deemed or construed to be a consent to or waiver of any other breach or default in the performance hereunder by such other Party. Failure on the part of a Party to complain of any act or failure of the other Party or to declare the other Party in default, irrespective of how long such failure continues, shall not constitute a waiver by such first mentioned Party of its rights hereunder.

(j) If any provision of this Agreement or the application thereof to any Party hereto or to any circumstance shall be determined by a court of competent jurisdiction to be invalid or unenforceable to any extent or for any reason, the remainder of this Agreement or the application of the provisions thereof to such Party or circumstance, other than those determined to be invalid or unenforceable, shall not be affected thereby and shall be enforced to the fullest extent permitted by law, and the Parties shall promptly enter into such other agreement(s) as their respective legal counsel may deem appropriate in order to replace such invalid or unenforceable provisions in a manner which produces a result which is substantially equivalent to the terms of this Agreement in all material respects.

(k) Nothing herein shall be interpreted as creating an association, partnership, joint venture or other joint undertaking between D&H and NSR.

(l) The interpretation and performance of this Agreement shall be governed by the substantive and procedural laws of the State of Delaware, without giving effect to any choice or conflict of laws provision or rule (whether of the State of Delaware or any other jurisdiction) that would cause the application of laws of any jurisdiction other than the State of Delaware.

(m) This Agreement may be executed in several counterparts, each of which will be deemed an original, and such counterparts shall constitute one and the same instrument.

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IN WITNESS WHEREOF, the Parties have caused this Agreement to be duly executed as of the date first above written.

WITNESS:

NORFOLK SOUTHERN RAILWAY
COMPANY

By _____

WITNESS:

DELAWARE AND HUDSON RAILWAY
COMPANY, INC.

By _____