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VIA ELECTRONIC FILING

Cynthia T. Brown  
Chief of the Section of Administration  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423

Re: STB Finance Docket No. 35873  
Norfolk Southern Railway Company – Acquisition and  
Operations- Certain Rail Lines of the Delaware and Hudson  
Railway Company, Inc.

Dear Ms. Brown:

Enclosed for filing in the above-referenced proceeding is Delaware and Hudson Railway Company, Inc.'s Reply to Samuel J. Nasca's Petition for Leave to File Petition to Strike and/or for Alternative Relief.

Please contact me if you have any questions.

Sincerely,

STINSON LEONARD STREET LLP

A handwritten signature in black ink, appearing to read "David F. Rifkind".

David F. Rifkind

DFR/pva

Enclosure

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**Finance Docket No. 35873**

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**NORFOLK SOUTHERN RAILWAY COMPANY-ACQUISITION AND OPERATION-  
CERTAIN RAIL LINES OF THE DELAWARE AND HUDSON RAILWAY COMPANY,  
INC.**

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**REPLY TO SAMUEL J. NASCA'S  
PETITION FOR LEAVE TO FILE PETITION  
TO STRIKE AND/OR FOR ALTERNATIVE RELIEF**

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Dated: February 27, 2015

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**Finance Docket No. 35873**

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**NORFOLK SOUTHERN RAILWAY COMPANY-ACQUISITION AND OPERATION-  
CERTAIN RAIL LINES OF THE DELAWARE AND HUDSON RAILWAY COMPANY,  
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**REPLY TO SAMUEL J. NASCA'S  
PETITION FOR LEAVE TO FILE PETITION  
TO STRIKE AND/OR FOR ALTERNATIVE RELIEF**

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Delaware and Hudson Railway Company, Inc. ("D&H") submits this reply in opposition to Samuel J. Nasca's ("Nasca") Petition for Leave to File Petition to Strike and/or For Alternative Relief filed February 13, 2015 (the "Petition for Leave"). The Petition for Leave asks that the Board accept Nasca's petition to either [1] strike as untimely Norfolk Southern Railway's ("NSR") January 21, 2015 filing (NS-13) and/or [2] accept into the record two exhibits relating to rail service in Chicago. In asking for this relief, Nasca seeks to exclude from the record relevant information that was timely filed – namely a list and compilation of 46 additional statements from shippers, short lines, public agencies and elected officials in support of NSR's application – and to include in the record late-filed material that is wholly irrelevant to the Board's consideration of NSR's application and is otherwise objectionable and should be excluded from the record pursuant to 49 CFR § 1004.8. Nasca fails to provide a good reason why the Board should accept his late filing, which is without merit, is objectionable and, therefore, should be rejected.

## **I. Background**

On November 17, 2014, NSR filed its application to acquire from D&H and to operate the D&H South Lines consisting of 282.55 miles of rail line located in New York and Pennsylvania. On December 16, 2014, the Board accepted NSR's application and established a procedural schedule which, among other things, required that "All comments, protests, requests for conditions, and any other evidence and argument in opposition to the primary application and related filings, including filings by the U.S. Department of Justice (DOJ) and the U.S. Department of Transportation (DOT), must be filed by January 15, 2015." Decision No. 1. On January 14, 2015, the Board extended the comment deadline to January 21, 2015 "to ensure that all parties have adequate time to comment on NSR's application." Decision No. 4.

On January 21, 2015, Nasca filed comments opposing NSR's application. That filing was Nasca's fourth in this proceeding. Prior filings included a "Reply to Classification as Minor Transaction, Reply to Petition to Establish Procedural Schedule, Reply to Motion for Protective Order, and Petition to Consolidate Proceedings" filed December 9, 2014 and a "Petition for Reconsideration" filed January 5, 2015.

Also on January 21, 2015, NSR filed NS-13 which included a list and compilation of 46 additional statements from shippers, short lines, public agencies and elected officials expressing support for NSR's application. Some of these statements had already been filed with the Board and were included in NS-13 for the Board's convenience. NS-13 supplemented a previous list and compilation of 78 support statements that NSR filed on December 8, 2014 (NS-5).

On February 13, 2015, Nasca filed his Petition for Leave to File Petition to Strike and/or For Alternative Relief. Nasca asks the Board to accept his late-filed petition on the grounds that he was confused by the "numerous filings on or about January 21, 2015, and thereafter, in

support of the control transaction”<sup>1</sup> which caused “SMART/TD-NY to evaluate whether to seeks to strike some of this improper material, such as NS-13, and/or to seek alternative relief of its own by submitting additional information, such as suggested linkage with another STB proceeding and CP congestion at Chicago in 2014.”<sup>2</sup> Petition for Leave at 3.

Nasca’s late-filed Petition to Strike and/or For Alternative Relief (Petition to Strike) asks the Board to strike NS-13 on the ground that NS-13 was late-filed. In the alternative, Nasca asks the Board to accept his submission of two late-filed exhibits which he posits might explain the STB’s “motivation” for what he describes as “the unusual and irregular procedure adopted by the Board in this control transaction.” Petition to Strike at 4.

## **II. Argument**

Nasca’s Petition to Strike is untimely, without merit, and objectionable. Nasca fails to provide a good reason why the Board should accept his late-filed Petition to Strike and none exists. Nasca’s late-filed Petition to Strike presents both argument and proffers additional materials that are irrelevant and improper. The argument and additional materials are submitted to impugn the Board’s motivation with respect to its handling of the proceedings and contain material that is pejorative. Moreover, they concern service issues in Chicago and west of Chicago, which have no relevance to NSR’s acquisition of the D&H South Lines which are located in New York and Pennsylvania. By contrast, the materials that Nasca seeks to strike – a

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<sup>1</sup> Nasca’s claim notwithstanding, there are no docket entries for filings made after January 21, 2015 in support of NSR’s application.

<sup>2</sup> According to Nasca’s petitions, Nasca is the New York Legislative Director for SMART/Transportation Division, New York State Legislative Board (SMART/TD-NY), and the petitions are submitted “for and on behalf of SMART/TD-NY.” Petition to Strike at 2.

list and compilation of 46 support statements – are materials that were both timely filed and indisputably relevant to NSR’s application.

**A. Good Cause Does Not Exist for Accepting Nasca’s Late-Filed Petition**

Nasca acknowledges that his filings missed not one, but two deadlines – the January 21, 2015 deadline for filing comments and the February 10, 2015 deadline for a motion to strike NS-13. Nasca does not deny that he was aware of these deadlines. In fact, Nasca twice challenged the filing deadline, and he timely filed his protest on January 21, 2015. Nevertheless, Nasca claims good cause exists for the Board to accept his late-filed Petition to Strike. Namely, that the deadlines passed before Nasca had decided on a course of action. *See* Petition for Leave at 3. Indecision, however, does not constitute good cause.<sup>3</sup>

Moreover, although Nasca asks the Board to accept the additional materials into the record as alternative relief in the event that the Board does not strike NS-13, there is no basis to link the Board’s decision as to NS-13 with acceptance of Nasca’s late-proffered materials. Neither Nasca’s Petition to Strike nor the attached materials are offered in rebuttal or response to any issues raised in NS-13. Rather, they are offered in response to the Board’s January 14, 2015 Decision No. 4 and earlier procedural decisions, in order to question the Board’s motives in issuing those decisions. *See* Petition to Strike at 4. Thus, even assuming NS-13 were deemed late, that would not justify the acceptance of Nasca’s late filing on unrelated issues.

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<sup>3</sup> Nasca does not claim, nor could he, that he was unable to file the additional materials by the January 21, 2015 deadline. The materials are dated between April 2014 and October 2014 and, accordingly, were available to Nasca prior to the filing deadline.

**B. Nasca's Late-Filed Petition to Strike Violates 49 CFR 1104.8**

In addition to being untimely, the argument and materials that Nasca seeks to insert into the record contain “irrelevant, immaterial, impertinent, or scandalous matter” that should be excluded pursuant to 49 CFR § 1104.8. Nasca proffers the additional materials because, according to Nasca, they suggest that the Board might be colluding with the carriers on this Transaction in order to facilitate other transactions that would address service issues in Chicago and west of Chicago (issues that were the focus of Ex Parte No. 724 in 2014). *See* Petition to Strike at 4. While that wholly unfounded suggestion is in and of itself improper and impertinent, so too are the underlying materials on which Nasca purports it is based. Specifically, Exhibit A-1 includes comments posted anonymously in an online rail fan forum that are derogatory and/or contain baseless speculation, supposition, and innuendo. Such materials are plainly objectionable and have no place in the regulatory record.

Moreover, the additional materials are entirely irrelevant and immaterial to the Board's consideration of NSR's application.<sup>4</sup> As Nasca acknowledges, efforts to solve Chicago and west of Chicago service issues are not relevant to the acquisition of a rail line in New York and Pennsylvania.<sup>5</sup> *See* Petition to Strike at 7. *See also Peter Pan Bus Lines, Inc.—Pooling—Greyhound Lines, Inc.*, STB Docket Nos. MC-F-20904, MC-F-20908, and MC-F-20912 (STB served April 20, 2011), slip op. at 3 (“We agree with Applicants that the new pleading is not relevant to the issues raised by Coach's challenge to Applicants' pooled service in a different

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<sup>4</sup> Exhibit B consists of STB press releases announcing various meetings to address service issues primarily west of Chicago.

<sup>5</sup> In fact, D&H who is the seller of the D&H South Lines, does not operate to or in Chicago.

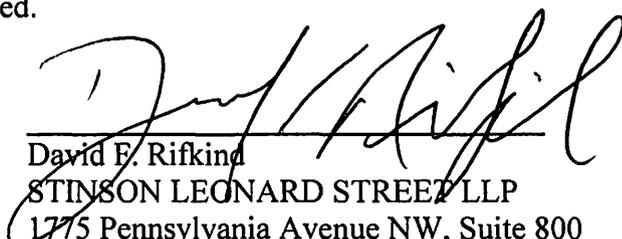
region, the Northeast. For that reason, we will not consider the letter in reaching our decision”). Thus, no interest is served by including such materials in the record.

**C. No Basis Exists for Striking NS-13**

Nasca incorrectly contends that the January 21, 2015 deadline applied to opposition statements only, and therefore NS-13 was untimely. However, the Board did not limit the filings due on January 21, 2015 to filings in opposition, but also allowed for the filing of “comments.” See Decision Nos. 1 and 4. In any event, NS-13 contains support statements that are relevant to the Transaction, and which NSR listed and compiled for the Board’s convenience. Notably, those support statements that were already in the record and/or are consistent with myriad other support statements already in the record and to which Nasca had ample opportunity to address. Accordingly, Nasca is not prejudiced by NS-13.

**Conclusion**

For the reasons stated above, Nasca’s Petition for Leave to File Petition to Strike and/or For Alternative Relief should be denied.



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**CERTIFICATE OF SERVICE**

I hereby certify that I have caused the foregoing Reply to Samuel J. Nasca's Petition for Leave to File Petition to Strike and/or for Alternative Relief to be served by First Class Mail and, by e-mail where an e-mail address is included on the Board's official service list, on February 27, 2015 to parties of record listed below.

  
David F. Rifkind

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