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April 15, 2015
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April 15, 2015

Ms. Cynthia T. Brown
Chief of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423

**RE: FD 35873, Norfolk Southern Railway Company-Acquisition and
Operation-Certain Rail Lines of the Delaware And Hudson Railway
Company, Inc.
Late-filed Notice of Intent to Participate by the East of Hudson Rail
Freight Service Task Force, Inc.**

Dear Ms. Brown:

Due to inaccuracies, the East of Hudson Rail Freight Service Task Force, Inc. (the Task Force) seeks leave to file a response. Delaware and Hudson Railroad's objects to its participation. It also objects to the suggestion that the Board condition approval of this petition on transfer of the Delaware and Hudson's right to serve Long Island via trackage over CSX to Norfolk Southern.

Thank you for your attention to this matter.

Very truly yours,

John F. McHugh

Cc: Service List

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

APPLICATION OF THE EAST OF HUDSON RAIL FREIGHT SERVICE TASK
FORCE, INC. TO APPEAR AND FILE OUT OF TIME A REQUEST FOR
MODIFICATION OF THE PROPOSED TRANSACTION TO INCLUDE
TRANSFER OF DELAWARE AND HUDSON'S TRACKAGE RIGHTS FROM
MECHANICSVILLE, N.Y. TO AN INTERCHANGE WITH THE NEW YORK
AND ATLANTIC RAILWAY AT FRESH POND, JT. QUEENS COUNTY, NY.
TO NORFOLK SOUTHERN RAILWAY COMPANY

The East of Hudson Rail Freight Task Force, Inc. (Task Force) seeks leave to file a response to the comments of the Delaware and Hudson Railway, (D&H). The D&H objects to the Task Force's suggestion that the Board include the D&H's trackage rights, mandated by the Board in FD 88833 Decision No. 89, slip op. at 177, between Mechanicsville, NY and Fresh Pond Jt., Queens, NY in the transfer of rights in issue to the Norfolk Southern as a part of this transaction. The suggestion is that transferring these rights will restore the competition in the East of Hudson region the Board had sought to create in that prior proceeding.

As noted previously, the D&H has made almost no effort to provide competitive services using these rights and, as of 2014, has essentially abandoned them. In 2013, the D&H handled only 530 revenue car loads, (approximately 1.5 cars per day) east of the Hudson. A more than 500 percent decline from 2010 when 2,880 cars were handled. Had they formally abandoned these rights, they would be required to sell them to a qualified bidder, thus, protecting the public from an unwarranted termination of service.

As is shown below, the D&H has not provided adequate service to shippers, the service is inadequate for shippers who would like to use the line, the transfer of the line to Norfolk Southern would have no adverse effect on D&H or the overall operation of the line and would be very likely to improve service on the line generally, 49 U.S.C. 10907 (c). It is of note that in FD 88833 it was the

Department of Transportation of the State of New York that asked that these trackage rights be granted to D&H. The Task Force is a person as defined by Title 1 U.S.C. 1 and is a person entitled to raise these issues under 49 U.S.C. 10102 (4). The obligation to establish the facts is fulfilled, as required by 49 U.S.C. 10907 (2), by the prior submission and the following.

In its prior submission the Task Force had provided a history of the progress in increasing access to rail freight services east of the Hudson over the last fifteen years of its activity. Unfortunately D&H played a very small role in that progress, at best. It now plays almost no role at all.

D&H, however, asserts that its haulage agreement with CSX Transportation has succeeded. That is very far from true if the interests of the residents and potential rail customers of the East of Hudson Region are considered.

By 2010, largely due to the activities of the East of Hudson Rail Freight Task Force, Inc., many of the obstacles to freight access to the region the D&H refers to had been eliminated or proven not to be major hurdles to increased rail freight use in the east of Hudson region. The upward trend in rail use was established and growing. Indeed, in the year that the Joint Operating Agreement between D&H and CSXT was signed, (the haulage agreement) rail carloads originating or terminating on geographic Long Island had grown 99.6 percent from 1999 levels. This occurred in spite of heavy passenger train volume, limited excess capacity and expansion opportunities.

In contrast, D&H never participated significantly in this market. To clarify the actors, in 1991 Canadian Pacific Limited, (CPR) a Canadian Corporation purchased certain assets and rights of the former Delaware and Hudson Railway Company, a bankrupt railroad. This purchase and assumption of trackage rights was approved by the Interstate Commerce Commission, *Canadian Pacific Limited-Purchase & Trackage Rights-Delaware & Hudson Railway Company*, Finance Docket 31700, 7 I.C.C. 2d 95 (1990). D&H was the corporate entity, owned by CPR, to which trackage rights were granted by CSX due to the mandate of the Board. On March 18, 2002, CPR/D&H, entered into an Operating Agreement to provide rail services for the City of New York via its Economic Development Corporation (EDC). The City sought to provide rail services to the general public by extending D&H operations to a certain parcel of property controlled by the City known as the 65th Street Rail Yard. That yard is a facility built by the State of New York to be the eastern terminal for float operation now operated by NYNJ as well as the State's Full Freight Access Program, a series of

improvements to clearances East of the Hudson designed to allow modern freight services to reach the City of New York and Long Island. The 65th Street Yard is comprised of approximately 33 acres at the south end of the developed Brooklyn Waterfront.

New York & Atlantic Railway Company (NYA) is a common carrier by rail authorized by the Surface Transportation Board to operate rail services in interstate commerce, entered into a haulage agreement with CPR to provide common carrier rail service from Fresh Pond Junction in Queens to 65th Street, Brooklyn and to provide the rail services required by the CPR Operating Agreement with the City.

Just two years later, on July 31, 2004 CPR and the EDC terminated the Operating Agreement and as a result abandoned CPR service between Fresh Pond and 65th Street. CPR attracted only one shipper to 65th Street, a shipper forced out of the City as CPR abandoned its service. See *TRI-STATE BRICK AND STONE OF NEW YORK, INC. AND TRI-STATE TRANSPORTATION, INC.—PETITION FOR DECLARATORY ORDER* FD 34824 (December 10, 2007).

The D&H was a bad choice to provide competition to CSXT in the region. As was argued by Congressman Nadler and the Congressional petitioners in 1998, the D&H/CP did not and does not efficiently reach the region's major trading partners and simply wasn't up to the task of providing effective service in this region. By 2004 CP was in full retreat from this task, demonstrated by its abandonment of the 65 Street Yard. The 2010 Joint Operating Agreement was the concluding part of that all but abandonment of its east of Hudson rights.

In 2010, all west of Hudson rail freight going to and coming from geographic Long Island in 2010 had to be interchanged with either the CSXT, NYNJ or CP. In 2010, the CP handled only 2,880 carloads and the NYNJ volume having decreased from a high of 3,548 carloads in 2006 when NYNJ was still privately owned, to 1,229 carloads in the second year of ownership by the Port Authority of NYNJ. CSX the major connecting carrier handled most of the freight generated in the region.

To excuse its non-service the D&H states that the same challenges to rail freight access which existed in 1999 remain today. It lists conflicts with passenger rail service, clearance issues, weight restrictions, and the need to expand yards and terminals. It claims these have prevented it from more effective service and these problems will not be solved by allowing Norfolk Southern (NS) access. Again these factual statements are inaccurate.

In 2004, a comprehensive capacity study of the Hudson Line, (Hudson Line Railroad Transportation Plan) performed by nationally recognized consultants, supervised by all the line's railroad stakeholders, including the Canadian Pacific reported that through 2025 the projected increases in the number of freight trains, six for the Canadian Pacific, did no harm. But new infrastructure investments were required to accommodate the increases in commuter trains and Amtrak train and speed increases. All the infrastructure investments recommended, were solely for commuter and Amtrak related improvements and would be required even if there were no freight trains operating on the Hudson Line. Some of the required passenger infrastructure improvements will also benefit freight trains operating on the corridor. The new high-speed signal system will make it easier for quality freight trains to operate on the corridor in the day time between the end of the morning passenger peak and the beginning of the evening passenger peak. That would enable freight trains hauling perishable goods to reach the Hunts Point Perishable Center directly by rail and sooner than any west of Hudson Train/Dray combination or any rail marine combination via New York and New Jersey (NYNJ). The study was reviewed and reaffirmed by the Hudson Line railroad operators in 2013 as part of the negotiations between Amtrak, CSX and the State of New York Hudson Line to lease the north end of the Hudson Line. Thus, capacity on the Hudson Line is not yet a constraint on freight use. There is clearly capacity to replace D&H with a more vigorous carrier such as NS.

Further all significant clearance issues existing east of the Hudson in 1999 and 2010 have since been resolved except for those that would allow the use of Double-Stack cars. The far more important, Plate F cars that require a 17'0" of vertical clearance above the rail can now move unrestricted from CSX's Selkirk Yard to Riverhead on the eastern end of Long Island and to shippers on freight only tracks in Brooklyn, the Bronx and Queens

Indeed, in the years immediately following the transfer of the Hudson Line to CSXT and CP, top Canadian Pacific executives pledged to establish an intermodal service between Montreal and New York City (Bronx-Harlem River Yard) using its "Iron Highway" system. The "Iron Highway" equipment required a higher vertical clearance window than conventional TOFC. The Task Force with Congressman Nadler worked with the State line owners to remove the last clearance restraint blocking the use of conventional Trailer-On-Flat-Car operations

on the Hudson Line. The Task Force went even further and supported the additional cost required to use the Canadian Pacific's "Iron Highway" system.

When the required clearances were achieved, Canadian Pacific took no action to provide the promised services.

Weight restrictions that existed in 1999 and 2010 have all been eliminated except for a few on the Bay Ridge Line south of Fresh Pond. Freight cars weighing up to 286,000 lbs. can now move freely from the CSX Selkirk Yard to Riverhead on eastern Long Island and to and from most shippers on the New York and Atlantic in Queens and Brooklyn and all on CSX in the Bronx.

Terminal space was provided to D&H at 65th Street, it abandoned it. A two track intermodal terminal cleared for Iron Highway service at Harlem River Yard remains unused.

Therefore, every excuse D&H gives here for its non-performance of its common carrier obligations under the trackage rights mandate are not a factor. It simply chooses not to try.

The overly truck dependent east of Hudson region is adjusting to the rebirth of reliable rail freight services. As with any new and growing business rail will need to build and expand its production facilities as it seeks to succeed. As a common carrier, the provision of such facilities is mandated by law, 49 U.S.C. 11121 (a) (1).

The need to build new and expand yards and terminals is only normal, that need is not a "barrier. Indeed, yard and terminal expansion limits thought to exist in 1999 and even as late at 2010, the year of the CP/DH-CSX Joint Operating Agreement, never fully materialized nor did any restrict growth to date. Indeed, in 2010, a group of investors, having witnessed the reincarnation of rail freight service on geographic Long Island, established a rail based intermodal and goods storage facility in Brookhaven, NY. The facility is currently processing 2,100 rail cars a year. Just a few months ago the New York and Atlantic Railway established a new rail-truck-water Intermodal Transfer Facility in western Queens. In the Bronx, Waste Management established Municipal Solid Waste Transfer Station that originates 25 cars per day.

In 2009, a study by a team of transportation, traffic and Real Estate experts retained by the New York State Department of Transportation evaluated the

availability of land for rail freight use. The study identified 13 potential sites in Nassau and Suffolk counties. In Brooklyn, a long stretch of open waterfront land owned by the New York City Economic Development Corp. has been upgraded for rail and water oriented freight use, known as the South Brooklyn Marine Terminal. It is served by the NYNJ and is close to the 65th St. yard that D&H abandoned. The New York City Economic Development Corp. also owns the East New York Yard, in Queens, that is serviced by the NYA. An additional site in Brooklyn, the 65th Street Yard owned by the New York City Economic Development Corporation but now leased and controlled by NYNJ. Indeed, as will be further explained infra, the NS has sought to open a transfer facility within that 65th St. Yard for several years.

The D&H's assertion that Norfolk Southern already has access to the market via NYNJ is also incorrect. No such access has been granted by NYNJ. Further the physical limitations of the NYNJ render it an ineffective means of access.

As stated above, for more than eight years, NS has expressed a desire to establish a high capacity rail-truck transfer facility in the 65St Yard in Brooklyn, mentioned above. The NS, has met many times with officials of the Port Authority, NYNJ and New York City Economic Development Corp. It has conducted professional market assessments, and established an east of the Hudson marketing/sales program. It has listed Brooklyn as an NS station. But still the 65th Street Yard which connects the NYNJ to the NY&A and to the trackage NS would like to use is essentially unused except for the NYNJ rail car float transfer. Tracks upgraded a few years ago with State and Federal Funds are unused. The same is true for the nearby South Brooklyn Marine Terminal site, which also remains empty. This situation continues as no agreement has been negotiated to open that trackage or terminal facility to Norfolk Southern or to otherwise provide effective service or facilities.

While the lack of an agreement may be solvable, the fact remains that NYNJ, will never be a major factor in providing rail freight service across the harbor. As pointed out in the Task Force's comments on the NYNJ reply and that of Congressman Nadler, the NYNJ operating model, even in the enhanced version will not be able to physically process large volumes of rail cars. It is further handicapped by the balkanized institutional structure which exists between Oak Island Yard in Newark, NJ and Fresh Pond. All of this puts the NYNJ and any class 1 carrier that wants/to connect to east of the Hudson shippers via the rail-marine route is at a cost/time disadvantage when competing for the major portion

of the east of Hudson transportation market. Indeed, even the 78,000 revenue carloads forecasted by the Cross Harbor DEIS to be available for diversion to NYNJ in 2035 is only .0087 of the tonnage projected to move across the Hudson at that time.

The idea that ownership by the Port Authority will improve the NYNJ performance has not been true to date. While it is true that revenue carloads handled by NYNJ when the Port Authority took it over stated at a low 873 cars in 2009, the first full year of Port Authority ownership and the volume did increase in the passing five years to an all-time post Conrail high of 3,620 revenue carloads in 2014 that is deceptive. Comparing traffic volumes from 2006, under private ownership with the Port Authority 2014 performance, shows an increase of just 78 cars. Further, in 2007, still under private ownership, revenue carload volume was 3,121 cars, slightly more than the 3,041 cars moved under Port Authority control in 2013.

For all these reasons, the D&H position that there is no need for a new solution for the east of Hudson market is incorrect. The east of Hudson transportation market as discussed is both very large and overly truck dependent. It has grossly low rail participation, a long known fact most recently re-stated in the Port Authority, NYNJ, Tier 1-Draft Environmental Impact Study. In this region rail handles only 3 percent of this huge transportation market. The national average rail share of the freight transportation market is 30 percent. Issues blamed for the low rail market share articulated here by D&H are simply not a significant factor. Lack of will is.

Where, as here a purchase, lease, or contract to operate property of a rail carrier by another rail carrier is before the Board, it has the authority to impose conditions [49 U.S.C. § 11324\(c\)](#). It has “extraordinarily broad discretion” under that section to fashion conditions to such transactions to ensure that the public interest standard is satisfied. *S. Pac. Transp. Co. v. ICC*, 736 F.2d 708, 721 (D.C.Cir.1984); *see also Grainbelt Corp. v. Surface Transp. Bd.*, 109 F.3d 794, 798 (D.C.Cir.1997). It was this provision of law that allowed the creation of the trackage rights in issue in FD 88833.

The six North American mega railroads on average generate 90+ percent of all North American rail car loadings and revenue. The CSX and NS are the two mega railroads serving the eastern and northeastern United States. The residents of

the East of Hudson Region are the only major concentration of population in the Eastern United States, other than Maine, currently served by only one of these two Class I carriers, both of which reach most of this region's trading partners, directly or via interchange with western mega carriers. This, the residence of over 12 million people is the largest consumer market on earth. The D&H has abandoned its rights to serve this region, thus the goal of the Board cited in in FD 88833 Decision No. 89, slip op. at 177, to bring competition to the region, has failed. To serve the public interest that failure can be corrected and should be corrected in this transaction by transfer of these rights to Norfolk Southern. The Board has the authority to do so where the public interest will be served and no negative environmental effect can result from this transfer.

Respectfully submitted

Dated, New York, N.Y.

/s/John F. McHugh

April 15, 2015

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Declaration of Service

Suzanne McDonald declares under penalty of perjury that on this 15th day of April, 2015 I served a copy of this cover letter and reply on all parties listed on the Service List by regular United States Mail.

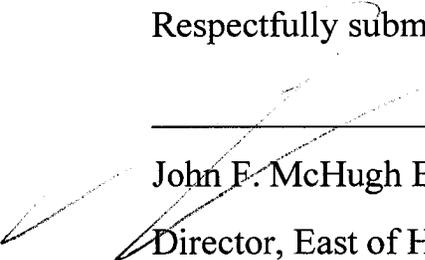
Suzanne McDonald

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Respectfully submitted

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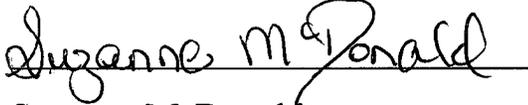


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