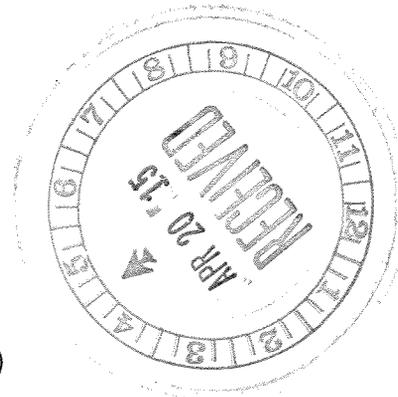


ORIGINAL

Before the
SURFACE TRANSPORTATION BOARD



Docket No. AB-156 (Sub-No. 27)

DELAWARE AND HUDSON RAILWAY COMPANY, . INC.
DISCONTINUANCE OF TRACKAGE RIGHTS EXEMPTION
IN BROOME COUNTY, NY; ESSEX, UNION, SOMERSET,
HUNTERDON, and WARREN COUNTIES, NJ; LUZERNE
PERRY, YORK, LANCASTER, NORTHAMPTON, LEHIGH,
CARBON, BERKS, MONTGOMERY, NORTHUMBERLAND,
DAUPHIN, LEBANON, and PHILADELPHIA COUNTIES,
PA; HARFORD, BALTIMORE, ANNE ARUNDEL, and PRINCE
GEORGE'S COUNTIES MD; THE DISTRICT OF COLUMBIA,
and ARLINGTON COUNTY, VA.

238237
ENTERED
Office of Proceedings
April 20, 2015
Part of
Public Record

PETITION TO REVOKE AND FOR STAY OF EXEMPTION

FILED
April 20, 2015
SURFACE
TRANSPORTATION BOARD

FEE RECEIVED
April 20, 2015
SURFACE
TRANSPORTATION BOARD

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April 20, 2015

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PETITION TO REVOKE AND FOR STAY OF EXEMPTION

Preliminary Statement

Samuel J. Nasca,^{1/} for and on behalf of SMART/Transportation
Division, New York State Legislative Board (SMART/TD-NY), submits
this petition to revoke, and for stay of exemption, with respect
to the Surface Transportation Board (STB, or Board) notice of
exemption, dated April 3, 2015 (served April 8), 80 Fed. Reg.
18937-38 (Apr. 8, 2015), as amended in certain respects April 16,
2015 (served April 17, 2015). Delaware and Hudson Railway Company,
Inc.-Discontinuance of Trackage Rights Exemption-in Broome County,
N.Y., Essex, Union,, Somerset, Hunterdon,, and Warren Counties,

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

N.J., Luzerne, Perry, York, Lancaster, Northampton, Lehigh, Carbon, Berks, Montgomery, Northumberland, Dauphin, Lebanon, and Philadelphia Counties, Pa., Harford, Baltimore, Anne Arundel, and Prince George's Counties, Md., the District of Columbia, and Arlington County, Va. (D&H Discon.).

The STB's April 8, 2015 notice of exemption tracked, restated, and published the Delaware and Hudson Railway Company (D&H) notice of exemption, for the same discontinuance transaction, filed March 19, 2015 by D&H at the STB.^{2/}

The instant STB notice of discontinuance, as amended April 17, 2015, announced D&H's intention to discontinue its overhead and local trackage rights service over approximately 670 miles of rail lines with respect to nine specified lines, owned and/or operated by seven other rail carriers,^{3/} to become effective June 15, 2015, upon the anticipated implementation of a related transaction in Finance Docket No. 35873, Norfolk Southern Railway-Acquisition and Operation-Certain Rail Lines of the Delaware & Hudson Railway (NS/D&H),^{4/} although the STB said it has not issued or approved NS/D&H at this time. (STB, 4/17/15,2).

^{2/}The STB's rules provide that the agency give notice and publish the carrier's notice 20 days after filing. 49 CFR 1152.50(d)(3).

^{3/}These seven carriers are Norfolk Southern Railway Company, Reading Blue Mountain and Northern Railroad Company, CSX Transportation, Inc., Consolidated Rail Corporation, Wilkes-Barre Connecting Railroad Company, Pocono Northeast Railway, Inc., and National Railroad Passenger Corporation.

^{4/}The instant 670-mile D&H Discon. proceeding is obviously directly related to the NS/D&H 282-mile D&H line transfer. The STB's April 17 amended decision directed service of D&H Discon. be made on all parties to NS/D&H. (STB, 4/17/15, 2n.2).

The STB's April 8, 2015 notice carried an earlier May 8, 2015 effective date, without reference to any decision in NS/D&H; but the STB's notice directed petitions for stay are due April 20, 2015, if on other than environmental or offer of financial assistance grounds, and that petitions to reopen are due April 28, 2015. The April 17 decision extended the effective date of the exemption from May 8, until June 15, 2015, and added a reference to NS/D&H.

I. THE BOARD SHOULD REVOKE THE CLASS EXEMPTION FOR THE DISCONTINUANCE TRANSACTION; ANY RENEWED PETITION OR APPLICATION SHOULD BE CONSOLIDATED WITH OTHER PENDING OR INITIATED NS/D&H PROCEEDINGS.

1. Improper Use of Class Exemption. The Discontinuance class exemption is an improper vehicle for the massive line discontinuances proposed herein. NS and D&H have bifurcated their proposal to transfer 282 miles of D&H line, and 670 miles of D&H local and trackage rights--a total of approximately 952 miles of service. Moreover, this is not a minor transaction under the statutory or Board concepts of consolidation proposal; and joining the 282-mile consolidation application proposal, with a massive 670-mile executory discontinuance exemption to follow automatically, serves to defeat the necessary overall examination of D&H's survival and other anti-competitive transportation consequences for the involved territory.

The STB's discontinuance class exemption is geared primarily to an absence of local traffic on a line segment over a two year period. The class exemption was not put in place primarily to permit the discontinuance of overhead traffic. Indeed, the inquiry

into overhead traffic comes into play only so as to defeat use of the discontinuance exemption, even if there has been an absence of local traffic over a two-year period. The former ICC in promulgating the discontinuance class exemption recognized that the impact on overhead traffic has never been the focus of abandonment (discontinuance) analysis. See: Exemption of Out of Service Rail Lines, 360 I.C.C. 885,887-88 (1983), vac. & rem. Illinois Commerce Com'n v. ICC, 787 F.2d 616, 634-35 (D.C. Cir. 1986), Exemption of Out of Service Lines, 2 I.C.C.2d 146, 149-51 (1986) Here, the extensive trackage rights to be discontinued were for the most part acquired through the Final System Plan, and other regulatory action, to improve competition in the Northeastern United States. See: Canadian Pacific Ltd.-Pur. Trackage-D&H Ry. Co., 7 I.C.C.2d 95 (1990). These were overhead rights, which also provided through traffic in which D&H might participate. The instant proposed massive discontinuances would not merely alter the flow of traffic over D&H lines, but also those of seven connecting carriers. The discontinuance class exemption was not intended for massive discontinuance of overhead trackage rights. As indicated, the ICC's enabling decision paid very little attention to through trackage rights other than as a limiting factor. The D&H discontinuances would turn the class exemption process and emphasis on its head, by placing overhead traffic as the primary concern, rather than local service for which the class exemption was designed. The discontinuance class exemption should be disallowed for this massive overhead traffic proceeding. Accordingly, the D&H notice should be revoked or rejected, as contrary to the class

exemption, and in order to carry out the rail transportation policy directives, such as 49 U.S.C. 10101(1), (4), (5), (9), (11), among others.

2. Alternatives. If the use of the class exemption is rejected or revoked, D&H would not be without alternative means to have the STB evaluate its discontinuance proposals. D&H might file a petition for exemption, either separately, or by converting its discontinuance notice into a petition for exemption. However, in either event, the carrier must introduce data and evidence concerning its movement of overhead traffic on each of the nine specified lines, together with recent historical and recent information, along with other pertinent knowledge relating to the trackage rights, and affording the opportunity for other parties to respond.

D&N might also submit an application for discontinuance of the trackage rights under 49 U.S.C. 10903. This would seem the preferred method for agency handling, particularly since the related 282-mile NS/D&H line transfers are being handled under agency application procedures.

3. Consolidation. It is clear that NS/D&H should be consolidated with this D&H Discon. This should be required, as exemplified by the STB's April 17, 2015 decision, D&H Discon., 4/17/15, at 2,2, even though this may mandate a more lengthy period for ultimate decision.

II. THE NOTICE SHOULD BE STAYED, AND/OR THE
THE STAY FILING DATE SHOULD BE EXTENDED.

1. Improper Deadline. The STB's April 8, 2015 notice of exemption set May 8, 2015 as the effective date for the notice of exemption, and April 20, 2015 as the deadline for parties to seek a stay of the effective date, on environmental or subsidy grounds, with April 28, 2015 for petitions to reopen.^{5/} Although the STB on April 17, 2015 extended the effective date until June 15, 2015, and announced it would serve a copy of the April 17 decision on all parties in NS/D&H, the STB declined to extend the April 20 date for stay petitions, or the April 28 date to seek reopening.

The exemption should be stayed since these parties require additional time owing to the Friday, April 17 decision extending the effective date and announcing coordination with NS/D&H. The time for stay petitions should run simultaneously with that for the NS/D&H decision, projected for service May 15, 2015.^{6/}

2. Stay of Notice. A stay should be granted, on the present record, because serious issues have been raised in this and in NS/D&H, such that protestants have a strong likelihood of success on their class exemption claim. There would be a failure of due process by the agency in not extending the time for seeking a stay in light of its April 17, 2015 decision extending the effective date. More than 3-days notice is required following the April 17 decision revising the effective date and advising of

^{5/}These time frames are embraced in the agency's normal rules for notices of this type. 49 CFR 1152.50(d).

^{6/}We suggest the STB, on its own motion, should extend the April 28, 2015 date for any petitions to reopen/reconsideration.

reference to NS/D&H. Additional time is required as indicated to provide due process. Railroad employees will suffer irreparable injury if the discontinuances take effect, and are later set aside. The carriers will not be injured by a stay pending ultimate determination of the petition to revoke/reject.

Respectfully submitted,



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Washington DC 20036

April 20, 2015

Attorney for Samuel J. Nasca

Certificate of Service

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

Washington DC



Gordon P. MacDougall