

Before the
Surface Transportation Board

JR - 4

STB DOCKET NO. AB-550 (Sub-No. 3X)

R. J. CORMAN RAILROAD COMPANY / ALLENTOWN LINES, INC.
– ABANDONMENT EXEMPTION –
IN LEHIGH COUNTY, PENNSYLVANIA

239039

JAMES RIFFIN'S SUPPLEMENT TO THE RECORD:

I.C.C. F.D. 31700

ENTERED
Office of Proceedings
August 14, 2015
Part of
Public Record

*CANADIAN PACIFIC LIMITED, et. al. –
PURCHASE AND RELATED TRACKAGE RIGHTS –
DELAWARE AND HUDSON RAILWAY COMPANY*

1. James Riffin herewith moves to supplement the record in the above entitled proceeding, by filing a copy of the file in I.C.C. F.D. 31700, *Canadian Pacific Limited, et. al. – Purchase and Related Trackage Rights – Delaware and Hudson Railway Company.*

Respectfully,

James Riffin
P.O. Box 4044
Timonium, MD 21094
(443) 414-6210

Filed August 14, 2015 by:

James Riffin

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of August, 2015, a copy of the foregoing Supplement to the record (FD 31700) was served on the following parties of record, by E-mail.

James Riffin

E-mail:

R.J. Corman
R.J. Corman
Eric Strohmeyer

Audrey L. Brodrick: abrodrick@fletcher-sippel.com
Robert A. Wimbish: rwimbish@fletcher-sippel.com
esstrohmeyer@yahoo.com

TABLE OF CONTENTS FOR FD 31700

1. Table of Contents:	1
2. Notice of Intent to File Applications to acquire Railroad property and Trackage Rights (CP-1 / DH - 1). Filed June 8, 1990:	3
3. Notice of Intent - CP's Attachment A (Dated May 15, 1990):	16
4. Notice of Intent - CP's Attachment A - Schedule 1:	44
5. Copy of Bankruptcy Court Order:	47
6. Copy of Amendment to Bankruptcy Court Order (render a decision within 90 days):	64
7. CP-2 / DH - 2 was a Motion for a Protective Order. It is not included. A copy is available upon request.	
8. CP-3 / DH - 3: Petition for Waiver or Clarification of Certain Railroad Consolidation Procedures:	66
9. I.C.C. Decision: June 25, 1990 - Notice - Scheduling Order:	89
10. I.C.C. Decision: July 3, 1990 - Decision granting clarification and waivers:	96
11. I.C.C. Decision: July 6, 1990 - Service List decision:	102
12. I.C.C. Decision: October 17, 1990 - Granting Authority to Acquire. Reported at 7 I.C.C. 2d 95:	103
13. I.C.C. Decision: November 9, 1990 - Byline correction:	125
14. I.C.C. Decision: January 25, 1991 - CN discovery request:	126
15. I.C.C. Decision: September 13, 1991 - Granting CN's request to dismiss CN's Petition to Reopen FD 31700:	128
16. I.C.C. Decision: September 27, 1990 Environmental Assessment:	130
17. Environmental Assessment Map:	140
18. CP letter noting CP consummated its acquisition of the D&H's assets on January 18, 1991:	141
19. Amtrak's Notice of Intent to Participate:	142
20. NY DOT's Notice of Intent to Participate:	147
21. Norfolk Southern's Notice of Intent to Participate:	151

22. Conrail's Notice of Intent to Participate:	153
23. Quad Graphics' Notice of Intent to Participate:	155

Note: The actual Application, which was scheduled to be filed by July 16, 1990, was NOT found in the STB's library file, nor was a copy found in the STB's Office of Proceedings' file.

SIDLEY & AUSTIN
A PARTNERSHIP INCORPORATED IN CALIFORNIA

1725 Eye Street, N.W.
Washington, D.C. 20006
Telephone 202: 420-4000
Telex 69-460
Facsimile 202: 427-6144

NEW YORK OFFICE
CHICAGO OFFICE
SAN FRANCISCO OFFICE
LOS ANGELES OFFICE
DALLAS OFFICE
HOUSTON OFFICE
MEMPHIS OFFICE
ATLANTA OFFICE
MIAMI OFFICE
PORTLAND OFFICE
SEATTLE OFFICE
SAN DIEGO OFFICE
WASHINGTON OFFICE

NEW YORK OFFICE
CHICAGO OFFICE
SAN FRANCISCO OFFICE
LOS ANGELES OFFICE
DALLAS OFFICE
HOUSTON OFFICE
MEMPHIS OFFICE
ATLANTA OFFICE
MIAMI OFFICE
PORTLAND OFFICE
SEATTLE OFFICE
SAN DIEGO OFFICE
WASHINGTON OFFICE

June 8, 1990



BY MESSENGER

Mareta R. McGee
Secretary
Interstate Commerce Commission
12th Street & Constitution Avenue, N.W.
Washington, D.C. 20423

Re: Finance Docket No. 31700, Canadian Pacific Limited, et al. — Purchase and Related Trackage Rights — Delaware and Hudson Railway Company

Dear Ms. McGee:

Enclosed for filing in the above-referenced proceeding (which has previously been assigned a docket number through the Rail Section of the Office of Proceedings) are a signed original and 11 copies of the following:

- (1) Notice of Intent to File Applications to Acquire Railroad Property and Trackage Rights (CP-1/D&H-1);
- (2) Motion for Protective Order (CP-2/D&H-2); and
- (3) Petition for Waiver or Clarification of Certain Railroad Consolidation Procedures (CP-3/D&H-3).

FILED

The parties have requested expedited consideration of the Motion for Protective Order and the Petition for Waiver or Clarification. Accordingly, we request that you accord the enclosed papers EXPEDITED HANDLING.

COMMERCIAL COMMISSION the request of the Rail Section of the Commission's Office of Proceedings, we are also attaching hereto a list of the names and addresses of all active parties in the bankruptcy court proceeding involving Applicant Delaware and Hudson Railway Company. We are serving the enclosed papers on each person included on that list by first-class mail.

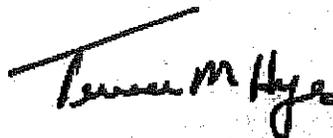
Finally, we are also sending to the Rail Section under separate cover a computer diskette containing a copy (in WordPer-

Horata R. McGee
June 8, 1990
Page 2

fact 5.0 format) of each of the three enclosed documents submitted for filing.

Please direct any inquiries about the enclosed papers to the undersigned counsel. Thank you for your prompt attention to this matter.

Very truly yours,



Terence H. Hynes
Ronald S. Flagg
Vincent P. Prada

Enclosures

cc: Joseph H. Dattmar
Deputy Director, Rail Section
Office of Proceedings
Interstate Commerce Commission
Room 2144
12th Street & Constitution Avenue, N.W.
Washington, D.C. 20423
(with enclosures)

BEFORE THE
INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 31700

CANADIAN PACIFIC LIMITED, ET AL. -- PURCHASE AND RELATED
TRackage RIGHTS -- DELAWARE AND HUDSON RAILWAY COMPANY

NOTICE OF INTENT TO FILE APPLICATIONS TO
ACQUIRE RAILROAD PROPERTY AND TRackage RIGHTS

Charles H. White, Jr.
HAZEL, THOMAS, FISKE, WEINER,
BECKHORN & HANES
2001 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 659-7000

Attorney for Francis P. Dicello,
not individually but as Trustee of
Delaware and Hudson Railway Company

Terence M. Hynes
Ronald S. Flagg
Vincenzo F. Prada
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

Katharine F. Braid
CANADIAN PACIFIC LIMITED
40 University Avenue
Suite 918
Toronto, Ontario M5J 1T1
(416) 863-8375

Attorneys for CP Applicants

DATED: June 8, 1990

BEFORE THE
INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 31700

CANADIAN PACIFIC LIMITED, ET AL. -- PURCHASE AND RELATED
TRackage RIGHTS -- DELAWARE AND HUDSON RAILWAY COMPANY

NOTICE OF INTENT TO FILE APPLICATIONS TO
ACQUIRE RAILROAD PROPERTY AND TRackage RIGHTS

Pursuant to 49 C.F.R. § 1180.4(b)(1), Canadian Pacific Limited ("CP") and D&H Corporation ("D&H Corp.") (jointly referred to herein as the "CP Applicants"), and Francis P. Dicallo, Trustee in Reorganization of the Delaware and Hudson Railway Company ("D&H Trustee" or "Trustee") (the CP Applicants and the D&H Trustee are sometimes collectively referred to herein as "Applicants") hereby notify the Commission of their intention to file applications (the "Applications") seeking Commission approval and authorization under 49 U.S.C. §§ 11343-11345 of:

- (1) D&H Corp.'s acquisition of substantially all of the rail assets, properties and business of the Delaware and Hudson Railway Company ("D&H") (including the stock or assets of certain D&H subsidiaries); and
- (2) D&H Corp.'s acquisition through assignment from D&H of various trackage rights over the lines of certain third-party rail carriers.

BACKGROUND

CP is a Canadian corporation engaged in a wide range of business activities in Canada and the United States. Through its CP Rail division, CP operates a 13,800-mile rail system in Canada and in the States of Maine and Vermont. CP Rail's operations in the United States are subject to the jurisdiction of the Commission, and CP Rail qualifies as a Class I rail carrier under Commission regulations. CP also controls through indirect stock ownership Soo Line Railroad Company, a Class I rail carrier providing transportation services subject to Commission jurisdiction over railroad lines located in 12 Midwestern states. CP also conducts motor carrier operations in the United States and Canada through its Canadian Pacific Express and Transport, Ltd. division ("CP Trucks"). The motor carrier operations of CP Trucks in the United States are subject to the jurisdiction of the Commission.

D&H Corp., presently a non-carrier, was organized under the laws of the State of Delaware solely for the purpose of carrying out the transaction involved in this proceeding. D&H Corp. is a wholly-owned subsidiary of Canadian Pacific (U.S.) Holdings Inc., a Delaware corporation which in turn is a wholly-owned, non-carrier subsidiary of CP.¹ Upon consummation of the transaction that is the subject of the Applications, D&H Corp.

¹ It is possible that CP may decide, for reasons unrelated to Commission review of the proposed transaction, to transfer stock ownership of D&H Corp. to another U.S. affiliate of CP.

will operate the acquired rail assets, property and business of D&H as part of the CP Rail system.

D&H, a Delaware corporation, is presently a Class II rail carrier providing transportation services subject to Commission jurisdiction. D&H and its affiliated carriers operate over approximately 1,200 miles of rail trackage, approximately 560 miles of which is owned or leased by D&H and the remainder of which consists of trackage rights over the lines of other rail carriers (principally Consolidated Rail Corporation ("Conrail")). D&H provides transportation service between Montreal and Potomac Yard (Alexandria, Virginia) and between Buffalo, New York, Philadelphia, Pennsylvania, and Oak Island (Newark), New Jersey.

On June 20, 1988, D&H filed a petition for reorganization under Subchapter IV of Chapter 11 of the Bankruptcy Code (11 U.S.C. §§ 1161-1174). Case No. 88-432, In re Delaware and Hudson Railway Company (Bankr., D. Del.). The Bankruptcy Court appointed Francis P. Dicello to serve as D&H Trustee on June 27, 1988. Since the filing of D&H's petition for reorganization, D&H has been operated pursuant to several directed service orders and emergency service orders issued by the Commission. At present, the Trustee has assumed direct operation of D&H and is providing full service over the lines of D&H pursuant to various subsidy arrangements with interested third parties.

The D&H Trustee determined that solicitation of proposals for the purchase of the assets of D&H was in the best

interest of the public as a means of insuring viable, continuing, competitive rail service in the region served by D&H and as a means of maximizing the potential return to the creditors of D&H. Accordingly, acting pursuant to Bankruptcy Court authorization, the Trustee solicited bids for the purchase of D&H's assets, properties and business. The Trustee reviewed various proposals that were submitted and, after extensive negotiations among the involved parties, concluded that in his business judgment a revised proposal submitted by CP provided the most favorable terms, was in the best interest of the public by insuring viable, continuing, competitive rail service in the region served by D&H, and was also in the best interest of D&H, its estate and its creditors.

On May 15, 1990, the Trustee and CP entered into a letter agreement providing for CP's purchase of substantially all of the rail assets, properties and business of D&H (the "CP Agreement"). (A copy of the CP Agreement is attached hereto as Attachment A.) The CP Agreement sets forth the general terms and conditions under which CP will acquire the D&H assets, properties and business. The parties will enter into a definitive Asset Purchase Agreement on or before July 13, 1990.²

² Paragraph 8(c) of the CP Agreement also provides that, subject to certain conditions, CP will assist the D&H Trustee in ensuring continued operation of D&H during the period prior to the consummation (or termination prior to consummation) of the transaction involved in the Applications by either (1) cooperating with the Trustee (including committing resources, if necessary) to arrange for the continuation of operation of D&H by the Trustee, or (2) making other suitable arrangements for the
(continued...)

By motion dated May 10, 1990, the D&H Trustee requested Bankruptcy Court approval and authorization of the CP Agreement. At a hearing held on June 7, 1990, the Bankruptcy Court granted such approval and authorization pursuant to Sections 363, 364 and 365 of the Bankruptcy Code (11 U.S.C. §§ 363, 364, 365). In light of the continuing losses that the Trustee is incurring in operating the D&H system, the Bankruptcy Court further admonished the Commission to issue a final decision with respect to the Applications no later than 90 days after the filing of such Applications. The Bankruptcy Court's rulings will be embodied in a written order to be issued on June 8, 1990. (Because the Bankruptcy Court's order is not presently available, Applicants will furnish the Commission a copy of the order early next week.)

INFORMATION REQUIRED BY 49 C.F.R. 5 1180.4(b)

The following information is provided in accordance with the requirements of 49 C.F.R. 5 1180.4(b):

(i) Description of Transaction. The Applications will seek Commission approval and authorization for the following transaction (as described more fully in the CP Agreement):

(a) Acquisition by D&H Corp. of substantially all of D&H's rail assets, properties and business including, without limitation (but subject to certain exclusions described in the CP Agreement), D&H's owned and leased rail

²(...continued)
provision of emergency service, which arrangements could include CP assuming the role of Emergency Service Operator.

lines and other properties used for rail operations, locomotives, cars and other rail operating equipment, and certain specified executory contracts.

(b) Acquisition by D&H Corp. of all shares of stock held by D&H in (or the assets of) the following companies that are or might arguably be construed to be carriers providing transportation subject to the jurisdiction of the Commission: Albany Port Railroad Corporation,³ Albany and Vermont Railroad Company, Saratoga and Schenectady Railroad Company, Wilkes-Barre Connecting Railroad Company and Northern Coal and Iron Company.

(c) Acquisition by D&H Corp. of trackage rights through assignment from D&H over the following lines of Conrail: (1) between Buffalo, NY and Binghamton, NY and all related trackage rights in the Greater Buffalo/Niagara Falls area; (2) between Dupont, PA and Allentown, PA; (3) between Allentown, PA and Oak Island (Newark), NJ via the former Lehigh Valley Railroad; (4) between Bethlehem, PA and Oak Island (Newark), NJ via the former Central Railroad of New Jersey; (5) between Allentown, PA and Philadelphia, PA; (6)

³ Applicants note that the D&H stock in Albany Port Railroad Corporation ("Albany Port") to be acquired by D&H Corp. constitutes 50 percent of Albany Port's outstanding common stock (the remaining 50 percent being held by Conrail). D&H does not currently control Albany Port, and D&H Corp.'s acquisition of D&H's stock in Albany Port would not enable D&H Corp. to exercise such control. Applicants therefore contemplate filing an application or exemption request and a related motion to dismiss with respect to D&H Corp.'s proposed acquisition of D&H's stock in Albany Port.

between Sunbury, PA and Perryville, MD via Harrisburg, PA;
(7) between Landover, MD and Alexandria, VA; and (8) between
Albany/Rensselaer, NY and Troy, NY.

(d) Acquisition by D&H Corp. of trackage rights
through assignment from D&H over the following lines of
Boston and Maine Corporation: (1) between W.Y. Cabin in
Mechanicville, NY and Coons, NY; (2) between Coons, NY and
Crescent, NY; and (3) between Mechanicville, NY and Eagle
Bridge, NY.

(e) Acquisition by D&H Corp. of trackage rights
through assignment from D&H over the following lines of
Buffalo, Rochester and Pittsburgh Railway Company (operated
by the former Baltimore and Ohio Railroad Company): (1)
between Silver Lake Junction, NY and P&L Junction, NY; and
(2) between Silver Lake Junction, NY and Silver Springs, NY.

(f) Acquisition by D&H Corp. of trackage rights
through assignment from D&H over the following lines of CSX
Transportation, Inc. (formerly Baltimore and Ohio Railroad
Company and Western Maryland Railway Company): (1) between
Shenandoah Junction, WV and Anacostia Junction, Washington,
D.C.; (2) between Lurgan, PA and Hagerstown, MD.

(g) Acquisition by D&H Corp. of trackage rights
through assignment from D&H over the following lines of the
National Railroad Passenger Corporation: (1) between Roy
Tower and Harris Tower near Harrisburg, PA; and (2) between
Post Road/Perryville, MD and Landover, MD.

(b) Acquisition by D&H Corp. of trackage rights through assignment from D&H over the following lines of the Wilkes-Barre Connecting Railroad Company: between Hudson, PA and Battenwood, PA.

(i) Acquisition by D&H Corp. of trackage rights through assignment from D&H over any other line or facility which forms a constituent part of D&H's rail system and with respect to which D&H has trackage rights.

(ii) Impact Analysis Year. The year 1989 will be used for all traffic diversion and competitive impact analyses, for costing purposes, and as the base year for pro forma financial statements.

(iii) Approximate Filing Date. Applicants contemplate filing their Applications on or about July 16, 1990. Pursuant to the Bankruptcy Court's ruling on June 7, 1990, the Commission has been directed to act on the Applications within 90 days of their submission.

(iv) Classification of Transactions. The transactions proposed in the Applications include a "significant" transaction as defined in 49 C.F.R. § 1180.2(b). Under that definition, the sale of substantially all of D&H's assets, properties and business to D&H Corp. involves a Class I railroad (CP) acting together with a Class II railroad (D&H) "in a major market extension." Currently, CP Rail's trackage extends from Canada only into the States of Maine and Vermont. D&H's lines, by comparison, extend from Montreal in the north to Potomac Yard in the south, and from

Buffalo/Niagara Falls in the west to Philadelphia and Newark in the east. The proposed transactions thus would involve the extension of CP's rail system into the geographic areas served by D&H -- areas which CP Rail does not currently serve. Accordingly, the Commission's railroad consolidation procedures applicable to "significant" transactions should govern this proceeding.

As discussed above, one element of the proposed transaction involves D&H's assignment to D&H Corp. of various trackage rights over the lines of third-party carriers. D&H Corp.'s assumption of those trackage rights would qualify for the trackage rights class exemption established under 49 C.F.R. § 1180.2(d)(7). Applicants do not intend to proceed under this exemption authority, however, but propose instead to seek formal Commission approval of such trackage rights transactions. Applicants have therefore filed a petition, dated June 8, 1990, seeking clarification (and, if necessary, revocation of the trackage rights class exemption pursuant to 49 U.S.C. § 10505(d) to the extent that it would otherwise apply) that the trackage rights components of the proposed transaction may be filed as related applications and will be considered by the Commission under the standards of 49 U.S.C. §§ 11343-11345.

Applicants' petition also seeks waiver and clarification of certain other portions of the Commission's Railroad Consolidation Procedures (49 C.F.R. § 1180), including waiver of the procedural schedule established in 49 U.S.C. § 11345 and the Commission's regulations and substitution therefor of an ac-

calculated procedural schedule under which the Commission would
decide the Applications by October 15, 1990.

Respectfully submitted,

Charles H. White Jr

by VE
Charles H. White, Jr.
HAZEL, THOMAS, FLEKE, WEINER,
BECKHORN & HANES
2801 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 659-7000

Attorney for Francis P. Dicallo,
not individually but as Trustee of
Delaware and Hudson Railway Company

Terence M. Hynes

Terence M. Hynes
Ronald S. Flagg
Vincent F. Prada
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

Katharine F. Braid
CANADIAN PACIFIC LIMITED
40 University Avenue
Suite 918
Toronto, Ontario M5J 1T1
(416) 863-8375

Attorneys for CP Applicants

DATED: June 8, 1990

CP Rail



May 15, 1990

Mr. Francis P. Dicelle
Trustee of the Delaware
and Hudson Railway Company
c/o Hazel, Thomas, Fiske, Weiner,
Backhorn and Hanns, P.C.
2001 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20005

Dear Mr. Dicelle:

This letter is to advise you of the revised terms and conditions pursuant to which Canadian Pacific Limited, acting either on its own behalf or through one or more subsidiaries ("CP"), proposes to purchase certain assets of the Delaware and Hudson Railway Company (the debtor in the Proceedings for a Railroad Reorganization under Chapter 11 of the Bankruptcy Code presently pending in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") as Case No. 88-342) and the stock or assets of its designated subsidiaries, including the Albany Port Railway Company, Albany and Vermont Railroad Company, Napierville Junction Railway Company, Saratoga and Schenectady Railroad Company, Wilkes-Barre Connecting Railroad Company, Northern Coal and Iron Company and Wyoming Valley Improvement Company (collectively with its subsidiaries, "D&H"). This letter supersedes in their entirety all prior or concurrent offers, proposals, understandings, or agreements relating to D&H, whether oral or written.

1. Assets

CP hereby offers to purchase, subject to the terms and conditions described below, all of D&H's right, title and interest in and to the properties and assets of D&H, whether or used and useable in the business of the Delaware and Hudson Railway Company, of every kind and description, wherever located, real, personal or mixed, tangible or intangible, owned or held by D&H as of the Closing Date (as defined in paragraph 7) in whole or in part, without limitation, all of D&H's right, title and interest in and to the property described below (collectively, the "Assets"), except the

properties and assets specifically excluded by paragraph 4 and by other provisions of this offer:

a. The Assets to be purchased by CP shall include all real property and options to acquire real property owned by D&H and all real estate leases and leasehold improvements including, but without limitation, the following lines of railway together with all property rights and all rights of way, yards and other lands not used for railway operations, all mineral rights, all installed track materials whether first main track, second main track, passing track, branchlines, spurs or D&H owned or leased sidings on third party property, all track maintenance materials, all structures (whether supporting, overhead or wayside), and all installed wayside signal and crossing protection materials:

i. The line from the Canadian border at Rouses Point northward to the junction with CP's Adirondack Subdivision at Delson, P.Q. being approximately 27 miles, known as the line of the Napierville Junction Railway. This is to include the office building and intermodal facilities and equipment at Lacolle, P.Q., and all other assets of the Napierville Junction Railway Company;

ii. The line from the Canadian border at Rouses Point through to Glenville Junction, being approximately 171 miles, known as the Canadian Main Line in the current D&H operating timetable extending between the junction with the Napierville Junction Railway Company at mileage 192+08 and CP# 450. This is to include the line of railway from Saratoga Springs to North Creek approximately 56 miles in length and known in the current D&H operating timetable as the Adirondack Main Line, and all other branchlines connected to the Canadian Main Line, and the D&H's leasehold interest in the Saratoga and Schenectady Railroad Company, being the segment approximately between Saratoga Springs and Glenville Junction;

iii. The line from the junction with the Boston and Maine Railroad Company near Mechanicville through Glenville Junction, Singhamton, Scranton, and Wilkes Barre to its junction with Consolidated Rail Corporation ("Conrail") in Sunbury, being approximately 286 miles in length, known as the

Freight Main Line in the current D&H operating timetable extending from CPF 466 at mileage 466.25 to Kass at mileage 752.00. This is to include all branchlines connected to this line, and the D&H's leasehold interest in the Saratoga and Schenectady Railroad Company, being the segment approximately between Glenville Junction and Schenectady, and the D&H's and the Wilkes Barre Connecting Railroad Company's leasehold interests in the Northern Coal and Iron Company, being the segment approximately between Minocks Junction and Hudson;

iv. The line from the connection with Conrail near Kenwood Yard through to the connection with the Freight Main Line near Mechanicville, being approximately 19 miles in length, known as the Colonia Main Line in the current D&H operating timetable, extending from CP01 at mileage 0.24 to CPF 467 at mileage 467.30. This is to include the Green Island Branch and the Troy Branch, and the D&H's leasehold interest in the Albany and Vermont Railroad Company, being the segment approximately between Albany and Waterford Junction;

v. The line from the connection with Conrail near Kenwood Yard through to the connection with the Freight Main Line near Delanson, being approximately 26 miles in length, known as the Albany Main Line in the current D&H operating timetable extending from CP01 at mileage 0.24 to CPF 499 at mileage 498.70. This is to include any D&H property interests in and operating rights over the Northeastern Industrial Park Branch;

vi. The line from the connection with the Freight Main Line near Crescent to the connection with the Canadian Main Line near Ballston Lake, being approximately 1 mile in length, known as the Canadian Connector in the current D&H operating timetable extending from CPF 478 at mileage 477.98 to CPC 24 at mileage 24.34; and

vii. The D&H's remaining property interests in any and all lines of railway including railway materials whose operations have been abandoned, including but not limited to the former Pennsylvania subdivision approximately between Nineveh and Scranton.

b. All trackage rights held or exercised by D&H, including but not limited to, D&H's trackage rights over the following lines owned by Conrail:

- i. Buffalo to Binghamton (approximately 212 miles) and all related trackage rights in Greater Buffalo/Niagara Falls area;
- ii. Dupont to Allentown (approximately 88 miles);
- iii. Allentown to Oak Island via the former Lehigh Valley Railroad (approximately 84 miles) and from Bethlehem to Oak Island via former Central Railroad of New Jersey;
- iv. Allentown to Philadelphia (approximately 93 miles);
- v. Trackage rights from Sunbury to Perryville via Harrisburg (approximately 127 miles); and,
- vi. Omitted intentionally
- vii. Trackage rights from Landover, MD to Alexandria, VA, and trackage rights from Albany/Ransselier to Troy, NY;

together with trackage rights held or operated by D&H with the following carriers:

viii. Boston and Maine Corporation:

A) Trackage rights, subject to termination upon 90 days' notice, from W.Y. Cabin in Mechanicville, NY to Coons, NY, and from Coons, NY, to Crescent, NY; and,

B) Trackage rights, subject to termination upon 90 days' notice, from Mechanicville, NY, to Eagle Bridge, NY;

ix. Buffalo, Rochester and Pittsburgh Railway Company (owner), The Baltimore and Ohio Railroad Company (operator):

Trackage rights until November 30, 2012, from Silver Lake Junction, NY, to P&L Junction, NY, and from Silver Lake Junction, NY, to Silver Springs, NY;

x. **The Baltimore and Ohio Railroad Company:**

Trackage rights until March 13, 2010, from connection with Norfolk and Western Railway Company at Shenandoah Junction, West Virginia, to connection with Conrail at Anacostia Junction, D.C.;

xi. **Omitted intentionally;**

xii. **Western Maryland Railway Company:**

Trackage rights until March 13, 2010, from connection with Conrail at Lurgan, PA, to connection with Norfolk and Western Railway Company at Hagerstown, Maryland;

xiii. **National Railroad Passenger Corporation:**

A) Trackage rights until June 30, 2015, from Roy Tower to Harris Tower near Harrisburg, PA; and

B) Trackage rights until June 30, 2015, from Post Road/Parryville, Maryland, to Landover, Maryland;

xiv. **Wilkes-Barre Connecting Railroad Company:**

Perpetual trackage rights from Hudson to Buttonwood, PA;

c. All owned and leased locomotives, subject however, to the provisions of Paragraph 4;

d. All owned freight and work equipment cars (approximately 760) and all leased freight and work equipment cars (approximately 590);

e. All inventory, supplies and materials acquired or held for use in connection with the ownership or operation of the Assets;

f. All equipment, furniture and furnishings, office equipment, vehicles, machinery and tools (both heavy and light), including without limitation, all maintenance of way equipment and all equipment

constituting part of signaling systems and all equipment constituting part of dispatching systems;

g. All:

i. Pre-petition executory contracts and unexpired real and personal property leases assumed by the Trustee and listed on Schedule 1 attached hereto, complete and correct copies of which have been delivered to CP (the "Pre-Petition Assumed Contracts"); and

ii. Contracts and obligations (to be listed on a schedule attached to the Asset Purchase Agreement) entered into by the Trustee after the commencement of D&H's pending Chapter 11 proceeding and copies of which have been delivered to CP (but excluding leases and agreements relating to locomotives and excluding indemnities, guaranties, loans and agreements of a like nature or purpose in favor of any person other than D&H), provided the aggregate amount of all liability remaining to be paid or satisfied thereunder does not exceed \$1,000,000 ("Post-Petition Contracts"); and

iii. Such executory contracts and unexpired real and personal property leases to which D&H is a party (other than those excluded from the purchase hereunder pursuant to Paragraph 4) which CP selects, on or before July 13, 1990 as being necessary or desirable to the operation of the Assets (the "Selected Contracts").

The Trustee shall assign to CP all such Pre-Petition Assumed Contracts, Post-Petition Contracts, and Selected Contracts and shall cure all defaults thereunder, subject to the limitation that, exclusive of the amounts required to cure pre-petition defaults (1) under Pre-Petition Contracts consisting of the equipment leases described under Section A on Schedule 1 attached hereto (for which the Purchase Price may be adjusted in accordance with subparagraph 2e), (2) under the Conrail trackage rights agreements described in subparagraph 1b above, and (3) under all agreements relating to D&H with the states of Pennsylvania and New York ("NY and PA Agreements"), the Trustee shall not be obligated to spend more than \$1,500,000 to effect cures of such pre-petition defaults. The Trustee shall cure all such defaults directly from Purchase Price

proceeds. The Trustee shall provide CP with a schedule of all Post-Petition Contracts and all executory contracts and unexpired leases as provided in subparagraph 8f. CP shall have the right to terminate this offer and the Asset Purchase Agreement as set forth in subparagraph 8n, if the aggregate amount necessary to cure all pre-petition defaults under the Selected Contracts relating to Essential Assets (exclusive of the Conrail trackage rights described in subparagraph 1b, above, and the NY and PA Agreements) exceeds \$1,900,000.

h. All trademarks, trade names (including, without limitation, the name "Delaware and Hudson Railway Company"), servicemarks, patents and copyrights (and all goodwill associated therewith), registered or unregistered and all applications for registration thereof and licenses relating thereto;

i. Books and records (including computer programs and software) which relate or are material to, or are used or useful in, the ownership or operation of the Assets;

j. All agreements, contracts and understandings with respect to any liability relating to environmental and other matters described in subparagraph 6b below relating to or arising from an Asset acquired by CP hereunder (including without limitation, to the extent assignable, all rights to seek indemnification, reimbursement, contribution or other recourse against third parties (including insurers) and all recoveries by D&H or the Trustee with respect thereto), subject, however, to Paragraph e;

k. All customer lists, trade secrets and other proprietary or confidential information which relate or are material to, or are used or useful in, the ownership or operation of the Assets;

l. The Trustee shall assign to CP on terms no less favorable to CP than to D&H, all permits, licenses, authorizations, and other related agreements or instruments which relate or are material to, or are used or useful in, the ownership or operation of the Assets which CP has expressly agreed to buy and assume pursuant to this offer and the Asset Purchase Agreement;

- B. Subject to the provisions of Paragraph 4, all stock of other corporations owned or held by D&H; and
- n. Omitted intentionally.

2. Purchase Price

The consideration for the purchase of the Assets shall consist of a payment (the "Purchase Price") at Closing in the amount of twenty five million dollars (\$25,000,000) in lawful currency of the United States of America and in immediately available funds, plus assumption of the liabilities described in Paragraph 3 below.

This Purchase Price is subject to adjustment for:

- a. All appropriate expenses or credits attributable to Trustee operations of the estate of D&H, prorated as of the Closing Date, including without limitation, accrued but not yet due and payable amounts under contracts and leases which are assigned pursuant to the terms hereof and real and personal property taxes with respect to the Assets purchased pursuant hereto.
- b. The fair market value (giving due consideration to the condition of the subject Asset as of January 9, 1990) of any Asset which is subject to any material loss, damage, sale or destruction between January 9, 1990 and the Closing Date unless repaired to substantially its prior or better condition or replaced by an additional Asset of similar or higher quality and value, in each case at no cost to CP;
- c. Any amounts received by D&H for (i) coal removed in excess of amounts permitted in 8j or (ii) scrap sold in excess of amounts permitted in 6l;
- d. Any and all amounts in excess of \$250,000 payable under the Post Petition Contracts which are not paid as of Closing; and
- e. That portion of the rent under the equipment leases described under Section A on Schedule 1 attached hereto which represents compensation to the lessor thereunder for defaults existing at the time such agreements were assumed by the Trustee or any defaults occurring thereafter.

3. Assumption of Liabilities

Except as, and only to the extent, expressly provided in subparagraphs 8c or otherwise expressly provided in this offer, CP will not assume any liability or obligation whatsoever relating to: (i) D&H, the Trustee, any Emergency Service or Directed Service Operator, the Assets or their operations which accrue prior to the Closing Date or (ii) relating to any Asset excluded from its purchase pursuant to Paragraph 4. Without limiting the generality of the foregoing and notwithstanding anything to the contrary contained herein, this offer does not constitute an offer to assume, and CP shall not assume, any obligation or liability with respect to: (i) any lease, arrangement, understanding, agreement or contract unless it is a Pre-Petition Assumed Contract, a Post-Petition Contract or a Selected Contract which the Trustee assigns to CP hereunder, (ii) any collective bargaining agreement or any employee benefit, pension or welfare plan or program to which the Trustee, D&H, or any Directed Service or Emergency Service Operator operating the business of D&H, is a party or a sponsor, and (iii) except as otherwise expressly provided in subparagraph 8c or elsewhere in this Agreement, the ownership, use, or operation of the Assets prior to Closing.

4. Excluded Assets

The Assets to be excluded from CP's purchase will be:

a. The Greenwich and Johnsonville Railway Company and Northern New York Development Company except to the extent that CP shall identify any assets or properties thereof which are used or useful in the ownership or operation of the Assets;

b. All employee benefit agreements, plans or arrangements and collective bargaining agreements of D&H;

c. Any tangible Asset which CP, in its sole judgment, determines, by July 13, 1990, not to purchase, (including without limitation, any non-Essential Asset which CP, in its sole judgment, determines (pursuant to subparagraph 8b and by July 13, 1990) does not comply with all applicable environmental laws or regulations, or which is an environmental hazard or could expose CP or the entity designated by CP to own and/or operate the Assets to liability);

d. Rail transportation contracts to which D&H is a party (the "Excluded Marketing Contracts");

e. In addition to any of the foregoing, all stock in corporations owned by D&H which CP advises the Trustee in writing by July 13, 1990 that it does not elect to purchase and all contracts, agreements, leases, and understandings and intangible assets (other than a Pre-Petition Assumed Contract or a Post-Petition Contract) unless CP advises the Trustee in writing, within 45 days after CP's receipt of a true, complete and correct copy thereof, (together, in the case of executory contracts and unexpired leases, with accurate information as to the amount necessary to cure any defaults thereunder and to comply with any other requirement under Section 365 of the Bankruptcy Code relating to the Trustee's assumption and assignment thereof) that it desires the Trustee to assign the same to CP and which the Trustee is obligated to assign to CP hereunder (each, a "Selected Contract");

f. The right to grant (i) within one year of the Closing, easements or other right to use to one party for construction and operation of a single fibre optic telecommunications transmission system, on reasonable and customary terms, under that portion of the D&H right of way between Binghamton, NY and Sunbury, PA (the "Sunbury Line"); and (ii) prior to Closing, a similar easement to each of MCI and U.S. Sprint (approximately 5 miles each) along lines from the Port of Albany, N.Y. to Menands, N.Y; and

g. Cash and cash equivalents (including accounts receivable and interline balances) as of the date of Closing and any causes of action not specifically assigned pursuant to this offer or the Asset Purchase Agreement, including without limitation, causes of action for fraudulent conveyances and preferences.

Except as otherwise expressly provided in this offer or the Asset Purchase Agreement, the Purchase Price shall not be reduced by the exclusion of any Asset pursuant to this Paragraph 4.

5. Inspection of Assets Inventory

From and after the date of acceptance of this offer by the Trustee, CP may at all reasonable times inspect all physical Assets. Such inspections shall be conducted in a manner which does not unduly disrupt the normal operations of the business of

D&H or any Emergency Service Operator or Directed Service Operator operating the Assets. On or before the date CP assumes emergency service pursuant to subparagraph 8c, and from time to time upon reasonable request D&H and CP shall jointly prepare an itemized inventory of the Assets (or any part thereof) and shall record the condition of such Assets (and to the extent there is a dispute regarding such condition, D&H and CP shall record their respective evaluations of such condition). The value of any Assets lost, damaged, sold or destroyed as of the Closing Date, and the cost of repairing any damage to such Assets (other than normal wear and tear), occurring between January 9, 1990 and the Closing Date or the cost of replacing any Assets, shall be reflected by reducing the amount of the Purchase Price payable pursuant to Paragraph 7 above. If at Closing, the value of Assets consisting of materials and supplies is less than \$900,000, the Purchase Price shall be reduced by the difference between the value of such Assets as of Closing and \$900,000. Disputes as to value as of the Closing will be resolved by independent audit of such Assets as set forth in the Asset Purchase Agreement. A mechanism for dealing with disputed amounts shall be set forth in the Asset Purchase Agreement.

6. Conditions Precedent to Closing

Closing of the transaction shall be subject to the following conditions precedent:

- a. Execution and delivery, on or before June 11, 1990, of a definitive Asset Purchase Agreement and other documentation which has terms consistent with the terms of this offer, and such other terms as are usual and customary for this type of transaction and which is in all respects mutually acceptable to the parties; all obligations required to be performed thereunder prior to or on the Closing shall have been performed; representations, warranties (which shall expire as of the Closing) and covenants (giving due consideration to the status of a bankruptcy Trustee) relating to the ownership and operations of the business of D&H as shall be mutually acceptable to the Trustee and CP;
- b. CP shall, on or before July 13, 1990, complete its review of environmental matters and be reasonably satisfied that all "Essential Assets" and the use and operation thereof are and will be in compliance with all health, safety, environmental and similar laws and regulations and that there are no environmental hazards or liabilities (whether fixed or contingent) which non-compliance or hazard or liability would, alone or in

the aggregate, have a material adverse effect (as reasonably determined by CP in good faith) on the value, use or operation of an Essential Asset or the value, use or operation of the Assets purchased by CP as a whole. An Asset is an "Essential Asset" if, in CP's good faith judgment, it is necessary or material to CP's proposed use or operation of the Assets as a whole;

c. On or before Closing, CP shall have received reasonable assurances or a final order of the Bankruptcy Court (not subject to appeal or writ of certiorari) to the effect that upon acquiring the lines and trackage rights of D&H, CP shall have the unimpeded right to operate freely trains over such lines and tracks in substantially the same manner and with substantially the same rights and privileges as D&H and that subject to Paragraph 4, the properties, rights, leases and agreements transferred to CP pursuant hereto are adequate to enable CP to operate the Delaware and Hudson railroad in substantially the same manner as it was operating on January 9, 1990. CP shall notify the Trustee on or before September 1, 1990 of those lines and trackage rights with respect to which such assurances have not been received and setting forth specifically the assurances which would be acceptable to CP. CP shall be deemed to have waived this condition on September 1, 1990 if CP does not deliver any such notice to the Trustee by that date and, if CP timely delivers such notice, this condition shall be deemed waived as to any lines and trackage rights not specified in such notice. Upon receipt of such notice the Trustee shall promptly seek such an order from the Bankruptcy Court containing such assurances;

d. A final court order no longer subject to appeal or writ of certiorari in form and substance reasonably acceptable to CP shall have been entered by the Bankruptcy Court, after adequate notice to and opportunity to be heard by all creditors and other parties in interest, authorizing and approving the sale of Assets to be acquired hereunder under Section 363 of the Bankruptcy Code, free and clear of all liens, claims, encumbrances or other interests and finding that the State of New York shall have granted, to the extent necessary, its written consent to the transfer and assignment to CP of all ownership and operating rights of D&H;

e. A final court order no longer subject to appeal or writ of certiorari in form and substance reasonably acceptable to CP shall have been entered by the Bankruptcy Court authorizing and approving the assumption by the Trustee and assignment to CP, pursuant to Section 365 of the Bankruptcy Code, of the Pre-Petition Assumed Contracts, the Post-Petition Contracts and the Selected Contracts the Trustee is obligated to assign to CP hereunder;

f. The transactions contemplated by this offer shall have been submitted to the ICC in accordance with applicable provisions of the Bankruptcy Code and the Interstate Commerce Act and the ICC shall have approved by final order (i) CP's acquisition of the Assets and/or CP's control of the entity through which the Assets are acquired, (ii) in the absence of private agreement, CP's use of those terminal facilities and related trackage of Canadian National Railway and Conrail in and around Buffalo and Niagara Falls, NY which CP deems necessary to connect the lines of or used by CP to D&H's yard at Buffalo, (iii) to the extent such approval is required, any other agreements entered into by CP and connecting rail carriers (including Norfolk Southern Corporation, CSX Transportation, Inc. and the New York, Susquehanna and Western Railway Corporation) relating to the handling and interchange of traffic between D&H's lines and the lines of such carriers; and (iv) the ICC shall not have imposed any condition or requirement, or failed to approve any portion of the transaction which, in CP's reasonable judgment, would materially and adversely affect the value or the costs of acquiring, owning, maintaining and operating the Assets or otherwise materially and adversely affect CP; and the period for appealing such order shall have expired with no appeal being prosecuted from such order;

g. The National Transportation Agency of Canada shall have approved by final order, if such approval is so required, the acquisition by CP or its affiliate of the assets of the Napierville Junction Railway Company, and any running rights over Canadian National Railway trackage in the vicinity of Fort Erie, Ontario which CP deems necessary to connect the lines of CP to D&H's yard at Buffalo;

h. The designated representatives of the employees of D&H and its subsidiaries shall have, on or before July 13, 1990, executed the following agreements in form and substance satisfactory to CP and any required Bankruptcy Court approvals for such agreements shall have been obtained on or before August 2, 1990: (i) collective bargaining agreements with CP; (ii) appropriate implementing agreements with CP specifying the nature and scope of any labor protective conditions to be assumed by CP in connection with the transaction; and (iii) an agreement with the Trustees (satisfactory to the Trustees and CP) relating to those employees who would not be offered employment under this offer (and to the extent CP deems necessary in its good faith judgment, current and former employees of D&H shall have, on or before July 13, 1990, executed appropriate agreements and releases); and the ICC shall not have imposed any labor protective conditions other than those set forth in such agreements; provided, however, that agreements with the United Transportation Union relating to the foregoing matters shall have been executed and delivered on or before June 11, 1990 and such agreements shall have been approved by the Bankruptcy Court on or before July 5, 1990;

1. Subject to CP's sole discretion, each of the following shall have occurred:
 - i. No later than July 13, 1990, CP shall have received assurances satisfactory to it, including without limitation, the passage of all necessary legislation, that no later than immediately before the Closing, CP will receive from the State of Pennsylvania, \$5,500,000 in immediately available funds, for the purpose of carrying out track and bridge maintenance and repairs on the D&H (the "PA Payment");
 - ii. No later than the earlier of 60 days from (x) the date of acceptance of this offer and (y) the date of the passage of the legislation referred to in clause i immediately above, the State of Pennsylvania and CP shall have entered into an agreement, on terms mutually acceptable, providing for the payment of the PA Payment to CP immediately before the Closing;

- iii. No later than immediately before the Closing, the PA Payment shall have been paid in full to CP in accordance with the agreement referred to in clause ii immediately above;
- iv. No later than July 13, 1990, CP shall have received assurances satisfactory to it, including without limitation, the passage of all necessary legislation, that CP will receive from the State of New York (x) \$1,000,000 and (y) the unused balance of the \$3,000,000 previously appropriated by the State of New York for the use of the D&H, in each case in immediately available funds, during the fiscal year ended April 1992, for the purpose of carrying out track and bridge improvements on the D&H (the "NY Payment"); and
- v. No later than the earlier of 60 days from (x) the date of acceptance of this offer and (y) the date of the passage of the legislation referred to in clause iv immediately above, the State of New York and CP shall have entered into an agreement, on terms mutually acceptable, providing for the payment of the NY Payment to CP.
- j. All other approvals required for the consummation of the transactions contemplated by this proposal or the operation or use of the Assets shall have been obtained and shall no longer be subject to judicial review; and there shall be no litigation pending or threatened which enjoins or seeks to enjoin such consummation or the proposed use or operation of the Assets;
- k. The Board of Directors of CP shall have provided all necessary approvals to the terms of this offer;
 - 1. Between January 9, 1990 and the Closing Date, there shall have been no material adverse change in a significant Asset or significant group of Assets (e.g. the disabling or destruction of significant Assets) that is not replaced or repaired as provided in Paragraph 3; and the Trustee shall have cooperated with any Emergency Service Operator or Directed Service Operator and shall have operated D&H so as to promote, to the fullest extent of the Trustee's ability,

efficient operation of the Assets and to minimize losses. Between the date of approval of this offer by the Bankruptcy Court and the Closing Date, without the prior written consent of CP, the Trustee shall have not sold, leased, transferred or otherwise disposed of any Asset (other than 20 GP 39-2 locomotives, 12 GP 38-2 locomotives and 5 ALCO C424 locomotives) outside the ordinary course of business, except as permitted by this offer or the Asset Purchase Agreement. The Asset Purchase Agreement shall include a representation by the Trustee that no such sale, lease or transfer shall have occurred between January 9, 1990 and such date of approval of the Offer. Sales of scrap in the ordinary course of business shall not have exceeded an average of \$50,000 per month in value from January 9, 1990 to date of Closing, and such sales of such scrap shall not cause the number of freight and work equipment cars to be conveyed to CP at the Closing to fall below the numbers specified in subparagraph 1d;

m. CP and the FRA shall have executed and delivered, on or before July 13, 1990, the Restated Indenture; and

n. CP and NYS&W shall have executed and delivered, on or before June 11, 1990, an agreement, on terms and conditions satisfactory to CP, pursuant to which NYS&W agrees to utilize the D&H (and CP after the Closing) to perform the transportation function for all its container traffic between Binghamton, NY and Buffalo, NY for a period of not less than 2 years from the Closing Date.

7. Closing

a. The closing of the purchase of the Assets and the other transactions contemplated by this offer (the "Closing") shall occur at the offices of Hazel, Thomas, Fiske, Weiner, Beckhorn & Hanes, 2001 Pennsylvania Avenue, N.W., Washington, D.C. The Closing shall, at CP's option, occur at any time within eleven days following the date on which all of the conditions precedent have been satisfied (the "Closing Date").

b. Subject to the satisfaction of the conditions set forth in subparagraphs 6d and 6e, above, the Trustee shall deliver title to all Assets to be purchased hereunder at Closing. CP will acquire such Assets by quit claim deeds, bills of sale, assignments and other appropriate documents of transfer on an "as is, where

Mr. Francis P. Sicello

May 15, 1970

Page 17

is^o basis but free and clear of all security interests, liens, encumbrances, charges, claims and other interests of every kind and nature (excluding current taxes not due and payable as of the Closing Date), other than those specifically permitted to remain in accordance with this offer or consented to by CP in writing.

8. Other Terms and Conditions

a. All gains, transfer, conveyance, sales and similar taxes, if any, owing on account of the purchase, sale and transfer of the Assets to CP shall be paid by the Trustee at Closing directly from the Purchase Price.

b. CP shall not, except as expressly agreed in subparagraph 8c and elsewhere in this offer, assume any liability to the Trustee, D&H or any other person whatsoever. CP shall not be liable for claims arising from the ownership or operation of the Assets prior to the Closing Date. D&H shall hold harmless and indemnify CP from and against all costs, claims, damages and expenses, including costs and reasonable attorneys' fees, with respect to claims arising from the ownership or operation of the Assets prior to the Closing Date and that are made and noticed to the Trustee on or before the date which is 24 months from the date of this offer. This indemnity shall not prevent the Trustee from winding up the affairs of D&H and making distributions in the normal course. Any claim for indemnity shall be limited to undistributed assets remaining in D&H's estate at the time a claim is made hereunder.

c. CP's offer to purchase the Assets is not contingent upon obtaining financing.

d. CP will offer employment to such D&H officers and those organized employees employed by D&H on the Closing Date who, in CP's sole determination, are reasonably necessary to maintain and operate the Assets. So long as employed by or under the direction of the Trustee, the Trustee shall make the services of Messrs. Belke, Flak and Parola available on a reasonable basis and upon reasonable request to CP at no cost to assist CP in developing its business plan for operating the Assets and in performing emergency service operations for D&H.

e. The Trustee and CP shall each use its best efforts and shall cooperate with each other to promptly and expeditiously satisfy all conditions precedent to the consummation of the transactions contemplated by this offer.

f. On or before May 29, 1990, the Trustee shall deliver to CP a listing of all Pre-Petition Assumed Contracts, all Post-Petition Contracts and all other contracts, arrangements, understandings and arrangements to which DTH is a party or by which the Assets are bound or which relate to the Assets. The Trustee shall certify that to the best knowledge of the Trustee, after diligent inquiry, this list is true, correct and complete and shall, to the extent the Trustee becomes aware of additions or corrections thereto, supplement such list, but shall not otherwise be liable for any omissions or inaccuracies in this list.

g. Intentionally omitted.

h. Subject to the provisions of this subparagraph 8h, subparagraph 1g and the other provisions of this offer, the Trustee shall assign all Pre-Petition Assumed Contracts, Post-Petition Contracts and shall assume and assign all Selected Contracts to CP at the Closing.

i. Except as set forth in this subparagraph 8i and 4f, the Trustee shall not grant, sell, lease or otherwise alienate any new easements, licenses or other access to or over Assets for fibre optic cables or any other uses whatsoever. The Trustee shall retain the right to grant to one party, within one year of Closing, easements or similar right to use for construction and operation of a single fibre optic telecommunications transmission system on or under the property described in subparagraph 4f(1). Prior to Closing, the Trustee may, in the ordinary course of business and consistent with historical practice, after consultation with CP, grant easements and similar rights to utilities, governmental entities and telecommunication companies for telephone lines, sewer, signal repair crossings and the like.

j. Except as permitted in this subparagraph 8j, from and after the date of acceptance of this offer, the Trustee shall cease removing, or permitting the removal of, or selling, or permitting to be sold or otherwise

alienated, coal and mineral deposits from underneath lines or on or underneath other Assets owned or leased by D&H. From the date of execution of this Offer and until the earlier of September 15, 1990 and 15 days before the Closing, the Trustee may continue to remove coal from underneath lines or on or underneath other Assets owned or leased by D&H in quantities consistent with the past practice of D&H (and in any event not exceeding an aggregate value of \$160,000); provided, however, that such removal shall be subject to the reasonable approval of CP as to the location and manner of such removal.

k. After Closing:

i. CP will cooperate with the Trustee to make available to the Trustee, under reasonable conditions, any pre-Closing records of D&H obtained by CP necessary to fulfill the Trustee's duties;

ii. The Trustee will cooperate with CP to make available to CP, under reasonable conditions, any pre-Closing records of D&H or the Trustee that may be useful to CP in the ownership or operation of the Assets or the performance of obligations, if any, assumed by CP;

iii. The Trustee will in his agreements with any transferee of Assets other than Assets purchased at the Closing make provision for such transferee to make available to CP, under reasonable conditions, any pre-closing records of D&H or the Trustee in the possession of such transferee that may be useful to CP in the ownership or operation of the Assets purchased, or the performance of obligations, if any, assumed, by CP;

l. Intentionally Omitted.

m. Upon acceptance of this offer by the Trustee, the Trustee shall afford CP, its officers, employees, attorneys, accountants and other representatives complete access during normal business hours, and at all other reasonable times to the offices, properties, Assets, employees, officers, and business and financial records of D&H and of the Trustee relating to the D&H, subject to the terms of the existing Confidentiality Agreements between CP and the Trustee;

n. This offer and the Asset Purchase Agreement may be terminated:

1. a. By CP, if the Closing has not then occurred, by written notice delivered to the Trustee at any time after November 1, 1990 (the "Termination Date"); provided however, if all conditions precedent to Closing (other than any of the conditions set forth in subparagraphs 6d, 6e, 6f and 6g) are satisfied; and:

(A) The orders and approvals referred to in all such subparagraphs have been entered or issued, but the period for appeal of any such order or approval has not expired, then the Termination Date shall be extended to a date ("First Extended Date") which is 15 days after the expiration of such unexpired appeal period; or

(B) If on the Termination Date (or if the Termination Date has been extended pursuant to clause a above, on the First Extended Date) an appeal is pending with respect to the orders and approvals referred to in any of subparagraphs 6d, 6e, 6f and 6g, the Termination Date (or if clause a is applicable, the First Extended Date), shall be extended to the earlier of 10 days after dismissal or withdrawal of such appeal, and the date which is 5 months from the date the appeal is filed.

Notwithstanding subparagraphs 6d, 6e, 6f and 6g, the condition precedent set forth in any such subparagraph shall be deemed satisfied even if an appeal from any such orders or approvals is pending, if CP so elects.

b. By the Trustee, 20 business days after satisfaction of all conditions precedent, unless an appeal or a writ of certiorari is pending, in which case, the Trustee may terminate this offer or the Asset Purchase Agreement 20 business days after dismissal, withdrawal or final disposition by the court of such appeal or writ.

ii. By the Trustee or CP, if the Asset Purchase Agreement has not then been executed and delivered by the non terminating party, by written notice delivered to the other at any time after June 11, 1990;

iii. By the Trustee or CP, if the Board of Directors of CP has not approved the transaction contemplated by this offer on or before June 12, 1990, by written notice delivered to the other at any time after June 19, 1990.

iv. By CP, if CP reasonably determines that the aggregate amount required to cure pre-petition defaults under Selected Contracts to be assigned hereunder (other than the PA and NY Agreements and the Conrail trackage rights described in subparagraph 1b) exceeds \$1,900,000. CP's exercise of its right to terminate under this clause iv shall be deemed waived, unless given by written notice to the Trustee, on the later of (A) July 13, 1990 and (B) the date that is 45 days after the Trustee fully complies with the provisions of subparagraphs 4e and 8f;

v. a. By CP, if by July 13, 1990 CP has not entered into a binding agreement, on terms satisfactory to CP, with each of the States of New York and Pennsylvania relating to waiver of all defaults and claims with respect to the NY and PA Agreements, by delivery to Trustee of written notice at any time after such date;

b. By the Trustee, if on or after July 13, 1990, CP is entitled to exercise termination rights pursuant to clause v.a. above and has not waived such rights, by delivery of written notice to CP given at least 10 days after the Trustee's written request for such a waiver.

vi. By the Trustee if CP elects not to purchase an Essential Asset based on its review of the matters described in subparagraph 6b and the Bankruptcy Court finds that such Asset cannot be abandoned by the Trustee and that the retention of such Asset and the consummation of the transactions contemplated by this offer is not in the best interest of D&H, by delivery to CP of written notice within 5 days after entry by the

Bankruptcy Court of an order containing such findings;

vii. By CP if any of the conditions described in subparagraphs 6b, 6c, 6h, 6i, 6j, 6k, 6m, and 6n hereof have not been satisfied (within the applicable periods, if any, set forth in such paragraphs) by delivery of written notice to the Trustee;

viii. By the Trustee, if CP is entitled to exercise the termination rights set forth in clause vii above and has not waived the same, by delivery of written notice to CP, given at least 10 days after delivery to CP of the Trustee's written request for such waiver.

o. If: (i) the Asset Purchase Agreement has been executed and delivered by the Trustee and CP, (ii) this offer or the Asset Purchase Agreement has not been terminated; (iii) the condition described in subparagraph 6n has been satisfied or waived by CP; (iv) the agreements between CP and United Transportation Union referred to in subparagraph 6h have been executed and delivered; and (v) the Bankruptcy Court has approved this offer, including, without limitation, this subparagraph 6o and subparagraphs 9a, b and c, then CP will, for the period specified below, either, at CP's option, (i) cooperate with the Trustee (including committing resources, if necessary) to arrange for the continuation of operation of the D&H by the Trustee or (ii) make other suitable arrangements for the provision of emergency service, which arrangements may include CP assuming the role of Emergency Service Operator. CP's obligations under this subparagraph 6o shall commence no sooner than 12:01 a.m. on the day following satisfaction of all the conditions in the immediately preceding sentence and end on the earlier of the Closing and the termination of this offer or the Asset Purchase Agreement. The provision of emergency service under this subparagraph 6o shall be on the terms set forth in Schedule 2 attached hereto. Any losses incurred by CP with respect to continued operation of the D&H by the Trustee with the support of CP or emergency service provided by or with the support of CP will be deemed a loan to the Trustee. If the transaction contemplated by this offer is consummated, or the Bankruptcy Court finds that the transaction has not been consummated

solely as a result of a CP Default, this loan will be forgiven by CP. However, in the event that the transaction contemplated by this offer is not consummated for any other reason, this loan will be due and payable upon sale, liquidation or disposition of the "Mortgaged Properties" or confirmation of a Plan of Reorganization. This loan shall be secured pursuant to section 364(d) of the Bankruptcy Code by a first lien on the "Mortgaged Properties" (as defined in the First Mortgage Trust Indenture dated January 1, 1984, State Bank of Albany, Trustee, as supplemented by the First Supplemental Indenture dated January 10, 1984 and the Second Supplemental Indenture dated December 26, 1985, Norstar Bank, successor Trustee and the General Mortgage Supplemental Indenture dated January 1, 1984, Key Bank N.A. Trustee) excluding the "Excepted Properties" as defined in such Indentures. CP's obligations under this subparagraph 80 are subject to obtaining all approvals and orders necessary to provide CP's loan with the priority described above and to obtaining all approvals and orders required by law or regulation, including prior approvals and orders respecting the provision of emergency service and the loan obligations to be incurred by the Trustee. If the approvals and orders described in the preceding sentence are not obtained by June 12, 1990, CP may terminate this offer and the Asset Purchase Agreement by written notice to the Trustee delivered by 5:00 p.m. on June 15, 1990. Nothing in this offer shall require CP to provide Directed Service with respect to D&H. The Trustee acknowledges that Section 4.03 (relating to certain loans by CP in connection with emergency services) of that certain Indemnification and Assistance Agreement, dated as of January 19, 1980, among the Trustee, CP, CSX Transportation, Inc. and The New York Susquehanna and Western Railway Corporation ("NYS&W"), shall remain in full force and effect until such loans are repaid to CP in full with interest or forgiven (and the Purchase Price reduced) in each case in accordance with such Section 4.03 and regardless of whether the transaction contemplated by this offer is consummated or not consummated for any reason.

p. Subject to the provisions of subparagraph 1(g) (ii), CP will assume all of D&H's rights and obligations under a fibre optic easement agreement granted by the Trustee pursuant to subparagraph 4f(i) (the "Fiber Optic Easement Agreement"), including but not limited to the obligations to give the fibre optic

assessant granted reasonable notice of any threatened condemnation or proposed abandonment of any property subject to the easement granted pursuant to the Fiber Optic Easement Agreement and except for the right to receive the consideration paid or to be paid for the sale of the easement pursuant to the Fiber Optic Easement Agreement. Further, CP will require any party to whom CP transfers CP's interest in any property subject to the easement granted pursuant to the Fiber Optic Easement Agreement or any portion thereof to agree, in a document to be recorded, that such party (i) purchases such property subject to the Fiber Optic Easement Agreement and the easement granted thereunder, (ii) assumes all of CP's obligations under the Fiber Optic Agreement, (iii) acknowledges Trustee's right to receive all consideration to be paid for the sale of the easement pursuant to the Fiber Optic Easement Agreement, and (iv) shall bind all of its successors and assigns to items (i), (ii) and (iii) above. The Trustee shall provide CP a true and correct copy of the Fiber Optic Easement Agreement as soon as it is entered into. The Trustee agrees that following the execution of the Fiber Optic Easement Agreement he shall not permit (and shall cause his successors not to permit) such agreement to be amended without CP's prior written consent.

9.

1. CP will use its best commercial efforts to execute and deliver to the Federal Railroad Administration ("FRA"), a non recourse contingency note (the "FRA Note") representing \$15 million face value of the two \$75 million aggregate face value Contingency Notes dated January 4, 1984, secured by a first lien on the Mortgaged Property (as defined in subparagraph 8o) in favor of the United States and restated pursuant to an indenture ("Restated Indenture") on terms acceptable to CP (including provisions relating to affiliate transfers, sales as a going concern, purchase money and other liens and debt to finance capital assets and capital improvement programs, and sales of the Sunbury Line.) The balance of such two Contingency Notes shall be considered as claims of the FRA against the assets of the Chapter 11 estate of D&H, including the proceeds of the purchase price paid pursuant to this offer or the Asset Purchase Agreement.

11. The FRA Note shall provide, among other things, that on the tenth anniversary of the Closing, the FRA Note shall automatically be forgiven and CP shall cease to have any obligation to FRA with respect to the FRA Note.

9. Other Agreements.

a. From and after acceptance of this offer by the Trustee, the Trustee will not enter into, will not solicit from, and will not discuss or negotiate with any potential purchaser, other than CP, any offer or proposal relating to the sale, disposition or other transfer of the Assets, stock or the business of D&H, except, only prior to the approval of this offer by the Bankruptcy Court, as may be required by applicable bankruptcy law after proper notice of the sale of substantially all of the assets of the D&H outside of a plan of reorganization. The Trustee, upon receipt, will promptly provide CP with copies and descriptions of all offers and proposals relating to the sale, disposition or other transfer of the Assets, stock or the business of D&H.

b. The Trustee shall pay to CP a fee ("Break Up Fee") equal to \$2,100,000 (in addition to repayment of any loans described in subparagraph 8c owed to CP in connection with the Trustee's operation of the D&H or emergency services) if: (i) the Trustee breaches its obligations under this offer or the Asset Purchase Agreement or (ii) after the Bankruptcy Court approves or authorizes this offer or the Asset Purchase Agreement, the Bankruptcy Court authorizes or approves any other offer or proposal for the sale or other disposition of the Assets (or a substantial portion thereof), the stock or the business of D&H (whether through a plan of liquidation or otherwise) to any person or entity other than CP or (iii) the Bankruptcy court authorizes or approves the liquidation of D&H (each of (i), (ii) and (iii), a "Break Up Event") and at the date of such Break Up Event, CP remains willing to proceed with its acquisition of the Assets on the terms set forth herein or in the Asset Purchase Agreement. CP's sole and exclusive remedy with respect to a Break Up Event shall be to receive the Break Up Fee and repayment of loans owed to CP described in subparagraph 8c or to obtain specific performance. If CP obtains specific performance it shall not be entitled to repayment of such loans (except for the

loans described in the last sentence of subparagraph 8c owing pursuant to Section 4.03 of the Indemnification and Assistance Agreement described in subparagraph 8e) or the Break Up Fee.

c. Within 2 business days after the later of: (i) approval by a final order of the Bankruptcy Court of this offer, (ii) approval by the Board of Directors of CP of this offer, and (iii) execution and delivery of the Asset Purchase Agreement, CP shall deliver to the Trustee an irrevocable standby letter of credit issued by the Royal Bank of Canada or other bank selected by CP and reasonably acceptable to the Trustee, naming the Trustee as beneficiary, in the stated amount of \$(US)2,100,000 and in form and substance satisfactory to the Trustee and CP. This standby letter of credit shall be payable upon presentation of (i) a sight draft, (ii) certification by the Trustee to the effect that (a) the Trustee has performed all of its obligations under this offer and the Asset Purchase Agreement, (b) each of the conditions precedent to the performance of CP's obligations under this offer and the Asset Purchase Agreement have been fully satisfied, (c) CP is in material default of its obligations under this offer or the Asset Purchase Agreement (a "CP Default") and (d) not less than 10 days has elapsed since the Trustee's delivery to CP of written notice specifying such defaults and demanding performance thereof and (iii) an order of the Bankruptcy Court finding that a CP Default exists. The Trustee's sole and exclusive remedy with respect to default by CP of its obligations under this offer or the Asset Purchase Agreement shall be to draw under this letter of credit and to receive the cancellation of loans as provided herein. The Trustee agrees that the amount of damages which it would suffer as a result thereof is impossible to ascertain and that \$2,100,000 and the cancellation of loans as provided herein constitutes liquidated damages with respect thereto.

d. The Trustee agrees to obtain Bankruptcy Court approval of this offer, including the provisions of subparagraphs 9a, 9b and 9c, no later than June 13, 1990. If such approval is not obtained by such date CP may terminate this offer and the Asset Purchase Agreement by written notice to the Trustee and no party shall have any further obligation to the other hereunder or thereunder.

Mr. Francis P. Dicello
May 15, 1980
Page 27

10. Trustee's Approval

If the terms of this proposal are acceptable, please countersign the enclosed copy of this letter in the space provided below and return the executed copy to us. Notwithstanding anything to the contrary in this offer: (i) CP and the Trustee acknowledge and agree that all rights and obligations hereunder shall be subject to the obtaining of all governmental, judicial and other approvals required by law or regulation and (ii) CP and the Trustee reserve the right, upon their mutual agreement, to restructure this offer so that the transactions contemplated hereby will be effected by a stock sale and/or a plan of reorganization.

Mr. Francis P. Dicello
May 15, 1990
Page 28

This proposal shall expire and become null and void if not accepted by the Trustees prior to 9:00 p.m. EST on May 16, 1990, unless extended by CP.

Very truly yours,

CANADIAN PACIFIC LIMITED

By: *K. J. Ritchie per K. J. Ritchie*
K. J. Ritchie
Executive Vice President *Vice President*
K. J. Ritchie

Agreed and Accepted this
15th day of May, 1990

F. P. Dicello, Trustee
FRANCIS P. DICELLO
Not individually but solely
as Trustee for the Delaware
and Hudson Railway Company

SCHEDULE 1

A. Railroad Equipment Leases

1. Harris Trust (97 gondola cars; 91 hopper cars) - dated 2/15/79.
2. Pullman Leasing (148 box cars) - dated 5/1/81, amended 1/1/84.
3. First Security State Bank (100 railroad cars) - dated 3/1/84, amended 3/1/88.
4. First National Bank of Louisville (60 covered hopper cars) - dated 3/1/74. Renewal and Amendment of Original Lease - dated 5/1/89; governs lease of equipment (56 covered hopper cars) following expiration of Original Lease on 4/30/89.
5. Railcar Lease (100 open hopper railcars) between XTRA, Inc. and Delaware & Hudson Railway Company, dated 5/16/80, amended 1/1/84.

B. Real Property Leases

1. Drumsond Building (dated 1/17/86).
2. Delanson "Tool House" (dated 10/83).
3. Railroad yard in Buffalo, NY; Lessor: Conrail (dated 2/1/84).
4. Northeastern Industrial Park, Albany, NY (dated 12/17/69, amended 6/18/70, 1/1/74, 3/23/76).

All of the above items are on terms and conditions contained in documents delivered to CP's counsel in connection with the delivery of this offer, exclusive of agreements and exhibits referred to in the above leases and agreements copies of which have not been so provided to CP.

SCHEDULE 2

CP will provide or underwrite emergency service operation of the D&H:

1. On substantially the same economic terms as those applicable as of May 11, 1990; provided all taxes shall be at cost, no facilities charges will apply, rates for locomotives provided by the Trustee and NYS&W shall be the rates applicable as of May 11, 1990, employee benefit and compensation matters will be subject to CP agreements with labor, all building rental charges at cost, no sharing of profits with Trustee, but profits will reduce amounts owing to CP which are deemed loans pursuant to the offer.
2. Mutually agreeable confidentiality provisions regarding information relating to operations to be provided to the Trustee.
3. Termination effective only on at least 30 days prior written notice to Trustee.
4. Operating conditions to be subject to mutual agreement and to be reasonable.
5. CP will forgive any reimbursement due to CP (as of the date of the execution of this offer) of premiums for liability insurance in connection with the Trustee's operation of the D&H, and CP hereby agrees to continue to pay the cost of premiums for liability insurance of the D&H in excess of \$25,000,000 up to a maximum of \$50,000,000 until CP assumes the obligation for emergency service pursuant to subparagraph 3(c) or the termination of this offer, whichever occurs earlier.
6. The Trustee may arrange, at the Trustee's expense, for the operation of a steam excursion train on the D&H's line in the vicinity of Scranton, PA; provided, however, that the Trustee will promptly (i) (and in any event prior to the Closing) reimburse CP for all cost and expense incurred in connection therewith, including but not limited to employee wages and fringe benefits, the cost of insurance and other out-of-pocket expenses and (ii) fully indemnify CP against any loss or expense arising out of the operation of such excursion train.
7. Prior to the Closing, the Trustee may arrange for construction of the fibre optic telecommunications transmission system referred to in clause (i) of subparagraph 4f above. CP agrees to provide reasonable and customary services in connection with said

construction; provided, however, that the actual construction of said system shall be performed by Trustee or the Trustee's grantee. The Trustee shall promptly reimburse CP for all costs to CP associated with such construction, including employee wages and fringe benefits, insurance, claims for loss or damage to persons or property, the cost of restoring grade crossings and/or right-of-way, labor protection claims by employees of CP and any other costs or expenses.

1100001.007

LAW OFFICES

Hazel Thomas Fiske Weiner Beddholm & Hanes

A PROFESSIONAL CORPORATION

WASHINGTON OFFICE

SUITE 400

2001 FIDELITY NATIONAL AVENUE, N. W.

WASHINGTON, D. C. 20008

(202) 659-7000

FAX (202) 659-7040

June 13, 1990

ARIZONA OFFICE
2102 FARMWAY PARK DRIVE, SUITE 400
P. O. BOX 12001
PHOENIX, ARIZONA 85012
(602) 944-4200

MEMPHIS OFFICE
441 EAST FRANKLIN STREET, SUITE 600
P. O. BOX 134
MEMPHIS, TENNESSEE 38101
(901) 526-1400

ALABAMA OFFICE
540 ONE STREET, SUITE 800
P. O. BOX 820
ALABAMA, VIRGINIA 22101
(703) 834-8400

LEICESTER OFFICE
115-B EDWARDS FERRY ROAD, N. E.
P. O. BOX 87
LEICESTER, VIRGINIA 22078
(703) 777-8777

MARLAND OFFICE
115 E. BALTIMORE STREET, SUITE 800
BALTIMORE, MARYLAND 21202
(301) 783-3200

Ms. Norata McGee
Secretary
Interstate Commerce Commission
12th Street & Constitution Ave., N.W.
Washington, D.C. 20423

Attn: Case Control Branch

Re: Finance Docket No. 31700

DEAR Ms. McGee:

At the request of Joe Levin of the Commission staff, enclosed please find 10 copies each of the Order Authorizing the Sale of Substantially all of the Assets of the Delaware and Hudson Railway Company, and an Amendment to the Order to be filed per Finance Docket No. 31700.

Will you kindly stamp and return the enclosed copy of this service letter when the documents are filed?

Very truly yours,

[Signature]
Charles H. White, Jr.
Counsel for the Trustees
of the Delaware and Hudson

ENTERED
Office of the Secretary
JUN 14 1990
<input type="checkbox"/> Part of Public Record

CHH:bjc

Enclosures

cc: Terry M. Bynes, Esq. v/encs
Linda S. Broyhill, Esq. v/encs



IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE



In Re:

DELAWARE AND HUDSON RAILWAY
COMPANY, a Delaware corporation,

Case No. 88-342
Chapter 11

Debtor.

**ORDER AUTHORIZING THE SALE OF SUBSTANTIALLY
ALL OF THE ASSETS OF THE DELAWARE AND HUDSON
RAILWAY COMPANY, PURSUANT TO 11 U.S.C. § 363(b),
THE ASSIGNMENT OF CERTAIN PREVIOUSLY ASSUMED
CONTRACTS PURSUANT TO 11 U.S.C. § 365, FREE AND CLEAR
OF ALL LIENS, CLAIMS, ENCUMBRANCES, CHARGES AND INTERESTS,
AND THE INCURRING OF SECURED DEBT PURSUANT TO 11 U.S.C. § 364(d)**

At Wilmington, Delaware, this day of 9th day of June,
1990:

THIS MATTER came on before the Court on the Motion of Francis P. Dicella as Trustee (the "Trustee") of the Delaware and Hudson Railway Company ("D&H") for authority to assign certain previously assumed contracts and to sell substantially all of the D&H assets free and clear of all liens, claims, encumbrances, charges and interests pursuant to Bankruptcy Code Sections 363 and 365 (the "Motion") and the companion Motion for Order Authorizing the Trustee To Incur Secured Debt Pursuant to 11 U.S.C. § 364(d) (the "Financing Motion"); notice of the Motion set 4:00 p.m., Eastern Daylight Savings Time, June 1, 1990, as the deadline for filing with the Court any objections to the Motion and the service upon counsel for the Trustee of any competing offer; and it appearing that good and sufficient notice of the Motion and the Financing Motion has been given to all creditors of D&H and to other parties in interest and persons

entitled to notice, as evidenced by the affidavit of service filed with the Clerk of this Court; and upon consideration of the objections and responses to the Motion filed by Mellon Bank, N.A. ("Mellon"); XTRA, Inc. ("XTRA"); the United States of America ("United States"); the New York State Department of Transportation ("NYSDOT"); Burlington Northern Railway, Missouri-Kansas-Texas Railway, Missouri Pacific Railway, Norfolk and Western, Southern Pacific, Southern Railway, St. Louis Southwestern Railway Co., Sunset Railway Co. and Union Pacific Railway (the "Interline Railways"); Barry Smith, a personal injury claimant; Guilford Transportation Industries, Inc. ("Guilford"); the supporting comments of counsel for the Railway Labor Executives' Association and the United Transportation Union (collectively "Rail Labor") and counsel for FELA personal injury claimants; and upon the record of the hearing held on June 7, 1990 (the "Hearing"), and the evidence and arguments of counsel presented at such Hearing; and sufficient cause appearing therefor; and after due deliberation; it is

HEREBY FOUND AND DETERMINED, that:

1. On June 20, 1988 (the "Filing Date"), D&H filed with this Court a voluntary petition for reorganization under Subchapter IV of Chapter 11 of the Bankruptcy Code. On June 27, 1988, the Trustee was appointed to serve in this case. The Interstate Commerce Commission ("ICC") issued a Directed Service Order on June 23, 1988, directing the New York, Susquehanna, and Western Railroad ("NYS&W") to operate the D&H. On February 13,

1989, and March 14, 1989, the ICC invoked its emergency jurisdiction to order the NYS&W to continue providing replacement service over the D&H's lines as emergency service carrier. At 12:01 a.m. on February 28, 1990, the NYS&W emergency service operations ceased, and the Trustee commenced operation of the D&H.

2. Shortly after his appointment the Trustee attempted to assume direct operation of the D&H. After extensive negotiations with regulatory agencies, other railroads, shippers, and labor representatives, the Trustee concluded that resumption of service by the estate at that time would not be possible.

3. The Trustee subsequently entered into negotiations with the NYS&W and CSX Transportation Inc. ("CSX") regarding the terms of the NYS&W's continued operation over the D&H's lines and CSX's continued financial support. This Court subsequently confirmed the Trustee's authority to enter into a Memorandum of Understanding between the Trustee and NYS&W and an Agreement among the Trustee, NYS&W and CSX ("Agreement").

4. Pursuant to the terms of the Agreement with NYS&W and CSX, CSX agreed to provide up to \$3 Million Dollars in working capital to the NYS&W and to provide indemnification to the NYS&W against loss during operations over the D&H's lines after February 13, 1989, for a period of 18 months. If losses exceeded \$1 Million Dollars, CSX could, upon 15 days notice to the Trustee and the ICC, withdraw its support and indemnification.

5. By October, 1989, the losses substantially exceeded \$1 Million Dollars and by letter dated October 17, 1989, CSX gave notice of its intent to withdraw its support and indemnification.

6. On November 17, 1989, this Court entered an Order authorizing the D&H to provide limited and specific financial assistance to the emergency service carrier to continue service over the D&H's lines and pursuant to the terms of the aforesaid agreements as amended, CSX agreed to indemnify the NYS&W for losses in excess of those covered by the D&H indemnification. The amended Agreement required that the NYS&W give CSX and the Trustee notice when it knew or had reason to believe that its post-November 1, 1989, losses had reached or exceeded \$1,600,000.00.

7. On January 10, 1990, the NYS&W gave notice to CSX and the Trustee that it had reason to believe that its post-November 1, 1989, losses had reached or exceeded \$1,600,000.00. Under the terms of the amended Agreement, CSX automatically and simultaneously gave notice of its intent to withdraw its financial support and indemnification of the emergency service carrier, said notice being effective 20 days thereafter. CSX's emergency service indemnification therefore expired on January 30, 1990.

8. On June 23, 1989, this Court entered an Order Authorizing the Procedure for Solicitation of Bids for the Sale of Assets and/or Reorganization of the Debtor. Pursuant to said

Order, the Trustee subsequently solicited proposals for purchase of the assets of the D&H and reorganization of the D&H, and in response thereto, received six proposals.

9. After extensive negotiations with the parties which submitted the proposals and substantial revisions of one or more proposals, the Trustee concluded that in his business judgment the proposal of Canadian Pacific Limited ("CP") provided the most favorable terms, that it was in the best interest of the public by insuring viable, continuing, competitive rail service in the region served by the D&H and that it was also in the best interest of the D&H, its estate, and creditors.

10. On January 9, 1990, the Trustee entered into an agreement with CP for the purchase of substantially all of the assets of the D&H (the "Initial CP Agreement"). After hearing on February 9, 1990, this Court approved the Initial CP Agreement.

11. By Order entered January 30, 1990, this Court authorized the execution of the Indemnification and Assistance Agreement by and among CP, NTS&W, CSX and the Trustee to provide indemnification and/or assistance for emergency service operations by the NTS&W during the interim period which expired at 11:59 p.m. on February 14, 1990, prior to the effectiveness of the indemnification provisions of the Initial CP Agreement.

12. A condition precedent to closing under the Initial CP Agreement was a requirement that CP reach an agreement with Conrail for a grant by Conrail of trackage rights over Conrail

lines between Allentown, Pennsylvania, and Hagerstown, Maryland, and Shippensburg, Pennsylvania, and Lurgan, Pennsylvania. Despite the directive of this Court that CP and Conrail conduct good faith negotiations in this regard, CP and Conrail were unable to reach an agreement upon mutually acceptable terms. Consequently, the Initial CP Agreement terminated.

13. Upon termination of the Initial CP Agreement, the Trustee assumed direct operation of, and restored full service over, the D&H lines to preserve and maximize the value of the D&H estate. In accordance with his statutory obligation, the Trustee continued operations while he pursued other options for the sale of the D&H or for an orderly termination of service over the line and liquidation.

14. The Trustee subsequently re-solicited proposals for the purchase and reorganization of the assets of the D&H and in response thereto, received three proposals.

15. After extensive negotiations with the parties which submitted the proposals and substantial revisions of two of the proposals, the Trustee concluded that in his business judgment the new proposal of CP provided the most favorable terms, and that it was in the best interest of the public by insuring viable, continuing, competitive rail service in the region served by the D&H and that it was also in the best interest of the Debtor, its estate and creditors.

16. The Trustee and CP entered into an Agreement dated May 15, 1990 (the "CP Agreement") (a copy of which is

annexed to and made a part hereof) whereby the Trustee agreed, subject to the approval of this Court on appropriate notice and hearing pursuant to Sections 363(b) and (f) of the Bankruptcy Code and Bankruptcy Rule 6004, to sell, subject to the terms and conditions therein, certain of all of D&H's right, title and interest in and to the properties and assets of D&H, or used and useable in the business of the D&H, of every kind and description, wherever located, real, personal or mixed, tangible or intangible, owned or held by D&H as of the Closing Date including, but without limitation, all of the D&H's right, title and interest in the property as such terms are more fully described in the CP Agreement (collectively, the "Assets") to CP and to assign certain previously assumed executory contracts and unexpired real and personal property leases as set forth in Schedule I of the CP Agreement (the "Pre-Petition Assumed Contracts"), to assign certain post-petition contracts executed by the Trustee after the Filing Date (the "Post-Petition Contracts") and to assume and assign certain pre-petition executory contracts and unexpired real and personal property leases (the "Selected Contracts") upon subsequent Motion to this Court, to CP for a \$25,000,000 cash purchase price at Closing, plus assumption of liabilities described in paragraph 3 of the CP Agreement, subject to certain adjustments as provided in paragraph 2 of the CP Agreement.

17. Proper, timely, adequate and sufficient notice of the Motion and the Financing Motion and the hearing on the

requested relief has been provided in accordance with the Rules of Bankruptcy Procedure and Local Rules of this Court, and no other or further notice of the Motion and the Financing Motion, the hearing or the entry of this Order is necessary.

18. A reasonable opportunity has been afforded any person or entity to make a higher and better offer to purchase the Assets and the Pre-Petition Assumed Contracts.

19. On February 9, of this year, there was before the Court essentially the same issues involving the same parties. The facts are in some but not all respects also the same.

20. The objection of the Interline Railways is not relevant because the CP Agreement excludes the sale of cash or cash equivalents.

21. The objections of XTRA and Mellon deal generally with the effect of CP's offer upon secured creditors. Guilford joined the XTRA objection.

22. The United States, Rail Labor and FELA personal injury claimants entered support in favor of the CP Agreement.

23. NYSDOT, the Commonwealth of Pennsylvania and users of rail service vigorously supported the Trustee's Motion and the Financing Motion.

24. CP's offer to purchase substantially all the assets of the D&H for a cash outlay of \$25 million and other consideration is not subject to any financing contingencies. CP's financial position has not been put in question either with respect to payment of the cash portion of the sale nor its

ability to assume the responsibilities of the proposed assignment of executory contracts and leases. There are net assets of \$19,000,000,000 behind CP's offer.

25. If certain contingencies regarding agreements with NYS&W and employee representatives are met on or before July 13, 1990, CP will insure continued service over the lines until Closing by either underwriting the losses of the Trustee (or a substitute emergency service carrier), or taking over the role of emergency service carrier in exchange for a first lien on the Mortgaged Property, excluding certain Excepted Property, serving as collateral for XTRA, Mellon and Pullman Leasing Company ("Pullman").

26. Mellon, XTRA, and Pullman assert a first lien in the Mortgaged Property, as such term is defined in, and pursuant to, a certain First Mortgage Trust Indenture dated as of January 1, 1984, and a Second Supplemental Indenture dated as of December 26, 1985, and the United States asserts a second lien in the Mortgaged Property, as such term is defined in, and pursuant to, a certain General Mortgage Supplemental Indenture dated January 1, 1984.

27. During the period from July 1, 1974, through September 25, 1987, D&H entered into certain agreements with the State of New York which provided for, among other things, capital project improvements and maintenance and service provisions. Both the General Mortgage Supplemental Indenture and the First Mortgage Trust Indenture exclude from the lien on the main line

and branch lines of the railroad, "any interest of the State of New York in improvements to said line financed by grants from that State." Under certain of these agreements the State of New York has asserted a title interest in the equipment and materials funded under the agreement during the term of the agreement and/or the bond term. New York State has also made claims arising out of recent maintenance agreements, and has asserted a security interest in certain D&H rolling stock by submissions to the ICC.

28. Both XTRA and Mellon object to the Financing Motion asserting that it should not be approved for the reason that the Trustee has not offered adequate protection which would support a priming of their interest in D&H's property. They also object to the Motion asserting that a sale of substantially all the assets under 11 U.S.C. section 363 deprives all interested parties of the full disclosure afforded by a formal disclosure statement and plan.

29. The State of New York is willing to waive any cash payments from the sale as to the claims of the non-governmental creditors for CP's undertaking a continuation and maintenance of service. It asserts that absent this sale and in a liquidation, it would assert ownership interest of approximately 67 to 68 million dollars, leaving Mellon, XTRA, Pullman, and the United States unsecured. Thus, it is the State of New York's contention that the objecting secured creditors are protected by equity in one event and unsecured in the other and

the road and the sale is not consummated. Upon consummation of the sale, any losses will be considered a forgiven loan.

34. The cash price of \$25,000,000 payable to the estate is more than sufficient to adequately protect the creditors holding alleged security interests valued at \$18,000,000 in the Mortgaged Property to be conveyed to CP. These calculations exclude the secured claim of the United States which did not object to the proposed sale. If the sale is not consummated, the most that can prime the asserted secured interests is \$2,000,000. Furthermore, there are curbs to the losses even reaching that figure in the event the sale is not consummated. There will be a delay caused by the necessary approval of governmental agencies, but there are also assurances of a fast-track procedure.

35. CP's offer to purchase the Assets and Pre-Petition Assumed Contracts, as embodied in the CP Agreement is the highest and best offer received by the Trustee for the Assets and Pre-Petition Assumed Contracts after a period during which the Trustee made reasonable and good faith efforts to identify and solicit offers from potential good faith purchasers of the D&H's assets, including the Assets and Pre-Petition Assumed Contracts.

36. CP is a purchaser acting in good faith, as that term is utilized in the Bankruptcy Code.

37. The CP Agreement has been negotiated in good faith and at arm's length by and between the Trustee and CP.

38. The Trustee has sound business reasons for assigning the Pre-Petition Assumed Contracts and for selling the Assets, under the terms set forth in the CP Agreement, and it is a reasonable exercise of the Trustee's business judgment for the Trustee to enter into the CP Agreement and to execute, deliver and perform his obligations thereunder.

39. The total consideration to be realized by the Trustee pursuant to the CP Agreement is fair and reasonable, and the transactions contemplated by the CP Agreement are in the best interests of the D&H estate, its creditors, and the public.

40. The Trustee is current and not in default with respect to any of his pre-petition and post-petition obligations under the Pre-Petition Assumed Contracts or, to the extent that parties in interest assert the existence of defaults under the Pre-Petition Assumed Contracts the Trustee has provided adequate assurance that he can and will at Closing under the CP Agreement cure such defaults if determined to exist.

41. The current financial condition and operating performance of CP is similar to or stronger than the financial condition and operating performance of the D&H as of the time D&H executed the Pre-Petition Assumed Contracts.

42. Adequate and sufficient disclosure has been made of any benefits accruing to any insiders in respect of the subject sales and transfers.

43. Compelling circumstances exist for the Court to approve the proposed sale of substantially all of the assets of

D&H without a disclosure statement and plan.

ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. The Motion and Financing Motion be and hereby are granted and approved;
2. All objections to the Motion and Financing Motion which have not been withdrawn are hereby overruled and denied;
3. Pursuant to Sections 363(b) and (f) of the Bankruptcy Code, and for the total consideration provided for under the CP Agreement (and pursuant to the terms and provisions thereof), the Trustee is hereby authorized to sell and transfer to CP the Assets;
4. The CP Agreement, as amended and clarified at the Hearing, and its terms and provisions are hereby approved in their entirety, and the Trustee is hereby authorized and empowered to execute, deliver and perform all things necessary to effectuate this Order and to consummate the transactions contemplated by the CP Agreement;
5. Pursuant to Sections 363(b) and 365 of the Bankruptcy Code, subject to and conditioned upon the closing of the transactions contemplated by the CP Agreement, the Trustee is hereby authorized and empowered to assign to CP the Pre-Petition Assumed Contracts as set forth in Schedule I of the CP Agreement. In connection therewith, the Trustee shall cure all arrearages and other defaults, if any, other than defaults of a kind specified in Bankruptcy Code § 365(b)(2), under such

foregoing Pre-Petition Assumed Contracts, at Closing under the CP Agreement;

6. The Trustee is hereby authorized and empowered to execute and deliver all documents and to take all action on behalf of D&H to consummate the sale of the Assets, the assignment of the Pre-Petition Assumed Contracts and the other transactions contemplated by this Order and the CP Agreement;

7. Pursuant to Sections 363(b) and (f) of the Bankruptcy Code, except as provided for in the CP Agreement, and upon execution and delivery of the CP Agreement and payment in accordance with the terms thereof by CP, the Assets and the Pre-Petition Assumed Contracts are hereby sold and/or transferred to CP free and clear of any and all liens, claims, encumbrances, charges and interests, with the exception of any interest of the State of New York except as set forth under the CP Agreement, (collectively, the "Encumbrances"), whether arising prior or subsequent to the Filing Date, with the Encumbrances thereafter only attaching to the proceeds of sale, with the same priority, validity, force and effect as they now have against the Assets and the Pre-Petition Assumed Contracts;

8. The provisions of this Order authorizing the sale of the Assets and the Pre-Petition Assumed Contracts free and clear of Encumbrances shall be self-executing, and neither the Trustee nor CP shall be required to execute or file releases, termination statements, assignments, consents, or other instruments in order to effectuate, consummate and implement the

foregoing provisions hereof, provided, however, that no party is excused hereby from performing any and all of their respective obligations under the CP Agreement;

9. Each and every federal, state and local governmental agency or department is hereby directed to accept any and all documents and instruments, necessary and appropriate to consummate the transactions contemplated by the CP Agreement;

10. This Order shall be binding upon, and inure to the benefit of the Trustee, CP, and their respective assigns, including, without limitation, any successor trustee(s) hereafter appointed for D&H's estate;

11. This Court shall retain jurisdiction over the parties to the extent provided for in the CP Agreement, and for the purpose of enforcing the terms and provisions of this Order;

12. CP shall be entitled to the protection of section 363(m) of the Bankruptcy Code with respect to the sale of the Assets and the Pre-Petition Assumed Contracts approved and authorized herein in the event this Order or any authorization contained herein is reversed or modified on appeal;

13. The terms and conditions of paragraph 8(c) of the CP Agreement are approved and CP is granted a first priority security interest and lien on and against the D&H's interest in the Mortgaged Property, excluding the Excepted Property, as security for repayment of losses in an amount not to exceed \$2,000,000, unless said amount is further modified by this Court, incurred by CP as provided therein and that such lien shall be

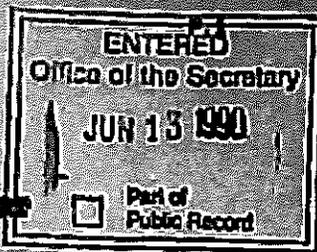
fully effective and perfected upon entry of this Order without any further action by CP, the Trustee, D&H or any other party and CP shall be entitled to the protection of section 364(a) of the Bankruptcy Code with respect to the incurrence of debt and the lien approved and authorized herein in the event this Order or any authorization contained herein is reversed or modified on appeal;

14. The issues of the validity, priority and extent of any claims, liens or outstanding ownership interests in the assets were not before this Court. Nothing in this Order, therefore, shall be construed as an adjudication of their validity, priority or extent; and

15. The Interstate Commerce Commission is admonished to issue a final and effective order within ninety (90) days from the date of filing ~~the application entitled "Canadian Pacific Limited, et al., Purchase and Related Trackage Rights - Selkirk and Hudson Railway Company"~~ *CP's Control application; and to complete its analysis of any related application, if any is filed, and to decide such related applications as soon as possible, but in any event not later than an additional 90 days.*

Heleen S. Baticke
UNITED STATES BANKRUPTCY JUDGE

JUN 12 '90 13:22 WOPES & GUY



**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

**DELAWARE AND HUDSON RAILWAY
COMPANY, a Delaware corporation,**
Debtor.

Case No. 88-142

AMENDMENT TO ORDER

The Court on June 8, 1990, having signed an "Order Authorizing the Sale of Substantially All of the Assets of the Delaware and Hudson Railway Company Pursuant to 11 U.S.C. § 363(b), the Assignment of Certain Previously Assumed Contracts Pursuant to 11 U.S.C. § 365, Free and Clear of All Liens, Claims, Encumbrances, Charges and Interests, and the Incurring of Secured Debt Pursuant to 11 U.S.C. § 364(d)" (the "Order"); the Order having been docketed on June 8, 1990; counsel for Francis F. Dicello as trustee (the "Trustee") of the Delaware and Hudson Railway Company and counsel for Canadian Pacific Limited ("CP") having concluded that Paragraph No. 15 of the Order is ambiguous and may be misconstrued; and counsel for the Trustee having requested the Court to amend Paragraph No. 15 of the Order,

IT IS ORDERED as follows:

1. Paragraph No. 15 of the Order is stricken in its entirety and the following is substituted in lieu thereof:

"15. The Interstate Commerce Commission is admonished to issue a final and effective order within ninety (90) days from the date

RECORDED

GA

JUN 12 '90 13:22 SCPEB & GWT

P.E.

of filing of CP's control and related applications; and if a terminal rights application relating to the Buffalo terminal area is filed by CP, the Commission is further admonished to complete its analysis of, and decide, such application as soon as possible, but not to exceed an additional ninety (90) days to reach its decision."

3. In all other respects the Order shall remain in full force and effect.

Dated: June 12, 1990

Walter S. Balick
Walter S. Balick
United States Bankruptcy Judge

BEFORE THE
INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 31700

CANADIAN PACIFIC LIMITED, ET AL. -- PURCHASE AND RELATED
TRackage RIGHTS -- DELAWARE AND HUDSON RAILWAY COMPANY

PETITION FOR WAIVER OR CLARIFICATION OF
CERTAIN RAILROAD CONSOLIDATION PROCEDURES

(Expedited Consideration Requested)

Charles H. White, Jr.
HAZEL, THOMAS, FISKE, WEINER,
BECKHORN & HANES
2001 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 659-7000

Attorney for Francis P. Dicallo,
not individually but as Trustee of
Delaware and Hudson Railway Company

Terance M. Hynes
Ronald S. Flagg
Vincent F. Prada
SIDLEY & AUSTIN
1732 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

Katharine F. Braid
CANADIAN PACIFIC LIMITED
40 University Avenue
Suite 918
Toronto, Ontario M5J 1T1
(416) 863-8375

Attorneys for CP Applicants

DATED: June 8, 1990

BEFORE THE
INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 31700

CANADIAN PACIFIC LIMITED, ET AL. -- PURCHASE AND RELATED
TRACAGE RIGHTS -- DELAWARE AND HUDSON RAILWAY COMPANY

PETITION FOR WAIVER OR CLARIFICATION OF
CERTAIN RAILROAD CONSOLIDATION PROCEDURES

Pursuant to 49 U.S.C. § 10505 and 49 C.F.R.

§ 1180.4(E), Canadian Pacific Limited ("CP") and D&H Corporation ("D&H Corp.") (jointly referred to herein as the "CP Applicants"), and Francis P. Dicolle, Trustee of the Delaware and Hudson Railway Company ("D&H Trustee" or "Trustee") (the CP Applicants and the D&H Trustee are sometimes collectively referred to herein as "Applicants") hereby petition the Commission for waiver or clarification of certain Railroad Consolidation Procedures (49 C.F.R. § 1180).

Specifically, Applicants seek relief in two areas. First, Applicants seek waiver or clarification of various filing requirements set forth in 49 C.F.R. § 1180. Second, Applicants request waiver of the procedural schedule established in 49 U.S.C. § 11345 and the Commission's regulations, and substitution thereof of an accelerated procedural schedule under which the Commission would decide the applications by October 15, 1990.

in accordance with the terms of a June 7, 1990 ruling by the Bankruptcy Court presiding over D&H's reorganization.

In their "Notice of Intent" (CP-1/DH-1) filed June 8, 1990, Applicants have advised the Commission of their intention to file applications seeking, pursuant to 49 U.S.C. §§ 11343-11345, Commission approval and authorization of: (1) D&H Corp.'s acquisition of substantially all of the rail assets, properties and business of the Delaware and Hudson Railway Company ("D&H") (including the stock or assets of certain D&H subsidiaries); and (2) D&H Corp.'s acquisition through assignment from D&H of various trackage rights over the lines of certain third-party rail carriers.

There is particular urgency associated with Commission review of these applications and the instant petition. D&H has been subject to the jurisdiction of the Bankruptcy Court since June 20, 1988, when it filed a petition for reorganization under Subchapter IV of Chapter 11 of the Bankruptcy Code (11 U.S.C. §§ 1161-1174). Case No. 88-432, In re Delaware and Hudson Railway Company (Bankr., D. Cal.). Since the filing of D&H's petition for reorganization, D&H has been operated -- with continuing losses -- pursuant to several directed service orders and emergency service orders issued by the Commission. On February 28, 1990, the Trustee commenced direct operation of D&H on an emergency service basis after determining that restoration of full service was essential to preserve the ability to sell D&H as a going-concern entity and to realize maximum value for the

bankruptcy estate. These direct operations are also suffering continuing losses.

Moreover, the D&H estate is now at the point where its available working capital is severely limited. At present, through stop-gap orders of the Bankruptcy Court, the Trustee's operations are being funded through the use of cash collateral that is subject to liens or ownership claims of the estate's creditors.¹ A number of state governments and shippers have also provided limited and temporary financial assistance to offset the losses sustained by the estate through the Trustee's continued operation of D&H. Finally, in order to avoid a shutdown of D&H and in order to preserve the value of the D&H operating assets and business it proposes to purchase, CP has agreed, subject to certain conditions, to assist in funding the Trustee's operation of D&H or to assume direct provision of emergency service until the transaction at issue in this proceeding is consummated (or terminated prior to consummation). In order to minimize further losses from the interim operation of D&H, and to protect the interests of the shipping public in preserving continued rail service by D&H, it is imperative that the proposed transaction be reviewed and approved by the Commission as expeditiously as possible.

At a public hearing held on June 7, 1990, the Bankruptcy Court authorized and approved pursuant to Sec-

¹ Unless extended by further order of the Bankruptcy Court, the Trustee's ability to use such cash collateral will end on July 31, 1990.

tions 363, 364 and 365 of the Bankruptcy Code (11 U.S.C. §§ 363, 364, 365) a May 15, 1990 agreement providing for the purchase by CP (or an affiliate of CP) of substantially all of the rail assets, properties and business of D&H and for the assignment by D&H to CP of certain executory contracts. In light of the continuing losses that the Trustee is incurring in operating the D&H system, the Bankruptcy Court also admonished the Commission to complete its review of the proposed transaction and render a final decision on the applications at issue in this proceeding no later than 90 days after the filing of such applications. Applicants have stated in their Notice of Intent that they intend to file their applications on or about July 16, 1990.

In light of the exigencies associated with the proposed transaction, Applicants' stated commitment to file their applications in approximately 30 days, and the Bankruptcy Court's direction that the Commission render a final decision with respect to those applications no later than 90 days after they are submitted, there are compelling reasons both for limiting certain categories of information required to be submitted in connection with the applications and for accelerating the procedural schedule under which the case will be heard. Set forth below are detailed requests for waiver or clarification (most of which have been routinely granted by the Commission in other cases), including a request that the case be decided by October 15, 1990 in accordance with the schedule set forth herein.

A. WAIVER OR CLARIFICATION OF SPECIFIC FILING REQUIREMENTS

Applicants seek waiver or clarification of the following filing requirements established in 49 C.F.R. § 1180:

1. Definition of "Applicant" and "Applicant Carriers".

Section 1180.3(a) defines the term "applicant" as "(t)he parties initiating a transaction," and Section 1180.3(b) defines the term "applicant carriers" to include not only an applicant but also "all carriers related to the applicant, and all other carriers involved in the transaction." The Commission's Railroad Consolidation Procedures require the submission of certain types of information both for "applicants" and for "applicant carriers." Applicants request waiver or clarification of these definitions in five respects.

First, Applicants seek clarification that the terms "applicant" and "applicant carriers" do not include D&H's parent company, Guilford Transportation Industries, Inc. ("GTI"), or any entities (except D&H and its subsidiaries) owned or controlled by GTI. Prior to the filing of its reorganization petition in June 1988, D&H was operated by GTI under common control with certain other carriers affiliated with GTI.² As a result of D&H's bankruptcy filing, however, GTI now exercises no control over D&H's

² See Guilford Transportation Industries, Inc. -- Control -- Boston & Maine Corp., 366 I.C.C. 292 (1982), aff'd sub nom. Lenoille Valley Railroad Co. v. ICC, 711 F.2d 295 (D.C. Cir. 1983); Guilford Transportation Industries, Inc. -- Control -- Esplanade & Hudson Railway Co., 366 I.C.C. 296 (1982), aff'd sub nom. Central Vermont Railway Co. v. ICC, 711 F.2d 331 (D.C. Cir. 1983).

operations despite its ownership of D&H stock. GTI is not a party to the proposed transaction. Moreover, neither D&H nor the D&H Trustees have access to business records of GTI and its affiliates, and neither can compel GTI to cooperate in the preparation of the applications in this proceeding. In view of these facts, Applicants submit that it would be both unnecessary and unduly burdensome to require GTI and its affiliates to be treated as "applicants" or "applicant carriers" and request clarification that they will not be so treated for purposes of this proceeding.

Second, Applicants seek clarification that the definition of "applicant" and "applicant carriers" does not extend to Soo Line Railroad Company ("Soo"). CP indirectly owns and controls approximately 98 percent of the outstanding common stock of Soo, a Class I rail carrier that provides transportation subject to Commission jurisdiction over lines located in 12 Midwestern states. Soo's rail operations are geographically distant from and unrelated to D&H's rail operations. Soo's operations thus would have little or no relevance to the Commission's evaluation of CP's proposed acquisition of D&H's assets, properties and business.

Moreover, particularly given the tight time frame for processing the applications in this case, requiring Applicants to assemble the detailed amount of information for Soo that would be required if it were deemed to be an "applicant" or "applicant carrier" would be unduly burdensome. Much of the financial and corporate information that the CP Applicants will submit as part

of the applications in this case (such as annual reports, SEC Form 10-Ks, corporate charts, etc.) will include data and information for Soo. The development of other types of information (such as maps, routes, density charts and terminal information) required by the Railroad Consolidation Procedures for each "applicant carrier" would be unduly burdensome and would not materially aid the Commission in its review of the proposed transaction.³ Accordingly, the Commission should clarify that the terms "applicant" and "applicant carriers" do not include Soo. Alternatively, the Commission should waive the requirement that Soo be included as an "applicant" or "applicant carrier."⁴

³ Some of the information (based on 1988 data) that would be required for Soo if it were treated as an "applicant" or "applicant carrier" has been submitted to the Commission recently in connection with the applications at issue in Finance Docket No. 31505, Rio Grande Industries, Inc. -- Purchase & Related Trackage Rights -- Soo Line Railroad Co. Line Between Kansas City, MO & Chicago, IL (the "RGI/Soo Proceeding"). To the extent that the Commission deemed such information to be relevant to this proceeding, it could refer to the parties' submissions in the RGI/Soo Proceeding rather than requiring Applicants to duplicate such material.

⁴ The Commission has granted similar waivers and clarifications in other recent carrier consolidation proceedings. See, e.g., Finance Docket No. 31505, Rio Grande Industries, Inc. -- Purchase & Related Trackage Rights -- Soo Line Railroad Co. Line Between Kansas City, MO & Chicago, IL (served August 16, 1989) ("RGI/Soo"), at 2 (granting clarification that CP would not be treated as "applicant"); Finance Docket No. 31247, CSX Corp. & American Commercial Lines, Inc. -- Control -- SCHO Acquisition Corp. (served May 25, 1988) ("CSX/SCHO"), at 3 (granting clarification that ocean container carrier and motor carriers affiliated with applicants would not be treated as "applicant carriers"); Finance Docket No. 31088, Southern Railway Co. & Norfolk Southern Corp. -- Purchase -- Illinois Central Gulf Railroad Co. Line Between Fulton, KY & Halesville, AL (served October 2, 1987) ("NS/ICG"), at 2 (granting clarification that motor carrier affiliated with applicants would not be treated as "applicant carriers").

Third, Applicants seek clarification that the definition of "applicant" and "applicant carriers" does not extend to CP's motor carrier affiliates. Through its Canadian Pacific Express and Transport, Ltd. division ("CP Trucks"), CP conducts motor carrier operations in Canada and the United States. The motor carrier operations of CP Trucks are subject to the jurisdiction of the Commission only insofar as they take place within the United States.

Virtually none of these motor carrier operations would affect, or would be affected by, the proposed transaction in terms of competitive impact, marketing and operations. In particular, CP Trucks accounts for a minuscule fraction of the motor freight traffic moving in the highly truck-competitive geographic areas served by D&H. Inclusion of CP's motor carrier affiliates within the terms "applicant" or "applicant carriers" would be unnecessary to the Commission's review of the proposed transaction and extremely burdensome to Applicants. Applicants therefore request that the Commission clarify in this case, as it has in other similar cases (see note 4, ENRCA), that the terms "applicant" and "applicant carriers" do not include motor carriers affiliated with the CP Applicants. Alternatively, the Commission should waive the requirement that these motor carriers be included as an "applicant" or "applicant carrier."

Fourth, Applicants seek clarification of the definition of the term "applicant carriers" to confirm that it does not include rail and motor carriers in which Applicants have non-

controlling common stock interests of 50 percent or less. These carriers -- which typically are terminal or switching carriers -- are operated independantly of Applicants, and maintain their own records. Although Applicants will provide information as to these carriers in the corporate charts submitted pursuant to 49 C.F.R. § 1180.6(b)(6), they should not be required to submit the extensive information relating to these carriers which would be necessary if such carriers were deemed to be "applicant carriers." Such information would be of no relevance to this proceeding and would be extremely burdensome (if not impossible) to develop. In recognition of these considerations, the Commission has regularly granted similar requests for clarification that the term "applicant carriers" refers only to Applicants and carriers in which they have a controlling interest.⁵ The Commission should adopt the same interpretation in this case.

Fifth. Applicants request clarification that all information or data pertaining to the "applicant carriers" and re-

⁵ See, e.g., Finance Docket No. 31522, Rio Grande Industries, Inc. -- Purchase & Trackage Rights -- Chicago, Missouri & Western Railway Co. Between St. Louis, MO & Chicago, IL (served August 18, 1989) ("RGI/CMW II"), at 3; RGI/Sou. SUBRA, at 2-3; CSX/SCND, SUBRA, at 2; Finance Docket No. 32000, Rio Grande Industries Inc., SPTC Holding, Inc., & Denver & Rio Grande Western Railroad Co. -- Control -- Southern Pacific Transportation Co. (served March 25, 1988) ("RGI/SPT II"), at 1; Finance Docket No. 32000, Rio Grande Industries Inc., SPTC Holding, Inc., & Denver & Rio Grande Western Railroad Co. -- Control -- Southern Pacific Transportation Co. (served January 22, 1988) ("RGI/SPT I"), at 1; NE/ICG, SUBRA, at 1-2; Finance Docket No. 31000, Union Pacific Corp. & BTHC Corp. -- Control -- Overnite Transportation Co. (served December 15, 1985) ("UP/Overnite"), at 2-3; Finance Docket No. 30500, Norfolk Southern Corp. -- Control -- North American Van Lines, Inc. (served August 7, 1984) ("N/NAVL"), at 2.

quired by the Railroad Consolidation Procedures may be submitted on a consolidated, rather than a carrier-by-carrier, basis. Although the Applicants intend to submit separate information and data for their respective rail carrier operations when such a breakdown would be relevant to the issues in this proceeding, no purpose would be served by requiring the CP Applicants and the D&H Trustee to provide separate information for each of their respective rail carrier subsidiaries.⁶ The Commission should therefore adhere to its practice of permitting the submission of carrier information and data on a consolidated basis.⁷

2. Profiling notification. Applicants seek partial waiver of the requirement set forth in 49 C.F.R. § 1180.4(b) that a profiling notification for a "significant" transaction be filed with the Commission between two and four months before the application is filed.⁸ Applicants have today filed their Notice of Intent -- only one day after the Bankruptcy Court approved and authorized the D&H Trustee to proceed with the proposed sale of

⁶ Indeed, D&H's carrier subsidiaries generally conduct no operations of their own, but merely lease small line segments to D&H.

⁷ See, e.g., RELI/Sec., supra, at 3; CHS/Sec., supra, at 2-3; RELI/STP II, supra, at 1; RE/ICG, supra, at 1-2; Finance Docket No. 30800, Union Pacific Corp., Union Pacific Railroad Co., & Missouri Pacific Railroad Co. -- Control -- Missouri-Kansas-Texas Railroad Co. (served March 17, 1987), at 1; RE/Orlando, supra, at 3; Finance Docket No. 30400, Santa Fe Southern Pacific Corp. -- Control -- Southern Pacific Transportation Co. (served July 3, 1984) ("SEEP"), at 2.

⁸ As explained in Applicants' Notice of Intent, the proposed transaction at issue in this proceeding includes a "significant" transaction as defined in 49 C.F.R. § 1180.2(b).

substantially all of D&H's rail assets, properties and business to CP. Filing a Notice of Intent prior to the receipt of that authorization would clearly have been premature and would have served no useful purpose. Similarly, requiring Applicants now to wait an additional two to four months before filing their applications would needlessly prevent Applicants from obtaining expedited Commission review of the proposed transaction, contrary to the legitimate interests of the Trustee, the CP Applicants, D&H creditors and the shipping public, and contrary to the admonition contained in the Bankruptcy Court's June 7, 1990 ruling. The notice afforded by Applicants' proposed procedural schedule is more than adequate given the exigencies associated with Commission review of the proposed transaction. Applicants therefore request waiver of the two to four month filing requirement.⁹

3. Energy Report. Section 1180.6(a)(9) requires that an energy report be prepared in accordance with 49 C.F.R. Part 1106. Part 1106 does not contain any specific reporting requirements for the type of transaction involved in this proceeding. Section 1105.12 repeals the reporting requirements for all rail-related transactions, which are the only class of actions listed in Part 1106 that could possibly apply to the proposed transaction. Accordingly, consistent with the Commis-

⁹ For the same reasons, Applicants seek waiver of the requirement set forth in 49 C.F.R. § 1180.4(f)(2) that petitions for waivers or clarification be filed at least 45 days before the application is submitted.

sion's practice in other similar proceedings.¹⁰ Applicants seek clarification that a statement of energy impact is not required, or a waiver of such statement if the regulations contemplate such a statement.

4. SEC Filings and Annual Reports. Applicants request waiver and clarification of Sections 1180.6(b)(1) (requiring submission of applicant carriers' most recent SEC Form 10-Ks), (b)(2) (requiring submission of applicant carriers' most recent SEC Form S-14s (now Form S-4)), and (b)(4) (requiring submission of applicant carriers' two most recent annual reports to stockholders) in the following respects consistent with prior Commission decisions.¹¹

The CP Applicants. CP annually files a Form 10-K with the SEC and submits annual reports to its shareholders, but has not filed any Form S-14s for more than ten years. No other carrier controlled by CP currently files separate SEC Reports or annual reports to shareholders.¹² Consequently, CP will include

¹⁰ See, e.g., RGI/CPA II, SUPRA, at 4; RGI/Soc, SUPRA, at 4; NS/ICG, SUPRA, at 3.

¹¹ See, e.g., RGI/Soc, SUPRA, at 3-4; RGI/SPT I, SUPRA, at 2; NS/NAVL, SUPRA, at 3.

¹² Prior to the consummation of the recent tender offer which increased CP's stock ownership of Soc from 56 percent to approximately 98 percent, Soc filed separate SEC Form 10-Ks and annual reports to shareholders. Because Soc no longer files such reports, Applicants will not include such reports for Soc in their applications. For the Commission's information, copies of Soc's Form 10-Ks and annual shareholder reports for the years 1987 and 1988 were submitted in connection with the RGI/Soc proceeding.

(continued...)

in the applications its two most recent Form 10-Ks and its two most recent annual reports to stockholders, and seeks clarification that the filing of these materials will comply with the requirements of Sections 1180.6(b)(1), (b)(2) and (b)(4).

D&H. D&H does not file Forms 10-K or S-14 with the SEC and therefore seeks waiver of the requirements set forth in Sections 1180.6(b)(1) and (b)(2). Similarly, D&H has not provided an annual report to its shareholders at least since its acquisition by GTI in 1984. Accordingly, the D&H Trustee seeks waiver of Section 1180.6(b)(4) so that it need not produce clearly outdated annual reports for D&H. As the Commission has recognized in other cases, however, an applicant carrier that does not file SEC reports or annual shareholder reports must provide the Commission with financial information comparable to the information contained in the public reports. See PGI/SPT I, supra, at 2. In order to provide the Commission with such information, the D&H Trustee proposes to submit, in lieu of SEC reports and annual shareholder reports, balance sheets and income statements for D&H covering the year 1989 and the first quarter of 1990. The D&H Trustee requests clarification that the filing of these materials

¹²(...continued)

Applicant D&H Corp., presently a non-carrier, was organized solely for the purpose of carrying out the transaction involved in this proceeding. At present, the company has no income, assets or liabilities. As a wholly-owned subsidiary of Canadian Pacific (U.S.) Holdings Inc., which in turn is a wholly-owned subsidiary of CP, D&H Corp. does not file reports with the SEC or annual reports to shareholders, and has no historical financial performance to report.

will comply with the requirements of Sections 1180.6(b)(1),
(b)(2) and (b)(4).¹³

5. Changes in Control. Applicants request clarification of the requirement set forth in Section 1180.6(b)(3) that the applications include an exhibit listing "any change in ownership, control, or officers not indicated in the most recent annual report Form R-1."¹⁴ In several recent carrier consolidation cases, the Commission has recognized that this requirement is burdensome and impracticable for carriers (such as the CP Applicants and D&H) which have a large number of subsidiaries each with multiple officer positions. The Commission has therefore granted requests to comply with this requirement by including in the application a list of the top five or six officer positions of the applicants and of each of their subsidiaries.¹⁵ Applicants request similar treatment here, and thus request a clarification that the requirement of Section 1180.6(b)(3) will be satisfied by an exhibit listing the individuals holding the top five officer positions of the applicants, and of each of their respective subsidiaries, as of June 1, 1980.

6. Common Officers and Directors. Applicants request waiver of the requirement set forth in Section 1180.6(b)(6) that

¹³ The submission of such financial statements for D&H should also constitute substantial compliance with the requirements of 49 C.F.R. § 1180.9(e).

¹⁴ See, e.g., ERI/EOZ, SUDKA, at 4; ES/IOG, SUDKA, at 2; NS/NAVY, SUDKA, at 3; Finance Docket No. 30300, CSX Corp. -- Control -- American Commercial Lines, Inc. (served October 19, 1983) ("CEL/ACLI"), at 7-8.

for each company identified on the corporate chart, a statement be included indicating any common officers or directors for every entity listed on the chart. Applicants request that they not be required to list common officers and directors for entities within their respective corporate families. This information would be burdensome to develop and would not be relevant to any pertinent issues in this proceeding. Applicants will, however, provide a complete list of the boards of directors of each of the named Applicants. A comparable waiver has been granted by the Commission in several similar carrier consolidation proceedings.¹⁵

7. Intercorporate or Financial Relationships. Applicants request clarification of Section 1180.6(b)(8) to confirm that disclosure of only significant intercorporate or financial relationships are required. With the Commission's approval, the Applicants propose to describe only those relationships involving ownership by Applicants or their affiliates of more than five percent of a non-affiliated carrier's common stock, including those relationships in which a group of people affiliated with Applicants owns more than five percent of a non-affiliated carriers' stock. In other words, corporate and financial relationships would be disclosed where (a) the CP Applicants and their affiliates, or (b) D&H and its affiliates, or any combination of

¹⁵ See, e.g., RGI/SQQ, supra, at 4; RGI/SPT II, supra, at 2; RGI/SPT I, supra, at 2; NH/ICG, supra, at 2; DP/Overnite, supra, at 7; NS/NAVL, supra, at 3-4; SPAP, supra, at 2; CSX/ACLI, supra, at 8.

(a) and (b) own over five percent of the subject stock. The Commission has granted similar requests in numerous prior carrier consolidation cases.¹⁶

8. Density Charts. Section 1180.0(a)(5) requires the submission for each applicant carrier of gross ton-mile traffic density charts for each line segment handling more than one million gross ton-miles per mile of traffic during the most recent calendar year. The CP Applicants request partial waiver of this requirement in order to permit them to fulfill this filing requirement by submitting such density information only with respect to CP Rail's lines located east of Windsor and Sudbury, Ontario. The proposed transaction would not have any more than a de minimis impact (if any) on CP Rail's lines located west of these points, and compilation of such density information for the thousands of miles of CP Rail trackage located west of these two points would be extremely burdensome to develop.

9. Pro Forma Financial Statements. Sections 1180.9(a) and (9)(b) require, in proceedings other than those involving control transactions, the submission of a pro forma balance sheet and a pro forma income statement, by both the transferor and transferee in a line sale transaction. Section 1180.9(c) further requires the submission of a statement of sources and application of funds for each applicant carrier. Applicants request waiver

¹⁶ See, e.g., RGI/CMH II, SUPRA, at 3-4; RGI/SPQ, SUPRA, at 4; RGI/SPT II, SUPRA, at 2; RGI/SPT I, SUPRA, at 2; NS/ICE, SUPRA, at 2; UP/Owensite, SUPRA, at 7-8; NS/NAVY, SUPRA, at 3-4; BESP, SUPRA, at 2; CSX/ACLI, SUPRA, at 8-9.

of these requirements with respect to the preparation of pro forma financial statements and a statement of sources and application of funds for the bankrupt D&H estate.

As discussed above, D&H is virtually cashless and, regardless of the proposed transaction, could not continue to operate as a rail carrier in the long-term. Absent the benefits of the proposed sale, the Trustee would be unable to continue operations and would be forced to commence the liquidation of the estate. In addition, once the Trustee sells D&H's assets, properties and business to the CP Applicants, the D&H estate will no longer be engaged in any ongoing business other than processing a plan of reorganization, concluding unrelated litigation and winding up the estate. Under these circumstances, the compilation of a pro forma balance sheet and income statement and a statement of sources and application of funds for D&H would be a futile exercise.

Moreover, the Commission has recognized in other recent line sale cases that its focus is on the financial condition of the purchaser and its related carriers, and not on the seller. See, e.g., RGY/Sea, supra, at 2. Thus, preparation of the required financial statements for D&H would not significantly aid the Commission in its analysis of the proposed transaction, and it would be unduly burdensome for Applicants to prepare. Accordingly, the Commission should waive the requirement that Applicants prepare and submit these financial statements for D&H.

10. Property Encumbrances. Applicants request partial waiver of the requirement set forth in Section 1180.9(d) that, with respect to any property covered by the application and as to which the applicant has agreed to assume obligations or liability in respect thereof, the application include a description of the encumbrance or liability and its amount. Such information is not necessary to the Commission's review of the proposed transaction, which will be judged under the standards of 49 U.S.C. § 11344(d) and not 49 U.S.C. § 11344(c) (which requires examination of the impact of the proposed transaction on fixed charges). Applicants will, however, include in their applications a copy of the Asset Purchase Agreement between D&H Corp. and the D&H Trustee; that agreement will describe any encumbrances and obligations which D&H Corp. will assume in connection with its acquisition of substantially all of the rail assets, properties and business of D&H.

11. Trackage Rights. The proposed transaction includes D&H's assignment to D&H Corp. of various trackage rights related to D&H's operations. Although such assignment of D&H's existing trackage rights agreements to D&H Corp. would qualify for the trackage rights class exemption established under 49 C.F.R. § 1180.2(d)(7), Applicants propose to seek formal Commission approval of the subject trackage rights transactions as part of the Commission's consideration of the transaction as a whole. Such unified review is appropriate given that the trackage rights assignment is an integral component of the proposed transaction

and would not be carried out independent of the overall transaction. Moreover, review of the trackage rights assignments together with the principal transaction would enable the Commission and the parties to address the entire proposed transaction in a single docket and under a common procedural schedule.

Applicants therefore seek clarification (and, if necessary, revocation of the trackage rights class exemption pursuant to 49 U.S.C. § 10505(d) to the extent that it otherwise would apply) that the trackage rights components of the proposed transaction may be filed as related applications, and will be considered by the Commission under the standards of 49 U.S.C. §§ 11340-11345. Similar requests have been granted by the Commission in other recent cases.¹⁷

B. WAIVER OF PROCEDURAL SCHEDULE AND ESTABLISHMENT OF ACCELERATED SCHEDULE

Applicants request that the Commission waive the procedural schedule provided in 49 U.S.C. § 11345(c) and 49 C.F.R. § 1180.4(a)-(e), and establish instead an accelerated schedule governing the various filing and other procedural steps in this proceeding. This highly accelerated schedule is necessitated by D&H's near cashlessness, the losses that operation of the bankrupt D&H estate is now generating and will continue to generate, and the Bankruptcy Court's express direction that the Commission complete its review of the proposed transaction and

¹⁷ See, e.g., RGI/CNH II, *SUDKA*, at 4-5; RGI/SQQ, *SUDKA*, at 4-5; NS/ICG, *SUDKA*, at 4.

render a final decision thereon within 90 days after the applications are filed. Applicants' request is generally consistent with relief which the Commission recently granted in connection with the sale of a line of another railroad in bankruptcy,¹⁸ and is fully warranted here.

Sat forth below is the procedural schedule which Applicants request the Commission to adopt:

Proposed Procedural Schedule

July 16	Applications are filed. (Notice of applications to be published in Federal Register as soon as possible).
August 6	Due date for comments and protests on Applications and requests for protective conditions, together with supporting evidence.
August 20	Due date for Applicants' response to comments and protective condition requests, together with supporting evidence.
August 30	Due date for opening briefs by all parties.
September 10	Due date for reply briefs by all parties.
September	Possible oral argument before Commission and/or open voting conference.
October 15	Service of final Commission decision.

In addition, Applicants request that the Commission, pursuant to 49 U.S.C. § 11345(e), waive the requirement of an initial decision by an administrative law judge and itself render

¹⁸ See Finance Docket No. 31522, Rio Grande Industries, Inc. -- Purchase & Trackage Rights -- Chicago, Missouri & Western Railway Co. Between St. Louis & Chicago, IL (served August 14, 1989) ("RGI/CWR I").

a final decision on the applications in the first instance. The waiver of an initial decision is required for the timely execution of the Commission's functions, including issuance of a final decision in accordance with the expedited procedural schedule requested by the Bankruptcy Court. Moreover, the applications herein are of major transportation importance within the meaning of Section 11345(a). Granting the requested waiver of the initial decision would also be consistent with the Commission's uniform practice in other recent carrier consolidation proceedings.

CONCLUSION

For the foregoing reasons, the Commission should grant Applicants' petition for a waiver or clarification of certain Railroad Consolidation Procedures and implement the accelerated procedural proposed by Applicants. Because Applicants as noted intend to file their applications in this proceeding on or about July 16, 1990, and because they wish to present the Commission with as full and complete a submission as possible, Applicants also request that the Commission grant expedited consideration to the instant petition.

Respectfully submitted,

Terance M Hynes

Charles H White Jr

Charles H. White, Jr.
HAZEL, THOMAS, FISKE, WEINER,
BECKHOEN & HANES
2001 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 639-7000

Attorney for Francis F. Dicello,
not individually but as Trustee of
Delaware and Hudson Railway Company

Terance M. Hynes
Ronald S. Flagg
Vincant P. Prada
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

Katharine F. Braid
CANADIAN PACIFIC LIMITED
40 University Avenue
Suite 918
Toronto, Ontario M5J 1T1
(416) 863-8375

Attorneys for CP Applicants

DATED: June 8, 1990

EC

SERVICE DATE

JUN 25 1990

INTERSTATE COMMERCE COMMISSION

NOTICE

Finance Docket No. 31700

CANADIAN PACIFIC LIMITED, ET AL. - PURCHASE AND
TRackage RIGHTS - DELAWARE & HUDSON RAILWAY COMPANY

AGENCY: Interstate Commerce Commission.

ACTION: Profiling notice and procedural schedule.

SUMMARY: On June 8, 1990, Canadian Pacific Limited (CP) and D&H Corporation (D&H Corp.) and Francis P. Dicello, Trustee in Reorganization of the Delaware & Hudson Railway Company (Trustee) jointly notified the Commission pursuant to 49 CFR 1180.4(b)(1) that they intend to file applications under 49 U.S.C. 11343, et seq. for D&H Corp. to acquire from Delaware & Hudson Railway Company (D&H): (1) substantially all of D&H's rail assets, properties and business; and (2) through assignment, various trackage rights over lines of other rail carriers. The application is expected to be filed July 16, 1990.

The Commission has agreed to accommodate the Bankruptcy Court's Order dated June 8, 1990 (as amended on June 12, 1990), and complete the proceeding within 90 days after the application is filed.

DATES: The Commission is establishing the following schedule and procedures:

- June 29, 1990 Notices of intent to participate must be filed and served on applicants.
- July 6, 1990 The Commission will prepare and serve the service list.
- July 16, 1990 The applications are due to be filed; copies of applications must be served on all parties.
- August 13, 1990 Verified comments on the application must be filed.
- August 27, 1990 Replies to comments are due.
- Dates for any needed further procedures, including a discovery conference and/or oral argument, will be set at a later time.

ADDRESSES: Send an original and 15 copies of all documents to:

Office of the Secretary
Case Control Branch
Attn: Finance Docket No. 31700
Interstate Commerce Commission
Washington, DC 20423

Also send one copy of all filings to the Attorney General of the United States, the Secretary, United States Department of Transportation, and each of applicants' representatives:

Attorney General of the United States
555 4th Street, N.W. Room 9104
Washington, DC 20530

Secretary of Transportation
400 Seventh Street, S.W.
Washington, DC 20590

Applicants' representatives:

Charles H. White, Jr.
Hazel, Thomas, Fisko, Walnor,
Beckhorn & Hanes
2001 Pennsylvania Avenue, N.W.
Washington, DC 20006

Terence M. Hynes
Sidley & Austin
1722 Eye Street, N.W.
Washington, DC 20006

Katharine F. Braid
Canadian Pacific Limited
40 University Avenue
Suite 918
Toronto, Ontario M5J 1T1

FOR FURTHER INFORMATION CONTACT:

Joseph H. Dettmar
(202) 275-7245

(TDD for hearing impaired: (202) 275-1721)

SUPPLEMENTARY INFORMATION:

On June 20, 1988, D&H filed a petition for reorganization under Chapter 11 of the Bankruptcy Code before the United States Bankruptcy Court for the District of Delaware (court). Case No. 88-432, In re Delaware & Hudson Railroad Company.

On May 15, 1990, The Trustees and CP entered into a letter agreement providing for CP's purchase of substantially all of D&H's rail assets, properties and business, including D&H's stock interest in the Albany Port Railroad Corporation, Albany and Vermont Railroad Company, Saratoga and Schenectady Railroad Company, Wilkes-Barre Connecting Railroad Company, and Northern Coal and Iron Company.

D&H Corp. will also acquire, through assignment, D&H's trackage rights over certain lines of: (1) Consolidated Rail Corporation; (2) Boston and Maine Corporation; (3) Buffalo, Rochester and Pittsburgh Railway Company; (4) CSX Transportation, Inc., (5) National Railroad Passenger Corporation; (6) Wilkes-Barre Connecting Railroad; and (7) "any other line or facility which forms a constituent part of D&H's rail system and with respect to which D&H has trackage rights."

The parties expect to complete an Asset Purchase Agreement by July 13, 1990.

Applicants' notice identifies the transaction as "significant" under 49 CFR 1180.2(b), since it involves CP, a class I railroad, and D&H, a class II carrier, and involves a "major market extension."

The acquisition is governed by 49 U.S.C. 11344(d), which states:

(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 Commission, the Commission shall approve such an application unless it finds that--

(1) as a result of the transaction, there is likely to be a 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 anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

Our assessment of competitive harm under section 11344(d) requires a showing that any adverse competitive impact be both "likely" and "substantial." Such adverse

impacts might be higher rail rates or deteriorated rail service levels as a result of the transaction.

D&H filed for reorganization in 1988, and its operations have been performed under directed service for quite some time. D&H's financial status, the interests of the Trustee, the bankruptcy court, the U.S. Government, and the prospective purchaser, as well as the public interest all strongly support an expedited decision.

To accommodate the 90-day schedule, we are establishing an expedited procedural schedule for developing the record.¹ Discovery will be permitted if necessary, and a discovery conference may be scheduled. The parties should make supporting work papers available for inspection and negotiate confidentiality agreements where necessary, similar to the terms proposed by the Applicants.² We encourage any necessary discovery to begin immediately and be conducted amicably. We caution that discovery must be limited to the applications before us and the relevant statutory criteria. Abuse of discovery and delay of the process will not be countenanced, and we do not intend to extend filing dates.

¹ Applicants' proposed schedule, set forth in their June 8th petition for waiver and clarification, is not adopted. The waiver requests will be addressed in a subsequent decision.

² We will adopt the protective order proposed by the Applicants in their motion filed June 8, 1990.

Finance Docket No. 31700

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

Decided: June 30, 1990.

By the Commission, Chairman Philbin, Vice Chairman Phillips, Commissioners Simmons, Lamboley, and Emmett.



Moreta R. McGeo

Moreta R. McGeo
Secretary

JUL 3 1990

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 31700

CANADIAN PACIFIC LIMITED, ET AL. - PURCHASE AND
TRACKEGE RIGHTS - DELAWARE & HUDSON RAILWAY COMPANY

WAIVER

Decided: June 27, 1990

On June 8, 1990, Canadian Pacific Limited (CP), D&H Corporation (D&H Corp.), and Francis P. Dicello, Trustee in Reorganization of the Delaware & Hudson Railway Company (Trustee), jointly notified the Commission pursuant to 49 CFR 1180.4(b)(1) that they intend to file applications under 49 U.S.C. 11243, et seq., for D&H Corp. to acquire from the Delaware & Hudson Railway Company (D&H): (1) substantially all of D&H's rail assets, properties and businesses, including its stock interest in several rail carriers, and (2) through assignment, various trackage rights over lines of other rail carriers.

The application will be filed under an order of D&H's Reorganization Court issued on June 8, 1990 (as amended June 12).¹ The applicants expect to file their application on July 16, 1990, and have sought waiver of various filing requirements. On June 25, 1990 we served a notice establishing the procedures and schedule to be followed in this proceeding. The notice indicates that we will complete the proceeding within 90 days after the application is filed. We stated there that this separate decision would be issued on the waiver requests.²

Applicants seek waiver or clarification of certain procedural requirements in 49 CFR Part 1180 for their applications. They state that the waiver requests will facilitate processing of the applications within 90 days.

1. Definition of "Applicant" and "Applicant Carriers."
Applicants seek clarification that the terms "applicant" and "applicant carriers" in 49 CFR 1180.3(a) do not include D&H's parent company, Guilford Transportation Industries, Inc. (GTI), or any entities owned or controlled by GTI, except for D&H. Applicants state that prior to its reorganization, D&H was operated by GTI under common control with other GTI affiliates. After D&H filed for reorganization, GTI no longer exercised control over D&H's operations, even though it still owns its stock. GTI is not a party to the transaction. D&H and its Trustee do not have access to GTI records and cannot compel it to cooperate in preparing the application. We agree with applicants that, under the circumstances here, GTI and its affiliates need not be considered as an "applicant" or "applicant carrier" for

¹ D&H is in reorganization under Chapter 11 of the Bankruptcy Code before the United States Bankruptcy Court for the District of Delaware. Case No. 80-142, In re Delaware and Hudson Railway Company.

² We thus implicitly granted applicants' requests to waive the time requirements in section 1180.4(b) for a pre-filing notice and to establish an accelerated procedural schedule, and need not consider those requests here.

this proceeding. We do not need data or information from DTI in order to conduct a meaningful review of this transaction.'

Applicants next request clarification that CP's subsidiary, Soo Line Railroad Company (Soo), not be considered an "applicant" or "applicant carrier" for this proceeding. CP indirectly owns and controls 98 percent of Soo's outstanding common stock. Applicants state that Soo's rail operations are geographically distinct from and unrelated to D&N's rail operations and, therefore, would not be relevant to the Commission's evaluation of CP's acquisition of D&N's assets, properties and businesses.

Applicants further contend that, given the tight time frame for preparing the applications, requiring them to assemble detailed information for Soo would be unduly burdensome. CP will include Soo in such of the financial and corporate information it will submit in the applications (i.e., annual reports, SEC Form 10-K, corporate charts, etc.). Requiring it to develop other types of information for Soo (such as maps, routes, density charts, and terminal information) would be burdensome and would not materially aid the Commission in reviewing the competitive impact of the transaction. We agree with applicants that it would be unduly burdensome to require them to consider Soo as an "applicant" or "applicant carrier" in this proceeding, especially since Soo would be included in more relevant corporate and financial information for CP's system.'

Applicants seek clarification that CP's motor carrier affiliates not be considered "applicants" or "applicant carriers." According to applicants, CP, through its Canadian Pacific Express and Transport, Ltd. division, conducts motor carrier operations in Canada and the United States. Its operations in the United States are subject to Commission jurisdiction. Applicants assert that the proposed transaction would not affect or be affected by CP's motor carrier operations, which account for a minuscule fraction of the motor freight service in the highly competitive area served by D&N. Applicants contend that including CP's motor carriers as "applicants" or "applicant carriers" is unnecessary for the Commission's review of the transaction and burdensome on applicants. This request is reasonable. We agree that it is unnecessary for reviewing competitive impact of the transaction to include CP's motor carrier subsidiary as an "applicant" or "applicant carrier." We have granted similar relief in other purchases.'

Applicants next request a finding that the definition of "applicant" or "applicant carriers" not include rail or motor carriers in which applicants have non-controlling common stock interests of 50 percent or less. These carriers are typically terminal, switching railroads that operate independently of applicants and maintain their own records. This request is reasonable and consistent with waivers we have granted in other

¹ See Finance Docket No. 10500, Norfolk Sou. Corp. - Central - North Am. Van Lines, Inc. (not printed), served August 7, 1984.

² See Finance Docket No. 31505, Rio Grande Industries, Inc. Et Al. - Pur. & Trac. - Sou. L. R. Co. (not printed), served August 16, 1989 (891-302).

³ See Finance Docket No. 31088, Southern Ry. Co. and Norfolk Southern Corp. - Pur. - Illinois Cent. G. Co. Line Between Fulton, KY and Haysville, AL (not printed), served October 7, 1987 (Southern - ICG).

purchase proceedings.⁶ Accordingly, in the context of this proceeding, these entities will not be considered "applicants" or "applicant carriers."

Finally, on this subject, applicants request that all information or data pertaining to "applicant carriers" required by the Railroad Consolidation Procedures be submitted on a consolidated rather than a carrier-by-carrier basis. Applicants state that they will submit separate information and data for their respective rail carrier operations when a breakdown is relevant but request that other information be consolidated. We agree with applicants that separate information for each of their rail carrier subsidiaries is unnecessary. We have previously granted identical relief when consolidated information was adequate for review of a transaction.⁷ Applicants may consolidate their submissions as necessary.

3. Energy Report. Applicants seek clarification that an energy report under 49 CFR 1104 is not required. They point out that the regulations do not specify that a report is required for this type of transaction. We agree with applicants that a separate energy report is not necessary here. Adequate information will be contained in the environmental report for a determination of the energy impact of the transactions. We have granted similar relief in other cases.⁸

3. SEC Filings and Annual Reports. Applicants request waiver and clarification of section 1180.6(b)(1), (2), and (4), requiring, respectively, submission of applicant carriers' most recent SEC Form 10-Ks, SEC Form S-14s (now Form S-4), and annual reports to stockholders.

CP annually files a Form 10-K with the SEC and submits annual reports to its shareholders, but it has not filed Form S-14s for more than 10 years. No other carrier controlled by CP currently files separate SEC Reports or annual reports to shareholders.⁹ Consequently, CP will include in the application its two most recent Form 10-Ks and its two most recent annual reports to stockholders. It requests a clarification that filing these materials will comply with the requirements in section 1180.6(b).

The Trustee also requests waiver of the requirements in section 1180.6. He states that D&H does not file Form 10-Ks or S-14s with the SEC and has not provided annual reports to stockholders since it was acquired by GTI in 1984. Instead, the Trustee proposes to submit balance sheets and income statements for D&H for the years 1989 and the first quarter of 1990.

⁶ SAB, R.R., Finance Docket No. 11522, Rio Grande Industries, Inc. - Pur. and Track. - Chicago, M. & W. Ry. Co. (not printed) served August 18, 1989 (RGI - CMH); and Finance Docket No. 11000, Rio Grande Industries, Inc. - Cont. - Southern Pac. R. Co. (not printed), served January 23, 1988 (RGI - SPT).

⁷ RGI - Soo, AMRCA; Southern - ICG, AMRCA.

⁸ SAB, R.R., RGI - CMH, AMRCA.

⁹ CP states that Soo used to file separate SEC Form 10-Ks and annual reports but no longer does so since CP increased its stock ownership. Copies of Soo's 1987 and 1988 Form 10-K and annual reports are on file in Finance Docket No. 11505, AMRCA.

The requests by CP and the Trustees are reasonable and will have no significant impact on our review of the transaction. We have granted similar relief previously, and will do so here.¹⁰

4. Changes in Officers and Common Officers and Directors. Section 1180.6(b)(3) requires applicants to include an exhibit listing "any change in ownership, control or officers not indicated in the most recent annual report Form A-1." Applicants request that they be permitted to satisfy this requirement by supplying an exhibit listing individuals holding the top five officer positions of the applicants and their respective subsidiaries.

Section 1180.6(b)(6) requires a statement of common officers or directors for each company identified on applicants' corporate chart. Applicants request waiver from this requirement as assertedly burdensome. They propose to provide a complete list of boards of directors of each of the named applicants.

These requests are similar to waivers granted in other proceedings.¹¹ We will grant them here. The information applicants will provide is adequate for our review of the transaction.

5. Intercorporate or Financial Relationships. Applicants request clarification of section 1180.6(b)(8) to confirm that disclosure of only significant intercorporate or financial relationships are required. Applicants propose to describe only those relationships involving ownership by applicants or their affiliates of more than 5 percent of a non-affiliated carrier's common stock, including those relationships in which a group of people affiliated with applicants owns more than 5 percent of a non-affiliated carrier's stock. This interpretation of the requirement is reasonable and will be approved.¹² The information applicants propose to provide will be adequate for our review.

6. Density Charts. Section 1180.6(a)(5) requires each applicant carrier to submit traffic density charts for each line segment handling more than 1 million gross ton-miles per mile of traffic during the most recent calendar year. CP requests a partial waiver of this requirement to permit it to submit this information only for CP's lines located east of Windsor and Sudbury, Ontario, Canada. They assert that the transaction will not have a significant impact on the thousands of miles of CP trackage located west of these points, and that compilation of density charts for these lines would be extremely burdensome with the limited time available for preparing the application. We will grant the partial waiver sought. Our review of the competitive impact of the transaction will concentrate on the relevant market that will include CP lines located east of Windsor and Sudbury. Density charts are necessary for these lines. Since our competitive analysis will not consider CP lines located west of these locations, density charts for these would not be necessary or relevant and thus need not be submitted.

7. Pre-Forma Financial Statements. Sections 1180.9(a) and (b), respectively, require that the transferor and transferee in a line sale submit pre forma balance and income statements.

¹⁰ See, e.g., PGI - 100, 200KA.

¹¹ See PGI-500, 200KA; 200KA - 100, 200KA.

¹² Similar relief was granted in PGI - 3PT, 200KA.

Section 1180.9(c) requires a statement of sources and application of funds for each applicant carrier. Applicants request waiver of these requirements for D&H. After D&H sells its rail lines to D&H Corp., it will no longer be a rail carrier. The proceeds from the sale will be used in completing D&H's reorganization. Applicants assert that, under these circumstances, D&H should not have to submit financial statements required by sections 1180.9(a), (b) and (c). We have previously waived the filing of financial statements by a bankrupt seller of a rail line,¹¹ and do so here. As we have previously stated,¹² our focus here will be on the financial condition of the purchaser and its related carriers to ensure that they will be able to operate the line to be acquired.

8. Property Encumbrances. Applicants request partial waiver of the requirement in section 1180.9(d) that the application describe any encumbered property for which the purchaser has agreed to assume obligations or liability. Applicants assert that all this information is not necessary for the Commission's review under the standards of 49 U.S.C. 11344(d). Applicants state that the Asset Purchase Agreement will describe any encumbrances and obligations D&H Corp. will assume when it acquires D&H's rail assets, properties and businesses. We agree that, since the Asset Purchase Agreement will provide the information required, it is unnecessary for applicants to supply it in a separate exhibit.

9. Trackage Rights. In Railroad Consolidation Procedures--Trackage Rights Exemption, 1 I.C.C.2d 376 (1985), the Commission exempted as a class trackage rights that are based on written agreements and not filed or sought in responsive applications in rail consolidation proceedings. 49 CFR 1180.3(d)(7). Thus, technically, applicants need only file notices of exemption for assignment of trackage rights. Applicants believe, however, that assignments of D&H's trackage rights to D&H Corp. are an integral part of the overall proposal and should be analyzed in connection with the proposed line acquisition. They assert that review of the trackage rights assignments together with the principal transaction would enable the Commission and the parties to address the entire transaction in a single proceeding under a common procedural schedule. They, therefore, seek revocation of the trackage rights class exemption to permit the trackage rights assignments to be considered as part of this transaction.

We adopted the trackage rights exemption to ease regulatory burdens. We have, in certain instances such as those presented here, revoked the exemption to accommodate an applicant's request to include trackage rights matters in the sale proceeding. Such relief is warranted here as well.¹³

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition for waiver and clarification is granted to the extent set forth in this decision.

¹¹ RGI - GMD. SUPRA.

¹² RGI - SSS. SUPRA.

¹³ RGI - GMD. SUPRA.

2. Partial revocation of the class exemption in 40 CFR 1180.2(d)(7) for trackage rights applications is granted.

3. This decision is effective on July 3, 1990.

By the Commission, Chairman Philbin, Vice Chairman Phillips, Commissioners Simons, Lambley, and Emmert.



Noreta R. McGee
Noreta R. McGee
Secretary

SERVICE DATE

JUL 6 1990

DO

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 31700

CANADIAN PACIFIC LIMITED, ET AL. - PURCHASE AND
TRACKAGE RIGHTS - DELAWARE & HUDSON RAILWAY COMPANY

July 5, 1990

NOTICE:

The attached service list has been compiled from notices of intent to participate in this proceeding submitted in response to the profiling notice and procedural schedule served June 25, 1990, and published on June 27, 1990 (55 Fed. Reg. 26269). Parties of record designated as POR, PRP, APP or APR must be served with copies of any filing by any other party to the proceeding. Individuals designated as VIS will receive copies of all Commission decisions and need not be served with filings by the parties.

Requests for change of status, corrections, or deletions should be addressed to:

Interstate Commerce Commission
Office of the Secretary - Room 2203
Commission Service Section
Washington, DC 20423

or

Call the Commission Service Section
(202) 275-7999

By the Commission, Jane F. Mackall, Director, Office of Proceedings.



Norata R. McGee
Secretary

(SEAL)

SERVICE DATE

OCT 17 1990

The attached decision is subject to a formal correction before publication in the ICC 2d Series of Printed Reports. Please notify the Office of the Secretary, Commission Service Section, Room 2203, Washington, D.C. 20423, (202) 275-7764 of any formal errors in order that corrections may be made.

ICC 137

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 31700

**CANADIAN PACIFIC LIMITED, ET AL. -
PURCHASE AND TRackage RIGHTS -
DELAWARE & HUDSON RAILWAY COMPANY**

TABLE OF CONTENTS

I.	INTRODUCTION	97
II.	BACKGROUND	98
	A. DESCRIPTION OF THE CARRIERS	99
	B. DESCRIPTION OF THE PRIMARY APPLICATION AND RELATED PROPOSALS	100
	C. COMMENTS	107
III.	DISCUSSION AND CONCLUSIONS	111
	A. STATUTORY CRITERIA	111
	B. COMPETITIVE ANALYSIS	112
	C. FINANCIAL IMPACTS	120
	D. PUBLIC INTEREST AND MISCELLANEOUS CONDITIONS	120
IV.	LABOR PROTECTION	122
V.	ENVIRONMENTAL MATTERS/HISTORIC PRESERVATION	123
VI.	OVERALL CONCLUSIONS	125
VII.	FINDINGS	125
	APPENDIX	128
	A Map of the Lines Involved in the Proposed Transaction	128

7 I.C.C.2d 95, 1990 WL 300380

SURFACE TRANSPORTATION BOARD (S.T.B.)

CANADIAN PACIFIC LIMITED, ET AL.—PURCHASE AND
TRackage RIGHTS—DELAWARE & HUDSON RAILWAY COMPANY

FINANCE DOCKET NO. 31700 ¹

Decided October 5, 1990

Effective on October 17, 1990

****1 *95** The Commission approves: (1) the acquisition of the assets of the Delaware & Hudson Railway Company, through its Trustee, Francis P. Dicello, by D & H Corporation; (2) the petitions for exemption for the acquisition of control through assignment of the Trustee's stock holdings in certain rail carrier subsidiaries of the Delaware & Hudson Railway Company; and (3) the acquisition of Delaware & Hudson Railway Company's trackage rights through assignment from the Trustee.

***97** BY THE COMMISSION:

I. INTRODUCTION

On July 18, 1990, Canadian Pacific Limited (CP), D & H Corporation (D & H Corp.) and Francis P. Dicello, Trustee in Reorganization of the Delaware & Hudson Railway Company (Trustee), filed an application under 49 U.S.C. §§ 11343–11345. Applicants seek approval of D & H Corp.'s acquisition of substantially all of the assets, properties and business of the bankrupt Delaware & Hudson Railway Company (D & H).

In addition to the primary application to purchase the D & H assets, applicants filed related proposals involving certain assignments from the Trustee. These are contained in the embraced sub-numbered proceedings. In Sub–Nos. 1 through 5, D & H Corp. is seeking to acquire by assignment from the Trustee the controlling stock interest in the following D & H subsidiaries: Albany Port Railroad Corporation (Albany Port), Albany and Vermont Railroad Company (Albany and Vermont RR), Saratoga and Schenectady Railroad Company (Saratoga and Schenectady RR), the Wilkes–Barre Connecting Railroad Company (WBC), and the Northern Coal and Iron Company (NCIC). Applicants request that the Commission grant their petitions and exempt these transactions under 49 U.S.C. § 10505 from the prior approval requirements of the acquisition of control provisions of 49 U.S.C. § 11343. ² In Sub–Nos. 6 through 12, D & H Corp. is acquiring by assignment from the Trustee D & H trackage rights over the ***98** following third-party carriers: Consolidated Rail Corporation (Conrail); Pocono Northeast Railway, Inc. (PNER); Boston & Maine Corporation (B & M); Buffalo, Rochester & Pittsburgh Railway Company (BR & P); National Railroad Passenger Corporation (Amtrak); WBC; and Albany Port. Applicants request approval of these trackage rights under 49 U.S.C. § 11343. ³

II. BACKGROUND

On June 20, 1988, D & H filed a petition with the United States Bankruptcy Court for the District of Delaware (court)⁴ for reorganization under Subchapter IV of Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1161–1174. The court appointed the Trustee on June 27, 1988. One year later, on June 23, 1989, the court entered an order authorizing the procedure for solicitation of bids for the sale of the assets and/or reorganization of the D & H. Pursuant to the order, the Trustee solicited bids and entered into an initial agreement with CP that ultimately failed. The current agreement with CP, entered into on May 15, 1990, represents the culmination of almost a year long effort on the part of the Trustee to find a buyer for the bankrupt carrier.

105

****2** The May 15, 1990 agreement was approved by the court in an order dated June 8, 1990, and the Trustee was thereby authorized to take all steps necessary to consummate the sale. One such step was the filing of an appropriate application with the Commission for approval for transfer of the assets as a result of 11 U.S.C. § 1166. By the June 8, 1990 order (as amended on June 12, 1990), the court admonished the Commission to issue a final and effective order within 90 days of the filing of an application.

4

On June 8, 1990, CP, D & H Corp. and the Trustee filed a notice with the Commission, under 49 C.F.R. § 1180.4(b)(1), of their intent to file applications for approval of the transaction. A pre-filing notice and procedural schedule in Finance Docket No. 31700, Canadian Pacific Ltd—Pur. & Track—D & H Ry. Co. (not printed), was served June 25, 1990, and published at 55 Fed. Reg. 26,269 (1990). The primary application and ***99** directly related proposals were filed July 18, 1990, in accordance with the procedural schedule, as amended.⁵

A. DESCRIPTION OF THE CARRIERS

CP is a Canadian corporation engaged in a wide range of business activities in Canada and the United States. Through its CP Rail division, it operates a 13,800-mile rail system in Canada and in the States of Maine and Vermont and is considered a Class I railroad. CP also controls the Soo Line Railroad Company (Soo), a Class I rail carrier, which operates in a number of Midwestern States. In addition to its rail operations, CP conducts motor carrier operations in the United States and Canada through its Canadian Pacific Express & Transport Ltd. division.⁶

D & H Corp. was created solely for purposes of this transaction and is a wholly owned subsidiary of Canadian Pacific (U.S.) Holdings, Inc., which, in turn, is a wholly owned, non-carrier subsidiary of CP. After the transaction is consummated, D & H Corp. will operate D & H's rail assets, property and business as part of the CP Rail system.⁷

D & H is a Class II rail carrier with approximately 1,500 miles of main line track extending from Montreal, Quebec, Canada, on the north to Alexandria, VA, on the south, and between Buffalo and Niagara Falls, NY, on the west to the eastern points of Albany, NY, Philadelphia, PA and Oak Island (Newark), NJ. D & H owns or leases approximately 600 miles of its track. The remaining 900 miles are operated under trackage rights over lines of other carriers. Trackage rights over Conrail lines constitute approximately 600 miles of D & H's system. In 1982, the Commission authorized Guilford Transportation Industries, Inc. (GTI), to acquire control of D & H.⁸ As indicated above, D & H filed for reorganization on June 20, 1988, and the Trustee was appointed on June 27, 1988. Since the ***100** filing of the petition for reorganization, service had been provided over D & H tracks and trackage rights by the New York, Susquehanna, and Western Railway (NYS&W) pursuant to several directed service orders and emergency service orders issued by the Commission. The Trustee assumed operation of the D & H lines on February 28, 1990. The Commission issued Service Order No. 1510, D & H Corp./Canadian Pacific Ltd. Authorized to Operate Tracks of D & H Ry. Co., Debtor (Francis P. Dicello, Trustee), (not printed), served August 1, 1990, and published at 55 Fed. Reg. 31,906 (1990), authorizing CP and D & H Corp. to operate D & H's lines for 30 days, i.e., through August 31, 1990. On August 30, 1990, the Commission served Amendment No. 1 to Service Order No. 1510 authorizing continued operations over D & H's lines through November 28, 1990.

B. DESCRIPTION OF THE PRIMARY APPLICATION AND RELATED PROPOSALS

****3** 1. Primary Application. The primary application seeks approval for D & H Corp. to acquire substantially all of D & H's rail assets, properties and businesses, including D & H's owned and leased rail lines and other properties used for rail operations, locomotives, cars and other rail operating equipment, and certain specified executory contracts. The precise terms of the transaction are contained in the Asset Purchase Agreement (ASA), which was completed on July 13, 1990. Essentially, it provides that D & H Corp. will acquire from the Trustee approximately 500 miles of D & H's main line track,⁹ 75 miles of

1060

branch lines¹⁰ and various D & H yards.¹¹ The purchase price is \$25 million. CP and D & H Corp. will not incur debt or other financial obligations to fund the purchase price, which will be paid in cash from CP's current funds.

The main line routes to be acquired are:

***101** (1) The Napierville Junction Railroad (NJR) line from the Canadian border at Rouses Point, NY, northward, to the junction with CP's Adirondack Subdivision at Delson, Quebec, Canada;

(2) The Canadian Main Line from the Canadian Border at Rouses Point to Glenville Junction, NY;

(3) The Freight Main Line from the junction with the B & M near Mechanicville, NY, through Glenville Junction, Binghamton, NY, Scranton, PA, and Wilkes-Barre, PA to the junction with Conrail in Sunbury, PA;

(4) The Colonie Main Line from the connection with the Albany Main Line near Kenwood Yard, NY, through to the connection with the Freight Main Line near Mechanicville;

(5) The Albany Main Line from the connection with the Colonie Main Line including a connection with Conrail and the Albany Port near Kenwood Yard, through to the connection with the Freight Main Line near Delanson, NY; and

(6) Canadian Connector from the connection with the Freight Main Line near Crescent, NY, to the connection with the Canadian Main Line near Ballston Lake, NY.

2. Related Proposals.

a. Control Petitions for Exemption.

Sub-No. 1. Applicants seek an exemption from prior Commission approval for D & H Corp. to acquire by assignment from the Trustee 50% of the outstanding shares of stock of Albany Port. Conrail owns the other 50%. As a result of the transaction, D & H Corp. will control Albany Port jointly with Conrail. Albany Port is a terminal railroad that serves the docks and terminal facilities at the Port of Albany. It leases approximately 16.5 miles of track from the Albany Port District Commission (APDC), a public corporation of the State of New York. Albany Port switches rail cars between shippers located at the Port of Albany and D & H and Conrail and also provides haulage service for D & H and Conrail. Applicants are seeking Commission approval for D & H Corp.'s acquisition of D & H's trackage rights over approximately 0.88 miles of this line in Sub-No. 12.

Sub-No. 2. Applicants seek an exemption from prior Commission approval for D & H Corp. to acquire by assignment from the Trustee 76% of the outstanding shares of stock of Albany and Vermont RR or, in the alternative, dismissal of the petition (see, supra note 2). The remaining shares of Albany and Vermont RR are held by 27 individuals or entities. ***102** Albany and Vermont RR owns an 11.70-mile portion of the D & H main line between Livingston Avenue, in Albany, and Waterford Junction, NY. The line has been leased perpetually to D & H and its predecessors since June 15, 1860. Applicants are seeking Commission approval of D & H Corp.'s acquisition of D & H's leasehold interest in this line as part of the primary application.

****4** Sub-No. 3. Applicants seek an exemption from prior Commission approval for D & H Corp. to acquire by assignment from the Trustee 76% of the outstanding shares of stock of Saratoga and Schenectady or, in the alternative, dismissal of the petition (see, supra note 2). The remaining shares of Saratoga and Schenectady are held by 27 individuals or entities. Saratoga and Schenectady owns a 20.32-mile portion of D & H's main line between Schenectady, NY and Saratoga Springs, NY. The line has been leased perpetually to D & H and its predecessors since October 14, 1850. Applicants are seeking Commission approval of D & H Corp.'s acquisition of D & H's leasehold interest in this line as part of the primary application.

Sub-No. 4. Applicants seek an exemption from prior Commission approval for D & H Corp. to acquire by assignment from the Trustee 100% of the outstanding shares of stock of WBC or, in the alternative, dismissal of the petition (see, supra note 2). WBC owns a 5.05-mile portion of D & H's main line between Hudson (Plains), PA and Buttonwood, PA that was built in 1914 to connect lines of the D & H, NCIC and the Pennsylvania Railroad Company (predecessor of the Penn Central and Conrail). Under an agreement dated December 29, 1914, WBC's lines were operated by D & H and the Pennsylvania Railroad under trackage rights. D & H has owned 100% of the shares of stock in WBC since 1976, when it acquired the shares held by Penn Central. Applicants are seeking Commission approval for D & H Corp.'s acquisition of D & H's trackage rights over the line in Sub-No. 11.

Sub-No. 5. Applicants seek an exemption from prior Commission approval for D & H Corp. to acquire by assignment from the Trustee 100% of the outstanding shares of stock of NCIC or, in the alternative, dismissal of the petition (see, supra note 2). NCIC owns an 11.16-mile portion of the D & H main line between Minooka Junction, PA, and Hudson and a 1.67-mile portion of D & H main line between Buttonwood and Wilkes-Barre. NCIC's properties have been leased perpetually to D & H and its predecessors since December 1, 1873. Applicants are seeking Commission *103 approval of D & H Corp.'s acquisition of D & H's leasehold interest in this line as part of the primary application.

b. Trackage Rights Applications.

Sub-No. 6. Applicants seek approval for D & H Corp. to acquire by assignment from the Trustee D & H's trackage rights over the following lines owned and operated by Conrail: (1) between Buffalo and Binghamton over the line of the former Erie Lackawanna Railway Company and related trackage rights in the Greater Buffalo/Niagara Falls area; (2) between Dupont, PA and Oak Island (Newark) over the rail line of the former Lehigh Valley Railroad; (3) between Oak Island and Phillipsburg, PA, over the rail line of the former Central Railroad of New Jersey, (4) between Bethlehem, PA, and Lehighon, PA, including use of Saucon Yard, and between Fraser, PA, and Laurel Run, PA; (5) between Allentown, PA, and Philadelphia; (6) between Sunbury and Perryville, MD via Harrisburg, PA; (7) between Perryville and Alexandria; (8) between Albany/Rensselaer and Troy, NY; and (9) Conrail's Keyser Valley Wye tracks in Scranton and on Conrail's tracks 16, 17 and 18 at Taylor Yard.

**5 Applicants also seek approval in this application to acquire by assignment from the Trustee trackage rights over the following lines owned by the Pocono Northeast Railway, Inc. (PNER): (1) between Union Junction and Hudson Yard in Wilkes-Barre; and (2) the former Conrail line east of Conrail's Bridge 60 to the D & H Vine Street Branch in Scranton.¹²

Applicants state that most of the trackage rights were derived from the Final System Plan (FSP), developed by the United States Railway Association (USRA), that created Conrail. Regional Rail Reorganization Act of 1973, 45 U.S.C. §§ 701, 716, 741.

Sub-No. 7. Applicants seek approval for D & H Corp. to acquire by assignment from the Trustee D & H's trackage rights over the following lines owned and operated by B & M: (1) joint D & H/B & M trackage from W.Y. Cabin in Mechanicville via Coons, NY, to Crescent; and (2) between Mechanicville and Eagle Bridge, NY. Applicants state that D & H and *104 B & M have operated jointly over these rail lines for more than 60 years using their paired track and reciprocal trackage rights to serve Mechanicville.

Sub-No. 8. Applicants seek approval for D & H Corp. to acquire by assignment from the Trustee D & H's trackage rights over the following lines owned and operated by BR & P:¹³ (1) between Silver Lake Junction and P&L Junction, NY; and (2) between Silver Lake Junction and Silver Springs, NY. These trackage rights enable D & H to interchange traffic with the Genesee and Wyoming Railroad Company (G&W).¹⁴

Sub-No. 9. In their reply, applicants request permission to withdraw this application because the D & H trackage rights over the lines of CSX Transportation, Inc. (CSXT), described in the application, have lapsed. Applicants will be permitted to withdraw.

108

Sub-No. 10. Applicants seek approval for D & H Corp. to acquire by assignment from the Trustee D & H's trackage rights over the following lines owned and operated by Amtrak: (1) between Roy Tower and Harris Tower near Harrisburg,¹⁵ and (2) between Post Road/Perryville and Landover, MD. Applicants state that these trackage rights are a significant segment of D & H's existing route from the Northeast to Washington, DC, and Alexandria, where D & H Corp. proposes to interchange traffic with major Southeastern carriers, such as Norfolk Southern Corporation (NS).

*105 Sub-No. 11. Applicants seek approval for D & H Corp. to acquire by assignment & from the Trustee D & H's trackage rights over WBC's 5.05-mile line between Hudson and Buttonwood.

Sub-No. 12. Applicants seek approval for D & H Corp. to acquire by assignment from the Trustee D & H's trackage rights over Albany Port's 0.88-mile line between Kenwood Yard and the Cabbage Island lead track in Albany. As previously noted, Albany Port is owned 50% by D & H and 50% by Conrail.

3. Financial Arrangements. The proposed transaction will be a cash sale and no securities will be issued by CP or D & H Corp. to finance the purchase. CP will forward \$60 million to D & H Corp. from its cash reserves, in exchange for 100% of D & H Corp. common stock. D & H Corp. will then use these funds to purchase most of D & H's assets for \$25 million. The remaining \$35 million will be used to acquire locomotives, make capital improvements, and fund working capital. D & H Corp. will acquire D & H's assets free and clear of all existing liens or encumbrances. However, D & H Corp. will enter into an Indenture Agreement with the Federal Railway Administration (FRA) in the amount of \$35 million. Under the agreement, D & H Corp. will assume the obligation to repay FRA only if it abandons or sells D & H lines (other than as an ongoing concern) within 10 years after the transaction is consummated. This contingent obligation will be entirely forgiven if D & H Corp. operates the rail lines for at least 10 years.¹⁶

**6 CP and D & H Corp will not receive any governmental financial assistance for the purchase of the assets of D & H. However, the States of New York and Pennsylvania have pledged to provide \$3 million and \$5.5 million, respectively, for capital improvements including bridge and track rehabilitation on D & H lines in those two States.

4. Proposed Operating Plan. D & H Corp. will acquire approximately 500 miles of main line track, as well as five branch lines totalling approximately *106 75 route miles. In addition, D & H Corp. seeks to operate the approximately 900 miles of trackage rights over other carriers currently enjoyed by D & H. Applicants anticipate that the acquisition of D & H will allow significantly faster and more reliable transit times. CP and D & H Corp. intend to coordinate their operations closely to offer efficient and competitive single-system cross-border service that will be capable of recapturing traffic from other carriers, particularly motor carriers.

Applicants plan to use Buffalo, Mechanicville, Philadelphia, Rouses Point, and Washington as the principal gateways for through freight service to D & H Corp. All trains delivered and received will be programmed and marshalled for expedited connections to destined roads and customers. CP plans to concentrate on building trains at the five gateways so as to reduce switching and time spent in intermediate yards. This will allow D & H Corp. to receive and deliver cars in the most efficient manner. Preliminary arrangements are currently being made with the interchange carriers.

D & H Corp. will connect with CP at Rouses Point and Buffalo. At Rouses Point, CP plans to operate through trains from Saratoga to St. Luc yard in Montreal, setting out only the local Rouses Point traffic to be handled by D & H's subsidiary in Canada, NJR, and D & H Corp. local assignments. This arrangement will retain the current number of assignments, while improving service through more competitive transit times. At Buffalo, where present operations consist of interchange with the Pittsburgh & Lake Erie Railroad Company, NS, Conrail and the Buffalo & Pittsburgh Railroad on a local basis, D & H Corp. expects that increased traffic volumes will enable it to operate run-through trains and power with some of these carriers, thus cutting transit times and making service more competitive.

Applicants' traffic study projects that by year 3, D & H Corp. will be operating approximately 119 trains per day over its entire system, an increase of 31 trains from D & H's 1988 levels. By year three, applicants project that D & H Corp. will be shipping an average of 169.51 million annual gross tons over its system. Applicants estimate that the proposed transaction will enable them to divert approximately \$34 million in gross revenues from other rail carriers.

Upon completion of marshalling arrangements with D & H Corp.'s connecting railroads, D & H Corp. will produce an updated schedule for all trains. In the interim, current schedules will be utilized. Local service will be tailored to meet future needs and is dependent on generating additional traffic.

****7 *107** 5. Amtrak and Other Commuter Train Operations. Amtrak service over three lines in the Northeast is directly affected by this transaction. Amtrak operates its Adirondack service between Montreal and New York over D & H's line between Schenectady and Rouses Point. Amtrak requests that the Commission assign the current operating agreement between Amtrak and D & H to D & H Corp. The other two lines are Amtrak's own between Post Road/Perryville and Landover and its line near Harrisburg, over which applicants are seeking trackage rights. Amtrak seeks to deny applicants' request for the assignment of D & H's trackage rights over these lines to D & H Corp. The issues regarding these lines are discussed below.

6. Capital Improvements. CP intends to spend approximately \$54 million for track and bridge maintenance and rehabilitation during the first three years following the transaction, with approximately \$19.4 million having been budgeted for the first year. Planned improvements will allow train speeds to increase to 50 miles per hour over D & H-owned lines from the current average of 30-40 miles per hour. D & H Corp. will install modern signal and communication facilities together with a comprehensive program of pole line repairs. Funding will also be focused on the replacement of defective ties and badly worn and corrugated rail. Particular attention will also be paid to the renovation of bridges, which have been generally neglected in the past.

To improve point-to-train communications, D & H will install or relocate communication towers where necessary. New radio equipment will be provided to train crews and engines as required. Communications between terminals will be enhanced by installing an electronic mail system at all major terminals.

7. Equipment Requirements. CP plans to acquire a fleet of 62 diesel locomotives at a total cost of approximately \$37.2 million for use by D & H Corp. These locomotives will include at least 15 four-axle units for local and yard service and 41 six-axle units for road service. Any demand for equipment over the number already owned or leased by D & H will be met by additional leasing where required.

8. Labor Impact. D & H Corp. intends to offer employment to nearly all of D & H's employees currently active in operating the railroad and will bring wage levels for D & H employees to the national industry standard. D & H Corp. has been negotiating with the various unions representing D & H employees in order to enter into collective bargaining agreements covering the terms and conditions of employment.

***108 C. COMMENTS**

Comments on the proposed transaction were filed by the United States Department of Transportation (USDOT), Port Authority of New York and New Jersey (Port Authority), New York State Department of Transportation (NYSDOT), Richmond Fredericksburg & Potomac Railroad Company (RF&P), Amtrak, Champion International Corporation (Champion), and U.S. Clay Producers Traffic Association, Inc. (Clay Producers).¹⁷ Applicants have also submitted verified statements from approximately 60 shippers that support the proposal.¹⁸ No formal protests were filed.

****8** 1. Champion International Corporation. Champion is a leading producer of paper and forest products. Uncertainties over D & H's long term viability have led to a steady decline in traffic routed over D & H lines. In 1987, it shipped more than 2,000 carloads over D & H; in 1990, it expects to ship only 500 carloads. It supports the transaction as a significant step in preserving a competitive bridge carrier for traffic moving into and from New England.

As a creditor, Champion is concerned that if D & H were liquidated, there would be a substantial adverse impact of rail service contrary to the public interest.

It asserts that CP's acquisition of D & H's assets and trackage rights would end deteriorating traffic on D & H and restore a financially sound and stable rail service carrier in the Northeast.

2. Richmond Fredericksburg & Potomac Railroad Company. RF&P submitted a letter from its General Counsel to CP's Vice President, Legal Services, confirming certain understandings that formed the basis for RF&P's decision not to object to the transaction. The first understanding is that statements in the application about the use of RF&P's property are not intended to seek Commission action affecting the status of that property *109 or arrangements regarding its use by applicants or other parties. The second understanding is that the applicants have not included any assignment of D & H's rights under a private agreement with RF&P regarding use of RF&P's property and services; the parties have begun discussions for alternate arrangements.

3. National Railroad Passenger Corporation. Amtrak requests that the Commission assign to CP/D & H Corp. the obligation to provide the use of its tracks, facilities and other services for operation of Amtrak's Adirondack rail passenger service under the existing operating agreement with D & H. Amtrak's Adirondack service between New York and Montreal runs over D & H's line between Schenectady and Rouses Point. The operations are conducted under an agreement dated January 1, 1979, as amended. The service was operated by NYS&W under its directed and other service orders.

Amtrak notes that applicants cite to the continuation of current passenger service over D & H as a benefit of the transaction, but fail to include a specific request in the application assigning the obligation under the existing operating agreement. It states that CP/D & H Corp. have informally agreed to honor the existing operating agreement until it can be renegotiated. Amtrak wishes to avoid any such renegotiation.

Amtrak also objects to the directly related application in Sub-No. 10 involving the assignment to D & H Corp. of the agreement permitting D & H to operate freight service over Amtrak's trackage between Roy Tower and Harris Tower near Harrisburg and between Perryville and Landover. Amtrak notes that NYS&W discontinued service over these line in June 1988 when it took over as the operator of D & H's lines.

**9 Amtrak claims that it no longer controls the line between Roy Tower and Harris, and that this line is currently controlled by Conrail. Amtrak has attempted to make the Northeast Corridor safer for heavy rail passenger traffic by rerouting freight service, principally Conrail's, over other lines. This corridor has more passenger traffic than any other rail line in the country. Eliminating freight service over these lines has also reduced wear and tear on the lines. Amtrak objects to the assignment of both lines in Sub-No. 10 because it would undo its success in eliminating freight traffic from its "Northeast corridor" lines. See 45 U.S.C. § 851.

Moreover, Amtrak contends that under its agreement with D & H, it has the right to consent to the transfer or assignment of D & H's operating contract rights. Amtrak states that the Trustee has not sought its consent to the assignment.

*110 4. New York State Department of Transportation. NYSDOT oversees the development and maintenance of the rail network of the State of New York. It states that the lines owned and operated by D & H are a vital part of the State's rail network. Continued operation of these lines, it contends, is essential to the economic well-being of the State and of the surrounding States. D & H serves 50 on-line customers in New York, generating 30,000 carloads.

Since 1974 the State has invested approximately \$70.4 million for D & H to rehabilitate, improve and acquire facilities and equipment for operations. Of that amount, \$3.4 million has been invested since D & H filed for bankruptcy. It further notes that as a condition of the sale, the State has agreed to provide an additional \$3 million to D & H Corp. for capital improvements.

It also sees the proposal as economically sound and offering the greatest potential for a permanent transportation solution in the Northeast. The purchase of D & H's assets and assignment of trackage rights will maintain the integrity of D & H's system, enhancing competition in the region. Moreover, NYSDOT believes that the relationship of D & H Corp. to CP, both financially and strategically, will result in long-term stability and successful operations.

5. Port Authority of New York and New Jersey. Port Authority is an agency of the States of New Jersey and New York responsible for developing and operating terminal, transportation and other facilities in the Port of New York/New Jersey.

It notes that when Conrail was created, the USRA granted trackage rights to D & H as a potential competitor to the monopoly it created. Port Authority asserts that Conrail presently controls 99% of the rail business and 90% of the rail intermodal traffic in New Jersey. Thus, while it views D & H as an ineffective competitor of Conrail, Port Authority believes that D & H's possible liquidation would expose it to a virtual monopoly by Conrail. It sees the transaction as providing the greatest potential for development of significant rail competition in the region. However, any approval of the transaction should include the trackage rights and access necessary to provide the competition envisioned by the FSP.

****10** In addition, Port Authority notes that the applicants will be able to compete for international container traffic currently moving to and from points in Canada, including Toronto, Ontario, Canada and Montreal by establishing single-system service via the ports of New York and/or Philadelphia to points throughout Canada. It sees the potential new routings as enabling CP/ D & H Corp. to compete for intermodal traffic ***111** currently moving by truck via the Port of New York and by rail via other ports.

6. U.S. Clay Producers Traffic Association, Inc. Clay Producers represents producers of clay shipping from Georgia, South Carolina and Tennessee origins to numerous industries throughout the United States and Canada. A principal market for clay is the paper industry in New York and New England. D & H is an important bridge carrier for northbound traffic and competes with Conrail. More than 90% of the clay traffic of these producers moves by rail. Clay Producers says that D & H has been competitive with Conrail, and it fears that if D & H were to be liquidated, clay producers could be subject to market abuse, since truck service is impractical and uneconomical. It claims that the transaction will enable D & H to continue as a competitive alternative to Conrail and to improve service.

7. United States Department of Transportation. USDOT agrees with applicants that the transaction will be a positive step toward ensuring continued local rail service to shippers while maintaining competition for east-west and north-south traffic in the Northeast. It also believes that a combined CP-D & H will enhance service levels by offering single-system rail service between major cities in the Northeast and points in Canada.

It sees the proposal as contemplating continued operation of D & H's entire rail system, ensuring that shippers who depend on rail service will have a financially stronger rail system to meet their transportation needs.

In D & H's bankruptcy proceeding, the FRA represented the United States as holder of two contingency notes issued by D & H, one in the principal amount of \$63,235,091.50 and the other in the principal amount of \$12,434,766.95. When D & H filed for bankruptcy, these notes became immediately due and payable out of rail assets deemed in a General Mortgage Supplemental Indenture dated as of January 1, 1984, naming Key Bank, N.A. as Trustee.

FRA is negotiating with D & H Corp. for a new mortgage indenture and contingency note to be exchanged for \$35 million principal amount of D & H's two obligations. The remainder will continue as a secured claim against the estate.

***112** III. DISCUSSION AND CONCLUSIONS

A. STATUTORY CRITERIA.

The prefiling notice served June 25, 1990, describes this transaction as "significant under 49 C.F.R. § 1180.2(b), since it involves CP, a Class I railroad, and D & H, a Class II railroad, and involves a major market extension. Thus, the following standards in 49 U.S.C. § 11344(d) govern:

****11 (d) ***** (T)he Commission shall approve such an application unless it finds that-

(1) as a result of the transaction, there is likely to be a 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 anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

Our main concern in evaluating the applications under these criteria is protecting the public interest by preserving competitive transportation markets and adequate transportation to the public. We are required to approve the transaction unless we find that: (1) it results in substantial anticompetitive effects; and (2) the anticompetitive effects outweigh the public interest in meeting significant transportation needs. Section 11344(d) provides a less stringent standard for approval than § 11344(b), which applies to control or merger of two Class I carriers. We are not required to make separate findings as to fixed charge coverage, harm to essential services, and impact on employees as in transactions subject to § 11344(b), and operational benefits of the proposed transaction become important for the decision only if significant adverse impacts are found. *Rio Grande Ind., Inc.—Pur & Track.—Soo Line R. co.*, 6 I.C.C. 2d 854, 875 (1990) (RCI—Soo).

Our assessment of competitive harm under § 11344(d) requires a showing that any adverse competitive impact be both "likely" and "substantial." Such adverse impacts might be the likelihood of significantly higher rates or charges to shippers or significantly poorer rail service levels, or the likelihood of a combination of the two as a result of the transaction.

In contrast, a showing of expected substantial harm to a particular competitor as a result of a transaction is not equivalent to a showing of harm to competition. For example, a rail or truck competitor might lose traffic precisely because a transaction promises the significant public benefit of a new, improved transport alternative. Harm to the competitor would ***113** not be grounds for rejecting a proposal or imposing conditions unless a carrier's ability to provide essential services is threatened.¹⁹

B. COMPETITIVE ANALYSIS.

1. Market Definition. In analyzing the competitive impact of these transactions, we begin by defining the relevant markets that would be affected. A relevant market is the area of effective competition, *Standard Oil Co. v. United States*, 337 U.S. 293, 299–300, n.5 (1949), and necessarily has two dimensions, product and geographic. *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962). Relevant markets must be defined in terms of commercial realities. *United States v. Grinnel Corp.*, 384 U.S. 563, 572 (1966).

a. Product Markets. The product sold by railroads is the transportation of freight. Freight transportation by other modes should be included in the same product market as rail freight transportation for the purpose of determining the competitive effects of a proposed transaction to the extent that it disciplines rates. See *Rio Grand Industries, Et Al.—Control—SPT Co., Et. Al.*, 4 I.C.C. 2d 834 (1988) (RGI—SPT), *aff'd sub nom. Kansas City Southern Industries, Inc. v. ICC*, 902 F.2d 423 (5th Cir.1990) and the cases cited there.

****12 b.** Geographic Markets. Like product markets, geographic markets must correspond to economic realities. In *Clayton Act § 7* cases, the relevant geographic market has been described as the area in which providers of a particular product or service operate and to which purchasers can turn for such products or services. *Tampa Electric Co. v. Nashville Co.*, 365 U.S. 320, 327–328 (1961). Geographic markets can be as small as individual cities and as large as the entire country. It is necessary, also, to examine any "economically significant" submarkets where the effect of the transaction may be substantially to lessen competition. *Id.* at 325.

c. Intermodal and Intramodal Competition. We will consider competition from other modes, in this case, principally motor carriers, as well as from other rail carriers within the geographic area in question.

***114** 2. Competitive Analysis of the Primary Application. Most competitive problems arising from railroad consolidations can be categorized as either parallel or end-to-end effects. As we stated in RGI-SPT, supra, at 888 (citing Milwaukee—Reorganization—Acquisition by GTC, 2 I.C.C.2d 161, 2245 (1984)):

Parallel effects may arise where the consolidating railroads run between common origin/destination pairs or corridors and generally involve the question of whether there is a reduction in the number of rail competitors serving transportation markets. End-to-end effects may exist where the consolidating railroads serve common destination points from different origins, or originate from common origins to different destinations, and these effects relate primarily to whether there will be a reduction in source competition or a vertical foreclosure of competition at commonly served gateways.

CP's acquisition of D & H's lines will allow CP to compete more effectively in the Northeast United States, and will allow the combined CP/D & H Corp. system to provide new single-system services between points in the Northeast United States and Canada. Applicants' submission confirms that this transaction is end-to-end in nature, with no significant parallel aspects. The transaction will link the CP rail system in Canada with the D & H system in the Northeastern United States.²⁰ The two systems meet along the Canada-U.S. border at Rouses Point/Montreal and Buffalo/Niagara Falls.

There is one north-south parallel aspect of this transaction: movements between the Montreal and Boston metropolitan areas. There are currently two independent routes between Montreal and Boston: (1) via the CN, through a connection with its subsidiary Central Vermont Railroad, as well as with the B & M; and (2) via a single line of Conrail. CP connects at Wells River, VT, with B & M, and D & H runs from Montreal (via NJR in Canada) to Mechanicville and Albany, where it connects to B & M and Conrail for Boston. As the two independent routes handling Boston-Montreal traffic will not decline as a result of this transaction, there will be no reduction in the number of shipping options between these points.

****13** The major commodity groups handled by CP are intermodal traffic, expedited freight traffic (e.g., perishables, automotive parts, pool), forest products, raw materials (e.g., coal, potash, and bulk minerals), petroleum ***115** products, and grain. Although D & H does operate a limited number of local freight trains (prior to bankruptcy nine local freight trains per day), it is primarily a bridge carrier and thus highly dependent on receiving and exchanging freight originating on other carriers' lines. The Northeast United States is criss-crossed with one of the densest highway networks in the world, and a significant portion of the traffic in the affected market, particularly intermodal freight, is subject to effective truck competition. Movements of bulk commodities, such as coal, for which motor carriers are not normally an effective competitive alternative are largely not involved.

Substantial shipper support has been expressed for the proposed transaction. D & H is currently in bankruptcy and absent this transaction, it might already have been liquidated.²¹ Yet, from D & H's standpoint and from that of its shippers, the proposed acquisition by CP does not represent merely a last-ditch effort to save the carrier and preserve service. Thanks to the infusion of capital and expected increases in traffic, the proposed acquisition will enable D & H Corp. to offer service significantly more competitive than that which D & H was able to provide. Moreover, by retaining and improving the service traditionally provided by D & H, this transaction preserves the original intent of the FSP to provide for a legitimate competitor to Conrail in the Northeast.

Applicants have submitted and rely upon traffic diversion studies to bolster their position.²²

No party has contested these basic facts about the consolidation or the affected markets. The record thus suggests that this particular end-to-end transaction, like end-to-end rail consolidations generally, embodies no significant anticompetitive impacts.

***116** 3. The Directly Related Proposals.

a. Sub-Nos. 1-5. In each of these directly related proposals, applicants seek an exemption from the control provisions of 49 U.S.C. §§ 11343-11345 of the acquisition by D & H Corp. of the Trustee's stock in the D & H subsidiaries.²³ In Sub-No. 1, D & H Corp. is acquiring 50% of the outstanding stock of Albany Port. In Sub-No. 2, D & H Corp. is acquiring 76% of the outstanding stock of Albany and Vermont RR. In Sub-No. 3, D & H Corp. is acquiring 76% of the outstanding stock of Saratoga and Schenectady RR. In Sub-No. 4, D & H Corp. is acquiring 100% of the outstanding stock of WBC. In Sub-No. 5, D & H Corp. is acquiring 100% of the outstanding stock of NCIC.

Under 49 U.S.C. § 11343(a)(3) the acquisition of control of a carrier by any number of carriers requires prior Commission approval. Under 49 U.S.C. § 10505, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation or service is not necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101a; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

****14** Detailed scrutiny of applicants' acquisition of the various amounts of outstanding stock of Albany Port, Albany and Vermont RR, Saratoga and Schenectady RR, WBC, and NCIC, under 49 U.S.C. §§ 11343-11345, is not necessary to carry out the RTP. By minimizing the administrative expense of effecting this transaction, an exemption will expedite regulatory decisions and reduce regulatory barriers to entry [49 U.S.C. § 10101a(2) and (7)]; foster sound economic conditions in transportation and ensure effective competition and coordination between carriers [49 U.S.C. § 10101a(5)]; and encourage efficient management [49 U.S.C. § 10101a(10)]. Other aspects of the rail transportation policy are not affected adversely.

The transaction is of limited scope. Albany Port leases only 16.5 miles of track and various buildings and equipment from the APDC (a public corporation of the State of New York). The other four New England carriers to be controlled total only approximately 49.90 miles. Although these are lines form integral links in the D & H rail system, the territory ***117** which they directly serve is relatively small. Albany and Vermont, Saratoga and Schenectady, and NCIC ceased their active operations as rail carriers in the last century. WBC was only created for the purpose of constructing a rail line. Today, these four entities conduct no business, have no current income, and have no employees.

No shipper opposes the transaction. In fact approximately 60 statements of support for the proposed transaction have been received from various shippers. Moreover, the record indicates no reason to believe that any shipper or member of the public would be subject to the abuse of market power for which regulation would be necessary to prevent. Approval of this transaction will guarantee that many shippers in the region have a competitive rail alternative to Conrail. As noted above, there are other competitive alternatives in the region available through motor carriage.

Under 49 U.S.C. § 10505(g), we may not use our exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting these control exemptions, we will impose the labor protective conditions in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979), *aff'd sub nom. New York Dock v. United States*, 609 F.2d 83 (2d Cir.1979) (*New York Dock*).

b. Sub-Nos. 6-8 and 10-12. These trackage rights applications seek approval under 49 U.S.C. §§ 11343-11345 for D & H Corp. to acquire trackage rights over other rail carriers. The Commission's regulations for exemptions provide for a class exemption for trackage rights that are based on written agreements and that are not filed or sought in responsive applications in rail consolidation proceedings. 49 C.F.R. § 1180.2(d)(7); see *Railroad Consolidation Procedures*, 1 I.C.C. 2d 270 (1985). D & H Corp.'s acquisition of these trackage rights would qualify for a class exemption under this standard. However, applicants requested that the class exemption be revoked and the trackage rights applications be considered in connection with the primary transaction. The Commission granted that request in *Waiver, supra*, at 5.

115

****15** We have considered the trackage rights together with our analysis of the primary application and approve these related applications as they are not likely to produce a substantial lessening of competition as discussed below.

In Sub-No. 6, applicants seek approval under 49 U.S.C. §§ 11343-11345 for D & H's proposed acquisition of trackage rights through assignment by Trustee of D & H's trackage rights over the aforementioned lines owned and ***118** operated by Conrail and PNER. The trackage rights outlined under this sub-number constitute almost 40% of the entire D & H system and applicants state that the acquisition of these rights is an integral part of the transaction. Most of these trackage rights agreements were entered into pursuant to the FSP as a means of preserving D & H's role as the sole competitor to Conrail in certain areas of the Northeast. As we already noted, applicants' reply modified their application to reflect the fact that the lines between Union Junction and Hudson Yard and east of Conrail's Bridge 60 to the D & H Vine Street Branch in Scranton are owned by PNER (supra note 12).

We emphasize that our approval of this related application contemplates the substitution of D & H Corp. for D & H with regard to the trackage rights granted in the FSP, as well as D & H's trackage rights to Philadelphia over lines owned by Conrail. Ordinarily, the Commission grants prospective approval for trackage rights, but does not require transfer of trackage rights—trackage rights agreements being a contractual matter between private parties. See Finance Docket No. 31505, Rio Grande Ind., Inc.—Pur. & Track.—Soo Line R. Co. (not printed), served November 15, 1989 (Decision No. 6), and RGI-Soo, supra. This case differs in that D & H is the only single-system alternative to Conrail in most of the major markets of the Northeast and the trackage rights are already in place and were originally provided to preserve or foster competition with Conrail in the Northeastern United States. Similarly, the Philadelphia trackage rights were granted by the Commission to protect the public interest by providing a competitive counterbalance to Conrail at Philadelphia.²⁴ The Commission has previously ordered transfer of rights necessary to preserve competition. See Chicago, M., St. P. & P. R. Co.—Trackage Rights, 342 I.C.C. 578 (1973), *aff'd sub nom. Louisville And Nashville Railroad Co. v. United States*, 369 F. Supp. 621 (W.D.Ky.1973), *aff'd mem.*, 414 U.S. 1105 (1973). We find that these trackage rights currently held by D & H continue to be in the public interest as a means of providing viable competition for Conrail in the Northeast, just as they were when the FSP was formulated and when the trackage rights to Philadelphia were originally granted. Accordingly, our approval here requires transfer of D & H's FSP and the Commission-imposed Philadelphia rights, regardless of any language contained in the agreements implementing those requirements purporting to limit transferability. As to all other Conrail trackage rights, which are ***119** in fact private agreements, our normal rule authorizing, but not requiring, the transfer of these rights will apply.

****16** Conrail has had notice of the related Sub-No. 6 application and has raised no objection with respect to the assignment of trackage rights provided therein. Therefore, any objection it may advance in the future will be barred by its actual notice and failure to appear and present its position to the Commission. See *Matter of Chicago, Milwaukee, St. Paul and Pacific*, 799 F.2d 317, 332-36 (7th Cir.1986). Conrail may of course appear before the Commission to argue changed circumstances should it desire to do so.

In Sub-No. 10, applicants seek approval under 49 U.S.C. § 11343 for D & H's proposed acquisition of trackage rights through assignment by Trustee of D & H's trackage rights over the aforementioned lines owned and operated by Amtrak. As was the case with Sub-No. 6, there is currently some uncertainty as to the precise ownership of some of the lines in question. In particular, Amtrak asserts that it no longer controls the freight line between Roy Tower and Harris Tower near Harrisburg, and that Conrail now controls it. In their reply, applicants sought modification of their original application to allow it to acquire by assignment from D & H all of D & H's trackage rights in this area, regardless of whether Amtrak or Conrail owns or controls the lines in question.

There is a dispute between Amtrak and applicants as to the assignment of trackage rights over Amtrak's line between Post Road/Perryville and Landover, as well as over its line near Harrisburg. Amtrak asserts that it is statutorily mandated to improve passenger railroad service on these lines and that it actively and successfully sought to reroute all freight traffic off these lines. 45 U.S.C. § 851(4). Amtrak also states that under the terms of the freight operating agreement which it entered into with D & H, any transfer of trackage rights over its lines would violate the terms of the agreement.

We do not feel that the uncertainty surrounding the precise ownership of this or other trackage involved here or issues of the contractual assignability of trackage rights over Amtrak's northeast corridor lines should hinder our approving the transaction. The Commission normally avoids interjecting itself into contractual disputes.²⁵ As we have *120 consistently noted on numerous occasions, it is not unusual in consolidation proceedings for applicants to present a proposal, significant elements of which remain to be finalized at the time of decision, and that the Commission has consistently held that it has the power to approve such an application prospectively.²⁶

Applicants remain confident that they will eventually obtain the trackage rights through private contractual means or the bankruptcy court. We should make clear, however, that in granting this approval we take no position on the rights of the various parties asserted before us nor do we intend that our approval should in any way affect those rights.

4. Competitive Conclusions. We conclude that the primary and related applications of D & H Corp. to acquire the assets of D & H and related trackage rights will not result in a substantial lessening of competition, creation of a monopoly or restraint of trade in freight surface transportation in the region. The transaction is procompetitive in that it will not only preserve a major rail carrier in the region, but will also result in improved service in the Northeast United States and Canada.

C. FINANCIAL IMPACTS.

**17 As noted previously, in transactions considered under 49 U.S.C. § 11344(d), a separate analysis of financial impacts and fixed charge coverage is not required. CP and D & H Corp. will incur no debt to finance *121 this transaction, and as a result, we conclude that the financial impacts of the transaction will have no impact upon applicants' ability to compete.

D. PUBLIC INTEREST AND MISCELLANEOUS CONDITIONS.

As noted, the public interest aspects of a proposed transaction under 49 U.S.C. § 11344(d) are material only if significant adverse competitive impacts are found. No adverse competitive impacts are found to emanate from this transaction, and thus we need not analyze the public benefits from this transaction. We only note that the transaction will provide several significant public interest benefits, including the preservation of a viable single-system rail carrier in the Northeast United States, improved service that will enhance the ability of both U.S. and Canadian shippers to compete in their respective markets, and the creation of the first coast-to-coast single-system rail route from the port of Vancouver, British Columbia, Canada to the metropolitan areas of the Northeast United States.

Amtrak has requested the imposition of a condition requiring D & H Corp. and CP specifically to assume the current agreement between D & H and Amtrak, whereby D & H allows Amtrak to operate its New York to Montreal, Adirondack passenger service. The current D & H/Amtrak agreement runs through April 30, 1996. Amtrak is concerned that absent such a condition, applicants will seek to negotiate a new operating agreement covering the Adirondack service before the current agreement expires. Applicants have stated that their acquisition of D & H's assets will facilitate the continuation of passenger services currently operated by Amtrak via D & H's lines. However, as Amtrak points out, they have not specifically requested the Commission to assign to them D & H's obligation to provide the use of its tracks, facilities, and other service to Amtrak. Applicants do not dispute Amtrak's authority to continue its Adirondack service, but they wish to reserve the right, as the new owner of the line, to renegotiate the current agreement. In their reply, applicants argue that Amtrak is authorized under § 402 of the Rail Passenger Service Act (RPSA) to apply to the Commission to fix just and reasonable terms for the transaction, but only after attempting to negotiate mutually acceptable terms for its use of other rail carriers' facilities. For the reasons outlined below, we will deny Amtrak's request.

The agreement in question was entered into on April 16, 1971, as part of the original basic system plan devised by Congress to create Amtrak. As a result, it is a § 401 agreement, rather than a § 402 agreement, as suggested by applicants. See *122 Congress of Railway Unions v. Hodgson, 326 F. Supp. 68 (D.D.C.1971). Pursuant to § 401, a rail carrier can be relieved of its

common carrier obligation to provide rail passenger service by assigning its passenger service to Amtrak. 45 U.S.C. § 56. In return, the rail carrier agrees to allow Amtrak to operate passenger service over its lines at a statutorily arrived-at rate. When it created Amtrak, Congress approved a basic system of rail lines, over which Amtrak acquired the authority to operate pursuant to § 401. The D & H line between Schenectady and Montreal is one such line.

****18** Contracts entered into under § 401 are distinct from those entered into under § 402. Penn Central—Compensation for Passenger Service, 342 I.C.C. 765, 767 (1973). Section 401 agreements concerned rail lines designated by Congress as necessary for the formation of Amtrak's passenger services according to the original basic system plan. Section 402 agreements concern rail lines designated by Amtrak, acting through the authority vested in it by Congress, as necessary for fulfilling its goal of providing efficient rail passenger service. It is clear that the Commission can fix terms and compensation under § 402 upon Amtrak's request, but only after ordering access to the facilities. Here, access was never ordered by the Commission and the obligation to provide Amtrak with use of the tracks and facilities in question, as well as the compensation, stems from the Basic Agreement. Absent a specific § 402 order, we cannot alter these terms. We direct the parties to the provisions of the Basic Agreement, as amended by D & H and Amtrak, on the matter of renegotiation (e.g., § 5.1(D)(5); § 6; and § 7.2(H)). Accordingly, we decline to impose the condition requested by Amtrak but do remind D & H Corp. that it takes this line subject to the obligation imposed by § 401 of the RPSA and the Basic Agreement entered into by its predecessor. We do not intend that our approval of this transaction should serve as an event triggering an obligation to renegotiate separate and apart from the terms of the agreement.

IV. LABOR PROTECTION.

For transactions under §§ 11344–11345, we are required to provide for a fair arrangement at least as protective of the interests of employees who are affected by the transactions as that established under 49 U.S.C. § 11347. In general, merger, control, and line acquisition proceedings under 49 U.S.C. §§ 11343–11345, are subject to the employee protective conditions in New York Dock. Trackage rights transactions are subject to conditions imposed in Norfolk and Western Ry. Co.—Trackage Rights—BN, 354 I.C.C. 605 (1978), as modified by Mendocino Coast Ry., Inc.—Lease and Operate, 360 I.C.C. 653 (1980) (N & W/Mendocino).

***123** Applicants state that the transaction will not have any adverse impact upon current CP employees. They also claim that D & H employees will not be adversely affected by the transaction. They state that arguably, no labor protective conditions would be appropriate, but they have agreed to the imposition of New York Dock and N & W/Mendocino labor protective conditions. They assert that rail labor will benefit from this transaction since jobs on D & H's lines that would otherwise be lost if D & H were liquidated will now be preserved. Since D & H's acquisition by GTI in 1982, D & H employees have been working under wage differential agreements that have held wages below national standards. Implementing agreements negotiated by D & H Corp will bring wage levels and work rules for D & H employees up to the industry's national standard. Moreover, D & H Corp. will recognize seniority rights of those D & H employees currently on furlough and recall them to service as work becomes available.

****19** D & H is bankrupt and is selling substantially all of its rail assets; D & H will no longer continue as an operating railroad once the transaction is consummated. In recognition of this fact, the ASA provides that D & H Corp. will offer jobs to nearly all of D & H's operating employees. D & H Corp. is currently negotiating with the unions representing D & H's employees in order to enter into collective bargaining agreements covering the terms and conditions of their employment with D & H Corp.²⁷ Moreover, D & H Corp. will enter into implementing agreements pursuant to New York Dock to provide protection to those D & H employees who will be adversely affected by this transaction. These agreements would accord appropriate protection to all affected employees.

V. ENVIRONMENTAL MATTERS/HISTORIC PRESERVATION

The Commission's Section of Energy and Environment (SEE) has reviewed environmental data submitted by the applicants and concluded that the proposed transaction will not have a significant impact on the quality of the human environment or conservation of energy resources, provided certain recommended historic preservation conditions are imposed. We will do so.

***124** Under the applicants' operating plan, proposed changes to present operations on the D & H system may be divided into three parts: additional trains; internal and yard adjustments; and capital improvements. Applicants project that by year 3 after acquisition approximately three trains per day will be added to lines between Binghamton and Buffalo, and Binghamton and Allentown, and that one or two trains per day will be added on some other parts of the system. An additional yard crew per day will be added at Saratoga, and a 3-year capital improvement program of \$18.1 million is planned that will focus on the maintenance and rehabilitation of tracks and bridges, and the installation of modern signalling and communication facilities. Applicants also plan to acquire a fleet of 62 diesel locomotives for an additional \$37.2 million. SEE concludes that the proposed transaction's effects on the quality of the human environment and conservation of energy resources will be insignificant, and preferable to a situation where D & H would be forced to liquidate its assets. Any negative environmental impacts from the transaction should be offset by positive impacts. For example, planned improvements to the track structure and communications should decrease fuel use and resultant air emissions by allowing more energy-efficient operations with reduced delays over a less-resistant track surface. Also, improved service should cause old traffic to return and new traffic to be gained from motor carriers, allowing more traffic to move by the more energy-efficient rail mode.

Planned operational changes should not affect land use, wildlife, plant, or water resources, the development or conservation of energy resources, or the movement or recovery of recyclable commodities. Information about this project has been provided to the appropriate offices of the U.S. Army Corps of Engineers and Fish & Wildlife Services, and state and local agencies. Responses from these authorities indicate that the proposal should not have an effect on water or plant and animal resources protected by statute. Further, the development or conservation of energy resources, or the movement or recovery of recyclable commodities should be positively affected by the preservation and improvement of rail service.

****20** The planned operational changes should not affect any historic resources. Applicants plan no abandonments or construction activities. Nevertheless, § 106 of the National Historic Preservation Act, 16 U.S.C. § 470, requires Federal agencies to consider the effect of undertakings within their direct and indirect jurisdiction on any district, site, building, structure, or object that is included in, or eligible for inclusion in the National Register of Historic Places (Register). Regulations of the Advisory Council on Historic Preservation implementing § 106 define all transfers, sales or leases of an historic property as an "adverse effect" requiring the ***125** full historic preservation process of those rules to be followed. 36 C.F.R. § 800.09.

The proposed acquisition involves numerous properties 50 years old or older. Information regarding this proposal was sent to the State Historic Preservation Officers (SHPO) of New York and Pennsylvania. The New York SHPO indicates that this transaction will have no effect on historic resources provided that further consultation with that office precede any future work involving structures 50 years old or older, or substantial ground disturbances. The Pennsylvania SHPO has indicated that numerous properties are not eligible for listing in the Register. However, it found that further information is needed to determine whether eight bridges, one tunnel, and two buildings are eligible for listing in the Register.²⁸

We agree with SEE's analysis and conclusions and will impose historic resources protective conditions requiring applicants to: (1) refrain from any future work on structures 50 years old or older, or activities that produce substantial ground disturbances without first consulting with SEE and the New York SHPO; and (2) retain their interest in and take no steps to alter the historical integrity of any of the 11 properties located in Pennsylvania for which the SHPO has requested additional information until the § 106 Process is completed.

VI. OVERALL CONCLUSIONS

We have concluded that the CP/D & H Corp. application meets all statutory criteria and should be granted and that the condition sought by Amtrak is not necessary or appropriate.

By acquiring D & H's rail lines, CP will obtain direct access to the major metropolitan centers of the Northeastern United States. Improving rail service in the Northeast as well as providing shippers there and in Canada with single-system service between Canada and the Northeast will have a positive and pro-competitive impact on those regions. Although we are not

*126 VI. OVERALL CONCLUSIONS

We have concluded that the CP/D & H Corp. application meets all statutory criteria and should be granted and that the condition sought by Amtrak is not necessary or appropriate.

By acquiring D & H's rail lines, CP will obtain direct access to the major metropolitan centers of the Northeastern United States. Improving rail service in the Northeast as well as providing shippers there and in Canada with single-system service between Canada and the Northeast will have a positive and pro-competitive impact on those regions. Although we are not required to make specific findings on the issue, we note that significant public benefits will result as well.

****21** We have concluded that the proposed consolidation will not significantly affect the quality of the human environment or energy conservation. Additionally, as required by the statute, we have imposed the standard New York Dock labor protective conditions on the primary transaction and for the transactions listed in Sub-Nos. 1-5. For those rail employees affected by the other related transactions, we have imposed the standard N & W/Mendocino labor protective conditions.

VII. FINDINGS

Based on all of the evidence of record, we find that: (a) under the criteria of 49 U.S.C. § 11344(d), the transaction will not cause a substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation needs; (b) the transaction does not contemplate a guaranty or assumption of payment of dividends or of fixed charges and will not result in an increase in fixed charges; and (c) this decision will not significantly affect the quality of the human environment or the conservation of energy resources.

It is ordered.

1. The modifications to the original application proposed by applicants, as noted above, are accepted.
2. In Finance Docket No. 31700, the application is approved.
3. In Finance Docket No. 31700 (Sub-No. 1), the petition for exemption is granted.
4. In Finance Docket No. 31700 (Sub-No. 2), the petition for exemption is granted.
5. In Finance Docket No. 31700 (Sub-No. 3), the petition for exemption is granted.
6. In Finance Docket No. 31700 (Sub-No. 4), the petition for exemption is granted.
7. In Finance Docket No. 31700 (Sub-No. 5), the petition for exemption is granted.
8. In Finance Docket No. 31700 (Sub-No. 6), the application is approved.
9. In Finance Docket No. 31700 (Sub-No. 7), the application is approved.
10. In Finance Docket No. 31700 (Sub-No. 8), the application is approved.

120

- *127 11. In Finance Docket No. 31700 (Sub-No. 9), applicants are permitted to withdraw their application.
12. In Finance Docket No. 31700 (Sub-No. 10), the application is approved.
13. In Finance Docket No. 31700 (Sub-No. 11), the application is approved.
14. In Finance Docket No. 31700 (Sub-No. 12), the application is approved.
15. If the applicants consummate the approved transactions, they shall confirm in writing to the Commission, within 15 days after consummation, the date of the consummation. Where appropriate, applicants shall submit to the Commission three copies of the journal entries recording the consummation of the transaction.
16. All notices to the Commission shall refer to this decision by date and docket number.
17. The authority granted in Finance Docket No. 31700 is subject to the labor protective conditions enunciated in New York Dock Ry., as clarified in Wilmington Terminal, for the protection of applicants' employees.
18. The exemption authority granted in the Sub-Nos. 1-5 is subject to the labor protective conditions enunciated in New York Dock Ry.
- **22 19. The trackage rights authority granted in the Sub-Nos. 6-8 and 10-12 is subject to the labor protective conditions enunciated in Norfolk and Western, as modified by Mendocino Coast Ry., as clarified by Wilmington Terminal, for the protection of applicants' employees who are adversely affected by the transactions.
20. Until completion of the § 106 process, applicants are prohibited from: (1) undertaking any future work on structures 50 years old or older, or causing substantial ground disturbances of properties acquired by applicants in this proceeding, without consulting with SEE and the New York State Historic Preservation Officer; and (2) taking steps to alter the historical integrity of any of the aforementioned properties located in Pennsylvania for which the Pennsylvania State Historic Preservation Officer has requested additional information. If such activities are contemplated, then applicants must contact the Section of Energy and Environment, the New York State Historic Preservation Officer or the Pennsylvania State Historic Preservation Officer, as appropriate.
21. No change or modification shall be made in the terms and conditions approved herein without the prior approval of the Commission.
22. This decision shall be effective on October 17, 1990.
23. A copy of this decision will be mailed to the United States Bankruptcy Court for the District of Delaware.

By the Commission, Chairman Philbin, Vice Chairman Phillips, Commissioners Simmons, and Emmett.

1. Embraces: Finance Docket No. 31700 (Sub-No. 1), Canadian Pacific Limited, et al.—Control Exemption—Albany Port Railroad Corporation; Finance Docket No. 31700 (Sub-No. 2), Canadian Pacific Limited, et al.—Control Exemption and Related Motion for Dismissal—Albany and Vermont Railroad Company; Finance Docket No. 31700 (Sub-No. 3), Canadian Pacific Limited, et al.—Control Exemption and Related Motion for Dismissal—Saratoga and Schenectady Railroad Company; Finance Docket No. 31700 (Sub-No. 4), Canadian Pacific Limited, et al.—Control Exemption and Related Motion for Dismissal—Wilkes-Barre Connecting Railroad Company; Finance Docket No. 31700 (Sub-No. 5), Canadian Pacific Limited, et al.—Control Exemption and Related Motion for Dismissal—Northern Coal and Iron Company; Finance Docket No. 31700 (Sub-No.

121

6), Canadian Pacific Limited, et al.—Trackage Rights—Lines of Consolidated Rail Corporation and Pocono Northeast Railway, Inc.; finance Docket No. 31700 (Sub-No. 7), Canadian Pacific Limited, et al.—Trackage Rights—Lines of Boston and Maine Corporation; Finance Docket No. 31700 (Sub-No. 5), Canadian Pacific Limited, et al.—Trackage Rights—Lines of Buffalo, Rochester and Pittsburgh Railway Company; Finance Docket No. 31700 (Sub-No. 9), Canadian Pacific Limited, et al.—Trackage Rights—Lines of CSX Transportation, Inc.; Finance Docket No. 31700 (Sub-No. 10), Canadian Pacific Limited, et al.—Trackage Rights—Lines of National Railroad Passenger Corporation, as Amended; Finance Docket No. 31700 (Sub-No. 11), Canadian Pacific Limited, et al.—Trackage Rights—Lines of Wilkes-Barre Connecting Railroad Company; Finance Docket No. 31700 (Sub-No. 12), Canadian Pacific Limited, et al.—Trackage Rights—Lines of Albany Port Railroad Corporation.

***128 APPENDIX**

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Footnotes

- 2 Alternatively, applicants seek dismissal of the exemption petitions for control of Albany and Vermont RR, Saratoga and Schenectady RR, WBC and NCIC, contending that these companies are not “carriers” within the meaning of 49 U.S.C. § 11343 and, thus, are not subject to the provisions of the Interstate Commerce Act. Applicants assert that these companies do not hold themselves out as carriers, but merely own lines operated by D & H and its predecessors under long-term leases. In those instances where the lessors may have performed rail operations in the past, applicants argue that such operations ceased long before the passage of the Interstate Commerce Act.
- We will deny the motions to dismiss. The Commission has previously considered these companies to be carriers subject to its jurisdiction when it authorized D & H to acquire control of them. Finance Application of Delaware & H. Co., 158 I.C.C. 615 (1930) and Delaware & H. Co. Finance Application, 162 I.C.C. 646 (1930). We will follow the same course here and assume jurisdiction to consider the exemption petitions involving these D & H subsidiaries. The fact that these companies do not perform and may never have performed their own transportation services is not determinative of their common carrier status. Furthermore, there is no indication that they ever applied for abandonment or discontinuance authority to extinguish their common carrier obligations.
- 3 The waiver decision in Finance Docket No. 31700, et al., Canadian Pacific Ltd. — Pur. Track. — D & H Ry. Co. (not printed), served July 3, 1990 (Waiver), revoked the class exemption in 49 C.F.R. § 1180.2(d)(7) to permit applicants to file these trackage rights applications.
- 4 Case No. 88-342, In re Delaware & Hudson Railroad Company.
- 5 A 2-day extension of the filing dates in the schedule was served, August 1, 1990.
- 6 The Waiver, *supra*, decision granted applicants' request that Soo and CP's motor carrier subsidiary not be considered as applicants in this proceeding.
- 7 Although not at issue, we note that the application was correctly filed under 49 U.S.C. §§ 11343-11345. Where a newly created subsidiary is an integral part of the parent carrier and is not intended to be independent of the parent, particularly as to financial risks, the governing statutory section is 11343, not 10901. See Finance Docket No. 31505, Rio Grande Ind., Inc.—Pur. & Track.—Soo Line R. Co. (not printed), served November 15, 1989 (RGI/Soo—Decision No. 6). In the instant proceeding it is clear that D & H Corp. will be fully integrated into the CP Rail system, both operationally and financially.
- 8 Guilford Transp. Industries, Inc.—Control—D & H Ry. Co., 366 I.C.C. 396 (1982).
- 9 Approximately 900 miles of D & H trackage rights are being acquired in the related trackage rights applications.
- 10 The branch lines are between the following New York points: Saratoga Springs to North Creek; Bluff Point to Freydenburg; Fort Edward to Glens Falls; Hudson Falls to Glens Falls, and Watervliet to Cohoe.
- 11 The yards are at the following locations: Rouses Point, Fort Edward, Saratoga, Whitehall, Colonie, Kenwood, Binghamton, Buffalo and Oneonta, NY; Taylor, PA; and Oak Island, NJ.
- 12 Applicants originally listed Conrail as the owner of these lines and only after filing their application did they discover that the lines had been conveyed by Conrail to PNER. In their reply, applicants request that we accept the technical correction and substitute the name of the owner. We will grant this request.
- 13 BR & P lines were previously operated by The Baltimore & Ohio Railroad Company (B&O), now a part of CSX Transportation, Inc.
- 14 D & H Corp. will assume D & H's rights under a Car Haulage Agreement with G&W, B&O and BR & P dated September 23, 1985. The agreement appears to be merely a business arrangement pertaining to the movement of cars of one carrier by another and, as such, it does not require our approval. Finance Docket No. 30918, KNRECO Inc. d/b/a/ Keokuk Junc. Ry.—Acq. and Oper. Exemp.

122

—The Atchison, Topeka & Santa Fe Ry. Co. (not printed), served April 28, 1988; *aff'd* sub nom. *Simmons v. ICC*, 871 F.2d 702 (7th Cir. 1989).

- 15 In its comments, Amtrak states that Conrail now controls this line. In their reply, applicants modify their original application and now request Commission approval to acquire D & H's trackage rights in this area, regardless of whether Amtrak or Conrail owns or controls the lines in question.
- 16 It does not appear that this indenture is subject to Commission jurisdiction for purposes of 49 U.S.C. § 11301. The FRA indenture is payable only in the event that D & H Corp. abandons the D & H Rail lines or sells them (other than as an ongoing concern) within 10 years following consummation of the current transaction. There does not seem to be any investment motivation for the purchase of the note, as there is no provision for interest — the negotiability of the instrument is therefore doubtful. The indenture appears to be a mere evidence of a loan, thus having more in common with the characteristics of a mortgage than of a security normally subject to our jurisdiction.
- 17 The Attorney General of the United States is a party of record in this proceeding, but has not filed comments.
- 18 Among the supporting shippers are: Agway, Inc.; Armstrong World Industries, Inc.; Bethlehem Steel Corporation; Borden Packaging and Industrial Products; Coors Brewing Company; Delaware River Port Authority, Dow Chemical Company; Ford Motor Company, General Electric Company, Georgia-Pacific Corporation; International Paper Company; Monsanto Chemical Company; PPG Industries, Inc.; Phillips 66 Company, The Proctor & Gamble Company, Quad/Graphics, Inc.; and Scott Paper Company.
- 19 See, e.g., *Union Pacific Corp. Et Al.—Cont.—MO-KS-TX R. Co. et Al.*, 4 I.C.C.2d 409 (1988); *aff'd* on other grounds sub nom. *Railway Labor Executives' Ass'n v. ICC*, 883 F.2d 1079 (D.C. Cir.1989).
- 20 Applicants note that, in addition, the proposed transaction will eliminate the need for an intermediate carrier on movements between points on CP Rail's system and points in the South and Southeast served by carriers such as CSXT and NS.
- 21 It might be argued that D & H is a "failing company," and that the Commission should apply the failing company doctrine in evaluating this transaction. Under this doctrine, a consolidation that would otherwise be disallowed as anticompetitive may be approved if one party to it is a failing firm. See *Santa Fe Southern Pacific Corp.—Control—SPT Co.*, 2 I.C.C. 2d 709 (1986) (*Santa Fe—SPT*). Yet, here we have found no anticompetitive impacts resulting from this transaction, and we need not consider whether D & H is a "failing firm" to approve the acquisition.
- 22 Applicants do not rely solely on diversion studies to support their application, as is often the case in such proceedings. We commend applicants' efforts at limiting the importance of their diversion studies on their analysis.
- 23 As already noted, applicants alternatively filed motions to dismiss in Sub-Nos. 2-5 claiming that Albany and Vermont, SSRC, WBC, and NCIC are not carriers subject to the Interstate Commerce Act. See, *supra* note 2. We have found these entities to be carriers subject to our jurisdiction, and are, therefore, denying the motions to dismiss.
- 24 See *Delaware & H. Ry. Co. v. Consolidated Rail Corp.*, 367 I.C.C. 718, 729 (1983).
- 25 Finance Docket No. 31148, *Indiana Harbor Belt R. Co.—Acquisition of Line of Chicago & W.I.R. Co.—Exemption from 49 U.S.C. § 11343* (not printed), served September 22, 1988 ("It would be inappropriate for this agency to interpose itself among the parties in what is essentially a private contractual dispute ***."); Finance Docket No. 30554, *Iowa Interstate Railroad—Lease and Operate—Exemption* (not printed), served October 1, 1984 (deciding case without reaching contractual issues); *Brotherhood of Locomotive Engineers v. C & NW Transp. Co.*, 366 I.C.C. 857, 858 (1983) ("We agree that contractual disputes between parties to trackage rights agreements are matters for the courts to resolve."); *Illinois Cent. Gulf R.R.—Acquisition—G.M. & O.R. Co.*, 338 I.C.C. 805, 844 (1971) (interpretation of contracts is for the parties and the courts, not the Commission). Cf. *Santa Fe—SPT*, *supra*, at 824 (acknowledging that "there is some doubt whether the Commission has the authority" to modify prior existing trackage rights and paired track agreements).
- 26 See *RGF—Soo*, *supra*, at 877-879; *Norfolk & W. Ry. Co.—Control—Detroit, T. & I. R. Co.*, 360 I.C.C. 498 (1979), *aff'd* sub nom. *Norfolk & W. Ry. Co. v. United States*, 639 F.2d 1096, 1098 (4th Cir.1981); *Northern Lines Merger Cases*, 396 U.S. 491 (1970); Finance Docket No. 30760, *Northeast Wisconsin Railroad Transportation Commission and Escanaba & Lake Superior Railroad Company—Exemption—Acquisition and Operation* (not printed), served January 7, 1986; *Midwestern Rail Prop. Inc.—Pur.—Rock Island*, 366 I.C.C. 915 (1983); and Finance Docket No. 30554 *Iowa Interstate Railroad—Lease and Operate—Exemption* (not printed), served October 1, 1984.
- 27 No comments have been filed by rail labor interests in this proceeding. Apparently, applicants and rail labor have determined to use the collective bargaining process to assure that employees will be accorded the appropriate protection when the transactions would be implemented. Given the contentious history of labor relations on the Guilford lines, we commend the applicants and rail labor on their positive and constructive attitude and efforts.
- 28 The structures in question are: The Tool House at Kingsley in Susquehanna County; Bridge No. WBC4.35 in Hudson; Bridge No. WBC2.04 in Hudson; Bridge No. H82.76 in Avoca; Bridge No. 196.91 at Carbon; Bridge No. H147.78 in Factoryville; Tunnel No.

T149.00 in Factoryville; Bridge No. 151.78 in Nicholson; Bridge No. H152.31 in Nicholson; Bridge No. 160.75 in Kingsley; and the Station at Kingsley, in Hartford Township in Susquehanna County.

A detailed listing of these 11 structures can be found in SEE's environmental assessment, which is a part of the public record in this proceeding.

7 I.C.C.2d 95, 1990 WL 300380

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

SERVICE DATE

NOV 9 1990

Interstate Commerce Commission
Washington, DC 20423

Finance Docket No. 31700

CANADIAN PACIFIC LIMITED, ET AL. - PURCHASE AND
TRACKAGE RIGHTS - DELAWARE & HUDSON RAILWAY COMPANY

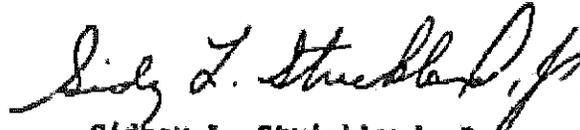
November 6, 1990

NOTICE TO THE PARTIES:

A decision by the Commission in the above proceeding, served October 17, 1990, contained a mistake in the byline on page 127. The byline wrongly stated that Commissioner Lamboley did not participate in the disposition of the proceeding. Commissioner Lamboley had resigned from the Commission when this matter was decided at an Open Commission Conference on October 2, 1990. The byline should read as follows:

By the Commission, Chairman Philbin, Vice Chairman Phillips,
Commissioners Simmons, and Emmett.

Please correct your copy accordingly.


Sidney L. Strickland, Jr.
Secretary

JAN 26 1991

DO

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 31700¹CANADIAN PACIFIC LIMITED, ET AL.-- PURCHASE AND RELATED
TRackage RIGHTS--DELAWARE & HUDSON RAILWAY COMPANY

Finance Docket No. 31805

CANADIAN PACIFIC LIMITED AND D&H CORPORATION--
TRackage RIGHTS EXEMPTION--CONSOLIDATED RAIL CORPORATION

Decided: January 23, 1991

On December 28, 1990, the Canadian National Railway Company (CN or petitioner) filed a verified petition requesting that the Commission: (1) revoke the exemption in Finance Docket 31805; (2) reopen our decision in Finance Docket 31700 in order to examine what CN claims is new evidence and substantially changed circumstances resulting from the Conrail trackage rights agreement; and (3) grant CN leave to conduct document discovery pursuant to 49 CFR 1114. Replies to CN's petition were received on January 17, 1991, from Canadian Pacific Limited and D&H Corporation, as well as from Francis P. DiCello, Trustee for the Delaware & Hudson Railway Company (collectively respondents). The proceeding will be referred to the Office of Hearings for resolution of disputed discovery.

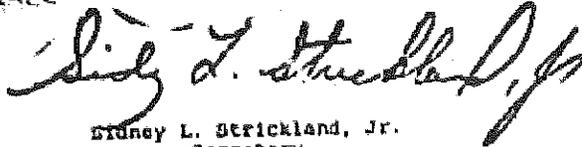
This action will not significantly affect either the quality of the human environment or conservation of energy resources.

¹ Encompasses Finance Docket No. 31700 (Sub-No. 1), Canadian Pacific Limited, et al.--Control Exemption--Albany Port Railroad Corporation; Finance Docket No. 31700 (Sub-No. 2), Canadian Pacific Limited, et al.--Control Exemption and Related Motion for Dismissal--Albany and Vermont Railroad Company; Finance Docket No. 31700 (Sub-No. 3), Canadian Pacific Limited, et al.--Control Exemption and Related Motion for Dismissal--Saratoga and Schoenectady Railroad Company; Finance Docket No. 31700 (Sub-No. 4), Canadian Pacific Limited, et al.--Control Exemption and Related Motion for Dismissal--Milken-Barre Connecting Railroad Company; Finance Docket No. 31700 (Sub-No. 5), Canadian Pacific Limited, et al.--Control Exemption and Related Motion for Dismissal--Northern Coal and Iron Company; Finance Docket No. 31700 (Sub-No. 6), Canadian Pacific Limited, et al.--Trackage Rights--Lines of Consolidated Rail Corporation and Pochena Northeast Railway, Inc.; Finance Docket No. 31700 (Sub-No. 7), Canadian Pacific Limited, et al.--Trackage Rights--Lines of Boston and Maine Corporation; Finance Docket No. 31700 (Sub-No. 8), Canadian Pacific Limited, et al.--Trackage Rights--Lines of Buffalo, Rochester and Pittsburgh Railway Company; Finance Docket No. 31700 (Sub-No. 9), Withdrawal; Finance Docket No. 31700 (Sub-No. 10), Canadian Pacific Limited, et al.--Trackage Rights--Lines of National Railroad Passenger Corporation, as Amended; Finance Docket No. 31700 (Sub-No. 11), Canadian Pacific Limited, et al.--Trackage Rights--Lines of Milken-Barre Connecting Railroad Company; Finance Docket No. 31700 (Sub-No. 12), Canadian Pacific Limited, et al.--Trackage Rights--Lines of Albany Port Railroad Corporation.

It is ordered:

1. Pending discovery matters are referred to the Office of Hearings for resolution.

By the Commission, David M. Bronschnik, Director, Office of Proceedings.



Sidney L. Strickland, Jr.
Secretary

(SCAL)

13423

SEP 13 1991

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 31700¹CANADIAN PACIFIC LIMITED, ET AL.--PURCHASE AND RELATED
TRackage RIGHTS--DELAWARE & HUDSON RAILWAY COMPANY

Finance Docket No. 31805

CANADIAN PACIFIC LIMITED AND D&H CORPORATION--
TRackage RIGHTS EXEMPTION--CONSOLIDATED RAIL CORPORATION

Decided: September 9, 1991

On December 28, 1990, the Canadian National Railway Company (CN or petitioner) petitioned for: (1) reopening of Finance Docket No. 31700 authorizing Canadian Pacific Limited (CP) to acquire the assets of the bankrupt Delaware & Hudson Railway Company (D&H), 7 I.C.C.2d 951; (2) revocation of the exemption in Finance Docket No. 31805 for CP to acquire overhead trackage rights on Consolidated Rail Corporation's (Conrail) 29-mile line between Buffalo and Niagara Falls, NY; and (3) leave to conduct document discovery pursuant to 49 CFR 1114. Replies were filed by Francis P. Dicello, Trustee for the Delaware & Hudson Railway Company (D&H Trustee), and jointly by CP and its operating subsidiary D&H Corporation (DHC) (collectively respondents).

In a decision served January 26, 1991, the Director of the Office of Proceedings referred the discovery issues to the Office of Hearings. Thereafter, in a decision served April 16, 1991, the Administrative Law Judge found inadequate support for and denied CN's request for leave to conduct document discovery.² Subsequently, on August 2, 1991, CN moved to dismiss its petition. The motion is unopposed and will be granted.

¹Embraces: Finance Docket No. 31700 (Sub-No. 1), Canadian Pac. Ltd., et al.--Contr. Exemp.--Albany Port R. Corp.; Finance Docket No. 31700 (Sub-No. 2), Canadian Pac. Ltd., et al.--Contr. Exemp. and Related Motion for Disp.--Albany and Vermont R. Co.; Finance Docket No. 31700 (Sub-No. 3), Canadian Pac. Ltd., et al.--Contr. Exemp. and Related Motion for Disp.--Saratoga and Schenectady R. Co.; Finance Docket No. 31700 (Sub-No. 4), Canadian Pac. Ltd., et al.--Contr. Exemp. and Related Motion for Disp.--Wilkes-Barre Connecting R. Co.; Finance Docket No. 31700 (Sub-No. 5), Canadian Pac. Ltd., et al.--Contr. Exemp. and Related Motion for Disp.--Northern Coal & Iron Co.; Finance Docket No. 31700 (Sub-No. 6), Canadian Pac. Ltd., et al.--Track, Rts.--Lines of Consol. R. Corp. and Pocono Northeast Ry., Inc.; Finance Docket No. 31700 (Sub-No. 7), Canadian Pac. Ltd., et al.--Track, Rts.--Lines of B&O Corp.; Finance Docket No. 31700 (Sub-No. 8), Canadian Pac. Ltd., et al.--Track, Rts.--Lines of Buffalo, Rochester and Pittsburgh Ry. Co.; Finance Docket No. 31700 (Sub-No. 9), Withdrawn; Finance Docket No. 31700 (Sub-No. 10), Canadian Pac. Ltd., et al.--Track, Rts.--Lines of National R. Passenger Corp.; Finance Docket No. 31700 (Sub-No. 11), Canadian Pac. Ltd., et al.--Track, Rts.--Lines of Wilkes-Barre Connecting R. Co.; Finance Docket No. 31700 (Sub-No. 12), Canadian Pac. Ltd., et al.--Track, Rts.--Lines of Albany Port R. Corp.

²Some documents were voluntarily provided to CN, including a redacted version of a December 13, 1990 letter agreement between CP and Conrail which settled the Buffalo-Niagara Falls trackage rights issue and also set out certain other arrangements between the two parties.

We will, however, reopen on our own motion the decision in Finance Docket No. 11700 (Sub-No. 6) to make a ministerial clarification. In connection with the assignment of trackage rights in Philadelphia we stated at 7 I.C.C.2d 117-118 as follows:

Similarly, the Philadelphia trackage rights were granted by the Commission to protect the public interest by providing a competitive counterbalance to Conrail at Philadelphia.¹⁴

¹⁴See Delaware & N. Ry. Co. v. Consolidated Rail Corp., 167 I.C.C. 718, 739 (1983).

We did not mean to suggest that the cited case was the source of D&N's trackage rights EQ (as opposed to IN) Philadelphia. Rather, the cited case, which involved a reciprocal switching prescription, was intended to illustrate our longstanding policy of ensuring a single-system competitive alternative to Conrail. D&N trackage rights EQ Philadelphia were also granted in furtherance of that policy, but they arose out of the United States Railway Association's Final System Plan for the creation of Conrail. Accordingly, 7 I.C.C. 2d 118, n.24, will be revised as follows:

¹⁴See FSP. Cf. Delaware & N. Ry. Co. v. Consolidated Rail Corp., 167 I.C.C. 718, 739 (1983) (reciprocal switching).

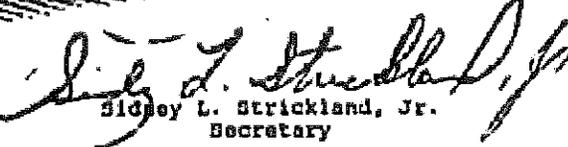
This decision will not significantly affect either the quality of the human environment or conservation of energy resources.

It is ordered:

1. The petition is dismissed.
2. This decision is effective on September 13, 1991.

By the Commission, Chairman Philbin, Vice Chairman Ezsett, Commissioners Simmons, Phillips, and McDonald.




Sidney L. Strickland, Jr.
Secretary

SERVICE DATE

SEP 27 1990

INTERSTATE COMMERCE COMMISSION
WASHINGTON, DC 20423

ENVIRONMENTAL ASSESSMENT

FINANCE DOCKET NO. 31700, 31700 (SUB-NO. 1) ET. AL., CANADIAN
PACIFIC LTD. --PURCHASE AND TRackage RIGHTS -- DELAWARE AND HUDSON
RAILWAY COMPANY

In the above entitled proceeding, the Canadian Pacific Limited (CP) and D&H Corporation (DHC), hereafter referred to as applicants, filed an application on July 18, 1990, seeking accelerated approval from the Interstate Commerce Commission (ICC) allowing DHC to acquire substantially all assets¹, properties, business, and certain trackage rights of the Delaware & Hudson Railway Company (D&H). Applicants state that the "purchase of the bankrupt D&H's assets will ensure continued and improved rail service over the lines of the D&H, whereas such service might otherwise be lost as a result of the liquidation of the D&H."² Concern about possible liquidation of the D&H and the loss of rail service if the proposed transaction is not approved is also expressed by several other parties.³ Approximately two weeks after filing, applicants acquired ICC "emergency" authority to operate the D&H in the absence of any operation by the Trustee under ICC Service Order 1510, which was effective August 1, 1990. The problems of preserving rail service on the D&H are of long standing and well-documented in the record.⁴ Applicants intend to

¹ Assets would include D&H's 50 percent ownership interest in the Albany Port Railroad Corporation, D&H's 76 percent ownership interest in the Albany and Vermont Railroad Company, D&H's 76 percent ownership interest in the Saratoga and Schoenectady Railroad Company, and two wholly-owned D&H subsidiaries - the Wilkes Barre Connecting Railroad Company and the Northern Coal and Iron Company. D&H has trackage rights over lines owned by each of the aforementioned companies which are part of D&H's current operations. (See Application, Volume 1, pp. 4-7).

² Application, Volume 1, Introduction, p. 2.

³ See Verified Comments of the New York State Department of Transportation, August 14, 1990, p.3, and Comments of the United States Department of Transportation, August 15, 1990, p. 12; Also, see Application, Volume 8, Verified Statements of Robert P. Siaskiewicz, GE Silicones, p.4, and Fred H. Zitto, Manager, U.S. Distribution Services, International Paper Company, p. 7;

⁴ Application, Exhibit J, Court Order Authorizing Sale.

consummate this transaction as soon as possible.¹ The proposed acquisition appears designed to preserve and stabilize rail service where it is in danger of being lost.

This proposal should also be viewed as an end-to-end consolidation of two railroads. The proposed acquisition would extend the current CP system² into the major markets of the Eastern United States, and allow it to offer more efficient rail service between these markets and points throughout Canada. The proposed transaction encompasses approximately 1400 route miles of railines, including branchlines and trackage rights over other railroads in the states of New York, Pennsylvania, New Jersey, Maryland, Virginia, and the District of Columbia.

The main part of the acquisition is the 520 mile D&H mainline that runs generally from Montreal in the Canadian Province of Quebec south through Schenectady, Albany, and Binghamton, New York and Scranton and Wilkes Barre to Sunbury in Central Pennsylvania. Another important part of the proposal is the acquisition of approximately 800 miles of D&H trackage rights over other railroads, mainly Conrail. These trackage rights provide access to Buffalo, Newark, Philadelphia, and Washington, D.C. Applicants also propose to acquire 75 miles of D&H branchlines including 56 miles from Saratoga Springs to North Creek, New York, and 7 miles from Fort Edward to Glen Falls, New York. All or parts of yards at Rouses Point, Fort Edward, Saratoga, Whitehall, Colonie, Kenwood, Binghamton, Buffalo, and Oneonta, New York; Taylor, Pennsylvania; and Oak Island, New Jersey are included in the proposed transaction (See map at Figure 1).

After acquisition, applicants plan changes to present operations on the D&H system which may be divided into three parts - additional trains, internal and yard adjustments, and capital improvements. Applicants project that by year three after acquisition approximately three trains per day will be added to lines between Binghamton and Buffalo, and Binghamton and Allentown, and that one or two trains per day will be added on some

¹ Ibid., p. 11.

² CP currently operates almost 14,000 miles of railroad serving Maine, Vermont, and the Canadian provinces of Nova Scotia, New Brunswick, Quebec, Ontario, Manitoba, Saskatchewan, Alberta and British Columbia. CP's subsidiaries, SOO Line Corporation and SOO Line Railroad Company, operate approximately 6,000 miles of railroad serving Illinois, Indiana, Iowa, Kansas, Kentucky, Minnesota, Missouri, Montana, North Dakota, South Dakota and Wisconsin. The proposed transaction should have no appreciable effect on the operations of either of these railroads.

other parts of the system.⁷ An additional yard crew per day will be added at Saratoga to expedite the handling of traffic.⁸ Also, a three-year capital improvement program of \$18.1 million is planned which will focus on the maintenance and rehabilitation of tracks and bridges, and the installation of modern signalling and communication facilities.⁹ Finally, applicants plan to acquire a fleet of 62 diesel locomotives for an additional \$37.2 million.¹⁰ All of these changes should greatly improve operations over the D&H system.

The railroad has submitted an environmental report (ER) that concludes the quality of the human environment will not be affected significantly as a result of the proposal. We have investigated the record in this proceeding. Also, we have contacted appropriate agencies and individuals to verify the railroad's report and to obtain additional information and comments regarding the potential environmental effects of the proposed action. Contacts have included the United States Army Corps of Engineers and Fish & Wildlife Service, and various state and local agencies of New York and Pennsylvania.

Environmental impacts in proceedings of this nature usually result from construction projects, rail line abandonment and related salvage activities, and changes in operations. No new construction activities or abandonment of rail line or rail facilities are a part of this proposal.¹¹ Changes in road or yard operations, as described above, may cause increases in air emissions, noise levels and at-grade crossing accidents or delays for emergency vehicles.

Our experience in rail proceedings of this type has shown that the following thresholds must be exceeded before potentially significant environmental impacts may occur¹²:

⁷ Application, Volume 2, Exhibit 13, Operating Plan (OP), Table 16, p. 26.

⁸ Ibid., p. 22, and Table 17 on p. 27.

⁹ Ibid., p. 20.

¹⁰ Ibid., p. 29.

¹¹ Application, Volume 3, Exhibit 4, Environmental Report (ER), p. 2-2.

¹² See, for example, F.D. No. 30400, Santa Fe Southern Pacific Corporation-Control-Southern Pacific Transportation Company; Merger the Atchison, Topeka and Santa Fe Railway Company and Southern Pacific Transportation Company Environmental Assessment served November 1, 1985 at 32, 33, and 44, and F.D. No. 32000, et al., Ric

1. An increase in rail line operations of eight trains a day;
2. An increase in rail line operations to eight trains a day - for noise impact analysis only;
3. An increase of 100% or greater in gross ton miles;
4. An increase in at-grade crossing delay time of 60 minutes or more per day - applicable to crossing delay (safety) analysis only;
5. For yard operations - a 100% increase in car handling activity, or additional switch engine assignments during night hours - for noise impact analysis only.

Exceeding these thresholds does not necessarily mean that significant environmental impacts will occur. The five thresholds defined above serve to indicate areas where more detailed environmental analysis is required. Conversely, if an area where no thresholds are exceeded may experience adverse environmental impacts resulting from operational changes, it will be identified and reviewed. We have identified no such areas in this review. However, as discussed below, several areas on the current D&H system and one area on the Conrail system have been identified where our thresholds are expected to be exceeded.

The environmental report (ER) prepared by applicants predicts how the proposed acquisition would affect the existing environment. The ER is based upon an Operating Plan¹³ which compares operations on the D&H prior to its being placed in bankruptcy - the second quarter of 1988 - to operations of the now improved D&H system with estimated traffic gains. The period prior to bankruptcy was used because it reflects more normal operations on the D&H, whose traffic declined after bankruptcy. This type of comparison provides a more rational basis for assessing environmental impacts than a comparison to current levels of rail traffic.

The ER identifies several areas where the above-mentioned thresholds may be exceeded on the D&H. Applicants state that changes projected for the existing CP system "... are not substantial enough to have a material impact on CP Rail's

Grande Industries, Inc.; SPTC Holding, Inc.; The Denver Rio Grande and Western Railroad Company-Central-Southern Pacific Transportation Company. Environmental Assessment, served May, 1988, page 2.

¹³ Application, Volume 5, Exhibit 13, Operating Plan (OP).

operations...¹⁴, so those changes are not considered in this report. Increases in gross ton miles are projected to be between 120% and 129%¹⁵ (an increase of approximately three trains per day¹⁶) on two D&H line segments - the 57 mile segment from Binghampton, New York to Taylor Yard in Scranton, Pennsylvania and the 7 mile segment from Taylor Yard to Dupont, Pennsylvania. These increases would exceed Threshold 3 for air emissions, noise levels and at-grade crossing accidents. In addition, the number of trains on the 88 mile Conrail segment from Dupont to Allentown, Pennsylvania would increase from 5 to an estimated 8.4 per day.¹⁷ This increase would exceed Threshold 4 for noise impact analysis only. The last area would be the projected increase of one yard assignment per day at Saratoga¹⁸, which would exceed Threshold 5 for noise impact analysis only. Because these increases exceed our thresholds above, detailed analyses of increases in air emissions and noise levels using accepted methodologies were prepared by applicants.¹⁹ As discussed below, the results of these analyses indicate that even where the thresholds are exceeded, the quality of the human environment would not be significantly affected.

Air quality impacts are determined by quantifying increases in air emissions in areas where air quality problems exist (i.e., non-attainment areas or in "Class 1 Federal Air Quality Areas" which include most National Parks, Monuments, and Wilderness Areas). Applicants have estimated the increase in air emissions resulting from this proposal and identified only one affected "non-attainment area" for ozone, the four Pennsylvania counties of Lackawanna, Luzerne, Susquehanna, and Wyoming.²⁰ However, Applicants indicate that railroad locomotives are excluded from regulations governing air emissions in Pennsylvania, and that the projected locomotive air emissions are less than the level that would be required for regulation of a stationary source, such as power plants, factories, refineries, etc. Further, the increased air emissions would be spread out along the rail line and rapidly dissipate rather than being concentrated in one location. Therefore, increases in air emissions resulting from this proposal should not significantly affect air quality.

¹⁴ Ibid., p. 24.

¹⁵ Ibid., Table 3.

¹⁶ Ibid., Table 2.

¹⁷ ER, Table 4.

¹⁸ OP, Table 17.

¹⁹ ER, pp. 3-3 to 3-15.

²⁰ Ibid., pp. 3-3 to 3-6.

Noise impacts are determined by comparing increases in noise levels to existing levels, and relating these increases to noise-sensitive receptors (residences, hospitals, schools, churches, etc.). Using a conservative approach which tends to overstate results²¹, Applicants estimated the noise impacts along the J line segments - Binghampton to Taylor, Taylor to Dupont, and Dupont to Allentown. Applicants indicate that estimated noise impacts along these line segments would be less than 5 decibels (dBA) in the Day-Night Noise Level scale (L_{dn})²², while studies show that generally an increase of 5 dBA in the L_{dn} must occur before adverse community response is expected.²³ Given the level of estimated noise impacts, and the infrequency of the additional activity (three trains per day) on already active rail lines, no significant increases in noise levels along these line segments are expected.

Noise impacts at Saratoga Yard would exceed the standard used above. Again, using a conservative approach which tends to overstate results, Applicants estimate that noise levels at Saratoga Yard would increase by 6 dBA.²⁴ However, upon examination of United States Geological Survey maps, no known noise-sensitive structures were found to be in the area of increased noise exposure²⁵, and these noise increases should affect only railroad employees who are used to these noises. If these noise increases are unacceptable to railroad employees, measures may have to be taken to make them more acceptable. Therefore, estimated overall noise impacts resulting from this proposal will not significantly

²¹ Ibid., pp. 3-9 to 3-10. Note: The methodology used does not include the shielding effect of intervening barriers - buildings, walls and fences, vegetation, etc., which reduces noise levels. Therefore, the methodology used overstates actual noise increases.

²² L_{dn} is a rating method adopted by the Environmental Protection Agency (EPA) used to describe community noise exposure over a twenty four hour period. L_{dn} adds a penalty of 10 dBA (dBA is a measurement that adjusts sound levels to the hearing characteristics of the human ear and is used for all noise level measurements in this report) to sounds occurring during the period from 10:00 P.M. to 7:00 A.M. to account for the greater annoyance of sounds during normal sleeping times.

²³ EB, pp. 3-10 to 3-11.

²⁴ Ibid., p. 3-14.

²⁵ Ibid., p. 3-16.

affect the quality of the human environment.²⁶

Impacts on public safety in a proposal of this nature would normally occur because of increases in train derailments or accidents and emergency vehicle delays at grade crossings. More trains over the line definitely increases the probability for train derailments and train-vehicle accidents at grade crossings. However, the previously-mentioned improvements in track structure and bridges, and in signalling and communication facilities should improve overall rail safety on the D&H, and train derailments and accidents in general should decrease.

Proposed changes in operations should not significantly increase grade crossing delays for emergency vehicles. Using lower than actual track speeds which produces overstated results, applicants calculate that adding approximately three trains per day on the Taylor to Dupont segment will increase the blocking of grade crossings by 38 minutes per day, well below the Threshold 4 limit of sixty minutes per day.²⁷ Again, the previously-mentioned improvements in track structure should permit faster train clearance of grade crossings and decrease delays on this section, and on the entire D&H system.

Positive environmental impacts are also likely to result from this proposal, and will offset negative impacts to some degree. For example, the proposal should have a positive effect on air quality and energy consumption in the area in two ways. First, planned improvements to the track structure and communications should decrease fuel use and resultant air emissions by allowing more energy-efficient operations with reduced delays over a less-resistant track surface. Also, the planned improvements on D&H and the time-savings resulting from less interchanges and switching on an expanded and more coordinated D&H/CP system should cause old traffic to return and new traffic to be gained from motor carriers. This should cause more truck traffic to be moved by the more energy-efficient rail mode, which should also decrease energy use and resultant air emissions. Finally, the previously-discussed decreases in derailments and accidents, and grade-crossing delays

²⁶ Some railroad noises have positive impacts on public safety. For example, railroad crews are generally required to alert the public of their approach at grade crossings by using whistles and/or bells. Also, grade crossing safety devices often include bells, particularly at crossings where pedestrian or vehicle traffic is considerable. While these noise emissions add to the overall noise levels at grade crossings and may cause some annoyance, they also serve to reduce grade crossing conflicts between trains and vehicles or pedestrians thereby improving public safety.

²⁷ ER, p. 3-18.

should benefit public safety. While these positive effects are not readily quantifiable, proposed changes in operations should at least partially offset the slight increases in air and noise emissions projected along the line.

Based on our examination of the proposed changes in road and yard operations as detailed in the Operating Plan, the Environmental Report, and in other supplemental information, we agree with Applicants' conclusion that the proposal will have no significant effect on noise levels, air emissions, or public safety.

Operational changes should not affect land use, wildlife, plant, or water resources, the development or conservation of energy resources, or the movement or recovery of recyclable commodities. Information about this project, including maps, has been provided to the appropriate offices of the U.S. Army Corps of Engineers and Fish & Wildlife Services, and state and local agencies. The attached responses to date from these authorities indicate that the proposal should not have an effect on water or plant and animal resources protected by statute. Further, the development or conservation of energy resources, or the movement or recovery of recyclable commodities should be positively affected by the preservation and improvement of rail service.

The operational changes listed above should not affect any historic resources. Further, applicants plan no abandonments or construction activities. Nevertheless, under Section 106 of the National Historic Preservation Act, the ICC is required to consider the effect of this proposal on any sites, structures or properties that are included in or eligible for inclusion in the National Register of Historic Places (16 U.S.C. 470f). Moreover, under the Advisory Council on Historic Preservation's regulations implementing Section 106, the transfer, sale, or lease of an historic property is an adverse effect unless the property's significant historic characteristics are protected by adequate restrictions or conditions [See 36 CFR 800.9 (b)(5) & (c)].

The proposed acquisition involves numerous properties 50 years old or older, i.e. bridges, rail structures or facilities. Information regarding this proposal has been sent to the State Historic Preservation Officers (SHPO) of New York and Pennsylvania.²⁵ By attached letter of August 10, 1990, the New York SHPO indicates this proposal will have no effect on historic resources provided that further consultation with that office will precede any future work involving 50 year or older structures or substantial ground disturbances. On the other hand, the Pennsylvania SHPO has indicated that numerous properties are not

²⁵ EB. See appended letters of July 12, 1990 with attachments.

eligible for listing in the National Register of Historic Places, but that further information is needed to determine whether eight bridges, one tunnel, and two buildings are eligible for listing in the National Register of Historic Places (See Attached letters of July 31, 1990, and August 1, 1990). Given the foregoing discussion, we recommend the imposition of an historic resources protective condition prohibiting (1) any future work on 50 year or older structures or substantial ground disturbances of properties acquired by applicants in this proceeding without consultation with the Section of Energy & Environment and the New York SHPO, and (2) the demolition, alteration, or other disposition of any of the eleven Pennsylvania properties for which the SHPO has requested additional information and are described in the attached letters of July 31, 1990 & August 1, 1990 until the Section 106 Process is completed.

Rail employees on the subject lines and their communities should be positively affected by projected traffic increases and commensurate changes in operations. Applicants indicate an intention to "...offer employment to nearly all of the employees currently operating the railroad."²⁸ Applicants further indicate substantial progress in negotiations with affected employees at higher rates of pay, and a willingness to "...provide an opportunity for furloughed employees to return to work..."²⁹ In addition, any employees adversely affected by this proposal will be protected by conditions routinely imposed in proceedings such as this under the Interstate Commerce Act. These "New York Dock" conditions provide affected employees with opportunities for compensation for lost and reduced wages and moving expenses, retraining, and priority consideration for reemployment for a period of up to 6 years. The conditions also soften the economic impact on the communities where the affected employees live. Finally, employees and communities along the line should benefit from the improvement and preservation of rail service and jobs. Given the proposed preservation of rail service, the effect of the labor protective conditions, and the prospect of an improved rail system, this proposal should not significantly affect rail labor and communities.

Alternatives to this proposal would include a similar proposal by another party or no acquisition. A similar acquisition proposal by another party should result in similarly insignificant environmental impacts. Nevertheless, any differences would have to be evaluated in the context of another proposal.

²⁸ Application, Vol. 7, Verified Statement of Donald V. Brazier, Assistant Vice-President, Industrial Relations, CP Rail, p. 1.

²⁹ Ibid p. 2.

A no acquisition alternative would preserve the existing quality of the human environment, at least for the immediate future. Several parties to this proceeding indicate that service is in jeopardy. While it is unlikely that all of the subject lines would be abandoned, uncertainty over the continuation of rail service along these lines could result in diversion of rail traffic to less energy-efficient motor carriers causing increases in fuel consumption and attendant air emissions and traffic congestion, and also affect communities and rail labor through job losses. Therefore, a no action alternative appears to be environmentally less preferable than the proposed acquisition.

We believe that the proposed acquisition would not significantly affect the quality of the human environment or energy conservation, subject to the conditions listed below, and overall, would be environmentally preferable to alternatives where rail service could be disrupted or lost.

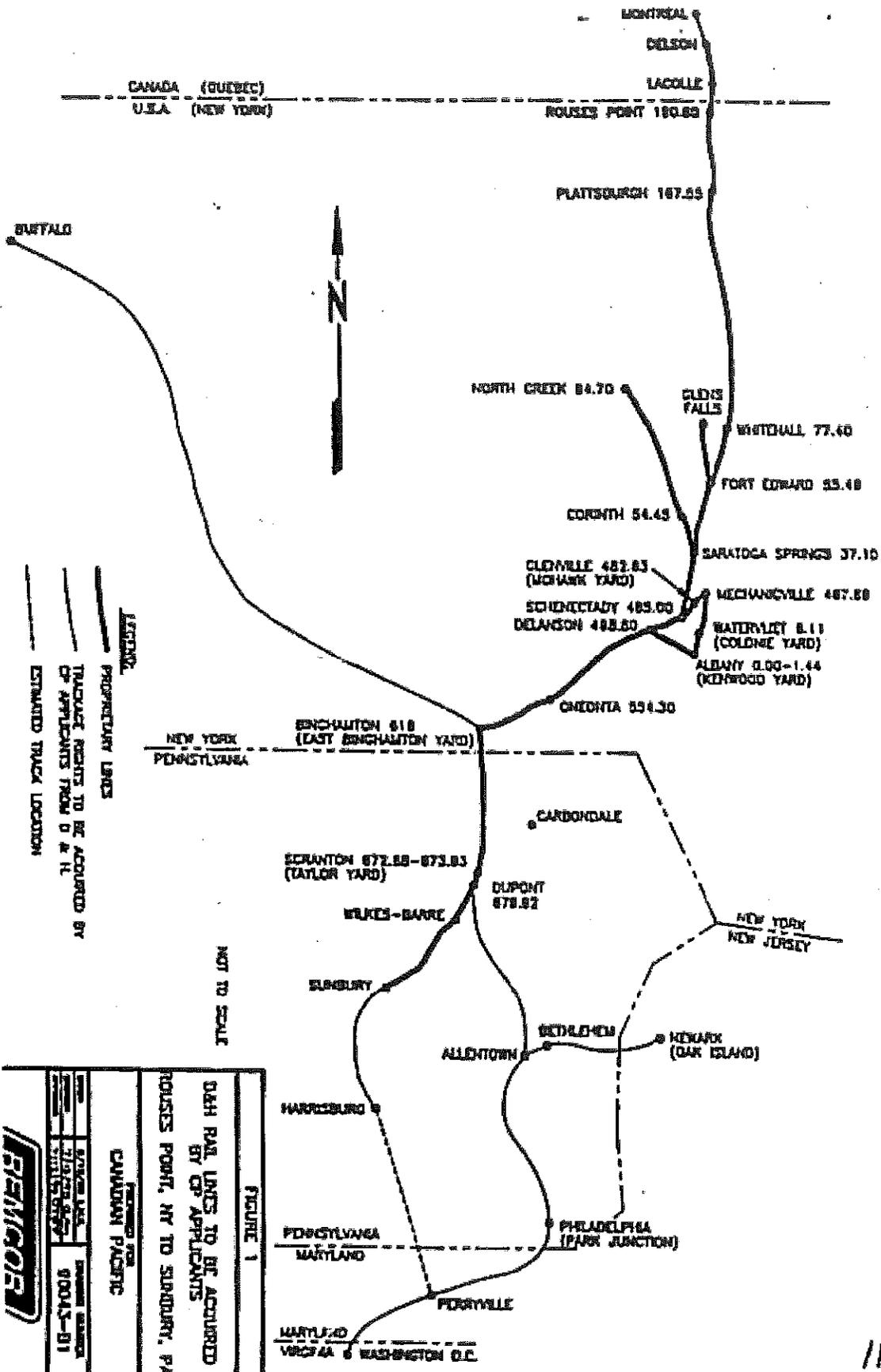
The imposition of the following environmental protective conditions is recommended:

Applicants shall 1) not undertake any future work on 50 year or older structures or initiate substantial ground disturbances of properties acquired by Applicants in this proceeding without consultation between the Section of Energy & Environment and the New York SHPO, and,

2) retain its interest in and take no steps to alter the historic integrity of any of the eleven Pennsylvania properties described in the attached letters of July 31, 1990 & August 1, 1990 until completion of the Section 106 process of the National Historic Preservation Act, 16 U.S.C. 470.

Comments regarding this environmental assessment should be directed as soon as possible to the Commission's Section of Energy and Environment, Office of Transportation Analysis, Room 3219, Washington, DC 20423, to the attention of Dennis B. Wierdak, who prepared this report. Also, any questions concerning this document should be addressed to Mr. Wierdak at (202) 275-0841.

Date made available to the public: September 20, 1990.



NOT TO SCALE

FIGURE 1

RAIL LINES TO BE ACQUIRED BY CP APPLICANTS

ROUSE'S POINT, NY TO SUNBURY, PA

PREPARED FOR

CANADIAN PACIFIC

DATE	BY	PROJECT NUMBER
11/15/83	J. L. ...	00045-01

EMCOR

DOCUMENT CONTROL CENTER

SIDLEY & AUSTIN

ATTORNEYS AT LAW INCLUDING PROFESSIONAL CORPORATION

ONE PINE NATIONAL PLAZA
CHICAGO ILLINOIS 60603
312 557-7000 FAX 312 553-7318
312 557-7000 FAX 312 553-7318

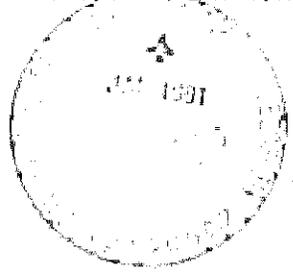
1700 EYE STREET N.W.
WASHINGTON, DC 20006
TELEPHONE 202-429-4000
TELEX 89-160
FACSIMILE 202-429-6144

16 2100 WILLIAM STREET
LONDON E14 6PP ENGLAND
TEL 071 493 0000 FAX 071 493 0737
K. SWEETIN WAS
SINGAPORE 0514
65 224 8000 FAX 65 224 8000
SINGAPORE OFFICE
WASHINGTON DC OFFICE
1700 EYE STREET N.W.
WASHINGTON DC 20006
TELEPHONE 202-429-4000
TELEX 89-160
FACSIMILE 202-429-6144

JAN 23 PM 4:36

January 18, 1991

Mr. Sidney L. Strickland, Jr.
Secretary
Interstate Commerce Commission
Room 1324
12th & Constitution Avenue, N.W.
Washington, D.C. 20423



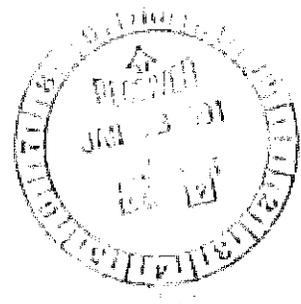
Re: Finance Docket No. 31700, Canadian Pacific Limited
and D&H Corporation -- Purchase & Trackage Rights
-- Delaware & Hudson Railway Company

Dear Mr. Strickland:

This is to advise the Commission that, on January 18, 1991, Canadian Pacific Limited ("CP"), D&H Corporation ("DHC") and the Trustees of the Delaware and Hudson Railway Company consummated the transactions approved by the Commission's October 17, 1990 Decision in the above-referenced proceeding. As of January 18, 1991, DHC ceased providing emergency service pursuant to the Commission's order in Service Order No. 1510, and commenced operation of the D&H as part of the CP Rail system.

Sincerely,
Terence M. Hynes
Terence M. Hynes

ENTERED
Office of the Secretary
JAN 28 1991
Part of
Public Record



TRV902491.SED (1/18/91 9:31am)

June 28, 1990



BY HAND DELIVERY

Noreta R. McGee, Secretary
Case Control Branch
Attn: Finance Docket No. 31700
Interstate Commerce Commission
Room 1324
12th Street, N.W. & Constitution Avenues, N.W.
Washington, D.C. 20423

Re: Canadian Pacific Limited, et al. -
Purchase And Trackage Rights - Delaware
& Hudson Railway Company,
Finance Docket No. 31700

Dear Ms. McGee:

Enclosed for filing with the Commission in the above-captioned proceeding are the original and fifteen (15) copies of a Notice of Intent to Participate by the National Railroad Passenger Corporation.

Thank you for your assistance in this matter.

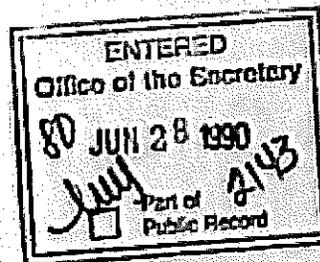
Sincerely,

Dennis M. Moore
Associate General Counsel

DMH:kl

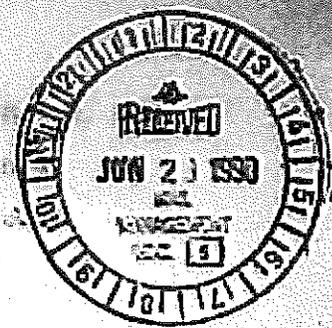
Enclosure

cc: All Parties



AN EQUAL OPPORTUNITY EMPLOYER

BEFORE THE
INTERSTATE COMMERCE COMMISSION



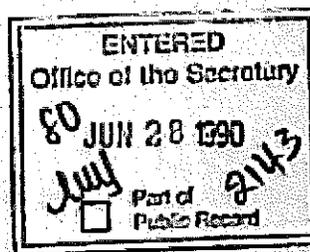
Finance Docket No. 31700

CANADIAN PACIFIC LIMITED, ET AL. - PURCHASE AND
TRackage RIGHTS - DELAWARE & HUDSON RAILWAY COMPANY

NOTICE OF INTENT TO PARTICIPATE
BY THE NATIONAL RAILROAD PASSENGER CORPORATION

The National Railroad Passenger Corporation ("Amtrak") hereby gives notice of its intent to participate in the above-captioned proceeding initiated by Canadian Pacific Limited ("CP").

Amtrak has an interest in this proceeding because CP intends to acquire certain trackage rights over Amtrak's lines (1) between Roy Tower and Harris Tower near Harrisburg, Pennsylvania, and (2) between Post Road/Ferryville, Maryland and Landover, Maryland. In addition, Amtrak's Adirondack passenger rail service between New York, New York and Montreal, Quebec, Canada, currently operates over lines to be acquired by CP from the Delaware & Hudson Railway Company ("DLH").



Please enter the appearances of Dennis N. Moore, Esq.
and Frederick C. Ohly, Esq. representing Amtrak in this
proceeding, upon whom service may be made, as follows:

Dennis N. Moore, Esq.
Frederick C. Ohly, Esq.
Amtrak
60 Massachusetts Avenue, N.E.
Washington, D.C. 20002
(202) 906-2750

Respectfully submitted,



Dennis N. Moore
Associate General Counsel
National Railroad Passenger
Corporation
60 Massachusetts Avenue, N.E.
Washington, D.C. 20002
(202) 906-2750

Dated: June 28, 1990

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of June, 1990, in Washington, D.C. I served a true and accurate copy of the foregoing Notice of Intent to Participate by the National Railroad Passenger Corporation by first-class mail, postage prepaid, upon the following:

Joseph H. Dettmar
Deputy Director, Rail Section
Office of Proceedings
Interstate Commerce Commission
Room 2144
12th Street & Constitution Avenue, N.W.
Washington, D.C. 20423

Alan E. Kleinbird
U.S. Department of Justice
P.O. Box 261
Ben Franklin Station
Washington, D.C. 20044

Attorney General of the United States
555 4th Street, N.W., Room 9104
Washington, D.C. 20530

G. Joseph King
U.S. Department of Transportation
Federal Railroad Administration
400 Seventh Street, S.W.
Room 8201
Washington, D.C. 20590

Secretary of Transportation
400 Seventh Street, S.W.
Washington, D.C. 20590

Charles H. White, Jr.
Haral, Thomas, Fiske, Weiner, Beckhorn &
Hanes
2001 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Terance M. Hynes
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006

Katharina F. Braid
Canadian Pacific Limited
40 University Avenue, Suite 916
Toronto, Ontario, M5J 1T1

Dennis M. Moore

Dennis M. Moore

**NYS DOT
MAIN OFFICE**

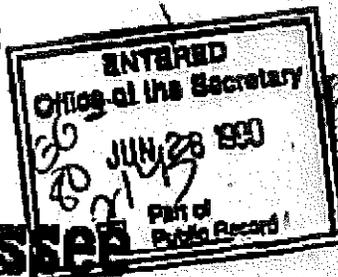
FO-31700

FAX NO.

Confem

275 7245

518-457-4021



Addressee

To: Joseph H Dettmar **Phone No.:** 202 2759237

From: Lone D Johnson **Phone No.:** 518 457411

Pages: 3 **Date:** June 28 '90

Messages: Original is fully expressed
Please call if
you have questions



STATE OF NEW YORK
DEPARTMENT OF TRANSPORTATION
ALBANY, N.Y. 12232

FRANKLIN E. WHITE
COMMISSIONER

June 27, 1990

Horata R. McGee, Secretary
Joseph H. Dattar
Interstate Commerce Commission
Office of Secretary
Case Control Branch
Attn: Finance Docket No. 31700
Room 1324
12th Street and Constitution Avenue, NW
Washington, DC 20423

FEDERAL EXPRESS

Docket No. 31700
Canadian Pacific Limited, et al.
Purchase and Trackage Rights
Delaware & Hudson Railway Co.

Dear Madam Secretary:

Attached please find 15 copies and one original of the Notice by the New York State Department of Transportation of the Intent to Participate in the above-captioned case.

Please include the Department by its attorneys Carline J. Clemente, Esq. and Fritz R. Kahn, Esq. on the service list as indicated in the attached Notice. If you have any questions, you may contact me at (518) 457-2411.

Thank you for your attention.

Very truly yours,

Leon D. Jochowitz
LEON D. JOCHOWITZ
Senior Attorney
Office of Legal Affairs

LDJ:ckf

Attachment
cc: Fritz R. Kahn, Esq.

AN EQUAL OPPORTUNITY/AFFIRMATIVE ACTION EMPLOYER

10 8-72226-222727 P:02 JUL-28-1990 09:30 FROM LEGAL AFFAIRS

BEFORE THE
INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 31700

CANADIAN PACIFIC LIMITED, ET AL.
PURCHASE AND RELATED TRACKAGE RIGHTS
DELAWARE AND HUDSON RAILWAY COMPANY

NOTICE OF INTENT TO PARTICIPATE

Please Take Notice, that the New York State Department by its
Commissioner, the Honorable Franklin E. White intends to participate in the
above-captioned proceeding and requests that it be listed on the service list
by its attorneys as follows:

Carmine J. Clemente
Deputy Commissioner and Special Counsel
Leon D. Jochowitz, of Counsel
New York State Department of Transportation
Building 5, Room 509
1220 Washington Avenue
Albany, New York 12232

and

Fritz R. Kahn, Esq.
Verner, Lipfert, Bernhard, McPherson and Hand
Suite 700
901 15th Street, NW
Washington, DC 20005-2301

Respectfully submitted,

Carmine J. Clemente, Esq.
Leon D. Jochowitz, Esq.
Leon D. Jochowitz
New York State Department of
Transportation
Building 5, Room 509
1220 Washington Avenue
Albany, New York 12232
(518) 457-2411



**NORFOLK
SOUTHERN**

Norfolk Southern Corporation
Law Department
Three Commercial Place
Norfolk, Virginia 23510-2101

R. Allan Winbush
Senior General Solicitor

Writer's Direct Dial Number

(804) 625-3246

June 27, 1990



Office of the Secretary
Case Control Branch
Attn: Finance Docket No. 31700
Interstate Commerce Commission
Washington, D.C. 20423

Re: Finance Docket No. 31700, Canadian Pacific
Limited, Et Al. - Purchase and Trackage Rights -
Delaware & Hudson Railway Company

Dear Sir or Madam:

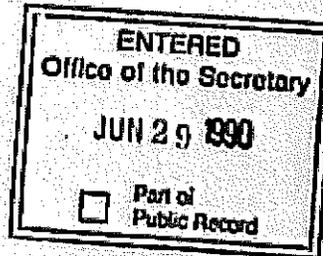
Notice is hereby given that Norfolk Southern Corporation intends to participate in the captioned proceeding and that the undersigned should be shown as its representative on the service list.

As directed by the Commission's Notice, copies of this letter have been sent to the Attorney General of the United States, the Secretary, United States Department of Transportation, and each of applicants' representative and 15 extra copies are enclosed herewith for filing with the Commission.

Yours very truly,

R. Allan Winbush

R. Allan Winbush



Operating Subsidiaries: Norfolk and Western Railway Company / Southern Railway Company / North American Van Lines, Inc.

cc: The Honorable Richard Thornburg
Attorney General of the United States
Tenth Street and Constitution Avenue, N.W.
Washington, D.C. 20530

Secretary of the United States
Department of Transportation
Federal Railroad Administration
400 Seventh Street, S.W.
Washington, D.C. 20590

Charles H. White, Jr., Esq.
Hazel, Thomas, Fleke, Weinar, Beckhorn & Hanes
2001 Pennsylvania Avenue, N.W.
Washington, D.C. 20005

Terence M. Hynes, Esq.
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006

Katharine F. Draid, Esq.
Canadian Pacific Limited
40 University Avenue
Suite 918
Toronto, Ontario M5J 1T1

ENTERED
Office of the Secretary
JUL 2 1990
<input type="checkbox"/> Part of Public Record

June 29, 1990



HARD DELIVER

Office of the Secretary
 Case Control Branch
 Attn: Finance Docket No. 31700
 Interstate Commerce Commission
 12th and Constitution Aves., N.W.
 Washington, D.C. 20423

Dear Secretary McGee:

Pursuant to the Commission's notice served June 25, 1990 in the above-referenced docket, this letter constitutes the notice of intent to participate by Consolidated Rail Corporation ("Conrail"). The names and address of Conrail's representatives for this matter are as follows:

Constance L. Abrams
 Anne E. Treadway
 Consolidated Rail Corporation
 1138 Six Penn Center Plaza
 Philadelphia, PA 19103

A copy of this letter has been served on the following parties:

Attorney General of the United States
 555 4th Street, N.W. Room 9104
 Washington, D.C. 20530

Secretary of Transportation
 400 Seventh Street, S.W.
 Washington, D.C. 20590

Charles H. White, Jr.
 Hazel, Thomas, Fiske, Weiner, Beckhorn &
 Hanes
 2001 Pennsylvania Ave., N.W.
 Washington, D.C. 20006

Terence M. Hynes
 Sidley & Austin
 1722 Eye Street, N.W.
 Washington, D.C. 20006

Page 2

Katharine P. Braid
Canadian Pacific Limited
40 University Avenue
Suite 918
Toronto, Ontario M5S 1T1

Very truly yours,



Anne E. Treadway
Senior General Attorney
(215) 977-5032

DONELAN, CLEARY, WOOD & MASER, P. C.

ATTORNEYS AND COUNSELORS AT LAW
SUITE 850

1275 R STREET N.W.
WASHINGTON, D. C. 20005-4008
TELEPHONE: (202) 571-8800
TELECOM: (202) 571-0800

June 29, 1990



The Honorable Noreta R. McGee
Secretary
Interstate Commerce Commission
Washington, D.C. 20423

Re: Finance Docket No. 31700, Canadian Pacific Limited, et al. -
Purchase and Trackage Rights - Delaware & Hudson Railway
Company

Dear Secretary McGee:

Please find enclosed for filing with the Commission the executed original and fifteen (15) copies of the Notice of Intent to Participate, submitted on behalf of Quad/Graphics, Inc. This Notice is being filed in accordance with the Prefiling Notice and Procedural Schedule in this proceeding, served June 25, 1990.

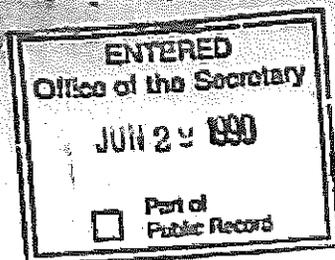
Respectfully submitted,

JOHN K. MASER III
Attorney for Quad/Graphics, Inc.

549-2
Enclosures

(Letter of Transmitted submitted in duplicate)

ENTERED Office of the Secretary JUN 29 1990 <input type="checkbox"/> Part of Public Record
--



**BEFORE THE
INTERSTATE COMMERCE COMMISSION**

Finance Docket No. 31700

**CANADIAN PACIFIC LIMITED, ET AL. - PURCHASE AND
TRackage RIGHTS - DELAWARE & HUDSON RAILWAY COMPANY**

NOTICE OF INTENT TO PARTICIPATE

**Submitted on Behalf of
QUAD/GRAPHICS, INC.**

Pursuant to the Commission's Prefiling Notice and Procedural Schedule in this proceeding, served June 25, 1990, Quad/Graphics, Inc., hereby files its Notice of Intent to Participate in accordance with the procedural schedule adopted by the Commission herein.

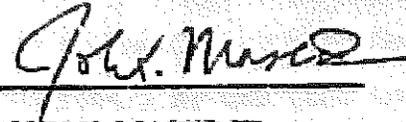
Accordingly, Quad/Graphics, Inc. requests that its representatives be included on the service list to be issued by Commission in this proceeding, as follows:

**Mr. Eric Spieldenner
Manager-Distribution
Saratoga Plant
Quad/Graphics, Inc.
100 DuPlainville Road
Saratoga Springs, NY 12866**

**John K. Maser III
Donelan, Cleary, Wood
& Maser, P.C.
1275 K Street, N.W.
Suite 850
Washington, D.C. 20005-4006**

Dated at Washington D.C. this 29th day of June, 1990.

Respectfully submitted,



JOHN K. MASER III
Donelan, Cleary, Wood
& Maser, P.C.
1275 K Street, N.W.
Suite 850
Washington, D.C. 20005-4006
(202) 371-9500
Attorney for Quad/Graphics, Inc.

Due date: June 29, 1990

Certificate of Service

I hereby certify that I have served today a copy of this Notice upon the Attorney General of the United States, the Secretary, United States Department of Transportation, and applicants' representatives, by first class mail, postage prepaid, in accordance with the Commission's Notice in Finance Docket No. 31700, served June 25, 1990.


JOHN K. MASER III