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BEFORE THE
SURFACE TRANSPORTATION BOARD

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STB DOCKET NO. AB-156 (SUB-NO. 27X)

DELAWARE AND HUDSON RAILWAY COMPANY, INC.
—DISCONTINUANCE OF TRACKAGE RIGHTS EXEMPTION—
IN BROOME COUNTY, N.Y.; MIDDLESEX, ESSEX, UNION, SOMERSET, HUNTERDON,
AND WARREN COUNTIES, N.J.; CUMBERLAND, CHESTER, LUZERNE, PERRY, YORK,
LANCASTER, NORTHAMPTON, LEHIGH, CARBON, BERKS, MONTGOMERY,
NORTHUMBERLAND, DAUPHIN, LEBANON, AND PHILADELPHIA COUNTIES, PA.;
CECIL, HARFORD, BALTIMORE, ANNE ARUNDEL, AND PRINCE GEORGE'S
COUNTIES, AND BALTIMORE CITY, MD.; THE DISTRICT OF COLUMBIA; AND
ARLINGTON COUNTY, AND THE CITY OF ALEXANDRIA, VA.

REPLY TO PETITION TO REVOKE

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Dated: September 17, 2015

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REPLY TO PETITION TO REVOKE

INTRODUCTION

Delaware and Hudson Railway Company, Inc. ("D&H") submits this Reply to the Petition to Revoke (the "Second Petition") filed August 28, 2015 by Samuel J. Nasca ("Nasca") on behalf of SMART/Transportation Division, New York State Legislative Board in this proceeding ("*D&H Discontinuance*"). In his Second Petition, Nasca seeks revocation of the exemption in the above proceeding on the grounds that D&H's use of the 2-year out-of-service class exemption is improper. These are the same grounds put forth in Nasca's previous Petition to Revoke, and which the Board rejected. *D&H Discontinuance*, Docket No. AB 156 (Sub-No. 27X), slip op. at 5-7, (STB served July 10, 2015). Thus, Nasca's Second Petition is a petition for reconsideration that is both late-filed and redundant, and should be rejected on either of these grounds. Further, Nasca fails to articulate any valid basis under the Board's standards for either

reconsideration or revocation. Accordingly, should the Board choose to overlook the procedural defects, it should nevertheless deny the Second Petition.

ARGUMENT

I. The Second Petition is Redundant and Should be Stricken.

In the Second Petition, Nasca argues that the Board should revoke the Notice of Exemption because use of the class exemption procedures is improper. Nasca made this same argument in his Petition to Revoke and for Stay (filed April 20, 2015, at 4). The Board rejected Nasca's argument and held that D&H's use of the class exemption in this proceeding was proper. *D&H Discontinuance*, slip op. at 5-7 (STB served July 10, 2015). Nasca advances no new arguments or new basis for revocation. The filing of the Second Petition serves no apparent legitimate purpose and should be stricken as redundant. 49 CFR § 1104.8.

II. The Second Petition Should be Treated as a Petition for Reconsideration.

Although styled as a petition to revoke, Nasca in fact seeks reconsideration of the Board's prior decisions which found that D&H's use of class action exemption was proper. *See e.g. D&H Discontinuance*, slip op. at 5-7 (STB served July 10, 2015); *Norfolk So. Ry. Co.—Acquisition and Operation—Certain Rail Lines of the Del. and Hudson Ry. Co., Inc. ("NSR/D&H")*, Docket No. FD 35873, Decision No. 6, slip op. at 15-16, 20 (STB served May 15, 2015). Accordingly, the Second Petition should be treated as a petition for reconsideration, and not a petition to revoke. This is an important distinction as petitions for reconsiderations and petitions to revoke are subject to different filing deadlines and standards.

A. Nasca's Second Petition Is Untimely and Should be Rejected.

While a petition to revoke may be filed anytime (49 CFR § 1115.31), a petition for reconsideration must be filed within 20 days "of the service of the action." 49 CFR § 1115.3(e).

Since the Board issued its most recent decision rejecting Nasca's challenge to D&H's use of the class exemption on July 10, 2015, a petition for reconsideration would have been due, at the latest, by July 31, 2015. Nasca's Second Petition was filed on August 28, 2015, and is therefore untimely and should be rejected. *See D&H Discontinuance*, Docket No. AB-156 (Sub-No. 27X), slip op. at 6-7 (STB served Aug. 13, 2015) (rejecting untimely motion to toll time to file an OFA). The Board should not allow Nasca to evade the filing deadline simply by mis-titling his pleading.

B. Nasca's Second Petition Fails to Meet the Standard for Reconsideration.

In addition to being late filed, Nasca fails to meet the standard for reconsideration. Under 49 C.F.R. § 1115.3(b), the Board will grant a petition for reconsideration only upon a showing that the prior action will be affected materially because of new evidence or changed circumstances or that the prior action involves material error. *NSR/D&H*, Decision No. 6, slip op. at 5 (STB served May 15, 2015) (denying Nasca's petition for reconsideration). Nasca fails to identify new evidence or changed circumstances or to establish that the July 10, 2015 Decision constitutes material error. The Board should deny the Second Petition accordingly. *See Reasonableness of BNSF Ry. Co. Coal Dust Mitigation Tariff Provisions*, Docket No. FD 35557 (STB served May 15, 2015) (denying request for reconsideration for failure to meet standard).

Although Nasca claims that "critical information has become available since the Board's publication of its April 8 and July 2, 2015 exemption notices," Nasca does not identify any critical information that was previously unavailable or that is material. If Nasca has in mind that the discontinuance involves trackage rights awarded to D&H as part of the Final System Plan ("FSP"), that is hardly new information. In fact, Nasca previously discussed the trackage rights' FSP origins in prior pleadings in this proceeding. *See* Nasca Petition to Revoke and for Stay filed April 20, 2015 at 5; Nasca Motion to Strike filed May 11, 2015 at 3. As the Board is aware,

the FSP origins have also been discussed extensively by others in pleadings submitted to the Board in this proceeding prior to the July 10, 2015 decision. Information that is already in the record cannot constitute "new evidence" and is not a valid basis for reconsideration.

Alternatively, Nasca may be referring to information Nasca allegedly received from unidentified SMART/TD-NY members regarding the nature of D&H operations over certain segments of the subject trackage rights. According to Nasca, these members "advise at least three of the nine lines embraced in the Board's notice handle active D&H freight traffic." Second Petition at 7. While Nasca appears to imply that D&H is moving "local freight" and, therefore cannot use the class exemption procedures, Nasca stops short of making concrete allegations to this effect. Nasca identifies no actual local D&H traffic that D&H has moved over the subject trackage in the two years prior to its filing of the Verified Notice of Exemption or since. Nor does Nasca explain why this alleged information was previously unavailable. Most importantly, Nasca's vague claims are entirely unsupported by any actual evidence.

Similarly, Nasca fails to identify any material error in the Board's prior decisions. Rather, Nasca simply reiterates the same arguments that he has made previously in this proceeding and which the Board rejected.

III. Nasca's Second Petition Fails to Meet the Standard for Revocation.

Even under the standard for revocation, Nasca's Second Petition must be denied. The Board set out its standard for revocation in its July 10, 2015 decision denying Nasca's prior petition for revocation:

Under 49 U.S.C. § 10502(d), the Board may revoke an exemption, in whole or in part, if the Board finds that regulation is necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101. The party seeking revocation has the burden of proof, and petitions to revoke must be based on reasonable, specific concerns. For example, the Board will revoke an exemption if a petitioner has demonstrated conduct that frustrates the RTP and the

Board has determined that the reinstated regulatory provisions could ameliorate the alleged harms. *Minn. Commercial Ry.—Trackage Rights Exemption—Burlington N. R.R.*, 8 I.C.C. 2d 31, 35-36 (1991) (the Board’s revocation analysis “focuses on the sections of the RTP related to the underlying statutory section from which an exemption is sought”).

Slip op. at 3-4 (citations omitted).

Once again, Nasca fails to show that regulation is necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101. Nasca alleges no specific competitive or other harm that will result from the discontinuance of D&H trackage rights and, as the Board has already observed, none will occur. *See* Docket No. FD 35873, Decision No. 6, slip op. at 14-16, 20-21 (STB served May 15, 2015). Thus, Nasca's Second Petition seeks to increase the regulatory burden to exit without demonstrating that such regulation is necessary to carry out the rail transportation policy. The RTP seeks to reduce the regulatory burden on exits from the industry and compels denial of the Second Petition. *See, e.g.*, 49 U.S.C. § 10101(2), (7), (15) (rail transportation policy seeks to minimize the need for Federal regulatory control over rail transportation system, to reduce regulatory barriers to entry and exit, and to provide for the expeditious handling and resolution of all proceedings).

Nasca suggests that because the trackage rights originated in the FSP, those rights are somehow ineligible for discontinuance under the class exemption procedures and must be subjected to regulatory scrutiny. Nasca, however, cites no authority for this erroneous proposition and none exists. The RTP specifically seeks to minimize the regulatory burden on carriers seeking to exit, and to provide for the expeditious handling and resolution of such proceedings. Congress made no exception to the RTP for rights conferred in the FSP.

Indeed, it would be unreasonable to conclude that Congress intended that rights conferred in the FSP be subject to increased regulatory burdens, particularly considering the historical

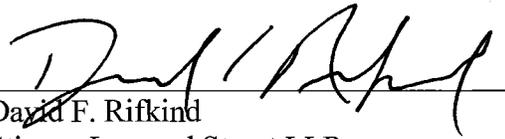
context. Both the FSP and RTP were legislative responses to the same root problem – over-regulation. Over-regulation led to the demise of several northeastern carriers in the 1970s resulting in lost competition in the northeast and over-regulation led to the generally dismal state of the rail industry at that time. In an effort to revitalize the rail industry, Congress passed landmark legislation largely deregulating the industry. At the same time, in an effort to restore the competition in the northeast that was lost as a result of over regulation, Congress established the process resulting in the FSP. Clearly, Congress did not intend that rights conferred under the FSP would be subject to unnecessary regulatory burdens of the kind that made the FSP necessary in the first place.

CONCLUSION

For the foregoing reasons, D&H respectfully requests that the Board deny the Second Petition in all respects.

Respectfully submitted,

Dated: Sep. 17, 2015

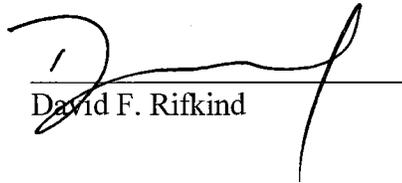

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CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing Reply to be served by First Class Mail and by e-mail where an e-mail address is included on the Board's official service list, on September 17, 2015 to parties of record.


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