

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**FINANCE DOCKET NO. 35348**

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**CSX TRANSPORTATION, INC. & DELAWARE AND HUDSON  
RAILWAY COMPANY, INC - JOINT USE AGREEMENT**

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**APPLICANT DELAWARE AND HUDSON RAILWAY COMPANY, INC.'S  
REPLY IN OPPOSITION TO NEW YORK & ATLANTIC RAILWAY  
COMPANY'S MOTION TO COMPEL RESPONSES TO ITS  
FIRST SET OF DISCOVERY REQUESTS**

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Dated: July 12, 2010

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COMPANY'S MOTION TO COMPEL RESPONSES TO ITS  
FIRST SET OF DISCOVERY REQUESTS**

Pursuant to the Board's regulations at 49 C.F.R. § 1114.31(a)(1), Applicant Delaware and Hudson Railway Company, Inc., ("D&H"), hereby submits this Reply in Opposition to New York & Atlantic Railway Company's ("NYA's") Motion to Compel Responses to the First Set of Discovery Requests Directed to D&H (the "Motion"). For the reasons set forth hereinafter, NY&A's Motion should be denied in its entirety.

NYA invokes what it describes as "the Board's policy of generally permitting discovery of all relevant information." (Motion at 1.) However, as the Board's prior decisions make clear, discovery is not an opportunity for a party to gain access to any information in which it might be interested. Rather, a party seeking to compel discovery must "show clearly that the information sought is relevant and would lead to admissible evidence." *Export Worldwide, Ltd. v. Knight*, 241 F.R.D. 259, 263 (W.D. Tex. 2006); *see* STB Docket No. 42069, *Duke Energy Corp. v. Norfolk So. Ry. Co.* (July 26, 2002) ("*Duke/NS*") (discovery must be "reasonably calculated to lead to discovery of admissible evidence"); *Alexander v. FBI*, 186 F.R.D. 154, 159 (D.D.C. 1999) ("[T]he proponent of a motion to compel discovery bears the initial burden of proving that the information sought is relevant."). The Board has made clear that "discovery requests must be

narrowly drawn, directed toward a relevant issue, and not used for a general fishing expedition.”

*Duke/NS*. As the Board has recognized, relevance is a function of whether the specific information sought is necessary for the Board’s determination of the issues that it must decide under the statutory standards governing a proceeding. *See, e.g.*, STB Fin. Docket No. 35087, *Canadian Nat’l Ry. Co. & Grand Trunk Corp. Control—EJ&E West Co.* (Feb. 22, 2008) (Board denies motion to compel discovery of traffic and environmental information that was not necessary to the Board’s public interest determination); STB Fin. Docket No. 35081, *Canadian Pac. Ry. Co.—Control—Dakota, Minn. & E. R.R. Corp.*, Decision No. 8 (Mar. 27, 2008) (“The requirement of relevance means that the information might be able to affect the outcome of a proceeding.”). NYA’s Motion falls far short of meeting these well-established standards.

NYA’s Motion seeks to compel production of three categories of information: (1) the fees and charges that D&H pays to third parties for the exercise of its existing Albany – Fresh Pond trackage rights; (2) commodity-specific traffic volumes – dating back to 2002 – moved by D&H over a rail line that is not involved in the transaction before the Board in this proceeding; and (3) copies of every “haulage” agreement to which D&H is a party. As this Reply demonstrates, none of the information sought by NYA is relevant to any issue that the Board must decide in this minor application proceeding. Moreover, contrary to NYA’s suggestion, compliance with NYA’s requests would require D&H to perform special studies to ascertain the specific data and information requested by NYA. NYA’s Motion fails to articulate any persuasive basis for imposing on D&H the burden of developing and producing such irrelevant information.

**A. NYA's Request That The Board Compel A Further Response To Interrogatory No. 3 and Request for Production No. 1 Should Be Denied.**

NYA's Motion asks the Board to compel D&H to provide a further response to NYA's Interrogatory No. 3, which seeks "the amount of all fees and charges currently paid by D&H to third parties" during the years 2006-2009 in connection with D&H's trackage rights operations between Albany and Fresh Pond, NY. (Motion at 3.) D&H objected to Interrogatory No. 3 on the grounds that the requested information is neither relevant to any issue in this proceeding nor reasonably calculated to lead to the production of admissible evidence. D&H further objected that, in order to provide the requested information for years other than 2007, D&H would be required to perform a special study to determine the specific amounts of the trackage rights fees and other charges actually paid to CSXT, Amtrak and Metro North during those years. *See* Attachment 1, D&H Responses/Objections at 7.

As an initial matter, the only issue before the Board in this minor application proceeding is whether the proposed transaction will result in a "substantial lessening of competition, creation of a monopoly or restraint of trade." 49 U.S.C. § 11324(d). NYA makes no showing whatsoever that the requested information is necessary to enable it (or the Board) to evaluate that issue. Indeed, the Comments filed by NYA on July 2, 2010 do not even allege that the proposed transaction raises any competitive concerns. Rather, NYA's request for a condition is premised on its purported concern that the transaction will "jeopardize" NYA's participation in certain stone shipments that it handles on an interline basis with D&H, because (according to NYA) the economic terms of the joint use agreement "may well be insufficient to keep D&H interested in the business." (NYA-5, Comments at 6.) However, NYA acknowledges that the subject stone traffic is "rate constrained" (*id.*); that stone currently moves to the Long Island destinations served by NYA by both truck and barge (*id.* at 7); and that {

} (*id.* at 13).<sup>1</sup> As the Application shows, the proposed transaction will not result in any lessening of competition. To the contrary, the transaction will improve D&H's competitive position, both by reducing its costs and by enabling it to offer customers more frequent service.

Even assuming *arguendo* that NYA's concerns regarding the impact of the proposed joint use agreement on D&H's continuing "interest" in handling stone traffic in conjunction with NYA were relevant – and it is not – NYA's demand for copies of D&H's trackage rights agreements (and the fees paid by D&H under those agreements during the years 2006-2009) reflects the incorrect assumption that the fees that D&H pays to third parties represent the "cost" of D&H's current trackage rights operations. As NYA itself acknowledged in its recent Comments, "if D&H operates at all on the Albany – Fresh Pond Segment, it has [to] pay for crews, locomotives and fuel for its operations, as well as the [trackage rights fees] it pays to CSXT and others." (NYA-5, Comments at 13-14 (emphasis added).) D&H has already produced to NYA a study that D&H performed (based upon its 2007 operations) comparing the total cost of D&H's current trackage rights operations (including both payments to third parties and the cost of D&H locomotives, fuel and crews) versus the costs that D&H would incur under the proposed joint use arrangement with CSXT. (D&H – HC – 00168-00169.) As that analysis – which was prepared in connection with D&H's negotiations regarding a potential joint use agreement with CSXT – shows, the joint use agreement will reduce D&H's operating costs by approximately {                    } per year. NYA proffers no reason why the information set forth in that study is insufficient to enable NYA to understand the impact of the proposed joint use

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<sup>1</sup> NYA's Comments fail to mention that NYA also handles thousands of carloads of stone to Long Island destinations in conjunction with the Providence and Worcester Railroad Company ("P&W").

arrangement on D&H's costs in the Albany – New York City corridor.<sup>2</sup> Since its initial production to NYA, D&H has discovered one additional document, which contains a preliminary estimate of the costs (including payments to CSXT, Amtrak and Metro North) incurred by D&H in connection with its East-of-the-Hudson trackage rights operations during 2006. D&H is making that document available to NYA as an attachment to this Reply. See Attachment 3, Document DH –HC – 00257. In order to develop similar information for other years (as NYA's Motion demands), D&H would have to perform additional special studies. The Board has consistently refused to compel parties to perform special studies in order to respond to a discovery request. See *Entergy Arkansas, Inc. v. Union Pac. R.R. Co.*, STB Fin. Docket No. 42104 (May 7, 2008) (“[T]he Board’s discovery rules do not require UP to conduct a special study to provide information precisely in the form sought by Entergy.”); *PPL Montana, LLC v. BNSF Ry. Co.*, STB Fin. Docket No. 42054 (Nov. 9, 2000) (“Our discovery rules . . . require parties to furnish information in their possession, not to prepare special studies.”); *Waterloo Ry. Co.—Adverse Abandonment—Lines of Bangor & Aroostook R.R. Co.*, STB Docket No. AB-124 (Sub-No. 2) (May 6, 2003) (“If information . . . is not readily available, we will not require CN to finance a special study to produce it.”). The Board should likewise deny NYA's Motion to compel D&H to perform such studies for NYA's benefit in this case.

**B. NYA's Requests For Information About The Southern Tier Line Are Irrelevant to this Proceeding.**

NYA also asks the Board to compel responses to Interrogatory Nos. 4 and 5, which request a commodity-specific breakdown of the carloads moved by D&H over Norfolk

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<sup>2</sup> Contrary to NY&A's claim that the information in the 2007 study is “cryptic” (Motion at 4), those documents clearly identify the dollar amounts that D&H paid to each of CSXT, Amtrak and Metro North in connection with its trackage rights operations in 2007, and thus are directly responsive to NY&A's request.

Southern's ("NS") so-called "Southern Tier" line between Binghamton and Buffalo, NY. D&H formerly had trackage rights over the Southern Tier line. In 2005, those trackage rights were discontinued,<sup>3</sup> and replaced by a haulage agreement pursuant to which NS handles traffic for D&H's account over the line. Interrogatory No. 4 seeks commodity-specific information for traffic moved by D&H over the Southern Tier pursuant to its trackage rights in each of the years 2002, 2003, and 2004. Interrogatory No. 5 seeks the same information for traffic moved pursuant to the NS-D&H haulage arrangement in each of the years 2006, 2007, 2008 and 2009.

The information sought by NYA Interrogatory Nos. 4 and 5 is simply not relevant to any issue in this proceeding. Neither the Southern Tier line nor D&H's traffic on that line are involved in the transaction before the Board in this proceeding – and NYA does not contend otherwise. Indeed, the only justification NYA can muster for its request that the Board compel D&H to produce seven years' worth of traffic data for this unrelated line is its assertion that it might be "instructive" to see whether D&H's acquisition of haulage rights on the Southern Tier "made [D&H] more competitive." (Motion at 6.) This bald assertion is insufficient to support a grant of the relief that NYA seeks.

As an initial matter, whether the transaction authorized in *Southern Tier* made D&H "more competitive" is not relevant to any issue before the Board in this case. The issue in this proceeding is whether the proposed D&H-CSXT joint use agreement will have "adverse competitive impacts that are both likely and substantial" and, if so, whether such anticompetitive effects outweigh the public interest in meeting significant transportation needs. *The Indiana Rail Road Co.—Acquisition—Soo Line Railroad Company*, Finance Docket No. 34783, Decision

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<sup>3</sup> See *Delaware and Hudson RY. Co.—Discontinuance of Trackage Rights—in Susquehanna Cty PA et al.*, STB Docket No. AB-156 (Sub-No. 25X) (served Jan. 19, 2005) ("*Southern Tier*").

No. 4, at 4 (served Apr. 11, 2006) (internal quotation marks omitted). Whether or not an entirely different transaction relating to an entirely different rail corridor approved by the Board five years ago made D&H “more competitive” in that corridor has nothing at all to do with the competitive impact of the joint use agreement before the Board in this case.

NYA’s suggestion that the “net effect” of the transaction authorized in *Southern Tier* is “substantially identical” to the transaction at issue in this proceeding (Motion at 5) is nonsense. In *Southern Tier*, D&H obtained (and consummated) authority to discontinue its trackage rights over the Southern Tier line – so its relinquishment of the right to operate its own trains on that line was permanent. Here, D&H is retaining its trackage rights, and will have the ability to re-institute separate train operations between Albany and Fresh Pond in the event that CSXT fails to handle D&H’s traffic in accordance with customer requirements or D&H traffic volumes increase to the point where separate train operations become more cost effective for D&H than moving its traffic under the joint use agreement. In short, rather than relinquishing its ability to exercise trackage rights (as it did in *Southern Tier*), D&H is gaining the flexibility to move traffic between Albany and the New York metropolitan area more cost effectively without forfeiting its existing trackage rights. Moreover, the economic terms of the proposed joint use agreement with CSXT are different than the terms under which D&H exercises haulage on the Southern Tier today.

In any event, a mere comparison of D&H’s traffic volumes on the Southern Tier line in the years before and after it discontinued its trackage rights over that line is not a valid measure of the degree to which D&H is “competitive” in that corridor, for several reasons. First, as the Board well knows, traffic volumes across the national rail system were depressed during 2008 and 2009 due to the recent economic downturn. A comparison of 2008 and 2009 volumes and

pre-recession volumes is thus inherently suspect. Second, D&H volumes on the *Southern Tier* have been adversely affected by conditions on a bridge in the vicinity of Portage, NY, which prevents D&H from moving cars in excess of 286,000 pounds over the line. Such cars must move over CPR's Canadian lines between Buffalo and Montreal, then south to the D&H via Rouses Point, NY. Third, following implementation of the *Southern Tier* transaction, CPR and D&H have chosen to reroute internally some of the overhead traffic that D&H previously handled over the *Southern Tier* line. That traffic now moves via Montreal, because that is the most cost effective way for CPR and D&H to handle it. For these reasons, simply looking at changes in D&H's traffic volumes on the Southern Tier over the past several years says nothing about D&H's "competitiveness" in the Southern Tier corridor.

Finally, NYA's assertion that the information requested by Interrogatory Nos. 4 and 5 "is kept in the ordinary course" and can readily be "extracted from D&H's data base" (Motion at 6) is wrong. In order to "identify the number of carloads of traffic, by commodity," that moved via the Southern Tier route during years dating back to 2002 would require D&H to conduct a special study.<sup>4</sup> The process of compiling the requested data for earlier years is complicated by the fact that D&H's parent, CPR, adopted new computer systems, so that the data are not available in a uniform format from a single data base. NY&A has not proffered any legitimate justification for compelling D&H to expend the time and resources that would be required to comply with NYA's irrelevant request.

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<sup>4</sup> NY&A has not proffered any justification for its request that D&H produce Southern Tier traffic on a commodity-specific basis.

**C. D&H's Haulage Agreements Are Irrelevant To This Proceeding.**

Finally, NYA seeks to compel D&H to respond to its Interrogatory No. 7, which seeks production of "all haulage agreements currently in effect between D&H and another railroad and the fee/paid/received by D&H . . . under each such arrangement." (Motion at 6-7.) The purported basis for this extraordinarily sweeping request is NYA's assertion that "the haulage fees in D&H's other haulage arrangements are highly relevant to the issues of whether the fees in the Joint Use Agreement are customary and reasonable, and are likely to make D&H more competitive." *Id.* at 6-7. NYA's request should be denied, for multiple reasons.

Whether the D&H Service Charge that D&H would pay for moving D&H cars in CSXT trains the handling of its traffic is "customary and reasonable" is not a relevant issue in this case. The question that the Board must decide here is whether the proposed transaction is anticompetitive, not whether D&H struck a good bargain with CSXT. The Board has consistently refused to second-guess the "reasonableness" of the economic terms of transactions presented to it for approval. *See, e.g., South Carolina Cent. R.R. Co.—Purchase and Lease—CSX Transp., Inc. Lines in Ga. And Ala.*, ICC Finance Docket No. 31360 (Apr. 28, 1989) ("We presume that SCRF is the best judge of the business opportunities this transaction presents. . . . It is not for us to second guess SCRF's business judgment."<sup>5</sup>)

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<sup>5</sup> *See also Canadian Nat'l Ry. Co. and Grand Trunk Corp.—Control—Duluth, Missabe and Iron Range Ry. Co. et al.*, STB Finance Docket No. 34424, Decision No. 7 (Apr. 9, 2004) ("The Board sees no reason to second-guess the business judgment" of parties who negotiated a trackage rights fee); *Greendyke Transport, Inc. et al.—Pooling Agreement*, STB Docket No. MC-F-20941 (June 7, 1999) ("[W]e see no reason to second-guess Applicants' business judgments as to how they can operate efficiently."); *Rio Grande Industries, Inc.—Purchase and Related Trackage Rights—Soo Line R.R. Co. Line Between Kansas City, MO and Chicago, IL*, 6 I.C.C. 2d 854, 886 (1990).

Moreover, there is no such thing as a “customary” haulage fee. Rather, the economic terms of haulage agreements are the product of the unique circumstances of each transaction, including the volume of haulage traffic; the distance over which haulage services are provided; the frequency of service provided, and any service guarantees; whether the serving carrier (or the haulage recipient) provides locomotives and fuel; the duration of the agreement; and whether the transaction involves “reciprocal” grants of haulage rights (or trackage) rights. Accordingly, comparing the fees payable under different haulage arrangements, or attempting to ascertain what level of compensation is “customary,” is a meaningless exercise.

In any event, the level of haulage fees paid (or collected) by D&H in connection with haulage arrangements involving other rail lines or corridors is utterly irrelevant to the second “issue” cited by NYA in support of this request – *i.e.*, whether the joint use agreement will make D&H more competitive in the Albany – New York City corridor. The amounts that D&H pays for (or receives for performing) haulage services in other corridors has no bearing whatsoever on how the joint use agreement before the Board in this case will affect D&H’s competitive capability in the Albany – New York City corridor. Rather, the potential impact of the joint use arrangement on D&H’s ability to compete more effectively in the Albany – New York City corridor depends, in part, on whether the transaction will reduce D&H’s costs. D&H has already produced to NYA the analysis that it performed during the course of evaluating a potential joint use arrangement with CSXT, which indicates that, considering all costs, exercising the joint use rights that it negotiated with CSXT will reduce D&H’s operating expenses in the Albany – New York City corridor by approximately {                    } annually. *See* Attachment 2. More importantly, the joint use agreement will enable D&H – for the first time – to offer customers

service five to seven days per week. *See* Application at 12, V.S. Craig at 5-6. Thus, the impact of the proposed transaction on D&H's competitive capability will be decidedly positive.

NYA appears to argue that the mere fact that there is a Protective Order in this case provides sufficient grounds for forcing D&H to disclose to NYA the terms of all of D&H's haulage agreements. But NY&A's mere desire to peruse the terms of haulage arrangements that have nothing to do with the current transaction, or to compare the D&H Service Charge to the fees that D&H pays other carriers to handle its traffic (or vice versa) is no justification for the Board to require D&H – much less third parties to those agreements – to disclose the commercially sensitive terms of their business arrangements, even pursuant to a protective order. Indeed, in order to grant NYA's request, the Board would have to order third party carriers to consent to disclosure by D&H. While such steps may be appropriate where the terms of confidential agreements are directly relevant to the issues in the case – such as a rate reasonableness case where the terms of the defendant carrier's transportation contracts may be necessary for a complainant to select traffic for its stand-alone railroad – they should not be taken in a case like this one, where the haulage agreements at issue are not relevant to any issue before the Board. The existence of a Protective Order is not an excuse for parties to engage in fishing expeditions for confidential and commercially sensitive agreements. *See Duke/NS* (“[D]iscovery requests must be narrowly drawn, directed toward a relevant issue, and not used for a general fishing expedition.”).

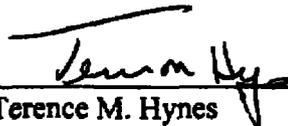
In prior proceedings, the Board has rejected similar blanket requests for an applicant's haulage agreements with other carriers, where there was no showing that the agreements were relevant to whether the proposed transaction was anticompetitive. *See Canadian Pacific Ry. Co.—Control—Dakota, Minnesota & Eastern R.R. Corp.*, STB Finance Docket No. 35081,

Decision No. 8 (Mar. 27, 2008) (denying KCS request for production of DM&E interline agreements with other carriers because “[t]he particular terms of any DM&E interline arrangements are not relevant to whether the combined carrier is likely to foreclose competition with regard to KCS”). The Board should likewise reject NYA's overreaching Interrogatory No. 7.

**CONCLUSION**

For the foregoing reasons, Applicant D&H respectfully request that the Board deny NYA's Motion to Compel in its entirety.

Respectfully submitted,

  
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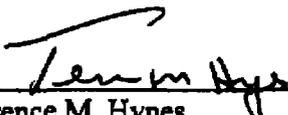
Dated: July 12, 2010

**CERTIFICATE OF SERVICE**

I hereby certify that I have caused the foregoing Applicant Delaware and Hudson Railway Company, Inc.'s Reply in Opposition to New York & Atlantic Railway Company's Motion to Compel Responses to Its First Set of Discovery Requests to be served by first class mail, postage pre-paid, this 12th day of July 2010, to all Parties of Record and to the following:

Secretary of Transportation  
1200 New Jersey Avenue, S.E.  
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Attorney General of the United States  
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Washington, D.C. 20530

  
\_\_\_\_\_  
Terence M. Hynes

**ATTACHMENT 1**  
**REDACTED PURSUANT TO PROTECTIVE ORDER**

**ATTACHMENT 2**  
**REDACTED PURSUANT TO PROTECTIVE ORDER**

**ATTACHMENT 3**  
**REDACTED PURSUANT TO PROTECTIVE ORDER**

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