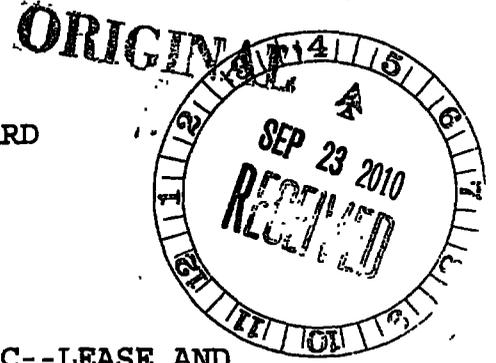


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Before the  
SURFACE TRANSPORTATION BOARD



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Finance Docket No. 35412

MIDDLETOWN & NEW JERSEY RAILROAD, LLC--LEASE AND  
OPERATION EXEMPTION--NORFOLK SOUTHERN RAILWAY COMPANY

\_\_\_\_\_  
PETITION FOR STAY <sup>\*/</sup>

227851

GORDON P. MacDOUGALL  
1025 Connecticut Ave., N.W.  
Washington DC 20036

Attorney for Samuel J. Nasca

September 23, 2010

\*/ Expedited consideration is requested, inasmuch as the notice of exemption is filed to become operative at 12:01AM on September 30.

Before the  
SURFACE TRANSPORTATION BOARD

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MIDDLETOWN & NEW JERSEY RAILROAD, LLC--LEASE AND  
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PETITION FOR STAY

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Preliminary Statement

Samuel J. Nasca,<sup>1/</sup> for and on behalf of United Transportation Union-New York State Legislative Board (UTU-NY), petitions the Surface Transportation Board (STB) that it stay the operation of the Notice of Exemption, filed August 31, 2010, by Middletown & New Jersey Railroad, LLC (M&NJ. 75 Fed. Reg. 56653 (Sept. 16, 2010)).

Unless stayed, the exemption will become effective at 12:01 AM on September 30, 2010.<sup>2/</sup>The Board should stay the exemption pending disposition of the forthcoming UTU-NY petition to revoke. It is anticipated the UTU-NY petition will be filed this coming

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<sup>1/</sup> New York State Legislative Director for United Transportation Union, with offices at 35 Fuller Road, Albany, NY 12205.

<sup>2/</sup> The September 30, 2010 date is by operation of the Board's rules, as indicated in the Board's Decision & Notice (D&N), served Sept. 16, 2010. (D&N, 2). However, the Notice of Exemption indicates the carrier intends consummation on or after October 1, 2010. (ibid.).

Monday, September 20, 2010. This petition for stay should be deemed supplemented by the petition to revoke.

This is an unusual and complicated proposed transaction, for which the 49 U.S.C. 10902 class exemption was not designed.<sup>3/</sup> Moreover, in subsequently authorizing leases between carriers to be processed under the §10902 class exemption, thus avoiding the otherwise applicable carrier lease requirements of 49 U.S.C. 1132-3(a)(2),<sup>4/</sup> the STB must take special precautions, as here, to revoke the class exemption in a given situation, so as to carry out the goals of the rail transportation policy. 49 U.S.C. 10101.

#### REASONS FOR A STAY

1. Background. M&NY gives its address as 505 S. Broad Street, Kennett Square, PA. (Notice, 3). This is the identical address which East Penn Railroad (ESPN) lists in the current (3Q 2010) issue of The Official Railway Guide (ORG). Both carriers came under common control in F.D. No. 35228, Continuance in Control Exemption-Middletown & New Jersey Railroad, LLC. (Mar. 20, 2009). However, for some reason, most probably failure to advise the publisher, M&NJ continues to show its address as 140 E. Main St., Middletown, NY, and advertises itself as "A Chartwell Internation-

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<sup>3/</sup> Class Exem. For Acq. or Oper. Under 49 U.S.C. 10902, 1 S.T.B. 95 (1996), rev. den. United Transp. Union-Ill. v. STB, 132 F.3d 1482 (D.C.Cir.1997).

<sup>4/</sup> Chicago Rail Link, L.L.C.-Lease & Oper.-Union Pacific RR Co., 2 S.T.B. 534 (1997), rev. den. United Transp. Union-Illinois v. Surface Transp., 169 F.3d 474, 479-80 (7th Cir. 1999).

al, Inc. Company," in the same current ORG.5/ The headquarters of M&NJ is not in the involved New York territory, but in southeastern Pennsylvania. Petitioner UTU-NY considers the remote location of M&NJ adverse to proper operation of these important lines in the involved New York area, embracing heavily populated and commuter rail operations. Close supervision is essential to efficient and safe operations, such that this factor supports a stay.

2. Success on Merits. Petitioner UTU-NY has a high probability of success on the merits. This is also apparent from the petition to revoke, scheduled to be filed Monday, September 27, 2010, and which is incorporated herein. By success, we mean that the STB is highly likely to revoke the class exemption for the transaction, and thus remit M&NJ to an individual exemption petition, or to an application.

(i). Decision & Notice. The Decision & Notice (D&N) served September 16, 2010, in the dissent of Vice Chairman Mulvey, points to the fact that the interchange agreement between M&NJ and NS, presents many undisclosed and anticompetitive features of rail traffic movements. (D&N, 3). UTU-NY agrees that this anti-competitive feature warrants revocation of the class exemption, in favor of individual handling, and particularly for reasons which extend beyond the competitive situation suggested by the Vice Chairman.. The more information disclosed about the features of the transaction may have an important bearing upon other aspects of the rail

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5/ Chartwell International, Inc., on August 10, 2010, entered voluntary bankruptcy. U.S. Bankruptcy Court, S.D.N.Y., No. 10-37462. Source: Form 8-K, S.E.C., filed August 20, 2010.

transportation policy, 49 U.S.C. 10101 (RTP). For example, the individual exemption process, which involves the RTP, embraces "fair wages and safe and suitable working conditions," §10101(11), "honest and efficient management," §10101(9), and "operate transportation facilities and equipment without detriment to public health and safety," §10101(8). Accordingly, the dissent presents an important factor warranting a stay of the exemption at this time.

(ii). Scope of Transaction. The proposed transaction goes far beyond the scope of the usual §10902 carrier acquisition and operation class exemption. This is a strong basis for revocation of M&NJ's attempted use of the class exemption. The M&NJ filing subsequently, on September 16, 2010, was accompanied by five additional agreements, although the STB's rules do not require the filing of any agreements, other than that imposing an interchange commitment as defined in the regulations, 49 CFR 1150.43(h). The required document, termed "Lease Agreement" was filed with the notice of exemption on August 31, 2010. The five additional agreements, filed September 16, 2010, are termed (1) "Sublease Agreement," (2) Partial Assignment of Trackage Rights Agreement and Supplemental Agreement," (3) Thoroughbred Through Freight Agreement," (4) Interchange Agreement," and (5) "Trackage Rights Agreement." Although all of the additional five agreements are described in M&NJ's covering letter to the STB as between M&NJ and NS, Nos. 1 & 2 also are signed by NYS&W, as acknowledged and consented to by N&S&W. Moreover, the lines of a fourth carrier, Metro North Commuter Railroad Company, are involved, as indicated

in the basic "Lease Agreement" filed August 31, 2010, under seal, with the notice of exemption.

The verified statement of Samuel J. Nasca, Appendix 1, sets forth a color-coded diagram map of the lines involved in the proposed transaction. The map is taken from M&NJ's notice of exemption, filed August 31, 2010.

Clearly, the transaction is substantial, and would involve at least four carriers. The STB's regulations under § 10902 mention and contemplates only three carriers, in its scope of exemption, 49 CFR 1150.41, and elsewhere. 49 CFR 1150.42.

(iii). Passenger Trackage. Petitioner considers the substantial involvement of Metro North lines, involves important safety considerations. Here, a small carrier with unknown personnel, would be operating on important commuter trackage. UTU-NY suggests that this should not occur under the class exemption. In an individual exemption or application proceeding, M&NJ should be required to demonstrate, by appropriate evidence, its operating personnel and capabilities. Safety is a very important consideration in the involved area, and cannot automatically be assumed under the class exemption, which was designed for small carrier freight operations.

(iv) Rail Transportation Policy. The foregoing considerations all are matters coming under the rail transportation Policy, 49 U.S.C. 10101, the key element in revocation proceedings. 49 U.S.C. 10502(d). Petitioner calls attention to various items in the RTP which it believes will sustain revocation of the exemption, 49 U.S.C. 10101(4), (5), (8), (9), and (11). These items bear upon 49 U.S.C. 10902, although the STB is not confined to

those items of the RTP bearing upon a specific statutory provision. Village of Palestine v. ICC, 936 F.2d 1335, 1342-46 (Silberman, J.) (D.C. Cir. 1991), cert. den. 502 U.S. 1030.

3. Irreparable Injury. Railroad employees will suffer irreparable injury if the exemption is not stayed. This is clear from the attached verified statement of Samuel J. Nasca, UTU's New York State Legislative Director. The exercise of seniority process and the workings of the collective-bargaining process do not confer carrier liability where the STB permits action of this type.

4. No Harm to Other Parties. There will be no harm to M&NJ if the exemption is stayed pending determination of the UTU-NY petition to revoke.

5. Public Interest. The public interest strongly suggests a stay for this exemption. Important considerations are at stake. UTU-NY directs particular attention to commuter operations, but the interests of railroad employees are also to be considered. Although the STB may not provide employee protection under § 10902, the interests of employees are to be considered under the public convenience and necessity, a command of § 10902. This was the situation during the period of Interstate Commerce Commission regulation of passenger train service, and is equally applicable here. Cf. I.C.C. v. Railway Labor Assn., 315 U.S. 373 (1942); Great Northern Ry. Co. Discontinuance of Service, 307 I.C.C. 59, 74 (1959).

Conclusion

The STB should stay the operation of the exemption, pending disposition of UTU-NY's petition to revoke.

Respectfully submitted,

  
GORDON P. MacDOUGALL  
1025 Connecticut Ave., N.W.  
Washington DC 20036

September 23, 2010

Attorney for Samuel J. Nasca

Certificate of Service

I hereby certify I have served a copy of the foregoing upon counsel for M&NJ, by personal service at this office in Washington.

Washington DC

  
Gordon P. MacDougall

VERIFIED STATEMENT  
OF SAMUEL J. NASCA

My name is Samuel J. Nasca, with offices at 35 Fuller Road Albany, NY 12205. I serve as New York State Legislative Director for United Transportation Union (UTU-NY), a full-time elective position I have held since March 1984. My seniority commenced in 1967 on the former Erie-Lackawanna Railroad Company.

I am fully familiar with railroad operations in New York State, and with the lines involved in this exemption proceeding. I have read the notice of exemption, and the notice and decisions of the Surface Transportation Board (STB) in this proceeding.

The United Transportation Union (UTU) represents persons employed by Norfolk Southern Railway Company (NS), that perform work as engineers, conductors, brakemen, and switchmen.

Middletown & New Jersey Railroad, LLC (M&NJ) heretofore has been a small rail carrier based at Middletown, NY, and connecting with NS at that point. My understanding of the M&NJ notice of exemption, filed August 31, 2010, is that M&NJ will "lease" the so-called NS Campbell Hall cluster of lines, namely, portions of the Hudson Secondary, Walden Secondary, Maybrook Industrial Track, Greycourt Industrial Track, and the EL Connection Track. NS is also granting M&NJ overhead trackage over an undisclosed 4.36-mile portion of the NS main line; M&NJ acquiring operations over the New York, Susquehanna & Western Railroad (NYS&W) connecting at

Hudson Jct., and M&NJ operations over the Hudson Secondary between Hudson Jct. and Warwick. The color-coded map attached to the notice of exemption indicates the substantial scope of the track age involved in the transaction, also embracing operations over the NS (Metro North) Southern Tier. I have attached Exhibit A to the M&NJ notice of exemption, for ready reference.

As indicated in Exhibit A, and according to my understanding, the transaction includes M&NJ operations in conjunction with lines over which Metro North conducts passenger train service. I believe this may go beyond the customary "incidental trackage rights" associated with short line carrier acquisitions. In any event, in my opinion, the involvement of Metro North in itself should take the transaction out of the class exemption, and processed under an individual exemption petition or application.

My investigation indicates that some 15 NS employee positions would be lost if the notice of exemption becomes effective and the transaction is consummated. Moreover, in the event the exemption is subsequently revoked, and the positions restored, the involved individuals would not be compensated for the wages and benefits lost during the interim period. First, by the working of the seniority system, when positions are restored, the same individuals do not always secure the same jobs previously held. Second, the collective-bargaining agreements usually do not provide for claims involving loss of employment due to federal regulatory action. Third, the provisions of §10902 expressly provides labor conditions may not be imposed. Accordingly, the injury which would be sustained if the notice of exemption becomes operative, would be clearly irreparable, not only for the 15 individuals directly

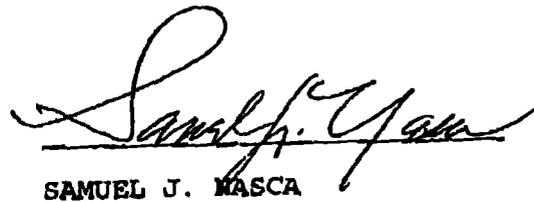
involved, but also for many others who would be adversely affected by the "bumping" process associated with the exercise of seniority by the 15 directly involved.

I ask that the Board stay the operation of the notice of exemption, pending disposition of the UTU-NY forthcoming petition to revoke.

SAMUEL J. NASCA

VERIFICATIONS

Under the penalties of perjury, I affirm that the foregoing  
Verified Statement is true and correct as stated.

  
SAMUEL J. MASCA

Dated at  
Albany, NY  
September 23, 2010

