

ORIGINAL

Before the  
SURFACE TRANSPORTATION BOARD

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Docket No. AB-156 (Sub-No. 25X)

DELAWARE AND HUDSON RAILWAY COMPANY, INC.-DISCONTINUANCE  
OF TRACKAGE RIGHTS-BETWEEN LANESBORO, PA, AND BUFFALO, NY

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APPEAL  
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Office of Proceedings

NOV 2 - 2004

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SURFACE  
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Due Date: November 1, 2004

Attorney for Samuel J. Nasca

\*/ Embraces also a request for an extension of time within which  
to file and serve written replies.

**FILED**

NOV 1 - 2004

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APPEAL

Preliminary Statement

Samuel J. Nasca,<sup>1/</sup> for and on behalf of United Transportation Union-New York Legislative Board (UTU-NY), submits this appeal from the decision of the Director of Office of Proceedings (DOP), served October 21, 2004, 69 Fed. Reg. 61904, which instituted an exemption proceeding pursuant to 49 U.S.C. 10502(b), responsive to the petition, filed October 1, 2004, by Delaware and Hudson Railway Company (D&H) to discontinue overhead trackage rights over approximately 229.5 miles of line between Lanesboro, PA, and Buffalo, NY.<sup>2/</sup>

<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 description of "overhead trackage rights" is misleading, for interchange presently is permitted at numerous points along the extensive D&H line; and in its "Summary of Documents" filed October 12, 2004, D&H explained that 6 transactions are associated with the Buffalo-Binghamton proceeding, namely, (1) Partial Termination of Trackage Rights; (2) Surrender of SK Yard; (3) Partial Assignment of Trackage Rights; (4) Restated Buffalo Trackage Rights; (5) Southern Tier Haulage; and (6) Bison Yard Terminal Services.

The DOP's October 21 decision instituted an exemption proceeding, but did not assign the matter for oral hearing. Moreover, the DOP ruled that a final decision will be issued by January 19, 2005.

The DOP established November 10, 2004 for filing replies to the D&H's petition for discontinuance.

#### GROUND'S FOR APPEAL

The grounds for an appeal from the DOP's decision, set forth in 49 CFR 1011.6(b), are for exceptional circumstances; and to correct clear error of judgment or to prevent manifest injustice.

1. Failure to Accord Hearing. The DOP erred in not assigning the matter for public hearing. The involved D&H trackage rights were established by United States Railway Association (USRA) through the Final System Plan (FSP). The D&H trackage rights are related to the exemptions noticed in F.D. No. 34561, Canadian Pacific Railway Company-Trackage Rights Exemption-Norfolk Southern Railway Company, and in F.D. No. 34562, Norfolk Southern Railway Company-Trackage Rights Exemption-Delaware and Hudson Railway Company, Inc.<sup>3/</sup> The relationships between the instant proceeding, and the related trackage rights, are expressed in the D&H petition for discontinuance, the Summary filed October 12, 2004 (fn. 2, supra), as well as in the public state-

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<sup>3/</sup> Petitions for stay denied October 27, 2004. The stay decision erroneously describes the two trackage rights to be "routine operational agreements designed to improve the efficiency of the railroads' operations and do not involve any carrier consolidations."

ments by D&H/Canadian Pacific Railway Company (CPRC) and Norfolk Southern Railway Company (NSR), addressed to the public and to their employees.<sup>4/</sup>

A hearing is required not only for the public, but also for employee impact and any employee conditions. The DOP states in his October 21, 2004 notice that the interest of railroad employees will be protected by Oregon Short Line conditions. This is a prejudgment, and also is absolutely incorrect. The D&H and NSR operations will be consolidated between Binghamton and Buffalo, NY, with NSR the surviving entity; likewise, the D&H and NSR yards will be consolidated at Buffalo.<sup>5/</sup> Where carrier consolidations are involved, the appropriate employee conditions are those established by the so-called New York Dock conditions.

This discontinuance proceeding is of exceptional importance. The practical effect of the D&H discontinuance would be to eliminate D&H as a competitor to CSXT and NSR. The conversion of "trackage rights" to "haulage" would leave D&H at the mercy of NSR. Moreover, along with other provisions of the Memorandum of Understanding (MOU), dated June 30, 2004, between D&H (CPRC) and NSR), the "Southern Tier" route between Buffalo and Binghamton would be substantially reduced if not eliminated as a competitive channel of commerce. Of course, in addition, CPRC and NSR have

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<sup>4/</sup>For a compendium of the railroad statements to the press and to their employees, see: F.D. Nos. 34561/34561, Petition to Revoke, by S.J. Nasca, 10/25/04, V.S. Nasca & Supp. V.S. Nasca.

<sup>5/</sup>Curiously, DOP asserts no carrier consolidations are involved, in flat contradiction with the carriers' statements, and use of the term, "yard consolidation."



discontinuance. An additional 40 days is warranted, to and including December 20, 2004. This request for additional time is in addition to the request for public hearings.

CONCLUSION

The Board should reverse the decision of the DOP, insofar as fails to establish public hearings, and to the extent it establishes a "final decision" date of January 19, 2005.<sup>6/</sup>

The period within which to file replies to the D&H petition should be extended to and including December 20, 2004.

Respectfully submitted

  
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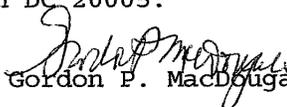
November 1, 2004

Attorney for Samuel J. Nasca

Certificate of Service

I hereby certify I have served a copy of the foregoing upon counsel for petitioner, by personal service upon Terence M. Hynes, 1501 K Street, N.W., Washington DC 20005.

Washington DC

  
Gordon P. MacDougall

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<sup>6/</sup> There are, of course, other errors in the DOP's determination, which we do not address at this point. The first, is the determination that Oregon Short Line employee conditions will protect the interest of railroad employees. The second, is whether the Board has clearly indicated that authority to institute investigations for individual exemption requests under 49 U.S.C. 10502 lies with the DOP.