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May 14, 2015
Part of
Public Record **JR - 10**

**Before the
Surface Transportation Board
Finance Docket No. 35873**

**NORFOLK SOUTHERN RY. CO.
- ACQUISITION AND OPERATION APPLICATION -
CERTAIN LINES OF THE DELAWARE AND HUDSON RY.**

**OPEN LETTER TO THE SURFACE TRANSPORTATION BOARD AND TO
THE PARTIES OF RECORD**

Filed May 14, 2015 by:

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1. This is an open letter to the Surface Transportation Board, and to the parties of record in the above entitled proceeding.

2. Shortly the STB will render its decision in FD 35873. On May 13, 2015, the STB stayed AB 156 (Sub. No. 27X). On May 11, 2015, the Third Circuit dismissed Riffin's Petitions for Review and his Writ of Prohibition, due to a lack of jurisdiction.

3. Due to a large number of technical and procedural errors, AB-156 (Sub. No. 27X), was held in abeyance. Due to a number of technical and procedural errors, there is a reasonable probability that the ultimate (after judicial review) decisions rendered in FD 35873, will be adverse to Norfolk Southern.

4. There is a reasonable probability that the Acquisition Agreement between Norfolk Southern and D&H, will not be consummated by the Summer of 2015.

5. Norfolk Southern strongly desires to acquire 282 miles of D&H line. The D&H strongly desires to obtain the \$217 million that Norfolk Southern has offered for the D&H line. A number of Protestants strongly oppose the D&H's relinquishment of its trackage rights. Three labor unions oppose the loss of 152 union jobs.

6. It is anything but certain, what decisions will be rendered. Given what has transpired to date (detailed below), there is a reasonable probability that if the parties do not reach some sort of accord, Norfolk Southern's acquisition of 282 miles of D&H line, and the D&H's acquisition of \$217 million, will be delayed far beyond the desired Summer of 2015 consummation date.

7. There is a reasonable probability that whatever decisions are rendered, will not be capable of being **quickly** reviewed.

8. With the goal of trying to find a way to facilitate the consummation of the transaction between Norfolk Southern and the D&H, to the satisfaction of the various Protestants, I offer the

following suggestions.

PROPOSED SETTLEMENT

9. Shortly after Mr. Mullins filed Norfolk Southern's Application, I telephoned Mr. Mullins. Before any comments had been filed, I suggested that he may wish to consult with interested parties, to ascertain what Norfolk Southern might offer, to gain the support of interested parties. He thanked me for the suggestion, then elected not to consult with any of the Protestants. (Norfolk Southern did consult with a number of short lines, and did offer concessions to those short lines in exchange for their support.)

10. On Saturday, May 9, 2015, I sent the original of this Open Letter to Mr. Mullins, counsel for Norfolk Southern, and to Karl Hansen and David Rifkind, counsel for the D&H.

11. On Tuesday, May 12, 2015, I spoke with Mr. Mullins. Mr. Mullins indicated that Norfolk Southern had no present interest in attempting to reach a settlement.

12. On Wednesday, May 13, 2015, the Director of the Office of Proceedings served her decision, finding that the D&H's Notice of Exemption, as filed, did not fully comply with the STB's regulations. Rather than rejecting the D&H's Notice of Exemption, the Director permitted the D&H to supplement its Notice of Exemption.

13. The Director's Decision raises several new issues, which Riffin believes only the Full Board may address, pursuant to a timely filed appeal of the Director's decision.

14. I do not believe that it is possible for the D&H to receive authority to discontinue its trackage rights by June 15, 2015, the presently scheduled effective date of the STB's presently scheduled May 19, 2015 decision.

15. Mr. Eric Strohmeier will be filing a pleading, wherein he will argue that without the simultaneous discontinuance of the D&H's trackage rights, Norfolk Southern will need to seek **additional** STB authority before it can consummate its acquisition of 282 miles of D&H Line.

16. At this point in time, one of two things will occur: Either the parties will reach a settlement, or the proceeding will continue on its present course. If the proceeding continues on its present course, then final resolution of the issues is not likely to occur for a considerable period of time.

17. If, on the other hand, a settlement were reached, then Norfolk Southern's acquisition of 282 miles of D&H Line could well be consummated by July, 2015.

18. Given the Office of Proceedings May 13, 2015 decision, Riffin believes that it would be appropriate for the STB to stay its presently scheduled May 15, 2015 decision for seven days, in order for the parties to mull over the Office of Proceeding's May 15, 2015 decision, and to weigh the pros and cons of a settlement.

19. With the above in mind, I filed a Motion to Stay on May 14, 2015, asking the STB to stay its presently scheduled May 19, 2015 decision for seven days, to permit the parties time to mull over the Office of Proceedings' May 13, 2015 decision, and to weigh the pros and cons of reaching a settlement.

POSITIONS OF THE PARTIES

20. Norfolk Southern desires to acquire 282 miles of D&H line. **No one** has opposed Norfolk Southern's acquisition of those 282 miles of D&H line. The **only** matters in dispute are the loss of **some** of the D&H's trackage rights, and the loss of 152 union jobs.

21. The non-union Protestants have indicated that they would support Norfolk Southern's acquisition of 282 miles of D&H line, if certain specified D&H trackage rights were preserved

(via imposing ‘conditions’).

22. If the trackage rights that are in dispute, were to be preserved by transferring those trackage rights to other entities, then those other entities would need to hire railroad personnel to operate pursuant to those trackage rights. The best people to hire would be those D&H individuals who are likely to lose their jobs. If a number of these D&H union workers were hired by the new entities, then that would lessen the adverse impact on D&H union workers.

23. **Simple solution:** Transfer those trackage rights that other entities desire, to those other entities. Permit discontinuance of those trackage rights that no one has any interest in.

24. I believe that it is possible to eliminate **all** of the procedural / technical errors: The Protestants can ‘waive’ their objections to the procedural / technical errors. The lack of Proper Notice would be mooted if no entity was adversely affected.

25. The controversy is about the discontinuance of the D&H’s trackage rights in Maryland (from the south side of Baltimore City to Perryville, MD, to Harrisburg, PA), in Pennsylvania, in New Jersey and from DuPont, PA to Binghamton, NY.

26. If those trackage rights that are in dispute, were to be preserved, then the Protestants’ concerns would be mooted. Specifically: If the trackage rights in New Jersey and in Maryland (at least to the south side of Baltimore City), were preserved, then the D&H’s failure to list all of the counties, and the D&H’s failure to list all of the Zip Codes, in New Jersey and in Maryland, would become a moot issue, for no one in those omitted counties or Zip Codes would suffer any adverse consequence. (There would be no loss of D&H trackage rights.)

27. **If** the D&H were to agree to transfer those trackage rights in dispute, to the Protestants that desire that those trackage rights be preserved, and **if** Norfolk Southern were to consent to the transfer of those trackage rights, **in exchange for** the Protestants **waiving all** of the procedural / technical errors, **then** everyone (except perhaps the unions), would support Norfolk Southern’s

Application, and would support the D&H's discontinuance of those trackage rights that no one had any interest in.

28. With full support, and no opposition, the Transaction could proceed on schedule. Everyone would be happy (at least they should be happy).

29. **However**, before anyone will ever agree to settle for less than what they set out to achieve, they must be convinced that there is a significant probability that they will not obtain any of what they desire to obtain.

30. What follows is a recitation of the reasons why I believe that neither Norfolk Southern nor the D&H will get what they want, when they want it.

FD 35873

31. In STB FD 35873, Norfolk Southern filed an Application to acquire 282 miles of D&H line. The Application noted that the discontinuance of the D&H's trackage rights were associated with the acquisition Application.

32. I note the following:

A. Notice of Norfolk Southern's Application was filed in the *Federal Register* on **December 22, 2014**.

B. The December 22, 2014 *Federal Register* Notice stated that Comments were due no later than January 15, 2015.

C. The December 22, 2014 *Federal Register* Notice **has never been amended nor has it been supplemented**.

- D. 49 U.S.C. 11325 **requires** that notice must be given in the *Federal Register*.
- E. The STB's January 14, 2015 Decision, which extended the deadline to file comments by six days, to January 21, 2015, **was never published in the *Federal Register***.
- F. Since **only** *Federal Register* Notice is legally effective, **no legally sufficient notice** has ever been given, informing all interested entities, that they had a statutory right to file comments up until January 21, 2015.
- G. Since the December 16, 2014 Decision is fatally defective, due to a lack of legally sufficient notice in the *Federal Register*, and since the STB's January 14, 2015 Decision does **not** constitute legally sufficient notice, and since the December 22, 2014 *Federal Register* notice has never been amended nor supplemented, to reflect a change in the date by which comments could be filed, it would be fair to assume that whatever decision the STB renders in FD 35873, will be the subject of a Petition for Review, and it would be fair to assume that there is a reasonable probability that whatever decision the STB renders in FD 35873, will be vacated on technical, procedural grounds (if not on its merits).

AB 156 (Sub. No. 27X)

33. The D&H filed a Notice of Exemption to discontinue 700 miles of its trackage rights.

34. I filed a Petition to Revoke the D&H's trackage rights discontinuance exemption. I pointed out that the Exemption failed to comply with STB precedent (it failed to list all of the counties the trackage rights are located in), and it failed to comply with the dictates of 49 CFR 1152.50 (d)(2) and 49 CFR 1152.22 (a)(8). (The Notice must list all of the Zip Codes that the trackage rights traverse.)

35. On May 13, 2015, the Director of the Office of Proceedings served a decision which held the AB 156 / 27X proceeding in abeyance, until such time that the D&H supplemented its Notice of Exemption.

36. The Director's Decision raises several new issues, which I believe only the Full Board may address, pursuant to a timely filed appeal of the Director's decision.

37. The discontinuance of the D&H's trackage rights is a necessary adjunct to Norfolk Southern's acquisition Application: Some of the operation agreements between Norfolk Southern and the D&H **require** STB approval **if** the D&H **retains** its trackage rights. If the D&H is relieved of its trackage rights, then those operation agreements **would not** require STB approval.

38. The Agreement between Norfolk Southern and the D&H, stipulates that both Norfolk Southern and the D&H have the permissive right (but not the obligation), to cancel their Agreement:

A. In the event that the STB imposes 'conditions.' See ¶¶ 9.02 and 10.02 of the Asset Purchase Agreement (pp. 61 and 63 of the Asset Purchase Agreement, pp. 67 and 69 of Volume Two of the Application).

B. In the event the STB does not grant authority to consummate the transaction by a certain redacted 'Drop Dead Date.'

CONCLUSION

39. I would suggest that there is a significant probability that, **without** the support of the Protestants:

- A. At least one Petition for Review will be filed, seeking review of whatever decision the STB renders in FD 35873.
- B. The D&H will not receive final (after judicial review) authority to discontinue its trackage rights anytime soon, certainly not in 2015.
- C. That the Third Circuit will vacate whatever decision the STB renders in FD 35873, on technical / procedural grounds.
- D. That Norfolk Southern will not receive final (after judicial review) authority to acquire 282 miles of D&H line in 2015.
- E. That the D&H will not receive from Norfolk Southern the \$217 million that it would like to receive, any time in 2015.

40. I would suggest that **with** the support of the Protestants, Norfolk Southern's acquisition of 282 miles of D&H line could be consummated by July, 2015.

41. And I would further suggest that Norfolk Southern and the D&H consider reaching out to the Protestants, and consider consenting to 'conditions' which would preserve the trackage rights / competitive opportunities presently enjoyed by the Protestants, in exchange for which the Protestants would **support** Norfolk Southern's Application, and would **waive** all of their procedural / technical issues.

Respectfully,

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of May, 2015, a copy of the foregoing Open Letter to the STB, was served on the parties noted below, by E-mail.

James Riffin

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