

NS-10

237398

BAKER & MILLER PLLC

ATTORNEYS and COUNSELLORS

2401 PENNSYLVANIA AVENUE, NW
SUITE 300
WASHINGTON, DC 20037

TELEPHONE: (202) 663-7820
FACSIMILE: (202) 663-7849

ENTERED
Office of Proceedings
January 7, 2015
Part of
Public Record

WILLIAM A. MULLINS

(202) 663-7823 (Direct Dial)
E-Mail: wmullins@bakerandmilller.com

January 7, 2015

VIA E-FILING

Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: *Norfolk Southern Railway Company – Acquisition and Operation -
Certain Rail Lines of the Delaware and Hudson Railway Company, Inc.*, STB
Docket FD 35873

Dear Ms. Brown:

Norfolk Southern Railway Company (“NS”) writes in opposition to the preliminary comments and verified statement filed by James Riffin in support of the petition to reject NS’s Application filed by CNJ Rail Corporation (“CNJ”). As an initial matter, it is important to note that Mr. Riffin has no legal standing in this proceeding. As is true for CNJ, Mr. Riffin is not a carrier, shipper, government entity, or other party who would suffer any injury in fact that is traceable to NS’s acquisition of the line nor does he (nor can he, not being an attorney or STB licensed practitioner) represent any such party that may have standing.¹ As such, his request should be dismissed.

Standing issues aside, Mr. Riffin’s comments do not satisfy the standard for reconsideration of a Board decision.² Mr. Riffin, in arguing that CNJ’s filing effectively was a petition for reconsideration, states that “‘Content’ trumps ‘Form.’” Riffin Comments at 2. Similarly, although Mr. Riffin labels his filing as “preliminary comments and verified statement,” Mr. Riffin’s comments should be treated as a petition for reconsideration based on their content, particularly when viewed in conjunction with his petition for review before the Third Circuit. As such, Mr. Riffin has failed to meet his burden to justify reconsideration. In the Board’s own words, “[w]here, as here, a petition alleges material error, a party must do more

¹ See *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992).

² See 49 U.S.C. § 722(c); 49 C.F.R. § 1115.3.

than simply make a general allegation; it must substantiate its claim of material error.”³ Mr. Riffin merely states that he “agree[s] with CNJ’s opinion that the statutory errors are of such a magnitude, that the only way to rectify the errors, would be to reject the Application.” Riffin Comments at 3. Such general statements do not substantiate a finding of material error.

Even when viewed on their merits, Mr. Riffin’s arguments do not constitute material error. As set forth in NS-9, the Board’s failure to publish notice of the acceptance or rejection of NS’s Application in the *Federal Register* by December 17, 2014 (i.e., the 30th day after the filing of the Application) was not a material error warranting reconsideration.⁴ Furthermore, like CNJ, Mr. Riffin has not demonstrated, and cannot demonstrate, that he suffered any injury or harm due to the Board’s failure to meet the *Federal Register* deadline. The Board’s publication of the Application on its website on November 17, 2014 served as adequate notice, thus providing Mr. Riffin and all other parties with nearly 60 days to analyze the Application, conduct discovery, and file comments by January 15, 2015. As explained in NS-9, with the passage of ICCTA and the Board’s “open door” website policy, the intent and purpose of the statutory 30-day *Federal Register* publication requirement are now fully carried out through the Board’s electronic website practices. Failure to technically meet the 30-day *Federal Register* publication requirement does not prejudice any party.

The notion that Mr. Riffin was somehow prejudiced by the January 15, 2014 due date for the filing of comments is also meritless. Indeed, Mr. Riffin is fully aware of the proceeding and is an active participant. Mr. Riffin already has filed his notice of intent to participate, made several calls to the undersigned counsel to discuss his concerns, filed a petition for review in the Third Circuit, and now filed “preliminary comments,” while all the time complaining about the

³ Union Pac. Corp., Union Pac. R.R. Co. and Missouri Pac. R.R. Co. – Control and Merger – Southern Pac. Rail Corp., Southern Pac. Transp. Co., St. Louis Southwestern Ry. Co., SPCSL Corp., and the Denver and Rio Grande Western R.R. Co., FD 32760 (STB served Dec. 30, 2014). See also Canadian Pac. Ry. – Control – Dakota, Minn. & E. R.R., FD 35081, slip op. at 4 (STB served May 7, 2009) (denying petition for reconsideration where petitioner merely restated arguments previously made).

⁴ See Friends of Iwo Jima v. National Capital Planning Comm’n, 176 F.3d 768 (4th Cir. 1999) (upholding agency action despite the agency’s failure to comply with a requirement to publish timely notice of relevant meetings in the Federal Register because the procedural error was harmless); Columbia Venture LLC v. South Carolina Wildlife Federation, 562 F.3d 290, 294-95 (4th Cir. 2009) (per curiam) (holding that the Federal Emergency Management Agency’s failure to timely publish in the Federal Register was harmless error). See also PDK Laboratories Inc. v. U.S. D.E.A., 362 F.3d 786, 799 (D.C. Cir. 2004) (“If the agency’s mistake did not affect the outcome, if it did not prejudice the petitioner, it would be senseless to vacate and remand for reconsideration.”); Nat’l Ass’n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 659 (2007) (finding that an inaccurate Federal Register notice stating that Endangered Act Species Act consultation was “required” was harmless error when consultation had already occurred).

alleged inability to conduct discovery and the lack of time to draft comments.⁵ The simple truth of the matter is that the procedural schedule set forth in the Board's December 16, 2014 decision is fully consistent with numerous prior procedural schedules adopted in minor proceedings, does not deprive any party of the full opportunity to comment on the Application before the Board, and allows more than enough opportunity for Mr. Riffin and CNJ to file comments and obtain discovery.

Mr. Riffin makes numerous other incorrect and unsubstantiated assertions in his petition. NS will briefly address some of them here, or to the extent necessary, will address them more fully in its comments due March 31, 2015. First, NS's Application and the STB's December 16, 2014 decision need not address D&H's discontinuances of trackage rights because such discontinuances are independent of NS's acquisition of the line. Irrespective of Mr. Riffin's incorrect application of statutory requirements, see Riffin Comments at 4, D&H is not an Applicant required to submit information as part of this proceeding.⁶ Additionally, the November 25 pleading that Mr. Riffin claims to be an "amendment," which is the same argument that CNJ made, was, as NS explained in NS-9, actually an "Errata" to a previous page that had been included in the Application. This errata made no substantive changes to the Application or anything required to be completed and set forth in an application. Finally, and perhaps most indicative of Mr. Riffin's sometimes absurd claims, he claims that "[o]n p. 152 of the Application, there appears a blank page, with the heading "Appendix A." Riffin Comments at 8. This page simply represents the cover page for what will be Exhibit A of the draft trackage rights agreement, which was submitted as part of the notice of exemption in FD 34209 (Sub-No. 1). As noted in that draft agreement itself, Exhibit A will be a map of the lines relevant to the trackage rights agreement once the agreement is finalized and filed. There were not redactions to this "blank" cover page.

In summary, Mr. Riffin's petition to reconsider the Board's acceptance of the Application and to reject the Application and/or modify the procedural schedule should be denied. Mr. Riffin has no standing, represents no party with a material interest in this proceeding, has not shown that the Board's decision constituted material error, and is not prejudiced by the procedural schedule.

⁵ Although he complains about the alleged lack of time for discovery, at no time during this proceeding has Mr. Riffin or CNJ filed discovery in this proceeding, notwithstanding the Board's rules that allow any party to obtain discovery in a proceeding. See 49 C.F.R. §1114.21(b).

⁶ Furthermore, Mr. Riffin's argument ignores that Dr. Grimm's competitive analysis did in fact account for the competitive effects of the discontinuances of D&H's trackage rights as well as the termination of various haulage and marketing agreements, even though such an analysis was not legally required.

Cynthia T. Brown, Chief
January 7, 2015
Page 4

NS-10

Respectfully submitted,



William A. Mullins
Attorney for Norfolk Southern Railway Company

cc: Parties of Record