

**Before the
Surface Transportation Board**

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STB DOCKET NO. AB-156 (Sub-No. 27X)

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**DELAWARE AND HUDSON RAILWAY COMPANY, INC. –
DISCONTINUANCE OF TRACKAGE RIGHTS EXEMPTION --
IN NY, PA, NJ, MD, VA AND DC**

JAMES RIFFIN'S REPLY TO

ERIC STROHMEYER'S

PETITION TO REVOKE

Filed August 3, 2015 by:

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JAMES RIFFIN'S REPLY TO ERIC STROHMEYER'S PETITION TO REVOKE

1. James Riffin herewith Replies to Eric Strohmeyer's July 22, 2015 Petition to Revoke the Delaware and Hudson Railway's ("**D&H**") Exemption Notice, which the D&H filed on March 19, 2015, and which the D&H amended / supplemented, on June 15, 2015, and in reply states:

D&H'S MAPS

2. In Eric Strohmeyer's ("**Strohmeyer**") Petition to Revoke, Mr. Strohmeyer correctly pointed out that the Maps appended to the D&H's original Exemption Notice, and the Maps appended to the D&H's Supplemental Exemption Notice, did not comport with the requirements of 49 CFR 1152.22(a)(4), which states:

§1152.22 Contents of application.

Applications for the abandonment of railroad lines or the discontinuances of rail service **shall** contain the following information, including workpapers and supporting documents, and **each paragraph (a) through (j) of this section SHALL be attested to by a person having personal knowledge of the matters contained therein:**

(a) *General.*

(4) Detailed map of the subject line on a sheet not larger than 8x10.5 inches, **drawn to scale, and with the scale thereon.** The **map must show**, in clear relief, **the exact location** of the rail line to be abandoned or over which service is to be discontinued **and its relation to other rail lines in the area,** highways, water routes, and population centers." Bold and caps added.

3. §1152.22(a)(4) is made applicable in a §1152.50 proceeding, which is the CFR being used by the D&H, by §1152.50(d)(2), which states:

"(2) The railroad must file a **verified notice** using its appropriate abandonment docket number and subnumber (followed by the letter 'X') with the Board at least 50 days before the abandonment or discontinuance is to be consummated. The notice **shall include** the proposed consummation date, the certification required in §1152.50(b), **the information**

required in §§ 1152.22(a) (1) through (4), (7) and (8), and (e)(4), the level of labor protection, and a certification that the notice requirements of §§ 1152.50(d)(1) and 1105.11 have been complied with.” Bold added.

4. As Mr. Strohmeier correctly pointed out, the maps appended to the D&H’s original Exemption Notice, and appended to the D&H’s Amended / Supplemented Exemption Notice, **do not comply** with the dictates of § 1152.22(a)(4) in the following particulars:

- A. **None** of the maps have the required ‘scale’ noted on the maps.
- B. The maps **do not** show the exact location of the rail lines over which the D&H proposes to discontinue its rail services.
- C. The maps **do not** show **all of** the relationships of the lines over which service is to be discontinued, “and **its relation to other rail lines in the area**, highways, water routes, and population centers.”

5. While Mr. Strohmeier references those sections of the D&H’s rail lines where the D&H failed to show the ‘exact location’ of the rail lines the D&H proposes to discontinue service over, and references those sections of the D&H’s rail lines where the D&H failed to show the relationship of the D&H’s rail lines, ‘to other rail lines in the area,’ Mr. Strohmeier did not explicitly describe, in sufficient detail to meet Riffin’s standards for detail, precisely where the D&H’s Maps were deficient.

6. Since the D&H has already admitted that it is not ‘familiar’ with the location of its lines, Riffin provides the following more explicit description of **where** the D&H’s Maps fail to comply with the Regulations, and in precisely **what respect** the D&H’s Maps fail to comply with the Regulations.

NONE OF THE D&H’S MAPS HAVE A ‘SCALE’ ON THEM

7. While all of the Maps in the D&H's Original and Supplemental Exemption Notices appear to be to scale, **none** of the Maps indicate what the scale might be. Under normal circumstances, the D&H might be given an opportunity to re-submit its Maps, with the Scale shown thereon. This is what Riffin did in FD Finance Docket No. 35221, *James Riffin – Acquisition and Operation Exemption – Veneer Mfg. Co. Spur – In Baltimore County, MD.*

8. If the only thing that was wrong with the D&H's Maps, was the absence of a 'scale' on them, Riffin would be inclined to say: "Let the D&H resubmit its Maps, with the Scale shown on them. Re-start the clocks again."

9. However, the absence of a scale is a relatively minor problem with the D&H's Maps. (Since the Maps appear to actually be to scale, if one really wanted to 'scale' the maps, that could be done, by 'scaling' the distance between several cities on the Maps, then comparing the scaled distances to the actual distances on a map that was to scale, such as a highway map. More effort on the part of the reader, but not too much effort.)

10. A much greater problem with the D&H's Maps, is the absence of any depiction of a number of miles of D&H line, and the absence of any depiction of the relationship of lines the D&H desires to discontinue service over, "**to other rail lines in the area.**" This is discussed below.

MAPS IN ORIGINAL EXEMPTION NOTICE

11. **Map One:** While this Map shows generally where the D&H's rail lines are located, (a desirable feature), it fails to depict the existence of, and the general location of, the entirety of the former CNJ main line. (That portion of the CNJ main line between Glen Gardner, NJ and Lehigh, PA, is not depicted.)

12. **Map Two:** This map fails to provide sufficient detail of that area between Allentown, PA and Lehigh, PA. In particular, this map fails to depict Norfolk Southern's Line between Allentown and Lehigh, and fails to depict **both** the Lehigh Valley Railroad ("LVRR") main

line, and the CNJ main line, between Allentown, PA and Lehigh, PA. (It only depicts the LVRR main Line.) The D&H has operating rights over **both** the LVRR and CNJ lines.

13. The LVRR main line traversed the **West** side of the Lehigh River, while the CNJ main line traversed the **East** side of the Lehigh River, between Allentown and Lehigh.

14. This map is inadequate for it fails to note “**the exact location**” of both the LVRR main line and the CNJ main line, between Allentown and Lehigh, and is inadequate for it fails to show the relationship between the LVRR main line, the CNJ main line, and Conrail’s / Norfolk Southern’s main line, between Allentown and Lehigh.

15. **Note A:** The **LVRR** main line, **Line Code 503A**, traversed the **West** side of the Lehigh River, between Allentown, MP 93.3, and Lehigh, MP 119.3. Line Code 0503A was conveyed to Conrail via the Final System Plan. See p. 282. The portion of the LVRR between MP 96.6 (about 3 miles north of Allentown), and Lehigh, was the subject of two Conrail abandonment petitions: AB 167, Sub. Nos. 623N (MP 96.6 to MP 98.0) and 451N (MP 98.0 to MP 119.3). The portion of the LVRR between MP 93.3 and MP 96.6, is the subject of AB 550 (Sub. No. 3X). The **April 25, 1979** Operating Agreement between Conrail and the D&H, granted the D&H **operating** rights over Line Code 503A.

16. **Note B:** The **Lehigh & Susquehanna RR** was leased to the CNJ under a 999-year lease. **Line Code 0521** of the Lehigh & Susquehanna, went from Easton, PA, along the **North** side of the Lehigh River, from Easton to Allentown (to a station called ‘Steel,’ at MP 85.5). From Allentown / Steel, Line Code 0521 went up the **East** side of the Lehigh River, from Allentown / Steel, MP 85.5, to Lehigh, MP 114.7. **Riffin refers to Line Code 521 as the “CNJ Main Line.”** The Lehigh River flows south from Lehigh to Allentown. At Allentown, the Lehigh River turns, and flows East, to the Delaware River, in Easton, PA. Line Code 0521 was conveyed to Conrail via the Final System Plan. See p. 283. The **April 25, 1979** Operating Agreement between Conrail and the D&H, granted the D&H **operating** rights over Line Code 521.

17. **Map Three:** No additional comments.

18. **Map Four:** While this Map shows where **some** of the D&H's rail lines are located, it fails to depict the existence of, and the exact location of, the entirety of the former CNJ main line.

A. The Map fails to depict that portion of the CNJ main line between Glen Gardner, NJ and the **East** side of Phillipsburg, NJ.

B. The Map fails to accurately depict the **exact location** of the LVRR main line between the East side of Phillipsburg, NJ, and the West side of Phillipsburg, NJ (at the Delaware River). Between these two points, it cannot be ascertained which of the two lines shown, is the LVRR main line, and the CNJ main line.

C. The Map fails to depict that portion of the LVRR main line between Allentown, PA and Lehigh, PA, which traverses up the West side of the Lehigh River between these two points. (Map Four appears to only show lines in New Jersey. The Map does not appear to show any portion of PA.)

19. **Map Five:** Incorrectly depicted the D&H's trackage rights as traversing over Amtrak's line in D.C. This was corrected in the D&H's Supplement.

20. **Maps Six, Seven, Eight:** No additional comments.

21. **Map Nine:** Correctly noted where the D&H's trackage rights traversed around D.C.

MAPS IN SUPPLEMENT TO EXEMPTION NOTICE

22. **Map One:** While this Map shows generally where the D&H's rail lines are located, (a desirable feature), it fails to depict the existence of, and the general location of, the entirety of

the former CNJ main line. (That portion of the CNJ main line between Glen Gardner, NJ and Lehigh, PA, is not depicted.)

23. **Map Two:** While this Map shows where **some** of the D&H's rail lines are located, it fails to depict the existence of, and the exact location of, the entirety of the former CNJ main line.

A. The Map fails to depict that portion of the CNJ main line between Glen Gardner, NJ and the **East** side of Phillipsburg, NJ.

B. The Map fails to accurately depict the **exact location** of the LVRR main line between the East side of Phillipsburg, NJ, and the West side of Phillipsburg, NJ (at the Delaware River). Between these two points, it cannot be ascertained which of the two lines shown, is the LVRR main line, and the CNJ main line.

C. The Map fails to depict that portion of the LVRR main line between Allentown, PA and Lehigh, PA, which traverses up the West side of the Lehigh River between these two points. (Map Four appears to only show lines in New Jersey. The Map does not appear to show any portion of PA.)

24. **Map Three:** Corrected to show actual location of the D&H's operating rights in D.C.

WHAT RIGHTS DOES THE D&H HAVE?

25. **Question One:** What trackage rights were conveyed to the original D&H (Railway)?

26. No place in the April 25, 1979 **Operating Agreement**, do the phrases "trackage rights" "overhead trackage rights," "bridge traffic" or "local traffic" appear. The April 25, 1979 Agreement talks about "joint lines."

27. The FSP dictated the **minimum** rights Conrail had to convey to the D&H. The FSP **did not limit** what rights could be conveyed. The phraseology used in the Operating Agreement, from its title, “Operating (vs. Trackage Rights) Agreement,” to its repetitive use of the phrase, “Joint Lines,” strongly suggests that Conrail conveyed **more than** the minimum rights the FSP required. For example, the Agreement clearly states that the D&H may interchange with any carrier along the route of the trackage rights, with permission from the USRA. Overhead or ‘bridge’ rights would normally not permit a carrier to interchange with carriers along the route of the trackage rights.

28. Since the nature of the D&H’s operating rights is at issue, that makes the proceeding ‘controversial,’ and requires a determination of a factual / legal issue. Consequently, it is inappropriate to resolve this proceeding with a highly abbreviated notice-of-exemption proceeding.

29. Resolution of the issue of what rights were conveyed to D&H Railway, appears to be an issue within the exclusive purview of the Special Court (U.S. District Court, D.C. District).

30. **Question Two:** What rights were conveyed by the bankruptcy court, to the D&H created by CP? (D&H Corporation.) See FD 31700, and Sub. No. 6 of FD 31700.

31. On August 1, 2015, the R.J. Corman Allentown Lines submitted into the record in AB 550 (Sub. No. 3X), the FD 30334 file, which was a Petition for Exemption filed by Conrail in 1984. In the FD 30334 proceeding, Conrail in effect instituted an adverse discontinuance proceeding. The D&H Railway, filed a letter saying it had no objection to losing its trackage rights over the portion of the Lehigh Valley main line between MP 98.0 (Catasauqua, PA), and MP 119.3 (Lehigh, PA.) The ICC served a decision granting Conrail’s request for an exemption. The ICC ordered **Conrail** (rather than the D&H), to file a notice of Consummation within 30 days after consummation of the discontinuance of the D&H’s trackage rights. **39 days** after the date Conrail certified the discontinuance was consummated, Conrail filed a Notice of Consummation.

32. That raises the question: Does the D&H presently have trackage rights over the former Lehigh Valley main line between MP 98.0 and MP 119.3?

33. What makes this question difficult to answer, is what happened five years later.

34. The Trustee for the bankrupt D&H Railway, executed an Asset Purchase Agreement, conveying to CP's D&H Corporation, the D&H Railway's Trackage Rights:

“(2) between Dupont, PA and Oak Island (Newark) over the rail line of the former Lehigh Valley Railroad.”

35. This conveyance was approved, and ordered, by the bankruptcy court.

36. The ICC gave express authority for CP's D&H Corporation to acquire the D&H Railway's trackage rights:

“(2) between Dupont, PA and Oak Island (Newark) over the rail line of the former Lehigh Valley Railroad.”

37. So one wonders: Why did the ICC grant the D&H Corp. authority to acquire trackage rights that were supposedly discontinued? Did the ICC find that the consummation notice was filed 9 days late, and thus was ineffective? Did the ICC realize that Conrail was not the appropriate entity to give notice that the trackage rights had been discontinued? (Abandonment is determined by one's 'intent.' How can someone else vouch for one's 'intent?') Did the ICC realize that adverse discontinuances can only be obtained with a full-blown 'application,' and can never be obtained via an exemption proceeding? Did the ICC realize that the ICC did not have the authority to question, or challenge, a bankruptcy court order? Did the Trustee void the trackage rights discontinuance? Did the D&H Railway represent to the Trustee that the D&H Railway still had trackage rights over the Lehigh Valley, between Catasauqua and Lehighton? (Meaning the D&H Railway never really 'intended' to relinquish its trackage rights.)

38. On Monday, August 3, 2015, it is expected that a copy of what CP's D&H Corporation filed in FD 31700 (Sub. No. 6), will be obtained. It is further expected that CP's D&H Corporation filing will use the exact language noted above. Which means that the CP's D&H Corp. believed at the time that it filed its Sub No. 6, that it was acquiring trackage rights over the Lehigh Valley between Catasauqua and Lehigh.

39. So now a **bankruptcy question** has been injected into the mix: What rights were conveyed by the bankruptcy court to CP's D&H Corporation?

40. Included within this bankruptcy question, is the question of what rights were conveyed to CP's D&H Corporation with regard to the Oak Island (Newark, NJ) rail yard?

41. To date, it has been argued that the D&H Corporation only has a 'lease' for the portion of the Oak Island yard that the D&H Corporation has used exclusively since 1990.

42. However, a careful reading of the FD 31700 decision, found at p. 100 of 7 I.C.C. 2d 95, reveals the following:

A. "Essentially, it [Asset Purchase Agreement] provides that D&H Corp. will acquire from the Trustee approximately 500 miles of D&H's main line track, 75 miles of branch lines, and various **D&H yards**. Footnote 11."

B. Footnote 11 states: "The yards are at the following locations: Rouses Point, Fort Edward, Saratoga, Whitehall, Colonie, Kenwood, Binghamton, Buffalo and Oneonta, NY; Taylor, PA; **and Oak Island, NJ.**" Bold added.

43. D&H Corp. has consistently represented that it **owns all** of the yards mentioned in footnote 11, **except** the Oak Island yard. However, the clear wording in footnote 11 indicates that the Oak Island yard is no different from all of the other listed yards.

44. So either the D&H Corp. owns **all** of the yards noted in footnote 11, or **owns none** of the yards listed in footnote 11.

45. Which raises another bankruptcy court question: What is the nature of the title conveyed to the D&H Corp. in the yards listed in footnote 11?

46. And raises more STB questions: If the D&H Corp. owns the Oak Island yard, then is the D&H Corp. seeking to ‘abandon’ its Oak Island yard, or is it seeking to ‘discontinue service’ within its Oak Island yard? Is the line within the Oak Island yard, a line of railroad, or is the D&H Corp.’s interest in the line, purely ‘trackage rights?’ If the D&H Corp. ‘owns’ the Oak Island yard, just as it ‘owns’ its Taylor, PA yard, then at least one set of tracks within the Oak Island yard, is a ‘line of railroad,’ rather than ‘excepted’ tracks or ‘trackage rights tracks.’

**PROCEEDING IS ‘TOO CONTROVERSIAL’
FOR A CLASS EXEMPTION PROCEEDING**

47. On March 30, 2009, Riffin filed a verified notice of exemption (“**NOE**”) to acquire from Mark Downs, Inc., a non-carrier, and to operate approximately 400 feet of track, formerly known as the Veneer Mfg. Co. Spur, in Cockeysville, Baltimore County, MD (“**Veneer Spur**” or “**Spur**” or “**Line**”).¹ In a decision served on April 28, 2009, the Surface Transportation Board (“**Board**”) rejected Riffin’s NOE, stating:

“The accelerated time period specified in the Board’s regulations for processing notices invoking class exemptions makes such procedures appropriate only when the notices do not raise a substantial controversy, or substantial factual and legal issues. ... Given the issues raised by MTA, this case is not routine. ... Because this notice of exemption is controversial and raises important issues that require more scrutiny and the development of a more complete record, it will be rejected. ...

This rejection is without prejudice to Riffin filing an individual petition for exemption or some other request, such as a formal application or a petition for declaratory order. In the event Riffin files an individual petition for exemption or some other request for authority, or a declaratory order, he must serve a copy on MTA, MDOT, and NSR.” Op. at 2. Bold added.

¹ *James Riffin – Acquisition and Operation Exemption – Veneer Spur – In Baltimore County, MD*, FD No. 35236.

48. As in Riffin’s Veneer Spur proceeding, this proceeding presents “a substantial controversy, or substantial factual and legal issues.” “Because this notice of exemption is controversial and raises important issues that require more scrutiny and the development of a more complete record, it [**should**] be rejected.”

49. As noted above, and as noted in Riffin’s Second Petition to Revoke, the D&H’s Exemption Notice, even as Supplemented, still presents “substantial factual and legal issues,” and is still mired in ‘controversy.’ That is in addition to the material defects in the D&H’s Maps. [Which material defects, Riffin will note, the D&H failed to correct in its Supplement to its Original Exemption Notice. Riffin wonders: Did the D&H fail to read the STB’s regulatory requirements? Did the D&H read the regulatory requirements, then chose to ignore / disregard them? Is the D&H so unfamiliar with its lines of railroad, that it has no idea what it seeks to discontinue service over? And if the D&H’s senior management is so unfamiliar with its lines of railroad, that it has no idea where its lines of railroad are located, how can the D&H’s senior management ‘knowingly’ certify that no ‘local traffic’ has moved over those line of railroad that it is unaware that it even possesses? This reminds Riffin of the BNSF proceeding in Oklahoma City, OK, where senior management was unaware of how local crews actually provided service to local shippers. See AB 6 (Sub. No 430X), Decision Served June 5, 2008, where the STB found that the BNSF in fact provided local service during the two years prior to the BNSF filing its exemption notice, then voided the BNSF’s exemption notice.]

CONCLUSION

50. Riffin has argued that the D&H’s Exemption Notice, as amended with the D&H’s Supplemental Information:

- A. Fails to comply with the Verification requirements of 49 CFR 1152.50(d)(2);
- B. Contains material “false or misleading statements;”

C. And is too “controversial / complex” to be eligible for a Class exemption proceeding.

51. Riffin has also argued that the July 2, 2015 Decision is infirm due to ‘material error.’

52. Mr. Strohmeyer has argued that the proceeding is too ‘controversial,’ and presents too many factual / legal issues, to be appropriate for an expedited class exemption proceeding.

53. Mr. Strohmeyer has further argued that the Maps provided by the D&H, do not comply with the requirements of 49 CFR 1152.22(a)(4).

54. Riffin incorporates by reference, all of the material in Mr. Strohmeyer’s Petition to Revoke, and Riffin’s Reply to Mr. Strohmeyer’s Petition to Revoke, into Riffin’s Second Petition to Revoke, as if fully set out in Riffin’s Second Petition to Revoke.

55. For these reasons, Riffin argues that the STB must **revoke / reject** the D&H’s Exemption Notice, as amended / supplemented. Such revocation / rejection need not be with prejudice. If the D&H continues to desire to rid itself of its trackage rights, the D&H should either agree to convey those trackage rights to another entity, or the D&H should file an Individual Exemption, with appropriate documentation.

56. Furthermore, for the foregoing reasons, Riffin reiterates his argument that the STB **should stay** the effective date of the Exemption Notice, until such time that the STB renders a decision on the Petitions to Revoke.

57. WHEREFORE, for the foregoing reasons, Riffin would respectfully pray that the STB **Revoke / Reject** the D&H’s Exemption Notice, as Amended / Supplemented, **Stay the effective date** of the Exemption Notice, and for such other and further relief as would be appropriate.

Respectfully,

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of August, 2015, a copy of the foregoing Reply to Mr. Strohmeyer's Petition to Revoke, was served on the parties noted below, by E-mail.

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