

**Before the  
Surface Transportation Board**

**JR - 14**

**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**

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238804

ENTERED  
Office of Proceedings  
July 13, 2015  
Part of  
Public Record

**PETITION FOR STAY**

Filed July 13, 2015 by:

James Riffin  
P. O. Box 4044  
Timonium, MD 21094  
(443) 414-6210

1. Comes now James Riffin (“**Riffin**”), who herewith files this Petition for Stay, and says in support hereof:

### **BACKGROUND INFORMATION**

2. On **March 19, 2015**, the Delaware and Hudson Railway Company, Inc. (“**D&H**”), filed a **verified** notice of Exemption under 49 CFR 1152.50, to discontinue overhead and local trackage rights on approximately 670 miles of rail line in New York, New Jersey, Pennsylvania, Maryland, the District of Columbia, and Virginia. Notice of this exemption was served and published in the *Federal Register* on **April 8, 2015**, and was scheduled to become effective on **May 8, 2015**.

3. On **April 20, 2015**, Riffin filed a Petition to Revoke, due to the exemption notice not listing all of the Zip Codes the trackage rights traversed.

4. On **May 13, 2015**, the **Board**, acting through the Director of the Office of Proceedings, held the proceeding in abeyance, “**until further order of the Board**,” Slip Op. at 2, and ordered the D&H to file a supplement to its exemption notice, which supplement had to contain all of the Zip Codes the trackage rights traversed.

5. On **May 18, 2015**, Riffin appealed the Director’s **May 13, 2015** decision to the full Board, arguing that the exemption notice contained “false or misleading information,” and consequently, the Board **was required to reject** the exemption notice, as opposed to permitting the D&H to supplement its exemption notice.

6. On **June 15, 2015**, the D&H filed its Supplement to its Exemption Notice.

7. On **July 2, 2015**, the STB **republished** the D&H’s Exemption Notice, as supplemented, in the *Federal Register*. See 80 FR 38,273.

8. On **July 10, 2015**, the STB served a decision which denied:
  - A. Riffin’s Motion to Consolidate the D&H proceeding with Norfolk Southern’s Acquisition of 282 miles of D&H Lines of Railroad proceeding, FD 35873.
  - B. Riffin’s Petition to Revoke.
  - C. SMART / Samuel Nasca’s Petition to Revoke.
  - D. SMART / Samuel Nasca’s Petition to Stay.
  - E. Riffin’s Appeal of the Director of the Office of Proceeding’s May 13, 2015 decision.

9. The **July 10, 2015** STB decision also stated that petitions to stay were due by **July 13, 2015**, and further stated that Notices of Intent to File Offers of Financial Assistance (“**Notices**”) **had to be refiled**.

10. The date by which Notices had to be filed **was NOT** specified in either the July 10, 2015 Board decision, nor in the July 2, 2015 Decision. [Per 49 CFR 1152.27(c)(2), Notices are due within 10 days after publication in the *Federal Register*, which would be **July 13, 2015**, since July 12, 2015, is a Sunday. (Only actual offers of financial assistance are due on the day before the due date, when the due date falls on a Saturday, Sunday, or a holiday.) 49 CFR 1152.50, does not specify when Notices must be filed.]

## **ARGUMENT**

11. Petitions to stay must meet the standards specified in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F. 2d 841, 843 (DC Cir. 1977), to wit:

- A. A likelihood of success on the merits;

B. Irreparable injury; [A violation of a statute or regulation has been held to be *per se* irreparable harm. See *Bank One, Utah v. Guttau*, 190 F.3d 844 at 847-848 (8<sup>th</sup> Cir. 1999).]

C. Prejudice to the stay-petitioner outweighs the prejudice to the carrier.

### **LIKELIHOOD OF SUCCESS ON THE MERITS**

12. Riffin intends to file another Petition to Revoke. Riffin argues / will argue in his Petition to Revoke, that the D&H's Exemption Notice, as amended with the D&H's Supplemental Information, fails to comply with the Verification requirements of 49 CFR 1152.50(d)(2), still contains "false or misleading statements," and is too "controversial / complex" to be eligible for a Class exemption proceeding. He also argues / will argue, the July 2, 2015 Decision has 'material error.'

### **SUPPLEMENT WAS NOT VERIFIED**

13. The Supplement **was not verified**. [All Exemption Notices, including any supplements to, or amendments of, a previously filed exemption notice, **must** be verified. See 49 CFR 1152.50(d)(2).]

### **FALSE OR MISLEADING STATEMENTS**

14. The Exemption Notice contains "false or misleading statements," to wit:

15. On p. 6 of the Exemption Notice, the D&H falsely averred:

"Pursuant to 49 C.F.R. §1105.6(c)(6), because this Verified Notice of Exemption involves a discontinuance of trackage rights rather than the abandonment of a line of railroad, preparation of an Environmental Report or Historic Report is not required."

16. 49 CFR 1105.6(c)(6) states: “(6) Discontinuance of trackage rights **where the affected line will continue to be operated;**” Bold added.

### **CNJ LINE SEGMENT WEST OF GLEN GARDNER**

17. In the D&H’s Exemption Notice, on p. 2 of Exhibit B, “Subject Trackage Rights,” in the first paragraph, the D&H avers: “The line west of Glen Gardner, NJ was removed following construction of the I-78 extension near Alpha, NJ.”

18. If the line “was removed,” it obviously cannot “be operated” on.

19. This line segment was the subject of AB 167 (Sub. No. 931N).

20. The AB 167 (Sub. No. 931N) **application was filed on January 21, 1986.**

21. **Abandonment authority was granted on May 1, 1986,** over the following segment of CNJ Main Line:

“The Raritan Valley Line owned by New Jersey Transit, from a point in Bloomsbury 1954 feet east of the center line of the Bloomsbury-Warren Glen Road, County Route 639 (approximately Milepost 66.53) to the projection of the Westerly side line of Market Street in Phillipsburg (approximately Milepost 72.23).”

22. Since Conrail abandoned its common carrier rights and obligations over the CNJ line “west of Glen Gardner, NJ,” upon the discontinuance of the D&H’s trackage rights over this line segment, **“the affected line will [NOT] continue to be operated.”**

23. Therefore, the D&H’s representation that following the discontinuance of its trackage rights, “the line will continue to be operated,” was a falsehood, and it was a falsehood that the D&H would not be required to prepare an Environmental or Historic Report for this line segment.

### **CNJ LINE SEGMENT BETWEEN MP 52.2 AND MP 60.1**

24. In the D&H's Exemption Notice, on p. 1-2 of Exhibit B, "Subject Trackage Rights," the D&H avers: "Overhead trackage rights [were] acquired by agreement dated April 25, 1979 ... Between Milepost 1.7 +/- in Oak Island, NJ and Milepost 72.1 +/- in Phillipsburg, NJ over former Central Railroad of New Jersey [{"CNJ"}] lines, a distance of approximately 67.0 miles.

25. The line segment between CNJ MP 52.2 and MP 60.1 was the subject of AB 167 (Sub. No. 864N).

26. The AB 167 (Sub. No. 864N) **application was filed on October 31, 1983.**

27. **Abandonment authority was granted on July 19, 1984,** over the following segment of CNJ Main Line:

"The Raritan Valley Line from the south side of Main Street in High Bridge (approximately Milepost 52.24) to Valuation Station 3170+00 in Bethlehem Township (approximately Milepost 60.1). This line is owned by New Jersey Transit."

28. Since Conrail abandoned its common carrier rights and obligations over the CNJ line between MP 52.2 and MP 60.1, upon the discontinuance of the D&H's trackage rights over this line segment, **"the affected line will [NOT] continue to be operated."**

29. Therefore, the D&H's representation that following the discontinuance of its trackage rights, "the line will continue to be operated," was a falsehood, and it was a falsehood that the D&H would not be required to prepare an Environmental or Historic Report for this line segment.

### **LVRR LINE SEGMENT BETWEEN MP 98.0 AND MP 119.3**

30. In the April 25, 1979 Operating Agreement between the D&H and Conrail, [see Exhibit

2 of the D&H's May 8, 2015 Reply to Riffin's Petition to Revoke: p. 1 of 3 of Ex. A, Line Code 503A], the D&H was granted trackage rights over that portion of the Lehigh Valley Railroad's ("LVRR") Line Code 503A, that lies between Allentown, MP 93.3, and Leighton, MP 119.1.

31. The line segment between LVRR MP 98.0 and MP 119.3 was the subject of AB 167 (Sub. No. 451N).

32. The AB 167 (Sub. No. 451N) **application was filed on November 30, 1981.**

33. **Abandonment authority was granted on March 11, 1982,** over the following segment of LVRR Main Line:

"[B]etween Catasauqua (milepost 98.0) and Leighton (sic) (milepost 119.3) in Lehigh and Carbon Counties, PA."

34. Since Conrail abandoned its common carrier rights and obligations over the LVRR Line Code 503A, between MP 98.0 and MP 119.1, upon the discontinuance of the D&H's trackage rights over this line segment, **"the affected line will [NOT] continue to be operated."**

35. Therefore, the D&H's representation that following the discontinuance of its trackage rights, "the line will continue to be operated," was a falsehood, and it was a falsehood that the D&H would not be required to prepare an Environmental or Historic Report for this line segment.

#### **LVRR LINE SEGMENT BETWEEN MP 96.6 AND MP 98.0**

36. In the April 25, 1979 Operating Agreement between the D&H and Conrail, [see Exhibit 2 of the D&H's May 8, 2015 Reply to Riffin's Petition to Revoke: p. 1 of 3 of Ex. A, Line Code 503A], the D&H was granted trackage rights over that portion of the Lehigh Valley Railroad's ("LVRR") Line Code 503A, that lies between Allentown, MP 93.3, and Leighton, MP 119.1.

37. The line segment between LVRR MP 96.6 and MP 98.0 was the subject of AB 167 (Sub. No. 623N).

38. The AB 167 (Sub. No. 623N) **application was filed on May 25, 1984.**

39. **Abandonment authority was granted on July 19, 1984,** over the following segment of LVRR Main Line:

“The Lehigh Secondary Track in Catasauqua from 200 feet west of the west side of Race Street Bridge, UG #96.59 (approximately Milepost 96.6), to point of prior abandonment (approximately Milepost 98.0);”

40. Since Conrail abandoned its common carrier rights and obligations over the LVRR Line Code 503A, between MP 96.6 and MP 98.0, upon the discontinuance of the D&H’s trackage rights over this line segment, **“the affected line will [NOT] continue to be operated.”**

41. Therefore, the D&H’s representation that following the discontinuance of its trackage rights, “the line will continue to be operated,” was a falsehood, and it was a falsehood that the D&H would not be required to prepare an Environmental or Historic Report for this line segment.

#### **TOO CONTROVERSIAL / COMPLEX FOR CLASS EXEMPTION PROCEEDING**

42. The D&H is uncertain of the extent of the trackage rights that it was granted. For example, in the D&H’s Supplement, at p. 2, the D&H stated:

“While D&H does not appear currently to have trackage rights over those line segments previously abandoned by Conrail, D&H includes them here out of abundance of caution and in order to ensure that there is a clear record with respect to the status of such rights. Footnote 3: Conrail abandoned a segment of U.S.R.A. Line Code 503A which traversed Zip Codes 18037, 18059, and 18080.”

43. The D&H statement above, **does not accurately list ALL of the Zip Codes** that the portion of Line Code 503A that was abandoned by Conrail, traverses. MP 96.6 of Line Code 503A [the beginning point of AB 167 (Sub. No. 623N)], lies in Zip Code **18052** (White Hall, PA). Line Code 503A then traverses Zip Codes **18052**, 18037, 18059, 18080 **and 18235** as it goes from MP 96.6 (White Hall, PA) to MP 119.3 (Lehigh, PA).

44. In the D&H's Exemption Notice, the D&H **failed to list its trackage rights on the LVRR line between Allentown, PA, MP 93.3, and Lehigh, PA, MP 119.3.**

45. In the D&H's May 8, 2015 Reply to Riffin's Petition to Revoke, the D&H included a copy of its April 25, 1979 Operating Agreement between the D&H and Conrail [see Exhibit 2]. The April 25, 1979 Operating Agreement clearly denotes that the D&H has trackage rights over Line Code 503A, from Allentown, PA to Lehigh, PA.

46. In the D&H's June 15, 2015 Supplement, at p. 3, the D&H lists the Zip Codes that Line Code 503A traverses, between Allentown, PA and Lehigh, PA. Zip Codes: 18102, 18052, 18037, 18059, 18080 and 18235. Of these six Zip Codes, two are listed in the D&H's original Exemption Notice: 18052 and 18059.

47. If the D&H is uncertain regarding what trackage rights it was conveyed pursuant to the Final System Plan, then that uncertainty **must be resolved by the Special Court, NOT the STB.**

48. Since the D&H (A) is disputing that it still retains trackage rights over the four line segments Conrail previously abandoned (Sub. Nos. 451N, 623N, 864N, 931N ), and (B) since the D&H is disputing the effect of Conrail's abandonment of the above four line segments, and (C) since the D&H is arguing, contrary to the U.S. Supreme Court's holding in *Thompson v. Texas Mexican Railway*, 328 U.S. 134, 144 (1946), that it does not need formal abandonment authority to be divested of its trackage rights, this proceeding has become exceedingly controversial, and involves rather complex issues, which cannot be resolved in the abbreviated time schedule dictated by a Class Exemption proceeding.

49. Riffin has challenged the D&H's certification that there has been no local traffic over the 670 miles of trackage rights the D&H is attempting to abandon. Riffin has made a discovery request upon the D&H, asking the D&H to provide Riffin with traffic information over the lines that are the subject of this proceeding. To date, the D&H has not provided Riffin with that information. Riffin filed a Motion to Compel. To date, the STB has not ruled on Riffin's Motion to Compel.

50. Given the large number of errors which manifested in the D&H's original Exemption Notice, it is quite conceivable that the D&H was so "unfamiliar" (to use the D&H's own words) with its lines of railroad, that it failed to realize that local traffic in fact moved over segments of those 670 miles of trackage rights.

51. An Individual Exemption proceeding would be a far more appropriate proceeding, since in an Individual Exemption proceeding, there is sufficient time to fully develop the record.

52. The likelihood that the STB will reject the D&H's Exemption Notice, is quite high, given the additional issues raised above. That satisfies the 'likelihood of success on the merits' criteria for a stay.

### **IRREPARABLE HARM**

53. As noted above, when a pleading is contrary to a statute or regulation, that constitutes *per se* irreparable harm. See *Bank One, Utah, op. cit.*

54. Since the D&H is required to prepare Environmental and Historic reports on those four line segments noted above (that Conrail previously abandoned), the D&H's failure to prepare Environmental and Historic reports, would constitute 'irreparable harm,' since the destruction of the environment, or historic structures, would constitute 'irreparable harm.'

### **BALANCE OF HARM**

55. The D&H has the burden of proof. It has failed to carry its burden of proof. Its original Exemption Notice was riddled with errors. Its Supplement contains errors and false statements. The D&H has failed to timely provide Riffin with documents that would substantiate the D&H's unsupported claim, that no local traffic has moved over any portion of the 670 miles of D&H line the D&H is attempting to abandon. Any harm to the D&H, is of its own doing.

56. Riffin desires freight service over a large portion of the D&H's 670 miles of line. Were these lines of railroad to be improvidently automatically abandoned, it would be impossible to ever retrieve these lines of railroad. That would cause irreparable harm to Riffin. It would also cause irreparable harm to those D&H employees that would be without a paycheck, and to the communities and merchants that depend on those D&H employees spending their paychecks in those communities and at those merchants.

### **MATERIAL ERROR**

57. Riffin argues / will argue, that it was 'material error,' for the Director of the Office of Proceedings to publish the revised *Federal Register* notice, and to set a revised scheduling order.

58. In the May 13, 2015 decision, "the Board, through the Director of the Office of Proceedings, issued a decision placing this proceeding into abeyance," July 10, 2015 Decision at 2, "until further order of the Board," May 13, 2015 Decision at 2.

59. No "further order of the Board" has been promulgated, lifting the stay / abeyance Order.

60. Until such time that the Board lifts the stay / abeyance Order, the STB cannot lawfully permit this proceeding to move forward.

61. Consequently, the Director of the Office of Proceedings did not have the requisite authority to serve the July 2, 2015 Decision, setting a new scheduling Order.

## CONCLUSION

62. Due to Petitions for Stay being required to be filed in such short notice, (before Riffin has filed his Petition to Revoke / before the STB has ruled on Riffin's Motion to Compel Discovery), there may not be sufficient evidence in the present record to fully support Riffin's Petition for a Stay. Therefore, Riffin would ask that the STB not rule on Riffin's Petition for Stay for a week / until Riffin files his Petition to Revoke. (Riffin is still researching the Zip Codes the lines traverse, to determine whether the D&H in fact listed all of the Zip Codes that the Lines traverse.) Within a week, Riffin will formally file his Petition to Revoke, which will formally place all of the above arguments into the record, in a more appropriate proceeding. (The STB could also just take judicial notice of Conrail's abandonments, take judicial notice that following the D&H's discontinuance of its trackage rights, at least four line segments would no longer be 'operated,' and thus would invoke the need for Environmental and Historic reporting for those four line segments, and could take judicial notice that this proceeding is still in / and will remain in 'abeyance,' until "further order of the Board.")

63. WHEREFORE, for the foregoing reasons, Riffin would respectfully pray that the STB stay this proceeding, and for such other and further relief as would be appropriate.

Respectfully,

James Riffin  
P.O. Box 4044  
Timonium, MD 21094  
(443) 414-6210

## CERTIFICATE OF SERVICE

I hereby certify that on the 13<sup>th</sup> day of July, 2015, a copy of the foregoing Petition for Stay, was served on the parties noted below, by E-mail.

James Riffin

### E-mail:

Brotherhood of MOW Employees:	Richard Edelman:	<a href="mailto:REdelman@odsalaw.com">REdelman@odsalaw.com</a>
Brotherhood of Locomotive Engineers & Trainmen:	Kevin Moore:	<a href="mailto:bletdiv191@hotmail.com">bletdiv191@hotmail.com</a>
CNJ / Alma / Pace Glass:	Thomas McFarland:	<a href="mailto:mcfarland@aol.com">mcfarland@aol.com</a>
D&H Railways:	Karl Hansen:	<a href="mailto:karl.hansen@stinsonleonard.com">karl.hansen@stinsonleonard.com</a>
D&H Railways:	David Rifkind:	<a href="mailto:david.rifkin@stinsonleonard.com">david.rifkin@stinsonleonard.com</a>
IAM District Lodge 19:	Jeffrey A. Bartos	<a href="mailto:Jbartos@geclaw.com">Jbartos@geclaw.com</a>
	Kyle A. DeCant	<a href="mailto:Kdecant@geclaw.com">Kdecant@geclaw.com</a>
Genesee & Wyoming, Inc.:	Eric Hocky:	<a href="mailto:ehocky@clarkhill.com">ehocky@clarkhill.com</a>
	Allison M. Fergus:	<a href="mailto:afergus@gwrr.com">afergus@gwrr.com</a>
Maryland DOT:	Charles Spitulnik:	<a href="mailto:cspitulnik@kaplankirsch.com">cspitulnik@kaplankirsch.com</a>
NY DOT:	Keith Martin:	<a href="mailto:keith.martin@dot.ny.gov">keith.martin@dot.ny.gov</a>
National Grain & Feed Assoc:	Randall C. Gordon:	<a href="mailto:ngfa@ngfa.org">ngfa@ngfa.org</a>
National Grain & Feed Assoc:	Thomas Wilcox:	<a href="mailto:twilcox@gkglaw.com">twilcox@gkglaw.com</a>
Norfolk Southern:	Williams Mullins:	<a href="mailto:wmullins@bakerandmiller.com">wmullins@bakerandmiller.com</a>
PPL Energy:	Kelvin Dowd:	<a href="mailto:kjd@sloverandloftus.com">kjd@sloverandloftus.com</a>
PA NE Regional RR Auth:	Lawrence Malski:	<a href="mailto:lmalski@pnrra.org">lmalski@pnrra.org</a>
Saratoga & N. Creek Ry:	John D. Heffner:	<a href="mailto:John.Heffner@strasburger.com">John.Heffner@strasburger.com</a>
Seda-Cog Railroads:	Jeffery K. Stover:	<a href="mailto:jra@seda-cog.org">jra@seda-cog.org</a>
U.S. Clay Producers Assoc:	Vincent P. Szeligo:	<a href="mailto:vszeligo@wsmoslaw.com">vszeligo@wsmoslaw.com</a>
Samuel J. Nasca (SMART):	Gordon P. MacDougall	<a href="mailto:gpmacdo@mindspring.com">gpmacdo@mindspring.com</a>