

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 156 (Sub-No. 27X)

DELAWARE AND HUDSON RAILWAY COMPANY, INC.—DISCONTINUANCE OF TRACKAGE RIGHTS EXEMPTION—IN BROOME COUNTY, N.Y.; MIDDLESEX, ESSEX, UNION, SOMERSET, HUNTERDON, AND WARREN COUNTIES, N.J.; CUMBERLAND, CHESTER, LUZERNE, PERRY, YORK, LANCASTER, NORTHAMPTON, LEHIGH, CARBON, BERKS, MONTGOMERY, NORTHUMBERLAND, DAUPHIN, LEBANON, AND PHILADELPHIA COUNTES, PA.; CECIL, HARFORD, BALTIMORE, ANNE ARUNDEL, AND PRINCE GEORGE’S COUNTIES, AND BALTIMORE CITY, MD.; THE DISTRICT OF COLUMBIA; AND ARLINGTON COUNTY, AND THE CITY OF ALEXANDRIA, VA.

Digest:<sup>1</sup> The Board denies a petition for a stay of the effective date of the exemption in this proceeding and a petition to toll the proceeding’s deadline to file offers of financial assistance.

Decided: August 13, 2015

BACKGROUND

On March 19, 2015, Delaware and Hudson Railway Company, Inc. (D&H) submitted a verified notice of exemption under 49 C.F.R. § 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 (80 Fed. Reg. 18,937).

On May 13, 2015, the Board placed this proceeding into abeyance and ordered D&H to supplement its March 19 verified notice of exemption with additional information that was omitted from its March 19 notice, including Zip Codes and counties. On June 15, 2015, D&H amended its verified notice of exemption, providing corrected information and stating that it was republishing newspaper notices and providing corrected notices to the governmental agencies as is required under 49 C.F.R. § 1152.50(d)(1). The Board served and published the corrected verified notice of exemption in the Federal Register on July 2, 2015 (80 Fed. Reg. 38,273).

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

On July 13, 2015, James Riffin (Riffin) filed a petition requesting that the Board stay the current proceeding,<sup>2</sup> and a notice of intent to file an offer of financial assistance (OFA) requesting certain information pursuant to 49 C.F.R. § 1152.27(a). On July 15, 2015, Riffin filed a second petition to revoke the exemption in this proceeding.<sup>3</sup> D&H replied to Riffin's petition for stay on July 20, 2015. On July 22, 2015, D&H replied to Riffin's request for information contained in his notice of intent to file an OFA. On August 10, 2015, Riffin filed a petition to toll the time to file an OFA, arguing that D&H's response to his request for information was deficient.

Riffin's petition for stay will be denied because, as discussed below, the standard for granting a stay has not been met. Riffin's petition to toll the time to file an OFA will also be denied because he has filed out of time and because D&H's response to his request for information under 49 C.F.R. § 1152.27 was not deficient.

### DISCUSSION AND CONCLUSIONS

*July 13, 2015 Petition for Stay.* Under 49 U.S.C. § 721(b)(4), the Board may issue an appropriate order, such as a stay, when necessary to prevent irreparable harm. In ruling on a petition for a stay, the Board considers: (1) whether the party seeking the stay has made a strong showing that it is likely to prevail on the merits; (2) whether the party seeking the stay will suffer irreparable harm in the absence of a stay; (3) whether other interested parties will be substantially harmed by a stay; and (4) the public interest in granting or denying the stay. See Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958).

Success on the Merits. Riffin is not likely to succeed on the merits of his petition to revoke D&H's exemption. Riffin argues that D&H's June 15, 2015 supplement failed to comply with the verification requirements of 49 C.F.R. § 1152.50(d)(2), which Riffin argues requires all supplements and amendments to exemption notices to be verified.<sup>4</sup> However, consistent with past proceedings, we find that D&H's verification of its original filing also covers its supplement. See, e.g., Ill. Cent. R.R.—Aban.—in Grenada Cnty, Miss., AB 43 (Sub-No. 182X) (STB served Feb. 18, 2009) (accepting unverified supplement into the record and noting that date

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<sup>2</sup> Although Riffin does not state why he seeks a stay of this proceeding, in order to address his petition we will presume his intent is to seek a stay of the effective date of D&H's corrected notice pending disposition of his second petition to revoke. We presume this because Riffin filed his second petition to revoke two days after he filed his stay petition.

<sup>3</sup> The Board will address the second petition to revoke in a separate decision. On April 20, 2015, Riffin filed his first petition to revoke the exemption in this proceeding, which was denied by the Board in a decision served on July 10, 2015.

<sup>4</sup> Id. at 4.

of supplemental filing would be considered official filing date); Del. & Hudson Ry.—Aban. Exemption—in Albany Cnty., N.Y., AB 156 (Sub-No. 26X) (STB served June 1, 2007) (noting filing of a supplement, which was not verified). Thus Riffin’s argument on this point is unlikely to succeed.

Riffin also argues that D&H’s June 15, 2015 supplement contains false or misleading information. Riffin contends that D&H’s statements that no environmental or historic reports are required under 49 C.F.R. §§ 1105.6(c)(6) and 1105.8(b)(3) are false with regard to four specific rail line segments included in the notice, because he believes these segments will actually be abandoned as a result of D&H’s discontinuance of trackage rights.<sup>5</sup>

However, these former Consolidated Rail Corporation (Conrail) lines were long ago authorized for abandonment under the Northeast Rail Service Act of 1981 (NERSA). See 45 U.S.C. § 748. NERSA required the agency “to grant, without examination, any Conrail abandonment application unless an offer of financial assistance [OFA] [wa]s timely filed.” Conrail Abans. Under NERSA, 365 I.C.C. 472, 472 (1981); 45 U.S.C. § 748 (absent a timely OFA, NERSA abandonment applications filed by Conrail “shall be granted”). The agency has expressly concluded that it lacks discretion to conduct an environmental review in NERSA abandonments. See Conrail Abans. Under NERSA, 365 I.C.C. at 475; see also 49 C.F.R. § 1105.5(c)(1) (environmental laws are not triggered for NERSA abandonments). If the discontinuances here had occurred prior to Conrail’s abandonments, no environmental review would have occurred under NERSA. Because the order of the NERSA abandonments and discontinuances over a former Conrail line should not affect whether or not environmental review is conducted, as evidenced by the plain language of NERSA, no environmental review is required here. As the Interstate Commerce Commission determined, NERSA required the agency to allow lines subject to NERSA to exit the interstate rail network without environmental analysis—a constraint that could be defeated if the agency required environmental and historic documentation when a line covered by NERSA was subject to a discontinuance of trackage rights in addition to an abandonment. See Conrail Abans. Under NERSA, 365 I.C.C. at 475, 477.

We are aware of cases in which the agency acted, without analyzing NERSA, as if our environmental process might apply under arguably analogous circumstances. See Del. & Hudson Ry.—Discontinuance of Trackage Rights Exemption—in Lehigh & Carbon Cntys., Pa., FD 30334 (ICC served Apr. 20, 1984); Norfolk S. Ry.—Discontinuance Exemption—in Hudson

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<sup>5</sup> Id. at 4-8. The segments Riffin believes will be abandoned are: (1) a segment of the Raritan Valley Line in Warren County, New Jersey, from approximately MP 66.53 to MP 72.23, id. at 5; (2) a segment of the Raritan Valley Line in Hunterdon County, New Jersey, from approximately MP 52.24 to 60.1, id. at 6; (3) a segment of United States Railroad Administration Line Code 0503A (Line 0503A) between MP 98.0 and MP 119.3 in Catasauqua and Leighton, Pa., id. at 6-7; and (4) a segment of Line 0503A between MP 96.6 and MP 98.0 in Catasauqua, Pa., id. at 7-8.

Cnty., N.J., AB 290 (Sub-No. 212X) (STB served Mar. 13, 2001). Because environmental review is not required under NERSA, and because that statutory principle should not change depending on whether the discontinuance or the abandonment occurs first, the Board now concludes that it was unnecessary for the agency to address environmental matters in those cases. To the extent those prior decisions indicated otherwise, they were incorrect.

Therefore Riffin is unlikely to succeed on this issue in his petition to revoke.

Riffin is also unlikely to succeed in his argument that this proceeding is so controversial or complex that D&H should not be allowed to use the class exemption procedures. First, the deficiencies in D&H's original notice of exemption have been corrected with D&H's June 15, 2015 supplement. Second, for the reasons set forth above, Riffin also is unlikely to demonstrate successfully that D&H's omission of environmental and historic reports creates complexity or controversy sufficient to warrant revoking D&H's use of the streamlined class exemption process here. Lastly, Riffin argues that "this proceeding has become exceedingly controversial" and cannot be resolved via the class exemption process based on the fact that D&H is uncertain of the rights it has over the four line segments at issue and is disputing the authority it must obtain from the Board to discontinue those rights.<sup>6</sup> However, in its June 15, 2015 supplement, D&H explains that it is uncertain whether it actually has trackage rights over those line segments and that it included these segments in its notice "out of an abundance of caution."<sup>7</sup> Thus, contrary to Riffin's argument, it is appropriate for D&H to seek discontinuance authority to resolve the apparently uncertain legal status of D&H's trackage rights over the four segments. See, e.g., Reg'l Rail Right of Way Co.—Aban. Exemption—in Collin & Dallas Cntys., Tex., AB 1050 et al., slip op. at 2 n.1 (STB served Dec. 28, 2009). Therefore, this argument is also unlikely to succeed.<sup>8</sup>

Finally, Riffin argues that the Board's publication of the July 2, 2015 Federal Register notice containing D&H's corrected information was material error because the Board did not issue an order explicitly removing this proceeding from abeyance as required by the Board's May 13, 2015 order.<sup>9</sup> This argument, too, is unlikely to succeed. The Board's publication of the July 2, 2015 Federal Register notice is the "further order of the Board" required by the May 13, 2015 order, as demonstrated by the fact that the July 2, 2015 Federal Register notice set a revised

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<sup>6</sup> Pet. for Stay 9.

<sup>7</sup> Reply to Pet. for Stay 7-8; Suppl. to Verified Notice of Exemption 2. D&H's trackage rights on approximately 11 miles of this track were authorized for discontinuance in 1984. See Del. & Hudson Ry.—Discontinuance of Trackage Rights Exemption—in Lehigh & Carbon Cntys., Pa., FD 30334 (ICC served Apr. 20, 1984).

<sup>8</sup> Pet. for Stay 9.

<sup>9</sup> Pet. for Stay 11. The Board's May 13, 2015 order directing D&H to supplement its verified notice of exemption placed this proceeding in abeyance "until further order of the Board."

procedural schedule in this proceeding. The Board previously has removed dockets from abeyance by publishing a subsequent Federal Register notice, even without expressly stating so. The Board's action was therefore consistent with Board precedent. See, e.g., N. Shore R.R.—Acquis. & Operation Exemption—PPL Susquehanna, LLC, FD 35377 (STB served June 3, 2010) (placing notice publication and effectiveness of exemption in abeyance pending further Board action); N. Shore R.R.—Acquis. & Operation Exemption—PPL Susquehanna, LLC, FD 35377 (STB served Dec. 14, 2012) (publishing notice of exemption in Federal Register to remove proceeding from abeyance).

Irreparable Harm. Riffin does not present evidence that he will suffer irreparable harm in the absence of a stay. As discussed above, D&H was not required to prepare environmental and historic reports for any of the line segments at issue in this proceeding. Therefore, the lack of environmental or historic reports was not contrary to any statute or regulation and thus could not result in irreparable harm per se, as Riffin claims.<sup>10</sup>

Moreover, Riffin's expressed desire to conduct future freight service on portions of the line segments subject to this proceeding does not demonstrate irreparable harm to Riffin.<sup>11</sup> He is not a current or former operator or shipper on these lines, and thus has not shown that he will suffer any actual harm as a result of D&H discontinuing the trackage rights subject to this proceeding.

In addition, Riffin's argument that D&H employees will suffer irreparable harm in the absence of a stay also fails. Riffin does not represent any D&H employees, and he presents no evidence of actual D&H employees who would be irreparably harmed by the discontinuance of these trackage rights.

Because the above-discussed factors of the stay criteria have not been satisfied, the Board concludes that the requirements for a stay have not been met. See 49 U.S.C. § 721(b)(4); Am. Chemistry Council v. Ala. Gulf Coast Ry., NOR 42129, slip op. at 5 (STB served May 4, 2012).

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<sup>10</sup> Furthermore, even if D&H's statements regarding environmental and historic reports were contrary to a statute or regulation, Riffin's argument that this would result in per se irreparable harm misinterprets the case on which he relies, Bank One, Utah, Nat'l Ass'n v. Guttau, 190 F.3d 844 (8th Cir. 1999). As D&H points out in its reply (see Reply to Pet. for Stay at 4), that case requires that petitioners seeking a stay also show actual irreparable harm to themselves. Bank One, 190 F.3d at 847-48 (requiring that, to obtain a stay, the petitioner show "that the relevant provisions of the Iowa [Electronic Fund Transfer Act] are preempted by the [National Bank Act] and that it will suffer irreparable harm if the State is not enjoined from enforcing those provisions . . . ." (emphasis added)).

<sup>11</sup> Riffin refers to these line segments over which he desires service as being "improvidently automatically abandoned," but, as discussed above, Riffin's argument with regard to these supposed abandonments is not likely to succeed in his petition to revoke. Pet. for Stay 11.

Thus, there is no need for the Board to address the remaining factors. Riffin's petition for stay will be denied.

*August 10, 2015 Petition to Toll the Time to File an OFA.* Pursuant to 49 C.F.R. § 1152.27(c)(2)(ii)(B), OFAs "must be filed and served no later than 30 days after" the publication of the notice of exemption in the Federal Register. Under 49 C.F.R. § 1152.27(c)(2)(ii)(C), if an applicant in a proceeding receives a bona fide request for information under 49 C.F.R. § 1152.27(a) from a party considering an OFA (an offeror) and fails to provide that information promptly, the offeror may file a petition to toll the 30-day period for submitting OFAs. Such petitions to toll are due within 25 days of the publication of the notice of exemption in the Federal Register.

In his July 13, 2015 notice of intent to file an OFA, Riffin requested that D&H provide him with an estimate of the annual subsidy to provide service for several types of potential traffic and the minimum purchase price for four track segments on which Riffin believes D&H to be the sole remaining carrier.<sup>12</sup> D&H's July 22, 2015 response states that D&H is unable to estimate the annual subsidy to provide the services Riffin requests because such traffic does not currently exist, and that D&H is unable to provide the minimum purchase price for the track segments Riffin seeks to purchase because D&H does not own those segments.<sup>13</sup> Riffin argues in his petition to toll that the information provided to him by D&H in response to his request was deficient,<sup>14</sup> and therefore that the Board should toll the time period in which to file an OFA until 10 days after D&H provides Riffin with the information he requested.

Riffin's petition to toll the deadline to file OFAs will be denied. The Board served and published a corrected verified notice of exemption in the Federal Register on July 2, 2015. Petitions to toll were due within 25 days of the publication of that notice, and thus were due July 27, 2015. Riffin's August 10 petition to toll was therefore filed two weeks late. Furthermore, OFAs were due within 30 days of the publication of the notice of exemption in the Federal Register, and thus were due August 1, 2015.<sup>15</sup> Riffin filed his petition to toll the deadline to file OFAs nine days after the deadline for filing OFAs passed.

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<sup>12</sup> Notice of Intent to File an OFA 8.

<sup>13</sup> Response to Request for Information 1.

<sup>14</sup> Riffin argues that it is irrelevant whether or not the traffic as to which he requests an estimated annual subsidy currently exists. Riffin also argues that he is not seeking to purchase the line segments at issue, but rather, to purchase D&H's easement interest. He states he is also aware the minimum purchase price for D&H's interest in those line segments is "Zero Dollars," but that D&H is required under 49 C.F.R. § 1152.27(a) to expressly state that fact. Pet. to Toll Time to File an OFA at 3, 5. As discussed further below, an OFA in this proceeding could only subsidize continued rail service by D&H for one year.

<sup>15</sup> See 49 C.F.R. § 1152.25(d)(4).

In addition, in a discontinuance of trackage rights proceeding, an OFA under 49 U.S.C. § 10904 may only be filed to subsidize continued rail service by the existing carrier. See, e.g., Union Pac. R.R.—Aban. & Discontinuance of Trackage Rights Exemption—in L.A. Cnty, Cal., AB 33 (Sub-No. 265X) (STB served May 7, 2008) (stating that “the Board’s rules and precedent are clear that OFAs for discontinuance of trackage rights are limited to subsidies to provide continued rail service.”); Del. & Hudson Ry.—Discontinuance of Trackage Rights Exemption—in Susquehanna Cnty, Pa. & Broome, Tioga, Chemung, Steuben, Alleghany, Livingston, Wyoming, Erie, & Genesee Cntys, N.Y., AB 156 (Sub-No. 25X), slip op. at 3 (STB served March 30, 2005) (stating that “[w]here discontinuance of trackage rights is involved, section 10904 can be used for involuntary subsidization of the trackage rights (as a temporary, transitional measure for up to 1 year, see 49 U.S.C. § 10904(f)(4)(B)).”). Here, D&H has not provided service to any shipper for at least two years, and Riffin has not provided persuasive evidence that there would be any traffic to subsidize within a year. Riffin, who is neither a current nor a former shipper who seeks service on the line or a representative of such an entity, asserts that existing truck traffic would move to rail and that silica and container traffic “will materialize,” but those assertions are unsupported and speculative. Based on these facts, D&H’s response was not deficient. Nor has Riffin provided any basis to permit the OFA process to continue, as he has not demonstrated that there is or would be any shipper activity to subsidize.<sup>16</sup> Riffin’s petition to toll the deadline to file OFAs will be denied.

It is ordered:

1. Riffin’s petition for a stay is denied.
2. Riffin’s petition to toll the time to file an OFA is denied.
3. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Miller.

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<sup>16</sup> Union Pac. R.R.—Aban. Exemption—in Lassen Cnty., Ca., & Washoe Cnty., Nev., AB-33 (Sub-No. 230X), slip op. at 4 (STB served Jan. 27, 2009) (“the OFA provisions are intended to preserve, whenever possible, any prospect for continuing rail freight service on corridors that would otherwise be abandoned, but the Board need not require the sale of a line under the OFA provisions if it determines that the offeror is not genuinely interested in, or capable of, providing rail service or that there is no likelihood of future traffic”). Although that proceeding involved an OFA to purchase, the Board’s reasoning applies equally to OFAs to subsidize.