

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. AB-156 (SUB-NO. 27X)

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Office of Proceedings
July 20, 2015
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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 COUNTIES, 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.

REPLY TO PETITION FOR STAY

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Dated: July 20, 2015

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REPLY TO PETITION FOR STAY

INTRODUCTION

Delaware and Hudson Railway Company, Inc. ("D&H") submits this reply in opposition to James Riffin's ("Riffin") Petition for Stay ("Petition" or "JR-14") of the effective date of the discontinuance exemption the Board published on July 2, 2015. D&H opposes Riffin's Petition on the grounds that Riffin, who is neither a shipper nor a carrier and has no cognizable interest in this proceeding, has failed to make a threshold showing that he will suffer irreparable harm absent a stay. Further, Riffin fails to demonstrate a likelihood of success on the merits of his Petition to Revoke (Riffin's second such petition), or that the balance of harms or the public interests warrants a stay. Accordingly, the Board should deny the Petition in all respects.

BACKGROUND

On March 19, 2015, D&H filed its Notice of Exemption to discontinue approximately 670 miles of trackage rights in five states and the District of Columbia. The Board published

notice of D&H's exemption on April 8, 2015 with an effective date of May 8, 2015, which the Board later postponed to June 15, 2015 to coincide with the effective date of the transaction in Finance Docket No. 35873. On April 20, 2015, Riffin filed his first petition to revoke the exemption in which he asserted that D&H had failed to include certain ZIP Codes and counties in its Notice. On May 8, 2015, D&H filed a reply to Riffin's petition acknowledging inadvertent omission of certain ZIP Codes and counties. On May 13, 2015, the Office of Proceedings ordered D&H to submit a supplement to its March 19, 2015 Notice that includes all omitted information required by 49 C.F.R. § 1152.50 and placing the proceeding in abeyance pending further order of the Board. On June 15, 2015, D&H filed the supplemental information (the "Supplement") required by the May 13 Order. On July 2, 2015, the Board republished the notice of exemption with an effective date of August 4, 2015.

On July 10, 2015, the Board issued a decision rejecting various petitions filed by Riffin and by SMART/TD-NY to stay this proceeding, to consolidate this proceeding with the NS proceeding to acquire and operate the D&H South Lines, and to revoke the Notice of Exemption. Docket No. AB-157 (Sub-No. 27X) (served July 10, 2015). The Board rejected arguments, including Riffin's, that use of the class exemption procedures to discontinue trackage was inappropriate under the circumstances. The Board rejected Riffin's argument that the Notice of Exemption should be revoked because of issues related to omissions in D&H's original Notice of Exemption. The Board also rejected Riffin's appeal of the May 13, 2015 Director's Decision placing the proceeding in abeyance. The Board affirmed that D&H has met the regulatory requirements for use of the class exemption. *Id.*, slip op. at 5.

On July 13, 2015, Riffin filed his Petition asserting that the exemption should be stayed because Riffin is likely to succeed on the merits his soon to be filed Petition to Revoke, that

irreparable harm would occur absent a stay, and that the balance of harms favored a stay. Riffin filed his Petition to Revoke on July 15, 2015 which mirrors the arguments in his Petition for Stay. Specifically, Riffin contends that the Notice of Exemption should be revoked because D&H's Supplement was not verified; that D&H falsely stated that it was not required to prepare environmental and historic reports for line segments that Conrail abandoned in the 1980s; that the trackage rights discontinuance is too controversial and complex for a class exemption proceeding; and that the Board's re-publication of the notice constituted material error. Riffin's claims are incorrect, unsubstantiated, and wholly without merit. His Petition meets none of the criteria necessary for a stay including the threshold consideration of irreparable harm. Accordingly, the Petition should be denied.

ARGUMENT

I. Standard.

The Board's standard for issuing a stay, although misstated in Riffin's Petition, is well settled:

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.

Norfolk So. Ry. Co.—Acquisition and Operation—Certain Rail Lines of The Del. and Hudson Ry. Co., Docket No. FD 35873, slip op. at 2 (STB served June 12, 2015) (citations omitted). A stay is an extraordinary remedy and rarely granted. The party seeking a stay carries the burden of persuasion on all of the elements required for such extraordinary relief. *Canal Authority of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974). In denying a prior Riffin petition to stay, the

Board explained that a stay "should not be sought unless the requesting party can show that it faces unredressable actual and imminent harm that would be prevented by a stay. Indeed, the threshold consideration in deciding whether injunctive relief is appropriate is whether the petitioning party will be irreparably harmed without it." *Eighteen Thirty Group, LLC—Acquisition Exemption—In Allegany County MD*, Docket No. FD 35438 (STB served Nov. 17, 2010) (citations omitted). Nevertheless, Riffin fails to substantiate any claim that he will suffer irreparable harm here. Additionally, he fails to demonstrate likelihood of success on the merits, and fails to address either the harm to other interested parties or the public interest factors. Accordingly, Riffin's Petition for Stay should be denied.

II. Riffin Faces No Threat of Irreparable Harm.

As noted, the Board's threshold consideration in deciding whether to issue a stay is whether the party seeking the stay has demonstrated that it faces unredressable actual and imminent harm without the stay. *Id.* While Riffin claims that his "freight service desires" will somehow be squelched absent a stay, he fails to allege that he will suffer any actual harm as a result of D&H's discontinuance of trackage rights. Nor is there any reason to believe that Riffin, who is neither a shipper nor a carrier, would suffer actual harm absent a stay.

Undeterred by the fact that he will suffer no actual harm, Riffin wrongly argues that the "irreparable harm" prong is satisfied because "when a pleading is contrary to a statute or regulation, that constitutes *per se* irreparable harm." JR-14 at 10, *citing Bank One, Utah, N.A. v. Guttau*, 190 F.3d 844 (8th Cir. 1999). However, Riffin misconstrues *Bank One* which clearly required that the party seeking injunctive relief demonstrate both success on the merits and that absent a stay, it would suffer actual and irreparable harm. *Id.*, at 850-51.

In *Bank One*, the bank sought a permanent injunction of a state statute that attempted to regulate the placement of ATMs. The bank argued that the state law was federal preempted by

the National Bank Act and the Eighth Circuit agreed. Turning to the injunction, the court stated that "[t]o be entitled to the grant of an injunction, Bank One must establish the existence of irreparable harm." *Id.*, at 850-51. The court found that Bank One had demonstrated that "in the absence of an injunction the continued enforcement of the relevant provisions of the Iowa EFT would result in irreparable economic loss to Bank One." *Id.* In granting the injunction, the court explained that where the state law was shown to be invalid and the party seeking injunctive relief demonstrated that it would suffer irreparable harm, "the balance-of-harm and public-interest factors need not be taken into account." *Id.*, at 848. Accordingly, even assuming that *Bank One's* holding with respect to the balance of harm and public-interest factors was somehow applicable here (it is not), *Bank One* makes clear that Riffin must still demonstrate that *he* will suffer irreparable harm.

Riffin assertions of potential irreparable harm to the environment and historic structures on four segments of rail track that he claims Conrail abandoned some 30 years ago are nonsense. D&H cannot and has not operated over those segments at least since their abandonment and has no property interests in them. D&H continuing not to operate over these line segments will have no environmental or historic site consequences. There is no potential harm and, as discussed below, no basis for requiring environmental or historic reports. In any event, any potential harm would not be harm to Riffin.

Accordingly, Riffin has failed to satisfy the threshold issue of demonstrating that he will suffer irreparable harm.

III. Riffin Has No Likelihood of Success on the Merits.

Riffin contends that a stay is warranted because he is likely to prevail on his now pending Petition to Revoke. However, Riffin's Petition to Revoke, which is nearly identical to his Petition for Stay, asks the Board to revoke the exemption based solely on alleged procedural

defects in D&H's June 15, 2015 Supplement and the Board's July 2, 2015 decision which, even if present, would not merit revocation of the exemption. Riffin's arguments are unfounded and unsupported. He provides no basis whatsoever for revocation of the exemption.

A. Verification of the Supplement is not required.

First, Riffin erroneously claims that D&H's Notice of Exemption is procedurally defective because D&H's June 15, 2015 supplement was not verified. According to Riffin, Board regulations require that "All Exemption Notices, including any supplements to, or amendments of, a previously filed exemption notice, **must** be verified." JR-14 at 4 (citing 49 C.F.R. § 1152.50(d)(2) (emphasis in the original)). However, the Board's regulations contain no such requirement with respect to supplements, and the Board's May 13, 2015 Decision directing D&H to file the supplemental information included no verification requirement.

The Board's regulations provide that a discontinuance is eligible for the class exemption if the carrier certifies that no local traffic has moved over the line for at least 2 years, that any overhead traffic on the line can be rerouted over other lines, and that no formal complaint is pending or has been decided adversely within the 2-year period. 49 C.F.R. § 1152.50(b). D&H provided the certification required by Section § 1152.50(b) in its verified Notice on March 19, 2015. While Section 1152.50(d)(2) requires the railroad to file a verified notice, it does not require supplemental or amended information to be similarly verified. In fact, the Board's rules provide that unless specifically required, an attorney's signature is sufficient. 49 C.F.R. § 1104.4(a) (a "pleading, document or paper thus signed [by an attorney] need not be verified or accompanied by affidavit unless required elsewhere in these rules."). Accordingly, D&H's June 15, 2015 supplemental filing, which was signed by counsel for D&H satisfied the Board's regulations. *See* Docket No. AB-156 (Sub-No. 27X), slip op. at 5 ("With the June 15

supplement, D&H has met the regulatory requirements for a verified notice of exemption in this proceeding..."). Riffin has provided no basis for reconsidering the Board's decision.

Even if the Board were to conclude that the supplemental information should have been verified, revocation of the exemption would be an extreme remedy that is wholly inconsistent with the purpose of the class exemption procedures. *See* 49 C.F.R. § 1152.50(c)(1)-(2) ("The Board has found [t]hat its prior review and approval of these abandonments and discontinuances is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and [t]hat these transactions are of limited scope and continued regulation is unnecessary to protect shippers from abuse of market power."). Rather, the Board could simply direct D&H to supplement the record with a verification.

B. No False or Misleading Information.

Riffin next argues that the exemption must be revoked because it contains false and misleading information. Specifically, Riffin identifies four line segments that were previously abandoned by Conrail in the 1980's.¹ According to Riffin, because these line segments will not continue to be operated after consummation of the discontinuance authority, the environmental and historic reporting requirements of 49 C.F.R. § 1105.6(c) are triggered. Thus, Riffin contends that D&H's averments in its March 19 Notice that the lines for which D&H seeks trackage rights discontinuance authority would continue to be operated and that environmental and historic reports are not required are "false and misleading". Riffin is wrong.

D&H's June 15, 2015 supplement explained that D&H does not appear to have trackage rights over line segments that were abandoned by Conrail decades earlier, and that those

¹ *See* AB-167 (Sub-No. 451N) (ICC served March 11, 1982); AB-167 (Sub-No. 864N) (ICC served July 19, 1984; AB-167 (Sub-No.623N) (ICC served July 19, 1984); AB-167 (Sub-No. 931N) (ICC served May 1, 1986).

segments were included merely "out of an abundance of caution and in order to ensure that there is a clear record with respect to the status of such rights." Supplement at 3. D&H's statement that the line segments have long since been abandoned cannot be squared with Riffin's claim that D&H misrepresented that these same line segments will continue to be operated. Consequently, there is no basis for asserting that the inclusion of the segments here somehow rendered any statement in the Notice of Exemption (as supplemented) either false or misleading.

As to Riffin's contention that environmental and historic reports are required in this proceeding, Riffin is 30 years too late. The time for considering harm to the environment and historic structures was when Conrail sought to abandon the segments (and by implication, to terminate D&H's trackage rights authority).

Moreover, Board regulations except from reporting requirements, "any action that does not result in significant changes in carrier operations." 49 C.F.R. § 1105.6(c)(2). Neither D&H nor Conrail has operated over these abandoned line segments in decades. Thus, to the extent that D&H somehow currently holds residual trackage rights authority over these former rail line segments, discontinuance of that authority would have no impact whatsoever on carrier operations. Under these circumstances, no reporting is required.

Indeed, to require D&H to provide environmental and historic reports would serve no purpose at all. D&H has no property interest in the underlying property and any action in this proceeding will have no impact on the underlying status of that property. Further, the property appears to have long since ceased to be part of the national freight rail network. Requiring reports would impose an unnecessary regulatory burden and subvert the purpose of the class exemption.

C. The class exemption is appropriate for discontinuance of D&H's trackage rights.

Next, Riffin again challenges the use of the class exemption in light of the supposed controversy and complexity of the proceeding. The Board has repeatedly rejected arguments against the use of the class exemption in this proceeding. *E.g.*, Docket No. AB-156 (Sub-No. 27X), slip op. at 6 (STB served July 10, 2015); Docket No. FD 35873, slip op. at 15-16, 20 (STB served May 15, 2015). Riffin offers no basis for reconsidering the Board's decisions.

As evidence of the supposed controversy and complexity Riffin again points to the omission of ZIP Codes in the original Notice of Exemption. However, the Board's July 10, 2015 decision specifically affirmed that "[w]ith the June 15, 2015 supplemental filing, D&H has met the regulatory requirements for a verified notice of exemption in this proceeding, including listing all affected Zip Codes and counties." Docket No. AB-156 (Sub-No. 27X), slip op. at 5. Riffin provides no evidence or argument that would merit revisiting the Board's affirmation of the use of the Class Exemption here.

Next, Riffin points to the alleged uncertainty concerning the status of D&H's rights over line segments that Conrail abandoned some three decades ago. However, those segments, which constitute a miniscule portion of the 670 miles of trackage rights that are being discontinued, are not controversial and do not raise any complex issues that this Board or the Special Court need to resolve.² Rights over the specific line segments were implicitly terminated by the abandonment

² Riffin suggests that there may be issues that the Special Court would need to resolve. The Special Court, however, addresses the nature of rights that were conferred under the Final System Plan ("FSP") while the Board has exclusive jurisdiction over abandonments and discontinuances of such rights. *See Consol. Rail Corp. v. STB*, 571 F.3d 13, 20 (D.C. Cir. 2009) ("Only in proceedings in which the Board's authority is challenged and an interpretation of the FSP or the Special Court's conveyance order under 45 U.S.C. § 719(e)(2) is required does the Board lack jurisdiction to resolve the question of the nature of the trackage sought to be

of the underlying segments. As stated in the June 15, 2015 supplement, they were included in this proceeding to ensure a clear record. To the extent that there is any question as to the status of D&H's trackage rights authority over these segments, however, it is of no practical significance, as the authority is unusable and has been at least since the Conrail abandonment. Discontinuance of long moribund and unusable trackage rights authority is nothing more than an exercise in administrative housekeeping that falls squarely within the class exemption procedures.

Further, Riffin again speculates that D&H's certification that no local traffic has moved over the trackage rights to be discontinued in at least two years might be erroneous. This is nothing more than pure conjecture on Riffin's part. Such conjecture provides no basis for the Board to reconsider the use of the class exemption here and therefore fail to satisfy Riffin's burden of establishing his likely success on the merits. Accordingly, the Board should deny the Petition.

D. The Board's re-publication of the corrected notice was not material error.

Finally, Riffin wrongly contends that the Office of Proceedings improperly re-published the notice of the exemption before a "further order of the Board" removing the state of abeyance created by the Director's May 13 decision. The further order, of course, is implicit in the July 2 decision to re-publish the notice. Riffin alleges no denial of due process or other harm. In any event, Riffin's argument provides no basis for revocation of the exemption.

abandoned"). Because this proceeding concerns only the discontinuance of trackage rights and not the nature of the rights, there are no issues that the Special Court might need to address.

IV. Neither The Balance of Harms Nor Public Interest Factors Favor a Stay.

As discussed above, Riffin will suffer no harm absent a stay. He has no cognizable interest in this proceeding, his "desires" notwithstanding. By contrast, a stay would delay the effective date of D&H's ability to discontinue trackage rights which are not economically justified, which following consummation of NS's acquisition of the D&H South Lines will be disconnected from the D&H system, and which D&H is clearly entitled to discontinue. If discontinuance authority is delayed, D&H will be harmed. For example, in order to meet its regulatory common carrier obligation if service is requested D&H may need to negotiate either haulage or trackage rights agreements with third party carriers and those agreements may require regulatory authority. Thus the balance of harm weighs heavily against a stay.

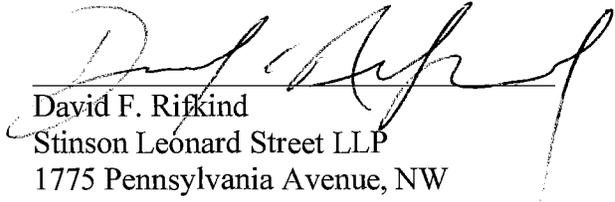
Likewise, the public interest factor, which Riffin ignores, weighs heavily against a stay. Congress has made clear that the public interest lies in eliminating unnecessary regulatory burdens to exit. 49 U.S.C. § 10101(7). The public has no interest in delaying discontinuance of unused and/or economically unjustified trackage rights. As demonstrated in the D&H South Lines acquisition proceeding, the discontinuance of the subject trackage rights has no anti-competitive impact. Docket No. FD 35873, slip op. at 14-16, 20 (STB served May 15, 2015). The public interest is best served by allowing D&H to consummate the discontinuance of the trackage rights and to focus its energy and resources on providing competitive rail service.

CONCLUSION

Riffin has failed to demonstrate that a stay of the exemption should issue. Accordingly, the Board should deny Riffin's Petition in all respects.

Dated: July 20, 2015

Respectfully submitted,



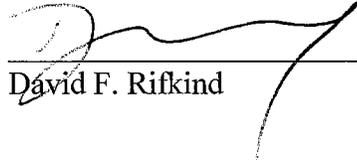
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CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2015 I have caused the foregoing Reply to be served to the parties of record by First Class Mail and by e-mail where an e-mail address is included on the Board's official service list.



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