

**Before the
Surface Transportation Board**

JR - 16

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

238828

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

ENTERED
Office of Proceedings
July 15, 2015
Part of
Public Record

SECOND PETITION TO REVOKE

Filed July 15, 2015 by:

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Note: Filing fee sent via U.S. Postal Service.

JAMES RIFFIN'S SECOND PETITION TO REVOKE

1. James Riffin herewith petitions the Surface Transportation Board (“**STB**”), to revoke the Delaware and Hudson Railway’s (“**D&H**”) Exemption Notice, filed on March 19, 2015, as amended / supplemented, on June 15, 2015, and in support hereof states:

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. On **July 13, 2015**, Riffin filed a Petition to Stay the Exemption Notice.

ARGUMENT

10. Riffin argues 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 that the July 2, 2015 Decision is infirm due to 'material error.' 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. As noted below, the D&H, if it continues to desire to rid itself of its trackage rights, should either agree to convey those trackage rights to another entity, or the D&H should file an Individual Exemption, with appropriate documentation.

SUPPLEMENT WAS NOT VERIFIED

11. 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

12. The Exemption Notice contains “false or misleading statements,” to wit:

13. 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.”

14. 49 CFR 1105.6(c)(6) states:

“(c) No environmental documentation will normally be prepared (although a Historic Report may be required under section 1105.8) for the following actions:

(6) Discontinuance of trackage rights **where the affected line will continue to be operated;**” Bold added.

15. 49 CFR 1105.8, *Historic Reports*, states:

“(a) *Filing*. An applicant proposing an action identified in §1105.6 (a) [rail construction] or (b) [Abandonment of a rail line], or an action in §1105.6(c) [(c)(6) Discontinuance of trackage rights where the affected line will continue to be operated] that will result in the lease, transfer, or sale of a railroad’s line, sites or structures, must submit ... the Historic Report described in paragraph (d) of this section, unless excepted under paragraph (b) of this section.”

16. As noted below, the discontinuance of the D&H's trackage rights over four line segments, totaling **36.3 miles of line**, will result in **the total cessation of common carrier operation** (which is the definition of the word 'abandonment') over those 36.3 miles of lines of railroad. (931N = 5.7 miles; 864N = 7.9 miles; 451N = 21.3 miles; 623N = 1.4 miles.)

17. Since the discontinuance of the D&H's trackage rights over the four line segments noted below, will result in the total cessation of any obligation by any carrier to provide common carrier operation over those four line segments, the discontinuance of the D&H's trackage rights over the four line segments noted below, **will effect an 'abandonment'** of those four line segments.

18. Consequently, the D&H is **required** to file an Environmental Report and an Historic Report, for the four line segments noted below.

19. It was a **material false statement** for the D&H (A) to represent that common carrier operation will continue over the below four line segments, following the discontinuance of the D&H's trackage rights over the below four line segments, and (B) it was a material false statement for the D&H to represent that no Environmental Report or Historic Report was required to be filed.

CNJ LINE SEGMENT WEST OF GLEN GARDNER

20. 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."

21. If the line "was removed," it obviously cannot "be operated" on.

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

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

24. **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).”

25. 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.”**

26. 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

27. 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.

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

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

30. **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.”

31. 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.”**

32. 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.

LVERR LINE SEGMENT BETWEEN MP 98.0 AND MP 119.3

33. 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 (“**LVERR**”) Line Code 503A, that lies between Allentown, MP 93.3, and Lehigh, MP 119.3.

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

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

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

“[B]etween Catasauqua (milepost 98.0) and Le[h]ighton (sic) (milepost 119.3) in Lehigh and Carbon Counties, PA.”

37. 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.”**

38. 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

39. 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 119.3.

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

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

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

“The Leighton 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);”

43. 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.”**

44. 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

45. 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.”

46. 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 (Lehighton, PA).

47. 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 Lehighton, PA, MP 119.3.**

48. 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 Lehighton, PA.

49. 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 Lehighton, 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.

50. 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.**

51. 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.

52. Riffin has challenged the D&H's certification that there has been no local traffic over the 670 miles of trackage rights that 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.

53. 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.

54. 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.

THE D&H FAILED TO CARRY ITS ‘BURDEN OF PROOF’

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.

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.

MATERIAL ERROR

57. Riffin argues 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. **This was material error.**

CONCLUSION

62. 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.

63. Riffin has also argued that the July 2, 2015 Decision is infirm due to 'material error.'

64. 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.

63. WHEREFORE, for the foregoing reasons, Riffin would respectfully pray that the STB Revoke / Reject the D&H's Exemption Notice, as Amended / Supplemented, 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 15th day of July, 2015, a copy of the foregoing Petition to Revoke, was served on the parties noted below, by E-mail.

James Riffin

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