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**Before the
Surface Transportation Board**

239314

Finance Docket No. 35873

ENTERED
Office of Proceedings
October 5, 2015
Part of
Public Record

**NORFOLK SOUTHERN RY. CO.
- ACQUISITION AND OPERATION APPLICATION -
CERTAIN LINES OF THE DELAWARE AND HUDSON RY.**

JAMES RIFFIN'S SUPPLEMENT TO THE RECORD:

1. James Riffin herewith provides this supplement to the record in the above entitled proceeding, by filing Riffin's Comments regarding the September 15, 2015 filing by the American Train Dispatchers Association ("ATDA").
2. On September 15, 2015, the ATDA filed a pleading which it entitled a 'Petition for Declaratory Order.'
3. Per 49 CFR 1104.13, a party has 20 days to reply to a pleading.
4. Pleadings in response to the ATDA's September 15, 2015 pleading, are due by October 5, 2015.

COMMENT ONE

5. The STB 'jumped the gun' when it issued its September 18, 2015 decision denying the ATDA's pleading. The STB denied Riffin his Due Process Right to file a response to the ATDA's September 15, 2015 pleading.

COMMENT TWO

6. This proceeding is currently the subject of Riffin’s Petition for Review in the Third Circuit. While the Third Circuit has yet to determine whether the Third Circuit is the proper venue for Riffin’s Petition for Review, (and has yet to rule on the STB’s Motion to Dismiss Riffin’s Petition for Review), Riffin’s Petition for Review was docketed.

7. Once a Petition for Review is docketed, the underlying agency loses its jurisdiction to make any further decisions.

8. Consequently, Riffin argues that the STB was without the requisite jurisdiction to render / serve its September 18, 2015 decision. (Of course, if the Third Circuit dismisses Riffin’s Petition for Review, then the STB may have had the requisite jurisdiction. Makes for another argument when the next Petition for Review is filed.)

COMMENT THREE

9. Riffin is still not sure what the ATDA actually filed. While it was labeled a “Petition for Declaratory Order,” that does not appear to be what it in fact was. For a start, no additional filing fee was remitted to the STB. (Petitions for Declaratory Order require the payment of a filing fee.) In addition, petitions for declaratory order normally are considered a separate action, and thus are assigned a separate docket number. The ATDA’s pleading was docketed in FD 35873, rather than its own docket.

10. Perhaps it was a ‘Motion for Clarification,’ since that in essence was what the ATDA sought: Clarification of whether an employee implementing agreement with the Soo Line was required.

11. It also had the appearance of being a ‘Motion for a Stay,’ since the ATDA ‘requested’ that the STB stay **the authority** granted by the STB’s May 15, 2015 decision. (The ATDA **did not** ask the STB to ‘stay’ **the date** Norfolk Southern planned to consummate its acquisition of the D&H’s South Lines.)

12. But while the ATDA's pleading had the appearance of being a Motion for a Stay, it did not have the 'trappings' of a Motion for a Stay: None of the criteria for a 'stay' were mentioned, nor discussed.

13. Consequently, when the STB ruled that there was insufficient evidence to justify issuing a stay of the authority granted on May 15, 2015, there was good grounds for that justification: None of the criteria for issuing a stay were addressed in the ATDA's pleading. A stay of any kind, without the requisite showing that the stay criteria had been met, would have been inappropriate.

COMMENT FOUR

14. The ATDA's revelation that all of the D&H's dispatching was being done by Soo Line employees, was shocking, to say the least.

15. Riffin argues that the STB's **May 15, 2015** decision, which granted Norfolk Southern authority to acquire the D&H's South Lines, was based on **material misleading representations** by Norfolk Southern, to wit: That only one Class I carrier was involved, when in fact two Class I carriers were involved, namely, Norfolk Southern, and the Soo Line.¹

The Board's Acquisition Orders are Fatally Defective, for they are based on Material Misrepresentations made by Norfolk Southern

16. Norfolk Southern is a Class I rail carrier.

¹ The STB has previously noted that the Soo Line is a Class I carrier. See EP 552 (Sub-No. 19), Served September 8, 2015.

17. The D&H is a Class II rail carrier.

18. The Soo Line is a Class I rail carrier.

19. Norfolk Southern represented to the Board that it was acquiring the D&H's South Lines.

20. Norfolk Southern **failed to tell the Board** (A) that Soo Line employees performed all dispatching services on all D&H lines, and (B) that Norfolk Southern was acquiring the Soo Line's Dispatching Services.

21. In *Rail-Term Corp. – Petition for Declaratory Order*, FD 35582, Served November 19, 2013, the Board found that an entity that provides dispatching services, is a 'rail carrier providing transportation subject to the jurisdiction of the Board.'

22. Norfolk Southern **misrepresented** to the Board that the only carriers involved, were Norfolk Southern and the D&H, when in fact three carriers were involved: Norfolk Southern, the D&H **and the Soo Line**.

23. Based on Norfolk Southern's misrepresentation, the Board concluded that the transaction was a '**minor**' transaction, since it involved only one Class I carrier (Norfolk Southern). (The D&H is a Class II carrier.) See 49 U.S.C. 11324 (d).

24. Whenever two (or more) Class I rail carriers are involved, 49 U.S.C. 11324 (b) is the applicable statute.

25. Under 49 U.S.C. 11324 (b), a transaction involving two (or more) Class I carriers, is deemed a '**significant**,' transaction.

26. The criteria for approving a 'minor,' vs. a 'significant' transaction, are radically different. (The criteria for approving a 'significant' transaction are **far more stringent**.)

27. The May 15, 2015 Order of the Board is fatally defective, for it is based on a material misrepresentation by Norfolk Southern.

COMMENT FIVE

28. Three Petitions for Reconsideration are presently before the STB in this proceeding.

29. At the time those Petitions for Reconsideration were filed, it was unknown by all of the parties (but not unknown by the two Applicants: Norfolk Southern and the D&H), that all of the D&H's dispatching was being done by another carrier: The Soo Line.

30. Two of the parties to those Petitions for Reconsideration have argued that the transaction was a 'significant,' rather than a 'minor' transaction.

31. Riffin argues that the revelations made by the ADTA (that all of the D&H's dispatching was being done by the Soo Line, a Class I carrier), are 'new evidence,' and as such, are properly a part of the record before the STB in the Petitions for Reconsideration proceedings.

32. Riffin further argues that the STB is **required** to take notice of the dispatching revelations made by the ATDA, and that in light of that additional evidence, that the STB **must find** that the Application submitted by Norfolk Southern **was 'incomplete,'** and as such **must be 'rejected.'** (The Application was 'incomplete,' for Norfolk Southern failed to tell the STB that the D&H's dispatching was done by the Soo Line. Had that information been revealed to the STB as a part of the original Application, the STB would have been given an opportunity to ascertain whether two Class I carriers were involved.)

33. Norfolk Southern's failure to disclose that the Soo Line was doing all of the D&H's dispatching, also implicates the Due Process Rights of the Parties, for it is a Constitutional

requirement that notice be afforded opposing parties, and opposing parties must be given a reasonable opportunity to respond to the notice.

COMMENT SIX

34. Riffin filed a 1st Amended Complaint in the U. S. District Court for the District of Maryland, Baltimore Division, against Norfolk Southern and the Delaware and Hudson, asking the District Court to enjoin the defendants to vacate their September 18, 2015 consummation of Norfolk Southern's acquisition of the D&H's South Lines. See **15 - CV - 2799 - CCB**. As of October 4, 2015, the District Court **has not** issued summons. Consequently, neither Defendant has been formally served with a copy of Riffin's Complaint, nor with a copy of the Court's summons. However, both David Rifkind and William Mullins were provided with a courtesy copy of Riffin's Complaint.

35. Both Defendants have filed their Opposition to Riffin's Motion for Leave to File his Complaint. (Riffin specifically asked the District Court to make a first determination, does Riffin's Complaint have merit? If not, then do not docket the Complaint. If so, Docket the Complaint, then let the matter proceed. So far, the District Court has provisionally docketed Riffin's Complaint. Whether the District Court dismisses Riffin's Complaint before the Defendants are required to file their Answers, is yet to be determined.)

CONCLUSION

36. Riffin argues the prudent thing for the STB to do, is to grant the Petitions for Reconsideration, vacate the STB's May 15, 2015 decision, then permit Norfolk Southern to resubmit another application, if it so desires, so that the STB is afforded an opportunity to determine whether the transaction should be characterized as a 'significant' transaction, as opposed to being characterized as a 'minor' transaction.

37. Were the STB to vacate its May 15, 2015 decision, that might render Riffin's District Court Complaint moot.

Respectfully,

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