

Before the  
SURFACE TRANSPORTATION BOARD

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

NORFOLK SOUTHERN RAILWAY, INC.

– ACQUITTION –

CERTAIN LINES OF THE DELAWARE & HUDSON RAILWAY, INC.

FD 35873

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**ERIC S. STROHMEYER**

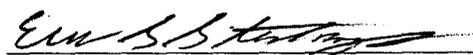
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PETITION TO INTERVENE

and

REPLY

Respectfully Submitted,

  
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Tel: (908) 361 – 2435 (direct line)

Dated: May 15<sup>th</sup>, 2015

Before the  
SURFACE TRANSPORTATION BOARD

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FD 35873

Norfolk Southern – Acquisition – Certain Lines of the Delaware & Hudson Railway

Now comes your Petitioner, Eric S. Strohmeier (“undersigned”), a corporate officer of CNJ Rail Corporation (“CNJ”), who respectfully seeks Leave to Intervene in the above captioned proceeding, for the purposes of filing a reply to Mr. James Riffin’s May 14<sup>th</sup>, 2015 “Request to Stay” and “Offer to Settle” in the above captioned proceeding.

In both his request for a “stay”, and “offer to settle”, Mr. Riffin suggests that the undersigned will be filing a pleading in which I will argue that approval of this transaction is contingent upon the Delaware and Hudson Railway Company, Inc. (“D&H”) receiving permission<sup>1</sup> to discontinue its trackage rights operations simultaneously or before the approval and consummation of this transaction, in which Norfolk Southern Railway (“NS”) has only sought this Board’s permission to acquire 282 miles of track from the D&H.

He significantly misrepresents the issue in his pleading and the fails to clearly articulate the issue at hand.

Since Mr. Riffin’s pleading directly attributes an anticipated pleading directly to the undersigned personally, despite the fact the undersigned’s employer is clearly already a party of record, and is represented by counsel, Mr. Riffin nonetheless has chosen to call me out personally. Since I have appeared before this agency many times in the past, and have submitted pleadings to this Board before, in the spirit of keeping this proceeding moving, the undersigned respectfully requests leave to intervene and file this direct response to Mr. Riffin’s statements.

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<sup>1</sup> See: *Delaware & Hudson Railway Company, Inc. - Discontinuance of Trackage Rights Exemption - In Broome County, NY; Essex, Union, Somerset, Hunterdon, and Warren Counties, NJ; Luzerne, Perry, York, Lancaster, Northampton, Lehigh, Carbon, Berks, Montgomery, Northumberland, Dauphin, Lebanon, and Philadelphia Counties, PA; Harford, Baltimore, Anne Arundel, and Prince Georges Counties, MD; District of Columbia; and Arlington County, VA* STB Docket # AB 156 (Sub No. 27) X

In what may appear surprising to the Board and others, the undersigned respectfully asks that the **Board deny Mr. Riffin's request.**

First off, Mr. Riffin apparently does not know what he wants. The undersigned would like to note: there is nothing to "Stay", since the Board has yet to make a decision in which to stay. It appears Mr. Riffin is really asking for the Board to hold the proceeding in abeyance for the purposes of permitting parties to enter into some sort of "settlement" discussions. For the reasons stated below, his request is at best premature, and at worse, an inappropriate request.

This matter has now been fully briefed by the parties and the matter is now ripe for an agency decision. *Up to this point*, there has been no actions taken by NS or D&H, nor arguments made by NS or D&H, nor any argument made by any party in opposition to the proposed transactions, nor any Board decision which has been made to date, that would **so clearly establish an indisputable nexus** between the two transactions, such that a court would be able to see a bright line that it could otherwise not avoid.

On May 13<sup>th</sup>, 2015, the Director of Proceedings rendered the first decision which now may begin to cast doubt on NS and D&H's argument that there is no interlocking nature, or "nexus", between the transactions. NS has argued that this transaction can be approved by the Board, even if the Board denies D&H the right to discontinue its trackage rights operations. Up until this point, the Board's treatment of the D&H discontinuance proceeding was obvious; the D&H proceeding appeared to be kept separate, but, for the *Board's administrative convenience*, were being harmonized with the Board's treatment of this proceeding. There was no indication, up until now, that in reality, the Board would have to render a decision in this proceeding where it truly was unclear if the D&H will receive its requested discontinuance authority.

The D&H proceeding is now on hold with obvious technical defects. The Director of Proceedings appears to believe these defects are limited solely to the omission of a few ZIP codes and minor notice issues. The issues raised so far are but the very tip of the proverbial "iceberg". Had the Office of Proceedings held their May 13<sup>th</sup> decision for another 24 hours, CNJ and the undersigned would have submitted a pleading over 80 pages in length which outlines a portion, but certainly not all, of the other egregious errors and omissions contained within the D&H's Notice.

In fact, there are so many issues, CNJ and the undersigned can actually split them into two groups. We'll litigate the first half of in Round I, and reserve the remainder for a second round, if needed. Since the Director's May 13<sup>th</sup> 2015 decision has effectively "reset" the clocks in the Discontinuance proceeding, CNJ and the undersigned will patiently wait until the D&H "corrects" its defects that Mr. Riffin has pointed out. When and if a new Notice is set, CNJ and the undersigned will review the new notice and make known to the Board if CNJ, or the undersigned, agree that all the errors and omissions were corrected. We are fairly confident the D&H will not even remotely come close to correcting them all.

In addition, on or before May 21<sup>st</sup> of next week, the undersigned is fairly confident another "omitted" revelation will come to the Board's attention. Neither NS in its application in this proceeding, nor D&H in the discontinuance proceeding, ever revealed there is yet another **heretofore undisclosed carrier** whose lines are also affected by these transactions.

CNJ and the undersigned are fairly confident Mr. Riffin is likely to seek judicial review of any decisions he views as adverse to his interests. The D&H proceeding is so badly compromised that the Board should be cautious about including any discussion of the pending D&H discontinuance proceeding in any decision contained in this proceeding. Any finding the Board might make which attempts to reference or discusses the effects of the D&H discontinuance in this proceeding could prove fatal given the pending revelations which are soon poised to come to light in the D&H proceeding. In short, the D&H proceeding is not likely to be resolved anytime soon.

The result of all these questions and uncertainties regarding the D&H discontinuance proceeding issues cast serious doubt on if the D&H may ever receive its authority. Given the Director's May 13<sup>th</sup> decision, it is no longer guaranteed the D&H will receive discontinuance authority. With that revelation, it is appropriate to discuss the following issue:

*The now indisputable "Nexus" between the two transactions is exposed*

Before we discuss the "nexus", the undersigned will briefly recount what NSR has expressly sought permission from this Board to do. NS has:

1. Sought Board permission to acquire 280 miles of track from the D&H,

2. Indicated NS intends to terminate a number of non-regulated haulage agreements which are outside of this Board's jurisdiction,
3. Entered into, or will enter into, a number of new non-regulated haulage agreements which are designed to mitigate any potentially anti-competitive impacts of the proposed sale, and
4. Partially disclosed another transaction, contemplated as a part of the transaction, but capable of standing alone on its own merits and thus, is sufficiently not related to this proceeding to warrant consolidation with this proceeding (D&H discontinuance proceeding).

NS has presented a very simple, straight forward transaction for the Board to review. A number of parties, including CNJ, have vigorously challenged the nature of the bifurcation of the transaction into two pieces (Items 1, 2, 3 in the NS proceeding, Item 4 in the D&H proceeding). NS has argued that nothing in items 1, 2, or 3 would be affected or altered, by any outcome of any decision, one way or the other, in item 4. To date, the Board appears to have agreed with that statement.

However, the Board, from the onset of this proceeding, appears to never have given much credence to the notion that the transactions are inextricably linked. That position might have been bolstered by the fact that Board precedent, if applied equally in the two decisions and if those decisions were made in "close proximity" to one another, would not produce an apparent "nexus" capable of defeating the Board's broad discretion in such matters if such findings were judicially reviewed. In short, if the Board addressed both issues separately, but in close proximity, the failure to consolidate the proceedings would not produce a result that a party could draw a bright line around and highlight as being either: arbitrary or capricious, or that is contrary to law.

The Director's decision of May 13<sup>th</sup> 2015 in the D&H proceeding began the process of causing this proceeding to "drift away" from the D&H proceeding. The reality now is that the Board will now have to acknowledge that possibility, and quite possibly, have to potentially defend a decision in this proceeding, while there is still no resolution to the D&H proceeding. It is an issue this Agency should, and must, consider now.

With that, the undersigned would like to direct the Board's attention to the 4 items outlined above and pose a question: Is there anything in the record **which NS itself** has placed in

record, that might be affected if there is no immediate resolution in the D&H proceeding in sight?

Before the undersigned answers the question, there are two highly relevant cases the Board must be aware of:

- *Delaware and Hudson Railway Company, Inc. – Discontinuance of Trackage Rights* STB Docket No. AB 156 (Sub No. 25) X (“D&H Discontinuance – NYS”)
- *CSX Transportation, Inc. and Delaware and Hudson Railway Co., Inc. – Joint Use Agreement* STB Docket No. FD 35348 (“CSX / D&H Joint Use”)

These two cases are highly relevant to the facts which are about to be revealed.

In the first proceeding, the D&H sought to discontinue certain trackage rights agreements, and choose to replace those previously performed operations with a non-regulated haulage agreement, in which NS would perform the work instead. It was made clear in that proceeding, the D&H wanted to rid itself of those unprofitable operations. After much contention, the transaction was approved. D&H exercised the authority it received and lawfully terminated its rights, and then executed the non-regulated haulage agreements to replace the now terminated trackage rights agreement.

In the second proceeding with CSX Transportation (“CSX”), D&H wanted to discontinue its own operations, which it also performed via trackage rights, and replace those right’s with a haulage agreement with CSX. However, the D&H did not want to rid itself of its ability to perform operations itself. Instead, it chose to retain its trackage rights for its use some day in the future when economic conditions improved. The result of the transaction was a clear consolidation transaction which required Board approval. Since the D&H retained the ability to perform the service it was asking to contract to CSX, Board approval of that transaction was required.

The difference between the two proceedings provides a nice contrast, and excellent precedent, to guide the Board’s decision making process in this proceeding. Simply put, the Board’s precedent allows for:

- Trackage rights to be discontinued and replaced with haulage agreements in discontinuance proceedings.

- Where trackage rights are retained, but the parties contemplate the use of a haulage agreement instead, then that transaction is a “consolidation” proceeding which requires separate authority and approval for that agreement to be lawful.

Against that backdrop, the undersigned will answer the question posed above. We direct the Board’s attention to the agreements **that NS itself placed in the record** and asked the Board to consider as a part of its proposed transaction.

In its application, NS lists a number of entities which it argues will be well served by the various short-line agreements it has negotiated with a number of northeast short-lines; as a result, NS claims there will be no reduction in competitive access for shippers as a result of NS’s acquisition of the D&H lines. NS claims the inclusion of these agreements in the record is vital to support NS’s position that no short-line would lose competitive rail access as a result of the proposed acquisition. NS also makes clear; those agreements are haulage agreements and are not regulated by the Board. NS claims they are outside the Board’s jurisdiction and are not subject to approval in this transaction.

One of those short-lines that NS lists as a participant to the short-line haulage agreement is called Lehigh Valley Rail Management (“LVRM”). LVRM is the corporate successor to the Philadelphia, Bethlehem and New England RR, the common carrier railroad formerly owned by Bethlehem Steel. It is also the only one of the short-line participants to the haulage agreement which does NOT directly connect with the D&H line.

LVRM connects with the D&H by way of the trackage rights which are at issue in the discontinuance proceeding. They are not served directly from the line which is the subject of the NS application. If the D&H were required to retain its trackage rights for any reason, then the Board’s treatment and evaluation of this transaction must change. The nature of the haulage agreement in which LVRM is a participant, and which NS itself has introduced into the record, and which agreement NS claims is a vital part of their competition mitigation argument, materially changes.

*What is the problem?*

In its application, NS has argued that the proposed D&H discontinuance of trackage rights, and the subsequent replacement of direct D&H service by the haulage agreement, is factually identical to the Board's prior precedent in *D&H Discontinuance – NYS*. However, if the D&H, for whatever the reason might be, is barred from discontinuing its trackage rights, the facts change considerably and no longer are identical to those in *D&H Discontinuance - NYS*. In fact, the cases become remarkably distinguishable. In *D&H Discontinuance – NYS*, the D&H **was able to actually discontinue its rights**. In the instant proceeding, there is no evidence at this stage that D&H will be able to discontinue its trackage rights.

Since the D&H at this point will clearly retain the ability to provide service via its own trackage rights to LVRM, the expected use of the NS haulage arrangement, in lieu of the D&H providing the service itself via use of its own rights, effectively turns the LVRM haulage agreement in a joint use / consolidation agreement which requires Board approval. Just like in *CSX-D&H Joint Use*, the haulage agreement which contemplates NS's movement of cars on behalf of the D&H while the D&H retains the ability to provide service directly is an agreement which requires approval. See: 49 U.S.C. § 11323 (a)(6).

If the D&H retains its ability to provide service directly to LVRM, the facts of the case are virtually indistinguishable from those found in *CSX-D&H Joint Use*. It should be noted that NS has not indicated anywhere, or at any time in this proceeding, that it intends to seek Board approval of the short-line agreement as a part of this transaction. Such approval is not currently relief NS is seeking before the Board. NS's application never made any claims that in the event of the D&H not receiving discontinuance authority, NS would seek approval of the short-line agreement to the LVRM.

Before the Director's May 13<sup>th</sup> 2015 decision, it might have been argued that the D&H had approval to discontinue its trackage rights. Since the transaction is now in abeyance, the effective date of the exemption is no longer valid. There is a legal impediment to consummation and it is not guaranteed that the Board will permit discontinuance.

D&H's failure to properly file its Notice will have a broad ranging impact upon any decision in this proceeding, if the Board chooses to issue one tomorrow. Parties in opposition to this transaction are certainly going to be justified in asking for immediate reconsideration of any

decision in this proceeding given the Director's May 13<sup>th</sup>, 2015 decision. If the Board denies the undersigned's Petition to Intervene, or otherwise fails to address this issue raised by the undersigned, it can be reasonably guaranteed that one of the other parties to the proceeding (such as CNJ itself) will raise the issue in a Petition for Reconsideration. Circumstances clearly changed when serious clouds began to arise over the D&H proceeding. That change occurred on May 13<sup>th</sup>. The Board is due to make a decision in this proceeding on May 15<sup>th</sup>. It would be highly appropriate for parties in opposition to the transaction to raise the issue on reconsideration.

After this issue is placed in the record before the agency, CNJ expects either Mr. Riffin, or more likely, **the unions**, to immediately seek Judicial Review. This issue is cut and dry; **if the D&H retains the right to serve LVRM at the time of a final decision in this proceeding, the haulage agreement needs approval.** The Transaction published in the Federal Register does not contemplate the applicant seeking such approval.

Remember, this is NS's own argument. They have claimed the only transaction they are seeking approval for is the acquisition of 282 miles of track owned by the D&H. As for the other contemplated agreements, NS has represented those agreements are outside of the Board's jurisdiction. Those agreements were only included in the NS's application to the extent those agreements demonstrate there are no anticompetitive issues with the proposed acquisition of 282 miles of track. NS is expressly saying those agreements do not require Board approval. But that argument only works if the D&H can, in fact, discontinue its trackage rights.

*Can Norfolk Southern cure this problem?*

Yes it can, but not without fatally harming its case and significantly undermining the Board's previous decisions in this proceeding. You see, in order to correct the problem, NS needs to take one of three actions:

- Supplement the record and ask for permission for joint use in the event the D&H transaction is not approved timely, or
- State that those portions of the transaction related to LVRM will not be consummated until the D&H proceeding is concluded, or
- Move to remove the LVRM haulage agreement altogether from the Board's consideration of the minor transaction.

All three of those actions would radically alter significant portions of original application. The original application was filed in November of last year. The completeness of the application was vigorously challenged at that time. The Board previously ruled it to be complete, and published a Notice (albeit a defective one) in the Federal Register regarding the transaction. Any one of the three actions above would alter the nature of the transaction significantly from what the world was told would happen in the Federal Register in 2014.

More importantly, any one of those actions destroys the argument that the transactions are not inextricably linked. As such, the entire transaction was not presented to the Board when the original application was filed, and, as such, was not complete when it was filed.

### **ARGUMENT**

Since Mr. Riffin has now filed a series of documents in which he claims that the undersigned will be filing a pleading in this proceeding, it is appropriate for the Board to grant this request to intervene so that the undersigned can be given the opportunity to refute the allegations and misquotations contained within Mr. Riffin's various pleadings.

As to the practical matter of Mr. Riffin's request to hold the proceeding in abeyance, the Board should deny the request. The Board has been fully briefed in this proceeding. The matter is now ripe for the Board to consider. Since Mr. Riffin has made clear his intent to seek judicial review of any decision he finds fault with, the undersigned would rather the Board render a decision in this proceeding immediately.

Given the materially changed circumstances regarding the D&H discontinuance proceeding, the undersigned would respectfully argue that the Board should now consider whether or not LVRM haulage agreement, in light of the fact the D&H will retain its ability to provide service directly to LVRM, constitutes an arrangement between carriers which requires Board approval.

The undersigned respectfully argues that a clear "nexus" has now been established which inextricably links the two proceedings, and that the failure of the D&H to obtain discontinuance authority before the Board's decision in this proceeding changes the nature of the LVRM haulage agreement in such a manner has to alter the Board's evaluation of this proceeding. We

also argue that if NS seeks to amend, modify, or supplement the record, the original application could not have been “complete” when it was filed in November of 2014, and thus must be rejected.

Wherefore, the undersigned individual respectfully prays that the Board:

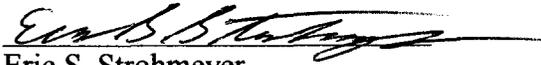
1. Grant his request for Leave to Intervene in this proceeding,
2. Except this reply into the record,
3. Deny Mr. Riffin’s request to hold this proceeding in abeyance,
4. Reject the NS application in this proceeding as incomplete, and
5. Provide for any additional relief which is equitable and just to affect the foregoing requested relief.

Respectfully submitted,

  
Eric S. Strohmeyer

CERTIFICATE OF SERVICE

I hereby certify that on this 15<sup>th</sup> day of May, 2015, a copy of the foregoing Petition to Intervene and Reply to Mr. James Riffin's "Request" and "Offer", was served on all the Parties of Record noted below, via E-mail and / or First Class Mail.

  
Eric S. Strohmeyer

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