

JR -12

Before the
Surface Transportation Board
Finance Docket No. 35873

238672

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

ENTERED
Office of Proceedings
June 24, 2015
Part of
Public Record

JAMES RIFFIN'S REPLY TO

SAMUEL J. NASCA'S JUNE 4, 2015 PETITION FOR STAY, AND
THE STB'S DENIAL OF SAMUEL NASCA'S PETITION FOR STAY

1. James Riffin (“**Riffin**”) herewith replies to Samuel J. Nasca’s June 4, 2015 Petition for Stay, and replies to the Surface Transportation Board’s (“**STB**”) denial of Mr. Nasca’s Petition for Stay.
2. On **May 19, 2015**, the STB improvidently (see below) rendered a decision in the above entitled proceeding, granting Norfolk Southern authority to purchase 282 miles of Delaware and Hudson Railway’s (“**D&H**”) lines of railroad.
3. The STB’s May 19, 2015 Decision stated that Petitions to Stay the STB’s May 19, 2015 Decision had to be filed by **June 4, 2015**. The May 19, 2015 Decision **did not** alter the 49 CFR 1104.13(a) 20-day-time-period for filing replies to any pleading filed with the STB.
4. On **June 4, 2015**, Samuel J. Nasca filed a Petition to Stay the STB’s May 19, 2015 decision.
5. On **June 12, 2015**, **BEFORE** Riffin’s **Due Process Right** to file a reply to Mr. Nasca’s Petition for Stay had lapsed, the STB served a decision denying Mr. Nasca’s Petition for Stay.

REPLY TO SAMUEL J. NASCA'S PETITION FOR STAY

6. Riffin **supports** Samuel J. Nasca's Petition for Stay.

7. Mr. Nasca listed several reasons why he felt a Stay of the May 19, 2015 decision would be appropriate.

ADDITIONAL REASONS FOR GRANTING A STAY

8. Riffin offers the following additional reasons why the STB should stay its May 19, 2015 decision. [The following reasons demonstrate that Norfolk Southern's Application, was "incomplete," and being "incomplete," should have, and on reconsideration should be, "rejected." Since there is a high probability that it ultimately will be found that Norfolk Southern's Application was "incomplete," and thus must be "rejected," it would be appropriate to "stay" the STB's May 19, 2015 decision, until final judicial review.]

NO 49 CFR 1180.8(c) INFORMATION

9. 49 CFR 1180.8(c) states:

"(c) For *minor* transactions: Operating plan - minor (exhibit 15). **Discuss any significant changes in patterns or types of service** as reflected by the operating plan **expected to be used** after consummation of the transaction. Where relevant, **submit information related to the following:**

- (1) **Traffic level density on lines proposed for joint operations.**
- (2) Impacts on commuter or other passenger service operated over a line which is to be downgraded, eliminated, or operated on a consolidated basis.
- (3) **Operating economies**, which include, but are not limited to, estimated savings.
- (4) **Any anticipated discontinuances or abandonments.**" Bold added.

10. On p. 61 of the Application, Norfolk Southern offers the following justification **for not submitting** required 49 CFR 1180.8(c) information:

“The Transaction subject to this Application will not involve any discontinuance of services or abandonment of rail lines.”

11. Riffin will first address the veracity of Norfolk Southern’s statement, that following the transaction, there will be **no “anticipated discontinuances or abandonments,”** both in light of the D&H being granted authority to discontinue 670 miles of its trackage rights, and in light of the D&H **not** being granted authority to discontinue 670 miles of its trackage rights. Following this discussion, Riffin then will address the consequences associated with the D&H **not** being granted authority to discontinue 670 miles of its trackage rights.

NO “ANTICIPATED DISCONTINUANCES OR ABANDONMENTS”

12. When Norfolk Southern filed its Application, on p. 61 of its Application, it **averred** that there would be **no “anticipated discontinuances or abandonments.”** However, in the sentence immediately following that averment, Norfolk Southern stated:

“However, as noted above, [on pp. 27 - 28] D&H has determined to seek regulatory approval to discontinue various trackage rights that it currently has over certain NS lines.”

13. Norfolk Southern **clearly** stated that it **clearly** “anticipated” that following the transaction, there would be “discontinuances” of trackage rights. Not only was the D&H going to seek authority to discontinue 670 miles of its trackage rights, but Norfolk Southern **was also going to discontinue its trackage rights over 282 miles of D&H lines of railroad.** (Norfolk Southern stated that it would no longer need its trackage rights, once it acquired full ownership of the lines over which it had trackage rights.)

14. Norfolk Southern’s acquisition of 282 miles of D&H lines of railroad, **clearly** would result in “**significant changes in patterns or types of service.**”

15. 49 CFR 1180.8(c) unambiguously states that when a transaction will result in “significant changes in patterns or types of service ,” the applicant **must discuss** “Traffic level density on lines proposed for joint operations,” **must discuss** “Operating economies,” and **must discuss** “Any anticipated discontinuances or abandonments.”

16. **Contrary** to the dictates of 49 CFR 1180.8(c), Norfolk Southern elected to **NOT discuss** “Traffic level density on lines proposed for joint operations,” “Operating economies,” nor “Any anticipated discontinuances or abandonments.” Instead, Norfolk Southern attempted to justify its lack of discussion of these three topics, by **misrepresenting** in sentence one, that “The Transaction subject to this Application will not involve any discontinuance of services or abandonment of rail lines.” Norfolk Southern then **contradicted** its statement in its first sentence, with the statement in its second sentence that: “However, as noted above, D&H has determined to seek regulatory approval to discontinue various trackage rights that it currently has over certain NS lines.”

17. Forget for the moment the fact that Norfolk Southern ‘anticipated’ that the D&H would seek to discontinue service on 670 miles of D&H lines of railroad. Instead, focus on what Norfolk Southern stated on p. 27 of its Application:

“2. NS’s retention and modification of 17.45 miles of existing NS trackage rights over D&H’s line between MP 484.85 in the vicinity of Schenectady, NY and CPF 467 in the vicinity of Mechanicville, NY.”

“3. NS’s amendment of the Saratoga-East Binghamton Trackage Rights Agreement, dated September 30, 2004, as necessary to retain the portion of its existing trackage rights between Milepost 37.10 of D&H’s Canadian Main Line in Saratoga Springs and CPF 484 at Schenectady, NY.”

18. The modification of Norfolk Southern’s trackage rights, as indicated above, clearly would result in “significant changes in patterns or types of service.” Likewise, Norfolk Southern’s acquisition of 282 miles of D&H line would also result in “significant changes in patterns or types of service.”

19. Since the modification of Norfolk Southern’s trackage rights, and the acquisition of 282 miles of D&H line would result in “significant changes in patterns or types of service,” Norfolk Southern **was required**, pursuant to 49 CFR 1180.8(c), to discuss, **in the 49 CFR 1180.8(c) section of its Application**, the “Traffic level density on lines proposed for joint operations,” “Operating economies,” and “Any anticipated discontinuances or abandonments.” **This Norfolk Southern failed to do. Therefore, Norfolk Southern’s Application was INCOMPLETE**, and being incomplete, was required to be rejected by the STB.

20. Riffin acknowledges that in the main body of its Application, Norfolk Southern did discuss Norfolk Southern’s “operating economies.” While it would be a case of ‘form over substance,’ to require Norfolk Southern to repeat, verbatim, in its Section 1180.8(c), its economic discussion, Norfolk Southern should at least have stated that it incorporated by reference, in its Section 1180.8 (c) discussion, its main-body-economic-analysis.

21. Unfortunately for Norfolk Southern, forgiving Norfolk Southern for failing to discuss the economies of its acquisition, and modification of its trackage rights agreements, in its Section 1180.8(c) section, does not make the problem with Norfolk Southern’s Section 1180.8(c) section, go away.

ADVERSE CONSEQUENCES OF THE D&H’S FAILURE TO RECEIVE DISCONTINUANCE AUTHORITY

“JOINT OPERATIONS”

22. Had the D&H received discontinuance authority for 670 miles of its trackage rights, **there would be no “joint operations,”** and the D&H would no longer have, post the conveyance of 282 miles of its lines of railroad, a continuing / remaining obligation to provide common carrier services on 670 **disconnected** lines of D&H lines of railroad.

23. As just stated, since the D&H will continue to retain its trackage rights subsequent to the conveyance of 282 miles of D&H lines of railroad, there **will continue to be JOINT OPERATIONS** over those 670 miles of D&H lines of railroad.

24. Since the D&H and Norfolk Southern will continue to have Joint Operations over 670 miles of D&H and Norfolk Southern lines of railroad, **after** the conveyance of 282 miles of D&H line to Norfolk Southern, and since the conveyance of 282 miles of D&H line to Norfolk Southern, will result in “significant changes in patterns or types of service,” not only on the 282 miles of line being conveyed to Norfolk Southern, but also on the 670 miles of D&H lines of railroad being retained by the D&H, Norfolk Southern **was , pursuant to 49 CFR 1180.8(c), REQUIRED to discuss** “Traffic level density on lines proposed for joint operations.”

25. This Norfolk Southern failed to do. Anyplace in its Application. That makes Norfolk Southern’s Application **Incomplete**.

“ECONOMIES”

26. Had the D&H received discontinuance authority for 670 miles of its trackage rights, the D&H would no longer have, post the conveyance of 282 miles of its lines of railroad, a continuing / remaining obligation to provide common carrier services on 670 **disconnected** lines of D&H lines of railroad.

27. Norfolk Southern made it very clear in its Application, at p. 28, that:

“Additionally, once NS acquires the D&H South Lines, **D&H will no longer physically connect with these trackage rights**. D&H’s trackage rights over the following NS lines are involved in D&H’s request for discontinuance authority:

1. From Lehighton to Allentown / Bethlehem, PA: **Used several times a week currently**.
2. Allentown / Bethlehem, PA - Oak Island, NJH: Not used since June 2012.
3. Sunbury - Harrisburg, PA: **Used daily for NS interchange**.
4. Harrisburg - Reading - Philadelphia, PA: Not used since early 2013.” Bold added.

28. Since the D&H will continue to have common carrier obligations over 670 miles D&H lines of railroad, **after** the conveyance of 282 miles of D&H line to Norfolk Southern, and since the conveyance of 282 miles of D&H line to Norfolk Southern, will result in those 670 miles of D&H lines of railroad **no-longer-being-connected** to the D&H's remaining lines of railroad, "significant changes in patterns or types of service," will occur on the 670 miles of D&H lines of railroad being retained by the D&H. Consequently, Norfolk Southern **was , pursuant to 49 CFR 1180.8(c), REQUIRED to discuss the D&H's** "operating economies," post the conveyance of 282 miles of D&H lines of railroad, post the **disconnection** of 670 miles of D&H lines of railroad, from the remaining D&H lines of railroad.

29. So while the transaction may improve Norfolk Southern's operating economies, it will **drastically increase the D&H's cost of operations**, since the D&H no longer will have all of its lines of railroad connected.

30. Norfolk Southern's Application **does not** address the issue of how the D&H will fulfill its common carrier obligations on those D&H lines that are the subject of the D&H's Discontinuance of Trackage Rights Exemption Notice, [See AB 156 (Sub. No. 27X)], given the high probability that the D&H's common carrier obligations over those D&H lines of railroad, will remain after consummation of Norfolk Southern's acquisition of 282 miles of D&H lines of railroad, and given that the D&H will no longer have access to those 670 miles of D&H lines of railroad from the remaining D&H lines of railroad.

31. Norfolk Southern failed to discuss, anyplace in its Application, the change in the **D&H's** "operating economies," were the D&H **not** to receive Discontinuance Authority over 670 miles of D&H lines of railroad. That makes Norfolk Southern's Application **Incomplete**.

"ANTICIPATED DISCONTINUANCES OR ABANDONMENTS"

32. 49 CFR 1180.8(c) requires the Applicant to discuss "Any anticipated discontinuances or abandonments." This Norfolk Southern failed to do.

33. In addition to the ‘discontinuances’ noted above, were the D&H to receive authority to discontinue 670 miles of D&H lines of railroad, that would result in **at least four line segments being abandoned.**

34. As Riffin noted in the D&H’s proceeding [See AB 156 Sub. No. 27X)], Conrail received authority to abandon the four line segments noted below, all of which are subject to the D&H’s trackage rights:

A. AB 167 (Sub. No. 864N). Application filed on October 31, 1983. Abandonment authority 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.”

B. AB 167 (Sub. No. 931N). Application filed on January 21, 1986. Abandonment authority 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).”

C. AB 167 (Sub. No. 451N). Application filed on November 30, 1981. Abandonment authority granted February 25, 1982, over the following segment of Lehigh Valley Main Line:

That portion of the former Lehigh Valley RR main line between Catasauqua, PA, near MP 98.0, and Lehighon, PA, near MP 119.3. Former USRA Line Code 0503A.

D. AB 167 (Sub. No. 623N). Application filed on April 9, 1984. Abandonment authority granted on July 13, 1984, over the following segment of Lehigh Valley Main Line:

That portion of the former Lehigh Valley RR main line between “200 feet west of the West Side of the Race Street Bridge, MP 96.59,” and MP 98.0 (“the point of prior abandonment authority.”)

35. Had the D&H received discontinuance authority over 670 miles of D&H lines of railroad, the above four line segments would have automatically been abandoned, since the last impediment to full abandonment, the D&H's trackage rights, would have been removed.

36. Norfolk Southern's statement that no abandonments were 'anticipated,' was a misrepresentation. (While Norfolk Southern may not have had actual knowledge about the above four Conrail abandonments, Norfolk Southern has constructive knowledge about these four Conrail abandonments, since Norfolk Southern is the successor in interest to Conrail for these four line segments.)

37. Norfolk Southern failed to discuss, anyplace in its Application, the automatic abandonments that would take place, were the D&H to receive Discontinuance Authority over 670 miles of D&H lines of railroad. That makes Norfolk Southern's Application **Incomplete**.

38. Likewise, the D&H, in its Trackage Rights Exemption Notice, failed to discuss, anyplace in its Exemption Notice, the automatic abandonments that would take place, were the D&H to receive Discontinuance Authority over 670 miles of D&H lines of railroad. Worse yet, the D&H actually **falsely certified** that no abandonments would result were the STB to grant the D&H authority to discontinue 670 miles of D&H trackage rights. That false certification, automatically makes the D&H's Exemption Notice *void ab initio*.

CONCLUSION

39. Since the modification of Norfolk Southern's trackage rights, and the acquisition of 282 miles of D&H line would result in "significant changes in patterns or types of service," Norfolk Southern **was required**, pursuant to 49 CFR 1180.8(c), to discuss, **in the 49 CFR 1180.8(c) section of its Application**, the "Traffic level density on lines proposed for joint operations," "Operating economies," and "Any anticipated discontinuances or abandonments." **This Norfolk Southern failed to do. Therefore, Norfolk Southern's Application was INCOMPLETE**, and being incomplete, was required to be rejected by the STB.

40. The above reasons demonstrate that Norfolk Southern’s Application, was “incomplete,” and being “incomplete,” should have, and on reconsideration should be, “rejected.” Since there is a high probability that it ultimately will be found that Norfolk Southern’s Application was “incomplete,” and thus must be “rejected,” it would be appropriate to “stay” the STB’s May 19, 2015 decision, until final judicial review

Respectfully,

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of June, 2015, a copy of the foregoing Reply to Nasca’s Petition for Stay, was served on the parties noted below, by E-mail.

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