

ENTERED
Office of Proceedings
January 12, 2015
Part of
Public Record **JR - 3**

**Before the
Surface Transportation Board
Finance Docket No. 35873**

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

JAMES RIFFIN'S ARGUMENT THAT

THE STB NO LONGER HAS JURISDICTION OVER THIS PROCEEDING, and

**JAMES RIFFIN'S REPLY TO
CNJ'S DECEMBER 29, 2014 REQUEST FOR REJECTION / 15-DAY EXTENSION
SAMUEL NASCA'S PETITION FOR RECONSIDERATION
NORFOLK SOUTHERN'S JANUARY 7, 2015 REPLY TO
RIFFIN'S PRELIMINARY COMMENTS, and**

NOTICE TO ALL POR OF IMPENDING THIRD CIRCUIT PROCEEDING

1. James Riffin ("**Riffin**"), a Party of Record in this Proceeding, herewith argues that the STB was divested of its jurisdiction over this proceeding when Riffin filed his Petition for Review on December 30, 2014, and herewith makes his Preliminary Reply to (A) CNJ's December 29, 2014 Request for Rejection / 15-day extension; (B) Samuel Nasca's Petition for Reconsideration; and (C) Norfolk Southern's January 7, 2015 Reply to Riffin's Preliminary Comments.

LOSS OF JURISDICTION

2. On **December 30, 2014**, Riffin filed a Petition for Review in the Third Circuit

(Philadelphia), asking the Third Circuit to review the STB's **December 16, 2014** Decision. Riffin filed a copy of that Petition with the STB on January 5, 2015. The copy now appears on the STB's web site.

3. Riffin argues:

- A. That the STB lost its jurisdiction over this proceeding at 2:30 p.m. on December 30, 2014;
- B. That any further proceedings before the STB involving this proceeding, prior to the Third Circuit remanding this case back to the STB, or prior to the Third Circuit giving express authority to the STB to address specific issues, would be a nullity; and
- C. That this proceeding has been effectively stayed until further notice from the Third Circuit.

**ARGUMENT IN SUPPORT OF RIFFIN'S ARGUMENT THAT THE STB
HAS BEEN DIVESTED OF ITS JURISDICTION OVER THIS PROCEEDING**

4. "The effective filing of a notice of appeal transfers jurisdiction from the district court to the court of appeals with respect to **all** matters involved in the appeal. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 ... (1982). That rule of exclusive appellate jurisdiction is a creature of judicial prudence, however, and is not absolute. (Citation omitted.) It is designed to avoid the confusion and inefficiency of two courts considering the same issues simultaneously. (Citation omitted.)" *Masalosalo by Masalosalo v. Sonewall Ins. Co.*, 718 F. 2d 955 (9th Cir. 1983). Bold added.

5. "When a proper notice of appeal has been timely filed, the general rule is that jurisdiction over any matters involved in the appeal is immediately transferred from the district court to the court of appeals. (Citations omitted.) **The district court is divested of authority to proceed further with respect to such matters, except in aid of the appeal, or to correct clerical**

mistakes, or in aid of execution of a judgment that has not been superseded, until the mandate has been issued by the court of appeals. (Citations omitted.) While this ‘rule is not a creature of statute and is not absolute in character,’ *Hoffman*, 536 F. 2d at 1276, ‘(i)t is judge-made doctrine designed to avoid the confusion and waste of time that might flow from putting the same issues before two courts at the same time.’ ” *Matter of Thorp*, 655 F. 2d 997, 998 (9th Cir. 1981). **Bold added.** [District court’s attempt to hold attorney in criminal contempt after appeal filed, held to be a nullity. *Thorp* at 999.]

6. A lower court retains jurisdiction:

- A. Over the parties. *U.S. v. Board of School Com’rs of City of Indianapolis, Indiana*, 503 F. 2d 68, 81 (7th Cir. 1974);
- B. To award costs, *U.S. v. Dennis*, 902 F. 2d 591, 592 (7th Cir. 1990), and attorney fees, *Masalosalo, op. cit.* at 957;
- C. To enforce or stay its judgment. *Time Life Broadcast Co. v. Boyd*, 289 F. Supp. 219 (S.D. Ind. 1968).

7. A lower court **does not** have jurisdiction:

- A. To dismiss the action. *Plascik v. British Ministry of War Transport*, 83 F. Supp. 518, 520 (S.D.N.Y. 1949);
- B. “[T]o proceed further with the case.” *Plascik, id.*; *Fiske v. Wallace*, 115 F. 2d 1003 (8th cir.);
- C. To permit amendment of a complaint. *Davis v. U.S.*, 667 F. 2d 822, 824 (9th cir. 1982);
- D. To rule on motions for intervention. *Halderman v. Pennhurst State School and Hospital*, 452 F. Supp. 867 (E.D. PA, 1978); *Rolle v. New York City Housing Authority*, 294 F. Supp. 574 (S.D.N.Y. 1969).

8. It has been held that the appeal of a non-appealable interlocutory order, vests exclusive jurisdiction in the appellate court, just like an appeal of an appealable order. *Keohane v. Swarco, Inc.*, 320 F. 2d 429, 432 (6th Cir. 1963).

9. Based on the above, Riffin would argue that the STB no longer has the jurisdiction:

A. To reject the Application; (CNJ request)

B. To modify the Scheduling Order; (CNJ request)

C. To reconsider its December 16, 2014 Decision. (Samual Nasca's request)

D. To rule on whether Riffin needs Article III standing to participate as a Party of

Record

in this proceeding. (NS request.)

10. Riffin would further argue that the STB lacks the jurisdiction to make any further decisions in this proceeding, until such time that the Third Circuit either remands the case back to the STB, or grants the STB express authority to do specified acts.

11. While Riffin is not expressly asking the STB to stay this proceeding, it would seem to be prudent for the STB to stay the proceeding on its own motion. The STB only retains the jurisdiction to enforce the December 16, 2014 decision. But there is little to enforce. All proceedings after December 30, 2014, are likely to be held to be a nullity.

12. The cases reviewed and cited by Riffin above, are directed toward a U.S. District Court and State Courts. Riffin has been unable to find any cases that expressly state that an administrative agency also is divested of its jurisdiction over a proceeding, once a Petition for Review has been filed. However, the reason for the doctrine (avoiding two courts simultaneously reviewing a case), would be applicable to decisions rendered by administrative agencies: To prevent the appellate court and administrative agency from considering the same issues simultaneously.

REPLY TO

CNJ'S DECEMBER 29, 2014 REQUEST FOR REJECTION / 15-DAY EXTENSION

SAMUEL NASCA'S PETITION FOR RECONSIDERATION

13. On December 29, 2014, CNJ filed a letter request, asking the STB to either reject the Application as incomplete, or to amend the Schedule, by extending the time for filing comments, by 15 days.

14. On January 5, 2015, Samuel Nasca (“**Nasca**”) filed a Petition for Reconsideration, asking the STB to reconsider its decision:

- A. That the Application was ‘complete;’
- B. That the Application was a ‘minor’ transaction;
- C. That the Delaware and Hudson Railway Company is not required to actively assist in the development of the record and in the protection of its employees;

15. Nasca further asked the STB to require an ‘employee impact submission,’ and to amend the Procedural Schedule ‘for opposition submissions.’

16. Riffin argues that the STB no longer has jurisdiction to either reject the Application, or to modify / amend, the existing procedural schedule (as requested by both CNJ and Nasca).

17. Whether the STB should have rejected the Application, will be the subject of Riffin’s Petition for Review. Likewise, the existing procedural schedule, will also be the subject of Riffin’s Petition for Review. The STB has lost its jurisdiction over all matters which will be the subject of Riffin’s appeal.

**REPLY TO NORFOLK SOUTHERN’S REPLY
TO RIFFIN’S PRELIMINARY COMMENTS**

18. Riffin argues that NS’s January 7, 2015 Reply to Riffin’s Preliminary Comments, are a nullity, due to the divestiture of the STB’s jurisdiction over this proceeding on December 30, 2014. Since the Third Circuit had exclusive jurisdiction over this proceeding on January 7, 2015, NS’s Reply was filed in the wrong forum, and consequently, is a nullity.

19. A reply to a reply is prohibited by the STB's regulations. To develop a more complete record, the STB has the authority to permit a reply to a reply. Riffin would ask that the STB permit this limited reply (if the STB has the authority to accept NS's Reply, or Riffin's Reply to NS's Reply.).

20. NS argued that Riffin's Preliminary Comments should be considered as a Petition for Reconsideration.

21. Riffin is aware of the format for a Petition for Reconsideration, having filed a number of them. He even commented that he felt filing a Petition for Reconsideration would be a waste of time. The rules are quite clear: One either files a Petition for Reconsideration or a Petition for Review. Riffin chose to file a Petition for Review. Riffin's Preliminary Comments were not intended to be a Petition for Reconsideration. See paragraphs 8 to 11 of Riffin's Preliminary Comments.

22. Counsel for NS has argued that neither CNJ nor Riffin have 'standing' in this proceeding, since neither are a carrier, shipper, government entity or other party who would suffer any injury in fact. The STB's rules do not require one to demonstrate that one will suffer any injury in fact, to be a Party of Record, to be a Protestant, or to file Comments.

23. Counsel for NS appears to be trying to impose the standing criteria for an Article III court, upon the STB. The standing criteria for an Article III court are not applicable to proceedings before the STB. All one need do to become a Party of Record, is to file a notice of one's intent to become a Party of Record. This Riffin did. In addition, at a later time, Riffin will detail how the transaction will cause a material injury to Riffin. (Once the STB regains its jurisdiction, Riffin will file a Motion for Protective Order, and will submit proprietary confidential information to the STB detailing how the transaction will cause injury to Riffin.)

IMPENDING THIRD CIRCUIT PROCEEDING

24. In a letter dated January 2, 2015, the Third Circuit advised Riffin, the STB, the Department of Justice, and the Secretary of Transportation, that the Third Circuit intended to submit to a panel of judges the question of whether the Third Circuit has jurisdiction to accept Riffin's Petition for Review. The Third Circuit advised that arguments on the issue of its jurisdiction were due within 21 days of January 2, 2015. A copy of the Third Circuit's notice is appended hereto.

25. On January 9, 2015, Riffin submitted to the Third Circuit, a Motion to Revise the Argument Schedule. A copy of Riffin's Motion is appended hereto.

26. Anyone wishing to participate in the Third Circuit proceeding is advised to file a Motion to Intervene in the Third Circuit, then file their comments / argument, by whatever date the Third Circuit sets.

Respectfully,

James Riffin
1941 Greenspring Drive
Timonium, MD 21093
(443) 414-6210

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of January, 2015, a copy of the foregoing Loss of Jurisdiction / Reply, was served on the parties noted below, by either E-mail, or by 1st Class Mail.

James Riffin

First class mail:

Surface Transportation Board:	Craig Keats General Counsel STB 395 E. St SW Washington, DC 20423
Unites States of America::	c/o Assistant Attorney General Appellate Section Antitrust Div Room 3109 Dept of Justice 950 Pennsylvania Ave NW Washington, DC 20530
Secretary of Transportation:	1200 New Jersey Ave SE Washington, DC 20590

Samuel J. Nasca / SMART:

Gordon P. MacDougall 1025 Connecticut Ave NW
Washington, DC 20036

E-mail:

Brotherhood of MOW Employees:	Richard Edelman:	REdelman@odsalaw.com
Brotherhood of Locomotive Engineers & Trainmen:	Kevin Moore:	bletdiv191@hotmail.com
CNJ / Alma / Pace Glass:	Thomas McFarland:	mcfarland@aol.com
D&H Railways:	David Rifkind:	david.rifkind@stinsonleonard.com
IAM District Lodge 19:	Jeffrey A. Bartos	Jbartos@geclaw.com
	Kyle A. DeCant	Kdecant@geclaw.com
Genesee & Wyoming, Inc.:	Eric Hocky:	ehocky@clarkhill.com
	Allison M. Fergus:	afergus@gwrr.com
Maryland DOT:	Charles Spitulnik:	cspitulnik@kaplankirsch.com
NY DOT:	Keith Martin:	keith.martin@dot.ny.gov
Norfolk Southern:	Williams Mullins:	wmullins@bakerandmiller.com
PPL Energy:	Kelvin Dowd:	kjd@sloverandloftus.com
PA NE Regional RR Auth:	Lawrence Malski:	lmalski@pnrra.org
Saratoga & N. Creek Ry:	John D. Heffner:	John.Heffner@strasburger.com
Seda-Cog Railroads:	Jeffery K. Stover:	jra@seda-cog.org
U.S. Clay Producers Assoc:	Vincent P. Szeligo:	vszeligo@wsmoslaw.com

OFFICE OF THE CLERK

MARCIA M. WALDRON

CLERK



UNITED STATES COURT OF APPEALS

21400 UNITED STATES COURTHOUSE

601 MARKET STREET

PHILADELPHIA, PA 19106-1790

Website: www.ca3.uscourts.gov

TELEPHONE

215-597-2995

January 2, 2015

James Riffin
1941 Greenspring Drive
Timonium, MD 21093

RE: James Riffin v. Secretary Surface Transportation, et al.

Case Number: 14-4839

Agency Case Number: FD-35873

Dear Mr. Riffin:

This will advise you that the above-captioned appeal will be submitted to a panel of this Court for possible dismissal due to a jurisdictional defect. It appears that this Court may lack appellate jurisdiction for the following reason(s):

In your petition, you state that you are seeking review of the December 16, 2014 Decision issued by the Surface Transportation Board, but it does not appear that this is a final or reviewable order over which this Court has jurisdiction.

Jurisdictional defects cannot be remedied by the court of appeals. The parties may submit written argument in support of or in opposition to dismissal of the appeal for lack of appellate jurisdiction. Any response regarding jurisdiction must be in proper form (original with certificate of service), and must be filed within 21 days from the date of this letter. Upon expiration of the response period, the case will be submitted to the Court for consideration of the jurisdictional question.

The parties will be advised of any Order issued in this matter.

Very truly yours,

Marcia M. Waldron

Marcia M. Waldron, Clerk

January 2, 2015
Page 2

By: 

Elizabeth A. Landis, Administrative Assistant

cc: Craig M. Keats, Esq.
Attorney General United States of America

**UNITED STATES COURT OF APPEALS
THIRD CIRCUIT**

JAMES RIFFIN
Petitioner

*

Case No.: 14-4839

*

V.

*

**SURFACE TRANSPORTATION
BOARD, et. al.**
Respondent

*

FD No. 35873
**NS Application to acquire D&H
Lines**

*

* * * * *

MOTION TO AMEND SCHEDULE

1. Comes now your Petitioner, James Riffin, who respectfully files this Motion to Amend the time by which comments / argument must be submitted to the Court for the purpose of ascertaining whether the Court has the requisite jurisdiction to hear the above entitled Petition for Review, and in support hereof states:

2. On December 30, 2014, Petitioner filed a Petition for Review of the Surface Transportation Board’s December 16, 2014 decision in STB Finance Docket No. 35873.

3. On January 2, 2015, the Clerk of the Court, Marcia M. Waldron, sent a letter to Petitioner advising Petitioner that a preliminary review of the STB’s decision that Petitioner seeks review of, suggested to the Clerk that the STB’s decision may not be a “final or reviewable order over which this Court has jurisdiction.”

4. Ms. Waldron then indicted that “parties may submit written argument in

support of or in opposition to dismissal of the appeal ... within 21 days of the date of this letter.”

5. A copy of Ms. Waldron’s letter was also served on Craig Keats, General Counsel of Respondent Surface Transportation Board, and on the Attorney General of the United States of America, counsel for Respondent United States of America.

6. Petitioner’s Petition for Review indicated that the Petition for Review was served via e-mail on a large number of individuals, all of whom are parties of record in the proceeding before the Surface Transportation Board. None of these parties received a copy of Ms. Waldron’s letter.

7. Ms. Waldron’s January 2, 2015 letter **was received by Petitioner on Thursday, January 8, 2015, at about 6 pm.**

8. Petitioner intends to serve via e-mail a copy of Ms. Waldron’s letter upon the parties of record listed on Petitioner’s Petition for Review, and intends to file with the STB, a copy of Ms. Waldron’s letter, so that all interested parties are put on notice of the proceeding before the Third Circuit. (There are nearly 100 entities who have filed comments / filed a notice of an intent to comment, in the STB proceeding.) Petitioner will note that if any of the parties of record desire to participate in the proceeding before the Third Circuit, then they should file a Motion to Intervene in the Third Circuit case, and should file comments.

9. Riffin argues that Due Process requires reasonable notice and a reasonable opportunity to respond.

10. Twenty-one days to respond would appear to be a reasonable amount of time to respond, providing one actually had 21 days to respond.

11. Due to the late-delivery of Ms. Waldron's letter, Petitioner presently only has 15 days to respond.

12. Of greater concern to Petitioner, is the inadequate amount of time all other parties of record will have to respond.

13. Petitioner expects this proceeding to be the subject of intense litigation, due to the significant varied interests involved.

14. Petitioner argues that the Court should afford all parties of record a reasonable amount of time to respond, and should afford Petitioner the opportunity to reply to whatever comments are filed with the Court.

15. WHEREFORE, Petitioner prays that the Court adopt the following scheduling order in this preliminary jurisdictional determination proceeding:

A. By February 3, 2015, Petitioner file his argument in opposition to dismissal of Petitioner's Petition for Review.

B. By February 24, 2015, Respondents, and all other parties of record, file their argument in favor of / in opposition to, dismissal of Petitioner's Petition for Review.

C. By March 10, 2015, Petitioner file whatever reply he elects to file, to whatever arguments have been filed by Respondents and any other parties of record.

16. The above schedule would grant Petitioner, Respondents and all other interested parties, 21 days within which to file their comments, and would grant unto Petitioner 14 days to reply to whatever comments have been filed.

17. By making the due date on a Tuesday, comments can be overnighted to the Court on a Monday, for delivery on a Tuesday.

18. Respondents oppose the motion: “There are no other parties involved.”

Respectively submitted,

James Riffin, *Pro Se*
1941 Greenspring Drive
Timonium, MD 21093
(443) 414-6210

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of January, 2015, a copy of the foregoing Motion to Amend Schedule, was served by E-mail or by first class mail, postage prepaid, upon the parties of record noted below.

James Riffin

First class mail:

Surface Transportation Board: Craig Keats General Counsel STB
395 E. St SW Washington, DC 20423
Unites States of America: c/o Assistant Attorney General Appellate
Section Antitrust Div Room 3109 Dept of
Justice 950 Pennsylvania Ave NW
Washington, DC 20530
Secretary of Transportation: 1200 New Jersey Ave SE Washington, DC
20590

Samuel J. Nasca / SMART Gordon P. MacDougal 1025 Connecticut Ave
NW Washington, DC 20036

E-mail:

Brotherhood of MOW Employees: Richard Edelman: REdelman@odsalaw.com
Brotherhood of Locomotive
Engineers & Trainmen: Kevin Moore: bletdiv191@hotmail.com
CNJ / Alma / Pace Glass: Thomas McFarland: mcfarland@aol.com
D&H Railways: David Rifkind: david.rifkind@stinsonleonard.com
IAM District Lodge 19: Jeffrey A. Bartos Jbartos@geclaw.com
Kyle A. DeCant Kdecant@geclaw.com
Genesee & Wyoming, Inc.: Eric Hocky: ehocky@clarkhill.com
Allison M. Fergus: afergus@gwrr.com
Maryland DOT: Charles Spitulnik: cspitulnik@kaplankirsch.com
NY DOT: Keith Martin: keith.martin@dot.ny.gov
Norfolk Southern: Williams Mullins: wmullins@bakerandmiller.com
PPL Energy: Kelvin Dowd: kjd@sloverandloftus.com
PA NE Regional RR Auth: Lawrence Malski: lmalski@pnrra.org
Samuel J. Nasca / SMART: Gordon P. MacDougall: gpmacd@mindspring.com
Saratoga & N. Creek Ry: John D. Heffner: John.Heffner@strasburger.com
Seda-Cog Railroads: Jeffery K. Stover: jra@seda-cog.org
U.S. Clay Producers Assoc: Vincent P. Szeligo: vszeligo@wsmoslaw.com