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Before the
Surface Transportation Board
Finance Docket No. 35873

238673

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 THE
PETITIONS FOR RECONSIDERATION FILED BY
SAMUEL J. NASCA, ERIC STROHMEYER AND PPL ENERGY

1. James Riffin (“**Riffin**”) herewith replies to the Petitions for Reconsideration filed on **June 4, 2015** by Samuel J. Nasca, Eric Strohmeyer and PPL Energy, which Petitions ask the Surface Transportation Board (“**STB**”) to reconsider its **May 19, 2015** decision in this proceeding, granting (A) Norfolk Southern authority to acquire 282 miles of Delaware and Hudson Railway (“**D&H**”) lines of railroad; (B) granting the **D&H** trackage rights over the portion of the D&H lines of railroad being acquired by Norfolk Southern, from the PPL’s point of new connection with the present D&H line of railroad near the power plant in Pennsylvania, to CSX’s lines of railroad in Schnectady, NY, in the event that the PPL in fact builds a new connecting track; and (C) denying all other requests for conditions.

2. Riffin **supports** the Petitions for Reconsideration.

3. In addition to the reasons advanced by the three Petitions for Reconsideration, Riffin provides the STB with the additional reasons noted below, which additional reasons further support the requests that the STB **reconsider** its May 19, 2015 decision, and after reconsideration, either impose additional conditions, or reject Norfolk Southern’s Application, on

the grounds that the Application was “incomplete.” [Below, Riffin argues that the Application was ‘incomplete,’ for it **failed to discuss** three of the four topics enumerated in 49 CFR 1180.8 (c), to wit: “Traffic level density on lines proposed for joint operations,” “Operating economies,” nor “Any anticipated discontinuances or abandonments.”]

GROUND FOR RECONSIDERATION

4. Petitions for reconsideration are subject to the regulations found in 49 CFR 1115.3. Sections (a) and (b) of that regulation state:

“(a) A discretionary appeal of an entire Board action is permitted. Such an appeal should be designated a ‘petition for reconsideration.’

(b) The petition will be granted only upon a showing of one or more of the following points.

(1) The prior action will be affected materially because of new evidence or changed circumstances.

(2) The prior action involves material error.”

5. The Petitions for Reconsideration noted above, were timely filed on **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.

NEW EVIDENCE

6. The material presented below, constitutes both new evidence and changed circumstances. Because of this new evidence and changed circumstances, the “prior action” now involves “material error.”

7. The material below constitutes “new evidence,” that is, it was not available at the time comments in this proceeding were due (revised to **January 21, 2015**).

8. The arguments presented below, are based on the extent of the D&H's trackage rights, and are based on the very high probability that the D&H **will not** be granted authority to discontinue its trackage rights **prior** to Norfolk Southern's acquisition of 282 miles of D&H lines of railroad.

9. Until the D&H filed its Discontinuance Exemption, on **March 19, 2015**, the parties to this proceeding had no idea just how extensive the D&H's trackage rights were. The D&H's March 19, 2015 Exemption Notice contained maps, which gave some idea of just how extensive the D&H's trackage rights were. On **May 8, 2015**, the D&H supplemented its Exemption Notice with a copy of its **April 25, 1979** Operating Agreement with Conrail, whereby the D&H acquired its trackage rights.

10. On May 15, 2015, the STB stayed the D&H's Exemption Notice "until further Board order," due to the D&H's failure to list all of the Zip Codes its 670 miles of trackage rights traverse.

11. Rather than rejecting the D&H's Exemption Notice, as is required when an Exemption Notice contains false or misleading information, the Director of the Office of Proceedings, in a Decision served on May 15, 2015, permitted the D&H to supplement its Exemption Notice.

12. Riffin appealed the May 15, 2015 Decision to the Full Board.

CHANGED CIRCUMSTANCES

13. Given that it is now impossible for the D&H Exemption Notice proceeding to conclude, and for the D&H to receive discontinuance authority over its 670 miles of trackage rights, **prior** to the consummation of Norfolk Southern's acquisition of 282 miles of D&H lines of railroad, several "changed circumstances" have occurred:

A. Norfolk Southern's acquisition of 282 miles of D&H lines of railroad, 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,.
- B. Once Norfolk Southern acquires 282 miles of D&H lines of railroad, there will be **“joint operations”** over portions of the 670 miles of trackage rights, due to the D&H’s continuing obligation to provide common carrier service over those 670 miles of trackage rights, absence the granting of discontinuance authority.
 - C. Since the D&H will continue to have a common carrier obligation to provide rail service over the entirety of its 670 miles of trackage rights, and since Norfolk Southern’s acquisition of 282 miles of D&H lines of railroad **will disconnect** the D&H’s 670 miles of trackage rights from the remainder of its lines of railroad, the **D&H’s “economies”** of providing service over its **disconnected** trackage-rights-lines-of-railroad, will dramatically change, for the worse.
 - D. Due to previously unknown prior abandonments by Conrail over portions of the line segments subject to the D&H’s trackage rights, were the D&H’s trackage rights to be discontinued over these Conrail-abandoned line segments, the impediment to full abandonment of these line segments would be removed, resulting in automatic abandonment of these line segments. Consequently, the Transaction, if fully implemented, will in fact result in “abandonments” not disclosed, nor “discussed,” by Norfolk Southern, as required by 49 CFR 1180.8(c)(4).

ADDITIONAL ‘CHANGED CIRCUMSTANCES’

- 14. On **June 4, 2015**, Samuel J. Nasca filed a Petition to Stay the STB’s May 19, 2015 decision.

15. On **June 12, 2015, BEFORE** Riffin's **Due Process Right**¹ 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.

16. Since the STB abridged Riffin's Due Process Right to file a reply to Mr. Nasca's Petition for Stay, the decision denying Mr. Nasca's Petition for Stay, is infirm. Upon reconsideration, the STB should vacate the decision denying Mr. Nasca's Petition for Stay, then, based on the very high probability that Norfolk Southern's Application will be rejected, due to being 'incomplete,' the STB should impose a stay until the issues raised by the D&H's trackage rights Exemption Notice proceeding, have been resolved.

ADDITIONAL REASONS FOR GRANTING THE PETITIONS FOR RECONSIDERATION

17. Riffin offers the following additional reasons why the STB should reconsider 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 "reconsider" the STB's May 19, 2015 decision, vacate the May 19, 2015 decision, then issue a new decision addressing the many issues raised in the Petitions for Reconsideration.

NO 49 CFR 1180.8(c) INFORMATION

18. 49 CFR 1180.8(c) states:

¹ 49 CFR 1104.13(a) grants a 20-day-time-period for filing replies to any pleading filed with the STB.

“(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.

19. 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.”

20. 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”

21. 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.”

22. 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.)

23. 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.**”

24. 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.”

25. **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.”

26. 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.”

27. 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.”

28. 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.

29. 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.

30. 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”

31. 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.

32. 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.

33. 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.”

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

“ECONOMIES”

35. 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.

36. 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.**

37. 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.

38. 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.

39. 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.

40. Norfolk Southern failed to discuss, anywhere 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"

41. 49 CFR 1180.8(c) requires the Applicant to discuss "Any anticipated discontinuances or abandonments." This Norfolk Southern failed to do.

42. 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**.

43. 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.”)

44. 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.

45. 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.)

46. Norfolk Southern failed to discuss, anywhere 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**.

47. Likewise, the D&H, in its Trackage Rights Exemption Notice, failed to discuss, anywhere 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

48. 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.

49. 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 Petitions for Reconsideration, was served on the parties noted below, by E-mail.

James Riffin

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