

Before the  
Surface Transportation Board

Finance Docket No. 35873

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

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JR -20

239748

ENTERED  
Office of Proceedings  
December 21, 2015  
Part of  
Public Record

**JAMES RIFFIN'S MOTION TO SUPPLEMENT THE RECORD**

1. Comes now James Riffin (“**Riffin**”), who moves to supplement the Record in this proceeding with the following “new evidence,” and who argues that the ‘new evidence’ constitutes “substantially changed circumstances” which warrants a new look at the decisions made by the Surface Transportation Board (“**STB**”), and the (unintended) consequences of those decisions.

2. As the attached news article states,<sup>1</sup> the Canadian Pacific Railway Company (“**CP**”) is mounting a “hostile takeover” effort to acquire the Norfolk Southern Railway Company (“**NS**”).

3. In a **November 24, 2015** reply to the STB’s Motion to Dismiss, filed in the Third Circuit, Case No. 15-3401, [a Petition to Review the STB’s Decision granting R.J. Corman abandonment authority to abandon some of its Allentown Lines, see AB 550 (Sub. No. 3X),] Riffin concluded his Reply with the following statement:

“57. (It took Riffin a few days to realize why the D&H / CP wanted / needed to get rid of the D&H’s trackage rights. So long as the D&H / CP had trackage rights over Norfolk Southern’s tracks, if CP tried to acquire Norfolk Southern, that merger would result in a 2-to-1 merger, which is virtually prohibited. Now that CP no longer controls

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lines of railroad parallel to Norfolk Southern's lines of railroad, were CP to acquire Norfolk Southern, there would be no 2-to-1 merger. It would result in an addition to the **end** of CP's tracks, rather than acquisition of tracks **parallel** to CP's lines of railroad. Good legal strategy for CP's hedge fund owners. Makes the STB look like it was / is being 'used.'")

4. In October, 2006, the Children's Investment Fund made an attempt to acquire CSX. But for the stock market crash in 2008, the Children's Fund may well have been successful in taking over CSX. In *Trains* magazine, in its October, 2011 issue, on pp. 46-47, appears an article written by Rush Loving, Jr, which details how the Children's Fund attempted to take over CSX. A copy of the *Trains* CSX article is attached.<sup>2</sup>

5. CP's attempt to take over NS raises the following questions:

A. Did CP, through its Delaware and Hudson Railway Company ("**D&H**") subsidiary, 'abuse' the STB's processes? (Was the STB 'used' in an inappropriate manner in furtherance of the undisclosed goal of CP's hedge-fund owners, to acquire NS?)

B. Does the STB desire to thwart CP's takeover attempt **before** NS spends millions of dollars trying to repel the CP attack?

6. The STB has no direct authority to prevent CP from attempting to acquire NS. The only direct authority that the STB has, is to grant / not grant, authority for CP and NS to merge, **after** CP has acquired sufficient votes to force NS' Board of Directors to vote in favor of selling NS to CP.

7. The proxy fight that is about to occur, will cost both NS and CP multiple millions of dollars. Riffin argues that those dollars would be better spent if they were used to improve the infrastructure of NS' and CP's lines of railroad.

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8. Riffin gives CP's hedge-fund lawyers high marks for their creative strategy: Eliminate the 2 to 1 regulatory barrier first, by getting rid of CP's parallel lines of railroad in a first strike. Deplete NS' bank account by \$217 million, so that NS has fewer financial resources to fight a proxy fight. Then use NS' money to wage the proxy fight. (Use the \$217 million that NS just gave to CP.)

9. Beautiful strategy: The most that it will cost CP is the loss of a line of railroad that CP had little interest in / that had little economic value to CP.

10. Riffin gives CP's hedge-fund lawyers very low marks for execution of the strategy: Before the ink was even dry (before the STB ruled on NS's Petitions for Reconsideration / the D&H's Petitions to Revoke), CP let the world, and the STB, know what it is really trying to do.

11. CP's strategy appears to be date-driven: Resolutions need to be filed by current shareholders by February 14, 2016, in order to get the resolutions before NS' May, 2016 stockholders' meeting.

12. Which explains why CP was in such a hurry to conclude the NS' purchase of CP's lines / discontinuance of the D&H's trackage rights.

13. If CP misses the February 14, 2016 deadline, the next opportunity may be in 2017. Which could give NS sufficient time to successfully fend off CP's proxy fight.

14. Which ultimately brings Riffin back to why he is writing this missive:

15. While the STB does not have the authority to prevent CP's proxy fight / prevent NS from squandering millions of shippers' dollars fighting CP's proxy fight / fighting for its life, the STB does have the authority to throw a really big monkey wrench into the works, **if it so choses.**

16. Once again, it all boils down to strategy: **IF (A)** the STB were to ‘reconsider’ its FD 35873 decision, and decide that the transaction really is not good for the ‘public’s convenience and necessity,’ (given the unintended consequences), and / or **(B) IF** the STB were to **grant** one or more of the Petitions to Revoke that were filed in the AB 156 (Sub. No. 27X) proceeding, then one or both of the NS / D&H decisions would be vacated.

17. If the NS decision were vacated, CP would have to return to NS the \$217 million it obtained from NS, thereby depriving CP of the requisite funds to mount the proxy fight with NS. It would also restore \$280 million to NS’ bank account, making NS stronger, and more able, to fend off a proxy fight.

18. Likewise, if the D&H decision was vacated / the D&H’s Notice of Exemption (“**NOE**”) was revoked, then CP would have lines of railroad parallel to NS’ lines of railroad, thereby making any merger a 2-to-1 merger, which is virtually prohibited.

19. If either / both of the NS / D&H decisions were vacated, it would become clearly obvious to all potential investors, that a merger was highly unlikely to actually occur. And if there is no prospect of a merger actually occurring, the hedge-fund investors are more likely to direct their shark-attack toward some other entity.

20. So it all boils down to, what would the STB prefer? How does the STB feel about the proposed merger? How does the STB feel about what CP did / is doing?

21. While Riffin and Norfolk Southern are not ‘friends’ by any means, Riffin strongly feels that Norfolk Southern should remain under the control and direction of those individuals presently in charge of NS.

22. Riffin decidedly does not like how Hunter Harrison is running CP. In an effort to boost short-term profits, and thus to increase CP’s stock price, Mr. Harrison has used draconian methods to reduce CP’s operating costs / improve CP’s operating ratio: He has cut back on

investment in CP's track infrastructure. (Part of the justification for selling 282 miles of D&H line to NS, was CP's failure to invest in the infrastructure / NS' willingness to invest in the track infrastructure.) He has virtually eliminated all 'reserve capacity.' Witness the Winter of 2013, when CP's trains virtually came to a halt for multiple months, due to a lack of functioning equipment / available train crews, due to massive layoffs.

23. Warren Buffet bought BNSF as an investment. He lets 'railroad people' run the railroad. He considers the BNSF a long-term investment.

24. CP's hedge-fund owners have only one interest: Making a 'quick buck.' (A quick 'multi-millions of bucks.') It reminds Riffin of when criminal elements buy a company for the sole purpose of siphoning off as much money as they can, before they bankrupt the company, then discard the company.

25. NOEs may be revoked if they contain 'false or **misleading** statements.'

26. Riffin argues that the D&H's failure to disclose to the STB that one of the main reasons / the overriding reason, why CP / the D&H wanted to abandon its trackage rights, was to eliminate the 2-to-1 regulatory barrier to a merger / was because CP (the D&H's parent company) intended to acquire NS, by force if necessary, **was a misleading statement.**

27. In the case of AB 156 (Sub. No. 27X), multiple reasons were advanced justifying revocation of the D&H's NOE.

28. As Riffin has argued, revocation of the D&H's NOE, would restore the D&H's trackage rights / lines of railroad, parallel to NS' lines of railroad.

29. Restoration of the D&H's trackage rights would put NS' Application in jeopardy / would be grounds to 'reconsider' / vacate the NS acquisition decision: See Riffin's June 24, 2015 Reply to Nasca' Petition for Reconsideration (**JR-13**) at paragraph 3 and paragraphs 18-49,

where Riffin extensively discusses the requirements of 49 CFR 1180.8(c).

## **IMPACT ON SHIPPERS**

30. Riffin pointed out that the shipper agreements executed by NS, would protect the shippers for a limited period of time from rate increases.

31. Were NS to be acquired by CP, those shipper agreements, and all other NS agreements, would be put into serious jeopardy: To increase its operating ratio, CP would surely raise rates, in order to increase revenue.

32. NS is run by railroad people. Those NS people realize that the long-term viability of NS' shippers is necessary for the long-term viability of NS.

33. CP's hedge-fund owners have only one interest: Making quick money by momentarily raising CP's stock price. Stock prices can be artificially raised by artificially raising one's profit. One's profit's can be artificially raised by eliminating / reducing investment in one's infrastructure. So by reducing investment in one's infrastructure, one can artificially raise, for a short time, one's stock prices. Just long enough for one's present stock owners to sell their stock at a substantial profit.

34. But eventually, the failure to invest in infrastructure, results in poor track infrastructure, which results in poor shipper service, which results in less revenue, due to shippers switching to motor carriers.

35. Mr. Harrison's approach will eventually hurt rail shippers. Either through poorer service and / or higher rates (due to the rail carrier's monopoly powers).

36. So if I were a NS shipper, I would be very concerned about CP's attempt to forcefully take over NS, then replace NS' management with management beholdng to CP's hedge-fund owners.

37. If I were NS' management, I would be very worried about losing my job.

38. If I were the STB, I would be very worried about the adverse impact CP's forced take-over of NS will have on shippers, on NS, and on the public.

39. This appears to be a case of: Pick your poison.

40. The STB / NS can try to undo what just transpired, in order to take the 'wind' out of CP's 'sails.' That is a difficult pill to swallow, since the parties have to acknowledge that what they did, should never have occurred.

41. The STB / NS can let things play out. NS is likely to spend millions of dollars fending off CP's proxy fight. The STB is likely to have to decide whether to permit a merger, after CP has gutted NS of its present management team.

42. If I were the STB / NS / NS' counsel, I would feel 'used.'

43. I would argue that the STB should grant the Petitions for Reconsideration filed in the FD 35873 proceeding, and should grant the Petitions to Revoke in the AB 156 (Sub. No. 27X) proceeding, thereby restoring the status quo ante.

## **SANCTIONS**

44. I would also argue that the STB should consider fashioning sanctions against both CP and NS. The following potential sanctions come to mind:

- A. Add a new condition to the FD 35873 proceeding: CP, its subsidiaries and affiliates, are prohibited from trying to hostilely acquire NS for a period of five years. At a minimum: Prohibiting transfer of the line for a period of five years.

B. Add a new condition to the AB 156 (Sub. No. 27X) proceeding: The trackage rights the D&H desires to abandon, may be acquired via the OFA process, at the trackage rights' Net Liquidation Value.

45. Prohibiting CP from hostilely trying to acquire NS is akin to the OFA provision which prohibits transferring what one acquires via the OFA process, to any other entity, for the first two years, and to any entity other than the carrier from which the line was acquired, without the granting carrier's consent. See 49 U.S.C. 10904(f)(4)(A).

46. Prohibiting transfer of the line for five years would not prevent a hostile takeover of NS: If NS is taken over, NS still retains title to the line.

47. Subjecting the D&H's trackage rights to the OFA process would sanction both CP and NS.

48. CP would be sanctioned, by precluding it from realizing any profit from the discontinuance / transfer of its trackage rights.

49. NS would be sanctioned by forcing NS to permit another carrier(s) to use its tracks. (Subject to standard trackage-usage rates.)

50. Riffin argues that NS should receive some form of sanction for permitting / failing to prevent / failing to put in its Purchase Contract, language which would prevent CP from trying to hostilely take over NS, using NS' money. The sanction is not for failing to prevent a hostile takeover from occurring. The sanction is the price extracted from NS, as payment to the STB, to all affected shippers, and to the general public, for interceding to prevent CP from hostilely taking over NS.

## **CONCLUSION**

51. Riffin argues (A) that it is **not** in the public's convenience and necessity to permit CP to hostilely take over CP; (B) that CP's attempt to hostilely take over NS is **contrary** to the U.S.' Rail Transportation policies, to wit:

“(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;”

“(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;”

“(9) to encourage honest and efficient management of railroads;”

“(12) to prohibit predatory pricing and practices, to avoid undue concentrations of market power, and to prohibit unlawful discrimination;”

52. Riffin argues that it was dishonest / misleading for CP **not** to disclose to the STB, to shippers, and to the general public, its intention of using NS' money to hostilely takeover NS.

53. Riffin argues that the STB **should** exercise its authority, in a manner consistent with its statutory powers, to **prevent / discourage** hostile / predatory takeovers of efficiently-run rail carriers.

54. Riffin argues that the STB has, in this unique circumstance, the authority, and the ability, to make its position known **before** NS and CP spend extremely large sums of shippers' money to hostilely takeover a fellow carrier, as opposed to putting those large sums of shippers' money into their track infrastructure, by **imposing conditions** on the two transactions still before the STB [FD 35873 and AB 156 (Sub. No. 27X)], which conditions would make it virtually impossible for CP to hostilely takeover NS.

55. Recently, Riffin was sent a link to a 45-second video entitled “When you marry an Italian.” The link follows. Riffin would rename the video: “When you buy a line of railroad from a hedge-fund owned railroad.” Link: <http://safeshare.tv/v/ss564899c87c19e>

Respectfully,

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### CERTIFICATE OF SERVICE

I hereby certify that on or before the 20<sup>th</sup> day of December, 2015, I served a copy of the foregoing Motion to Supplement Record, on the parties noted below.

James Riffin

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# Trains News Wire: UPDATE: CP makes third offer for NS

By Bill Stephens | December 16, 2015



Canadian Pacific slightly sweetened its bid for Norfolk Southern today, offering NS shareholders what amounts to an insurance policy on the stock price of the combined company while the merger is under regulatory review.

“We are increasing our offer to NS shareholders by as much as \$3.4 billion through the addition of a contingent value right,” Mark Erceg, CP’s executive vice president and chief financial officer, said during a conference call this morning with investors and Wall Street analysts.

The basics of the \$30 billion proposal remain the same: NS shareholders would receive \$32.86 in cash in May 2016 and 0.451 shares in the new CP-NS company. The wrinkle CP added today is that NS shareholders would receive 0.451 of a contingent value right, or CVR.

What’s a CVR? “Think about this as a long-term insurance policy on the share price,” says Bill Ackman, a CP board member and head of Pershing Square Capital Management, CP’s largest investor.

The CVR puts a floor beneath the share price of the combined CP-NS. It would protect investors if the CP-NS share price falls below \$175. The CVR would be worth up to \$25 and is a liquid investment that could be sold immediately after CP is put in a voting trust in May 2016.

“The CVR gives significant value to shareholders — unless we’re right,” Ackman says, adding they’re willing to bet \$3.4 billion that CP-NS is worth at least \$175 per share. “We’re not betting that money recklessly.”

CP values its latest offer as a premium of between 58 percent and 77 percent — the same premium of its second offer, which was made on Dec. 8 and immediately rejected by NS.

The two railroads have disagreed on the value of the merger offers and have escalated their war of words over the past week. CP CEO E. Hunter Harrison said the CP-NS battle has turned into a “street fight environment,” adding, “if this is going to be a street fight, so be it.”

There are two ways that CP can move forward with a transaction in light of continued opposition from NS, Ackman says. Both require resolutions by current shareholders, which would need to be filed with NS by Feb. 14, 2016.

The first is a simple shareholder resolution asking the NS board to engage with CP to see if a deal can be worked out. The second — and more complicated — route would be a proxy contest that would seek to replace the NS board of directors with a slate of candidates who favor a merger.

In either case, it's likely the outcome would be decided at or before NS's annual shareholder meeting in May, Ackman says.

CP insists that its two-part merger plan can succeed.

The first part — putting CP in a voting trust, having Harrison sever ties with CP and become CEO of NS — is highly likely and will win STB approval, Ackman says. Harrison would then launch operational improvements at NS, which would save the company \$1.2 billion and drive up its share price.

The second part — gaining STB approval of the merger, a process that could last 16 months — is less certain, Ackman says. But NS shareholders would be rewarded in either case, he says.

CP's stock-and-cash offer would be worth \$125 to NS shareholders if the STB ultimately rejects the merger. If the STB approves the deal, it would be worth \$140 for NS shareholders, Ackman says.

NS did not immediately respond to CP's latest offer.

*UPDATE: Dec. 16, 2015, 10:42 a.m., Central time. Details from Canadian Pacific's Wednesday conference call.*

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# SUFFER the Children's Fund

Just as Michael Ward was leading CSX out of a morass of poor performance and low earnings, a hedge fund based in London and registered in the Cayman Islands made a run at the company. The Children's Investment Fund, or TCI, had a reputation for taking over weak corporations and turning them around with new management while it ran up that company's debt.

The fund's name was a bit misleading. Only a portion of its profits went to The Children's Investment Fund Foundation, which was run by the wife of TCI founder Chris Hohn, the son of a Jamaican auto mechanic. The foundation financed children's causes in the Third World. But despite its charitable-sounding name, the rest of TCI's earnings lined the pockets of its investors.

In early 2006, the fund began looking at potential railroad investments in the United States. It zeroed in on the two Eastern giants, CSX and Norfolk Southern, then deemed CSX the best candidate, since it offered more room for improvement. That October TCI began acquiring control of CSX shares by purchasing from various banks derivatives, or swaps, backed by CSX stock. The banks held the stock, and TCI paid them interest on their investments. If the

stocks' value fell, the fund would make up the difference, and if they rose the fund would take the profit. With the banks holding the stock, CSX was shielded from knowing what the fund was up to.

Ward soon received a chilling message from the Children's Fund telling him it controlled \$300 million of the railroad's shares and planned on getting more. The fund

demanded that Ward relinquish his chairmanship and that directors with railroad experience fill some of the board seats.

In January 2007, TCI proposed a leveraged buyout of the railroad. At a February transportation conference, Hohn's partner at TCI, Snehal Amin, confronted CSX financial chief Oscar Munoz, telling him the fund "owned" 14 percent of his company's shares. Munoz seemed unfazed.

Knowing that he would have to launch a proxy fight if he wanted CSX, Hohn sent out feelers to other hedge funds, apparently hoping to build a group of allies who would buy CSX shares and cast

their votes with TCI. Hohn also forged a secret alliance with another Cayman Islands hedge fund named 3G Capital Partners, which in early 2007 bought 1.9 percent of CSX's outstanding shares.

In early March, Amin informed CSX that TCI had notified the U.S. Securities and Exchange Commission of its intent to buy at least \$500 million of the railroad's shares. The fund also started describing to friendly bankers the profits that could be made if it took CSX private.

On March 29 Munoz and Ellen Fitzsimmons, CSX's general counsel, flew to New York to meet with

Back in Jacksonville, Munoz lined up a company to help with a proxy fight while Fitzsimmons hired merger and acquisition lawyers and prepared for battle.

In May 2007, Amin delivered a blistering attack against CSX management at a well-attended session of a Bear Stearns transportation conference. Munoz fired back at a subsequent session with an impressive overview of CSX's progress and prospects.

For the rest of the year, Ward, Munoz, and Fitzsimmons talked periodically with TCI, hoping to find a compromise, but the fund kept demanding enough seats on the board to control it without paying the other shareholders a premium for giving up their power. Meanwhile 3G and TCI continued expanding their holdings, both through outright share purchases and behind-the-scenes swaps.

On March 10, 2008, TCI and 3G filed a proxy statement nominating five candidates to the CSX board of directors. The names would be voted on at CSX's annual meeting. The statement indicated that the group held 8.7 percent of the company's shares, and that one of its derivative partners, Deutsche Bank, held another 9.1 percent. The proxy avoided disclosing that the group controlled other votes as well. Under U.S. securities laws it is illegal to hold more than 4.9 percent of a public company without disclosing it promptly.

Then came the phone call. Fitzsimmons was in her car, driving to a meeting, when Alan Miller

**'YOU'RE ABSOLUTELY NOT  
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Amin. Only 32, Amin was overflowing with confidence. He told them how disappointed he was that Ward had not responded to TCI's buyout proposal, even though the fund held around 14 percent of CSX's outstanding shares.

Amin wanted the buyout to begin immediately, and demanded that the company announce a "significant" share repurchase when it gave its next quarterly report to stock analysts three weeks later. If there was no announcement, Amin warned, "we will assume Ward is not listening to us."

"And if not?" Munoz asked.

"There will be no limits to what we will do," Amin replied darkly.

of Innisfree, the firm that was handling CSX's proxy solicitation, called from New York.

"You're absolutely not going to believe what's going on with your stock," Miller said.

"What?" she said.

"They own their positions through swaps," he said, explaining that around Feb. 27, the date of record for shareholders who qualified to vote in the annual meeting, TCI's banking allies that held the swaps had moved the shares back and forth in a way that would enable TCI to control how they were voted. This way, Miller said, TCI and its friends controlled 34 percent of the stock.

"I've never seen anything like this," he said.

Days later, on March 17, CSX filed suit in a federal district court complaining that Hohn, Amin, and the funds were guilty of securities fraud. The railroad asked the court to block the funds from voting their shares. On June 11, 2008, Judge Lewis A. Kaplan handed down a 130-page opinion stating Hohn and the others had indeed violated the Exchange Act. Although he enjoined the funds from employing such tactics against CSX in the future, the judge said he had no authority under the law to keep the funds from voting their current shares, whether they were legally controlled or ill-gotten.

By the time CSX held its annual meeting June 25 at Gentilly Yard in New Orleans, Hohn controlled 34 percent of CSX's stock, and other shares were lined up with him.



**CSX's corporate headquarters in Jacksonville, Fla., is the ex-Atlantic Coast Line building.** Eric T. Hendrickson

Many long-term shareholders had sold their stock to arbitragers, who always vote for whatever makes them the quickest money. It was obvious the railroad did not have the votes, but in a last-ditch attempt to stave off defeat, the railroad's proxy specialists were working the phones in the back room, trying to round up more votes while Ward — aided by a lengthy presentation from Tony Ingram — dragged out the meeting.

At one point Amin tried to protest, but Ward ruled him out of order. Finally the meeting ended and the votes were counted. CSX announced that one of TCI's candi-

dates had clearly lost, but two other nominees had won seats on the board. The company held out on admitting Hohn and a fourth director, asking an appeals court to prevent TCI from voting the proxies that they had swapped back and forth with the banks.

Back in Jacksonville, Ward received a long, standing ovation from an emotional crowd of 400 CSX administrators and officers. Despite the threat to Ward and his management team, the siege by Hohn and TCI had become CSX's finest hour. It brought all the employees together, galvanizing everyone into the new corpo-

rate culture Ward had been trying to create.

That September, the appeals court ruled in favor of TCI. But just as Hohn took his seat on the board, the stock market crashed and TCI felt the heat. When Hohn went to Jacksonville to meet with members of the management team, he kept interrupting each session to take calls on his cell phone. By spring 2009, TCI had lost 40 percent of its value and, forced to sell the fund's CSX holdings, Hohn soon gave up his directorship. Under the luck of the recession, Michael Ward had dodged a bullet. — *Rush Loving Jr.*