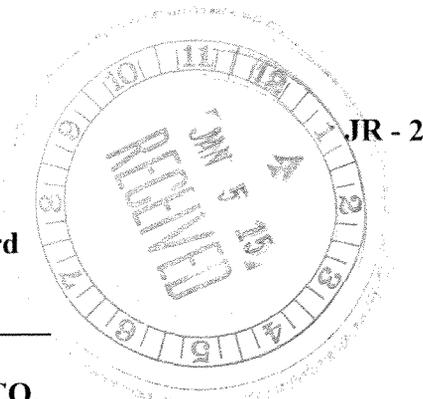


237381

ENTERED
Office of Proceedings
January 5, 2015
Part of
Public Record

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 PRELIMINARY COMMENTS and
VERIFIED STATEMENT**

1. James Riffin herewith provides the Surface Transportation Board ("STB") with his **preliminary** comments, in the form of this Verified Statement.

2. I, James Riffin, am over the age of 21. I am competent, qualified and authorized to make this Verified Statement. The facts contained in this Verified Statement are true and correct to the best of my personal knowledge.

3. Attached is a copy of my Petition for Review of the STB's December 16, 2014 decision in this proceeding.

**CNJ's SECOND MOTION TO REJECT THE APPLICATION
CNJ'S 'REQUEST' FOR A 15-DAY EXTENSION**

4. I read CNJ's second motion to reject the Application, and CNJ's request for a 15-day extension of the time to file comments, along with CNJ's supporting arguments.

5. Since the STB summarily rejected CNJ's first motion to reject the Application, I would not expect the STB to grant CNJ's second motion to reject the Application.

6. Since Norfolk Southern (“**Applicant**”) was unwilling to consent to a 15-day extension of time to file comments, and since the STB facilitated the Applicant’s request to expedite the proceeding, I would not expect the STB to grant CNJ’s request for a 15-day extension.

CNJ’S LETTER REQUEST IS, AT LAW, A PETITION FOR RECONSIDERATION

7. While CNJ’s letter ‘request’ was not titled a ‘Petition for Reconsideration,’ in effect, that is what CNJ’s ‘request’ to reject the Application, and to alter the STB’s Schedule, amounts to. Since ‘Content’ trumps ‘Form,’ I believe that CNJ’s December 29, 2014 ‘letter request’ is, at law, a ‘Petition for Reconsideration,’ and should be treated as such.

WHY I FILED A PETITION FOR REVIEW VS A PETITION FOR RECONSIDERATION

8. The STB’s rules permit a party **to either** file a Petition for Reconsideration or a Petition for Review.

9. As stated above, I believe that CNJ’s December 29, 2014 ‘letter request,’ is, at law, a Petition for Reconsideration. Filing a second Petition for Reconsideration, would be redundant. Furthermore, as stated above, given the tenor of the STB’s December 16, 2014 decision, the unwillingness on the part of Applicant’s attorney to consent to a very modest extension of time for comments to be filed, particularly in light of the extensive amount of holidays-time between the time of the decision, and the time to file comments, and given my prior experience with the STB, I felt that filing a Petition for Reconsideration would be an exercise in futility.

10. I became aware of the statutory deficiencies of the STB’s December 16, 2014 decision shortly after the Decision was rendered. I waited to see if anyone at the STB would catch their error. I also waited to see if counsel for the Applicant would catch the error, then ask the STB to amend its Decision. No one caught the error.

11. I agree with CNJ's opinion that the statutory errors are of such a magnitude, that the only way to rectify the errors, would be to reject the Application. Rejecting the Application, then setting new dates, would only rectify some of the Due Process issues raised by the December 16, 2014 Decision. **All**, not just some, of the infirmities in the Decision need to be rectified.

DISCONTINUANCE OF TRACKAGE RIGHTS

12. My major issue with the December 16, 2014 Decision, is the STB's decision **not** to address the discontinuance of the D&H's trackage rights over the vast majority of its lines.

13. Applicant's expert witness, Mr. Grimm, expressly stated that he was directed to look at the "totality of all actions resulting from the D&H South Lines acquisition, the trackage rights discontinuance[s], and the termination of the marketing and haulage arrangements." Grimm verified statement at 4, Application at 86. On p. 5-6 of Mr. Grimm's verified statement, Application at 86-87, Mr. Grimm discusses the proper methodology for ascertaining whether a merger / consolidation, would be anti-competitive.¹ In his verified statement, he fails to mention or discuss, the discontinuance of D&H's trackage rights that the Applicant states will be addressed by the D&H at a later date.² Discovery is needed to ascertain whether Mr. Grimm in fact analyzed the totality of the transaction, and whether the totality of the transaction would result in material anti-competitiveness. The STB totally disregarded the standard by which the Applicant's own expert witness stated 'anti-competitiveness' must be judged.

¹ "The STB, in having moved towards a policy emphasizing preserving and enhancing competition in rail mergers, has in fact moved towards a more structural approach with respect to reviewing rail mergers and consolidations. I have long supported such an approach and **believe it is appropriate here.**" Bold added. Verified Statement at 4, Application at 86.

² See footnote 2 in Vol. 79 of the *Federal Register*, at page 76447: "The D&H trackage rights over NSR lines that Applicant states will be involved in D&H's request(s) for discontinuance authority are: (1) From Lehigh, Pa., to Allentown / Bethlehem, Pa.; (2) from Allentown / Bethlehem, Pa., to Oak Island, N.J.; (3) from Sunbury, Pa., to Harrisburg, Pa.; (4) from Harrisburg to Reading, Pa., to Philadelphia, Pa.; and (5) from Harrisburg to Perryville, Pa. [*sic, should be MD*], to the Washington, DC area."

14. The Applicant, and the STB, attempted to justify their decision to exclude any consideration of the adverse impacts of the discontinuance of CP's trackage rights, by stating that those trackage rights discontinuances were the responsibility of a party that was not a party to the Applicant's transaction.

15. On December 24, 2014, the Delaware and Hudson Railway Company ("**D&H**") filed a pleading wherein it reminded the STB that a transferor is, per 49 CFR 1180.3(a)(1), an "Applicant." The regulation goes on to state that the transferor need not submit any information, if the transaction is a 'minor' transaction.

16. While the D&H is not required to submit any information (so long as the transaction remains a 'minor' transaction), the adverse consequences of any line transfers that it seeks authority for, certainly are proper subjects for consideration by the STB, particularly when evaluating the 'anti-competitive' consequences and the 'public interest' consequences, of such line transfers or discontinuances.

17. I noted that the STB's scheduling order **did not** provide any time for the D&H to submit any information, were the STB to find at a later date, that the transaction was a 'significant' transaction, rather than a 'minor' transaction. This lack of 'scheduled time,' further signaled to me, that the STB had already decided that it would never reconsider its finding that the transaction was a 'minor' one, versus a 'significant' one, irrespective of how much evidence was presented.

18. By ignoring D&H's trackage rights discontinuances, the STB very conveniently limited the transaction to only one small part of two states: Pennsylvania and New York. That made it easy to justify the STB's decision that the transaction was a 'minor' one.

19. Had the STB broadened its analysis to include the D&H's trackage rights discontinuances, the area under consideration would have been broadened to **five** states: Pennsylvania, New York, New Jersey, Maryland and the District of Columbia. The total track

miles would have increased from 250 miles, to over 1,500 miles. The impact on the D&H's total system miles would have been substantial: From 20% or so, to more than 70% of the D&H's total line miles.

20. In effect, after this transaction was concluded, the D&H would be virtually non-existent.

NO ABANDONMENTS

21. The Applicant **falsely** stated that the transaction did not involve any abandonments of rail lines.

22. The D&H's Oak Island, NJ facility, has within it, a line of railroad. See FD 33901 in footnote 5 below. D&H's abandonment of its Oak Island facility, will require the abandonment of the D&H's Oak Island rail line. [The D&H has **exclusive** rights to use its Oak Island facility. Those are **not** trackage rights. While the D&H's Oak Island rail line is not very long (about 5,000 linear feet), it is long enough to be a 'line of railroad,' and was used as a 'line of railroad.']

MINOR VS SIGNIFICANT TRANSACTION

23. The STB held that the transaction, as described solely by the Applicant, was a 'minor' transaction, as opposed to being a 'significant' transaction. While the decision stated that its decision that the transaction was a 'minor' one, was preliminary, the STB's scheduling order provided no time for the STB to adjust its schedule, were the STB to find, after more evidence was provided to the STB, that the transaction was in fact a 'significant' transaction. ('Significant' transactions require far more information from the Applicant, and further provide that Responsive Applications may be filed.) In effect, were the STB to find at a later date that the transaction was a 'significant' one, protestants were not afforded a viable remedy to address the STB's change of position.

24. This failure by the STB to allow for this contingency in its scheduling order, furthered signaled to me, that the STB would never change its position, no matter how much evidence was submitted.

NO PROVISION FOR DISCOVERY

25. In the two Finance Dockets cited by the Applicant, footnote 5, Application at p. 11, and the STB (FD 35348, CSX's Joint Use Agreement, and FD 35147 Norfolk Southern's Trackage Rights acquisition), the STB's scheduling order provided for discovery.

26. The STB's December 16, 2014 Decision **did not provide for any discovery**. This is contrary to the STB's precedents. The STB did not offer any reason or justification for precluding any form of discovery in this proceeding.

27. I read Mr. Grimm's Verified Statement. It stated that Mr. Grimm's conclusion was based upon information provided to Mr. Grimm by Mr. Muten. See Application at p. 100 *et al.* Neither verified statement indicated what information Mr. Grimm analyzed.

28. I have every desire to review whatever information Mr. Grimm analyzed, in order to ascertain whether I agree, or disagree, with Mr. Grimm's anti-competitive conclusions. The STB's scheduling order, did not provide me, or any one else, with an opportunity to serve discovery requests upon the Applicant.

D & H TRAFFIC ANALYSIS LIMITED TO 2012 / 2013

29. The Applicant deliberately limited the D&H's traffic analysis to 2012 / 2013. The Applicant deliberately failed to inform the STB about an event that occurred in late 2012, which virtually eliminated the majority of the traffic that the D&H carried from its Oak Island facility.

30. Prior to 2012, the D&H's Oak Island facility was leased to TLA.³ TLA used the facility to load Municipal Solid Waste into rail cars. Those rail cars then were carried by CP to Buffalo, NY, and thence on to Ohio, where the Solid Waste was disposed of in Ohio land fills.

31. In late 2012, TLA filed a Chapter 7 bankruptcy petition. See Bankruptcy Case No.: 12-25683, U.S. Bankruptcy Court for the District of New Jersey. CP's entire Oak Island facility became the property of TLA's bankruptcy trustee, Mr. Robert B. Wasserman. **All traffic** from / to the D&H's Oak Island facility, ceased. Overnight, CP's Oak Island / Buffalo, NY traffic went from tens of thousands of rail cars per year, to mere thousands. CP's traffic from Oak Island to Allentown, PA, went from tens of thousands of rail cars per year, to **no rail cars per year**.

32. During the bankruptcy proceeding, CP was barred by the bankruptcy proceeding, from using, or marketing, its Oak Island facility.

33. In June, 2014, the bankruptcy trustee and CP reached an agreement, whereby the bankruptcy trustee agreed to relinquish his rights to CP's Oak Island facility. Only then did CP have the right to reuse its Oak Island facility.

34. CNJ made numerous attempts to acquire the bankruptcy trustee's rights in CP's Oak Island facility. Unfortunately, the bankruptcy trustee was unable to ascertain what rights he had. (The bankruptcy trustee only had an unexecuted copy of the lease agreement between CP and TLA. Neither CP nor TLA ever produced an executed copy of the lease agreement between CP and TLA. Both CP and TLA acknowledged that there was a lease. Neither were willing to disclose to the bankruptcy trustee precisely what rights TLA had.)

³ Trans-Load America, formerly known as Hi-Tech. See STB FD 34192. *Hi-Tech Trans. LLC – Petition for Declaratory Order*. See also FD 33901, *Hi-Tech Trans. LLC – Operation Exemption – Over Lines owned by Canadian Pacific Railway and Connecting Carriers*, Published in the Federal Register on July 19, 2000. 65 FR 44852-53.

35. CNJ made reference to using the Oak Island facility as the origin of MSW trains. The STB discounted CNJ's assertions. There are a number of MSW firms near the Oak Island facility that have a high desire to ship MSW from the D&H Oak Island facility.⁴ There are two landfills near Scranton, PA, that have a high desire to receive that MSW via rail. One of those two landfills has contracted to spend a very large sum of money reinstalling tracks in its railroad right-of-way, in order to receive MSW rail cars. I know of this from personal knowledge, having been to both Scranton landfills, having spoken with the operators of those landfills, and having inspected the former railroad right-of-way, to ascertain that the railroad right-of-way was fully functional, and fully capable of handling rail cars loaded with MSW.

IS THE APPLICATION 'COMPLETE?'

36. The Application as filed on November 17, 2014, was not 'complete.' It was amended a week later. On p. 152 of the Application, there appears a blank page, with the heading: "Appendix A." The Application was heavily redacted. An unredacted copy of the Application did not become available until December 17, 2014.

37. The STB ruled that the Application was 'substantially' complete.

38. The U.S. Supreme Court held in *Chevron* that when a statute is unambiguous, an agency may not 'interpret' that statute. The statute states that an Application that is "incomplete" "**shall**" be rejected. See 49 U.S.C. 11325(a). That term, 'incomplete,' does not appear to be ambiguous. It does not appear to me that the STB has the legal authority to 'interpret' the word 'incomplete' to mean 'substantially' complete.

39. In previous filings by me, and by other parties, the STB has consistently stated that when a pleading is amended, the date the amended pleading is filed, becomes the effective date of filing, not the date the original pleading was filed.

⁴ CP's Oak Island facility was a New Jersey permitted Municipal Solid Waste facility.

40. When the STB failed to change the effective date of the Application to the date the amendment was filed, the STB failed to follow its precedent. The STB failed to justify why it was not following its precedent. That has been held to be arbitrary and capricious.

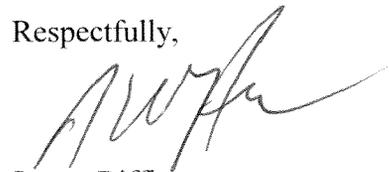
41. An appellate court has never addressed the issue of whether the standard for accepting an application is 'complete,' or 'substantially complete.' It is a legal issue that needs to be resolved by an appellate court.

42. For all of the above reasons, it appears to me, that the STB made up its mind to approve the transaction, prior to hearing from any protestants, and made up its mind not to impose any conditions whatsoever, regardless of whether any protestant advocated for conditions.

43. When a tribunal makes up its mind, it generally is futile to ask the tribunal to reconsider its decision. I have learned that it generally is better just to appeal the decision. Which is why I filed my Petition for Review. It was filed in the Third Circuit, since a substantial portion of the trackage rights that are at issue, are located in Pennsylvania and New Jersey..

44. I declare under the penalties of perjury, that the foregoing is true and correct to the best of my personal knowledge.

Respectfully,



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

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of December, 2014, a copy of the foregoing Preliminary Comments of James Riffin and Verified Statement, 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

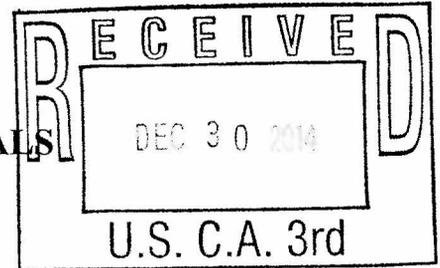
Unites States of America:: c/o Assistant Attorney General Appellate Section
Antitrust Div Room 3109 Dept of Justice 950
Pennsylvania Ave NW Washington, DC 20530

Secretary of Transportation: 1200 New Jersey Ave SE Washington, DC 20590

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.rifkin@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:	csputulnik@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

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT



JAMES RIFFIN
Petitioner

Case No.: 14-4839

V.

SURFACE TRANSPORTATION
BOARD and

* FD No. 35873
* D&H Lines

UNITED STATES OF AMERICA
Respondents

*
*
*

* * * * *

**PETITION FOR REVIEW OF
SURFACE TRANSPORTATION BOARD
DECISION SERVED ON DECEMBER 16, 2014**

Notice is hereby given this 30th day of December, 2014, that Petitioner, James Riffin, herewith petitions the United States Court of Appeals for the THIRD Circuit for review of the Decision of the Respondent, Surface Transportation Board, entered (Served) on **December 16, 2014**, in the case entitled: *Norfolk Southern Railway Company – Acquisition and Operation – Certain Rail Lines of the Delaware and Hudson Railway Company, Inc.*, STB Finance Docket No. 35873, STB served December 16, 2014.

A copy of the STB’s decision is appended hereto.

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

**PETITIONERS' DISCLOSURE OF
AFFILIATIONS AND FINANCIAL INTEREST**

Your Petitioner is not a publicly held entity, nor does he have a parent corporation. He has a 100 % ownership interest. No other publicly held corporation or other publicly held entity has a direct financial interest in the outcome of this litigation. Your Petitioner is not a trade association. This case did not arise out of a bankruptcy proceeding.

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of December, 2014, a copy of the foregoing Petition for Review, 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

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.rifkin@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