

JR - 6

Before the
Surface Transportation Board
Finance Docket No. 35873

237590

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

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

**JAMES RIFFIN'S SUPPLEMENTARY COMMENTS and
VERIFIED STATEMENT**

1. James Riffin (“**Riffin**”), herewith provides the Surface Transportation Board (“**STB**”) with his **supplementary** comments, in the form of this Verified Statement. These comments are in addition to, and supplement, the comments that Riffin has previously filed (Preliminary Comments, JR-2, filed January 5, 2015; Lack of Jurisdiction, JR-3, filed January 12, 2015; Motion for Stay, JR-4, filed January 14, 2015; Motion for Protective Order, JR-5, filed January 15, 2015).

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, information and belief.

3. While Riffin believes that the STB has lost its jurisdiction over this proceeding, these supplementary comments are being filed just in case the Third Circuit ultimately rules that the STB’s December 16, 2014 Scheduling Order is a viable Order, ultimately rules that the STB has retained its jurisdiction to receive comments, and ultimately rules that all parties are required to comply with the STB’s December 16, 2014 Scheduling Order.

RIFFIN'S SUPPLEMENTAL COMMENTS

4. To date, no party has objected to Norfolk Southern's ("NS") **purchase** of 282 miles of Delaware and Hudson Railroad ("D&H") line. Riffin has no objection to NS's purchase of this line, nor does he object to the modification of the trackage rights agreements that are directly associated with this line.

5. To date, all objections, including Riffin's objections, have been addressed to the collateral issues noted below. Riffin argues that the below issues, while collateral to NS's purchase of 282 miles of track, are so 'intricately intertwined' with NS's purchase of 282 miles of track, that NS's purchase of 282 miles of track **cannot be authorized until these issues have been addressed:**

A. Has the STB complied with statutory requirements?

- a. Was notice published in the *Federal Register* within 30 days of the filing of the Application? See 49 U.S.C. 11325(a). Riffin argues: NO. The *Federal Register* notice was published **36** days after the Application was filed. While it could be argued that this failure did not result in a material deprivation of anyone's Due Process rights, and by itself, would not be grounds to reject the Application, it is one more factor against acceptance of the Application.

- b. Were interested parties afforded the statutory minimum of 30 days after publication in the *Federal Register*, to file comments? See 49 U.S.C. 11325(c)(1). Riffin argues: NO. Comments were due on January 15, 2015, **24 days** after the December 22, 2014 *Federal Register* notice. This is a significant Due Process Rights violation, which by itself, would warrant vacating any decision made by the STB. While the STB's decision extending the comment period to January 21, 2015, helped ameliorate this Due Process violation, Riffin argues that it was not enough, given the number of, and nature of, holidays that were within this period of time, and given the disproportionate number of days granted to Applicant to respond to Comments. (30 days for commenters, 75 days for NS.)

- c. Was the Application ‘incomplete?’ See 49 U.S.C. 11325(a). Riffin argues: YES
The Application had to be amended. The Application contained insufficient
‘employee impact’ information. The STB excluded the impact of the D&H’s
abandonment of hundreds of miles of its trackage rights, from consideration. The
Application failed to address the de facto abandonment, without prior authority, of
hundreds of miles of D&H trackage rights, since post Application, the D&H
would no longer have any access to, have a physical connection with, those
trackage rights. The Application failed to address NS’s acquisition of trackage
rights over the Reading and Blue Mountain’s tracks, between Taylor, PA and
Lehighton, PA, which NS must acquire in order to gain access to the Taylor Yard
from Allentown.
- d. Is the D&H a ‘Co-applicant?’ See 49 CFR 1180.3(a)(1). Riffin argues: YES.
The regulation expressly states that a ‘transferor’ is an ‘applicant.’
- e. Will the transaction result in de facto abandonment of hundreds-of-miles of
trackage rights without prior STB authority, in violation of 49 U.S.C.
10903(a)(1)(B)? Riffin argues: YES. As noted above, once the transaction is
completed, the remaining portion of the D&H will no longer be physically
connected to hundreds of miles of trackage rights that the D&H will retain post
sale of 282 miles of its tracks. [From Lehighton to Allentown to Oak Island.
From Sunbury to Harrisburg to Reading to Philadelphia. From Harrisburg to
Perryville, MD to Alexandria, VA.]
- f. Will the transaction result in de facto provision of transportation by a rail carrier
(NS), “over, or by means of, an extended or additional railroad line,” without prior
STB approval, in violation of 49 U.S.C. 10901(a)(3)? Riffin argues: YES. The
Application notes that NS intends to acquire D&H’s trackage rights between
Lehighton and Taylor, from the Reading Blue Mountain. NS needs to acquire
these trackage rights in order to get from Allentown to Taylor.

- B. Should the abandonment by the D&H of hundreds of miles of its trackage rights, be treated as an integral part of NS's Application? Riffin argues: YES. Artificial segmentation of transactions in order to circumvent regulatory scrutiny, is to be avoided. Stranded segments are to be avoided. De facto abandonment of trackage rights is to be avoided.
- C. Should the Application be treated as a 'minor' or as a 'significant' transaction? See 49 CFR 1180.2. Riffin argues: The Application is a 'significant' transaction. It involves six states (NY, PA, NJ, MD, DC and VA), not two (NY, PA), due to the extensive amount of trackage rights that are to be abandoned per the express conditions of the contract between NS and the D&H. It involves abandonment by the D&H of 70% or so of its lines of railroad. More than 150 shippers will lose access to two Class I carriers. More than 250 employees will be displaced.
- D. Will the anti-competitive effects of the Application, when combined with the anti-competitive effects of the discontinuance of hundreds of miles of D&H trackage rights, be outweighed by the public benefits resulting from NS's acquisition of ownership of 282 miles of D&H line that NS presently has authority to use? Riffin argues: NO. The only professed benefit is the capital that NS proposes to spend upgrading the 282 miles of track that it seeks to purchase. Since NS currently is the primary user of those 282 miles of track, it should make that capital investment whether it owns the tracks or not. NS will be the beneficiary of those improvements, whether it owns the tracks or not. An analogy would be an air conditioning unit for a commercial space. The existing a/c unit is energy inefficient, but functional. The tenant would like a more energy-efficient a/c unit. Most landlords would say to the tenant: If you want a more energy-efficient unit, buy it yourself. No landlord would sell their building to a tenant just because the tenant wants their space to be more energy efficient / more modern looking / more useful to the tenant.

- E. Is NS's expert witness, Curtis Grimm's, conclusion that the benefits from NS's acquisition of ownership of 282 miles of D&H line, outweighs the anti-competitive effects of NS's acquisition of 282 miles of D&H line:
- a. Supported by the methodology advocated by Mr. Grimm? Riffin argues: NO. See the Verified Statement of Michael Nelson, CNJ's expert witness, which is incorporated by reference herein.
 - b. Supported by all the evidence? Riffin argues: NO. See the Verified Statement of Michael Nelson, CNJ's expert witness, which is incorporated by reference herein.
- F. Does the Application contain all of the 'supporting information' required by 49 CFR 1180.6? Riffin argues: NO. See Samuel Nasca's arguments in his Petition for Reconsideration, which are incorporated by reference herein.
- G. Should the STB impose the following conditions upon the proposed transaction:
- a. Grant to CNJ / Riffin use of the D&H's Oak Island Terminal? Riffin argues: YES
 - b. Grant to CNJ / Riffin use of the D&H's trackage rights between Oak Island and some point¹ that will enable CNJ / Riffin to operate trains from Oak Island to the Keystone Landfill in Scranton (Dunmore) PA / to operate trains from Oak Island to a point of interchange with the Canadian Pacific Railway? Riffin argues: YES
 - c. The grant of the above rights to CNJ / Riffin, would preserve competitive access to two carriers for Allegro and Pace Glass, two new shippers who desire rail service, to points in NE PA.; would preserve competitive access to two rail carriers for

¹ That point could be as distant as Binghamton, NY, as near as Easton, PA, or at some mid-point, such as Scranton, PA. The condition should include the ability to interchange with NS at Allentown, PA. See Eric Strohmeier's Verified Statement for a detailed discussion of this condition.

more than 150 existing shippers, post the expiration / renewal / modification of their existing rail contracts with the D&H.²

- c. Grant to the Saratoga & North Creek Railway (“S&NC”) a condition permitting the S&NC to interchange with NS and CSX in Saratoga Springs, NY, in or near the D&H Saratoga Yard, as requested by the NY DOT? Riffin argues: YES. This will preserve competitive access to three Class I carriers.

 - d. Grant to the State of Maryland / Riffin, use of the D&H’s trackage rights from a point south of Baltimore, such point being where traffic could be interchanged with CSX, to a point either in Enola, PA, or a point in the vicinity of where NS’s tracks pass beneath I-95, north of Perryville, MD, such point being at a location where interchange could be made with the former Octoraro Railroad right-of-way, and interchange could be made with CSX? Riffin argues: YES. This will permit the State of Maryland to be able to operate double-stack trains containing post-Panamax containers, to the Mid-west, thereby eliminating a major transportation problem for the Port of Baltimore.
- H. Should the transaction be subject to the employee protections as specified in *New York Dock* or as specified in *Wilmington Terminal*? Riffin takes no position on this issue at this time.
6. WHEREFORE, Riffin would pray that the STB:
- A. Grant conditions, as noted above;
 - B. Modify the Scheduling Order, to permit discovery, and to balance the amount of time commenters have to utilize discovery, make more informed comments, with the amount of time NS has to respond to comments;

² The Application states that existing shipper contracts with the D&H will last **only until** the contracts “expire, renew, or are modified.”

- C. Require all related transactions to be filed, then consolidated, with the Application, then make a decision based on the **totality** of the effect of **all related transactions**;
- D. Rule that the D&H is a Co-applicant, and further order the D&H to provide relevant information;
- E. Rule that the totality of the transactions constitutes a ‘significant’ transaction; and
- F. For such other and further relief as would be appropriate.

7. I hereby certify that the above is true and correct to the best of my personal knowledge, information and belief.

Respectfully submitted,

/s/ James Riffin
James Riffin

Filed: January 21, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of January, 2015, a copy of the foregoing Supplementary Comments, was served by first class mail, postage prepaid, or by e-mail, upon the Parties of Record noted below.

/s/ James Riffin
James Riffin

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