

BEFORE THE
SURFACE TRANSPORTATION BOARD

238720

STB DOCKET NO. AB-156 (SUB-NO. 27X)

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June 29, 2015
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DELAWARE AND HUDSON RAILWAY COMPANY, INC.
-- DISCONTINUANCE OF TRACKAGE RIGHTS EXEMPTION --
IN BROOME COUNTY, NY; MIDDLESEX, ESSEX, UNION, SOMERSET, HUNTERDON,
AND WARREN COUNTIES, NJ; CUMBERLAND, CHESTER, LUZERNE, PERRY, YORK,
LANCASTER, NORTHAMPTON, LEHIGH, CARBON, BERKS, MONTGOMERY,
NORTHUMBERLAND, DAUPHIN, LEBANON, AND PHILADELPHIA COUNTIES, PA;
CECIL, HARFORD, BALTIMORE, ANNE ARUNDEL, AND PRINCE GEORGE'S
COUNTIES, MD; THE DISTRICT OF COLUMBIA; AND ARLINGTON COUNTY, VA

REPLY TO MOTION TO COMPEL DISCOVERY RESPONSES

David F. Rifkind
STINSON LEONARD STREET LLP
1775 Pennsylvania Avenue NW, Suite 800
Washington, DC 20006
Telephone: (202) 785-9100
E-mail: david.rifkind@stinsonleonard.com

W. Karl Hansen
STINSON LEONARD STREET LLP
150 South Fifth Street, Suite 2300
Minneapolis, MN 55402
Telephone: (612) 335-7088
E-mail: karl.hansen@stinsonleonard.com

Attorneys for Delaware and Hudson
Railway Company, Inc.

Dated: June 29, 2015

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INTRODUCTION

Delaware and Hudson Railway Company, Inc. ("D&H") submits this reply in opposition to "James Riffin's Motion to Compel The Delaware and Hudson Railway Company, Inc. To Provide Riffin with the Documents He Requested on April 20, 2015, and on May 1, 2015"¹ (the "Motion" or "JR-13") filed with the Board on June 8, 2015.² In order to obtain discovery in discontinuance proceeding, the party seeking discovery must demonstrate both need and relevance. Riffin, who is not a shipper and has no cognizable interest in this proceeding, has

¹ The discovery requests were actually served and filed on April 16, 2015 and April 20, 2015. In this Reply, D&H will refer to the actual dates.

² In his 11 page (not including exhibits) motion to compel, Riffin includes 6-1/2 pages of responses to D&H's June 2, 2015 Reply to Notice of Appeal, which Riffin acknowledges constitute an unauthorized reply to a reply. *See* 49 C.F.R. § 1104.13(c). The Board should strike or otherwise disregard Riffin's attempt to circumvent its rules, which in any event, do not merit further response by D&H.

failed to demonstrate either need or relevance for the requested information. Accordingly, the Board should deny the Motion.

BACKGROUND

On March 19, 2015, D&H filed its Notice of Exemption to discontinue approximately 670 miles of trackage rights in five states and the District of Columbia. The Board published notice of D&H's exemption on April 8, 2015 with an effective date of May 8, 2015, which the Board later postponed to June 15, 2015 to coincide with the effective date of the transaction in Finance Docket No. 35873. However, on April 20, 2015, Riffin, who is neither a shipper nor a carrier, filed a petition to revoke the exemption, claiming that D&H had failed to include certain ZIP Codes and counties in its Notice. On May 8, 2015, D&H filed a reply to Riffin's petition acknowledging inadvertent omission of certain ZIP Codes and counties. On May 13, 2015, the Office of Proceedings ordered D&H to submit a supplement to its March 19, 2015 Notice that includes all omitted information required by 49 C.F.R. § 1152.50. The Order further provided "All deadlines in this proceeding, . . . are no longer operative, and this proceeding is placed in abeyance until further order of the Board." Slip op. at 2. D&H filed the supplemental information required by the May 13 Order on June 15, 2015.

On April 16, 2015 and on April 20, 2015, Riffin served discovery requests on D&H seeking a broad range of information.³ On June 8, 2015, while the proceeding remained in abeyance, Riffin filed his motion to compel discovery responses. Riffin contends that the Board should compel production of the information so he can challenge D&H's ability to use the 2-year out of service exemption procedures. JR-13 at 6. Riffin's claims are without merit.

³ D&H's discovery responses initially were due May 20, 2015, thirty days after Riffin filed his petition to revoke the exemption. The May 13 Order, however, placed the proceeding in abeyance and, as a result, D&H's responses are not yet due.

ARGUMENT

I. The Board Sets a High Bar for Discovery in Discontinuance Proceedings.

Although parties are entitled to discovery “regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding,” 49 C.F.R. § 1114.21(a)(1), the Board requires “more than a minimal showing of potential relevancy” before granting a motion to compel discovery. *Potomac Elec. Power Co. v. CSX Transp., Inc.* (“PEPCO”), 2 S.T.B. 290, 292 (1997). Parties must demonstrate a real, practical need for the information. *Coal Rate Guidelines, Nationwide*, 1 I.C.C. 2d 520, 548 (1985). This is particularly so in abandonment and discontinuance proceedings where discovery is disfavored not only due to the strict statutory time constraints, “but also because only rarely can discovery be justified in an abandonment proceeding.” *Cent. R.R. of Ind.—Aban. Exemption—in Dearborn, Decatur, Franklin, Ripley, and Shelby Counties, Ind.*, AB-459 (Sub-No. 2X), slip op. at 4 (STB served Apr. 1, 1998) (denying a motion to compel discovery for failure to show need for the requested material). As the Board has explained,

Congress has directed the Board to expedite its decisionmaking process in general, and its decisions in abandonment cases in particular. Discovery, which can hold up the Board’s processes, may be necessary in some cases, even in some cases--such as rate cases--involving statutory decisional deadlines. In abandonment cases, however, it is not typically productive, and hence not typically pursued. Contested discovery may be granted under appropriate circumstances in particular abandonment proceedings, but only when the party seeking discovery shows that the information sought is relevant and might affect the result of the case, and that it ought to be obtained through discovery rather than some other means.

SWKR Operating Co.—Aban. Exemption—In Cochise County, AZ, AB-411 (Sub-No. 2X), slip op. at 2 (STB served Feb. 14, 1997). The burden is on the party seeking discovery in abandonment and discontinuance proceeding to “demonstrate relevance and need.” *Cent. R.R. of*

Ind., slip op. at 4. Riffin has not met this high threshold and therefore his motion to compel should be denied.

II. Riffin Has Not Demonstrated a Real Practical Need for Discovery.

Riffin has no cognizable interest in this proceeding. He is neither a shipper nor a carrier. He has identified no harm that he, or anyone else for that matter, will suffer as a result of D&H's discontinuance of the subject trackage rights.

Moreover, he seeks the information requested for the sole purpose of challenging D&H's use of the 2-year out of service class exemption: "Whether the D&H has moved local traffic over any of the subject trackage rights is **very much in dispute**. That is the very reason why Riffin serviced his discovery requests" JR-13 at 6 (emphasis in the original). Riffin's claim is wholly unfounded. More to the point, seeking discovery for the sole purpose of making it more onerous for a carrier to discontinue trackage rights is at odds with the Congressional and STB intent in establishing the exemption procedures for discontinuance of trackage rights. *See Exemption of Out of Service Rail Line*, 2 I.C.C.2d 146 (1986); 49 C.F.R. § 1152.50(c).

Perhaps most importantly, none of the information that Riffin seeks will affect the outcome of this proceeding. That D&H is entitled to discontinuance authority is not genuinely in dispute. The Board has been presented with more than sufficient evidence -- and more evidence that the Board requires or is typically provided -- to demonstrate that detailed regulatory scrutiny of D&H's trackage rights discontinuances is not necessary to carry out national transportation policy. *See id.*, 2 I.C.C.2d at 157-58. This evidence includes the competitive analysis submitted by NSR in the D&H South Lines acquisition proceeding, which showed that discontinuance of the trackage rights in this proceeding would result in no competitive harm. *See* Docket No. FD 35873, slip op. at 14-16 (STB served May 15, 2015). Although more than 100 shippers submitted statements in support of that transaction, not a single shipper opposed the transaction

and no party, including Riffin, presented evidence in either proceeding identifying any such harm. Moreover, 660 of the 670 miles of the subject trackage rights are overhead only, and many have not been used in a decade or more. In these circumstances, the Board should not countenance pursuit of discovery by a party with no cognizable interest in the proceeding, thereby risking further delay and imposing additional costs.

III. The Information Sought Far Exceeds Riffin's Purported Need.

Although Riffin claims that he needs the information to test the veracity of the representations in D&H's Notice of Exemption, his requests seek information that far exceed that purpose. For example, in his April 16 discovery requests, Riffin seeks copies of six of the eleven agreements that are the subject of this proceeding in addition to documents concerning traffic over rail lines that are not the subject of the trackage rights discontinuance proceeding,⁴ documents detailing the number of cars in each train, origin and destination of each car in each train, shipper, receiver, origin and destination carrier, number of cars interchanged with other carriers, and information regarding traffic originating or terminating in D&H's Taylor Yard facility in Pennsylvania, including shipper, receiver, and origin and destination carriers. None of the information requested has any bearing on this trackage rights discontinuance proceeding and, accordingly, should not be allowed. *See Cent. R.R. of Ind.*, slip op. at 4. (denying motion to compel "broad brush discovery requests, none of which the protestants have shown is necessary to present their case").

Similarly, Riffin's April 20 supplemental discovery requests seek copies of switching agreements and documents concerning D&H's right to use certain yard facilities at Oak Island,

⁴ In addition to traffic D&H handles via its trackage rights, Riffin also seeks information regarding traffic D&H handles over its own lines between Dupont, PA and Binghamton, NY and between Dupont and Sunbury, PA.

Greenville, and Elizabethport, NJ, and Allentown and Bethlehem, PA, none of which are the subject of the discontinuance proceeding. The only ostensible purpose for these requests is to further Riffin's improper supplemental OFA notice to acquire D&H's rights in the various yard facilities. These discovery requests should also be disallowed.

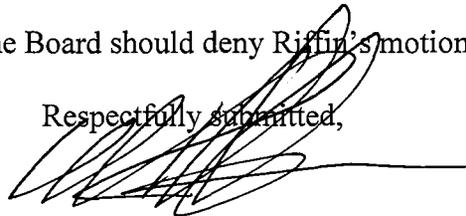
Discovery is not an opportunity for a party to gain unlimited access to a carrier's files in order to obtain any information in which it might be interested. Rather, discovery must be relevant, and a party seeking to compel discovery must "show clearly that the information sought is relevant and would lead to admissible evidence." *Export Worldwide, Ltd. v Knight*, 241 F.R.D. 259, 263 (W.D. Tex 2006); *see also SWKR Operating Co.*, slip op. at 2; *PEPCO*, 2 S.T.B. at 292. Riffin's discovery requests are wholly without relevance to this proceeding and would serve no useful purpose. Accordingly, the Board should reject Riffin's motion to compel.

CONCLUSION

For the foregoing reasons, the Board should deny Riffin's motion to compel.

Dated: June 29, 2015

Respectfully submitted,



W. Karl Hansen
STINSON LEONARD STREET LLP
150 South Fifth Street, Suite 2300
Minneapolis, MN 55402
Telephone: (612) 335-7088
E-mail: karl.hansen@stinsonleonard.com

David F. Rifkind
STINSON LEONARD STREET LLP
1775 Pennsylvania Avenue NW, Suite 800
Washington, DC 20006
Telephone: (202) 785-9100
E-mail: david.rifkind@stinsonleonard.com

Attorneys for Delaware and Hudson
Railway Company, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2015 I have caused the foregoing Reply to be served to the parties of record by First Class Mail and by e-mail where an e-mail address is included on the Board's official service list.

A handwritten signature in black ink, appearing to read 'W. Karl Hansen', written over a horizontal line.

W. Karl Hansen

PARTIES OF RECORD

Jeffery A. Bartos
(Jbartos@Geclaw.com)
Guerrieri, Clayman, Bartos & Parcelli, P.C.
1900 M Street, N.W., Suite 700
Washington, DC 20036

David Bernhardt
Maine Department of Transportation
16 State House Station
Augusta, ME 04333

Eugene H. Blabey
Western New York & Pennsylvania Railroad, LLC
3146 Constitution Avenue
Olean, NY 14760

David Brillhart
New Hampshire Depart Of Transportation
P.O. Box 483
Concord, NH 03302-0483

Honorable Robert P. Casey, Jr.
United States Senate
Washington, DC 20510

Honorable Chris Collins
1117 Longworth House Office Building
Washington, DC 20515

P. Scott Conti
75 Hammond Street
Worcester, MA 01610

Honorable Chris Gibson
House of Representatives
Washington, DC 20515

Kelvin J. Dowd
(Kjd@Sloverandloftus.com)
Slover & Loftus
1224 Seventeenth Street N.W.
Washington, DC 20036-3003

Susan Duckworth
(S_Duckworth@Nefreighttransfer.com)
Northeast Freight Transfer
321 Spruce Street, Suite 607
Scranton, PA 18503

Richard Edelman
(Redelman@Odsalaw.com)
Mooney, Green, Saindon, Murphy & Welch
1920 L Street, N.W., Suite 400
Washington, DC 20036

Toby L. Fauver
Pennsylvania Department of Transportation
Keystone Building 400 North Street
Harrisburg, PA 17104

Nathan R. Fenno
New York, Susquehanna & Western
Railway Corporation
1 Railroad Avenue
Cooperstown, NY 13326

L. Andrew Fleck
NI Industries, Inc.
5430 LBJ Freeway, Suite 1700
Dallas, TX 75240-2697

Frank Depaola
Ten Park Plaza
Suite 4160
Boston, MA 02116

Louis E. Gitomer
The Adams Building, Suite 301 600
Baltimore Avenue
Towson, MD 21204
Lou_Gitomer@Verizon.Net

Steven M. Golich
Celtic International
7840 Graphics Drive, Suite 100
Tinley Park, IL 60477

Pennsylvania Public Utility Commission
PO BOX 3265
Harrisburg, PA 17105-3265

Honorable Richard Hanna
U. S. House of Representatives
319 Cannon House Office Building
First Street & Independence Avenue, S.W.
Washington, DC 20515

John Heffner
(John.Heffner@Strasburger.com)
Strasburger & Price, LLP
1025 Connecticut Avenue, N.W., Suite 717
Washington, DC 20036

Honorable Brian M. Higgins
U. S. House of Representatives
319 Cannon House Office Building
First Street & Independence Avenue, S.W.
Washington, DC 20515

Eric M. Hocky
(Ehocky@Thorpreed.com)
Clark Hill, PLC
One Commerce Square
2005 Market Street, Suite 1000
Philadelphia, PA 19103

Eric B. Lee
Owego Harford Railway, Inc.
415 Woodland Road
Syracuse, NY 13219

Randall C. Gordon
(ngfa@ngfa.org)
National Grain and Feed Association
1250 Eye St N.W., Suite 1003
Washington, DC 20005-3922

Gordon P. MacDougall
1025 Connecticut Avenue, N.W.
Suite 919
Washington, DC 20036-5444

Lawrence C. Malaki
(Lmalski@Pnrra.org)
Pennsylvania Northeast Regional Railroad
Authority
280 Cliff Street
Scranton, PA 18503

Keith D. Martin
(Keith.Martin@Dot.Ny.gov)
New York State Department
of Transportation
50 Wolf Road, 6th Floor
Albany, NY 12232

Terrence D. Matthews
JB Hunt Transport Services, Inc.
P.O. Box 130
Lowell, AR 72745-0130

Thomas McFarland
(Mcfarland@Aol.com)
Thomas F. McFarland, P.C.
208 South Lasalle Street, Suite 1890
Chicago, IL 60604

John McHugh
East Of Hudson Rail Freight Service
Task Force, Inc.
233 Broadway, Suite 2320
New York, NY 10279

Peter R. Leishman
(Mbrxnh1@Aol.com)
Milford-Bennington Railroad Co., Inc.
62 Elm Street
Milford, NH 03055

Kevin Moore
(Bletdiv191@Hotmail.com)
Brotherhood Of Locomotive Engineers & Trainmen
3 Deer Hollow Road
Plaistow, NH 03865

William A. Mullins
(Wmullins@Bakerandmiller.com)
Baker & Miller PLLC
2401 Pennsylvania Ave, N.W., Suite 300
Washington, DC 20037

Raj Mukherji
(Asmmukherji@Njleg.org)
P.O. Box 1
Jersey City, NJ 07303

Sam Ninness
Thoroughbred Direct Intermodal Service, Inc.
5165 Campus Drive, Suite 400
Plymouth Meeting, PA 19462

Mike Radak
Hanjin Shipping America, L.L.C.
80 Route 4 East
Paramus, NJ 07652-4600

Honorable Thomas Reed, II
U.S. House of Representatives
1037 Longworth House Office Building
Washington, DC 20515

James Riffin
P. O. Box 4044
Timonium, MD 21094

Wayne A. Michel
Reading Blue Mountain &
Northern Railroad Company
P.O. Box 218
Port Clinton, PA 19549

Jeffery K. Stover
(Jstover@Seda-Cog.org)
Seda-Cog Joint Rail Authority
201 Furnace Road
Lewisburg, PA 17837

Vincent P. Szeligo
(Vszeligo@Wsmoslaw.com)
Wick Streiff Meyer O'Boyle & Szeligo PC
1450 Two Chatham Center
Pittsburgh, PA 15219-3427

Ben J. Tarbuton, III
Sandersville Railroad Company
P.O. Box 269
Sandersville, GA 31082

Honorable Paul Tonko
U.S. House of Representatives
2462 Rayburn House Office Building
Washington, DC 20515

Honorable Pat Toomey
United States Senate
248 Russell Senate Office Building
Washington, DC 20510

David J. Monte Verde
Delaware Lackawanna Railroad Co.
1 Mill Street, Suite 101
Batavia, NY 14020-3141

John B. Vermynen
Zerega (A. Zerega Sons, Inc.)
P.O. Box 241
Fair Lawn, NJ 07410

Joe Shefchik
PTI Logistics LLC
2701 Executive Drive
Green Bay, WI 54304

Charles A. Spitulnik
(Cspitulnik@Kaplankirsch.com)
Kaplan Kirsch & Rockwell LLP
1001 Connecticut Avenue, NW
Suite 800
Washington, DC 20036

Tom Malloy
Thoroughbred Direct Intermodal Services
5165 Campus Drive, Suite 400
Plymouth Meeting, PA 19462

John A. Boccadori,
PO BOX 347
Scranton, PA 18503

George H. Kleinberger
PO BOX 8002
Clifton Park, NY 12065-8002

Maryland State Clearinghouse Department Of State
Planning
301 West Preston Street
Baltimore, MD 21201-2365

New York Movers Tariff Bureau, Inc.
888 Seventh Avenue
New York, NY 10106-0201

Virginia Department Of Transportation
1221 East Broad Street
Richmond, VA 23219

Thomas W. Wilcox
(twilcox@gkgglaw.com)
GKG Law, P.C.
Canal Square
1054 31st Street, N. W., Suite 200
Washington, DC 20007-4492

Sharon Clark
(Sharon.Clark@Perdue.com)
Perdue Agribusiness LLC
SVP Transportation & Regulatory Affairs
P.O. Box 1537
Salisbury, MD 21802

Jerrold Nadler
U. S House of Representatives
201 Varick Street, Suite 669
New York, NY 10014

Intrastate Rail Rate Authority - Virginia
Commonwealth Of Virginia
PO BOX 1197
Richmond, VA 23209-1197

Maryland Public Service Commission
Transportation Division
6 St Paul Centre
Baltimore, MD 21202

New Jersey Department Of Energy
1100 Raymond Blvd
Newark, NJ 07102-5205

Vermont Agency Of Transportation
One National Life Drive
Montpelier, VT 05633--0001

Douglas R. Nj Webb
Department Of Tptn.
1035 Parkway Avenue
Trenton, NJ 08618-2309