

**Before the
Surface Transportation Board**

JR - 9

238360

STB DOCKET NO. AB-156 (Sub-No. 27X)

**DELAWARE AND HUDSON RAILWAY COMPANY, INC. –
DISCONTINUANCE OF TRACKAGE RIGHTS EXEMPTION --
IN NY, PA, NJ, MD, VA AND DC**

ENTERED
Office of Proceedings
May 12, 2015
Part of
Public Record

**REPLY TO
THE D&H'S REPLY TO
RIFFIN'S PETITION TO REVOKE**

Filed May 12, 2015 by:

James Riffin
P. O. Box 4044
Timonium, MD 21094
(443) 414-6210

1. Comes now James Riffin (“**Riffin**”), who herewith seeks leave to reply, and provides his reply, to the D&H’s May 8, 2015 Reply to Petitions to Revoke Exemption.

2. Replies to a Reply, are not permitted by the STB’s regulations. See 49 CFR 1104.13(c). However, on occasion, the STB has permitted a reply to a reply, in order to have before it, a more complete / more accurate record.

3. In addition, the D&H in its Reply introduced into the record totally new evidence (a Operating Rights Agreement), which Riffin argues Riffin has the right to comment on.

4. Riffin seeks permission to file this Reply to the D&H’s Reply to Riffin’s Petition to Revoke, in order to provide the STB with a more complete, and a more accurate, record, and in order to respond to the new evidence (Operating Rights Agreement) the D&H put into the record.

5. The D&H argued that Riffin is **presently** not a shipper on any of the D&H’s lines. Riffin has made it clear (or at least has attempted to make it clear), that not only does he **desire** to become a shipper on a portion of the D&H’s lines, but also that he has made several **attempts** to become a shipper on that portion of the D&H’s lines that connect the D&H’s Oak Island Terminal, located in Newark, New Jersey, with Taylor Yard, located a bit south of Scranton, PA., for the purpose of shipping Municipal Solid Waste to one or more land fills located near the Taylor, PA yard. Each and every time Riffin has requested a rate, the D&H has failed to provide Riffin with a rate.

6. In Riffin’s Notice of Intent to File an OFA, he made it clear that he has a present desire to ship (**become a shipper**) large quantities of freight over D&H lines of railroad.

7. Riffin’s desire to become a shipper is so great, that he has asked the D&H to provide him with what it would cost to subsidize the continued operation of some of the D&H’s lines.

8. The issue of whether it is in the interest of the Public Convenience and Necessity to permit the D&H to discontinue its Operating rights, involves more than just existing, or prior shippers. The focus is, and should be, upon **future** shippers, since only those shippers that desire **future** shipment of freight by rail, have any vested interest in preserving freight shipment options.

LEGALLY SUFFICIENT NOTICE

9. 49 CFR 1152.50(d)(2) and 1152.22(a)(8) **require** D&H's Exemption notice to list **all** of the Zip Codes through which D&H's Operating rights traverse. In *Norfolk Southern Railway Company – Abandonment Exemption – In Baltimore County, MD*, STB Docket No. AB-290 (Sub-No. 237X), Served April 3, 2006, **the full Board** ruled that the omission of a significant number of Zip Codes from an Exemption Notice, was grounds to reject an Exemption notice.

10. The D&H made reference to a **Director of Proceedings** decision, wherein the Director of Proceedings permitted an exemption to proceed, in spite of the fact that **one** of five Zip Codes had not been listed. See *Buffalo & Pittsburgh R.R., Inc. – Abandonment Exemption – In Erie and Cattaraugus Counties, NY*, STB Docket No. AB-369 (Sub-No. 7X) (STB served November 4, 2008).

11. Riffin would argue that a Full Board Decision trumps a Director of Proceedings' decision. In addition, omitting one Zip Code, on a line only 27 miles long, could at least be classified as a *de minimis* omission. Particularly in light of the near total lack of opposition to the Buffalo & Pittsburgh abandonment exemption.

12. In the D&H proceeding, at least 13 Zip Codes were omitted. That is a lot of Zip Codes. Particularly in light of the fact that Riffin only checked the Zip Codes for two states: New Jersey and Maryland.

13. Had the D&H only omitted one or two Zip Codes, that might have been excused.

Especially if the D&H had taken some effort to correct its oversight. (Publish new newspaper notices / file a corrected / amended *Federal Register* notice.)

14. The purpose of noting the Zip Codes the lines traverse, is to give notice to **the general public**, **NOT** to give notice to those who regularly read the STB's web site.

15. Not listing the Zip Code for P.O. Box holders, is just as egregious as not listing the Zip Codes for entities that get mail at their residences / places of business.

COMBINATION OF ERRORS

16. It is not just the absence of a significant number of Zip Codes that concerns Riffin.

17. The Exemption Notice failed to note two counties that the Lines traverse: Middlesex County, NJ and Cecil County, MD.

18. The Exemption Notice failed to give notice to the **general public** where the lines that were being discontinued, were located, to wit:

“between Allentown and Oak Island, NJ,”

19. There is no city, town, borough, municipality or township in the State of New Jersey called “Oak Island.”

20. “Oak Island” is a railroad station / terminal / yard. Only entities conversant with railroads, would know where “Oak Island” is located. (“Oak Island” is located in Newark, NJ.)

21. Remember, the purpose of publishing a notice in a local newspaper, is to inform **the general public**, not readers of the STB's web site.

22. A proper notice would have stated: “Between Allentown, PA and Oak Island Yard, NJ, located in Newark, NJ.”

23. In Exhibit B, Subject Trackage Rights, in paragraph IV, the Exemption stated:

“Between Milepost 1.7 +/- in Oak Island, NJ and Milepost 72.1 +/- in Phillipsburg, NJ over former Central Railroad of New Jersey lines, a distance of approximately 67.0 miles. The line west of Glen Gardner, NJ was removed following construction of the I-78 extension near Alpha, NJH.”

24. As the STB is fully aware, based on the above statement, Riffin was led to believe that Milepost 1.7 was on the former CNJ mainline, in Jersey City, NJ. The Exemption Notice gave no hint that the D&H had Operating rights between the Elizabeth Port yard, located on the former Lehigh Valley main line, and the CNJ’s Oak Island yard, located on the CNJ’s main line, via Line Code 205 (Newark and Elizabethport Branch).

25. Mr. Clements, in his May 8, 2015 Verified Statement, blithely stated:

“Riffin’s Petition ¶¶ 18-21 and Exhibit One pp. 39-44 incorrectly assume that **Oak Island Jct at milepost 1.7** is located on CNJ’s Main Line, USRA Line Code 0201.”
Bold added.

26. **Oak Island Jct IS NOT MENTIONED** in the Exemption Notice. The first Riffin (and readers of the STB’s web site) heard about Oak Island Jct, is when they read Mr. Clement’s May 8, 2015 Verified Statement.

27. Even Mr. Clement’s May 8, 2015 Verified Statement is misleading: He states that MP 1.7 is at Oak Island Jct. Not so. The track map he attached as his Exhibit 4, clearly shows that MP 1.7 is at Newark Airport. The track map also clearly shows that Oak Island Jct. is actually located at MP 1.23 / 1.24, where the Newark and Elizabethport Branch crosses the Pennsylvania RR line, at MP 1.24, and crosses the Lehigh Valley Main Line, at MP 1.23. That is a difference

of ½ mile, a significant difference on a line only five miles in length.

28. The Exemption Notice is further misleading, for it **totally fails to mention** that the D&H intends to abandon its Operating rights on the Newark Elizabethport Branch!

TRAFFIC ON 115 MILES OF D&H LINES

29. The Exemption Notice is premised on the D&H's representation that no local traffic has moved over any of the D&H's 670 miles of Operating rights.

30. Mr. Clements stated in his May 8, 2015 Verified Statement, at p. 2, that:

“D&H continues to operate over its trackage rights between Dupont and Allentown and between Sunbury and Harrisburg in Pennsylvania.”

31. The D&H Line ended at Sunbury, PA. The D&H was granted Operating rights from Sunbury to Alexandria, VA, and from DuPont, PA to Oak Island, NJ, via Allentown. The April 25, 1979 Operating Rights Agreement, expressly gave the D&H the right to interchange cars **only** at the following locations:

- A. Any point on the line between Binhhampton and Buffalo.
- B. Any point on the line between Attica and Groveland, NY.
- C. At and within the Buffalo, Black Rock and Niagara Falls, NY, terminal areas.
- D. The right to interchange with and operate on or off the Philadelphia, Bethlehem and New England Railroad at Bethlehem, PA.
- E. The Baltimore and Ohio Railroad (Chessie System) at Park Junction (Philadelphia), PA.

32. There is **nothing in the record** to indicate that the D&H has the right to interchange cars with carriers at **any** intermediate points, other than the **one** intermediate point in Bethlehem, where it was given the right to interchange cars with the Philadelphia, Bethlehem and New England Railroad.

33. Since Mr. Clements has testified that the D&H has carried, and continues to this date to carry, traffic to / from Harrisburg, PA to Sunbury, PA, and has carried traffic to / from DuPont, PA to Allentown, PA, that raises the question: What kind of traffic is this traffic? Overhead or local traffic?

34. There is no evidence in the record indicating what type of traffic the D&H is carrying between Harrisburg, PA and Sunbury, PA, nor is there evidence in the record indicating the type of traffic the D&H carries between Allentown, PA and DuPont, Pa. Since there is no evidence in the record that the D&H has the right to interchange overhead traffic at the intermediate points of Harrisburg, which lies between Sunbury, PA and Alexandria, VA, or Allentown, PA, which lies between DuPont, PA and Oak Island, NJ, that raises the question: Is any of this traffic local traffic?

35. The origin / destination of the traffic the D&H has moved between Sunbury and Harrisburg, and between DuPont and Allentown, is the subject of Riffin's **April 16, 2015 Documents Request**. To date, the D&H **has not** provided Riffin with this documentation.

36. If **any of the traffic** the D&H carries between Sunbury and Harrisburg, or between Allentown and DuPont, either originates or terminates, in Harrisburg, Sunbury, DuPont or Allentown, then that traffic would constitute 'local' traffic, as opposed to 'overhead' traffic.

37. And if any of this traffic is 'local' traffic, then the basis for the D&H's Exemption Notice fails.

38. Just because Mr. Clemants says no local traffic has moved over any of the Operating rights lines the D&H desires to discontinue service over, does not make it so. Mr. Clemants' definition of 'local' traffic may be totally at odds with the STB's definition of 'local' traffic.

OPERATING RIGHTS AGREEMENT

39. The April 25, 1979 **Operating** Rights Agreement appended to Mr. Clements' Verified Statement as his Exhibit 2, raises many more issues:

40. The Operating Rights Agreement **is not** a "Trackage Rights" agreement. The word 'trackage' **does not** appear in the heading, nor does it appear in the Recitals. It is an "Operating Rights" Agreement. It is **far broader** than a typical 'trackage rights' agreement.

41. Section 2.01 of the Operating Rights Agreement states:

"D&H shall have the right **to operate such rail service** over the Joint Lines **as it may deem necessary or advisable to provide efficient and economical transportation** consistent with the Interstate Commerce Act and with its operating authority under the Rail Act including, **without limiting the foregoing**, set-out of bad order cars, necessary repair and servicing of equipment, and the operation of trains, cars or vehicles for inspection and management purposes." Bold added.

42. The Operating Rights Agreement states, on pp. 4-5, that the D&H:

"[I]s entitled, as an incident to the grant of its operating rights over the Joint Lines, to switch and classify its cars at intermediate points on the Joint Lines and to interchange cars with other carriers **or operate onto or off other carriers** at intermediate points on the Joint Lines other than those specified in this Section."

43. There is no statement in the Exemption Notice regarding whether the D&H exercised its right to obtain permission to operate on other carrier's lines at intermediate points on the Joint Lines, or exercised its right to provide service to shippers located on lines connecting to the Joint Lines. (Which service would constitute 'local' service.) Riffin would expect the D&H to make an affirmative statement regarding whether the D&H ever exercised these rights, and if so, what rights were obtained.

OAK ISLAND YARD

44. Appended to the Operating Rights Agreement was an Exhibit A, which described in more detail, the rights being conveyed. Of particular interest is the Note under the Oak Island - Phillipsburg Heading:

“Note: Line Segments 0501, 0502A, 0205, and 0201 are for the purpose of handling intermodal traffic including the right to LV’s Oak Island intermodal facility and use of LV’s Oak Island yard. The links are connective permitting use between Bethlehem Interlocking and Oak Island via either the LV or CNJ route.”

45. The D&H’s use of its portion of the Oak Island Yard was **exclusive**. The D&H used its portion of the Oak Island Yard to serve multiple shippers. That makes the tracks used by the D&H within its portion of the Oak Island Yard, a ‘line of railroad.’ As such, discontinuance of operating authority over these Oak Island Yard tracks would require an **abandonment** proceeding, rather than a ‘discontinuance’ proceeding.

46. Riffin served a Documents Request upon the D&H seeking documents from the D&H noting what shippers the D&H served within its portion of the Oak Island Yard. To date, the D&H has not provided Riffin with these documents.

SAUCON LINE / YARD

47. On page 115 of the Operating Rights Agreement, there is a section entitled:

“Saucon - Bethlehem Junction - Allentown Yard - Lehighon (LC&N)

48. The *Saucon* section granted the D&H Operating Rights over two lines of railroad, which were former Lehigh Coal and Navigation Company lines. (USRA Lines 502F and 521.)

49. The “Note” stated:

“Note: Line Segment 0502F includes the right to interchange with **all** railroads at Allentown / Bethlehem, including the Philadelphia, Bethlehem and New England. Line Segment 0521 includes the right to use Allentown Yard.” **Bold added.**

50. The D&H's Exemption Notice makes no mention of the *Saucon* (LC&N) lines of railroad.

51. Upon information and belief, the D&H has used, and continues to use, the *Saucon* lines to originate / terminate local traffic: Traffic originating / terminating at the Lehigh Valley Rail Management intermodal yard in Bethlehem.

52. Riffin requested Documents regarding traffic originating / terminating in the Lehigh Valley Rail Management intermodal yard. To date, the D&H has not provided Riffin with these documents.

Respectfully,

James Riffin
P.O. Box 4044
Timonium, MD 21094
(443) 414-6210

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of May, 2015, a copy of the foregoing Reply to the D&H's Reply to Riffin's Petition to Revoke, was served on the parties noted below, by E-mail.

James Riffin

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:	Karl Hansen:	karl.hansen@stinsonleonard.com
D&H Railways:	David Rifkin:	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

Maryland DOT:	Allison M. Fergus:	afergus@gwrr.com
NY DOT:	Charles Spitulnik:	cspitulnik@kaplankirsch.com
National Grain & Feed Assoc:	Keith Martin:	keith.martin@dot.ny.gov
National Grain & Feed Assoc:	Randall C. Gordon:	ngfa@ngfa.org
Norfolk Southern:	Thomas Wilcox:	twilcox@gkglaw.com
PPL Energy:	Williams Mullins:	wmullins@bakerandmiller.com
PA NE Regional RR Auth:	Kelvin Dowd:	kjd@sloverandloftus.com
Saratoga & N. Creek Ry:	Lawrence Malski:	lmalski@pnrra.org
Seda-Cog Railroads:	John D. Heffner:	John.Heffner@strasburger.com
U.S. Clay Producers Assoc:	Jeffery K. Stover:	jra@seda-cog.org
	Vincent P. Szeligo:	vszeligo@wsmoslaw.com

First Class mail:

Gordon P. MacDougall, 1025 Connecticut Ave. N.W., Washington, DC 20036.