

**Before the
Surface Transportation Board**

JR - 11

238404

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 18, 2015
Part of
Public Record

NOTICE OF APPEAL

Note: The filing fee is being remitted to the STB via the U.S. Postal Service in a separate envelope.

Filed May 17, 2015 by:

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FEE RECEIVED
May 18, 2015
SURFACE
TRANSPORTATION BOARD

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MAY 18, 2015
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1. Comes now James Riffin (“**Riffin**”), who herewith files this Notice of Appeal, noting his appeal of the Office of Proceedings’ **May 13, 2015 decision**, and in support hereof states:

BACKGROUND INFORMATION

2. On **March 19, 2015**, the Delaware and Hudson Railway Company, Inc. (“**D&H**”) filed a Notice Exemption to Discontinue its trackage rights in the states of New York, Pennsylvania, New Jersey, Maryland and Virginia, and in the District of Columbia (“**Exemption**”), pursuant to 49 CFR 1152.50 (2-years out-of-service exemption).

3. **On April 20, 2015**, Riffin filed a Petition to Revoke the D&H’s Exemption, alleging that the Exemption failed to list all of the Zip Codes that the trackage rights traverse, in violation of 49 CFR 1152.22(a)(8), made applicable by 49 CFR 1152.50(d)(2).

4. Riffin also alleged that the Exemption failed to list all of the stations the trackage rights traverse, and failed to list all of the counties that the trackage rights traverse.

5. On **May 8, 2015**, the D&H filed a reply, wherein it admitted that its Exemption omitted 13 of the 19 Zip Codes that Riffin alleged that the trackage rights traversed.

6. On **May 13, 2015**, rather than rejecting the Exemption, as required by 49 CFR 1152.50(d)(3), the Director of the Office of Proceedings served a decision wherein the Director:

A. Ordered the D&H to submit a supplement to its March 19, 2015 Exemption, which supplement was to contain all omitted information required by 49 CFR 1152.50.

B. Ordered the proceeding be held in abeyance until further order of the STB.

7. Of particular note is what the Director **did not** order the D&H to do:

- A. The Director’s decision **did not** order the D&H to republish its newspaper advertisements in all applicable newspapers of general circulation in the various counties that the trackage rights traverse; and
- B. The Director’s decision **did not** order the D&H to re-notify in writing the Public Service Commission in the states the trackage rights traverse, The Department of Defense, the National Park Service and the U.S. Department of Agriculture, as required by 49 CFR 1152.50(d) (i) through (iv).

ARGUMENT

8. 49 CFR 1152.50(d) states:

“Notice of exemption. (1) At least 10 days prior to filing a notice of exemption with the Board, the railroad seeking the exemption must notify in writing:

- (i) The Public Service Commission (or equivalent agency) in the state(s) where the line will be abandoned or the service or trackage rights discontinued;*
- (ii) Department of Defense (Military Traffic Management Command, Transportation Engineering Agency, Railroads for National Defense Program);*
- (iii) The National Park Service, Recreation Resources Assistance Division; and*
- (iv) The U.S. Department of Agriculture, Chief of the Forest Service.*

The notice **shall** name the railroad, describe the line involved, **including United States Postal Service ZIP Codes**, indicate that the exemption procedure is being used, and include the approximate date that the notice of exemption will be filed with the Board.” Bold added.

9. The Exemption contains ‘false’ or ‘misleading’ information, to wit:

A. The Exemption declares under penalties of perjury that its lists **all** of the Zip Codes the trackage rights traverse, **when in fact**, the Exemption **fails to list** at least 13 Zip Codes that the trackage rights traverse.

- B. The Exemption declares under penalties of perjury that its lists **all** of the counties that the trackage rights traverse, **when in fact**, the Exemption **fails to list** at least two counties that the trackage rights traverse. (Middlesex County, NJ and Cecil County, MD.)
- C. The Exemption declares under penalties of perjury that at least 10 days prior to filing the Exemption, the D&H provided notice in writing, to the Public Service Commission in the states the trackage rights traverse, to the Department of Defense, to the National Park Service and to the U.S. Department of Agriculture, as required by 49 CFR 1152.50(d) (i) through (iv) , **all** of the Zip Codes that the trackage rights traverse, **when in fact**, the Exemption **fails to list** at least 13 Zip Codes that the trackage rights traverse.
- D. The Exemption declares under penalties of perjury that prior to filing the Exemption, the D&H published a notice in a newspaper of general circulation in each county in which the trackage rights traverse, as required by 49 CFR 1105.12, which newspaper notice listed **all** of the Zip Codes, and listed **all** of the counties, that the trackage rights traverse, **when in fact**, the Exemption **fails to list** at least 13 Zip Codes, and **fails to list** at least two counties that the trackage rights traverse.

10. 49 CFR 1152.50 (d)(3) states:

“If the notice of exemption contains false or misleading information, the use of the exemption is void *ab initio* and the Board **shall** summarily reject the exemption notice.” Bold added.

11. The Exemption contains ‘false’ or ‘misleading’ information, as noted above.

12. Per 49 CFR 1152.50(d)(3), when an exemption notice contains ‘false’ or ‘misleading’ information, **the only option** for the Surface Transportation Board (“STB”), is to declare the

exemption notice ‘void *ab initio*,’ and to ‘reject’ the exemption notice.

13. The Director **does not** have the option / discretion to permit an entity filing a notice of exemption pursuant to 49 CFR 1152.50, to ‘supplement’ its exemption notice with information the filing entity failed to put in its exemption notice.

14. The Director **does not** have the option / discretion, to permit an entity **falsely** certifying that it has given proper notice, in writing, to four governmental agencies, and in newspaper advertisements to the general public, to re-file the required certifications.

15. The Director **does not** have the option / discretion **to fail to compel** the D&H to re-notify the four government agencies required to be notified by 49 CFR 1152.50(d) (i) through (iv).

16. And the Director **does not** have the option / discretion **to fail to compel** the D&H to re-publish in local newspaper, the newspaper notice required by 49 CFR 1105.12.

ADDITIONAL ISSUE

17. 49 CFR 1152.50 (d)(2) states:

“The notice shall include the proposed consummation date, the certification required in §1152.50(b), the information required in §§1152.22(a)(1) through (4), (7), and (8), and (e)(4), the level of labor protection, and a certificate that the notice requirements of §§1152.50(d)(1) and 1105.11 have been complied with.”

18. The requirement for **newspaper notices** is found in **49 CFR 1105.12**.

19. 49 CFR 1105.12 **is not** a CFR listed in 49 CFR 1152.50 (d)(2).

20. 49 CFR 1105.12 states:

“In every abandonment exemption case, the applicant shall publish a notice in a newspaper of general circulation in each county in which the line is located and certify to the Board that it has done this by the date its notice (or petition for) exemption is filed. The notice shall alert the public to the proposed abandonment, to available reuse alternatives, such as trail use and public use, and to **how it may participate in a Board proceeding.**” Bold added.

21. Part 1105 concerns the Procedures for Implementation of Environmental Laws.

22. The **additional issue** presented is:

In a 49 CFR 1152.50 proceeding, **must** the entity filing the exemption notice, comply with 49 CFR 1105.12?

23. To put it another way: Is the D&H **required** to publish notice of its Exemption in newspapers of general circulation through which their trackage rights traverse?

24. It could be argued, that 49 CFR 1152.50 is **only applicable** to **abandonment** proceedings, and is **not** applicable to proceedings involving the discontinuance of trackage rights, wherein a common carrier will remain once the trackage rights have been discontinued.

25. And it could be argued that because the D&H is seeking only to discontinue its trackage rights, that the D&H was not **required** to publish a notice in any newspaper, and **would not be required** to **re-publish** notice in newspapers, listing all of the Zip Codes and Counties that the D&H’s trackage rights traverse.

26. On the other hand, it could be argued that one of the purposes of 49 CFR 1105.12, is to “alert the public ... to how it may participate in a Board proceeding.” Notice to the public about how it may participate in a trackage rights discontinuance proceeding, appears to be a sufficient reason to require newspaper notices for **all** abandonment / discontinuance exemption

proceedings.

27. Furthermore, in this particular proceeding, Riffin has provided evidence that the discontinuance of the D&H's trackage rights over two line segments in New Jersey, will in fact result in **abandonment** of the two line segments, since the D&H is the last carrier with a common carrier obligation over the two line segments. See Riffin's JR-4 (Notice of Intent to File an OFA), JR-8 (Supplement to Notice of Intent to File an OFA), AB 167 (Sub. No. 864N) and AB 167 (Sub. No. 931N).

28. So the **additional issues** are:

- A. Would the D&H be required to re-publish notice of its proposed trackage rights discontinuances in local newspapers in **all** of the counties through which the D&H's trackage rights traverse?
- B. Would the D&H be required to re-publish notice of its proposed trackage rights discontinuances in local newspapers in **only those counties** through which the D&H's trackage rights traverse, where the D&H is the last common carrier remaining on the line segment(s)?

29. WHEREFORE, for the foregoing reasons, Riffin would pray:

- A. That the full STB Board decide the issues presented in this Notice of Appeal; and
- B. For such other and further relief as would be appropriate.

30. I certify under the penalties of perjury, that the foregoing is true and correct to the best of my personal knowledge and belief.

Respectfully,

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of May, 2015, a copy of the foregoing Notice of Appeal, was served on the parties noted below, by E-mail.

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