

**Before the  
Surface Transportation Board**

**JR - 10**

238361

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

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

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

**REPLY TO**

**THE D&H'S REPLY TO**

**RIFFIN'S PETITION TO TOLL TIME TO FILE AN OFA**

Filed May 12, 2015 by:

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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 Riffin’s Petition to Toll Time to File an OFA.

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), and introduced into the record a false statement, 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 Toll Time to File an OFA, 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 / False Statement) 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.

**POINTS ARGUED BY THE D&H  
WITH REPLIES BY RIFFIN**

9. The D&H argued that Riffin’s Notice of Intent to File an Offer of Financial Assistance (“**OFA**”) was not *bona fide*. In support of this argument, the D&H alleged:

A. The OFA process cannot be used to acquire lines of railroad when the real estate and track material underlying a line of railroad, is owned by non-carriers / third parties.

B. **Reply:** A line of railroad is separate and apart from the real estate underlying the line of railroad. It is common for a railroad to have an easement over the real estate its line is on. In addition, pursuant to many *State of Maine* proceedings, frequently the rails a line of railroad uses, are owned by a non-carrier entity, such as a State Government Agency. Such is the case with regard to the CNJ Main Line between Bound Brook, NJ and Phillipsburg, NJ. (The underlying real estate and the track material is owned by New Jersey Transit. Conrail / Norfolk Southern / the D&H have the right to use this rail corridor, and the rails thereon, for common carrier freight service.) The right to use the rails / rail corridor, is fully assignable, since the rail corridor has been impressed with a perpetual freight rail easement.

10. The D&H does not have the right to interchange traffic in Orangeville (Baltimore), MD.

11. **Reply:** The April 25, 1979 Operating Agreement between the D&H and Conrail contains the following clauses:

A. 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.

B. 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.”

12. The D&H has failed to provide the STB with documentation regarding where it has obtained the right to interchange cars at intermediate points on the Joint Lines. It is obvious that the D&H has obtained such intermediate interchange rights, since the D&H has stated that it interchanges cars in Harrisburg, PA and in Allentown, PA, neither of which are listed as permissible interchange points.

13. In addition, the Operating Rights Agreement **does not** preclude the D&H, or its successors or assigns, from exercising its right to request explicit authority to interchange cars with other carriers at other ‘intermediate points on the Joint Lines,’ “as it may deem necessary.”

14. **“At Oak Island, D&H lacks the facilities that would be necessary to support the movement of municipal solid waste and silica from Oak Island.”**

15. It is evident that Mr. Clemants has not visited the Oak Island Yard used exclusively by the D&H, for had he visited that yard, or asked a D&H employee to visit that yard, or looked at a Bing or Google aerial view of that yard, he would have noted that **all** of the tracks used

exclusively by the D&H, are still in place, as is the building that was used by Trans Load America (formerly *Hi Tech*), to load Municipal Solid Waste into open-top rail cars. Riffin has personally visited that facility, and can attest from personal, first hand observation, that **all** of the “facilities” needed to load Municipal Solid Waste into rail cars, are still at that site.

16. **“[T]here is no credible basis to believe that such traffic will suddenly materialize.”**

17. Riffin does not propose to load loose Solid Waste into open-top hopper cars, as Trans Load America / Hi Tech did. Riffin proposes to have the Solid Waste loaded into Containers at a permitted Solid Waste Transfer Facility, then truck those containers to the D&H Oak Island Yard, where he will ask the D&H to place those containers onto flat cars, to be transported to the Taylor Yard in PA, where the containers will either be off-loaded onto truck-trailers, or the flat cars will be interchanged with the Delaware Lackawanna Railroad, for transport to a land fill with a rail siding. (The permitted Solid Waste Transfer Facility is an existing, fully-permitted, solid waste transfer facility, that currently is transporting its solid waste via trucks. The silica producer is currently constructing a silica-processing facility. The facility is expected to be fully functional and operating by September, 2015, if not sooner. Riffin proposes to transport that silica to Oak Island, to be loaded into hopper-cars, either via a front-end loader, or via a ‘radial stacker’ conveyor belt.)

18. **Riffin “fails to explain why the traffic does not currently move when no subsidy is required.”**

19. Riffin has made numerous attempts, since 2013, to get the D&H to quote him a rate for moving Municipal Solid Waste from Oak Island to Scranton, PA. The D&H has steadfastly refused to quote Riffin a rate. Until the D&H quotes Riffin a rate, he cannot begin to move Solid Waste via the D&H’s Oak Island Solid Waste Transfer Facility. The silica producer came into existence in the autumn of 2014. Permits had to be obtained before a silica-processing facility could be built. Permits have been obtained. The silica-processing facility is currently being built. (Foundations were poured the week of May 4, 2015.) The facility should be fully

functional by September, 2015.

**20. “Riffin’s subsidy of D&H service would [not] be economically rational.”**

21. Until the D&H quotes Riffin a subsidy price, it cannot be determined if subsidized rail service by the D&H would be ‘economically rational.’

**22.. “The OFA process cannot be used to acquire the discontinuing Carrier’s rights in Third Parties’ Yards.”**

23. It depends on what those rights are. Upon information and belief, the D&H’s rights in that portion of the Oak Island Yard that the D&H used, are exclusive, and are fully assignable. The D&H assigned those rights to *Hi Tech*, and upon *Hi Tech*’s metamorphous into *Trans Load America*, assigned those rights to *Trans Load America*. The bankruptcy trustee for *Trans Load America* made an attempt to sell those rights to anyone who had an interest in them. Had the bankruptcy trustee held on to those rights for another six months, Riffin would be negotiating to purchase those rights from *Trans Load America*’s bankruptcy trustee, rather than from the D&H.

**24. “The OFA process cannot be used to obtain trackage rights.”**

25. The OFA process cannot be used to obtain, via purchase, trackage rights, when there is a carrier remaining on the line, after the trackage rights have been discontinued. As noted in Riffin’s Notice of Intent to File an OFA, there are at least two segments on the CNJ Main Line, where the D&H is the last carrier remaining. Since the D&H is the last carrier remaining, those trackage rights are capable of being acquired, in order to preserve freight rail service.

26. For those portions of the D&H’s line segments where there will be a remaining common carrier, Riffin is seeking to subsidize, not purchase, the D&H’s trackage rights.

**27. Riffin should not be considered a financially responsible person.**

28. Riffin filed a bankruptcy petition in 2010. In October of 2010, he received his discharge in bankruptcy. He executed a settlement agreement with his bankruptcy trustee, wherein in exchange for Riffin not objecting to his bankruptcy trustee selling Riffin's line of railroad, and keeping the proceeds, Riffin's bankruptcy trustee agreed to abandon (give back to Riffin), all of Riffin's remaining bankruptcy estate assets, which were considerable.

29. During the intervening years, Riffin has increased his net worth substantially. Shortly, Riffin expects his net worth to increase dramatically. (This will manifest itself shortly, in a yet-to-be-filed proceeding before the STB.)

30. A 'financially responsible person' is defined as one who has the financial ability to perform their contractual obligations. At the moment, due to the D&H's failure to provide Riffin with the cost of subsidizing his requested rail service, and due to the D&H's failure to provide Riffin with the Net Liquidation Value for those line segments where the D&H is the last carrier standing (see Riffin's Notice of Intent to File an OFA for details), Riffin has no idea how much money he needs to have / have access to, in order to fulfill his proposed 'contractual obligations.' Since easements have a Net Liquidation Value of Zero Dollars, and since it appears that the D&H only has easement rights, Riffin's cost to acquire those easement rights would be a nominal \$1, which Riffin attests he has in his pocket in pocket change. At the appropriate time, Riffin will file a Personal Financial Statement, attesting to his financial wherewithal. Needless to say, there are entities with substantial assets who desire to utilize the rail service Riffin proposes to offer.

31. WHEREFORE, Riffin repeats his request that the STB toll the time to file an OFA until 15 days after such time that the D&H provides Riffin with the information specified in 49 CFR 1152.27(a).

32. 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 11<sup>th</sup> day of May, 2015, a copy of the foregoing Reply to the D&H's Reply to Riffin's Petition to Toll, was served on the parties noted below, by E-mail.

James Riffin

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