

**BEFORE THE SURFACE TRANSPORTATION BOARD**

**JR-1**

238855

**STB EX PARTE NO. 727**

ENTERED  
Office of Proceedings  
July 21, 2015  
Part of

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**PETITION OF NORFOLK SOUTHERN RAILWAY COMPANY TO INSTITUTE A RULEMAKING PROCEEDING TO ADDRESS ABUSES OF BOARD PROCESSES** Public Record

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**COMMENTS OF JAMES RIFFIN**

Filed: July 20, 2015

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1. Comes now James Riffin (“**Riffin**”), who herewith provides his Comments regarding Norfolk Southern’s (“**NS**”) Petition to Institute a Rulemaking Proceeding to Address Abuses of Board Processes. (“**Petition**”).

2. NS asks the Surface Transportation Board (“**STB**”) to institute a rulemaking proceeding, for the purpose of creating a new set of rules, which would:

A. Require pre-approval for filings:

- a. Made by ‘abusive filers.’ (An undefined term in NS’s Petition.)
- b. Made for ‘harassment purposes.’ (Another undefined term.)
- c. Made by entities that ‘lack standing.’ (Another undefined term.)
- d. Made by entities without ‘any cognizable interest.’ (Another undefined term.)
- e. Made by entities that are not ‘financially responsible.’ (Another undefined term.)

B. Create a presumption that entities that have previously been found to not be financially responsible, or that have filed for bankruptcy protection, are presumptively ‘not financially responsible.’

3. The professed goal of NS’ Petition is to:

- A. “filter[] out ... unmeritorious filings.”
- B. “filter[] out ... those individuals that are not financially responsible.”

4. NS argues:

“Board decision-making benefits from the broad participation of **interested parties**, and the Board should continue to strive **to foster an active dialogue** in Board proceedings with regulated entities and other **interested stakeholders**.”

5. NS fails to define what it believes should be the definition of “interested parties,” the definition of “an active dialogue,” or the definition of “interested stakeholders.”

6. NS argues:

“Board decision-making does not benefit from abusive, harassing, irrelevant, and unmeritorious filings.”

7. To support its Petition, NS mentions only two individuals: Riffin and Eric Strohmeyer.

8. To support its Petition, NS references only the pleadings of Riffin, noting that Riffin has been ‘mentioned,’ or ‘was a party,’ in ‘more than 80 decisions.’

9. NS also notes that in 2007, the STB pledged to “closely scrutinize any future filing by Mr. Riffin.”

### REPLIES

10. Since the STB ‘closely scrutinizes filings by Mr. Riffin,’ and since Riffin is the only person named in NS’ Petition, there is no good reason to institute a rule making proceeding. The STB already has instituted special rules applicable only to Riffin. For the past **8 years**, the STB has been ‘closely scrutinizing all of Riffin’s pleadings.’ And to date, the STB **has never rejected any pleading made by Riffin on the grounds that the pleading was ‘unmeritorious,’ was filed for ‘harassment purposes,’ or that Riffin ‘lacked standing’ to file his pleading.**

11. NS asks the STB to look at Riffin’s ‘pattern’ of filings. This the STB has assuredly done, when it has ‘closely scrutinized’ all of Riffin’s filings.

12. Since the STB **has never rejected** any of Riffin’s pleadings on the grounds that his pleading was ‘unmeritorious,’ was filed for ‘harassment purposes,’ or that Riffin ‘lacked standing,’ the only conclusion that is possible, is that Riffin **does not file** ‘unmeritorious pleadings,’ **does not file** pleadings for ‘harassment purposes,’ and **has always had** ‘standing.’

13. NS obviously is highly agitated. And for good reason. NS thought that its Application to Acquire and Operate 282 miles of Delaware and Hudson Railway (“**D&H**”) lines of railroad, see FD 35873, would sail through the STB approval process. NS thought that its acquisition of those 282 miles of D&H Lines, and thought that the D&H’s discontinuance of 670 miles of D&H trackage rights, see AB 156 (Sub. No. 27X), would be consummated by August of 2015, nine months after NS started the process.

14. Unfortunately for NS, its counterparts at the D&H failed to carefully proofread their Exemption Notice, before filing the Exemption Notice. After a  **cursory** reading of the D&H’s Exemption Notice, Riffin noted that the D&H failed to list more than a dozen Zip Codes the D&H’s trackage rights traversed in New Jersey and Maryland, and failed to list two of the counties the trackage rights traversed. And after Riffin contacted counsel for the D&H, and **quietly** let the D&H know that its Exemption Notice was defective, the D&H still failed to make any effort to correct its  **obviously** defective Exemption Notice.

15. And that is when Riffin did what Riffin does (after giving the D&H 10 days to think about what it could / should do: Withdraw its Exemption Notice. Refile an error-free Exemption Notice): He informed the world, and the STB, in a decidedly unquiet way, that the ‘Emperor was not wearing any clothes,’ (That the D&H’s Exemption Notice was riddled with errors.).

16. As it turns out, the lack of Zip Codes was just the tip of the ice berg. Further investigation revealed that the D&H’s statement that no  **abandonments** would occur, was a falsehood. There are at least four line segments, totaling over 36 miles of rail line, where abandonment will occur, if the D&H discontinues its trackage rights. (This is because Conrail abandoned its common carrier rights and obligations over these four line segments more than 30 years ago, thus leaving the D&H as the last carrier standing on these four line segments.) If any abandonments will occur, then 49 CFR 1180.8(c)(4) becomes implicated, [submit information on any anticipated  **abandonments**]. And if 49 CFR 1180.8(c)(4) becomes implicated then NS’s Application becomes fatally defective.

17. And to make matters worse for NS, due to the infirmities with the D&H's Exemption Notice, there is a very high probability that the D&H will not receive its discontinuance authority soon enough. (No later than when NS desires to consummate its purchase of the D&H lines – In August, 2015). If NS acquires 282 miles of D&H line in August, 2015, and if the D&H does not receive discontinuance authority by August, 2015, then there will be **joint operations** on those 282 miles of line, and on 670 miles of D&H trackage-rights-lines. If joint operations are likely to occur, then 49 CFR 1180.8 (c)(1) becomes implicated, [submit information on traffic density on lines proposed for **joint operations**]. And if 49 CFR 1180.8(c)(1) becomes implicated, then NS's Application becomes fatally defective.

18. And if NS's Application becomes fatally defective, then NS has a catastrophe on its hands. All because the D&H failed to **carefully** do what it needed to do (discontinue its trackage rights).

19. And ultimately this entire fiasco falls on the shoulders of NS: Had NS not been in such a big hurry, and had NS reached out to those entities that have a high interest in preserving the D&H's trackage rights, none of this would have occurred. (Had the D&H failed to discontinue its trackage rights **before** NS filed its Acquisition Application, and had the D&H received authority to discontinue its trackage rights **before** NS filed its Application, which likely would have occurred, then there would be nothing that any of the protestants could have done.)

20. So rather than acknowledge that NS and the D&H made a number of really colossal blunders, which Riffin, the Messenger, brought to the attention of the STB, NS now is attempting to 'assassinate the messenger.'

## STANDING

21. The Supreme Court, in *Interstate Commerce Commission v. Baird*, 194 U.S. 25, 39 (1904), set the standard for 'standing' before the Interstate Commerce Commission (now the STB):

“It is urged that the complainant before the Commission **did not show any real interest** in the case brought and that the proceeding should, for that reason, have been dismissed. It is provided in the Act to Regulate Commerce, § 13, that **‘any person, firm, corporation,’ etc., complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act, in contravention of the provisions thereof, may apply to said Commission by petition, etc.** And certain procedure is provided for – and (said Commission) ‘may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made,’ and the section concludes: **‘No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.’** In face of this **mandatory** requirement that the complaint **shall not be dismissed because of the want of direct damage to the complainant**, no alternative is left the Commission but to investigate the complaint, if it presents matter within the purview of the act and the powers granted to the Commission.” Bold added.

22. The Supreme Court has determined that a ‘party’ has ‘standing,’ if that party complains of anything ‘done,’ or ‘not done,’ by any common carrier. To have ‘standing,’ one **need not** allege, or prove, any kind of ‘direct damage.’

23. Riffin decidedly has ‘standing,’ in all of the proceedings that he has participated in, for he ‘complains’ about things ‘common carriers’ ‘do,’ or ‘do not do.’

### UNMERITORIOUS PLEADINGS

24. NS complains that Riffin’s pleadings are ‘unmeritorious,’ but cites no specific pleadings, nor any cases, to support its allegations.

25. If anyone thinks it would be useful / helpful / desirable, to read up on what legally constitutes an ‘unmeritorious / frivolous’ pleading, let Riffin know. He will provide 50 plus cases on the issue, and will provide a 50+ page Memorandum of Law on the subject. (Riffin has thoroughly researched this topic, and has prepared an extensive Memorandum of Law on the subject.)

26. In short, a ‘frivolous’ pleading is one that is not ‘fairly debatable,’ one that is ‘patently without merit,’ one that does not present at least a ‘colorable claim,’ [one that is ‘apparently

valid, but, which is in reality legally insufficient.'], one for which there is no 'reasonable basis for believing that the claims will generate an issue of fact or law.' "The inherent danger in the process is that overzealous pursuit of the objective may result in stifling the enthusiasm or chilling the creativity that is the very lifeblood of the law.' The Supreme Court, in *Christiansburg Garmet Co. V. E.E.O.C.*, 434 U.S. 412, 421-22 (1978) stated:

A trial court should "... resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable ... ."

27. There is no reason to create a new rule. There already is a perfectly good rule.

28 Riffin will point out the obvious: 49 CFR 1104.8 already covers **all** of the situations mentioned by NS:

"The Board may order that any redundant, irrelevant, immaterial, impertinent, or scandalous matter be stricken from any document."

29. NS, and all other parties, are free to file a Motion to Strike any pleading filed by Riffin, or filed by any other person, which the complaining party believes contains "irrelevant, immaterial, impertinent, or scandalous matter."

### **FINANCIAL RESPONSIBILITY**

30. It would be impossible to pre-approve anyone for 'financial responsibility.' To be 'financially responsible,' one need only demonstrate that one "has **or within a reasonable time will have** the financial resources to fulfill proposed contractual obligations."

31. “Proposed contractual obligations’ means the purchase price for a line of railroad. **No one knows what the purchase price is, or will be, until the carrier provides that information.** And once that information is provided, and the OFA offeror submits an OFA, the STB only has five days within which to determine whether the OFA offeror “has or within a reasonable time will have the financial resources” to purchase the line of railroad. In effect, the STB already has a ‘pre-approval rule.’ If the STB determines that one is not ‘financially responsible,’ (after the carrier indicates what the purchase price will be), which determination is made within five days, then the carrier need not negotiate with the OFA offeror.

32. It should be kept in mind, that frequently the purchase price for a line of railroad is Zero Dollars. (When the carrier only has an easement, and the carrier has previously removed all of the track infrastructure.) And everyone has at least Zero Dollars. So everyone who offers to purchase a rail easement with no track infrastructure, would be a ‘financially responsible person.’

33. As for bankruptcy: While one is going through a bankruptcy proceeding, one would not be ‘financially responsible,’ by definition. (A debtor in bankruptcy stipulates that the debtor has insufficient assets to pay the debtor’s present debts.)

34. The whole purpose of a bankruptcy proceeding, is to turn ‘financially irresponsible’ persons into ‘financially responsible’ persons. A ‘new start.’ And often, shortly after exiting a bankruptcy proceeding, debtors do in fact become ‘financially responsible.’

35. In the case of Riffin, he made a settlement with his bankruptcy trustee: He gave his bankruptcy trustee Riffin’s Allegany line of railroad. In exchange, Riffin’s bankruptcy trustee returned to Riffin, all of Riffin’s other assets, which were considerable. Post Riffin’s bankruptcy, Riffin was asset-rich, and virtually debt-free (he only had a mortgage on his dwelling), Seventy-five percent of that mortgage has been repaid. Riffin still has nearly all of his pre-bankruptcy assets, including all of his heavy construction equipment, and all of his railroad maintenance-of-way equipment. Shortly, (hopefully), Riffin will make an OFA. And if he in fact makes an OFA offer, he will provide the STB with financial documentation which will

demonstrate that Riffin is in fact, 'financially responsible,' for just about anything that he may desire to purchase.

### **AMERICA'S ADVERSARY JUDICIAL SYSTEM**

36. In America, we have an adversary judicial system. Under America's judicial system, all litigation constitutes 'harassment' of someone else.

37. The mark of a good lawyer, is the lawyer's ability to 'bury his opponent in paper,' as the old adage goes. Defend all of his client's rights. Attack all of his opponent's weaknesses. "Litigate to the death!" Everyone seeks such a lawyer. Everyone fears and despises such a lawyer, when such a lawyer is the opponent's lawyer.

38. Riffin is not the best litigant. But he will give you a good run for your money.

39. All abandonment proceedings have two components:

- A. A carrier wants to exit being a carrier on a particular line segment.
- B. The public has an interest in retaining a rail corridor as a rail corridor.

40. Prior to enactment of the Staggers Act, it was very difficult to exit the industry, and very difficult to abandon a line of railroad. The Staggers Act made it very easy to exit the industry, and very easy to dispose of unwanted / unprofitable line segments. The Staggers Act made it easier to abandon a line of railroad, providing no one expressed any interest in preserving the line of railroad. However, if anyone expressed an interest in preserving the rail corridor, the Staggers Act also made it very easy for another entity to acquire that rail corridor, and very easy for a non-carrier to enter the industry

41. In effect, exiting the industry, or ridding oneself of an unwanted / unprofitable line segment, has been made easy. On the other hand, abandoning a rail corridor, has always been,

and rightfully continues to be, very difficult, if anyone expresses an interest in preserving the rail corridor, for it is nearly impossible to regain a rail corridor once it is lost.

42. The statutes and regulations make it easy for a carrier to exit the industry. The only time it becomes difficult for a carrier, is when the carrier does not want to only exit the industry – when the carrier wants to exit the industry, but keep the fruits of being a carrier, namely, keep the rail corridor, not for continued rail use, but for non-rail private profit, which is decidedly not in the public interest.

43. What rail carriers frequently fail to realize, is that the rail corridor that they are trying to abandon, and to turn into private profit, belongs to the public, not the rail carrier. [It is the King's (rail)Way.] Only if the King (the public) decides that it no longer wants the Way, is the carrier permitted to privately profit from the sale of the Way.

44. Being relieved of one's obligation to provide common carrier service, is, and should be, easy. Being able to privately profit from the sale of the public's property, is, and should be, difficult.

### **KANSAS CITY SOUTHERN**

45. Kansas City Southern filed a comment, stating that because of Riffin, its legal expenses to abandon a 3-mile line of railroad in Vicksburg, MS, doubled. Yes, Kansas City Southern's legal expenses did double, but not because of Riffin. Kansas City Southern refused to negotiate any kind of relief for the lone shipper on the Line: Ray English. It was Mr. English who filed an OFA, since Mr. English's corporation needed continued rail service. Had Kansas City Southern provided Mr. English with an alternative rail site, Mr. English likely never would have filed his OFA. Riffin only became involved at the end of the process. And only offered to purchase the two-miles of rail corridor that was beyond the line segment that Mr. English needed / wanted. And it was Mr. English, not Riffin, who backed out of his OFA offer. However, the STB had made Riffin's purchase of the rail corridor beyond the line segment Mr. English

wanted, contingent on Mr. English buying the line segment that Mr. English wanted. If Mr. English failed to buy his line segment, then Riffin was prohibited from buying the line segment Riffin wanted. After Mr. English found an alternative rail transload site, he decided that it was not cost-effective to purchase the line segment that he had used for years. Unfortunately, due to Kansas City Southern's refusal to help Mr. English find an alternative transload site, Mr. English had to file an OFA to protect his business interest. Fortunately for Mr. English, he found a close-by rail transload site, just before he bought the line segment that he had always used, thereby eliminating his pressing need to purchase the line segment from Kansas City Southern.

46. Kansas City Southern's extra legal expenses were due to:

- A. Kansas City Southern's refusal to help Mr. English find an alternative transload site;
- B. Kansas City Southern's desire to profit from the sale of the public's rail Way;
- C. Warren County's unauthorized removal of the Glass Road rail bridge during the OFA process.

#### **NORFOLK SOUTHERN**

47. Norfolk Southern's extra legal expenses in the FD 35873 proceeding, is due to:

- A. Norfolk Southern's refusal to negotiate with entities that have an interest in the D&H's trackage rights;
- B. The D&H's failure to carefully proofread its filing, before filing it;
- C. The D&H's failure to withdraw its Exemption Notice, then re-file it after it made the necessary corrections;
- D. Norfolk Southern's desire to expedite the process, and its desire to combine two separate proceedings into one simultaneous proceeding, rather than doing things in a step-wise fashion. (Discontinue trackage rights first. Acquire Line second.)

#### **RULEMAKING**

48. The STB already has a perfectly good rule, which is fully capable of being utilized by anyone who feels that they are being subjected to ‘unmeritorious’ filings, or pleadings meant to harass one: 49 CFR 1104.8. (Motion to Strike.)

49. One cannot pre-determine ‘financial responsibility,’ prior to a rail carrier disclosing the Net Liquidation Value of whatever it desires to abandon. And once that Net Liquidation Value is determined, the ‘financial responsibility’ process already in place, is exceedingly fast (5 days).

50. One always has a choice: Negotiate or Litigate. If one chooses to litigate, then one no longer has the right to complain about the cost of litigation.

51. WHEREFORE, for the foregoing reasons, Riffin would respectfully pray that the STB **deny / reject** Norfolk Southern’s Petition for Rulemaking, and for such other and further relief as would be appropriate.

Respectfully,

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#### **CERTIFICATE OF SERVICE**

I hereby certify that on the 20<sup>th</sup> day of July, 2015, a copy of the foregoing Comments, was served on the parties of record, either by E-mail, or by 1<sup>st</sup> Class Mail.

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