

Before the
Surface Transportation Board

Finance Docket No. 35873

NORFOLK SOUTHERN RY. CO.
- ACQUISITION AND OPERATION APPLICATION -
CERTAIN LINES OF THE DELAWARE AND HUDSON RY.

239750

ENTERED
Office of Proceedings
December 21, 2015
Part of
Public Record

JAMES RIFFIN'S SUPPLEMENTAL COMMENTS

1. Comes now James Riffin ("**Riffin**"), who herewith files his Supplemental Comments.
2. On Friday, December 20, 2015, Riffin e-filed his Motion to Supplement the Record, seeking to supplement the record in this proceeding by (A) putting into the record two *Trains Magazine* articles, and by (B) posing three questions for the Surface Transportation Board ("**STB**").
3. One of Riffin's goals, was to elicit commentary regarding CP's actions, **before** CP and NS spend millions of Dollars in a proxy fight, and to provide the STB with input from interested parties.
4. Riffin, in his Motion to Supplement the Record, gave some argument to justify supplementing the record. Riffin **did not** address the policy question: **Should** CP be permitted to acquire NS?
5. Riffin argues that CP's actions raise three questions, that need to be addressed by the STB:
 - a. Did Norfolk Southern ("**NS**") or the Delaware and Hudson Railway Company ("**D&H**") abuse the STB's processes by failing to disclose to the STB that the D&H's

parent company, the Canadian Pacific Railway Company (“CP”), intended to take over NS, hostilely if necessary, after consummation of NS’s acquisition of 282 miles of D&H line (FD 35873), and after consummation of the D&H’s discontinuance of 670 miles of its trackage rights (AB 167 (Sub. No. 27X)?

b. Did NS or the D&H make “false or misleading statements” when they averred:

i. “D&H has determined that its trackage rights on certain NS lines are not economically justified and should be discontinued.” NS FD 35873 Application at p. 27.

ii. “Accordingly, the proposed trackage rights discontinuance will strengthen D&H as a carrier and a competitor by allowing D&H to focus resources and capital where it is better able to compete for traffic.” May 8, 2015 Verified Statement of James D. Clements, CP Vice-President Strategic Planning and Transportation Services, at p. 3, filed in the D&H’s May 8, 2015 Reply to Petitions to Revoke. See AB 156 (Sub. No. 27X).

c. **Should** the STB make an attempt to try to prevent CP from hostilely taking over NS **prior to** institution of a proxy fight, or should the STB let whatever happens, happen, then address merger issues, if and when merger issues are presented to the STB?

6. Riffin argued in his Motion to Supplement, and repeats that argument here, that by failing to disclose to the STB that CP intended to takeover NS, by force if necessary, it both abused the STB’s processes, and made false and misleading statements.

7. Mr. Clements made the statement: Discontinuing the D&H’s trackage rights, would permit the D&H “to focus resources and capital where it is better able to compete for traffic.”

8. NS made the statement: “D&H has determined that its trackage rights on certain NS lines are not economically justified and should be discontinued.”

9. Riffin argues that Mr. Clements’ statement is false or misleading. To Riffin, buying back what one just sold, does not constitute focusing “resources and capital where it is better able to compete for traffic.” To Riffin it is more akin to: “I plan to sell a small part of my assets, then use the money from that transaction, to acquire the buyer.”

10. Riffin argues that NS’ restatement of what the D&H said (“D&H has determined that its trackage rights on certain NS lines are not economically justified and should be discontinued.”), which statement was used to justify NS’ acquisition of 282 miles of D&H line, is also false or misleading. If those “trackage rights ... are not economically justified,” then why is CP trying so hard to buy them back? At a premium at that! (CP’s is offering \$3.2 **Billion** more than the present value of NS’ stock.)

SHOULD CP BE PERMITTED TO ACQUIRE NS?

11. In his Motion to Supplement the Record, Riffin **did not** address the policy question: **Should** CP be permitted to acquire NS?

12. What follows are Riffin’s Comments on the issue of whether CP should be permitted to acquire CP.

13. America is a capitalistic society, where individuals / entities may invest in whatever enterprise they may chose to invest in. The guiding philosophy is: Let market forces determine what entities will survive.

14. While railroads are privately-owned enterprises, they also are ‘public utilities,’ and are regulated for the ‘public convenience and necessity.’

15. Since railroads are regulated public utilities, limitations are placed on what they may, or may not, do.

16. The ultimate question before the STB, rail shippers, and the general public, is:

SHOULD CP be permitted to acquire NS?

17. Mr. Hunter Harrison, the CEO of CP, has expressed his opinion: CP should be permitted to acquire NS in order to “launch operational improvements at NS, which would save the company \$1.2 billion and drive up its share price.” *Trains*’ December 16, 2015 article at p. 2.

18. Mr. Harrison was CEO at Canadian National Railway Company (“CN”). While there, he improved CN’s Operating Ratio significantly. He then became CEO at CP, where he improved CP’s Operating Ratio significantly.

19. Mr. Harrison proposes to become the CEO at NS. *Trains*’ December 16, 2015 article at p. 2.

20. Mr. Harrison has demonstrated that he has the ability to improve the Operating Ratio of whatever railroad he is placed in charge of.

21. So the ultimate question becomes: Should Mr. Harrison be permitted to take charge of NS, in order to “save the company \$1.2 billion and drive up its share price.”

22. The answer to that question will depend on who is giving the answer:

A. If you own shares in the hedge-fund that acquires NS’s stock, or if you own CP or NS shares, then you are likely to answer: “Yes.” For the value of your shares will likely increase.

- B. If you are the investment bank that puts the deal together, your answer will be a resounding, “Yes!!” For the investment bank is likely to make hundreds of millions of Dollars.
- C. If you are a member of NS’ executive staff (who are likely to be fired, then replaced with someone who will implement Mr. Harrison’s policies), then your answer is likely to be: “No.”
- D. If you are an employee of NS or CP, you should have some discomfort, for that \$1.2 Billion in savings is likely to come from laying off a significant number of employees, due to ‘consolidation’ and / or elimination of functions.
- E. If you utilize / like NS’ efforts to preserve steam locomotives, to run steam locomotive excursions, NS’ efforts to repaint a number of its locomotives in ‘heritage’ colors, then you should have some discomfort, for the costs of preserving those steam locomotives / running those steam excursions / painting those locomotives, exceed any revenue that is generated, thereby making NS’ Operating Ratio worse, not better. Meaning: All of these activities are highly likely to be eliminated.
- F. If you are a shipper, you should have some discomfort. Mr. Harrison reduced CP’s operating reserves so severely, CP was unable to provide reliable / timely train service during the Winter of 2013.
- G. If you are a shipper / a member of the general public adjacent to a NS line, you should have some discomfort. Mr. Harrison reduced CP’s investment in its track infrastructure.

23. In the late 1800's, early 1900's, the owners of the railroads were known as ‘robber barons.’ They used their monopolistic powers to charge shippers ‘whatever the market would

bear,' and misused their employees, making their employees work long hours at very low wages, in very dangerous conditions.

24. Should 'maximizing' profit be the primary goal of a corporation? Or should a corporation have a 'social conscience,' making a reasonable profit while returning something to its employees / the communities through which it operates?

CAN THE STB STOP THE PROCESS?

25. 49 U.S.C. 11323 gives the STB authority to approve, or not to approve, a merger of two rail carriers, or control by a 'person' of two or more rail carriers.

26. If **CP** wants to acquire NS, that would require STB approval.

27. However, if the persons who own / control the **stock** of CP, want to own NS' stock / control how NS **operates**, ways can be found to effect that **without** running afoul of 49 U.S.C. 11323. Any number of LLCs can be created. Those LLCs can own / control sufficient stock to elect Board members, who will hire executives, who will implement the policies of the LLCs that own / control stock. The executives managing NS would not be simultaneously managing another rail carrier. The newly-appointed NS Board Members need not also sit on the Board of another rail carrier. The LLCs merely own stock. They only 'control' how those shares are 'voted.' LLCs are separate legal entities. A team of smart lawyers would have little difficulty creating sufficient LLCs / layers, to render 49 U.S.C. 11323 totally ineffective.

28. Riffin believes that if the players behind CP want to take over NS, the STB could not prevent that from happening once NS's present Board Members and Management Staff have been replaced.

29. Riffin also believes that the STB could, if it so desires, make it **a whole lot more difficult** for the players behind CP, to replace NS's present Board Members and present

management staff.

30. For a start, as Riffin argued in his Motion to Supplement, the STB still has control over the FD 35873 / AB 156 (Sub. No. 27X) proceedings. Were the STB to add a condition to the FD 35873 proceeding, restricting the D&H / CP from acquiring what it just sold to NS, that would make CP's acquisition of NS much more difficult. Were the STB to vacate the FD 35873 decision, CP could be required to return to NS the \$217 million it acquired from NS, (and that it is using to finance its efforts to acquire NS). Were the STB to revoke the D&H's exemption, CP's merger would result in a 2-to-1 merger, which is virtually prohibited. I am sure that the STB could fashion even more remedies that would make it much more difficult for the players behind CP to acquire NS.

31. The ultimate question for the STB is: **Should** it make an effort to prevent NS from being hostilely acquired? That is a policy question, not a legal question.

32. Which brings Riffin back to why he is writing this missive: He is trying to get interested parties to weigh in / inform the STB, as to what the STB **should** do.

33. If it is not clear what Riffin's position is, he will make it clear:

He believes that the STB should try to prevent the hostile takeover of NS. The present management team at NS is doing a commendable job. Riffin believes that Mr. Harrison's quest to maximize profits, is over zealous.

Respectfully,

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

CERTIFICATE OF SERVICE

I hereby certify that on or before the 22nd day of December, 2015, I served a copy of the foregoing Supplemental Comments, on the parties noted below.

James Riffin

ORIGINAL SERVICE LIST

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 Rifkind:	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
	Allison M. Fergus:	afergus@gwrr.com
Maryland DOT:	Charles Spitulnik:	cspitulnik@kaplankirsch.com
NY DOT:	Keith Martin:	keith.martin@dot.ny.gov
National Grain & Feed Assoc:	Randall C. Gordon:	ngfa@ngfa.org
National Grain & Feed Assoc:	Thomas Wilcox:	twilcox@gkglaw.com
Norfolk Southern:	Williams Mullins:	wmullins@bakerandmiller.com
PPL Energy:	Kelvin Dowd:	kjd@sloverandloftus.com
PA NE Regional RR Auth:	Lawrence Malski:	lmalski@pnrra.org
Saratoga & N. Creek Ry:	John D. Heffner:	John.Heffner@strasburger.com
Seda-Cog Railroads:	Jeffery K. Stover:	jra@seda-cog.org
U.S. Clay Producers Assoc:	Vincent P. Szeligo:	vszeligo@wsmoslaw.com
Samuel J. Nasca (SMART):	Gordon P. MacDougall	gpmacdo@mindspring.com
R.J. Corman	Audrey L. Brodrick:	abrodrick@fletcher-sippel.com
R.J. Corman	Robert A. Wimbish	rwimbish@fletcher-sippel.com
Eric Strohmeier		esstrohmeier@yahoo.com

ADDITIONAL SERVICE LIST FOR FD 35873

<u>Party of Record</u>	<u>Serve On</u>	<u>E-mail address</u>
Maine DOT	David Bernhardt	david.bernhardt@maine.gov
	Cheryl Martin	cheryl.martin-hunt@maine.gov

Western NY & Pa RR
N. Hampshire DOT
Senator Robert Casey, Jr.
Hon. Chris Collins
Providence & Worcester RR
Massachusetts DOT
NE Freight Transfer
Penn. DOT

NY Susquehanna & West RR
N I Industries
Hon. Chris Gibson
CSX Transportation
Celtics International
Natl Grain & Feed
Hon. Richard Hanna
Hon. Brian Higgins
Milford Benningham RR
J. B. Hunt

E. of Hudson Rail Frt Task Force
Reading Blue Mtn RR
Hon. Jerrod Nadler

Thoroughbred Direct Intermodal
Hanjin Shipping
Hon. Tom Reed
Pti Logistics
Sandersville RR
Hon. Paul Tonko
Sen. Pat Toomey
Delaware Lackawanna RR
A Zerega Sons
Am. Train Dispatchers Assoc

Owego Harford RR et al

Eugene Blabey
David Brillhart
Sen. Casey
Hon. Collins
Scott Conti
Frank Depaola
Susan Duckworth
Toby L. Fauver
P. Bratcher
Nathan Fenno
Fleck Andrew
Hon. Chris Gibson
Lou Gitomer
Steven Golich
Randal Gordan
Hon. Richard Hanna
Hon. Brian Higgins
Peter Leishman
Terrence Matthews
Jennifer Boattini
John McHugh
Wayne Michel
Hon. Jerrod Nadler
Sam Ninness
Mike Radak
Hon. Tom Reed
Joe Shefchik
Ben Tarbutton III
Hon. Paul Tonko
Sen. Pat Toomey
David Verde
John Vermeylen
Michael Wolly

Eric Lee

kylie.mclaughlin@wnyprr.com
bcass@dot.state.nh.us
kichelle_webster@casey.senate.gov
erynn.hook@mail.house.gov
wendy@pwrr.com
christine.kondis@state.ma.us
s.duckworth@nefreighttransfer.com
tfauver@pa.gov
pbratcher@pa.gov
nfenno@nysw.com
afleck@valhi.net
rep.chris.gibson@mail.house.gov
Lou_Gitomer@verizon.net
lgiroux@celticsintl.com
cdelacruz@ngfa.org
rep.richard.hanna@mail.house.gov
rep.brian.higgins@mail.house.gov
mbrxnh1@aol.com
terrence_matthews@jbbhunt.com
jennifer_boattini@jbbhunt.com
jfmchughpc@aol.com
bhess@readingnorthern.com
robert.gottheim@mail.house.gov
lisette.morton@mail.house.gov
sam.ninness@ns_direct.com
mradak@us.hanjin.com
alison.hunt@mail.house.gov
joeshefchik@papertransport.com
bjtjr@sandersvillerrailroad.com
paul.tonko@mail.house.gov
tyler_minnich@toomey.senate.gov
sbedette@gvtrail.com
dwhite@zerega.com
mwolly@zwerdling.com

By First Class Mail

415 Woodland Rd Syracuse, NY 13219