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Office of Proceedings
May 15, 2015 **JR - 11**
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Public Record

**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.**

JAMES RIFFIN'S SUPPLEMENT TO MOTION TO STAY MAY 19, 2015 DECISION

1. James Riffin ("**Riffin**") herewith supplements his Motion to Stay the Surface Transportation Board's ("**STB**") scheduled **May 19, 2015 decision** in this proceeding for seven days (more or less).
2. Riffin is aware that Norfolk Southern opposes Riffin's request for a stay, and is aware that Norfolk Southern's opposition carries significant weight.
3. In Riffin's Motion for Stay, he stated that Mr. Eric Strohmeier was going to file a pleading which would argue that Norfolk Southern would need **additional** STB approvals, in the event that the Delaware & Hudson's ("**D&H**") trackage rights were not discontinued simultaneously with Norfolk Southern's acquisition of 282 miles of D&H Line.
4. As of 5:00 pm on May 14, 2015, Mr. Strohmeier's argument had not been filed.
5. Riffin believes that the STB needs to know what Mr. Strohmeier's argument is, **prior** to the STB rendering a decision on Riffin's Motion for Stay, and **prior** to the STB serving its May 15, 2015 decision.

6. To date, Norfolk Southern has argued that its acquisition of 282 miles of D&H Line is totally independent of, and in no way relies upon, or is dependent upon, the D&H discontinuing its trackage rights.

7. What follows is a short summary of Mr. Strohmeier's argument. I will let Mr. Strohmeier provide the STB with a more detailed argument.

**WHY NORFOLK SOUTHERN NEEDS ADDITIONAL STB APPROVAL IF
THE D&H'S TRackage RIGHTS ARE NOT DISCONTINUED SIMULTANEOUSLY**

8. In *Delaware and Hudson Railway Company, Inc. – Discontinuance of Track Rights* STB Docket No. AB 156 (Sub No. 25) X, the D&H sought to discontinue certain trackage rights agreements, and choose to replace those previously performed operations with **a non-regulated haulage agreement**, in which Norfolk Southern would perform the work, instead of the D&H. It was made clear in that proceeding, that the D&H wanted to rid itself of those unprofitable operations. After much contention, the transaction was approved. The D&H exercised the authority it received, and lawfully terminated its rights. It then executed non-regulated haulage agreements to replace its **terminated** trackage rights agreements.

9. In *CSX Transportation, Inc. and Delaware and Hudson Railway Co., Inc. – Joint Use Agreement* STB Docket No. FD 35348, the D&H wanted to discontinue its own operations, which it performed via trackage rights, then replace its operations with a haulage agreement with CSX. However, the D&H did not want to rid itself of its ability to perform the operations itself, if economic conditions improved. The result of the transaction was a clear consolidation transaction, which required Board approval. **Since the D&H retained the ability to perform the service it was asking to contract to CSX, Board approval of that transaction was required.**

10. These two decisions give rise to the following precedent:

- If Trackage rights are discontinued, then replaced with haulage agreements, no prior STB approval of the haulage agreements is needed.
- If trackage rights **are retained**, but the parties contemplate the use of a haulage agreement, then that transaction is a “consolidation” proceeding, which **requires** separate authority and approval from the STB.

11. The D&H provides STB regulated transportation services to Lehigh Valley Rail Management (“**LVRM**”), a carrier. (Lehigh Valley Rail Management is the successor in interest of the Philadelphia, Bethlehem and New England Railroad, the common carrier formerly owned by Bethlehem Steel.)

12, **Unlike** the other short lines the D&H interchanges with, the D&H provides transportation services to LVRM **solely via trackage rights**.

13. The D&H and Norfolk Southern, in FD 35873, propose that Norfolk Southern provide regulated transportation services to LVRM **via a haulage agreement**.

14. **IF** the D&H’s trackage rights to LVRM were to be discontinued **simultaneously** with the consummation of the FD 35873 transaction, **then** the D&H and Norfolk Southern would have a *Delaware and Hudson Railway Company, Inc. – Discontinuance of Track Rights* STB Docket No. AB 156 (Sub No. 25) X, situation, in which the D&H’s operations were performed via a haulage agreement **after** the D&H relinquished its right / obligation to provide common carrier services. Such a situation **would not** require prior STB approval.

15. If, on the other hand, regulated transportation services were to be provided to LVRM via a haulage agreement, as proposed by Norfolk Southern in FD 35873, **while the D&H still retained its right to provide common carrier services to LVRM, THEN** a *CSX Transportation, Inc. and Delaware and Hudson Railway Co., Inc. – Joint Use Agreement* STB Docket No. FD 35348, situation would occur. (Two carriers have the right to serve an entity, whereas previously, only one carrier had the right to serve the entity.) This situation **would require** prior STB approval.

16. Prior to the Office of Proceedings' May 13, 2015 decision, Norfolk Southern's FD 35873 proceeding and the D&H's Discontinuance of Trackage Rights Proceeding, were to become effective simultaneously. Had that occurred, there would have been no overlap regarding service to LVRM.

17. **However**, since the D&H's trackage rights discontinuance proceeding has been held in abeyance, and since it is no longer possible for the D&H's trackage rights to be discontinued simultaneously with approval of Norfolk Southern's Acquisition proceeding, (if the FD 35873 proceeding continues on its present schedule), **if** the STB were to grant Norfolk Southern approval to implement the operating agreements embraced in FD 35873 **prior** to the D&H receiving authority to discontinue its trackage rights / common carrier obligation to serve LVRM, **then** a *CSX Transportation, Inc. and Delaware and Hudson Railway Co., Inc. – Joint Use Agreement* STB Docket No. FD 35348 situation would occur, and as previously held, such a situation **would require additional prior STB approval**.

18. The Office of Proceedings' decision in AB 156 - 27X has created a new set of issues, which to date, no one was aware of.

19. Riffin would respectfully suggest that a short 'time-out' be called, to address this new issue. Riffin believes that it would be far more efficient to address this issue now, rather than address it upon judicial review.

20. WHEREFORE, Riffin will respectfully suggest that the STB call a short 'time-out' (7 to 15 days), by **holding in abeyance** its scheduled May 15, 2015 decision, and by directing the parties to address the legal ramifications of the Office of Proceedings' May 13, 2015 decision in AB 156 - 27X, on the FD 35873 proceeding.

Respectfully,

James Riffin

P.O. Box 4044

Timonium, MD 21094

(443) 414-6210

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of May, 2015, a copy of the foregoing Supplement to Motion for Stay, was served on the parties noted below, by E-mail.

James Riffin

E-mail:

Brotherhood of MOW Employees:	Richard Edelman:	REdelman@odsaw.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

First Class mail:

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