

No. 18-1481

IN THE SUPREME COURT OF THE UNITED STATES

CNJ RAIL CORPORATION AND
ERIC STROHMEYER

Petitioners

v.

SURFACE TRANSPORTATION BOARD; and
UNITED STATES OF AMERICA

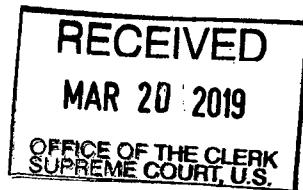
Respondents

PETITION FOR A WRIT OF CERTIORARI,
TO THE THIRD CIRCUIT
(D & H)

Eric Strohmeyer, *pro se*
Petitioner
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1. QUESTIONS PRESENTED

- A. Was it clear error for the Third Circuit to **fail to address** the issue of whether the Surface Transportation Board (“STB”) **had the jurisdiction to render a decision** in the underlying proceeding? (Even if the court determines that Petitioner does not have standing.)
- B. Were the allegations in Petitioner’s Affidavit sufficient to defeat Respondents’ Motion to Dismiss for lack of standing?

2. PARTIES

The parties before the Third Circuit in Case No. 16-4362 (D&H Railroad / STB AB 156 (Sub. No. 27X) are:

Petitioners CNJ Rail Corporation and Eric Strohmeyer.

Respondents Surface Transportation Board and the United States of America.

Intervenors Norfolk Southern Railway Company and James Riffin

3. PETITIONERS' DISCLOSURE OF AFFILIATIONS AND FINANCIAL INTEREST

Your Petitioners are not publicly held entities, nor do they have a parent corporation. They have a 100 % ownership interest. No other publicly held corporation or other publicly held entity has a direct financial interest in the outcome of this litigation. Your Petitioners are not a trade association. This case did not arise out of a bankruptcy proceeding.

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5. TABLE OF AUTHORITIES

TABLE OF CASES CITED

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| <i>Arizonians for Official English v. Arizona</i> , 520 U.S. 43 (1997): | 1,5,7 |
| <i>Bender v. Williamsport Area School Dist.</i> , 475 U.S. 534 (1986): | 1,5 |
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TABLE OF STATUTES CITED

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6. OPINIONS BELOW

1. The Third Circuit Panel Opinion that is the subject of this Petition for Writ of Certiorari (Third Circuit Case No. 16-4362), was rendered on **April 27, 2018**.

2. The Third Circuit Panel Reconsideration and En Banc Opinions that are the subject of this Petition for Writ of Certiorari (Third Circuit Case No. 16-4362), were rendered on **December 21, 2018**.

7. JURISDICTION

3. Jurisdiction is proper in this Court, for the Third Circuit's decisions are contrary to multiple decisions of this Court.

4. On the issue of the Third Circuit's failure to address the STB's lack of jurisdiction, the decisions of the Third Circuit are contrary to the dictates of this Court, as expressed in *Arizonians for Official English v. Arizona*, 520 U.S. 43 (1997) (to wit: 520 U.S. at 73); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, at 541 (1986), and the cases cited in *Bender*; *Iron Arrow Soc. v Heckler*, 464 U.S. 67, at 72-73 (1983); and *U.S. Bancorp Mortgage Co.*, 513 U.S. 18, at 21 (1994).

5. On the issue of 'standing,' the Third Circuit's decisions are contrary to the dictates of this Court, as expressed in *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992), and its progeny, and *U.S. v. SCRAP*, 412 U.S. 669, at 683 - 690 (1973).

8. STATUTES INVOLVED

6. 49 U.S.C. 11323 - 25; 45 U.S.C. 719(e)(2); 5 U.S.C. 706(2)(C); Article III, U.S. Constitution.

9. WHEN FEDERAL QUESTIONS WERE RAISED

7. The issue of the STB's lack of jurisdiction, was raised very early in the FD 35873 proceeding before the STB.

8. The issue of Petitioners' 'standing,' was first raised in the Third Circuit (when the STB moved to dismiss Petitioners' appeal for 'lack of standing').

10. STATEMENT OF THE CASE

9. Norfolk Southern Railway ("NS") desires to purchase 282 miles of Delaware and Hudson Railway ("D&H") line of railroad ("Line"). To effect this purchase, the D&H must **simultaneously** abandon its right to operate over this 282 miles of railroad line.

10. In two separate decisions, the STB granted authority for NS to purchase the 282 miles of D&H Line, (see **STB Docket No. 35873**), and granted the D&H authority to abandon its rights over the 282 miles of Line (plus the right to abandon an additional 600+ miles of D&H lines of railroad.) [See **STB Docket No. AB 156 (sub no. 27X)**].

11. Petitioners appealed both decisions to the Third Circuit. [The **NS appeal** was docketed Case No. **16-4435** in the Third Circuit. The **D&H appeal** was docketed Case No. **16-4362** in the Third Circuit.) Petitioners argued:

A. The NS decision is dependent upon the D&H being granted **simultaneous** authority to abandon some 900 miles of D&H lines of railroad.

B. For the STB to grant abandonment authority, the STB must first determine the nature of the tracks being

abandoned: Are the tracks “lines of railroad,” or 49 U.S.C. 10906 “excepted” track (spur, yard, etc. tracks)? If “lines of railroad,” does the carrier have “full operating rights” (the right to provide both local and overhead rail service), or more limited “trackage rights.” (Typically **either** local service rights OR overhead rights.)

- C. Petitioners argued (before the STB and the Third Circuit) that the STB **does not have the jurisdiction** to determine the “nature” of the 900 miles of D&H tracks: The tracks were conveyed to the D&H via the Special Court. (A special bankruptcy court created to deal with the bankruptcies of multiple railroads / to convey to Conrail the bankrupt railroads’ rights.) The Special Court has **exclusive jurisdiction** to determine the nature of what it conveyed to the D&H.
- D. Since the “nature” of the tracks that the D&H desires to abandon must be determined before abandonment authority can be granted; and since the STB does not have the jurisdiction to determine the “nature” of the D&H’s tracks, the STB’s decision granting the D&H authority to abandon 900 miles of its tracks, is infirm, and must be set aside.
- E. And if the STB’s D&H decision is set aside, then the STB’s NS decision must likewise be set aside, since the NS decision is dependent upon the D&H being granted authority to abandon, and to simultaneously abandon, some 900 miles of D&H tracks.
- F. Petitioners argued / continue to argue, that because the NS decision is dependent upon the D&H decision not being set aside, the NS decision and

D&H decision, must be consolidated / affirmed (or set aside), simultaneously.

12. Ultimately, the Petitioners desire this Court / the Third Circuit, to address the issue of the STB's **lack of jurisdiction to determine the nature of the operating rights the D&H desires to abandon.**

13. However, before that can occur, it first must be determined whether the Petitioners have Article III standing.

14. The STB filed a Motion to Dismiss, wherein the STB argued that the Petitioners do not have Article III standing.

15. The Petitioners argued before the Third Circuit, that Petitioners did in fact have Article III standing, citing numerous 'interests' that the Petitioners have.

16. The Third Circuit Panel looked at **only one** (of the many) 'interests' that the Petitioners cited: Petitioners' efforts to provide Allegro Sanitation with rail service.

17. The STB argued that Allegro had failed to provide a verified statement that Allegro wanted 'immediate' rail service. And due to this lack of a verified statement, Allegro's desire for rail service was 'speculative.'

18. The Third Circuit decided that Allegro's desire for rail service was 'speculative,' and **based on that evidence alone**, held that Petitioners lacked Constitutional Article III standing.

19. Having decided that Petitioners lacked Article III standing, the Third Circuit held that all other issues were moot. (Such as whether Petitioners had 'prudential' standing; whether the STB had the jurisdiction to determine the nature of the operating rights that the D&H desired to abandon.)

20. Petitions filed a Petition for Rehearing / Petition for en banc review. In their Petition for Rehearing, Petitioners cited the many 'interests' that Petitioners had identified in Petitioner's Petition for Review, in further support of Petitioners' argument that Petitioners had Article III standing.

21. In addition, Petitioners argued that when the jurisdiction of the underlying tribunal is questioned, the Third Circuit **must address** the jurisdictional issue – **even if the Petitioner does not have Article III standing**. See: *Arizonians for Official English*, at 520 U.S. 43 at 73, where this Court made the following statements:

"Even if we were to rule definitively that AOE and Park **lack standing**, we would **have an obligation** essentially to search the pleadings on core matters of federal-court adjudicatory authority – to inquire not only into this Court's authority to decide the questions petitioners present, **but to consider, also, the authority of the lower courts to proceed**. As explained in *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986):¹

[E]very federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it. *Mitchel v. Maurer*, 293 U.S. 237, 244 (1934). See *Juidice v. Vail*, 430 U.S. 327, 331-332 (1977) (standing). '**And if the record discloses that the lower court was without jurisdiction this court will notice the defect**, although the parties make no contention concerning it. **[When the lower federal**

4. A 3rd Circuit case.

court lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.' *U.S. v. Corrick*, 298 U.S. 435, 440 (1936)."

See also *Iron Arrow Honor Soc. v. Heckler*, 464 U.S. 67, 72-73 (1983) (*per curiam*) (vacating judgment below where Court of Appeals had ruled on the merits although case had become moot). In short, we have authority to 'make such disposition of the whole case as justice may require.' *U.S. Bancorp Mortgage Co.*, 513 U.S. 18, at 21 (1994)." Bold added.

22. The Third Circuit Panel denied Petitioners' Petition for Panel Rehearing, and the Third Circuit, sitting en banc, denied Petitioners' Petition for en banc review.

11. ARGUMENT – STANDING, AND NEED TO ADDRESS JURISDICTIONAL ISSUE

23. Petitioners adopt by reference, their Consolidated Petition for Panel Rehearing, and Petition for en banc Review, as if fully reproduced herein. See Petitioners' Appendix at A-8 to A-24, and especially at ¶¶ 21 - 30, A-16 - 22.

12. RELIEF PRAYED FOR

24. Petitioners ask this Court to determine, from the facts and argument presented in Petitioners' Petition for Panel Rehearing / en banc Review, whether Petitioners have presented sufficient facts / argument, to overcome the STB's Motion to Dismiss for Lack of Article III Standing. (Constitutional Standing, as opposed to Prudential Standing, since the Third Circuit did not address the issue of whether Petitioners have Prudential Standing.)

25. Petitioners further ask this Court to determine whether the Third Circuit is **required to address** the issue of whether the STB had the jurisdiction to determine the nature of the D&H's operating rights. **Even if**, after a more thorough review of Petitioners' Standing, the Third Circuit were to determine that Petitioners still lack Constitutional and Prudential standing. (Does the *Arizonians*' statement² apply to the Third Circuit? To the facts in this proceeding?)

13. ADDITIONAL RELIEF PRAYED FOR

26. Petitioners filed two separate appeals in the Third Circuit. No. 16-4362 (D&H, this petition) and 16-4435 (Norfolk Southern). The Third Circuit consolidated the two appeals for briefing purposes. The Third Circuit affirmed both appeals.

27. The two appeals are related. Petitioners argue that the underlying decisions are dependent upon one another.

28. Petitioners ask this Court to determine whether the NS decision is so dependent upon the D&H decision, that were the D&H decision to be vacated, the NS decision would likewise have to be vacated.

29. If the Court finds that the two decisions are dependent upon one another, Petitioners ask that the Court consolidate the two Petitions for Writ of Certiorari.

2. "Even if we were to rule definitively that AOE and Park **lack standing**, we would **have an obligation** essentially to search the pleadings on core matters of federal-court adjudicatory authority – to inquire not only into this Court's authority to decide the questions petitioners present, **but to consider, also, the authority of the lower courts to proceed.**"

30. Petitioners pray that the Court:

- A. Consolidate the two Petitions for Writ of Certiorari (3rd Cir. Nos. 16-4362 and 16-4435);
- B. Grant Petitioners' Petitions for Writs of Certiorari;
- C. Find that the dictate expressed in *Arizonians* (appellate courts must address lower court jurisdictional issues, even when Petitioners do not have Article III standing), also applies to appellate review of administrative agency decisions;
- D. Find that Petitioners pleaded sufficient facts to warrant denial of Respondents' Motion to Dismiss for Lack of Standing;
- E. Vacate the decisions in 3rd Circuit Case Nos. 16-4362 and 16-4434; and
- F. For such other relief as would be appropriate.

31. I HEREBY CERTIFY, under the penalties of perjury, that the foregoing is true and correct.

Respectfully,

Eric S. Strohmeyer

Eric S. Strohmeyer, Individually, and as
the COO of CNJ Rail Corporation