APPENDIX

ALD-104 January 18, 2018

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. No. **16-4362**

ERIC S. STROHMEYER; CNJ RAIL CORPORATION,
Petitioners

VS.

SURFACE TRANSPORTATION BOARD, ET AL.,
Respondents

(Surface Transportation Board Case No. AB 156)

Present: MCKEE, VANASKIE and SCIRICA, Circuit Judges

Submitted:

(1) Respondents' motion to dismiss Petitioners' petition for review for lack of jurisdiction;

(2) Intervenor James Riffin's response to Respondents' motion to dismiss;

(3) Respondents' reply to Riffin's aforementioned response;

(4) Riffin's motion to modify the briefing schedule;

(5) Riffin's motion for a order to compel Petitioners to respond to Respondents' motion to dismiss;

(6) Riffin's motion to strike Respondents' motion to dismiss;

(7) Riffin's motion (a) for leave to amend his motion to strike and (b) to extend the parties' time to respond to that motion to strike;

(8) Riffin's amendment to his motion to strike;

(9) Respondents' response to Riffin's motion to modify the briefing schedule;

(10) Riffin's motion for leave to file a sur reply to Respondents' motion to dismiss;

(11) Riffin's sur reply to Respondents' motion to dismiss;

(12) Riffin's motion to summarily vacate the decisions of the Surface Transportation Board ("the STB");

(13) Respondents' letter filed pursuant to Federal Rule of Appellate Procedure 28(j);

(14) Respondents' response to Riffin's motions (a) for an order compelling Petitioners to respond to Respondents' motion to dismiss, (b) to strike the motion to dismiss, and (c) for leave to amend Riffin's motion to strike;

(15) Respondents' response to Riffin's motion for leave to file a sur reply to the motion to dismiss;

(16) Respondents' response to Riffin's motion for summary vacatur;

(17) Riffin's reply in support of his motion for summary vacatur;

(18) Petitioner Eric Strohmeyer's "Motion for Leave to File an Over-Length Consolidated Dispositive Motion, and Late-Filed Consolidated Reply;"

(19) Strohmeyer's "Consolidated *Motions* to: Consolidate the Proceedings; and Summarily Vacate the Board's Decisions ... and ... Petitioner's Single Consolidated Reply to the Respondents' Motions to Dismiss and [Riffin's] Motions;"

(20) Strohmeyer's "Motion for Leave to File an Errata Filing;"

(21) Respondents' response to Strohmeyer's motion for leave to file an over-length motion and to late-file a "consolidated reply;"

(22) Riffin's reply to Strohmeyer's aforementioned motions and Respondents' response to Strohmeyer's motion for leave to file an over-length motion and to late-file a "consolidated reply;"

(23) Strohmeyer's reply to Respondents' response to his motion for leave to file an over-length motion and to late-file a "consolidated reply;"

(24) CNJ Rail Corporation's ("CNJ Rail") motion to summarily vacate the STB's decisions;

(25)CNJ Rail's response to Respondents' motion to dismiss;

(26) Respondents' reply to CNJ Rail's response to their motion to dismiss;

(27) Respondents' response to CNJ Rail's motion for summary vacatur;

(28) CNJ Rail's reply in support of its motion for summary

vacatur; and

(29) CNJ Rail's amendment to its reply in support of its motion for summary vacatur

In the above-captioned case.

Respectively,

Clerk

ORDER

Respondents have moved to dismiss Petitioners' petition for review for lack of jurisdiction. Intervenor James Riffin's request to supplement his motion to strike that motion to dismiss is granted; however, the motion to strike, as supplemented, is denied, and Riffin's motion to extend the time for responses to the motion to strike is denied a moot. Respondents' motion to strike Petitioner Eric Strohmeyer's response to the motion to dismiss is denied, and we hereby grant Strohmeyer's motions for leave to (a) file that overlength response out of time, and (b) file an errata to that response. We also grant Riffin's motion for permission to file a sur reply to the motion to dismiss, and we deny as moot Riffin's motion to compel Petitioners to respond to the motion to dismiss.

As for the motion to dismiss itself, we hereby grant that motion. Although we have jurisdiction to review final orders of the Surface Transportation Board ("the STB", see 28 U.S.C. § 2342(5), only a 'party aggrieved' by such an order has standing to file a petition for review challenging that order, see 28 U.S.C. § 2344. "Proof of such aggrievement requires a showing of both Constitutional and prudential standing." Burlington N. & Sante Fe Ry. Co. v. Surface Transp. Bd., 403 F. 3d 771, 775 (D.C. Cir. 2005); see Maroni v. Pemi-Baker Reg'l Sch Dist., 346 F. 3d 247, 253 (1st Cir. 2003). We need not reach the issue of prudential standing in this case because Petitioners have not

demonstrated that they meet the requirements for constitutional standing. See Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992); Lewis v. Alexander, 685 F. 3d 325, 338 (3d Cir. 2012). More specifically, Petitioners have failed to show an injury in fact, for their alleged injury appears to be based on mere speculation as to what Allegro Sanitation Corporation would have done or what it might do in the future. See Clapper v. Amnesty Int'l USA, 568 U.S. 398, 414 (2013) (highlighting the Supreme Court's "reluctance to endorse standing theories that rest on speculation about the decisions of independent actors").

Because the petition for review is subject to dismissal, and notwithstanding Riffin's motion to intervene, we will terminate this case in its entirety. See Littlejohn v. Bic Corp., 851 F. 2d 673, 677 n. 7 (3d Cir. 1988). Although we "ha[ve] discretion to treat the pleading of an intervenor as a separate action in order that it might adjudicate the claims raised by the intervenor," Fuller v. Volk, 351 F. 2d 323, 328 (3d Cir. 1965), we decline to exercise that discretion here because Riffin's motion to intervene, if treated as a petition for review, would be time-barred. See 28 U.S.C. § 2344; see also Council Tree Commc'ns, Inc. v. FCC 503 F. 3d 284, 287 (3d Cir. 2007).

The following motions are denied as moot: (a) Strohmeyer's motion to consolidate this case with C.A. No. 16-4435; (b) Riffin's motion to modify the briefing schedule; (c) Respondents' request to impose a moratorium on further pleadings in this case pending the resolution of the motion to dismiss; and (d) Petitioners' and Riffin's respective motions to summarily vacate the STB's decisions. To the extent that any of the numerous filings submitted by Petitioners, Respondents, or Riffin seek other relief, that relief is denied.

By the Court,

s/ Theodore A. McKee
Circuit Judge

Dated: April 27, 2018

kr/cc: Eric S. Strohmeyer
Andrew L. Jiranek, Esq.
Anika S. Cooper, Esq.
Evelyn G. Kitay, Esq.
Robert B. Nicholson, Esq.
William A. Mullins, Esq.
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Steven J. Mintz, Esq.
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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. **16-4362**

ERIC S. STROHMEYER; CNJ RAIL CORPORATION,
Petitioners

v.

SURFACE TRANSPORTATION BOARD;
UNITED STATES OF AMERICA
Respondents

(STB No. AB 156)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREP, BIBAS, SCIRICA[1] and VANASKIE, Circuit Judges

The petition for rehearing filed by Petitioner in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is **denied**.

BY THE COURT

s/ Theodore A. McKee
Circuit Judge

December 21, 2018

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1 Judge Scirica's vote is limited to panel rehearing only.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. **16-4362**

ERIC S. STROHMEYER; CNJ RAIL CORPORATION,
Petitioners

VS.

SURFACE TRANSPORTATION BOARD;
UNITED STATES OF AMERICA
Respondents

(STB DOCKET No. AB 156 - 27X)

CONSOLIDATED

PETITION FOR PANEL REHEARING AND

PETITION FOR EN BANC REVIEW

Respectfully submitted,

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Dated: June 11, 2018 *Counsel for CNJ Rail Corp.*

1. Comes now your Petitioner, CNJ Rail Corp., by its Attorney, Andrew L. Jiranek, who herewith files this Consolidated Petition for Panel Rehearing, and Petition for En Banc Review, and in support hereof states:

2. The panel decision conflicts with multiple decisions of the Supreme Court, this Court, a decision of the D.C. Circuit, and multiple decisions of the Special Court, to wit:

Arizonians for Official English v. Arizona, 520 U.S. 43 (1997);
Bender v. Williamsport Area School Dist., 475 U.S. 534 (1986);
Iron Arrow Honor Soc. v. Heckler, 464 U.S. 67 (1983);
Mitchel v. Maurer, 293 U.S. 237 (1934);
Juidice v. Vail, 430 U.S. 327;
U.S. Bancorp Mortgage Co., 513 U.S. 18 (1994);
U.S. v. Corrick, 298 U.S. 435 (1936);
U.S. v. SCRAP, 412 U.S. 669 (1973);

American Iron and Steel Institute v. E.P.A., 568 F. 2d 284 (3rd Cir. 1977);
Wagner Elec. Corp. v. Volpe, 466 F. 2d 103 (3rd Cir. 1972);

Consolidated Rail Corporation v. STB, 571 F. 3d 13 (D.C. Cir. 2009);

Consolidated Rail Corp. v. Penn Central Corp., 53 F. Supp. 1351 (Reg'l Rail Reorg. Ct. 1982);
Consolidated Rail Corp. v. Pittsburgh and Lake Erie Railroad Co., 459 F. Supp. 1013 (Reg'l Rail Reorg. Ct. 1978).

3. The proceeding involves one or more questions of exceptional importance, to wit: The panel decision conflicts with authoritative decisions of the Supreme Court, this Circuit, other U.S. Courts of Appeal, and the Regional Rail Reorganization Court (Special Court), that have addressed the issues presented in this Petition for Review. See cases cited above in paragraph 2, and see below.

4. Counsel states that it is his belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the Supreme Court, the Third Circuit, the D.C. Circuit, and the Regional Rail Reorganization Court (Special Court), and that consideration by the full court / reconsideration by the Panel, is necessary to secure and maintain uniformity of decisions in this Court, and uniformity of decisions of this Court with decisions of other Circuit Courts of Appeal, and decisions of the Special Court.

TIMELINESS

5. The Panel Decision that CNJ Rail Corp. seeks panel reconsideration of, en banc review of, was filed on **April 27, 2018**.

6. The time for filing a Petition for en banc rehearing, is 45 days after entry of judgment, since this is a civil case in which the United States is a party. 45 days after April 27, 2018, would be **June 11, 2018**.

ISSUES

7. The issues in these two proceedings are:

   A. Must this Court determine 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?

BACKGROUND INFORMATION

8. On **April 27, 2018**, the Panel **Granted** Respondents' Motion to Dismiss, having concluded (erroneously, Petitioner argues) that Petitioner lacked Constitutional standing, holding that Petitioner "failed to show an injury in fact, for their alleged injury appears to be based on mere speculation as to what Allegro Sanitation Corporation would have done or what it might do in the future." Dec. at 4.

9. In its Petition for Review, Petitioner argued that the Surface Transportation Board ("STB"):

A. Had to determine the **nature** of the **Operating Rights** that the Delaware and Hudson Railway Company ("D&H") desired to abandon **before** the STB could grant authority to abandon / discontinue service over, the trackage at issue, citing the D.C. Circuit's holding in *Consolidated Rail Corporation v. STB*, 571 F. 3d 13 (D.C. Cir. 2014), wherein, at p. 20, the D.C. Circuit stated:

"Because the Board "does not have authority... over ... abandonment ... of spur, ***20** industrial, team, switching, or side tracks," 49 U.S.C. § 10906, the **Board's approval or denial of an abandonment application presupposes that the trackage** for which abandonment is sought **is** "part of [the rail carrier's] railroad lines" **subject to the Board's abandonment authority** under section 10903. ... Only **in proceedings**

in which the **Board's authority is challenged** and **an interpretation** of the FSP [Final System Plan] or the Special Court's conveyance order under 45 U.S.C. § 719(e)(2) is required **does the Board lack jurisdiction** to resolve the question of the nature of the trackage sought to be abandoned. ... Under 45 U.S.C. § 719(e)(2), however, the district court *qua* **the Special Court retains its exclusive jurisdiction to decide the antecedent question if it arises**, namely, whether the trackage was conveyed by the FSP as "part of [the rail carrier's] railroad lines." 49 U.S.C. 10903(a)(1)(A)." [1]

B. Petitioner further argued that the STB **lacked the jurisdiction** to determine the **nature** of the Operating Rights conveyed to the D&H by the Final System Plan.[2]

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1 The D.C. Circuit reasoned as follows:

"In *Consolidated Rail Corp. v. Pittsburgh and Lake Erie Railroad Co.*, 459 F. Supp. 1013 (Reg'l Rail Reorg. Ct. 1978), **the Special Court concluded** that it had **exclusive jurisdiction** of an action seeking a declaratory judgment regarding the **trackage rights** of the Pittsburgh and Lake Erie Railroad Co. (**P&LE**). 459 F. Supp. at 1017-18. Pursuant to the Special Court's conveyance order and the FSP, P&LE and Conrail executed an '**operating rights grant**' and an implementing agreement giving P&LE certain trackage rights. *Id.* at 1014. The Special Court noted that it was undisputed that trackage rights had been granted. *Id.* at 1017. '**The question, rather, is the nature and extent of the privileges conveyed**,' which the Special Court determined '**raises substantial questions with respect to the interpretation of the FSP and [the] conveyance orders themselves**.' *Id.*

C. And Petitioner argued that were the STB's D&H decision (3rd Cir. Case No. 16-4362) to be vacated, the STB's Norfolk Southern decision would also have to be vacated, since they are intricately intertwined, and the STB's Norfolk Southern decision is dependent upon the STB's D&H decision not being vacated.

ARGUMENT – JURISDICTION

10. It was clear error for the Panel to **fail to address** whether the STB had the jurisdiction to determine the nature of the Operating Rights conveyed to the D&H by the Final System Plan.

11. In *Arizonians for Official English v. Arizona,* 520 U.S. 43, 73 (1997), the Supreme Court held:

> "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.*

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2 What was the **nature** of the **Operating Rights** conveyed to the D&H by the Final System Plan: was the D&H conveyed 'lines of railroad," with **full** operating rights (both local and overhead operating rights), or was the D&H conveyed mere "overhead trackage rights?" The distinction between full operating rights, and mere overhead trackage rights, is significant, and material, for the authority granted, differs, and the remedies available to entities desiring to make Offers of Financial Assistance, differs.

Williamsport Area School Dist., 475 U.S. 534, 541 (1986):[3]

> **[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 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.

12. In this proceeding, Petitioners have argued (A) that since the STB lacked the jurisdiction to render the STB's decision in the D&H proceeding (3rd Cir. Case No. 16-4362), the STB's D&H decision must be vacated and (B) that since this proceeding and the D&H proceeding are intricately intertwined,

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3. A 3rd Circuit case.

and the STB's Norfolk Southern decision is dependent upon the STB's D&H decision not being vacated, if the STB's D&H decision is vacated, then the STB's Norfolk Southern decision (this proceeding), must likewise be vacated.

13. Even though the Panel determined that Petitioner lacked standing to prosecute this Petition for Review, as the Supreme Court held in *Arizonians for Official English:*

> "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.** *Id.* 73.

14. It was clear error for the Panel to fail to address the issue of whether the STB had the jurisdiction to render the STB's D&H decision. (It was clear error for the Panel to fail to comply with the dictates of the Supreme Court.)

15. While the Supreme Court's dictate mandates review of the jurisdiction of a lower **court**, as opposed to a decision of a Federal **agency**, the distinction has no significance.

16. In should be kept in mind that what is at issue is the **exclusive jurisdiction of the U.S. District Court for the D.C. District** (sitting as the Special Court).

17. The STB, when it determined the nature of the Operating Rights conveyed to the D&H, infringed upon the exclusive jurisdiction of the Special Court. Which is a **very serious error.**

18. **NO entity**, has the right to usurp the exclusive

jurisdiction of the Special Court.

19. It is **the DUTY of this Court** to protect and to defend, the sanctity of the exclusive jurisdiction of the Special Court. [Just as the D.C. Circuit protected and defended the exclusive jurisdiction of the Special Court in *Consolidated Rail Corporation v. STB*, 571 F. 3d 13 (D.C. Cir. 2014).] Whether the Petitioner has standing to be in this Court **is irrelevant**. *Arizonians* at 73.

20. This Court decidedly **has the jurisdiction,** (and the duty), to determine whether it was error for the STB to entertain the D&H's Notice of Exemption. *Arizonians* at 73; *U.S. v. Corrick* 298 U.S. 435 at 440.

ARGUMENT ON STANDING

21. The Panel held that Petitioner could not rely upon what Allegro Sanitation would have done, or what it might do in the future, as the basis for Petitioner's standing.

22. However, Petitioner **did not rely upon** what Allegro Sanitation would have done, or what it might do in the future, as the basis for Petitioner's standing.

23. Petitioner stated in its **Affidavit** filed in this proceeding, CNJ Appx 51 - 92, particularly at 54,[4] 55-56,[5]

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4. "The only reason for the *termination* of the negotiations between the parties to the *non-disclosure agreement* was the Board's authorization of the sale of the D&H rail line to NS in the *NS Acquisition* proceeding, and the Board's approval of the *D&H Discontinuance* proceeding."

5. "*Due Process* From the onset of the *NS Acquisition* proceeding, the Board's actions were plagued by *mistakes and*

59-60,[6] and

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controversies. One of the more significant controversies is the agency's failure to provide the *statutorily required notice,* which was then further compounded by the Board's *failure* to set the *required* deadlines *appropriately.*

The Board's *failure* to follow the *specific instructions* laid out by *Congress* in the *relevant statutes* has a *significant impact* upon the *preparation* of our case to the Agency.

The Board's failures to follow the statutes directly affected the ability of *CNJ's* counsel to prepare an effective *request for a condition.* First and foremost is the fact that the Board's early decisions *effectively* limited CNJ's time to respond to the formal notice published in the *Federal Register* to 21 days. The statute *commands* the Board to provide 30 days.

Had the Board granted our *request for a 15 day extension,* we would not have been hurt by the Board's error. The agency elected however to not grant that relief. **We were hurt by that decision**." Bold added.

6. "The Board's failure to timely publish the required notice in the *Federal Register* also impacted our ability to secure additional support for our *remedial condition.* The Board's decision to withhold *publication* of the *notice* of the *NS application* until December 22nd, combined with the Board's unilateral decision to restrict participation in the proceeding to only those parties who could respond within 7 days (*3 business days*) of the publication of the *Notice* in the *Federal Register*, deeply impacted CNJ's ability to line up additional support for our requested *remedial condition.*

For example, your petitioner was not able to direct personnel, nor resources, to alerting potentially impacted *public agencies,* until the Board published the official notice in the *Federal Register.*

If the *CNJ Parties* had their *full statutory time period*

60,[7] that **Petitioner** had executed a Non-disclosure Agreement with the Canadian Pacific Railway Company ("CP"), in furtherance of **Petitioner's** desire to negotiate an agreement for rail service with CP.

24. CNJ, in the *D&H Discontinuance* proceeding, in its July 23, 2015 filed Petition to Reopen / Revoke Exemption (see Ex. A, at CNJ - PTR 1, footnote 1), stated:

> "Furthermore, CNJ continues to argue that the failure to timely submit this transaction simultaneously with the remainder of the transaction made the NS application 'incomplete' and the Board's failure to date to correct that deficiency constitutes material error and **deprives the parties of due process.** CNJ would like to note for the record that the purported discontinuances in this proceeding are significantly larger than what Norfolk Southern indicated they would be in the *NS Acquisition.*

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to respond, additional CNJ / Allegro personnel could have been mobilized to reach out to our contacts at both the New Jersey Department of Transportation, as well as those at the New Jersey Department of Environmental Protection, in order to seek additional support for our request for a *remedial condition.*

Both governmental agencies ... would have had significant reasons to participate in the proceedings. ... The CNJ / Allegro project would have removed numerous daily garbage truck movements from Interstates 80 and 380."

7. Redressability. Vacating all the decisions under review provides the *CNJ Parties* with very meaningful relief. Doing so restores the *status quo ante* that existed prior to the Board's decisions. In short, **we will get our *D&H* service back. We will get the carrier back that we were in negotiations with.**" Bold added.

> The CNJ Parties continue to argue that the failure to timely disclose and precisely replicate the discontinuances outlined in *Norfolk Southern* - FD 35873, **deprived CNJ of its ability to articulate an appropriate request for conditions** because the Norfolk Southern Corp ... along with co-applicants Delaware and Hudson Railway ... failed to disclose the full extent of the D&H's rights that were to be the subject of this transaction." Bold added.

25. Petitioner, in the *Norfolk Southern Acquisition* proceeding, stated, multiple times, that Petitioner had a desire to file "a responsive trackage rights **application**, and that finding that the proposed transaction was a 'minor' transaction, would preclude Petitioner from filing "a responsive trackage rights **application**," per 49 CFR §1180.4(d). ["No responsive **applications** shall be permitted in minor transactions."][8]

26. Petitioner, in the *Norfolk Southern Acquisition* proceeding, stated, multiple times, that Petitioner had a desire to file "a **Request for Condition** if the application is approved." See Ex. C at 2, Doc. 003112541660 at 111 [CNJ's January 21, 2015 filed Objections and Request for Condition], and Ex. C's Verified Statement of Michael A. Nelson at 1, 2, 6, 7. Doc. 003112541660 at 131, 132, 136, 137. See also Ex. D at 3. Doc. 003112541660 at 188. [CNJ's June 4, 2015 filed Petition for Reconsideration.] And see Ex. E at 1-3. [CNJ's December 29, 2014 letter to the STB requesting an extension of time; asking the STB to reject Norfolk Southern's Application, since the lack of proper notice **violated CNJ's Due Process**

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8. See Ex. B at 3, 4, 5, 7, 8. [CNJ's December 8, 2014 "Reply in Opposition to Petition ... and Motion to Reject application as Incomplete." in the *NS Acquisition* proceeding. proceeding.] Doc. 003112541660 at 99, 100, 101, 103, 104.

procedural rights.][9]

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9. **P. 1**: "(1) publication of notice of the Application in the *Federal Register* did not occur by the end of the 30th day after the Application was filed with the Board, as required by 49 U.S.C. § 11325(a); (2) parties have not been given at least 30 days after publication of notice of the Application in the *Federal Register* **to file comments** on the Application, as required by 49 U.S.C. § 11325(d)(1); and (3) the time between publication of notice of the Application in the *Federal Register* and the **deadline for filing notice of intent to participate** in the proceeding is so unreasonably short as to **violate due process of law**."

P. 2: "It is not reasonable to require parties to obtain and review the very lengthy Application and to determine whether or not to participate in the proceeding regarding the Application in only seven days." "In view of the explicit violation of applicable statutes and disregard of procedural due process of law, the Application **is required to be rejected**. The violations of law can only be cured by refiling the Application; by publication of notice of the Application in the *Federal Register* on a timely basis; by providing at least 30 days after such publication for filing written comments on the Application; and by providing sufficient time after such publication **for filing notices of intent to participate in the proceeding**." "The requested extension is justified because *the 24-day period in the midst of the Christmas-New Year Holiday* **is inadequate for preparation of requests for conditions**."

P. 3: "In fact, the current 24-day period for requesting conditions and the 75-day period for Applicants to respond to such requests is so skewed in favor of the Applicants that a failure to grant the requested extension **would constitute a denial of procedural due process of law.**" Bold added.

27. The decision of the STB **infringed upon Petitioner's** desire / right:

A. To negotiate an agreement with CP for rail service;
B. To file "a responsive trackage rights **application**;"
C. To file / have approved, "a **Request for Condition**;" and
D. Caused CNJ to "lose competitive options as a result of the proposed transaction [which would cause CNJ to] experience any number of specific harms, including the following: - Higher rates; - Inadequate service; - diminished access to preferred sources / destinations; -Longer cycle times (and correspondingly increased rolling stock needs); and -Increased buffer stock requirements and costs." Ex. B, Verified Statement of Michael A. Nelson, at p. 6.
E. All of which constitute "injuries in fact" to Petitioner's legal interests.

28. At the Motion to Dismiss stage of a proceeding, the Supreme Court has held (see *Lujan* and *U.S. v. SCRAP,* 412 U.S. 669, 683 - 690*)* that:

A. Statements made by an appellant in an affidavit, are **presumed to be true**. (Petitioner's statement that it suffered an injury in fact, **must** be presumed to be true.)

B. All inferences and presumptions are to be construed in a light most favorable to the non-moving party. (Petitioner was the non-moving party.)

C. 'Injury in fact' is **not** confined to those who can show 'economic harm.' A "harm to their use and enjoyment," *SCRAP,* 412 U.S. at 686, of the D&H's rail service, is sufficient to establish 'standing.'

D. Petitioner needs to allege 'direct harm' to it. *SCRAP* at 687; that Petitioner "has been or will in fact be **perceptibly** harmed by the challenged agency action," *SCRAP* at 688. Bold added. (It did. See footnotes 4 to 8 and paragraphs 24 to 26 above.)

E. "[S]tanding is not to be denied simply because many people suffer the same injury." *SCRAP* at 687.

F. Petitioner's "allegations must be true and **capable** of proof **at trial**." *SCRAP* at 689. Bold added. CNJ's allegations are true and are very capable of 'proof at trial.' (Call Micheal A. Nelson as an expert witness.)

G. To deny standing, **the Respondents** would have to prove that Petitioner "could not prove their allegations." *SCRAP* at 689 - 690.

29. As the Supreme Court made clear in *Lujan* and *SCRAP*, the amount of 'proof' needed to support standing **at the Motion to Dismiss stage**, is minuscule. As the proceeding progresses, the amount of proof needed to support a contention of standing, increases.

30. Petitioner argues that it was clear error for the Panel:

A. To **not** presume that Petitioner's statements that it was injured by the STB's decision, were true;

B. To **not** view, and to **not** construe, Petitioner's Affidavit Statements in a light most favorable to Petitioner; and

C. To find that at the Motion to Dismiss stage of the proceeding, Petitioner **had not** made sufficient allegations / had not presented sufficient proof, that

Petitioner had "failed to show an injury in fact."

ARGUMENT – IMPROPER NOTICE

31. The STB's *NS Acquisition Federal Register* Notice, was not in conformity with statutory requirements. (The STB only gave 24 days notice, when 30 days notice is required.)

32. This Court has held on numerous occasions, that a lack of statutorily-required notice, not only is grounds to vacate an agency decision, but generally **requires** that the agency decision be vacated. See *American Iron and Steel Institute v. E.P.A.*, 568 F. 2d 284 (3rd Cir. 1977); *Wagner Elec. Corp. v. Volpe,* 466 F. 2d 103 (3rd Cir. 1972).

33. The lack of proper notice deprived CNJ of its Due Process Rights, which in turn caused CNJ to suffer an "injury in fact," to wit: The time allocated was "inadequate for preparation of requests for conditions." Ex D at 2. [CNJ's December 29, 2014 Letter Motion to Reject the Application.]

CONCLUSION

34. WHEREFORE, for the foregoing reasons, Petitioner:

A. Prays that the Panel **reconsider** its decision to dismiss Petitioner's Petition for Review; and / or

B. Prays that the Court grant *en banc* review of this proceeding; AND

C. Prays that the Panel / full court, **follow** the dictates of the Supreme Court, by addressing the issue of whether the STB **infringed upon** the **exclusive** jurisdiction of the Special Court, when it determined the nature of the D&H's Operating Rights (even if,

upon reconsideration, the Panel / full court, still finds that Petitioner lacks standing); and

D. Prays that the Panel / full court, **find** that Petitioner has alleged sufficient facts and proof to support a finding of standing at the Motion to Dismiss stage of this proceeding; and

E. Prays that the Panel / full court, vacate the Decision of the STB in the *NS Acquisition* proceeding, due to improper *Federal Register* notice;

F. And Prays for such other and further relief as would be appropriate.

Respectfully submitted,

Andrew L. Jiranek
Counsel for CNJ Rail Corp. &
Eric Strohmeyer

44834 SERVICE DATE – OCTOBER 18, 2016
EB

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 156 (Sub-No. 27X)

DELAWARE AND HUDSON RAILWAY COMPANY, INC.—DISCONTINUANCE OF TRACKAGE RIGHTS EXEMPTION—IN BROOME COUNTY, N.Y.; MIDDLESEX, ESSEX, UNION, SOMERSET, HUNTERDON, AND WARREN COUNTIES, N.J.; CUMBERLAND, CHESTER, LUZERNE, PERRY, YORK, LANCASTER, NORTHAMPTON, LEHIGH, CARBON, BERKS, MONTGOMERY, NORTHUMBERLAND, DAUPHIN, LEBANON, AND PHILADELPHIA COUNTIES, PA.; CECIL, HARFORD, BALTIMORE, ANNE ARUNDEL, AND PRINCE GEORGE'S COUNTIES, AND BALTIMORE CITY, MD.; THE DISTRICT OF COLUMBIA; AND ARLINGTON COUNTY, AND THE CITY OF ALEXANDRIA, VA.

Digest:[1] The Board denies three petitions to revoke the exemption in this proceeding.

Decided: October 13, 2016

1. The digst constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

BACKGROUND

On March 19, 2015, Delaware and Hudson Railway Company, Inc. (D&H) submitted a verified notice of exemption under 49 C.F.R. § 1152.50 to discontinue overhead and local trackage rights on approximately 670 miles of rail line in New York, New Jersey, Pennsylvania, Maryland, the District of Columbia, and Virginia. Notice of this exemption was served and published in the Federal Register on April 8, 2015 (80 Fed. Reg. 18,937).

In a petition to revoke filed on April 20, 2015, James Riffin (Riffin) argued that D&H's verified notice of exemption, as originally filed, did not include all of the Zip Codes, counties, and stations for the proposed trackage rights discontinuances. As a result, on May 13, 2015, the Board placed this proceeding into abeyance and ordered D&H to supplement its March 19 verified notice of exemption with additional information that was omitted, including certain Zip Codes and counties traversed by the lines proposed for discontinuance. On June 15, 2015, D&H amended its verified notice of exemption, providing corrected information and stating that it was republishing newspaper notices and providing corrected notices to governmental agencies as required under 49 C.F.R. § 1152.50(d)(1). (D&H Suppl. to Verified Notice of Exemption 1-3.) The Board served and published the corrected verified notice of exemption in the Federal Register on July 2, 2015 (80 Fed. Reg. 38,273).

On July 10, 2015, the Board denied petitions to revoke the exemption filed by Riffin and by Samuel J. Nasca, on behalf of SMART/Transportation Division, New York State Legislative Board (SMART/TD-NY) (2015 Revocation Decision). On August 13, 2015, the Board denied a petition for a stay of the effective date of the exemption and a petition to toll the deadline to file an offer of financial assistance that

Riffin filed on July 13, 2015 (2015 Stay Denial). In that decision, the Board noted that it would address another petition by Riffin—his second petition to revoke—in a separate decision.

Riffin filed his second petition to revoke the exemption on July 15, 2015. On August 4, 2015, D&H replied, requesting that the Board treat D&H's previously filed reply to Riffin's petition for stay also as D&H's reply to Riffin's second petition to revoke because Riffin made the same arguments in both filings. On July 23, 2015, CNJ Rail Corporation and Eric Strohmeyer (collectively, CNJ) filed their own petition to revoke the exemption, to which Riffin replied on August 3, 2015, and to which D&H replied on August 12, 2015. On August 28, 2015, SMART/TD-NY filed its second petition to revoke, to which D&H replied on September 17, 2015.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 10502(d), the Board may revoke an exemption, in whole or in part, if the Board finds that regulation is necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101. See, e.g., Caldwell R.R. Comm'n—Exemption from 49 U.S.C. Subtitle IV, FD 32659 (Sub-No. 1), slip op. at 1-2 (STB served Nov. 26, 2014); Ind. Hi-Rail Corp.—Lease & Operation Exemption—Norfolk & W. Ry. Line Between Rochester & Argos, Ind., &—Exemption from 49 U.S.C. 10761, 10762, & 11144, FD 32162 et al., slip op. at 4 (STB served Jan. 30, 1998). The party seeking revocation has the burden of proof, and petitions to revoke must be based on reasonable, specific concerns. Caldwell R.R. Comm'n, FD 32659 (Sub-No. 1), slip op. at 1-2; I&M Rail Link, LLC—Acquis. & Operation Exemption—Certain Lines of Soo Line R.R., FD 33326 et al., slip op. at 7 (STB served Apr. 2, 1997), aff'd sub nom. City of Ottumwa v. STB, 153 F.3d 879 (8th Cir. 1998). For

example, the Board will revoke an exemption if a petitioner has demonstrated conduct that frustrates the RTP and the Board has determined that the reinstated regulatory provisions could ameliorate the alleged harms. Entergy Ark. Inc. v. Union Pac. R.R., NOR 42104 et al., slip op. at 16 (STB served Mar. 15, 2011); Rail Gen. Exemption Auth.—Miscellaneous Agric. Commodities—Pet. of G. & T. Terminal Packaging Co. to Revoke Conrail Exemption, 8 I.C.C.2d 674, 676-77 (1992), aff'd in pertinent part sub nom. Mr. Sprout, Inc. v. United States, 8 F.3d 118 (2d Cir. 1993); Minn. Commercial Ry.—Trackage Rights Exemption—Burlington N. R.R., 8 I.C.C.2d 31, 35-36 (1991) (the Board's revocation analysis "focuses on the sections of the RTP related to the underlying statutory section from which an exemption is sought").

As discussed below, none of the parties seeking revocation have shown that D&H has engaged in any conduct that frustrates the RTP as it relates to this proceeding. Nor have they demonstrated that regulation of the lines subject to this proceeding is necessary to carry out the RTP. Therefore, the petitions to revoke will be denied.

Riffin's Second Petition to Revoke.

In his second petition to revoke the exemption, Riffin reiterates the arguments made in his July 13, 2015 petition for stay. Riffin argues that D&H's June 15, 2015 supplement failed to comply with the verification requirements of 49 C.F.R. § 1152.50(d)(2). (Riffin Second Pet. to Revoke 3-4.) Riffin also argues that D&H's supplement contains false or misleading information. In particular, Riffin contends that D&H's statements that no environmental or historic reports are required under 49 C.F.R. §§ 1105.6(c)(6) and 1105.8(b)(3) are false with regard to four specific rail line segments included in the notice, because Riffin believes those

segments will actually be abandoned as a result of D&H's discontinuance of trackage rights. (Id. at 4-9.).[2] Riffin further argues that this proceeding is too controversial or complex for the streamlined class exemption procedures because of the uncertainty surrounding D&H's rights over those four line segments and Riffin's belief that local traffic may exist on certain lines proposed for discontinuance. (Id. at 9-11.)[3] Finally, Riffin argues that it was material error for the Board to publish the July 2, 2015 Federal Register notice containing D&H's corrected information because the Board had not previously issued an order explicitly removing this proceeding from abeyance. (Id. at 11-12.)

In response, D&H argues that there is no requirement that supplements be verified. (D&H Reply to Pet. for Stay 6.) D&H further contends that its notice was not false or misleading with respect to the four line segments because, although it was likely that Consolidated Rail Corporation

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2. The segments Riffin contends will be abandoned are: (1) a segment of the Raritan Valley Line in Warren County, N.J., from approximately MP 66.53 to MP 72.23; (2) a segment of the Raritan Valley Line in Hunterton County, N.J., from approximately MP 52.24 to 60.1; (3) a segment of United States Railroad Administration Line Code 0503A (Line 0503A) between MP 98.0 and MP 119.3 in Catasauqua and Lehighton, Pa.; and (4) a segment of Line 0503A between MP 96.6 and MP 98.0 in Catasauqua, Pa. (Riffin Second Pet. to Revoke 5-9.)

3. On June 8, 2015, Riffin filed a motion to compel discovery, requesting the Board to compel D&H to provide Riffin with information about traffic on the lines subject to this proceeding. In a decision served August 10, 2015, the Board denied Riffin's motion to compel (2015 Discovery Decision).

(Conrail) had abandoned those segments decades earlier, D&H had included them in this proceeding "out of an abundance of caution." (Id. at 7-8.) D&H further argues that its abundance of caution in including those segments does not create controversy or complexity, and that Riffin did not support his allegations of local traffic on certain lines or establish that the Board erred in publishing the July 2, 2015 Federal Register notice. (Id. at 10.).

As the Board previously found, D&H's verification of its original filing also covers its supplement and, thus, D&H did not need to again comply with the Board's verification requirements in its supplemental filing. 2015 Stay Denial, slip op. at 2-3 (citing Ill. Cent. R.R.— Aban.—in Grenada Cty., Miss., AB 43 (Sub-No. 182X) (STB served Feb. 18, 2009); Del. & Hudson Ry.—Aban. Exemption—in Albany Cty., N.Y., AB 156 (Sub-No. 26X) (STB served June 1, 2007)). D&H has therefore met the Board's verification requirements at 49 C.F.R. § 1152.50(d)(2).

Riffin also fails to support his argument that D&H's supplement contains false or misleading information with regard to the requirements for environmental and historic reports over the four lines Riffin believes will be abandoned as a result of this proceeding. Even if Riffin were correct that this proceeding would leave D&H as the last carrier on those lines,[4] his argument is unpersuasive. As discussed in the

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4. In fact, for at least two of the four lines in question, the Board has resolved consummation of the final carrier's abandonment or discontinuance in other proceedings. See R.J. Corman R.R. Co./Allentown Lines, Inc.—Aban. Exemption—in Lehigh Cty., Pa., AB 550 (Sub-No. 3X), slip op. at 2 n.4 (STB served Aug. 20, 2015) (noting that, with respect to Line 0503A between MP 98.0 and MP 119.3, Conrail was granted authority to abandon that segment in a

Board's 2015 Stay Denial decision, slip op. at 3-4, the four line segments to which Riffin refers were all authorized for abandonment under the Northeast Rail Service Act of 1981 (NERSA). NERSA required the agency "to grant without examination, any Conrail abandonment unless an offer of financial assistance [was] timely filed." Conrail Abans. Under NERSA, 365 I.C.C. 472, 475 (1981); see also 45 U.S.C. § 748 (absent a timely offer of financial assistance, NERSA abandonment applications filed by Conrail "shall be granted"). Therefore, the agency lacks discretion to consider environmental or historic factors in rendering abandonment decisions under NERSA. Accordingly, the Board's environmental rules specifically exclude NERSA abandonments from the agency's environmental and historic reporting requirements. See 49 C.F.R. § 1105.5(c)(1) (environmental laws are not triggered for NERSA abandonments); id. § 1105.8(a) (applicant must submit a historic report only if proposing an action identified as subject to environmental review under 49 C.F.R. § 1105.6(a) or (b), or an action under § 1105.6(c) that will result in the lease, transfer, or sale of a railroad's line, sites, or structures).[5]

1982 agency decision and D&H was granted authority to discontinue its trackage rights over that segment in a 1984 agency decision), appeal docketed, No. 15-3501 (3rd Cir. Oct. 16, 2015); Consol. Rail Corp.—Aban.—in Lehigh Cty., Pa., AB 167 (Sub-No. 623N), slip op. at 2 (STB served Mar. 15, 2016) (recognizing Conrail's official consummation of its abandonment of Line 0503A between milepost 96.709 and milepost 98.0), aff'd sub nom. Riffin v. STB, No. 16-1147 (D.C. Cir. May 17, 2016) (summary affirmance).

5. Section 1105.6(a) classifies the types of STB regulatory proceedings that typically require preparation of an Environmental Impact Statement, namely, rail constructions. Section 1105.6(b) describes the types of proceedings that

In short, NERSA required the agency to allow lines subject to NERSA to exit the interstate rail network "quickly," without environmental analysis—a constraint that would be defeated if the agency required environmental and historic documentation when a line covered by NERSA was subject to a discontinuance of trackage rights in addition to an abandonment. See Conrail Abans. Under NERSA, 365 I.C.C. at 475, 477. Moreover, the Board has previously concluded that the order of NERSA abandonments and discontinuances does not affect whether or not an environmental or historic review is triggered. 2015 Stay Denial, slip op. at 3-4. Riffin has therefore failed to show that D&H has filed false or misleading information with regard to the need for environmental and historic reports.

Riffin's argument that this proceeding is too controversial or complex to allow use of the class exemption procedures similarly fails. As the Board has found, the deficiencies in D&H's original notice of exemption were corrected with its June 15, 2015 supplement. Id. at 4. In addition, to the extent that D&H may be uncertain of the legal status of any of its trackage rights over line segments subject to this proceeding, it is appropriate for D&H to seek discontinuance authority here to resolve the status of those lines. See id. That does not create the kind of controversy that could lead to revocation. With regard to Riffin's contention about possible local traffic

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typically require a more limited Environmental Assessment (EA), and specifies that preparation of an EA is required for abandonments other than NERSA abandonments. Section 1105.6(c) sets out the types of cases that may or may not require a case-specific environmental or historic review, depending on the potential for significant environmental impacts. Abandonments or discontinuances filed under NERSA are not included in § 1105.6(c).

on the lines, the Board properly determined that Riffin's claims about local traffic or shipper activity—which were presented without any concrete supporting evidence—were too speculative to justify discovery related to any potential local traffic or to justify tolling the deadline to file offers of financial assistance. See 2015 Discovery Decision, slip op. at 4; 2015 Stay Denial, slip op. at 7. Indeed, consistent with our regulations, D&H has certified that there has been no local traffic on any of the lines at issue for at least two years, see 49 C.F.R.§ 1152.50(b), and no evidence to the contrary has been presented here. Riffin's mere speculation otherwise does not create the kind of controversy or complexity that would support revoking the exemption in this case.

Finally, we reject Riffin's argument that the Board's publication of the July 2, 2015 Federal Register notice was material error because the Board did not explicitly remove this proceeding from abeyance. That Federal Register notice is the "further order of the Board" that removed the proceeding from abeyance, in accordance with the May 13, 2015 order. See 2015 Stay Denial, slip op. at 4-5 (citing N. Shore R.R.—Acquis. & Operation Exemption—PPL Susquehanna, LLC, FD 35377 (STB served June 3, 2010) (placing notice publication and effectiveness of exemption in abeyance pending further Board action); N. Shore R.R.—Acquis. & Operation Exemption—PPL Susquehanna, LLC, FD 35377 (STB served Dec. 14, 2012) (publishing notice of exemption in Federal Register to remove proceeding from abeyance)).

CNJ's Petition to Revoke.

In its July 23, 2015 petition to revoke, CNJ asserts that this proceeding is too controversial to be handled under the class exemption procedures. In particular, CNJ argues that D&H has misrepresented the nature of its rights over the lines

subject to this proceeding, namely, whether D&H's rights are "overhead" (as opposed to "local") trackage rights and whether they are indeed trackage rights at all. (CNJ Pet. to Revoke 4-11.) CNJ also raises concerns that D&H's revised New Jersey and Pennsylvania state maps do not accurately portray the routes D&H seeks to discontinue, and that none of the maps include a scale. (Id. at 13-16.) CNJ further argues that, to adjudicate this transaction, the Board will need to investigate the impact of all related Conrail sales and abandonments under NERSA on the lines subject to this proceeding to determine if D&H's notice will result in abandonments. (Id. at 17-19.) Finally, CNJ argues that D&H's notice contains several false statements, including statements regarding the nature of D&H's rights, incorrect references to railroads that no longer exist, the omission of proper references to existing railroads, incorrect statements that certain lines had not been used in almost 30 years, and incorrect references to a line segment that D&H states has been removed but that CNJ believes has not been removed. (Id. at 20-28.)

In response to CNJ's petition, D&H argues that its notice of exemption, as supplemented, does not contain false or misleading information and that D&H properly used the class exemption here. (D&H Reply to CNJ Pet. to Revoke 3-4.) D&H argues that the evidence cited by CNJ is consistent with D&H's representation that it has overhead trackage rights over 660 of the 670 miles that are being discontinued. (Id.) D&H further asserts that, despite CNJ's speculation that D&H's rights over the lines might be broader than mere trackage rights, CNJ has provided no evidence to support this theory. (Id. at 4.) D&H also asserts that, while there may be some uncertainty as to the nature of all of D&H's rights on these lines, and whether some of the rights at issue were previously removed, D&H properly included those segments in its notice of exemption to ensure that it has the necessary

authority to extinguish any dormant trackage rights it might have retained on former Conrail line segments. D&H disputes that there is a need for the Board to examine all Conrail sales and abandonments on segments related to this proceeding. (Id. at 3-4.) In addition, D&H argues that the maps submitted with its notice "sufficiently correspond with the route descriptions and adequately depict the subject rail lines," that any inaccuracies are de minimis and have not misled any parties, and that the level of detail and accuracy of its maps is at least consistent with the Board's custom and practice. (Id. at 4-5.) Finally, D&H argues that its notice does not contain any false or misleading information. (Id. at 6-7.)

CNJ's request for revocation will be denied. CNJ has not demonstrated that D&H has misrepresented the rights it has over the lines subject to this proceeding. As D&H explains, the evidence of record is consistent with D&H's verified representations that its rights consist mostly of overhead trackage rights. (See D&H Reply to Pets. to Revoke Exemption, V.S. Clements, Ex. 2 at 5, May 8, 2015 (providing that "D&H shall not perform any local freight service on the Joint Lines" except in limited circumstances).) In addition, CNJ presents little more than speculation to support its claim that the rights granted to D&H via the 1975 Final System Plan (FSP) (pursuant to which the Conrail system was created) and in D&H's related 1979 Agreement with Conrail may be greater than the trackage rights D&H now seeks to discontinue. (CNJ Pet. toRevoke 4-8.) CNJ alleges that, while the FSP apparently intended to convey trackage rights, the 1979 Agreement's use of the terms "joint lines" and "operating rights" instead of "trackage rights" calls into question the rights that were conveyed to D&H. (Id. at 4-5.) However, the terms of the 1979 Agreement are not inconsistent with a grant of trackage rights or with D&H's

verified representations in this proceeding.[6] Mere speculation that D&H may have acquired additional rights[7] is insufficient to show that D&H in fact received greater rights or to warrant revocation of the exemption here.[8]

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6. The 1979 Agreement states that "[t]he parties have acquired the right to conduct rail operations over certain lines of railroad hereinafter described ('Joint Lines') as provided in the Final System Plan," that the "[t]he Joint Lines were conveyed to Conrail subject to operating rights granted to D&H," and prescribes that D&H "shall not perform any local freight service" on the Joint Lines except in limited circumstances. (See D&H Reply to Pets. to Revoke, V.S. Clements, Ex. 2 at 1, 5, May 8, 2015.)

7. CNJ fails to specify what alleged "excess" rights D&H may have acquired. However, to the extent CNJ suggests that such additional rights included rights within the Oak Island intermodal facility or Oak Island Yard (see CNJ Pet. to Revoke 7-10), those rights would be outside the scope of this proceeding, which involves only D&H's discontinuance of the 670 miles of trackage rights specifically listed in its exemption notice and supplement. See 2015 Discovery Decision, slip op. at 4.

8. CNJ also argues that, because D&H's rights over these lines were conveyed as part of the FSP, the Special Court is the entity with exclusive jurisdiction to determine D&H's rights. (CNJ Pet. to Revoke 9-10.) The Special Court was a three-judge judicial panel established in 1974 to oversee "all judicial proceedings with respect to the final system plan." 45 U.S.C. § 719(b)(1). The Special Court was abolished in 1996, and the jurisdiction of the Special Court was assumed by the United States District Court for the District of Columbia. Id. § 719(b)(2). However, this proceeding does not require the agency

We also reject CNJ's argument that D&H's revised notice, and specifically the maps D&H includes in its notice, does not comply with the Board's regulations. (See CNJ Pet. to Revoke 12; Riffin Reply to CNJ Pet. to Revoke 2-7.) While CNJ and Riffin raise concerns about D&H's maps, our regulations are to be interpreted "liberally to secure just, speedy and inexpensive determination of the issues presented." 49 C.F.R. § 1100.3. Here, the Board required D&H to amend its original notice because it had deficiencies. We find that the maps included with D&H's revised notice are sufficient to put the public on notice as to the location of the lines subject to this proceeding, and there is no evidence of any deficiencies that have resulted in harm or prejudice to any interested parties.

Moreover, although CNJ (like Riffin) has raised concerns that the discontinuance of these lines will actually result in abandonments because of previous Conrail line sales and abandonments, it has presented no concrete basis for such concerns. Indeed, with respect to the only example proffered by CNJ (the portion of Line 0503A between milepost 96.7 and milepost 98.0), the Board recently determined that Conrail, not D&H, had authority to consummate the NERSA abandonment of that line segment. See Consol. Rail Corp., AB 167 (Sub-No. 623N), slip op. at 2. With respect to CNJ's assertion that the Board must review all Conrail sales and abandonments under NERSA on lines subject to this

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or a court to determine what rights may (or may not) have been conveyed to D&H under the FSP. Rather, the only matter we are considering is whether D&H properly invoked the class exemption to discontinue whatever trackage rights it had on these lines. Thus, CNJ fails to show that there are issues here that should be addressed by the D.C. District Court as the successor to the Special Court.

proceeding, that argument is unsupported by any evidence. As previously noted, mere speculation is insufficient to meet the burden of proof required for the Board to revoke an exemption.

We also find unpersuasive CNJ's suggestion that D&H made false or misleading statements (or is "judicially estopped" from arguing) that D&H "'does not appear currently to have trackage rights over [certain] line segments previously abandoned by Conrail,'" but "'include[d] them [in its exemption notice] out of an abundance of caution.'" (CNJ Pet. to Revoke 19 (quoting D&H Suppl. to Verified Notice of Exemption 2).) As stated above, to the extent D&H is uncertain of the legal status of any of its trackage rights over line segments subject to this proceeding, it is appropriate for D&H to seek discontinuance authority here to resolve the status of those lines. Furthermore, D&H's uncertainty as to its rights over some portions of the lines subject to this proceeding does not make its statements false or bar D&H from making them.

CNJ's remaining arguments that D&H's revised notice contains false statements also fail to meet the standard for revoking the exemption. For example, CNJ argues that D&H made false statements by referring to Pocono Northeast Railway, which CNJ argues no longer exists, as the owner of certain lines, and by failing to refer to R. J. Corman/Allentown Lines Inc. and New Jersey Transit, which CNJ argues are current owners of certain lines over which D&H has trackage rights subject to this proceeding. (CNJ Pet. to Revoke 20-22.) However, D&H correctly notes that the Board's regulations at 49 C.F.R. § 1152.50 do not require a notice of exemption to address the current ownership of the

lines at issue. (D&H Reply to CNJ Pet. to Revoke 6.)[9] D&H's references to the former owners of the lines and D&H's omission of certain current owners of the lines are therefore not false statements warranting revocation of the exemption.

In addition, CNJ submits photographs purporting to show D&H operations in 2010 and 2011 to counter D&H's statements that it has not operated on portions of these lines in nearly 30 years. However, D&H's original notice, filed on March 19, 2015, included certification that no local operations had been conducted on any of the lines in at least two years, as required by 49 C.F.R. § 1152.50(b). Thus, even if CNJ's evidence actually depicts local operations at the alleged time, operations in 2010 and 2011 would not invalidate D&H's certification nor support revocation of the exemption.

Similarly, CNJ asserts that D&H's statement that "the line West of Glen Gardner [previously] has been removed" is false. (CNJ Pet. to Revoke 22.) In response, D&H argues that

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9. See also Union Pac. R.R.—Aban. & Discontinuance of Trackage Rights Exemption— in L.A. Cty., Cal., AB 33 (Sub-No. 265X), slip op. at 3 (STB served Dec. 16, 2008) (denying petition to revoke notice of exemption to abandon and discontinue trackage rights where petition was based on notice's failure to identify who had residual common carrier obligation, because such information is not required by 49 C.F.R. § 1152.50(d)(2)); N.H. Cent. R.R.—Lease & Operation Exemption—Line of the N.H. Dept. of Transp., FD 35022, slip op. at 3 (STB served Dec. 11, 2007) (notice of exemption to lease and operate rail line that did not refer to existing operators on the line was not false or misleading because such information is not required by 49 C.F.R. § 1150, subpart E).

CNJ has not provided evidence to support its assertion that this line is still intact, and that, in any event, the physical status of this line is immaterial to the issues involved here. (D&H Reply to CNJ Pet. to Revoke 6-7.) Even if there is some doubt as to the physical status of this line, D&H's statement that it believes that line segment may have been previously removed is not the kind of false statement that would support revoking the exemption. In any event, CNJ has not presented any concrete evidence demonstrating the physical status of this line segment.

SMART/TD-NY's Second Petition to Revoke.

In its second petition to revoke, filed August 28, 2015, SMART/TD-NY reiterates the argument made in its first petition to revoke that D&H's use of the two year out-of-service class exemption is improper in this matter because the exemption permits D&H to discontinue overhead operations on the subject lines. SMART/TD-NY also argues that, in the 2015 Revocation Decision denying its first petition to revoke, the Board erred in finding that D&H sought discontinuance of trackage rights but not discontinuance of "overhead traffic" on the lines. (SMART/TD-NY Second Pet. to Revoke 11-12.) Alleging that the Board has now espoused a "novel theory" that a party may discontinue trackage rights, but continue overhead service, on a subject line, SMART/TD-NY argues that the 2015 Revocation Decision has created such confusion that revocation of D&H's exemption is required. (Id. at 13.) SMART/TD-NY also contends that revocation is warranted because the trackage rights at issue were established by the FSP and approved by Congress, and thus the Board may not allow the class exemption to be used to discontinue these trackage rights. (Id. at 14.) Finally, SMART/TD-NY suggests that "critical information has become available" to warrant revocation of the class exemption, but it does not specify what this information is. (Id. at 4.)

D&H argues in reply that SMART/TD-NY has failed to show that revocation is necessary to carry out the RTP and that "Congress made no exception to the RTP for rights conferred in the FSP."[10] (D&H Reply to SMART/TD-NY Pet. to Revoke 2, 5.)

SMART/TD-NY's petition will be denied. Its suggestion that the 2015 Revocation Decision created a "novel theory," thereby warranting revocation, misunderstands the Board's decision. The Board did not intend to imply that D&H will continue to operate overhead traffic on these lines even though its trackage rights have been discontinued. Nor did the Board suggest in any way that its statutes and regulations may be used to discontinue mere "rights," without also discontinuing "operations" or "service" pursuant to those rights, over a line.[11] Instead, we simply intended to clarify

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10. D&H also requests we (1) strike SMART/TD-NY's petition as redundant of its earlier petition to revoke, or (2) consider SMART/TD-NY's petition to revoke as a petition for reconsideration and reject the petition because it was filed after the deadline for petitions for reconsideration and does not meet the standard for reconsideration. (D&H Reply to SMART/TD-NY Pet. to Revoke 2-4.) Because SMART/TD-NY fails to meet the standard for revocation, we deny the petition on those grounds and need not consider D&H's alternative arguments.

11. SMART/TD-NY also fails to support its apparent argument that 49 U.S.C. § 10903 does not provide for the discontinuance of trackage rights. (See SMART/TD-NY Pet. to Revoke 8, 9.) Indeed, in one of the proceedings it cites, the agency expressly found that § 10903 covered trackage rights. See Exemption of Out of Serv. Rail Lines, 366 I.C.C. 885, 891 (1983) ("The type of regulation governing the

that, consistent with 49 C.F.R. § 1152.50(b) and in contrast to SMART/TD-NY's earlier claims, local traffic on these lines (or lack thereof) is the focus of this proceeding, not overhead traffic, which can be rerouted. 2015 Revocation Decision, slip op. at 6 ("[C]onsistent with the class exemption regulations, D&H seeks to discontinue trackage rights over which, it certifies, there has been no local service in at least two years and any overhead traffic can be rerouted."). Thus, the 2015 Revocation Decision has not created confusion requiring the revocation of this exemption.

Additionally, as noted in the 2015 Revocation Decision, D&H has not erred in using the two-year out-of-service class exemption for the discontinuances subject to this proceeding. SMART/TD-NY provides no justification for its apparent belief that the class exemption cannot be used where overhead operations will cease over the line(s) subject to discontinuance. In fact, although our analysis in cases such as

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discontinuance of rail service and of trackage rights parallels that applicable to abandonments. Indeed, all three are covered by the same statutory and regulatory provisions."), vacated and remanded on other grounds sub nom. Ill. Commerce Comm'n v. ICC, 787 F.2d 616 (1986), initial decision reaff'd sub nom. Exemption of Out of Serv. Rail Line, 2 I.C.C.2d 146 (1986). That is consistent with the interpretations of § 10903 by this agency and by the courts, as well as with the agency's regulations. See, e.g., Howard v. STB, 389 F.3d 259, 268 (1st Cir. 2004) (stating "when a rail carrier intends to abandon its underlying rail lines or discontinue rail transportation or trackage rights over a line, it must seek permission by filing an application with the STB" and citing 49 U.S.C. § 10903); 49 C.F.R. § 1152.50(a)(1) (stating that "[a] proposed abandonment or discontinuance of service or trackage rights over a railroad line is exempt from the provisions of 49 U.S.C. § 10903 if the criteria in this section are satisfied").

this is focused on the cessation of local operations, the agency has long recognized that the class exemption may impact overhead operations and that this does not pose a concern so long as all overhead traffic can be rerouted. Exemption of Out of Serv. Rail Line, 2 I.C.C.2d at 150, 156; see also 49 C.F.R. § 1152.50(b). Indeed, in promulgating the class exemption, the ICC observed that "overhead traffic [does] not affect the ultimate decision whether to permit an abandonment." Exemption of Out of Serv. Rail Line, 2 I.C.C.2d at 156. That logic is equally applicable to trackage rights discontinuances, and nothing in the relevant statutes or rule suggests otherwise. See 49 U.S.C. § 10903(a)(1); id. § 10502; 49 C.F.R. § 1152.50. Here, D&H complied with the Board's requirements by certifying that any overhead operations (limited to approximately 115 miles of the 670 miles of subject trackage rights) will be rerouted. Thus, the class exemption process was available in this case.

SMART/TD-NY's contention that D&H's trackage rights cannot be discontinued via the class exemption process because they were established under the FSP also lacks merit. SMART/TD-NY argues that, because the FSP was "set up by the Congress," the streamlined requirements of 49 C.F.R. § 1152.50 are inapplicable here. (SMART/TD-NY Second Pet. to Revoke 14.) But it has presented no evidence that Congress intended to prohibit use of the class exemption process for rights that originated in the FSP.[12] To treat these rights differently simply because they were part of the FSP would in

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12. In fact, where Congress has intended to remove certain types of transactions from our regulatory review, it has done so explicitly. See, e.g., Conrail Abans. Under NERSA, 365 I.C.C. at 472 (implementing exemption to abandonment regulations that required the ICC to grant, without review, any abandonment applications filed by Conrail unless an offer of financial assistance was filed).

fact go against the RTP, which requires us to reduce regulatory barriers to exit from the industry. See 49 U.S.C. § 10101(7).

Finally, with regard to the "critical information" that SMART/TD-NY claims has become available, SMART/TD-NY does not specify what this information is or present concrete evidence of it. Elsewhere in its petition, SMART/TD-NY asserts that its "members advise at least three of the nine lines embraced in the Board's notice handle active D&H freight traffic." (SMART/TD-NY Second Pet. to Revoke 7.) Assuming this is the information to which SMART/TD-NY refers, the mere allegation of traffic—without any supporting evidence or indication as to whether the traffic is local or overhead—is not sufficient to support revocation of the exemption.

It is ordered:

1. Riffin's second petition to revoke is denied.

2. CNJ's petition to revoke is denied.

3. SMART/TD-NY's second petition to revoke is denied.

4. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.