

## **APPENDIX**



**UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

C.A. No. **16-4435**

ERIC S. STROHMEYER; CNJ RAIL CORPORATION,  
Petitioners

VS.

SURFACE TRANSPORTATION BOARD, ET AL.,  
Respondents

(Surface Transportation Board Case No. FD 35873)

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

(13) 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;

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

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

(16) 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;"

(17) Strohmeyer's "Motion for Leave to File an Errata Filing,"

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

(19) 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;"

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

(21) Riffin's "Motion for the Court's Indulgence;"

(22) CNJ Rail Corporation's ("CNJ Rail") response to Respondents' motion to dismiss;

(23) CNJ Rail's motion to summarily vacate the STB's decisions;

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

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

(26) CNJ Rail's reply in support of its motion for summary vacatur; and

(27) 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., 43 F. 3d 771, 775 (D.C. Cir. 2005); see Maroni v. Pemi-Baker Reg'l Sch Dist., 346 F. 3d 247, 253 (1<sup>st</sup> 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 Comme'ns, Inc. V. FCC503 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. 16-43623; (b) Riffin's motion to modify the briefing schedule; (c) Riffin's motion for permission to obtain counsel for Petitioner CNJ Rail Corporation; (d) Respondents' request to impose a moratorium on further pleadings in this case pending the resolution of the motion to dismiss; and (e) Petitioners' 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 | William A. Mullins, Esq.  |
| James Riffin              | Anika S. Cooper, Esq.     |
| Evelyn G. Kitay, Esq.     | Carolyn J. Chachkin, Esq. |
| Craig M. Keats, Esq.      | Amber L. McDonald, Esq.   |
| Robert B. Nicholson, Esq. | Andrew L. Jiranek, Esq.   |
| Steven J. Mintz, Esq.     |                           |

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

No. 16-4435

ERIC S. STROHMEYER; CNJ RAIL CORPORATION,  
Petitioners

VS.

SURFACE TRANSPORTATION BOARD;  
UNITED STATES OF AMERICA  
Respondents

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO,  
CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR.,  
VANASKIE, SHWARTZ, KRAUSE, RESTREP, BIBAS AND  
SCIRICA<sup>1</sup> 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 Court en banc, is **denied**.

BY THE COURT

s/ Theodore A. McKee

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Circuit Judge

July 3, 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. 16-4435**

**ERIC S. STROHMEYER; CNJ RAIL CORPORATION,  
Petitioners**

**VS.**

**SURFACE TRANSPORTATION BOARD;  
UNITED STATES OF AMERICA  
Respondents**

**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.*

Case # 16-4435  
Norfolk Southern Acquisition

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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 (3<sup>rd</sup> Cir. 1977);

*Wagner Elec. Corp. v. Volpe*, 466 F. 2d 103 (3<sup>rd</sup> 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).”<sup>2</sup>

B. Petitioner further argued that the STB lacked the jurisdiction to determine the nature of the

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2 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.*

Operating Rights conveyed to the D&H by the Final System Plan.<sup>3</sup>

C. And Petitioner argued that were the STB's D&H decision (3<sup>rd</sup> 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

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3 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.

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):<sup>4</sup>

**[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 (3<sup>rd</sup> Cir. Case No. 16-4362), the

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4. A 3<sup>rd</sup> Circuit case.

STB's D&H decision must be vacated and (B) that since this proceeding and the D&H proceeding are intricately intertwined, 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. During the proceedings before the Agency, within their replies to the Respondents' Motion to dismiss, and again in their respective Motions to summarily vacate the Agency's decisions, the Petitioners have repeatedly challenged whether the STB had the requisite jurisdiction to reach any of the critical findings of fact (which findings were necessary for the Agency to adjudicate the proceedings under review) regarding the nature of the rights the D&H was seeking to alter.

14. Since the Agency's jurisdiction was undisputedly challenged before this Court, **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. This Court decidedly has the jurisdiction, (and the duty), to determine whether it was error for the STB to adjudicate the D&H's discontinuance proceeding. *Arizonians* at 73; *U.S. v. Corrick*, 298 U.S. 435 at 440.

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. What is at issue is whether or not the STB's decisions exceeded the Agency's jurisdiction by impermissibly intruding into exclusive jurisdiction of the U.S. District Court for the D.C. District (sitting as the Special Court). 45 U.S.C. §719(b)(2).

17. When the STB determined the nature of the Operating Rights conveyed to the D&H, it committed a serious error by

exceeding its jurisdiction and by infringing upon the exclusive jurisdiction of the Special Court. 45 U.S.C. §719(e)(2), 5 U.S.C. §706(2)(C).

18. 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).] That duty remains even if this Court determines that the Petitioners lack standing to be in this Court. *Arizonians* at 73.

(Paragraphs 19, 20 intentionally omitted)

#### **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,<sup>5</sup>

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5. "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."

55-56,<sup>6</sup> 59-60,<sup>7</sup> and

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6. **“Due Process** From the onset of the *NS Acquisition* proceeding, the Board’s actions were plagued by *mistakes and 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.

7. “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 22<sup>nd</sup>, 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

60,<sup>8</sup> 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

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in the *Federal Register*.

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

8. 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.

record that the purported discontinuances in this proceeding are significantly larger than what Norfolk Southern indicated they would be in the *NS Acquisition*.

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.”]<sup>9</sup>

26. Petitioners, in the *Norfolk Southern Acquisition* proceeding, stated, multiple times, that Petitioners had a desire to file “a **Request for Condition** if the application is approved.” See Ex. B at 2, Doc. 003112541660 at 111 [CNJ’s January 21, 2015 filed Objections and Request for Condition], and Ex. B’s Verified Statement of Michael A. Nelson at 1, 2, 6, 7. Doc. 003112541660 at 131, 132, 136, 137. See also Ex. C at 3. Doc. 003112541660 at 188. [CNJ’s June 4, 2015 filed Petition

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9. See Ex. A 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.] Doc. 003112541660 at 99, 100, 101, 103, 104.

for Reconsideration.] And see Ex. D 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 procedural rights.].<sup>10</sup>**

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10. **P. 1:** "(1) publication of notice of the Application in the *Federal Register* did not occur by the end of the 30<sup>th</sup> 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 resubmitting 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

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.)

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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.

- 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 (3<sup>rd</sup> Cir. 1977); *Wagner Elec. Corp. v. Volpe*, 466 F. 2d 103 (3<sup>rd</sup> 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,

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