

Before the
Surface Transportation Board

JR - 2

DOCKET NO. AB-167 (Sub-No. 623N)

239472

CONSOLIDATED RAIL CORPORATION – ABANDONMENT –
IN LEHIGH COUNTY, PA

ENTERED
Office of Proceedings
November 2, 2015
Part of
Public Record

JAMES RIFFIN’S MOTION TO STRIKE

1. James Riffin (“**Riffin**”) herewith moves to strike the **October 5, 2015** dated letter from Conrail, which was entered into the Record on **October 13, 2015**, which Letter purported to give notice of Conrail’s consummation of abandonment of the line of railroad that is the subject of the above entitled proceeding, as of **September 18, 2015**. In support hereof, Riffin states:

BACKGROUND INFORMATION – LINE CODE 503A

2. **Line Code 503A**, is the former Lehigh Valley Railroad main line of railroad that lies between **MP 93.3, in Allentown, PA, and MP 119.3, in Lehigh, PA.**
3. Conrail acquired Line Code 503A pursuant to the Final System Plan.
4. Pursuant to the Final System Plan, and pursuant to an **April 25, 1979 Operating Agreement** between Conrail and the D&H, the D&H was granted trackage rights over Line Code 503A.
5. A copy of the April 25, 1979 Operating Agreement was appended to Riffin’s Initial Comments, JR-2, filed May 20, 2015, in *R.J. Corman Railroad Company / Allentown Lines, Inc. – Abandonment Exemption – In Lehigh County, PA*, STB Docket No. AB 550 (Sub. No. 3X).

6. The April 25, 1979 Operating Agreement is incorporated by reference herein, as if fully reproduced herein.

7. The discontinuance of the D&H's trackage rights over Line Code 503A, is the subject of *Delaware and Hudson Railway Company, Inc. – Discontinuance of Trackage Rights Exemption – In NY, PA, NJ, MD, VA and DC*, STB Docket No. AB-156 (Sub-No. 27X).

AB 167 (Sub. No. 451N) – MP 98.0 to MP 119.3

8. The portion of Line Code 503A that lies between LVRR **MP 98.0 and MP 119.3**, was the subject of a Conrail abandonment application that was filed on **November 30, 1981**, and was docketed **AB 167 (Sub. No. 451N)**. Abandonment authority was granted on **March 11, 1982**, over the following segment of LVRR Main Line:

“[B]etween Catasauqua (milepost 98.0) and Leighton (sic) (milepost 119.3) in Lehigh and Carbon Counties, PA.”

AB 167 (Sub. No. 623N) – MP 96.6 to MP 98.0

9. The portion of Line Code 503A that lies between LVRR **MP 96.6 and MP 98.0**, was the subject of a Conrail abandonment application that was filed on **May 25, 1984**, and was docketed **AB 167 (Sub. No. 623N)**. Abandonment authority was granted on **July 19, 1984**, over the following segment of LVRR Main Line:

“The Leighton Secondary Track in Catasauqua from 200 feet west of the west side of Race Street Bridge, UG #96.59 (approximately Milepost 96.6), to point of prior abandonment (approximately Milepost 98.0);”

10. Conrail's abandonment authority in AB 167 (Sub. No. 623N), was subject to one condition:

“(2) If the authority granted by this certificate and decision is exercised, Conrail shall advise this Commission in writing, immediately after abandonment of the line of railroad, of the date on which the abandonment actually took place.”

11. Prior to Conrail’s October 5, 2015 Letter (filed October 13, 2015), Conrail had never filed notice with either the Interstate Commerce Commission, or the Surface Transportation Board (“STB”), giving notice in writing, that it had consummated abandonment of the Line Code 503A segment between MP 96.6 and MP 98.0.

AB 550 (Sub. No. 3X) – MP 93.3 to MP 96.6

12. The portion of Line Code 503A that lies between LVRR **MP 93.3** (the beginning point of Line Code 503A, in Allentown, PA) **and MP 96.6**, was the subject of a **1996** Conrail line sale, that was docketed **FD 35897**. This portion of Line Code 503A was sold to R.J. Corman Railroad Company / Allentown Lines, Inc., the Applicant in AB 550 (Sub. No. 3X).

13. In *R.J. Corman Railroad Company / Allentown Lines, Inc. – Abandonment Exemption – In Lehigh County, PA*, STB Docket No. AB 550 (Sub. No. 3X), R.J. Corman sought, and received, in a decision served on **August 20, 2015**, authority to abandon the portion of Line Code 503A that lies between MP 93.3 and MP 96.6.

ARGUMENT

14. It should go without saying, that Notice of the Consummation of Abandonment Authority, may only be given by an entity that has the requisite legal right to effect abandonment of a line of railroad, and to give such notice.

15. The question before the STB, is:

Did Conrail, on September 18, 2015, have the legal right to consummate abandonment of that portion of Line Code 503A that lies between MP 96.6 and MP 98.0?

16. Riffin argues that as of **June 16, 1999**, Conrail no longer had the requisite legal authority to abandon any portion of the lines of railroad that it had prior to June 16, 1999.

17. Riffin further argues that as of June 16, 1999, the only legal entity / carrier, that could effect / consummate abandonment of any portion of Line Code 503A, is Norfolk Southern Railway Company, a carrier.

18. In FD 33388, reported in 3 S.T.B. at 196, the STB granted authority to divide Conrail into two parts.

19. One part, known as the New York Central Lines LLC (“**NYC**”), was to be composed of those lines of railroad formerly owned and operated by the New York Central Railroad. Control of the NYC part, was to be vested in CSX Corporation, a non-carrier. Operation of the NYC part was to be performed by CSX Transportation, a carrier.

20. The other part, known as the Pennsylvania Lines LLC (“**PRR**”), was to be composed of those lines of railroad formerly owned and operated by the Pennsylvania Railroad. Control of the PRR part, was to be vested in Norfolk Southern Corporation, a non-carrier. Operation of the PRR part was to be performed by Norfolk Southern Railway Company, a carrier.

21. In a decision served on **July 20, 1998** (Decision No. 89), the STB ordered:

“8. Except as otherwise provided in this decision, NYC and PRR shall have, upon consummation of the authorized control and the NYC / PRR assignments, **all of such right, title, interest in and other use of such assets as CRC itself had,** notwithstanding any provision in any law, agreement, order, document, or otherwise, purporting to limit or prohibit CRC’s unilateral transfer or assignment of such assets to another person or persons, or purporting to affect those rights, titles, interests, and uses in the case of a change of control.” Bold added.

9. Except as otherwise provided in this decision, CSXT and NSR may conduct, pursuant to 49 U.S.C. 11321, **operations** over the routes of Conrail as provided for in the application, including those presently operated by CRC under trackage rights or leases (including **but not limited to** those listed in Appendix L to the application), **as fully**

and to the same extent as CRC itself could, notwithstanding any provision in any law, agreement, order, document, or otherwise, purporting to limit or prohibit CRC's unilateral assignment of its operating rights to another person or persons, or purporting to affect those rights in case of a change in control." Bold added.

22. On **June 16, 1999**, CSX Transportation and Norfolk Southern Railway Company, gave notice that they had consummated the division of Conrail, and that as of June 16, 1999, the NYC lines of railroad would be operated by CSX Transportation, and that the PRR lines of railroad would be operated by Norfolk Southern Railway Company.

23. Riffin argues that pursuant to the July 20, 1998 decision in FD 33388:

A. All **lines of railroad** that Conrail owned prior to June 16, 1999, except those in the Shared Assets areas, were assigned / conveyed to either CSX Transportation, a carrier, or to Norfolk Southern Railway Company, a carrier, and that following June 16, 1999, the only **lines of railroad** that Conrail had operating authority over, were those contained within the three Shared Assets Areas.

B. All **assets other than lines of railroad**, that were **outside** the three Shared Assets Areas, that Conrail owned prior to June 16, 1999, were assigned / conveyed to either NYC or to PRR, both non-carriers, and that following June 16, 1999, Conrail **owned no assets** outside of the three Shared Assets Areas.

24. Line Code 503A was assigned to the PRR lines of railroad.

25. Given the above, Riffin argues that on **June 16, 1999**, pursuant to the decision served on July 20, 1998, in FD 33388 (Decision No. 89), and pursuant to the Consummation Notice filed on June 16, 1999 in FD 33388, Conrail, a carrier, assigned **all** of its non-line-of-railroad rights, title and interest, in Line Code 503A, to *Pennsylvania Lines LLC* ("**PRR**"), a non-carrier, an entity controlled by Norfolk Southern Corporation ("**NSC**"), a non-carrier.

26. However, since non-carriers may not acquire a line of railroad without prior STB approval, and since neither PRR nor NSC are carriers, neither PRR nor NSC were authorized to acquire, nor did they acquire, the **Line of Railroad** associated with Line Code 503A, when they acquired the assets associated with Line Code 503A.

27. Consequently, Riffin further argues that on **June 16, 1999**, pursuant to a decision served on July 20, 1998, in FD 33388 (Decision No. 89), and pursuant to the Consummation Notice filed on June 16, 1999, in FD 33388, the **Line of Railroad** associated with Line Code 503A, between MP 96.6 and MP 98.0, **was conveyed from Conrail, a carrier, to Norfolk Southern Railway Company, a carrier**, and that post June 16, 1999, Conrail had **NO** lines of railroad outside of the three Shared Assets Areas.

28. In light of the above, Riffin argues that the **only entity** that has the legal authority to consummate abandonment of that portion of the **line of railroad** associated with Line Code 503A, that lies between MP 96.6 and MP 98.0, **is Norfolk Southern Railway Company**.

29. Riffin's argument is buttressed by a previous filing by Norfolk Southern, in which **Norfolk Southern made the same argument** that Riffin makes, just in a different proceeding, regarding a different line segment. See 'p. 2' of Norfolk Southern's November 27, 2006 filing in *James Riffin, DBA The Raritan Valley Connecting Railroad – Acquisition and Operation Exemption* – STB Finance Docket No. 34963, **a copy of which is attached hereto**, where **Norfolk Southern** argued:

“The attached verified statement of Robert D’Zuro, an employee of Consolidated Rail Corporation (“Conrail”), states that Conrail never filed an application or petition for exemption to authorize the abandonment or discontinuance of the line segment that is the subject of the Notice of Exemption.

It is NS' belief that, in the absence of abandonment or discontinuance authority, Conrail retained common carrier operating authority over the line and that such authority was transferred to NS pursuant to the Transaction Agreement approved by the Board in *CSX Corp., et. al. – Control - Conrail, Inc., et. al.*, 3 S.T.B. 196 (1998) (“Conrail Control”).” Bold added.

30. Given that Conrail was aware that the D&H had operating rights over Line Code 503A, and given that Conrail acknowledged that Conrail's 623N application to abandon **would not** extinguish the D&H's operating rights over the 623N segment, there was good legal reason for Conrail **not** to exercise its permissive authority to consummate abandonment of the 623N segment, during the period of time Conrail possessed the line of railroad associated with 623N (that is, from 1976 until June 16, 1999).

31. Which leads Riffin to the conclusion that Norfolk Southern Railway Company, a carrier, has, at this present time, a common carrier obligation to provide service over the 623N segment (upon reasonable demand), and leads Riffin to the conclusion that the STB presently continues to have jurisdiction over the 623N segment, which jurisdiction will continue unless and until such time that abandonment authority is granted to Norfolk Southern, and exercised by Norfolk Southern, to abandon the 623N segment.

32. Riffin will point out to the STB, that Conrail has failed to seek abandonment / give notice of consummation of abandonment, in a number of instances, post June 16, 1999, where portions of Conrail's pre-June 16, 1999 lines of railroad, were abandoned, either by CSX Transportation, or by Norfolk Southern Railway Company.

33. Were the STB to rule that Conrail, as of September 18, 2015, still had operating authority over Line Code 503A between MP 96.6 and MP 98.0, and thus had the legal authority to effect abandonment of that line segment, and to give consummation notice of its abandonment of that line segment, such a ruling would be applicable to those other line segments that Conrail has not given notice of abandonment of its common carrier rights and obligations. In effect, all of those NYC and PRR line segments abandoned by CSX Transportation and by Norfolk Southern Railway Company, post June 16, 1999, would still be Conrail lines of railroad. And would still be subject to the Offers of Financial Assistance procedures.

34. WHEREFORE, Riffin will respectfully pray that the STB **strike** Conrail's October 5, 2015 letter (filed October 13, 2015), on the grounds that Conrail is not the appropriate entity to

effect abandonment, nor to give notice of the consummation of abandonment, of that portion of Line Code 503A that lies between MP 96.6 and MP 98.0, and for such other and further relief as would be appropriate.

Respectfully,

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

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd Day of November, 2015, a copy of the foregoing Notice of Intent to Participate, was mailed via first class mail, postage prepaid, to Jonathan M. Broder, Suite 1310, 1717 Arch Street, Philadelphia, PA 19103, counsel for Conrail.

James Riffin

218149

ZUCKERT SCOUTT & RASENBERGER, L.L.P.

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November 27, 2006

EXPEDITED ACTION REQUESTED

Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings
NOV 27 2006
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Re: Finance Docket No. 34963, James Riffin, dba The Raritan Valley Connecting Railroad—Acquisition and Operation Exemption; Petition of Norfolk Southern Corporation and Norfolk Southern Railway Company For Housekeeping Stay and Commencement of a Proceeding.

Dear Secretary Williams:

I enclose for filing in the above captioned proceeding an original and ten copies of a Petition of Norfolk Southern Corporation and Norfolk Southern Railway Company For A Housekeeping Stay of the Effectiveness of the Notice of Exemption and For Commencement of a Proceeding.

Because this petition seeks a stay of the effectiveness of a notice of exemption that will soon become effective, Norfolk Southern respectfully request *expedited consideration* of the enclosed petition.

Sincerely,

Richard A. Allen

Enclosures

cc: David Konschnik (by fax)
James Riffin (by Federal Express)
Steven C. Armbrust, Esq.
John K. Enright, Esq.
John V. Edwards, Esq.

ENTERED
Office of Proceedings

NOV 27 2006

Part of
Public Record

Before The
Surface Transportation Board

Finance Docket No. 34963



JAMES RIFFIN, DBA THE RARITAN VALLEY CONNECTING RAILROAD-
ACQUISITION AND OPERATION EXEMPTION – ON RARITAN VALLEY
CONNECTING TRACK (Line Code 0326, Sub. No. 1038), BETWEEN THE
NORTHERLY SIDELINE OF THE LEHIGH VALLEY LINE (AT FORMER
DELAWARE & BOUND BROOK MP 57.25), MANVILLE BOROUGH, AND THE
INTERSECTION OF THE LINE WITH THE SOUTHERLY SIDELINE OF THE
FORMER RARITAN VALLEY LINE, NOW NEW JERSEY TRANSIT’S RARITAN
VALLEY COMMUTER LINE, IN BRIDGEWATER TOWNSHIP (AT FORMER
DELAWARE & BOUND BROOK MP 58.50), ALL IN SOMERSET COUNTY, NEW
JERSEY, A DISTANCE OF APPROXIMATELY 1.25 MILES

**PETITION FOR OF NORFOLK SOUTHERN CORPORATION AND NORFOLK
SOUTHERN RAILWAY COMPANY FOR A HOUSEKEEPING STAY OF THE
EFFECTIVENESS OF THE NOTICE OF EXEMPTION AND FOR
COMMENCEMENT OF A PROCEEDING**

Norfolk Southern Corporation and Norfolk Southern Railway Company

(collectively, “NS”) hereby petitions the Board to issue a housekeeping stay of the effectiveness of the Notice of Exemption filed in this proceeding on November 21, 2006 and to commence a proceeding in order to permit NS to show that the Notice of Exemption seeks to acquire common carrier operating authority that may in fact belong to NS and to permit the Board fully to consider the issues presented.

The Notice of Exemption seeks an exemption from 49 U.S.C. §10901 to authorize for James Riffin, dba The Raritan Valley Connecting Railroad, to acquire and operate as a common carrier 1.25 miles of railroad line in Somerset County, NJ. The Notice asserts that Mr. Riffin does not own the line and is not certain what entity has title to it, but that

“[a]greements are being negotiated.” Notice of Exemption at 1. The Notice further states:

In a deed dated August 24, 1995, recorded in the Land Records of Somerset County, New Jersey, at Liber BK 2031 folio 320 *et al.*, Conrail transferred all of its title and interest in this portion of the former D&BB line, to Joseph C. Horner, an individual. Mr. Horner in turn has leased this line to Bridgewater Resources, Inc. (“BRI”). If Conrail received authority from the Interstate Commerce Commission to abandon this line segment, then BRI has title to the line. If the Commission did not approve abandonment of this line segment, then Conrail would still have title to the line segment.

Notice of Exemption at 2.

The attached verified statement of Robert D’Zuro, an employee of Consolidated Rail Corporation (“Conrail”), states that Conrail never filed an application or petition for exemption to authorize the abandonment or discontinuance of the line segment that is the subject of the Notice of Exemption.

It is NS’ belief that, in the absence of abandonment or discontinuance authority, Conrail retained common carrier operating authority over the line and that such authority was transferred to NS pursuant to the Transaction Agreement approved by the Board in *CSX Corp., et al.—Control—Conrail Inc., et al.*, 3 S.T.B. 196 (1998) (“*Conrail Control*”). Furthermore, even in Conrail retains the common carrier authority, NS understands that Conrail is not negotiating to sell it to Mr. Riffin. Accordingly, the Notice of Exemption is based on incorrect premises

NS further believes that the Class Exemption in 49 C.F.R. §1150.31 invoked by the Notice of Exemption is not available to Mr. Riffin because Mr. Riffin is already a carrier by virtue of his recent purchase of a rail line from CSX Transportation, Inc. pursuant to an offer of financial assistance and the Board’s decision in, *CSX Transportation, Inc.—Abandonment Exemption—In Allegheny County, MD—In the*

Matter of An Offer Of Financial Assistance, STB Docket No. AB-55 (Sub.-No. 659X) (served August 18, 2006). Mr. Riffin's acquisition of a rail line in Somerset County, NJ would not be a transaction subject to 49 U.S.C. §10901 or the Class Exemption established by 49 C.F.R. §1150.31.

A housekeeping stay of the effectiveness of the Notice of Exemption until further order of the Board is warranted to permit NS to provide more complete information to the Board regarding the correctness of the legal and factual assumptions underlying the Notice and to give the Board adequate time fully to consider the issues presented. NS has not had sufficient time to do so because the Notice of Exemption was filed only six days ago, on November 21, 2006, just before the Thanksgiving holiday, and was not served on NS or Conrail. The Notice of Exemption itself acknowledges the Mr. Riffin himself is uncertain about which entity has title to the line.

Furthermore, issuance of a housekeeping stay should not prejudice Mr. Riffin or any other party. The Notice of Exemption acknowledges that Mr. Riffin has not concluded the agreements he would need to acquire and operate the line, and there is no indication that any such agreements are imminent.

The Board has frequently issued housekeeping stays in similar circumstances to permit a more complete development of the record and to give it sufficient time fully to consider the issues presented before a notice or decision is permitted to take effect. *See City of Alameda - Acquisition Exemption - Alameda Beltline Railroad*, 2005 STB LEXIS 618, *2-3, STB Finance Docket No. 34798 (Dec. 15, 2005) (“A housekeeping stay of the effective date of the exemption is appropriate to allow time for the parties to provide additional information and for the Board to consider the issues presented in the stay

request.”) *See also, e.g., Keokuk Junction Railway Company d/b/a Peoria & Western Railway - Lease and Operation Exemption - BNSF Railway Company Between Vermont and Farmington, IL*, STB Finance Docket No. 34918 (August 10, 2006); *Buffalo Southern Railroad, Inc. - Acquisition and Operation Exemption - Line in Croton-On-Hudson, NY*, STB Finance Docket No. 34903 (July 3, 2006); *General Railway Corporation d/b/a Iowa Northwestern Railroad Company - Operation Exemption - Line of Dickinson Osceola Railroad Association*, STB Finance Docket No. 34037 (May 25, 2006).

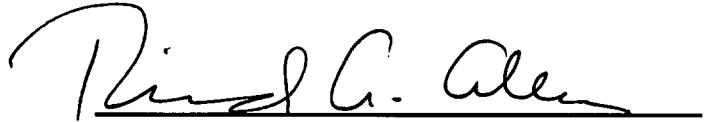
Indeed, in Ex Parte No 659, *Public Participation in Class Exemption Proceedings* (served October 19, 2006), the Board recently lengthened the time before which a notice of exemption filed under 49 C.F.R. §1150.31 may take effect for the very purpose of giving the public and the Board more time to address issues that may be presented by such a notice. Pursuant to that decision, the new notice period went into effect on November 23, 2006. Although it is not entirely clear, it would appear that the new period applies to the Notice of Exemption in this proceeding and would not take effect until 30 days after November 21, 2006, or December 21, 2006. In any event, NS submits that the circumstances in this case warrant the issuance of a housekeeping stay until further order of the Board.

NS also requests the Board to institute a proceeding to consider the issues presented by the Notice of Exemption and this petition and to establish a procedural schedule for the submission of evidence and comments by all interested parties.

CONCLUSION

The Board should issue a housekeeping stay of the effectiveness of the Notice of Exemption filed in this proceeding until further order of the Board and should institute a proceeding and establish a procedural schedule for the submission of evidence and comments by all interested parties.

Respectfully submitted,



John V. Edwards
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*Attorneys for
Norfolk Southern Railway Company*

November 27, 2006

CERTIFICATE OF SERVICE

I certify that I have this 27th day of November, 2006, caused copies of the foregoing Petition of Norfolk Southern Corporation and Norfolk Southern Railway Company to Petitioner's Second Discovery Requests to be served by first class mail, postage prepaid, and, in the case of James Riffin, by overnight delivery, on the following:

John K. Enright
Assistant General Counsel
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1000 Howard Blvd.
Mt. Laurel, NJ 08054-2355

John V. Edwards
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James Riffin
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(By Federal Express)


Richard A. Allen

Before The
Surface Transportation Board

Finance Docket No. 34963

JAMES RIFFIN, DBA THE RARITAN VALLEY CONNECTING RAILROAD – ACQUISITION AND OPERATION EXEMPTION – ON RARITAN VALLEY CONNECTING TRACK (Line Code 0326, Sub. No. 1038), BETWEEN THE NORTHERLY SIDELINE OF THE LEHIGH VALLEY LINE (AT FORMER DELAWARE & BOUND BROOK MP 57.25), MANVILLE BOROUGH, AND THE INTERSECTION OF THE LINE WITH THE SOUTHERLY SIDELINE OF THE FORMER RARILTAN VALLEY LINE, NOW NEW JERSEY TRANSIT'S RIARTIAN VALLEY COMMUNTER LINE, IN BRIDGEMWATER TOWNSHIP (AT FORMER DELAWARE & BOUND BROOK MP 58.50), ALL IN SOMERSET COUNTY, NEW JERSEY, A DISTANCE OF APPROXIMAGELY 1.25 MILES.

VERIFIED STATEMENT OF ROBERT D'ZURO

1. My name is Robert D'Zuro. I am a paralegal employed in the law department of Consolidated Rail Corporation ("Conrail"). I am giving this statement in support of a motion to stay the subject proceeding being filed this date by Norfolk Southern Corporation.
2. I have been employed as a paralegal by Conrail since February 28, 1995. During most of my employment with Conrail, I have been the principal paralegal assigned to assist with abandonment proceedings filed by Conrail with the Surface Transportation Board (and previously the Interstate Commerce Commission). As part of that responsibility, I maintain and update as necessary the legal files for all of the abandonments that have been filed (or considered for filing) by Conrail since its creation in 1976.
3. In connection with the subject Notice of Exemption, I have reviewed the abandonment files with respect to The Raritan Valley Connecting Track (the "Line"). A Notice of Insufficient Revenue was filed by Conrail with respect to the Line on or about October 31, 1985. I also located in the file a memo from Charles Mechem, Esq., a former attorney in Conrail's Law Department, dated April 17, 1986, which identified the Line as one of several for which Mr. Mechem had "not drafted or filed applications (for abandonment) for one or more of several reasons, including – (a) low priority... (b) lack of exhibits, and/or (c) lack of senior management approval." There is no application or notice of abandonment or of discontinuance of service in the file; accordingly, it appears that Conrail never filed for abandonment or discontinuance of service with respect to the Line. There is an e-mail from a Conrail property manager, dated December 2, 1988, confirming that a notice of abandonment or discontinuance of service for the Line was never filed.

VERIFICATION

I, Robert D'Zuro, verify under penalty of perjury that I have read the foregoing verified statement and know its contents, and that it is true and correct to the best of my knowledge and belief. I further certify that I am qualified and authorized to make this statement.

Executed on November 27, 2006

Robert D'Zuro
Robert D'Zuro