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SERVICE DATE – SEPTEMBER 19, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34975

MARYLAND TRANSIT ADMINISTRATION—PETITION FOR DECLARATORY ORDER

Decided: September 17, 2008

On October 29, 2007, Mr. James Riffin (Riffin) filed a petition for reconsideration of the decision in this proceeding served on October 9, 2007 (October 2007 decision). That decision granted the request of the Maryland Transit Administration (MTA) for a declaratory order confirming that MTA did not require authorization from the Board's predecessor, the Interstate Commerce Commission (ICC), when, in 1990, MTA acquired a 14.22-mile line of railroad between Baltimore and Cockeysville, MD, known as the Cockeysville Industrial Track (CIT). On November 19, 2007, MTA filed a reply opposing the petition for reconsideration. For the reasons discussed below, the petition for reconsideration will be denied.

BACKGROUND

The CIT is a stretch of rail track that carried little freight traffic for many years and has not been utilized for freight service since 2004. MTA, which is part of the Maryland Department of Transportation (MDOT), acquired the CIT from Consolidated Rail Corporation (Conrail) in 1990 in order to construct, operate, and maintain a light rail transit system that now carries over 18,000 passengers per day.

The Agreement of Sale and the deed reserved to Conrail a perpetual, assignable, exclusive freight operating easement over the CIT. An operating agreement between MTA and Conrail (Operating Agreement) set forth the terms by which MTA and Conrail were to share use of the CIT in perpetuity and carry out maintenance, dispatch, and improvements. Subsequently, Norfolk Southern Railway Company (NSR) acquired Conrail's interest.<sup>1</sup>

In its petition for declaratory order, MTA sought confirmation that its 1990 acquisition of the CIT did not require approval under 49 U.S.C. 10901 because Conrail's common carrier rights and obligations were not transferred to, or assumed by, MTA as part of its acquisition of the line's physical assets. Riffin opposed that request, arguing that the Operating Agreement gave

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<sup>1</sup> For a more detailed discussion of MTA's acquisition of the CIT, see the October 2007 decision, slip op. at 3-4.

MTA too much control over Conrail's (now NSR's) operations.<sup>2</sup> He also alleged that MTA was interfering with NSR's freight rail service.<sup>3</sup> In the October 2007 decision, we found that MTA's 1990 acquisition of the CIT did not require authorization under section 10901.<sup>4</sup> Riffin now seeks reconsideration of our October 2007 decision.

## DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 722(c) and 49 CFR 1115.3(b), a petition for reconsideration will be granted only upon a showing that the prior action would be affected materially because of changed circumstances or new evidence or that the prior action involves material error. Here, Riffin has not offered any new evidence or changed circumstances. Rather, he argues that we materially erred by failing to properly apply agency precedent and by not providing for discovery aimed at eliciting information from NSR and shippers regarding NSR's past and current ability to provide freight service on the CIT. As discussed below, we are satisfied that our prior finding—that the agreement here preserved NSR's ability to provide rail service—is consistent with precedent. Moreover, there is no reason to believe that allowing Riffin to engage in unspecified discovery would produce any information that would lead to a different result.

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<sup>2</sup> Riffin owns property on York Road in Cockeysville, which he alleges is adjacent to the CIT. However, MTA's engineer, head archivist and historian stated that there has not been any rail connection between Riffin's property and the CIT since the 1940's. Response of the Maryland Transit Administration, Exh. 1, ¶ 7 (verified statement of Robert L. Williams) (filed Apr. 20, 2007). See also James Riffin—Petition for Declaratory Order, STB Finance Docket No. 34997, slip op. at 5 (STB served May 2, 2008) (Riffin Declaratory Order). Riffin has not presented any evidence that his property has been connected to the CIT at any time during the period of his ownership.

<sup>3</sup> CNJ Rail Corporation (CNJ) also filed comments, but did not offer any information or argument not already presented by Riffin. Notwithstanding the name it has chosen, CNJ does not own any rail assets or conduct any rail operations. CNJ's filing did not describe its interest in this proceeding.

<sup>4</sup> Under the May 1990 Agreement of Sale, Conrail retained title to a connecting line referred to as the Cockeysville Industrial Park Track (Exh 1. to Petition for Declaratory Order, Agreement of Sale at 1), which Riffin alleges MTA acquired from Conrail in 1997. See Letter from James R. Paschall filed Mar. 14, 2006, at 1, in STB Docket No. AB-290 (Sub-No. 237X), Norfolk Southern Railway Company—Abandonment Exemption—in Baltimore County, MD (NSR Baltimore County Abandonment). Although Riffin questions why MTA did not include the 1997 acquisition in its request for a declaratory order and asks us to expand this proceeding, we see no reason to do so. Riffin has not shown that later acquisitions of right-of-way by MTA would affect our decision on the question posed by MTA's request for a declaratory order.

Pertinent Precedent

We reject Riffin's claim that, in finding that MTA did not acquire a common carrier obligation by virtue of its acquisition of the CIT, we failed to follow the principles established in Maine, DOT—Acq. Exemption, ME. Central R. Co., 8 I.C.C.2d 835 (1991) (State of Maine) and Southern Pac. Transp. Co. —Abandonment Exempt.—LA County, CA, 8 I.C.C.2d 495 (1992), recon. denied, 9 I.C.C.2d 385 (1993) (Southern Pacific). State of Maine is the seminal case establishing that a state agency may work out an arrangement with a freight railroad under which the state agency acquires rail property – either to use in a mass transit system or to hold so that freight rail service can be preserved – without itself becoming a rail freight carrier under the Interstate Commerce Act, 49 U.S.C. 10102(5). In State of Maine, 8 I.C.C.2d at 836-37, the ICC held that the Maine Department of Transportation's acquisition of the physical assets of a rail line owned by a common carrier railroad did not require approval under 49 U.S.C. 10901 where the existing carrier retained a permanent and unconditional easement to conduct common carrier freight operations and the right to maintain, operate and improve the line.<sup>5</sup>

Since State of Maine, other state agencies have sought to work out similar arrangements. As the case law developed, the parameters of State of Maine were occasionally tested. Thus, in Southern Pacific, the ICC found that the acquisition by the Los Angeles County Transportation Commission (LACTC) of the physical assets of several rail lines from the Southern Pacific Transportation Company (SP) required agency approval under section 10901 because, under the terms of the acquisition, LACTC obtained too much control over the freight carrier's ability to provide freight rail service. The operating agreement there gave LACTC the right to acquire SP's remaining interest in the lines and to file an abandonment application to have freight rail service over the lines discontinued, and it prohibited SP from opposing any such acquisition or abandonment request before the agency. Moreover, SP could not use the lines to move overhead traffic, and SP's local trackage rights were subject at all times to the directives and control of LACTC.<sup>6</sup>

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<sup>5</sup> Riffin also cites an earlier decision in City of Austin, TX—Acquisition—Southern Pacific Transportation Company, STB Finance Docket No. 30861 (ICC served Nov. 4, 1986) (Austin), where the City of Austin was found to have assumed a common carrier obligation, even though it did not intend to operate the line itself. However, in State of Maine, the ICC distinguished Austin on the ground that the City there had failed to sever the freight operating rights from the real property interest it acquired. In contrast, here (as in State of Maine), the freight rail carrier retained an exclusive, perpetual easement for freight operations.

<sup>6</sup> It should be noted that the ICC in Southern Pacific did not rescind the acquisition. It recognized that the transaction clearly was in the public interest because Los Angeles needed to construct a mass transit system. Therefore, although it found that LACTC acquired certain common carrier responsibilities because of the control the transaction documents gave LACTC over SP's freight operations, the ICC used its authority under former 49 U.S.C. 10505 (now 49 U.S.C. 10502) to exempt the transaction from regulation to help LACTC fulfill its public

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Riffin argues that the provision in the Operating Agreement here that requires NSR to seek authority to abandon the CIT if NSR ceases using the CIT for rail service for 60 consecutive months is analogous to the abandonment provision of the agreement in Southern Pacific. However, the Southern Pacific decision was based on the totality of the restrictions on the freight operator's ability to provide service; and the abandonment provision there gave the purchaser the unqualified right to require the freight operator to apply for authority to abandon the line at any time. Here, in contrast, the Operating Agreement provides that NSR must seek abandonment authority if there is no rail freight service on the CIT for a 5-year period. In other words, as long as there is any freight service moving over the CIT within a 5-year period, there would be no contractual requirement to seek abandonment authority. And if there has been no freight traffic on the line for such an extended period, then applying for abandonment authority would not seem inconsistent with any freight rail service needs.<sup>7</sup> Thus, Southern Pacific is not analogous to this case.

In any event, Riffin ignores more recent precedent that supports our October 2007 decision. To balance the development of mass transit with the retention of freight rail service, the freight carrier need not necessarily retain full control. Instead, the Board examines in each case whether the agreements between the parties continue to give the freight carrier the ability to conduct its existing and reasonably foreseeable freight operations so that it can satisfy its common carrier obligation.<sup>8</sup>

While the freight carrier must continue to have a permanent easement or its equivalent to provide freight service, the public agency acquiring the right-of-way and track may negotiate terms and conditions with the freight carrier necessary to provide reliable commuter service or protect the agency's investment so long as such terms and conditions do not unreasonably

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purpose as a mass transit operator with minimal regulatory constraints. See Southern Pacific; see also Los Angeles County Metropolitan Transportation Authority—Abandonment Exemption—in Los Angeles County, CA, STB Docket No. AB-409 (Sub-No. 5X) (STB served July 17, 2008).

<sup>7</sup> See 49 CFR 1152.50(b) (establishing class exemption from the abandonment requirements of 49 U.S.C. 10903 for rail lines that have been out of service for 2 years).

<sup>8</sup> See State of Maine—Acquisition Exemption—Certain Assets of St. Lawrence & Atlantic Railroad Company, STB Finance Docket No. 35018, slip op. at 2 (STB served Sept. 13, 2007) (St. Lawrence & Atlantic); Washington County, OR—Acquisition Exemption—Certain Assets of the Union Pacific Railroad Company, STB Finance Docket No. 34810 et al., slip op. at 2 (STB served Apr. 11, 2007); Los Angeles County Transportation Commission—Petition for Exemption—Acquisition from Union Pacific Railroad Company, STB Finance Docket No. 32374 et al., slip op. at 2 (STB served July 23, 1996) (LACTC).

interfere with freight rail service.<sup>9</sup> Thus, the easement or the operating agreement may restrict freight operations to specific parts of the day, provided that the window for exclusive freight operations is adequate to satisfy the service needs of freight shippers.<sup>10</sup> Likewise, the public agency may assume responsibility for maintaining the line and dispatching freight operations if the operating procedures are reasonable and do not discriminate against freight service, and if the freight carrier has the right to inspect and to request prompt repair of any track defects.<sup>11</sup> Indeed, the Board has found that construction by a public agency of additional track or track improvements for passenger service on the right-of-way, even if it interrupts freight service, does not unreasonably interfere with the freight carrier's service obligations where the public agency bears the cost of substitute freight service and gives adequate notice to the affected shippers. Utah, slip op. at 4.

Riffin argues that the abandonment provision in the Operating Agreement here is no different than the limited-term easement granted by the Wisconsin Department of Transportation (WisDOT) that the Board found inadequate in Wisconsin Department of Transportation—Petition for Declaratory Order, STB Finance Docket No. 34764 (STB served Dec. 2, 2005) (Wisconsin I). However, the two cases are not analogous. In Wisconsin I, the Board indicated (slip op. at 2) that an easement limiting the freight rail carrier's term to 10 years with renewals at the option of WisDOT was inconsistent with State of Maine. Here, by contrast, the easement granted by MTA to the freight rail carrier is exclusive and perpetual, and the abandonment provision in the Operating Agreement will not be triggered so long as there has been some freight traffic over the line within the previous 5 years. Further, in subsequent decisions in the Wisconsin proceeding, served on February 6, 2006 (Wisconsin II), and March 13, 2006 (Wisconsin III), after noting that WisDOT had expanded the easement term to 50 years and made the renewal options solely at the freight rail carrier's discretion, the Board found that WisDOT would not assume a common carrier obligation through its purchase of the rail line.

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<sup>9</sup> See generally Metro Regional Transit Authority—Acquisition Exemption—CSX Transportation, Inc., STB Finance Docket No. 33838, slip op. at 2-3 (STB served Oct. 10, 2003) (Metro); North Carolina State Ports Authority—Acquisition Exemption—North Carolina Ports Railway Commission, STB Finance Docket No. 34258, slip op. at 3 (STB served Oct. 31, 2002); Sacramento-Placerville Transportation Corridor Joint Powers Authority—Acquisition Exemption—Certain Assets of Southern Pacific Transportation Company, STB Finance Docket No. 33046 (STB served Oct. 28, 1996) (Sacramento-Placerville); LACTC.

<sup>10</sup> Metro at 2; Utah Transit Authority—Acquisition Exemption—Union Pacific Railroad Company, STB Finance Docket No. 35008, slip op. at 2-4 (STB served July 23, 2007) (Utah); St. Lawrence & Atlantic.

<sup>11</sup> Metro, slip op. at 2; Utah, slip op. at 4; Sacramento-Placerville, slip op. at 2; LACTC, slip op. at 2.

Riffin contends that the Operating Agreement here imposes significant constraints on NSR's freight service through MTA's management and dispatch of the CIT and the freight operating window, and he asserts that the Board should have found, as it did in Southern Pacific and Wisconsin I, that the public agency has substantial control over freight operations. However, MTA does not have the same level of control over freight operations that the owners of the lines had in Southern Pacific or Wisconsin I.<sup>12</sup> NSR retains all local and overhead traffic rights, and MTA has acquired no freight operating rights itself, conditional or otherwise. Under the Operating Agreement, MTA is committed to allowing fixed hours of freight operation and to expanding those hours if market demands so warrant. MTA may not alter the freight window unilaterally. Further, as pointed out in the October 2007 decision, slip op. at 6, MTA is obligated to dispatch freight trains in compliance with the Northwestern Operating Rules Advisory Committee and to manage the CIT in a manner that will minimize delays to the freight rail carrier and afford every reasonable accommodation to freight traffic.

Riffin also asserts that we failed to consider which party has ultimate responsibility under the terms of the Operating Agreement for maintenance of the CIT. He is incorrect. In the October 2007 decision, slip op. at 6, we discussed MTA's obligation to maintain the CIT to standards set forth in the Operating Agreement. We pointed to NSR's right to inspect the CIT and to the requirement that, while improvements are being made, the CIT should remain open to permit freight operations to continue at a certain speed. Under the Operating Agreement, MTA also must perform additional maintenance at NSR's request, for which NSR is to reimburse MTA. Thus, MTA's contractual responsibility to maintain the CIT appropriately takes into account the needs of the freight operations.

Riffin contends in addition that, after its 1990 acquisition of the CIT, MTA used its rights under the Operating Agreement to interfere with NSR's ability to satisfy its common carrier obligations. We rejected this argument in our October 2007 decision (slip op. at 1-2, 7-8). Riffin has offered nothing new in his request for reconsideration and has not persuaded us that our decision was in error.

In the 18 years since MTA's acquisition of the CIT, no active shipper on the line has filed a complaint asserting that NSR has not met its service obligations.<sup>13</sup> Nor has NSR filed any

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<sup>12</sup> As noted in Wisconsin I (see slip op. at 2-3), the original transaction documents gave WisDOT the right to provide freight service itself if the freight carrier that held the easement failed to maintain a desirable level of service, as determined by WisDOT, and the freight carrier was required to obtain a permit from WisDOT before operating over lines also used for passenger service. WisDot deleted these provisions in the revised agreements that were before the Board in Wisconsin II and Wisconsin III.

<sup>13</sup> In one of his several "supplemental" filings, Riffin attached letters that he procured from four putative shippers, apparently to show that MTA removed active portions of the CIT or that MTA has interfered with NSR's ability to provide common carrier rail service. They

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complaint (formal or informal) charging that MTA has interfered with its ability to provide service. Further, MTA has satisfactorily answered Riffin's allegations that MTA had compromised NSR's ability to meet its common carrier obligations by dismantling, salvaging or selling portions of the CIT. MTA has explained that it has not salvaged any part of the rail line that NSR was using to provide freight rail service, and Riffin has not shown that any actions taken by MTA have affected active portions of the CIT.<sup>14</sup> MTA and NSR have not made a secret of the fact that, during the period when MTA was double tracking the CIT (see October 2007 decision, slip op. at 2), MTA arranged for alternative service for the remaining shippers on the line with NSR's cooperation and that these shippers have agreed to continue using the alternative arrangements.<sup>15</sup> As noted, we do not consider an interruption of freight service due to the construction of passenger rail lines to be an unreasonable interference with the freight carrier's service obligation where the transit agency makes satisfactory arrangements with the freight shippers and the carrier for alternative service. See Utah Transit, slip op. at 4. Since the purpose of the common carrier obligation is to meet the service needs of shippers, it is not an unreasonable interference with the freight railroad's common carrier obligations for the affected parties to agree to continue the alternative service after completion of the track work. In the absence of objections from NSR or active shippers, we have no reason to believe that freight shippers' needs are not being met.

In sum, our conclusion in the October 2007 decision—that MTA's level of control over management and dispatch of the CIT and the freight operating window does not unduly hinder NSR's ability to carry out its obligations as a common carrier over the CIT—is within the

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contain equivocations such as: "If shipping our raw ingredients to us by rail was less expensive than shipping it via truck, we would consider using rail service." These letters, which are filtered to us through Riffin, are too vague and indefinite to be given any weight. Generally, a reasonable request for service is one that is specific as to volume, commodity and time of shipment. CSX Transportation, Inc.—Abandonment Exemption—In Parke and Vermillion Counties, IN., STB Docket No. AB-55 (Sub-No. 579X) (STB served Sept. 13, 2002), aff'd, Montezuma Grain Co. v. STB, 339 F.3d 535 (7th Cir. 2003). A shipper may not "lie low" and then claim that a request for service has not been honored. See Groome & Associates, Inc. and Lee K. Groome v. Greenville County Economic Development Corporation, STB Finance Docket No. 42087, slip op. at 11 (STB served July 27, 2005).

<sup>14</sup> See, e.g., The Atchison, Topeka and Santa Fe Railway—Abandonment Exemption—In Lyon County, KS, Docket No. AB-52 (Sub-No. 71X) (ICC served June 17, 1991).

<sup>15</sup> See Pet. for Exempt. at 8, 14-15, filed Dec. 14, 2005, in NSR Baltimore County Abandonment.

bounds of agency precedent. Riffin has failed to show new evidence, changed circumstances, or material error that would warrant reconsideration of the October 2007 decision.<sup>16</sup>

### Request For Discovery

Riffin continues to argue that wide-ranging discovery is needed here to develop a sufficient record. He claims to need discovery to show that the freight operating window and the dispatching on the line were inadequate; that there was inadequate maintenance at certain points in time; and that there could be shippers that want service over the line. Riffin's argument is not persuasive.

The Board generally does not order discovery in declaratory order proceedings where the dispute involves a legal issue<sup>17</sup> and where the record is sufficient to resolve the controversy without discovery.<sup>18</sup> Our October 2007 decision correctly found that the record was sufficient to permit us to issue the requested declaratory order.

At bottom, the October 2007 decision rests on facts that are not in dispute. We based our conclusion that MTA did not require authorization from the ICC to acquire the physical assets of the CIT primarily on the transaction documents submitted by MTA. Riffin has not argued that the transaction documents were ambiguous or that the documents could not be interpreted without discovery.

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<sup>16</sup> In another of his “supplemental” filings, Riffin argues that agency approval of the 1990 acquisition was required under what is now 49 U.S.C. 11323 (formerly 49 U.S.C. 11343) because MTA had common carrier authority elsewhere on the interstate rail system in 1990. This is incorrect. The rail lines acquired by MDOT from Penn Central Corporation in 1982 had already either been abandoned or authorized for abandonment, and, as a result, their acquisition did not give the state agency common carrier status. See 49 CFR 1150.22; Common Carrier Status of States, State Agencies and Instrumentalities, and Political Subdivisions, 363 I.C.C. 132 (1980). It was not until 1991—after the 1990 acquisition involved here—that MTA obtained authority to acquire a 5.78-mile line of railroad, in Maryland Mass Transit Administration—Acquisition and Operation Exemption—Baltimore & Annapolis Railroad Company, Finance Docket No. 31929 (ICC served Oct. 25, 1991). Therefore, MTA was not an ICC-regulated rail carrier in 1990, and its acquisition of the CIT was not subject to former 49 U.S.C. 11343.

<sup>17</sup> See CSX Transportation, Inc.—Petition for Declaratory Order, STB Finance Docket No. 34662, slip op. at 13 (STB served Mar. 14, 2005).

<sup>18</sup> See Town of Babylon and Pinelawn Cemetery—Petition for Declaratory Order, STB Finance Docket No. 35057, slip op. at 4 n.4 (STB served Feb. 1, 2008).

In addition, we relied on several incontrovertible facts. Neither NSR nor any shipper has intervened and challenged MTA's representations or alleged that NSR's service arrangements have been inadequate, whether due to interference by MTA or any other reason. Neither NSR nor any shipper on the line has indicated to the Board, in this proceeding or in NSR Baltimore County Abandonment, that there are operating window or dispatching problems on the CIT that interfered with NSR's operations or that MTA failed to maintain the CIT and, thus, impeded NSR from fulfilling its common carrier obligation. Moreover, although the Operating Agreement has been in effect for nearly 18 years, no shipper on the CIT has filed a complaint or sought informal assistance alleging that NSR has refused to provide rail service or that MTA has prevented NSR from serving it.<sup>19</sup> These facts are verifiable without discovery. Based on our experience, we can reasonably draw the inference from the lack of shipper participation in this case and the absence of complaints to the Board that MTA has not taken any action that prevented NSR from meeting its common carrier obligations.

Riffin also claims that discovery is needed to address the physical condition of the line. We disagree. Riffin conducted a physical examination of the line, apparently without obtaining MTA's or NSR's consent, and presented his evidence of the line's condition. In our October 2007 decision, we considered Riffin's allegations concerning MTA's alterations of the CIT and were satisfied that MTA has not taken any action that would cause NSR to violate its common carrier obligation. Riffin has not explained why further discovery is necessary.

Finally, we note that Riffin does not purport to represent any shipper here, and that he has not submitted verified statements from any shippers regarding problems with NSR's service or the adequacy of alternative arrangements negotiated between the shippers and MTA or NSR. Under these circumstances, Riffin's bare allegations – presented in his unsworn filings and his own accounts of purported statements by other (sometimes unnamed) individuals – are not sufficient to convince us that discovery was necessary in this case.<sup>20</sup>

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

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<sup>19</sup> Riffin has written a letter and spoken informally to Board personnel about NSR's alleged refusal to deliver unidentified "rail cars" to Riffin in Cockeysville. But consistent with our finding in Riffin Declaratory Order, supra note 2, the record here indicates that Riffin's property is located beyond the northern limit of the CIT and that Riffin's property was severed from the CIT prior to MTA's acquisition of the CIT. See Response of Maryland Transit Administration, Exhibit 1 at ¶ 7, ¶ 13. Thus, Riffin is not a shipper on the CIT.

<sup>20</sup> See Norfolk Southern Railway Company—Abandonment Exemption—Norfolk and Virginia Beach, VA, STB Docket No. AB-290 (Sub-No. 293X), slip op. at 6 (STB served Nov. 6, 2007) (finding unpersuasive Riffin's self-serving characterization of the needs or desires of others).

It is ordered:

1. The petition for reconsideration is denied, as discussed above.
2. This decision is effective on its service date.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan  
Acting Secretary