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SERVICE DATE – MARCH 22, 2010

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-290 (Sub-No. 311X)

NORFOLK SOUTHERN RAILWAY COMPANY–PETITION FOR EXEMPTION–IN
BALTIMORE CITY AND BALTIMORE COUNTY, MD

Decided: March 19, 2010

This decision grants in part and denies in part the motion to strike filed by Norfolk Southern Railway Company (NSR), grants James Riffin’s motion to amend and supplement his comments to the extent set forth in this decision, and strikes Riffin’s March 10, 2010 reply as an impermissible reply to a reply.

BACKGROUND

On December 16, 2009, NSR filed with the Surface Transportation Board a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903 to abandon its rail freight operating rights and freight service operations over a 13.26-mile dead-end segment (“Line”) of a line of railroad commonly known in recent years as the Cockeysville Industrial Track (“CIT”). The Line is located between railroad milepost UU-1.00 (located just north of Wyman Park Drive, formerly Cedar Avenue) and the end of the CIT line south of the bridge at railroad milepost UU-15.44 in the City of Baltimore and in Baltimore County, MD. Notice of the petition for exemption was published in the Federal Register on January 5, 2010.

NSR additionally seeks exemption from 49 U.S.C. 10904 [offer of financial assistance procedures] and 49 U.S.C. 10905 [public use conditions]. In support, NSR states that, following abandonment of the freight service operating rights and freight service operations, the Line will remain in use for a public purpose as a passenger rail transit line of railroad operated by the Maryland Transportation Administration (MTA) and owned by the Maryland Department of Transportation. This request will be addressed in the final decision.

On January 5, 2010, Riffin, Zandra Rudo, Carl Delmont, Lois Lowe, and Eric Strohmeyer jointly filed a notice of intent to participate as parties of record and a notice of intent to file an offer of financial assistance (OFA), to purchase all of the freight operating rights, freight operating easement(s), any related operating agreements or leases, and all rights NSR desires to abandon that pertain to the CIT.

On the same date, Riffin, on behalf of himself and the other named individuals, filed comments and opposition to NSR's request for exemption from the OFA procedures. Riffin states that he opposes NSR's request for exemption from the OFA procedures, as he believes that there is demand for freight rail service on the CIT. Riffin alleges that MTA has paid potential freight rail shippers a generous transportation subsidy, which ends in April 2010, to utilize motor carriers for the shipping requirements of their respective businesses. Riffin claims that many of these shippers want to use freight rail service after the MTA subsidy ends, because it will be more economical. Riffin states that he additionally seeks to provide freight rail service over the CIT to a new incinerator proposed by Harford County.

Also on the same date, Riffin, on behalf of himself and the other named individuals, filed a motion for a protective order to protect highly confidential marketing data and business information filed under seal. In response to Riffin's motion for a protective order, MTA filed a reply on January 8, 2010, and NSR filed a reply on January 14, 2010.

On January 14, 2010, NSR filed a motion to strike the following filings: the notice of intent to participate as parties of record; the notice of intent to file an OFA; the comments and opposition to NSR's request for exemption from the OFA procedures; and the motion for a protective order. On February 25, 2010, Riffin, on behalf of himself and the named individuals, filed both a reply to NSR's motion to strike and a motion to amend the comments and opposition to NSR's request for exemption from the OFA procedures. On the same date, Riffin additionally filed a supplement to confidential information. On March 2, 2010, and March 4, 2010, respectively, NSR and MTA filed replies to Riffin's motion to amend. On March 10, 2010, Riffin filed a second supplement to confidential information and, separately, a reply to NSR's and MTA's reply to Riffin's motion to amend.¹

By a decision served on January 29, 2010, the Board authorized the use of a modified protective order and denied NSR's motion to strike the request for a protective order. Additionally, the Board denied MTA's request to have Riffin submit a certification regarding the confidential nature of all information, but re-designated as "confidential" the documents Riffin had submitted as "highly confidential." The Board also stated that Riffin may only represent himself, as he is neither a licensed attorney nor practitioner approved to practice before the Board.

This decision addresses the remainder of NSR's motion to strike and Riffin's motion to amend his comments and opposition filing.

¹ Under Board rules at 49 CFR 1104.13(c), a reply to a reply is not permitted. Moreover, Riffin's submission is repetitive or irrelevant, particularly with regard to references to Maryland state law. Therefore, Riffin's March 10 reply will be stricken.

DISCUSSION AND CONCLUSIONS

NSR's motion to strike the notice of intent to participate as parties of record. NSR asks the Board to strike the entire notice of intent to participate as parties of record (Participation Notice), as Riffin fails to identify each person submitting the Participation Notice other than himself and fails to comply with the Board's regulations regarding the submission of pleadings. In the alternative, NSR asks the Board to strike paragraph 3 of the Participation Notice,² as only attorneys and practitioners may represent others before the Board. NSR additionally asks the Board to strike footnote 1 of the Participation Notice,³ and states that it is an implicit motion to amend in the future without leave of the Board.

The protective order issued by the Board on January 29, 2010, stated that, under 49 CFR 1103.2 and 1103.3, Riffin may only represent himself, as he is neither a licensed attorney nor practitioner approved to practice before the Board. Accordingly, NSR's motion to strike paragraph 3 and footnote 1 from the Participation Notice is granted.

Also, under 49 CFR 1104(b), a document not signed by a practitioner or attorney must be accompanied by the signer's address. Of those individuals purportedly seeking to participate, only Riffin and now Eric Strohmeyer⁴ have submitted sufficient information to be listed as parties of record. Accordingly, NSR's motion to strike the Participation Notice is granted as to all of the named individuals except for Riffin.

NSR motion to strike the notice of intent to file an OFA. NSR asks the Board to strike the notice of intent to file an OFA (OFA Notice) for substantially the same reasons that apply to NSR's motion to strike the Participation Notice. In the alternative, NSR asks the Board to strike paragraph 5 of the OFA Notice,⁵ as only attorneys and practitioners may represent others before the Board. NSR additionally asks the Board to strike footnote 1 of the OFA Notice,⁶ claiming that it is an implicit motion to amend in

² Paragraph 3 states that Riffin is authorized to sign all future pleadings or filings associated with this proceeding on behalf of the named individuals.

³ Footnote 1 states that the number of participants may increase.

⁴ Eric Strohmeyer filed a proper notice of intent to participate on March 4, 2010, and will be considered a party as of that date. This filing, however, does not cure the defects in prior filings submitted by Riffin as the representative of Strohmeyer and the other named individuals.

⁵ Paragraph 5 states that Riffin is authorized to sign all future pleadings or filings associated with this proceeding on behalf of the named individuals.

⁶ Footnote 1 states that the number of participants may increase.

the future without leave of the Board. NSR also asks the Board to strike paragraph 4 of the OFA Notice,⁷ as compliance would require providing information to persons who are unidentified and persons yet to be identified.

NSR's motion to strike paragraph 5 and footnote 1 of the OFA Notice is granted. As stated above and in the decision issuing the protective order on January 29, 2010, Riffin may not represent other parties before the Board. As with the Participation Notice, the other named individuals have failed to provide sufficient identifying information with the OFA Notice. Thus, NSR's motion to strike the OFA Notice in its entirety with regard to them also will be granted.

This ruling does not preclude any financially responsible person from submitting an offer of financial assistance in this proceeding at the proper time, consistent with the Board's rules. But it is important for a party wishing to file an OFA to provide sufficient identifying information. First, the public is entitled to know the actual identity of an offeror. See James Riffin—Petition for Declaratory Order, STB Finance Docket No. 35245, slip op. at 2 n.4 (STB served Sept. 15, 2009) (noting Riffin's claim that he filed an OFA in an earlier proceeding under a pseudonym to conceal his involvement from Maryland state regulators), appeal docketed sub nom. Riffin v. STB, No. 09-1277 (D.C. Cir. Nov. 12, 2009). Second, the Board must be able to determine whether that party is financially responsible and, in the event an OFA sale goes through, who holds the common carrier obligation on the line. Third, precise identification of the party making an OFA helps avoid later disputes over the offeror's identity such as occurred in CSX Transportation, Inc.—Abandonment Exemption—In Allegany County, MD, STB Docket No. AB-55 (Sub-No. 659X) (STB served Apr. 24, 2008), aff'd sub nom. Riffin v. STB, No. 08-1208 (D.C. Cir. Jan. 22, 2010). Thus, persons seeking to participate in the OFA process must properly identify themselves.

Under 49 CFR 1152.27(a), a rail carrier must provide upon request, to a party considering an OFA, an estimate of the annual subsidy or the minimum purchase price required to keep the line or a portion of the line in operation. NSR must therefore provide Riffin with that information and with any other information that has been sought by Riffin that is required to be provided to a potential offeror under 49 CFR 1152.27(a). NSR's request for an exemption from the OFA process does not relieve it from its obligation under the Board's rules to provide the required information upon request to a party considering an OFA, pending a ruling on the petition for exemption from section 10904. Thus, NSR's motion to strike paragraph 4 of the OFA Notice as it pertains to Riffin is denied.

NSR motion to strike the comments and opposition to request for exemption from the OFA procedures. NSR asks the Board to strike the comments and opposition to request for exemption from the OFA procedures (Comments). NSR claims that the

⁷ Paragraph 4 asks NSR to provide Riffin and the named individuals with specific financial and operating information pertaining to the CIT.

submission contains allegations of fact without verification from Riffin and suffers from the same infirmities as the Participation Notice and the OFA Notice. On February 25, 2010, Riffin submitted a motion to amend containing a verification to the Comments and supplementary information, and on March 10, 2010, he filed additional supplementary information.

Under 49 CFR 1100.3, the Board's rules are to be construed liberally to ensure a just determination of the issues presented. In the interest of compiling a full and complete record, the Comments, as amended and supplemented, will be accepted into the record solely on behalf of Riffin. However, Riffin is advised that he has had a full and fair opportunity to respond to the NSR petition for exemption. The final date for a reply to the NSR petition for exemption was January 25, 2010. Accordingly, any further submissions by Riffin to supplement the record will be looked upon with disfavor by the Board.⁸

It is ordered:

1. NSR's motion to strike is granted to the extent set forth in this decision.
2. Riffin's motion to amend and supplement his comments is granted to the extent set forth in this decision.
3. Riffin's March 10, 2010 reply is stricken as an impermissible reply to a reply.
4. This decision is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

⁸ Riffin states in his reply to the motion to strike MTA's comments that he is a pro se litigant and should therefore be accorded some leeway when he does not comply with all the technical rules of procedure of the Board. However, Riffin is well-versed in the Board's procedures as he has participated in numerous proceedings before the Board over the past several years. See, e.g. James Riffin—Petition for Declaratory Order, STB Finance Docket No. 35245, slip op. at 2 n.4 (STB served Sept. 15, 2009); CSX Transportation, Inc.—Abandonment Exemption—In Allegany County, MD, STB Docket No. AB-55 (Sub-No. 659X) (STB served Apr. 24, 2008), aff'd sub nom. Riffin v. STB, No. 08-1208 (D.C. Cir. Jan. 22, 2010).