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SERVICE DATE – JANUARY 27, 2012

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.

Digest:¹ The Board denies a petition to reopen a prior decision, in which the Board allowed a railroad to end its responsibility to provide freight rail service over a 13.26-mile rail line in Maryland, and exempted the transaction from the forced-sale law under which another party could acquire the railroad’s operating rights over the line. The Board denies the petition to reopen, because the petitioner has not met the standard for granting this request by showing material error in the Board’s decision or by presenting new evidence or substantially changed circumstances that would warrant reopening the prior decision.

Decided: January 23, 2012

In a prior decision in this docket, the Board granted a petition filed by Norfolk Southern Railway Company (NSR) on December 16, 2009, to abandon a 13.26-mile dead-end segment (the Line) of a line of railroad commonly known as the Cockeysville Industrial Track (CIT), by exempting NSR from the provisions of 49 U.S.C. § 10903 pursuant to 49 U.S.C. § 10502.² In the same decision, the Board also exempted NSR from the offer of financial assistance (OFA) provisions of 49 U.S.C. § 10904. In that decision, the Board rejected the arguments of an individual, James Riffin, and individuals supporting him, who argued that the transaction should not be exempted from the OFA procedures. Riffin filed a petition to reopen the Board’s decision, arguing that it was material error for the Board to conclude that Riffin is not a shipper on that line. Riffin also states, among other claims, that NSR failed to identify sufficiently the

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

² NSR succeeded to the interest of the Consolidated Rail Corporation (Conrail) in the CIT in 1999. See CSX Corp.—Control & Operating Leases/Agreements, 3 S.T.B. 196 (1998), 3 S.T.B. 764 (1998), aff’d sub nom. Erie-Niagara Rail Steering Comm. v. STB, 247 F.3d 437 (2d Cir. 2001). Under the Railroad Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 985, a “Final System Plan” (FSP) reorganized 8 bankrupt railroads into a single system operated by Conrail, which included the CIT.

line being abandoned, and that the OFA exemption granted by the Board is contrary to Congressional and statutory intent.

We will deny the requested relief. Riffin has not shown that the Board committed material error here, nor has he presented new evidence or shown substantially changed circumstances that would warrant reopening.

BACKGROUND

In its petition, NSR described the Line as running between milepost UU-1.00 “and the end of the CIT line south of the bridge at railroad milepost UU-15.44”.³ In addition to seeking an exemption for the abandonment of the Line, NSR also sought exemption from the OFA provisions of 49 U.S.C. § 10904 and the public use condition provisions of 49 U.S.C. § 10905. The Maryland Transit Administration (MTA), which operates what it terms a light rail passenger or transit service (passenger rail service) on the Line, supported NSR’s requests. Riffin opposed the request for an OFA exemption, and claimed that there is a significant potential demand for renewed freight rail operations on the Line.

By decision served on April 5, 2010 (April 2010 Decision), the Board granted NSR’s petition for an exemption to abandon freight rail service on the Line, subject to standard employee protective conditions, and for an exemption from the OFA process. The Board denied as moot NSR’s request for an exemption from the public use condition process, because no one had filed for a public use condition. On April 20, 2010, Riffin filed a petition for stay of the April 2010 Decision. NSR filed a response on April 23, 2010, and MTA filed a response on April 26, 2010. By decision served on May 4, 2010 (May 2010 Decision), the Board denied Riffin’s petition for stay.

On April 30, 2010, Riffin filed a petition to reopen the April 2010 Decision, claiming that the Board committed material error and that the Board’s decision was not supported by substantial evidence. On the same date, Lois Lowe filed a motion to supplement a motion for protective order, asking the Board to grant Riffin’s petition to reopen the proceeding and to permit Lowe to submit under seal 8 verified letters from parties she says are Cockeysville shippers, in addition to other claims. Lowe also filed comments and a reply to the petition for stay and the petition to reopen on May 4, 2010. On May 5, 2010, Eric Strohmeyer filed a statement on behalf of CNJ Rail Corporation, informing the Board of his support of Riffin’s and Lowe’s positions and of his intention to file a petition for review of the April 2010 Decision. Also on May 5, 2010, NSR submitted a notice of consummation to the Board, stating that the abandonment of NSR’s freight rail operating rights and freight rail service operations over the Line had been consummated. On May 17, 2010, Carl Delmont and Zandra Rudo each filed comments and a reply to the petition to stay and the petition to reopen the April 2010 Decision.

³ According to the FSP, Conrail acquired the portion of the Cockeysville Branch, which is now referred to as the CIT, between milepost 0.0 and milepost 15.4. The portion of the Cockeysville Branch between milepost 15.4 and milepost 54.6 in Hyde, Pa. appears on a list of lines not designated for transfer to Conrail.

On May 19, 2010, NSR filed a response to Riffin's petition to reopen and the filings supporting Riffin's petition. On May 20, 2010, MTA also filed a reply to Riffin's petition to reopen. Lowe, Rudo and Riffin each filed individual rebuttals to NSR's May 19 reply and to MTA's May 20 reply on May 25, 2010. On June 2, 2010, Lowe, Delmont, and Rudo filed a petition for review of the April 2010 Decision with the D.C. Circuit Court of Appeals. Riffin filed a supplement to his petition to reopen on June 30, 2010.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 722(c) and 49 C.F.R. § 1152.25(e)(4), a petition to reopen an abandonment decision will be granted only upon a showing that the prior decision involved material error or would be affected materially because of new evidence or substantially changed circumstances. We find that none of Riffin's arguments warrant reopening. Although the majority of Riffin's claims have been addressed previously in this proceeding by the Board, we nevertheless discuss each of Riffin's arguments for reopening below.⁴

Riffin's Purported Status as a Shipper

In his petition to reopen, Riffin claims that the Board's conclusion in its April 2010 Decision that Riffin is not a shipper on the CIT is material error. Riffin argues that the Board based its conclusion, with respect to one parcel, on purportedly incorrect statements submitted by an MTA witness in a previous case, and failed to consider Riffin's current ownership interest in a 400-foot segment of track in Baltimore County, known as the Veneer Mfg. Co. Spur (Veneer Spur). The Board has previously considered and rejected the same arguments Riffin raises here.

First, as stated in the April 2010 Decision,⁵ and again in the May 2010 Decision,⁶ the Board has previously determined that Riffin is not a shipper on the Line. That is because the parcel he claims to own is not located on the CIT, and its connection to the CIT was severed some time ago.⁷ Riffin has conceded previously that this parcel is 200 feet north of the CIT right-of-way, and that its connection to the CIT was severed.⁸ Second, in the May 2010 Decision,⁹ we found that Riffin failed to prove that his asserted acquisition of a leasehold interest in the Veneer Spur in 2009 makes him a shipper, and that his testimony on this point is

⁴ The arguments raised in Riffin's filings are substantially similar, if not nearly identical in many circumstances, to the arguments raised in the filings submitted by Lowe, Strohmeyer, Delmont, and Rudo. For convenience, we will refer to these arguments largely within the context of Riffin's pleadings.

⁵ Slip op. at 4, n. 3.

⁶ Slip op. at 6.

⁷ See James Riffin—Pet. for Declaratory Order, FD 35245, slip op. at 3 n. 6 (STB served Sept. 15, 2009).

⁸ See May 2010 Decision., slip op. at 6.

⁹ Slip op. at 6.

inconsistent with his own sworn statements in his petition for bankruptcy filed in the Maryland bankruptcy court.¹⁰ Third, in the May 2010 Decision, the Board found that Riffin failed to demonstrate that he has made a reasonable request for freight rail service. Instead, in direct contradiction to his claim that he is a shipper, Riffin claimed in a different proceeding to have acquired an interest in the Veneer Spur to operate a transload service for others, rather than to ship goods for himself.¹¹ The issue of Riffin's purported status as a shipper has been addressed thoroughly by the Board several times in this proceeding and rejected, and we find that Riffin has failed to demonstrate otherwise here through a showing of new evidence, substantially changed circumstances, or material error that would warrant reopening this proceeding.

Shipper Interest in Freight Rail Service on the Line

Riffin claims that the Board committed material error by concluding in its April 2010 Decision that there is insufficient evidence of shipper interest in freight rail service on the Line. He asserts that shippers who had executed letters of interest for freight rail service on the Line in 2006 in a different proceeding have executed new letters of interest in November 2009 opposing the loss of freight rail service. Riffin further claims that these letters were not included in his

¹⁰ Riffin claims in this proceeding that he acquired the Veneer Spur in 2009. (Riffin Pet. 12). The record in a prior proceeding involving the Veneer Spur states that his acquisition consisted of a lease of the property from a noncarrier entity, Mark Downs, Inc. See James Riffin—Petition for Declaratory Order, FD 35245, slip op at 3 (STB served Sept. 15, 2009). But Riffin's claim that he acquired a leasehold interest in the Veneer Spur is contradicted by his sworn statements in his Maryland bankruptcy proceeding. In that proceeding, Riffin was required to list "all unexpired leases of real or personal property" to which he was a party. Riffin did not include the Veneer Spur property on that list. See Schedule G—Executory Contracts and Unexpired Leases, Feb. 1, 2010, In re Riffin, No. 10-11248 (Bankr. D. Md.).

¹¹ Riffin has continuously made contradictory and misleading comments before the Board about his status as a shipper and as a carrier. In an acquisition and operation application filed under 49 U.S.C. § 10901 on September 1, 2011 (which the Board rejected on October 20, 2011 on the grounds that it was inherently defective and incomplete), Riffin stated that he is currently a "non-carrier", and claimed that the Board found Riffin was not a rail carrier in a decision served on July 13, 2011, thus suggesting that this determination was made recently. See Riffin Acquis. and Operation Application, FD 35527, at 1, 2 (STB filed Sept. 1, 2011); see also Eric Strohmeier and James Riffin—Acquis. and Operation Application—Valstir Indus. Track in Middlesex and Union Cntys., N.J., FD 35527 (STB served Oct. 20, 2011), petition to reopen filed Dec. 21, 2011. However, the Board had determined that Riffin was not a rail carrier in a 2008 proceeding. See James Riffin—Pet. for Declaratory Order, FD 34997, slip op. at 2 (STB served July 13, 2011). Most recently, on September 12, 2011, Riffin filed a consolidated petition to reopen Docket Nos. FD 34997 and FD 35245, asking the Board to find that Riffin was a rail carrier associated with a line of railroad in Allegany County, Md. from August 16, 2006, until March 17, 2011, based on a February 16, 2011 decision of the U.S. Bankruptcy Court for the District of Maryland, Baltimore Division. See James Riffin—Consolidated Petitions to Reopen, FD 34997 et al, at 3-5 (STB filed Sept. 12, 2011).

request for a protective order because Lowe is the appropriate individual to submit these letters to the Board under seal, due to her purported status as the executive secretary of what he calls the Cockeyville Rail Line Shippers Coalition. As part of her motion to supplement a motion for a protective order on April 30, 2010, Lowe submitted 8 verified letters or statements from individuals who identify themselves as shippers. Three of the submitted documents are from Lowe, Riffin, and Rudo (representing an entity they call the Cockeyville Coal Company), who are already parties to this case. The other letters are from the Packard Fence Company, SealMaster, European Landscapes and Design, Buschemi Stone Masonry, Inc., and the Lawn Doctor of Baltimore County (collectively, Cockeyville Businesses). Each letter supports Riffin's efforts to purchase the operating rights on the CIT from NSR and claims that the restoration of freight rail service on the Line will result in a shipment of approximately 8 to 40 rail cars per shipper per year.

The Cockeyville Businesses do not explain why they failed to submit their respective letters prior to the Board's April 2010 Decision, particularly when they do not claim that their interest in freight rail service arose after the decision. To warrant reopening, evidence must be newly available.¹² While Riffin and Lowe claim they were prevented by the Board's March 22, 2010 decision (March 2010 Decision) from submitting these letters,¹³ they do not argue that the Cockeyville Businesses were similarly hindered. Riffin, the Cockeyville Businesses, and the other parties to this proceeding had ample opportunity to submit their respective letters prior to the Board's April 2010 Decision. We find the letters that Lowe submitted do not constitute new evidence, and therefore cannot constitute the basis for reopening the April 2010 Decision.

Denial of Due Process

Riffin claims that the Board denied Rudo and Lowe their due process right to participate in this proceeding by failing to permit them to submit evidence to the Board regarding their

¹² See Friends of Sierra R.R., Inc. v. ICC, 881 F.2d 663, 667 (9th Cir. 1989) (“*newly raised* evidence is not the same as *new* evidence” for purposes of reopening an administratively final decision) (emphasis in original); Canadian Nat’l Ry. – Control – Ill. Cent. Corp., 6 S.T.B. 344, 350 (2002) (“‘new evidence’ is not newly presented evidence, but rather is evidence that could not have been foreseen or planned for at the time of the original proceeding”).

¹³ In particular, Riffin and Lowe claim that Lowe was precluded from supplementing her March 26, 2010 motion for protective order with a verified statement indicating that she desired freight rail service in Cockeyville, due to the statement in the Board's March 2010 Decision that any further submissions by Riffin to supplement the record would be viewed with disfavor. However, abandonment and OFA proceedings are, by statute, to be expedited. While we on occasion may extend these sorts of proceedings, good cause must be shown to warrant an opposed extension. Here, Riffin and his supporters became involved with this proceeding on January 5, 2010, and they knew from the start that their OFA exemption pleadings were due on January 25. Thus, by March 22, when the Board issued the decision attempting to cut off further pleadings and move this case forward, replies to the petition for exemption from the OFA procedures were already approximately 3 months too late.

interest in preserving the Line for their freight rail needs.¹⁴ Riffin bases this claim largely on the Board's March 2010 Decision, where the Board granted NSR's motion to strike the participation notice as to all of the named individuals except for Riffin, because Riffin was the only individual to have submitted sufficient information to be listed as a party of record.¹⁵ Riffin further claims that, although the Board and NSR were both fully aware of who Lowe was based on her filings in a previous proceeding, the Board did not permit Rudo and Lowe to become parties of record until April 5, 2010. In addition, Riffin states that he and other individuals were informed by the Deputy Director of the Office of Proceedings at the Board, in telephone conversations on March 23, 2010, and March 24, 2010, that they were not required to provide the Board with a photocopy of their Maryland driver's licenses in order to establish their identities. Riffin then claims that the Board did not acknowledge that Rudo, Lowe, and Delmont became parties to the proceeding until March 26, 2010, the date that the photocopies of their driver's licenses purportedly arrived at the Board.

Riffin's claims are wholly without merit, and do not demonstrate material error, new evidence, or changed circumstances. As explained in the March 2010 Decision,¹⁶ the Board granted NSR's motion to strike the participation notice submitted on January 5, 2010, as to all the named individuals except Riffin, and later Strohmeyer, because the participation notice did not meet the standards established by the Board's rules. Under 49 C.F.R. § 1104.1(b), a document not signed by a practitioner or attorney must be accompanied by the signer's address. The participation notice failed to meet this standard for most of the named individuals, because it only contained a valid address for Riffin, and later, Strohmeyer. As also stated in the March 2010 Decision,¹⁷ the Board granted NSR's motion to strike paragraph 3 and footnote 1 from the participation notice, because under 49 C.F.R. § 1103.2 and 49 C.F.R. § 1103.3, Riffin may only represent himself, as he is neither a licensed attorney nor practitioner approved to practice before the Board. Contrary to Riffin's claims in his petition to reopen, neither Lowe nor any other individual is "known" to the Board based on filings submitted in a previous case, nor can such filings be used to meet the standards established by 49 C.F.R. § 1104.1(b), 49 C.F.R. § 1103.2, and 49 C.F.R. § 1103.3 for this proceeding.

Riffin's claims regarding the proper mode of identification for individuals seeking to be parties to a Board proceeding¹⁸ are also without merit. The Board's rules do not require prospective parties to submit a photocopy of their driver's licenses to establish their identities before the Board. As explained above, 49 C.F.R. § 1104.1(b) states that a document that is not signed by a practitioner or attorney must be accompanied by the signer's address. Other than

¹⁴ Delmont, Rudo and Lowe also make similar claims in their filings. As their claims and arguments are almost exactly the same as Riffin's, we will reference, for convenience, Riffin's pleadings.

¹⁵ Strohmeyer filed a proper notice of intent to participate on March 4, 2010, and was considered a party as of that date.

¹⁶ Slip op. at 3.

¹⁷ Slip op. at 3.

¹⁸ See Riffin Pet. to Reopen, slip op. at 8-10.

Riffin, and later Strohmeier, all of the named individuals to the January 5, 2010 participation notice failed to meet this procedural standard, which resulted in their participation notice being rejected. Contrary to Riffin's claims, Rudo, Lowe, and Delmont were accepted as parties to this proceeding as of March 26, 2010, because that is the date that they each filed a motion to amend the January 5, 2010 notice of intent to participate as a party of record. These filings on March 26, 2010, met the procedural standard delineated by 49 C.F.R. § 1104.1(b), and were therefore accepted by the Board.

Identification of Line Being Abandoned

Riffin claims that NSR has failed to identify precisely the line being abandoned and has failed to indicate precisely the scope of the conveyance to Conrail pursuant to the FSP, thus necessitating an interpretation of the FSP by the Special Court.¹⁹ Riffin claims that NSR's and MTA's description of the Line is imprecise, primarily for the following reasons: 1) NSR's petition and MTA's April 26, 2010 reply state that the Line ends at milepost (MP) 15.44, although NSR's petition states in footnote 11 that the FSP only conveyed to Conrail the line running up to MP 15.4; 2) NSR states in its petition that it seeks to abandon to a point "south of the bridge at railroad milepost UU-15.44", without specifying where the bridge at milepost UU-15.44 is located or how far south of this bridge the point of abandonment is; 3) MTA's deed states that Conrail conveyed to "the southerly line of Bridge No. 16", which is not clearly identified, as MTA states in its April 26, 2010 reply that Bridge 16 is not located at MP 15.96, and an exhibit from a prior proceeding lists bridges at mileposts 14.85 (York Road), 15.05, 15.16, 15.44, 15.96, and 16.18; 4) if Bridge 16 is located north of MP 15.4, it was not subsequently conveyed to MTA by Conrail, based on NSR's statement in its April 23, 2010 response; and 5) the location of MP 15.4 is unknown at this time.²⁰ Based on these purported facts, Riffin concludes that the location of the Line is imprecisely described, and that the Board

¹⁹ In March 1976, the Special Court, a United States District Court composed of 3 federal judges selected by the Judicial Panel on Multi-District Litigation, ordered the trustee or trustees of each railroad in reorganization to convey to Conrail the rail properties designated for transfer in the FSP. See Order of Conveyance to Trustees of Railroads in Reorganization in the Region, Misc. No. 75-3(A), at 8-9 (Reg'l Rail Reorg. Ct. Mar. 25, 1976). The Special Court has since been abolished and the jurisdiction and other functions of the Special Court have been assumed by the United States District Court for the District of Columbia. See 45 U.S.C. § 719(b)(2).

²⁰ Riffin bases his claim that the location of MP 15.4 is unknown on an FSP out-of-service note submitted by MTA, stating the following: "Hyde, Pa (milepost 54.6) to Cockeysville, Md. (milepost 15.4). Damaged by 'Agnes.'" Riffin interprets this note as a reference to the bridge over Beaver Dam Run (Beaver Dam Run bridge), as it was purportedly washed out by Hurricane Agnes on June 23, 1972, and thus, according to Riffin, halting service north of the Beaver Dam Run bridge after that date. Riffin does not believe this note refers to the bridge over Western Run (Western Run bridge), as it is located 1,500 feet north of Beaver Dam Run and was not damaged by Hurricane Agnes. Riffin therefore claims it is more probable that the intent was to convey to Conrail only to the south side of Beaver Dam Run, rather than to the south side of Western Run.

must reopen and reject NSR's petition for abandonment, or hold the proceeding in abeyance, in order to permit an interpretation of the FSP by the Special Court.

Riffin's arguments about the location of the Line do not reflect a changed circumstance occurring after the Board's decision, nor does he present new evidence about the Line's endpoint that was not reasonably available to him when the record was developed. From a procedural perspective, Riffin's argument that the Line's precise location has not been identified also fails to raise a claim of material error. Riffin appears to have forfeited the claim concerning proper identification of the Line by failing to dispute in a timely manner NSR's assertion in its petition that the Line ended at milepost 15.44. See BNSF Ry. v. STB, 453 F.3d 473, 479 (D.C. Cir. 2006). As stated in the May 2010 Decision,²¹ Riffin affirmatively waived his current claim that the precise location of the Line is not identified, because he submitted a map in a confidential filing dated February 25, 2010, with a handwritten notation marking the end of MTA's property at milepost 15.44.

Moreover, the identity of the Line has already been discussed thoroughly in both the April 2010 Decision and the May 2010 Decision in this proceeding. In the May 2010 Decision,²² the Board noted that NSR sought authority to abandon to the northern-most end of the Line, as shown by NSR's description of the line proposed for abandonment in its petition for exemption as a 13.26-mile "dead-end segment" of a line of railroad extending to the "end of the CIT line south of the bridge."²³ The Board also stated that NSR specifically indicated in its petition that the Agreement of Sale dated May 1, 1990, between MTA and Conrail, allowed for some small variance to the described length of the Line, and that differences in the actual distance between mileposts of the Line resulted from multiple relocations of milepost 0.0.²⁴ NSR clearly indicated its intent to abandon the Line to the end of the CIT. As no substantive question related to the nature of the track transferred in the FSP currently exists, there is clearly no need for an interpretation of the FSP. Thus, Riffin has failed to demonstrate that the identification of the Line is unclear or that an interpretation of the FSP by the Special Court is necessary.

The Stranded Segment Argument

Riffin also claims that the Board's approval of NSR's petition for abandonment results in a stranded segment. In support of this claim, Riffin asserts that MTA has a common carrier obligation to provide rail service on the Cockeyville Industrial Park Track (CIPT), which connects to the CIT near MP 13.0 and was acquired by MTA in 1997. Riffin states that NSR's abandonment of the CIT causes the CIPT to become a stranded segment, as the CIPT will no longer be part of the national rail system. Riffin states that he believes that the MTA has never sought or received approval to acquire or abandon the CIPT, though MTA was required to do so

²¹ Slip op. at 4.

²² Slip op. at 4.

²³ See NSR Pet. 6.

²⁴ See NSR Pet. 7-8, n. 6; see also May 2010 Decision, slip op. at 4.

as a rail carrier, and notes that the order issued by the Board on October 9, 2007, merely stated that MTA's 1990 acquisition of the CIT did not need prior Commission authority.

Riffin's stranded-segment argument is inconsistent with his prior claims in this proceeding, and fails to demonstrate material error, new evidence, or substantially changed circumstances. Riffin previously claimed that a stranded segment would remain between milepost 15.4 and milepost 15.96, whereas his petition to reopen now states that the stranded segment instead is the CIPT, which he claims is connected to the CIT near milepost 13.0. As with the issue of the identification and location of the Line, discussed above, Riffin here also fails to explain why he was previously unable to raise this issue in a timely manner. The evidence Riffin relies upon is also not new evidence, nor does it represent substantially changed circumstances. This information was reasonably available to him when the record was developed.²⁵ In addition, as MTA indicated in its reply on May 20, 2010, NSR's petition clearly describes the CIPT (also known as the Hunt Valley Industrial Track)²⁶ as ancillary or excepted trackage to be abandoned in connection with NSR's abandonment of the CIT, thus demonstrating that there is no stranded segment. As previously found in the May 2010 Decision, Riffin's stranded-segment argument has no merit and does not constitute grounds for reopening the April 2010 Decision.

The FRA Waiver Argument

In the May 17, 2010 pleading filed by Rudo and in the May 25, 2010 pleading filed by Riffin, Riffin also claims that, as of November 28, 2007, NSR could no longer legally operate on the CIT, as MTA no longer had a waiver from certain Federal Railroad Administration (FRA) regulations involving shared passenger/freight rail service on a rail line. Riffin argues that because MTA's purported failure to renew its FRA waiver materially interfered with NSR's ability to provide freight rail service on the Line, MTA acquired the common carrier obligations associated with the CIT, and therefore it was material error for the Board to grant abandonment authority without relieving MTA of this obligation. NSR and MTA dispute Riffin's claims.

The finding that an entity is a common carrier by rail can be made only by the Board, regardless of whatever waivers a party has or does not have from the FRA. In Maryland Transit Administration—Pet. for Decl. Order, FD 34975 (STB served Oct. 9, 2007), the Board found over Riffin's objection that while MTA had acquired the physical assets of the CIT in 1990, it had not taken action since the time of the acquisition to conduct, control, or interfere with common carrier freight operations on the Line, nor had it held itself out as a common carrier performing freight rail service. Based on these findings, the Board held that MTA had not become a rail carrier subject to the Board's jurisdiction by virtue of its 1990 acquisition of the CIT, and that MTA's 1990 acquisition of the CIT did not require ICC authorization. Riffin did

²⁵ See Toledo, Peoria & W. Ry. V. STB, 462 F.3d 734, 753 (7th Cir. 2006).

²⁶ In its petition filed on December 16, 2009, NSR states that the CIPT is also known as the Hunt Valley Industrial Track. NSR additionally states that the abandonment necessarily includes all ancillary or excepted trackage that connects with the Line, including without limitation, the CIPT. See NSR Pet. 6 Note 5.

not, in the years between 2007 and 2010, attempt to show that MTA was allegedly interfering with NSR's common carrier operations by not renewing the waiver, and therefore, the Board never addressed the claim that Riffin raises now: that expiration of the waiver resulted in MTA's assumption of common carrier status. Because the Board never found that MTA had common carrier status on the Line, there was no reason for it to have required MTA to obtain abandonment authority, as Riffin claims.

Validity of Evidence Submitted by MTA and NSR

Riffin attacks the validity of pleadings submitted by NSR and MTA, claiming that they do not constitute substantial evidence. Riffin states that MTA's assertion that "the abandonment of freight rail service is critical to ensuring the future safety and success of the light rail transit system MTA operates over the Line" was made by counsel for MTA and was not supported by a sworn or unsworn statement by an MTA employee. Riffin claims that MTA's evidence is not substantial due to the lack of a sworn or unsworn statement from an MTA employee, and cites several federal court cases in an attempt to support his claim. Riffin further claims that as "all proceedings before the Board are subject to the Administrative Procedures Act, 5 U.S.C., and in particular to 5 U.S.C. 556(d)", the statements made by MTA's counsel are hearsay, and, as such, do not constitute substantial evidence and cannot be used as the basis for a decision. Riffin also claims that MTA failed to explain why continued use of the CIT for freight rail purposes would affect the safety and success of the passenger rail service, and states that the safety issue is a ruse, since MTA and NSR have exclusive operating windows and never occupy the Line at the same time.

We find Riffin's claims to lack merit, both procedurally and substantively. First, Riffin's claims that statements made by MTA's counsel are hearsay, and do not constitute substantive evidence, are procedurally incorrect. The Board's rules specifically permit us to rely on pleadings signed by counsel.²⁷ In the May 2010 Decision,²⁸ we found that Riffin is essentially challenging the weight the Board should accord to evidence submitted by MTA and NSR, as opposed to its admissibility. It is within the Board's discretion to determine how much weight to accord to evidence submitted by parties; the exercise of this discretion does not constitute material error.

In addition, we find unpersuasive Riffin's claim that MTA failed to explain why continued use of the CIT for freight rail purposes would affect the safety and success of the passenger rail service. NSR has established that the Line is currently used for a valid public purpose by MTA to provide passenger rail service. MTA informed the Board that its passenger rail service over the Line carries a weekday average of 25,754 passengers for regularly scheduled service, and that the abandonment of freight rail service is critical to ensuring the future safety and success of the passenger rail service MTA operates over the Line. MTA also claimed that it had made arrangements with the 3 former shippers on the Line in order to assist them in finding a permanent alternative to freight rail service over the Line. In the April 2010 Decision, we

²⁷ See 49 C.F.R. § 1104.4(a); see also May 2010 Decision, slip op. at 9, n. 12.

²⁸ Slip op. at 9.

found MTA's claim to be credible, as a temporary alternative would not resolve MTA's safety concerns arising from increased commuter passenger use of the Line.²⁹ In its reply on May 20, 2010, MTA noted the importance of preserving a window of time for MTA's performance of maintenance on the Line and that the best time to perform maintenance of rail lines and testing of equipment and of the lines is when no revenue service is provided. MTA states that Riffin's characterization of MTA's safety efforts as a "ruse" makes light of the work, attention to detail, and millions of dollars expended by MTA to ensure the safety, integrity, and improved operation of the Line. On this record, Riffin has not persuasively rebutted MTA's position that existing and future passenger rail operations on the Line would be compromised by sharing track with freight operations to be conducted by Riffin, and his claims do not constitute new evidence or substantially changed circumstances that warrant the reopening of the April 2010 Decision.

Exemption from OFA Process

In his petition to reopen, Riffin claims that the Board acted arbitrarily and capriciously in granting NSR an exemption from the OFA process. Riffin argues that this is unusual relief that is rarely granted. Riffin contends that the OFA exemption granted by the Board in this proceeding contravenes the clearly stated legislative intent of Congress that rail service be preserved whenever possible. Riffin asserts that 8 potential shippers oppose abandonment of the Line, and that 3 potential shippers have filed a notice of intent to file an OFA. Riffin additionally cites several cases in support of his position, which he claims list the following criteria purportedly used by the Board in granting exemptions from the OFA process: 1) shippers retain access to rail service via an adjacent line; 2) no one opposed abandonment or OFA exemption requests; 3) no one filed an OFA notice; 4) delay of the OFA exemption would have delayed an important public project; and 5) continued use of the line would have precluded using the line for an important public/private undertaking. Riffin claims that none of these criteria exists in this case.

Riffin fails to interpret correctly the Board's rationale for granting OFA exemptions. Under 49 U.S.C. § 10904, a financially responsible person may offer to purchase, or subsidize continued rail operations over, a rail line sought to be abandoned. When the record shows, however, that the right-of-way is needed for a valid public purpose, the Board has, on numerous occasions, granted exemptions from 49 U.S.C. § 10904, unless there is an overriding public need for continued rail service. Indeed, the Board, on its own initiative, has exempted a line segment from the OFA provisions. BNSF Ry.—Pet. for Decl. Order, FD 35164, et al., slip op. at 9-10 (STB served May 20, 2009), pet. for review denied in relevant part, dismissed in part, sub nom. Kessler v. STB, No. 09-1161 (D.C. Cir. Mar. 15, 2011). There, the Board weighed the public need for rail service against the public purpose of replacing a deteriorating, overburdened highway. In that case, there had been no local traffic on the rail line segment for 10 years and

²⁹ Slip op. at 5.

the right-of-way was necessary for an important interstate highway project. An exemption from the OFA process was appropriate in those circumstances.³⁰

Two further examples involve offeror Riffin, where the Board granted a request to exempt the line from the OFA provisions. In Norfolk S. Ry.—Aban. Exemption—in Norfolk and Virginia Beach, Va., AB 290 (Sub-No. 293X) (STB served Nov. 6, 2007), pet. for review dismissed, sub nom. Riffin v. STB, No. 07-1483 (D.C. Cir. Apr. 22, 2009), the City of Norfolk planned to acquire a segment of the line at issue as part of a light rail commuter passenger project. In view of such public use, the Board balanced those plans against the lack of evidence of continued public need for freight rail service, and found that an exemption from the OFA provisions was warranted.

In Consolidated Rail Corp.—Aban. Exemption—In Hudson Cnty., N.J., AB 167 (Sub-No. 1190X) (STB served May 17, 2010), aff'd mem., Riffin v. STB, No. 10-1150 (D.C. Cir. May 27, 2011), the Board also exempted a rail line from the OFA provisions, despite an attempt by Riffin and Strohmeyer to acquire a portion of the line through the OFA process. There, 3 railroads jointly filed a verified notice of exemption for 1 railroad to abandon, and 2 railroads to discontinue service over, a line of railroad in Hudson County, N.J., where 1 parcel of the line of railroad (Parcel C) was owned by New Jersey Transit Corporation (NJ Transit) and used for a light rail system, and was the parcel sought by Riffin and Strohmeyer. The Board weighed the weak demonstration of shipper need against NJ Transit's need for its commuter line and decided that the need for NJ Transit's light rail system to continue to use Parcel C to serve thousands of commuters daily was a valid and valuable public purpose, and therefore granted an exemption from the OFA provisions.³¹ The Board also focused on financial responsibility, an essential component of an OFA. Strohmeyer had made no showing of financial responsibility, and although Riffin had attempted to show that he was financially responsible, he had gone into bankruptcy in January 2010, telling the bankruptcy court that he had assets of around \$400,000 and liabilities of approximately \$4 million, in stark contrast to what he had told the Board a few months earlier. Thus, apart from its public-purpose-vs.-public-need test, there the Board found that insolvency is incompatible with being "financially responsible" for OFA purposes.

Here, in assessing public purpose and public need, we balance Riffin's claims of shipper need for freight rail service on the Line against the demonstrated need for MTA's passenger rail service to use the Line to serve thousands of commuters daily—a valid and valuable public purpose. NSR has established that the Line is currently used by MTA as an important passenger rail line servicing the State of Maryland.³² MTA has asserted on this record that it fully supports

³⁰ See also CSX Transp., Inc.—Aban. Exemption—in Pike Cnty., Ky., AB 55 (Sub-No. 653X), slip op. at 1, 2-3 (STB served Sept. 13, 2004) (expansion of a highway; no local traffic).

³¹ See Hudson County, slip op. at 5.

³² April 2010 Decision, slip op. at 6.

NSR's request for exemption from the OFA process, because the abandonment of freight rail service is critical to the future safety and success of the passenger rail service MTA operates over the Line.

In contrast to NSR's showing that the right-of-way is needed for a valid public purpose, Riffin has failed to prove that an overriding public need for continued freight rail service exists. Instead, throughout this proceeding, he has based this purported need for freight rail service over the Line on several different and unrelated claims, all of which the Board has found to lack substance or credibility. Riffin initially claimed that the 3 former shippers on the Line were unable to indicate their need for freight rail service on the Line due to the subsidy agreement payments they received from MTA for utilizing alternate transportation for their goods in place of freight service on the Line. Next, Riffin claimed that Baltimore County needed freight rail service over the Line in order to transport municipal solid waste (MSW) to a proposed incinerator on a U.S. military installation in Harford County, Maryland (Proposed Harford County Incinerator).³³ Subsequently, in his stay petition submitted on April 20, 2010, Riffin submitted letters from a Baltimore County Councilperson and a candidate for the office of Baltimore County Executive, as purported proof of shipper interest in freight rail service on the Line. Later still, Riffin claimed in the stay petition that a need for freight rail service over the Line was demonstrated by letters submitted by Cockeysville shippers in a different proceeding. In the April 2010 Decision and May 2010 Decision, the Board examined all of Riffin's claims and evidence and found them to be without sufficient substance, credibility, or merit.

Riffin now relies upon the letters filed confidentially by Lowe on April 30, 2010, as purported proof of a demonstrated need for freight rail service over the Line, and as support for his claim that the Board acted arbitrarily and capriciously in granting NSR an exemption from the OFA process. However, as discussed previously in this decision, the letters that Lowe submitted do not constitute new evidence, and therefore cannot furnish the basis for reopening the April 2010 Decision.³⁴ Moreover, even if the letters submitted by Lowe on April 30, 2010, were considered new evidence, the letters do not indicate an overriding public need sufficient to outweigh the public purpose that would be advanced by an exemption from the OFA provisions. No actual traffic has moved over the Line in some time, and the purported desire for freight rail service to these individuals is *de minimis*. These prospective shippers plainly have viable transportation alternatives available.³⁵ In our April 2010 Decision,³⁶ we stated that there is no

³³ See Riffin Mot. Protective Order, slip op. at 10 (Jan. 5, 2010).

³⁴ Permitting the late filing of evidence in support of an OFA would be contrary to Congress's direction to streamline the abandonment and OFA process. See *Aban. and Discon. of R. Lines and Transp. Under 49 U.S.C. § 10903*, 1 S.T.B. 894, 909-10 (1996) (in enacting the ICC Termination Act of 1995, Congress shortened the time for the Board to process OFAs under 49 U.S.C. 10904). Thus, it is extremely important for parties to submit timely evidence in an abandonment proceeding involving an OFA, and the Board permits such filings only in very rare circumstances.

³⁵ Indeed, NSR pointed out that there has been no reasonable request for freight rail service over the Line by or on behalf of a railroad customer located along the Line in the period

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indication of an overriding public need for continued freight rail service on the Line, and we find here that Riffin has submitted no new evidence to alter our prior finding.

In his petition to reopen, Riffin once again cites Norfolk Southern Ry.—Aban. Exemption—In Orange Cnty., NY, AB 290 (Sub-No. 283X) (STB served May 2, 2007), apparently in support of his claim that the Board acted arbitrarily and capriciously in granting NSR an exemption from the OFA process. However, Riffin’s mere expression of interest in providing freight rail service on the Line does not suffice to prevent the Board from granting an OFA exemption.³⁷ Unlike the MTA’s passenger rail service here, the petition for abandonment in Orange County was not tied to a public project. In any event, Riffin’s reliance on Orange County was addressed extensively in a previous decision served in this proceeding;³⁸ does not constitute material error, new evidence, or substantially changed circumstances; and adduces no new argument that would justify reopening on those grounds.

Riffin also cites several other decisions,³⁹ apparently in an attempt to distinguish the facts here on the alleged grounds that MTA’s passenger rail service is not a sufficiently valid public

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since April 2005. Cf. Norfolk and W. Ry.—Aban. Exemption—in Cincinnati, Hamilton Cnty., Ohio, AB-290 (Sub-No. 184X) (STB served May 13, 1998) (Hamilton County). In that case, the Board granted a petition for exemption from the OFA process in the face of arguments by two potential shippers that there was an overriding public need for transportation service, pointing out that no traffic had moved on the line for the prior 11 years, the shippers had viable transportation alternatives available, and the city of Cincinnati wished to use the right-of-way over the track being abandoned for multi-purpose improvements for the city’s downtown area, including a new professional football stadium.

³⁶ Slip op. at 6.

³⁷ See April 2010 Decision, slip op. at 7.

³⁸ Id. at 7-8.

³⁹ See, e.g., 1411 Corp.—Aban. Exemption—In Lancaster Cnty., Pa., AB 581 (STB served Sept. 6, 2001) (rejecting an OFA exemption request in an abandonment proceeding where the requester claimed its trail use proposal constituted an overriding public purpose for the line to be abandoned); Iowa N. Ry.—Aban.—In Blackhawk Cnty., Iowa, AB 284 (Sub-No. 1X) (ICC served Apr. 1, 1988) (granting an OFA exemption in an abandonment proceeding where the rail carrier entered into a contract selling the right of way to a state agency for construction of a public highway, and where both existing shippers supported the abandonment); Chi. & N. W. Transp. Co.—Aban. Exemption—In Blackhawk Cnty., Iowa, AB 1 (Sub-No. 226X), et al. (ICC served Jul. 14, 1989) (granting an OFA exemption in an abandonment proceeding where the rail carrier entered into a contract selling the right of way to a state agency for construction of a new four-lane public highway); Mo. Pac. R.R.—Aban.—In Harris Cnty., Tex., AB 3 (Sub-No. 105X), (ICC served Dec. 22, 1992) (granting an OFA exemption in an abandonment proceeding where the rail carrier entered into a contract selling the right of way to a state agency for the expansion of an interstate highway and for the compatible future use as a mass transit corridor); Cent. Mich. Ry.—Aban. Exemption—In Saginaw Cnty., Mich., AB 308 (Sub-No. 3X)

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project involving the Line to justify an OFA exemption. These cases, many of which involve OFA exemptions granted for the purpose of constructing interstate highways, strengthen the rationale for our decision in this proceeding. MTA's safe and efficient operation of its passenger rail service represents a well-accepted public project equal in standing to the construction of an interstate highway. None of the cases cited by Riffin contradicts this rationale in any way, nor do his purported criteria for granting OFA exemptions run contrary to our reasoning.

Riffin also claims that the Board erred in relying on Union Pac. R.R.—Discontinuance—in Utah Cnty., Utah, AB 33 (Sub-No. 209) (STB served Jan. 2, 2008) (Utah), to support its holding that Riffin's evidence of potential traffic is insufficient. Primarily because the purported shipper had not taken the basic step of contacting the railroad regarding future traffic, the Board found the shipper's traffic projections too speculative to be credible.⁴⁰ Riffin claims, however, that Utah is easily distinguished from this proceeding because it involved the discontinuance of freight rail service, rather than the total abandonment of freight rail service. The question, however, of what represents an adequate showing of need for continued freight rail service is analogous, and we have properly relied on Utah to support our finding that Riffin has failed to show an overriding public need for continued freight rail service. Thus, we find that Riffin has failed to demonstrate that the Board erred in relying upon Utah, and that Riffin has submitted no new evidence here to warrant altering our prior finding that MTA's use of the Line to provide passenger rail service is a valid public purpose that fully justifies an OFA exemption.

Final Environmental Assessment

In his petition to reopen and his supplement to the petition to reopen, Riffin claims that the Board prepared a post environmental assessment, now referred to as a final environmental assessment (Final EA), on March 18, 2010, but that the Final EA was neither listed in the decisions section of the Board's website nor served on Riffin or the 4 other individuals who filed their comments on the Board's environmental assessment issued on February 16, 2010. Riffin also argues that the Final EA does not comply with the National Environmental Policy Act (NEPA) for the following reasons: 1) the Final EA summarily dismisses the issue of future traffic on the Line; 2) the Final EA does not acknowledge the environmental benefits of moving

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(STB served Oct. 31, 2003) (granting an OFA exemption in an abandonment proceeding to permit the Michigan Department of Transportation to widen an interstate highway despite the opposition of the lone shipper on the line); Mo. Pac. R.R.—Aban. and Discontinuance of Operations Exemption—In Houston, Harris Cnty., Tex., AB 3 (Sub-No. 139X) (STB served Dec. 31, 1996) (granting an OFA exemption in an abandonment proceeding where the line appeared unsuitable for public use and abandonment of the line was critical to expansion plans of the line's only shipper); The Cincinnati, New Orleans and Tex. Pac. Ry.—Aban. Exemption—In Cumberland and Roane Cntys., Tenn., AB 290 (Sub-No. 208X) (STB served on Nov. 15, 2000) (granting an OFA exemption in an abandonment proceeding where the railroad sold the line to its sole shipper for further operation as a private industrial lead track).

⁴⁰ See Utah, slip op. at 6.

municipal solid waste (MSW) by rail to the Proposed Harford County Incinerator; and 3) the Final EA never directly addresses the question of whether an environmental impact statement should be prepared.

Riffin's claims regarding the Final EA's purported deficiencies are without merit, and do not constitute a showing of material error, new evidence, or substantially changed circumstances. Final EAs issued by the Board's Office of Environmental Analysis (OEA), formerly known as the Section of Environmental Analysis, are not decisions and are usually not served on parties nor posted in the decisions section of the Board's website. Final EAs, which are OEA's final recommendations to the Board, contain OEA's response to comments received during the EA comment period. The contents of the Final EA are summarized and addressed in the Board's final decision. As a courtesy to the public, OEA makes Final EAs available by posting them on the environmental correspondence tracking system, which is publicly available through the Board's website, although there is no NEPA requirement to do so. The Board does not seek comments on Final EAs because they are issued to conclude the environmental review process.

Riffin's claims that OEA dismissed the issue of future freight rail traffic on the Line, as well as failed to acknowledge the benefit of moving MSW by rail to the Proposed Harford County Incinerator, are without merit. To meet its NEPA responsibilities, the Board prepares environmental analyses in accordance with the regulations of the President's Council on Environmental Quality (CEQ),⁴¹ as well as the Board's own environmental regulations for implementing NEPA.⁴² Under these regulations, OEA assesses the potential environmental effects of reasonably foreseeable future actions.⁴³ Based on its own independent review, OEA did not consider Riffin's freight rail traffic proposals to be reasonably foreseeable future actions requiring environmental analysis. Similarly, on the record before it, the Board found that Riffin's forecasts for potential freight rail traffic on the Line were too speculative to be given any significant weight.⁴⁴ The Board also found Riffin's claim that Baltimore County would use freight rail service to transport MSW to the Proposed Harford County Incinerator to be speculative as well, as the record contained no evidence that the Proposed Harford County Incinerator had even been approved for construction.⁴⁵

Riffin's claims that the environmental assessment issued by the Board never directly addressed the question of whether an environmental impact statement should be prepared are also incorrect. OEA concluded in its environmental assessment that, as currently proposed, the abandonment of freight rail service operations on the Line would not significantly affect the quality of the human environment, and, therefore, the environmental impact statement process is unnecessary.

⁴¹ See 40 C.F.R. Parts 1500-1508.

⁴² See at 49 C.F.R. § 1105.

⁴³ See 40 C.F.R. §§ 1508.7 and 1508.8.

⁴⁴ April 2010 Decision, slip op. at 4.

⁴⁵ Id. at 5.

Conclusion

As discussed in the prior decisions in this proceeding, we properly granted NSR's petition under 49 U.S.C. § 10502 for exemption from the provisions of 49 U.S.C. § 10903 to abandon its freight operating rights on the Line. We also properly granted NSR's petition for an exemption from the OFA provisions of 49 U.S.C. § 10904. Because Riffin and other interested parties have failed to prove the existence of material error, new evidence, or substantially changed circumstances, we deny the petition to reopen filed by Riffin and supported by other interested parties.

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

It is ordered:

1. The petition to reopen this proceeding is denied.
2. This decision is effective on its service date.

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