

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.



Finance Docket No. 35221

JAMES RIFFIN – ACQUISITION AND OPERATION EXEMPTION –
VENEER MFG CO. SPUR –
LOCATED IN BALTIMORE COUNTY, MD

ENTERED
Office of Proceedings

MAR 06 2008

Part of
Public Record

SECOND AMENDED

VERIFIED NOTICE OF EXEMPTION

James Riffin (Applicant), a Carrier, pursuant to 49 U.S.C. §10902, provides the following as his verified exemption notice to acquire from Mark Downs, Inc., a non-carrier, approximately 400 feet of privately-owned spur track, and to operate the spur track as an additional line, which spur track is located in Cockeysville, Baltimore County, MD., This action comes within the class of transactions which are exempt from regulation under 49 U.S.C. §10902.

1. The following 49 CFR §1150.43 details are provided:

(a) and (b): **APPLICANT** and representative to whom correspondences should be sent:

James Riffin
1941 Greenspring Drive
Timonium, MD 21093
Phone: (443) 414 - 6210

(c): An agreement has been reached.

(d): James Riffin will be the operator of the property.

(e): The following is a brief summary of the proposed activity:

The Applicant, a carrier, on February 16, 2009, acquired from Mark Downs, Inc., a non-carrier, a long-term leasehold interest in the track material and underlying real estate associated with a 400-foot +/- privately-owned spur, and in the land adjacent to the spur track. Pursuant to 49 U.S.C. §10902, Applicant proposes to operate the spur track as an additional line. Mark Downs, Inc. and the spur track are located at 15 Beaver Run Lane, Cockeysville, Baltimore County, MD. The spur track is designated the Veneer Mfg. Co. Spur (“Veneer Spur”), on a valuation map appended to the Verified Statement of Robert L. Williams, which valuation map is identified as Page C-5 of Exhibit C, in the April 20, 2007 Response of the Maryland Transit Administration in STB Finance Docket No. 34975, *Maryland Transit Administration – Petition for Declaratory Order* (“Page C-5 Valuation Map”). The Page C-5 Valuation Map indicates the Veneer Spur is located at MP 15.05 on the Cockeysville Industrial Track (“CIT”), in Baltimore County, MD. Applicant proposes to interchange with Norfolk Southern Railroad at the western end of the Veneer Spur. Applicant proposes to use the eastern end of the Veneer Spur to provide transload rail service to a number of local shippers. Commodities that may be shipped on the Veneer Spur include, but are not limited to, clay, coal tar, cement, natural stone, railroad ties, rails, steel, chemicals, salt, wood products and rail cars. Estimated number of cars to be shipped per year: 200+. Highly confidential marketing information is contained in a Protective Order filed on February 19, 2009. Mark Downs, Inc. has a long-term leasehold interest in the subject and adjacent property, which it acquired from the Stenersen Mahogany Company, the fee simple owner of the underlying real estate and improvements. Stenersen Mahogany Company acquired title to the property when it acquired the Veneer Mfg. Company many decades ago. Applicant proposes to have the line rehabilitated and ready for service within 60 days. A Memorandum is appended hereto, which discusses Applicant’s status as a carrier, and the appropriate classification of the spur track, given Applicant’s intended use of the spur track.

(f): A map is attached hereto.

(g): The Petitioner certifies that the projected annual revenues of the carrier associated with this transaction, will not exceed the Class III carrier threshold, nor are they expected to exceed \$5,000,000.00.

2. Caption Summary required by 49 CFR §1150.44 is attached.

3. Environmental and Historical Impact:

Petitioner certifies that these activities will not exceed the thresholds established in 49 CFR §§1105.7 (e) (4) or (5), that per 49 CFR §1105.6 (c) (2) no environmental documentation need be prepared, and that the proposed activities will not affect any historic structures.

Respectfully submitted,

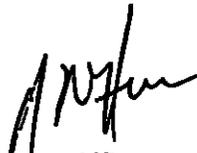


James Riffin

Date: March 5, 2009

VERIFICATION

I, James Riffin, having been duly sworn, state under the penalties of perjury, that I have read the foregoing Second Amended Notice of Exemption, and that its contents are true and correct to the best of my knowledge and belief.

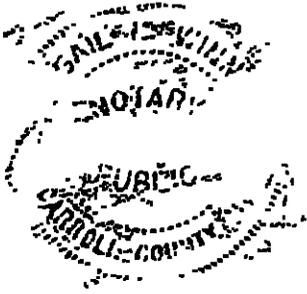


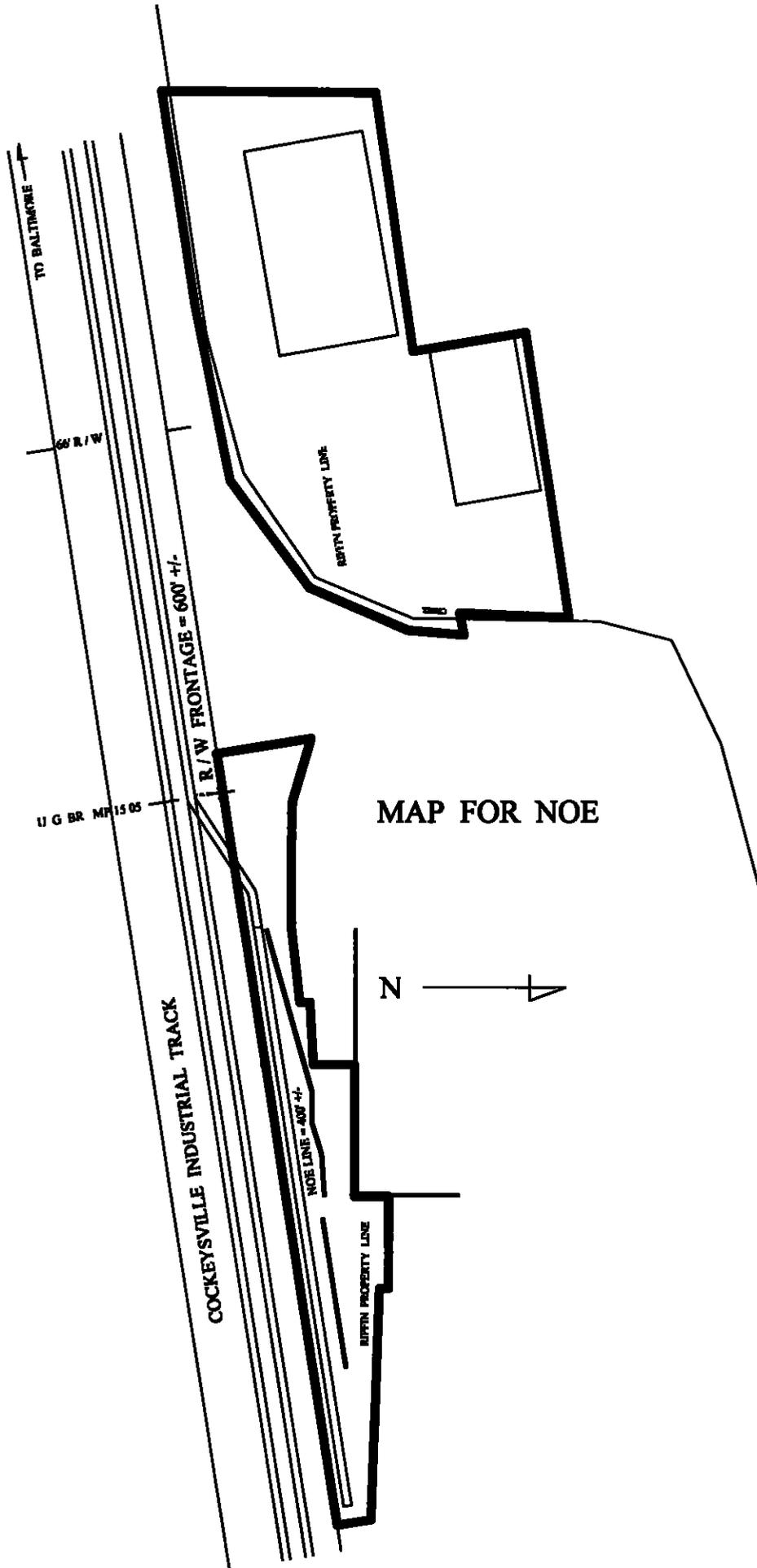
James Riffin

Subscribed and sworn to before me this 6th day of February, 2009.

Gail L. W

Notary Public exp 12/1/09 (SEAL)





SURFACE TRANSPORTATION BOARD

NOTICE OF EXEMPTION

Finance Docket No. 35221

CAPTION SUMMARY

**JAMES RIFFIN – ACQUISITION AND OPERATION EXEMPTION –
VENEER MFG CO. SPUR – LOCATED IN BALTIMORE COUNTY, MD**

James Riffin, a Carrier, has filed a Notice of Exemption under 49 U.S.C. §10902 to acquire from Mark Downs, Inc., a non-carrier, approximately 400 feet of privately-owned spur track, and to operate the spur track as an additional line, which spur track is located in Cockeysville, Baltimore County, MD. This action comes within the class of transactions which are exempt from regulation under 49 U.S.C. §10902.

Comments must be filed with the Surface Transportation Board and served on James Riffin, 1941 Greenspring Drive, Timonium, MD 21093, telephone (443) 414-6210.

This Notice conforms to the format in 49 CFR §1150.44. If the notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemptions under 49 U.S.C. §10505 (d) may be filed at any time. Filing petitions to revoke will not automatically stay the transaction.

Dated:

By the Board: Anne Quinlan

Secretary

MEMORANDUM

BACKGROUND INFORMATION

1. On February 16, 2009, the Applicant, James Riffin (“**Riffin**”), a carrier, acquired from Mark Downs, Inc., a non-carrier, a long-term leasehold interest in the underlying real estate, track and track material, and adjacent land associated with a privately-owned 400' +/- spur known as the Veneer Mfg. Co. spur (“**Veneer Spur**”), which spur connects to the Cockeysville Industrial Track (“**CIT**”) at MP 15.05. See the appended copy of page C-5 of Williams V.S. (See ¶ 2, *infra*.) Mark Downs, Inc., and the subject spur, are located at 15 Beaver Run Lane, Cockeysville, Baltimore County, MD. The fee-simple owner of the spur, underlying and adjacent real estate, is Stenersen Mahogany Company, which acquired the assets of the Veneer Mfg. Company many decades ago.

2. The CIT is a 14.96-mile stub-ended line of railroad that begins in Baltimore City on the west side of Amtrak’s Baltimore Pennsylvania Station, near North Avenue (MP 1.30), then continues northward to Ashland, MD, at MP 15.96. See April 11, 2007 Verified Statement of Robert L. Williams, contained in Exhibit D of Response of the Maryland Transit Administration, dated April 20, 2007, filed in *Maryland Transit Administration – Petition for Declaratory Order*, Finance Docket No. 34975 (“**Williams V.S.**”). The CIT was the beginning portion of the Northern Central Railroad’s line of railroad (Line Code 1224) between Baltimore and Lake Erie, New York. The line begins near Orleans Street (MP 0.0), crosses at grade, Amtrak’s Northeast Corridor, in the vicinity of Baltimore’s Pennsylvania Station, then leaves Amtrak’s Northeast Corridor near MP 1.30 (North Avenue). In 1911, the Pennsylvania Railroad (“**PRR**”) leased the Northern Central Line for 999 years.

3. Conrail acquired the assets of the PRR, including Line Code 1224. On May 1, 1990, Conrail deeded the underlying real estate and the tracks, of that portion of Line Code 1224 that lies between MP 1.0 and MP 15.96 [south side of Bridge 16 south of Ashland Station], to the

Maryland Transit Administration. This portion of Line Code 1224 is known as the CIT. Conrail retained a perpetual freight operating easement over the CIT. See attached copy of deed. Conrail continued to provide freight rail service on the CIT until Norfolk Southern Railway (“NSR”) acquired the PRR’s portion of Conrail’s assets. Norfolk Southern continued to provide freight rail service until December 14, 2005, when NSR filed a Petition for Exemption to abandon the CIT. See *Norfolk Southern Railway Company – Petition for Exemption – Abandonment of Freight Operating Rights and of Rail Freight Service – Between Baltimore, MD and Cockeysville, MD in Baltimore County, MD*, AB 290 (Sub No. 237X), filed December 14, 2005 (“NSR Abandonment Exemption”). The Board denied NSR’s abandonment petition on April 3, 2006.

4. In 1972, after Hurricane Agnes destroyed portions of Line Code 1224, the PRR filed an abandonment application with the Interstate Commerce Commission (“ICC”) to abandon that portion of the line that lies between Ashland, MD, at MP 15.96, and the Maryland / Pennsylvania border, at MP 35.6. The ICC never ruled on the abandonment application. In a January 27, 2006 letter addressed to the Board, in NSR Abandonment Exemption, NSR admitted Conrail’s operating rights did extend to Ashland, MD at MP 15.96, and admitted NSR could find no record indicating the Board or the Interstate Commerce Commission had ever approved abandonment of the Line. See attached copy of NSR’s January 27, 2006 letter.

5. Riffin is a rail carrier. See *CSX Transportation, Inc. – Abandonment Exemption – In Allegany County, MD*, STB Docket No. AB-55 (Sub-No. 659X) (STB served August 18, 2006) (“**Allegany Line**”). See also the section entitled “Riffin is a rail carrier,” *infra*, ¶23

6. Riffin intends to use the Veneer Spur for transload purposes: Local shippers will consign rail cars to the eastern end of Riffin’s Veneer Spur. Riffin will move the loaded consigned rail cars from the point of interchange with NSR (on the western end of the Veneer Spur), to the transload area at the eastern end of the Veneer Spur. After the rail cars have been unloaded, Riffin will move the railcars back to the NSR interchange area. Riffin’s transload track will be

available to the general public. Shippers utilizing Riffin's transload track, will pay Riffin's applicable tariff. The shippers Riffin intends to offer rail service to, typically would be any shipper who desires to utilize Riffin's rail-served transload facility. The nearest transload facility is some 15 miles south of Cockskeyville, near MP 2.0 on the CIT.

ISSUE #1

7. Should the Veneer Spur be classified as Line or §10906 Excepted Track?

APPLICABLE LAW

8. In *Texas & Pacific Ry Co v Gulf, Colorado, & Santa Fe Ry. Co.*, 270 U.S. 266, 278, 46 S.Ct. 263, 266, 70 L.Ed. 578 (1926)), the Supreme Court stated:

"But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. ... If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad, within the meaning of paragraph 18, although the line be short, and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks."

9. In *Nicholson v. Interstate Commerce Comm'n*, 711 F.2d 364, 367 (D.C. Cir. 1983), the D.C. Circuit stated:

"It is well established that the determination of whether a particular track segment is a 'railroad line,' requiring Commission authorization pursuant to section 10901(a), or a 'spur, industrial, team, switching, or side' track, exempt from Commission jurisdiction pursuant to section 10907(b), turns on the intended use of the track segment, not on the label or cost of the segment."

"Thus it can be seen that track segments which are intended to be used to carry through trains between points of shipment and delivery, particularly those segments which extend a railroad's service into new territory, must be approved by the Commission pursuant to

section 10901(a). On the other hand, track segments which are merely incidental to, and not required for, a railroad's service between points of shipment and delivery are exempted from the requirements of section 10901(a) by section 10907(b)." *Id.* at 368.

10. In *United Transp. Union-Illinois v. Surface Transp.*, 169 F.3d 474 (7th Cir. 1999) ("*Chicago Rail Link*"), quoting from *Class Exemption – Acq. & Oper. of R. Lines Under 49 U.S.C. 10901*, 1 I.C.C. 2d 810 n.1 (1985), the 7th Circuit stated:

"The terms 'acquire' and 'operate' include interests in railroad lines of a lesser extent than fee simple ownership, such as a lease or a right to operate."

11. In *Lone Star Steel Company v. McGee*, 380 F.2d 640 (5th Cir. 1967), the 5th Circuit quoted the following from *United States v. Louisiana & P.R.Co.*, 234 U.S.1. 34 S.Ct.741,746 (1913):

"But this conclusion [that one is not a common carrier if only a small part of the traffic carried is the property of others] loses sight of the principle that the extent to which a railroad is in fact used does not determine the fact whether it is or is not a common carrier. It is the right of the public to use the road's facilities and to demand service of it, rather than the extent of its business, which is the real criterion determinative of its character."

12. In *United Transp. Union v. Surface Transp. BD*, 183 F.3d 606, 613 (7th Cir. 1999), ("*Effingham*") the 7th Circuit quoted the following from *Brotherhood of Locomotive Engineers v. US*, 101 F.3d 718, 727 (D.C. Cir. 1996):

"If the track is or has been used or owned by more than one carrier, what controls classification of the track as spur or railroad line is the tenant railroad's use."

"although the ICC may focus on the tenant railroads' use of the tracks solely for switching operations as the controlling factor in determining the tracks' character, if those switching operations have the effect of substantially extending the tenant railroads' lines into new territory, then the Commission may not decline jurisdiction" *Id.* at 728.

VENEER MFG. CO. SPUR

13. When Conrail / NSR operated on the Veneer Mfg. Co. Spur, only one shipper was served: Veneer Mfg. Co. The spur was not available for general public use. Since the spur

served only one shipper, was not available to the general public, and served a shipper long served by the operator of the CIT (Pennsylvania RR, followed by Conrail, followed by Norfolk Southern Railway Co.), the spur would have met the criteria for §10906 excepted track.

14. Since Riffin's line of railroad is in Allegany County, MD, "the purpose and effect of the new trackage [Riffin's acquisition of the Veneer Spur] is to extend substantially the line of a carrier [Riffin] into new territory, [consequently] the proposed trackage constitutes an extension of the railroad, within the meaning of paragraph 18, although the line be short, and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks." *Texas and Pacific, op cit* , 270 U.S. 278.

15. The Veneer Spur is connected to the national rail system on its western end. There is insufficient room to engage in transload activities on the western end of the Veneer Spur. The ultimate destination of the railcars, is the eastern end of the Veneer Spur, where transload activities are to occur. Consequently, Riffin must move the rail cars from the western end of the Veneer Spur to the eastern end of the Veneer Spur. While only a short distance, this movement is a part of the 'line haul,' for which Riffin will collect a fee.

16. Since Riffin's use of the Veneer Spur will permit Riffin to serve new customers which Riffin cannot currently serve via Riffin's Allegany Line, since the shippers Riffin would serve via the Veneer Spur could currently be served by another carrier, NSR, since the eastern end of the Veneer Spur would be available for general public use [more than one shipper], and since the movement of railcars from the western end of the Veneer Spur to the eastern end of the Veneer Spur would be a part of the 'line haul,' that is from the point of shipment to the point of delivery [at the eastern end of the Veneer Spur], Riffin would argue the intended use of the Veneer Spur was as a line of railroad, rather than a spur track. As a point of reference, in *Effingham*, the Board held that 206 feet of track was sufficient to be a line of railroad for Effingham.

CRITERIA FOR EXEMPTION FROM REGULATION

17. 49 U.S.C. 10502, states in pertinent part:

“(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Board under this part, the Board, to the maximum extent consistent with this part, shall exempt a person, class of persons, or a transaction or service whenever the Board finds that the application in whole or in part of a provision of this part –

“(1) is not necessary to carry out the transportation policy of section 10101 of this title; and

(2) either –

(A) the transaction or service is of limited scope; or

(B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.

18. Permitting Riffin’s Notice of Exemption (“NOE”) to acquire and operate the Veneer Spur to become effective, would be in conformity with the following Rail Transportation Policies:

“(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;” [Creating a rail-served transload facility in Cockeyville would foster competition between motor and rail carriers, and would increase the demand for rail services.]

“(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;” [Permitting Riffin’s Notice of Exemption to become effective would ‘minimize the need for Federal regulatory control over the rail transportation system and [would result in] expeditious regulatory decisions.’]

“(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense.” [Creating a rail-served transload facility in Cockeyville would foster competition between motor and rail carriers, and would help meet the needs of the public in the Cockeyville area.]

“(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;” [Creating a rail-served transload facility in Cockeyville would foster competition between motor and rail carriers.]

“(7) to reduce regulatory barriers to entry into and exit from the industry;” [Permitting Riffin’s NOE to become effective would “reduce regulatory barriers to entry into ... the industry.”

“(8) to operate transportation facilities and equipment without detriment to the public health and safety;” [Permitting Riffin’s NOE to become effective would not have any adverse detriment to the public health and safety. The Veneer Spur is an existing spur, located in an industrially zoned area, and is not in a floodplain.]

“(14) to encourage and promote energy conservation;” [Creation of a transload facility in Cocksylville would make it possible for local shippers to ship their products via rail, rather than via motor carrier. Shipping goods via rail requires far less energy than shipping goods via motor carrier.]

“(15) to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part.” [Permitting Riffin’s NOE to become effective would permit Riffin to expeditiously begin providing rail transload services to local shippers, before the local shipper’s busy summer season.]

19. Permitting Riffin’s NOE to become effective would not adversely affect any Rail Transportation Policy.

20. The transaction is of limited scope: The Veneer Spur is only 400 feet long. Placing it back into service would certainly be ‘limited in scope.’

21. “The application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.” None of the local shippers are captive rail customers. Providing local shippers with alternative rail service would relieve them of motor carrier’s ‘abuse of market power,’ by making an alternative mode of transportation available.

22. Permitting Riffin’s NOE to become effective would be in conformity with 8 of the 15 Rail Transportation Policies, and would not adversely affect any of the 15 Rail Transportation Policies. The transaction is of very limited scope, and would not result in any abuse of market power. Consequently the Board ‘shall exempt a person [Riffin], or a transaction or service [Riffin’s NOE].’

RIFFIN’S STATUS AS A RAIL CARRIER

APPLICABLE STATUTES

23. 49 U.S.C. 10501(b) states in pertinent part:

“(b) The jurisdiction of the Board over –

- (1) transportation by rail carriers, and the remedies provided in this part with respect to ... practices, routes, **services, and facilities** of such carriers; and
- (2) the construction, acquisition, **operation**, abandonment, or discontinuance of **spur, industrial, team, switching, or side tracks, or facilities**, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to **regulation of rail transportation are exclusive** and preempt the remedies provided under Federal or State law.

24. 49 U.S.C. §10102. **Definitions**

In this part –

(5) “rail carrier” means a person providing common carrier railroad transportation for compensation, but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation;

(6) “railroad” includes –

- (A) a bridge, car float, lighter, ferry, and intermodal equipment used by or in connection with a railroad;
- (B) the road used by a rail carrier and owned by it or operated under an agreement; and
- (C) a **switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation;**

(9) “transportation” includes –

- (A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, **property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and**
- (B) **services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property;”**

25. Prior to, and following Riffin's purchase of his Allegany Line (see ¶5), Riffin purchased more than a dozen rail cars, which he has made available to potential shippers. He has also purchased three prime movers. Riffin has offered to provide rail service to a number of shippers located in the vicinity of his Allegany Line: (A) Several coal mining companies mining coal in Georges Creek, which coal is transported by truck to (a) coal-fired power plants in Cumberland, MD (Warrior Run), and Williamsport, MD; (b) cement manufacturing plants in Union Bridge, MD and Martinsburg, W. VA; (B) A pallet manufacturing plant in Frostburg, MD receiving lumber via truck from Canada; (C) Several refractory-brick manufacturing companies located in Frostburg, MD, which receive their raw materials via truck from Pittsburg, PA; (D) Several road salt suppliers, which ship road salt to Garrett and Allegany Counties in trucks from Pittsburg, PA.; (E) A manufacturing plant in Garrett County which trucks its products to rail transload facilities in Baltimore, MD and Harrisburg, PA. The shippers Riffin spoke with stated they had entered into long-term contracts with motor carriers. They indicated when those contracts expired, they would consider using rail service.

26. **Allegany County.** Georges Creek, which flows adjacent to Riffin's Allegany County Line, has seriously eroded three sections of the Line. While the Line could be made operational by relocating the tracks farther away from the bank of the creek (a few days work), doing so would not prevent further erosion of the trackbed. To properly repair the washouts, and to prevent further erosion of the trackbed, the eroded bank needs to be rebuilt using fill material, then protected with large (2 - 20 ton) boulders. Rebuilding the eroded trackbed would require placement of fill material and boulders in the portion of the creek bed that was washed out by the creek. Maryland's Department of the Environment ("MDE") and Allegany County have argued Riffin would need approval and permits from MDE and Allegany County prior to starting repair of these washouts. The issue of whether Riffin needs to obtain permits from MDE and/or Allegany County prior to repairing the washouts on his Allegany Line, is presently before the Court of Appeals for the District of Columbia Circuit. See Case No. 08-1190. Once that court resolves this permit issue, Riffin will proceed to permanently repair the washouts on his Allegany Line. If a local shipper's motor carrier contract expires prior to the Court of Appeals' decision, and if a local shipper requests rail service, Riffin will relocate his tracks farther away from the

creek bank, and will provide the requested service within a few days after a request for service has been received.

27. Riffin has spoken with numerous shippers regarding using his Allegany Line rail service. Riffin has been holding out to the public since August 18, 2006, the availability of his Allegany rail line, and has been offering to provide transportation-by-rail-carrier services to the public.

**STB PRECEDENT HOLDS ONE BECOMES A RAIL CARRIER
WHEN THE STB GIVES ONE AUTHORITY TO OPERATE
A LINE OF RAILROAD**

28. In *General Railway Corp. d/b/a Iowa Northwestern Railroad – Exemption for Acquisition of Railroad Line – In Osceola and Dickinson Counties, IA*, FD No. 34867, Served June 15, 2007, the STB stated:

“In addition, the Chairman directed GRC to file an amended notice of exemption under 49 CFR 1150.41 [for existing carriers] instead of 49 CFR 1150.31 [for non-carriers], because GRC **had become a rail carrier after having obtained authority to operate the Line** in 2001. Note 6: See FD No. 34867, Served May 25, 2006.” [GRC was seeking authority to acquire the line it previously had been given authority to operate.]

29. In *City of Creede, Co – Petition for Declaratory Order*, FD No. 34376, Served May 3, 2005, the STB stated:

“Once rail operations have been authorized by the Board, the track remains a line of railroad subject to full agency regulation until the agency authorizes its abandonment.” Op. at 8.

“We are mindful that, at the present time, D&RGHF is not using any of the ROW [right of way] for rail service, as it is still in the process of rehabilitating the line. However, as the June 2004 Decision explains, the legal status of the Creede Branch under the statute is that of an active rail line with all the rights and obligations attendant to that designation. Op. 7.

30. In Case No. 08-1190 in the DC Court of Appeals, Allegany County attempted to make much of the fact that the deed to Riffin's Allegany County Line has not been recorded. On p. 19 of its Brief, Allegany County **misquoted** what the Maryland Court of Appeals stated in *Childs v. Ragonese*, 460 A.2d 1031, 1036, note 8. The Court of Appeals stated:

"It is well settled that in a sale of real estate, legal title does not pass until a deed is properly executed and delivered. *Kingsley v. Makay*, 253 Md. 24, 251 A.2d 585 (1969)." In its Brief, Allegany County changed the word 'delivered,' to 'recorded.'

31. Whether legal title has passed or not, is irrelevant. Riffin was given authority to operate his Allegany County Line on August 18, 2006. At that time, pursuant to ICC and STB precedent, and pursuant to the STB's interpretation of the statutes it administers (49 U.S.C. 10901 and 10902), Riffin became a rail carrier. Keep in mind, the General Railway Corp. became a common carrier when it received authority to operate on a line it did not own. See ¶28, *supra*, and see ¶33, *infra*, wherein the Court held that American Orient Express was a common carrier even though it did not own the tracks it operated on, and did not own or operate the locomotives pulling its rail cars.

32. Allegany County, in Case No. 08-1190, has also attempted to make much of prior STB decisions which have held that authority to acquire and operate a line is permissive and is not dispositive of ownership of the Line. For acquisitions pursuant to 49 U.S.C. 10901 or 10902, or NOE's from those statutes, authority to acquire is permissive, and the selling carrier cannot be compelled to deliver title to the line to the buyer. See *General Railway* at 4, Served June 15, 2007. However, under 49 U.S.C. 10904, Offers of Financial Assistance, if a prospective buyer offers the fair market value, then the seller can, and will be compelled to transfer title to the buyer. Riffin's purchase of his Allegany County Line was pursuant to the STB's Offer of Financial Assistance procedures. In Case No. 08-1208, before the DC Court of Appeals, Riffin has argued that he has the right to compel CSX to transfer title to the Allegany Line to him.

33. In *American Orient Exp. Ry v Surface Transp*, 484 F.3d 554, (D.C. Cir. 2007), the Court held:

“A ‘rail carrier’ may own tracks and transport passengers along its tracks, but that is not the only way to provide ‘railroad transportation.’ A rail carrier may instead use tracks owned by another entity and ‘operated under an agreement.’ ” *Id.* at 556.

“To be a common carrier, a company need only, in practice, serve the public indiscriminately and not ‘make individualized decisions, in particular cases, whether and on what terms to deal.’ ” *Id.* At 557.

34. In *U.S. v. Louisiana & P.R.Co.*, 234 U.S.1, 34 S.Ct. 741, 746 (1913), the Supreme Court held: “It is the right of the public to use the road’s facilities and to demand service of it, rather than the extent of its business, which is the real criterion determinative of its character.”

35. Allegany County has also attempted to make much of the ICC’s statement in *Alabama Southern Railroad Company, and the Alabama Great Southern Railroad Co. – Acquisitions, Operations and Trackage Rights – Exemption*, FD 30505, Decided August 24, 1984, wherein the Commission stated: “Since ASR presently provides no rail transportation services, it is not a carrier.” That case had to do with mergers under 49 U.S.C. 11343. The ICC actually held that the ICC’s authority to impose labor protective conditions would be invoked only if the acquiring party was providing rail services at the time of the acquisition. If the acquiring entity was not providing rail services at the time of the acquisition, then the acquisition would not result in the merger of two ‘carriers.’

36. Allegany County has referenced *S.D. Warren Co. d/b/a Sappi Fine Paper N America – Acquisition and Operation Exemption – Maine Central R Co and the Springfield Terminal Ry. Co.*, STB FD No. 34133, Service Date Sept. 30, 2002). In that case, the petitioner was held to be a private carrier, since the petitioner only moved its own rail cars, and did not offer to move rail cars being utilized by other shippers on the line.

37. Allegany County has referenced *Lone Star Steel Company v. McGee*, 380 F.2d 640 (1967). In that case, the Lone Star Steel Company had a network of private tracks at its steel manufacturing plant. Lone Star used its locomotives and crews to move not only its railcars on its plant tracks, but also the railcars of other shippers whose facilities were on Lone Star property,

and were adjacent to Lone Star's private tracks. Even though Lone Star did not charge the shippers whenever Lone Star moved their railcars on Lone Star's private tracks, the Court held Lone Star was a common carrier, since it moved rail cars belonging to other shippers. As for payment, the court held the charge for moving the shipper's rail cars was included in their long-haul freight bills. [A short line railroad owned by Lone Star brought the rail cars to Lone Star's plant. The court held Lone Star received 'payment' for its in-plant rail movements via dividends from the short line railroad it owned.]

38. Allegany County has referenced *Simmons v ICC*, 871 F.2d 702 (7th Cir. 1989). In this case, like the *Alabama Southern* case in ¶35, the issue was whether the protective labor provisions of 49 U.S.C. 11343 were applicable. The court held that it was not the merger of two 'carriers,' since operations had not commenced. (The court reasoned if operations had not commenced, then there were no railway employees which would be affected by the merger, and thus the labor protective provisions of 11343 would not be applicable.)

39. Allegany County has referenced *The Chicago, Lake Shore and South Bend Ry Co – Acquisition and Operation Exemption – Norfolk S. Ry. Co.*, STB FD No. 34960, Service Date February 14, 2008, at slip op. 3-4. In its Brief in Case No. 08-1190, Allegany County indicated the STB's decision held:

“(person may obtain permissive authority from the Board to acquire a line of railroad, but cannot exercise that authority and become a carrier until it actually acquires the line and commences operation);” AC Brief at 15.

40. The portion of Allegany County's statement in bold, **does not appear** in the STB's decision. The actual statement by the STB follows:

“Moreover, an executed agreement is not a prerequisite for a noncarrier seeking to invoke the class exemption to acquire and operate a rail line. Board authorization is permissive and may not be exercised unless an agreement is ultimately reached by the parties to the transaction. Note 3. Thus, if NSR eventually enters into an

agreement with CLS&SB, then CLS&SB would be able to acquire and operate the Line pursuant to this exemption. On the other hand, if NSR declines to execute an agreement, CLS&SB would not be able to exercise this authority.”

41. 49 CFR 1152.27(f)(2) states:

“Board approval is not required under 49 U.S.C. 10901, 10902, or 11323 for the parties to consummate the transaction or for the purchaser to institute service and operate as a railroad subject to 49 U.S.C. 10501(b).”

42. 49 CFR 1152.27(k) states:

(k) Default on agreement. If any party defaults on its obligations under a financial assistance agreement, any other party to the agreement may promptly inform the Board of that default. Upon notification, the Board will take appropriate action.”

CONCLUSION

43. Riffin is a rail carrier. Pursuant to the Board’s Precedent in *General Railway Corp.*, ¶28, Riffin became a rail carrier when the Board, on August 18, 2006, in AB 55-659X, granted Riffin authority to operate his Allegany County Line.

44. Pursuant to the court holdings in the cases discussed *supra*, ¶¶33, 34, 37, Riffin became a common carrier by rail on August 18, 2006 when, following the grant of authority to operate his Allegany Line, he began to hold himself out as a common carrier by rail, began to offer rail service to the public, and made it known to the public / shippers near his Allegany Line, that he would provide rail service on his Allegany Line upon a reasonable demand for service.

45. Riffin’s operation of the Veneer Spur would constitute the operation of a line of railroad, since it would permit Riffin to provide rail service in a territory Riffin currently does not serve, and to provide rail service in a territory currently served by another carrier.

46. WHEREFORE, Riffin would ask that the Board:

- A. Find that Riffin is a common carrier by rail;
- B. Find that the Veneer Spur is a line of railroad;

- C. Permit Riffin's NOE to become effective, or in the alternative, to institute an Individual Exemption Proceeding.
- C. And for such other and further relief as would be appropriate.

Respectfully submitted,



James Riffin, Applicant

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of March, 2009, a copy of the foregoing Notice of Exemption and Memorandum, was served by first class mail, postage prepaid, upon James R. Paschall, Senior General Attorney, Norfolk Southern Railway Company, Law Department, Three Commercial Place, Norfolk, VA 23510; and upon Charles Spitulnik, Kaplan Kirsch Rockwell, Ste 905, 1001 Connecticut Ave, N.W., Washington, DC 20036, counsel for the Maryland Transit Administration and Maryland Department of Transportation.



James Riffin

VERIFIED STATEMENT OF JAMES RIFFIN

1. My name is James Riffin. I am over the age of 18 and am qualified and authorized to make this Verified Statement.

2. Prior to, and following my purchase of my Allegany Line (see AB-55, Sub No. 659X, Served August 18, 2006) I purchased more than a dozen rail cars, which I have made available to potential shippers. I have also purchased three prime movers. I have offered to provide rail service to a number of shippers located in the vicinity of my Allegany Line: (A) Several coal mining companies mining coal in Georges Creek, which coal is transported by truck to (a) coal-fired power plants in Cumberland, MD (Warrior Run), and Williamsport, MD; (b) cement manufacturing plants in Union Bridge, MD and Martinsburg, W. VA; (B) A pallet manufacturing plant in Frostburg, MD receiving lumber via truck from Canada; (C) Several refractory-brick manufacturing companies located in Frostburg, MD, which receive their raw materials via truck from Pittsburg, PA; (D) Several road salt suppliers, which ship road salt to Garrett and Allegany Counties in trucks from Pittsburg, PA.; (E) A manufacturing plant in Garrett County which trucks its products to rail transload facilities in Baltimore, MD and Harrisburg, PA. The shippers I spoke with stated they had entered into long-term contracts with motor carriers. They indicated that when those contracts expired, they would consider using rail service.

3. Georges Creek, which flows adjacent to my Allegany County Line, has seriously eroded three sections of the Line. While the Line could be made operational by relocating the tracks farther away from the bank of the creek (a few days work), doing so would not prevent further erosion of the trackbed. To properly repair the washouts, and to prevent further erosion of the trackbed, the eroded bank needs to be rebuilt using fill material, then protected with large (2 - 20 ton) boulders. Rebuilding the eroded trackbed would require placement of fill material and boulders in the portion of the creek bed that was washed out by the creek. Maryland's Department of the Environment ("MDE") and Allegany County have argued I would need approval and permits from MDE and Allegany County prior to starting repair of these washouts. The issue of whether I need to obtain permits from MDE and/or Allegany County prior to repairing the washouts on my Allegany Line, is presently before the Court of Appeals for the District of Columbia Circuit. See Case No. 08-1190. Once that court resolves this permit issue, I will proceed to permanently repair the washouts on my Allegany Line. If a local shipper's motor carrier contract expires prior to the Court of Appeals' decision, and if a local shipper requests rail service, I will relocate my tracks farther away from the creek bank, and will provide the requested service within a few days after a request for service has been received.

4. I have spoken with numerous shippers regarding using my Allegany Line rail service. I have been holding out to the public since August 18, 2006, the availability of my Allegany rail line, and have been offering to provide transportation-by-rail-carrier services to the public.

5. I affirm under the penalties of perjury that the above is true and correct to the best of my knowledge and belief.

Executed on March 6, 2008.


James Riffin

STATE OF MARYLAND, BALTIMORE COUNTY, to wit:

I HEREBY CERTIFY, that on this 6th Day of March, 2009, before me, a Notary Public of said State, personally appeared James Riffin, known to me or satisfactorily proven to be the person whose name is subscribed to the within Verified Statement, and who acknowledged that he executed the same, for the purposes therein contained

AS WITNESS my hand and notarial seal.


Notary Public

My commission expires: 12/1/09



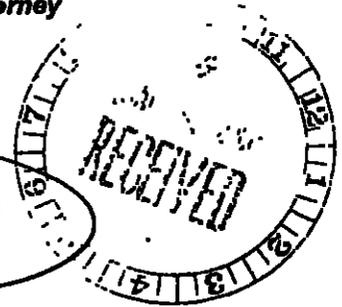


Norfolk Southern Corporation
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2/1/06
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Senior General Attorney

Writer's Direct Dial Number
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January 27, 2006



via fax (202) 565-9004
and original and 10 copies via DHL Express

Honorable Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20006.

Re. STB Docket No. AB-290 (Sub-No. 237X), Norfolk Southern Railway Company - Abandonment Exemption - in Baltimore County, MD

Dear Mr. Williams:

On January 3, 2006, the Board served notice in the subject proceeding that on December 14, 2005, Norfolk Southern Railway Company ("NSR") filed with the Board a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903-05 to abandon its freight operating rights and rail freight service over 12.8 miles of a line of railroad between milepost UU-1.0 at Baltimore, MD, and milepost UU-13.8 at Cockeysville, MD (the "Line"). NSR also seeks exemption from 49 U.S.C. 10904 [offer of financial assistance ("OFA") procedures] and 49 U.S.C. 10905 [public use conditions] because the Line's right-of-way is owned by the Maryland Department of Transportation ("MDOT"), which will continue to use the Line for the public purpose of providing light rail commuter passenger service through the Maryland Transit Administration ("MTA"). Replies to NSR's petition were due on or before January 23, 2006. The Board stated that a final decision in this proceeding will be issued by April 3, 2006.

James Riffin ("Riffin") filed a protest or opposition to the petition for exemption with the Board before the January 23, 2006 due date. Riffin's filing is dated January 13, 2006. NSR received a copy of the filing on January 17, 2006. The Board's regulations require that a petitioner's entire case be filed with the petition. In some cases and under certain circumstances, the Board has permitted petitioners to reply to protests, opposition statements or replies. This case presents circumstances in which an NSR response to Mr. Riffin's statement is necessary for the Board to decide this matter on a

the return of the cars to origin without charge (if necessary) and waiver of any accrued charges for storage of the cars should more than make up for any mistake NSR may have made with respect to the handling of the cars.

It is unfortunate that NSR did not handle the disposition of Mr. Riffin's cars more promptly. We believe our current and proposed further handling of the matter will appropriately correct any mishandling of the matter and will do so without attempting to place any expense on Mr. Riffin.

Mr. Riffin has not shown that his attempt to have these empty cars delivered to him at Cockeysville make him a customer on the Line or that he has any railroad freight traffic for NSR at all. He has presented no basis for the Board to conclude that he is an objecting shipper or on which the Board should deny or dismiss the petition.

Typographical Error In Milepost Number. It is plainly absurd for Mr. Riffin to suggest that a single and obvious typographical error with respect to the milepost at one end of the Line justifies dismissal of the petition. The milepost is stated correctly on the map and in numerous other places in the petition.

Abandonment of Additional Former Conrail Operating Rights. Mr. Riffin has raised one legitimate question that requires explanation to the Board and further action by NSR. It does not require either dismissal or denial of the subject petition, however.

In the subject petition, NSR has filed for an exemption from the prior approval requirements of the Act in order to abandon the remaining active right-of-way of the Cockeysville Branch that was acquired by NSR from Conrail in 1999 and on which all active shippers on the Line are located. Mr. Riffin questions whether the Line for some distance beyond Milepost UU-13.8 ever was formally abandoned. Upon further investigation, we have determined that Conrail's operating rights did extend at least a short distance beyond Milepost UU-13.8 and we can not find any record of the formal abandonment of this additional segment of right-of-way. There is no track on most or all of this segment but the right-of-way is intact and some track and material is still next to or along it even though it is not on the right-of-way in usable condition.

NSR proposes to rectify this situation by filing as promptly as possible a notice of exemption to abandon this long inactive railroad line segment along which no current or recent customers are or have been located and of which few people were even aware. No current shipper or other party will be injured or prejudiced by NSR filing this separate notice of exemption in the near future. Indeed, if anything, there will be a benefit to cleaning up the status of the short segment of former line that was not previously formally abandoned. While NSR can not state that the notice of exemption can be filed and made effective coincident with the effective date of the petition, we will do our best to move this along quickly. Under the circumstances, we will embargo the entire line, as indicated above, and file the notice of exemption as soon as possible. We regret not being able to include this short segment in this petition, the need for a further filing and

THIS DEED made this 1st day of May in the year One Thousand Nine Hundred and Ninety (1990),

RCF 66.00
DEFERRED 66.00
WYTRA 0001 R02 Y08=41
06/14/90

BY AND BETWEEN CONSOLIDATED RAIL CORPORATION,

Corporation of the Commonwealth of Pennsylvania, having an office at Six Penn Center Plaza, Philadelphia, Pennsylvania, 19103, hereinafter referred to as the Grantor, and

TRANSPORTATION ADMINISTRATION, an agency of the State of Maryland, having a mailing address of 300 West Lexington Street, Baltimore, Maryland 21201-3415, hereinafter referred to as the Grantee;

WITNESSETH, that in consideration of the sum of ONE DOLLAR (\$1.00) and other good and valuable consideration, the said Grantor does remise, release and forever quitclaim unto the said Grantee, the successors and assigns of the said Grantee, all right, title and interest of the said Grantor of, in and to,

ALL THAT CERTAIN property of Grantor, together with all the improvements thereon, being a portion of Grantor's Cockeysville Branch identified as Line Code 1224 in its corporate records and also being a part or portion of the former Northern Central Railway Company's line of railroad known as Penn Central Northern Central Branch and further identified as Line Code 1224 in the Recorder's Office of the City of Baltimore, Maryland in Liber 6231, at page 098, and which property is generally indicated on Grantor's Case Plan No. 69458-A, Valuation Map Nos. V-1/7 through V-1/16, which are attached hereto and made a part hereof as Attachment "A", and generally described as follows:

SITUATE in the County of Baltimore, Maryland, and BEGINNING at the Boundary Line between the City of Baltimore, Maryland and the County of Baltimore, Maryland at the James Falls Expressway City Line Bridge which is north of Mount Washington; and thence extending from said Boundary Line and continuing in a general northerly direction and passing through Bare Hills, Hollins, Ruston, Ridewood, Lutherville, Timonium, Pardonea, Texas and Cockeysville and continuing to the ENDING at the southerly line of Bridge No. 16 at Railroad Station No. 836+867, which is further identified in the Baltimore County Recorder's Office in Liber 6231 at page 118 and indicated on pages 116 and 117, which is south of the Ashland Section in Baltimore County, Maryland.

TOGETHER WITH, all tracks, materials, trestles, bridges, buildings and all other improvements and all the appurtenances belonging thereto.

BEING a part or portion of the same premises which Fairfax Leary, as Trustee of the Property of The Northern Central Railway Company, Debtor, by Conveyance Document No. NC-CRC-RP-1 dated March 31, 1976 and recorded on November 19, 1980, in the Recorder's Office of Baltimore County, Maryland,

TRANSFER TAX NOT RECEIVED
Director of Finance
BALTIMORE COUNTY, MARYLAND
Authorized Signature

RECEIVED FOR TRANSFER
State Department of
Revenue & Taxation
By Baltimore County
JK 5-22-90

AGRICULTURAL TRANSFER TAX
NOT APPLICABLE
SIGNATURE JR DATE 5-22-90

in Liber 6811 at page 6811c, granted and conveyed unto Consolidated Rail Corporation.

EXCEPTING and RESERVING, therout and therefrom and unto the said Grantor, permanent, exclusivn and assignable freight operating easements over the premises hereinbefore described for the purpose of providing rail freight service to present and future customers and otherwise fulfilling its common carrier obligations, said easement is subject to, governed by and exercised solely in accordance with the specific term and condition of the Operating Agreement between Grantor and Grantee.

EXCEPTING and RESERVING, therout and therefrom and unto the said Grantor, all right, title and interest in and to the land, track, track material and their appurtenances, being the ~~Cookeyville Industrial Park~~ track, situate on the westerly side of the Cookeyville Industrial Track in the vicinity of Railroad Station ~~50000~~, and indicated on Grantor's Plan R.M.D-437J, in Cookeyville, Baltimore County, Maryland.

UNDER and SUBJECT, however, to (1) whatever rights the public may have to the use of any roads, alleys, bridges or streets crossing the premises herein described, (2) any streams, rivers, creeks and water ways passing under, across or through the premises herein described, and (3) any easements or agreements of record or otherwise affecting the land hereby conveyed, and to the state of facts which a personal inspection or accurate survey would disclose, and to any pipes, wires, poles, cables, culverts, drainage courses or systems and their appurtenances now existing and remaining in, on, under, over, across and through the premises herein described, together with the right to maintain, repair, renew, replace, use and remove same.

THIS INSTRUMENT is executed and delivered by Grantor, and is accepted by Grantee, subject to the covenants set forth below, which shall be deemed part of the consideration of this conveyance and which shall run with the land and be binding upon, and inure to the benefit of, the respective heirs, legal representatives, successors and assigns of Grantor and Grantee. Grantor hereby knowingly, willingly, and voluntarily waives the benefit of any rule, law, custom, or statute of the State of Maryland now or hereafter in force with respect to the covenants set forth below.

(1) Grantor shall not be liable or obligated to provide for or supply any type of utility service to Grantee.

(2) Grantee by the acceptance of this Instrument, does hereby accept all existing and prospective responsibility for removal and/or restoration costs for any and all railroad bridges and grade crossings and their appurtenances that may be located on the line of railroad herein to be conveyed to the said Grantee, except as provided in the Operating Agreement between Grantor and Grantee.

TOGETHER with all and every the rights, alleys, ways, waters, privileges, appurtenances and advantages to the same belonging or in any wise appertaining, **EXCEPTING and RESERVING and UNDER and SUBJECT** and provided as aforesaid.

TO HAVE AND TO HOLD the premises above described and mentioned and hereby intended to be quitclaimed, together with the rights, privileges, appurtenances and advantages thereto belonging or appertaining unto and to the proper use and benefit of the said Grantee, the heirs or successors and assigns of the Grantee, **EXCEPTING and RESERVING and UNDER and SUBJECT** and provided as aforesaid.