

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.



Finance Docket No. 35221

224775

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

VERIFIED NOTICE OF EXEMPTION

ENTERED
Office of Proceedings

MAR 30 2009

Part of
Public Record

MOTION TO STRIKE

1. Comes now James Riffin (“Riffin”), who herewith files this Motion to Strike the Maryland Transit Administration’s (“MTA”) March 26, 2009 Motion to Dismiss Riffin’s Notice of Exemption, filed in FD No. 35221, and for reasons states:

2. On February 19, 2009, Riffin filed a Notice of Exemption (“NOE”) and paid the appropriate filing fee. On March 5, 2009, the Board rejected Riffin’s NOE, since the Board felt Riffin had not sufficiently identified who the transferor was.

3. On March 4, 2009, the Maryland Transit Administration (“MTA”) filed a Reply to [Riffin’s] Motion for a Protective Order. In its Reply, the MTA argued that the MTA was not a ‘competitor,’ and further argued that the confidential material appended to Riffin’s Motion for Protective Order was not “commercially sensitive data.”

4. The Board, in its March 5, 2009 Decision, stated its rejection of Riffin’s initial NOE was “without prejudice to Riffin refileing a new notice of exemption or some other request for

authority.” The Board further stated that Riffin should serve any future pleadings upon Norfolk Southern and the MTA, and should provide the Board with evidence that Riffin has been holding himself out as a common carrier by rail. [The Board indicated that it needs to address the threshold issue of whether Riffin is a carrier, so that it can determine whether Riffin’s NOE should be filed pursuant to 49 CFR 1150.43 (Information to be contained in notice for small line acquisitions) or pursuant to 49 CFR 1150.33 (Information to be contained in notice – transactions that involve creation of Class III carriers.)].

5. On March 6, 2009, Riffin filed “some other request for authority,” namely a Second Amended NOE, which contained information relating to Riffin’s holding out as a common carrier by rail on his Allegany County line, and filed a Replacement Motion for Protective Order. In his Replacement Motion for Protective Order, Riffin argued that the MTA is a ‘competitor,’ since the MTA has offered three shippers on the Cockeysville Industrial Track (“CIT”) substantial subsidies (\$100,000 / year) if they utilize trucks for their shipping needs, rather than the adjacent rail service [thereby “offering the most favorable terms”], and since the MTA terminated the lease of the Packard Fence Company when the Packard Fence Company expressed an interest in rail freight service. Copies were served on Norfolk Southern and the MTA.

6. On March 26, 2009, the MTA filed a Motion to Dismiss Riffin’s Second Amended NOE, and filed a second reply to Riffin’s Motion for a Protective Order. In its second reply to Riffin’s Motion for Protective Order, the MTA offered definitions of the terms ‘competition,’ and ‘competitor,’ then argued that the MTA is not a ‘competitor,’ and consequently anyone who works for the MTA should be permitted to view Riffin’s confidential material. The MTA did not offer any reason why all MTA employees should be permitted to view Riffin’s confidential data.

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THE MTA IS NOT A PARTY

7. 49 CFR 1104.13 states a party may file a reply or motion addressed to any pleading. 49 CFR 1101.2 (d) defines a ‘party’ to be “a complainant, defendant, applicant, respondent, protestant, intervener, or petitioner in any proceeding, or other persons permitted or directed by the Board to participate in a proceeding. Persons on the docket service list merely for the purpose of receiving copies of Board releases are not considered parties to the proceeding.” To date, the MTA has not filed a notice to participate as a party of record in this proceeding, nor has the Board directed the MTA to participate as a party of record. The Board has placed the MTA

on the service list, but that does not make the MTA a party. Since the MTA is not a 'party' in this proceeding, any pleadings it makes in this proceeding should be stricken until it receives permission to participate as a party. Consequently, the Board should strike the pleadings submitted by the MTA, and should reject any future filings until such time as the MTA files a notice that it intends to participate as a party of record in this proceeding, and as a party of record, subjects itself to the Board's jurisdiction, including the Board's discovery rules.

THE MTA'S MOTION TO DISMISS

8. On March 26, 2009, the MTA filed a Motion to Dismiss Riffin's Second Amended NOE. This Motion to Dismiss contained "redundant, irrelevant, immaterial, impertinent, or scandalous matter," and pursuant to 49 CFR 1104.8, should be stricken.

9. P.2: The MTA misperceives the respective roles of the Board and Riffin and the nature of the proceeding: Riffin's role is to provide the Board with relevant facts regarding in what ways Riffin has held himself out to be a common carrier by rail on Riffin's Allegany Line. This Riffin has done. The Board's role is to evaluate those facts, then determine as a matter of law whether Riffin's conduct meets the common law criteria for being a common carrier. If the Board determines that as a matter of law, Riffin is a common carrier by rail, then the Board will make a determination that Riffin's NOE was appropriately filed pursuant to 49 CFR 1150.43. Once Riffin's status as a common carrier has been determined, then the Board can address the issue of whether the spur track Riffin has acquired, will be a line of railroad or §10906 excepted track. Riffin has presented facts indicating how he intends to use the spur track. The Board will make a determination as a matter of law, whether Riffin's intended use of the spur track would result in the spur track being classified as a line of railroad, or as §10906 excepted track.

10. P.3: The MTA asserts that Riffin's acquisition of the Veneer Spur is "without corroboration." Riffin's Verified Statement accompanying his NOE, provides all the "corroboration" that is required. Whatever authority the Board grants, is permissive. Riffin is not obligated to effectuate acquisition prior to being granted authority to acquire and operate. Riffin may not exercise his authority to operate, until he actually acquires the line. *Chicago, Lake Shore and South Bend Ry Co. – Acquisition and Operation Exemption – Norfolk S Ry co*, STB FD No. 34960, *slip op.* at 3-4 (Served February 14, 2008). Since Riffin has already acquired the spur track, once Riffin receives Board authority to operate the spur track as a line of

railroad, Riffin can immediately put the spur track into service. For the MTA's benefit: A copy of Riffin's lease of the spur track is included in Riffin's Motion for Protective Order.

11. P. 3 Riffin's Maps: Counsel for the MTA may need a new pair of glasses, for both the 'sketch,' as the MTA describes it, and the 1965 Valuation Map clearly show the turnout for the Veneer Spur was located at MP 15.05, the 'sketch' has a very prominent North arrow on it, the Val Map clearly indicates the York Turnpike (York Road, or State Road 45), is located at MP 14.85, and also depicts Cockeysville Road. The Maps provided by Riffin, in conjunction with the statements accompanying Riffin's NOE, clearly indicate the area to be served ("any shipper who desires to utilize Riffin's rail-served transload facility. The nearest transload facility is some 15 miles south of Cockeysville, near MP 2.0 on the CIT." ¶10, Memorandum), Origin (MP 15.05), Termini (400 feet beyond MP 15.05), Station (Cockeysville), City (Cockeysville), County (Baltimore), and State (Maryland). 49 CFR 1150.43(f) does not require the map "be to scale," "describe physical features," "indicate the adjacent property owners," "denote dimensions." "distinguish between existing and proposed facilities," or "depict current conditions."

12. P. 4, track material: The MTA falsely stated that the railroad bridge which carried the CIT over York Road was removed in 1971. It was removed in 1990 by the Six-M Company pursuant to a contract with the Maryland State Highway Administration. The MTA correctly stated that it was the MTA, not Conrail, that granted the State Highway Administration permission to remove the bridge. See Mr. Williams Verified Statement, ¶7, MTA's April 20, 2007 Response in FD 34975. The track material north east of York Road (north of MP 14.85) was removed by a MTA contractor from the cross ties, then placed in a pile near MP 14.90. The MTA gave the Walkersville Railroad, north of Frederick, MD, a portion of the rails, to replace rails washed out on that line of railroad. The remaining rails are in a pile near MP 14.90, and are clearly visible on www.Maps.Live.com. If counsel for the MTA had consulted its files in FD 34975 more carefully, it would have noted that Riffin repositioned, he did not remove or take, the rails near the Cockeysville Freight Station, which the Val Map shows is located at MP 14.83, or some 1,100 feet south of the Veneer Spur.

13. P. 4, National Rail System: In STB Docket No. AB-103 (Sub No. 21X), *The Kansas City Southern Railway Company – Abandonment Exemption – Line in Warren County, MS, In the Matter of a Request to Set Terms and Conditions*, Served February 22, 2008, on p.9, the Board stated:

“... a carrier may remove track, as long as no shipper seeks service and as long as the carrier is prepared to restore the track should it receive a request for service.”

14. The January 27, 2006 Norfolk Southern letter appended to Riffin’s NOE clearly states no abandonment authority has been granted on the CIT. The deed from Conrail to the MTA clearly states the CIT extended to at least MP 15.44 (bridge over Western Run). The 1988 Track Diagram map appended to the MTA’s Motion to Dismiss, Exhibit F, Page D-30, clearly depicts tracks continuing past York Road an unspecified distance. The Light Rail Line track diagram appended to the MTA’s Motion to Dismiss, Exhibit G, dated April 5, 2005, clearly depicts the end of the MTA’s right-of-way ends on the south side of the Western Run bridge, and clearly depicts the right-of-way extending to Ashland, the next station north of Cockeysville. While a carrier “may remove track, as long as no shipper seeks service and as long as the carrier is prepared to restore the track should it receive a request for service,” once a demand for service is made, the carrier is obligated to restore the missing track. The CIT is a line of railroad at least to Ashland. A rail carrier has a common law obligation to maintain its tracks. “A railroad has a duty under both the Interstate Commerce Act and under its state franchises to maintain and repair its lines and provide service thereon. *I.C.C v Maine Central Railroad Company*, 505 F.2d 590, 593 (2nd Cir. 1974). A rail carrier has an obligation “to receive, carry and deliver all goods offered to the carrier for transportation. The obligation rests on common law principles, *Wabash Railroad Company v Pearce*. 192 U.S. 179, 187, 24 S.Ct. 231, 48 L.Ed. 397 (1904), as well as on statute. 49 U.S.C. Sec 1 (4) and (11). In fact the federal statute, supra, is declaratory of common law.” *General Foods Corp. v. Baker*, 400 F.2d 968, 971 (9th Cir. 1968). A rail carrier’s failure to maintain its tracks, would constitute negligence. “Public policy demands that the right of the owners to absolute security against the negligence of the carrier, and of all persons engaged in performing the carrier’s duty, shall not be taken away by any reservation in the carrier’s receipt.” *President, etc. Bank of Ky, v. Adams Ex Co*, 93 U.S. 876 (1876). The fact that the track material past MP 14.83 is no longer in place, is of no import. Norfolk Southern has a statutory and common law obligation to restore the track material, and may be enjoined by either the Board or a U.S. District Court if it fails to do so, since its failure to restore the track material would constitute an unlawful abandonment. *I.C.C. v. Baltimore and Annapolis Railroad Co.*, 398 F.Supp. 454, 461 (D. Md, 1975). [The MTA should remember this decision, since it involved the southern end of the MTA’s light rail line.]

15. P.5, Riffin's status as a rail carrier. Counsel for the MTA is fully aware that it made an issue of Riffin's status as a rail carrier in *Board of County Commissioners of Allegany County, Maryland v. STB*, Case No. 08-1217, U.S. Court of Appeals for the District of Columbia Circuit, and is fully aware that the DC Court of Appeals, on March 17, 2009, issued an Order stating it would make its decision in that case based on the Briefs that were filed. That is a subtle way of stating the Court was not persuaded by the arguments presented by counsel for the MTA. Prior to Case No. 08-1217, the issue of Riffin's status as a rail carrier has never been presented to the Board or a Court for a decision.

16. P. 6, Riffin's Allegany County deed: Counsel for the MTA is also fully aware that the issue of CSX's refusal to issue a deed to Riffin's Allegany County Line to Riffin in Riffin's personal name, is also before the DC Court of Appeals, in Case No. 08-1208, and that on March 13, 2009 the DC Court of Appeals reversed its previous position (no oral argument needed), then ordered Case Nos. 08-1190 (Riffin's Declaratory Order) and 08-1208 (Riffin's Motion to Compel) be set for oral argument before the same panel on the same day. Again, a subtle hint that the Court finds sufficient merit in Riffin's arguments to Order the cases be scheduled for oral argument.

17. P. 8, frivolous filings: The Circuit Court for Baltimore County and the U.S. District Court for Maryland, Baltimore Division, held (without any kind of a hearing or any opportunity to present a defense) that Riffin's argument that State and local regulation of transportation by rail carrier has been preempted by 49 U.S.C. 10501(b), was without 'substantial justification.' The March 17, 2009 Order of the DC Court of Appeals, scheduling this very issue for oral argument, says otherwise.

18. P. 8, Riffin's prior NOEs: The Board rejected Riffin's prior NOEs because the MTA made them controversial by objecting to them. When NOEs became effective after only seven days, the Board held that an NOE was not appropriate when the NOE was controversial, since seven days was insufficient time within which to develop a complete record when the matter became controversial. Now that NOEs become effective after 30 days, there is sufficient time to develop a more complete record. In the instant case, since the effective date for Riffin's NOE

will be April 30, 2009 at the earliest, and since that will have provided 75 days worth of notice, or more than sufficient to develop a very complete record, there should be no need to convert this proceeding into an Individual Exemption proceeding.

19. P. 10, *Forty Plus Foundation*: The MTA cites the *Forty Plus Foundation* feeder line application to support its argument that Riffin's NOE should be dismissed due to "insufficient information." A feeder line application requires detailed, substantiated information since the applicant is asking the Board to compel a rail carrier to sell a rail line to the applicant. In this proceeding, Riffin is not asking the Board to compel anyone to do anything. Riffin has acquired the Veneer Spur. He now seeks a determination as to whether the Spur should be classified as a regulated line of railroad, or unregulated excepted track. Riffin believes the Board has more than sufficient information to make this determination of law. If the Board finds that Riffin's use of the Spur would indicate the Spur should be classified as line, then Riffin needs Board authority to operate on the Spur.

20. P.11, *Shippers*: Had the MTA executed an Undertaking, it would have known who Riffin's potential shippers are. While no shippers have existed adjacent to the Veneer Spur for a number of years, shippers have existed in the immediate surrounding area, and have expressed a desire for rail service. Norfolk Southern refuses to provide these shippers with rail service on spurs closer to these shippers. Riffin is willing to provide the rail service Norfolk Southern is unwilling to provide. Trucking goods a few thousand feet is a lot cheaper than trucking goods thousands of miles. Riffin has the means, equipment and motivation to transload freight from rail cars to Riffin's semi-trailers, then truck those goods the last few thousand feet to local shippers. Providing this service to local shippers will provide revenue for Riffin, and will save local shippers thousands of dollars on their transportation costs.

21. P. 12, *Required permits*: Baltimore County has cited Riffin for grading without a permit, in violation of §33-5-103 of the Baltimore County Code. §33-5-103(b) states that if one's proposed grading activities might alter the flow of surface water on an adjoining property, then one must obtain a grading permit. Riffin's Maryland Registered Surveyor has executed a Verified Statement stating that Riffin's grading activities on his Cockeysville Site physically

cannot alter the flow of surface water on any adjoining property. Consequently, Riffin does not need, nor has he ever needed, a grading permit. In due course, Maryland's Appellate Courts will address this issue, and correct the injustice Riffin has been subjected to.

22. The MTA's Motion to Dismiss contains numerous other false, misleading, irrelevant, scandalous information. Riffin would argue the matters discussed above provide ample evidence that the MTA's Motion to Dismiss contains pages of "redundant, irrelevant, immaterial, impertinent, or scandalous matter," and pursuant to 49 CFR 1104.8, should be stricken.

23. WHEREFORE, Riffin would ask that the Board:

- A. STRIKE the MTA's Motion to Dismiss in its entirety
- B. And for such other and further relief as would be appropriate.

Respectfully,



James Riffin

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of March, 2009, a copy of the foregoing Motion to Strike, 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