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**BEFORE THE
SURFACE TRANSPORTATION BOARD**



STB DOCKET NO. AB-290 (Sub- No. 237X)

**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, MARYLAND**

**SUPPLEMENT TO
PROTEST / OPPOSITION OF JAMES RIFFIN
TO PETITION FOR EXEMPTION AND
TO ABANDONMENT OF RAIL FREIGHT SERVICE**

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Dated: January 27, 2006

Public Record

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34. James Riffin (“Riffin”), pursuant to the applicable regulations of the Surface Transportation Board (“STB” or “Board”) herewith files this Supplement to his Protest / Opposition to Norfolk Southern Railway Company’s Petition for Exemption - Abandonment of Freight Operating Rights and of Rail Freight Service - Between Baltimore, Md and Cockeysville, Md, in Baltimore County, Maryland. Hereinafter the Petition for Exemption will be referred to as the “Petition”, Norfolk Southern Railway Company will be referred to as either “NS” or “Norfolk Southern,” Riffin’s Protest will be referred to as “Riffin’s Protest.”

35. The Petition was filed on December 14, 2005. Riffin’s Protest was filed on January 13, 2006.

36. On January 23, 2006, the Maryland Transit Administration (“MTA”) filed Comments of the Maryland Transit Administration in Support of the Abandonment (“MTA’s Comments”).”

Errata

37. In paragraph 9 of Riffin's Protest, Riffin incorrectly said the Line was leased to the Pennsylvania Railroad in 1919. The correct date was 1911. In paragraph 26 of Riffin's Protest, Riffin incorrectly stated the line was taken out of service in January, 2004. The line was taken out of service by MDOT in January, 2005.

38. Since it is uncertain precisely who has the common carrier obligations associated with the Line, on January 27, 2006, Riffin also served a copy of his Notice of Intent to File an Offer of Financial Assistance on Charles A. Spitulnik, Suite 800, One Massachusetts Avenue, NW, Washington, DC 20001, counsel for the MTA. The Notice states Riffin proposes to purchase **all** of the Freight Operating Rights, Freight Operating Easement(s) and any related Operating Agreements or Leases, pertaining to the Line, NS desires to abandon. Riffin herewith amends that Notice to include **all** of the Freight Operating Rights, Freight Operating Easement(s) and any related Operating Agreements or Leases, pertaining to the Line, which either NS, *or any other entity*, desires to abandon *and / or discontinue*.

**V. Norfolk Southern may not have sufficient interests in the Line
to warrant the grant of an exemption for an abandonment.**

39. On pages 6-7 of NS's Petition, NS stated on May 1, 1990, Conrail and the Maryland Department of Transportation ("MDOT") entered into an agreement providing for the sale of the Line to MDOT. NS stated the sale was consummated on April 25, 1997. On page 71 of the Petition, NS stated "until June 1, 1999, Consolidated Rail Corporation **held title to** and operated the railroad property that is the subject of this proceeding." (Emphasis added.) If the sale was consummated on April 25, 1997, then Conrail could not have "**held title to**" the Line until June 1, 1999.

40. On page 1 of MTA's Comments, the MTA stated it "acquired the line that is the subject of this abandonment from the Consolidated Rail Corporation ("Conrail") in 1990." If the sale was consummated on April 25, 1997, as NS stated, or if Conrail "held title to" the Line until June 1, 1999, then the MTA could **not** have "acquired the line ... in 1990."

41. On page 81 of the Petition, NS stated effective June 1, 1999, "PRR's assets, in turn, were leased to and operated by NSR under the terms of an allocated assets operating agreement between PRR and NSR." NS stated this agreement was approved by the Board in a decision served July 23, 1998 in STB Finance Docket No. 33388, effective June 1, 1999.

42. On page 82 of the Petition, NS stated the Board, in a decision served on November 7, 2003, approved NS's petition to operate the PRR lines via direct ownership.

43. Neither NS nor MTA stated the sale of the Line to the MTA was approved by either the Interstate Commerce Commission or the Board. No documents have been filed to indicate precisely what was sold to the MTA, and what limitations were placed on Conrail's (and its successor's) ability to provide rail service on the Line.

44. On page 6 of NS' Petition, NS explicitly stated its Petition "involves the abandonment of a railroad line, rather than discontinuance of service over a railroad line."

45. In *Southern Pacific Transportation Company – Abandonment Exemption – Los Angeles County, Ca*, decided May 6, 1992, Docket No. AB-12 (Sub-No. 139X), 8 I.C.C.2d 495, ("Southern Pacific") the Interstate Commerce Commission ("ICC") held:

- A. Non-carriers (such as the MTA) require Commission approval under §10901 to acquire an active rail line. (pp. 501-502.) See also: *Common Carrier Status of States, State Agencies*, 363 I.C.C. 132 (1980), *aff'd Simmons v. I.C.C.*, 697 F.2d 326 (D.C. Cir. 1982).
- B. If a non-carrier acquires an active rail line, that non-carrier assumes "a common carrier obligation, even though it did not intend to operate the line itself, because by acquiring full ownership of the line it necessarily assumed responsibility for contracting with, and ensuring continued service by, a rail operator." P. 503. See *City of Austin, TX*, Finance Docket No. 30861(A), served November 4, 1986. ["In *City of Austin*, we found that a city's acquisition of an active railroad line necessarily makes it a common carrier, even though the City of Austin did not intend to operate the line." P. 504. "In sum, in *City of Austin* and other cases, this agency has made it clear that any party that acquires an active line of railroad acquires the common carrier obligation to provide service over it, even if the purchaser disavows that duty and another party, by agreement with the purchaser, obligates itself to provide service by operating trains on the line." P. 505.
- C. In footnote 6 of the *Southern Pacific* case, the Commission stated: "In *State of Maine* [Finance Docket No. 31847, served May 24, 1991], we cautioned that similar transactions should be submitted to the Commission in advance, together with a copy of the agreement between the railroad and the entity acquiring its right-of-way, for a jurisdictional determination."
- D. The Board and the ICC have held that if, after the sale of an active line, the railroad retains the right and ability to continue to provide service, that is, that the railroad retains a "permanent and unconditional easement," as occurred in the *State of Maine* case, then the buyer does not acquire residual common carrier obligations. If the sale places substantial limitations on the railroad's ability to provide rail service, as occurred in the *Southern Pacific* case, then the buyer *does* acquire residual common carrier obligations. See page 507. On page 508 of the *Southern Pacific* opinion, the Commission held the following were substantial limitations: The buyer had broad control of the rail line: The buyer had a right to assume sole responsibility of the line; the railroad only had trackage rights that were subject to the directives and control of the buyer, which control extended to the management, operation and maintenance of the line; the movement of trains, cars and locomotives over and

along the tracks at all times were subject to the direction and control of the buyer's superintendent, train dispatchers and other authorized agents; the buyer could dictate when the rail carrier was allowed to use the tracks.

- E. The sale of an active line could not become legally effective until after the Commission had granted approval of the sale. Page 496.

46. The buyer in the *Southern Pacific* case filed a petition for reconsideration of the Commission's decision. In a decision rendered on February 12, 1993, 9 I.C.C. 2d 385, the Commission denied the buyer's petition for reconsideration and affirmed its previous decision. The Commission stated on p. 388 that:

"We are particularly impressed with two significant differences with *State of Maine, supra*. First, LACTC [the buyer] can effectively force SP to curtail its freight service as passenger service expands, and freight shippers would have no recourse against LACTC if LACTC were found not to acquire a common carrier obligation. Second, SP has neither the right nor the obligation to make repairs so that freight service will not deteriorate, in contrast to the easement retained and the obligation to make repairs in *State of Maine*.

47. The MTA on page 5 of its Comments argued "[m]ere acquisition of ownership of a line over which a rail carrier continues to have operating and service obligations did not cause MTA to become a common carrier with respect to this line. Cf. STB Docket No. AB-863X, *City of Venice – Abandonment Exemption*," service date June 22, 2004. In the *City of Venice* case, the railroad sought and received permission from the Interstate Commerce Commission to abandon 2.0 miles of line. After receiving permission from the ICC to abandon the line, the railroad then sold the line to the City of Venice. In that case the ICC reaffirmed its previous holdings that once the ICC grants approval to abandon a line, the ICC loses jurisdiction over the line, and the railroad may dispose of the line as it sees fit. If the purchaser of a properly abandoned line subsequently leases the line to a rail carrier, who acquires permission to operate the line, the purchaser will not become a common carrier. The *City of Venice* case is much different from the instant case. In the instant case, the MTA bought an active line without first obtaining approval from the Board or its ICC predecessor. If the sales agreement imposed "substantial limitations" on the selling railroad's ability to provide rail service, then the MTA becomes a residual common carrier by operation of law. See *Southern Pacific, supra*.

48. The instant case appears to be very similar to the *Southern Pacific* case. NS has not alleged that it has the right or the obligation to make repairs. The MTA can curtail NS' freight service as passenger service expands [MTA put the Line out-of-service for nearly a year while it double-tracked the Line; NS can only use the Line when the MTA is not using the Line.]. The movement of trains, cars and locomotives over the Line appear to be subject to the direction and control of the MTA. Riffin would argue that the Board should find that "substantial limitations" had been placed on NS' ability to provide rail service, and thus, NS does not have sufficient

interests in the Line to warrant the grant of an exemption for an abandonment. The proper party to be requesting abandonment would be the owner of the Line, the MTA.

49. Riffin would ask that the Board direct NS to provide the Board with copies of all of the agreements NS, and its predecessor, Conrail, have entered into with the MTA, or any other Maryland agency, that pertain to the Line, so that the Board may ascertain whether “substantial limitations” have been placed on NS’ ability to provide rail service on the Line.

50. If the Board finds that “substantial limitations” have been placed on NS’ ability to provide rail service on the Line, then Riffin would ask that the Board DISMISS NS’ Petition, direct NS and the MTA to file appropriate petitions to request Board approval for the sale of the Line, then find that if the sale is approved, the MTA has acquired residual common carrier obligations.

51. On January 24, 2006, Riffin filed a Notice of Intent to File an Offer of Financial Assistance (“Notice”). A copy was served on NS. Since it is uncertain precisely who has the common carrier obligations associated with the Line, on January 27, 2006, Riffin also served a copy of the Notice on Charles A. Spitulnik, Suite 800, One Massachusetts Avenue, NW, Washington, DC 20001, counsel for the MTA. The Notice states Riffin proposes to purchase **all** of the Freight Operating Rights, Freight Operating Easement(s) and any related Operating Agreements or Leases, pertaining to the Line, NS desires to abandon. Riffin herewith amends that Notice to include **all** of the Freight Operating Rights, Freight Operating Easement(s) and any related Operating Agreements or Leases, pertaining to the Line, which either NS, *or any other entity*, desires to abandon *and / or discontinue*.

VI. Exemption from Offers of Financial Assistance.

52. On pages 15-16 of NS’ Petition, NS requested that the Board exempt its abandonment transaction from the provisions of 49 U.S.C. 10904 (offer of financial assistance procedures) and 49 U.S.C. 10905 (public use conditions). NS stated the Line would continue to be used for light rail commuter passenger operations by MTA, a public use, and that the Line was not suitable for further public use. NS stated it would not consent to a Trail Use negotiation condition. On page 23 of its Petition, NS cites three cases in support of its request for exemption from offers of financial assistance and public use conditions.

53. Since the Line will continue to be used for a public purpose, namely light rail commuter rail, Riffin does not oppose NS’ request for exemption from the provisions of 49 U.S.C. 10905 (public use conditions). Riffin **strongly** opposes NS’ request for exemption from 49 U.S.C. 10904 [offer of financial assistance (“OFA”)].

54. Granting an exemption from 49 U.S.C. 10904 is an “unusual relief,” rarely granted. From 1980 through 1996, the ICC granted an exemption from offers of financial assistance only 5 times. The Board has granted this exemption only once (in 2000). “In the past, the

Commission has granted this unusual relief when the right-of-way is needed for a valid public purpose and there is no overriding public need for continued rail service.” *Southern Pacific Transportation Company – Discontinuance of Service Exemption – In Los Angeles County, CA*, Docket No. AB-12 (Sub-No. 172X), decided December 1, 1994, (“SP 172X”) at page 3. In the very few cases where exemption from offers of financial assistance have been granted, the Board and the ICC have enumerated criteria which justify granting this exemption:

A. In *Iowa Northern Railway Co. – Abandonment - In Blackhawk County, IA*, Docket No. AB-284 (Sub-No. 1X), decided March 28, 1988, the line to be abandoned was to be used as the corridor for a new U.S. highway 218. The line had two active shippers. One shipper elected to sell its property to the State of Iowa, then relocate its business. The other shipper had adjacent parallel alternate rail service available. (Its facility was served by two rail lines.) Using the line proposed for abandonment for rail service, would have precluded construction of the highway. No one opposed the abandonment or OFA exemption requests, nor did anyone file a Notice of Intent to File An Offer of Financial Assistance.

B. In *Chicago and North Western Transportation Company – Abandonment Exemption – In Blackhawk County, IA*, Docket No. AB-1 (Sub-No. 1X), decided July 7, 1989, the railroad asked for abandonment approval so that the right-of-way could be used for another portion of the proposed U.S. highway 218, see *Iowa Northern, supra*. The railroad arranged to provide rail service to the only shipper on the line via other tracks adjacent to the shipper’s facility. The shipper also planned to sell its facility to the State of Iowa, then relocate its business. Using the line proposed for abandonment for rail service, would have precluded construction of the highway. No one opposed the abandonment or OFA exemption requests, nor did anyone file a Notice of Intent to File An Offer of Financial Assistance.

C. In *Missouri Pacific Railroad Company – Abandonment – In Harris County, TX*, Docket No. AB-3 (Sub-No. 105X), decided December 16, 1992, the line to be abandoned was to be used as the corridor for an expanded Interstate Highway 10, and as the corridor for future mass transit. The line had a number of shippers. The active shippers either elected to relocate or to use alternate existing rail service. Using the line proposed for abandonment for rail service, would have precluded expansion of I-10. No one opposed the abandonment or OFA exemption requests, nor did anyone file a Notice of Intent to File An Offer of Financial Assistance.

D. In the *SP 172X* case, the only shipper on the line had stopped using the line prior to SP filing its Discontinuance of Service exemption. (The shipper, a bakery, had converted its facility. Previously it had received shipments of grain, which it milled. Several years before the petition was filed, the bakery stopped milling grain into flour. It bought flour, rather than grain. The flour was delivered via truck.) The Los Angeles County Mass Transit Administration (“LACMTA”) previously had purchased, without ICC approval, the right-of-way (see *Southern Pacific, supra*). After finding, in the *Southern Pacific* case, *supra*, that LACMTA was the common carrier, not Southern Pacific, SP filed this Discontinuance of Service exemption. The right-of-way was to be used for mass transit purposes. Using the line proposed for abandonment

for rail service, would have precluded using the corridor for mass transit purposes. No one opposed the discontinuance of service or OFA exemption requests, nor did anyone file a Notice of Intent to File An Offer of Financial Assistance.

E. In *Missouri Pacific Railroad Company – Abandonment – In Harris County, TX*, Docket No. AB-3 (Sub-No. 139X), decided December 23, 1996, the railroad wanted to abandon a 0.52 mile segment. There was one shipper on the line, who had two means of rail access. After abandonment, the line was to be sold to the shipper. The shipper would still have rail access via the other line adjacent to its property. The shipper desired to erect a structure on the right-of-way, thereby expanding its existing structure adjacent to the line. The shipper needed to start building its new structure as soon as possible, since its lease of another structure was due to expire. Using the line proposed for abandonment for rail service, would have precluded the shipper from building its warehouse on the corridor. No one opposed the discontinuance of service or OFA exemption requests, nor did anyone file a Notice of Intent to File An Offer of Financial Assistance.

F. In *The Cincinnati, New Orleans & Texas Pacific Railway Co. – Abandonment Exemption – in Cumberland and Roane Counties, TN*, STB Docket No. AB-290 (Sub-No. 208X), decided November 13, 2000, (“*Cincinnati, New Orleans*”) the railroad wanted to abandon a 15.4 mile segment of a dead-end branch line that served only one shipper. After abandonment, the shipper intended to purchase the line, then operate the line as a private line. Delaying abandonment while the OFA time period ran its course, would have delayed transfer of ownership of the line to the shipper, which in turn would have delayed the beginning of necessary maintenance and rehabilitation of the line by the shipper. No one opposed the abandonment or OFA exemption requests, nor did anyone file a Notice of Intent to File An Offer of Financial Assistance.

55. The following common criteria existed in the six cases where exemption from the OFA regulations was granted:

- A. After abandonment, the shippers still had access to rail service via an adjacent line.
- B. No one opposed the abandonment or OFA exemption requests.
- C. No one filed a Notice of Intent to File An Offer of Financial Assistance.
- D. Delaying approval of the abandonment petition, while the statutory period for filing an OFA lapsed, would have delayed an important public or private undertaking.
- E. Continuing to use the line proposed for abandonment, for freight rail service, would have precluded using the line for an important public or private undertaking.

56. In the instant case, **none** of the criteria enumerated in the six cases that granted exemption from the OFA regulations, exists.

- A. After abandonment, **none** of the shippers will still have access to rail service at their site.

- B. Riffin, a shipper on the Line, **strongly** opposes the abandonment of freight rail service and **strongly** opposes exemption from the OFA regulations. Two of the major shippers on the Line, have indicated that while they do not oppose NS' relinquishment of its common carrier obligations on the Line, they do not truly want to lose their freight rail service. In private conversations with Riffin, they have indicated that they would resume utilizing freight rail service, if it were offered, and so long as using that freight rail service would not cause them to be in breach of their agreement with MDOT. Based on Riffin's limited understanding of their agreement with MDOT, it does not appear using freight rail service provided by Riffin, would cause them to be in breach of their MDOT agreement. Furthermore, the subsidy provided to the shippers via their MDOT agreement, will expire in approximately four years. In approximately four years, the shippers will have to pay the full extra costs associated with shipping their products via truck, rather than via rail. These costs are substantial (\$150,000/ year for Fleischmann's; \$240,000/ year for Imerys).
- C. Riffin has filed a Notice of Intent to File An Offer of Financial Assistance.
- D. Delaying approval of the abandonment petition, while the statutory period for filing an OFA runs, will **not** delay any public or private undertaking, important or insignificant. The Line presently is in use for light rail service. The double-tracking project has been completed. There are no plans involving use of the Line, which would preclude or interfere with the use of the Line for freight rail service, during the period of time the Line has been used for freight rail service. (The Line is used for commuter rail service from 5 a.m. to midnight. The Line has been used for freight rail service between midnight and 5 a.m., when the Line is not being used for any other purpose. Historically, NS has delivered rail cars to the shippers on the Line once or twice a week. That leaves 5 to 6 days per week available for MTA track maintenance personnel to do their routine track maintenance.)
- E. Continuing to use the line proposed for abandonment, for freight rail service, will **not** preclude using the line for any important public or private undertaking.

57. In the *Southern Pacific* case, discussed *supra* in paragraph 45, the ICC granted the exemptions requested. However, the ICC **did not** grant any exemption from the OFA regulations. The decision stated the exemption would become effective, "**provided no formal expression of intent to file an offer of financial assistance has been received.**" Page 518.

58. Since **none** of the criteria enumerated in the six cases that granted exemption from the OFA regulations, exists, it would be inappropriate, and contrary to the Board's and ICC's precedents, to grant NS' request for an exemption from the OFA regulations.

VII. The Board's decision in this case should be consistent with its precedents.

59. In *New York Cross Harbor R.R. v. Surface Transp. BD.*, 374 F.3d 1177 (D.C. Cir. 2004), New York City attempted to adversely abandon Cross Harbor's railroad terminal, so that the City could evict Cross Harbor from the site, which the City owned. The Board granted the adverse abandonment in STB Docket No. AB-596, decided May 12, 2003. The court reversed the Board's decision. The Board, in a decision dated December 15, 2005, dismissed the City's application for adverse abandonment. In its decision, the court made a number of salient comments, which are equally applicable to the case at bar:

A. "An agency acts arbitrarily and capriciously if it "reverse[s] its position in the face of a precedent it has not persuasively distinguished," citing *Louisiana Pub. Serv. Comm'n v. FERC*, 184 F.3d 892, 897 (D.C. Cir. 1999). At 1181.

B. The court cited the following from the Board's August Order : " "Board weighs the relative burdens that continuing or ceasing rail service would have on all of the potentially affected interests, including the railroad, the owners of the property (if different from the carrier), shippers, the national rail network, and the broader public." There are thus articulated at least four interests to balance: (1) the railroad; (2) the owner and/or the public; (3) the shippers; and (4) interstate commerce and the rail system in general." At 1183.

C. In a non-adverse abandonment, the petitioning railroad's interest as well as the current and projected profitability of the line are routinely considered.." At 1184

D. "In addition, the Board improperly elevated to premier status the interest of New York City. ... First, this statement is contrary to Board precedent. The STB does not, and cannot, simply accede to a public entity's wishes in an abandonment proceeding; instead it weighs that interest as "only one factor in [its] analysis." Citation omitted. The impediments to State and local government projects, although entitled to some weight, are nevertheless required to give way to our statutory duty to preserve and promote continued rail service, where the carrier has expressed a desire to continue operations and has taken reasonable steps to acquire traffic." ... "State transportation agency's opinion "entitled to respect" but Board must nonetheless "weigh that argument" against national interests in "development and continuation of a sound rail transportation system." At 1184-1185.

E. More importantly, the STB itself – not New York City – is to determine the "public convenience and necessity." ... Yet that is not what happened here: here the Board in effect said, "the City says abandonment is in the public interest, and therefore it is." At 1185.

F. "In addition, by requiring an "overriding need" for rail service to supersede the NYCEDC's interest, the Board shifted the burden to the objecting carrier to come forward with sufficient evidence of hardship or harm. ... "Shippers "assert that use of trucks would be economically infeasible ... [but] *they offered no support* to substantiate these claims, and there is *no reason to believe* that these transportation alternatives, although they may be somewhat less convenient and / or more costly, would not meet these shippers' needs." In

Salt Lake City, however, the Board cautioned against such a shift: there the Board described Salt Lake City's claim that *it* embodied the public interest and that the objecting railroad and shippers had to adduce evidence about the market and alternative routes as an impermissible "attempt to shift the burden to the railroad" which was "contrary to the statute and case law interpreting it." At 1186.

G. "Indeed, in *WisDOT*, the Board noted that to authorize the abandonment, thereby severing the rail service of the one affected shipper, would undercut its goal of promoting competition between rail and trucking services." At 1187.

H. "Because of the strong statutory and Board policies favoring the preservation of rail-to-rail competition and *the provision of adequate service for shippers*, the Board will not deprive [shipper] of the availability of *rail service options that it already has* absent a *very strong showing* that such action is in the public interest." At 1187.

I. "The Board rejected the trustee's argument that the availability of alternative but less convenient and more expensive truck and railway service was sufficient to overcome the shipper's interest in maintaining the rail line." At 1187.

J. "Finally, the STB neglected to mention its "statutory duty to preserve and promote continued rail service, [citations omitted] and, specifically in the context of the "abandonments or discontinuance of rail service," that one of its "function[s] ... is to provide the public with a degree of protection against the unnecessary discontinuance, cessation, interruption, or obstruction of available rail service." At 1187.

K. "The Board failed to assess the abandonment's impact on rail service or on interstate commerce generally. ... Could, or should, the Verrazano-Narrows and Tri-borough Bridges, to name just two non-rail routes, support additional truck traffic? And at what additional cost to current and future shippers? The STB dismissed questions like these by observing that "the shippers located along the tracks and facilities at issue have other transportation options, and the line's overhead rail traffic can be rerouted." ... But this is no answer because shippers can usually find other options and traffic can generally be rerouted and yet competition – both rail-to-rail and rail-to-other transportation modes – may suffer. .. "The burden to show that the Board should extinguish competition where it already exists is a difficult one to meet because the Board is guided by its governing statutes and policies, which make competition important." The Board failed to explain what effect its action will have on shippers' options and competition generally." At 1187 - 1188.

60. NS and MDOT have indicated they desire to eliminate all freight rail service on the Line. While this desire may be one factor in the Board's analysis of the case, elevating this interest to "premier status" is impermissible. If continuing to provide freight rail service on this Line somehow created an impediment to MDOT's project (providing light rail service), this impediment, although entitled to some weight, is nevertheless required to give way to the

Board's statutory duty to preserve and promote continued rail service, especially where someone such as Riffin has expressed a strong desire to provide that freight rail service. (Riffin failed to find any reference in the Petition or MDOT's comments, which suggested, or gave evidence, that continued freight rail service on the Line in the middle of the night, when the Line is not used for commuter rail service, would become an impediment to MDOT's mission to provide commuter rail service. To date, MDOT has provided commuter rail service, which service has not been adversely impacted or impeded by NS' use of the Line for freight rail service in the middle of the night, when the Line is not used for commuter rail service.)

61. In its *WisDOT*, *op. cit.*, decision, the Board noted that severing rail service to even one affected shipper, would undercut its goal of promoting competition between rail and trucking services. In the instant case, approving abandonment of all freight rail service on the Line (by approving NS' Petition, then denying Riffin's OFA), would sever rail service to at least four active shippers, and to other future or inactive shippers. This would seriously undercut the Board's goal of promoting competition between rail and trucking services. As the *Cross Harbor* court pointed out in its concluding remarks on pages 1187-1188 of its opinion, "The burden to show that the Board should extinguish competition where it already exists is a difficult one to meet because the Board is guided by its governing statutes and policies, which make competition important."

62. There are strong statutory and Board policies favoring the preservation of rail services, and the provision of adequate service for rail shippers. As the *Cross Harbor* court pointed out, at p. 1187, depriving a rail shipper of the availability of rail service options that it already has, would require **a very strong showing** that such action is in the public interest.

63. In past decisions, the Board has rejected the argument that the availability of alternative, but less convenient and more expensive truck service, was sufficient to overcome the shipper's interest in maintaining the rail line. *Cross Harbor* at 1187.

64. The Board has a statutory duty to preserve and promote continued rail service. Specifically, one of the Board's functions is to provide the public with a degree of protection against the unnecessary discontinuance, cessation, interruption, or obstruction of available rail service. *Cross Harbor* at 1187. In the instant case, there is no overriding need to approve abandonment of freight rail service on the Line. In this case, there is any easy solution to the problem: NS desires to cease providing freight rail service on the Line. Riffin desires to provide that freight rail service. If those freight operating easements and rights are transferred to Riffin, NS will get what it desires (relief from its common carrier obligations on the Line), and the shippers will get what they desire (access to freight rail service). MDOT will not be adversely affected by this transfer of operating rights, since there will be no adverse change in the use of the Line.

VIII. Approving Riffin's OFA will ensure continued freight rail service.

65. In *Kulmer v. Surface Transp. BD.*, 236 F.3d 1255 (10th Cir. 2001), the court held that the Board may consider whether a disputed OFA was intended for continued freight rail service. In addressing this issue, the Board may require the Offeror to demonstrate that there is a sufficient amount of projected rail traffic on the line to make service on the line self-sustaining. With this in mind, Riffin has requested NS provide Riffin with data concerning NS' costs of providing freight rail service on the Line, and revenue amounts realized from delivery of rail cars to shippers on the Line. Until Riffin receives this information, he cannot definitively demonstrate that the Line will be self-sustaining. However, in spite of this lack of information, there appears to be sufficient data in NS' Petition to indicate that the Line can be self-sustaining.

66. On page 7 of its Petition, NS states operations on the Line have been marginally profitable in some years, and unprofitable in other years. In footnote 4 of its Petition, NS states 122 carloads were moved over the Line in 2003, which may have been an unprofitable year, and states 193 carloads were moved over the Line in 2004, which may have been a marginally profitable year. The numbers suggest traffic over the Line increased substantially between 2003 and 2004. No traffic moved over the Line in 2005, since the Line was out-of-service due to double-tracking the Line. In private conversations with Tom Minirik, plant manager of Fleischmann's Vinegar, he indicated his volume of rail traffic in 2005 increased to 72 rail cars. In private conversations with Tony Zivkovich, plant manager at Imerys, he indicated his volume of rail traffic in 2005 increased to 200 rail cars. The sum of these two numbers is 272 rail-car loads, which is 40 % greater than the traffic moved on the Line in 2004. If moving 193 carloads was marginally profitable for NS, then moving 272 car loads would have been significantly more profitable.

67. In the *Cincinnati, New Orleans* case discussed in paragraph 54 F, *supra*, the Board acknowledged that the shipper, who desired to acquire the line being abandoned, could operate the line more economically with a crew dedicated only to serving the line, and the shipper could operate the line more economically than the railroad could. In the instant case, the Line will be maintained by MDOT. Riffin will pay a fee to MDOT, which, presumably, will be based on the number of rail cars moved over the Line. Presumably, the portion of the rate attributable to the movement of rail cars over the Line, is greater than MDOT's fee. Consequently, if NS can profitably move 193 rail cars over the Line, Riffin should be able to profitably move 272 rail cars over the Line.

IX. The Exemption Criteria in § 10502 have not been met.

68. 49 U.S.C. §10502 permits the Board to exempt transaction providing "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."

69. 49 U.S.C. §10101 lists 15 policies regarding regulation of the railroad industry:

“(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;” Elimination of freight rail services on the Line runs counter to this policy, since eliminating freight rail service eliminates the ability of a shipper to weigh the competitive advantage of rail transportation vs. motor carrier transportation.

“(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;” Granting the requested exemptions would minimize the need for Federal regulatory control. It would not make the process more expeditious, for Riffin would file a Petition for Review with the U.S. Court of Appeals for D.C. Furthermore, granting the exemptions **would not** ensure that the Board’s decision was fair, for Riffin’s rights as a shipper and his right to make an Offer of Financial Assistance, would have been summarily disregarded.

“(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board;” Allowing NS to discontinue providing rail service on the Line may increase NS’ profitability by a small amount, since occasionally NS did not earn a profit on the Line. However, NS presented insufficient evidence to permit the Board to find that overall, savings resulting from discontinuing service on the Line would be significant enough to have a noticeable impact on NS’ revenues.

“(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;” Permitting discontinuance of freight rail service on the Line would be diametrically opposed to this policy statement: Discontinuance would preclude future development of additional rail service on this corridor, and would abolish, rather than continue, this portion of the rail system. Discontinuance would eliminate all competition between rail carriers and other modes of transportation. Discontinuance would not meet the needs of the public, or the shippers on the Line. Discontinuance requires shipment of goods via truck, which is more expensive. Maryland’s taxpayers are paying for this extra expense, via the taxpayer’s subsidy being paid to the shippers to offset, for a limited period of time, the extra costs associated with shipping their products via truck, rather than via rail. Spending public money to subsidize extra trucking costs created by unnecessarily discontinuing freight rail service on the Line, decidedly does **not** meet the needs of the public. Abandoning freight rail service on this Line would preclude reinstating rail service via this Line to York, Pennsylvania. Presently, NS’ rail traffic goes from Harrisburg, PA to Baltimore via the Susquahanna river. If terrorists, floods or earthquakes were to destroy one or more of the railroad bridges over the Susquahanna river, there would be no direct rail link between Baltimore and Harrisburg. If rail service was reinstated on this Line, and the remaining portion of this Line that is in Maryland, there would be an alternate rail link to Harrisburg via this Line. Having an alternate rail link between Baltimore and Harrisburg, would help promote our national defense. (York, PA is a major manufacturing

center. Having a rail link between York and Baltimore's port facilities would help our national defense.) NS and MDOT have argued eliminating freight rail service on the Line would benefit the public. Unfortunately, they have not offered any particularized benefits the public would realize by discontinuing freight rail service on the Line. Presently, MDOT gets payments from NS for NS' use of the Line when the Line is not being utilized by MDOT's light rail system. These payments help offset the cost to maintain the Line. Discontinuing freight rail service will cause these payments to cease, which in turn will require Maryland's citizenry to pay more taxes to offset this loss of revenue.

“(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;” Discontinuing freight rail service on the Line runs counter to this policy statement. Discontinuing freight rail service on the Line eliminates all competition between rail carriers and other modes, for movement of goods to and from shippers on this Line.

“(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;” It does not appear eliminating freight rail service on the Line would impact this policy.

“(7) to reduce regulatory barriers to entry into and exit from the industry;” Granting the exemptions would reduce regulatory barriers to exit from the industry. Granting an OFA exemption would erect a new barrier to Riffin's entry into the rail industry.

“(8) to operate transportation facilities and equipment without detriment to the public health and safety;” Eliminating freight rail service runs counter to this policy. It is far safer to transport ethanol via rail to Fleischmann's Vinegar, rather than via motor carrier. It is safer to offload a rail car directly into Fleischmann's storage tank, than to offload it into a truck, then offload it a second time into Fleischmann's storage tank. It is also safer to transport Imerys slurry product via rail rather than via truck, since there is a highly probability one of Imerys' trucks will be involved in an accident, than a rail car would be involved in an accident.

“(9) to encourage honest and efficient management of railroads;” Discontinuing rail service on the Line is not likely to impact how honestly NS manages its railroad. It may increase the efficiency with which NS manages its railroad.

“(10) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;” Discontinuing rail service on the Line is not likely to impact this policy statement.

“(11) to encourage fair wages and safe and suitable working conditions in the railroad industry;” Discontinuing rail service on the Line is not likely to impact this policy statement.

“(12) to prohibit predatory pricing and practices, to avoid undue concentrations of market power, and to prohibit unlawful discrimination;” Discontinuing rail service on the Line is not likely to impact this policy statement.

“(13) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information;” Discontinuing rail service on the Line is not likely to impact this policy statement.

“(14) to encourage and promote energy conservation;” Discontinuing rail service on the Line is diametrically opposed to this policy statement. It is far more energy efficient to move 272 rail car loads on the Line, than it is to truck this same quantity of material in 1,288 truck loads. It is also more energy efficient to load a product only once, rather than handling the product twice. Using trucks to move products to / from the shippers on the Line requires that the products be handled twice: Once into a truck, then a second time out of / into a tanker truck. Furthermore, the thresholds mentioned in 49 CFR §1105.7 (e) (4) state diversions from rail to motor carriage of more than an average of 50 rail carloads per mile per year for any part of the affected line, is considered to be significant. In this case, discontinuance of freight rail service on the Line would divert more than 272 rail carloads per mile per year for the first several miles of the Line, and 200 rail carloads per mile per year for the portion of the Line between Fleischmann’s Vinegar and Imerys, near the end of the Line.

“(15) to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part.” Granting NS’ exemption requests is unlikely to result in the expeditious handling and resolution of all proceedings. If the exemption requests are granted, particularly the OFA exemption, Riffin will file a petition for review with the U.S. Appeals Court for D.C., asking that court to review the Board’s decision. That will be decidedly **unexpeditious**. On the other hand, if the Board were to simultaneously grant NS’ abandonment exemption **and** grant Riffin permission to acquire the rights being abandoned by NS, then that **would** expeditiously resolve these proceedings.

WHEREFORE, for the foregoing reasons, Riffin OPPOSES Norfolk Southern Railway’s Petition for Exemption, and its request for an exemption from the Offer of Financial Assistance provisions of 49 U.S.C. §10904, and would pray that the Board DENY the Petition for Exemption, and DENY the request for an exemption from the Offer of Financial Assistance provisions of 49 U.S.C. §10904;

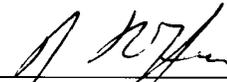
OR IN THE ALTERNATIVE, that the Board grant the Petition for Exemption *providing* the Board simultaneously approve transfer of Petitioner’s freight operating rights to Riffin, thereby ensuring freight rail service on the Cockeysville line is not terminated.

Respectfully submitted,


James Riffin

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of January, 2006, a copy of the foregoing Supplement to Protest / Opposition of James Riffin to Petition for Exemption and to Abandonment of Rail Freight Service was served by first class mail, postage prepaid, upon James R. Paschall, Senior General Attorney, Norfolk Southern Corporation, Law Department, Three Commercial Place, Norfolk, VA 23510-9241; and upon Charles A. Spitulnik, McLeod, Watkinson & Miller, Suite 800, One Massachusetts Avenue, NW, Washington, DC 20001, counsel for the Maryland Transit Administration.



James Riffin