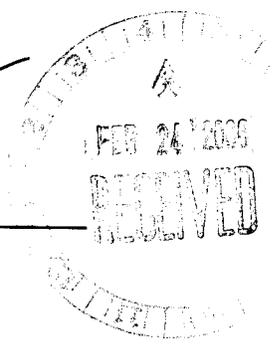


215862
BEFORE THE
SURFACE TRANSPORTATION BOARD



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**

ENTERED
Office of Public Inquiries

**COMMENTS OF JAMES RIFFIN ON
ENVIRONMENTAL ASSESSMENT**

1. James Riffin ("Riffin"), herewith makes the following comments in connection with the Environmental Assessment ("EA") in the above entitled proceeding.
2. An Environmental Assessment ("EA") in the above entitled proceeding was served on February 10, 2006. The EA stated the comment due date was March 13, 2006.
3. The Board's Section of Environmental Analysis ("SEA") began its EA by stating the Line is owned by the Maryland Department of Transportation ("MDOT") and that the Maryland Transit Administration ("MTA") plans to continue to use the line for light rail commuter passenger service following Norfolk Southern Railway Company's ("NSR") abandonment of its freight operating rights and rail freight service. The Board's SEA then concludes that because NSR does not plan to do any salvage activities, and because the Line will continue to be used for commuter rail service, there is no need to comply with the procedures typically associated with

the abandonment of a line of railroad. This conclusion is diametrically opposed to the SEA's conclusion stated in its EA for the southern end of this light rail line. In Docket Number AB 590-0X, *Maryland Mass Transit Administration - Abandonment Exemption - in Baltimore City, Baltimore County, and Anne Arundel County, MD*, the SEA stated on page 3 of its EA:

“Applicants are seeking approval for an action which, if granted, will result in removal of the Line from the Board’s jurisdiction. We are, therefore, obligated, pursuant to the requirements of the national Environmental Policy Act (NEPA) to review the potential environmental impacts of salvage of the rail line, even though applicants intend to keep the rail line in operation.” P. 3.

“However, by granting abandonment and discontinuance authority, Applicants would be able to salvage the Line at some point in the future without seeking the Board’s authorization. Therefore, even though Applicants do not intend to perform any salvage activities on the Line, we have conducted an environmental analysis of possible future salvage to meet the Board’s responsibilities under NEPA.”

4. In this proceeding, if NSR’s Petition is granted, the Line will be removed from the Board’s jurisdiction. Consequently, this proceeding must comply with all of the requirements applicable to the abandonment of a railroad line.

5. **Salvage activities:** The EA correctly states that the rails and crossties that are being used by the MTA for its light rail operations, will not be removed. This statement, unfortunately, does not address **all** of the rails and crossties that are on the Line proposed for abandonment. Attached to the Motion for Preliminary Determination filed by Riffin on February 6, 2006, is a map which depicts **all** of the rails and crossties that are on the Line proposed for abandonment, and the branch lines connecting to the main line. As the map depicts, just south of the Cockeysville station, near Milepost 13.0, the Hunt Valley Business Park branch line comes off of the main Cockeysville Line. The light rail tracks follow the Cockeysville Line to this juncture, then leave the Cockeysville Line, following the Hunt Valley Business Park branch line, to the end of the light rail tracks. The portion of the Cockeysville Line which lies between Milepost 13.0 and 13.8, is **not** used for light rail purposes. Likewise, the Cockeysville Industrial Park branch line is **not** used for light rail purposes. NSR has stated it does not propose to remove and salvage the rails and crossties on these two line segments. (NSR has stated it does not own these

rails and crossties. NSR has stated they are owned by MDOT.) If NSR's Petition is granted, the Board will lose its jurisdiction over these non-light rail segments. If the Board grants NSR's Petition, and the decision does not contain conditions regarding the disposition of these rail segments, then MDOT will be at liberty to dispose of these rail segments as it sees fit. MDOT could do what NSR would not be allowed to do. [These rail segments contain creosoted crossties. The rail segments are adjacent to streams which flow into Loch Raven Reservoir, which is the primary source for Baltimore City's drinking water. The rail segments may contain National Geodetic Survey ("NGS") station markers. There is a historic structure on the Line at Milepost 13.8. (The original Cockeysville Freight Depot, built in 1929, which is listed on the Maryland Historical Trust Inventory as BA 886.)]

6. In *Yakima Interurban Lines Association - Abandonment Exemption - in Yakima County, WA*, Docket No. AB 600 -1X, Decided February 17, 2006, the Board stated that if the line was abandoned, that prospective abandonment would be subject to seven environmental conditions (consultation with NGS, section 402 stormwater permit, threatened or endangered species impacts, wildlife sanctuaries impact, section 404 permit, historic structures, archaeological sites.) [At the time the decision was rendered, abandonment was not guaranteed, since an OFA had been filed.] The *Yakima* case is similar to this proceeding, in that in the *Yakima* case, the applicant had asked to be exempt from the OFA procedures, a notice of intent to file an OFA had been (late) filed, and Yakima County had stated it desired to purchase the rail corridor, to be used for a public purpose, to wit: trail use. In this proceeding, since the Board will lose its jurisdiction over the Line if NSR's Petition is granted, it would be appropriate to impose the *Yakima* environmental conditions on this abandonment. [The *Yakima* decision is further relevant to this proceeding for another reason: In that case, the railroad had asked to be exempt from the OFA procedures. Even though the railroad objected to a late-filed notice of intent to file an OFA, the Board disallowed the OFA exemption, stating:

"The OFA provisions reflect a Congressional desire to preserve, whenever possible, any prospect for continuing or resuming rail freight service on corridors that would otherwise be abandoned. (Citation omitted.) OP&E's notice of intent presents the possibility of preserving rail service pursuant to the method prescribed by Congress. YILA has failed to show that it has been injured by OP&E's having filed late. Further, YILA does not support

its assertion that only government support can restore rail service to this line.. ... Therefore, the notice will be accepted, thus allowing the OFA process to proceed and postponing the effective date of the exemption. For these same reasons, YILA's request for exemption from the OFA provisions at 49 U.S.C. 10904 will be denied."

7. Riffin would further argue that the "prospect for continuing or resuming rail freight service" criterion for denying the OFA exemption in the *Yakima* case, should be applied in this proceeding, particularly since the "prospect for continuing or resuming rail freight service" in this proceeding is greater than it was in the *Yakima* case. [The *Yakima* line was subject to \$764,000 in liens, it was in *really* poor condition, and there were no active or prospective shippers located along the line. The Cockeyville Line, on the other hand, has no liens, most of the Line is in excellent condition, and it has (had) three substantial active shippers, and has at least **six** potential new shippers. (Riffin plus five additional prospective new shippers: Packard Fence, Mark Downs, Badolato Stone Supply, Blue Mount Quarry and European Landscapes and Designs. See the five letters of support filed by the Cockeyville Rail Line Shippers Coalition.)]

8. **Historic review.** NSR served a copy of its Historic Report on the Maryland Historic Trust (State Historic Preservation Officer or SHPO). The Historic Report contained the following misleading statement:

"it is crucial to note that this railroad property will remain intact upon the abandonment of freight service over the Line. Light rail commuter passenger service will continue to be provided over the Line by the MTA after the abandonment of the freight operating rights and the discontinuance of freight service. Thus, even if it were determined that any properties comprising or associated with the Line are actual or eligible historic properties, abandonment of the freight operating rights over the Line will have no effect on them."
P. 64, NSR Petition.

This statement is misleading for it fails to indicate that **not all** of the Line will continue to be used for light rail service. That portion of the Line between milepost 13.0 and 13.8 will not be used for light rail service, nor will the track that is located in the Cockeyville Industrial Park.

On page 83 of its Petition, NSR made the following misleading statement, which may have

been imprudently relied upon by the SHPO and by the Board's SEA:

"NSR has no reason to believe that there is any likelihood of finding historic properties on the line proposed for abandonment."

This statement is misleading, for had one of NSR's employees actually inspected the Line prior to NSR filing its Petition, that employee would have seen the Cockeysville Freight Depot at milepost 13.8. It is obvious from even a cursory inspection, that this structure is more than 50 years old (it was built in 1929), and that it is on the right-of-way. (A rail siding is immediately adjacent to the structure.) Furthermore, had NSR checked the Maryland Historical Trust Inventory, it would have found that this depot is on that register. (Register No. BA 886.)

NSR's historic and archaeological statements are also misleading for they failed to mention that a number of the original stone ties were found on the Line in the vicinity of Texas, Maryland (near Industry Road and Church Lane, across from shipper Imerys' facility). Regretfully, since the sale of the Line by Conrail to MDOT was **not** presented to the Board prior to the sale, no archeological conditions were attached to the sale. Since the Line was not subject to any Board-ordered conditions, the contractor performing MDOT's double tracking, 'trashed' the stone ties.

9. Other false and misleading statements.

- A. "Baltimore County, MD, the only county through which the Line runs" Petition at p. 20. While the Line is "mainly" in Baltimore County, 35% of the Line is in Baltimore City, which has the same status as a Maryland county.

- B. "The Line proposed for abandonment traverses United States Postal Service Zip Codes 21030, 21065 and 21201, and serves the stations of Lutherville, MD, Timonium, MD, Texas, MD and Cockeysville, MD." Petition at p. 13; Federal Register Notice (Petition at p. 28); *Baltimore Sun* newspaper legal advertisement (Petition at p. 95). The Line **does not** pass through Zip Codes 21065 or 21201. Had NSR checked a Baltimore City / Baltimore County map, NSR should have noted that

the Line passes through Zip Codes 21217, 21211, 21209, 21210, 21212, 21204, 21093 and 21030. The Line also passes through the following stations: Woodberry, Mt. Washington, Bare Hills, Hollins, Lake, Ruxton, Riderwood, Lutherville, Timonium, Padonia, Texas, Cockeysville and Ashland. The station of Baltimore was located several miles south of Milepost UU 1.0 (in the 500 block of Calvert Street), and thus is not on the Line proposed for abandonment.

- C. “The rail line proposed for abandonment of rail freight operations crosses Western Run, ...” Petition at p. 42. This statement was repeated on p. 4 of the EA. While the Line does cross Western Run, near Milepost 16.8, this crossing is about 3 miles past the portion of the Line NSR petitioned to abandon.
- D. NSR’s common carrier obligations go at least to Milepost 16.8 (Western Run). [The deed from Conrail to MDOT covers that portion of the Line between Milepost 1.0, at North Avenue, and Milepost 16.8, at Western Run.] NSR’s failure to include this truncated segment in its abandonment Petition runs counter to the intent of the governing statutes, and is inconsistent with prior Board and court decisions. The following salient comments are equally applicable to this proceeding:

“When segmentation of transportation lines is involved, we consider whether the segmentation satisfies three conditions: (1) does the proposed segment have logical termini? (2) does the segment have substantially independent utility?; and (3) will abandonment of the disputed segment foreclose alternate treatment of the remaining segments? The satisfaction of these three criteria tends to ensure that carriers will not abuse the out-of-service exemption by carving out one segment of a line in an attempt to make the remainder of the line useless and subject imminently to abandonment. **We must, of course, be vigilant to detect and restrain the latter phenomenon should it appear.**” (Emphasis added.) *Futurex Industries, Inc. v. I.C.C.*, 897 F.2d 866, 870-873 (7th Cir. 1990). Quoted in *Caddo Antoine and Little Missouri R. Co. v. U.S.*, 95 F.3d 740 (8th Cir. 1996) at 747-748.

“The Commission itself has acknowledged that its analytical focus should “be on the ultimate issue: whether abandonment of one segment would foreclose the viability of contiguous segments, making their eventual abandonment a foregone conclusion.”

Central Michigan Railway Co. – Abandonment – East of Ionia to West of Owosso – In Michigan, 8 I.C.C. 2d 166, 173 (1991). Quoted in *Caddo* at 748.

“In a word, what the Commission has done in this case is that which it said in *Central Michigan Railway Co.* it should guard against: a segmentation of lines that would have the effect of foreclosing the viability of contiguous segments, making their eventual abandonment a foregone conclusion.” *Caddo* at 748.

[In the *Caddo* case, the applicant filed to abandon the last 49.2 miles of a 52.9 mile line of railroad “that from the date of its construction has been operated as a unitary line of railroad.” *Caddo* at 747. A major shipper was located on the first 3.07 miles of the line. The 8th circuit held that “cherry-picking” the single, more easily served shipper, was impermissible when a party had filed to acquire the entire line. This is very similar to this proceeding, where NSR has elected to keep the first mile of the Line, and its North Avenue Transload facility, while abandoning the remainder of the Line. It is also similar since NSR has not filed to abandon several miles of the Line which extend beyond Milepost 13.8.]

10. The false and misleading statements enumerated above, had they been contained in a Notice of Exemption, could have led to the Notice of Exemption being declared null and void *ab initio*. The Board’s regulations do not state what effect false and misleading statements would have, if contained in a Petition for Exemption. Some of the misleading information (naming only one of the 8 Zip Codes the Line goes through, naming only four of the 13 stations the Line passes through, failure to list Baltimore City as a county) appeared in legal notices (Federal Register, newspaper legal advertisement). The Board’s regulations do not indicate what effect misleading statements would have on a Petition for Exemption, if contained in the legal notices associated with a Petition for Exemption. NSR’s failure to include all of the Line in its Petition

to Abandon, which failure results in several stranded segments, runs counter to prior Board and court decisions. Given the infirmities noted above, it may be appropriate for the Board to reconsider its January 3, 2006 decision permitting this proceeding to proceed as an exemption proceeding.

11. On occasion the Board has accepted flawed petitions, particularly when the applicant has filed amendments correcting the flaws, and the opposing party has not been harmed by the flaws, or has consented to the amended filing. [In the *Yakima* case cited above, over the objection of the applicant, the Board accepted a late-filed notice of intent to file an offer of financial assistance.] In this proceeding, Riffin has identified a number of flaws in NSR's Petition. The failure to give proper notice has not harmed Riffin. NSR's failure to include all of the Line north of Milepost UU 1.0, would harm Riffin if the Board granted NSR permission to abandon that portion of the Line between Mileposts UU 1.0 and UU 13.8, without also granting permission to abandon that portion of the Line that lies beyond Milepost 13.8. Riffin has identified three new shippers whose facilities lie to the north of Milepost 13.8 (Riffin, Mark Downs and the Blue Mount Quarry). If Riffin is unable to acquire that portion of the Line, the viability of the remaining portion of the Line will suffer.

12. With the above in mind, Riffin would not oppose a filing by NSR to amend its Petition, so long as all of issues addressed above are dealt with in the following manner:

- A. Amend its Milepost designations **from** UU 1.0 / UU 13.8 **to** UU 1.0 / 35.2 (at or near the Maryland / Pennsylvania border). [This would eliminate the uncertainty regarding the lack of Board or I.C.C. approval for abandonment of this portion of the Line, and would ensure portions of the Line are not isolated.]
- B. Specifically include the Hunt Valley Business Park and Cockeysville Industrial Park branch lines. [This would eliminate the need to ascertain whether these are line or spur tracks.]
- C. Riffin stated in his Notice of Intent to File an OFA, that he proposed to acquire all of

the Line NSR desires to abandon. If the above amendments are filed, Riffin will amend his OFA filing accordingly.

- D. Delete NSR's request to be exempt from the OFA procedures. [This would eliminate the need to address salvage, historic structures, National Geodetic Survey, etc. issues.]
- E. Include in its amended filing all of the Zip Codes and stations specified above, and make mention that the Line passes through Baltimore City.

Respectfully submitted,



James Riffin

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of February, 2006, a copy of the foregoing Comments of James Riffin on Environmental Assessment, 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.



James Riffin