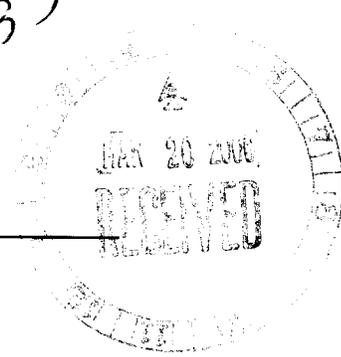


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**BEFORE THE
SURFACE TRANSPORTATION BOARD**



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**

**PETITION TO SET ASIDE AN UNAPPROVED SALE
OF A LINE OF RAILROAD**

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Dated: March 20, 2006

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Office of Proceedings

MAR 21 2006

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Public Record

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SURFACE TRANSPORTATION BOARD**

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1. James Riffin (“Riffin”), pursuant to 49 U.S.C. 721, 49 CFR 1117 and other applicable regulations of the Surface Transportation Board (“STB” or “Board”), herewith files this Petition to Set Aside an Unapproved Sale of a Line of Railroad, and for reasons states:

BACKGROUND INFORMATION

2. On December 14, 2005, Norfolk Southern Railway Company (“NS”), filed a Petition for Exemption (“Petition”) to abandon that portion of the Cockeysville Line (“Line”) which lies between Milepost UU 1.0 and UU 13.8, which Line is in Baltimore City and Baltimore County, Maryland. (The Line was formerly known as the Pennsylvania Railroad’s Northern Central Branch.) NS acquired its rights in the Cockeysville Line via the purchase of, merger with, that portion of Conrail’s assets known as the Pennsylvania Lines assets. On pages 6-7 and 63 of NS’ Petition, NS averred NS’ predecessor in title, Conrail, sold the Line to the Maryland Department of Transportation (“MDOT”), a non-carrier, in 1997. In a January 27, 2006 letter addressed to the Board, NS admitted Conrail’s operating rights did extend beyond Milepost UU 13.8, and

admitted NS could find no record indicating the Board or the Interstate Commerce Commission (“ICC” or “Commission”) had ever approved abandonment of the Line.

3. In a letter to the Board, dated March 14, 2006, (“NS 3/14 letter”) NS indicated its original statements concerning the sale of the Line were incorrect. NS further indicated that “the entire line of railroad, and most of the related track,” was sold to the Maryland Mass Transit Administration [now, the Maryland Transit Administration] (“MTA”) on May 1, 1990. The letter further stated:

“Conrail reserved an exclusive freight operating easement over the Line in order to provide freight rail service over the entire Line in accordance with the terms of an operating agreement between MTA and Conrail, dated May 1, 1990. Conrail’s 1990 sale of the rail assets and right-of-way specifically excluded the 1.1-mile Cockeyville Industrial Track. The Conrail-MTA April 25, 1997 supplemental agreement and deed, which NSR misinterpreted to apply to the entire Line, only dealt with the conveyance of the Cockeyville Industrial Track to MTA, not to the main line that had been sold to MTA in 1990. Conrail also retained a freight operating easement over that track.

NSR has acknowledged in this case that Conrail and MTA did not seek ICC or STB review of the sale of the Line. Such review clearly has been required since the ICC’s decision in ICC Finance Docket Nos. 31847, 31829, ... 8 I.C.C. 2d 835 (1991) [“*State of Maine.*”], that clarified that such transactions should be submitted to the agency for a jurisdictional determination. Before that time, whether such review of transactions that only involved transfer of rail assets or right-of-way but left the common carrier obligation to provide freight service over a Line with the selling carrier might not have been as clearly understood. Since the sale did not unduly limit Conrail’s ability to provide service over the Line, Conrail intended to continue to provide service over the Line and MTA did not intend to acquire any type of common carrier obligation to provide rail freight service over the Line, the parties might have more understandably concluded over a year before the State of Maine DOT decision that submission of the transaction for agency review was not required and the transaction and operating agreement were not subject to ICC and later STB jurisdiction. The 1997 transaction involved the sale from Conrail to MTA of an industrial lead track that also would not be subject to Board jurisdiction.”

Freight operations have been conducted over the Line under the MTA-Conrail operating agreement since 1990 without impairing Conrail’s and later NSR’s ability to provide reasonable service over the Line. Thus, the 16-year old transaction that

transferred ownership of the Line to MTA and reserved Conrail's freight operating rights, subject to the operating agreement, clearly would have left an unimpaired and exclusive common carrier freight obligation with Conrail and put the sale of the rail line assets and the operating agreement outside the agency's jurisdiction."

4. The following salient facts may be gleaned from the NS 3/14 letter:

In 1990, the *entire* Line, except for the Cockeyville Industrial Track portion, was sold to the MTA. [The letter does not specify what the entire Line consisted of.] ICC approval of the 1990 sale was not sought. In 1997, Conrail sold the remaining Cockeyville Industrial Track portion to the MTA. STB approval of this sale was not sought. NS characterized the Cockeyville Industrial Track as "industrial lead track," indicated that it was only 1.1 miles in length, then opined that the sale of this track would not be subject to the Board's jurisdiction. Conrail and MTA executed an operating agreement which gave Conrail exclusive freight operating rights over the Line. NS expressed its unsupported opinion that this operating agreement did not unduly limit Conrail's ability to provide service. NS further expressed its opinion that the operating agreement did not impair NSR's ability to provide reasonable service over the Line. NSR then concluded that the sale of the Line "left an unimpaired and exclusive common carrier freight obligation with Conrail and put the sale of the rail line assets and the operating agreement outside the agency's jurisdiction."

5. Riffin would argue NSR's 3/14 letter misrepresents the following:

- A. **The length of the Cockeyville Industrial Track.** NSR stated it was 1.1 miles (5,800 feet) in length. Its actual length is in excess of 12,000 feet.
- B. **The Cockeyville Industrial Track is industrial lead track.** NS, in its 3/14 letter, called the line of railroad that was sold by Conrail to the MTA in 1997, the Cockeyville Industrial Track ("CI track"). NS opined that this line of railroad was industrial lead track, and as such, MTA's acquisition of this line did not need Board approval, citing 49 USC §10906. Riffin would argue only the Board may classify track as line or excepted. See *United Transp. Union-Illinois v. Surface Transp.*, 169 F.3d 474 (7th Cir. 1999) ("*Chicago Rail Link*"). Riffin would further argue that this

track was in fact a line of railroad, rather than excepted (§10906) track.

In deciding how to classify track, the Board has applied a test based on the “intended use” of the track. See *Nicholson v. Interstate Commerce Comm’n*, 711 F.2d 364, 367 (D.C. Cir. 1983). “Under this test, track is railroad line if it extends into new territory not served by the carrier or already served by another carrier. A focus on use must not obscure “the larger purpose and effect of the transaction at issue.” *Brotherhood of Locomotive Eng’rs v. Surface Transportation Board*, 101 F.3d 718, 728 (D.C. Cir. 1996). New or proposed track is “ ‘an extension of the railroad,’ ” and so constitutes railroad line, as long as “ ‘the purpose and effect of the new track[] is to extend substantially the line of a carrier into new territory,’ ” even if the track is short and “ ‘the character of the service contemplated [is] commonly rendered ... by means of spur[] tracks.’ ” *Id.* (quoting *Texas & Pacific Ry. Co. v. Gulf, Colorado, & Santa Fe Ry. Co.*, 270 U.S. 266, 278, 46 S.Ct. 263, 70 L.Ed. 578 (1926)).” *United Transp. Union v. Surface Transp. Bd.*, 183 F.3d 606, 613 (7th Cir. 1999). (“*Beer Track case*”).

In the 1970's, the Hunt Valley Business Park and the Cockeysville Industrial Park were built. The developers of these two Parks asked Penn Central to construct a branch line into these two industrial parks, for the purpose of providing / extending rail service to shippers in these two parks. Prior to construction of this branch line, this area did not have rail service. The main branch left the Northern Central right-of-way near Milepost UU 12.8. (See the orange-highlighted portion of the map appended hereto, which was also appended to Riffin’s Motion for a Preliminary Determination, filed on February 6, 2006.) The Hunt Valley Business Park portion of the line extended west for approximately 5,000 feet, then turned north and paralleled Gilroy Road for an additional 2,000 feet or so. This line provided rail service to a number of shippers along this line, including the McCormick Spice Company. The Cockeysville Industrial Park branch line branched off of the Hunt Valley Branch line at a point approximately 500 feet west of the Northern Central right-of-way. This branch line ran generally north for a total distance of approximately 2,500 feet, ending

with a double-track siding adjacent to the Michel Warehouse property on Stenersen Lane. Noxel Cosmetics was a tenant at this site, and received many rail cars. About 1,000 feet from the end of this branch line, another double-track siding serviced the Stenersen property. Noxel's finished products were loaded onto box cars at this siding, then shipped to its customers. Approximately 1,500 feet from end of this branch line, another siding provided rail service to another business.

Since there was no rail service to these two industrial parks prior to construction of the Cockeysville Industrial Tracks, the purpose for constructing this branch line was to extend rail service to shippers located in these two industrial parks. Consequently, based on the criteria enumerated above, this branch line should be classified as railroad line, not excepted track. When Conrail acquired the line from Penn Central, it was a line of railroad, and continued to be a line of railroad until it was purchased by the MTA in 1997. Since it was a line of railroad, prior Board approval of the sale of the line to the MTA was required via 49 USC § 10901.

It should be noted that the length of a line is not a part of the criteria used to determine what the purpose of a line is. In the *Beer Track case, supra*, the Board held, and the court upheld, the Board's finding that 206 feet of track was a line of railroad.

- C. **Operating agreement: Ability to provide service.** NSR stated the operating agreement with the MTA did not impair NSR's ability to provide reasonable service over the Line. Riffin would argue the facts indicate the operating agreement *severely* impaired NSR's ability to provide reasonable service over the Line. From March of 2005 until December of 2005, the MTA took the line out of service, to construct track improvements. Evidently the Operating Agreement permitted this to happen. During this period of time, NSR's ability to provide service over the Line was *severely* impaired. (It was rendered impossible.) Furthermore, NS continues to refuse to

deliver Riffin's rail cars to him in Cockeysville.¹ Riffin would argue the total lack of freight rail service on this Line is either due to constraints found in the operating agreement with MTA, or NS' unilateral decision to no longer provide any freight rail service over the Line, or perhaps both. Regardless of the reason, NS appears to be in breach of its Public Convenience and Necessity common carrier obligations applicable to this Line.

D. Operating agreement: Were common carrier rights or obligations transferred to the MTA? How permanent was the freight operating easement? NS has argued that because Conrail had the exclusive right to provide freight rail service over the Line, that because the MTA did not desire to provide common carrier services, and that because NS *does not think* the Operating Agreement impaired Conrail's ability to provide service on the Line, the sale of the Line was not subject to the Board's jurisdiction. Unfortunately for NS, this is not the criteria utilized by the Board when reviewing the sale of a line of railroad. The Board, and its Commission predecessor, has clearly stated: If a rail carrier seeks to transfer *some or all* of its common carrier *rights or obligations*, it first must seek approval from the Board. ["It is well established that when a noncarrier, including a State, acquires a railroad, it must seek our approval under section 10901. See *United States v. California*, 297 U.S. 175 (1936); *Iowa Term. R. Co. Acquisition and Operation*, 312 I.C.C. 546, 549 (1961)". *Common Carrier Status of States, State Agencies*, 363 I.C.C. 132, 133 (decided July 23, 1980); *State of Maine, supra*, at 836-837.]

Whether Conrail had the exclusive right to provide freight rail service, is not the applicable criteria. What is critical, is whether the operating agreement transferred *any* of Conrail's common carrier *rights or obligations*, such as Conrail's right to

¹ On March 8, 2006, Riffin received a telephone call from a Mike at NS' Central Yard Operations. Mike wanted to know why Riffin's rail cars were still languishing in NS' Baltimore Bayview Yard. Riffin told Mike Riffin had signed leases to utilize the sidings adjacent to properties adjacent to the Line. Riffin also told Mike that Riffin had made numerous calls to NS representatives since January, 2006, in an effort to induce NS to deliver Riffin's rail cars to him in Cockeysville. It would appear, someone very high in NS' hierarchy has issued an eddict: Do not deliver Riffin's rail cars to him in Cockeysville!

exercise dispatching control; Conrail's obligation to maintain the Line; whether the number of hours the Line was available for Conrail's use, was sufficient to service shippers along the Line;² whether Conrail had to submit freight schedules to the MTA for its approval; whether there were restrictions on where freight cars could be loaded or unloaded; whether the MTA could block construction of new track to new shippers located along the Line; whether Conrail had the right to construct, reconstruct, relocate or remove any facility or improvement along the Line; whether the MTA had the unfettered right to construct, reconstruct, relocate or remove any facility or improvement along the Line; whether MTA's trains got first priority when the Line had maintenance issues; whether Conrail had the right to remove a crippled passenger train at MTA's expense; and whether the MTA could ask Conrail to seek abandonment. (How "permanent" was the easement?) See *Orange County Transp. - Exempt. - Atchison, T. & SF. Ry. Co.*, 10 I.C.C. 2d 78, 83-87. See also *Wisconsin DOT - Petition for Declaratory Order*, FD 34764, December 2, 2005 and February 2, 2006 Decisions.

On page 7 of NS' Petition, NS stated Conrail and the MTA:

"had an understanding that Conrail would file an application for abandonment authority or petition for exemption to abandon the freight operating easement and rights and to permanently abandon freight service over the Line due to MDOT's desire to use the Line exclusively for light rail commuter passenger operations. Conrail seems to have been willing to make this agreement because of the marginally profitable or unprofitable results of the freight operations over the Line."

This statement would strongly suggest that neither Conrail nor the MTA envisioned the freight easement to be permanent, which would have been required for the sale to fall under the guidelines enumerated in *State of Maine, supra*.

² Riffin has often observed NS and Conrail locomotives stranded at the north end of the Line. They were stranded, because there was insufficient time to make it back down to Milepost UU 1.0 before NS / Conrail was required to be off of the Line. This would suggest the number of hours the Line was available for freight service, was insufficient.

**MARYLAND MASS TRANSIT ADMINISTRATION STATUS:
CARRIER OR NON-CARRIER?**

6. On August 9, 2001, the Maryland Mass Transit Administration filed a Verified Notice of Exemption (“NOE”) to abandon 5.78 miles of rail line between milepost 0.0 at Clifford Junction, Maryland, to milepost 5.78 at Dorsey, Maryland, in Baltimore City and Baltimore County, Maryland. AB 590 (Sub-No. 0X). See also AB-193 (Sub-No. 2X). In paragraph 3 (a) (2) of that NOE, the MTA made the following statement:

“MTA and Canton are common carriers by railroad subject to 49 U.S.C. Subtitle IV, Chapter 105.”

7. A historic report was attached to the NOE as Exhibit E. On page 7 of the Historic Report, in paragraph 6.0, the MTA made the following statement:

“MTA acquired this portion of the Line from the B&A Railroad Company in 1991 ...”

8. Based on the verified statements made by the MTA in its August 9, 2001 NOE, it would appear that when the MTA acquired the Cockeysville Industrial Track in 1997, the MTA was a common carrier subject to the jurisdiction of the Board. Therefore, per 49 U.S.C. §10902, prior to the MTA’s acquisition of this line of railroad, the MTA needed to file with the Board either an application, seeking approval from the Board to acquire this additional rail line, or a Notice of Exemption or Petition for Exemption. If the Board were to find that the Cockeysville Industrial Track was excepted track, then the MTA would have been subject to the labor protective conditions found in 49 USC § 11323, since the Board may not grant an exemption from its required approval of the transaction, if the track is excepted track. See *Chicago Rail Link, supra*, at 476.

9. In *New York Dock Railway – Control – Brooklyn Eastern District Terminal*, Fin. Doc. No. 28250, 354 I.C.C. 399, at 411 (Decided April 11, 1978) the Commission quoted as follows from *Southern Ry. Co. – Control – Central of Georgia Ry. Co.*, 331 I.C.C. 151, 163-169 (1967):

“the Commission explained that the employee rights to notice and negotiation were indispensable prerequisites to approval of the transaction.”

10. At the present time, Riffin does not know if the MTA was a common carrier at the time it purchased “the entire line” on May 1, 1990. Individuals Riffin has spoken with have indicated they believe the MTA was a common carrier prior to 1991. If Riffin finds evidence that the MTA was a common carrier on May 1, 1990, Riffin will fill a supplement to this Petition, which supplement will contain this additional information.

CONTRACT LAW

11. The validity of a contract is determined as of the date the contract is made. *National Dairymen Ass'n v. Dean Milk Co.*, 183 F.2d 249, cert. denied 340 U.S. 876, 71 S.Ct. 122, 95 L.Ed. 637 (1950). It has long been held that a contract forbidden by an act of Congress or against its policy would be void. *Walworth v. Kneeland*, 56 U.S. 348, 15 How. 348, 14 L.Ed. 724 (1853). A contract which is contrary to public policy and violative of state or federal laws is void. *Broxham v. Borden's Farm Products Co. of Illinois*, 53 F.2d 946 (C.C.A. Ill. 1931). All contracts which provide for doing a thing which is contrary to law, morality, and public policy are void. *Lingle v. Snyder*, 160 F.2d 627, 87 C.C.A. 529 (Who. 1908). A contract in violation of provisions of a statute prohibiting certain acts is void, whether the prohibition is expressed or implied. *Harris v. Runnels*, 53 U.S. 79, 12 How. 79, 13 L.Ed.901 (xxxx). A contract which is expressly within the prohibition of a statute, is void, although the statute does not declare, in so many words, that all such contracts shall be void. *The Pioneer*, Fed. Cas. No. 11, - 177, Deady 72 (D.C. Or. 1864). A contract which is contrary to the requirements of a statute is void, whether expressly made so by the statute or not. *Lakos v. Saliaris*, 116 F.2d 440 (C.C.A. Md. 1941). A contract which cannot be performed without violation of a statute, is void. *National Transformer Corp. v. France Mfg. Co.*, 215 F.2d 343 (C.A. Ohio 1954). Mere words and ingenuity of contractual expression, whatever their effect between the parties, cannot make permissible a course of conduct which is forbidden by law. *U.S. v. City and County of San Francisco*, 60 S.Ct. 749, 310 U.S. 16, 84 L.Ed.1050 (1940), rehearing denied 60 S.Ct. 1071, 310

U.S. 657, 84 L.Ed. 1420. Any contract is illegal if either the formation or performance is prohibited by statute or the Constitution. *Wolk v. Benefit Ass'n of Ry. Emp.*, 172 F.Supp. 62 (D.C. Pa. 1959). Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute is a void contract, though the statute itself does not mention that the contract shall be void, but only inflicts a penalty on the offender. *Hutterian Brethren of Wolf Creek as a Church of Sterling, Alberta, Canada v. Haas*, 116 F.Supp. 606 (D.C. Mont. 1953).

**THE CONTRACTS BETWEEN CONRAIL AND THE MTA,
FOR THE UNAPPROVED SALE OF THE COCKEYSVILLE LINE, ARE VOID.**

12. In *Common Carrier Status of States, State Agencies*, Fin. Doc. No. 28990 F, 363 I.C.C. 132 (decided July 23, 1980), the Interstate Commerce Commission ("Commission") stated, at 133: It is well established that when a noncarrier, including a State, acquires a railroad, it must seek our approval under section 10901. See *United States v. California*, 297 U.S. 175 (1936); *Iowa Term. R. Co. Acquisition and Operation*, 312 I.C.C. 546, 549 (1961)."

13. 49 U.S.C. §11901 (d) [both the 1988 and 1994 editions] states:

(d) a person knowingly authorizing, consenting to, or permitting a violation of sections 10901-10907 of this title or of a condition of a certificate or a regulation under any of those sections, is liable to the United States Government for a civil penalty of not more than \$5,000.

14. NS has admitted neither Conrail nor the MTA sought, nor obtained, prior approval from the Commission for the 1990 acquisition by the MTA of the entire Cocksவில்ville Line of railroad (minus the Cocksவில்ville Industrial Park portion). NS has admitted neither Conrail nor the MTA sought, nor obtained, prior approval from the Board for the 1997 acquisition by the MTA of the Cocksவில்ville Industrial Park portion of the Line of railroad. The 1990 acquisition violated either 49 USC § 10901 (if the MTA was a non-carrier) or §§ 10902 and 11323 *et seq.* (if the MTA was a carrier at the time). The 1997 acquisition of the Cocksவில்ville Industrial Track violated 49 USC §§10902 and 11323 *et seq.*, since at that time, the MTA was a carrier.

15. In *New York Dock Railway – Control – Brooklyn Eastern District Terminal*, Fin Doc.

No. 28250, 360 I.C.C. 60 (Decided February 9, 1979), the Commission promulgated labor protective conditions to be imposed in railroad transactions pursuant to 49 US.C §11343 *et seq.* Section 4, *Notice and agreement or decision*, (a) and (b) states:

“(a) Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes. Prior to consummation the parties shall negotiate in the following manner:”

“(b) No change in operations, services, facilities, or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered.”

The 1997 Cocksylville Industrial Track Acquisition must be set aside.

16. The classification of the Cocksylville Industrial Track, as either line or excepted track, is irrelevant. The 1997 acquisition transaction was between Conrail, a Class I carrier, and the MTA, also a carrier. This transaction falls within the purview of 49 USC §11343 *et seq.* Consequently, this transaction was subject to the labor protective arrangements mandated by §11347.

17. Since notice and negotiation with affected employees are “indispensable prerequisites to approval of the transaction,” *Southern Ry. Co. – Control – Central of Georgia Ry. Co.*, 331 I.C.C. 151, 163-169 (1967), the 1997 Cocksylville Industrial Track acquisition transaction cannot be approved. [It would be impossible for Conrail to post the requisite notice on the appropriate bulletin board, since that bulletin board, and the facility wherein that bulletin board hung, no longer exist, and the affected employees are long gone. In addition, the *Notice and*

agreement or decision time constraints cannot be met.] Likewise, the Board does not have the authority to exempt any of the labor protective procedures or agreements. See *K & E Railway Co. – Abandonment Exemption – In Alfalfa, Garfield and Grant counties, OK, and Barber County, KS*, AB 480-0-X, (Decided December 31, 1996), at page 3; *Norfolk and Western Ry. Co. – Abandonment Exemption – In Cincinnati, Hamilton County, OH*, Docket No. AB 290-184 X (Decided May 13, 1998), at page 9. Consequently, the only option available to the Board, is to set aside the 1997 unapproved sale of the Cockeysville Industrial Track. In addition, previously cited, well established contract law holds that contracts in violation of provisions of a statute prohibiting certain acts, and contracts which cannot be performed without violation of a statute, are void. Since the purchase contracts and subsequent Deeds (contracts) for the 1997 unapproved acquisitions of the Cockeysville Industrial Track by the MTA are void, the conveyances memorialized in the applicable deeds are likewise void, have no legal effect, and must be set aside.

The 1990 Cocksysville Line Acquisition must be set aside.

18. **If the MTA was a carrier on May 1, 1990**, then for the reasons cited above, the only option available to the Board is to set aside the unapproved sale.

19. **If the MTA was NOT a carrier on May 1, 1990**, the Board may want to ascertain whether the acquisition was subject to the jurisdiction of the Board [*i.e.* did the transaction meet the criteria expressed in *State of Maine*]. As was discussed *supra* on page 8, it would appear Conrail and the MTA did not envision the freight easement retained by Conrail being permanent. If Conrail's freight easement was not permanent, then per the reasoning expressed in *State of Maine*, the Board had jurisdiction, and the MTA acquired common carrier rights and obligations. If the freight easement was found to be permanent, then NS' request to be exempt from the OFA procedures must be denied. [Exempting this proceedings from the OFA procedures would render the freight easement non-permanent.] The Board then should examine Conrail's operating agreement, to see if the operating agreement transferred any of Conrail's common carrier rights or obligations to the MTA.

A. Riffin would argue long standing contract law mandates the sale be declared void, for the transaction violated 49 USC §10901. Riffin would further argue that once a transaction becomes void, it cannot retroactively be resurrected via a §10505 exemption from the Board's prior approval requirement. In *Hannay v. Eve*, 7 U.S. 242, 3 Cranch 242, 2 L.Ed. 427 (1806), the Supreme Court held "Where the contract, being in violation of the statute, is void, the subsequent repeal of the statute will not render it valid." Riffin would argue that since the acquisition contract is void, a subsequent exemption will not render it valid.

B. If the Board were to rule that it had authority to retroactively exempt an unapproved transaction, and that exemption would revive a void contract, the Board then would have to ascertain whether granting an exemption would not be contrary to U.S. Transportation Policy. On pages 13-15 of Riffin's Supplement to his Protest, filed January 27, 2006, Riffin discussed all fifteen transportation policy statements. Granting an exemption for the 1990 acquisition of the Line may be in conformity with statements number (2) (minimizing the need for Federal regulatory control); (14) (to promote energy conservation - via mass transit); and (15) (to provide for the expeditious handling and resolution of all proceedings). Riffin would argue granting an exemption for the 1990 acquisition of the Line would *not* be in conformity with the following transportation policy statements:

a. (3) (to promote a safe and efficient rail transportation system); (8) (to operate transportation facilities and equipment without detriment to the public health and safety); (11) (to encourage fair wages and safe and suitable working conditions in the railroad industry). If the agreements between Conrail and the MTA shifted maintenance of way, operating and scheduling control from Conrail to the MTA, this would have impaired Conrail's ability to provide for a safe and efficient rail transportation system, Conrail's ability to operate transportation facilities and equipment without detriment to the public health and safety, and it would have had a deleterious effect on Conrail's employees. (They no longer would have been responsible for performing these tasks, and thus would have been subject to a diminution in the number of hours they could have worked.)

b. (4) (to ensure development and continuation of a sound rail transportation system).

Selling rail assets, particularly a right-of-way, does not ensure development or continuation of a sound rail transportation system. It is the first step toward abolishing / abandoning a portion of the rail transportation system. In addition, if the agreements between Conrail and the MTA restricted Conrail's ability to construct, reconstruct, relocate or remove any facility or improvement along the Line, restricted where Conrail could load or unload freight cars, or impaired Conrail's ability to service shippers along the Line, then the acquisition would have had a detrimental affect on development and continuation of a sound rail transportation system.

§10505 AUTHORITY TO EXEMPT RAIL CARRIER TRANSPORTATION

20. 49 USC § 10105 (a) states:

- A. **1988 edition:** “(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle –
- (1) is not necessary to carry out the transportation policy of section 10101a of this title; and
 - (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.”
- B. **1994 edition:** “(a) In a matter related to a rail carrier providing transportation, or a motor carrier providing transportation of property other than household goods, or in non-contiguous domestic trade, subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle –
- (1) is not necessary to carry out the transportation policy of section 10101 or section 10101a of this title; and
 - (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.”
- C. **2004 edition:** [Retitled §10502] “(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 – [emphasized portion not in 1988 & 1994 editions]

- (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.”

21. 49 USC § 10101a [1988 and 1994 editions] states in pertinent part:

In regulating the railroad industry, it is the policy of the United States Government –

- (2) to minimize the need for Federal regulatory control over the rail transportation system
- (3) to promote a safe and efficient rail transportation system ...
- (4) ... to meet the needs of the public ...
- (8) to operate transportation facilities and equipment without detriment to the public health and safety;
- (9) to cooperate with the States on transportation matters ... [deleted in the 2004 edition]
- (12) to encourage ... safe and suitable working conditions in the railroad industry; [renumbered as ¶ 11 in the 2004 edition]

22. Prior Commission, Board and Court decisions have concluded the Board’s exemption authority is very broad. See for example *Simmons v. I.C.C.*, 697 F.2d 326 (1982). Generally, the Board’s decisions granting exemptions are forward-looking, *i.e.*, the decisions have exempted prospective future transactions. Occasionally, the Commission granted a retroactive exemption. In those few cases where a retroactive exemption was granted, no one challenged the granting of the exemption, the issue of whether the Commission (or the Board) had the authority to *retroactively* grant an exemption, was never raised, the transaction being exempted had recently occurred, and the parties had petitioned the Commission for a determination of the Board’s jurisdiction, and/or approval. See, for example, *Southern Pacific Transportation Company – Abandonment Exemption – Los Angeles County, CA*, 8 I.C.C. 2d 495 (1992), Petition to Reconsider, denied, 9 I.C.C.2d 385 (1993); *Orange County Transp. - Exempt - Atchison, T. & SF. Ry. Co.*, 10 I.C.C. 2d 78 (1994).

23. In the *Southern Pacific* case, the acquisition of the lines was not protested, and would not have affected any railroad employees, since there was no traffic on the lines. (The only shipper on the lines being acquired, had decided to relocate its business.) The lines were not generating any revenue for SP. And SP had petitioned the Commission to abandon the lines.

24. In the *Orange County* case, the acquisition of the lines was not protested. The unions representing the affected railroad employees, intervened, thereby protecting the interests of the railroad employees. The railroad had petitioned to abandon some of the lines. The Commission further held that the acquisitions by SANBAG and OCTA would result in SANBAG and OCTA becoming common carriers, and would subject these two entities to standard *New York Dock* labor protection conditions. The Commission then gave SANBAG and OCTA the option of disavowing their acquisitions, if they did not want to become common carriers and did not want to be saddled with protective labor agreements.

25. The time sequence in the *State of Maine* (1991), *Southern Pacific* (1992), and *Orange County* (1994) cases is of some importance. Some of the *Southern Pacific* acquisitions occurred in 1990, prior to the *State of Maine* case. When the *State of Maine* decision was rendered, Southern Pacific realized that its 1990 line sales was inappropriate. Southern Pacific then made a good faith attempt to apprise the Commission of its prior misconduct, then sought the Commission's forgiveness, and sought approval of additional acquisitions. In the *Orange County* case, the A T & SF also realized some of its prior line sales was inappropriate, then sought the Commission's forgiveness, and sought approval for additional acquisitions. In addition, there were time constraints associated with the beginning of construction of a commuter rail system, and if the acquisitions had not been approved, construction of the proposed commuter rail lines would have been precluded.

26. In this proceeding, unlike in the *Southern Pacific* and *Orange County* cases, there has been no effort on the part of Conrail, the MTA or NS, to seek any type of approval for the unauthorized acquisitions, even though the 1990 acquisition occurred shortly before the *Southern Pacific* case was decided, and the 1997 acquisition occurred just three years after the *Orange County* case was decided. It was a secret transaction that the parties wanted to keep secret.

Today, two of the parties have chosen not to participate in these proceedings. One of the parties to the 1990 and 1997 acquisitions, the MTA, has failed to advise NS or the Board that at the time of the 1997 acquisition, the MTA was a common carrier. If they were to participate, they would appear before the Board with 'unclean hands.' It has long been a tenet of law that a court will not help those who appear before the court with 'unclean hands.'

27. In this proceeding, there are no pressing time issues, nor are there any preclusion-of-construction-of-commuter-rail-line issues. The MTA's light-rail system has been completely built. There is nothing more to do to make it fully operational.

28. In this proceeding, there were a number of active shippers on the Line in 1990, and today there still are a number of active and potential shippers on the Line. The 1990 acquisition in all likelihood, did adversely affect some of Conrail's employees, for responsibility for maintaining the right-of-way was transferred to the MTA, thereby eliminating work for Conrail's maintenance-of-way employees. Other Conrail employees may also have been adversely affected. NS' maintenance-of-way employees have also been adversely affected, since all maintenance work has been performed by MTA employees, not NS employees. The rights of all of these railroad employees have been adversely affected. Today, it is not possible to correct these wrongs.

29. Granting the MTA an exemption for its 1990 acquisition of the Line would set a new precedent, which the Board would be obligated to follow in all future cases. Granting this exemption would not right the wrongs inflicted on Conrail's or NS' employees.

30. Setting the 1990 and 1997 acquisitions aside, would negate many of the problems associated with this proceeding. If the two acquisitions were to be set aside, then the issue of the lack of Commission or Board approval, would no longer exist. If the acquisitions were set aside, then there no longer would be any §11323 *et seq.* issues, and there would be no MTA common carrier issues. As stated earlier, the 1997 acquisition must be set aside, since it is not possible to comply with the requirements of §11347 at this late date, and these requirements cannot be exempted. There does not appear to be any overriding reason why the 1990 acquisition should

not be set aside. Setting aside one acquisition, while leaving the other acquisition in place, would not provide any significant benefit, but would give rise to many deleterious side effects.

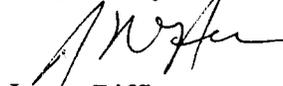
31. WHEREFORE, for the foregoing reasons, Riffin would respectfully request that the Board:

A. Set aside the 1990 acquisition by the MTA of that Line of railroad between milepost UU 1.0 and 16.8, which Line of railroad is commonly known as the Cockeyville Line, and which is located in Baltimore City and Baltimore County, Maryland; and

B. Set aside the 1997 acquisition by the MTA of that Line of railroad commonly known as the Cockeyville Industrial Track; and

C. For such other and further relief as may be just and equitable.

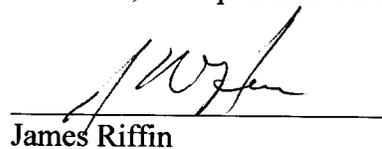
Respectfully submitted,



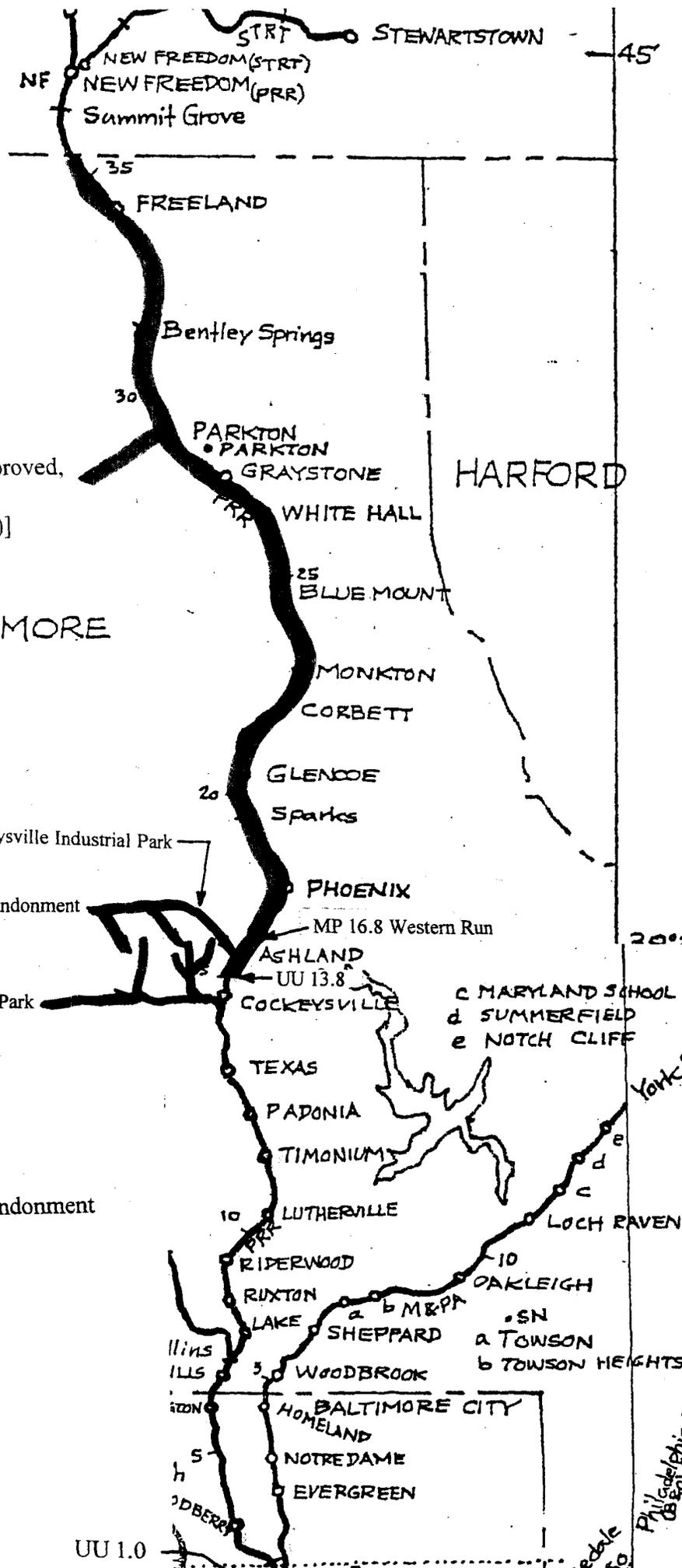
James Riffin

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of March, 2006, a copy of the foregoing Petition to Set Aside an Unapproved Sale of a Line of Railroad, 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, upon Charles A. Spitulnik, McLeod, Watkinson & Miller, Suite 800, One Massachusetts Avenue, NW, Washington, DC 20001-1401, counsel for the Maryland Transit Administration, and upon Eric Strohmeyer, CNJ Rail Corporation.



James Riffin



Line proposed, but not approved,
for abandonment.
[AB 5 Sub 106 (9/11/72)]

Line never proposed for abandonment

Petition Line proposed for abandonment

BALTIMORE

HARFORD

45'

35

30

20

20'

UU 1.0

Philadelphia
York