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**BEFORE THE
SURFACE TRANSPORTATION BOARD**



STB DOCKET NO. AB-290 (Sub- No. 293X)

**NORFOLK SOUTHERN RAILWAY COMPANY
ABANDONMENT EXEMPTION
NORFOLK AND VIRGINIA BEACH, VIRGINIA**

**SUPPLEMENT TO
PETITION
TO STAY AND TO REOPEN
AND / OR TO RECONSIDER
DECISION SERVED ON NOVEMBER 6, 2007**

**ENTERED
Office of Proceedings
NOV 28 2007
Part of
Public Record**

1. Now comes James Riffin ("Riffin"), who herewith asks leave from the Board to Supplement his Petition to Stay and to Reopen and / or to Reconsider the Board's Decision in the above entitled case, which Decision was served on November 6, 2007, and for reasons states:

BACKGROUND INFORMATION

2. On November 16, 2007, Riffin filed a Petition to Stay and to Reconsider that portion of the Board's November 6, 2007 Decision in the above entitled case, which granted Norfolk Southern's ("NS") request for exemption from the Board's OFA procedures. On November 23, 2007, Riffin asked the Board for Leave to Amend the Title of his Petition to Stay / to Reconsider, if amendment was necessary, in order to add the additional phrase, "to Reopen," if the Board found that the applicable CFR was 1152.25 (e) rather than 1115

**REQUEST TO SUPPLEMENT
NOVEMBER 16, 2007 PETITION TO STAY AND TO RECONSIDER**

3. Riffin would ask for further leave from the Board to amend his November 16, 2007 Petition to Stay / To Reconsider, in order to add the following additional ¶ 18 B and 18 C:

New ¶ 18 B. When NS requested to be exempt from the Board’s OFA procedures, NS was requesting a 10502 exemption from 49 U.S.C. 10904. Riffin would argue 10904 is **not an abandonment proceeding**. It is the antithesis of an abandonment proceeding, for the ultimate purpose of a 10904 proceeding is the **preservation of rail service, NOT the abandonment of rail service**. Riffin would further argue that since 10904 is not an abandonment proceeding, any Board decision regarding a 10904 issue would be subject to the Part 1115 appellate procedures, **not the Part 1152 25 (e) appellate procedures**.

New ¶ 18 C. In *Rail Abandonments – Use of Rights-of-Way as Trails*, 2 I.C.C. 2d 591 at 608, the Commission stated:

“b. Sections 10905 and 10906 [now 10904 and 10905] – Offers of financial assistance to acquire rail lines or subsidize rail operations under section 10905 [now 10904] take priority over both interim trail use and public use conditions because retention of existing rail service is mandatory under section 10905 [now 10904] (where agreement is reached or where the offeror accepts the terms and conditions fixed by the Commission), whereas section 10906 [now 10905] public use conditions and section 1247(d) trail use are voluntary.”

In *Dallas, Garland & Northeastern Railroad Company – Discontinuance of Service Exemption – In Dallas County, TX*, STB Docket No. AB-585 (Sub-No. 2X), Served November 23, 2007, (7 days after Riffin filed his Petition to Stay / Reconsider) at p. 4, the Board stated:

“The parties should note that operation of the public use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10904. As stated in *Trails*, 2 I.C.C. 2d at 608, offers of financial assistance (OFA) to acquire rail lines for continued rail service or to subsidize rail operations take priority over public use. Accordingly, if an OFA is timely filed under 49 CFR 1152.27(c)(1), the effective date of this decision will be postponed beyond the effective date indicated here. See 49 CFR 1152.27(e)(2). In addition, the effective date may be further postponed at later stages in the OFA process See 1152.27(f). Finally, if the line is sold under the OFA procedures, the petition for abandonment exemption **will be dismissed and public use precluded.” (Emphasis added.)**

ADDITIONAL BACKGROUND INFORMATION

4. On November 21, 2007, the City of Norfolk filed a letter with the Board stating that it had already awarded the first contract relating to its proposed light rail project [which will utilize the

subject Line], and further stating that the City of Norfolk planned to award 5 additional light-rail-related contracts in January, 2008. The City of Norfolk expressed its concern about any potential delay that may result were the Board to grant Riffin's requested Stay and were the Board to Reconsider its November 6, 2007 Decision.

5 On November 23, 2007, Riffin sent a letter to the City of Norfolk, indicating that since Riffin did not desire to have the light-rail-project delayed, Riffin would be willing to give his consent regarding any proposed light-rail-related work on the Line, providing the shippers on the Line consented to any necessary non-rail shipping alternatives. A copy of this letter was sent to the Board.

6 On November 21, 2007, NS filed its Response of Norfolk Southern Railway Company to Riffin Petition for Stay ("Response"). In its Response, NS argued that Riffin's Petition to Reconsider should have included the phrase, "to Reopen," and should have referenced 49 CFR 1152.25(e). In light of the ambiguity in the Board's regulations, Riffin filed a request to amend his Petition to Stay / to Reconsider See ¶ 2, *supra*

7. In its November 21, 2007 Response, NS argued *Riffin had not carried "his burden of demonstrating that the Holiday Tours standard justifies the imposition of a stay "* NS further argued *a stay could delay the City of Norfolk's proposed light rail project, that light rail and freight rail service are incompatible uses, Riffin would not be irreparably harmed absent a stay, that little traffic had moved on the Line during the past five years, that no shippers filed objections to NS' 2004 and 2006 petitions to discontinue service on the Line, that a desire for rail service was insufficient to require a carrier to continue to provide service, that mere speculation about future traffic is not a sound basis upon which to deny an abandonment exemption, that potential future traffic does not justify forcing a carrier to incur losses by operating a line, that Riffin has no intention or ability to provide rail service on the Line*

RIFFIN'S RESPONSE TO NS' CONCERNS

8. In the event Riffin's Response to NS' Concerns would not be permitted by the Board's regulations, Riffin would ask leave from the Board to file these comments, in order to narrow the issues the parties are asking the Board to resolve, which would conserve the Board's resources, and to ensure the Board has a complete record before it.

9. A Stay would NOT delay the light rail project. As stated in ¶ 5, *supra*, Riffin sent a letter to the City of Norfolk offering to consent to any light-rail-related construction project which would not interfere with Riffin's ultimate goal of providing rail service on the Line. Since Riffin is the only party who potentially could object to beginning construction of the light rail project, and since Riffin is willing to consent to beginning construction, Riffin does not believe the light rail project would, or should, be delayed. The sooner the City of Norfolk starts, the sooner the project will be completed. And the sooner the project is completed, the sooner shippers on the Line will no longer be adversely impacted by reconstruction of the Line

10. Light rail and freight rail service ARE COMPATIBLE. Riffin has argued in all of his filings that light rail and freight rail are compatible. Each service is assigned an operating window. The most recent illustration of this compatibility can be found in *Utah Transit Authority – Acquisition Exemption – Union Pacific Railroad Company in Salt Lake County, Utah*, FD No. 35008, and the related *Savage Bingham & Garfield Railroad Company – Acquisition and Operation Exemption – Union Pacific Railroad Company*, FD No. 35002, wherein the parties reached an agreement which resolved all of the shipper's concerns, and which allowed for both light rail and freight rail services

11. Riffin and the shippers on the Line would suffer irreparable harm if the stay is not granted. 49 CFR 1152.25(e)(2) clearly states the Board's decision is "administratively final upon the date they are served." Consequently, unless the Board's decision is stayed, NS and the City of Norfolk can immediately commence salvaging operations. In its November 21, 2007 letter to the Board, the City of Norfolk stated that it had already awarded its first contract, and further stated that in January, 2008, it planned to award five more contracts. The process of salvaging the Line has begun! And once even one portion of the Line is salvaged, there will be no rails upon which a freight carrier could operate, which would make it impossible to provide freight rail service to any shipper on the Line. NS clearly stated all salvage work was to be done by the City of Norfolk. The City of Norfolk is a sovereign entity, and as such, has sovereign immunity, and thus is immune from tort liability or the imposition of monetary damages. Consequently, neither Riffin nor any shippers on the Line would have a monetary remedy against the City of Norfolk, were the City of Norfolk not enjoined from salvaging the Line prior to the Board reconsidering its November 6, 2007 Decision. And the absence of any type of remedy for monetary damages has been held to constitute "irreparable harm." *Bank One, Utah v Guttau*,

12. Little traffic has moved over the Line in the past 5 years. No shipper filed an objection to NS' 2004 petition to discontinue service on the Line. For the past 5 years, NS has been refusing to provide rail service on the Line. In 2004, when NS petitioned the Board to discontinue service on the Line, the price of oil was \$18 a barrel. At \$18 a barrel, shipping goods in a truck was so inexpensive, there was little cost savings associated with using rail service. As we approach 2008, the price of oil is approaching \$100 a barrel (It hit \$99.38 during the week prior to Thanksgiving). At \$100 a barrel, the cost to ship goods via truck has become astronomical! Consequently, the demand for rail service has escalated to the point that the rail system is near, and in some locations is beyond, its capacity. So while three years ago no shipper on the Line voiced any objection to NS discontinuing service on the Line, today, those same shippers have a totally different attitude. In addition, in 2004, Blue Linx, a nationwide major shipper of building materials, was not a shipper on the Line. Blue Linx acquired the Georgia Pacific operation on the Line during the summer of 2007. Blue Linx is a new shipper, who has made it clear to Riffin that it truly does want rail service. Riffin has had several telephone conversations with Gary Bachelor, Blue Linx's Logistics Manager (the same Gary Bachelor NS sent a copy of the Board's abandonment Decision to on November 13, 2007). Mr. Bachelor stated he would be willing to provide the Board with a letter stating Blue Linx desired rail service on the Line. He further stated that he needed clearance from Blue Linx's legal department, before he could prepare such a letter. Due to the Thanksgiving holiday, he has been unable to secure the legal department clearance he needs.

13 That a desire for rail service was insufficient to require a carrier to continue to provide service; that mere speculation about future traffic is not a sound basis upon which to deny an abandonment exemption; that potential future traffic does not justify forcing a carrier to incur losses by operating a line. While all of these statements would be applicable to NS' request for abandonment authority, none of these statements have any bearing on the issue before the Board: Should the Line be exempted from the Board's OFA procedures?

14. Riffin has both the intention and the ability to provide rail service on the Line. On November 12, 2007, Riffin purchased a like-new, blue-carded locomotive in pristine condition. It can be put into service at the flick of an ignition switch. Riffin would argue one does not

purchase locomotives (they are a bit pricey – more expensive than a Rolls Royce, but less expensive than a Boeing 737), unless one intends to use them to pull rail cars Since Riffin owns a blue-carded locomotive (it has passed its FRA inspection, and may be immediately put into service), Riffin would argue he also has the ability to immediately begin to operate on the Line (within a few hours after receiving authority to operate on the Line).

CONCLUSION

15. Riffin has a present intention and the ability to operate on the Line. The shippers on the Line, including the new kid on the block, Blue Linx, have expressed a desire to have rail service, due to the escalating costs of moving their goods via truck. Using the line for light rail and freight services is very doable. Riffin has offered to work with the City of Norfolk, to ensure its light rail project is not delayed. “Offers of financial assistance to acquire rail lines . under section 10905 [now 10904] take priority over ... public use conditions because retention of existing rail service is mandatory under section 10905 [now 10904] ”

Respectfully submitted,



James Riffin

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of November, 2007, a copy of the foregoing Supplement to Petition to Stay and to Reopen and / or to Reconsider Decision Served on November 6, 2007, was served by first class mail, postage prepaid, upon: **James R. Paschall**, Senior General Attorney, Norfolk Southern Railway Company, Law Department, Three Commercial Place, Norfolk, VA 23510, **Stanley A. Stein**, Assistant City Manager for the City of Norfolk, Virginia, 1101 City Hall Bldg, 810 Union Street, Norfolk, VA 23510; and **Matthew O. Tucker**, Commonwealth of Virginia, P.O. Box 590, Richmond, VA 23218-0590



James Riffin

TO: Stanley Stein
Assistant City Manager
1101 City Hall Building
810 Union Street
Norfolk, VA 23510

FROM: James Riffin
1941 Greenspring Drive
Timonium, MD 21093
(443) 414-6210
November 23, 2007

Dear Mr Stein:

Some months ago when I knocked on your door to introduce myself as your potential new neighbor, you poured hot tar all over me. Since I still may become your new neighbor, and if I do, we are going to have to at least communicate with each other, I will make a second effort to open up a line of dialogue with you. Since the last time you accused me of trying to extort Norfolk, I will communicate in writing, and I will send a copy of my correspondence to the Board I will also make the following disclaimer:

Disclaimer: This is NOT a solicitation for compensation.

Your November 21, 2007 letter to the Board indicated you awarded your first light rail contract in November, 2007, and plan to award five more contracts in January, 2008 Your letter indicated you were quite concerned about the potential for delay due to the controversy over the abandonment of the Virginia Beach Line.

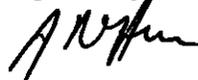
My legal position would be that I have an equitable interest in the Line, and that you need my consent prior to doing anything that would compromise my ability to provide freight rail service on the Line. My personal position would be that I laud your efforts to provide light rail service in Norfolk, that I do not wish to impede the progress of your light rail project, and that the provision of both light rail service and freight rail service are compatible uses. Light rail should reduce the quantity of greenhouse gases emitted into the air, due to a reduction in vehicle miles driven, and should reduce the number of cars utilizing your streets. Providing freight rail service also would reduce the quantity of greenhouse gases emitted into the air, and would reduce the quantity of heavy trucks traversing your streets. [Each rail car carries the same quantity of goods as four trucks. It takes substantially less energy to move rail cars due to the absence of substantial grades and due to a substantial reduction in rolling friction. Unloading a rail car at a shipper's site is far more energy efficient than unloading goods at a distant location, then trucking the goods to the shipper.]

My personal philosophy is that a negotiated agreement is likely to resolve a conflict much sooner than a litigated outcome. Consequently, I make a point of telling my opponent what I plan to do if we proceed down a litigation path, then offer to enter into a dialogue in an effort to resolve the conflict without the need for litigation With this in mind, please be advised that I strongly disagree with the Board's decision to exempt the Virginia Beach Line from the Board's OFA procedures, and strongly oppose the precedent the Board's decision would set My feelings on this matter are so strong, that I plan to file a Petition for Review and a Petition for Stay with the D.C. Circuit Court of Appeals. Since any stay issued by the Board or the court has the potential

to delay your light rail project, and since I do not desire to cause any unnecessary delay of your light rail project, I would offer the following:

Indicate to me what the nature of the contract work is for the upcoming contracts. If the work contemplated by those contracts would not interfere with my ability to provide freight rail service to customers on the Line, then I would be willing to give my consent to performing that work. If the contemplated work would make it impossible to provide freight rail service for a short period of time, and if the shippers on the Line were willing to consent to alternative shipping services, then I would be willing to consent to the performance of that work, providing that after completion of the contracted work, my ability to provide freight rail service would not be impaired.

Respectfully,



James Riffin

cc. Vernon Williams, Secretary
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