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FEB 25 2010

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. AB-290 (Sub- No. 311X)

**NORFOLK SOUTHERN RAILWAY COMPANY
PETITION FOR EXEMPTION
ABANDONMENT OF RAIL FREIGHT SERVICE OPERATION –
IN THE CITY OF BALTIMORE, MD AND BALTIMORE COUNTY, MARYLAND**

**REPLY TO
MOTION TO STRIKE
MTA'S COMMENTS**

ENTERED
Office of the
FEB 25 2010
Part of
Public Record

1. James Riffin (“**Riffin**”), Zandra Rudo, Carl Delmont, Lois Lowe, and Eric Strohmeier, collectively¹, the “**Offerors**” or “**Protestants**,” herewith jointly file this Reply to Motion to Strike, and state:

2. On January 14, 2010, Norfolk Southern Railway Company (“**NSR**”) filed a Motion to Strike (“**Motion**”).

3. On January 25, 2010, the Maryland Transit Administration (“**MTA**”) filed a Reply in Support of Petition for Exemption (“**MTA**”).

¹ The number of participants will increase: John Kessler will be joining the Offerors. Shortly, Mr. Kessler will file his notice of intent to participate as an Offeror.

4. In its Motion to Strike, NSR asked the Surface Transportation Board (“**Board**” or “**STB**”) to strike the Offerors’ Notice of Intent to Participate as a Party of Record (“**Participation Notice**”), Notice of Intent to file an Offer of Financial Assistance (“**OFA Notice**”), Motion for a Protective Order (“**Protective Order**”) and Comments and Opposition to Request for Exemption from the Offer of Financial Assistance Procedures (“**Comments**”).

5. In support of its Motion to Strike, NSR made the following allegations:

The Offerors are “unidentified and unidentifiable,” Motion p.4, due to “No address is provided and no company association listed.” Motion p.5.

REPLY

6. NSR correctly noted that the Offerors “intend to participate in their individual capacities.” Motion P.5. [Jointly, in their individual capacities, to be more precise.]

7. NSR failed to indicate the authority supporting NSR’s Motion to Strike. If NSR intended to rely on 49 CFR 1104.8, then NSR has failed to show in what way any of the material objected to was “redundant, irrelevant, immaterial, impertinent, or scandalous.”

8. Paragraph 2 of the Participation Notice explicitly stated the Offerors were to be served by mailing “all documents, filings or decisions” to the Offerors at 1941 Greenspring Drive, Timonium, MD 21093. The Offerors could have insisted that all documents be mailed to their individual addresses, thereby increasing the administrative expenses of the Board, NSR, and the MTA by a factor of five. However, in the interest of administrative economy, the Offerors elected to receive one set of filings at one address, thereby reducing the Board’s, NSR’s and MTA’s administrative expenses by a factor of five. If the Board, NSR or the MTA desires to send each Offeror a copy of whatever it files, then that desire should be communicated to the Offerors at 1941 Greenspring Drive. Following such communication, the Offerors will provide each entity so requesting with separate addresses, and will insist that a copy of all pleadings be sent to each Offeror.

9. As NSR correctly pointed out, 49 CFR 1104.4(b) states that each pleading not made by an attorney of record, must be accompanied by the signer’s address. The CFR does not state the

nature of the signer's address. (Dwelling, residence, business address, P.O. Box, agent's address, mailing address, summer home, winter home, beach condo or cottage, hotel, motel, shelter, electronic, etc.) The address to be provided, is determined by the signor, not by the sender. [The Board's rules permit service to be electronic, which means the recipient could literally be anywhere in the universe, and could be in motion while receiving the communication.]

10. The Offerors would argue that each Offeror was sufficiently identified. The Board's rules do not require participants to provide the Board, or other parties, with the participant's Taxpayer's Identification Number, Social Security Number, Driver's License Number, Passport Number, Voter's Registration Number, Medicare or Medicaid Number, Age, Sex, Race, Nationality, Religious affiliation or preference, blood type, photograph, or any other form of identifying information. Suffice it to say, the Offerors are human beings over the age of 21 residing in the United States, and are legally competent. It should be kept in mind, that the Offerors could have been a limited liability company represented by an attorney, in which case, the only information NSR would have been able to glean is the name and address of the attorney, which would have had no interest in the proceeding other than that of representing its client.

11. **Footnote 1:** NSR argues that one needs leave of the Board to participate as a party in this proceeding. Motion at 9. The Board's rules do not require that one receive permission from the Board to participate as a party of record, nor do the Board's rules require that one receive permission from the Board prior to filing a Notice of Intent to File an Offer of Financial Assistance, or filing an Offer of Financial Responsibility. The purpose of Offerors' Footnote 1 was to apprise the Board, and any other interested party, that there was a probability that more entities may participate in this proceeding, jointly, with the first-named Offerors. And as it turns out, an additional human being, over the age of 21 and residing in the United States, has decided to join with the initial Offerors: John Kessler. [For NSR's benefit: John Kessler is Edwin Kessler's brother. He lives in the Chicago area and he participated in AB-6 (Sub No. 430X) and FD 35164. In those proceedings he was represented by Thomas McFarland, of Chicago. Eric Strohmeyer is the COO of CNJ Rail Corporation, lives in New Jersey, and is participating in this proceeding in his individual capacity, rather than as a corporate officer. From this NSR may correctly deduce that the Offerors intend to vigorously pursue their goal of obtaining NSR's Operating Rights over the Cockeysville Industrial Track.]

12. **Demands to provide information to persons yet to be identified. Motion at 11.** By providing one address for all of the Offerors, the Offerors have relieved NSR of providing multiple copies of the information NSR is required by statute to provide to the Offerors. However, as stated above, if NSR or the MTA desires to provide multiple copies, the Offerors are willing to accommodate NSR's or the MTA's desire to increase their administrative expenses.

13. **Motion for Protective Order. Motion at 11.** The Board has already addressed this issue.

14. ¶8, **Motion for Protective Order. Motion at 12.** At the time the Motion for Protective Order was written, NSR had not taken a position. It now has taken a position. Nothing more need be said.

15. ¶¶ 3,4,5 and 6 **Motion for Protective Order. Motion at 12.** 49 C FR 1104.4(b)(3) states that documents that contain allegations of facts must be verified. The Motion for Protective Order was verified. The Board accepted it on behalf of James Riffin. That is sufficient to admit the document into the Record.

16. **Comments. Motion at 12.** NSR objected to "allegations of fact in Paragraphs 7 through to the end of the document, without verification from any of the Offerors." The Offerors will concede that a 49 CFR 1104.5 Affirmation did not accompany the Offerors' Comments, and apologize for the omission. Accompanying this Reply is a Motion to Amend the Offerors' Comments, appending a verification to the Comments' document.

17. The Offerors will remind the Board and NSR that they are not practicing attorneys, that they are proceeding *pro se*, and that the U.S. Supreme Court, and all of the U.S. Courts of Appeal, including the District of Columbia Circuit, have stated that *pro se* litigants are to accorded some leeway when they do not comply with all of the technical rules of procedure. See *Boag v. MacDougall*, 454 U.S. 364, 365 (1982); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Haines v. Kerner*, 404 U.S. 519 (1972); *Warren v. District of Columbia*, 353 F.3d 36, 37-37 (2004).

REPLY TO MTA'S COMMENTS

18. The MTA has not filed any notice that it intends to participate as a party of record in this proceeding. Which raises the question: By filing comments, has the MTA automatically become a party of record?

19. The MTA captioned its comments as a Reply. A reply to a reply is not permitted by the Board's rules. 49 CFR 1104.13. However, the Offerors would argue that replying to the MTA's comments is not prohibited by 49 CFR 1104.13. In the event 49 CFR 1104.13 is applicable, the Offerors would ask for leave to make this reply to the MTA's comments in order to provide the Board with a more complete record.

20. The MTA alleged that it owned the underlying real estate in fee simple, and further alleged that the Board had found that the "MTA owns the fee simple interest in the real estate under the Line, not merely a reversionary interest." MTA at 2. Riffin has certified copies of the deeds granting the right-of-way to the Baltimore and Susquehanna Railroad, the original title holder. All of the deeds were condemnation deeds. None of the deeds conveyed fee simple title. The MTA has an easement, not fee simple title. If the MTA chooses to insist that it has a fee simple interest, then it should produce deeds that so indicate. It should be pointed out that the MTA's deed of conveyance from Conrail, was a Quit Claim deed, which does not convey fee simple title. The Offerors do not agree that this point is not relevant. For those portions of the right-of-way which lie between MP UU 1.0 and MP 13.0, it may be irrelevant, since that portion of the Line will continue to be used for railroad purposes (light rail). For the portion that lies between UU 13.0 (Warren Road) and UU 15.44 (Western Run bridge), it is relevant, since NSR is the only entity using that portion for railroad purposes. If NSR is permitted to abandon its freight operating rights, and the OFA procedures are exempted, then this portion of the line will no longer be used for railroad purposes. [It will be used as parking lots for adjacent businesses, or not used for any purpose.] Consequently, under Maryland law, abandoning this portion of the Line will result in the Line reverting to the heirs of the original owners.

21. The MTA made the following allegations:

A. The proceeding needs to be exempted from the OFA procedures in order “to ensure the future safety and success of the light rail transit system MTA operates over the Line.” MTA at 2.

Comment: This statement conflicts with the MTA’s statement in ¶E below [which states the MTA double-tracked the line in 2005 to “**reduce actual and potential temporal conflicts between freight traffic and light rail traffic.**”] Given that the MTA uses the line exclusively between 6:00 am and 11:00 pm (see ¶F below), how using the line for freight purposes between Midnight and 5 am (when the Offerors propose to use the Line) is not explained. The two hours between scheduled light rail use and freight use, should be more than sufficient “for staging and other purposes.” (See ¶F below). In addition, since the Line is double-tracked, the MTA could use one of the tracks while the Offerors used the other track for freight purposes.

B. “There has been no freight traffic on the Line, or any reasonable request for such service, since April 2005.” MTA at 2.

Comment: The critical phrase is “reasonable request for such service.” The MTA did acknowledge that James Riffin did make several requests for service. These requests for service were unilaterally deemed not to be ‘reasonable,’ and thus were denied. The MTA argued that there were no rails to Riffin’s property. The reason there are no rails, is because the MTA removed them without Board authority. And as the Board has oft stated: A rail carrier may remove its rails without Board authority, but it must replace those rails if a demand for service is made. In this case, a demand for service was made. Unfortunately, this statement by the Board is ethereal, for the Board refused to order Norfolk Southern (or BNSF in FD 35164) to replace rails that had been removed, even though a demand for service had been made.

C. “There is no credible or reasonable prospect of future demand for such service.” MTA at 2.

Comment: The prospect for future service is addressed in comments submitted to the Board under seal.

D. “The three former shippers still extant have all located **permanent** alternatives to shipping by rail.” MTA at 2.

Comment: The BGE and Fleischmann’s Vinegar letters submitted by the MTA, **do not** contain the word “permanent.” The letters merely state “alternative” shipping modes have been used. This is in conformity with the Subsidy Agreements these shippers executed with the MTA. What should be noted, is the absence of a letter from Imerys, and the fact that the author of the Fleischmann’s Vinegar letter is the **Interim** VP for Operations. Mr. Minarik’s permanent replacement may have a totally different viewpoint, particularly since the MTA’s subsidies end in April, 2010.

E. “By the early 2000s, ... increased demand for light rail service compelled MTA to take steps to (1) **increase capacity** on the Line for light rail traffic and (2) **reduce actual and potential temporal conflicts between freight traffic and light rail traffic**. Accordingly, MTA double-tracked the entire segment of the Line from North Avenue to just north of Warren Road in Baltimore County, where the light rail line leaves the subject right-of-way. MTA at 3. Emphasis added.

Comment: Double-tracking the Line has reduced both actual **and potential** conflicts between freight traffic and light rail traffic.

F. “Scheduled light rail service operates between 6:00 am and 11:00 pm Monday-Saturday, and between 11:00 am and 7:00 pm on Sundays. Light rail trains also need access to the track during non-service hours for staging and other purposes.” MTA at 4.

Comment: The Offerors propose to use the Line between midnight and 5 am. That leaves two hours per day “for staging and other purposes.” In addition, since the Line is double-tracked, the MTA could use one track while the Offerors used the other track.

G. “[T]he only three prior shippers have made **permanent** alternative shipping arrangements.” MTA at 4.

Comment: See Comment to ¶D above.

H. The MTA in its footnote 6 did acknowledge James Riffin had made a demand for service. MTA at 4.

I. The MTA attached two letters of support: From BGE and Fleischmann's Vinegar.

Comment: See the Comment in ¶D above.

J. "Furthermore, Mr. Riffin does not oppose the abandonment or abandonment exemption request." MTA at 5.

Comment: Mr. Riffin and the Offerors **strongly oppose** the abandonment exemption request (exemption from the OFA procedures). The Offerors **strongly oppose** the loss of freight rail service to Cockeysville. Who provides the service is not particularly important, so long as the operator is willing to provide freight rail service (which NSR is not willing to do).

22. "[P]ermitting the OFA to proceed would preclude use by the light rail agency as planned, thus frustrating 'the very purpose of the abandonment.'" MTA at 6.

Comment: Permitting the OFA to proceed **would not preclude** use by the light rail agency in this case. For over 12 years, from 1993 to 2005, when the Line was single-tracked, no complaints were ever lodged indicating using the Line for freight purposes conflicted with using the Line for light rail purposes. If there were no conflicts when the Line was single-tracked, the probability that there would be a conflict now that the Line is double-tracked, is even less. This bald-faced statement lacks any credibility. The only reason NSR desires to abandon its freight operating rights, is the lack of sufficient profitability. NSR would rather operate 130-car unit trains as opposed to 10-car local trains. The Offerors do not need the "big bucks" associated with 130-car unit trains. The Offerors are quite willing to operate 10-car local trains.

23. The portion of the Line between MP UU 1.0 and 13.0 "comprises virtually *all* of MTA's light rail corridor along the Line and the vast majority of the Line NSR seeks to abandon." MTA

at 9.

Comment: The only shipper south of MP 12.0 with a rail spur is Fleischmann's Vinegar, which has stated it no longer needs rail service. For this reason, the Offerors would likely use that portion of the Line that lies between MP 1.0 and 12.0 only for over-head traffic. Light rail ceases using the main Line at MP 13.0. Consequently, only one mile of the Line, between MP 12.0 and 13.0, would be used by the Offerors for local switching purposes. Operating at 20 mph, it would only take 33 minutes to traverse from MP 12.0 to MP 1.0. Thus, the Offerors propose to use the vast majority of the Line that light rail uses, 92 %, for about one hour per night. Using the Line for about an hour per night, certainly should not materially interfere with the MTA's use of the Line. The vast majority of the Offerors' use of the Line would occur between MP 13.1 and 15.44, the portion of the Line that the MTA never uses. The Offerors find it difficult to imagine that using the Line for light rail and freight rail purposes would ever conflict [providing the MTA complies with the terms of the Operating Agreement]. It should be noted that the MTA offers no support for its bald-faced allegation that "Any freight service at all would unduly interfere with MTA's light rail service." MTA at 9. How would it interfere? Where would it interfere? In what way would it interfere? The MTA offers no specifics, speculative or otherwise.

24. Need for continued rail service. MTA at 10.

Comment: NSR has made no effort to solicit rail business on the Line since acquiring the Line in 1999. NSR explicitly asked (demanded actually) that the three shippers that were using the Line (Fleischmann's, BGE and Imerys), stop using the Line. When the three shippers refused to stop using rail service, the MTA was forced to offer the three shippers huge (\$1 million plus each) subsidies to induce the shippers to stop using the Line. Negative marketing, if practiced long enough, will drive away customers. Positive marketing, such as actually offering rail service at competitive rates, then actually providing rail service in a timely fashion, on the other hand, will generate demand for rail service. The Offerors plan to offer rail service at competitive rates, then plan to actually provide timely rail service. The Offerors motto will be: What can we do to help you with your transportation needs? Rather than NSR's motto: Go Away! Don't bother us! Use trucks!

25. Under seal, the Offerors have provided the Board with evidence that supports their contention that the Line is needed for continued freight rail service. While the Offerors would welcome Fleischmann's Vinegar, Imerys and BGE back as rail shippers, the Offerors are not relying upon these three shippers to support their proposed operation of the Line. The Offerors firmly believe that there is sufficient demand for rail service to support their proposed operation of the Line, without any demand by Fleischmann's Vinegar, Imerys or BGE.

26. Riffin's previous filings. MTA at 14.

Comment: The MTA asserts that Riffin's previous filings have been frivolous. The U.S. Court of Appeals for the District of Columbia thought otherwise: In Case No. 08-1190, it held that it was the Board that had acted arbitrarily and capriciously. In the *Virginia Beach* proceeding, the Board prevailed due to an unknown, unpublished technicality (One must file two Petitions for Review if one files a Motion to Reopen.) *Oklahoma* (FD 35164) will determine who has been complying with the rules.

27. "NSR will be forced to retain control of the Line." MTA at 17.

Comment: This statement makes no sense. Regardless of what happens in this proceeding, NSR will be relieved of its obligation to provide freight service on the Line. Either no service will be available, or service will be made available by the Offerors.

28. "The result of allowing Mr. Riffin to invoke the OFA procedures ... will be to mire MTA, NSR and the Line in senseless litigation." MTA at 17.

Comment: NSR filed to abandon its operating rights on the Line. Had NSR not attempted to exempt its abandonment of the Line from the OFA procedures, this procedure would have been completed by now. Since at the conclusion of this proceeding, NSR will have no rights in the Line, it **does not** have any vested interests that will be affected if the Offerors assume operation of the Line. Unlike other abandonment proceedings, if the Offerors assume NSR's Operating Rights, NSR will not lose any revenue from selling the rails or from selling the real estate. Consequently, one wonders why NSR is so adamantly fighting to exempt this

proceeding from the OFA procedures. What's in it for NSR? How does NSR benefit? What is the motivating factor? It is fairly easy to understand why the MTA would want to exempt it from the OFA procedures (to gain exclusive use of the Line), but it confounds rational thinking why NSR would so adamantly want to exempt the proceeding from the OFA procedures. The only reason NSR will become "mired in senseless litigation," is because NSR **chooses** to become mired in senseless litigation. [The Offerors will agree, the litigation fostered by NSR's attempt to exempt this proceeding from the OFA procedures, is senseless. NSR's request for exemption from the OFA procedures, if NSR prevails, will provide NSR with no benefit. If the Offerors prevail, NSR will have expended significant resources and efforts fighting for something that will not provide any kind of benefit for NSR – other than the satisfaction of saying they won the fight they picked with Riffin. Had NSR not attempted to exempt this proceeding from the OFA procedures, NSR would already have been relieved of its obligations with regard to this Line. By choosing to file an exemption from the OFA procedures, NSR has on its own volition, ensured it will retain its obligations with regard to this Line for many more months.]

29. We, the undersigned Offerors, declare under the penalty of perjury that the foregoing is true and correct to the best of our respective knowledge, information and belief. Further, we certify that we are qualified and authorized to file this Reply.

Executed on: February 24, 2010.

Respectfully submitted,


James Riffin


Zandra Rudo


Lois Lowe


Carl Delmont


Eric Strohmeyer

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of February, 2010, a copy of the foregoing Reply to Motion to Strike MTA's Comments, was served by first class mail, postage prepaid,

upon John V. Edwards, Senior General Attorney, Norfolk Southern Corporation, Law Department, Three Commercial Place, Norfolk, VA 23510-9241, and upon Charles A. Spitulnik, STE 800, 1001 Connecticut Avenue, NW, Washington, DC 20036, counsel for the MTA.


James Riffin