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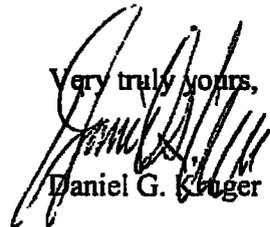
Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW,
Washington, DC 20423-0001

ENTERED
Office of Proceedings
MAY 19 2010
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Public Record

Re: 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, MD

Dear Ms. Brown:

I attach for electronic filing the Response of Norfolk Southern Railway Company to
Various Petitions to Reopen the April 5, 2010 Decision, in the subject proceeding.

Very truly yours,

Daniel G. Kruger

Attachment

cc: Service List

**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, MD**

**RESPONSE OF NORFOLK SOUTHERN RAILWAY COMPANY TO
VARIOUS PETITIONS TO REOPEN THE APRIL 5, 2010 DECISION**

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Dated: May 19, 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, MD**

**RESPONSE OF NORFOLK SOUTHERN RAILWAY COMPANY TO
VARIOUS PETITIONS TO STAY THE APRIL 5, 2010 DECISION**

On December 16, 2009, Norfolk Southern Railway Company (“NSR”) submitted a Petition for Exemption to abandon its common carrier obligation over a section of track in Maryland, which Maryland Transit Administration (“MTA”) owns and over which MTA operates light rail passenger service. On April 5, 2010, the Surface Transportation Board (“STB” or “Board”) granted that petition, which such grant included an exemption from the provisions concerning offers of financial assistance (“OFA”). On April 20, 2010, James Riffin (“Riffin”) filed a petition for stay (“Stay Petition”). In a decision served May 4, 2010, the Board denied the Riffin Stay Petition. On May 5, 2010, NSR consummated the proposed abandonment.

On April 30, 2010, Riffin filed a Petition to Reopen the April 5, 2010 decision (“Riffin Petition to Reopen”). Also on April 30, 2010, Lois Lowe filed a Petition to Reopen the April 5, 2010 decision (“Lowe Petition to Reopen”). On May 4, 2010, Eric Strohmeyer filed a statement informing the Board of his intention to file a Petition to Review the April 5, 2010

decision and claiming a right to comment on the “new issues” raised in the Riffin Petition to Reopen and the Lowe Petition to Reopen.

On May 14, 2010, Carl Delmont and Zandra Rudo separately filed Comments and Replies to the Petition to Stay and Petitions to Reopen. The Delmont and Rudo filings repeat substantially the same arguments made in the Riffin and Lowe Petitions to Reopen, and NSR thus also addresses the arguments made below on the Riffin and Lowe Petitions to the allegations in the Delmont and Rudo Petitions. NSR would note, however, that the allegation in the Rudo Petition at Paragraphs 36 – 44 that the MTA and/or NSR did not adhere to Federal Railroad Administration (“FRA”) requirements is completely irrelevant to the prosecution or defense of an abandonment case. Any noncompliance with FRA regulations is, of course, subject to investigation and sanction by FRA; however the FRA has no statutory jurisdiction over abandonment proceedings. Therefore none of the allegations in the Rudo Petition relating to noncompliance with FRA requirements, even if such allegations were true, should have any legal effect whatsoever on the STB’s adjudication of the instant Petitions to Reopen.

The Board must deny the various Petitions to Reopen. The claims that the Board somehow has deprived anyone of due process fail when one reviews the long list of pleadings, motions, and claims that have already been thrown around in this proceeding. More process than is due has been given. The red herring of a so-called stranded segment, and the various “challenges” to the jurisdiction of the Board with regard to the delineation of the abandoned segment, have been thoroughly adjudicated before the STB in this and other matters and have no continued relevance in this proceeding. For these reasons, the Board must deny the various requests to reopen this proceeding.

ARGUMENT

A. ZANDRA RUDO FAILED TO CLAIM PREJUDICE, SO RIFFIN'S ASSERTIONS ON BEHALF OF RUDO MUST BE DISMISSED.

Riffin claims that the Board denied Zandra Rudo "due process." Riffin Petition to Reopen at 8-11. Riffin, of course, cannot represent Rudo. 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, MD*, served January 29, 2010 ("January 29, 2010 Decision"), *slip op.* at 1, n.1. Rudo fails to make the claim herself, despite her earlier involvement in this proceeding. The only conclusion is that Rudo has waived any such claims.

B. RIFFIN WAS NOT A SHIPPER IN 2009.

Riffin claims that it was material error for the Board to conclude that he was not a shipper in 2009. Riffin is wrong.

Riffin generally repeats the arguments he made in his Petition for Stay, filed April 20, 2010, for the proposition that he was a shipper in 2009. Basically, those arguments boil down to the allegation that the Board was wrong in its earlier determination that Riffin was not a shipper, but in any event some of the problems identified were later cured by his acquisition of the Vener Spur. In his one deviation from the arguments he previously made (which have been refuted and dismissed) Riffin now describes a self-serving letter dated April 10, 2010, concerning his desire to receive traffic. Riffin argues that it was material error for the Board to rely on evidence on the record as of April 5, 2010, when the Board served its decision, rather

than evidence Riffin had yet to create on April 10, 2010.

NSR relies on its Response to Riffin's Petition for Stay, and adopts those arguments into this pleading, but further adds that the April 10, 2010 letter is completely irrelevant. Besides being completely manufactured evidence, it is manufactured too late.

C. THE FINAL SYSTEM PLAN ARGUMENT HAS BEEN MADE, AND DISMISSED.

Riffin next reiterates his argument (supported lock-step by Lowe and Strohmeier), that the Board lacks jurisdiction to determine this abandonment, because only a special court can determine the boundaries of the Final System Plan. Taken to its logical extreme, such an argument would divest the Board of jurisdiction to determine any abandonment at the edges of the Final System Plan delineations. NSR relies on its Response to Riffin's Petition for Stay, and adopts those arguments into this pleading, but further adds that the Board fully and completely analyzed this issue and correctly dismissed it in its decision served on May 4, 2010. 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, MD*, served May 4, 2010 (“May 4, 2010 Decision”), *slip op.* at 4-5 .

D. THE STRANDED SEGMENT ARGUMENT HAS BEEN MADE, AND DISMISSED.

Riffin next argues that the Board's decision would leave a stranded segment. Again, NSR relies upon its previous arguments in this regard, and further notes that in its decision served on May 4, 2010, the Board fully analyzed, and dismissed, this argument. May 4, 2010 Decision, at *id.*

In addition, Riffin at least impliedly argues for the first time in his April 30, 2010 Petition that the Cockeysville Industrial Park Track (“CIPT”) is a “line of railroad.” Riffin Petition to Reopen, at 17. Riffin notes that the CIPT would constitute a line of railroad, presumably within the legal meaning of that concept, “since it served at least five shippers.” Riffin notes that the CIPT would become a stranded segment following the abandonment of the Cockeysville Industrial Track (“CIT”), to which it connects near Milepost 13.0. *Id.*

Riffin’s argument that the CIPT is a line of railroad necessitating a distinct proceeding before the STB is incorrect. Indeed, NSR explicitly addressed the status of the CIPT in its Petition for Exemption of December 16, 2009. In a footnote, NSR observed that “[t]he abandonment necessarily includes all ancillary or excepted trackage that connects with the Line [the CIT], including without limitation, the 1.1 mile, more or less, Hunt Valley Industrial Track, also known as the Cockeysville Industrial Park Track.” NSR Petition for Exemption, at 6, n. 5. NSR went on to observe that

“[s]uch ancillary industrial lead track is subject to the Board’s jurisdiction under 49 U.S.C. § 10501(b) but the abandonment of such track is excepted from the requirement for Board approval or exemption by the provisions of 49 U.S.C. § 10906. The abandonment of freight rights and operations over such track is thus a matter within the managerial discretion of the railroad. NSR’s intent to abandon the freight easement, rights, and operations over ancillary track springing from the subject Line [the CIT] is expressed by this petition.” *Id.*

The CIPT is therefore clearly not a line of railroad, and NSR has made this point, and its intended disposal of the same, clear from the outset of these proceedings. Pursuant to 49 C.F.R. § 1152.25(e)(2)(ii), the STB “will grant a petition to reopen only upon a showing that the action would be affected materially because of new evidence, changed circumstances, or material error.” As the issue of the CIPT was placed before the Board in NSR’s December 16, 2009

Petition for Exemption, Riffin's statements about the CIPT in his Petition to Reopen evince neither new evidence, changed circumstances, nor material error. The STB has considered and dismissed this point in the past, and Riffin has shown no basis for reconsideration.

E. THE BOARD'S APRIL 5, 2010 DECISION WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Riffin next argues that the Board's April 5, 2010 decision was not supported by substantial evidence, in large part because he believes his evidence is substantial but other evidence submitted is not. Riffin's arguments go to the weight, and credibility, of the evidence submitted. The Board is entitled to evaluate the value and credibility of evidence submitted, and to make judgments based upon that evaluation. NSR relies upon its previous arguments in this regard, and further notes that in its decision served on May 4, 2010, the Board fully analyzed, and dismissed, this argument. May 4, 2010 Decision at 6-7.

F. GRANTING NSR EXEMPTION FROM THE OFA PROCEDURES WAS NOT CONTRARY TO THE LAW – IT WAS IN FULL COMPLIANCE WITH THE LAW.

Riffin next attacks the Board's grant of NSR's request for an exemption from the OFA procedures, claiming that such a grant was contrary to the law. Riffin is wrong.

Riffin attempts to draw out a number of "common criteria" that have characterized cases in which an exemption from the OFA procedures were granted. But those self-selected "common criteria" do not substitute for an evaluation of the statutory criteria imposed by Congress. The Board fully and fairly performed the statutory analysis. (Riffin argues, for the first time that the Board ignored several aspects of the Rail Transportation Policy of 49 U.S.C. 10101, but the Board did not, finding that "aspects of the rail transportation policy [other than the

ones explicitly discussed] will not be affected adversely.” 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, MD*, served April 5, 2010 (“April 5, 2010 Decision”), *slip op.* at 6). It weighed the evidence submitted, and determined to grant the exemption. Riffin reargues the same points previously made, and NSR does not here undertake to reiterate its arguments. NSR relies upon its prior arguments in this regard, and further notes that in its decisions served on April 5, 2010 and May 4, 2010, the Board fully analyzed, and dismissed, this argument.

G. A POST-EA RECOMMENDATION WAS ISSUED AND AVAILABLE TO THE PUBLIC.

Riffin claims that it is material error for the Board to rely on a post-EA that is not available to the public. It is Riffin who is in error. First, the post-EA was available to the public and appears still today at the following internet web address:

[http://www.stb.dot.gov/Ect1/ecorrespondence.nsf/PublicOutgoingByDocketNumber/D916387F6882FB6D852576EA00687670/\\$File/EO-1421.pdf?OpenElement](http://www.stb.dot.gov/Ect1/ecorrespondence.nsf/PublicOutgoingByDocketNumber/D916387F6882FB6D852576EA00687670/$File/EO-1421.pdf?OpenElement)

Second, a post-EA does not have to be served on all parties of record. Third, even had the post-EA been served on all parties of record, Riffin would not have had the right to respond to it. Finally, all the post-EA provides is that the Board’s Section of Environmental Analysis reviewed the evidence provided by the parties, and, as to the environmental analysis (that since no traffic had moved over the line in the past 5 years, permitting the abandonment would not result in a further diversion of traffic), Riffin’s evidence did not alter its previous analysis. There is no material error here.

H. THE COCKEYSVILLE RAIL LINE SHIPPERS COALITION FAILED TO MAKE AN APPEARANCE, SO IT CANNOT CLAIM TO HAVE BEEN DEPRIVED OF DUE PROCESS.

Lowe claims she is the “executive secretary” of an organization that she calls the Cockeysville Rail Line Shippers Coalition (“CRLSC”). Lowe Petition to Reopen at 3. Certainly the true existence of such a coalition is doubtful, notwithstanding Lowe’s use of the moniker in the past, but in any event the CRLSC failed to make any appearance in this proceeding. Notwithstanding her continued involvement in this proceeding, Lowe has not once previously mentioned or asserted any claims on behalf of the CRLSC. If CRLSC exists, it cannot claim that it was deprived of its ability to be involved in a proceeding when its first appearance is months after the proceeding begins, particularly when its asserted “executive secretary” has been so actively involved on her own behalf.

I. LOWE HAS BEEN TOO INVOLVED TO CLAIM THAT SHE HAS BEEN DEPRIVED OF DUE PROCESS.

Lowe claims that she was deprived of the ability to submit certain evidence, specifically a few letters of support. “The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Lowe has made herself heard numerous times during this proceeding, but she never attempted to submit the letters she now seeks to submit. If her claim relates to unverified letters of support, she has had plenty of opportunity to submit that evidence along with all of the other evidence and argument she has submitted. If the claim relates to verified letters of support, those letters are dated after the decision that is the source of her complaint. She cannot claim to have been deprived of the right

to submit evidence that was not in existence. Her so-called due process claims must fail.

Lowe complains that she was deprived of her right to submit certain evidence. She claims that this deprivation was effectuated by the failure of the Board to acknowledge her notice of intent to participate until it served its April 5, 2010 decision, a decision that also determined to exempt the proposed abandonment from the offer of financial aid procedures. Her Due Process Claims are sadly lacking.

Lowe claims that she learned on November 9, 2009, that NSR would file to abandon its operating rights over the subject line. She allegedly proceeded at that time, to obtain certain letters from shippers. On December 16, 2009, NSR filed its petition for exemption. On January 5, 2010, the Board published a notice describing the NSR petition for exemption, the proposed abandonment, and the fact that NSR had requested exemption from the offer of financial assistance provisions. It described the procedural process that would govern the proceeding, requiring responses to the NSR petition to be filed by January 25, 2010. Also on January 5, 2010, Lowe claims to have filed a notice of intent to participate, a notice of intent to file an offer of financial assistance, a motion for protective order, and a response to the NSR petition, in each case through filings submitted by Riffin. The evidence that Lowe now claims she was prevented from filing was not filed at that time.

On January 8, 2010, Maryland Transit Administration ("MTA") filed a response to the motion for a protective order, among other things. On January 14, 2010, NSR filed a response to the motion for a protective order, also among other things. On January 29, 2010, the Board published a decision that put into place a protective order. In that decision, the Board determined that Riffin could not represent Lowe, January 29, 2010 Decision, *slip op.* at 1, n.1, but that does

not detract from the fact that evidence that Lowe claimed to have in hand for more than a month was not submitted when she purportedly replied to the NSR Petition for Exemption. Lowe had her chance to submit the evidence, but failed to do so.

On February 25, 2010, Lowe claimed to have filed, through Riffin, a reply addressing, in part, the issue of whether there were shippers interested in moving freight on the line. The fact that Riffin could not represent Lowe does not detract from the fact that a pleading with her name and a signature was filed on her behalf, but again the evidence was not filed at this time. On the same date, Lowe claimed to have filed, again through Riffin, a statement affirming that the earlier filing was made on her behalf.

On March 10, 2010, Lowe claimed to have filed, again through Riffin, several more documents. One of those documents was an adoption of the earlier pleadings. Two more – not one but two more – documents involved arguments and submission of additional evidence as to whether there were shippers interested in moving freight on the line. Again, the evidence was not submitted at this time. The fact that the pleadings, as to Lowe, were subsequently stricken does not change the fact that the evidence, which existed at that time, had not been filed.

If that were all that happened, one would be left with the unmistakable conclusion that either one of two possibilities existed – either Lois Lowe fully participated in the pleadings illegitimately submitted by Riffin, and thus had all of the administrative process due to her, or Riffin committed perjury and forgery in submitting verified pleadings under Lois Lowe's name. But that was not all that happened.

On March 22, 2010 the Board ruled on NSR's motion to strike. At that time, the Board made it abundantly clear that Riffin should not be representing Lowe. In response, on March 26,

2010, Lowe made three filings, amending earlier documents. Yet again, the evidence in hand for months was not submitted. Furthermore, nothing in those three filings gave any indication that Lowe was waiting on the sidelines for a determination of her status. Instead, she filed further information, requesting process pursuant to a protective order, and demanding information.

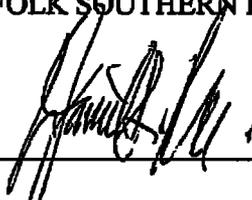
Lois Lowe has been deprived of no process. In one way or another she has been involved in this administrative proceeding and has had ample time to submit to the Board letters she has had in hand for since before a procedural order was published. Her claim of deprivation of due process has absolutely no merit whatsoever.

CONCLUSION

For all of the reasons set forth above, NSR respectfully suggests that the Board deny the various petitions to reopen.

Respectfully submitted,

NORFOLK SOUTHERN RAILWAY COMPANY

By: 

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Dated: May 19, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of May, 2010, I caused to be served a copy of the foregoing document via first class mail or e-mail on:

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