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

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MAY 20 2010

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Public Record

Re: *Norfolk Southern Railway Company – Abandonment of Rail Freight Service Operations – In the City of Baltimore, MD and Baltimore County, MD*  
STB Docket No. AB-290 (Sub-No. 311X)

Dear Ms. Brown:

I am enclosing the Reply of the Maryland Transit Administration to James Riffin's Petition to Reopen in the above-referenced proceeding.

Thank you.

Sincerely,

Allison I. Fultz

Enclosure

cc: All Parties of Record

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**BEFORE THE  
SURFACE TRANSPORTATION BOARD  
Washington, DC**

**Docket No. AB-290 (Sub-No. 311X)**

**NORFOLK SOUTHERN RAILWAY COMPANY –  
ABANDONMENT OF RAIL FREIGHT SERVICE OPERATIONS  
IN THE CITY OF BALTIMORE, MD AND BALTIMORE COUNTY, MD**

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**REPLY OF THE MARYLAND TRANSIT ADMINISTRATION TO  
JAMES RIFFIN'S  
PETITION TO REOPEN**

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Dated: May 20, 2010

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**REPLY OF THE MARYLAND TRANSIT ADMINISTRATION TO  
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Pursuant to 49 C.F.R. § 1104.13(a), the Maryland Transit Administration (“MTA”) hereby submits this Reply to the “Petition to Reopen April 5, 2010 Decision” filed in this proceeding by James Riffin (“Riffin”) on April 30, 2010 (“Riffin Petition”). Riffin has not satisfied the Board’s well-established criteria to support the reopening of an administratively closed proceeding, and no public purpose would be served by granting his Petition. Accordingly, the Riffin Petition should be denied.<sup>1</sup>

Riffin fails to demonstrate any basis for reopening the Board’s Decision issued on April 5, 2010 (“April 5 Board Decision”), in this proceeding. Riffin’s misstatements of the facts and law do not satisfy, or even address, the criteria the Board must establish in order to reopen an administratively closed proceeding. Here, the Board granted the thoroughly-documented Petition for Exemption of Norfolk Southern Railway Company (“NSR”), filed on December 16, 2009 (“NSR Petition”), for authority to abandon the subject line and to exempt the abandonment

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<sup>1</sup> MTA has reviewed the Response of Norfolk Southern Railway Company to Various Petitions to Reopen the April 5, 2010 Decision filed in this proceeding on May 19, 2010, and supports and adopts the argument contained in that pleading.

from the offer of financial assistance (“OFA”) provisions at 49 U.S.C. § 10904. NSR filed notice that it had consummated the abandonment on May 5, 2010. Furthermore, based on the well-developed record in this case, the Board’s Decision issued on May 4, 2010 (the “May 4 Board Decision”), has already dispensed with several of the arguments Riffin attempts to make in his Petition. None of Riffin’s various new allegations that (a) the Board failed to provide sufficient due process in this matter, or (b) the abandonment has created a stranded segment of the Hunt Valley Industrial Track, demonstrate material error on the part of the Board, constitute new evidence, or describe substantially changed circumstances, as required pursuant to 49 C.F.R. § 1152.25(e)(4). Riffin has failed to establish any basis upon which this Board could grant a petition to reopen and his request to do so should be denied.

#### **ARGUMENT**

##### **I. The Board did not deny any person his or her due process rights.**

Riffin has only himself to blame for the considerable lack of clarity and transparency as to the participants in this proceeding. The Board’s March 22, 2010, Decision (“March 22 Board Decision”) clearly indicated that “[o]f those individuals purportedly seeking to participate, only Riffin and now Eric Strohmeier have submitted sufficient information to be considered parties of record.” March 22 Board Decision at 3. Accordingly, any additional persons desiring to participate had ample notice from the Board and, by reference to Mr. Strohmeier’s notice of intent to participate, a roadmap for submitting the requisite information. Any failure to timely seek participation and to submit supporting materials was occasioned by such parties’ own actions, and not by any failure of the Board. Mr. Riffin’s allegation that the Board and NSR were “fully aware of who Ms. Lowe was” (Riffin Petition at ¶ 20) is wholly unsupported by the record in this proceeding, aside from undocumented assertions by Lois Lowe in her Motion to

Supplement Motion for Protective Order, filed in this proceeding on April 30, 2010, and Comments/Reply to Petition to Stay and Petition to Reopen April 5, 2010, Decision (Para. 9) filed in this proceeding on May 4, 2010. In addition, Eric Strohmeyer filed a Reply in this matter on May 5, 2010, and Zandra Rudo and Carl Delmont each filed separate, but virtually identical, pleadings on May 17, 2010, both entitled “Comments/Reply to Petition to Stay and Petition to Reopen April 5, 2010 Decision” (respectively, the “Rudo Comments” and “Delmont Comments”). Ms. Rudo and Mr. Delmont also recite a string of self-created failures to timely submit information into the record, and cannot demonstrate that the Board somehow lapsed in fulfilling any duties toward them.<sup>2</sup> Accordingly, any claim of material error on the part of the Board for failing to provide due process rights to any prospective participant is unavailing and the Board should deny Riffin’s request to reopen.

**II. Riffin’s assertion that the abandonment will result in a stranded segment does not constitute new evidence, and is inaccurate.**

Riffin alleges that the abandonment has created a stranded segment because it severed the Hunt Valley Industrial Track from the national rail network. Riffin Petition at ¶¶ 41-44. Riffin appears to have neglected to read the NSR Petition, in which NSR clearly describes the Hunt Valley Industrial Track as ancillary or excepted trackage to be abandoned in connection with NSR’s abandonment of the Cockeysville Industrial Track. NSR Petition at 6, n.5.

Accordingly, NSR fully addressed the disposition of the Hunt Valley Industrial Track in its abandonment Petition, and any allegation by Riffin that this spur is a stranded segment is

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<sup>2</sup> Ms. Lowe’s, Mr. Strohmeyer’s, Ms. Rudo’s and Mr. Delmont’s arguments are duplicative of those offered by Riffin in the Riffin Petition and in his Petition for Stay filed on April 20, 2010, in this proceeding. Because the Board has already dispensed with a number of these arguments and MTA is addressing the remaining issues in this Reply, MTA requests that, to the extent necessary, the Board treat this Reply as a Reply to those pleadings. To the extent that Ms. Rudo alleges “MTA lied to STB” (Rudo Comments at ¶¶ 36-44), MTA simply points out that, aside from being irrelevant to this proceeding, the sequence of events and documents offered by Ms. Rudo to demonstrate alleged irregularities in MTA’s request for a waiver from the Federal Railroad Administration (“FRA”) instead clearly illustrate that MTA complied with FRA’s waiver requirements and that FRA acknowledged the cessation of NSR’s service on the line.

simply incorrect. Misstating facts in the record does not constitute new evidence. The Hunt Valley Industrial Track was abandoned by virtue of NSR's notice of consummation of its abandonment.

MTA's acquisition of the track in 1997 does not change this analysis or give rise to the need for any additional action by this Board to confirm that freight service over this segment is now officially extinguished. As NSR noted in its Petition (at 6, n.5), 49 U.S.C. § 10906 removes this track from the otherwise broad authority of the Board to authorize abandonments under 49 U.S.C. § 10903. Riffin has introduced no evidence that was not available when he responded to the NSR Petition in the first instance (or the second, or at any time thereafter) about this industrial lead track that would lead the Board to understand that the obligation to provide service to or over it track is anything but gone. The ownership of the track is immaterial. Riffin's assertion that this line served at least five shippers (Riffin Petition at ¶ 41), does not change the character of the track. Section 10906 makes clear that MTA, even if it was a common carrier at the time that it acquired this track, required no authorization for that acquisition and no further action is required for rail service over that track to cease.

The Board should therefore disregard Riffin's assertions that the Hunt Valley Industrial Track is a stranded segment.

**III. Riffin's characterization of MTA's efforts to improve safety on the line as a "ruse" does not demonstrate material error on the part of the Board.**

Riffin argues, but fails to demonstrate, that the safety of existing passenger operations on the line would not be compromised by sharing track with freight traffic. He is not bothered, of course, by the weight of authority from the federal agency charged with monitoring the safety of the nation's rail system that disagrees with him. *See, e.g.*, 49 C.F.R. Part 211, App.A.

Moreover, despite Riffin's belief in his own expertise regarding the safety of shared use of

tracks, he fully disregards the importance to MTA of preserving a window of time for the performance of maintenance. As an avowed purveyor of railroad maintenance services, clearly Riffin must be aware that the best time to perform maintenance of rail lines and testing of equipment and of the lines is at times when no revenue service is provided. MTA, the owner of the track that is the subject of this proceeding, has stated on the record in this proceeding in a pleading signed by counsel in accordance with this Board's regulations, that safety of its operations requires unfettered access to this track 24 hours per day. That need is real – the light rail service is operating today, and the support by the Baltimore County Executive for the MTA light rail operation confirms its importance to the community it serves. NSR Petition, Appendix C. Riffin's speculative conjecture about the potential for operating trains of municipal solid waste to an incinerator that is yet to be formally proposed and certainly is not yet approved or under construction, does not (as this Board has recognized) provide a basis to undercut MTA's desire to preserve the safety and integrity of the light rail operations in which the State of Maryland has made such an extensive investment.

Moreover, the May 4 Board Decision already establishes that the Board may rely on statements signed by a party's counsel pursuant to 49 C.F.R. § 1104.4(a), and that the Board has elected to do so with respect to MTA's obligation to safely operate a public transportation service, and its methods for doing so. Riffin's unsupported speculation that there "were no safety or capacity issues due to freight use of the Line . . . when the Line was single-tracked" (Riffin Petition at ¶ 52) does not make a "ruse" (*Id.*) of MTA's decision to double-track its light rail line. Riffin's cavalier treatment of the extraordinary work and careful attention to detail required of MTA's staff to ensure the safety and integrity of the operation of its line dismisses without evidentiary support the recognition of the regulators and participants in the rail industry

of the need to devote extreme care (which translates into extra cost for both the freight and passenger operators) to circumstances where freight and light rail operations share a track. It is hardly a “ruse” when a public agency invests millions of dollars of very limited public money to improve a rail line for public passenger transportation. Contrary to Riffin’s allegations, the Board did not fail to rely on “substantial evidence” or commit material error when it observed its own rules in reaching its Decision. The Board should accordingly deny Riffin’s petition to reopen this proceeding.

**IV. The Board’s decision to exempt NSR’s abandonment from offer of financial assistance provisions did not constitute material error.**

Riffin appears to argue that the Board committed material error when it granted NSR’s petition to exempt the now-consummated abandonment from the offer of financial assistance (“OFA”) procedures set forth at 49 U.S.C. § 10904. Riffin Petition at ¶¶ 53-69. However, Riffin seems to conflate the Board’s appellate procedures with those applicable to petitions for review in the United States Courts of Appeal by characterizing the April 5 Board Decision as “arbitrary and capricious.” Riffin Petition at ¶ 53. In any event, Riffin’s discussion consists either of argument that he should have, but failed to, make in his Comments and Opposition to Request for Exemption from the Offer of Financial Assistance Procedures, filed in this proceeding on January 5, 2010 (“Riffin OFA Exemption Comments”), or a repetition of argument in that pleading already rejected by the Board in the April 5 Board Decision. If Riffin has failed to present argument in a timely manner, he cannot remedy his failure by somehow alleging material error on the part of the Board. The missteps here are all Riffin’s.

Riffin continues to ignore the Board’s clearly articulated standard for granting an exemption from the OFA procedures “when the record shows that a right-of-way is needed for a valid public purpose and there is no overriding public need for continued rail service”.

*Consolidated Rail Corporation – Abandonment Exemption – In Hudson County, NJ*, STB Docket No. AB 167 (Sub-No. 1190X), *slip op.* at 3 (Service Date May 17, 2010) (“*Conrail*”). Instead, he continues to cast inapposite facts and argument into the record of this proceeding. For instance, he purports to rely on the Board’s decision in *1411 Corporation – Abandonment Exemption – In Lancaster County, PA*, STB Docket No. AB-581 (Sub-No. 0X) (Service Date Apr. 12, 2002), to support the incorrect assertion that the policy goals applicable to railbanking pursuant to the Trails Act (16 U.S.C. § 1247(d)) apply generally to OFA proceedings. Riffin correctly quotes the Board’s decision with respect to the priority that applies when an OFA is filed in a proceeding in which trail use or a public use condition has been requested, but the cited passages do not address the criteria for granting an exemption from the OFA provisions themselves based on the criteria the Board applied in the April 5 Board Decision. No trail use request was submitted in the instant proceeding, and, although NSR requested an exemption from the public use provisions at 49 U.S.C. § 10905, no request for a public use condition materialized, and the Board determined NSR’s request to be moot by the time the April 5 Board Decision was issued. Accordingly, the Board’s decision in *1411 Corporation* is entirely inapplicable to the facts of this case.

Furthermore, Riffin’s asserted “criteria” for granting a petition for exemption from the OFA provisions, which he claims are the factors on which the Board relies (Riffin Petition at ¶ 59), are simply common facts he has identified in a small subset of cases in which the Board has granted such exemptions.<sup>3</sup>

For instance, Riffin asserts that existing shippers must have access to alternative rail transportation in order to justify the Board’s grant of a petition to exempt an abandonment from

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<sup>3</sup> In contrast, MTA commends to the Board the list of several dozen cases in which the Board has granted petitions for exemption from OFA requirements included in the NSR Petition as Attachment D.

the OFA process. *Id.* The Board has not articulated any such requirement. In fact, the more common scenario is that shippers will have access to trucking, rather than rail, services. *See, e.g., Mo. Pac. R.R. Co. — Abandonment in Harris County, TX*, STB Docket No. AB-3 (Sub-No. 105X), *slip op.* at \*2 (Service Date Dec. 22, 1992) (“[A]lternative means of *transportation* will be available.”) (emphasis added). In any event, the availability of alternative transportation is not a factor in this case because the three previous shippers on the line had all switched to alternate modes of transportation more than two years prior to NSR’s filing its Petition.

Riffin also simply ignores cases, including at least three in which he was a party, undermining his assertions. Although he alleges that the STB has only granted an exemption from OFA procedures where “[n]o one opposed the abandonment or OFA exemption requests” (Riffin Petition at ¶ 59), in *Los Angeles County Metropolitan Transportation Authority — Abandonment Exemption — In Los Angeles County, CA*, STB Docket No. AB-409 (Sub-No. 5X), *slip op.* at 5 (Service Date Jul. 17, 2008) (“*LACMTA*”), the Board determined that, for reasons pertaining specifically to the abandonment applicant, Board authority was not required for the proposed abandonment, which Riffin had opposed and in which he had indicated his intent to file an OFA. *LACMTA* at 2-4. Furthermore, the Board announced that, “had the agency not already granted *LACMTA* an exemption from the OFA procedures, we would have done so here. . . . Exemptions from 49 U.S.C. § 10904 have been granted . . . when the record shows that a right-of-way is needed for a valid public purpose and there is no overriding public need for continued rail service.” *Id.* at 5. *See also Conrail, supra* (OFA would have interfered with safety and operation of existing light rail line); *Norfolk Southern Railway Company — Abandonment Exemption — in Norfolk and Virginia Beach, VA*, STB Docket No. AB 290 (Sub-No. 293X) (Service Date Nov. 6, 2007) (OFA would have interfered with City’s planned acquisition of a

portion of the line for light rail passenger service). And in *Norfolk and Western Ry. Co. – Abandonment Exemption – In Cincinnati, Hamilton County, OH*, STB Docket No. AB-290 (Sub-No. 184X) (Service Date May 13, 1998), the Board granted a petition for exemption from the OFA process in the face of arguments by two potential shippers that there was an overriding public need for transportation service, finding that no traffic had moved over the line in over 10 years, that the shippers had valid transportation alternatives available, and that the right-of-way was needed for the valid public purpose of redeveloping portions of downtown Cincinnati.

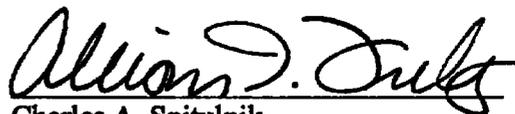
In short, Riffin cannot show that the Board erred materially in the April 5 Board Decision, does not offer any new evidence and cannot point to any changed circumstances to support his request that the Board reopen this proceeding. The Board granted NSR's requested abandonment exemption and, based on its well-established criteria for relief from the OFA provisions, also granted NSR's petition for exemption from the requirements of 49 U.S.C. § 10904. NSR has consummated the abandonment. Reopening this proceeding would be contrary to the public interest because it would (a) prolong uncertainty concerning MTA's ability to plan for existing light rail service and related improvements along the CIT and (b) frustrate NSR's valid business purpose in abandoning an idle and unprofitable line. The Riffin Petition should therefore be denied.

**CONCLUSION**

WHEREFORE, in light of the foregoing, MTA respectfully requests that the Board deny the Riffin Petition.

Dated: May 20, 2010

Respectfully submitted,



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**Certificate of Service**

I hereby certify that I have this 20th day of May, 2010, caused to be served a copy of the foregoing Reply of the Maryland Transit Administration upon the following parties of record:

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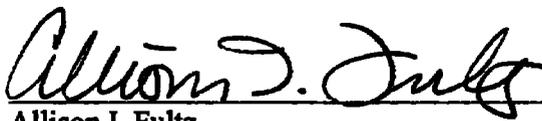
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