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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**

**REBUTTAL TO NORFOLK SOUTHERN'S MAY 19, 2010 REPLY
REBUTTAL TO MTA'S MAY 20, 2010 REPLY**

1. James Riffin (“**Riffin**”), herewith provides his Rebuttal to Norfolk Southern Railway Company’s (“**NSR**”) May 19, 2010, and to the Maryland Transit Administration’s (“**MTA**”) May 20, 2010 Reply to Riffin’s Petition to Reopen.

2. 49 CFR 1104.13(c) states that a reply to a reply is not permitted. In spite of this prohibition, both NSR and the MTA filed a reply to Carl Delmont’s (“**Delmont**”), Zandra Rudo’s (“**Rudo**”) and Lois Lowe’s (“**Lowe**”) Reply to Riffin’s Petition to Reopen.

3. In order to provide the STB with a more complete and accurate record, Riffin would ask that the Board accept this Rebuttal. In the alternative, since NSR and the MTA failed to seek permission to file a reply to a reply, Riffin would ask that the Board Strike those portions of NSR’s and MTA’s replies that reference Delmont’s, Rudo’s, or Lowe’s Replies.

4. Rudo and Lowe have filed separate rebuttals, which Riffin adopts and supports.

5. In *DesertXpress Enterprises, LLC – Petition for Declaratory Order*, FD 34914, Served May 7, 2010, the STB stated:

“Under 49 U.S.C. §722(c), a petition to reopen a Board decision will be granted only upon a showing that the prior decision involved material error or would be affected materially because of new evidence or changed circumstances.” Slip op. at 6.

“To warrant reopening, evidence must be newly available. FN 27: ‘new evidence’ is not newly presented evidence, but rather is evidence that could not have been foreseen or planned for at the time of the original proceeding.’ Slip op. at 7.

MATERIAL ERROR

6. Riffin, Rudo, Delmont and Lowe (collectively with Eric Strohmeyer, “**Offerors**”) have argued that the Board denied Rudo, Delmont and Lowe their **Due Process Right** to be heard “at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). By granting Rudo, Delmont and Lowe a right to participate in its April 5, 2010 Decision, then exempting the proceeding from the Offer of Financial Assistance (“**OFA**”) procedures in the same April 5, 2010 decision, without allowing Rudo, Delmont and Lowe to be heard, the Board’s decision involved ‘material error.’ This denial of Rudo’s, Delmont’s and Lowe’s Due Process Rights should by itself, be sufficient to warrant reopening the proceeding.

7. The Board had before it unverified letters from Cockeysville Shippers supporting the Offerors’ Offer of Financial Assistance, two **unverified** letters from BGE and Fleischmann’s Vinegar supporting the abandonment, and one **unverified** letter from Jim Smith, Baltimore County Executive, supporting the abandonment. Until the STB rendered its April 5, 2010 decision, the parties had no way of knowing that the STB would treat NSR’s unverified letters differently than it treated the Offerors’ unverified letters. This **unequal treatment of evidence** violated the Offerors’ Constitutional right to **Equal Protection** of the law.

NEW EVIDENCE – SHIPPERS’ VERIFIED LETTERS

8. Rudo, Delmont and Lowe have presented evidence ‘that could not have been foreseen or planned for at the time of the original proceeding.’ None of the parties knew, nor could they

have foreseen, the basis upon which the Board exempted the proceeding from the OFA procedures.

9. The Offerors did not have any way of knowing that the STB would hold that if an attorney presents unverified letters to the STB, those unverified letters magically become 'verified,' simply because they were submitted to the STB by an attorney, rather than by the authors of those letters. Riffin would argue that this disparate, unequal treatment of unverified letters is arbitrary, capricious, unreasonable and is a violation of the 14th Amendment to the U.S. Constitution, which states "No State shall ... deny to any person within its jurisdiction the equal protection of the laws."

10. Several of the authors of the verified letters submitted under seal by Ms. Lowe expressed their displeasure in the Board's dismissal of their expressions of interest in freight rail service. They were so incensed by the arbitrary and capricious manner in which their desires for freight rail service had been summarily dismissed, they immediately executed new verified letters, and explicitly stated that they wanted freight rail service. These shipper letters constitute 'new evidence,' since no one would have foreseen that the STB would treat unverified letters submitted by an attorney differently from those submitted by non-attorneys.

NEW EVIDENCE – FINAL SYSTEM PLAN

11. On April 20, 2010, the same date Petitions for Stay were due in this proceeding, the Board served its *Consolidated Rail Corporation – Abandonment Exemption – In Hudson County, NJ, AB-167 (Sub-No.1189X)*. In that decision, the Board acknowledged for the first time that it did not have authority to interpret Final System Plan ("FSP") conveyances. Prior to this decision, it could not have been foreseen that the Board was not permitted to determine the extent of a FSP conveyance that was subject to abandonment.

12. The FSP was quite explicit: It conveyed to Conrail only those lines that were "used or usable." The portion of the CIT between Beaver Dam Run and Western Run was not "used or usable" on July 26, 1975, the date of the FSP. The FSP, on p. 241, expressly states that milepost markers "are necessarily approximate." In this proceeding, NSR has requested authority to

abandon to MP 15.44, but has failed to indicate where MP 15.44 is actually located. NSR has expressly stated that it desires to abandon 13.26 miles of the CIT. If the FSP only conveyed to the south side of Beaver Dam Run, and if 13.26 miles of the CIT are abandoned, then there is a high probability that the beginning point for the abandonment will be some 1,500 feet south of the Wyman Park Drive bridge, or near new milepost UU 0.7, rather than at new milepost UU 1.0. Moving the beginning point of abandonment 1,500 feet south would encompass the Flexi-Flo facility that NSR stated it did not want to abandon. Since NSR desires to abandon whatever portion of the CIT that was conveyed to Conrail by the FSP that lies north of Wyman Park Drive, and since the STB can neither 'go long nor go short,' (grant abandonment authority for real estate not subject to its jurisdiction, or leave a stranded segment), where the STB's jurisdiction ends must be determined prior to any grant of authority to abandon.

13. Only the successor to the Special Court can determine what was conveyed to Conrail. *Consolidated Rail Corporation v. STB*, 571 F.3d 13, 18 (CA DC 2010).

14. The STB exceeded its jurisdiction when it determined that the FSP had conveyed to Conrail that portion of the CIT that lies north of Beaver Dam Run, and exceeded its jurisdiction when it granted NSR abandonment authority for that portion of the CIT that was not conveyed to Conrail by the FSP. This was material error.

COCKEYSVILLE INDUSTRIAL PARK TRACK

15. Riffin acknowledges that NSR expressly stated in its abandonment petition that it desired to abandon the Cockeysville Industrial Park Track ("CIPT").

16. The CIPT presents a number of issues:

A. Is it a line of railroad or is it §10906 excepted track?

B. Did the MTA acquire a residual common carrier obligation when it acquired the CIPT in 1997?

C. Was the MTA required to obtain STB approval under §11323 prior to acquiring the CIPT?

17. NSR and the MTA have argued that since they consider the CIPT to be §10906 excepted track, it **magically is** §10906 excepted track. In *United Transp. Union v. Surface Transp. Bd.*, 183 F.3d 606, 612 (7th Cir. 1999) [*“Effingham”*], it was held that the nature of track is to be determined by the use intended by the grantee of that track. And in a whole host of cases, it has been universally held that if track serves more than one shipper, it is §10901 track, not §10906 excepted track. See *Effingham*, and *United Transp. Union – Illinois v. Surface Transp.*, 169 F.3d 474, 477 (7th Cir. 1999) [*“Chicago Rail Link”*]. And in *United States v. Idaho*, 298 U.S. 105, 56 S.Ct. 690, 80 L.Ed. 1070, the Supreme Court held that the nature of track is to be determined judicially, not administratively (and certainly not by the grantee of the track).

18. Riffin is aware of at least five shippers who received rail freight service via the CIPT. (Proctor and Gamble, McCormick Spice, Michel Warehousing, Stenersen Warehousing, and a trucking company.) Mr. Williams’s Exhibit Page 2.4, labeled Exhibit A-3 in Ms. Rudo’s May 14, 2010 Reply, states that **one** of the branches off of the CIPT served “warehouses” (plural, meaning more than one).

19. The test for whether track is line or excepted track was succinctly stated by the 5th Circuit in *New Orleans Terminal Company v. Spencer*, 366 F.2d 160, 165-166 (5th Cir. 1966):

“If there are traffic movements which are part of the actual transportation haul from shipper to consignee, then the trackage over which the movement takes place is a ‘line of railroad, or extension thereof,’ [*Texas & P. Ry. Co. v. Gulf, C. & S. F. Ry. Co.*, 270 U.S. 266, 278, 46 S.Ct. 263, 266, 70 L.Ed. 578 (1926)] and there can be no abandonment of such trackage without obtaining a certificate of public convenience and necessity from the Interstate Commerce Commission.”

20. While NSR and the MTA can argue that the CIPT is §10906 excepted track, their arguments are just that: argument. This issue has been raised in a number of prior proceedings, including FD 34975, which the STB has incorporated into this proceeding by reference thereto. To date, the STB has not addressed the issue. In this proceeding, from NSR’s point of view, whether the CIPT is line or excepted track is irrelevant, since NSR has requested permission to

abandon its operating rights over all track of whatever nature, that is north of the Wyman Park Drive bridge. However, the nature of the CIPT is highly relevant for the MTA and the Offerors. Since the CIPT appears at first blush to be line, due to the fact that it serves more than one shipper, and since the MTA acquired this line of railroad without prior authority to acquire, and without exemption from either 11323 or 10903 to acquire this line of railroad, and since, without an exemption, the MTA has the common carrier obligations associated with the CIPT, the nature of the CIPT must be determined prior to abandoning the CIT, in order to prevent the CIPT from becoming an unlawful 'stranded segment.'

21. Another issue is whether the MTA has a residual common carrier obligation with regard to the CIPT. In its *Petition for Declaratory Order*, FD 34975, the MTA **did not** seek nor obtain a ruling from the STB regarding whether the MTA acquired a residual common carrier obligation when it acquired the CIPT in 1997. There is a presumption that the MTA **did acquire** a residual common carrier obligation with regard to the CIPT, which presumption controls unless and until the STB declares that the MTA did not obtain a residual common carrier obligation with regard to the CIPT, See *Common Carrier Status of States, State Agencies and Instrumentalities, and Political Subdivisions*, 363 I.C.C 132 (1980).

22. Since the MTA **has** a common carrier obligation with regard to the CIPT, it was material error for the STB to grant authority to abandon the CIPT prior to extinguishing the MTA's common carrier obligation on the CIPT. By granting abandonment authority over the CIT, the STB has left a stranded segment: the CIPT.

REVOCATION OF MTA'S FRA WAIVER

23. Ms. Rudo did not allege that the MTA failed to comply with FRA waiver requirements. MTA Reply at 3, footnote 2. Ms. Rudo argued that the MTA **failed to tell the STB** that as of **November 28, 2007**, or six weeks after the STB rendered its decision in FD 34975, it no longer had a FRA waiver, and **failed to tell the STB** that as of November 28, 2007, NSR no longer could legally operate on the CIT, due to the lack of a FRA waiver. Had the MTA informed the STB of this very material change in circumstances, the STB would have had no choice but to hold that the MTA had materially interfered with NSR's ability to provide freight service on the

CIT, by failing to renew its FRA waiver, and that as a consequence, the MTA had acquired the common carrier obligations associated with the CIT.

24. Contrary to the MTA's argument on p.3 of its Reply, in footnote 2, and NSR's argument on p.4 of NSR's Reply, the MTA's failure to renew its FRA waiver has great relevance in this proceeding. Since NSR lost its ability to provide service on the CIT on November 28, 2007, due to the MTA's failure to renew its FRA waiver, the MTA acquired the common carrier obligations on the CIT. And since the MTA now has the common carrier obligations, the CIT cannot be abandoned prior to relieving the MTA of its common carrier obligations on the CIT.

MTA'S DECLARATORY ORDER

25. In FD 34975 the STB held that the MTA did not acquire a residual common carrier obligation when it acquired the CIT in 1990. It made this finding on **October 9, 2007**. The STB based its decision on the premise that the MTA had not done anything that would materially interfere with NSR's ability to provide service on the CIT.

26. When the MTA filed its request for a declaratory order on **December 22, 2006**, it had a valid FRA waiver which permitted NSR and the MTA to use the CIT at different times of the day. On **May 17, 2007**, the MTA asked the FRA to cancel this waiver. On **October 9, 2007**, when the STB made its decision, the MTA still had a valid FRA waiver in place. On **November 28, 2007**, the FRA revoked the MTA's waiver. As of November 28, 2007, NSR no longer had legal authority to operate on the CIT. Therefore, as of November 28, 2007, the MTA acquired the common carrier obligations over the CIT.

27. Since the MTA has the common carrier obligation over the CIT, it was material error for the STB to grant authority to abandon the CIT prior to relieving the MTA of its common carrier obligations on the CIT and on the CIPT.

28. Since the STB heavily relied upon its October 9, 2007 decision in FD 34975 to support its April 5, 2010 decision in this proceeding, to grant authority to abandon the CIT and to exempt this proceeding from the OFA procedures, and since the primary legal finding supporting that

October 9, 2007 decision (that the MTA had not done anything to hamper NSR's ability to provide service on the CIT), was obliterated by the FRA's revocation of the MTA's CIT waiver, this proceeding must be reopened to consider the impact the MTA's loss of its CIT waiver has upon this proceeding.

SAFETY ISSUE

29. The MTA alleged in this proceeding that continued use of the CIT for freight rail service would compromise 'safety.' There are a number of infirmities with this argument:

A. One, the MTA is **judicially estopped** from making this argument. In its 2000 FRA waiver application, when the CIT was single-tracked, the MTA represented that there were no safety issues due to NSR's operation on the CIT. The FRA issued the MTA a waiver from the FRA's regulations, having found that NSR's operation on the CIT did not present any safety issues. In its *Petition for Declaratory Order*, FD. No. 34975, the MTA represented that its use of the CIT would not "unreasonably interfere with freight rail service." In the STB's September 19, 2008 decision in FD No. 34975, the STB found that the "MTA is committed to allowing fixed hours of freight operation and to expanding those hours if market demands so warrant." The MTA is **judicially estopped** from arguing before the STB that using the CIT for freight operations creates safety issues, or in any manner interferes with its operations on the CIT.¹ In addition, whatever minor safety issues that may have existed in 2000 (too minor to concern the FRA), were eliminated when the line was double-tracked.

B. Safety issues are subject to the exclusive jurisdiction of the FRA. The STB has repeatedly stated that it has no jurisdiction over safety issues.

C. NSR and the MTA, not the Offerors, have the burden of proving all facts. The MTA's bald statement that continued freight operations would somehow create 'safety'

¹ Judicial estoppel has 3 elements: (1) Asserting a position factually incompatible with a position taken in a prior proceeding; (2) the prior position was adopted by a tribunal; (3) the party takes an inconsistent position in a later proceeding. *King v. Herbert J. Thomas Memorial Hosp.*, 159 F.3d 192, 196 (4th Cir. 1998).

issues, is not ‘proof.’ The MTA has offered no specifics regarding how continued freight operations would impact ‘safety.’ Furthermore, the MTA has represented to the FRA that there are no safety issues related to continued freight operations, which is why, as the MTA argued before the FRA, it would be appropriate for the FRA to issue to the MTA a waiver from the FRA’s safety regulations.

30. In *Tyrrel v. Norfolk Southern Ry. Co.*, 248 F.3d 517, 523 (6th Cir. 2001), the court stated:

“the FRA exercised primary authority over rail safety matters under 49 U.S.C. §20101 *et seq.*, while the STB handled economic regulation and environmental impact assessment.”

31. If there are any significant safety issues due to the MTA’s use of the Line, then those safety issues, if not resolved by the MTA, would interfere with NSR’s ability to provide freight service on the Line. And if any safety issues due to the MTA’s use of the Line interfere with NSR’s ability to provide service on the Line, then the MTA acquires residual common carrier obligations on the Line. And if the MTA has a residual common carrier obligation, then the Line cannot be abandoned.

PUBLIC USE

32. The STB has taken the position that if a line is needed for some public use, then that public use negates the OFA procedures. This stance by the STB is contrary to 49 U.S.C. 10904 and to the STB’s prior precedent, as specifically announced in *1411 Corporation*, where the STB made it clear that the OFA procedures trump public use, since the OFA procedures are mandatory, while the public use procedures are permissive. In *Kansas City Southern Industries, Inc. v. I.C.C.*, 902 F.2d 423, 430 (5th Cir. 1990), the court stated:

“In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed. 2d 694 (1984), the United States Supreme Court further explained that ‘the judiciary ... must reject administrative [statutory] constructions which are contrary to clear congressional intent.’ *Id.* 104 S.Ct. at 2781 n. 9.”

TRANSPORTATION POLICIES

33. 49 U.S.C. 10502(a)(1) states that the STB shall exempt a transaction from the application of a provision of this part whenever it “is not necessary to carry out the transportation policy of section 10101 of this title.” In its April 5, 2010 decision at p.8, the STB found that two transportation policies supported NSR request for an exemption from the OFA procedures: 10101(2) [minimize regulatory control] and 10101(7) [facilitate exiting from the industry.] 10101(7) actually **is not applicable** to the exemption from the OFA procedures, since the OFA procedures concern **entry into NOT exit from** the industry. Likewise, 10101(15) would not favor exemption, since it would be absurd to argue that exempting this procedure from the OFA procedures would ‘provide for the expeditious handling and resolution of all proceedings.’ Far from it. Because the STB exempted this proceeding from the OFA procedures, this proceeding will continue on for several more years (unless the STB recalls its OFA exemption). So the only transportation policy that favors exemption from the OFA procedures is a minimization of regulatory control [10101(2)].

34. In *State of Texas v. United States*, 292 U.S. 522, 530, 54 S.Ct. 819, 824 (1934), the Supreme Court stated:

“We found that Transportation Act 1920 introduced into the federal legislation a new railroad policy, seeking to insure an adequate transportation service. To attain that end, new rights, new obligations, new machinery, were created. (Citations omitted.) It is a primary aim of that policy to secure the avoidance of waste. That avoidance, as well as **the maintenance of service, is viewed as a direct concern of the public.** (Emphasis added.)

35. The maintenance-of-service and the avoidance-of-waste policies are the two primary goals of railroad policy. The avoidance-of-waste policy is applicable to NSR’s desire to be relieved of its obligations regarding the CIT. The maintenance-of-service policy is applicable to the OFA procedures. When balancing maintenance-of-service vs. minimizing regulatory control, maintenance-of-service predominates. And as Riffin pointed out in his Petition to Reopen, the STB’s April 5, 2010 decision adversely affected a number of other railroad policies, particularly the policy regarding facilitating **entry into** the industry.

36. NSR, on p.8 of its Reply, stated that "Riffin argues, for the first time that the Board ignored several aspects of the Rail Transportation Policy of 49 U.S.C. 10101." It is true that Riffin argued for the first time that the STB ignored several aspects of Rail Transportation Policy. But arguing that the STB ignored several aspects of Rail Transportation Policy prior to the time the STB rendered its April 5, 2010 decision, would have presumed that the STB was going to ignore several aspects of Rail Transportation Policy. Which raises the issue of why NSR knew that the STB was going to ignore several aspects of Rail Transportation Policy, and thus knew that Riffin should have raised this issue prior to the STB's April 5, 2010 decision. Was it because the STB had already made it known to NSR and the MTA that it would grant an exemption from the OFA procedures regardless of what the Offerors presented?

37. I certify under the penalties of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed on May 21, 2010

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of May, 2010, a copy of the foregoing Rebuttal, was served by first class mail, postage prepaid, upon John Edwards, Senior General Attorney, Norfolk Southern Corporation, Law Department, Three Commercial Place, Norfolk, VA 23510-9241, Charles Spitulnik, Kaplan Kirsch, Ste 800, 1001 Connecticut Ave NW, Washington, DC 20036, and was hand delivered to Zandra Rudo, Lois Lowe and Carl Delmont and was served via e-mail upon Eric Strohmeyer.



James Riffin