

BEFORE THE  
SURFACE TRANSPORTATION BOARD  
WASHINGTON, D.C.



Finance Docket No. 35246

JAMES RIFFIN – § 10902 ACQUISITION AND OPERATION APPLICATION –  
VENEER SPUR – IN BALTIMORE COUNTY, MD

ENTERED  
Office of Proceedings

SEP 15 2010

Part of  
Public Record

**OPPOSITION TO NORFOLK SOUTHERN'S  
MOTION TO DISMISS NOTICE OF APPEAL and  
SUPPLEMENT TO NOTICE OF APPEAL**

1. Now comes James Riffin (“**Riffin**”), the Applicant in the above entitled proceeding, who herewith files this Opposition to Norfolk Southern’s (“**NSR**”) Motion to Dismiss the Notice of Appeal and this Supplement to the Notice of Appeal that was filed on September 8, 2010 in the above entitled proceeding.

2. In its Motion to Dismiss, NSR argued that pursuant to **49 CFR 1011.2(a)(7)**, Riffin’s Notice of Appeal had to be filed **within 10 days** after the Director of the Office of Proceedings (“**Director**”) issued her August 18, 2010 decision dismissing Riffin’s 49 U.S.C. 10902 Application. NSR further argued that the Director “issued the August 18 Decision pursuant to **her delegated authority in 49 C.F.R. §1011.7(b).**” (Bold added.)

3. 49 CFR 1011.2(a)(7) states:

“(7) All appeals of initial decisions issued by the Director of the Office of Proceedings **under the authority delegated by §1011.7(b).** Appeals must be filed within 10 days after service of the Director decision or publication of the notice, and replies must be filed within 10 days after the due date for appeals or any extension thereof.” (Bold added.)

4. 49 CFR 1011.7(b) states:

“(b) In addition to the authority delegated at 49 CFR 1011.6(h) [certificates authorizing Conrail to abandon lines], the Director of the Office of Proceedings shall have authority initially to determine the following:

Seventeen subparagraphs are listed. **None** of the subparagraphs, except for ¶ (15), grant the Director authority to dismiss an Application under 49 U.S.C. §10902.

5. 49 CFR 1011.7(b)(15) states:

“(15) To reject applications, petitions for exemption, and verified notices (filed in class exemption proceedings) **for noncompliance with the environmental rules at 49 CFR part 1105.**” (Bold added.)

6. Since the Director did not dismiss Riffin’s Application “for noncompliance with the environmental rules at 49 CFR part 1105,” the authority delegated to the Director pursuant to ¶15 **is not applicable.**

7. It would appear that NSR failed to read the seventeen subparagraphs listed in 49 CFR 1011.7(b). [Or, worse yet, deliberately attempted to mislead the Board and Riffin regarding what authority had been delegated to the Director.]

8. It would also appear that NSR only selectively read 49 CFR 1011.2(a)(7), for 1011.2(a)(7) specifically states that appeals of initial decisions “**under the authority delegated by §1011.7(b)**” are subject to the 10 day appeal rule in §1011.2(a)(7).

9. Since the Director, pursuant to §1011.7(b), **has not** been delegated authority to dismiss §10902 Applications, the 10-day appeal rule in §1011.2(a)(7) **is not applicable.**

#### **SUPPLEMENT TO NOTICE OF APPEAL**

10. In Riffin’s Notice of Appeal, he argued that the Director’s Decision was premature.

11. Riffin supplements his Notice of Appeal by further arguing that the Director **has no authority** to dismiss 49 U.S.C. §10902 Applications. Consequently, the Director's Decision is void *ab initio*.

12. 49 CFR 1011.2(a)(4) states:

“(a) The Board reserves to itself for consideration and disposition:”

“(4) All other matters submitted for decision except those assigned to an individual Board Member or employee or an employee board.”

13. The **only** non-Board person who may dismiss an Application is the Secretary of the Board, and then **only if the Applicant** requests that the Application be dismissed. See 49 CFR 1011.6(d).

14. The filing of NSR's Motion to Dismiss Riffin's Notice of Appeal, violated a number of the Board's rules, particularly 49 CFR 1103.27, which states that it is not candid or fair for a practitioner knowingly to misstate or misquote the contents of items referred to. It also was a violation of Federal Rules of Civil Procedure Rule 11, which states that by signing a pleading, an attorney is certifying that “(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.”

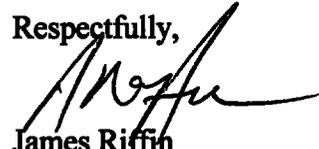
15. The Board has the authority to sanction NSR and its attorney, Daniel Kruger.

16. An appropriate sanction would be an admonishment to Mr. Kruger and NSR to read all applicable statutes and regulations in their entirety, carefully, and to stop misrepresenting what cited statutes, regulations and cases actually say.

17. WHEREFORE, Riffin would ask that the Board:

- A. **Not dismiss his Notice of Appeal;**
- B. **Vacate the Director's August 18, 2010 Decision in this proceeding;**
- C. **Keep the proceeding in abeyance until resolution of the numerous appeals before the Board and the U.S. Court of Appeals;**
- D. **Sanction NSR and Daniel Kruger;**
- E. **And for such other relief as would be appropriate.**

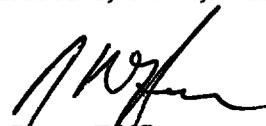
Respectfully,



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#### **CERTIFICATE OF SERVICE**

I hereby certify that on the 14<sup>th</sup> day of September, 2010, a copy of the foregoing Opposition to Motion to Dismiss Appeal and Supplement to Notice of Appeal, was served by first class mail, postage prepaid, upon Daniel G. Kruger, Attorney, Norfolk Southern Railway Company, Law Department, Three Commercial Place, Norfolk, VA 23510; and upon Charles Spitulnik, Kaplan Kirsch Rockwell, Ste 800, 1001 Connecticut Ave, N.W., Washington, DC 20036, counsel for MTA, and Allegany County.



James Riffin