

Before the
Surface Transportation Board

ENTERED **JR - 8**
Office of Proceedings
December 12, 2024
Part of
Public Record

STB DOCKET NO. AB-290 (Sub-No. 412X)

**NORFOLK SOUTHERN RAILWAY COMPANY –
ABANDONMENT EXEMPTION --
IN THE CITY OF BALTIMORE, MARYLAND**

JAMES RIFFIN’S

**NOTICE OF INTENT TO SEEK JUDICIAL REVIEW OF
THE DECEMBER 9, 2024 SERVED DECISION GRANTING NSR AUTHORITY
TO WITHDRAW ITS ABANDONMENT EXEMPTION, AND
PETITION TO STAY THAT DECISION**

NOTICE OF INTENT TO SEEK JUDICIAL REVIEW

1. James Riffin (“**Riffin**”) herewith gives notice of his Intent to Seek Judicial Review of the Acting Director of Proceeding’s December 9, 2024 Decision **granting** Norfolk Southern Railway Company’s (“NSR”) **December 6, 2024 filed** letter request to withdraw its Abandonment Exemption (“NOE”),

2. Riffin intends to file his Petition for Review on or about Tuesday, **December 17, 2024**.

PETITION TO STAY DECEMBER 9, 2024 SERVED DECISION

3. On **late-Friday, after 2 pm, December 6, 2024**, NSR filed a letter request to withdraw its NOE in the above entitled proceeding. NSR’s justification for the withdrawal request:

that “Since filing its Notice, certain real estate and other issues have come to NSR’s attention
need time to resolve and cannot be resolved in the statutory period afforded to notices of exemption.”

4. On **Monday morning, before 11 am, December 9, 2024**, the Acting Director of Proceedings served a Decision which **granted** the Withdrawal Request. Riffin received an eservice copy of the decision at 10:49 am on December 9, 2024.

GROUND FOR SEEKING PETITION TO STAY

5. **Material Error:**

6. 49 CFR 1104.13 states:

“(a) A party may file a reply or motion addressed to any pleading within 20 days after the pleading is filed with the Board, unless otherwise provided.”

7. The NOE was filed pursuant to 49 CFR 1152.50. [No traffic for 2 years exemption.]

8. 49 CFR 1152.50 does NOT “otherwise provide” with regard to replies.

9. Riffin desired to reply, and intended to reply, in opposition, to the Withdrawal Request.

10. In **violation** of 49 CFR 1104.13, Riffin **was not** afforded 20 days within which to file his Reply in Opposition. Riffin argues the violation of 49 CFR 1104.13 constitutes “Material Error.”

11. In addition, Riffin argues serving the Decision less than three calendar days after the Letter Request was filed, less than one business day after the Letter Request was filed, violated Riffin’s Constitutional Due Process Right to “Notice, and a **reasonable time to respond**,” particularly when no Notice was given that replies had to be filed in less than 20 days / that a reply had to be filed before 11 am on the Monday following the filing of the Withdrawal Request on the preceding Friday.

12. **Changed circumstances:**

13. The ‘changed circumstances’ issue is: When does a carrier’s right to withdraw an abandonment exemption terminate?

14. Neither 49 USC 10904, nor 49 CFR 1152, addresses this issue, thus creating an ‘ambiguity.’

15. In prior decisions granting an abandonment NOE withdrawal request, the Board justified granting the withdrawal request by saying:

“When a carrier is authorized to **abandon** a line, that authority is permissive, not mandatory.

The carrier can choose to exercise that authority or not. **Because carriers are not compelled to abandon lines, the Board NORMALLY** grants a carrier’s motion to withdraw its request for abandonment authority. See *Almono LP – Abandonment Exemption – In Allegheny County, PA*, STB Docket No. AB-842X (STB served Jan. 28, 2004).” Bold and caps added.

16. While the Board cannot compel a carrier to **abandon** a line, the Board **can compel** a carrier **to convey** a line to another entity, which entity would become the new carrier for the line. See 49 U.S.C. 10907 (feeder line) and 49 U.S.C. 10904 [offer of financial assistance (“**OFA**”)].

17. **Prior to July 29, 2017**, the effective date of the newest version of 49 CFR 1152.27, the Board had always held that the filing of a notice of Intent to file an OFA, merely **started negotiations** for an OFA; the filing of a **notice of intent** to file an OFA, did NOT bestow on the OFA offeror any **rights**. Under the **pre-2017** version of 1152.27, the **only time** an OFA offeror acquired any **rights**, was IF, and WHEN, the OFA offeror filed a Petition to Set Terms and Conditions. [Once the Board set the terms and conditions, the OFA offeror had the absolute right to acquire the line pursuant to the terms and conditions set by the Board.]

18. The **newest version** of 49 CFR 1152.27, made significant changes to the OFA process. Relevant to this Proceeding, the present version has a newly-added “Preliminary Financial

Responsibility' section. 49 CFR 1152.27(c)(ii).

19. The Preliminary Financial Responsibility section creates **new rights** for an OFA offeror:

“If the Board does not issue a decision regarding the preliminary financial responsibility demonstration within 10 days of receipt of the expression of intent, the party submitting the expression of intent **will be presumed** to be preliminarily financially responsible and, upon request, the **applicant must provide** the information required under paragraph (a) of this section.” 1152.27(c)(ii). Bold added.

“(d) *Access to documents*. Upon receipt by the carrier of a written comment under §1152.25, **or satisfaction of the preliminary financial responsibility requirement** under paragraph (c)(1)(ii) of this section or upon receipt by the carrier of an offer of financial assistance, whichever occurs earlier, the carrier **must make available** to that party or offeror the records, accounts, appraisals, working papers, and **other documents** used in preparing Exhibit 1 (§1152.36) or, **if an exemption proceeding**, those documents that would have been used in preparing Exhibit 1 had an abandonment or discontinuance application been filed, **or other records, reports, and data** in the possession of the carrier seeking the exemption that provide comparable data.” Bold added.

20. Riffin argues, when he became presumptively preliminarily financially responsible, his **right** (A) to obtain ‘paragraph (a) information; (B) to obtain ‘paragraph (d) [‘Exhibit 1’] information; and (C) **to file, and serve on NSR**, an Offer of Financial Assistance to Purchase a (specified) Portion of the Line, **VESTED**.

21. In effect, Riffin argues that 49 U.S.C. 10904, and 49 CFR 1152.27, **vest** Riffin with Rights, which NSR cannot interfere with, subvert, by filing a Request to Withdraw its abandonment NOE.

22. Riffin further argues that Riffin’s Rights **vested** the moment he became (presumptively, or by Board decision), ‘Preliminarily Financially Responsible.’

23. Riffin argues that NSR’s **right** to withdraw its abandonment NOE **terminated** at the moment Riffin (presumptively, or by Board decision), became ‘Preliminarily Financially Responsible.’

24. 49 CFR 1152.27(c)(ii). states that if the Board does NOT serve a decision, within 10 (calender) days of when Riffin files his Notice of Intent to file an OFA, with supporting calculations and financial information, as to whether Riffin is ‘preliminarily financial responsible,’ then Riffin is **presumed to be** ‘preliminarily financially responsible,’ and his 1152.27 **Rights vest.**

25. Riffin filed his Notice of Intent to file an OFA, his calculations, and financial statements, on **November 25, 2024.** Ten calender days later would be Thursday, **December 5, 2024.**

26. Riffin argues that on **Thursday, December 5, 2024, he presumptively became a preliminarily financially responsible person, and that the Rights pertinent thereto, vested.**

27. Riffin further argues that on **Friday, December 6, 2024,** NSR’s right to withdraw its abandonment NOE, had **terminated, the previous day, December 5, 2024.**

THE ISSUE

28. WHEN does a carrier’s right to withdraw an abandonment exemption terminate?

29. The Board’s decision is *Almono*, implies: Never.

30. Were a carrier’s right to withdraw an abandonment exemption (or application, or petition for exemption), to never terminate, that would create a conflict with the Board’s authority to set terms and conditions. It would also permit a carrier to subvert an OFA offeror’s right to file, and to enforce, an offer of financial assistance. If a carrier did not ‘like’ an OFA offeror’s offer to acquire a line the carrier had indicated the carrier desired to abandon, for the line’s ‘net liquidated value,’ the carrier could ‘withdraw’ its abandonment exemption, thereby subverting 49 U.S.C. 10904.

31. Obviously, at some point in the OFA process, a carrier’s right to withdraw its

abandonment exemption, must terminate, and an OFA offeror's right to acquire the line, must vest.

32. This requires an interpretation of 49 U.S.C. 10904. And 49 CFR 1152. Neither of which address the issue of when a carrier's right to withdraw its abandonment exemption, terminates.

33. On **June 28, 2024**, the Supreme Court issued its decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024). At 144 S.Ct. 2244, 2273, the Court held:

“*Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. . . But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.”

34. Prior to *Loper*, a court was required to defer to the Board's interpretation of a statute. Post *Loper*, and court is prohibited from deferring to the Board's interpretation of a statute. Post *Loper*, the court is **required** to make its own interpretation of a statute.

35. Which is the primary reason why Riffin will be seeking Judicial Review of the December 9, 2024 decision. To afford the court an opportunity to determine WHEN a carrier's right to withdraw an abandonment exemption, terminates.

WHY A STAY SHOULD BE GRANTED

36. The obvious reason why a stay should be granted, is because Riffin asked for a stay. The basic grounds for issuing a stay, have been met: Material error. (No opportunity to file a reply.)

37. In this proceeding, there are additional reasons.

38. NOT staying the decision, is likely to have multiple, serious, adverse consequences, for

NSR, to wit:

ADVERSE CONSEQUENCES OF **NOT ISSUING A STAY**

39. Without a stay, NSR is re-vested with **all** of its common carrier obligations. Including providing rates, service terms, and rail service at the Flexi Flo facility.

40. A shipper could ask for a rate, and service terms, for a non-exempt commodity / type of rail car. If the **rate** is not provided within 10 business days:

- A. The shipper could file a complaint. Which the Board **must** act on.
- B. The filing of a complaint **prevents** the use of an ‘exemption’ abandonment procedure. Basically, NSR would have to file a ‘full blown’ Application.

41. A shipper could ask for **rail service** at the Flexi flo facility. If rail service is denied, the shipper could file a complaint for denial of rail service.

- A. Such a complaint limits NSR’s option to filing a ‘full-blown’ Application.
- B. 2. The complaint could ask the Board to compel NSR to restore the Flexi flo facility.
 - a. Which would require NSR to void its deed to the contractor presently using the site.
 - b. Which would require NSR to put the track back;
 - c. Which would require NSR to put the ‘crossing track’ back in place.
- C. NSR could be required to pay to an OFA offeror, the cost of restoring the Flexi flo facility. (The more likely remedy.)

ADVERSE CONSEQUENCES WOULD BE AVOIDED BY ISSUING A STAY

42. It is Riffin’s belief that once an abandonment request has been filed, NO complaint will be ‘effective.’ Thus, NONE of the adverse ramifications noted above, could result. [If the

abandonment NOE remains effective.]

CONSEQUENCE OF SEEKING JUDICIAL REVIEW

43. At the moment a Petition for Review is filed, the Board loses its jurisdiction over the matter. Until the appellate court issues its mandate, the Board would NOT have the jurisdiction to act on a re-filed abandonment exemption.

44. If the appellate court vacates the withdrawal request, the original NOE would be reinstated. Which means the status quo of the Line, as of October 31, 2024, **must be maintained**. Which means Riffin would have the right to acquire, via the OFA process, whatever existed on October 31, 2024.

45. Riffin's Notice of Intent to file an OFA detailed what Riffin desired to acquire. Of particular note: All loose rail 'adjacent to' the Line. Which, Riffin would argue, includes the loose rail that **was** adjacent to the Line, on the real property owned by **Amtrak**. Which loose rail was removed by **MTA** personnel a week or so ago.

46. Riffin reminds the Board of its 'Glass Road Bridge' decision in AB 103 (Sub. No.21X), [*Line in Warren County, MS*], served February 22, 2008. Essentially: An OFA was filed. While the OFA was pending, local officials removed the Glass Road Bridge, without the carrier's knowledge or consent. Even though the bridge had no 'value,' the Board held the carrier had to deduct from the Net Liquidated Value, the cost of replacing the bridge.

CONCLUSION

47. Only Riffin has the right to file a stay request. Which he is doing. Knowing full well, that if the stay request is granted, the adverse consequences noted above, would likely be avoided. Which is Riffin's goal. [Riffin's ultimate goal is to acquire a mile or so of line, somewhere in the Baltimore area, so that he can provide rail service for the shipper that has been identified. Riffin has no desire to make NSR's life 'difficult.']

48. IF the stay is granted, Riffin will have limited the adverse consequences associated with withdrawing NSR's abandonment NOE. If the stay request is not granted, 'what will be, will be.'

49. On Sunday, **December 8, 2024**, Riffin offered NSR a potential settlement to this controversy. On Monday, December 9, 2024, AFTER the Board granted NSR's withdrawal request, Riffin provided counsel for the MTA with a copy of what Riffin offered NSR. Neither counsel had sufficient time to respond to Riffin's offer, before the Board's (Riffin would argue, improvidently-granted) decision granting NSR's (Riffin would argue, improvidently-requested) withdrawal request.

50. All of the above was disclosed to counsel for NSR and the MTA, on **December 11, 2024**. Riffin indicated to opposing counsel, that once the Board rules on the stay request, once Riffin files his Petition for Review, NSR's ability to control what happens in the future, will basically no longer exist.

51. IF counsel for NSR asks Riffin to delay (for a few days), filing his Petition for Judicial Review, so that discussions regarding Riffin's settlement offer could commence, Riffin would delay filing his Petition for Review. Without such a request, Riffin intends to file his Petition for Review on Tuesday, December 17, 2024, or at the latest, Wednesday, December 18, 2024.

Respectfully,

/s/ James Riffin

James Riffin
P. O. Box 4044
Timonium, MD 21094
(443) 414-6210

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of December, 2024, a copy of the foregoing Petition to Stay, and Notice of Intent to file a Petition for Judicial Review, was served on the parties noted below, by E-mail.

/s/ James Riffin

E-mail:

James Riffin

NSR: Crystal M. Zorbaugh
MTA Charles Spitulnik

czorbaugh@mullinslawgroup.net
cspitulnik@kaplankirsch.com