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**BEFORE THE
SURFACE TRANSPORTATION BOARD**



STB DOCKET NO. AB-167 (Sub- No. 1185X)

**CONSOLIDATED RAIL CORPORATION
ABANDONMENT EXEMPTION
IN MERCER COUNTY, NJ**

ENTERED
Office of Proceedings

OCT 30 2006

Part of
Public Record

PETITION TO REOPEN / RECONSIDER AND TO STAY

1. James Riffin ("Riffin"), pursuant to the applicable regulations of the Surface Transportation Board ("STB" or "Board"), herewith files this Petition to Reopen / Reconsider and to Stay, requesting that the Board:

A. Reopen, then reconsider its October 20, 2006 decision denying Riffin's request for a finding that Norfolk Southern Railway Company ("NSR") and CSX Transportation, Inc. ("CSXT") must file notices of discontinuance contemporaneously with Conrail's Abandonment Exemption for the abandonment of that portion of a line of railroad known as the Robbinsville Industrial Track, between milepost 32.20 and milepost 37.90, in the cities of Hamilton Township and Washington Township, Mercer County, New Jersey, a distance of 5.7 miles more or less, ("Exemption"), which line of railroad is the subject of the above entitled proceeding ("Line");

B. Stay the date an Offer of Financial Assistance ("OFA") must be filed by, from October 30, 2006, to a date which is 15 days after the issue of whether NSR and CSXT must file notices of discontinuances, has been resolved; and for reasons states:

**NORFOLK SOUTHERN AND CSX TRANSPORTATION
MUST FILE NOTICES OF DISCONTINUANCES / ABANDONMENT
PRIOR TO THE BOARD APPROVING AN OFFER OF FINANCIAL ASSISTANCE
OR GRANTING AN EXEMPTION FOR ABANDONMENT**

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SURFACE
TRANSPORTATION BOARD

2. The Line which is the subject of this abandonment proceeding, appears to be a part of Conrail's Retained Assets within the North Jersey Shared Assets Area ("NJSAA"), established as part of the Conrail control transaction, approved by the Board in *CSX Corp. et. al. – Control – Conrail Inc. et. al.*, 3 S.T.B. 196 (1998) (Decision No. 89).

3. In Docket No. AB 290 (Sub-No. 212X), *Norfolk Southern Railway Company – Discontinuance Exemption – In Hudson County, NJ*, Decided January 28, 2002, the Board made the following statements:

"The River Line is one of a number of branch lines located within the North Jersey Shared Assets Area (NJSASA) ... NS and CSXT acquired local and overhead operating rights over the River Line and all other lines within the three Shared Assets Areas. **NS and CSXT have exclusive and independent authority to establish rates, charges, service terms, routes, and divisions for, and to collect freight revenues on, any traffic moving within the Shared Assets Areas for their account.** See Conrail Purchase, 3 S.T.B. at 228. Neither carrier, however, has operated over the River Line. Instead, Conrail, acting as their agent, provided service to Cognis and Dykes." Decision pp. 2-3. (Emphasis added.)

Note 3: "Conrail filed applications to abandon its remaining interest in the line segments on November 14, 2000. See ... *Conrail – Abandonment of the River Line – In Hudson County, NJ*, STB Docket No. AB -167 (Sub-No. 1067N)."

Note 12: "NS and CSXT state that they intend to implement the proposed discontinuance of service exemptions to the same extent and at the same time Conrail exercises its abandonment authorities."

4. In light of the Board's holding in AB 290 (Sub No. 212X) that NS and CSXT acquired independent authority to operate over all Retained Assets in the NJSAA, it would appear that both Norfolk Southern and CSXT must contemporaneously file Notices of Discontinuance, which the Board must approve, before the Board can grant Conrail's exemption to abandon the Robbinsville Industrial Track. Likewise, these Notices of Discontinuance would have to be filed and approved by the Board, before the Board could approve an Offer of Financial Assistance to purchase the Robbinsville Industrial Track.

5. In a Decision dated October 20, 2006, the Board **incorrectly** found that NSR and CSXT did not have to file contemporaneous notices of discontinuance in the above entitled proceeding. The Board stated: "There is no indication that either of those carriers began service over these lines or that Conrail provided any service over the line either on their behalf or on its own behalf since the "split date" in 1999."

6. Riffin would reiterate that in Docket No. AB 290 (Sub-No. 212X), *Norfolk Southern Railway Company – Discontinuance Exemption – In Hudson County, NJ*, Decided January 28,

2002, the Board stated NSR and CSXT have exclusive and independent authority to operate over all lines within the three Shared Assets Areas. Since the Robbinsville Line is within the Shared Assets Area, it would appear that NSR and CSXT have exclusive and independent authority to operate over the Robbinsville Line, and that their authority to operate over the Line is not predicated on them having actually provided any service over the Line since the 1999 “split date,” nor is their authority to operate over the Line predicated on them requesting Conrail provide any service over the Line on their behalf.

7. The issue before the Board, is whether NSR and CSXT have any operating rights in the Robbinsville Line. If so, then both NSR and CSXT must file notices of discontinuance of those operating rights contemporaneously with Conrail’s Abandonment Exemption. The Board’s October 20, 2006 decision did not address this issue. Had the Board’s decision explicitly stated NSR and CSXT did not have any operating rights over the Line, and given a reason why the reasoning in Docket No. AB 290 (Sub-No. 212X), *id.*, was inapplicable¹, and had the Board explicitly stated whomever acquired the Line via an OFA would acquire the Line unencumbered and free and clear of any other operating rights over the Line, there would be no need for this appeal. Riffin’s concern is whether NSR or CSXT could at some later date reassert their right to operate over the Line, arguing that they had never consented to the abandonment of their operating rights over the Line.

PETITION TO STAY DATE BY WHICH AN OFA MUST BE FILED

8. Paragraphs one through seven are incorporated by reference herein, as if fully stated herein.

9. Riffin, pursuant to the applicable regulations of the Board, herewith files this Petition to Stay, requesting that the Board stay the date by which an OFA in the above entitled case must be filed, from October 30, 2006, until 15 days after the issue of whether NSR and CSXT must file notices of discontinuances, has been resolved.

10. It would be appropriate to stay the date an OFA must be filed. Part of the basis of the bargain, is precisely what the purchaser would be purchasing. In this case, it presently is unknown whether the purchaser would be offering to purchase the Line unencumbered by NSR or CSXT operating rights. An encumbered line would have significantly less value than an unencumbered line. Furthermore, the issue of whether Conrail has the legal right to sell the line if NSR and CSXT have operating rights over the line, has not been resolved, nor has the issue of whether the Line is subject to an OFA proceeding, been resolved. [In *Delaware & Hudson*

¹ In *New York Cross Harbor R.R. v. Surface Transp. BD.*, 374 F.3d 1177 at 1181 (D.C. Cir. 2004), the court stated: “An agency acts arbitrarily and capriciously if it “reverse[s] its position in the face of a precedent it has not persuasively distinguished,” citing *Louisiana Pub. Serv. Comm’n v. FERC*, 184 F.3d 892, 897 (D.C. Cir. 1999).

Railway Co. Inc., Discontinuance of Trackage Rights, Docket No. AB 156 (Sub25X), Decided March 29, 2005, the Board ruled that until **all** operating rights over a line were subject to abandonment, the line could not be acquired via an OFA.]

11. For the reasons stated above, Riffin would respectfully ask that the Board:

A. Reopen the above entitled case, then reconsider its decision that NSR and CSXT need not contemporaneously file notices of discontinuances.

B. Rule on the issue of whether Notices of Discontinuance must be filed and approved prior to anyone filing an Offer of Financial Assistance to purchase the Line.

C. Toll the time period for filing an Offer of Financial Assistance to purchase the Line until 15 days after the issues raised, have been resolved.

Respectfully submitted,


James Riffin

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of October, 2006, a copy of the foregoing Petition to Reopen / Reconsider and To Stay, was served by first class mail, postage prepaid, upon John K. Enright, counsel for Conrail, 1000 Howard Boulevard, 4th Floor, Mt. Laurel, NJ 08054, and to the other parties of record noted below.


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