

Orig.

220364

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. AB-290 (Sub- No. 293X)

**NORFOLK SOUTHERN RAILWAY COMPANY
ABANDONMENT EXEMPTION
NORFOLK AND VIRGINIA BEACH, VIRGINIA**

**REPLY TO NORFOLK SOUTHERN'S
MOTION TO STRIKE COMMENT AND NOTICE OF INTENT
MOTION FOR SANCTIONS
REQUEST FOR LEAVE TO FILE BRIEF REPLY TO COMMENTS
MOTION TO ADD OFA EXEMPTION REQUEST TO PETITION**

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1. Now comes James Riffin ("Riffin"), who herewith requests leave from the Board to late file (by two days), this Reply ("Reply") to Norfolk Southern's ("NS"): Motion to Strike Comment [1] and Notice of Intent [2]; Motion for Sanctions [3, 4a, b]; Request for Leave to File Brief Reply to Comments [5 a, b]; Motion to Add OFA Exemption Request to Petition [6a]; Request for exemption from OFA procedures [6b] (Collectively, "Motion").

2. On September 6, 2007, NS filed a number of motions, (collectively, "Motion"). 49 CFR 1104.13 (a) states a party may file a reply to any pleading within 20 days after the pleading is filed with the Board. This Reply is being filed 22 days after NS' September 6, 2007 pleading. Because this proceeding has become highly controversial, Riffin would formally request leave from the Board to late-file this Reply, and would justify this request as follows:

A. NS cited in its Motion: *Rail System Diagram Maps*, Ex Parte No. 494 (ICC served August 21, 1991). Riffin made a number of attempts to locate a copy of this decision, without success. (This decision was not reported in any ICC Reporter.)

B. Permitting Riffin to late-file this Reply, will made for a more complete record, will not unduly delay the proceeding, and may assist the Board in reaching its decision.

BACKGROUND INFORMATION

3. On July 19, 2007, Norfolk Southern Railway Company ("NS") filed a Petition for Exemption ("Petition"), requesting to be exempt from the prior approval requirements of 49 U.S.C. §10903, to abandon 15.34 miles of railroad line in Norfolk and Virginia Beach, Virginia ("Line").

4. On July 20, 2007, Riffin received a telephone call advising him that NS had filed its Petition, and suggesting that Riffin may want to review the Petition, and further suggesting that Riffin may want to look into the possibility of purchasing the Line through the Board's Offer-of-Financial-Assistance procedures.

5. On July 21, 2007, Riffin downloaded a copy of the Petition from the Board's web site. As Riffin was reading the Petition, he noted NS had stated on page 5 of its Petition, that NS had not listed the Line on NS' System Diagram Map as being subject to abandonment. NS attempted to justify its failure to list the Line on NS' System Diagram Map by stating NS had not expected the Line would be the subject of an abandonment application. When Riffin read page 24 of the Petition, Riffin noted NS' statement that approximately 18 months prior to filing the Petition, NS had filed with the Board an Environmental and Historic Reports for the Line, "anticipating an abandonment filing covering the subject line." (Emphasis added.)

6. After reading the Petition, and after doing some preliminary research on the Line, Riffin noted the Line was the only means of rail access to Virginia Beach. Riffin noted Norfolk, Virginia is a major port, noted the Line went through manufacturing areas, and read with interest that as recently as August of 2006, a shipper on the Line had used the Line. Riffin received another telephone call informing him that an importer that had been based in New Orleans, had been forced to relocate to Norfolk, due to Hurricane Katrina damage. Riffin was informed this importer desired to ship its products by rail, and that the site it had hurriedly occupied in Norfolk, did not have good rail access. Upon further inquiry, Riffin learned that the Line could be used to provide this prospective shipper with freight rail access. Riffin then concluded that the Line might have economic potential as a freight line of railroad. Having reached the conclusion that the Line might have economic potential as a line of railroad, Riffin decided to file a Notice of Intent to File an Offer of Financial Assistance ("OFA") to purchase the Line, so that the quickly approaching effective date of the Petition could be postponed, so that Riffin had additional time

within which he could learn more about the Line, and so that Riffin could make an informed decision regarding whether he would in fact make an offer to purchase the Line, and if so, what the Net Liquidation Value of the Line might be.

7. By July 23, 2007, Riffin had sufficient information to justify in his mind the time and expense associated with filing an OFA. Having had a prior experience in purchasing a line of railroad via the OFA process, Riffin was aware that the deed that would convey the Line would be a Quit Claim Deed, which would have no warranties regarding NS' title to the Line. Riffin was aware that title insurance was not obtainable, and that if title to the Line was subsequently found to be defective, there would be no recourse against the seller, nor against a title company. Riffin was also aware that the legal underpinning for the OFA process, was the filing of a Petition for Exemption, or a Notice of Exemption ("NOE"), to abandon a line of railroad, and that if the Petition for Exemption or NOE was later voided due to containing a fatal error (such as a false or misleading statement, or legally insufficient Notice), the underpinning for the OFA would fail, which in turn would cause the OFA to be rendered moot (effectively, null and void). Rather than run the risk of having the Petition later found to have a fatal error, Riffin elected to contact NS, to suggest that NS amend its Petition to remove any potential fatal errors, such as the two inconsistent statements.

8. On July 23, 2007, Riffin telephoned Mr. James Paschall, Senior General Attorney for NS, author of the Petition, to advise him that it appeared to Riffin that Mr. Paschall's July 19, 2007 filing in this proceeding, had two statements which appeared to be inconsistent, one of which (on page 5 of the Petition) could be construed to be a "false or misleading statement." (A "false or misleading statement" in a Petition for Exemption could cause the Petition to become void *ab initio*.) Riffin suggested Mr. Paschall correct his filing prior to the deadline by which Comments were due, so that Riffin would not feel compelled to address the inconsistency in Mr. Paschall's filing.

9. In its Petition, NS stated that it had reached an agreement with the City of Norfolk, Virginia ("Norfolk"), to sell a portion of the Line to Norfolk, so that Norfolk could use that portion of the Line for a proposed light-rail project. The Petition did not reveal any details about the intended sale, nor did the Petition indicate whether construction of the light-rail project was imminent, or sometime in the distant future.

10. Riffin was aware that if the Line were later used for light-rail purposes, this could materially interfere with the freight carrier's ability to provide freight rail service on the Line. In addition, Riffin was aware that if a transit entity desired to use a line of railroad for transit purposes, that transit entity would first have to reach an accord with the freight carrier, would have to execute an operating agreement, and would have to seek, then receive from the Board, authority to acquire the line. Oftentimes, dual use of a line of railroad for freight and transit purposes, is fraught with controversy. Witness the recent controversy in *Utah Transit Authority - Acquisition Exemption - Union Pacific Railroad Company*, FD No. 35008, and the continuing controversy in *Maryland Transit Administration Petition for Declaratory Order*, FD No. 34975.

11. Riffin knew that if he were to purchase the Line, and if Norfolk desired to use the Line for light-rail purposes, Riffin and the City of Norfolk would have to reach some sort of agreement. Before one joins with another in a joint venture, Riffin believes the parties should first ascertain whether they are likely to be compatible, and should ascertain what the expectations of the respective parties are likely to be.

12. With the above in mind, and in furtherance of Riffin's "due diligence obligations," on August 16, 2007, Riffin telephoned a number of individuals in Norfolk, including the engineer for the proposed project, in an effort to ascertain what Norfolk desired to do, how serious it was about its proposed light-rail project, how soon it desired to begin construction, and whether it had funding in place to begin the project. (Most light-rail projects are federally funded. Submitting an application for funding does not guarantee federal funding will in fact be forthcoming, nor does it guarantee the amount of funding. There often are many constraints attached to federal funds, including deadlines by which certain activities must commence.)

13. On August 16, 2007, Riffin spoke with Stanley A. Stein, Assistant City Manager for the City of Norfolk. During that conversation Riffin indicated he planned to file a Notice of Intent to File an OFA, and that he might actually purchase the Line. Riffin did state that if an OFA was filed, any use-for-public-purposes offers would be subservient to an OFA offer. (The Board's regulations specifically state that if an OFA is filed, and the offeror offers to pay the Net Liquidation Value of the line, then the rail carrier is compelled to sell the line to the offeror. The Board's regulations do not compel a rail carrier to sell a line it proposes to abandon, to anyone who proposes to acquire the line for public-use purposes, or for trail-use purposes.) At NO time did Riffin ever state, or even remotely suggest, that he would consider a settlement offer to

withdraw his Notice of Intent to File an OFA. (Mr. Paschall recorded Riffin's message to him. It would have been informative if Mr. Stein had recorded the conversation between him and Riffin, so that what was said (and what was not said) could be ascertained.)

14. Since NS chose not to amend its Petition, on August 17, 2007, Riffin timely filed his Comments and timely filed a Notice of Intent to File an Offer of Financial Assistance to purchase the Line.

15. On September 6, 2007, NS filed its Motion.

REPLY TO NS' MOTION

1. NS' Request for Leave to File Reply to Riffin's Comments [5a].

16. While Riffin does not agree with NS' legal argument in its reply to Riffin's Comments, Riffin does not object to NS' filing its reply to Riffin's Comments. [In his Comments, Riffin suggested NS should file an appropriate reply, in order to address the apparent inconsistency between two of its statements.]

2. NS' request to deny relief requested by Riffin [5b].

17. In his Comments, Riffin did not request any specific relief, so there is no "requested relief" to deny. Riffin merely suggested how NS and the Board may wish to address the issue raised by Riffin, without requesting any particular relief. [Riffin generally does not like to say "You cannot do that," without explaining why it would be inappropriate to do the indicated behavior, and without suggesting some potential more-appropriate alternative behavior.]

3. NS' request to strike Riffin's Comments [1].

18. NS has made "much hay" in its effort to persuade the Board that there is a significant difference between a 49 USC §10903 abandonment Application proceeding, and a Petition for Exemption proceeding, to be exempt from the full requirements of a §10903 Application proceeding. Specifically, NS has argued that because, in the 1st quarter of 2006, it anticipated commencing a Petition for Exemption proceeding, rather than a §10903 Application to abandon

proceeding, the System Diagram Map requirements associated with a §10903 Application proceeding, were not applicable to its Petition for Exemption filing.

19. Riffin would argue that if a rail carrier asks the Board to strictly construe a statute or Board regulation, then that request for strict construction should be applicable to all aspects of the rail carrier's filing. Riffin would further argue that if a rail carrier files a Petition for Exemption, and if the rail carrier is requesting the Board to very narrowly construe the applicable statutes, then the rail carrier should be subject to the full requirements of the statute that it is seeking to be exempt from, except for those specific requirements that the rail carrier specifically states it would like to be exempt from. In this case, NS has never asked to be exempt from the System Diagram Map requirements of §1152.10 or of §1152.22(a)(5). NS has asked the Board to narrowly construe the notice requirements associated with its abandonment petition, and has asked the Board to adopt its argument that because in the 1st quarter of 2006, it anticipated filing a Petition for Exemption, rather than a §10903 Application, it would not be subject to the 49 CFR §1152.10 System Diagram Map requirements, nor the 49 CFR §1152.22 (a)(5) [System Diagram Map] Application requirements.

20. Riffin would argue the policy intent of 49 CFR §1152.10 and §1152.22 (a)(5), is to give the general public, all shippers along the affected line, and all parties who may have an interest in preserving the line as a line of railroad, sufficient notice that the carrier is anticipating abandoning the line, so that any interested party may have sufficient time to begin the arduous process of attempting to preserve the line, either through a Feeder Line Application, or an OFA.

21. Riffin would further argue that any attempt to circumvent this Due Process Notice requirement, should be carefully scrutinized, and should be vigorously resisted.

22. In the instant case, NS has failed to ask the Board to be exempt from the System Diagram Map requirements of either §1152.10 or §1152.22(a)(5). NS has failed to offer an alternative notice option, which would substantially comply with the notice requirements of either §1152.10 or §1152.22(a)(5). Instead, NS has stridently argued that it is not subject to the notice requirements of either §1152.10 or §1152.22(a)(5), and that anyone who disagrees with this stance, should be summarily barred from ever making any further filings with the Board, and should be required to submit any future filings to NS prior to submitting the filing with the Board, so that NS can censor out any objectionable comments, protestations, or legal arguments

that are contrary to the legal position it is trying to espouse. Needless to say, Riffin does not agree with NS' "prior censorship," request, nor with NS' request to be immune from the Board's regulations.

23. The Board has promulgated a detailed set of regulations covering abandonment proceedings. An experienced attorney such as Mr. Paschall, should have no trouble complying with those regulations. An experienced attorney such as Mr. Paschall should be fully adept at reading his filings prior to filing them, to root out inconsistent statements and to correct any gross, obvious typographical errors. Given the number of times Riffin has found significant typographical errors in Mr. Paschall's filings, it would appear Mr. Paschall either is too pressed for time to carefully review his filings prior to submitting them to the Board, or his eyesight has degenerated to the point where he no longer sees these glaring errors. Riffin might suggest Mr. Paschall hire an adept proofreader who would more carefully review his future filings. And Mr. Paschall might consider submitting vitriolic-laced future filings to a disinterested outside party, to review the propriety of filing irrelevant verbal assaults on those who have taken a legal position which is contrary to his legal position.¹

4. The Right to Submit Comments.

24. While 49 CFR §1121.4(a) states public comments generally are not sought during consideration of exemption petition proposals, 49 CFR §1104.13 specifically grants a party has the right to file a reply to any pleading. 49 CFR §1152.25 states: "Interested persons may become parties to an abandonment or discontinuance proceeding² by filing written comments or protests with the Board." While §1152.25 is specifically applicable to a 49 U.S.C. §10903 Application proceeding, Riffin is not aware of any prior decision that has held that one may only become a party to an abandonment APPLICATION proceeding, and that no one has the right to become a party in any other type of proceeding, and specifically that no one has the right

¹ For the record, Riffin went to law school for the primary purpose of protecting his legal rights. And for the record, Riffin does submit his filings to outside parties for review prior to filing them. And for the record, Riffin might point out that he has an eye doctor degree, and minors in Physics and Chemistry, from the U of California at Berkeley, a M.B.A., a J.D., a L.L.M. from the U. of Pennsylvania law school, and a Ph.D (abd) from the Wharton School of Business.

² Riffin would argue not just Application proceedings, but Petition for Exemption and NOE proceedings that are requesting abandonment authority.

to become a party in a **Petition for Exemption** proceeding. In this proceeding, Riffin timely gave notice that he intended to participate fully as a party. As a party, Riffin would argue he has the absolute right to file comments. Striking a party's timely, relevant comments, would appear to be a violation of Due Process. Had Mr. Paschall asked the Board not to give Riffin's comments any weight, would have been legally supportable. Asking the Board to strike Riffin's timely-filed comments, is legally unsupportable.

5. System Diagram Map Statement

25. Riffin has been unable to obtain a copy of the Commission's decision in *Rail System Diagram Maps*, Ex Parte No. 494 (ICC served August 21, 1991). [The decision does not appear in any ICC Reporter volume.] Consequently, Riffin is unable to comment on whether a rail carrier has been exempted from listing a line on its System Diagram Map as being subject to abandonment, prior to filing a petition for exemption, or a notice of exemption.

26. It should be clear from Riffin's transcribed message to Mr. Paschall, that Riffin had no desire to make a big issue of the apparent inconsistency in NS' Petition. ["my position would be if you correct it, I don't have to talk about it." "I'd rather not comment on it to the Board, because if I do, then I have to file a petition to revoke, then you gotta start over again, then you gotta pay another fee, and that's just kind of a pain in the ass."] But since NS has made a big issue of this inconsistency, Riffin will state his position.

27. Riffin would argue, whether the Board's regulations require a line be listed on a carrier's system diagram map prior to filing a petition for exemption or a NOE, is but one of the issues. The issue Riffin raised is whether NS' Petition contains inconsistent statements. NS has argued that when it filed its 1st quarter 2006 Environmental and Historic Reports, it did not anticipate filing a full-blown §10903 Application, and that consequently, it had no legal mandate to list the line on its system diagram map as being subject to abandonment. While NS may not have anticipated filing a §10903 Application, it obviously anticipated filing some sort of filing with the Board to abandon the Line, otherwise it never would have prepared, then filed, its Environmental and Historic Reports with the Board. And while the Board's regulations do not state explicitly why a carrier must list on its system diagram map all lines that may be subject to abandonment, it could be inferred that the underlying policy reason for this requirement, is to give notice that a line may be subject to abandonment, so that any shippers on the line, or any

other interested parties, may begin the arduous process of filing a Feeder Line Application to acquire the line. Riffin would further argue that NS' justification for not listing the Line on NS' system diagram map [it anticipated filing a Petition for Exemption, rather than a § 10903 Application] demonstrates a blatant disregard for the intent behind the system diagram map regulations [which is to give notice], and thus demonstrates a knowing and intentional disregard for the Board's procedures.

28. In a previous filing by NS, *Norfolk Southern Railway Company - Abandonment Exemption - In Baltimore County, MD*, STB Docket No. AB-290 (Sub-No. 237X), NS failed to list all of the Zip Codes and stations that line traversed. The Board, in its April 3, 2006 decision in that proceeding, stated giving proper notice was extremely important for due process purposes, then held that because NS failed to give proper notice, NS' petition would be denied.

29. It would appear from a close reading of the Board's regulations, that when a carrier files a Petition for Exemption for exemption from the full requirements of 49 U.S.C. §10903, there is no mandate for NS to even make a comment regarding whether the Line had been listed on its system diagram map as being subject to abandonment. No one could have chastised NS if it had omitted to make the statement it made on page 5 of its Petition. However, it did make the statement, and the statement obviously is contradicted by its statement on page 24 of its Petition. Rather than spending hours writing the 42-page diatribe it filed with the Board on September 6, 2006, NS could have quietly asked the Board to grant it leave to amend its Petition, then deleted the statement on page 5. The matter would have been over, the effective date of NS' Petition would not have been affected, the Board would not have had to spend time reading 42 pages of vitriolic, Riffin would not have had to spend time preparing this Reply, nor would the Board have had to address this tangential issue. [Riffin would argue the vast majority of NS' September 6, 2007 filing constituted a good example of what a frivolous filing looks like.]

6. NS' Motion to Strike Riffin's Notice of Intent to File an OFA [2].

30. 49 U.S.C. §10904 states a party may file an OFA to purchase any line of railroad which is the subject of an abandonment proceeding. If the offeror offers to purchase the line for the Net Liquidation Value of the line, then the carrier may be compelled to sell the line to the offeror for the line's Net Liquidation Value. 49 CFR §1152.27 spells out in detail, the procedures to be followed when filing an OFA. There are no restrictions on who may offer to purchase a line of

railroad subject to abandonment. The only restrictions are that authority to purchase the line may only be granted to a financially responsible person, and that the purchase price may not be less than the Net Liquidation Value of the line.

31. Riffin timely filed a Notice of Intent to File an OFA. Riffin has previously been found to be a financially responsible person. Riffin would argue that he has the absolute right to make an OFA to purchase the Line, and that there is no legal basis which would justify the Board striking Riffin's Notice of Intent to File an OFA.

32. On page 13 of its Motion, NS argued that "the high net liquidation value of the Line that obviously would be set by the Agreement," would preclude Riffin from being able to offer the Net Liquidation Value of the Line. NS has never disclosed what Norfolk has offered to purchase the Line. Without this information, Riffin would be justified in assuming the Net Liquidation Value of the Line would be the net value of the metal, plus, if the land was held in fee simple, the fair market value of the land. Without knowing the actual weight of the rails, a good first guess would be that the rails are 90-pound rail. 15.34 miles of rail at 90 pounds per yard, equates to 2,170 long tons. Presently, scrap metal is being purchased for approximately \$175 per long ton. 2,170 long tons at \$175 / long ton equals \$380,000. Less 50% to cover the cost to remove the rails, and to transport the rails to a scrap dealer, equates to \$190,000. Adding 10% for miscellaneous metal (spikes, ties plates, joint bars), brings the Net Liquidation Value of the metal to approximately \$210,000. If the right-of-way was 30-foot wide, the land area would be about 56 acres. An unknown quantity of this land is covered with water and has no fair market economic value. Portions of the Line traverse economically depressed areas, where land has a very low value. At an average land value of \$10,000 per acre, the land may have a fair market value of \$500,000. (There is very little demand for long, skinny pieces of land, since there is little one can put on that land, other than a railroad. Consequently, railroad right-of-ways often have very low fair market economic value, except if one wants to use it as a line of railroad.) If NS only has a railroad easement, then the land has no Net Liquidation Value, since title to the land would revert back to the original owners if the line of railroad were to be abandoned. If the Net Liquidation Value of the Line was found to be close to what Riffin just calculated, that would be \$700,000. Riffin has already demonstrated that he had the financial ability to purchase a line of railroad for \$725,000 in cash, with very little advance notice. Riffin would proffer that he could do it again, if he so desired.

33. NS has argued that Riffin's statement that if NS were to sell to Riffin its rights in the Cockeysville Industrial Track ("CIT"), Riffin "would get off your back," implies Riffin's Notice of Intent was filed for improper purposes (to harass NS and to pressure NS into selling its interests in the CIT to Riffin). As the Board is well aware of, Riffin has been attempting to get NS to fulfill its common carrier obligations on the CIT for over a year. Recently, Riffin filed a complaint with the Board's Office of Compliance and Enforcement, asking that Office to intercede. Were NS to sell its interests in the CIT to Riffin, that would relieve NS of its common carrier obligations on that line, and Riffin would "get off of NS' back" with regard to his demand for freight rail service on the CIT. And yes, Riffin did show up unannounced at NS' Baltimore Bayview Operations Center, and yes, Riffin did ask why NS refused to accept delivery of two rails cars consigned to Riffin, to be delivered to Riffin in Cockeysville, which rail cars had been presented to NS by CSX at the NS / CSX interchange point in Baltimore. And no, Riffin did not make any vague or overt threatening remarks to Mr. Spencer, other than possibly to say that were his superiors to learn that he had consented to have a conversation with Riffin, his superiors might fire him. (It appears that NS has dispatched a message to all NS personnel, that no one is to have a conversation with Riffin.)

34. Given the above, Riffin would argue the Board should deny NS' Motion to Strike Riffin's Notice of Intent to Make an OFA.

7. Motion to Add OFA Exemption Request to Petition [6 a].

35. 49 CFR §1121.3 (a) clearly states a party filing a petition for exemption shall provide its case-in-chief at the time it files its petition. Permitting NS to add an OFA Exemption Request to its Petition at this stage in the proceeding, clearly would contravene this regulation, and would set an undesirable precedent. For this reason, Riffin would ask that the Board deny NS' Motion to Add an OFA Exemption Request to its Petition.

36. A second reason why the Board should deny NS' Motion to Add an OFA Exemption Request to its Petition, is because the Board should summarily deny any request for an OFA exemption. And if the Board is going to deny the OFA Exemption, why set an undesirable precedent for letting a carrier append an OFA exemption to its abandonment petition several months after filing the abandonment petition.

8. NS' Request to be exempt from the OFA procedures, should be denied [6 b, c].

37. In *Norfolk Southern Railway Company - Abandonment Exemption - In Orange County, NY*, FD No. AB-290 (Sub-No. 283X) ("*Orange County*"), NS asked to be exempt from the OFA process. Riffin strongly objected to NS' request to be exempt from the OFA process. In that proceeding, Riffin made the following arguments, which he reiterates in this proceeding:

"7. Granting an exemption from 49 U.S.C. 10904 is an "unusual relief," rarely granted. From 1980 through 1996, the ICC granted an exemption from offers of financial assistance only 5 times. The Board has granted this exemption only once (in 2000). "In the past, the Commission has granted this unusual relief when the right-of-way is needed for a valid public purpose and there is no overriding public need for continued rail service." *Southern Pacific Transportation Company - Discontinuance of Service Exemption - In Los Angeles County, CA*, Docket No. AB-12 (Sub-No. 172X), decided December 1, 1994, ("SP 172X") at page 3. In the very few cases where exemption from offers of financial assistance have been granted, the Board and the ICC have enumerated criteria which justify granting this exemption:

A. In *Iowa Northern Railway Co. - Abandonment - In Blackhawk County, IA*, Docket No. AB-284 (Sub-No. 1X), decided March 28, 1988, the line to be abandoned was to be used as the corridor for a new U.S. highway 218. The line had two active shippers. One shipper elected to sell its property to the State of Iowa, then relocate its business. The other shipper had adjacent parallel alternate rail service available. (Its facility was served by two rail lines.) Using the line proposed for abandonment for rail service, would have precluded construction of the highway. No one opposed the abandonment or OFA exemption requests, nor did anyone file a Notice of Intent to File An Offer of Financial Assistance.

B. In *Chicago and North Western Transportation Company - Abandonment Exemption - In Blackhawk County, IA*, Docket No. AB-1 (Sub-No. 1X), decided July 7, 1989, the railroad asked for abandonment approval so that the right-of-way could be used for another portion of the proposed U.S. highway 218, see *Iowa Northern, supra*. The railroad arranged to provide rail service to the only shipper on the line via other tracks adjacent to the shipper's facility. The shipper also planned to sell its facility to the State of Iowa, then relocate its business. Using the line proposed for abandonment for rail service, would have precluded construction of the highway. No one opposed the abandonment or OFA exemption requests, nor did anyone file a Notice of Intent to File An Offer of Financial Assistance.

C. In *Missouri Pacific Railroad Company - Abandonment - In Harris County, TX*, Docket No. AB-3 (Sub-No. 105X), decided December 16, 1992, the line to be abandoned was to be used as the corridor for an expanded Interstate Highway 10, and as the corridor for future mass transit. The line had a number of shippers. The active shippers either elected to

relocate or to use alternate existing rail service. Using the line proposed for abandonment for rail service, would have precluded expansion of I-10. No one opposed the abandonment or OFA exemption requests, nor did anyone file a Notice of Intent to File An Offer of Financial Assistance.

D. In the *SP 172X* case, the only shipper on the line had stopped using the line prior to SP filing its Discontinuance of Service exemption. (The shipper, a bakery, had converted its facility. Previously it had received shipments of grain, which it milled. Several years before the petition was filed, the bakery stopped milling grain into flour. It bought flour, rather than grain. The flour was delivered via truck.) The Los Angeles County Mass Transit Administration ("LACMTA") previously had purchased, without ICC approval, the right-of-way (see *Southern Pacific, supra*). After finding, in the *Southern Pacific* case, *supra*, that LACMTA was the common carrier, not Southern Pacific, SP filed this Discontinuance of Service exemption. The right-of-way was to be used for mass transit purposes. Using the line proposed for abandonment for rail service, would have precluded using the corridor for mass transit purposes. No one opposed the discontinuance of service or OFA exemption requests, nor did anyone file a Notice of Intent to File An Offer of Financial Assistance.

E. In *Missouri Pacific Railroad Company – Abandonment – In Harris County, TX*, Docket No. AB-3 (Sub-No. 139X), decided December 23, 1996, the railroad wanted to abandon a 0.52 mile segment. There was one shipper on the line, who had two means of rail access. After abandonment, the line was to be sold to the shipper. The shipper would still have rail access via the other line adjacent to its property. The shipper desired to erect a structure on the right-of-way, thereby expanding its existing structure adjacent to the line. The shipper needed to start building its new structure as soon as possible, since its lease of another structure was due to expire. Using the line proposed for abandonment for rail service, would have precluded the shipper from building its warehouse on the corridor. No one opposed the discontinuance of service or OFA exemption requests, nor did anyone file a Notice of Intent to File An Offer of Financial Assistance.

F. In *The Cincinnati, New Orleans & Texas Pacific Railway Co. – Abandonment Exemption – In Cumberland and Roane Counties, TN*, STB Docket No. AB-290 (Sub-No. 208X), decided November 13, 2000, ("*Cincinnati, New Orleans*") the railroad wanted to abandon a 15.4 mile segment of a dead-end branch line that served only one shipper. After abandonment, the shipper intended to purchase the line, then operate the line as a private line. Delaying abandonment while the OFA time period ran its course, would have delayed transfer of ownership of the line to the shipper, which in turn would have delayed the beginning of necessary maintenance and rehabilitation of the line by the shipper. No one opposed the abandonment or OFA exemption requests, nor did anyone file a Notice of Intent to File An Offer of Financial Assistance.

8. The following common criteria existed in the six cases where exemption from the OFA regulations was granted:

- A. After abandonment, the shippers still had access to rail service via an adjacent line.
- B. No one opposed the abandonment or OFA exemption requests.
- C. No one filed a Notice of Intent to File An Offer of Financial Assistance.
- D. Delaying approval of the abandonment petition, while the statutory period for filing an OFA lapsed, would have delayed an important public or private undertaking.
- E. Continuing to use the line proposed for abandonment, for freight rail service, would have precluded using the line for an important public or private undertaking.

9. In the instant case, none of the criteria enumerated in the six cases that granted exemption from the OFA regulations, exists."

38. In footnote 3 of its Motion, NS referenced two cases wherein the Board granted an exemption from the OFA process. Neither of these two cases even remotely mirror the case at bar. In the *Central Michigan Railway* case [AB-308 (Sub-No. 3X), served October 31, 2003], the Board exempted the abandonment from the OFA process so that an interstate highway could be widened. [The carrier's railroad bridge crossed over the highway. The bridge's abutments were so close together, the highway could not be widened without removing the bridge and its abutments.] The sole shipper on the line did object, particularly since the shipper had recently invested over \$100,00 in rail infrastructure at its site. That shipper withdrew its objection after the Board ordered the carrier to reimburse the shipper for its \$100,000 rail infrastructure investment, and the carrier offered to subsidize the shipper's extra shipping costs due to the loss of its rail service. The carrier also received \$3 million for abandoning its railroad bridge. In the *CSX* case, [AB-55 (Sub-No. 500) served January 9, 1997], the Board had been ordered by the D.C. Circuit Court of Appeals, to grant the abandonment petition. The State of W. Virginia offered to purchase the line, to preserve it as a rail corridor (a commendable public-use). The Board exempted the abandonment from the OFA process, since it had been ordered to grant abandonment authority, and since the line was to be preserved as a rail corridor.

39. In those few cases where the Board has granted a request to be exempt from the OFA process, no one has filed a notice indicating they had a desire to purchase the line via the OFA process. In addition, the public-use project was so massive, the right-of-way was too small to accommodate both the public-use project (typically a highway), and a line of railroad.

40. In the instant case, Riffin has previously demonstrated that he has a desire, and the financial resources, to purchase lines of railroad on the east coast, he has expressed an interest in purchasing the Line, and he has indicated that he is aware of a local shipper who has a desire to

utilize the line for freight rail purposes. In addition, the proposed public-use project and the line of railroad could co-exist.

41. In the *Orange County* case cited above, the Board denied NS' request to be exempt from the OFA process. The Board justified its decision as follows:

"The OFA provisions - which permit a party genuinely interested in providing continued rail service to acquire a line for that purpose over the objections of the owner - reflect a Congressional intent that rail service be preserved whenever possible. While exemptions from 49 U.S.C. 10904 have been granted from time to time, they have been granted when the right-of-way is needed for an overriding public purpose (footnote 3) or an important private undertaking (footnote 4), and there is no apparent interest in continued rail service (footnote 5). ... Mr Riffin has shown an interest in providing continued rail service, despite the absence of an active shipper on the line for almost 2 years. Accordingly, the Board finds no basis for undercutting the Congressional objective of maintaining rail service, despite the fact that the prospects for a successful OFA are marginal." [Ultimately, in order to prevent Riffin from acquiring the line, NS requested permission from the Board to withdraw its petition for abandonment, thereby rendering Riffin's OFA moot.]

42. In *Conrail Abandonment of the River Line - In Hudson County, NJ*, STB Docket No. AB-167 (Sub-No. 1067N) [*"Hudson County"*], Conrail proposed to abandon its freight operating rights over the River Line. On February 12, 2001, Cognis Corporation, a shipper on the line, filed an OFA to subsidize, then to purchase, the line. New Jersey Transit ("NJT") filed petitions for exemption from the OFA process. [NJT had purchased the real estate under the line, and the track material, six years earlier in 1995, and proposed to begin using the line for light-rail purposes.] Even though NJT had spent tens of millions of dollars purchasing the line, and would have had to spend tens of millions of dollars to make the line compatible for both freight and light-rail uses, if NJT's exemptions were denied, the Board denied NJT's exemption petitions. [Ultimately, NJT offered Cognis a sum of money that was nearly equal to the full value of the corporation, on the condition that Cognis would abandon its efforts to acquire the line. NJT also paid the full cost to relocate another shipper on the line, Dykes Lumber Company, to another location not on the River Line. Cognis and Dykes accepted the financial incentives, then withdrew the OFA. After NJT built an alternative freight line for Conrail, the line was abandoned. NJT then built its light-rail system on the line.]

43. In the instant case, using the Line for both light-rail and freight, would not necessarily be incompatible uses. Many rail lines are used for both rail freight and light-rail. Each use is assigned an operating window. Therefore, for the foregoing reasons, Riffin would ask that the Board deny NS' request to be exempt from the OFA process.

9. Motion for Sanctions [3,4 a, b].

44. NS has asked the Board [3] to bar Riffin from any further participation in this proceeding; [4 a] to order Riffin to pay NS' costs to prepare its Motion; and [4 b] to bar Riffin from participating in any future proceedings involving NS; from appearing *pro se*; and from filing any documents with the Board without first giving the Board an opportunity to pre-screen the filing "to see if they merit summary rejection or dismissal."

45. Evidently, Riffin touched a really sensitive nerve when he filed his Comments and Notice of Intent to File an OFA. [It does have an impact on one's self-esteem and ego when a novice such as Riffin prevails on legal points and issues, as has happened the last three times Riffin has participated in a NS proceeding.] In an effort to justify these proposed sanctions, NS listed and disparaged all of Riffin's legal filings. Riffin would argue, NS' Motion should be stricken, for it is irrelevant and immaterial to the issues before the Board in this proceeding, and much of the Motion would constitute a "reply to a reply," which is not permitted by 49 CFR §1104.13 (c).

46. To grant the sanctions, would violate Riffin's constitutional Due Process Rights.

47. *Pro se* filings. As noted in footnote 1, *supra*, Riffin has two law degrees, including a L.L.M. from the U. of Pennsylvania law school. Consequently, if he desired to be admitted to practice before the Board (so that he could represent paying clients), he could. He went to law school to protect his legal rights, which he has done, and which he proposes to continue to do.

48. Riffin has read the Board's Canons of Ethics (49 CFR §§1103.10 to 1103.35), and has made a concerted effort to comply with them. Riffin would argue §1103.21 is applicable in the present controversy:

§1103.21 How far a practitioner may go in supporting a client's cause.

A Practitioner shall put forth his best effort to maintain and defend the rights of his client. Fear of disfavor of the Board or public unpopularity should NOT cause a practitioner to refrain from the full discharge of his duty. The client is entitled to the benefits of any and every remedy and defense authorized by law. The client may expect his counsel to assert every such remedy or defense. However, the practitioner shall act within the bounds of the law. A practitioner shall not violate the law or be involved in any manner of fraud or chicanery for any client." (Emphasis added.)

49. Riffin is both the client and the practitioner. As the client, he is entitled to the benefits of any and every remedy and defense authorized by law. As the practitioner, he has the duty to present and argue any and every remedy and defense authorized by law. To Riffin's knowledge, he has not violated any of the Board's rules, nor has he engaged in any conduct unbecoming a member of the bar of the Board. If he has inadvertently violated any of the Board's rules, or engaged in any conduct unbecoming a member of the bar of the Board, he would ask that he be informed of his missteps, so that he may not make such a misstep again.

50. Mr. Paschall, on the other hand, in filing NS's Motion, appears to have violated a number of the Board's Canons of Ethics, including the following:

§1103.25. Treatment of witnesses, litigants and other counsel.

(a) A practitioner shall always treat adverse witnesses and other litigants with fairness and due consideration. He should never minister to the prejudice of a client in a trial or conduct in a cause. The client has no right to demand that the practitioner representing him abuse the opposing party or indulge in offensive personal attacks.

(c) In conducting a case it is improper for a practitioner to allude to the personal history or the personal peculiarities or idiosyncracies of practitioners on the other side, or otherwise engage in personal abuse of other practitioners. (Emphasis added.)

§1103.27 Candor and fairness in dealing with other litigants.

(d) A practitioner shall not offer evidence which he knows the Board should reject, in order to get the same before the Board by argument for its admissibility, or arguments upon any point not properly calling for determination. He shall not introduce into an argument remarks or statements intended to influence the bystanders.

10. City of Norfolk May Wish To Consider Filing Its Own OFA.

51. If the City of Norfolk were to file its own OFA, NS would have the absolute right to sell the Line to the City, rather than sell the Line to Riffin, even if Riffin were to offer a higher price. 49 CFR §1152.27 (L). If the City were to purchase the Line via the Board's OFA procedures, the purchase price would be the Net Liquidation Value of the Line, which, as Riffin calculated in ¶32, *supra*, would be approximately \$700,000 for a 30-foot wide right-of-way. The cost to purchase the entire Line via the OFA process, may be less than the cost to purchase the 4.6 miles of the Line that is within the city limits of Norfolk. If Norfolk City were to purchase the Line, it would become the common carrier, and as such, could control how and when the Line was used for freight rail purposes, and would control all aspects of designing, constructing and operating on the Line. Doing this would ensure the Line was preserved for freight rail purposes.

11. CONCLUSION

52. For the foregoing reasons, Riffin would ask that the Board deny NS' Motion for Sanctions, and Riffin would further ask that the Board admonish Mr. Paschall for his unprofessional behavior in this proceeding. [As Riffin said in his telephone message, "I'd rather not comment on it, because if I do ... that's just kind of a pain in the ass." Perhaps next time, Mr. Paschall will consider walking down the smooth path, rather than the thorny path.]

Respectfully submitted,



James Riffin

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of September, 2007, a copy of the foregoing Reply to Norfolk Southern's: Motion to Strike Comment and Notice of Intent; Motion for Sanctions; Request for Leave to File Brief Reply to Comments; Motion to Add OFA Exemption Request to Petition; and Request for Exemption from OFA Procedures, was served by first class mail, postage prepaid, upon James R. Paschall, Senior General Attorney, Norfolk Southern Railway Company, Law Department, Three Commercial Place, Norfolk, VA 23510, and a copy was mailed by first class mail, postage prepaid, to Stanley A. Stein, Assistant City Manager for the City of Norfolk, Virginia, 1101 City Hall Bldg, 810 Union Street, Norfolk, VA 23510.



James Riffin