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**BEFORE THE
SURFACE TRANSPORTATION BOARD**



FINANCE DOCKET NO. 34975

**VERIFIED PETITION OF THE MARYLAND TRANSIT ADMINISTRATION
FOR DECLARATORY ORDER**

PETITION TO OPEN / FOR RECONSIDERATION

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Dated: October 28, 2007

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34975

**VERIFIED PETITION OF THE MARYLAND TRANSIT ADMINISTRATION
FOR DECLARATORY ORDER**

PETITION TO REOPEN / FOR RECONSIDERATION

1. James Riffin ("Riffin"), pursuant to the applicable regulations of the Surface Transportation Board ("STB" or "Board"), herewith files this Petition To Reopen / for Reconsideration, requesting that the Board reopen, then reconsider its October 9, 2007 decision granting the Maryland Transit Administration's ("MTA") request for a Declaratory Order stating the MTA did not need Interstate Commerce Commission approval prior to its acquisition of the Cockeysville Industrial Track ("CIT") in 1990, and for reasons states:

1. BACKGROUND INFORMATION

2. On December 22, 2006, the Maryland Transit Administration filed a Verified Petition of the Maryland Transit Administration for Declaratory Order ("Petition"), asking the Board to institute a declaratory order proceeding to confirm that (1) the MTA's May 1, 1990 acquisition of the Cockeysville Industrial Track¹ from Conrail was outside the Board's jurisdiction and was not subject to Board approval under 49 U.S.C. §10901 because common carrier obligations attached to the line were not transferred; and (2) that the MTA did not assume any common carrier rights or obligations by virtue of its acquisition of the CIT.

3. On January 11, 2007, Riffin filed a Notice of Intent to Participate as a Party, and filed Comments of James Riffin.

¹ The Line was formerly known as the Pennsylvania Railroad's Northern Central Branch. Norfolk Southern Railway acquired its rights in the Cockeysville Line via the purchase of, merger with, that portion of Conrail's assets known as the Pennsylvania Lines assets.

4. On March 30, 2007, the Board served a Decision directing the MTA to submit:
 - a. An explanation of the apparent discrepancy between the stated length of the line and the corresponding stated mileposts;
 - b. A description of and explanation for any sale or salvage of any portion of the CIT since the MTA acquired it;
 - c. A description of and explanation for any and all obstacles that could potentially inhibit freight rail service on any portion of the CIT; and
 - d. A detailed map of the CIT, showing any out-of-service sections of the line.
5. On April 20, 2007, the MTA filed its Response of the Maryland Transit Administration.
6. On May 11, 2007, Riffin filed Supplemental Comments in response to the material filed by the MTA on April 20, 2007.
7. On August 21, 2007, the MTA filed a letter ("Letter") with the Board, requesting the Board expedite its consideration of the MTA's Petition for Declaratory Order. In its Letter, the MTA made five additional statements, including the statement that there is no shipper activity on the Line and the Line is clearly no longer required or used for freight railroad purposes.
8. On September 6, 2007, Riffin filed his Reply to Petitioner's August 21, 2007 Letter to Board.
9. On October 9, 2007, the Board served its Decision, wherein the Board held the MTA did not need the prior approval of the Interstate Commerce Commission when the MTA, in 1990, acquired the real estate and track material associated with the Line.
10. Since the freight carrier on the Line, Norfolk Southern Railway Company ("NS"), did not make any comments, Riffin asked the Board to permit discovery, in order to elicit comments from NS regarding its ability to provide freight rail service on the Line. The Board **denied** Riffin's request for discovery, justifying this denial by stating:

“The information presented here is similar to the information presented in prior cases, and MTA has answered the questions about some of its statements in its petition.”

2. ARGUMENT

11. Under the provisions of 49 CFR §1115.3, Petitions for Reconsideration are permitted. §1115.3 (b) states a Petition for Reconsideration will only be granted upon a showing that the prior action will be affected materially because of new evidence or changed circumstances, or involves material error. In *New York Cross Harbor R.R. v. Surface Transp. BD.*, 374 F.3d 1177, 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).” Your Petitioner would argue the Board’s October 9, 2007 decision in the above entitled case denied Petitioner his Administrative Due Process Rights, involves material error, is contrary to precedent, and was not persuasively distinguished.

3. The Decision Contravenes Precedent and was Not Persuasively Distinguished.

3 A. PRECEDENT

12. The resolution of the instant controversy is a mixed question of fact and law. As a general rule, a person, including a state agency, that acquires an active rail line assumes a common carrier obligation to provide rail service on the line following the change in ownership. The acquisition of an active rail line and the common carrier obligation that goes with it ordinarily requires Board approval under 49 U.S.C. 10901. See *Common Carrier Status of States, State Agencies*, 363 I.C.C. 132, 133 (1980), *aff’d sub nom Simmons v. ICC*, 697 F.2d 326 (D.C. Cir. 1982).

13. In *City of Austin, TX – Acquisition – Southern Pacific Transportation Company*, Finance Docket No. 30861(A), Served November 4, 1986 (“*City of Austin*”), the Commission held that the City of Austin assumed a common carrier obligation, even though it did not intend to operate the line itself, because by acquiring full ownership of the line it necessarily assumed responsibility for contracting with, and ensuring continued service by, a rail operator.

14. In *Southern Pacific Transp. Co. ("SP") - Abandonment Exemption - Los Angeles County, CA*, Docket No. AB-12 (Sub-No. 139X), **Decided May 6, 1992** ("*Southern Pacific*"), the Commission held that the sale of some of SP's lines of railroad to the Los Angeles County Transportation Commission ("LACTC"), was subject to the Commission's jurisdiction. Op. at 508. In finding that the sale to LACTC was subject to the Commission's jurisdiction, the Commission noted that

"SP's right and ability to continue to provide service is far more restricted than the 'permanent and unconditional easement' retained by the MEC in *State of Maine*. The Agreements place substantial limitations on SP's ability to provide rail service." Op. at 507.

"(1) *Limited abandonment authority*. Under the Interim Use Agreement, LACTC has the option of acquiring the line outright and SP is precluded from opposing the sale before this agency. LACTC may file for the abandonment of the lines and SP may not oppose the abandonment.

(2) *Reduced Control after Changeover Date*. The Agreements also provide for a "Changeover Date" when LACTC exercises its right to "assume sole responsibility for the rail line or portion thereof ***." After that date, SP's interest is reduced to trackage rights to provide local freight service subject to the directives and control of LACTC. That control extends to the "management, operation and maintenance" of LACTC or its independent contractor. Specifically, "the movement of trains, cars and locomotives over and along the [tracks] shall at all times, be subject to the direction and control of LACTC's superintendent, train dispatchers and other authorized agents ***." While LACTC's operating rules must be "reasonable", it is apparent that it has broad control of the rail lines after the Changeover Date and that SP's trackage rights to provide local (but not overhead) freight service may be relegated to a secondary role behind rail passenger service. Once mass transit service is instituted on these lines, the safety and convenience of the passenger using the line may significantly restrict freight service.

We find that LACTC's acquisition of rights to these three lines is subject to our jurisdiction under §10901. The Agreements place so many restrictions on SP's right to continue to provide freight service over the [branches] that SP's rights under the Agreements **cannot be characterized as "unconditional and permanent"**. The Agreements substantially reduce SP's ability to carry out its common carrier obligation. **The most that can be said for the rights which SP retains to provide freight service over the lines following the sale is that they may not be completely abrogated without our approval.** The rights which SP retains are too circumscribed to permit it to carry out the obligations it purports to retain, and the corresponding rights which LACTC has acquired are so extensive that, under the Act, LACTC necessarily incurs an obligation to exercise these rights as a common carrier, unless it acquires abandonment or exemption authority from this agency."

(Emphasis added.)

15. In *Southern Pacific Transp. Co. - Abandonment Exemption - Los Angeles County, CA*, Docket No. AB-12 (Sub-No. 139X), Decided February 12, 1993, the Commission reaffirmed its prior assertion of jurisdiction over SP's attempt to transfer the physical assets of its lines to LACTC, and clarified its prior decision. In its Petition for Reconsideration, LACTC argued:

"Although LACTC has the right under the various agreements to request SP to stop providing freight service over the subject lines, it cannot compel cessation without Commission approval. LACTC, to be sure, may petition this commission under §10903 for abandonment by SP. Even if SP does not oppose, LACTC would still need to comply with notice and evidentiary requirements of the statute and regulations. Until the ICC specifically tells SP that it no longer has the obligation to provide freight common carrier service upon reasonable request, SP continues to have this obligation. No provision of an agreement between SP and LACTC could allow SP to refuse a reasonable request for transportation until that has occurred. [Petition, at 6.] " (Emphasis added. This is the same argument the MTA has advanced regarding the contractual obligation of NS to file to abandon the CIT if no freight traffic has moved over the line for 60 consecutive months.)

16. The Commission responded to LACTC's argument as follows:

"But as we found in our prior decision, the rights retained by SP under the agreements effecting the transfers are too limited to permit it to carry out the freight service obligation that it purports to have. 8 I.C.C.2d at 507-8. fn 4. Op. at 387.

fn 4: **"We are aware that in *American Train Dispatchers Assn. v. Chicago & N W*, 360 I.C.C. 457 (1979) and *American Train Dispatchers Ass'n v Union Pac. R. Co*, 363 I.C.C. 143, 148 (1980), both *aff'd in American Train Dispatchers Ass'n v. I.C.C.*, 671 F.2d 580 (D.C.Cir.1982), the Commission ruled and the court affirmed that the transfer of dispatching responsibilities over jointly operated track did not alter the common carrier obligations of either carrier. However, the decisions are not controlling, for LACTC is acquiring far more rights over the lines than the responsibilities transferred in these decisions. Moreover, in these cases, all parties were already carriers, whereas here LACTC would not be a carrier unless we declare it to have a common carrier obligation as a result of this transaction."** (Emphasis added.)

"LACTC also reiterates that it is not holding itself out to perform common carrier rail service and lacks the ability to do so. As we found in our prior decision, however, the rights that LACTC has acquired are so extensive that LACTC necessarily incurs an obligation to exercise these rights as a common carrier in the absence of abandonment or exemption authority from this agency. 8 I.C.C.2d at 508. Op. at 387-388.

“As discussed in our prior decision, the test of whether an entity acquiring railroad assets is subject to 49 U.S.C. §10901 is whether it is acquiring sufficient power over the operation of these assets to justify finding the transaction to be an acquisition of a “railroad line” under §10901(a)(3). There is a spectrum of cases ranging from cases like Finance Docket 31847 *et al.*, *State of Maine, Department of Transportation - Acquisition and Operation Exemption - Maine Central Railroad Company* (unprinted), served May 24, 1991, where the purchasing State acquired minimal operational power over the lines, to cases like Finance Docket No. 30816(A), *City of Austin, TX, - Acquisition - Southern Pacific Transportation Company* (unprinted), served November 4, 1986, where the City acquired all transportation operational rights from the selling carrier before a transfer to an operator. Thus, the greater the control by the buyer, the more likely the entity is subject to regulation under §10901. Op. at 388.

“In this case, LACTC is acquiring substantial power over the lines, and SP is retaining very little power. We are particularly impressed with two significant differences with *State of Maine, supra*. First, LACTC can effectively force SP to curtail its freight service as passenger service expands, and freight shippers would have no recourse against LACTC if LACTC were found not to acquire a common carrier obligation. Second, SP has neither the right nor the obligation to make repairs so that freight service will not deteriorate, in contrast to the easement retained and the obligation to make repairs in *State of Maine*. (Emphasis added.) Op. at 388.

“LACTC argues that our approval of SP’s abandonments would have mooted the issue of whether the parties acted lawfully in the prior transfer of the lines’ real property to LACTC. This approach would have the Commission acquiesce in LACTC’s unauthorized acquisition of control over lines. Our statutory responsibilities dictate that we require carriers to follow the statutory requirements for transferring the physical assets of rail lines. Op. at 388-389.

17. In *Maine, DOT – Acquisition Exemption, ME Central R Co.*, 81 C.C. 2d 835, 836-37 (1991), the Commission stated it had “exclusive jurisdiction over the acquisition of a railroad line by a non-carrier (including a State) where the common carrier rights and obligations are also to be transferred, in whole or in part.” The commission went on to say:

“Moreover, nothing in the transfer of underlying assets in this case would disenable MEC from meeting its common carrier obligation. The permanent and unconditional easement which it retains ensures MEC (and its successors and assigns) BOTH the full right and necessary access to maintain, operate and renew the line. In short, this record persuades us that there will be no alteration of any common carrier obligations here and MEC has done nothing that impairs its ability to fulfill its continuing common carrier obligation. MEC has both the intent and UNCONDITIONAL ability to continue to assume and exercise its common carrier rights and obligations.” (Emphasis added.)

18. The *State of Maine* case held the following were to be critically evaluated:

- A. Is the retained freight easement both permanent and **unconditional**?
- B. Does the transfer of underlying assets **disenable** the freight carrier from meeting its common carrier obligations?
- C. Does the rail carrier retain the **full right and obligation** to maintain, operate and renew the line?
- D. Does the transfer **impair** the freight carrier's ability to fulfill its common carrier obligations?
- E. Does the freight carrier have the **unconditional ability** to continue to exercise its common carriers rights and obligations?

3 B. FINDINGS OF FACT

In its Decision, the Board made the following findings:

19. **Perpetual Easement / Abandonment of the Line.** The Agreement of Sale and the Deed, both state Conrail retained a permanent, exclusive, and assignable freight operating easement over the CIT. However, unlike the *State of Maine* case, and more like the *Southern Pacific* case, the Operating Agreement **requires** the freight carrier to seek abandonment authority to abandon the Line if the Line has not been used for freight service for 60 consecutive months. And like the *Southern Pacific* case, the MTA **"can effectively force SP to curtail its freight service ***, and freight shippers would have no recourse against LACTC if LACTC were found not to acquire a common carrier obligation.** In the instant case, the Board did not find the MTA's ability to effectively force the freight carrier to abandon the Line, to be objectionable. The only justification offered for this break with the *Southern Pacific* precedent, was "the Board would still have to authorize the abandonment." This exact same argument was raised by LACTC in its Petition for Reconsideration. See ¶15, *supra*. The Commission's retort to LACTC's argument was to affirm its previous decision (wherein the Commission stated: "The most that can be said for the rights which SP retains to provide freight service over the lines

following the sale is that they may not be completely abrogated without our approval.”)²

20. In *Wisconsin Department of Transportation – Petition for Declaratory Order*, STB Finance Docket No. 34764, Served December 2, 2005, the Board found Section 2.1 (c) of the operating agreement, which stated “Provided Operator is not in default, Operator shall have the right to renew this Agreement for successive additional ten (10) year periods,” to be inconsistent with the “perpetual easement to operate the line,” language contained in the operating agreement. Riffin would argue the language in the instant Operating Agreement, which **compels** the freight carrier to seek abandonment, **even if the carrier does NOT wish to abandon the Line**, if there is no service on the Line for 60 consecutive months, is totally contrary to the concept of the phrase, “permanent and perpetual easement.” **The decision to seek abandonment authority should be solely that of the carrier, and should be reached freely, without any contractual coercion.** Anything less flies in the face of the meaning of the words “permanent” and “perpetual.”

21. The Board found that the “MTA obtained substantial control over certain aspects of rail operations over the CIT, including hours of freight operation, repair and maintenance of the track, dispatch of trains, and improvements to the track.” Op. at 5. Regarding **hours of freight operation**, the Board found that while the Agreement limited the freight carrier’s hours of operation, limiting a freight carrier’s hours of operation does not *per se* convey common carrier obligations upon the MTA, nor does it *per se* interfere with the freight carrier’s ability to carry out its common carrier obligations. In ¶ 29 of **Comments of Riffin**, Riffin specifically stated he had seen locomotives stranded at the end of the CIT due to insufficient operating window time to return to Baltimore. Riffin specifically asked for discovery “to ascertain how often this occurred, to ascertain whether the freight-operating window allocated to the railroad was in fact adequate, and did not cause undue interference with freight operations.” Since the Board refused to permit discovery, Riffin was **improperly restrained** from asking the freight carrier if

² Riffin finds the Board’s reasoning to be perplexing. If there is no traffic for 60 months, the freight carrier is **contractually required** to file for abandonment. If the freight carrier desired to abandon the Line, there would be no problem. If the rail carrier did not desire to abandon the Line, there would be a major problem: By contract, the carrier would be required to file an abandonment application. If the carrier did not truly desire to abandon the Line, how would the carrier communicate this to the Board? By saying: “I am filing an abandonment application. However, I do not want the Board to approve it.” [This would be tantamount to a defendant saying to a judge, “Your Honor, I am being coerced to plead guilty, but I don’t really want to plead guilty, so please do not accept my guilty plea.”]

the hours of operation specified in the Operating Agreement, were adequate. [During conversations with NS operating personnel, Riffin was told the operating hours were inadequate.] Riffin would argue denying Riffin's request for discovery limited his ability to ascertain facts which are materially relevant to the issue of whether the operating hours contained in the Operating Agreement are in fact adequate, and the Board's denial of discovery violated Riffin's Administrative Due Process Rights. Furthermore, the denial of discovery resulted in the Board improperly issuing its decision following a review of only a partial record. Riffin would argue denial of discovery on the issue of the adequacy of the hours of operation contained in the Operating Agreement, was arbitrary, capricious, an abuse of discretion or otherwise contrary to law, and constituted material error.

22. **Maintenance of the Line.** Under the Operating Agreement, the MTA is responsible for general maintenance of the Line, and the freight railroad has the right to inspect the MTA's maintenance of the Line. The Board did not address the issue that the Operating Agreement did not provide the freight rail carrier with any recourse if its was dissatisfied with the MTA's maintenance of the Line, the Board did not address the issue that the Operating Agreement did not bestow upon the freight carrier ultimate responsibility for maintenance of the Line, nor did the Board address the fact that substantial portions of the Line are unfit for freight rail service, due to the total lack of maintenance by the MTA of those portions of the Line. As was stated in ¶16, *supra*, in the *Southern Pacific Petition for Reconsideration* case, the Commission stated:

"We are particularly impressed with two significant differences with *State of Maine, supra*. *** Second, SP has neither the right nor the obligation to make repairs so that freight service will not deteriorate, in contrast to the easement retained and the obligation to make repairs in *State of Maine*. (Emphasis added.) Op. at 388.

23. In the 1992 *Southern Pacific* case, the Commission stated:

"A *bona fide* 'holding coupled with the ability to carry for hire' is the principal test for a common carrier. Op. at 506. (Emphasis added.)

24. Riffin would argue since the ability to carry for hire, is a part of the principal test for a common carrier, and since the ability to carry for hire on a line of railroad is dependent upon the line of railroad being sufficiently maintained to permit carriage over the line of railroad, the obligation to maintain one's line cannot be delegated, without simultaneously transferring common carrier status. Therefore, the party who has the ultimate responsibility for the

maintenance of a rail line **becomes the common carrier**. And while the common carrier may authorize another party to perform the actual maintenance work, and presumably would retain the right to inspect the third-party's work, a common carrier **may not** delegate to a third-party ultimate responsibility for maintenance of its line. In the event the third-party fails to properly maintain the line, the responsibility for maintaining the line devolves upon the common carrier. Riffin would argue, if common carrier status on the part of the transferee is to be avoided, the Operating Agreement **must** contain language that **specifically and unequivocally** states the freight carrier retains the ultimate responsibility for maintaining the line, and that if the third-party (MTA) fails to properly maintain the Line, the freight carrier has the **right, and obligation**, to perform the maintenance. In the instant case, the Operating Agreement states **the MTA has the ultimate responsibility** for maintaining the Line, and the only thing the freight carrier may do, is inspect the Line. The Operating Agreement **does not** state that if upon inspection of the MTA's maintenance of the Line, the freight carrier finds the maintenance to be sub-par or lacking, then the freight carrier has the **right** to perform the maintenance work, then bill the third-party (MTA) for the cost of maintaining the Line. Given the language contained in the Operating Agreement, and the total lack of maintenance upon that section of the Line between MP 12.8 and 15.4, Riffin would argue, the freight carrier no longer has the **ability** to provide carriage for hire on this portion of the Line, and consequently, common carrier status has passed to the MTA. Given the language in the Operating Agreement, the absence of any input from the freight carrier on this material issue, and the evidence in the record indicating there has been no maintenance on that portion of the CIT between MP 12.8 and 15.4, Riffin would argue the Board's decision was based upon an incomplete record, and would further argue that the denial of discovery to address this lack-of-maintenance issue, denied Riffin his Administrative Due Process Rights, was arbitrary, capricious, an abuse of discretion or otherwise contrary to law, and constituted material error.

25. In ¶8 B of Riffin's Reply to Petitioner's August 21, 2007 Letter to Board, Riffin provided the Board with photographs depicting the absence of the grade crossing at Cockeysville Road. Riffin pointed out that this grade crossing removal had been authorized by the MTA. In ¶41 of Riffin's Supplemental Comments, Riffin pointed out that Dave Gunther, an MTA employee, stated the MTA had "removed a section of rail and placed a barricade to prohibit movement on this track." In ¶44 of Riffin's Supplemental Comments, Riffin pointed out that the MTA had erected another barricade on the northern portion of the Wye at Warren Road. In

¶46 of Riffin's Supplemental Comments, Riffin pointed out that the MTA had sanctioned the removal of 1,800 feet of track from the right-of-way. In **¶47 of Riffin's Supplemental Comments**, Riffin pointed out that the MTA sanctioned the removal of the tracks and a railroad bridge which serviced a number of shippers along the Beaver Dam Quarry branch of the CIT, all of whom have expressed an interest in receiving freight rail service. In **¶48 of Riffin's Supplemental Comments**, Riffin pointed out that the MTA had executed leases with a number of local businesses, granting these local businesses the right to turn the right-of-way into a parking lot, thereby burying the tracks under several inches of gravel and asphalt. In **¶53 of Riffin's Supplemental Comments**, Riffin pointed out that the MTA's failure to maintain the right-of-way between Warren Road, at MP 12.8, and Cockeysville Road, at MP 13.7, had caused the tracks to deteriorate to the point where the tracks were unsuitable for even 'excepted' service. In **¶33 of Comments of James Riffin**, and again in **¶40 of Riffin's Supplemental Comments**, Riffin pointed out that the MTA had sanctioned the removal of the railroad bridge at MP 13.9, which carried the Line over York Road, and had removed the track material from MP 13.9 to the end of the Line at MP 15.4, a distance of 1.5 miles. The MTA made an unsubstantiated statement that the track material had been removed prior to the MTA's 1990 acquisition of the Line. If the track material in the portion of the Line between MP 13.9 and MP 15.4 had been removed prior to the MTA's 1990 acquisition of the Line, then (1) there would not have been a pile of rail at MP 14.1, and (2) title to any rail that did exist at MP 14.1, would not have passed to the MTA at the time of the 1990 acquisition. The MTA has steadfastly maintained that it **does** have title to the rail at MP 14.1, and has exercised dominion and control over that pile of rail, by granting the Walkersville Southern Railroad permission to take possession of, and to remove, several thousand feet of that rail. In addition, the contractor who actually removed the railroad bridge that had carried the Line over York Road, has told Riffin that the rails were intact prior to the contractor removing the railroad bridge. Furthermore, additional individuals have told Riffin that the rails between York Road at MP 13.9 and Beaver Dam Run, at MP 14.5, were intact prior to the removal of the York Road railroad bridge, and that just prior to the removal of the York Road railroad bridge, rail cars that had not been properly secured, rolled down the track from MP 12.8 or so, to MP 14.5, where the rail cars derailed. Based on this information, Riffin would argue the MTA's statement that the rails were removed prior to its 1990 acquisition of the CIT, is a false statement, and that discovery is not only warranted, but necessary, to ascertain more precisely when these rails were removed, and who gave the order to remove them. Riffin would further argue the denial of discovery resulted in the Board improperly issuing its decision

following a review of only a partial record, a critical portion of which contains a false statement which is highly relevant and material. For these reasons, Riffin would argue denial of discovery on the issue of maintenance of the Line, particularly in light of the evidence submitted by Riffin indicating the MTA's maintenance of the Line was sub-par at best, deprived Riffin of his Administrative Due Process Rights, was arbitrary, capricious, an abuse of discretion or otherwise contrary to law, and constituted material error.

26. Management of the Line and Dispatching. Under the Operating Agreement, the MTA manages the Line and controls and dispatches freight trains using the Line. The Board held the MTA's control over dispatching does not *per se* transfer common carrier obligations to the MTA. The Board did not address the issue of the MTA's management of the Line. The Board found the Operating Agreement stated the MTA's control over dispatching was structured in such a manner as to minimize delays to the freight rail carrier. Because discovery was denied, no evidence was adduced to ascertain whether the MTA's control over dispatching caused more than minimal delays to the freight carrier. [In conversations with Riffin, NS operating personnel stated the MTA's dispatching often substantially delayed NS' freight operations, often resulting in locomotives and rail cars being stranded at the North Avenue Transload Facility. Because discovery was denied, Riffin was unable to ask NS personnel how often its freight operations were delayed, and for how long.] Given the fact that the record contained evidence indicating the MTA's dispatching of the Line has caused substantial delays to the freight rail carrier, the Board's failure to permit discovery to ascertain how often, and for how long, the freight carrier's operations were delayed, [and thus, to address the material issue of whether the MTA's dispatching of the Line caused more than minimal delays for the freight carrier], violated Riffin's Administrative Due Process Rights, was arbitrary, capricious, an abuse of discretion or otherwise contrary to law, and constituted material error.

27. Improvement to the Line. The Operating Agreement grants the MTA the right to make changes to the Line, which the MTA has done. However, the Operating Agreement also expressly states that it does not allow the MTA's improvements to "affect" the freight operator's abilities to meet its common carrier obligations. The Board held the MTA's "right to make improvements did not give, by the terms of the agreement, the commuter agency 'sufficient rights to materially interfere with ... freight operations.' " (Emphasis added.) In the Commission's 1992 *Southern Pacific* decision, at p. 506, the Commission stated: "We look at what an entity does, rather than what it says it does." In the instant case, the Board only

looked at what the MTA said it had a right to do, rather than looking at what the MTA **has actually done, and how the MTA's actions have impacted the freight carrier.** So while the language contained in the Operating Agreement may not appear to convey to the MTA common carrier rights and obligations, it is not the language that controls, but how that language has been interpreted by the MTA, and what the MTA has done in reliance upon its interpretation of the Operating Agreement language. The Board's denial of discovery, prevented Riffin from asking the freight carrier, and shippers along the Line, whether placing the Line out of service for a year, while the MTA double-tracked the Line, **without first seeking Board approval,** "affected" the freight carrier's ability to meet its common carrier obligation. And since the Board **did not** address the issue of whether placing the Line out of service for a year, "affected" the freight carrier's ability to meet its common carrier obligation, Riffin would argue the Board's decision was based on an incomplete record. Nor did the Board address the issue that Riffin requested freight service in August, 2006, which NS did not provide, due to its inability to use the Line during the double-tracking project. Riffin would argue there was sufficient evidence in the record to indicate *per se*, the MTA's decision to put the line out-of-service for a year, materially interfered with NS' ability to provide freight service on the Line. For these reasons, Riffin would argue the Board's denial of discovery on this issue, and the Board's failure to address this issue, deprived Riffin of his Administrative Due Process Rights, was arbitrary, capricious, an abuse of discretion or otherwise contrary to law, and constituted material error.

28. Priority of Passenger Operations. The Board found that giving light rail preference over freight service, does not *per se* convey common carrier obligations upon the transit agency, **providing** the freight railroad retains a reasonable opportunity to provide service. Because the Board denied discovery, Riffin was unable to ascertain whether giving light rail preference over freight service has denied NS a reasonable opportunity to provide service. As stated previously, NS personnel have stated the freight operating window was inadequate, and Riffin has observed locomotives stranded at the end of the Line, due to insufficient time to get the locomotives back to Baltimore before the freight operating window expired. Furthermore, NS continues to refuse to provide service to Riffin in Cockeysville, on the grounds that its operating window is so constrained, it cannot provide service to Cockeysville. The Board's denial of discovery, has prevented Riffin from asking NS if the MTA's light rail preference over freight service, has denied NS a reasonable opportunity to provide service. Without input from the freight carrier on this material issue, Riffin would argue the Board's decision was based upon a partial record, and

the Board's decision would not withstand scrutiny once the record was more fully developed. For these reasons, Riffin would argue the denial of discovery on the issue of light rail preference over freight service, denied Riffin his Administrative Due Process Rights, was arbitrary, capricious, an abuse of discretion or otherwise contrary to law, and constituted material error.

29. The Board found the Operating Agreement contained language which stated the Operating Agreement should not be construed in a manner that would interfere with the freight carrier's ability to provide service to present and future customers. Riffin provided the Board with evidence that the MTA had removed track infrastructure, had sold a portion of the Line, and had failed to maintain that portion of the Line north of milepost 12.8 (at Warren Road). Riffin argued these actions on the part of the MTA made it impossible for NS to provide service to either Riffin (a new customer), or to other new shippers who have expressed a desire to have freight rail service in Cockeysville. The Board did not permit discovery to ascertain whether any of the MTA's actions materially interfered with the freight carrier's ability to provide service on the CIT, nor did the Board address any of these issues. As was stated in ¶27, *supra*, in the Commission's 1992 *Southern Pacific* decision, at p. 506, the Commission stated: **"We look at what an entity does, rather than what it says it does."** Riffin would argue the denial of discovery on the issue of whether the Operating Agreement **has been** construed in a manner that would interfere with the freight carrier's ability to provide service to present and future customers, denied Riffin his Administrative Due Process Rights, was arbitrary, capricious, an abuse of discretion or otherwise contrary to law, and constituted material error.

30. The Board acknowledged Riffin has argued the MTA effected a number of physical changes that have created interruptions to freight service. The Board then summarily dismissed all of the evidence Riffin provided to the Board showing NS no longer has the **ability** to provide common carrier service to Cockeysville, stating:

The "MTA addresses the alleged interruptions and demonstrates that it has made no sale or salvage of any portion of the CIT that would interfere with or inhibit freight rail service. *** Moreover, the record includes no formal complaints of freight service interruptions caused by virtue of MTA's purchase of the CIT or its control over aspects of CIT usage."

31. The only thing the MTA provided the Board was a verified statement stating that it had not done anything which, **in the MTA's opinion**, would interfere with freight rail service. Riffin would argue, the MTA's opinion is not relevant. The opinion that is relevant and material, is that

of NS, the CIT freight carrier. To date, NS has been unwilling to provide any comment. And without discovery, NS will continue to remain silent. And without any comment from NS regarding its ability to provide service on the CIT, any conclusions regarding the impact of the MTA's action with regard to the CIT, are not based on credible evidence, are illusory, and have no basis at law. The Board's reliance on the absence of any **formal** complaint being filed, seems to be far-fetched, particularly in light of the **numerous times** Riffin has complained in his previous filings with the Board, about NS' refusal to deliver rail cars to Riffin in Cockeysville, including Riffin's most recent **formal written complaint**, addressed to Melvin Clemens, a copy of which was appended to Riffin's Reply to Petitioner's August 21, 2007 Letter To Board. It would appear, the only formal complaint the Board is willing to give any credence to, is a 49 CFR §1002.2 (56) (ii) complaint, and then only if accompanied by the requisite \$7,000 + filing fee.

32. The Board justified its denial of discovery by stating:

“However, the information presented here is similar to the information presented in prior cases, and MTA has answered the questions about some of its statements in its petition.”

33. Whether the information presented in the instant case is similar to the information presented in prior cases, has no relevance, since the inquiry in this case is whether the record before the Board has been sufficiently developed to support a decision. And likewise, whether the MTA has answered questions about some of its statements in its petition, has little relevance to the issue of whether the actions of the MTA have materially interfered with NS' ability to provide freight rail service to all points along the Line, including to MP 15.4. To address the critical issue of whether the MTA's actions have materially interfered with NS' ability to provide freight service along all portions of the CIT, questions addressing this issue must be propounded to NS, and NS must be compelled to answer those questions. As the Commission stated in the *Southern Pacific* case: **“We look at what an entity does, rather than what it says it does.”** To date, the Board has only looked at what the MTA says it does. The Board has yet to look at what the MTA, and NS, have actually done.

4. CONCLUSION

34. Your Petitioner has argued the Board's October 9, 2007 decision contains material error, and if discovery were permitted, new evidence or changed circumstances would be adduced, which would materially affect the outcome in this case. Specifically, your Petitioner has argued the instant case is more like the Commission's 1992 *Southern Pacific* case, wherein the Commission found it did have jurisdiction over the sale of the lines of railroad, since the easement retained by SP was not unconditional, the buyer was acquiring substantial power over the lines, and SP was retaining very little power. The Commission was particularly impressed by two significant differences between the *Southern Pacific* case and the *State of Maine* case: First, the buyer had the right to effectively force SP to curtail its freight service and freight shippers would have no recourse against the buyer if the buyer was found not to acquire a common carrier obligation, which is quite similar to the case at bar, and second, SP had neither the right nor the obligation to make repairs on the lines, which also is similar to the case at bar. When the buyer attempted to persuade the Commission not to subject its purchase of the lines to the Commission's jurisdiction, arguing that would render the issue of the unauthorized sale moot, the Commission replied:

"This approach would have the Commission acquiesce in LACTC's unauthorized acquisition of control over lines. Our statutory responsibilities dictate that we require carriers to follow the statutory requirements for transferring the physical assets of rail lines. Op. at 388-389.

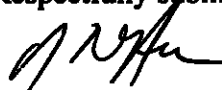
35. Your Petitioner has argued the easement retained by the seller in this case, was not unconditional, for the MTA retained the right to force the freight carrier to file to abandon the Line. Your Petitioner has presented evidence and has argued the actions of the MTA have disabled the freight carrier from meeting its common carrier obligations. Your Petitioner has pointed out that the Operating Agreement **does not** state the freight carrier has the full right and obligation to maintain, operate and renew the line. [The freight carrier only has the right to inspect the line. The Operating Agreement does not indicate what, if any, recourse would be available to the freight carrier were it to find the MTA's maintenance of the Line to be unacceptable.] In the Commission's 1992 *Southern Pacific* decision, at p. 506, the Commission stated: **"We look at what an entity does, rather than what it says it does."** In the case at bar, the Board has only looked at what the MTA has said it does. The Board chose not to look at what the MTA has in fact done, nor did the Board permit discovery, in order to solicit comments from the present freight carrier regarding its ability to provide freight service on the CIT.

36. Your Petitioner has argued the rights which the freight carrier retained, are too circumscribed to permit it to carry out the obligations it purports to retain, and the corresponding rights which the MTA has acquired, are so extensive that, under the Interstate Commerce Act, the MTA necessarily incurs an obligation to exercise these rights as a common carrier.

37. In conclusion, your Petitioner would argue denial of discovery, for the purpose of eliciting comments from NS regarding its ability to provide freight service on the CIT, particularly in light of the evidence submitted by Riffin indicating the MTA's management, operation and maintenance of the Line, materially interfered with NS' ability to provide freight service along the entire length of the Line, deprived Riffin of his Administrative Due Process Rights, was arbitrary, capricious, an abuse of discretion or otherwise contrary to law, and constituted material error.

38. WHEREFORE, your Petitioner would ask that the Board reopen the above entitled case, order discovery be permitted so that a more complete record can be developed, then reconsider its October 9, 2007 decision in light of the new evidence adduced via discovery.

Respectfully submitted,



James Riffin, Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of October, 2007, a copy of the foregoing Petition to Reopen / To Reconsider, was served by first class mail, postage prepaid, upon Charles A. Spitulnik, Kaplan Kirsch Rockwell, Ste 905, 1001 Connecticut Ave., N.W., Washington, DC 20036, counsel for the MTA, and upon Eric Strohmeyer, CNJ Rail Corporation, 833 Carnoustie Drive, Bridgewater, NJ 08807.



James Riffin