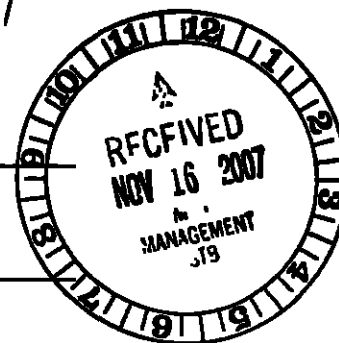


220703
220704

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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



FILED

NOV 16 2007

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

SUPP.

**PETITION
TO STAY AND TO RECONSIDER
DECISION SERVED ON NOVEMBER 6, 2007**

1. Now comes James Riffin ("Riffin"), who herewith petitions the Board to STAY and to RECONSIDER the Board's Decision in the above entitled case, which Decision was served on November 6, 2007, and for reasons states:

BACKGROUND INFORMATION

2 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")

3. 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.

4. On September 6, 2007, NS filed a 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 a Request for exemption from OFA procedures

5 On September 26, 2007, Riffin filed his Response to NS' Motions.

**ENTERED
Office of Proceedings**

NOV 16 2007

**Part of
Public Record**

FILED

NOV 16 2007

STB BOARD

6. On November 6, 2007, the Board served a Decision wherein the Board granted NS' Petition for Exemption to abandon the Line which is the subject of the above entitled case, and further granted NS' motion for exemption from the OFA process.

7. The Board premised its decision to exempt the abandonment from the OFA process on the premise that there was nothing in the record to show that there was any potential for continued rail service on the Line.

8. The Board gave no weight to Riffin's statement that a potential shipper had expressed an interest in utilizing the Line, on the grounds that Riffin had failed to identify this potential shipper.

9. As a part of Riffin's Notice of Intent to File an Offer of Financial Assistance, Riffin requested NS provide Riffin with the names of shippers who had utilized the Line. NS did not provide Riffin with this shipper-information

10 As a part of its Decision, the Board ordered NS to serve a copy of the Board's Decision on all shippers located on the line.

11 On November 9, 2007, NS certified to the Board that it had mailed a copy of the Board's Decision to four shippers located on the Line. In its Certification, NS identified four shippers who had utilized the Line: Georgia Pacific (now BlueLinx); Asphalt Roads and Materials Company, Inc ; H B Hunter Company; and Vulcan Construction Materials

12 On November 13, 2007, Riffin telephoned each of the four shippers. During Riffin's conversations with the four shippers, he was told the following:

A. **Georgia Pacific / BlueLinx:** Riffin spoke with Bill Buchholz at BlueLinx's Virginia Beach facility, which facility is located near MP 5.0, or just beyond the Norfolk City city line, which is located at or near MP 4.8. Mr. Buchholz was ecstatic that there was a possibility that BlueLinx might be able to regain its freight rail service, for some years prior, NS had adamantly refused to continue to provide freight rail service to the Georgia Pacific site. Due to a lack of freight rail service, BlueLinx has been forced to rely exclusively on motor carriers for delivery of its building material products, at considerable extra expense. Mr. Buchholz further indicated

that numerous truckloads of materials moved in and out of his facility on a daily basis, and expressed a great interest in the possibility of regaining freight rail service. As the Board is well aware, Georgia Pacific / BlueLinx is a major shipper throughout the United States.

B H. B. Hunter Company: Riffin spoke with Bill Barrett, president of the H.B. Hunter Company. Mr. Barrett indicated that he had been told that the Line was being abandoned, and that there was nothing he could do to prevent that from happening. He further indicated he was the shipper that had received the last rail car delivery made by NS in August of 2006. Mr. Barrett informed Riffin that his company made ice cream toppings, and that his major raw ingredient was corn syrup from Dayton, Ohio. After the loss of his freight rail service, he had to resort to motor carriers for delivery of his corn syrup, which was sent by rail to Maryland, where it was then transloaded onto trucks, to be delivered to his plant in Norfolk City. After the loss of his direct freight rail service, his transportation costs increased by \$1,000.00 per truck load, or about \$4,000.00 per rail car load. This annual \$50,000.00 increase in costs, has seriously adversely impacted his ability to obtain customers, since the ice cream toppings industry is highly competitive, and margins are razor thin. He also indicated that due to the recent substantial increase in fuel costs, his increased transportation costs were escalating. Needless to say, he was very upset when he lost his freight rail service, and would be truly appreciative if that freight rail service were to be made available once again.

C. Asphalt Roads and Materials Company, Inc.: Riffin spoke with Tucker Beaman at Asphalt Roads and Materials Company, Inc., which is located near MP 5.0.

Mr. Beaman stated his company made bituminous asphalt paving material from aggregates and asphalt. Some time ago, NS informed his company that NS would no longer provide freight rail service to his company. Once his company's freight rail service was terminated, his company had to resort to motor carriers to transport his raw materials to his plant site. Whereas previously, he took delivery of rail car loads of aggregates and asphalt, after the loss of his freight rail service, his raw materials were shipped via rail to a transload site, where the raw materials were then transloaded onto trucks, for the final carry to his plant site, all at considerably extra transportation costs. He too indicated he would be quite pleased if freight rail service were to be restored on the Line.

D. Vulcan Construction Materials: Riffin spoke with John Barnes, Vulcan's transportation manager. Mr. Barnes indicated Vulcan had an aggregates distribution facility in

Virginia Beach, Virginia, near the end of the Line. When NS informed Vulcan that it no longer would provide Vulcan with freight rail service at Vulcan's Virginia Beach distribution facility, Vulcan had to close the facility, due to the high cost of transporting aggregates by truck to that facility. Vulcan presently services its clients via trucks, at considerably higher transportation costs, from other more distant aggregates distribution sites.

13 Riffin stated a potential new shipper recently had relocated to the Norfolk area, and that this potential new shipper desired rail service. Riffin did not disclose the identity of this new shipper for proprietary reasons. Were Riffin to disclose the identity of this new shipper (which would be a substantial shipper), NS could have concluded that the traffic that would be generated by this new shipper, was so substantial, that it would be economically prudent NOT to abandon the Line. And had NS reached this conclusion, it could have withdrawn its abandonment exemption, and thus would have been unjustly enriched due to the uncompensated marketing efforts of Riffin. Needless to say, Riffin was unwilling to provide NS with information that could enrich NS, with no compensation for Riffin. And for this reason, Riffin would argue NS had no right to know, and the Board was unjustified in rejecting Riffin's Notice of Intent to File and Offer of Financial Assistance, solely because Riffin was unwilling to disclose this privileged proprietary information.

**IS THIS APPEAL BY RIGHT, OR IS IT DISCRETIONARY?
IS A STAY AUTOMATIC, OR DISCRETIONARY?**

14 Under the provisions of 49 CFR 1115.2, an appeal as of right is permitted, and "the timely filing of an appeal to an initial decision will stay the effect of the action pending determination of the appeal. This category includes the initial decision of an individual Board Member.

15. Under the provision of 49 CFR 1115.3, a discretionary appeal of an entire Board decision is permitted. An appeal under this section does not automatically stay the decision being appealed

16. In the instant case, the Decision expressly stated Commissioner Mulvey did not participate, and thus the Decision was NOT made by the entire Board. The Rules do not

state which rule, 1115.2 or 1115.3, is applicable when two Board Members, rather than an individual Board Member, participate in a decision.

17. Since the Decision in this case was not made by the ENTIRE Board [which is a requirement of 49 CFR 1115.3 (a)], Riffin would argue 49 CFR 1115.2 is applicable, and as such, the Board's November 6, 2007 Decision is **automatically stayed** by the filing of this Petition for Stay and Reconsideration.

18. In the event the Board finds a stay is not automatic, Riffin would argue the shipper information he is presenting to the Board, constitutes new evidence which was not available prior to the Board making its Decision, and this new evidence renders the Board's finding of facts [that there is no potential for continued rail service on the Line; that no shipper has an interest in continued common carrier service] erroneous and unsupported by substantial evidence of record. And given the strength of this new evidence, the fact that Riffin requested NS provide Riffin with prior shipper information, the fact that NS refused to provide Riffin, or the Board, with this information, and the fact that NS misled the Board into believing that no shipper on the Line had a desire for freight rail service, Riffin would argue a Stay should be automatically granted, or in the alternative, should be granted to prevent any salvaging of the Line prior to the Board reconsidering its November 6, 2007 Decision

19. The Board will grant a stay in a proceeding where (a) there is a substantial likelihood that the movant will prevail on the merits, (b) the movant will be irreparably harmed absent the stay, (c) the stay would not harm other parties, and (d) issuance of a stay is in the public interest. *Hilton v Braunsell*, 481 U.S. 770, 776 (1987); *Washington Metropolitan Area Transit Commission v Holiday Tours, Inc* 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Association v FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). Moreover, the board has the power to stay its own decision without such showings on the merits where it needs additional time to consider difficult issues presented in a case. *City of Alameda - Acquisition Exemption - Alameda Belt Line*, STB Finance Docket No. 34798 (served December 15, 2005) (stay granted) Such is the case here

20. Administrative Due Process requires both notice and a meaningful opportunity to be heard. In the instant case, NS unlawfully withheld material shipper evidence, which evidence,

had it been disclosed, would have shown NS unlawfully refused to provide service to shippers on the Line, knowingly and fraudulently misled the Board into believing, due to the absence of any traffic on the Line [due to NS' refusal to provide any service on the Line, **rather than the absence of any request for service on the Line**], that there was no desire for freight rail service on the Line. Because the Board was misled into believing none of the existing shippers on the Line had an interest in freight rail service, the Board denied Riffin any opportunity to engage in any fact-finding, and thus denied Riffin his Administrative Due Process Right to engage in discovery and fact-finding. And had the Board ordered NS to provide Riffin with the rudimentary OFA information mandated by 49 CFR 1152.27 (a), in particular the traffic information required by 49 CFR 1152.27 (a) (3) [including the names of shippers located along the Line who had used the Line], Riffin would have been able to communicate with those shippers in order to ascertain **WHY those shippers had not utilized the Line [BECAUSE NS REFUSED TO PROVIDE ANY SERVICE]**, and to ascertain that the majority of the shippers on the Line **HAD A HIGH DESIRE FOR RAIL SERVICE**. By exempting this proceeding from the OFA process, the Board nullified its own processes, and abused its own processes, to the detriment of the majority of the shippers on the Line, to the detriment of Riffin, and to the detriment of all shippers whose requests for rail service have been summarily dismissed, ignored, and refused by carriers such as NS, who have no interest or desire to provide rail service to local industries. [Carriers such as NS seem to only have an interest in providing rail service if the shipper ships unit-train quantities of cars, and seem to only have an interest in selling the land under their right-of-way to developers and government entities flush with Federal Dollars, willing to pay outlandishly high prices for the dirt.]

CRITERIA FOR A STAY

21. If the Board finds that this appeal is under the auspices of 49 CFR 1115.3, and thus a stay is not automatic, Riffin would argue he has met the four criteria for granting a stay, namely:

22. **Likelihood movant will prevail on merits.** The Board's Decision to exempt this abandonment proceeding from the OFA process was based on NS' representations that there was no desire for rail service by any shippers located on the Line. As Riffin has demonstrated, the three remaining shippers on the Line, **all desire service!** The fourth shipper went out of business due to NS' refusal to provide rail service. Since there is a high desire for rail service on the Line on the part of **all** of the shippers on the Line, the Board's factual underpinning for its OFA

exemption decision, no longer exists. And without this factual underpinning, there is no legal basis to support the Board's OFA exemption decision, and consequently, the OFA exemption must be disallowed, which means Riffin will prevail on the merits of his argument.

23. Movant will be irreparably harmed. If the Board's abandonment and OFA exemptions are not stayed, Riffin and the three existing shippers on the Line will be irreparably harmed, for NS will convey the Line to Norfolk City, which then would immediately begin to dismantle the Line. [Bill Barrett, president of the H.B. Hunter Company, informed Riffin that contracts to dismantle the Line have already been let by Norfolk City, and that dismantling operations are scheduled to begin in November, 2007, which is right now!] And since Norfolk City is not subject to the Board's jurisdiction, Riffin and the three shippers on the Line, would have no remedy to stop Norfolk City's salvaging operations, and the Board would be powerless to order Norfolk City to replace any portions of the Line it destroyed. And furthermore, since Norfolk City is a sovereign entity, it has immunity from suit for monetary damages. And the absence of any type of remedy for monetary damages has been held to constitute "irreparable harm." *Bank One, Utah v. Guttiau*, 190 F.3d 844, (8th Cir. 1999)

24. The stay would not harm other parties. The only parties in this proceeding are NS and Riffin. Staying NS' abandonment of the Line is not likely to harm NS, for it is not costing NS anything to keep the Line in its present condition. When balancing the harm the stay would inflict upon NS [minimal to non-existent], versus the harm salvaging the Line would cause Riffin and the three shippers on the Line [irreparable harm, since once the Line is lost, it cannot be recovered], the harm Riffin and the three shippers are likely to suffer, is magnitudes greater than any harm NS may sustain.

25. The issuance of a stay is in the public interest. The underlying test for granting an abandonment request, is whether there is no public convenience and necessity for retaining the line. If there is no desire for rail service, then there would be no public convenience and necessity to preserve the rail line. In the instant case, there is a **high desire on the part of ALL of the shippers on the Line, for continued rail service, IF ONLY the rail carrier would consent to provide that rail service!** Consequently, there is an overwhelming public convenience and necessity to preserve rail service on the instant Line. And consequently, issuing the stay, which would ensure the Line is preserved for rail service for these shippers, is decidedly in the public interest.

26. For the reasons enumerated above, Riffin would argue all four criteria for issuing a stay have been met, and therefore, the Board should stay its November 6, 2007 decision pending its decision upon reconsideration of this case.

**THE BOARD SHOULD RECONSIDER, THEN DENY
NORFOLK SOUTHERN'S MOTION FOR EXEMPTION FROM THE OFA PROCESS.**

27. Riffin is asking the Board to reconsider that portion of its Decision which granted NS' motion for exemption from the OFA process. Riffin is **not** asking the Board to reconsider any other portion of its Decision. Riffin does not oppose NS' desire to abandon its common carrier rights and obligations with respect to this Line. What Riffin **strongly opposes**, is NS' request to exempt this proceeding from the OFA provisions, particularly since there are active shippers located on the Line that desire freight rail service, and but for NS' refusal to provide rail service to these shippers, would have been shipping traffic on this Line.¹ In addition, the purported public use (light rail transit over 1/3 of the Line), is not incompatible with continued freight rail service on the 1/3 of the Line that would be used for light rail. The remaining 2/3 of the Line, would simply be abandoned, even though there are two shippers on this portion of the Line which have a high desire for freight rail service. (The other shipper, H.B. Hunter Company, is located on the 1/3 portion of the Line that would be used for light rail purposes.)

CRITERIA FOR PETITIONS TO RECONSIDER

28. 49 CFR 1115.2 states an appeal must be based on **one** (or more) of the following grounds.

- “(1) That a necessary finding of fact is omitted, erroneous, or unsupported by substantial evidence of record, [See ¶¶ 30 - 32, *infra*]
- (2) That a necessary legal conclusion, or finding is contrary to law, Board precedent, or policy; [See ¶¶ 30 - 32, *infra*]
- (3) That an important question of law, policy, or discretion is involved which is without governing precedent; [See ¶ 33, *infra*]

¹ It sure sounds like another Cockeysville situation, where NS continues to refuse to provide service to shippers who are asking for service, then innocently tells the Board that there has been no traffic on the Line, without disclosing to the Board that the reason there has been no traffic, is because NS refuses to provide any rail service on the Line!

(4) That prejudicial procedural error has occurred.” [See ¶¶ 34 - 39, *infra*]

29 49 CFR 1115.3 states an appeal will be granted only upon a showing of one (or more) of the following points:

“(1) The prior action will be affected materially because of new evidence or changed circumstances. [See ¶ 40, *infra*]

(2) The prior action involves material error.” [See ¶ 41, *infra*]

30. **That a necessary finding of fact is omitted, erroneous, or unsupported by substantial evidence of record. That a necessary legal conclusion, or finding is contrary to law, Board precedent, or policy.** 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. The Board denied NS’ request to be exempt from the OFA process. The Board ruled 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 ” (Emphasis added.)

31. In its Decision, the Board found: “Here, no shipper has expressed interest in continued common carrier service. ... Mr. Riffin has provided no evidence to show a public need for continued freight rail service on this line. ... Allowing the OFA provisions to be applied in this instance is not necessary to carry out the rail transportation policy because there is nothing in the record to show any potential for continued rail service on this line ”

32. **The Board’s “necessary finding of fact [that there is no potential for continued rail service] is ... erroneous.”** NS did not voluntarily disclose to the Board, nor to Riffin, who the shippers on the Line were. Once NS was ordered to provide this information [by the Board ordering NS to certify to the Board that NS had provided the shippers with a copy of the Board’s

Decision], Riffin was able to contact these shippers. These shippers then made it abundantly clear that they had a high desire for rail service, and would have been using rail service but for NS' refusal to provide rail service. Since there is an actual present desire for rail service by three shippers on the Line, Riffin would argue this desire for rail service is far more than a mere potential for rail service, which is all that is required to justify the application of the OFA provisions. Since the Board's finding of fact [that there is no potential for continued rail service], has been countermanded by the new, highly material, shipper evidence Riffin has provided to the Board, Riffin would argue the Board's finding of fact now is clearly "erroneous." And if the Board's finding of no potential for continued rail service is erroneous, then the Board's legal conclusion [that the OFA provisions need not be applied to carry out rail transportation policy] "is contrary to law, Board precedent, or policy."

33 An important question of law, policy, or discretion is involved which is without governing precedent. Riffin would argue there are two questions of law, policy or discretion, which is without governing precedent:

A. If two of three Board Members participate in a decision, would an appeal of that decision be under the provisions of 49 CFR 1115.2, or under 49 CFR 1115.3? Riffin has argued that the language in 1115.3 clearly states this section is applicable **only if** a decision has been rendered by the **entire** Board. And if less than the entire Board participates in the decision, then an appeal would be per 49 CFR 1115.2

B. Must an OFA offeror disclose who potential new shippers are? Board precedent has held that if a party refers to an existing shipper on a line, then the party must disclose who that shipper is, so that the carrier can check its records to verify whatever is being said about that shipper. See *BNSF Railway Company - Abandonment Exemption - In Oklahoma County, OK, et al*, STB Docket No. AB-6 (Sub-No. 430X) (STB served January 26, 2007). In the instant case, Riffin has identified a potential new shipper, the identity of which he does not wish to disclose to the carrier. Riffin has argued in ¶13, *supra*, that the identity of a potential new shipper would be privileged proprietary information, which Riffin should not be compelled to disclose, since disclosing the identity of the potential new shipper may induce the carrier to withdraw its abandonment petition, in order to reap the financial benefits of providing rail service to this potential new shipper. And were this to occur, Riffin would not be compensated for his marketing efforts. As the Board stated in its *Orange County* case, *op cit*

“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.”

Riffin would argue 49 CFR 1152.27 does not mandate, nor does it even intimate, that an OFA offeror must identify who potential shippers may be. The only requirements are that the offeror be financially responsible, and that the offeror must offer the Net Liquidation Value of the line. To require more than this, would impermissibly burden the OFA process.

34. Prejudicial procedural error has occurred. Congress, in exchange for the deregulation of the abandonment process, created procedures by which affected shippers, or other parties, could acquire lines of railroad proposed for abandonment. These new procedures, originally codified in 49 USC 10905 [now in 10904] for Offers of Financial Assistance, and originally codified in 49 USC 10910 [now in 10907] for Feeder Line Applications, streamlined the process by which interested parties could acquire lines proposed for abandonment, and reflected Congress’ determination that whenever an interested party desired to preserve a line of railroad proposed for abandonment, that interested party should be accorded every opportunity and accommodation to further the preservation of lines of railroad.

35 Several sections of 49 USC §10904 are relevant to the issue at hand [whether NS’ abandonment should be exempted from the OFA process]. §10904 (b) states.

“(b) Any rail carrier which has filed an application for abandonment or discontinuance SHALL provide promptly to a party CONSIDERING an offer of financial assistance [relevant information] that the Board considers necessary to allow a potential offeror to calculate an adequate subsidy or purchase offer.” (Emphasis added.)

“(c) Within 4 months after an application is filed under section 10903, any person may offer to subsidize or purchase the railroad line that is the subject of such application.

“(d)(1) If the Board finds that such an offer or offers of financial assistance has been made within such period, abandonment or discontinuance shall be postponed until –

(A) the carrier and a financially responsible person have reached agreement on a transaction for subsidy or sale of the line;” (Emphasis added.)

36. 49 USC 10101 (4) states:

(4) [It is the policy of the United States Government –] to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense,”

37 “Granting an exemption from 49 U.S.C. 10904 is an “unusual relief,” “rarely granted.” “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, 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 exemption²

- 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

38. In the instant case, **none** of the criteria enumerated in prior cases granting an exemption from the OFA procedures, exists. After abandonment, none of the shippers will have access to rail service via an adjacent line The OFA exemption request has been strongly opposed by Riffin. A Notice of Intent to File An Offer of Financial Assistance has been filed. Continuing to

² *Iowa Northern Railway Co – Abandonment - In Blackhawk County, IA*, Docket No AB-284 (Sub-No 1X), decided March 28, 1988, *Chicago and North Western Transportation Company – Abandonment Exemption – In Blackhawk County, IA*, Docket No AB-1 (Sub-No 1X), decided July 7, 1989, *Missouri Pacific Railroad Company – Abandonment – In Harris County, TX*, Docket No AB-3 (Sub-No 105X), decided December 16, 1992, *Southern Pacific Transportation Company – Discontinuance of Service Exemption – In Los Angeles County, CA*, Docket No AB-12 (Sub-No 172X), decided December 1, 1994, *Missouri Pacific Railroad Company – Abandonment – In Harris County, TX*, Docket No AB-3 (Sub-No 139X), decided December 23, 1996, *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, *Conrail Abandonment of the River Line - In Hudson County, NJ*, STB Docket No AB-167 (Sub-No 1067N), *Central Michigan Railway case [AB-308 (Sub-No 3X), served October 31, 2003]*, *Norfolk Southern Railway Company - Abandonment Exemption - In Orange County, NY*, FD No AB-290 (Sub-No 283X) Served June 22, 2007

use the line for freight rail service **would not preclude** using the line for the proposed public undertaking (light rail transit purposes), for the line could be used for freight purposes during those night-time hours when the line was not being used for transit purposes.

39. Riffin would argue, for the foregoing reasons, exempting this abandonment procedure from the OFA procedures, constitutes prejudicial procedural error.

40. **The prior action will be affected materially because of new evidence or changed circumstances.** In the instant case, NS refused to provide any information regarding the Line. Had NS provided Riffin with the rudimentary information mandated by 49 CFR 1152.27(a), Riffin would have been able to ascertain whether any of the former shippers on the Line, had a present interest in rail service. Within 24 hours after Riffin obtained the names of the former shippers on the Line, Riffin had made contact with the shippers, and had ascertained that they did in fact have a present interest in rail service, and further ascertained that the only reason there has been no traffic on portions of the Line, is because NS refused to provide any service on those portions of the Line. Riffin would argue this new evidence, which had not been available prior to the Board rendering its decision, materially affects and undermines the underlying factual and legal basis [no public need for continued freight rail service; no potential for continued rail service], relied upon by the Board when it granted NS' request to exempt the abandonment proceeding from the OFA procedures.

41. **The prior action involves material error.** Riffin would argue exempting this abandonment proceeding from the OFA procedures involves material error, for this exemption is a direct contradiction of the policy Congress unequivocally enumerated in 49 USC 10101 (4) That it is the policy of the United States Government to ensure the continuation of a sound rail transportation system. This exemption is also in direct contradiction of the OFA provisions contained in 49 USC 10904, as previously discussed in ¶34, *supra*.

CONCLUSION

42. 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 preserve rail service on the line by offering 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.

43 In the instant case, Riffin has previously demonstrated that he has a desire, and the financial resources, to purchase lines of railroad, 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, and he has identified three shippers on the Line that have expressed to Riffin a desire to utilize freight rail services on the Line, if and when freight rail service becomes available. In addition, the proposed public-use project and the line of railroad could co-exist. Many rail lines are used for both rail freight and light-rail. Each use is assigned an operating window.

44. Wherefore, for the foregoing reasons, Riffin would ask that the Board:

- A. Stay its November 6, 2007 Decision in the above entitled case;
- B. Reopen this case, to permit the admission of additional evidence regarding the desire by shippers on the Line for freight rail service;
- C. Reconsider its November 6, 2007 Decision in the above entitled case;
- D. Deny NS' request to be exempt from the OFA process,
- E. And for such other and further relief as would be appropriate.

Respectfully submitted,



James Riffin

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of November, 2007, a copy of the foregoing Petition to Stay and to Reconsider Decision Served on November 6, 2007, 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

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

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

VERIFIED STATEMENT OF JAMES RIFFIN

1. I am over the age of eighteen and am competent to testify to the matters stated in this Verified Statement.

2. On Tuesday, November 13, 2007, I spoke with Bill Buchholz at BlueLinx's Virginia Beach, Virginia facility. Mr. Buchholz told me the following:

A. His facility was formerly known as Georgia Pacific. BlueLinx purchased this portion of Georgia Pacific's business.

B. BlueLinx sells and distributes building materials

C. BlueLinx's Virginia Beach facility is located adjacent to the line of railroad which runs between Norfolk City and Virginia Beach, Virginia. BlueLinx has its own rail siding. BlueLinx is located just outside the city limits of Norfolk City. Numerous truckloads of materials move in and out of BlueLinx's facility on a daily basis. It is considerably more expensive to move BlueLinx's materials via truck, rather than via rail.

D. When the site was owned by Georgia Pacific, the site received deliveries via rail. Some years ago, Norfolk Southern Railway Company informed the site manager that Norfolk Southern would no longer provide rail service to the site.

E. BlueLinx would very much like to have access to freight rail service at its Virginia Beach, Virginia site once again.

3. On Tuesday, November 13, 2007, I spoke with Tucker Beaman at Asphalt Roads and Materials Company, Inc. Mr. Tucker told me the following:

A. Asphalt Roads has a bituminous asphalt manufacturing plant adjacent to the line of railroad which runs between Norfolk City and Virginia Beach, Virginia. Asphalt Roads has its own rail siding. Asphalt Roads is located just outside the city limits of Norfolk City, and is located on the opposite side of the tracks from the BlueLinx's Virginia Beach, Virginia, facility.

B. Some years ago, Norfolk Southern Railway Company informed Asphalt Roads that Norfolk Southern would no longer provide rail service to Asphalt Roads' plant.

C. Prior to the date Norfolk Southern stopped providing rail service, Asphalt Roads received aggregates and other materials via rail. Due to Norfolk Southern's refusal to provide rail service to Asphalt Roads, inbound materials now are delivered via rail to a distant transload facility, where the materials are transloaded onto trucks, then transported to Asphalt Roads' Virginia Beach site.

D. Asphalt Roads would very much like to have access to freight rail service at its Virginia Beach, Virginia site once again.

4. On Tuesday, November 13, 2007, I spoke with Bill Barrett, President of the H.B. Hunter Company. Mr. Barrett told me the following:

A. The H B Hunter Company has an ice cream toppings manufacturing plant adjacent to the line of railroad which runs between Norfolk City and Virginia Beach, Virginia. H.B. Hunter Company has its own rail siding. H B. Hunter Company is located inside the city limits of Norfolk City.

B. Up until August of 2006, H B Hunter Company received approximately one rail car of corn syrup per month. The corn syrup originated in Dayton, Ohio. In 2006, Norfolk Southern Railway Company informed H B Hunter Company that Norfolk Southern would no longer provide rail service to H.B. Hunter Company.

C. Due to Norfolk Southern's refusal to provide rail service to H.B. Hunter Company, corn syrup now is delivered via rail to a Maryland transload facility, where the corn syrup is transloaded onto trucks, then transported to H.B. Hunter Company's Virginia Beach site. Shipping corn syrup via truck from Maryland has increased H.B. Hunter Company's transportation costs by approximately \$1,000.00 per truck load.

D. H.B. Hunter Company would like to have access to freight rail service at its Norfolk City site once again.

5. On Tuesday, November 13, 2007, I spoke with John Barnes, transportation manager for Vulcan Construction Materials. Mr. Barnes told me the following:

A. Vulcan Construction Materials had an aggregates distribution plant adjacent to the line of railroad which runs between Norfolk City and Virginia Beach, Virginia. Vulcan Construction Materials' plant was located near the end of the line, and had its own rail siding.

B. Some years ago, Norfolk Southern Railway Company informed Vulcan Construction Materials that Norfolk Southern would no longer provide rail service to Vulcan Construction Materials' Virginia Beach aggregates distribution site. Without rail service, it was not cost effective to maintain Vulcan Construction Materials' Virginia Beach, Virginia facility. Consequently, Vulcan Construction Materials closed its Virginia Beach, Virginia facility. Vulcan Construction Materials now trucks aggregates to the Virginia Beach area from a more distant aggregates distribution site, at considerably greater cost.

Respectfully submitted,



James Riffin

VERIFICATION

I, James Riffin, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.



James Riffin

Executed on November 15, 2007.