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December 17, 2007

via DHL Express

Honorable Vernon A. Williams, Secretary
Surface Transportation Board
395 E Street, S W
Washington, DC 20024

Re STB Docket No AB-290 (Sub-No 288X), Norfolk Southern Railway
Company - Abandonment Exemption - in Bergen County, NJ - Norfolk
Southern Railway Company's Reply to Motion to Compel

Dear Mr. Williams

Enclosed for filing with the Board in the subject docket is an original and ten
copies of Norfolk Southern Railway Company's (NSR) Reply to Bergen Passaic Rail
Corporation's (BP Rail) Motion to Compel NSR to provide information under 49 CFR
1152.27(a) in connection with a Notice of Intent to file an offer of financial assistance to
acquire the line of railroad that was the subject of the Notice of Exemption in this
docket

Yours very truly,

Greg E. Summy
for James R. Paschall

Enclosures

cc Mr. Vincent Caruso, Jr.
22 Somerset Place
Clifton, NJ 07012

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Office of Proceedings

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**DOCKET NO AB-290 (SUB-NO 288X)
NORFOLK SOUTHERN RAILWAY COMPANY
- ABANDONMENT EXEMPTION -
IN BERGEN COUNTY, NJ**

**NORFOLK SOUTHERN RAILWAY COMPANY'S REPLY TO
MOTION OF BERGEN PASSAIC RAIL CORPORATION d/b/a BP RAIL
TO COMPEL PRODUCTION OF OFA INFORMATION**

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Dated December 17, 2007

Before the
Surface Transportation Board

Docket No AB-290 (Sub-No 293X)

Norfolk Southern Railway Company
- Abandonment Exemption -
In Bergen County, NJ

Norfolk Southern Railway Company's Reply to
Motion of Bergen Passaic Rail Corporation d/b/a BP Rail
To Compel Production of OFA Information

In a decision served November 27, 2007, the Board extended the time period for Bergen Passaic Rail Corporation d/b/a BP Rail ("BPR") to file an Offer of Financial Assistance ("OFA") in this proceeding until January 25, 2008 and extended the effective date of the exemption permitting abandonment of the subject line of railroad until February 4, 2008. The Board issued the extensions of these dates in order to allow the Board additional time to review Norfolk Southern Railway Company's ("NSR") request to modify the exemption in this proceeding. NSR has requested that the Board modify the exemption from an exemption to allow abandonment of the subject long out-of-service line of railroad to an exemption to allow discontinuance of service over the Line. In view of NSR's modification request and the Board's extension orders, NSR has not gathered and provided information requested by BP Rail so that it may be better able to prepare an OFA to acquire the Line, if it so later chooses. Despite the status of the proceeding, on November 29, 2007, BPR filed a motion to compel NSR to provide the

OFA information This is NSR's reply

PROCEEDING STATUS

NSR filed a notice of exemption under 49 CFR 1152 Subpart F - Exempt Abandonments to abandon a 1 40-mile line of railroad between milepost UQ 8 80 and milepost UQ 10 20, in Rutherford, Bergen County, NJ ("Line") The Board served the Notice of Exemption and published it in the Federal Register on May 31, 2007 (72 FR 30432-33) The exemption was scheduled to become effective on June 30, 2007, but it was automatically stayed by the Board's regulations due to the filing by BPR on June 11, 2007 of a formal expression or Notice of Intent to file an (OFA) pursuant to the provisions of 49 U S C 10904 and 49 CFR 1152 27(c)(2) to acquire the Line

In its Notice of Intent, BPR requested that NSR provide it with the information set forth in 49 CFR 1152 27(a), including the minimum purchase price required to acquire the Line BPR also requested that NSR provide the most recent report on the physical condition of the Line and the traffic, revenue and other data necessary to determine NSR's estimate on the net liquidation value (NLV) of the Line, with supporting data reflecting available real estate appraisal, assessments of quality and the quantity of track material in the Line, and removal cost estimates used to obtain the NLV By decision served by on June 29, 2007, the Board tolled the time period for filing an OFA for an additional 30 days, until July 30, 2007, and extended the effective date of the exemption until August 9, 2007.

By pleading filed on July 23, 2007, BPR requested a further extension until September 30, 2007, for NSR to provide the requested information to BPR and until 30

days from the date that NSR provides the requested information and informs the Board that NSR has done so for BPR to file its OFA. On July 27, 2007, NSR filed a request to modify its Notice of Exemption and the exemption granted by the Board in this proceeding so that NSR would have exemption authority only to discontinue service over, but not to permanently abandon, the Line. NSR also requested that the Board declare BPR's Notice of Intent to file an OFA and its request for valuation information under the financial assistance procedures moot. By decisions served on July 30, 2007 and September 28, 2007, the Board extended the due date for BPR to submit an OFA, and the effective date of the exemption in order to allow the Board time to consider NSR's modification request and any replies to it that may be filed. The latter decision extended the due date until November 27, 2007.

Rather than wait for the Board's further action on the matter, BPR filed its motion to compel, filed November 29, 2007, although dated November 27, 2007, the same date as the Board's latest extension of the due date for submission of OFAs and the effective date of the abandonment. This motion is, at least, premature and unnecessary. Moreover, whether or not the Board grants NSR's request for relief, NSR believes the Board should consider and determine whether notices of intent or OFAs in cases such as this one are really for the purpose of continuing (currently nonexistent) rail service or are an abuse of the Board's processes that interfere with the railroad's legitimate railroad purposes.

THE INFORMATION REQUIREMENTS OF 49 C F R 1152.27(a)

The Board's financial assistance procedures in 49 C F R 1152.27(a) specify that

the following information be provided by the railroad to a party considering an offer of financial assistance to continue existing rail service, and concurrently to the Board, in a class exemption proceeding:

(ii) In a class exemption proceeding, either an estimate of the annual subsidy or the minimum purchase price, depending upon the type of financial assistance indicated in the potential offeror's formal expression of intent submitted under paragraph (c)(2)(i) of this section,

(2) Its most recent reports on the physical condition of the involved line, and

(3) Traffic, revenue, and other data necessary to determine the amount of annual financial assistance that would be required to continue rail transportation over that part of the railroad line. In an exemption proceeding, the data to be provided must at a minimum include the carrier's estimate of the net liquidation value of the line, with supporting data reflecting available real estate appraisals, assessments of the quality and quantity of track materials in a line, and removal cost estimates (including the cost of transporting removed materials to point of sale or point of storage for relay use), and, if an offer of subsidy is contemplated, an estimate of the cost of rehabilitating the line to Federal Railroad Administration class 1 Safety Standards (49 CFR part 213)

BPR requested "traffic, revenue and other data necessary to determine the net liquidation value of the line," among other information. Of course, traffic and revenue data are not necessary to determine the net liquidation value of a line of railroad. BPR's error in the description of requested information may have been unintended and due to an abbreviation of the regulation's language. Nonetheless, there obviously is no traffic or revenue information for a Line that has been out of service for at least eight years. As NSR pointed out previously, no traffic has moved over the Line since before NSR acquired it from Conrail in 1999.

NSR does not dispute that the regulations permit a prospective offeror to ask the railroad for information concerning the condition of a line of railroad that may become

the subject to an OFA. However, we suspect that BPR knows the condition of this particular property. BPR certainly can easily view and determine that condition. As the map in Exhibit 1 indicates, BP Rail's mailing address is only a short distance, about two miles using the map legend, from the location of the Line.

THE SUBJECT LINE

The Line is a 1.4-mile dead-end spur on which rail operations ceased so long ago that local government officials thought the Line already had been abandoned when the Town approached NSR about acquiring the property.

No current or recent railroad customers are located on the Line. NSR has not operated over the Line since acquiring it from Conrail in 1999.¹ Nonetheless, in view of the Line's location in the highly urbanized area of northern New Jersey across from New York City, the right-of-way might have value for a number of other purposes. It is obvious, however, that the prospects for reactivation of rail service over the Line have become exceedingly small since no prospective railroad customers have requested service over, used or located on the Line for a long period of time. Exhibit 1 not only shows the location of the Line in relation to BPR's mailing address, but also shows its location in relation to the Meadowlands Sports Complex, about an equal distance away.

BERGEN AND PASSAIC RAIL CORPORATION d/b/a BP RAIL

BPR has filed several submissions with the Board recently. All but one were

¹NSR has had many other priority projects that took precedence over a determination of the future use or disposal of the subject dormant operating property.

related to OFAs. BPR has described itself as a start-up short line. We have been unable to find any other information about BPR, including the identity of its principals and whether they have any experience in railroad operations or any other past, existing or potential relationship to the industry or the location. We have found only a letterhead and reporting marks.

The only person connected with BPR that we have been able to identify is BPR's "authorized representative," Mr. Vincent Caruso, Jr. BPR's address is 22 Somerset Place, Clifton, NJ 07012, not far from the Line that is the subject of this proceeding. This address is also the location of Countywide Fireground Rehab & Canteen Service, a volunteer organization, whose contact person is Mr. Vincent Caruso, Jr. (see Exhibit 2). This address also is or until recently has been the location of Tri-State Emergency Communications Consortium, an organization that has something to do with firefighting and other emergency communications. No page on its web site has been updated for at least several months, which is why we condition the statement about Tri-State's location. Tri-State's contact person is, again, Mr. Caruso. We also strongly suspect that Mr. Caruso is the same Vincent Caruso identified in a recent local newspaper article as a North Hudson, NJ firefighter.

Thus, it would appear that Mr. Caruso is rather fully engaged in firefighting and volunteer work. We also note that Mr. Caruso describes himself as the "authorized representative" of BPR. We infer that this title or description means that Mr. Caruso's time is not fully devoted to BPR. It could easily mean he is not even a principal behind BPR. This would be no surprise given his other work. Yet, BPR's other principals,

officers or employees choose to remain undisclosed.

Countywide's web site gives ample photographic evidence of that organization's existence and useful volunteer work. Mr. Caruso's work and community service appears to be honorable and meritorious, especially if he is engaged in the dangerous profession of firefighting. The foregoing background information about BPR is presented because it raises questions about BPR's identity and purpose and whether BPR intends to continue, actually reactivate, long-dormant rail service on the Line. Mr. Caruso's background appears to be far removed from railroad operations and the designation he uses in signing his correspondence suggests his interest in or connection to BPR may be less than that of other undisclosed persons. Moreover, the Fire Department and the volunteer organization(s) are not the types of organizations that can contribute a base of traffic to help reactivate a long-dormant rail line. This background certainly raises suspicion that any contemplated OFA to acquire the subject Line could not be made for the purpose of continued (actually reactivated) rail service.

NSR's REQUEST TO MODIFY THE EXEMPTION TO PROVIDE FOR ONLY FOR DISCONTINUANCE OF SERVICE OVER THE LINE IS CONSISTENT WITH RECENT PRECEDENT AND SHOULD BE GRANTED

NSR has fully stated the rationale for the requested modification or amendment of the exemption authority in this proceeding. We merely point out in addition that the Board has accepted and used this rationale to grant identical requests in recent decisions.

In *BNSF Railway Company - Abandonment Exemption - in Fergus County, MT*, STB Docket No. AB-6 (Sub-No. 434X) (STB served June 6, 2007), the Board, through Director Konschnik, granted BNSF's request for modification of the abandonment exemption authority previously granted in the proceeding so that BNSF might discontinue service over, but not abandon, a portion of the subject line. Director Konschnik stated in part

On January 19, 2007, BNSF filed a letter requesting authority merely to discontinue service over the portion of the subject line between milepost 9.50 and milepost 13.88, as opposed to authority to abandon that portion of the line

BNSF states that it now intends to use that portion for car storage ²

The Board's grant of regulatory approval through a carrier's filing of a notice of exemption permits, but does not require, the transaction to proceed BNSF's request for modification, which narrows the authorization previously received, is reasonable and will be granted As a result, BNSF will no longer have authorization to abandon the portion of the line between mileposts 9 50 and 13 88 without first seeking Board authority and complying with all applicable regulations

Similarly, in *BNSF Railway Company - Abandonment Exemption - in Dawson and McCone Counties, MT*, STB Docket No AB-6 (Sub-No 424X) (STB served January 8, 2007), the Board, through Director Konschnik, granted the same relief to BNSF for the same reason The Director stated in part

By letter filed on November 9, 2006, BNSF requests authority only to discontinue service over the subject line, rather than authority to abandon the line BNSF states that it now intends to use portions of the line for car storage The Board's grant of regulatory approval through a carrier's filing of a notice of exemption permits, but does not require, the transaction to proceed BNSF's request for modification that narrows the authorization it previously received is reasonable and will be granted

²Under similar circumstances, NSR, and at least some other railroads probably would have consummated the abandonment of the line segment and reclassified the retained segment of the line as storage or spur or other excepted track NSR sees nothing wrong with BNSF's reasoning or alternate approach It might be a better approach in some cases However, we believe the more common practice of reclassifying the track through the consummation of an abandonment of the line is often most appropriate The railroads' more frequent use of reclassification as a method of achieving a similar goal may be the reason for fewer modification or amendment decisions and more cases in which track to be abandoned is to be reclassified in whole or in part

See also *The Burlington Northern and Santa Fe Railway Company - Abandonment Exemption - in Hamilton and Merrick Counties, NE*, STB Docket No AB-6 (Sub-No 408X) (STB served May 26, 2004), By the Board, Director Konschnick

NSR's rationale for the requested modification of its exemption authority in this proceeding from abandonment exemption authority to discontinuance exemption authority is precisely the same as that accepted and used by the Board through Director Konschnick in the above proceedings and by the Board in the very similar situation of complete withdrawal of abandonment exemption notices or petitions and relinquishment of any exemption already granted. Modification of the abandonment exemption authority to discontinuance exemption authority would narrow the authorization previously received by NSR through the Notice of Exemption in this case NSR would be required to file another Notice of Exemption to abandon the Line in order to abandon the Line in the future, but would be spared having to deal with spurious requests for rail service in the meantime.

Therefore, NSR believes that the Board should allow modification of the exemption authority in this case because (1) the Board has granted BNSF the same relief for the same reasons upon which NSR based its request, (2) the Board and the ICC have described the permissive nature of exemption decisions in many past decisions; and (3) the Board has permitted railroads to withdraw, in whole or in part, abandonment and other applications, petitions or notices and has withdrawn or modified the previously granted exemption or authority in several past decisions, as noted in our original request and further explained below

PERMISSION TO WITHDRAW THE NOTICE OF EXEMPTION AND TO RELINQUISH THE EXEMPTION AUTHORITY AS SUPPORT FOR MODIFICATION OF AN EXEMPTION OR AS AN ALTERNATIVE TO THE RELIEF REQUESTED

Previous Board decisions have permitted the withdrawal of abandonment Applications or Notices of Exemption or Petitions for Exemption, even after Notices of Intent to File OFAs have been filed with the Board. The Board has granted this permission because, among other reasons, the Board's approval or exemption authority is permissive and need not be exercised by the railroad. The rationale for and relief granted in these withdrawal decisions support NSR's request to take the lesser action of narrowing or limiting the exemption authority originally sought and obtained in this proceeding.

In the next paragraph, we quote or closely paraphrase the Board's language in several decisions permitting complete or partial withdrawal of abandonment applications, petitions for exemption or notices of exemption and the withdrawal or modification of the approval or exemption authority granted with respect to those filings.

When a rail carrier is authorized by Board approval or exemption to abandon a line of railroad, that authority is permissive, not mandatory. The rail carrier can choose to exercise that authority or not. Until the railroad exercises the abandonment authority it has received, the subject line of railroad is not abandoned and the Board's primary jurisdiction over the line continues. Because rail carriers are not compelled to abandon lines, the Board normally grants a railroad's motion to withdraw its request for abandonment authority. See *The Cincinnati, New Orleans and Texas Pacific Railway*

Company - Abandonment Exemption - in Scott County, TN, STB Docket No AB-290 (Sub-No. 279X) (STB served April 24, 2007), Norfolk Southern Railway Company - Abandonment Exemption - in Lorain County, OH, STB Docket No AB-290 (Sub-No 268X) (STB served October 25, 2006), The Burlington Northern and Santa Fe Railway Company - Abandonment Exemption - In Hamilton and Merrick Counties, NE, STB Docket No AB-6 (Sub-No 408X) (STB served May 26, 2004)(partial withdrawal of exemption notice); Almono LP - Abandonment Exemption - In Allegheny County, PA, STB Docket No. AB-842X (STB served Jan 28, 2004), Massachusetts Port Authority – Acquisition Exemption – Certain Assets of Boston and Maine Corporation, STB Finance Docket No 34276 (STB served March 25, 2003) embracing Boston and Maine Corporation – Abandonment – in Suffolk County, MA, STB Docket No AB-32 (Sub-No 92), Kansas Southwestern Railway, L L C - Abandonment - in Sumner, Harper, Barber, Reno and Kingman Counties, KS, STB Docket No AB-437 (Sub-No 1) (STB served May 23, 2001), Maine Central Railroad Company - Abandonment Exemption - In Androscoggin County, ME, STB Docket No AB-83 (Sub-No 16X) (STB served September 15, 2000); Soo Line Railroad Company - Abandonment Exemption - in Marshall and Roberts Counties, SD, STB Docket No. AB-57 (Sub-No. 50X) (STB served August 15, 2000); Soo Line Railroad Company - Abandonment - in Roberts County, SD, STB Docket No. AB-57 (Sub-No 51) (STB served August 14, 2000), Union Pacific Railroad Company - Abandonment Exemption - in Cerro Gordo County, IA, STB Docket No. AB-33 (Sub-No 107X) (STB served February 28, 1997), Bessemer and Lake Erie Railroad Company - Abandonment Exemption - Armstrong and Butler Counties, PA,

STB Docket No AB-88 (Sub-No 8X) (STB served February 26, 1997), and *Lamoille Valley Railroad Company - Abandonment and Discontinuance of Service Exemption - in Franklin and Lamoille Counties, VT*, STB Docket No AB-444X (STB served November 1, 1996) See also *CMC Real Estate Corporation - Abandonment Exemption - Chicago, IL*, ICC Docket No AB-7 (Sub-No 114X) (ICC decided October 5, 1988)

If despite the authority cited in the previous and instant sections of this reply, the Board for any reason denies NSR's requested modification of the exemption authority in this case, NSR requests that the Board permit NSR to withdraw the Notice of Exemption and relinquish the exemption authority granted in this proceeding This would simply put this matter in the same posture as it would be under the well-established precedent cited in the preceding paragraph In view of the similarity of NSR's rationale to that which has been accepted by the Board in the cited precedent and cases involving other types of licensing, NSR could not have anticipated that its request to narrow the exemption authority requested in this proceeding would receive less favorable consideration or put the matter in a less favorable posture than if NSR had requested that the Board permit withdrawal of the Notice of Exemption and relinquishment of the exemption authority in its entirety NSR still does not anticipate the Board will deny its request to modify the exemption authority in this case Nonetheless, if the Board's decision results in denial of NSR's request, it would only be fair for the Board to permit NSR to take advantage of the well-established precedent of withdrawal of the Notice of Exemption and relinquishment of the exemption authority should it choose to do so

THE PROBLEM OF NOTICES OF INTENT TO FILE OFAs AND OFAs THAT ARE NOT

FOR CONTINUED RAIL SERVICE OR OTHERWISE ARE NOT BONA FIDE

Railroads, and the Board, may be rightly suspicious whether the OFA process is being initiated with respect to out of service rail lines for reasons other than a planned continuation (reactivation) of rail service or under circumstances in which future rail service over the line can reasonably be expected to result. Railroads do not seek to abandon out of service lines because the railroad cannot provide current rail service over the line profitably, but because there is no service on the line at all and no apparent prospect that profitable service can be reactivated. Thus, the railroad can put the dormant assets to better use or, in some cases, simply dispose of non-productive property, perhaps to a local government or public service organization. The railroad would at least gain some local good will for the conversion of the property to public use.

We understand the Board's desire to give potential offerors the benefit of the doubt with respect to possible continuation of rail service. Occasionally, an OFA to acquire an out of service rail line may be bona fide. Even cursory and possibly incomplete research shows that in at least the following nine abandonment class exemption proceedings in recent years, however, the offeror withdrew the notice of intent after receiving information from the railroad or did not accept Board prescribed terms and conditions: *CSX Transportation, Inc - Abandonment Exemption - in Niagara County, NY*, STB Docket No. AB-55 (Sub-No. 649X) (Board has not yet acted on offeror's withdrawal request) ("BP Rail"), *Consolidated Rail Corporation - Abandonment Exemption - in Mercer County, NJ*, STB Docket No. AB-167 (Sub-No. 1185X) (STB served February 14, 2007), embracing Norfolk Southern Railway Company -

Discontinuance Exemption - in Mercer County, NJ, STB Docket No AB-290 (Sub-No 294X) and CSX Transportation, Inc - Discontinuance Exemption - in Mercer County, NJ, STB Docket No. AB-55 (Sub-No 676X) ("James Riffin"), *BNSF Railway Company - Abandonment Exemption - In Colfax County, NM*, STB Docket No AB-6 (Sub-No 428X) (STB served September 29, 2006) ("Hust Brothers, Inc."); *San Pedro Railroad Operating Company, LLC - Abandonment Exemption - in Cochise County, AZ*, STB Docket No. AB-1081X (STB served July 26, 2006) ("Sonora-Arizona International LLC"), *Union Pacific Railroad Company - Abandonment Exemption - In Kootenai County, ID*, STB Docket No AB-33 (Sub-No. 218X) (STB served March 14, 2005) ("Pan American Railway, Inc."), *The Burlington Northern and Santa Fe Railway Company - Abandonment Exemption - In Hamilton and Merrick Counties, NE*, STB Docket No AB-6 (Sub-No 408X) (STB served May 26, 2004) ("The Garden City Western Railway, Inc"), *Great Western Railway of Colorado, LLC - Abandonment Exemption - in Weld County, CO*, STB Docket No AB-857X (STB served April 7, 2004) ("Windsor, Severance & Eaton Railroad, LLC"), *CSX Transportation, Inc - Abandonment Exemption - in Parke and Vermillion Counties, IN*, STB Docket No AB-55 (Sub-No 579X) (STB served December 30, 2002) ("Parke County Redevelopment Commission"); *Trinidad Railway, Inc - Abandonment Exemption - in Las Animas County, CO*, STB Docket No AB-573X (STB served September 15, 2003 ("Rail Ventures, Inc.") (STB set terms and conditions in decision served May 15, 2002, but offeror advised it would not acquire the line in July 29, 2002 letter to STB) ³

³OFA's were withdrawn after information was provided by the railroad or STB prescribed

terms were not accepted by the offeror in the following abandonment proceedings initiated by applications or petitions for exemption, as well *McCloud Railway Company - Abandonment and Discontinuance of Service Exemption - in Siskiyou, Shasta, and Modoc Counties, CA*, STB Docket No AB-914X (STB served November 20, 2006) (petition) ("Seaside Holdings, LLC"), *Yakima Interurban Lines Association - Abandonment Exemption - in Yakima County, WA*, STB Docket No AB-600 (Sub-No 1X) (STB served April 5, 2006) (petition) ("Oregon Pacific & Eastern Railroad Company"), *Greenville County Economic Development Corporation - Abandonment and Discontinuance Exemption - in Greenville County, SC, In the Matter of a Request to Set Terms and Conditions*, STB Docket No AB-490 (Sub-No 1X) (STB served April 5, 2006) (petition) ("Western Carolina Railway Service Corporation"), *Sierra Pacific Industries - Abandonment Exemption - In Amador County, CA*, STB Docket No AB-512X (STB served May 13, 2005), embracing *SierraPine - Discontinuance Exemption - In Amador County, CA*, STB Docket No AB-880X (petition) ("Martell Industrial Center, LLC" - "settlement" reached between railroad and offeror), STB Docket No AB-490 (Sub-No 1X) *Mississippi Tennessee Holdings, LLC - Abandonment Exemption - in Union, Pontotoc and Chickasaw Counties, MS*, STB Docket No AB-868X (STB served November 18, 2004) (petition) ("Hust Brothers, Inc"), *A & R Line, Inc - Abandonment Exemption - In Cass and Pulaski Counties, IN*, STB Docket No AB-855 (Sub-No 1X) (STB served April 22, 2004) (petition) ("Kokomo Grain Company"), *CSX Transportation, Inc - Abandonment Exemption - In Allegan County, MI, in the Matter of an Offer of Financial Assistance*, STB Docket No AB-55 (Sub-No 619X) (STB served January 30, 2003) (petition) ("Hamilton Farm Bureau"), *Union Pacific Railroad Company - Abandonment - In Polk County, IA*, STB Docket No AB-33 (Sub-No 170) (STB served July 9, 2002) (application) ("Mid-America Railroad, LLC") Nonetheless, NSR acknowledges that OFAs that lead to line acquisitions are more likely in these types of proceedings The point to be made, however, is

During the same period of time, offerors were authorized to acquire lines in six class exemption proceedings and one combined petition and notice proceeding for contiguous line segments. The offerors were former shippers on the line in two cases (one of which was the paired proceedings), a government agency or department in two cases, an established short line railroad in one case, a straw man for a salvage company in one case and James Riffin, a person with an unusual agenda who has operated no service on the line that he acquired as an undisclosed ninety-eight percent owner of a shell company in one case. In five of these cases, the offeror would be a party that obviously would have a legitimate interest in operating the rail line. In the other two, the railroad was indifferent about selling the line for net liquidation value.

It is clear that if an offeror has some business to bring to the line or obviously has a legitimate interest in restoring or continuing rail service, the offeror is much more likely to be serious, even with respect to an out of service line, than an offeror with no relationship to the line, no traffic to bring to the line, no shippers committed to using the line and no railroad background or experience. Nonetheless, even if the offeror may have more apparent interest in providing rail service, that alone should not have decisive weight without a realistic business plan and commitments to bring traffic to the line.

In *Exemption of Out of Service Rail Lines*, 366 I.C.C. 885, 892 (1983), the ICC noted that "only rarely would there be a public need or interest in continued

that notices of intent or OFAs are withdrawn even where there is or recently has been traffic on a line

transportation service over the line" that was the subject of a notice of exemption to abandon at out-of-service line. In that decision, based on a reading of the OFA provisions of the Act that was later determined to be unduly narrow, the agency stated that OFAs would not be accepted in abandonment proceedings under the class exemption procedures for out-of-service lines. The ICC reversed this position and adopted regulations permitting the use of the OFA procedures in abandonment class exemption cases in Ex Parte No. 274 (Sub-No. 16) *Exemption of Rail Line Abandonments or Discontinuance - Offers of Financial Assistance*, 4 I.C.C. 2d 164 (1987). In that decision, the Commission noted the objections of several railroads to allowing the ready filings of OFAs in class exemption abandonment cases. Nonetheless, the ICC stated

Because the subject matter of abandonment and discontinuance exemptions is primarily little-used on out-of-service lines, we anticipate limited use of the proposed rule, indeed that has been confirmed by our experience since we began using the rules on an interim basis. Thus the new procedures should not impose any undue burden upon the carriers.

The Commission may have been right in its judgment at the time. More recently, the railroads and the Board have had to deal with an increasing number of burdensome and speculative requests for information, notices of intent and occasionally even OFAs that are not tendered for continued rail service and in fact, are often withdrawn after the railroad has gathered the information. Some of these requests and proceedings have been initiated by salvage companies, real estate speculators, even hobbyists or other

non-business people, or as seems to be happening more often, by straw men for these types of operators. Not only can these speculative, unlikely or even bogus processes and ultimate OFAs cause additional work to the railroads and the Board, but they can disrupt railroad plans for the use or disposition of its assets or take value from the railroads without fulfilling the purpose of the OFA process of continuing rail freight service. These results are contrary to the purpose of the out of service line exemption as well as to the purpose of the OFA process.

Although in some cases the railroad may be satisfied with disposing of dormant property for net liquidation value, regardless whether the OFA was for the purpose of continued or reactivated rail service or would result in such service, that is not always the case. More importantly, it does not lessen the burden caused in most cases by the increasing number of speculative requests or processes that have no chance of accomplishing anything, except perhaps to get some railroad property cheaply. That property is more likely to be turned into a profitable further sale later than it is to be used for rail service and rail service ultimately would not materialize over the line. As a result, the railroad would lose its potential to secure more compensation for its property or the continued use of assets. It might even just lose the chance to work with a community on a disposition that would benefit the locality. These situations happen and will continue to happen until the Board takes a harder look at whether requests for information or OFA processes are being made or initiated under circumstances where continued rail service is not the likely purpose of the offeror's actions or is unlikely to result in any event.

THE BOARD MAY CONSIDER WHETHER NOTICES OF INTENT TO FILE OFAs AND OFAs ARE FOR CONTINUED RAIL SERVICE, THE BOARD MAY PROTECT THE INTEGRITY OF ITS PROCESSES, NOTICES OF INTENT TO FILE OFAs, REQUESTS FOR INFORMATION AND OFAs FOR OUT OF SERVICE RAIL LINES SHOULD BE SUBJECT TO ADDITIONAL SCRUTINY, A BONA FIDE NOTICE OF INTENT TO FILE AN OFA FOR AN OUT OF SERVICE LINE SHOULD SHOW THAT THE OFA MIGHT REASONABLY LEAD TO CONTINUED RAIL SERVICE

The Board may, and should, consider whether notices of intent to file OFAs, as well as OFAs, are really being pursued for the purpose of continuing rail service, especially in out of service class abandonment exemption cases where there is no service to continue and where the line segment may be too short for the location of a significant traffic base

In *Burlington Northern and Santa Fe Railway Company - Abandonment Exemption - in King County, WA, in the Matter of an Offer of Financial Assistance*, 3 S T.B. 634 (1998), the Board stated

In implementing former section 10905, our predecessor agency, the Interstate Commerce Commission, concluded that

[The statute] envisions either an uninterrupted service or a continuation of service within a reasonable period of time . . . Those [*11] situations in which a purchaser of rail properties has no affirmative plans for continuation or resumption of service, but merely holds out the possibility of service at some unspecified future time, are not properly to be considered offers of financial assistance and do not fall within the scope of [the statute].

Abandonment of R. Lines & Discontinuance of Serv., 365 I C C 249, 260 (1981)

.....

Accordingly, this agency's (and its predecessor's) long-standing precedent that an offer must contemplate continued rail service reflects current law as well as the prior statute See, e g., *Owensville Term. Co.--Aband Exemption--In*

Gibson and Posey Counties, OFA, Docket No AB-477 (Sub-No 2X) (STB served Dec 16, 1997), Union Pac R Co --Aband Exemption--In Lancaster County, NE, In the Matter of a Request to Set Terms and Conditions, Docket No AB-33 (Sub-No 71X) (ICC served Sept 28, 1992), Norfolk and Western Ry Co - -Aband. Exemption--Between Bowyer Creek and Junction and Burma, VA, Docket No AB-290 (Sub-No 43X) (ICC served Dec 5, 1988), Conrail Aband. of W. 30th Street in New York, Docket No AB-167 (Sub-No. 493N) (ICC served Jan 13, 1987)

Here, after considering all the evidence presented by RIRPA and the other parties, we conclude that the record does not permit us to conclude that the offer is motivated by a desire to provide continued rail service. Nor can we find that continued rail service is likely to result from the offer. That being the case, it would be an abuse of our processes to permit the section 10904 process to go forward. Accordingly, RIRPA's OFA will be rejected.

The record indicates that no traffic has moved over the line in almost 2 years, that any prospect for future traffic is highly speculative, and that the cost to rehabilitate the line is substantial. In short, given all the circumstances, it is not reasonable to believe that the offeror would make the substantial investments required to rehabilitate the track (including the replacement of a bridge) in order to pursue rail traffic that ceased long ago and that, based on the shipper statements submitted by RIRPA itself, does not show any real likelihood of returning. This is particularly true where, as here, the offeror is not an entrepreneur [*22] with a track record of running short lines and a sound business plan to attract new shippers, but rather is an association consisting mostly of landowners who live along the line. RIRPA's expression of willingness to haul traffic that seems unlikely to materialize does not provide a sufficient basis for invoking section 10904.

Given all of these circumstances, we cannot conclude that the offer of financial assistance filed by RIRPA is for continued rail service. That being the case, we will not institute a proceeding under section 10904, and, accordingly, we need not determine whether RIRPA is a financially responsible person.

The STB may reject an OFA offer if the offeror does not present an adequate demonstration of a bona fide intent to continue freight rail service. *Kulmer v STB*, 236 F.3d 1255 (10th Cir. 2001), *Redmond-Issaquah R.R. Preservation Ass'n [RIRPA] v*

Surface Transp Bd , 223 F 3d 1057 (9th Cir 2000). See also *Borough of Columbia v Surface Transportation Board*, 342 F 3d 222 (3rd Cir. 2003) ("*Borough of Columbia*") where the U. S. Court of Appeals for the Third Circuit stated

In the order reviewed by the Tenth Circuit in *Kulmer*, the STB denied an OFA that proposed to purchase an abandoned rail line. The agency found that the offerors did not have good-faith plans to provide continued rail service on the line. The STB stated:

The OFA process is designed for the purpose of continuing to provide freight rail service, and is not to be used to obstruct other legitimate processes of law (whether Federal, state, or local) when continuation of such service is not likely [citations omitted]. Accordingly, when disputed, an offeror must be able to demonstrate that its OFA is for continued rail freight service [citations omitted]. Where, as here, the line is not currently active, there must be some assurance that shippers are likely to make use of the line if continued service is made available, and that there is sufficient traffic to enable the operator to fulfill its commitment to provide that service [citations omitted].

Roaring Fork R R Holding Auth. – Abandonment Exemption – in Garfield, Eagle, and Pitkin Counties, CO, 1999 STB LEXIS 299, STB Docket No AB-547X at *2 (served May 21, 1999) (available at 1999 WL 323347)

The STB found lacking the *Kulmer* offeror's evidence of projected rail use, and pointed to three specific deficiencies in the OFA. First, although five potential shippers were identified, three were not in a position to use the line and the traffic projections for the remaining two were "too indefinite and insufficient to support continued freight rail operations." Second, the offeror had acknowledged "that continued freight service would not be self-sustaining." Finally, the offeror did not intend to use the line for continued freight service, but instead, for passenger service – the same use planned by the existing owner of the line. *Id.* 1999 STB LEXIS 299, [WL] at *3

The Tenth Circuit affirmed the STB's decision and rejected the offeror's claim that the STB was statutorily barred from considering rail-service continuation as a factor in approving an OFA. *Kulmer*, 236 F 3d at 1257. The court noted that "while Congress has not specifically required the STB to consider continued rail service as a factor, there is no basis in the statute for concluding that Congress has specifically prohibited the STB from doing so." *Id.*

In *RIRPA*, the Ninth Circuit upheld a similar dismissal of an OFA in which the

applicant, according to the STB decision that formed the basis for the petition for review, did nothing more than "merely hold[] out the possibility of service at some unspecified future time " *The Burlington N & Santa Fe Ry Co – Abandonment Exemption – in King County, Wa. in the Matter of an Offer of Fin. Assistance*, 3 S T B. 634, STB Docket No. AB-6 (Sub-No 380X) at *4 (served Aug 5, 1998) (available at 1998 WL 452837) The Ninth Circuit opined that, given "the STB's exclusive province to draw legitimate inferences from the evidence," the conclusion that "there was no potential for future traffic and that RIRPA was not interested in offering rail service" was reasonable *Redmond-Issaquah R R. Preservation Ass'n [RIRPA] v Surface Transp. Bd.*, 223 F 3d 1057, 1064 (9th Cir 2000) Accordingly, the court affirmed the denial of the OFA

Kulmer and *RIRPA* are persuasive authority that the STB may evaluate the likelihood of continued rail service when presented with an OFA We see no reason to disagree .

Borough of Columbia, 342 F 3d at 230

In addition to this relevant precedent concerning the Board's authority to scrutinize the purpose of potential or filed OFAs, the Board has the authority to protect the integrity of its processes *ICC v American Trucking Ass'ns*, 467 U S 354, 364-65 (1984), *Railroad Ventures, Inc. v. Surface Transportation Board*, 299 F.3d 523 (6th Cir. 2002)(any government agency has inherent authority to act to ensure "the fairness, efficiency, and integrity of its processes and the appropriateness of the conduct of the parties appearing before it"), *James Riffin d/b/a The Northern Central Railroad - Acquisition and Operation Exemption - In York County, PA*, STB Finance Docket No 34501 (STB served February 23, 2005), *The Land Conservancy of Seattle and King County - Acquisition and Operation Exemption - The Burlington Northern and Santa Fe Railway Company*, STB Finance Docket No 33389 (STB served Sept. 26, 1997)

NSR believes the Board must stop the growing abuse of the OFA process by

looking more closely at whether requests for information and notices of intent to file OFAs, as well as OFAs themselves, are really for the purpose of continued freight service or can reasonably be expected to result in such service or are for other purposes or speculative, wasteful and an abuse of the Board's processes

BP RAIL'S INTEREST IN THIS AND OTHER RAIL LINES, BP RAIL'S MOTION, ALONG WITH TWO OTHER BP RAIL NOTICES OF INTENT TO FILE OFAs FOR OUT OF SERVICE LINES RAISE QUESTIONS ABOUT BP RAIL'S INTENT

While we can understand BP Rail's eagerness to acquire property near both its mailing address and the Meadowlands Sports Complex at a potentially bargain price, we are rather sure that any delay in the acquisition of this long-dormant 1 4-mile right-of-way will not delay the continuation or, more properly, the restoration of non-existent rail service to non-existent customers

Given BP Rail's background, as far as we know it and as shown above, we are less certain why BP Rail would want to acquire two other dormant lines, of relatively short length, farther from its headquarters and over which there is also no rail service to continue *Norfolk Southern Railway Company - Abandonment Exemption - in Grant County, IN*, STB Docket No AB-290 (Sub-No 291X), *Norfolk Southern Railway Company - Abandonment - In Wyoming and Genesee Counties, NY*, STB Docket No. AB-290 (Sub-No 271X) Of course, we have seen this type of behavior from another offeror who had a separate objective and filed the notices of intent for harassment or to exert pressure In those cases, we will actually go through the likely wasteful exercise of producing the information, and BP Rail likely will withdraw its notice of intent, just as it has in *CSX Transportation, Inc - Abandonment Exemption - in Niagara County, NY*,

STB Docket No AB-55 (Sub-No 649X) That, however, will be persuasive evidence of BP Rail's intent and motivation both in this case and in the future.

Given the lack of demand or urgency to "continue" rail service over the Line, BP Rail's strident approach to this matter is puzzling In a charge that does not pass the laugh test in view of NSR's work with short lines and the apparent lack of potential for rail service over this Line, BP Rail has charged NSR does not wish to work with short lines. Ironically, on the same day that BP Rail wrote this accusation, NSR was hosting a conference for its short line connections. Moreover, NSR worked with a bona fide offeror and completed one of the few recent sales under the OFA provisions that are referenced above *Tennessee Railway Company - Abandonment Exemption - In Scott County, TN*, STB Docket No AB-290 (Sub-No 260X) (STB served March 3, 2006) (petition), *Tennessee Railway Company - Abandonment Exemption - In Anderson and Campbell Counties, TN*, STB Docket No AB-290 (Sub-No 259X) (notice) ("National Coal Corporation" subsidiary "NC Railroad, Inc ")

There are some serious questions that should be posed in this case, but they should be posed to BP Rail What is BP Rail's plan for "continuation" of rail service over the Line in this case and who are the actual or potential shippers who might use service over the Line? The same question can be asked with respect to the other two NSR lines for which BP Rail has filed notices of intent Unless we are to believe that the apparently busy Mr Caruso came up with this motion in his spare time, who is the attorney (or perhaps other person) who counseled BP Rail to file the motion to compel

in this case and may have helped turn some of the layman's language into something like a real pleading and who does he also represent? Who are the real principals of BP Rail and what other businesses, rail or otherwise, might they conduct or plan to conduct?

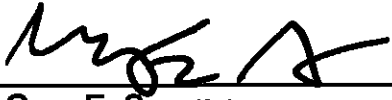
BP RAIL'S MOTION IS PREMATURE

BP Rail's motion is premature and internally inconsistent. Why should NSR have produced any information if it appears likely that NSR will not need to produce the information? In our view, there appears little reason, based on precedent cited above, for the Board to deny the requested modification of the abandonment authority or at least to allow NSR to withdraw the notice of exemption altogether. Why would NSR's position now have anything to do with whether it would respond to a request for information if required to do so?

CONCLUSION

NSR requests that the Board deny BP Rail's motion as premature, if not suspect in motivation. NSR renews its request for modification of the Notice of Exemption and the exemption already granted in this case from an exemption to abandon the subject Line to an exemption to discontinue service over the Line. NSR further requests that the Board carefully scrutinized whether the OFAs filed by BP Rail in this and recent cases are for the purpose of continuing or restoring rail service and whether there is any realistic possibility that such service could result

Respectfully submitted
NORFOLK SOUTHERN RAILWAY COMPANY

BY 

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Norfolk Southern Railway Company
Three Commercial Place
Norfolk, VA 23510

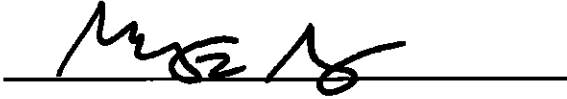
(757) 629-2759
fax (757) 533-4872

Attorney for
Norfolk Southern Railway Company

Dated December 17, 2007

CERTIFICATE OF SERVICE

I certify that the foregoing Reply to Motion in STB Docket No AB-290 (Sub-No 288X) has been served on Vincent Caruso, Jr , 22 Somerset Place, Clifton, NJ, by DHL Express, prepaid

A handwritten signature in black ink, appearing to read "Greg E. Summy", is written over a horizontal line.

Greg E Summy

Dated December 17, 2007

Exhibit 1



22 Somerset Pl
Clifton NJ
07012-1123 US

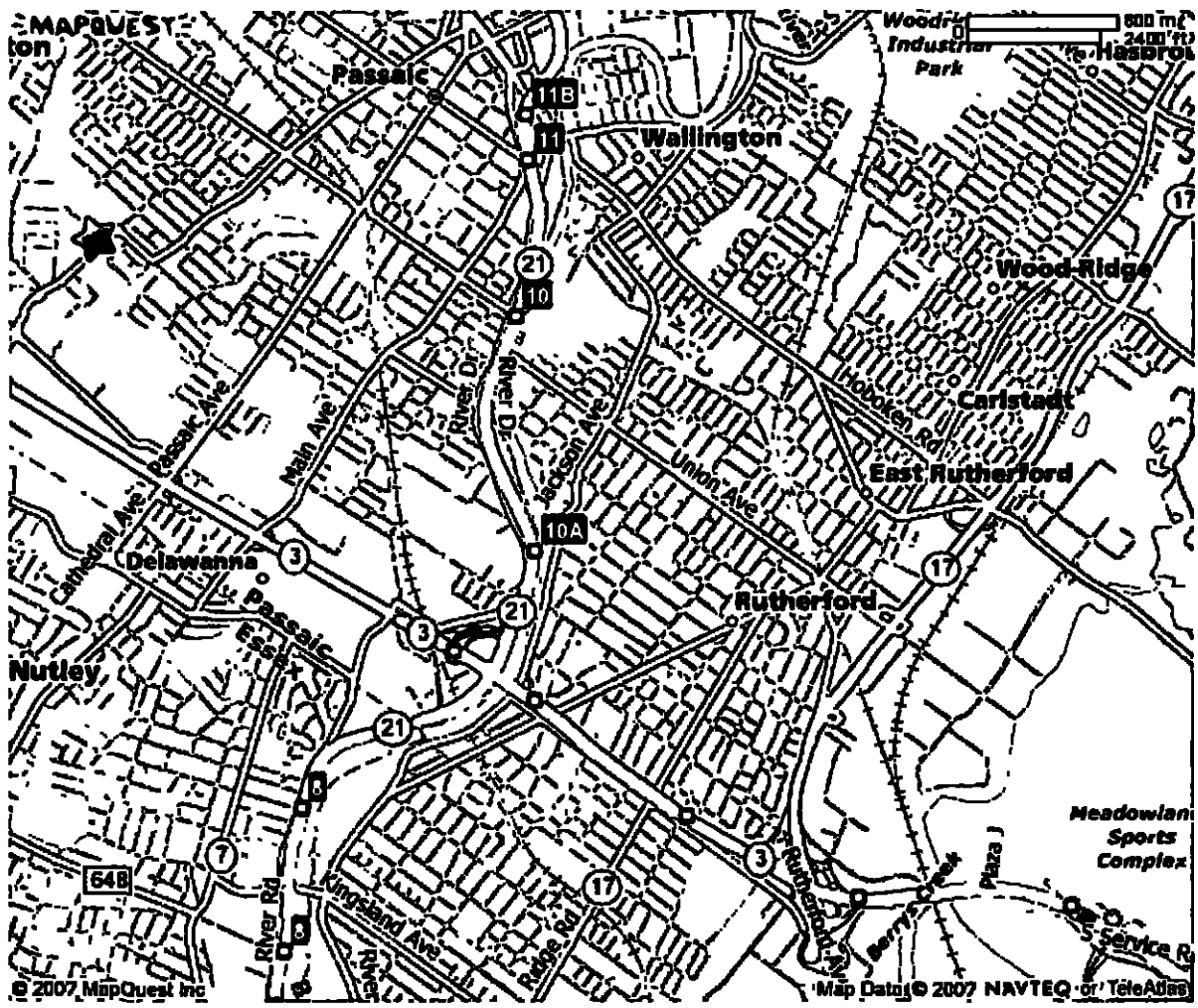
Notes:
Only text visible within note field will print

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State Farm	\$655 - \$834
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Quote and Compare



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Exhibit 2

Countywide Fireground Rehab. and Canteen Service

A Non-Profit Volunteer Emergency Services Organization

- ▶ Contact Us
- ▶ Join The Team
- ▶ Events
- ▶ Vehicles
- ▶ Donate
- ▶ FAQs
- ▶ Run Log
- ▶ Links
- ▶ Photo Gallery

Welcome

Countywide Fireground Rehab and Canteen, Box 54 Club, Fireground, Fire Ground, Rehabilitation, Fire Canteen, Teaneck, NJ Fire Dept Jersey City Gong Club, Bell and Siren Club, NJ, New Jersey, Passaic County, Fire Service Support Unit, Special Services, Clifton, Fire, Passaic, Paterson, Wayne, West Paterson, Ringwood, Little Falls, Totowa, County Wide, Canteen, Bayonne, Mutual Aid,

"Passaic County's Own Rehab."

Countywide Fireground Rehab and Canteen Service is an all volunteer non-profit unit that offer its services to Fire Fighters, Police & Emergency Services throughout Passaic County, New Jersey and nearby communities as situations may arise

Our goal is to promote and deliver rehabilitation support to the Fire and Emergency Services by providing our services professionally and efficiently in a timely, proactive manner

Our purpose is to ensure that the physical and mental condition of personnel operating at the scene of an emergency or a training exercise does not deteriorate to a point that affects the safety and integrity of the operation. Emergency incident rehab should be applied to all emergency operations and training exercises where strenuous activity or exposure to heat or cold exists

Funding for our services is through direct donations and grant applications. Management of the group and dispatching is performed internally. We are not manned by fire buffs, our members take their station in emergency response services seriously

All current members of Countywide have been certified through the Passaic County Public Safety Academy in Emergency Incident Rehab and as a stipulation of membership all new members will be required to do the same. Our members are encouraged to expand their knowledge of emergency services and are from time to time presented opportunities to take additional courses offered by the Academy, FEMA or the American Red Cross

Countywide Fireground Rehab and Canteen Service will operate under the guidelines set forth by FEMA, IAFF, & IFSTA



Find a Program

Program Detail

Countywide Fireground Rehab & Canteen

22 Somerset Place

Clifton, New Jersey 07012

Categories of Activities.

Administrative

Auxiliary

Chaplain Corps

Fundraising Initiatives

Grant Writing

Life Safety Education

Special Projects

Contact Name: Vincent Caruso

Contact Phone: 973-614-0555

Contact Fax: 209-396-8149

Contact E-mail: vcaruso@firecanteen.org

Fire Department Website: <http://www.firecanteen.org>

Category of fire or EMS department:

Volunteer

Citizen Corps council in area: Yes

Citizen Corps council is aware of the start of the Fire Corps program: No

Organization sponsors or helps train CERT: No

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