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May 26, 2009

VIA Electronic Filing

Anne K. Quinlan, Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D. C. 20024

Re: STB Finance Docket No. 35245, James Riffin - Petition for Declaratory
Order - Norfolk Southern Railway Company's Motion to Deny Petition

Dear Ms. Quinlan:

Attached for electronic filing with the Board in the captioned proceeding is
Norfolk Southern Railway Company's (NSR's) Motion to Deny the Petition for
Declaratory Order filed May 6, 2009 in the subject proceeding.

Very truly yours,

A handwritten signature in cursive script, appearing to read 'James R. Paschall'.

James R. Paschall

Attachment

cc: via e-mail jimriffin@yahoo.com
James Riffin
1941 Greenspring Drive
Timonium, MD 21093

via e-mail cspitulnik@kaplankirsch.com
Charles A. Spitulnik
Attorney for Maryland Transit Administration

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35245
JAMES RIFFIN - PETITION FOR DECLARATORY ORDER

NORFOLK SOUTHERN RAILWAY COMPANY'S
MOTION TO DENY PETITION

James R. Paschall
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Dated: May 26, 2009

Before the
Surface Transportation Board

STB Finance Docket No. 35245

James Riffin - Petition for Declaratory Order

Norfolk Southern Railway Company's
Motion to Deny Petition

Norfolk Southern Railway Company's ("NSR") moves that the Board deny the petition for declaratory order filed May 6, 2009 by James Riffin ("Riffin") in the subject docket¹ without establishing a procedural schedule for further filings and proceedings.

¹Riffin initially filed a notice of exemption for the acquisition and operation as a line of railroad and transload facility of a 400-foot derelict side track in STB Finance Docket No. 35221, *James Riffin - Acquisition and Operation Exemption - Veneer Spur - In Baltimore County, MD*, on February 19, 2009. He submitted an amended notice to the Board on the next day. Riffin proposes to operate this side track which springs from an abandoned and partially removed (excepted) siding off the dormant Cockeysville Industrial Track. In a decision served March 5, 2009, the Board rejected this notice of exemption without prejudice to refiling consistent with the Board's decision. Although Riffin filed a Second Amended Notice of Exemption in that docket on March 6, 2009, this notice did not comply with the refiling language in the Board's March 5, 2009 decision. Riffin apparently anticipated that the Board would find the amended filing insufficient and also filed a new Notice of Exemption in a new docket, STB Finance Docket No. 35236, *James Riffin - Acquisition and Operation Exemption - Veneer Spur - In Baltimore County, MD*, on March 30, 2009. Riffin, who describes himself as a "Carrier," now has filed an "application under 49 U.S.C. 10902" proposing "pursuant to 49 U.S.C. §10902," to acquire from Mark Downs, Inc., a non-carrier, "approximately 400 feet of privately-owned spur track" in Cockeysville, Baltimore County, MD "and to operate the spur track as an additional line" in STB Finance Docket No. 35246, *James Riffin - § 10902 Acquisition and Operation Application - Veneer Spur - In Baltimore County, MD*, also on May 6, 2009. This proceeding is related to STB Finance Docket No. 35246 and presents some of the same key issues involved in the application proceeding, including whether the side track, called the Veneer Spur, is or will be a line

The Board has discretionary authority under 5 U.S.C. 554(e) and 49 U.S.C. 721 to issue a declaratory order to eliminate a controversy or remove uncertainty. In this case, however, there is no need for the Board to institute a declaratory order proceeding. It is clear that Riffin is not a rail carrier in his personal, individual capacity, that the Veneer Spur track is not a line of railroad and can not become a line of railroad and that Riffin can not acquire and operate the Veneer Spur track as a line of railroad pursuant to 49 U.S.C. 10902 by notice of exemption, petition or application.

Riffin is Not a Rail Carrier in His Personal, Individual Capacity. Riffin clearly is not a rail carrier in his personal, individual capacity. Riffin desires a determination that he is currently a rail carrier so that he can acquire and operate the Veneer Spur track as a line of railroad pursuant to 49 U.S.C. 10902 and the Board's regulations pertaining to that section of the Act. For that purpose, and therefore for the purpose of this proceeding, it is not relevant whether Riffin could become a rail carrier as an individual if he could do so by acquiring the subject derelict side track and converting it into a line of railroad because as a non-carrier he would need to do this pursuant to 49 U.S.C. 10901 and the Board's regulations pertaining to that section of the Act.

In STB Finance Docket No. 34997, *James Riffin - Petition for Declaratory Order*, served May 2, 2008, the Board assumed that Riffin was or could become a rail carrier, but did not decide whether he was a rail carrier in his individual, personal capacity. The Board did not need to make that determination in order to provide guidance to the parties on the questions presented in the petition, the reach of federal preemption

of railroad and whether Riffin is a "carrier" in his individual, personal capacity.

under 49 U.S.C. 10501(b)(2) and the status of Riffin's Cockeysville property as a line of railroad.² Therefore, the Board's decision served May 2, 2008 in STB Finance Docket No. 34997 would not support Riffin's assertion that he is currently a Class III railroad in his individual, personal capacity.

Under the Interstate Commerce Act,³ the Board has jurisdiction over transportation by rail carrier, 49 U.S.C. 10501(a)(1), and the term "rail carrier" is defined as "a person *providing* common carrier railroad transportation for compensation," 49 U.S.C. 10102(5) (emphasis supplied). Riffin has not shown that either Riffin personally or the (forfeited) corporate entity which he controls, WMS, L.L.C.,⁴ has ever transported

²The Board addressed this question in pertinent part as follows: "The activities proposed by petitioner [Riffin] for the Cockeysville property would not be considered to be part of or integral to rail transportation by a rail carrier, and thus would not come within the Board's jurisdiction. Petitioner's statements make clear that he cannot operate as a rail carrier on the CIT. The Cockeysville property is disconnected from any line of railroad over which petitioner may have authority to operate as a rail carrier." STB Finance Docket No. 34997, *James Riffin - Petition for Declaratory Order*, served May 2, 2008.

³Although some recent pleadings and decisions again refer to the Board's governing Act as the Interstate Commerce Act, the statute is still commonly referred to as the Interstate Commerce Commission Termination Act ("ICCTA"), which was the title of the statute when it was enacted. The act is codified in the United States Code at Title 49, Transportation, Subtitle IV, Interstate Transportation, Part A, Rail.

⁴Public records of the Maryland Secretary of State's office on May 22, 2006 showed the following entry for WMS, LLC, 1941 Greenspring Dr., Lutherville Timonium, MD, 21093-4158: "10/03/2008 FILING DEPT. ACTION - FORFEITURE; THE ENTITY WAS FORFEITED FOR FAILURE TO FILE PROPERTY RETURN FOR 2007." Md. Code Ann., Corp. & Ass'ns § 3-503(d) provides that when the charter of a corporation is forfeited, the powers conferred by law on the corporation are inoperative, null, and void. A corporate charter can be revived under Maryland law. Md. Code Ann. §§ 3-507 through 3-512. However, in the interim, Md. Code Ann. § 3-514(a) (2008) provides: "Any person who transacts business in the name or for the account of a corporation knowing that its charter has been forfeited and has not been revived is guilty of a misdemeanor and on conviction is subject to a fine of not more than \$500."

a single carload of freight for compensation for an unrelated third party over an active line of railroad that is owned or controlled by Riffin or WMS, L.L.C.

Riffin claims that he satisfies a key requirement or fundamental test for rail carrier status by holding himself out to provide rail transportation service. This is not enough because he cannot provide any rail transportation service and, moreover, his alleged holding out is a sham.⁵ Riffin has never provided any rail transportation service and neither he nor WMS, L.L.C. would be able to provide rail transportation service over the Allegany County Line, the only rail line in which he (actually WMS, L.L.C., which he controls) has an interest, if he received a reasonable request for service over that line. It is clear from Riffin's own description of his contacts with local businesses

⁵In *Railway Labor Executives' Association v. Wheeling Acquisition Corp.*, 736 F. Supp. 1397 (E.D. Va. 1990), the United States District Court for the Eastern District of Virginia stated in pertinent part at p. 1402:

The ICA defines "carrier" as "a person providing railroad transportation for compensation." 49 U.S.C. § 10102(19). [footnote omitted]. The present tense is significant; for purposes of the ICA and RLA, a carrier is one who currently provides railroad transportation for compensation. Wheeling does not fall within this definition. This interpretation is entirely consistent with the ICC's construction of the term "carrier." Illustrative of this is the ICC's decision in *United Transport Union v. Bessemer & Lake Erie Co. & P & C*, 342 I.C.C. 849 (1974). There, the ICC made clear that "carrier" excludes entities who do not currently provide rail service even though their organizational purpose is to do so.

To be a carrier, P & C must be engaged in transportation. This test includes the common law concept of "holding out" to transport the property or person of anyone who might elect to use the service. This is an objective test and depends not upon the corporate charter or declared purposes, but rather on what the company does.

342 I.C.C. 849 (1974) (citations omitted.)

[Note that a petition for review of the ICC's 1974 decision was filed but before the court reviewed the matter, the parties settled and asked the Commission to vacate and set aside its prior report and order. The agency did so on February 13, 1975. This does not invalidate the Court's later citation of the decision for the proposition for which it is cited.]

and of the condition of the Allegany County Line⁶ which was acquired by WMS, L.L.C. that no transportation has been performed over the Allegany County Line since its acquisition by WMS, L.L.C., that there is no current demand for such service and that no transportation can be performed over that line until it is rehabilitated. In *Association of P&C Dock Longshoremen v. Pittsburgh and Conneaut Dock Company*, 8 I.C.C. 2d 280 (1992), the ICC stated that whether a person or entity is a rail carrier is determined by "two tests distilled from the foregoing cases:⁷ (1) does defendant conduct rail operations; and (2) does it "hold out" that service to the public." Riffin conducts no rail operations, never has conducted rail operations and is currently unable to conduct rail operations over any rail line in which he or an entity which he controls has an interest.

Moreover, Riffin is currently legally prohibited from providing transportation or any other business service or product under the name of WMS, L.L.C., the authorized

⁶As explained at greater length in the text below, CSXT deeded an 8.54-mile line in Allegany County, MD ("Allegany County Line") to a corporate entity, WMS, L.L.C., in which Riffin has the majority interest, but not the sole interest, on June 20, 2006, pursuant to the Board's Offer of Financial Assistance ("OFA") procedures in *CSX Transportation, Inc. - Abandonment Exemption - In Allegany County, MD*, STB Docket No. AB-55 (Sub-No. 659X) (STB served December 14, 2005).

⁷See *Lone Star Steel Co. v. McGee*, 380 F.2d 640 (5th Cir.), cert. denied 389 U.S. 977 (1967); *Kieronski v. Wyandotte Terminal R. Co.*, 806 F.2d 107 (6th Cir. 1986); *Status of Bush Universal, Inc.*, 342 I.C.C. 550 (1973). *Lone Star* directs the following considerations:

First-actual performance of rail service, second-the service being performed is part of the total rail service contracted for by a member of the public, third-the entity is performing as part of a system of interstate rail transportation by virtue of common ownership between itself and a railroad or by contractual relationship with a railroad, and hence such entity is deemed to be holding itself out to the public, and fourth-remuneration for the services performed is received in some manner, such as a fixed charge from a railroad or by a percent of the profits from a railroad.

operator of the Allegany County Line. As shown in footnote 4, WMS, L.L.C. has forfeited its corporate charter. If Riffin were to conduct any business in the name of WMS, L.L.C. before having that entity's charter revived under applicable Maryland law, he would be guilty of a misdemeanor under Maryland law.

On June 20, 2006, pursuant to the Board's Offer of Financial Assistance ("OFA") procedures in *CSX Transportation, Inc. - Abandonment Exemption - In Allegany County, MD*, STB Docket No. AB-55 (Sub-No. 659X) (STB served December 14, 2005),⁸ CSXT deeded the 8.54-mile line in Allegany County, MD ("Allegany County Line") to the corporate entity, WMS, L.L.C., in which Riffin has the majority interest, but not the sole interest.⁹ From almost the date that WMS, L.L.C. acquired the Allegany County Line, Riffin has been trying to convince or to force CSXT to re-convey the Line directly to Riffin personally.¹⁰ As part of this effort, Riffin, in the name of WMS, L.L.C.

⁸We refer to the decisions served April 24 2008, August 18, 2006 and December 15, 2005 in *CSX Transportation, Inc. - Abandonment Exemption - In Allegany County, MD*, STB Docket No. AB-55 (Sub-No. 659X) as the *Allegany County Line Decisions*.

⁹In his filings in the *Allegany County Line* case, Riffin acknowledged that there were minority stakeholders in WMS, LLC with respect to the acquisition of the Line. See footnote 7 in *James Riffin - Petition for Declaratory Order*, STB Finance Docket No. 34997 (STB served May 2, 2008). We cannot be sure that these minority stakeholders are even aware that Riffin, in the name of WMS, L.L.C. filed the motion to have himself substituted for WMS, L.L.C. as the purchaser of the Allegany County Line. We also have found nothing on the record in this proceeding or any related proceeding or filing concerning the possible acquisition of these minority interests by Riffin or of any other disposition of them or concerning any protection of the interests of these minority stakeholders in the event the Allegany County Line was reconveyed by CSXT to Riffin as an individual.

¹⁰Riffin has based his requests for reconveyance of the Allegany County Line from CSXT to Riffin personally on the proposition that WMS, L.L.C. did not exist on the date of the Board's decision served December 14, 2005 authorizing the acquisition of the Allegany County Line by WMS, L.L.C. through the OFA procedures. But WMS,

petitioned the Board to substitute Riffin as the purchase of the Allegany County Line. The Board through a decision by Director Konschnik permitted, but did not require, the substitution of Riffin for WMS, L.L.C. as the purchaser of the Allegany County Line in a decision served August 18, 2006 in the *Allegany County Line* case,¹¹ which was subsequent to CSXT's conveyance of the Line to WMS, L.L.C. That decision did not require that CSXT reconvey the Allegany County Line to Riffin personally. See *Allegany County Line Decision*, STB served April 24, 2008 for further Board exposition on this point. Most importantly, Riffin errs by stating that the Board's August 18, 2006

L.L.C. did exist on the date that CSXT conveyed the line to WMS, L.L.C. and the Board's consideration, approval or exemption of a transaction to be consummated by a corporation to be formed is not unique. See e.g. *Norfolk Southern Railway Company, Pan Am Railways Inc., et al. - Joint Control and Operating / Pooling Agreements - Pan Am Southern LLC*, STB Finance Docket No. 35147 (STB served November 14, 2008); *Moscow Camden and San Augustine Railroad LLC - Acquisition and Operation Exemption - Assets of Moscow, Camden & San Augustine Railroad*, STB Finance Docket No. 34990 (STB served February 16, 2007); *Dakota Rail, Inc. - Abandonment Exemption - In McLeod, Carver, and Hennepin Counties, MN*, STB Docket No. AB-472 (Sub-No. 1X) (STB served November 30, 2001); *Caddo Antoine and Little Missouri Railroad Company - Feeder Line Acquisition - Arkansas Midland Railroad Company Line Between Gurdon and Birds Mill, AR*, 4 S.T.B. 326 (1999); *CSX Transportation, Inc - Abandonment Exemption - In Sanilac and St. Clair Counties, MI; In the Matter of a Request to Set Terms and Conditions*, ICC Docket No. AB-55 (Sub-No. 321X) (ICC Decided August 30, 1990); and *Amite, Wilkinson & Feliciana Railroad Co. - Exemption*, ICC Finance Docket No. 30685 (ICC Decided July 22, 1985). Riffin's argument about the corporate existence of WMS, L.L.C. at the time of the Board's decision provides no basis for Riffin's assertions that the property must be reconveyed to him, much less that the acquisition of the property by WMS, L.L.C. makes him personally a Class III rail carrier as an individual.

¹¹In his petition for stay filed December 17, 2007 in *Petition of James Riffin for Declaratory Order*, STB Finance Docket No. 34997, p. 4, Riffin admitted that he intentionally misled the Board in filing his Offer of Financial Assistance in *CSX Transportation, Inc. - Abandonment Exemption - In Allegany County, MD*, STB Docket No. AB-55 (Sub-No. 659X) by concealing the "true identity" of the offeror and filing the OFA under a "pseudonym."

decision authorized Riffin to operate the Allegany County Line. The decision permitted Riffin to purchase the Line. In the absence of Riffin actually acquiring the Line, the decision did not even require that the Line be reconveyed to Riffin, much less give him authority to operate it in his personal, individual capacity.

As the *Allegany County Line* decision served April 24, 2008 shows, the Board has rejected subsequent motions and petitions by Riffin in which he has attempted to obtain an order requiring the Allegany County Line to be reconveyed to himself in his personal, individual capacity. Undaunted, Riffin has filed a petition for review of the Board's decision served April 24, 2008 with the United States Court of Appeals for the District of Columbia Circuit. Since that petition for review of the Board's most recent *Allegany Line Decision* apparently is still pending in the U.S. Court of Appeals and CSXT has not reconveyed the Allegany Line to Riffin as an individual, Riffin has no basis for claiming to be a Class III rail carrier or to have authority to operate the Allegany County Line in his personal capacity.¹²

In addition to Riffin's erroneous reliance on the *Allegany County Line Decision* served August 18, 2006, Riffin cites decisions that concern the status of a track as a railroad line, not whether the owner of the track has become a rail carrier. Other than these easily distinguishable precedents, Riffin most heavily relies on a statement in the Board's decision in *General Railway Corporation, d/b/a Iowa Northwestern Railroad - Exemption for Acquisition of Railroad Line - In Osceola and Dickinson Counties, IA*,

¹²Since CSXT has not conveyed the Allegany County Line to Riffin personally in his individual capacity under 49 U.S.C. 10905 and the Board's OFA regulations and he has never been granted authority as a rail carrier from the Board after following formal procedures under 49 U.S.C. 10901, Riffin has no legal basis to claim to be a rail carrier.

STB Finance Docket No. 34867 (STB served June 15, 2007) that “GRC had become a rail carrier after having obtained authority to operate the line in 2001.” This reliance is also misplaced because GRC had specifically obtained authority to operate the line and in fact had operated it. GRC inadvertently had not sought authority to acquire it. This decision provides no basis for concluding that the acquirer of a line which has not in fact operated over that line or any other line becomes a rail carrier merely through the acquisition of the line without meeting the *P&C Dock* tests.¹³

Moreover, under Maryland law, the owner of a business entity is not presumed to have an ownership interest in assets owned by that entity. See *Superior Outdoor*

¹³Riffin also relies on the Board's *Effingham Railroad Company* decisions, which are also inapposite. The line that was the subject of the notice in the initial *Effingham* decision qualified for the class exemption because it was a line of railroad acquired from a rail carrier, unlike the spur track that is the subject of Riffin's notice. Clearly, from the outset, Effingham Railroad showed that it would not be providing service to and from a mere 206-foot track but would use that track for access to an industrial park and to an industry outside the industrial park over track of considerably longer distances, even if that track was excepted track. The extension involved 9,201 feet of track that left the boundaries of the industrial park to connect TQW's facility with CNR/ICR.

No actual operation by Riffin to date at any location and no such feasible operation on the Veneer Spur is shown here. Rather, Riffin makes statements concerning setting up a transload facility but has not shown that he has the property, permits and access to do so. He has not shown that he has a credible plan to provide service beyond the “initial phase” of the plan, as did Effingham Railroad. Moreover, Effingham Railroad already had interchange agreements and arrangements with connecting carriers when it filed its notices and petition. Riffin does not.

Effingham Railroad was prepared to and did provide rail transportation service, which Riffin has not done. The only point Riffin can make by citing *Effingham* is to show that he has not satisfied the criteria to become a rail carrier and that his proposal and his application are insufficient and incomplete. See the summary of prior cases and discussion in *Effingham Railroad Company - Operation Exemption - Line Owned by Total Quality Warehouse*, STB Finance Docket No. 34081 (STB served April 10, 2002).

Signs, Inc. v. Eller Media Co., 150 Md.App. 479, 499, 822 A.2d 478, 490 (2003).¹⁴

Riffin appears to recognize, at least implicitly, the distinction between corporate and individual property and the fact that the acquisition of the Allegany County Line by WMS L.L.C. does not make him a rail carrier in his individual capacity by his persistent efforts to require CSXT to reconvey the Allegany County Line to himself personally.

Rail common carrier status can not be conferred on either a company or an individual merely by the ownership by the company or person of property formerly used to provide rail service or even by mere ownership of currently legally active railroad operating property.¹⁵

Rail carrier status also does not result from the mere invocation of a class

¹⁴See also *Stein v. Smith*, 358 Md. 670; 751 A.2d 504 (2000): ("....corporations and individuals are separate entities. "The corporate entity will be disregarded only when necessary to prevent fraud or to enforce a paramount equity." *Bart Arconti & Sons, Inc. v. Ames-Ennis, Inc.*, 275 Md. 295, 312, 340 A.2d 225, 235 (1975).) See also in general *Rhode Island Hospital Trust Co. v. Doughton*, 270 U.S. 69 (1926) ("But whatever the view of the other courts, that of this Court is clear: the stockholder does not own the corporate property."); *Boise Cascade Corporation v. Wheeler*, 419 F. Supp. 98 (S.D.N.Y. 1976) (A corporation's property rights are entirely distinct from those of its shareholders and even complete ownership of capital stock does not operate to transfer the title to corporate property).

¹⁵See *Staten Island Railway Corporation - Exemption From 49 U.S.C. 10901; Delaware Otsego Corporation and Staten Island Railway Corporation - Exemption from 49 U.S.C. 11301*, ICC Finance Docket No. 30629 (ICC decided July 11, 1985), where the ICC stated: "A new company acquiring a line, but that has not yet commenced operations, is not a carrier for purposes of section 11343 jurisdiction. Finance Docket No. 30505, *Alabama Southern Railroad Company and the Alabama Great Southern Railroad Company - Acquisitions, Operations, and Trackage Rights Exemption*, I.C.C. 2d (1984). SIRC is a new company which has not yet commenced operations. Accordingly, it does not qualify as a carrier under 49 U.S.C. 11343."

See also *Wisconsin Central Ltd. v. STB*, 112 F.3d 881 (7th Cir. 1997).

exemption for acquisition of a rail line¹⁶ or from the mere acquisition of a rail line under the OFA procedures unless the tests set forth in the 1992 *P&C Dock* decision set forth above are met.

For these reasons, Riffin clearly is not a rail carrier in his individual, personal capacity.

The Veneer Spur Is Not and Can Not Become a Line of Railroad. The “Veneer Spur” track is actually a former side track that springs from a former siding or lead track that served the old Cockeysville freight depot or station and connected with two lead tracks or side tracks. This siding or lead track was located between approximately milepost 14.7, which lies between Cockeysville Road and York Road and milepost 15.4, which is approximately 0.59-mile north and east across York Road. See Exhibit 1, a portion of the Conrail valuation map of the Cockeysville Industrial Track. Riffin acknowledges that the Veneer Spur has been a side track and is not now a line of railroad. His contention is that the Veneer Spur track will become a line of railroad if he receives Board approval to acquire and operate it as described in his petition and related application. However, the (excepted) siding from which the Veneer Spur

¹⁶In *Railway Labor Executives' Association v. Wheeling Acquisition Corp.*, 736 F. Supp. 1397 (E.D. Va. 1990), the United States District Court for the Eastern District of Virginia stated in pertinent part at p. 1402-3:

Plaintiffs further argue that, despite the plain language of the RLA and the ICA, Wheeling's invocation of an ICC class exemption for line acquisitions under ICA § 10901 and its issuance of securities pursuant to ICA § 11301, transformed Wheeling into a carrier. This argument is without merit. These provisions govern transactions involving non-carrier activities, including line acquisition and securities issuance. That a specific transaction involving a non-carrier requires ICA compliance does not convert a non-carrier into a carrier. The plain language of these provisions recognizes the non-carrier status of the entities to which they apply.

springs and which would connect it to the Cockeysville Industrial Track main line has been (or can now be) abandoned and does not and can not connect to the national rail system. Therefore, the "Veneer Spur" can not be put into service as a line of railroad or any other type of track.

Whether or not Riffin's recitation concerning the changes in the configuration and status of the track to which the Veneer Spur connected from a former second main line track to an excepted track is correct, this recitation has no bearing on the most recent or the current status of the track. The past changes in the former second main line track's configuration and status were within Conrail's managerial discretion and did not require ICC or STB approval. As an excepted track, the siding from which the Veneer Spur track was connected to the Cockeysville Industrial Track could have been abandoned by either Conrail or NSR by their expressed intent. Even now, if the excepted siding track were not to be deemed abandoned already, which it should be, NSR could abandon this excepted track merely by expressing an intent to abandon it. For the record in this case, then, and notwithstanding whether the siding has previously been abandoned, NSR declares its intent to abandon the siding and hereby "abandons" it and disclaims any intention or responsibility for providing service of any kind over it, subject to any right (if any) that it may have as Conrail's successor to any salvage.

The Operation Proposed By Riffin Could Not Be Conducted on the Veneer Spur. Exhibit 2 is a map showing the location of 15 Beaver Run Lane, Cockeysville, MD, which is where Riffin states the Veneer Spur is located. The map is generally accurate in showing where the track on the right-of-way of the Cockeysville Industrial

Track of the "Northern Central" Railroad now ends, between Cockeysville Road and York Road. Exhibit 3 is an aerial photograph of the location of 15 Beaver Run Lane. It is apparent that there is no track crossing York Road although a trace of the old right-of-way can be seen.¹⁷ The large building with vehicles and other material on a scarred and scraped piece of ground is the described location of Riffin's property if we read his map correctly. It is readily apparent that Riffin could not establish a transload operation or any other type of railroad operation except a delivery track in this area, especially considering that Riffin's own map shows he does not own or lease all of the property in this small area, and only if the line were restored from the point at which it has been taken up.

By contrast, Exhibit 4 is a map and Exhibit 5 is an aerial photograph of NSR's bulk terminal facility at approximately milepost 1.0 on the Cockeysville Line. The legend in the top right corner of the photograph, as compared with the legend in the same location on Exhibit 3, shows that the photograph covers three times more area than the Exhibit 3 photograph of the Beaver Run Lane location. This was necessary to fit the entire NSR terminal location into the photograph. It is plainly shown that a much larger, clearer and unobstructed location is needed for a transload or other terminal

¹⁷The removal of the railroad bridge crossing York Road by the Maryland Department of Transportation before NSR acquired the Cockeysville Industrial Track from Conrail has been described in other proceedings and need not be repeated here. There has been no reasonable demand for rail service over this segment of track since before NSR acquired it. It need only be noted that this track would need to be restored in order for Riffin's planned use of the track to become effective. Since Riffin seems intent on keeping his proposed traffic commitments, if any, and business plan, if any, secret, the feasibility of this restoration can not be evaluated on the current record. As noted below, NSR intends to file for an exemption to permit abandonment of freight service on the Cockeysville Industrial Track within the next few months.

facility than the property Riffin would have available and that the Riffin property could not support his proposed operation even if it were still connected to the Cockeysville Industrial Track.

Riffin proposes to operate a track that is only 0.076-mile (400 feet) in length as a line of railroad. As the Board noted in *Union Pacific Railroad Company - Abandonment and Discontinuance of Trackage Rights Exemption - in Los Angeles County, CA; In the Matter of an Offer of Financial Assistance*, STB Docket No. AB-33 (Sub-No. 265X) (STB served May 7, 2008), where Riffin tried to acquire a 0.08-mile track segment for a supposedly similar railroad operation, UP showed that a track of such length is incapable of supporting rail service due to its short length and confined location similar to the location of the Veneer Spur. Riffin proposes to operate the track in conjunction with a transload or bulk terminal facility. However, he does not demonstrate that the area surrounding this track, which is generally occupied by buildings, is large enough to support such a facility or that he or anyone else has use of property and appropriate permits for a transloading facility.

Riffin has no interchange agreement with Norfolk Southern Railway Company. His proposal to interchange with NSR at the “western end of the Veneer Spur” is ludicrous in view of the extent and condition of the track as established in previous recent proceedings before the Board as well as the location as shown in Exhibit 3. In view of the lack of an interchange agreement with NSR and the size of property, if the declaratory order is granted and Riffin’s application is considered on the merits, Riffin should be required to identify where an interchange track and any necessary switches, turnouts and runaround tracks would be located.

In view of the exhibits hereto and the finding in the *Union Pacific* case, *supra*, concerning the infeasibility of the operation of a track of similar length and configuration as a railroad line, if the declaratory order is granted and Riffin's application is considered on the merits, if the declaratory order is granted and Riffin's application is considered on the merits, Riffin should be required to show exactly how he can move cars in and out of a 400-foot long track and where the proposed transload facility will be located in relation to the track, the identity of the party that owns all of the property on which the facility will be situated, an exact plan of and for the facility showing all surrounding buildings and streets and proposed track locations, whether the operation will fit on available open property, the access to the facility for the pickup and delivery of freight by motor carriers, whether Riffin has ownership, a lease or permission to use all of the property needed for a right-of-way to connect the end of the Veneer Spur with his supposed "railroad maintenance facility" and whether he has consulted with any environmental agencies and obtained any necessary permits or clearances for such construction. It is not enough to allege that such an operation will be set up when there is visual evidence that shows no such operation can be conducted at the proposed location.¹⁸ We are confident, however, that the petition and application will be denied

¹⁸In the companion case to the *Union Pacific* case, *Los Angeles County Metropolitan Transportation Authority - Abandonment Exemption - in Los Angeles County, CA*, STB Docket No. AB-409 (Sub-No. 5X) (STB served July 17, 2008), the Board found that Riffin's proposed OFA suffered from many of the same deficiencies as his petition and application with respect to the Veneer Spur. The Board stated:

Riffin has not shown an overriding public need for rail service here. Just as in Hamilton County, traffic on the Line (and on the adjacent, long-abandoned segment) has been nonexistent for years, and any plans to restore freight service on the Line are speculative at best. Riffin has not provided a single verified statement from a potential shipper, or even a letter or any other tangible

and the Board will not need to impose these additional reasonable informational requirements.

Riffin's Proposed Construction of an Extension to His Facility Is Related to the Transaction and Can Not Be Justified. Riffin asserts that "the Applicant owns and operates a rail carrier maintenance-of-way facility / rail car maintenance and repair shop, which is adjacent to, and will be served by, the Line." Previously, he has stated that construction of 600 feet of track will be needed to reach his facility from the Veneer Spur track. As noted above, if the declaratory order is granted and Riffin's application is considered on the merits, he should be required to show whether he has ownership, a lease or permission to use all of the property needed for a right-of-way to connect the end of the Veneer Spur with his supposed "railroad maintenance facility" and whether he has consulted with any environmental agencies and obtained any necessary permits or clearances for such construction since it is directly related to his proposed acquisition and operation of the Veneer Spur.

Of course, we can be sure that he has made no such consultations or applications for permits. Instead of complying with applicable environmental laws and regulations at this very location, Riffin has pursued a course of vexatious, frivolous, and

manifestation of intent to use the Line, and has only offered vague claims of discussions with area businesses. And, his notion that he might transload for the Port of Los Angeles is not supported by a meaningful business plan. Riffin does not even provide evidence of having contacted the Port, let alone evidence of its entertaining his transload idea.

While Riffin may argue that his confidential submission remedies these and similar defects in his application and petition, we doubt that is the case and ask the Board to strictly scrutinize these filings. We also plan to respond to Riffin's motion for a protective order that would bar NSR, including NSR in-house counsel, from seeing these submissions.

meritless litigation and filings in an effort to evade compliance with these laws and regulations.¹⁹

The Veneer Spur Track Would Not Be an Extended Line of Railroad Even if Riffin were a Class III Rail Carrier and Even If It Were a Line of Railroad. Even if Riffin acquired the subject track under the supposition that it would be a line of railroad (which it is not), and even if Riffin were a carrier (which he is not), Riffin's acquisition of a line of railroad in the Baltimore area which can not be reached from the Allegany County Line would result in the acquisition or creation of a new carrier. The supposed purpose of Riffin's acquisition is to serve new shippers. However, track that is hundreds of miles distant, or at least that is disconnected and unreachable from an existing rail line, "cannot reasonably be viewed as used for a purpose ancillary to the service that [in this case, WMS, L.L.C., the current owner and putative operator of the dormant and currently inoperable Allegany County Line] is already authorized to provide" from the existing rail line that WMS, L.L.C. owns. See *Suffolk & Southern Rail Road LLC - Lease and Operation Exemption - Sills Road Realty, LLC*, STB Finance Docket No. 35036 (STB served December 20, 2007).

Riffin (a) is a non-carrier but (b) even if Riffin were to be a carrier, the subject

¹⁹As the Board knows, Riffin was incarcerated for approximately 2 weeks in the Baltimore County jail in June 2008 because of his refusal to comply with State and local environmental laws on and near his Baltimore County property in contempt of court. Thus, this is not some old problem that has long since been resolved. Riffin's appeal to the the Court of Special Appeals of Maryland in No. 02379/07, *James Riffin vs. Maryland Department of the Environment et al.* was scheduled to be heard on briefs on December 12, 2008. See November 21, 2008 memorandum from Leslie D. Gradet, Clerk to The Court, <http://www.courts.state.md.us/cosappeals/pdfs/200812schedule.pdf>.

track is (i) owned by a non-carrier and (ii) is not a rail line. Under any of these existing circumstances, a notice, petition or application to acquire and operate the Veneer Spur track by Riffin would not be a transaction covered by 49 U.S.C. 10902 or the corresponding Board regulations in 49 C.F.R. Part 150, which apply only to the acquisition and operation of existing railroad lines by existing rail carriers. If a notice, petition or application for the acquisition and operation of the Veneer Spur is cognizable by the Board at all, at least under these or similar facts, such a filing would be subject to the provisions of 49 U.S.C. 10901 and the regulations at 49 C.F.R. 1150.31, *et seq.* The facts of this case present all three separate disqualifying circumstances for an application or other filing under 49 U.S.C. 10902.²⁰

Forthcoming NSR Abandonment Notice or Petition. Riffin's filings with respect to the Veneer Spur are no doubt simply another action in furtherance of his efforts to secure the freight operating rights on the Cockeysville Industrial Track.²¹ Riffin himself is responsible for the delay in NSR abandoning its common carrier obligation to provide freight service over the Cockeysville Industrial Track because of his ultimately meritless delaying actions in prior Board cases. Now that MTA has obtained a final

²⁰See *James Riffin d/b/a The Northern Central Railroad - Acquisition and Operation Exemption - In Baltimore City, MD*, STB Finance Docket No. 34982 (STB served October 9, 2007), among other decisions.

²¹In *Norfolk Southern Railway Company - Abandonment Exemption - In Norfolk and Virginia Beach, VA*, STB Docket No. AB-290 (Sub-No. 293X) (STB served November 6, 2007), the Board noted Riffin's improper efforts to harass "NSR into conveying the freight operating rights of the Cockeysville Line to Mr. Riffin." The Board stated:

Accordingly, we will closely scrutinize any future filings by Mr. Riffin in this or any other proceeding before the Board, and we strongly admonish Mr. Riffin that abuse of the Board's processes will not be tolerated.

decision with respect to its lack of a common carrier obligation to provide freight service over line, NSR is preparing to file another notice or petition to abandon freight service on the Cockeysville Industrial Track, which we expect to file within the next few months. Riffin will have a chance to raise his arguments in that case if his stated concern is his real concern or purpose. It should go without saying, but in this case we note that NSR does not agree with or acquiesce in any statement of fact or law by Riffin in this proceeding or the related application that is not addressed in this document simply by not addressing it. Some erroneous statements by Riffin are simply irrelevant or superfluous to the determination in this declaratory order proceeding and need not be addressed.

Conclusion. Riffin is not a "carrier" and is not entitled to use the procedures and processes of 49 U.S.C. § 10902 and the Board's regulations at 49 C.F.R. § 1150.41 et seq. Even if he were a carrier, acquisition of the Veneer Spur track would not be an extension of any line owned and operated by Riffin. Moreover, the Veneer Spur is severed from the national rail system and can not be put back in service as any type or status of track or railroad line. Riffin's petition for declaratory order should be denied and NSR so requests. NSR, of course, reserves its right to reply in full to the petition or any further statement by Riffin that is permitted by the Board if the Board institutes a declaratory order proceeding in this case.

Respectfully submitted,

NORFOLK SOUTHERN RAILWAY COMPANY

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Dated: May 26, 2009

CERTIFICATE OF SERVICE

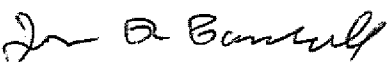
I hereby certify that I caused to be served a copy of the foregoing Motion to Deny

Petition for Declaratory order on:

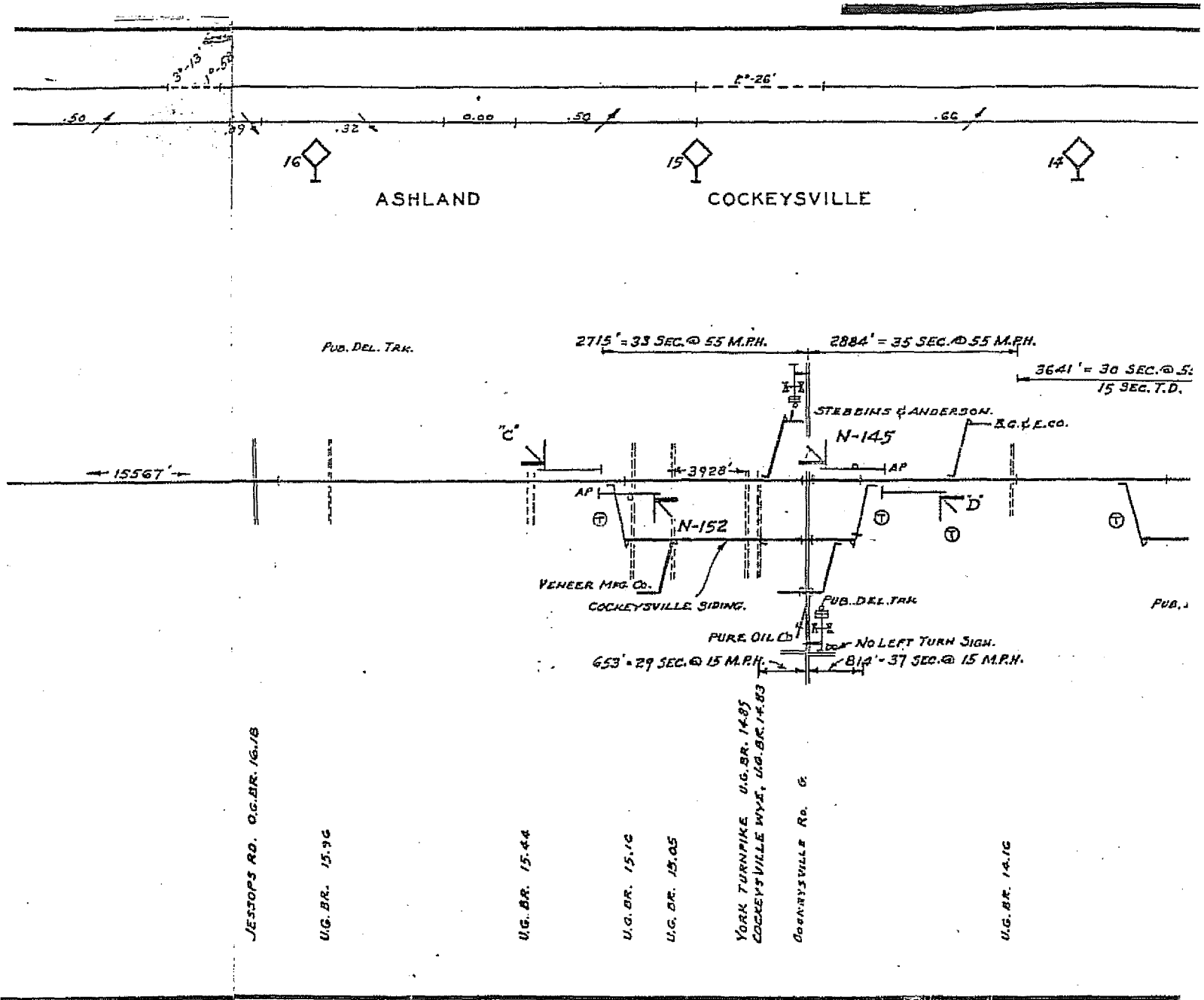
James Riffin
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Charles A. Spitulnik
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via e-mail on this 26th day of May, 2009.

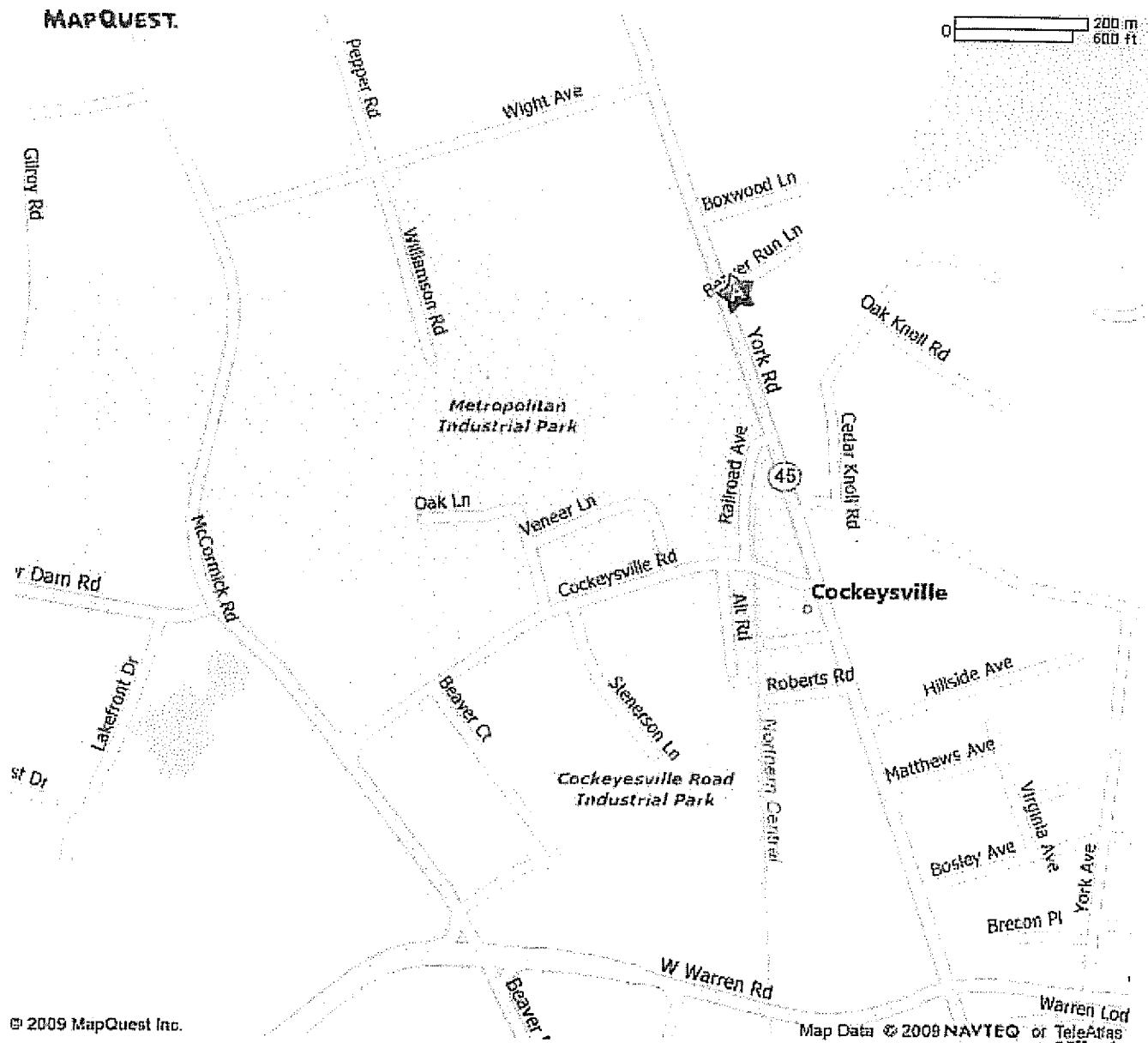

James R. Paschall

STB Finance Docket No. 35245
Exhibit 1

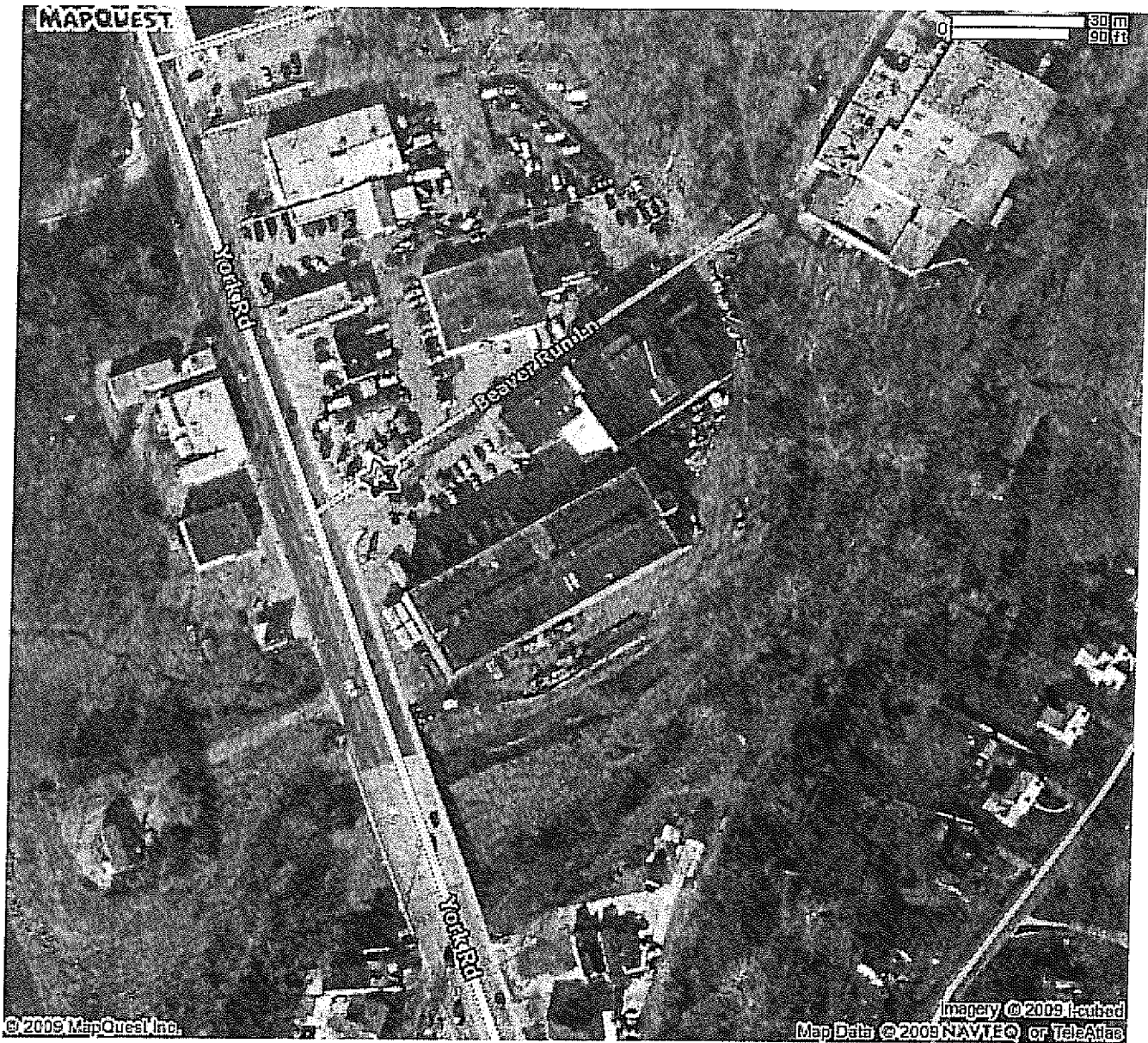


A: 15 Beaver Run Ln, Cockeysville, MD 21030-2010

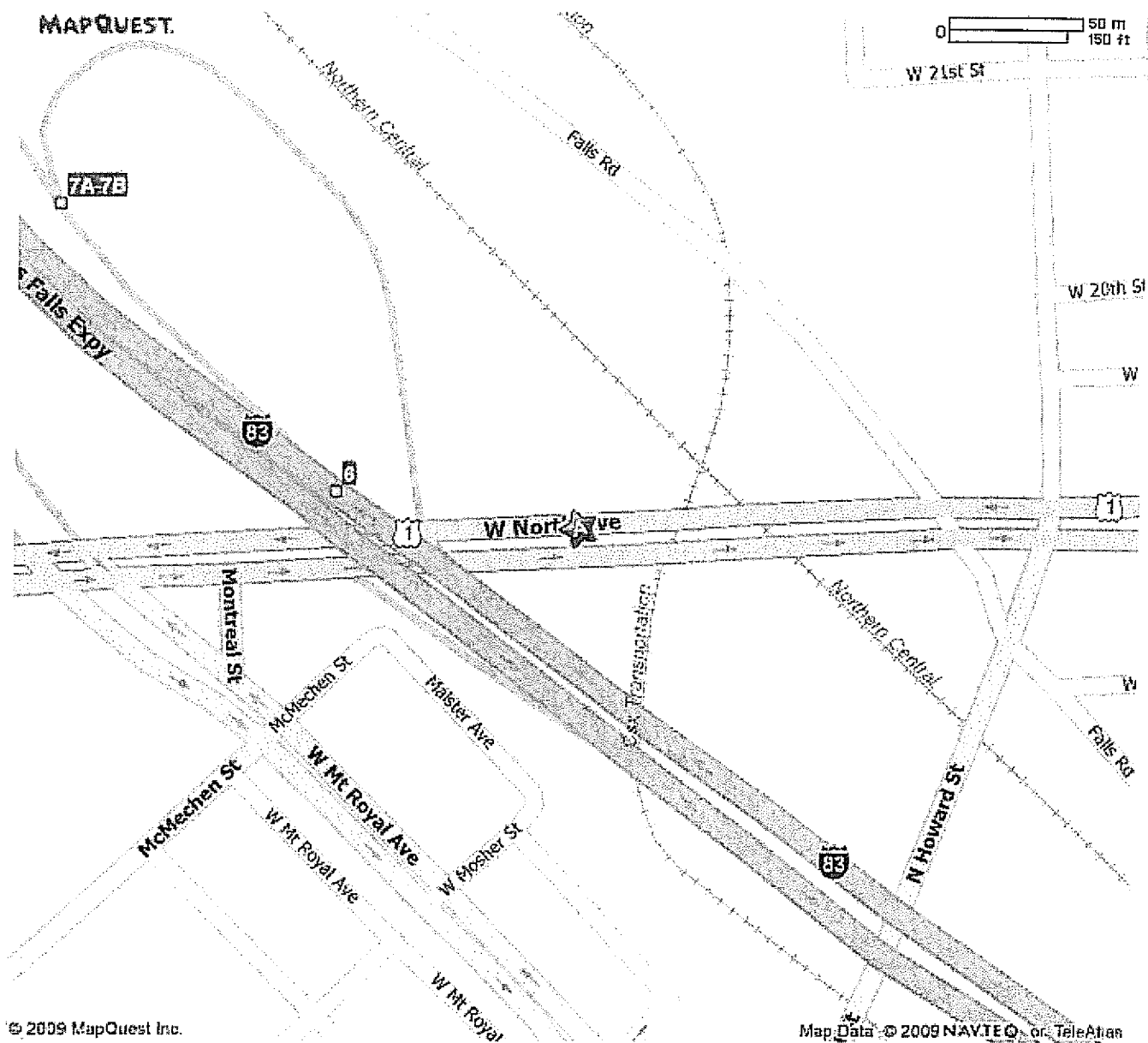
STB Finance Docket No. 35245
Exhibit 2



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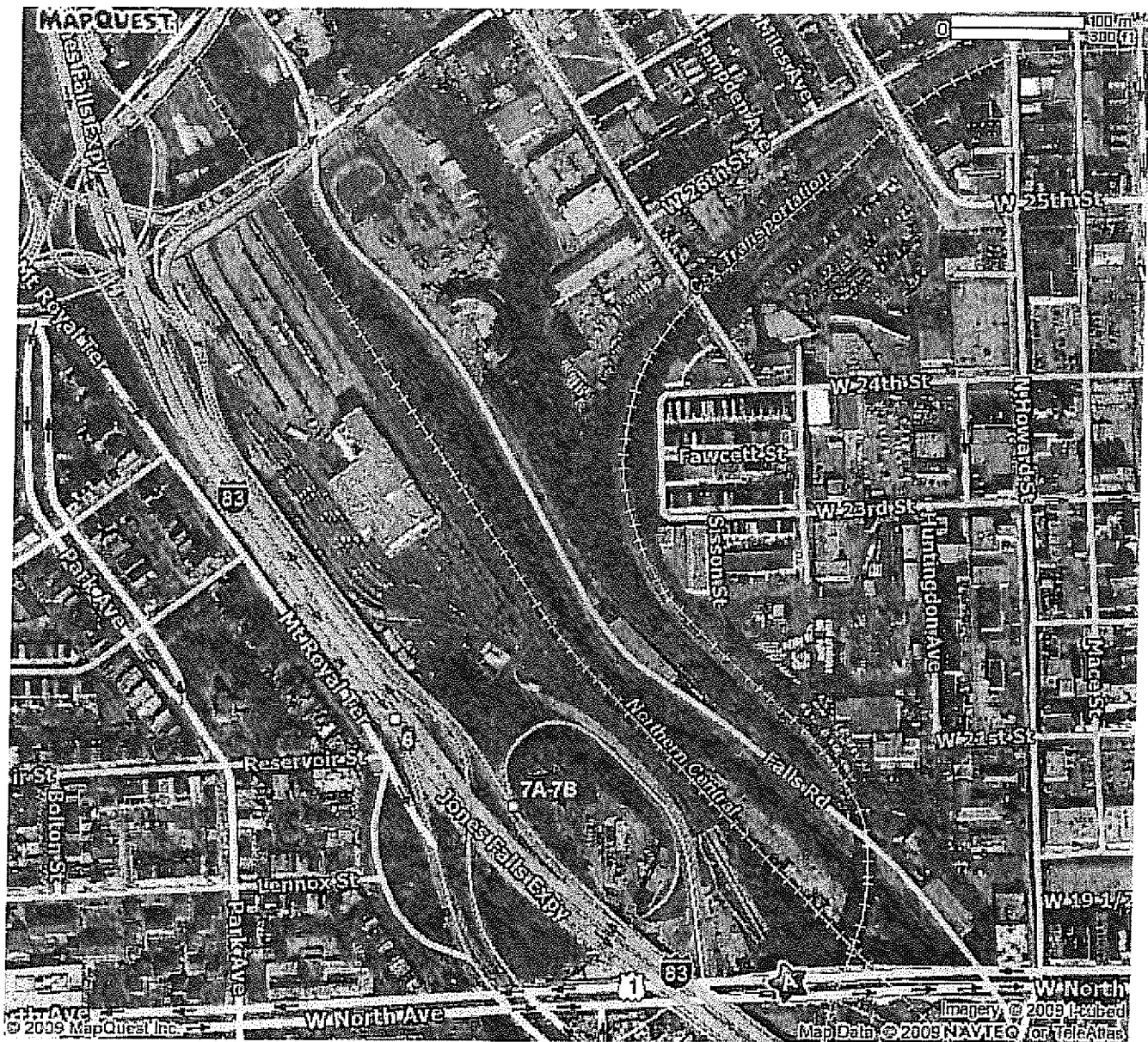


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