

LAW OFFICES
JOHN D. HEFFNER, PLLC
1750 K STREET, N.W.
SUITE 200
WASHINGTON, D.C. 20006
PH: (202) 296-3333
FAX: (202) 296-3939

October 30, 2009

BY E-FILING

Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-2001

**RE: STB Finance Docket No. 35296, Anthony Macrie-Continuance
in Control Exemption**

**STB Finance Docket No. 35297, New Jersey Seashore Lines, Inc.-
Operation Exemption**

To Whom It May Concern:

I am filing on behalf of Anthony Macrie and New Jersey Seashore Lines, Inc., respectively, their "Motion to Strike and/or Response" to the "Notice of Intent" filed in the above-captioned proceedings by James Riffin.

Sincerely yours,



John D. Heffner

Enclosure

cc: service list
Anthony Macrie

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 35296

**ANTHONY MACRIE
-- CONTINUANCE IN CONTROL EXEMPTION --
NEW JERSEY SEASHORE LINES, INC., AND
CAPE MAY SEASHORE LINES, INC.**

STB FINANCE DOCKET NO. 35297

**NEW JERSEY SEASHORE LINES, INC.
--OPERATION EXEMPTION--
CLAYTON COMPANIES, INC.**

**MOTION TO STRIKE AND/OR
RESPONSE OF ANTHONY MACRIE AND
NEW JERSEY SEASHORE LINES, INC.**

Respectfully submitted,

John D. Heffner
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1750 K Street, N.W.
Suite 200
Washington, D.C. 20006
(202) 296-3333

Due: October 30, 2009

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**ANTHONY MACRIE
-- CONTINUANCE IN CONTROL EXEMPTION --
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INTRODUCTION

On October 21, 2009, James Riffin (“Riffin”) filed a document¹ with the Board stating his intent to participate as a party of record and purporting to submit his comments in the above-captioned proceedings. Respondents Anthony Macrie and New Jersey Seashore Lines, Inc.,² are confused as to the purpose behind Riffin’s participation in these proceedings and urge their rejection. On the one hand, Mr. Riffin characterizes himself as a

¹ Hereafter “the Notice.”

² Hereafter collectively referred to as “NJSL”

“Protestant.” Notice at page 1. Yet on page 3, he states that he supports and asks that the Board grant NJSL’s exemption. Id. Accordingly and pursuant to the Board’s Rules of Practice at 49 CFR 1100 *et al*, NJSL requests that the Board strike or reject as irrelevant and immaterial Riffin’s Notice and the comments contained therein. Moreover, NJSL urges the Board to reject his comments insofar as Mr. Riffin has no standing in this proceeding. Should the Board allow Mr. Riffin’s participation, NJSL requests that the Board accept NJSL’s comments in reply.

NJSL’s COMMENTS

The Board’s Rules of Practice at 49 CFR 1104.10 and 1104.8, respectively, allow the agency to strike or reject any pleading that does not comply with its rules and to order stricken from any document matter that is irrelevant or immaterial. NJSL urges the Board to do so here because Mr. Riffin’s comments have virtually nothing to do with whether the Board grants NJSL an exemption to operate over the rail line owned by Clayton Sand Company (“Clayton”). Aside from his first concern that NJSL might not be willing to interchange traffic moving between the subject line and a line in Jersey City, NJ, owned by Consolidated Rail Corporation (“Conrail”)

that is the subject of the Riffin/Strohmeyer offer of financial assistance,³ Riffin's principal concern seems to be any precedent rendered here could apply in any other proceedings to which he is a party. Id.

As to his first point, Riffin's concerns are premature. NJSL has every intention of abiding by the interchange requirements of 49 U.S.C. 10742 and dealing with all shippers and carriers indiscriminately. Even Riffin himself recognizes the conjecture of his first point, stating "*in the event* [emphasis supplied] that Riffin and Strohmeyer *were* granted authority to acquire the Lehigh Valley Line and Clayton *decided* it wanted to ship its product to Riffin and Strohmeyer's proposed transload facility..." Id. To paraphrase the old saying, "first step in making rabbit stew is to catch the rabbit."

Second, Riffin's concerns have little to do with NJSL's eligibility for an exemption to operate over the subject line. Riffin does not allege that NJSL has submitted false and material information in support of its exemption request, that the exemption notice does not comply with the Board's rules, or that NJSL's filing in some way is an abuse of the Board's procedures. He does not claim that the exemption fails to satisfy the statutory criteria of 49 U.S.C. 10502 or that the transaction is in any way controversial or not worthy of approval. In fact, he even urges that it be

³ Filed in Consolidated Rail Corporation-Abandonment Exemption in Hudson County, NJ, STB Docket No. AB-167 (Sub-No. 1190x).

granted! Notice at page 3. Riffin's motivation for interjecting himself into these proceedings appears to be to establish a precedent that he could use to buttress his position that his ownership of a rail line elsewhere establishes his *bona fides* as a federally regulated railroad common carrier with a right of preemption under 49 U.S.C. 10501. Accordingly, NJSL submits that Mr. Riffin's comments are irrelevant and immaterial as to whether NJSL is entitled to a class exemption and his pleading should be rejected on that ground alone.

Mr. Riffin devotes the balance of his Notice to discussing the jurisdictional issue of whether the subject railroad line is a regulated "line of railroad" or an unregulated "private track." Mr. Riffin wrongly appears to be suggesting that the subject line may not have been fully abandoned by Conrail at the time of its sale to Clayton and, as a result, Clayton needs to obtain acquisition authority as a prerequisite to NJSL's start up of operations over it. Furthermore, even if Conrail did properly abandon the subject line, Riffin implies that Ashland Railway's contract operation over it after 1986 may have somehow "resuscitated" its common carrier status.

While these arguments make for intriguing fodder for law review articles and internet rail fan "chat rooms," they ignore the law in effect at the time of Conrail's 1986 abandonment authorization. Historically, under

agency precedent a rail line was considered abandoned after a certificate of public convenience and necessity authorizing the abandonment has been issued, operations have ceased, tariffs have been canceled and a letter has been filed with the Commission stating that the abandonment has been consummated. Common Carrier Status of States, State Agencies and Instrumentalities, and Political Subdivisions, 363 I.C.C. 132, 135 (1980) cited in Black v. I.C.C., 762 F.2d 106 (D.C. Cir. 1985). But in Black the D.C. Circuit noted that although the Commission made no explicit review of the abandoning carrier's compliance with these abandonment criteria, there was evidence in the record supporting a finding of compliance with at least three of the four requirements.⁴ And the Commission in 1984 discontinued its former policy of requiring railroads to advise the agency in writing when they had consummated an abandonment. Consolidated Rail Corporation v. Surface Transportation Board, 93 F.3d 793 (D.C. Cir. 1996). Although the Board now requires abandoning carriers to provide written evidence of consummation within one year of obtaining abandonment authorization,⁵ the agency applies the law in effect at the time of the original action, the former Interstate Commerce Act. Moreover, the fact that Ashland Railway

⁴ It appeared that the railroad inadvertently filed a notice of consummation for discontinuance but instead of abandonment. 762 F.2d 112-4.

⁵ Aban. And Discon. Of R. Lines and Transp. Under 49 U.S.C. 10903, 1 S.T.B. 894, 905-906 (1996).

commenced private contract carrier operations over the subject line for the account of Clayton does not “re-infect” an abandoned line with a common carrier obligation as Riffin seems to suggest. See, Consolidated Rail Corp.-Petition for Declaratory Order, 1 I.C.C2d 284 (1984)(Conrail’s continued ownership of and provision of contract carrier operation for shippers over an abandoned rail line does not give rise to a common carrier obligation) and cf., Wisconsin Central LTD. v. Surface Transportation Board, 112 F.3d 881 (7th Cir. 1997)(indicating that the railroad owner of an already abandoned rail line does not reacquire a common carrier obligation over it by reason of its leasing the line to a short line common carrier railroad and holding specifically that upon lawful termination of operations by the short line the owner need not obtain abandonment approval before salvaging the line).

Here Conrail lawfully obtained abandonment authorization. Conrail Abandonment in Burlington And Ocean Counties, NJ, Docket No. AB-167 (Sub-No. 741N), ICC served March 11, 1986. NJSL does not know whether or not Conrail filed a letter of consummation with the Board. But under the law in effect in 1986, that would not make any difference. And Clayton then acquired the line as an *abandoned line of railroad*. Accordingly, the subject line is a private segment of track and the Board has no jurisdiction over Clayton. The impact of Ashland’s now discontinued contract carrier

operation of the subject line is of no import here and the applicability of this proceeding (if any) to Mssrs. Riffin and Strohmeyer elsewhere is of no concern to NJSL, Clayton, or this proceeding.

CONCLUSION

Accordingly, NJSL urges the Board to strike or reject and ignore Mr. Riffin's comments as irrelevant and immaterial to the issues presented in these proceedings as well as to note that he has no standing to participate here. NJSL requests that the Board promptly issue a decision authorizing NJSL to commence operations and finding that it has no jurisdiction over Clayton.

Respectfully submitted,

John D. Heffner
John D. Heffner, PLLC
1750 K Street, N.W.
Suite 200
Washington, D.C. 20006
(202) 296-3333

Due: October 30, 2009

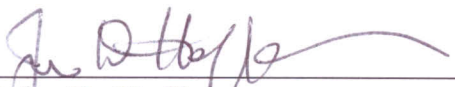
CERTIFICATE OF SERVICE

I, John D. Heffner, hereby certify that I served a copy of the foregoing
“Motion to Strike and/or Response of Anthony Macrie and New Jersey
Seashore Lines, Inc.,” upon the following named parties by first class United
States mail this 30th day of October 2009:

Mr. James Riffin
1941 Greenspring Drive
Timonium, MD 21093

Ashland Railway, Inc.
1 Village Square,
Logan Square, New Hope, PA 18938

Signed this 30th Day of October, 2009, by



John D. Heffner