

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. AB-290 (Sub- No. 311X)

ENTERED
Office of Proceedings

JAN 05 2010

**NORFOLK SOUTHERN RAILWAY COMPANY
PETITION FOR EXEMPTION
ABANDONMENT OF RAIL FREIGHT SERVICE OPERATION –
IN THE CITY OF BALTIMORE, MD AND BALTIMORE COUNTY, MARYLAND**

Part of
Public Record

**COMMENTS AND
OPPOSITION TO REQUEST FOR EXEMPTION FROM THE
OFFER OF FINANCIAL ASSISTANCE PROCEDURES**

1. James Riffin (“**Riffin**”), Zandra Rudo, Carl Delmont, Lois Lowe and Eric Strohmeyer, collectively¹, the “**Offerors**” or “**Protestants**,” herewith jointly file this Comments and Opposition to Request for Exemption from the Offer of Financial Assistance Procedures, and state:

BACKGROUND INFORMATION

2. On December 16, 2009, Norfolk Southern Railway Company (“**NSR**”) filed a Petition for Exemption to abandon its Operating Rights on the Cockeysville Industrial Track (“**CIT**”), from milepost UU 1.0 (located just north of Wyman Park Drive, formerly Cedar Avenue) to milepost 15.44 (located on the south side of the bridge that carries the CIT over Western Run, near the former Ashland station, which is located just north of Cockeysville, MD) (“**Petition**” or “**P**”).

¹ The number of participants may increase.

3. In its Petition, NSR asserted the following:

- A. "The Maryland Transit Administration (MTA) owns the entire Line over which NSR will abandon the freight service operating rights and operations." Petition at 7.
- B. The "MTA's 1990 acquisition of the CIT did not require agency (ICC) authorization under 49 U.S.C. §10901 and that MTA did not acquire a common carrier obligation by virtue of its acquisition of the CIT in 1990 or transactions it has taken since that time." Petition at 8.
- C. "MTA currently operates passenger rail transit service over most of the Line. MTA's passenger rail transit operation over the Line extends to the wye track just north of Warren Road, **near Milepost UU-13**, at which the Hunt Valley Extension springs from the CIT main line." Petition at 8-9. Emphasis added.
- D. "NSR freight service operations over the Line ceased in April 2005, active shippers on the Line at that time have been using alternative transportation services for over four years and have agreed with MTA to continue using such services, no railroad customer who has received service over the Line has filed a formal complaint concerning lack of service on the Line, there has been no reasonable request for rail freight service over the Line by on on behalf of an actual railroad customer located along the Line in the period since April 2005 and the Line is now heavily used for passenger rail transit operations. There is no reasonable prospect that a sufficient volume of traffic could be attracted and definitely committed to use restored rail service over the Line for NSR (or any railroad freight service operator) to be able to operate freight service over the Line at a profit. Thus, there is no need for future rail freight service over the Line." Petition at 13-14.
- E. "Whether or not the title to any of the property on which the Line is located is subject to any reversionary interest is not relevant in this proceeding. The Line's right-of-way is already owned or lawfully used under easements for railroad purposes by MDOT for MTA's passenger rail transit operations." Petition at 17.
- F. "NSR states that if OFA information concerning ownership or valuation of the Line's right-of-way or other property was requested, NSR could only respond that MTA, not NSR, owns the right-of-way, including all real estate held in fee, and the track and materials that comprise the Line. NSR can not convey the Line's right-of-way or material to an offeror. Therefore, NSR can not provide a minimum purchase price for the Line or the supporting valuation information." Petition at 29.
- G. "NSR can not estimate the value of the freight operating easement, freight service operating rights and freight service operations on the Line or the compensation that should be **paid to MTA** for such easement, rights and operations by a third party." Petition at 30. Emphasis added.

H. "NSR does not maintain the Line." Petition at 30.

I. "NSR surmises that only minor rehabilitation of the Line and restoration and reconnection of switches would be required to perform freight service over the Line and to ancillary tracks" Petition at 30.

4. NSR requested that the Board "exempt the abandonment of NSR's freight service operating rights and its freight service operations over the Line from the provisions of 49 U.S.C. §10904." Petition at 32.

5. In support of its request to exempt the proceeding from the OFA procedures, NSR asserted the following:

A. No traffic has moved over the Line since April, 2005. Petition at 32.

B. "[T]here has not been a reasonable request for rail service from a customer on the Line since that date [April, 2005]." Petition at 32.

C. "Moreover, there is no reasonable prospect that any definite amount of freight traffic would move over the Line in the future, much less a sufficient amount of definite future freight traffic to operate freight service over the Line at a profit." P. at 33.

D. "There has been no freight service over the Line for well over four years, former customers have committed to and agreed to use alternative transportation services, no other definite potential freight service customers have committed to or are likely to commit to use of rail service over the Line in volumes and at rates or revenues sufficient to operate the service profitably. Thus, there is no demand or need for future freight service over the Line." Petition at 35-36.

COMMENTS

6. The Offerors do not object to NSR's abandonment of its operating rights on the CIT, **providing the Board permits the Offerors to acquire those operating rights, then continue to provide freight rail service on the Line. The Offerors STRONGLY OPPOSE the loss of freight rail service on the CIT.**

NO TRAFFIC FOR PAST FOUR YEARS

7. NSR makes much of the fact that there has been no freight rail traffic over the Line since **April, 2005**. NSR even alludes to the Subsidy Agreement between the MTA and the three

former shippers on the Line: Fleischmann's Vinegar, Imerys and BGE. What NSR failed to disclose to the Board, is the fact that the Subsidy Agreement **expires in April, 2010!** And NSR failed to disclose to the Board that the MTA provides these three shippers with subsidies **in excess of \$200,000 per year**, to subsidize the extra costs these shippers incur **trucking** their products (in the case of Imerys) to Baltimore (Canton) to be placed in a railcar for shipment to Imerys' customers, and in the case of Fleischmann's and BGE, to subsidize the extra costs these shippers incur **trucking** their products from Baltimore (Canton) to their facilities on the CIT.

8. The Subsidy Agreement specifically prohibits these shippers from filing comments with the Board. If these shippers were to file a comment, they would be required to return more than \$1 million each to the MTA. Needless to say, these shippers will not be heard from directly.

9. In November, 2009, Riffin spoke with the plant managers at Fleischmann's and Imerys. The plant managers disclosed that there have been extensive discussions regarding how they were going to transport their goods once the subsidies expired in April, 2010. Needless to say, the loss of \$200,000 per year in transportation subsidies will significantly impact these company's profits. Once the subsidies end, and the Subsidy Agreement expires, these shippers will be free to resume using freight rail service, **providing it is still available.**

10. NSR also makes much of the fact that Fleischmann's, Imerys and BGE have not filed a complaint, and tries to minimize Riffin's repeated efforts to obtain rail service in Cockeysville. Riffin paid NSR the freight costs to transport 11 rail cars to Cockeysville. NSR summarily refused to ship the rail cars to Cockeysville. NSR characterized the rail cars as "derelict." When Riffin's two passenger cars first arrived in NSR's Baltimore Bayview Yard, they were in mint condition. After sitting in NSR's Bayview yard for more than a year, NSR shipped the two cars to York, PA, where they were heavily vandalized. Today, Riffin has no idea where these two rail cars are at. Riffin also had six tank cars, which were certified until 2009, and three flat cars, all of which had more than 20 years of useful life when NSR took possession of them. These cars were also in mint condition. Riffin has no idea what NSR has done with these rail cars. Riffin's demand that NSR transport these rail cars to Cockeysville was "reasonable." Riffin paid NSR the full freight cost to transport these rail cars to Cockeysville. NSR took possession of the rail cars, then refused to deliver them to their intended destination. NSR's refusal to complete

deliver of these rail cars to their destination, constitutes a violation of NSR's common carrier obligations. See *Montgomery Ward & Co. v. Northern Pacific Term. Co.*, 128 F.Supp. 475 (D.Or. 1953). Unfortunately, the Board refused to compel NSR to complete delivery of these rail cars to Cockeysville. Riffin's many complaints to the Board were summarily ignored by the Board.

OFA INFORMATION

11. NSR asked the Board to exempt it from providing the information mandated by 49 U.S.C. 10904(b). In a separate filing, Notice of Intent to File an Offer of Financial Assistance, the Offerors asked NSR to provide the information mandated by 49 U.S.C. 10904(b). The Offerors would agree that NSR has provided in their Petition most of the information mandated by 49 U.S.C. 10904(b). However, certain portions of the mandated information was not provided, specifically: The minimum purchase price and traffic in 2003, 2004 and 2005. "Other information" the Offerors need are information regarding how often conflicts between NSR and the MTA have occurred; the speed limits on the Line (to determine whether the Offerors can move rail cars from Cockeysville to North Avenue and back, and provide switching service to Fleischmann's and Imerys in the Midnight to 5 am window during which freight operations may occur); a copy of the Operating Agreement (to determine what restrictions have been imposed on use of the Line); the amount NSR pays to the MTA for use of the Line (to determine what it will cost to operate freight service on the Line); and which switches NSR can manually control (to determine how much time it would take to switch cars into Fleischmann's and Imerys, and how much time it would take to interchange cars with NSR at North Avenue).

12. NSR argued that it could not determine the minimum purchase price, since the MTA owns the right-of-way and the track material, and since the Line has no going-concern value due to a lack of traffic for the past four years. The Offerors would argue that the Net Liquidation Value of the Line is Zero, based on these disclosures by NSR. (The real estate has a Net Liquidation Value of Zero, since NSR does not own any of the real estate in fee simple. Since NSR does not own the track material, the track material has no Net Liquidation Value to NSR.) What the Offerors want NSR to do, is to acknowledge the obvious: That the Net Liquidation Value for the Operating Rights that NSR proposes to abandon, is Zero.

13. In *Consolidated Rail Corporation – Abandonment Exemption – In Hudson County, NJ*, STB Docket No. AB-167 (Sub-No. 1190X), the Board ordered Conrail to state the Net Liquidation Value for the Line, even though Conrail disclosed that there was no rail on the line and Conrail did not have a fee simple interest in portions of the line. Conrail reluctantly complied with the Board's order by stating that the Net Liquidation Value was zero. The Offerors request the same relief: The Offerors want NSR to state for the record that the Net Liquidation Value for the Line is zero.

14. On page 30 of its Petition, NSR stated that it did not know what compensation should be paid to the MTA. The Offerors propose to purchase NSR's Operating Rights. Whatever payment is made, will be made to NSR, **not** the MTA. The MTA has no right to demand any payment for the transfer of NSR's Operating Rights, since the Board has declared that the MTA has no common carrier rights with regard to the Line.

15. The Offerors are fully aware that NSR has no title to the Line. However, for the purpose of determining the Net Liquidation Value, NSR must state, **for the record**, that NSR has no fee simple title in the Line, and thus the Net Liquidation Value for the right-of-way is Zero. What title NSR has in the right-of-way is highly relevant. What title the MTA has in the right-of-way, has no bearing on the Net Liquidation Value. (For the record, the MTA only has a reversionary interest in the Line, since the entire Line, from Baltimore to the Maryland / Pennsylvania border, was acquired by the Baltimore and Susquehanna Railroad via condemnation in 1832.)

OPPOSITION TO EXEMPTION FROM OFA PROCEDURES

16. NSR requested that the Board exempt the proceeding from the OFA procedures. In support of this request, NSR stated that there has been no traffic on the Line since 2005, nor has there been a "reasonable" demand for service from "an existing" shipper on the Line since 2005. No traffic moved on the Line between April, 2005 and January, 2007, because the Line was **taken out of service by the MTA** to facilitate the MTA's double-tracking project. The three existing shippers on the Line, Fleischmann's, Imerys and BGE, have not requested service since 2005, due to the Subsidy Agreement between them and the MTA. Unfortunately for these shippers, the Subsidy Agreement **expires at the end of April, 2010**. Beginning in May, 2010,

these shippers will be in the market for rail service, since the \$200,000 per year extra costs per shipper to truck their goods to / from a rail terminal, will no longer be subsidized by the MTA. In addition, Riffin, and a number of other shippers, have a high desire for rail service in Cockeysville.

17. The minimum traffic criteria to support an OFA was stated by the Board in *Norfolk Southern Railway Company - Abandonment Exemption - In Orange County, NY*, FD No. AB-290 (Sub-No. 283X) ("*Orange County*"), where the Board stated:

"The OFA provisions - which permit a party genuinely interested in providing continued rail service to acquire a line for that purpose over the objections of the owner - reflect a Congressional intent that rail service be preserved whenever possible. While exemptions from 49 U.S.C. 10904 have been granted from time to time, they have been granted when the right-of-way is needed for an overriding public purpose (footnote 3) or an important private undertaking (footnote 4), and there is no apparent interest in continued rail service (footnote 5). ... Mr Riffin has shown an interest in providing continued rail service, despite the absence of an active shipper on the line for almost 2 years. Accordingly, the Board finds no basis for undercutting the Congressional objective of maintaining rail service, despite the fact that the prospects for a successful OFA are marginal."

18. More recently, in *Norfolk Southern Railway Company - Adverse Abandonment - St. Joseph County, IN*, FD No. AB-290 (Sub-No. 286X) ("*Notre Dame*"), Served February 13, 2008, the Board stated:

"Applicants claim that there has been no rail service on the lines or requests for rail service for at least 10 years and that there is 'no demonstrable need for future rail service.' Application at 2. They also claim that NSR has made no effort to solicit traffic or reinstitute service since acquiring the lines in 1999, and that a survey conducted by the City's Economic Development Specialist indicated no shipper interest in rail service over the lines. More specifically, applicants assert that the University has publicly stated that 'it has no intention of receiving coal by rail' ... and that the Brothers and the Sisters have no current or future need for rail service. Under the circumstances, applicants contend that it would be 'economically infeasible to attempt to reinstate service.' Op. at 4.

The record, however, shows that there is a potential for renewed rail operations. There is traffic suitable for rail that could move over the lines, there is a railroad willing to carry that traffic, and there is at least one shipper capable of receiving that traffic. As CLS&SB points out, the university currently receives 80,000 tons of coal annually, has upgraded its coal plant in the face of increasing electrical demands, and is expected to need 100,000 tons of coal

annually in the near future. The fact that the University received coal by rail for several decades before switching to delivery by truck from a transloading facility indicates that its plant is capable of handling rail deliveries. ... CLS&SB estimates that 2 weekly trains of 15 cars each would replace the approximately 3,500 truck loads a year (14 truck loads a day 5 days a week) that currently move coal to the University. Thus, there is no doubt that traffic that could use the Lines is available. Op. at 4.

Footnote 13: Coal can generally be moved more efficiently by rail than by truck, and rail transportation is generally considered less damaging to the environment than truck transportation. Op. at 4.

There is also a carrier willing to carry the traffic over the Lines' track and that track can be readily made adequate to handle the service. Applicants claim that the Lines have been degraded to the point that rail service is no longer feasible, but CLS&SB's efforts to acquire the Lines attest to the lines' potential for rail operations. NSR, the Lines' current owner, notes that the switch connection to its main line was removed sometime after June 1, 2004, but states that it could be reinstalled if there is reason to do so. NSR further states that it would not be economically prohibitive to rehabilitate the lines to permit rail service to resume for coal deliveries to the University's campus. Op. at 5.

"[W]e are mindful of Congress' intent, as expressed in many statutory provisions, that lines be kept within the rail system where possible. ... That is why the Board has stated in the past that authority for an adverse abandonment would not be granted, even in the absence of current traffic on a line, if there is a reasonable potential for future railroad use. Op. at 5-6.

19. And most recently in *BNSF Railway Company – Abandonment Exemption – In Kootenai County, ID*, STB Docket No. AB-6 (Sub-No. 468X), Served November 27, 2009, the Board denied a request for an OFA exemption. In this decision, the Board articulated additional information that must accompany an OFA:

"[A]ny person seeking to file an OFA must provide not only evidence of its financial responsibility, but should also address one or more of the following: whether there is a demonstrable commercial need for rail service, as manifested by support from shippers or receivers on the line being abandoned or as manifested by other evidence of immediate and significant commercial need; whether there is community support for continued rail service; whether acquisition of freight operating rights would interfere with current and planned transit services; and whether continued rail service is operationally feasible. Op. at 4. Emphasis added.

PUBLIC USE OF THE LINE / COMPATIBILITY

20. In the instant case, acquisition of NSR's freight operating rights **would not** interfere with current or planned transit services.

21. NSR correctly stated that the MTA only uses that portion of the Line that lies between milepost UU 1.0 (at Wyman Park Drive) and milepost UU 13.0 (on the north side of Warren Road in Cockeysville), and that portion of the Hunt Valley Industrial Track that extends from the CIT at milepost UU 13.0 to the Hunt Valley Mall. What NSR failed to disclose to the Board is that NSR has the right to use **exclusively** the following portions of the CIT: From milepost UU 13.0 to milepost UU 15.4; the Cockeysville Industrial Park Branch that connects to the Hunt Valley Industrial Track a few hundred meters west of milepost UU 13.0; the Public Delivery Branch, which connects to the CIT at milepost UU 13.6; the northern and eastern branches of the wye at Warren Road; and the Cockeysville Wye, at milepost UU 13.6 to UU 13.9. Consequently, the Offerors use of these portions of the Line, since it would be exclusive, would not interfere with the MTA's light rail operations. The only portion of the Line where the MTA and the Offerors would have to coordinate, would be between North Avenue, at milepost UU 1.0, and Warren Road, at milepost UU 13.0. This coordination has been spelled out in the Operating Agreement, which assigns to the MTA the right to use this portion of the Line between 5 am and Midnight, and which grants NSR the exclusive right to use this portion of the Line between Midnight and 5 am.

22. From 1990, when the MTA began using the Line for light rail purposes, until April, 2005, the Line was mostly single track. No complaints were filed with the Board suggesting that Conrail's use of the Line was unduly interfering with the MTA's light rail operations. In April, 2005, the Line was taken out of service to permit the MTA to double track the entire Line. If using the Line for freight rail purposes for 15 years when the Line was single-tracked, never interfered with the MTA's light rail operations, then using the Line for freight rail purposes, now that the entire Line has been double-tracked, would interfere even less with the MTA's use of the Line.

CONTINUED RAIL SERVICE IS OPERATIONALLY FEASIBLE

23. NSR, in its Petition, stated:

A. "NSR does not maintain the Line." Petition at 30.

B. "NSR surmises that only minor rehabilitation of the Line and restoration and

reconnection of switches would be required to perform freight service over the Line and to ancillary tracks" Petition at 30.

24. Since only "minor rehabilitation of the Line and restoration and reconnection of switches would be required to perform freight service over the Line and to ancillary tracks," continued rail service is, pursuant to NSR's own statements, "operationally feasible."

DEMONSTRABLE COMMERCIAL NEED FOR RAIL SERVICE

25. Shortly, a Motion for a Protective Order will be filed with the Board. The Motion will detail the traffic potential for the Line. The Board is already aware of some of the potential shippers: See the Protective Order in *James Riffin – §10902 Acquisition and Operation Application – Veneer Spur – In Baltimore County, MD*, STB Finance Docket No. 35246. The Motion for Protective Order will provide additional shipper information, which will definitively establish that there is a substantial demand for freight rail service on the Line, which freight rail service NSR has adamantly refused to provide.

COMMUNITY SUPPORT FOR CONTINUED RAIL SERVICE

26. As will be detailed in the Offerors' Motion for a Protective Order, there is considerable "community support for continued rail service."

CONCLUSION

27. The Board in the BNSF *Idaho* case, see ¶18, stated that potential OFA offerors must address at least **one** of four criteria. The Offerors have addressed all four criteria. Operation of the Line is feasible, since, according to the NSR's Petition, the Line only needs "minor rehabilitation," and since the MTA has the responsibility for maintaining the Line. Freight operations on the Line would cause even less interference with the MTA's light rail operations, since there is no record that Conrail's use of the Line for freight purposes while the Line was single-tracked, caused no operational problems for the MTA, and since the Line was double-tracked in 2005, thereby substantially increasing the Line's capacity. The information contained in the Offerors' Motion for Protective Order demonstrates that there is considerable need for freight rail service, and that there is community support for retaining the Line for rail service.

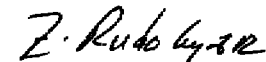
28. The only reason there has been no traffic on the Line since April, 2005, is because the MTA took the Line out of service for almost two years, and because the trucking costs of the three shippers on the Line, have been heavily subsidized, **which subsidies expire in less than four months**. Once the subsidies for these three shippers terminate, these shippers will be looking to reinstate rail service to their facilities in order to remain competitive.

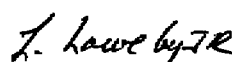
29. WHEREFORE, for the foregoing reasons, the Offerors would respectfully ask that the Board:

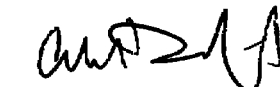
- A. **Grant** NSR's request to be relieved of its common carrier obligations on the Line;
- B. **Deny** NSR's request to exempt this proceeding from the Board's OFA procedures;
- C. **Grant** the Offerors' the right to purchase NSR's Operating Rights, so that the Offerors can provide freight rail service on the CIT;
- D. And for such other and appropriate relief.

Respectfully submitted,


James Riffin


Zandra Rudo

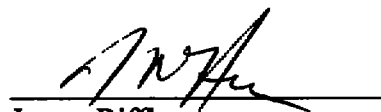

Lois Lowe


Carl Delmont


Eric Strohmeyer

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of January, 2010, a copy of the foregoing Comments and Opposition to Request for Exemption from the Offer of Financial Assistance Procedures, was served by first class mail, postage prepaid, upon James R. Paschall, Senior General Attorney, Norfolk Southern Corporation, Law Department, Three Commercial Place, Norfolk, VA 23510-9241.


James Riffin