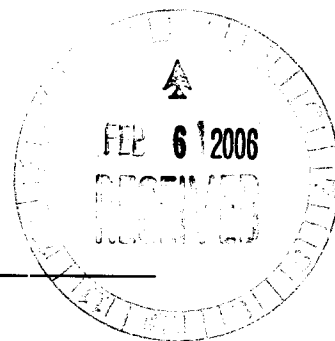


**BEFORE THE
SURFACE TRANSPORTATION BOARD**



STB DOCKET NO. AB-290 (Sub- No. 237X)

**NORFOLK SOUTHERN RAILWAY COMPANY
PETITION FOR EXEMPTION
ABANDONMENT OF FREIGHT OPERATING RIGHTS AND
OF RAIL FREIGHT SERVICE
BETWEEN BALTIMORE, MD AND COCKEYSVILLE, MD
IN BALTIMORE COUNTY, MARYLAND**

**PROTEST / OPPOSITION OF JAMES RIFFIN
TO NORFOLK SOUTHERN'S
JANUARY 27, 2006 REPLY TO RIFFIN'S PROTEST AND NS'
JANUARY 31, 2006 REPLY TO RIFFIN'S PROTEST SUPPLEMENT**

James Riffin
1941 Greenspring Drive
Timonium, MD 21093
(443) 414-6210

Dated: February 6, 2006

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1. James Riffin ("Riffin"), pursuant to the applicable regulations of the Surface Transportation Board ("STB" or "Board") herewith files his Protest / Opposition to Norfolk Southern Railway Company's ("NS") January 27, 2006 Reply to the Protest filed by Riffin on January 13, 2006 ("Reply-1"), and to NS' January 31, 2006 Reply to the Protest Supplement filed by Riffin on January 27, 2006 ("Reply-2"), and for reasons states:

I. Criteria to permit a reply to a protest.

2. In its Reply-1, NS correctly stated that the Board's regulations require that a Petitioner's entire case be filed with the petition. If a reply is to be permitted, it should discuss matters relevant to the relief requested in the Petition. In the instant case, matters relevant to the relief requested would include:

A. With regard to the Petition to Abandon: Precisely what rail segments the Petitioner desires to abandon, whether any rail segments would be stranded if the abandonment is permitted, any environmental issues not properly addressed in its Petition [such as 49 CFR 1105.7 (e) (4) (iv) (B) and (e) (5) (i) (C)], and whether Petitioner's request to abandon those rail segments conforms, or is adverse to, the Transportation Policy Statements enumerated in 49 U.S.C. 10101, and if so, whether the abandonment is of limited scope, or regulation is not needed to protect shippers from the abuse of market power. In addition, since the Line was sold by NS' predecessor, Conrail, to the Maryland Department of Transportation ("MDOT"), a non-carrier, **without** Board or Interstate Commerce Commission ("ICC") approval, the Board may want NS to provide the Board with copies of the freight operating agreement between Conrail and MDOT, so that the Board may ascertain whether the sale is similar to *State of Maine*, Finance Docket No. 31847, served May 24, 1991, wherein the State of Maine did not acquire residual common carrier obligations, or similar to *Southern Pacific Transportation Company*, Docket No. AB-12 (Sub-No. 139X), decided May 6, 1992, wherein the ICC held the buyer acquired residual common carrier obligations

B. With regard to the Petition to Exempt the Proceeding from Offers of Financial Assistance ("OFA"): Whether Riffin plans to continue rail service on the Line, whether there are any shippers, present or prospective, who would utilize rail service if it were offered, and, if the Board so desires, information regarding whether the Line can be operated profitably. Whether Riffin is a financially responsible person, is to be determined by the Board's Director of Proceedings, based on information Riffin has provided to the Board.

II. NS' JANUARY 27, 2006 REPLY

3. Reply-1 contains 8 single-spaced pages of text. A portion of page 6 addresses the issue of what rail segments NS proposes to abandon. On page 7, NS summarily addresses the environmental issues raised by Riffin by stating "fewer than one car per day on average traversed the Line over distances between 4.5 and 12.8 miles." One car/day equals 365 cars per year, which is 7 times the "50 rail carloads per mile per year for any part of the affected line" threshold criteria in 49 CFR 1105.7 (e) (4) (iv) (B). The rest of the reply presents irrelevant, immaterial, or

extraneous information or information applicable to other unrelated proceedings before the Board. It would be appropriate to include in the record the following information:

A. NS acknowledged the milepost listed in the first paragraph of its Petition was a typographical error, and further indicated that it intended to say milepost 13.8, rather than 12.8. While it would be appropriate to permit NS to correct its typographical errors, the proper procedure would be to submit an amendment or supplement to its Petition. A Reply, especially one that contains such voluminous irrelevant material, is the wrong mechanism. [When Riffin read the Board's January 3, 2006 Decision instituting an exemption proceeding, he noted the Board's Decision stated the exemption was from Milepost UU 1.0 to Milepost UU 12.8.]

B. NS acknowledged its operating rights extend beyond milepost 13.8, and that NS actually desires to abandon its operating rights to the point on the Line where its operating rights terminate, not just to milepost 13.8. Once again, the proper procedure would be to request permission to amend its Petition, then refile those portions of the Petition it desires to amend. It would not be necessary to refile the entire Petition. A Reply, especially one that contains such voluminous irrelevant material, is the wrong mechanism to accomplish this goal.

C. The remainder of NS' January 27, 2006 letter to the Board should **not** be included in the record, since it contains irrelevant, extraneous and immaterial information not needed to address the issue of whether Exemption from 49 USC 10903 or 10904 should be granted.¹

¹ The Board is fully aware of Riffin's previous attempts to acquire portions of the Cockeysville Line north of MP 13.8. Sometime ago, in a previous filing with the Board, Riffin abandoned his desire to operate a dinner or excursion train. NS' statement that Riffin would utilize the Line for a dinner or excursion train is ludicrous. Who eats dinner at 1 a.m.? Who would ride an expensive excursion train in the middle of the night, when one can traverse the same line during the day for \$2 on a light-rail car? [NS' operating rights on the Line are from midnight to 5 a.m.] Riffin's most recent filings have revolved around his desire to offer freight rail service on portions of the Line north of MP 13.8, specifically, hauling aggregates from the Blue Mount Quarry, at MP 25, to Cockeysville, and hauling bricks, lumber, grain, ethanol, molasses and liquid nitrogen fertilizer from Hyde, PA, MP 54.6, to New Freedom, PA, MP 36, and thence to Stewartstown, PA. The newspaper article attached to NS' letter, while interesting, is not relevant to this proceeding. [The article contains 4 references to Riffin's desire to reinstitute freight service. It also stated Riffin offered to rehabilitate the Hyde-New Freedom line, using Riffin's own track maintenance equipment, at no expense to York County.] While Riffin has not recently requested permission to use Baltimore Gas & Electric Company's Cockeysville siding, he has had permission to utilize that siding in the past. Riffin's status as a shipper is addressed elsewhere. NS' statement that "fewer than one car per day on average traversed the Line over distances between 4.5 and 12.8 miles," begs the question. One car load per day equals 365

STRANDED SEGMENTS

4. NS proposed to address the stranded segment issue in a later filing, alleging “[n]o current shipper or other party will be injured or prejudiced by NSR filing this separate notice of exemption in the near future.” Riffin objects to NS’ proposed solution, and objects to NS’ statement regarding prejudice to a shipper or other party. Two of Riffin’s commercial properties are adjacent to a portion of the stranded segment. A siding on this stranded segment still exists. Abandoning the beginning portion of the Line would make access to the unabandoned end portion of the Line via rail, impossible, and would permit NS to argue that it would be impossible for NS to comply with its common carrier obligations at the end of the Line, and thus should be excused from its common carrier obligations.

5. NS indicated it would file a separate petition at a later time to abandon the stranded segments. Riffin believes a better approach would be to request permission from the Board to amend its Petition, then amend its Petition to include all segments on the Line that NS desires to abandon.

RIFFIN’S DESIRE FOR RAIL FREIGHT SERVICE

6. As Riffin stated in his Protest, Riffin has a high desire to utilize rail service at his Cockeysville properties. He would like to receive goods via rail [such as the large diesel generators, cement silo and track maintenance equipment that are presently on his flat cars, still awaiting delivery to Riffin in Cockeysville]. Riffin also desires to receive via rail: vegetable oil (to become biodiesel); molasses (to become ethanol); and his own rail cars and locomotives.²

cars per year, which is 7 times more than the 50 rail carloads threshold in 49 CFR 1105.7 (e) (4) (iv) (B). And what about MP UU 1.0 to MP UU 4.5? [Is Fleischmann’s Vinegar just beyond MP 4.5?]

² The site would be the ‘home port’ for the cars (the cars and locomotives would be maintained at this site); the cars would be leased to rail shippers; the locomotives would be used by Riffin or leased to rail entities desiring to lease, rather than purchase, locomotives; ethanol and biodiesel would be shipped via rail. Riffin intends to make his flat cars and tank cars available to shippers, to be used to ship goods via rail. His 89-foot flat cars were in TOFC service prior to his purchase of the cars. His tank cars were rebuilt in 1998, and are certified through 2008. In 2005, Riffin had an agreement to purchase a newly rebuilt GP-38-2, and two 2,000 HP GE locomotives. Riffin voided the agreement when the Board revoked Riffin’s York County, PA Notice of Exemption. Riffin is considering purchasing a number of coal cars and locomotives, to be leased to a new rail coal hauling operation. Once Riffin is assured any locomotives or other rail cars he purchases will in fact be delivered to his Cockeysville site, where the

RIFFIN'S STATUS AS A SHIPPER

7. In its Reply-1, NS argued that Riffin is not a 'shipper.' NS argued Riffin's request to have NS ship 13 rail cars to Riffin in Cockeysville, is not substantial enough to constitute a 'shipper.' NS does consider the Baltimore Gas and Electric Company ("BGE") to be a shipper. In 2004, BGE received about 12 rail carloads of utility poles, similar to the number of rail carloads Riffin consigned to himself in Cockeysville. Riffin would argue that shipping or consigning one rail car a year would constitute being a rail shipper. Not only has Riffin been a shipper, but Riffin proposes to become a more significant rail shipper, providing he does not lose his rail service.

8. In its Reply-1, NS attempted to blame Riffin for NS' failure to deliver Riffin's rail cars to him in Cockeysville. NS attempted to excuse its refusal to deliver Riffin's rail cars to him, firstly, by arguing the Cockeysville Line was out-of-service, due to MDOT's double-tracking project, and secondly, that Riffin did not have access to a rail siding. Shortly after Riffin's rail cars arrived at NS' Bayview yard, in August, 2005, Riffin spoke with the project manager for MDOT's double-tracking project. The project manager informed Riffin that there was a window of opportunity to deliver Riffin's rail cars to him in August, 2005. Riffin called NS' Baltimore terminal superintendent, to advise him of this window of opportunity. Unfortunately, the superintendent did not answer his telephone, nor did he respond to the voice mail Riffin left him. The project manager further informed Riffin that the tracks could be utilized after September 16, 2005. Riffin made repeated telephone calls to the Baltimore Superintendent, Baltimore Train Master, Baltimore Track Maintenance supervisor, and to NS' Central Yard Operations personnel, all in an attempt to persuade NS to deliver Riffin's rail cars to him in Cockeysville. Riffin spoke with several property owners regarding his use of the rail sidings adjacent to their properties. In spite of all of these efforts, NS still refused, and still refuses, to deliver Riffin's rail cars to him. The first excuse was the track was out-of-service due to the double tracking project. The second excuse was that Riffin did not have access to a rail siding. The third excuse was that NS did not know what the radius of curvature was of the track at the point where the Hunt Valley Business

rail assets can be properly maintained, he will recommence negotiations to purchase these rail assets.

Park branch line comes off of the main line. An MDOT engineer told Riffin that the curve had a radius of 280 feet. Riffin then passed this information on to NS' Track Maintenance Supervisor. The next excuse, was the segments leading to the rail sidings Riffin had access to, needed cross ties. (Maintenance of these segments is the responsibility of NS. Riffin offered to replace whatever cross ties needed to be replaced. Neither the Track Supervisor nor Terminal Superintendent returned any of Riffin's repeated telephone calls.) The next excuse was NS' train crews had to be re-qualified to use the double-tracked Line, prior to using the Line. The most recent excuse, is NS plans to retroactively embargo the Line. (An embargo is legally justified when a line is rendered unsafe due to an act of God.) MDOT has completed its double-tracking project. During the double-tracking period, one or more ribbon-rail containing freight trains utilized the existing single track to deliver the ribbon rail to be used for the second track. On December 4, 2005, the Line was placed back into revenue service for MDOT.

NS' PLANS TO EMBARGO THE LINE

9. An embargo is legally justified when a line is rendered unsafe due to an act of God. If the Line was unsafe, MDOT would not continue operating its light-rail trains on the Line. The rail sidings Riffin has access to, are not located on the line used by the light-rail trains. If some portion of these non-light-rail Lines is unsafe, that unsafe condition is the direct result of NS' failure to properly maintain the portions of the Line NS is responsible for maintaining, not due to an act of God. Therefore, there is no legal justification to embargo any portion of the Line. In short, there is no legal justification for NS' refusal to deliver Riffin's rail cars to him in Cocksylvie. Riffin would **strongly** object to NS' proposal to return Riffin's rail cars to their points of origin. (All of Riffin's rail cars were delivered via other Class I railroads to Chicago, then handed over to NS, to be delivered to Riffin.)

THE CONDITION OF RIFFIN'S RAIL CARS

10. NS characterized Riffin's rail cars as being "very old, empty freight cars." Riffin's six tank cars were rebuilt in 1998, and are certified through 2008. If Riffin is granted permission to purchase NS' Cocksylvie Line operating rights, Riffin would make these tank cars available to

Imerys, to haul their calcium carbonate slurry in. If not used for that purpose, Riffin could use them to haul corn syrup (their last cargo), which Riffin could utilize in his proposed Cockeysville ethanol manufacturing facility. Riffin's three 89-foot flat cars were built in the 1980's, are in excellent condition, and prior to Riffin's purchase of them, were used for TOFC service. Two of the flat cars have track maintenance equipment on them. (A laser-guided track liner, two large spike-pullers, several 'speeders,' and a stainless steel 200-barrel capacity cement silo with auger.) One car has three large (1,000 HP each) locomotive-size diesel-powered generators on it. Empty, they are not. Riffin's two passenger cars are vintage passenger cars that were rebuilt in the 1990's. One was in active passenger service six weeks prior to Riffin's purchase of the car, has head-end power pass-thru capability, and may be Amtrak certifiable. (It was in active service in Canada, and met Canada's passenger car certification criteria, which are probably similar to Amtrak's criteria.)

III. NS' JANUARY 31, 2006 REPLY

11. In its January 31, 2006 Reply to the Board, NS objected to Riffin's Protest Supplement, filed on January 27, 2006, arguing it was untimely filed. In its January 3, 2006 Decision, the Board stated the due date for replies to NS' Petition were due on or before January 23, 2006.

12. Riffin timely filed his Protest on January 13, 2006.

13. 49 CFR 1100.3 states "The rules will be construed liberally to secure just, speedy and inexpensive determination of the issues presented." "Leave to amend any document is a matter of the Board's discretion. 49 CFR 1104.11.

14. In *Norfolk and Western Railway Company – Abandonment Exemption – in Cincinnati, Hamilton County, OH*, Docket No. AB 290 - 184X, decided May 13, 1998 ("NW") replies to comments, supplemental comments, and a response to the replies, were filed, and duly objected to. The Board elected to deny the motions to strike, then accepted and considered all of the filings, stating "In the interest of deciding [a] case on the most comprehensive record available, we will deny the motion to strike and will accept and consider all filings." Likewise, in its discretion, the Board has construed its rules liberally to permit parties to file pleadings and

responses when they address important issues or questions, help to clarify the record, identify important errors or mis-statements in the opposing statement, and are submitted soon after a deadline has passed or opposing statement is filed, so long as the Board's handling of the proceeding will not be unduly delayed or hindered. See the citations found in footnote 2 of NS' January 27, 2006 Reply.

15. In the instant case, even though NS knew Riffin was a shipper (i.e., had consigned 11 cars to be delivered to himself in Cockeysville in 2005), NS failed to provide Riffin with notice of the filing of its Petition for Exemption.

16. NS' Petition failed to address important issues relevant to the proceeding, namely: That the Line had been previously sold to a non-carrier without Board or ICC approval; The Petition omitted important information which directly bears on the adverse impact granting the requested exemptions would have on Transportation Policy, namely, it failed to tell the Board that Riffin was a shipper, that Riffin would not have alternate modes of transportation available to ship rail cars to Riffin, and that not all shippers on the Line supported NS' Petition to abandon; on page 22 of the Petition, NS stated it was "giving notice to the three currently active railroad freight service customers on the Line," implying there were only three active shippers on the Line, when in fact there were four; the Petition failed to say how many rail carloads would be diverted to motor carrier, what impact this diversion would have on energy consumption and failed to address the safety issues associated with transporting 2 million gallons of ethanol in tanker trucks over Baltimore City's streets³; the underlying reasons why the three shippers it identified, filed letters not objecting to NS' Petition to Abandon; the fact that the Line was taken out-of-service without prior Board approval; and the fact that several rail segments would be left stranded. In addition, the three cases NS cited in support of its request for exemption from the OFA regulations, do not in fact support its request for exemption.

17. It would be decidedly unfair to strike Riffin's Protest Supplement, which was filed **prior**

³ Attached is a letter sent to Riffin by Baltimore City Councilman James B. Kraft, stating he does "not want tanker trucks of ethanol traveling across Boston Street through the Canton, Fells Prospect, Fells Point and Little Italy neighborhoods."

to NS' January 27, 2006 Reply and January 31, 2006 Reply, without also striking both of NS' Replies.

18. Allowing Riffin's Protest Supplement to become part of the record, would promote the Board's interest in "deciding [a] case on the most comprehensive record available." *NW, supra*. Because the Protest Supplement was filed only four days after the deadline for filing comments, accepting Riffin's Protest Supplement would not unduly delay or hinder the handling of the proceeding. Furthermore, as NS admitted on page 3 of its Reply-2, Riffin's Protest Supplement did correctly point out that the sale of the Line to MDOT had not received prior ICC or Board approval, and did help clarify what NS meant when it said "title" had passed to Conrail in 1999, even though the sale had closed in 1997. [By "title," NS meant freight operating rights, not title to the land.] In addition, the Board's regulations concerning exemption proceedings [Part 1121 and Subpart G. 49 CFR §1152.60] do not indicate what the filing deadlines are for comments. 49 CFR § 1152.26 indicates the filing deadline for comments under 49 U.S.C. 10903 is 45 days after the Petition has been filed. January 27, 2006 is 43 days after NS filed its Petition. When Riffin called the Office of Public Assistance, no one was able to cite a particular CFR which specified what the deadline date was for filing comments or protests. And finally, 49 CFR § 1121.3 (c) states "Information later obtained through discovery can be submitted in a supplemental petition pursuant to 49 CFR 1121.2." The only indication Riffin could find regarding a filing deadline for protests, was the January 3, 2006 decision instituting exemption proceedings. Unfortunately, Riffin did not see this decision until February 4, 2006. [NS' January 31, 2006 letter made reference to this decision. Riffin received this letter on February 3, 2006.]

19. On pages 4-5 of its January 31, 2006 Reply, NS cites the *NW* case mentioned in paragraph 14, *supra*, as precedent for its request for exemption from the OFA regulations. NS correctly pointed out that in the *NW* case an exemption from the OFA regulations was granted even though the exemption was contested, and a Notice of Intent to file an CFA was filed. The facts in that case are still radically different from the facts in this case. In the *NW* case, there were no active shippers on the line, there were no prospects of any locating on the line, and there was no likelihood of reactivating rail service to any shipper on the line; any overhead traffic on the line could have been rerouted via other active lines; all overhead shippers had alternate rail

service available; the City of Cincinnati had a pressing public need which would have been thwarted had the line remained active due to an OFA: construction of the Bengal Tigers stadium would have been delayed, thereby subjecting the City to substantial financial penalties, and the City's revitalization plans for the Ohio River waterfront adjacent to the line being abandoned, would have been thwarted. In addition, there were serious safety concerns if freight trains were allowed to operate where there was heavy pedestrian traffic, and the OFA's offeror had misstated that the line could be realigned, and that the offeror could use proposed commuter rails, when none had been proposed. And finally, if an OFA had been allowed, that would have defeated a concurrent Board decision granting adverse discontinuance of trackage rights over the line. As stated in paragraphs 55 and 56 of Riffin's Protest Supplement, in the instant case, if freight rail service on the Line is abandoned, **none** of the active shippers on the Line will still have access to rail service, delaying this proceeding while the statutory period for filing an OFA lapses, will **not** delay any public or private undertaking, important or insignificant, and continuing to use the Line for freight rail service will **not** preclude using the Line for an important public or private undertaking.

20. On page 5 of its Reply-2, NS intimated that if Fleischmann's, Imerys or BGE were to resume utilizing rail freight service, that would cause them to be in breach of their agreement with MDOT. The agreements with MDOT specify that if a shipper fails to file a letter with the Board stating that the shipper does not object to NS' Petition to abandon its freight operating rights, the shipper will be in breach of the agreement, and MDOT may demand refund of all subsidy payments paid to the shipper. Since all three shippers have filed a letter with the Board stating the shipper does not object to NS' Petition to Abandon its freight operating rights, the shippers have complied with their agreements. If the shippers were to resume using freight rail service, MDOT would have the right to terminate any further subsidy payments, since the purpose for the subsidy, the extra costs associated with using motor carriers, would have been eliminated, as would the costs associated with using motor carriers. Resuming using freight rail service would not cost the shippers anything. Since the subsidies do not fully compensate the shippers for the extra costs associated with shipping their products via motor carrier, resuming freight rail service would lower the shippers' freight costs. In addition, the subsidies expire in

four years.⁴ Without the availability of freight rail service, in four years, the shippers' transportation costs will escalate substantially.

21. On page 5 of its Reply-2, NS states "MDOT should not be required to configure, maintain and operate the Line in order for Mr. Riffin's speculative and unneeded freight service to co-exist with its light rail passenger service." NS has been operating on MDOT's light rail tracks for a number of years. The double-tracking project has been completed. There is nothing left for MDOT to configure to permit resumption of freight rail service. In addition, MDOT must maintain its line for its own purposes, and MDOT does not propose to operate the Line with regard to freight rail service.

WHEREFORE, for the foregoing reasons, Riffin would move to strike NS' January 27, 2006 Reply to Riffin's Protest and NS' January 31, 2006 reply to Riffin's Protest Supplement,

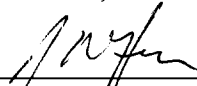
OR IN THE ALTERNATIVE, admit Riffin's Protest Supplement and this Protest to NS' two Replies, so that the Board may decide the case "on the most comprehensive record available."

Respectfully submitted,


James Riffin

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of February, 2006, a copy of the foregoing Protest / Opposition of James Riffin to Norfolk Southern's January 27, 2006 Reply to Riffin's Protest and NS' January 31, 2006 Reply to Riffin's Protest Supplement, 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

⁴ More precisely, the subsidies expire at the sooner of 7 years from the date they were signed, or when the maximum amount of subsidy has been received. At the current rate of subsidy, the maximum amount of subsidy will be reached in about 4 years.

JAMES B. KRAFT
COUNCILMAN
FIRST DISTRICT

BILLY B. HWANG
LEGISLATIVE AIDE

JEAN P. PULA
ADMINISTRATIVE AIDE



BALTIMORE CITY COUNCIL

CHAIR
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COMMITTEE
CITY COUNCIL MEMBER
MARYLAND MUNICIPAL LEAGUE
CLEAN AIR PARTNERS

January 25, 2006

Honorable Martin O'Malley
250 City Hall
100 N. Holliday Street
Baltimore, MD 21202

Re: Norfolk Southern – Cockeysville Line

Dear Mayor O'Malley:

Enclosed herewith please find a copy of a letter from Mr. James Riffin, which I received yesterday. It is self-explanatory.

I have no idea if his representations are true. In the event that they are, I do not want tanker trucks of ethanol traveling across Boston Street through the Canton, Fells Prospect, Fells Point and Little Italy neighborhoods. I am certain that you do not want this either.

Please have someone investigate this situation and take whatever actions are necessary to resolve this situation.

Thank you for your anticipated cooperation and assistance in this matter. I await your response.

Very truly yours,



James B. Kraft

JBK/jpp
Enclosure

Cc: Col. Al Foxx w/ enclosure
Mr. James Riffin

O'Malley 1-25-06 re Norfolk-Southern