



# KAPLAN KIRSCH ROCKWELL

November 19, 2007

Hon. Vernon A. Williams  
Secretary  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423-0001

Re: **Verified Petition of the Maryland Transit Administration for Declaratory  
Order; Finance Docket No. 34975**

Dear Sir:

I am enclosing the Reply of the Maryland Transit Administration in Opposition to the  
Petition of James Riffin to Open/For Reconsideration in the above referenced proceeding.

Sincerely,



Charles A. Spitulnik

Enclosure

155031

**Before the  
Surface Transportation Board  
Washington, D.C.**

**Finance Docket No. 34975**

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**VERIFIED PETITION OF THE MARYLAND TRANSIT ADMINISTRATION  
FOR DECLARATORY ORDER**

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**REPLY OF THE MARYLAND TRANSIT ADMINISTRATION  
IN OPPOSITION TO  
THE PETITION OF JAMES RIFFIN  
TO OPEN/FOR RECONSIDERATION**

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Counsel for the Maryland Transit  
Administration

Dated: November 19, 2007

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Surface Transportation Board  
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**PREFACE AND SUMMARY OF ARGUMENT**

The Maryland Transit Administration ("MTA"), by counsel, hereby submits this reply to the Petition "to Open"/for Reconsideration submitted by James Riffin ("Riffin") in connection with the above-captioned proceeding on October 29, 2007 (the "Riffin Petition"). This Board should summarily deny Riffin's request to reopen the proceedings or to have the Board reconsider the Declaratory Order issued in this proceeding on October 9, 2007 (the "*October 9 Decision*") that confirmed (1) that MTA did not require authorization from the Board's predecessor, the Interstate Commerce Commission ("ICC"), for MTA's acquisition in 1990 of a 14.22-mile line of railroad known as the Cockeysville Industrial Track ("CIT") and (2) that MTA has not become a common carrier providing transportation subject to the Board's jurisdiction because it did not acquire the contractual rights necessary to conduct or control common carrier freight rail operations on the subject line.

Riffin has not met the standards for granting either a Petition to Reopen or a Petition for Reconsideration. A request that the Board reconsider an action of the entire Board will be granted only if Riffin is able to demonstrate that (1) the prior action will be affected materially because of new evidence or changed circumstances or (2) the prior action involves material error. 49 C.F.R. §1115.3(b). A request that the Board reopen an administratively final action will only be granted if Riffin is able to state in detail that the proceeding involved material error, new evidence or substantially changed circumstances. 49 C.F.R. §1115.4. Riffin has not alleged any relevant changed circumstances or new evidence and has not shown any material error in the *October 9 Decision*. Virtually all of Riffin's arguments consist of points he has raised repeatedly and without success in previous filings in this proceeding. Accordingly, the Board should deny Riffin's petition in its entirety.

## INTRODUCTION

The Board is well acquainted with the facts and issues in this case, which are set forth succinctly and accurately in the *October 9 Decision*. That Decision confirmed that MTA had not acquired any common carrier rights or obligations when it acquired the CIT from Consolidated Rail Corporation ("Conrail") pursuant to an Agreement of Sale dated May 1, 1990 ("Agreement of Sale"). In the Agreement of Sale and deed conveying the CIT to MTA, Conrail reserved to itself a perpetual, assignable, exclusive freight operating easement over the CIT, so that Conrail could fulfill its common carrier obligations to provide freight rail service to then-existing and anticipated customers. Conrail also retained several parcels that it continued to use for freight operations, including the "Conrail Flexi-Flo Facility" and the "Cockeysville Industrial Park Track," and retained easements over the CIT to access these facilities. Along with the

Agreement of Sale, Conrail agreed to exercise its rights under the easement in accordance with an Operating Agreement, dated March 29, 1990, by and between MTA and Conrail (the “Operating Agreement”), a copy of which was provided to this Board along with the Petition for Declaratory Order.

The gist of Riffin’s argument is that the rights MTA acquired, and its actions since that 1990 transaction, interfere with the freight railroad’s ability to fulfill its common carrier obligation. MTA has addressed those allegations previously, and refutes them further here. However, as a preliminary matter, it is worth noting that the rail carrier that holds that obligation at this point, Norfolk Southern Railway Company (“NSR”) as Conrail’s successor in interest, has filed no comments or pleadings in this proceeding. Filings from either MTA or Riffin were published on the Board’s website on December 22, 2006, and January 11, April 16, April 20, May 11, August 21, August 23 and October 29, 2007. Additionally, the Board issued Decisions in connection with this proceeding on March 30, April 18 and October 9, 2007. Although NSR is the entity Riffin alleges is potentially most affected by the Board’s determination here, it has not entered an appearance on its own behalf, submitted comments, pleadings or complaints, or supported Riffin’s allegations. Although NSR has had the opportunity to participate in this proceeding, it evidently elected not to do so. MTA suggests that if NSR believed that MTA’s actions interfered with its ability to fulfill its obligations, it would have come forth at some stage of this proceeding or commenced a proceeding on its own.

Because the Board rendered the *October 9 Decision* in this matter on the basis of a substantial record supplemented by information and documentation requested by the Board itself, and because Riffin has submitted no new evidence and no argument not previously considered and rejected by this Board, Riffin’s Petition “to Open” / for Reconsideration should be denied.

## ARGUMENT

### I. RIFFIN'S PETITION SHOULD BE DENIED

As discussed in detail below, Riffin's Petition "to Open" / for Reconsideration should be denied because the petition fails to satisfy the criteria necessary for the Board to reconsider an action by the entire Board pursuant to 49 C.F.R. §1115.3 or reopen an administratively final action pursuant to 49 C.F.R. §1115.4. Riffin fails to adduce any new evidence or changed circumstances and fails to demonstrate any material error on the part of the Board in reaching the *October 9 Decision* in this proceeding. Cutting through the extensive chaff to get to the wheat of the Riffin Petition, the following summarizes MTA's response to the main points he presents.

- **Riffin fails to adduce new evidence.** The "new" facts Riffin purports to present or seeks to obtain through discovery are those Riffin has recited time and again in previous filings in this now-closed proceeding, and are largely concerned with events that have no bearing on the issue presented to the Board here.
- **Riffin fails to allege substantially changed circumstances.** The circumstances germane to the Board's determination with respect to MTA's acquisition of the CIT in 1990 have not changed in the intervening 17 years. The 1990 Operating Agreement governing the rights and obligations of MTA and NSR, Conrail's successor in interest with respect to operations on the CIT, remains in effect and the relationships set forth therein among the parties have not been disturbed.
- **Riffin fails to allege material error.** The Board committed no error in the exercise of its discretion to evaluate the evidence before it and to deny Riffin's requests to conduct discovery. Discovery would add nothing to the Board's ability to make its determination because the relevant facts already appear in the

record the Board reviewed. Indeed, the Board acknowledged that it needed further information when it directed MTA to provide additional information after reviewing MTA's petition for declaratory order and the objections to it. The *October 9 Decision* carefully analyzed that documentation. Accordingly, the Board's record in this matter is extensive and complete, the Board has correctly determined that no discovery is required to address the issues raised in this proceeding.

**A. Riffin's Arguments With Respect to Whether MTA Has Acquired Common Carrier Rights or Obligations Are Erroneous.**

The Board has correctly concluded that the terms of the MTA acquisition from Conrail and the Operating Agreement that has governed the relationship between MTA and Conrail (initially and its successor NSR) bring the transaction and relationship within the authority that allow a non-carrier public agency to acquire physical rail assets without also acquiring common carrier rights and obligations relating to the operation of service over those assets. See *State of Maine, Department of Transportation – Acquisition and Operation Exemption – Maine Central Railroad Company*, 8 I.C.C.2d 835 (1991); *Southern Pacific Transportation Company – Abandonment Exemption – Los Angeles County, CA*, 8 I.C.C.2d 495 (1992)); and the Board's decisions in Finance Docket 34764, *Wisconsin Department of Transportation – Petition for Declaratory Order* (Service Date December 2, 2005) ("*Wisconsin I*"), (Service Date February 2, 2006) and (Service Date March 10, 2006) *slip ops*. Riffin misconstrues these cases (Riffin Petition at ¶¶ 14-20, 22, 23, 27, 29, 33-35), as discussed in more detail below. As the Board correctly concluded, the Operating Agreement evidences that "adequate protections [are] built into the transaction," *State of Maine*, 8 I.C.C.2d at 838, to allow Conrail, and now Conrail's successor in interest NSR, to fulfill its common carrier obligations.

- 1. The Board correctly concluded that MTA's rights with respect to abandonment of the CIT do not give MTA control over operations on that line.**

Riffin misapprehends the structure of the abandonment provision of the Operating Agreement. This situation is distinct from the situation in *Southern Pacific* where the owner of the tracks had the unilateral right to require the carrier to abandon. Here, by contrast, the carrier has agreed in advance that a five-year period with no freight traffic is a sufficient amount of time to confirm for its own purposes that the line is appropriate for abandonment. It is also different from the situation in *Wisconsin I*, where the freight railroad's easement was limited by its terms to ten years, with successive renewal options. There is a clear difference between a permanent property interest that is subject to a condition subsequent (the MTA-Conrail arrangement) and a limited duration property interest that requires affirmative action by the holder of that interest to ensure its preservation (the *Wisconsin I* case).

In this proceeding the Board has recognized that its role in determining whether to approve an abandonment request by NS will safeguard against any forced relinquishment of railroad operating rights and obligations if the public convenience and necessity require that service to remain available. Here, NS has agreed that five (5) years is enough time to ascertain whether service is required. Both parties have agreed that the STB is the final arbiter of whether the line should remain dedicated to interstate commerce. The differences between the facts of this transaction and those in *Southern Pacific* and *Wisconsin I* provide sufficient justification for the conclusion in the *October 9 Decision* that the terms of the MTA-Conrail transaction did not require approval by its predecessor the ICC.

**2. The terms and conditions of the Operating Agreement do not impose significant restraints on NSR's right to operate freight service.**

The Board has correctly concluded that MTA's management of the CIT and responsibility for dispatching do not interfere with NSR's obligations to provide common carrier service over the line. *October 9 Decision* at 6. As MTA and the Board have already noted, consistent with extensive Board precedent, MTA has not acquired common carrier obligations by virtue of its control of dispatching operations. Riffin's quotes from *Southern Pacific* (Riffin Petition at ¶¶ 14, 16) may illuminate the Board's reasoning in that case under the facts relating to property owner's latitude to curtail freight service as demand for passenger transit service increased, but the facts of *Southern Pacific* are relevant here primarily to illustrate the stark contrast to MTA's obligations to conduct its dispatching responsibilities in a manner that minimizes delays to the freight carrier. *Id.*

With respect to the freight operating window set forth in the Operating Agreement, the Board has correctly concluded that the Operating Agreement provides for an adequate window of service to meet current demands and contains sufficient flexibility to allow the parties to expand that window should demand for freight service increase. *Id.* at 5-6. *See also* Finance Dockets 35002 and 35008, *Utah Transit Authority – Acquisition Exemption – Union Pacific Railroad Company*, slip op. at 5-6 (Service Date July 20, 2007) (determining that a fixed freight operating window subject to limited expansion upon notice from the operator and to negotiation of more permanent expansion did not impede the operator's ability to fulfill its common carrier obligations).

Such an arrangement, under which the parties will evaluate whether the freight window should be expanded based on the needs of the common carrier, contrasts directly with the facts related in the cases cited by Riffin. In *Wisconsin I*, the state transit agency retained

the right to provide “supplemental freight service” itself if the operator failed to maintain a desirable level of service, as determined by the State. The State also required the operator to obtain a permit before operating over lines also used for passenger transit. There, the Board determined that the operator’s ability to provide freight service could potentially be significantly compromised if the state exercised its rights. *Wisconsin I* at 2-3. In contrast, MTA has committed to fixed hours of freight operation and an obligation to negotiate an expansion of such hours if market demands so warrant. *October 9 Decision* at 5-6.

In *Southern Pacific*, the operator was granted trackage rights to provide only local, but not overhead, freight service, and such rights were subject to “the directives and control of ...[the Los Angeles County Transportation Commission, the owner of the property].” *Southern Pacific* at 508. In direct contrast, MTA’s rights to alter the freight window are tightly circumscribed and subject to the assent of NSR. *October 9 Decision* at 5-6. Different from the rights retained by the transit agencies in *Wisconsin I* and *Southern Pacific*, the Operating Agreement does not allow MTA to act unilaterally to alter the freight window.

Riffin’s argument that MTA retains sufficient control over the freight operating window to impermissibly limit the freight operator’s ability to provide service simply fails. Additionally, as the Board points out, no formal complaints regarding the sufficiency of freight service appear in the record. *Id.* at 7. Accordingly, the Riffin Petition should be denied.

**3. MTA does not hold itself out as a common carrier and has not retained sufficient control to be deemed a common carrier.**

The Board has correctly determined that MTA does not hold itself out as a common carrier. All other relevant facts examined in light of established Board precedent support the Board’s conclusion that MTA has not acquired common carrier obligations as a result of its acquisition of the CIT. *Id.* at 5.

Riffin incorrectly relies (Riffin Petition at ¶ 13) on the decision in ICC Finance Docket 30861(A), *City of Austin, TX – Acquisition – Southern Pacific Transportation Company*, slip op. (Service Date November 4, 1986), where the agency concluded that a public transit agency acquires common carrier obligations if it acquires a line of railroad even if the agency does not hold itself out as a common carrier. Riffin ignores, however, the key distinction between *City of Austin* and this proceeding, that is, that MTA and Conrail severed the ownership interests in the real property from the operating interests (including an easement over the CIT). The City of Austin did not do this when it acquired its railroad line. *Id.* at 1.

The relationship between MTA and NSR is analogous instead to that of the State of Maine and Maine Central Railroad Company (“MEC”) in the *State of Maine* case. There, the ICC held that, in contrast to the relevant facts in *City of Austin*, the state did *not* acquire common carrier obligations when it purchased an active line of railroad, because MEC retained an operating easement when the State of Maine acquired the physical assets.<sup>1</sup> *State of Maine* at n.6.

The Board has correctly held that none of the other terms or conditions of the Operating Agreement impede NSR’s ability to provide service over the CIT, and the scope of NSR’s easement is therefore not limited or otherwise compromised, in distinct contrast to the easement at issue in *Wisconsin I. October 9 Decision* at 5, 7. Consistent with Riffin’s repeated insistence, the Board thoroughly examined what MTA does as opposed as what it says it does, and found that MTA’s assertion that it does not hold itself out as a common carrier is consistent with all other facts. *Id.* at 7, 8. As a result, Riffin’s comparisons of the NSR easement over the

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<sup>1</sup> The Board characterized the transaction in *State of Maine* as “innovative” (*Id.* at n.7), and the bifurcation of (1) operating rights coupled with an easement and (2) ownership of the physical assets has since become accepted practice. *See, e.g., Utah Transit Authority* at 4, 6.

CIT to various easements at issue in other cases fail to support an assertion that NSR's easement is impermissibly limited in scope. The Board should therefore deny the Riffin Petition.

**4. The terms and conditions of the Operating Agreement governing MTA's repair and maintenance obligations do not allow MTA to interfere with NSR's ability to provide freight service.**

The Board has correctly concluded that MTA's obligations to repair and maintain the CIT as set forth in the Operating Agreement are consistent with Board precedent allowing a transit authority to maintain lines that it owns without incurring common carrier obligations as long as the freight carrier also has the right to inspect the line. *Id.* at 6. Riffin's assertion that the Board "did not address" whether NSR has "ultimate responsibility for maintenance of the line" (Riffin Petition at ¶ 22) is misplaced. MTA is obligated to maintain the CIT to standards set forth in the Operating Agreement and must perform maintenance in such a way as to minimize disruption to freight service. Furthermore, MTA must perform additional maintenance at NSR's request. NSR is required to reimburse MTA for the cost of performing any additional maintenance requested by NSR. By agreement of the parties, MTA's responsibility to maintain the line is conditioned upon and subject to the needs of the freight carrier, an arrangement that the Board has approved in extensive precedent. *October 9 Decision* at 6. Riffin's argument that the maintenance provisions of the Operating Agreement violate established precedent is therefore misplaced.

**B. Riffin's Allegations of Board Error Are Baseless.**

The Board correctly dismissed Riffin's request to conduct discovery. The Board issued its decision based on a detailed record, which included information provided in response to specific Board inquiries. Whether or not the record reflects analysis of issues that Riffin believes are relevant to this inquiry, the Board has concluded that the record included sufficient

information to reach a decision on the issues presented in this proceeding. Here, the MTA presented an extensive record and the Board based its decision on the substantial evidence contained therein.<sup>2</sup> The various issues Riffin attempts to raise, not supported by facts that are relevant to this proceeding, do not justify the relief he seeks here.

**1. Freight operating window, priority of passenger operations and dispatching (Riffin Petition at ¶¶ 21, 26, 28, 29).**

The Board correctly denied Riffin's discovery request with respect to the freight operating window and dispatching. Significantly, the freight operator, NSR, has not registered any concern with respect to the freight operating window or dispatching on the CIT in the many months this proceeding remained open. As the party in the best position to comment on any deficiencies in operation, NSR would reasonably have been expected to involve itself in this proceeding had it had any concern about operations or dispatching. In the absence of *any* comment from NSR and *any* complaint from shippers in the record, the Board correctly concluded that it had before it the information and evidence necessary to its determination and therefore committed no error, material or otherwise.

**2. Maintenance (Riffin Petition at ¶¶ 22-25).**

Riffin's allegations of a "lack of maintenance" during unspecified periods since 1990 are irrelevant to a determination whether a transaction that occurred in 1990 was subject to the ICC's jurisdiction. No additional discovery is necessary about the terms of the 1990 transaction because the record before the Board amply documents its terms. Notably, NSR, successor in interest to Conrail and therefore now a party to the Operating Agreement, has not alleged any failure by MTA to maintain the CIT. Conrail's ability to provide service was fully

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<sup>2</sup> It is important to note that almost all of the facts alleged by Riffin have arisen at unspecified times or since 1990, and for that reason most of the musings contained in paragraphs 21 through 37 are not relevant to the Board's determination that the transaction between MTA and Conrail in 1990 was exempt from the Board's jurisdiction.

present and being exercised in 1990 when MTA acquired the line, and the Board has now found that the sale did not require ICC approval or exemption because no common carrier obligation was transferred. Events transpiring in the years since are irrelevant to the Board's decision about that transaction, which, despite Riffin's attempts to broaden the scope of the inquiry, remains the focus of this proceeding.

**3. MTA's improvements to the CIT (Riffin Petition at ¶¶ 27, 30).**

The Board, after review of the extensive record developed here, has correctly determined that MTA has acted in conformance with the Operating Agreement, which itself conforms to applicable standards articulated by the Board. The question of whether MTA's exercise of its right to make improvements to the CIT has interfered with NSR's obligations to provide freight service over the line is not germane to the analysis of the terms of the 1990 transaction, the focus of this proceeding. Accordingly, the Board's denial of Riffin's request for discovery was appropriate because all relevant facts are contained in the record.

**4. Riffin's property and alleged "new shippers" (Riffin Petition at ¶ 29).**

The Board correctly denied Riffin's request for discovery in connection with the possibility of providing freight service to his property, which is not even located along the CIT, or to unspecified "new shippers". Current alleged requests for service to unspecified locations in the vicinity of Cockeysville, Maryland, or to locations that are not situated along or connected to the CIT are irrelevant to the Board's determination with respect to MTA's 1990 acquisition of the line. As MTA demonstrated in its April 20, 2007, response to the Board's March 30, 2007, Order requesting supplemental information about the CIT, Riffin's property is located beyond the northern limit of the CIT, along a portion of line that was abandoned prior to 1990. This portion of line is not owned by MTA. Because all of the relevant facts regarding

MTA's acquisition of the CIT are included in the record, the Board's denial of Riffin's discovery request was proper.

**5. MTA's verified statement (Riffin Petition at ¶ 31).**

The Board correctly treated MTA's verified statement as a good faith recitation of the facts as MTA understands them, not as MTA's "opinion". Additionally, MTA provided detailed documentation of existing conditions on the CIT and any events about which it had knowledge with respect to the maintenance and improvement of the line. As stated above, the record contains no complaints or comments from NSR or any existing shippers with respect to freight service over the CIT. Riffin's assertion that he thinks he would like to receive service now is irrelevant to any determination the Board made with respect to the 1990 transaction. Furthermore, MTA has amply demonstrated that its actions since 1990 have not violated the Operating Agreement. Accordingly, the Board correctly determined that the record is complete and did not arbitrarily or capriciously deny Riffin's discovery request.

**6. *Southern Pacific* factors (Riffin Petition at ¶ 34):**

As discussed in detail above, Riffin's purported new evidence or changed circumstances are irrelevant to the Board's conclusion that the 1990 acquisition of the CIT by MTA was exempt from the Board's jurisdiction, and discovery would produce no evidence that would have any bearing on an analysis of the instant facts in light of *Southern Pacific*. Indeed, the facts relevant to the Board's determination are readily distinguishable from those in *Southern Pacific*, and are included in the record.

**7. Riffin's generalized allegations (Riffin Petition at ¶¶ 32, 33, 37):**

As a general matter, the Board's evaluation of MTA's 1990 acquisition of the CIT and related Operating Agreement, and its denial of Riffin's requests to conduct

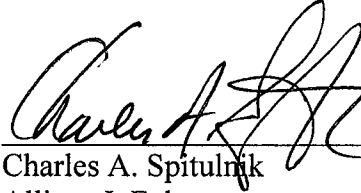
discovery represented a valid exercise of the Board's discretion. Riffin alleges that the Board's reliance on MTA's submissions, as being "similar to the information presented in prior cases" (Riffin Petition at ¶¶ 32, 33) and the Board's denial of Riffin's request for discovery somehow caused the record to be incomplete. The Board's denial of discovery clearly stems from the Board's conclusion that the record, as developed, was fully sufficient to enable the Board to make a well-considered determination in this matter. In the Board's view, MTA had demonstrated that the Operating Agreement reflects acceptable accommodations of transit and freight operations. Additionally and significantly, NSR, the party alleged to be most impacted by the Board's action, has submitted no comment suggesting that it was experiencing the interference that Riffin alleges, during the many months that the record in this proceeding remained open. The Board has discretion to judge whether the information before it is sufficient or not, and, having examined the record and inquired into what MTA *does* as well as what MTA *says* it does, the Board correctly concluded that MTA's purchase of the CIT in 1990 was exempt from the Board's jurisdiction.

### **CONCLUSION**

Riffin continues to burden the record of this proceeding with unfounded allegations and references to other decisions by this Board or the courts that have no bearing on the issues presented here. As MTA has demonstrated in the extensive record developed in this proceeding, the transaction between MTA and Conrail in 1990 did not effect a transfer of Conrail's common carrier obligation to MTA.

WHEREFORE, and in view of the foregoing, the MTA respectfully requests this Board to deny Riffin's Petition "to Open"/for Reconsideration in connection with this proceeding.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Charles A. Spitulnik", written over a horizontal line.

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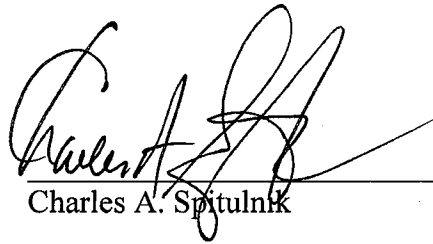
Dated: November 19, 2007

### **Certificate of Service**

I hereby certify that I have this 19<sup>th</sup> day of November, 2007, caused to be served a copy of the foregoing Reply of the Maryland Transit Administration in Opposition to the Petition of James Riffin to Open/for Reconsideration upon the following party of record by first class mail, with postage prepaid:

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833 Carnoustie Drive  
Bridgewater, NJ 08807



Charles A. Spitulnik