

220784

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. AB-290 (Sub- No. 293X)

**NORFOLK SOUTHERN RAILWAY COMPANY
ABANDONMENT EXEMPTION
NORFOLK AND VIRGINIA BEACH, VIRGINIA**



**ENTERED
Office of Proceedings**

NOV 26 2007

**Part of
Public Record**

**PETITION
TO STAY AND TO REOPEN
AND / OR TO RECONSIDER
DECISION SERVED ON NOVEMBER 6, 2007**

1. Now comes James Riffin ("Riffin"), who herewith petitions the Board to STAY and to REOPEN and / or to RECONSIDER the Board's Decision in the above entitled case, which Decision was served on November 6, 2007, and for reasons states:

BACKGROUND INFORMATION

2. On July 19, 2007, Norfolk Southern Railway Company ("NS") filed a **Petition for Exemption** ("Petition"), requesting to be exempt from the prior approval requirements of 49 U.S.C. §10903, to abandon 15.34 miles of railroad line in Norfolk and Virginia Beach, Virginia ("Line").

3. On August 17, 2007, Riffin timely filed his Comments and timely filed a Notice of Intent to File an Offer of Financial Assistance to purchase the Line.

4. On September 6, 2007, NS filed a Motion to Strike Comment and Notice of Intent; Motion for Sanctions; Request for Leave to File Brief Reply to Comments; Motion to Add OFA Exemption Request to Petition; and a **Request for Exemption from OFA Procedures**.

5. On November 6, 2007, the Board served a Decision wherein the Board granted NS' Petition for Exemption to abandon the Line which is the subject of the above entitled case, **and further granted NS' motion for exemption from the OFA process.**

6. On November 16, 2007, Riffin filed a Petition to Stay and to Reconsider the portion of the Board's November 6, 2007 decision in the above entitled case, which granted Norfolk Southern Railway Company's ("NS") Motion to Exempt this Proceeding from the Board's Offer of Financial Assistance procedures.

7. On November 21, 2007, NS filed its reply to Riffin's Petition to Stay and to Reconsider. In its reply, NS indicated Riffin's Petition to Reconsider should have been titled a Petition to Reopen, rather than a Petition to Reconsider, and should have made reference to 49 CFR 1152.25 (e), rather than 49 CFR 1115.2 or 1115.3.

8. 49 CFR 1115.1, Scope of Rule, states:

"Abandonments and discontinuance proceedings instituted under 49 U.S.C. 10903 are governed by separate appellate procedures exclusive to those proceedings. (See 49 CFR part 1152)."

9. 49 CFR 1152.(e) states:

"Appellate procedures – (1) Scope of rule. Except as specifically indicated below, these appellate procedures are to be followed in abandonment and discontinuance proceedings in lieu of the general procedures at 49 CFR 1115."

10. 49 CFR 1152.60 states:

"(a) This section contains special rules applicable to any proceeding instituted under the 49 U.S.C. 10502 exemption procedure for either the abandonment of a rail line or the discontinuance of service or trackage rights over a rail line. General rules applicable to any proceeding filed under the 49 U.S.C. 10502 exemption procedure may be found at 49 CFR part 1121, but the rules in part 1152 control in case of any conflict with the general exemption rules." (Emphasis added.)

PROCEDURAL QUESTION

11. Riffin has made it clear that he **does not** contest the Board's decision to grant NS authority to abandon service on the Line that is the subject of this proceeding. Riffin has also made it clear that Riffin **does desire** that the Board reconsider its decision to exempt this proceeding from the Board's OFA procedures. Which gives rise to a procedural question:

If a party asks the Board to reconsider its decision to exempt an abandonment proceeding from the Board's OFA procedures, what should the Petition be titled? Under what regulation would the request to reconsider be filed under?

12. NS made a point of emphasizing that it filed a Petition for Exemption, under 49 U.S.C. 10502, rather than an Application for Abandonment under 49 U.S.C. 10903. 49 CFR 1115.1 states that "Abandonments and discontinuance proceedings instituted under 49 U.S.C. 10903 are governed by separate appellate procedures exclusive to those proceedings. (See 49 CFR part 1152)." 49 CFR 1115.1 **does not state** that abandonment proceedings instituted under 49 U.S.C. 10502 are governed by separate appellate procedures exclusive to those proceedings. Consequently, it would appear at first blush that if one desires to have the Board reconsider a 10502 abandonment exemption proceeding (such as the case at bar), then the appropriate regulation would be 1115, rather than 1152.25. However, when one reads 1152.25(e) (1), one reads "these appellate procedures are to be followed in abandonment and discontinuance **proceedings** in lieu of the general procedures at 49 CFR 1115." This regulation does not distinguish between a 10903 application for abandonment proceeding, and a 10502 petition for exemption from the 10903 abandonment procedures. Consequently, one could argue that since this was an abandonment **proceeding** (without dwelling on the fact that it was a 10502 abandonment exemption proceeding, rather than a 10903 abandonment application proceeding), the appropriate appellate procedures would be those in 1152.25 (e), rather than in 1115. **On the other hand, one could equally argue** that since 1115 states quite clearly that **10903** abandonment proceedings are subject to the 1152.25(e) appellate procedures, and since a 10502 exemption proceedings **is not** the same as a 10903 proceeding, and since with a 10502 exemption proceeding, one is explicitly asking to be exempted from the 10903 regulations (which have their own appellate procedures), by asking for a 10502 exemption, one is concurrently asking to be exempt from **all portions** of the 10903 regulations, **including the appellate procedures at 1152.25(e).**

13. To make matters even less clear, in the instant case, Riffin is not appealing the Board's decision to grant NS authority to abandon the subject Line. Riffin is appealing the Board's

decision to grant NS' request to be exempt from the OFA procedures. The appellate procedures at 1152.25(e) appear to be primarily directed toward the decision to grant abandonment authority. Riffin doubts if the authors of 1152.25(e) ever even contemplated the situation which is at bar: namely, a decision to exempt an abandonment from the OFA procedures.

14. This new wrinkle only becomes an issue because NS has argued that Riffin's Petition to Stay and to Reconsider should be denied because it was improperly titled, and because Riffin referred to Part 1115, rather than Part 1152.25(e). Riffin would argue NS' position would place form over substance. Regardless of which title is more appropriate, it is quite obvious what portion of the Board's Decision Riffin is asking the Board to reconsider. And had Riffin titled his Petition a Petition to Reopen, he would have titled it a Petition to Reopen in order to Reconsider the Board's decision to grant the OFA exemption request.

15. The real test is whether Riffin has met his burden of proof. Under 1115.2, Riffin must show either that a necessary finding of fact is omitted, erroneous, or unsupported by substantial evidence of record; or that a necessary legal conclusion, or finding is contrary to law, Board precedent, or policy; or that an important question of law, policy, or discretion is involved which is without governing precedent; or that prejudicial procedural error has occurred. Under 1115.3, Riffin must show that either the prior action will be affected materially because of new evidence or changed circumstances; or that the prior action involves material error.

16. Under 1152.25(e)(2)(ii), Riffin must show that "the action would be affected materially because of new evidence, changed circumstances, or material error." This burden of proof is the same as that in 1115.3.

17. Riffin has primarily argued that the Board's OFA exemption should be reversed, due to new evidence (the presence of numerous shippers who strongly desire freight rail service), which new evidence was not available prior to the Board's decision (NS adamantly refused to disclose who the shippers on the Line were), and which new evidence would materially affect the underlying legal basis for the Board's decision to exempt this proceeding from the OFA procedures (that there was no desire for continued rail service on the Line). Since the burden of proof under 1152.25(e)(2)(ii) is the same as that under 1115.3, and since Riffin has shown there are a number of shippers on the Line who desire rail service, this new evidence meets the applicable criteria, regardless of which regulation is relied upon.

18. 49 CFR 1100.3 states:

"The rules will be construed liberally to secure just, speedy and inexpensive determination of the issues presented."

CONCLUSION

19. Riffin would ask that the Board issue a decision indicating which CFR is the appropriate CFR, if one desires to have the Board reconsider a decision it has made with regard to exempting an abandonment proceeding from the OFA procedures.

20. In the event the Board determines that 1152.25(e) is the appropriate CFR, then Riffin would ask leave from the Board to amend the title of his Petition to:

Petition to Stay and to Reopen to Reconsider Decision Served on November 6, 2007

21. In the event the Board determines that 1152.25(e) is the appropriate CFR, then Riffin would ask leave from the Board to amend his Petition, by adding the following paragraph 29B, to follow his paragraph 29:

29B. 49 CFR 1152.25(e)(2)(ii) states:

"The Board will grant a petition to reopen only upon a showing that the action would be affected materially because of new evidence, changed circumstances, or material error." [See ¶¶ 40 and 41, *infra*.]

Respectfully submitted,



James Riffin

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of November, 2007, a copy of the foregoing Petition to Stay and to Reconsider Decision Served on November 6, 2007, was served by first class mail, postage prepaid, upon **James R. Paschall**, Senior General Attorney, Norfolk Southern Railway Company, Law Department, Three Commercial Place, Norfolk, VA 23510.

and a copy was mailed by first class mail, postage prepaid, to **Stanley A. Stein**, Assistant City Manager for the City of Norfolk, Virginia, 1101 City Hall Bldg, 810 Union Street, Norfolk, VA 23510.

A handwritten signature in black ink, appearing to read 'J. Riffin', written over a horizontal line.

James Riffin