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November 21, 2007

Via Electronic Filing

Vernon A. Williams, Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423

Re: STB Docket No. AB-290 (Sub-No. 293X), *Norfolk Southern Railway
Company - Abandonment Exemption - in Norfolk and Virginia Beach, VA*

Dear Secretary Williams:

Please accept this Response of Norfolk Southern Railway Company to Riffin
Petition for Stay.

Sincerely,

A handwritten signature in black ink, appearing to be "J. Edwards", written over a horizontal line.

John V. Edwards

For Norfolk Southern Railway Company

Cc: All Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. AB-290 (Sub-No. 293X)

**NORFOLK SOUTHERN RAILWAY COMPANY – ABANDONMENT EXEMPTION –
IN NORFOLK AND VIRGINIA BEACH, VA**

**RESPONSE OF
NORFOLK SOUTHERN RAILWAY COMPANY
TO RIFFIN PETITION FOR STAY**

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Dated: November 21, 2007

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SURFACE TRANSPORTATION BOARD**

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On November 6, 2007, the Surface Transportation Board (“STB” or the “Board”) served a decision granting Norfolk Southern Railway Company (“Norfolk Southern” or “NSR”) authority to abandon 15.34 miles of railroad line in Norfolk and Virginia Beach, VA (the “Virginia Beach Line”) and further granting Norfolk Southern an exemption from the offer of financial assistance provisions. STB Docket No. AB-290 (Sub-No. 293X), Norfolk Southern Railway Co. – Abandonment Exemption – in Norfolk and Virginia Beach, VA, served November 6, 2007 (the “Abandonment Decision”). The Abandonment Decision has set the stage for development of a long-anticipated, and funded, light rail project in the city of Norfolk. Construction on that project was to begin this month.

On November 17, 2007, James Riffin (“Riffin”) filed a combined Petition for Stay and Petition for Reconsideration (“Riffin Petition”) that makes several arguments not fully grounded in either law or fact seeking, first, a stay of the Abandonment Decision, and second, a reconsideration of the portion of the Abandonment

Decision in which the Board granted Norfolk Southern an exemption from the offer of financial assistance provisions.

There is little doubt that the petition for stay and the petition for reconsideration are seriously lacking in merit, and should be denied. But in addition, Riffin's latest unwarranted involvement in this proceeding creates an uncertainty that is inimical to the public interest as it relates to the Norfolk light rail project. The uncertainty and delay engendered by the petition for a stay has the very real danger of delaying the construction of that project (which delay would tend to cascade throughout the construction cycle) and put at risk the project's significant Federal, state and local funding. The Board should not only deny the petition for stay – it should do so expeditiously so as to remove the uncertainty brought about by Riffin's involvement, thereby allowing the Norfolk light rail project to proceed in a timely manner.

PRELIMINARY MATTERS

A. Automatic Stay

Riffin expresses confusion as to whether the stay he requests should be granted as of right, citing 49 C.F.R. Section 1115.2 and 49 C.F.R. Section 1115.3. Riffin Petition at 4. Petitions for stays of decisions in abandonment proceedings, however, are governed by an entirely different section – 49 C.F.R. Section 1152.25(e). Under that section, a stay is not automatic. Therefore, Norfolk Southern will not deem it necessary to further respond to the Riffin Petition in this respect.

B. Petition to Reconsider vs Petition to Reopen

Board decisions in abandonment proceedings are administratively final actions on the date they are served. 49 C.F.R. Section 1152.25(e)(2). As such, appeals from these decisions are not entertained. Id. Instead, parties seeking relief from such decisions must file a petition to reopen pursuant to 49 C.F.R. Section 1152.25(e)(4). In order to justify reopening, a party must state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances. Further, the Board will grant a petition to reopen only upon a showing that the action would be affected materially by such a showing. 49 C.F.R. Section 1152.25(e)(2)(ii). Norfolk Southern will respond to this Petition for Stay as if it were submitted in support of a petition to reopen.

C. Weight of Certain Evidence

Riffin asserts, perhaps accurately, that “[t]he Board gave no weight to Riffin’s statement that a potential shipper had expressed an interest in utilizing the Line, on the grounds that Riffin had failed to identify this potential shipper.” Riffin Petition at 2. Riffin further asserts that “Riffin did not disclose the identity of this new shipper for proprietary reasons.” Riffin Petition at 4. If Norfolk Southern knew the identity of the shipper, so Riffin’s argument goes, Norfolk Southern would steal that information, realize the true value of the shipper and its potential, reverse its decision to abandon the Line (notwithstanding the fact that it has agreed to sell a portion of the Line to the City of Norfolk), and obtain the vast revenues to be garnered from this shipper for itself. Id.

As enticing as his teaser is, Riffin's tale of this unnamed shipper (a displaced importer forced to flee New Orleans) still fails to reach the level of credible evidence worthy of any weight. Earlier this year the STB reinforced a long-standing tenet of American jurisprudence as applied to the Board's processes: that a party to a proceeding has the right to examine relevant evidence lodged against it.¹ Riffin acknowledges this, but argues that this long standing tenet of American jurisprudence should be ignored – not only to keep relevant evidence from opposing parties but also from the Board itself.

The Board has long had processes in place to permit the filing of confidential and highly confidential evidence, often tailored to any specific circumstances that may be relevant in the proceeding in question, available for use in a vast array of proceedings, including abandonments and discontinuances. See, e.g., STB Docket No.

¹ See, e.g., STB Docket No. AB-6 (Sub-No. 430X), BNSF Railway Co. – Abandonment Exemption – In Oklahoma County, OK, served January 26, 2007, slip op. at 3-4 (“Petitioners have failed to offer any support for their attack on the railroads’ certifications that the line has carried no local traffic for at least 2 years. Petitioners have offered only circumstantial evidence, third-person testimony, and photographs, all of which they refuse to allow railroad personnel to evaluate and address. For us to be able to give this evidence any weight, the railroads must have an opportunity to assess it and respond to it.”). See also, Finance Docket No. 34335, Keokuk Junction Railway Co. – Feeder Line Acquisition – Line of Toledo Peoria and Western Railway Corp. between La Harpe and Hollis, IL, served November 24, 2004 (“Keokuk Feeder Line Acquisition”) slip op. at 3 (“TP&W’s contention that it was about to enter into a transportation contract for major commodity shipments is unconvincing. TP&W does not even identify the shipper, its location, the nature of the traffic, or any of the circumstances of the negotiations that TP&W says took place. The purported shipper has not supported TP&W’s petition. The evidence TP&W has offered is simply not adequate to support a finding of new evidence or changed circumstances, either to modify the Board’s finding that the public convenience and necessity permit the sale of the Line or to alter the Line’s valuation.”).

AB-878, City of Peoria and the Village of Peoria Heights, IL – Adverse Discontinuance – Pioneer Industrial Railway Co., served February 14, 2007 (protective order put into place to facilitate discovery). Riffin is fully aware of these processes, having sought protective orders in at least two of the several cases he has prosecuted before the Board. STB Docket No. AB-290 (Sub-No. 237X), Norfolk Southern Railway Co. – Abandonment Exemption – In Baltimore County, MD, served February 8, 2006 (Riffin motion for protective order granted); STB Docket No. AB-55 (Sub-No. 659X), CSX Transportation, Inc. – Abandonment Exemption – In Allegany County, MD, served June 27, 2007 (Riffin motion for protective order granted).

Under the circumstances of this proceeding and of past proceedings, see Abandonment Decision, slip op. at 3 and 8, the Board gave the Riffin evidence exactly the weight it deserved. Riffin has provided the Board no sound reason for having the Board treat any differently his evidence as to the unnamed shipper.

C. Legal Standard for Review of Petition for Stay

Although Riffin asserts that the Board should evaluate the propriety of granting or denying his request for a stay on the basis of the traditional Holiday Tours factors, he misstates those factors.² The factors are as follows:

² Riffin also argues that the Board “has the power to stay its own decision without such showings on the merits where it needs additional time to consider difficult issues presented in a case.” Riffin Petition at 5 (citing, Finance Docket No. 34798, City of Alameda - Acquisition Exemption - Alameda Belt Line, served December 15, 2005). Although it is not at issue in this proceeding, and without disputing the fact that the Board does have that power, Norfolk Southern notes that the Alameda Belt Line case does not stand for the proposition Riffin asserts for it. As with this case, a party to the Alameda Belt Line case sought a stay which, in that case, was granted by the Board.

In considering whether to stay a Board decision pending judicial review, the following factors must be considered: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the party seeking the stay will be irreparably harmed absent a stay; (3) whether issuance of a stay would substantially harm other interested parties; and (4) whether the public interest would be served by granting or denying the stay. Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).

STB Docket No. AB-596, New York City Economic Development Corp. – Adverse Abandonment – New York Cross Harbor Railroad – in Brooklyn, NY, served August 28, 2003 (granting the requested stay).

“The party seeking a stay carries the burden of persuasion on all of the elements required for stay.” Docket No. AB-573X, Trinidad Railway, Inc. – Abandonment Exemption – In Las Animas County, CO, served January 15, 2002, slip op. at 3 (denying the petition for stay) (citing Canal Authority of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974)). Further, the issuance of a stay is “extraordinary relief,” Docket No. AB-398 (Sub-No. 5X), San Joaquin Valley Railroad Co. – Abandonment Exemption – in Tulare and Kern Counties, CA, served April 3, 1998, slip op. at 4, relief that should not be granted lightly.

ARGUMENT

Riffin has failed to carry his burden of demonstrating that the Holiday Tours standard justifies the imposition of a stay. Not only is there not a substantial likelihood that Riffin will prevail on the merits, there is little chance he will. Riffin will not be irreparably harmed absent the stay. In fact, he has failed to demonstrate that he would suffer any irreparable injury. In reviewing whether the issuance of a stay would harm anyone else, however, Riffin studiously ignores the significant delay and injury to

the City of Norfolk, and the people who live and work in Norfolk, that would be inherent in the issuance of a stay (which does not even take into account the uncertainty and injury visited upon the City from the pendency of his stay petition). Finally, Riffin argues that the “overwhelming” public interest in his purchase of a rail line that has not seen traffic for years outweighs any public interest in progressing a funded light rail project on the verge of construction.

Norfolk Southern’s argument opens with a brief discussion of the procedural posture of the case, because many of the issues raised by Riffin in his petition for stay have long been fully addressed, either in this proceeding or in the preceding discontinuance proceedings. Then, because the public interest is so central to the Holiday Tours analysis in this case, and because the public interest is what would suffer the most in the issuance of a stay, the final prong of that test will be discussed first.

A. Procedural Posture

1. Discontinuance of Service from VB 1.75 to VB 15.46.

On November 10, 2004, Norfolk Southern submitted a notice of exemption for the discontinuance of service on the rail line lying between milepost VB 1.75 at Tidewater Junction, in Norfolk, VA, and milepost VB 15.46 at Oldfield, in Virginia Beach, VA. At that time no traffic had originated, terminated or moved overhead on that line segment for at least two years. Norfolk Southern published in the local newspaper a notice of its intent to formally discontinue rail service. No persons objected to the discontinuance, and on November 30, 2004, the Board published the notice. Docket No. AB-290 (Sub-No. 258X), Norfolk Southern Railway Co. –

Discontinuance of Service Exemption – in Norfolk and Virginia Beach, VA, served November 30, 2004. The Board's notice also was published at 69 Fed. Reg. 69682 (November 30, 2004). The effective date of the formal discontinuance was December 30, 2004.

According to the undisputed facts on the record, there has been no rail shippers, and no rail traffic has moved, on this 13.71 mile section of the Line since at least November 30, 2002 (two years prior to the submission by Norfolk Southern), or nearly five (5) years ago. Norfolk Southern has been formally relieved of the obligation to provide rail service over this section since December 30, 2004.

2. Discontinuance of Service from VB 0.12 to VB 1.75.

On March 28, 2006, Norfolk Southern submitted a petition for exemption for the discontinuance of service on the rail line lying between milepost VB 0.12 near Park Avenue and milepost VB 1.75 near Tidewater Junction, in Norfolk, VA. In the petition, Norfolk Southern stated: (a) that H.B. Hunter Company was the sole shipper on the line, (b) that H.B. Hunter Company had received an averaged 12 car loads annually over the previous three years, (c) that this number was representative of the volume of traffic that Norfolk Southern had moved over the Line for H.B. Hunter Company for the past several years, and (d) Norfolk Southern had operated the Line at a considerable loss during the Base Year ending September 30, 2005. Petition for Exemption, Docket No. AB 290 (Sub-No. 269X), Petition at 6. As is evidenced on the second page of the transmittal letter submitting the petition for exemption to the Board, Norfolk Southern

served a copy of that petition for exemption on William D. Barrett, President of H.B. Hunter Company.

On April 17, 2006, the Board published notice that it had instituted an exemption proceeding, setting a May 8 deadline for filing replies. Docket No. AB-290 (Sub-No. 269X), Norfolk Southern Railway Co. – Discontinuance of Service Exemption – in Norfolk, VA, served April 17, 2006. That same day, the Board notice was published in the Federal Register at 71 F.R. 19786. No one, including H.B. Hunter Company, filed comments.

On July 7, 2006, the Board granted the petition for exemption. Docket No. AB-290 (Sub-No. 269X), Norfolk Southern Railway Co. – Discontinuance of Service Exemption – in Norfolk, VA, served July 7, 2006. On July 10, 2006, Norfolk Southern served a copy of that Decision on Mr Barrett, President of H.B. Hunter Company. The effective date of the formal discontinuance was August 6, 2006.

According to the undisputed facts on the record, Norfolk Southern has been formally relieved of the obligation to provide rail on this 1.63 mile section of the Line since August 6, 2006. The identity of the one remaining shipper on that line segment prior to formal discontinuance has been part of the public record, and available to Riffin and other members of the public. That one shipper did not participate in the discontinuance proceeding despite being served with all pleadings and decisions.

3. The Petition for Abandonment

On July 19, 2007, Norfolk Southern filed a petition for exemption (the “NS Abandonment Petition”) in the instant docket, seeking authority to abandon the

15.34 mile line of railroad extending between milepost VB 0.12 in Norfolk, VA and milepost VB 15.46 in Virginia Beach, VA. In the NS Abandonment Petition, Norfolk Southern explained the history of the line, including the fact that the line was subject to a formal discontinuance:

Service on the portion of the Line between Milepost VB-1.75 and Milepost VB-15.46 was discontinued effective December 30, 2004 pursuant to a notice of exemption in Norfolk Southern Railway Company – Discontinuance of Service Exemption – In Norfolk and Virginia Beach, VA, STB Docket No. AB-290 (Sub-No 258X) (STB served November 30, 2004). Service on the remaining portion of the Line between Milepost VB-0.12 and Milepost VB-1.75 was discontinued effective August 6, 2006 pursuant to the STB decision in Norfolk Southern Railway Company – Discontinuance of Rail Service – Petition for Exemption - In Norfolk and Virginia Beach, VA, STB Docket No AB-290 (Sub-No 269X) (STB served July 7, 2006).

NS Abandonment Petition at 7. Norfolk Southern published in the local newspaper a notice of its intent to formally discontinue rail service on June 28, 2007.

On August 8, 2007, the Board published a notice instituting an exemption proceeding. Docket No. AB-290 (Sub-No. 293X), Norfolk Southern Railway Co. – Abandonment Exemption – in Norfolk and Virginia Beach, VA, served August 8, 2007. Notice of the exemption proceeding was issued that same date in the Federal Register at 72 F.R. 44608-09. On August 17, 2007, the Board's Section of Environmental Assessment gave notice of the availability of its environmental assessment.

On August 17, 2007, Riffin filed a Notice of Intent to file an Offer of Financial Assistance. In that document, Riffin asked for certain information, including information on prior traffic and customers. As described above, information concerning traffic (or, as to the vast majority of the Virginia Beach Line, the lack of traffic) on the Virginia Beach Line was publicly available in the prior two discontinuance dockets. A

few days later, August 23, 2007, Riffin left a voicemail at Norfolk Southern indicating that he had no real intention to acquire the Virginia Beach Line for operation – that his real intent was to force Norfolk Southern to transfer certain other lines to him.

On August 27, 2007, the Commonwealth of Virginia, Department of Rail and Public Transportation wrote to the Board, supporting the petition for an abandonment exemption. “DRPT recognizes that the Norfolk Light Rail Transit Project will serve as a critical component of the transportation network in Hampton Roads, and we support the City of Norfolk’s efforts to purchase portions of this line as part of the project development process.” DRPT Letter at 1 (emphasis added).

On September 6, 2007, Norfolk Southern filed a Motion to Strike, Motion to Add OFA Exemption Request to Petition, Motion for Sanctions, and Request for Leave to File Included Brief Reply to Comment. (“Motions Pleading”). Norfolk Southern asked to be exempted from the OFA process, which would make any response to Riffin’s OFA data requests moot.

In the Motions Pleading, Norfolk Southern included a verified statement of Stanley A. Stein, Assistant City Manager for the City of Norfolk, detailing the plans and the public funding (Federal, state and local) for the Norfolk light rail project, including the important public interest involved in the project. “Any undue delay in starting construction of the project could lead to anticipated increased costs and deferral of the public benefits of the project.” V.S. of Mr. Stein, Exhibit 2, Motions Pleading at 38. Mr. Stein expresses concern about delays potentially initiated by Riffin, but baring further interference, “construction could commence soon after STB approval of the abandonment of the NSR rail line segment....” Id.

Only three parties chose to participate in the abandonment proceeding: Norfolk Southern, the Commonwealth of Virginia, and Riffin.

On November 6, 2007, the Board issued a decision in this proceeding. The Board reviewed the pleadings to date, noted that no shipper had participated in the proceeding, and granted the Norfolk Southern request for an exemption from the Offer of Financial Assistance (“OFA”) process, making a response to Riffin’s data requests moot.

B. Application of the Holiday Tours Test

1. Whether Issuance of the Stay is in the Public Interest.

The Holiday Tours test, in part, examines whether the public interest would be served by granting or denying the requested stay. There is absolutely no question that the public interest would suffer a serious harm from the granting of the requested stay.

The City of Norfolk and Norfolk Southern have entered into a Purchase and Sale Agreement for substantial segments of the Virginia Beach Line in order to progress a long-sought light rail project in Norfolk. “The City states that its light rail line will enhance the continued redevelopment of the City, improve local transportation systems, protect and preserve the environment, and create a transit corridor linking residential, educational, medical services, and employment areas of the City. As a result, automobile use within the City will be reduced.” Abandonment Decision at 6. That light rail project, in the words of the State of Virginia, Department of Rail and Public Transportation, “will serve as a critical component of the transportation network in Hampton Roads....” DRPT Letter at 1. That light rail project is the very real, very

substantive public interest in this case. The issuance of a stay would: (1) delay any activity on that light rail project; and (2) throw the future of that light rail project into doubt until the Board resolved the uncertainty with a ruling on the merits (or lack thereof) of the underlying petition for reconsideration. Delay and uncertainty is the bane of light rail projects.

Riffin argues that preserving the Virginia Beach Line for shippers is in the public interest. In a vacuum, and assuming some credibility for the claims Riffin makes, perhaps that would be correct, but this abandonment proceeding, and the discontinuance proceedings that went before, demonstrate that a substantial portion of the Virginia Beach Line saw no traffic for nearly five (5) years, and that the last shipper on the remaining portion moved an average of one (1) car load per month. Further, unlike the City of Norfolk who chose to participate in this abandonment proceeding to protect its interests, no party having traffic to tender has chosen to participate. The desire to maintain a rail option – at least as communicated by Riffin – is truly ethereal.

The Board has made it abundantly clear that the OFA process can, and should, at times yield to an overriding public interest:

As our predecessor agency long held, we believe that, in the exercise of our abandonment jurisdiction, we must consider arguments that there exist overriding public purposes sufficient to justify our withdrawing our jurisdiction where that jurisdiction would operate to defeat a paramount public purpose. In appropriate situations, we will allow the displacement of rail service by other public purposes where the public interest justifies that end. Accordingly, we find that our authority under sections 10903 and 10904 would permit us to deny a petition requesting the Board to establish the conditions of sale and amount of compensation under section 10904, even if the petitioner were a financially responsible person as defined by 49 U.S.C. 10904(d)(1).

Norfolk and Western Railway Co. - Abandonment Exemption - in Cincinnati, Hamilton County, OH, 3 S.T.B. 110, __ (1998); Docket No. AB-290 (Sub-No. 184X) (STB served May 13, 1998), slip op. at 8.

In light of the facts, and the character of the petition for reconsideration before it, the substantial public interest in the light rail project is of paramount importance and argues for an expedited denial of the requested stay. See, Docket No. AB-55 (Sub-No. 562X), CSX Transportation, Inc. - Abandonment Exemption - in Rocky Mount, Nash County, NC, served December 30, 1999, slip op. at 4 (delay to public project that would result from the issuance of a stay).

2. Likelihood that Riffin will Prevail on the Merits

Riffin seeks a stay to maintain the status quo – delaying further the Norfolk light rail project – while he argues that the Board erred in granting Norfolk Southern an exemption from the OFA process. Riffin Petition at 8. Riffin does not dispute the underlying grant of abandonment authority. Id.

In order to justify reopening the grant of Norfolk Southern's requested exemption from the OFA process, Riffin must state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances. Further, Riffin must demonstrate that the action (the Board granting Norfolk Southern an exemption from the OFA process) would have been materially affected by the material error, the new evidence, or the changed circumstances. 49 C.F.R. Section 1152.25(e)(2)(ii). Riffin has not made, and is not capable of making, such a demonstration.

Riffin has not presented any new material evidence. He has not demonstrated any material error in the Board's decision. Finally, Riffin does not show that the Board would have denied Norfolk Southern's grant of an exemption from the OFA process under the set of circumstances he posits as fact.

Riffin's argument that the Board's decision to grant Norfolk Southern an exemption from the OFA process was in error because (Riffin asserts) Norfolk Southern lied to the Board about, and hid from Riffin information concerning, whether any of the former shippers on the Line had a present interest in rail service. Riffin Petition at 9-10. According to Riffin, it was not until Norfolk Southern served the Abandonment Decision on certain identified former shippers that he suddenly had the information necessary to contact these former shippers and discovered that they would like to have a rail option available to them. The sum total of all of this is that, according to Riffin, the Board erred – not in granting Norfolk Southern abandonment authority – but instead in granting an exemption from the OFA process. Riffin Petition at 12-13. Riffin's argument is seriously flawed.

First, Norfolk Southern provided complete information with regard to traffic on the line. Norfolk Southern did not (and would not) lie to the Board about the existence of current shippers on the Virginia Beach Line. In essence, there was no information as to potential traffic of current shippers on the Virginia Beach Line because there were no current shippers – service on the entirety of the Virginia Beach Line had been formally discontinued.³

³ The lack of service on the Virginia Beach Line is no recent phenomenon. As to the segment between milepost VB 1.75 at Tidewater Junction in the City of Norfolk, and milepost VB 15.46 at Oldfield in the City of Virginia Beach, VA, no local traffic had

Second, as to the discontinuance of portion of the line covering the 1.63 mile line of railroad between milepost VB-0.12 near Park Avenue and milepost VB 1.75 near Tidewater Junction in Norfolk, VA, Norfolk Southern filed a petition for exemption that specifically identified H.B. Hunter Company, located near milepost VB 0.12, as the sole shipper on the line. The Board's decision on the discontinuance provided the public with that information as well. Docket No. AB-290 (Sub-No. 269X), Norfolk Southern Railway Co. – Discontinuance of Service Exemption – in Norfolk, VA, served July 7, 2006, slip op. at 1.

Third, each of the potential shippers that Riffin identified had actual or constructive knowledge of the discontinuance proceedings that occurred in 2004 and 2006, and the abandonment proceedings that occurred in 2007. No shipper appeared in either of the discontinuance proceedings, nor has appeared in this abandonment proceeding, complaining of harm or guaranteeing traffic.

Fourth, although Riffin asserts that there is great interest in obtaining rail service, a simple desire for rail service is not sufficient to obligate a rail carrier to reinstitute service over a line formally discontinued. None of the parties identified by Riffin committed to moving traffic by rail – instead they all noted that they would like to have rail service available to them as an option. “[M]ere speculation about future traffic is not a sound basis upon which to deny an abandonment” exemption. See, Docket No.

moved over the line for at least two (2) years prior to the submission of the Notice of Exemption on November 10, 2004. So, as to that portion of the line, there has been absolutely no traffic whatsoever for over five (5) years. The other portion of the line, covering the 1.63 mile line of railroad between milepost VB-0.12 near Park Avenue and milepost VB 1.75 near Tidewater Junction in Norfolk, VA, did not progress by a notice of exemption. Instead, Norfolk Southern filed a petition for exemption concerning that portion of the line, which served only a single customer that had moved only an average of one car per month for a number of years.

AB-290 (Sub-No. 260X), Tennessee Railway Co. – Abandonment Exemption – in Scott County, TN, served June 17, 2005, slip op. at 4 (citing, Docket No. AB-433X, Idaho Northern & Pacific Railroad Co. – Abandonment Exemption – in Wallowa and Union Counties, OR, served December 13, 2001, slip op. at 5-6); see also, Docket No. AB-468 (Sub-No. 5X), Paducah & Louisville Railway, Inc. – Abandonment Exemption – in McCracken County, KY, served June 20, 2003, slip op. at 3 (“Speculation that additional traffic might materialize in the future does not justify forcing the railroad to incur losses by operating this rail line.”).

Fifth, the hearsay presented about potential traffic is simply not evidence that can be used to justify the extraordinary relief requested. The Board has rejected similar assertions as a basis for a stay. See, e.g., Keokuk Feeder Line Acquisition (denying a stay based upon the lack of credibility concerning claims of future transportation). Notwithstanding the foregoing, the lack of any specifics as to potential rail traffic, and its viability from a volume and pricing standpoint, make the evidence nearly meaningless.

Sixth, the issue of whether the Board erroneously granted Norfolk Southern an exemption from the OFA process does not merely depend upon whether there is any interest in the receipt of rail service on the line. Instead, the Board applies the traditional standards found in 49 U.S.C. Section 10502 to determine whether to grant a request that the particular abandonment be exempted from the OFA process. See, e.g., Docket No. AB-55 (Sub-No. 633X), CSX Transportation, Inc. – Abandonment Exemption – In Genesee County, MI, served July 25, 2007. The entirety of the

circumstances dictates the Board's decision, and in this case the Board's decision was clearly right.

Riffin is familiar with the analysis, as should be indicated by his involvement in yet another Norfolk Southern proceeding:

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 or an important private undertaking, and there is no apparent interest in continued rail service. Here, the petition for abandonment is not tied to a public project, and no transfer to facilitate private rail operations is referenced by NSR. Also, 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 prospects for a successful OFA are marginal. Therefore, NSR's request for an exemption from the OFA requirements of 49 U.S.C. 10904 will be denied.

Docket No. AB-290 (Sub-No. 283X), Norfolk Southern Railway Co. – Abandonment Exemption – in Orange County, NY, served May 2, 2007 ("Orange County"), slip op. at 3.

Riffin has carefully crafted his arguments in this proceeding to fit within the general outline provided by Board in Orange County, but has failed in several aspects.

- Riffin is not genuinely interested in providing continued rail service on the Virginia Beach Line. See, Abandonment Decision, slip op. at 3 ("Based on the evidence provided, NSR has made a strong showing that Mr. Riffin's interest lies in the Cockeysville Line, not the line involved in this particular proceeding.")

- There is an overriding public purpose for the Virginia Beach Line. See, Abandonment Decision, slip op. at 6 (noting the significant public benefits to accrue to the City of Norfolk, its residents and those who work there). See also, Docket No. AB-55 (Sub-No. 500), CSX Transportation, Inc.—Abandonment—in Barbour, Randolph, Pocahontas, and Webster Counties, WV, served Jan. 9, 1997; and Docket No. AB-12 (Sub-No. 172X), Southern Pacific Transportation Company—Discontinuance of Service Exemption—In Los Angeles County, CA, served Dec. 23, 1994 (exemption from OFA requirement granted where owner planned to use the rail corridor for mass transit purposes) (cited in the Abandonment Decision, slip op. at 4, note 4).
- Not a single party other than Riffin – with evidence reaching the depths of credibility – has submitted evidence of an interest in continued rail service. See, Docket No. AB-855 (Sub-No. 1X), A&R Line, Inc. – Abandonment Exemption – in Cass and Pulaski Counties, IN, served November 18, 2003 (abandonment exemption granted notwithstanding testimony of the Indiana Department of Transportation that was simply too speculative insofar as INDOT “has not provided any specific evidence of future traffic, nor given an explanation of why there will be a return or growth of traffic, when there has not been any activity on the line within the past year”) and Docket No. AB-433X, Idaho Northern & Pacific Railroad Company-Abandonment Exemption-In Wallowa and Union Counties, OR, served Mar. 12, 1997 (unsupported speculation about future traffic is not a sufficient basis to deny an abandonment).

- And here, for all the reasons that have been long discussed in this proceeding, the prospects for a successful OFA are not marginal, they are close to non-existent.⁴

Finally, Riffin does not show that the Board would have denied Norfolk Southern's grant of an exemption from the OFA process under the set of circumstances he posits as fact. Had the Board known of the information provided – that four companies who combined have not moved more than one car per month desired to have the option of rail service – would that have been sufficient to overcome the substantial public interest in progressing the Norfolk light rail project? Riffin is not arguing that the abandonment authority should be denied, but whether he should be granted the right to delay the Norfolk light rail project by participating in the OFA process to an uncertain end.

The likelihood that Riffin will prevail on his arguments that the failure of Norfolk Southern to reach back over five years for information on past customers on a line over which service has been formally discontinued is simply not sufficient to instill further uncertainty and delay as a barrier against a long-sought, funded public passenger rail project.

⁴ In The Burlington Northern and Santa Fe Railway Company - Abandonment Exemption - in King County, WA; in the Matter of an Offer of Financial Assistance, 3 S.T.B. 634 (1998), Docket No. AB-6 (Sub-No. 380X) slip op. at 5, served August 5, 1998, the Board stated: "In implementing former section 10905, our predecessor agency, the Interstate Commerce Commission, concluded that '[the statute] envisions either an uninterrupted service or a continuation of service within a reasonable period of time Those situations in which a purchaser of rail properties has no affirmative plans for continuation or resumption of service, but merely holds out the possibility of service at some unspecified future time, are not property to be considered offers of financial assistance and do not fall within the scope of [the statute].'"

3. Riffin will not be Irreparably Harmed absent a Stay.

Absent a stay, Norfolk Southern and the City will proceed with actions consistent with instituting light rail service over the Virginia Beach Line. Riffin, however, suffers no harm. He does not have the intention or the ability to provide rail service over the line. He has no current interest in the line. Riffin does not show, and has not shown, that he can operate a viable freight operation over this line or any other line consistent with Federal Railroad Administration requirements.

D. A Stay would Substantially Harm Other Interested Parties.

Unlike Riffin, the City of Norfolk has demonstrated that it intends to proceed with development of a light rail project, and that it is capable of doing so. Riffin notes, in fact that, absent a stay, the City of Norfolk intends to proceed with construction of the light rail system.

Without question, the issuance of a stay would adversely affect Norfolk Southern, and its ability to consummate a transaction that it views important to the community in which it is headquartered. But more importantly, the issuance of a stay would be inimical to the public interest, and create irreparable harm to the City, and those who live and work in Norfolk.

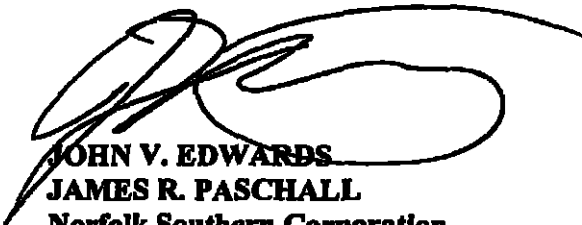
If the Board issued a stay, that stay will add delay to construction projects already planned and funded, which delay will have a significant cascading effect on further construction and the eventual opening of the light rail line. Further, the stay would instill a significant uncertainty in the Federal, state and local funding process. The delay and uncertainty on a project this large reaches many others, as well: "The City

states that its light rail line will enhance the continued redevelopment of the City, improve local transportation systems, protect and preserve the environment, and create a transit corridor linking residential, educational, medical services, and employment areas of the City. As a result, automobile use within the City will be reduced." Abandonment Decision at 6. This should not be delayed for Riffin.

CONCLUSION

The petition for stay is seriously lacking in merit, and should be denied – expeditiously. Riffin has not, and cannot, meet his burden in justifying a stay, and the pendency of the stay request creates an uncertainty and delay that is inimical to the public interest as it relates to the Norfolk light rail project and the project's significant Federal, state and local funding.

Respectfully Submitted,



**JOHN V. EDWARDS
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Norfolk, VA 23510**

Counsel to Norfolk Southern Railway Co.

Dated: November 21, 2007

CERTIFICATE OF SERVICE

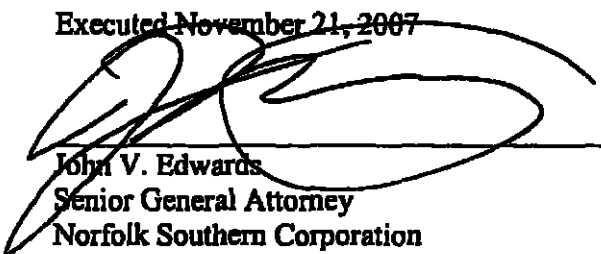
I certify that on this 21st day of November, 2007, I have caused to be served by first class mail, postage prepaid, the foregoing Response of Norfolk Southern Railway Company to Riffin Petition for Stay on the following persons:

Stanley Stein
Assistant City Manager
City of Norfolk
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Norfolk, VA 23510

James Riffin
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Matthew O. Tucker
Commonwealth of Virginia
P.O. Box 590
Richmond, VA 23218-0590

Executed November 21, 2007



John V. Edwards
Senior General Attorney
Norfolk Southern Corporation