

**BEFORE THE SURFACE TRANSPORTATION BOARD**

**JR-2**

**STB EX PARTE NO. 729**

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**ADVANCED NOTICE OF PROPOSED RULEMAKING  
OFFERS OF FINANCIAL ASSISTANCE**

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**REPLY COMMENTS OF JAMES RIFFIN**

Date: March 15, 2016

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1. Comes now James Riffin (“**Riffin**”), who herewith provides his Reply Comments regarding the Surface Transportation Board’s Notice of Proposed Rulemaking – Offers of Financial Assistance.

### **GENERAL COMMENTS**

2. The OFA process is meant to preserve rail corridors, wherever possible, since rail corridors, once lost, generally can never be regained. No one can predict the future. Whether a rail corridor will be needed sometime in the future, can never be known.

3. Congress, when it enacted 10904, desired to make it possible to save rail corridors that have little to no **present** use or utility, in order to save the corridor for possible **future** use or utility. Any effort to make it more difficult to save a rail corridor, should be strongly resisted.

4. Rail carriers conveniently forget (chose to ignore) that rail corridors are the ‘king’s way.’ That is, they are ‘publicly owned rights of way.’ Rail carriers are merely entrusted with their use and preservation. Rail corridors were not established to provide carriers with profits from their sell. Rail corridors were provided, first and foremost, to benefit the ‘public’s convenience and necessity.’

5. If no one expresses any desire to preserve a rail corridor, it should be (and presently is) easy to get rid of. However, if **anyone** expresses an interest in preserving a rail corridor, it **should be difficult** to get rid of the rail corridor, and it **should be easy** to preserve the rail corridor. The present 10904 codifies those two goals.

6. Riffin will repeat what he said in his comments: There are a lot of ‘unwritten’ rules when it comes to the OFA process. (Unwritten in the regulations. Written in the many decisions that have been served.) Riffin advocates putting in the written regulations, those rules that have been promulgated via STB and ICC decisions. That would help, and enable, the novice OFA filer, and would give notice to the potential OFA offeror, what is likely to be required.

7. Due Process requires ‘reasonable notice.’ It would be helpful if that ‘reasonable notice’ was not so difficult to come by. (From reading a hundred or so OFA cases.)

8. The primary impetus for this proposed rule making, is a desire to constrain three individuals: Me, Eric Strohmeier, and Mr. Kemp. (Mr. Kemp has pretty much given up, since he has not filed anything for a number of years.) Given that I am 72, I do not expect to be filing too many more OFAs. (My 1189X OFA may well be my last.) I argue that making the OFA process more difficult, just to constrain me, is not sufficient justification to make the OFA process more difficult.

9. It was my belief a very long time ago, that the primary purpose of the STB, was to serve the ‘**public’s** convenience and necessity,’ **not** the convenience of carriers who desire to sell their rail corridors to the highest bidder, in order to realize a quick profit that might make their balance sheet look better. Unfortunately, my belief has been seriously eroded. Shippers (present and potential future), come in a distant second to the Class I carriers.

### **Reply to AAR Comments**

10. The AAR asked the STB to exempt all abandonments from the OFA process “where the abandoning railroad has entered into an agreement to sell or donate the line to a governmental entity for a public purpose.” AAR at 2.

11. Doing so should require Congressional action, since presently 10904 trumps 10905. Unfortunately, it has become easy to thwart Congress’ intent via 10502.

12. It should be remembered that nearly anything can be classified as a ‘public purpose.’ In AB 103 (Sub No. 21X) [Vicksburg, MS / KCS], the local government wanted to facilitate construction of another (there already were six or so) casinos, and did not want to be bothered putting in a grade crossing over the line that separated the casino property from a local highway. The line was being used to supply rail cars to a local shipper. [Styrene pellets to make egg

cartons, an operation that employed over 100 people.] With no notice to the shipper, KCS agreed to sell the line to the local government, then announced to the shipper that rail service would be discontinued in 30 days. KCS offered the shipper no alternative rail shipping sites. Had KCS given the shipper more notice, and had KCS provided the shipper with viable alternatives, the ensuing litigation likely never would have occurred.

13. **Ownership of entity:** AAR at 3. Who **owns** an entity should have little relevance in an OFA proceeding. The more significant question should be: Does the entity have a real interest in preserving the rail corridor for continued freight rail service?

14. **Address of offeror:** AAR at 4. The officers and employees of corporations presently are not **required** to disclose to the public **where they reside**. Where one reside in an OFA proceeding, has no relevance whatsoever. If an OFA offeror is to be required to disclose where they reside, then so should all of the officers, directors and other management personnel associated with rail carriers, and associations representing carriers (and shippers), be required to disclose where they reside. (Such a rule I would find to be abhorrent. All citizens should try to protect what little privacy they still have.)

15. **Filing a notice of intent to file an OFA:** Presently, the **only** purpose in filing a notice of intent to file an OFA, is to **stay an NOE proceeding** for an additional ten days. Notices are not required in Application or Individual Exemption proceedings because there is sufficient time to acquire relevant information without the need to request a stay. NOEs, by design, are intended to be ‘quick.’ However, being ‘quick’ only tends to benefit the carrier, not the public. And since rail corridors belong to the public, the public’s need to have sufficient time to ascertain whether a rail corridor should be saved, should prevail when the public expresses any interest in preserving a rail corridor.

16. It should be kept in mind that the decision to abandon a rail corridor by a carrier, is never quickly made. When carriers were required to give a year’s notice that a rail corridor was being considered for abandonment, the public at least had a way of ascertaining what rail corridors

might be abandoned. Today, the public is given, at best, 15 days notice (in an NOE proceeding). Such notice is woefully insufficient to determine whether a rail corridor should be preserved.

17. If the **purpose** for filing a Notice of Intent to file an OFA, is to obtain a stay of a proceeding, then that notice should be required by a date certain (as it presently is).

18. If there is no desire to obtain a stay of a proceeding, then there should be **no requirement** to file a Notice of Intent to File and OFA. (If filing a Notice serves no purpose, why file one?)

19. The regulations address the critical issue: When an OFA is required to be filed. The present filing requirement, while extremely short, has worked. Since it is not 'broken,' it should not be 'fixed.'

20. **Insurance:** AAR at 6. It is impossible to prove ability to obtain insurance **prior** to consummation of an OFA offer. Until one has an 'insurable interest,' no insurance carrier will quote a rate. And until one begins to do something that exposes one to liability, there is no need to have any insurance.

21. **Operate for two years:** AAR at 8. Since most lines being abandoned have been totally neglected by the carrier, it frequently is highly unlikely service could even be offered within two years of acquisition. Since the purpose of the OFA statute is to **preserve** a rail corridor for **future** freight rail service, **operation** over the rail corridor for the first two years after acquisition, is, and should be, of little concern.

22. The requirement for sufficient funding to operate a line immediately after acquisition, and to fund insurance covering operation over a line, stems from 10907. 10907 is very different from 10904. In a 10907 proceeding, the existing carrier desires to continue operating the line. Typically a shipper on the line, is dissatisfied with the service being provided, and desires to replace the existing carrier with a new carrier. There is no desire on the part of anyone, to

abandon the line. To justify taking the line from the existing carrier, who desires to continue operating the line, one **should be required** to demonstrate that the putative replacement carrier can, and likely will, provide superior service. Under 10907, it is, and should be, a high burden of proof that the putative new carrier should be required to provide.

23. In a 10904 proceeding, the existing carrier has no desire to continue operating the line. The existing carrier just wants to get rid of it. Since it is a **public** right-of-way, the public should be permitted the opportunity to preserve the **public's** right-of-way, with very minimal proof.

24. **OFA is a burden:** AAR at 10. Yes, the OFA procedures do impose a wee burden on the carrier. But it is a pretty wee burden: Tell the public what the Net Liquidation Value of the line is. Which is information that the carrier already has (or should already have). If disclosing that wee bit of information to the public, and to the STB, is such a burden, then perhaps the carrier should no longer be a carrier / is fit to be a carrier. (As Donald Trump might say: "You are just a wimp!")

### **NORFOLK SOUTHERN'S COMMENTS**

25. All of Riffin's AAR comments are equally appropriate to Norfolk Southern's comments.

26. **Potential offerors should already know a line is about to be abandoned.** NS at 5. When carriers were required to file system diagram maps, and were required to indicate which lines were subject to abandonment within the next year, such a statement may have had some validity. Today, however, it is not possible to ascertain whether a line is profitable, or not, or is subject to abandonment. This information is carefully guarded by carriers.

27. **Financial responsibility / Notice of Intent.** NS at 7-9. NS at least acknowledges that "the potential offeror will not have complete information regarding the costs and other considerations related to providing continued rail service on a particular line at issue." NS at 7.

28. And it is that very lack of information that makes any ‘financial responsibility’ showing **prior to** the carrier disclosing the Net Liquidation Value of a line, an exercise in futility.

29. A good example would be AB 167 (Sub. No. 1189X) (Jersey City). Prior to Conrail disclosing the Net Liquidation Value of the Line, estimates of multiple millions of Dollars for the line were the norm. Jersey City arranged to have \$7 million available, just in case the Net Liquidation Value turned out to be in the millions of Dollars. And then Conrail disclosed the Net Liquidation Value of the entire 1.36 mile-long line (some 12 to 15 acres in the heart of Jersey City, where real property can fetch \$10 million an acre.): A paltry \$36,000. Yes, that is correct. A bit less than \$18,000 an acre, for the two acres that Conrail had fee simple title to. The remainder of the Line was only an easement. And easements only have a Net Liquidation Value of Zero Dollars.

30. Had it been known in 2009 that the cost of acquiring the 1189X line was only \$36,000, there probably would have been hundreds of OFA offers tendered. But as it turned out, only two entities gave notice of their intent to make an OFA offer: Eric Strohmeyer and Jersey City. And at \$36,000, just about anyone would be ‘financially responsible.’ (That is, have sufficient funds to pay the purchase price.)

31. Needless to say, Steve Hyman, who paid Conrail \$3 million in 2005 for six of those acres, was shocked to learn that Jersey City had the right to acquire his six acres for free. That’s right: **FREE!!** So is it any wonder that Jersey City is trying so hard to get Mr. Hyman’s six acres? Particularly when a one-acre parcel less than 1,000 feet from one of Mr. Hyman’s six acres, sold for \$10 million in 2015.

32. Does Riffin fault Jersey City? Not a bit! Had Mr. Hyman’s legal counsel (one of which is a well-known railroad lawyer) read some of the STB’s OFA cases involving easements, they would have known years ago that the rail easement over Mr. Hyman’s six acres, had a Net Liquidation Value of Zero Dollars. And since Mr. Hyman’s six acres could be acquired for free, plus the cost of Jersey City’s litigation expenses (a bit less than \$1 million at last count), Jersey

City was, and still is, highly motivated to be the only OFA offeror.

33. The only hitch is: Is Jersey City going to be **required to operate** the Line over **Mr. Hyman's six acres**, for two years? If so, that would increase the cost of acquiring Mr. Hyman's six acres rather substantially. On the other hand, if Jersey City is only required to offer service over the first two acres of the line (the two acres that Conrail has fee simple title to), that would make acquisition of the Line still very affordable. (The cost to put a few hundred feet of track on the ground, plus a turn-out, is only a few hundred thousand Dollars.)

34. **Moral of the story:** If the regulations stated that rail easements have a Net Liquidation Value of Zero Dollars, and that railroad bridges have a Net Liquidation Value of Zero Dollars (unless they are required to be removed, in which case they may have a negative Net Liquidation Value), that may have influenced the outcome in 1189X. Likewise, if the regulations state that an OFA offeror **is required to OPERATE** on the entirety of the line to be acquired, (as the carrier commenters and AAR have advocated), that decidedly would have a major impact in the 1189X proceeding. (If Jersey City is required to actually operate over the entirety of Mr. Hyman's six acres, that likely would diminish Jersey City ardor for acquiring the 1189X Line by a very substantial amount.)

35. **Riffin's position:** The purpose of the OFA procedures is to preserve rail corridors for **potential FUTURE** freight rail purposes. Since Jersey City has expressed its desire to preserve the 1189X rail corridor, as **an initial matter**, Jersey City should **not be required to operate** over the entirety of the Line, for two years, beginning on the date the line is acquired. (Operating over the line immediately after acquisition, would not be possible, since the railroad bridges connecting each of Mr. Hyman's six elevated acres, were removed decades ago.)

36. **However**, given that the justification for the OFA procedures is the provision of 'continued freight rail service,' there should be some requirement that some effort be expended in an effort to provide 'continued freight rail service.' And if no good faith effort is made to provide freight rail service over a rail corridor, then the rail corridor should be subject to

reversion back to the carrier, if the carrier so desires, or the rail corridor should be made available to other entities that have a desire to provide, and the ability to provide, rail service over the rail corridor. While this requirement is desirable, Riffin would not advocate that it be a part of all OFA procedures. It would be better if such a condition could be imposed on the OFA offeror, as a condition, if requested by the carrier / other parties with an economic interest at stake.

37. It is interesting to note that were NS' requirements adopted ('must own rail assets / must have conducted rail operations'), NS at 10, Jersey City, and most other government entities, would not be permitted to use the OFA procedures to acquire a rail corridor subject to abandonment, since few government entities 'own rail assets' or have 'conducted rail operations.'

38. Likewise, requiring immediate operation, or requiring two years of operation, likely would preclude the Defense Department from using the OFA procedures to preserve a rail corridor, for rarely is an actively-used rail corridor serving a Defense facility, abandoned.

#### **AMERICAN SHORT LINE ASSOCIATION**

39. A member of the American Short Line Association evidently had a bad experience with an OFA offer from a railroad museum. Why the OFA procedures delayed abandonment for a year, is not explained. At most, an OFA offer should delay an abandonment proceeding by a few weeks. If the Net Liquidation Value is quickly provided to the OFA offeror, that generally starts a 10-day clock to file an Offer. And if the Offer is less than the Net Liquidation Value, that generally will stop the process, since the STB almost always accepts the carrier's Net Liquidation Value as being the value of the line. If Terms and Conditions are sought, that process will conclude in 60 days or less.

40. If a carrier desires to expedite an abandonment proceeding, the carrier should disclose in its NOE / Individual Exemption / Application, the Net Liquidation Value of the line.

41. Disclosing the NLV in the carrier's filing should **not** be required. **However**, if the carrier fails to provide the NLV in its initial filing, then likewise the carrier **should not be heard to complain** about any delay due to the time that it takes to disclose the NLV. Any delay, when the NLV has not been disclosed in the initial filing, is solely of the carrier's own making.

### **CSX COMMENTS**

42. Contrary to CSX's representation, a carrier's title to its right-of-way is seldom readily available from public sources. Riffin's experience to date, is that many documents supporting the carrier's title claims, have never been recorded in land record offices, particularly when easements have been acquired, or the rail corridor was obtained via eminent domain proceedings. In addition, the vast majority of rail corridors were obtained more than 100 years ago. Documents recording those acquisitions, if available at all, are in archives difficult to gain access to. In many cases, the only evidence of title is found on the carrier's Valuation Maps, which rarely are publicly disclosed.

### **UNION PACIFIC COMMENTS**

43. Requiring an OFA offeror to put up a deposit, before the carrier discloses the NLV, is absurd. (10% of what?!) Given the speed with which the abandonment process progresses, putting funds into escrow would take longer than the abandonment process. (It takes time to create an escrow account.)

44. One comment UP made I strongly agree with: Up until the time a Petition to Set Terms and Conditions is filed, I strongly believe that a carrier should have the right, (and does in fact already presently have the right), **to withdraw its abandonment petition**. UP at 11. A clause in the regulations expressly so stating, would be desirable, so that everyone knows of this right.

### **JERSEY CITY COMMENTS**

45. Many of Jersey City's comments I agree with. Many of Jersey City's comments, if adopted, would 'level the field.'

46. If a carrier fails to provide NLV information within 30 days, then the Offeror's value is accepted. JC at 24. Good rule. That would help speed the process up. (Which is what the carriers who gave comments, desire.)

47. OK to take for passenger service, if no freight rail service for past two years. JC at 29. An interesting rule, and would seem to be a good rule. Since the goal of the OFA process is to preserve rail corridors for **rail** service (passenger, as well as freight rail service), preserving a rail corridor for passenger rail service serves the same basic goal.

48. **De Facto Abandonments:** JC at 50. JC is right to protest against de facto abandonments. Unfortunately, de facto abandonments happen too often, and rarely with any adverse consequences to the carrier. Is this likely to change? Not likely. Good try though, JC.

49. Enforce existing rules before make new rules. JC at 54. Hear! Hear! Unfortunately, the STB rarely enforces the existing rules against Class I carriers. (It does enforce the rules against Class II and Class III carriers.) Good example: The STB's AB 167 (Sub. No. 623N) decision. It is unexplained how Conrail retained title to a line segment not within a Shared Assets Area. And it is contrary to Norfolk Southern's argument on 'p. 2' of Norfolk Southern's November 27, 2006 filing in *James Riffin, DBA The Raritan Valley Connecting Railroad – Acquisition and Operation Exemption* – STB Finance Docket No. 34963, wherein NS argued:

**It is NS' belief that, in the absence of abandonment or discontinuance authority, Conrail retained common carrier operating authority over the line and that such authority was transferred to NS pursuant to the Transaction Agreement approved by the Board in *CSX Corp., et. al. – Control - Conrail, Inc., et. al.*, 3 S.T.B. 196 (1998) (“*Conrail Control*”).”** Bold added.

50. No need to demonstrate commercial need. JC at 57. If the purpose of the OFA procedures is to preserve rail corridors for **potential future** rail needs, then there should be no requirement, as a condition precedent, to demonstrate a **present** need for freight rail service. Generally, the existing carrier has provided such poor service that the existing shippers adjacent to a line, have long given up on trying to obtain rail service. Under such circumstances, demonstrating present commercial need / desire for rail service, is likely to be nearly impossible. Only after much hard work, are any of these disillusioned shippers likely to reconsider / use rail service.

51. No need to demonstrate a need for continued rail service. JC at 59. JC makes a good point.

52. A government entity has a greater ability than a private entity, to preserve a rail corridor. JC at 72. While generally that may be true, that is not always the case. It depends on the size, and budget, of the government entity.

53. The problem, in Riffin's mind, arises when the government entity professes to want a rail corridor for continued freight rail purposes, but in reality, really wants it for non-freight rail purposes. A good example of this dichotomy, would be 1189X. Jersey City has proclaimed to the world that it desires to obtain the 1189X Line for the purpose of 'continued freight rail service.' It has also proclaimed that it desires the 1189X Line for potential future 'commuter rail service.' Both uses involve rail service. And in Riffin's view, and in Jersey City's opinion, (which the STB does not appear to embrace), both uses would justify acquisition of the 1189X Line via the OFA process. Jersey City has provided the STB with a verified statement from a prospective shipper, who certified it wants freight rail service, now, in sufficient quantity to make operation of the line profitable. An engineering firm has determined rail service is feasible. There is substantial community support for acquiring the rail corridor. Jersey City has \$6 million available, in dedicated funds, to fund the purchase of the Line. (At a total NLV cost of \$36,000.) So far, so good.

54. Jersey City passed an Ordinance, twice, authorizing Jersey City to acquire the 1189X Line.

55. So where is the problem? It is in the Ordinance. Which authorizes acquisition of the Line only to the East end of Mr. Hyman's six acres. Which is some 600 feet West of the Hudson Bergen Light Rail Line. So how does Jersey City propose to get a potential future commuter rail line from the East end of Mr. Hyman's six acres, to the Hudson Bergen Light Rail Line? There does not appear to be any provision for that possibility. Jersey City's latest (approved Summer, 2015) Master Development Plan for the 8-acre parcel immediately East of Mr. Hyman's six acres, has no provision / set aside, of a right-of-way across the 8-acre parcel, to get to the Hudson Bergen Light Rail Line. While it might be possible to place tracks above 6<sup>th</sup> Street (Gangemi Drive), to get to the Light Rail Line, the intersection would be perpendicular. A 35-story high rise is being built on the south side of 6<sup>th</sup> street, immediately adjacent to the Light Rail Tracks, right where tracks would have to be laid, to connect the 1189X Line to the Light Rail Line. There are existing structures on the north side of 6<sup>th</sup> Street, which likewise would prevent 1189X tracks from connecting to the Light Rail Tracks.

56. And then there is the problem of Mr. Hyman's six acres being 20+ feet above grade. The railroad bridges that connected each of the six one-acre parcels, are long gone. It would be very expensive to put railroad bridges back in place. And even more difficult to get freight transload goods to / from the top of the elevated Embankment structures, to ground level.

57. A simple solution would be to put tracks on the ground at grade level, then run the tracks into / through each Embankment section. But that would require removing the fill material from each Embankment section. Something Jersey City has adamantly indicated that it will not do / does not want done.

58. So if Jersey City is unwilling to put tracks on the ground, and run the tracks through each Embankment section, and if it is impossible to connect the East end of Mr. Hyman's portion of the 1189X real property, with the Light Rail Line, due to the lack of any easement / corridor in

which to place tracks / inability to connect tracks which connect at a right angle, just how does Jersey City propose to **ever** offer any kind of rail service (freight or passenger), over the six acres that Mr. Hyman owns?

59. And if it is impossible / highly unlikely that Jersey City will **ever** offer any kind of rail service over the six acres that Mr. Hyman owns, where is the justification for using the OFA process to acquire that portion of the 1189X Line that traverses over Mr. Hyman's six acres?

60. Riffin acknowledges that it is imminently feasible, and readily doable, to provide freight rail service over that portion of the 1189X Line that lies to the West of Mr. Hyman's six acres.

61. And Riffin acknowledges that it is imminently feasible, and readily doable, to provide freight rail service over that portion of the 1189X Line that traverses Mr. Hyman's six acres, **providing** tracks are placed at street level, the fill material in each Embankment section is removed, tracks are run through each Embankment section at street level, and providing the rail easement between the East end of Mr. Hyman's six acres, and the Light Rail Tracks, is sought, and obtained. None of which Jersey City desires to do, nor can do, due to the limitations Jersey City has placed on itself per its OFA ordinance and per Jersey City's already approved, Master Plan for the 8 acre parcel (Metro Plaza parcel) immediately East of Mr. Hyman's six acres.

## **CONCLUSION**

62. Which brings Riffin back to where this all started: Carriers objecting to abusing the OFA process.

63. The OFA process is intended to preserve rail corridors. For potential, future freight rail service. (Passenger rail service would be covered under 10905 – public use.) Riffin agrees, when contested, an OFA offeror should be required to produce some evidence that it is feasible, to provide freight rail service, and that there at least is some level of desire for freight rail service.

64. Given the very short time frames associated with NOE abandonment proceedings, Riffin argues that it is contrary to the intent of 10904, to require OFA offerors to produce verified statements from shippers committing to ship X quantity of freight rail cars per year, in order to justify letting contested OFA proceedings continue to consummation.

65. No shipper will ever commit to ship X number of rail cars, prior to knowing what the rail rates will be. And rail rates are not obtainable prior to taking title to a rail corridor, and executing an interchange agreement, and division of rates agreement.

66. It should be sufficient, in a contested OFA proceeding, to submit verified statements, or unverified statements, from potential rail shippers, indicating an interest in freight rail service.

67. Once the NLV of the Line is disclosed, an OFA offeror should be required, within 10 days or so, to demonstrate access to funds sufficient to pay the NLV of the Line within 30 days. Bank statements, or other 3<sup>rd</sup> party documents, should be sufficient.

68. If there is no demonstrated bone fide effort to put the Line back into service within one year of acquiring the Line (such as, evidence of shipper solicitation, marketing, maintenance or rehabilitation of the line), then the carrier should have the option of regaining the line, and / or another entity, who has demonstrated an ability to put the line back into service, should be afforded the option of acquiring the line.

Respectfully,

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