

Before the
Surface Transportation Board

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DOCKET NO. AB-167 (Sub-No. 623N)

CONSOLIDATED RAIL CORPORATION – ABANDONMENT –
IN LEHIGH COUNTY, PA

239830

ENTERED
Office of Proceedings
January 5, 2016
Part of
Public Record

JAMES RIFFIN'S REPLY TO
CONRAIL'S REPLY TO
RIFFIN'S MOTION TO STRIKE

1. James Riffin (“**Riffin**”) herewith requests permission to reply to Conrail’s November 17, 2015 Reply to Riffins’s November 2, 2015 Motion to Strike.
2. A reply to a reply is not permitted, except when the reply makes the record more complete. Replies, when permitted, are also due within 20 days.
3. In order to make a more complete record (in order to provide an appellate court with a more complete record), and in order to respond to issues raised for the first time in Conrail’s Reply, Riffin respectfully requests permission to make this Reply.
4. This proceeding presents many issues that have never been addressed. (The issue was raised in FD 34963, but was not addressed in that proceeding.)
5. In Riffin’s Motion to Strike, Riffin stated that the question before the STB was:

Did Conrail, on September 18, 2015, have the legal right to consummate abandonment of that portion of Line Code 503A that lies between MP 96.6 and MP 98.0?

6. In Conrail's Reply, Conrail argued, for the first time, that:

“This renders Conrail's October 5, 2015 consummation notice a legally voluntary act with no legal consequences.” Conrail's Reply at 8.

7. That raises additional issues:

A. Does the STB still have jurisdiction over the line segment at issue?

B. Did the ICC have the legal authority to require Conrail to notify the ICC / STB, when Conrail consummated its abandonment of the segment at issue?

RIFFIN'S 'STANDING'

8. Another issue raised by Conrail, was: Does Riffin have standing to participate in this proceeding?

9. There is a LaFarge Cement manufacturing plant in Cementon, PA, which is located adjacent to, and formerly was served by, the Line Code that is the subject of this proceeding, at approximately MP 99.

10. The LaFarge Cement company desires rail service, and has expressed its desire for rail service, numerous times, to no avail.

11. Riffin seeks to provide LaFarge with the rail service that LaFarge desires.

12. Rail service to the LaFarge plant would be provided using the Line Segment that is the subject of this proceeding.

13. Riffin argues that he has sufficient 'interest' to justify participation in this proceeding.

14. In addition, the answers to the underlying issues will affect other Conrail abandonment proceedings, and the Delaware and Hudson's trackage rights discontinuance proceeding. Riffin is / has / expects to, participate in those other affected proceedings.

THE ISSUES

15. Conrail raised an interesting issue:

Did the ICC have the authority to direct Conrail to notify the ICC of the date Conrail consummated abandonment of the segment at issue?

16. The NERSA Act severely limited the ICC's authority in abandonment proceedings brought pursuant to NERSA.

FIRST QUESTION

17. **First question:** Is the ICC's requirement that Conrail notify the ICC when abandonment was consummated, a prohibited 'condition?'

18. Conrail argued: "The ICC issued the abandonment certificate without any conditions." Conrail's Reply at 2.

19. Riffin argues that the ICC did not 'condition' the abandonment. The ICC merely required Conrail to notify it, **if and when**, Conrail **exercised** its **permissive** authority to abandon the segment at issue.

20. Abandonment authority is 'permissive.' That is, once a rail carrier receives permissive authority to abandon a line segment, the rail carrier has the sole discretion to determine **whether** it wants to exercise that permissive authority, and if so, **when** it chooses to exercise that permissive authority.

21. The granting of abandonment authority **does not** automatically **cause** the abandonment of a line of railroad. Abandonment requires an act on the part of the rail carrier. Abandonment requires an **intent** to abandon.

22. The Third Circuit, in *Lucas v. Township of Bethel*, 319 F. 3d 595, 602 (3d Cir. 2003), had occasion to address portions of the NERSA Act. At p. 602, the 3d Circuit stated:

“Thus, the abandonment proceedings established by §308 contemplate **limited** agency involvement and **virtually** automatic approval of Conrail’s request to abandon the line.”

23. “Limited agency involvement” does not constitute “NO agency involvement.”

24. “Virtual automatic approval” does not constitute “automatic approval.”

25. In this case, abandonment approval was granted.

26. The ICC ‘limited’ its involvement to one requirement: Notify the ICC when Conrail exercised its permissive abandonment authority.

27. Such a requirement would help facilitate the ICC’s efforts to keep track of what line segments were still subject to its jurisdiction. For a line segment subject to permissive abandonment authority, remains subject to the ICC’s / STB’s jurisdiction, up until the time abandonment of the line segment is consummated.

28. So Riffin argues that the ICC had the requisite authority to require Conrail to notify the ICC of the date that Conrail in fact consummated its abandonment of the line segment at issue.

SECOND QUESTION

18. **Second question:** Does Conrail have the **present** right, to ‘consummate’ / to give notice of a ‘consummation,’ of abandonment authority?

19. To effect abandonment of property, one must have a present legal interest in the property.

20. Up until June 16, 1999, Conrail had the requisite legal interest in the line segment, to effect its abandonment. However, on June 16, 1999, **all** of Conrail's legal rights in the line segment, including any common carrier rights, were transferred to PRR LLC, thereby divesting Conrail of any further legal interest in the common carrier rights associated with the line segment.

21. To hold otherwise, would mean that Conrail still retains common carrier rights in all of the lines of railroad transferred to Norfolk Southern and CSX Transportation, and would mean that to effect an abandonment of any of those lines of railroad transferred to Norfolk Southern and to CSX Transportation, would require the participation of Conrail.

22. And since Conrail has not participated in any of those line abandonments, that would mean those abandoned line segments, are still lines of railroad, subject to the STB's jurisdiction. A result no one would want. (Well, Riffin would not object, for that would mean that the Cocksவில் Industrial Track is still a line of railroad, subject to the STB's jurisdiction, and subject to a demand for rail service.)

THIRD QUESTION

23. So if Conrail's legal interest in the line segment at issue was transferred to Norfolk Southern, can Norfolk Southern effect the abandonment of the line segment without any further proceedings before the STB?

24. Riffin argues: No. The NERSA Act applied **solely** to Conrail, and then for only a very limited period of time.

25. Riffin argues: The **only** entity that can effect abandonment of the line segment at issue, is Norfolk Southern, since only Norfolk Southern has the requisite property interest.

26. Riffin further argues that Norfolk Southern **may not** use the permissive abandonment authority granted to Conrail, for that permissive abandonment authority **could not be transferred** to Norfolk Southern.

27. Under the circumstances, Riffin argues that Norfolk Southern has the sole right to effect abandonment of the line segment at issue, and to do so, Norfolk Southern would have to institute a new abandonment proceeding.

THE LINE SEGMENT IS STILL SUBJECT TO THE JURISDICTION OF THE STB

28. Conrail argued (Conrail's Reply at 7) that under NERSA, and pursuant to the Third Circuit's *Lucas* decision at 602-602, the ICC lost jurisdiction over the line segment at issue **on the date the ICC issued its decision.**

29. Were the line segment not subject to the D&H's trackage rights, Conrail may have a good argument. However, since the line segment was subject to the D&H's trackage rights, the ICC retained its jurisdiction over the line segment at issue, and passed that jurisdiction to the STB.

WHY THIS ISSUE NEEDS TO BE ADDRESSED

30. R.J. Corman has sold its right-of-way to a developer. The line segment at issue, is a 'cloud' on the developer's title, for if the line segment at issue is still a line of railroad, it would become a prohibited 'stranded' line of railroad, if R.J. Corman's line is abandoned prior to the abandonment of the line segment at issue.

31. Over the years, Conrail has created a number of 'messes.' The STB needs to clean this 'mess' up, so that clean title to this property, and to similarly situated properties, can be transferred.

30. WHEREFORE, Riffin would pray that the STB:

A. Accept this Reply, and place it in the record;

B. Resolve the underlying issues;

C. And for such other and further relief as would be appropriate.

Respectfully,

James Riffin
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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd Day of January, 2016, a copy of the foregoing Reply to Conrail's Reply to Riffin's Motion to Strike, was mailed via first class mail, postage prepaid, to Jonathan M. Broder, Suite 1310, 1717 Arch Street, Philadelphia, PA 19103, and a copy was e-mailed to Robert Jenkins, counsel for Conrail.

James Riffin

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**CONSOLIDATED RAIL CORPORATION – ABANDONMENT –
IN LEHIGH COUNTY, PA**

SUPPLEMENTAL CERTIFICATE OF SERVICE FOR

**JAMES RIFFIN’S REPLY TO
CONRAIL’S REPLY TO
RIFFIN’S MOTION TO STRIKE**

SUPPLEMENTAL CERTIFICATE OF SERVICE

I hereby certify that on the 4th Day of January, 2016, a copy of the foregoing Reply to Conrail’s Reply to Riffin’s Motion to Strike, was e-mailed to William Mullins, counsel for Norfolk Southern.

James Riffin