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**Before the
Surface Transportation Board**

STB DOCKET NO. AB-167 (Sub-No. 1189X)

**CONSOLIDATED RAIL CORPORATION – ABANDONMENT EXEMPTION –
IN HUDSON COUNTY, NJ**

STB DOCKET NO. AB-55 (Sub-No. 686X)

**CSX TRANSPORTATION, INC. – DISCONTINUANCE OF SERVICE EXEMPTION –
IN HUDSON COUNTY, NJ**

STB DOCKET NO. AB-290 (Sub-No. 306X)

**NORFOLK SOUTHERN RAILWAY COMPANY – DISCONTINUANCE OF SERVICE
EXEMPTION – IN HUDSON COUNTY, NJ**

**JAMES RIFFIN’S RESPONSE TO JERSEY CITY’S, ET. AL.’S
MOTION TO MAKE JUNE 18, 2015 THE DUE DATE FOR OFAS;
JAMES RIFFIN’S ARGUMENT THAT ANYONE CAN FILE AN OFA; AND
JAMES RIFFIN’S NOTICE THAT HE INTENDS TO FILE PLEADINGS
IN RESPONSE TO CONRAIL’S AND JERSEY CITY’S OBJECTIONS TO
JAMES RIFFIN FILING AN OFFER OF FINANCIAL ASSISTANCE /
REQUEST FOR DOCUMENTS**

1. James Riffin (“**Riffin**”) herewith responds to Jersey City’s Motion seeking an order from the Surface Transportation Board (“**STB**”), setting June 18, 2015, as the due date for Offers of Financial Assistance.

2. Riffin appreciates the fact that counsel for both Conrail and Jersey City¹ sent Riffin an e-mail copy of their June 9, 2015 filings.

3. Riffin appreciates the fact that Conrail, Jersey City and the LLCs, after six years of litigation and delays, now ‘suddenly’ are in a hurry to start the Offer of Financial Assistance (“**OFA**”) process. However, Riffin cautions the STB, that the STB needs to comply with its regulations. As the STB is aware, technical mistakes often become the basis for judicial review.

4. And Riffin appreciates the fact that Mr. Montagne is scheduled to be out of the country between June 27, 2015, and July 14, 2015.

5. Before the STB is an appeal, filed by Jersey City quite some time ago. It is Riffin’s recollection, that there are other matters that are still unresolved. If Jersey City desires to expedite the OFA process, Riffin would respectfully suggests that Jersey City, Conrail, and the LLCs, all move to withdraw their outstanding issues. That way the STB will have a ‘clean slate,’ with no outstanding issues.

ANYONE CAN SUBMIT AN OFA

6. 49 CFR 1152.27(c)(2)(iii) states:

¹ For his convenience, Riffin will refer to the three entities represented by Charles Montagne, as “Jersey City,” and the 8 limited liability companies represented by Daniel Horgan as the “LLCs.”

“(iii) *Contents of offer.* The offeror shall set forth its offer in detail. **The offer must meet the requirements of paragraph (c)(1)(ii) of this section.**” Bold added.

7. 49 CFR 1152.27 (c)(1)(ii) states:

“(ii) *Contents of offer.* The offeror shall set forth its offer in detail. The offer must:

- (A) Identify the line, or the portion of the line, in question;
- (B) Demonstrate that the offeror is financially responsible; that is, that it has or within a reasonable time will have the financial resources to fulfill proposed contractual obligations; governmental entities will be presumed to be financially responsible; and
- (C) Explain the disparity between the offeror’s purchase price or subsidy if it is less than the carrier’s estimate under paragraph (a)(1) of this section, and explain how the offer of subsidy or purchase is calculated.”

8. Nowhere in 49 CFR 1152.27 (c)(1)(ii) or in 49 CFR 1152.27(c)(2)(iii), does it state that a prerequisite to filing an OFA, is the filing of a Notice of Intent to File an OFA.

9. Filing a Notice of Intent to File an OFA operates as an automatic stay of the proceeding, if the proceeding is a class exemption proceeding. If one fails to file a Notice of Intent to File an OFA, then in a class exemption proceeding, abandonment authority will automatically be granted after the specified number of days following publication in the *Federal Register*.

10. Filing a Notice of Intent to File an OFA puts the carrier on notice that someone wants the information required by 49 CFR 1152.27 (a), and that someone **may** have an interest in either subsidizing the operation of a line, or purchase of a line, for the purpose of continuing rail service.

11. Filing a Notice of Intent to File an OFA **does not** obligate the potential offeror to actually file an OFA. Whether one in fact files an OFA can only be determined after the carrier informs the prospective offeror / and the world, what the purchase price for the line will be.

12. In the instant proceeding, it was unknown what the Net Liquidation Value of the Line was, until Conrail revealed that information. Had Conrail said the purchase price was multiple-millions of Dollars per acre, no one, including Jersey City, would have submitted an OFA.

13. Now that Conrail has disclosed the purchase price for a narrow rail corridor, multiple parties may file OFAs to acquire that rail corridor. (Purchasing the rail corridor is the not-so-expensive / easy part. Putting infrastructure on the ground, is the more difficult / expensive part.)

14. Based on the clear wording of the applicable regulations, Riffin argues that **OFA s may be SUBMITTED by anyone**. Filing a notice of intent to file an OFA, **is not** a prerequisite to filing an OFA. However, the submission of an OFA is only the beginning stage. The next hurdle that must be overcome, is whether the OFA offeror is ‘financially responsible.’

WHEN OFAs ARE DUE

15. The applicable regulations appear at 49 CFR 1152.27(c)(2)(ii)(A) and (B):

“(A) An offer may be filed and served at any time after the filing of the notice of exemption. Once a notice of exemption is published in the *Federal Register*, however, the Board must be notified that an offer has previously been submitted.

(B) An offer, or notification of a previously filed offer, must be filed and served no later than 30 days after the *Federal Register* publication described in paragraph (b)(2)(ii) of this section. This filing and service is subject to the requirements of 49 CFR 1152.25 (d)(1), (d)(2), and (d)(4).”

16. 49 CFR 1152.25 (d) (1), (2) and (4) have to do with time limits, and how time is computed. In OFA proceedings, the date a pleading is received by the STB is the effective date of the pleading. Also, if the due date for an OFA is due on a Saturday, Sunday, or Holiday, then the due date of the OFA is the first previous day the STB was open.

17. Jersey City may file its OFA **at any time**. However, if Jersey City’s OFA is filed before “service of the Board decision granting the application or petition for exemption,” then Jersey City would have to notify the STB that it had previously filed its OFA.

18. Since the *Federal Register* notice in this proceeding appeared six years ago, the 30-day time period specified in 49 CFR 1152.27(c)(2)(ii)(B), has long passed.

19. The regulations do not specify when an OFA must be filed, under the circumstances present in this proceeding.

20. However, 49 CFR 1152.27(c)(1)(i)(B) gives guidance: This regulation is quite similar to the regulation for class exemption procedures, and states:

“(B) An offer, or notification of a previously filed offer, must be filed and served no later than 10 days after service of the Board decision granting the application or petition for exemption. This filing and service is subject to the requirements of 49 CFR 1152.25 (d)(1), (d)(2), and (d)(4).”

21. It is a Constitutional requirement, that reasonable notice, and a reasonable opportunity to respond, must be provided.

22. What starts the clock for OFAs, is a decision authorizing an abandonment. For applications or petitions for exemption, the decision is not automatic. For class exemption proceedings, the decision is automatic, unless it is stayed.

23. Regardless of the proceeding, it is the decision that authorizes abandonment, that starts the OFA clock.

24. Since in non-class exemption proceedings, OFAs are due within 10 days “after service of the Board decision granting the application or petition for exemption” it would be appropriate in

this proceeding (which is proceeding similar to an ‘individual exemption’ proceeding), for OFAs to be due within 10 days of whenever the STB serves a decision granting abandonment authority.

25. Since counsel for Jersey City will be out of the country for more than 10 days, and since Mr. Montange’s travel plans were made quite some time ago, Riffin would argue that it would be unfair for the STB to render a decision setting the OFA due date, while Mr. Montange is out of country, particularly if that due date was 10 days after the decision setting the due date.

26. Mr. Montange indicated that he was leaving on Saturday, June 27, 2015. Presumably, he will be packing his bags on Friday, June 26, 2015. So if OFAs were made due on June 25, 2015, that would give Mr. Montange sufficient time to submit Jersey City’s OFA. (He did say that he was prepared to submit Jersey City’s OFA on or after June 11, 2015.) Ten days before June 25, 2015, would be June 15, 2015.

OPTION A – STB SERVES A DECISION BY JUNE 15, 2015

27. So if the STB were to serve its decision authorizing abandonment by **June 15, 2015**, with OFAs due **June 25, 2015**, that would permit Jersey City to timely file an OFA.

28. The Office of Proceedings has five days within which to determine if the OFA offeror(s) is ‘financially responsible.’ Since government agencies are presumed to be ‘financially responsible,’ Jersey City need not worry that the Office of Proceedings will make a ‘financial responsibility’ decision that is adverse to Jersey City.

29. However, the presumption that Jersey City is ‘financially responsible,’ is subject to challenge. While Riffin certifies that he **will not** challenge the presumption that Jersey City is ‘financially responsible,’ that **does not mean** that Conrail, or the LLCs, will not challenge whether Jersey City is ‘financially responsible.’

30. In a decision served on March 14, 2012 in AB 167 (Sub. No. 1191X), at p. 4, the Office of Proceedings held that to be ‘financially responsible,’ one had to demonstrate that one had sufficient funds not only to purchase the line, but also “to operate” the line for two years. This decision was affirmed by the Full Board. The Office of Proceedings’ decision to reject the OFA, was summarily affirmed by the D.C. Circuit. The requirement, that to be ‘financially responsible,’ one had to have sufficient funds “to operate” a line for two years, has never been directly raised, nor litigated in a U.S. Circuit Court of Appeals. Riffin believes that the imposition of the ‘operate for two years’ requirement, is infirm. The ‘feeder line’ statute, 49 U.S.C. 10907, has this requirement. (For 3 years, vs. 2 years.) The OFA statute, 49 U.S.C. 10904, does not have this requirement. Basic statutory construction rules hold that if Congress used express language in one section of a statute, but used different language in another similar section of the statute, then Congress must have intended the language not used, to not be in the statute without the language. On the other hand, *Chevron* deference permits an administrative agency to interpret imprecise statutes (such as 10904). Riffin saves this argument for another day.

31. The LLCs and Conrail have indicated that they will vigorously challenge Jersey City’s right to file an OFA, and will vigorously challenge whatever OFA Jersey City submits. Presumably, this means **all** aspects of an OFA, including whether the OFA offeror is ‘financially responsible.’

32. If the LLCs and Conrail were to challenge Jersey City’s ‘financial responsibility’ presumption, or any other aspect of Jersey City’s OFA, then Jersey City’s reply would be due within 20 days of the challenge. That means that Jersey City’s reply might be due while Mr. Montange is out of the country.

33. Riffin argues that requiring Mr. Montange to cut his vacation short, or to have to worry about making pleadings while on vacation, is decidedly unfair. At least without Mr. Montange’s consent.

34. So it would appear that Mr. Montange has two choices: Either consent to whatever deadlines are imposed, even if those deadlines fall during the period of time Mr. Montange is out-of-country, or ask that the STB wait until July 10, 2015, or thereafter, to render a decision setting when OFAs are due.

35. Riffin is aware that one shipper has begun building its facility. Once built and operational, this shipper has indicated that it will desire rail service. While Riffin is unaware of precisely when that shipper will be ready to start using rail service, Riffin would expect that the shipper would desire rail service sometime around September, 2015.

36. It will take a minimum of 30 days to put track infrastructure on the ground. The unknown, is how long Conrail will take to execute an interchange agreement, and how long Conrail will take to install one or more turnouts (switches). (At least one, and possibly two, turnouts must be installed, in order to connect the National Rail System to whatever track infrastructure is placed on the ground.)

37. Also unknown, is how long it will take to litigate whether whatever OFA is submitted, should be accepted, or rejected by the STB; If more than one OFA is submitted, how long it will take Conrail to decide which OFA offeror Conrail chooses to negotiate with; and Whether a request to Set Terms and Conditions will be tendered to the STB. (Riffin fully expects whomever Conrail selects to negotiate with, will ask the STB to Set Terms and Conditions.)

OPTION B – FILE A DECISION ON OR AFTER JULY 10, 2015
SETTING THE OFA DUE DATE

38. After considering all of the above, Riffin concludes that it is highly unlikely that rail service could be offered to any rail shipper, by September, 2015, without a tremendous amount of cooperation / settlement, between all of the parties.

39. Riffin takes no position on when OFAs are due, other than providing 10 days notice of when OFAs are due, and other than not making an OFA due date when Mr. Montange will be unable to respond to pleadings made by other parties. (Riffin is prepared to submit his OFA within 10 days of when the STB serves notice of the due date for OFAs.)

RIFFIN'S OBSERVATIONS

40. Riffin observes:

- A. If Jersey City obtains the Embankment portion of the Line, Jersey City will have the absolute right to 'exclusive possession' of the full width, by full length, by the surface, sub-surface and air rights above, the properties acquired by the LLCs.
- B. The LLCs had the option of filing an Acquire & Operate Petition. Had the LLCs done this, and had the Acquire & Operate Petition been authorized by the STB, the LLCs' ability to possess their properties, would have been preserved. However, the LLCs would have become rail carriers, contrary to their desires.
- C. The only way Conrail and the LLCs can preserve the LLCs' ability to possess the Embankment properties the LLCs purchased from Conrail, is for Conrail / the LLCs, to successfully defeat any OFA made by Jersey City. That means that Conrail and the LLCs will vigorously contest all aspects of any OFA filed by Jersey City.
- D. Conrail and the LLCs do not appear to have a 'back-up' plan, if the OFA submitted by Jersey City is approved by the STB. (The LLCs will lose possession of their properties. Conrail and the LLCs then will litigate between themselves due to the LLCs inability to obtain unencumbered title to their properties.)
- E. The party behind the LLCs, Mr. Steve Hyman, will have been very-legally divested of what he spent a lot of time and money trying to acquire. This is an outcome Riffin

finds to be highly objectionable. So objectionable, that Riffin has volunteered to submit his own OFA. Riffin is not only willing, but fully capable of providing rail service. And not just for 2-5 years, as required by the OFA statute. Riffin has made Mr. Hyman an offer: If the STB permits the OFA process to move forward (If Conrail and the LLCs are unable to stop the OFA process), then support Riffin's OFA. If Conrail chooses to transfer its rail easement to Riffin, Riffin has agreed to permit the LLCs to possess whatever portion of the Line is not needed for 'continued rail service.' (Riffin only needs surface rights, and about 30-feet of air space above his surface rights.) In effect, Riffin has agreed to permit the LLCs to use about 90% of the rights associated with their properties. If Jersey City prevails, Jersey City will use 100% of the properties, and will divest the LLCs of their right to possess any of their properties. In effect, Riffin is Mr. Hyman's 'back-up plan.'

Respectfully,

James Riffin
P. O. Box 4044
Timonium, MD 21094
(443) 414-6210

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of June, 2015, a copy of the foregoing Riffin's Response to OFA Due Date Motion, etc., was served on the parties noted below, by E-mail.

James Riffin

E-mail:

Consolidated Rail Corporation:	Robert Jenkins	rmjenkins@mayerbrown.com
CSX Transportation:	Robert Jenkins	rmjenkins@mayerbrown.com
Norfolk Southern Railway Co.:	Robert Jenkins	rmjenkins@mayerbrown.com
Conrail / CSXT / Norfolk So.:	Adam Sloan	asloane@mayerbrown.com
The LLCs: ²	Daniel E. Horgan	dehorgan@lawwmm.com
Charles H. Montange: ³	Charles Montange	c.montange@frontier.com
Eric Strohmeyer:		esstrohmeyer@yahoo.com

² The LLCs: 212 marin Boulevard, LLC; 247 Manila Avenue, LLC; 280 Erie Street, LLC; 317 Jersey Avenue, LLC; 354 Cole Street, LLC; 389 Monmouth Street, LLC; 415 Brunswick Street, LLC; 446 Newark Avenue, LLC; NZ Funding, LLC. All limited liability companies of New Jersey.

³ Counsel for City of Jersey City; Rails to Trails Conservancy; PRR Harsimus Stem Embankment Preservation Coalition.