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Office of Proceedings

June 25, 2015

Part of Public Record

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423

Re: Conrail - Abandonment Exemption - in Hudson
County, N.J., AB 167 (Sub-no. 1189X)
and related proceedings AB 55-686X
and AB 290-306X

Reply to James Riffin's Notice of Intent to OFA

Dear Ms. Brown:

Enclosed please find a reply to the Notice of Intent to OFA
filed by Mr. Riffin in this proceeding on or about June 8, 2015.
The Riffin notice of intent is vastly out-of-time and was filed
without an extension of time or motion for leave. It should be
dismissed, stricken, rejected or otherwise denied.

Thank you for your assistance in this matter.

Respectfully,



Charles H. Montange
for City of Jersey City, Rails to Trails
Conservancy and PRR Harsimus Stem Embankment
Preservation Coalition

Att. Reply

cc. Parties per certificate of service

BEFORE THE SURFACE TRANSPORTATION BOARD

Consolidated Rail Corporation -)
Abandonment Exemption -) AB 167 (Sub-no 1189X)
in Hudson County, NJ)

Reply on behalf of City of Jersey City, et al.,
to James Riffin's
Notice of Intent to OFA

City of Jersey City, Rails to Trails Conservancy, and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition ("Coalition") (collectively, "City et al.") hereby reply to the notice of intent to file an Offer of Financial Assistance ("notice of intent to OFA") filed by James Riffin in this proceeding on or about June 8, 2015. Mr. Riffin's notice of intent to OFA is vastly out of time, and was filed without any motion for leave to file. Under applicable precedent, no leave to file should have been granted. Mr. Riffin's notice of intent (and any actual OFA by Mr. Riffin at this point) must be rejected, denied, dismissed, or stricken under STB precedent, and if a motion to do so is required, then this Reply should be so treated.

I.

The first problem with Mr. Riffin's tardy notice of intent to OFA is that under this Board's general procedural rules, his

filing should have been accompanied by a timely request for an extension of time. 49 C.F.R. 1104.7(b). In addition, it should have been filed ten days before the due date for which an extension is sought. Id. Since his filing is vastly out of time, he should have filed for a motion for leave to file out of time. In all events, Mr. Riffin's filing ignored the requirement for leave to violate the timeliness requirements of this Board. No leave should be granted for the reasons stated infra.

II.

This proceeding is a two-year out of service "class exemption" proceeding pursuant to 49 C.F.R. 1152.50. For 49 C.F.R. 1152.50 class exemptions, a party interested in filing an OFA "must ... file" a notice of intent to OFA "no later than 10 days after Federal Register publication" of the filing of a notice of exemption by STB. 49 C.F.R. 1152.27(b)(2)(i). The relevant STB notice appeared in the Federal Register on March 18, 2009 (Federal Register website version attached as Exhibit A). The due date for all filings of notices of intent to OFA was therefore March 28, 2009, a Saturday. Under this Board's 49 C.F.R. 1104.7(a), the notice of intent to OFA was therefore due on Monday, March 30, 2009. The actual Federal Register notice specifically stated that date for notices of intent to OFA (Exhibit A at p. 2).

Two parties filed timely notices of intent to OFA: City of Jersey City and CNJ Rail. Both filings appear on the STB website, as filed on March 27, 2009. No other person or entity filed a timely notice of intent to OFA.

Mr. Riffin's purported notice of intent to OFA filed on June 8, 2015 is tardy by a little over six years and two months. This Board's precedent indicates that late-filed notices of intent to OFA's are dismissed when the railroad objects. E.g., Illinois Central RR Co. - Abandonment Exemption - in Champaign County, IL, AB 43-189X, served May 11, 2015, slip at 2 (denying a grain cooperative's notice of intent to OFA that was ten days late); General Railway Corporation d/b/a Iowa NW RR, Abandonment Exemption - in Osceola and Dickinson Counties, IA, AB 1067-2X, served Oct. 24, 2008, slip at 2 (denying a nine day late request to file a notice of intent to OFA by a local railroad authority). This Board has explained that "[a]llowing the late filing of an OFA over the owning rail carrier's objection would be contrary to Congress's direction to streamline the abandonment and OFA process." AB 1067-2X, served Oct. 24, 2008, supra, at p. 2, citing Aban. & Disc. Of Rail Lines..., 1 STB 894, 909-10 (1996) (noting that Congress shortened the time for STB to process OFA's under ICCTA).

Since Conrail in its letter filed June 9, 2015, in this proceeding very clearly and firmly objected to the Mr. Riffin's

purported late-filed notice of intent, it follows that Mr. Riffin's notice of intent to OFA should and must be dismissed.

III.

This Board's regulations further require all notices of intent to OFA in those proceedings to be filed within thirty (30) days of the publication by the Board of a Notice of Exemption (per 1152.50) in the Federal Register. 49 C.F.R. 1152.27(c)(2)(ii)(B). Since the Federal Register publication was on March 18, it follows that Mr. Riffin's OFA was due no later than April 17, 2009. The only lawful method around this strict limitation is to file a notice of intent to OFA and a motion to toll the due date for one's own OFA until receipt of specified valuation information from the rail carrier. 49 C.F.R. 1152.27(c)(2)(ii)(C).

Both City and CNJ in making their timely notices of intent to OFA also asked, in accordance with STB regulations, for a tolling of the time on which OFA's would be due until ten days after Conrail supplied valuation information. In its Decision in this proceeding served May 26, 2009, STB at p. 3 ordering paragraph 1 tolled "the time period for City and CNJ to file an OFA ... until ten days after Conrail supplies City and CNJ with the information specified in 49 C.F.R. 1152.27(a)." Mr. Riffin of course neither sought nor obtained any tolling of the OFA due

date. He cannot rely on the extension obtained by City and CNJ, which was for themselves alone.

In sum, Mr. Riffin's OFA itself is now at least six years and two months out of time. This Board does not ordinarily grant extensions for OFA's unless the railroad consents. Consolidated Rail Corp. - Abandonment Exemption - in Philadelphia, PA, AB 167-1191X, served Oct. 26, 2012, slip at 5 (rejecting incomplete OFA as untimely under deadline as extended). This Board has never to our knowledge granted an OFA extension sought six years after the due date. Indeed, this Board has said that "[t]here is no precedent to entertain an OFA filed 4-1/2 years after its due date, and to do so plainly would be inconsistent with Congressional intent." Idaho-Northern & Pac. RR Co. - Abandonment Exemption - in Wallowa and Union Counties, PA, AB 433X, served Dec. 13, 2001 (denying petition to allow the late-filing of an OFA by Oregon Department of Transportation). In short, Mr. Riffin is well beyond any tardiness this Board has ever tolerated. What Riffin seeks to do now is directly contrary to agency case law and Congressional intent.

In any event, participation in this proceeding by Mr. Riffin would be prejudicial to City et al. The City, mindful of the showings this Board imposed in its Decision served May 26, 2009, has dutifully prepared its OFA in response to the May 26,

2009 Decision, which provides that OFA's would be due within 10 days of Conrail's provision of valuation information.¹ Conrail supplied its valuation information on June 1, 2015, and City was prepared to file as early as June 11.² When STB indicated that the OFA would not be due on June 11, City promptly requested (with the support of Conrail and CNJ) a due date of June 18. Further delay to accommodate late-filed OFA's unreasonably increases City's litigation burdens, unnecessarily complicates the proceeding, and is contrary to shipper interests because, inter alia, it postpones resolution of the rail future of the Harsimus Branch.³

IV.

Riffin provides no traditional justification for his delay (e.g., illness, incapacitation), and (as already noted) has filed no motion for leave to file or to extend his time, and

¹In sum, without prejudice to the City's appeal of the requirement to make showings on rail need and feasibility and public support, the filing provides that information.

²Unless STB in its scheduling order further alters the ordinary ground rules on what an OFA must contain, City needs a few days notice to complete printing and service of its OFA, including the portions covered by the protective order. Counsel has already requested no due date apply while he is unavailable due to travel (June 27 through July 14).

³City could file its OFA at any time, but understands this Board would not likely act upon it until it sets a schedule, since there is an additional party (CNJ) which has filed a notice of intent and an additional party (Riffin) purporting to have done so. City anticipates that it will be asking for OFA terms and conditions since Conrail so far has declined to negotiate. City wishes to move the OFA process forward.

therefore eschews any conscious excuse for his tardiness.

However, Mr. Riffin did file a "Response" on June 11, 2015, to City's June 9, 2015, request for a June 18 deadline for OFA's. Mr. Riffin's "Response" offers two rationales explaining to the Board why his effort to invoke the OFA process in AB 167-1189X should be indulged.

First, Mr. Riffin appears to argue that OFA's can be filed at any time. E.g., Riffin Response at p.3, para 9. This claim is belied by 49 C.F.R. 1152.27(b)(2)(ii) and the STB precedents already cited.

Mr. Riffin's second rationale is no excuse for his tardy notice of intent to OFA but nonetheless very intriguing. Mr. Riffin states that he now wants to help out "Mr. Steve Hyman," whom he describes as the party behind the intervenor LLCs. These LLCs are the same entities to whom Conrail illegally sold the Harsimus Branch in 2005 in the face of the City's efforts to acquire the property and in the face of City's inquiries about compliance with STB regulations. Based on discovery responses to date, City is aware that Mr. Riffin has been advising Mr. Hyman on how to "defeat" the City. Thus, Riffin's assertion that he is acting, or at least thinks he is acting, for Mr. Hyman's benefit is plausible.

In his "Response," Mr. Riffin indicates that he thinks it is objectionable that Mr. Hyman d/b/a the LLCs may be divested

of title when STB remedies are finally applied.⁴ He says that Conrail and the LLCs do not have a "back-up" plan in that regard.⁵ He says he finds the predicament Conrail and the LLCs have gotten themselves into so objectionable that "Mr. Riffin has volunteered to submit his own OFA."⁶ He suggests that his intent is to secure Conrail and the LLCs at least 90% of their property if Conrail will choose him as the party to negotiate with in the event OFA's are allowed.⁷ He hopes in this way "to defeat any OFA made by Jersey City."⁸

Since one of Conrail's parents recently filed a petition for a rulemaking at STB is essence accusing Riffin of abusing the OFA process, it takes considerable chutzpah for Mr. Riffin to posit that Conrail (a Norfolk Southern 50% subsidiary) would voluntarily select him to deal with on OFA, given Norfolk Southern's catalog of issues with Mr. Riffin set forth in Petition of Norfolk Southern Railway, Ex Parte No. 277, filed May 26, 2014 (seeking new rules to impede OFA's by parties who file repeated OFA's and lack financial responsibility). But the

⁴ Riffin Response at p. 9-10, para 40 E.

⁵ Id. p. 9 para D.

⁶ Id. p. 10 para E

⁷ Id.

⁸ Id. p. 9 para C. As Mr. Riffin suggests, the LLCs and Conrail are expected to do their best to defeat the City's OFA in any event. Id. p. 7 para 31. He is clearly offering himself for the Board's consideration as a last ditch, hail-Mary kind of proposition to help his team (Conrail and the LLCs) stop the City from preserving this rail line.

problems for Mr. Riffin's attempt to invoke the OFA process in AB 167-1189X go well beyond tardiness and the general lack of responsibility argued by Norfolk Southern in its Petition. The problems include misuse of the OFA process to assist a developer in breaking up a rail corridor.

Although Riffin suggests he is acting to ensure Mr. Hyman's ownership of the Harsimus Branch is preserved, Mr. Hyman's LLCs have disavowed Riffin, claiming that he has no standing. See LLCs' Letter filed June 11, 2015 in this proceeding). Riffin may think he is helping out Mr. Hyman with funding supplied by Mr. Hyman or other real estate speculators. Alternatively, Riffin may have no arrangements for funding at all, as argued generally by Norfolk Southern in its pending petition for rulemaking. Whatever Riffin's situation, use of the OFA processes for the purpose of helping Mr. Hyman or any other developer keep unlawfully acquired railroad right of way for non-rail purposes is abusive. Mr. Riffin's tardy effort to do another of his OFA invocations at this Board in order to secure the property for Mr. Hyman is nothing more than a ruse.

The LLCs and Conrail have repeatedly attacked the City's efforts to employ the OFA statute. The Board has stated in response that OFA's are supposed to be for continued rail use. This purpose necessarily excludes OFA's by Mr. Riffin designed

to help a developer convert a rail line into townhouses and/or skyscrapers.⁹

In short, other than misstating the law, Mr. Riffin's only explanation for his tardy attempt to invoke OFA processes is that he wants to help out the developer. That might qualify Mr. Riffin as an officious intermeddler, but it does not justify him in being even six days' late, much less six years' late. The only action Mr. Riffin's purported justification supports is to toss his whole effort to invoke OFA under this Board's precedent.

V.

⁹ The record of this proceeding (and the record of F.D. 34818) demonstrates that the LLCs (and Conrail) wish to demolish the historic Embankment on the corridor and turn the whole transportation facility into townhouses or skyscrapers. But "The Board has found that acquiring a line of railroad for the purpose of abandoning rather than operating over it constitutes a misuse of agency procedures. See The Land Conservancy of Seattle & King County-Acquis. & Operation Exemption-The Burlington N. & Santa Fe Ry., FD 33389, slip op. at 3 (STB served Sept. 26, 1997) (notice of acquisition exemption revoked where acquiring party filed for abandonment within 2 months of acquiring the line), reconsideration denied, The Land Conservancy of Seattle & King County-Acquis. & Operation Exemption-The Burlington N. & Santa Fe Ry., FD No. 33389 et al. (STB served May 13, 1998), pet. for judicial review dismissed sub nom. The Land Conservancy of Seattle & King County v. STB, 238 F.3d 429 (9th Cir. 2000). City of Temple - Acq. & Op. Exemption - Georgetown Railroad, F.D. 35369, served April 23, 2010, slip op. at 1.

For the reasons stated, Riffin's notice of intent to OFA must be denied, rejected, stricken and/or dismissed and any other invocation of the OFA process by Mr. Riffin in this proceeding similarly denied, rejected, stricken and/or dismissed. If Riffin requests (or implicitly requested) leave to file the tardy pleadings, then that leave must be denied. Otherwise if it takes a motion to dismiss Mr. Riffin's notice of intent to OFA, then City et al so move, and the motion should be granted for the reasons stated.

Respectfully submitted,


Charles H. Montange
426 NW 162d St.
Seattle, WA 98177
(206) 546-1936
Fax: -3739
Counsel for City of Jersey City

cc. City of Jersey City
RTC, PRRHSEP Coalition

Certificate of Service

The undersigned hereby certifies service by posting the foregoing in the US Mail, postage pre-paid, first class or priority mail, this ~~21~~²⁵th day of June 2015 addressed to Daniel Horgan, counsel for the LLCs, Waters, McPherson, McNeill, P.C., 300 Lighting Way, P.O. Box 1560, Secaucus, NJ 07096 (also email attachment); and Robert M. Jenkins III, counsel for Conrail, Mayer Brown LLP, 1999 K Street, N.W., Washington, D.C. 20006-1101 (also email attachment) and other parties on the attached service list with known addresses.



Service List
Revised June 17, 2015

Daniel D. Saunders
State Historic Preservation Office
Mail Code 501-04B
NJ Dept. Environmental Protection
P.O. Box 420
Trenton, NJ 08625-0420

Massiel Ferrara, PP, AICP, Director
Hudson County Division of Planning
Bldg 1, Floor 2
Meadowview Complex
595 County Avenue
Secaucus, NJ 07094

Joseph A. Simonetta, CAE,
Executive Director
Preservation New Jersey
414 River View Plaza
Trenton, NJ 08611

Justin Frohwith, President
Jersey City Landmarks Conservancy
54 Duncan Avenue
Jersey City, NJ 07303

Eric Fleming, President
Harsimus Cove Association
344 Grove Street
P.O. Box 101
Jersey City, NJ 07302

President
Hamilton Park Neighborhood Association
PMB 166
344 Grove Street
Jersey City, NJ 07302

Jill Edelman, President
Powerhouse Arts District Nbd Ass'n
140 Bay Street, Unit 6J
Jersey City, NJ 07302

President
The Village Nbd Ass'n
365 Second Street
Jersey City, NJ 07302

President
Van Vorst Park Association
91 Bright Street
Jersey City, NJ 07302

President
Historic Paulus Hook Ass'n
192 Washington Street
Jersey City, NJ 07302

Dennis Markatos-Soriano
Exec. Director
East Coast Greenway Alliance
5315 Highgate Drive, Suite 105
Durham, NC 27713

Gregory A. Remaud
Conservation Director
NY/NJ Baykeeper
52 West Front Street
Keyport, NJ 07735

Sam Pesin, President
Friends of Liberty State Park
580 Jersey Ave., Apt. 3L
Jersey City, NJ 07302

Aaron Morrill
Civic JC
64 Wayne St.
Jersey City, NJ 07302

Eric S. Strohmeyer
Vice President, COO
CNJ Rail Corporation
81 Century Lane
Watchung, NJ 07069 (also email attachment)

James Riffin
PO Box 4044
Timonium, MD 21094 (also email attachment)

1.36, a point east of Washington Street, in Jersey City, Hudson County, NJ.¹²¹The line traverses United States Postal Service Zip Codes 07302, 07306, and 07310.

Applicants have certified that: (1) No local or overhead traffic has moved over the property for at least 2 years; (2) any overhead traffic that has moved or could move over the property can be rerouted; (3) no formal complaint filed by a user of rail service on the property (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the property either is pending with the Surface Transportation Board (Board) or with any U.S. District Court or has been decided in favor of a complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.7 (environmental report), 49 CFR 1105.8 (historic report), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to these exemptions, any employee adversely affected by the abandonment or discontinuances shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, these exemptions will be effective on April 17, 2009, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,¹³¹ formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),¹⁴¹ and trail use/rail banking requests under 49 CFR 1152.29 must be filed by March 30, 2009. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by April 7, 2009, with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423-0001.

A copy of any petition filed with the Board should be sent to applicants' representatives: John K. Enright, 1717 Arch Street, 32nd Floor, Philadelphia, PA 19103, and Robert M. Jenkins III, Mayer Brown LLP, 1909 K Street, NW., Washington, DC 20006.

If the verified notice contains false or misleading information, the exemptions are void *ab initio*.

Applicants have filed a joint combined environmental and historic report, which addresses the effects, if any, of the abandonment and discontinuances on the environment and historic resources.¹⁵¹ SEA will issue an environmental assessment (EA) by March 23, 2009. Interested persons may obtain a copy of the EA by writing to SEA (Room 1100, Surface Transportation Board, Washington, DC 20423-0001) or by calling SEA, at (202) 245-0305. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.] Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), Conrail shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by Conrail's filing of a notice of consummation by March 18, 2010, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available on our Web site at "<http://www.stb.dot.gov>."

Decided: March 11, 2009.

By the Board, Joseph H. Dettmar, Acting Director, Office of Proceedings.

Michael Cannon box

Kulunie L. Cannon,

Clearance Clerk.

[FR Doc. E9-5612 Filed 3-17-09; 8:45 am]

BILLING CODE 4915-01-P

Footnotes

1. On January 6, 2009, applicants previously filed a notice of exemption to abandon the same line of railroad. However, in a decision served on January 26, 2009, the notice was rejected without prejudice to refiling. The decision stated that applicants did not meet the prefiling notice requirements at 49 CFR 1105.7(b) and 1105.8(c).

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2. In *City of Jersey City, Rails to Trails Conservancy, Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition, and New Jersey State Assemblyman Louis M. Manzo-Petition for Declaratory Order*, STB Finance Docket No. 34818 (STB served August 9, 2007), the Board described the line as follows: Extending between milepost 1.3 near Luis Munoz Marin Boulevard (formerly Henderson Avenue) and milepost 2.54 near Waldo Avenue, in Jersey City, NJ.

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3. The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Section of Environmental Analysis (SEA) in its independent investigation)

cannot be made before the abandonment exemption's effective date. *See Exemption of Out-of-Service Rail Lines*, 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

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4. Each OFA must be accompanied by the filing fee, which is currently set at \$1,500. *See* **49 CFR 1002.2(f)(25)**.

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5. On March 12, 2008, Conrail originally filed an Environmental and Historic Report with the Board. In response to the comments generated by that report, applicants have filed a Supplemental Environmental and Historic Report.

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