

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. EP 729

OFFERS OF FINANCIAL ASSISTANCE

Advance Notice of Proposed Rulemaking

REPLY COMMENTS OF CONSOLIDATED RAIL CORPORATION

Consolidated Rail Corporation (“Conrail”) submits these comments in reply to the opening comments submitted in the above-captioned proceeding on February 5 and February 12, 2016, by the Department of the Army (“Army”), James Riffin (“Riffin”), and the City of Jersey City (“City”).

1. The Army makes broad statements that “[g]overnment entities and shippers on the rail line should not have to demonstrate a need for rail service to file an OFA” and “[t]here should be no need for them to demonstrate that rail service is operationally feasible.” Army Comments at 2. But the Army makes clear its expectation that in the rare instances in which the Army might file an OFA, it would be to subsidize continued operations by the existing carrier on a line—not to purchase the property, and certainly not to purchase it to resurrect an out-of-service rail line.

Id. The Army’s subsidization scenario provides no reason for the Board not to codify its settled requirements for OFA offerors to demonstrate a need for rail service and operational feasibility. Where there is ongoing rail service on a line and the Army seeks to subsidize that ongoing service, neither the need for rail service nor its operational feasibility will likely be a serious issue.

2. Riffin has an irreconcilable view of the requirement that an OFA offeror demonstrate the need for rail service and financial responsibility. On the one hand, he emphatically states that the purpose of 49 U.S.C. § 10904 is ““continuation of freight rail service,”” and “**not** to save a rail corridor for non-freight rail service, such as trails, parks, commuter rail service, or any other public use.” Riffin Comments at 23 (emphasis in original). He observes that both governmental and private OFA offerors are required ““to demonstrate shipper support, demonstrate that rail service could actually be provided, demonstrate community support, and demonstrate that the line could be operated profitably.” *Id.* at 25.

On the other hand, with respect to financial responsibility, Riffin takes the position that ““there should be **no requirement** that the OFA offeror demonstrate the ability to fund operation of the line for at least two years.” *Id.* at 15 (emphasis in original). Riffin suggests that the Board require a showing ““that the OFA offeror will be able to acquire the necessary funds to pay the existing carrier the Net Liquidation Value for the line,”” but that is all he suggests. *Id.* at 14.¹ Since in his view the primary goal of the OFA process is simply to save the rail corridor, he asserts that there should be no time pressure or schedule required to rehabilitate or operate the line. *Id.* at 15.

¹ Concomitantly, Riffin argues that OFA offerors should not be required to make **any** showing of financial responsibility when they file their notices of intent to file an OFA, because they do not at that point have information from the railroad about the net liquidation value of the line. Riffin Comments at 15. Of course, this assumes that the offeror’s ability to pay net liquidation value is the only financial responsibility issue. It elides entirely the offeror’s financial capacity to rehabilitate and operate the line. That is exactly what Riffin intends. Indeed, in a significant number of cases, he would nullify entirely the statutory requirement for a demonstration of financial responsibility. This is clear from his assertion that where a carrier only has an easement and all track infrastructure has been removed, “the purchase price for a line of railroad is Zero Dollars. . . . And everyone has at least Zero Dollars. So everyone who offers to purchase a rail easement with no track infrastructure, would be a ‘financially responsible person.’” *Id.* at 39.

Riffin's views regarding continuation of rail service and financial responsibility are not only at odds with each other but also display a fundamental misunderstanding of the purpose of the statute. As he himself implies with respect to continuation of rail service, the purpose of Section 10904 is **not** to save the rail corridor for its own sake, but to preserve freight rail service. *See, e.g., Borough of Columbia v. STB*, 342 F.3d 222, 226 (3d Cir. 2003) ("When a carrier has applied to abandon a rail line, 'any person' may file an OFA, which is an offer to purchase or subsidize a rail line and **so to facilitate continued freight rail service.**") (emphasis added). That is the only basis upon which a forced sale of the line can be justified. If an OFA offeror cannot demonstrate both the need for continued freight rail service **and** the offeror's financial capacity to provide that service (including whatever rehabilitation of the line is required), then the Board cannot make the necessary determination that freight rail service will be preserved.

Riffin's suggestion that there should be no time pressure or schedule for rehabilitation of an out-of-service line simply underscores the hollowness of his position. If an OFA offeror is not required to rehabilitate an out-of-service line **before** the minimum two-year service period begins, then there is nothing to prevent the offeror from **never** rehabilitating and **never** operating the line at all. It is precisely this kind of abuse of the OFA process that the Board can and has sought to prevent with its construction of Section 10904. The Board can and should further that construction by amending its regulations to incorporate the "financial responsibility" and "continuation of rail service" criteria proposed by Conrail in its opening comments. The Board should specifically provide that any successful OFA offeror must **actually provide freight rail service for a minimum of two years** before the Board will entertain any petition to abandon or discontinue service.

3. The City's comments suggest that the "chief abuse" of the OFA remedy arises from illegal abandonments. City Comments at 2. This unsupported, and unsupportable, view is attributable to the fact that the City has chosen to generalize from its tendentious characterizations of abandonments undertaken by Conrail in Jersey City itself, especially *Consolidated Rail Corporation—Abandonment Exemption—In Hudson County, NJ*, AB 167 (Sub-No. 1189X), which is currently before the Board. The City's transparent special pleading concerning that case in its comments here does not require a lengthy response. There have been more than enough pleadings filed about the City's claims in that case, and Conrail will not burden the Board by repeating its responses here, particularly with respect to non-OFA issues.

There is one generic OFA argument the City makes that requires a response. The City believes that the fundamental purpose of OFAs is the preservation of rail corridors. As noted above, this is a view that Riffin also embraces, at times, in his comments. But the City's reasoning in support of this erroneous conclusion is unique. The City believes that the preservation of rail corridors is a valid purpose for OFAs because, alone of the parties filing opening comments, the City seems to think that an OFA can be employed as a kind of adjunct to the public use condition provisions of 49 U.S.C. § 10905.² In general, the City asks the Board to

² Under Section 10905, the Board may impose a "public use condition" on an abandonment where the rail properties involved "are appropriate for use for public purposes, including highways, other forms of mass transportation, conservation, energy production or transmission, or recreation." 49 U.S.C. § 10905. Significantly, under Section 10905, when the STB approves an abandonment, it may prevent "disposal" of the properties involved for up to 180 days, but it cannot force a railroad to engage in negotiations with a public entity or void an agreement by the railroad to sell the properties to a private party. *See, e.g., Georgia S.W. Div., South Carolina Cent. R.R. Co.—Aban. Exemption—in Dodge and Wilcox Counties, GA*, AB 385 (Sub-No. 1X), 1996 WL 39972, at *4 (STB served Feb. 2, 1996) (observing that "[t]his agency has consistently held that . . . we cannot compel a carrier to sell a line for public purposes" and rejecting argument that ICC had authority under Section 10905 to void railroad's prior contractual commitment to a private party); *see also Connecticut Trust for Historic Pres. v. ICC*, 841 F.2d

“acknowledge that governmental entities may employ the OFA remedy to secure otherwise to be abandoned rail lines for multiple rail or other public purposes, including passenger rail purposes.” *Id.* at 32. More specifically, the City argues that there is no requirement in 49 U.S.C. § 10904 that an OFA be for the continuation of freight rail service, “so it is available not just for rail transportation to be continued but also for rail lines to be preserved [for public use].” *Id.* at 61. The City claims that “[t]he issue of improper OFA purpose is now relevant under the statute only when an OFA will have the effect of upsetting a public project.” *Id.* at 61-62.

The first answer to the City’s argument is that the City is demonstrably wrong when it asserts that there is no requirement that an OFA must be for the continuation of freight rail service. We need not detail here the reasons, since they have been thoroughly discussed by the STB and the courts. *See, e.g., Redmond-Issaquah R.R. Pres. Ass’n v. STB*, 223 F.3d 1057, 1063 (9th Cir. 2000) (“[W]e hold that the STB’s interpretation of § 10904 as authorizing it to reject OFAs which are not intended to enable the continuation of rail transportation is reasonable.”); *Roaring Fork R.R. Holding Auth.—Aban. Exemption—in Garfield, Eagle, and Pitkin Counties, CO*, 4 S.T.B. 116, 119 (1999) (“The OFA process is designed for the purpose of continuing to provide freight rail service, and is not to be used to obstruct other legitimate processes of law (whether Federal, state, or local) when continuation of such service is not likely.”), *aff’d sub nom. Kulmer v. STB*, 236 F.3d 1255 (10th Cir. 2001).³

479, 483 (2d Cir. 1988) (upholding “ICC’s view that it lacks power to require sale or impose terms and conditions of sale” under [current section 10905]).

³ Not only is the City’s reading of Section 10904 demonstrably wrong with respect to the continuation of rail service, but it is also demonstrably wrong with respect to financial responsibility for government entities. The City asserts that the current regulatory presumption that government entities are financially responsible is “irrebuttable,” because the statute supposedly “indicates that governmental entities must be treated as financially qualified.” City Comments at 33. The statute neither “indicates” nor says any such thing, and the Board’s

The second answer to the City's argument is that it would make a mockery of the statutory abandonment scheme. As its title states, Section 10904 authorizes OFAs "to avoid abandonment and discontinuance." If an OFA is approved, the railroad is forced to sell the properties involved to the OFA offeror. The line remains in service, with a different owner. This is an extraordinary remedy that is justified only by the preservation of common carrier rail service.

The Board has no eminent domain authority, and is not empowered to take property for general public purposes. Its regulatory concern with freight railroads is freight rail service. *See* 49 U.S.C. § 10101. Absent a need for freight rail service, the Board has no mandate to preserve rail lines. As the Tenth Circuit noted in *Kulmer v. STB*, 236 F.3d 1255 (10th Cir. 2001), any contrary interpretation would raise constitutional problems. *Id.* at 1257 ("It would be difficult indeed to justify a statute that forces a rail carrier desiring to discontinue freight rail service to sell its lines solely because a 'financially responsible' person offers to purchase them. Whereas a statute that forces the sale of potentially abandoned lines to 'financially responsible' persons who will continue rail service at least furthers a legitimate government interest in preserving access to, and service over, rail lines.") Of course, if a state or a locality like Jersey City desires to acquire **abandoned** rail properties for public use under its state or local eminent domain authority, it is free to do so. But that state or locality cannot use Section 10904 to force a sale for public use. Absent a demonstrated need for rail service, there is no basis for the Board to deny the railroad abandonment authority or to force the railroad to sell that property to any particular buyer or buyers.

precedent is firmly to the contrary. *See Indiana S.W. Ry. Co.—Aban. Exemption—in Posey and Vanderburgh Counties, Ind.*, AB 1065X, slip op. at 4-6 (STB served Apr. 8, 2011).

As noted earlier, the statute in Section 10905 does give the state or local authorities that desire to acquire a line authorized for abandonment the **opportunity** to negotiate a **voluntary** agreement with the railroad for the post-abandonment acquisition and public use of the line.⁴ The National Rails to Trails Act, 16 U.S.C. § 1247(d), similarly authorizes **voluntary** rail-banking of a line eligible for abandonment. 49 CFR § 1152.29(b)(1)(ii). What the statute does **not** do is authorize a state or local authority desiring to acquire a rail line for public use—like a commuter line, a park, a highway, or a trail—to bypass the requirement for voluntary agreement and assert a right under Section 10904 to **force** a sale for public use.⁵

Conclusion

For the foregoing reasons, Conrail urges the Board to reject the efforts of some commenters in this proceeding to undermine the Board’s long-established requirements under 49 U.S.C. § 10904 for OFA offerors to demonstrate the need for and feasibility of continued freight rail service and their financial capacity to provide that service. As discussed in Conrail’s opening comments, those requirements should be reinforced and codified so as to streamline the

⁴ The City devotes considerable attention to cases in which railroads have obtained **exemptions** from the OFA process (City Comments at 62-63), but those cases simply reinforce the point that the OFA process cannot be used by a government entity for the purpose of acquiring a rail line for public use. In all of those cases the railroad sought the exemption from the OFA process to facilitate the railroad’s **voluntary** cooperation with the plans of the state or local entity for public use after the line was abandoned.

⁵ The City appears to recognize that the OFA offeror seeking to use Section 10904 to acquire a rail line for “public use” cannot avoid taking on a common carrier obligation. City Comments at 32. After all, the line is not abandoned if the OFA is approved. But apparently the City believes that the offeror’s only obligation is to meet the statutory obligation not to abandon the line for two years or to sell the property to a third party (other than the railroad abandoning the property) for five years post-acquisition. *Id.* In other words, the City or another government entity desiring a defunct rail line for public use can simply hold the line for two years, abandon it, then develop it itself for public use or sell it to a third party after three more years have elapsed. This is the very definition of a sham.

abandonment and OFA process and prevent the waste of railroad and Board resources that results from protracted litigation over the legitimacy of OFA offers.

Respectfully submitted,

Jonathan M. Broder
CONSOLIDATED RAIL CORPORATION
1717 Arch Street, Suite 1310
Philadelphia, PA 19103
(215) 209-5020

Robert M. Jenkins III^{acs}

Robert M. Jenkins III
Adam C. Sloane
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3261

Attorneys for Consolidated Rail Corporation

March 14, 2016

CERTIFICATE OF SERVICE

I, Adam C. Sloane, hereby certify that, on this 14th of March, 2016, I caused a copy of the foregoing Reply Comments of Consolidated Rail Corporation to be served by First Class Mail, postage prepaid, upon the parties of record, as set forth on the Surface Transportation Board's Service List for STB Docket No. EP 729 as of March 13, 2016:

Borman, Keith
American Short Line Regional Railroad
Association
50 F Street NW Suite 7020
Washington, DC 20001-1564

Chester County Historic Preservation Network
Board Of Directors
PO Box 216
Chatham, PA 19318

Dicenso, David
1 Soldier Way
Scott AFB, IL 62225-5006

Ferster, Andrea C.
2121 Ward Court, N.W., 5th Fl.
Washington, DC 20037

Montange, Charles H
426 NW 162nd Street
Seattle, WA 98177

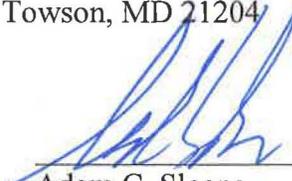
Parkerson, Maquiling
Three Commercial Place
Norfolk, VA 23510

Riffin, James
P. O. Box 4044
Timonium, MD 21094

Rinn, Louise A
Union Pacific Railroad Company
1400 Douglas Street, Stop 1580
Omaha, NE 68179

Strafford, Timothy J.
Association Of American Railroads
425 3rd Street, SW, Suite 1000
Washington, DC 20024

Yasbin, Melanie B.
Law Offices Of Louis E. Gitomer
The Adams Building, Suite 301
600 Baltimore Avenue
Towson, MD 21204


Adam C. Sloane