

BEFORE THE SURFACE TRANSPORTATION BOARD

JR-1

STB EX PARTE NO. 729

240121

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

ENTERED
Office of Proceedings
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Part of
Public Record

COMMENTS OF JAMES RIFFIN

PUBLIC VERSION

Date: February 12, 2016

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

2. In a Decision Served on December 14, 2015, the Surface Transportation Board (“**STB**”) invited interested parties to provide comments regarding whether, and how, the STB should update its rules pertaining to offers of financial assistance (“**OFA**”) to improve that process and to protect that process against abuse.

GENERAL COMMENTS

3. The OFA regulations, codified in 49 CFR 1152.27, provide an overview of the OFA process, including the justifications for OFAs, and some guidance as to what should be included in an OFA.

4. The OFA regulations presently **do not** provide sufficient detail, or guidance, to potential OFA offerors. Many of the terms are virtually undefined, such as “financial responsibility,” or are inadequately defined, such as “for continued rail service.” The criteria for several terms are not listed in the present CFRs. E.g.: “Exemption from the OFA process.”

5. It took Riffin ten years to learn the nuances of the OFA process. All by trial and error. Which is a rough way to learn about OFAs.

6. Riffin believes that it would be beneficial to add additional verbiage to the OFA regulations, which additional verbiage should apprise prospective OFA offerors of the requirements and criteria that have been promulgated over the years via STB OFA decisions.

SPECIFIC COMMENTS

7. Over the past 14 years or so, Riffin has filed a number of OFAs. (Perhaps more than

anyone else.) Most of the time, his OFAs were rejected for various reasons. Three times his OFAs were accepted, and he successfully obtained authority to acquire several lines of railroad.

IDENTITY OF THE OFFEROR

8. One of the specific questions posed by the STB, concerns the identity of the Offeror. The case cited, was one of Riffin's OFAs. Some background information will help the reader understand how that disaster occurred.

9. In a nutshell: An OFA was filed by a long-time STB practitioner (on behalf of someone **other than Riffin, before** Riffin even knew about the line), using the acronym: "WMS." Neither the STB nor the conveying carrier (CSX), was told that WMS was an acronym for a **West Virginia** LLC: "Western Maryland Services, LLC." When it came time to convey the line, CSX conveyed the line to "WMS, a **Maryland** LLC." Ultimately, Riffin lost the line, primarily because the STB determined that Riffin was not a 'carrier,' due to the fact that Riffin did not have a 'sufficient legal interest in the line.' (Riffin was never successful in persuading CSX to re-deed the line to Riffin in Riffin's personal name.) Direct Loss for Riffin: **\$750,000.** (The amount he paid CSX for the line.)

10. Moral of the story:

- A. Be careful that an OFA is filed in the name of a legal entity that actually exists, and is authorized to do business.
- B. The **STB practitioner should verify, and certify to the STB, prior to filing an OFA Notice of Intent:**
 - a. That the Offeror is in fact a legal entity, authorized to do business.
 - b. The legal name for the legal entity, if the legal entity is not an individual.

- c. That the prospective Offeror actually has, or within a reasonable time (by settlement date) is at least likely to have, the full purchase price.

THE MAKING OF A \$750,000 DISASTER

11. CSX filed an NOE to abandon a line in Allegany County (Western) Maryland. An Allegany County resident desired to save / acquire the line. The Allegany County resident contacted a long-time STB practitioner. The Allegany County resident told the STB practitioner that he wanted to take title to the Line in the name of “WMS.” It is unknown by Riffin if the Allegany County resident ever told the STB practitioner that “WMS” was an **acronym** for a **West Virginia** LLC: “Western Maryland Services LLC.”

12. The STB practitioner **late-filed** a Notice of Intent to File an OFA in the name of “WMS,” **rather than the full name of the LLC.** [The time for filing a Notice of Intent to File an OFA in a Notice of Exemption (“NOE”) proceeding, **is exceedingly short: 10 days.**] CSX did not object to the late-filing of the OFA, so the STB permitted the OFA process to move forward.

13. The STB practitioner **never told the STB** that “WMS” was an acronym for “Western Maryland Services, LLC.”

14. Consequently, neither CSX nor the STB had any way of knowing that “WMS” was an acronym. So when it came time to convey the line, CSX’s outside counsel conveyed the line to “WMS, a Maryland LLC.” See ¶ 29 below.

15. CSX certified that the Net Liquidation Value for the Line was **\$750,000.**

16. The Allegany County resident **did not** have \$750,000. (He had a few hundred Dollars in his personal checking account. He actually did not even have enough money to pay the STB practitioner’s fee.)

17. The Allegany County resident contracted with a salvage company, who agreed to loan him \$750,000, to purchase the Line, on the condition that the salvage company would get the right to salvage the line if the loan was not paid back within two years. This loan contract was submitted to the STB, to substantiate that the Offeror was ‘financially responsible.’

18. The Director of the Office of Proceedings made a finding that the Offeror was ‘financially responsible’ and **granted authority for “WMS” to acquire the Allegany Line.** The OFA process began.

19. Unfortunately, neither the STB nor the STB practitioner representing the Allegany County resident, **knew that “WMS” DID NOT EXIST.** (The only legal entity that did exist, was a legal entity called: “Western Maryland Services LLC, a West Virginia LLC.)

20. Thirty days before settlement date, the salvage contractor decided not to provide the funds for the purchase of the Line.

21. The Allegany County resident telephoned Riffin and asked Riffin if Riffin had an interest in purchasing the Line. Riffin said that he did have an interest in purchasing the Line.

22. Riffin met with the STB practitioner. Riffin agreed to pay, and did pay, the STB practitioner’s fee.

23. Riffin arranged with CSX for a 60-day extension of the settlement date, so that Riffin could convert non-liquid assets into liquid assets (cash). Riffin timely wired \$750,000 to CSX.

24. At the time, Riffin, the Maryland Department of the Environment, and Baltimore County, Maryland, were engaged in litigation regarding Riffin’s construction of a maintenance-of-way facility on one of Riffin’s commercial properties in Baltimore County, Maryland. (Adjacent to the former Northern Central line.) At the time, Riffin was attempting to acquire the freight operating rights over the Northern Central Line / Cockeyville Industrial Track (“**CIT**”),

in order to re-instate freight rail service to rail shippers in Cockeyville, MD. The State of Maryland, and Baltimore County, adamantly did not want any freight rail service on the CIT. (The CIT was being used as a Light Rail line.)

25. When Riffin first met with the STB practitioner, Riffin believed that due to the ongoing litigation between Riffin and Maryland / Baltimore County, that if Riffin were to offer to purchase the Allegany County Line in Riffin's personal name, Maryland / Baltimore County would file an objection to Riffin's purchase of the Allegany County Line, with the STB.

26. So initially, Riffin did not object to obtaining authority to acquire the Allegany County Line in the name advanced by the Allegany County resident: "WMS."

27. However, as the settlement date approached, Riffin realized that he needed to take title to the Line in his personal name. So Riffin asked for authority from the STB to take title to the Line in his personal name.

28. Unfortunately, CSX was too impatient to wait for a decision from the STB.

29. **CSX deeded the Line to:** "WMS, a **Maryland** LLC."

30. "WMS, a Maryland LLC," **did not exist. Nor did** "WMS, a West Virginia LLC." There **was** a legal entity entitled: "Western Maryland Services, a West Virginia LLC."

31. As expected, counsel for Maryland filed an objection with the STB.

32. Ten days **after** CSX deeded the Allegany Line to the **non-existent** "WMS LLC, a Maryland LLC," the STB granted Riffin authority, in his personal name, to acquire the Allegany County Line.

33. Riffin tried, without success, to persuade CSX to re-deed the Line to Riffin in Riffin's personal name. CSX refused.

34. Riffin asked the STB to compel CSX to re-deed the Line to Riffin in Riffin's personal name. The STB refused. (The STB held that it was a State property-law issue, and should be resolved by a Maryland court, not the STB.)

35. Riffin asked the STB to declare that Riffin was a 'carrier.' The STB refused. The STB held that because Riffin did not have a 'sufficient legal interest' in the Allegany Line, he did not have the 'ability' to be a carrier on the Allegany Line, and thus was not a 'carrier.' [In spite of the fact that Riffin personally paid for the Line, and had total control of the Line.]

36. That determination by the STB defeated Riffin's argument that he was constructing a maintenance-of-way ("MOW") facility in Cockeyville. [One has to be a 'carrier,' in order to come under the STB's 49 U.S.C. 10501(b) preemption umbrella.] Since Riffin's MOW construction activities were not preempted from State and local regulation, Maryland and Baltimore County were successful in subjecting Riffin to massive fines for attempting to build his MOW facility. Unable to complete his MOW facility, Riffin was unable to obtain tenants. Without tenants, Riffin was unable to pay the massive fines levied against him, which were increasing at the rate of \$1,000 per day. Riffin filed for bankruptcy protection.

37. Riffin argued that because he did not have title to the Allegany Line, the Allegany Line was not a part of Riffin's bankruptcy estate. The bankruptcy court disagreed. Riffin's bankruptcy trustee sold the Allegany Line to a Fox 45 executive, for \$220,000, which was about 20% of the salvage value of the continuous welded rail that was on the Line.

38. Riffin and Riffin's bankruptcy trustee reached a settlement: In exchange for Riffin not opposing the sale of the Allegany Line, and Riffin not contesting his bankruptcy trustee's retention of the entire proceeds from the sale of the Line, (for the legal fees he had accrued in administering Riffin's bankruptcy estate), Riffin's bankruptcy trustee abandoned (returned to

Riffin), all of the remaining assets in Riffin's bankruptcy estate. (Which were considerable.)

39. Riffin emerged from bankruptcy debt free (except for the mortgage on his house, which he has virtually paid off), and in possession of all of his pre-bankruptcy assets (except for his Allegany Line and his commercial properties).

40. Baltimore County now pays \$60 a ton to truck its municipal solid waste from its Cocksylville Transfer station to landfills in Virginia and Pennsylvania. Had Riffin saved the CIT, he could have provided rail service to the Transfer Station, which is adjacent to the CIT, and railed Baltimore County's MSW for less than \$50 a ton. (At 250,000 tons a year, Baltimore County could have been saving \$2.5 million a year.)

41. Maryland has blocked 'fracking' in Western Maryland. Demand for coal has diminished. Due to a lack of any demand to rail these two commodities, the Allegany Line has yet to be used for rail freight purposes. The salvage value of the Allegany Line rail has plummeted to less than \$200,000.

LESSONS LEARNED – PROPOSED RULE MAKING

42. It would be appropriate to add to the OFA regulations a statement that **before** an **STB practitioner** files a Notice of Intent to File an OFA, or an actual OFA, the STB practitioner **should:**

- A. Verify the true legal name for the legal entity in whose name the OFA is filed (if filed in the name of a legal entity);
- B. Verify that the legal entity is authorized to do business.
- C. Certify to the STB that the name in which the OFA Notice is filed, is the true legal name of the entity, and that the entity has authority to conduct business.

43. In the event that **an individual** files a Notice of Intent to File an OFA, **in the name of a legal entity**, the regulations should require that the individual file a current “Certificate of Good Standing.” Since the time for filing a Notice of Intent to File an OFA in an NOE proceeding is exceptionally short, it would be appropriate to permit the Certificate of Good Standing to be filed **within 7-10 days** after filing the Notice of Intent.

INDIVIDUAL FILERS

44. In the event that **an individual** files a Notice of Intent to File an OFA, **in the individual’s personal name, there should be NO REQUIREMENT** that the individual provide the STB with a copy of the individual’s driver’s license, or other identifying documentation. (Not everyone has a driver’s license.)

45. It should **NEVER** be a requirement that an individual disclose to the STB the individual’s **residence address**. Everything filed with the STB, is disclosed on the STB’s web site. Individuals who desire to keep their residence address out of the public record, should be afforded that opportunity. This is especially important for females, who may strongly desire to keep their residence address out of the public record.

46. If an individual or legal entity desires to use a post office box, business address, or any other private mail box service, as their address of record, they should be afforded that opportunity. There are way too many ‘crazies’ surfing the internet, looking for ‘marks’ that they can take advantage of.

PRINCIPAL PLACE OF BUSINESS

47. There should be **no requirement** that an OFA Offeror disclose to the STB the Offeror’s ‘principal place of business.’ An offeror’s ‘principal place of business’ may well change, especially if the offeror is successful in acquiring a line of railroad. In addition, in today’s cyber-based world, one’s ‘principal place of business’ may well be wherever one’s computer is

located at the moment.

48. One's 'principal place of business' generally becomes relevant only when one files an appeal in an appellate court. (The issue of 'venue' is based on where one's 'principal place of business' is located.) During the OFA process, there is no appellate proceeding involved, so there is no justification for ascertaining where one's 'principal place of business' is located.

MULTIPLE ENTITIES

49. **IF** multiple entities desire to file an OFA in the name of one entity, then they should be permitted to do so.

50. If multiple individuals desire to file a Joint OFA in their individual capacities, they should be permitted to do so.

51. There are many factors which influence how property is titled. It is not, nor should it be, the prerogative of the STB to **dictate** how a line of railroad is titled. That is a personal decision, and should remain a personal / individual decision.

52. It would be appropriate for the regulations to expressly require that an OFA offeror specify the name of the legal entity that will acquire the common carrier obligation / or will acquire the authority to acquire a line of railroad.

53. However, since the name of the entity filing an OFA Notice, is highly likely **not to be** the name of the entity that ultimately takes title, the regulations should continue to permit a prospective OFA offeror to seek authority from the STB to transfer the authority to acquire a line of railroad, from one entity to another entity, prior to actually taking title to a line of railroad, subject to the caveat that the successor entity should still be required to demonstrate its 'financial responsibility.'

54. It would be appropriate to amend the OFA regulations to effect the above suggestions.

FINANCIAL RESPONSIBILITY

55. Another topic that the STB seeks comments on, is the topic of ‘financial responsibility.’

56. The OFA statute, 49 U.S.C. **10904**, merely says that an OFA may be filed by a ‘financially responsible’ person. The statute does not define the phrase: ‘Financially responsible.’

57. The regulations add little to the phrase, ‘financially responsible,’ merely adding the additional words:

“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;” See 49 CFR 1152.27 (c)(1)(ii)(B).

58. Congress, when it wrote 49 U.S.C. **10907**, was more explicit:

“(a) In this section, the term ‘financially responsible person’ means a person who –

(1) is capable of paying the constitutional minimum value of the railroad line proposed to be acquired; **and**

(2) is able to assure that adequate transportation will be provided over such line for a period of not less than 3 years.” Bold added.

59. A basic tenet of statutory construction, is that if Congress uses words in one portion of a statute, but does not use the same words in a similar other portion of the statute, then Congress **intended** the portion of the statute without the words, to **not** have those words in the portion of the statute where the words do not appear.

60. Riffin has no problem with the term ‘financially responsible,’ meaning that the offeror has, or is likely to have, by settlement date, sufficient funds to pay the ‘constitutional minimum value of the railroad line.’ (Otherwise known as the Net Liquidation Value.)

61. For many years, the ICC and the STB held that the minimum funds needed by an offeror was whatever the Net Liquidation Value of the line was.

62. Then in AB 167 (1191X), [another Riffin OFA involving 2 miles of line in Philadelphia], the STB changed the rules: The STB held that to be ‘financially responsible,’ an offeror had to have ‘sufficient funds to operate the line for a period of two years.’

63. The issue of whether an offeror had to have ‘sufficient funds to operate the line for a period of two years.’ was never addressed by the DC Circuit. [The STB moved for summary affirmance of its decision rejecting Riffin’s OFA, which motion was granted by the DC Circuit prior to briefs being filed.]

64. Over the years, Riffin has learned that the STB has **four** or more sets of (unpublished) OFA rules:

- A. If no one objects to selling the line to an OFA offeror, the STB will use its least stringent set of OFA rules: All an OFA offeror has to do is ask for authority to acquire the line. Authority is routinely granted. The offeror and the carrier work out the details of how the offeror will pay for the line. Sometimes, the carrier takes back a note. (The carrier provides the financing.) For example, see AB 33 (Sub No. 132X).
- B. If a local or State government objects, but the carrier does not object, the criteria is a bit more stringent, but only a bit more stringent. (Support from the carrier supercedes objection from a local / State government.)

- C. If the carrier objects (either because the carrier wants to sell the real estate for non-rail purposes, for a much higher price, or no longer wants to provide service to the line), then the STB uses a more stringent set of rules: The offeror must offer some evidence that the line is needed / or will be used, for continued rail service. A letter from a prospective shipper saying that the shipper has an interest in rail service, may be sufficient evidence that the purchase is for continued rail service. See AB 290 (Sub No. 283X), served May 2, 2007, wherein the STB held that the **potential for rail service** was sufficient to establish that a line is still needed for continued rail service.
- D. If a local / State government objects, and wants to use the right-of-way for a ‘public purpose,’ the test is far more stringent: The offeror will be required to obtain and submit verified statements from shippers **committing** to use rail service. The offeror will be required to prove that rail service is feasible, and is likely to be profitable. The offeror will be required to prove that not only does the offeror have sufficient funds to purchase the line, but also has sufficient funds to operate the line for two years, and has sufficient funds to rehabilitate the line.
- E. Depending on the proposed public use, no amount of evidence submitted by the offeror may be sufficient to persuade the STB to permit the OFA process to proceed. For example, if the public use is for a highway, or a commuter rail line, the STB is likely to take the position that 49 U.S.C. 10905 (public use) trumps 49 U.S.C. 10904 (OFA). [Which is contrary to what the statute says, and contrary to STB precedent.] See, for example, AB 290 (Sub. No. 311X) [commuter rail] and FD 35164 [highway].

65. End result: The present regulations do not disclose to a prospective offeror what the rules will be. Knowledge of the STB’s prior decisions is necessary to gauge what set of rules the STB is likely to use.

66. Consequently, it would be desirable to codify what the rules are, to apprise novice offerors what will be expected of them.

WHAT THE FINANCIAL RESPONSIBILITY RULES SHOULD BE

67. 49 U.S.C. 10904 and 49 U.S.C. 10907 serve different purposes. Consequently, the criteria for financial responsibility is, and should be, different.

68. The goal of the OFA statute is to preserve a rail corridor that the existing carrier no longer wants as a rail corridor.

69. The goal of 10907, is to displace a carrier that wants to continue providing rail service, with a different carrier, who argues that it will provide better service.

70. If one is attempting to displace a carrier under 10907, the burden of proof is, and should be, much greater.

71. Since the goal of the OFA statute is to save a rail corridor, if one is attempting to save a rail corridor that the existing carrier no longer wants to operate on, then the burden of persuasion should be minimal.

72. In effect, it **SHOULD be easy** to acquire a line of railroad via the OFA process.

73. While it should be easy to acquire a line of railroad via the OFA process, there still must be at least minimal criteria. One of those criteria, is the ability to purchase the line from the existing carrier.

74. So at a minimum, an OFA offeror needs to demonstrate at least a likelihood that the OFA offeror will be able to acquire the necessary funds to pay the existing carrier the Net Liquidation Value for the line.

75. Since the goal of the OFA process is to save an existing rail corridor, there should be **no requirement** that the OFA offeror demonstrate the ability to fund operation of the line for at least two years.

76. Since most lines being abandoned have been neglected by the existing carrier for multiple years, the cost to rehabilitate the line generally is quite high. However, since the goal of the OFA process is, first and foremost, to save **the rail corridor**, rehabilitating the line is of secondary importance. If the rail corridor is saved, there is no / should not be any, time pressure / schedule to rehabilitate / place the line back into service.

77. Consequently, it is **not appropriate, and is CONTRARY to the PRIMARY goal of the OFA statute**, (and, Riffin would argue, expressly contrary to the intent of Congress when it enacted the OFA statute), to require an OFA offeror to demonstrate that the offeror has sufficient funds to rehabilitate the line / operate the line, for (within) two years.

WHEN FINANCIAL RESPONSIBILITY SHOULD BE DEMONSTRATED

78. Lately, there has been a push by carriers (particularly Conrail and Norfolk Southern) to require an OFA offeror to demonstrate financial responsibility at the time a **Notice of Intent** to file an OFA is filed.

79. Generally, at the time a Notice of Intent to File an OFA is filed, the offeror has no idea what the Net Liquidation Value of the line might be. The carrier knows (or should have a good idea) what the line's Net Liquidation Value is. But until that information is disclosed to the offeror, it is impossible to determine whether the offeror has, or does not have, sufficient funds to buy the line.

80. In addition, until the Net Liquidation Value of the line is disclosed, the offeror has no idea if it is economically feasible / desirable, to even try to save the line.

81. There are many factors which govern the Net Liquidation Value of a line:

- A. What type of title to the underlying real property, does the carrier have? [Fee simple? (Value = value of adjacent property.) Only an easement? (Zero Net Liquidation value.) Over what portions of the line?]
- B. How many acres does the corridor have?
- C. What is the value of adjacent fee simple property?
- D. What weight / type of rail is on the line? (Rail less than 112 lbs / yard only has scrap value. Welded rail has high value.) What condition is it in?
- E. What is the condition of the cross ties? [Good ties have a positive value. Scrape ties have a negative value.]
- F. How accessible is the line from adjacent roads? (How far must the cross ties / rail be carried before it can be trucked on a highway?)
- G. How many grade crossings are there? [The cost of removing grade crossings is a negative value.]

82. So while the carrier may object to expending the effort to ascertain the Net Liquidation Value of the line, it is, and should be, a necessary, and required, task the carrier must undertake. (For most carriers, the carriers actually already have determined the Net Liquidation Value, and have already factored that value into the decision to abandon the line.)

83. Once the carrier discloses the Net Liquidation Value, the offeror then should be afforded some time to demonstrate the financial ability to acquire the line. Since the offeror has the right to question the Net Liquidation Value ascribed to the line by the carrier, and has 30 days to ask

the STB to set the terms and conditions, an appropriate amount of time to demonstrate financial responsibility would be **30 days after the carrier discloses the Net Liquidation Value of the line.**

PRESUMPTIONS

84. The regulations presently say that a governmental entity is presumed to be financially responsible. Leave that regulation alone. It is a presumption. It is generally true. If it is a small governmental entity, with a small budget, relative to the Net Liquidation Value of the line, then the carrier should have the right to question / challenge the presumption.

85. The rules should explicitly state the documents that the STB is willing to accept, to demonstrate financial responsibility.

86. Presently, the STB demands letters from banking institutions.

87. Riffin argues that the STB's present requirements are far too restrictive. Since the OFA goal is to save rail corridors, the STB should help facilitate saving the rail corridor, by being willing to consider more evidence of financial responsibility, such as including the offeror's potential ability to sell / mortgage / use as collateral, non-liquid assets, the offeror's ability to borrow money, including the offeror's ability to borrow money via credit cards. (And for those individuals who do not trust keeping their money in a bank / prefer to keep substantial sums of cash in their home / office, the STB should be willing to view real cash, and to verify the existence of real cash, if that is what the offeror has.)

88. Whether the offeror has had financial difficulties in the past, (such as filing for bankruptcy protection), should not be considered. The goal of bankruptcy, is to give the debtor a 'fresh start.' Using a prior bankruptcy filing as a negative factor is contrary to the goal of the bankruptcy statute.

BONDS / EARNEST MONEY

89. The STB **should not** require an OFA offeror to post a bond, or to post ‘earnest money.’ (A deposit.)

90. The time constraints in an OFA proceeding are severe. It can take months to get a bond. What is the purpose of depositing ‘earnest money,’ when settlement in an OFA proceeding is generally within weeks of when abandonment authority is granted? Creating an ‘escrow’ account takes time, and money. Both of which are in short supply in most OFA proceedings.

91. Since the goal of the OFA process is to save rail corridors, and since that goal is best attained by making it **as easy as possible** to acquire the unwanted rail corridor, anything that runs counter to that goal, such as requiring bonds or putting money in an escrow account, should be avoided.

92. Whether the OFA offeror will in fact go to settlement, is generally quickly determined. Any other required evidence, generally would serve no purpose, and would not save the carrier any time, expense or effort.

NOTICES OF INTENT TO FILE AN OFA

93. Presently, Riffin argues that an OFA can be made by any person, so long as it is made within 10 days of when a decision granting abandonment has been served.

94. There should be **no requirement** to file a Notice of Intent to File an OFA. Particularly by a date certain.

95. Filing a Notice of Intent to File an OFA should be voluntary, as Riffin argues it presently is.

96. Presently, the main goal of filing a Notice of Intent to File an OFA is to obtain a **stay** of the proceeding, in order to obtain Net Liquidation Value and traffic data from the carrier.

97. Often, one first learns that a line is about to be abandoned when one learns about the decision granting abandonment authority. Precluding that person from filing a timely OFA solely on the grounds that the person failed to give any advance notice, defeats the main goal of the ORA process: saving rail corridors.

98. Occasionally, much time may pass between the time an abandonment petition / exemption is filed, and the date abandonment authority is granted. During that intervening period of time, persons with an interest in saving the rail corridor, may change their mind, and persons with no initial interest in saving the rail corridor, may acquire a belated interest in saving the rail corridor.

99. A good example is AB 167 (Sub. No. 1189X). Conrail filed its NOE in 2009. To date, the STB has yet to grant abandonment authority. Consequently, no date has been set / can be set, by which time OFAs must be filed. Since Conrail filed an NOE, Notices of Intent had to be filed more than six years ago, if one wanted to stay the proceeding. Filing a notice today, would serve little purpose, other than to advise the world that someone who previously had not disclosed an interest in saving the line, now has an interest in saving the line.

100. Permitting a person who has not filed a Notice of Intent to File an OFA, to timely file an OFA, serves the following goals:

- A. It increases the likelihood that the rail corridor will be saved, since more persons are available to attempt to save the rail corridor. That facilitates the primary goal of the OFA statute.
- B. It increases the number of offerors. That generally will benefit the carrier, since with more offerors making offers, the carrier is more likely to get a better offer. And the

carrier can pick the offeror that it would prefer to negotiate with. (And will interchange with, if the carrier retains tracks that connects the rail corridor to the National Rail System.)

ABUSIVE FILERS

101. Some parties have advocated ‘abusive filers’ should be barred from making filings with the STB.

102. To Riffin’s knowledge, no one has been officially declared to be an ‘abusive filer’ by the STB.

103. Yes, some individuals (and Riffin is one of them), do make numerous filings with the STB. And some filers do in fact ‘**use**’ the STB’s processes to attain goals others do not like.

104. A recent example would be Canadian Pacific’s (“**CP**”) recent discontinuance of 680 miles of its (or more precisely, the Delaware and Hudson’s) trackage rights. See AB 156 (Sub No. 27X). What CP failed to disclose, was that by getting rid of its trackage rights, CP’s acquisition of Norfolk Southern **would not** result in a 2 to 1 merger. (Once CP got rid of its trackage rights, there was only one carrier left.)

105. Another example would be Jersey City’s use of the OFA process to acquire the Embankment portion of the Harsimus Branch. See AB 167 (Sub. No. 1189X), which is discussed in some detail in paragraphs 111 and 122 to 142, below.

106. However, **none** of those filings have been ‘frivolous.’ That is, without any merit. Not ‘fairly debatable.’

107. The American legal system was designed to be adversarial. As such, every pleading made is likely to ‘irritate’ someone, if for no other reason, then a response must be filed.

108. Some individuals, such as Riffin, are not afraid to call anyone to task, are not afraid to ask questions that make others uncomfortable, and not afraid to demand that an opposing party explain, and justify, whatever position they are advocating for.

109. But that does not make Riffin a ‘frivolous litigant,’ nor does it support the accusation that Riffin is an ‘abusive filer.’

110. We have different opinions. Class I carriers may believe, sincerely, that a line no longer has any use as a line of railroad, and should be abandoned. Others, such as Riffin, may have a different viewpoint. The value of a rail corridor, like beauty, is in the eyes of the beholder.

111. A good example of this would be the AB 167 (Sub. No. 1189X) proceeding. Jersey City sincerely believes that a portion of that rail corridor should be saved. Steve Hyman equally believes that the best use for that rail corridor is high-rise buildings. Counsel for Jersey City often complains about the filings made by counsel for Mr. Hyman. And vice versa. Both counsels vigorously represent and defend the interests of their respective clients. Mr. Hyman’s counsel frequently argues that Jersey City is attempting to ‘abuse’ the OFA process, while counsel for Jersey City frequently argues that Mr. Hyman and Conrail ‘abused’ the STB’s regulations (when Conrail sold the real estate underlying a line of railroad to Mr. Hyman without first seeking, and obtaining, abandonment authority.)

112. Occasionally, the STB has found that someone has ‘abused’ its processes. Such as when the STB ordered the reconveyance of the Redmond Issaquay line back to BNSF, when it was learned that the OFA purchasers really had no desire, or intent, to use the rail corridor for continued freight rail service. Or when the rail carrier saddled a line with onerous conditions / sold portions of the rail assets. (Witness: *Railroad Ventures*.)

113. Some time ago, the STB decided that Riffin’s attempt to acquire a line of railroad in Norfolk Virginia, was ‘abusive.’ (In spite of the fact that several major shippers on the line had a high desire for continued rail service.) Since then, the STB has ‘closely scrutinized’ Riffin’s

filings. To date, the STB has not struck any of Riffin's filings, on the grounds that the filings were 'frivolous' or abusive.

114. If an individual makes repeated pleadings that are truly 'frivolous,' and after the individual has been adjudicated, after notice and an opportunity to respond, to have made 'frivolous' pleadings, that is, without any merit, pleadings that are not 'fairly debatable,' then, and only then, may it be appropriate to impose a sanction upon that individual.

115. Conclusion: America's adversarial system fosters highly controversial, highly irritating, pleadings. It is a fact of life. Accept it and move on.

PROPOSED RULE MAKING

116. Since the goal of the OFA process is to save rail corridors, the STB **should make it explicit:**

- A. OFAs must be filed within xx number of days (presently 10), after a decision granting abandonment authority is served.
- B. Filing a Notice of Intent to File an OFA is **optional**. If one is filed, then the time for filing an OFA may be stayed, if requested, in order to give the carrier additional time to provide the potential offeror with required traffic, condition of the line, Net Liquidation Value data.
- C. Financial Responsibility in an OFA proceeding means the financial ability to pay the Net Liquidation Value for the line by the expected time of settlement.
- D. Evidence of financial responsibility should be provided to the STB within 30 days after the carrier discloses the Net Liquidation Value of the line.

117. If the carrier wishes to speed the process up, the carrier could disclose the Net Liquidation Value of the line in its abandonment petition / exemption. If this were done, then the time to provide evidence of financial responsibility could be shortened, say to 15 days, and pegged to a different date, say the date the STB grants authority to abandon the line.

CONTINUATION OF RAIL SERVICE

118. The primary goal of the OFA statute is to save rail corridors.

119. The purpose for that goal, is to retain the rail corridor for the ‘continuation of freight rail service.’

120. The purpose of the **OFA** statute **is not** to save a rail corridor for non-freight rail service, such as trails, parks, commuter rail service, or any other public use.

121. Other public uses are addressed and covered by 49 U.S.C. 10905.

122. There is one big difference between 10904 and 10905: Under 10904, a carrier can be compelled to convey its rail corridor to an offeror. Under 10905, the rail carrier **cannot be compelled** to convey its rail corridor for a public purpose.

123. A good example of the difference between 10904 and 10905, is the AB 167 (Sub. No. 1189X) proceeding. In that proceeding, Conrail offered to sell the Embankment portion of its Harsimus Branch, to Jersey City. Jersey City declined the offer. Conrail offered the Embankment portion to the world. No one accepted Conrail’s offer. Finally, after several years of trying, Conrail found a buyer for the Embankment portion of its Harsimus Branch: A real estate developer. (Steve Hyman.)

124. **After** Mr. Hyman bought the Embankment portion of the line, newly elected officials of Jersey City decided that they wanted the Embankment portion after all. To be used as park land,

a trail, and perhaps, someday, to accommodate an extension of Jersey City's Light Rail system.

125. When Jersey City approached Mr. Hyman, and asked if he would sell the property to Jersey City, he said, "Sure, but the price is more than what I paid for it."

126. Jersey City hired a really good 'rails to trails' attorney. After some research, it was learned that the Embankment was a line of railroad, and that it had never been abandoned.

127. Conrail filed an Exemption Notice, seeking authority to abandon the line.

128. Jersey City could have attempted to use 49 U.S.C. 10905, to acquire the line for a 'public purpose.'

129. Unfortunately for Jersey City, Conrail was unwilling to voluntarily convey the line to Jersey City. (That would have made Conrail liable to Mr. Hyman.)

130. The rails-to-trails lawyer realized that Jersey City could **compel** Conrail to convey to Jersey City the line of railroad easement impressed on the Embankment property, via the OFA process. And since Jersey City would only be acquiring a rail easement, the price would be Zero Dollars, since the Net Liquidation Value of a rail easement is Zero Dollars.

131. After five years (two years with Conrail's consent), Jersey City could convey the rail easement to a 'trail' entity, thereby keeping the rail easement viable forever.

132. The rail easement would give Jersey City the right to **exclusive** possession of the property, its full length by full width, from the center of the earth to the heavens.

133. A very neat way to acquire a very valuable property, for free. (Other than legal fees and costs.)

134. The hitch was: To use the OFA process, one needs to convince the STB that the line can be / will be used for ‘continued rail service.’

135. Physically, it is possible to put track back on the ground.

136. For ‘continued rail service,’ one needs at least one shipper.

137. Such a shipper materialized. [Riffin learned in AB 167 (Sub. No. 1190X), that there are actually multiple shippers in Jersey City that desire rail service. Conrail is unwilling to accommodate those shippers. Those shippers still desire rail service.]

138. Because it was a government entity, rather than Riffin, that filed a Notice of Intent to File an OFA, the STB permitted the OFA process to begin.

139. However, the STB held Jersey City to the same standard that it would have subjected Riffin (or any other entity) to: The OFA offeror would have to demonstrate shipper support, demonstrate that rail service could actually be provided, demonstrate community support, and demonstrate that the line could be operated profitably.

140. A shipper materialized and executed a verified statement saying the shipper wanted rail service. An engineering firm verified that it was possible to put track back on the ground. At a hearing to approve an ordinance authorizing Jersey City to file an OFA, multiple dozens of individuals, representing hundreds of Jersey City residents, all supported the OFA ordinance, signifying tremendous community support. The putative shipper desires to ship xxxxxxxx tons of product per year (xx rail cars). More than enough traffic to make the line (marginally) profitable. Additional shippers have made it known that they desire freight rail service.

141. Conrail and counsel for Mr. Hyman continue to vigorously argue that Jersey City **is not** attempting to acquire the Embankment portion of the line for ‘continued rail service,’ that rail service is not ‘feasible,’ and that Jersey City will never in fact ever provide any rail service.

142. So the question becomes: Has / Can Jersey City make a sufficient showing to persuade the STB that Jersey City truly wants to acquire the Embankment portion of the Line for ‘continued rail service?’

PROPOSED RULE MAKING

143. The better question is: Just how much ‘proof’ is required?

144. In Cockeysville, MD, Riffin provided the STB with 6 verified statements from shippers who wanted rail service, to no avail. (The STB held that it was too ‘speculative.’)

145. In AB 167 (Sub. No. 1190X), Riffin provided the STB with multiple shipper statements saying the shippers wanted freight rail service. To no avail. (The STB rejected the OFA, due to New Jersey Transit’s objection to Riffin’s proposal to cross a light rail line with a diamond, and proposal to cross the light rail line only in the middle of the night, when no light rail trains were running. The STB also held that there was insufficient ‘shipper support.’)

146. It would be very helpful if the STB would quantify just how much ‘proof’ must be provided, to justify an OFA when the OFA is opposed by the carrier / a government entity.

THE STORY BEHIND THE STORY

147. What makes Jersey City interesting, is the fact that Riffin recently decided to also submit a competing OFA. (As was stated earlier, individuals with no interest sometimes acquire an interest. The OFA process should be receptive to individuals who decide to file an OFA long after the OFA process has begun.)

148. What makes Jersey City interesting, is the fact that Jersey City has made all of the arguments that Riffin would need to make.

149. And what makes Jersey City interesting is the fact that Riffin would actually provide freight rail service, for as long as the shippers desire freight rail service, not just for five years.

150. It has been argued that the real estate is too valuable to be used for freight rail service.

151. While it may be very valuable real estate, since the cost to Riffin to acquire the rail easement would be Zero Dollars, that is very affordable real property. And with the price that low, it would be very profitable to provide rail service. (Maybe not as profitable as building a high-rise, but sufficiently profitable to satisfy Riffin's desire for profits.)

UNINTENDED CONSEQUENCES

152. And then the STB granted Jersey City's wish: Jersey City asked the STB to do a more thorough 'historic review' of the property. Which the STB reluctantly agreed to do. Which will delay the OFA process for a considerable period of time, much to Jersey City's consternation. (Jersey City desired to have possession of the property by the middle of 2015. At the rate the proceeding is moving forward, it could well be 2018 before the OFA process resumes.)

153. In the '*Continuation of Rail Service*' section of the STB's December 14, 2015 Rule Making Notice Decision, the STB made reference to its AB 167 (Sub. No. 1190X) decision, Served May 17, 2010, (another Riffin OFA proceeding), stating:

“(exempting line from OFA process despite OFA filing because offerors failed to show cause that there was a continued need for rail service outweighing other concerns);”

154. Had the STB permitted Riffin to acquire that portion of the former Lehigh Valley line that was north of Chapel Avenue in Jersey City, there would be a rail transload facility at that site. And were there a transload facility at that site, the shipper whose verified statement was filed in the AB 167 (Sub No. 1189X) proceeding, would be transloading its products into railcars at that site as this is being written. As would the other shippers who still desire rail service in

Jersey City. And had that transload site been authorized by the STB, there would be no AB 167 (Sub. No. 1189X) controversy, for there would be no ‘shipper demand for rail service’ to justify an OFA proceeding in the AB 167 (Sub No. 1189X) proceeding. (The Chapel Avenue site is less than a mile south of the Embankment property, is situated adjacent to Conrail’s Docks Branch, is in an industrial area, and is located adjacent to truck routes that can easily accommodate truck traffic, unlike the Embankment properties.)

155. However, the demand for rail service is still there. So if the shippers cannot obtain rail service at a more ideal location, the shippers will settle for rail service at a much less ideal location, such as the Embankment. (Rail service at a ‘crappy’ location is better than no rail service at all.)

156. And in the AB 156 (Sub. No. 27X) and FD 35873 proceedings, as noted above in ¶104, when CP discontinued 680 miles of its Delaware and Hudson trackage rights, and sold 282 miles of its D&H South Lines to Norfolk Southern for \$217 million, that made it possible for CP to use Norfolk Southern’s money to mount a hostile takeover of Norfolk Southern, and eliminated all 2 to 1 merger problems, were the takeover to be successful.

156. Moral of the stories:

A. Be careful what you wish for. You might get it.

B. Be careful what you decide. You may not like the unintended consequences.

EXEMPTIONS FROM THE OFA PROCESS

157. Since the goal of the OFA statute is to preserve rail corridors, exemptions from the OFA process should be rarely granted, and only after strict criteria ha been met.

158. To date, Riffin argues that the STB has used its exemption authority too often, too freely, and for inappropriate reasons.

159. Whenever a government entity has expressed a desire to use a rail corridor for a public non-freight-rail purpose, the STB has capitulated to that desire, thereby inappropriately letting 10905 trump 10904. Examples would be AB 290 (Sub No. 311X) (Exclusive light rail use 24/7 more important than freight rail use during periods when light rail was not running.); FD 35164 (a highway more important than one shipper on the line); AB 167 (1190X) (Exclusive light rail use 24/7 more important than freight rail use during periods when light rail was not running.)

PROPOSED RULE MAKING

160. The STB should expressly establish stringent criteria to justify exempting an abandonment proceeding from the OFA process.

APPENDIX

161. Appended is an Appendix, which contains a copy of what Riffin filed in EP 727, which was Norfolk Southern's request for a rule making proceeding to amend the OFA regulations.

162. Many of Riffin's Comments in the EP 727 proceeding are equally applicable in this EP 729 proceeding. All of Riffin's Comments are appended, (even though some have little relevance in this proceeding), for context.

CONCLUSION

163. The OFA regulations as they presently exist, are workable, when used in concert with the many OFA decisions that have been rendered by the STB.

164. It would be helpful for novice OFA filers, to incorporate into the OFA regulations the criteria that have been enunciated in the many STB OFA rulings.

165. In doing so, the STB should keep in mind that the **primary goal** of the OFA statute, is to make it **easy** (reduce regulatory obstacles) to save / acquire rail corridors that are subject to abandonment, for once a rail corridor is abandoned, it can never be resurrected. And as history has demonstrated, we often wish, at some time in the future, that we had not discarded the rail corridors that were discarded.

Respectfully,

James Riffin
P.O. Box 4044
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(443) 414-6210

APPENDIX

STB EX PARTE NO. 727

**PETITION OF NORFOLK SOUTHERN RAILWAY COMPANY
TO INSTITUTE A RULEMAKING PROCEEDING
TO ADDRESS ABUSES OF BOARD PROCESSES**

COMMENTS OF JAMES RIFFIN

Filed: July 20, 2015

James Riffin
P.O. Box 4044
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(443) 414-6210

1. Comes now James Riffin (“**Riffin**”), who herewith provides his Comments regarding Norfolk Southern’s (“**NS**”) Petition to Institute a Rulemaking Proceeding to Address Abuses of Board Processes. (“**Petition**”).

2. NS asks the Surface Transportation Board (“**STB**”) to institute a rulemaking proceeding, for the purpose of creating a new set of rules, which would:

A. Require pre-approval for filings:

- a. Made by ‘abusive filers.’ (An undefined term in NS’s Petition.)
- b. Made for ‘harassment purposes.’ (Another undefined term.)
- c. Made by entities that ‘lack standing.’ (Another undefined term.)
- d. Made by entities without ‘any cognizable interest.’ (Another undefined term.)
- e. Made by entities that are not ‘financially responsible.’ (Another undefined term.)

B. Create a presumption that entities that have previously been found to not be financially responsible, or that have filed for bankruptcy protection, are presumptively ‘not financially responsible.’

3. The professed goal of NS’ Petition is to:

- A. “filter[] out ... unmeritorious filings.”
- B. “filter[] out ... those individuals that are not financially responsible.”

4. NS argues:

“Board decision-making benefits from the broad participation of **interested parties**, and the Board should continue to strive **to foster an active dialogue** in Board proceedings with regulated entities and other **interested stakeholders**.”

5. NS fails to define what it believes should be the definition of “interested parties,” the

definition of “an active dialogue,” or the definition of “interested stakeholders.”

6. NS argues:

“Board decision-making does not benefit from abusive, harassing, irrelevant, and unmeritorious filings.”

7. To support its Petition, NS mentions only two individuals: Riffin and Eric Strohmeyer.

8. To support its Petition, NS references only the pleadings of Riffin, noting that Riffin has been ‘mentioned,’ or ‘was a party,’ in ‘more than 80 decisions.’

9. NS also notes that in 2007, the STB pledged to “closely scrutinize any future filing by Mr. Riffin.”

REPLIES

10. Since the STB ‘closely scrutinizes filings by Mr. Riffin,’ and since Riffin is the only person named in NS’ Petition, there is no good reason to institute a rule making proceeding. The STB already has instituted special rules applicable only to Riffin. For the past **8 years**, the STB has been ‘closely scrutinizing all of Riffin’s pleadings.’ And to date, the STB **has never rejected any pleading made by Riffin on the grounds that the pleading was ‘unmeritorious,’ was filed for ‘harassment purposes,’ or that Riffin ‘lacked standing’ to file his pleading.**

11. NS asks the STB to look at Riffin’s ‘pattern’ of filings. This the STB has assuredly done, when it has ‘closely scrutinized’ all of Riffin’s filings.

12. Since the STB **has never rejected** any of Riffin’s pleadings on the grounds that his

pleading was ‘unmeritorious,’ was filed for ‘harassment purposes,’ or that Riffin ‘lacked standing,’ the only conclusion that is possible, is that Riffin **does not file** ‘unmeritorious pleadings,’ **does not file** pleadings for ‘harassment purposes,’ and **has always had** ‘standing.’

13. NS obviously is highly agitated. And for good reason. NS thought that its Application to Acquire and Operate 282 miles of Delaware and Hudson Railway (“**D&H**”) lines of railroad, see FD 35873, would sail through the STB approval process. NS thought that its acquisition of those 282 miles of D&H Lines, and thought that the D&H’s discontinuance of 670 miles of D&H trackage rights, see AB 156 (Sub. No. 27X), would be consummated by August of 2015, nine months after NS started the process.

14. Unfortunately for NS, its counterparts at the D&H failed to carefully proofread their Exemption Notice, before filing the Exemption Notice. After a **cursory** reading of the D&H’s Exemption Notice, Riffin noted that the D&H failed to list more than a dozen Zip Codes the D&H’s trackage rights traversed in New Jersey and Maryland, and failed to list two of the counties the trackage rights traversed. And after Riffin contacted counsel for the D&H, and **quietly** let the D&H know that its Exemption Notice was defective, the D&H still failed to make any effort to correct its **obviously** defective Exemption Notice.

15. And that is when Riffin did what Riffin does (after giving the D&H 10 days to think about what it could / should do: Withdraw its Exemption Notice. Refile an error-free Exemption Notice): He informed the world, and the STB, in a decidedly unquiet way, that the ‘Emperor was not wearing any clothes,’ (That the D&H’s Exemption Notice was riddled with errors.).

16. As it turns out, the lack of Zip Codes was just the tip of the ice berg. Further investigation revealed that the D&H’s statement that no **abandonments** would occur, was a falsehood. There are at least four line segments, totaling over 36 miles of rail line, where abandonment will occur, if the D&H discontinues its trackage rights. (This is because Conrail abandoned its common carrier rights and obligations over these four line segments more than 30

years ago, thus leaving the D&H as the last carrier standing on these four line segments.) If any abandonments will occur, then 49 CFR 1180.8(c)(4) becomes implicated, [submit information on any anticipated **abandonments**]. And if 49 CFR 1180.8(c)(4) becomes implicated then NS's Application becomes fatally defective.

17. And to make matters worse for NS, due to the infirmities with the D&H's Exemption Notice, there is a very high probability that the D&H will not receive its discontinuance authority soon enough. (No later than when NS desires to consummate its purchase of the D&H lines – In August, 2015). If NS acquires 282 miles of D&H line in August, 2015, and if the D&H does not receive discontinuance authority by August, 2015, then there will be **joint operations** on those 282 miles of line, and on 670 miles of D&H trackage-rights-lines. If joint operations are likely to occur, then 49 CFR 1180.8 (c)(1) becomes implicated, [submit information on traffic density on lines proposed for **joint operations**]. And if 49 CFR 1180.8(c)(1) becomes implicated, then NS's Application becomes fatally defective.

18. And if NS's Application becomes fatally defective, then NS has a catastrophe on its hands. All because the D&H failed to **carefully** do what it needed to do (discontinue its trackage rights).

19. And ultimately this entire fiasco falls on the shoulders of NS: Had NS not been in such a big hurry, and had NS reached out to those entities that have a high interest in preserving the D&H's trackage rights, none of this would have occurred. (Had the D&H filed to discontinue its trackage rights **before** NS filed its Acquisition Application, and had the D&H received authority to discontinue its trackage rights **before** NS filed its Application, which likely would have occurred, then there would be nothing that any of the protestants could have done.)

20. So rather than acknowledge that NS and the D&H made a number of really colossal blunders, which Riffin, the Messenger, brought to the attention of the STB, NS now is attempting to 'assassinate the messenger.'

STANDING

21. The Supreme Court, in *Interstate Commerce Commission v. Baird*, 194 U.S. 25, 39 (1904), set the standard for ‘standing’ before the Interstate Commerce Commission (now the STB):

“It is urged that the complainant before the Commission **did not show any real interest** in the case brought and that the proceeding should, for that reason, have been dismissed. It is provided in the Act to Regulate Commerce, § 13, that **‘any person, firm, corporation,’ etc., complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act, in contravention of the provisions thereof, may apply to said Commission by petition, etc.** And certain procedure is provided for – and (said Commission) ‘may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made,’ and the section concludes: **‘No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.’** In face of this **mandatory** requirement that the complaint **shall not be dismissed because of the want of direct damage to the complainant**, no alternative is left the Commission but to investigate the complaint, if it presents matter within the purview of the act and the powers granted to the Commission.” Bold added.

22. The Supreme Court has determined that a ‘party’ has ‘standing,’ if that party complains of anything ‘done,’ or ‘not done,’ by any common carrier. To have ‘standing,’ one **need not** allege, or prove, any kind of ‘direct damage.’

23. Riffin decidedly has ‘standing,’ in all of the proceedings that he has participated in, for he ‘complains’ about things ‘common carriers’ ‘do,’ or ‘do not do.’

UNMERITORIOUS PLEADINGS

24. NS complains that Riffin’s pleadings are ‘unmeritorious,’ but cites no specific pleadings, nor any cases, to support its allegations.

25. If anyone thinks it would be useful / helpful / desirable, to read up on what legally constitutes an ‘unmeritorious / frivolous’ pleading, let Riffin know. He will provide 50 plus

cases on the issue, and will provide a 50+ page Memorandum of Law on the subject. (Riffin has thoroughly researched this topic, and has prepared an extensive Memorandum of Law on the subject.)

26. In short, a ‘frivolous’ pleading is one that is not ‘fairly debatable,’ one that is ‘patently without merit,’ one that does not present at least a ‘colorable claim,’ [one that is ‘apparently valid, but, which is in reality legally insufficient.’], one for which there is no ‘reasonable basis for believing that the claims will generate an issue of fact or law.’ “The inherent danger in the process is that overzealous pursuit of the objective may result in stifling the enthusiasm or chilling the creativity that is the very lifeblood of the law.’ The Supreme Court, in *Christiansburg Garmet Co. V. E.E.O.C.*, 434 U.S. 412, 421-22 (1978) stated:

A trial court should “... resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one’s belief that he has been the victim of discrimination, no matter how meritorious one’s claim may appear at the outset, the course of litigation is rarely predictable”

27. There is no reason to create a new rule. There already is a perfectly good rule.

28 Riffin will point out the obvious: 49 CFR 1104.8 already covers **all** of the situations mentioned by NS:

“The Board may order that any redundant, irrelevant, immaterial, impertinent, or scandalous matter be stricken from any document.”

29. NS, and all other parties, are free to file a Motion to Strike any pleading filed by Riffin, or filed by any other person, which the complaining party believes contains “irrelevant, immaterial, impertinent, or scandalous matter.”

FINANCIAL RESPONSIBILITY

30. It would be impossible to pre-approve anyone for ‘financial responsibility.’ To be ‘financially responsible,’ one need only demonstrate that one “has **or within a reasonable time will have** the financial resources to fulfill proposed contractual obligations.”

31. “Proposed contractual obligations’ means the purchase price for a line of railroad. **No one knows what the purchase price is, or will be, until the carrier provides that information.** And once that information is provided, and the OFA offeror submits an OFA, the STB only has five days within which to determine whether the OFA offeror “has or within a reasonable time will have the financial resources” to purchase the line of railroad. In effect, the STB already has a ‘pre-approval rule.’ If the STB determines that one is not ‘financially responsible,’ (after the carrier indicates what the purchase price will be), which determination is made within five days, then the carrier need not negotiate with the OFA offeror.

32. It should be kept in mind, that frequently the purchase price for a line of railroad is Zero Dollars. (When the carrier only has an easement, and the carrier has previously removed all of the track infrastructure.) 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.’

33. As for bankruptcy: While one is going through a bankruptcy proceeding, one would not be ‘financially responsible,’ by definition. (A debtor in bankruptcy stipulates that the debtor has insufficient assets to pay the debtor’s present debts.)

34. The whole purpose of a bankruptcy proceeding, is to turn ‘financially irresponsible’ persons into ‘financially responsible’ persons. A ‘new start.’ And often, shortly after exiting a bankruptcy proceeding, debtors do in fact become ‘financially responsible.’

35. In the case of Riffin, he made a settlement with his bankruptcy trustee: He gave his bankruptcy trustee Riffin’s Allegany line of railroad. In exchange, Riffin’s bankruptcy trustee

returned to Riffin, all of Riffin's other assets, which were considerable. Post Riffin's bankruptcy, Riffin was asset-rich, and virtually debt-free (he only had a mortgage on his dwelling), Seventy-five percent of that mortgage has been repaid. Riffin still has nearly all of his pre-bankruptcy assets, including all of his heavy construction equipment, and all of his railroad maintenance-of-way equipment. Shortly, (hopefully), Riffin will make an OFA. And if he in fact makes an OFA offer, he will provide the STB with financial documentation which will demonstrate that Riffin is in fact, 'financially responsible,' for just about anything that he may desire to purchase.

AMERICA'S ADVERSARY JUDICIAL SYSTEM

36. In America, we have an adversary judicial system. Under America's judicial system, all litigation constitutes 'harassment' of someone else.

37. The mark of a good lawyer, is the lawyer's ability to 'bury his opponent in paper,' as the old adage goes. Defend all of his client's rights. Attack all of his opponent's weaknesses. "Litigate to the death!" Everyone seeks such a lawyer. Everyone fears and despises such a lawyer, when such a lawyer is the opponent's lawyer.

38. Riffin is not the best litigant. But he will give you a good run for your money.

39. All abandonment proceedings have two components:

- A. A carrier wants to exit being a carrier on a particular line segment.
- B. The public has an interest in retaining a rail corridor as a rail corridor.

40. Prior to enactment of the Staggers Act, it was very difficult to exit the industry, and very difficult to abandon a line of railroad. The Staggers Act made it very easy to exit the industry, and very easy to dispose of unwanted / unprofitable line segments. The Staggers Act made it easier to abandon a line of railroad, providing no one expressed any interest in preserving the line of railroad. However, if anyone expressed an interest in preserving the rail corridor, the Staggers

Act also made it very easy for another entity to acquire that rail corridor, and very easy for a non-carrier to enter the industry

41. In effect, exiting the industry, or ridding oneself of an unwanted / unprofitable line segment, has been made easy. On the other hand, abandoning a rail corridor, has always been, and rightfully continues to be, very difficult, if anyone expresses an interest in preserving the rail corridor, for it is nearly impossible to regain a rail corridor once it is lost.

42. The statutes and regulations make it easy for a carrier to exit the industry. The only time it becomes difficult for a carrier, is when the carrier does not want to only exit the industry – when the carrier wants to exit the industry, but keep the fruits of being a carrier, namely, keep the rail corridor, not for continued rail use, but for non-rail private profit, which is decidedly not in the public interest.

43. What rail carriers frequently fail to realize, is that the rail corridor that they are trying to abandon, and to turn into private profit, belongs to the public, not the rail carrier. [It is the King's (rail)Way.] Only if the King (the public) decides that it no longer wants the Way, is the carrier permitted to privately profit from the sale of the Way.

44. Being relieved of one's obligation to provide common carrier service, is, and should be, easy. Being able to privately profit from the sale of the public's property, is, and should be, difficult.

KANSAS CITY SOUTHERN

45. Kansas City Southern filed a comment, stating that because of Riffin, its legal expenses to abandon a 3-mile line of railroad in Vicksburg, MS, doubled. Yes, Kansas City Southern's legal expenses did double, but not because of Riffin. Kansas City Southern refused to negotiate any kind of relief for the lone shipper on the Line: Ray English. It was Mr. English who filed an OFA, since Mr. English's corporation needed continued rail service. Had Kansas City

Southern provided Mr. English with an alternative rail site, Mr. English likely never would have filed his OFA. Riffin only became involved at the end of the process. And only offered to purchase the two-miles of rail corridor that was beyond the line segment that Mr. English needed / wanted. And it was Mr. English, not Riffin, who backed out of his OFA offer. However, the STB had made Riffin's purchase of the rail corridor beyond the line segment Mr. English wanted, contingent on Mr. English buying the line segment that Mr. English wanted. If Mr. English failed to buy his line segment, then Riffin was prohibited from buying the line segment Riffin wanted. After Mr. English found an alternative rail transload site, he decided that it was not cost-effective to purchase the line segment that he had used for years. Unfortunately, due to Kansas City Southern's refusal to help Mr. English find an alternative transload site, Mr. English had to file an OFA to protect his business interest. Fortunately for Mr. English, he found a close-by rail transload site, just before he bought the line segment that he had always used, thereby eliminating his pressing need to purchase the line segment from Kansas City Southern.

46. Kansas City Southern's extra legal expenses were due to:

- A. Kansas City Southern's refusal to help Mr. English find an alternative transload site;
- B. Kansas City Southern's desire to profit from the sale of the public's rail Way;
- C. Warren County's unauthorized removal of the Glass Road rail bridge during the OFA process.

NORFOLK SOUTHERN

47. Norfolk Southern's extra legal expenses in the FD 35873 proceeding, is due to:

- A. Norfolk Southern's refusal to negotiate with entities that have an interest in the D&H's trackage rights;
- B. The D&H's failure to carefully proofread its filing, before filing it;
- C. The D&H's failure to withdraw its Exemption Notice, then re-file it after it made the necessary corrections;

D. Norfolk Southern's desire to expedite the process, and its desire to combine two separate proceedings into one simultaneous proceeding, rather than doing things in a step-wise fashion. (Discontinue trackage rights first. Acquire Line second.)

RULEMAKING

48. The STB already has a perfectly good rule, which is fully capable of being utilized by anyone who feels that they are being subjected to 'unmeritorious' filings, or pleadings meant to harass one: 49 CFR 1104.8. (Motion to Strike.)

49. One cannot pre-determine 'financial responsibility,' prior to a rail carrier disclosing the Net Liquidation Value of whatever it desires to abandon. And once that Net Liquidation Value is determined, the 'financial responsibility' process already in place, is exceedingly fast (5 days).

50. One always has a choice: Negotiate or Litigate. If one chooses to litigate, then one no longer has the right to complain about the cost of litigation.

51. WHEREFORE, for the foregoing reasons, Riffin would respectfully pray that the STB **deny / reject** Norfolk Southern's Petition for Rulemaking, and for such other and further relief as would be appropriate.

Respectfully,

James Riffin
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(443) 414-6210

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of July, 2015, a copy of the foregoing Comments, was served on the parties of record, either by E-mail, or by 1st Class Mail.

James Riffin

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