

**Before the
Surface Transportation Board**

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

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

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

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

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

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

**JAMES RIFFIN’S SUPPLEMENT TO HIS REPLY TO
CHARLES MONTANGE’S MOTION TO COMPEL**

1. Comes now James Riffin, who herewith files his Supplement to his Reply to Charles Montange’s Motion to Compel, and in supplement states:

2. It was suggested by a number of parties in the Surface Transportation Board’s (“STB”) EP 729 proceeding (Advanced Notice of Proposed Rulemaking: Offers of Financial Assistance), that Offers of Financial Assistance (“OFA”) Offerors:
 - A. Provide information regarding how the Offeror would provide service immediately after consummation of the OFA process; and

B. Provide financial information to demonstrate that the Offeror has sufficient financial resources to operate the OFA line for two years.

3. Riffin provided comments in the EP 729 proceeding, and in his JR-13 Reply to Mr. Montange's Motion to Compel, addressing the issue of financial responsibility to operate an OFA line for two years.

4. In paragraph 71 of Riffin's JR-13 Reply to Montange's Motion to Compel, Riffin discussed at length the issue of demonstrating financial ability to operate an OFA line for two years.

5. In the last few days, Riffin had occasion to read the ICC's December 19, 1986 decision in EP 392 (*Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*). A copy of which is appended hereto. Riffin believes that portions of that ICC decision, have great relevance with regard to the issue of having sufficient financial resources to 'operate an OFA line for two years.'

6. In the *Federal Register* notice, the ICC proposed the following:

“§ 1150.33 Information to be contained in notice.

- (a) The full name and address of the applicant.
- (b) The name, address, and telephone number of the representative of the applicant who should receive correspondence;
- (c) A statement that an agreement has been reached or details about when an agreement will be reached.;
- (d) The operator of the property;
- (e) A brief summary of the proposed transaction, including (1) the name and address of the railroad transferring the subject property, (2) the proposed time schedule for consummation of the transaction, (3) the mile-posts of the subject property including any branch lines and (4) the total route miles being acquired;
- (f) A brief description of the amount and type of traffic expected to be handled on the line;**

(g) A map that clearly indicates the area to be served, including origins, termini, stations, cities, counties and States; and

(h) The amount of projected revenues that will be generated in the first year by operations on the property to be acquired.”

7. The ICC stated, on p. 6 of its decision:

“We have considered the proposed rules with these conclusions in mind, **and will eliminate proposed rules 1150.33 (f) and (h)** as unnecessary and potentially misleading.”

8. With regard to ‘financial responsibility,’ the ICC stated:

“Some protestants fear that this proposal will be used by class I railroads to divest themselves of marginally profitable lines. **They are concerned that this will result in a transfer of ownership to a party who is not financially viable or lead to inferior service.** The three cases cited to support this concern involved purchases of lines that were being abandoned. **In these cases, if it were not for the operations by the shortline, rail service would have ended at an earlier date,** and there was **no negative impact** on service to the public as a result of the transactions. Additionally, insolvency by three small railroads attempting to improve unprofitable lines of class I railroads that were to be abandoned is not indicative of the financial stability of numerous other shortlines.

Commenters’ concerns about the financial viability of new carriers are not supported by any specific evidence. ... While some new operators may, of course, not succeed in revitalizing unprofitable or marginal lines, we are not aware of many that have failed.

Transfer of a line to a new carrier that can operate the line more economically or more effectively than the existing carrier **serves shipper and community interests by continuing rail service,** and allows the selling railroad to eliminate lines it cannot operate economically.

Finally, we note that shortlines are dependent on local traffic for their survival, and thus have a greater incentive than class I carriers to provide local shippers with service tailored to their needs. Notably, **no shipper opposes** this class exemption.” 1 ICC 2d at 812-813. Bold added.

9. The ICC went on to say, at p. 814 - 815:

“When this statute [10904] was enacted, Congress stated that one of its goals was to assist shippers who are sincerely interested in improving rail service. [Employee protective] conditions **are inconsistent with these goals since they will render acquisition more costly and, therefore, deter efforts which otherwise are to be encouraged.**

Employee protection is also **inconsistent with our goals** in granting this class exemption and **would discourage acquisitions and operations that should be encouraged.** The record supports a conclusion that **the acquirer would not be able to complete the transaction if those conditions were imposed.**

Faced with **the need to encourage continuation of rail service**, the Commission adopted the present policy of **not imposing conditions** on the buyer or the seller. We reasoned that there are costs associated with labor protection, and these costs would result in an increased selling price. Thus, the acquirer would indirectly bear these costs. In addition, in transactions under section 10901, **operations are continuing and jobs for rail employees will continue to be available.** Thus, railroads seeking to rid themselves of marginal lines **should be encouraged to sell to shippers, shortlines, communities, and other mainline carriers who seek to continue operations over these lines.** **If labor protective conditions are imposed, the economic justification for transfer of a line is diminished if not negated.** Accordingly, for these reasons and the reasons discussed above, **no conditions will be imposed as a matter of course** on the seller in a proposal using this class exemption.” Bold added.

10. Those that oppose the OFA process, advocate that the STB should impose on OFA offerors additional conditions, to wit: OFA offerors should be required to demonstrate financial ability to rehabilitate, and to operate for two years, a line subject to the OFA procedures. See, for example, the comments of Conrail in this proceeding, and the comments of Norfolk Southern, CSX, Union Pacific, and the American Association of Railroads in EP 729.

11. Riffin argues that the imposition of conditions on the OFA process, beyond the two conditions that OFAs have historically been subject to [financial ability to pay the purchase price; cannot abandon or convey the line for two years], is contrary to the intent of Congress, when it enacted 49 U.S.C. 10904 [originally numbered 10905], and is contrary to the ICC’s precedent, as manifested in EP 392.

12. WHEREFORE, Riffin argues that requiring an OFA offeror to demonstrate the financial ability to rehabilitate the 1189X line / to operate the 1189X line for two years, **is inconsistent with the precedent set in EP 392, and is inconsistent with Congress' intent when it enacted 49 U.S.C. 10904** (originally numbered 10905).

Respectfully,

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CERTIFICATE OF SERVICE

I hereby certify that on or before the 19th Day of May, 2016, a copy of the foregoing Supplement to Riffin's Reply to Charles Montange's Motion to Compel, was served on all of the parties in this proceeding, either via e-mail, or via U.S. Postal Service, postage prepaid, including Ms. Ferster, co-counsel for the Rails to Trails Conservancy.

James Riffin