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October 2, 2009

BY HAND-DELIVERY

Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

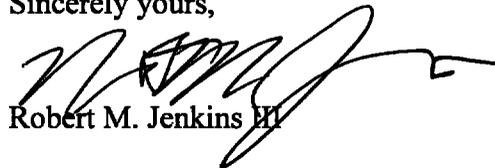
Re: STB Docket No. AB-167 (Sub-No. 1190X)
Consolidated Rail Corporation—Abandonment
Exemption—In Hudson County, NJ

ENTERED
Office of Proceedings
OCT 2 - 2009
Part of
Public Record

Dear Secretary Quinlan:

Enclosed for filing in the above-captioned proceeding are the original and ten copies of "Consolidated Rail Corporation's Motion to Strike." Please date-stamp the extra copy of this pleading and return it to our representative.

Sincerely yours,



Robert M. Jenkins III

RMJ/bs

Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD



STB NO. AB 167 (SUB-NO. 1190X)

CONSOLIDATED RAIL CORPORATION—ABANDONMENT EXEMPTION—IN
HUDSON COUNTY, NEW JERSEY

NOTICES OF EXEMPTION

CONSOLIDATED RAIL CORPORATION'S MOTION TO STRIKE

Consolidated Rail Corporation ("Conrail") hereby moves to strike portions of the "Reply to NJT 9/19/09 Pleading, Amendment of OFA, Reply to Conrail's New Issues" filed by Eric Strohmeier and James Riffin ("Offerors") on September 30, 2009 ("Reply and Amendment"). Specifically, Conrail requests that paragraphs 23-53, 55, 57-60, and all the exhibits referred to or supporting those paragraphs be stricken.¹

In their Reply and Amendment, Offerors propose yet another amendment to their Offer of Financial Assistance ("OFA"); submit shipper statements that should have been filed with their OFA or, at the latest, with their response to the Show Cause Order issued by the Director of the Office of Proceedings on August 12, 2009 ("Show Cause Order"); and include a more-than five-page discussion, together with photographs and a new verified statement by James Riffin, that allegedly responds to "NEW ISSUES RAISED BY CONRAIL" (Reply and Amendment ¶¶ 23-42). The amendment to the OFA and shipper statements should be stricken on the grounds that they are being filed far too late in this proceeding, and Offerors have failed to justify their failure

¹ In the Reply and Amendment, Riffin continues to refer to himself as a "carrier" despite the Board's finding to the contrary more than two weeks ago in *James Riffin—Petition for Declaratory Order*, STB Finance Docket No. 35245 (STB served Sept. 15, 2009).

to file this material earlier. The asserted response to “new issues raised by Conrail” should be stricken on the ground that it is an improper reply to a reply.²

A. Shippers Statements and the Amendment to the OFA

Conrail filed its notice of exemption on November 19, 2008. CNJ Rail Corporation—a New Jersey corporation that has been dissolved without assets—filed a Notice of Intent to File an OFA on December 19, 2008. Nearly eight months later, on August 7, 2009, Offerors—not CNJ—filed an OFA. On August 12, 2009, the Office of Proceedings issued its Show Cause Order, noting, among other things, that Offerors had changed their plans for the OFA and had failed to submit evidence of support from Dameo Trucking or to provide a financial plan, a business plan, or other evidence to support their assertions.

On September 1, 2009, the Offerors filed their response to the Show Cause Order, but did not include a statement from Dameo Trucking or any shippers and failed to offer valid evidence of financial responsibility, a demonstration of operational feasibility, or other basic requisites for a successful OFA. Then, on September 11, the Offerors filed another document, purporting to amend their OFA yet again and seeking to have the proceeding held in abeyance. The September 11 submission detailed a whole new purpose for the OFA—to function as a transfer facility for a Jersey City-sponsored light freight rail system—that Offerors had never previously discussed. Then, on September 30—almost eight weeks after filing their OFA and a month after responding to the Show Cause Order—the Offerors filed their Reply and Amendment, purporting to amend their OFA yet again (this time, recasting their facility as a transload for a

² Since Conrail believes it is well past time for the pleadings in this overlong matter to end, we have not taken the liberty that the Offerors have taken of submitting more “supplemental” material and a reply to a reply prior to receiving authorization from the Board. If, however, the Board denies Conrail’s motion to strike, we request leave to file a response to Offerors’ Reply and Amendment.

tunnel project).³ In addition, the Offerors have sought to use the Reply and Amendment as a vehicle to submit evidence showing alleged shipper support for their plans.

The Offerors' amendment and shipper statements come far too late in this proceeding and should be stricken. Board regulations set strict time limits for OFAs, and the Board strictly construes such time limits. *See Chelsea Property Owners—Abandonment—Portion of the Consolidate Rail Corporation's W. 30th Street Secondary Track in New York, NY—in the Matter of Financial Assistance*, Docket No. AB-167 (Sub-No. 1094), 1993 WL 274727, at *3 (served July 22, 1993). The Offerors have not explained why these principles should not apply to them, and have not provided any justification for allowing them to drag out the OFA process by amending their OFA (yet again) and filing "evidence" at this late date.

By now, the Board surely is all too familiar with the Offerors' cavalier disregard of OFA procedures and time frames. The Reply and Amendment is simply another in the long line of abuses of the OFA process perpetrated by Offerors in this proceeding, and by Riffin in this and many other proceedings. It is time to bring these proceedings to a close. The amendment to the OFA and the shipper statements should be stricken.

³ Certain amendments to the OFA discussed in the first section of the Reply and Amendment (the section relating to New Jersey Transit) are relevant and should be considered by the Board. For instance, Offerors have finally come to the belated conclusion that New Jersey Transit does own the property between Mile Posts 2.9 and 3.3, and, therefore, Offerors have removed that portion from the parcel, reducing the OFA parcel to the 1.23-strip between Mile Post 3.3 and Mile Post 4.53. *See* Reply and Amendment ¶ 15. Offerors also concede that the sole potential shipper that they had alleged existed on the line—Suydam Partners—"has no present interest in rail service." *Id.* at ¶ 12. This amendment to the OFA also is relevant and should be considered by the Board in evaluating the Offerors' OFA.

B. Response to New Issues Raised by Conrail

The Offerors assert that Conrail's reply to their response to the Show Cause Order "raised a number of new issues" (Reply and Amendment ¶ 23) to which they should be permitted to reply. This assertion is false.

Conrail did not inject new issues into this proceeding. Conrail merely discussed and applied long-established principles for OFAs that were clearly implicated by the filings of the Offerors themselves and by the Show Cause Order. There is not a single issue discussed by Offerors in their responses to "New Issues Raised By Conrail" (Reply and Amendment ¶¶ 23-42) that they could not have anticipated and addressed in their OFA or in their response to the Show Cause Order. Thus, the assertion that Conrail "raised a number of new issues" to which a reply should be permitted is a transparent pretext for filing an improper reply to a reply. The Offerors' response to "new issues raised by Conrail" reeks of bad faith and should be rejected.

Accordingly, the portion of the September 30 Submission bearing the heading "New Issues Raised by Conrail," together with all of the materials in support of that section (including Riffin's verified statement and various photographs) should be stricken.

CONCLUSION

The Offerors have been indulged for far too long. They have been given far more than a reasonable opportunity to develop and demonstrate a workable OFA that meets the statutory and regulatory requirements and purposes of the OFA process. The Board's generosity in overlooking the Offerors' repeated abuses of the process has only emboldened them to take still more liberties. It is time for this to end.

For the foregoing reasons, Conrail respectfully requests that the following portions of the Reply and Amendment be stricken: paragraphs 23-53, 55, 57-60, and all the exhibits referred to

or supporting those paragraphs. If, however, the Board denies this motion to strike, Conrail requests leave to file a response to the Reply and Amendments.

Respectfully submitted,

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Dated: October 2, 2009

CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2009, a copy of Consolidated Rail Corporation's
Motion to Strike was served by overnight mail on:

Eric Strohmeyer
81 Century Lane
Watchung, NJ 07069

James Riffin
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Timonium, MD 21093


Robert M. Jenkins III