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BEFORE THE
SURFACE TRANSPORTATION BOARD

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Public Record

STB DOCKET NO. AB-409 (Sub- No. 5X)

LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY
ABANDONMENT EXEMPTION
IN LOS ANGELES COUNTY, CA

REPLY TO PETITIONER'S REQUEST TO BE EXEMPT FROM 49 U.S.C. §10904
(OFFERS OF FINANCIAL ASSISTANCE)

1. James Riffin ("Riffin"), a Class III carrier, herewith files this Reply to Petitioner's Request to be Exempt From 49 U.S.C. §10904 (Offers of Financial Assistance) ("PE"), and herewith requests the Board deny Los Angeles County Metropolitan Transportation Authority's ("LAMTA") request to be exempt from the provisions of 49 U.S.C. §10904, and for reasons states:

1. BACKGROUND INFORMATION

2. On May 29, 2008, LAMTA filed a Notice of Exemption ("NOE"), to abandon 0.31 miles of the Santa Monica Industrial Lead between mileposts 485.69 and 486.00, a distance of 0.31 miles, in Los Angeles County, California ("Line"). LAMTA requested the Board exempt this proceeding from the Offer of Financial Assistance ("OFA") provisions of 49 U.S.C. §10904.

3. As justification for its OFA exemption request, LAMTA stated:

- A. There are no existing or potential shippers on the Line. PE at 3.
- B. The line is incapable of supporting rail service due to its short length. PE at 3.
- C. There is no likelihood any shipper would generate any traffic on the Line. PE at 3.
- D. The Line is needed to support current construction activities and future operations. [{"(1) a staging area for the storage of track and signal material and components; (2) parking for

construction equipment ...; (3) construction of a traction power substation; (4) employee parking, and (5) future rail transit operations.”] PE at 4.

E. Fifteen years ago, the Commission had exempted other lines SP had sought to abandon, in order to facilitate LACTC’s desire to construct commuter rail lines. PE at 5-6.

F. No traffic has moved over the Line for the past two years. PE at 6.

G. Permitting the OFA to proceed would preclude use by the transit agency as planned, thus frustrating the very purpose of the abandonment and discontinuance. PE at 6.

4. On June 26, 2008, Riffin filed his Notice of Intent to Participate as a Party of Record, filed his Comments, filed a Notice of Intent to File an Offer of Financial Assistance to purchase the Line, and filed a Petition to Stay the effective date of the NOE.

5. In a decision served on June 16, 2008, the Board stated “any person who wishes to oppose the request for an exemption from the OFA provisions or who intends to file an OFA, should address **one or more** of the following (Op. at 3. Emphasis added.):

A. “Whether there is a demonstrable commercial need for rail service, as manifested by support from shippers or receivers on the line being abandoned or as manifested by other evidence of immediate and significant commercial need;

B. Whether there is community support for continued rail service;

C. Whether acquisition of freight operating rights would interfere with current and planned transit services;

D. And whether continued rail service is operationally feasible, especially where, as here, the line to be abandoned is physically constrained.” Op. at 3.

2. THE LINE IS NEEDED FOR CONTINUED RAIL SERVICE

6. Contemporaneously filed with this Opposition, is a Motion for a Protective Order, together with highly confidential information which addresses the issue of the commercial viability of the Line and whether the line is needed for continued rail service. Included in this Motion for Protective Order is highly confidential marketing information.

7. Riffin has demonstrated in his Motion for Protective Order that he has a desire to purchase the Line, so that he can provide rail service to both existing potential shippers, and to future potential shippers.

3. REPLY TO LAMTA'S REASONS IN SUPPORT OF ITS PETITION FOR EXEMPTION

8. The highly confidential marketing information contained in Riffin's Motion for Protective Order clearly demonstrates existing shippers on the Line have a desire for rail service, and clearly demonstrates a shipper who is not presently located on the Line, has a high desire to utilize the Line for freight rail purposes.

9. The fact that no shipper has utilized the Line in the past two years strongly suggests LAMTA and Union Pacific have made no effort to offer freight rail service on the Line. Shortly Riffin will serve Discovery upon both Union Pacific and LAMTA, asking both carriers to describe any marketing activities they have engaged in during the past two years, which relate to the Line, and which have been directed to those shippers that are located near or adjacent to the Line. While Riffin cannot state at this time that neither UP nor LAMTA have made any effort to solicit rail business along the Line, Riffin fully expects both UP and LAMTA to state they have made no effort to market rail service to shippers located near or adjacent to the Line. If a rail carrier makes no effort to solicit business on a Line, then potential shippers are unlikely to seek or to utilize rail service. Likewise, for the past two years, the price of fuel has been so low, the transportation cost savings associated with using rail service was insignificant. Today, with diesel selling for more than \$5 a gallon, the cost of transporting goods via rail is very

significantly less than the cost of shipping goods via motor carrier. Two years ago, there was virtually no demand for hybrid cars. Today, the demand is so great, there is a six-month waiting period to acquire a hybrid car, all due to the rapidly escalating cost of fuel.

10. LAMTA does **NOT** propose to use the Line for commuter rail service. LAMTA only proposes to use the Line for storage purposes. LAMTA has not offered any evidence that the only land available to the LAMTA for storage purposes, is this Line. Riffin, in his discovery request, will ask the LAMTA to detail how much vacant land it has that could be used for storage purposes, where that land is located, and will ask LAMTA to provide evidence that there is no other land available to the LAMTA which could be used for storage purposes.

11. LAMTA has emphasized the short length of the Line in support of its bald statement that the Line is too short to generate any rail traffic. In Riffin's Motion for Protective Order, Riffin identifies a number of shippers who are located on this short portion of the Line, some of whom could be significant rail users. In addition, the Line is some 2 miles long, and just west of MP 485.69, a cursory search of www.Maps.Live.com would reveal the Line is 100 feet or more in width, passes through a highly industrialized area, is adjacent to millions of square feet of commercial warehouse space, and in some locations, is double tracked and has existing spurs.

4. LAMTA's REQUEST TO BE EXEMPT FROM THE OFA PROCEDURES SHOULD BE DENIED.

12. Granting an exemption from 49 U.S.C. 10904 is an "unusual relief," rarely granted. "In the past, the Commission has granted this unusual relief when the right-of-way is needed for a valid public purpose and there is no overriding public need for continued rail service." *Southern Pacific Transportation Company – Discontinuance of Service Exemption – In Los Angeles County, CA*, Docket No. AB-12 (Sub-No. 172X), decided December 1, 1994, ("SP 172X") at page 3.

13. In *Norfolk Southern Railway Company - Abandonment Exemption - In Orange County, NY*, FD No. AB-290 (Sub-No. 283X) ("*Orange County*"), the carrier asked to be exempt from

the OFA process. James Riffin filed a Notice of Intent to File an Offer of Financial Assistance to purchase the line, and strongly objected to NS' request to be exempt from the OFA process. In that proceeding, the Board denied the carrier's request to be exempt from the OFA process. The Board justified its decision as follows:

"The OFA provisions - which permit a party genuinely interested in providing continued rail service to acquire a line for that purpose over the objections of the owner - reflect a Congressional intent that rail service be preserved whenever possible. While exemptions from 49 U.S.C. 10904 have been granted from time to time, they have been granted when the right-of-way is needed for an overriding public purpose (footnote 3) or an important private undertaking (footnote 4), and there is no apparent interest in continued rail service (footnote 5). ... Mr Riffin has shown an interest in providing continued rail service, despite the absence of an active shipper on the line for almost 2 years. Accordingly, the Board finds no basis for undercutting the Congressional objective of maintaining rail service, despite the fact that the prospects for a successful OFA are marginal."

14. In *1411 Corporation – Abandonment Exemption – In Lancaster County, PA*, STB FD No. AB 581 (Sub-No. X), Served April 12, 2002, an entity called Shawnee desired to acquire the right-of-way that was the subject of the abandonment proceeding, to be used a rail trail. The carrier, Middletown & Hummelstown Railroad Company, supported Shawnee's desire to exempt the proceeding from the OFA provisions of 49 U.S.C. §10904. Shawnee argued that an overriding public interest [the nearby city of Columbia's Master Plan proposed that the line be converted into a recreational and scenic trail] required the board to set aside the OFA process in that case. In denying the OFA exemption request, the Board stated:

"But it is well settled that an OFA should take priority over a trail use proposal because of the strong Congressional intent to preserve rail service wherever possible. Footnote 14: See 49 CFR 1152.29(d) (trail use is provided for only if "continued rail service does not occur under 49 U.S.C. 10904. ...") See also *Rail Abandonments - Use of Right-of-Way As Trails*, 2 I.C.C.2d 591, 608 (1986) ("Offers of financial assistance to acquire rail lines or subsidize rail operations under section 10905 [now 10904] take priority over both interim trail use and public use conditions because retention of existing rail service is mandatory under section 10905 ..."). Indeed, even under the Trails Act, trail use is interim and always subject to restoration of rail service over the line. 49 CFR 1152.29(a)(3)."

15. In the very few cases where exemption from offers of financial assistance have been granted, the Board and the ICC have enumerated criteria which justify granting this exemption:

A. In *Iowa Northern Railway Co. – Abandonment - In Blackhawk County, IA*, Docket No. AB-284 (Sub-No. 1X), decided March 28, 1988, the line to be abandoned was to be used as the corridor for a new U.S. highway 218. The line had two active shippers. One shipper elected to sell its property to the State of Iowa, then relocate its business. The other shipper had adjacent parallel alternate rail service available. (Its facility was served by two rail lines.) Using the line proposed for abandonment for rail service, would have precluded construction of the highway. No one opposed the abandonment or OFA exemption requests, nor did anyone file a Notice of Intent to File An Offer of Financial Assistance.

B. In *Chicago and North Western Transportation Company – Abandonment Exemption – In Blackhawk County, IA*, Docket No. AB-1 (Sub-No. 1X), decided July 7, 1989, the railroad asked for abandonment approval so that the right-of-way could be used for another portion of the proposed U.S. highway 218, see *Iowa Northern, supra*. The railroad arranged to provide rail service to the only shipper on the line via other tracks adjacent to the shipper's facility. The shipper also planned to sell its facility to the State of Iowa, then relocate its business. Using the line proposed for abandonment for rail service, would have precluded construction of the highway. No one opposed the abandonment or OFA exemption requests, nor did anyone file a Notice of Intent to File An Offer of Financial Assistance.

C. In *Missouri Pacific Railroad Company – Abandonment – In Harris County, TX*, Docket No. AB-3 (Sub-No. 105X), decided December 16, 1992, the line to be abandoned was to be used as the corridor for an expanded Interstate Highway 10, and as the corridor for future mass transit. The line had a number of shippers. The active shippers either elected to relocate or to use alternate existing rail service. Using the line proposed for abandonment for rail service, would have precluded expansion of I-10. No one opposed the abandonment or OFA exemption requests, nor did anyone file a Notice of Intent to File An Offer of Financial Assistance.

D. In the *SP 172X* case, the only shipper on the line had stopped using the line prior to SP filing its Discontinuance of Service exemption. (The shipper, a bakery, had converted its facility. Previously it had received shipments of grain, which it milled. Several years before

the petition was filed, the bakery stopped milling grain into flour. It bought flour, rather than grain. The flour was delivered via truck.) The Los Angeles County Mass Transit Administration (“LACMTA”) previously had purchased, without ICC approval, the right-of-way (see *Southern Pacific, supra*). After finding, in the *Southern Pacific* case, *supra*, that LACMTA was the common carrier, not Southern Pacific, SP filed this Discontinuance of Service exemption. The right-of-way was to be used for mass transit purposes. Using the line proposed for abandonment for rail service, would have precluded using the corridor for mass transit purposes. No one opposed the discontinuance of service or OFA exemption requests, nor did anyone file a Notice of Intent to File An Offer of Financial Assistance.

E. In *Missouri Pacific Railroad Company – Abandonment – In Harris County, TX*, Docket No. AB-3 (Sub-No. 139X), decided December 23, 1996, the railroad wanted to abandon a 0.52 mile segment. There was one shipper on the line, who had two means of rail access. After abandonment, the line was to be sold to the shipper. The shipper would still have rail access via the other line adjacent to its property. The shipper desired to erect a structure on the right-of-way, thereby expanding its existing structure adjacent to the line. The shipper needed to start building its new structure as soon as possible, since its lease of another structure was due to expire. Using the line proposed for abandonment for rail service, would have precluded the shipper from building its warehouse on the corridor. No one opposed the discontinuance of service or OFA exemption requests, nor did anyone file a Notice of Intent to File An Offer of Financial Assistance.

F. In *The Cincinnati, New Orleans & Texas Pacific Railway Co. – Abandonment Exemption – in Cumberland and Roane Counties, TN*, STB Docket No. AB-290 (Sub-No. 208X), decided November 13, 2000, (“*Cincinnati, New Orleans*”) the railroad wanted to abandon a 15.4 mile segment of a dead-end branch line that served only one shipper. After abandonment, the shipper intended to purchase the line, then operate the line as a private line. Delaying abandonment while the OFA time period ran its course, would have delayed transfer of ownership of the line to the shipper, which in turn would have delayed the beginning of necessary maintenance and rehabilitation of the line by the shipper. No one opposed the abandonment or OFA exemption requests, nor did anyone file a Notice of Intent

to File An Offer of Financial Assistance.

G. In *Central Michigan Railway Company - Abandonment Exemption - in Saginaw County, MI*, STB Docket No. AB-308 (Sub-No. 3X), served October 31, 2003, the Board exempted the abandonment from the OFA process so that an interstate highway could be widened. [The carrier's railroad bridge crossed over the highway. The bridge's abutments were so close together, the highway could not be widened without removing the bridge and its abutments.] The sole shipper on the line did object, particularly since the shipper had recently invested over \$100,00 in rail infrastructure at its site. That shipper withdrew its objection after the Board ordered the carrier to reimburse the shipper for its \$100,000 rail infrastructure investment, and the carrier offered to subsidize the shipper's extra shipping costs due to the loss of its rail service. The carrier also received \$3 million for abandoning its railroad bridge.

H. In *CSX Transportation, Inc. - Abandonment - in Barbour, Randolph, Pocahontas, and Webster Counties, WV*, STB Docket No. AB-55 (Sub-No. 500) served January 9, 1997, the Board had been ordered by the D.C. Circuit Court of Appeals, to grant the abandonment petition. The State of W. Virginia offered to purchase the line, to preserve it as a rail corridor (a commendable public-use). The Board exempted the abandonment from the OFA process, since it had been ordered to grant abandonment authority, and since the line was to be preserved as a rail corridor.

16. In those few cases where the Board has granted a request to be exempt from the OFA process, no one has filed a notice indicating they had a desire to purchase the line via the OFA process (or if an OFA was filed, it was subsequently withdrawn due to the offeror receiving substantial financial incentives to withdraw the OFA.). In addition, the public-use project was so massive, the right-of-way was too small to accommodate both the public-use project (typically a highway), and a line of railroad.

17. The following common criteria existed in the cases where exemption from the OFA regulations was granted:

- A. After abandonment, the shippers still had access to rail service via an adjacent line.
- B. No one opposed the abandonment or OFA exemption requests.
- C. No one filed a Notice of Intent to File An Offer of Financial Assistance.
- D. Delaying approval of the abandonment petition, while the statutory period for filing an OFA lapsed, would have delayed an important public or private undertaking.
- E. Continuing to use the line proposed for abandonment, for freight rail service, would have precluded using the line for an important public or private undertaking.

18. In the instant case, **none** of the criteria enumerated in the cases that granted exemption from the OFA regulations, exists.”

5. THE LINE CANNOT BE USED FOR COMMUTER RAIL SERVICE

19. LAMTA intimated it desired to use the Line for commuter rail service. A close inspection of the Line would reveal the **Line cannot be used for commuter rail service**. It intersects LAMTA’s Blue Line, at MP 485.69, at a right angle. The land surrounding this intersection, is highly industrialized, and has structures on it. There is insufficient vacant land at this intersection, to permit movement of rail cars from one line to the other line, without demolishing many acres of building. In addition, the line is only 2 miles long. West of MP 487.72, aerial maps available on www.Maps.Live.com clearly show the Line has been severed by the I-110 freeway, has numerous structures on the right-of-way, including a coliseum near MP 487.8, and has been paved over, and currently is used as a thoroughfare for automobiles.

6. CONCLUSION

20. There is strong Congressional intent to preserve rail service wherever possible. Offers of financial assistance to acquire rail lines under section 10904 take priority over both interim trail use and public use conditions because retention of existing rail service is mandatory under section 10904. Not abandoning the Line would not preclude LAMTA from finding vacant land to store rail, signal equipment, construction equipment or cars on. Therefore, for the foregoing reasons, Riffin would ask that the Board **deny LAMTA’s request to be exempt from the OFA**

process.

Respectfully submitted,



James Riffin

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of June, 2008, a copy of the foregoing Reply to Petitioner's Request to be Exempt From 49 U.S.C. §10904, was served by first class mail, postage prepaid, upon Charles Spitulnik, Kaplan Kirsch Rockwell, Ste 905, 1001 Connecticut Ave, N.W., Washington, DC 20036, counsel for LAMTA.



James Riffin