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SURFACE TRANSPORTATION BOARD

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Docket No. AB 167 (Sub-No. 1189X)

CONSOLIDATED RAIL CORPORATION—ABANDONMENT EXEMPTION—IN HUDSON
COUNTY, NJ

Docket No. AB 55 (Sub-No. 686X)

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

Docket No. AB 290 (Sub-No. 306X)

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

**COMMENTS IN RESPONSE TO CITY OF JERSEY CITY'S
OFFER OF FINANCIAL ASSISTANCE**

MICHAEL L. ROSENTHAL
Covington & Burling LLP
One CityCenter
850 Tenth Street, N.W.
Washington, D.C. 20001
(202) 662-6000

*Attorney for Consolidated Rail
Corporation*

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COMMENTS IN RESPONSE TO CITY OF JERSEY CITY'S OFFER OF FINANCIAL ASSISTANCE

The City of Jersey City's Offer of Financial Assistance to acquire all of Conrail's interests in the Harsimus Branch between the west boundary of Marin Boulevard and the former point of connection to the interstate railroad at or near Chestnut Avenue, along with two additional parcels of land owned by Conrail, does not satisfy the standards established by 49 U.S.C. § 10904, Board rules, and precedent. The City has not shown a continued need for freight rail service over the Harsimus Branch. The City also has not shown it is financially capable of restoring freight rail service over the Harsimus Branch within a reasonable period of time. Further, the City's OFA impermissibly depends on acquiring Conrail parcels that are not "facilities on the line" to be abandoned. 49 U.S.C. § 10904(f)(1)(B). Accordingly, the Board must reject the OFA.¹

I. The City has not shown a continued need for freight rail service.

The "OFA process is designed for the purpose of continuing to provide freight rail service." *Roaring Fork R.R. Holding Auth.—Aban. Exemption—In Garfield, Eagle & Pitkin Counties, Colo.*, 4 S.T.B. 116, 119 (1999), *aff'd sub nom. Kulmer v. STB*, 236 F.3d 1255 (10th Cir. 2001). "Where, as here, the line is not currently active," the Board will not entertain an OFA unless the offeror provides "some assurance that shippers are likely to make use of the line if continued service is made available, and that there is sufficient traffic to enable the operator to fulfill its commitment to provide that service." *Id.* at 119–20. As the Board has recognized, "[i]t is not appropriate . . . to force the sale of a line" when "the statutory objective of continued freight rail service would not be likely to result from [the] OFA proposal." *Id.* at 120.

¹ Due to the short amount of time provided by the applicable regulations for initial review of the OFA by the Board's Director of the Office of Proceedings, Conrail reserves the right to make further legal and factual arguments, depending on the Board's and the City's subsequent actions and further development of the proceeding.

The City's OFA fails to provide *any* evidence of a continued need for freight service over the Harsimus Branch, much less the specific and concrete evidence required by precedent. For many years, the City urged Conrail to terminate freight rail operations on the Harsimus Branch. No freight rail traffic has moved over any part of the line for nearly three decades. All of the track and track structure has been removed. No rail shipper or receiver is located on the Harsimus Branch. The City does not identify any rail shipper or receiver that might conceivably locate on the Harsimus Branch. The City discusses the feasibility of establishing a transload facility on a different parcel of Conrail-owned property from which the City says it could construct a rail connection to the Harsimus Branch, but the City does not identify any potential operator of such a transload facility or a single potential shipper or receiver that would use such a transload facility. The City also provides no estimate of the volume of rail traffic that could move over the line. The City plainly fails to demonstrate a need for freight rail service on the Harsimus Branch. *See, e.g., R.J. Corman R.R. Prop.—Aban. Exemption—In Scott, Campbell, & Anderson Counties, Tenn., AB 1296X*, slip op. at 3 (STB served June 26, 2020) (“*R.J. Corman I*”) (rejecting OFA where the record lacked “specific information such as statements from actual prospective users of the Line explaining their intent to use freight rail service in the foreseeable future or the actual volume of shipments they anticipate making”); *Union Pac. R.R.—Aban. and Discontinuance of Trackage Rights Exemption—In Los Angeles County, CA*, AB 33 (Sub-No. 265X), slip op. at 2 (STB served May 7, 2008) (rejecting OFA where there were “no active shippers on the segment” and the “one business located on the segment has not expressed any interest in using rail service”); *Roaring Fork*, 4 S.T.B. at 120 (rejecting OFA where projected traffic from potential shippers was “too indefinite and insufficient to support continued freight rail operations”). At best, the City speculates that customers will materialize if a transload is constructed, “[b]ut such speculation is

inadequate” to establish “any realistic possibility of traffic,” and thus the OFA should be rejected as “unlikely to lead to continued rail service.” *Union Pac. R.R.—Aban. Exemption—In Lassen County, CA, & Washoe County, NV*, AB 33 (Sub-No. 230X), slip op. at 5–6 (STB served Jan. 27, 2009); *see also R.J. Corman R.R. Prop.—Aban. Exemption—In Scott, Campbell, & Anderson Counties, Tenn.*, AB 1296X, slip op. at 8 (STB served May 3, 2021) (assertion that transload operator was in discussions about locating a transload facility on the line was “speculative” and “lack[ed] supporting documentation”). ““Those situations in which a purchaser of rail properties has no affirmative plans for continuation or resumption of service, but merely holds out the possibility of service at some unspecified future time, are not properly to be considered offers of financial assistance and do not fall within the scope of [the statute].”” *Burlington N./Santa Fe—Aban.—In King County, WA*, 3 S.T.B. 634, 638–39 (1998) (quoting *Abandonment of R. Lines & Discontinuances of Serv.*, 365 I.C.C. 249, 260 (1981)), *aff’d sub nom. Redmond-Issaquah R.R. Pres. Ass’n v. STB*, 223 F.3d 1057 (9th Cir. 2000).

The City’s OFA includes various statements suggesting at least some community members support using the Harsimus Branch to transport freight, acquisition of freight operating rights would not interfere with other transit services, and freight rail service is operationally feasible, but those statements do not show a continued need for freight rail service. The statements at most suggest the Harsimus Branch could potentially be used for freight rail service should a sufficient demand for service ever materialize. The statements are “too generalized and speculative to support a finding that, despite there being no current shippers on the [Harsimus Branch] and no active service [in decades], there is a continued need for rail service sufficient to allow the possible forced sale of the [Harsimus Branch] under the OFA process.” *R.J. Corman R.R. Prop.—Aban.*

Exemption—In Scott, Campbell, and Anderson Counties, Tenn., AB 1296X, slip op. at 5 (STB served Sept. 23, 2020).

Further, the City does not appear to believe there is a need for freight rail service over the Harsimus Branch. The City contends it is required only to make the line available for freight rail use, and then only for a period of two years before it may seek to discontinue its freight obligation. *See* OFA at 15–16.² As discussed above, that is not the law. Under 49 U.S.C. § 10904 and Board precedent, OFA procedures can be used to provide combined freight and passenger service, and in some cases, passenger service might be the predominant use, but the objective of allowing passenger service is “to make it financially viable for an operator to offer continued (or restored) freight service.” *Offers of Financial Assistance*, EP 729, slip op. at 17 (STB served June 29, 2017).³ Consequently, even where the OFA process is used primarily to develop new passenger service, the offeror still must show a need for freight rail service. *See Roaring Fork R.R.*, 4 S.T.B. at 119; *R.J. Corman I*, slip op. at 4; *Consol. Rail Corp.—Aban. Exemption—In Philadelphia, PA*, AB 167 (Sub-No. 1191X), slip op. at 6 (STB served Oct. 26, 2012) (“[T]he Director must ensure . . . that the offeror is committed to . . . providing continued rail service”); *Atchison, Topeka & Santa Fe Ry.—Aban. Exemption—In Atchison County, KS*, AB 52 (Sub-No. 79X), 1995 WL 215507 at *1 (ICC served Apr. 13, 1995) (denying an OFA for the stated purpose of creating a passenger

² The City also refers to construction and operation of “*interim* freight rail transload facilities.” *Id.* at 22 (emphasis added).

³ The City claims passenger-only OFAs are supported by the court’s decision in *Chicago & North Western Transportation Co. v. United States*, 678 F.2d 665 (7th Cir. 1982). However, contrary to the court’s suggestion in dicta, Congress did not revise the OFA statute in the Staggers Rail Act of 1980 to secure rail lines for passenger use. Rather, Congress revised the provision to “assist shippers who are sincerely interested in improving rail service.” H.R. Rep. No. 96-1430, at 125 (1980) (Conf. Rep.) (emphasis added).

excursion operation because the “OFA procedure . . . requires the offer to demonstrate that the offer is one for continued freight service”).

Congress expressly addressed the possibility that rail lines proposed for abandonment might not be needed for continued freight rail service but might be appropriate for public purposes, including light rail and recreational use, through a separate statute, 49 U.S.C. § 10905. When there is no need for continued or restored freight rail service, the Board cannot force a rail carrier to sell its property for public use; rather, the Board can only prohibit disposal of the property “for a period of not more than 180 days after the effective date of the order, unless the properties have first been offered, on reasonable terms, for sale for public purposes.” 49 U.S.C. § 10905.

Because the City failed to demonstrate a need for continued or restored freight rail service over the Harsimus Branch, the Board must reject the OFA.

II. The City has not shown it is financially capable of restoring freight rail service over the Harsimus Branch within a reasonable period of time.

The City’s OFA includes no evidence showing the City is financially capable of restoring freight rail service over the Harsimus Branch within a reasonable period of time. Under the Board regulations governing this proceeding, an offeror must demonstrate it is “financially responsible; that is, that it has or within a reasonable time will have the financial resources to fulfill proposed contractual obligations.” 49 C.F.R. § 1152.27(c)(1)(ii)(B) (2009). Moreover, under the governing statute, an offeror must not only have the financial resources to purchase the line, it also must have the financial resources to operate the line for at least two years. *See* 49 U.S.C. § 10904(f)(4)(A). The Board has interpreted this statutory provision as requiring the offeror to have sufficient funds both to acquire and rehabilitate a line in need of rehabilitation so it can become operable. *See, e.g., Consol. Rail Corp.—Aban. Exemption—In Philadelphia, PA*, slip op. at 8 & n.18 (affirming Director’s decision to reject OFA because offeror did not have funds to both acquire the line and

to rehabilitate the line); *Union Pac. R.R.—Aban. Exemption—In Lassen County, CA, & Washoe County, NV*, slip op. at 6 (offeror failed to show funding “sufficient to acquire and operate” the line). The City relies on the statement in the regulations that governmental entities will be presumed to be financially responsible. *See* OFA at 12 (“City of Jersey City is a governmental entity and the second largest city in New Jersey. Governmental entities are presumed to be financially responsible.”). But that presumption applies only to the acquisition phase of the proceeding—*i.e.*, the offeror’s “proposed contractual obligations.” The City fails to demonstrate it has the financial ability required under the statute to “to provide rail service over a long-defunct line.” *See Consol. Rail Corp.—Aban. Exemption—In Philadelphia, PA*, slip op. at 8. The Board must reject the OFA for this reason as well.

Even if the City were entitled to some sort of presumption that it has the funds to rehabilitate and operate a line in an ordinary case, that presumption is rebutted by the facts in this case, where the cost to rehabilitate the Harsimus Branch would so vastly exceed the funds supposedly allocated by the governmental entity to the OFA process. The City provides no estimate of the costs to rehabilitate the Harsimus Branch, but its evidence demonstrates the costs would be extraordinarily high—far above the \$5.7 million that the City says it has authorized to acquire the Harsimus Branch. *See* OFA at 21. The City witness who addresses the feasibility of providing light rail and freight service over the line acknowledges that essentially the entire track and supporting structure, including many trestles and bridges, would need to be constructed from scratch. *See* OFA, Appendix VIII, Verified Statement of Michael Allen at 6–8; *see also* OFA at 24 (“Obviously bridges, trestles and track must be replaced or repaired for any light rail expansion or to operate freight.”). The City’s only reference to whether the City could pay the costs of “the reconstruction of bridges and trackage” is to assert that the costs “will be at public expense (or

subsidized)” and to claim, incorrectly, that “its financial responsibility for any needed reconstruction is presumed.” OFA at 26. The City also provides no timeline for acquiring the required funds or beginning the extensive line construction process. The City’s failures to address the financial and timing aspects of its proposal further demonstrate this is one of “[t]hose situations in which a purchaser of rail properties has no affirmative plans for continuation or resumption of service, but merely holds out the possibility of service at some unspecified future time,” and thus is “not properly to be considered [an] offer[] of financial assistance and do[es] not fall within the scope of [the statute].” *Burlington N./Santa Fe—Aban.—In King County, WA*, 3 S.T.B. 634, 638–39 (internal quotation omitted).

The City’s failure to show the City is financially capable of restoring freight rail service over the Harsimus Branch within a reasonable period of time is another reason the Board must reject the OFA.

III. The City’s OFA impermissibly depends on acquiring Conrail parcels that are not facilities on the line to be abandoned.

Even if the City could establish a need for freight rail service over the Harsimus Branch and the ability to fund restoration of such service within a reasonable period of time, its proposal to provide that service is infeasible because it requires use of Conrail-owned parcels that are not facilities on the Harsimus Branch. In the OFA, the City seeks to acquire not only portions of the Harsimus Branch, but also a parcel it calls the “Harsimus Connector,” which is actually an abandoned portion of Conrail’s River Line. *See* OFA at 11–12. The River Line connected to Conrail’s Passaic & Harsimus Line, not Conrail’s Harsimus Branch. *See generally, Consol. Rail Corp.—Abandonment of the River Line—In Hudson County, NJ*, AB 167 (Sub-No. 1067N). The City’s real interest in the River Line parcel is to pursue recreational and light rail use, but the City says the River Line parcel is where it would construct the transload it would use to provide freight

service over the Harsimus Branch. *See* OFA at 31–32. However, the City cannot acquire the River Line process through its OFA, so it has not presented a feasible proposal for providing freight rail service over the Harsimus Branch.⁴ The Board must reject OFA’s when an offeror’s proposal to provide continued rail service is not operationally feasible. *See, e.g., Consol. Rail Corp.—Aban. Exemption—In Philadelphia, PA*, slip op. at 6–7; *Union Pac. R.R.—Aban. and Discontinuance of Trackage Rights Exemption—In Los Angeles County, CA*, slip op. at 3 (“Because this segment by itself is unsuitable for continued railroad operations, the intended OFA cannot be deemed to be made for purposes of providing continued rail service . . .”).

Contrary to the City’s claim, an OFA cannot be used to acquire just any property of the abandoning rail carrier that the offeror claims is necessary to restore freight rail service on the line to be abandoned. Under the OFA process, the line to be abandoned includes “all facilities *on the line* or portion necessary to provide effective transportation services.” 49 U.S.C. § 10904(f)(1)(B) (emphasis added). The reference to facilities “on the line” is a reference to property the abandoning carrier “‘assembled for, and dedicated to, rail service’” on the line to be abandoned. *Railroad Ventures, Inc., v. STB*, 299 F.3d 523, 543 (6th Cir. 2002) (quoting *R.R. Ventures, Inc.—Aban. Exemption—Between Youngstown, OH, and Darlington, PA, in Mahoning and Columbiana Counties, OH, and Beaver County, PA*, AB 556 (Sub-No. 2X), slip op. at 10 (STB served Oct. 4, 2000)). As Sixth Circuit explained in *Railroad Ventures*, “[p]ursuant to the abandonment and OFA provisions of the ICCTA, the abandoning line owner identifies the property that is being

⁴ Conrail focuses on the River Line parcel in this filing because, by the City’s own account, the City’s ability to provide freight rail service over the Harsimus Branch depends on its ability to establish a transload facility on that parcel, and it is clear that the River Line parcel cannot be considered a facility on the Harsimus Branch. By focusing on the River Line parcel, Conrail does not concede the City would have the right under the OFA process to acquire either the River Line parcel or what the City calls the “Waldo Access” parcel.

abandoned in its abandonment petition, while the prospective OFA purchaser submits an offer to buy the rail line being abandoned, either in whole or part.” *Id.* at 554.

The River Line parcel is not now and has never been a facility on the Harsimus Branch. The River Line was a separate line of railroad owned by Conrail that connected to Conrail’s Passaic & Harsimus Line, which is not even the same line as the Harsimus Branch. The River Line parcel is not part of Conrail’s abandonment proceeding here. The River Line parcel thus cannot be considered property Conrail “assembled for and dedicated” to providing freight rail services over the Harsimus Branch that the City could lawfully acquire through an OFA in this proceeding.⁵

Because the City cannot acquire the River Line parcel, its OFA does not present a feasible proposal for providing freight rail service on the Harsimus Branch. The City’s failure to present a feasible proposal for providing freight rail service on the Harsimus Branch is an additional reason the Board must reject the OFA.

⁵ If the City could pursue an OFA that includes the River Line parcel, this proceeding would have to be further delayed, because the Board never required Conrail to develop a valuation that would apply to that parcel, and Conrail has not developed such a valuation. Further, as the City acknowledges, the River Line parcel is in close proximity to and overlaps portions of Conrail’s active National Docks rail line. Conrail has not had time to evaluate the issues that would arise if the River Line parcel were sold to the City, including the impacts on Conrail’s ability to conduct maintenance on the National Docks line and its ability to expand service on the National Docks line to meet future demand the City and its supporters discuss in the City’s OFA.

Respectfully submitted,

/s/ Michael L. Rosenthal
MICHAEL L. ROSENTHAL
Covington & Burling LLP
One CityCenter
850 Tenth Street, N.W.
Washington, D.C. 20001
(202) 662-6000

*Attorney for Consolidated Rail
Corporation*

May 21, 2025

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of May, 2025, I caused a copy of the foregoing document to be served by email or first-class mail, postage prepaid, on all parties of record in Docket No. AB 167 (Sub-No. 1189X), Docket No. AB 55 (Sub-No. 686X), and Docket No. AB 280 (Sub-No. 306X).

/s/ Michael L. Rosenthal