

44943
EB

SERVICE DATE – DECEMBER 14, 2015

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 729

OFFERS OF FINANCIAL ASSISTANCE

Decided: December 7, 2015

AGENCY: Surface Transportation Board.

ACTION: Advance Notice of Proposed Rulemaking.

SUMMARY: The Surface Transportation Board seeks comment on whether and how it should update its rules pertaining to offers of financial assistance in order to improve that process and protect it against abuse.

DATES: Comments are due by February 12, 2016. Reply comments are due by March 14, 2016.

ADDRESSES: Comments and replies may be submitted either via the Board's e-filing format or in paper format. Any person using e-filing should attach a document and otherwise comply with the instructions found on the Board's website at "www.stb.dot.gov" at the "E-FILING" link. Any person submitting a filing in paper format should send an original and 10 paper copies of the filing (and also an electronic version) to: Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001. Copies of written comments and replies will be available for viewing and self-copying at the Board's Public Docket Room, Room 131, and will be posted to the Board's website.

FOR FURTHER INFORMATION CONTACT: Jonathon Binet, (202) 245-0368. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.]

SUPPLEMENTARY INFORMATION: In the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (ICCTA), Congress revised the process for filing offers of financial assistance (OFAs) for continued rail service, codified at 49 U.S.C. § 10904. Under the OFA process, as further implemented in the Board's regulations at 49 C.F.R. § 1152.27, financially responsible parties may offer to temporarily subsidize continued rail service over a line on which a carrier seeks to abandon or discontinue service, or offer to purchase a line and provide continued rail service on a line that a carrier seeks to abandon.

Upon request, the abandoning or discontinuing carrier must provide certain information required under 49 U.S.C. § 10904(b) and 49 C.F.R. § 1152.27(a) to a party that is considering making an OFA. A party that decides to make an OFA (the offeror) must submit the OFA to the Board, including the information specified in 49 C.F.R. § 1152.27(c)(1)(ii). If the Board determines that the OFA is made by a financially responsible offeror, the abandonment or discontinuance authority is postponed to allow the parties to negotiate a sale or subsidy arrangement. 49 U.S.C. § 10904(d)(2); 49 C.F.R. § 1152.27(e). If the parties cannot agree to the terms of a sale or subsidy, they may request that the Board set binding terms under 49 U.S.C. § 10904(f)(1). After the Board has set the terms, the offeror can accept the terms or withdraw the OFA. When the operation of a line is subsidized to prevent abandonment or discontinuance of service, it may only be subsidized for up to one year, unless the parties mutually agree otherwise. 49 U.S.C. § 10904(f)(4)(b). When a line is purchased pursuant to an OFA, the buyer must provide common carrier service over the line for a minimum of two years and may not resell the line for five years after the purchase. 49 U.S.C. § 10904(f)(4)(A); 49 C.F.R. § 1152.27(i)(2).

Since the changes to the OFA process in ICCTA were enacted, the Board's experiences have shown that there are areas where clarifications and revisions could enhance the OFA process and protect it against abuse. Therefore, the Board seeks public comments on whether and how to improve any aspect of the OFA process, including enhancing its transparency and ensuring that it is invoked only to further its statutory purpose of preserving lines for rail service. Although we invite public comment on ways to improve any aspect of the OFA process, we also specifically seek comments on the following possible changes to the Board's OFA regulations.

Financial Responsibility

The Board's regulations require that a potential offeror demonstrate that it is "financially responsible," but those regulations do not fully define this concept or what facts or evidence a party must provide to demonstrate financial responsibility. The Board has made various rulings on this question in specific proceedings, but those rulings are not codified in our regulations, which has led to disputes in some proceedings. See, e.g., Consol. Rail Corp.—Aban. Exemption—in Phila. Pa., AB 55 (Sub-No. 710X) et al., slip op. at 4 (STB served Oct. 26, 2012) ("[T]he Offerors assert that they were and are still unsure exactly what documents they were required to produce to be considered financially responsible. . ."). See also Ind. Sw. Ry.—Aban. Exemption—in Posey & Vanderburgh Ctys., Ind., AB 1065X, slip op. at 4-5 (STB served April 8, 2011) (detailing information required from an offeror to establish financial responsibility, in detail beyond that contained in 49 C.F.R. § 1152.27(c)(1)(ii)(B)). Accordingly, we ask parties to comment on how the Board should modify its regulations so that the definition of financial responsibility is more transparent and understandable. We also ask parties to comment on methods of ensuring that an offeror is in fact financially responsible, including the following:

- What documentation should a potential offeror be required to submit to show financial responsibility?

- Should the Board require that potential offerors file notices of intent to file an OFA in abandonment and discontinuance proceedings by a date certain?
- Should the Board require potential offerors to make a financial responsibility showing *before* requiring carriers to provide financial information to those offerors?¹
- Should the definition of financial responsibility include the ability, based on the price reflected in an offer of financial assistance, to purchase and operate for at least two years a line being abandoned or to subsidize for one year service being abandoned or discontinued?
- Should the Board alter the process for carriers to provide required financial information to potential offerors, and if so, how?
- Should the Board require potential offerors to make an “earnest money” payment or escrow payment, or to obtain a bond? Key considerations include: whether the payment or bond amount would be a fixed figure or established on a case by case basis; what method would be used in calculating or fixing the amount; when in the process an offeror would need to make a payment or obtain a bond; and whether (and under what circumstances) a waiver of such a requirement would be appropriate.
- Should the Board prohibit OFA filings by individuals or entities that have abused the Board's processes or engaged in other deceitful or abusive behavior before the Board, and if so, what standards should the Board establish in making a prohibition determination?

Continuation of Rail Service

The Board has also adjudicated cases in which there has been controversy as to whether a party seeking to subsidize or acquire a line through the OFA process is doing so based on a genuine interest in and ability to preserve the line for rail service. See, e.g., Consol. Rail Corp.—Aban. Exemption—in Hudson Cty., N.J., AB 167 (Sub-No. 1190X), slip op. at 5 (STB served May 17, 2010) (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); Roaring Fork R.R. Holding Auth.—Aban. Exemption—in Garfield, Eagle, & Pitkin Ctys., Colo., AB 547X (STB served May 21, 1999) (dismissing OFA because the record did not provide “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”). The Board’s regulations do not currently address these situations;

¹ Pursuant to 49 C.F.R. § 1152.27(a), a rail carrier seeking abandonment or discontinuance authority must provide information promptly upon request to a party considering an OFA, including: an estimate of the annual subsidy and minimum purchase price required to keep the line or a portion of the line in operation; its most recent reports on the physical condition of the line; traffic, revenue, and other data necessary to determine the amount of the annual financial assistance that would be required to continue rail transportation over that part of the line.

therefore, we ask parties for ideas on how the regulations could be modified to do so. In particular, we ask parties to comment on the following:

- Should the Board require that an offeror address whether there is a commercial need for rail service as demonstrated by support from shippers or receivers on the line or through other evidence of immediate and significant commercial need; whether there is community support for rail service; and whether rail service is operationally feasible?
- Should the Board establish criteria and deadlines for carriers that want to file requests for exemptions from the OFA process?

Identity of the Offeror

Another issue the Board has encountered in OFA proceedings is confusion over the identity of the potential offeror. See CSX Transp. Inc.—Aban. Exemption—in Allegany Cty., Md., AB 55 (Sub-No. 659X), slip op. at 1 n.2 (STB served April 24, 2008) (describing confusion over proper name and existence of entity that filed OFA in 2005 but may not have been a legal entity until 2007 or the correct legal entity to receive deed for rail line). In order to avoid such confusion in future proceedings, we ask the parties to comment on the following:

- Should the Board require multiple parties intending to submit a joint OFA to do so through a single legal entity, such as a corporation or partnership, to facilitate the financial responsibility determination and to clarify the party acquiring the common carrier obligation?
- Should the Board require an individual filing an OFA to provide his or her personal address?
- Should the Board require a private legal entity filing an OFA to provide the offeror's exact legal name, the state under whose laws it is organized, and the address of its principal place of business?

Because this is an Advanced Notice of Proposed Rulemaking, the Board may not act on each item listed above, but we seek the public's comment on these ideas, including how they could best be implemented, if appropriate. Parties are encouraged to be specific in commenting on these possible changes and in presenting ideas for other possible changes to the OFA process.

The requirements of section 603 of the Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601-612, (RFA) do not apply to this action because, at this stage, it is an ANPRM and not a "rule" as defined in section 601 of the RFA. Under the RFA, however, the Board must consider whether a proposed rule would have a significant economic impact on a substantial number of small entities. "Small entities" include small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations under 50,000. If adoption of any rule likely to result from this ANPRM could have a significant economic impact on a small entity within the meaning of the RFA, commenters should submit as part of their comments an explanation of how the business or

organization falls within the definition of a small entity, and how and to what extent the commenter's business or organization could be affected. Following review of the comments received in response to this ANPRM, if the Board promulgates a notice of proposed rulemaking regarding this matter, it will conduct the requisite analysis under the RFA.

It is ordered:

1. Initial comments are due by February 12, 2016.
2. Reply comments are due by March 14, 2016.
3. This decision is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Miller.