



ASSOCIATION OF AMERICAN RAILROADS

425 3rd Street, SW, Suite 1000
Washington, D.C. 20024

Timothy J. Strafford
Associate General Counsel

Phone: (202) 639-2506
Fax: (202) 639-2868
E-mail: tstrafford@aar.org

240110

February 12, 2016

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

ENTERED
Office of Proceedings
February 12, 2016
Part of
Public Record

Re: EP 729, *Offers of Financial Assistance*

Dear Ms. Brown:

Pursuant to the Advance Notice of Proposed Rulemaking served in the above docketed proceeding on December 14, 2015, the Association of American Railroads respectfully submits the attached comments.

Sincerely,

Timothy J. Strafford
Counsel for the Association
of American Railroads

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 729

OFFERS OF FINANCIAL ASSISTANCE

COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

Pursuant to the Advance Notice of Proposed Rulemaking (“ANPRM”) served by the Surface Transportation Board (“Board”) in this proceeding on December 14, 2015, the Association of American Railroads (“AAR”) respectfully submits these comments. The AAR and its member railroads have a strong interest in the application of the Offer of Financial Assistance (“OFA”) procedures under 49 U.S.C. § 10904 that promotes the public interest in an economically rational national rail system.

The AAR appreciates this opportunity to comment on the Board’s rules implementing the statutory provisions related to the OFA process and commends the Board’s willingness to review and improve its processes. In the 20 years since the Board’s OFA rules were last revised, it has become evident that the OFA process has been subject to abuse. *See, e.g., Union Pac. R.R.—Aban. Exemption—in Lassen Cnty., Cal., and Washoe Cnty., Nev., AB 33 (Sub-No. 230X) (STB served Sept. 19, 2008).* The AAR supports the Board’s efforts to improve the OFA process and protect the integrity of its processes.

As discussed below, the Board should enforce existing rules that protect the integrity of its processes and amend its rules to further that aim. The Board should amend its OFA rules in a

way that reflects the balance that Congress struck between preserving rail service on the one hand with the burdens on interstate commerce caused by regulation that prevents or delays railroads from abandoning unprofitable rail lines on the other. Specifically, the Board should enhance the OFA process to ensure that railroads are not unduly burdened by delays in the abandonment process caused by frivolous offers by individuals or entities that: (1) do not have the financial ability to either subsidize the line for 1 year or purchase the line at market value and operate it for at least 2 years; and/or (2) invoke the Board's authority for purposes other than continued freight rail service. The Board should also create a class exemption from the requirements of 49 U.S.C. § 10904 where the abandoning railroad has entered into an agreement to sell or donate the line to a governmental entity for a public purpose.

Comments

I. The Board Should Protect the Integrity of Its Processes by Adopting Common Sense Requirements Regarding Offers of Financial Assistance

The ANPRM was issued in the context of a petition for rulemaking filed by Norfolk Southern Railway Company seeking the adoption of rules to deal with the problem of vexatious litigation at the Board, particularly in the abandonment context. *See* Petition of Norfolk Southern Railway Company to Institute a Rulemaking Proceeding to Address Abuses of Board Processes (filed May 22, 2015). The Board declined to institute the requested rulemaking, but stated that it would address the issue through “increased enforcement of the Board’s existing rule addressing irrelevant and immaterial pleadings at 49 C.F.R. § 1104.8 (allowing the Board to strike from any document any material that is “redundant, irrelevant, immaterial, impenitent, or scandalous).” *Petition of Norfolk Southern Railway Company to Institute a Rulemaking Proceeding to Address Abuses of Board Processes*, EP 727 (STB served Sept. 23, 2015), slip op. at 4. While such enforcement would be a welcome first step, the Board should also enforce its

rule that persons who are not attorneys-at-law must be admitted to practice before the Board before representing the interests of another party in a Board proceeding, 49 C.F.R. § 1103.3, and subject those practitioners to discipline in appropriate circumstances under 49 C.F.R. § 1103.5.

Beyond enforcing its existing rules, the Board should adopt reforms to protect against the burdens created by filings by individuals or entities that do not meet the requirements of the statute. In the ANPRM, the Board posed a number of questions regarding requirements that offerors make basic disclosure of information, almost all of which should be answered in the affirmative to protect against parties seeking to game the OFA process. Such common sense disclosures will act as a deterrent to frivolous filings, facilitate the flow of required information between railroads and legitimate offerors and preserve Board resources in adjudicating disputes among the parties.¹

For example, common sense and practical experience dictate that the Board should require the offeror to establish its legal identity. *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). The Board should require any entity filing an OFA to provide the offeror's exact legal name, the state under whose laws it is organized, the date of its incorporation or formation, and the address of its principal place of business. The Board should also require information regarding ownership of the entity, such as a list of shareholders for a closely held corporation, members of a limited

¹ As suggested below, the AAR believes that such basic disclosures should be included in a required notice of intent to file an OFA in all cases. Regardless of whether or not the Board proposes rules implementing that suggestion, the AAR submits that the Board should adopt basic disclosure requirements for OFA offerors to protect the integrity of its processes.

liability company, partners in a partnership, and any affiliated entities. The Board should also adopt corporate disclosure requirements akin to those in Rule 7.1 of the Federal Rules of Civil Procedure and Rule 26.1 of the Federal Rules of Appellate Procedure and require disclosure of any parent corporation and any publicly held corporation that owns 10% or more of its stock.

Similarly, the Board should require an individual filing an OFA to provide his or her personal address. With regard to joint offers from multiple individuals or entities not organized into a single legal entity, the Board should require that the offerors clearly disclose what entity will assume the common carrier obligation on the line and how the parties will allocate responsibility for financing the purchase and operation of the line.

II. The Board's OFA Rules Should Reflect the Balanced Goals of the Rail Transportation Policy

Though 49 U.S.C. § 10904 reflects a Congressional interest in preserving rail service in certain instances, that section also operates within a broader statutory framework that recognizes that railroads operate in markets like other businesses and should not be subject to regulation that forces them to continue to operate unprofitable lines. Such regulation would burden interstate commerce by diverting resources away from economically viable rail operations. This balance is reflected in the Rail Transportation Policy ("RTP") that explicitly directs the Board to conduct its regulatory functions so as: (1) "to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required"; (2) "to reduce regulatory barriers to entry into and exit from the industry"; and (3) "to provide for the expeditious handling and resolution of all proceedings. . . ." 49 U.S.C. §10101(2); (7), (15).

To reflect that balance, the Board should amend its rules to protect against the burdens associated with unsubstantiated OFAs. As the Board has noted, "[t]o allow . . . an

unsubstantiated OFA to proceed, particularly over the railroad's objection, would open [the Board's] process to possible abuse and undermine the Congressional intent that railroads, when they meet the statutory standards, should be permitted to abandon their lines expeditiously." *Ind. Sw. Ry—Aban. Exemption—in Posey & Vanerburgh Ctys., Ind.*, AB 1065X (STB served Sept. 23, 2011).

Generally, invocation of the Board's OFA procedures is appropriate only in extremely exceptional situations. As rational economic actors, if railroads are able to sell unprofitable lines to other operators as going concerns rather than abandoning them, they will do so. Intervention by the Federal Government is not necessary to effect the sale of valuable assets from a willing seller to a willing buyer. The OFA process is thus a mechanism that has potential utility only in instances where market failure interferes with the realization of mutual benefits available through a sale. Any rule that limits the availability of the OFA process in a given case because the offeror fails to meet the statutory standards does not in any way preclude the parties from pursuing a sale of the line or other arrangement to continue rail service outside the forced sale context.

A. The Board Should Amend Its Rules to Require A Notice of Intent to File an OFA in All Cases

The Board should amend its rules to require a notice of intent to file an OFA in all cases by a date certain. A notice of intent that includes basic disclosures made early in the process will help all stakeholders and the Board adhere to the tight deadlines associated with abandonment proceedings generally, and OFA proceedings specifically. *See Aban. & Discontinuance of Rail Lines & Rail Transp. Under 49 U.S.C. 10903*, 1 S.T.B. 894, 909-10 (1006). The AAR suggests that such notices should be filed within 45 days of an application consistent with trail use and

public use condition requests, and within 10 days of the Federal Register Notice publication in the petition and class exemption process consistent with 49 C.F.R. § 1152.27(c)(2).

Notices of intent should contain the information disclosing the basic identity of the offeror discussed above, and establish that the offeror is likely to qualify as a financially responsible person and that the offer is likely to result in continued freight rail service. In the notice of intent, the offeror should disclose information regarding its overall financial situation by proffering specific documents identified by the Board, including bank and accounting statements, company balance sheets, and any bankruptcy information. The notice of intent should also include disclosure of the individual's or entity's general ability to satisfy a common carrier obligation to provide freight rail service or its plans to do so. This showing of the ability to fulfill the common carrier obligation should also include disclosures that the offeror is willing and able to assume liability on the line, including the ability to obtain liability insurance. Also, the offeror should disclose whether it has ever failed to consummate an OFA transaction in the past. Only if these requirements are timely met, should a railroad be forced to disclose information about the line in question to the offeror. *See Ill. Central RR Co.—Aban.*

Exemption—in Champaign Cnty., Ill., AB-43 (Sub-No. 189X)(STB served May 11, 2015).

B. The Board Should Adopt Rules that Require an OFA to Contain Specific Evidence that the Offeror Qualifies as a Financially Responsible Person under the Statute

The Board's regulations currently require that a potential offeror demonstrate with its offer that it is "financially responsible," consistent with the statutory text of 49 U.S.C. § 10904. *See* 49 C.F.R. § 1152.27(c)(1)(ii)(B)). The agency has stated that "an offeror must show that it is financially responsible and that the offer is reasonable." *See Conrail Abandonments under NERSA*, 365 I.C.C. 472 (1981). The Board's rules provide that an offeror is financially responsible if 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). Offers of financial assistance have been rejected by the Board where the offeror: (1) had not provided a verified assurance from a third party from which the offeror intended to secure the needed funds; (2) did not provide an agreement with the purported source of funds; and (3) supplied only vague and unsubstantiated assurance of its ability to fund, or to obtain funding, to purchase a line, and to arrange for operations for a period of two years. *See Union Pac. R.R.—Aban.—in New Madrid, Scott, and Stoddard Counties, Mo.*, AB 33 (Sub-No. 261) (STB served July 30, 2009); *Ariz. & Cal. R.R.—Aban. Exemption—in San Bernardino and Riverside Counties, Cal.*, AB 1022 (Sub-No. 1X) (STB served July 15, 2009)); *Union Pac. R.R.—Aban. Exemption—in Lassen County, Cal., and Washoe County, Nev.*, AB 33 (Sub-No. 230X) (STB served Sept. 19, 2008)).

Government entities are presumed to be financially responsible, but that presumption has been rebutted where a town did not demonstrate that it had the necessary funds and took no steps to secure them. *Ind. Sw. Ry.—Aban. Exemption—in Posey & Vanerburgh Ctys., Ind.*, AB 1065X (STB served Apr. 8, 2011).

Further clarity in the Board’s rules as to what constitutes financial responsibility would preserve Board resources and benefit railroads and potential offerors alike. Clear rules will prevent protracted litigation and multiple Board decisions regarding financial responsibility. Offerors with the genuine ability to purchase a line at market price and operate it for two years will benefit from knowing that they will qualify under the Board’s rules. *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. . .”). Railroads will

benefit from not being subject to the unnecessary delay and expense associated with negotiating with entities that ultimately cannot and will not purchase the line in question.

To that end, the Board should require documentation in the offer to show specific financial responsibility as to the ability to purchase or subsidize the line in question. The offer should build on the documentation submitted with the notice of intent described above. In addition to general financial information, the offer should include evidence that demonstrates the ability, based on the price reflected in an offer of financial assistance and a feasible operating plan, to purchase and operate the line for at least two years or to subsidize the line for one year. At a minimum, the Board should establish a rebuttable presumption that offerors who previously have been found to be not financially responsible are not financially responsible persons within the meaning of section 10904.

C. The Board Should Adopt Rules that Require an OFA to Contain Specific Evidence that the Offer is Likely to Result in Continued Freight Rail Service

The Board's current rules do not explicitly state that the party seeking to subsidize or acquire a line through the OFA process must demonstrate that its offer, if accepted, will enable the continuation of rail service. But the agency has required a genuine interest in and ability to preserve the line for rail service when an OFA has been challenged. *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 authority to require that an offeror demonstrate that its offer, if accepted, will enable the continuation of rail service has been upheld on appeal. *See, e.g., Kulmer v. STB*, 236 F.3d 1255 (10th Cir. 2001); *Redmond-Issaquah R.R. Preservation Ass’n v. STB*, 223 F.3d 1057 (9th Cir. 2000).

The Board should set forth a clear requirement that an offeror must demonstrate that its offer, if accepted, will enable the continuation of rail service by proffering evidence, including: (1) a rail plan; (2) a time table for restoring service; (3) the means by which the offeror will rehabilitate the line if necessary; (4) economic forecasts and traffic projections; and (5) concrete expressions of shipper interest in the line, including service contracts.

The Board should require a greater showing of likelihood of continued rail service in abandonments and discontinuances approved under the two-year out of service exemption. The Board has adopted an expedited class exemption for abandonments for lines that have not seen local traffic in two years or more. In such cases, the Board has already determined that as a class, abandonment of those lines meets the prior approval requirements of 49 U.S.C. § 10903. The likelihood of a successful OFA for continued rail service in such cases is remote.

For a time, the ICC’s regulations did not contemplate use of the OFA procedures in cases where abandonment or discontinuance of service was approved by exemption at all. *See Exemption of Rail Line Abandonments or Discontinuance—Offers of Financial Assistance*, 4 I.C.C.2d 164 (1987). Despite the contention of some rail carriers that the OFA procedures should not apply to all cases because the potential for offerors to provide rail service on lines over which there has been no service for at least two years is remote, the ICC stated that “[b]ecause the subject matter of abandonment and discontinuance exemptions is primarily little-used and out-of-service lines, we anticipate limited use of the proposed rule; indeed that has been

confirmed by our experience since we began using the rules on an interim basis. Thus the new procedures should not impose any undue burden on the carriers.” 4 I.C.C.2d at 168. The AAR submits that the Board’s experience since then has shown that while there may be few instances where parties motivated by a genuine desire to reinstitute rail service invoke the OFA provision, in the majority of cases, a party’s invocation of the OFA procedures reflects other, less meritorious goals and imposes an undue burden on carriers.

III. The Board Should Establish a Class Exemption from the OFA Process for Abandonments Where the Abandoning Railroad has Entered into an Agreement with a Governmental Body to Sell or Donate the Line for a Public Purpose Other Than Continued Freight Rail Service

Congress has directed the Board to exempt a transaction or class of transactions from the provisions of the Interstate Commerce Act, as amended, when the Board finds that: (1) continued regulation is not necessary to carry out the RTP of 49 U.S.C. § 10101; and (2) either: (A) the transaction is of limited scope or (B) regulation is not necessary to protect shippers from an abuse of market power. This standard is met for a class exemption from 49 U.S.C. § 10904 where the abandoning railroad has entered into an agreement with a federal, state, or local governmental entity to sell or donate the line for a public purpose. In the past, the Board has granted an individual exemption where a line proposed for abandonment is needed for a valid public purpose and there is no overriding public need for rail service on the line. *See, e.g., BNSF Rwy.—Petition for Declaratory Order, FD 35164 et al.* (STB served May 20, 2009); *CSX Trans.—Aban—In Barbour, Randolph, Pocohontas, and Webster County, AB-55* (Sub-No. 500) (STB served Jan. 9, 1997). The Board has undertaken to exempt transactions from section 10904 on its own motion in certain circumstances. *See, e.g., Central Michigan Rwy. Co.—Aban. Exemption—in Saginaw County, MI, AB-308* (STB served Oct. 31, 2003). Establishing a class exemption would further the public interest and preserve Board and stakeholder resources.

Conclusion

Based on the foregoing, the Board should vigilantly enforce its existing rules to protect against abuse of the OFA process. The Board should issue a Notice of Proposed Rulemaking to amend its OFA procedures to: (1) protect against the burdens associated with OFAs that fail to meet the statutory standards; (2) require a notice of intent to file an OFA by a date certain; and (3) establish specific requirements that offerors demonstrate that they are financially responsible and that their offers, if accepted, will enable the continuation of freight rail service. The Board should also adopt a class exemption where the abandoning railroad has entered into an agreement with a governmental entity to sell or donate the line for a public purpose.

Respectfully Submitted,



Kathryn D. Kirmayer
Timothy J. Strafford
Association of American Railroads
425 Third Street, S.W.
Suite 1000
Washington, D.C. 20024
(202) 639-2502

*Counsel for the Association of
American Railroads*

February 12, 2016