

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

240104

Docket No. EP 729
OFFERS OF FINANCIAL ASSISTANCE
Advance Notice of Proposed Rulemaking

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COMMENTS OF CONSOLIDATED RAIL CORPORATION

Consolidated Rail Corporation (“Conrail”) hereby submits these comments on the Advance Notice of Proposed Rulemaking (“ANPR”) concerning Offers of Financial Assistance (“OFAs”) in the above-referenced docket.

Conrail was created by Congress under the Regional Rail Reorganization Act of 1974 from the estates of eight bankrupt railroads in the Northeast and Midwest United States. By 1983, Conrail was the fourth largest freight hauler in the United States. In the spring of 1997, Norfolk Southern Corporation (“NS”) and CSX Corporation (“CSX”) agreed to acquire Conrail through a joint stock purchase. NS and CSX split most of Conrail’s assets between them. The STB approved the acquisition and restructuring of Conrail on July 23, 1998. The approved merger plan restructured Conrail into a switching railroad operating about 1,200 miles of track in three regional areas -- Northern New Jersey, Southern New Jersey/Philadelphia, and Detroit, Michigan.

INTRODUCTION

Throughout its history, Conrail has been heavily involved in restructuring and rationalizing the rail properties it inherited from its bankrupt predecessors. Thus, Conrail has participated in a large number of Board abandonment proceedings, many of which have involved properties that have been out of service for more than two years and that have no active shippers

on the lines. Despite the fact that Congress, the Interstate Commerce Commission (“ICC”), and the Surface Transportation Board (“STB”) have sought to expedite abandonment proceedings, Conrail has faced disputes, confusions, and abuses relating to the OFA process that have unduly delayed and complicated these proceedings. *See, e.g., Consolidated Rail Corp.—Aban.*

Exemption—in Philadelphia PA, AB 167 (Sub-No. 1191X) & embraced dockets (STB served Oct. 26, 2012), *aff’d sub nom. Riffin v. STB*, No. 12-1487 (D.C. Cir. Dec. 11, 2013) (unpublished summary affirmance); *Consolidated Rail Corp.—Aban. Exemption—in Hudson County, NJ*, AB 167 (Sub-No. 1190X) (STB served May 17, 2010) (decision on show cause order directed to Strohmeyer and Riffin, exempting line from OFA provisions of 49 U.S.C. § 10904), *aff’d sub nom. Riffin v. STB*, No. 10-1150, slip op. at 2 (D.C. Cir. May 27, 2011) (unpublished decision holding, among other things, that, in light of Riffin’s filing for bankruptcy shortly before the Board issued its decision, “there was nothing unreasonable about the STB’s determination that Riffin was not ‘financially responsible’ within the meaning of the statute.”).

In the ANPR, the Board has identified the chief areas of dispute, confusion, and delay, and Conrail welcomes the Board’s interest in promulgating regulations relating to these issues. In the following comments, Conrail will address the issues raised by the Board and suggest specific regulatory approaches to some of the recurring problems identified by the Board.

As detailed below, Conrail urges the Board to adopt regulations that:

- Require the filing of a notice of intent to file an OFA in the time frames provided for in the current regulations as a condition precedent to the filing of an OFA in abandonment and discontinuance proceedings, and preclude any party that has failed to file such a notice from later filing an OFA.
- Clarify the concept of “financial responsibility” by providing that an OFA offeror is deemed financially responsible only if the offeror possesses the financial ability, through its own financial resources or through demonstrated creditworthiness, to acquire and properly maintain the property in question, and

provide operationally and financially feasible freight rail service for a period of not less than two years.

- Require that the offeror's notice of intent provide preliminary evidence of financial responsibility that includes:
 - a certification from a CPA of the offeror's financial position;
 - a certification regarding bankruptcy;
 - a certification that the offeror has not previously made an OFA offer that the offeror was unable to consummate (and an explanation for any past failures to consummate); and
 - a certification with regard to any past Board findings that the offeror was *not* financially responsible.
- Require that if the notice of intent is accepted, the OFA offeror must submit with its offer capital plans, service plans, and further financial information as necessary to establish the offeror's ability to cover the costs of providing freight transportation.
 - Require detailed projections of costs and market demand in cases where the line at issue has been out of service or is in need of repair.
 - Require that an offeror's statement of financial responsibility be supported by documentary evidence such as income statements, balance sheets, letters of credit, or other financial statements.
 - Require the offeror to submit an agreement or verified assurance from a third party certifying that the third party will provide the necessary funds in cases in which the offeror cannot document that it has in its possession the necessary funds for acquiring the property and providing freight service.
- Eliminate the presumption that governmental or other public entities that have not previously administered or provided common carrier freight operations are financially responsible.
- Require all offerors to establish the need for and feasibility of continued freight rail service by requiring documentary evidence demonstrating:
 - That there is a specific and definite commercial need for rail service, as manifested by written support and commitments from shippers or receivers on the line or as manifested by other evidence of immediate and significant commercial need, and
 - That continued rail service is operationally feasible.

- Require the offeror to provide detailed operational plans supporting the offer where a line has been out of service for two or more years.
- Require all public and government entities to address whether there is community support for freight rail service.
- Require specification of the entity or person sponsoring an OFA:
 - Require that multiple parties who intend to submit a joint OFA do so through a single legal entity, such as a corporation or partnership.
 - Require individual offerors to provide an address and other contact information.
 - Require business entities to provide the entity’s legal name, the state under whose laws it is organized, the address of the entity’s principal place of business, and a certification that the entity, as of the filing of the notice of intent and the making of the OFA offer, is an entity in good standing in the state under whose laws the entity is organized.

DISCUSSION

Comments on Issues Raised by the Board

Financial Responsibility

The Board should require the filing of a notice of intent to file an OFA as a condition precedent to the filing of an OFA in abandonment and discontinuance proceedings. The due dates for such notices of intent should be those that are set forth in the current regulations governing the filing of notices of intent. No OFAs should be accepted from offerors who have failed to file a notice of intent, except with the consent of the abandoning railroad.

The Board should clarify the concept of “financial responsibility” by providing that an OFA offeror is deemed financially responsible only if the offeror possesses the financial ability, through its own financial resources or through demonstrated creditworthiness, to acquire the property in question and provide operationally and financially feasible freight rail service for a period of not less than two years.

In order to assure that railroads are required to provide valuation information only to legitimate OFA offerors, and to prevent potentially needless disputes about the financial responsibility of offerors, the Board should require that, when the OFA offeror files its notice of intent, the offeror must provide preliminary documentary evidence of financial responsibility. At a minimum, the Board should require that an OFA offeror provide:

- A certification from a certified public accountant of the offeror's financial position.
- A certification made under penalty of perjury stating whether the offeror is currently the subject of a Chapter 7, 11, or 13 proceeding under the United States Bankruptcy code, or has previously been judicially declared bankrupt. Offerors who are currently in bankruptcy proceedings should be deemed *not* to be financially responsible, and there should be a strong presumption that offerors that have sought bankruptcy protection or been adjudicated as bankrupt in the past are not financially responsible. Offerors who claim to have been discharged from bankruptcy should be required to submit documentation showing such discharge.
- A certification by the offeror that the offeror has not previously made an offer under the OFA process that the offeror was unable to consummate. Offerors who cannot provide such a certification should be required to explain the circumstances of their failure to consummate the previous offer and should be presumed not to be financially responsible in most circumstances.
- A certification by the offeror stating that the offeror has never been found by the Board *not* to be financially responsible or otherwise had an OFA rejected by the Board. An offeror who has previously been found not to be financially responsible should be presumed not to be financially responsible. To overcome such a presumption of lack of financial responsibility, the offeror should be required to provide substantial evidence that the offeror's financial situation has materially improved since the previous finding was made and that the offeror can satisfy the standards for financial responsibility.

The Board's regulations should provide that the Board will reject a notice of intent that does not include the required preliminary documentary evidence of financial responsibility.

If the OFA offeror meets the preliminary requirements, and the Board accepts the notice of intent, the Board's regulations should require the offeror to submit with its offer capital

investment plans, service plans, and further financial information as necessary to establish the offeror's ability to cover the costs of:

- acquiring the property in question, as well as sufficient equipment;
- retaining employees or other necessary agents; and
- rehabilitating, repairing, and maintaining the transportation facilities in sufficient condition to provide operationally feasible freight rail service and fulfill all common carrier obligations for a period of not less than two years,

The Board's regulations should emphasize that where a line is out of service or in need of repair, the OFA offeror must provide detailed projections of the costs involved in returning the line to service consistent with FRA standards of good repair, as well as market information demonstrating demand for rail service sufficient to support the provision of that service for at least two years after the line is returned to service.

The Board should require that the offeror support its statement of financial responsibility with "concrete financial evidence such as income statements, balance sheets, letters of credit, or other financial statements." *Norfolk S. Ry. Co.—Aban. Exemption—In Somerset County, PA*, AB 290 (Sub-No. 305X), slip op. at 1 (STB served Jan. 30, 2009). If an offeror cannot document that it has in its possession the necessary funds for acquiring, rehabilitating, and maintaining the property in a state of good repair consistent with federal law, and for providing freight service, the Board's regulations should require that the offeror provide documentary proof that it will be able to obtain necessary funding from third party sources. Such proof should be presented in the form of a "verified assurance" from the third party or an agreement with the entity purporting to be the source of funds. *Indiana S.W. Ry. Co.—Aban. Exemption—in Posey and Vanderburgh Counties, Ind.*, AB 1065X, slip op. at 4 (STB served Apr. 8, 2011); *accord Union Pac. R.R. Co.—Aban.—in New Madrid, Scott, and Stoddard Counties, Mo.*, AB 33 (Sub-No., 261), slip op.

at 2 (STB served July 30, 2009); *Ariz. & Cal. R.R. Co.—Aban. Exemption—in San Bernardino and Riverside Counties, Cal.*, AB 1022 (Sub-No. 1X), slip op. at 1 (STB served July 15, 2009).

The Board also should eliminate the presumption that governmental and other public entities that have not previously administered or provided common carrier freight operations are financially responsible. In light of the severe and well publicized financial difficulties recently experienced by many public entities, the presumption has outlived its usefulness and its basis in fact. The unfortunate reality is that many public entities lack the financial resources necessary to undertake common carrier obligations. *See, e.g., Indiana S.W. Ry. Co.—Aban. Exemption—in Posey and Vanderburgh Counties, Ind.*, AB 1065X, slip op. at 6 (STB served Apr. 8, 2011) (town found not to be financially responsible).

Thus, the STB should require that governmental and other public entities seeking to establish financial responsibility provide the same type of documentary evidence required of other offerors. The STB also should require governmental and other public entities to demonstrate that they have taken the steps required under applicable law (municipal, state, or otherwise) to authorize that specific governmental or public entity to acquire the property and common carrier obligations, including obtaining or creating legally sufficient authorizations to expend funds for such purposes and obtaining any authorizations required under applicable laws from state authorities.

Although, as discussed below, most OFA offerors should not be required to demonstrate community support for continued rail operations, such a showing is relevant to OFAs made by governmental and public entities. Without such a showing of public support for continued freight service, a change of political administration could undermine ongoing efforts to continue freight service through the OFA process.

Finally, for the reasons stated by Norfolk Southern Railway Company in its petition to institute a rulemaking to address abuses of Board processes (EP No. 727), the Board should establish a pre-approval process and other rules for OFA filings by individuals with an established history of not being financially responsible parties or of abusing Board processes.

Continuation of Rail Service

As noted in the ANPR, the Board has “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.” *Offers of Financial Assistance*, EP No. 729, slip op. at 3 (STB served Dec. 14, 2015). And the Board and the courts have definitively resolved the issue: The preservation and continuation of *freight* service is the fundamental purpose of OFAs.¹

As the Tenth Circuit noted, “[w]e are troubled by the constitutional problems inherent in petitioners’ interpretation. It would be difficult indeed to justify a statute that forces a rail carrier desiring to discontinue freight rail service to sell its lines solely because a ‘financially responsible’ person offers to purchase them. Whereas a statute that forces the sale of potentially

¹ See, e.g., *Borough of Columbia v. STB*, 342 F.3d 222, 226 (3d Cir. 2003) (“When a carrier has applied to abandon a rail line, ‘any person’ may file an OFA, which is an offer to purchase or subsidize a rail line and *so to facilitate continued freight rail service.*”) (emphasis added); *Kulmer v. STB*, 236 F.3d 1255, 1256 (10th Cir. 2001) (firmly rejecting petitioners’ “claim [that] the STB erred in dismissing their OFA because the OFA provisions do not expressly require the STB to consider rail service continuation as a factor in approving an OFA” and upholding the STB’s consideration of future freight service as a factor in weighing OFAs); *Redmond-Issaquah R.R. Pres. Ass’n v. STB*, 223 F.3d 1057, 1063 (9th Cir. 2000) (“[W]e hold that the STB’s interpretation of § 10904 as authorizing it to reject OFAs which are not intended to enable the continuation of rail transportation is reasonable.”); *Roaring Fork R.R. Holding Auth.—Aban. Exemption—in Garfield, Eagle, & Pitkin Counties, CO*, 4 S.T.B. 116, 119 (1999) (“The OFA process is designed for the purpose of continuing to provide freight rail service, and is not to be used to obstruct other legitimate processes of law (whether Federal, state, or local) when continuation of such service is not likely.”), *aff’d sub nom. Kulmer v. STB*, 236 F.3d 1255 (10th Cir. 2001).

abandoned lines to ‘financially responsible’ persons who will continue rail service at least furthers a legitimate government interest in preserving access to, and service over, rail lines.”

Kulmer, 236 F.3d at 1257.

To assure that an OFA is being made for the purpose of continuing freight rail service, the Board has directed that “[a]ny person who intends to file an OFA should address one or more of the following: whether there is a demonstrable commercial need for rail service, as manifested by support from shippers or receivers on the line or as manifested by other evidence of immediate and significant commercial need; whether there is community support for rail service; and whether rail service is operationally feasible.” *Consolidated Rail Corp.—Aban. Exemption—in Hudson County, NJ*, AB 167 (Sub-No. 1190X), slip op. at 2 (STB served Jan. 7, 2009) (hereinafter “*Conrail 1190X*”). In addition, the Board has directed applicants to address “whether acquisition of freight operating rights would interfere with current and planned transit services; and whether continued rail service is operationally feasible” *Los Angeles County Metro. Transp. Auth.—Aban. Exemption—in Los Angeles County*, AB 409 (Sub-No. 5X), slip op. at 3 (STB served June 16, 2008).

The Board’s regulations should require offerors to address each of the factors set forth above in establishing the need for, and feasibility of, continued freight service. *Conrail* notes, however, that in general, the presence or absence of “community support for rail service” (*Conrail 1190X*, slip op. at 2) is not an important consideration in evaluating OFAs, except, as noted above, when the offeror is a public entity. In *Conrail*’s view, the absence of community support should not be counted against an OFA, although the presence of such support may be a consideration in favor of an offer.

Thus, Conrail suggests that Board regulations mandate that offerors establish the need for and feasibility of continued freight service by providing documentary evidence at the time of the offer that demonstrates that:

- There is a demonstrable commercial need for rail service, as manifested by verified statements from shippers or receivers on the line that specify the volumes likely to be shipped and reflect a commitment to ship freight on lines that are preserved through the OFA process for no less than two years.
- Continued rail service is operationally feasible.

Where a line has been out of service for two or more years, the showing required of offerors should be even more stringent. In those instances, the offeror should be required to provide:

- A conceptual plan of the proposed transportation facility;
- The location of any required turnouts, related sidings, or other track infrastructure;
- Proof that it owns or otherwise controls all property not subject to the OFA that is required for the proposed transportation facility;
- Proof that there will be no unreasonable interference with current rail operations; and
- A demonstration that there will be no negative environmental or other impacts on the community.

In addition, as noted above, public and government entities should be required to address whether there is community support for rail service. *Conrail 1190X*, slip op. at 2. Other offerors could also address this issue if they wish to.

Identity of the Offeror

Citing *CSX Transp. Inc.—Aban. Exemption—in Allegany County, Md.*, AB 55 (Sub-No. 695X) (STB served Apr. 22, 2008), the Board also has asked whether OFA regulations should include provisions to avoid uncertainty about the identity of OFA offerors. Although the cited

case was an extreme example of the confusions that can result from lack of clarity about the identity of OFA offerors, Conrail itself has repeatedly dealt with confusion and other problems resulting from joint OFA filings by multiple individual filers, as well as issues arising from filings made by entities purported to be corporations that were not, in fact, valid corporate entities at the time. In such cases, it can be difficult to know which entity is claimed to be financially responsible, whether the offeror can make a legally valid offer, or with whom the railroad should negotiate.

To address these problems, Conrail endorses the proposal for the Board to require that multiple parties who intend to submit a joint OFA do so through a single legal entity, such as a corporation or partnership. Such a requirement would impose little burden on joint offerors, because, to Conrail's knowledge, the process of forming corporations and partnerships under most states' laws is not particularly onerous or expensive. Moreover, any argument by offerors that it would be too burdensome or expensive for them to create a single legal entity to make an OFA offer should raise questions about the legitimacy of the offerors: if they cannot even form a legal entity to make an OFA, how could they acquire property and fulfill common carrier obligations pursuant to an OFA?

Regulations requiring individuals filing OFAs to provide address (and other contact) information and requiring corporate and other business entities to identify their exact legal name, the state under whose laws the entity is organized, and the address of the entity's principal place of business also would assist in evaluating offerors' financial responsibility and facilitating negotiations with OFA offerors, while placing little burden on such offerors.

In addition, the Board should mandate that all business entities making OFA offers provide documentation showing that, as of the time the notice of intent to file an OFA is made,

and as of the time an actual offer is made, the entity is in good standing in the state under whose laws the entity is organized.

CONCLUSION

Conrail welcomes the Board's interest in considering regulations to govern and clarify the OFA process. Conrail urges the Board to adopt the proposals set forth above. Conrail's proposals, if adopted, would ultimately streamline the abandonment and OFA process and prevent the waste of railroad and Board resources that results from protracted litigation over the legitimacy of OFA offers.

Respectfully submitted,

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