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Before the Surface Transportation Board

Offers of Financial Assistance –)
) Ex Parte 729
Advance Notice of Proposed Rulemaking)

COMMENTS ON BEHALF OF CITY OF JERSEY CITY

The subject of this Advance Notice of Proposed Rulemaking ("ANPR") is the "offer of financial assistance" ("OFA") remedy provided under the ICC Termination Act (ICCTA), 49 U.S.C. 10904, in rail abandonment proceedings pursuant to 49 U.S.C. 10903 or 49 U.S.C. 10502 (petitions for exempt abandonment and class exemption abandonments under 49 C.F.R. 1152.50). The Board in the ANPR does not propose any rule changes, but appears to raise questions seeking information or views on which the agency may base proposed rules in the future. The ANPR appears to have been precipitated by a petition for rulemaking filed by Norfolk Southern Railway Company (NSR) in response to what NSR views as abusive invocation of the OFA remedy by Mr. James Riffin and Mr. Eric Strohmeier (d/b/a CNJ Railroad) in multiple NSR (and other) abandonment proceedings.¹

¹ See Petition of Norfolk Southern Railway Company to Institute a Rulemaking Proceeding to Address Abuses of Board Processes, Ex Parte (EP) 727, served Sept. 23, 2015, denying petition but indicating intent to initiate an ANPR.

These comments are submitted on behalf of the City of Jersey City (New Jersey), hereinafter "City." Since the City has experienced considerable difficulty in obtaining remedies in connection with the federal abandonment process, these comments will be relatively extensive. Part I deals with interest, experience and standing for judicial review. Parts II and III address substance. As shown below in Part II, the chief abuse of the OFA remedy (and all other agency remedies in the abandonment context) arises when railroads engage in illegal de facto abandonments, or when an OFA is filed to subvert a public project on the corridor. The agency should avoid cobbling up the OFA process to please rail interests, and instead should focus on abuse of the abandonment process itself and on protecting public projects from abusive use or abusive non-use of agency procedures.

As shown in Part III, some of the questions raised by the agency (which seem to arise at least in part from concerns from the rail industry as manifest in the NSR petition referenced in note 1) appear to be better addressed to Congress for they involve changes to the statute, not the regulations. In other instances, the questions do not take into account the public interest, or appear to be looking to "solutions" to perceived abuses that risk - or may result in -- in abuse of the public interest.

I. City Has a Direct Interest in this ANPR

City makes the following showing in order to assist in establishing standing for purposes of possible future judicial review in the event of a rule change.

City is the second largest municipality in the State of New Jersey, with over a quarter million people, a high population density, and miles of Hudson River waterfront. The City has been and remains a port of entry and transportation terminus, as well as a distribution and manufacturing center, with great ethnic diversity and heavy dependence on public transit. The City formerly hosted passenger and/or freight termini for most of the major railroads serving the East Coast, and the City's history is intertwined with those railroads. It is hardly surprising that the City harbors multiple historic districts, landmarks and other historic assets associated with its rail history.

In the past decade, the City has been the location of at least two unlawful de facto abandonments in which, once the railroads involved were forced to file abandonment proceedings, the "OFA" remedy was invoked by Mr. Riffin and/or CNJ Railroad, and (in the case of the Harsimus Branch) by Jersey City itself.

The two proceedings are as follows²: (1) Consolidated Rail Corp. - Ab. Ex. - in Hudson County, NJ, AB 167-1190X, served May 17, 2010 (exempting line from OFA procedures in light of interference with Hudson Bergen Light Rail System) (referenced in ANPR served Dec. 14, 2015, slip op. at 3), and (2) Consolidated Rail Corp. - Ab. Ex. - in Hudson County, NJ, AB 167-1189X [initiated by Conrail in 2008, still unresolved].³ AB 167-1189X was initiated by Conrail in response to City of Jersey City, et al - Petition for a Declaratory Order, F.D. 34818, petition filed January 12, 2006, granted decision served Aug. 9, 2007, pet. reh. denied Dec. 19, 2007, vacated Consolidated Rail Corp. v. STB, 571 F.3d 13 (D.C.Cir. 2009)]. In AB 167-1189X, Conrail and its parents (NSR and CSX) sold a section 106-protected portion of the Harsimus Branch (a former Pennsylvania RR mainline for freight) to a developer who immediately sued the City for permits to tear out the section 106 protected asset and

² NSR and CSX [co-owners of Consolidated Rail Corporation ("Conrail")] filed co-terminus discontinuance proceedings with Conrail's abandonment exemption proceedings.

³In AB 167-1190X, City understands that at least one title company for a developer (properly) refused to insure title to an illegally abandoned line, forcing Conrail into an STB proceeding. In AB 167-1189X, Conrail's chosen developer somehow managed to get title insurance in an illegal abandonment, but Conrail, NSR and CSX ultimately were forced into compliance with STB jurisdiction after extensive litigation by City, Rails to Trails Conservancy, and PRR Harsimus Stem Embankment Preservation Coalition.

devote it to non-rail use. Conrail (and NSR and CSX) took the position that a freight main line was an unregulated spur, not a line subject to STB abandonment jurisdiction. On challenge from the City in F.D. 34818, the railroads and the developer lost. The developer filed for rehearing and claimed that the line was authorized for abandonment under the Railroad Revitalization and Recovery Act (3-R Act). The developer lost on rehearing, but got a ruling in the D.C. Circuit that STB jurisdiction must first be determined in the U.S.D.C. for D.C, where he and Conrail challenged the City's standing on the ground that the City should rely on state law for relief. The D.C. Circuit ruled that the City (and its allies) did have standing to challenge the railroad's non-compliance with STB jurisdiction. City of Jersey City v. Consolidated Rail Corporation, 668 F.3d 741 (D.C. Cir. 2012), reversing 741 F.Supp. 131 (D.D.C. 2010). The developer then flipped his legal theories, stipulating that STB had abandonment jurisdiction and accusing Conrail of fraudulent and negligent misrepresentation to the courts, the agency, the City, and the developer. Conrail gave up litigating the issue. But even after admitting this agency's jurisdiction in court, Conrail's chosen developer continued to litigate against STB jurisdiction for several more years both in court, and in an independent agency declaratory proceeding. See City of Jersey City v. Conrail, 968 F.Supp.2d 302 (D.D.C. Sept. 30,

2013), sum. aff'd, No. 13-7175 (D.C. Circ. Feb. 19, 2014); 212 Marin Boulevard LLC et al - Petition for Declaratory Order, F.D. 35825, served Aug. 11, 2014, reh denied, April 24, 2015. In addition, Conrail's chosen developer, in some instances with the express joinder of Conrail, filed multiple administrative and state court proceedings against the City, and in some cases Rails to Trails Conservancy and the PRR Harsimus Stem Embankment Preservation Coalition, including attorneys representing same, in order to burden the City's efforts to obtain a remedy for the illegal de facto abandonment of the Harsimus Branch. Along the way, City and CNJ Railroad timely invoked the OFA process. Six years later, long after the deadline for OFA's or other invocation of the OFA process had expired, Mr. Riffin, indicating he was acting as a "back up" plan to protect the interests of Conrail's chosen developer,⁴ sought to invoke the OFA process.⁵ In its decision served November 2, 2015 in AB 167-1189X, the agency allowed him to do so.

⁴ Riffin Reply, para 40 E, p. 10, in AB 167-1189X.

⁵ See Conrail - Abandonment Exemption - in Hudson County, NJ, AB 267-1189X, notice of exemption filed January 6, 2009; id., City's notice of intent to file an OFA timely filed March 27, 2009; id., notice of intent to file an OFA timely filed by CNJ March 27, 2009; id., notice of intent to file an OFA untimely filed by James Riffin June, 8, 2015.

In the same decision, STB at the behest of Conrail and its chosen developer imposed on the City some of the additional OFA showings concerning which the instant ANPR asks for advice.

The agency's ANPR has also raised issues concerning to compliance with regulatory deadlines which the agency ignored in its aforementioned November 2 decision in connection with participation in an OFA proceeding by Mr. Riffin as protector of Conrail's chosen developer.

In short, the City of Jersey City has had extensive experience with the OFA statute and Conrail, NSR and CSX abandonment proceedings, including those involving Mr. Riffin and/or CNJ. This experience goes to the crux of this ANPR. Additional information relevant to City's interest in this ANPR is set forth in the Appendix to these comments. City has ample knowledge, experience and interest for participation in this proceeding, and standing for judicial review purposes.

II. Key Problems in Administering OFA Remedy

In considering revisions to any remedies administered by the agency in connection with rail abandonments, the agency should be mindful among other things of its own limitations as well as the experience of entities like the City in respect to the agency's processes.

A. Statutory and Funding Constraints

The agency's administration of the OFA remedy is constrained by tight statutory deadlines for filing of OFA's and for conclusion of the OFA process. OFA's by statute must be filed within 120 days of inception of institution of a proceeding. Parties seeking to request that the Board set terms and conditions must do so within 30 days of OFA. Responses are due five days later. The only formal discovery provided by the statute is that the railroad must supply, upon timely request, certain valuation information specified in 49 U.S.C. 10904(b).

This tight time schedule affords essentially no time for an examination of the purpose or intent of a party filing an OFA. Not surprisingly, this agency in the past has refused to impose any kind of "bono fide" requirement on OFA's on the ground that this would be contrary to Congressional intent in adopting the form of OFA remedy embodied in ICCTA's 49 U.S.C. 10904. See 61 Fed. Reg. 67881 (December 24, 1996).

The problem of lack of time or provision for discovery⁶ concerning the circumstances of an OFA is compounded by the

⁶ In STB practice, a party may tender discovery to another party, but that party may refuse meaningful discovery, necessitating a motion to compel. This takes time for the agency to consider, rendering the discovery process time-consuming and expensive. Moreover, the agency is reluctant to allow discovery in abandonment proceedings (particularly in exemption procedures which railroads tend to use), and the City's experience is that even where the agency agrees to permit discovery, it does so only very narrowly, and certainly inadequately to address public interest issues.

agency's lack of resources to conduct investigations. The agency has no field offices, and has acknowledged that it generally only finds out about illegal abandonments after the fact.⁷ Partly for the same reasons, the agency lacks resources for independent examination into the bona fides of OFA's, especially given the tight time schedule for OFA's. And the lack of discovery mechanisms, let alone time for discovery, makes it serendipitous if a litigant is able meaningfully to contest assertions made by or against a particular OFA applicant in any given proceeding. Moreover, the agency's resources are likely further strained by its recent return to independence which the City understands was without the additional funding for the FTE's necessary to carry out general administrative duties previously borne by the Department of Transportation.

If the agency adopts rules or requirements, it should ensure that it has the resources and resolve to enforce them, which includes some means of independent investigation and some ability to smoke out unlawful conduct. Where resources are limited and even growing less, as they appear to be at STB, the agency should focus on situations leading to possible abuse and on non-resource intensive solutions. As indicated below, the

⁷ Consummation of Rail Line Abandonments that Are Subject to Historic Preservation and Other Environmental Conditions, Ex Parte 678, served April 23, 2008, slip op. at 4

situations most likely to lead to abuse of -- or against -- the OFA process involve illegal de facto abandonments and or where OFA's are advanced to subvert a public project, whether it is a rail, a transit, a highway, or a trail project, or some combination thereof, or perhaps a public project that is not transportation related at all.

B. Experience with Abandonments and OFA's

1. Abandonments, and unlawful de facto abandonments.

Although the ANPR in part arose from complaints of OFA abuse by Mr. Riffin and/or CNJ arising from the rail industry, the Board's net should be cast more broadly. The OFA remedy is only material in the abandonment process. In Jersey City, all instances of what railroads appear to perceive as abuse have arisen when the abandoning railroad (in Jersey City, the abandoning railroad is Conrail, since 1998 owned by NSR and CSX) has engaged in an unlawful de facto abandonment by selling off its property without prior STB abandonment authorization either to a private developer or to a public agency for a use incompatible with continued use for freight rail purposes. In short, the railroads (and their chosen developers) engage in unlawful activity, and then complain greatly when an OFA or other remedy is invoked which might upset their unlawful achievements. The long term "remedy" is not to change regulations to make OFA more difficult, but for the railroads to

obtain an abandonment authorization before they sell rail lines for non-rail use.

Under the ICC Termination Act (ICCTA), like the Interstate Commerce Act (24 Stat 379), the Nation's railroads, though privately owned, have a common-carrier obligation to serve shippers on their lines. 49 U.S.C. 11101(a). To be relieved of that obligation for a particular line, a railroad must obtain the Board's permission to abandon the line or discontinue service over it. See 49 U.S.C. 10903.⁸ In particular, 49 U.S.C. 10903 provides that no rail line in interstate commerce may be abandoned (or service over it discontinued) without prior authorization by the STB. 49 U.S.C. 10903(d). (Thus de facto abandonments prior to STB authorization are unlawful.⁹) STB is empowered to authorize abandonment of a line only if the Board finds that the public convenience and necessity (PCN) require or

⁸ If a railroad fails or refuses to serve shippers on the line, it violates its common-carrier obligation (49 U.S.C. 11101) and may be subject to injunctive relief and damages. 49 U.S.C. 11701-11704; GS Roofing Prods. Co. v. STB, 143 F.3d 387, 391 (8th Cir. 1998).

⁹ Accord, Consummation of Rail Line Abandonments that Are Subject to Historic Preservation and Other Environmental Conditions, Ex Parte 678, served April 23, 2008, slip op. at 4 ("In some cases railroads have taken actions affecting rail property without first seeking abandonment authority. When this occurs on inactive lines, we generally do not discover these actions until after the fact when the carrier seeks abandonment authority. Such actions are unlawful.").

permit abandonment. Id. In making this finding, the Board must consider whether an abandonment will have a serious, adverse impact on rural and community development. Id. If the Board finds PCN, the Board may authorize abandonment, or approve an abandonment with modifications or pursuant to conditions consistent with PCN. 49 U.S.C. 10903(e).

During the abandonment licensing process, the Board must comply with statutes like the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA). The conditioning remedy in 49 U.S.C. 10903(e) is frequently informed by NEPA and NHPA concerns. ICCTA, however, also provides two additional remedies for use in order to foster preservation of rail lines: 49 U.S.C. 10905 (public use conditioning) and 49 U.S.C. 10904 (OFA).

If the rail properties are suitable for public purposes, 49 U.S.C. 10905 authorizes the Board to impose conditions on abandonment governing their disposition. Section 10905 states that these can include a prohibition on disposal for a period not more than 180 days unless the properties have first been offered, on reasonable terms, for sale for public purposes. Unfortunately, even when the agency finds that an otherwise-to-be abandoned line is suitable for public purposes, the agency has failed or refused to ascertain whether (much less enforce that) it is first offered on reasonable terms for public use

before it is sold for private purposes. Railroads bent on defeating public projects thus find 49 U.S.C. 10905 relatively easy to evade: they simply illegally sell parcels in their lines in advance of abandonment.¹⁰ This "fait accompli" tactic historically has been a device used by Conrail in Jersey City. E.g., AB 167-1190X, AB 167-1189X.

This renders the remaining abandonment remedy, 49 U.S.C. 10904, all the more important. In 1976, Congress adopted legislation "guaranteeing any financially responsible person - including shippers and even state governments¹¹ - the right to purchase ... abandoned rail facilities..." Baltimore & O. RR Co. v. ICC, 826 F.2d 1125, 1128 (D.C. Cir. 1987) [discussing 49 U.S.C. 10905 of the Interstate Commerce Act, now recodified (with modifications) as 49 U.S.C. 10904]. Section 10904 provides a very fast-track eminent domain remedy for a community, another rail line, a shipper or "any person" with "financial responsibility" to acquire an otherwise-to-be

¹⁰ Of course, such sales are unlawful. Consummation of Rail Line Abandonments that Are Subject to Historic Preservation and Other Environmental Conditions, Ex Parte 678, served April 23, 2008, slip op. at 4. For 49 U.S.C. 10905 to be a meaningful remedy, STB must stop railroads from making unlawful de facto abandonments, or, alternatively, to void sales of parcels for conflicting private use in corridors that are subject to a public use condition.

¹¹ The statute actually indicates that any "governmental authority" is eligible to pursue an OFA by defining "a governmental authority" as equivalent to an eligible financially responsible person. See 49 U.S.C. 10903(d)(1) & (e).

abandoned rail line. Under section 10904, a party must file an "offer of financial assistance" ("OFA") for a line within four months of the initial abandonment application, with an explanation of any difference from the purchase price estimated by the abandoning railroad. This Board must determine in 15 days of the expiration of the four month period if there is a financially responsible offeror. 49 U.S.C. 10904(d)(1). If there is such an offeror, then abandonment is postponed for 30 days pending either a negotiated sales agreement or the offeror seeking terms and conditions for sale. Id. 10904(d)(2) & (e). The Board has 30 days from request to set terms and conditions (including compensation). Id. 10904(f)(1)(A). Because this affords little time for action, the Board by regulation requires that responses to the OFA offerant's evidence for terms and conditions be filed within five more days (in particular, 35 days after the original OFA is made). 49 C.F.R. 1152.27(h)(4). The Board sets the price at fair market value (FMV). FMV in general amounts to the constitutional minimum value, which for all abandonments of which City is aware is the "net liquidation value" or "NLV." See id. 1152.27(h)(6). NLV is the salvage value of rail, ties and other track material, plus the across-the-fence appraised value of real estate parcels in the rail property to which the railroad holds marketable (i.e., fee simple absolute) title, subject to appropriate discounts. The

main exception is in cases where a railroad has entered into a sale or other transfer agreement in advance of valuation. In those cases, the value specified in the sales agreement (if bona fide) becomes the NLV for the property in question. Under this formulation of NLV, easement parcels are valued at zero (no marketable title), and if the railroad purported to donate a parcel to which it had marketable title, then the value for OFA purposes of that parcel is also zero. See, e.g., Iowa Terminal Railroad v. ICC, 853 F.2d 965 (D.C. Cir. 1988).

Once this Board establishes terms and conditions, the offeror has ten days to withdraw its OFA, or the terms and conditions become binding. 49 U.S.C. 10904(f)(2). The Board's regulations provide that the terms and conditions become binding only if the offeror expressly accepts them in 10 days. If the terms and conditions are not expressly and timely accepted, the offer is deemed withdrawn and the line authorized for abandonment. 49 C.F.R. 1152.27(h)(7). If the Board finds that more than one financially responsible offer has been filed, other offerors have an additional ten days to accept the terms and conditions. Id. 10904(f)(3). The Board's typical terms and conditions require closing within 90 days of the order setting the terms, with payment by cash or certified check, transfer by quitclaim deed, with a release of liens within 90 days of

closing. See, e.g., CSX Transp. - Ab. Ex. - in Laporte et al Counties, IN, AB 55-643X, served April 30, 2004, slip at 9-10.

The "four month" time period for filing an OFA is an artifact of an earlier version of the House bill that gave rise to ICCTA, under which the OFA remedy was essentially the only remedy against an abandonment. To rationalize what is meant by four months from institution of the proceeding, the Board's implementing regulations provide that OFA's are due 120 days after an application is filed, or ten days after a decision granting an application is served, "whichever occurs sooner." 49 C.F.R. 1152.27(b)(1). However, these deadlines are contingent on the railroad promptly supplying certain valuation information specified in 49 C.F.R. 1152.27(a). If that information is not available in the application form filed by the railroad, an OFA offerant can request (within 5 days of a decision authorizing abandonment) that the Board toll the time for filing an OFA until the information is furnished. 49 C.F.R. 1152.27(c).

Of course the vast majority of abandonments are not regulated under 49 U.S.C. 10903, but pursuant to individual petitions for exemption (49 C.F.R. Part 1121 & 49 C.F.R. 1152.60) or pursuant to the two-year out-of-service class exemption (49 C.F.R. 1152.50). (The Board has authority to grant exemptions in individual instances, or to classes,

pursuant to 49 U.S.C. 10502(a) provided certain findings are made.) The Board has provided for the OFA remedy in all petition for exemption or two-year out-of-service class exemptions. Not surprisingly, regulations implementing the OFA remedy in exempt abandonments mirror the fast track provided by statute for the OFA remedy in 10903 ("regulated") abandonments.

Railroads in general seek greater compensation than the NLV valuation employed for OFA purposes. They thus have incentive to minimize its applicability by professing to need regulatory protection against "abuses." Since OFA is relatively fast track, one wonders what the fundamental abuse is. That abuse in most instances is the valuation of rail property under OFA at NLV, but that is not an abuse, it is the ordinary "gamut" that Congress intended abandonments to run. This problem is especially acute in unlawful de facto abandonments.

In cases where the railroads have engaged in unlawful de facto abandonments by a sale to a developer, the price on OFA under this Board's NLV approach in general is the amount the developer paid for the property. Thus an OFA may divest the party with whom the railroad contracted with any interest in the property. Borough of Columbia v. STB, 342 F.3d 222 (3d Cir. 2003) (parties advocating public project divested of any interest by OFA at their contracted price). But the fact that a railroad is forced to sell at NLV is not an abuse or abusive in any way.

See, e.g., Chicago & NW Transp. Co., 363 ICC 956 (1981), aff'd 678 F.2d 665 (7th Cir. 1982); Iowa Terminal Railroad v. ICC, 853 F.2d 965, 969 (D.C. Cir. 1988) (because OFA statute in generally affect "only those lines which ... have been found not economically viable," a railroad intent on abandoning the line is fairly compensated when it receives "the normal economic value of its assets").

Both the railroad and the developer may vehemently oppose the use of OFA where the OFA will result in the developer losing what it unlawfully purported to acquire. The railroad in such cases opposes OFA because it does not wish to be sued by the developer for misrepresentation or expectation damages resulting from the unlawful de facto abandonment, and the developer opposes because it wishes to maximize its profit expectations from the unlawful transaction. Thus in AB 167-1189X, Conrail and its chosen developer have entered into a settlement agreement in which they basically agree to cooperate to defeat any effective remedy against the illegal de facto abandonment of the Harsimus Branch, and the consideration for Conrail for that agreement is it not be sued. The developer in the meantime claims (most recently) that he should receive \$100 million for property he purchased in an unlawful de facto abandonment which under STB's OFA NLV standard is available to the City for \$3 million. The developer and Conrail thus view the City's efforts

to use OFA as abusive. They seek all manner of constraints on the City's use of the OFA remedy, and evidently have inspired Riffin to seek to invoke the OFA remedy in order to allow the developer and Conrail to escape the embrace of the City's proposed OFA. The unlawful de facto abandonment by Conrail and unlawful sale to the developer were abusive; and the Riffin OFA invocation was abusive. But the OFA remedy and the City's attempt to use it are not. It is not appropriate to load up an OFA (like the City's) with additional burdensome requirements (including unpredictable scheduling delays) in order to facilitate an unlawful abandonment deal between Conrail and its developers.

There is an additional problem which arises from railroad's failure to obtain STB abandonment authorizations before they abandon rail property: because STB regulation as a general manner preempts state economic regulation of railroads, state economic regulation of rail lines only is supposed to occur upon STB-authorized abandonment. Accordingly, in New Jersey, and we suspect most states, state law assumes that railroads will comply with federal abandonment law by obtaining an abandonment authorization before they purport to sell off their lines. For rail lines subject to STB abandonment proceedings, New Jersey provides that railroads must provide notice to units of government, and offer their properties at the same price they

entertain with developers (or suffer deed avoidance). NJSA 48:12-125.1.¹² When railroads like Conrail, CSX and NS evade federal abandonment licensing through illegal de facto abandonments, and thus subvert federal remedies of units of local government like Jersey City, they at the same time subvert state law remedies that are supposedly available to local and state governments.

In sum, the greatest problem in fair implementation of the OFA remedy experienced in the past decade and in multiple proceedings by the City of Jersey City is that Conrail (since 1998 owned by NSR and CSX) has engaged in unlawful de facto abandonments. City believes that these are far from isolated instances at least in the urban context. The chief priority of the agency should be to prevent the railroads from engaging in unlawful de facto abandonments, and a good way to start is to penalize them where this occurs, not "let them off" by weakening availability of the OFA remedy to units of local government. In all events, the "abuse" to date of the OFA process arises from the railroads and certain developers abusing the abandonment process. The remedy is not to "fix" OFA but to prevent

¹² Conrail and its chosen developer have argued that NJSA 4812-125.1 is preempted but it, like other lawful state remedies, is applicable only after this agency has authorized abandonment, and, as to fairness, is at least as favorable to the railroad as the OFA remedy and is similar to the laws of many other states.

abandonment abuse. Moreover, prevention of abuse of the abandonment process by railroads will assist in making the public use conditioning remedy (49 U.S.C. 10905) more meaningful, as well as allow section 106, NEPA, and state law to apply in a meaningful fashion.

2. OFA delays.

Railroads frequently complain of delays and burdens in OFA proceedings. This is especially the case in exempt proceedings, which are supposed to be expeditious, just as the OFA remedy is supposed to be expeditious. The delay problem by Jersey City's experience arises not from the OFA applicant so much as the railroad itself. Railroads seldom calculate estimated purchase prices and otherwise compile the basic financial information required for OFA purposes at the time they file petitions for (or notices of) exemption. Indeed, railroads sometimes take months or even years (Conrail has taken as long as six years) to compile that information. The lack of timely information is a problem. The OFA statute requires that the railroad "go first." In other words, the railroad is supposed to "promptly" supply valuation information to a party "considering" filing an OFA. 49 U.S.C. 10904(b). Per the Board's regulations, an OFA applicant has a fixed period to file the OFA - in the case of petitions for exemption, the lesser of 120 days from the filing of a petition for exemption or 10 days from a decision on the

petition in the case of petitions for exemption; in the case of notices of exemption, no later than 30 days from printing the notice of exemption in the Federal Register for two-year out of service notices. 49 C.F.R. 1152.29(b)(2). In order for the OFA applicant to comply with the OFA deadline, the railroad must be ready with its valuation information right away. This is relatively subjective, and given there is no specific deadline for valuation information to be supplied, can lead to confusion.

The Board's regulations therefore spell out an alternative schedule for exemptions, where the valuation information is not generally available as it presumably is in the application for abandonment process. Focusing on the two year out of service abandonment process, the Board by regulation provides that OFA offerants must file a notice of intent to file an OFA within 10 days of Federal Register publication. This automatically stays abandonment effectiveness for 40 days (normally ten additional days beyond the ordinary effective date). The OFA itself is then due 30 days after Federal Register publication unless within 25 days of publication the offerant files a petition to toll the deadline because the information specified in 49 C.F.R. 1152.27(a) (similar to 49 U.S.C. 10904(b)/10903(a) information) was not set forth in the railroad's notice or otherwise provided. 49 C.F.R. 1152.27(e)(2). Because valuation

information is seldom timely available in petition cases, there is a tolling provision for those as well.

Claims by the rail industry of abuse of OFA frequently arise because the rail industry files petitions and notices of exemption without compiling OFA valuation information. Then, when a party interested in the OFA remedy seeks the information, it is unavailable. A motion to toll follows. The motion is of course granted, but the proceeding then enters a kind of netherworld where further schedules are largely dependent on the railroad supplying the required information. In short, the "abuse" from delay of proceedings (a concern of NSR in its petition in EP 727) is frequently and perhaps almost always due to the railroad's failure to provide information which is the railroad's duty to assemble and to provide in the first instance. As Shakespeare's Cassius explains to Brutus in Julius Caesar, "[t]he fault is ... not in our stars, but ourselves..." In short, rather than blame others for delay, it would be better to acknowledge that the railroads themselves are the main culprits. The fault here is not OFA applicants but the railroads' lack of preparedness in exemption proceedings.

Jersey City's experience is a case in point. Conrail did not supply valuation information in 2009 either with its notice of exemption or after the City filed its notice of intent to OFA. The City filed a motion to toll. Rather than assemble the

information, Conrail sought an exemption from OFA. This request was frivolous for it was sought to upset a public project, not facilitate it in accordance with this Board's precedent. Even when Conrail's misplaced effort at an exemption was denied, Conrail balked. City ultimately was forced to file a motion to compel to obtain the valuation information. Conrail contested the motion with what amounted to another plea for exemption. This Board issued an order compelling the railroad. In short, based on the City's experience in 1189X and 1190X, as well as observation of other proceedings, the railroads are the primary cause of OFA delay because they fail to make their valuation information available in a timely fashion.

One means to prevent delays (which some railroads see as abusive) in the abandonment process is to require railroads to supply the information specified in 49 U.S.C. 10903(a) and 49 C.F.R. 1152.27(a) at the time that they file their petitions for or notices of exemption. Alternatively, the Board could provide that if the railroads do not supply that information within a relatively short period (30 days or less) from timely request, then the railroads shall be deemed to have waived any contest to the value set on the assets by the offering party.

To reiterate, in AB 167-1189X, both City of Jersey City and CNJ in March 2009 timely filed notices of intent to OFA and sought the information specified by statute and regulation.

Only after this Board granted City's motion to compel in a decision served on May 22, 2015 was any information responsive to the statute and regulation supplied by Conrail. In short, Conrail dallied for six years and forced the City to file a motion to compel it to comply with what should be a rudimentary and routine part of the abandonment process.¹³ A railroad seeking abandonment authority should come into any abandonment proceeding prepared to deal expeditiously with the main remedy administered by the Board rather than complain that the main remedy is abusive.

¹³ Conrail, of course, had illegally sold key portions of the Harsimus Branch to a developer prior even to seeking abandonment authorization, and then (after this Board determined the Harsimus Branch was a line of railroad for which abandonment authorization was necessary) entered into another contract with the developer committing the railroad inter alia to thwarting all STB remedies in abandonment proceedings (MOU dated 12 Oct. 2007, para 1 and to cooperation to "develop" the property. Id. para 3. A major incentive for Conrail to be dilatory, passive aggressive, and litigious in supplying the valuation information was its commitment to its chosen developer to "maintain the benefit of the [illegal] 2005 [de facto abandonment] sale..." Id, final whereas clause. This illustrates how illegal abandonments incentivize railroads (and developers) into strategies and tactics that cobble up not the entire abandonment process, including all remedies to unlawful de facto abandonments such as OFA's. The referenced MOU is on file with STB in AB 167-1189X (multiple pleadings by the City). While Conrail delayed the process in AB 167-1189X, its chosen developer hammered the City with multiple lawsuits and legal proceedings. Some of these are directly aimed at subverting the City's ability to seek STB remedies, or otherwise sought to gain control of the City's legal strategy and to deprive it and the public of meaningful relief.

The agency should not be tempted, much less stampeded, into "revisions" to protect the railroads from something they claim is abusive but which is simply a remedy the railroads dislike because of its valuation methodology. The OFA remedy is a kind of quid pro quo. In return for expedited abandonments, railroads are subject to a transfer remedy at NLV. It is there by the will of Congress. If the railroad industry wishes further to encumber or to neutralize the OFA remedy, then they should instead petition Congress for its repeal or other minimization. City suspects that they are reluctant to do so, for the availability of the remedy if anything should be expanded to protect the public interest in preserving our remaining rail infrastructure.

3. OFA's that subvert public projects

There unquestionably are instances in which OFA's are offered to prevent a public project or to hold it to ransom, without any reasonable possibility that the rail line will be restored to service (other than through a public project to that purpose). Mr. Riffin has advised the Board that he is seeking to invoke the OFA process in AB 167-1189X involving Conrail's unlawful de facto abandonment and sale of the Harsimus Branch to a developer in order to foster ("back-stop") the profit expectations of Conrail's chosen developer by providing a means to defeat the City's OFA. (That presumably would involve

Conrail and/or its chosen developer paying Riffin a fee to facilitating the developer in retaining control of the Harsimus Branch, through mis-use of the Board's policy of allowing Conrail to choose with whom to deal in the event of multiple OFA's.)

This Board in general dismisses OFA (and even exempts abandonments from the OFA process) where on balance it finds that shipper needs do not outweigh a public project on a corridor. E.g., Consolidated Rail Corp. - Ab. Ex. - in Hudson County, NJ, AB 167-1190X, served May 17, 2010. In cases in which the public project involves rail, and the OFA purports to be essentially the same, the agency has deferred to the public project. E.g., Roaring Fork RR Holding Authority - Ab. Ex. - in Garfield, Eagle & Pitkin Counties, CO, AB 547X, served May 21, 1999 (dismissing OFA).

The agency should continue to focus on protecting public projects from abuse. City will discuss this further in Part III in response to questions stated by the Board in its ANPR.

4. OFA remedy broadly applicable for use by units of government

The OFA statute has supposedly "guarantee[ed] any financially responsible person" the right to purchase an otherwise to be abandoned rail line at NLV. Baltimore & O. RR Co., supra, 826 F.2d at 1128. As this Board has long

recognized, financially responsible parties presumptively includes any governmental entity.¹⁴ Consistent with this, the Board has long recognized that the OFA statute is broadly available where there is an offeror willing to assume the common carrier obligation to provide rail service. Colorado Wheat Administrative Committee et al v. V and S Railway LLC, NOR 42140, served May 7, 2015, slip at 7 n.14, citing The Kan. City S. Ry. Co. - Aban. Ex. - Line in Warren Co., Miss., AB-103-21X, served May 20, 2008, slip at 4-5. The only exceptions of note involve cases in which an OFA would subvert a public project. E.g., Consolidated Rail Corp. - Ab Ex - in Hudson County, supra, AB 167-1190X, served May 17, 2010, slip at 3 (exempting abandonment from OFA due to adverse impact on Hudson Bergen Light Rail). The agency should avoid imposing additional requirements upon local and state governments seeking to employ the OFA process to facilitate public projects.

A governmental entity may seek to acquire an otherwise-to-be abandoned rail line for passenger rail in addition to freight

¹⁴ “[G]overnmental entities will be presumed to be financially responsible” for OFA purposes. 49 C.F.R. 1152.27(e)(1)(ii)(B). In point of fact, the regulation is not really what the statute says. Under 49 U.S.C. 10904(d)(1) and (e), a financially responsible person as well as a government authority may pursue an OFA. The issue is not that a governmental authority is presumed financially responsible. Instead, it must be treated as equivalent to a financially responsible person for purposes of being qualified to file an OFA.

rail purposes. The agency's ANPR fails to acknowledge or otherwise to take into account this fact. (For example, the ANPR asks if the OFA remedy should turn on commercial need of the line by shippers or receivers. It does not acknowledge that a municipality may prudently be prepared to offer freight rail service in conjunction with passenger rail even if there would be insufficient commercial use by shippers to justify private rail development.) In short, the agency appears to assume, for purposes of its ANPR, that the OFA remedy is only available for privately financed freight rail purposes. Indeed, that assumption also seems to underlie the agency's holdings concerning what Jersey City must show in order to be allowed to use the OFA remedy in AB 167-1189X. But the agency's assumption has never been upheld in a court of appeals. To the contrary, the leading decision on OFA - Chicago & N.W. Transp. Co. v. United States, supra, 678 F.2d 665 - involved a local government seeking to OFA a moribund freight rail line for passenger rail purposes.

When a local government seeks a line for passenger rail purposes, there is no statutory or policy basis to deny the OFA remedy, if the local government is prepared to assume the freight common carrier obligation for the minimum of two years required by statute.

In sum, if a governmental entity or other financially responsible person files an OFA, the relevant statute conditions the remedy's availability only (a) on the requirement that the OFA applicant not transfer or discontinue service on a line prior to the end of the second year after the OFA purchase closes, and (b) that the OFA applicant not transfer the line to a party other than the rail carrier from whom it was purchased for five years after the closing. 49 U.S.C. 10904(f)(4)(A). While the acquiring government must properly address freight rail continuation for a minimum of two years, there is no basis to add additional requirements, either in the positive (e.g., the government must offer continued freight for more than two years) or in the negative (e.g., the governmental entity cannot OFA the line if applicant also desires it for compatible passenger rail uses, or for that matter, for compatible historic preservation or open space).

If the agency is considering "revisions" to its OFA process, it must take care not to preclude OFA's that seek rail infrastructure for passenger rail purposes so long as the offerant (presumably a governmental entity) assumes the freight common carrier obligation and other "limitations" provided in the statute. Accord, Chicago & N.W. Transp. Co. v. United States, supra.

5. Summary

In Jersey City's experience, most if not all delays arising under the OFA statute are attributable to unlawful de facto abandonments or other misconduct, or simply lack of preparedness, on the part of the railroad seeking abandonment authority.

The best way to minimize OFA litigation in the context of illegal unlawful abandonments is to prevent railroads from engaging in illegal abandonments and attendant unlawful sales of their property for non-rail purposes. This would result in less litigation by railroads and their developers concerning OFA's, and also render other remedies under 49 U.S.C. 10905, NHPA section 106, and NEPA more meaningful. It follows that the agency should broaden the ANPR to consider ways to make not only the OFA but also other remedies more meaningful, and in particular, should seek ways to make it clear to railroads that de facto abandonment of rail lines (sales to developers prior to any abandonment authorization) may not be used as a means to evade either 49 U.S.C. 10905 or 49 U.S.C. 10904. Piecemeal sales of lines prior to any abandonment authorization is, after all, unlawful. Acting unlawfully should have consequences for the lawbreaker, and not be allowed to foreclose the rights and opportunities of the public.

Another fruitful way to address uncontrolled delay due to OFA's is to require railroads to supply 49 C.F.R. 1152.27(a)

information with their petitions or notices of exemption, or within 30 days of filing same, or face dismissal of their petition or notice, or a bar on submission of valuation information.

The agency should acknowledge that governmental entities may employ the OFA remedy to secure otherwise to be abandoned rail lines for multiple rail or other public purposes, including passenger rail purposes, at least so long as they meet the statutory requirement not to abandon or to discontinue freight rail service for two years, and not to sell the property to a third party (other than the original abandoning railroad) for five years post-acquisition.

III. STB's Questions

City will now offer comments on the specific questions rendered by the agency, although for flow of presentation, in some cases in a different order.

A. Financial Responsibility

The Board's ANPR discussion (slip op. at 2) does not acknowledge that governmental entities also seek to use the OFA remedy. Under the statute, any financially responsible party, or a governmental authority, may employ the OFA remedy. 49 U.S.C. 10904(d)(1) & (e). This Board's existing regulations state that governmental entities are presumed to be financially responsible for OFA purposes. 49 C.F.R. 1152.27(c)(1)(ii)(B).

While this presumption should be continued for governmental entities, the real point of the statute is that they must be treated the same as a private party qualified to make an OFA.

City nonetheless has an interest in how STB handles the issue of financial responsibility. First, although the regulatory "presumption" that a governmental entity is financially responsible is irrebuttable (the statute indicates that governmental entities must be treated as financially qualified), it is possible that a litigious railroad or its chosen developer may seek to rebut the presumption, especially in a de facto abandonment situation. Second, the City -- and the public generally -- have a legitimate interest in avoiding unnecessary and costly delays caused by OFA's filed by private parties who lack financial responsibility.¹⁵

- Should the Board require that potential offerors file notices of intent to file an OFA in abandonment and discontinuance proceedings by a date certain?

Under 49 U.S.C. 10904 and this Board's regulations, notices of intent to file an OFA are irrelevant (and certainly not required) in 49 U.S.C. 10903 regulated abandonment proceedings. There is no reason of which City is aware to alter that

¹⁵ The City, for example, has no wish for Mr. Riffin's non-meritorious OFA filings in AB 167-1189X to drag out proceedings to the City's detriment.

situation. Under the Board's regulations, in petition of exemption proceedings, an OFA is due the earlier of 120 days from initiation of the proceeding, or 10 days after the Board grants the exemption. 49 C.F.R. 1152.27(b)(2)(i). This time can be tolled upon timely request for 1152.27(a) valuation information. There is no provision for filing of notices of intent to file an OFA in petition for exemption proceedings.

The only proceedings in which notices of intent to file an OFA are currently relevant are 1152.50 two year out of service class exemption abandonments. In such proceedings, the regulations require notices of intent to OFA be filed within 10 days of Federal Register publication of the granting of the notice of abandonment. 49 C.F.R. 1152.27(c)(2)(i). The regulations also require that actual OFA's be filed 30 days after Federal Register publication (id. 1152.27(c)(2)(ii)(B), unless a tolling request in order to obtain 1152.27(a) valuation information is submitted within 25 days of Federal Register publication. Timely filing of a notice of intent to OFA is obviously important for it automatically stays the exempt abandonment long enough for either an OFA or tolling motion to be filed and acted upon. The only alternative would be for a party seeking an OFA opportunity to file a petition for stay, but that would inevitably be granted to the same end. A notice of intent to file an OFA is thus unavoidably necessary. Since

49 C.F.R. 1152.50 class exemptions are supposed to be fast track abandonment proceedings and since the OFA remedy under 49 U.S.C. 10904 is supposed to be an expeditious and efficient remedy, the deadlines for filing notices of intent to OFA and OFA's in 49 C.F.R. 1152.50 proceedings obviously are important. If the filings are not made by a date certain, then the supposedly efficient and expeditious class exemption proceeding goes off track, or the OFA remedy goes off track. Congress intended all abandonment regulation, including the OFA process to be streamlined. Deadlines relating to OFA are thus important and should be enforced.

Unfortunately, the City's experience with deadlines in the OFA process is that the agency has not honored them in a fashion consistent with its precedent, and this has permitted abuse of the OFA process. This Board's precedent uniformly indicates that late-filed notices of intent to OFA's are dismissed when the railroad objects. E.g., Illinois Central RR Co. - Abandonment Exemption - in Champaign County, IL, AB 43-189X, served May 11, 2015, slip at 2 (denying a grain cooperative's notice of intent to OFA that was ten days late); General Railway Corporation d/b/a Iowa NW RR, Abandonment Exemption - in Osceola and Dickinson Counties, IA, AB 1067-2X, served Oct. 24, 2008, slip at 2 (denying a nine day late request to file a notice of intent to OFA by a local railroad authority). This Board has

explained that “[a]llowing the late filing of an OFA over the owning rail carrier’s objection would be contrary to Congress’s direction to streamline the abandonment and OFA process.” AB 1067-2X, served Oct. 24, 2008, *supra*, at p. 2, citing Aban. & Disc. Of Rail Lines..., 1 STB 894, 909-10 (1996) (noting that Congress shortened the time for STB to process OFA’s under ICCTA). The Board’s position stated above mirrors that of its predecessor, the ICC, under the Interstate Commerce Act. See, e.g., Conrail Abandonment of Edgewater Branch in Hudson County, NJ, AB 167-1036N, served May 21, 1987 (rejecting request for terms and conditions as untimely filed); *id.* served Feb. 18, 1987 (allowing OFA applicant belatedly to file additional financial responsibility information only because Conrail did not object to the tardy invocation of OFA process).

Moreover, this Board does not ordinarily grant extensions for OFA’s themselves unless the railroad consents. Consolidated Rail Corp. - Abandonment Exemption - in Philadelphia, PA, AB 167-1191X, served Oct. 26, 2012, slip at 5 (rejecting incomplete OFA as untimely under deadline as extended). Indeed, this Board has said that “[t]here is no precedent to entertain an OFA filed 4-1/2 years after its due date, and to do so plainly would be inconsistent with Congressional intent.” Idaho-Northern & Pac. RR Co. - Abandonment Exemption - in Wallowa and Union Counties,

PA, AB 433X, served Dec. 13, 2001 (denying petition to allow the late-filing of an OFA by Oregon Department of Transportation).

In denying NSR's anti-Riffin EP 727 petition, the agency hinted it would make greater use of its existing rule authorizing it to strike redundant, irrelevant, immaterial, impertinent or scandalous" pleadings. EP 727, supra, served Sept. 23, 2015, slip op. at 4. But this seems not to be working. In EP 727, Mr. Riffin explained that this Board in 2007 "pledged to closely scrutinize any future filings" by Mr. Riffin (Riffin Comment filed July 21, 2015 in EP 727, at p. 3), but he claims that this Board has never stricken any of his pleadings even under this increased scrutiny. Id. at p. 4. If this Board feels that Mr. Riffin is so abusive of the Board's procedures as to serve as a basis for a formal ANPR (namely, this ANPR), then his failure to meet a deadline which heretofore had always been mandatory would certainly be grounds to eliminate him from the proceeding.

But in its decision in Conrail - Aban. Ex. - in Hudson County, AB 167-1189X served November 2, 2015, STB over the opposition of Conrail and the City allowed Mr. Riffin to file a "notice of intent to OFA" six years after the deadline for any OFA-related filings had passed.¹⁶ Allowing Mr. Riffin to subvert

¹⁶ City filed a petition for review of the Board's unprecedented action in the referenced decision. D.C. Cir. No. 15-1435. The

what heretofore had been strictly enforced deadlines for notices of intent to OFA -- or to OFA -- is especially puzzling in light of the Board's statements in EP 727.

In any event, if one wishes to prevent abuse of OFA proceedings, then uniformly applying deadlines for notices of intent to file an OFA in a class exemption abandonment proceeding is not only an excellent way to proceed but the only way to proceed. Class exemptions and OFA's are supposed to be fast track, not the six years and counting experienced by Jersey City.

- Should the Board alter the process for carriers to provide required financial information to potential offerors, and if so, how?

The statute requires carriers to supply persons considering filing an OFA with specified valuation information "promptly." This obviously must be done before the offerors make their offer. The Board's question thus makes sense only if the Board is considering making some kind of preliminary finding before valuation information must be made available. But that is not compatible with the statute, or with administration of an expeditious remedy. As already noted, Congress intended "to

government has moved to dismiss the petition for review on the ground that the November 2 decision is not an appealable final order. Since that is the government's position, the November 2 decision is not properly viewed as precedential.

streamline the abandonment and OFA process.” General Railway Corp., supra, citing Aban. & Disc. Of Rail Lines..., 1 STB 894, 909-10 (1996) (noting that Congress shortened the time for STB to process OFA’s under ICCTA).

While an expeditious OFA remedy is sometimes seen as a benefit to the rail industry, it is also a benefit to the public to be able to count on an expeditious and efficient remedy. The City would be delighted to be able to acquire the Harsimus Branch efficiently and expeditiously pursuant to the OFA remedy. That remedy is supposed to take about 60 days for the agency to implement so long as the railroad timely supplies valuation information. Jersey City has been asking the agency to implement the remedy for over six years. During the six years of delay to date, the City has been hammered with state court and local administrative litigation by Conrail’s chosen developer. This has been and continues to be a burdensome and costly ordeal.

The chief causes of delay encountered by Jersey City to date in connection with OFA are (a) complications and machinations that arise from the railroad or its chosen developers striving to evade OFA in order to “protect” unlawful sales of the line in advance of the proceeding,¹⁷ and (b) failure

¹⁷ Jersey City’s experience primarily relates to Conrail, NSR and CSX. However, they are not the only carriers who have

of the railroad to assemble or refusal of the railroad to make available 49 C.F.R. 1152.27(a) valuation information. The latter problem can be addressed by altering the time that rail carriers supply valuation information. As City has indicated in Part I, this Board should require carriers seeking abandonment authority under exemption procedures to provide 1152.27(a) information at the time of their initial filing, or no later than 30 days thereafter. This will serve to keep the exemption and OFA proceedings, which are supposed to be streamlined, on track.

- Should the Board require potential offerors to make a financial responsibility showing *before* requiring carriers to provide financial information to those offerors?

No. First, the statutory OFA remedy basically requires the railroad to state its valuation "promptly" to the OFA applicant (49 U.S.C. 10904(b)), then the OFA applicant to make its offer (id. 10904(c)). If voluntary negotiations do not work out a deal, then the OFA applicant must state its case in a request for terms and conditions (based in part on what the railroad has

engaged in apparent unlawful de facto abandonments. For example, a portion of the Alameda Belt Line was purportedly sold without abandonment authorization by its then owners (Union Pacific and BNSF). This sale also violated a private contract which City of Alameda ultimately enforced to acquire the line. Cf. City of Alameda - Acquisition Ex. - Alameda Belt Line, F.D. 34798, served April 3, 2006.

provided), and the railroad has five days to rebut. In short, the railroad goes first and last. The act of timely providing valuation information itself serves to weed out financially irresponsible OFAs by alerting parties considering OFA the railroad's asking price and the support for it. Requiring the OFA applicant to go first without seeing the railroad's information would not simply provide another litigation and delay opportunity while at the same time upsetting the sequence of events provided by Congress and providing the railroad with unfair advantage by allowing it to conceal information for rebuttal.

In addition, railroads generally are publicly held corporations, and owe a fiduciary responsibility to their shareholders to value their property properly for sale. They cannot in good faith respond to the validity of some sort of preliminary offer or case by a party considering an OFA if they themselves have not prepared an NLV valuation of their property in discharge of their duty to their shareholders. They are simply unable meaningfully to participate, much less negotiate, unless they have developed their own valuation information. In other words, unless the railroad provides the basic information on which it justifies its valuation on abandonment, the price of the asset from the rail perspective is speculative. Finally, in the absence of the railroad's own valuation assessments, the

agency would have only the applicant's estimates. The applicant could not explain why its assessment differed from the railroad's assessment, because that was not supplied. The agency would have no basis for making the financial responsibility determination. Moreover, making a determination of financial responsibility without an indication of value from the railroad is contrary to the statute, which provides the opposite.¹⁸ There is no requirement for an OFA applicant to make an offer (i.e., to indicate what it must be financially responsible for) until the railroad discloses its 1152.27(a) valuation information, and the offerant actually makes an OFA. At the time of the OFA, the offerant either accepts the value set by the railroad, or explains the disparity between the railroad's valuation and the offerant's own. 49 C.F.R. 1152.27(c)(1)(ii). At that point, the private applicant can show that it has sufficient resources or access to credit to cover the cost of the line as calculated by the offerant based on some actual information. And the agency can then make an informed judgement on financial responsibility.

¹⁸ City acknowledges that one can also offer to subsidize operations for one year, but the major use of OFA is for purchase, not one year of subsidized use, so the City's focus is on purchase OFA's. The same principles apply, however, to one year subsidy OFA's.

Given these considerations, it is unclear whether the Board could do anything responsive on this question. Delays due to information are attributable to lack of preparation by the railroads, and this sort of abuse is for the railroads to fix.

- Should the definition of financial responsibility include the ability, based on the price reflected in the offer of financial assistance, to purchase and operate for at least two years a line being abandoned...?

Governmental entities are, as already noted, deemed financially responsible by the statute. The issue posed by the Board thus relates to private entities making an OFA.

Because 49 U.S.C. 10904(f)(4)(A) requires that the OFA applicant maintain the common carrier obligation for two years,¹⁹ there are some Board decisions that suggest in dicta that the private OFA party should be financially capable for two years' operation. E.g., Union Pacific Railroad Co. - Ab.Ex.-in Lassen County, CA and Washoe County, NV, AB 33-230X, served Sept. 19, 2008 (rejecting an OFA for 220 foot segment of a 23.77 mile line on grounds of inconsistency with rail operation and lack of

¹⁹ Failure to discharge the common carrier obligation will subject the party acquiring the line under OFA to civil liability to shippers. See, e.g., GS Roofing v. STB, 143 F.3d 387, 392 (8th Cir. 1998). Thus any OFA applicant will need a realistic plan to discharge the common carrier obligation for the first two years of ownership (after which it may seek a discontinuance of the obligation).

showing of financial responsibility for the purchase).

However, so far as City is aware, the Board has never determined a party financially unfit solely because it could not finance operations on a line that it otherwise was fit to buy.

It would be potentially difficult to administer a requirement for financial responsibility for two years' operation in the fast track OFA proceedings. While the statute and regulations require railroads to make available valuation information, nothing requires the OFA applicant to make available its operational plans. Since an OFA applicant may have a different plan for operation of a line than the original carrier (Owensville Terminal Co., Inc. - Ab. Ex. - in Gibson & Posey Counties, IN, AB 477-2X, served Dec. 6, 1997), or since its plans might depend on how much of the line it purchased which in turn may depend in part on what the railroad's valuation case is, it is potentially difficult to administer an informed inquiry (especially under the tight OFA deadlines) into operational costs. If the Board were to attempt to determine such costs, it would presumably require OFA applicants to submit plans for operation and expected costs and revenues (which would presumably be under seal for they may contain confidential business information). City suspects this would only be feasible at the time the OFA were made. Then the entire OFA process would be encumbered with multiple uncertainties: the

OFA applicant would not know if the agency would permit its OFA to proceed, while at the same time the applicant faced the potentially costly burden of assembling the evidence for its valuation case and the expense of a terms and conditions request. Presumably for reasons such as these, there is little discussion of operating expenses in OFA cases.

49 U.S.C. 10904(b) envisions that the abandoning railroad will furnish information sufficient for an OFA applicant to calculate an amount necessary to provide an annual subsidy to the railroad to continue service (limit or one year), or purchase the rail line. The OFA applicant may provide a different value, with an explanation of the discrepancy with the railroad's estimates and the OFA applicant's alternative means of calculation. 49 U.S.C. 10904(c). The statute thus seems to envision the financial responsibility determination to be based on the ability of the OFA applicant to justify in the first instance an offer that differs from the railroad's valuation, and to show financial responsibility for whatever that offer is.

Finally, most OFA's are offered in the context of exempt abandonments where actual freight rail use has dwindled to zero, sometimes for years. Continuation of rail service in those instances amounts to continuation of the freight rail common carrier obligation. That in turn amounts to an ability to restore the line for freight rail service.

In sum, financial responsibility by statute must take into account the offerant's ability to pay the price (or the subsidy) reflected in the offer of financial assistance tendered the agency, and the Board sometimes references 10904(f)(4)(A) to imply that financial responsibility may also include two years' of operation. The focus in almost all instances is on purchase price.

If an OFA is tendered to defeat a public project, this Board customarily balances shipper need against the benefit of the public project. If the OFA applicant cannot demonstrate sufficient shipper need to justify operation of a line, then it is hard to see how that sort of need could possibly counterbalance the benefits from a public project on a line. Even in these instances, the issue is not the offerant's ability to fund actual rail operation for two years, but whether the operations even if funded are responsive to commercial needs justifying derailing a public project. Of course, if the private offerant has no financial ability to fund rail operation, that may be evidence of insufficient commercial need for the line in the first instance.

The City's chief concern in terms of financial responsibility for restoration of service is that the Board's approach weed out OFA's that are designed to subvert (or extract some kind of ransom or pay-off to allow) a public project to

which the line would otherwise be devoted. Thus in AB 167-1189X, where Conrail has removed trestles and track, City is not opposed to requiring private OFA applicants seeking to thwart the City's public project on the line (including the City's own OFA) to make some showing of enough funds to implement a technically feasible plan to restore service and to operate a rail line in two years.

In cases of de facto abandonment, railroads frequently unlawfully eviscerate rail infrastructure, removing bridges and track. This indeed has happened on the Harsimus Branch (F.D. 34818, AB 167-1189X). Requiring a showing of financial responsibility to restore service on such lines would reward the railroad for unlawful conduct by making successful OFA's more difficult. This would encourage unlawful actions by the railroad in subversion of federal remedies to abandonments. Unless the OFA may subvert a public project, no financial responsibility requirement should be structured in a fashion that rewards unlawful conduct by the abandoning railroad.

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

The private offeror should submit evidence of accounts at a reputable financial institution, or comparable access to credit, sufficient to cover at least the purchase price for the asset

and, at most, the net costs (if any) projected by the OFA applicant for its plan to discharge its common carrier obligation for the two years specified by statute. Governmental entities must be treated as financially qualified.

- Should the Board require potential offerors to make an "earnest money" payment or escrow payment, or to obtain a bond?

Governmental entities are deemed financially responsible. There is no basis to require any escrow or earnest money from them. As to private parties, any escrow or surety requirement must be consistent with the statute. There is no requirement in 49 U.S.C. 10904 that an OFA applicant post a bond as a general matter. Once an OFA is made, the agency is supposed to make a financial responsibility determination. If the OFA applicant is determined fit, then parties either negotiate a transaction, or are allowed to ask for terms and conditions (upon payment of a filing fee for same).

The Board does not supply any data showing that there are defaults on terms and conditions that in general could be remedied with a bond requirement. If a railroad wishes the agency to impose some kind of surety or escrow requirement, then it can file (after payment of the filing fee - currently in excess of \$25,000) a request for such a term to be imposed, along with an explanation of why it is appropriate in that

particular instance. The Board did not supply any data indicating a railroad had ever done so. If a railroad did request a bond, the OFA applicant under this Board's rules will have five days to respond, and the agency will issue terms no later than 30 days following the initial terms and conditions request. The Board could impose a bond if the railroad justified it under current law. Under the statute, an OFA applicant has ten days to accept or to reject terms and conditions. Under existing law, the terms and conditions once accepted are binding. 49 C.F.R. 1152.27(h)(7). The terms and conditions if binding are a contract. The OFA applicant presumably either must pay the purchase price at closing or is liable to the railroad for damages or injunctive relief. If a bond requirement were imposed, and the terms accepted, then failure to go to closing in theory would result in bond forfeiture.

In short, the only circumstance in which an escrow or bond requirement would even arguably provide protection is in an instance in which an OFA applicant accepted the terms and conditions but then defaulted at closing.

Based on the City's experience, the abandoning railroad would seek a bond requirement only as an impediment or cost to drive off an OFA. The railroad otherwise would prefer that the OFA applicant defaulted (or were otherwise unsuccessful) so that

the railroad could seek values in excess of NLV or otherwise "protect" unlawful de facto abandonment sales to third parties. For example, Conrail and its chosen developer in AB 167-1189X are not seeking a bond, but, in the case of the developer, are actively litigating against a bond already issued by the City that has raised millions for the acquisition of the Harsimus Branch. In other words, Conrail's chosen developer is actively seeking to erode the City's special funding mechanism for the City's proposed OFA. This suggests that the Board's question can be turned around. On other words, the Board should consider ways to prevent railroads and their chosen developers in unlawful de facto abandonments from litigating in state courts to prevent units of government from seeking federally administered remedies. The Board should consider requiring railroads to post bonds in proceedings arising from illegal de facto abandonments to cover the costs incurred by local governments in litigating with the railroads and their chosen developers in federal, state and local tribunals in order to obtain relief from the illegal de facto abandonments.

As already noted, in AB 167-1189X, Conrail has contractually bound not to negotiate a sale in the public interest. In other words, it has obligated itself to render STB administered remedies in the public interest meaningless. In such cases, the agency should consider requiring the railroad to

post a bond to cover the City's costs in requesting terms and conditions.

Conrail's chosen developer is litigating or threatening litigation to prevent the City from filing an OFA. In no event should an effort by Conrail or its developer to subvert the City's access to federal remedies be rewarded with a bond or surety requirement.

The only instance of which City is aware in which the Board has set a bond requirement in the context of an OFA proceeding involved what is now the High Line Trail in Manhattan, but it did not involve an OFA. A group of adjoining landowners brought an adverse abandonment action against Conrail to compel it to vacate its line. Conrail resisted, noting that the expense of dismantling the line was substantial. The adjoining landowners claimed that the amount was under \$7 million, far less than Conrail claimed, and the ICC granted their adverse abandonment application provided they furnished a bond covering the net salvage cost of the High Line in excess of \$7 million. This result was upheld on appeal. See Conrail v. ICC, 29 F.3d 706 (D.C.Cir. 1994). The adjoining property owners never placed the bond, so the adverse abandonment lapsed. While the entire affair shows that the Board has great flexibility under 49 U.S.C. 10903(e) to impose conditions on abandonment, it is not

instructive as to how a surety will prevent abuse, especially without provoking more abuse, in the context of OFA's.

- 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?

This question appears to arise from the issues expressed in NSR's unsuccessful petition to control repeated OFA filings by Mr. Riffin and/or CNJ Railroad (City understands that Mr. Riffin owns a financial interest in CNJ Railroad). City begins by stating that it is sympathetic to NSR's concern about Riffin. Riffin has indicated that he wishes to work with Conrail's chosen developer to "defeat" the City. He wishes to misuse or subvert STB procedures to thwart a public project on the Harsimus Branch and to foster the developer's economic gain through successfully pulling off an unlawful de facto abandonment. The Board has allowed him to file a notice of intent to OFA six years out of time. Riffin has gone beyond being an officious intermeddler using the system to hold railroads to compliance with the law without any real interest in a particular proceeding and is now actively in the realm of using the OFA process for the declared purpose of thwarting public projects and the public interest.

But the Constitution guarantees all citizens a right to petition their government, as well as due process. Since STB is

part of the government, it is difficult to single out some person or group for discriminatory removal from the petitioning process, unless they subvert procedural rules like filing deadlines. While NSR represented in its petition that this Board has issued more than 80 decisions in which Mr. Riffin was involved as a party or mentioned, Mr. Riffin points out that the agency has yet to strike any of his pleadings. Compare NSR Petition in EP 727, filed May 26, 2015, at p. 5 with Riffin Comment in EP 727 at p. 4. Riffin seems to have been successful in some of his OFA's. Neither NSR in its petition nor this Board in its ANPR has provided any real data on Mr. Riffin or any other individual or group of alleged malingerers sufficient for the City to form a judgment on how to frame a new rule to deal with them that would not create or leave room for more or worse abuse. City does not yet see any new "neutral" criteria to weed out Riffin or his ilk without the risk of causing more harm than benefit, much as we might share NSR's EP 727 cry of pain.

The classic response to a frivolous filing is to award attorney's fees and possibly punitive assessments on a case by case basis. But this Board generally does not do so.

Based on the City's experience and NSR's pleading in EP 727, the crux of the problem is that railroads should not engage in unlawful de facto abandonments that require post hoc

correction (for that results in litigation); railroads should make their valuation information available in a timely fashion and otherwise take steps to make accurate filings; and this Board should enforce its filing deadlines and pleadings content requirements. If Riffin or similar parties file belated or incomplete pleadings, they should be promptly thrown out of the process, which is what the Board appears to do to bona fide shippers and rail transportation agencies with greater alacrity than NSR portrays the situation in connection with Riffin, or than the City has experienced in connection with Riffin. In short, the Board should follow the precedent set in Illinois Central RR Co. - Abandonment Exemption - in Champaign County, IL, AB 43-189X, served May 11, 2015, slip at 2 (denying a grain cooperative's notice of intent to OFA that was ten days late); and General Railway Corporation d/b/a Iowa NW RR, Abandonment Exemption - in Osceola and Dickinson Counties, IA, AB 1067-2X, served Oct. 24, 2008, slip at 2 (denying a nine day late request to file a notice of intent to OFA by a local railroad authority). Before adding more rules, the agency should start by more uniformly enforcing what exist. If the agency enforces what exists, then at least some, and perhaps much, of the problem may go away.

There is also the issue of "standing." The doctrine of standing arises from Constitutional requirement that federal

courts decide "cases or controversies" which is taken to mean that they should not offer merely advisory opinions. Federal courts accordingly require parties to their proceedings to have standing, in the form of some injury for which redress is available. An academic or general or taxpayer interest in a subject is not enough. The Board is not a court and does not have a standing requirement. Perhaps the agency is asking whether it should establish a requirement in the nature of "standing" in order to file an OFA. If so, the agency should deem any local or state governmental agency as having sufficient standing to file an OFA, or to contest an OFA as inappropriate if it will subvert a public project.

But even without a standing requirement, where Riffin announces to the agency that he wishes six years out of time to participate in the OFA process in order to thwart the City's public project and to assist Conrail's chosen developer in maximizing profit from an illegal de facto abandonment involving a section 106 protected historic asset, there is more than officious intermeddling, there is active interference in a public project and abuse. How he is nonetheless allowed to participate is perplexing. But at least some of that would be addressed if the Board would enforce its deadlines.

When Riffin or any other party invokes the OFA process in order to defeat a public project, then the Board should exempt

the proceeding from that party's OFA. Compare LACMTA - Ab.Ex. - in Los Angeles County, CA, AB 409-5X, served June 16, 2008 (Riffin alerted that any OFA would subvert public project and thus showings of commercial need necessary, for the Board is considering an exemption from OFA) with id. served July 17, 2008 (Board concludes that the line was already exempted from abandonment and OFA requirements, but would qualify for exemption from OFA in any event).

B. Continuation of Rail Service

STB poses questions concerning whether it should require showings of commercial need by shippers and receivers as a condition to allowing the OFA process to move forward. Such a requirement would ostensibly be to prevent abuse of the OFA process. Since most OFA's are in connection with exemption proceedings and indeed may well involve rail lines out of service for two or more years, the issue is not so much actual rail continuation as rail restoration. Many shippers seek otherwise out of service lines as available alternatives to hold down or to negotiate better transportation costs. Many local governments seek otherwise out of service lines in order to foster future business and job opportunities. These have not heretofore been regarded as illegitimate purposes. They instead represent shippers and communities being willing to take on the costs of maintaining transportation infrastructure that the

shipper or community believes important for its survival or development which are no longer economic for the railroad. City is thus dubious of any requirement that OFA's now hinge on showings of commercial need.

On the other hand, City of Jersey City is well aware that individuals or corporate entities opposed to public projects to preserve rail corridors invoke the OFA process to defeat the public project. The City has already discussed its concerns about Riffin in AB 167-1189X. But there are others who advise use of OFA to thwart public projects. For example, the National Association of Reversionary Property Owners (NARPO) on its website as updated December 15, 2015 contains a link to "NARPO's Railroad Right of Way Primer on Railroad Easements and Reversionary Rights." Although NARPO appears to direct its energies primarily against rail trail proposals (all of which are public projects), the methodology advocated in the "Primer" to use OFA to upset rail trail projects can be employed to upset any public project involving an otherwise-to-be abandoned rail line. NARPO's advice thus raises a general concern about abuse of the OFA process. It is thus worthwhile to study what NARPO says. The Primer, dated December 10, 2015, after discussing ideas on how to promote political opposition to preservation of rail lines, states as follows (p. 5 of 8):

"There is another avenue for shippers and local property owners when it comes to abandonment of rail lines. Anyone with the financial ability to acquire the rail line and operate it can step forward at the time the abandonment application is being processed by the STB and acquire the rail line. The federal statute that allows this "forced sale" is 49 U.S.C. 10904 and federal regulations 49 C.R.F. 1152.27 implement this statute. These laws allow anyone to step forward and buy the operating rail line for its "net liquidation value". Net liquidation value is the salvage value of the rails and ties plus the value of the right of way land the railroad owns in fee title. In that railroads generally do not own any fee title to their rights of way, there is usually not a great cost to acquiring the rail line through the forced sale procedures. If you intend to acquire a rail line through the forced sale procedure, you need to have your ducks in a row and your finances all set up as there is only a 10 day window to make your application for the forced sale. You will need legal help in these forced sales and the best attorney in the country for this is _____. This is all _____ does in his practice. He can be contacted at _____ in Chicago.²⁰

In short, NARPO advises local landowners to consider using OFA to defeat trail projects. See RIRPA v. STB, 223 F.3d 1057 (9th Cir. 2000 (OFA attempted against trail project adjacent to property owned by NARPO's Executive Director). It certainly is abusive to use OFA to prevent any public project, including a planned public trail.

In addition, there are cases in which developers apparently seek to invoke OFA procedures to acquire otherwise to be

²⁰ Counsel for the City has deleted the name and telephone number of the attorney listed in the NARPO "primer" in part because counsel feels that the "primer" mischaracterizes the attorney's practice.

abandoned rail property in the face of public projects. E.g., Conrail Abandonment of the Edgewater Branch in Hudson County, NJ; In the Matter of an Offer of Financial Assistance, AB 167-1036N, served Feb. 18, 1987 (1987 ICC Lexis 427) (developer Steve Hyman allowed to file OFA after demonstrating financial responsibility); Consolidated Rail Corporation - Ab. Ex. - in Hudson County, NJ, AB 167-1189X, served Nov. 2, 2016 (Riffin allowed to invoke the OFA process after representing he is back up plan for developer Hyman).

The issue is what to do, if anything. STB is constrained by the statute and its deadlines. Under the Revised Interstate Commerce Act (RICA), the OFA statute was codified at 49 U.S.C. 10905. Under RICA's section 10905, STB's predecessor ICC had to make two findings for an OFA to proceed: (a) that a government entity or a "financially responsible person" was making the OFA, and (b) that the OFA was "to enable the rail transportation to be continued over that part of the railroad line to be abandoned..." 49 U.S.C. 10905(d)(1) (repealed). To implement the latter, the regulatory agency prior to ICCTA imposed a requirement that OFA's be bona fide. ICCTA in new 49 U.S.C. 10904 omitted the requirement that the OFA be for continuation of rail transportation. ICCTA only retained the requirement that the OFA offerant be found financially responsible. In addition, ICCTA imposed even more stringent deadlines not only

on the abandonment process but also on implementation of the OFA statute.

In its proposed regulations implementing the ICCTA changes, STB proposed only to require OFA applicants to demonstrate financial responsibility. See 61 Fed. Reg. 11178 (March 19, 1996). Rails to Trails Conservancy, well aware of advice by entities like NARPO to use OFA to defeat public rail trail projects, specifically commented to the agency, as the agency acknowledged, that STB "should retain the requirement that, in addition to being made by a financially responsible person, the [OFA] must be 'bona fide.'" RTC asked that such a requirement be retained in the regulations. Id.²¹ The Board, however, flatly refused: "[w]e find no merit in RTC's request. New 49 U.S.C. 10904 clearly does not retain that aspect of the prior statute. Accordingly, we will not add such a requirement to our regulations." Id.

Since the agency has taken the position that there is no bona fide requirement (i.e., that the OFA be for continuation of rail service) for making an OFA, and indeed that such a requirement is omitted by "new" 49 U.S.C. 10904, the agency appears to lack power to impose it at this time, under the guise

²¹ Counsel for the City in these comments (and in AB 167-1189X) remembers this episode rather vividly since he was Council for RTC in the referenced comments in 1996.

of some generic requirement for a showing of commercial need by shippers and so forth. Indeed, the agency has suggested that such a requirement is contrary to the statute.

The only general control over abuse of the OFA statute is that the successful OFA applicant is subject to the federal common carrier obligation for a minimum of two years, and is liable for damages if that obligation is not discharged. At the end of that period, he can seek discontinuance (and presumably abandonment) authority but he cannot sell the property to anyone other than the original abandoning railroad until the end of the fifth year. Congress in revising the OFA remedy for the ICCTA appears to have broadened it so it is available not just for rail transportation to be continued but also for rail lines to be preserved.

It is accordingly not difficult to see how courts have concluded that the OFA remedy is a "guarantee" that "any financially responsible person" inclusive of both shippers and governmental entities has "the right to purchase ... abandoned rail facilities..." Baltimore & O. RR Co. v. ICC, 826 F.2d 1125, 1128 (D.C. Cir. 1987) (discussing 49 U.S.C. 10905 of the Interstate Commerce Act, now recodified (with modifications) as 49 U.S.C. 10904).

The issue of improper OFA purpose is now relevant under the statute only when an OFA will have the effect of upsetting a

public project. In those cases, STB has balanced the importance of the public project against actual countervailing shipper need. The issue has arisen in two ways. First, from time to time, railroads have petitioned for an exemption from the OFA process. Exemptions are generally governed by 49 U.S.C. 10502. Under section 10502(a), an exemption from any requirement (presumably including OFA) may only be granted (1) when regulation is not necessary to carry out the transportation policy of section 10101 and (2) when the transaction is either (a) of limited scope or (b) application of the regulation is not needed to protect shippers from the abuse of market power.

The STB from time to time grants exemptions from OFA in order to facilitate public projects. This agency gave a comprehensive explanation of its policy on exemptions from OFA in Norfolk Southern Railway Company - Pet for Exemption -min Baltimore City and Baltimore County, AB 290-311X, served Jan. 27, 2012, slip at 11-12. The Board there explained that

"Under 49 U.S.C. § 10904, a financially responsible person may offer to purchase, or subsidize continued rail operations over, a rail line sought to be abandoned. When the record shows, however, that the right-of-way is needed for a valid public purpose, the Board has, on numerous occasions, granted exemptions from 49 U.S.C. § 10904, unless there is an overriding public need for continued rail service. Indeed, the Board, on its own initiative, has exempted a line segment from the OFA provisions. BNSF Ry.-Pet. for Decl. Order, FD 35164, et al., slip op. at 9-10 (STB served May 20, 2009), pet. for review denied in relevant part, dismissed in part, sub nom. Kessler v. STB, No. 09-1161 (D.C. Cir. Mar. 15, 2011). There, the Board weighed the public need for rail service against the public

purpose of replacing a deteriorating, overburdened highway. In that case, there had been no local traffic on the rail line segment for 10 years and the right-of-way was necessary for an important interstate highway project. An exemption from the OFA process was appropriate in those circumstances. [Footnote with additional authority omitted.]

“Two further examples involve offeror Riffin, where the Board granted a request to exempt the line from the OFA provisions. In Norfolk S. Ry.—Aban. Exemption—in Norfolk and Virginia Beach, Va., AB 290 (Sub-No. 293X) (STB served Nov. 6, 2007), pet. for review dismissed, sub nom. Riffin v. STB, No. 07-1483 (D.C. Cir. Apr. 22, 2009), the City of Norfolk planned to acquire a segment of the line at issue as part of a light rail commuter passenger project. In view of such public use, the Board balanced those plans against the lack of evidence of continued public need for freight rail service, and found that an exemption from the OFA provisions was warranted.

“In Consolidated Rail Corp.—Aban. Exemption—in Hudson Cnty., N.J., AB 167 (Sub-No. 1190X) (STB served May 17, 2010), aff’d mem., Riffin v. STB, No. 10-1150 (D.C. Cir. May 27, 2011), the Board also exempted a rail line from the OFA provisions, despite an attempt by Riffin and Strohmeyer to acquire a portion of the line through the OFA process. There, 3 railroads jointly filed a verified notice of exemption for 1 railroad to abandon, and 2 railroads to discontinue service over, a line of railroad in Hudson County, N.J., where 1 parcel of the line of railroad (Parcel C) was owned by New Jersey Transit Corporation (NJ Transit) and used for a light rail system, and was the parcel sought by Riffin and Strohmeyer. The Board weighed the weak demonstration of shipper need against NJ Transit’s need for its commuter line and decided that the need for NJ Transit’s light rail system to continue to use Parcel C to serve thousands of commuters daily was a valid and valuable public purpose, and therefore granted an exemption from the OFA provisions. [Citation omitted.]”

The City supports granting exemptions from OFA where the OFA may subvert a valid and valuable purpose. But sometimes an OFA is to facilitate a public project, especially public projects that require the continuation of a rail line. For

OFA's that facilitate such public projects, there obviously should not be an exemption that precludes use of the OFA remedy.

Even where it declines to exempt a proceeding from OFA, STB will consider dismissing the OFA. In almost all cases, motions to dismiss OFAs occur in situations where they conflict with a public project (or amount to an effort to take over the public project). A prime example is Roaring Fork R.R. Holding Auth.- Abandonment Exempt. - in Garfield, Eagle & Pitkin Counties, CO, AB 547X, served May 21, 1999 (noting that transaction likely qualified for exemption from OFA, and dismissing OFA where it appeared the OFA applicant agreed with the railroad that future freight use depended in rehabilitation of the line for passenger use).

STB seems to treat public trails in a different category from other public projects. Trail projects seem to be accorded less protection. E.g., The Land Conservancy of Seattle and King County - Ac. Op. Ex. -- BNSF, F.D. 33389, et al., served May 13, 1998. In the above (complicated) proceedings, STB insofar as relevant here declined to grant an exemption from OFA, and decided to concentrate only on whether there was a showing of rail need. If a public project involves a greenway or historic preservation objective, an exemption from OFA (or dismissal of an OFA) should rest on whether the showing of rail need

outweighs the benefits of the public project. There is no reason to treat greenway projects as disqualified from the balancing test the Board otherwise employs. This ANPR proceeding offers STB the ability to clarify that public projects of all sorts will be balanced against OFA's. This would bring the Board's approach into compliance with modern transportation and land use planning, which acknowledges the importance of multi-modal public transportation infrastructure and greenspace. See Circulation Element of the City's Master Plan, supra. There is no reason to allow developers or NIMBY's to mis-use OFA's against greenway projects. Additionally, railroad rights of way "railbanked" under this Board's jurisdiction pursuant to 16 U.S.C. 1247(d) are preserved consistent with future rail use, and this purpose is consistent with congressional intent under revised section 10904. It is inconsistent to allow an abusive use of OFA to disrupt a public project that is consistent with rail line preservation.

- Should the Board require 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?

So far as the City's research to date discloses, the requirements described above originated in dicta in connection with the Board's test for whether to grant an exemption from OFA for abandonments that were to facilitate public projects. In particular, as quoted, the proposed requirement first appeared in dicta in a notice of exemption case involving expansion of public transit in Los Angeles. See LACMTA -Ab. Ex.-in Los Angeles County, CA, AB 409-5X, served June 16, 2008, slip op 1 n.1 (Riffin involvement) & 3 (where property is to be used for public purpose, OFA offerant must be prepared to show one or more of the items in STB's proposed question above). The LACMTA controversy was later resolved on other grounds. However, according to the search engine on the STB e-library website, STB subsequently has referenced the LACMTA dicta in seven other decisions, involving a total of four proceedings. Interestingly, three of the decisions (in two cases) involved lines in Jersey City.

The first case in which STB referenced the LACMTA dicta was Union Pac. RR - Ab.Ex. - in Lassen County, CA and Washoe County, NV, AB 33-230X, served Sept. 19, 2008. The agency does not indicate the OFA in that case would subvert a public project, but did emphasize that it was directed at a 220 foot segment of a 21.77 mile line and there was no indication that that could

support common carrier rail service. The suggestion appears to be that the effort to use eminent domain was for a private purpose, not a public (e.g., common carrier) purpose. The agency also found the offerant (a Mr. Kemp) lacked financial responsibility. On appeal, Mr. Kemp indicated that he desired the 220 foot segment to construct a longer 22 mile line, but the Board found that not only speculative, but also underscoring Mr. Kemp's failure to show financial responsibility even to buy and operate 220 feet. Id. served Jan. 27, 2009. The case seems to have been resolved on grounds of lack of financial responsibility.

In CSX Transp. - Ab. Ex. - in Glynn County, GA, AB 55-687, served July 9, 2009, this Board granted a petition for an expedited exempt abandonment of an unused line to facilitate new public access to a new school. The Board granted the expedited abandonment, but declined to exempt the matter from OFA. It said, however, that in light of the fact that an OFA would disrupt a public project, any OFA offerant should address the LACMTA criteria. Slip op. at 3. There were evidently no OFA's, so the criteria were never applied.

In BNSF - Ab. Ex. - in Kootenai County, ID, AB 6-468X, served November 27, 2009, the Board did not find a public trail and expansion of public colleges sufficient grounds to grant an

up-front exemption from OFA, but did indicate that any OFA offerant should address the LACMTA criteria. This was moot because the proposed OFA offerant failed to comply with the OFA deadlines. Id. served Dec. 30, 2009.

The remaining three decisions all involve two Conrail lines in Jersey City. In Consolidated Rail Corporation - Ab. Ex. - in Hudson County, AB 167-1190X, Conrail sought a class exemption for its unlawful de facto abandonment of the Lehigh main line, a portion of which Conrail's environmental report acknowledged had already been sold to and developed by NJ Transit for the Hudson Bergen Light Rail system. In its decision in that case served January 7, 2009, the Board tolled the time for CNJ Railroad to file an OFA, but citing LACMTA, noted that any OFA offerant should be prepared to address the LACMTA dicta. In its decision in id. served May 17, 1990, STB exempted the entire proceeding from OFA on the ground that the evidence of shipper need did not justify interference with the Hudson Bergen Light Rail System.

In Consolidated Rail Corporation - Ab. Ex. - in Hudson County, AB 167-1189X, involving Conrail's unlawful de facto abandonment and sale to a developer of the Harsimus Branch in Jersey City, both the City and CNJ Railroad filed timely invocations of the OFA process and sought tolling of the time for the actual OFA pending receipt of valuation information from

Conrail. In a decision served May 26, 2009, in AB 167-1189X, STB tolled the time for OFA, but, citing LACMTA, stated that OFA offerants should address the LACMTA dicta. City filed an appeal of this decision, arguing that LACMTA was inappropriate as applied to a local government seeking to acquire a line for the public. In a decision served six and a half years later (AB 167-1189X, served November 2, 2015), STB reiterated the criteria. The City filed a petition for judicial review in the D.C. Circuit, but the government is there taking the position that the November 2, 2015 decision is not a final order from which review may be had.

Since ICCTA section 10904 did away with the bona fide requirement, and since the Board has seldom if ever employed the LACMTA criteria except in dicta, what the Board intends with the LACMTA criteria in this ANPR is puzzling. In the City's view, the criteria are germane only if they provide evidence responsive to the balancing test the Board administers concerning whether shipper need outweighs the benefits of the public project. But some of the criteria have nothing to do with shipper need (like community support for the OFA). But the Board can obtain more germane evidence for its test by simply asking the proponent of the OFA to supply the evidence on which it relies for shipper need, in those cases where an the

OFA would subvert a public project. If the issue is whether the OFA is seeking enough of a line actually to permit rail operations, then City supposes that the agency could ask for some kind of operational feasibility showing.²² But to impose any requirements as a general condition is a reversal of the Board's position (articulated in response to Rails to Trails Conservancy's request in 1996) that scrutiny of whether an OFA is bona fide is contrary to "new" 49 U.S.C. 10906.

The key issue for the agency is not protecting railroads from "misuse" of the OFA process, because railroads will inevitably obtain constitutionally required compensation from the OFA process. The key issue is protecting the public from

²² There would appear to be a small category of cases where private individuals or entities seek to OFA bits of rail line that appear insufficient or infeasible for any continued rail purpose, and which do not involve a public project. An example is Lassen County case (AB 33-230X), in which an offerant sought 220 feet of a 23 mile line. It would raise a constitutional question if the OFA process were used for a purely private purpose (takings for public purposes, with compensation, are constitutional, but takings for purely private ends, with compensation, are not). If a segment of line is OFA'd for a purely private (non-public, non-common carrier) purpose, then that use of OFA might be unconstitutional. In such cases, it would appear reasonable for the agency to inquire of the OFA applicant how it will use the line for rail transportation. See, e.g., Owensville Terminal Co. - Ab. Ex. - in Gibson and Posey Counties, IN, AB 477-2X, served Dec. 16, 1997 (OFA for discontinuous two mile segment acceptable when OFA offerant Farm Bureau Cooperative Association represents it will link to reactivation of another line). While OFA offerants are not required to operate a line in the same fashion as the abandoning railroad, it does seem reasonable in some situations to require some showing of a feasible rail plan.

"misuse" of the OFA process. Local and state governments seeking to acquire otherwise-to-be abandoned rail lines should not be ousted by contrived OFA applicants. Nor should local and state governments willing to comply with the requirements of 49 U.S.C. 10904 be burdened in their pursuit of the OFA remedy by railroads contesting whether the OFA is bona fide in order to protect the railroad's unlawful de facto abandonments and unlawful efforts to subvert public projects by sales to developers prior to abandonment authorization.

The Board's basic rule for exemption from OFA is that exemptions are granted in instances in which the OFA may interfere with a public project, if the Board determines that shipper need is outweighed by the benefits of the public project. This basic test was applied in AB 167-1190X, decision served May 26, 2010. This basic balancing test is appropriate for granting exemptions from OFA, and for dismissing OFA's, that are disruptive of public projects.

When the OFA is the public project (i.e., when the OFA process is invoked by a governmental entity that will comply with section 10904), then there is no reason to prohibit the governmental OFA as it is by definition not subverting a public project. There is no reason to grant an exemption or possible exemption from the remedy in those circumstances.

In adopting 49 U.S.C. 10904, Congress guaranteed the governmental entities the right to file an OFA so long as they are prepared to assume the common carrier obligation for two years and not transfer the property to a party other than Conrail for five years. In considering OFA's, the Board repeatedly indicates they need not be detailed. The time deadlines in OFA proceedings, which flow from the statute, are not amenable to requiring detailed OFA's. In these circumstances, the Board should concentrate on protecting the public from OFA's whose purpose or effect is to disrupt public projects while providing little or no shipper benefits (certainly none commensurate to the burden to the public).

In all events, the Board's discussion fails to take into account the fact that a governmental entity like Jersey City likely has a more realistic ability to preserve an existing transportation corridor than a private party, that it may be concerned about community development to the extent of being prepared to bear the costs of a line that might be viewed as uneconomic in the private sector, and that it may view the corridor as worth investment not solely for freight rail purposes but for multiple public purposes. The Board has no statutory or policy basis to burden governmental entities so equipped or motivated.

Mr. Riffin in AB 167-1189X has acknowledged to the Board that the purpose of his proposed OFA is to assist or to ensure Conrail's chosen developer in converting the Harsimus Branch to non-rail use in order to subvert the City's public project. Under this Board's precedent, it is definitely appropriate to require Riffin and any other OFA applicant seeking to defeat a public project to show that his OFA has sufficient support from shippers and is based on a feasible plan to provide rail service to them such that overriding a public project on the line is justified. City questions why Mr. Riffin is permitted to participate in the first place given his admission of motivation and the fact that he filed six years after the deadline for participation had expired. Since Mr. Riffin's participation seems contrary to the agency's existing regulations, the City is dubious that additional regulations will help.

The agency needs to formulate requirements that are universal in operation, are enforced and enforceable, and that are not abused to upset public projects. The requirements must be consistent with the stringent time schedule to which the agency is supposed to adhere in OFA proceedings. City is concerned that the agency is having problems enforcing such requirements as it already has, has misapplied its precedent, and is not sufficiently paying heed to protecting public

projects rather than frustrating them in the abandonment process. While the City certainly supports measures to prevent abuse of the OFA process (the City in these comments and in AB 167-1189X, and NSR in EP 727 have certainly indicated their concerns about Mr. Riffin), the Board should avoid cobbling up the OFA process in a fashion that denies shippers or local governments their primary remedy in rail abandonment proceedings, except where the OFA's upset worthy public projects involving a line proposed for abandonment.

The LACMTA criteria, with some clarification so they are not misapplied to governmental entities, may be of limited use on a case by case basis when an OFA will subvert a public project, or perhaps ensure that a segment of line is not being acquired for a private as opposed to public or common carrier purpose.

- Should the Board establish criteria and deadlines for carriers that want to file requests for exemptions from the OFA process?

First, the Board's question presumes that only carriers will request exemption from the OFA process. An interested local or state government should be allowed to seek an exemption consistent with fostering a public project that a given OFA may subvert.

Second, the criteria for an exemption is already quite clear: an exemption turns on whether a line is needed for a valid public purpose and there is no overriding need for continued freight rail service. See, e.g., Norfolk Southern, supra, AB 290-311 X, slip at 11-12; Canadian National Railway Co. - Ab. Ex. - in Niagara County, NY, AB 279-6X, served August 3, 2012, slip at 4. No clarification appears to the City necessary. The balancing test is something that should be made on a case by case basis. Review of precedent suggests the agency's main failure in this area is its failure to treat public trail projects like other public projects for protection from OFA's whose purpose is to subvert them.

Third, the deadline for requesting an OFA exemption presumably is when the exemption request is filed for railroads, and when public comment is due in the case of all other parties. City is thus unclear as to any need for another deadline. If a deadline is missed, and an OFA threatening a public project is filed, the agency should entertain a motion to dismiss the OFA on the same grounds that it would implement an exemption from the OFA.

C. Identity of the Offeror

- Should the Board require multiple parties intending to submit a joint OFA to do so through a single legal entity...

The City does not understand how an offeror can be "multiple parties." The offeror acquires the line and a common carrier obligation. OFA's are not intended to create a committee with a common carrier obligation.

Citing a case (CSX Transp. - Ab. Ex. - in Allegany County, MD., AB 55-659X, served April 4, 2008), in which Mr. Riffin d/b/a WMS LLC filed a successful OFA, CSX issued a deed to WMS, and then Riffin asked the Board to direct CSX to issue the deed to a different Riffin affiliate, the Board appears to suggest confusion over how to identify the real OFA offerant.

The Board's regulations provide that an OFA applicant prior to closing may substitute its corporate affiliate as purchaser provided the Board has determined that the original offeror has guaranteed the financial responsibility of the affiliate or the affiliate has demonstrated financial responsibility in its own right. 49 C.F.R. 1152.27(i)(1). The confusion in the referenced Riffin case may have arisen because the proposed substitution occurred so near closing that the Board could not make the required determination. If that is the problem, then it could be addressed by the agency amending 1152.27(i)(1) to require that substitutions be proposed to the Board no later than 30 days after acceptance of terms and conditions (or a voluntary agreement having otherwise been reached). The

railroad would have ten days to comment. Then the agency should have ample time to make a determination of financial responsibility or guarantee before closing.

If Riffin proposed a substitution after closing, then that amounts to a request to transfer property in violation of 49 U.S.C. 10904(f)(4)(A). This is contrary to statute.

Indeed, the Board is not obligated under the statute to afford the flexibility provided by 49 C.F.R. 1152.27(i)(1), but City suspects that flexibility is useful in the industry for a variety of financial and organizational reasons.

- 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?

An OFA is basically a request to transfer the common carrier obligation and property from one rail entity to another. This agency has a well-established set of requirements for that purpose: the notice of exemption for acquisition regulations (49 C.F.R. 1150.31 et seq.) The requirements relating to identity are specified in 49 C.F.R. 1150.33. Section 1150.33 requires (insofar as relevant to the Board's question) the full

name and address of the applicant; and the name, address and telephone number of the representative of the applicant who should receive correspondence. If this is adequate information for the voluntary transfer of lines, it should be adequate for involuntary transfer as well. The City is unaware of any justification for cobbling up the OFA process with extraordinary requirements.

Conclusion

Although no freight rail lines are supposed to be abandoned until licensed by the STB (49 U.S.C. 10903), the City has been the situs of a number of illegal de facto rail abandonments by Conrail. As noted, one of these proceedings (AB 167-1190X) is specifically relied upon by the Board in its ANPR (slip op. at 3). In two of these cases, the illegal de facto abandonments -- after being forced into STB's scrutiny -- have generated "offer of financial assistance" activity by Mr. Riffin and/or CNJ Railroad. In one of these instances, the City of Jersey City itself has been seeking to pursue the OFA remedy since 2009. In addition, City has been seeking federal remedies against the unlawful de facto abandonment of the Harsimus Branch since at least 2005, and specifically the OFA remedy once Conrail finally filed an abandonment proceeding so it could be timely requested.

The City has encountered many expensive obstacles to OFA and all other available remedies, arising from the tactics and strategies of (a) Conrail, (b) a developer d/b/a 212 Marin Boulevard LLC, et al claiming a part of a rail line illegally sold to him by Conrail as part of an unlawful de facto abandonment; and (c) (more recently) Mr. Riffin. In a decision served November 2, 2015, in AB 167-1189X, the Board allowed Mr. Riffin to participate in the OFA process despite the fact that he sought participation six years beyond the filing deadline and has informed the Board that his invocation of the OFA process was the developer's "back-up plan." The City welcomes this opportunity to re-voice its concerns about illegal de facto abandonments, how illegal abandonments by the railroads should not be permitted to undermine this Board's administration of remedies, the strain unlawful de facto abandonments place on municipalities seeking to invoke Board remedies, and the inconsistent application of Board precedent that has occurred in AB 167-1189X and the OFA process at the behest of Mr. Riffin, Conrail, and/or the developer.

The Board should administer the OFA remedy, and other remedies, in an efficient fashion that maximizes opportunities to keep the Nation's otherwise-to-be abandoned rail infrastructure intact where this can be accomplished without

depriving the abandoning railroads of minimum constitutional value. The Board's rules should encourage OFA's that favor public projects and eliminate those offered to defeat public projects. The Board should take strong measures against illegal de facto abandonments that attempt to destroy rail lines before they can be saved through the agency's system of remedies, or through state law triggered when this agency authorizes an abandonment.

Respectfully submitted,
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Appendix Concerning City's Interest

The Regional Railroad Revitalization Act of 1973 (3-R Act) resulted in the abandonment of many rail lines and properties in Jersey City as a result of the consolidation of viable rail properties from several bankrupt rail estates into the Consolidated Rail Corporation ("Conrail"). However, Jersey City remained a major conduit for interstate freight and passenger rail services with important yards and lines. In or about 1998,

Conrail was acquired by Norfolk Southern Railroad (NSR) and CSX Transportation (CSX). Conrail at that time was dismembered, except for continued operation in three "Shared Asset Areas," of which the North Jersey Shared Assets Area, which encompasses Jersey City, is one. Conrail (along with NS and CSX) nonetheless still retain a major presence in Jersey City.

Jersey City's relevant Master Plan calls for support for railroad infrastructure, both for passenger and freight purposes, as a means to alleviate increasing traffic congestion problems arising from the City's growing population and commercial activity. The City, like most local governments, has a general interest in preserving existing transportation facilities for this general purpose, as well as other compatible purposes. The City seeks to facilitate a multi-modal transportation system that is attractive, clean, safe, efficient, reliable, inclusive, affordable, accessible and user-friendly, that will mitigate congestion and minimize single occupancy vehicular traffic. See "Circulation Element" (part of the Jersey City Master Plan), Jersey City Planning Division internet home page. The Circulation Element calls for facilitating regional movement of goods and services and specifically calls for support for the construction or rehabilitation of transload facilities and similar railroad infrastructure projects. Id. pp. 64-65. It also encourages

use of rail to deliver goods and services in order to minimize reliance on trucks. Id. pp. 67-68. The City also wishes to foster passenger rail transport. The Hudson Bergen Light Rail system, located in part on former Conrail trackage, is a very popular means of transportation. The City's Master Plan has long called for preservation of the Harsimus Branch to facilitate rail transportation options. See, e.g., Circulation Element section 4.4 (rail right of way needs). The Harsimus Branch is the former mainline for freight of the Pennsylvania Railroad, and was also heavily used by Conrail in the first decade of its existence. Conrail ceased operating over the Branch in or about 1994 and thereafter engaged in an illegal de facto abandonment of the Branch. The Branch contains the Harsimus Embankment, an enormous stone-walled structure that is listed on the National Register of Historic Places. The Embankment provides grade separation from the streets below. The Branch in combination with other un-used or under-used rail infrastructure (some already owned by other units of government) could alleviate downtown congestion not only by providing a new (grade-separated) light rail corridor but also valuable transload options. The Master Plan also recognizes that the Branch is desirable for other compatible purposes, including historic preservation (much of it is a City Historic Landmark) and as the preferred route of the East Coast Greenway.

To summarize, the City has an interest in the subject matter of the ANPR. The City remains an important center of transportation, with among others Conrail, NSR and CSX owning track or trackage rights. The City is concerned to preserve rail transportation infrastructure as a means of addressing congestion, historic preservation and open space. Per the text in the comments, the City has experience with illegal de facto abandonments as well as lawful abandonment proceedings. The City has experience with OFA's from multiple vantage points: in AB 167-1190X, the City certainly did not wish a public project - - the Hudson Bergen Light Rail system - burdened by Riffin or CNJ OFA's, and in AB 167-1189X, City seeks to file an OFA to facilitate a public project, which includes, compatible with the City's Master Plan, not only facilitation of freight rail but also passenger rail outcomes (including a route for the Hudson Bergen Light Rail system), the East Coast Greenway, and historic preservation. City opposes burdening that public project with a Riffin OFA which, as Mr. Riffin admits, is to protect a developer who, along with Conrail, has left no stone unturned in seeking to thwart the City's public project. In conclusion, the City not only has sufficient interest to merit standing for purposes of judicial review on all issues addressed in the ANPR, but also has concerns which must be taken into account if the agency proceeds to a proposed rulemaking.

