



ASSOCIATION OF AMERICAN RAILROADS
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March 14, 2016

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

Re: EP 729, *Offers of Financial Assistance*

Dear Ms. Brown:

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

Sincerely,

Timothy J. Strafford
Counsel for the Association
of American Railroads

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 729

OFFERS OF FINANCIAL ASSISTANCE

REPLY COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

The Association of American Railroads (“AAR”) respectfully submits these reply comments in response to filings by the Military Surface Deployment and Distribution Command of the Department of the Army (“Army”), The City of Jersey City, NJ (“City”) and James Riffin (“Mr. Riffin”).

In opening comments, the AAR urged the Board to protect the integrity of its Offer of Financial Assistance (“OFA”) processes by both enforcing existing rules and by adopting new rules that reflect the statutory balance between preserving freight rail service and the burdens on interstate commerce caused by regulation that prevent or delay railroads from abandoning unprofitable rail lines. Specifically, the AAR requested that the Board issue proposed rules that ensure that railroads are not burdened unduly by delays in the abandonment process caused by frivolous offers by individuals or entities that are not financially responsible and by offers that are not likely to result in continued freight rail service. The AAR also suggested that the Board create a class exemption from the requirements of 49 U.S.C. § 10904 where the

abandoning railroad has entered into an agreement to sell or donate the line to a governmental entity for a public purpose.

The bulk of the non-railroad comments filed in this proceeding focused on specific abandonment proceedings and disputes that arose therein. The AAR will not address the merits of any of those ongoing or already adjudicated disputes, but submits these limited reply comments to four points made in the opening comments.

First, the City contends that the Board's presumption that government entities are financially responsible pursuant to 49 U.S.C. § 10904 is irrebuttable. City Opening Comments at 33. That contention is unsupported by the statute or Board precedent. Section 10904 merely includes government entities as an enumerated example of entities that can be a financially responsible person. *See* 49 U.S.C. § 10904(e); 49 C.F.R. 1152.27 (1)(ii)(B). The Board has long presumed that government entities are financially responsible in OFA proceedings, but that presumption has been rebutted where a town did not demonstrate that it had the necessary funds and took no steps to secure them. *Ind. Sw. Ry.—Aban. Exemption—in Posey & Vanderburgh Ctys., Ind.*, AB 1065X (STB served Apr. 8, 2011).

Second, Mr. Riffin and the City both assert that the goal of the OFA statute is simply to preserve rail corridors, not necessarily to preserve the corridor for likely future or continued rail service. Mr. Riffin Opening Comments at 15, 23; City Opening Comments at 60. In fact, the City goes so far as to contend that an OFA should be justified as long as a potential offeror intends to preserve the rail corridor for a public use. City Opening Comments at 28. The notion that an OFA need not contemplate the continuation of rail service contravenes Board precedent and is inconsistent with the existing statutory landscape, which charges the Board with promoting national rail transportation policy. Regardless of whether the Board

ultimately adopts rules requiring potential offerors to demonstrate the need for continued rail service with their offers, the Board should clarify that the purpose of the OFA process is to preserve rail service over active rail lines.

In evaluating whether to accept an OFA, the Board has repeatedly considered whether the potential offeror presented sufficient evidence to demonstrate the continued operation of rail lines. *Roaring Fork R.R. Holding Authority—Aban.—In Garfield, Eagle, and Pitkin Counties, CO*, AB-547X (STB served May 21, 1999); *BNSF Rwy.—Petition for Declaratory Order*, FD 35164, *et al.*, slip op. at 9-10 (STB served May 20, 2009); *Norfolk Southern Rwy. Co.—Aban. Exemption—in Norfolk and Virginia Beach, VA*, AB-290 (Sub-No. 293X) (STB served Nov. 6, 2007). Various courts of appeals have upheld the Board’s consideration of this evidence. *Kulmer v. STB*, 236 F.3d 1255 (10th Cir. 2001); *Redmond-Issaquah R.R. Preservation Ass’n v. STB*, 223 F.3d 1057 (9th Cir. 2000).

Moreover, the OFA statute affords the Board the extraordinary authority to compel the sale of a rail line to a financially responsible person. Section 10904 authority to force the sale of property is contrasted necessarily with the Board’s more limited authority under section 10905 merely to delay disposition of a rail line authorized for abandonment if the line is found to be appropriate for public purposes. This dichotomy is logical and constitutionally sound; Congress has granted the Board jurisdiction over transportation by rail carrier, but the Board has no statutory authority to compel the sale of rail lines absent continued common carrier rail service. *Kulmer*, 236 F.3d at 1257 (noting the constitutional issues implicated in an interpretation of section 10904 that did not require continued rail use).

Third, the Army notes that the U.S. military monitors rail abandonments to ensure that strategically significant rail corridors are not abandoned and suggests ways that the Board’s

rules could potentially affect future OFAs filed by the Department of Defense. However, the AAR is not aware of any instances since the Board's creation twenty years ago where the Army or any other part of the Department of Defense has filed an OFA with the Board. The Army itself recognizes that the "Department of Defense rarely participates in abandonment cases since most proposed railroad abandonments do not involve railroad lines that are important to national defense." Army Opening Comments at unnumbered page 2. To the extent that the Army suggests the Board make changes to its rules of general applicability to address the military's unique situation, the AAR submits that such rules are not necessary and the Board can address those circumstances on a case-by-case basis. Should the Board believe rules are necessary to address the Army's unique concerns, the AAR suggests that such rules be narrowly tailored to apply only to offers submitted by the military rather than making wholesale changes to the OFA process for all offerors.

Finally, Mr. Riffin and the City suggest that railroads could expedite the determination of financial responsibility by including information relevant to potential OFAs with their initial abandonment filing, including notices of exemption. *See* Mr. Riffin Opening Comments at 23; City Opening Comments at 24, 40. This suggestion is a call for the proverbial tail to wag the regulatory dog. As discussed in the AAR opening comments, the Board's OFA procedures are appropriate only in exceptional situations, and genuine offers of financial assistance to continue freight service are rare. *See* AAR Opening Comment at 5. Instead of requiring unnecessary and burdensome data to be included with abandonment filings to avoid delays caused by frivolous OFAs, the AAR suggests that the Board amend its rules to require a notice of intent to file an OFA to precede each OFA. Such a filing that included basic disclosures, including the general financial information of the offeror, would

allow the parties and the Board to determine early on whether the offeror was likely to be financially responsible for purposes of an OFA. That would allow railroads to begin developing valuation information earlier in the process and facilitate genuine sales.

Conclusion

The AAR supports the Board's goals in ensuring that its regulations ensure the integrity of the OFA process and protect it against abuse. The Board should proceed with a Notice of Proposed Rulemaking consistent with the AAR's opening comments and this reply.

Respectfully submitted,



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