

SURFACE TRANSPORTATION BOARD

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STB Ex Parte No. 727

**PETITION OF NORFOLK SOUTHERN RAILWAY COMPANY
TO INSTITUTE A RULEMAKING PROCEEDING
TO ADDRESS ABUSES OF BOARD PROCESSES**

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PETITION OF NORFOLK SOUTHERN RAILWAY COMPANY TO INSTITUTE A RULEMAKING PROCEEDING TO ADDRESS ABUSES OF BOARD PROCESSES

Norfolk Southern Railway Company (“NS”) hereby petitions the Surface Transportation Board (“Board”) to initiate a rulemaking to establish: (1) a pre-approval process for filings made by individuals with an established history of being abusive filers, of filing for harassment purposes, of filing in proceedings in which they lack standing or any cognizable interest, or in the context of the offer of financial assistance (“OFA”) process, of not being financially responsible; (2) new rules to create a presumption in the OFA process that individuals who previously have been found not financially responsible or have been bankrupt are not financially responsible; and (3) new rules to require additional certifications in the OFA process regarding the financial responsibility of potential offerors.

A survey of Board proceedings illustrates the need for the requested rulemaking. As detailed below, the Board has received numerous filings in various proceedings that merely serve to waste limited resources and distract the Board and parties to proceedings from a consideration of the relevant issues. Currently, the Board and parties have no

effective defense¹ against such filings, and must address all filings as legitimate equals. The processes and rules proposed herein would provide a defense against such wasteful and distracting filings. The pre-approval process would ensure meaningful participation in Board proceedings, promoting more efficient and focused proceedings overall, by filtering out only such unmeritorious filings. Similarly, the rules for the OFA process would ensure meaningful participation in the OFA process, promoting the efficient allocation of abandoned rail lines, by filtering out only those individuals that are not financially responsible. As such, the processes and rules proposed herein promote good governance by ensuring that limited resources are not wasted on unmeritorious filings and offers.

The feasibility and public interest benefits of the proposed processes and rules are reinforced by the experiences of the Federal Communications Commission and various judicial courts which have used similar pre-approval measures. In addition, the proposed pre-approval process would simply enforce the Board's existing Rules of Practice; and, the proposed rule changes to the OFA process would simply build on the Board's current regulatory approach. Thus, the processes and rules proposed herein do not represent a novel approach and would further the public interest by preserving the integrity of Board proceedings and conserving the limited resources of the Board and parties to proceedings. Accordingly, NS hereby submits this petition for a rulemaking.

¹ The Board's Rules of Practice direct "all persons appearing in proceedings before it to conform, as nearly as possible, to the standards of ethical conduct required of practice before the courts of the United States." 49 C.F.R. § 1103.11. Under the Federal Rules of Civil Procedure, parties should not file pleadings "for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Fed. R. Civ. P. 11(b)(1). However, as detailed below, § 1103.11 has not prevented persons from submitting unmeritorious filings.

I. THE BOARD SHOULD ACT IN THE PUBLIC INTEREST TO ESTABLISH PROCESSES AND RULES TO PRESERVE THE INTEGRITY OF BOARD PROCEEDINGS AND CONSERVE LIMITED RESOURCES OF THE BOARD AND PARTIES TO PROCEEDINGS.

Board decision-making benefits from the broad participation of interested parties, and the Board should continue to strive to foster an active dialogue in Board proceedings with regulated entities and other interested stakeholders. However, Board decision-making does not benefit from abusive, harassing, irrelevant, and unmeritorious filings that only serve to waste limited resources and distract the Board and parties to proceedings. As such, the Board should establish a process to deem an individual, based on his or her demonstrated pattern of behavior, an abusive filer, a filer for harassment purposes, or a filer who lacks standing or any cognizable interest in a proceeding; and, the Board should establish a pre-approval process for such an individual's filings with the Board. In the context of the OFA process, the Board should establish a similar pre-approval process for the offers of an individual who, based on his or her demonstrated pattern of behavior, is not financially responsible. The Board also should amend its OFA regulations to create a presumption that certain individuals are not financially responsible, again based on their past behavior, and to require additional information to ensure that offerors will be able to provide the represented financial assistance.

A. The Board Should Establish A Pre-Approval Process For Abusive Filers, Filers For Harassment Purposes, And Filers Without Standing Or Any Cognizable Interest In A Proceeding.

Too often, the Board has received filings from abusive filers, filers for harassment purposes, and filers without standing or any cognizable interest in a proceeding. Such filings only raise improper, irrelevant, or unmeritorious claims, and as such, only serve to waste the limited resources of the Board and parties to proceedings and distract the same

from the actual decision-making process. Thus, establishing a pre-approval process for filings from individuals, with an established history of being abusive filers, filing for harassment purposes, or filing without standing, would conserve limited resources and preserve the integrity of Board proceedings.

As just one example, the Board has issued more than 80 decisions in which James Riffin was mentioned or was a party. The Board repeatedly has dismissed Mr. Riffin's arguments or requests as improper, irrelevant, or unmeritorious. In fact, based on the pattern of Mr. Riffin's filings, the Board pledged in 2007 to "closely scrutinize any future filings by Mr. Riffin in this or any other proceeding before the Board." *Norfolk Southern Ry. Co.—Aban. Exemption—in Norfolk and Va. Beach, Va.*, AB No. 290 (Sub-No. 293X), slip op. at 8 (STB served Nov. 6, 2007), *pet. for review dismissed, sub nom. Riffin v. STB*, No. 07-1483 (D.C. Cir. Apr. 22, 2009). *See also* Response to Court's Letter and Argument in Support of Dismissal of the Appeal for Lack of Appellate Jurisdiction at 4, n.3, *Riffin v. STB*, No. 14-4839 (3rd Cir. Feb. 3, 2015) ("STB Response to Riffin") (describing Mr. Riffin as a "prolific litigant before the Board and the federal courts who has been repeatedly sanctioned or warned for filing baseless claims or disregarding procedural rules"). Nevertheless, Mr. Riffin² continues to submit improper, irrelevant, or unmeritorious filings, as in the following Board proceedings, to name a few:

- Board rejected Mr. Riffin's joint application to acquire 800 feet of railroad track without assuming the common carrier obligation for toxic inhalation hazard shipments as "inherently defective." *Eric Strohmeyer and James Riffin—*

² It is interesting to note that Mr. Riffin generally files absent representation by counsel or a Board practitioner subject to the Board's Canon of Ethics. *See* 49 C.F.R. § 1103.31. *See also* 49 C.F.R. § 1103.5; 49 C.F.R. § 1104.4; *Norfolk Southern Ry. Co. – Petition for Exemption – in Baltimore City and Baltimore County, MD; Motion for Protective Order*, AB No. 290 (Sub-No. 311X) (STB Served Jan. 29, 2010) (noting that "Riffin is neither a licensed attorney nor practitioner approved to practice before the Board").

Acquisition and Operation Application—Valstir Industrial Track in Middlesex and Union Counties, NJ, FD No. 35527 (STB served Oct. 20, 2011).

- Board rejected Mr. Riffin’s application to acquire and operate under 49 U.S.C. § 10902 approximately 400 feet of track because “Riffin is not a rail carrier.” *James Riffin—Acquisition and Operation—Veneer Spur—in Baltimore County, MD*, FD No. 35246 (STB served Aug. 19, 2010).
- Board rejected Mr. Riffin’s OFA to (1) acquire a 0.31-mile track segment as “fundamentally flawed” because UP only had trackage rights over this segment and under the Board’s well-established precedent, the “OFA process is not available” in a trackage rights discontinuance proceedings; and (2) acquire a 0.08-mile track segment for a supposed transload operation after UP demonstrated that this track was incapable of supporting rail service due to its short length and narrow width, noting that “[q]uestions about Riffin’s motives as an OFA offeror have been raised before.” *Union Pacific R.R. Co.—Abandonment and Discontinuance of Trackage Rights Exemption—in Los Angeles County, CA; In the Matter of an Offer of Financial Assistance*, AB No. 33 (Sub-No. 265X) (STB served May 7, 2008).³

As another example, the Board has issued numerous decisions addressing filings from Eric Strohmeier or CNJ Rail Corporation (“CNJ Rail”)⁴ that were improper, irrelevant, or unmeritorious:

- Board ordered Mr. Strohmeier and Mr. Riffin to show cause after contradictory filings in the OFA process and after the Board had received “no statement from [the shipper allegedly requiring service], no business plan, financial forecasts, or any other evidence to support the assertions of the offerors.” *Consolidated Rail*

³ See also *Norfolk Southern Ry. Co.—Acquisition and Operation—Certain Rail Lines of the Delaware and Hudson Ry. Co., Inc.*, FD No. 35873 (STB served May 15, 2015) (noting that “Riffin is not a Board-licensed rail carrier” in denying his request for trackage rights); *Stewartstown R.R. Co.—Adverse Abandonment—in York County, PA.*, AB No. 1071 (STB served Nov. 16, 2012) (rejecting Mr. Riffin’s allegations of shippers’ need for freight service as “too indefinite and insubstantial to be accorded any weight”); *Norfolk Southern Ry. Co.—Petition for Exemption—in Baltimore City and Baltimore County, MD.*, AB No. 290 (Sub-No. 311X) (STB served Jan. 27, 2012) (rejecting Mr. Riffin’s false claims to be a shipper); *James Riffin—Acquisition and Operation—Veneer Spur—in Baltimore County, MD.*, FD No. 35246 (STB served Feb. 4, 2011) (rejecting Mr. Riffin’s appeal of an order because “his arguments lack merit”).

⁴ Mr. Strohmeier is the President of CNJ Rail. Some of these decisions also address claims by Mr. Riffin.

Corp.—Aban. Exemption—in Hudson County, NJ, AB No. 167 (Sub-No. 1190X) (STB served Aug. 12, 2009).

- Board noted that “[n]otwithstanding the name it has chosen, CNJ does not own any rail assets or conduct any rail operations. CNJ’s filing did not describe its interest in this proceeding.” *Maryland Transit Admin.—Petition for Dec. Order*, FD No. 34975 (STB served Sept. 19, 2008).
- Board stated that CNJ Rail’s “OFA is fundamentally flawed and must be rejected. First, it should be noted that CNJ is seeking to acquire through the OFA process rights that are geographically broader than those for which D&H obtained discontinuance authority. Second, and more importantly, even if the OFA had not exceeded the geographical limits of the trackage rights authorized for discontinuance, the OFA would have to be rejected because, in the January 19 decision, the Board, following longstanding precedent, stated that OFAs for discontinuance of trackage rights are limited to subsidies to provide continued rail service. Here, as CNJ is not seeking to subsidize D&H’s operations under the trackage rights, the OFA process is not available to it.” *Delaware and Hudson Ry. Co., Inc.—Discontinuance of Trackage Rights Exemption—in Susquehanna County, PA and Broome, Tioga, Chemung, Steuben, Allegany, Livingston, Wyoming, Erie, and Genesee Counties, NY; In the Matter of an Offer of Financial Assistance*, AB No. 156 (Sub-No. 25X) (STB served Feb 3, 2005).⁵

Like the Board, parties to proceedings also must expend an unwarranted and disproportionate amount of resources to address unmeritorious filings which ultimately have no value in the Board’s decision-making process. For example, in the *Stewartstown* case, Mr. Riffin filed more than a dozen pleadings and more than a dozen pleadings were

⁵ See also *Consolidated Rail Corp.—Abandonment Exemption—in Philadelphia, PA.; CSX Transp., Inc.—Discontinuance of Service Exemption—in Philadelphia, PA.; Norfolk Southern Ry. Co.—Discontinuance of Service Exemption—in Philadelphia, PA.*, AB No. 167 (Sub-No. 1191X), AB No. 55 (Sub-No. 710X), AB No. 290 (Sub-No. 552X) (STB served Oct. 26, 2012) (“Conrail Abandonment”) (upholding an order to reject an OFA from Mr. Riffin, Mr. Strohmeyer, and CNJ Rail on the grounds that it “was late-filed, that it lacked merit, and that the Offerors had not demonstrated financial fitness”); *Consolidated Rail Corp.—Abandonment Exemption—in Philadelphia, PA.; CSX Transp., Inc.—Discontinuance of Service Exemption—in Philadelphia, PA.; Norfolk Southern Ry. Co.—Discontinuance of Service Exemption—in Philadelphia, PA.; In the Matter of an Offer of Financial Assistance*, AB No. 167 (Sub-No. 1191X), AB No. 55 (Sub-No. 710X), AB No. 290 (Sub-No. 552X) (STB served Mar. 14, 2012) (noting that Mr. Strohmeyer and CNJ Rail filed their OFA without any supporting evidence of financial responsibility).

filed in response; and ultimately, every motion made by Mr. Riffin was rejected, including a duplicative and unnecessary motion for a protective order. *See Stewartstown R.R. Co.—Adverse Abandonment—in York County, PA*, AB No. 1071 (STB served Nov. 16, 2012). As another recent example, NS responded to more than 15 filings⁶ made by Mr. Riffin and CNJ Rail in the proceeding related to NS’s acquisition of a rail line from the Delaware and Hudson Railway Co., Inc.⁷ Even after the Board dismissed several of their arguments in *Norfolk Southern Ry. Co.—Acquisition and Operation—Certain Rail Lines of the Delaware and Hudson Ry. Co., Inc.*, FD No. 35873 (STB served Dec. 16, 2014) (“Initial D&H Decision”), Mr. Riffin and CNJ Rail continued to parrot these arguments in subsequent filings. The Board even noted that since the *Federal Register* publication of the Initial D&H Decision, Mr. Riffin had made six additional filings as of February 3, 2015. *STB Response to Riffin*, at 4. And despite the Board’s previous conclusion that “CNJ does not own any rail assets or conduct any rail operations,” *Maryland Transit Admin.—Petition for Dec. Order*, FD No. 34975 (STB served Sept. 19, 2008), CNJ Rail requested trackage rights based on unsubstantiated allegations regarding shippers’ need for service.⁸ None of Mr. Riffin’s or CNJ Rail’s requests were granted in the Board’s final decision. *See Norfolk Southern Ry. Co.—Acquisition and Operation—*

⁶ This count does not include notices of intent to participate without comment, certificates of service, errata sheets, and changes of address.

⁷ As neither a rail carrier nor a shipper, Mr. Riffin and CNJ Rail had no interest in the proceeding and did not represent an actual party to the proceeding.

⁸ *See also* Reply of Intervenors to Motion of Jersey City to Compel Conrail to Produce Information Pursuant to 49 CFR 1152.27(a), *Conrail Petition For Exempt Abandonment Hudson County, New Jersey*, AB No. 167 (Sub-No. 1189-X) (filed Jan. 14, 2015) (alleging that CNJ Rail’s filings were fraudulent).

Certain Rail Lines of the Delaware and Hudson Ry. Co., Inc., FD No. 35873 (STB served May 15, 2015).

These examples are not presented to pre-judge whether these individuals should be deemed to have an established history of being abusive filers, filing for harassment purposes, or filing in proceedings where they lack standing or any cognizable interest, and therefore, required to obtain Board pre-approval for any future filings. Rather, these examples are presented to demonstrate the need for the proposed pre-approval process. These examples clearly show that individuals without any stake in a proceeding nevertheless are able to waste resources and distract the Board and legitimate parties from a focused consideration of the actual issues before the Board, which compromises the efficiency and integrity of the Board's decision-making process.

The pre-approval process proposed in this Petition would remedy this situation. By requiring Board pre-approval for filings made by individuals with an established history of being abusive filers, filing for harassment purposes, or filing without standing or any interest in a proceeding, the Board and parties to proceedings would be able to devote their resources and attention to meritorious filings by legitimate parties. The pre-approval process also would serve as a substantial deterrent to questionable filings by flagged individuals, further reducing the administrative burden and improving the Board's docket over the long-term.

It is important to note that the pre-approval process fully preserves legitimate public participation in Board proceedings. Parties who are judicious in their participation in Board proceedings—appearing only in those proceedings that affect them and carefully considering the relevance and merits of their proposed filings—would never be

subject to this pre-approval process. Even individuals subject to the pre-approval process would not face an absolute bar against future filings. Rather, the Board simply would have the ability to pre-approve such an individual's filing to ensure that the individual has standing and raises a legitimate claim in the proceeding.

In sum, the proposed pre-approval process would advance the public interest by ensuring open *and legitimate* participation in Board proceedings, thus promoting a more efficient and focused Board decision-making process for the benefit of the Board, regulated entities, and interested stakeholders.

B. The Board Should Establish A Pre-Approval Process And Amend Its Regulations For The OFA Process To Ensure That Offerors Are Financially Responsible.

An offeror in an OFA to acquire a line for continued rail service must show that it is financially responsible and that its offer is reasonable. *See Conrail Abandonments under NERSA*, 365 I.C.C. 472, at *2 (1981). An offeror is financially responsible if it has, or within a reasonable time will have, the financial resources to fulfill proposed contractual obligations. 49 C.F.R. § 1152.27(c)(1)(ii)(B). The Board has rejected OFAs where the offeror (1) did not provide a verified assurance from a third party from whom the offeror intended to secure the needed funds, *see Union Pac. R.R.—Aban.—in New Madrid, Scott, and Stoddard Counties, Mo.*, AB No. 33 (Sub-No. 261) (STB served July 30, 2009); (2) did not provide an agreement with the purported source of funds, *see Ariz. & Cal. R.R.—Aban. Exemption—in San Bernardino and Riverside Counties, Cal.*, AB No. 1022 (Sub-No. 1X) (STB served July 15, 2009); or (3) supplied only vague and unsubstantiated assurance of its ability to fund, or to obtain funding, to purchase the line and to arrange for operations for a period of two years, *see Union Pac. R.R.—Aban.*

Exemption—in Lassen County, Cal., and Washoe County, Nev., AB No. 33 (Sub-No. 230X) (STB served Sept. 19, 2008).

On numerous occasions, the Board has summarily rejected OFAs because the offeror was deemed not financially responsible. For example in a Conrail abandonment, the Board found that the offerors (Mr. Riffin, Mr. Strohmeyer, and CNJ Rail) “failed to include any evidence to demonstrate that they were financially responsible to acquire and operate the OFA Segment,” despite being granted an extension of time to file such materials. *Conrail Abandonment*. Although the Board ultimately arrived at the right outcome, railroads interested in the proceeding had to file six different replies to the offerors’ facially insufficient OFA filings. Moreover, the parties and the Board had to address Mr. Riffin’s financial responsibility, or lack thereof, even though the Board had dealt with his bankruptcy just two years prior. *See Eighteen Thirty Group, LLC—Acquisition Exemption—in Allegany County, MD; Georges Creek Ry., LLC—Operation Exemption—in Allegany County, MD; Duncan Smith and Gerald Altizer—Continuance in Control Exemption—Eighteen Thirty Group, LLC and Georges Creek Ry., LLC, FD Nos. 35438, 35437, 35436 (STB served Nov. 17, 2010); Eighteen Thirty Group, LLC—Acquisition Exemption—in Allegany County, Md., FD No. 35438 (STB served Nov. 4, 2010).*

Again, these examples are not presented to pre-judge whether these individuals should be deemed to have an established history of not being financially responsible, and therefore, required to obtain Board pre-approval for any OFA filings. Rather, these examples are presented to demonstrate the need for the proposed pre-approval process and rules for the OFA process set forth in this Petition. These examples clearly show that

individuals who are not financially responsible are nevertheless able to participate in the OFA process, waste resources, and distract the Board and legitimate parties from a focused consideration of the abandoned line, which compromises the efficiency and integrity of the Board's decision-making process.

The pre-approval process and rules proposed in this Petition would remedy this situation. By requiring Board pre-approval for filings made by individuals with an established history of not being financially responsible parties, the Board and parties to proceedings would be able to devote their resources and attention in the OFA process to offerors with the necessary financial resources to actually consummate their offers. The pre-approval process would not impair the ability of individuals with the necessary financial resources to participate in the OFA process. Parties who are judicious in their participation in OFA proceedings—submitting only offers they can consummate—would never be subject to this pre-approval process. Even individuals subject to the pre-approval process would not face an absolute bar against future offers. Rather, the Board simply would have the ability to pre-approve such an individual's offer to ensure that the individual is financially responsible.

Further, by creating a presumption that parties who previously have been found not financially responsible or have been bankrupt are not financially responsible, the burden of proof would shift to the questionable offeror who can more easily access and produce records demonstrating financial responsibility, thus reducing the burden on the Board and parties to proceedings. Finally, requiring additional information at the outset regarding the financial responsibility of potential offerors would ensure that only those who are able to fulfill the commitments of the OFA process actually participate in the

OFA process. The combination of the pre-approval process and new rules also would serve as a substantial deterrent to questionable offers by flagged individuals, further reducing the administrative burden and improving the OFA docket over the long-term.

In sum, the proposed pre-approval process and rules for the OFA process would advance the public interest by ensuring open *and financially responsible* participation in the OFA process, thus promoting a more efficient and focused Board decision-making process for the benefit of the Board, regulated entities, and interested stakeholders.

C. The Proposed Processes And Rules Have Recognized Value By Other Agencies and Courts, And Are Not Novel.

First, creating a gatekeeper rule or a pre-approval process for filings is not a novel agency approach. For example, the Federal Communications Commission (“FCC”) has long recognized that an “agency is not powerless to prevent an abuse of its processes” and it “need not allow the administrative process to be obstructed or overwhelmed by captious or purely obstructive protests.” *E.g., In re Warren C. Havens*, 27 FCC Rcd 2756, 2758 (2012) (noting that the Communications Act allows the FCC to “conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice” and to prescribe any restrictions “as may be necessary to carry out the provisions of this Act”). *See also Touche Ross & Co., et al. v. Securities and Exchange Commission, et al.*, 609 F.2d 570, 582 (2d Cir. 1979) (holding that even in the absence of an express statutory provision authorizing an agency to discipline those appearing before it, an agency can promulgate rules “to protect the integrity of its own processes”); *Atlantic Richfield Co. v. United States Department of Energy, et al.*, 769 F.2d 771, 794 (D.C. Cir. 1984) (noting that “the broad congressional power to authorize agencies to adjudicate ‘public rights’ necessarily carries with it power to authorize an agency to take

such procedural actions as may be necessary to maintain the integrity of the agency's adjudicatory proceedings"). In *In re Warren C. Havens*, the FCC required a litigant to file a request for permission to file further pleadings in a proceeding, to include a certification that the claims presented were not frivolous or made in bad faith, after the litigant repeatedly filed frivolous pleadings. See also *In re Comsat Corp.*, 17 FCC Red 13179, 13187-88 (2002) (noting that "should a party engage in such an abusive course of conduct before the agency, the Commission may decide to require the party to obtain the Commission's prior permission to file documents based on a prior showing of public interest").

Similarly, numerous courts have recognized their ability to impose reasonable filing restrictions on prolific, abusive, or frivolous litigants. For example in *In re Davis*, 878 F.2d 211, 212 (7th Cir. 1989), the Seventh Circuit stated that "[f]ederal courts have both the inherent power and constitutional obligation to protect their jurisdiction from conduct which impairs their ability to carry out Article III functions." Accordingly, the Seventh Circuit upheld an order requiring the court's threshold review of the litigant's documents to ensure that such documents were not duplicative or frivolous, when the litigant had filed at least 31 separate civil actions rife with unsubstantiated claims and attacks. The Seventh Circuit noted that this order was "a sensible and constitutional means of dealing with a litigant intent upon pressing frivolous litigation," because it did not create an absolute bar to the litigant's courthouse access. *Id.* at 212-13. See also *Riccard v. Prudential Ins. Co. of Am.*, 307 F.3d 1277, 1298 (11th Cir. 2002) (noting that litigants do not have a First Amendment right to abuse the judicial process with baseless filings in order to harass or distract); *In re Green*, 669 F.2d 779 (D.C. Cir. 1981) (finding

absolute bars against filing to violate the constitutional and statutory rights of access to the courts). Similarly in *In re Martin-Trigona*, 737 F.2d 1254, 1262 (2d Cir.1984), the Second Circuit upheld a pre-filing injunction that prevented the party from filing in federal courts and federal agencies without fulfilling certain conditions:

The district court is part of the federal judicial system and has an obligation to protect and preserve the sound and orderly administration of justice throughout that system. The order does not prohibit Martin-Trigona from seeking access to other federal district courts; it merely requires that he inform the court in question of pertinent facts concerning the action he seeks to bring, including the existence of the injunction order and of outstanding litigation against the named defendants, and that he obtain leave of that court to file the action. These conditions are hardly unreasonable. We need not wait until a vexatious litigant inundates each federal district court with meritless actions to condition access to that court upon a demonstration of good faith.

Thus, various courts have upheld requirements that prolific, abusive, or frivolous litigants first must obtain leave of court before any future filings in order to preserve the integrity of judicial proceedings. *See, e.g., Iwachiw v. N.Y. State DMV*, 396 F.3d 525 (2d Cir. 2005); *Edwards v. Nicholson*, 21 Vet. App. 265 (Jan. 11, 2007); *Federal Land Bank of St. Paul v. Ziebarth*, 520 N.W.2d 51 (N.D. 2004); *In re Whitaker*, 8 Cal. Rptr. 2d 249 (Cal. Ct. App. 1992).

The Indiana Supreme Court also has noted the various policy rationales that justify the need for special rules for prolific, abusive, or frivolous litigants:

Such voluminous filings burden both opposing parties and the courts, the latter of which must house, store, and in some cases eventually microfilm the filings. . . . Nothing Mr. Zavodnik has filed or done in this case shows any desire to litigate this case expeditiously to resolution on the merits. Rather, he has burdened the opposing party and the courts of this state at every level with massive, confusing, disorganized, defective, repetitive, and often meritless filings. And this Court has previously warned Mr. Zavodnik against continuing such abusive and burdensome litigation tactics. Last year, we described his voluminous, dilatory, and often meritless filings in another case, and the burdens imposed by those tactics:

. . . Each time he filed [an application to withdraw the case and appoint a special judge], he prevented the trial court judge from advancing the case until the application was resolved, making it more difficult for the judge to rule on pending matters. Each time he filed such an application, the Executive Director of the Division of State Court Administration was required to analyze the allegations to determine whether a violation had occurred.

Zavodnik v. Harper, 17 N.E.3d 259, 262-63 (Ind. 2014). In short, “[e]very resource that courts devote to an abusive litigant is a resource denied to other legitimate cases with good-faith litigants. There is no right to engage in abusive litigation, and the state has a legitimate interest in the preservation of valuable judicial and administrative resources.” *Id.* at 264 (internal citations omitted).

The Indiana Supreme Court also outlined how courts can deal with prolific, abusive, or frivolous litigants:

- Require the litigant to accompany future pleadings with an affidavit certifying under penalty of perjury that the allegations are true to the best of the litigant’s knowledge, information, and belief.
- Direct the litigant to attach to future complaints a list of all cases previously filed involving the same, similar, or related cause of action.
- Inform the litigant that future pleadings will be stricken if they do not meet the requirements of the rules or regulations.
- Require the litigant to state clearly and concisely at the beginning of a motion the relief requested.
- Direct the litigant to provide specific page citations to documents alleged by the litigant to support an argument or position.
- Limit the litigant’s ability to request reconsideration and to file repetitive motions.

Id. at 268-69. *See also Sims v. Scopelitis*, 797 N.E.2d 348, 352 (Ind. Ct. App. 2003)

(outlining steps for a pre-approval process with respect to a litigant).

Moreover, courts have not modified their approach with respect to pro se litigants. *See, e.g., In re Davis*, 878 F.2d 211, 212 (7th Cir. 1989) (imposing pre-screening restrictions on pro se litigant’s filings). As the Fifth Circuit has stated, “[t]hat his filings are pro se offers . . . no impenetrable shield, for one acting pro se has no license to harass others, clog the judicial machinery with meritless litigation, and abuse already overloaded court dockets.” *Ferguson v. MBank Houston, N.A.*, 808 F.2d 358, 359 (5th Cir. 1986).

Consistent with the views of the FCC and various courts, the Board has the inherent authority to adopt reasonable restrictions for illegitimate filers to protect the integrity of its proceedings and to preserve its valuable administrative resources. The Board and legitimate parties suffer when limited resources are wasted on illegitimate filers. In fact, the Board’s Rules of Practice direct “all persons appearing in proceedings before it to conform, as nearly as possible, to the standards of ethical conduct required of practice before the courts of the United States,” 49 C.F.R. § 1103.11; and the Board has recognized that parties therefore should not file “for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.” *Norfolk Southern Ry. Co.—Aban. Exemption—in Norfolk and Va. Beach, Va.*, AB No. 290 (Sub-No. 293X), slip op. at 8 (STB served Nov. 6, 2007). The proposed pre-approval processes simply would serve to enforce the Board’s existing Rules of Practice.

Second, with respect to the proposed rules for the OFA process, the Board already employs presumptions and requires information from offerors in this context. For example, government entities are presumed to be financially responsible under 49 C.F.R. § 1152.27(c)(1)(ii)(B). Similarly, parties who previously have been found not financially responsible or have been bankrupt should be presumed not financially responsible as a

matter of sound public policy. The Board itself has acknowledged the soundness of this presumption, stating in an abandonment proceeding that “Riffin could not be considered a financially responsible party, as he recently filed for bankruptcy petition. . . . [A] bankruptcy proceeding could result in any rail line Riffin might acquire becoming encumbered property, thereby jeopardizing its use for continued rail service.”

Consolidated Rail Corp.—Aban. Exemption—in Hudson County, NJ, AB No. 167 (Sub-No. 1190X) (STB served May 17, 2010). *See also Norfolk Southern Ry. Co.—Petition for Exemption—in Baltimore City and Baltimore County, MD*, AB No. 290 (Sub-No. 311X) (STB served Jan. 23, 2012) (noting that “insolvency is incompatible with being ‘financially responsible’ for OFA purposes”). As noted in *Indiana Southwestern Ry. Co.—Aban. Exemption—in Posey and Vanderburgh Counties, IN.*, AB No. 1065X (STB served Apr. 8, 2011), “[t]his presumption, although entitled to significant weight, is not conclusive” and simply would shift the burden of proof to the prospective offeror to demonstrate to Board staff that changed circumstances have given the individual a reasonable chance of being financially responsible. Furthermore, the Board already requires the offeror to include certain information within its offer. *See* 49 C.F.R. § 1152.27(c)(1)(ii). Although the current regulations have proven inadequate to distinguish illegitimate offerors from the legitimate, requiring an offeror to submit additional information regarding his or her financial responsibility would simply expand upon existing regulations and fulfill their intended purpose.⁹

⁹ In fact, the AAR previously provided a list of suggested additions to existing regulations: “Options that the Board should consider are to require an earnest money escrow or deposit at the time of the offer, a certification from a financial institution or a certified public accountant of the offeror’s financial position, or a representation from the offeror that it has not previously made an offer (or some specific number of offers) under

In sum, the processes and rules proposed herein do not represent a novel approach and should be adopted by the Board as a matter of public interest in order to protect the integrity and efficiency of its proceedings, as reinforced by the experiences of the FCC and various courts.

II. DRAFT LANGUAGE FOR PROPOSED PROCESSES AND RULES.

In this Petition for a Rulemaking, NS has advocated for three rules:

1. Adopt a process to deem a person or entity an abusive filer, a filer for harassment purposes, one who lacks standing or a cognizable interest in a proceeding, or a not financially responsible party, and require pre-approval by Board staff before such a person or entity can file in Board proceedings.
2. Establish a presumption in the OFA process that offerors who previously have been found not financially responsible or have been bankrupt are not financially responsible.
3. Require information at the outset to ensure that an offeror can provide the represented financial support in the OFA process; and if such information is not provided, disallow the filing of the OFA.

These proposed rules are not mutually exclusive. The Board could adopt one, two, or all of them to address the issues discussed in this Petition. But all of the proposals are worthy of inclusion in a Notice of Proposed Rulemaking.

To implement the first proposal, a new 49 C.F.R. § 1103.36¹⁰ should be added to provide as follows:

“49 C.F.R. § 1103.36. Persons and Entities Requiring Prior Approval. A person or entity who has been designated by the Board, upon the Board’s own motion or upon complaint, as an abusive filer, a filer for harassment purposes, one who lacks standing or an interest in proceedings, or, in the case of offers of

the OFA process that it was unable to consummate.” Ex Parte 712, Comments of the Association of American Railroads at 5-6 (Jan. 10, 2012).

¹⁰ If the Board does not feel that this provision is appropriate for Part 1103 of Title 49 of the Code of Federal Regulations, the Board alternatively could choose to add a new 49 C.F.R. § 1100.5 for this provision.

financial assistance, not a financially responsible party is required to obtain approval from the Director of Proceedings before filing any document in any proceeding before the Board until such time as that designation is removed by the Board. Such documents submitted to the Director of Proceedings for prior approval must be submitted on the person's or entity's behalf by counsel or a practitioner, both of whom are subject to the Canons of Ethics in Part 1103, subpart B of Title 49 of the Code of Federal Regulations.”¹¹

To implement the second proposal, 49 C.F.R. § 1152.27(c)(1)(ii)(B) should be amended to strike the word “and” and insert in its place:

“offerors who have previously been found not to be financially responsible or who have been bankrupt will be presumed not to be financially responsible and must disclose in the offer that they have previously been found not to be financially responsible or have been bankrupt; and”.

To implement the third proposal, new subsections (D) and (E) should be added to 49 C.F.R. § 1152.27(c)(1)(ii) and conforming changes made in subsection (B) by striking the word “and” and made in subsection (C) by deleting “.” and inserting in its place “; and”. New subsections (D) and (E) would provide as follows:

“(D) Certify that the offeror has established and funded an earnest money escrow or deposit prior to submitting the offer that is equal to ten (10) percent of the carrier's estimate; and (E) Provide either (i) a certification from a financial institution or a certified public accountant of the offeror's financial position or (ii) a representation, signed under penalty of perjury, from the offeror that it has not previously made an offer¹² under this section that it was unable to consummate.”

III. CONCLUSION

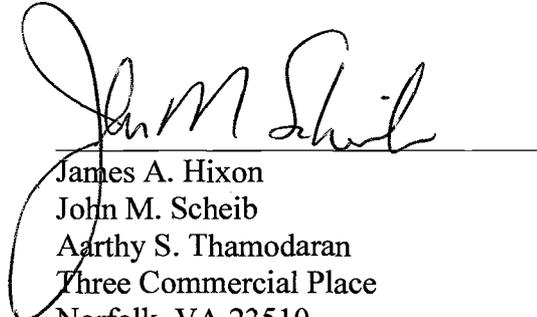
The proposed processes and rules contained in this Petition are in the public interest. Too often, Board proceedings have been victim to unmeritorious filings by

¹¹ The Board may conduct such a proceeding upon its own motion pursuant to 49 U.S.C. § 703, which permits the Board to establish its own rules for practice. Because such an action is not an investigation Subtitle IV, Part A, the limitation in 49 U.S.C. § 11701(a) upon Board initiated investigations does not apply.

¹² If the Board feels that this threshold is too low, it could require that the offeror has not previously made a specific number of offers that it was unable to consummate under the OFA process.

illegitimate parties that unnecessarily consume limited resources of the Board and parties to proceedings and distort the Board's decision-making process. The pre-approval processes and OFA rules proposed herein would provide a defense against such filings, thus preserving the integrity of Board proceedings and conserving the limited resources of the Board and parties. As such, NS respectfully requests the Board to expeditiously issue a notice of proposed rulemaking to seek comment and to refine these proposals.

Respectfully submitted,



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