

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

**ENTERED**  
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**Public Record**

REPLY COMMENTS ON BEHALF OF CITY OF JERSEY CITY

These Reply Comments are on behalf of the City of Jersey City ("City").

I. The City's Position is in Accord with DoD

As the Defense Department indicates in its comments in Ex Part 729, rail lines serve the public interest, and local, state and federal governmental entities from time to time decide that it is in the public interest that a rail line that a particular railroad deems money-losing remain available for service.<sup>1</sup> In such instances, it is reasonable to expect a local governmental entity to submit an "offer of financial assistance" ("OFA") in the relevant abandonment proceeding.<sup>2</sup> As the Department of Defense (DoD) points out in its comments,<sup>3</sup> preserving such lines through an OFA serves the public interest without damaging the private interest of the railroad, because the railroad will not be required to continue operating the line at a loss, and

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<sup>1</sup> DoD Railroads for National Defense Program comments in EP 729, STB website filed Feb. 11, 2016, at unnumbered p. 1.

<sup>2</sup> DoD Comments at unnumbered pp. 1-2.

<sup>3</sup> DoD Comments at unnumbered pp. 1-2.

instead will receive all constitutionally required compensation upon a sale pursuant to the OFA statute. The Surface Transportation Board (STB or Board) accordingly should not inhibit, hobble, or burden access to the OFA remedy on the part of governmental entities or shippers. In particular, City concurs with the Department of the Defense (DoD) which urges in its comments that "[g]overnmental entities and shippers on the rail line should not have to demonstrate a need for rail service to file an OFA."<sup>4</sup> Similarly, City concurs with DoD's view that "there should be no need [for governmental entities and shippers] to demonstrate that rail service is operationally feasible."<sup>5</sup> Additionally, City agrees with DoD's view that governmental entities should be presumed financially responsible, and should not have to post "earnest money" or post performance bonds.<sup>6</sup> Moreover, City concurs that carriers should be required to furnish financial data to governmental entities without preconditions for OFA purposes, and that potential offerants should not be required to perform additional steps or otherwise to divert themselves from preparing their OFA

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<sup>4</sup> DoD Comments, *supra*, P. 2. Alleged serial abusers of the OFA process such as Mr. James Riffin (whose "use" of the OFA process was discussed in E.P. 727, and in part precipitated EP 729) are neither governmental entities nor shippers.

<sup>5</sup> DoD comments, *supra*.

<sup>6</sup> DoD comments, *supra*.

in accordance with current regulatory deadlines.<sup>7</sup> (Indeed, imposing such requirements in the ordinary course is not consistent with the OFA statute.) City also concurs with DoD that the requirements of the Regulatory Flexibility Act may apply if this agency actually proposes to encumber access to the OFA process by shippers and governmental entities, because “[a]ny community with a population less than 50,000 that is served by a railroad is potentially impacted ...”<sup>8</sup> The Board is already attempting<sup>9</sup> to impose many of encumbrances it is considering in this ANPR upon the City of Jersey City. The City attests that it is adversely, expensively and for no sound reason impacted in its efforts to employ the OFA remedy as a result.

## II. The Carrier Comments Miss the Mark

Without waiver of any position should this Board actually propose rule changes in connection with offers of financial assistance, the City will now turn to some of the basic issues raised by commenting railroads,<sup>10</sup> their trade association

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<sup>7</sup> DoD comments, supra.

<sup>8</sup> DoD comments, supra, at 3.

<sup>9</sup> City has petitioned for judicial review concerning the imposition of the ANPR requirements on its efforts to OFA the Harsimus Branch. STB has sought to dismiss the appeal on the ground that imposition of the ANPR requirements upon the City is not a final order subject to review under the Hobbs Act.

<sup>10</sup> Railroads filing comments in this proceeding, according to the STB website, are as follows: Union Pacific Railroad Company (“UP”), Norfolk Southern Railway Company (“NS”), CSX

[Association of American Railroads ("AAR")], and the short line association [American Short Line and Regional Railroad Association ("ASLRRA")] (collectively "carriers"). The carriers all appear to call for additional showings by "offer of financial assistance" ("OFA") applicants, and additional findings by this Board, as a condition for allowing OFA's to proceed. First, the carriers all appear to overlook the fact that Congress in adopting the ICC Termination Act version of the OFA remedy (now codified at 49 U.S.C. 10905) not only shortened the timetable for submission of OFA's and for STB to adjudicate terms and conditions,<sup>11</sup> but also eliminated the requirement that this agency find an OFA to be "bona fide" before allowing it to proceed.<sup>12</sup> Shortening the timetable is not compatible with imposing preconditions on OFA applicants, much less litigating the preconditions, and this agency has already determined that Congress did not intend it to determine that OFA's were bona

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Transportation ("CSX"), and Consolidated Rail Corporation ("Conrail").

<sup>11</sup> STB noted the shortened time period in its proposed rules, including the fact that Congress cut the Board from 60 down to 30 days to issue terms and conditions, and that the Board would require the party requesting terms to make its entire case on valuation at the time of the request. 61 Fed. Reg. 11178 (March 19, 1996). There is no time in the process for meaningful litigation over rail need and continuation issues, and the Board lacks field staff for independent investigation.

<sup>12</sup> Fed. Reg. 67881 (December 24, 1996) (Board rejects RTC request to maintain bona fide requirement as contrary to congressional intent).

fide before allowing them to proceed. The carrier comments in effect seek to amend the statute and should be directed to Congress, not the agency.

The carriers oppose the OFA remedy because it requires them -- in what is intended to be a fast and efficient proceeding -- to transfer rail lines at the constitutional minimum value. In abandonment proceedings, the minimum constitutional value is Net Liquidation Value (NLV). Under the NLV approach, carriers are entitled to salvage value of the rail and ties, and to an across the fence (ATF) valuation (subject to appropriate discounts for matters like cost of sales) of only that real estate to which they hold marketable title. Carriers are not allowed to demand much less receive compensation for rail easements; nor do carriers receive compensation for "assembly" or "corridor" value. Carriers cannot demand "hold up" value; in other words, they cannot extort additional compensation on the ground that state law eminent domain is preempted so their demands must be met before they will agree to transfer of a rail line they no longer wish to operate. Most of the carrier suggestions to prevent "abuse" of OFA are really nothing more than efforts by the carriers to make it difficult to impossible to file an OFA, thus allowing them to abuse shippers and governmental entities by imposing compensation demands in excess of what they would

receive under OFA. The carrier comments have nothing to do with preventing delays.

But the OFA "abuse" with which the ANPR is concerned is unnecessary delay.<sup>13</sup> The City is very sympathetic to complaints about delay in the OFA process.<sup>14</sup> If delay is the issue, it is not a solution to impose additional procedural showings and call for this agency to make additional findings as a condition of allowing an OFA to proceed. Additional showings and additional requirements for findings will cause delay, particularly since the agency is already understaffed, without field offices, and

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<sup>13</sup> E.g., ASLRRRA comments at unnumbered pp. 2-3.

<sup>14</sup> As City indicated in its comments in chief, alleged OFA abuser James Riffin is currently seeking to OFA a line in Jersey City on behalf of a developer to prevent the City from acquiring the line for rail and compatible historic preservation purposes. See AB 167-1189X. The agency allowed Mr. Riffin to participate despite his avowed purpose of seeking to assist a developer in defeating the City's efforts, and allowed him to participate despite his failure to comply with the applicable deadline (Mr. Riffin's pleading was allowed by the agency despite missing the deadline by roughly six years.

Riffin devotes roughly half his comments in Ex Parte 729 to attacking the City and its attorney in AB 167-1189X. These Riffin comments are as irrelevant to this proceeding as they are misleading. The City will not respond to them further here, but reserves all rights to file a supplemental response once the City's objections to the protective order which this Board entered on March 9 in EP 729 are resolved, and the City's motion to strike any Riffin filing pursuant to that protective order is resolved. In any event, any failure to respond to Mr. Riffin's various misrepresentations should not be taken as an admission of any for any purpose here or elsewhere, including in AB 167-1189X. Furthermore, City opposes Riffin's belated invocation of the OFA process in AB 167-1189X on all available grounds, and nothing here or elsewhere should be construed as waiving any position to the contrary.

without substantial investigative staff. In all events, this agency should reject (as DoD suggests) all efforts by the carriers to persuade STB to second guess the public interest decisions and conclusions of governmental entities, or the needs of shippers, seeking to file an OFA.

Almost all abandonment proceedings since the inception of STB have been (i) fast track two year out-of-service notice of exemption proceedings (49 C.F.R. 1152.50) (no local traffic for at least two years), or (ii) petitions for exemption (49 U.S.C. Part 1121 and 1152.60) (little or no traffic). The main cause of OFA delay in those sorts of proceedings is that the railroads do not have the economic information available which by statute and regulation they must supply the OFA applicant prior to any obligation actually to file an OFA. (City repeatedly unsuccessfully asked Conrail for such information, and ultimately had to move to compel Conrail to supply that information in AB 167-1189X, even after this agency repeatedly confirmed to Conrail it must make the information available.) The carriers are responsible for this delay. Their fault lies in themselves, not this agency or even alleged serial abusers like Riffin.

Another major cause for delay -- witnessed by City repeatedly (e.g., AB 167-1189X and AB 167-1190X) within its own municipal boundaries this past decade -- arises when railroads

(Conrail, CSX and NS in the case of City) engage in unlawful de facto abandonment and sale of their rail property before seeking abandonment authority. The carriers then seek exemption from OFA procedures in order to protect their unlawful de facto abandonment sales. The unlawful de facto abandonments not only provoke efforts to avoid OFA, but also thwart this Nation's environmental and historic preservation laws and remedies like 49 U.S.C. 10906 (public use conditioning). To the extent the railroads in their comments seek some kind of general exemption from OFA for sales prior to seeking abandonment authority, this Board should advise the railroads to postpone sales until after the abandonment process is completed. The public interest is not served by unlawful de facto abandonments but by their elimination and curtailment.

Another cause for OFA delay that the City has experienced in AB 167-1189X arises when this Board does not enforce its own regulations barring late filed notices of intent to OFA and when the Board unilaterally waives otherwise applicable procedural schedules for resolving an OFA, creating an indefinite delay. In particular, in AB 167-1189X, this agency (over Conrail's objection as well as the City's) allowed alleged serial OFA abuser Riffin to file a notice of intent to OFA roughly six years after the due date. The agency then effectively vacated the schedule for filing and resolving OFA's (and months later

has still not issued another one), thus creating uncertainty and indefinite delay. These sorts of delay are harmful to the City as well as the carriers, and can be addressed simply by obedience to existing regulations which provide for orderly proceedings.

AAR proposes adding more notice of intent requirements (AAR comments at 5), and the railroads (e.g., Conrail) in their comments ask for more showings and procedures. But adding more requirements will not result in shortening OFA proceedings. Instead, additional showings and requirements will simply be grounds to prolong OFA proceedings, because it takes time and resources to assemble the showings and time and resources to adjudicate findings. Moreover, if this agency (as exemplified in AB 167-1189X) fails to enforce existing relatively straightforward procedural deadlines already in place that are aimed at preventing delay, it follows that adding additional regulations calling for complex showings and adjudications before an OFA proceeding can go forward will only make even more delay necessary and/or unavoidable.

If delay is the issue, the solution is for railroads simply to provide valuation information promptly in exemption proceedings (and perhaps for this agency to require that information be supplied when notices or petitions for exemption are filed), for railroads to eschew illegal de facto

abandonments (and for this agency to prevent railroads from profiting from their illegal conduct in derogation of the agency's regulatory authority), and for the Board to adhere to existing procedural deadlines for notices of intent and for submission of OFA's.

### III. The Board Should Apply its Balancing Test to Prevent Abuse of OFA

There remains a very real OFA abuse problem. Individuals like Mr. Riffin and/or railroads controlled by or affiliated with such individuals from time to time submit OFA's in order, (a) to acquire the line for non-rail development, (b) to frustrate a public project on the line, and (c) perhaps to extract a ransom from a railroad which has engaged in an illegal de facto abandonment. As City indicated in our opening Comments, certain organizations (e.g., NARPO) publicly advocate use of the OFA remedy to defeat public projects. City will ignore abuses in the nature of (c) for they arise in situations created by unlawful conduct of the railroads themselves. City will focus instead on abuses in the nature of (a) or (b) above.

In cases where no public project is involved, but a carrier complains that an OFA is being proffered solely for private purposes (e.g., to acquire a line for conversion into townhouses or skyscrapers), there needs to be some means to ensure that the OFA remedy is being constitutionally applied to secure property

for a public purpose. The Board could require the OFA applicant to provide documentation showing that its OFA is supported or requested by (a) at least one shipper or potential shipper on the line, or (b) an interested governmental entity (e.g., local political subdivision, state agency, or federal agency like DoD). This should be all the demonstration of "rail need" required. However, OFA applicants - especially serial OFA abusers such as Riffin -- should not be allowed to piggy-back onto shipper support for an OFA by a governmental entity or the shipper itself. OFA applicants who cannot point to any governmental or shipper support for their own OFA have insufficient interest in, or capability of, supplying service to merit consideration.

Use of the OFA remedy to defeat a public project and to facilitate its non-rail diversion into townhouses and skyscrapers (Riffin's admitted purpose in AB 167-1189X) clearly amounts to use of a federal eminent domain remedy for private purposes. Again, takings (eminent domain) must be for public purposes, not private purposes, in order to be constitutional. The Board has developed a relatively efficient and effective means to weed out OFA's that are intended to frustrate public projects. The Board balances the public project's benefits against the OFA applicant's evidence of rail need. This test

should be vigorously applied to prevent the OFA remedy from being used to undercut important public projects.

Moreover, the City does not oppose scrutiny of the financial responsibility of private parties to acquire and to provide rail service. Indeed, if an alleged OFA abuser such as Riffin is relying on developer backing to buy a right of way for a developer, then that should be grounds to disqualify the OFA abuser. However, as the DoD states in its comments, governmental entities are -- and should be -- presumed to have financial responsibility.

Rails to Trails Conservancy in its comments points out that this Board does not treat public trail projects as worthy of the same protection against abusive OFA's as other public projects. NARPO has targeted public trail projects for OFA abuse. The City of Jersey City agrees that public trail projects should be afforded the same protection against abusive OFA's as are any other public projects. This is not somehow giving priority to "trails" or "railbanking" over OFA's. Instead, it is simply protecting a public project that preserves the corridor within this Board's jurisdiction from an abuse of the OFA process. The fact that Congress has chosen to facilitate public projects involving railbanking by adoption of 16 U.S.C. 1247(d) does not mean that railbanking deserves less protection from abusive OFA's than any other public projects, just because Congress has

not chosen specifically to facilitate public projects to the degree that it has chosen to facilitate railbanking. The City also agrees with DoD that this Board should not grant exemptions from OFA that subvert national defense interests.

#### IV. OFA's Are Still Relevant

UP in its comments intimates that it has negotiated many rail line sales without the need for OFA. UP seems to imply that OFA's are no longer germane, useful or important. The OFA remedy sets the standards for compensation to carriers for preserving rail corridors for continued viatic use. It thus encourages private deals at valuations that are based on NLV as opposed to hold-up value. The fact, if it is a fact, that there are more rail corridor sales outside OFA than inside OFA does not mean that the OFA remedy is irrelevant, much less that additional conditions should be placed on governmental entities or shippers seeking to use the OFA remedy.

Respectfully submitted,  
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