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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Docket No. EP 729

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OFFERS OF FINANCIAL ASSISTANCE

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**OPENING COMMENTS OF  
UNION PACIFIC RAILROAD COMPANY**

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Union Pacific Railroad Company (“Union Pacific”) submits our comments in response to the Board's Advanced Notice of Proposed Rulemaking on whether and how the Board should update its rules pertaining to offers of financial assistance (“OFAs”) in order to improve that process and protect it against abuse. Offers of Financial Assistance, EP 729 (STB served December 14, 2015) (“Notice”). Union Pacific commends the Board on proactively seeking to improve the OFA process. In these comments, we offer recommendations that will further the statutory goal of preserving rail service on rail lines that would otherwise be abandoned or discontinued when there is a need to preserve such service. At the same time, our recommendations are designed to prevent abuses of the OFA process while making it easier for the Board to evaluate OFAs and improving the process for rail carriers to dispose of rail lines when there is no demonstrated need for continued rail service. Implementing our recommendations furthers the Rail Transportation Policy set forth in 49 U.S.C. § 10101 by minimizing the need for Federal regulation, reducing regulatory barriers, encouraging honest and efficient management, and providing for the expeditious handling of proceedings.<sup>1</sup>

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<sup>1</sup> Union Pacific also adopts the comments submitted by the Association of American Railroads (“AAR”).

## **I. Background**

Union Pacific does not take lightly abandoning parts of our rail network. Abandoning a railroad line means foregoing all future opportunities to provide customer service to generate revenue on the line. Only those lines that offer or appear to offer no reasonable prospect for sustainable operations are submitted for abandonment or discontinuance. Before taking this step, Union Pacific looks diligently for alternatives including selling or leasing the line to another railroad, to a shipper on the line or to a public entity interested in preserving rail service. Union Pacific typically seeks to abandon a line only when the prospects for continued, viable rail service are virtually non-existent.

Our experience with OFAs validates that judgment. OFAs have been submitted in a very small number of UP-initiated abandonment or discontinuance proceedings and only a handful of these were successful. Following the passage of ICCTA, the Board promulgated revised regulations governing abandonments, discontinuances and the OFA process in Ex Parte No. 537. Since the revised regulations governing abandonments, discontinuances and OFAs became effective on January 23, 1997, Union Pacific has initiated 190 proceedings to abandon or discontinue service on a rail line. Yet a party has submitted an expression of intent to file an OFA in only 17 UP-initiated proceedings to abandon or discontinue service. An actual OFA was filed in only nine of these proceedings and only five of the OFAs resulted in continuation of rail service by a third party on the line Union Pacific sought to abandon. Although fewer than 1 in 3 notices of intent to submit an OFA resulted in a successful OFA, the unsuccessful notices and offers consumed time and resources and delayed the abandonment, sometimes by many months.

Union Pacific believes it is important for the Board to review its regulations and ensure the OFA process achieves its statutory objective. We believe regulatory improvements can be

achieved without creating any undue burden on the Board, on railroads seeking to abandon rail lines, or on OFA offerors. These improvements can bring the OFA process into closer conformity with the salutary goals of the Rail Transportation Policy to minimize the need for regulation, to reduce regulatory barriers to entry and exit, to encourage honest and efficient management of railroads, and to provide for the expeditious handling and resolution of proceeding.<sup>2</sup> Providing clarity on OFA requirements will ease the burden on offerors by providing them with notice of what must be included, will ease the burden on the Board by providing guidelines against which to review an OFA, and will ease the burden on railroads by ensuring that all OFAs are *bona fide* offers. To this end, we offer the following recommendations.

## **II. The Board Should Require Additional Evidence of Financial Responsibility**

Under 49 U.S.C. § 10904, the Board must ensure that any person submitting an OFA is financially responsible before allowing an OFA to proceed. To fulfill this obligation, the Board currently requires OFA offerors to demonstrate financial responsibility under 49 C.F.R. § 1152.27(c)(1)(ii)(B). Yet, those regulations do not define specific requirements or criteria that an offeror must meet in order to be found financially responsible. Notice at 2. Union Pacific believes the Board can improve the current process by specifying the type of documentation required to support a financial responsibility determination. We further believe a requirement that potential offerors to make an earnest money payment would serve the public interest.

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<sup>2</sup> 49 U.S.C. §§ 10101 (2), (7), (9), and (15).

## A. Documentation of Financial Resources

To allow the Board to evaluate the financial responsibility of an offeror in accordance with the statutory objections of the OFA process, Union Pacific recommends the following revisions to the Board's regulation (proposed new language in italics).

49 C.F.R. § 1152.27 (c)(1)(ii) Contents of offer. The offeror shall set forth its offer in detail. The offer must:

- (A) Identify the line, or the portion of the line, in question;
- (B) *State whether the offeror is a governmental entity; governmental entities will be presumed to be financially responsible;*
- (C) *If the offeror is not a governmental entity, demonstrate that the offeror is financially responsible by submitting:*
  - (1) *A verified statement by the offeror that the offeror has the financial resources or within a reasonable time will have the financial resources to fulfill proposed contractual obligation and stating whether the offeror or an entity in which the offeror had a controlling interest has filed for bankruptcy or been forced into bankruptcy involuntarily in the last 10 years;*
  - (2) *Documentation of the offeror's financial resources from a reputable financial institution in the form of account statements, a letter of credit or financing commitment;*
  - (3) *Evidence of the offeror's ability to obtain adequate insurance from a reputable insurer for continued rail operations; and*
  - (4) *Any other relevant documentation or evidence demonstrating that the offeror has the financial resources or within a reasonable time will have the financial resources to fulfill proposed contractual obligations.*
- (D) *[see recommended language on pages 7-8 in Section III below concerning rail operations]*
- (E) Explain the disparity between the offeror's purchase price or subsidy if it is less than the carrier's estimate under paragraph (a)(1) of this section, and explain how the offer of subsidy or purchase is calculated.

This type of information is the same type that offerors have submitted and the Board has suggested is appropriate for it to review when evaluating past OFAs.<sup>3</sup> Explicitly requiring this

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<sup>3</sup> See, e.g., *Consol. Rail Corp.—Aban. Exemption—in Phila. PA.*, AB 55 (Sub-No. 710X) (STB served Oct. 26, 2012); *Ind. Sw. Ry.—Aban. Exemption—in Posey & Vanderburgh Ctys., Ind.*, AB

information to be submitted with an OFA will ensure uniformity among OFAs. This will help the Board expeditiously handle and resolve OFAs, in furtherance of the Rail Transportation Policy, by ensuring the Board has the information necessary to evaluate OFAs and is able to evaluate all OFAs using the same standard. The proposed specification of information required would provide clear guidance to parties considering making an OFA on how they can demonstrate financial responsibility.

### **B. Earnest Money**

In addition to specifying the type of information an offeror must provide, Union Pacific suggests that the Board also require potential offerors to make an earnest money deposit with the applicant railroad *before* the applicant railroad is required to provide financial information required under 49 C.F.R. § 1152.27(a). Requiring an earnest money payment will give further assurance that the potential offeror is financially responsible and that the corresponding OFA is *bona fide* and worthy of the Board's consideration. Stated differently, an earnest money payment will serve an important screening function; such payments ensure that only parties having a sincere and plausible interest in pursuing the OFA process to completion will invoke the Board's scarce deliberative and regulatory resources. Parties facing such a requirement will be far less likely to pursue a frivolous OFA or one they have no intention of seriously taking to a conclusion. Union Pacific recommends setting the earnest money payment at an amount equal to the OFA filing fee so as to not impose too great a burden on potential *bona fide* offerors. We also believe it is appropriate and fair for the applicant railroad to retain the earnest money payment,

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1065X (STB served April 8, 2011); *Norfolk S. Ry. Co.—Aban. Exemption—in Somerset Cty., Pa.*, AB 290 (SUB-305X) (STB Served Jan. 30, 2009); *Union Pac. R.R.—Aban.—in New Madrid, Scott, and Stoddard Ctys., Mo.*, AB 33 (Sub-No. 261) (STB served July 30, 2009); *Ariz. & Cal. R.R.—Aban. Exemption—in San Bernardino and Riverside Ctys., Cal.*, AB 1022 (Sub-No. 1X) (STB served July 15, 2009); *Union Pac. R.R.—Aban. Exemption—in Lassen Cty., Cal., and Washoe Cty., Nev.*, AB 33 (Sub-No. 230X) (STB served Sept. 19, 2008).

regardless of the outcome of the OFA process, to compensate the applicant for the time and expense involved in providing information to the offeror. If the offer is successful, the deposit would be credited against the purchase price or subsidy payment.

To require an offeror to make an earnest money payment, Union Pacific recommends the following revisions to the Board's regulation (proposed new language in italics).

49 C.F.R. § 1152.27 (a) Provision of information. An applicant must provide promptly upon request to a party *that has fulfilled the requirements in paragraph (o)*, and concurrently to the Board, the following: [remainder of paragraph unchanged]

*49 C.F.R. § 1152.27 (o) Earnest Money. Prior to or concurrent with a request for information from an applicant under paragraph (a), a party considering an offer of financial assistance to continue existing rail service must deposit with the applicant an earnest money payment in an amount equal to the filing fee for an offer of financial assistance under 49 C.F.R. § 1002.2(f)(25). The earnest money payment will be payable to the applicant, by check payable in United States currency drawn upon funds deposited in a United States or foreign bank or other financial institution, money order payable in United States currency. The earnest money payment will be retained by the applicant regardless of the outcome of the proceeding. If the offer is successful, the earnest money payment will be credited towards the purchase price or subsidy. The Board will consider requests for a waiver or reduction of the earnest money payment in accordance with the Board's policy set forth in 49 C.F.R. § 1002.2(e).*

### **III. The Board Should Require Evidence that Continued Rail Service is Needed and Feasible**

While the Board is only required to make a finding of financial responsibility before allowing an OFA to proceed, the Notice requests comments on how to ensure the OFA process is invoked only to further the statutory purpose of preserving lines for rail service for which there is no identified demand. In evaluating OFAs, the Board routinely examines whether there is actual need for continued rail service and whether the offeror will be able plausibly to meet that need.<sup>4</sup>

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<sup>4</sup> *The Burlington N. & Santa Fe Ry. Co.—Aband. Exemption—in King Cty., Wa in the Matter of an Offer of Fin. Assistance*, 3 S.T.B. 634 (1998), AB 6 (Sub-No. 308X) (STB served Aug. 5,

The courts have upheld the Board's examination of these factors and upheld the Board's denial of OFAs based on findings that there is no need for continued rail service.<sup>5</sup> Thus, it is already an accepted legal principle that the Board may include in its regulations a requirement that the offeror demonstrate (i) a need for continued rail service on the line and (ii) the offeror's ability to meet that need. Doing so will improve the efficiency of the OFA process by giving the Board access to more of the information needed to evaluate fairly an OFA without the need for further Board action to request such information. Requiring this information will also further the Rail Transportation policy by encouraging honest and efficient management of the railroad sought to be acquired by an offeror.

To allow the Board to evaluate the need for continued rail service more effectively and the offeror's ability to provide rail service, Union Pacific recommends the following revisions to the Board's regulation (proposed new language in italics).

49 C.F.R. § 1152.27 (c)(1)(ii) Contents of offer. The offeror shall set forth its offer in detail. The offer must:

- (A) [unchanged from recommendation on page 4 in Section II]
- (B) [unchanged from recommendation on page 4 in Section II]
- (C) [unchanged from recommendation on page 4 in Section II]
- (D) *Demonstrate that there is a need for continued rail service on the line and the offeror's ability to provide rail service by submitting:*
  - (1) *Documentation of the need for continued rail service on the line including statements from shippers or potential*

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2008); *Roaring Fork Railroad Holding Authority—Aband. Exemption—In Garfield, Eagle, and Pitkin Clys., CO*, AB 547X (STB served May 21, 1999); *Trinidad Railway, Inc.—Aband. Exemptio—in Las Animas Cty., CO*, Docket No. AB 573X (STB served Aug. 13, 2001); *Union Pac. R.R. Co.—Aband. Exemption—in Lassen Cty., Ca, & Washoe Cty., Nv*, AB 33 (SUB-230X) (STB Served Sept. 19, 2008).

<sup>5</sup>*Redmond-Issaquah R.R. Pres. Ass'n v. Surface Transp. Bd.*, 223 F.3d 1057 (9th Cir. 2000); *Kulmer v. Surface Transp. Bd.*, 236 F.3d 1255 (10th Cir. 2001); *Borough of Columbia v. Surface Transp. Bd.*, 342 F.3d 222 (3d Cir. 2003); *Kemp v. Surface Transp. Bd.*, 387 F. App'x 703 (9th Cir. 2010).

*shippers that describe the nature of the shippers' operations, anticipated volume and type of rail traffic that will move over the line;*

*(2) Documentation of community support for continued rail service on the rail line including statements of support from public entities;*

*(3) A narrative statement describing anticipated operations on the line including a statement that the offeror intends to operate the line for at least 2 years or provide a subsidy for continued operations at least 1 year;*

*(4) A map indicating the anticipated location(s) of shipper(s) on the line and anticipated interchange location(s) with other railroads;*

*(5) A description of any rehabilitation or repair that is necessary prior to the offeror commencing rail service including an estimate of the costs for the rehabilitation or repair and a statement explaining how the offeror will fund such rehabilitation or repair;*

*(6) A description of any anticipated additions or alterations to the line and a statement indicating whether further Board action will be necessary to authorize or exempt such additions or alterations; and*

*(7) If the offeror seeks to acquire the line, a pro forma balance sheet covering the initial two years of offeror's proposed operations on the line.*

(E) [unchanged]

This type of information is the same type that the Board typically reviews when evaluating an OFA.<sup>6</sup> Explicitly requiring this information to be submitted with an OFA will ensure an even playing field among offerors and will facilitate the Board's orderly, diligent and complete evaluation of OFAs. Our proposal also benefits potential offerors by providing notice of what information must be included in an OFA. This will make it easier for *bona fide* offerors to meet the statutory criteria and submit a successful OFA.

#### **IV. The Board Should Create a Class Exemption to Section 10904**

As explained above, Union Pacific does not seek to abandon a line of railroad if there are viable prospects for continued rail service. When there is no longer a need for rail service, Union

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<sup>6</sup> See *supra* note 3.

Pacific will typically attempt to sell a rail line to another entity that will put the land to a better use. Under current rules, if UP wants to sell a rail line to a third party for a non-rail use, the parties must negotiate the sale, and Union Pacific must then seek abandonment authority before the sale is consummated. The constantly looming possibility of an OFA process introduces a level of considerable uncertainty and risk of delay into these transactions that otherwise promote market efficiency. If an OFA is filed, the sale will likely be delayed for months and, if the OFA is successful, the sale will not be allowed to proceed.

Since 1997, Union Pacific sought an exemption from 49 U.S.C. § 10904 in 14 abandonment or discontinuance proceedings, seven of which were granted.<sup>7</sup> However, seeking an exemption does not remove the uncertainty of whether an OFA will be filed. To remove this uncertainty, Union Pacific recommends the Board create a class exemption from § 10904 if certain criteria are met.

Union Pacific endorses the proposal for a class exemption for lines to be transferred to a public entity recommended by the Association of American Railroads (“AAR”) in its comments.<sup>8</sup> Six of the seven exemptions sought by Union Pacific that were granted involved a pre-arranged transaction for transfer of the line to be abandoned to a public entity for a public purpose.<sup>9</sup> Allowing for a class exemption for such transactions is consistent with Board precedent.

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<sup>7</sup> In addition, one request for a waiver has not yet been ruled on, one request was denied as moot because no intent to file an OFA was submitted and one request for waiver was never ruled on by the Board because the abandonment filing was converted to a line relocation in a separate proceeding.

<sup>8</sup> Comments of the AAR, Ex Parte 729, p. 10 (filed on February 12, 2016).

<sup>9</sup> The other successful exemption request involved a sale to a shipper located on the line to preserve rail service for the shipper.

In addition, Union Pacific recommends the Board expand the AAR's proposal to include a class exemption from the OFA process for rail lines over which no local traffic has moved for at least five consecutive years. The fact that no local traffic has moved over a line for half of a decade strongly suggests there is no need for rail service on that line. Under 49 U.S.C. § 10502, the Board is within its authority to create such a class exemption because such a long period without local traffic is sufficiently conclusive evidence that continued regulation is not necessary to carry out the Rail Transportation Policy of 49 U.S.C. § 10101. Requiring such lines to be subject to the process does not minimize the need for regulatory control, in contravention of § 10101(2). On the other hand, providing a class exemption when rail service has not been requested on a line for such a long period of time will further the Rail Transportation Policy by reducing regulatory barriers to exit and by providing the expeditious handling and resolution of all proceedings. 49 U.S.C. §§ 10101(7) and (15). Because there have been no shippers on line for at least 5 years, continued regulation is not necessary to protect shippers from the abuse of market power. A class exemption from the OFA process for such long out-of-service rail lines thus fulfills the Board's directive under § 10502 to exempt transactions from regulation.

Union Pacific recommends that the Board create the following class exemption from the OFA process:

*An abandonment or discontinuance of service or trackage rights is exempt from 49 U.S.C. § 10904 if the carrier certifies that no local traffic has moved over the line for at least 5 consecutive years and any overhead traffic on the line can be rerouted over other lines and that no formal complaint filed by a user of rail service on the line (or a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Board or any U.S. District Court or has been decided in favor of the complainant within the 5-year period. The complaint must allege (if pending), or prove (if decided) that the carrier has imposed an illegal embargo or other unlawful impediment to service.*

## V. The Board should Allow Railroads to Withdraw Proceedings

Union Pacific recommends that the Board revise its regulations to allow an applicant railroad to withdraw its abandonment or discontinuance filing if a continued need for rail service becomes evident during the proceeding. When it works properly, the OFA process should act as an information gathering activity to determine whether there is a previously undetected need for continued rail service. It is possible, though unlikely in our experience, that a potential offeror may be aware of a need for rail service that was unknown to Union Pacific when we initiated the abandonment or discontinuance. If new information concerning the need for rail service comes to light as a result of the OFA process, a railroad should be allowed to reexamine its previous, voluntary decision to abandon a line or discontinue service. Under current Board rules, this voluntary decision to abandon can result in the forced dispossession of the railroad's asset through the OFA process.<sup>10</sup> A railroad should generally not be opposed to a line being acquired through an OFA given the railroad's initial decision to abandon the line. However, a railroad might want to reconsider that decision if new evidence, data or facts are presented by the offeror suggesting a true need for continued service. In that case, the applicant railroad should have the option facilitate continued service by negotiating with the OFA offeror or by choosing to provide service itself.

Allowing withdrawal of an abandonment proceeding in this situation will not frustrate the OFA process because the core purpose of the OFA process is to preserve rail service. By withdrawing the proceeding, an applicant railroad would retain any common carrier obligation to

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<sup>10</sup> In a discontinuance proceeding, an OFA can only be made to request an operating subsidy. *See, e.g., New York & Atl. Ry.—Discontinuance of Service Exemption—in Queens Cty., N.Y.*, AB 1236X, slip op. at 2 (STB served Jan. 22, 2016). Therefore, a discontinuance will not result in the line being acquired by a third party.

continue rail service on the line, thus accomplishing the ultimate goal of the OFA framework. The Board should be indifferent as to whether rail service is preserved by an offeror acquiring the line or by the original applicant railroad continuing to operate the line.

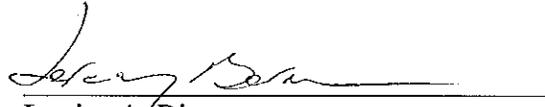
To allow an applicant railroad to withdraw its abandonment or discontinuance filing and continue rail operations, Union Pacific recommends the following revisions to the Board's regulation (proposed new language in italics):

*49 C.F.R. § 1152.27(p) Withdrawal by Applicant. At any time prior to final Board action in a proceeding, an applicant may withdraw its application, petition for exemption or notice of exemption with respect to all or any portion of the line. Such withdrawal will terminate all pending offers of financial assistance with respect to such line or any portion thereof. Following withdrawal the applicant will have no obligation to negotiate with an offeror or to transfer such line or portion of the line to an offeror. Upon withdrawal, the applicant carrier must return all earnest money payments to the offeror.*

## **VI. CONCLUSION**

Union Pacific appreciates this opportunity to offer its suggestions on improving the efficiency and effectiveness of the OFA process. The recommendations we propose will assist the Board in timely and efficient evaluation of OFAs without unduly or unreasonably burdening potential, *bona fide* offerors.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Louise A. Rinn", is written over a horizontal line.

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