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**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.**

STB Docket No. Ex Parte 729

Offers of Financial Assistance

ADVANCED NOTICE OF PROPOSED RULEMAKING

**COMMENTS OF THE
AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION**

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Introduction and Interest of the American Short Line and Regional Railroad Association

ASLRRA is an international trade organization of approximately 1,100 members consisting of about 550 short line and regional small locally based railroads in 49 states and six Canadian provinces as well as approximately 550 suppliers and contractors. These railroads operate about 50,000 miles of track connecting largely less populated, rural areas to the national rail network. Those fifty thousand miles constitute 32 percent of the nation's rail system and short line and regional railroads participate in 40 percent of all carload movements but earn only five percent of the revenue generated on the national rail system. Class II and III railroads frequently provide the first and last mile of service on many rail movements.

ASLRRA is filing Comments in this proceeding as it supports the STB's efforts to update the OFA rules, particularly to improve the process and protect the rules against abuse. Many Railroad Members of the Association have suffered delays and waste of resources inflicted on them by parties who have abused the process. Updating the rules to close loopholes and to ensure that only legitimate offers of financial assistance are made by parties who truly have the financial and other resources to operate and maintain the line subject to discontinuance or abandonment.

Background of the Proceeding

In a decision served December 14, 2015, the Surface Transportation Board (the "Board" or the "STB") issued a Notice of Proposed Rulemaking ("ANPR") seeking comments on whether and how it should update its rules pertaining to offers of financial assistance in order to improve

that process and protect it against abuse. In the ANPR, the Board said that under the ICC Termination Act of 1995 ("ICCTA"), Congress revised the process for filing offers of financial assistance ("OFA's"). The STB's regulations promulgated under the ICCTA provide for procedures for continued rail service by a financially responsible party when a rail common carrier files to abandon or discontinue service over a line. Under the statute and regulations, a financially responsible party may offer to temporarily subsidize continued rail service or offer to purchase the line the carrier seeks to abandon and continue rail service on it.

The Notice

In its notice, the STB said that in its experience with OFA's there are some areas it feels there need to be clarifications and revisions to enhance the process and protect it against abuse. The Board stated that it wanted to hear comments from parties on how it could make the definition of financial responsibility be more transparent and understandable.

Specifically, the STB is seeking comments on the following issues:

1. What documents should a potential offeror be required to submit to show financial responsibility?
2. Should the offeror file notices of intent to file an OFA in abandonment and discontinuance proceedings by a date certain?
3. Should the offeror be required to make a financial responsibility showing before requiring carriers to provide financial information to the offeror?
4. Should the definition of financial responsibility include the ability to purchase and operate the line for at least two years after the line is abandoned be based on the price offered or the amount the offeror states is required to subsidize the operation for one year after the line is abandoned or discontinued?
5. Should the Board alter the process for carriers to provide the required financial information to offerors and, if so, how?
6. Should an offeror be required to make an earnest money payment or escrow payment or obtain a bond? If a payment of bond is required, should it be a fixed amount or established on a case by case basis? How would the amount be calculated of fixing the amount? When during the process would the offeror need to make a payment or obtain a bond? When and how would this requirement be waived?

7. Should the Board prohibit an OFA by individuals or entities that have abused the processes or engaged in other deceitful or abusive behavior before the Board? If so, what standards should the Board establish to make a prohibition determination?
8. Should an offeror address whether there is a genuine need for the rail service as demonstrated by support from shippers or receivers on the line or other evidence of an immediate and significant commercial need; whether is community support for rail service; and whether rail service is operationally feasible?
9. Should the Board establish criteria and deadlines for carriers that want to file requests for exemptions from the OFA process?
10. Should the Board require multiple parties intending to submit a joint OFA do so through a single legal entity in order to facilitate the financial responsibility determination and to clarify the party acquiring the common carrier obligation?
11. Should the Board require that an individual filing an OFA to provide his personal address?
12. Should the Board require a private legal entity filing an OFA to provide the offeror's exact legal name, the state under which whose laws it is organized, and the address of its principal place of business?

ASLRRRA Comments

A number of the Railroad Members have experienced abuses at the hands of parties who never had any intention of following through with their filed offer of assistance and operate the line concerning which the railroad sought to discontinue operations over a line or abandon it or did not have the financial resources to do so. A few examples will show that some parties have in fact taken advantage of the impreciseness of the current rules and the need to update and reform them.

- In a proceeding where no traffic had moved over the line in more than two years, there were no shippers or receivers remaining on the line, and no prospects to attract any, the railroad determined it had no alternative but to file for abandonment. Notwithstanding these facts, a group filed an OFA, claiming it had the financial resources to operate and maintain the line and averred it intended to operate the line.

It developed during the negotiations between the group and the railroad that the group did

not have the funds to make the purchase and operate and maintain the line and did not have any access to borrow the funds. Further, the negotiations disclosed the group had no plan or ability to operate and maintain the line and had not had any discussions with a potential operator. At the end of the day, all the OFA filing accomplished was to delay the ultimate abandonment of the line for over 12 months, costing the railroad a substantial amount of money for legal fees and experts and tying up the railroad's assets in the line when those assets could have earned more money elsewhere.

- In another proceeding, the railroad's line had not been used for over 20 years and had no prospect of attracting rail traffic to it. The local government approached the railroad to discuss establishing a trail on the right-of-way. The railroad agreed to proceed with an abandonment of the line and, once approved by the STB, donate the line to the trail authority under the Rails to Trails Act.

A local railroad museum filed an OFA. During the process after the filing, it developed the museum did not have the funds to purchase the line and operate it, did not have the authority from its board of directors to even make the filing, and did not have the intent to operate if even if successful with its OFA. In reality, its director only wanted to salvage some old equipment stored on the line. Again, the railroad had to expend substantial funds to deal with the OFA and the delay in effectuating the abandonment not only tied up the railroad's assets when they could have earned more money elsewhere but it also delayed the start-up of a trail.

The type delays encountered in these examples could be avoided if the OFA regulations are updated and revised so that only truly legitimate OFA's are filed.

In response to the questions asked by the STB, ASLRRRA submits the following comments, combining answers where a common response avoids duplication.

Questions 1 and 4. What documents should a potential offeror be required to submit to show financial responsibility? and Should the definition of financial responsibility include the ability to purchase and operate the line for at least two years after the line is abandoned based on the price offered or the amount the offeror states is required to subsidize the operation for one year after the line is abandoned or discontinued?

Comment: A potential offeror should file auditable balance sheets and profit and loss statements for a reasonable period prior to the date of filing. Three years' of such documentation would tend to show whether the offeror is able to purchase and operate a line. It should also be required to provide viable financial information showing the STB that it has the wherewithal to maintain and operate the line after purchasing it. In that regard, the offeror should be required to provide a business plan identifying sources of traffic, staffing, equipment it proposes to use, its deferred maintenance plan, and other factors involved in operating a rail line.

The definition of financial responsibility should include the ability to purchase and operate the line for at least two years after the line is abandoned. That should be based on the price offered or the amount the offeror states is required to subsidize the operation for two years after the line is abandoned or discontinued. Requiring a potential offeror to prove that it has the level of responsibility will help weed out any illegitimate potential offeror.

Question 2: Should the offeror file notices of intent to file an OFA in abandonment and discontinuance proceedings by a date certain?

Comment: Yes, the rule should provide that any party must file within five business days from the time the proposed abandonment or discontinuance is filed. This would help to avoid unnecessary delays in the discontinuance or abandonment process.

Questions 3 and 5. Should the offeror be required to make a financial responsibility showing before requiring carriers to provide financial information to the offeror?; and Should the Board alter the process for carriers to provide the required financial information to offerors and, if so, how?

Comment: Yes, the offeror should be required to make a financial responsibility showing before requiring carriers to provide financial information to the offeror. If the rules require that the offeror make such a responsibility at the time of the OFA filing and it cannot make that showing, the carrier should not have to waste time and resources to provide financial information to the offeror. The process should include a step providing that the burden is on the offeror to provide *prima facie* evidence that it possess the wherewithal to undertake the

purchase, operation, and maintenance of the line. The STB should make a preliminary finding that the offeror has or has not met that burden. If it has not, then the process should be over and the railroad would not be required to provide any financial information. If it has met that preliminary burden as determined by the STB, then and only then should the railroad have to submit financial information to the offeror but only under seal.

Question 4: Should the definition of financial responsibility include the ability to purchase and operate the line for at least two years after the line is abandoned be based on the price offered or the amount the offeror states is required to subsidize the operation for one year after the line is abandoned or discontinued?

Comment: The definition should include this. If the offeror does not have these abilities, it clearly is not able to close the transaction or operate the line for a reasonable period of time or subsidize it, it would be a waste of resources for both the STB and the railroad to continue the process. As noted above, the offeror should be required to provide a business plan identifying sources of traffic, staffing, equipment it proposes to use, its deferred maintenance plan, and other factors involved in operating a rail line.

Question 6: Should an offeror be required to make an earnest money payment or escrow payment or obtain a bond? If a payment of bond is required, should it be a fixed amount or established on a case by case basis? How would the amount be calculated or fixed the amount? When during the process would the offeror need to make a payment or obtain a bond? When and how would this requirement be waived?

Comment: It seems prudent to require an offeror to either put a percentage of the amount it is offering into either escrow or obtain a bond in that amount simultaneously with the filing of the offer. Such a requirement would serve to separate out those offerors who are not truly interested in buying the line or operating it from those who are. It should be a fixed percentage, however, for each case. If it is shown that the offer was a sham or that the offeror has abused the process, the escrowed amount or bond should be paid to the railroad to compensate it for the delays and costs it incurred.

Question 7: Should the Board prohibit an OFA by individuals or entities that have abused the processes or engaged in other deceitful or abusive behavior before the Board? If so, what standards should the Board establish to make a prohibition determination?

Comment: Yes. The STB should not allow repeat offenders to file repeated OFA's when all such filings do is to delay the inevitable or when the offeror is simply on a fishing expedition with no intent to ever follow through on the purchase or subsidy. The STB now has the authority to investigate abuses of its rules and should do so in the OFA process. Examples of standards the STB could use to prohibit an offender from filing an OFA include repetitive filings with no follow through after the filing, submitting false or misleading information, and similar abusive activities. To assist the STB in determining if the offeror is abusing the process, it should require an offeror to disclose all prior OFA proceedings in which they or their affiliates and/or principals participated and the status of any lines acquired through the OFA process.

Question 8: Should an offeror address whether there is a genuine need for the rail service as demonstrated by support from shippers or receivers on the line or other evidence of an immediate and significant commercial need; whether is community support for rail service; and whether rail service is operationally feasible?

Comment: Yes. A railroad does not normally seek to abandon a line if there is sufficient business on it or legitimate prospects of securing a rail customer on it in the near term future. The OFA rules should require an offeror to show there is a genuine need for continued rail service through support from shippers or receivers. Shipper or receiver support should include definitive statements about such items as the volume of freight the supporter will provide the offeror, why it has not used the line in the recent past, and similar substantive information. Community support may not be as valuable as that support may be largely emotion based – "we do not want to lose our railroad" rather than economically based.

Question 9: Should the Board establish criteria and deadlines for carriers that want to file requests for exemptions from the OFA process?

Comment: Yes. The rule should provide that if the railroad wants to file a request for exemption, it should do so at the time of filing for the abandonment or discontinuance. The criteria could include a statement from the railroad that the railroad has not operated over the line for an established period of time, that there are not shippers or receivers on the line, that it is not possible to operate over the line because of bridges being out of service or similar infrastructure deficiencies that the railroad cannot fix due to the lack of traffic and expense of the repair or replacement of the deficient assets.

Question 10: Should the Board require multiple parties intending to submit a joint OFA do so through a single legal entity in order to facilitate the financial responsibility determination and to clarify the party acquiring the common carrier obligation?

Comment: Ideally, this should be required for the reasons stated in the question. If, however, that is not possible because of such factors as the structure of the offeror or legal reasons, then each person or member of the multiple party offeror should be identified by name, its or their level of financial participation, what role each would play in the operation and maintenance of the line, who will have the common carrier obligation, and similar information to allow a meaningful determination of the financial responsibility of the multiple member offeror.

Question 11: Should the Board require that an individual filing an OFA to provide his personal address?

Comment: The revised rule should require that the individual provide all of his or her contact information, including his or her personal address, telephone number, e-mail address, and other methods of contacting them.

Question 12: Should the Board require a private legal entity filing an OFA to provide the offeror's exact legal name, the state under which whose laws it is organized, and the address of its principal place of business?

Comment: Yes. This is the one way both the STB and the railroad can determine who the actual offeror is and also to determine if the offeror is a legitimate legal entity. It may prove

that the offeror is a sham or front of someone who has previously abuse the process or otherwise not a legitimate party making an OFA.

In summary, ASLRRA supports updating and revising the current rules governing OFA's. Today the process is cumbersome, time-consuming, and often a waste scarce resources at both the STB and small railroads. Too often, all an OFA does is delay an abandonment by a filing by a party that has no intention of following through with actually buying and/or operating the line.

Respectfully submitted,

A handwritten signature in cursive script that reads "Keith T. Borman". The signature is written in black ink and is positioned above a horizontal line.

By: Keith T. Borman

