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Ms. Cynthia T. Brown
Chief of the Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

ENTERED
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February 12, 2016
Part of
Public Record

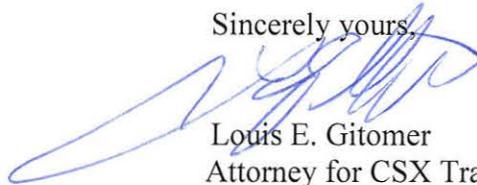
Re: **Docket No. EP 729, *Offers of Financial Assistance***

Dear Ms. Brown:

CSX Transportation, Inc. is efiled Opening Comments in the above-entitled proceeding.

Thank you for your assistance. If you have any questions, please contact me.

Sincerely yours,



Louis E. Gitomer
Attorney for CSX Transportation, Inc.

Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. EP 729

OFFERS OF FINANCIAL ASSISTANCE

CSX TRANSPORTATION, INC. OPENING COMMENTS

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Dated: February 12, 2016

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. EP 729

OFFERS OF FINANCIAL ASSISTANCE

CSX TRANSPORTATION, INC. OPENING COMMENTS

CSX Transportation, Inc. (“CSXT”) commends the Surface Transportation Board (the “Board”) for opening a proceeding to improve the process for handling the offer of financial assistance (“OFA”) process under 49 U.S.C. §10904 and the implementing regulations at 49 CFR 1152.27, as part of the overall abandonment process¹. The Advance Notice of Proposed Rulemaking served by the Board on December 14, 2015 (the “ANPR”) proposes a number of measures that will enhance and ensure the integrity of the OFA process.

The OFA process originated in Section 802 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. Law No. 94-210 at 99 (the “4R Act”). The OFA process provided for a “financially responsible person ... **to enable the rail service involved to be continued.**” Former 49 U.S.C. §1a(6)(a)(i) (emphasis added). Negotiation of an OFA under the 4R Act was voluntary, the Interstate Commerce Commission was not given the extraordinary power of requiring a railroad to sell or operate under subsidy a railroad line that had been authorized for abandonment. Section 402(c) of the Staggers Rail Act of 1980, Pub. Law No. 96-448 at 54 (the

¹ In referring to abandonments in these comments, CSXT also includes the discontinuance of service process.

“Staggers Act”) gave the ICC the power to require a railroad to sell a railroad line for fair market value or to continue to operate under subsidy.

An OFA is usually the final option for continuing rail service after a request for abandonment has been granted, but not consummated. As part of the abandonment process the OFA process is expedited², the Board must decide if the OFA is valid within 15 days of the filing of the OFA³, the railroad and offeror have 30 days to negotiate after an OFA is filed⁴, if the parties are unable to agree, the Board has 30 days to decide on purchase price or subsidy⁵, and the offeror has 10 days to accept STB determination.⁶

The expedited abandonment process is integral to the railroads’ ability to provide honest, economical, and efficient management.⁷ In the ANPR, the Board has properly proposed certain rules that will expedite the OFA process in keeping with the overall concept of expediting abandonments. The Board has also proposed concepts to ensure that potential offerors are financially responsible and intend to continue to provide rail service.

CSXT supports the comments submitted by the Association of American Railroads. CSXT’s comments are directed to the schedule to begin the OFA process, the information to be provided to a potential offeror by the railroad, the content of the OFA, and the requirement that the offeror continue common carrier rail service.

THE SCHEDULE TO BEGIN THE OFA PROCESS.

There are three general procedures for a railroad to seek abandonment authority from the

² An OFA must be filed while an abandonment proceeding is pending. 49 U.S.C. §10904(c).

³ 49 U.S.C. §10904(d)(1).

⁴ 49 U.S.C. §10904(e).

⁵ 49 U.S.C. §10904(f)(1)(A).

⁶ 49 U.S.C. §10904(f)(2).

⁷ 49 U.S.C. §10704(a)(2).

Board: (1) the Application (49 CFR 1152 Subpart C), (2) the Petition for Exemption (49 CFR 1152 Subpart G), and (3) the Notice of Exemption (49 CFR 1152 Subpart F).

The rules governing these three types of abandonment filings require the Board to publish a notice in the *Federal Register* 20 days after the request for abandonment authority has been filed (49 CFR 1152.22(i), .60(a), and .50(d)(3)). As suggested by the Board in the ANPR at 3, CSXT proposes that the *Federal Register* publication require a potential offeror to file with the Board and serve on the railroad⁸ within 10 days of the *Federal Register* notice, a Notice of Intent to file an OFA.

Because it is early in the OFA process, the Notice of Intent is the appropriate document to resolve many of the issues raised in the ANPR. CSXT suggests that the Notice of Intent clearly identify (1) the offeror as proposed at page 4 of the ANPR⁹, (2) the name, title, address, phone number, and email address of representative of offeror to whom correspondence should be sent, (3) whether offeror is a common carrier by railroad subject to 49 U.S.C. Subtitle IV, Chapter 105, (4) whether the OFA is for purchase or subsidy, (5) the extent of the line to be acquired, by milepost, (6) the information requested from the railroad and whether the offeror will seek a right-of-entry to inspect the property, and (7) the need for rail service, especially if there is no service on the line as of the date of filing the abandonment request.

None of the information suggested in the Notice of Intent is burdensome. Indeed, if the potential offeror cannot demonstrate the need for rail service, it may well be that an OFA is inappropriate. Moreover, the timing of the Notice of Intent is imperative to expediting the OFA

⁸ Preferably electronically.

⁹ Including the name, title, address, phone number, and email address of the offeror.

process. The early filing of the Notice of Intent provides time to resolve issues raised by the Notice of Intent (e.g., the information requested by the offeror, issues relating to the bona fides of the Notice of Intent, and additional time for the offeror to conduct studies and analyses).

CSXT also proposes that the Board reduce the time for the consummation of a sale under an OFA at the end of the OFA process. Based on nearly 35-year old precedent, parties are provided 90 days after the Board sets the terms to close the transaction.¹⁰ Since 1981, all of the Class I railroads have engaged in significant rationalization programs resulting in numerous sales. As a result of the rationalization process, the Class I railroads are very familiar with the documentation required to complete a sale and in many instances have base documents ready to be finalized. The same can be said of shortline railroads who have participated in acquisitions. Therefore, CSXT requests that the Board propose reducing the period after the terms and conditions have been set to 30 days from 90 days.

THE INFORMATION A RAILROAD IS TO PROVIDE TO A POTENTIAL OFFEROR.

The railroad is required to provide specific information to an offeror for the purpose of the offeror to prepare the purchase price or subsidy to be included in an OFA. 49 U.S.C. §10904(b). The information identified in the statute is proprietary information within the possession of the railroad. The information is specifically identified as an estimate, reports, and data. The statute does not require the railroad to conduct a special study or to provide the data in any special form. Nor does the statute require the railroad to provide projections of future traffic, and neither should the Board. CSXT urges the Board to limit the reports and data required to be provided in order to avoid the delays over “OFA discovery.”

¹⁰ *Chicago and North Western Transp. Co. - Abandonment*, 363 I.C.C. 956, 963 (1981).

The burden of providing publically available information to a potential offeror should not be placed on the railroad. An example of this burden has been the request for title information from the railroad. The railroad may have some title information, but the definitive location of title information is in local land records offices, which are open to the public and often available electronically. Where a party is seeking to acquire and operate a railroad line, a claim by the offeror that the cost of obtaining public information is burdensome should raise a red flag with the Board that the potential offeror may not be financially responsible and that an in-depth review of that offeror's financial responsibility is warranted.

Where a railroad has filed an Application for authority to abandon, the information required by statute is in the Application. 49 CFR 1152.22(b, c, and d). Therefore, the Board should not allow a request for information as part of the Notice of Intent where an Application has been filed.¹¹

Petitions for Exemption vary as to the amount of information provided. CSXT considers it reasonable for a potential offeror to request the statutory data required to prepare an OFA, but to be required to justify any additional information. However, the Board should not allow a potential offeror to request a railroad to conduct a study or to format data in a different way than is provided in the railroads records.

Notices of Exemption do not contain information necessary for a potential offeror to prepare an OFA. CSXT considers it reasonable for a potential offeror to request the statutory data required to prepare an OFA, but to be required to justify any additional information. However, the Board should not allow a potential offeror to request a railroad to conduct a study

¹¹ An exception should be made where information required by 49 CFR 1152.22(b, c, or d) has been waived.

or to format data in a different way than is provided in the railroads records. CSXT also considers past traffic information on a railroad line where there has been no traffic in at least two years irrelevant to a showing that a potential offeror will provide rail service and a railroad should not be required to provide such information.

CONTENT OF THE OFA.

Along with the information to be provided in the Notice of Intent, CSXT proposes that the actual OFA contain the following: (1) purchase price or subsidy, (2) if the OFA is less than the purchase price or subsidy proposed by the railroad, then the offeror must provide valid justification for the difference, (3) evidence of financial responsibility, and (4) evidence that the offeror will not discontinue rail service for at least two years after purchase.

Purchase price or subsidy. The requirement for the purchase price or subsidy in an acquisition or subsidy is mandated by statute. 49 U.S.C. §10904(c). CSXT urges the Board to reject any OFA that is filed without such statutorily mandated information and to allow the abandonment to proceed.

Justification of a lower purchase price. Justification of a purchase offer that is less than the railroad's estimate is also mandated by statute. *Id.* Not only must the offeror explain the basis for the disparity, but it must also explain the manner in which the offer has been calculated. *Id.* Since the Notice of Intent is filed early, the offeror has the opportunity to conduct the necessary studies to provide a robust justification. CSXT suggests that any OFA that does not fully justify a lower purchase price be rejected and allow the abandonment to proceed.

Evidence of financial responsibility. The Board is to determine whether a financially responsible person has filed the OFA. 49 U.S.C. §10904(d)(1). The rationale for this

requirement is quite clear. Abandonments are to be expedited. Realistic opportunities to continue rail service are legitimate grounds for a brief delay of an abandonment. However, OFA's made for the purpose of delay or where the offeror does not have the wherewithal to close the deal should not be permitted to delay an abandonment. Therefore, the burden is on the offeror to demonstrate its financial responsibility.

To that end, the term "financial responsibility" should be defined. CSXT recommends a definition that requires the offeror to have immediately available funds to: (1) pay the costs of the OFA process (including the STB filing fees); (2) pay for the purchase of the railroad line within 30 days of the parties agreeing or the Board setting the purchase price; (3) obtain the locomotives and cars necessary to provide common carrier service; (4) repair, upgrade, and maintain the line in operable condition; (5) obtain industry standard levels of insurance; and (6) provide 15 days of working capital to cover the avoidable costs of operating the railroad line.¹²

In order for the offeror to meet this statutory requirement, CSXT suggests that Board require the same information required by the Interstate Commerce Commission (the "ICC") to determine financial responsibility prior to enactment of the Staggers Act at 49 CFR 1121.38(b)(2 and 3) (1980). A copy is attached in the Exhibit. The ICC required substantial information to delay an abandonment, even when the ICC did not have authority to require a railroad to sell the line to an offeror. Knowing the specific information sought by the Board in advance will allow the offeror to readily provide it to the Board. The railroad and Board can then review the information to assure that the offeror is a financially responsible person able to

¹² See 49 CFR 1152.32 for the calculation of avoidable costs.

consummate the acquisition of the railroad line expeditiously, as is contemplated in 49 U.S.C. §10904.

EVIDENCE THAT THE OFFEROR WILL NOT DISCONTINUE SERVICE WITHIN TWO YEARS OF ACQUISITION.

A purchaser of a railroad line through the OFA process is not permitted to discontinue service prior to the second year after acquiring the railroad line. 49 U.S.C. §10904(4)(A).

CSXT contends that if the offeror is not going to commence service immediately upon acquisition, then the offer should be determined to be invalid.¹³ However, as explained below, if the Board does not want to reject OFA's where there has been no recent service, a strict test should be adopted. The Board can look beyond financial responsibility to determine if the offeror is actually interested in providing rail service and if there is evidence of future traffic on the line.¹⁴

CSXT urges the Board to look carefully at OFA's to determine whether the OFA is intended to or can continue common carrier rail service in two instances.

First, where a shipper at the end of a railroad line seeks to have the railroad abandon a portion of the railroad line, consummate the abandonment, and transfer it to the shipper so that the shipper can expand its facility for its own use and not use by any other shipper.¹⁵ In this instance, the shipper has decided that instead of common carrier service, it is more important to expand its facility over a portion of the former railroad line and then to have the railroad serve it. Since there are no other shippers, the railroad is merely cooperating with one of its customers. If

¹³ CSXT points out to the Board that railroad lines can be acquired through private negotiations, as well as the OFA process. Indeed, CSXT explores all alternatives for continuing rail service prior to seeking abandonment authority.

¹⁴ *Redmond-Issaquah R.R. Preservation Ass'n v. Surface Transp. Bd.*, 223 F.3d 1057 (9th Cir. 2000)

¹⁵ See *CSX Transportation, Inc.-Abandonment Exemption-in Ben Hill County, Ga.*, Docket No. AB 55 (Sub-No. 747X) (served December 18, 2015).

a third party seeks to intervene in this agreed upon arrangement by inserting itself as an unwanted common carrier through the OFA process, CSXT suggests that the Board reject an OFA in these circumstances, instead of following the current practice of requesting an exemption from 49 U.S.C. §10904..

The second instance involves a railroad line that is abandoned through the Notice of Exemption process where the line has been out of service for at least two years. In this case, there is no traffic and no prospect of future traffic. CSXT requests the Board set a strict test for the offeror to demonstrate that it will provide rail service in the immediate future. CSXT proposes that the Board require definitive verified statements from potential shippers as to the quantity of shipments and timing of operation. CSXT also proposes that the offeror be required to provide a specific verified plan for repair of the line and the commencement of service, along with evidence of the financial ability to carry through on its plans.

CONCLUSION

CSXT respectfully requests the Board to adopt the proposals suggested by CSXT as proposed rules to expedite the OFA process.

Respectfully submitted,



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Dated: February 12, 2016

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INC.

EXHIBIT - 49 CFR 1121.38(b)(2 and 3) (1980)

financial assistance to assure continued rail service under section 1a(6) of the act and pursuant to this section of the regulations. This FEDERAL REGISTER notice will be published when the proceeding is administratively final.

(b) *Submission of offers of financial assistance.* (1) A prospective offeror shall serve any offer of assistance upon the Commission, the carrier owning or operating the involved line, and other parties to an abandonment or discontinuance proceeding.

(i) Such offer may be filed and served at any time subsequent to the filing with the Commission of an abandonment or discontinuance application.

(ii) Such offer must be filed and served no later than 15 days after publication in the FEDERAL REGISTER (as required in paragraph (a) of this section) of a Commission finding that the present and future public convenience and necessity permit or require the proposed abandonment or discontinuance of service.

(2) The offer as filed shall contain:

(i) An offer of financial assistance accompanied by a Proposed Subsidy Payment in the form prescribed in § 1121.46 or an offer to acquire all or a portion of the line accompanied by a detailed statement of the proposed acquisition cost and a proposal for continued operations;

(ii) A resolution, authorization, or other evidence demonstrating that the offeror has, or within a reasonable time will have, the authority to execute and fulfill an agreement to subsidize or to acquire and operate the line;

(iii) Information demonstrating that the offeror has, or within a reasonable time will have, the financial resources to subsidize or acquire the line and to otherwise fulfill its contractual obligations; and

(iv) Information demonstrating that the financial assistance offered is likely to cover the difference between the revenues attributable and avoidable costs, plus a reasonable return of the value of the line, or the cost of acquisition and continued operation of the line.

(3) If the offeror is not a government entity it shall also submit:

(i) A current, detailed balance sheet showing its financial condition as to the latest date available (not more than 90 days prior to the filing of the offer);

(ii) A statement of revenues, expenses, and net income for the current portion of the calendar or offeror's fiscal year and statements for the two immediately preceding calendar or fiscal years or if not available, a statement from a bank or other financial institution attesting to the person's financial capability to discharge its obligations; and

(iii) Such additional information which, in the opinion of the offeror, is necessary or appropriate to support a finding that it is financially responsible.