



ASSOCIATION OF AMERICAN RAILROADS

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Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

Re: EP 729, *Offers of Financial Assistance*

Dear Ms. Brown:

Pursuant to the Notice of Proposed Rulemaking served in the above docketed proceeding on September 30, 2016, the Association of American Railroads respectfully submits the attached comments.

Sincerely,

Timothy J. Strafford
Counsel for the Association
of American Railroads

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 729

OFFERS OF FINANCIAL ASSISTANCE

COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

Pursuant to the Notice of Proposed Rulemaking (“NPRM”) served by the Surface Transportation Board (“Board” or “STB”) in this proceeding on September 30, 2016, the Association of American Railroads (“AAR”) respectfully submits these comments.

The AAR is a trade association representing the interests of North America’s major freight railroads, and often presents comments and testimony in STB proceedings, including opening and reply comments in this docket in response to the Advance Notice of Proposed Rulemaking issued on December 14, 2016 (“ANRPM”). The AAR and its member railroads have a strong interest in the application of the Offer of Financial Assistance (“OFA”) procedures under 49 U.S.C. § 10904 that promotes the public interest in an economically-rational national rail system.

The AAR appreciates the Board’s willingness to review its OFA processes and supports the Board’s efforts through the NPRM to improve the OFA procedures and protect the integrity of the Board’s processes. As discussed below, the Board should adopt the proposed rules, with the modifications suggested in these comments, because the proposals would be modest procedural changes that reflect the framework established by Congress in the Rail Transportation

Policy (“RTP”) and the Interstate Commerce Act, as amended. The proposed rules reflect the careful balance that Congress has struck between the national interest in preserving rail service, on the one hand, and the national interest in maintaining an economically-rational rail system, on the other. In adopting final rules, the Board should make one improvement to its proposal by revising one input to the proposed formula to establish preliminary financial responsibility. In addition to adopting the proposed rules, the Board should be vigilant in enforcing existing rules that protect the integrity of its processes.

Comments

I. The Board Should Adopt the Proposed Rules Because They Strike the Appropriate Balance Between Preserving Rail Service and Maintaining an Economically-Rational Rail System

The RTP explicitly directs the Board to conduct its regulatory functions so as: (1) “to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required”; (2) “to reduce regulatory barriers to entry into and exit from the industry”; and (3) “to provide for the expeditious handling and resolution of all proceedings. . . .” 49 U.S.C. § 10101 (2), (7), (15). The OFA provision, 49 U.S.C. § 10904, reflects a Congressional interest in preserving rail service in certain instances, but that section operates within the broader statutory framework that recognizes that railroads operate in markets like other businesses and should not be subject to regulation that forces them to continue to operate unprofitable lines.

The NPRM proposals reflect this framework by limiting the ability of entities unable or uninterested in actually providing continued freight rail service from using the Board’s regulatory procedures to frustrate rail carriers’ legitimate interest in rationalizing their networks. Indeed, the AAR believes that experience over the nearly four decades that § 10904 has been in effect demonstrates that the government-administered, forced-sale OFA process is largely

unnecessary. Railroads are already incentivized to operate lines that are economically viable or sell them to willing buyers. Parties will purchase (or subsidize) rail lines, and railroads will sell, lease or accept subsidies whenever market forces justify those transactions. The terms and conditions for such arrangements will be reached by negotiation and agreement by all concerned. As such, the Board should generally expect its forced-sale procedures to be invoked only in rare occurrences. In this context, the Board is justified in taking the small steps proposed in the NPRM to avoid spurious OFA offers that delay abandonments and burden interstate commerce by diverting resources away from economically viable rail operations.

A. Financial Responsibility

The NPRM includes four changes intended to clarify the requirement that OFA offerors must be financially responsible and to require offerors to provide additional evidence of financial responsibility to the Board. The AAR supports the proposed changes, as discussed below.

First, the NPRM would modify the rules to include examples of the kinds of evidence the Board would accept to demonstrate that offerors are financially responsible, as well as examples of the kinds of documentation the Board would not accept as evidence of financial responsibility. The cited examples will provide clearer guidance to offerors as to what evidence will demonstrate financial responsibility in the OFA process and should be adopted.

Second, the NPRM proposes to require potential offerors to submit notices of intent (“NOIs”) to file an OFA in all abandonment and discontinuance proceedings. The proposal to require NOIs to be filed no later than 10 days after the Federal Register publication of notice that a petition for exemption has been filed, or no later than 45 days after the Federal Register publication of notice that an application to abandon or discontinue has been filed is sensible and straightforward. Potential offerors are already required to file NOIs no later than 10 days after

the publication of a notice of exemption in notice of exemption proceedings. The small burden that the proposed change would place on potential offerors would be balanced by the benefit NOIs would provide to the Board and to abandoning or discontinuing carriers by notifying them that a party is interested in an OFA.¹

Third, the NPRM would require a preliminary showing of financial responsibility with the filing of an NOI, before the railroad is required to provide financial information to the potential offeror. The AAR supports a minimal financial responsibility showing at the NOI stage as a necessary tool to ensure offerors are legitimately interested in, and capable of, participating in the OFA process and are not seeking to abuse the Board's processes or cause delay in abandonment or discontinuance proceedings. In the next section, the AAR offers an improvement to one of the inputs to the formula proposed by the Board to establish preliminary financial responsibility.

The process for reviewing the preliminary financial responsibility materials appears somewhat problematic. The NPRM states that the Board would review the information submitted in the NOI and,

[i]f the Board finds the information is inadequate to determine the potential offeror's preliminary financial responsibility, it would issue a decision within 10 days of the receipt of the information, either requesting further information from the potential offeror or rejecting the potential offeror's NOI. If after 10 days the Board has not issued a decision on the NOI, the potential offeror would be presumed to be preliminarily financially responsible for the minimum subsidy or purchase cost of the line, and the carrier would be required to provide the potential offeror with the information required under 49 C.F.R. § 1152.27(a) upon request. Being preliminarily financially responsible under this process would not create any presumption that the party will be found financially responsible under 49 C.F.R. § 1152.27(c)(1)(iv) if an OFA is submitted later.²

¹ The NOI will also give the abandoning railroad and potential offeror time to negotiate a private transaction outside the Board's regulatory processes.

² NPRM at 17-18.

While the AAR supports the concept of preliminary financial responsibility, the proposed rule would inappropriately create legal obligations on railroads as a result of government inaction. The AAR suggests that to ensure timely decisions on preliminary financial responsibility, the Board delegate the authority to rule on preliminary financial responsibility to the Director of the Office of Proceedings. The Director should issue a decision in all cases, including making a preliminary finding of financial responsibility, not just to reject the NOI or seek more information.

Fourth, the Board proposes to require offerors to demonstrate in their OFA that they have placed in escrow with a reputable financial institution 10% of the preliminary financial responsibility amount calculated at the NOI stage. The AAR supports this minimal escrow requirement as consistent with other significant financial transactions. The deposit into escrow would allow the offeror to demonstrate that its offer and interest in the line are legitimate. The requirement would be a concrete showing of the offeror's financial wherewithal. The offeror would be at no risk of loss, as it could, at any time before consummation of the transaction, decide to end its involvement in the OFA process, at which point it would be entitled to return of the escrowed funds. The proposed preliminary financial responsibility amount is already a conservative figure that will be substantially lower than the eventual amount of the subsidy or purchase price. It would not be unduly burdensome to require offerors to "put some skin in the game." Otherwise, unqualified offerors would not be dissuaded from submitting an OFA and from wasting Board resources and delaying the abandonment and discontinuance of lines that is otherwise in the public interest.

B. Continued Rail Service

The AAR also supports the NPRM's proposal to require offerors to demonstrate in their OFA that continued rail service on the line the offeror seeks to subsidize or purchase would be needed and feasible. The requirement for an OFA to show evidence of a continued need for service is already laid out in Board precedent. *Los Angeles County Metropolitan Transportation Authority—Aban. Exemption—in Los Angeles County, California*, AB 409 (Sub-No. 5X), slip op. at 3 (STB served June 16, 2008). Codifying existing precedent will clarify this standard for potential offerors that may not be familiar with Board case law.

In the final rule, the Board should clarify that all offerors need to show by specific evidence that there is a continued need for rail service on the line. The language of the NPRM states, “in cases of two year out-of-service notices of exemption, the burden on the offeror to show the continued need for rail service would remain the same as in other proceedings. However, because of the nature of the exemption process, where there has been no service for at least two years, an offeror would need to present concrete evidence of a continued need for rail service.”³ The AAR understands this phrasing to mean that there will be heightened scrutiny on claims that there is continued need for rail service in out-of-service exemption proceedings, not that particular and specific evidence would not be required in other proceedings.

³ NPRM at 19.

C. Identity of Offerors

The AAR supports the NPRM's proposed three common sense changes to the OFA rules to clarify the identity of offerors. As noted in the ANPRM, in the past the Board has encountered confusion in the OFA process over the identity of offerors. *See CSX Transp. Inc.—Aban. Exemption—in Allegany Cty., Md.*, AB 55 (Sub-No. 659X), slip op. at 1& n.2 (STB served Apr. 24, 2008) (describing confusion over proper name and existence of entity that filed an OFA). Specifically, the NPRM proposes to require offerors to provide a mailing address, either business or personal, and other contact information, including a phone number and email address, for the offeror or a representative. Second, the NRPM proposes to require offerors that are legal entities to include in their offer the entity's full legal name, state of organization or incorporation, and a description of the ownership of the entity. Third, the NPRM proposes to require multiple parties filing a single OFA to clearly identify which entity or individual would be assuming the common carrier obligation and to clearly identify how the parties would allocate responsibility for financing the purchase or subsidy and, if purchased, for the operation of the line.

The Board should adopt these proposals. There should be no question that before the Board can order a forced sale, it should be able to identify the parties to assess the ability of the party or parties to carry out an OFA, including assessing the financial responsibility of the offeror(s). It is also important for a carrier receiving an OFA to be able to identify the party or parties involved in an offer so that the carrier can effectively negotiate with them and provide proper documents if an agreement is reached or sale or subsidy is ordered by the Board.

II. The Proposed Formula for Preliminary Financial Responsibility is Understated

The NRPM would establish a formula to calculate an initial minimal financial responsibility showing for offers to subsidize or purchase a line through the OFA process. For a

potential OFA to subsidize service, the Board proposes that the preliminary financial responsibility showing at the NOI stage be calculated as a minimum maintenance cost for the line per mile for the one-year mandatory subsidy period. To determine this amount, the Board proposes multiplying a standard \$4,000 per-mile per-year maintenance cost⁴ for rail lines by the length of the line in miles. Similarly, for a potential OFA to purchase a line, the Board proposes that the preliminary financial responsibility showing at the NOI stage be calculated as the sum of: (1) the current rail steel scrap price per ton, multiplied by 132 tons per track mile as the estimated weight of the track, multiplied by the total track length in miles; and (2) the \$4,000 minimum maintenance cost per mile, multiplied by the total track length in miles, multiplied by two for each of the two years an OFA purchaser is responsible for operating the acquired line.

The AAR supports this general approach to preliminary financial responsibility as a useful tool to ensure that offerors are legitimately interested in, and capable of actually operating or subsidizing the line in question. However, the AAR submits that the Board should modify its formula to reflect the predominant weight of rail currently in the national rail network and likely to be subject to the OFA process in the future. The NPRM proposes to set a standard weight of

⁴ The Board has been relying on a general estimate of \$5,000-6,000 per track mile for maintenance costs in abandonment proceedings since at least 1988. *Florida East Coast Railway Co. – Abandonment – in St. Johns and Putnam Counties, FL*, ICC Docket No. AB-70 (Sub-No. 3) (ICC served Feb. 18, 1988). The AAR is not certain how this estimate of maintenance costs was originally derived, but it is likely that the Board based the estimate on maintenance costs submitted by rail carriers in earlier abandonment and discontinuance petitions. For example, in a 1972 abandonment proceeding, the carrier noted that its 1970 system-wide average maintenance cost was \$5,000 per track mile based on actual expenditures. *Penn Central Transportation Co. – Abandonment – Canandaigua Branch, Ontario County, NY*, 342 ICC 139, Finance Docket No. 26567 (ICC served May 11, 1972). In another 1972 abandonment proceeding, the carrier stated that maintenance of the line over the last three years had averaged about \$6,000 per mile annually. *Indian Creek Valley Railway Co. and the Baltimore and Ohio Railroad Co. Abandonment of the Indian Creek Valley Branch in Fayette and Westmoreland Counties, Pennsylvania*, 342 ICC 493, Finance Docket No. 26946 (ICC served June 13, 1972). To the AAR's knowledge, these figures have not been updated or indexed since.

rail to be used in this calculation in order to simplify the preliminary financial responsibility calculation and avoid requiring offerors to determine actual weights of rail on a case-by-case basis. The NPRM proposes to set the estimated weight of the steel per mile of track at 132 tons per mile of track. Footnote 8 spells out how that figure was derived:

Seventy-five pounds per yard of rail equals 25 pounds per foot. Twenty-five pounds per foot multiplied by 5,280 feet per mile equals 132,000 pounds per mile. One hundred thirty-two thousand pounds per mile multiplied by two (the number of rails per track) equals 264,000 pounds, or 132 tons, of rail per mile of track.⁵

The NPRM admits that this amount is at or near the low end of the weight range for track materials generally associated with the OFA process, but suggests that it would be a reasonable standard weight to be used in this calculation at the NOI stage. In fact, there is nearly no main line Class I rail left in the national system that is 75 pounds per yard or less. As shown in Table I, data from Schedule 725 of the railroads' R-1 reports show that such rail now accounts for only 57 miles of main-line track in the entire system, less than five hundredths of one percent.⁶ Even combining all main-line rail less than 90 pounds per yard only accounts for less than 3% of track that could be subject to future abandonment or discontinuance. The AAR submits that the Board should instead utilize 115 pounds per yard in the preliminary financial responsibility formula, as reflective of the track that may be subject to OFAs in the future, as demonstrated in the table below.

⁵ NPRM at 17 & n.8.

⁶ The AAR notes that the Board has discontinued Schedule 725 of the R-1. *See Accounting and Reporting of Business Combinations, Security Investments, Comprehensive Income, Derivative Instruments and Hedging Activities*, EP 720 (STB served April 6, 2016).

Table I

Profile of Class I Railroad Rail Use 2011 - 2015						
Year	Rail Weight 75 Pounds or Less	Rail Weight 76 Pounds to 90 Pounds	Rail Weight 91 Pounds to 120 Pounds	Rail Weight 121 Pounds to 135	Rail Weight 136 Pounds or Greater	Total Main Line Miles Measured
Main Line Track Miles						
2011	207	3,589	25,179	39,689	43,282	111,946
2012	199	3,519	24,546	38,749	44,825	111,838
2013	192	3,547	23,858	37,975	46,028	111,600
2014	100	3,239	23,045	37,095	47,252	110,731
2015	57	2,797	21,981	36,073	48,644	109,552
Percent of Annual Main Line Track Miles						
2011	0.18%	3.21%	22.49%	35.45%	38.66%	100.00%
2012	0.18%	3.15%	21.95%	34.65%	40.08%	100.00%
2013	0.17%	3.18%	21.38%	34.03%	41.24%	100.00%
2014	0.09%	2.93%	20.81%	33.50%	42.67%	100.00%
2015	0.05%	2.55%	20.06%	32.93%	44.40%	100.00%
Predominant Rail Size in Each Weight Category in 2015	75 Pound	90 Pound	115 Pound	132 Pound	136 Pound	
2015 Miles of Main Track Represented By Predominant Rail Size	26	2,230	12,504	19,657	36,259	
Percentage of Weight Category Represented By Predominant Rail Size in 2015	45.6%	79.7%	56.9%	54.5%	74.5%	

Source: Class I Annual Reports R-1, Schedule 725, 2011 - 2015.

III. The Board Should Be Vigilant in Enforcing Existing Rules Against Vexatious Litigation

This proceeding was begun in the context of a petition for rulemaking filed by Norfolk Southern Railway Company seeking the adoption of rules to deal with the problem of vexatious litigation at the Board, particularly in the abandonment context. *See Petition of Norfolk Southern Railway Company to Institute a Rulemaking Proceeding to Address Abuses of Board Processes* (filed May 22, 2015). The Board declined to institute that requested rulemaking, but stated that it would address the issue through “increased enforcement of the Board’s existing rule addressing irrelevant and immaterial pleadings at 49 C.F.R. § 1104.8. (allowing the Board to strike from any document any material that is “redundant, irrelevant, immaterial, impenitent, or scandalous.”). *Petition of Norfolk Southern Railway Company to Institute a Rulemaking Proceeding to Address Abuses of Board Processes*, EP 727), slip op. at 4 (STB served Sept. 23, 2015). The Board reiterated its commitment to enforcing its rules in the NPRM: “we believe that the best way to handle inappropriate filings is to increase enforcement of the existing rules, including 49 C.F.R. § 1104.8.” The Board also noted that it rejected a vexatious filing in a recent case. *See Norfolk S. Ry.—Acquis. & Operation—Certain Rail Lines of Del. & Hudson Ry.*, FD 35873 (STB served Mar. 24, 2016).

The AAR strongly supports the Board’s ongoing efforts to more aggressively use § 1104.8 to filter out abusive, unmeritorious, and vexatious filings that only serve to waste limited Board resources without furthering any public interest. In addition to § 1104.8, the Board has other tools to protect the integrity of its processes. The NPRM notes that a pro se party found to have abused the Board’s processes could be required to be represented by counsel

in any future matters.⁷ Recently, an Administrative Law Judge prohibited a pro se party from introducing materials into the record, barred the party from further participation in the proceeding, struck pleadings, and ordered the party to pay counsel fees. *Consolidated Rail Corp. – Aban. Exemption – In Hudson County, NJ*, AB-167 (Sub-No. 1189X) *et al* (STB served Oct. 26, 2016). The AAR supports Board efforts to utilize all appropriate measures to ensure that the Board’s regulatory jurisdiction is not subverted by vexatious litigants.

Conclusion

Based on the foregoing, the Board should adopt its proposed rules, subject to the improvements suggested above. The Board should also vigilantly enforce its existing rules to protect against abuse of the OFA process.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'K. Kirmayer', is written over the typed name.

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December 5, 2016

⁷ NPRM at 9 & fn. 3.