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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: STB Ex Parte No. 729 – *Offers of Financial Assistance*

Dear Ms. Brown:

Pursuant to the Notice of Proposed Rulemaking served on September 30, 2016 in the above docketed proceeding, Norfolk Southern Railway Company respectfully submits the enclosed comments.

Sincerely,

Aarthy S. Thamodaran
Counsel for Norfolk Southern Railway Co.

Enclosures

**UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD**

STB Ex Parte No. 729

OFFERS OF FINANCIAL ASSISTANCE

**COMMENTS OF
NORFOLK SOUTHERN RAILWAY COMPANY**

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Dated: December 5, 2016

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Ex Parte No. 729

OFFERS OF FINANCIAL ASSISTANCE

**COMMENTS OF
NORFOLK SOUTHERN RAILWAY COMPANY**

Norfolk Southern Railway Company (“NS”) provides these comments in response to the Notice of Proposed Rulemaking served by the Surface Transportation Board (“STB” or “Board”) on September 30, 2016 in this proceeding (“NPRM”). NS also joins in support of the comments filed in this proceeding by the Association of American Railroads.

NS supports the STB’s proposals to protect the integrity of its offer of financial assistance (“OFA”) processes by: (1) providing greater clarity regarding the definition of financial responsibility; (2) requiring offerors to file notices of intent to file an OFA in all abandonment and discontinuance proceedings by specified deadlines; (3) requiring offerors to make a preliminary showing of financial responsibility; (4) requiring offerors to deposit in escrow with a reputable financial institution 10% of that preliminary financial responsibility amount; and (5) adopting commonsense disclosure requirements intended to clarify the identity of offerors. Finally, NS strongly supports the STB’s declared intention to more aggressively enforce its existing rules, including 49 C.F.R. 1104.8, to strike and deter abusive filings.

However, NS submits these comments to recommend three modifications to the STB’s proposals. First, the STB should ensure that its standard for maintenance costs, as used to

calculate the amount of the preliminary showing of financial responsibility, is appropriate and current. Second, the STB should eliminate the presumption of financial responsibility for state and municipal governmental entities and should require such entities to satisfy the preliminary financial responsibility showing. Third, the STB should require offerors to demonstrate a continued need for rail service by satisfying, in full, the criteria set forth in *Los Angeles County Metropolitan Transportation Authority – Abandonment Exemption – in Los Angeles County, California*, AB 409 (Sub-No. 5X), slip op. at 3 (STB served June 16, 2008) (“*LACMTA*”); and, the STB should incorporate in its regulations a heightened burden for offerors to demonstrate a continued need for rail service on line segments that have not been used for at least two years.

I. The STB Should Use An Appropriate And Current Standard For Maintenance Costs When Calculating The Preliminary Financial Responsibility Amount.

In the NPRM, for purposes of calculating the preliminary financial responsibility amount, the STB proposes to use a standard per-mile per-year maintenance cost of \$4,000.¹ The STB explains that it has previously “accepted base maintenance costs for rail line of between \$4,000 and \$11,000 per mile per year.”² However, the STB should not rely upon one carrier’s forecast per-year maintenance costs from 2004 of \$4,300 per mile³ to set the standard for maintenance costs.

Failure to use an appropriate and current standard for maintenance costs would only frustrate the Board’s efforts to protect the integrity of its OFA processes. NS understands the Board’s desire to use a fairly conservative standard for maintenance costs “so as not to unintentionally discourage parties that have a legitimate interest in pursuing an OFA too early in

¹ See NPRM at 16-17.

² NPRM at 16.

³ See *id.* (citing *Wis. Cent. Ltd. – Abandonment – in Ozaukee, Sheboygan, & Manitowoc Counties, Wis.*, AB 303 (Sub-No. 27), slip op. at 6 (STB served Oct. 18, 2004)).

the process.”⁴ At the same time, it is critically necessary to use a fairly *accurate* standard for maintenance costs so as not to unintentionally encourage parties that clearly lack the financial capabilities to consummate an OFA. As the STB itself explains, the preliminary showing of financial responsibility is intended 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.”⁵ Even the STB “acknowledge[s] that the result of this [preliminary financial responsibility] calculation would be an amount somewhat below (in some cases substantially below) the actual subsidy or purchase price of the line, but the purpose is merely to discourage abusive OFAs.”⁶ Setting the standard for maintenance costs too low would not provide any meaningful protection against abusive filers.

NS respectfully submits that \$4,000 may represent an inappropriately low standard for annual, per-mile maintenance costs. In abandonment decisions since at least 1988, the Board has recognized that “as a general rule of thumb, [maintenance] costs for a rail line operating at Class III standards, assuming a fairly level road bed and no extraordinary maintenance costs, averages between \$5,000 and \$6,000 a mile”⁷ (“Benchmark”). The STB never explained how it derived the Benchmark and has not updated or indexed the Benchmark since 1988. NS’s reference to the Benchmark is not intended as an endorsement thereof, but rather as an illustration that the STB’s proposed \$4,000 standard for annual, per-mile maintenance costs is low based on the STB’s own precedent.

NS’s recent maintenance costs provide further support that \$4,000 may represent an inappropriately low standard for annual, per-mile maintenance costs. For example, based on

⁴ NPRM at 16.

⁵ *Id.*

⁶ NPRM at 18.

⁷ *Florida East Coast Railway Co. – Abandonment – in St. Johns and Putnam Counties, FL*, AB-70 (Sub-No. 3) (ICC served Feb. 18, 1988).

Schedule 410 maintenance of way expenses in NS's 2012 Form R-1, system-wide average maintenance costs per track mile were \$26,886 for NS in 2012.⁸ As another example, under the Uniform Railroad Costing System ("URCS"), which the Board has used to establish the variable costs of providing rail service in abandonment proceedings,⁹ fixed maintenance costs for NS in 2012 were \$11,084 per track mile, assuming no traffic on the line.¹⁰

Thus, NS urges the STB to decline to adopt a specific standard for maintenance costs in the OFA context until it evaluates current maintenance costs across the national rail system. As a lesser alternative to this studied approach, NS asks the STB to at least follow its own "rule of thumb" and use a standard annual, per-mile maintenance cost of \$5,000 in the OFA processes. Regardless of the actual standard for maintenance costs adopted by the STB, such standard should be updated annually for inflation to ensure the continued protection of the integrity of the OFA processes.

II. The STB Should Eliminate The Presumption Of Financial Responsibility For State and Municipal Governmental Entities.

In the NPRM, the STB proposes to maintain the presumption of financial responsibility for governmental entities, noting that governmental entities would not be subject to the preliminary financial responsibility requirement.¹¹ However, the STB also proposes to require governmental entities to "file the NOI"¹² and "demonstrate in their OFA that they have placed in escrow with a reputable financial institution 10% of the preliminary financial responsibility

⁸ This calculation excludes non-running track maintenance costs, like depreciation and switching costs.

⁹ See, e.g., *Pyco Industries, Inc. – Feeder Line Application – Lines of South Plains Switching, Ltd. Co.*, FD 34890; *Keokuk Junction Railway Co. – Feeder Line Application – Lines of South Plains Switching, Ltd. Co.*, FD 34922 (STB served Aug. 31, 2007).

¹⁰ In this context, "fixed maintenance costs" refer to the expenditures grouped in the URCS regression accounts for "Running Track Maintenance" and "Track Maintenance Overhead & Other Equipment and Maintenance & Overhead" that URCS treats as non-variable, divided by total running track miles.

¹¹ NPRM at 5.

¹² NPRM at 18.

amount calculated at the NOI stage.”¹³ NS agrees that governmental entities should file NOIs and satisfy the escrow requirement. However, NS disagrees that all governmental entities should be exempt from the preliminary financial responsibility requirement.

Since 2010, there have been 51 bankruptcy filings by municipalities.¹⁴ As one of the most prominent examples, the City of Detroit, Michigan filed for bankruptcy on July 18, 2013—the largest municipal bankruptcy filing in U.S. history, estimated at approximately \$18-20 million.¹⁵ Some authorities even predict that certain states are on the brink of financial crises; and, according to an April 2016 Moody’s report, there is “almost zero chance that the federal government will bail out an indebted state government.”¹⁶ Thus, state and municipal governmental entities should no longer benefit from the presumption of financial responsibility. For purposes of clarity, as used in these comments, “state and municipal governmental entities” does not include the various divisions of the United States Armed Forces.

As all governmental entities would be required to file NOIs and eventually place in escrow 10% of the calculated preliminary financial responsibility amount, NS notes that it would not be an unreasonable burden to require state and municipal governmental entities to submit along with their NOIs acceptable documentation evidencing that they are financially responsible for the calculated preliminary amount. Such a requirement would protect the integrity of the OFA processes by ensuring at an earlier stage that state and municipal governmental entity offerors are legitimately capable of participating therein.

¹³ NPRM at 18-19.

¹⁴ *Bankrupt Cities, Municipalities List and Map*, GOVERNING, <http://www.governing.com/gov-data/municipal-cities-counties-bankruptcies-and-defaults.html>.

¹⁵ *Detroit Bankruptcy*, WIKIPEDIA, https://en.wikipedia.org/wiki/Detroit_bankruptcy.

¹⁶ See, e.g., John Mauldin, *Don’t Be So Sure That States Can’t Go Bankrupt*, FORBES (July 28, 2016), <http://www.forbes.com/sites/johnmauldin/2016/07/28/dont-be-so-sure-that-states-cant-go-bankrupt/#b06290375213>.

III. The STB Should Require Offerors To Address The Continued Need For Rail Service By Satisfying The Specific *LACMTA* Criteria.

In the NPRM, the STB proposes to require offerors to demonstrate that there is a continued need for rail service and to amend its regulations to list the *LACMTA* “criteria as examples of what the STB will accept as evidence of continued need.”¹⁷ NS argues that the STB should require offerors to satisfy the *LACMTA* criteria in full in order to demonstrate a continued need for rail service.

NS submits that the *LACMTA* criteria are not meant to operate in a piecemeal fashion. Under the STB’s proposed regulations, an offeror arguably could just submit evidence as to one *LACMTA* criterion (for example, that continued service is operationally feasible) without any evidence as to the other *LACMTA* criterion (that continued service is commercially necessary). It is only the sum of the *LACMTA* criteria that allows the STB to make a reasoned decision as to whether there is a continued need for rail service sufficient for a forced sale or subsidy under the OFA processes. Furthermore, requiring offerors to satisfy the *LACMTA* criteria in full would provide offerors and carriers with greater certainty as to the required evidentiary showings, thus reducing the potential universe of issues for litigation.

Although the Board expresses a reluctance to “adopt a requirement that offerors must submit specific information to show continued need for rail service,” the *LACMTA* criteria themselves are broadly worded to provide offerors with some degree of flexibility in what is required to demonstrate a continued need for rail service. For example, the first criterion requires either “support from shippers or receivers on the line *or other evidence* of an immediate and significant commercial need.” Such other evidence could include volume forecasts from

¹⁷ NPRM at 10-11.

shippers or receivers on the line, contractual commitments from shippers or receivers on the line, or construction plans for new or expanded plant facilities on the line, to name a few.

NS also urges the STB to clarify its statement that “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.”¹⁸ NS agrees that there should be a heightened burden to demonstrate a continued need for rail service in such circumstances, as these line segments are the least likely candidates for continued rail service.¹⁹ NS further submits that such “concrete evidence” should consist of contractual commitments from shippers or receivers on the line. NS urges the STB to explicitly incorporate this heightened burden in the text of its proposed regulations.

For the STB’s review, below is a revised proposed regulation reflecting the two modifications discussed in this subsection:

(E) Demonstrate that there is a continued need for rail service on the line, or portion of the line, in question by submitting evidence (1) of a demonstrable commercial need for service (as reflected by support from shippers or receivers on the line or other evidence of an immediate and significant commercial need); (2) of community support for continued rail service; (3) that acquisition of freight operating rights would not interfere with current and planned transit services; and (4) evidence that continued service is operationally feasible. In addition, where the line, or portion of the line, in question has not been used for at least two years, demonstrate that there is a continued need for rail service by submitting concrete evidence of a demonstrable commercial need for service (as reflected by contractual commitments from shippers or receivers on the line).

¹⁸ NPRM at 19.

¹⁹ See also *Exemption of Rail Line Abandonments or Discontinuance - Offers of Financial Assistance*, EP 274 (Sub-No. 16), 1987 ICC LEXIS 23, at *11 (ICC served Dec. 14, 1987) (noting that “[b]ecause the subject matter of abandonment and discontinuance exemptions is primarily little-used [or] out-of-service lines, we anticipate limited use of the proposed rule; indeed that has been confirmed by our experience since we began using the rules on an interim basis”).

Conclusion

In sum, NS supports the STB's ongoing efforts to protect the integrity of its OFA processes. NS agrees with the majority of the proposals in the NPRM designed to improve the OFA processes.

In these comments, NS respectfully offers three modifications to the STB's proposals. First, the STB should ensure that its standard for maintenance costs, as used to calculate the amount of the preliminary showing of financial responsibility, is appropriate and current. Second, the STB should eliminate the presumption of financial responsibility for state and municipal governmental entities and should require such entities to satisfy the preliminary financial responsibility showing. Third, the STB should require offerors to demonstrate a continued need for rail service by satisfying in full the *LACMTA* criteria and should incorporate in its regulations the heightened burden to demonstrate a continued need for rail service on line segments that have not been used for at least two years.

NS believes that the STB's proposals in the NPRM, as modified as described in these comments, would create a well-functioning OFA process that ensures participation by legitimate offerors, promotes reasoned decisionmaking by the agency, and furthers the public interest in an efficient national rail system.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'W. A. Galanko', written over a horizontal line.

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Dated: December 5, 2016