

ENTERED
Office of Proceedings
December 5, 2016
Part of
Public Record

These Comments are on behalf of the City of Jersey City ("City") in response to the Notice of Proposed Rulemaking concerning Offers of Financial Assistance ("OFAs") served September 30, 2016.

1

developer who had unlawfully acquired a line without any abandonment authorization when City sought to acquire the line lawfully for public purposes).¹

The City supports protecting the OFA process from abuse. Unfortunately, the proposed amendments to the OFA process fall well short of the mark, imposing requirements of at best very limited use to prevent delays and abusive OFAs, at least of the kind experienced in an urban setting. In addition, the agency's proposals amount to throwing the baby out with the bathwater, insofar as they continue to treat OFAs by public agencies as equivalent to OFAs by private interests for purposes of most of the agency's proposed new requirements. City of Jersey City concurs with the December 1 comments filed by the Railroads for National Defense Program (Department of Defense (Dod)) to the effect that escrow requirements should not be imposed on governmental entities tendering OFAs.

I. Origin of Rulemaking

¹ In both these instances, Consolidated Rail Corporation sold off regulated lines of railroad without complying with 49 U.S.C. 10903 (obtaining the required abandonment license). City of Jersey City believes that most delays in abandonment proceedings, including abusive OFAs from private parties, arise in such instance, especially in urban areas. The agency should focus more resources on ensuring that rail carriers comply with 49 U.S.C. 10903 before they unlawfully engage in de facto abandonment of their lines.

This rulemaking arose from an "advance notice of proposed rulemaking" which in turn was precipitated by a petition for rulemaking filed by Norfolk Southern Railway Company (NSR). NSR sought some amendments to the OFA process to address what NSR viewed as abusive invocation of the OFA remedy by Mr. James Riffin and Mr. Eric Strohmeier (d/b/a CNJ Railroad) in multiple NSR (and other) abandonment proceedings. Although the Board denied NSR's petition, the Board announced an intent to initiate an ANPR.² Consistent with this history, the Board notes that this proposed rulemaking is in part to protect the OFA process from abuse. EP 729, slip op. p. 2.

If one of the purposes of the proposed rulemaking is to address abusive invocation of the OFA remedy by individuals or entities of which Mr. Riffin is a kind of paradigm, then the agency should be aware that the paradigm believes the agency has failed. In a recent purported pleading (which itself flows from an abusive use of OFA procedures by Mr. Riffin) that Mr. Riffin circulated to the undersigned, Mr. Riffin states that he "was the impetus for the [September 30] EP 729 Decision." He notes the September 30 decision makes many references to him. Riffin

² See Petition of Norfolk Southern Railway Company to Institute a Rulemaking Proceeding to Address Abuses of Board Processes, Ex Parte (EP) 727, served Sept. 23, 2015.

further states that STB's September 30 proposals did not impede, but instead facilitated his abusive use of OFA procedures:

"The Court should note that in spite of the derogatory remarks made against Riffin, the STB, in its EP 729 Decision, **did not** make it more difficult to prosecute an OFA in the 1189X proceeding. The STB actually **made it easier**. (By eliminating its prior precedent requiring 'operation' of a line for two years.) Now one only has to demonstrate the financial ability to **maintain** a line for two years, at the minimal cost of \$4,000 a year per mile of line. And the STB took away Riffin's adversaries' argument that Riffin cannot be 'financially responsible,' since Riffin filed a bankruptcy petition in 2010."

Document styled Riffin's Second -- Oct. 3, 2016 - Motion for Leave to Amend Plaintiff's Complaint, in Riffin v. Forest City, et al., USDC NJ No. 16-CV-04433-ES, para 24 (bold face in original document). The fact that a prime example supplied by Norfolk Southern of abusive filing is openly representing that the agency's proposals make it easier for him to abuse the OFA process should be entitled to some weight. To the extent that the Board is relying on its proposals to prevent abuse, they do not appear to be achieving that purpose, according to a party very frequently charged with abusive use of OFAs.

While Jersey City certainly supports measures to inhibit abusive OFAs, the instant proposals appear to fall short. This raises the question whether the Board should craft alternative proposals, and also the question whether the additional burdens (both in terms of delay and administration) that the proposals would impose on the Board's resources are justifiable.

II. The Board's Approach Is Difficult to Square with Past Precedent

STB is constrained by the terms of the OFA statute and its deadlines. Under the Revised Interstate Commerce Act (RICA), the OFA statute was codified at 49 U.S.C. 10905. Under RICA's section 10905, STB's predecessor ICC had to make two findings for an OFA to proceed: (a) that a government entity or a "financially responsible person" was making the OFA, and (b) that the OFA was "to enable the rail transportation to be continued over that part of the railroad line to be abandoned..." 49 U.S.C. 10905(d)(1)(repealed). To implement the latter requirement, ICC in general required that OFAs be bona fide. ICCTA in new 49 U.S.C. 10904 omitted the requirement that the OFA be for continuation of rail transportation. ICCTA only retained the requirement that the OFA offerant be found financially responsible. In addition, ICCTA imposed even more stringent deadlines not only on the abandonment process but also on implementation of the OFA statute.

In its proposed regulations implementing the ICCTA changes, STB proposed only to require OFA applicants to demonstrate financial responsibility. See 61 Fed. Reg. 11178 (March 19, 1996). Rails to Trails Conservancy, well aware of advice by entities like NARPO to use OFA to defeat public rail

trail projects, specifically commented to the agency, as the agency acknowledged, that STB "should retain the requirement that, in addition to being made by a financially responsible person, the [OFA] must be 'bona fide.'" RTC asked that such a requirement be retained in the regulations. Id.³ The Board, however, flatly refused: "[w]e find no merit in RTC's request. New 49 U.S.C. 10904 clearly does not retain that aspect of the prior statute. Accordingly, we will not add such a requirement to our regulations." Id.

If the Board in 1996 said it lacked power under ICCTA to retain a "bona fide" requirement, and otherwise viewed such a requirement as contrary to the intent of Congress, it is difficult to see what has changed in 2016. To be sure, there has been a remarkable accumulation of cases involving potential abusive use of the OFA statute, but the law has not changed to permit the agency as a general matter to apply new requirements to potential offerants wholesale. An alternative approach would be to require special showings where an OFA may inhibit or frustrate a public project that involves a rail line. That would focus the agency's administrative resources on instances

³ Counsel for the City in these comments (and in AB 167-1189X) remembers this episode rather vividly since he was counsel for RTC in the referenced comments in 1996.

where an OFA may be tendered not to keep a line intact but to forestall a public program.

49 U.S.C. 10904 amounts to a federal eminent domain proceeding administered by STB. As such, it is governed by the Fifth Amendment, which requires that any taking be for a "public purpose." Abusive use of OFA involves instances in which the OFA remedy is invoked for private purposes, such as to secure a rail line for salvage profits, or to "back stop" a developer who wishes to convert a line into townhouses or skyscrapers in order to forestall a public project to keep the line intact. In order to comport with the Fifth Amendment, the agency does need some mechanism to ensure that the OFA process is not abused.

III. The Agency's Proposed Rules Are Misfocussed

1. The agency's focus appears to view railroads as the interest group requiring more protection. The agency's proposed regulations appeared to be designed to discourage OFAs in order to protect railroads from "abuse." But railroads are not "abused" by an OFA per se. Under the OFA statute, every railroad is guaranteed the constitutional minimum of compensation on terms and conditions set by the agency under the OFA remedy. Any successful OFA applicant must keep the line intact for at least two years. During that time, the line will be subject to common carrier obligations. Since violation of these obligations may result in substantial civil liability,

there is a kind of built-in disincentive for casual OFAs (although City acknowledges that this has not deterred abuse, at least in urban settings). Moreover, Congress has provided a very tight procedural schedule for OFAs. As noted, when ICCTA was adopted, Congress eliminated any requirement that STB find an offer "bona fide" before proceeding. STB rejected a suggestion from Rails to Trails Conservancy that STB maintain the requirement in part because of the new tighter deadlines. However, it follows from the statute that Congress has determined that railroads are not burdened by the OFA process so long as this tight schedule is adhered to by the agency. Or, put another way, the public interest (and the interest of current and future shippers) in preserving hard-to-assemble transportation corridors outweighs the short delay that Congress has provided for the OFA remedy to work itself out. Only when the agency fails to adhere to the stringent procedural schedule for OFAs can the railroads complain of abuse.

The remedy to that kind of abuse is for the agency to adhere to the statutory and regulatory deadlines. Thus, STB should not permit late-filed notices of intent to OFA over the objection of rail carriers, as STB did in Consolidated Rail Corp. - Ab. Ex. - in Hudson County, AB 167-1189X, served November 2, 2015, slip at 4-5 (allowing Riffin to file a notice

of intent to OFA over the objection of Conrail roughly five years out of time).

2. The agency's real focus should be to protect the public and public projects from OFA abuse. Riffin and others from time to time have filed notices of intent to OFA which are inappropriate and subversive of public projects (e.g., AB 167-1189X, AB 167-1190). However, in the past STB has successfully dealt with that problem by granting exemptions from the OFA remedy where invocation of the remedy subverts or burdens a public use without some form of overriding freight rail need. See, e.g., Consolidated Rail Corporation -- Ab. Ex. - in Hudson County, AB 167-1190X, served May 17, 2010, slip at 4. Jersey City has no objection - indeed, we vigorously support - requiring private parties invoking the OFA process to show an overriding freight rail need when their OFA will interfere with a public project of any sort. That is exactly what long standing agency precedent supports.

In short, the interest group that needs protection from abusive OFAs is not the railroads but the public, including states and municipalities seeking to implement public projects. However, in its NPR, the agency declined to address the issue. EP 729, served Sept. 30, 2016 at p. 11.

IV. The Board's Specific Proposals Lack Basis

1. Financial Responsibility.

Although the Board states that it will presume state and local governments financially responsible (which we of course support), STB states that it intends to require state and local governments to post an escrow for 10% of the value of rail steel in the right of way, calculated on the basis of 264,000 pounds of steel per mile, multiplied by a value to be obtained from "one" of the "websites that track steel prices." Id. at p. 17. Jersey City joins DoD in opposing this requirement as applied to state and local governments for the same reasons that DoD articulates in its comments.

In addition, the agency's formulation of how to determine the amount for escrow is totally arbitrary. Salvage value of rail steel as calculated for OFA purposes depends on (1) grade (scrap, re-lay, re-roll), (2) weight, (3) accessibility for salvage, (4) transportation costs, (5) condition of ties (scrap, landscape, or re-lay) and their value, since they are generally marketed with the rail, (6) cost to remove bridges (a large bridge can cost more to remove than the salvage value of the steel in the line), and so forth. The only uncertainty addressed by the Board's proposal is rail weight, with the Board specifying a relatively low weight of rail for the calculation. But the other factors all vary from site to site. For example, the price for track on salvage varies per market (Pittsburgh vs. Seattle vs. Houston vs. Chicago, etc.), and whether one is

looking at "wholesale" (the amount paid to the railroad by a salvager, which takes into account removal costs, possibly some clean-up costs, and delivery and profit) or "retail" (the amount paid by a steel mill for scrap or re-roll, or by another railroad for re-lay). The Board in its proposed regulations posits that applicable rail steel prices are generally available on the web. Counsel is unaware of any reliable generally available sites on the web to price rail steel. This experience is based on three decades in rail acquisitions and abandonments. Moreover, a recent google search fails to identify any useful sites.

If the agency is going to adopt an arbitrary escrow requirement based on rail steel prices, then to avoid massive confusion and thus to ease implementation, the agency should undertake to publish and to update on its own website as it feels appropriate what it thinks 268,000 pounds of rail steel per mile should generally be considered worth for purposes of its proposed escrow requirement. That would be consonant with the agency's specification of \$4000 per mile per year for two years for maintenance. Alternatively, the agency should identify the on websites it intends the regulated community (and itself) to rely upon, and receive comment on the sites the agency identifies.

There is only a de minimis amount of rail steel left on the Harsimus Branch (a few sticks at CP Waldo), so any escrow requirement assuming track exists is wholly arbitrary in Jersey City in AB 167-1189X, and likewise in other instances in which railroads have engaged in illegal de facto abandonments. Similarly, the agency's approach will vastly overstate salvage value for any line that has substantial bridges (an easy local example is the Georgetown Branch in Washington, D.C., for which the bridge over Rock Creek Park essentially apparently would have cost more to salvage than the value of the rail steel in salvage at the time). In certain cases, the overstatement of value from the Board's formula will render even the 10% escrow proposed by the agency excessive.

Since the escrow amount is to be held independent of the railroad and the agency, and is to be returned to the OFA applicant in the event the applicant chooses not to proceed, it is difficult to understand what purpose it serves. It does not apply at the notice of intent stage, which is where the abuse of the OFA process in Jersey City has occurred. The Board proposes to require it only when an OFA is filed. The Board currently charges a "fee" of \$1700 on filing an OFA. EP 542-24, served Aug. 2, 2016. The "escrow" will amount to an arbitrary additional de facto fee of \$ 8000/mile plus 10% of track value (per the Board's formula) that is refundable. Jersey City notes

that for the Harsimus Branch, that amount would be around \$10,000. This amount is unlikely to deter abusive OFAs.⁴ See Riffin's quoted comments *supra*, p. 4.

Given the lack of purpose in the escrow requirement, Jersey City urges that it not be applied to state or local governments. As DoD states in its December 1 comments, the escrow requirement is contrary to the presumption of financial responsibility anyway. In further support, the City notes that the agency does not identify a single instance of abuse of the OFA process by a state or local government, or any instance in which an escrow requirement would have addressed an abuse by a state or local government witnessed by the agency. Moreover, unlike private individuals or companies, state and local governments frequently have public hearing and budgeting requirements that inhibit their ability to set up escrows in short time frames even though they can supply purchase funds within the sixty days normally required by the Board's terms and conditions in the OFA context.

2. "Commercial rail need" and "community support" showings

The agency proposes to require all OFA offerants to show commercial rail need (evidenced by shipper statements or other

⁴ The agency's charge of \$24,900 (as of EP 542-24, served August 2, 2016) for filing a request for terms and conditions is a much healthier deterrent to "joy-ride" OFAs.

evidence "of an immediate and significant rail need") and "community support" for their OFAs. In addition, the agency proposes that OFA offerants show their OFAs will not "interfere with any current or planned transit services" and that "continued service is operationally feasible." Slip op. at 19.

Although this requirement as applied to private OFAs marches in a generally correct direction, it is problematic for several reasons. First, it amounts to a generally applicable requirement that OFA offerants show that their offers are bona fide. The Board in the past has said this does not square with Congressional intent under ICCTA.

Second, if an OFA "interferes" with any public project, not just current or planned transit services, the Board should take that interference into account. While we agree that interference with transit is undesirable, that does not mean that interference with other valuable public projects is acceptable.

Third, the Board proposes to apply the requirement to governmental OFAs. When a government files an OFA, the OFA embodies the public project. It makes no sense to call upon the government entity to show non-interference with transit or community support in those circumstances. The agency fails to identify a single instance in which a governmental entity has abused the OFA process. In addition, to Jersey City's

knowledge, there is no case in which ICC or STB has imposed such requirements on a municipality seeking to employ the OFA remedy, except in the AB 167-1189X proceeding in Jersey City.⁵ Jersey City objected to the unprecedented application of such requirements upon the City in AB 167-1189X, but the presence of Riffin and CNJ notices of intent to OFA in that proceeding apparently obscured the issue for the agency. The fact that private parties have abused the OFA process does not mean that barriers should be erected to invocation of OFA by shippers or local governments.

The Board's proposal as applied to local and state governments is a departure from its prior stance that it is not seeking to usurp local land use planning functions. As this Board's predecessor, the ICC, stated in Implementation of Environmental Laws, 7 I.C.C.2d 807, 811-812 (1991), ICC is "not a planning agency; the identification and development of reuse alternatives is the responsibility of state and local planning agencies, not the ICC." A key local government planning function is to create and to maintain an adequate transportation system for the jurisdiction involved. To this end, municipalities like Jersey City develop Master Plans, including transportation elements that often cover a variety of

⁵ Conrail - Ab. Ex. - in Hudson County, AB 167-1189X, served Nov. 2, 2015.

transportation modes, including rail, highway, street, light rail, and so forth.

Virtually every requirement that STB now proposes to impose on local and state governments seeking to employ the OFA provisions amounts to substituting the STB's planning judgments for those of local and state governments. The proposed regulations, at least in terms of rail planning, in fact do put the agency in the role of identifying and evaluating reuse alternatives, contrary to agency policy as proclaimed in 1991 by ICC.

In order to alleviate traffic congestion, or to support future rail-dependent uses or development, a state or local government may well wish to preserve a rail line through use of the OFA remedy. As the Department of Defense (DoD) pointed out in its comments on STB's ANPR in this proceeding,⁶ preserving such lines through an OFA serves the public interest without damaging the private interest of the railroad, because the railroad will not be required to continue operating the line at a loss, and instead will receive all constitutionally required compensation upon a sale pursuant to the OFA statute. STB accordingly should not inhibit, hobble, or burden access to the OFA remedy on the part of governmental entities or shippers. In

⁶ DoD Railroads for National Defense Program comments in EP 729, STB website filed Feb. 11, 2016, at unnumbered pp. 1-2.

particular, City concurs with the Department of the Defense (DoD) which earlier indicated that "[g]overnmental entities and shippers on the rail line should not have to demonstrate a need for rail service to file an OFA."⁷ The City notes that its views are in accord with DoD's earlier comments that "there should be no need [for governmental entities and shippers] to demonstrate that rail service is operationally feasible."⁸

Although the agency in its NPR appears properly to acknowledge that local and state governments may employ the OFA process for passenger rail purposes (NPR, slip op. at 13), the showings that the agency proposes as a precondition for rail use appear all to deal solely with freight. If 49 USC 10904 is available for passenger rail acquisitions, as the agency appears to suggest, and if the agency continues to wish to condition use of OFA on some kind of showing to ensure that the OFA is somehow "bona fide," and if the agency wishes to apply this requirement to a local or state government, then a local or state government should be allowed to support the agency's new bona fide requirement with a showing related to passenger/light rail use just as well as freight rail use. In addition, some state

⁷ DoD Comments, *supra*, p. 2. Alleged serial abusers of the OFA process such as Mr. James Riffin (whose "use" of the OFA process was discussed in E.P. 727, and in part precipitated EP 729) are neither governmental entities nor shippers.

⁸ DoD comments, *supra*.

and local governments are prepared to subsidize rail operations in order to alleviate congestion, or because rail line can be used for multiple public purposes that a community values. STB has no basis to block these efforts through imposition of requirements to show "demonstrable commercial need" or "immediate and significant commercial demand." These requirements are appropriate for OFAs by private enterprise parties, but not as applied to state or local governments. "Commercial" connotes "for profit" or "private enterprise" uses. Public agencies do not ordinarily operate "for profit" or on the same basis as "private enterprise" in the transportation arena.

STB has limited resources, and from time to time Board members have lamented the Board's inability to meet deadlines or issue decisions on urgent matters in a timelier fashion. Requiring more showings for all OFAs, especially along the lines proposed by the Board, amounts to reinstitution of a general "bona fide" requirement, and will stress already overtaxed Board resources. While the City certainly supports measures to curb abusive OFAs, the agency's proposal appears of limited if any use in that regard, and instead appears unnecessarily (and without citing any instance of governmental abuse) to encumber the process for governmental entities to use the OFA remedy.

The Board should concentrate on requiring parties to adhere to the stringent deadlines already embodied in the OFA process.

The agency otherwise should focus its attention on requiring any OFA that may burden a public project to demonstrate an overriding need for freight rail service. We do not object to requiring private applicants to show rail need, community support, and indeed an overriding need for freight rail service when a private OFA is made that interferes with or forestalls any public project. Mr. Riffin should not be allowed to file notices of intent to OFA belatedly, or when he represents that he is acting on behalf of developers, nor should developers be permitted to file OFAs in order to secure railroad rights of way for development.

City otherwise incorporates its comments and reply comments as filed in the ANPR, many of which we feel the agency has mischaracterized. City reserves the right to file a reply.

Respectfully submitted,
S/
City of Jersey City, by
Charles H. Montange
426 NW 162d St.
Seattle, WA 98177
(206) 546-1936
Fax: -3739
c.montange@frontier.com
Attorney for City of Jersey City

For filing: December 5, 2016