

Offers of Financial Assistance -)
) Ex Parte 729
 Notice of Proposed Rulemaking)

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

1 In the interest of full disclosure, Jersey City's counsel has also successfully filed a major feeder line application on behalf of a shipper under 49 U.S.C. 10907 for another client (PYCO Industries). Section 10910 is a kind of eminent domain twin of 49 U.S.C. 10904 ("OFA's").

comments reflect that experience, as well as prior decisions of this agency and its predecessor and actions of Congress.

Only a few comments were filed on the Board's proposed regulations. Only two comments (as of December 31) were filed by the rail industry (AAR and Norfolk Southern). They and the Defense Department politely tried to find something to support, for abuse of the agency's OFA regulations is viewed as a problem by all. Strikingly, however, the Board's approach was also supported by James Riffin, generally cast by the rail industry as a chronic OFA abuser, and by the Hyman interests (212 Marin Boulevard LLC, et al) which are linked to Mr. Riffin.² This should raise a red flag, not just to the agency but to all of us interested in preventing abuse of the OFA process.

The City supports effective efforts to deal with abuse of the OFA process, but does not view STB's proposals as effective in that regard. It is notable, on the one hand, Mr. Riffin, a major alleged abuser of the OFA process, has advised us that the regulations pose no deterrence to him. On the other hand, by erecting requirements for additional procedures and showings, the regulations seem to afford opportunities for additional

² Mr. Riffin has informed this Board that his proposed OFA of the Harsimus Branch is a "back-up plan" for the Hyman interests, and has further informed targets of his lawsuits that he will obtain a commission from the Hyman interests if successful. See notes 8 and 9 infra.

litigation. This raises the possibility of adding to the abuse and delay faced by shippers and local communities, such as Jersey City, seeking to preserve rail lines. The City requests STB to focus on enforcing existing deadlines, issuing timely decisions, and preventing OFA's that thwart public projects.

Background

At the same time Congress began easing the rail abandonment licensing process to make exit from the industry less burdensome, Congress adopted the OFA statute, first codified at 49 U.S.C. 10905 of the Revised Interstate Commerce Act. The OFA remedy was intended to allow shippers and local communities an opportunity to preserve rail lines intact for continued rail purposes, including passenger rail use, provided that the shippers or local communities were prepared to assume the common carrier responsibilities for the otherwise-to-be abandoned line. Until adoption of the ICC Termination Act (ICCTA), the OFA statute as well as the ICC regulations allowed the OFA process to move forward if the agency determined that a party seeking to OFA the rail line in question (a) was financially responsible, and (b) was making an offer likely to cover (for purchase offers) the acquisition cost of the line. See 49 U.S.C. 10905(d) (1995, repealed by ICCTA); 49 C.F.R. 1152.27(e) (1994).

This second requirement was sometimes referred to as a determination that the offer was "reasonable" or "bona fide."³

Since 49 USC 10905(f)(4) (1995, repealed by ICCTA) barred any successful OFA offeror from discontinuing service over, or transferring a line, for two years, and since assumption of the common carrier obligation for two years was viewed as sufficient to show a public purpose ("rail need"), ICC did not examine whether the line was in fact "needed" for rail purposes, or otherwise look into the intentions of a party seeking to file an OFA. In other words, the public purpose was viewed as self-enforcing due to the requirement that the common carrier obligation must be assumed for at least two years, and then could only be discontinued through the agency's abandonment/discontinuance regulatory processes.

In adopting the ICCTA, Congress expressed no concern with ICC's administration of the OFA statute on issues such as rail need for OFA's, but did eliminate the requirement that offers be found bona fide. Congress otherwise further streamlined the OFA process.⁴ In particular, Congress eliminated any requirement

³ See Burlington Northern RR -- Ab. Ex. - in King County, WA; In the Matter of an Offer of Financial Assistance, AB 6-357X, served April 22, 1994 (rejecting OFA for line sought by Seattle for rail trail purposes as not bona fide or reasonable).

⁴ The House version of ICCTA largely eliminated abandonment regulation, substituting a notice process, but provided for a streamlined OFA remedy. See H. Report 104-311, 104th Cong., 1st Sess. (Nov. 6, 1995) at pp.388-91. The conference version of

that the Board find an offer "reasonable" in order to proceed (see 49 U.S.C. 10904(d)(1)). Congress also cut the time for the Board to set terms and conditions from 60 days from date of request to 30 days 49 U.S.C. 10904(e)(1)(A). The Board adjusted its regulations accordingly, rejecting Rails to Trails Conservancy's argument that the Board continue to impose a requirement that an offer be "bona fide" as contrary to congressional intent. Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903, Ex Parte 537, served Dec. 24, 1996, slip op. at 15.⁵ The Board thus no longer evaluates whether an "offer" is reasonable (that is, likely to be adequate given the likely price range for the rail line).

Since the agency no longer can make a finding on whether an offer is reasonable, it is not clear how the agency can determine financial responsibility. Under the case law since adoption of ICCTA, financial responsibility seems largely confined to whether the offering party can meet the price the offering party self-declares, or that the Board ultimately sets

the bill opted for the Senate's formulation of abandonment regulation but adopted some of the streamlining to the OFA remedy. H. Conf. Report 104-422, 104th Cong., 1st Sess. (Dec. 18, 1995) at p. 180-81.

⁵ City referenced this matter at pp. 5-6 of City's initial comments but did not include the correct citation. The initial "Id." on p. 6 should be to the citation in the text above.

for purchase of a line. Thus due to the change in ICCTA, the "financial responsibility" requirement has not served as a significant deterrent to abusive OFA's, even when filed by alleged impecunious offerors, such as the previously bankrupt Mr. Riffin, because they in general claim the right to make their showing without reference to the likely value of the rail line in question. It is difficult to see how financial responsibility can serve as a bar unless the Board reimports the bona fide requirement. The Board's proposed bond based on a constructed valuation for scrap rail deemed to be on a line even if it is not appears to be an effort to reimpose a bona fide requirement. But the Board has previously indicated it lacks power to do. See EP 537, supra. If the Board can explain why what was beyond its power in 1996 is now within its power without any statutory change, then City believes reimportation of the bona fide requirement would be helpful. However, it should not be based on some kind of constructed value for the line based on theoretical rail, but on the range of likely values for the line as was the case pre-ICCTGA.

Even then, the upgraded financial requirement would not unequivocally control against abuse. For example, Mr. Riffin has informed the Board that he can acquire the Harsimus Branch

for \$23,000 under current precedent, for which he represents he has the cash assets, and thus is financially responsible.⁶

In order to develop regulations responsive to abuse, the Board needs to identify exactly what is the abuse of its OFA process that it feels needs correction. Then the Board needs to identify corrective measures within its power and within its resources to implement that actually address a true abuse. Insofar as City can tell, the Board has failed to identify the true abuse of OFA (delays, and use of the OFA process to prevent public projects), and has equally failed to acknowledge that delays and turmoil caused by chronic filers like Mr. Riffin are the result of failure of the Board to enforce existing deadlines and to issue timely decisions, and the failure of railroads seeking abandonment authority to have their valuation information promptly available as required by statute.

Some of the proposals (e.g., bond requirements based on an arbitrarily ascribed value for track in a line, even if there is none) to address abuse are overbroad, appear to be outside the Board's power given Congressional omission of the bona fide requirement, and do not focus on the true sources of abuse. City of Jersey City supports prevention of abuse of the OFA

⁶ The matter was discussed inter alia at the hearing in AB 167-1189X held on August 24, 2016, Transcript at 34, available in STB's e-library, under filings.

process, but the Board's proposals are not conducive to that end, and instead risk imposing delays and burdens on legitimate OFA applications.

I. Delay

The chief legitimate "abuse" identified by the railroad industry is delay. The City shares the industry's concern with delays in what is supposed to be a streamlined process. Since the OFA process is supposed to be very streamlined, it is important to inquire where "delay" arises.

The first point of delay involves failure to comply with regulatory and statutory deadlines. For example, in AB 167-1189X, this Board allowed Mr. Riffin to file a "notice of intent to OFA" roughly six years out of time, over the objection of Conrail and City of Jersey City. See Conrail - Ab Ex - in Hudson County, NJ, AB 167-1189X, served Nov. 2, 2015, slip at 5-6. This unquestionably has resulted in delays in AB 167-1189X due to Mr. Riffin's subsequent activities in the proceeding (including failure to comply with discovery orders, multiple filings, appeals, and filing of additional declaratory proceedings). Indeed, in AB 167-1189X, the Board's failure to enforce its deadlines has been used by Mr. Riffin as his grounds for standing for purposes of his lawsuit against third parties in Jersey City. See Complaint attached to Wasser Certification, Appendix I to City et al's Reply to the Motion for Sanctions

sought by the Hyman interests against City et al for pursuing discovery issues, in AB 167-1189X, filed Oct. 20, 2016 (available in STB's e-library, filings).

The Board should insist on reasonable compliance with the streamlined schedule for OFA's established by Congress. Failure to do so, as in AB 167-1189X, spawns burdensome delays and unreasonably consumes the resources of the agency, the courts, the abandoning railroad, and the public.

Another source of delay involves financial information which the railroads have been required promptly to supply OFA applicants since the inception of the OFA remedy. E.g., 49 U.S.C. 10905(b) (1995, repealed by ICCTA); 49 C.F.R. 1152.27(a) (1994) (railroad must provide "promptly upon request to a party considering an offer of financial assistance ... in an application proceeding ... [the] minimum purchase price ... [and] in an exemption proceeding "at a minimum the carrier's estimate of the net liquidation value of the line, with supporting data..."). The requirement that information be promptly supplied continues forward in ICCTA (49 U.S.C. 10904(b)) and in current regulations. Similarly, ICC regulations provided that if the information is not promptly supplied, an OFA applicant can obtain an automatic tolling of the due date of its offer of financial assistance until the information is supplied. E.g.,

49 C.F.R. 1152.27(c) (1994). The requirement for tolling continues to exist in current STB regulations.

Unfortunately, railroads frequently do not have the valuation information available at the time they file, or refuse to make it available. For example, in AB 167-1189X, City of Jersey City actually had to file a motion to compel Consolidated Rail Corporation to make available its valuation information despite a previous order by STB indicating that Conrail should do so. This resulted in months of delay in AB 167-1189X (to be sure, that delay caused by Conrail is now eclipsed by yet more delay caused by Mr. Riffin and the Hyman interests).

When the OFA provision was extended to exempt abandonments, the rail industry unsuccessfully objected to having to provide valuation information. See Exemption of Rail Line Abandonments or Discontinuance - Offers of Financial Assistance, EP 274-sub no. 16, 4 ICC 2d 164 (1987). Judging from rail comments to date, rail carriers would still prefer to evade supplying valuation information, but the industry needs to recognize that Congress in adopting measures to facilitate the abandonment process also intended to create a significant remedy (the OFA remedy) for communities and shippers to purchase rail lines otherwise to be abandoned so long as the communities or shippers were willing to bear the costs attached. See id. This requires that valuation information be made available. The OFA

remedy is supposed to be streamlined, and the industry can make it so by having its valuation information available at the time it seeks abandonment authority, and by making that information available promptly as the statute and regulations require. Creating additional hurdles to accessing valuation information simply burdens OFA applicants, and delays the abandonment process contrary to the intent of Congress.

Since the primary cause of financial information delay is the railroads, the Board should consider sanctioning any carrier which fails to make valuation information available promptly, including barring the carrier from relying on information it does not promptly provide, or dismissing the proceeding in appropriate cases.

II. Public Purpose

The remaining source of abuse of the OFA statute arises out of the nature of the remedy. The OFA statute is a kind of fast-track federal eminent domain proceeding. The Fifth Amendment bars federal "takings" (eminent domain) unless for a public purpose. If the OFA remedy is used for a private as opposed to a public purpose, then the remedy poses a constitutional issue.

There is definitely a danger that the OFA remedy may be employed to acquire a rail line for a private purpose; namely, a kind of "not in my backyard" (NIMBY) effort to defeat public projects. The National Association of Reversionary Property

Owners (NARPO) advertises the OFA remedy as a means for landowners adjacent to a rail line to acquire the property in order to prevent rail trail projects.⁷ Steve Hyman -- the developer whose wife owns commenters (in this proceeding) 212 Marin Boulevard LLC, et al -- has sought to employ the OFA process at least twice in Jersey City for purposes of private real estate development schemes, at least one of which amounts to an effort to thwart a public project.⁸ Mr. Riffin has not attempted to conceal - either at this Board (see note 8) or in Jersey City⁹ - that his invocation of this Board's OFA remedy and

⁷ E.g., NARPO internet page at <http://home.earthlink.net/~dick156/row.htm>, print out at p. 5 of 8 (penultimate paragraph).

⁸ The first known instance was in Conrail Abandonment of the Edgewater Branch in Hudson County, NJ; In the Matter of an Offer of Financial Assistance, AB 167-1036N, served Feb. 18, 1987 (ICC accepts Hyman OFA). The second known instance involves Mr. Hyman's support for the late-filed "notice of intent" to OFA filed by James Riffin in AB 167-1189X. Mr. Riffin has informed this Board that his objective in participating in AB 167-1189X (including in particular pursuing an OFA) is to protect the Hyman interests and that he is Mr. Hyman's "back-up plan." Riffin Response, AB 167-1189X, filed June 11, 2015, at pp. 9-10. Mr. Riffin indicates that there indicates his intent is to defeat the City's public project.

⁹ Verified statement that Riffin tells Wasser at meeting with Hyman that he (Riffin) will get a commission from the Hyman interests for his efforts in relation to subverting STB proceedings dealing with the Harsimus Branch. Certification of Gregg Wasser, Appendix I to City et al's Reply to the Motion for Sanctions sought by the Hyman interests against City et al for pursuing discovery issues, in AB 167-1189X, filed Oct. 20, 2016.

other antics in connection with AB 167-1189X is to force a settlement favorable to the Hyman real estate interests.¹⁰

In general, the railroads seeking abandonment authority could care less about whether an OFA is for a public purpose, for they will receive all the compensation to which they are constitutionally entitled regardless of the purpose of the OFA. However, abuse of the OFA remedy in order to thwart a public project can and will readily harm the public, and at the very least may operate to thwart state law that would govern the line if it were otherwise authorized for abandonment.

The only current protection against such abuse of OFA is the requirement in 49 U.S.C. 10904(f)(4)(A) barring transference or discontinuance of service for two years after OFA acquisition. This protection is essentially identical to the similar requirement for OFA's under the Revised Interstate

¹⁰ Consolidated Rail Corporation unlawfully sold eight critical blocks of the Harsimus Branch, a line of railroad containing the National Register-eligible Harsimus or Sixth Street Embankment, to the Hyman interests in 2005, without an authorization for abandonment from this Board and without any proof that no abandonment authorization was required. This sale was over the objection of the City of Jersey City and others who sought its acquisition by the City for public purposes. Even 212 Marin Boulevard LLC, et al acknowledge that Conrail in acting to thwart the City behaved in a fraudulent or at least negligent fashion. See City et al's Notice of Decision filed Nov. 22, 2013 in AB 167-1189X, at pp. 3-4 & Ex. C. Yet 212 Marin seeks to maximize profit from participating in a transaction it says was based on fraud and at least negligence. To that end, Mr. Riffin's OFA has become the "back-up plan" for the Hyman interests.

Commerce Act. If the successful OFA applicant is barred from discontinuing service for two years, then the successful applicant in effect must meet the federal common carrier obligation for the line. Under 49 USC 11101, that obligation is chiefly to quote rates and terms on request and to furnish service on reasonable request. Failure to discharge the common carrier obligation can result in liability to shippers for lost profits. This risk of liability is often a formidable concern and thus a deterrent to mis-purposed OFA's. As a result, the requirement that the OFA applicant shoulder a minimum of two years' worth of federal common carrier obligation has been taken as assurance that there is enough public purpose behind an OFA to meet the Fifth Amendment's requirements, at least to the extent required in order to support the streamlined OFA process provided by Congress for rail abandonment licensing.

But in some cases - particularly on low or no density lines with little or no traffic - the common carrier obligation may not be viewed as particularly burdensome. For example, if there are no shippers, then the risk of liability for lost profits is at most conjectural and perhaps a de minimis risk.¹¹

¹¹ This does not mean that low or no density lines are generally inappropriate for OFA purposes. See Exemption of Rail Line Abandonments or Discontinuance - Offers of Financial Assistance, EP 274-sub no. 16, 4 ICC 2d 164 (1987). A community may desire such a line to address freight congestion or to support passenger rail transit or both.

In such cases, real estate developers, adjoining landowners, or opportunists may attempt to use the OFA process in order to prevent a public project, simply because they want to use some or all of the line for private purposes, like townhouses or skyscrapers as the Hyman interests seek for the Harsimus Branch. The risk of mis-purposed OFAs is especially the case if the public project involves preservation of the rail line for freight and/or passenger use, for use as a highway, for use as a trail, or for some other viatic use.

In short, the only real "abuse" of the OFA statute that merits examination for possible new regulations is situations in which this Board's OFA remedy is invoked to prevent or to inhibit a public project, particularly in the context of low or no density lines. The abuse arises because in such situations, the constitutional requirement that eminent domain only be for public purposes may not be adequately addressed by the statutory requirement that the successful OFA applicant be subject to the common carrier requirement for two years. In such cases, the presumption made in section 10904 that the common carrier requirement safeguards the remedy is outweighed by the risk that the OFA is simply to derail a public project.

The Board currently addresses this issue on a case by case basis, generally in response to motions to dismiss (or the

equivalent) an OFA. The Board does so by requiring a showing of rail need.

One of the Board's proposed regulatory revisions would extend this requirement to all OFA's. Although City is dubious the Board's proposal will address abuse (Riffin seems undeterred by it), City has no objection requirements for some showing of rail need as applied to private parties, with the possible exception of shippers.¹²

However, as applied to local and state governments (and perhaps to actual shippers or former shippers), the requirement is arbitrary and capricious. The STB is not a planning agency, much less a planning agency for state or local governments. Yet

¹² City is curious how the Board will find the resources timely to adjudicate disputes over whether rail need showings are adequate. The Board frequently takes months to reach decisions on motions to dismiss OFA's, even when they target public projects, and imposing a generic rail needs requirement invites such litigation in essentially all OFA's. That likely will cause more delay or at least involve more cases in delay.

In addition, it is not clear what kind of showing of rail need is required. This Board in the past has indicated that preservation of a long unused line for possible future rail use by a shipper is sufficient to show rail need for an OFA even if it thwarts a public project. See Borough of Columbia v. STB, 342 F.3d 222 (3d Cir. 2003) (salvage company which has not used line for long period allowed to OFA thus thwarting rail trail project in order to preserve line for possible future use). In extending the OFA remedy to exempt abandonments, the ICC specifically rejected imposition of a minimum traffic requirement, because that "could impose an obstacle to rail service in some cases." Exemption of Rail Line Abandonments or Discontinuance - Offers of Financial Assistance, EP 274-sub no. 16, 4 ICC 2d 164, 167 (1987).

the agency seems to be setting itself up to second guess local and state government planning decisions concerning transportation networks. This second-guessing might be necessary if the Board was faced with a situation in which the OFA was tendered to thwart public planning. But if the OFA is by a public agency, the OFA is not thwarting public planning. A state or local government OFA cannot be in conflict with a public project, because the state or local OFA is and embodies the public project. In such situations, there is no danger of a Fifth Amendment violation, because the "taking" is for a public purpose, and in such a circumstance, the statutory requirement that the successful OFA applicant assume the common carrier obligation is more than adequate to comply with the intent of Congress in allowing communities free use of the OFA remedy.

This rulemaking proceeding is not the place to debate the issues in AB 167-1189X, where no actual OFA has yet been made. However, City notes that most of the comments filed as of December 31 in this rulemaking are by its adversaries (or their parents) in AB 167-1189X. City objects to all their proposals to burden the City's projected OFA. In a congested metropolitan area such as Hudson County, New Jersey, preserving the last unused transportation corridor (the Harsimus Branch) between transportation (Secaucus) and growth (Journal Square) hubs and the City's downtown (not to mention the local light rail system

and NJ Transit lines serving Manhattan) is a kind of rail use no-brainer. Of course the City has a rail need. This is particularly the case since the agency now appears properly to recognize that the OFA statute should be available for, and take into account, passenger rail transportation needs.

Similarly, the Board's proposal to require state or local governments to post, at any point in the process, a refundable bond based on an arbitrary calculation of scrap value of imagined track, makes no sense as applied to state or local governments. They are presumptively financially responsible,¹³ no abuse by them of the OFA process has been articulated, and no need for additional regulation on the subject has been identified as to them. In any event, Conrail long ago removed all rail from the Harsimus Branch which City of Jersey City seeks to OFA in AB 167-1189X. The Board's bond requirement amounts to an effort to reimpose a very arbitrary version of the "bona fide" requirement based on a constructed value of hypothetical rail. Congress in ICCTA deleted the bona fide requirement from the OFA statute, and STB said that prohibited its reinstitution. The bond form of the bona fide requirement

¹³ Norfolk Southern (a part owner of Conrail) asserts in its comments that governments should not be presumed financially responsible, citing Detroit. But City can find no instance in which a bankrupt city has ever sought to file an OFA. The record is bereft of any instance in which a local or state government has filed an OFA for an abusive purpose.

has little connection with reality. In all events, it would be arbitrary and capricious in the case of the Harsimus branch given Conrail's prior removal of the rail without any STB abandonment authority.

III. Alternatives

The Board should reconsider its current proposals. When two major abusers of the Board's processes (Mr. Riffin and the Hyman interests) favor what the Board proposes as an OFA modification, then the modification is not accomplishing a legitimate purpose. City of Jersey City recommends that the Board re-examine Norfolk Southern's original proposal for rulemaking in Ex Parte 727, served Sept. 23, 2015. Norfolk Southern had some useful ideas focused on inhibiting alleged chronic abusers such as Mr. Riffin. If the Board is going to deal with abuse, it should deal with abusers and not risk abusing the innocent.

The best approach to deal with OFAs aimed at thwarting public projects is to require any such offeror to show an overriding public overriding public need for rail service. E.g., Norfolk Southern Railway Co. - Pet. Ex. - in Baltimore City and Baltimore County, AB 290-311X, served Jan. 27, 2012, slip at 11-13 (denying Riffin's petition to reopen exemption from the OFA process). If the public project itself embodies continued rail use, STB should further require that the offeror

seeking to thwart the public project show how it would convincingly address rail needs better than the public project (which may be embodied in a local or state OFA) itself. E.g., Kulmer v. STB, 236 F.3d 1255, 1258 (10th Cir. 2001) (where freight service - as an adjunct to passenger service - more likely under local government plan than under private OFA, then private OFA inappropriate). City invites STB to consider that approach in its regulations or as a policy statement.

Conclusion

Virtually all abuse of the OFA process arises either from failure to adhere to deadlines or from use of OFA to thwart public projects. If a party invokes the OFA process against any public project, then it should demonstrate that its OFA is not for an illegitimate purpose. City of Jersey City supports efforts to prevent abuse of the OFA process. City is dubious of the Board's proposals, which may burden legitimate OFA's, and which may spawn more litigation and delays than they prevent. There is no evidence of any abuse of the OFA process by local or state governments.

There is a federal policy to keep rail corridors intact for future reactivation. Railroad rights of way are difficult to re-assemble once lost, and are useful for rail and transit purposes. They resemble a depletable natural resource and if retained are national assets. Legitimate efforts to preserve

them should not be burdened or sacrificed due to angst caused by Mr. Riffin and those with whom he sometimes works (e.g., the Hyman interests). Here Riffin views the agency's proposals as no particular hindrance to his abuse of the OFA process. This underscores City's concern that the agency's proposals are not effective to prevent abuse, and in particular will not serve to prevent Riffin and his developer collaborators from abusing the OFA process in order to subvert Jersey City's efforts to preserve the Harsimus Branch.

Failure to comment on any of the claims by other parties to this proceeding should not be viewed as assent to any of those claims to the extent contrary to statements herein.

Respectfully submitted,

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