

**BEFORE THE SURFACE TRANSPORTATION BOARD**

**JR-4**

**242185**

**STB EX PARTE NO. 729**

**ENTERED**

**Office of Proceedings**

**December 5, 2016**

**Part of**

**Public Record**

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**ADVANCED NOTICE OF PROPOSED RULEMAKING  
OFFERS OF FINANCIAL ASSISTANCE**

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**REPLY COMMENTS OF JAMES RIFFIN**

**TO THE STB'S SEPTEMBER 30, 2016 PROPOSED OFA RULES**

1. Comes now James Riffin (“**Riffin**”), who herewith provides the Surface Transportation Board (“**STB**”) with Riffin’s Comments regarding the September 30, 2016 Served Proposed Offer of Financial Assistance (“**OFA**”) Rules.

2. Riffin commends the STB for the well-thought-out, well-written proposed OFA rules.

3. Riffin’s comments are of a technical nature. (He seeks more precision.)

**Evidence of financial responsibility**

4. The proposed rule lists a number of examples. However, none of the example address the two most commonly used evidence of financial responsibility:

- A. **Financial Institution** “account statements.” Riffin suggests adding the words ‘financial institution’ in front of the words ‘account statements,’ to clarify the phrase ‘account statements.’

- B. On occasion, some entities may have substantial sums of actual cash. (Federal Reserve Notes.) Substantial quantities of precious metals. Stocks and bonds. Which are **not kept in**, or subject to the direct control of, a ‘financial institution,’ or in a brokerage firm, providing statements. It would be appropriate for the rules to state that a verified statement indicating the Dollar value of these types of assets, would also be acceptable forms of evidence of ‘financial responsibility.’
- C. While the proposed rule lists ‘**letters** of credit,’ it does not list ‘**lines** of credit.’ A ‘letter of credit’ is a formal document typically with specified beneficiaries. A ‘line of credit,’ on the other hand, provides access to cash upon demand. The rule should also specify ‘**lines** of credit.’

## NOTICES OF INTENT

5. Presently, a ‘notice of intent to file an OFA’ is only required in Notice of Exemption (“**NOE**”) proceedings. The primary purpose for filing a ‘notice of intent’ in an exemption proceeding, is to automatically stay the proceeding. The primary purpose for filing a ‘notice of intent’ in an individual or full-application proceeding, (and a secondary purpose in an NOE proceeding) is to secure the right to obtain §1152.27(a)(1) information from the carrier. The failure to file a Notice of Intent **should not bar** an entity from **timely** filing an Offer of Financial Assistance. (Within 10 days after abandonment authority is granted.) After all, until the §1152.27(a)(1) information has been disclosed, it is very difficult to determine whether an offer to purchase the line should even be made. In addition, 49 U.S.C. 10904 expressly states:

“(c) Within 4 months after an application is filed under section 10903, **any person** may offer to subsidize or purchase the railroad line that is the subject of such application.”

6. Restricting Offers of Financial Assistance to entities that have timely filed Notices of Intent, runs counter to the express language in 10904. (And rules that run counter to the express language in the statute, are void. See *Railroad Ventures*.)

7. Consequently, the rule should state that Notices **may** be filed in any abandonment proceeding, and that if such a notice is filed, then, the carrier is obligated to provide the §1152.27(a)(1) information, and in the case of a NOE proceeding, the proceeding is automatically stayed as per the present rule. The proposed rule may also expressly state that late-filing a Notice **will not toll** the date an OFA must be filed.

### **Preliminary Financial Responsibility**

8. The proposed rule strikes an appropriate balance, and brings the OFA requirements into line with, and consistent with, a carrier's rights and obligations. (A carrier may remove its rail infrastructure without prior authority, and without penalty. However, such removal is subject to the caveat: If a reasonable demand for service is leveled, the carrier will be obligated to replace sufficient rail infrastructure to provide the requested service.) So to with an OFA offeror: If a reasonable demand for service is leveled, the OFA offeror will be obligated to provide sufficient rail infrastructure to provide the requested service.

9. **Some fine tuning:** The proposed rule states that the preliminary financial responsibility showing shall be the sum of the scrap value of the track (assumed to be 132 tons per track mile), multiplied by the total track length in miles, plus a maintenance cost.

10. **The type of 'ton' is not indicated.** ['Short' (2,000 lb),. 'long' (2240 lb), 'metric' (1,000 kg or 2,204.6 lb).] Scrap prices are quoted for 'long' tons. The proposed rule should specify the type of ton. E.g.: 132 **short** tons per mile of track.

11. **IF** there is any track on the right-of-way, and **IF** the OFA offeror wants to acquire the **entire** length of the line, then the proposed rule is appropriate. However, the proposed rule does not address the following:

A. **There is no track left.** (The track was already removed by the carrier / previous carrier). There are two options:

- a. The track value goes to zero.
- b. The OFA offeror must have sufficient financial resources to acquire 132 short tons / mile of track. (Which is 75 lb / yard rail.)

12. Riffin would suggest that the OFA offeror should have sufficient financial resources to at least be able to acquire 75-lb / yard rail. While that is not enough to actually put track back on the ground, if required, (no provision is made for the cost of cross ties, ballast, or grading and installation), that at least assures that the OFA offeror has sufficient funds to at least pay for **some** of the cost of installing track infrastructure.

**B. The OFA offeror does not want the entire line.** The OFA statutes expressly states that the OFA offeror determines what the offeror desires to acquire. And in *Railroad Ventures*, it was determined that the OFA offerer may offer to take **less than** the full length of the line. Subject to the caveats: No stranded segments are permitted. The full width of the right-of-way must be acquired.

13. Riffin would suggest that the following additional phrase be added:

“times the total track length **the offeror proposes to acquire**, in miles ...”

14. “The current rail steel scrap price is available at no charge from websites that track steel prices. The Board proposes requiring the potential offeror to use one of these publicly available sources to determine the price of steel.”

15. Riffin’s comments: Disclose what websites the STB has in mind. (Add the phrase:

“E.g.: (Names of websites)”

16. Indicate the **type** of steel being priced. (There are multiple categories of scrap steel.)

## Continuation of Rail Service

17. **The proposed rule uses the conjunctive ‘and.’** Meaning, an OFA offeror would be required to meet **all four** of the criteria indicated. To date, only **one** of the four criteria has had to be met. (The criteria were separated by the word ‘or.’) Meeting all four criteria, would be next to impossible, in the short period of time allowed for processing NOEs.

18. Riffin suggests: Replace the word ‘and’ with the word ‘or,’ to indicate that at least **one** of the criteria must be met.

19. The proposed rule requires: “evidence 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);”

20. There are many different types of ‘support from shippers.’ Most often, all an OFA offeror can obtain, are letters saying that a shipper ‘has an interest,’ and would use rail ‘if it was price competitive.’ The same language may be used in Verified letters. Getting a verified statement from a shipper committing to shipping X number of rail cars per year, is nigh impossible. For good reason: At the OFA stage, it is impossible to ascertain what a rail rate would be with any connecting rail carriers. And until the ‘through’ rate can be ascertained, no shipper will commit, can commit, to shipping X number of rail cars, since there is no way to compare the unknown rail rates with known truck rates.

21. Riffin’s experience to date is that nothing short of a verified statement will be given any weight by the STB. And verified statements are given little weight in contested proceedings, unless the verified statements commit to shipping specified quantities of rail cars. (Which is nearly impossible to obtain, since the rail rates cannot be obtained.)

22. Riffin suggests: Language be added to indicate that no one criteria is dominant. That the STB will ‘balance’ the four criteria, as is done by courts when deciding to issue injunctions.

23. Other than the small ‘clarifications’ noted above, Riffin argues that the proposed rules are appropriate, and will accomplish their intended goals.

Respectfully,

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**CERTIFICATE OF SERVICE**

I hereby certify that on or before the 5<sup>th</sup> Day of December, 2016, the above Comments were served on the parties of record in the EP 729 proceeding, either by e-mail or U.S. Postal Service.

James Riffin