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January 3, 2017

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 reply 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

REPLY 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 reply comments.

On December 5, 2016, the AAR filed opening comments in this proceeding supporting the proposed rules. The AAR supported the NPRM proposals because they strike the appropriate balance between preserving rail service in certain circumstances and maintaining an economically-rational rail system. The AAR submitted that the Board could improve the NPRM proposal by modifying the formula for preliminary financial responsibility 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 AAR also called on the Board to be vigilant in enforcing existing rules that protect the integrity of its processes. The AAR is filing this limited reply to

respond to four statements made in the opening comments filed by the City of Jersey City, NJ (“Jersey City”) and Mr. James Riffin (“Mr. Riffin”).¹

First, in suggesting that the failure to file a notice of intent should not bar an entity from filing an OFA, Mr. Riffin entirely ignores the Board’s stated goals in this proceeding to enhance the OFA process and protect it against abuse. *Compare* Mr. Riffin Opening Comments at 2 *with* NPRM at 14. The NPRM considered and rejected Mr. Riffin’s position that a notice of intent requirement would not allow sufficient time for an entity to determine if it was interested in pursuing an OFA. As stated in the NPRM, “the benefit of providing notice to the abandoning or discontinuing carrier that a party is considering an OFA will help expedite the process. Although Mr. Riffin argues that a party may not know so early in the process that it wants to file an OFA, the proposed filing deadlines for an NOI should still allow potential offerors sufficient time to consider their options.” NPRM at 4.

Moreover, the statutory language of 49 U.S.C. § 10904 does not prevent the Board from enacting rules to protect the integrity of its process, contrary to Mr. Riffin’s naked assertion otherwise. Mr. Riffin Opening Comments at 2. Section 1321 grants the Board authority to issue regulations consistent with the Rail Transportation Policy (“RTP”). 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

¹ The Military Surface Deployment and Distribution Command of the U.S. Department of the Army also filed opening comments. As indicated in the AAR’s reply comments in response to the Advance Notice of Proposed Rulemaking, the AAR does not believe the Board should make changes to its rules of general applicability that affect the military’s unique situation. *See* AAR Reply Comments (filed March 14, 2016).

proceedings. . . .” 49 U.S.C. § 10101 (2), (7), (15). The NPRM proposals, including the notice of intent requirement, reflect the Congressional interest in preserving rail service in certain instances, balanced by Congress’s recognition that railroads operate in markets like other businesses and should not be subject to regulation that forces them to continue to operate unprofitable lines.

Second, Jersey City quotes from a letter in which Mr. Riffin claims that the NPRM “did not make it more difficult to prosecute an OFA 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” Jersey City Opening Comments at 4. While the AAR does not comment on any of the issues between Mr. Riffin and Jersey City, this quoted statement is clearly erroneous. In the final rules adopting the NPRM proposals, the Board should clarify that the requirements of preliminary financial responsibility are separate and distinct from the ultimate determination of financial responsibility. That is, the NPRM did not alter existing precedent as to what would constitute financial responsibility after an OFA is submitted. Instead, the NPRM would create a new preliminary financial responsibility requirement. It is entirely possible that an entity might submit sufficient evidence and qualify under the preliminary test, but later be ultimately deemed by the Board not to be a financially responsible entity because that entity could not demonstrate that it could operate a line for two years.

Third, Jersey City has confused: (a) the requirement that an offer be for continued rail service and (b) the requirement, omitted in the ICC Termination Act, that the Board find an OFA to be *bona fide* before proceeding. Jersey City contends that “49 U.S.C. 10904 amounts to a federal eminent domain proceeding administered by the STB.” Jersey City Opening Comments

at 7. But, in fact, the STB has no general eminent domain power. Instead, the Board has jurisdiction over “transportation” by “rail carrier.” 49 U.S.C. § 10501. Contrary to Jersey City’s claim, states and municipalities have no right to railroad rights of way for public projects, absent a desire and ability to obtain the line for continued rail service. *See* Jersey City Opening Comments at 9. The Board has no statutory authority to compel the sale of rail lines absent continued common carrier rail service. *See Kulmer v. STB*, 236 F.3d 1255, 1257 (10th Cir. 2001) (noting the constitutional issues implicated in an interpretation of section 10904 that did not require continued rail use). Similarly, Jersey City’s assertion that the NPRM’s proposals amount “to substituting the STB’s planning judgements for those of local and state governments” Jersey City Opening Comments at 16, are also erroneous. Instead, the NPRM reflects the limited jurisdiction of the STB to impose restrictions on the use of private property by railroads.

Finally, Jersey City takes issues with state and local government OFA offerors being required to place a small portion of the necessary funds into escrow. Jersey City Opening Comments at 10. Jersey City mischaracterizes the escrow requirement as an additional fee on OFAs. Jersey City Opening Comments at 12. However, the entity that puts money into escrow will have that amount put towards the ultimate fulfilment of the OFA or receive it back if the sale does not occur. Moreover, Jersey City suggests that the agency’s fee for setting terms and conditions “is a much healthier deterrent to ‘joy-ride’ OFAs” than an escrow requirement. Jersey City Opening Comments at 3 & n.4. But the agency’s fees cannot protect unnecessary delays associated from state and local governmental agencies that may lack the ability to actually gather the funds necessary for an OFA because governmental entities routinely get waivers from the Board’s fees.

Conclusion

The Board should adopt the proposed rules, subject to the improvements suggested in the AAR Opening Comments. The Board should also vigilantly enforce its existing rules to protect against abuse of the OFA process.

Respectfully submitted,



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