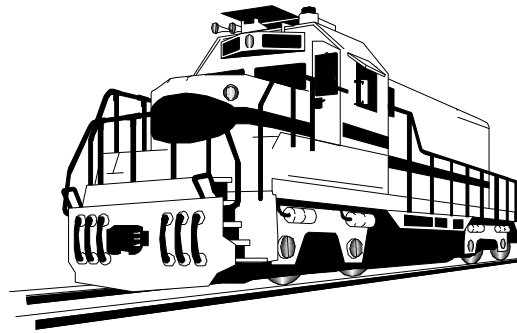


SO YOU WANT TO START A SMALL
RAILROAD

SURFACE TRANSPORTATION BOARD
SMALL RAILROAD
APPLICATION PROCEDURES



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INTRODUCTION

This information bulletin provides general information on Surface Transportation Board (STB) procedures for obtaining approval to operate a railroad. It focuses primarily on those procedures that are most useful in helping potential and established short line railroads begin or expand operations. For each of the methods listed below, we have detailed what information must be provided, the form it must take, and various procedural deadlines.

Section One discusses when and how to file Notices and Petitions for Exemption from filing a formal application for authority. The Offers of Financial Assistance section (Section Two) and the Feeder Railroad Development Program (Section Three) discuss the purchase or subsidization of lines.

Other methods of beginning or expanding a rail operation exist. However, this information bulletin is not intended to offer comprehensive coverage of all types of rail transactions such as acquisitions of control, consolidations, or mergers of two or more railroads (commonly known as finance transactions). A majority of finance transactions involving short line railroads will fall within one of the exemption categories covered in Section One.

The various legal options for entering short line railroading should be examined carefully. An attorney or STB practitioner experienced in railroad matters and STB regulations and requirements could prove most helpful. The STB's Office of Public Services (202/ 565-1592) can offer further information on application and exemption procedures.

A successful applicant is not relieved from complying with all other STB, Federal, State and local regulations, such as compliance with the Board's labor regulations and those concerned with environmental protection and historic preservation. Questions regarding environmental matters or the need to file an environmental and/or historic report should be directed to the Board's Section of Energy and Environment (SEE) at 202/565-1538.

Other Federal agencies also regulate rail transportation after a line is in operation. The Federal Railroad Administration (FRA) regulates all aspects of rail safety, from track inspection and speed limits to rail employees' hours of service. The FRA can be reached at 202/632-3124. Finally, the Railroad Retirement Board (RRB) administers the industry unemployment compensation and retirement programs. New operators should notify the RRB when they begin. The RRB can be reached at 312/751-4500.

Other considerations are also important to operate a line successfully. A potential operator must assess the viability of the line, establish divisions of rates with connecting carriers, obtain adequate financing, and follow other good business practices. These nonregulatory issues are beyond the scope of this bulletin, but should be considered in the early planning stages. Professional advice is invaluable in these areas.

SECTION ONE: EXEMPTION PROCEDURES

I. A General Discussion of Exemptions

The simplest, fastest, and easiest way to start or expand a small railroad is to acquire an existing line from a large carrier. The new operator needs authority from the STB to do that and the best way to get it is through one of the various exemptions. All applicants, and especially short line railroads and railroads with limited operations, should review the exemption criteria and procedures. A majority of transactions involving short line railroads will fall within one of the exemption categories.

Briefly, exemptions are either absolute or discretionary. Absolute (“class”) exemptions are those that apply automatically if certain criteria are met. These are discussed in Parts II and III of this section. Discretionary exemptions are those granted by the Board that do not qualify for an absolute exemption, if the Board makes certain findings. These are discussed in Part IV.

The Board is also required pursuant to the National Environmental Policy Act, the Energy Policy and Conservation Act, the National Historic Preservation Act and related laws to consider various environmental and energy impacts generated by the proposed transaction. It is possible that the proposed transaction will be subject to historic and/or environmental review. Generally, no environmental documentation will be prepared for the following actions (See 49 CFR 1105.6(c)(2)):

- (1) Any actions that do not result in significant changes in carrier operations, *e.g.*, acquisitions, leases or operations that do not exceed specified environmental thresholds;
- (2) Common use of rail terminals and trackage rights; and
- (3) Discontinuance of trackage rights where the affected line will continue to be operated.

Although the transaction may be exempt from environmental review, a report complying with the National Historic Preservation act may be required (see 49 CFR 1105.8).

II. Class Exemptions for Acquisitions and Operations by Small Entities

A. What is Exempt

Under the Board’s revised rules, noncarriers and Class III carriers may take advantage of the class exemption procedures set out in 49 CFR 1150, Subpart D (noncarriers) and Subpart E (Class III carriers). These exemptions include:

1. Acquisitions or operations by new carriers and Class III carriers
2. Acquisitions by a noncarrier or Class III carrier that would be operated by a third party
3. Operation by a new carrier or a Class III carrier of rail property acquired by a third

- party.
4. A change in operators on such a line
 5. Acquisition of incidental trackage rights. Incidental trackage rights include the grant of trackage rights by the seller, or the acquisition of trackage rights to operate over the line of a third party, that occurs at the time of the purchase.

B. Required Information

1. Different Information Requirements Apply Depending On The Class of Carrier That Results From The Transaction

The procedures applicable to class exemptions differ depending on whether the transaction will result in a new a Class I or Class II carrier (annual operating revenues greater than \$20 million) on the one hand, or a Class III carrier (annual operating revenues of \$20 million or less), on the other. More information is required of an applicant when the transaction will create a new Class I or Class II carrier than when a transaction will create a Class III carrier. In addition, when the transaction will result in a Class I or Class II carrier, a two-stage notice period with an extended consummation time applies. Procedures applicable to transactions of Class III carriers are addressed in the text of this publication; those for transactions involving Class I and II carriers are noted in Appendix I.

2. Information Required of Class III Carriers

To qualify for this exemption, applicant must be a noncarrier or a Class III carrier whose annual operating revenues will be \$20 million or less after the transaction is consummated. Applicant must file a verified notice including details about the transaction, and a brief caption summary which will be used to provide public notice of the transaction.

a. Verified Notice

The verified notice must contain the following information:

- (a) The full name and address of the applicant;
- (b) The name, address, and telephone number of applicant's representative who should receive correspondence;
- (c) *Either* (i) a statement that an agreement has been reached *or* (ii) details about when an agreement will be reached;
- (d) The name of the operator of the property (rail line);
- (e) A brief summary of the proposed transaction, including (i) the name and address of the railroad transferring the subject property, (ii) the proposed time schedule for

consummation of the transaction, (iii) the mileposts of the subject property, including any branch lines, and (iv) the total route miles being acquired.

(f) A map that clearly indicates the area to be served, including origins, termini, stations, cities, counties, and States; and

(g) A certificate that applicant's projected revenues do not exceed those that would qualify it as a Class III carrier.

The verified notice should be a narrative statement, not just a list of data. Although the Board does not wish to encourage pleadings that are wordy, good factual information is essential to the Board's understanding of a particular set of circumstances.

b. Caption Summary

The caption summary will be published in the Federal Register and must be in the format shown below. The information symbolized by numbers is identified in footnote 2.

SURFACE TRANSPORTATION BOARD
NOTICE OF EXEMPTION
Finance Docket No. _____¹

²(1) -- EXEMPTION (2) - - (3)

(1) has filed a notice of exemption to (2) (3)'s line between (4). Comments must be filed with the Board and served on (5). (6).

This notice is filed under 49 CFR 1150.31 [if applicant is a noncarrier, but cite 49 CFR 1150.41 if applicant is already a Class III carrier prior to the consummation of the transaction]. If the notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to

¹ To reserve a docket number, you should contact the Office of the Secretary at 202/565-1681.

² Key to symbols:

- (1) Name of entity acquiring or operating line or both,
- (2) The type of transaction, e.g., to acquire, operate or both,
- (3) The transferor,
- (4) Describe the line,
- (5) Petitioner's representative, address, and telephone number,
- (6) Cross reference to other class exemptions being used.

revoke will not automatically stay the transaction.

C. Procedural Information

The exemption will be effective seven days after the notice is filed. The Board will publish the notice within 30 days of the date of filing.

Applicants must preserve intact all sites and structures more than 50 years old until compliance with the requirements of Section 106 of the National Historic Preservation Act, 16 U.S.C. 470, is achieved (see 49 CFR 1180.8).

III. Additional Finance Class Exemptions

A. What Is Exempt

Under 49 CFR 1180, various types of financial transactions between two or more rail carriers are exempt from more complex procedural rules even though the participants may not be noncarriers or Class III's. Many small railroads have expanded their lines through the seven classes of finance transactions found at 49 CFR 1180.2(d) listed below for which the Board does not require prior approval.³

1. Acquisition of a line of rail which would not constitute a major market extension where the Board has found that the public convenience and necessity permit abandonment.
2. Acquisition or continuance in control of a nonconnecting carrier or one of its lines where (a) the railroads would not connect with each other or any railroads in their corporate family, (b) the acquisition or continuance in control is not part of a series of anticipated transactions that would connect the railroads with each other or any railroad in their corporate family, and (c) the transaction does not involve a Class I carrier.
3. Transactions within a corporate family that do not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with carriers outside the corporate family.
4. Renewal of leases and any other matters where the STB (or the ICC, its predecessor agency) previously authorized the transaction and only an extension in time is involved.

³ A transaction that may not be suitable for a finance class exemption may qualify as a "minor" transaction under 49 CFR 1180.2(c). The information that must be provided for a minor transaction is limited. A discussion of minor transactions is beyond the scope of this information bulletin.

5. Joint projects involving the relocation of a line of railroad which do not disrupt service to shippers.
6. Reincorporation in a different State.
7. Acquisition of trackage rights and renewal of trackage rights by a rail carrier over lines owned or operated by any other rail carrier or carriers that are (a) based on written agreements, and (b) not filed or sought in responsive applications in rail consolidation proceedings.

B. Required Information

The procedures to be followed to qualify for a finance class exemption are set out in 49 CFR 1180.4(g). Prior to filing any documents with the Board, the railroad must obtain a docket number from the Office of the Secretary⁴. The carrier must then file a verified notice of exemption for any of the seven transactions listed in III A, *supra*, which must contain the following information:

1. A title listing the names of the applicants and the nature of the proposed transaction.
2. A brief summary of the proposed transaction, the name of applicants, their business address, telephone number, and name of the counsel to whom questions regarding the transaction can be addressed.
3. The proposed time schedule for consummation of the proposed transaction.
4. The purpose sought to be accomplished by the proposed transaction (e.g., operating economies, eliminating excess facilities, improving service, or improving the financial viability of the applicants).
5. A list of the State(s) in which any part of the property of each applicant is situated.
6. As **Exhibit 1**, a general or key map indicating clearly, in separate colors or otherwise, the line(s) of applicant carriers in their true relations to each other, short line connections, other rail lines in the territory, and the principal geographic points in the region traversed. If a geographically limited transaction is proposed, a map detailing the transaction should also be included.
7. As **Exhibit 2**, a copy of any contract or other written instrument entered into, or proposed

⁴ Phone 202/565-1664 to reserve a docket number.

to be entered into, pertaining to the proposed transaction. In addition, parties to exempt trackage rights agreements and renewal agreements must submit one copy of the executed agreement or renewal agreement with the notice of exemption, or within 10 days of the date that the agreement is executed, whichever is later.

8. The level of labor protection to be imposed.

If the notice is for the seventh category (acquisition or renewal or trackage rights agreements), the railroad also must file a caption summary suitable for publication in the Federal Register in the form prescribed by the STB in 49 CFR 1180.4(g)(2)(i) in addition to the verified notice. See Appendix II for the details of filing.

C. Procedural Information

Within 30 days after the Board receives a verified notice involving categories 1 through 6 (Part IIIA, *supra*), it will publish a notice of exemption in the Federal Register. If the notice contains false or misleading information, an exemption will be revoked and the Board will require divestiture.

If the notice is for an acquisition or renewal of trackage rights agreements, (category 7) the Board will publish the caption summary in the Federal Register within 20 days after it is filed. The filing of a petition to revoke under 49 U.S.C. 10502(d) does not stay the effectiveness of this exemption.

Some transactions may be subject to environmental review.

IV. Petitions for Exemption

Many finance and other transactions involving small railroads, such as acquisitions of connecting lines, may not fit within the exemption categories discussed above. In these circumstances the Board will consider a petition for an individual exemption of the transaction pursuant to 49 U.S.C. 10502. If the petition is granted, the applicant need not comply with the Board's more detailed approval procedures. The Board's regulations governing exemption petitions are found at 49 CFR 1121.

A. What May Be Exempted

Petitioning parties may seek an exemption from almost any Board rail regulation, ranging from a specific filing or other requirement to complete exemption from regulation under the Act (Title 49, Subtitle IV). Although the vast majority of petitions for exemption seek relief from application filing requirements only, the exact scope of the exemption sought will vary according to the nature and extent of the operation proposed. Petitions must comply with any applicable

environmental or historic reporting notice requirement of 49 CFR 1105, and employee labor protective conditions will be imposed where appropriate.

The Board's statutory authority to exempt rail transportation is 49 U.S.C. 10502. Under Section 10502, the Board must exempt a person, class of persons, or transaction or service from specific legal requirements if it finds that compliance with those requirements is:

2. not necessary to carry out the rail transportation policy of Section 10101 of Title 49 of the United States Code and
3. either the transportation is of limited scope or regulation is not necessary to protect shippers from the abuse of market power.

This is a two part test; the second part has two options. The concepts of what constitutes "limited in scope" and "abuse of market power" are being continuously developed in the case law.

B. Required Information

Petitions should be tailored to the facts and circumstances of each individual case. To qualify for the exemption, the petition must describe the transaction and relate the facts of the transaction to the criteria of section 10502. For example, a petition for exemption to operate a short line might explain that regulation of the operation is not required to carry out the rail transportation policy of 49 U.S.C. 10101 because exemption of the transaction will actually further the goals of that policy. Minimizing the need for Federal regulatory control over the rail transportation system and reducing regulatory barriers to entry into the rail industry are examples of some of the policy goals that could be furthered by such an exemption. Moreover, the petition might state that the transaction is limited in scope because it involves the operation of a small line segment, and that regulation is not necessary to protect shippers from an abuse of market power because the shippers have transportation alternatives such as truck transportation. See Appendix II for the details of filing.

C. Procedural Information

In most instances, once the petition is filed, an initial decision will be made as to whether to grant the petition. However, if unusual circumstances are presented, the Board may publish notice of the exemption in the Federal Register and solicit comments before making an initial decision. If denied, the petitioner may file the appropriate application for authority. When granted, a notice of exemption will appear in the Federal Register. In the usual case, the exemption will become effective 30 days after publication. Parties objecting to an exemption have 20 days from the service date of the decision granting the exemption to file a petition to reopen and 10 days from the date of service to seek a stay.

V. **Unregulated Transactions**

Other types of rail operations or transactions are exempt by law from STB regulation. For example, under 49 U.S.C. 10906, a rail carrier providing transportation subject to Board jurisdiction does not need STB approval to enter into arrangements for the joint ownership or joint use of spur, industrial, team, switching or side tracks. Similarly, also under 49 U.S.C. 10906, the Board does not have authority to regulate the construction, acquisition, or operation of spur, industrial, team, switching or side tracks. In these circumstances, a rail carrier may proceed without filing any documents or requests for authority with the Board. These statutory exemptions and some of the relevant terms (such as spur), however, are defined narrowly. Careful examination is necessary to ensure that a particular operation or transaction does not require STB approval. If in doubt, an application or petition for exemption should be filed, along with a motion to dismiss, setting forth the reasons why the transaction is not regulated⁵. If the STB finds that the transaction is not regulated, it will grant the motion to dismiss the application or petition, and the parties may proceed with the transaction. If the transaction is regulated the Board will deny the motion to dismiss; and act on the application or petition.

⁵ Persons can first file a request for informal opinion if, as in construction cases, the filing fee for an exemption petition is high. For more information on this option contact the STB's Office of Public Services at 202/565-1592.

SECTION TWO: OFFERS OF FINANCIAL ASSISTANCE

I. General Discussion

If a railroad applies to the STB to abandon a line, interested persons can seek to preserve rail service by offering to purchase or subsidize operations over some or all of the line. These Offers of Financial Assistance (“OFA”) are governed by statute (49 U.S.C. 10904) and the Board’s regulations (49 CFR 1152.27). The successful purchaser will be restricted from selling the line again for a period of time as discussed below.

There are three different procedures that a rail carrier can use to abandon a line. If, for example, no local traffic has moved over the line for at least 2 years, overhead traffic can be rerouted, and no formal complaints about the cessation of service have been filed with the Board, the carrier may take advantage of a class exemption procedure and file a Notice of Exemption. The Notice must be filed at least 50 days prior to the date on which the carrier intends to consummate the abandonment. Opponents of the abandonment must file a Petition to Revoke and, to be successful, must show that the original Notice contains false or misleading information. The majority of rail abandonments filed with the Board qualify for and use this class exemption procedure.

In cases where there has been some limited traffic over the line, a carrier may choose to file a Petition for Exemption. This procedure is shorter and less costly than a full abandonment application, but is likewise subject to protests from shippers and other interested persons. The Board can grant or deny a Petition for Exemption. If the Petition is denied, the carrier can still file a full abandonment application. The full application procedure requires the carrier to file detailed information about the line, including extensive financial information.

It is very important that a person contemplating an OFA (“offeror”) determine which type of abandonment procedure has been selected by the railroad seeking to abandon the line (“carrier”) because the time table the offeror must follow is different in each case.

II. Class Exemption Procedures

Certain procedures, set out at 49 CFR 1152.27 must be followed by an offeror when a carrier files a Notice of Exemption. Persons with a potential interest in providing financial assistance must submit to the Board and the carrier, no later than 10 days after the Federal Register publication⁶, a formal expression of their intent to file an Offer of Financial Assistance (Notice of Intent) indicating the type of assistance they wish to provide i.e., subsidy or purchase. Submission of a Notice of Intent will automatically stay the effective date of the Notice of Exemption for 40 days.

⁶ A Notice of Exemption will be published in the Federal Register 20 days after it is filed with the Board and would normally become effective 30 days after the publication date.

Once that Notice of Intent is received by the carrier, the carrier must provide to the Offeror and the Board (1) either an estimate of the annual subsidy, or the minimum purchase price (depending on the type of financial assistance indicated by the offeror in the formal expression of intent) (2) the carrier's most recent reports on the physical condition of the involved line (3) traffic, revenue, and other data necessary to determine the amount of annual financial assistance that would be required to continue rail transportation over that part of the railroad line (4) the carrier's estimate of the net liquidation value of the line with supporting data, and (5) an estimate of the cost of rehabilitating the line to Federal Railroad Administration class 1 Safety Standards (49 CFR part 213). The carrier must also make available to the offeror records, accounts, appraisals, working papers and other documents as set out in 49 CFR 1152.36 during regular business hours at a time and place mutually agreeable to the parties.

Once the offeror has that information, it can file an Offer of Financial Assistance. That Offer is due 30 days after the Federal Register publication of the carrier's Notice of Exemption which is, in effect, 20 days after the Offeror has filed its formal expression of intent⁷. It, too, must be served on the carrier and filed with the Secretary of the Board. The offeror has little time to digest the carrier's information and prepare the Offer, so the offeror should notify the Board immediately by filing a Petition to toll the 30 day period for filing an Offer, if there is any delay in receiving the required information from the carrier⁸. What an Offer of Financial Assistance must contain is discussed in Part III of this section, *infra*.

After the Offer has been reviewed by the Board, the Director of the Board's Office of Proceedings will issue an Order which states whether or not the Offer is *bona fide*, *i.e.*, whether or not the offeror is a financially responsible person for purposes of partial revocation of the exemption and for the institution of negotiations between the offeror and the carrier. If the Offer is not found to be *bona fide*, the abandonment will go forward. If the Offer is found to be *bona fide*, and negotiations are instituted, the procedures described in Part IV of this section, *infra*, will be followed.⁹

⁷ If the Offeror has filed an Offer of Financial Assistance *prior* to publication of the Notice of Exemption in the Federal Register, the Offeror must notify the Board that its Offer has been previously submitted, no later than 30 days after the Federal Register publication of the Notice of Exemption.

⁸ For more details on the Petition to toll the 30 day period and the time frames see 49 CFR 1152.27(c)(2)(ii)(C) and(D).

⁹ The Director's timetable for issuing this Order is described in 49 CFR 1152.27(e)(2). Procedures for appealing the Director's Order are set out in 49 CFR 1011.2(a)(7).

III. Individual Petitions for Exemption and Formal Abandonment Applications

As discussed earlier in this information bulletin, any carrier can apply for an exemption from Board regulations and procedures under 49 U.S.C. 10502. Each year many carriers file Petitions for Exemption from the Board's full abandonment application procedures in order to abandon lines that do not fit the qualifications discussed above for a class exemption. Petitions are more likely to be opposed than Notices because the line has had some recent use. Formal abandonment applications are, in general, the most controversial. These lines are often good candidates for potential short line operators even though the economies of scale may make the line unprofitable for a larger railroad. Rules for filing an OFA in a case in which the carrier has filed a Petition for Exemption or a Formal Abandonment application are also set out at 49 CFR 1152.27.

When the Board receives a Petition for Exemption or a Formal Abandonment Application it will publish notice of the Petition or Application in the Federal Register within 20 days. Offers of Financial Assistance are due 120 days after the filing of the Petition for Exemption or Application or 10 days after the service of a Board decision granting the exemption, whichever occurs sooner.¹⁰

The first step for a potential offeror to take in a Petition for Exemption or Formal Application case is to notify the carrier seeking to abandon the line. The carrier is then required to serve upon the Board and upon the potential offeror an estimate of the annual subsidy and minimum purchase price required to keep the line or a portion of the line in operation.

Next, although the rules do not require it (unlike class exemption abandonments), the offeror would be well advised to file a Notice of Intent to file an OFA with the Board and serve a copy on the carrier as promptly as possible. The offeror will then be included on the service list in the docket and assured of receiving copies of all decisions and orders in the case, and the carrier will be required to provide to the offeror access to the records, accounts, appraisals, working papers and other documents set forth in 49 CFR 1152.36.

The Offer itself must contain the information set forth in 49 CFR 1152.27(c)(1)(ii). Contents are discussed in Part IV of this section, *infra*.

After the Offer has been reviewed by the Board, the Director of the Board's Office of Proceedings will issue an Order which states whether or not the Offer is *bona fide*, *i.e.*, whether or not the offeror is a financially responsible person for purposes of partial revocation of the exemption and for the institution of negotiations between the offeror and the carrier. If the Offer is not found to be *bona fide*, the abandonment will go forward. If the Offer is found to be *bona fide*, and

¹⁰ A decision granting or denying a Petition for Exemption or a Formal Application is not published in the Federal Register. Persons interested in a particular Petition for Exemption in an abandonment docket can be notified of the decision when it is made by placing their names on the service list. To do this contact the Board's Office of the Secretary at 202/565-1674.

negotiations are instituted, the procedures described in Part VI of this section, *infra*, will be followed.¹¹

IV. Preparing the Offer

A. Information Provided by the Railroad

To assist potential offerors, the Board requires a railroad that has applied to abandon the line to furnish certain information promptly if requested by any person considering an OFA. The data must be sent concurrently to the Board and must include:

- (1) an estimate of the minimum purchase price or annual subsidy needed to keep the line (or a portion of the line) in operation;
- (2) the carrier's most recent reports on the physical condition of the line;
- (3) traffic, revenue, and other data necessary to determine the amount of annual financial assistance needed to continue service.¹²

Anyone who believes subsidy or acquisition is a possibility should request this information immediately and begin a thorough feasibility study. A potential offeror should explore the possibility that the State will agree to provide some money for rehabilitating the line.

B. Contents of The Offer

1. Notice of Intent

As noted above, if the carrier has filed a Notice of Exemption in a class exemption case, the offeror is required to file a Notice of Intent to file an OFA. Although offerors in Exemption Petitions and Full Applications do not have that requirement, it is an excellent idea to do so for the reasons stated in footnote 12. The Notice of Intent should clearly identify the line or portion of the line to be purchased or subsidized and whether the offeror intends to try to purchase or subsidize the line. In addition, the Notice may contain a request to the carrier to provide the information required under 49 CFR 1152.36 and a request to the Board to toll the 30 day period for submitting offers of financial assistance for an additional number of days. A sample Notice of Intent is attached as Appendix III.

¹¹ The Director's time table for issuing this Order is described in 49 CFR 1152.27(e)(2). Procedures for appealing the Director's Order are set out in 49 CFR 1011.2(a)(7).

¹² If the carrier receives written notice of intent to make an offer from a party to the abandonment proceeding, the carrier must make available to the offeror the records, account appraisals, working papers, and other documents used to prepare the revenue and cost data included in the abandonment application. As discussed above, it also serves the purpose of putting the offeror on the Board's service list for the abandonment application so that the offeror is served with all decisions and orders in the docket.

2. Offer of Financial Assistance

The OFA must:

- (1) identify the line (or portion of the line) to be purchased or subsidized;
- (2) demonstrate that the offeror is financially responsible; and
- (3) explain any disparity between the offeror's purchase price or subsidy and that of the carrier if it is less than the carrier's estimate, and explain how the OFA has been calculated.

With regard to financial responsibility, the offeror must show that it has or within a reasonable time will have the financial resources to fulfill proposed contractual obligations. This may be done by submitting documents such as a current financial statement or a line of credit with a bank. The Board assumes that a State or local government entity is financially responsible. A sample OFA is included at Appendix IV.

V. The Board Will Review the Offer

Each OFA will be reviewed by the Board to determine whether the offeror is a financially responsible person and whether the offer is reasonable. A subsidy must cover the difference between the revenue attributable to the line and the avoidable costs of providing freight service on the line plus a reasonable return on the value of the line. A purchase offer must equal the line's net liquidation value or its going concern value, whichever is higher. If these criteria are met, the Board will issue a decision postponing the abandonment and give the parties an opportunity to negotiate. This decision will be served within 15 days after the Federal Register notice of the approval of the abandonment (5 days after the OFA is due).¹³

¹³ If the Board has tolled the time for filing an OFA, this decision will be issued 5 days after the OFA is filed.

VI. If Negotiations Are Successful

A. Subsidy

If the carrier and an offeror enter into a subsidy agreement designed to provide for continued rail service, the Board will postpone abandonment for as long as the subsidy agreement is in effect.

B. Purchase

Should the parties enter into a purchase agreement resulting in continued rail service, the Board must approve that transaction and dismiss the abandonment application. The purchaser need not seek any further Board approval to acquire the line.

VII. If Negotiations Fail

A. Request That The Commission Set The Terms

Should the carrier and offeror fail to agree on the terms of subsidy or purchase, either party may ask the Board to establish the terms.¹⁴ Such a request must be filed no later than 30 days after the offer is made.¹⁵ ¹⁶ A copy of the request must also be served simultaneously on all parties to the abandonment proceeding. The request must indicate the status of negotiations between the parties and the likelihood of voluntary settlement before issuance of an STB decision setting the terms. The party asking the Board to set terms must also submit with its request:

- (1) reasons why its estimates are correct and why the other negotiating party's estimates are incorrect;
- (2) points of agreement and disagreement between the negotiating parties; and
- (3) evidence in support of these positions.

¹⁴If the railroad receives more than one OFA, requests to establish terms will not be permitted before it selects the Offeror with whom it wishes to transact business, and notifies the Board and all parties to the proceeding of its selection.

¹⁵If no timely request to set terms is made, the railroad generally will be allowed to abandon the line 10 days later (unless an appeal to the abandonment is pending).

¹⁶In class exemption proceedings if the carrier has received more than one OFA, it must select the offeror with which it chooses to do business within 45 of the publication of the Federal Register and any Request to Set Terms and Conditions is due within 60 days of the publication.

NOTE: The offeror has the burden of proof regarding all disputed issues.

The other party's reply is due within 5 days after the request to set terms and conditions is made. Data submitted after these deadlines may be rejected.

Throughout this process the parties are expected to continue negotiating and to apprise the Board of agreement on any terms the Board has been asked to set. Even if a full agreement is not reached, continued negotiations could result in agreement between the parties on many points.

The Board's decision setting the terms will be issued within 30 days after the request is due, *i.e.*, within 60 days after the due date for making an offer.

B. When the STB Sets The Subsidy Payment

If requested to set a subsidy, the Board will use the methodology found at 49 CFR 1152 Subpart D, to calculate subsidy payments. This methodology ensures the carrier that it will recover operating costs, rehabilitation expenses, if any, and have a reasonable return on investment.

C. When the STB Sets The Purchase Price And Terms Of The Sale

1. Methodology

If asked to determine purchase price and terms of sale, the price set by the Board will be no lower than the fair market value of the line. This computation will include, unless otherwise agreed by the parties, all facilities on the line (or portion) necessary to provide effective transportation services. The STB has determined that fair market value is the net liquidation value (NLV) of the rail properties for their highest and best nonrail use (absent a higher going concern value for continued rail use). The value of the line is computed without regard to labor protection costs.

NLV is computed by adding the net value of the land for nonrail purposes to the net salvage value of the track materials. The parties must submit sufficiently detailed evidence to enable the Board to make cost determinations on each of these components. For example, the offeror should submit two appraisals, one for the value of the land and another for the value of the track and other materials, including the costs to remove the track. The methodologies used by the appraisers should be fully explained and any inaccuracies in opposing parties' appraisals should be identified. Additionally, since railroad rights-of-way are often held by less than fee simple title, the parties should also present data concerning the nature of the railroad's property interests and the effect on land value. The offeror has the burden of proof on all matters. Therefore, where it is impossible to determine on the evidence submitted which valuation is more accurate, the Board will accept the railroad's appraisals.

2. Standard Conditions The STB Imposes

When the Board issues a decision setting the purchase price, it normally imposes four standard conditions to ensure the smooth transfer of the line. They are:

- (1) Payment must be made by cash or certified check;
- (2) Closing date is set 90 days from the service date of the Board's Order setting terms and conditions;
- (3) Carrier shall convey all property by quitclaim deed;
- (4) Carrier shall deliver any and all mortgage releases within 90 days of closing.

If the parties desire specific terms differing from the standard conditions, these terms and conditions should be specifically requested and evidence provided in support of their imposition. The parties can, of course, change these terms by agreement.

D. The Offeror Must Act No Later Than 10 Days After the STB Sets The Terms

No later than **10 days** after issuance of the Board's decision setting terms of the sale or subsidy, the offeror must give a written acceptance or rejection to the STB and all parties to the proceeding. If the offeror accepts the Board's terms, there terms will be binding on both parties.

If the original offeror does not accept the Board's terms, any other offeror may accept them within 20 days after the decision setting the terms. (See discussion *infra*.) The carrier will be bound by those terms.

Should no offeror accept the Board's terms, the Board will promptly issue a certificate allowing abandonment of the line (unless an appeal to the abandonment is pending).

VIII. When More Than One Offer is Received

When an applicant carrier receives more than one OFA it must select the offeror with whom it wishes to transact business, and notify the STB and all parties to the proceeding (in writing) of its selection. Notification of selection must be received no later than 25 days after the service date of the decision granting an application or petition for exemption. In the case of a Notice of Exemption filed in a class exemption proceeding, the applicant carrier must act within 45 days after the Federal Register publication of the Notice of Exemption.¹⁷

IX. Substitution of Purchasers

An Offeror may substitute a corporate affiliate as the purchaser before consummation of the purchase if the Board has determined that either the original offeror has guaranteed the financial responsibility of its affiliate or the affiliate has demonstrated financial responsibility in its own right.

¹⁷ Please note the potentially tight time frame here. The applicant carrier provides notice of which offeror it has selected by day 45. By day 60 if no agreement has been reached, the request to set terms and conditions is due.

X. Restrictions on Disposition of the Line

A purchaser may not transfer the line or discontinue service over the line for 2 years after consummation of the original sale under the OFA provisions. After 2 years the purchaser may transfer the line back to the selling carrier, but it must wait 5 years before selling it to anyone else. A purchaser is not precluded, however, from transferring the line to a corporate affiliate following consummation of the original sale, but Board approval is required and the affiliate would be subject to the same transfer and discontinuance restrictions.

SECTION THREE: FEEDER RAILROAD DEVELOPMENT PROGRAM

Lines that are not the subject of an abandonment (or discontinuance) proceeding may be acquired through the forced sale provisions of the Feeder Railroad Development Program. The statutory procedures for this program are found at 49 U.S.C. 10907 and the STB's regulations are at 49 CFR 1151.

The feeder line program was designed as an alternative to abandonment. Congress envisioned it as a method of allowing shippers, communities, or other interested parties to acquire rail lines before an abandonment application is filed. If a rail line has been listed on a carrier's system diagram map as subject to abandonment, the Board can require the sale of the line to a financially responsible person.¹⁸ If the line in question is not on the carrier's map, it can still be subject to a forced sale if the feeder line proponent can show that (1) the rail carrier operating the line refuses within a reasonable time to make the necessary efforts to provide adequate service to shippers; (2) the sale of the line would not have an undue adverse effect on the carrier's operations; and (3) that the sale would result in improved service on the line.

I. Advantages and Disadvantages of the Program

In theory, this program has two major advantages. It allows the parties to save the time and expense involved in the abandonment process, and it allows the new owners to take over operations of a line before further deterioration occurs. Another advantage is that the buyer may be exempted from most STB regulations.

However, the program has great potential for placing the new carrier and the original owner of the line into an adversarial relationship from the outset. After forcing the railroad to sell at a price to which it might not otherwise have agreed, the newly created short line may have to develop a working relationship with the main line railroad to become a viable venture, especially where the short line is dependent on the larger carrier for interline rates.

¹⁸ Under 49 U.S. C.10907 the term "financially responsible person" is defined as including, inter alia, a government entity but excluding a Class I or Class II railroad.

II. Required Information

A feeder line application must be filed with the Board.¹⁹ The application must contain detailed information in the form of verified statements, including, among other things:

1. An estimate of the line's Net Liquidation Value (NLV) and Going Concern Value (GCV), with supporting evidence;
2. An offer to purchase the line for the higher of either NLV or GCV;
3. Information sufficient to demonstrate that the offeror is financially able to pay either the NLV or the GCV, whichever is higher;
4. An operating plan that identifies the proposed operator, details the service to be provided, and demonstrates that adequate transportation will be provided for at least 3 years

Applicants should consult the STB's regulations at 49 CFR 1151.3 for a complete description of information required to be filed with the application.

The Board usually will reject incomplete applications. If an applicant is unable to obtain required information that is primarily or exclusively within the personal knowledge of the owning carrier, it may file an incomplete application if it files at the same time a request for discovery (under 49 CFR 1114) to obtain the needed information from the carrier. The Board will conditionally accept an application if it finds that the missing information is necessary and is under the control of the owning carrier.

III. Procedural Matters

The Board has 30 days to accept or reject the application. If accepted, a notice is published in the Federal Register.

Generally, within 30 days after the application is accepted, any other interested party may file a competing application to acquire all or any portion of the same line.²⁰ Competing applications will be accepted or rejected within 15 days after they are filed. The owning railroad and other interested parties may submit verified statements containing their evidence and arguments within 60

¹⁹ Copies of the application must be sent by first class mail to (1) the owning carrier, (2) shippers who used the line during the year preceding the month in which the application is filed, (3) designated State(s) agency(ies) in which the line is located, (4) county governments where the line is located, (5) Amtrak if it operates over the line, and (6) the national offices of the rail unions with employees on the line.

²⁰ The time frames in this paragraph apply unless specified otherwise by the Board.

days after the original application was accepted. Verified replies may be filed within 80 days after acceptance of the initial application.

The Board will determine if one or more offerors are financially responsible, that is, able to pay the NLV or GCV (whichever is higher) and provide adequate service for at least 3 years. If the line qualifies for forced sale, the STB will set the sale price and other terms of the sale, and order the railroad to sell the line to one of the qualifying offerors. However, should the offeror and owner agree on a different sale price, that price will be the final price instead of the one set by the STB.

The STB's findings will be published in the Federal Register. The offeror then has 10 days to accept or reject the Board's terms; this must be done in writing and sent to both the STB and the railroad. If two or more offerors accept the STB's terms, the owning railroad may select the one with whom it wishes to transact business. The railroad must notify the Board and offerors of its selection within 15 days after the Board's decision setting the terms of the sale. The parties may then consummate the sale without any further Board approval.

For more information on the Feeder Line Program call the STB's Office of Public Services at 202/565-1592 and consult 49 CFR 1151.

APPENDIX I

EXEMPTION REQUIREMENTS FOR TRANSACTIONS THAT INVOLVE CREATION OF CLASS I OR CLASS II CARRIERS (49 CFR 1150.31 and 49 CFR 1150.35)

(a) To qualify for this exemption, applicant must serve a notice of intent to file a notice of exemption no later than 14 days before the notice of exemption is filed with the Board.

(b) The notice of intent must contain all the information required in a Class III carrier class exemption (see page 4 of the text) plus:

(1) a general statement of service intentions, and

(2) a general statement of labor impacts.

(c) The notice of intent must be served on:

(1) the Governor of each State in which track is to be sold;

(2) the State(s) Department of Transportation or equivalent agency(ies);

(3) the national offices of the labor unions with employees on the affected line(s); and

(4) shippers representing at least 50 percent of the volume of local traffic on the line(s) in the most recent 12 months for which data are available (beginning with the largest shipper and working down).

(d) Applicant must also file a verified notice of exemption conforming to the requirements of (b) above, and 49 CFR 1150.34 D (*i.e.*, a caption summary filed pursuant to the class exemption as described in the text on pages 5 and 6 and certify compliance with (a), (b) and (c) above, attaching a copy of the notice of intent.

(e) The exemption will be effective 21 days after the notice is filed. The Board, through the Director of the Office of Proceedings, will publish a notice in the Federal Register within 30 days of the filing.

(f) If the notice contains false or misleading information, the exemption is void *ab initio*. A petition to revoke under 49 U.S.C. 10502(d) does not automatically stay the transaction. Stay petitions must be filed within 7 days of the filing of the notice of exemption. Replies will be due 7 days thereafter. To be considered, stay petitions must be timely served on the applicant.

(g) Applicant must comply with 49 CFR 1150.33(g) regarding Section 106 of the National Historic Preservation Act, 16 U.S.C. 470.

APPENDIX II

FILING REQUIREMENTS

General Filing Requirements

No official application or petition for exemption form is required. Specific requirements and formats are set out in each section below. Regardless of the kind of railroad authority or exemption being sought, all applicants must comply with the following general procedures:

- Applications, notices, or petitions for exemption must be typewritten or printed in ink on paper measuring approximately 8½ x 11 inches.
- The name, address and telephone number of the persons filing the pleading should be included on the title page.
- The original must be signed and dated.
- The appropriate application or exemption filing fee must accompany the application. See Fee Schedule Insert.
- The completed application, notice or petition along with the required number of copies and appropriate filing fee should be submitted to:

The Office of the Secretary
Surface Transportation Board
Washington, D.C. 20423-0001

- If mailed, the lower left hand corner of the envelope should be marked "Notice of Exemption", "Petition for Exemption" or "Rail Application", whichever is appropriate.
- An environmental and/or historic report *must* be filed prior to or with the application, petition or notice of exemption *if* the project is subject to environmental or historic review under the Board's rules at 49 CFR 1105.

Specific Filing Requirements

I. Class Exemptions for Acquisitions and Operations by Small Entities

A. Class III carriers:

Verified Notice	
Original	1
No. of copies for Board	10
Service on other parties	No
Filing fee	Yes
Caption Summary	
Original	1
No. of copies	10
Service on other parties	No
Filing fee	No
(summary accompanies verified statement)	

B. Class I and Class II carriers:

Notice of Intent to File a Notice of Exemption	
Original	1
No. of copies for Board	10
Service on other parties	Yes
(See Appendix I(c))	
Filing fee	No
Notice of Exemption	
Original	1
No. of copies to Board	10
Service on other parties	Yes
Filing Fee	Yes

II. Other Finance Class Exemptions

Notice of the Transaction	
Original	1
No. of copies for Board	10
Service on other parties	No
Filing fee	Yes
Caption summary	
(required only for acquisition or renewal of trackage rights agreements)	
Original	1
No. of copies to Board	10
Service on other parties	No
Filing fee	No

III. Petitions for Exemption	
Original	1
No. of copies for Board	10
Service on other parties	Yes
Filing fee	Yes
IV. Offers of Financial Assistance	
1. Notice of Intent to Make an Offer	
Original (to carrier)	1
No. of copies to Board	10
Service on other parties	No
Filing fee	No
2. Actual Offer	
Original	1
No. of copies for Board	10
Service on other parties	Yes
Filing fee	No
3. Request to Set Terms and Conditions	
Original	1
No. of copies for Board	10
Service on other parties	Yes
Filing fee	No
V. Feeder Railroad Development Program	
Original	1
No. of copies for Board	10
Service on other parties	Yes
Filing fee	Yes

SAMPLE NOTICE OF INTENT TO FILE AN OFFER OF FINANCIAL ASSISTANCE

(Including Request for Information set out in 49 CFR 1152.27(a) and
Request to Toll 30 Day Period for Filing OFA)

RE: BIG GUY RAILROAD - ABANDONMENT EXEMPTION - FARMER'S COUNTY,
STATE, Docket No. AB-999, Sub No. 3X¹

Surface Transportation Board
Office of the Secretary
1925 K Street N.W.
Washington, D.C. 20423-0001

To the Secretary of the Board:

Pursuant to the Surface Transportation Board Notice of Exemption published in the Federal Register on (date), (Full name of Offeror) hereby advises the Board and parties of record of its intent to file an Offer of Financial Assistance ("OFA") under 49 CFR 1152.27. The OFA is to purchase part (or all) of the Big Guy rail line between (city and state or nearest station) at milepost number _____ and (city and state or nearest station) at milepost number _____, a distance of _____ miles, (local name of line, if any).

In connection with this notice of intent to file an Offer of Financial Assistance, (Offeror) requests that applicant carrier provide the information set forth in 49 CFR 1152.27(a) including the minimum purchase price required to acquire the (local name of the line). We also request that Big Guy provide its most recent report on the physical condition of the involved line and traffic, revenue and other data necessary to determine Big Guy's estimate of net liquidation value of the line together with supporting data reflecting available real estate appraisal, assessments of the quality and the quantity of track material in the line and removal cost estimates used to obtain the net liquidation value.

Since it is unlikely that this information can be provided to the prospective offeror prior to (due date of OFA), offeror requests the Board to toll the thirty day period for submitting offers of financial assistance for an additional _____ days (offeror may request any number of additional days, but 30 days is the most commonly requested extension period) in order to provide offerors with an adequate opportunity to review and analyze the material provided by applicants and submit their OFA. This will not prejudice the interests of applicant carrier or any other party.

Yours truly,

Attorney or Authorized
Representatives

¹Docket Name should appear exactly as it does in Federal Register notice.

APPENDIX IV

SAMPLE OFFER OF FINANCIAL ASSISTANCE

**Before The
SURFACE TRANSPORTATION BOARD**

Docket No. AB 999 Sub No. 3X

**BIG GUY RAILROAD
-ABANDONMENT EXEMPTION-
FARMERS COUNTY, STATE¹**

**OFFER OF FINANCIAL ASSISTANCE
ON BEHALF OF
[FULL NAME OF OFFEROR]**

[Full name of Offeror] (hereinafter referred to as “Offeror”) hereby files this Offer of Financial assistance with respect to that portion of Big Guy Railroad’s line between milepost _____ at or near [City and State] and milepost _____ at or near [City and State], a distance of approximately _____ miles.

By [Notice or Decision] served [service date of Board’s Notice or Decision], the Surface Transportation Board [exempted from the prior approval requirements of 49 U.S.C. 10903] [granted the carrier’s petition for exemption to abandon][granted the carrier’s application to abandon] the above described portions of Big Guy’s railroad line. On [date], Offeror filed a Notice of Intent to File an Offer of Financial Assistance (“OFA”) under 49 CFR 1152.27 to purchase all or part of the line. By Order dated _____, the STB tolled until [date], the time for Offerors to file an OFA.

Offeror seeks to acquire the subject rail line in order to preserve and enhance rail service to and from the facilities of the shippers on the line. Offeror has assessed the financial information provided by Big Guy concerning the estimated net liquidation value of track and other material on this line and the real estate appraisal information for the rights-of-way. Based on this initial review, Offeror believes that the valuations provided [may or may not] represent fair market value for the rail assets described. [If Offeror disagrees with carrier assessment of net liquidation value, it should explain its disagreements here, and provide its estimate of the fair market value]. Offeror expects to negotiate the acquisition of this line based on the estimated line values provided by the parties.

¹Docket name should appear exactly as it does in Federal Register notice.

Offeror is a financially responsible party. Enclosed in Appendix A [which may be labeled “Confidential”] is a financial statement for Offeror which demonstrates that Offeror has the financial capability to acquire all of the rail line in question and to operate the line for at least two years.

Respectfully submitted,

Attorney or Authorized Representative

Certificate of Service

I hereby certify that on [date], I served a copy of the foregoing Offer of Financial Assistance upon the following parties of record by first class mail, postage prepaid (or Overnight Delivery) at their addresses set forth below:

Big Guy Railroad
100 Railroad Lane
City, State

Protesting Shipper
200 Farmers Lane
City, State

Attorney or Authorized Representative

APPENDIX V

SAMPLE REQUEST TO SET TERMS AND CONDITIONS

Before the
SURFACE TRANSPORTATION BOARD

Docket No. AB 999 Sub No. 3X

BIG GUY RAILROAD
-ABANDONMENT EXEMPTION -
FARMERS COUNTY, STATE

REQUEST TO SET TERMS AND CONDITIONS

Pursuant to 49 CFR 1152.27(g)(1) and (h)(3), (Full name of Offeror) hereby requests that the Board establish the conditions and amount of compensation for financial assistance in this proceeding.

Background

On (date) Big Guy Railroad filed an (Notice, Petition, Application) to abandon _____ miles of track in Farmers County, State. (The Notice was published in the Federal Register on (date).) (The Surface Transportation Board served an Order granting the (Petition, Application) on (date).)

On (date) Offeror filed a formal expression of intent to file an Offer of Financial Assistance. On (date) Big Guy provided valuation information to Offeror and valued the line at \$_____.

On (date) Offeror filed an Offer of Financial Assistance. In a decision served (date) the Director of the Office of Proceedings found that Offeror's OFA is *bona fide* and postponed the effective date of the abandonment pending completion of the OFA process. The Offer set out in detail the reasons for Offeror's variance from the valuation provided by Big Guy.

Status of Negotiations

The parties are continuing to negotiate with respect to various aspects of this transaction. We have agreed on some terms but not others. Our points of agreement and disagreement are set forth below.

(Here include some discussion to show that negotiations are going forward in good faith)

- i -

Requested Board Action

In view of the absence of an agreement on terms and conditions of sale as of the deadline for filing this Request, Offerors request that the Board review the valuation assessments prepared by each party and establish reasonable terms and conditions of sale. Offeror hereby agrees to notify the Board of any additional agreements reached between the parties while this Request is pending.

Respectfully submitted,

Attorney or Authorized Representative
of Offeror

Certificate of Service

I hereby certify that a copy of the foregoing Request to Set Terms and Conditions was mailed, this ____ day of _____, 199_, to the following parties:

Big Guy Railroad
Address

(Any other parties of record in the proceeding)

