40158 SERVICE DATE – LATE RELEASE SEPTEMBER 10, 2009
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SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-33 (Sub-No. 261)

UNION PACIFIC RAILROAD COMPANY—ABANDONMENT—IN NEW MADRID, SCOTT, AND STODDARD COUNTIES, MO

IN THE MATTER OF AN OFFER OF FINANCIAL ASSISTANCE

Decided: September 9, 2009

By decision and certificate of interim trail use or abandonment served on June 17, 2009, the Board, under 49 U.S.C. 10903, granted the abandonment application of Union Pacific Railroad Company (UP) for its Essex-to-Miner Line, extending from milepost 196.7, near Essex, to milepost 216.27, near Miner, a distance of 19.57 miles, in New Madrid, Scott, and Stoddard Counties, MO (the Line),[1] subject to trail use, public use, environmental, and standard employee protective conditions (June 17 Decision).

The decision and certificate was scheduled to become effective on July 17, 2009, unless it was stayed by the Board or a formal expression of intent to file an offer of financial assistance (OFA) under 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1) was filed by June 26, 2009. On June 16, 2009, Mississippi Central Railroad Co. (MSCI), a Class III rail carrier, filed a notice of intent to file an OFA and asked that the Board toll the period for submitting OFAs for an additional 30 days. In a decision served on June 24, 2009, the due date for MSCI to file an OFA was tolled until July 24, 2009, and the effective date of the abandonment was extended until August 3, 2009 (10 days after the due date for filing an OFA) (June 24 Director's Decision).

On July 27, 2009, MSCI late-filed an OFA to purchase a portion of the Line, from milepost 208.95, near Sikeston, MO, to milepost 213.8, in Sikeston, a distance of 4.85 miles in Scott County (OFA Line), for $302,990.[2] In a decision served on July 30, 2009 (July 30 Director's Decision), MSCI was granted leave to late-file, but its OFA was rejected as insufficient to demonstrate that MSCI is a financially responsible offeror. MSCI also had not sufficiently explained the calculation of its $302,990 offer, as required under 49 CFR

[1] In addition to the 19.57 miles of branch line, the Line includes approximately 4.4 miles of sidings and industrial track.

[2] UP filed a reply to the OFA on July 31, 2009 (July 31 reply), in which it did not object to the late filing of the OFA.

1152.27(c)(1)(ii)(C). On August 4, 2009, MSCI filed a revised OFA that addressed the deficiencies that led to the Board's rejection of its original OFA.[3]

On August 7, 2009, UP filed a response to MSCI's revised OFA (August 7 reply). In its response, UP urges rejection of the revised OFA, arguing that MSCI could have filed an appeal of the Board's rejection of the OFA under 49 CFR 1152.27(e), but the revised OFA was filed outside the time set by the Board. On August 11, 2009, MSCI requested leave to file a reply to the August 7 reply, along with its reply. The Board's rules preclude acceptance of a reply to a reply. See 49 CFR 1104.13(c). MSCI has not provided sufficient reason for the Board to make an exception to this rule. MSCI's August 11 request for leave to file a reply to a reply will therefore be denied, and its reply to UP's reply will not be accepted.

We will accept MSCI's revised OFA. Abandonment cannot proceed until the OFA process is administratively final. An offeror is allowed 10 days to appeal the rejection of its OFA under 49 CFR 1152.27(e)(1) and 1011.2(a)(7). Until that period has run, the OFA process is not final. Here, the 10-day appeal period began with the July 30 Director's Decision and expired on August 9, 2009. Therefore, the portion of the June 24 Director's Decision stating that the effective date of the abandonment authorization would be August 3, 2009 did not provide sufficient time for the Board's processes to run their course, and was in error.[4]

MSCI's revised OFA was filed before the proper date on which the abandonment authorization became effective. In some cases, the Board has allowed an offeror to cure a defective OFA after the OFA deadline but before the abandonment authorization becomes effective.[5]

In this case, good reason exists to allow MSCI to remedy its OFA. The federal rail transportation policy, as set by Congress, is intended to ensure development and continuation of a sound rail transportation system to meet the needs of the public.[6] More specifically, the OFA provisions reflect a Congressional desire to preserve legitimate prospects for continuing or resuming freight rail service on corridors that would otherwise be abandoned. See Redmond—

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[3] Original signature pages to the verified statements were submitted on August 5, 2009.

[4] On August 7, 2009, the Board served a notice (August 7 Notice), issued by the Director of the Office of Proceedings. The purpose of the notice was to advise the parties that the Board was evaluating the revised OFA. In asserting that the effective date of the abandonment authorization was August 3, 2009, the August 7 Notice did not take into account the time prescribed for MSCI to appeal the rejection of its original OFA and the impact that should have on the effective date of the abandonment.

[5] See, e.g., Arizona & California Railroad Company—Abandonment Exemption—in San Bernardino and Riverside Counties, CA, STB Docket No. AB-1022 (Sub-No. 1X) (STB served July 29, 2009).

[6] 49 U.S.C. 10101.

Issaquah R.R. Pres. Ass'n v. STB, 223 F.3d 1057, 1060-63 (9th Cir. 2000). Here, Tetra Pak, Inc., an active shipper on the OFA Line, has expressed its desire for continued rail service. Likewise, the Missouri Department of Transportation has suggested that service can and should be maintained to the shippers on the Line.[7] MSCI, as an existing Class III rail carrier, appears to be in a good position to provide this service.

Our acceptance of MSCI's revised OFA will not harm UP. UP had notice of MSCI's intent to file an OFA on June 16, 2009,[8] and consented to the late filing of the original OFA.[9] Furthermore, UP's abandonment authority is subject to trail use and public use conditions, which preclude UP from: (1) fully abandoning the line; (2) disposing of the corridor, other than track, ties, and signal equipment, except for public use on reasonable terms; and (3) removing or destroying potential trail-related structures, such as bridges, trestles, culverts, and tunnels until December 14, 2009.[10] The OFA process will run its course before UP will otherwise be free to exercise its abandonment authority.

An OFA to acquire a line for continued rail service need not be detailed, but an offeror must show that it is financially responsible and that the offer is reasonable. See Conrail Abandonments under NERSA, 365 I.C.C. 472 (1981). MSCI asserts that it is financially responsible and that it has received a commitment from its parent company, Pioneer Railcorp (Pioneer), to finance the purchase with a no-interest loan. By verified statement submitted with MSCI's revised OFA, J. Michael Carr attests that he is the President and Chief Executive Officer of Pioneer and President of MSCI. Mr. Carr states that, as of the close of the second financial quarter for 2009, Pioneer had unrestricted cash on hand in excess of $600,000, and that he commits Pioneer to provide MSCI with a no-interest loan in the amount of at least $302,990 or such funds as necessary to finance MSCI's acquisition of the OFA Line.

MSCI's submission demonstrates that it has the financial resources to acquire the line for the proposed $302,990 purchase price.[11] In addition to Mr. Carr's statement, the credible prospect of revenue from an existing shipper demonstrates that MSCI has the financial resources to operate the line. Accordingly, MSCI is found to be financially responsible.

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[7] See June 17 Decision, slip op. at 6.

[8] See June 24 Director's Decision.

[9] See July 30 Director's Decision.

[10] See June 17 Decision.

[11] UP noted in its August 7 reply that MSCI does not provide a commitment to purchase the OFA Line at the UP valuation of $549,353. However, an offeror need only demonstrate that it has the financial resources to fulfill proposed contractual duties. See 49 CFR 1152.27(c)(1)(ii)(B). MSCI's revised OFA satisfies this requirement.

Consistent with 49 U.S.C. 10904(c) and 49 CFR 1152.27(c)(1)(ii)(C), MSCI notes that there is a disparity between the amount offered ($302,990) and the valuation for the OFA Line ($549,353) submitted by UP in its July 31 reply. MSCI states that it accepts the amount of land, rail, and track material comprising the OFA Line in UP's valuation estimates; and that the difference between the two valuations is due to a disagreement on the per-unit values of each grade of rail and crossties, and the per ton salvage value of other track material. There is also a difference between the parties' valuations of the real estate.[12] As required, MSCI has explained the basis for the disparity between its offer and UP's valuation.

MSCI is financially responsible and has offered financial assistance, that, though less than UP's estimated minimum purchase price, is sufficient to satisfy 49 U.S.C. 10904. Therefore, the effective date of the abandonment authorization will be postponed to permit the OFA process to proceed.

Our governing statute and regulations contemplate that the carrier and a financially responsible person will attempt to reach an agreement setting the terms and conditions of the purchase. If they do not reach agreement, either party may request that the Board establish terms and conditions. 49 CFR 1152.27(g). Any person filing a request to set terms and conditions must pay the requisite filing fee, set forth at 49 CFR 1002.2(f)(26), which currently is $22,700. An original and 10 copies of the request should be submitted, along with the fee, in an envelope bearing the docket number of this proceeding, along with the words "Attention: Request to Set Terms and Conditions" in the lower left hand corner.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. MSCI's August 11, 2009 request for leave to file a reply to a reply is denied.

2. MSCI's August 11, 2009 reply to UP's reply is not accepted.

3. MSCI's revised OFA is accepted.

2. The effective date of the abandonment is postponed to permit the OFA process under 49 U.S.C. 10904 and 49 CFR 1152.27 to proceed.

[12] In its revised OFA, MSCI incorrectly stated that UP's valuation of the OFA line was $446,461. This figure omits the appraised value for the fee parcels on the OFA Line of $102,892, provided by UP. As MSCI has provided its assessment of the real estate value of the OFA Line that can be compared to UP's assessment, MSCI's error is inconsequential.

3. If MSCI and UP cannot agree on the purchase price, either party may request the Board to establish the terms and conditions of the purchase on or before October 13, 2009. If no agreement is reached and no request is submitted by that date, the Board will serve a decision vacating this decision and allowing UP to exercise its abandonment authority.

4. This decision is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Nottingham, and Commissioner Mulvey.

Anne K. Quinlan
Acting Secretary