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SERVICE DATE – OCTOBER 26, 2012

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 167 (Sub-No. 1191X)

CONSOLIDATED RAIL CORPORATION—ABANDONMENT EXEMPTION—IN
PHILADELPHIA, PA.

Docket No. AB 55 (Sub-No. 710X)

CSX TRANSPORTATION, INC.—DISCONTINUANCE OF SERVICE EXEMPTION—IN
PHILADELPHIA, PA.

Docket No. AB 290 (Sub-No. 552X)

NORFOLK SOUTHERN RAILWAY COMPANY—DISCONTINUANCE OF SERVICE
EXEMPTION—IN PHILADELPHIA, PA.

Digest:¹ Eric Strohmeier, CNJ Rail Corporation, and James Riffin have appealed a decision by the agency's Director of the Office of Proceedings. These parties claim that the Director erred in finding that their offer to purchase a rail line authorized for abandonment and discontinuance was procedurally deficient and lacked merit. The Board affirms the Director's decision to reject the offer.

Decided: October 24, 2012

This proceeding concerns the proposed abandonment of, and discontinuance of service over, a line of railroad in Philadelphia, Pa., and an attempt by Eric Strohmeier, CNJ Rail Corporation, and James Riffin (collectively, Offerors) to purchase a portion of the line through the Board's offer of financial assistance (OFA) process. The Offerors submitted a purchase offer, and, in a decision served on March 14, 2012 (March 14 Decision), the Director of the Office of Proceedings (Director) found that the offer was procedurally deficient and lacked merit. Accordingly, it was rejected. The Offerors have appealed the Director's decision, and we are affirming the Director's decision here.

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

BACKGROUND

Consolidated Rail Corporation (Conrail), CSX Transportation, Inc. (CSXT), and Norfolk Southern Railway Company (NSR) (collectively, Applicants) jointly filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments for Conrail to abandon, and for CSXT and NSR to discontinue service over, a 2.98-mile line of railroad known as the Berks Street Industrial Track, extending from milepost 0.00± to milepost 2.98± in Philadelphia, Pa.² Notice of the exemption was served and published in the Federal Register on January 25, 2012 (77 Fed. Reg. 3,893). The exemption was scheduled to become effective on February 24, 2012, unless it was stayed by the Board or a formal expression of intent to file an OFA under 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27(c)(2) was filed by February 6, 2012.

On January 30, 2012, Eric Strohmeier and CNJ Rail Corporation (CNJ) (collectively, Strohmeier Parties) jointly filed a formal notice of intent to file an OFA to purchase from Conrail a segment of the line between milepost 0.00 and milepost 2.80 (OFA Segment). The Strohmeier Parties concurrently filed a request to toll the OFA due date until 10 days after Conrail provided them with the information specified at 49 C.F.R. § 1152.27(a), along with certain other information. Conrail provided responses to the information requests on February 7, 2012.³

On February 24, 2012, the Strohmeier Parties filed a second request to toll the OFA due date for the OFA Segment until March 9, 2012, to which the Applicants did not object. By decision served on March 2, 2012, the Board granted the Strohmeier Parties' request, tolled the OFA due date for the OFA Segment until March 9, 2012, and postponed the effective date of the exemption authority for that segment until March 19, 2012. The Board also made the abandonment and discontinuance authority for the remainder of the line effective immediately, and imposed two environmental conditions on the authority for the entire 2.98-mile line, including the OFA Segment.

On March 9, 2012, the Offerors⁴ filed their OFA without any of the supporting exhibits referenced in their filing. In particular, they failed to include any evidence to demonstrate that

² The Applicants stated in their notice that Conrail owns the line extending from milepost 2.70 to milepost 2.98, but that Conrail only has operating rights from milepost 0.00 to milepost 2.70.

³ Because the Applicants responded on February 7, a 10-day tolling request would have placed the requested OFA due date earlier than the due date of February 24, 2012, established under 49 C.F.R. § 1152.27(b)(2)(ii). The first tolling request therefore was rendered moot and was dismissed.

⁴ Only the Strohmeier Parties were identified in the March 9 OFA filing, but on March 12, 2012, James Riffin submitted a letter wherein he claimed that he had also filed the OFA. Subsequently, the Strohmeier Parties agreed to include James Riffin as an offeror. For that reason, we refer to the Strohmeier Parties and James Riffin collectively as Offerors.

they were financially responsible to acquire and operate the OFA Segment. On March 14, the due date for the Director's determination of financial responsibility, James Riffin late-filed materials purporting to demonstrate his ability, as one of the Offerors, to purchase the line. At the same time, the Strohmeyer Parties filed a request for an extension of time and for modification of the procedural schedule.

Although the Applicants estimated the minimum purchase price for the OFA Segment to be \$200,000, the Offerors submitted an offer in the amount of \$30,261. The bulk of the Offerors' price covered a subsegment running between milepost 2.70 and milepost 2.80, the portion owned by Conrail in fee. The Offerors did not seek to acquire the entire right-of-way for this subsegment, but limited their offer to a corridor 20 feet wide and 528 feet long. They also offered \$2.87 for every square foot of additional right-of-way needed to facilitate the construction of a rail siding to serve an industrial property near the junction of the line with Conrail's Port Richmond Secondary line. The Offerors did not quantify how much additional square footage they would be seeking in the future and did not include a total for the additional right-of-way in the amount offered for this subsegment.⁵ The remainder of their offer included nominal sums to acquire operating rights for the line between milepost 2.70 and milepost 0.00.

In the March 14 Decision, the Director found that the Offerors had failed to file a complete OFA by the extended deadline and then later provided only partial financial information. The Director found that this information was insufficient to demonstrate that the Offerors were financially responsible.

Additionally, the Director found that the offer lacked merit. The Offerors proposed to acquire a right-of-way narrower than the full width of the right-of-way to be abandoned, but failed to substantiate that the 20-foot wide strip of right-of-way would be sufficient for effective rail operations or that their offer would properly compensate the Applicants. The Offerors also sought Board permission as part of their OFA to acquire additional square footage for an area that they would determine in the future. The Director found that this selective parceling approach to an OFA was not appropriate and also constituted grounds for rejecting the OFA. For all of these reasons, the Director rejected the OFA.⁶ Because the decision ended the OFA process, the exemption authority for the OFA Segment became effective on March 19, 2012.

On March 20, 2012, the Offerors filed their appeal of the Director's March 14 Decision rejecting the OFA, and have raised several issues. First, Offerors dispute the Director's finding

⁵ According to the Offerors, this determination is complicated because they have not been able to determine precisely the location of the property lines and fear that one of Conrail's predecessors, the Reading Company, sold a portion of the right-of-way before 1976. See Offerors' OFA 11, March 8, 2012.

⁶ In that decision, the Director also denied as moot: (1) the Strohmeyer Parties' motion for a protective order; (2) James Riffin's separate motion for a protective order; and (3) the Strohmeyer Parties' request for an extension of time and for modification of the procedural schedule.

that they are not financially responsible. They argue that Eric Strohmeyer filed a financial statement supporting the OFA, but that agency staff did not show the filing to the Director.⁷ Furthermore, the Offerors assert that they were and are still unsure exactly what documents they were required to produce to be considered financially responsible, and they assert that the Board's lack of guidance in this area is arbitrary and capricious. In an attempt to produce evidence of their financial responsibility, the Offerors provide under seal a January 6, 2012 letter from Baltimore County Savings Bank verifying certain funds in a checking account held by James Riffin, and a March 20, 2012 letter from Susquehanna Bank verifying that James Riffin brought to the bank a certain amount of funds – a total amount, the Offerors assert, that was more than sufficient to cover their offer for the line.⁸

In addition, the Offerors argue that the Director erred by holding that an OFA offeror bears a heavy burden to justify purchasing less than the full width of the right-of-way. The Offerors assert that the cases the Director cited for this proposition⁹ were overturned by the United States Court of Appeals for the Sixth Circuit in Railroad Ventures, Inc. v. STB, 299 F.3d 523 (6th Cir. 2002) (Railroad Ventures). There, according to the Offerors, the court stated that neither the abandoning rail carrier nor the Board can alter or amend what the OFA buyer has offered to buy; rather, the Board can only set terms on whatever the offeror has proposed to purchase. Therefore, according to the Offerors, they were entitled to purchase less than the full property proposed for abandonment.

The Offerors add that they sought to purchase a 20-foot right-of-way to avoid the significant cost of attempting to quiet title to the rest of the parcel. They assert that adjacent landowners have encroached on the Applicants' parcel and that the Offerors fear retaliation and sabotage should they attempt to evict these landowners. They further claim that the parcel is covered with hundreds of tons of solid waste and that they sought to acquire a narrow right-of-way to avoid having to remove the waste. Based on these grounds, the Offerors ask that the Board vacate the March 14 Decision, find that the Offerors are financially responsible, and stay the abandonment proceeding to permit OFA negotiations to go forward.

On April 2, 2012, the Applicants filed a reply opposing the appeal and challenging the arguments put forward by the Offerors. The Applicants assert that the Offerors have neither met the standard of financial responsibility nor made a bona fide offer for the rail property. The

⁷ The Offerors assert in their appeal that Eric Strohmeyer has hand-filed a second copy of his personal financial statement and a second copy of CNJ's financial statement, but to date the Board has no record of such filings.

⁸ The Offerors further argue that the Director incorrectly stated that they must demonstrate having sufficient funds to operate the line for two years, as discussed further below.

⁹ Union Pac. R.R.—Aban. Exemption—In Lancaster Cnty., Neb., AB 33 (Sub-No 112X), slip op. 5 (STB served Mar. 2, 1998) and Boston & Me. Corp. & Springfield Terminal Ry.—Aban. & Discontinuance of Service in Hartford Cnty., Conn., AB 32 (Sub-No. 43) (ICC served Aug. 9, 1991).

Applicants include as an exhibit a list of procedural matters involving James Riffin's recent bankruptcy proceedings. Accordingly, the Applicants ask that the Board affirm the Director's March 14 Decision.

DISCUSSION AND CONCLUSIONS

The Board has reserved for itself the consideration and disposition of all appeals of initial decisions issued by the Director. See 49 C.F.R. §§ 1011.2(a)(7), 1152.25(e)(1)(i). Under 49 C.F.R. § 1152.25(e)(2)(ii), an appeal of a Director's decision will be granted only upon a showing that the prior action will be affected materially because of new evidence, changed circumstances, or material error. Here, the Offerors have failed to demonstrate that we should overturn the Director's decision on the basis of material error or on any other grounds. We will therefore deny their appeal.

The Director rejected the OFA on grounds that it was late-filed, that it lacked merit, and that the Offerors had not demonstrated financial fitness. See March 14 Decision at 3-5. Our review of the record leads us to conclude that the Director's rejection was appropriate and that nothing the Offerors have submitted on appeal warrants a different conclusion here.

As to lateness, the OFA submitted on March 9 (the filing deadline) was materially incomplete and therefore not timely filed, even though the Offerors had been granted an extension to prepare their OFA materials, as explained above. Once the OFA was late-filed, nothing submitted by the Offerors after the deadline, including the materials submitted on appeal, could alter that result.¹⁰ Deadlines are important in the OFA process. As stated in the March 14 Decision at 4: "[T]he Director ... has only five days under the Board's regulations to review the offer and rule on it. This tight schedule is important and is driven by this agency's Congressional mandate. Congress' intent in limiting the time for filing OFAs was to protect carriers from involuntary protracted proceedings." See Staggers Rail Act of 1980, H.R. Rep. No. 96-1430, 96th Cong., 2nd Sess. at 125 (1980).

Moreover, we agree with the Director's finding that the OFA lacks merit. The Director found that the Offerors had not justified their unusual OFA, which contemplated acquiring a

¹⁰ The Offerors claim that Eric Strohmeier filed financial information on March 12 that was never shown to the Director, but there is no evidence in the record to substantiate the Offerors' suggestion that Board staff hid or misplaced any financial material. In fact, this assertion is undercut by the statements made by Eric Strohmeier on behalf of the Strohmeier Parties in his March 14 request for an extension of time. There, Mr. Strohmeier stated on page 2: "Your petitioners filed a request for a protective order [on March 12] in this proceeding so it [sic] can make available our financial materials to the Board. Your petitioners have not yet filed those materials in light of the fact that there has not yet been a ruling on the request for a protective order." As indicated, no protective order has been issued in this proceeding and the Board has no indication that any financial materials have been received from Mr. Strohmeier or the Strohmeier Parties.

20-foot wide island linked by operating rights that, at one point, go the wrong way down a one-way street. The Director also found that the Offerors had failed to specify the exact amount of land to be subject to the OFA. These problems existed at the time of the March 14 Decision, and they remain today, as the Offerors have not addressed them.

Instead, the Offerors' assert only that Railroad Ventures, 299 F.3d at 550-556, requires that we permit them to seek or offer to acquire whatever portion of the to-be-abandoned property they choose: in this case, only a 20-foot width of the right-of-way on just a 0.10-mile segment of the portion of this inactive urban line that Conrail owns in fee. We disagree. In Railroad Ventures, the offeror made an OFA for the entire line and the Board set a price for the entire line, but before the property was transferred the transferor began selling off to its own affiliate the line's non-rail crossing, aerial, and subsurface property rights. 299 F.3d at 536-39, 542, 552. In supporting the Board's ruling that the seller could not strip the property of its value after the selling price had already been set, the court did point out that the statute does not permit the Board to alter or amend what the offeror has offered to buy.¹¹ But the Railroad Ventures decision was directed at questionable business tactics by the seller of the line; it did not purport to limit the Board's authority to prevent the misuse of the OFA process by reviewing OFAs to ensure that they are genuine offers for legitimate, feasible rail service. Under the Offerors' interpretation of Railroad Ventures, a party with no interest in providing rail service could use the OFA process to buy a 10-foot long, 10-foot wide piece of unused and unusable rail line in the middle of an otherwise usable parcel of land. That cannot be an outcome that Congress or the Railroad Ventures court had in mind.

In determining whether an OFA should be accepted, the Director must ensure that an offer is reasonable and that the offeror is committed to and capable of providing continued rail service; the Director may reject OFAs that are not feasible or reasonable.¹² Here, the Director had good reason to find that this OFA had not been shown to be feasible or reasonable. The Director concluded that, because an OFA offeror is in effect acting pursuant to condemnation power, the Board must be vigilant to ensure that offers for less than the entire right-of-way not leave the abandoning carrier with unwanted, unproductive land for which it could not be adequately compensated. Because such a taking would run contrary to the Constitution and the statute, the Director found that an offeror has a burden of demonstrating that these sorts of offers need to be justified.¹³ Here, moreover, the Director found that under these Offerors' proposal,

¹¹ See id. at 552 ("Once the offeror seeks to purchase the entire rail line or a portion thereof . . . , the STB is then statutorily obligated to render a decision setting price and other sale terms as to what the offeror seeks to buy").

¹² See Union Pac. R.R.—Aban. and Discontinuance of Trackage Rights Exemption—In Los Angeles Cnty., Cal., AB 33 (Sub-No. 265X) (STB served May 7, 2008).

¹³ We could theoretically address issues about the diminution in the value of the remaining property by adjusting upward the compensation for the portion subject to the OFA. Here, however, because the Offerors have not made any showing as to the reasonableness of their proposed carve-out, we need not attempt to do so here.

neither Conrail nor the Board could know exactly where the Offerors' swath of land would run, or when or how much of it would need to be acquired. Because the Offerors simply asserted that the property they sought would be adequate for their needs, the Director reasonably found that they had failed to demonstrate that this parceling was warranted.

The Offerors have not even attempted to counter this finding or otherwise demonstrate the feasibility of their proposal on appeal.¹⁴ Therefore, we conclude that they have not shown that the Director's decision was erroneous, or that this project would realistically lead to continued rail service. Under the circumstances presented here, we need not and will not require the sale of a line under the OFA provisions.¹⁵

Although there is no need for us to resolve the Offerors' claim that the Director erred in finding that the Offerors had not shown that they are financially responsible, we do note, that at the time of the March 14 Decision, the Offerors' financial information consisted of a "summary and unsupported" presentation by James Riffin (March 14 Decision at 4) and no submission by the Strohmeier Parties. Moreover, despite allegations to the contrary by the Offerors in their appeal, the Board still has not received any financial materials from the Strohmeier Parties.¹⁶

¹⁴ The Offerors have not shown substantial shipper support, nor have they provided any credible reason to believe that their proposal could lead to successful rail operations. At a minimum, the Offerors would need to acquire an unknown amount of land, some of which Conrail might not own, lay track, negotiate an interchange agreement with Conrail, and have Conrail install a switch. According to the Applicants, the Offerors would likely need to spend over \$1 million to install safety equipment to allow trains to safely cross city streets. See Applicants' Reply 3, March 12, 2012. The costs of rehabilitating the line and laying track are not even included in this sum. And, the Offerors have conceded that it would take a period of years to get a full operation in place. See Offerors' OFA 14, March 9, 2012.

¹⁵ See Union Pac. R.R.—Aban. Exemption—In Lassen Cnty., Cal., and Washoe Cnty., Nev., AB 33 (Sub-No. 230X) (STB served Sept. 19, 2008) (holding that the Board need not require the sale of a line under the OFA provisions if it determines that the offeror is not genuinely interested in, or capable of, providing rail service or that there is no likelihood of future traffic).

¹⁶ The Offerors claim that the Board has provided no guidance as to what should be submitted in support of an OFA. But in various cases, the Board has explained the sorts of things an offeror can do to meet its burden. See Ind. Sw. Ry.—Aban. Exemption—In Posey and Vanderburgh Cntys., Ind., AB 1065X (STB served Sept. 23, 2011); Union Pac. R.R.—Aban.—in New Madrid, Scott, and Stoddard Cntys., Mo., AB 33 (Sub-No. 261) (STB served July 30, 2009) (indicating that an offeror may need a verified assurance from a third party from which the offeror intends to secure funds); Ariz. & Cal. R.R.—Aban. Exemption—in San Bernardino and Riverside Cntys., Cal., AB 1022 (Sub-No. 1X) (STB served July 15, 2009) (indicating that an offeror may need to provide an agreement with the purported source of funds); Union Pac. R.R.—Aban. Exemption—in Lassen Cnty., Cal., and Washoe Cnty., Nev., AB 33 (Sub-No. 230X) (STB served Sept. 19, 2008) (indicating that an offeror must do more than supply only

(Continued . . .)

Although James Riffin has submitted additional information on appeal, it is still untimely and demonstrates no more than that he brought a sum of “cash for counting” to one bank on March 20, 2012 — a substantially smaller amount than what he purported to have had in a checking account with another bank on January 6, 2012.¹⁷ Finally, the Offerors are proposing to provide rail service over a long-defunct line. It is evident that the total funds they would need to purchase the property, to rehabilitate the line, and to install safety equipment would far exceed both the \$200,000 (calculated by the Applicants as the minimum purchase price) and the funds James Riffin claims he has available to finance the OFA.¹⁸

In sum, we affirm the Director’s findings that the OFA was late-filed and that the OFA lacked merit. Consequently, we affirm the Director’s decision to reject the OFA and we deny the Offerors’ appeal.¹⁹

It is ordered:

1. The appeal is denied.
2. This decision is effective on its date of service.

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

(. . . continued)

vague and unsubstantiated assurance of its ability to fund, or to obtain funding, to purchase a line, and to arrange for operations for a period of two years).

¹⁷ It is not clear whether the funds that Mr. Riffin claims were in the checking account and the “cash-for-counting” funds brought to the other bank at a later date are the same or separate funds.

¹⁸ The Offerors further argue that the Director incorrectly stated that they must demonstrate having sufficient funds to operate the line for two years. However, the Director’s statement is in accord with the provisions of 49 U.S.C. § 10904(f)(4), which states that an offeror who purchases a line under the OFA provisions may not transfer or discontinue service on the line prior to the end of the second year after consummating the sale.

¹⁹ The Offerors are free, of course, to attempt to purchase the line from Conrail outside of the Board’s financial assistance procedures.