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SERVICE DATE – LATE RELEASE MARCH 14, 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.

IN THE MATTER OF AN OFFER OF FINANCIAL ASSISTANCE

Decided: March 14, 2012

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.<sup>1</sup> Notice of the exemption was served and published in the Federal Register on January 25, 2012 (77 Fed. Reg. 3,893-94). The exemption was scheduled to become effective on February 24, 2012, unless 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 C.F.R. § 1152.27(c)(2) was filed by February 6, 2012.

On January 30, 2012, Eric S. Strohmeyer and CNJ Rail Corporation (collectively, Strohmeyer Parties or Offerors) 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 Strohmeyer 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

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<sup>1</sup> The Applicants state that Conrail has ownership of the line extending from milepost 2.70 to milepost 2.98 but only has operating rights from milepost 0.00 to milepost 2.70.

certain other information. Conrail provided responses to the Strohmeier Parties' information requests on February 7, 2012.<sup>2</sup>

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 and tolled the OFA due date for the OFA Segment until March 9, 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 Strohmeier Parties<sup>3</sup> filed their OFA without any of the supporting exhibits referenced in the filing. In particular, they failed to include any evidence to demonstrate that they are financially responsible to acquire and operate the OFA Segment. See 49 C.F.R. § 1152.27(c)(2)(iii). On March 14, the due date for the Director's determination of financial responsibility, Riffin late-filed a confidential summary Personal Financial Statement, but did not include any supporting documentation. At that same time, the Strohmeier Parties filed a Request for an Extension of Time. In that request, the Strohmeier Parties concede that they have not yet filed their financial materials with the Board.

The Applicants estimate the value of the OFA Segment at a minimum purchase price of \$200,000.<sup>4</sup> The Strohmeier Parties seek to purchase the entire OFA Segment for \$30,261.00.<sup>5</sup> The Offerors claim that Conrail has varying property interests in the OFA Segment, so they break the segment and the corresponding offer into three parts.

For Subsegment # 1, which runs between milepost 2.80 and milepost 2.70, the Strohmeier Parties offer \$30,250.00. The Offerors claim that this subsegment is worth the most because, even though the track has been salvaged, Conrail owns the right-of-way in fee. The Offerors further limit their offer to only a 20-foot wide right-of-way for this subsegment.

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<sup>2</sup> 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, as otherwise provided at 49 C.F.R. § 1152.27(b)(2)(ii). The first tolling request therefore was rendered moot and has been dismissed.

<sup>3</sup> Mr. James Riffin submitted a March 12 letter wherein he claims that he also filed the OFA. In their March 13 Amended OFA, the Strohmeier Parties state that they have agreed to include Riffin as an offeror. Riffin's participation is noted, but for purposes of clarity, the Offerors still will be collectively referred to as the Strohmeier Parties.

<sup>4</sup> Applicants' Response to Information Request 2, Feb. 6, 2012.

<sup>5</sup> The Strohmeier Parties include with their offer for Subsegment # 1 an offer of \$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, but do not otherwise quantify that amount or include it in their offer.

For Subsegment # 2, which runs between milepost 2.70 and milepost 0.95, the Strohmeier Parties offer \$10.00 as nominal consideration. The Offerors claim that Conrail possesses only an operating easement over this portion. The record reveals that Conrail sold the underlying assets to the City of Philadelphia (City) in 1978.<sup>6</sup>

For Subsegment # 3, which runs between milepost 0.95 and milepost 0.00, the Strohmeier Parties offer \$1 for whatever right, title, and interest Conrail might have in the subsegment. The Offerors justify this amount by claiming that the subsegment has a negative net liquidation value. The record suggests that Conrail does not own this property. Conrail claims that it and its predecessors only operated over this portion of the line pursuant to an 1871 agreement with the City.<sup>7</sup>

The Offerors claim that they hope to restore service over Subsegments # 1 and # 2 within 90 days of closing. They claim that only 800 feet of track is needed to reconnect the remaining tracks in Subsegment # 2 to the Conrail-retained connecting track in the southwest quadrant of the junction with Conrail's Port Richmond Secondary located at the end of Subsegment # 1. The Strohmeier Parties note that they will need assistance from Conrail with this project, including restoring the connecting track, replacing the switch, and negotiating an interchange agreement. Once service is restored, the Offerors claim that they plan to begin serving a shipper, Morris Iron and Steel Co., Inc., and to acquire additional customers on these two subsegments within six months to a year.

According to the OFA, the plans for Subsegment # 3 are more long-term. The Strohmeier Parties state that they do not believe that they can restore service over this subsegment for several years, because part of this subsegment must traverse a one-way street with automobile traffic running in the opposite direction of train traffic. The Strohmeier Parties state that they plan eventually to use this subsegment to reach Class I carriers.

The Offerors claim that they are financially responsible to purchase the OFA Segment. To safeguard financial statements supporting this claim, on March 12, 2012, the Strohmeier Parties filed a motion for protective order and a proposed protective order. Riffin filed a separate motion for protective order on March 14, 2012. As of the service date of this decision, however, the Offerors still have not submitted complete financial information.

The Applicants replied in opposition to the offer submitted by the Strohmeier Parties. They assert, among other things, that the restoration of service would be extremely expensive, would raise major public safety issues, and would be operationally infeasible.

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); 49 C.F.R. § 1152.27(e). This OFA will

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<sup>6</sup> See Applicants' Reply 2, Feb. 7, 2012.

<sup>7</sup> See Applicants' Reply 5, Feb. 27, 2012.

be rejected because the Offerors have not demonstrated that they are financially responsible or that their offer is reasonable.

The deadline for filing an OFA in this case was March 9, 2012, and the Director of the Office of the Proceedings 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 Stagers Rail Act of 1980, H.R. Rep. No. 96-1430, 96th Cong., 2nd Sess. at 125 (1980).

Although the Offerors were granted an extension to prepare their materials, they filed an incomplete OFA on March 9, the due date, and did not timely provide financial statements in support of their OFA.<sup>8</sup> The only financial information submitted, Riffin's Personal Financial Statement, is summary and unsupported. Not only is the OFA untimely because a complete offer was not filed, but, because complete financial information was not submitted, the Strohmeier Parties have failed to demonstrate that they would be able to finance the purchase of the OFA Segment and to operate it for at least two years, as called for under the OFA statute.<sup>9</sup>

Moreover, the offer itself lacks merit. Conrail defines the property it owns between milepost 2.70 and milepost 2.80 as 1.39 acres. The Strohmeier Parties would have the Board carve a corridor 20 feet wide and 528 feet long through that rail property. The Strohmeier Parties further ask that the Board permit the acquisition of additional square footage for an area that the Offerors will determine in the future.

This selective parceling approach to an OFA is not appropriate and also constitutes grounds for rejecting the OFA. It is not clear to Conrail, or to the Board, exactly where the Offerors' swath of land would run or even how much land the Strohmeier Parties wish to acquire and when. As a general proposition, in proceedings involving the forced sale of a rail line, the agency does not favor and will closely scrutinize any offer to purchase less than the entire right-of-way of the railroad.<sup>10</sup> Because the acquiring party is in effect acting pursuant to condemnation power, the carrier whose property is being taken must receive "just

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<sup>8</sup> The Strohmeier Parties indicated in their March 12 filing that they would file their financial statements after the Board entered a protective order. If the Offerors required the entry of a protective order prior to submitting their financial information, they should have made their request sufficiently in advance of the OFA due date to permit the Board to rule on that request by March 9. Another option would have been for the Strohmeier Parties to submit their confidential information under seal until the Board ruled on the motion, as provided in the Board's rules. 49 C.F.R. § 1104.14.

<sup>9</sup> See 49 U.S.C. § 10904(f)(4)(A); Union Pac., R.R.—Aban. Exemption—In Lassen Cnty, Cal., & Washoe Cnty, Nev., AB 33 (Sub-No. 230X), slip op. 3, (STB served Sept. 19, 2008).

<sup>10</sup> See Union Pac. R.R.—Aban. Exemption.—In Lancaster Cnty., Neb., AB 33 (Sub-No 112X), slip op. 5 (STB served Mar. 2, 1998).

compensation.” Requiring a carrier to sell less than the entire width of the right-of-way can leave the railroad with a liability in the form of unwanted, unproductive land. Unless the carrier is somehow compensated for the diminution in the value of its remaining estate, it will emerge from the OFA process as a net loser, which is contrary to the intent of the statute. For that reason, an offeror seeking to acquire less than the entire right-of-way will ordinarily have a heavy burden to bear.<sup>11</sup> The Strohmeier Parties only assert that the 20-foot wide right-of-way they seek will be adequate. This unsubstantiated assertion is not enough to overcome such burden.

For the foregoing reasons, the offer will be rejected. In view of this ruling, it is not necessary to reach the various other arguments raised by the Applicants.

Because the rejection of the OFA ends the OFA process, a protective order to disseminate the OFA materials securely is not necessary. The motions for protective order are therefore moot and will be denied. For the same reason, the Strohmeier Parties’ request for extension of time and for modification of the procedural schedule will be denied.

It is ordered:

1. The Strohmeier Parties’ OFA is rejected.
2. The motions for protective order are denied.
3. The Strohmeier Parties’ request for extension of time and for modification of the procedural schedule is denied.
4. This decision is effective on its date of service.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

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<sup>11</sup> See Boston & Me. Corp. & Springfield Terminal Ry.—Aban. & Discontinuance of Serv. in Hartford Cnty, Conn., AB 32 (Sub-No. 43) (ICC served Aug. 9, 1991).