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SERVICE DATE – SEPTEMBER 19, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-33 (Sub-No. 230X)

UNION PACIFIC RAILROAD COMPANY—ABANDONMENT EXEMPTION—IN LASSEN
COUNTY, CA, AND WASHOE COUNTY, NV

Decided: September 19, 2008

By decision served on January 26, 2007 (January decision), the Board, under 49 U.S.C. 10502, exempted from the prior approval requirements of 49 U.S.C. 10903 the abandonment by Union Pacific Railroad Company (UP) of a 21.77-mile rail line from milepost 338.33 near Flanigan, NV, in Washoe County, to milepost 360.10 near Wendel, CA, in Lassen County, and a .57-mile rail line from milepost 358.68 to milepost 359.25 near Wendel (collectively, Line).¹ The exemption was scheduled to become effective on February 25, 2007, but three timely notices of intent to file an offer of financial assistance (OFA) to purchase the Line were filed, including one filed by Nevada Central Railroad (NCR).

By decision served on February 2, 2007, the Board tolled the time period to file an OFA until 10 days after UP provided two of the potential offerors with the financial data and information prescribed in 49 CFR 1152.27(a) (prescribed information). During the tolling period, UP chose to negotiate the sale of the Line with a potential offeror other than NCR. When those negotiations fell through, UP requested, in a filing dated March 27, 2008, that the Board remove the tolling period. In opposition, NCR sought extension of the tolling period, arguing that UP failed to provide potential offerors with all of the prescribed information. By decision served on August 5, 2008, the Board directed UP to provide NCR with additional information and to certify to the Board that it had done so by August 15, 2008. On August 15, 2008, UP certified to the Board that it had provided NCR with the additional information, making the due date for filing an OFA August 25, 2008.

On August 29, 2008, NCR filed a “Notice of Substitution,” apparently seeking to substitute “Robert Alan Kemp d/b/a Nevada Central Railroad” in place of NCR. On the same date, Robert Alan Kemp (Kemp) requested that the due date for him to file an OFA be extended until September 14, 2008, to which UP agreed. By decision served on September 12, 2008, the Board allowed NCR to substitute Kemp in its place and granted Kemp’s extension request, making his OFA due on or before September 15, 2008.

¹ The January decision made the exemption subject to employee protective conditions, as well as various environmental and historic preservation conditions, all of which remain in effect.

On September 15, 2008, Kemp filed an OFA for the purchase of a 220-foot portion of the 21.77-mile Line (220-foot segment), beginning at MP 338.33, for an “approximate” price of \$5,750.13. In his OFA, Kemp merely states that the 220-foot section of track he seeks to acquire will enable him to stage the delivery of necessary fuel to supply what he calls his “Mainline Railroad Power Generating Facility,” which he says will support his initial operation of a 220-foot “Electrified Rail Line.”

Additionally, a letter from an entity called The Banks Family Trust (Trust), entitled “Notice of Financial Guarantee,” was filed on behalf of Kemp stating that the Trust confirms a financial guarantee to Kemp in the amount of \$13,000 to be used for his OFA in this proceeding. The Trust also advised that it will guarantee the necessary financial commitments to Kemp for any and all additional financial requirements to enable Kemp to maintain operation of the 220-foot segment for a period of not less than 5 consecutive years.

On September 17, 2008, UP filed a reply opposing Kemp’s OFA and asking the Board to reject it. UP argues that, whatever Kemp’s purpose is for attempting to acquire the 220-foot segment, it is not for providing rail service. UP states that there are no rail shippers or any other businesses located on the 220-foot segment and that it is too short to conduct any rail operations. UP contends that Kemp has no “Mainline Generating Facility” on the 220-foot segment or anywhere else and questions the existence and financial resources of the Trust.

DISCUSSION AND CONCLUSIONS

The OFA provisions reflect a Congressional desire to preserve, whenever possible, any prospect for continuing or resuming rail freight service on corridors that would otherwise be abandoned. See Redmond—Issaquah R.R. Pres. Ass’n v. STB, 223 F.3d 1057, 1060-63 (9th Cir. 2000). However, 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.² In Los Angeles County Metropolitan Transportation Authority—Abandonment Exemption—in Los Angeles County, CA, STB Docket No. AB-409 (Sub-No. 5X), slip op. at 3 (STB served June 16, 2008) (Los Angeles County), the Board provided that any person “who intends to file an OFA should address one or more of the following: whether there is a demonstrable commercial need for rail service, as manifested by support from shippers or receivers on the line being abandoned or as manifested by other evidence of immediate and significant commercial need; whether there is community support for continued rail service; whether acquisition of freight operating rights would interfere with current and planned transit services; and whether continued rail service is operationally feasible, especially where, as here, the line to be abandoned is physically constrained.” Although, in outlining the above criteria, the Board was addressing a request for an exemption from the OFA

² Roaring Fork—Exem.—in Garfield, Eagle & Pitkin Counties, CO, 4 S.T.B. 116, 119-20 (1999); Burlington N./Santa Fe—Aban.—in King County, WA, 3 S.T.B. 634, 638-39 (1998).

provisions as well as a notice of intent to file an OFA pertaining to a short .31-mile line, the criteria remain valid for an evaluation of feasibility of an OFA request, as is the situation here.

Here, in its notice of exemption, UP stated that the sole traffic over the Line, since 2004, is from UP's contractors hired to dispose of salvage material from other UP abandonments in the area. UP went on to explain that this salvage-based traffic was scheduled to be completed by or shortly after the anticipated effective date of the Board decision granting abandonment authority for the Line and that the final movements might have to be made by truck. According to UP, the only other shipper on the Line, the Sierra Army Depot (Depot), used the Line for one movement of 29 cars in 2004, but, since 2004, the Depot has used another UP main line connection in the vicinity, which is not subject to this abandonment.

The record shows that there is no current or future traffic to support continued rail service over the 220-foot segment. Further, UP has stated that there is no practicable possibility for new rail business on the Line and no overhead traffic. Kemp, on the other hand, only provides a single-sentence statement that he intends to initiate operation of an "electrified rail line." Kemp has provided no evidence of shippers or traffic on the 220-foot segment and fails to support even the possibility of continued rail service in any way. In fact, as UP contends, it is highly unlikely that a rail operation could be conducted independently over the 220-foot segment. See Union Pacific Railroad Company—Abandonment and Discontinuance of Trackage Rights Exemption—in Los Angeles County, CA, STB Docket No. AB-33 (Sub-No. 265X), slip op. at 2 (STB served May 7, 2008) (finding that there was essentially no possibility of offeror providing freight rail service over the 0.08-mile segment of line). In short, the record before the Board does not show that continued rail service is likely to result from Kemp's OFA.

Further, even if the record supported the conclusion that continued rail service would be likely, Kemp fails to demonstrate that he would be able to finance the purchase of the segment and operations over it for at least two years, as called for under the OFA statute. See 49 U.S.C. 10904(f)(4)(A). Kemp does not demonstrate that the asserted \$13,000 guarantee would be sufficient for that purpose. And although the Trust advises of an indefinite additional guarantee on behalf of Kemp to maintain operations, neither Kemp nor the Trust demonstrates the extent of the Trust's financial resources or even what type of an institution or organization the Trust is.

For all of the foregoing reasons, Kemp's OFA will be rejected.

Any appeal of this decision, filed pursuant to 49 CFR 1011.2(a)(7), is due by September 29, 2008.

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

It is ordered:

1. Kemp's OFA is rejected.
2. The exemption will become effective on October 19, 2008, subject to the conditions imposed in the January decision.
3. This decision is effective on its service date.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Anne K. Quinlan
Acting Secretary