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SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-33 (Sub-No. 132X)

UNION PACIFIC RAILROAD COMPANY
– ABANDONMENT EXEMPTION –
IN RIO GRANDE AND MINERAL COUNTIES, CO

Decided: May 3, 2005

This decision denies a petition to reopen prior decisions in this proceeding served on May 11, 1999 (1999 Decision), May 24, 2000 (2000 Decision), and June 22, 2004 (2004 Decision). The 1999 Decision authorized the sale of a 21.6-mile rail line known as the Creede Branch by Union Pacific Railroad Company (UP) to the Denver & Rio Grande Railway Historical Foundation (D&RGHF) under the offer of financial assistance (OFA) procedures of 49 U.S.C. 10904 and 49 CFR 1152.27. In the 2000 Decision and the 2004 Decision, the Board declined to reopen the 1999 Decision.

BACKGROUND

The Creede Branch, located in Rio Grande and Mineral Counties, CO, historically served local mines. The line had long been out of service when, in December 1998, UP filed a notice of exemption with the Board for authority to abandon the line. Two parties, the D&RGHF and the Rio Grande & San Juan Railroad Co., submitted OFAs to acquire the line. The Director of the Office of Proceedings (Director) found both parties to be financially responsible and accepted their OFAs.

When faced with multiple qualified offerors, the railroad may choose the one with which it will negotiate. UP selected D&RGHF. Following a brief period of negotiation, UP and D&RGHF advised the Board that they had reached an agreement for D&RGHF's purchase of the rail line. In the 1999 Decision, UP's abandonment exemption was dismissed effective on the date the sale was consummated, and D&RGHF was authorized to acquire the line.

On November 26, 1999, more than 6 months after the approval of the sale, the City of Creede, CO (City), which lies along the Creede Branch, filed a letter opposing reinstitution of service over the line. The Board treated the City's letter as a petition to reopen UP's abandonment exemption and the sale to D&RGHF. On May 24, 2000, the Board denied the City's petition to reopen, finding that the City had not satisfied the criteria at 49 CFR 1152.25(e)(4) for reopening an administratively final proceeding. Also on May 24, 2000, D&RGHF and UP consummated the sale of the line, with D&RGHF paying $350,000 in cash and financing the remaining $274,616 by a note held by UP.

On November 2, 2000, the City filed an action against D&RGHF in state court, seeking a declaration that a City residential zoning ordinance applied to the railroad right-of-way (ROW), except for the 25-foot wide center portion that the City claimed was the only part necessary for rail operations. City of Creede v. Denver & Rio Grande Railway Historical Foundation, Dist. Ct., Mineral Cty., Colo., No. 00-CV-4. The case was removed to the U.S. District Court for the District of Colorado (U.S. District Court). City of Creede v. Denver & Rio Grande Railway Historical Foundation, No. 01-RB-318 (CBS) (D. Colo. May 9, 2003). The U.S. District Court subsequently referred certain issues of federal preemption to the Board.

On July 2, 2003, the City filed a petition with the Board in STB Finance Docket No. 34376, City of Creede, CO—Petition for Declaratory Order, seeking a declaratory order to address the issues referred by the court. D&RGHF and the City made their evidentiary submissions to the Board on July 21, 2003, and October 14, 2003, respectively.[1] The City also contemporaneously filed a petition in this abandonment proceeding, asking again that the Board void the authorization of the sale of the line to D&RGHF. Two adjacent landowners submitted comments in support of reopening the 1999 Decision and D&RGHF and UP filed a response in opposition. In the 2004 Decision, the Board denied the City's petition to reopen.

On November 5, 2004, the Concerned Citizens of Creede and Mineral County, CO (Concerned Citizens), a group of permanent area residents, filed another petition to reopen the 1999 Decision. Petitioners ask that the Board: (1) find that D&RGHF did not satisfy the requirements of 49 U.S.C. 10904; (2) authorize abandonment of the line; and (3) exempt this line from the OFA provisions of section 10904. Concerned Citizens also request an oral hearing. D&RGHF and UP replied separately on December 16, 2004. On December 27, 2004, the Upper Rio Grande Economic Development Council filed a letter urging denial of Concerned Citizens' petition.

On January 12, 2005, Concerned Citizens filed a motion for leave to file a limited reply to the replies of D&RGHF and UP, and included that reply in their filing. By separate pleadings filed on February 1, 2005, D&RGHF and UP oppose acceptance of Concerned Citizens' reply to their replies.

PRELIMINARY MATTERS

Oral Argument

As discussed below, the petition does not raise any novel issues of law or fact. Because substantially all material issues of fact can be resolved through the written record already submitted, and because efficient disposition of the proceeding can be accomplished without oral testimony, the request for oral hearing will be denied. See 49 CFR 1112.1.

Reply to a Reply

The Board's rules at 49 CFR 1104.13(c) state that a reply to a reply is not permitted. On occasion, however, we will accept a reply to a reply where no party objects or will be prejudiced

[1] A decision in the declaratory order proceeding is also being issued today.

by its acceptance. Here, however, both UP and D&RGHF object to petitioners' filing and Concerned Citizens have not presented any justification for allowing this extra pleading. Therefore, petitioners' request for leave to file a reply will be denied.

DISCUSSION AND CONCLUSIONS

Under 49 CFR 1152.25(e)(4), a petition to reopen an administratively final action must state in detail the respects in which the challenged decision involves material error, or is affected by new evidence or substantially changed circumstances. Such a petition will be granted only upon a showing that the challenged action would be materially affected by one or more of those criteria. 49 CFR 1152.25(e)(2)(ii).

Here, Concerned Citizens argue that new evidence shows that D&RGHF's OFA failed to meet the standards of 49 U.S.C. 10904, and that the Board's approval of D&RGHF's OFA and subsequent denials of the two prior petitions to reopen involved material error. Specifically, petitioners contend that their evidence demonstrates that there is no need for freight service on the line, that D&RGHF is not financially able to fully purchase, rehabilitate, and operate the line, and that the line was "de facto" abandoned years ago.

As discussed below, we find that petitioners have not presented any new evidence that materially affects the agency's earlier decisions in this proceeding, nor have they shown material error. Further, concerns for administrative finality, repose, and detrimental reliance strongly counsel against reopening. See Railroad Ventures, Inc.—Abandonment Exemption Between Youngstown, OH and Darlington, PA in Mahoning and Columbiana Counties, OH and Beaver County, PA, STB Docket No. AB-556 (Sub-No. 2X), slip op. at 5 (STB served Dec. 13, 2004); CSX Transportation, Inc.—Abandonment Between Bloomingdale and Montezuma in Parke County, IN, Docket No. AB-55 (Sub-No. 486), slip op. at 8 n.10 (STB served Sept. 13, 2002), aff'd sub nom. Montezuma Grain Co., LLP v. STB, 339 F.3d 535 (7th Cir. 2003). The OFA sale at issue was consummated nearly 5 years ago, and both UP and D&RGHF have relied on the prior Board determination. D&RGHF made a substantial investment as part of its reliance, and UP may have forgone other opportunities to sell the line. Petitioners here thus face a substantial burden in seeking to reopen the proceeding and reverse the outcome at this late date. Concerned Citizens' petition, which is largely repetitive of, and seeks to relitigate, matters already considered and disposed of in prior decisions, fails to meet that burden. For these reasons, the petition to reopen will be denied.

Continued Rail Service

Concerned Citizens argue that we should reopen this proceeding because the Board, in the 2004 Decision and earlier Board decisions, erred in finding that D&RGHF met its burden to demonstrate that it can reestablish and conduct freight operations on the line for 2 years. In support of their position, petitioners cite Conrail Abandonment of a Portion of the West 30th Street Secondary Track in New York, NY, In the Matter of an Offer of Financial Assistance, Docket No. AB-167 (Sub-No. 493N) (ICC served Jan. 13, 1987) (High Line); Roaring Fork—Exem.—in Garfield, Eagle, and Pitkin Counties, CO, 4 S.T.B. 116 (1999), aff'd sub nom. Kulmer and Schumacher v. STB, 236 F.3d 1255, 1257 (10th Cir. 2001) (Roaring Fork); and The

Burlington Northern and Santa Fe Railway Company—Abandonment Exemption—In King County, WA, STB Docket No. AB-6 (Sub-No. 380X) (STB served Aug. 5, 1998) (King County). Concerned Citizens also argue that the 2004 Decision materially erred in finding any real shipper interest in revived freight service. Further, petitioners contend that D&RGHF's stated intent is, and always has been, to operate a tourist passenger service and not a freight railroad.

Petitioners misapprehend the allocation of burdens in OFA proceedings. As the Board indicated in the 2004 Decision, when challenged, a buyer must be able to demonstrate that its OFA is for continued rail service, including freight rail service. Roaring Fork; see also Columbia v. STB, 342 F.3d 222 (3d Cir. 2003) (Columbia). But, as the agency also noted, challengers of an OFA also bear a burden—to demonstrate that the offer is for some other purpose that is incompatible with continued rail service. See Land Conservancy of Seattle and King County—Acquisition and Operation Exemption—Burlington Northern and Santa Fe Railway Company, STB Finance Docket No. 33389 et al. (STB served May 13, 1998) (Land Conservancy), aff'd sub nom. Redmond-Issaquah R.R. Pres. Ass'n v. STB, 223 F.3d 1057 (9th Cir. 2000).

Concerned Citizens have not shown that the Board erred in rejecting claims that D&RGHF's OFA was not for continued rail service in the prior decisions. Concerned Citizens again question D&RGHF's commitment to use the line for freight and argue that demand for freight service on the Creede Branch is too speculative to sustain an OFA. But there is no minimum traffic requirement necessary to sustain an OFA. Exemp. of Rail Abandonment—Offers of Finan. Assist., 4 I.C.C.2d 164, 167 (1988); Illinois Central R.R. Co.—Abandonment Exemption—in Perry County, IL, Docket No. AB-43 (Sub-No. 164X) (ICC served Oct. 18, 1994). As noted in the 2004 Decision, the agency has never required an offeror to prove in advance that its efforts to revive a failing line will, without question, succeed. 1411 Corp—Abandonment Exemption—Lancaster County, PA, Docket No. AB-581X, slip op. at 5 n.9 (STB served Sept. 6, 2001), aff'd sub nom. Columbia. Rather, when challenged, the Board considers whether the plan taken as a whole is intended to result in continuing or resumed freight rail service—a test that has been met here. See id.

As the Board explained in Trinidad Railway, Inc.—Abandonment Exemption—in Las Animas County, CO, STB Docket No. AB-573X (STB served Aug. 13, 2001), in determining whether there are sufficient traffic prospects to sustain freight rail operations, the Board considers all potential income resulting from the operation of the rail line. Here, as the Board explained in the 2004 decision (at 7-10), the record supports the conclusion that D&RGHF intended from the outset to rehabilitate the Creede Branch and that its plan taken as a whole was intended to result in rail freight service. Moreover, the record shows that D&RGHF has made continued efforts to rehabilitate the line. As the Board found in the 2004 Decision, D&RGHF has cleared the line of vegetation and debris and has shored up the roadbed adjacent to a river. D&RGHF has also installed hundreds of cross-ties, rail lengths, angle bars, tie plates, and spikes, and has replaced and added new crossings. And the majority of the line has been brought back into gauge. There would be little incentive for D&RGHF to have taken those steps if it did not intend to operate the line. Furthermore, D&RGHF has provided the Board with letters from three area proponents of rail service. As we indicated in the 2004 Decision at 7, while these

letters are not contracts, they represent a reasonable level of commitment to use a rail line that is not yet fully rehabilitated.

Finally, the evidence presented in this case supports the conclusion that D&RGHF intends to subsidize any available freight traffic by running a tourist passenger excursion service on the line. Such passenger service is not incompatible with freight service and, indeed, can serve to make feasible a level of freight service that might not otherwise justify the cost of owning, rehabilitating, and maintaining the line. See 2004 Decision at 8.

The cases cited by petitioners do not support reopening here. Rather, those cases demonstrate situations where OFAs that were challenged before they became administratively final did not present the best chance for continued or revived rail service. In Roaring Fork, the Board dismissed an OFA. As the Board stated, that case presented "the anomalous situation in which any future reinstitution of rail freight service (as an adjunct to passenger service) appear[ed] more likely under [the abandoning carrier's] own plans for the future of the right-of-way than through the OFA process." Roaring Fork, 4 S.T.B. at 121 n.19. That case was anomalous because: (1) the OFA offeror acknowledged that it would put the line to the same use as the one planned by the abandoning carrier—a use that the abandoning carrier could pursue with $40 million from the federal government and (2) the abandoning carrier sought dismissal of the OFA, asserting that the OFA offeror was associated with a salvage company that was in the business of acquiring lines that had been abandoned or were in the process of being abandoned and selling the rail for scrap. Roaring Fork, 4 S.T.B. at 117 n.2. This case is not such an anomalous situation. Granting Concerned Citizens the relief they seek would eliminate the prospect of resumed rail service on the line that D&RGHF provides.

In High Line, the ICC rejected an OFA because it found that the offeror was not financially responsible. A financial responsibility finding relates to both whether the offeror possesses the resources necessary to pay the line's fair market value and to operate the line for the statutorily mandated 2-year period. In that case, however, the ICC required the offeror to make a more specific showing because the ICC had already found that reinstituting service on that particular line in New York City was infeasible. In requiring that showing, the ICC specifically noted that it was unique to that matter and not normally required. See Chelsea Property Owners—Abandonment—Portion of the Consolidated Rail Corporation's West 30th Street Secondary Track in New York, NY; In the Matter of an Offer of Financial Assistance, Docket No. AB-167 (Sub-No. 1094), slip op. at 7-8 (ICC served July 15, 1993). Accordingly, Concerned Citizens' attempt to interpret High Line to stand for the proposition that D&RGHF had an affirmative duty here to demonstrate with its original offer, or in response to subsequent challenges on other grounds, that it would successfully provide rail service for 2 years following its purchase, is erroneous. Moreover, the time for a challenge on the grounds that D&RGHF was not financially responsible was 5 years ago, while the OFA was being considered, and it is not clear on the present record that such a challenge would have succeeded at that time.

Petitioners also contend that an OFA must show a real need for service, citing King County. That decision was part of a series of decisions in a group of proceedings regarding the disposition of a 12.45-mile rail line in King County, WA. In one of those decisions—Land Conservancy—Acq. & Oper.—Burlington Northern, 2 S.T.B. 673 (1997)—the Board used its

revocation power to disallow the sale of an active (albeit embargoed) line to a purchaser that had, immediately after the purchase, sought to abandon the line and to be exempted from the OFA process in order to create a trail. The agency acted there to preserve the integrity of its processes when an acquiring noncarrier initiated an abandonment proceeding within days of purchasing the line. The line was reconveyed to The Burlington Northern and Santa Fe Railway Company (now BNSF Railway Company), which subsequently filed for authority to abandon the line. That case raised concerns about the potential for further misuse or abuse of its processes, and thus the Board indicated its intentions to closely scrutinize any OFAs that might be filed (as well as any challenges thereto) in that particular case. Land Conservancy, slip op. at 14.

Thus, the requirement in King County that the offeror demonstrate sufficient need for rail service grew out of a unique set of events surrounding a particular case in which abuse was evident. Here, in contrast, D&RGHF has presented evidence of area interest in renewed rail freight service, when challenged after the sale, and indicated that its planned tourist excursion service could subsidize rail freight operations. In our prior decisions, we found no evidence that undercuts the assertion that D&RGHF's OFA proposal, considered as a whole, could result in restoring service to the line. Concerned Citizens have not demonstrated that this was material error.

Having petitioned to void the OFA authorization, Concerned Citizens, not D&RGHF, have the primary burden of proof. See 5 U.S.C. 556(d). But Concerned Citizens have not demonstrated that the Board erred in finding that, consistent with the objectives of 49 U.S.C. 10904, D&RGHF's OFA presented the best available plan for restoring freight rail service over this line. See Illinois Central Railroad—Abandonment Exemption—In Perry County, IL, Docket No. AB-43 (Sub-No. 164X) (ICC served Nov. 8, 1994), recons. denied and terms set (ICC served Jan. 12, 1995). Moreover, the need for administrative finality and repose more than 5 years after the sale of the line weigh heavily against granting Concerned Citizens' petition to go back in time to revisit the original OFA, particularly when a more appropriate vehicle (the adverse abandonment procedure discussed below) is available to address their concerns.

Financial Responsibility

Concerned Citizens assert that new evidence demonstrates that the Board committed material error in finding that D&RGHF satisfied the financial responsibility requirement of 49 U.S.C. 10904. But much of their evidence—for example, D&RGHF's articles of incorporation, old tax returns, evidence regarding the condition of the rail line, and the cost of rehabilitation—was available and could have been submitted years ago, rather than 5 years after the OFA sale was consummated. Petitioners have not explained why they failed to come forward with this evidence when the Board was considering three earlier challenges to this OFA. Thus, none of this information can be considered new evidence that might provide a basis for reopening at this late date. See Friends of Sierra R.R. v. ICC, 881 F.2d 663, 667 (9th Cir. 1989).

Other evidence submitted by petitioners relates to post-consummation events—such as D&RGHF's alleged failure to pay all of its tax liabilities and its apparent failure thus far to obtain sufficient funds to complete the rehabilitation of the line. Such evidence is intended to demonstrate that D&RGHF's venture may not turn out to be financially viable in the end. Given

the difficulty of making progress in the face of constant legal challenges, it would be premature to assume that rail service will not be instituted on the line within a reasonable time. And even if the project were to ultimately fail, that would not show that the Board erred in finding that D&RGHF intended to revive service on the line. As we have stated previously in this proceeding, the Board must determine, based on a limited record and in a limited time, whether an offeror has the financial resources to make good on its offer to buy and operate the line under 49 U.S.C. 10904(d). This is a case-by-case determination. An OFA will always involve a somewhat risky venture, given the nature of the lines typically subject to the OFA provisions. The sort of guarantees that petitioners advocate are unlikely to be available in the context of an OFA sale. And such requirements would undermine the underlying purpose of the OFA provisions—to provide a last chance to preserve or revive service on an otherwise failing rail line.

Status of the Creede Branch

Concerned Citizens also repeat the claim, made and rejected in earlier challenges to this OFA, that the Creede Branch was somehow "de facto" abandoned many years ago. While it is true that the line has not been in service for a number of years, the legal status of the line and the common carrier obligation to provide rail service upon request has not changed. The Board has exclusive and plenary power over rail abandonments. Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 319-21 (1981); Phillips Co. v. Denver & Rio Grande Western R. Co., 97 F.3d 1375, 1376-78 (10th Cir. 1996), cert. denied, 521 U.S. 1104 (1997). UP did not seek abandonment authority until 1998 and, although the line was initially approved for abandonment (by an exemption from 49 U.S.C. 10903), D&RGHF's OFA precluded that authority from taking effect. Now, although D&RGHF has not yet returned the line to active service, it is working toward that objective. Thus, as we stated in the 2004 decision, the status of the Creede Branch remains that of an active rail line with all of the rights and obligations attendant to that designation.

Adverse Abandonment.

The petition to reopen makes it clear that residents in Creede and Mineral County are concerned about the effects that D&RGHF's plan to reactivate the line and reinstate rail service could have in their communities. However, repeated challenges to the OFA process are not the appropriate administrative remedy to address such concerns. Rather, as noted at pp. 8-9 of the 2004 Decision, parties who wish to demonstrate that the public interest permits an active rail line like this one to be abandoned, may file an application with the Board for adverse abandonment authority under 49 U.S.C. 10903. Should such a party succeed in demonstrating that the public convenience and necessity permit abandonment, the Board would withdraw the shield of its primary jurisdiction over the rail property. Modern Handcraft, Inc.—Abandonment, 363 I.C.C. 969, 971 (1981).

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

It is ordered:

1. The request for oral hearing is denied.

2. Concerned Citizens' motion for leave to file a reply to a reply is denied.

3. Concerned Citizens' petition to reopen is denied.

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

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams

Secretary