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SERVICE DATE - LATE RELEASE APRIL 22, 1999

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

IN THE MATTER OF AN OFFER OF FINANCIAL ASSISTANCE

Decided: April 21, 1999

Union Pacific Railroad Company (UP) filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments and Discontinuances of Service and Trackage Rights to abandon and discontinue service over a 21.6-mile line of railroad known as the Creede Branch, extending from milepost 299.3 near Derrick to the end of the line at milepost 320.9 at Creede, in Rio Grande and Mineral Counties, CO. Notice of the exemption was served and published in the Federal Register on January 25, 1999 (64 FR 3740-41). Under 49 CFR 1152.50(d)(3), the exemption was scheduled to become effective on February 24, 1999, but formal expressions of intent to file an offer of financial assistance (OFA) were timely filed by the February 4, 1999 due date by the Denver & Rio Grande Railway Historical Foundation (D&RGHF) (to purchase or to acquire by donation the entire line), by South Fork-Creede Railway Corridor Preservation Group Inc. (SFCR) (to purchase the entire line), and by the Rio Grande & San Juan Railroad Co. (RG&SJ) (to purchase the entire line). These filings automatically stayed the effective date of the exemption until March 6, 1999.¹

SFCR and RG&SJ also requested UP to provide the financial data and information prescribed in 49 CFR 1152.27(a). On February 4, 1999, and February 19, 1999, RG&SJ and SFCR, respectively, filed petitions to toll the 30-day period for submitting their OFAs. By decision served February 23, 1999, the deadline to file an OFA was extended to March 26, 1999, and the effective date of the abandonment exemption was further postponed to April 5, 1999. On March 26, 1999, RG&SJ timely filed an OFA under 49 U.S.C. 10904 and 49 CFR 1152.27(c) to purchase the entire line for \$302,000. Also on March 26, 1999, D&RGHF filed a request to extend its due date to file an OFA for an additional 5 days. By decisions served March 30, 1999, D&RGHF was granted an extension until March 31, 1999, to file its OFA, and RG&SJ was found financially responsible, and the effective date of the exemption authorizing abandonment was postponed to permit the OFA process to proceed.

By letter filed on March 31, 1999, RG&SJ indicated its objection to the 5-day extension and reserved the right to file an administrative appeal. By letter filed April 1, 1999, RG&SJ urged the

¹ See 49 CFR 1152.27(c)(2)(i).

Board to reject any OFA filed by D&RGHF after the March 31, 1999 extended due date, asserting that acceptance of a late-filed OFA would prejudice both it and UP.

On April 2, 1999, D&RGHF filed a petition for leave to file its OFA two days late and tendered an OFA under 49 U.S.C. 10904 and 49 CFR 1152.27(c) to purchase the entire line for \$387,930. D&RGHF stated that, despite its best efforts, it was unable to finalize financial statements for it and Mr. Donald H. Shank, D&RGHF's founder, until April 2, 1999. D&RGHF urged the Board to accept its late-filed OFA because UP would not be prejudiced by the acceptance. D&RGHF pointed out that the effective date of the exemption had already been postponed due to the filing and acceptance of RG&SJ's OFA and adds that UP would have a choice of offerors with which to negotiate if D&RGHF's OFA is accepted.

On April 5, 1999, RG&SJ filed a letter, in which it took the position that D&RGHF's OFA should be rejected on the following grounds: first, that it unjustifiably delayed negotiations between UP and RG&SJ that might otherwise have begun without waiting for UP's selection of an offeror with which to negotiate, and that RG&SJ was prejudiced both by the delay and by the fact that the timing of D&RGHF's filing permitted it to see RG&SJ's OFA and then submit a higher bid; second, that D&RGHF did not adequately explain the disparity between its OFA and UP's valuation of the property; and third, that D&RGHF did not adequately demonstrate its financial responsibility.

By decision of the Director of the Office of Proceedings, served April 6, 1999, D&RGHF's offer was accepted. Moreover, it was determined that D&RGHF is financially responsible and, because there were two offers from financially responsible entities as a result of this determination, UP was directed to provide written notification of its selection of the offeror with which it wished to transact business to the Board and all parties by April 12, 1999. On April 12, 1999, UP notified the Board that it had selected D&RGHF for negotiations with respect to the possible purchase of the line segment.

On April 14, 1999, pursuant to 49 CFR 1011.2(a)(7) and 49 CFR 1011.8(c)(2), RG&SJ appealed the April 6 decision, arguing that the Director acted erroneously in accepting D&RGHF's offer and that it should be rejected. RG&SJ alleges that D&RGHF does not intend to acquire and operate the subject line for common carrier rail service, but rather as a narrow gauge steam powered historic railroad, a use it asserts is outside the purposes of the OFA statute. RG&SJ submitted a copy of an article that was reported in the Colorado Time-Table, April 1999, to support its statement. RG&SJ further argues that, if D&RGHF had filed its offer in a timely manner, as RG&SJ did, neither offeror would have been in a position to learn in advance the amount the other party offered. RG&SJ states that, because D&RGHF had prior knowledge of its \$302,000 offer, D&RGHF was in a position to make a higher bid. RG&SJ asserts that, under these circumstances, D&RGHF's OFA should be rejected. RG&SJ adds that it is now offering \$778,616, and requests the Board to accept its revised offer. RG&SJ also states that evidence previously submitted to the Board on March 26, 1999, indicates that its backers have sufficient funds to purchase the entire line for the asking price and to maintain and operate the line for two years.

In response, D&RGHF asserts that it intends to acquire and operate the line to provide interstate common carrier rail freight service. It maintains that it intends to provide tourist passenger service in addition to freight service. D&RGHF states that it is considering the addition of a third rail that would allow a narrow-gauge passenger operation, but which would not be inconsistent with freight operations over the existing rails. Finally, D&RGHF disputes RG&SJ's claims that acceptance of D&RGHF's later and higher offer was unfair.

DISCUSSIONS AND CONCLUSIONS

The OFA procedures require that an offer be for continued rail service on a line that otherwise would be abandoned and that the offeror be financially responsible. See Hayfield Northern v. Chicago & N.W. Transp. Co., 467 U.S. 622, 629-31 (1984); Consolidated Rail Corp. v. I.C.C., 29 F.3d 706, 712 (D.C. Cir. 1994). The evidence here supports the Director's finding that D&RGHF is financially responsible. Furthermore, the record supports D&RGHF's contention that it intends to acquire the line for continued rail freight service.² D&RGHF states in its reply that it has "every intention of acquiring and operating the rail line for the provision of interstate common carrier rail freight service." According to D&RGHF, the tourist passenger service will be "in addition to freight service." The third rail in the line that D&RGHF is considering to allow a narrow gauge passenger operation would not be inconsistent with a rail freight operation. Moreover, most of the track rehabilitation that D&RGHF would perform would consist of replacing failed standard-gauge crossties with new standard-gauge crossties. Thus, nothing in RG&SJ's appeal shows that D&RGHF's offer does not fall within the scope of the OFA statute.

As to the Director's acceptance of D&RGHF's OFA after the due date, we agree with the Director that there was no evidence that the railroad in question, UP, would be disadvantaged by acceptance of D&RGHF's OFA. Indeed, on April 12, 1999, UP selected D&RGHF as the party with which it will negotiate.

At the same time, given RG&SJ's claim that the Board's acceptance of D&RGHF's later and higher offer was unfair to RG&SJ, and RG&SJ's statement that it now offers \$778,616 for the line, it seems appropriate to give UP time to advise us whether the railroad has changed its mind regarding the party with which it wishes to negotiate. Therefore, UP is directed to provide updated written notification to the Board and all parties to this proceeding by April 26, 1999. Following

² In a footnote in its reply to RG&SJ's appeal, D&RGHF invites a comparison between former 49 U.S.C. 10905(d)(1) and current 49 U.S.C. 10904(d)(1), evidently inferring that OFAs no longer need to be for continued rail service. We do not read current 49 U.S.C. 10904(d)(1) as having eliminated the requirement that an OFA must be for continued rail service. See 49 U.S.C. 10904(f)(4)(A) (specifying that purchasers of rail lines under the OFA statute may not "transfer or discontinue service on such line[s]" for 2 years); Owensville Term. Co. — Aband. Exemption — In Gibson and Posey Counties, IN, OFA, STB Docket No. AB-477 (Sub-No. 2X) (STB served Dec. 16, 1997).

UP's selection of the party for negotiations, if negotiations are not successful, a request to set terms will be due by May 10, 1999. If no agreement is reached between the party with which UP decides to negotiate and UP, and the Board has not been requested to establish conditions and the amount of compensation by May 10, 1999, then the other party may file a request with the Board by May 20, 1999, for the Board to establish conditions and the amount of compensation. And, if no agreement is reached between the selected negotiating party and UP, and the Board is requested to set conditions and compensation, the Board sets the conditions and compensation, and the selected negotiating party withdraws its offer, then the other party may accept the Board's decision setting terms and compensation within 20 days after the service date of that decision.

Accordingly, we find no basis for reversing the Director's April 6 decision and we will deny RG&SJ's appeal of that decision, but give UP time to provide updated written notification as to the party with which it will negotiate, given the unusual circumstances of this case.

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

It is ordered:

1. RG&SJ's appeal is denied, but UP will be given until April 26, 1999, either to make a new selection of a negotiating party or to confirm its earlier selection.
2. The new due dates for pertinent filings are as set forth in this decision.
3. This decision is effective on its service date.

By the Board, Chairman Morgan, Vice Chairman Clyburn and Commissioner Burkes.

Vernon A. Williams
Secretary