

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-6 (Sub-No. 468X)

BNSF RAILWAY COMPANY — ABANDONMENT EXEMPTION —
IN KOOTENAI COUNTY, ID

Decided: December 30, 2009

This decision denies the request of Pan-American Railway, Inc., d.b.a. Post Falls-Coeur d'Alene Railroad (PFCA-RR), to stay the effective date of the exemption granted in a decision served in this proceeding on November 27, 2009 (Exemption Decision) and to extend retroactively the time for filing an offer of financial assistance (OFA).

BACKGROUND

By petition filed on August 10, 2009, BNSF sought an exemption from the prior approval requirements of 49 U.S.C. 10903 to abandon a 6.23-mile rail line in Idaho, between milepost 6.10, near Port Falls, and milepost 12.33, at Coeur d'Alene, in Kootenai County (the line). BNSF also sought exemption from the OFA provisions of 49 U.S.C. 10904 and the public use condition provisions of 49 U.S.C. 10905. Notice of the filing was served and published in the Federal Register on August 28, 2009 (74 FR 44435-36).

On September 15, 2009, PFCA-RR filed a response opposing BNSF's request for exemption from the OFA provisions and stating that PFCA-RR intended to file an OFA to acquire the line for resuming rail operations on it.¹ After receiving several statements in support of the various exemptions BNSF had requested, the Board granted the exemptions: (1) from the prior approval requirements of Section 10903 to abandon the line, subject to environmental, historic preservation, and standard employee protective conditions; and (2) from the public use provisions of Section 10905. The Board denied, however, the request for exemption from the OFA provisions of Section 10904 on the ground that BNSF had not adequately justified an exemption. In doing so, the Board noted that PFCA-RR's plans to return service to the line "are speculative and contingent on facts that may well be outside of PFCA-RR's control." Exemption Decision at 4. The Board also ordered that any OFAs for the line were to be received by the railroad and the Board by December 7, 2009, and that stay requests were to be filed by December 14, 2009.

Notwithstanding these deadlines, PFCA-RR late-filed, on December 22, 2009, a request to the Board for a stay of the Exemption Decision and a request to BNSF, under 49 CFR

¹ PFCA-RR did not oppose the other exemptions BNSF requested.

1152.27(a)(3) and (c), for information on the valuation of the line. In a pleading filed on December 23, 2009, BNSF opposes the late-filed requests for a stay and for valuation information. BNSF states that it is not possible for PRCA-RR to restart service on the line, that there are no shippers on the line, that the public-private partnership cited by PFCA-RR does not exist, and that parcels of land required to implement PFCA-RR's plans are not for sale.

The City of Coeur d'Alene (the City) and North Idaho College Foundation (the Foundation) jointly filed, on December 24, 2009, a Reply to Petition for Stay, in which they oppose the stay and join in BNSF's Reply. In the pleading, the City and the Foundation also seek leave to late-file a Petition to Reconsider if Stay is Granted.

DISCUSSION AND CONCLUSIONS

An interested party seeking a stay of a Board decision must establish that: (1) it will suffer irreparable harm in the absence of a stay; (2) there is a strong likelihood that it will prevail on the merits; (3) other interested parties will not be substantially harmed by a stay; and (4) the public interest supports granting the stay. Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). The party seeking a stay carries the burden of persuasion on all of the elements required for such extraordinary relief. Canal Auth. of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974). PFCA-RR does not argue or attempt to demonstrate that it meets the criteria for stay. On that ground alone, a stay may be denied. We also note that PFCA-RR's stay request ignores the Board-imposed deadline of December 14, 2009 for stay requests. PFCA-RR has not explained its failure to comply with that deadline, nor has it demonstrated good cause why the Board should accept its late-filed request.

Not only did PFCA-RR fail in its burden to show that it met the standards for a stay, but its arguments why we should retroactively extend the OFA deadline are also without merit. PFCA-RR first claims that it failed to request the valuation information from August 10, 2009, the date of filing of the petition, to November 27, 2009, the date of issuance of Exemption Decision, due to BNSF's pending request for exemption from the OFA provisions. PFCA-RR next claims that, after the Board denied the OFA exemption request and set the date, 10 days later, for filing OFAs, there was a miscommunication between PFCA-RR and its counsel regarding the request for the valuation information.

PFCA-RR's petition, therefore, asks the Board to permit its late-filed request for information and to extend retroactively the OFA filing date. BNSF has objected to this request. Allowing the late filing of an OFA over the owning rail carrier's objection would be contrary to Congress's direction to streamline the abandonment and OFA process. See Aban. and Discon. of R. Lines and Transp. Under 49 U.S.C. 10903, 1 S.T.B. 894, 909-10 (1996) (in enacting the ICC Termination Act of 1995, Congress shortened the time for the Board to process OFAs); Railroad

Ventures, Inc. v. STB, 299 F.3d 523, 531 (6th Cir. 2002) (same). Thus, the Board does not generally allow extensions of time for filing OFAs when the line owner objects. See, e.g., Mid-Michigan Railroad, Inc.—Abandonment Exemption—in Kent, Ionia, and Montcalm Counties, MI, STB Docket No. AB-364 (Sub-No. 14X), slip op. at 5 (STB served Sept. 26, 2008).

As a participant in this proceeding, PFCA-RR had notice of the deadline for filing OFAs. It also was aware that the bona fides of its claim that it wanted to provide rail service had been seriously challenged. It could have filed an OFA, or at least sought valuation information, at any time since the filing of BNSF's petition for exemption on August 10, 2009 through December 7, 2009. A miscommunication between PFCA-RR and its counsel does not excuse the late filing of either a request for the valuation information or a request for stay. Nor is the pendency, for a time, of a request for exemption from the OFA provisions a sufficient justification for PFCA-RR's failure to submit a necessary request for the information. Granting PFCA-RR's request for stay to permit the unjustified late request for valuation information and the consequent late filing of an OFA would contravene the time limits imposed in Section 10904.

Given that PFCA-RR had adequate notice and sufficient time to request valuation information from BNSF and submit an OFA, and that BNSF objects to an extension of time to file an OFA, PFCA-RR's request to extend retroactively the time for filing of an OFA will be denied. Because we will not permit the late filing of an OFA, and because PFCA-RR has failed to demonstrate that it otherwise has met the criteria for a stay, PFCA-RR's request for a stay likewise is denied.

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

It is ordered:

1. PFCA-RR's request for a stay is denied.
2. BNSF is not required to respond to any request from PFCA-RR for valuation information.
3. The joint request of the City and the Foundation for leave to late-file a Petition to Reconsider if Stay is Granted is denied as moot.
4. This decision is effective on its date of service.

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