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SERVICE DATE – AUGUST 29, 2007

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34947

DR. DANIEL R. FIEHRER—FEEDER LINE APPLICATION—
LINE OF BNSF RAILWAY COMPANY
BETWEEN HELENA AND GREAT FALLS, MT

Decided: August 27, 2007

We are affirming a decision rejecting the feeder line application of Dr. Daniel R. Fiehrer (Dr. Fiehrer or appellant).

BACKGROUND

On October 27, 2006, Dr. Fiehrer, a citizen of Montana, filed an application under the Feeder Railroad Development Program, 49 U.S.C. 10907 and 49 CFR part 1151, to acquire from BNSF Railway Company (BNSF) a rail line between milepost 118.2 at or near Great Falls, MT, and milepost 210.2 at or near Helena, MT.¹

In a decision served on November 22, 2006, in this proceeding, the Board, through the Director of the Office of Proceedings, rejected Dr. Fiehrer's application because it did not contain the information required by the feeder line procedures at 49 U.S.C. 10907(a) and 49 CFR 1151.3 (November 22 decision). The Director determined that Dr. Fiehrer had not provided sufficient evidence of financial responsibility because he failed to establish his ability to cover the expenses associated with providing rail service over the line for the first 3 years after acquisition of the line. The November 22 decision also outlined additional deficiencies in the application to inform Dr. Fiehrer about the type of information that would be needed to complete the application under 49 CFR 1151, including: the name of the proposed operator, a description of liability insurance, and the public convenience and necessity criteria. The application was rejected without prejudice to allow Dr. Fiehrer to file a new application containing the required information. By pleading filed in December 2006 (Appeal), Dr. Fiehrer appealed the Director's decision. BNSF filed a reply.

¹ Although the milepost designations indicate a rail line of 92 miles, both Dr. Fiehrer and BNSF state that the line is approximately 100 miles in length.

PRELIMINARY MATTER

In his Appeal, Dr. Fiehrer requests information on whether former Chairman Nober had any conversations with STB members regarding this case. Statutory post-employment restrictions applicable to officers and employees of the executive branch set forth at 18 U.S.C. 207 prohibit individuals from engaging in certain activities on behalf of other persons or entities. Former Chairman Nober has not discussed this case with any Board Member.

DISCUSSION AND CONCLUSIONS

Congress has authorized the Board to order the sale of rail lines likely to be abandoned or over which rail service is inadequate.² Before the Board may order one of these so-called “feeder line” sales in a particular case, however, a financially responsible person must file an application to purchase the line and the Board must make certain findings. 49 U.S.C. 10907. To facilitate ruling on the application, the Board requires that the applicant provide detailed information relevant to the required findings. 49 CFR 1151.3.

The Board has delegated to the Director the initial authority to accept or reject feeder line applications. 49 CFR 1011.7(b)(8). In exercising this authority, the Director does not address the merits of an application.³ Instead, he determines whether or not the application is “complete,” that is, whether or not it contains substantially all of the information required by our regulations. See 49 CFR 1151.2(b)(1) and (2). The Board has reserved for itself the consideration and disposition of all appeals of initial decisions issued by the Director to accept or reject feeder line applications. See 49 CFR 1011.2(a)(7). On appeal, the Board, like the Director, does not decide the merits of the feeder line application. Rather, we consider only whether the Director properly determined to accept the application as complete or reject it as incomplete.

Our regulations specify the information required to be included in an initial feeder line application. 49 CFR 1151.3. Among other things, the application must include, in the form of verified statements: information sufficient to demonstrate that the applicant is a financially responsible person (49 CFR 1151.3(a)(3)); estimates of the net liquidation value (NLV) and going concern value (GCV) of the line and evidence in support of these estimates (49 CFR 1151.3(a)(4)); an operating plan that identifies the proposed operator, describes in detail the rail service to be provided, and demonstrates that adequate transportation would be provided for at

² 49 U.S.C. 10907; Cheney R. Co.—Feeder Line Acq., 5 I.C.C.2d 250, 251 (1989), aff’d sub nom. Cheney R.R. Co. v. ICC, 902 F.2d 66 (D.C. Cir. 1990).

³ See Keokuk Junction Railway Company—Feeder Line Acquisition—Line of Toledo Peoria and Western Railway Corporation Between La Harpe and Hollis, IL, STB Finance Docket No. 34355, slip op. at 3 & 5 n.12 (accepting feeder line application as complete and noting that Board was not ruling on the application’s merits).

least 3 years from the date of acquisition (49 CFR 1151.3(a)(7)); and, if the application is based on the public convenience and necessity (PC&N) criteria, evidence that permits the Board to find that those criteria are met (49 CFR 1151.3(a)(11)(i)). The information required in a feeder line application is significant because it seeks to ensure that the sale of the line will advance the fundamental purpose of the statute—to provide an alternative to inadequate rail service or abandonment and an opportunity to preserve feeder lines.

As explained below, the Director properly concluded that Dr. Fiehrer’s application was incomplete.

Financial Responsibility. To demonstrate financial responsibility, a feeder line applicant must show two things. The first is the ability to pay the higher of the NLV or the GCV. 49 CFR 1151.3(a)(3)(i). The Director found that Dr. Fiehrer has failed to make this showing. The Director noted that Dr. Fiehrer’s estimate that the NLV was zero or negative rested on an unsupported assumption that the salvage and cleanup costs would exceed the line’s estimated scrap value. The Director rejected Dr. Fiehrer’s argument that the line must have an NLV of zero or less or otherwise BNSF would have salvaged the line. The Director said that BNSF had given a plausible explanation for keeping the line intact: if rail traffic in the region were to increase sufficiently, it could reopen the line without having to invest millions of dollars to reacquire the real estate and rebuild the line. On appeal, Dr. Fiehrer gives us no reason to doubt the rationale BNSF provided for keeping the line intact. Nor does he point to any evidence that the Director overlooked.⁴

The second showing needed to demonstrate financial responsibility is that the applicant could cover expenses associated with providing rail service over the line for 3 years from the date of acquisition. 49 CFR 1151.3(a)(3)(ii). The Director stated that Dr. Fiehrer provided no evidence that any local shipper would seek service over the line, no evidence that other rail carriers would route rail cars over the line or seek trackage rights to use the line, and no evidence that the line would make a profit. On appeal, Dr. Fiehrer asserts that he identified two shippers who would use the line if he acquired it, but he does not name them.

Our review of Dr. Fiehrer’s application reveals, at most, one potential shipper, Gwynn Lumber & Reload, Inc. Gwynn Lumber’s letter is ambiguous; it does not state that Gwynn Lumber would use the line if purchased by Dr. Fiehrer, but only that reopening the line would provide “a more direct route” for connecting to the Union Pacific and another carrier. Liberally

⁴ After filing this appeal, Dr. Fiehrer submitted a statement from the Montana Department of Revenue estimating the value of the land at issue to be \$16,177.12, assuming it was classified as grazing land. In a later letter, Dr. Fiehrer submitted a quote for removal of the track and related materials. Even assuming, however, that those letters were prima facie evidence of the land’s value and the cost of salvaging the line, respectively, Dr. Fiehrer still has not provided us with evidence of the value of the track and related materials. Thus, we could not calculate a net liquidation value for the line based on what he has presented.

construed, Gwynn Lumber's letter might be read to suggest that the company would ship over the Helena-to-Great Falls line were the line reopened. But the letter fails to say how much traffic on the line Gwynn Lumber would generate. Thus, the letter does not support a finding that Dr. Fiehrer could cover the expenses associated with the line's operation.

Our review of the application reveals no other potential shipper. The application does include letters from Excel Transportation Services (a rail equipment supplier) and Montana Rail Link (a shortline rail carrier), but neither of these letters supports Dr. Fiehrer's claim of financial responsibility because neither company is a potential shipper. In fact, Montana Rail Link's letter tends to undermine Dr. Fiehrer's claim. In its letter, Montana Rail Link said that it was not interested in operating the Helena-to-Great Falls line because the line "has little, if any, customer base to support the cost of maintenance and operation." In short, Dr. Fiehrer has not presented evidence that he could cover the expenses associated with 3 years of rail operations based on revenues from shipments over the line.

Dr. Fiehrer suggests that he could fund 3 years of rail operations on the line out of his personal net worth or, if needed, through an appropriate revolving line of credit. But Dr. Fiehrer's total net worth would be relevant to the issue of how he would cover the new railroad's operating expenses only if he were willing to pledge adequate personal assets either to fund the railroad directly or as collateral for a loan, neither of which he has done. And Dr. Fiehrer's suggestion that he could rely on a line of credit is insufficient to show financial responsibility because he has not actually obtained a firm commitment for any line of credit.⁵

For these reasons, the Director properly concluded that Dr. Fiehrer had not presented evidence of financial responsibility.

Named Operator and Insurance. The Director also found Dr. Fiehrer's application deficient in that it failed to name the proposed operator of the line, as required under 49 CFR 1151.3(a)(7). On appeal, Dr. Fiehrer claims that requiring him to name an operator placed him in a "catch-22" in that he had to attest in his application that he was not "fronting" for any railroad operator. Dr. Fiehrer does not further explain this supposed dilemma. If he is referring to the statutory prohibition on any Class I or Class II rail carrier from qualifying as a financially responsible person, then he is mistaken in thinking that our regulation placed him in an impossible situation. Nothing in the feeder line statute or our regulations prevented Dr. Fiehrer from naming a Class III rail carrier to be the line's operator.

⁵ See Forty Plus Foundation/Manhattan Central Railway Systems, LLC—Feeder Line Acquisition—The Manhattan Highline, STB Finance Docket No. 34606, slip op. at 4 (STB served Jan. 25, 2005) (rejecting feeder line application where applicant failed to show a committed source of funds for the line's operation); PYCO Industries, Inc.—Feeder Line Acquisition—South Plains Switching, Ltd. Co., STB Finance Docket No. 34844, slip op. at 4 (STB served June 2, 2006) (same).

Dr. Fiehrer suggests another reason for his failure to name an operator. Specifically, he says that, although three qualified shortline operators have allegedly asked to be the operator, they wish to remain anonymous until the application is approved and protective orders issued to avoid possible economic reprisals by BNSF. In order for us to allow these proceedings to go forward, however, we must have evidence from Dr. Fiehrer of a viable operating plan, which necessarily includes a proposed operator. Vague assertions about fear of retribution do not excuse Dr. Fiehrer's failure to provide this information.⁶

The Director also found the application deficient for failing to describe the liability insurance coverage carried by Dr. Fiehrer or his proposed operator, which we require to assure the protection of the public. On appeal, Dr. Fiehrer maintains that he "will obtain quotes" for liability insurance. But Dr. Fiehrer does not state that he will obtain liability insurance, nor does he describe the coverage for which he will obtain these quotes. This showing is inadequate for us to allow this proceeding to go forward now.

Public Convenience and Necessity. The Director found that Dr. Fiehrer's application provided no evidence as to three elements of the PC&N test: that BNSF has refused to make the necessary efforts to provide adequate transportation to shippers, that transportation is inadequate for a majority of shippers on the line, and that the sale would likely improve transportation for the line's shippers.

On appeal, Dr. Fiehrer argues that the lack of service for over 6 years is prima facie evidence of inadequate service. This is not true, however, if during that time there has been no request for service. Here, Dr. Fiehrer does not claim that BNSF refused a reasonable request for service on the line during the last 6 years.

Dr. Fiehrer also contends that it "is obvious to any casual observer that sale of the line would likely result in improved railroad transportation for shippers." Dr. Fiehrer maintains that, for overhead traffic, the sale would result in a more direct route, lower transit times, and better turnaround times with the possibility of lower total costs. But we agree with the Director that the lack of statements of support from any shippers or other potential connecting railroads undermines the likelihood that a sufficient number of overhead shipments would occur. Dr. Fiehrer suggests that current BNSF shippers who could conceivably ship over the line were it reopened are reluctant to express support for the application out of fear of economic reprisals. But an equally plausible reading of the silence of these shippers is that they are satisfied with their current service. PYCO, slip op. at 3. Indeed, Gwynn Lumber, the one potential shipper identified in the application, says that its current service over a different line "appears to be working well for us."

⁶ Cf. PYCO Industries, Inc.—Feeder Line Acquisition—South Plains Switching, Ltd. Co., STB Finance Docket No. 34844, slip op. at 3 (STB served July 3, 2006) (PYCO) (rejecting feeder line applicant's claim that the silence of a majority of the line's shippers should be excused because shippers may be reluctant to speak out for fear of retribution).

In sum, Dr. Fiehrer has not shown that the Director erred in rejecting his feeder line application as incomplete. We now address Dr. Fiehrer's request for clarification.

Request for Clarification.

In his Appeal, Dr. Fiehrer asserts that his October 27, 2006 filing was merely a "Preliminary Application" and asks the Board for clarification of the November 22 decision so that he can complete the application. Specifically, appellant states that he needs clarification on seven matters, which we discuss below.

First, appellant requests clarification on the number of letters of support from shippers who would use the line that the Board requires to support the application. There is no specified number of supporting letters required from shippers because it is case-specific as to how many shippers would use a particular line, although there must be some evidence of shipper support.

Second, appellant requests the definition of financial responsibility in the statute. According to the statute, a "financially responsible person" means "a person who (1) is capable of paying the constitutional minimum value of the railroad line proposed to be acquired; and (2) is able to assure that adequate transportation will be provided over such line for a period of not less than 3 years." 49 U.S.C. 10907(a). The "constitutional minimum value" is presumed to be the greater of the NLV or GCV of the line. 49 U.S.C. 10907(b)(2).

Third, appellant requests the acceptable amount and type of liability insurance coverage required by the Board. While the Board does not require a specific dollar amount for liability insurance under 49 CFR 1151.3(a)(8), the amount obtained needs to be sufficient to protect the public from derailments and accidents. The burden is on the applicant to show that the amount of insurance coverage is of a sufficient level.

Fourth, appellant requests clarification on the public interest served in allowing the line to remain "closed." When a rail line is not listed on the owning carrier's system diagram map as a candidate for future application for abandonment authority, a feeder line application may be granted only if the Board finds that the PC&N require or permit the sale of the rail line. See 49 U.S.C. 10907(c)(1). An application under this standard must contain detailed evidence as discussed in the November 22 decision.⁷ It is not the Board's role to explain the public interest

⁷ The Board must be able to find, in accordance with 49 U.S.C. 10907(c)(1), all of the following: "(A) the rail carrier operating such line refuses within a reasonable time to make the necessary efforts to provide adequate service to shippers who transport traffic over such line; (B) the transportation over such line is inadequate for the majority of shippers who transport traffic over such line; (C) the sale of such line will not have a significantly adverse financial effect on the rail carrier operating such line; (D) the sale of such line will not have an adverse effect on the overall operational performance of the rail carrier operating the line; and (E) the

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in the status quo but rather the applicants' burden to show that the PC&N requires or permits the sale.⁸

Fifth, appellant requests clarification on how the GCV is defined in the statute with respect to "speculation" of undefined future business. The statute does not define GCV; nor does it address the GCV with respect to "speculation" of undefined future business. Courts have defined GCV as what an entity is worth as an operating business (as opposed to its break-up value) based on its current operations. United States v. Miller, 317 U.S. 369, 375 (1942). The Board computes GCV by dividing the current anticipated operating profit (revenues less costs) by an earnings multiplier (the pre-tax equivalent of the railroad industry cost-of-capital rate). See Caddo Antoine and Little Missouri Railroad Company—Feeder Line Acquisition—Arkansas Midland Railroad Company Line Between Gurdon and Birds Mill, AR, STB Finance Docket No. 32479 (STB served May 5, 2000). Here, to determine the GCV of an undefined future business, Dr. Fiehrer would need to evaluate the value of any potential business.

Sixth, appellant asks the Board to allow him to conduct discovery to obtain information from BNSF so that he can submit a "complete" application. The appellant asserts that the information necessary to determine the constitutional minimum value of the line hinges on the NLV of the line, and that the NLV can only be determined by discovery from BNSF. Appellant further asserts that, if the Board were to reconsider the November 22 decision and conditionally grant his feeder line application and discovery requests with the appropriate protective orders, appellant would provide the Board with a proposed operating plan, the names of potential carriers to serve the line, and quotes for liability insurance. We reject appellant's claim that he should now be able to seek discovery from BNSF and file a revised, complete application. An incomplete application will only be accepted as "conditional" under 49 CFR 1151.2(d)(1) if the information required to complete the application is primarily or exclusively within the personal knowledge of the owning carrier. Because most of the information omitted from the application goes to the heart of what is required in feeder line cases (funding sources, operating plans, insurance, etc.) and is in appellant's possession, rather than BNSF's, the application is defective. See Forty Plus Foundation/Manhattan Central Railway Systems, LLC—Feeder Line Acquisition—The Manhattan Highline, STB Finance Docket No. 34606 (STB served June 13, 2005). Thus, Dr. Fiehrer will not be permitted to revise his initial filing in this docket.

(. . .continued)

sale of such line will be likely to result in improved railroad transportation for shippers who transport traffic over such line."

⁸ Appellant again argues that BNSF, which appellant maintains is market dominant in Montana, has not operated on the line for 6 years. He also states that the sale of the line would not have an adverse financial impact on BNSF and that BNSF would actually benefit from the additional interchanges in BNSF's yard. Finally, appellant reiterates his prior assertion that the sale of the line would result in improved transportation for shippers on the line.

Seventh, Dr. Fiehrer asks how can he obtain a firm commitment from a financial institution or pledge to liquefy his net worth without a determination of the constitutional minimum value or NLV. Regarding NLV, appellant has submitted evidence, as noted above, on certain costs necessary for determining the NLV and could hire an expert just as easily as could BNSF to determine the other costs needed to calculate the value of the line as either the NLV or the GCV with respect to future business on the line. With this information, appellant could seek a commitment from a financial institution.

Appellant asserts that the Director prematurely made his decision immediately after receiving BNSF's response without the benefit of appellant's reply. The chronology of events shows, however, that the Director acted reasonably. BNSF filed its response to Dr. Fiehrer's application on November 13, 2006. The Director's decision was served on Wednesday, November 22, 2006; Dr. Fiehrer filed his reply to BNSF's response on the afternoon of Friday, November 24, 2006. Dr. Fiehrer asserts that the Director's decision could have been issued as late as the close of business on Monday, November 27, 2006. But our regulations do not require the Director to wait until the last permitted day to issue a decision, nor are parties entitled to rest on the assumption that he will do so.

Nor has there been any prejudice to Dr. Fiehrer. He does not identify any arguments or evidence the Director missed because of the alleged premature decision. Moreover, Dr. Fiehrer has had an opportunity to fully present his arguments in this appeal. We have considered those arguments and, for the reasons, explained above, find them lacking.

In sum, Dr. Fiehrer's arguments are unpersuasive. Our regulations are specific as to the necessary contents of an application. 49 CFR 1151.3. In a clear and concise manner, the November 22 decision spelled out the deficiencies in Dr. Fiehrer's application and stated how those deficiencies could be rectified by a new filing. Appellant has not provided new information or arguments to alter that determination. This decision is without prejudice to the right of Dr. Fiehrer to file a new application that includes all of the required information.

It is ordered:

1. Dr. Fiehrer's appeal of the Director's decision served on November 22, 2006, is denied.

2. This decision is effective on its date of service.

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

Vernon A. Williams
Secretary