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SERVICE DATE – JANUARY 25, 2005

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34606

FORTY PLUS FOUNDATION/MANHATTAN CENTRAL RAILWAY SYSTEMS, LLC–
FEEDER LINE ACQUISITION–THE MANHATTAN HIGHLINE

Decided: January 24, 2005

On December 30, 2004, Forty Plus Foundation/Manhattan Central Railway Systems, LLC (MCRS or applicant)¹, filed an application under the Feeder Railroad Development Program. See 49 U.S.C. 10907; 49 CFR Part 1151. MCRS seeks to acquire from Consolidated Rail Corporation (Conrail) and CSX Corporation and CSX Transportation, Inc. (collectively, CSX)² a 1.45-mile rail line (the Highline)³ that runs over an elevated viaduct between 34th Street and Gansevoort Street in Manhattan in New York, NY. On January 13, 2005, the City of New York (the City) submitted a reply arguing that MCRS’s application is incomplete and should be rejected.⁴

¹ Forty Plus Foundation describes itself as a not-for-profit employment support organization founded in 1939 and says that it developed MCRS to be a for-profit railroad. Applicant describes MCRS as a “Class III shortline railroad,” but does not indicate that MCRS has ever received any authority from this agency or that it provides any rail service.

² CSX Corporation is part owner of, and asset manager for, Conrail. CSX Transportation, Inc. is a wholly owned subsidiary of CSX Corporation and the operator of the Highline along with New York Central Lines LLC (NYCLLC), a limited liability company wholly owned by Conrail. NYCLLC is the successor to Conrail’s property interests in the Highline.

³ Although the parties here refer to the Highline as 1.6 miles in length, previous decisions involving the Highline have consistently described it as a 1.45-mile line. The Highline is currently the subject of an adverse abandonment proceeding before the Board. Chelsea Property Owners–Portion of the Consolidated Rail Corporation’s West 30th Street Secondary Track in New York, NY, Docket No. AB-167 (Sub-No. 1094)A.

⁴ Prior to filing its application, MCRS filed a notice of intent to file a feeder railroad development application on October 26, 2004. On November 23, 2004, the City filed a petition to strike the notice of intent and to dismiss this proceeding, and Conrail and CSX filed a statement supporting the City’s petition. MCRS replied in opposition to the City’s petition on December 9,

(continued...)

Under 49 U.S.C. 10907(b)(1), the Board is directed to require the sale of a rail line to a financially responsible person if the public convenience and necessity (PC&N) permits or requires the sale. MCRS contends that the proposed sale is required under the PC&N criteria (set forth at 49 U.S.C. 10907(c)(1)(A)-(E)), and that it is a financially responsible person willing to pay not less than the line's constitutional minimum value. Under 49 U.S.C. 10907(b)(2), constitutional minimum value is defined as the greater of a line's net liquidation value (NLV) or going concern value (GCV). A financially responsible person is defined as a person able to pay the higher of a line's NLV or GCV and cover the expenses associated with providing rail service over the line for at least the first 3 years of operation. See 49 U.S.C. 10907(a).

MCRS estimates that the Highline has an NLV of \$41. Applicant's estimate apparently relies on an offer of financial assistance (OFA) made in a proceeding to purchase the Highline in 1992.⁵ In that proceeding, the offeror sought to purchase the Highline for \$10, based on the ICC's determination that, in the event of any abandonment, Conrail would be obligated to demolish the viaduct at an estimated cost of between \$7 million and \$34 million,⁶ which the offeror argued meant the line was essentially valueless. Presumably under the same rationale, MCRS offers a nominal value (\$41) that allegedly takes into account inflation. Applicant asserts that the Highline has no GCV "since the line has been dormant and steeped in litigation over the past 20 years." Application at 32.

MCRS offers to pay \$41 for the line. As an alternative, applicant offers to accept the line as a charitable donation along with a minimum \$7 million cash contribution, for which, it contends, Conrail and CSX could obtain a tax deductible benefit and be relieved of all future liability and expenses.⁷

⁴(...continued)

2004. In light of the fact that MCRS subsequently filed a formal application, we will deny the City's petition to strike as moot. In the notice, MCRS asserted that it is affiliated with, and supported by, New York Cross Harbor Railroad Co. (NYCH), assertions that NYCH has disavowed.

⁵ The Interstate Commerce Commission (ICC) rejected the OFA. 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) (ICC served Nov. 30, 1992).

⁶ Chelsea Property Owners–Aban.–The Consol. R. Corp., 8 I.C.C.2d 773 (1992) (Chelsea), aff'd sub nom. Consolidated R. Corp. v. I.C.C., 29 F.3d. 706 (D.C. Cir. 1994).

⁷ In a letter to the Board filed on November 23, 2004, Conrail and CSX disavow any suggestion that they would be interested in financially supporting MCRS's "inchoate proposal."

To cover the costs of operation, applicant states that it would rely on operating revenues, commercial loans, and its relationship with its “vast and growing network” of corporate and public contacts, donors, and financial institutions. Applicant adds that it is fully eligible to participate in the Federal Railroad Rehabilitation & Improvement Program (RRIF), which has earmarked \$1 billion for loans for shortline and regional railroad projects, and that it would also qualify for a number of Federal, state, and local mass transit and freight grant programs. Finally, as a source of financial support, applicant cites an affiliation with Morristown & Erie Railway Inc. (M&E).⁸

MCRS contends that its acquisition of the line would relieve Conrail and CSX of an unwanted liability, while providing the City with a revitalized Highline. Applicant states that it would provide efficient rail freight and passenger transit services over the Highline, which, it asserts, would eliminate environmental hazards and reduce vehicular accidents, traffic congestion, and air and noise pollution. MCRS adds that it would incorporate state-of-the-art intermodal rail freight technology to provide automated and on-demand rail service 24 hours a day, 7 days a week.⁹

In reply, the City argues that MCRS has failed to satisfy the essential requirements for a complete feeder line application. The City maintains that MCRS’s application bears no relation to the purpose of the feeder line program, which is to protect shippers and communities from the loss of rail service. The City also argues that the application does not provide sufficient evidence as to how MCRS would pay to restore and maintain the line, or how it would cover the other costs associated with providing rail service over it. The City states that applicant has described no specific traffic or traffic volumes that it seeks to carry and has named no shippers that want to move any traffic. The City argues that applicant has thus not proven that it is a financially responsible person and urges the Board to reject MCRS’s application as incomplete.¹⁰

⁸ On January 3, 2005, applicant submitted a letter in which M&E’s Executive Vice President/Chief Operating Officer states that M&E would collaborate with MCRS to reactivate the Highline for future rail service. However, there is no indication that M&E has pledged financial support for the restoration or operation of the line.

⁹ MCRS also argues that no public project or alternate use for the right-of-way would be impeded by its proposed operation of rail service on the Highline. But, as MCRS is aware, the City has proposed to preserve the right-of-way under the National Trails System Act, 16 U.S.C. 1247(d).

¹⁰ The City also argues that applicant has failed to demonstrate that the PC&N justifies granting the application. In light of the findings made here, that issue need not be addressed here.

DISCUSSION

Under the Board's feeder line regulations at section 1151.3(a)(3), to demonstrate financial responsibility an applicant must demonstrate its ability: (i) to pay the higher of the NLV or GCV of the line; and (ii) to cover expenses associated with providing services over the line (including, but not limited to, operating costs, rents, and taxes) for at least the first 3 years after acquisition of the line. MCRS's application does not contain any evidence to support the second requirement. Therefore, even assuming arguendo that the line could properly be valued at \$41, MCRS has not demonstrated that it is a financially responsible person under 49 U.S.C. 10907(a). Accordingly, MCRS's feeder line application will be rejected.

Applicant states that it would cost \$10 million to restore the track structure to Class 1 track condition and \$50,000 per month for the first 12 months to operate the line. Applicant also estimates the cost of rehabilitating the line and operating it for 3 years to be \$30 million. But MCRS has not established that it has any financial resources of its own and does not show where or how it would otherwise obtain these funds. Applicant alludes to several possible sources of income, including the RRIF loan program and a number of Federal, state, and local mass transit and freight grant programs. The mere existence of these programs does not represent a committed source of funds for MCRS, and MCRS has failed to show that funding would be likely for its proposal. Applicant also claims that future funding needs would be satisfied from public and private sources or commercial loans, but it has failed to provide any details regarding these sources.

MCRS also claims that a fully-operational Highline would be self-sufficient and profitable. But applicant has failed to provide any evidence supporting that claim. Applicant's operating plan is sketchy at best. Applicant fails to identify any specific traffic it plans to move or any shippers that want to move any traffic. MCRS has not submitted any contracts, affidavits, or other verification to support its contention that there are shippers along the Highline that currently desire service. To the Board's knowledge, no shippers have sought freight service along the Highline for approximately 20 years, and MCRS's assumptions about operating revenues and the interest of shippers are pure speculation.

Furthermore, it must be noted that the easements pursuant to which the owners of the Highline may operate require the owner to absorb the cost of demolishing the viaduct when the easements terminate. Chelsea, 8 I.C.C.2d at 775. Consequently, if MCRS were to seek the abandonment of the Highline in the future, there is no evidence that it would have the resources to fund a multi-million dollar demolition.

In summary, given the history of this line and all of the other circumstances presented here, MCRS has failed to establish that it is a financially responsible person able to cover the expenses

associated with providing rail service over the line for the first 3 years of operation. As a result, MCRS's application will be rejected.

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

It is ordered:

1. The City's petition to strike MCRS's notice of intent is denied as moot.
2. MCRS's feeder line application is rejected.
3. This decision is effective on the date of service.

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

Vernon A. Williams
Secretary