

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 167 (Sub-No. 1190X)

CONSOLIDATED RAIL CORPORATION—ABANDONMENT EXEMPTION—IN HUDSON
COUNTY, N.J.

Decided: May 13, 2010

By decision served on August 12, 2009, the Board directed Eric Strohmeier and James Riffin (collectively, Offerors) to show cause why the Board should not exempt from the offer of financial assistance (OFA) provisions of 49 U.S.C. § 10904 the portion of the subject rail line for which Offerors have filed an OFA. This decision exempts the entire Line in this proceeding from 49 U.S.C. § 10904.

BACKGROUND

Consolidated Rail Corporation (Conrail), CSX Transportation, Inc. (CSXT), and Norfolk Southern Railway Company (NS) jointly filed a verified notice of exemption under 49 C.F.R. § 1152 Subpart F—Exempt Abandonments and Discontinuances of Service for Conrail to abandon, and for CSXT and NS to discontinue service over, a 2.27-mile portion of a line of railroad known as the Lehigh Valley Main Line (the Line), between railroad milepost 2.90± and railroad milepost 5.17±, in Jersey City, Hudson County, N.J. Notice of the exemption was served and published in the Federal Register. Notice of Abandonment and Discontinuance Exemption, 73 Fed. Reg. 74,801 (Dec. 9, 2008). The exemption was scheduled to become effective on January 8, 2009, unless it was stayed by the Board or unless a formal expression of an intent to file an offer of financial assistance (OFA) under 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27(c)(2) was filed by December 19, 2008.

On December 19, 2008, CNJ Rail Corporation (CNJ) filed a formal expression of intent to file an OFA to purchase the Line and a request to toll the time period for filing an OFA. In the filing, CNJ requested that Conrail provide it with the information set forth in 49 C.F.R. § 1152.27(a), as well as certain additional information relating to Conrail's present, prior, or future use of the Line, including all valuation maps for the Line. By decision served on January 7, 2009, the Board granted CNJ's request to toll the deadline for filing an OFA until 10 days after Conrail provided CNJ with the information required under 49 C.F.R. § 1152.27(a).

In a decision served on May 26, 2009, the Board, inter alia, directed Conrail to provide CNJ with a minimum purchase price for the Line that meets the requirements of 49 C.F.R. § 1152.27(a). On July 30, 2009, Conrail filed with the Board a letter it sent to CNJ, which included a valuation of the Line. In that letter, Conrail explained that it had divided the Line into three parcels, and that it had received appraisals for Parcels A and B. Conrail stated that Parcel

A, consisting of “5.73 acres between Chapel and East Linden Avenues,” is valued at \$13,600,000, and that Parcel B, consisting of “.06 acres along the south side of Communipaw Avenue,” is valued at \$90,000. Conrail explained that it did not seek an appraisal for Parcel C, the remainder of the Line, because that portion was no longer owned by Conrail, but rather, by third parties, including New Jersey Transit Corporation (NJ Transit). Consequently, Conrail assigned Parcel C a value of \$0. Conrail stated that none of the parcel valuations included a value for track material, because no rail structures remained on the Line.

Eric Strohmeier, Vice President of CNJ, and James Riffin jointly filed an OFA for Parcel C on August 7, 2009, and supplemented their OFA on August 10, 2009.¹ They offered \$5 for “all the track material, bridges, and any and all other items on, appurtenant to, or associated with, the Line, including any and all interests, legal or equitable, that [Conrail] may have in, or which is associated with, the Line, including all licensing and any other agreements associated with the Line.”

In Consolidated Rail—Abandonment Exemption—in Hudson County, N.J., Docket No. AB 167 (Sub-No. 1190X) (STB served Aug. 12, 2009), the Board noted that Parcel C was owned by NJ Transit, was being used for mass transit purposes, and had not seen an active shipper in at least two years. Consequently, the Board directed Offerors to show cause why the agency should not exempt Parcel C from the OFA provisions of 49 U.S.C. § 10904. On September 1, 2009, Offerors filed an answer and a separate filing containing supplemental information. Conrail filed a response in support of exempting the Line from the OFA process on September 11, 2009. Likewise, in support of an exemption, NJ Transit filed as an intervener on September 21, 2009. On September 23, 2009, CNJ and Offerors requested permission to file a reply to NJ Transit, which the Board granted by decision served on September 28, 2009. Offerors filed their reply on September 30, 2009; additionally, Offerors filed a second request to amend to their OFA,² a “Motion for Leave to Reply to Conrail’s New Issues,” and other supplemental information, including unverified letters from persons they describe as potential shippers.

PRELIMINARY MATTER

On October 2, 2009, Conrail filed a motion to strike as false certain statements and related exhibits in Offerors’ reply. Further, Conrail maintains that the Board should strike Offerors’ September 30, 2009 request to amend their OFA and the accompanying letters because

¹ On September 11, 2009, Offerors filed a motion to amend their OFA to exclude the portion of the Line between milepost 4.9 and milepost 5.17. By letter filed on September 29, 2009, the City of Jersey City expressed support for the amendment request.

² Offerors ask that their OFA be amended to exclude the portion of the Line that lies between milepost 2.90 and milepost 3.3. Instead, they propose to acquire, via their OFA, the portion that lies between milepost 3.3 to the south margin of Chapel Avenue (near milepost 4.53).

the material was filed too late and without justification. Conrail states that Offerors have abused the OFA process by dragging out this proceeding. Also, Conrail asserts that the portion of Offerors' filing labeled "New Issues Raised by Conrail" does not in fact respond to new issues argued by Conrail, but instead is a pretext for filing an improper reply to a reply. Offerors filed a response on October 6, 2009.

We will deny Conrail's motion to strike and will accept the proffered filing in the interest of compiling a more complete record in this matter.

DISCUSSION AND CONCLUSIONS

In the Consolidated Rail—Abandonment Exemption—in Hudson County, N.J., Docket No. AB 167 (Sub-No. 1190X) (Aug. 12, 2009), Offerors were directed to address the issue of whether the Board should grant an exemption in this proceeding from the OFA provisions of 49 U.S.C. § 10904. Based on our evaluation of the record, we will grant such an exemption.

The OFA provisions at 49 U.S.C. § 10904 permit a party genuinely interested in providing continued rail service on a line that would otherwise be abandoned to acquire that line for such continued rail service. Union Pac. R.R.—Aban. Exemption—in Lassen County, & Washoe County, Nev., Docket No. AB 33 (Sub-No. 230X), slip op. at 2 (STB served Sept. 19, 2008). Indeed, consistent with the Board's own policy—rooted in Congress's rail transportation policy—the Board generally favors continued rail service over non-rail uses. See 49 U.S.C. § 10101.

The Board, however, has on numerous occasions granted exemptions from 49 U.S.C. § 10904 when the record shows that the right-of-way is needed for a valid public purpose and there is no overriding public need for continued rail service. For example, in BNSF Railway—Petition for Declaratory Order, Docket No. 35164, et al., slip op. at 9-10 (STB served May 20, 2009),³ the Board, on its own initiative, exempted a line segment from the OFA provisions at 49 U.S.C. § 10904. There, the Board weighed the public need for rail service against the public purpose of replacing a deteriorating overburdened highway. In that case, there had been no local traffic on the segment for 10 years and the right-of-way was necessary for an important interstate highway project. An exemption from the OFA process was appropriate in those circumstances.⁴ A further example involves offeror Riffin. In Norfolk Southern Railway—Abandonment Exemption—in Norfolk and Virginia Beach, Va., Docket No. AB 290 (Sub-No. 293X) (STB

³ Petition for review pending sub nom. Edwin Kessler and James Riffin v. STB, No. 09-1161 (D.C. Cir. filed June 11, 2009).

⁴ See also CSX Transp., Inc.—Aban. Exemption—in Pike County, Ky., Docket No. AB 55 (Sub-No. 653X), slip op. at 1, 2-3 (STB served Sept. 13, 2004) (expansion of a highway; no local traffic).

served Nov. 6, 2007), pet. for review dismissed, sub nom. Riffin v. STB, No. 07-1483 (D.C. Cir. Apr. 22, 2009), the Board granted a request to exempt the line from the OFA provisions despite Riffin's filing a notice of intent to file an OFA. There, the City of Norfolk planned to acquire a segment of the line at issue as part of a light rail commuter passenger project; those plans balanced against the lack of evidence of continued public need for freight rail service warranted granting an exemption from the OFA provisions.

As in earlier cases, we will balance any demonstrated need for continued rail service here against another public purpose for the Line. Offerors maintain that there is a need for rail service on the Line. They present a pro forma business plan to establish an aggregates transload facility and submit letters addressed to the Board from two concrete companies that support Offerors' "efforts to create an aggregates transload facility." Offerors claim that their facility would also be able to serve two massive public works projects that have recently begun: a rail tunnel project under the Hudson River and a bridge reconstruction project over the Hackensack River. Additionally, Offerors assert that they have communicated with representatives from 10 quarries, 23 ready-mix concrete plants, and 7 asphalt plants, all of whom have "expressed a strong interest in creating / utilizing Offerors' proposed aggregates transload facility." (Offerors' Sept. 1, 2009 Answer to Board's August 2009 Decision, ¶ 11). Offerors also assert that area shipper Clayton Sand Company (Clayton) used freight service 20 years ago, but was forced to rely on trucking when Conrail stopped Clayton from storing its sand at a rail facility. Moreover, Offeror Riffin indicates that he is seeking a location near Jersey City to store rail cars. Finally, Offerors assert that their proposed freight operations would not interfere with NJ Transit's mass transit operation because they would be conducted between 2:11 a.m. and 5:17 a.m., when no commuter trains are scheduled.

Conrail argues that the Line should be exempted from the OFA provisions at 49 U.S.C. § 10904 because there is no overriding need for freight service and because an OFA would interfere with a valid public purpose. According to Conrail, there are currently no active shippers on the Line and the only entity that is physically located on the Line that could use rail service, Suydam Partners, has no interest in doing so.

Conrail and NJ Transit argue that the OFA would interfere with a valid public purpose because Offerors' proposal to cross the commuter line at grade at mileposts 3.0 and 3.9 would disrupt the existing mass transit operation. Specifically, Bernadette Gill, NJ Transit's Director of Property Management, states that, "NJ Transit acquired the property comprising of the portions of Parcel C in order to construct, operate and maintain the Hudson Bergen Light Rail System."⁵ And Joseph North, NJ Transit's General Manager Light Rail and Contracts, explains that installing a freight system across the light rail system would "severely interfere with its public transit operation and create unacceptable safety risks." Mr. North also states that the system operates around the clock and that Offerors' proposed operation would traverse directly through the system's layover storage yard and maintenance facility.⁶

⁵ NJ Transit's Sept. 19, 2009 Motion to Intervene, V.S. of Bernadette Gill, ¶ 3.

⁶ Id., V.S. of Joseph North.

Offerors' evidence of a need for continued rail service is lacking. There have been no active shippers on the Line for several years and, consequently, no shipper will lose service if an OFA exemption is granted here. Moreover, of the 40 businesses Offerors state they contacted to support their proposed transload facility, only two have actually submitted letters in support and neither makes a firm commitment to use such a facility were it to be created. None of the other potential shippers mentioned in the record (Dameo Trucking, Inc., Suydam Partners, Clayton) has provided any written support for Offerors' proposal; indeed, Clayton and an operator with whom it is conducting business have filed separate letters disassociating themselves from Offerors and their proposal. Although Offerors suggest that traffic from two large area construction projects might become available to them, the absence of any concrete support for that claim renders those potential sources too speculative.

Against this weak demonstration of shipper need we must balance the need for the light rail system to continue to use Parcel C to serve thousands of commuters daily—a valid and valuable public purpose.⁷

For all of the above reasons, we will exempt Parcel C from the OFA provisions at 49 U.S.C. § 10904.

We will also exempt from the OFA process the remainder of the Lehigh Valley Main Line between railroad milepost 2.90± and railroad milepost 5.17±. Freight rail service on any rail line constructed on Parcels A and B would be highly unlikely in the absence of Parcel C since Parcels A and B rely on Parcel C to link to track that has access to interstate rail lines. Moreover, as we are exempting the entire Line, we will not rule on Offerors' motions to amend their OFA as those requests will be mooted by our action here.

In their OFA, Offerors provide a personal financial statement for Riffin to support the assertion that Offerors are financially responsible.⁸ Even if we did not exempt the Line from § 10904, Riffin could not be considered a financially responsible party, as he recently filed for bankruptcy protection. Voluntary Petition, In re Riffin, No. 10-11248 (Bankr. D. Md. Jan. 20, 2010). In that petition, Riffin claimed assets of \$400,000, liabilities of over \$4,000,000, no specialized rail equipment, and only modest income from rental property. Insolvency is inconsistent with the financial responsibility to acquire and operate a railroad under the OFA provisions. Moreover, a bankruptcy proceeding could result in any rail line Riffin might acquire becoming encumbered property, thereby jeopardizing its use for continued rail service, contrary to the fundamental purpose of 49 U.S.C. 10904.

⁷ Moreover, we find no merit to Offerors' claim that they could cross the light rail system at 2 points during a 3-hour window in the early morning hours without interfering with commuter operations. Offerors' window is based solely on a current commuter train schedule that does not take into account any off-duty light rail movements, maintenance needs, or future schedule changes. As such, that schedule is too unrealistic a basis upon which to allow a conflicting freight rail operation to resume.

⁸ Offerors' offer of fin. assistance 3, Aug. 7, 2009.

One final matter requires discussion. A number of serious concerns about Conrail's actions (or inactions) with respect to the Line have surfaced in this proceeding. As a result, in Consolidated Rail Corporation's Sales and Discontinuances, STB Ex Parte No. 695, served concurrently with this decision, we are instituting an investigation into Conrail's conveyance of the Line to NJ Transit in 1996 without seeking or obtaining Board authority and its filing for an abandonment exemption in 2008 without informing the Board that it no longer owned portions of the Line to be abandoned.

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

It is ordered:

1. Conrail's motion to strike is denied.
2. The entire Lehigh Valley Main Line at issue in this proceeding, between railroad milepost 2.90± and railroad milepost 5.17 ±, is exempted from the OFA provision at 49 U.S.C. § 10904.
3. Conrail's abandonment exemption will be effective 30 days from the service date of this decision.
4. This decision will be effective 30 days from its service date.

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