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SERVICE DATE – JULY 22, 2011

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 33 (Sub-No. 297X)¹

UNION PACIFIC RAILROAD COMPANY—ABANDONMENT EXEMPTION—IN
LAFAYETTE COUNTY, MO.

Digest:² The Board denies a request by Robert Alan Kemp, d/b/a Nevada Central Railroad (NCR), to restart the process for seeking a forced sale of a rail line authorized for abandonment.

Decided: July 18, 2011

BACKGROUND

Union Pacific Railroad Company (UP) filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments to abandon 2.91 miles of a line of railroad, known as the Lexington Industrial Lead, between milepost 246.49 near Myrick and milepost 243.58 near Lexington, in Lafayette County, Mo. (the Line). Notice of the exemption was served and published in the Federal Register on February 18, 2011 (76 Fed. Reg. 9,634-35).

Under the Board's rules, the exemption was scheduled to become effective on March 22, 2011, unless it was stayed by the Board or a formal expression of 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 February 28, 2011. On February 28, 2011, Robert Alan Kemp, d/b/a Nevada Central Railroad (NCR or Kemp), timely filed a formal expression of intent to file an OFA, in which NCR also asked UP to produce certain information regarding the Line, including information prescribed in 49 C.F.R. § 1152.27(a).³ This filing automatically stayed the effective date of the notice of exemption for 10 days, until April 1, 2011.⁴ Thus, OFAs were due by March 18, 2011 (30 days

¹ This decision embraces Docket No. FD 35497, Nevada Central Railroad—Acquisition Exemption—Union Pacific Railroad Company.

² The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, STB Ex Parte No. 696 (STB served Sept. 2, 2010).

³ On March 1, 2011, NCR filed corrections to its February 28 filing, and, on March 14, 2011, it filed a “Notice of Oral Stipulation” to its March 1 filing.

⁴ 49 C.F.R. § 1152.27(c)(2)(i).

after publication of the notice of exemption in the Federal Register).⁵ Under the Board's regulations, however, the Board will entertain petitions to toll that 30-day deadline if a railroad fails to provide a potential OFA offeror promptly with the information the offeror has requested under 49 C.F.R. § 1152.27(a).⁶ In this case, any petition to toll was due by March 15, 2011.⁷ No such petition was filed, and no OFA was filed.

By decision served on March 29, 2011, the proceeding was reopened at the request of the Board's Office of Environmental Analysis (OEA), and the exemption was made subject to 2 salvage-related consultation conditions and a public use condition. In the same decision, the Board noted that, because no OFA or petition to toll the time period for filing an OFA had been filed, the exemption would become effective on April 1, 2011.

On March 31, 2011, NCR filed a combined (1) petition to extend the OFA filing deadline and (2) motion to allow that petition to be filed late. On April 1, 2011, UP replied, requesting that the Board deny NCR's petition and motion. UP indicated that it was willing to continue negotiating with NCR on an arms-length basis concerning acquisition of all or any portion of the Line, track structure, and right-of-way, but not under the OFA process. In response, on April 11, 2011, NCR filed a "Notice of Stipulation To Abandonment," in which NCR "stipulat[ed]" to UP's abandonment of the Line in reliance on UP's stated willingness to continue to negotiate with NCR to acquire all or part of the Line outside the OFA process.⁸

On April 19, 2011, the Board, through the Director of the Office of Proceedings, issued a decision in response to NCR's April 11 "Notice of Stipulation to Abandonment" (April 2011 decision). The Board noted that, in "stipulat[ing]" to UP's abandonment, it appeared that NCR was, in substance, agreeing to forego the OFA process and negotiate instead outside that process, as UP had offered. Therefore, the April 2011 decision construed NCR's "stipulation" to UP's abandonment as a request to withdraw its expression of intent to file an OFA and, accordingly, granted that request. Because NCR was withdrawing from the OFA process, NCR's March 31 petition for an extension of time to file an OFA and motion to late file the petition were denied as moot.⁹

⁵ 49 C.F.R. § 1152.27(c)(2)(ii)(B). Because day 30 was Sunday, March 20, OFAs were due on Friday, March 18. See 49 C.F.R. § 1152.25(d)(4).

⁶ 49 C.F.R. § 1152.27(c)(2)(ii)(C).

⁷ See id.

⁸ Shortly thereafter, on April 18, 2011, NCR filed a "Notice of Intent to Institute Case" in Docket No. FD 35497, a docket NCR reserved apparently in anticipation of seeking acquisition authority for the Line as a result of the negotiations NCR hoped to conclude with UP outside the OFA process.

⁹ It is NCR's appeal of this April 2011 decision that we principally address in this decision.

The next day, April 20, 2011, UP filed with the Board a copy of a letter it sent to NCR that day advising NCR that UP was withdrawing its offer to negotiate for the sale of the Line outside the OFA process. In that letter, UP asserted that, on April 1, 2011, Kemp, unbeknownst to UP's counsel at the time, had made what UP characterized as an "abusive" telephone call to UP's Senior Manager of Rail Line Planning and that on other occasions Kemp had made similar calls accusing UP of fraud. The letter also indicated that in the past Kemp had accused UP and others of "criminal conduct, including fraud, conspiracy, theft, espionage, racketeering, etc." UP stated that, although it initially had been willing to "give [Kemp] the benefit of the doubt" in this matter, Kemp's "threats and unfounded accusations" had made negotiations "untenable," and for that reason UP's management had directed its counsel to withdraw its offer to negotiate for the sale of the Line outside the OFA process. The letter further advised Kemp that, pursuant to the Board's rules of practice at 49 C.F.R. § 1103.28,¹⁰ he is not to communicate with other UP personnel without UP's counsel's express agreement.

On May 9, 2011, NCR filed a petition seeking "[f]ull Board [r]econsideration" of the April 2011 decision and purporting to withdraw its April 11 Notice of Stipulation to Abandonment. NCR contends that UP "deliberately and knowingly deceived the Board and [NCR] by indicating it would continue to negotiate with NCR in good faith outside of the OFA process for the possible sale of the Line. As a result of UP's alleged "fraud" in offering to negotiate outside the OFA process and later withdrawing that offer, NCR asks the Board to reconsider NCR's March 31 petition to extend the OFA deadline (and motion to late file that petition). UP responded on May 26, 2011, asserting that its withdrawal of its offer to negotiate reflected no fraud on UP's part, but resulted instead from "Kemp's own abusive and threatening conduct with UP personnel."

PRELIMINARY MATTERS

On May 10, 2011, NCR filed a motion to strike UP's April 20, 2011 letter reply. NCR's motion appears to contend that UP's letter should be stricken because its description of Kemp's April 1 telephone call to UP is not supported by any sworn statement and is thus "virtually worthless documented [hearsay] evidence." NCR further alleges that submission of UP's letter constitutes an act of "Conspiracy, Defamation, Li[bel] and Criminal Fraud" against Kemp. On May 18, 2011, UP replied to NCR's motion to strike, asserting that its April 20 letter accurately describes the reasons UP terminated the negotiations—most immediately, Kemp's "threatening and abusive" April 1 telephone call to UP.

¹⁰ That section provides, in relevant part, that a practitioner before the Board "shall not in any way communicate upon the subject of controversy with a party represented by another practitioner except upon express agreement with the practitioner representing such party" and "shall not negotiate or make compromises with the other party, but shall deal only with the opposing practitioner."

The motion to strike will be denied. Under the Board's regulations, "redundant, irrelevant, immaterial, impertinent, or scandalous matter" may be stricken from any document. 49 C.F.R. § 1104.8. NCR has failed to show that UP's letter includes any such material. NCR's only discernable concern is that UP's description of Kemp's April 1 telephone call to UP is unsupported by any verified statement. That concern, however, goes only to the weight and credibility to be attributed to UP's letter; it does not support a finding that the letter should be stricken. Even reading into NCR's motion an allegation that UP's description of Kemp's alleged conduct in his April 1 telephone call to UP is somehow "impertinent or scandalous," NCR fails to substantiate any such claim, and indeed, fails to offer any rebuttal to UP's description of that conversation. Moreover, UP's description of that telephone call is material and relevant to its explanation as to why it discontinued negotiations with NCR. The motion to strike is therefore denied.

On May 27, 2011, NCR filed what it called a "Notice of Intent to File Motions To Strike" 2 filings: (1) UP's May 18, 2011 response to NCR's motion to strike, and (2) UP's May 26, 2011 response to NCR's petition for full Board review of the April 2011 decision. On June 9, 2011 (and again on June 15), NCR filed a "Motion for Extension of Time To File Motions To Strike," seeking leave to file its motions to strike by June 17, 2011. The Board, however, received no such motions by NCR's self-imposed deadline nor has it since. In any event, we have examined UP's May 18 and May 26 filings under the standard set out in 49 C.F.R. § 1104.8, discussed above, and find no reason to strike them.

DISCUSSION AND CONCLUSIONS

NCR has petitioned for "full Board reconsideration" of the April 2011 decision. For the reasons discussed below, the petition will be denied. As a result, the OFA process in this case remains closed.

The April 2011 decision was issued pursuant to authority delegated under 49 C.F.R. § 1011.6(c)(3). The Board has reserved for itself the consideration and disposition of all appeals of decisions issued pursuant to that delegated authority. See 49 C.F.R. § 1011.6(b). NCR's petition for "full Board reconsideration" is, in substance, an appeal to the Board under 49 C.F.R. § 1011.6(b). Such appeals "are not favored and will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice." Id.

At the outset, we note that NCR's petition was filed late. Appeals must be filed within 10 days of the decision appealed from. Id. NCR's appeal was filed on May 9, 2011, 20 days after the April 2011 decision was served. Although NCR's petition could be denied on that procedural defect alone, NCR's appeal also fails to demonstrate that the April 2011 decision involved a clear error of judgment or that granting the appeal is necessary to prevent manifest injustice.

First, there is no clear error of judgment in the April 2011 decision. In its April 11, 2011 filing, NCR “stipulate[d] to abandonment” of the Line, noting that UP had agreed to negotiate with NCR outside the OFA process. The OFA process, by which a financially responsible party may seek to force the sale of a rail line authorized for abandonment, postpones the carrier’s abandonment authority, and if a sale agreement is reached, the notice of exemption is dismissed. See 49 C.F.R. § 1152.27(e)(2), (f)(2). Thus, the April 2011 decision reasonably construed NCR’s “stipulation to abandonment” of the Line as a determination by NCR that it would forego an OFA (thus allowing the abandonment process to go forward) and would negotiate for the sale of the line outside the OFA process instead, as UP had offered. In other words, NCR’s “stipulation” was, in substance, a request to withdraw its expression of intent to file an OFA. NCR does not dispute this interpretation of its “stipulation.” Having correctly interpreted NCR’s stipulation as expressing NCR’s intent not to pursue an OFA, the April 2011 decision properly granted NCR’s request, declared NCR’s February 28, 2011 expression of intent to file an OFA withdrawn, and denied as moot NCR’s March 31, 2011 petition to extend the OFA filing deadline and motion to late file that petition. We find no error.

Nor will any manifest injustice result if NCR’s appeal is not granted. In essence, NCR appears to argue that UP’s April 20 withdrawal from negotiations requires that NCR be given a second bite at obtaining the Line through an OFA. We disagree. First, NCR failed to timely file an OFA or a petition for additional time to do so. Even were we to consider anew NCR’s petition for extension of time to file an OFA, it would be denied. The statute, at 49 U.S.C. § 10904, imposes strict time limits for the filing of an OFA, and UP opposed the request for extension. 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. & Discontinuance of Rail Lines & Rail 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); R.R. 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 R.R.—Aban. Exemption—in Kent, Ionia, and Montcalm Cntys., Mich., AB 364 (Sub-No. 14X), slip op. at 5 (STB served Sept. 26, 2008); BNSF Ry.—Aban. Exemption—in Kootenai Cnty., Idaho, AB 6 (Sub-No. 468X) (STB served Dec. 30, 2009).

Second, after UP agreed to negotiate outside the OFA process, NCR itself chose not to continue pursuing an OFA (and thus the opportunity to force the sale of the Line), but to rely instead on private negotiations. At no time did UP (or the Board) suggest any guarantee that private negotiations would eventually result in NCR’s acquiring the Line. To the contrary, having decided to rely on voluntary negotiations, NCR assumed the risk that those negotiations might ultimately prove fruitless.

Finally, we are not persuaded by NCR’s assertion that UP’s reversal of position amounted to deliberately fraudulent behavior on UP’s part. Rather, we find credible UP’s explanation for its reversal as having been prompted by NCR’s counterproductive behavior

toward UP personnel. Although NCR describes in detail a conversation between Kemp and a UP official on March 31, 2011, in which UP allegedly promised to provide the information NCR had requested for its OFA, NCR fails to address UP's description of its subsequent conversation with NCR on April 1 that UP stated was "threatening and abusive" toward UP personnel and prompted UP's change of position. Moreover, the Board is troubled by certain passages in NCR's filings to the Board containing uncivil and unsubstantiated accusations of criminal conduct by others.¹¹ If, as UP's unchallenged assertions indicate, NCR took a similar approach in its exchanges with UP, then NCR accepted the risk of the predictable consequences of that choice—that negotiations broke down.

For the foregoing reasons, NCR's appeal is denied.

Because negotiations for the Line between UP and NCR have terminated, Docket No. FD 35497, which NCR had reserved in anticipation of seeking Board authority to acquire the Line if negotiations with UP were successful, will be closed.

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

It is ordered:

1. NCR's May 9, 2011 petition for reconsideration of the April 2011 decision is denied, and the OFA process remains closed.
2. NCR's motion to strike UP's April 20, 2011 filing is denied.
3. Docket No. FD 35497 is closed.
4. This decision is effective on its service date.

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

¹¹ See NCR's Petition For Reconsideration (filed May 9, 2011) and its Motion To Strike (filed May 10, 2011).