

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: November 22, 2006

On October 27, 2006, Dr. Daniel R. 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 On November 13, 2006, BNSF submitted a reply seeking rejection of the application as incomplete. In a letter filed on November 17, 2006, Recreation Trails, Inc., and two individuals, supported the request for rejection of the application. This decision rejects the application as incomplete, without prejudice to Dr. Fiehrer filing a new application containing the necessary information.

BACKGROUND

BNSF states that it operated this rail line until July 2000, when it took the line out of service due to the washout of several sections of trackage along the Missouri River. Dr. Fiehrer seeks to acquire the line under the feeder line provisions so that service can be restored. BNSF reports, however, that no shipper has filed a formal service complaint concerning the line, and it is unaware of demands for service from the line's local shippers that BNSF has been unable to satisfy.

BNSF submits that Dr. Fiehrer's application shows no realistic prospects for operating a rail line. BNSF even questions Dr. Fiehrer's motivation for filing the application. According to BNSF, Dr. Fiehrer owns two pieces of property through which this rail line passes. BNSF opines that Dr. Fiehrer may be trying to protect his private property by ensuring, through his ownership of the line, that it cannot be acquired as a trail under the National Trails System Act, 16 U.S.C. 1247(d).²

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.

² BNSF provided a copy of an e-mail dated July 9, 2005, from Dr. Fiehrer to a BNSF representative, in which Dr. Fiehrer expressed his desire to prevent the line from becoming a recreational trail.

DISCUSSION AND CONCLUSIONS

A feeder line application must include the information set forth at 49 CFR 1151.3(a). Dr. Fiehrer provides some information pertaining to all of the criteria in that subsection, but there are basic omissions in the information, as discussed below.

Financial Responsibility (1151.3(a)(3)). An application must include information sufficient to demonstrate that the applicant is a financially responsible person, able to pay the higher of the net liquidation value (NLV) or going concern value (GCV) of the line and to cover expenses associated with providing service over the line for at least the first 3 years after acquisition of the line.

Concerning the first requirement, Dr. Fiehrer estimates that the GCV of the line is zero because it has not been in operation for more than 6 years. BNSF, however, contends that the line has a potentially substantial GCV because it is a through line that could be reactivated in the future if there were an increase in the demand for rail capacity in the region. There is no need to dwell on the application's GCV estimate because, for a non-operating line such as this, it is likely that the GCV is less than the NLV. 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. 34335, slip op. at 11 (STB served Oct. 28, 2004) (buyer and seller agreed that the traffic originating or terminating on the non-operated portion of a line was inadequate to give that portion a GCV higher than NLV).

Accordingly, we will turn to NLV. Dr. Fiehrer estimates that the line has a scrap value of \$3,375,520. Without providing any supporting evidence, Dr. Fiehrer assumes that the salvage and cleanup costs must be greater than the estimated scrap value of the line because, he argues, BNSF would otherwise have salvaged the line. In light of his assumption about the high cost of salvaging the line, Dr. Fiehrer estimates that the NLV is either zero or a negative value. BNSF, however, provides a plausible explanation for keeping the line intact: if rail traffic in the region increases sufficiently, it could reopen the line without having to invest millions of dollars to reacquire the real estate and rebuild the line.

Dr. Fiehrer further assumes that BNSF owns all of the real estate in the line by easement, rather than in fee, and he assigns no value to the real estate. But absent any supporting evidence, it is not possible to determine if ownership by easement is true for the entire line. If, as BNSF asserts, it owns much of the real estate in fee, any NLV estimate must take into account the value of land owned in fee.

Even assuming that the line could properly be valued at a very low NLV, the application must include evidence that Dr. Fiehrer will be able to cover expenses of operating the line for at least the first 3 years after acquisition. Without providing any evidentiary support, Dr. Fiehrer assumes that unnamed local shippers will seek service over the line, that other rail carriers will

route rail cars over the line or seek trackage rights to use this line,³ and that the line will make a profit. In the absence of statements supporting those assumptions, however, there is no indication that the line could be operated profitably.

Dr. Fiehrer submits a statement of his net worth from a certified public accountant and apparently assumes that, in view of that net worth, he could obtain commercial loans and revolving lines of credit to support the operation of this rail line. Without a firm commitment from lending sources, however, Dr. Fiehrer's net worth does not establish that he will receive such loans.⁴ 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) (Forty Plus) (application deficient for failure to provide any details regarding loan sources for operating funds); 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) (feeder line application by a large commercial enterprise found incomplete for lack of a loan commitment or assurance of sufficient available cash to acquire and operate rail line). Likewise, Dr. Fiehrer's reliance on his eligibility to participate in government programs that provide loans and grants to railroads does not establish financial responsibility because the mere existence of these programs does not represent a committed source of funds. See Forty Plus, slip op. at 4.

The failure to provide sufficient evidence of financial responsibility is, in itself, grounds to reject the application as incomplete. See id. Nevertheless, we will discuss other deficiencies in this application in order to inform Dr. Fiehrer, who appears without counsel, about the type of information that would be needed for a complete application.

Named Operator and Insurance (1151.3(a)(7)-(8)). Under 49 CFR 1151.3(a)(7), an applicant must include in its operating plan the name of the proposed operator of the line. Dr. Fiehrer hopes to contract with an operator, but does not identify one. In the only arguably relevant statement, Montana Rail Link, a regional rail carrier, indicated no interest in operating the line because of a lack of potential shippers that would make the operation profitable.

Similarly, to assure the protection of the public, 49 CFR 1151.3(a)(8) requires a description of the liability insurance carried by the applicant or chosen operator of the line. There is no description of liability insurance here.

³ The application includes a letter from a potential user of the line, Gwynn Lumber & Reload Inc., which operates on a former BNSF branch line. Gwynn Lumber does not indicate that it would use the line if purchased by Dr. Fiehrer, but only that the line would provide a more direct route for an unspecified number of Gwynn Lumber's shipments.

⁴ Significantly, Dr. Fiehrer did not pledge to liquefy his assets in order to apply his net worth to acquiring and operating this rail line.

Public Convenience and Necessity (PC&N) Criteria (1151.3(a)(11)). Where, as here, a rail line is not listed on the owning carrier's system diagram map as a candidate for a 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. 49 U.S.C. 10907(b)(1)(A)(i). An application under the PC&N standard must contain detailed evidence that permits the Board to find, in accordance with 49 U.S.C. 10907(c)(1), all of the following:

- (A) The rail carrier operating the line refused within a reasonable time to make the necessary efforts to provide adequate service to shippers who transport traffic over the line;
- (B) The transportation over the line is inadequate for the majority of shippers who transport traffic over the line;
- (C) The sale of the line will not have a significantly adverse financial effect on the rail carrier operating the line;
- (D) The sale of the line will not have an adverse effect on the overall operational performance of the rail carrier operating the line; and
- (E) The sale of the line will be likely to result in improved railroad transportation for shippers who transport traffic over the line.

This application provides no indication that any shipper has requested service over this rail line during the time it has not been operated. Absent such evidence, the application does not show that BNSF has refused to make the necessary efforts to provide adequate transportation to shippers nor that transportation is inadequate for the majority of shippers that transported traffic over the line in the past.

To establish that the sale would likely improve transportation for shippers over the line, Dr. Fiehrer states that the line would attract overhead shipments moving between Canada, the southern United States, and Mexico, by providing a more direct route than is currently being used. As discussed previously, the lack of statements of support from shippers or other railroads undermines the likelihood that a sufficient number of these shipments would occur. Absent such support, the application does not show that Dr. Fiehrer's purchase of the line would improve the existing transportation options for shippers.

The regulations permit an incomplete application to be accepted conditionally when the required information is primarily or exclusively within the personal knowledge of the owning carrier and the applicant simultaneously filed a request for discovery of the missing information. See 49 CFR 1151.2(d). Here, Dr. Fiehrer asks us to order BNSF to answer information requests contained in the application. But information that BNSF could provide would not cure all the

deficiencies in the application. For example, BNSF could shed no light on Dr. Fiehrer's financial responsibility, the identity of Dr. Fiehrer's proposed operator, or the insurance carried by the proposed operator. Therefore the application cannot be conditionally accepted but must instead be rejected as incomplete. However, this rejection is without prejudice to Dr. Fiehrer filing a new feeder line application should he be able to provide the evidence and information that are lacking here.

In the application, Dr. Fiehrer sought an order preventing BNSF from transferring ownership and from altering this rail line by removing any portions of it (tracks, related materials, bridges, tunnels, etc.). In light of the rejection of this application, that request will be denied.

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

It is ordered:

1. The feeder line application is rejected without prejudice to the filing of a new application containing the required information.
2. Dr. Fiehrer's requests for an order preventing transfer and/or alteration of the line and to compel BNSF to provide information are denied.
3. This decision is effective on the date of service.

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

Vernon A. Williams
Secretary