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SERVICE DATE - MAY 24, 2000

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-33 (Sub-No. 132X)

UNION PACIFIC RAILROAD COMPANY--ABANDONMENT
EXEMPTION--IN RIO GRANDE AND MINERAL COUNTIES, CO

IN THE MATTER OF AN OFFER OF FINANCIAL ASSISTANCE

Decided: May 18, 2000

Union Pacific Railroad Company (UP) filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments and Discontinuances of Service and Trackage Rights to abandon and discontinue service over a 21.6-mile line of railroad known as the Creede Branch, extending from milepost 299.3 near Derrick to the end of the line at milepost 320.9 at Creede, in Rio Grande and Mineral Counties, CO. Notice of the exemption was served and published in the Federal Register on January 25, 1999 (64 FR 3740-41). Under 49 CFR 1152.50(d)(3), the exemption was scheduled to become effective on February 24, 1999, but formal expressions of intent to file an offer of financial assistance (OFA) were timely filed by the February 4, 1999 due date. OFAs were filed by the Denver & Rio Grande Railway Historical Foundation (D&RGHF or offeror) (to purchase or to acquire by donation the entire line), by South Fork-Creede Railway Corridor Preservation Group Inc. (SFCR) (to purchase the entire line), and by the Rio Grande & San Juan Railroad Co. (RG&SJ) (to purchase the entire line). These filings automatically stayed the effective date of the exemption until March 6, 1999.¹

On February 4 and 19, 1999, RG&SJ and SFCR, respectively, filed petitions to toll the 30-day period for submitting their OFAs. By decision served February 23, 1999, the deadline to file an OFA was extended to March 26, 1999, and the effective date of the abandonment exemption was further postponed to April 5, 1999. On March 26, 1999, RG&SJ timely filed an OFA under 49 U.S.C. 10904 and 49 CFR 1152.27(c) to purchase the entire line for \$302,000. Also on that date, D&RGHF filed a request to extend its due date to file an OFA for an additional 5 days. By decision served March 30, 1999, D&RGHF was granted an extension until March 31, 1999, to file its OFA, RG&SJ was found financially responsible, and the effective date of the exemption authorizing abandonment was postponed to permit the OFA process to proceed.

¹ See 49 CFR 1152.27(c)(2)(i).

On April 2, 1999, D&RGHF filed a petition for leave to file its OFA 2 days late and tendered an OFA to purchase the entire line for \$387,930.² By decision of the Director of the Office of Proceedings, served April 6, 1999, D&RGHF's offer was accepted.³ Moreover, it was determined that D&RGHF is financially responsible and, because there were two offers from financially responsible entities as a result of this determination, UP was directed to provide written notification of its selection of the offeror with which it wished to negotiate to the Board and all parties by April 12, 1999. On April 12, 1999, UP notified the Board that it had selected D&RGHF for negotiations with respect to the possible purchase of the line segment.

On April 14, 1999, pursuant to 49 CFR 1011.2(a)(7) and 49 CFR 1011.8(c)(2), RG&SJ appealed the April 6 decision, arguing that the Director had acted erroneously in accepting D&RGHF's offer and that it should be rejected. By a decision served April 22, 1999, RG&SJ's appeal was denied, but UP was directed to notify the Board by April 26, 1999, of a new selection of a negotiating party or to confirm its earlier selection of D&RGHF. UP subsequently confirmed its earlier selection of D&RGHF. On April 28, 1999, UP and D&RGHF advised the Board that the railroad and the offeror had reached an agreement for the purchase and sale of the rail line. By a decision of the Director of the Office of Proceedings served May 11, 1999, UP's abandonment exemption was dismissed, effective on the date the sale is consummated, and D&RGHF was authorized to acquire the subject rail line. On August 2, October 12, and November 22, 1999, and February 7, 2000, the parties notified the Board by letter that the closing date for the transaction had been postponed.⁴ The latest postponement had extended the closing date to May 2, 2000.

On November 26, 1999, the City of Creede, CO (City), filed a letter-protest in opposition to the proposed sale. D&RGHF replied on December 1, 1999.⁵

² D&RGHF stated that, despite its best efforts, it was unable to finalize financial statements until April 2, 1999. D&RGHF urged the Board to accept its late-filed OFA because UP would not be prejudiced by the acceptance.

³ RG&SJ had earlier filed letters objecting to the 5-day extension (March 31) and urging the Board to reject D&RGHF's OFA (April 1 and 5).

⁴ On October 8, 1999, RG&SJ filed a letter arguing that, because D&RGHF had failed to earlier consummate the acquisition, RG&SJ wished to pursue its OFA and commence negotiations with UP.

⁵ In its reply, D&RGHF characterizes the City's filing as a petition to reopen an administratively final decision, and argues that the City has failed to make the showing of material error, new evidence, or substantially changed circumstances needed for such a petition to succeed. Although the City has labeled its filing as a protest, D&RGHF is correct that it is more properly considered as a petition to reopen an administratively final decision because the Board's May 11, 1999 decision approved the sale of the rail line to D&RGHF and dismissed UP's notice of

(continued...)

DISCUSSION AND CONCLUSIONS

In its filing, the City expresses its “protest, fears and concerns” regarding the sale of the line to D&RGHF.⁶ The City suggests that UP cannot sell the line under 49 U.S.C. 10904 because it has already been abandoned under Colorado state law. The City also objects to D&RGHF’s proposed sharing of a rail depot, now being used by the City’s historical society, and expresses concern regarding the effect this use would have on public parking and its events center and playground. The City fears that an active rail line will necessitate the construction of a new turnaround spur on the site of the City’s newly constructed ballpark, and the City says it is concerned that a section of street rerouted to alleviate drainage problems may also be affected. Moreover, the City questions D&RGHF’s financial ability to buy and operate the line. Finally, the City makes reference to “Rails to Trails” legislation⁷ and questions why it should abandon its current public uses of the rail property to accommodate an active rail line.

In response, D&RGHF disputes the City’s characterization of D&RGHF’s plans and the assumptions as to the governing law which underlie the City’s protest. In support, D&RGHF attaches a letter from UP addressing legal issues and a statement by Donald H. Shank, President and Chairman of the Board of D&RGHF. Mr. Shank claims that the City has turned to a tourist-based economic philosophy since the last area mines closed in the 1980s. He asserts that the City would benefit from the sale of the Creede Branch. He claims that it was never D&RGHF’s intent to construct a spur on the site of the City’s ballpark, and that all drainage issues will be worked out. Mr. Shank further contends that D&RGHF has not asked the City to give up its events center and argues that this transaction has nothing to do with the Trails Act. UP rejects the City’s claim that UP has lost title to the line and abandoned it under state law.

⁵(...continued)

exemption upon consummation of the sale. See 49 CFR 1115.4, 1152.25(e)(2) and (4), and Consolidated Rail Corporation--Abandonment Exemption--In Bergen & Passaic Counties, NJ, STB Docket No. AB-167 (Sub-No. 1151X) (STB served Oct. 30, 1997) (Bergen & Passaic Counties).

D&RGHF also notes that the City has not heretofore participated in this proceeding and has not explained or justified its failure to have timely participated or why it is only now filing its “protest.” As such, the railroad argues, the City’s filing is fatally untimely. However, our Rules of Practice state that a person may file a petition to reopen an administratively final action at any time. 49 CFR 1115.4. Thus, the City’s petition is within our rules and will be evaluated on its merits.

⁶ By letter filed December 22, 1999, the Board of County Commissioners of Mineral County, CO, lends its support to the City.

⁷ The City evidently is referring to Section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), whose purpose is to preserve rail corridors for possible reactivation of rail service by permitting their interim use as recreational trails. See Preseault v. ICC, 494 U.S. 1 (1990) (Preseault); 49 CFR 1152.29.

Under our abandonment rules, a petition to reopen an administratively final action must state in detail whether there is material error, new evidence, or substantially changed circumstances to warrant reopening the proceeding. See, e.g., Bergen & Passaic Counties and 49 CFR 1152.25(e)(4). Although not totally clear from its submission, the City is apparently alleging material error here by suggesting, contrary to the Board's findings, that D&RGHF is not financially responsible, that the Creede branch has been abandoned under state law, and that continued rail use should not be allowed over the line.

1. Financial Responsibility. The City asserts that D&RGHF is not financially responsible. In support, the City points to an October 1999 newspaper article indicating that an anonymous businessman would finance a portion of the purchase of the line. Based on this article, the City questions the ability of D&RGHF to buy, restore and operate the corridor. The City does not, however, offer any other evidence that D&RGHF lacks the funds to acquire and operate the line.

Where, as here, a finding is made that an offeror is financially responsible to fund the acquisition and operate the line for 2 years as required by 49 U.S.C. 10904(f)(4), its capability to conduct operations for 2 years is customarily presumed in the absence of persuasive evidence to the contrary. The City's newspaper article is not enough to show that we erred in finding D&RGHF financially responsible. Moreover, the financial responsibility of D&RGHF is not compromised by the fact that the purchase of the line is being financed in part with borrowed funds. See Bergen & Passaic Counties. The City's claims to the contrary are rejected.

2. State Law Abandonment. The City suggests that we lack jurisdiction to approve the sale of this line under 49 U.S.C. 10904 because it has allegedly already been abandoned under state law. According to the City, UP has removed its railroad facilities from Creede and abandoned its turnaround spur in South Creede. Allegedly, there has been no rail service to Creede since November 1969. Moreover, the City notes that the State of Colorado granted the railroad a new right-of-way in Creede by an agreement dated October 24, 1969, which prohibits the railroad from leasing to persons not railroad customers or for purposes not connected with railroad operations, or selling to persons without State approval. According to the City, violation of these provisions would terminate the agreement and it alleges that the railroad has done so. The City further argues that the railroad's violation of the right-of-way agreement with Colorado has resulted in UP's losing title to the Creede Branch and a common law abandonment of the line, preventing its sale to D&RGHF.

In response, D&RGHF provides a copy of a letter dated November 15, 1999, from UP to the Colorado State Attorney General's Office in which UP argues that no common law abandonment of the Creede Branch has occurred under Colorado law, and that UP and its predecessors have always retained the continuity of the line for rail use. Further, the offeror contends, the Board's jurisdiction preempts state law as to whether the line can be abandoned, and it points out that neither the Interstate Commerce Commission (ICC) nor the Board has ever granted abandonment authority for the subject line.

The City's arguments lack merit. As D&RGHF points out, it is well settled that the Board has exclusive and plenary authority over the abandonment of rail lines. Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 319-21 (1981); Phillips Co. v. Denver & Rio Grande Western R. Co., 97 F.3d 1375, 1376-78 (10th Cir. 1996), cert. denied, 521 U.S. 1104 (1997) (Phillips); Preseault, 494 U.S. at 9-10.

Although railroad operations ceased on the Creede Branch in November 1969, prior to UP's January 1999 abandonment notice, neither UP nor any of its predecessors sought or received abandonment authority from the ICC or the Board. However, ICC or Board authorization is necessary prior to a determination of abandonment, in light of the agency's plenary and exclusive authority under 49 U.S.C. 10903. E.g., Phillips. Additionally, our May 1999 decision simply provided for dismissal of UP's notice of exemption upon consummation of D&RGHF's purchase of the line via the OFA process. Moreover, the record before us does not indicate that common carriage rates have been canceled or that track and ties have been salvaged. Thus, the record supports the conclusion that the availability of the line for active rail use has consistently been maintained, that UP has never relinquished title to the line, and that the agency has retained jurisdiction over the line. As such, the City has failed to demonstrate material error on the Board's part in approving the sale of the line under 49 U.S.C. 10904.⁸

3. Trails Act. The City also invokes the Trails Act in support of its case. Noting that the law was enacted to preserve rail corridors for public use, Creede points out that it has used the trail corridor for public uses for 30 years, and argues that doing so reflects the intent of the Trails Act. The City asserts that the OFA would violate the intent of the legislation.

The City does not argue that the Trails Act applies here. Nor could it make such an argument as the line was never authorized to be abandoned prior to the exemption for abandonment in this proceeding. Moreover, the acquisition pursuant to the OFA in this proceeding takes precedence over any potential Trails Act acquisition. Rather, Creede appears to be citing the Trails Act in support of a policy argument to the effect that non-rail uses should be favored. However, the OFA statutory provisions, which do apply here, reflect a Congressional policy favoring continued rail use. Indeed, the purpose of the Trails Act is to preserve rail corridors by rail banking them to enable their future use as active rail lines. For these reasons, the City's public use/trail use argument cannot serve as a basis to reopen this proceeding.

⁸ As to the City's assertion that there has been a common law abandonment here under Colorado state law, our exclusive and plenary jurisdiction in the abandonment area may not be circumscribed by a state agreement. Thus, whether UP has violated provisions of its 1969 right-of-way agreement with Colorado does not affect our continuing jurisdiction here. However, the City may, of course, bring a court action against the railroad for violation of the parties' contract and seek damages for any alleged breach thereof.

In sum, we find that the City has not satisfied any of the criteria necessary for reopening this administratively final proceeding. As such, we will deny its petition.

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 reopen is denied.
2. This decision is effective on its service date.

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.

Vernon A. Williams
Secretary