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SERVICE DATE - LATE RELEASE APRIL 6, 1999

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: April 6, 1999

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 by the Denver & Rio Grande Railway Historical Foundation (D&RGHF) (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

SFCR and RG&SJ also requested UP to provide the financial data and information prescribed in 49 CFR 1152.27(a). On February 4, 1999, and February 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 proceeding was reopened, 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 March 26, 1999, D&RGHF filed a request to extend its due date to file an OFA for an additional 5 days. By decisions served March 30, 1999, D&RGHF was granted an extension until March 31, 1999, to file its OFA, and RG&SJ was found financially responsible, and the effective date of the exemption authorizing abandonment was postponed to permit the OFA process to proceed.

By letter filed on March 31, 1999, RG&SJ indicated its objection to the 5-day extension and reserved the right to file an administrative appeal. By letter filed April 1, 1999, RG&SJ urged the

¹ See 49 CFR 1152.27(c)(2)(i).

Board to reject any OFA filed by D&RGHF after the March 31, 1999 extended due date, asserting that acceptance of a late-filed OFA would prejudice both it and UP.

On April 2, 1999, D&RGHF filed a petition for leave to file its OFA two days late and tendered an OFA under 49 U.S.C. 10904 and 49 CFR 1152.27(c) to purchase the entire line for \$387,930. D&RGHF stated that, despite its best efforts, it was unable to finalize financial statements for it and Mr. Donald H. Shank, D&RGHF's founder, until April 2, 1999. D&RGHF urges the Board to accept its late-filed OFA because UP would not be prejudiced by the acceptance. D&RGHF points out that the effective date of the exemption has already been postponed due to the filing and acceptance of RG&SJ's OFA and adds that UP would have a choice of offerors with which to negotiate if D&RGHF's OFA is accepted.

On April 5, 1999, RG&SJ filed a letter, in which it takes the position that D&RGHF's OFA should be rejected on the following grounds: first, that it unjustifiably delays negotiations between UP and RG&SJ that might otherwise begin without waiting for UP's selection of an offeror with which to negotiate, and that RG&SJ is prejudiced both by the delay and by the fact that the timing of D&RGHF's filing permitted it to see RG&SJ's OFA and then submit a higher bid; second, that D&RGHF does not adequately explain the disparity between its OFA and UP's valuation of the property; and third, that D&RGHF does not adequately demonstrate its financial responsibility.

D&RGHF's OFA will be accepted. The deadlines in 49 U.S.C. 10904 and 49 CFR 1152.27 are aimed at limiting a rail carrier's losses resulting from continued operation of a line that has been authorized for abandonment. Here, the effective date of the exemption has already been postponed due to the filing and acceptance of RG&SJ's OFA. While RG&SJ has asserted that acceptance of a late-filed OFA would prejudice it and UP, UP has raised no objection either to the extension request or to acceptance of the late-filed OFA. In addition, negotiations should not be significantly delayed, as UP will be required to make its selection no later than April 12, 1999. Also, where both of two offerors have offered amounts less than the railroad's estimated net liquidation value (NLV), it does not necessarily follow that the entity making the higher offer has the advantage. Moreover, while RG&SJ's OFA may stand a better chance of succeeding if there are no other OFAs, RG&SJ has not demonstrated that it has a right to be free of rival bids, especially where, as here, D&RGHF gave early notice (December 17, 1998) of its intention to file an OFA, requested a 5-day extension on March 26, 1999, and only filed its OFA 2 days late.

An OFA to acquire a line for continued rail service need not be detailed, but an offeror must show that it is financially responsible and that the offer is reasonable. See Conrail Abandonments Under NERSA, 365 I.C.C. 472 (1981).

As indicated, D&RGHF has offered to acquire the line for \$387,930. D&RGHF states that it has cash available for purchase of the line in the amount of \$23,000, and a pledge in the amount of \$400,000 from the founder of D&RGHF (Donald H. Shank). D&RGHF submitted a copy of the pledge executed on March 30, 1999, and a statement of the financial condition of Donald H. Shank

as of March 15, 1999. The financial information submitted is sufficient to demonstrate that D&RGHF is financially responsible.

D&RGHF states that, according to UP, the estimated NLV of the line is \$778,616. D&RGHF's offer is less than UP's estimated NLV. Consistent with 49 U.S.C. 10904(c) and 49 CFR 1152.27(c)(1)(ii)(C), however, D&RGHF has, despite RG&SJ's criticisms, adequately explained the basis for the difference between its lower NLV estimate for the line and UP's estimated NLV for the line (with the difference lying in differing valuations for the real estate).

Under 49 U.S.C. 10904(f)(3) and 49 CFR 1152.27(l), when there are multiple offers, the carrier must select the offeror with which it wishes to transact business. UP will thus be directed to provide written notification of its selection to the Board and all parties to this proceeding by April 12, 1999.

Any person filing a request to set terms and conditions, upon failure to negotiate satisfactory terms and conditions with UP, must pay the requisite filing fee, set forth at 49 CFR 1002.2(f)(26), which currently is \$14,800. An original and 10 copies of the request, which will be due by April 26, 1999,² should be submitted along with the fee, in an envelope bearing the docket number of the proceeding, along with words "Attention: Application Unit, Request to Set Terms and Conditions" in the lower left hand corner.

Appeals to this decision are governed by 49 CFR 1011.2(a)(7). Any appeal must be filed within 10 days of the service date of this decision and will be heard by the entire Board.

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

It is ordered:

1. D&RGHF's petition for leave to late-file its OFA is granted and the OFA is accepted.
2. UP is directed to provide written notification of its selection of the offeror with which it wishes to transact business to the Board and all parties to this proceeding by April 12, 1999.
3. If UP and the party it selects cannot agree on a purchase price of the line, either party may request the Board to establish the terms and conditions of the purchase price on or before April

² This decision sets the due date for requesting terms and conditions as to D&RGHF's OFA as the same date as that established for requesting the Board to set terms and conditions as to RG&SJ's OFA to further ensure that there is no prejudice to UP in the Board's acceptance of D&RGHF's OFA.

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26, 1999. If no agreement is reached and no request is submitted by that date, the Board will serve a decision vacating this decision and allowing the abandonment exemption to become effective.

4. This decision is effective on its service date.

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

Vernon A. Williams
Secretary