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SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35038

TULARE VALLEY RAILROAD COMPANY–
FEEDER LINE ACQUISITION–
A LINE OF THE SAN JOAQUIN VALLEY RAILROAD CO.

Decided: June 19, 2007

On May 25, 2007, the Tulare Valley Railroad Company (TVR) filed an application under the Feeder Railroad Development Program (49 U.S.C. 10907 and 49 CFR part 1151) to acquire from the San Joaquin Valley Railroad Co. (SJVR) a 39.77-mile segment of the Exeter Branch, extending between milepost 259.4, near Exeter, and milepost 229.17, at Jovista, in Tulare County, CA. On June 7, 2007, SJVR filed a petition to reject the application.¹ On June 8, 2007, Union Pacific Railroad Company (UP) submitted a letter opposing the application, to which TVR replied on June 12, 2007.

This decision rejects the application as incomplete, without prejudice to TVR's filing a new application containing the necessary information.²

DISCUSSION AND CONCLUSIONS

A feeder line application must include the information set forth at 49 CFR 1151.3(a). TVR provides some information pertaining to each of the criteria in that subsection, but fails to provide sufficient information for a number of the criteria, as discussed below. In addition,

¹ A petition by SJVR for leave to file its petition to reject the TVR's application will be granted.

² In a letter filed June 8, 2007, TVR advises that it intends to reply to SJVR's petition. Given that the Board's feeder line rules do not provide for additional filings by applicants at this stage of a feeder line proceeding and that a 30-day time period applies for the Board to accept or reject the application, the Board must proceed to issue its decision on whether to accept or reject the application.

SJVR and UP state that TVR has not served them with copies of its application as required by 49 CFR 1151.2(a).

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. TVR's application does not contain sufficient information showing that it is financially responsible as required by the feeder line statute.

The only financial information TVR provides in the application is a statement that Mr. Kern Shumacher, who allegedly owns 90% of TVR's stock, has a net worth of more than \$10 million and guarantees TVR's ability to pay the purchase price and to provide adequate transportation for a period of not less than 3 years. However, the application does not include a verified statement from Mr. Shumacher confirming that he will guarantee that TVR will pay the purchase price and provide adequate transportation service, or any evidence demonstrating Mr. Shumacher's net worth. Nor has TVR submitted any financial statements showing that it has adequate resources to acquire and operate the line or commitments from financial institutions to provide funds for the transaction.

Estimate of NLV and GCV (1151.3(a)(4)). According to the application, TVR believes that the line has no GCV. However, there is almost nothing in the record indicating the operating status of the line. TVR has not provided any traffic or revenue data reflecting SJVR's operations on the line and has not requested discovery to obtain this information from SJVR.³ Without this information, there can be no finding as to whether the line has a GCV.

TVR estimates the NLV of the line at \$968,000. This value is based on an alleged estimated value of track, ties and other track materials of \$2,206,100, less removal costs of \$673,500 and costs for refurbishing highway crossings and sidewalks of \$384,600. However, TVR does not provide any supporting evidence for its valuation of the line's assets and removal costs, and SJVR says that it calculates the NLV of the track and materials to be \$2,075,789. Nor does the application include any valuation for the underlying right-of-way.

UP states in its response that it currently owns the right-of-way as successor to the former Southern Pacific Transportation Company (SP), which had sold the track structure and leased the

³ In another part of its application, TVR claims, without any evidentiary support, that a \$950 per car surcharge imposed by SJVR for traffic moving on the line has effectively rendered it impossible for shippers to use the line. If TVR is claiming that traffic no longer moves over the line, it should clearly say so.

underlying right-of-way to SJVR in 1993.⁴ UP asserts that it is entitled to compensation for the underlying right-of-way, which it values at \$8.3 million. According to UP, while the Board has authority under the feeder line statute to require the sale of the line, it has no authority to require UP to lease its property to TVR. UP notes further that, even if the Board could force UP to lease the property, TVR has not offered to pay UP any compensation for leasing the right-of-way, or explained why it should be allowed to use UP's property for free. While TVR replies that UP only owns the right-of-way as realty and has no common carrier obligation on the line, TVR does not address further UP's claim for compensation. Thus, the application is not complete on this issue.

Operating Plan (1151.3(a)(7)). The operating plan provided in the application is sketchy at best. TVR's application merely says that the carrier will render on-demand service and, if traffic permits, scheduled service and provides no details about TVR's proposed operations on the line.

SJVR notes that TVR has not provided rail operations on its own line, pointing out that when it acquired its line in 1993, TVR had indicated that it would contract with an agent to assist in providing service.⁵ SJVR states that it provided service on TVR's line under an agreement that terminated in 2006, and that TVR has not operated its own line and may not have any equipment to provide service over the line it is proposing to acquire here. These circumstances warrant a more detailed operating plan showing how TVR proposes to provide service on the line.

Liability Insurance (1151.3(a)(8)). TVR states, without any supporting evidence, that it carries \$5 million of general liability insurance. The Board's rules require a more thorough description, with supporting documents, for a complete application.

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:

⁴ See San Joaquin Valley Railroad Company–Acquisition and Lease Exemption–Southern Pacific Transportation Company, Finance Docket No. 31993 (Sub-No. 1) (ICC served Oct. 4, 1993).

⁵ See Tulare Valley Railroad Company–Acquisition and Operation Exemption–The Atchison, Topeka & Santa Fe Railway Company, Finance Docket No. 32215 (ICC served July 2, 1993).

(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.

The application contains no evidence supporting TVR's assertion that SJVR has refused to provide adequate service to shippers served on the line or that transportation is inadequate for the majority of shippers who transport traffic over the line. TVR merely claims that service is inadequate because SJVR has imposed a \$950 per car surcharge on traffic moving on the line. But the application does not contain any supporting statements from shippers transporting traffic on the line showing that SJVR has refused to provide them with adequate service. And TVR has not submitted any supporting evidence showing that transportation services provided by SJVR to a majority of shippers transporting traffic on the line is inadequate. Nor is there any evidence supporting TVR's assertion that its purchase of the line would likely result in improved service. The record also lacks evidence indicating whether TVR's proposed purchase of the line would have adverse effects on SJVR's finances or operational performance. Without this evidence, the Board would be unable to determine whether the feeder line proposal complies with the PC&N standard in the statute, and TVR's application therefore is incomplete on these issues.

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 has filed a request for discovery to obtain the missing information. See 49 CFR 1151.2(d). Here, TVR has not sought any discovery from SJVR to obtain missing information. But the information SJVR could provide would not cure all the defects in the application. For example, SJVR would not have any information about TVR's financial responsibility regarding the acquisition and operation of the line. Nor could SJVR shed light on the insurance carried by TVR or TVR's operating plans for the line. Therefore, the application cannot be conditionally accepted but must instead be rejected as incomplete. However, this rejection is without prejudice to TVR filing a new feeder line application should that carrier be able to provide the evidence and information that are lacking here.

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

It is ordered:

1. SJVR's petition for leave to file a petition to reject is granted.
2. TVR's feeder line application is rejected without prejudice to the filing of a new application containing the required information.
3. This decision is effective on the date of service.

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

Vernon A. Williams
Secretary