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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

Decided: June 22, 2004

This decision denies a petition to reopen a decision served on May 11, 1999 (1999 Decision), in this proceeding. That decision approved the sale of a 21.6-mile rail line known as the Creede Branch by Union Pacific Railroad Company (UP) to the Denver & Rio Grande Railway Historical Foundation (D&RGHF) in accordance with the offer of financial assistance (OFA) procedures of 49 U.S.C. 10904 and 49 CFR 1152.27.

BACKGROUND

The Creede Branch, located in Rio Grande and Mineral Counties, CO, historically served local mines. The last train served Creede in 1969. UP filed a notice of exemption with the Board to abandon the line in December 1998. Two parties, the D&RGHF and the Rio Grande & San Juan Railroad Co. filed OFAs to acquire the line. The Director of the Office of Proceedings (Director) found both parties to be financially responsible. When faced with multiple qualified offerors, the railroad may choose the one with which it will negotiate, and here, UP selected D&RGHF. Following a brief period of negotiation, UP and D&RGHF advised the Board that they had reached an agreement for D&RGHF's purchase of the rail line. By the 1999 Decision, UP's abandonment exemption was dismissed effective on the date the sale was consummated, and D&RGHF was authorized to acquire the line.

On November 26, 1999, more than 6 months after the approval of the sale, the City of Creede, CO (City), which lies along the Creede Branch, filed a letter expressing its "protest, fears, and concerns" regarding the sale. The City was opposed to reinstitution of service over the line. The Board treated the City's letter as a petition to reopen UP's abandonment exemption and the sale to D&RGHF. On May 24, 2000, the Board denied the City's petition to reopen, finding that the City had not satisfied the criteria at 49 CFR 1152.25(e)(4) necessary for reopening administratively final proceedings. Also on May 24, 2000, D&RGHF and UP consummated the sale of the line. D&RGHF paid $350,000 in cash and financed the remaining $274,616 by a note held by UP.

On November 2, 2000, the City filed an action against D&RGHF in the District Court for Mineral County, seeking a declaration that a City residential zoning ordinance applied to the

railroad right-of-way (ROW), except for the 25-foot wide center necessary for rail operations. City of Creede v. Denver & Rio Grande Railway Historical Foundation, Dist. Ct., Mineral Cty., Colo., No. 00-CV-4. The case was removed to the U.S. District Court for the District of Colorado (U.S. District Court). City of Creede v. Denver & Rio Grande Railway Historical Foundation, No. 01-RB-318 (CBS) (D. Colo. May 9, 2003).

In an order entered on May 9, 2003, the U.S. District Court referred to the Board certain questions involving federal preemption of the City's zoning laws as applied to D&RGHF. The court ordered the parties to submit to the Board, within 80 days, all portions of the court record relevant to the preemption issue. In response to a request that the referral include issues regarding the sale, the court ruled that "referral of these questions to the STB by this court is not appropriate." Court Order at 5.

On July 2, 2003, the City filed a petition with the Board seeking a declaratory order in STB Finance Docket No. 34376, City of Creede, CO–Petition for Declaratory Order to address the issues referred by the U.S. District Court. D&RGHF made its submission to the Board on July 21, 2003. After requesting two extensions from the U.S. District Court, the City submitted portions of the court record, totaling over 400 pages, on October 14, 2003. The Board will resolve this declaratory order proceeding separately.

The City also contemporaneously filed a petition in this abandonment exemption proceeding, asking again that the Board void the authorization for the sale of the line to D&RGHF. The Board stated in a decision served on November 3, 2003, that it would treat that pleading as a petition to reopen the 1999 Decision. The City filed a supplemental update to its submission of materials on December 1, 2003. On December 19, 2003, two landowners along the ROW – Elk Creek Ranch, Inc. and Wason Ranch Corporation (landowners) – filed comments in support of the City's petition to reopen. On January 20, 2004, UP and D&RGHF replied separately to the City's petition.

PRELIMINARY MATTERS

On February 9, 2004, the landowners filed a motion to strike a portion of D&RGHF's reply – specifically a 14-page statement by D&RGHF president Donald Shank, rebutting their statement. D&RGHF replied in opposition. The landowners cite 49 CFR 1104.4, 1104.5, 1112.6, 1112.8 and all of 49 CFR Part 1112 for the proposition that the Board should strike the statement because it is not verified.

The Board's verification rules only apply to pleadings and verified statements. Letters and other unverified materials accompanying, or submitted in support of, pleadings are routinely accepted into the record. The lack of verification goes to the weight the Board will accord such materials and not to their admissibility. See SF&L Railway, Inc. – Acquisition and Operation Exemption – Toledo, Peoria and Western Railway Corporation between La Harpe and Peoria,

IL, STB Finance Docket No. 33995 et al. (STB served Apr. 13, 2001). The motion to strike therefore will be denied.

On February 10, 2004, the City filed a motion for leave to file supplemental rebuttal, accompanied by the rebuttal. D&RGHF filed in opposition and, in the alternative, asked that the Board accept and consider an attached verified statement from Mr. Shank as surrebuttal. Although a reply to a reply is generally prohibited by 49 CFR 1104.13(c), the Board's rules may be construed liberally to ensure a just determination of the issues presented. See 49 CFR 1100.3. In the interest of compiling a full and complete record, the motion will be granted and the limited rebuttal will be accepted into evidence and considered. For the same reason, the Shank statement will also be accepted and considered.

On April 23, 2004, the City filed a motion to strike all filings made in this proceeding by D&RGHF. D&RGHF replied in opposition to the motion on May 13, 2004. The City argues that a statement made by Donald Shank regarding D&RGHF's application to the Colorado Department of Transportation for rehabilitation funds has been contradicted by another witness and is part of a pattern of deception. Therefore, the City argues, all of D&RGHF's filings should be stricken from the record.[1] The motion will be denied. The Board's role in this proceeding is to evaluate the entire record and accord weight to witness testimony as warranted. It is not appropriate to strike evidence from the record because of disputes as to witness veracity.

POSITIONS OF THE PARTIES

The City argues that new evidence developed in the U.S. District Court proceeding demonstrates that D&RGHF fraudulently misrepresented its financial capacity to purchase and operate the Creede Branch. In fact, the City claims that D&RGHF still has not paid off the balance of the monies owed UP for the ROW, and indeed cannot, thereby forcing UP to defer receipt of payment to the end of 2005. In support, the City contends that D&RGHF did not have possession or title to substantial assets listed on its financial statement to the Board, and that Mr. Shank could not make good on a $400,000 personal guaranty because he never had title to a residence that he had listed as his largest single personal asset.

The City also argues that D&RGHF's representations regarding the cost of rehabilitating the line, and its capability to restore service to the line, were false and fraudulent. According to the City, while D&RGHF cited a $700,000 figure for rehabilitation, the actual figure is over $10 million. The City points to an application to the Colorado Department of Transportation for $11.295 million in grants to rehabilitate the line. The City also maintains that D&RGHF does not actually seek to restore rail freight service to the line. Rather, it contends that D&RGHF's real agenda is leasing real estate back to Creede residents and businesses whose property is

[1] The City also made a filing on June 21, 2004, in support of its motion to strike.

located along the ROW. For these reasons, the City contends that D&RGHF's OFA rights must be revoked.

The adjacent landowners echo the arguments made by the City. In essence, the landowners argue that the Board should reopen this proceeding and revoke the OFA because D&RGHF's financial statement contained false and misleading representations as to the ability of D&RGHF to buy, rehabilitate, and operate the line. Further, they argue that D&RGHF's offer was not for continued rail freight service, and that there is no need for such service. Lastly, they reiterate the City's claim that Mr. Shank and D&RGHF are attempting to extort money from property owners adjacent to the ROW and are otherwise harassing the community.

D&RGHF responds that the OFA sale is a settled matter and that the City's petition should be rejected because it was filed without regard to the U.S. District Court order declining to refer issues regarding the sale to the Board. D&RGHF contends that the City is trying to use the OFA provisions to prevent rail service – a goal contrary to the purpose of the OFA program. Further, it maintains that third parties such as the City lack standing to seek review of the agency's 1999 Decision. According to D&RGHF, such parties cannot be injured by the agency's action because the effect of the OFA was merely to put D&RGHF in UP's shoes before UP began the abandonment process. D&RGHF also argues that the need for finality in the administrative process limits the Board's ability to reopen a consummated acquisition. In order to reopen, D&RGHF contends, the Board must find not only materially false and misleading information in the filings but also that the Board relied on that information in approving the transaction. Moreover, D&RGHF argues that, because the Board's role in approving an OFA sale is limited, the issues that can be presented on reopening must be limited to the determination of the purchaser's financial responsibility and the timeliness of the offer. D&RGHF maintains that there has been no showing that the Board's finding of financial responsibility was based on fraudulent information. With regard to its intent to provide freight rail service, D&RGHF provides letters from three proponents of resumed rail service: GMCO Corporation, the Board of County Commissioners for Mineral County, and Hinsdale County, CO.

UP also opposes reopening. It argues that D&RGHF's rights to own and operate the line cannot be revoked by reopening the OFA sale at this late date. UP points out that, because the Creede Branch is, and always has been, an active rail line, the only mechanism to remove D&RGHF from the line would be a third-party abandonment proceeding under 49 U.S.C. 10903. UP argues that D&RGHF's financial responsibility in 1999 should no longer be relevant 5 years later, especially viewed in light of the fact that D&RGHF had the ability to consummate the sale – the ultimate test of financial responsibility. UP also argues that the City's new evidence does not support its claims as to D&RGHF's activities since obtaining the line. UP maintains that D&RGHF's leasing activities are legitimate and consistent with UP's past practice. UP also points to the City's own evidence concerning D&RGHF's fundraising activities as demonstrating that D&RGHF is genuinely pursuing the restoration of service on the Creede Branch. Finally, as to its extension of the due date on D&RGHF's note, UP asserts that it was

willing to do so, and that there is nothing in such action that is improper or in conflict with the OFA regulations.

DISCUSSION AND CONCLUSIONS

Under 49 CFR 1152.25(e)(4), a petition to reopen must state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances. The Board will grant a petition to reopen only upon a showing that the challenged action would be materially affected by one or more of those criteria. 49 CFR 1152.25(e)(2)(ii). The Board finds that the new evidence presented by the City does not materially affect the 1999 Decision in this proceeding. Therefore, the petition to reopen will be denied.

Financial Responsibility

Through the OFA program, Congress sought to preserve, whenever possible, any prospect for continuing or (as here) resuming rail freight service on corridors that would otherwise be abandoned, while allowing an owner that is losing money on the line to sell it for fair market value. The OFA program confers upon financially responsible persons a right to acquire such a rail line for the constitutional minimum value of the property. See Redmond-Issaquah R.R. Preservation Ass'n v. STB, 223 F.3d 1057, 1061 (9th Cir. 2000); Consolidated Rail Corp. v. ICC, 29 F.3d 706, 712 (D.C. Cir. 1994) (Conrail); S. Rep. No. 96-470, 96th Cong., 1st Sess. 40 (1979). To protect the selling railroad from bearing the financial burden of holding and operating the rail line for an extended period of time, Congress established procedures for conducting the OFA process expeditiously, limiting the time for parties to make offers to purchase or subsidize the line and for the Board to make determinations of financial responsibility. See H. R. Rep. No. 96-1430, 96th Cong., 1st Sess. 125, reprinted in 1980 U.S.C.C.A.N. 4110, 4157 (the OFA provisions will "assist shippers who are sincerely interested in improving rail service, while at the same time protecting carriers from protracted legal proceedings which are calculated merely to tediously extend the abandonment process"). In interpreting and administering the OFA provisions, the Board seeks to accommodate and harmonize Congress' dual objectives of preserving rail service where possible, while protecting the owning railroad from bearing the costs associated with unreasonable delay of its disposition of the line.

The Board has delegated to the Director the preliminary determination of an OFA offeror's financial responsibility. 49 CFR 1011.7(b)(2). The Director must determine, based on a limited record, whether an offeror has the financial resources to make good on its offer to buy and operate the line under 49 U.S.C. 10904(d). This is a case-by-case determination designed to prevent opponents of abandonments from filing frivolous OFAs in order to keep a rail line active during the OFA process. Once a finding is made that an offeror is financially responsible and the terms and conditions of the sale have been established, the offeror's capability to conduct

operations for 2 years is presumed in the absence of evidence to the contrary. See 49 U.S.C. 10904(f)(4)(A); Conrail Abandonment of a Portion of the West 30th Street Secondary Track in New York, NY, In the Matter of an Offer of Financial Assistance, Docket No. AB-167 (Sub-No. 493N), slip op. at 11 n.6 (ICC served Jan. 13, 1987).

The City offers nothing compelling to warrant a challenge to the Director's determination of D&RGHF's financial responsibility at this late date. One of the chief purposes of the financial responsibility requirement is to prevent delay in the abandonment process caused by nuisance OFAs filed by offerors unable to buy the line in question. Although 49 CFR 1152.25(e)(4) allows the filing of a petition to reopen any administratively final decision, the need for administrative finality dictates that the hurdle to be overcome by such a petitioner increases substantially as time passes.[2] The City had every opportunity to question D&RGHF's financial responsibility during the OFA process, but did not until November 22, 1999, long after D&RGHF and UP notified the Board that they had reached an agreement on the sale of the line. The City's arguments then were found to lack merit, and were rejected in May of 2000. Union Pacific – Abandonment Exemption – in Rio Grande and Mineral Counties, CO, STB Docket No. AB-33 (Sub-No. 132X) (STB served May 24, 2000).

The City has not met its substantial burden of showing that the Board's finding of financial responsibility should be reopened and reversed, and that the sale to D&RGHF should be undone at this very late stage. D&RGHF is an existing charitable historic foundation that has taken in significant donations for the purpose of rehabilitating the Creede Branch. Mr. Shank's personal guarantee and the foundation's various assets do not comprise the entire financial picture here. D&RGHF was able to consummate the sale, paying $350,000 of the $624,000 total price in cash at closing, and is current in its financial obligations to UP. While the Board is troubled by apparent inconsistencies raised by the City regarding Mr. Shank's financial documents, such claims do not justify unwinding a 4-year old sale on the grounds of financial responsibility where the buyer is current with its financial obligations, and the principal party that the financial responsibility standard is designed to protect – the selling railroad – remains satisfied with the outcome of the OFA process.

Finally, the City's petition is contrary to the intent of the OFA provisions. Here, UP, the party that the financial responsibility requirement was largely designed to protect, is satisfied with the outcome of the sale and opposes reopening. The City has seized upon the financial responsibility standard in order to attempt to prolong the abandonment process 4 years after the

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[2] See CSX Transportation, Inc.–Abandonment–Between Bloomingdale and Montezuma, in Parke County, IN, Docket No. AB-55 (Sub-No. 486) et al., slip op. at 8 n.10 (STB served Sept. 13, 2002), aff'd sub nom. Montezuma Grain Co., LLP v. STB, 339 F.3d 535 (7th Cir. 2003).

sale was approved, forcing UP to defend its willingness to sell a line it sought to abandon in January 1999.

Continued Rail Service

The claim that this OFA should be reopened because it was not for continued rail service will also be rejected. In considering a challenge to an OFA on this ground, the Board looks at the totality of the evidence regarding the buyer's intentions. When disputed, a buyer must be able to demonstrate that its OFA is for continued rail service, including freight rail service. Roaring Fork Railroad Holding Authority – Abandonment Exemption – in Garfield, Eagle, and Pitkin Counties, CO, STB Docket No. AB-547X (STB served May 21, 1999), aff'd sub nom. Kulmer and Schumacher v. STB, 236 F.3d 1255, 1257 (10th Cir. 2001) (Roaring Fork); see also Columbia v. STB, 342 F.3d 222 (3d Cir. 2003) (Columbia). But challengers of an OFA also bear a burden — to demonstrate that the offer is for some other purpose. See Land Conservancy of Seattle and King County–Acquisition and Operation Exemption–Burlington Northern and Santa Fe Railway Company, STB Docket No. AB-508X (STB served May 13, 1998), aff'd sub nom. Redmond-Issaquah R.R. Pres. Ass'n v. STB, 223 F.3d 1057 (9th Cir. 2000).

In 1999, the Board rejected claims that this OFA was not for continued freight service. See Union Pacific – Abandonment Exemption – in Rio Grande and Mineral Counties, CO, STB Docket No. AB-33 (Sub-No. 132X) (STB served Apr. 22, 1999). The City continues to dispute the issue, but in fact, D&RGHF's intent to operate the line has been demonstrated by its continued efforts to rehabilitate the line. It has cleared the line of vegetation and debris and has shored up the roadbed adjacent to a river. D&RGHF has also installed hundreds of cross-ties, rail lengths, angle bars, tie plates and spikes. The majority of the line has been brought back into gauge and D&RGHF has also replaced three road crossings and has installed a new crossing at South Fork, CO. Shank V.S. at 3. There would be little incentive for D&RGHF to have taken these steps if it did not intend to operate the line.

The fact that D&RGHF has provided the Board with letters from three area proponents of rail service further supports D&RGHF's position that it intends to haul freight on the line. GMCO Corporation states that it would ship 25 cars a year to serve its dust control needs in the area. The Board of County Commissioners of Mineral County hopes to ship magnesium chloride in tank cars to the City of Creede. The Hinsdale County Government states that it would prefer rail service to its current practice of trucking 65,000 gallons of magnesium chloride in the county. D&RGHF Reply at Appendix DHS-5-7. While these letters are not contracts, they represent a reasonable level of commitment to use a rail line that is not yet fully rehabilitated. The Board has never required an offeror to prove in advance that its efforts to revive a failing line will, without question, succeed. 1411 Corp–Abandonment Exemption–in Lancaster County, PA, Docket No. AB-581X, slip op. at 5 n.9 (STB served Sept. 6, 2001), aff'd sub nom. Columbia. Rather, the Board considers whether the plan taken as a whole is intended to result in continuing or resumed freight rail service. See id.

Thus, as the Board explained in Trinidad Railway, Inc. – Abandonment Exemption – in Las Animas County, CO, STB Docket No. AB-573X (STB served Aug. 13, 2001), in determining whether there are sufficient traffic prospects to sustain freight rail operations, the Board considers "all potential income resulting from the operation of the rail line." Here, the record supports the conclusion that D&RGHF intended from the outset to rehabilitate the Creede Branch and subsidize any available freight traffic by running a tourist passenger excursion service on the line. Such passenger service is not incompatible with freight service and, indeed, can serve to make feasible a level of freight service that might not otherwise justify the cost of owning, rehabilitating, and maintaining the line. See id. at 8-10.

Finally, it appears that D&RGHF's practice of leasing land in the ROW not required for rail operations is much the same as that of its predecessor owners. The record, viewed as a whole, does not show that the leases motivated D&RGHF's acquisition of the ROW.

Having petitioned to void the OFA authorization, the City is the party with the primary burden of proof. See 5 U.S.C. 556(d). But the City has not demonstrated that the Board erred in finding that, consistent with the objectives of 49 U.S.C. 10904, the OFA presented the best available plan for restoring freight rail service over this line. See Illinois Central Railroad–Abandonment Exemption–In Perry County, IL, Docket No. AB-43 (Sub No. 164X) (ICC served Nov. 8, 1994), recons. denied and terms set (ICC served Jan. 12, 1995). The facts in the present proceeding are distinguishable from those in Roaring Fork, relied on by the City. In Roaring Fork, the Board dismissed an OFA before any sale of the line went forward and noted that reinstitution of freight rail service (as an adjunct to passenger service) appeared to be more likely under the current owner's plans than under the proposed OFA. In contrast, granting the City's petition would prevent the resumption of rail service on the line.

The Public Interest

The City is opposed to continued rail service on the Creede Branch and has fought a running battle with D&RGHF over its plans to rehabilitate the line and reinstitute rail service. The legal status of the Creede Branch under the statute is that of an active rail line with all of the rights and obligations attendant to that designation. If a party wishes to demonstrate that the public interest permits an active rail property to be abandoned, as the City clearly wishes to do, it may file an application with the Board for adverse abandonment authority under 49 U.S.C. 10903. See, e.g., Canadian National Railway Company–Trackage Rights Exemption–Bangor and Aroostook Railroad Company and Van Buren Bridge Company, STB Finance Docket No. 34014 et al. (STB served June 25, 2002). Under section 10903, the Board will withdraw the shield of its primary jurisdiction over rail property upon a showing by a third party that the public convenience and necessity permit discontinuance or abandonment. Conrail; Modern Handcraft, Inc.–Abandonment, 363 I.C.C. 969, 971 (1981). In implementing this standard, the Board balances the competing benefits and burdens of abandonment or discontinuance on all interested parties, including the railroad, the shippers on the line, the communities involved, and

interstate commerce generally. Waterloo Railway Company–Adverse Abandonment–Lines of Bangor and Aroostook Railroad Company and Van Buren Bridge Company in Aroostook County, Maine, STB Docket No. AB-124 (Sub-No. 2) et al. (STB served May 3, 2004). The current record lacks the evidence necessary to properly address all of the issues that would be part of an adverse abandonment proceeding. Should the City decide to proceed in that manner, it would need to file an application to which opposing parties would have the opportunity to respond.

Related Proceeding

In a decision served on November 3, 2003, in City of Creede, CO–Petition for Declaratory Order, STB Finance Docket No. 34376, et al., the Board held in abeyance the declaratory order proceeding regarding the questions of federal preemption referred by the U.S. District Court pending the disposition of the City's petition to reopen in this docket. Now that the petition to reopen has been disposed of here, the Board will issue a decision establishing a procedural schedule for expeditiously resolving the declaratory order proceeding.

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

It is ordered:

1. The landowners' motion to strike portions of D&RGHF's reply is denied.

2. The City's motion for leave to file limited rebuttal is granted.

3. D&RGHF's motion to file limited surrebuttal is granted.

4. The City's motion to strike all of D&RGHF's filings in this proceeding is denied.

5. The City's petition to reopen is denied.

6. The Board will issue a decision setting a procedural schedule for handling the related declaratory order proceeding in STB Finance Docket No. 34376.

7. This decision is effective on the date of service.

By the Board, Chairman Nober, Vice Chairman Mulvey, and Commissioner Buttrey.

Vernon A. Williams
Secretary