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SERVICE DATE – LATE RELEASE SEPTEMBER 17, 2010

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35405

C.T. CHAPPELEAR, dba OMAHA AND NORTH WESTERN RAILROAD
– FEEDER RAILROAD DEVELOPMENT APPLICATION –
LINE OF NEBRASKA RAILROAD MUSEUM BETWEEN FREMONT AND
WEST POINT, NEB.

PETITION FOR WAIVER

Decided: September 17, 2010

The Board is denying the petition of C.T. Chappellear, dba Omaha and North Western Railroad (ONWR) for waiver of certain regulations governing the filing of applications under 49 U.S.C. § 10907, which governs the involuntary sale of railroad lines to financially responsible persons who can assure the provision of adequate transportation and compensate owners for the constitutional minimum value of the lines.

BACKGROUND

ONWR asserts that it plans to file a Feeder Railroad Development Program application under 49 U.S.C. § 10907 and the Board's implementing rules at 49 C.F.R. pt. 1151 to acquire and operate over a line of railroad running north approximately 37.5 miles from milepost 1.5 at Fremont, Neb., to milepost 39.0 at West Point, Neb. According to ONWR, the line was originally part of a line that was owned by the Chicago and North Western Transportation Company (CNW) and was abandoned by CNW in 1984.¹ In 1986, CNW sold the abandoned line to what is now the Nebraska Railroad Museum (NRM), formerly the Eastern Nebraska Chapter, National Railway Historical Society. In 1987, NRM formed the Fremont, West Point and Pacific Railway, Inc. (FWPP), to provide freight service on the line, and FWPP acquired operating authority from the Interstate Commerce Commission to do so.² In 1988, however, the

¹ See Chi. & N. W. Transp. Co.–Aban. Exemption–Dodge, Cuming, Stanton and Madison Counties, Neb., AB 1 (Sub-No. 180X) (ICC served May 10, 1985).

² See Fremont, W. Point & Pac. Ry.–Exemption–Operation–Certain Abandoned R.R. Lines Owned by the E. Neb. Chapter of the Nat'l Ry. Historical Soc'y in Dodge and Cuming Counties, Neb., FD 31147 (ICC served Nov. 25, 1987).

Nebraska Secretary of State administratively dissolved FWPP for nonpayment of taxes. At that time, freight service over the line ceased. Today, NRM operates the southern portion of the line between milepost 1.5 and milepost 19.0 near Hooper, Neb., as a tourist railroad.³ According to ONWR, after FWPP ceased freight operations, NRM began salvaging the northern portion of the line between milepost 19.0 and milepost 39.0 and sold the right-of-way underlying that segment to nearby landowners, businesses, and the State of Nebraska Department of Roads. ONWR states that it has found no record showing that either NRM or FWPP obtained authority to discontinue or to abandon service over any part of the line.

In its petition filed on August 20, 2010, ONWR asks the Board to waive the requirements of 49 C.F.R. §§ 1151.3(a)(3)(i), 1151.3(a)(4), and 1151.3(a)(5) that the financially responsible party estimate, and offer to pay, the higher of the net liquidation value (NLV) or the going concern value (GCV) of the line. In support of this request, ONWR argues that (1) the line can have no GCV because the line, having no active shippers, is unprofitable; and (2) NLV is “near zero” because of the litigation costs that would arise from resolving ownership disputes from the prior sale of the right-of-way on the northern portion of the line and from the costs of salvaging the line. ONWR suggests that, rather than require estimates of NLV or GCV, the Board should set the constitutional minimum value of the line at \$227,250, which ONWR calculates by multiplying 454.5 acres (line’s alleged acreage) by \$500/acre (alleged value per acre).

In its petition, ONWR also asks the Board to waive its regulations at 49 C.F.R. § 1151.3(a)(11)(i) governing evaluation of the public convenience and necessity to the extent that these regulations “invoke” shippers, because there are none.

On September 9, 2010, NRM filed in opposition to the waiver request, questioning the propriety of filing a feeder line application for this alleged rail line.

DISCUSSION AND CONCLUSIONS

ONWR’s requests for waiver will be denied. The waiver request regarding estimates for the GCV and NLV of the line raises issues that can be properly resolved only after an application is filed and input can be received from other interested parties, particularly NRM, the owner of the line, which was not served with ONWR’s petition. If ONWR believes that the GCV or NLV are low, it can so state in its application, support its position with evidence, and thereby give NRM and other interested parties an opportunity to reply. ONWR’s allegation that the line is worth \$227,250 is unsupported and, as such, cannot serve as a substitute for an evidentiary showing of the line’s GCV and NLV to determine the line’s constitutional minimum value as provided by statute and Board rules.

It would also be improper to waive application of 49 C.F.R. § 1151.3(a)(11)(i). That rule implements the statutory standards under 49 U.S.C. § 10907(c) for determining whether the public convenience and necessity require the sale of a rail line. The Board will not waive that

³ Tourist trains do not require authority from this agency if they do not involve interstate movements. See 49 U.S.C. § 10501.

provision because doing so would contravene the statutory basis for the feeder line provision. See, e.g., Fiehrer–Feeder Line Application–Line of BNSF Ry. Between Helena & Great Falls, Mont., FD 34947 (STB served Aug. 29, 2007).

NRM's arguments regarding the propriety of the feeder line procedures here are premature at this time, however, because ONWR has not yet filed an application. When and if ONWR should file a feeder line application for the alleged rail line, the Board would give full consideration to these arguments in deciding whether to accept the application. NRM will be notified of any such application, as Board rules require that a feeder line applicant concurrently serve a copy of the application on the owning railroad when filing an application with the Board. 49 C.F.R. § 1151.2(a)(1).

It is ordered:

1. ONWR's petition for waiver is denied.
2. This decision is effective on the date of service.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.