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THOMAS F. MCFARLAND

May 19, 2015

By UPS overnight mail

Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20024

238459

ENTERED
Office of Proceedings
May 21, 2015
Part of
Public Record



Re: Docket No. AB-43 (Sub-No. 189X), *Illinois Central Railroad Company --
Abandonment Exemption -- in Champaign County, IL*

Dear Ms. Brown:

Hereby transmitted is the original and 10 copies of an Appeal of Acting Director's
Decision Served May 11, 2015 for filing with the Board in the above referenced matter.

Also enclosed is a check in the amount of \$300 for the filing fee.

Very truly yours,

Thomas F. McFarland
Attorney for Appellant

TMcF:kl:enc:wp8.0\1682\ltrSTB1

FEE RECEIVED
May 21, 2015
SURFACE
TRANSPORTATION BOARD

FILED
May 21, 2015
SURFACE
TRANSPORTATION BOARD

BEFORE THE
SURFACE TRANSPORTATION BOARD



ILLINOIS CENTRAL RAILROAD
COMPANY -- ABANDONMENT
EXEMPTION -- IN CHAMPAIGN
COUNTY, IL

)
) DOCKET NO.
) AB-43 (SUB-NO. 189X)
)

APPEAL OF ACTING DIRECTOR'S DECISION SERVED MAY 11, 2015

TOPFLIGHT GRAIN COOPERATIVE
420 West Marion
Monticello, IL 61856

Appellant

THOMAS F. McFARLAND
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Attorney for Appellant

Due Date: May 21, 2015

BEFORE THE
SURFACE TRANSPORTATION BOARD



ILLINOIS CENTRAL RAILROAD)
COMPANY -- ABANDONMENT) DOCKET NO.
EXEMPTION -- IN CHAMPAIGN) AB-43 (SUB-NO. 189X)
COUNTY, IL)

APPEAL OF ACTING DIRECTOR'S DECISION SERVED MAY 11, 2015

Pursuant to 49 C.F.R. § 1011.2(a)(7), TOPFLIGHT GRAIN COOPERATIVE (Topflight) hereby appeals from a decision of Acting Office of Proceedings Director Joseph H. Dettmar, served on May 11, 2015 (Director's decision).

THE DIRECTOR'S DECISION

The Director's decision denied Topflight's request that the Board accept its late-filed notice of intent to file an Offer of Financial Assistance (OFA) to purchase a 3.2-mile rail line of Illinois Central Railroad Company (IC), a subsidiary of Canadian National Railway Company (CN), between Bondville and Seymour, IL (Bondville-Seymour line or the Rail Line), and rejected Topflight's tendered notice of intent to file an OFA. (Director's decision at 3, ordering paragraph 2).^{1/}

The ground for the Director's decision was Topflight's failure to have provided any reason why its notice of intent was late and could not have been filed by the April 20 deadline, citing 49 C.F.R. § 1152.25(d)(5), which provides that late-filed pleadings are to be rejected in the absence of a showing of good cause for their acceptance. (Director's decision at 2 and note 4).

^{1/} The notice of intent was filed ten days out of time.

LEGAL BASIS FOR APPEAL

The Director's decision was issued pursuant to authority delegated to the Board's Office of Proceedings. *See* 49 C.F.R. § 1011.7(a)(2)(ii). The grounds for such an appeal are circumscribed. Cf. 49 C.F.R. § 1011.6(b), i.e., in exceptional circumstances (1) to correct a clear error of judgement, or (2) to prevent manifest injustice.

The ground for this appeal is that in the exceptional circumstances set forth in support of this appeal, acceptance of Topflight's late-filed notice of intent to file an OFA is essential to prevent manifest injustice.^{2/} In making that determination, the Board is to take into account the National Rail Policy in favor of continuation of a sound rail transportation system to meet the needs of the public, as set forth in 49 U.S.C. § 10101(4), and the strong policy of 49 U.S.C. § 10904 in favor of continued rail service on rail lines authorized for abandonment. *See, e.g., Burlington N./Santa Fe - Aban. - in King County, WA*, 3 STB 634 (1998), at 639 ("While the ICC Termination Act streamlined the language in former section 10905, now 10904, language remaining in the statute clearly reaffirms the fundamental purpose of section 10904 to continue rail service").^{3/}

^{2/} There was no error of judgement. The Acting Director correctly determined that in the absence of a showing of good cause for Topflight's late filing, its notice of intent to file an OFA was required to be rejected by virtue of 49 C.F.R. § 1152.25(d)(5).

^{3/} In exchange for more accelerated processing of rail abandonments, Congress provided for a better opportunity for continued rail service by means of OFAs. HR Rep. No. 96-1430, Staggers Rail Act of 1980, Conf. Rep. at 125 ("The provisions in Section 202 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.")

ARGUMENT IN SUPPORT OF APPEAL

Reference will be made in this Argument to the attached Verified Statement of Mr. Scott Docherty, General Manager of Topflight.

Topflight's notice of intent to file an OFA was not timely filed on April 20, 2015 because Mr. Docherty misinterpreted the following provision in the Board's Notice of Exemption served April 10, 2015 as providing that such a notice could be filed up to May 12, 2015 (VS Docherty at 3):

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption may become effective on May 12, 2015, unless stayed pending reconsideration . . .

That was Mr. Docherty's mistake, not the Board's. Later in the Notice of Exemption, it was stated that formal expressions of intent to file an OFA must be filed by April 20, 2015 (Notice at 2). In some instances, a unilateral mistake by a party to a Board proceeding will justly lead to denial of a request that the Board excuse the mistake. In the case at hand, however, there are extensive extenuating circumstances that militate in favor of accepting into the record Topflight's late-filed notice of intent to file an OFA.

As a non-attorney employee of a grain company in a rural area, Mr. Docherty was not familiar with Board procedures and, in particular, was not experienced in the sequence of Board filings in OFA proceedings (VS Docherty at 3). His misinterpretation of the filing date for a notice of intent should be viewed from that standpoint.

In addition, when IC took the Rail Line out of service, Topflight's attempts to lease or purchase it for reinstatement of rail service were scuttled by IC at every turn. In response to

Topflight's request for an extended lease term, IC's offer of a lease with an 836 percent rental increase and a requirement that Topflight repair poor track conditions caused by IC's failure of adequate maintenance was not a good faith offer, but instead was effectively a refusal to lease the line. Not only did IC later refuse to sell the Line to Topflight, IC failed to disclose to Topflight that it already had filed for abandonment, even though IC was well aware of Topflight's strong interest in reinstatement of rail service over the Line (VS Docherty at 2 and Appdx. SD-1 and SD-2).

IC may not have had a legal obligation to voluntarily sell or lease the Line to Topflight. Nevertheless, IC's failure to have done so while the 2-year out-of-service period was running to qualify for a class exemption for abandonment can and should be taken into consideration in determining whether an opportunity should be provided now for Topflight to purchase the rail line.

The same is to be said for IC's failure to disclose to Topflight IC's filing for abandonment when Topflight specifically inquired about the status of the rail line. Technically, IC did not have a duty to serve Topflight with a copy of the Notice of Exemption for abandonment. Even so, IC's stonewalling when Topflight asked about IC's plans for the rail line is a material consideration in the determination of whether it is just and reasonable now to provide Topflight with an opportunity to purchase the rail line.

CONCLUSION AND REQUESTED RELIEF

If this appeal were to be granted, a forum to permit reinstatement of needed rail service would be made available to a former extensive user of the Rail Line whose good faith efforts to restore rail service by means of voluntary sale or lease of the out-of-service Line were

consistently thwarted by IC. That result would in perfect harmony with the policy of 49 U.S.C. § 10904 and 49 U.S.C. § 10101(4) in favor of continuation of needed rail service.

Granting the appeal would not significantly harm IC. The 3.2-mile line segment here under consideration is less than one-tenth of one percent of the 20,400-mile CN rail system. If the appeal were to be granted, there would be a modest delay in abandonment or sale of that short stretch of track. However, as was shown in Topflight's Reply of May 8, 2015 (Item 2), IC itself has been on a very leisurely pace in processing its Notice of Exemption. IC has not come close to establishing a need for expedited handling of the proposed abandonment.

The foregoing shows without question that a balancing of equities strongly favors a grant of this appeal. That is another way of saying that granting the appeal is essential to prevent manifest injustice. Accordingly, the Board should grant the appeal.

Respectfully submitted,

TOPFLIGHT GRAIN COOPERATIVE
420 West Marion
Monticello, IL 61856

Appellant



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Attorney for Appellant

Due Date: May 21, 2015

VERIFIED STATEMENT OF SCOTT DOCHERTY

My name is Scott Docherty. I am General Manager of Topflight Grain Cooperative (Topflight). Topflight maintains facilities for the shipment of grain at Seymour, IL. Those facilities are rail-served by Illinois Central Railroad Company (IC).

Historically, Topflight made 25-car shipments of grain from Seymour over IC. However, in more recent times, IC has taken the rail line at Seymour out of service due to washouts and other poor track conditions. IC has not attempted to repair and reopen the rail line. As a result, Topflight has been unable to ship by rail from Seymour.

Prior to the line being taken out of service, Topflight leased 6,100 feet of rail line at and near Seymour for rent of \$8,600 per year under a short-term cancellable lease. In view of the continuing out-of-service condition of the rail line, in 2013, I asked IC for a five-year lease. In response, IC offered a five-year lease at the following exorbitant yearly rentals:

YEAR 1	\$36,600
YEAR 2	\$61,000
YEAR 3	\$79,300
YEAR 4	\$103,700
YEAR 5	\$122,000
5 YEAR TOTAL	\$402,600, AVERAGE OF \$80,520 per year

In addition to that 836 percent increase in yearly rental, the lease would require Topflight to restore the track to operable condition and to continue to maintain it for rail shipment despite the fact that it was IC's failure to adequately maintain the line that caused it to be taken out of

service. It was obvious from those terms that IC had no intention of leasing the rail line to Topflight. Topflight could not go forward with a lease under those draconian terms.

Attached to my Statement as Appendix SD-1 is a copy of an e-mail message dated March 19, 2015 from Ms. Amy Brammer, Business Development Manager of Topflight, to Ms. Angelique Cope of IC, in which Ms. Brammer asked for the status of IC's plans for the Bondville-Seymour rail line, and expressed an interest in starting a discussion about possible purchase of the rail line. I later learned that Ms. Brammer's message was sent only four days prior to the date on which IC's Notice of Exemption for abandonment of the Bondville-Seymour rail line was filed at the Surface Transportation Board (STB). Neither Ms. Brammer nor I was aware of that imminent filing when Ms. Brammer's message was sent.

Attached to my Statement as Appendix SD-2 is a copy of Ms. Cope's responsive message to Ms. Brammer, dated March 26, 2015, in which Ms. Cope stated that CN is not interested in selling the Bondville-Seymour line to Topflight. Ms. Cope's message failed to disclose to Topflight IC's filing of a Notice of Exemption for abandonment of that rail line at the STB three days earlier, even though Ms. Brammer had specifically inquired about CN's (IC's) plans for that line.

Topflight was not served with a copy of IC's Notice of Exemption. Instead, I learned of that filing from an independent third party. Later, I obtained a copy of the Notice that was issued by the STB, having a service date of April 10, 2015. On page 2 of that Notice, it was stated:

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption may become effective on May 12, 2015, unless stayed pending reconsideration . . .

I misinterpreted that provision as providing that an intent to file an OFA could be filed until May 12, 2015. I am now aware that filing of such an intent actually was due on April 20, 2015. By way of explanation of my mistake, I am not an attorney familiar with STB procedures and, in particular, I have never been involved in an OFA proceeding before the STB.

In the days following issuance of the STB Notice of Exemption, I was engaged in discussions with a representative of Chessie Logistics (Chessie) about potential operation of the rail line by Chessie if Topflight were to purchase the line pursuant to an OFA. The Chessie representative did not alert me that an OFA was due on April 20, 2015. Discussions between Topflight and Chessie concluded without an agreement concerning Chessie's operation of the rail line.

Thereafter, I contacted a representative of Pioneer Railcorp (Pioneer) about potential operation of the rail line if Topflight were to acquire it. The Pioneer representative alerted me to the April 20 deadline for filing notices of intent to file an OFA. At that time, however, that deadline had passed.

In that circumstance, with the help of the Pioneer representative, I requested that the attorney for IC provide IC's estimate of the net liquidation value (purchase price) of the rail line, and on April 30, 2015 (as corrected on May 1, 2015), Topflight filed a request that the STB accept its tendered late-filed notice of intent to file an OFA. In the decision of May 11, 2015 hereby being appealed, Acting Office of Proceedings Director Joseph H. Dettmar denied that request.

From: Amy Brammer [<mailto:abrammer@topflightgrain.com>]
Sent: Thursday, March 19, 2015 9:05 AM
To: Angelique Cope
Cc: Amy Brammer; Scott Docherty
Subject: CN Rail Line - Seymour, IL
Importance: High

Good Morning –

I am writing to inquire as to the status of the plans the CN Railroad has for the rail line running from west of Bondville, IL to Seymour, IL. I believe the last correspondence you had with Topflight Grain, after some leasing discussions, we were waiting on the results of track inspections from the CN Engineering team. Topflight Grain has yet to receive any results of those findings.

Topflight Grain is interested in starting a discussion about our possibly purchasing the portion of the track from west of the Bondville, IL domain until the end of the line in Seymour, IL. I am unsure if I should start that process with you or someone else. If not you, would you kindly direct me toward who I need to speak with regarding this matter?

Thank you!

Amy N. Brammer
Business Development Mgr. | Topflight Grain Coop.
PO Box 349/103 N Oak Street | Maroa, IL 61756
phone :: (217) 794-5533 | fax :: (217) 678-8113
web :: www.topflightgrain.com

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Sent from my iPhone

Begin forwarded message:

From: Angelique Cope <Angelique.Cope@cn.ca>
Date: March 26, 2015 at 1:05:41 PM CDT
To: Amy Brammer <abrammer@topflightgrain.com>
Cc: Michael Ceslick <mike.ceslick@cn.ca>
Subject: RE: CN Rail Line - Seymour, IL

Good Afternoon Amy

After thorough discussion with CN's Operations team as well as our Network Strategies group, we are not interested in selling the portion of the track that you are interested in purchasing from Bondville to Seymour.

However, we will continue to serve Bondville. Please inform me on how you wish to proceed.

VERIFICATION

SCOTT DOCHERTY, being duly sworn, states that he is General Manager of Topflight Grain Cooperative; that he is familiar with the facts asserted in the foregoing Verified Statement; and that those facts are true and correct as stated.


SCOTT DOCHERTY

STATE OF ILLINOIS)
)
COUNTY OF PIATT)

SUBSCRIBED and SWORN to before me
this 18 day of May, 2015.



Notary Public



My Commission expires: 3/25/16

CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2015, I served a copy of the foregoing Appeal of Acting Director's Decision Served May 11, 2015 on Robert A. Wimbish, Esq. at 29 North Wacker Dr., Suite 920, Chicago, IL 60606 and *rwimbish@fletcher-sippel.com* by e-mail and first-class, U.S. mail, postage prepaid.

Thomas F. McFarland

Thomas F. McFarland