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PUBLIC VERSION  
BEFORE THE  
SURFACE TRANSPORTATION BOARD



STB DOCKET NO. AB-1081X  
SAN PEDRO RAILROAD OPERATING  
COMPANY, LLC-ABANDONMENT EXEMPTION-  
IN COCHISE COUNTY, AZ

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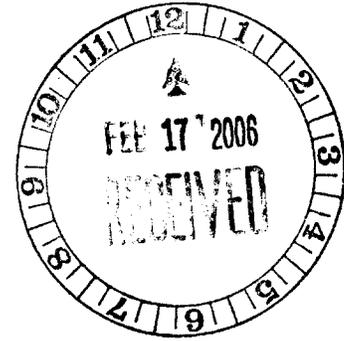
SAN PEDRO RAILROAD OPERATING COMPANY, LLC  
MOTION TO REJECT OFFER OF FINANCIAL ASSISTANCE  
AND REPLY TO MOTION FOR PROTECTIVE ORDER

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Dated: February 16, 2006

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INTRODUCTION

On February 13, 2006, Sonora-Arizona International LLC (hereafter "Sonora" or "Offeror") filed an Offer of Financial Assistance in the above-captioned abandonment proceeding accompanied by a Motion for a Protective Order. San Pedro Rail Operating Company ("SPROC") now moves the Board to reject this offer on the grounds that the Offeror is not a "financially responsible person" and on the grounds that its offer is not "bona fide and reasonable" under 49 U.S.C. 10904(d)-(f) and 49 CFR 1152.27. Additionally, SPROC opposes the Motion for a Protective Order insofar as it forbids SPROC from negotiating the sale of its assets with the Offeror except through counsel or allows SPROC to satisfy itself as to the financial fitness of the Offeror or its investor.

## BACKGROUND

On February 3, 2006, the Board granted SPROC's petition for exemption for abandonment of approximately 76.2 miles of track and railroad right of way in Cochise County, AZ. The Board conditioned its authorization on certain environmental, historic, public use, and trail use conditions not relevant here and upon the right of a "financially responsible person" to make an "offer of financial assistance" (hereafter an "OFA") under 49 U.S.C. 10904(d)-(f) and 49 CFR 1152.27.<sup>1</sup> Surprisingly, Chemical Lime Company, the sole shipper on the affected segment of railroad and the sole protestant to this proceeding, did not submit an OFA. Instead, Sonora, the creation of an individual named Charles Sotelo, submitted the only OFA.

Briefly, Sonora offered to acquire the subject 76.2 miles of track and right of way for \$5,400,000, the amount of SPROC's valuation. Additionally, in a cover letter addressed to SPROC's counsel, Sonora offered to purchase for \$400,000 in cash and a revenue-based supplemental "earnout" an additional seven mile segment that SPROC has no plans to abandon or sell.<sup>2</sup> Sonora proposes to close at the end of a 45 day due diligence period.

In support of its claim of financial responsibility, Sonora represents that it has formed an alliance with Sonora-Arizona

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<sup>1</sup> Hereinafter the Offer of Financial Assistance shall be cited as Sonora OFA.

<sup>2</sup> That segment extends from MP 1033.008 at the Union Pacific interchange at Benson, AZ, to MP 1040.15 at Curtiss, AZ.

International S.A. de C.V. ("Sonora-Mexico"), a Mexican company for which Mr. Sotelo is described as serving as "Managing Director of the alliance of the two companies." Sonora OFA at 3. Sonora represents that Sonora-SA was formed by Lic. Isidoro de la Garza Orozco "for the purpose of entering into this alliance and the two companies have formed an experienced and well-qualified management team and received a commitment for the required financing." Sonora OFA at 3. Sonora claims that it has secured financing from [\_\_\_\_\_ a \_\_\_\_\_-based] financial services and venture capital firm. Sonora submits with its OFA an affidavit of one [\_\_\_\_\_] representing that he has obtained a letter of credit from Citibank that will be used to finance the purchase of SPROC's line. He also represents that he is discussing with Sonora the amount of money needed to rehabilitate the line for operation and will make those funds available as well. Sonora's OFA indicates that Mr. Sotelo has been working for the past 10 years to develop the Port of Guaymas in Mexico. Presumably, this rail line would connect with an unidentified rail line in Mexico to enable unspecified trans-border traffic to flow between the port and points in the United States using the subject rail line. Sonora's OFA indicates that Mr. Sotelo has managed "large teams" at Merrill Lynch, is a licensed real estate broker, has established communications with officials and potential partners

on both sides of the border, has received endorsements and letters of support for the project, and is fluent in English and Spanish. While Sonora's OFA identifies five other individuals<sup>3</sup> who will be involved with this project, there is no indication that any of these people will be providing any portion of the financing.

#### ARGUMENT

##### 1. Offeror's Financial Fitness

The Board must reject Sonora's OFA for failure to comply with the statute and the regulations. The Board's regulations are very simple. They merely state that the offer must:

- (a) Identify the line in question;
- (b) Demonstrate that the offeror is financially responsible, that is, that it has or within a reasonable time will have the financial resources to fulfill the proposed contractual obligations...; and
- (c) Explain the disparity between the offeror's purchase price or subsidy if it is less than the carrier's estimate..

See, 49 CFR 1152.27(c)(ii). While Sonora has satisfied requirements (a) and (c) of this regulation (it has identified the lines subject to its offer and there is no discrepancy

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<sup>3</sup> Isidoro de la Garza Orozco, Edward McLaughlin, Bruce Brogan, Rubens Perez Vasquez, and Jose Carbajal.

between the offering price and SPROC's valuation, it fails to satisfy sec. 1152.27(c)(ii)(b). Sonora has not provided convincing evidence of its financial responsibility. Moreover, its offer fails to satisfy the Board's normal policy that closing take place 90 days from the date of a Board decision approving the acquisition. Chicago And North Western Transp. Co.-Abandonment, 363 I.C.C. 956, 963 (1981).

Regarding financial responsibility, the Board and Interstate Commerce Commission have allowed an offeror to establish its financial qualifications by submitting, among other things, financial statements, commitment letters from banks or other recognized lenders, unconditional written commitments from known investors or other sources of financing, unconditional lines of credit, and unconditional letters of credit. Superficially, Sonora has done just that. It has submitted an affidavit from an investor who is committed to financing both the acquisition and rehabilitation of this rail line. Since the investor is not a recognized source of financing, it has submitted a letter of credit for \$120,000,000, drawn on an internationally recognized lending institution, Citibank. So far, so good.

However, SPROC's research suggests that this information is so bogus as to warrant a finding that this offerer is not a financially responsible person within the meaning of the statute

and the regulations. First, counsel for SPROC checked both Google and whitepages.com to find listings for both the venture capital firm and the individual behind that firm in the two Canadian locations where they appear to be domiciled.<sup>4</sup> While Google displayed numerous listings for both firms containing the names identified in the Confidential Version of the OFA, SPROC's counsel could not find a specific listing for either party. Moreover, whitepages.com did not indicate any telephone listing for either party in either location. Second, SPROC's counsel then called directory assistance for both Canadian locations. An operator confirmed no listing for either party in either location. Third, SPROC's counsel compared the name of the proposed venture capital firm against a list of venture capital firms in that larger location and found no listing. In addition, a representative of the economic development agency for the smaller location advised SPROC's counsel that she was unable to find any listing for either the venture capital firm or the individual behind the firm.<sup>5</sup>

Counsel for SPROC then attempted to confirm the authenticity of the Citibank letter of credit accompanying both the public and confidential versions of this filing. He did so by contacting Citibank's Connecticut Avenue branch where the

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<sup>4</sup> One location was a major city in Western Canada. The other was a smaller community located about 50 miles away.

<sup>5</sup> A copy of her email message is attached as Exhibit A to the confidential version of this filing.

branch manager<sup>6</sup> then faxed a copy of the public version of the letter of credit to the bank's commercial office. Initially, a bank employee named Rizwan Lodi<sup>7</sup> advised SPROC's counsel that the format for the letter of credit was not of a type familiar to the Washington, D.C. branches of Citibank. He then referred SPROC's inquiry to the national customer service office. An individual named Roman (no last name given for security reasons) in customer service (813-604-7000) called back and declined to discuss this matter with any one not a customer of the bank's. He did admit that the Standby Letter of Credit Number on the face of the letter was unfamiliar and that a letter of credit for an amount as large as \$120,000,000 would be known to bank employees.

2. Sonora's offer is not bona fide

In order for the Board to accept an OFA for the purpose of initiating purchase negotiations, the Board must be able to find that the offer is "bona fide," that is to say, likely to lead to a continuation or resumption of rail service at an early date. See, e.g., Burlington Northern And Santa Fe Railway Company-Abandonment Exemption in King County Washington, STB Docket No. AB-6 (Sub-No. 380X), (slip op. served Aug. 5, 1998) and cases cited therein. In that case, the Board rejected an OFA as not

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<sup>6</sup> Stephen Koorey, phone 202-828-5988.

<sup>7</sup> Phone 202-508-4503.

bona fide finding that (1) the abandoning railroad had embargoed the line for safety reasons a couple of years before seeking abandonment approval, (2) no traffic has moved on it since that time, (3) the cost of restoring the line would be substantial, and (4) the Board had no information to suggest that prospects for anything more than de minimis traffic on the line now or in the future exists, certainly not enough to cover rehabilitation, maintenance and operating costs. As the Board noted there,

Given the circumstances surrounding this case, we advise the public and all the parties that have participated in these proceedings that we intend to carefully review the substance as well as the form of any OFA that should be filed involving this line. Specifically, because the information now before us shows that this line is not currently being used for rail service and that there is no apparent demand for rail service, any entity filing an OFA should be prepared to submit not only evidence of its financial responsibility, but also evidence of a public need for continued rail service [emphasis supplied]. Similarly, anyone challenging an OFA should be prepared to address why the OFA is not bona fide. Id. at 6; See also, Chelsea Property Owners-Aband.-The Consol. R. Corp., 8 I.C.C.2d 773, 779 (1992), aff'd sub. nom., Conrail v. ICC, 29 F.3d 706, 712 (D.C. Cir. 1994).

An offeror seeking to acquire the subject rail line to provide common carrier rail service over it would likely do so for two reasons: to handle local traffic and to provide overhead rail service between points in the United States and Mexico. These are the same reasons which motivated SPROC and its predecessors to acquire and operate this rail line.

Regarding local service, there is only one current customer, Chemical Lime Company ("CLC") at Paul Spur. It

generates about 400 car loads of traffic per year, not enough business to justify retention of this railroad. Considering the great lengths to which CLC went to block SPROC's abandonment, it is very strange that CLC did not file an OFA or provide any financial or traffic support to Sonora. Its silence here is very telling. Numerous efforts by SPROC and its predecessors to persuade other customers to locate on the line have resulted in failure.

As to overhead traffic, SPROC and its predecessors had attempted to persuade Ferromex, a Mexican regional railroad, to re-establish an interchange at Naco in order to move traffic between the United States and Canada. Ferromex concluded there was insufficient traffic to justify this additional gateway. See, Ferromex email attached to this filing as Exhibit B. SPROC believes that Union Pacific Railroad also has no desire to preserve this route.

Sonora provides no evidence whatsoever as to the need for another international corridor or how it will attract sufficient business to justify its \$5,400,000 offering price as well as the substantial amount of money needed to put the line in even a minimally acceptable condition for service. Finally, neither the State of Arizona nor local interests have stepped forward with any plans to preserve service over or acquire the line, not

even a letter of support for Sonora. SPROC submits there is no need for this line and the OFA should be rejected.

Before addressing Sonora's Motion, SPROC wishes to point out that Sonora and its principal Charles Sotelo have been trying for years to preserve this line as an international rail corridor. The Board is well aware of Mr. Sotelo and his interest in the line as well as his lack of credibility and financial resources. See, Charles M. Sotelo-Petition for Declaratory Order-Line Relocation in Cochise County, AZ, STB Finance Docket No. 34191 (October 24, 2002). Mr. Sotelo has previously engaged SPROC's principal in discussions for purchase of the line but has yet to demonstrate either any ability to pay for that purchase or generate traffic that would be required to justify such financing. Considering how long Mr. Sotelo has sought to acquire this line and the fact that Mr. Sotelo has known about this abandonment since April 2005 when SPROC published its System Diagram Map narrative, it is clear that he could have obtained credible funding for a viable venture. But there is no basis for viability.

For all of the above reasons, SPROC urges the Board to reject Sonora's OFA.

3. The Board should deny Sonora's Motion for a Protective Order

Should the Board accept Sonora's OFA, SPROC asks that it reject its Motion for A Protective Order insofar as it forbids SPROC from contacting any officer, agent, principal, investor, or assigns of Sonora or Sonora-Mexico to discuss Confidential or Highly Confidential Information or the OFA except through counsel for Sonora.

SPROC notes that Charles Sotelo has previously engaged its principal David Parkinson in discussions regarding the sale of this railroad. Those discussions have gone nowhere because of a lack of funding on Mr. Sotelo's part. The Board should not allow Sonora to negotiate for the purchase of the subject rail line by requiring SPROC to deal with Sonora only through counsel, unnecessarily increasing SPROC's already significant legal fees. Moreover, if SPROC is to be forced to wait another six months to salvage its investment in this line, SPROC is entitled to meet Sonora's investor and management team to allow it to satisfy itself that the Offeror has the resources to carry out this transaction. The Board should deny Sonora's Motion for a Protective Order to the extent it would prevent SPROC from dealing directly with the Offeror.

CONCLUSION

For the reasons stated above, SPROC requests that the Board reject Sonora's OFA and deny in part its Motion for a Protective Order.

Respectfully submitted

A handwritten signature in black ink, appearing to read "John D. Heffner", is written over a horizontal line.

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Counsel for San Pedro  
Railroad Operating  
Company, LLC

Dated: February 16, 2006

**CERTIFICATE OF SERVICE**

I, John D. Heffner, certify that I served a copy of San Pedro Rail Operating Company, LLC's, "Motion to Reject Offer of Financial Assistance" and "Reply to Motion for Protective Order" of Sonora-Arizona International, LLC, on all parties to this proceeding by fax transmission and first class U.S. Mail this 17<sup>th</sup> day of February 2006.

  
\_\_\_\_\_  
John D. Heffner

EXHIBIT A  
OMITTED FROM PUBLIC VERSION

Mail :: INBOX: Re: Your Nov. 15 communication

# EXHIBIT B

INBOX Compose Folders Options Search Help Address Book Memos Calendar Logout Open Folder

INBOX

Move Copy This message to

Delete | Reply | Reply to All | Forward | Redirect | Blacklist | Message Source | Resume | Save as | Back to INBOX

Date: Tue, 25 Jan 2005 16:38:07 -0600

From:

To:

Subject: Re: Your Nov. 15 communication

Dave:

For you to get an idea, our weakest gateway is Mexicali/Calexico, where we interchange close to 10,000 cars annually. This gateway had a very significant increase in 2004 with 34%. At one time, we were considering closing this gateway because of the low volume but after last year's increase we think we can further develop this border. The next border, Nogales, interchanged almost 46,000 cars in 2004.

I think that it is a good idea to liquidate the land that connects to our track in Naco. I anticipate that there will be problems to open the gateway there and would be easier to get government's approval farther out from the city.

I hope the above gives you a better idea. Let's keep in touch.

Regards,  
Rogelio

dave@arizonarg.com wrote:

> Rogelio: Thank you for the status report. Of course, we are disappointed that >Ferroflex cannot move ahead with Naco at this point. I have two questions that >will help our future efforts:  
> 1. What approximate level of traffic would it take to interest Ferroflex in >reopening the Naco Crossing?  
> 2. Given the current situation we will likely liquidate the property on the US >side of the border leading to your rails in the center of Naco. That still >leaves us the option to connect east of Naco, which is more politically >acceptable should we wish to pursue the crossing in the future. Are you ok with >that? Best Regards, Dave

>quoting Rogelio Velez Lopez de la Cerda <rvelez@ferromex.com.mx>:

>>Dave:

>>At this time, we are not considering the opening of a new gateway at >>Naco because the potential volume does not justify investment and >>operating expenses. As you may know, we have just reopened that gateway >>at Ojinaga/Presidio to begin interchanges with the Texas Pacific and >>until we determine success we will not consider another gateway. >>Apache has been in touch with us and we are trying to resolve their >>problems with UP. I have meetings with UP on Jan. 25 and this item is in >>the agenda.

>>I understand that this decision is not what you are expecting but at >>this time this is our position. Let's keep in touch and with an open >>mind to opportunities.

>>Best regards,

>>Rogelio

>>dave@arizonarg.com wrote: