

SERVICE DATE – MAY 26, 2020

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1296X

R. J. CORMAN RAILROAD PROPERTY, LLC—ABANDONMENT EXEMPTION—
IN SCOTT, CAMPBELL, AND ANDERSON COUNTIES, TENN.

Decided: May 26, 2020

Digest:¹ This decision grants in part a motion filed by Arkansas-Oklahoma Railroad Co. and denies a motion filed by National Coal, LLC, in this abandonment exemption proceeding.

R. J. Corman Railroad Property, LLC (RJC Railroad Property), filed a verified notice of exemption under 49 C.F.R. part 1152 subpart F—Exempt Abandonments and Discontinuances of Service to abandon a railroad line extending from milepost 0.95 at or near Oneida, Tenn., to the end of the line at milepost 42.0 at or near Devonia, Tenn., a distance of approximately 41.05 miles in Scott, Campbell, and Anderson Counties, Tenn. (the Line).² Notice of the exemption was served and published in the Federal Register on March 9, 2020 (85 Fed. Reg. 13,696), and the exemption was scheduled to become effective on April 8, 2020.

On March 19, 2020, Arkansas-Oklahoma Railroad Co. (AOK), a Class III rail carrier, filed a notice of intent to file an offer of financial assistance (OFA) to purchase the Line, which stayed the effective date of the exemption until April 18, 2020. See 49 C.F.R. § 1152.27(c)(2). AOK's OFA was due on April 8, 2020, and any request to toll that deadline under 49 C.F.R. § 1152.27(c)(2)(ii)(C) was due on April 3, 2020. AOK, however, did not timely file an OFA or ask to toll the deadline.

Thereafter, by decision and notice of interim trail use or abandonment (NITU) served on April 17, 2020, the proceeding was reopened and a one-year period was authorized for the Tennessee Citizens for Wilderness Planning, Inc., and Cumberland Trail Conference, Inc. (collectively, the Sponsors), to negotiate with RJC Railroad Property for acquisition of the Line

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² The verified notice also embraced Docket No. AB 875 (Sub-No. 1X), R. J. Corman Railroad Company/Bardstown Line—Discontinuance Exemption—in Scott, Campbell, & Anderson Counties, Tenn., in which R. J. Corman Railroad Company/Bardstown Line sought an exemption to discontinue service over the Line.

for use as a trail under the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d), and 49 C.F.R. § 1152.29. The decision also imposed a 180-day public use condition under 49 U.S.C. § 10905.

On April 20, 2020, AOK late-filed a motion to extend the deadline to file an OFA. AOK states that the circumstances surrounding the current pandemic have prevented its inspectors and appraisers from accessing the Line. (AOK Mot. 2.) AOK asserts that it had received only some of the necessary information it requested from RJC Railroad Property. (Id. at 2-3.) AOK, therefore, requests that the deadline for filing an OFA “be extended for a reasonable time after the current ‘state of emergency’ is lifted” and that “the Board provide guidance to RJC Railroad Property regarding the production of information.” (Id. at 3.)

RJC Railroad Property responded on April 21, 2020, opposing AOK’s extension request as untimely and unwarranted. Specifically, RJC Railroad Property states that AOK missed both the April 8 deadline for filing an OFA and the April 3 deadline for requesting that the Board toll the OFA deadline. (RJC R.R. Prop. Reply 2, Apr. 21, 2020.) RJC Railroad Property also disputes AOK’s assertion that AOK was unable to comply with the deadlines due to the current pandemic, noting that AOK made electronic filings on March 19 and March 24. (Id. at 3.) RJC Railroad Property also states that “despite an apparent lack of any continued need for freight service” on the Line, it “has timely and in good faith responded to communications” and information requests from AOK. (Id. at 2-3.)

On April 23, 2020, AOK filed a response³ claiming that RJC Railroad Property failed to provide it with timely and adequate information and reiterating the impact of the current pandemic on its ability to inspect and appraise the Line. (AOK Reply 1-2, 4, Apr. 23, 2020.)

On April 29, 2020, National Coal, LLC (National Coal), filed a motion challenging AOK’s notice of intent to file an OFA, the Sponsors’ NITU, and RJC Railroad Property’s verified notice of exemption. National Coal contends that it sold the Line to RJC Railroad Property in 2010 and, in doing so, reserved in the relevant deeds a right of first refusal to repurchase the Line. (Nat’l Coal Mot. 2.) National Coal argues that any acquisition of the Line by AOK through an OFA or by the Sponsors through an interim trail use/rail banking agreement would violate that right. (Id.) National Coal also claims that, as a “significant user” of the Line under the application procedures at 49 C.F.R. § 1152.20(a)(2)(i), it should have been served with RJC Railroad Property’s verified notice. (Id. at 2-3.)

RJC Railroad Property opposed National Coal’s motion, claiming, among other things, that National Coal did not pursue negotiations to purchase the Line in the past and has not requested service or moved freight over the Line since May 2013. (See RJC R.R. Prop.

³ Although AOK styled its submission as a supplement to its motion, it is more properly considered a reply to a reply, which is prohibited under 49 C.F.R. § 1104.13(c). However, in the interest of having a more complete record, the submission will be accepted.

Reply 2-3, May 6, 2020.) It also notes that National Coal has made no representation that it intends to resume providing traffic. (Id. at 3.) In response to the claim that it did not serve National Coal with the verified notice, RJC Railroad Property states that it filed its verified notice under the exemption procedures at 49 C.F.R. § 1152.50 and there is no dispute that those criteria have been met. (RJC R.R. Prop. Reply 1, May 6, 2020.)

On May 8, 2020, National Coal replied to RJC Railroad Property's reply.⁴ National Coal states that its right of first refusal was intended to "protect the continued existence" of the Line and that National Coal intends to support "a reasonable resolution which will protect the [L]ine for future use." (Nat'l Coal Reply 2.) Accordingly, National Coal states that it is willing to negotiate to waive its right of first refusal as part of an OFA sale to AOK, and, notwithstanding its earlier objection to AOK's OFA extension request, it now asks the Board to grant AOK's request. (Id.) In the alternative, National Coal asks that RJC Railroad Property's verified notice of exemption "be dismissed" to preserve National Coal's contractual right of first refusal. (Id.)

On May 15, 2020, Anderson County Government (Anderson County) filed a letter opposing the abandonment of the Line and supporting AOK's motion for an extension of time to file an OFA. (See Anderson Cty. Reply 1.) Anderson County explains that the Line and its infrastructure "are very valuable assets in the current and future economic development of [the] region." (Id.)

DISCUSSION AND CONCLUSIONS

AOK's Motion

AOK's motion for an extension of time to file an OFA will be granted in part. In class exemption proceedings, an OFA is due no later than 30 days after notice of the exemption is published in the Federal Register. See 49 C.F.R. § 1152.27(b)(2)(ii). In this case, that deadline was April 8, 2020.

When a railroad fails to provide promptly the information required under 49 C.F.R. § 1152.27(a), the Board's regulations permit the potential offeror to seek to toll the OFA deadline, but such a petition must be filed with the Board within 25 days after publication of the notice of exemption in the Federal Register. Here, AOK filed its extension request on April 20, 2020, 17 days after the April 3 deadline. AOK states in its extension request that the circumstances surrounding the pandemic have prevented its inspectors and appraisers from accessing the Line and that it has yet to receive certain information from RJC Railroad Property (though RJC Railroad Property alleges that it has timely responded to requests for information). In its surreply, AOK acknowledges that it "perhaps should have come to the Board sooner" to request tolling of the OFA deadline, but that its delay is excusable given its "ongoing

⁴ In the interest of having a more complete record, the submission will be accepted.

engagement” with RJC Railroad Property and that it “did not want to put unneeded pressure on [RJC Railroad Property] at this difficult time.” (AOK Reply 4, Apr. 23, 2020.)

The Board’s regulations specifically provide a mechanism to address situations where a rail carrier fails to provide potential offerors promptly with the required information. See 49 C.F.R. § 1152.27(c)(2)(ii)(C). Here, AOK did not submit its request for extension until well after the deadline, when the Board had already imposed a NITU and public use condition. At the same time, the record is unclear whether RJC Railroad Property did indeed fail to provide necessary information for an OFA filing. Nevertheless, in light of current events, the Board will allow a brief extension of time for AOK to file an OFA. Although AOK seeks an extension of time to file an OFA for an indefinite period (“a reasonable time after the current ‘state of emergency’ is lifted”), granting such a request over the objection of the Line owner would be contrary to the goal of streamlining the abandonment and OFA processes.⁵ Rather, the Board will allow AOK until June 9, 2020, to submit an OFA. Any request to toll that deadline would be due June 4, 2020, and must include copies of prior written requests for information that remains outstanding or an accurate outline of the information that remains outstanding that was orally requested, as required under 49 C.F.R. § 1152.27(c)(2)(ii)(C).⁶

The Board has previously stated that an OFA takes priority over a request for a NITU. See, e.g., Trinidad Ry.—Aban. Exemption—in Las Animas Cty., Co., AB 573(X), slip op. at 2 n.3 (STB served July 25, 2002); West Shore R.R.—Aban. Exemption—in Union & Northumberland Ctys., Pa., AB 1017X, slip op. at 5 (STB served May 20, 2008). Normally, the Board holds in abeyance requests for issuance of a NITU or public use condition pending the outcome of the OFA process. Here, however, as noted above, a NITU has already been issued and a public use condition imposed. As such, because the Board, under the unusual circumstances here, is allowing AOK additional time to submit an OFA, the previously issued NITU and public use condition will both be stayed until June 9, 2020, pending the outcome of the OFA process. Further, because the OFA process typically stays the effective date of abandonment authority, the effective date of the abandonment exemption covered by the verified notice is likewise stayed until June 9, 2020. See 49 C.F.R. § 1152.27(c)(2)(i).

⁵ See Offers of Financial Assistance, EP 729, slip op. at 18 (STB served June 29, 2017) (adopting final rules geared toward addressing delays associated with OFA process); Aban. & Discontinuance of Rail Lines & Transp. Under 49 U.S.C. 10903, 1 S.T.B. 894, 909-10 (1996) (noting that, in enacting the ICC Termination Act of 1995, Congress shortened the time for the Board to process OFAs under 49 U.S.C. § 10904, and stating goal of expediting the process where possible); see also Lassen Valley Ry.—Aban. Exemption—in Washoe Cty., Nev. & Lassen Cty., Cal., AB 1074X, slip op. at 2 (STB served Sept. 7, 2011) (denying late-filed request for extension to file OFA where carrier objected and extension request provided no indication of when OFA would be filed).

⁶ To the extent RJC Railroad Property has not already provided all of the information requested by AOK under 49 C.F.R. § 1152.27(a), it is required to do so promptly.

National Coal's Motion

National Coal argues that, under 49 C.F.R. § 1152.20(a)(2)(i), RJC Railroad Property was required to serve it with a copy of the verified notice because National Coal is a “significant user” of the Line. (See Nat'l Coal Mot. 2-3.) The regulations under 49 C.F.R. § 1152.20, however, apply to abandonment proceedings initiated by application, not proceedings under the Board's exemption procedures (for which there are special rules).⁷ See, e.g., 49 C.F.R. § 1152.60. Here, National Coal has not challenged RJC Railroad Property's compliance with the applicable requirements in 49 C.F.R. § 1152.50(d).⁸

National Coal also argues that any acquisition of the Line for trail use would violate its right of first refusal,⁹ and it therefore requests that the Board “refuse to approve transfer of any rights in the property to . . . [the] Sponsors.” (Nat'l Coal Mot. 2-3.) National Coal makes no attempt to demonstrate that the Trails Act requirements for the NITU are no longer satisfied, nor does it provide any legal support for its request. Accordingly, National Coal's motion will be denied. See Wis. Cent. Ltd.—Aban. Exemption—in Brown Cty., Wis., AB 303 (Sub-No. 13X), slip op. at 3 (STB served Feb. 17, 2000) (in response to argument that railroad was legally incapable of making the required commitment to a trail sponsor to negotiate because it was contractually obligated by right of first refusal to negotiate with another entity for sale of the line, “[t]here is no requirement in our rules that would preclude a railroad from agreeing to issuance of a NITU when it is also pursuing other sale options”). Moreover, as noted above, the NITU in this proceeding is being stayed pending the outcome of the OFA process.¹⁰

⁷ Under 49 C.F.R. § 1152.2(l), a “significant user” is defined as the 10 rail patrons originating the largest number of carloads and any rail patron that originates 50 or more carloads during the 12-month period preceding the month in which notice is given of the abandonment or discontinuance application.

⁸ National Coal states that it opposes the abandonment and wants to preserve its contractual rights of first refusal, but it has not addressed the revocation standards. Likewise, Anderson County states that it opposes the abandonment but also has not addressed the revocation standards.

⁹ The Board has explained that contract issues typically should be pursued in court rather than at the Board. See Gen. Ry.—Exemption for Acquis. of R.R. Line—in Osceola & Dickinson Ctys., Iowa, FD 34867, slip op. at 4 (STB served June 15, 2007); see also Ga. Sw. Div.—Aban. Exemption—in Dodge & Wilcox Ctys., Ga., AB 385 (Sub-No. 1X), slip op. at 4 (STB served Feb. 2, 1996) (explaining that if a “purchase offer [has] been perfected under [predecessor to 49 U.S.C. § 10904], the offeror [is] able to acquire the line . . . regardless of the existence of [a] contractual provision . . . concerning the disposition of the line”).

¹⁰ Even if RJC Railroad Property and the Sponsors were to eventually reach a trail use agreement during a NITU negotiating period, should it be reestablished, under the Trails Act the Line remains within the Board's jurisdiction as part of the interstate rail system and subject to potential reactivation of rail service if necessary. See 16 U.S.C. § 1247(d).

It is ordered:

1. This proceeding is reopened.
2. AOK's April 23, 2020 submission and National Coal's May 8, 2020 submission are accepted into the record.
3. AOK's motion is granted in part. The deadline for AOK to file its OFA is extended to June 9, 2020. Any request to toll that deadline would be due June 4, 2020.
4. National Coal's motion is denied.
5. The NITU and public use condition served on April 17, 2020 are stayed until June 9, 2020, pending the outcome of the OFA process.
6. The effective date of the abandonment exemption covered by the verified notice is stayed until June 9, 2020.
7. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, and Oberman.