

SERVICE DATE – SEPTEMBER 23, 2020

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1296X

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

Digest:¹ The Board denies an appeal of a decision rejecting the offer of financial assistance filed by Arkansas-Oklahoma Railroad Co.

Decided: September 22, 2020

On June 26, 2020, the Director of the Office of Proceedings (Director) rejected an offer of financial assistance (OFA) filed by Arkansas-Oklahoma Railroad Co. (AOK), a Class III rail carrier. The Director held, based on the totality of the circumstances, that AOK failed to make the requisite showing that there is a continued need for rail service on the line in question. AOK filed an appeal on June 29, 2020. For the reasons discussed below, the Board will deny the appeal.

BACKGROUND

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 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).

On March 19, 2020, AOK filed a notice of intent to file an OFA under 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27, to purchase the Line. Following two extensions of the OFA filing deadline, which were requested by AOK, AOK timely filed an OFA to purchase the Line on June 23, 2020. On the same day, Campbell County, Tenn., National Coal, LLC, and the North

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.

East Tennessee Railroad Authority (NETRA) each filed letters supporting the acceptance of AOK's OFA. On June 24, 2020, Evergreen Packaging also filed a letter in support.

By a decision served on June 26, 2020, the Director rejected AOK's OFA because AOK had not demonstrated a "continued need for rail service" on the Line pursuant to 49 C.F.R. § 1152.27(c)(1)(iv)(E). See R. J. Corman R.R. Prop.—Aban. Exemption—in Scott, Campbell, & Anderson Cntys., Tenn. (Director Order), AB 1296X, slip op. at 2-4 (STB served June 26, 2020).

AOK filed an appeal under 49 C.F.R. § 1011.6(b) on June 29, 2020, arguing that the Director erred because the record contained evidence of a continued need for rail service in the form of letters demonstrating community support for the offer. (Appeal 1-2.) AOK claims that the Director further erred because the "applicable regulation does not require that communities must provide specific details demonstrating a commercial need for rail service." (Id. at 2.)

On July 2, 2020, IRAIL Car Services, LLC (IRAIL), filed public and confidential versions of a letter supporting AOK's appeal. On July 6, 2020, NETRA submitted an additional filing,³ asking the Board to consider supplemental evidence. (NETRA Comment 2-3, July 6, 2020.) NETRA includes a letter from Straight Fork Forest Management LLC (Straight Fork) regarding its possible use of the Line.⁴ (Id. at Ex. 1.) On the same day, the Tennessee Department of Transportation (TDOT) filed a letter explaining that, while it does not desire to take a position in favor of either party, it "support[s] dialog" and "additional due diligence by both parties to assess what type of further financial investment may be needed to make this line operational" and "would be willing and compliant with either outcome once a decision is made by the [Board]." (TDOT Letter 1.)

RJC Railroad Property filed a reply to AOK's appeal on July 2, 2020, arguing that the appeal is based on a misrepresentation of the Director Order. (RJC R.R. Prop. Reply 5-6, July 2, 2020.) RJC Railroad Property asserts that the Director Order "is based on substantial evidence, consistent with established law, and should be affirmed by the Board." (Id. at 2.) In response to NETRA's filing, RJC Railroad Property also filed a reply, arguing that NETRA's request to intervene in order to submit additional information should be rejected, as it "ignores established deadlines and the additional information is not material to the appeal." (RJC R.R. Prop. Reply 2, July 9, 2020.)

³ NETRA filed what it captions as an appeal, claiming to have standing but, should the Board disagree, seeking to intervene in AOK's appeal. (NETRA Comment 1, 1 n.1, July 6, 2020.) RJC Railroad Property responds that NETRA lacks standing to file an appeal because it is not the offeror and further argues that "the letters of support filed after the [Director Order] was issued should be stricken from the record." (RJC R.R. Prop. Reply 2, July 9, 2020.) The Board need not resolve the standing question because NETRA's filing will be considered as a comment in support of AOK's appeal, rather than a separate appeal.

⁴ The substance of the filings submitted by IRAIL, NETRA, and Straight Fork is discussed further in the Discussion and Conclusions section below.

DISCUSSION AND CONCLUSIONS

The authority to determine initially whether OFAs satisfy the statutory standards of 49 U.S.C. § 10904(d) is delegated to the Director under 49 C.F.R. § 1011.7(a)(2)(ii). Appeals of such decisions are considered under 49 C.F.R. § 1011.2(a)(7).⁵ When reviewing appeals of a Director’s initial decision under 49 C.F.R. § 1011.7(a), the Board has previously stated that it considers whether the Director made the correct decision, given the circumstances presented. See CSX Transp. Inc.—Aban. Exemption—in Pinellas Cnty., Fla., AB 55 (Sub-No. 794X), slip op. at 3 (STB served June 22, 2020).

To submit an OFA under 49 C.F.R. § 1152.27(c)(2)(iii), an offeror must set forth its offer “in detail” and meet the requirements for the contents of an offer found at § 1152.27(c)(1)(iv). Among the requirements, an offeror must “[d]emonstrate that there is a continued need for rail service on the line, or portion of the line, in question.” 49 C.F.R. § 1152.27(c)(1)(iv)(E). The Board adopted this requirement in Offers of Financial Assistance, EP 729 (STB served June 29, 2017), explaining that offerors “must make a strong showing of need” and “will be required to show specific and concrete evidence of a continued need for rail service to make the showing required by this rule.” Id. at 14-15. Examples of the types of evidence that can be provided to show a continued need for rail service include, among other things, “[e]vidence of a demonstrable commercial need for service (as reflected by support from shippers or receivers on the line or other evidence of an immediate and significant commercial need)” and “evidence of community support for continued rail service.” 49 C.F.R. § 1152.27(c)(1)(iv)(E).

When considering whether an offeror has met its burden to show a continued need for rail service, the Director must look at the totality of the circumstances. See Offers of Financial Assistance, EP 729, slip op. at 14. Here, the Director concluded that AOK had “failed to demonstrate a need for continued rail service sufficient to warrant permitting a forced sale of the Line through the OFA process.” Director Order, AB 1296X, slip op. at 4. While the Director acknowledged that AOK had “provided evidence of general community support for its OFA, . . . it [had] not sufficiently demonstrated ‘a continued need for rail service’ on the Line under § 1152.27(c)(1)(iv)(E).” Id. at 2. The Director noted that “[t]his abandonment exemption is for a line of railroad with no active shippers, and on which there has been no service since 2013.” Id. The Director then detailed how the OFA and supporting filings failed to provide specific and concrete evidence of a continued need for rail service.

In its appeal, AOK argues that the Director erred because the OFA satisfied the requirement to show a continued need for rail service on the Line. (Appeal 1-2.) Specifically, AOK relies on the evidence of community support in the record stating that “[o]n the basis of that evidence, the Director should have found that there is a continued need for rail service on the

⁵ AOK incorrectly cites the decisional standard at 49 C.F.R. § 1011.6(b), which governs appeals of Director’s orders issued pursuant to a different delegation of authority.

[L]ine.” (Appeal 2.) AOK argues that “the applicable regulation does not require that communities must provide specific details demonstrating a commercial need for rail service” and that the regulation would need to be “amended” to support such an expanded review. (Id.) In addition, in its comment supporting AOK’s appeal, NETRA asks the Board to consider new evidence, stating that “[s]ince the date of the Director’s decision, NETRA has found strong evidence of a commercial need for service on the Line.” (NETRA Comment 2, July 6, 2020.) NETRA provides a letter from Straight Fork, references IRAIL⁶ (which has also submitted a letter to the Board), and alludes to an unidentified “large volume importer of foreign wood.” (NETRA Comment 2-3, July 6, 2020.)

First, the Board disagrees with AOK’s suggestion that, because it submitted evidence indicating community support, it necessarily showed a continued need for rail service. As stated above, when considering whether an offeror has met its burden to show a continued need for rail service, the Director must look broadly at the totality of the circumstances. While § 1152.27(c)(1)(iv)(E) gives examples of the types of evidence offerors can submit in order to show a continued need for rail service, that provision does not suggest that providing evidence of any one example will be dispositive. See also Offers of Financial Assistance, EP 729, slip op. at 17 (explaining that the rule lists “the types of evidence the Board will look for when considering the totality of the circumstances surrounding the continued need for rail service, not specific requirements”).⁷

Here, the Director correctly articulated and applied these principles, weighing all of the evidence submitted and considering the totality of the circumstances. See Director Order, AB 1296X, slip op. at 2, 2 n.2, 4. AOK points to one sentence in the Director Order referring to “commercial need” and argues that the regulations do not require offerors to show commercial need. (Appeal 2.) At the outset, the Board notes that whether there is evidence of community support for continued rail service is not unrelated to the question of whether there is a

⁶ NETRA states that it mentioned this entity in its letter of support but the Director Order failed to discuss it. (NETRA Comment 3.) It is true that NETRA included one sentence in its letter of support referring to an unidentified entity, stating “[o]utside of building back up the freight business on the [L]ine, AOK also has secured a company wanting to set up a car repair business on the Line.” (NETRA Letter 3.) Although the Director Order did not specifically reference this sentence, it did correctly conclude that the record as a whole lacked specific information such as statements from actual prospective users of the Line, and the unidentified entity falls into that category of evidence. See Director Order, AB 1296X, slip op. at 3.

⁷ Indeed, to the extent that AOK suggests that evidence of one of the listed examples necessitates a finding of continued need for rail service, (see Appeal 2), that understanding is belied by the regulation itself. Some of the examples may not be relevant in all cases (e.g., “evidence that acquisition of freight operating rights would not interfere with current and planned transit services”), while others are related to the need for service but do not directly speak to it (e.g., “evidence that continued service is operationally feasible”). See 49 C.F.R. § 1152.27(c)(1)(iv)(E).

commercial need for freight rail service.⁸ Moreover, the Director did not reject the OFA simply because AOK failed to demonstrate commercial need. The Director considered the letters by Anderson County, Tenn., and TMA, which had been previously submitted in support of one of AOK's extension requests. See Director Order, AB 1296X, slip op. at 2. The Director's review concluded that those letters were lacking in specific detail, and then proceeded to evaluate the other evidence that had also been submitted in reaching the ultimate conclusion that there had not been a sufficient showing of continued need for rail service. See id. at 2-4. The Board agrees with the Director's conclusion that the evidence submitted was too generalized and speculative to support a finding that, despite there being no current shippers on the Line and no active service since 2013, there is a continued need for rail service sufficient to allow the possible forced sale of the Line under the OFA process.

Second, NETRA argues that the Board, in assessing whether the Director's ruling was correct, should consider additional evidence NETRA submitted *after* the Director Order was served. But even if that evidence were considered, the Board would still conclude that AOK had failed to demonstrate a continued need for rail service on the Line. NETRA states that an unidentified large volume importer of foreign wood "is in the process of purchasing land on the Line" and should need rail service "in the near future[.]" but explains that the "deal is subject to a non-disclosure agreement which is why NETRA cannot provide any more detail." (NETRA Comment 3, July 6, 2020; NETRA Letter 2.) While the Board can appreciate the constraints imposed by a non-disclosure agreement, the proffered information lacks detail on the timing or extent of the projected service need and, ultimately, falls short of the "specific and concrete evidence" the Board has required of "[a]ll offerors in all OFA proceedings." See Offers of Financial Assistance, EP 729, slip op. at 14-15. Likewise, while Straight Fork says generally that it is interested in the possibility of being able to utilize the Line, its letter does not indicate whether it has taken any concrete steps in exploring shipping by rail as opposed to truck.⁹

⁸ One of the letters AOK submitted with its OFA and characterized in its appeal as demonstrating "community support" for preserving the Line is from the Tennessee Mining Association (TMA), "an organization that supports the critical operation of the mining industry in the state of Tennessee[.]" (OFA App. 4; *see also* Appeal 2.) While described as community support, TMA's letter is largely focused on the purported potential commercial need for service (unsupported by details or specific and concrete evidence) by mining companies and the collateral effects on the environment and tourism if mining companies are unable to restore operations.

⁹ RJC Railroad Property notes that Straight Fork, which is not located on the Line, assumes without explanation that using the Line to ship lumber to two clients in Indiana and North Carolina would be more cost-effective than using "the two Norfolk Southern Lines that are in similar proximity to [it]" and fails to address whether the prospective clients are currently capable of receiving freight rail shipments. (RJC R.R. Prop. Reply 7, July 9, 2020.) RJC Railroad Property similarly notes that Straight Fork does not substantiate "with any specificity" its claim that it made an unsuccessful inquiry "several years ago" about shipping on the Line. (Id. at 6.)

IRAIL's letter provides some indication of a potential need for service but without concrete evidence in support of its projections. The Board finds that for purposes of evaluating continued need, IRAIL's claims are speculative and unsupported, and therefore, given the totality of the circumstances, they are not sufficient for the Board to conclude that it should allow the OFA to proceed in this case.

For the reasons stated above, the Board concludes that the Director made the correct decision, given the circumstances presented, when she rejected AOK's OFA for failing to show a continued need for rail service on the Line. Accordingly, AOK's appeal will be denied.

It is ordered:

1. AOK's appeal of the Director Order is denied.
2. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, and Oberman. Board Member Oberman dissented with a separate expression.

BOARD MEMBER OBERMAN, dissenting:

For the following reasons, I dissent from the Board's decision (Decision) denying the appeal filed by Arkansas-Oklahoma Railroad Co. (AOK).

Standard of Review

The majority states that in "reviewing appeals of a Director's initial decision under 49 C.F.R. § 1011.7(a), the Board has previously stated that it considers whether the Director made the correct decision, given the circumstances presented." Decision 3. While this statement is technically accurate, it fails to acknowledge that, in actual practice, particularly in the offer of financial assistance (OFA) context, the Board has considered evidence submitted for the first time on appeal when warranted by the public interest, and in order to reach a fair and correct decision. The Board has done so even where the newly submitted evidence was previously available to the parties. For example, in Union Pacific Railroad—Abandonment & Discontinuance of Service Exemption—in Cerro Gordo County, Iowa, AB 33 (Sub-No. 327X) (STB served Nov. 20, 2017), the Director rejected a notice of intent to file an OFA because the filing did not comply with the Board's regulations, which had been amended six months earlier. On appeal the filer provided the information required by the amended regulations. In granting the appeal, the Board found that "[w]hile the Director's decision to reject [the] incomplete notice of intent was consistent with the Board's rules, in light of the additional circumstances that have arisen since the Director's decision, the Board will grant [the] appeal." Union Pac. R.R.—Aban. & Discontinuance of Service Exemption—in Cerro Gordo Cnty., Iowa, AB 33 (Sub-No. 327X), slip op. at 3 (STB served Jan. 26, 2018); see also Ill. Cent. R.R.—Aban. Exemption—in

Champaign Cnty., Ill., AB 43 (Sub-No. 189X), slip op. at 3 (STB served July 2, 2015) (granting appeal of a rejection of a late-filed notice of intent based on additional information filed on appeal and finding that “[a] mechanical application of Board precedent in this case could encourage a course of dealing that is inconsistent with the intent behind the Board’s OFA precedent”).

These two cases illustrate that in deciding an appeal of a Director’s Order, when presented with unique circumstances, the Board has considered additional evidence filed on appeal in determining whether the “correct decision” was made.¹ In such circumstances, the Board may grant an appeal of a Director’s initial decision, even where the Director did not err based on the information before him or her at the time. Such unique circumstances exist here, as discussed below.

Discussion

The policy objective of the Board’s OFA process is to promote the statutory purpose of 49 U.S.C. § 10904: preserving rail lines for continued service. See Redmond-Issaquah R.R. Pres. Ass’n v. STB, 223 F.3d 1057, 1061 (9th Cir. 2000) (“Beginning with [§ 10904]’s title, ‘Offers of Financial Assistance to Avoid Abandonment and Discontinuance,’ Congress signals its interest in the continued operation of railroad lines where possible. This signal gains resonance in the various parts of § 10904.” (emphasis added)); see also Roaring Fork R.R. Holding Auth.—Aban. Exemption—in Garfield, Eagle, & Pitkin Cntys., Colo., AB 547X, slip op. at 4 (STB served May 21, 1999) (finding that “[t]he OFA process is designed for the purpose of continuing to provide freight rail service”), aff’d sub nom. Kulmer v. STB, 236 F.3d 1255 (10th Cir. 2001); Offers of Financial Assistance, EP 729, slip op. at 2, 15 (STB served June 29, 2017).

Thus, in evaluating OFAs in general, and AOK’s offer in particular, the Board should be guided by this policy objective.

In 2017, in Offers of Financial Assistance, Docket No. EP 729, the Board amended its regulations at 49 C.F.R. § 1152.27 implementing § 10904. In doing so, the Board codified prior precedent requiring offerors to show that there is a need for continued freight rail service on the line at issue, and included in the regulations what it described as “four examples of how an offeror may demonstrate that need.” Offers of Financial Assistance, EP 729, slip op. at 13. Those examples are:

evidence of a demonstrable commercial need for service (as reflected by support from shippers or receivers on the line or other evidence of an immediate and

¹ To be sure, an appeal of a Director’s Order should not, without more, be used simply to afford a party a free second bite at the apple to submit sufficient evidence to support its case. But as discussed below, that is not the situation here.

significant commercial need); evidence of community support for continued rail service; evidence that acquisition of freight operating rights would not interfere with current and planned transit services; and evidence that continued service is operationally feasible.

49 C.F.R. § 1152.27(c)(1)(iv)(E).

In that decision, however, the Board explicitly rejected any contention that evidence supporting all four, or any of the examples, is strictly required, stating that they are only “examples” and emphasizing that:

Offerors will not be strictly required to meet any one of (or all) the criteria to show a continued need for rail service. The . . . criteria are intended to provide guidance to offerors as to the types of evidence the Board will examine when considering this element of an OFA.

Offers of Financial Assistance, EP 729, slip op. at 14.

To be sure, the Board also stated that “[a]ll offerors in all OFA proceedings will be required to show specific and concrete evidence of a continued need for rail service to make the showing required by this rule” Id. at 14-15.

In actual practice, prior to the instant case, the Board has not had occasion to interpret the above language providing examples of evidence by which an offeror could satisfactorily establish a continued need for service. Thus, it is understandable that an offeror such as AOK, here, may have concluded that its initial showing—subsequently rejected by the Director—in which it submitted statements of community support (discussed in detail below) would be sufficient, given the language of the second example in the regulation and the final rule’s explanation that offerors are not strictly required to meet any one or all of the criteria. The Board has never previously stated that such statements would not constitute “specific and concrete evidence” under the regulations. For that reason, as well as the fact that, in reviewing Director’s Orders in unique circumstances such as this, the Board has previously taken into account evidence filed for the first time on appeal (as discussed above), I conclude that it is appropriate for the Board to consider all of the evidence now before the Board in ruling on the instant appeal.²

² This is not to say that AOK and the parties supporting AOK’s OFA need not have submitted the information now available to the Board at the time of AOK’s original OFA filing. They should have, and in the future, practitioners will be well advised to obtain and submit as much specific evidence as is available in presenting a detailed offer as required under 49 C.F.R. § 1152.27(c)(1)(iv) & (c)(2)(iii), and not assume that a future Board will consider evidence submitted for the first time on appeal of a Director’s decision. Although no particular item of evidence is required, whatever evidence can be adduced (e.g., business plan specifics or specific

The Evidence

In EP 729 the Board made clear not only that no specific criteria need be proven, but most importantly that “in all proceedings the Board will consider the totality of circumstances in evaluating the evidence submitted by offerors.” Offers of Financial Assistance, EP 729, slip op. at 15. Based on this approach, I disagree with the majority’s conclusion that, “even if [the additional evidence filed on appeal] were considered, the Board would still conclude that AOK had failed to demonstrate a continued need for rail service on the Line.” Decision 5. On the contrary, the record in this proceeding now demonstrates, with specific and concrete evidence and considering the totality of the circumstances, that there is a continued need for rail service on the Line.

First, it is important to note that AOK is a railroad with a substantial operating history, having operated in Oklahoma for approximately 24 years. AOK, therefore, not only is willing but also appears capable of providing adequate freight rail service, were it to acquire the Line. While not a requirement under 49 C.F.R. § 1152.27, this fact distinguishes this case from previous situations in which the Board has rejected an OFA. See, e.g., Union Pac. R.R.—Aban. Exemption—in Lassen Cnty., Cal. & Washoe Cnty., Nev., AB 33 (Sub-No. 230X), slip op. at 3 (STB served Sept. 19, 2008) (rejecting OFA because offeror sought to purchase line “to initiate operation of an ‘electrified rail line’”); Burlington N. & Santa Fe Ry.—Aban. Exemption—in King Cnty., Wash., 3 S.T.B. 634 (1998) (rejecting OFA because “the record does not permit us to conclude that the offer is motivated by a desire to provide continued rail service”).³

Second, AOK, the North East Tennessee Railroad Authority (NETRA), and the other supporting parties have submitted evidence of a demonstrable commercial need for service. In its confidential filing, IRAIL provides specific information on its business plan as it relates to the Line, including several specific estimates of both traffic volumes on the Line and timelines for those volumes, and numbers of potential jobs that could be created by its business plan. (IRAIL Letter 1-2; see also NETRA Comment 3, July 6, 2020 (stating that IRAIL’s operation “would add hundreds of additional rail cars annually on the Line that would be handled by AOK”).) In addition, NETRA submitted a letter from Straight Fork Forest Management, LLC (Straight Fork), a timber company, with NETRA’s July 6, 2020 comment, which refers to specific clients Straight Fork would seek to ship to, and includes some discussion of why Straight Fork would prefer to ship by rail instead of truck and a specific estimate of the volume of shipments Straight Fork would anticipate making if there were service on the Line. (NETRA Comment, Attach.

annual carload estimates to be shipped on the acquired line) should be submitted in support of an OFA. Because there is now substantial additional evidence before the Board here, it is no longer necessary to determine whether the evidence available at the time of the Director’s decision was insufficient to support AOK’s OFA.

³ This is not to say that an offeror must be an operating railroad—as noted above there is no such requirement in the regulations—but only that such a fact is a relevant and persuasive factor in evaluating the “totality of the circumstances.”

at 1, July 6, 2020 (“I estimate we would average 900 to 1100 rail car shipments annually if not more”).) This is concrete and specific information from potential users of the Line that, taken together, aptly demonstrates a commercial need for service on the Line.

Third, with respect to community support for the OFA, the record here is replete with such evidence.⁴ Even before AOK filed its OFA, Anderson County, Tenn. and the Tennessee Mining Association (TMA) filed letters expressing support for AOK’s request for an extension of time and for preserving service on the Line generally. Anderson County noted that it and NETRA, of which the County is a member, are “work[ing] as quickly as possible to preserve this asset for our county and region.” (Anderson Cnty. Letter 1.) TMA underscored the economic importance of the Line in the surrounding community, stating that “[p]reservation of this rail line will protect future, affordable access by Tennessee mining companies to undeveloped coal reserves in Anderson County, in addition to supporting imminent freight needs,” and that those future mining operations could provide both critical electricity reserves and “numerous well-paying jobs in this rural area of the state.” (TMA Letter 1.)

Several parties filed letters expressing support for AOK’s OFA, continued service on the Line, and the importance of the Line as an economic development opportunity in the community. (Campbell County Letter 1 (expressing support for “this effort that can create tremendous value within [the] county”); National Coal Letter 1 (former shipper on the Line stating that it hopes to resume use of the Line when the market recovers and that “[o]ur economy will only have access to these resources if critical infrastructure, such as this rail line, is preserved”); NETRA Comment 2-3, June 23, 2020 (describing several potential shippers and economic development opportunities on the Line and stating that “keeping this Line in the national rail system would be crucial for this area that needs more industrial development for new jobs and an influx of capital to help the local economy”); see also Evergreen Packaging Letter.) Finally, in addition to NETRA’s filing in support of AOK’s appeal discussed above, the Tennessee Department of Transportation filed a letter in reply to AOK’s appeal. Though TDOT does not take a position in favor of either side in this proceeding, TDOT states that it supports “additional due diligence by both parties to assess what type of further financial investment may be needed to make this line operational and preserve short line rail service.” (TDOT Letter 1.) Taken together, these parties have provided specific and concrete evidence that clearly shows community support for continued rail service on this Line. I place particular weight on these numerous statements of support, especially from the local economic development authorities. Given that the only objection to maintaining the Line is from the current owner, R. J. Corman Railroad Property, LLC (RJC Railroad Property), there appear to be no public downsides to the continuation of rail

⁴ Indeed, in rejecting AOK’s OFA the Director found that AOK had submitted evidence of community support for continued rail service. Director Order, AB 1296X, slip op. at 2. The majority appears to concur. See Decision 4.

service on this Line. Under these circumstances, I see no reason to second guess the stated need for the Line by these local interests.⁵

The Director's initial decision found that "[l]acking in the record is specific information such as statements from actual prospective users of the Line explaining their intent to use freight rail service in the foreseeable future or the actual volume of shipments they anticipate making." Director Order, AB 1296X, slip op. at 3. On appeal, AOK and its supporters submitted substantial and specific additional evidence, detailed above, including statements from prospective users of the Line explaining their intent to use freight rail service and specific estimates of traffic volumes those users anticipate making. But in concluding "that AOK ha[s] failed to demonstrate a continued need for rail service on the Line," Decision 5, the majority dismisses much of this evidence and instead focuses on what AOK and the potential shippers did not say.

For example, the majority attempts to diminish the importance of Straight Fork's letter by emphasizing that the letter "does not indicate whether [Straight Fork] has taken any concrete steps in exploring shipping by rail as opposed to truck." Id. The majority also relies on RJC Railroad Property's argument that Straight Fork does not explain how "using the Line to ship lumber to two clients in Indiana and North Carolina would be more cost-effective than using" two Norfolk Southern lines RJC Railroad Property says are in similar proximity to Straight Fork, and that Straight Fork "fails to address whether the prospective clients are currently capable of receiving freight rail shipments." Id. at 5 n.9. The majority also dismisses the substantial information provided by IRAIL, finding that IRAIL has not provided "concrete evidence in support of its projections" and thus that IRAIL's claims of a need for service are "speculative and unsupported." Id. at 6.

The majority's search for additional information that might have been provided by AOK but was not, in my view, amounts to nothing more than moving the goal posts on what might be a satisfactory showing of a need for rail service on a line which has been out of service for more than two years. Given the majority's according virtually no weight to the additional information submitted on appeal,⁶ the magnitude and type of evidence sufficient to convince the Board that there is "a continued need for rail service on the line," 49 C.F.R. § 1152.27(c)(1)(iv)(E), remains

⁵ As stated above, given this substantial amount of community support, and the fact that the Board has not previously interpreted this aspect of its regulations, AOK may reasonably have concluded that its OFA contained sufficient evidence to have established a continued need for rail service under the regulations. As noted, given the considerable additional evidence now in the record, there is no need to evaluate whether AOK's initial evidence, without more, would have been sufficient.

⁶ While the majority appears to hold that the additional evidence presented on appeal would not be considered, the majority nevertheless evaluated that evidence and found it insufficient. See Decision 5.

vague; indeed, the majority decision adds little illumination to the “specific and concrete evidence” requirement stated in EP 729. Offers of Financial Assistance, EP 729, slip op. at 15.

In every case or submission, it will be possible to identify some piece of information an offeror or potential user of a line did not supply to the Board. Here, Straight Fork and IRAIL have provided the Board with useful and substantive information on their potential use of the Line. That information speaks to an overall continued need for rail service, and, as discussed throughout the Decision and this dissent, the Board looks at the “totality of the circumstances.” I therefore disagree with the majority’s emphasis on what was not included in Straight Fork’s and IRAIL’s evidence.⁷

Ultimately, the majority finds that all of the evidence, taken in its totality, would still lead the Board to “conclude that AOK ha[s] failed to demonstrate a continued need for rail service on the Line,” and would not support a “forced sale” of the Line.⁸ Id. at 5. On the contrary, this information is specific, concrete, and provides ample evidence of an actual commercial need for service on the Line and community support for continued rail service.

Under the majority’s view, it would be nearly impossible for an OFA offeror to establish a continued need for rail service unless there were existing shippers on the line at the time of the proposed abandonment. This would present an impermissibly heavy burden to offerors for lines on which there had been no service for a period of years. Indeed, in EP 729, the Board expressly

⁷ Similarly, Straight Fork’s letter also states that “several years ago” it contacted RJC Railroad Property to inquire about receiving service on the Line, but RJC Railroad Property never responded. (NETRA Comment, Attach. at 1, July 6, 2020.) Again, the majority dismisses this statement, stating that Straight Fork “does not substantiate ‘with any specificity’ [this] claim.” Decision 5 n.9. But RJC Railroad Property does not dispute Straight Fork’s statement and says only that Straight Fork should have followed up with RJC Railroad Property. (RJC R.R. Prop. Reply 6-7, July 9, 2020.) On the contrary, it is just as reasonable that RJC Railroad Property should have “followed up” with the potential shipper, leaving me to infer that there is some likelihood of business from this shipper if a more aggressive railroad operator, such as AOK, chooses to pursue it.

⁸ Although the OFA process can be described as a “forced sale,” as the Director’s initial decision and the Decision describe it, see Director Order, AB 1296X, slip op. at 4; Decision 3, 5, the OFA regulations ensure that the owner of the line receives fair compensation for such a sale, either via negotiation with the offeror or, should the parties fail to come to agreement, the Board setting a price that is at least the fair market value of the line. See 49 C.F.R. §§ 1152.27(f) & (h)(6). Describing the OFA process as constituting a “forced sale” of a line to an offeror should carry no implication that such a transaction is unfair to the abandoning rail line owner since § 10904 as well as basic constitutional principles also mandate that any price for the “forced sale” constitute just compensation. See Chi. & N. W. Transp. Co. v. United States, 678 F.2d 665, 668 (7th Cir. 1982). Indeed, “the nonrail market value of an individual line is readily determinable.” Id. at 669.

rejected the proposition that for lines which have been out of service for two years or more there would be “heightened scrutiny” or a “higher burden” on the offeror to establish a continued need for rail service. Offers of Financial Assistance, EP 729, slip op. at 15. Here, where there has been no active service for several years, AOK has met its burden of showing that there are potential shippers who need and could use the Line if AOK acquires it.

Instead of focusing on what theoretically might have been shown, the Board should act to fulfill the Congressional intent of “continu[ing] [the] operation of railroad lines where possible.” Redmond-Issaquah R.R. Pres. Ass’n, 223 F.3d at 1061 (emphasis added). Here, the detailed information discussed above is the kind and level of information the Board should find is more than sufficient evidence of a continued need for rail service warranting allowing the OFA process to continue.

Conclusion

Accepting, arguendo, that the Director made a reasonable decision based on the evidence before her at the time, in considering the circumstances here and the additional evidence submitted since the Director’s initial decision and looking at “the totality of circumstances in evaluating the evidence submitted by offerors,” Offers of Financial Assistance, EP 729, slip op. at 15, in my view, the evidence now on the record is sufficient to support a finding of a continued need for rail service. The unique circumstances here, at a minimum, consist of the uncertainty concerning the proper interpretation of 49 C.F.R. § 1152.27(c)(1)(iv)(E), which justifies considering the additional evidence now on the record—in particular, the statements from potential shippers on the Line demonstrating a commercial need for service. This evidence, together with the many support statements from local and state government entities and companies operating within the communities that could be served by the Line, indicates that the public interest falls strongly in favor of allowing the OFA process to proceed. An OFA here could provide for continued rail service, which Congress has directed the Board to favor, 49 U.S.C. § 10101(4) & §§ 10904-10906, as well as economic development opportunities in the local community. As such, I would grant AOK’s appeal and allow the OFA process to proceed.

Therefore, I respectfully dissent.