

SURFACE TRANSPORTATION BOARD**Docket No. AB 1296X**

ENTERED
Office of Proceedings
October 5, 2020
Part of
Public Record

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

IN THE MATTER OF AN OFFER OF FINANCIAL ASSISTANCE

PETITION FOR A STAY

Arkansas-Oklahoma Railroad Co. (“AOK”) and North East Tennessee Railroad Authority (“NETRA”) respectfully petition the Surface Transportation Board (“STB” or “Board”) pursuant to 49 C.F.R. § 1115.3(f) for a stay in advance of their Petition for Reconsideration of the Board’s decision denying AOK’s appeal. On June 26, 2020, the Director of the Office of Proceedings (“Director”) rejected an offer of financial assistance (“OFA”) filed by 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, and NETRA filed an appeal on July 6, 2020. The Board denied the appeal in a decision served on September 23, 2020, treating NETRA’s filing as a comment in support of AOK’s appeal.

THE CASE

R. J. Corman Railroad Property, LLC (“RJC Railroad Property”), filed a verified notice of exemption in the above-captioned proceeding 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”). 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 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 claimed 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 appeal, asking the Board to consider supplemental evidence. (NETRA Comment 2-3, July 6, 2020) NETRA included a letter from Straight Fork Forest Management LLC ("Straight Fork") regarding its desire to use the Line. (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.)

Despite these letters from IRAIL and Straight Fork that demonstrate a "continued need for rail service" as described in NETRA's filing, the Board rejected the appeal of the Director's decision for failing

to show a continued need for rail service on the line at issue. In arriving at this decision, the Board explained:

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.

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.

R. J. Corman R.R. Prop.—Aban. Exemption—in Scott, Campbell, & Anderson Cntys., Tenn., AB 1296X, slip op. at 5-6 (STB served September 23, 2020). AOK and NETRA ask the Board to stay the effect of this

decision until it has a chance to rule on their petition for reconsideration to be filed which will provide new evidence of continued need for rail service and demonstrate material error in the Board's decision.

ARGUMENT

The standards governing disposition of a request for a stay are: (1) whether petitioner is likely to prevail on the merits; (2) whether petitioner will be irreparably harmed in the absence of a stay; (3) whether issuance of a stay would substantially harm other parties; and (4) whether issuance of a stay would be in the public interest. *Wash. Metro. Area Transit Comm. v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977); *Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958). The party seeking a stay carries the burden of persuasion on all of the elements required for stay. *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974). The Board typically does not grant a stay unless it is necessary to prevent irreparable harm. *See, e.g., Eighteen Thirty Group, LLC—Acquis. Exemption—in Allegany Cty., Md.*, FD 35438 et al. (STB served Nov. 17, 2010).

First, AOK and NETRA are likely to prevail on the merits. To prevail on a petition for reconsideration, a petitioner must demonstrate:

- (b) The petition will be granted only upon a showing of one or more of the following points:
 - (1) The prior action will be affected materially because of new evidence or changed circumstances.
 - (2) The prior action involves material error.

49 C.F.R. § 1115.3. AOK and NETRA can demonstrate both new evidence and material error in the prior decision here to succeed on a petition for reconsideration.

AOK and NETRA can show material error and new evidence by demonstrating that IRAIL has concrete support for its projections regarding the need for rail service on the Line. IRAIL's leadership has operated nearly identical railcar repair and storage facilities at other locations like its proposed operation on the Line here. Based on these existing facilities and IRAIL's analysis of the market in the

area where the Line is located, IRAIL strongly believes that it can achieve the numbers outlined in its June 29, 2020 letter regarding use of the Line for repairs (300-600 cars annually) and storage (500-1000 cars annually). (See second letter from IRAIL attached hereto.) Therefore, this evidence is not speculative and demonstrates the Board's material error and should materially change the Board's decision.

Moreover, AOK and NETRA can show material error and new evidence demonstrating that Straight Fork has taken concrete steps to explore shipping by rail on the Line. Columbia Forest Products and Frank Miller Lumber (the companies mentioned in the Straight Fork's letter that receive timber from Straight Fork) have both provided letters attached hereto that clearly demonstrate they have the rail infrastructure in place to accept timber from Straight Fork and these parties have seriously discussed the use of rail between them. This also demonstrates the Board committed material error and new evidence that should materially change the decision because Straight Fork clearly has taken concrete steps to explore rail service.

Because the Board rejected the appeal on the ground that AOK and NETRA had not shown a continued need for rail service, this additional information regarding IRAIL and Straight Fork should demonstrate this need. While AOK and NETRA believed the information these companies submitted regarding their need for rail service was sufficient¹, it has now addressed the Board's above-quoted concerns in a manner that should change its decision on the appeal herein. Moreover, another shipper

¹ AOK and NETRA also urge the Board to follow the dissent in this decision by Vice Chairman Oberman because the Board committed material error by not finding a need for continued rail service. This dissent is the right holding here and follows the policy behind the OFA process to preserve rail lines. It also correctly provides how AOK and NETRA demonstrated a continued need for rail service on the Line. They also urge the Board to consider this new evidence. As noted in Vice Chairman Oberman's dissent, the Board has not established in prior decisions what evidence is needed to demonstrate a continued need for rail service. NETRA in good faith submitted substantial evidence in its comments in support of the appeal only to be told by the Board that more evidence is needed. Therefore, it provides this new evidence to comply with the Board's new standard. In addition, the new shipper that will file in support only surfaced recently and did not know about this case until after the Board's decision.

will be filing a letter demonstrating its need for rail service on the Line in support of the Petition for Reconsideration. Therefore, AOK and NETRA have a strong likelihood of success on the merits.

Second, AOK and NETRA will be irreparably harmed in the absence of a stay. Last week, RJC Railroad Property finished some rehabilitation on a yard upgrading and replacing switches and track in North Carolina. When they were finished with this work and moving out, an AOK agent asked where they were going with the equipment. The driver stated northeast Tennessee off Interstate 75. This is where the line is. Once this track is removed, it is highly unlikely that the railroad Line will ever be able to be used again. The cost to replace the removed track would prohibit any chance of future rail service on this Line. In a similar situation, the Board has found “irreparable harm”:

We find that the “irreparable harm” prong has been met. In determining whether irreparable harm has been demonstrated, the Board looks to whether the requesting party will suffer unredressable actual and imminent harm absent the injunction. *Am. Chemistry Council v. Ala. Gulf Coast Ry.*, NOR 42129, slip op. at 5 (STB served May 4, 2012).

Here, the injury—removal of the track—appears to be actual and imminent. Absent an injunction, V&S has indicated that it will remove the track on the Western Segment to fulfill contractual obligations V&S has with OmniTRAX, Inc. In fact, the record indicates that V&S was in the beginning stages of removing the track at the time that the Colorado Interests first initiated the court proceeding that led to this Board proceeding.

Moreover, although economic injury, by itself, may be insufficient to qualify as irreparable harm, economic losses that are substantial and unredressable can qualify as irreparable injury. Here, the Colorado Interests have shown that they would suffer substantial and unredressable economic losses in the absence of an injunction. If, following V&S's removal of the track on the Western Segment, the Colorado Interests ultimately were to prevail on their Complaint and V&S were, as a result, to file for abandonment, then the Colorado

Interests would be entitled to acquire the line through the OFA process at the line's diminished value. But the Colorado Interests would have to expend substantial funds on design, engineering, and labor to install replacement tracks. There is nothing in the Board's OFA process that would require V&S to compensate the Colorado Interests for these additional costs, which would be substantial given that the length of track is approximately 60 miles. If saddled with these substantial and unrecoverable costs, we believe that it is highly unlikely—if not impossible—that the Colorado Interests would be able to ever overcome the high barriers associated with replacing the track.

Colorado Wheat Administrative Committee, Colorado Association of Wheat Growers, Colorado Wheat Research Foundation, and KCVN, LLC v. V and S Railway, LLL, NOR 42140 (STB served May 7, 2015).

Therefore, AOK and NETRA would suffer irreparable harm if the stay is not granted here because of RJC Railroad Property's imminent actions to remove the track on the Line, which would make it highly unlikely that this track would ever be replaced.

Third, the granting of a stay would not harm RJC Railroad Property. The only impact of a stay here would either delay the removal of the track for a short period of time or allow AOK to pay RJC Railroad Property a fair price for the rail line. In any event, a short delay would not harm anyone but would allow the Board to consider evidence and argument about the need for continued rail service and hopefully save this rail line from abandonment.

Fourth, issuance of a stay would be in the public interest. 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*

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).

Moreover, the STB is required to “consider whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development”. 49 U.S.C. § 10903(d). Distressed counties rank among the 10 percent most economically distressed counties in the nation. Each year, the Appalachian Regional Commission prepares an index of county economic status for every county in the United States. Economic status designations are identified through a composite measure of each county's three-year average unemployment rate, per capita market income, and poverty rate. Based on these indicators, each county is then categorized as distressed, at-risk, transitional, competitive or attainment. Currently, Scott County is listed as “Distressed”, Campbell is at “Risk” and Anderson is in “Transition”. The loss of the Line, which was in past years the leading economic engine for this region, will have a long-term effect on all efforts to strengthen and get these counties back to competitive or attainment status. The business plan and current efforts to add new shippers to the Line has been shown to have a \$15 to 20 million annual economic impact. (See letter from Tennessee Department of Economic and Community Development attached hereto.) By granting this stay, the Board would be supporting the public interest of preserving this Line that is so desperately needed in this rural area as Congress intended.

CONCLUSION

Clearly, AOK and NETRA have demonstrated the need for a stay here by meeting these four standards. Accordingly, they respectfully ask the Board to grant this stay request in order to save this railroad Line.

Respectfully submitted,

/s/ Daniel R. Elliott
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Counsel for AOK and NETRA

October 4, 2020

CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2020, I served the foregoing Petition for a Stay using the below email addresses on all parties of record in this proceeding:

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June 29, 2020

The Honorable Ann D. Begeman
Chairman
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395 E Street, SW
Washington, DC 20423

The Honorable Patrick J. Fuchs
Member
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

The Honorable Martin J. Oberman
Vice Chairman
Surface Transportation Board
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**Re: Docket No. AB 1296X, R. J. Corman Railroad Property, LLC – Abandonment
Exemption – in Scott, Campbell, and Anderson Counties, Tennessee**

Dear Chairman Begeman, Vice Chairman Oberman, and Commissioner Fuchs:

IRail Car Services, LLC respectfully submits this letter in support of the motion for reconsideration of the Board's decision rejecting the appeal related to the offer of financial assistance ("OFA") filed by Arkansas-Oklahoma Railroad Co. ("AOK") in the above referenced Docket.

For the second time, it was with great distress that we received news of the rejection of AOK's appeal regarding its OFA. We are in full agreement with Vice-Chairman Oberman's dissent, specifically with regard to our plans being "speculative." As was referenced in our previous confidential letter, our team has over 120 years' worth of collective experience in the railroad industry. That experience includes both management and hands-on experience in railroad operations (including new ventures), railcar repair and maintenance, car storage brokerage, railroad employee/craft education and certification, and new traffic development. With respect to our proposed operations on this line, we are actively engaged with railcar storage operations and brokerage in other locations. We maintain active relationships with several railroads (one regional and several shortline partners). The specific business model/plan we intend to implement (subject to the ultimate resolution of this line's fate) on this line is directly related to our experience and has been successful on another shortline by one of our team members who is the general manager of that road. Much like this line, the St. Mary's Railroad had limited traffic prospects after the loss of its primary customer, a paper mill, in St. Mary's, Georgia. It has since developed a robust storage and running repair shop business and is currently in the process of expanding the car repair business with full AAR M-1003 car repair designation.

While it is true that we do not currently have storage contracts, nor have we purchased land and constructed a repair facility, we already have the "pieces of the puzzle" in place to implement our planned business operations. We have conducted due diligence: We have identified 3-4 potential locations for shop facilities. We have worked/are working with AOK's team, including local government and economic development officials and agencies and their local consultant who is intimately familiar with the line with respect to economic development opportunities and operating

plan development. We have spoken with both existing and prospective customers about the prospective business opportunities if AOK is ultimately successful. Considering the line's current status, we're not sure just how much less "speculative" the Board should expect our business plans to be. In business, nothing is certain. Even transactions subject to contract can and regularly do fail to occur, thus sometimes spurring legal actions. However, based on the experience of those involved with IRail's proposed venture, we have no reason to be anything other reasonably confident in our success.

We would respectfully ask the Board to consider this letter as further "specific information" noted as lacking in the previous decision(s).

Respectfully submitted,

Mario C. Bush, Sr.
President/Owner
Independent Rail Associates
IRAIL Car Services



Terry Frank
Chair
North East Tennessee Railroad Authority

9/29/2020

RE: Receiving shipments by Rail to our Facility in North Carolina

Chairman Frank,

Straight Fork Timber Company is a client of ours and currently ships their raw products to us by truck to our manufacturing facility outside of Old Fort North Carolina. This letter is to confirm we have active rail service in and out of our plant there. We currently ship finish products out via NS to our clients. If Straight Fork Timber Company has the opportunity to ship by rail to us, we have the infrastructure in place to receive it as we have done with other timber suppliers.

We look forward to being able to receive logs from them if you are able to make it possible. This form of delivery is more effective for us over trucking.

Sincerely,

A handwritten signature in black ink that reads "Greg Decker". The signature is written in a cursive, flowing style.

Greg Decker
Timber Manager
Columbia Forest Products

Innovating
Responsibly.™

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cfpwood.com



10/01/2020

Terry Frank
Chair
North East Tennessee Railroad Authority

RE: Rail Access to our Facility in Union City, Indiana

Chairman Frank,

This is in response confirming we have rail service, via transload, about three miles from our plant, in Union City, Indiana. Straight Fork Timber Company currently provides hardwood logs to our facility, by truck. Though they have never shipped to us by rail, we have received logs by rail from another logging company, in the past. We could accommodate shipments from them if this option was available and cost effective for both of our companies.

Please let me know if you need any further information from me.

Regards,

Robert A. Miller

Director of Strategic Planning

Frank Miller Lumber Company, Inc.



Department of Economic and Community Development

Bob Rolfe
Commissioner

Bill Lee
Governor

Allison Davis, Director
Surface Transportation Board
Office of the Managing Director
395 E Street SW
Washington, DV 20423

10/01/2020

SUBJECT: Docket Number AB-1296X

Director Davis:

Our office has recently been informed of your decision to allow the abandonment of the RJ Corman's line in Scott, Campbell, and Anderson Counties in Tennessee. If this line is removed it will have an adverse impact on these rural communities and their prospects for economic development.

Scott County is classified by the Appalachian Regional Commission (ARC) as "Distressed", and Campbell County is classified as "At-Risk" of becoming distressed. Distressed counties are those that rank in the bottom 10% of the nation in economic attainment. The loss of this line, which in years past has been a leading economic engine for this region, will have a long-term effect on our efforts to help these counties set forth on a path to prosperity. The business plan for this rail line, along with efforts to add new shippers to the line, are expected to have a significant annual economic impact.

We know many examples of lines being put up for abandonment that have been saved and restored to become a vital economic driver. One example of this is the rail line in Etowah, TN. CSX planned to abandon the line to Copperhill, TN in 2001. A public-private partnership saved the line, and now it provides tremendous economic value to rural Southeastern TN. The Tennessee Valley Authority (TVA) subsequently needed this line to move transformers to the Apalachia Powerhouse in 2003. This would not have been possible if the line had been unavailable.

As you know well, the United States has seen a sharp drop in economic output due to the pandemic. These unprecedented economic times could take many years for to recover from. The abandonment and removal of RJ Corman's line in rural Scott, Campbell, and Anderson Counties in Tennessee will have a serious negative impact on these communities and damage their prospects for growth and development. We would respectfully ask that you consider this in your decision.

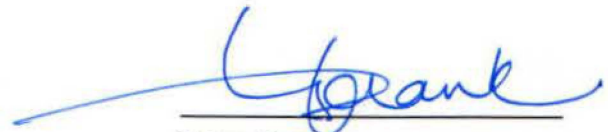
Sincerely,

Sammie Arnold
Assistant Commissioner of Rural & Community Development
Tennessee Department of Economic & Community Development

VERIFICATION

I, Terry Frank, Mayor of Anderson County and Chairman of the North East Tennessee Railroad Authority, hereby verify under the penalty of perjury that to the best of my knowledge, the foregoing Motion for Stay is true and correct. Further, I certify that I am qualified and authorized to make such verification on behalf of Anderson County and the North East Tennessee Railroad Authority in connection with this proceeding before the Surface Transportation Board.

Executed this 2 day of Oct, 2020



Terry Frank
Mayor, Anderson County;
Chairman, North East
Tennessee Railroad Authority