

BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings
October 9, 2020
Part of
Public Record

DOCKET NO. AB-1296X

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

**APPLICANT'S REPLY TO PETITION FOR STAY FILED BY
NORTH EAST TENNESSEE RAILROAD AUTHORITY AND
ARKANSAS-OKLAHOMA RAILROAD COMPANY**

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Date: October 9, 2020

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R. J. Corman Railroad Property, LLC (“RJC Railroad Property” or “Applicant”), by counsel, submits its reply to the petition for stay filed by North East Tennessee Railroad Authority (the “NETRA”)¹ and Arkansas-Oklahoma Railroad Company (“AOK”) (collectively “Petitioners”) on October 4, 2020. Applying the relevant standard, as described below, the petition for stay should be denied.

I. **THE OFA PROCESS IS BEING USED TO DELAY AND PREJUDICE APPLICANT**

RJC Railroad Property is eight (8) months into what has become a costly and time-consuming effort to abandon approximately 41.05 miles of rail line in Scott, Campbell, and Anderson Counties, Tennessee (the “Line”). This Line has no active shippers, and there has been no service on the Line since 2013. It is a Line that was exclusively used to haul coal from a single mine that no longer operates and the owners of which have made no commitment as to if or when coal mining operations will ever resume.

¹ In its September 22, 2020 decision in this matter, the Board, in footnote 3, declined to address whether the NETRA had standing to appeal the rejection of AOK’s offer of financial assistance, and rather, considered its filings as comments. Consistent with its earlier filings, Applicant objects to the NETRA’s standing in this matter.

Similarly, there has been no indication that Petitioners ever had any genuine belief that there was a concrete need for continued rail service on the Line. In a June 3, 2020 local newspaper article in the Courier News, which was months into AOK's effort to pursue its OFA, Anderson County Mayor Frank² expressed interest in maintaining the Line for *tourism* purposes. Mayor Frank is quoted in the article stating that "We are hoping that Arkansas-Oklahoma Railroad will come up with an offer, and they have told us that they have a tourist operation that wants to use the line for excursions."³ Significantly, the article also notes that the Anderson County Board of Commissioners approved a resolution in August of 2019 authorizing the county mayor to enter into discussions with RJC Railroad Property about the *possible tourism use* of the Tennessee Oneida Line. (Emphasis added). The article contains no discussion of commercial interests or potential shippers.⁴

Given this, demonstrating a need for continued rail service was never the focus and was simply a perfunctory box to check in the OFA process until AOK's OFA was rejected. Since June 23, 2020 and the rejection of the OFA, Petitioners have pivoted from "possible tourism" or a "public need" to waging a campaign to find evidence to show a continued need for rail service on the Line, where there is none. As a part of this new and belated effort, with each new appeal and now the soon to be motion for reconsideration, Petitioners cite allegedly new evidence hoping for a different result.

² Mayor Frank is also on the Board of NETRA.

³ The link to the article is as follows: <https://mycouriernews.com/articles/2020/06/3662/pushing-to-get-back-on-the-right-track>.

⁴ To this extent, as noted previously, RJC Railroad Property spoke with the local county mayors in 2019, before seeking permission to abandon, about its assessment of the Line and its economic viability given the cessation of the coal mine. At the time, the mayors identified no need for continued rail service. Had a need been identified, RJC Railroad Property would have explored such opportunity. Instead, the only idea mentioned was an excursion train, which was attempted before RJC Railroad Property purchased the Line and not successful.

As stated in previous filings, RJC Railroad Property is willing to sell the Line to any *bona fide* purchaser at the net liquidation value. AOK has been aware of RJC Railroad Property's net liquidation value for the Line since it provided AOK information in early June 2020 during the initial exchange of information. Since then, RJC Railroad Property has also provided AOK with a copy of a third-party offer to purchase the harvestables on the Line, so that AOK knew that RJC Railroad Property's net liquidation calculation represented fair market value. Nonetheless, AOK has never made an offer to purchase the Line equal to even fifty percent (50%) of the net liquidation value.

Manifestly, this proceeding and instant Petition are being used by Petitioners to create delay and leverage the threat of costly and time-consuming litigation to force RJC Railroad Property to accept less than net liquidation value for the Line. In doing so, AOK is forcing RJC Railroad Property to hold, insure and maintain a deteriorating asset, expend time and money litigating, or agree to sell the Line to AOK at less than net liquidation value.⁵ Even assuming grounds for a stay existed, which they do not, the foregoing is reason to deny AOK's petition.

II. GROUND FOR STAY DO NOT EXIST

The standard for issuance of a stay is well-established. The requesting party bears the burden of establishing: (1) there is a likelihood that it will prevail on the merits of any challenge to the action sought to be enjoined; (2) it will suffer irreparable harm in the absence of an injunction; (3) other interested parties will not be substantially harmed by an injunction; and (4) the public interest supports the granting of the injunction. *Ballard Terminal Railroad Company, LLC – Acquisition and Operation Exemption – Woodinville Subdivision*, Finance Docket No.

⁵ AOK's attorney recently sent a letter to counsel for RJC Railroad Property stating AOK would take its low-ball offer off the table if AOK was forced to go to Court. AOK appears to have no intention of paying net liquidation value for the Line.

35731, slip op. at 3 (STB served Aug. 1, 2013). As set forth below, Petitioners cannot meet this standard.

A. Motion for Reconsideration Lacks Merit and Does Not Support a Stay

AOK's OFA has been rejected twice based on its failure under applicable regulations to demonstrate a specific and concrete need for continued rail service on the Oneida Line. In order to prevail on a motion for reconsideration, Petitioners are required to show (1) new evidence or changed circumstances or (2) the prior decision involves material error. 49 C.F.R. § 1115.3. Petitioners cannot do this.

As an initial matter, as part of their motion for reconsideration, Petitioners state they will ask the Board to again consider new information in support of the OFA. NETRA did exactly this in the first appeal, and the Board agreed to consider the information, but ultimately did not find it to be material. Now, with the benefit of the Board's decision denying the appeal, Petitioners want to cherry-pick facts and submit more information attempting to bolster their position. Yet, these efforts and the need to continuously reinvent their position only further highlights the absence of a fundamental basis for that position.

Moreover, Petitioners are effectively asking to set a precedent at the Board that anyone who fails to properly support its OFA by the deadline for filing, can simply appeal and then seek reconsideration, each time offering allegedly new information, despite the so called new information actually being nothing more than information which could have been presented with the original OFA. This would essentially render the Board's timelines useless and invite repeated wastes of Board resources.⁶

⁶ Even the Dissent in the Board's September 22, 2020 decision in this matter recognized in footnote 1 the concern associated with allowing a "second bite at the apple". Here, Petitioners will be seeking a third bite at the apple.

It is also true, as was the case previously, that the “new evidence” gathered by Petitioners is neither new nor material. For example, Petitioners state the new letters they have obtained show that two customers in Indiana and North Carolina could receive timber by rail and that the parties have “seriously discussed the use of rail.” However, neither letter even suggests use of rail has been seriously discussed. At most, the Indiana client’s letter confirms it “could accommodate shipments from [Straight Fork] if this option was available and cost effective for both of our companies.” So in summary, *if* conditions are right, they may consider using rail. In the second letter, the North Carolina client only confirms that it can receive timber via Norfolk Southern Railway. This only highlights the point previously made by RJC Railroad Property that there is a Norfolk Southern Railway line that is in closer proximity to Straight Fork than the Line. Given this, the lack of any explanation by Straight Fork as to why it could not or does not currently use Norfolk Southern Railway for its shipping needs is striking. Certainly, no attempt has ever been made to address why the Oneida Line is even relevant to Straight Fork’s operations, particularly given that Straight Fork is not even on the Line.

Similarly, IRAIL’s latest letter cited by Petitioners is alleged to show concrete evidence of a continued need for service. Yet, IRAIL is likewise not on the Line, much less even in the State of Tennessee. According to IRAIL’s latest letter, “It is true that we do not currently have storage contracts, nor have we purchased land and constructed a repair facility”. IRAIL’s sole interest in the Line is for car storage and repair, neither of which even requires carrier track.⁷

Finally, Petitioners argue that the Board should reconsider its decision because it applied an incorrect standard. There is no support for this proposition. Even the Dissent to the Board’s

⁷ It should be noted, Mayor Frank’s representation to the local Courier News that she working to save the Line for tourism is quite different from what is now being proposed, i.e., storing cars on the Line, which seems operationally incompatible with a tourism use of the Line.

September 22, 2020 decision does not say the Board applied the wrong standard; rather, the Dissent found extraordinary circumstances, due to the alleged lack of clarity around the standard for showing continued need for rail service, justified consideration of additional evidence in support of the OFA. Ultimately, the Dissent used the same standard used by the Board but weighed the totality of the circumstances differently.

B. There is no Irreparable Harm

Petitioners' speculation that removal of the rail is imminent is false. Petitioners state an "AOK agent" talked to an unspecified person allegedly associated with RJC Railroad Property in North Carolina and learned that a RJC Railroad Property track maintenance crew was headed to northeast Tennessee off Interstate 75. Based on this, Petitioners conclude the crew was going to remove harvestables on the Line. Such claim is not true and ignores the fact that RJC Railroad Property and its affiliated entities operate in several locations throughout Tennessee.

In addition, *Colorado Wheat Administrative Committee, Colorado Association of Wheat Growers, Colorado Wheat Research Foundation, and KCVN, LLC v. V and S Railway, LLC*, NOR 42140 (STB served May 7, 2015), cited by Petitioners, does not support a finding of irreparable harm. The only similarity between that case and the case at hand, is that it involves the removal of tracks. Beyond that, the facts are inapposite. V&S Railway was in the process of removing tracks before seeking permission to abandon the track. Here, the abandonment exemption has been effective since June 26, 2020. Likewise, the parties seeking relief against V&S Railway were shippers on the Line, one of which had the assets and intent to purchase the line in order to continue freight services. In the instant case, AOK is not a current shipper; nor would it be forced to rebuild track to address its own shipping needs or that of any other shipper. If AOK ultimately was able

to pursue its OFA, the purchase price, i.e. net liquidation value, would reflect the current status of the Line. Nor is AOK obligated to even purchase the Line.⁸

The circumstances here are more consistent with *Ballard Terminal Railroad Company, LLC – Acquisition and Operation Exemption – Woodinville Subdivision*, Finance Docket No. 35731, slip op. at 3 (STB served Aug. 1, 2013). There, the Board denied a requested injunction preventing removal of track where it could not conclude there was a demand for rail service over the line. The Board noted that the two cited prospective shippers were not located on the line and did not have a contract to participate in the local construction projects cited as purported need for freight rail service. Moreover, the carload estimates cited by the potential shippers were not supported by any probative support.

In the instant case, it is undisputed there are no active shippers on the Line and not one potential shipper has taken one affirmative step toward using the Line, in the seven (7) years prior to this proceeding or in the eight months since its filing. Petitioners cannot establish irreparable injury, and the best way to ensure the continued existence of the rail corridor, should service ever genuinely be needed over it, is to allow the NITU process to continue.

C. Other Interested Parties Will be Harmed by an Injunction

Petitioners argue that RJC Railroad Property will not be harmed by an injunction and that it only involves a short delay. Yet, it has already been eight (8) months since the abandonment proceeding was filed. RJC Railroad Property is being forced to hold, insure and maintain an asset that depreciates over time, when it has a third party who is prepared to purchase the harvestables

⁸ Petitioners' irreparable harm argument blurs the interests between NETRA and AOK. In other words, Petitioners suggest that NETRA and AOK will be irreparably harmed because once the track is removed, it is unlikely it will be able to be used again. Yet, the only party to the appeal and any motion for reconsideration is AOK, as it is the only party who filed the OFA. And, as noted above, AOK has no current interests in the Line.

consistent with the Board's June 26, 2020 Decision. Without question, a stay harms RJC Railroad Property.

Moreover, the abandonment was effective on June 26, 2020 and the NITU and public use negotiating time periods are running. Meaningful discussions with the Tennessee Citizens for Wilderness Planning, Inc. and the Cumberland Trail Conference, Inc. are severely limited by the continued litigation of the OFA. No one is interested in wasting resources that may ultimately be for naught. Certainly, the non-profit groups would have a difficult time securing funds to proceed with their plans for trail development while this uncertainty continues, and ultimately a stay pushes the real economic benefits associated with increased tourism in the area resulting from the scenic trail further down the pipe.

D. The Public Interest Does Not Support the Granting of the Injunction

Petitioners argue issuance of a stay is consistent with the Board's OFA policy objective of continuing to provide freight rail service and therefore, consistent with public interest. Such assertion might be relevant if, in fact, there was evidence of a continued need for rail service. Petitioners further argue that abandonment will have serious, adverse impact on rural and community development under 49 U.S.C. § 10903(d). As the abandonment exemption has already been granted consistent with established regulatory authority, such factor is not determinative at this stage.

Moreover, Petitioners' claim that removal of the track has an adverse impact on the community is unsupported.⁹ Petitioners assert the "loss of the Line, which was in past years the leading economic engine for this region" will have a long-term effect on the counties' ability to

⁹ It should not go without notice that there are two non-profit groups representing their local community who have appeared in this matter, filing for public use and a NITU, in order to pursue development of the Line into a recreational trail and tourism destination which is a well-established source of economic development for communities. Clearly, they would not agree that removal of the track will have an adverse impact on the community.

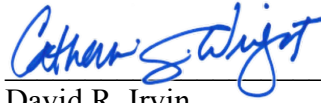
improve their economic status. However, this statement misses the mark entirely; as there was only ever one shipper on the Line - the coal mine - it was the *coal mine*, not the Line that was the leading economic engine for the region. As the coal mine has been closed for more than seven years, and there is are no current or potential shippers on the Line, it is simply not true that removal of the Line will negatively impact the economic status of these counties. Moreover, the Line is in a rural, forested area, which essentially follows the winding New River until the Line dead ends at the now closed coal mine. While quite scenic, such characteristic does not lend itself to commercial developments in which commodities are shipped or received. For the same reason, Petitioners' unsupported statement that there is a plan that will have a "\$15 to \$20 million annual economic impact" on the community must also be rejected. Nor does the Tennessee Department of Economic and Community Development's letter, submitted by Petitioners, support such claim.

Based on the foregoing, Petitioners have not met their burden of proof for an injunction in this matter. Accordingly, the requested relief should be denied.

III. ANY STAY SHOULD REQUIRE AOK TO POST A BOND AND ONLY COVER THE TIME PERIOD UNTIL A DECISION ON PETITIONERS' MOTION FOR RECONSIDERATION IS ISSUED.

Petitioners' request for a stay should be denied. To the extent that the Board grants the relief sought, it should require Petitioners to post a bond to cover damages incurred by RJC Railroad Property that will result from the stay, including lost opportunity costs and the costs of continued ownership. In addition, RJC Railroad Property requests that if the Board should decide to grant the relief sought by Petitioners, such a stay should only be in effect during the pendency of AOK's motion to reconsider.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2020, I served the foregoing Reply using the below email addresses on all parties of record in this proceeding:

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