

SERVICE DATE – DECEMBER 1, 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 the petition for a stay of its decision denying an appeal of an earlier decision rejecting the offer of financial assistance filed by Arkansas-Oklahoma Railroad Co., and orders Board-sponsored mediation in an effort to resolve disputes regarding the line at issue.

Decided: November 30, 2020

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 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, to purchase the Line. 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. AOK filed an appeal of the Director's decision on June 29, 2020, which was denied by the Board on September 23, 2020 (Appeal Order).

On October 5, 2020, AOK filed a petition under 49 C.F.R. § 1115.3(f) to stay the Appeal Order,³ pending resolution of the petition for reconsideration that it subsequently filed on

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 Pol'y 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.

³ AOK was joined on its stay petition by the North East Tennessee Railroad Authority (NETRA), which had submitted filings in support of AOK's OFA. Whether NETRA has standing has been a matter of dispute in this proceeding. In the Appeal Order, AB 1296X, slip op. at 2 n.3, the Board found that it need not resolve the standing issue for purposes of that

October 14, 2020.⁴ AOK argues that it is likely to prevail on the merits of its petition for reconsideration, it will be irreparably harmed in the absence of a stay, the granting of a stay will not harm RJC Railroad Property, and the issuance of a stay would be in the public interest. (Pet. 4-8.) AOK also argues that it would be irreparably harmed in the absence of a stay “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.” (*Id.* at 7.)

RJC Railroad Property filed a reply to AOK’s petition on October 9, 2020. RJC Railroad Property argues that the stay request should be denied because AOK is unlikely to prevail on the merits of its petition for reconsideration, AOK will not suffer irreparable harm in the absence of a stay, RJC Railroad Property and other interested parties will be harmed if AOK’s stay request is granted, and the public interest does not support granting a stay. (RJC R.R. Prop. Reply 5-10, Oct. 9, 2020.) With regard to irreparable harm, RJC Railroad Property contends that AOK’s “speculation that removal of the rail is imminent is false.” (*Id.* at 7.) RJC Railroad Property further argues that a stay is not appropriate in these circumstances in the absence of a concrete demand for rail service. (*Id.* at 3, 8.)⁵

On October 24, 2020, AOK jointly filed with NETRA a request for Board-sponsored mediation “to allow for the exploration of all options to resolve this matter to the satisfaction of the various interested parties.” (Req. for Mediation 1.) In an October 30, 2020 response, RJC Railroad Property argues that the mediation request is inappropriate. (RJC R.R. Prop. Reply 1, Oct. 30, 2020.) Alternatively, RJC Railroad Property argues that if the Board initiates mediation, the mediation should include conditions on its duration, scope, and participants and the proceeding should not be stayed. (See *id.* at 2.) Notwithstanding its opposition to RJC Railroad Property’s arguments and proposed conditions, AOK filed a reply on November 3, 2020, stating that it and NETRA are willing “to enter into mediation without pre-conditions, or with any conditions the Board deems just.” (AOK Reply 1.)

DISCUSSION AND CONCLUSIONS

Petition for a Stay. Under 49 U.S.C. § 1321(b)(4), the Board may issue an appropriate order, such as a stay, when necessary to prevent irreparable harm. In deciding a petition for a

decision, as it addressed NETRA’s arguments and evidence in any event. Likewise, the issue of NETRA’s standing need not be resolved here, as the stay petition was filed jointly with AOK. Accordingly, this decision will refer only to AOK as the filing party.

⁴ AOK and NETRA filed a petition for reconsideration of the Appeal Order on October 13, 2020, to which RJC Railroad Property replied on October 21, 2020. That petition will be addressed in a subsequent Board decision.

⁵ The Cumberland Trails Conference and Tennessee Citizens for Wilderness Planning jointly filed a letter on October 14, 2020, opposing AOK’s stay request and requesting a timely decision in favor of RJC Railroad Property.

stay, the Board considers: (1) whether the party seeking the stay has made a strong showing that it is likely to prevail on the merits; (2) whether the party seeking the stay will suffer irreparable harm in the absence of a stay; (3) whether other interested parties will be substantially harmed by a stay; and (4) the public interest in granting or denying the stay. See, e.g., Ind. Harbor Belt R.R.—Trackage Rights—Consol. Rail Corp. (IHB), FD 36099 et al., slip op. at 4 (STB served Mar. 14, 2017) (citing Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977)). The party seeking a stay carries the burden of persuasion on all of the elements required for such extraordinary relief. Id. (citing Canal Auth. of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974)). The threshold consideration in deciding whether injunctive relief is appropriate is whether the petitioning party will be irreparably harmed without it. Eighteen Thirty Group, LLC—Acquis. Exemption—in Allegheny Cnty., Md., FD 35438 et al., slip op. at 3 (STB served Nov. 17, 2010) (citing Sampson v. Murray, 415 U.S. 61, 88 (1974)). As to irreparable harm, the party seeking a stay must demonstrate that the injury claimed is “imminent, certain and great.” IHB, FD 36099 et al., slip op. at 4 (quoting Sault Ste. Marie Bridge Co.—Acquis. & Operating Exemption—Lines of Union Pac. R.R., FD 33290, slip op. at 6 (STB served Jan. 24, 1997)).

AOK has not demonstrated that it will suffer irreparable harm in the absence of a stay. Except in unusual circumstances, the removal of track, by itself, has been found insufficient to demonstrate irreparable harm.⁶ AOK argues that it would be irreparably harmed in the absence of a stay “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.” (Pet. 7.) AOK’s only support for this contention is a purported conversation in late September or early October between an “AOK agent” and the driver of an RJC Railroad Property rehabilitation crew, who assertedly reported that the crew was departing a project in North Carolina and heading to “northeast Tennessee off Interstate 75.” (Id. at 6.) According to AOK, “[t]his is where the [L]ine is. Once this track is removed, it is highly unlikely that the railroad Line will ever be able to be used again.” (Id.) These statements, which have not been supported by verified statements or any other evidence, are insufficient to demonstrate that RJC Railroad Property intends to remove the track. Moreover, RJC Railroad Property represents that any “speculation [by AOK] that removal of the rail is imminent is false.” (RJC R.R. Prop. Reply 7, Oct. 9, 2020.)

Taken as a whole, this record is insufficient to convince the Board that AOK will suffer irreparable harm in the absence of a stay. Because AOK has not demonstrated that irreparable harm will occur if a stay is not granted, the petition for a stay will be denied and the Board need not address the remaining stay criteria. See IHB, FD 36099 et al., slip op. at 5; 49 U.S.C. § 1321(b)(4).

⁶ See City of Fishers—Pet. for Partial Revocation of Exemption, FD 36137 et al., slip op. at 7 (STB served Dec. 21, 2018) (explaining that “a lost business opportunity alone does not qualify as irreparable harm”). But see Colo. Wheat Admin. Comm. v. V & S Ry., NOR 42140, slip op. at 4-6 (STB served May 7, 2015) (finding bad faith on the part of the railroad and irreparable harm likely to result from the “actual and imminent” removal of track).

The Board expects that RJC Railroad Property will, consistent with its representation noted above and in light of the Board-sponsored mediation being ordered in this decision, maintain the status quo and take no action to remove the track while the Board considers AOK's petition for reconsideration of the Appeal Order.

Request for Mediation. The Board favors the resolution of disputes through alternative dispute resolution in lieu of formal Board proceedings whenever possible. 49 C.F.R. § 1109.1. Therefore, the Board will order Board-sponsored mediation pursuant to 49 C.F.R. § 1109.2(a)(1). The Chairman will soon appoint one or more mediators pursuant to 49 C.F.R. § 1109.3(a). Once appointed, the mediator or mediators will contact the parties to discuss the timing and logistics for conducting the mediation, and other matters.⁷ At least one principal of each party, who has authority to commit that party, shall participate in the mediation and be present at any session at which the mediator or mediators request(s) that the principal be present.

The mediation period shall be 30 days, beginning on the date of the first mediation session. 49 C.F.R. § 1109.3(b). The Board may extend mediation pursuant to mutual written requests of all parties to the mediation proceeding. Id. The mediator or mediators are instructed to inform the Board when mediation has ended, with or without a resolution.

RJC Railroad Property argues that mediation is not justified here but alternatively asks, among other things, that the proceeding not be held in abeyance if mediation is initiated. Therefore, the Board will not hold the proceeding in abeyance. 49 C.F.R. § 1109.3(e) (where one or both parties to mediation do not voluntarily consent to mediation, the Board will not hold the underlying proceeding in abeyance).

⁷ RJC Railroad Property requests that the scope of the mediation be limited to the purchase price for the Line, "which must be not less than RJC Railroad Property's current highest third party offer for the materials that can be removed from the rail corridor upon abandonment." (RJC R.R. Prop. Reply 2, Oct. 30, 2020.) It further asks that NC Railroad, Inc., and National Coal, LLC, be parties to the mediation, and that mediation be limited to a 10-day period within 30 days of the Board ordering mediation. (Id.)

Although the exact scope and format of the mediation will not be determined at this time, the mediator(s) will seek to effectuate the wishes of the parties to the extent appropriate. The Board also notes that, although the mediation period under 49 C.F.R. § 1109.3(b) is 30 days, the parties may conclude mediation at any time, at which point the mediator(s) shall notify the Board whether the parties have reached any agreement. See 49 C.F.R. § 1109.3(b). And, while the parties are encouraged to work out as many issues as possible, the scope of the mediation will not encompass any grant, denial, stay, or revocation of regulatory authority. 49 C.F.R. § 1109.1.

It is ordered:

1. AOK's petition to stay the Appeal Order is denied.
2. Mediation will be initiated as discussed above.
3. This decision is effective on its service date.

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