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SERVICE DATE – JANUARY 27, 2009

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-33 (Sub-No. 230X)

UNION PACIFIC RAILROAD COMPANY—ABANDONMENT EXEMPTION—IN LASSEN
COUNTY, CA, AND WASHOE COUNTY, NV

Decided: January 23, 2009

On September 29, 2008, Robert Alan Kemp (Kemp) filed an administrative appeal of a decision of the Director of the Office of Proceedings (Director) served on September 19, 2008 (Director's decision), in which the Director rejected an offer of financial assistance (OFA) filed by Kemp to purchase a 220-foot portion of a 21.7-mile rail line (220-foot segment) of the Union Pacific Railroad Company (UP). On October 7, 2008, UP filed a reply. The decision below will deny that appeal and another and also will address several motions filed by Kemp.

BACKGROUND

By decision served on January 26, 2007 (January decision), the Board, under 49 U.S.C. 10502, exempted from the prior approval requirements of 49 U.S.C. 10903 the abandonment by UP of a 21.77-mile rail line from milepost 338.33 near Flanigan, NV, in Washoe County, to milepost 360.10 near Wendel, CA, in Lassen County, and a .57-mile rail line from milepost 358.68 to milepost 359.25 near Wendel (collectively, Line).¹ The exemption was scheduled to become effective on February 25, 2007, but three timely notices of intent to file an OFA to purchase the Line were filed, including one filed by Nevada Central Railroad (NCR).

By decision served on February 2, 2007, the Board tolled the time period to file an OFA until 10 days after UP provided two of the potential offerors with the financial data and information prescribed in 49 CFR 1152.27(a) (prescribed information). During the tolling period, UP chose to negotiate with a potential offeror other than NCR for the sale of the Line. When those negotiations fell through, UP requested, in a filing dated March 27, 2008, that the Board remove the tolling of the time period for filing an OFA. In opposition, NCR sought extension of the tolling period, arguing that UP had failed to provide NCR with all of the prescribed information. By decision served on August 5, 2008, the Board directed UP to provide

¹ The January decision made the exemption subject to employee protective conditions, as well as various environmental and historic preservation conditions, all of which remain in effect.

NCR with certain additional information and ordered that, once UP certified to the Board that it had done so, the period for filing an OFA would expire 10 days thereafter.

On August 15, 2008, UP certified to the Board that it had provided NCR with the additional information, making the due date for submitting an OFA August 25, 2008. NCR then filed a motion to substitute Kemp in its place, and Kemp filed a request to extend the due date for submitting an OFA until September 14, 2008, because he was moving his office from Nevada to Arizona. By decision served on September 12, 2008 (September 12 decision), the Director allowed NCR to substitute Kemp in its place and, at Kemp's request, extended the OFA due date until September 15, 2008. The Director also found that, after review of the additional information submitted by UP, UP appeared to have met the requirements set forth in 49 CFR 1152.27(a).

On September 15, 2008, Kemp filed an OFA to purchase only the 220-foot segment located at the beginning of the Line (MP 338.33), for an "approximate" price of \$5,750.13, which appears to be loosely based on a pro rata share of the Line's total \$3,187,065 net liquidation value (NLV) provided by UP under 49 CFR 1152.27(a). A letter from an entity called The Banks Family Trust (Trust) purported to provide a financial guarantee to Kemp in the amount of \$13,000 for the OFA in this proceeding and asserted that the Trust would guarantee the necessary financial commitments to enable Kemp to maintain operation of the 220-foot segment for 5 consecutive years. Kemp stated that he was capable of purchasing only this small segment due to acts of UP, upon which Kemp did not elaborate. On September 17, 2008, UP filed a reply opposing Kemp's OFA (UP's September 17 reply), asking the Board to reject it.

In the Director's decision, the Director rejected Kemp's OFA to purchase the 220-foot segment, finding that there was no current or future traffic to support continued rail service over that segment and that, even if the record had supported continued rail service, Kemp had failed to show that he could finance the purchase and operation of the segment. Specifically, the Director found that the only movements on the Line since 2004 involved the temporary transportation of salvage materials from UP abandonments by UP's contractors and one movement of 29 cars in 2004 by the Sierra Army Depot, which has used another UP main line connection since then. The Director also found that Kemp had not shown the extent of the Trust's financial resources.

On September 29, 2008, Kemp filed an appeal of the Director's decision, to which UP replied on October 7, 2008 (UP's October 7 Reply). As an alternative to his appeal, Kemp asks that he be allowed to amend his OFA, but that request will be denied, as will Kemp's other motions, as discussed in the Preliminary Matters section below.

PRELIMINARY MATTERS

Kemp's October 27 motion. On October 27, 2008, Kemp filed a "Motion to Strike" (Kemp's October 27 motion), in which he requests that the Board strike UP's October 7 reply. But Kemp's October 27 motion attempts to rebut UP's October 7 reply, rather than provide

justification to strike UP's reply. Further, UP's October 7 reply was a proper reply to Kemp's appeal under 49 CFR 1104.13(a). Therefore, the motion to strike will be denied.

Kemp's November motions. On November 10, 12, and 24, 2008, Kemp filed three additional "Motions to Strike" (Kemp's November motions), which follow the same pattern as Kemp's October 27 motion by primarily further replying to UP's replies rather than providing a basis to strike them. Thus, Kemp's November motions fail to provide a basis to strike UP's replies, and they will be denied.

UP's provision of information. In cover letters to six different filings by Kemp (Kemp's October 27 motion, Kemp's November motions, and two "notices" of intent to file a motion to strike filed on October 15 and 30, 2008), Kemp asserts that UP has not provided him with the prescribed information. UP has replied to this allegation three times: on October 21, 2008, November 4, 2008, and November 19, 2008, each time showing that UP has legally served NCR and Kemp with the ordered information. The Director, in the September 12 decision, found that the materials provided by UP appeared to meet the requirements of 49 CFR 1152.27(a), and we find nothing in the record now that indicates the information provided by UP to NCR and Kemp fails to meet the requirements of 49 CFR 1152.27(a). Furthermore, Kemp has filed his OFA, and appears to have used UP's NLV to do so. He also has never explained what additional information he is seeking from UP or why he needs it. Thus, the Board will not allow Kemp to late file an amendment to his OFA.

Appeal of the November 26 decision. Finally, on December 16, 2008, Kemp filed an appeal of the decision served on November 26, 2008 (November 26 decision), which rejected a November 24, 2008 filing by the Trust, entitled "Evidence of: Provision of Bond" (November 24 filing), purporting to set up a trust with the Board on behalf of Robert Alan Kemp to pay \$5,750.00 to UP via a credit card. The November 26 decision rejected the November 24 filing because the Board's rules do not provide for the Board to accept monies in trust in Board proceedings. In his appeal, Kemp argues that the Trust was attempting to establish evidence of its ability to pay and requests that the November 24 filing be accepted as evidence in this proceeding. But the November 24 filing could not be accepted under the Board's rules and was properly rejected as explained in that decision. Therefore, Kemp's appeal of the November 26 decision will be denied, but we note that the Trust already put in the record information about having \$5,750.00 available.²

² On December 3, 2008, the Trust filed a pleading entitled "evidence" that appears to recount the November 24 filing and the Trust's attempt to pay \$5,750.00 in trust to the Board for UP.

DISCUSSION AND CONCLUSIONS

As stated in the Director's decision, the OFA provisions are intended to preserve, whenever possible, any prospect for continuing rail freight service on corridors that would otherwise be abandoned, but the Board need not require the sale of a line under the OFA provisions if it determines that the offeror is not genuinely interested in, or capable of, providing rail service or that there is no likelihood of future traffic.³ In his appeal, as in his previous submissions in support of his OFA, Kemp fails to show that there is any current or future traffic or that he is capable of providing rail service.

No current or future traffic

Kemp claims that he has contracts from a new power generating customer to “co-locate” on the 220-foot segment, but Kemp does not identify the customer or provide any other information about it or the contracts. In its reply, UP states that it knows of no such customer and that UP would not have abandoned that small segment along with the rest of the Line if there were such a customer desiring to locate on the 220-foot segment. Indeed, the record shows that the only traffic on the Line since 2004 was from UP's contractors hired to dispose of salvage material from other UP abandonments, which UP indicated was to be completed by now.

In his appeal, Kemp refers to a “33 Megawatt Power Generating Facility . . . located less than a mile from the end of the . . . Line,” but that plant is in Wendel, nearly 22 miles away from the 220-foot segment Kemp is seeking to purchase. To serve this plant, Kemp claims that he is going to construct an approximately 22-mile rail line parallel to the Line to reach Wendel, and that he has a contract to provide service over it. But instead of a contract, Kemp simply provides an April 25, 2008 letter (April 25 letter) from HL Power Company (HL Power) addressed to Kemp and submitted as part of Kemp's October 27 motion. In the April 25 letter, HL Power's plant manager generally states that the plant has long contemplated using rail transportation to deliver a portion of its 350,000 tons-per-year biomass fuel requirement. But Kemp himself predicates any potential traffic from HL Power on constructing a 22-mile line, the feasibility of which is not supported by the record. Further, due to the plant's location, HL Power's connection to the Line would require an additional mile of right-of-way and track, an issue which Kemp fails to address.⁴

³ Roaring Fork—Exem.—in Garfield, Eagle & Pitkin Counties, CO, 4 S.T.B. 116, 119-20 (1999); Burlington N./Santa Fe—Aban.—in King County, WA, 3 S.T.B. 634, 638-39 (1998).

⁴ In its April 25 letter, HL Power indicates that it has rail, ties, splice bars, bolts, spikes, and one switch that it anticipates using to make a connection to the Line, but the record contains no evidence of the amount of these materials, or whether the right-of-way to build such track has been purchased or how it might be purchased.

Kemp alludes to the possibility of serving other customers, but he identifies none. Kemp's filings suggest that, once he constructs nearly 22 miles of track parallel to the Line, he will find customers. But such speculation is inadequate to show that Kemp's asserted plan is feasible. Cf. Norfolk Southern Railway Company—Abandonment Exemption—in Norfolk and Virginia Beach, VA, STB Docket No. AB-290 (Sub-No. 293X) (STB served Nov. 6, 2007) (generalized assertion of future need inadequate to defeat OFA exemption request).

Kemp asserts that the construction of a new 22-mile parallel track to Wendel would require "no permit" because Kemp appears to believe that the parallel track would be a "main line extension" from the 220-foot segment. While this issue is not before the Board in this proceeding, it should be noted that the construction of 22 miles of track to Wendel almost certainly would require construction authority from the Board, along with substantial environmental review.

In each of his four motions to strike, Kemp implies, incorrectly, that he has some kind of Board authority by referring to two Board dockets. He refers to STB Finance Docket No. 34382 in stating that NCR is in the process of constructing a "ByPass,"⁵ but the Board has received no request for construction and operation authority in that docket and has not granted any such authority. Nor does Kemp sufficiently describe this track or even explain how it connects to the 220-foot segment. Kemp also refers to the track described in STB Finance Docket No. 34773, which he asserts directly connects to the above-referenced "ByPass." But, in STB Finance Docket No. 34773, the Board rejected NCR's notice of exemption to acquire and operate 134 miles of track because the notice was unclear and failed to comport with the Board's filing requirements, including failing to provide such basic information as the name and address of the railroad transferring the property and fully describing the 134 miles of track. See Nevada Central Railroad—Exemption for Acquisition and Operation of Rail Service—in Elko and White Pine Counties, NV, STB Finance Docket No. 34773 (STB served Nov. 22, 2005).

Kemp further claims that the 220-foot segment is "critical" to a "458-Mile Heavy High Speed Mainline Railroad System located within the state of Nevada," but makes no showing that this plan is real or viable. Even more than the construction of the 22 miles of track discussed above, Kemp's assertions about the construction of 458 miles of track are not credible.⁶ Here too, Kemp has not filed for construction authority or sufficiently explained why such authority would not be required.

⁵ It is unclear how NCR is in the process of constructing a rail line, when in its August 29, 2008 filing, it represented to the Board that it had transferred all of its assets to Kemp.

⁶ Kemp suggests that he can construct a line of railroad for less than purchasing an existing line for NLV, but he provides no support for this statement. Based on UP's NLV, purchase of the Line would cost about \$147,397 per mile. According to UP, this is a fraction of the cost per mile to construct a new line of railroad.

UP contends that the 220-foot segment is too short for any kind of independent rail operations, as it would hold fewer than five rail cars. Whether a rail line that is 220 feet long can be operated as a line of railroad is a question of fact, but, here, Kemp has not shown that he could conduct rail operations over the 220-foot segment. Kemp implies that he could construct the long lines of track discussed above, which he variously calls an “extension,” “ByPass,” “turnout,” and “mainline,” from the 220-foot segment. But, as discussed above, his plans lack any specificity or credibility.

Kemp’s asserted plans for such extensive constructions (thousands of times longer than the 220-foot segment) demonstrate that the 220-foot segment cannot stand alone as an operable line of railroad. The record is void of any realistic possibility of traffic on the 220-foot segment. Thus, the Director properly found that the record showed that there is no current or future traffic to support continued rail service over the 220-foot segment and, therefore, properly rejected Kemp’s OFA as unlikely to lead to continued rail service.

Failure to show capability to provide rail service

The Director also properly determined that Kemp failed to demonstrate that he would be able to finance the purchase of the 220-foot segment and operate over it. In its letter to the Board, the Trust stated that it would guarantee Kemp with up to \$13,000, but neither Kemp nor the Trust provided information about the Trust’s resources or its ability to back its pledge. Nor did he show that this amount of funding would be sufficient to acquire and operate even the 220-foot segment. In his appeal, Kemp calls the Trust a “financial investment partnership,” but provides nothing to demonstrate the Trust’s authority to transact business or its financial resources, even though both were issues of concern identified in the Director’s decision.⁷

Kemp claims that \$13,000 would be sufficient to purchase and operate the 220-foot segment, but he makes no attempt to demonstrate how he could operate a railroad, even over the 220-foot segment, with only \$13,000. Even using Kemp’s offered \$5,750.13 as a purchase price, that would leave only \$7,249.87 to operate the 220-foot line for 2 years. Kemp makes no showing how that amount could pay for operational costs, including, for example, locomotives, railcars, maintenance, salaries, retirement contributions, fuel, signals, or communications.⁸

Finally, Kemp argues that the Board has granted other OFAs with limited information, citing STB Docket No. AB-1081X, San Pedro Railroad Operating Company, LLC—Abandonment Exemption—in Cochise County, AZ, but in that case the offeror provided more

⁷ As UP points out in UP’s September 17 reply, “[f]or all we know, the ‘Trust’ exists only as a name on a letterhead.”

⁸ The Trust provided an additional offer to provide an unspecified amount for operations, but this offer is no more convincing than Kemp has shown the Trust’s \$13,000 guarantee to be. Even if Kemp could show that the Trust has sufficient resources, the Trust’s unspecified offer is not binding on the Trust.

extensive information about its financial resources, including a \$120,000,000 letter of credit from an established financial institution. In contrast, Kemp has provided only a letter from an entity alternatively identified as “a family trust” and an “investment partnership” with no documentation about the financial resources available to that entity.

In sum, Kemp’s appeal provides no information or evidence that contravenes the Director’s findings or reasoning in rejecting Kemp’s OFA. Kemp fails to show a demonstrable commercial need for rail service on the 220-foot segment. Nor does Kemp show that he could finance the purchase and operation of the 220-foot segment, let alone finance two additional construction projects, one involving 22 miles of track, the other 458 miles, for which neither Kemp, NCR, nor anyone else has construction authority. Thus, the record does not permit a conclusion that continued rail service is likely to result from Kemp’s OFA, and the Director’s decision will be affirmed.

In his appeal, Kemp requests that, in the alternative, the Board allow him to amend his OFA to include the information contained in his appeal. He contends that, once this information is added to the record, his OFA will be complete. Kemp makes two arguments for allowing him to amend or supplement his OFA. First, he argues that, because he contacted the Board’s Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC) on September 19, 2008, about his intent to file a supplement to his OFA, he should be allowed to do so now. But the Board’s regulations do not provide for oral filings and any interpretation of a conversation with Board staff as permission to late file a pleading is incorrect. Thus, Kemp’s telephone call to OPAGAC does not support a late-filed amendment of Kemp’s OFA. Second, Kemp argues that he should have an opportunity to respond to UP’s September 17 reply because UP’s reply should have been styled as a motion to reject or dismiss. But UP’s September 17 reply was a proper reply to Kemp’s OFA under 49 CFR 1104.13(a). Thus, Kemp provides no justification to amend his OFA, and his request will be denied.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Kemp’s October 27 motion is denied.
2. Kemp’s November motions are denied.
3. Kemp’s appeal of the Director’s decision (served on September 19, 2008) is denied.
4. Kemp’s appeal of the November 26 decision is denied.
5. Kemp’s request to amend or supplement his OFA is denied.

6. This decision is effective on its service date.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan
Acting Secretary