

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 33 (Sub-No. 327X)

UNION PACIFIC RAILROAD COMPANY—ABANDONMENT AND DISCONTINUANCE
OF SERVICE EXEMPTION—IN CERRO GORDO COUNTY, IOWA

Digest:¹ The Board grants an appeal of the November 20, 2017 decision of the Acting Director of the Office of Proceedings, rejecting M&StL Group, LLC's notice of intent to file an offer of financial assistance to purchase a rail line from Union Pacific Railroad Company, and finds M&StL Group, LLC, preliminarily financially responsible.

Decided: January 26, 2018

On November 20, 2017, the Board, by Director's Order, rejected a notice of intent to file an offer of financial assistance (OFA) filed by the M&StL Group, LLC (MSL), under 49 C.F.R. § 1152.27(c)(2) because it did not conform with the Board's current regulations. On November 28, 2017, MSL filed an appeal of that decision. For the reasons discussed below, the Board grants the appeal and finds MSL preliminarily financially responsible. The Board also sets a procedural schedule for the submission of MSL's OFA.

BACKGROUND

On October 12, 2017, Union Pacific Railroad Company (UP) filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments and Discontinuance of Service to abandon a 2.0-mile portion of UP's Rockwell Industrial Lead in Mason City, Iowa, between milepost 155.5 near Elm Street and milepost 157.5 near 19th Street (the Line). Notice of the exemption was served and published in the Federal Register on November 1, 2017 (82 Fed. Reg. 50,729).² The exemption became effective on December 1, 2017.

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. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² On October 16, 2017, the City of Mason City, Cerro Gordo County, and the Iowa Natural Heritage Foundation (Trail Use Applicants) filed a request for a public use condition and a notice of interim trail use. On November 6, 2017, the Board's Office of Environmental Analysis served an Environmental Assessment. On November 29, 2017, the Board reopened the proceeding and modified the November 1, 2017 exemption notice by issuing a Notice of Interim
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On November 13, 2017, MSL filed a notice of intent to file an OFA to purchase the Line. By a decision served on November 20, 2017, the notice of intent was rejected because it did not meet the Board's requirements under 49 C.F.R. § 1152.27(c)(2)(i).³ In that decision, the Director pointed out that the regulations governing OFA procedures were amended by the Board on June 29, 2017, and became effective on July 29, 2017. See Offers of Financial Assistance, EP 729 (STB served June 29, 2017); see also 82 Fed. Reg. 30,997 (July 5, 2017). The Director determined that MSL's notice of intent failed to meet the new requirements adopted in the final rule.

On November 28, 2017, MSL filed an appeal of the Director's decision. In its appeal, MSL provides the information required under the Board's current OFA regulations at 49 C.F.R. §§ 1152.27(c)(2)(i) and 1152.27(c)(1)(ii) to demonstrate MSL's preliminary financial responsibility—information that was not provided with MSL's original notice of intent. (See MSL Appeal 3-4, App. 1, App. 2.) MSL also provides other information required upon the filing of an OFA, including financial information to show its ability to comply with the Board's escrow requirement; argument about the need for continued rail service on the Line; and information regarding the identity of the offeror. See 49 C.F.R. § 1152.27(c)(1)(iv). MSL argues that, having now provided the required preliminary financial information and other information, it would be "unjust in the circumstances" to reject its notice of intent. (Appeal 3.) MSL argues that its notice of intent is in furtherance of the rail transportation policy at 49 U.S.C. § 10101(4), and that "[b]oth MSL and the public interest in sound rail transportation would be harmed if this [a]ppeal were to be denied." (Id. at 5.) MSL further argues that UP would not be harmed if this appeal were granted, that any "minimal opportunity cost" to UP "would not be material in the balance of hardships," and that any harm to the Trail Use Applicants "is not entitled to consideration in the balance of hardships because revival of rail service takes priority over trail use." (Id. at 6.) MSL argues in conclusion that the balance of hardships favors the Board granting its appeal and accepting its notice of intent. (Id.)

In its December 11, 2017 reply in opposition to MSL's appeal, UP argues that the appeal should be denied because MSL "did not provide any explanation for its failure to comply with the Board's regulations," and MSL has therefore failed to show "that the [a]ppeal must be granted to prevent manifest injustice." (Reply 1.) UP argues that the Board should require strict compliance with its OFA procedures, as 49 U.S.C. § 10904 "balances the competing policy considerations to preserve rail lines for continued rail service and to allow railroads the ability to quickly abandon unprofitable rail lines." (Reply 2.) UP further argues that, in a recent

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Trail Use to allow the Trail Use Applicants to negotiate with UP for trail use for the Line until May 28, 2018.

³ Because MSL's notice of intent was rejected, the effective date of the exemption remained December 1, 2017, and was not stayed pursuant to 49 C.F.R. § 1152.27(c)(2)(i).

proceeding where the Board granted an appeal of a Director's Order rejecting an OFA notice of intent, the potential offeror had "explained in its appeal why it did not comply with the OFA rules," which MSL has not done here. (Reply 3, citing Ill. Cent. R.R.—Aban. Exemption—in Champaign Cty., Ill., AB 43 (Sub-No. 189X), slip op. at 3 (STB served July 2, 2015).)

DISCUSSION AND CONCLUSIONS

Appeal of Director's Order

MSL's appeal, and UP's reply in opposition to the appeal, refer to the decisional standard at 49 C.F.R. § 1011.6(b), which governs appeals of Director's Orders issued pursuant to a delegation of authority under 49 C.F.R. § 1011.6. The authority delegated to the Director to initially determine whether OFAs satisfy the statutory standards of 49 U.S.C. § 10904(d), however, is delegated under 49 C.F.R. § 1011.7(a)(2)(ii), not 49 C.F.R. § 1011.6. The Board considers appeals of initial § 1011.7 decisions issued by the Director under 49 C.F.R. § 1011.2(a)(7). See Consol. Rail Corp.—Aban. Exemption—in Hudson Cty., N.J., AB 167 (Sub-No. 1189X) et al., slip op. at 3 (STB served Nov. 2, 2015) (appeals of initial decisions issued by the Director evaluating OFAs are considered "[p]ursuant to 49 C.F.R. § 1011.7(a)(2)(ii) and § 1011.2(a)(7)").

In considering appeals of initial decisions issued by the Director pursuant to the authority delegated under 49 C.F.R. § 1011.7(a)(2)(ii), the Board considers whether the Director made the correct decision, given the circumstances presented.⁴ Notwithstanding their reference to the incorrect decisional standard, the Board will consider the parties' arguments as they apply to the appropriate standard.

While the Director's decision to reject MSL's 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 MSL's appeal.

The purpose of the Board's OFA rules is to preserve rail lines for continued rail service. See Offers of Financial Assistance, EP 729, slip op. at 2, 15 (STB served June 29, 2017). In

⁴ See, e.g., Del. & Hudson Ry.—Discontinuance of Trackage Rights Exemption—in Broome Cty., N.Y.; Middlesex, Essex, Union, Somerset, Hunterdon, & Warren Cties., N.J.; Cumberland, Chester, Luzerne, Perry, York, Lancaster, Northampton, Lehigh, Carbon, Berks, Montgomery, Northumberland, Dauphin, Lebanon, & Phila. Cties., Pa.; Harford, Balt., Anne Arundel, & Prince George's Cties., & Balt. City, Md.; D.C.; & Arlington Cty., & the City of Alexandria, Va., AB 156 (Sub-No. 27X), slip op. at 7 (STB served July 10, 2015) (finding that, "[g]iven the circumstances presented here, the Board concludes that the Director did not err"); Ill. Cent. R.R., AB 43 (Sub-No. 189X), slip op. at 3 (stating that "[o]n appeal, the Board considers whether the [notice of intent] was properly rejected").

addition, the purpose of the procedures underlying the Board's OFA rules is to ensure that interested parties are afforded the opportunity to participate in Board proceedings in an orderly manner, and to balance several aspects of the rail transportation policy: ensuring the development and continuation of a sound rail transportation system, 49 U.S.C. § 10101(4), reducing regulatory barriers to entry into and exit from the industry, 49 U.S.C. § 10101(7), and providing for the expeditious handling and resolution of proceedings before the Board, 49 U.S.C. § 10101(15). Where a potential OFA offeror has submitted a filing that does not comply with the Board's OFA procedures, it is appropriate for the Director to reject that filing.

The procedures in the Board's OFA regulations at 49 C.F.R. § 1152.27 have recently changed pursuant to the adoption of a final rule on June 29, 2017, which became effective on July 29, 2017. Offers of Financial Assistance, EP 729, slip op. at 1. This final rule was the culmination of a rulemaking process that the Board began with the issuance of an advance notice of proposed rulemaking in December 2015, seeking public comment on whether and how the Board should update its OFA rules in order to improve that process and protect it against abuse. Among the provisions adopted by the Board in that rulemaking proceeding were new requirements that a potential offeror, in its notice of intent to file an OFA, calculate a preliminary financial responsibility amount for the rail line it seeks to subsidize or purchase, and then demonstrate that it is preliminarily financially responsible for that amount. 49 C.F.R. § 1152.27(c)(1)(ii); see also Offers of Financial Assistance, EP 729, slip op. at 6-9. The Board's final rule was served and published in the Federal Register on July 5, 2017, providing the public with legally sufficient notice of the changes to the OFA regulations.

In the past, the Board has occasionally accepted notices of intent and OFAs that were not in compliance with the Board's regulations over a railroad's objection.⁵ Here, MSL's November 13 notice of intent failed to provide the information required under the Board's amended regulations. Subsequently, after the Director's Order rejecting MSL's notice of intent was served, the Board received, in a separate and unrelated proceeding, two additional notices of intent to file an OFA that also do not comply with the amended regulations. See Paul Didelius Notice of Intent to File an OFA, Jan. 16, 2018, CSX Transp., Inc.—Aban. Exemption—in Clark, Floyd, Lawrence, Orange, & Washington Ctys., Ind., AB 55 (Sub-No. 775X) (correction and

⁵ See Norfolk S. Ry.—Aban. Exemption—in Roanoke, Va., AB 290 (Sub-No. 389X), slip op. at 3 (STB served May 5, 2017) (late-filed notice of intent accepted due to the potential offeror's lack of familiarity with Board proceedings and conversations with Board staff regarding the filing deadline); Ill. Cent. R.R., AB 43 (Sub-No. 189X), slip op. at 3 (late-filed notice of intent accepted where the filing was handled by an employee of the potential offeror who was unfamiliar with Board procedures and where the railroad failed to disclose the abandonment to the potential offeror); Union Pac. R.R.—Aban.—in New Madrid, Scott, & Stoddard Ctys., Mo., AB 33 (Sub-No. 261), slip op. at 2 (STB served Sept. 10, 2009) (revised OFA accepted after the effective date of the notice where the effective date was set in error).

amendment filed January 18, 2018); Indianapolis Metropolitan Railway Company Notice of Intent to File an OFA, Jan. 17, 2018, CSX Transp., Inc., AB 55 (Sub-No. 775X).

These three notices of intent are the first three filed since the OFA regulations were amended. Based on those filings, there appears to be a lack of public awareness about the changes to the OFA regulations. Therefore, although it was reasonable for the Director to expect MSL to be aware of and compliant with the Board's revised regulations based on the circumstances at the time, given the subsequent circumstances, the Board will grant MSL's appeal.⁶

Preliminary Financial Responsibility Finding

In light of MSL's appeal being granted in this decision, the Board accepts the preliminary financial responsibility information contained in MSL's appeal as an amendment to its notice of intent. The Board has reviewed that financial information and finds that MSL is preliminarily financially responsible as required under 49 C.F.R. §§ 1152.27(c)(2)(i) & (c)(1)(ii). As a result, MSL will be allowed to continue to participate in the OFA process. UP must promptly provide the information requested in MSL's November 13 notice of intent pursuant to 49 C.F.R. § 1152.27(a). See 49 C.F.R. § 1152.27(c)(1)(ii). If UP does not promptly provide the required information, MSL may, no later than February 9, 2018, file a petition to toll the OFA filing deadline under 49 C.F.R. § 1152.27(c)(2)(ii)(C).

In class exemption proceedings, a notice of intent to file an OFA must normally be filed within 10 days of the date of the Federal Register publication giving notice of the exemption, 49 C.F.R. § 1152.27(c)(2)(i), and an OFA must normally be filed no later than 30 days after the date of the Federal Register publication. 49 C.F.R. § 1152.27(b)(2)(ii). Because, in this proceeding, that timeline has passed, MSL will have until February 15, 2018, to file an OFA that complies with the Board's current regulations at 49 C.F.R. § 1152.27, and in particular 49 C.F.R. § 1152.27(c)(1)(iv) (which contains the OFA requirements, including those recently adopted).⁷

⁶ Out of an abundance of caution, the Board will, for a limited time, include language in notices for abandonment and discontinuance as a reminder that OFA procedures were modified in Docket No. EP 729.

⁷ The exemption in this proceeding became effective on November 1, 2017. However, as noted above, see supra, note 2, on November 29, 2017, the Board reopened the proceeding and modified the November 1, 2017 notice to implement interim trail use/rail banking conditions to allow the Trail Use Applicants to negotiate with UP for trail use for the Line until May 28, 2018. This condition is a barrier to UP's consummation of the exemption, and thus, though the exemption is already effective, there is no risk of UP avoiding the OFA process by consummating the abandonment. The Board notes that the OFA process discussed in this decision is also a barrier to consummation. It is therefore not necessary for the Board to revoke or otherwise modify the exemption at this time.

It is ordered:

1. MSL's appeal of the Director's decision is granted.
2. The preliminary financial information contained in MSL's appeal is accepted as an amendment to its November 13, 2017 notice of intent to file an OFA, and MSL is found to be preliminarily financially responsible under 49 C.F.R. § 1152.27(c)(1)(ii).
3. MSL has until February 15, 2018, to file an OFA in this proceeding.
4. UP must promptly provide the information requested by MSL pursuant to 49 C.F.R. § 1152.27(a) in MSL's November 13 notice of intent. If UP does not promptly provide the required information, MSL may, no later than February 9, 2018, file a petition to toll the OFA filing deadline under 49 C.F.R. § 1152.27(c)(2)(ii)(C).
5. This decision is effective on its service date.

By the Board, Board Members Begeman and Miller.