

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-492 (Sub-No. 2X)

FILLMORE WESTERN RAILWAY COMPANY--
ABANDONMENT EXEMPTION--IN FILLMORE COUNTY, NE

IN THE MATTER OF AN OFFER OF FINANCIAL ASSISTANCE

Decided: October 22, 2001

Fillmore Western Railway Company (FWRY) filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments and Discontinuances of Service and Trackage Rights to abandon a line of railroad between: (a) milepost 1.7 near Fairmont and milepost 10.0 near Geneva, NE; and (b) milepost 8.1 near Fairmont, NE, and milepost 23.0 near Milligan, NE, a distance of approximately 23.2 miles in Fillmore County, NE. Notice of the exemption was served and published in the Federal Register on June 27, 2001 (66 FR 34328-29). Under 49 CFR 1152.50(d)(3), the exemption was scheduled to become effective on July 27, 2001, but a formal expression of intent to file an offer of financial assistance (OFA) was timely filed by Provident Industries, LLC (PI) to purchase a portion of the right-of-way between milepost 8.1 near Fairmont and milepost 23.0 near Milligan.¹ PI also requested FWRY to provide the financial data and information prescribed in 49 CFR 1152.27(a).

On August 27, 2001, PI timely filed an OFA under 49 U.S.C. 10904 and 49 CFR 1152.27(c) to purchase the portion of the line between milepost 8.1 and milepost 23.0 for \$305,103. By decision served August 31, 2001, the Acting Director of the Office of Proceedings found PI to be financially responsible and its offer to be sufficient to further postpone the effective date of that portion of the exemption so as to permit the OFA process to proceed.² On

¹ The filing of PI's formal expression of intent to file an OFA stayed the effective date of the exemption until August 6, 2001. On July 18, 2001, PI filed a petition to toll the period for submitting the OFA pending receipt of the information required to be furnished by FWRY. By decision served July 20, 2001, the time period for PI to file its OFA was extended until August 27, 2001, or 20 days after PI's receipt of the requested information, whichever was later, and the effective date of the exemption as to the pertinent portion of the right-of-way was further postponed until September 5, 2001, or 30 days after PI's receipt of the required information, whichever was later.

² The August 31 decision identified September 26, 2001, as the date on or before which the buyer or seller could request the Board to establish the terms and conditions of the purchase for
(continued...)

September 10, 2001, FWR Y appealed the August 31 decision pursuant to 49 CFR 1011.2(a)(7) and 49 CFR 1152.27(e)(2), arguing that PI's OFA should be rejected.³

This decision addresses FWR Y's appeal of the August 31 decision. On appeal, FWR Y argues that PI did not adequately demonstrate its financial responsibility, that the OFA is not for continued rail service, and that PI did not adequately explain the disparity between its OFA and FWR Y's valuation of the property. In response, PI has submitted an unconditional commitment from Geneva State Bank for a loan to PI for \$700,000 — an amount that PI maintains would cover the purchase price and some start-up costs. PI has also submitted a letter from Manning Grain Company (MGC) stating that it intends to use the line to ship grain.⁴ PI asserts that its valuation of the line was preliminary because of the time constraints, but that the amount of its offer is subject to negotiation with the rail line owner during the 30 days following the filing of the offer.⁵

²(...continued)
that portion of the line.

³ By decision served September 18, 2001, the due date for PI to file its reply to FWR Y's appeal was extended to September 24, 2001; the due date for either party to request the Board to establish the terms and conditions for the purchase under the OFA process was extended to October 1, 2001; and the due date for replies to any request to set terms and conditions was extended to October 9, 2001.

⁴ On October 17, 2001, MGC filed a comment in support of PI's efforts to purchase the line and restore service. On October 19, 2001, FWR Y filed a motion to strike the filing, arguing that it was late-filed or in the alternative, that we strike the comment on grounds of fairness and due process. We will deny the motion to strike. The comment is not late. The regulation cited by FWR Y, 49 CFR 1152.27(h)(4), is inapposite. That regulation prohibits offerors from supplementing their requests to set terms and conditions. At issue here is an appeal by FWR Y of a finding that PI is a financially responsible party.

Nor do fundamental fairness or due process require that the pleading be stricken. As noted, PI submitted a letter from MGC in its reply to FWR Y's appeal, responding to the abandoning carrier's charge that the offer was not for continued rail service. Now MGC has come in on its own, reaffirming that it will use PI. The comment is relevant and strengthens PI's representations about MGC's intentions. MGC also criticizes the rates and services provided by FWR Y, and submits evidence to support its charges. FWR Y argues that it has been denied an opportunity to reply to those criticisms. But the motion to strike contains a vigorous response to those criticisms and the evidence offered in support of them.

⁵ On September 28, 2001, FWR Y filed a motion to strike material in PI's reply on the ground
(continued...)

DISCUSSION AND CONCLUSIONS

The OFA provisions reflect a Congressional desire to preserve, whenever possible, any prospect for continuing or (as here) resuming rail freight service on corridors that would otherwise be abandoned. See Redmond-Issaquah R.R. Preservation Ass'n v. STB, 223 F.3d 1057, 1060-63 (9th Cir. 2000) (Redmond-Issaquah). The OFA procedures require only that an offeror be financially responsible, that the offer be reasonable, and that the offer be for continued rail service. See 49 U.S.C. 10904; Redmond-Issaquah at 1061.⁶ The August 31 decision properly found that these requirements are met here. Therefore, we will deny FWRV's appeal.

FWRV has challenged PI's showing of financial responsibility, but we find no error in the August 31 decision finding PI to be financially responsible. Moreover, the evidence of financial responsibility has been strengthened by the commitment letter from a lender, which was submitted with PI's reply. We need not determine at this stage the full extent of financial resources that would be needed to complete the purchase and provide rail service over the track. We need only find that the offeror has sufficient financial responsibility to warrant it being afforded an opportunity to negotiate for purchase of the line. PI has shown sufficient financial responsibility to have that opportunity.

A finding of financial responsibility is not a guarantee that the offeror will be able to go through with the purchase at the price ultimately set (whether set through negotiation or, if necessary, by the Board). However, FWRV is protected against any possibility that PI ultimately may not obtain sufficient funds to complete the purchase. There are short, strict statutory time limits on this process: 30 days to either agree to a price or ask the Board to set terms; 30 days for the Board to rule on a request to set the terms and conditions; and 10 days for the offeror to accept or reject the terms that we set. If PI finds the price unacceptable or if it cannot arrange necessary funding to meet the terms of sale, PI will have to walk away, and FWRV will then be in the same position it would be in were we to grant the relief it seeks here. FWRV's rights are

⁵(...continued)

that the material should have been submitted along with PI's OFA and not at a time when FWRV would not have an opportunity to respond to this material. Because we find that FWRV has been able to address in its motion to strike the supplemental evidentiary presentation in PI's reply, we will accept and consider the contents of PI's reply. On October 4, 2001, PI filed a Reply in Opposition to Motion to Strike Reply to Appeal of Acting Director's Decision, which has been rendered moot by our decision to accept PI's reply.

⁶ An OFA, while it must meet these criteria, need not be overly detailed. See Illinois Central Railroad Co. – Abandonment – Between Aberdeen Junction and Kosciusko, in Holmes and Attala Counties, STB Docket No. AB-43 (Sub-No. 163) (STB served Jan. 31, 1997), citing Conrail Abandonments under NERSA, 365 I.C.C. 472 (1981).

thus preserved while PI will be ensured an adequate opportunity to pursue its efforts to purchase the line for the purpose of resuming rail freight service.

FWRV questions the sufficiency of PI's explanation regarding the disparity between PI's offer and FWRV's asking price. But the requirement that an offeror explain any such disparity assumes that the abandoning railroad has submitted some support for its own valuation. See Burlington Northern Railroad Company – Abandonment Exemption – In King County WA, In the Matter of an Offer of Financial Assistance, STB Docket No. AB-6 (Sub-No. 357X), slip op. at 7 (ICC served Apr. 22, 1994). Here, because there is nothing in the record to support FWRV's valuation, it would be premature for us to conclude that PI's preliminary offer is not reasonable. Accordingly, PI's general explanation for the disparity between its offer and the amount FWRV is seeking for the line was sufficient for purposes of providing a period for negotiations between the parties.⁷

Finally, FWRV questions whether PI's purchase of the line would result in continued rail freight service.⁸ PI has supported its statement that it intends to restore rail service with a commitment letter from a shipper, MGC. MGC's letter states that MGC was a substantial and consistent user of rail service until 1998, and that MGC intends to utilize PI's rail service once PI acquires the line. FWRV argues that MGC would not generate sufficient traffic to make the line viable, but FWRV offers no support for its assertion. In any event, a party filing an OFA does not need to prove in advance that its efforts to revive a failing line will unquestionably succeed.⁹ Here, PI's offer represents the last chance to preserve any prospect for resuming service on the subject track, it has submitted evidence showing that it is already lining up traffic, and it is entitled under the statute to pursue that endeavor.

Accordingly, we find no basis for reversing the August 31 decision, and we will deny FWRV's appeal of that decision.

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

⁷ We note that, on October 1, 2001, PI submitted more detailed support for its calculations with its request for terms and conditions.

⁸ Until the purpose of an offer is challenged, we can apply a rebuttable presumption that the offer is indeed for the purpose of providing rail freight service. See Redmond-Issaquah, 223 F.3d at 1063.

⁹ See 1411 Corporation – Abandonment Exemption – In Lancaster County, PA, et al., STB Docket No. AB-581X, et al., slip op. at 5 n.9 (STB served Sept. 6, 2001).

It is ordered:

1. FWRY's motions to strike are denied.
2. FWRY's appeal is denied.
3. This decision is effective on its service date.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams
Secretary