

SLOVER & LOFTUS

ATTORNEYS AT LAW

1224 SEVENTEENTH STREET, N. W.

WASHINGTON, D. C. 20036-3003

WILLIAM L. SLOVER
C. MICHAEL LOFTUS
DONALD G. AVERY
JOHN H. LE SEUR
KELVIN J. DOWD
ROBERT D. ROSENBERG
CHRISTOPHER A. MILLS
FRANK J. PERGOLIZZI
ANDREW B. KOLESAR III
PETER A. PFOHL
DANIEL M. JAFFE
KENDRA A. ERICSON

213346
TELEPHONE:
(202) 347-7170

FAX:
(202) 347-3619

WRITER'S E-MAIL:

kjd@sloverandloftus.com

February 18, 2005

VIA HAND DELIVERY

The Honorable Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Room 711
Washington, D.C. 20423

ENTERED
Office of Proceedings

FEB 18 2005

Part of
Public Record



Re: Docket No. AB-290 (Sub-No. 259X). Tennessee Railway
Company – Abandonment Exemption – In Anderson and Campbell
Counties, TN – Notice of Intent to File Offer of Financial Assistance

Dear Secretary Williams:

This letter is submitted on behalf of National Coal Corporation (“NCC”), in response to the February 14, 2005 letter filed in the referenced docket on behalf of Norfolk Southern Railway and Tennessee Railway Company (collectively, “NSR”), and in further support of NCC’s January 28, 2005 Notice of Intent to File an Offer of Financial Assistance (“OFA”) with respect to the subject line. As a threshold matter, NCC confirms that the OFA will be for purchase of the line pursuant to 49 U.S.C. §10904 and supporting regulations.

In its February 14 letter, NSR: (1) requests that it be allowed sixty (60) days to respond to NCC’s request for information pursuant to 49 C.F.R. Part 1152.27(a); (2) requests that it not be compelled to provide information related to its estimate of the costs of needed repairs to and/or rehabilitation of the line; and (3) suggests that NCC’s Notice of Intent should be rejected “because of serious questions about National Coal’s financial ability to acquire, rehabilitate and operate the line.” (NSR Letter at 4). NCC has no objection to NSR’s request for an extension of time, and subject to NSR’s agreement to allow NCC access to the line to conduct an independent appraisal, NCC agrees to withdraw its request for information from NSR regarding repair and rehabilitation costs. However, NCC submits that there is no basis whatsoever to disqualify NCC from submitting an OFA on grounds that NCC is not a “financially responsible person” within the meaning of the governing statute.

The Board's regulations and prior decisions make clear that the matter of an offeror's financial responsibility cannot be in issue until the offer itself is submitted. See 49 C.F.R. Part 1152.27(c)(1)(ii); Docket No. AB-565 (Sub-No. 4X), New York Central Lines, LLC – Abandonment Exemption – In Vermillion and Warren Counties, IN, Decision served January 31, 2002 at 2; Docket No. AB-581X, 1411 Corporation – Abandonment Exemption – In Lancaster County, PA, Decision served July 16, 2001 at 2. This is only logical, as to demonstrate financial responsibility an offeror must show "that it has or within a reasonable time will have the financial resources to fulfill proposed contractual obligations . . ." 49 C.F.R. Part 1152.27(c)(1)(ii). Obviously, the Board cannot determine whether an offeror has or will have sufficient resources to fulfill the terms of an OFA before the OFA even has been tendered. On this basis alone, NSR's challenge to the Notice of Intent should be denied.

Though it was not required to do so, NCC submitted with its Notice of Intent certain publicly released earnings information ("Statement"), that partially describes its financial posture as of December 31, 2004. NSR selects a few excerpts from the Statement and, taking them out of context, argues that they cast doubt on NCC's financial responsibility. (NSR Letter at 2-3). In actuality, however, the Statement clearly reflects NCC's financial capability to undertake investments along the lines of the contemplated OFA.

Over the nine (9) months ending September 30, 2004, NCC showed a net cash flow increase of approximately \$5.8 million. See Statement at 19-20. Coal sales revenue through that same time-frame (the first full year of renewed mining operations) was over \$8.8 million. Id. at 16. Based upon 2005 sales results to date, NCC projects full-year revenues for the current year at between \$40 million and \$50 million. While the company did show a net operating loss during its first two (2) years, very little coal was sold during its start-up year (2003), and its financial performance improved dramatically in 2004, setting the stage for the current year's robust growth. Id. at 15.

In addition to a substantial and growing positive cash flow, NCC has an immediately available credit reserve of approximately \$4.5 million, and expects to have a new credit facility of up to \$40 million in place by the time NSR's requested extension of time to comply with 49 C.F.R. Part 1152.27(a) expires. NCC's credit compliance failure in December, 2004 (NSR Letter at 3) was technical in nature – an increase in the time to "ramp-up" production at a new mining location in Kentucky, which has been corrected – and is in the process of being formally reviewed by the lender, who since mid-January has lent an additional \$500,000 toward the acquisition of a new high-wall miner. Meanwhile, sales volumes for January (approximately 57,000 tons) were well in excess of requirements, and volumes are projected to grow throughout year. Taken together, and measured against any reasonable estimate of the net liquidation value of a single-line segment that has been out of service two (2) to five (5) years, these facts easily establish NCC's overall financial vitality and status as a "financially responsible person" under 49 U.S.C. § 10904.

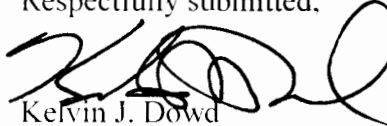
Hon. Vernon Williams
February 18, 2005
Page 3

Finally, NSR makes various assertions regarding past, unsuccessful negotiations with NCC's predecessor over the potential sale of NSR's entire line between Oneida and Devonia. Id. Apparently, the failure of those negotiations in part led to NSR's current plan for piecemeal abandonment of the line in separate segments, as each becomes eligible for treatment under 49 C.F.R. Part 1152.50(b). NCC takes no position on the consistency of this approach with prior agency precedent in this area. See, e.g., Central Michigan Railway Company – Abandonment, 8 I.C.C. 2d 166 (1991). However, NCC does not agree that valuation data which might have been exchanged or considered in connection with prior NSR efforts to sell all or part of the line would have no relevance to a determination of net liquidation value under 49 C.F.R. Part 1152.27(g) and (h). In any event, this question need not be addressed now, as NCC's initial OFA has yet to be submitted.

NSR's request that NCC's Notice of Intent be rejected is without merit, and should be denied. NCC has no objection to NSR being granted an additional sixty (60) days to respond to NCC's OFA information request, and subject to NSR's agreement to allow NCC access to the line to conduct an independent appraisal. NCC will agree to withdraw its request for repair and rehabilitation cost information.

Ten (10) copies of this letter are submitted along with the original, and an extra copy also is enclosed. Kindly indicate receipt and filing by time-stamping this additional copy and returning it to the bearer of this letter.

Respectfully submitted,



Kelvin J. Dowd
An Attorney for
National Coal Corporation

cc: Mr. David Konschnik
Director, Office of Proceedings
James R. Paschall
Norfolk Southern Railway
Charles W. Kite
National Coal Corporation