

SURFACE TRANSPORTATION BOARD

239637

Docket No. AB 603 (Sub-No. 4X)

ENTERED
Office of Proceedings
November 30, 2015
Part of
Public Record

V AND S RAILWAY, LLC
--DISCONTINUANCE EXEMPTION--
IN PUEBLO, CROWLEY, KIOWA AND OTERO COUNTIES, COLO.

AMENDED VERIFIED NOTICE OF EXEMPTION
OF
V AND S RAILWAY, LLC

Eric M. Hocky
Clark Hill, PLC
One Commerce Square
2005 Market Street, Suite 1000
Philadelphia, PA 19103
215-640-8500
ehocky@clarkhill.com

Attorneys for
V and S Railway, Inc.

Dated: November 30, 2015

SURFACE TRANSPORTATION BOARD

Docket No. AB 603 (Sub-No. 4X)

V AND S RAILWAY, LLC
--DISCONTINUANCE EXEMPTION--
IN PUEBLO, CROWLEY, KIOWA AND OTERO COUNTIES, COLO.

AMENDED VERIFIED NOTICE OF EXEMPTION
OF
V AND S RAILWAY, LLC

On August 3, 2015, V and S Railway LLC (“V&S”) filed a notice of exempt abandonment (the “Original Notice”) to abandon the 121.9-mile railroad line (the “Line”) described therein. By decision served October 19, 2015, the Board raised a question regarding whether the Line passed through Otero County, Colorado, and the related zip code, both of which were not referenced in the Original Notice. V&S determined that, in fact, the Line does pass through a small corner of Otero County, and that V&S had inadvertently not referenced Otero County or the related zip code. The Board’s notice provided that V&S should supplement its notice of exemption and environmental report to include the previously omitted information. V&S has determined, as part of supplementing the Original Notice, to convert its notice from one seeking an abandonment exemption to one seeking a discontinuance exemption. Cf. Reading Blue Mountain and Northern Railroad Company -Abandonment Exemption - In Schuylkill County, PA, STB Docket No. AB-996X (served February 5, 2008) (because carriers are not compelled to abandon lines, the Board normally grants a carrier's motion to withdraw its request for abandonment authority); Almono LP--Abandonment Exemption--in Allegheny

County, PA, STB Docket No. AB-842X (served Jan. 28, 2004).¹ As such, while V&S is supplementing the information contained in the Original Notice, it is not supplementing the environmental and historic report, except as discussed in paragraphs 13 and 14 below.

Accordingly, V&S submits the following information which updates the information contained in the Original Notice:

Required Information

V and S Railway, LLC ("V &S"), a Class III rail carrier subject to this Board's jurisdiction, pursuant to 49 U.S.C. § 10903, 49 U.S.C. § 10502 and 49 C.F.R. § 1152.50, states as follows:

1. The railroad line ("Line") which is subject of the proposed discontinuance extends between Milepost 747.5 near Towner 81071 and Milepost 869.4 near NA Junction 81022, a distance of 121.9 miles in Pueblo, Crowley, Kiowa and Otero Counties, Colorado.
2. The anticipated consummation date of the discontinuance is January 19, 2015, fifty days after the filing of this Amended Notice.²
3. V &S, by the attached Verification of Ms. Rhonda Nicoloff, a Manager of V &S, Exhibit E, certifies that (a) no local traffic has moved over the Line for at least two years' time³;

¹ While V&S has previously indicated that it would abandon the Line, it now has been presented with a significant car storage opportunity, so it has determined to seek discontinuance authority instead, and to continue to own and use the tracks for other opportunities.

² V&S already has discontinuance authority for the "Western Segment" of the Line between Milepost 808.3 near Haswell and Milepost 868.5 towards NA Junction. V&S Ry.—Discontinuance of Serv. Exemption—in Pueblo, Crowley, & Kiowa Cntys., Colo., AB 603 (Sub-No. 2X) (STB served June 28, 2012). Since the existing exemption does not include the 0.9-mile segment between Milepost 868.5 and the end of the Line at milepost 869.4, or any of the Line east of Haswell, V&S is including the entire Line in this Amended Notice, even though it does not require any additional authority to discontinue service over the Western Segment.

³ Not only has there been no service for at least two years, but in the last two years, except for car storage, V&S has received no inquiries of any kind (calls, emails or other written communications) relating to rail service to, from or over the Line from any shippers or

(b) any overhead traffic on the Line can be rerouted over other lines. and (c) no formal complaint by a user of rail service on the Line (or a state or local government entity acting on behalf of such user) regarding cessation of service over the Line either is pending with the Board or any U.S. District Court or has been decided in favor of the complainant within the two-year period.⁴

4. The exact name of the entity seeking discontinuance authority is: V and S Railway, LLC.

5. V&S is a common carrier by railroad subject to 49 U.S.C. Subtitle IV, chapter 105, having acquired the Line, generally referred to as the Towner Line, pursuant to the decision in Docket No. FD 35664, V and S Railway, LLC - Acquisition and Operation Exemption - Colorado Department of Transportation, (STB served November 13, 2012), 77 Fed Reg. 69542-69543, November 17, 2012.

6. V &S seeks the Board's authorization to discontinue service over the Line.

7. A map of the Line is attached as Exhibit A.

8. The representative of V &S to whom correspondence should be addressed is: Eric M. Hocky, Clark Hill, PLC, One Commerce Square, 2005 Market Street, Suite 1000, Philadelphia, PA 19103; 215-640-8500; ehocky@clarkhill.com.

9. The United States Postal Zip Codes traversed by the Line are 81022, 80125,

prospective shippers, or from anyone purporting to represent or be affiliated with the Colorado Wheat Administrative Committee, the Colorado Association of Wheat Growers, the Colorado Wheat Research Foundation, or KCVN, LLC (collectively, the "Colorado Interests").

⁴ In Docket No. NOR 42140 (the "Colorado Interests Proceeding"), the Colorado Interests filed a complaint alleging that V&S has violated 49 U.S.C. §§ 11101 and 10903 by removing certain track and related assets from the Western Segment. In a decision served May 7, 2015, a preliminary injunction was issued by the Board prohibiting removal of track by V&S, and the matter is currently stayed so that V&S could pursue abandonment of the Line. The complaint was not brought by a "user of service", nor does it relate to the cessation of service – the complaint relates only to the Western Segment for which V&S has already received authority to discontinue service. Therefore, whether the complaint is considered pending or not, the certification is still correct.

81062, 81033, 81063, 81076, 81021, 81045, 81036, 81071, and 81050.

10. The Amended Notice is to discontinue common carrier operations over the Line. Accordingly, trail use / rail banking and other public use conditions are not appropriate. See Blacklands Railroad, Inc. – Discontinuance Exemption – In Rusk County, Tex., STB Docket No. AB 1108X (Served April 3, 2013); CSX Transportation, Inc. – Discontinuance of Service Exemption - In Raleigh County, W. Va., STB Docket No. AB 55 (Sub-No. 725X) (served September 11, 2012); Norfolk Southern Railway Company – Discontinuance of Service Exemption – In St. Joseph and LaPorte Counties, IN, STB Docket No. AB-290 (Sub-No. 307X) (served June 18, 2008); Everett Railroad Company – Discontinuance of Service Exemption – In Blair County, PA, STB Docket No. AB-721X (served November 16, 2007); Columbus and Greenville Railway Company – Discontinuance of Service Exemption – In Greenwood, MS, STB Docket No. AB-297 (Sub-No. 103X) (served July 2, 2007).⁵ Because only discontinuance authority is being sought, only offers of financial assistance for a subsidy are permitted. See St. Lawrence & Atlantic Railroad Company – Discontinuance of Service Exemption – In Cumberland County, ME, STB Docket No. AB 1117X (served February 25, 2014), slip op. at 4-5.

11. Any adversely affected employee of V&S will be subject to the employee protective conditions of Oregon Short Line R. Co. – Abandonment - Goshen, 360 I.C.C. 91 (1979).

⁵ As indicated in the Original Notice, portions of the Line were constructed on easements through public lands obtained under the General Railroad Right-of-Way Act of 1875. Therefore, the use of the property for other than rail purposes would have been limited.

12. V &S, by its attorney, certifies that advanced notice of the amended exemption was mailed on November 18, 2015, in compliance with 49 C.P.R. § 1152.50(d)(1). A copy of the notice, and the list of the addressees, is attached as Exhibit B.

13. Because the subject notice of exemption pertains to the discontinuance of rail service only, no environmental or historic report (“EHR”) is required. See the decisions cited in paragraph 10 above.

Although an EHR is not required, V&S notes that an EHR was prepared and served in connection with the Original Notice. V&S does not believe that the determination that a small piece of the Line passes through Otero County would have required any changes in the EHR other than a notation that the Line also passed through Otero County and the related zip code. V&S is serving a copy of this Amended Notice on all agencies that were consulted in connection with the preparation, and that were served with a copy, of the EHR. Additionally, V&S is serving a copy of this Amended Notice and the EHR on Otero County. A list of the addressees who received the EHR is attached as Exhibit C. (The address for Otero County is shown on the Certificate of Service.)

14. As noted above, the Environmental and Historic Report was prepared and attached to the Original Notice. None is required in connection with the Amended Notice.

15. V &S, by its attorney, certifies that a legal (newspaper) notice of the Amended Notice relating to the discontinuance of service over the Line was published in the November 27, 2015, edition of the following publications: The Pueblo Chieftain, the Fowler Tribune and the Kiowa County Press, newspapers of general circulation in Pueblo, Crowley, Kiowa and Otero Counties, in compliance with 49 C.F.R. § 1105.11 (as modified to account for discontinuance

instead of abandonment). A copy of the text of the notice is attached as Exhibit D. Copies of the affidavits of publication will be provided when received from the newspapers.

16. V&S acknowledges the preliminary injunction issued by the Board in the Colorado Interests Proceeding will continue to apply to the Western Segment. V&S states that it will also agree not to dismantle or remove the tracks or related assets (other than the removal of track or other materials in the usual course of maintenance or rehabilitation, provided that track and other materials are replaced with like or better materials) comprising the remainder of the Line unless and until it receives abandonment authority from the Board.⁶

17. The Verification of Doug Davis is attached as Exhibit E.

⁶ V&S will be seeking clarification from the Board in the Colorado Interests Proceeding that the injunction (1) relates only to the main line, and not to any spurs or other ancillary tracks, and (2) does not prohibit V&S from removing track and other materials in the usual course of maintenance or rehabilitation, provided that track and other materials are replaced with like or better materials.

Conclusion

For the reasons set forth above, the Board should determine that the proposed discontinuance of service qualifies for the use of the Board's class exemption procedures at 49 C.F.R. part 1152 subpart F, and issue the appropriate notice.

Respectfully submitted,



Eric M. Hocky
Clark Hill, PLC
One Commerce Square
2005 Market Street, Suite 1000
Philadelphia, PA 19103
215-640-8500
ehocky@clarkhill.com

Attorneys for
V and S Railway, Inc.

Dated: November 30, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of November, 2015, I served a copy of the foregoing Amended Verified Notice of Exemption on the persons listed below by the method indicated:

By email:

Thomas W. Wilcox
GKG Law, P.C.
The Foundry Building
1055 Thomas Jefferson Street NW
Suite 500
Washington, DC 20007
twilcox@gkglaw.com

By email and US First Class Mail, postage prepaid:

Richard Scott
Cindy McLoud
Donald Oswald
Kiowa County
1305 Goff Street
PO Box 100
Eads, CO 81036
kiowaco100@gmail.com

By US First Class Mail, postage prepaid:

Board of County Commissioners
Otero County
Otero County Courthouse
13 W. 3rd Street, Room 212
La Junta, CO 81050

All persons who received the advance notice as shown on Exhibit B

All persons who received copies of the EHR as shown on Exhibit C

By: _____

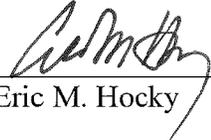

Eric M. Hocky

EXHIBIT A

EXHIBIT B

CLARK HILL

Eric M. Hocky
T 215.640.8523
F 215.640.8501
Email: ehocky@clarkhill.com

Clark Hill PLC
One Commerce Square
2005 Market Street
Suite 1000
Philadelphia, PA 19103
T 215.640.8500
F 215.640.8501
clarkhill.com

November 18, 2015

To: All Persons on the Attached Service List

Re: STB Docket No. AB-603 (Sub-No. 4X)
V&S Railway, LLC -
Discontinuance of Service Exemption -
In Pueblo, Crowley, Kiowa and Otero Counties, CO

Dear Sir or Madam:

This letter is being sent to you pursuant to the requirements of 49 C.F.R. §1152.50(d), to advise you that V and S Railway, LLC (“V&S”) plans to seek authorization from the Surface Transportation Board (“STB”) for its proposed discontinuance of service over the line of railroad described below, by filing an amended notice of exemption pursuant to the provisions of 49 CFR Part 1152 Subpart F. (V&S originally planned to seek authorization to abandon the line, and you would have received a letter dated June 4, 2015, regarding the original notice of exemption.) V&S expects to file the joint notice of exemption with the STB on or about November 30, 2015, under STB Docket No. AB-603 (Sub-No. 4X).

V&S will invoke the STB’s exemption procedures to discontinue service of the 121.9-mile line of railroad between railroad milepost 747.5 near Towner and milepost 869.4 near NS Junction (the “Line”). The Line traverses through United States ZIP Codes 81022, 81025, 81062, 81033, 81063, 81076, 81021, 82045, 81036, 81071, and 81050, in Pueblo, Crowley, Kiowa and Otero Counties, Colorado. (The description of the Line updates the description included in the original letter to you by including Otero County and the related ZIP Code which were inadvertently omitted from the original description.) A map of the Line is enclosed with this letter.

Because these proceedings would involve the discontinuance of common carrier service and not abandonment of the Line, V&S understands that the question of whether the Line contains federally granted rights-of-way is inapplicable, and that the Line would not be suited at

To: All Persons on the Attached Service List
November 18, 2015
Page 2

this time for alternative public use. Any pertinent documentation in the railroads' possession will be made available promptly to those requesting it.

V&S has no current plans to salvage the track that is part of the Line as a result of discontinuance.

Respectfully,

CLARK HILL, PLC


Eric M. Hocky

EMH/e
Enclosure

**Service List for
STB Docket No. AB-603 (Sub-No. 4X)**

Chairman, Public Utilities Commission
1560 Broadway (Ste. 250)
Denver CO 80202

United States Department of the Army
Military Surface Deployment and Distribution Command
Transportation Engineering Agency
ATTN: SDTE-SA (Railroads for National Defense)
1 Soldier Way (Building 1900W)
Scott AFB, IL 62225

Chief, USDA Forest Service
1400 Independence Ave., SW
Washington, DC 20250-003

U.S. Department of the Interior -
National Park Service
RTCA Program
1849 C Street, NW
(Org code 2240)
Washington, DC 20240

EXHIBIT C

ADDRESSEES OF THE 49 C.F.R. §1105.7 TRANSMITTALS ON
JULY 13, 2015, OF THE ENVIRONMENTAL AND HISTORIC REPORTS

Hon. Joshua B. Epel, Chairman
Colorado Public Utilities Commission
1560 Broadway (Ste. 250)
Denver, CO 80202

Board of County Commissioners
215 W. 10th Street
Pueblo, CO 81005

Crowley County Commissioners
603 Main Street (Ste. 2)
Ordway, CO 81063

Kiowa County Commissioners
1305 N. Goff Street
Eads, CO 81036

Ute Mountain Ute Tribe
P.O. Box 52
Towaoc, CO 81334

Colorado Department of Public Health and Environment
4300 Cherry Creek South
Denver, CO 80246

U.S. Environmental Protection Agency
1596 Wynkoop Street
Denver, CO 80292

Corps of Engineers, Albuquerque District
4101 Jefferson Plaza NE
Albuquerque, NM 87109-3435

Ms. Phyllis Ann Philipps
State Conservationist
Natural Resource Conservation Service
Denver, CO 80202

Dr. Pamela M. Fischhaber
Chief of Rail/Transit Safety
Colorado Public Utilities Commission
1560 Broadway (Ste. 250)
Denver, CO 80202

Ms. Susan C. Linner
U.S. Fish and Wildlife Service
P.O. Box 25486 DFC (65412)
Denver, CO 89225-0486

U.S. National Geodetic Survey
NGS/12
1315 East-West Highway
Silver Spring, MD 20910-3282

Mr. Charlie Stockman
Park and Planning Special Studies
National Park Service
1201 Oakridge Drive (Ste. 150)
Fort Collins, CO 80525

Mr. Edward C. Nichols
State Historic Preservation Officer
Office of Archeology and Historic Preservation
1200 Broadway
Denver, CO 80203

EXHIBIT D

AMENDED NOTICE OF INTENT TO DISCONTINUE RAIL SERVICE

V and S Railway, LLC (“V&S”) gives notice that on or about November 30, 2015, it intend to file with the Surface Transportation Board (“STB”), Washington, DC 20423, an Amended Notice of Exemption pursuant to the provisions of 49 CFR Part 1152 Subpart F – *Exempt Abandonments and Discontinuances of Service and Trackage Rights* permitting the discontinuance of service over the 121.9-mile line of railroad between railroad milepost 747.5 near Towner and milepost 869.4 near NS Junction. The line traverses through United States ZIP Codes 81022, 81025, 81062, 81033, 81063, 81076, 81021, 82045, 81036, 81071, and 81050, in Pueblo, Crowley, Kiowa and Otero Counties, Colorado. The proceeding (originally filed as an abandonment exemption) has been docketed as STB Docket Nos. AB-603 (Sub-No. 4X).

Because the proposed action entails the discontinuance of service over the line rather than abandonment, no environmental or historic documentation is required, and the STB will not prepare an environmental assessment.

Appropriate offers of financial assistance to subsidize continued rail service can be filed with the STB. Trail use / rail banking and public use condition requests are not appropriate in discontinuance proceedings. An original and 10 copies of any pleading that raises matters other than environmental issues (such as offers of financial assistance) must be filed directly with the STB’s Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001 [see 49 C.F.R. §§ 1104.1(a) and 1104.3(a)], and one copy must be served on applicants’ representative [see 49 C.F.R. § 1104.12(a)]. Questions regarding offers of financial assistance may be directed to the STB’s Office of Public Assistance, Government Affairs and Compliance at 202-245-0238. Copies of any comments or requests for conditions should be served on the applicant’s representative: Eric M. Hocky, Clark Hill, PLC, One Commerce Square, 2005 Market Street, Suite 1000, Philadelphia, PA 19103; 215-640-8500.

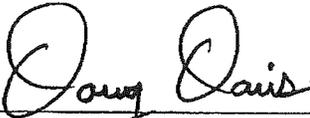
EXHIBIT E

VERIFICATION OF DOUG DAVIS

I, Doug Davis, a Vice President and Officer of V and S Railway, LLC ("V&S"), declare under penalty of perjury under the laws of the United States of America, that I have read the foregoing Amended Verified Notice of Exempt Discontinuance, and that its assertions are true and correct to the best of my knowledge, information and belief. No local traffic has moved over the line between Milepost 747.5 near Towner and Milepost 869.4 near NA Junction, a distance of 121.9 miles in Pueblo, Crowley and Kiowa Counties, Colorado, for at least two years' time, and any overhead traffic on the line can be rerouted over other lines. (Indeed, not only has there been no service for at least two years, but in the last two years, except for car storage, V&S has received no inquiries of any kind (calls, emails or other written communications) relating to rail service to, from or over the Line from any shippers or prospective shippers, or from anyone purporting to represent or be affiliated with the Colorado Wheat Administrative Committee, the Colorado Association of Wheat Growers, the Colorado Wheat Research Foundation, or KCVN, LLC.) No formal complaint by a user of rail service on the Line (or a state or local government entity acting on behalf of such user) regarding cessation of service over the Line either is pending with the Board or any U.S. District Court or has been decided in favor of the complainant within the two-year period. I further declare that I am qualified and authorized to submit this verification on behalf of V&S.

I know that willful misstatements or omission of material fact constitute Federal criminal violations punishable under 18 U.S.C. 1001 by imprisonment up to five years and fines up to \$10,000 for each offense. Additionally, these misstatements are punishable as perjury under 18 U.S.C. 1621, which provides for fines up to \$2,000 or imprisonment up to five years for each offense.

Dated at Salt Lake City, Utah, this 25th day of November, 2015.



Doug Davis