

Before the

**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.**

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**REPLY OF V AND S RAILWAY, LLC TO  
PETITION OF KCVN, LLC TO REJECT AMENDED NOTICE OF EXEMPTION  
OR IN THE ALTERNATIVE TO DENY REQUEST TO WITHDRAW**

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Dated: December 17, 2015

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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. V&S determined, as part of supplementing the Original Notice, to convert its notice from one seeking an abandonment exemption to one seeking a discontinuance exemption. After giving the required amended advanced notice to designated agencies, and publishing the required newspaper advertisements, V&S filed its Amended Notice of Exemption (the “Amended Notice”) on November 30, 2015.<sup>1</sup> In response, KCVN, LLC (“KCVN”) filed a Petition (the “KCVN Petition”) requesting that the Board reject the Amended

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<sup>1</sup> V&S acknowledged in the Amended Notice, at 7, that the Colorado Interests Proceeding at STB Docket NOR 42140 remains pending, and that the injunction not to remove the tracks and track materials remains in effect. V&S understands that its decision not to follow through with the abandonment of the Line can mean reactivation of the Colorado Interests Proceeding if the Colorado Interests still wish to seek relief beyond the injunction.

Notice, or in the alternative deny V&S's implied withdrawal of its Original Notice seeking an exemption to abandon the Line. Because KCVN has not set forth any grounds to justify the relief requested in the KCVN Petition, the KCVN Petition should be denied.

### Discussion

Significantly, in seeking to have the Amended Notice rejected, KCVN does not claim that the Amended Notice fails to comply with the Board's regulations, or that the Line does not qualify for an out-of-serve discontinuance exemption.<sup>2</sup> Rather, KCVN wants the Board to reject the Amended Notice solely to have V&S file an amended notice that continues to seek abandonment instead of discontinuance. This would be a useless act, and would not put KCVN in any different or better position than it is in today. If V&S were required by the Board to file the amendment that KCVN wants, the Board would be required to process the amended abandonment notice. Once issued, V&S would then still have the right to, and would, file to withdraw the request for the abandonment exemption,<sup>3</sup> and to obtain discontinuance authority instead.

As noted in the Amended Notice, there is nothing in a Board abandonment authorization or exemption that requires the railroad to consummate an abandonment; consummation requires an additional formal step by the railroad. 49 CFR 1152.29(e)(2). Until consummation, a railroad retains the power to withdraw its request for authority. KCVN has not cited any decisions of the

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<sup>2</sup> Indeed, V&S has already discontinued service over the "Western Segment" of the Line between Milepost 808.3 near Haswell and Milepost 868.5 towards NA Junction pursuant to an exemption issued by the Board. *V&S Railway - Discontinuance of Service Exemption - in Pueblo, Crowley, & Kiowa Counties, Colo.*, AB 603 (Sub-No. 2X) (STB served June 28, 2012).

<sup>3</sup> The Board does not compel railroads to abandon their lines. *See Maine Central Railroad Company - Abandonment Exemption - In Androscoggin County, ME ("MEC")*, STB Docket No. AB-83 (Sub-No. 16X), slip op. at 5; *Reading Blue Mountain and Northern Railroad Company - Abandonment Exemption - In Schuylkill County, PA*, STB Docket No. AB-996X (served February 5, 2008); *Almono LP--Abandonment Exemption--in Allegheny County, PA*, STB Docket No. AB-842X (served Jan. 28, 2004).

Board (or its predecessor, Interstate Commerce Commission (“ICC”)) in which a railroad’s request for withdrawal of its abandonment request was denied. Even in the decision cited by KCVN for the proposition that the Board has the discretion to deny a request for withdrawal, the Board did not exercise that discretion, because as the Board noted, doing so would not force the railroad to abandon. *MEC, supra*, slip op. at 5 (cited by KCVN Petition at 7).

While KCVN may be disappointed that with a discontinuance it cannot make an offer of financial assistance to purchase the Line, there is nothing in the record to indicate that the withdrawal and conversion is contrary to the public interest (KCVN Petition at 5-8), or even that the public interest is an appropriate consideration with respect to the proposed withdrawal. *Cf. Conrail Abandonment of a Portion of the West 30<sup>th</sup> Street Secondary Track in New York, NY (“Conrail”)*, ICC Docket No. AB-167 (Sub-No. 493N) (served January 29, 1988), 1988 ICC LEXIS 73 at \*19, n.8 (in an exemption proceeding, the ICC (now the Board) is required to examine whether regulation is necessary to carry out the transportation policy of 49 USC 10101(a), and whether the transaction or service is of limited scope or an abuse of market power is involved). Interestingly, KCVN is not seeking to have the Amended Notice rejected in order that the proposed abandonment or discontinuance will receive more scrutiny or be denied – to the contrary, KCVN wants to force the line to be abandoned so that it may pursue its own private interests in acquiring the Line via an offer of financial assistance (“OFA”).<sup>4</sup> While KCVN has indicated that it intends to make an OFA, it has also indicated that the offer will be substantially less than the net liquidation value (“NLV”) calculated by V&S.<sup>5</sup> There is no suggestion that the

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<sup>4</sup> In the *Conrail*, the interests arguing against the withdrawal of the abandonment were the “private property interests” of the underlying landowners that would have benefitted from the consummation of the abandonment. The ICC rejected the argument that their private interests represented the public interest. *Conrail, 1988 ICC LEXIS 73, at \*16-17.*

<sup>5</sup> See KCVN’s Motion for Extension of Filing Date (filed October 20, 2015), at 3.

parties will be able to agree on the NLV, or any guarantee that KCVN would purchase the Line for the value that would be established by the Board if it is more than what KCVN argues is the value. Moreover, with no traffic on the Line for more than two years, it is not clear that KCVN will be able to demonstrate that it can operate the Line for at least two years.<sup>6</sup>

As noted in the Amended Notice, there has been no local (or overhead) service on the Line for over two years. In such situations, the Board has adopted the out-of-service class exemption after concluding that the criteria for an exemption from regulation under 49 USC 10502 are met in such circumstances. *See* 49 CFR Subpart F. Moreover, with a discontinuance, the Line is not permanently removed from the rail network, and is available to be reactivated if and when there is ever a sufficient demand for service. Thus, future potential shippers will be more protected by the discontinuance than they would be by an abandonment.

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<sup>6</sup> On December 14, 2015, the Board issued an Advance Notice of Proposed Rulemaking regarding OFAs, and how to improve the OFA process and protect it against abuse. *Offers of Financial Assistance*, STB Docket No. EP 729 (served December 14, 2015). Among the issues raised by the Board are how to address questions regarding whether there is a genuine interest in and ability to preserve the line for rail service. The Board is considering whether to require an offeror to demonstrate evidence of immediate and significant commercial need for service. *Id.* at 3-4. There is no such evidence in this proceeding.

### Conclusion

For the reasons set forth above, V&S requests that the Board deny the KCVN Petition, and proceed to process the Amended Notice for discontinuance.

Respectfully submitted,



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Dated: December 17, 2015

## CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of December, 2015, I served a copy of the foregoing document on the parties listed below by the method indicated:

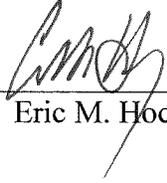
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