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Office of Proceedings

June 20, 2014

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June 20, 2014 Public Record

VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, D. C. 20423

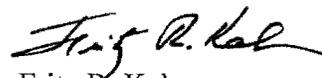
Re: Docket No. AB 603 (Sub-No. 3X), V and S Railway, LLC—Abandonment
Exemption—in Kiowa County, Colo.

Dear Ms. Brown:

Attached is the Appeal of V and S Railway, LLC from the Decision of the Board,
Rachel D. Campbell, Director, Office of Proceedings, served June 17, 2014.

If you have any question about the filing or if I can be of assistance otherwise,
please let me know.

Sincerely yours,


Fritz R. Kahn

Att.

Cc: Chairman Elliott
Vice Chairman Miller
Commissioner Begeman
Mr. Roger D. Nelson
Mr. Richard Scott

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June 20, 2014

SURFACE

TRANSPORTATION BOARD

FILED

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Docket No. AB 603 (Sub-No. 3X)

V AND S RAILWAY, LLC
-- ABANDONMENT EXEMPTION --
IN KIOWA COUNTY, COLO.

PROMPT BOARD ACTION RESPECTFULLY REQUESTED

APPEAL
OF
V AND S RAILWAY, LLC

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Attorney for

V AND S RAILWAY, LLC

Dated: June 20, 2014

SURFACE TRANSPORTATION BOARD

Docket No. AB 603 (Sub-No. 3X)

V AND S RAILWAY, LLC
-- ABANDONMENT EXEMPTION --
IN KIOWA COUNTY, COLO.

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APPEAL
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Applicant, V and S Railway, LLC (“V&S”), pursuant to 49 C.F.R. 1011.6(b), appeals from the Decision of the Board, Rachel D. Campbell, Director, Office of Proceedings (“Director”), to correct clear errors of judgment and to prevent manifest injustice and in support thereof V&S states, as follows:

The Director’s Decision denied V&S access to the two-year out-of-service class exemption of 49 C.F.R. § 1152.50(b) and rejected the Notice of Abandonment Exemption which V&S had filed May 14, 2014.¹ The two-year out-of-service class exemption of 49 C.F.R. § 1152.50(b) exempts the discontinuance of service on a railroad line or the

¹ The two-year out-of-service class exemption was adopted by the Board’s predecessor, the Interstate Commerce Commission (“ICC”). See Exemption of Out of Service Rail Lines, 2 I.C.C.2d 146 (1986), aff’d, Illinois Commerce Com’n v. ICC, (D.C. Cir. 1988), cert denied, 488 U.S. 1004 (1989). Pursuant to note 204(a) to section 701 of the ICC Termination Act of 1995, the decisions of the ICC remain in effect unless revoked by the Board, an action that the Board has not taken with respect to the two-year out-of-service class exemption.

abandonment of a railroad line if there has been no service on the line for at least two years' time.² Nothing in the two-year out-of-service class exemption of 49 C.F.R. § 1152.50(b) restricts its use to the owner of the railroad line on which there has been no service for at least two years' time. To the contrary, the Board routinely allows the discontinuance of service by rail carriers which for at least two years' time have ceased operating on the lines of the owning rail carriers. See Florida Northern Railroad Company, Inc.—Discontinuance of Service Exemption—in Alachua County, Fla., Docket No. AB 507 (Sub-No. 1X) (STB, served December 10, 2013; Central Midland Railway Company—Discontinuance of Trackage Rights Exemption—in Cass and Jackson Counties, Mo., Docket No. AB 1070 (Sub-No. 2X) (STB, served December 6, 2013); Willamette & Pacific Railroad, Inc.—Discontinuance of Service and Discontinuance of Trackage Rights Exemption—in Benton County, Or., Docket No. AB 986 (Sub-No. 1X) (STB, served June 10 2011). It is not the ownership of the railroad line that is determinative, but rather it is the length of time that a Board sanctioned railroad line has not been operated which is significant, and the failure of the Director to recognize that was a clear error of judgment, and it requires reversal to prevent manifest injustice.

V&S' Notice of Exempt Abandonment, filed May 14, 2014, had stated that no service, whether local or overhead, had been rendered for at least two years' time on the

² “An abandonment or discontinuance of service or trackage rights is exempt if the carrier certifies that no local traffic has moved over the line for at least 2 years and any overhead traffic on the line can be rerouted over other lines and that no formal complaint filed 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 2-yr period. The complaint must allege (if pending) or prove (if decided) that the carrier has imposed an illegal embargo or other unlawful impediment to service.”

portion of the Towner Line which V&S sought the Board's authorization to abandon, between Milepost 749.5 near Towner and Milepost 787.5 near Eads, and no complaint had been filed with the Board or a U.S. District Court within that two year period regarding cessation of service on the line sought to be abandoned, and V&S' representations were supported by the Verification of V&S' President, Ms. Rhonda Nicoloff. The truth of those assertions at no time has been questioned. Thus the Director knew or should have known that V&S, a rail carrier subject to the Board's jurisdiction, had met the requirements of the two-year out-of-service class exemption of 49 C.F.R. § 1152.50(b). The Director's rejection of V&S' Notice of Exempt Abandonment under the circumstances was a clear error of judgment, and the Director's decision needs to be overturned to prevent manifest injustice.

No one was better informed about the service which had been rendered on the railroad line which V&S sought the Board's authorization to abandon than V&S. V&S had been the one and only rail carrier rendering service on the Towner Line since 2005, when V&S succeeded the Colorado, Kansas & Pacific Railway Company as the operator of the Towner Line pursuant to the Board's authorization in V & S Railway, Inc.—Acquisition and Operation Exemption—Rail Line of Colorado, Kansas & Pacific Railway Company, FD 34779 (STB, served December 30, 2005).

Seven years thereafter, on June 8, 2012, V&S filed its Notice of Discontinuance Exemption pursuant to the two-year out-of-service class exemption of 49 C.F.R. § 1152.50(b) to secure the Board's authorization to discontinue rendering service on the western segment of the Towner Line, between Milepost 868.5 near NA Junction and Milepost 808.3 near Haswell. See V & S Railway, LLC—Discontinuance of Service

Exemption—in Pueblo, Crowley and Kiowa Counties, Colo. AB 603 (Sub-No. 2X)

(STB, served June 28, 2012).

During the course of preparing the foregoing Notice of Discontinuance Exemption, V&S realized that in its 2005 Board filing, it should have sought the Board's authorization not only to operate the Towner Line, but to acquire it from the Colorado Department of Transportation. On August 15, 2012, V&S petitioned the Board to acknowledge its purchase of the Towner Line, attaching a copy of the Purchase Agreement between it and the Colorado Department of Transportation, dated as of December 1, 2005, and copies of the quitclaim deeds filed with the recorders of deeds for Pueblo, Crowley and Kiowa Counties. The Board approved V&S' petition, but, whereas V&S had asked that the effective date of its acquisition of the Towner Line be December 30, 2005, the date when it became the operator of the Towner Line, the Board denied its request. As the Board recently noted in MCM Rail Services LLC—Petition for Retroactive Exemption—in Sparrows Point, Md. FD 35707 (STB, served March 20, 2013, "The Board generally disfavors granting licensing authority retroactively [citations omitted].” In its decision approving V&S' acquisition of the Towner Line from the Colorado Department of Transportation, the Board, anticipating that V&S would be filing a Notice of Exempt Abandonment, ruled that it would not require Board-authorized ownership of the line for at least two years' time before the filing of the notice, but for some inexplicable reason limited its ruling to “the western segment of the Towner Line.” V and S Railway, LLC—Acquisition and Operation Exemption—Colorado Department of Transportation. slip op. p. 5, FD 35664 (STB, served November 13, 2012).

The requirement that a rail carrier have owned the line for the two years preceding its filing of a notice of abandonment exemption under the two-year out-of-service class exemption of 49 C.F.R. § 1152.50(b) does not appear in the regulation. Rather, it stems from ICC’s Decision in Tulare Valley R. Co. – Aban. – Kings & Tulare Counties, CA, 9 I.C.C.2d 1205 (1993). In that proceeding the Tulare Valley Railroad Company sought the Board’s authorization to abandon portions of the Visalia Branch which it had acquired from the Atchison, Topeka and Santa Fe Railway Company that same year. The ICC observed, “In an attempt to meet the certification requirement of 49 C.F.R. §1152.50(b), Tulare certified, in pertinent part, that ‘no local traffic has originated or terminated on the segments sought to be abandoned since the Visalia Branch was conveyed to the Tulare and for the two years preceding its conveyance, when it was operated by the ATSF.’” Id. , at 9 I.C.C. 2d 1206. The ICC held, “[W]e conclude that use of the class exemption is inappropriate in the circumstances before us. Consequently, Tulare’s certification and notice of exemption will be rejected.” Id. at 9 I.C.C.2d 1207.

The Director seized upon the Board’s limitation “to the western segment the Towner Line” in its decision in V and S Railway, LLC—Acquisition and Operation Exemption—Coloado Department of Transportation, supra, when V&S sought to avail itself of the two-year out-of-service class exemption of 49 C.F.R. § 1152.50(b) in seeking the Board’s authorization to abandon the eastern segment of the Towner Line. In effect, the Director concluded that V&S must have had the Board’s approved ownership of the entire Towner Line for the two years preceding its use of the two-year out-of-service class exemption of 49 C.F.R. § 1152.50(b) when seeking the Board’s authorization to abandon any segment of the Towner Line other than “the western segment of the Towner

Line” and thus inserted into the Board’s regulation a restriction that the regulation does not contain. To analogize the situation herein to that in Tulare Valley R.R. – Aban. Exemption - in Kings & Tulare Counties, CA, supra, is altogether fanciful and fallacious, and the Director’s reliance on the decision is wholly misplaced. Unlike the Tulare Valley Railroad which sought to use the two-year out-of-service class exemption to seek the Board’s abandonment authorization based on the absence of traffic for two years before acquiring the railroad line, V&S has owned and been the operator of the Towner Line for more than two-years’ time. The Director knew or should have known that V&S in fact had owned and been the sole operator of the entire Towner Line since December 30, 2005, and, therefore, could affirmatively assert that no traffic, whether local or overhead, had been handled on the segment between Milepost 749.5 near Towner and Milepost 787.5 near Eads for at least two years’ time preceding its filing of the Notice of Abandonment Exemption. To reject V&S Notice of Abandonment Exemption under the circumstances was a clear error of judgment, and it requires reversal to prevent manifest injustice.

The Director then refers to the Comments, filed on May 28, 2014, by the Professional Land Surveyors of Colorado, Inc., which charged V&S with contending that the Towner Line did not include any federal granted rights of way, evidently in the letters sent on May 2, 2014, to the U.S. and Colorado officials designated in 49 C.F.R. § 1152.50(d)(1). By letters, dated June 4, 2014, to the very same U.S. and Colorado officials, V&S stated, “Based on information in the possession of V and S Railway, Inc. the line of railroad [the segment of the Towner Line proposed for abandonment in Docket No. AB 603 (Sub-No. 4X)] includes federally granted rights-of-way.” Copies of the

letters were filed by V&S with the Board, one of which, the letter sent to the Chairman, Kiowa County Commissioners, appears on the Board's web page among the filings of June 4, 2014. Moreover, the Environmental and Historic Report in Docket No. AB 603 (Sub-No. 4X) mailed on June 17, 2014, to the U.S. and Colorado agencies consulted in its preparation, with a copy sent to the Board's Office of Environmental Analysis, includes the statement, "V&S has learned that portions of the Rail Line proposed to be abandoned contain federally granted right-of-way " Thus the Director knew or should have known that V&S had corrected its earlier statements to the contrary, and the Director's contention that V&S' failure to do so by amending its filings in the subject proceeding as a reason for rejecting V&S' Notice of Exempt Abandonment is another demonstration of clear error of judgment, and its reversal is required to prevent manifest injustice.

The Director moreover endeavors to raise the alleged uncertainty of what the Director refers to as the Middle Segment of the Towner Line, between Milepost 808.3 near Haswell and Milepost 787.5 near Eads. V&S, however, has let it be known that the so-called Middle Segment of the Towner Lines is expected to be the subject of a Notice of Exempt Abandonment which V&S plans to file in Docket AB 603 (Sub-No. 4X) on or about July 5, 2014, to secure the Board's authorization for its abandonment. The Board's Office of Environmental Analysis received copies of the letters which V&S sent on May 15, 2014, to the U.S. and Colorado agencies consulted in the preparation of the Environmental and Historic Report which V&S will need to file no fewer than twenty days in advance of filing its Notice of Abandonment Exemption. Moreover, as already noted, V&S on June 4, 2014, sent letters to the U.S. and Colorado officials pursuant to 49 C.F.R. § 1152.50(d)(1), copies of all of which were filed with the Board, one of which,

the letter to the Chairman, Kiowa County Commissioners, appears on the Board's web page among the filings of June 4, 2014, and the letters stated that V&S expects to file its Notice of Abandonment Exemption in Docket No. AB 603 (Sub-No. 4X) to secure the Board's authorization on or about July 5, 2014. For the Director to attempt to raise the alleged uncertainty about what the Director refers to as Middle Segment of the Towner Line as yet another reason for rejecting V&S' Notice of Exemption is a further manifestation of clear error of judgment, and its reversal is called for to prevent manifest injustice.

The basic flaw in the Director's action is her failure to give effect to the two-year out-of-service class exemption of 49 C.F.R. § 1152.50(b) as it is written. The Board's decision in V and S Railway, LLC—Acquisition and Operation—Colorado Department of Transportation, *supra*, was silent as to what the effect would be of a V&S filing of a Notice of Exempt Abandonment of any segment other than “the western segment of the Towner Line.” V&S has owned and has been the operator of the Towner Line since December 30, 2005, and, therefore, it was qualified to avail itself of the class exemption when seeking the Board's authority to abandon any segment of the Towner Line which had handled no traffic, whether local or overhead, for no less than two years' time. The Director's rejection of V&S' Notice of Exempt Abandonment which contained the required certifications did violence to the regulation's provisions. *See Resolution Trust Corp. v. Home Sav. of America*, 946 F.2d 93, 98 (8th Cir. 1991) (“Federal regulations have the force and effect of law.”); *Montilla v. I.N.S.*, 926 F.2d 162, 166 (2nd Cir 1991) (“[R]ules promulgated by a federal agency, which regulates the rights and interests of others, are controlling upon the agency.”); *Marshall v. Lansing*, 839 F.2d 933, 943 (3rd

Cir. 1988) (“[P]rinciples of due process require an agency to follow its own regulations, which have the force of law.”)

WHEREFORE, the applicant, V and S Railway, LLC respectfully asks that the Board, pursuant to 49 C.F.R. 1011.6(b), reverse the Decision of the Board, Rachel D. Campbell, Director, Office of Proceedings, served June 17, 2014, and reinstate the Notice of Exempt Abandonment, together with its appendices, filed by V and S Railway, LLC on May 14, 2014. V and S Railway, LLC, further respectfully asks that the Board act promptly so that there will be no need to postpone any current deadline dates.

Respectfully submitted,

V AND S RAILWAY, LLC

By its attorney,



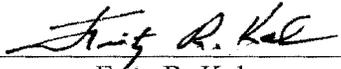
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Dated: June 20, 2014

CERTIFICATE OF SERVICE

I certify that I this day have served a copy of the foregoing Appeal upon the Professional Land Surveyors of Colorado, Inc. by e-mailing a copy to its President, Mr. Roger D. Nelson, at roger.nelson@merrick.com and upon Kiowa County by e-mailing a copy to the Chairman of the Kiowa County Commissioners, Mr. Richard Scott, at kiowaco100@gmail.com.

Dated at Washington, DC, this 20th day of June 2014.



Fritz R. Kahn