

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35664

V AND S RAILWAY, LLC—ACQUISITION AND OPERATION EXEMPTION—
COLORADO DEPARTMENT OF TRANSPORTATION

Digest:¹ This decision addresses unusual circumstances in which V and S Railway, LLC (V&S) bought a line of railroad, obtained lease and operating authority, but failed to obtain acquisition authority. V&S now seeks to abandon a portion of the line that has been out of service for over two years. In this decision, the Board grants acquisition authority, but denies the request that the authorization be made retroactive to the time of purchase. To facilitate the abandonment process, however, the Board waives the requirement that the carrier have Board-authorized ownership of the line for at least two years in order to use the expedited procedures for terminating operations on out-of-service lines.

Decided: November 13, 2012

V and S Railway, LLC (V&S), a Class III rail carrier, has filed a petition pursuant to 49 U.S.C. § 10502 seeking an exemption from 49 U.S.C. § 10902 and 49 C.F.R. § 1150.1 et seq., regarding its acquisition and operation of approximately 121.9 miles of rail line between milepost 747.5, near Towner, and milepost 869.4, near NA Junction in Pueblo, Crowley, and Kiowa Counties, Colo. (the Towner Line or the line). V&S filed its petition for exemption because, in an earlier Board proceeding, it had received Board authority only to operate over the Towner Line by assignment of the lease of the previous operator. However, V&S had actually purchased the Towner Line from the owner, the Colorado Department of Transportation (CDOT), rather than acquiring just the lease and operating rights. V&S now seeks retroactive approval of its acquisition of the Towner Line.

Under the circumstances presented here, the Board will grant V&S's petition for exemption to acquire the Towner Line, but will deny its request to have that authority take effect retroactively. As discussed below, the Board will allow V&S to file a notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments to abandon the western segment of the Towner Line and will waive the requirement that it have had Board-authorized ownership of that portion of the line for at least two years before making the certification required at 49 C.F.R.

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

§ 1152.50(b). See Tulare Valley R.R.—Aban. Exemption—Kings and Tulare Cntys., Cal. 9 I.C.C.2d 1205 (1993).

BACKGROUND

CDOT acquired the Towner Line from the Union Pacific Railroad Company (UP) in 1998. V&S states that the Colorado legislation approving CDOT's acquisition of the Towner Line also directed CDOT to sell or lease the line to an operator by June 30, 2000. In Colorado, Kansas & Pacific Railway Company—Lease, Operation and Future Purchase Exemption—Colorado Department of Transportation, FD 33857 (STB served April 7, 2000), Colorado, Kansas & Pacific Railway Company (CKPR) received Board authority to lease and initiate common carrier operations over the Towner Line. In late 2004, CDOT replaced CKPR with V&S, and in V & S Railway, Inc.—Acquisition and Operation Exemption—Colorado, Kansas & Pacific Railway Company, FD 34779 (STB served Dec. 30, 2005), V&S received authorization from the Board to lease and operate the Towner Line.

V&S states that in the course of preparing its discontinuance-of-service filing in V & S Railway, LLC—Discontinuance of Service Exemption—in Pueblo, Crowley and Kiowa Counties, Colo., AB 603 (Sub-No. 2X) (filed June 8, 2012), it became aware of a mistake in the authority it had sought from the Board.² V&S states that, while it was in fact the assignee of CKPR's lease, V&S had at the same time bought the Towner Line from CDOT.³ As a result, V&S now seeks Board authority to own the Towner Line (V&S has been a Board-authorized operator on the line since December 29, 2005.)

According to V&S, within the past three years, it has served two shippers on the eastern portion of the Towner Line: Temple Grain Company (Temple), at Haswell, and Bartlett Grain Company (Bartlett), at Eads. V&S states that their shipments consisted primarily of outbound shipments of wheat and barley and that there were no inbound shipments. V&S further states that, in 2010, Temple and Bartlett together shipped 478 carloads of grain. Temple ceased using its facility at Haswell in December 2010. In 2011, Bartlett shipped 27 carloads of grain, and in the first six months of 2012, Bartlett shipped 51 carloads of grain. Bartlett's facility at Eads is located to the east of the portion of the line where service has been discontinued.

V&S states that in the near future it expects to file a verified notice of exemption to abandon the western segment of the Towner Line, between NA Junction and Haswell, on which there has been no traffic for more than two years. V&S asks that the effective date of its

² The Board authorized this discontinuance in 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).

³ With its petition, V&S provided copies of the Purchase Agreement and the quitclaim deeds.

acquisition be concurrent with the consummation of its lease of the line (December 29, 2005) to facilitate the proposed abandonment of the western portion of the Towner Line.

DISCUSSION AND CONCLUSION

Pursuant to 49 U.S.C. § 10902, prior Board approval is required for the acquisition of a rail line by a Class III rail carrier. Under 49 U.S.C. § 10502(a), however, the Board must exempt a transaction or service from regulation upon finding that: (1) regulation is not necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not needed to protect shippers from the abuse of market power.

An exemption from the prior approval requirements of 49 U.S.C. § 10902 is consistent with the standards of 49 U.S.C. § 10502. Detailed scrutiny of the proposed transaction through an application for review and approval under 49 U.S.C. § 10902 is not necessary to carry out the RTP here. V&S has leased and operated the Towner Line pursuant to Board authority since December 2005, although it mistakenly failed to obtain Board authority for its purchase of the line.⁴ An exemption will promote the RTP by minimizing the need for Federal regulatory control over the proposed transaction [49 U.S.C. § 10101(2)], pursuant to which V&S would correct what appears to be an inadvertent mistake and come into compliance with our statute. An exemption here will also promote the RTP by reducing regulatory barriers to entry into the rail industry [49 U.S.C. § 10101(7)], and encourage efficient management of railroads [49 U.S.C. § 10101(9)] by allowing V&S to use the class exemption process which will require less time and resources than an additional petition or an application. Other aspects of the RTP will not be adversely affected.

Regulation of the proposed transaction is not necessary here in order to protect shippers from the abuse of market power, because V&S's acquisition of the Towner Line will have (or, more precisely, has had) no adverse impact on competition. According to V&S, there was no change in the level of rail service because the shippers on the line received the same service after V&S acquired the line as had been rendered by CKPR; and common carrier rail service continues to be available to shippers, on the eastern portion of the Towner Line, including Bartlett, which shipped 51 carloads of grain in the first six months of 2012, where service has not been discontinued. Moreover, no shipper (or any other entity) has objected to V&S's acquisition. Nevertheless, to ensure that the shippers are informed of our action, we will require V&S to serve a copy of this decision on all shippers on the Towner Line so that it is received

⁴ It appears that petitioners' inaccurate description of the proposed transaction in 2005 was inadvertent. The record shows an absence of any intent to flout the law, or of a deliberate or planned violation. See New Brunswick Ry.—Continuance in Control Exemption—Me. N. Ry., FD 35520 et al., slip op. at 3 (STB served Sept. 26, 2011), citing Kenosha Auto Transport Corp.—Control—U.S.A.C. Transport, Inc., 85 M.C.C. 731, 736 (1960).

within five days of the service date of this decision and to certify contemporaneously to the Board it has done so.⁵

V&S also seeks retroactive approval of its acquisition of the Towner Line. V&S appears to be seeking retroactive authority because it is concerned that it would otherwise be precluded from using the two-year out of service class exemption to abandon the western segment of the Towner Line and would have to file a petition or application to seek authority for the abandonment. V&S acknowledges that the Board generally disfavors retroactive grants of authority, but in support of its request it relies on cases in which the Board granted retroactive authority because the failure to seek authorization was inadvertent and efforts to notify the agency were expeditious and in good faith. Pet. at 9-10. While V&S's error certainly appears to have been inadvertent and unintentional, here, the relief petitioners appear to seek – to be permitted to use the class exemption for an anticipated abandonment – can be accomplished without granting retroactive authority to the acquisition.

The Board has required ownership of a line during the two-year certification period in order for a railroad to satisfy the two-year out of service requirement of 49 C.F.R. § 1152.50(b). See Tulare Valley R.R.—Aban. Exemption—Kings and Tulare Cntys., Cal. 9 I.C.C.2d 1205 (1993) (class exemption process was not available for railroad that acquired a line less than two years before filing a notice of exemption to abandon it). The unusual circumstances here merit a different approach. Under our statute, a party may not lawfully acquire ownership of a rail line without first obtaining Board authority. Here, V&S has owned the line since 2005. While it obtained only lease and operating authority, and not acquisition authority, from the Board, it appears that V&S's error was inadvertent. In addition, V&S has not relied upon the class exemption process to cure this deficiency, but rather has brought the matter before the entire Board for consideration through its petition for exemption here. Moreover, the western segment of the Towner Line appears to qualify otherwise for the class exemption process for an out-of-service line, because it has been out of service for more than two years.⁶ Thus, there appears to be no effort by V&S here to cut short the operational aspects of the exemption process that are in place to protect the public interest. We see no reason, therefore, to require V&S to file another petition and bring this matter before the entire Board again in order to seek abandonment

⁵ Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

⁶ As noted above, V&S has already received discontinuance authority for the western segment of the Towner Line using the class exemption process for out-of-service rail lines, which would have been appropriate for an operator who did not own the line of railroad and otherwise met the standard for discontinuance, in 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).

authority.⁷ The Board will instead allow V&S to file a notice under the Board's class exemption procedures at 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments to abandon the western segment of the Towner Line. To do so, we will waive the requirement that V&S have had Board-authorized ownership of the line for at least two years in order to make the certification required under 49 C.F.R. § 1152.50(b).

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

It is ordered:

1. Under 49 U.S.C. § 10502, we exempt from the requirements of 49 U.S.C. § 10902 V&S's acquisition of the Towner Line from CDOT.

2. V&S's request for retroactive authority for the acquisition is denied.

3. With respect to V&S's future request to seek authority to abandon the western segment of the Towner Line, application of the Board's regulation at 49 C.F.R. § 1152.50(b) is waived to the extent it requires V&S to have had Board-authorized ownership of the line for at least two years in order to make the certification required under that provision.

4. V&S is directed to serve a copy of this decision on all shippers on the Towner Line so that it is received within five days of the service date of this decision, and to certify contemporaneously to the Board that it has done so

5. Notice will be published in the Federal Register on November 19, 2012.

6. The exemption will become effective on December 13, 2012.

7. Petitions to stay must be filed by November 28, 2012. Petitions to reopen must be filed by December 10, 2012.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman.

⁷ The Board recently allowed an applicant to use the class exemption process to obtain Board authority to acquire a line years after the transaction had been consummated. In that case, the applicant then filed a petition for exemption when it sought to abandon the line, because it had not been the Board-authorized owner of the line for two years. See Ga. Dep't of Transp.—Acquis. Exemption—CSX Transp., Inc., FD 35591 (STB served Feb. 27, 2012) and Ga. Dep't of Transp.—Aban. Exemption—in Fulton Cnty., Ga., AB 1096X (STB served May 30, 2012). The relief we are providing here would involve the same combination of filings, but in reverse order.