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SURFACE TRANSPORTATION BOARD

Docket No. FD 35459

V & S RAILWAY, LLC—PETITION FOR DECLARATORY ORDER—
RAILROAD OPERATIONS IN HUTCHISON, KAN.

Decided: February 16, 2011

By petition filed on December 28, 2010, V & S Railway, LLC (VSR) requests that the Board institute a declaratory order proceeding to resolve a dispute between VSR and Hutchinson Salt Company, Inc. (HSC), Hutchinson Transportation Company, Inc. (HTC), and BNSF Railway Company (BNSF) (collectively, respondents) regarding operating rights over a 5.14-mile line of railroad, extending from milepost 0.0 to milepost 5.14, in Hutchinson, Reno County, Kan. (the line). As discussed below, a declaratory order proceeding is being instituted to resolve certain questions related to the dispute.

BACKGROUND

VSR filed its petition pursuant to a referral by the United States District Court for the District of Kansas in V&S Railway, LLC v. Hutchinson Salt Company, Inc., Hutchinson Transportation Company, Inc., and BNSF Railway Company (No. 08-1402-WEB (Dec. 17, 2010)). On January 18, 2011, the Association of Railway Museums, Inc., and the Tourist Railroad Association, Inc. (collectively, ARM/TRAIN) filed a petition for leave to intervene and to file a reply. On January 20, 2011, respondents filed a letter stating their intent to participate in this proceeding in accordance with any procedural schedule that may be established by the Board.[1] VSR filed a reply to ARM/TRAIN on February 7, 2011.

In its petition, in accordance with the court's instructions, VSR asks the Board to address the following issues related to the dispute:

1. Whether VSR is the sole rail carrier authorized to operate on the line and to interchange traffic with BNSF on the line.

[1] On February 7, 2011, respondents filed a letter supporting ARM/TRAIN's petition to intervene. By letter filed February 8, 2011, VSR asserts that respondents should be barred from filing any reply to the declaratory order petition because they did not do so within 20 days of the filing of the petition. On February 11, 2011, respondents filed a letter stating their opposition to VSR's assertion, and on February 14, 2011, VSR filed a letter replying to respondents' February 11 letter. Respondents clearly have an interest in this matter, and their views will assist the Board. The Board, therefore, is establishing a procedural schedule that will permit their participation.

2. Whether HSC and/or HTC has the right to operate on the line and to interchange traffic with BNSF by virtue of the fact that they own part of the real property underlying the railroad line and/or the fact that they claim ownership of some of the tracks and improvements that are part of the line.

3. Whether the Hutchinson & Northern Railway Company (HN), from whom VSR acquired the line,[2] or any successor-in-interest to HN, abandoned the segment of the line located on that portion of the right-of-way described as Parcel 1, which was obtained by virtue of a 1925 easement.

DISCUSSION

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 to issue a declaratory order to terminate a controversy or remove uncertainty. In this case, there are controversies on the present record regarding the right to operate on the line, the ownership of the underlying right-of-way, and the possible past abandonment of part of the line. Therefore, pursuant to the Board's authority at 5 U.S.C. § 554(e) and 49 U.S.C. § 721, a declaratory order proceeding will be instituted.

This matter will be resolved pursuant to the modified procedure rules at 49 C.F.R. § 1112. Pursuant to the District Court's order, VSR has requested expedited handling of this matter. Accordingly, VSR's petition will be treated as its opening statement. Replies will be due March 9, 2011, VSR's rebuttal will be due March 29, 2011.

With respect to ARM/TRAIN's petition for leave to intervene, ARM/TRAIN states that, because its members operate tourist and excursion passenger rail lines as private carriers, and these operations sometimes take place over rail lines owned or leased by common carrier railroads, the Board's disposition of the issue of whether private rail service may be conducted over common carrier rail lines will affect its members' ability to do business. In its reply to ARM/TRAIN, VSR argues that ARM/TRAIN's petition unduly broadens the issues on the grounds that no members of ARM/TRAIN operate on the line and VSR does not claim that the operation of consensual intrastate passenger excursion trains on common carrier track would be prohibited by the Board.

Under 49 C.F.R. § 1112.4, the Board will permit intervention when it will not unduly disrupt the procedural schedule and will not unduly broaden the issues raised. Here, ARM/TRAIN has not unduly broadened the issues. The claim that ARM/TRAIN seeks to refute was initially raised by VSR.[3] Nor will ARM/TRAIN's participation delay the proceeding. VSR has already filed a reply to ARM/TRAIN, and respondents have indicated that they support

[2] V&S Ry.—Acquis. and Operation Exemption—The Hutchinson & N. Ry., FD 34875 (STB served May 31, 2006).

[3] VSR Petition 3.

ARM/TRAIN's petition. Therefore, the Board grants ARM/TRAIN's petition for leave to intervene.

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

It is ordered:

1. A declaratory order proceeding is instituted. This proceeding will be handled under the modified procedure on the basis of written statements submitted by the parties. All parties must comply with the Board's Rules of Practice, including 49 C.F.R. §§ 1112 and 1114.

2. ARM/TRAIN's petition for leave to intervene is granted.

3. The procedural schedule is as follows:

   Replies are due March 9, 2011.
   VSR's rebuttal is due March 29, 2011.

4. This decision is effective on the date of service.

5. A copy of this decision will be served on:

   The Honorable Wesley E. Brown
   United States Senior District Judge
   United States District Court for the District of Kansas
   U.S. Courthouse
   401 North Market Street
   Wichita, KS 67202

By the Board, Rachel D. Campbell, Director, Office of Proceedings.