

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36005

KCVN, LLC AND COLORADO PACIFIC RAILROAD, LLC—FEEDER LINE
APPLICATION—LINE OF V AND S RAILWAY, LLC, LOCATED IN CROWLEY,
PUEBLO, OTERO, AND KIOWA COUNTIES, COLORADO

Decided: April 12, 2016

On March 18, 2016, KCVN, LLC (KCVN) and its wholly owned subsidiary, Colorado Pacific Railroad, LLC (Colorado Pacific) (collectively applicants) jointly filed an application under the feeder line provision at 49 U.S.C. § 10907 to acquire a 121.9-mile line of railroad owned by V and S Railway, LLC (V&S) in southeast Colorado. The line, known as the Towner Line, extends between milepost 747.5 near Towner and milepost 869.4 near NA Junction in Pueblo, Crowley, Kiowa, and Otero Counties, Colo. As discussed below, the application is substantially complete and will be accepted. However, the applicants should provide certain supplemental material described below by April 29, 2016. This decision also establishes a procedural schedule.

BACKGROUND

The Towner Line has been the subject of two other Board proceedings during the past two years. In Docket No. NOR 42140, KCVN, the Colorado Wheat Administrative Committee, the Colorado Association of Wheat Growers, and the Colorado Wheat Research Foundation (collectively, the Colorado Interests) filed a complaint on October 28, 2014, alleging that V&S violated 49 U.S.C. §§ 11101 and 10903 by removing certain track and related assets from a segment of the Towner Line (the Western Segment) without first seeking abandonment authority.¹ On May 7, 2015, the Board partially granted the Colorado Interests' concurrently filed motion for preliminary injunction, and barred V&S from removing and dismantling track and related assets from the Western Segment pending the Board's ruling on the complaint. Thereafter the parties moved to hold the complaint case in abeyance pending V&S's decision to seek abandonment authority for the Towner Line. The Board granted this request in a decision served on July 17, 2015, and the complaint case remains in abeyance.

On August 3, 2015, V&S filed a verified notice of exemption in Docket No. AB 603 (Sub-No. 4X) to abandon the Towner Line, as it had agreed to do in Docket No. NOR 42140.

¹ The Western Segment extends between milepost 808.3 near Haswell, Colo., and milepost 868.5, which is approximately 0.9 miles short of the Towner Line's western terminus at milepost 869.4.

The Board served and published notice of the exemption in the Federal Register, and KCVN and Colorado Pacific sought information from V&S to allow them to file an offer of financial assistance under 49 U.S.C. § 10904 to purchase the line. V&S provided the information, but that information suggested that the Towner Line passes through a county and zip code not included in V&S's verified notice. The Board therefore directed V&S to supplement its verified notice if necessary. Rather than filing a supplement, V&S attempted to amend the notice to seek authority to only discontinue operations over the Towner Line rather than abandon it. KCVN opposed that amendment. In a decision served on January 15, 2016, the Board rejected V&S's November 30 amendment. The Board found that, if V&S wished to pursue discontinuance authority for the Towner Line, it must either file a petition for exemption under 49 U.S.C. § 10502 or a formal application under 49 U.S.C. § 10903. The Board further stated that V&S could supplement its original notice of exemption if it instead decided to continue seeking abandonment authority. On January 27, 2016, V&S gave notice of its desire to withdraw its notice of exemption seeking abandonment authority.²

On March 18, 2016, KCVN and Colorado Pacific initiated this proceeding by filing a feeder line application under 49 U.S.C. § 10907 to acquire the Towner Line and 12 miles of related track and facilities. Under § 10907(b)(1), the Board is authorized to require the sale of a rail line to a financially responsible person if the public convenience and necessity require or permit the sale.³ The applicants claim that the proposed sale is required under the public convenience and necessity criterion and that Colorado Pacific is a financially responsible person willing to pay not less than the constitutional minimum value of the line. The applicants allege that V&S engaged in a systemic plan to drive traffic off the Towner Line with the ultimate aim of abandoning it and selling the line's rail assets. The applicants assert that V&S raised rates to a prohibitive level around 2011 and engaged in other behavior forcing traffic off the line rather than meeting its common carrier obligation and maintaining the line. The applicants argue that the Board has found previously that this type of behavior can lead to a forced sale under the feeder line statute. See Keokuk Junction Ry.—Feeder Line Acquis.—Line of Toledo Peoria & W. Ry. Between La Harpe & Hollis, Ill., 7 S.T.B. 893 (2004).

According to the applicants, Colorado Pacific seeks to acquire the Towner Line and its related track and facilities and lease them to a connecting carrier, Kansas & Oklahoma Railroad (K&O), to operate. Although the parties are still in negotiations, the applicants provide a supporting verified statement from a representative of K&O's owner. The applicants also include verified statements supporting the application from a local farmer and representatives of Bartlett Grain Co., LP, Tallman Grain Co., Inc., and Thunderbird L&L, Inc.

The applicants state that Colorado Pacific offers to buy the Towner Line for its net liquidation value (NLV), which the applicants estimate to be \$2,594,551, rather than the line's

² Withdrawal of the notice of abandonment exemption will be addressed in a separate decision.

³ The Board also is to require a sale to a financially responsible person if the line is currently in category 1 or 2 of the owning railroad's system diagram map and the owning railroad has not filed an application to abandon the line. See 49 U.S.C. § 10907(b)(1)(A)(ii); 49 C.F.R. § 1151.1. The applicants argue that the Towner Line also satisfies this criterion.

going concern value (GCV), which they estimate to be \$0 given that V&S provides no service. The applicants assert that rehabilitating the Towner Line would cost an additional \$3,500,000, bringing the total cost to restore service to \$6 million. The applicants claim that Colorado Pacific can afford these costs and that it is financially responsible. Specifically, they note that KCVN would fund Colorado Pacific's acquisition and other expenses with cash. As support, they provide a KCVN account statement showing assets of approximately \$6.5 million. The applicants also note that KCVN owns 58,000 acres of farmland primarily dedicated to dryland wheat within 25 miles of the Towner Line, which collectively are valued at approximately \$50 million (Application 8), and that KCVN has wealthy principals and would make funds available to meet additional acquisition, rehabilitation, maintenance, and operations costs if necessary (Application, Exhibit A at 5).

DISCUSSION AND CONCLUSIONS

Under 49 C.F.R. § 1151.2(b), the Board, through the Director of the Office of Proceedings, must accept a complete feeder line application, or reject one that is incomplete, no later than 30 days after the application is filed. An application is complete if it has been properly served⁴ and contains substantially all the information required by § 1151.3, except as modified by advance waiver. 49 C.F.R. § 1151.2(b)(1). Notice of an acceptance must be published in the Federal Register and provide a procedural schedule for the proceeding. Id.

The Board has determined that the applicants have provide substantially all the information required by § 1151.3 and therefore accepts the feeder line application. The applicants should provide some additional information, described below, for the Board's consideration as the feeder line case proceeds.⁵ See Ore. Int'l Port of Coos Bay—Feeder Line Application—Coos Bay Line of Cent. Ore. & Pac. R.R., FD 35160 (STB served Aug. 1, 2008) (accepting the feeder line application, but encouraging the applicant to provide supplemental material).

Financial Responsibility (1151.3(a)(3)). An application must include information sufficient to demonstrate that it is a financially responsible person, able to pay the higher of the NLV or GCV of the line and to cover expenses associated with providing service over the line for at least the first three years after the line is acquired. Based on the information in the application, Colorado Pacific appears to have access to considerable funds to pay the expenses of

⁴ As originally filed, the application failed to indicate service on the Board of County Commissioners of Otero County, Colo., but that omission was remedied by a certificate of service filed on March 28, 2016.

⁵ KCVN and Colorado Pacific request that the Board accept their application for filing subject to any environmental reporting that might be required under 49 C.F.R. § 1105.7. The Board will grant this request. The Board's Office of Environmental Analysis will determine what, if any, environmental review is required in this case and coordinate with the applicants. A historic report is not required here because the proposal clearly falls within the exception at 49 C.F.R. § 1105.8(b)(1).

acquiring and rehabilitating the Towner Line.⁶ Colorado Pacific states that it does not anticipate incurring operating costs because they would be borne by K&O, the anticipated operator. Nonetheless, the applicants should provide financial statements showing a breakdown of three years of K&O service costs, including maintenance costs, to fully demonstrate that Colorado Pacific or KCVN could cover any revenue shortfall during the first three years.

Operating Plan (1151.3(a)(7)). Although the applicants and K&O have provided basic information about the common carrier freight operations K&O would perform, they indicate that the specifics of an operating plan are still being developed. The applicants should provide the Board with more detail, including an estimate of the average number of trains anticipated to be operated over the line per day.

Liability Insurance (1151.3(a)(8)). Colorado Pacific and K&O anticipate that the lease and operating agreement they are negotiating would provide that K&O secure and maintain at all times an insurance policy from a reputable insurance company that provides for commercial liability coverage in an amount not less than \$25 million. In addition to the information provided in the application, the applicants should also submit to the Board a certificate of K&O's existing insurance coverage over its current system.

PROCEDURAL SCHEDULE

The procedural schedule is as follows:

Any supplement by KCVN and Colorado Pacific to their application is due by April 29, 2016.

Competing applications by other parties seeking to acquire all or any portion of the Towner Line are due by May 16, 2016. See 49 C.F.R. § 1151.2(c)(1).

Verified statements and comments addressing both the initial and competing applications must be filed by June 14, 2016. See 49 C.F.R. § 1151.2(e).

Verified replies by applicants and other interested parties must be filed by July 5, 2016. See 49 C.F.R. § 1151.2(f).

It is ordered:

1. KCVN's and Colorado Pacific's feeder line application is accepted and notice will be published in the Federal Register.
2. The above schedule will govern this proceeding.

⁶ The applicants state that no financial statements are available because Colorado Pacific is a new company.

3. This decision is effective on its service date.

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