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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

Digest:[1] The Board finds that KCVN, LLC, and its wholly owned subsidiary, Colorado Pacific Railroad, LLC, have met the criteria and eligibility requirements for the forced sale and acquisition of an approximately 121.9-mile line of railroad in southeast Colorado owned by V and S Railway, LLC. The Board requests that the parties participate in Board-sponsored mediation to resolve the net liquidation value of the line.

Decided: July 28, 2017

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 for Colorado Pacific to acquire a rail line owned by V and S Railway, LLC (V&S) in southeast Colorado. This line (referred to here as the Towner Line or Line) consists of approximately 121.9 miles of railroad line and approximately 12 miles of other tracks and facilities. The Line is located between milepost 747.5, near Towner, Colo., and milepost 869.4, near NA Junction, in Pueblo, Crowley, Kiowa, and Otero Counties, Colo. (Application 1.)

In this decision, the Board finds that the Line meets the statutory criteria for a forced sale under § 10907 and that Colorado Pacific is financially responsible and thus eligible to purchase the Line. The Board requests that the parties engage in Board-sponsored mediation to resolve the net liquidation value (NLV) of the Line, and directs the parties, by August 15, 2017, to confirm whether they will participate in Board-sponsored mediation.

[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).

BACKGROUND

V&S's Acquisition of the Towner Line

In 1998, the Colorado Department of Transportation (CDOT) bought the Towner Line from Union Pacific Railroad Company for approximately $10.2 million. (CDOT Letter 1, June 27, 2016.) After CDOT's first operator had financial problems, CDOT and V&S entered into an agreement in 2005, and V&S purchased the Line for approximately $10.3 million. (Id. at 1-2; see also Application 2.) The agreement also afforded CDOT a right of first refusal to repurchase the Line if V&S thereafter sought to sell or abandon it. (CDOT Letter 1-2, June 27, 2016.)

V&S obtained Board authorization to assume the existing lease of the prior rail operator of the Towner Line. V & S Ry.—Acquis. & Operation Exemption—Rail Line of Colo., Kan. & Pac. Ry., FD 34779 (STB served Dec. 30, 2005). V&S did not seek Board authorization to purchase the Line.

Agricultural Interests Along the Towner Line

KCVN owns approximately 68,835 acres of farmland near the Towner Line and another 12,795 acres in Kansas. Its landholdings consist of farms that grow hard red winter wheat, sorghum, and other dryland farming commodities. (Applicants Reply, V.S. Zenner 2, Sept. 27, 2016.) In 2016, KCVN produced 354,447 bushels of hard red winter wheat. (Id.)

Bartlett Grain Co., LP (Bartlett), operates two grain elevators along the Towner Line: one at Haswell (MP 807.7) and another at Eads (MP 785.8). (Application, V.S. Griffith 1.) These elevators serve hundreds of wheat farmers in the area through which the Towner Line runs. (Id.) Most of the grain handled by these elevators comes from farmers in Kiowa County. (Id.)

V&S's Rail Operations on the Towner Line

In 2008, 2009, and 2010, the amount of grain traffic transported by V&S on the Line was 156, 295, and 511 cars, respectively. (V&S Comments, V.S. Parsons 3.) Bartlett would generally tender between 10 and 25 single carloads at a time, as its operations at Eads and Haswell were not conducive to assembling blocks of more than 40 cars. (Application, V.S. Griffith 2-3.)

In June 2011, V&S adopted a tariff with a new, tiered rate structure. (V&S Comments, V.S. Parsons 3.) The new tariff eliminated the $560 per car single-car rate and replaced it with a $3,000 per car "Intermediate Switching Rate." (Application 32; id. at V.S. Griffith 3.) However, rates for blocks of 49 cars or more were "similar to" the rates in effect under the old tariff. (V&S Comments, V.S. Parsons 3.)

Applicants claim that the increased tariff rate for single-car shipments made shipping on the Line uneconomic. They state that Bartlett's operations at Eads and Haswell are not

conducive to assembling blocks of more than 40 cars (Application, V.S. Griffith 3)—below V&S's 49-car threshold to qualify for the lower rates. Bartlett approached V&S about lowering the rates in 2011 and 2012, but V&S refused and continued to insist on what Bartlett describes as volume commitments, which Bartlett could not make. (Id.) Faced with the tariff increase, Bartlett shifted its operations to ship exclusively by truck in early 2012. (Application 31.) Bartlett provided the Line's last traffic in February 2012. (V&S Comments, V.S. Parsons 6.)

It appears that V&S stopped performing regular maintenance on the Line in 2011. (Application, Ex. N 7.) The Applicants claim that since that time, the only maintenance V&S appears to have performed was to replace dirt at two areas washed out by heavy rains, though Applicants claim V&S still did not attempt to reestablish the roadbed. (Applicants Reply 23 n.14, Sept. 27, 2016.)

V&S's Abandonment and Discontinuance Efforts

In December 2011, V&S notified CDOT of its intention to abandon the Towner Line. (CDOT Letter 2.) Although CDOT had a contractual right to repurchase the Line, CDOT's budget did not allow it to do so. (Id.) V&S then began a series of filings with the Board to abandon and discontinue service on various segments of the Line.

Western Segment Discontinuance. In 2012, V&S obtained authority to discontinue operations over a 60.2-mile portion of the Line known as the Western Segment,[2] V & S Ry.—Discontinuance of Serv. Exemption—in Pueblo, Crowley, & Kiowa Ctys., Colo., AB 603 (Sub-No. 2X) (STB served June 28, 2012), and that authority became effective on July 28, 2012. In seeking discontinuance authority, however, V&S realized that it had erred in 2005 by failing to obtain Board authorization to purchase the Line. (See V&S Pet. for Exemption 9, Aug. 15, 2012, V & S Ry.—Acquis. & Operation Exemption—Colo. Dep't of Transp., FD 35664 (explaining that in seeking Board authority to assume the prior operator's existing lease of the Line, V&S "los[t] sight of the fact that at the same time it had purchased the line from CDOT").) Accordingly, in August 2012, V&S belatedly petitioned the Board for an exemption authorizing its purchase of the Line. V&S stated that after obtaining the acquisition authority, it expected to seek authority "in the near future" to abandon "the western segment of the Towner Line, between NA Junction and Haswell." (Id. at 8-9.) V&S therefore asked that its requested acquisition authority be made retroactive to the consummation date of its lease in 2005. The Board received no opposition to V&S's petition and authorized the purchase, but did not make V&S's authority retroactive. The decision stated, however, that V&S would be allowed to use the Board's streamlined class exemption procedures at 49 C.F.R. part 1152 subpart F to abandon the Western Segment by waiving the usual requirement for an abandoning carrier to have had Board-authorized ownership of the line for at least two years. See V & S Ry.—Acquis. & Operation Exemption—Colo. Dep't of Transp., FD 35664, slip op. at 5 (STB served Nov. 13, 2012).

[2] 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.

Attempted Abandonment of the Eastern Segment. More than a year passed without a request for abandonment authority from V&S for the Western Segment. When V&S did seek abandonment authorization in May 2014, it sought to abandon not the Western Segment, but the portion of the Line from milepost 749.5 to milepost 787.5 (the Eastern Segment). The Kiowa County Board of Commissioners protested the planned abandonment of the Eastern Segment, questioning whether V&S had ever intended to make the Line viable and claiming that the lack of rail service would preclude the development of certain agricultural markets in the county and in the southeast Colorado region. (Kiowa County Letter 2, June 13, 2014, V & S Ry.—Aban. Exemption—in Kiowa Cty., Colo., AB 603 (Sub-No. 3X).) In June 2014, the Board, through the Director of the Office of Proceedings, rejected V&S's notice of exemption because V&S had not owned the Eastern Segment with Board authorization for more than two years, as required by 49 C.F.R. § 1152.50(b).[3] The Director also noted that V&S had failed to address how it would continue to meet its common carrier obligation on other portions of the Towner Line (including a middle segment that could end up stranded). V & S Ry.—Aban. Exemption—in Kiowa Cty., Colo., AB 603 (Sub-No. 3X) (STB served June 17, 2014). V&S appealed the Director's order to the Board, but the Board affirmed the Director's decision. V & S Ry.—Aban. Exemption—in Kiowa Cty., Colo., AB 603 (Sub-No. 3X) (STB served Oct. 23, 2014).

Attempted Dismantling of the Line. In July 2014, KCVN offered to buy the Towner Line for $10 million in cash. (Applicants Reply 8, Sept. 27, 2016; see also KCVN Complaint 8, Colo. Wheat Admin. Comm. v. V & S Ry. (Colorado Wheat), NOR 42140.) V&S responded by saying that "[d]ue to other commitments, [V&S] will not be in a position to consider any offers to purchase our Towner [L]ine until, at the earliest, the end of August. Please feel free to check back . . . at that time." (KCVN Complaint 9, Colorado Wheat, NOR 42140.) In mid-August, however, V&S arranged for the sale of the assets of the Line and began removing track materials. Id. at 10.

On October 28, 2014, 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 with the Board in Docket No. NOR 42140, alleging that V&S was violating 49 U.S.C. §§ 11101 and 10903 by removing certain track and related assets from the Western Segment without first obtaining abandonment authority. In a decision served October 31, 2014, the Board granted the Colorado Interests' requested emergency relief, enjoining V&S from dismantling and removing any tracks or related assets on the Western Segment until the Board ruled on the requested preliminary injunction. Colorado Wheat, NOR 42140 (STB served Oct. 31, 2014). In May 2015, the Board partially granted the Colorado Interests' concurrently filed motion for preliminary injunction, thus barring V&S from removing and dismantling track and related assets from the Western Segment pending the Board's ruling on the complaint. Colorado Wheat, NOR 42140 (STB served May 7, 2015).

On July 10, 2015, the parties moved to hold the complaint case in abeyance based on "certain understandings" that V&S intended to seek abandonment authority for the Towner Line.

[3] The Director noted that the two-year ownership requirement had only been waived for the Western Segment, not the Eastern Segment.

The Board granted this abeyance request. Colorado Wheat, NOR 42140 (STB served July 17, 2015).

Attempted Abandonment of the Entire Line. As indicated by the parties' abeyance request, on August 3, 2015, V&S filed, under 49 C.F.R. part 1152 subpart F, a verified notice of exemption in Docket No. AB 603 (Sub-No. 4X) to abandon the entire Towner Line. After the Board served and published notice of the exemption in the Federal Register, KCVN and Colorado Pacific sought information from V&S to allow them to file an offer of financial assistance (OFA) under 49 U.S.C. § 10904 to purchase the Line. However, in the information that V&S provided in response, it suggested that the Towner Line passes through a county and zip code not included in V&S's verified notice. Because notices of exemption must include all zip codes that the line proposed for abandonment traverses, the Board directed V&S to supplement its verified notice if necessary. See V & S Ry.—Aban. Exemption—in Pueblo, Crowley, & Kiowa Ctys., Colo., AB 603 (Sub-No. 4X) (STB served Oct. 19, 2015).

Rather than filing a supplement, however, V&S attempted to amend the notice to seek authority to discontinue operations over the Towner Line, rather than abandon it, to take advantage of a business opportunity to store cars on the Line. KCVN opposed V&S's attempt to amend its notice as contrary to law and the Board's October 19, 2015 order. The Board rejected V&S's amendment. The Board stated 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. Alternatively, the Board 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 notified the Board that it no longer wanted to pursue abandonment authority for the Line. The Board, noting that its authority is permissive, allowed V&S to withdraw its notice on May 6, 2016.

V&S did not pursue abandonment of the Towner Line, and the Colorado Interests have not moved to reactivate the complaint case, which remains in abeyance.

The Feeder Line Proceeding

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. Under § 10907(b)(1), the Board is authorized to require the sale of a rail line to a financially responsible person if (1) the public convenience and necessity (PC&N) require or permit the sale or (2) the line is currently in category 1 or 2 of the owning railroad's system diagram map (SDM) and the owning railroad has not filed an application to abandon the line.

Applicants claim that the proposed sale is required under both standards and that Colorado Pacific is a financially responsible person willing to pay not less than the constitutional minimum value (CMV) of the Line. In regard to the PC&N standard, 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 for scrap. 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. Applicants argue

that the Board has found previously that this type of behavior can lead to a forced sale under the feeder line statute, citing Keokuk Junction Railway—Feeder Line Acquisition—Line of Toledo Peoria & Western Railway Between La Harpe & Hollis, Ill. (Keokuk), 7 S.T.B. 893 (2004). In regard to the SDM-listing standard, the Applicants argue that although V&S has not actually listed the Towner Line on its SDM as a category 1 or 2 line, it should have so categorized the Line, as V&S has made clear in various Board filings since 2012 that it intends to abandon the Line. As such, Applicants argue they should be permitted to obtain a feeder line order under this standard as well. (Application 15-19.) Applicants note that they are negotiating a lease and operating agreement with a carrier connecting to the Towner Line, Kansas & Oklahoma Railroad (K&O),[4] whereby K&O would become the operator of the Line upon its purchase by Colorado Pacific, perform all necessary rehabilitation and maintenance of the Line, and develop and market traffic on the Line. (Application 5 n.2.) KCVN and Colorado Pacific supported their application with a verified statement from K&O and a verified statement from Bartlett, the Line's last major shipper. Applicants also provided supporting verified statements from a local farmer and representatives of Tallman Grain Co., Inc., and Thunderbird L&L, Inc. CDOT also filed a letter supporting Applicants' request for a forced sale.

In the application, the parties estimate the Line's net liquidation value (NLV) to be $2,594,551. Applicants assert that rehabilitating the Towner Line would cost an additional $3,500,000, bringing the total cost to restore service to approximately $6 million. (Application 7.) Applicants claim that Colorado Pacific can afford these costs and is financially responsible.

In a decision served on April 15, 2016, the Director of the Office of Proceedings found the application to be substantially complete, accepted it for consideration, and established a procedural schedule permitting comments on the application and replies. However, the Director also suggested that Applicants supplement their filing with additional information regarding its financial responsibility, operating plan, and liability insurance. On April 29, 2016, Applicants submitted a public version of their supplement and a confidential version filed under seal.[5]

V&S submitted a confidential and public comment in response to the feeder line application. V&S asserts that the application fails to establish that the statutory standards for a forced sale are met. In particular, V&S maintains that there have been no charges that the railroad has been unresponsive to shippers and states that no traffic has been tendered to it on the Line since 2012. V&S disputes the contention that it has tried to drive traffic off the Line and argues that the reason it raised its single-car rate in 2011 was because it was losing money on the Line. It also notes that it established lower rates for larger blocks of cars to encourage shippers to tender additional traffic. (V&S Comments 9.) V&S also disputes Applicants' argument that the Line qualifies for a forced sale under the SDM-listing standard. As for the purchase price,

[4] K&O operates over 840 miles of track predominantly located in eastern and central Kansas, and it is one of the 34 carriers owned by Watco Transportation Services, LLC. (Application 13.)

[5] The Board issued a protective order on May 16, 2016, to safeguard confidential material filed in this case.

V&S disputed Applicants' value for the Line, arguing that the Line should be valued instead at an NLV of $23,931,500.

On September 27, 2016, Applicants replied, arguing that the Towner Line is eligible for a forced sale under § 10907 because V&S has no intention of restoring common carrier service over the Towner Line. Instead, they stated that V&S intends to reap as much revenue as it can from storing cars on some of the tracks and, once that revenue dries up, abandon the Line and sell it for scrap. Applicants also provided a revised NLV of $7,021,901.

In a decision served on March 3, 2017, the Director ordered Applicants to provide wholesale price data and calculate a revised NLV based on the record as supplemented. On March 17, 2017, Applicants filed this supplemental information, including a revised NLV of $5,522,518. V&S submitted a response on March 31, 2017, including an updated NLV of $20,107,900. Applicants filed a rebuttal on April 7, 2017. On April 17, 2017, Cando Rail Services filed a letter to clarify the pricing estimate it provided to V&S. KCVN replied to that letter on April 18, and V&S responded to KCVN on April 19.

DISCUSSION AND CONCLUSIONS

The feeder line provision at 49 U.S.C. § 10907 was enacted to enable shippers and communities to acquire rail lines that are slated for abandonment or over which rail service is inadequate.[6] Specifically, a financially responsible party may obtain a Board order requiring the sale of a rail line in two situations: (1) when the owning carrier has identified the line as a candidate for abandonment on its "system diagram map" (SDM) (filed at the Board as required by 49 C.F.R. part 1152 subpart B), but the carrier has not yet sought authority to abandon the line; or (2) when the PC&N require or permit the sale. See 49 U.S.C. § 10907(b)(1). The PC&N factors generally look to the impact of the sale on the owning carrier and whether the owning carrier has been providing adequate service to shippers that use the line. If the Board finds that either the SDM or PC&N criteria are met, it shall direct the owning carrier to sell the line to the applicant at the CMV, which is the higher of the going concern value (GCV) (the line's value as a viable business) or the NLV (the salvage value of the line's physical assets and the value of the underlying land).[7] See 49 U.S.C. § 10907(b)(2).

[6] See Cheney R.R.—Feeder Line Acquis. Between Greens & Ivalee, Ala., 5 I.C.C.2d 250, 251 (1989), aff'd sub nom. Cheney R.R. v. ICC, 902 F.2d 66 (D.C. Cir. 1990); H.R. Conf. Rep. 96-1430, at 85 (1980), reprinted in 1980 U.S.C.C.A.N. 4110, 4116.

[7] Applicants argue that the Line satisfies both tests for granting their application. But because, as discussed further below, the Board finds that the Line qualifies for a forced sale under the PC&N criteria, it need not consider the Applicants' SDM argument.

Public Convenience and Necessity

To find that the PC&N require or permit the sale of a rail line, the Board must find that the following five criteria are met:

(1) the rail carrier operating the line has refused within a reasonable time to make the necessary efforts to provide adequate service to shippers who transport traffic over the line;

(2) the transportation over such line is inadequate for the majority of shippers who use the line;

(3) the sale of such line will not have a significantly adverse financial effect on the rail carrier operating it;

(4) the sale of such line will not have an adverse effect on the overall operational performance of the rail carrier operating it; and

(5) the sale will likely result in improved rail transportation for shippers that use the line.

49 U.S.C. § 10907(c)(1). As discussed below, the Board finds that these criteria are met here.

(1) The rail carrier has refused to make the necessary efforts to provide adequate rail service. Applicants argue that V&S has repeatedly indicated its lack of interest in providing common carrier service in filings with the Board and has actively driven traffic off the Line by raising rates to "prohibitively high levels."[8] Applicants assert that the Board has found a similar pattern of behavior to drive traffic off the line sufficient to meet this criterion. See Keokuk, 7 S.T.B. at 896-98 (finding criterion met when, in the face of shippers' demonstrated desire for service, incumbent railroad did not list disputed segment on map, did not provide data to formulate joint rates, quoted local shippers rates three to four times higher than before, and engaged in a salvage scheme). As discussed below, the Board finds that V&S has engaged in behavior sufficient to meet this prong of the PC&N test.

From 2008 to 2010, V&S transported an average of approximately 320 cars per year on the Line. In June 2011, V&S adopted a tariff that dramatically increased single-car rates from $560 per car to $3,000 per car. Although V&S retained the lower per-car rate for shipments in blocks of 49 or more cars, those rates were out of reach for Bartlett, the Line's principal remaining shipper, whose operations at Eads and Haswell were not conducive to assembling blocks of more than 40 cars. Bartlett approached V&S about lowering the rates in 2011 and 2012, but V&S refused and continued to insist on volume commitments Bartlett could not provide, presumably knowing that Bartlett would not be able to meet that threshold. Indeed, the significant increase in rates was the major factor that led Bartlett to stop shipping by rail. Bartlett provided the Line's last traffic in 2012.

[8] Keokuk, 7 S.T.B. at 896.

V&S's claim that it did not deliberately drive traffic from the Line is not credible given that, when it became clear that the effect of the new tariff was to drive away existing traffic rather than attract new traffic, V&S made no effort to work with Bartlett or seek out new customers. On the contrary, V&S embarked on a series of filings with the Board to abandon or discontinue service on the Line. In December 2011, six months after the rate increase and while Bartlett was trying to work with V&S to secure rates under which it could continue shipping, V&S's six-year commitment to CDOT to operate the Line ended. Around this time, V&S essentially stopped maintaining the Line and notified CDOT that it intended to abandon the Line.

In addition to these actions, V&S took steps to make rail service physically impossible. Shortly after receiving an offer in 2014 from KCVN to purchase the entire Towner Line and revitalize it, V&S stated to KCVN that it was not in a position to consider the offer until the end of August 2014, but in mid-August, V&S sought to begin removing track and related assets from the Line.[9] This action led KCVN and several other entities to file their complaint in Docket No. NOR 42140. According to the complainants, V&S sold the track assets of the Western Segment to its affiliate, A&K Railroad Materials (A&K), which, on August 11, 2014, entered into a contract to sell the tracks and other track assets of the Western Segment. Although V&S claims that the degree to which the track was removed is exaggerated, (V&S Comments, Joint V.S. of Meadows, Banks, & Ireland 43; see also V&S Reply 4, Jan. 7, 2015, Colorado Wheat, NOR 42140), it does not dispute that it did sell the track assets, Colorado Wheat, NOR 42140, slip op. at 8 (noting that V&S suggested to a Colorado court ruling on a temporary restraining order that the railroad had entered third-party contracts to sell some of the track). The fact that A&K agreed to sell the assets at the same time that V&S had led KCVN and other parties interested in rail service to believe that a sale of the Line was still possible makes V&S's actions all the more suspect. In Keokuk, a carrier attempted to sell a line to another entity so that entity could abandon and salvage the line. The Board found that such actions underscored the carrier's failure to recognize and meet the service demands for the Line. The Board finds that V&S's actions lead to a similar conclusion.

Even in the midst of this feeder line proceeding, V&S was unresponsive to a potential business opportunity. On June 29, 2016, KCVN asked V&S for the rates and terms to transport 100,000 bushels of hard red winter wheat to NA Junction. KCVN knew that the Line was in poor condition, and it asked V&S to provide this information for shipping in August or whenever the Line would be capable of handling traffic. (Applicants Reply, V.S. Zenner 3, Sept. 27, 2016.) V&S noted that there had been a recent bridge fire and stated "we are currently investigating the cost of replacing the bridge and the cause of this fire, and will look to the liable party for remuneration. However, as of today, we do not have a timeframe of when this will be resolved or when the bridge will be rebuilt. As a result of the loss of the bridge, V&S has embargoed the line." (V&S Comments, V.S. Parsons, Ex. 3.) It further noted that it had been granted discontinuance authority and hence has no common carrier obligation on the Western Segment. V&S did not follow up on KCVN's inquiry with any status reports on the bridge, did

[9] Colorado State Senator Larry Crowder expressed concern about V&S's removing track on the Western Segment in a different proceeding where V&S attempted to abandon another segment on the Line in 2014. See V&S Ry.—Aban. Exemption—in Kiowa Cty., Colo., AB 603 (Sub-No. 3X), slip op. at 2 n.4 (STB served Oct. 23, 2014).

not respond to KCVN regarding whether it could meet KCVN's transportation needs, and did not seek information about the potential business opportunity. (Applicants Reply, V.S. Zenner 4, Sept. 27, 2016.)

Despite this array of evidence indicating an unwillingness to provide service, V&S claims that there have been no charges that it has been unresponsive to shippers and states that no traffic has been tendered since 2012. The Board concludes, however, that V&S's large rate hikes, lack of maintenance, salvaging of track, and unresponsiveness to shippers' expressed interest in service created a belief that pursuing shipping with V&S would be futile. (See Application, V.S. Dusty Tallman (asserting that V&S had virtually embargoed the Line years ago with its rate actions and had not offered the opportunity to ship in years); id. at V.S. Griffith 3 (noting that Bartlett approached V&S occasionally after 2012 about restoration of rail service, but those discussions were futile).) Here, as in Keokuk, the incumbent carrier has raised rates to a prohibitive level and acted to drive traffic away. V&S has repeatedly demonstrated an indifference to the fact that it owns a rail line meant to provide rail service to the public. Even now, supporters of the application are showing interest in shipping on the Line and point to new opportunities, such as transporting Snowmass, a new hard white wheat, but V&S has taken no steps to pursue such opportunities.[10] Accordingly, the Board finds that this prong of the PC&N test is met and that V&S has refused within a reasonable time to make the necessary efforts to provide adequate service to shippers on the Line.

(2) The transportation over the line is inadequate for the majority of shippers who use the line. The Board looks to former, current, and potential shippers when examining this prong of the PC&N test. See, e.g., Or. Int'l Port of Coos Bay—Feeder Line Application—Coos Bay Line of the Cent. Or. & Pac. R.R., FD 35160, slip op. at 6 (STB served Oct. 31, 2008); Pyco Indus.—Feeder Line Application—S. Plains Switching, Ltd. (Pyco), FD 34890 et al. (STB served Aug. 31, 2007); Keokuk, 7 STB at 898. Here, Bartlett, a former and potential shipper, and KCVN, a potential shipper, clearly support the application. Applicants argue that V&S's lack of maintenance on the Line and the overall deterioration of the Line currently make rail transportation unviable. (Application 35.) Applicants also point to a number of other entities interested in a new carrier on the Line.

V&S argues that this criterion has not been met. It explains that Applicants did not show that service has been inadequate for shippers that actually transport traffic over the Line. V&S notes that it made repairs for Bartlett in 2008. It further asserts that, unlike in Pyco, there is no evidence that the incumbent railroad took retaliatory action against shippers.

It is not disputed that V&S made repairs for Bartlett in 2008. However, the record shows that it later undermined service and let track deteriorate to a condition that rendered the Line inadequate to meet Bartlett's transportation needs and serve other former and potential shippers.

[10] V&S also argues that Applicants have overstated the demand for service and, as such, failed to demonstrate that V&S provided inadequate service. V&S raises the issue again when questioning whether service would improve if V&S were not on the Line (section (5) below), but as explained in that section, V&S's challenge is unpersuasive.

Bartlett also was clearly alienated and now supports a new carrier. Under these circumstances, the Board finds that the criterion is met.

(3) The sale of the line will not have a significantly adverse financial effect on the rail carrier operating the line. V&S will not suffer a significant adverse effect as a result of the forced sale of the Line because it will receive the Line's CMV. V&S asserts that it will nonetheless be harmed because it would lose car storage revenues from a forced sale and not be compensated for that loss by receiving the Line's NLV. The Board, however, has rejected similar arguments in the past, finding that as long as the incumbent railroad receives the CMV, it does not matter that some revenues will be lost. See Pyco, slip op. at 13; Keokuk 7 S.T.B. at 902. Furthermore, V&S has not even attempted to show that the loss of car storage revenues would imperil its business or that it needs these funds to continue service elsewhere. See Keokuk, 7 S.T.B. at 898-99; Pyco, FD 34890, slip op. at 13.

(4) The sale of the line will not have an adverse effect on the overall operational performance of the rail carrier operating the line. The Board finds that Applicants have satisfied this criterion. The Line is not connected to any other V&S lines,[11] and V&S provides no evidence that service on those lines would be affected by granting the application.

(5) The sale of the line will likely result in improved rail transportation for shippers that use the line. Applicants argue that the sale of the Line, its successful rehabilitation, and the installation of a competent rail operator, such as K&O, would result in improved rail transportation for shippers on the Line. (Application 36.) V&S claims that Applicants have failed to demonstrate that service would improve if the Line were sold and operated by K&O, Applicants' preferred carrier. V&S points out that K&O has not disclosed the rates it would charge and thus questions how Applicants can therefore claim that the service would be better. Moreover, V&S notes that K&O proposes keeping the track at FRA Class I standards, which limit train operations to only 10 mph, and that K&O's maintenance cost estimates are unrealistic. V&S also argues that Applicants' traffic projections are overly optimistic; V&S provides a report indicating that the Line would carry no more than 450 carloads of grain a year. (V&S Comments, V.S. Hoegemeier 9.) V&S further claims that with such limited traffic, K&O would not provide weekly service, as Applicants suggest, but only sporadic service.

Applicants have satisfied this criterion. In response to V&S's claims that the traffic levels would be no more than 450 carloads, Applicants submitted their own report identifying numerous flaws in V&S's report. In particular, Applicants' report claims that V&S's report overlooked the sorghum crop, underestimated hard red winter wheat harvest volumes, incorrectly assumed that elevators on competing lines could accept hard white winter wheat, and overlooked the importance to producers of having a close delivery point. (Applicants Reply, R.V.S. Hanavan 3-11, Sept. 27, 2016.) Even if the Line were to carry less traffic than Applicants

[11] V&S owns and operates two other lines of railroad, the Medicine Division line between Medicine Lodge and Attica, Kan., and the Hutchinson Division line located wholly within Hutchinson, Kan. V&S also owns the Missouri Central Railroad Line between Vigus, Mo., and Beaufort, Mo., which is operated by Central Midland Railroad Company. (V&S Comments 2 n.1.)

predict and there is uncertainty about the rates K&O would charge, it is hard to imagine that the situation on the Line would not improve. Here, as Applicants note, V&S provides no service on the Line and has shown no interest in providing service for a number of years. The transfer of operations to K&O would therefore replace an incumbent carrier that is uninterested in providing service with an experienced carrier that is both supported by shippers and eager to provide service. Although K&O proposes operating at only 10 mph based on the Line's condition (which is a result of V&S's own neglect), service at 10 mph is preferable to no service.[12]

Financial Responsibility

To be an eligible purchaser under the feeder line program, an applicant must show that it is financially responsible. 49 U.S.C. § 10907(b)(1)(B). To be considered financially responsible, § 10907(a) provides that the purchaser must be able (1) to pay the CMV for the line and (2) to cover the expenses of operating on the line for at least the first three years. 49 U.S.C. § 10907(a).

Applicants assert that Colorado Pacific has the financial resources to acquire the Line and fulfill its responsibilities to pay the expenses of rehabilitating, operating, and maintaining the Line for at least the first three years from the date of acquiring the Line. 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. They further note in their application 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.)[13] Applicants also explain that KCVN has wealthy principals, (Application, V.S. Osborn 3), and would make funds available to meet additional acquisition, rehabilitation, maintenance, and operations costs if necessary, (id. at 5). In its

[12] V&S further claims that because Applicants provided an incomplete operating plan, the Director should not have accepted the application. (V&S Comments 17, 20-22.) It notes that the draft operating agreement in the record does not demonstrate that K&O will cover the cost of materials to rehabilitate the Line, and K&O does not provide any estimate of revenue to show that it could operate the Line profitably and provide for improved service. Although all the details of the parties' arrangement have not yet been finalized, Applicants have put forward enough details to demonstrate a credible plan backed by a former shipper and other potential shippers. Specifically, K&O's representative explains how its minimum carload estimate for the first three years can be multiplied by a conservative line-haul rate. K&O also states its line-haul revenue would be supplemented with car storage revenue. K&O projects that this combined revenue would surpass its operating and maintenance expenses. (See Applicants Reply 23, Sept. 27, 2016; 2nd V.S. Story.) Moreover, as discussed in the Financial Responsibility section below, Colorado Pacific is sufficiently financed to cover all expenses if the sale occurs. Thus, the Director properly accepted the application.

[13] Since the application was filed, KCVN has purchased about 7,800 additional acres in Kiowa and Prowers Counties, Colo. KCVN now owns and operates over 30,000 acres of farmland in Kiowa County. (Applicants Reply 19 n.13, Sept. 27, 2016.)

supplemental filing submitted on April 29, 2016, Applicants provide financial statements showing a breakdown of three years of K&O estimated service costs, including maintenance costs.

V&S argues that the application, even as supplemented, still provides insufficient information to determine that Colorado Pacific is financially responsible for purposes of pursuing a forced sale. In particular, V&S argues that, while Applicants have provided some information indicating that KCVN can fund Colorado Pacific's ability to acquire and operate the Line for three years at the purchase price put forward by Applicants, the data provided does not demonstrate that Colorado Pacific can do so based on the NLV put forward by V&S. (V&S Comments 18.)

Furthermore, V&S notes that while K&O would be responsible for rehabilitation costs, no financial information has been provided with respect to K&O's ability to bear these costs. While Applicants claim that they will be able to cover the rehabilitation costs if K&O does not, V&S asks that the Board make an independent determination of whether K&O can in fact bear these costs.[14] V&S also argues that the Applicants' $3.5 million estimate for rehabilitation is too low, as it does not include replacement of the bridge that burned in June 2016. V&S argues that an additional $500,000 for the bridge replacement (which V&S bases on an average of bids it obtained for this work) needs to be included in the rehabilitation costs. (V&S Comments 18-19.)

V&S further claims that Applicants should be required to show that they can cover startup costs for providing service on the Line. Although V&S acknowledges that these costs might be minimal (as they would more likely be borne by the operator, K&O, than by the Applicants), V&S notes that Applicants nonetheless pledge to pay for such costs if K&O cannot do so. Despite this assurance from the Applicants, V&S claims that Applicants have not submitted an estimate of the startup costs. (V&S Comments 19.) V&S further argues that if sufficient funds are not clearly available to cover all the costs associated with acquiring the Line, rehabilitating it, and operating it for three years, Applicants must provide a committed source of funds, such as a line of credit. (V&S Comments 19-20.)

Here, the Director already noted in an April 15, 2016 decision that Colorado Pacific has access to considerable funds. The Board agrees and finds that Colorado Pacific is financially responsible for purposes of the statute. As Applicants note, KCVN owns large holdings near the Line and has access to significant funds. These funds establish the ability to purchase the Line at any of the NLVs proposed in this case and to cover the expenses of operating on the Line for at least the first three years. Although V&S suggests that KCVN's commitment to Colorado Pacific is not firm, KCVN has offered to post a line of credit for Colorado Pacific in any amount required by the Board. (Application, V.S. Osborn 5.) KCVN has also stated that, to the extent the application process results in a final purchase price for the Line beyond the amount Colorado

[14] V&S also argues that Applicants' rehabilitation cost estimates do not include any mitigation costs that might be imposed as a result of an environmental report. (V&S Comments 19.) However, this argument lacks merit because, as discussed in the Environmental Issues section below, no environmental report or Board environmental analysis is necessary in this case.

Pacific has offered or requires additional funds for operating or rehabilitation, KCVN or its owners would provide a cash infusion. (Applicants Reply 19, Sept. 27, 2016.) Such funds would be in addition to the $6.5 million KCVN has already set aside for the Towner Line. Although V&S questions whether K&O could finance rehabilitation or haul as much traffic as projected, these concerns are immaterial in light of the resources KCVN is willing to commit. As such, the Board finds that Colorado Pacific is financially responsible under the statute.

Valuation

Under 49 U.S.C. § 10907(b)(1), the purchase price for a line of railroad in a forced sale must not be less than the line's CMV. The CMV is statutorily presumed to be "not less than the net liquidation value of such line or the going concern value of such line, whichever is greater." 49 U.S.C. § 10907(b)(2); Coos Bay, FD 35160, slip op. at 8.

Here, Applicants and V&S agree that the Line's NLV exceeds its GCV and that that the NLV is the appropriate measure of the CMV. The parties assign no value to the land, so the NLV should be based solely on the Net Salvage Value (NSV) in this case.[15] The Line's NSV is based on an asset inventory, the condition of those assets, and the unit prices based on the condition of the assets.

Asset Inventory. Applicants' expert, Gerald W. Fauth III, bases his NLV of the Line's assets using an inventory contained in a report prepared by R.L. Banks & Associates (RLBA) for V&S in 2014. According to this report, Crew Heimer, P.E., on behalf of RLBA, conducted an inventory inspection of the Line on October 1, 2014. (V&S Comments, Joint V.S. of Meadows, Banks, & Ireland 6.) The inventory prepared by Heimer contained detailed lists of several different rail types and quantities that make up 134.10 miles of track (121.90 miles of main track and 12.20 miles of sidings) and 28,909 tons of rail. (Application, V.S. Fauth 25.) Fauth accepted these track sizes and amounts for purposes of computing Applicants' NLV. (Application, V.S. Fauth 26.)

In its reply, V&S argues for a slightly different inventory than the one used by Fauth. V&S explains that it engaged RLBA again in 2016, in part to confirm the Line's inventory, and thus relies on the on-site inventory from the inspection of the Line performed by Lee Meadows on May 11 and 12, 2016. (V&S Comments, Joint V.S. of Meadows, Banks, & Ireland 7.)

The Board will accept the inventory put forward by Meadows on behalf of V&S. That inventory is the most recent, and it is extremely close to Heimer's inventory (V&S Comments, Joint V.S. of Meadows, Banks, & Ireland 21-24), which Fauth has already accepted on behalf of Applicants.

[15] Applicants state that neither they nor V&S assign any value to the real estate associated with the Towner Line for a variety of reasons, one of which is that large portions of the Line were constructed on easements through public lands under the General Railroad Right-of-Way Act of 1875, 43 U.S.C. §§ 934-939 (repealed in part, Pub. L. No. 94-579, Title VII § 706(a), 90 Stat. 2793 (1976)). (Application 7.)

Condition of Assets. Fauth, on behalf of Applicants, inspected the entire Towner Line on December 2 and 3, 2014, and again on October 5 and 6, 2015. (Application, V.S. Fauth 18.) According to Fauth, the Line consists of 26.30 miles of 136-pound continuous welded rail (CWR) (or 19.61% of the total track miles) that could be sold as relay rail, and 28.35 miles of 136-pound CWR and other CWR (or 21.14% of the total track miles) that could be sold as reroll rail. (Application, V.S. Fauth 29.) He argues that the remaining 136-pound rail and other CWR is likely not suitable for relay or reroll based on the age and wear of the rail. In particular, Fauth claims that, in mid-2014, V&S started removing pins and tie plates from a large segment of the 136-pound CWR, which he asserts could have resulted in damage to the loose rail. Fauth claims that loose rail is more susceptible to severe temperature swings from the summer to winter months, which can cause repeated steel expansion and contraction.[16] Fauth also suggests that the age of the rail undermines its value. (Application, V.S. Fauth 70.) Accordingly, he claims the remaining 79.45 miles of mostly jointed 115-pound, 112-pound, 85-pound, and 90-pound rail would be suitable only for scrap. (Application, V.S. Fauth 29.)

In its reply, V&S alleges that there are several problems with Fauth's assessment of the condition of the assets. V&S alleges that Fauth did not thoroughly inspect the entirety of the Line. V&S also refutes Fauth's claim that the loose rails, temperature swings, and age would create significant wear on the assets.

The Board accepts V&S's material classification as the best evidence of record. As an initial matter, Fauth inspected the Line by driving Colorado Route 9, a road that follows and parallels the Line. At each of the 84 crossings, he stopped and inspected 200 yards in each direction from the crossing. As V&S notes, however, this crossing inspection would have only allowed him to closely observe 15.5% of the Line. (V&S Comments, Joint V.S. Meadows, Banks, & Ireland 38.)[17] The inspection performed by V&S's expert Meadows in 2016 does not suffer from these flaws. Meadows also performed a more thorough inspection by driving on the Line itself with a hi-rail vehicle. (V&S Comments 28.)

The classifications are further called into question based on some of the problems with Fauth's assumptions and data. Fauth asserts that, when track materials like spikes and tie plates are removed, the remaining rail is undermined by temperature swings. (Application, V.S. Fauth 29.) However, as V&S notes, and the Board agrees, although thermal stresses can affect operations, the normal range of atmospheric temperatures does not alter the nature or quality of the steel. (See V&S Comments, Joint V.S. Meadows, Banks, & Ireland 42-43.)

The Board also rejects Fauth's suggestion that the age of the rail undermines its value, as age alone does not affect the steel's classification. (V&S Comments, Joint V.S. Meadows,

[16] Fauth notes that V&S has removed spikes and rail anchors from both rails for over 20 miles (leaving them in place on approximately every fifth tie) in an area between milepost 821 and milepost 848. (Application, V.S. Fauth 19.) V&S claims that this figure is inflated. (V&S Comments, Joint V.S. Meadows, Banks, & Ireland 43.)

[17] Had Fauth wished to gain greater access to the Line, he could have asked V&S and, had V&S refused, sought permission from the Board.

Banks, & Ireland 41.) Wear on a rail does undermine rail's value, and Fauth claims he measured rail wear at the locations he inspected. He does not, however, provide the results of those measurements or compare them to any rail-use standards, such as the American Railway Engineering and Maintenance-of-Way Association Manual for Railway Engineering.

For these reasons, the Board accepts V&S's expert's evidence regarding the condition of the assets. The expert, Meadows, found that the Line consists of 124.22 miles of relay rail and 10.38 miles of scrap. Meadows also classifies much of the other track materials as relay quality. (V&S Comments, V.S. Meadows at Appendix 2.)

Unit Price. With respect to the Line's CMV, the parties have presented vastly different NLVs, which differ by approximately $14.5 million. These differing values are in large part driven by their different unit prices. In response to the March 3, 2017 decision directing the parties to provide "wholesale prices," the Applicants valued the Line's track assets based on wholesale *offers* quoted by four companies (Harmer Steel, Progress Rail, L.B. Foster, and EVRAZ Rocky Mountain Steel) who, like A&K, buy and sell used railroad assets. (Supp. V.S. Fauth 3.) V&S, on the other hand, started with prices supported by actual executed sales *contracts*, as opposed to offers, but at the *retail*, rather than wholesale, level; V&S then subtracted costs for removal and restoration, transportation, and administration and marketing, as well as a profit margin, to arrive at the prices it relies on. Given this significant difference in the parties' approaches to determining unit prices, the Board believes it would be preferable for the parties to first attempt to mediate an NLV, based on the asset inventory and asset classification set forth by V&S. The Board therefore requests that the parties participate in Board-sponsored mediation, pursuant to 49 C.F.R. part 1109, to resolve the NLV for the Line based on V&S's classification of assets and inventory. The Board "favors the resolution of disputes through the use of mediation and arbitration procedures, in lieu of formal Board proceedings." 49 C.F.R. § 1109.1. Accordingly, the Board directs the parties, by August 15, 2017, to confirm whether they will participate in Board-sponsored mediation.

Environmental Issues

V&S argues that the Board should conduct an environmental review given that any traffic on the inactive Line would result in a 100% increase in traffic and thus exceed the Board's thresholds for environmental review at 49 C.F.R. § 1105.7(e)(5).[18] The 100% threshold, however, is not applicable here. The agency has found that, where there has been no recent traffic on a line, the 100% threshold cannot be sensibly applied.[19] Instead, the threshold for

[18] V&S also questions whether the Director should have accepted the application in the first place without an environmental report. See 49 C.F.R. § 1105.7(a). However, as V&S itself notes, the Director has accepted an application conditionally upon an environmental review, if needed, being prepared later in the application process. See Keokuk Jct. Ry.—Feeder Line Acquis.—Line of Toledo Peoria & W. Between LaHarpe & Hollis, Ill., FD 34335, slip op. at 3 (STB served July 9, 2003). Therefore, the Director acted properly and in accordance with precedent.

[19] See Mo. Cent. R.R.—Acquis. & Operation Exemption—Lines of Union Pac. R.R., FD 33508, slip op. at 7 (STB served Apr. 30, 1998) (finding that where there had been no recent

environmental review is eight trains per day in this case, and the traffic that Applicants project would not exceed that threshold. Therefore, no environmental report or Board environmental analysis is necessary. See 40 C.F.R. §§ 1500.4(p), 1501.4(a)(2), 1508.4; and 49 C.F.R. § 1105.6(c).

It is ordered:

1. The Board finds that Applicants' feeder line application satisfies the PC&N criteria under 49 U.S.C. § 10907 and that Colorado Pacific is financially responsible to purchase the Line.

2. The Board directs the parties, by August 15, 2017, to confirm whether they will participate in Board-sponsored mediation to resolve the NLV of the Line based on V&S's asset inventory and classifications.

3. This decision is effective on its service date.

By the Board, Board Members Begeman, Elliott, and Miller.

traffic on a rail line that would be reactivated, the relevant threshold for environmental review is eight trains per day), aff'd sub nom. Lee's Summit, Mo. v. STB, 231 F.3d 39, 42 (D.C. Cir. 2000).