

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33390

ROARING FORK RAILROAD HOLDING AUTHORITY
—ACQUISITION AND OPERATION EXEMPTION—
SOUTHERN PACIFIC TRANSPORTATION COMPANY

Decided: June 27, 1997

On June 23, 1997, Roaring Fork Railroad Holding Authority (RFRHA) filed a notice of exemption under 49 CFR 1150.31, *et seq.*, to acquire from Southern Pacific Transportation Company and operate approximately 33.44 miles of rail line between milepost 360.22 at Glenwood Springs and milepost 393.66 at Woody Creek, in Garfield, Eagle, and Pitkin Counties, CO.

On June 24, 1997, the Phillips Company (Phillips) filed a petition to vacate or stay the notice of exemption.¹ Phillips contends that RFRHA has neither the ability² nor the intention to operate the line and that the acquisition is in essence an unauthorized abandonment. It asks that the Board take whatever action is appropriate to prevent closing of the line sale, currently scheduled for June 30, 1997. RFRHA filed a timely reply, and Colorado Department of Transportation filed a letter in support of the notice of exemption and in opposition to the stay.

DISCUSSION AND CONCLUSIONS

The stay will be denied because Phillips has not presented justification under the applicable criteria. *See Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).³ Under these criteria, Phillips makes no showing of a likelihood of success on the merits. As pointed out by RFRHA, the IGA authorizes it to comply with all requirements of the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803. RFRHA also notes that it has contracted with a third party for operation of the line in the event of need. RFRHA submits, however, that future need for rail service is likely to be minimal, based on recent traffic.⁴

In a similar vein, RFRHA contends that Phillips has made no showing of irreparable harm. Indeed, it appears that Phillips ships no rail shipments on this line. Indeed, Phillips' posture as a shipper needing service here is totally inconsistent with its persistent efforts to have this line declared abandoned before this Board, a United States District Court in Colorado, the United States Court of Appeals for the Tenth Circuit, and even the Supreme Court.⁵ Conversely, RFRHA contends that

¹ Phillips had earlier (June 18, 1997) filed a protest and request for investigation. The instant pleading incorporates the prior one. In addition to seeking a stay, Phillips' petition constitutes a petition to revoke the exemption and will be treated as such.

² Phillips refers to the Intergovernmental Agreement (IGA) creating RFRHA to support its allegation that RFRHA has no legal capacity to carry out any of the functions necessary to own or operate a rail line.

³ A party seeking a stay must show: (1) that it is likely to prevail on the merits; (2) that it will be irreparably harmed in the absence of a stay; (3) that issuance of a stay will not substantially harm other parties; and (4) that issuance of a stay is in the public interest.

⁴ Assertedly, the only recent shipper on the line is a beer distributor that has required service for only a few cars a year.

⁵ *See The Phillips Company - Petition for Declaratory Order*, Finance Docket No. 32518 (ICC served Apr. 18, 1995, and STB served Feb. 14, 1997); *Phillips Co. v. Southern Pac. Rail Corp.*, 902 F. Supp. 1310 (D. Colo. 1995), *aff'd*, 97 F.3d 1375 (10th Cir. 1996), *cert. denied* June

any delay in closing this transaction could jeopardize funding and, in turn, the preservation of the line through either contracted operation or, if there is no service demand, rail banking. The evidence in this regard is undisputed. Thus, both the balance of harms and the public interest support denial of a stay. Accordingly, the request for stay will be denied.

The petition to revoke will also be denied. Phillips has not shown under 49 U.S.C. 10502(d) that application of a provision of Part A of Subtitle IV of Title 49 of the United States Code is necessary to carry out the transportation policy in 49 U.S.C. 10101. Phillips contends that cases of this type are not susceptible to handling under the class exemption, citing *Southern Pacific Transp. Co.—Abandonment*, 8 I.C.C.2d 495 (1992) and *Southern Pac. Transp. Co.—Aban.—L.A. County, CA*, 9 I.C.C.2d 385 (1993). Those cases, however, involve the question of whether any authority was necessary for those transactions under section 10901, not the question of whether or not the class exemption from the formal requirements of section 10901 could be used. Here, RFRHA is acquiring and undertaking to operate, or contract to operate, a line of railroad and, in so doing, will be bound by the common carrier obligation. The transaction falls squarely under the class exemption at 49 CFR 1150.31.

It is ordered:

1. The petition for stay is denied.
2. The petition to revoke is denied.
3. This decision is effective on June 27, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary