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SERVICE DATE - APRIL 3, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-398 (Sub-No. 5X)

SAN JOAQUIN VALLEY RAILROAD COMPANY--ABANDONMENT EXEMPTION--  
IN TULARE AND KERN COUNTIES, CA

Decided: March 31, 1998

On February 13, 1998, San Joaquin Valley Railroad Company (SJVR) filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments to abandon a 9-mile line of its railroad between milepost 295.2 near Richgrove and milepost 304.2 near Hollis, in Tulare and Kern Counties, CA.<sup>1</sup> Notice of the exemption was served and published on March 5, 1998 (63 FR 10966). The exemption will be effective on April 4, 1998.

On March 16, 1998, the California Public Utilities Commission (CPUC) filed a petition for stay of the effective date of the exemption.<sup>2</sup> On March 16 and March 17, 1998, respectively, shippers Great Lakes Chemical Corporation (Great Lakes)<sup>3</sup> and J. R. Simplot Company, Minerals & Chemical Group (Simplot),<sup>4</sup> also filed petitions for stay. SJVR replied to the petitions on March 16, 1998.

Simplot is a fertilizer producer that maintains a facility at Jovista, CA, which, the shipper asserts, is served by the line SJVR proposes to abandon. The facility receives approximately 150

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<sup>1</sup> As required by the regulations at 49 CFR 1152.50(b), SJVR has certified that: (1) no local traffic has moved over the line for at least 2 years; (2) any overhead traffic on the line can be rerouted over other lines; (3) no formal complaint . . . regarding cessation of service over the line either is pending . . . or has been decided in favor of complainant within the 2-year period; and (4) specified reporting and notice requirements have been met.

<sup>2</sup> CPUC's petition embraces a verified statement of Donald Edmisten, CPUC's Associate Transportation Operations Supervisor.

<sup>3</sup> Great Lakes' pleading does not contain a certificate of service, but SJVR has replied to the pleading. Great Lakes is advised that all persons filing documents that they want to have treated as pleadings in a proceeding should comply with the Board's regulations at 49 CFR part 1104, including the provisions regarding identification, typographical requirements, copies, and service.

<sup>4</sup> Although Simplot filed its petition with the Board one day after SJVR filed its reply, Simplot served SJVR earlier, and the railroad has replied to Simplot's pleading.

railcars a year. According to this shipper, as many as 300 cars a year have moved into the facility in the past, and the potential exists for additional traffic. Simplot avers that SJVR has proposed to reroute the shipper's traffic through Richgrove. Simplot claims, however, that the rerouting necessitates crossing two bridges situated at mileposts 289 and 281.

Simplot is concerned that SJVR will neglect maintenance of these bridges, with resulting service delays or stoppages. Alternate transportation sources, the shipper avows, are too costly to be feasible.

Simplot requests a stay because SJVR has provided no information as to the expenses, such as maintenance expenses, SJVR incurs in keeping the subject line open. The shipper asserts that SJVR has made no showing that it is absorbing a financial loss from operating the line. Simplot is concerned that the railroad's association with a rail salvage company may have been a motivating factor in the abandonment.

Great Lakes is a specialty chemical producer that maintains a plant in McFarland (Hollis), near the southern end of the subject line. Great Lakes receives an average of 60 railcars of methyl bromide a year at its McFarland facility. Great Lakes is concerned that this abandonment proceeding may be the precursor of other abandonment proceedings that will eliminate service at points south of Hollis, including McFarland. Great Lakes asserts that the only safe way to ship its products is by rail. This shipper questions whether, as SJVR has alleged, no local traffic has moved over the subject line for at least 2 years, because Great Lakes allegedly has seen apparently full railroad cars moving past its plant within that time period.

CPUC asserts that allowing the exemption to go into effect would result in the elimination of service over the mid portion of SJVR's Ducor-to-Famosa, CA line, making service to Simplot dependent on the preservation of the Ducor-to-Richgrove segment, which CPUC contends is "little maintained and problematic." CPUC foresees a chain of events in which SJVR, in concert with an affiliated salvage company, would attempt to justify abandoning service to Simplot. CPUC is concerned that, should Simplot and Great Lakes lose rail service, these shippers' hazardous commodities would have to move on California's busy freeways, at increased cost and risk.

CPUC complains that SJVR's notice contains no financial information. The agency would like to review revenue and expense figures attributable to the entire Ducor-to-Famosa line, including the branch that serves Simplot. CPUC maintains that the Board should stay the effectiveness of the exemption in order to allow further inquiry (apparently through discovery) into the issues CPUC has raised.

In reply, SJVR states that Simplot's Jovista facility is not served by the line to be abandoned but, rather, is situated on a branch that runs west from Richgrove, at milepost 294.9, north of milepost 295.2, where the subject segment begins. The railroad adds that shipments consigned to the Jovista facility will not be rerouted but, rather, will continue to move through Richgrove as they always have. Also, SJVR asserts that there is no truth to Simplot's contentions that the condition of

bridges, ties, and track on the line north of Richgrove is cause for concern. The railroad avers that the line is maintained to class 1 standards as prescribed by the Federal Railroad Administration (FRA). The railroad emphasizes that its abandonment will not in any way affect operations to Simplot's Jovista facility.

In response to Great Lakes' concerns regarding future operations, SJVR asserts that the shipper's fears also are unfounded. The railroad indicates that it has no plans to abandon its Hollis-to-Famosa line. The railroad adds that, if it were to seek such an abandonment, shippers would have an opportunity to oppose any abandonment proposal before the Board. Regarding that shipper's belief that loaded rail cars have passed its plant within the last 2 years, SJVR asserts that there is no suggestion that the rail cars carried anything other than overhead traffic.

In reply to CPUC's arguments regarding the condition of its remaining line segments, SJVR again asserts that the lines have been maintained to permit operations at FRA class 1 speeds and adds that CPUC has acknowledged this fact. If and when rail operations are threatened by disrepair of the Richgrove-to-Ducor line, SJVR asserts, interested parties would be able to petition the Board for relief and, pursuant to 49 U.S.C. 11101(a), the Board could order repair of the line so as to assure continued service.

The railroad characterizes as premature CPUC's concerns that the subject exemption might signal the start of a process of eliminating portions of SJVR's Ducor-to-Famosa line. The railroad states that any action to abandon the lines required to adequately serve Simplot at Jovista from the north or Great Lakes at Hollis from the south can be addressed if and when SJVR takes such action.

Regarding CPUC's desire to use discovery in this proceeding, SJVR argues that, under 49 CFR 1114.21(a), discovery does not lie in an exemption proceeding because it is an "informal proceeding" under the Board's rules. Moreover, the railroad asserts, the matters CPUC wants to explore through discovery, such as revenue and expense data and plans for further abandonments, are not relevant to a proceeding under the class exemption for 2-year out-of-service railroad lines.

#### DISCUSSION AND CONCLUSIONS

Under the Board's rules of practice, a party may file a petition to stay in advance of a petition for reconsideration or reopening (49 CFR 1115.3(f)) or pending a request for judicial review (49 CFR 1115.5). Assuming that petitioners intend to file petitions for administrative review, the petitions for stay will be treated as having been filed in advance of such petitions.

The standards governing disposition of a petition for stay are: (1) whether petitioner is likely to prevail on the merits on appeal; (2) whether petitioner will be irreparably harmed in the absence of a stay; (3) whether issuance of a stay would substantially harm other parties; and (4) whether issuance of a stay is in the public interest. Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977); and Virginia Petroleum Jobbers Association v.

FPC, 259 F.2d 921 (D.C. Cir. 1958). The party seeking stay or injunctive relief carries the burden of persuasion on all of the elements required for extraordinary relief such as a stay. Canal Authority of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974).

Petitioners here have failed to demonstrate entitlement to a stay under the governing criteria. Accordingly, their requests for such relief will be denied.

Likelihood of prevailing on the merits. In order to prevail on a petition to reject the notice, petitioners would have to demonstrate that SJVR's notice contains false or misleading information or that the railroad's certification under section 1152.50(b) is somehow inaccurate. Here, although Simplot and Great Lakes have asserted that local traffic has, in fact, moved over the line during the last 2 years, their assertions appear to be without merit. In particular, SJVR has stated in response that it has not used the line to serve Simplot and that any traffic moving over the line is overhead traffic. Petitioners also question whether the line is unprofitable but, as SJVR correctly notes, profitability is not in issue in a 2-year out-of-service exemption. Finally, petitioners' arguments that the subject abandonment is a component of an overall scheme to eliminate service is speculative. Nevertheless, in this regard, SJVR is advised that future proposals for abandonment in the area of the Richgrove-to-Hollis line will be scrutinized with petitioners' arguments in mind, particularly should the cessation of service to a shipper be involved.

Irreparable harm. Petitioners do not show how they would suffer irreparable harm in the absence of a stay. As noted, no shipper is losing service as a result of the abandonment. Contentions that service might be disrupted in the future, and that shippers might have to resort to the more costly and hazardous alternative of motor carrier transportation, are speculative. Furthermore, if rail operations are threatened by disrepair of the Richgrove-to-Ducor line, interested parties can petition the Board for relief at that time, under 49 U.S.C. 11101(a). In short, it does not appear that the impact of the proposed abandonment will be anything other than de minimis. Nevertheless, an abandonment authorization or exemption is not irreversible; a carrier that proceeds with an abandonment assumes the risk that Board action may be reversed on appeal and that service may have to be resumed. Busboom Grain Co., Inc. v. ICC, 830 F.2d 74, 76 (7th Cir. 1987), and Union Pacific RR Co.--Aban.--Fremont & Teton Counties, ID, 6 I.C.C.2d 641, 648 (1990). If the Board's action here ultimately is reversed, then SJVR would have to take whatever steps are necessary to reinstitute service. For these reasons, a stay is not essential to the shippers' opportunity to obtain relief.

Harm to other parties. Issuance of a stay would harm SJVR, as it would continue to incur the opportunity costs it is experiencing by forgoing a more profitable alternative use of assets tied up in a line that has not carried local traffic in more than 2 years. In other words, a stay would prevent SJVR from achieving the savings that abandonment of the line would provide.

Public interest. The public interest does not support a stay. Petitioners' claims as to ulterior motives behind SJVR's seeking abandonment, and their speculation that there might be future service disruptions, simply do not suffice to support the extraordinary relief of a stay. The Board

expects that SJVR will properly maintain its remaining line segments and serve its shippers consistent with its common carrier obligation, as it has committed to do.

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

It is ordered:

1. The requests for stay are denied.
2. This decision is effective on its service date.

By the Board, Linda J. Morgan, Chairman.

Vernon A. Williams  
Secretary