

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-573X

TRINIDAD RAILWAY, INC.—ABANDONMENT EXEMPTION—
IN LAS ANIMAS COUNTY, CO

STB Finance Docket No. 34087¹

TRINIDAD RAILWAY, INC.—LEASE AND OPERATION EXEMPTION—
KERN VALLEY RAILROAD COMPANY

Decided: January 15, 2002

This decision denies a petition to stay the effect of an order of this agency requiring Kern Valley Railroad Company (Kern Valley) to disclose certain information to Rail Ventures, Inc. (Rail Ventures), and requiring Kern Valley to allow the latter access to the subject rail line. A protective order will be issued, however, governing the information that Kern Valley must disclose.

BACKGROUND

On September 1, 2000, Trinidad Railway, Inc. (Trinidad) invoked the class exemption procedures at 49 CFR 1152.50 to abandon a 28-mile segment of rail line in Las Animas County, CO, between milepost 2.0 at Jansen and the end of its line at milepost 30.0. Before that notice went into effect, Rail Ventures timely filed a notice of its intent to invoke the offer of financial assistance (OFA) provisions of 49 U.S.C. 10904 in order to acquire the line for continued rail service. That filing, and subsequent extensions, stayed the effective date of the abandonment exemption covered by the notice.² On December 5, 2000, Rail Ventures timely filed its OFA, offering to buy the line for \$2.5 million.

¹ These proceedings are not consolidated; a single decision is being issued for administrative convenience.

² The Rails to Trails Conservancy (RTC) has requested issuance of a notice of interim trail use (NITU) under the National Trails System Act, 16 U.S.C. 1247(d), in order to negotiate for the acquisition of the right-of-way for rail banking and interim use as a trail. However, because an OFA takes priority over a request for a NITU, RTC's request has been held in abeyance pending the completion of the OFA process.

Meanwhile, on October 31, 2000, after having received notice of Rail Ventures' forthcoming OFA, Trinidad sold its entire 30-mile line (including the 28-mile segment for which it sought abandonment authority in this proceeding) to Kern Valley, which subsequently invoked the class exemption procedures at 49 CFR 1150.31 to obtain authorization for the purchase. Kern Valley Railroad Company—Acquisition and Operation Exemption—Trinidad Railway, Inc., STB Finance Docket No. 33956 (notice served and published Nov. 21, 2000). Kern Valley conceded that it acquired the line segment not to provide rail service, but rather to salvage the rail property once it is abandoned. Kern Valley, however, also acknowledged that the line remained subject to the section 10904 OFA process, to RTC's request for issuance of a NITU, and to other conditions imposed on the abandonment exemption.

In a decision served December 8, 2000, the Director of the Office of Proceedings found that Rail Ventures was a financially responsible entity. The Director also denied a request by Kern Valley to reject the OFA and a request by RTC to dismiss the OFA.

By a decision served August 13, 2001, addressing various challenges to the propriety of Kern Valley's acquisition and of Rail Ventures' OFA, the Board affirmed the Director's decisions approving Kern Valley's purchase and finding Rail Ventures to be financially responsible under section 10904. The Board set September 12, 2001, as the date by which Kern Valley or Rail Ventures could ask the agency to establish the terms and conditions for an OFA purchase of the line, if the parties were unable to agree on a purchase price.³

On August 30, 2001, Rail Ventures, asserting a lack of cooperation by Kern Valley, filed a petition to grant Rail Ventures access to inspect the line and to compel Kern Valley to disclose the purchase price it had paid for the line. Rail Ventures also requested an extension of the due date for a request to establish the terms and conditions for an OFA purchase of the line. In a decision served September 12, 2001 (the Disclosure Order), the Board granted Rail Ventures' requests. On the same day, Kern Valley petitioned for reconsideration of that decision.

In a decision served December 12, 2001, the Board, inter alia, denied Kern Valley's petition for reconsideration of the Disclosure Order and ordered Kern Valley, by January 21, 2002, to: (1) disclose to Rail Ventures the purchase price Kern Valley paid for the line; and (2) grant Rail Ventures access to the line in order to inspect it.

By a petition filed on December 21, 2001, Kern Valley asks the Board to stay its December 12, 2001 order requiring disclosure and access, pending Board action on a further

³ In a decision served on December 12, 2001, in STB Docket No. AB-573X and STB Finance Docket No. 33956, Kern Valley Railroad Company—Acquisition and Operation Exemption—Trinidad Railway, Inc., the Board denied a petition by RTC to reconsider the August 13, 2001 decision.

petition for reconsideration filed by Kern Valley on December 28, 2001.⁴ Rail Ventures replied in opposition.

DISCUSSION AND CONCLUSIONS

The standards governing disposition of a petition for stay are: (1) whether petitioner is likely to prevail on the merits; (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 would be in the public interest. Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977); Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921 (D.C. Cir. 1958). The party seeking a stay carries the burden of persuasion on all of the elements required for stay. Canal Authority of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974). Kern Valley has not made the showing required under these standards.

1. No Irreparable Harm to Kern Valley Absent a Stay. Kern Valley contends that a stay is necessary because the purchase price constitutes commercially sensitive information, release of which, without a protective order, would be harmful to Kern Valley. Accepting at face value Kern Valley's assertion that the purchase price is commercially sensitive information, Rail Ventures will be required to comply with a protective order prohibiting it from revealing the purchase price to others. Thus, any alleged harm will be avoided. Because Kern Valley did not submit a proposed protective order, the form set out in the Appendix to this decision will be imposed.

Accordingly, Kern Valley will be required to provide the purchase price information to Rail Ventures, provided Rail Ventures agrees, by signing the undertaking in the protective order, that it will not reveal the purchase price to any other person or entity, except the Board.⁵ With such protective procedures, Kern Valley has not shown that revealing the purchase price will cause it irreparable injury.

2. Other Considerations. In light of the lack of irreparable injury, the remaining criteria for a stay need not be addressed. It should be noted, however, that, although the OFA process is supposed to move forward expeditiously, this case has been pending for a long time. Accordingly, the release of the purchase price information under the conditions imposed here will expedite the process in the event the OFA moves forward.

⁴ The Board will rule on the petition for reconsideration in a future decision.

⁵ If, in any future submission to the Board, Rail Ventures refers to the purchase price, it should submit the complete document under seal, accompanied by a public (redacted) version of the document.

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

It is ordered:

1. Kern Valley's petition for stay is denied.
2. A protective order is granted, and the Protective Order and Undertaking in the Appendix to this decision are adopted.
3. Any confidential purchase price information submitted to the Board will be kept under seal by the Board and not placed in the public docket or otherwise disclosed to the public, unless the attached Undertaking is executed and the terms of the Protective Order are followed, or unless otherwise ordered by the Board.
4. On or before January 21, 2002, Kern Valley shall afford Rail Ventures access to the rail line and shall provide to Rail Ventures a written document revealing the purchase price.
5. Rail Ventures shall not disclose the revealed purchase price information to any person or entity other than the Board.
6. This decision is effective on its date of service.

By the Board, Linda J. Morgan, Chairman.

Vernon A. Williams
Secretary

APPENDIX

Protective Order

1. For the purposes of this Protective Order, “confidential information” means information regarding the purchase price of the line purchased by Kern Valley from Trinidad that has been the subject of STB Docket No. AB-573X and related proceedings.
2. The confidential information shall be used for the purpose of this and any related Board proceedings, or any judicial review proceeding arising therefrom, and not for any other business, commercial or competitive purpose.
3. The confidential information shall not be disclosed in any way except to officers of Rail Ventures and their counsel and consultants that have signed the attached undertaking, and the information may be used solely in connection with this and any related Board proceedings, or any judicial review proceeding arising therefrom.
4. Any documents containing the confidential information must be destroyed, and notices of such destruction must be served on the Board at the completion of this and any related Board proceedings, or any judicial review proceeding arising therefrom, whichever comes later.
5. If the Board retains the confidential information, it shall, in order to keep it confidential, treat the information in accordance with the procedure set forth at 49 CFR 1104.14.
6. If Rail Ventures intends to use the confidential information at hearings in this proceeding or in any related Board proceedings, or in any judicial review proceeding arising therefrom, it shall submit any documents setting forth or revealing such confidential information to the Board, or the reviewing court as appropriate, under seal, and shall accompany such submission with a written request to the Board or the court to (i) restrict attendance at the hearing during discussion of such confidential information, and (ii) restrict access to the portion of the record or briefs reflecting discussion of such confidential information in accordance with this Protective Order.
7. All parties must comply with all of the provisions stated in this Protective Order unless good cause, as determined by the Board, is shown by any party to warrant suspension of any of the provisions herein.

Undertaking

I, _____, have read the Protective Order governing the filing of confidential information by Kern Valley Railroad Company (Kern Valley) in STB Docket No. AB-573X and understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any data or information obtained under this Undertaking, or to use or permit the use of any techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and preservation of evidence and argument in STB Docket No. AB-573X or any judicial review proceedings taken or filed in connection therewith. I further agree not to disclose any data or information obtained under this Protective Order to any person who is not also bound by the terms of this order and has executed an Undertaking in the form hereof.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking, and that Kern Valley shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Dated:

Name
Position/Affiliation: