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SERVICE DATE – DECEMBER 11, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-491 (Sub-No. 2X)

R.J. CORMAN RAILROAD COMPANY/PENNSYLVANIA LINES, INC.—
ABANDONMENT EXEMPTION—IN CLEARFIELD, JEFFERSON, AND INDIANA
COUNTIES, PA

Decided: December 10, 2008

R.J. Corman Railroad Company/Pennsylvania Lines, Inc. (RJCP), filed a notice of exemption under 49 CFR 1152 Subpart F—Exempt Abandonments to abandon a 7-mile segment of a line of railroad known as the Hillman Branch, extending from milepost 0 near McGees to the end of the line at milepost 7 near Hillman, in Clearfield, Jefferson, and Indiana Counties, PA (the line). Notice of the exemption was served and published in the Federal Register on October 7, 2008 (73 FR 58710-11). In this decision, we are denying requests to reject the notice of exemption and stay the exemption in this proceeding, and affirming a decision by the Director of the Board's Office of Proceedings that tolled the deadline for filing offers of financial assistance (OFA) and thus allowed a previously filed OFA to be amended or supplemented by December 8, 2008.

The exemption was scheduled to become effective on November 6, 2008, unless it was stayed by the Board or a formal expression of intent to file an OFA under 49 U.S.C. 10904 and 49 CFR 1152.27(c)(2) was filed by October 17, 2008. On October 15, 2008, P&N Coal Company, Inc. (P&N or petitioner), filed a formal expression of intent to file an OFA either to subsidize operations over the line or to purchase the line. This filing automatically stayed the effective date of the exemption for 10 days, until November 16, 2008,¹ and extended the due date for an OFA to be filed until November 6, 2008. In the filing, P&N indicated that it served the notice of intent on RJCP, and requested that RJCP provide it with the information set forth in 49 CFR 1152.27(a), including RJCP's estimate of the annual subsidy and minimum purchase price required to keep the line in operation, the physical condition of the line, and traffic, revenue, and other data necessary to determine the amount of annual financial assistance that would be required to continue operations over the line. P&N indicated that this information should include RJCP's estimate of the net liquidation value of the line, supporting data reflecting available real estate appraisals, assessments of the quality and quantity of track materials in a line, and removal cost estimates (including the cost of transporting removed materials to the point of sale or salvage), and an estimate of the costs of rehabilitating the line to Federal Railroad Administration safety requirements. P&N also requested that it be allowed access to documents pursuant to 49 CFR 1152.27(d), and that RJCP provide the records, accounts, appraisals,

¹ See 49 CFR 1152.27(c)(2)(i).

working papers, and other documents used in preparing any exhibits for an abandonment or discontinuance application filed, or other records, reports, and data in the possession of the carrier seeking exemption.²

In the filing, P&N also requested that the Board: (1) reject the notice of exemption and (2) stay the effective date of the exemption.

Request to reject the notice of exemption

P&N contends that RJCP's environmental report contained misleading statements and, therefore, the notice of exemption should be rejected and declared void ab initio. P&N argues that the statement in the report indicating that the proposed abandonment will not have an effect on the transportation of energy resources is misleading because the elimination of the line will prevent P&N from shipping coal by rail, thereby increasing costs. In particular, P&N asserts that the statement in RJCP's report indicating that the coal was sent to PPL Corporation (PPL) or exported is partly misleading, as the coal was also transported and sold to other utilities. P&N also argues that RJCP's contention that PPL's new specifications exclude coal from the mine at Hillman is wrong, and that PPL has advised P&N that scrubbers were in place at PPL that would allow use of the Hillman coal. Finally, P&N argues that there is no foundation for RJCP's statement that the export moves ended when China started buying coal from Australia.

In opposing P&N's request for rejection of the notice of exemption, RJCP states that P&N does not raise any issue with the notice of exemption and specifically that P&N does not dispute the basis for the notice of exemption—that no traffic has moved on the line for over 2 years. As for the issues that P&N raises about the environmental report, RJCP points out that, because no traffic moves on the line, removal of the line from the national transportation system will not have any effect on the current transportation of energy resources.

A notice of exemption is void ab initio if the notice contains false or misleading information. 49 CFR 1152.50(d)(3). In applying this standard, we examine an allegedly false or misleading statement to determine if it is material to the exemption sought. U S Rail Corporation—Lease and Operation Exemption—Shannon G., a New Jersey Limited Liability Company, STB Finance Docket No. 35042 (STB served Oct. 8, 2008).

Here, even assuming that the challenged statements in RJCP's environmental and historic report should be considered part of the notice for purposes of our void ab initio rule, the statements are not material to the exemption and thus would not justify invoking the rule in any

² By petition filed on November 3, 2008, P&N requests, pursuant to 49 CFR 1152.27(c)(2)(ii)(C), that the 30-day time period for filing an OFA be tolled an additional 30 days. The Board granted that request by decision served on November 5, 2008.

event.³ P&N's criticisms of some of RJCP's statements in the environmental report all revolve around P&N's suggestion that, because there could be future traffic, RJCP has misled the Board. But even if we assume that the further information offered by P&N presents a more complete and accurate picture of how coal traffic moved in the period before the undisputed period of disuse and what traffic might conceivably move in the future, RJCP's environmental report statements would not constitute false or misleading information that would warrant our finding the notice of exemption void. The fact remains that P&N has not used the line for almost 3 years. The Board does not require a railroad to continue operating a losing line based on mere hope of economic growth. See SWKR Operating Co.—Abandonment Exemption—in Cochise County, AZ, STB Docket No. AB-441 (Sub-No. 2X), slip op. at 6 (STB served Feb. 14, 1997). That P&N has not disputed the basic eligibility of the line for the class exemption for the abandonment of lines that have not been used for more than 2 years is significant. Thus, even if we were to agree with P&N that the environmental report is incomplete and incorrect, it is not false or misleading in a material manner. Accordingly, P&N's request to reject the notice of exemption will be denied.

Request to stay the effective date of the exemption

P&N also requests that the Board stay the effective date of the exemption to afford P&N the opportunity to consider filing either an OFA to subsidize continued operations for the line or to purchase the line. P&N states that RJCP did not notify P&N of RJCP's intention to abandon the line, and that P&N only became aware of the abandonment by the notice of publication in a local newspaper. P&N indicates that it has been a significant user of the line over the last 10 years, until January 2006, and that it transported 2 million tons of coal during this time. P&N states that it intends to use the line again and expects that 2 million tons of coal may be available for transportation over the line over the next 10 years. P&N indicates that, once the line is abandoned, only transportation by truck would be available, and truck transportation has become cost prohibitive as a result of increasing fuel prices. P&N contends that it would suffer irreparable harm in the absence of a stay in that P&N would not have an opportunity to explore an offer either to purchase the line or to subsidize continued operations for the line. P&N also contends that no one would be harmed by a stay.

RJCP argues that P&N's petition to stay should be rejected. RJCP notes that nothing P&N raises in support of its petition justifies the granting of a stay. RJCP indicates that it has complied with all applicable requirements regarding notice of its intent to abandon the line. RJCP also notes that, as a matter of courtesy, its counsel served a copy of the notice of exemption on counsel for P&N at the time that RJCP filed the notice of exemption with the Board. RJCP asserts that P&N's projection of future traffic is speculative and is insufficient to justify continued operation of a line with no business and its resulting burden on the rail carrier.

³ Because the statements are not material to the exemption, we need not decide whether environmental and historic report should be considered part of the notice for purposes of our void ab initio rule.

The factors to be considered in addressing a petition for stay are: (1) whether there is a strong likelihood that petitioner will prevail on the merits of any challenge to the action sought to be stayed; (2) whether petitioner will suffer irreparable harm in the absence of a stay; (3) whether issuance of stay would substantially harm other parties; and (4) whether issuance of a stay would be in the public interest. Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958). A party seeking a stay carries the burden of persuasion on all of the elements required for such extraordinary relief. Canal Auth. of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974).

P&N did not directly address and has not satisfied the criteria for a stay. First, P&N has not shown any likelihood of success on the merits of a claim before the Board. We have rejected, above, P&N's claim that the notice should be rejected because the environmental documentation contains false or misleading information. Further, P&N has not alleged a violation of any substantive statute or regulation, and its defective notice allegation has been adequately rebutted because any notice that was required to be given has been given. Second, P&N has not shown that it will be irreparably harmed in the absence of a stay. Any alleged harm attributable to P&N's perceived lack of time to prepare an OFA should be alleviated by the Board's decision of November 5, 2008, which is discussed further below. The harm that petitioner alleges is that, once the line is abandoned, there are no other railroads in the vicinity to provide rail service and that P&N would have to rely on truck transportation. But because P&N has not moved traffic by rail in nearly 3 years, its irreparable harm claim is speculative, at best. Finally, P&N has not shown that a stay is warranted under the other two stay criteria. Accordingly, P&N's request for a stay of the effective date of the exemption will be denied.

As indicated previously, the filing of P&N's notice of intent by operation of law stayed the effective date of the exemption until November 16, 2008. On November 3, 2008, P&N requested, pursuant to 49 CFR 1152.27(c)(2)(ii)(C), that the 30-day time period for filing an OFA be tolled an additional 30 days. P&N subsequently filed an OFA on November 5, 2008, but, in that filing, it indicated a desire for an opportunity to supplement or amend its OFA. By decision of the Director of the Office of Proceedings served on November 5, 2008, the Board further tolled the due date so that P&N would have that opportunity until December 8, 2008, to supplement or amend the OFA, and postponed the effective date of the exemption until December 18, 2008.

After the tolling decision was issued, the Board received, the same day, a reply from RJCP urging rejection of P&N's petition to toll because it should have been filed by October 31, instead of November 3. RJCP is correct but, under the circumstances of this proceeding and because P&N filed its OFA on November 5 before it knew whether its tolling request would be granted, we conclude that the Director's decision allowing P&N to supplement or amend its OFA by December 8 was appropriate. P&N did not use all of the additional time allotted but filed its amended OFA on December 2, 2008. In a decision in this proceeding served on December 4, 2008, P&N was found to be financially responsible and, based on P&N's amended

OFA, the effective date of the exemption in this proceeding was further postponed to allow time for completion of the OFA process.

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

It is ordered:

1. The request to reject the notice of exemption is denied.
2. The request for stay is denied.
3. This decision is effective on its date of service.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan
Acting Secretary