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SERVICE DATE - MARCH 6, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-397 (Sub-No. 5X)

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

Decided: February 24, 1998

In a decision in this proceeding served February 21, 1997 (February 21 decision), Tulare Valley Railroad Company (TVR) was granted an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon its 18.5-mile line segment between milepost 47.2, near Lindsay, and milepost 66.0, near Ultra, in Tulare County, CA, but its request to abandon the 5.9-mile segment between milepost 71+2969.2 (SP milepost 287.1), near Ducor, and milepost 66.0, near Ultra, that is required to serve Cannella Chemical Company (Cannella), in Tulare County, was denied.¹ The Board also granted TVR's request to discontinue trackage rights over 25.7 miles of railroad owned by the San Joaquin Valley Railroad Co. (SJVR). On March 18, 1997, TVR filed a petition for reconsideration of the February 21 decision. On April 2, 1997, the Public Utilities Commission of the State of California (CPUC) filed a reply. The petition will be denied.

February 21 Decision. In denying the abandonment for the Ducor-Ultra segment, the February 21 decision found that the evidence did not support the conclusion that the section 10502 exemption requirements had been met.² The February 21 decision cited Boston and Maine Corporation--Abandonment Exemption--In Hartford and New Haven Counties, CT, STB Docket No. AB-32 (Sub-No. 75X) et al., (STB served Dec. 31, 1996) (Boston and Maine) for the proposition that the exemption process "is used only when the information provided is sufficient for us to reach an informed decision." February 21 decision at 7. We noted that the typical abandonment exemption

¹ Notice of the exemption that was granted was published in the Federal Register on February 21, 1997, at 62 FR 8077.

² Under 49 U.S.C. 10903, a rail line may not be abandoned and service may not be discontinued without our prior approval. Under 49 U.S.C. 10502, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

involves situations where shippers do not object to the abandonment, or, if there is opposition, “revenue from their traffic is clearly marginal compared to the cost of operating the line.” Id.

In denying the petition to abandon the Ducor-Ultra line, the Board found that “TVR has failed to present credible evidence that this line segment cannot be operated profitably.” Id. at 8. We rejected TVR’s carload per mile standard as indicia of the line’s unprofitability. We stated that carloads per mile were not “a substitute for legitimate methods of determining profitability. More importantly, we will not use it as a substitute for evidence, which is what is lacking here.” Id. Based on the record as developed, we noted the line was potentially profitable. Id., n.22. We added, however, that TVR had presented no evidence concerning “its non-surcharge revenues, operating expenses, or indirect costs. Ultimately, we do not have enough evidence to make a reasonable determination as to the line segment’s profitability.” Id. at 8.

Based on these factors and doubts as to transportation alternatives and evidence of shipper investment in its facilities, we found:

that use of the exemption process is not appropriate in these circumstances and that the petition for exemption should be denied for the Ultra to Ducor segment. If TVR desires to pursue this aspect of the abandonment proposal, it must file a formal application under 49 U.S.C. 10903. See Boston and Maine, slip op. at 5-6.

Id. at 9.

Petition for Reconsideration. TVR seeks reconsideration only of the requirement that it file an abandonment application to abandon the Ducor-Ultra line. TVR argues that the brevity of the exemption process sometimes means that there is insufficient time to supplement the record.³ Accordingly, we found that in Boston and Maine, at 5-6, “that in many cases, there will not be sufficient time for us to provide parties an opportunity to supply further evidence and still meet the statutory time limitations.” Under these conditions, TVR cites Boston and Maine, at 6, for the proposition that

where there is an inadequate record on which to grant the petition for exemption, the petition will be denied outright. The petitioner may refile the petition for exemption if it can cure the noted problems. In the alternative, it may file a formal application for abandonment in the first instance.

³ Under the ICCTA, the Board has determined that abandonment applications and petitions will be decided in 110 days. See Boston and Maine and Abandonment and Discontinuance fo Rail Lines and Rail Transportation Under 49 U.S.C. 10903, STB Ex Parte No. 537 (STB served Dec. 24, 1996).

TVR argues that, while there was an inadequate record in the February 21 decision to grant the petition, this did not mean that opponents had made a sufficient contrary showing. Instead, TVR claims that we found in the February 21 decision that the time limitations did not permit supplementation of the record.

TVR asks that, consistent with Boston and Maine, it be allowed to refile its petition for exemption to cure problems in the petition. It argues that time and expense militate against requiring the filing of an application. Secondly, TVR argues that, in view of Boston and Maine, the Board should not treat similarly situated parties differently. Finally, TVR argues that it should not be permanently barred from using two of the three abandonment procedures--the petition for exemption and the notice of exemption.

DISCUSSION AND CONCLUSIONS

The exemption process is designed to minimize regulatory burdens; and as, noted, in exemptions from 49 U.S.C. 10903, this process is primarily used for lines where the shippers do not contest the abandonment or where revenue from the line is minimal or marginal when compared to the cost of operating the line. In this proceeding, there has been shipper opposition and, more significantly, serious questions have been raised about revenues and costs and about whether the line is profitable. Thus, the exemption process is inadequate for us to reach an informed decision on whether this line of railroad may be abandoned. Under these circumstances, we will require the filing of an abandonment application, because any future decision concerning the abandonment of this line must rest on solid financial data, readily available for review by affected parties.

Our formal abandonment regulations are designed to obtain reliable financial data, which are essential for us to analyze TVR's complicated operating arrangements.⁴ These procedures elicit what revenues may be expected to accrue to the carrier from the line's operation, what the line's traffic potential is, and the public need for service. The formal abandonment regulations require an applicant to include work papers and supporting documents for its application. 49 CFR 1152.22. They require that revenue and cost data be calculated in a prescribed manner and be fully supported and documented. 49 CFR 1152.22(d). By contrast, our exemption procedures are general in scope, and do not require the filing of the specific information submitted with an abandonment application. See 49 CFR 1152 Subpart G and 49 CFR Part 1121.

TVR argues that we should follow the Boston and Maine decision, where we allowed the petitioning railroad to refile a petition for exemption, while here, we have directed TVR to file a

⁴ TVR provides service under an agency agreement with SJVR, which is a Class III carrier that owns and operates the line that connects to TVR's system at Ducor.

formal abandonment application.⁵ TVR contends that, in Boston and Maine, at 6, we stated that a second petition for exemption may be filed “if [the petitioning carrier] can cure the noted problems.” TVR asks that it be given the opportunity to refile a petition for exemption to cure the problems found in its original petition.

Boston and Maine, to the extent it permits the filing of a petition for exemption, is not controlling here. First, TVR does not state how in a petition it would cure the problems we found in its original petition. Second, Boston and Maine and this case differ in the evidentiary problems that must be corrected. In Boston and Maine, the petitioner had already presented information on revenues, costs, and return on value for its embargoed line. The Board found that it needed evidence of the cost of restoring the line to service and the forecast year projection based on increased traffic projected by protestants. We there found that this evidence could be submitted in an application or a petition. Here, the evidence that TVR must submit is best presented in an application: non-surcharge revenues, operating expenses, and indirect costs.⁶

TVR cites the time and expense burdens the parties and the Board would face if it is forced to file a formal application. We do not find that these perceived burdens on TVR outweigh our responsibility to gather accurate revenue and cost information and to reach a fair decision if TVR again proposes to abandon this line segment. Moreover, the filing of a petition might be even more burdensome for all concerned, since TVR has not demonstrated how a petition would present sufficient information for us to make an informed decision. Our February 21 decision sought “credible evidence” in order to reach “a reasonable determination of the line segment’s profitability.” The abandonment application process is the best vehicle to achieve this here.

TVR argues that it is unfair to bar it permanently from using either a petition for exemption under 49 U.S. C. 10502 or the Board’s class exemption at 49 CFR 1152 Subpart F--Exempt Abandonments and Discontinuances for lines that have been out of service for 2 or more years.

⁵ TVR suggests that we denied the petition for exemption for the Cannella segment because of time constraints, citing to our reference to Boston and Maine. This is not correct. Our prior decision was based on the evidence of record and does not discuss time constraints regarding the processing of TVR’s petition for exemption.

⁶ We find that a more appropriate precedent for our actions here is found in CSX Transportation, Inc.- Abandonment Exemption - In Grant, Delaware, Henry, Randolph, and Wayne Counties, IN, Docket No. AB-55 (Sub-No. 282X) (ICC served Oct. 16, 1989). There, the ICC denied the petition for exemption and required the carrier to file an abandonment application. In making this determination, the ICC noted that “[b]ecause CSXT did not file a formal abandonment application, it was not required to comply with the revenue/cost requirements set forth at Subpart D of 49 CFR 1152. Protestants have raised important, legitimate questions about the profitability and overall financial condition of CSXT’s Marion-Richmond service.” Decision at 6.

TVR states that our prior decision places no time limitation on our decision to require it to file a formal application. While TVR is correct that we have placed no time limitation on this requirement, our rules of practice allow TVR to file a petition to reopen this proceeding at any time for, inter alia, “substantially changed circumstances.” 49 CFR 1115.4. If, for example, Cannella no longer needed service and stopped shipping, TVR could seek reopening, and we could remove the application requirement upon a proper showing under section 1115.4. Until the circumstances surrounding the use of this line of railroad change substantially, however, we will require TVR to file a formal abandonment application under 49 CFR part 1152, if it desires to pursue the abandonment of this line and to discontinue service to Cannella. Accordingly, TVR’s petition for reconsideration will be denied.

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

It is ordered:

1. The petition is denied.
2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary