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SERVICE DATE – JANUARY 15, 2016
SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 603 (Sub-No. 4X)

V AND S RAILWAY, LLC—DISCONTINUANCE EXEMPTION—IN PUEBLO,
CROWLEY, KIOWA, AND OTERO COUNTIES, COLO.

Decided: January 14, 2016

This decision rejects an amended verified notice of exemption (Amended Notice) filed by V and S Railway, LLC (V&S) on November 30, 2015. In the Amended Notice, V&S invoked the streamlined class exemption procedure at 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments and Discontinuances of Service to discontinue service over a line of railroad extending between milepost 747.5 near Towner and milepost 869.4 near NA Junction, a distance of 121.9 miles in Pueblo, Crowley, Kiowa, and Otero Counties, Colo. (Towner Line). V&S had previously sought to abandon the Towner Line through a notice of exemption served and published in the Federal Register on August 21, 2015 (Original Notice). For the reasons discussed below, this proposed discontinuance transaction raises significant unresolved issues and questions that require detailed scrutiny, and it is not suitable for the Board’s notice of exemption process. If V&S wishes to seek discontinuance authority, it may do so either through a petition for exemption under 49 U.S.C. § 10502 or an application under 49 U.S.C. § 10903.

BACKGROUND

The Towner Line has been the subject of two Board proceedings during the past two years. On October 28, 2014, KCVN, LLC (KCVN), the Colorado Wheat Administrative Committee, the Colorado Association of Wheat Growers, and the Colorado Wheat Research Foundation (collectively, the Colorado Interests) filed a complaint in Docket No. NOR 42140, alleging that V&S has violated 49 U.S.C. §§ 11101 and 10903 by removing certain track and related assets from a segment (the Western Segment) of the Towner Line.¹

Concurrently, the Colorado Interests filed a motion seeking: (1) a preliminary injunction barring V&S from “dismantling and removing the tracks and related assets of the line of railroad that is the subject of the Complaint in this proceeding until V&S receives formal abandonment authority from the Board” (the preliminary injunction); and (2) “an order, on an emergency basis before 5:00 EST [sic] on October 31, 2014, enjoining [V&S] from dismantling and removing the

¹ The Western Segment extends between milepost 808.3 near Haswell, Colo., and milepost 868.5, which is approximately 0.9 miles short of the Towner Line’s western terminus at milepost 869.4.

tracks and related assets of the line of railroad that is the subject of the Complaint in this proceeding until the Board reviews and rules on [the Colorado Interests’] request for a Preliminary Injunction” (the emergency relief). In a decision served on October 31, 2014, the Board granted the emergency relief on a temporary basis while it considered whether to grant the motion for preliminary injunction.

In a subsequent decision, the Board granted the preliminary injunction in part and ordered the parties to confer regarding discovery matters and provide a proposed procedural schedule for the complaint proceeding. See Colo. Wheat Admin. Comm. v. V&S Ry., NOR 42140 (STB served May 7, 2015). The Board issued a procedural schedule to govern that proceeding on June 25, 2015.

On July 10, 2015, V&S and KCVN jointly moved to hold the complaint proceeding in abeyance pending V&S’s seeking authority to abandon the Towner Line and the conclusion of any abandonment proceeding and offer of financial assistance (OFA) process for continued rail service under 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27(c)(2), if invoked. The Board granted this request on July 17, 2015.

On August 3, 2015, V&S filed its Original Notice in Docket No. AB 603 (Sub-No. 4X) under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments and Discontinuances of Service to abandon the Towner Line. Notice of the exemption was served and published in the Federal Register on August 21, 2015 (80 Fed. Reg. 50,922). The notice stated that the exemption would become effective on September 20, 2015 unless stayed by the Board or a formal expression of intent to file an OFA was filed by August 31, 2015.

On August 24, 2015, KCVN and its wholly owned subsidiary, Colorado Pacific Railroad, LLC (Colorado Pacific), jointly filed a formal expression of intent to file an OFA for Colorado Pacific to purchase the Towner Line. The notice included a request that V&S provide the information set forth in 49 C.F.R. § 1152.27(a) as well as certain other documentation concerning the Towner Line. These parties requested that the Board toll the 30-day period for submitting OFAs for an additional 30 days to provide them with an adequate opportunity to review and analyze the material to be provided by V&S. By decision served September 17, 2015, the Board tolled the OFA due date and the effective date of the exemption, and, on September 22, 2015, V&S provided a number of documents under seal.

The documents suggested that the Towner Line passes through a county and zip code not listed in the Original Notice. Therefore, by decision served October 19, 2015, the Board directed V&S to address the matter. V&S submitted a letter on October 21, 2015, noting that the Towner Line does pass through the missing county and zip code. As a result, the abandonment proceeding was placed into abeyance so that V&S could supplement the Original Notice to include the missing information.

V&S instead submitted an Amended Notice on November 30, 2015, seeking authority to discontinue service over the Towner Line. V&S claims that, although it had originally decided to seek authority to abandon the Towner Line “it now has been presented with a significant car storage opportunity, so it has determined to seek discontinuance authority instead, and to continue to own and use the tracks for other opportunities.” (Amended Notice 3 n.1.) As for the May 7 injunction the Board imposed in the complaint case, which remains in effect, V&S states it will seek clarification that that order “(1) relates only to the main line, and not to any spurs or other ancillary tracks, and (2) does not prohibit V&S from removing track and other materials in the usual course of maintenance or rehabilitation, provided that track and other materials are replaced with like or better materials.” (Id. at 7 n.6.)

On December 7, KCVN filed a petition to reject the Amended Notice. KCVN argues that the filing is contrary to the Board’s October 19 decision because it does not follow that decision’s directive on how V&S should proceed with the abandonment process. KCVN further argues that the Amended Notice is improper because V&S failed to ask for Board permission to withdraw the Original Notice. KCVN argues that, if the Board considers V&S’s filing as seeking permission to withdraw its abandonment notice, the request should be denied. According to KCVN, such a request would be contrary to the public interest because it would permit V&S to ignore its promise to seek authority to abandon the Towner Line and thereby potentially allow the line to be acquired for continued rail service through the OFA process. KCVN asks that the Board reject the Amended Notice and order V&S to supplement the Original Notice as set forth in the agency’s October 19 order so that the abandonment and OFA process can resume.

On December 17, 2015, V&S filed a reply opposing the relief sought by KCVN. V&S asserts that railroads cannot be compelled to abandon lines and that it would seek to withdraw the Original Notice if forced to supplement that notice. V&S further questions whether KCVN and its subsidiary could and would acquire the Towner Line through the OFA process. It also suggests that those interested in using the Towner Line would be in a better position if the Towner Line were discontinued, as opposed to abandoned, because under discontinuance authority the line would remain available for reactivation if or when there is a sufficient demand for service. On December 21, 2015, the Kiowa County Board of Commissioners submitted a filing supporting both KCVN and rail service on the Towner Line. The Crowley County Board of Commissioners submitted a similar filing on January 4, 2016, and V&S filed additional information concerning its Amended Notice on the same date.

DISCUSSION AND CONCLUSIONS

In general, the notice of exemption process is an expedited means of obtaining Board authorization in certain classes of transactions that ordinarily do not require greater regulatory scrutiny, as defined in the Board’s regulations.² Notices that raise significant unresolved issues

² See Exemption of Out of Serv. Rail Lines, 366 I.C.C. 885, 889 (1983) (two year out-of-service class exemption for abandonments is “intended to provide a simple, expedited

or questions that require detailed scrutiny may be rejected.³ Given the history of the Towner Line, and the implications a discontinuance would have for the pending complaint case involving the Western Segment (Docket No. NOR 42140), the streamlined notice of exemption process is inappropriate for the discontinuance authority sought here. In particular, the issues raised in the complaint proceeding regarding the removal of track on the Western Segment would need to be resolved if V&S sought discontinuance authority rather than abandonment authority, and the resolution of those issues would affect not just the Western Segment, but the entire Towner Line.

Under these circumstances, if V&S chooses not to seek abandonment authority by supplementing its Original Notice and instead seeks discontinuance authority, V&S must file a petition for exemption or an application. Either of these processes would allow the more comprehensive review that is needed here, including consideration of the arguments raised in KCVN's petition to reject and whether V&S should be permitted to discontinue service. Any petition or application, however, should not include the Western Segment, given that the Board has already permitted V&S to discontinue service over that portion of the Towner Line.⁴ If V&S wishes to continue to pursue abandonment authority, it may do so by supplementing its Original Notice as described in Ordering Paragraph 2(a) of the Board's decision served October 19, 2015.

It is ordered:

1. V&S's Amended Notice is rejected.
2. This decision is effective on its date of service.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

procedure" for routine cases); Exemption of Out of Serv. Lines (Discontinuance of Serv. & Trackage Rights), 1 I.C.C.2d 55 (1984) (expanding class exemption to include discontinuances).

³ See ABC & D Recycling, Inc.—Lease & Operation Exemption—a Line of R.R. in Ware, Mass., FD 35397, slip op. at 4 (STB served Jan. 20, 2011); FPN USA, Inc.—Operation Exemption—Tijuana-Tecate Shortline, FD 35155 (STB served Aug. 8, 2008); Pro-Go Corp.—Operation Exemption—in Suffolk Cty., N.Y., FD 35120 (STB served Mar. 13, 2008).

⁴ See V&S Ry.—Discontinuance of Serv. Exemption—in Pueblo, Crowley, & Kiowa Cty., Colo., AB 603 (Sub-No. 2X) (STB served June 28, 2012).