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December 8, 2015

By E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: Docket No. AB 603 (Sub-No.4X), *V AND S Railway, LLC - Abandonment Exemption - in Pueblo, Crowley, Otero and Kiowa Counties*

Dear Ms. Brown:

Accompanying this letter for filing in the referenced docket is a Petition to Reject Amended Verified Notice of Exemption, Or in the alternative, to Deny Request to Withdraw submitted on behalf of KCVN, LLC. Please note that this Petition requests Expedited Consideration.

Do not hesitate to contact the undersigned with any questions or if you need additional information.

Sincerely,

A handwritten signature in blue ink that reads 'Thomas W. Wilcox'.

Thomas W. Wilcox
Attorney for KCVN, LLC

cc: Eric Hocky, Esq.
William S. Osborn, Esq.

EXPEDITED CONSIDERATION REQUESTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**V AND S RAILWAY, LLC
-- ABANDONMENT EXEMPTION --
IN PUEBLO, CROWLEY, OTERO, AND KIOWA COUNTIES, COLORADO**

**PETITION TO REJECT
AMENDED VERIFIED NOTICE OF EXEMPTION,
OR IN THE ALTERNATIVE, TO DENY REQUEST TO WITHDRAW**

KCVN, LLC ("KCVN") hereby petitions the Surface Transportation Board to reject the "Amended Verified Notice of Exemption" ("Amended Notice") filed by the V AND S Railway, LLC ("V&S") in this docket on November 30, 2015. For the reasons set forth below, the filing is not in compliance with the Decision and Order served by the Director of the Office of Proceedings on October 19, 2015 ("Order"), and it is otherwise contrary to applicable law and policy regarding abandonment of rail lines and the preservation of common carrier lines of rail for interstate freight rail transportation. The Board should therefore reject V&S's attempt to defy the express terms of the Order and fundamentally change its original notice of abandonment exemption to now seek discontinuance authority so that V&S can use the Towner Line as a private rail car storage track, and thereby prevent parties such as KCVN, and/or its wholly-owned subsidiary, the Colorado and Pacific Railroad, LLC ("CPRR") from potentially acquiring the Towner Line through the Board's offer of financial assistance ("OFA") process and restoring interstate freight rail operations over it.

In the alternative, should the Board construe V&S's filing as a request to withdraw its abandonment application, the request should be denied. In either case, V&S should be directed, on an expedited basis, to comply with the Order by filing a supplement to its original notice of exemption to abandon the entire Towner Line so that the abandonment process can resume, including the process for submitting OFAs to potentially purchase the Towner Line and facilitate the reinstatement of freight service over it.

I. Factual Background

On August 3, 2015, V&S filed a verified notice of exemption to abandon its line of rail extending between milepost 747.5 near Towner, Colorado and mile post 869.4 near NA Junction, Colorado. This 121.9 mile long line is known historically as the Towner Line. As the Board knows from this proceeding, prior filings in sub-dockets of Docket AB-603, and from Docket NOR 42140, *Colorado Wheat Administrative Committee, Colorado Association of Wheat Growers, Colorado Wheat Research Foundation, and KCVN, LLC* ("Docket NOR 42140"), V&S's ownership and treatment of the Towner Line since purchasing it in 2005 has been questionable and controversial, to the point that on October 31, 2014, the Board took the extraordinary measure of enjoining V&S from removing and selling a significant portion of the track assets of the Towner Line. *See* Decision served in Docket NOR 42140 on October 31, 2014. V&S stopped providing any common carrier freight service over the Towner Line several years ago, and KCVN and other parties have established (confirmed by V&S's own actions) that V&S has no intention of making the investments and taking the other necessary steps to restore freight service over the line for rail shippers, which KCVN and CPRR have formally stated they are willing to pursue.

The V&S's decision to abandon the Towner Line, after first announcing its intention to do so in 2011, was in part the result of a litigation settlement agreement reached between V&S,

KCVN, and the other Colorado parties in Docket NOR 42140 in Colorado federal district court. That settlement was reached after V&S announced in its Answer filed in Docket NOR 42140 on May 28, 2015 that it would finally seek abandonment authority so that KCVN or other parties could potentially acquire the Towner Line via an OFA.¹ As part of the litigation settlement, the parties in Docket NOR 42140 also agreed to ask the Board to stay further action in Docket NOR 42140, which the Board did on July 10, 2015.

The Board published V&S's notice of exemption to abandon the Towner Line on August 21, 2015, with an effective date of September 20, 2015 pending the receipt of a formal expression of intent to file an OFA. KCVN and CPRR jointly filed such a formal expression of intent on August 24, 2015, and were prepared to file an OFA on October 20, 2015, the due date established by the Board. On or before October 19, 2015, however, the Board discovered a minor error in V&S's notice, namely the omission of a county and related zip code through which a small piece of the Towner Line travelled, a mistake which V&S acknowledged.

The October 19 Order clearly and explicitly instructed V&S to simply supplement its abandonment notice of August 3 and the accompanying environmental and historical report ("EHR") with the missing information and any other missing information required by the Board's rules. Order at 2. The Order also clearly stated that once the abandonment notice was properly supplemented, the Board would publish a corrected notice in the Federal Register and "will set new deadlines for the abandonment proceeding based on the filing date of the supplement, including a new effective date for the exemption." *Id.* The Board stayed any further action in this docket until V&S filed its supplement, and so KCVN and CPRR have not yet filed their OFA to purchase the entire Towner Line, which they remain prepared to do when so instructed by the Board.

¹ See Docket NOR 42140, Answer of V and S Railway, filed May 28, 2015 at 14-15.

On November 30, 2015, a full 42 days after the issuance of the Order, V&S did not file a supplement to its abandonment notice, but rather the Amended Notice, which purportedly “converted” its notice of abandonment exemption into a notice of discontinuance exemption. The only reason given for this change was that after the discovery of its mistake by the Board, V&S has “been presented with a significant car storage opportunity” Amended Notice at 3, Note 1.

II. Argument

A. The Amended Notice does Not Comply with the Order

The Amended Notice should be rejected² because it obviously and intentionally defies the October 19 Order. Specifically, the Order explicitly required V&S to simply supplement its abandonment notice of exemption and the EHR to correct the apparent minor error of omitting Otero County and its zip code. Order at 2. V&S admits that it concluded the omission of Otero County was *di minimis*, and states that V&S does not believe it “would have required any changes in EHR other than a notation that the Line also passed through Otero County and the related zip code.” Amended Notice at 6.³ However, rather than simply file the ordered supplement to its notice of abandonment exemption and EHR in an expeditious manner so this abandonment proceeding could quickly resume, V&S waited six weeks⁴ and then filed the

² Rejection of the Amended Notice would be the second verified notice submitted by V&S involving the Towner Line to be rejected by the Board due to V&S’s questionable use of the rules governing notices of exemption. Docket No. AB 603 (Sub-No. 3X) *V AND S Railway, LLC – Abandonment Exemption – in Kiowa County, Colo.*, (served June 17, 2014)(decision by the Director of the Office of Proceedings affirmed by the full Board on October 23, 2014).

³ The omission also had zero effect on the valuations of the Towner Line prepared by V&S and by KCVN/CPRR, since the tracks and other assets located in Otero County were included in the calculation of Net Liquidation Value.

⁴ It should be apparent to the Board from the extraordinary length of time V&S took to make its amended filing that instead of diligently attempting to comply with the Order and fix a very minor error, V&S spent the time strategizing how to try to circumvent the Order, as well as apparently strategizing on how to try to limit the scope of the Board’s injunction in Docket NOR

Amended Notice, which fundamentally changes this proceeding, including the application of the Board's rules governing OFAs. V&S also decided to not supplement the EHR as directed by the Order. *Id.* at 3. Apart from the legal reasons for rejecting the Amended Notice, or refusing V&S's request to withdraw its abandonment application (if its Amended Notice is construed as such), which are discussed below, it should be rejected because it plainly is contrary to the explicit instructions set out in the Order, and the Order's obvious intent, which was for V&S to merely correct a minor mistake in the abandonment notice.

B. The Amended Notice is Contrary to Law and the Public Interest

V&S's Amended Notice should also be rejected because it has no legal basis. V&S cites as the only authority for its Amended Notice and attempt to "convert" its abandonment notice into a discontinuance notice two decisions in which railroads were granted permission to withdraw their abandonment applications after receiving authority to abandon but prior to exercising that authority. Notably, V&S cites no authority that the Board must grant such permission, but only asserts that the Board "normally grants a carrier's motion to withdraw its request for abandonment authority." Amended Notice at 1. In KCVN's view, the circumstances surrounding V&S's ownership and stewardship of the Towner Line are far from "normal." In any event, the cited decisions have zero application to this matter for at least two other obvious reasons. In the first place, unlike the railroads in the decisions it cites, V&S has not asked the Board for permission to withdraw its request for abandonment authority. Rather, its filing would unilaterally "convert" its request for abandonment authority into a request for the lesser discontinuance authority, and have the converted petition processed under the rules

42140 to further facilitate its newly found "car storage opportunity." Amended Notice at 7, note 6.

governing exemption petitions. No permission to do this is being sought by V&S, and it cites no authority supporting this unilateral action.

The Amended Notice should therefore be rejected for that additional reason alone. But, even if it is instead construed by the Board to be a request to withdraw V&S's abandonment application, the second obvious distinction between the Amended Notice and the two cases it cites is that in those cases the railroad sought to withdraw its abandonment application because it expressly stated an intention to continue to honor its common carrier obligations and continue common carrier service over the lines at issue. Here, V&S's purported "conversion" is for the opposite purpose of releasing V&S from the common carrier obligation to provide service so V&S can use the Towner Line as a private car storage track. Specifically, in STB Docket AB-996X, *Reading Blue Mountain and Northern Railroad Co. – Abandonment Exemption – In Schuylkill, Pa.* (served February 5, 2008), on which V&S principally relies, the railroad submitted an unopposed request to withdraw its notice of abandonment exemption, informing the Board that it "has determined to continue to provide service over the line that was subject to abandonment." In the other case cited by V&S, STB Docket No. AB-842X, *Almono LP – Abandonment Exemption – In Allegheny County, PA.* (served January 28, 2004), the railroad also formally stated "its intention to continue to honor its common carrier obligations," and that it would "continue to provide common carrier service over the line if authority to withdraw its abandonment petition for exemption is granted." *Id.* at 1. Given these assurances, the STB granted the request for withdrawal.

The facts of these decisions and the railroads' intentions in seeking withdrawal are the polar opposite of what V&S has stated its intentions are, *i.e.*, to be relieved of its common carrier obligation so it can use the Towner Line as its own private car storage track and for unspecified "other opportunities" that by definition would not include common carrier freight

operations. Moreover, V&S's action would prevent parties from potentially acquiring the Towner Line through the OFA process and restoring common carrier service over the line. Accordingly, the authority cited by V&S for its Amended Notice in no way supports it. It is also well established by V&S's own filings in the various proceedings before the Board involving the Towner Line that V&S has no intention of actively trying to fulfill its common carrier obligations over the line, and indeed, but for its recently found "car storage opportunity," and the injunction imposed by the Board, V&S would prefer to salvage and sell the entire line's track assets. Accordingly, any statement by V&S in response to this Petition that it either intends to resume common carrier freight service over the Towner Line or that it stands ready to provide such service if only any shipper would ask for it should ring hollow with the Board and be dismissed out of hand.

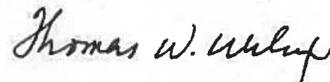
The Board has discretion to deny a request to withdraw an abandonment application if such denial is in the public interest. STB Docket No. AB-83, *Maine Central RR Co. – Abandonment Exemption – in Androscoggin Co., ME*, (served September 15, 2000) at 3-5. In that case, the Board ultimately denied a party's opposition to a request for withdrawal, but did so primarily because denying the request would not have provided the relief sought by the party opposing withdrawal, which was to exercise certain rights after the abandonment was consummated. *Id.* at 5. In this case, rejecting V&S's Amended Notice and requiring it to comply with the Order by filing a supplement to its abandonment notice would restart the OFA process that was halted as a result of the STB's discovery of V&S's error. KCVN submits that denying V&S' attempt to renege on its promises to abandon the Towner Line under all of the circumstances surrounding the Towner Line would clearly be in the public interest because it provides the opportunity for the Towner Line to be restored and used again for interstate freight rail operations through the OFA process. *See* Docket No. AB-167 (Sub- No. 493N) *Conrail*

Abandonment of a Portion of the West 30th Street Secondary Track in New York, NY (decided January 29, 1988), 1988 WL 225779, at 3-4 (in exercising its discretion considering whether to grant a request to withdraw an abandonment application, the Board gave “substantial weight” to considerations of the broader public interest as a whole over private interests). Conversely, KCVN submits that the broader public interest as a whole is not served by permitting V&S to “convert” its notice of exemption for abandonment into a notice of exemption for discontinuance authority so that V&S may use the Towner Line as a private car storage track.⁵

III. Conclusion

For all the reasons stated in this Petition, the Amended Notice filed by V&S on November 30 should be summarily rejected, and V&S should be ordered, on an expedited basis, to file a supplement to its August 3 notice of abandonment exemption that complies in all respects with the October 19 Order.

Respectfully submitted,



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Attorneys for KCVN, LLC

December 8, 2015

⁵ KCVN further notes that V&S will not be harmed by rejection of its Amended Notice, since it will continue to receive revenues from its “car storage opportunity” during the pendency of the ensuing OFA proceedings up until the line is acquired by CPRR or another offeror.

CERTIFICATE OF SERVICE

I do hereby certify that on this 8th day of December, 2015, I have served a copy of the foregoing Petition to Reject Amended Verified Notice of Exemption or in the Alternative, to Deny Request to Withdraw by email to:

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Thomas W. Wilcox

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