

STB DOCKET NO. AB-573X¹

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

Decided December 11, 2001

The Board denies a request to permit withdrawal of a notice of exemption to abandon a line, and rejects a notice of exemption to lease and operate the line, where the effect would be to abrogate an ongoing offer of financial assistance process.

BY THE BOARD:

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, Inc. (Rail Ventures) timely filed a notice of its intent to invoke the 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.

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 Railroad Company (Kern Valley), which subsequently invoked the class exemption procedures at 49 CFR 1150.31 to obtain authorization for the

¹ This decision embraces STB Finance Docket No. 34087, *Trinidad Railway, Inc. — Lease and Operation Exemption — Kern Valley Railroad Company*. 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 outcome of the OFA process.

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 did not acquire the line segment to provide rail service but rather to salvage the rail property once it was abandoned. Kern Valley, however, also acknowledged that the line remained subject to the section 10904 process, to RTC's request for issuance of a NITU, and to other conditions imposed on the notice of 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.

In a decision served August 13, 2001, addressing various challenges to the propriety of Kern Valley's acquisition and of Rail Ventures' OFA, we affirmed the Director's decisions approving Kern Valley's purchase and finding Rail Ventures to be financially responsible under section 10904. We set September 12, 2001, as the date by which Kern Valley or Rail Ventures could ask us 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 compel Kern Valley to disclose the purchase price it had paid for the line and to grant Rail Ventures access to inspect the line.⁴ 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*), we granted Rail Ventures' requests. On that same day, Kern Valley petitioned for reconsideration of that decision.

Kern Valley has now indicated that it wants to terminate the abandonment process and lease the line back to Trinidad. On September 4, 2001, in STB Finance Docket No. 34087, Trinidad filed a notice of exemption under 49 CFR

³ In a separate decision served simultaneously this proceeding, *Trinidad Railway, Inc. — Aban. Exem. — Las Animas County, Co.*, 5 S.T.B. 1121 (2001) which embraces STB Finance Docket No. 33956, *Kern Valley Railroad Company — Acquisition and Operation Exemption Trinidad Railway, Inc.*, we deny a petition by RTC to reconsider our August 13, 2001, decision.

⁴ Rail Ventures indicated that, on August 22, 2001, it had requested Kern Valley to disclose: (1) the purchase price it paid for the portion of line between mileposts 2.0 and 15.11, (2) the purchase price it paid for an easement over the portion of line between mileposts 15.11 and 30.0, and (3) the purchase price it paid for the portion of the line between mileposts 0.0 and 2.0, which is not subject to the abandonment exemption. (Rail Ventures had submitted documents showing that, whereas Kern Valley purchased the rail line land and trackage between mileposts 2.0 and 15.11, it purchased only the track materials and an easement for rail purposes over the land between mileposts 15.11 and 30.0.) Rail Ventures stated that, on August 23, 2001, Kern Valley had refused to disclose the requested information.

1150.31 to lease and operate the rail line pursuant to an agreement with Kern Valley.⁵ Rail Ventures filed a request, which Kern Valley opposed, asking us to stay the lease authority. In a decision served September 10, 2001, the effectiveness of Trinidad's notice of exemption to lease and operate was stayed pending further Board action. On September 19, 2001, Rail Ventures filed a petition to reject the notice. RTC joined that petition in a pleading filed September 20, 2001. Kern Valley and Trinidad separately replied to the petition, on October 2 and October 4, 2001, respectively.

DISCUSSION AND CONCLUSIONS

Request to Withdraw Notice of Abandonment Exemption.

In its notice invoking the class exemption for abandonment of out-of-service lines, Trinidad stated that the line had carried no traffic since March 1996. Prior to that time, the only shipper using the line was a coal mine that has since been closed for more than 5 years. Kern Valley and Trinidad now say that revival in the demand for coal mined at points on the line has led them to make arrangements for restoring the line to active service. Kern Valley and Trinidad assert that allowing Kern Valley to withdraw the abandonment request and permitting it to lease the line to Trinidad will facilitate the immediate rail transportation of coal shipments to be tendered by an affiliate of Trinidad that assertedly plans to operate a mine located on the line.

The claims of Kern Valley and Trinidad are simply not credible. Kern Valley — which would have a common carrier obligation were we to grant its request — previously admitted that it bought this line solely to scrap it. Kern Valley's request that we turn back the clock, abort the OFA process, and thwart the only entity that has, to this point, expressed a genuine, unwavering interest in providing service over this line is based on the assertion that it (and Trinidad) have belatedly realized the coal-hauling potential of the line. But that assertion is belied by both Trinidad's and Kern Valley's actions during the prior phases of this proceeding.

Trinidad's assessment of the line's potential is best illustrated by the fact

⁵ Kern Valley notified us by letter filed August 31, 2001, that it would be seeking leave to withdraw the abandonment exemption request Trinidad had filed with respect to the line, so that Kern Valley could instead lease the line to Trinidad. On September 10, 2001, Kern Valley supplemented its August 31 letter by filing a statement supporting its request to withdraw the notice of exemption to abandon the line. On September 17, 2001, Rail Ventures replied in opposition to the withdrawal request. On September 20, 2001, Trinidad filed a statement in support of Kern Valley's request.

that, when it recently sought abandonment authority on the ground that providing continued rail service was an undue burden, Trinidad was so anxious to rid itself of the line that it sold it to Kern Valley before the abandonment process could be completed. And Kern Valley, when it sought to defeat Rail Ventures' OFA through more conventional channels, disparaged as totally unsupported Rail Ventures' claims about the potential for reviving the coal traffic on the line. While it may be convenient for Kern Valley and Trinidad to now embrace the arguments that they so recently rejected,⁶ we will not permit our processes to be misused in what appears to be simply an attempt to thwart the OFA process.

Trinidad now says that the public interest favors its operation of the line over that of Rail Ventures because Trinidad is affiliated with Lorencito, the coal shipper now seeking rail service.⁷ But Trinidad does not say why its corporate affiliation should make a difference, and neither Lorencito nor Trinidad asserts that Rail Ventures would not provide adequate rail service. Rail Ventures has certainly expressed great interest in hauling coal for anyone, and neither Kern Valley nor Trinidad has presented any convincing evidence to show that Rail Ventures will not be successful. Rail Ventures is before us trying to obtain the line in order to perform service. Trinidad came in here to abandon the line, and then sold it to Kern Valley. Trinidad's intentions, at least judged by its actions, are at best ambiguous.

We also find it significant that the parties do not propose for Trinidad to buy back the line. Rather, Trinidad would merely lease the line from Kern Valley, which would retain ownership of the line it has said it wishes to scrap. This leads us to further doubt the parties' true intentions. We recognize that, if we were to permit this arrangement and Trinidad were to later seek to discontinue service again, an abandonment application by Kern Valley would then trigger the OFA provisions of section 10904 yet again. But permitting Kern Valley to subvert the section 10904 OFA process in the meantime, after Rail Ventures has incurred substantial fees and other expenses in pursuit of its OFA, would undermine the statutory goal of continued rail service by creating a substantial disincentive to invoking the OFA process, both in this case and in potential future cases.

⁶ This action, if allowed to stand, would also permit Kern Valley to avoid the effect of an order it has challenged. At the request of Rail Ventures in connection with its OFA, we issued an order directing Kern Valley to reveal the purchase price it paid Trinidad for the line. Kern Valley has sought reconsideration of that order, which we are affirming here. But if Kern Valley were successful in trumping the OFA process, Rail Ventures' request for Kern Valley's purchase price would become moot, and Kern Valley could keep to itself the information that it apparently does not want to reveal.

⁷ The record indicates that Lorencito has a contract to provide coal to the Tennessee Valley Authority. Trinidad acknowledges that Lorencito requires Federal, state, and local permits to undertake mining operations and that those permits have not yet been issued.

Moreover, to permit the lease arrangement to proceed and terminate the section 10904 OFA process now would mean ignoring the rights for which Rail Ventures qualified when it timely filed its OFA and we found it to be financially responsible. Neither Trinidad nor Kern Valley cites any statutory or regulatory provision or any precedent that would require us to do so.⁸ Rather, in seeking our permission for Kern Valley to withdraw the notice of abandonment exemption filed by Trinidad, into whose shoes Kern Valley stepped when it acquired the line, the parties seem to concede that we have discretion as to whether or not to allow that. Here, we see no reason to grant Kern Valley's request to withdraw the abandonment notice, and good reason to deny it. Neither Kern Valley nor Trinidad offers any argument to justify disturbing the section 10904 process, which Rail Ventures has properly invoked. We conclude that continued rail service can be provided as well or better by Rail Ventures without infringing on the OFA process of section 10904.

Kern Valley and Trinidad contend that the proposed withdrawal, coupled with the proposed lease to Trinidad, would serve the purposes of the OFA process, which is to safeguard continued rail service. To the contrary, we believe that Kern Valley and Trinidad would have us compromise the integrity of that statutory scheme by pulling the rug out from under Rail Ventures' OFA based solely upon Trinidad's professed newfound enthusiasm for rail service. We allowed Kern Valley to acquire the line during the pendency of the OFA process based on Kern Valley's specific acknowledgment that the line remained subject to that process. It would be highly adverse to the OFA process and to Rail

⁸ Citing precedent such as *Conrail Abandonment of a Portion of the West 30th Street Secondary Track in New York, NY*, ICC Docket No. AB-167 (Sub-No. 493N) (ICC served Feb. 11, 1988) (*Conrail*), Kern Valley argues that, because abandonment authorization is permissive, we must allow it to withdraw its request for abandonment authority. We disagree. Because we do not compel abandonment (other than in the context of "adverse abandonments"), we normally grant a carrier's motion to withdraw its request for abandonment authority. See, e.g., *Maine Central Railroad Company — Abandonment Exemption — In Androscoggin County, ME*, STB Docket No. AB-83 (Sub-No. 16S) (STB served Sept. 15, 2000) (*Maine Central*). But there is no unqualified right to withdraw a request for abandonment authority or exemption. Indeed, in *Conrail*, our predecessor, the Interstate Commerce Commission (ICC), noted that the parties to abandonment litigation — such as Rail Ventures — acquire certain rights, and that it is within the agency's discretion to protect such rights by denying a request for withdrawal of abandonment authority. See, also, *Maine Central* at 5 n.11. Kern Valley cites *Railway Labor Executives Ass'n v. Staten Island R.R.*, 792 F.2d 7 (2d Cir. 1986) (*Staten Island*), for the proposition that Rail Ventures has no vested rights until we have established the terms and conditions of sale, and those terms are accepted by the offeror. The *Staten Island* decision, however, stands only for the proposition that we do not permit withdrawal of an abandonment request after we (or in the case of *Staten Island*, the ICC) have set the terms of a section 10904 sale. In no way did the decision state or imply that the railroad remained free to terminate its abandonment proposal up to the time the agency issues its "terms and conditions" decision.

Ventures' interests to now permit Kern Valley to renege on its commitment and circumvent that process, and we will not permit it to do so.

For these reasons, we will deny Kern Valley's request to withdraw the abandonment notice of exemption.

Notice of Exemption Filed in STB Finance Docket No. 34087.

As indicated, the effectiveness of Trinidad's notice of exemption to lease the rail line was stayed pending resolution of Rail Ventures' petition to revoke the notice. In view of our conclusions above, we will reject the notice of exemption. Kern Valley may not lease the line to Trinidad or to anyone else during the pendency of the OFA process.

Kern Valley's Petition for Reconsideration of the Disclosure Order.

Kern Valley argues that, in our decision served September 12, 2001, we should not have ruled on Rail Ventures' requests to compel Kern Valley to reveal the price Kern Valley paid for the line, and to grant Rail Ventures access to the line in order to prepare a valuation of it, without waiting 20 days for Kern Valley to have an opportunity to reply to the requests. However, Kern Valley has now had the opportunity to reply to Rail Ventures' request, in its petition for reconsideration, and Kern Valley has not advanced any reasons why it should not be compelled to do these things. We will not allow this proceeding to be further delayed. Accordingly, we deny Kern Valley's petition for reconsideration. Kern Valley must disclose the purchase price information and grant access as specified in our ordering paragraphs below.

ANCILLARY MATTER

On September 5, 2001, Kern Valley and its principals, Kern W. Schumacher and Morris H. Kulmer, filed a petition seeking to have us disqualify Thomas F. McFarland from continuing to serve as counsel for Rail Ventures.⁹ Petitioners assert that Mr. McFarland formerly represented Messrs. Schumacher and Kulmer. They argue that, in representing Rail Ventures, he is now able to rely on his insight into the business practices of Messrs. Schumacher and Kulmer and the railroads they control, having become familiar with them as a result of his prior representation of them. Petitioners add that Mr. McFarland did not request

⁹ The request was made in STB Docket No. AB-573X, STB Finance Docket No. 33956, and, in addition, STB Finance Docket No. 33957 *Kern W. Schumacher and Morris H. Kulmer — Continuance in Control Exemption — Kern Valley Railroad Company*.

petitioners' consent to his representation of Rail Ventures and that no consent has been given. Petitioners take the position that Mr. McFarland's continued representation of Rail Ventures in these proceedings violates our Canons of Ethics, specifically the provisions of 49 CFR 1103.16 — Adverse Influences and Conflicting Interests.

On September 24, 2001, Mr. McFarland replied. In a sworn affidavit, Mr. McFarland states that he has never represented Kern Valley and that he has represented Messrs. Schumacher and Kulmer only once, before the United States Court of Appeals for the Tenth Circuit. He states that, in the course of his representation, he did not learn any confidential information about the business practices of Messrs. Schumacher or Kulmer or the rail carriers with which they are affiliated. Mr. McFarland adds that, at that time, it was not necessary for him to rely on any facts beyond those contained in the pertinent public record.

Petitioners seek extraordinary relief (disqualification of opposing counsel), yet they have presented no specifics — either in their petition, or in their reply — demonstrating that Mr. McFarland has even had access to, much less divulged, secrets or confidences in violation of our Canons of Ethics, or that possession of confidential information could assist or has assisted Mr. McFarland in the representation of Rail Ventures in their case. Accordingly, we cannot find that petitioners have been or would be prejudiced by Mr. McFarland's representing Rail Ventures. The petition will be denied.

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 request for leave to withdraw the notice of exemption in STB Docket No. 573X is denied.
2. The notice of exemption in STB Finance Docket No. 34087 is rejected.
3. Kern Valley's petition for reconsideration of the *Disclosure Order* is denied.
4. Within 10 days of the effective date of this decision, Kern Valley must disclose to Rail Ventures the purchase price it paid for the subject line and grant Rail Ventures access to inspect the line.
5. If Rail Ventures and Kern Valley cannot agree on a purchase price for the line, either party may request the Board to establish the terms and conditions for the purchase on or before a date 20 days after the date Rail Ventures receives the relevant purchase price information and is granted access to the line. If no agreement is reached and no request is submitted by that date, the Board will issue a decision partially vacating this decision and allowing the abandonment exemption to become effective, subject to trail use or other appropriate conditions.

6. Rail Ventures must notify the Board when it has received the purchase price information from Kern Valley and has been granted access under paragraph 4 so that the due date in paragraph 5 can be determined.
7. Kern Valley's petition for disqualification of Thomas F. McFarland as counsel for Rail Ventures is denied.
8. This decision is effective January 11, 2002.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.