

STB DOCKET NO. AB-573X¹

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

Decided December 11, 2001

This decision denies a petition to reconsider a prior Board decision permitting a noncarrier to buy a rail line approved for abandonment subject to the offer of financial assistance provisions of 49 U.S.C. 10904.

BY THE BOARD:

BACKGROUND

On September 1, 2000, in STB Docket No. AB-573X, *Trinidad Railway, Inc. (Trinidad)* invoked the class exemption procedures at 49 CFR 1152.50 to file a notice of exemption 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. Prior to the scheduled effective date of the exemption, Rail Ventures, Inc. (Rail Ventures) timely filed a notice of its intent to invoke the offer of financial assistance (OFA) provisions of 49 U.S.C. 10904 in order to buy the line for continued rail service. That filing, and subsequent extensions, stayed the effective date of the abandonment exemption covered by the notice.

Rails to Trails Conservancy (RTC) timely requested issuance of a notice of interim trail use (NITU) under the National Trails Systems 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. Because an OFA takes priority over a request for a NITU, RTC's request was held in abeyance pending the outcome of the OFA process.

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) to Kern Valley Railroad

¹ This decision embraces STB Finance Docket No. 33956, *Kern Valley Railroad Company — Acquisition and Operation Exemption — Trinidad Railway, Inc.* These proceedings are not consolidated; a single decision is being issued for administrative convenience.

Company (Kern Valley), which, in STB Finance Docket No. 33956, subsequently invoked the class exemption procedures at 49 CFR 1150.31 to obtain authorization for the purchase. 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 it had stepped into the shoes of the seller, meaning 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 exemption.

On December 5, 2000, Rail Ventures filed its OFA, offering to buy the line for \$2.5 million. 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 denied a request by Kern Valley that the OFA be rejected and a request by RTC that the OFA be dismissed.

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 decision approving Kern Valley's purchase and finding Rail Ventures to be financially responsible under section 10904. We also set a date, subsequently extended, 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.

On September 4, 2001, RTC filed a petition for reconsideration of our August 13 decision. On September 20, 2001, Kern Valley replied.²

DISCUSSION AND CONCLUSIONS

A petition for reconsideration must state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances. 49 CFR 1115.3. RTC contends that we materially erred in our August 13 decision by ignoring or failing to distinguish relevant precedent and by overruling that precedent without explanation.

First, petitioner argues that it was impermissible for Kern Valley to buy a line that had not been used for several years and then invoke the class exemption

² Numerous other pleadings, raising issues different from those raised by RTC here, have been filed in these proceedings and in a related proceeding. They are addressed in a separate decision served today in STB Docket No. AB-573X and STB Finance Docket No. 34087, *Trinidad Railway, Inc. — Lease and Operation Exemption — Kern Valley Railroad Company*.

procedures of section 1152.50 to abandon an out-of-service line.³ Petitioner cites *Tulare Valley R. Co. — Aban. — Kings & Tulare Count., CA*, 9 I.C.C.2d 1205 (1993), for the proposition that a railroad cannot satisfy the 2-year out-of-service certification requirement of section 1152.50(b) by using or “tacking on” the previous owner’s certification that no local traffic has moved over the line for 2 years.

There is no merit to this argument. In this case it was Trinidad that invoked the class exemption procedures at section 1152.50 and made the certification, which has not been challenged, that no local traffic had moved over the line for at least 2 years. Kern Valley has not independently sought abandonment authority. Rather, it subsequently acquired the line subject to the conditions we had placed on the abandonment exemption. Thus, no tacking of the 2 year out-of-service period occurred here.

RTC next contends that we did not properly distinguish our rulings in the August 13 decision from those we made in *Land Conservancy — Acq. and Oper. — Burlington Northern*, 2 S.T.B. 673 (1997), *reconsideration denied*, STB Finance Docket No. 33389 (STB served May 13, 1998) (*Land Conservancy*), *pet. for judicial review dismissed sub nom. The Land Conservancy of Seattle and King County v. STB*, 238 F.3d 429 (9th Cir. 2000). In *Land Conservancy*, we used our revocation power to disallow the sale of an active (albeit embargoed) line to a purchaser that had, immediately after the purchase, sought to abandon the line and to be exempted from the OFA process. We acted there to protect the integrity of our processes when an acquiring noncarrier (the Land Conservancy) initiated abandonment proceedings within days of purchasing the line. As we noted in *Land Conservancy*, 2 S.T.B. at 677, the procedure attempted in that case posed a real threat of abuse to both shippers and employees because an active, embargoed line has shippers and, upon reactivation, would have a rail crew assigned to it.

By contrast, in this case there is no similar threat of abuse. Shippers are protected because Kern Valley has not asked for exemption from the OFA process, but rather explicitly agreed to be bound by that process. Thus, a purchaser under the section 10904 OFA process can provide service if there is a need. In addition, should the OFA sale not go through, any affected employees will be protected if the abandonment authority obtained by Trinidad for the line subsequently acquired by Kern Valley were exercised. *See* 49 U.S.C.

³ The Board’s class exemption procedures at section 1152.50 provide expedited means to abandon or discontinue service over lines that have not originated or terminated any freight in at least 2 years.

10903(b)(2) (Board shall require, as condition of abandonment, provisions to protect the interests of employees).⁴ Finally, should a sale not proceed, RTC's NITU may be reactivated.

In sum, this case is clearly distinguishable from *Land Conservancy*, and therefore RTC has not demonstrated material error. Accordingly, its petition for reconsideration 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. The petition for reconsideration is denied.
2. This decision is effective December 12, 2001, its service date.

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

⁴ We recognize that there well may be no rail employees assigned to this out-of-service line. But if there are affected employees, they would be protected.