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SERVICE DATE – JANUARY 29, 2021

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36470

RIO GRANDE PACIFIC CORPORATION—CONTINUANCE IN CONTROL
EXEMPTION—COLORADO, MIDLAND & PACIFIC RAILWAY COMPANY

Docket No. FD 36471¹

COLORADO, MIDLAND & PACIFIC RAILWAY COMPANY—LEASE & OPERATION
EXEMPTION CONTAINING INTERCHANGE COMMITMENT—UNION PACIFIC
RAILROAD COMPANY

Digest:² The Board postpones the effective dates of the exemptions in two related dockets. The Board also defers consideration of a motion for access to confidential documents and waives a regulatory provision that otherwise establishes a 30-day time period for ruling on that motion.

Decided: January 28, 2021

On December 31, 2020, Colorado, Midland & Pacific Railway Company (CMPR), a noncarrier, filed in Docket No. FD 36471 a verified notice of exemption under 49 C.F.R. § 1150.31 to lease from Union Pacific Railroad Company (UP) and operate approximately 163.1 miles of rail line located between milepost 171.9 at Parkdale, Colo., and milepost 335.0 near Sage, Colo., in Fremont, Chaffee, Lake, and Eagle Counties, Colo. (the Line). In a verified notice of exemption filed concurrently in Docket No. FD 36470, Rio Grande Pacific Corporation seeks Board approval to continue in control of CMPR upon CMPR's becoming a Class III rail carrier. The exemptions are scheduled to become effective on January 30, 2021.

On January 8, 2021, Colorado Pacific Railroad, LLC (Colorado Pacific), and KCVN LLC (KCVN) (collectively, Movants) filed a motion to reject the verified notice of exemption filed in

¹ These proceedings are not consolidated. A single decision is being issued for administrative efficiency.

² The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

Docket No. FD 36471 for CMPR to lease and operate the Line.³ Movants contend that the verified notice contains material factual errors and misrepresentations and that the transaction is inappropriate for consideration under the class exemption procedures because, among other things, the lease agreement, which contains an interchange commitment, would restrict competition. (Mot. to Reject 6-13.) Concurrently, Movants filed, under 49 C.F.R. § 1150.33(h)(2), a motion for access to the lease agreement containing the interchange commitment, which CMPR submitted under seal with the verified notice in accordance with 49 C.F.R. §1150.33(h)(1). Movants also requested that the Board postpone the effective date of the exemption. (Mot. to Reject 13.)

On January 13, 2021, CMPR filed a reply in opposition to the motion for access, contending that Movants are not potential shippers, but rather competitors in seeking to acquire the Line, and that Movants should not have access to the lease agreement. On January 15, 2021, Movants filed a letter responding to CMPR's reply, stating, among other things, that KCVN is in fact a shipper but in any event that the regulations do not limit access to confidential documents to just shippers.⁴

Comments opposing the proposed lease and operation transaction have also been filed in both dockets by several organizations and individuals expressing various environmental, safety, and other concerns about reinstituting rail service on the Line. Additionally, the Friends of Browns Canyon and a coalition of entities led by American Whitewater have filed motions to reject the verified notice of exemption filed in Docket No. FD 36471. Some parties have asked the Board to stay the effective date of the lease and operation exemption, and others have called for an environmental review of the proposed transaction.

On January 21, 2021, UP filed in opposition to Movants' motion to reject, contending that there is no basis for rejecting the notice of exemption. On January 26, 2021, CMPR replied in opposition to the motions to reject and the requests to stay the effective date of the exemption; CMPR addresses various issues raised in those filings and states that its "primary objective in leasing the line is to provide passenger operations." (CMPR Reply 2.)

To provide sufficient time for the Board to fully consider the verified notices and the arguments presented, including whether the verified notices should be rejected, the exemptions in Docket Nos. FD 36470 and FD 36471 will not become effective until further order of the

³ Movants state that Colorado Pacific, a noncarrier wholly owned subsidiary of KCVN, owns a 121.9-mile line of railroad (known as the Towner Line) that runs between Towner, Colo., and NA Junction, Colo., where it connects to rail lines owned and operated by BNSF Railway Company and UP. (Mot. to Reject 2.) Movants further state that KCVN is a grain grower and landowner in Colorado (and other states) that transports grain by rail and owns farmland in the vicinity of the Towner Line. (*Id.* at 3.)

⁴ Although "replies to replies" are not generally permitted, *see* 49 C.F.R. § 1104.13(c), in the interest of having a more complete record, the Board will grant Movant's request that its reply be accepted into the record.

Board.⁵ The Board also finds it appropriate to defer consideration of the motion for access pending consideration of certain issues raised by the motion to reject.⁶ Accordingly, the Board will waive the regulation at 49 C.F.R. § 1150.33(h)(3)(ii) that would otherwise require a decision on the motion for access to be issued within 30 days after the motion is filed.⁷

It is ordered:

1. The reply to CMPR's response to the motion for access is accepted into the record in Docket No. FD 36471.

2. The exemptions in Docket Nos. FD 36470 and FD 36471 will not become effective until further order of the Board.

3. The regulation at 49 C.F.R. § 1150.33(h)(3)(ii) is waived and consideration of the motion for access is deferred pending consideration of certain issues raised by the motion to reject in Docket No. FD 36471.

4. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, Oberman, Primus, and Schultz.

⁵ The Board's streamlined class exemption procedures are reserved for transactions involving routine, uncomplicated, and non-controversial matters. Saratoga & N. Creek Ry.—Operation Exemption—Tahawus Line, FD 35559, slip op. at 5 (STB served May 14, 2012); V&S Ry.—Aban. Exemption—in Kiowa Cnty., Colo., AB 603 (Sub-No. 3X), slip op. at 2 (STB served June 17, 2014). Notices raising unresolved issues or questions that require considerable scrutiny may be rejected. E.g., Saratoga & N. Creek Ry., FD 35559, slip op. at 5; V&S Ry., AB 603 (Sub-No. 3X), slip op. at 2.

⁶ If the Board were to determine that the motion to reject should be granted, the motion for access in this proceeding would become moot.

⁷ The Board may waive its regulations, see 49 C.F.R. § 1110.9, and has done so on its own motion in various contexts. See, e.g., Lake Providence Port Comm'n—Feeder Line Appl.—Line of Delta S. R.R. Located in E. Carroll & Madison Pars., La., FD 36447, slip op. at 5 & n.15 (STB served Dec. 11, 2020).