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SERVICE DATE – MARCH 25, 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

Decided: March 25, 2021

As discussed below, the verified notice of exemption in Docket No. FD 36471 will be rejected (and a motion to amend will be denied and a motion for access to confidential documents rejected as moot) because the proposed lease and operation transaction is not appropriate for consideration under the Board's streamlined class exemption procedures. The related verified notice of exemption for continuance in control in Docket No. FD 36470 will be rejected as moot.

BACKGROUND

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 (RGPC) seeks Board approval to continue in control of CMPR upon CMPR's becoming a Class III rail carrier.

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.

Docket No. FD 36471.² Movants contend that the verified notice contains material misinformation and that the transaction is inappropriate for consideration under the Board's class exemption procedures because, among other things, it raises questions about whether 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 response, asserting, among other things, that KCVN is in fact a shipper but in any event that the regulations do not limit access to confidential documents just to shippers.

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 filed a response in general opposition to the motions to reject and the requests to stay the effective date of the exemption in Docket No. FD 36471 filed by UP and others, which addresses some of the issues raised in those filings and states that CMPR's "primary objective in leasing the line is to provide passenger operations." (CMPR Reply 2.)

Numerous comments opposing the proposed lease and operation transaction have been filed in both dockets by organizations, individuals, and local governmental entities expressing various environmental and other concerns about resuming rail service on the Line.³ 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. Many parties opposing the transaction have called for closer scrutiny or an environmental review of the proposed transaction and for additional information about CMPR's future operational plans.⁴ One comment has been filed in support of the transaction.⁵

² 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.)

³ (*See, e.g.*, Coalition Against the Tennessee Pass Rail Line Comment, FD 36471, Jan. 27, 2021; County Commissioners of Chaffee County, Colo. Comment, FD 36471, Jan. 15, 2021; Wild Connections Comment, FD 36471, Jan. 29, 2021.)

⁴ (*See, e.g.*, WildEarth Guardians Comment, FD 36471, Jan. 14, 2021; Hobbs Comment, FD 36471, Jan. 21, 2021.)

⁵ (Guthrie Comment, FD 36471, Jan. 27, 2021.) Additionally, two comments indicate some support for use of the Line, notwithstanding their opposition to the transaction. (City of

By decision served on January 29, 2021 (January 2021 Decision), the Board determined that, to provide sufficient time to fully consider the verified notices and the arguments presented, the exemptions in Docket Nos. FD 36470 and FD 36471 would not become effective until further order of the Board. January 2021 Decision, FD 36470, slip op. at 2-3. The Board also deferred consideration of the motion for access to confidential documents and waived a regulatory provision that otherwise would require a decision on such motions to be issued within 30 days after the motion is filed. Id. at 3.

CMPR filed a motion to amend the notice of exemption in Docket No. FD 36471 on March 15, 2021. CMPR asks the Board to “restrict the proposed lease of the Line against the transportation of crude oil, coal and hazardous commodities.” (CMPR Mot. to Amend 2.)

For the reasons discussed below, the motion to amend will be denied and the verified notice filed in Docket No. FD 36471 will be rejected, the motion for access filed in that docket will be denied as moot, and the verified notice filed in Docket No. FD 36470 will be rejected as moot.

DISCUSSION AND CONCLUSIONS

The verified notice of exemption at issue in Docket No. FD 36471 was submitted under the class exemption procedures found at 49 C.F.R. § 1150.31, which provide an expedited process for obtaining authority under 49 U.S.C. § 10901. These class exemption procedures were adopted pursuant to 49 U.S.C. § 10502, which directs the agency to exempt proposed transactions from regulation whenever it finds that application of title 49, subtitle IV, part A is not necessary to carry out the rail transportation policy and either the transaction or service is of limited scope or the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power. The class exemption allowing noncarriers (such as CMPR) to acquire or operate a rail line was adopted to serve shippers and community interests by facilitating continued rail service, and the agency explained that in most instances, the transactions under the class exemption would involve resumed or continued rail service with no change in operations. Class Exemption for the Acquis. & Operation of Rail Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810, 811-13, 817 (1985), aff’d sub nom. Ill. Commerce Comm’n v. ICC, 817 F.2d 145 (D.C. Cir. 1987). These procedures were “designed to meet the need for expeditious handling of a large number of requests that are rarely opposed” and “to reduce regulatory delay and costs.” Class Exemption, 1 I.C.C.2d at 811.

As such, the agency has often explained that these streamlined class exemption procedures are reserved for transactions involving routine, uncomplicated, and non-controversial matters. Burlington N. & Santa Fe Ry.—Acquis. & Operation Exemption—South Dakota,

Salida Comment 1-2, FD 36471, Jan. 28, 2021 (it “intends to work with CMPR, [UP], and other stakeholders to sort through the details of a long-awaited return of rail service in Chaffee County, including the potential for light freight and passenger service”); (Riden Comment 1-2, FD 36470, Jan. 12, 2021 (noting potential support for “an electrified and low impact passenger service on a lightweight structure for the express use of tourism and commuting”).)

FD 34645, slip op. at 2-3 (STB served Jan. 14, 2005); Saratoga & N. Creek Ry.—Operation Exemption—Tahawus Line, FD 35559, slip op. at 5 (STB served May 14, 2012) (citations omitted). They are not intended for use in matters that involve substantial controversy and local interest. Saratoga & N. Creek Ry., FD 35559, slip op. at 5. A notice that raises unresolved issues or questions that require considerable scrutiny may be rejected. Id.

Here, not only is the transaction proposed in Docket No. FD 36471 highly controversial, but the verified notice of exemption and opposing submissions also raise unresolved questions that require more detailed consideration than the expedited class exemption process is designed to provide. Issues raised in the comments include questions pertaining to potential environmental⁶ and competitive impacts of the proposed transaction, as well as questions concerning interchange operations and the nature of actual or anticipated operating rights over portions of the Line. UP's arguments that "this is a routine, non-controversial short line lease transaction" are not persuasive. (See UP Reply 2-5.) And CMPR's reply, while responding to certain specific allegations that its verified notice is false or misleading, does not sufficiently address the broader issues and concerns raised and the significant controversy surrounding the transaction. CMPR's motion to amend does not resolve the controversy (which goes beyond transporting specific commodities over the Line), and its request that the Board restrict the proposed lease to authorize only certain types of rail service appears to be at odds with Board precedent and in any event would not be suitable for resolution under the class exemption process. See generally Strohmeyer—Acquis. & Operation Appl.—Valstir Indus. Track in Middlesex & Union Cntys., N.J., FD 35527, slip op. at 2 (STB served Oct. 20, 2011), aff'd sub nom. Riffin v. STB, 733 F.3d 340 (D.C. Cir. 2013) (rejecting application that requested limitation on common carrier authority to exclude transport of toxic inhalation hazard shipments).

In light of the substantial controversy and unresolved issues requiring more detailed analysis that have been raised, the class exemption procedures are not appropriate for this case. See Burlington N. & Santa Fe Ry., FD 34645, slip op. at 2-3 (rejecting notice as not routine or noncontroversial); Riverview Trenton R.R.—Acquis. & Operation Exemption—Crown Enters., Inc., FD 33980, slip op. at 7-8 (STB served Feb. 15, 2002) (revoking exemption for transaction filed by notice because transaction differed from those typical for class exemption procedures due to substantial controversy and factual and legal issues). Accordingly, in Docket No. FD 36471, the motion to amend will be denied, the verified notice of exemption rejected, and the motion for access denied as moot, see January 2021 Decision, FD 36470, slip op. at 3 n.6. The

⁶ Many objectors contend that an environmental review under the National Environmental Policy Act (NEPA) should be conducted. CMPR asserted in its verified notice that an environmental review is not necessary but has provided no information about the number of trains it expects to operate on the Line. Under the Board's environmental rules, requests for new operational authority on a rail line typically are excluded from NEPA review unless they trigger certain thresholds (generally an increase of three or eight trains per day depending on whether the area is in attainment under the Clean Air Act). Saratoga & N. Creek Ry., FD 35559, slip op. at 8 (citations omitted); see also Mo. Cent. R.R.—Acquis. & Operation Exemption—Lines of Union Pac. R.R., FD 33508, slip op. at 5-7 (STB served Sept. 14, 1999), aff'd Lee's Summit, Mo. v. STB, 231 F.3d 39, 42 (D.C. Cir. 2000).

rejection of the notice does not preclude CMPR from seeking authority to lease and operate the Line through more appropriate procedures that would allow for the more comprehensive review required here.⁷ Given that environmental concerns have been raised about the proposal in question, any such future filing should describe in detail the proposed operations and specify the number of trains that CMPR expects to operate in the reasonably foreseeable future.

Rejection of the verified notice in Docket No. FD 36471 renders the related continuance-in-control notice filed by RGPC in Docket No. FD 36470 unnecessary; accordingly, the verified notice in Docket No. FD 36470 will be rejected as moot. Should CMPR seek authority to lease and operate the Line in a proceeding that permits more comprehensive review of the proposed transaction, RGPC may file a continuance-in-control notice referring to the authority sought in that proceeding.

It is ordered:

1. The motion to amend the notice of exemption in Docket No. FD 36471 is denied.
2. The notice of exemption in Docket No. FD 36471 is rejected, as discussed above.
3. The motion for access to confidential documents in Docket No. FD 36471 is denied as moot.
4. The notice of exemption in Docket No. FD 36470 is rejected as moot.
5. This decision is effective on its service date.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.

⁷ The parties are reminded that the Board's Rail Customer and Public Assistance program is a resource for informally discussing Board procedures and answering questions and may be contacted at (866) 254-1792 or by email at rcpa@stb.gov.