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SERVICE DATE – MARCH 13, 2020

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36386

KCVN, LLC AND COLORADO PACIFIC RAILROAD, LLC—
FEEDER LINE APPLICATION—LINE OF UNION PACIFIC RAILROAD COMPANY
LOCATED IN PUEBLO, FREMONT, CHAFFEE, LAKE, AND EAGLE COUNTIES, COLO.

Decided: March 13, 2020

On February 14, 2020, KCVN, LLC (KCVN), and its wholly owned subsidiary, Colorado Pacific Railroad, LLC (Colorado Pacific) (collectively, Applicants), filed an application under 49 U.S.C. § 10907 and 49 C.F.R. part 1151 to acquire from Union Pacific Railroad Company (UP) a 228.80-mile line of railroad and 58.23 miles of other track in Pueblo, Fremont, Chaffee, Lake, and Eagle Counties, Colo. Known as the Tennessee Pass Line, the entire line extends between milepost 118.20 near Pueblo, Colo., and milepost 341.90 near Dotsero, Colo., and includes the 5.1-mile Leadville Branch that connects to the main line at milepost 271 (Tennessee Pass Line or the Line). In the alternative, Applicants seek to acquire the 163.10 miles of main line and 40.16 miles of sidings of the Tennessee Pass Line between Parkdale, Colo., and Sage, Colo., and the 6.9 miles of track between Sage and Dotsero (Alternative Acquisition). Applicants included requests for discovery from UP and for issuance of a protective order to preserve the confidentiality of information that might be submitted in the future.

On March 6, 2020, UP submitted a motion to reject the application and deny the discovery requests, as well as a motion for protective order.¹ On March 9, 2020, Rock & Rail, Inc. (R&R), filed a motion for partial rejection of the application. On March 12, 2020, Applicants filed a letter in response to UP and R&R.

As explained below, the application will be rejected as incomplete under the Board's regulations.

BACKGROUND

Applicants initiated this proceeding by filing a feeder line application under 49 U.S.C. § 10907 for a forced sale of the Tennessee Pass Line. Under § 10907 and the corresponding regulations, the Board is authorized to require the sale of a rail line to a financially responsible person if the public convenience and necessity (PC&N) require or permit the sale, or if the rail

¹ Applicants and UP submitted substantially the same protective order. Because Applicants have not submitted any confidential information, their request for a protective order will be denied as moot. UP's motion for protective order will be granted by separate decision.

line is currently designated as category 1 or 2 on the owning railroad's system diagram map but the railroad has not filed an application to abandon such line.²

Applicants state that UP has not conducted freight operations over the entire Tennessee Pass Line since 1996, (Appl. 8), and describe the Line in four segments, as follows:

The first segment comprises 41.95 miles of line extending from Cañon City to Pueblo (milepost 160.15 to milepost 118.20). (Appl. 8, 13; *id.* at Ex. D, V.S. Crowley 3.) Applicants state that R&R provides service on a portion of this segment via trackage rights, which R&R acquired from BNSF Railway Company (BNSF). (*Id.*)

The second segment, comprising 11.75 miles of track between Parkdale and Cañon City (milepost 171.90 to milepost 160.15), is owned by the Royal Gorge Express, LLC (Royal Gorge), which, according to Applicants, acquired the segment from UP and simultaneously leased the segment to R&R, subject to UP's permanent overhead trackage rights. (Appl. 9, 13; *id.* at Ex. D, V.S. Crowley 3.) Royal Gorge provides passenger excursion service over the segment. The Board granted discontinuance authority over this segment in the UP and Southern Pacific Transportation Company (SP) merger proceeding. See Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., 1 S.T.B. 233, 504 (1996).³

The third segment, from Parkdale to Sage, which comprises 163.1 miles (milepost 171.9 to milepost 335.0) along with the 5.1-mile Leadville Branch, has been inactive since 1996, when discontinuance authority was granted in the UP/SP merger proceeding. (Appl. 13; Ex. D, V.S. Crowley 4.) See Union Pac. Corp., 1 S.T.B. at 504.⁴ Applicants state that this segment is designated category 1 on UP's system diagram map. (*Id.*, at Ex. D, V.S. Crowley 4.) Applicants describe this segment as requiring approximately \$278 million in repairs for restoration of service. (*Id.* at Ex. D, V.S. Crowley 71.)

² Under 49 C.F.R. § 1152.10(b), a carrier's system diagram map must separate lines or portions of lines into five categories. Category 1 includes lines or portions of line that the carrier anticipates will be subject to an abandonment or discontinuance proceeding within three years. Category 2 includes lines or portions of lines that are potentially subject to abandonment because of either anticipated operating losses or excessive rehabilitation costs, as compared to potential revenues.

³ As relevant here, the UP/SP merger decision embraced dockets Denver & Rio Grande Western Railroad—Discontinuance—Malta-Cañon City Line, in Lake, Chaffee, & Fremont Counties, Colo., Docket No. AB 8 (Sub-No. 39), and Southern Pacific Transportation Co.—Abandonment—Malta-Cañon City Line, in Lake, Chaffee, & Fremont Counties, Colo., Docket No. AB 12 (Sub-No. 188).

⁴ As relevant here, the UP/SP merger decision embraced dockets Denver & Rio Grande Western Railroad—Discontinuance Exemption—Sage-Leadville Line in Eagle & Lake Counties, Colo., Docket No. AB 8 (Sub-No. 36X), and Southern Pacific Transportation Co.—Abandonment Exemption—Sage-Leadville Line in Eagle & Lake Counties, Colo., Docket No. AB 12 (Sub-No. 189X).

Applicants state that the fourth segment, consisting of 6.9 miles of line from Sage to Dotsero (milepost 335.0 to milepost 341.9), is still in active service by UP, although Applicants suggest that the segment is primarily used for car storage. (Appl. 14; id. at Ex. D, V.S. Crowley 4.)

If the Board does not direct the sale of the entire Tennessee Pass Line, Applicants seek, in the alternative, to acquire the 163.1 miles of main line and 40.16 miles of sidings on the Line between Parkdale and Sage (the third segment), and the 6.9 miles of track between Sage and Dotsero (the fourth segment).

In support of its application and commitment to restoration of rail service, Applicants cite to Colorado Pacific's acquisition of a 121.9-mile line of railroad, known as the Towner Line, between milepost 747.5 near Towner, Colo., and milepost 869.4 near NA Junction, Colo. (Appl. 2-3); see KCVN, LLC—Feeder Line Appl.—Line of V & S Ry., Located in Crowley, Pueblo, Otero, & Kiowa Ctys., Colo., FD 36005 (STB served Dec. 18, 2017). Applicants state that they have rehabilitated the Towner Line and that they expect it to reopen for common carrier service by April 1, 2020. (Appl. 2-3.) The Tennessee Pass Line is connected to the Towner Line by a 26-mile line of railroad jointly owned and operated by BNSF and UP; Applicants thus assert that the sale of the Tennessee Pass Line to Colorado Pacific would result in the reactivation of a nearly 400-mile continuous main line railroad. (Id. at 4.) Applicants state that they will enter into discussions with the Kansas & Oklahoma Railroad (K&O), the operator of the Towner Line, and other experienced short line operators regarding an operating agreement over the Tennessee Pass Line. (Id. at 23.)

In response, UP filed a motion to reject the application, asserting that Applicants fail to establish any of the PC&N criteria that would require or permit the sale of the Line. UP states that KCVN has failed to show that UP has refused to make the necessary efforts to provide adequate service to any shippers on the Line, nor have Applicants shown that service is inadequate for a majority of shippers. (UP Mot. to Reject 9-12.) Further, UP asserts that Applicants have not fully analyzed the potential impacts of a forced sale on UP's financial and operating interests, given the Tennessee Pass Line's strategic value as an alternative route through the Rocky Mountains. (Id. at 13.) UP also claims that the application fails to demonstrate that KCVN is a "financially responsible person." (Id. at 14-16.)

R&R filed a motion for partial rejection of the application, asserting that UP does not have sufficient ownership rights over either the Cañon City to Parkdale (the second segment) or the Cañon City to Pueblo segment (the first segment) segment for a feeder line application to be appropriate. As the Cañon City to Parkdale segment is owned by Royal Gorge and R&R is the exclusive common carrier, R&R argues UP's alleged trackage rights cannot be acquired via a feeder line application. (R&R Mot. 5.) R&R claims that Applicants have mischaracterized UP's interest in the segment, and that UP has only an easement for utility, oil and gas, and mineral rights. (Id.) R&R also asserts that it provides service via trackage rights over the Cañon City to Pueblo segment and, as a result of that and other agreements between UP and R&R, UP does not alone possess a sufficient interest that would qualify for acquisition under the feeder line statute. (Id. at 6-7.) Further, R&R argues that Applicants have failed to demonstrate that any of the PC&N factors are met. (Id. at 10-12.)

On March 12, 2020, Applicants filed a letter responding to UP's motion to reject and R&R's motion to partially reject. Applicants note, among other things, that Board policy encourages feeder line applications and argue that to the extent there are any deficiencies in their application, the deficiencies can be cured through discovery and development of a full record. (Applicants Letter 4.)

DISCUSSION AND CONCLUSIONS

A feeder line application must include the information set forth at 49 C.F.R. § 1151.3(a). Under 49 C.F.R. § 1151.2(b), the Board, through the Director of the Office of Proceedings, must accept a complete feeder line application or reject one that is incomplete no later than 30 days after the application is filed. Because the application does not contain the information required under § 1151.3(a), the application will be rejected as incomplete.

Basis for the Application and PC&N (§ 1151.3(a)(11)). Under § 1151.3(a)(11), an application must contain a statement explaining whether the applicant seeks a finding that the PC&N require or permit acquisition, or a statement that the line is currently in category 1 or 2 of the railroad's system diagram map. Applicants seek a finding that the PC&N require or permit acquisition. (Appl. 26.)

Applicants also assert that a majority of the Tennessee Pass Line is classified as category 1 by UP on its system diagram map but state that, under Board precedent, they must demonstrate that the PC&N require or permit the sale because the Line is a unitary line of railroad comprised of tracks that fall under both prongs of the statute. (Appl. 5, 25 (citing Caddo Antoine & Little Mo. R.R.—Feeder Line Acquis.—Ark. Midland R.R. Line Between Gurdon & Birds Mill, Ark., 4 S.T.B. 326 (1999)).) UP disputes that the Line is identified as category 1, stating that its system diagram map identifies portions of the Tennessee Pass Line as “discontinued,” not candidates for abandonment. (UP Mot. to Reject 6.) However, UP notes that the issue of how the Line is designated on its system diagram map is irrelevant here because, as Applicants acknowledge, the application should be considered under the PC&N standard. (Id.) R&R disputes Applicants' reliance on Caddo for the proposition that the Tennessee Pass Line is a “particular line of railroad” under § 10907(b) for feeder line purposes, pointing to the fact that UP does not own or operate all of the segments of the Tennessee Pass Line. (R&R Mot. 7-10.) R&R also acknowledges, however, that Applicants filed their application under the PC&N standard, but argues that Applicants have failed to demonstrate that any of the five PC&N criteria set forth at § 10907(c)(1) are met and require or permit the forced sale of the entire line. (Id. at 10.)

UP's most recent system diagram map, attached as Exhibit E to the application, does not indicate that any portion of the Tennessee Pass Line is classified as category 1 but rather shows a portion of the Line as “discontinued.” (See Appl., Ex. E at 5 (“There are no lines in Category 1”

in Colorado), 17-19 (indicating that portions of the Line are classified as “discontinued”).⁵ Therefore, any feeder line application must be brought under the PC&N criteria. The fact that service has been discontinued over a portion of the Line does not mean that the system diagram map prong of the statute (§ 10907(b)(1)(A)(ii)) is available for that section of line. See N.Y. & Greenwood Lake Ry.—Feeder Line Acquis.—a Line of Norfolk S. Ry., FD 34649, slip op. at 3 (STB served July 27, 2005) (stating that, under the plain language of the statute, the more summary procedures of § 10907(b)(1)(A)(ii) are applicable only when a line appears on a carrier’s system diagram map). Regardless, this decision need not resolve any questions concerning Applicants’ reliance on Caddo, as the application relies on the PC&N prong of the statute (§ 10907(b)(1)(A)(i)), as noted above.⁶

An application under the PC&N standard must contain “detailed evidence that permits the Board to find,” in accordance with 49 U.S.C. § 10907(c), all of the following:

- (A) The rail carrier operating the line refused within a reasonable time to make the necessary efforts to provide adequate service to shippers who transport traffic over the line;
- (B) The transportation over the line is inadequate for the majority of shippers who transport traffic over the line;
- (C) The sale of the line will not have a significantly adverse financial effect on the rail carrier operating the line;
- (D) The sale of the line will not have an adverse effect on the overall operational performance of the rail carrier operating the line; and
- (E) The sale of the line will be likely to result in improved railroad transportation for shippers who transport traffic over the line.

49 C.F.R. § 1151.3(a)(11)(i).

Applicants state that UP “has never had any interest in providing service to shippers who would transport over the entire Tennessee Pass Line,” pointing to UP’s attempt to abandon most of the Line in the UP/SP merger. (Appl. 26.) Applicants also point to an “ongoing keen interest from the [Colorado Department of Transportation] to reactivate the Tennessee Pass,” and UP’s refusal to do so. (Id.) However, the application provides no indication that any shipper has requested service over the Line or that UP has refused to make the necessary efforts to provide service to any shipper. See Fiehrer—Feeder Line Appl.—Line of BNSF Ry. Between Helena & Great Falls, Mt., FD 34947, slip op. at 5 (STB served Aug. 29, 2007) (affirming decision rejecting application because, absent evidence that shippers had requested service, the

⁵ See also Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., 3 S.T.B. 987, 1012 n.95 (1998) (noting that UP had advised the Board that it was removing the Tennessee Pass Line from category 1 on its system diagram map).

⁶ R&R argues that the Line cannot be acquired under § 10907 because it does not constitute a UP-owned railroad line given the various interests in the Line. (R&R Mot. 3-10.) That argument need not be addressed here given that Applicants have not supported their claims that the PC&N criteria are met.

application did not show that the railroad had refused to make the necessary efforts to provide adequate service).

Applicants state that they “fully expect to provide additional information [regarding refusals of service by UP] to the Board . . . after the discovery phase of the proceeding and additional discussion with shippers.” (Applicants Letter 3.) Although an application may be conditionally accepted when the applicant is unable to obtain required information that is primarily or exclusively within the personal knowledge of the owning carrier and the applicant files with the application a request for discovery to obtain the needed information, 49 C.F.R. § 1151.2(d), that is not the case here. The information relating to shippers on the Line and the need for service is not primarily or exclusively in the control of UP, and the application shows that Applicants were able to identify several potential shippers and had discussions with at least some of them. (Appl. 30-31; *id.* at Ex. B, V.S. Osborn 9-12; *id.* at Ex. D, V.S. Crowley 50-56, 63.)

Applicants also assert that, because “UP presently conducts no common carrier freight service for any shippers along the [L]ine,” transportation is clearly inadequate for the majority of shippers. (Appl. 27.) Applicants do not support this statement with any specific evidence from any potential shippers on the Line other than a verified statement from a representative of the Applicants, (*see* Appl. at Ex. B, V.S. Osborn 9-11), let alone the “detailed evidence” required for this criteria to be complete under the PC&N analysis. Compare KCVN, LLC—Feeder Line Appl.—Line of V & S Ry., Located in Crowley, Pueblo, Otero, & Kiowa Ctys., Colo., FD 36005, slip op. at 6 (STB served July 31, 2017) (describing how applicants supported their application with verified statements from former shippers and CDOT), with PYCO Indus., Inc.—Feeder Line Acquis.—S. Plains Switching, Ltd., FD 34844 et al., slip op. at 5-6 (STB served July 3, 2006) (affirming decision rejecting feeder line application that did not provide evidence showing that the majority of shippers experienced inadequate service).

Nor do Applicants point to any precedent to explain why a lack of evidence in this instance would be permissible. This omission is particularly notable given that the feeder line statute has not been successfully used to force the sale of a line authorized for discontinuance, and it has not been determined whether the feeder line statute can be invoked in the absence of an obligation to provide service where a discontinuance of service has been granted. PSI Energy, Inc.—Feeder Line Devel.—Norfolk S. Corp. Line Between Cynthiana & Carol, Ind., 7 I.C.C.2d 227, 231 n.13 (1991) (“On the one hand, it can be argued that no service at all is, a fortiori, an inadequate level of service, and that any service would be better than none. But, on the other hand, it can be argued that, where there is no duty to provide any service (due to a discontinuance authorization), then no service is nothing less than what is expected and thus cannot be inadequate.”); but see N.Y. & Greenwood Lake Ry.—Feeder Line Acquis.—a Line of Norfolk S. Ry., FD 34649, slip op. at 3 (STB served July 27, 2005) (noting, in dicta, that “[i]f a shipper did need service that [the railroad] was unwilling to provide, a financially responsible person would be able to apply to use the feeder line provisions to acquire the line—even though service has been lawfully discontinued—through the public convenience and necessity standard.”).

Other Criteria (§ 1151.3(a)(4)-(5), (7)). Although the absence of detailed evidence relating to the PC&N is the most serious omission, this decision notes the following additional issues. First, the regulations at 49 C.F.R. § 1151.3(a)(4) require an application to provide an estimate of the NLV and the GCV of the line and evidence in support of these estimates. Applicants state that Colorado Pacific offers to buy the Tennessee Pass Line for the constitutional minimum value (CMV), which Applicants estimate to be the NLV of \$8,835,833, rather than the GCV, which they estimate to be \$6,819,066. (Appl. 1, 16, 21, 22; id. at Ex. D, V.S. Crowley, App. TDC-4A, TDC-5A.) For the Alternative Acquisition, Applicants state that Colorado Pacific offers to purchase those segments at the higher of the GCV or NLV but that they do not yet have sufficient information to make this offer. (Appl. 22.) Applicants state that the CMV for the Alternative Acquisition would be less than the estimate for the entire Line. (Id. at 17.) In order to consider the Alternative Acquisition as an option, estimates of the NLV and GCV and an offer to purchase based on the higher of the two estimates would be required. See Keokuk Junction Ry.—Feeder Line Acquis.—Line of Toledo Peoria & W. Ry. Between La Harpe & Hollis, FD 34335, slip op. at 3-4 (STB served May 9, 2003) (rejecting application that did not include GCV for a segment of a line that had a GCV).

Second, the regulations at 49 C.F.R. § 1151.3(a)(7) require an application to provide an operating plan that, among other things, identifies the proposed operator. The application here states that Colorado Pacific “will enter into discussions with K&O and other experienced short line railroad companies,” but does not identify those other potential operators. (Appl. 23.) Although Applicants are not required at this stage to have selected an operator, an application should identify those entities with whom Applicants intend to enter discussions. See Oregon Int’l Port of Coos Bay—Feeder Line Appl.—Coos Bay Line of the Cent. Or. & Pac. R.R., FD 35160, slip op. at 1 (STB served Aug. 1, 2008) (accepting application where applicant indicated it had engaged in exploratory discussions with several identified short line operators, but asking applicant to supplement information on the operator criteria); Fiehrer, FD 34947, slip op. at 4-5 (affirming decision rejecting application because the applicant failed to name the proposed operator of the line).

It is ordered:

1. Applicants’ feeder line application is rejected without prejudice to filing a new application.
2. Applicants’ request for issuance of a protective order is dismissed as moot.
3. UP’s motion to reject and R&R’s motion for partial rejection are denied as moot.
4. This decision is effective on its service date.

By the Board, Allison C. Davis, Director, Office of Proceedings.