

300479



ENTERED
Office of Proceedings
March 12, 2020
Part of
Public Record

ATTORNEYS AT LAW
THE FOUNDRY BUILDING 1055 THOMAS JEFFERSON STREET, NW WASHINGTON, DC 20007
TELEPHONE: 202.342.5200 FACSIMILE: 202.342.5219

RICHARD BAR
BRENDAN COLLINS
EDWARD D. GREENBERG
MATTHEW T. JOURNY
KATHARINE FOSTER MEYER
DAVID K. MONROE
TROY A. ROLF
KEITH G. SWIRSKY
THOMAS W. WILCOX
CHRISTOPHER B. YOUNGER

OLIVER KRISCHIK
KRISTINE O. LITTLE

OF COUNSEL:
STEVEN JOHN FELLMAN

MINNESOTA OFFICE:
114 FIRST STREET SOUTH
BUFFALO, MN 55313
TELEPHONE: 763-682-6620
FACSIMILE: 763-682-6261

WRITER'S DIRECT E-MAIL ADDRESS
TWILCOX@GKGLAW.COM

WRITER'S DIRECT DIAL NUMBER
(202) 342-5248

March 12, 2020

By E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: 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, Colorado*

Dear Ms. Brown:

The undersigned counsel for the Applicants in this proceeding hereby submits these brief responses on their behalf to (1) the "Motion to Reject Feeder Line Application and Discovery Requests" filed by the Union Pacific Railroad Company ("UP") in this docket on March 9, 2010 ("Union Pacific Motion") and (2) the "Motion for Partial Rejection of the Feeder Line Application Submitted by KCVN, LLC and Colorado Pacific Railroad LLC" filed by Rock & Rail, Inc. ("R&R") late in the day on March 9, 2010 ("R&R Motion"). As an initial point, the two motions materially contradict each other on the current ownership and use of the Tennessee Pass Line, which highlights the need for the Board to accept, or conditionally accept the Application and start a proceeding to develop a more complete record.

1. Union Pacific Motion

The Union Pacific Motion seeks to elevate the Tennessee Pass Line to the status of "irreplaceable strategic asset" of the railroad despite nearly 80% of the line laying uncared for since 1996 after the Board denied UP's attempt to abandon all of the tracks and take them out of

Ms. Cynthia T. Brown
March 12, 2020
Page 2

service. This statement and other self-serving statements such as “in the years since the merger, Union Pacific has engaged with various parties who expressed interest in restoring service on some or all of the discontinued portions of the Line,” and “Union Pacific continues to have a strong interest in restoring service on the Line,”¹ and the like², are contrary to publicly known facts set out in the Application. They are also unverified or otherwise supported by any evidence. UP’s interest, or rather demonstrated lack thereof, in restoring the entire Tennessee Pass and the reasons it has not to date should be subject to discovery. Similarly, the statements about UP’s alleged current negotiations are unsupported by any verified testimony or evidence.

UP’s assertion that Applicants have not sufficiently demonstrated their financial responsibility under 49 U.S.C. §10907(a)(2) is simply wrong. First, KCVN and Colorado Pacific Railroad, LLC (“CPRR”) previously established this requirement in Docket No. FD 36005 involving CPRR’s purchase of the Towner Line, a decision that UP, oddly, cites in its Motion.³ Second, in terms of meeting this requirement for the Tennessee Pass Line, UP’s statement that KCVN has not offered any evidence of a binding pledge to use its corporate assets or the assets of its principles to fund the line’s estimated rehabilitation costs is flatly contradicted by the verified testimony of William Osborn submitted with the Application that “[f]or purchase and rehabilitation of the Tennessee Pass Line, KCVN and/or other family western business entities will provide CPRR with any level of funding ultimately considered necessary by the Board for CPRR to acquire the Tennessee Pass and secure the financial solvency of its operations at least for the first three years.”⁴ But in any event, the need for additional assurances or evidence of financial responsibility is not grounds for an application to be rejected in all cases, as opposed to simply supplemented, which the Director requested KCVN and CPRR do in Docket No. FD 36005.⁵ As they did in that proceeding, Applicants stand ready to provide the Board with whatever assurances it needs concerning financial responsibility.

Union Pacific’s Motion also argues that Applicants have not met the requirements of §10907(c)(1), but UP’s arguments are again largely based on self-serving, utterly unsupported claims about UP’s alleged interest in restoring service over the entire line, such as “Union Pacific has been, and remains, interested in promoting sustainable and beneficial rail uses of the Line”⁶ In fact, UP currently provides very little service over only small sections of the Line. Moreover, while Union Pacific’s Motion asserts UP is interested in restoring service over the Tennessee Pass Line, it stops well short of stating UP has considered, or actually taken, any action in the past 24 years to restore service over the *entire* line from Pueblo to Dotsero. Whether it is in the public interest for UP to continue to severely restrict the options of shippers on the line, and other shippers in Colorado and other states, by preventing the re-establishment of

¹ Union Pacific Motion at 4.

² See also, *id.* at 5 (where UP’s Motion asserts that “Union Pacific regards the Line as a critical, strategically valuable alternative for handling traffic moving across our network.”).

³ See *id.* at 14, note 14.

⁴ Osborn V.S. at 3-4.

⁵ Docket No. FD 36005, *KCVN and Colorado Pacific Railroad, LLC – Feeder Line Application – Line of V&S Railway, LLC, Located in Crowley, Pueblo, Otero, and Kiowa Counties, Colorado* (served April 15, 2016).

⁶ Union Pacific Motion at 10.

Ms. Cynthia T. Brown
March 12, 2020
Page 3

a continuous route from Pueblo to Dotsero is a significant issue in this proceeding related to the showing required under §10907(c)(1).

Information about the foregoing, and also UP's internal decisions about restricting use of the Tennessee Pass and/or its refusal of requests by shippers for service over part of or the entire line, is all information that is "necessary for the application and primarily or exclusively within the knowledge of the owning carrier." 49 C.F.R. §1151.2(d)(2). Applicants fully expect to provide additional information to the Board relevant to the showings under §10907(c)(1) after the discovery phase of the proceeding and additional discussions with rail shippers. Union Pacific's Motion reinforces that, at a minimum, the Application should be conditionally accepted and supplemented with data and information obtained by UP through the targeted discovery questions submitted by Applicants.

R&R Motion

The R&R Motion focuses almost exclusively on its view of the ownership and operation of the segment of the Tennessee Pass between Pueblo and Parkdale, Colorado, over which the R&R operates. R&R states no objection to the Alternative Acquisition in the Application, which is the purchase via 49 U.S.C. §10907 of the portion of the Line extending from Parkdale to Dotsero, Colorado.⁷ As explained in the Application the Pueblo to Parkdale portion of the Line is made up of the 41.95-mile segment from Pueblo to Canon City and the 11.75-mile segment from Canon City to Parkdale. In its Motion, R&R raises the unexpected claim that, contrary to the understanding of Applicants and UP, UP does not actually own all of the rights it claims to have to put its alleged "irreplaceable strategic asset" back in to service. In direct contradiction to UP, R&R asserts "[i]nstead, it is R&R that owns and operates the active portions of the 'line of railroad' [between Pueblo and Parkdale] that KCVN seeks to acquire from UP."⁸ None of R&R's assertions are supported by any evidence or verified testimony. Such unsupported and disputed claims provide no basis for rejecting the Application.

Indeed, Applicants believe that development of a full record concerning the ownership and operations between Pueblo and Canon City through discovery and the submission of evidence would demonstrate that R&R's position as to this portion of the Tennessee Pass Line is not correct. In any event, the Application clearly states that CPRR would acquire UP's rights in the Pueblo to Parkdale portion of the Tennessee Pass Line subject to R&R's and BNSF Railway's existing rights. As for the 11.75-mile segment that UP sold in 1998 but retained permanent irrevocable trackage rights in order to preserve the integrity of the Tennessee Pass Line route, R&R's position appears to be that the presence of these rights over this 11.75 mile segment can prevent the sale of the 288-mile Tennessee Pass under the feeder line process, thereby preventing the reinstitution of rail service over the entire line. This position is flatly

⁷ See, Application at 14-15.

⁸ R&R Motion at 5.

GKG Law, P.C.

Ms. Cynthia T. Brown
March 12, 2020
Page 4

contrary to the plain language of UP's express reservation, as well as the statute and agency policy encouraging feeder line applications.⁹

While R&R also argues that Applicants have not met the five criteria of 49 U.S.C. §10907(c)(1), its arguments are entirely based in its contested claims about R&R's and UP's respective ownership and operation of the Pueblo to Parkdale segment. They also are focused on R&R's service pursuant to its rights over this segment, which Applicants have not questioned and have expressly stated their acquisition of UP's ownership rights would be subject to. R&R's laser focus on protecting its existing interests over the Pueblo to Parkdale raises issues that are irrelevant to the issues presented by the Application.

In conclusion, neither motion provides sufficient grounds for the Board to reject the Application. Even if the Director of the Office of Proceedings concludes the Application is deficient in certain respects, "Board policy encourages feeder line applications," and the "appropriate" next step would be for Applicants to submit any additional required information, after obtaining discovery from UP of necessary information that its primarily or exclusively within its possession and control.¹⁰

Please do not hesitate to call me if you have any questions. I hereby certify that a copy of this letter was served on counsel for UP and counsel for R&R by email.

Respectfully submitted,



Thomas W. Wilcox
*Attorney for KCVN, LLC and Colorado Pacific Railroad
Company*

Cc: Michael L. Rosenthal
William A. Mullins
(via email)

⁹ STB Finance Docket No. 34335, *Keokuk Junction Railway Co. – Feeder Line Acquisition – Line of Toledo Peoria and Western Railway Corp. Between La Harpe and Hollis, Illinois* (served May 9, 2003) at 5-6.

¹⁰ *Id.*

