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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 36471

ENTERED
Office of Proceedings
January 21, 2021
Part of
Public Record

**COLORADO, MIDLAND & PACIFIC RAILWAY COMPANY
--LEASE AND OPERATION EXEMPTION
CONTAINING INTERCHANGE COMMITMENT--
UNION PACIFIC RAILROAD COMPANY**

**UNION PACIFIC RAILROAD COMPANY'S
RESPONSE TO MOTION TO REJECT NOTICE OF EXEMPTION**

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This transaction is not controversial. KCVN LLC ("KCVN") could not acquire the Tennessee Pass line through private negotiations with Union Pacific and could not force a sale at a sub-market price through a feeder line application.¹ Frustrated by the commercially beneficial agreement between Union Pacific and Colorado, Midland & Pacific Railway Company ("CMPR"), KCVN's strategy is now to use Board processes to obtain its untenable goal. However, KCVN's frustration is not a controversy that could delay this exemption or support any form of Board intervention. The Board should deny KCVN's motion to reject and allow CMPR's notice of exemption to become effective.

Union Pacific and CMPR have been fully transparent with the Board. Union Pacific informed the Board of its ongoing negotiations with CMPR's parent company when KCVN filed its feeder line application.² This transaction between Union Pacific and CMPR is the culmination of those successful negotiations.

¹ For clarity, KCVN and Colorado Pacific Railroad, LLC will be collectively referred to as KCVN.

² See Union Pacific Railroad Company's Motion to Reject Feeder Line Application filed on March 6, 2020 in FD 36386 at 4.

As explained below, this transaction is a completely appropriate use of the Board's notice of exemption procedure. It is not controversial or complicated and the notice of exemption does not contain materially false or misleading information.

I. This is a Routine, Non-Controversial Short Line Lease Transaction

None of the theories put forth by KCVN provide a basis for the Board to conclude that this is a controversial transaction.

A. The Line's Out Of Service Status Is Irrelevant

The fact that the line is currently out of service does not mean that CMPR cannot use a notice of exemption to obtain lease and operating authority. CMPR filed its notice of exemption under 49 C.F.R. Part 1150, Subpart D. There are no regulations in this Subpart or elsewhere that indicate a notice of exemption may not be used to obtain lease and operating authority over a line that is out of service. This is likely the reason that KCVN did not cite to any such regulations in support of its argument. Tellingly, KCVN also did not cite to any Board proceedings finding that a notice of exemption may not be used in such a situation.

To the contrary, the Board has allowed notices of exemption to be used in similar situations. A short line was allowed to use a notice of exemption to lease and operate 308.85 miles of track in *Kanawha River Railroad, L.L.C.—Lease Exemption Containing Interchange Commitment—Norfolk Southern Railway Company*, FD 36028 (STB served July 15, 2016). The track covered by this notice included 119.85 miles of track that were previously idle or out of service. Similarly, a notice of exemption was used to authorize a short line to lease and operate 17.35 miles of track, which included 3.25 miles of track that were previously discontinued by the owning carrier, in *Caterparrott Railnet, LLC—Lease and Operation Exemption—Rail Line of*

Central of Georgia Railroad Company in Lamar and Upson Counties, Ga., FD 36026 (STB served May 6, 2016).

In the cases above, the Board did not question whether a notice of exemption was an appropriate procedure. Similarly, here, the Board should find that the notice of exemption procedure is proper and not be persuaded by KCVN's arguments. There is no statutory, regulatory, or precedential authority that supports rejection of CMPR's notice of exemption due to the previous status of the line.

B. The Inclusion Of An Interchange Commitment Does Not Make The Transaction Controversial

The existence of an interchange commitment is not grounds to reject the notice of exemption. The Board held a proceeding in Ex Parte 714 and compiled an extensive record concerning interchange commitments. The result of that proceeding was regulations requiring the inclusion of specific information in notices of exemption for transactions wherein the underlying agreement includes an interchange commitment. Since Ex Parte 714, many transactions with interchange commitments have been allowed through the notice of exemption process.

The presence of an interchange commitment does not make this transaction controversial. When service is restored to the line, shippers will be allowed to request rates from CMPR in accordance with applicable law and other railroads will be allowed to request interchange CMPR in accordance their rights to do so. The interchange commitment does not alter these rights or the competitive landscape.

KCVN is apparently arguing that Union Pacific and CMPR must increase competition by allowing unrestricted access to the line. However, there is no such obligation under the Board's rules. The presence of an interchange commitment is not grounds to reject the notice of exemption.

C. No Conditions Imposed in the UP/SP Merger Are Implicated

The UP/SP merger and the conditions imposed by the Board in the merger proceedings have no bearing on this transaction. As part of the UP/SP merger, Union Pacific initially proposed to abandon segments of the line with little or no local traffic and to reroute overhead traffic on alternative lines. But Union Pacific revised its plans in response to various expressions of concern. Instead of abandoning the line, Union Pacific obtained more limited authority to discontinue service over the segments previously slated for abandonment.³

The expressions of concern surrounding Union Pacific's proposal to abandon the line focused primarily on the line's use as an alternate route through Colorado in the event Union Pacific's route through the Moffat Tunnel could not handle the post-merger traffic. History has shown that alternate routing is no longer a concern. Even if routing was an ongoing concern, the lease transaction would alleviate that concern because the lease preserves the line as an alternative for Union Pacific.

D. The Transaction is Not Otherwise Controversial

KCVN's attempts to compare this transaction to other transactions deemed too controversial for the notice of exemption procedure are meritless. Every proceeding cited by KCVN contains distinguishing and significantly more complicated facts.

- i. In *Riverview Trenton RR Co.—Acquisition and Operation Exemption—Crown Enterprises, Inc.*, FD 33980 (STB served Feb. 15, 2002), the carrier seeking authority was accused of improperly invoking Board jurisdiction in order to avoid condemnation. There were also questions concerning whether the Board had jurisdiction over the transaction at all.
- ii. The underlying transaction in *Northeast Interchange Railway, LLC—Lease and Operation Exemption—Line in Croton-on-Hudson, NY*, FD 34734 (STB served Nov. 18, 2005) concerned a waste transfer facility. The facility had been the

³ See *Union Pacific/Southern Pacific Merger*, 1 S.T.B. 233, 508 (1996), *aff'd sub nom. Western Coal Traffic League v. STB*, 169 F.3d 775 (D.C. Cir. 1999).

subject of litigation and there questions concerning whether the transaction was subject to Board authority.

- iii. The owner of the rail line disputed the use of the exemption process in *Burlington Northern and Santa Fe Railway Co.—Acquisition and Operation Exemption—State of South Dakota*, FD 34645 (STB served Jan. 14, 2005). Ownership of the line was the subject of ongoing litigation and the carrier seeking authority even acknowledged it would have to prevail in litigation in order to acquire and operate the lines.
- iv. Finally, in *Southern San Luis Valley RR, LLC—Acquisition and Operation Exemption—Iowa Pacific Holdings*, FD 35586 (STB served Feb. 10, 2012) there were legal questions concerning a prior owner’s failure to obtain Board authorization to acquire the line at issue which, in turn, created questions about the propriety of the transaction.

Union Pacific’s lease to CMPR bears no resemblance to the transactions at issue in these above proceedings. Despite KCVN’s efforts to create controversy, the lease is a routine transaction and CMPR’s use of the Board’s notice of exemption procedure is completely appropriate.

II. The Notice Does Not Contain Materially False or Misleading Information

Contrary to KCVN’s assertions, the notice of exemption does not contain materially false or misleading information. To the extent the notice of exemption contains errors, the erroneous information is not material and any errors can be remedied with a supplemental filing, in accordance with Board precedent.

A. The Notice Accurately Describes the Rights Being Granted to CMPR

KCVN claims the notice is misleading because it does not state that Union Pacific is granting rights to CMPR between Sage, Colorado and Dotsero, Colorado. Though KCVN attempts to claim that the notice is misleading, it is not. More specifically, the notice accurately describes all rights being granted to CMPR under the lease agreement. Additionally, CMPR’s operations between Sage and Dotsero are outside the scope of the lease agreement and therefore

outside the scope of information required to be included in the notice of exemption. In order for CMPR to reach Dotsero, for the purpose of interchange with Union Pacific, Union Pacific and CMPR may enter into an interchange agreement, which would not require Board authorization or exemption. Or, Union Pacific may grant CMPR trackage rights to reach Dotsero, in which case there will be another Board proceeding concerning those rights. In either case, CMPR was not required to describe the manner of its operation between Sage and Dotsero and the omission of that information does not render the notice of exemption false or misleading.

B. The Notice Does Not Misrepresent BNSF's Ability to Interchange at Dotsero

As required by 49 C.F.R. § 1150.33(h), the notice states that interchanges at Parkdale and Dotsero are subject to the interchange commitment and that BNSF Railway Company ("BNSF") could physically interchange with CMPR. These are both true and accurate statements. The interchange commitment in the lease agreement applies to interchanges that take place, or may take place, at Parkdale and Dotsero.⁴ As noted in KCVN's motion, BNSF could physically interchange with CMPR at Dotsero. While BNSF does not currently have the right to do so, it could obtain those rights in the future. There is nothing false or misleading about the information contained in the notice of exemption.

C. Any Inaccurate or Incomplete Information Is Not Material

CMPR did not misrepresent the transaction or mislead the Board. Indeed, CMPR could not have misled the Board even if it sought to do so. Along with the notice of exemption, CMPR submitted a copy of the lease agreement under seal, which on its face demonstrates this

⁴ The interchange commitment also applies to interchanges that take place, or may take place, at Sage and interchanges to/from Rock & Rail Railroad ("RRRR"). Union Pacific understands that CMPR will explain in a supplemental filing why Sage was not listed as an affected interchange and why RRRR was not listed as a carrier that could interchange with CMPR.

transaction qualifies for the notice of exemption procedure. Any information inadvertently omitted from the notice is evident from the lease agreement. This information is therefore not material because its omission does not affect whether the transaction qualifies for the exemption.⁵ If the Board determines that any such omissions should be corrected then the most appropriate course of action is for the Board to request clarification, not reject the notice.

III. Conclusion

KCVN is unable to show that this transaction is controversial or that the notice should be rejected. The Board should deny KCVN's motion and allow the notice of exemption to take effect in accordance with the Board's rules and precedent.

Respectfully submitted,

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⁵ See e.g. *Ohio River Partners, LLC—Acquis. & Operation Exemption—Hannibal Dev., LLC*, FD 35984, (STB served Apr. 1, 2016).

CERTIFICATE OF SERVICE

I hereby certify that, on this 21st day of January 2021, a copy of the foregoing pleading was served by email on all parties of record in FD 36471.

/s/ Jeremy Berman
JEREMY M. BERMAN