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**SURFACE
TRANSPORTATION BOARD**

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ORIGINAL

January 22, 2002

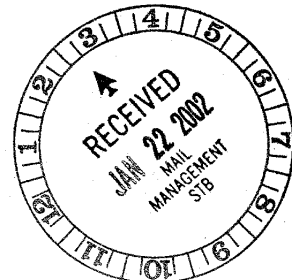
VIA HAND DELIVERY - RETURN COPY

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW (7th fl.)
Washington, DC 20423-0001

ENTERED
Office of the Secretary

JAN 22 2002

Part of
Public Record



Dear Secretary Williams:

Enclosed for filing in each of STB Docket No. AB-573X, Trinidad Railway, Inc.--Abandonment Exemption--In Las Animas County, CO, and STB Finance Docket No. 34087, Trinidad Railway, Inc.--Lease and Operation Exemption--Kern Valley Railroad Company, are the original and ten copies of the Appeal of Kern Valley Railroad Company. 204479 204480

This firm's checks in the amount of \$150 each in payment of the filing fee are attached.

Additional copies of this letter and of the Appeal are enclosed for you to stamp to acknowledge your receipt of them and to return to me via messenger.

By copy of this letter, service is being effected in accordance with the Certificate of Service.

If you have any question concerning the foregoing which you believe I may be able to answer or if I otherwise can be of assistance, please let me know.

Sincerely yours,


Fritz R. Kahn

enc.

cc: Thomas F. McFarland, Esq.
Charles H. Montange, Esq.
John D. Heffner, Esq.
Michael J. Van Wagenen, Esq.

FILED

JAN 22 2002

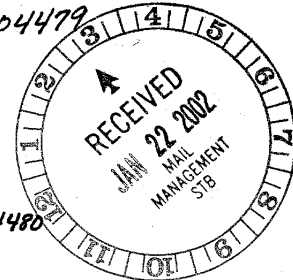
**SURFACE
TRANSPORTATION BOARD**

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

ORIGINAL

STB Docket No. AB-573X / 204479

TRINIDAD RAILWAY, INC
--ABANDONMENT EXEMPTION--
IN LAS ANIMAS COUNTY, CO



STB Finance Docket No. 34087 204480

TRINIDAD RAILWAY, INC.
--LEASE AND OPERATION EXEMPTION--
KERN VALLEY RAILROAD COMPANY

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Office of the Secretary

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Public Record

APPEAL
OF
KERN VALLEY RAILROAD COMPANY,

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SURFACE
TRANSPORTATION BOARD

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TRANSPORTATION BOARD

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Attorney for

KERN VALLEY RAILROAD COMPANY

Dated: January 22, 2002

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

STB Docket No. AB-573X

TRINIDAD RAILWAY, INC
--ABANDONMENT EXEMPTION--
IN LAS ANIMAS COUNTY, CO

STB Finance Docket No. 34087

TRINIDAD RAILWAY, INC.
--LEASE AND OPERATION EXEMPTION--
KERN VALLEY RAILROAD COMPANY

APPEAL
OF
KERN VALLEY RAILROAD COMPANY,

Kern Valley Railroad Company ("KVR"), pursuant to 49 C.F.R. 1115.2, appeals from the Decision of the Board, Chairman Morgan, served January 15, 2002, on the grounds that the Decision contravened the agency's regulations, was contrary to Board precedents and manifested egregious prejudicial error.

1. The Decision, among other things, faithfully recited that on August 30, 2001, Rail Ventures, Inc., petitioned the Board to compel KVR to disclose the price it had paid Trinidad Railway, Inc. ("TRI"), for the Jansen-to-New Elk Mine railroad line in southern Colorado.

2. The Decision, however, failed to acknowledge that well in advance of date, when, pursuant to 49 C.F.R. 1104.13(a), KVR

was entitled to file a Reply to Rail Ventures' Petition and without KVR, in fact, having filed a Reply, the Board, by its Decision, served September 12, 2001, granted Rail Ventures' Petition and ordered the disclosure of the purchase price.

3. The Decision, further, noted that KVR promptly petitioned for reconsideration of the September 12, 2001, Decision.

4. The Decision, however, failed to reference that KVR's reconsideration request was unopposed by Rail Ventures. Indeed, by its letter to the Board, dated September 15, 2001, Rail Ventures advised, "Rail Ventures, Inc. (RVI) does not object to providing KVR an opportunity to reply to petitions filed by RVI in this proceeding on August 30, 2001 and September 5, 2001."¹

5. Notwithstanding that KVR's reconsideration request was unopposed, the Board by its December 12, 2001, Decision again denied KVR the right to respond to Rail Ventures' August 30, 2001, Petition. Pending before the Board is the Petition for Reconsideration filed by KVR on December 28, 2001.

6. By the Decision of the Board, Chairman Morgan, denied the request of KVR, filed December 21, 2001, that it not be required to furnish the data Rail Ventures requested by its August 30, 2001, Petition at least until the pending Petition for Reconsideration has been acted on by the Board.

7. The Decision from which this appeal is taken denied KVR

¹ Rail Ventures on September 5, 2001, petitioned the Board to order KVR to make its line available for inspection by Rail Ventures.

the opportunity to point out that Rail Ventures' request was out of time. The Board's regulations, 49 C.F.R. 1152.27(a)(1)(ii), are explicit as to when a carrier is required to respond to a potential purchaser's request for information pertaining to the railroad line proposed for abandonment in a class exemption proceeding, namely, when the party is considering making its formal expression of intent to offer financial assistance.² That time had long since passed; Rail Ventures had noted its intent to make an offer of financial assistance by September 13, 2000. Nowhere else in the Board's regulations are there provisions requiring the applicant to provide the offeror with additional data once it has noted its intent to make an offer of financial assistance.

8. The Decision denied KVR the opportunity to point out that Rail Ventures' request was for data not contemplated by the Board's regulations. 49 C.F.R. 1152.27(a)(2) and (3) are specific as to the information pertaining to the railroad line proposed for abandonment which the applicant must provide upon request, to wit, the most recent reports on the physical condition of the involved line and the carrier's estimate of the net liquidation value of the line, with supporting data reflecting available real estate appraisals, assessments of the quality and quantity of track materials on the line and estimates

² The regulation tracks the language of the statute, 49 U.S.C. 10904(b), which provides for the production of any other information that the Board considers necessary "to a party considering an offer of financial assistance [underscoring added for emphasis]."

of their removal costs. The Board's regulations simply do not provide for the disclosure by the applicant of the sort of data Rail Ventures sought by its August 30, 2001, Petition.

9. The Decision denied KVR the opportunity to point out that Rail Ventures already had requested and received all of the data it deemed relevant in connection with its offer to purchase the involved line. Rail Ventures, having failed to obtain the requested data informally, on October 17, 2000, petitioned the Board for an order compelling disclosure of the information prescribed in 49 C.F.R. 1152.27(a), and by its Decision, served October 20, 2001, the Board ordered the disclosure of the requested information no later than November 20, 2000. KVR, which in the meantime had purchased the properties of Trinidad Railway, Inc., on November 14, 2000, provided Rail Ventures with all of the requested information. Rail Ventures' subsequent disclosure request amounts to a "second bite at the apple;" however, nowhere in the Board's regulations is there a provision allowing the offeror to submit a further request for information.

10. The Decision denied KVR the opportunity to point out that Rail Ventures' request contravenes the Board's consistent methodology for calculating a railroad line's net liquidation value. The Board's predecessor, the Interstate Commerce Commission, in Chicago and North Western Transp. Co.--Abandonment, 363 I.C.C. 956 (1981), aff'd, Chicago & North Western Transp. Co. v. ICC, 678 F.2d 665 (7th Cir. 1982), detailed the data which were relevant to a determination of a

railroad line's net liquidation value. That method of calculating the net liquidation value of a railroad line has been followed consistently by the ICC, see, Docket No. AB-32 (Sub-No. 42X), Boston and Maine Corporation, et al.--Abandonment and Discontinuance Exemption--In Berkshire County, served November 19, 1990; Docket No. AB-1 (Sub-No. 217), Chicago and North Western Transportation Company--Abandonment--Between Steamboat Rock and Hampton In Hardin and Franklin Counties, IA, served May 26, 1989, as it has by the Board, see, STB Docket No. AB-32 (Sub-No. 90), Boston and Maine Corporation--Abandonment--In Essex County, MA, and Rockingham County, NH, served October 3, 2001; STB Docket No. AB-564, Camas Prairie Railnet, Inc.--Abandonment--In Lewis, Nez Perce and Idaho Counties, ID, served September 12, 2000; STB Docket No. AB-32 (Sub-No. 83), Boston and Maine Corporation--Abandonment--In Hartford and New Haven Counties, CT, served July 1, 1998; STB Docket No. AB-441 (Sub-No. 2X), SWKR Operating Co.--Abandonment Exemption--In Cochise County, AZ, served November 12, 1997; Docket No. AB-290 (Sub-No. 168X), Norfolk and Western Railway Company--Abandonment Exemption--Between Kokomo and Rochester in Howard, Miami, and Fulton Counties, IN, served September 25, 1996; Docket No. AB-448 (Sub-No. 1X), SF&L Railway, Inc.--Abandonment Exemption--In Ellis and Hill Counties, TX, served July 30, 1996; Docket No. AB-425, Lone Star Railroad, Inc.--Abandonment and Discontinuance of Trackage Rights--In Wichita, Archer, Baylor, Knox, Haskell and Jones Counties, TX, served June 9, 1995. At no time has either the ICC

or the Board considered the price that the abandoning railroad had paid for the involved railroad line as relevant to a determination of its net liquidation value.³

11. The Decision denied KVR the opportunity to point out that the amount paid by KVR for the properties acquired from TRI, which Rail Ventures wants to have disclosed, is not a measure of the southern Colorado railroad line's net liquidation value. The amount paid was for, among other things, the rails, ties and other track materials "as is, where is." That amount did not take into account the removal costs, which are considerable and for which KVR would expect to be reimbursed in the prices it sets when selling the rails, ties and other track materials. That amount did not take into account the costs of complying with the eight onerous environmental conditions imposed by the Board by its Decision, served October 20, 2000, which are substantial and for which KVR would expect to be reimbursed in the prices it sets when selling the rails, ties and other track materials. That amount did not take into account the interest on the purchase price which KVR has had to forego pending its sale of the rails, ties and other track materials, which is significant and for which KVR would expect to be reimbursed in the prices it sets when selling the track materials. It is the prices at which the

³ A firm contract pursuant to which the railroad would sell its railroad line has been accepted as an indicium of its NLV, see, Docket No. AB-225 (Sub-No. 2X), Portland Traction Company--Abandonment Exemption--In Multnomah and Clackamas Counties, OR, served January 10, 1990, but that is not the present situation. KVR has no contract to sell the southern Colorado line but simply one to lease it.

railroad is able to sell its rails, ties and other track materials that enter into the calculation of the railroad line's net liquidation value, and those prices are a far cry from what KVR had paid TRI for the southern Colorado railroad line. Moreover, that price fails to reflect the approximately \$300,000 of improvement to the railroad line made the last several months in contemplation of the coal movements currently underway. In short, the price that KVR paid TRI when, subject to Board approval, it acquired the southern Colorado railroad line in no way is indicative of, or relevant to, the current net liquidation value of the property, and, therefore, requiring its disclosure would be altogether inappropriate.

12. The Decision denied KVR the opportunity to point out that Rail Ventures' Petition, dated August 30, 2001, has been rendered moot by KVR's resumption of operations on the southern Colorado railroad line. As recently as September 1, 2000, when TRI availed itself of the out-of-service class exemption, 49 C.F.R. 1152.50, to abandon the 28-mile railroad line between Jansen and New Elk Mine, east of Stonewall, Colorado, the price of coal was so low that the owners of the coal reserves were unable economically to undertake mining operations. In the absence of any other shippers, actual or potential, no traffic had moved over TRI's line in approximately five years' time. In the interim, however, the price of coal has doubled, thereby permitting coal to be mined profitably along the railroad line. Lorencito Mining Company, L.L.C., secured the requisite permits

and began mining coal on October 18, 2001.

13. Meanwhile, however, TRI's railroad line had been sold to KVR, which planned to exercise the abandonment authorization which TRI had secured, subject, of course, to the notice to file an offer of financial assistance of Rail Ventures, the request for a trails condition by the Rails to Trails Conservancy and the environmental conditions recommended by the Section of Environmental Analysis. See, STB Finance Docket No. 33956, Kern Valley Railroad Company--Acquisition and Operation Exemption--Trinidad Railway, Inc., served November 21, 2000. Only recently, by its Decision, served in that proceeding on December 12, 2001, the Board upheld the validity of that transaction.

14. When the reopening of mining along the Jansen-to-New Elk Mine railroad line became a realistic possibility, KVR was asked to resume railroad service on the line. The Board's acceptance of the offer of financial assistance filed by Rail Ventures had foreclosed KVR's exercise of the abandonment authorization,⁴ and, hence, KVR remained the common carrier authorized and, indeed, required, pursuant to 49 U.S.C. 11101, to render service on the line upon reasonable request. KVR undertook to provide that service, using a contract operator; however, it has agreed to have TRI reacquire and operate the line, pursuant to a lease of the property.

15 KVR, accordingly, sought leave to withdraw the

⁴ See, STB Docket No. AB-573X, Trinidad Railway, Inc.--Abandonment Exemption--In Las Animas County, CO, served December 8, 2000.

abandonment request,⁵ and TRI gave notice of its intent to lease the Jansen-to-New Elk Mine railroad line.⁶ By its Decision, served December 12, 2001, the Board disallowed KVR's withdrawal of the abandonment request and summarily rejected TRI's Verified Notice of Exemption.

16. As already noted, KVR petitioned for reconsideration of the Board's December 12, 2001, Decision, and its Petition remains pending. The Board's Decision clearly evinced a concern that permitting KVR to withdraw the abandonment request and entertaining TRI's Verified Notice of Exemption would "compromise the integrity of that [section 10904] statutory scheme by pulling the rug from under Rail Ventures' OFA based solely upon Trinidad's professed newfound enthusiasm for rail service."

17. Rail Ventures' OFA, however, has validity only in the face of the threatened abandonment of a railroad line and the loss of freight services which the shippers would suffer. The whole idea behind section 10904 is the preservation or restoration of railroad service, as this Board itself has recognized time and again. STB Docket No. AB-581X, 1411 Corporation--Abandonment--In Lancaster County, PA, served September 6, 2001; STB Docket No. AB 547X, Roaring Fork Railroad Holding Authority--Abandonment--In Garfield, Eagle, and Pitkin

⁵ See, KVR's letter, dated August 31, 2001, supplemented by its Statement, filed September 10, 2001, in STB Docket No. AB-573X, Trinidad Railway, Inc.--Abandonment Exemption--In Las Animas County, CO.

⁶ See, Verified Notice of Exemption, filed herein on September 4, 2001.

Counties, CO, served May 21, 1999, aff'd, Kulmer v. Surface Transp. Bd., 236 F.3d 1255 (10th Cir. 2001); STB Docket No. AB-6 (Sub-No. 30X), The Burlington Northern and Santa Fe Railway Company--Abandonment Exemption--In King County, WA, served August 5, 1998, aff'd, Redmond-Issaquoh R.R. Preserv. v. Surface Transp., 223 F.3d 1057 (9th Cir. 2000); Abandonment of R. Lines & Discontinuance of Serv., 365 I.C.C. 249, 260 (1981).

18. Since KVR began moving coal from the Lorencito Mining Company's mine to the tipple of Picketwire Processing Company on October 29, 2001, no loss of service on the Jansen-to-New Elk Mine railroad line has occurred or been threatened. To the contrary, on December 1, 2001, KVR transported the first 115-car unit train of coal from the tipple to Jansen, where the train was turned over to The Burlington Northern and Santa Fe Railway Company for movement beyond. On December 16, 2001, KVR transported the second unit train of coal, and it is anticipated that a unit train of coal will move over the railroad line every eight to ten days. There are 17 million tons of surface coal on reserve, and, if Lorencito Mining Company were able to market a million tons of coal a year, it would be 17 years before the supply of coal will have been exhausted.

19. The Jansen-to-New Elk Mine railroad line, which had been a defunct property only 18 months ago, now is a successful operation, and, if the Board were to persist in its efforts to force KVR to divest itself of the line by enabling Rail Ventures to purchase it under the OFA process, KVR would expect to be paid

the line's going concern value. 49 U.S.C. 10904(f)(1)(B) obliges the Board, if asked, to set a price which is not below the fair market value of the property, and, in the case of the Jansen-to-New Elk Mine railroad line, that is its going concern value. Indeed, the Board would be constitutionally barred from setting a lower price.

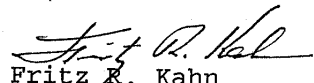
20. The price which KVR had paid TRI at a time when the Jansen-to-New Elk Mine railroad line was slated to be abandoned bears no relation to the property's current going-concern value. Accordingly, it would be pointless to require the price's disclosure, as Rail Ventures sought by its August 30, 2001, Petition.

WHEREFORE, Kern Valley Railroad Company asks that the Decision of the Board, served December 12, 2001, be stayed insofar as it would require the disclosure of the price which Kern Valley Railroad had paid Trinidad Railway, Inc., for the Jansen-to-New Elk Mine railroad line, at least until the Petition for Reconsideration, filed December 28, 2001, has been acted on by the Board.

Respectfully submitted,

KERN VALLEY RAILROAD COMPANY

By its attorney,

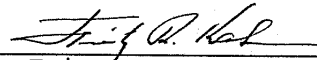

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Dated: January 22, 2002

CERTIFICATE OF SERVICE

I certify that I this day have served copies of the foregoing pleading upon counsel for each of the parties by facsimile transmission.

Dated at Washington, DC, this 22nd day of January 2002.


Fritz R. Kahn