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SERVICE DATE LATE RELEASE - SEPTEMBER 3, 1999

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-556 (Sub-No. 2X)

RAILROAD VENTURES, INC.--ABANDONMENT EXEMPTION--BETWEEN
YOUNGSTOWN, OH, AND DARLINGTON, PA, IN MAHONING AND COLUMBIANA
COUNTIES, OH, AND BEAVER COUNTY, PA

STB Docket No. AB-555 (Sub-No. 2X)¹

THE OHIO & PENNSYLVANIA RAILROAD COMPANY--ADVERSE DISCONTINUANCE
OF SERVICE EXEMPTION--BETWEEN YOUNGSTOWN, OH, AND DARLINGTON, PA, IN
MAHONING AND COLUMBIANA COUNTIES, OH, AND BEAVER COUNTY, PA

Decided: September 2, 1999

By petition filed on May 19, 1999,² Railroad Ventures, Inc. (RVI), seeks an exemption under 49 U.S.C. 10502 from the provisions of 49 U.S.C. 10903 to abandon a 35.7-mile line from milepost 0.0 at Youngstown, OH, to milepost 35.7 at Darlington, PA, and a connecting 1-mile line segment near Negley, OH. RVI also petitioned for an exemption under 49 U.S.C. 10502 from the provisions of 49 U.S.C. 10903 for The Ohio & Pennsylvania Railroad Company (OPRC) to discontinue its service obligations over the line.³ Comments in opposition were filed jointly by Darlington Brick and Clay Products Company (Darlington Brick) and Insul Products, Inc. (Insul) (collectively protestants), and by the Board of Commissioners of Beaver County (Beaver County). RVI replied. We will grant the petition for exemption.

¹ These proceedings are consolidated in this decision.

² Notice was served and published in the Federal Register on June 8, 1999 (64 FR 30560) (June 8 notice).

³ OPRC has a lease with RVI to provide service over this line, but has not provided service since 1996. Although the proposed discontinuance is styled as an adverse discontinuance because it was filed by RVI, the owner of the line, instead of by OPRC, the carrier authorized to operate over the line, the interests of the parties are not adverse. OPRC agrees that its lease and service obligations should be discontinued and it previously sought on its own behalf a discontinuance exemption, which was rejected. Moreover, the President of OPRC submitted a verified statement, attached as Exhibit 9 to RVI's petition, stating that OPRC has no objection to the discontinuance.

BACKGROUND

The circumstances surrounding RVI's purchase of the subject line,⁴ OPRC's lease to operate over the line, and their subsequent attempts to abandon the line and discontinue service were set out in the June 8 notice, as well as in prior decisions,⁵ and need not be reiterated here. Having rejected without prejudice to refiling RVI's last attempt to abandon this line in RVI II, we now have before us, in this petition for exemption, sufficient information to determine what rehabilitation is required to restore service, what the costs of the rehabilitation would be, and an accurate estimate of the line's revenue potential.⁶

PRELIMINARY MATTERS

In its petition, RVI has attempted to provide information consistent with our regulations for abandonment applications in 49 CFR part 1152. To the extent that it has been unable to comply, RVI seeks several waivers of specific rules, which it styles as requests for exemptions. These include waivers of 49 CFR 1152.22, related to the contents of abandonment applications, and the

⁴ The subject line formerly was part of the Youngstown & Southern Railroad Company, a nonoperating railroad and a wholly owned subsidiary of the Montour Railroad Company, itself a nonoperating railroad and successor in interest to The Pittsburgh and Lake Erie Railroad Company.

⁵ See Railroad Ventures, Inc.--Acquisition and Operation Exemption--Youngstown & Southern Railroad Company, STB Finance Docket No. 33385 et al. (STB served July 15, 1997) (RVI I), and Railroad Ventures, Inc.--Abandonment Exemption--Between Youngstown, OH, and Darlington, PA, in Mahoning and Columbiana Counties, OH, and Beaver County, PA, STB Docket No. 556 (Sub-No. 1X) et al. (STB served Jan. 22, 1999) (RVI II).

⁶ Although this information is not generally included in a petition for exemption, RVI was required to produce the data if it chose to file a petition for exemption instead of an abandonment application. See RVI II, slip op. at 5. This was due to concerns that service was not being restored, which ultimately led to biweekly reporting by RVI to our Office of Compliance and Enforcement (OCE). See RVI I, slip op. at 4. The data provided by RVI will assist us in reaching an informed decision on whether to approve the abandonment and will help parties who might be interested in purchasing the line under 49 U.S.C. 10904 to restore service. See RVI II, slip op. at 5.

notice requirements of 49 CFR 1152.20 and 1152.21.⁷ RVI also requests that it not be required to present a formal appraisal for the entire right-of-way.

RVI's requests for waivers of the abandonment application filing requirements are unnecessary. RVI II did not require full compliance with the filing requirements for abandonment applications, only that RVI provide certain information if it refiled with a petition for exemption, which it has done. As for RVI's request that it not be required to submit a formal appraisal of its right-of-way, RVI has submitted an extensive appraisal, with substantial documentation, which was prepared by David L. Handel, and it is sufficient for our purposes.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned or service discontinued without our prior approval. Under 49 U.S.C. 10502, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

The exemption process is designed to minimize regulatory burdens. An exemption is appropriate when we have sufficient information to reach an informed decision. Typically, the types of abandonment and discontinuance transactions that are exempted are those where the shippers do not contest the abandonment or, if they do contest it, revenue from their traffic is clearly marginal compared to the cost of operating the lines.

RVI, with OPRC's assistance, has provided sufficient information for us to determine that this line of railroad cannot be operated at a profit. OPRC began operations in July 1995. During OPRC's operations in 1995, the line had eight active shippers that generated 319 carloads.⁸ In

⁷ Because RVI complied with these notice requirements in its previous abandonment request, served copies of its petition on the parties of record in the previous proceedings, and stated that it will serve a copy of its petition on any other interested party requesting it, RVI was not required to republish notice of the proposed abandonment and discontinuance. June 8 notice at 4 n.4.

⁸ In 1995, Mahoning Valley Plastics shipped 33 carloads of plastic pellets, Darlington Brick shipped 23 carloads of brick and clay products, Grief Bros. Corp. shipped 19 carloads of paper rolls, Darlington Pipe shipped 2 carloads of pipe, Donohue Railcar Parts Co. shipped 5 carloads of wheel sets and rail/truck components, Allied Scrap shipped 75 carloads of scrap paper, Lumber City shipped 9 carloads of lumber products, Magneco/Metrel shipped 25 carloads of blast furnace
(continued...)

1996, the last year OPRC operated the line, it had three active shippers that generated 120 carloads.⁹ Based on OPRC's operations from July through December 1995, RVI approximates revenues at \$59,000 and expenses at \$209,000.¹⁰ From January through November 1996, RVI approximates revenues at \$22,000 and expenses at \$79,000. This results in operating losses of approximately \$150,000 for 1995 and \$57,000 for 1996. No party disputes these figures. While protestants state that we should critically analyze the financial evidence submitted by RVI, they have not specifically challenged it.¹¹

The June 8 notice, slip op. at 3 n.3, pointed out that RVI's rehabilitation costs were not stated with any certainty and that several items appeared questionable. Although protestants and Beaver County have not addressed the issue, RVI has in its reply. It explains the discrepancies in the range of rehabilitation estimates that it provided, as discussed in the next paragraph.

According to RVI, the \$800,000 rehabilitation figure is contained in a 1997 report prepared by Kennedy Railroad Builders, Inc., which estimates rehabilitation costs for only 26 miles of the line from North Lima, OH, to Darlington. Approximately \$425,000 of the \$800,000 represents the cost of installation of a switch to the main line at Columbiana, OH (formerly operated by the Consolidated Rail Corporation). The \$1.8 million rehabilitation figure is also a 1997 projection, which was provided by Ohio Rail Development Commission (ORDC),¹² and, according to RVI, represents the minimum repairs needed for the entire line. Both of these estimates are intended to corroborate what RVI considers the best evidence of current rehabilitation costs, and that is the \$4.5

⁸(...continued)

refractory brick, and Associated Paper Stock shipped 128 carloads of paper products.

⁹ In 1996, Darlington Brick shipped 18 carloads of brick and clay products, Grief Bros. Corp. shipped 12 carloads of paper rolls, and Associated Paper Stock shipped 90 carloads of paper products.

¹⁰ RVI includes in expenses costs related to train crews, locomotives and fuel, track maintenance, car hire, and other operating expenses.

¹¹ Protestants complain that RVI has not provided more details about plans of L.A.S. Recycling, Inc. (L.A.S.), to open a land fill site for construction debris in an area south of Negley, OH. Protestants submit that L.A.S. plans to ship 2,000 to 4,000 cars of new traffic annually over the line. RVI in its petition explains that it only recently became aware of L.A.S.'s plans, but that in any event the site is not served by RVI's line. We note that L.A.S. has not protested the abandonment.

¹² ORDC is a state agency charged with promoting economic development, rail branch line preservation, highway and rail safety, and passenger and commuter rail planning and development.

million rehabilitation figure contained in a 1999 appraisal of the line prepared by R/W Specialists, Inc. RVI submits that, whichever figure is used, the line cannot generate sufficient revenue to justify that level of investment. We agree and accept RVI's explanation.

More detailed scrutiny of the proposed abandonment and discontinuance of service under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of the application process, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. Moreover, an exemption will foster sound economic conditions and encourage efficient management by relieving RVI from the costs of owning (including rehabilitation) and OPRC from the costs of operating the line. [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy are not affected adversely.

Although protestants and Beaver County desire to retain the line for continued rail service, the shippers on the line have access to alternative motor carrier service. Accordingly, we find that regulation is not necessary to protect shippers from the abuse of market power. Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

Under 49 U.S.C. 10502(g), we may not use our exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting OPRC's exemption for discontinuance of service, we will impose the labor protective conditions in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979), in STB Docket No. AB-555 (Sub-No. 2X). On the other hand, we do not normally impose employee protective conditions when, as here, a carrier abandons its entire line unless the evidence shows the existence of: (1) a corporate affiliate that will continue substantially similar rail operations; or (2) a corporate parent that will realize substantial financial benefits over and above relief from the burden of deficit operations by its subsidiary railroad. See Wellsville, Addison & Galetton R. Corp.--Abandonment, 354 I.C.C. 744 (1978); and Northampton and Bath R. Co.--Abandonment, 354 I.C.C. 784 (1978) (Northampton). Because RVI proposes to abandon its entire line of railroad and has no railroad employees and because no one has attempted to show that the situation under Northampton exists for imposing labor protection in this proceeding, we will not impose labor protective conditions in STB Docket No. AB-556 (Sub-No. 2X).

RVI has resubmitted, with its petition, the environmental report originally submitted in RVI II, and has notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed abandonment. See 49 CFR 1105.11. Our Section of Environmental Analysis (SEA) has examined the environmental report, verified its data, and analyzed the probable effects of the proposed action on the quality of the

human environment.¹³ SEA served an environmental assessment (EA) on July 16, 1999, indicating that, prior to commencing salvage operations, RVI should consult with: the Pennsylvania Department of Environmental Protection, Southwest Regional Office; the Beaver County, PA, Conservation District; and the State of Ohio Environmental Protection Agency, Northeast District Office. A comment to the EA was filed by Boardman Township Park District (Boardman) encouraging the Board to allow a recreational trail on this line. No other comments to the EA were filed by the August 16, 1999 due date.

We will impose the condition recommended by SEA in the EA. Based on SEA's recommendation, we conclude that the proposed abandonment, as conditioned, will not significantly affect either the quality of the human environment or conservation of energy resources.

We note that 49 U.S.C. 10904 provides a mechanism for those who want to continue rail service that the Board has authorized to be discontinued or abandoned. Under section 10904, any financially responsible person (and all government agencies are deemed to be financially responsible) may file an offer of financial assistance (OFA) to acquire a line or subsidize the losses of the existing operator. Should area shippers or any other interested party determine that continued rail service over the line is in their best interest, they may avail themselves of the section 10904 procedures.

Requests for the issuance of a notice of interim trail use (NITU) under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), were filed by Beaver County, Boardman, the Columbiana County Park District (Columbiana), the Mill Creek Metropolitan Park District (Mill Creek), and the City of Youngstown (Youngstown) (collectively, trail proponents). Each trail proponent has requested that a NITU be issued for the line, and each submitted a statement of willingness to assume financial responsibility for the right-of-way, and has acknowledged that use of the right-of-way is subject to possible future reconstruction and reactivation for rail service as required under 49 CFR 1152.29. Although all of the trail proponents advocate preservation of the entire right-of-way for trail purposes, each one has limited its request by asserting interest in only a portion of the right-of-way, as follows: Beaver County will negotiate for approximately 6 miles in Beaver County; Boardman will negotiate for approximately 5 miles in Boardman Township; Columbiana will negotiate for approximately 13 miles in Columbiana County; Mill Creek will negotiate for approximately 6 miles in Beaver Township; and Youngstown will negotiate for approximately 3 miles in the City of Youngstown. By letter filed on July 19, 1999, RVI agreed to negotiate with the trail proponents.

¹³ RVI requested an exemption from the filing of a new environmental and historical report. SEA examined RVI's resubmitted reports and found them acceptable for use in this proceeding. Accordingly, no new reports need to be filed.

These requests comply with the requirements of 49 CFR 1152.29, and RVI is willing to enter into negotiations with each trail proponent. Therefore, we will issue a NITU for each of the line segments referred to above and the trail proponents may negotiate agreements as to their respective segments with RVI during the 180-day period prescribed below. If agreements are executed, no further Board action is necessary. If no agreements are reached within 180 days, RVI may fully abandon the line, subject to the conditions imposed below. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

SEA has indicated in its EA that the right-of-way may be suitable for other public use following abandonment. The trail proponents also request that a 180-day public use condition be imposed. The requests are made to provide time for the trail proponents to assemble and review information needed to complete their trail use plans and negotiations with RVI for the conversion of the rail corridor into trails. In support of their requests, the trail proponents state that the rail corridor will connect residential areas to public parks, businesses, schools, and other destinations and that the corridor provides important wildlife habitat and green space.

We have determined that persons who file under the Trails Act may also file for public use under 49 U.S.C. 10905. See Rail Abandonments--Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 609 (1986) (Trails). When the need for both conditions is established, it is our policy to impose them concurrently, subject to the execution of a trail use agreement. The trail proponents have met the public use criteria prescribed at 49 CFR 1152.28(a)(2) by specifying: (1) the condition sought; (2) the public importance of the condition; (3) the period of time for which the condition would be effective; and (4) justification for the period of time requested. Accordingly, a 180-day public use condition also will be imposed on the line to be abandoned commencing from the effective date of this decision and notice. If a trail use agreement is reached on a portion of the right-of-way, RVI must keep the remaining right-of-way intact for the remainder of the 180-day period to permit public use negotiations. Also, a public use condition is not imposed for the benefit of any one potential purchaser. Rather it provides an opportunity for any interested person to acquire the right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, RVI is not required to deal exclusively with the trail proponents, but may engage in negotiations with other interested persons.

The trail proponents should note that operation of the trail use and public use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10904. As stated in Trails, 2 I.C.C.2d at 608, OFAs to acquire rail lines for continued rail service or to subsidize rail operations take priority over interim trail use/rail banking and public use. Accordingly, if an OFA is timely filed under 49 CFR 1152.27(c)(1), the effective date of this decision and notice will be postponed beyond the effective date indicated here. See 49 CFR 1152.27(e)(2). In addition, the effective date may be further postponed at later stages in the OFA process. See 49 CFR 1152.27(f). Finally, if the line is sold under the OFA procedures, the petition for exemption, as it relates to the abandonment only, will be dismissed and trail use and public use

precluded. Alternatively, if a sale under the OFA procedures does not occur, the trail use and public use processes may proceed.

It is ordered:

1. Under 49 U.S.C. 10502, we exempt the above-described discontinuance of service by OPRC from the prior approval requirements of 49 U.S.C. 10903, subject to the employee protective conditions set forth in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979).

2. Under 49 U.S.C. 10502, we exempt the above-described abandonment by RVI from the prior approval requirements of 49 U.S.C. 10903, subject to the conditions that RVI shall: (1) prior to commencing salvage operations, consult with the Pennsylvania Department of Environmental Protection, Southwest Regional Office; the Beaver County, PA, Conservation District; and the State of Ohio Environmental Protection Agency, Northeast District Office; (2) leave intact all of the right-of-way, including bridges, trestles, culverts and tunnels (but not track and track materials), for a period of 180 days from the effective date of this decision and notice to enable any state or local government agency or any other interested person to negotiate the acquisition for public use of the line to be abandoned; and (3) comply with the interim trail use/rail banking procedures set forth below.

3. If interim trail use/rail banking agreements are reached for any of the segments of the line to be abandoned, each agreement must require the trail user to assume, for the term of the agreement, full responsibility for management of, any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify RVI against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way.

4. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligations for the right-of-way.

5. If interim trail use is implemented and subsequently the user intends to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

6. If any agreement for interim trail use/rail banking is reached by the 180th day after service of this decision and notice, interim trail use may be implemented. If no agreements are reached by that time, RVI may fully abandon its line, provided the conditions imposed above are met.

7. An OFA under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by September 13, 1999, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by a \$1,000 filing fee. See 49 CFR 1002.2(f)(25).

8. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: “**Office of Proceedings, AB-OFA.**”

9. Provided no OFA has been received, this exemption will be effective on October 3, 1999. Petitions to stay must be filed by September 13, 1999, and petitions to reopen must be filed by September 23, 1999.

10. Pursuant to the provisions of 49 CFR 1152.29(e)(2), RVI shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned its line. If consummation has not been effected by RVI's filing of a notice of consummation by September 3, 2000, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the 1-year period, the notice of consummation must be filed not later than 60 days after satisfaction, expiration or removal of the legal or regulatory barrier.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams
Secretary