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SERVICE DATE - JANUARY 22, 1999

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-556 (Sub-No. 1X)¹

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. 1X)

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

Decided: January 21, 1999

On January 4, 1999, The Ohio & Pennsylvania Railroad Company (OPRC) filed a notice of exemption under 49 CFR 1152.50 to discontinue service over 35.7 miles of railroad line from milepost 0.0 at Youngstown, OH, to milepost 35.7 at Darlington, PA, and over a connecting 1-mile spur near Negley, OH. Also, on January 4, 1999, Railroad Ventures, Inc. (RVI), filed a notice of exemption to abandon this same line of railroad, which represents its entire line of railroad.² The notices will be rejected.

BACKGROUND

RVI's acquisition of the subject line, formerly part of the Youngstown & Southern Railroad Company (Y&S), was consummated without appropriate authority from the Board on November 8, 1996. On November 19, 1996, OPRC, which was the only carrier authorized to provide service,³

¹ These proceedings are not consolidated. A single decision is being issued for administrative convenience.

² The notice exempting RVI's acquisition and operation of the line included 2.65 miles of incidental trackage rights between Struthers and Youngstown, OH, which do not appear to be included in these notices.

³ See Ohio & Pennsylvania Railroad Company--Acquisition, Lease and Operation Exemption, Finance Docket No. 32711 (Sub-No. 1) (ICC served July 3, 1995).

embargoed the line, stating as the cause for the embargo the cancellation of its lease.⁴ The matter was investigated by the Board's Office of Compliance and Enforcement (OCE), and an agreement was reached for service to be restored. Accordingly, the embargo was canceled.⁵ On December 18, 1996, another embargo was issued because of washouts on the line.⁶ Service has not been restored despite repeated attempts by OCE to obtain the parties' voluntary compliance with their common carrier obligations under 49 U.S.C. 11101(a)⁷ and repeated requests for the resumption of service by shippers on the line⁸ and by local and state government officials.

RVI attempted to bring its purchase of the line into compliance with its statutory responsibilities by filing a notice of exemption under 49 CFR 1150.31(a) on January 3, 1997, for retroactive authorization of its purchase. That notice was rejected in Railroad Ventures, Inc.--Acquisition and Operation Exemption--Youngstown and Southern Railway Company, STB Finance Docket No. 33336 (STB served Jan. 9, 1997), because RVI did not provide sufficient information to determine whether it qualified for the class exemption in light of Columbiana County Port

⁴ See OHPA Embargo Notice No. 1-96, issued and effective on November 19, 1996.

⁵ See OHPA Embargo Notice No. 1-96, issued on December 5, 1996, and effective on December 9, 1996.

⁶ See OHPA Embargo Notice No. 2-96, issued and effective on December 18, 1996.

⁷ Section 11101(a) provides, as pertinent: "[a] rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall provide transportation or service on reasonable request."

⁸ Darlington Brick and Clay Products Company (Darlington Brick) and The Insul Company, Inc. (Insul), have made informal and formal requests for service to be restored to their facilities on RVI's line. Darlington Brick's most recent request was filed on January 4, 1999, and Insul's most recent request was filed December 16, 1998, in STB Finance Docket No. 33385, Railroad Ventures, Inc.--Acquisition and Operation Exemption--Youngstown & Southern Railroad Company.

Authority's (CCPA)⁹ allegations that RVI would not return the line to service.¹⁰ CCPA maintained that RVI had purchased the line solely to salvage it.¹¹

On February 5, 1997, OCE sent a letter to RVI, giving RVI 20 days in which to indicate its intentions with respect to refileing for the requisite authority to lawfully acquire the Y&S railroad property. On February 25, 1997, RVI replied to OCE and to a petition for declaratory order in STB Docket No. 41991, Ohio Rail Development Commission and Columbiana County Port Authority--Petition for Declaratory Order--Certain Actions of Railroad Ventures, Inc., in which CCPA and the Ohio Rail Development Commission (ORDC)¹² sought to have RVI divest itself of the line.¹³ In its reply to OCE, RVI indicated that it reached agreement with the contractor hired to repair the flood-damaged rail line; that repairs, which had been held up by bad weather, would begin by February 28, 1997, and should take 1 to 2 months to complete; and that it intended to file for requisite acquisition and operating authority within 30 days. In its February 25, 1997 reply to the petition for declaratory order, RVI indicated that insurance and indemnification matters were resolved and that it was prepared to allow Wintrow Construction Corporation (Wintrow)¹⁴ onto the line to start repairs

⁹ CCPA is a quasi public agency established by the Board of County Commissioners of Columbiana County, OH, to promote economic development within Columbiana County. It assists private and public interests in efforts to assure the adequacy of the county's transportation services.

¹⁰ RVI was not foreclosed from filing a new notice of exemption, provided that it disclose in detail its plans for operating the line, Y&S's ownership or authority to sell the line, RVI's arrangements with OPRC for it to provide service, and its arrangements to restore the line for operations.

¹¹ After the notice of exemption was rejected, CCPA submitted a letter for the record dated January 6, 1997, from David L. Handel of Handel Investments, which took over the management and day-to-day operations of RVI on December 16, 1996, to Tracy V. Drake, Executive Director, CCPA, stating that RVI was actively evaluating the abandonment of the line and that any repairs that CCPA might make to the line would be taken at CCPA's sole risk and expense. OCE's monitoring of RVI's actions indicates that RVI continued to maintain this position and that CCPA was never able to reach an agreement with RVI for the line's restoration.

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.

¹³ RVI replied to the petition for declaratory order on February 25, 1997.

¹⁴ On January 31, 1997, Wintrow attempted to obtain permission from RVI, through a general release form, to commence repairs on the line in order to restore service. Funding for the reconstruction of the line was made available by OPRC, ORDC, CCPA, the North East Ohio Trade
(continued...)

by February 28, 1997, but RVI conditioned its consent on petitioners' counsel clarifying what interests petitioners might assert in the future in connection with funding the repairs.

On April 2, 1997, RVI filed a second verified notice of exemption, which was docketed as STB Finance Docket No. 33385, stating that its acquisition of the line was "for the purpose of conducting rail freight common carrier operations on the former Y&S line" (emphasis in the original)¹⁵ and "that repairs to the washout could commence immediately [and that it was RVI's understanding] that the contractor has commenced repairs on the line so that service may be restored."¹⁶ By notice served and published in the Federal Register on April 24, 1997 (62 FR 20061), RVI was exempted under 49 CFR 1150.31(a)(1) to allow it to acquire and operate the Y&S line. At the time the notice was served, a petition to reject, revoke, or stay the notice of exemption, which was jointly filed on April 8, 1997, by ORDC and CCPA was pending.¹⁷ Also pending was the petition for declaratory order.

The Board denied both the petition for declaratory order and the petition to revoke the exemption allowing RVI to purchase the Y&S line, stating that "our main concern in rejecting the notice the first time was RVI's failure to acknowledge its common carrier obligation under 49 U.S.C. 11101(a), [footnote omitted] which it now does." Railroad Ventures, Inc.--Acquisition and Operation Exemption--Youngstown & Southern Railroad Company, STB Finance Docket No. 33385 et al. (STB served July 15, 1997), slip op. at 4. To allay the concerns of parties opposing RVI's acquisition of the line, the Board imposed a bi-weekly reporting requirement on RVI to allow the Board to monitor the restoration of service and the specific causes of any delays in restoring service.

¹⁴(...continued)

& Economic Consortium (the Consortium), Mahoning County Commissioners (the County Commissioners), and other concerned public agencies. RVI apparently rejected Wintrow's general release indemnifying RVI from liability in connection with needed repairs and refused to allow the repairs to be made. In an attempt to stop RVI's interference with the repairs, petitioners filed their request for a declaratory order on February 5, 1997.

¹⁵ Verified notice of exemption filed April 2, 1997, at 6.

¹⁶ Id. at 5.

¹⁷ As explained in the notice, the exemption was not stayed prior to its scheduled effectiveness on April 9, 1997, because petitioners did not address the Board's stay criteria. Railroad Ventures, Inc.--Acquisition and Operation Exemption--Youngstown & Southern Railroad Company, STB Finance Docket No. 33385 (STB served Apr. 24, 1997), slip op. at 1-2, n.2.

DISCUSSION AND CONCLUSIONS

Under these circumstances, where the Board has been monitoring RVI's attempts to restore service on the line, use of the out-of-service class exemption would be inappropriate because it would deprive the Board members of the opportunity to review the merits of the abandonment and discontinuance. RVI's bi-weekly reports demonstrate that it has refused to spend any funds on restoring the track or the right-of-way. RVI appears to have placed unacceptable conditions on proffered public funding for the reconstruction of the line, which was made available by OPRC, ORDC, CCPA, the Consortium, the County Commissioners, and other concerned public agencies, and they appear no longer willing to help in restoring service.¹⁸

RVI's original acquisition of this line was granted on the understanding that RVI would provide freight service over this line, as RVI stated in its verified notice of exemption. RVI's position now is that the line is not economically viable and it should be allowed to abandon and either salvage it or permit other interested parties to acquire the line through the offer of financial assistance procedures under 49 U.S.C. 10904 and 49 CFR 1152.27.¹⁹ If the abandonment of the line is warranted by its economics, this could well be an acceptable approach for resolving the service issues surrounding RVI's acquisition of this line and could accommodate any interest in continued rail service over the line. The class exemption procedure, however, does not provide the information that the Board needs to make this determination because it does not provide for a projection of the financial results of future operation of the line. This information is required for the Board to make an informed decision on whether to approve the abandonment of this line of railroad and for other parties who might be interested in purchasing the line under section 10904 to restore service. Accordingly, the rejection of the notice of exemption will be without prejudice to RVI's filing either a petition for exemption or a formal application for abandonment. A formal abandonment application under 49 CFR 1152 must contain the cost, revenue, and value information required by 49 CFR subpart D. A petition for exemption must contain sufficient information for the Board 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.

OPRC's notice of exemption will also be rejected without prejudice to its filing either a petition for exemption or a formal discontinuance application, provided that it submits to the Board and to RVI all relevant information in its possession concerning its costs of operation and revenues for the last 12-month period of its operations over the line. OPRC has evidently been precluded from operating over the line because of RVI's unwillingness to restore the line to safe operating

¹⁸ RVI also apparently rejected Wintrow's general release indemnifying RVI from liability in connection with needed repairs and refused to allow the repairs to be made.

¹⁹ See Reply of RVI, to the January 4, 1999 filing by Darlington Brick and Insul, filed January 12, 1999, in STB Finance Docket No. 33385, at 5.

conditions. Because of the relationship between RVI's proposed abandonment and OPRC's proposed discontinuance, OPRC's notice similarly lacks the proper basis for invocation of the class exemption. Moreover, concurrent Board consideration of resubmitted and fully supported proposals by RVI and OPRC would be practically and administratively desirable.

Because this decision is relevant to requests for service filed in STB Finance Docket No. 33385, a copy of this decision will be served on all parties of record in that proceeding.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The notice of exemption in STB Docket No. AB-556 (Sub-No. 1X) is rejected.
2. The notice of exemption in STB Docket No. AB-555 (Sub-No. 1X) is rejected.
3. This decision is effective upon its service date.
4. A copy of this decision will be served on all parties of record in STB Finance Docket No. 33385.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams
Secretary