

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-573X

TRINIDAD RAILWAY, INC.—ABANDONMENT EXEMPTION—
IN LAS ANIMAS COUNTY, CO

IN THE MATTER OF A REQUEST TO SET TERMS AND CONDITIONS

Decided: July 25, 2002

On July 16, 2002, Rail Ventures, Inc. (Rail Ventures or Petitioner) filed a petition for clarification of our April 17, 2002 decision in this proceeding. That decision set a purchase price and other terms for the sale of a rail line under the offer of financial assistance (OFA) provisions of 49 U.S.C. 10904.¹ Kern Valley Railroad Company (Kern Valley or Respondent), the line's owner, replied to the petition on the same day. A.P. Maxwell and the Trinidad Railway, Inc. (Trinidad) submitted a reply in support of Kern Valley on July 19, 2002.

BACKGROUND

On September 1, 2000, Trinidad invoked the class exemption procedures of 49 CFR 1152.50 — which provide an exemption from the procedures of 49 U.S.C. 10903 for the abandonment of out-of-service rail lines at 49 CFR 1152.50 — on a 28-mile segment of rail line in Las Animas County, CO, between milepost 2.0 at Jansen and the end of the Trinidad line at milepost 30.0.² Before that notice went into effect, Rail Ventures timely filed a notice of its intent to invoke the OFA provisions of section 10904 in order to acquire the line for continued rail service. That filing, and subsequent

¹ The April 17 decision also set July 16, 2002, as the deadline for consummation of the sale of the line. As Rail Ventures' petition was filed on that date, petitioner also requested an extension of the deadline pending resolution of its petition. By a decision served on July 16, 2002, the deadline was extended for 10 days, until July 26, 2002.

² The earlier procedural history of this and related proceedings is set out more fully in our January 15, 2002 decision. At the time Trinidad submitted the notice to abandon, the line had not carried any traffic for 4 or more years.

extensions, stayed the effective date of the abandonment exemption covered by the notice.³ On December 5, 2000, Rail Ventures timely filed its OFA, offering to buy the line for \$2.5 million.

Shortly before that, however, on October 31, 2000, after having received notice of Rail Ventures' forthcoming OFA, Trinidad sold most of its interest in its entire 30-mile line (including the 28-mile segment for which it sought abandonment authority in this proceeding) to Kern Valley, which subsequently invoked the class exemption procedures at 49 CFR 1150.31 to obtain authorization for the purchase. Kern Valley Railroad Company—Acquisition and Operation Exemption—Trinidad Railway, Inc., STB Finance Docket No. 33956 (STB served and published Nov. 21, 2000).⁴ Kern Valley stated that it did not acquire the line segment to provide rail service, but rather to salvage the rail property once it was abandoned.⁵ Kern Valley also acknowledged that the line remained subject to the section 10904 process, a request for issuance of a NITU, and other conditions imposed on the abandonment exemption.

Rail Ventures pursued its OFA, but the parties were unable to reach an agreement on the terms and conditions for sale of the line under the OFA process. Accordingly, Rail Ventures asked us to set the terms and conditions of sale and, in a decision served on April 17, 2002, we set the purchase price for the line at \$3,830,697, which we found to be the net liquidation value (NLV) of the line. We also established terms for transfer and set the consummation of the sale to occur no later than 90 days after the date of service, i.e., by July 16, 2002.

In arriving at the \$3,830,697 figure for the NLV, we assigned no value to the land underlying the line because Rail Ventures had not submitted any evidence of land value — it claimed that it had been unable to determine how much, if any, property Kern Valley owned in fee. Kern Valley's

³ The Rails to Trails Conservancy (RTC) has requested issuance of a notice of interim trail use (NITU) under the National Trails System Act, 16 U.S.C. 1247(d), in order to negotiate for the acquisition of the right-of-way for rail banking and interim use as a trail. However, because an OFA takes precedence over a request for a NITU, RTC's request has been held in abeyance pending the outcome of the OFA process.

⁴ As explained in the decision served November 21, 2000, Kern Valley obtained the right-of-way only between milepost 2.0 and milepost 15.11, and a permanent, irrevocable easement to operate over the remainder of the line. Rail Ventures recognized this easement interest in its Request to Establish Terms and Conditions of Sale, filed in this proceeding on March 18, 2002. Trinidad retained its real estate interest in the right-of-way between milepost 15.11 and the end of the line.

⁵ Based on the structure of the transaction with Trinidad, Kern Valley would have the right to salvage the track materials over the entire line if abandonment were allowed to be consummated.

valuation also did not place any value on any real estate. Similarly, neither party provided any evidence of the value of any structures located along the line.⁶

Furthermore, Rail Ventures' submission failed to offer any support for any of its calculations. In requests to set terms and conditions of an OFA sale, the offeror bears the burden of proof to support its valuation of the line. Consequently, we adopted Kern Valley's calculations.

Rail Ventures accepted the terms and conditions that we set. Accordingly, by a decision served on May 15, 2002, the Board (through the Director of the Office of Proceedings) authorized Rail Ventures to acquire the line and provided for the notice of abandonment exemption to be dismissed upon the sale being consummated.

Rail Ventures now argues that two structures – an engine house situated between milepost 29 and 30 and a depot at Segundo near milepost 15 – are located on the railroad right-of-way and, thus, should be conveyed to it pursuant to the OFA sale. Rail Ventures states that Kern Valley has refused to include the structures in the sale.

Kern Valley states that its \$3.8 million valuation of the line, which we adopted, did not include either the engine house or the depot. Kern Valley has submitted a verified statement from Kenneth Cotten, who performed the original NLV appraisal, stating that he did not include either structure in his appraisal. Kern Valley states that it does not even own the engine house, which was retained by Trinidad.⁷ Kern Valley states that it is willing to sell the depot at Segundo to Rail Ventures but outside of the OFA process. Kern Valley notes that it made an offer to sell the depot to Rail Ventures over a month ago.

⁶ Kern Valley's submission mentions a "shop facility" at milepost 29.25 (Cotten Verified Statement at 5), but no value was included for such a facility in Kern Valley's NLV calculations.

⁷ Trinidad confirmed this statement in its July 19, 2002 reply. Of course, the fact that Trinidad retained ownership would not in and of itself deter us from ordering Trinidad to convey the engine house to Rail Ventures, because we have jurisdiction to order the sale of all the property encompassed in the notice of abandonment exemption that is needed for effective transportation service (at its fair market value), whether retained by Trinidad or sold to Kern Valley. See 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-556 (Sub-No. 2X) (STB served Oct. 4, 2000) (Railroad Ventures). Here, however, as discussed later, we do not find it appropriate to order transfer of this property.

Finally, in a letter received today, Rail Ventures requests that we grant an extension of the July 26, 2002 closing date to a date 10 days after the Board rules on Rail Ventures' request for clarification. Rail Ventures states that the financial institution that will help fund the transaction refuses to proceed until it has received a more definitive statement concerning the assets to be transferred. Kern Valley has filed a reply today opposing the request for extension, stating that Rail Ventures has known since May 20 exactly what property would be conveyed at closing. Trinidad supports Kern Valley's position.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10904(f), we will set the price and other terms of sale in an OFA transaction upon the request of a party. We cannot set a price which is "below the fair market value of the line (including, unless otherwise mutually agreed, all facilities on the line or portion necessary to provide effective transportation services)." 49 U.S.C. 10904(f)(1)(B). That is, we are statutorily directed to include all facilities necessary for effective transportation services when setting an OFA sale price.

Rail Ventures bases its argument that the engine house and depot should be included in the OFA sale on the premise that the structures were included in the NLV we adopted, and thus the purchase price we set. In support of that argument, Rail Ventures cites a statement made by Kenneth Cotten, the appraiser who submitted a valuation of the line on behalf of Kern Valley.⁸ As relevant, Cotten stated, at page 5 of his verified statement:

(Fixed Asset Ownership) This valuation encompasses all of the Kern Valley Railroad between Milepost 2.00 (west of Jansen Yard (Trinidad, Colorado) and Milepost 30.00 (Picketwire (Stonewall) Colorado). This includes the main track, double ended siding at Segundo, MP 14.9, coal tipple tracks at MP 28.25, and a shop facility at MP 29.25 (Emphasis added).

This statement, although it seems to support Rail Ventures' argument, is diminished by another statement by Cotten, also cited by Rail Ventures, that his appraisal covers everything except for "land and rolling stock." The shop facility sits on land, and setting a value on it while apportioning no value for the land under it would require some explanation in the valuation.

But no valuation for either the shop facility or the depot is listed in Cotten's appraisal, which includes a detailed valuation of track, ties, and other equipment (such as tie plates, bars and anchors).

⁸ Rail Ventures cites Kern Valley's appraiser because the valuation we established in our April 17, 2002 order is based on Kern Valley's evidence and argument.

The fact that no appraisal of major assets such as the engine house or depot appears in Cotten's valuation lends support to Kern Valley's argument that they were not included. Cotten's own statement that he did not include them, submitted in reply to Rail Ventures' petition for clarification, lends further support to this argument.

The fact that the structures were not included in the appraisal does not end the matter, however. We presume that all of the property the abandoning carrier (or its predecessor) has assembled for, and dedicated to, rail service is necessary to provide effective transportation services.⁹ Railroad Ventures. But that presumption, as we noted in Railroad Ventures, may be rebutted. Here, on the record now before us, we find that Kern Valley has rebutted the presumption that the engine house and the depot are necessary for effective transportation services.

Kern Valley argues that neither structure is necessary for Rail Ventures to carry out its common carrier obligation. The fact that Kern Valley is currently serving (through a contractor) the only active shipper on the line, the Lorencito Coal Company, LLC (Lorencito), without utilizing either the engine house or the depot, together with the fact that Rail Ventures did not attach sufficient importance to these structures to ensure that they were included in the valuation,¹⁰ offers strong support to its argument.

Unlike the case in Railroad Ventures, in this proceeding there is no statement or showing by Rail Ventures that it needs these structures for such service and why. The mere expression of desire by Rail Ventures to obtain the structures offers little support, particularly in the case of the depot, because it would appear to be useful only in passenger operations, and not freight operations. Rail Ventures' interest in scenic rail operations, while not inconsistent with its proposed common carrier service,

⁹ This presumption is, in part, dictated by practical considerations. Without such a presumption, we might not be able to set terms of sale within the exceedingly short time (30 days) allowed by the statute. In this regard, despite the time constraints, Rail Ventures has not offered any explanation why it has waited until the absolute last minute — the deadline for consummation — to come forward and seek clarification of our April 17 order. Rail Ventures' request to set terms and conditions provided no mention or valuation of the structures. The question of whether the structures at issue were to be included in the OFA sale was raised over a month ago in correspondence between counsel for the parties. Rail Ventures was aware that Kern Valley did not believe that either structure was included in the purchase price and that Kern Valley did not have title to the engine house. The fact that Rail Ventures waited until the deadline for consummation shows little regard for the timeliness of the OFA process.

¹⁰ Rail Ventures provided its own estimates of the value of the track and related materials in the line, but did not provide any estimate of the value of the structures.

affords us no basis for expanding the scope of section 10904, which is directed at continuation of the freight operations that would otherwise be discontinued if the line is abandoned pursuant to section 10903 (or an exemption from that section).

The situation with the engine house presents a somewhat closer issue, because, unlike the passenger depot, it is more likely to be related to freight service. But Kern Valley does not use it and obviously does not need it to serve the Lorencito mine. Rail Ventures offers no statement as to what use the engine house would serve or even whether it needs it.

Based on the record before us, we find that Kern Valley has rebutted the presumption that these structures are needed to provide effective common carrier rail freight service. Thus, we will not compel their transfer to Rail Ventures.

Rail Ventures' request for an extension of time for consummation will be denied. The Petitioner has known the nature and scope of the properties to be transferred for at least 2 months. Moreover, the fact that neither structure was included in an itemized appraisal (so detailed that it identified the individual pieces of hardware that hold rail onto ties and which enumerated and categorized the condition of railroad ties) should have put both Rail Ventures and any lender on notice that the two buildings were not included in the \$3.8 million value set for the line.

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

It is ordered:

1. The petition for clarification is denied.
2. Rail Ventures' request to further extend the OFA consummation deadline is denied.
3. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Burkes.

Vernon A. Williams
Secretary