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

Decided November 8, 2001

The Board clarifies which assets were ordered to be sold to Columbiana County Port Authority in this forced sale under the ofer of financial assistance procedures, establishes a new procedure for paying for repairs on the line, and denies as moot the request for a cease-and-desist order.

BY THE BOARD:

This decision concerns the transfer of a rail line in eastern Ohio and western Pennsylvania under the forced sale provision of 49 U.S.C. 10904. We set the terms for the sale in a series of decisions issued in 2000 and earlier this year.[1] In May 2001 the purchaser of the line, Columbiana County Port Authority (CCPA),[2] filed a request for: (1) clarification of which assets we ordered to be transferred to CCPA; (2) establishment of a procedure for disbursing funds from an escrow account to pay for repairs on the line; and (3) issuance of a cease-and-desist order to stop the line's seller, Railroad Ventures, Inc. (RVI), from interfering with disbursements from the escrow account.[3] In this decision, we

[1] The decisions are pending judicial review in *Railroad Ventures, Inc., et al. v. STB*, No. 00-3261 and consolidated cases (6th Cir. filed Mar. 1, 2000) (*RVI v. STB*).

[2] CCPA is a quasi-public agency established by the Board of County Commissioners of Columbiana County, OH, to promote economic development within the County.

[3] RVI filed a reply; CCPA filed a response to RVI's reply; RVI filed a motion to strike CCPA's response; and CCPA filed a reply to RVI's motion to strike. In view of the continuous litigation in this proceeding, the parties' earlier failure to provide pertinent information to the Board, and the additional information submitted by RVI itself in its motion, we see no reason to strike CCPA's response. RVI characterizes CCPA's response as an unwarranted attempt to abuse the OFA procedures and to repudiate the terms and conditions of sale. As explained below, however, we agree with CCPA's interpretation of the terms of sale and therefore we find no repudiation of those terms or any abuse of process by CCPA. Accordingly, RVI's motion to strike will be denied, and the additional information submitted by CCPA in its response and by RVI in its motion to strike will

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clarify the assets that we ordered to be sold, establish a new procedure for paying for repairs, and deny as moot the request for a cease-and-desist order.

BACKGROUND

We have set forth the background and facts of this case in several previous decisions, particularly the one at 5 S.T.B. 283 (2000) (*October 2000 Decision*). We will not repeat that discussion here, except as necessary to resolve the issues now before us.

1. *Assets*. In the months after RVI sold the rail line to CCPA, the buyer and seller disagreed on the breadth of assets that we ordered to be sold to CCPA. RVI takes the position that its affiliate, Venture Properties of Boardman, Inc. (VPB), lawfully retains an interest in certain leases, licenses, and agreements concerning the rail line that RVI had transferred to VPB shortly before CCPA made an offer to purchase the line. CCPA maintains that, in our earlier orders, we voided the transfer to VPB of the assets at issue here, and CCPA asks us to declare that it acquired these disputed interests when it purchased the line. As we explain below, we agree with CCPA.

2. *Escrow Disbursements*. The parties also disagree on the procedures and payment for repairs to the line. In our earlier decisions, we ordered the parties to place in escrow $375,000 from the sale proceeds to pay for certain repairs to the line. RVI has raised questions about the breadth of repairs for which payment was to be made from the escrowed funds. Also, the designated escrow agent, attorney James Davis, is no longer willing to serve and has not disbursed any of the funds for repairs that already have occurred. CCPA asks us to establish a procedure for determining whether specific repairs were intended to be covered and to provide for disbursement from the escrow account. In connection with that request, CCPA asks us to order RVI to cease and desist from interfering with the disbursement of funds from the escrow account. In this decision, we clarify the type of repairs to be paid from the escrowed funds, order the immediate payment to CCPA of all of the funds in the escrow account, and order CCPA itself to keep account of those funds.

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[3](...continued)
be allowed to remain in the record.

PRELIMINARY MATTER

In August 2001, Home Depot filed a request that, before we issue a decision on CCPA's request for clarification, it be afforded time to review the pleadings and file any pleadings it deems necessary to protect its property interests. Home Depot owns property in Mahoning County, OH, where it has a retail store. According to Home Depot, that store is accessible by three points of entry, two of which require customers and employees to cross CCPA's rail line. To ensure access to its property, Home Depot acquired easements to cross the rail line when it purchased the property in 1997.[4]

Because we are not determining the validity or terms of Home Depot's crossing easements in this decision, there is no need for Home Depot to submit evidence or argument. Here, we are simply addressing whether VPB or CCPA is the party with whom Home Depot should deal in matters relating to these easements.

Home Depot has also asked to become a party of record in this proceeding so that it might receive copies of all filings until matters concerning the ownership of the line, and interests in it, are settled. That request is unopposed. We will treat the request as a petition for leave to intervene and will grant it because it will not delay the proceeding or prejudice any party.

DISCUSSION

1. *Compatibility With Pending Judicial Review.* RVI argues that entertaining CCPA's request for clarification of our earlier, final orders would interfere with the jurisdiction of the United States Court of Appeals for the Sixth Circuit on judicial review of those orders. But where, as here, the parties have differing interpretations of our prior order, clarifying what our order meant should assist, rather than interfere with, the court's review. Indeed, we have issued a similar clarification of a final order earlier in this proceeding, even though that order was pending before the court on review. *See* our decision issued in this proceeding at 5 S.T.B. 373 (2000).

Moreover, we believe that the Sixth Circuit expects us to resolve disputes as they arise concerning execution of our orders, as demonstrated by the Court's

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[4] As indicated in a letter from CCPA to Home Depot, a Federal Railroad Administration (FRA) field representative has apparently raised safety concerns regarding Home Depot's crossings. *See* Exhibit B to Home Depot's Requests. We urge Home Depot and CCPA to cooperate with the FRA and to immediately address any safety concerns regarding these crossings.

Order of January 5, 2001, directing us to determine the form of the deeds to be used to transfer this line from RVI to CCPA because the parties could not agree. As the Court recognized in that order, "the Board appears to be in a better position than the court to resolve this [kind of] dispute expeditiously."

Here, in order for the parties to execute our orders regarding payment for repairs, it is necessary for us to make a new arrangement concerning the escrowed funds. Our doing so should not interfere in any way with the court's review of the issues that have been presented to it. Even if the court were to find that the escrowed funds should not have been deducted from the proceeds of sale to cover these repairs, we would have authority, upon a remand from the court, to require CCPA to return the monies to RVI.

2. *Clarification of the Property Interests Transferred from RVI to CCPA.* RVI acquired this rail line from the former Youngstown & Southern Railroad (Y&S), subject to various crossings and license agreements granted by Y&S (and prior owners) to various third parties, particularly utilities and governmental entities.[5] During its ownership of the former Y&S line,
RVI granted additional crossings and easements, some of which provided periodic income. In anticipation of the forced sale of the line, RVI converted various renewable leases of First Energy Corporation into permanent easements. RVI also transferred to VPB all of its right, title, and interest in numerous other leases, crossings, easements, and license agreements concerning this line.

CCPA learned of the transfer of the leases, easements, crossings, and licenses late in the process of formulating its offer to purchase the former Y&S line from RVI. CCPA asked us to reject RVI's sale of the easements to First Energy Corporation and RVI's assignment to VPB of all right, title, and interest to income from third party agreements concerning this line. We declined to void the sale of the easements to First Energy or the transfer of certain interests to VPB because CCPA had not demonstrated that these transfers would obstruct future rail operations, but we recognized that such eleventh-hour actions to strip the property of part of its value should be reflected in the price that CCPA would be required to pay for the line.

Consequently, CCPA submitted to us (in an appendix to its Request to Set Terms) a list of some — but not all — of the crossings and agreements in which RVI's right, title, and interest was transferred from RVI to VPB. CCPA estimated the value of the listed easements and adjusted its offer to reflect the

[5] For ease of reference, we will refer to this rail line as "the former Y&S line."

loss of income from the listed crossings and easements. When we set the purchase price, we adjusted the price of the line to account for the fact that VPB would continue to receive the income from the *listed* crossings and agreements.

In ordering the sale, we recognized that there were other transfers of interests in this rail line from RVI to VPB that had not been specifically identified, and to protect the integrity of the OFA process we declared those other transfers to be void. *October 2000 Decision* at 294. In that way, we would be able to assure that CCPA would receive the full property we valued (and for which it was paying). Accordingly, we ordered RVI to "sell to CCPA all of the interests that it acquired in this rail line with the exception of the licenses and crossings to which CCPA ha[d] acquiesced" by adjusting the valuation of the line, *i.e.*, the licenses and crossings specifically listed in CCPA's evidence. *Id.* at 294.

RVI takes the position that VPB still retains the interest in the crossing agreements and licenses that were not listed in CCPA's evidence (and that accordingly were not accounted for in the purchase price we set). RVI Reply at 11. RVI's position patently ignores our earlier order declaring that such other transfers to VPB were void.

The voiding of the transfer of these other interests from RVI to VPB does not, however, cast into doubt the validity of the leases, easements, crossings, and licenses at issue. Rather, it just means that CCPA — not VPB — is the party that has the right to receive income (if any) from these other interests.[6] Also, CCPA now has the role of grantor of the leases, easements, licenses, or crossings. Any lease, easement, license, or crossing holders should turn to CCPA with questions about the easement or the underlying agreement granting it.

Accordingly, we clarify that neither RVI nor VPB has any remaining right, title, or interest in this rail line other than in the First Energy Corporation easements mentioned above and the licenses and crossings listed in Exhibit A (Confidential Version) to Exhibit 7 of CCPA's Request to Set Terms, filed earlier in this proceeding. We clarify that VPB holds rights or interests in only four of the leases listed in Exhibit Y,[7] because those four leases were listed in CCPA's evidentiary submission described above. VPB is entitled to income (if any) from these four leases.

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[6] With the transfer to VPB voided, RVI retained the right, title, and interest in these assets until the closing of the sale of the former Y&S line to CCPA, at which point RVI's right, title, and interest transferred to CCPA.

[7] Ohio Bell (lease date June 16, 1983); Ohio Edison (lease date July 1, 1976); Ohio Edison (lease date July 19, 1967); and Mahoning County (lease date July 8, 1966).

Turning to the remaining leases listed in Exhibit Y, we reiterate that the transfers from RVI to VPB of any right, title, and interest in these leases are void, as we stated in our *October 2000 Decision*. RVI shall arrange for its affiliate, VPB, within 15 days of the effective date of this decision, to transfer, effective January 24, 2001 (the date of the sale of this rail line to CCPA), the rights, title, and/or interest formerly held by RVI to CCPA. Any income or other benefits that would have accrued to VPB before January 24, 2001, now accrue to CCPA, not VPB.

3. *The Escrowed Funds*. We earlier ordered the parties to escrow $375,000 of the proceeds of the OFA sale to pay for repairs that are needed to make serviceable any segment of the former Y&S line that RVI allowed to become unserviceable during its ownership. Some repairs have been made, but none of the escrowed funds have been distributed to CCPA because escrow agent Davis resigned prior to the disbursement of any of the funds.[8]

The parties disagree on a replacement for the escrow agent. CCPA has asked us to appoint the Ohio Rail Development Commission (ORDC), which already has the role of approving the disbursement of the funds, to also serve as escrow agent, but RVI objects, contending that ORDC has a conflict of interest.

The parties also disagree on whether certain repairs are to be paid out of the escrowed funds. RVI asserts that the escrowed funds are to pay for repairs to the rail line only at those road crossings at which RVI explicitly authorized governmental entities to pave over the track or to disconnect the traffic signals. RVI objects to the escrowed funds being used to cover repairs to any other portions of track, particularly those where a governmental entity paved over or removed track without RVI's explicit authorization, and where the governmental entity stated that it would pay to restore the track and signals if service were to resume.[9] RVI now takes the position that the escrowed funds were not intended to cover the majority of the 92 repair sites that CCPA identified in a letter to RVI dated March 6, 2001.[10]

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[8] Mr. Davis appears to have retained control over the escrowed funds pending our determination as to how those funds should be released.

[9] RVI makes this argument even though it previously informed many of the responsible government agencies that RVI did not object to work crews entering onto RVI property to make road improvements. *October 2000 Decision* at 301. RVI also assured these entities that, if rail service were to be reinstituted, RVI would be responsible for exposing rails that had been covered with asphalt. *See, e.g.*, Exhibit A to RVI Reply.

[10] *See* Exhibit 1 to CCPA's Petition for Clarification, filed May 14, 2001.

In view of the disagreement on coverage for repair sites, CCPA has asked us establish a procedure affording RVI a time to identify any specific repair or restoration projects it considers not to be covered by the escrow provision and affording CCPA additional time to respond. Under CCPA's suggestion, we would then decide whether a particular repair is covered by the escrowed funds, and, if it is, we would then order a newly appointed escrow agent to disburse the funds to CCPA.

a. *Covered Repairs*. We first address the general dispute as to the kind of repairs intended to be covered by the escrowed funds. RVI has suggested that we did not mean for these funds to be used for capital expenditures or for any purpose other than removing asphalt or reconnecting signals. Our purpose in establishing the escrow account was broader, however. We meant for the escrowed proceeds to be used to correct egregious misconduct, whether by RVI actively (by inviting road crews to pave over track) or passively (by failing to protect the property from others rendering the line unserviceable by paving over, removing, or destroying track or disconnecting signals).[11] Contrary to RVI's allegations, expenditures necessitated by RVI's disregard for the common carrier obligation cannot be considered as capital expenditures, but rather as necessary repair expenses to restore the line to service and should be covered from the escrowed funds.

b. *Disbursement of Funds*. We ordered the establishment of the escrow account so that an independent manager would conserve the account's assets, ensure timely payment of funds to CCPA, and surrender any unused funds to RVI after the repairs were made. RVI's position and actions regarding the escrow account have not furthered these goals, but rather have frustrated the orderly administration of these funds and have prevented disbursement of funds

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[11] RVI had an obligation to keep the line serviceable notwithstanding weather-related damage, which CCPA fixed within a short time and at little cost, as shown in a pleading filed in a related court case, *Railroad Ventures, Inc. v. Columbiana County Port Authority, et al.* (No. 4:01CV 01164 (N.D. Ohio) (Defendants' Response to Court Order of July 16, 2001, at Attachment B, Exhibit A). *See GS Roofing Products Co. v. STB*, 143 F.3d 387, 392 (8th Cir. 1998) (railroad has obligation to take reasonable steps to fix damage that is basis for embargo). RVI should not have allowed any portion of the track to become unserviceable through the actions of third parties, much less have invited those responsible for road repairs to pave over any portion of its tracks. Accordingly, it does not matter whether RVI authorized the modifications to the right-of-way or whether a simple lack of due diligence was the cause for sections of the track to become unserviceable; we hold RVI responsible. RVI may in turn seek to enforce against local governmental entities any promises that they would compensate RVI for its expenses of fixing the track and appurtenances.

from the account for legitimate expenditures that were meant to be covered by the fund.

RVI first attempted to assert a right to make repairs itself. When that attempt was rejected, RVI tried to reserve for itself a right to determine in the first instance what crossing expenses should be subject to reimbursement. Under the procedures proposed by RVI, CCPA could proceed with repairs only after RVI approved both the work involved and the estimated cost of repairs. CCPA objected vigorously to RVI's proposed approach. The disagreements between the parties were such that Mr. Davis was unwilling to continue as escrow agent because he did not want to be "caught in the middle of an explosive situation which will most likely end up in further litigation." Exhibit 4 to CCPA Request for Clarification.

Under these circumstances, we do not believe that finding a suitable replacement escrow agent would be an easy task. Nor do we believe that it is necessary to do so. Rather, we now conclude that the best way to ensure that RVI does not interfere further with the orderly administration of these funds and the accomplishment of our original objectives in setting up the fund is to allow CCPA to manage the funds directly. Accordingly, we will direct Mr. Davis (the escrow agent who resigned) to make a lump-sum, one-time payment of the entire amount in the escrow account to CCPA immediately. CCPA shall: (1) keep these funds in a separate account; (2) keep account of all funds expended for repairs, including evidence of competitive bids for each repair project (although we will allow for separate repairs to be grouped for the bidding process); and (3) complete all repairs for which escrow funds are to be used within 270 days from the effective date of this decision. Funds expended in this fashion shall be subject to challenge by RVI or its affiliates only for fraud.

In light of our action here, we will deny as moot CCPA's requests for (1) an order establishing procedures for RVI to challenge whether certain repairs may be paid from the escrowed funds; and (2) an order requiring RVI to cease and desist from interfering with disbursements from the escrow account.

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

It is ordered:

1. Home Depot's request to become a party of record to this proceeding is granted. Home Depot's request that we refrain from issuing a decision on the issues presented in this decision until it has the opportunity to comment is denied.

2. RVI's motion to strike CCPA's June 20, 2001, response is denied.

3. RVI shall arrange for transfer, effective January 24, 2001, from either VPB or RVI to CCPA of all of RVI's former right, title, and interest in agreements, leases, licenses, and crossings pertaining to this rail line (except the First Energy Corporation easement and the licenses that were identified in Exhibit A of Exhibit 7 of CCPA's Request to Set Terms) within 15 days from the effective date of this decision.

4. Except for unuseable chattels, and the income from licenses, crossings, leases, easements, and similar agreements specifically listed in Exhibit A (Confidential Version) to Exhibit 7 in CCPA's Request to Set Terms, neither RVI nor VPB is entitled to any ownership interest in, or income from, the former Y&S rail line.

5. Former escrow agent Davis shall immediately transfer to CCPA all funds in the escrow account established pursuant to previous order and shall be held harmless for doing so.

6. CCPA shall establish a separate escrow account with the proceeds transferred to it pursuant to paragraph 5. CCPA may withdraw from the escrow account such funds as are necessary to pay for repairs of this rail line at road crossings and the restoration of signaling equipment that occurred as a result of RVI's failure to keep the line of railroad operational, and shall keep account of all funds spent.

7. If any funds remain in the escrow account after the 270th day from the effective date of this decision, they shall be transferred to RVI at that time.

8. CCPA shall be held harmless for any funds spent from the escrow account for repairs to its line that were the result of RVI's failure to keep the line operational during its ownership of the line, except for any fraudulent expenditures.

9. This decision is effective November 24, 2001.

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