

STB DOCKET NO. AB-556 (SUB-NO. 2X)¹

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

Decided October 3, 2000

In this decision, we are declaring void: (1) the transfer by Railroad Ventures, Inc. (RVI), to its affiliate, Venture Properties of Boardman, Inc. (VPB), of subsurface and air rights in the right-of-way at issue; (2) other land transfers from RVI to VPB or to other third parties; and (3) the contract of sale between RVI and Boardman Township Park District (Park District) for a 4.012-acre parcel of the right-of-way. We also are ordering RVI to transfer to Columbiana County Port Authority (CCPA)² all of the interests in the right-of-way discussed in this decision. Further, we are denying CCPA's request to revoke the exemptions granted to RVI in these proceedings and resolving other outstanding motions or petitions. Finally, we are generally denying RVI's request to revisit valuation issues, but are adjusting the purchase price in two respects.

BY THE BOARD:

BACKGROUND

This decision concerns a 35.7-mile rail line that extends from milepost 0.0 at Youngstown, OH, to milepost 35.7 at Darlington, PA, and includes a connecting 1-mile line segment near Negley, OH. The width of the line varies between 30 and 100 feet, but generally it is 60-feet wide.

¹ This decision embraces STB Finance Docket No. 33385, *Railroad Ventures, Inc. — Acquisition and Operation Exemption — Youngstown & Southern Railroad Company — Request to Set Terms and Conditions*. These proceedings are not consolidated. A single decision is being issued for administrative convenience.

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.

Former owner and operator. Prior to RVI's acquisition, the line was owned by the Youngstown and Southern Railway (Y&S)³ and operated by the Ohio & Pennsylvania Railroad Company (O&P). When O&P declined to exercise its option to purchase the line, P&LE sought other purchasers.

RVI's acquisition of the line and failure to provide for service over the line. RVI purchased the line from Y&S on November 8, 1996, without having sought or obtained the necessary authority from the Board.⁴ RVI immediately cancelled the O&P lease, which ended rail service to several shippers located on the line. After intervention by the Board's Office of Compliance and Enforcement, RVI agreed to restore service, with O&P as operator. Soon after service was restored, flooding caused washouts on the line. As a result, O&P issued an embargo announcing that service could not be provided because the line was not operable.

RVI sought retroactive authorization for its purchase of the line by filing a notice in January 1997 to invoke the class exemption at 49 CFR 1150.31.⁵ That notice of exemption was rejected⁶ for two reasons: (1) RVI had not acknowledged its common carrier obligation to provide service on the line; and (2) a third party, CCPA, alleged that RVI would not operate, or arrange for another party to operate, the line.

In the meantime, various parties — O&P (the operator under the restored lease) and various public entities, including CCPA and the Ohio Rail Development Commission (ORDC) — offered to provide funding to reconstruct the line. However, in late January 1997, RVI refused to allow a contractor to make the repairs.⁷

In April 1997, again invoking the class exemption provision in our regulations, RVI filed a new notice for retroactive authorization of its acquisition

³ Y&S (a noncarrier) was a wholly owned subsidiary of the Montour Railroad Company (also a noncarrier), which in turn was a wholly owned subsidiary of Pittsburgh & Lake Erie Properties, Inc. (P&LE), the successor-in-interest to the Pittsburgh & Lake Erie Railroad Company.

⁴ A noncarrier (such as RVI) that seeks to purchase and operate a rail line must obtain authorization from the Board under either 49 U.S.C. 10901 (application for approval) or 49 U.S.C. 10502 (through a request for exemption from the application requirement).

⁵ The Board has a class exemption under which a noncarrier seeking to acquire a rail line need not file an application under 49 U.S.C. 10901, but need only follow certain notification procedures. See 49 CFR 1150.31(a), 1150.32.

⁶ *Railroad Ventures, Inc. — Acquisition and Operation Exemption — Youngstown and Southern Railway Company*, STB Finance Docket No. 33336 (STB served Jan. 9, 1997).

⁷ On February 5, 1997, ORDC and CCPA asked us for a declaratory order to stop RVI's interference with the repairs. We denied that request in a decision issued in July 1997, as discussed *infra*.

of the line, stating that it was doing so “for the purpose of conducting rail freight common carrier operations on the former Y&S line” (emphasis in the original).⁸ We then granted RVI the authority that it needed in order to own and operate the rail line. *Railroad Ventures — Acquisition and Operation Exemption — Youngstown & Southern Railroad Company*, STB Finance Docket No. 33385 (STB served April 24, 1997, and published at 62 Fed. Reg. 10,061(1997)).

CCPA and ORDC promptly filed a petition to revoke the exemption. RVI responded that it was prepared to allow the contractor onto the rail line to begin repairs and had concluded an operating agreement with O&P. RVI further stated⁹ that, if service did not resume, it would seek authority to abandon the line,¹⁰ thereby enabling the rail line to be acquired for continued rail service under the financial assistance procedures of 49 U.S.C. 10904 and 49 CFR 1152.27. Based upon these representations, we were satisfied that RVI acknowledged its common carrier obligation to provide transportation upon reasonable request, *see* 49 U.S.C. 11101(a), and we declined to revoke its authority to own and operate the line.¹¹ However, because of the parties’ concern that RVI might not restore service, we imposed a requirement that RVI report biweekly on the status of the restoration of the line and provide details as to the cause for any delays.¹²

However, as CCPA and ORDC had suspected, RVI failed to provide any of its own funds to restore service and did not cooperate with the public agencies that sought to assist in restoring service. Instead, in January 1999, RVI filed a notice to abandon the line pursuant to the class exemption at 49 CFR 1152.50 for the abandonment of out-of-service rail lines. We rejected its attempted use of the class exemption, given the local interest in restoring rail service that had prompted us to monitor RVI’s attempts to restore service.¹³ We explained that,

⁸ Verified Notice of Exemption, filed April 2, 1997, in STB Finance Docket No. 33385 at 6.

⁹ Reply of RVI, filed April 19, 1997, in STB Finance Docket No. 33385 at 11.

¹⁰ In order to be relieved of the common carrier obligation to provide service over a rail line, the owner and operator of the line must obtain Board authorization under either 49 U.S.C. 10903 (application for approval) or 49 U.S.C. 10502 (through a request for exemption from the application requirement).

¹¹ *Railroad Ventures Inc. — Acquisition and Operation Exemption — Youngstown & Ohio Railroad Company*, STB Finance Docket Nos. 33385, *et al.* (STB served July 15, 1997).

¹² *Id.* In the same decision, we denied the earlier request of CCPA and ORDC for a declaratory order directing repairs to the line because of RVI’s new operating agreement with O&P and the reporting requirement we imposed.

¹³ *Railroad Ventures, Inc. — Abandonment Exemption — Between Youngstown, OH, and Darlington, PA, in Mahoning and Columbiana Counties, OH, and Beaver County, PA*, STB Docket (continued...)

while RVI could not use the class exemption, it could file an appropriate petition or application showing why it should be allowed to abandon the line.

The RVI abandonment proceeding and CCPA's offer to purchase the line. In May 1999, RVI filed a petition asking that it be allowed to abandon the line and that O&P be relieved of its service obligations over the line. We granted that petition in September 1999.¹⁴

Under the offer of financial assistance (OFA) provisions of 49 U.S.C. 10904, when we decide to allow an abandonment or discontinuance of rail service over a line, any financially responsible person has a right to acquire the line to provide continued rail service, and we set the price for, and order the sale of, the line if the parties cannot agree on the terms of the sale. In September 1999, CCPA notified RVI and the Board that it wished to exercise its right, under section 10904, to make an offer to purchase the line in order to provide continued rail service.¹⁵

As required by our regulations at 49 CFR 1152.27(a), RVI, on October 8, 1999, provided to CCPA the information needed for CCPA to formulate its offer. One month later, on November 8, 1999, CCPA timely submitted an offer to purchase the rail line for \$419,360. CCPA valued the underlying land component using an across-the-fence method (*i.e.*, valuing the right-of-way as if it would be cut up and sold as separate parcels of land).¹⁶ When RVI and CCPA could not agree on terms, CCPA, on December 8, 1999, timely asked the Board to establish the conditions and terms of sale. This request started the 30-day period that is provided by the statute, at 49 U.S.C. 10904(f)(1)(A), for the Board to set the terms.

In its request for the Board to set terms, CCPA adjusted its valuation of the line upward to \$441,700.¹⁷ CCPA also disputed the validity of a contract, dated

¹³(...continued)

No. AB-556 (Sub-No. 1X) (STB served Jan. 22, 1999).

¹⁴ *Railroad Ventures Inc. — Abandonment Exemption — Between Youngstown, OH, and Darlington, PA, in Mahoning and Columbiana Counties, OH, and Beaver County, PA*, STB Docket Nos. AB-556 (Sub-No. 2X) *et al.* (STB served Sept. 3, 1999).

¹⁵ CCPA sought additional time to file an OFA. We granted the request, giving CCPA an extension of time until 30 days after RVI furnished certain information.

¹⁶ CCPA adjusted its real estate appraisal to reflect some, but not all, of RVI's recent transfers of property interests in the rail line.

¹⁷ In its OFA at 3, CCPA had valued the track and materials in the line at \$69,360. CCPA revised that value to \$91,706 in the verified statement of Gary Landrio at 3 (Exhibit 10 in its Request to Set Terms).

November 5, 1999, that RVI had entered into with Boardman Township, a municipality that the rail line traverses. That contract purported to bind RVI's successor to pay all of the costs associated with the construction of grade-separated crossings¹⁸ "at State Route 224 and at such other road crossings as may be determined by [Boardman Township]" as a condition precedent to the restoration of rail service. CCPA objected that the cost of constructing even one crossing would be prohibitively expensive, exceeding the value of the entire line.

CCPA also asked us to undo a series of recent transactions by which RVI had allegedly altered the value of the line. These transactions included: (1) the assignment to VPB of all right, title, and interest to income, proceeds, accounts receivable, royalties, and other payments arising from third-party agreements which are attributable to the line; (2) the sale of a 4.012-acre segment of the right-of-way to the Park District for \$140,000; and (3) a contingent agreement for \$600,000 for the sale of 20.61 acres of the right-of-way to the Park District for a 4.2-mile bicycle trail. CCPA argued that RVI was required under section 10904 to convey its entire interest in the rail line.

RVI promptly submitted a reply, in which it disputed both CCPA's view of the extent of the interest required to be conveyed under section 10904 and the value of this property. RVI argued that CCPA should be required to pay \$2,261,490,¹⁹ in exchange for which RVI offered to convey to CCPA only:²⁰

a limited interest which would be sufficient to permit [the] purchaser to operate the rail line and provide continued rail service over this right-of-way. My valuation [is] for surface rights only and [does] not include any so called "third party agreements" which have no relation or impact on the operation of the right of way for railroad purposes. By surface rights I mean a possessory interest sufficient to enable the grantee to use the right of way for railroad purposes. Such an interest can be conveyed by means of an easement, right of way agreement or quit claim deed subject to various reservations or reversionary interests.

The January 2000 Decision. In our decision setting the terms of sale,²¹ we first dealt with the issue of the crossing agreement with Boardman Township. We found (*January 2000 Decision* at 470) that:

¹⁸ As used here, a grade-separated crossing is an elevated or subterranean structure that carries a rail line over or under, rather than across, a public highway.

¹⁹ To support this figure, RVI provided a valuation by its president, who is not a certified appraiser. See Verified Statement of David Handel at 12, attached to RVI Petition for Exemption for Abandonment.

²⁰ Affidavit of David Handel at 2-3, attached to RVI Reply to CCPA Request to Set Terms.

²¹ *Railroad Ventures, Inc. — Aban. Exem. — Youngstown, OH & Darlington, PA*, 4 S.T.B. 467 (2000) (*January 2000 Decision*) at 470.

[b]y creating conditions precedent to the resumption of rail service, most particularly CCPA's contemplated rail service under its OFA, [the Agreement's contractual] restrictions unreasonably interfere with the OFA process and the common carrier operations required by 49 U.S.C. 10904(f)(4)(A). These terms of the Agreement also circumvent our exclusive statutory authority to set the terms and conditions of the sale under 49 U.S.C. 10904(f)(1).

Accordingly, we held that the terms of the agreement that purported to assign obligations to RVI's successors, and to require construction of a grade-separated crossing as a condition precedent to the restoration of rail service, "are void as against public policy." *January 2000 Decision* at 470. As to the other transactions by which RVI had allegedly altered the value of the line, we declined to take similar action in the absence of evidence of a binding agreement that could obstruct future rail operations. *Id.* at 474.

Turning to the task of valuing the line, we explained that, in setting the terms of sale for OFAs under section 10904, the proper standard is the net liquidation value (NLV) of the properties "for their highest and best nonrail use." *January 2000 Decision* at 475. In ascertaining the net salvage value for the track and materials, we relied upon the bid of a rail salvage company, introduced by RVI, but deducted the amount needed to restore grade crossings, and arrived at a net figure of \$730,560. *Id.* at 476.

In valuing the underlying land, we rejected RVI's estimate for two reasons. There was no contract or firm offer to support a valuation of the entire assembled corridor for non-rail use. Similarly, RVI had not supported its estimate of the valuation of individual segments of the assembled corridor because it had not presented signed sales contracts or firm offers. *January 2000 Decision* at 477.

We credited CCPA's appraisal of the value of the land because it was complete, well supported, and had a reasonable basis (comparable sales data). Like CCPA, we deducted \$100,000 from the appraised value "to account for RVI's assignment of lease and interest income," and determined that the land value for the entire right-of-way was \$350,000. *January 2000 Decision* at 477. Together with the net salvage value of the tracks and materials, we set the total purchase price at \$1,080,560. *Id.*

March 2000 Decision. CCPA formally accepted the terms and conditions of sale established in the *January 2000 Decision* and we therefore ordered RVI to transfer all the property interests "that formed the basis for our [*January 2000*] decision setting the terms and conditions for the transfer to CCPA by quitclaim

deed” upon CCPA’s tender of the amount we had set in that decision.²² We reiterated our rejection of RVI’s argument that it could only be required to transfer “what real estate interests are necessary for CCPA to conduct rail operations, such as a rail easement.” *March 2000 Decision* at 540. Because CCPA had not agreed to any additional encumbrances (by liens or easements) that were not reflected in its evidence on the value of the line, *id.* at 540, we ordered RVI to transfer the entire line “as defined here.”

April 2000 Decision. Shortly before the scheduled closing date of April 6, 2000, CCPA presented evidence of another transaction of which it had been unaware at the time it submitted its OFA — a quitclaim deed, dated October 28, 1999, in which RVI purported to transfer in fee simple the subsurface and air rights of the right-of-way to its affiliate, VPB. Because RVI had not immediately informed either CCPA or the Board of this transfer — which occurred after the date RVI had provided CCPA with the required information on its title to the land — we directed RVI to show cause why that transfer was not voidable.²³ We explained that the transfer of subsurface and air rights may affect the value of the land and the purchase price we had set, and that RVI had thus undermined the OFA process by transferring assets after providing the required information to CCPA. *April 2000 Decision* at 584.

We also questioned the propriety of the proposed deeds (submitted by RVI) by which RVI would transfer the line to CCPA. We noted that the proposed deeds would narrow the right-of-way and exclude specified parcels, industrial track, spur, and other properties that had been included in our determination of the value of the property. *April 2000 Decision* at 585. Accordingly, we required RVI to show cause why the interests to be conveyed to CCPA should not include the entire property upon which our January 2000 valuation had been based.

²² *Railroad Ventures, Inc. — Aban. Exem. — Youngstown, OH, & Darlington, PA*, 4 S.T.B. 537 (2000) (*March 2000 Decision*) at 540.

²³ *Railroad Ventures, Inc. — Aban. Exem. — Youngstown, OH, & Darlington, PA*, 4 S.T.B. 583 (2000) (*April 2000 Decision*) at 584.

DISCUSSION AND CONCLUSIONS

In response to our show-cause order, RVI has presented detailed criticisms of the CCPA appraisal upon which we valued the land interests to be conveyed. But RVI has not explained why it failed to submit these criticisms within the 30-day statutory time period allotted for establishing the terms and conditions of an OFA sale. *See* 49 U.S.C. 10904(f)(1)(A). Given the very short time frame we have for setting terms, both the buyer and seller must necessarily present all of their evidence up front.²⁴ With one exception (discussed below), RVI did not utilize its opportunity to submit, at the appropriate time, convincing counter-evidence concerning the NLV of the line. Instead, it submitted what amounted to a counter-proposal²⁵ to sell to CCPA only “surface rights” (essentially an easement) over the right-of-way — an approach that has no basis under the statute, our rules, or precedent.²⁶

I. *Extent of Property That RVI Is Required To Convey Under Section 10904.*

A. *Language of Section 10904.*

RVI’s primary argument is that all we may compel a line owner to convey, absent its consent, is “an easement for railroad purposes and all rail facilities, including track, ties, switches, bridges, structures, loose ballast, signals, and

²⁴ The short statutory time frame benefits a selling/abandoning carrier by minimizing the time in which it is obligated to continue to provide rail service (while the OFA process is pending). *See Hayfield N. R.R. v. Chicago & N.W. Transp. Co.*, 467 U.S. 622, 630 n.8 (1984). Indeed, because the embargo of this line formally ended on December 17, 1996, RVI currently has an obligation to provide service over this line that it is not meeting.

²⁵ *See* RVI Reply to Show Cause Order, filed April 20, 2000, at 13 & 37 (referring to its surface rights proposition as a proposal or offer).

²⁶ RVI recently submitted a letter notifying us that a proposed landfill along this rail line has not yet received a permit to operate, and arguing that “the questionable status” of the proposed landfill “undercuts the entire purpose and rationale advanced by [CCPA] for the acquisition and resumption of rail service on this line.” RVI Letter dated Sept. 7, 2000, at 4. But RVI does not contend that this new evidence shows that CCPA’s offer to purchase and operate this line was a sham. By letter dated September 14, 2000, Penn-Ohio Recycling, Inc., the developer of the landfill, replied, stating that the licensing and development of the landfill are moving ahead. Moreover, the statute provides adequate protection for both shippers and selling rail line owners in this regard. Shippers are protected because no purchaser under section 10904 “may transfer or discontinue service on such line prior to the end of the second year after consummation of the sale[.]” 49 U.S.C. 10904(f)(4)(A). RVI is protected because a purchaser such as CCPA may not “transfer such line, except to the rail carrier from whom it was purchased, prior to the end of the fifth year after consummation of the sale.” *Id.*

similar rail related equipment which is used in the provision of rail transportation services,²⁷ allowing the selling/abandoning carrier to retain for itself the right to sell other easements for utilities, fiber optics, communication towers, and the like to be installed under, beside, or over the rail line. RVI relies on the following highlighted language in 49 U.S.C. 10904(f)(1)(B):

(f)(1) Whenever the Board is requested to establish the conditions and amount of compensation under this section –

(A) the Board shall render its decision within 30 days;

(B) for proposed sales, the Board shall determine the price and other terms of sale, except that in no case shall the Board set a price which is below the fair market value of the line (including, unless mutually agreed, all facilities on the line *or portion necessary to provide effective transportation services*)[.]

We do not believe that the language of the statute compels RVI's narrow reading. A more natural reading of the highlighted language is that it serves merely to clarify that an offeror need not purchase the entire property slated for abandonment, but can opt²⁸ to acquire less than the full length of a line where the offeror wishes to provide for continued rail service on only a portion of the line.²⁹ Where (as here) the offeror does not seek to purchase less than the entire property, we believe that it is reasonable to assume that the entire property is needed for effective transportation services. After all, that is the property the selling/abandoning carrier (or its predecessor) assembled for, and dedicated to, rail service.³⁰ Moreover, as a practical matter, without such a (rebuttable)

²⁷ RVI Reply to Show Cause Order at 51.

²⁸ A section 10904 sale of a line is voluntary with respect to the offeror, but compulsory with respect to the selling/abandoning carrier. See 49 U.S.C. 10904(f)(2).

²⁹ See, e.g., *Iowa Terminal R.R. v. ICC*, 853 F.2d 965, 968 (D.C. Cir. 1988) (16.1-mile slated to be abandoned, but OFA was for only a 10.4-mile portion); *Cleveland & Cuyahoga Heights R.R. v. ICC*, 851 F.2d 1500 (D.C. Cir. 1988) (7.33-miles slated to be abandoned, but OFA was for only a 2.2-mile portion).

³⁰ RVI asserts that some parcels of the land are not contiguous with this rail line and thus it should not be required to convey those parcels to CCPA. Verified Statement of David Handel, dated March 29, 2000, at 3. But RVI did not identify the specific parcels to which it referred or explain why, though they were part of the property it acquired from Y&S, these parcels nevertheless were not associated with rail operations in any way.

presumption, we would not be able to meet the exceedingly short time (30 days) that we have been given by statute to set terms of sale.³¹

The selling/abandoning carrier bears a heavy burden to rebut a presumption that all of the property is needed to provide effective transportation services. Here, RVI did not provide any convincing evidence to show that CCPA (or any buyer) could provide efficient rail service with less than RVI's entire interest in the rail line. RVI presented only its "assurance" that the land interests it intended to convey to CCPA would be sufficient to operate the rail line. That assurance is entitled to little, if any, weight, considering that RVI has not had any experience operating this, or any other, rail line.

To the contrary, we believe that the division of property interests proposed by RVI would be impractical and unworkable from an operational standpoint. A forced split of the rail surface rights from the underlying real estate could create constant tension between the owner of the rail line (here, RVI's affiliate VPB) or other easement holders, on the one hand, and, on the other hand, the holder of surface rights to conduct rail operations (here, CCPA). RVI claims that there would be no such problems because "the aerial and subsurface rights * * * are necessarily subject to continued rail service and require coordination of installation and maintenance with the rail operator."³² We are not persuaded, however, that there can be any assurance that rail operations will be unhampered unless the offeror (who will be responsible for ensuring that rail service is provided) possesses sufficient property rights to determine unimpeded who may enter the right-of-way at what times and under what circumstances, as well as whether any underground or additional overhead cables or similar structures would interfere with its own rail use of the right-of-way.

B. *Scope of Section 10906.*

RVI further argues that a forced sale under section 10904 may not include any spur, industrial, team, switching or side tracks.³³ RVI bases this argument on 49 U.S.C. 10906, which excepts such track from the need for Board approval to construct or abandon the trackage.³⁴ It does not follow, however, that, where

³¹ The 30-day statutory time allows only for summary procedures. See *Chicago & N.W. Transp. Co. v. United States*, 678 F.2d 665, 671 (7th Cir. 1982) (*C&NW*).

³² RVI Reply to Show Cause Order at 48.

³³ RVI Reply to Show Cause Order at 53.

³⁴ RVI complains that some of the tracks ordered to be conveyed in our *January Decision* and our *March Decision* have not been used for years. However, RVI does not clearly identify which (continued...)

such tracks are attached to a main line or branch line for which abandonment authority is required, they cannot be included in a forced sale under section 10904. Indeed, Congress could not have intended such a result, as it would defeat the very purpose of section 10904. The offeror could not provide continued rail service if it were deprived of the spur, industrial and side track needed to physically reach the shippers' facilities (for loading and unloading traffic) or the passing and switching track that is needed for operating trains and interchanging traffic moving onto or off of the line.

II. *Cancellation of Contrary Sales and Agreements.*

RVI's attempted transfers of subsurface and air rights and parcels of land to its affiliate, VPB — as well as its November 8th contract to transfer to the Park District a 4.012-acre segment of the right-of-way³⁵ — contravene our continuing and exclusive regulatory jurisdiction over the rail line prior to its abandonment. See *Chicago & N. W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 320 (1981) (our authority to regulate abandonments is exclusive and plenary); *Hayfield Northern* (our authority over the property does not end until all regulatory conditions are met and abandonment authority is exercised). These attempts to sell portions of the right-of-way to third parties, after RVI was placed on notice that CCPA would be submitting an OFA, was a blatant effort to strip away as much of the property as possible to avoid including those portions of the property in the OFA sale.³⁶ As discussed above, allowing these transfers of property would undermine the OFA sale by jeopardizing CCPA's ability to provide effective, uninterrupted rail service.

It is well settled that administrative agencies have inherent authority to protect the integrity of the regulatory processes that they are charged with

³⁴(...continued)

track has not been used and, more importantly, does not show that track has been abandoned, as opposed to unused but retained for possible future rail use.

³⁵ RVI's separate agreement with the Park District for the sale of 20.61 acres was expressly contingent on the availability of the property for trail use. Thus, that contract does not infringe our jurisdiction; if the line is conveyed under section 10904, the property will not be available for trail use, so that neither party will have any obligations that conflict with the section 10904 sale.

³⁶ See RVI Reply to Show Cause Order at 16-17: "the transfers from RVI to VPB were done * * * as part of a plan to create an entity to protect and facilitate the ongoing ownership, management and development of non-rail assets. * * * [W]e believed it prudent to take whatever steps possible to insulate the remaining non-rail assets from RVI as the owner of the rail assets to be conveyed to the Port Authority for continued rail operations."

administering,³⁷ and to prevent or remedy a misuse of those processes. See *ICC v. American Trucking Ass'n*s, 467 U.S. 354, 364-65 (1984); *Permian Basin Area Rate Cases*, 390 U.S. 747, 780 (1968); *Consolo v. FMC*, 383 U.S. 607, 620-21 (1966). Here, to protect the integrity of the OFA process, we will use our inherent power to undo RVI's conveyances to VPB of portions of its interest in this rail line.³⁸ Thus, we will here void the transfers and the contract and reaffirm our order that RVI 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 has acquiesced by reducing its assessment of the valuation of the line (as listed in Exhibit A (Confidential Version) to Exhibit 7 of CCPA's Request to Set Terms).

III. *Grade-Separated Crossing Agreement.*

As noted above, in the *January 2000 Decision*, we voided a grade-separated crossing agreement that RVI entered into with Boardman Township that purported to obligate RVI's successors to construct and maintain a grade-separated crossing of this rail line at its intersection with State Route 224, as well as other possible crossing sites, before rail service is restored. The Township has filed a petition for judicial review of that determination in the United States Court of Appeals for the Sixth Circuit,³⁹ and, by a request filed April 5, 2000, has asked us to stay our action until the court has completed its review.

The Township has not made the showing necessary to support a stay: (1) that it is likely to prevail on the merits; (2) that it will be irreparably harmed in the absence of a stay; (3) that a stay would not substantially harm other interested

³⁷ RVI has repeatedly disregarded our regulatory processes — by acquiring this rail line without seeking the necessary Board authority, by refusing to meet its common carrier obligation to provide for operations over the line, by preventing needed repairs to the line, by inviting the State to pave over the tracks at road crossings, and, with the knowledge that CCPA would be making an offer under the OFA processes, by conveying to third parties portions of its interest in the right-of-way.

³⁸ We have consistently used our broad powers to protect the OFA process against misuses. See, e.g., *Burlington N./Santa Fe — Aban. — in King County, WA*, 3 S.T.B. 634 (1998), *aff'd sub nom. Redmond-Issaquah Railroad Preservation Ass'n v. STB*, 223 F. 3rd 1057 (9th Cir. 2000); *Land Conservancy of Seattle and King County — Acquisition and Operation Exemption — The Burlington Northern & Santa Fe Railway*, STB Docket Nos. 33389, *et al.* (STB served May 13, 1998), *petition for review dismissed sub nom. Land Conservancy of Seattle v. STB*, Nos. 98-70776 *et al.* (9th Cir. Sept. 14, 2000).

³⁹ *Boardman Township, Ohio v. Surface Transportation Board*, No. 00-3275 (6th Cir. filed March 3, 2000). That petition is being held in abeyance by the court pending our decision here.

parties; and (4) that a stay is in the public interest.⁴⁰ See *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). Indeed, the Township has not even addressed the first three criteria.

As for the fourth criterion, section 10904 represents a clear legislative determination that rail service should be preserved whenever there is an offeror willing to provide for continued service. The grade-separated crossing agreement here is clearly contrary to the public interest because it would impose a substantial obstacle (in fact, a “poison pill”) to the resumption of rail service. RVI clearly had no intention to provide service on this line and thus no intention of paying for a grade-separated crossing, and the Township is adamantly opposed to the resumption of rail operations on this line.⁴¹ Thus, the parties’ attempt to bind any future rail operator to this highly unusual⁴² and costly condition was obviously designed to effectively preclude future rail service, thus frustrating section 10904 of the statute. Accordingly, the stay request will be denied.

IV. *Sale of Track and Rail Materials.*

In a pleading filed May 19, 2000, CCPA submitted newly discovered evidence that RVI sold the rail, ties, and ballast on this line in 1996 to Kovalchick Corporation for \$400,000.⁴³ CCPA contends that this sale, which occurred prior to RVI’s seeking authority to acquire the rail line, shows that RVI never had any intention to operate the line and that we should therefore revoke the exemptions in which we authorized RVI to acquire, and later to abandon, the line.

RVI maintains that all it sold to Kovalchick Corporation was the future right to remove track materials from the line and that no track or materials will be

⁴⁰ The party seeking a stay carries the burden of persuasion on all of the elements required for such extraordinary relief. *Canal Authority of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974).

⁴¹ See letter of Curtis Seditz, Administrator of Boardman Township, dated Oct. 1, 1999.

⁴² Normally, governmental entities bear the majority of the cost for a grade-separated crossing of a railroad and a public road, and the rail line owner bears a much smaller portion.

⁴³ CCPA tendered two verified statements of Mr. Ronald Hall, the former President of RVI, testifying to the sale. CCPA also provided a copy of the contract of sale between RVI and Kovalchick Corporation, and an unsigned copy of RVI’s tax return for 1996.

removed unless and until we authorize abandonment of the line.⁴⁴ RVI tendered a verified statement by Joseph Kovalchick, the owner of Kovalchick Corporation, committing his company to return its interest in the track and materials to RVI, for the amount specified in our valuation of the track material, if the line is conveyed under our OFA procedures.

Given this clarification of the limited nature of the Kovalchick Corporation's interest in the track and materials and its commitment to return that interest, we find that RVI's business dealings with Kovalchick Corporation, while suspect, do not necessitate revocation of the exemptions. Indeed, revocation at this stage would frustrate CCPA's efforts to acquire the line and restore rail service, as it would remove the basis for a sale under section 10904.⁴⁵ Therefore, we will deny the petition to reopen these proceedings and revoke the prior exemptions.

V. *Valuation of the Property.*

On May 11, 2000, RVI filed a motion asking us to reopen and reconsider our valuation of the line, to which CCPA has replied. RVI argues that the purchase price we established for the land is too low because it does not account for the higher value of non-rail use of the land as an assembled corridor, and that requiring it to sell all of its interest in this rail line for the price we have set would constitute a taking of its property in violation of the Fifth Amendment. While the highest and best use of the land could be as an assembled corridor for some purpose other than operating a railroad, except as to the 4.2 miles of right-of-way (comprising approximately 20.61 acres) that the Park District contracted to purchase (discussed, *infra*), RVI failed to provide timely and convincing evidence establishing a higher value for the right-of-way as an assembled corridor.

RVI points to its sale of a non-exclusive aerial corridor easement along 11.7 miles of this right-of-way to Ohio Edison for \$893,000 as supporting a higher purchase price. But RVI has already received compensation from Ohio Edison

⁴⁴ On June 14, 2000, CCPA filed a motion to strike certain information about Kovalchick Corporation submitted by RVI. In its reply, RVI states that CCPA's motion is a reply to a reply and contains additional legal argument on the issues before the Board. We agree. Therefore, the motion to strike will be denied.

⁴⁵ Given the Congressional objective to continue rail service, we are very reluctant to interfere with an OFA sale. See *Consolidated Rail Corporation — Abandonment Exemption — in Erie County, NY*, STB Docket No. AB-167 (Sub-No. 1164X), *et al.* (STB served Oct. 7, 1998), at 8, *aff'd sub nom. Buffalo Crushed Stone, Inc. v. STB*, 194 F.3d 125 (D.C. Cir. 1999).

for the sale of this easement, and is not entitled to any further compensation for this interest from CCPA. Indeed, in the *January 2000 Decision* at 477, we deducted \$100,000 from the appraised value of the land, which is encumbered by this permanent easement, to account for the loss of the income from this easement and other licenses and crossings listed in Exhibit A (Confidential Version) to Exhibit 7 in CCPA's Request to Set Terms.

RVI's evidence purporting to establish an assembled-corridor value for two other segments of the right-of-way⁴⁶ is unconvincing. While two other park districts apparently obtained funding for establishing trails, and intended to acquire those segments using that funding, there is no corresponding agreement between a purchaser and RVI. Absent such evidence, we cannot tell how much of the acquired funding was allocated to purchasing the land and how much to other trail-related purposes. Accordingly, we do not view this evidence as demonstrating the value of the land in these segments.

We ordinarily will not reopen valuation issues for consideration of evidence that could have been, but was not, presented in a timely manner. Valuation issues must be raised and resolved within the time period allotted by Congress to ensure the prompt sale of a line and resumption (or continuation) of rail service under section 10904. But even if we were to consider RVI's new evidence submitted after we set the price, we would not adjust the purchase price based on that evidence. With the exception of the completed sale of an easement to Ohio Edison, discussed above, there is no comparable signed contract for sale of rights for other utility easements on any other portion of the right-of-way. Nor is there a firm bid from a purchaser that would be binding upon RVI's acceptance. Rather, the only evidence tendered is an offer by RVI itself to sell an easement over 13.5 miles of the right-of-way to Williams Communications, Inc. (Williams), for installation and maintenance of fiber optic cable.⁴⁷ As there is no indication that Williams has accepted RVI's offer, this evidence is speculative and does not establish the market value of these 13.5 miles of right-of-way. In setting terms and conditions of a sale under section 10904, we cannot

⁴⁶ Verified Reply Statement of Susan Dicken, Director of Development of Mill Creek Metropolitan Park District, and appended exhibits, included in RVI Reply to CCPA Request to Set Terms.

⁴⁷ RVI Reply to Show Cause Order, Appendix E.

credit speculative evidence, but rely only upon firm bids (from a purchaser) or signed contracts in establishing the value of an assembled corridor.⁴⁸

We could not credit another document memorializing RVI's purported sale of 4.012 acres of the right-of-way to the Park District as valuation evidence because RVI did not provide a map or other indication of the location of this acreage, nor did it argue that this contract is evidence of the value of the land in the right-of-way. Indeed, one pleading⁴⁹ suggests that this 4.012 acres may be a part of the 20.61 acres in the contingent contract for sale between RVI and the Park District that provides the basis for an upward adjustment in the price, as discussed below.

Accordingly, we will not here revisit our prior valuation except for the limited purposes of (1) correcting our own error in not considering the timely evidence that properly was before us regarding the value of the land involved in the contingent sale of 20.61 acres to the Park District; and (2) holding RVI accountable for its earlier omission of a material fact regarding the net salvage value of the track and materials. These two adjustments to the price we set in the *January 2000 Decision* — one an upward adjustment and the other a downward adjustment — are discussed below.

A. Upward Adjustment — Value of the land.

While RVI did not submit sufficient evidence of the value of the entire right-of-way as an assembled corridor, it did submit a signed contract for the sale of 4.2 miles of right-of-way (comprising approximately 20.61 acres) to the Park District for \$600,000.⁵⁰ As noted above, the contract was contingent upon the property becoming available for trail use and upon the Park District obtaining the funding to make the purchase.⁵¹ RVI's evidence sufficiently described the

⁴⁸ See *Portland Traction Co. — Abandonment Exemption — in Multnomah and Clackamas Counties, OR*, Docket No. AB-225 (Sub-No. 2X) (ICC served Jan. 10, 1990), slip op. at 5; *Florida E. Coast Ry. Co. — Abandonment — In Dade Co., FL*, ICC Docket No. AB-70 (Sub-No. 2) (ICC served Dec. 9, 1997) (*Florida E. Coast*), slip op. at 7, *petition for review dismissed sub nom. Florida Gas Terminals v. ICC*, No. 88-5116 (11th Cir. May 6, 1988).

⁴⁹ See Motion of Boardman Township Park District to Reaffirm Decision, dated January 7, 2000, at 2.

⁵⁰ RVI Reply to CCPA Request to Set Terms, Exhibit 1a.

⁵¹ Other evidence indicates that the Park District likely would obtain the necessary funding. See Verified Reply Statement of Susan Dicken, Director of Development of Mill Creek Metropolitan Park District, and appended exhibits, included in RVI Reply to CCPA Request to Set Terms.

location of this land,⁵² and the signed sales contract was good evidence of the value of that real estate. See *Portland Traction*, slip op. at 5 (an executed sales contract is the best evidence of the fair market value of the real estate underlying the rail line); *Union Pacific Railroad Co. — Abandonment Exemption — in Lancaster County, NE*, STB Docket No. AB-33 (Sub-No. 112X) (STB served Dec. 3, 1997), slip op. at 4 (the Board will credit evidence of a firm commitment of a purchaser to pay value for an assembled corridor).⁵³ Accordingly, we now value the 20.61-acre portion of the right-of-way that was the subject of the sale agreement with the Park District at \$600,000.

In order to revalue the 20.61 acres, we must adjust our earlier valuation of the entire acreage that is within Boardman Township. In so doing, upon further inspection we conclude that RVI's original calculation of the extent of the land located in Boardman Township (22.672 acres)⁵⁴ appears to be more accurate than the acreage figure used by CCPA's appraiser, Rossi, for the Township (25.93 acres).⁵⁵ For the resulting 2.062-acre portion in Boardman Township that is not included in the sales agreement with the Park District, we apply a pro rata portion of the Rossi land value and arrive at a valuation for this acreage of \$19,306.

For the portions of the right-of-way that are outside Boardman Township, we continue to rely on the Rossi appraisal, submitted by CCPA, for the reasons given in the *January 2000 Decision*. The approach used in the Rossi appraisal provides an appropriate basis for the valuation because, as the Board (and the ICC before us) consistently has found, the fair market value of a line of railroad to be sold under the OFA process is its NLV. *C&NW*, 678 F.2d at 665.

After making these adjustments, we find that the total land value of the entire right-of-way is \$817,868. From this amount we subtract the \$100,000 value for the income from the licenses and crossings listed in Exhibit A (Confidential

⁵² See RVI Reply to CCPA Request to Set Terms, Exhibit 3b, and Greenamyer appraisal, included in RVI Petition for Exemption for Abandonment.

⁵³ We do not agree with CCPA's argument that we should credit a sales agreement for an assembled corridor only if the purchaser is a private, rather than a public, entity. CCPA Request to Set Terms at 20-22. In the *Portland Traction* case, we found that a contract to sell an assembled corridor to the City of Portland and the Oregon Department of Transportation (both public entities) was the best evidence of the value of the right-of-way. Many public entities have purchased rail rights-of-way for public use and we do not fail to credit executed sales agreements (or binding offers) simply because the purchaser is a public entity that may have condemnation power. *e.g.*, *Florida East Coast*.

⁵⁴ RVI Petition for Exemption for Abandonment, Greenamyer appraisal at 26.

⁵⁵ CCPA Request to Set Terms, Exhibit 7 at 12.

Version) to Exhibit 7 in CCPA's Request to Set Terms, to arrive at a net value of the land of \$717,868.⁵⁶

B. Downward Adjustment — Net salvage value of the track and materials.

The newly-discovered evidence concerning the sale to Kovalchick Corporation of the future right to remove and salvage the track and materials is disturbing. When we were called upon to value the line and set the price, RVI submitted two offers to salvage the track and materials but withheld from us the crucial fact that it had already sold the rights to the Kovalchick Corporation and for a much lower figure. The prior sale of the track and materials to Kovalchick Corporation renders meaningless the later offer upon which we had relied. Moreover, RVI cannot be allowed to profit from its withholding of this material information. Thus, to protect the integrity of our processes, we will adjust the net salvage value figure down to \$400,000 — the amount that Kovalchick Corporation had actually paid for the future right to salvage these materials.⁵⁷

C. Corrected Total Purchase Price.

The total purchase price for the line, after making these two adjustments, is \$1,117,868 — consisting of \$717,868 for the land and \$400,000 net salvage value for the track and materials.

⁵⁶ To summarize, we have valued the land in the right-of-way as follows:

<i>Jurisdiction</i>	<i>STB Valuation</i>	<i>Jurisdiction</i>	<i>STB Valuation</i>
Youngstown City	\$ 29,921	<i>Beaver County</i>	<u>\$ 19,034</u>
Boardman Township	619,306	Total, Right-of-way	\$817,868
<i>Beaver Township</i>	<u>48,649</u>	Licenses, etc. in Exh. A	(\$100,000)
Subtotal, Mahoning County	<u>\$697,876</u>	Total, Land	\$717,868
Columbiana County	\$100,958		

⁵⁷ We note that the \$400,000 figure is close to RVI's April 1999 appraisal that the net salvage value of the track and materials was \$445,000. See Appraisal of George Wehner, Exhibit 4B and C at 8, attached to RVI's Petition for Exemption for Abandonment, and Wehner Replied Verified Statement, attached to RVI Reply to CCPA's Request to Set Terms and Conditions of Sale.

VII. *Other Terms.*

CCPA in various pleadings complains that either RVI or Kovalchick Corporation has removed or damaged several segments of the line.⁵⁸ CCPA has provided documents showing RVI's authorization to have state road crews pave over the line while it was still an active rail line (albeit subject to an embargo) and at the same time that shippers were requesting service.⁵⁹ CCPA has provided an estimate of the damage to the line, including segments that have been paved over by state or local authorities for road improvements, and requests that we require RVI to establish an escrow account, in the amount of \$350,000, to cover the actual costs of restoring the track and reconnecting signal equipment. Additionally ORDC requests that we establish an escrow account, of at least \$25,000, to assure that RVI meets its commitment to state and local authorities to restore covered grade crossings and reconnect signal equipment.⁶⁰

RVI's blatant disregard of its common carrier obligation to provide service is disturbing. In view of RVI's misconduct, the requests for establishment of escrow accounts to ensure that RVI pays for uncovering and restoring paved-over track and for reconnecting signal equipment at road crossings are entirely appropriate. Accordingly, we will require that \$375,000 of the sale price be placed in an interest-bearing escrow account maintained by an independent third-party fiduciary to ensure payments by RVI for restoring the paved-over track and the signals. Additionally, in order to aid in the restoration of rail service as soon as possible, we are ordering RVI to allow CCPA and its agents immediate access to the right-of-way to determine what repairs are necessary. CCPA may request the assistance of the Federal Railroad Administration in making the inspections.

⁵⁸ On May 8, 2000, RVI filed a motion to strike portions of CCPA's response to RVI's reply to our show cause order, specifically the verified statements of Walter J. Gane (Exhibit 5), Timothy K. Robbins (Exhibit 6), and Tracy Drake's January 29, 1997, memo to file (Exhibit 7), as well as pages 16-18 and 22-31 of CCPA's legal argument. RVI contends that the material contained in these exhibits is not responsive to our show cause order and that with this material CCPA only seeks to relitigate issues previously decided by the Board. CCPA filed a reply to the motion to strike on May 26, 2000. This response introduced a new verified statement from Mr. Gane that pertains to the same allegations of damages to the line. RVI has not moved to strike this new verified statement, which also introduced the same type of information subject to its motion to strike. RVI's motion goes more to the weight to be accorded to these statements and allegations, rather than admissibility. Therefore, we will deny RVI's motion to strike.

⁵⁹ See letters from RVI to Ohio Department of Transportation, attached to Verified Statement of Walter Gane.

⁶⁰ See Exhibit 9 to CCPA Response to RVI Reply to Show Cause Order.

The parties are directed to follow these terms for closing: (1) payment will be made by cash or certified check; (2) RVI shall convey all property in the right-of-way, including the subsurface and air rights, all real estate and track, and all other rail materials, to CCPA by quitclaim deed; (3) RVI shall deliver all releases from any mortgage within 90 days of closing; and (4) closing will occur within 45 days of the service date of this order. The parties may alter any of these terms by mutual agreement.

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

It is ordered:

1. RVI's sales or transfers of land or property interests in this rail line (except unuseable chattels, and the income from licenses, crossings, and similar agreements listed in Exhibit A (Confidential Version) to Exhibit 7 in CCPA's Request to Set Terms) are void, and within 30 days of the date of service of this order, RVI shall record this order in the land records of the counties in which the voided transfers were earlier recorded, with an appropriate reference to those earlier recordings.

2. The Park District's motion to allow RVI to sell to it a portion of the right-of-way is denied.

3. Boardman Township's motion to intervene is granted, and its motion to stay these proceedings is denied.

4. CCPA's June 14, 2000, motion to strike is denied.

5. CCPA's petition to reopen and revoke the exemptions granted in these proceedings is denied.

6. RVI's request to reconsider the purchase price that we previously set in STB Docket No. AB-556 (Sub-No. 2X) is granted in part and denied in part, and on our own motion we further revise to \$1,117,868 the purchase price for the property previously ordered to be sold.

7. The requests of CCPA and ORDC to establish escrow accounts from which funds would be made available for repairs to, and restoration of, the track and materials, are granted. CCPA shall place \$375,000 of the sale price in an interest-bearing escrow account maintained by an independent third-party fiduciary to ensure payments by RVI for restoring the paved-over track and the signals.

8. RVI's May 8, 2000, motion to strike is denied.

9. RVI shall convey to CCPA all land, track, and related material, and property interests covered by our previous order, as clarified here, within 45

days of the date of service of this decision according to the terms of closing stated in this decision.

10. RVI shall grant CCPA and its agents immediate access to the line to allow them to determine what repairs are required in order to restore service.

11. Any further motions or petitions will not stay the effective date of this decision, unless otherwise ordered by the Board.

12. This decision is effective November 3, 2000.

13. The service date of this decision is October 4, 2000.

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