

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 December 7, 2000

The Board grants Railroad Ventures, Inc.'s request for clarification to resolve the disputed terms of the closing sale of rail line to Columbiana County Port Authority.

BY THE BOARD:

In a “request for clarification” filed November 21, 2000, Railroad Ventures, Inc. (RVI) asks us to resolve disputed terms of closing for the sale of this 35.7-mile rail line to Columbiana County Port Authority (CCPA) that we ordered in *Railroad Ventures, Inc. — Aban. Exem. — Youngstown, OH & Darlington, PA*, 5 S.T.B. 283 (2000) (*October 2000 Decision*) in this proceeding.<sup>1</sup> Under our *October 2000 Decision*, the sale was to take place no later than November 17, 2000 (*i.e.*, within 45 days after the decision was served). The closing did not occur by that date because of disputes between the parties concerning terms not addressed in the *October 2000 Decision*. RVI has brought these disputes to us for resolution, and CCPA has replied.<sup>2</sup>

In a related action, CCPA and the operator it has chosen for this rail line have filed an emergency motion before the United States Court of Appeals for the Sixth Circuit<sup>3</sup> seeking an order requiring RVI immediately to convey the rail line in compliance with the terms and conditions we set in the *October 2000 Decision*.

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<sup>1</sup> Under 49 U.S.C. 10904, we have the responsibility for ordering the sale of a rail line that otherwise would be abandoned where there is an offer to acquire the line to provide continued rail service. If the parties cannot agree on the price or other terms of sale, we must, upon either party's request, set the terms and conditions of the sale. 49 U.S.C. 10904(e), (f).

<sup>2</sup> RVI also submitted a supplemental verified statement of David L. Handel, to which CCPA has replied.

<sup>3</sup> That court has before it various petitions for review of the Board's decisions in this proceeding, in No. 00-3261, *et al.*, *Railroad Ventures, Inc. v. Surface Transportation Board and United States of America*.

## PERTINENT BACKGROUND

We described this case at length in the *October 2000 Decision*, and we augment that discussion here only as necessary to address the issues before us now. RVI was formed and purchased this rail line from the former Youngstown and Southern Railroad Company in November 1996. About one month after the purchase, RVI entered into a management agreement with OLE, Ltd. (OLE), whose managing member is David L. Handel, now the president of RVI. The management agreement made OLE “the exclusive manager for all purposes to manage the property [consisting of this rail line] on behalf of” RVI for a period of 10 years. Management Agreement (Mgt. Agree.) at 1-2. Although RVI later represented to us that it had bought the line in order to provide continued rail service, the agreement with OLE expressed RVI’s “intent to liquidate the property in whole or in part to maximize the cash flow potential to both parties” and contemplated the complete removal of railroad track and ties. *Id.* at 3, 5.

The agreement required OLE to perform certain management and financial services regarding the property and to lend \$95,000 to RVI. Mgt. Agree. at 4-5. RVI was to repay the loan by paying OLE 75% of net revenues from the operation and/or transfer of the property until the loan was repaid. After repayment of the loan, RVI was to pay OLE 50% of those net revenues. There was an “additional compensation provision” under which RVI was to pay OLE 10% of gross cash receipts from the operation and/or transfer of the property, including long term rentals. *Id.* at 6. The agreement provided that it could be assigned by RVI (with OLE’s approval) and stated that it would be binding upon any such approved successors and assigns. *Id.* at 9, 12.

Shortly after entering into the agreement with OLE, RVI was sold to David L. Handel (the managing member of OLE). Under Handel’s ownership, RVI sought to abandon the line, which led to our order directing the sale for continued rail service pursuant to 49 U.S.C. 10904. About three days prior to the scheduled closing, the parties began to exchange letters concerning the time and place of closing, and the deeds to be signed. The parties could not agree on the exact terms, and consequently the closing did not occur.

RVI now asks us to resolve the disputes as to the terms of closing by specifying: (1) the inclusion of a provision in the quitclaim deeds stating that the conveyance of RVI’s right, title, and interest in the rail line is subject to future orders by the Board in this proceeding and by the reviewing court; (2) the use of the bill of sale prepared by RVI for conveying personal property (track, ties, ballast, and non-fixtured facilities); (3) that all of the property to be conveyed is subject to the management agreement with OLE; (4) the use of an escrow

arrangement whereby disbursements would be subject to the oversight and written consent of the Ohio Rail Development Commission; (5) a new date for the closing; and (6) that, if CCPA should fail to tender funds on that date in accordance with the Board's orders, CCPA will be in default on the terms of sale and RVI will be authorized to dispose of these assets as it wishes. CCPA has submitted a reply objecting to all of the requests except No. 4 (the escrow arrangement). We will review all of the requests except the one relating to the escrow arrangement, about which there is no disagreement between the parties.

## DISCUSSION

### I. *The OLE Management Agreement.*

The OLE management agreement purports to bind RVI's successor to pay OLE (acting as property manager) a management fee of 10% of gross cash receipts from the operations or transfer of the property in this rail line, including long term rental of any portion. Mgt. Agree. at 6, 12. RVI and OLE claim that the agreement is binding on CCPA and that, upon the closing of the sale, CCPA will owe OLE nearly \$137,000, representing 10% of the value of the track lease agreement into which CCPA has contracted to enter with its chosen operator for the rail line.

We find that subjecting CCPA to the OLE management agreement is neither necessary nor appropriate under section 10904. It is not necessary because this management agreement does not constitute part of the "fair market value of the line" or "facilities on the line" for which the seller is entitled to be compensated under section 10904(f)(1)(B). As the court explained in *Chicago & N. W. Transp. Co. v. United States*, 678 F.2d 665, 688 (7th Cir. 1982), Congress did not intend to allow the selling railroads "to extract from potential offerors a share of the subsidies that the offerors have earmarked for continuing service on lines[.]"

It would also be entirely inappropriate under section 10904 to subject CCPA to the terms of this management agreement. The primary objective of a forced sale under section 10904 is to provide for continued rail service. The management agreement would not further that objective. To the contrary, it would subject the purchaser to costs that are not needed to hold and operate the

line<sup>4</sup> and would serve only to increase the costs of providing for continued rail service. Burdening purchasers with unnecessary costs could thwart line sales under section 10904. Thus, the imposition on CCPA of RVI's management agreement with OLE would undermine the statutory program.

We note that nothing in our *October 2000 Decision* can be read as saddling CCPA with RVI's obligations under the management agreement.<sup>5</sup> In that decision, we ordered RVI to transfer to CCPA "all of the interests in the right-of-way discussed in this decision." *October 2000 Decision* at 283. Nowhere in that decision was there any mention of the management agreement. In an expanded explanation, we indicated that we were ordering "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)." *October 2000 Decision* at 294. The management agreement was not one of the licenses or crossings listed in that exhibit.

For these reasons, the property conveyance we have ordered is not subject to the OLE management agreement, CCPA will not be subject to it, and we deny RVI's Request No. 3.

## II. *The Bill Of Sale For Personal Property.*

Under the bill of sale that RVI prepared, and whose use RVI asks us to require as a term of closing (Request No. 2), RVI would transfer all of its right, title and interest in the personal property located on this rail line, including the rail, ties, and other track facilities, "subject upon and to the covenants and conditions" contained in the document. One of those conditions is that CCPA "will assume all liability for any future maintenance, repair or removal of the fixtures located" on the rail line and "shall protect and indemnify RVI from any

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<sup>4</sup> In this case, OLE provided no services or help to CCPA in arranging for the track lease with the future operator of the line.

<sup>5</sup> In a letter to CCPA (Ex. 7, Nov. 16, 2000, letter to Tracy V. Drake), OLE asserts that language in *Railroad Ventures, Inc. — Aban. Exem. — Youngstown, OH & Darlington, PA*, 5 S.T.B. 308 (2000) (*November 2000 Decision*) "affirms" that CCPA will be subject to the OLE agreement upon purchasing this rail line from RVI. However, the *November 2000 Decision* does not do that. The statement in question was that "CCPA's understanding that encumbrances on the line would be limited to those of which it was aware prior to filing its OFA on November 8, 1999, was correct and that CCPA's acceptance was valid." *November 2000 Decision* at 310. No one had advised us of the terms of the agreement and we did not approve, nor would we have approved, its application to CCPA for the reasons explained above.

liability for any future maintenance, repair, improvement, replacement, removal, or expense required by any court or any governmental agency having jurisdiction to order the same.”

CCPA correctly observes that this condition would contradict a term of the *October 2000 Decision*, at 302, directing the establishment of an escrow fund “to ensure that RVI pays for uncovering and restoring paved-over track and for reconnecting signal equipment at road crossings” (emphasis added). We took the extraordinary step of requiring the seller to pay for restoring the track and signals because of RVI’s “blatant disregard of its common carrier obligation” when, among other actions, it authorized state road crews to pave over the line when it was still an active rail line. *Id.* As we explained in the *October 2000 Decision*, CCPA, in setting up its rail operations, should not have to pay extra to undo what RVI has improperly done, and so we set up the escrow provision. Because we agree with CCPA that the condition proposed by RVI is inconsistent with the escrow term we ordered, we deny RVI’s Request No. 2.

### III. *The Instruments of Conveyance.*

RVI insists that the quitclaim deeds (for transferring the real property) and the bill of sale (for transferring personal property) indicate that the property is conveyed subject to our future orders in this proceeding and future orders of the Sixth Circuit on judicial review (Request No. 1). Including such a statement in the deeds and bill of sale would do no more than state the legal effect of proceeding with closing prior to completion of the pending judicial review of our *October 2000 Decision*. See *Busboom Grain Co., Inc. v. ICC*, 830 F.2d 74, 76 (7th Cir. 1987). We note that CCPA has not asked for, but rather has opposed, delaying the closing pending judicial review. Therefore, we see no valid basis for objecting to this provision in the legal instruments. Accordingly, we approve the use of the following language in the property transfer documents (as corrected to reflect the exact title of this proceeding):

UNDER AND SUBJECT, however, to the orders and decisions of the Surface Transportation Board in 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* and the orders and decision of the United States Court of Appeals for the Sixth Circuit in *Railroad Ventures, Inc. v. United States of America and Surface Transportation Board*, Docket No. 00-3261, *et al.*

*IV. Rescheduling of Closing.*

The passing of the earlier-ordered deadline for the sale means that there will be further delay in restoring service to the shipping public. Unnecessary delay in restoring service is contrary to the objectives of section 10904 and thus contrary to the public interest. Accordingly, the sale should be completed as soon as possible. However, we will not set a new date for the closing, as RVI asks (Request No. 5), because this very issue of when the closing should occur is now before the Court of Appeals<sup>6</sup> and we do not wish to take any action that would be inconsistent with actions that the court may take on CCPA's motion. We expect the parties to comply with any order of the court in this regard. Accordingly, we deny RVI's Request No. 5.

*V. Potential Default.*

We see no reason to attempt to declare in the abstract, as RVI asks (Request No. 6), what circumstances would or would not lead to a determination of a default by CCPA if closing does not occur by a particular date. We will consider issues of default, should such issues arise, if and when there is a need for us to do so.

*It is ordered:*

1. RVI's request is granted to the extent discussed in this decision.
2. This decision is effective on December 7, 2000.

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

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<sup>6</sup> CCPA has filed an emergency motion seeking a court order compelling RVI to comply immediately with the terms and conditions of the *October 2000 Decision*. That court has authority to issue writs in aid of its appellate jurisdiction. 28 U.S.C. 1651(a).