

FINANCE DOCKET No. 11662  
NEW YORK, ONTARIO & WESTERN RAILWAY COMPANY  
REORGANIZATION

*Submitted August 16, 1937. Decided November 2, 1937*

Upon reconsideration, finding in former report, 221 I. C. C. 577, that ratification of the appointment of Vincent Dailey as a trustee of the property of the New York, Ontario & Western Railway Company, should be denied. affirmed.

*Leo P. Dorsey* for petitioner.

REPORT OF THE COMMISSION ON RECONSIDERATION

BY THE COMMISSION:

The New York, Ontario and Western Railway Company, hereinafter called the debtor, on May 20, 1937, filed a petition with the United States District Court for the Southern District of New York, stating that it was unable to meet its debts as they matured and that it desired to effect a plan of reorganization pursuant to section 77 of chapter VIII of the acts of Congress relating to bankruptcy. On the same day, the petition was approved by the court as properly filed, the order of approval directing the debtor, pending a further order, to manage, operate, and maintain its property. On June 15, 1937, the court, after hearing, entered an order appointing Vincent Dailey and Frederic E. Lyford trustees of the debtor's property, subject to ratification by us. Copies of these petitions and orders have been duly filed with us by the clerk of the court. Similarly, a certified copy of the stenographic minutes of the hearing before the court on June 14, 1937, in the matter of the appointment of one or more trustees of the debtor's property, has been filed with us, to the end that we may determine upon the ratification of the appointments of Dailey and Lyford.

On June 18, 1937, Dailey and Lyford filed with us separate petitions for ratification of their appointments, which petitions contained statements pertaining to their education, experience, and business relationships. Under the provisions of subdivision (c) (1) of section 77 of the Bankruptcy Act, as amended, appointments of trustees become effective upon ratification by us without a hearing, unless we deem a hearing necessary. By a report and order in 221 I. C. C. 577, entered in this proceeding on July 13, 1937, the Commis-

sion, division 4, without a formal hearing, ratified the appointment of Lyford and denied ratification of the appointment of Dailey.

On July 21, 1937, Dailey filed with us a petition for reconsideration of the petition previously filed by him for ratification of his appointment, alleging, among other things, that the order made by us was without a determination that an oral hearing was required and without such a hearing being had, and that he believes that an oral hearing with opportunity granted to him to present more fully the facts relating to his business experience and his capacity to fill the appointive position would have resulted in a ratification of his appointment. A public hearing on this petition has been held and the case submitted without briefs or oral argument. Root, Clark, Buckner & Ballantine, New York, N. Y., representing a group of insurance companies holding an aggregate of \$11,020,000 of the debtor's bonds, approximately 40 percent of its outstanding funded debt, which firm suggested Lyford as trustee at the hearing before the court, now urges the ratification of Dailey's appointment, and particularly so in view of his general business experience, which they state will prove exceptionally valuable in dealing with the situation of coal properties in which the debtor has a financial interest, a matter discussed hereinafter. No objection to the ratification of Dailey's appointment was presented at the hearing.

According to Dailey's testimony, the judge agreed with the bondholders in appointing trustees, and his appointment was made because the judge wanted someone he had known for years and in whom he had implicit trust.

In our report, 221 I. C. C. 577, *supra*, we stated that it would appear that one trustee should be sufficient to serve properly the interests of all parties, that Lyford's experience includes 13 years with railroads or dealings with railroad problems, that it did not appear that Dailey had had any experience of this character, and that, in all probability, either of the appointees would find it necessary to retain most of the debtor's officers to conduct its operations. The evidence presented at the hearing is designed to show that there are problems confronting the debtor, apart from the operation of its property, which will require the services of a trustee in addition to Lyford. It is contemplated, if Dailey's appointment is ratified, that Lyford will concern himself primarily with the operation of the debtor's property with a view of effecting economies and increasing its tonnage and revenue and that Dailey will, among other things, endeavor to hold the anthracite-coal tonnage to the debtor's line, the loss of which is threatened by the cessation of operations of the Scranton Coal Company, now in bankruptcy under section 77-B

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of the Bankruptcy Act and for whose property no trustee has as yet been appointed by the court.

The debtor is a class I railroad, but its operations are not very extensive. It is dependent on its anthracite-coal tonnage for successful operation. Its operating revenues declined from \$12,650,717 in 1928 to \$8,705,934 in 1936. Correspondingly, its revenues from products of mines tonnage were \$4,609,641 and \$5,572,342, or about 36 percent and 64 percent of its total operating revenue for the respective years. The tonnage of products of mines increased from 4,039,475 in 1928 to 7,068,211 tons in 1936, and in the latter year anthracite coal represented about 86 percent of such tonnage. The open winter of 1936-37 affected adversely the consumption of anthracite coal, precipitating the bankruptcy of the Scranton Coal Company, with a consequent decrease in the debtor's coal tonnage.

The mines of the Scranton Coal Company, the Monarch Coal Company, and the Penn-Anthracite Company, which companies are hereinafter referred to as the Scranton, Monarch, and Penn-Anthracite, respectively, are operated on a somewhat cooperative basis, and are the principal sources of the debtor's coal tonnage. The Scranton is owned by the debtor, the Monarch by Dixon and Eddy, who are also selling agents for the Scranton, and the Penn-Anthracite is controlled by Frank C. Wright, who has no interest in the other two companies. The mines of the Scranton and the Penn-Anthracite are located on opposite sides of the Monarch's mines at Scranton, Pa., and by operating agreements the latter utilizes the breakers of the others in preparing its coal for market. Operation in this manner, without a large investment in a breaker by the Monarch, has averaged the low cost of production of the latter with the high cost of production of the Scranton, thus enabling them to operate at a profit, and giving the tonnage to the debtor's line. In 1934, 1935, and 1936 the Scranton's net income was \$515,783, \$414,783, and \$167,525, respectively.

Dailey apprehends that if the Scranton is liquidated, no equity will remain and that the Monarch may construct a breaker and ship its coal over other railroads. An immediate problem of the debtor is that of securing sufficient tonnage to enable it to pay operating expenses and bond interest, and it is Dailey's opinion that the solution of the problem lies in a merger of the coal companies or the continued use of the Scranton breaker by the Monarch, which has a potential 20 years' supply of about 28,000,000 tons of coal, and this traffic would be held to the debtor's line if he succeeds in his efforts to solve this problem.

The debtor owns the capital stock of the Scranton and all its outstanding bonds in principal amount of \$3,525,000. Of these

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bonds \$300,000 has been pledged by the debtor for a bank loan, and \$3,225,000 has been pledged by the debtor with Dixon and Eddy as security for payment of a \$900,000 note of the Scranton to the latter firm, the payment of which is guaranteed by the debtor. The debtor has advanced \$2,590,000 to the Scranton on its notes, which debt is subject to a standby agreement during the life of a loan of \$650,000 by the Finance Corporation to the Scranton, secured by a first mortgage on the latter's property. The debtor also owns \$800,000, principal amount, of Penn-Anthracite first-mortgage bonds, of which \$100,000 has been pledged by the debtor for a bank loan and \$600,000 has been pledged by the debtor as security for a loan from the New York, New Haven & Hartford Railroad Company, which in turn has pledged these bonds with the Finance Corporation. The New York, New Haven & Hartford Railroad Company owns over 50 percent of the common capital stock of the debtor and is in bankruptcy under section 77.

Dailey has been engaged in business of a commercial nature for 18 years. In 1914 he organized and became vice president of Dailey-Udell, Incorporated, Brockport, N. Y., which developed into a large organization and was eventually sold to the Atlantic & Pacific Tea Company. In 1920 he became president of the Gold Mark Knitting Company, Woonsocket, R. I., then in the hands of a private trustee and within two years had increased the business to such an extent that it was sold at a profit to the owners of the corporation. For three years he was New York State manager for the Home Owners Loan Corporation. At present he is associated in a consulting capacity with the chairman of the board of the Bulova Watch Company, who is interested in developing home sites and building homes.

At the hearing before the court, E. G. Buckland, president of the debtor, testified he had been connected with the debtor's property in one capacity or another since it was acquired by the New York, New Haven & Hartford Railroad Company some 30 years ago, and that he is chairman of the board and the agent of the trustees of the latter, president of the Railroad Credit Corporation, and, therefore, unable to devote the time that ought to be devoted as trustee of the debtor. Further, that if he were to consider the appointment as trustee it would necessitate, under the law, an appointment of a cotrustee, and the debtor ought not to be put to the expense of a cotrustee. This position was taken by Buckland after he had outlined generally the anthracite-coal situation and its effect upon the debtor.

Various provisions of section 77, and interpretive court decisions leave no doubt that the Congress intended by passage of the act to foster speedy and economical railroad reorganizations. The provi-

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sion of subdivision (c) that the Commission fix maximum reasonable limits of compensation for trustees and their counsel and reimbursement of reasonable expenses of other parties in interest and their counsel affords clear evidence of the intention that our administrative discretion in the proceedings should be directed toward a furtherance of this object. Under these circumstances we should ratify the appointment of trustees only as their services are necessary for the efficient conduct of the affairs of the debtor, including the operation of its property, during the proceedings.

Testimony was adduced at the hearing to show that Dailey's services as trustee are needed for the solution of the problem involving the three anthracite-coal companies, and to carry forward an endeavor, from New York headquarters, to increase the debtor's coal traffic into that city. The record is clear that the former problem is the crux of the situation and that its solution will also solve the debtor's coal-traffic difficulties. There is no evidence that the debtor's coal traffic could be increased materially in any other way, nor were any constructive suggestions advanced at the hearing as to the steps which might be taken with this end in view or of other duties which would be undertaken by Dailey after the affairs of the three coal companies have been settled.

While we recognize the importance to the debtor of a speedy settlement of the financial difficulties of the Scranton, we are yet convinced that, in the last analysis, this is more directly a problem of the Scranton than of the debtor. Thus any continuing service to be rendered in that connection should be paid for by the Scranton rather than the debtor. On the other hand, the record does not indicate that the solution of the problem of merging the coal companies and harmonizing their activities will be a protracted matter. The petitioner was unable to state the time which would be necessary for this. We heretofore have been advised that a speedy solution of this problem was urgent, yet no satisfactory evidence has been furnished of the need for two trustees after the Scranton has been placed on an operating basis.

The debtor's operations are not extensive, nor is its traffic diversified. It is predominantly a coal-carrying road, with the usual organization for the solicitation of traffic. Most of its officers and personnel have been retained to conduct its operations. In addition, the trustee will be assisted in matters requiring legal aid by a counsel recently appointed by the court, for whom we have fixed maximum reasonable compensation on an annual basis. His services should aid greatly in hastening a solution of the difficulties of the Scranton.

For the foregoing reasons and upon consideration of the record, we are convinced that one trustee should be sufficient for the estate of the

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debtor, and the expense of a second trustee would not be warranted. Upon reconsideration, we find that the ratification of the appointment of Vincent Dailey, as trustee of the property of the debtor, should be denied. The former finding of division 4 is affirmed.

An appropriate order will be entered.

**MAHAFFIE, Commissioner**, dissenting:

The estate of this bankrupt is vitally interested in the coal business. It not only owns mining properties, but whether it can continue to exist as a carrier is dependent on the volume of anthracite coal it transports. The mining properties in which it has a large investment and which normally furnish the bulk of its traffic are in difficulties. To develop traffic to a basis that will support the rail operations, those properties must be, in some way, reorganized, and must be operated on a basis that will enable them to compete successfully with other producers. Otherwise the railroad cannot earn a living. Lyford was appointed and ratified as trustee principally, I think it fair to say, on his qualifications as a railroad operator. An efficient railroad operator may not, necessarily, be the best possible man to deal with many of the problems confronting a trustee. It is probably at least as easy to hire competent operating officials as it is to secure the talent required to deal adequately with other problems presented in attempting to rehabilitate a bankrupt estate. In this case, the court in charge of the proceedings and the bondholders group, agree that, in the circumstances, the additional trustee is desirable. The bondholders have a very direct interest both in getting the estate back to a solvent basis, and in holding down expenses. Their views are entitled to real weight. I would ratify the appointment.

I am authorized to state that **CHAIRMAN MILLER** and **COMMISSIONER PORTER** join in this expression.

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