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SEC

SERVICE DATE - OCTOBER 12, 1999

SURFACE TRANSPORTATION BOARD

DECISION

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

STB Docket No. AB-555 (Sub-No. 2X)

THE OHIO & PENNSYLVANIA RAILROAD COMPANY--ADVERSE DISCONTINUANCE  
OF SERVICE EXEMPTION--BETWEEN YOUNGSTOWN, OH, AND DARLINGTON, PA, IN  
MAHONING AND COLUMBIANA COUNTIES, OH, AND BEAVER COUNTY, PA

MOTION FOR PROTECTIVE ORDER

Decided: October 8, 1999

By decision served on September 3, 1999, the Board, under 49 U.S.C. 10502, exempted from the prior approval requirements of 49 U.S.C. 10903 the abandonment by Railroad Ventures, Inc. (RVI), of a 35.7-mile line of railroad extending from milepost 0.0 at Youngstown, OH, to milepost 35.7 at Darlington, PA, and a connecting 1-mile line segment near Negley, OH, and the discontinuance of service over the line by The Ohio & Pennsylvania Railroad Company. The exemption was scheduled to become effective on October 3, 1999. By separate petitions filed on September 3, 1999, and September 8, 1999, respectively, Columbiana County Port Authority (CCPA) and Penn-Ohio Recycling, Inc. (Penn-Ohio) (collectively referred to as offerors), requested that the Board toll the period for submitting an offer of financial assistance (OFA).

By decision served on September 10, 1999, the time period for filing an OFA in this proceeding was tolled until 30 days after RVI provides offerors with certain requested information and documents, and the effective date of the abandonment exemption was stayed. RVI was ordered to provide offerors with all of the information required by 49 CFR 1152.27(a), including supporting data and access to maps and deeds and any information necessary to ascertain the nature and value of RVI's title to the right-of-way to permit offerors to prepare their offers for submission to the Board. RVI was advised that it could request the Board to issue a protective order under 49 CFR 1104.14 before furnishing any information to the offerors that it considered to be proprietary and confidential.

By letter filed on September 24, 1999, RVI states that it is willing to provide offerors with certain requested information concerning licenses, easements, and other third party agreements, but only if CCPA and Penn-Ohio sign a Confidentiality Agreement that RVI has prepared to protect its

interests. RVI requests that the Board issue an order directing CCPA and Penn-Ohio to execute the Confidentiality Agreement.<sup>1</sup> CCPA replied to RVI's request, objecting to the Confidentiality Agreement's restriction on contacts with third parties that may have an interest in the right-of-way as well as the requirement that all information provided thereunder be returned to RVI either immediately after review or after the filing of an OFA. CCPA argues that it may be necessary to investigate restrictions or encumbrances that might limit continued rail operations on the line and, therefore, CCPA should not be required to obtain RVI's prior approval for such third party contacts. CCPA states that it also should have access to any materials provided until the OFA process has ended.

By letter filed on September 27, 1999, RVI replied to CCPA's objections, alleging that CCPA is refusing to proceed without an order by the Board in order to extend the OFA time periods. It reiterates its request that the Board issue a protective order using its Confidentiality Agreement and that the Board advise CCPA that the 30-day OFA extension period had commenced to run on September 21, 1999, which is the date of RVI's letter to CCPA and Penn-Ohio stating that the requested documentation would be available for their inspection and review upon the execution of its Confidentiality Agreement.<sup>2</sup>

Good cause exists to grant RVI's request for a protective order. RVI has shown that the materials sought by offerors contain proprietary information, public disclosure of which is not required to complete the OFA proceeding. Accordingly, the request will be granted, subject to the Protective Order and Undertaking contained in the Appendix. Issuance of the protective order will ensure that the material produced thereunder will be used only in connection with this proceeding and not for any other purpose.

The Board's September 10, 1999 decision, extending the time period for offerors to file an OFA until 30 days after RVI provides the offerors with the requested documents and information will not be changed. RVI's conditional offer of September 21, 1999, to make the requested information available cannot be interpreted as starting the running of the 30-day period. That period will begin to run only when RVI has actually provided the requested information.

The protective order usually issued by the Board will be modified to include the prohibition against third party contacts as set forth in RVI's Confidentiality Agreement, but the order provides

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<sup>1</sup> Although RVI's letter requests for a protective order did not conform with the Board's rules at 49 CFR 1104.14, the letters will be treated as a motion for a protective order.

<sup>2</sup> RVI followed up with subsequent entreaties to the Board for a protective order filed on September 30, 1999, and October 4, 1999. The October 4 filing states that RVI will make all documentation requested by the potential offerors, and which is in the possession of RVI, available immediately, subject to any protective order that the Board might impose.

that, as usual, the offerors may retain any information obtained under the protective order until all Board proceedings regarding the OFA process or any court proceedings that might arise from this proceeding are concluded. Offerors may request an additional order of the Board that would allow third party contacts, if offerors can demonstrate why such contacts are necessary for offerors to determine the value of the interest in the rail line they seek to acquire for continued rail service.

It is ordered:

1. RVI's request for a protective order is granted, and the Protective Order and Undertaking in the Appendix to this decision are adopted.
2. The parties are directed to comply with the Protective Order and Undertaking in the Appendix to this decision.
3. This decision is effective on its service date.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams  
Secretary

APPENDIX

PROTECTIVE ORDER

1. To the extent that materials reflecting the terms of certain utility interests, as well as licenses, easements, crossing and other third party agreements (hereinafter referred to as “documents”) pertaining to the right-of-way controlled by Railroad Ventures, Inc. (RVI), and considered by RVI to be confidential or proprietary information, are produced pursuant to a request for discovery by any party to this proceeding, or are submitted in pleadings, such materials must be treated as confidential. Such materials, any copies, and any data derived therefrom:

(a) Shall be designated and stamped as “CONFIDENTIAL” and shall be used solely for the purpose of this proceeding, and any judicial review proceeding arising therefrom, and not for any other business, commercial, or competitive purpose.

(b) Shall not be disclosed in any way or to any person without the written consent of RVI or an order of the Board, except to the employees, counsel, agents, or contractors of the party requesting such materials, solely for use in connection with this proceeding and any judicial review proceeding arising therefrom, provided that such employee, counsel, agent, or contractor has been given and has read a copy of this Protective Order and agrees to be bound by its terms prior to receiving access to such materials.

(c) If produced through discovery, must be destroyed by the requesting party, its employees, counsel, agents, and contractors and notice of such destruction served on the Board and RVI at the completion of this proceeding and any judicial review proceeding arising therefrom.

(d) If contained in any pleading filed with the Board, shall, in order to be kept confidential, be filed only in pleadings submitted in a package clearly marked on the outside “Confidential Materials Subject to Protective Order.” See 49 CFR 1104.14.

2. RVI may in good faith designate and stamp particular material relating to third party interests in its right-of-way as “CONFIDENTIAL.” If any party wishes to challenge such designation, the party may bring such matter to the attention of the Board. Material that is so designated shall not be disclosed except to employees, counsel, agents, or contractors of the party requesting such materials, solely for use in connection with this proceeding, and any judicial review proceeding arising therefrom, provided that such persons have been given and have read a copy of this Protective Order and agree to be bound by its terms prior to receiving access to such materials.

3. If any party intends to use confidential material at hearings in this proceeding, or in any judicial review proceeding arising therefrom, the party so intending shall submit any proposed exhibits or other documents setting forth or revealing such confidential material to the Board, or the reviewing court, with a written request to the Board, or the court to (a) restrict attendance at the hearings during discussion of such confidential material, and (b) restrict access to the portion of the

record or briefs reflecting discussion of such confidential material in accordance with the terms of this Protective Order.

4. If any party intends to use confidential material in the course of any deposition in this proceeding, the party so intending shall so advise counsel for the party producing the materials, counsel for the deponent, and all other counsel attending the deposition, and all portions of the deposition at which any such confidential material is used shall be restricted to persons who may review that material under this Protective Order. All portions of deposition transcripts and/or exhibits that consist of or disclose confidential materials shall be kept under seal and treated as confidential material in accordance with the terms of this Protective Order.

5. To the extent that confidential materials are produced by a party in this or any related proceedings and held and used by the receiving person in compliance with paragraph 1 or 2 above, such production, disclosure, and use of the materials and of the data that the materials contain are deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. 11904.

6. Any party obtaining confidential material under the provisions stated in this Protective Order shall not contact the parties to such agreements or appraisals without the prior written consent of RVI, unless the party first receives an order from the Board for such contact. The Board will issue such an order only for good cause, as determined by the Board, shown by any party requesting such contacts.

7. All parties must comply with all of the provisions stated in this Protective Order unless good cause, as determined by the Board, is shown by any party to warrant suspension of any of the provisions herein.

**UNDERTAKING**

**CONFIDENTIAL MATERIAL**

I, \_\_\_\_\_, have read the Protective Order served October 12, 1999, governing the production of the confidential documents in STB Docket No. AB-556 (Sub-No. 2X) and STB Docket No. AB-555 (Sub-No. 2X), understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any data or information obtained under this Undertaking, or to use or permit the use of any techniques disclosed or information learned as a result of receiving such data or information, for any purposes other than the preparation and presentation of evidence and argument in STB Docket No. AB-556 (Sub-No. 2X) and STB Docket No. AB-555 (Sub-No. 2X) or any judicial review proceedings taken or filed in connection therewith. I further agree not to disclose any data or information obtained under this Protective Order to any person who is not also bound by the terms of the Order and has not executed an Undertaking in the form hereof.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

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Dated: \_\_\_\_\_