

Before the
SURFACE TRANSPORTATION BOARD



Docket No. AB-556 (Sub No. 2X)

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

ENTERED
Office of Proceedings
DEC 21 2004
Part of
Public Record

SUPPLEMENT TO JOINT PETITION FOR STAY AND
REPLY TO PETITION FOR CLARIFICATION

Come now CCPA and CCPR ("Petitioners"), by and through their counsel of record, and respectfully request the Board to consider the material that is submitted herewith in connection with the previously filed request that the Board stay the effective date of its December 13, 2004 Decision ("*December 2004 Decision*") pending resolution of the "Joint Petition For Reopening And Reconsideration" that will be filed forthwith. As previously noted, if not stayed, the *December 2004 Decision* will become effective on January 12, 2005, and would require CCPA/CCPR to pay Railroad Ventures, Inc. ("RVI") \$217,282, plus interest, even though payment of any amount to RVI would be contrary to the public interest, would cause irreparable harm to CCPA, and would retroactively repudiate the earlier decisions of the Board which were designed to ensure that RVI would be held accountable for all repairs to the line of railroad necessitated by RVI's failure to keep the line operational, including the Board's November 7, 2001 Decision ("*November 2001 Decision*") which ordered CCPA to take charge of the escrowed funds.

In addition, the Board's Decision appears to violate the automatic stay provisions of the Bankruptcy Code. In this respect, Petitioners note their partial agreement with the Petition for Clarification filed by RVI on December 21, 2004, in which RVI suggests a need for clarification. They strongly disagree, however, with RVI's attempt to have the Board "clarify" its decision by retroactively adopting an interpretation of Ordering Paragraph 4 (sic) of its *November 2001* Decision that "ordering paragraph number 4 is intended to impose joint and several liability on CCPA and CCPR for the refund payment due on January 12, 2005."¹

To the extent that the Board would impose joint and several liability on CCPA/CCPR for the January 12, 2005 payment, the Board's *December 2004* Decision violates not only the explicit terms of Ordering Paragraph 8 of its *November 2001* Decision, but it also violates the provisions of the automatic stay entered by the Bankruptcy Court.² Such conclusion is compelled by the fact that Ordering Paragraph 8 of the *November 2001* Decision (a copy of which is attached hereto) specifically states that CCPA "**shall be held harmless for any funds spent from the escrow account for repairs to its line that were the result of RVI's failure to keep the line operational during its ownership of the line, except for any fraudulent expenditures.**" (Emphasis added). Given the absence of any finding of fraud, liability for any violation of the terms of the escrow account would fall solely on CCPR. In addition, the Board should be aware that CCPR has heretofore agreed to indemnify CCPA should any specific payment be determined not to be covered by the Board's provision for escrowed funds. This

¹ Ordering Paragraph 4 has nothing to do with the escrow. Rather it makes clear that RVI and its affiliates are not "entitled to any ownership interest in, or income from, the former Y&S rail line." See *November 2001* Decision, slip op. at 8.

² As RVI has noted, it previously advised the Board that CCPR, on June 14, 2004, filed for bankruptcy in the United States Bankruptcy Court for the Eastern District of Arkansas, Case No. 4:04-bk-163887M, *In Re: Central Columbian & Pennsylvania Railway, Inc., Debtor*.

issue, which has not been addressed by the Board, will be addressed in detail in the forthcoming Petition for Reconsideration and Reopening.

Most importantly, the attached letter, dated December 21, 2004 and addressed to Keith O'Brien from counsel for RVI, which was served on all parties of record and the Board and received by the undersigned on December 27, 2004, conclusively demonstrates the need for the Board to take a further look at this matter before issuing a final order. As made crystal clear in its December 21, 2004 letter, "absent a stay, RVI will be forced to pursue appropriate enforcement actions against CCPA which could result in the imposition of civil penalties under 49 USC § 11901 or the imposition of attorneys' fees under 49 USC § 11704(d)(3)." As RVI has also observed, "under § 11901(a) ... a rail carrier (such as CCPA) providing transportation subject to the jurisdiction of the Board or an officer or agent of that rail carrier who knowingly violates an Order of the Board is liable to the United States Government for a civil penalty of not more than \$5,000 for each violation and that a separate violation occurs for each day the violation continues."

Given RVI's well-documented, reprehensible conduct that created the situation in which CCPA, CCPR and the Board now find themselves, the order to pay RVI the sums used to make legitimate repairs would clearly result in unjust enrichment to RVI. Furthermore, it would be a complete miscarriage of justice to subject CCPA/CCPR to any potential liability for taking steps that were in the public interest, especially when the Board's *November 2001* Decision imposed a far different standard than has been applied retroactively in the *December 2004* Decision.

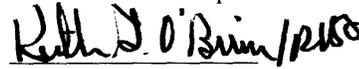
Therefore, the Board is once again urged to stay the effective date of its *December 2004* Decision. As CCPA/CCPR have previously advised the Board, it is their intention to seek

reconsideration and reopening so as to allow them to respond to the newly minted evidentiary standard that was imposed in the Board's *December 2004* Decision.

Respectfully submitted,



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Counsel for Columbiana County Port Authority and
Central Columbiana & Pennsylvania Railway, Inc.

Date: December 27, 2004

CERTIFICATE OF SERVICE

I hereby certify that I have this 27th day of December, 2004, served a true copy of the foregoing Petition for Stay upon the following by Federal Express and by e-mail:

John A. Vuono, Esq. (via Federal Express)
Richard R. Wilson, Esq. (rrwilson@mail.csrlink.net)
Vuono & Gray, L.L.C.
2310 Grant Building
Pittsburgh, PA 15219



Richard H. Streeter

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SERVICE DATE - NOVEMBER 9, 2001

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

Decided: November 8, 2001

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

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

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

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

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

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

It is ordered:

1. Home Depot's request to become a party of record to this proceeding is granted. Home Depot's request that we refrain from issuing a decision on the issues presented in this decision until it has the opportunity to comment is denied.
2. RVI's motion to strike CCPA's June 20, 2001 response is denied.
3. RVI shall arrange for transfer, effective January 24, 2001, from either VPB or RVI to CCPA of all of RVI's former right, title, and interest in agreements, leases, licenses, and crossings pertaining to this rail line (except the First Energy Corporation easement and the licenses that were identified in Exhibit A of Exhibit 7 of CCPA's Request to Set Terms) within 15 days from the effective date of this decision.
4. Except for unuseable chattels, and the income from licenses, crossings, leases, easements, and similar agreements specifically listed in Exhibit A (Confidential Version) to Exhibit 7 in CCPA's Request to Set Terms, neither RVI nor VPB is entitled to any ownership interest in, or income from, the former Y&S rail line.
5. Former escrow agent Davis shall immediately transfer to CCPA all funds in the escrow account established pursuant to previous order and shall be held harmless for doing so.
6. CCPA shall establish a separate escrow account with the proceeds transferred to it pursuant to paragraph 5. CCPA may withdraw from the escrow account such funds as are necessary to pay for repairs of this rail line at road crossings and the restoration of signaling equipment that occurred as a result of RVI's failure to keep the line of railroad operational, and shall keep account of all funds spent.
7. If any funds remain in the escrow account after the 270th day from the effective date of this decision, they shall be transferred to RVI at that time.
8. CCPA shall be held harmless for any funds spent from the escrow account for repairs to its line that were the result of RVI's failure to keep the line operational during its ownership of the line, except for any fraudulent expenditures.

Law Offices

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December 21, 2004

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Re: 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
Our File 4431

Keith O'Brien, Esq.
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Washington, DC 20036

Dear Keith:

The purpose of this letter is to follow up on our conversations of December 16, 2004 concerning the December 13, 2004 Order of the Surface Transportation Board in the above-captioned proceeding. We understand that your client has decided to pursue an appeal of that Decision. As you are aware, the December 13th Order becomes effective January 12, 2005 and directs that CCPA/CCPR shall pay \$217,282 to RVI together with interest as set forth in 49 CFR §1141 on January 12, 2005. Since CCPR is now subject to the protections of the Bankruptcy Act and the Board's Order makes clear that sole responsibility for the accounting, management, and disbursement of monies from the fund created by the STB rested with CCPA, RVI will look to CCPA for full payment of the \$217,282 on January 12, 2005 absent an administrative or judicial stay of that payment order prior to that date.

Furthermore, if payment is not received from CCPA on that date, absent a stay, RVI will be forced to pursue appropriate enforcement actions against CCPA which could result in the imposition of civil penalties under 49 USC §11901 or the imposition of attorneys' fees under 49 USC §11704(d) (3). We note under §11901(a) that a rail carrier (such as CCPA) providing transportation subject to the jurisdiction of the Board or an officer or agent of that rail carrier who knowingly violates an Order of the Board is liable to the United States Government for a civil penalty of not more than \$5,000 for each violation and that a separate violation occurs for each day the violation continues.

In light of the foregoing provisions, might it not be appropriate for CCPA to pay RVI the \$217,282 on January 12, 2005, as directed by the Board's Order, subject to whatever adjustments, if any, may subsequently be required as a result of CCPA's appeal?

Keith O'Brien, Esq.
Page 2
December 21, 2004

Thank you for your consideration of these matters. Once you have had an opportunity to discuss these matters with the Executive Officers and Board of CCPA, it is our hope that we will be able to work out arrangements that will limit further litigation associated with this matter and avoid the imposition of further liabilities related thereto.

Very truly yours,

VUONO & GRAY, LLC

A handwritten signature in black ink, appearing to read "Richard R. Wilson", with a long horizontal flourish extending to the right.

Richard R. Wilson, Esq.

RRW/bab

cc: All parties of record
Surface Transportation Board
STB Office of Proceedings