

Original

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



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JOINT PETITION FOR REOPENING AND RECONSIDERATION

Come now CCPA and CCPR ("Petitioners"), by and through their counsel of record, and respectfully request the Board, on the basis of material error, to reopen and reconsider its Decision of December 13, 2004 (the "*December 2004 Decision*"). That decision would require CCPA/CCPR to pay Railroad Ventures, Inc. ("RVI") \$217,282, plus interest. For all the reasons set forth below, payment of any amount to RVI would be contrary to the public interest as it would unjustly enrich RVI by retroactively repudiating the earlier decisions of the Board that were designed to ensure that RVI would be held accountable for all repairs to the line of railroad that were necessitated by RVI's failure to keep the line operational.

INTRODUCTION

Although repairs to the line totaled at least \$2,009,529, under the Board's *December 2004 Decision*, RVI would be responsible for only \$157,718 of the cost of repairs necessitated by RVI's failure to maintain the line in operating condition. That amount is but a small fraction of the well-documented repairs that totaled far in excess of \$375,000, the amount that was escrowed for the purpose of holding RVI accountable. Therefore, if the Board does not reverse its *December 2004 Decision*, RVI would successfully foist its responsibility for repairs to the

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line necessitated by its neglect and deliberate destruction to state and federal taxpayers. Such a result would be contrary to the public interest and would negate the Board's decision to hold RVI accountable for its malfeasance.

The *December 2004* Decision overlooks the fact that due *solely* to RVI's intransigence, there was a eleventh-month hiatus between the date that CCPA acquired the line on January 24, 2001 and the initial release of escrowed funds in December 2001. The Board's *December 2004* Decision also ignores the fact that during that period, CCPA and concerned shippers repeatedly demanded that CCPR immediately undertake and progress the needed repairs so as to be able to restore rail service as soon as possible. However, when CCPA/CCPR, armed with ORDC certification that payment was appropriate, sought to withdraw funds from the escrow account to pay for those repairs, Mr. Davis, the original trustee, refused to release funds from the escrow account for fear of personal liability.¹

In a further attempt to halt payments from the escrow account, RVI also filed suit in the Northern District of Ohio against CCPA, its Executive Director, CCPR, the Ohio Rail Development Commission ("ORDC") and its Executive Director and Commissioners. By its Complaint, RVI sought to

restrain and enjoin Defendants, and all those acting in concert with them, from further asserting, assessing, levying or collecting from Plaintiff any costs associated with, or related to, the restoration of at grade crossings or the reconnection of signal facilities at those at grade crossings in Mahoning County and Columbiana County, Ohio which exceed the restoration or reconnection costs directed by the federal Surface Transportation Board.

¹ As the Board observed at p. 7 of its *November 2001* Decision, "[t]he disagreements between the parties were such that Mr. Davis was unwilling to continue as escrow agent because he did not want to be 'caught in the middle of an explosive situation which will most likely end up in further litigation.'"

This collateral attack on the Board's Orders was ultimately rejected by the District Court in an unpublished opinion dated August 13, 2001. *See Railroad Ventures, Inc. v. Columbiana County Port Authority*, Case No. 4:01 CV 1164, August 13, 2001.²

As a result, CCPA/CCPR had to make a choice. On the one hand, they could stop the essential repairs to make the line operational that were commenced immediately after transfer of the line to CCPA and wait for the Board to take action.³ On the other hand, they could look to other sources of funds to cover the expenditures that should have been paid out of the escrow. They decided to press forward and make the repairs. As a result of their efforts to get the line operational, at least \$177,210.38 was paid by the ORDC to cover the early repair expenses that could not then be drawn out of the escrow account that the Board authorized to cover those very expenses.

In its *December 2004* Decision, the Board ignored the fact that, had it not been for RVI's continuing and deliberate interference with the orderly disbursement of funds from the escrow account, a significant portion of the \$177,210.38 of crossing repair expenses that were paid by the Ohio Rail Development Commission between January 24, 2001 and November 9, 2001 would have qualified for payment with escrowed funds.⁴ As a result, the Board has penalized ORDC, CCPA and CCPR for taking steps to restore rail service consistent with the common carrier obligation and with the Board's earlier decisions, while giving a financial windfall to RVI that rewards it for tortiously interfering with the timely release of escrowed funds.

² CCPR was forced to expend \$17,886.72 in attorney fees to defend against this frivolous action. Such fees constitute overhead expenses that have not heretofore been addressed, but will be included in the expanded accounting that is being provided herewith. *See* Attachment A, V.S. Timothy Robbins.

³ There was a 6-month hiatus between May 11, 2001 (when CCPA, after being unable to resolve the "explosive situation" created by RVI's continued interference with the line, filed its Petition for Clarification) and the date that the Board issued its *November 2001* Decision.

⁴ Invoices that support the expenditure of \$149,872.69 by ORDC prior to November 9, 2001 are attached to the Verified Statement of Tracy Drake submitted herewith. CCPR did not assess any overhead against the invoices that were forwarded to ORDC.

If the Board does not overturn its *December 2004* Decision, RVI not only will escape liability for payment of repairs paid for by ORDC between January and November 2001, for which RVI was to be held accountable under multiple Board decisions, but RVI will be unjustly enriched for its obstructionist tactics by receiving an undeserved refund of \$217,282, plus interest, that was used to cover legitimate expenses associated with needed repairs resulting from RVI's malfeasance. That result is unconscionable as RVI lacks the "clean hands" that would warrant any equitable relief.

The *December 2004* Decision also violates the Board's explicit statement in Ordering Paragraph 8 of its *November 2001* Decision 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." Instead of holding CCPA harmless, the Board has retroactively and unfairly shifted the burden of proof from RVI to CCPA. Furthermore, it denies CCPA/CCPR due process by erroneously faulting them for not meeting an unanticipated evidentiary burden that goes far beyond the requirement that CCPA "keep account of all funds spent."

The Board is also requested to note that CCPR was forced to seek the protection of the bankruptcy laws in June 2004 (caused in large measure to the expenses it was forced to bear as a result of RVI's harassment). Therefore, to the extent that it would require CCPR to pay any amount to RVI, which would constitute pre-petition debt, the *December 2004* Decision violates the automatic stay set forth at 11 U.S.C. § 362(a)(3). As the Interstate Commerce Commission was previously advised by the United States Bankruptcy Court in *Cooper v. Interstate Commerce Commission (In re Bulldog Trucking, Inc.)*, 150 B.R. 912, 916 (W.D.N.C. 1992):

The automatic stay applies to all entities, including governmental agencies. 11 U.S.C. §§ 101(15), 362(a). Because the United

States has waived any claim it may have of sovereign immunity under the bankruptcy code, the ICC is subject to the automatic stay.”

The identical reasoning applies to the Board in this case.

Finally, the Board’s harsh criticism of CCPA and CCPR for not submitting detailed receipts, work sheets, receipts for vehicle and travel expenses and the like to support CCPR’s allocation of overhead expenses as part of their “Joint Motion Seeking Final Closure of Escrow Account” (“Closure Motion”) is unwarranted. In the first place, the Board did not establish any procedure to govern how disputes about expenditures were to be resolved, much less define what evidence would have to be tendered to the Board for its evaluation and audit.

Second, the Board did not require CCPA to conduct an audit of CCPR’s books and underlying documentation before it released funds to CCPR. The Board required only that CCPA “keep account of all funds spent,” which it did. *November 2001 Decision at Ordering Paragraph 6*. That requirement provided no suggestion that CCPA was to audit CCPR’s accounting system or to require a special study before it authorized the release of escrowed funds. Rather, it indicated that CCPA could rely on the accounting system that was in place at CCPR, as well as CCPR’s allocation of overhead expenses, which, as the Board correctly observed, “are an essential component of the cost of repairs.”⁵ Nor did the Board indicate that overhead could not be applied to repair projects that were ultimately paid through funds obtained from ORDC -- funds that would have been paid from the escrow account had RVI not interfered with disbursements from that account.

Third, when CCPA/CCPR filed their Closure Motion on January 21, 2003, there were no established evidentiary guidelines that they had to satisfy. As a result, counsel followed the generally accepted procedure of filing Verified Statements that summarized expenditures and

⁵ *December 2004 Decision*, slip op. at 13.

explained the methodology used to compute overhead expenses. While the Board has claimed that the allocation was “unprofessional,” and that CCPR failed to carry its burden to tender underlying documents to support the allocation, the Board has not cited a similar case in which it previously required the filing of receipts for vehicle and travel expenses, time logs, billing sheets and the like for the Board (or previously the ICC) to review. In addition, the Board ignores the fact that the figures underlying Tim Robbins’ allocations were substantiated by an independent Certified Public Accountant. Moreover, the validity of the 20% markup, which has been affirmed by the Board, was reviewed and approved by an economic consultant with years of experience in the rail industry.

In summary, the *November 2001* Decision did not require CCPA to conduct a full blown audit of CCPR’s overhead allocations. Nor was there any reason for CCPA to disallow overhead expenses that were attributed to needed repairs that were paid for with federal and state grants, rather than direct payments from the escrow account. The invoices attached to the Verified Statement of Tracy Drake conclusively demonstrate that the repairs that were paid for by federal and state grants cured problems attributed to RVI’s failure to maintain the line and its decisions to allow track to be removed and paved over. Therefore, there is no legitimate distinction between overhead expenses attributed to those repairs and overhead expenses attributed to later repairs that were made after the escrow was modified. Because there is no legitimate distinction, the arbitrary and capricious disallowance of administrative overhead expenses for repair projects paid for with state and federal grants constitutes material error.

The net result is that the Board has imposed, without prior notice, a unique evidentiary standard that finds no support in Board precedent or in the specific Ordering Paragraphs of the

November 2001 Decision. By retroactively imposing this new, and wholly unanticipated evidentiary standard, the Board denied CCPA/CCPR administrative due process.

ARGUMENT

I. THE REQUIREMENT THAT CCPA/CCPR PAY RVI THE AMOUNT THAT WAS EXPENDED TO REPAIR THE CROSSINGS AT OLD ROUTE 51 AND CANNELTON ROAD IS BASED ON A MATERIALLY ERRONEOUS INTERPRETATION OF THE BOARD'S *NOVEMBER 2001* DECISION.

The “refund” payment ordered by the Board covers three categories of costs. The first category includes the uncontested cost of repairs to the crossing at Old Route 51 and the crossing at Cannelton Road. The cost of repairs to these two crossings totaled \$79,120. When CCPA acquired the line in January 2001, these two crossings were the subject of an Amended Complaint, dated February 2, 1998, filed with the Pennsylvania Public Utility Commission by the Pennsylvania Department of Transportation (“PaDOT”).⁶ By its Complaint, PaDOT averred that RVI had allowed the two crossings to deteriorate to the point where they created safety hazards. The Complaint also averred that when RVI refused to correct the situation and cure the hazard, PaDOT was required to take remedial action by removing and paving over the crossings.

When it learned that CCPA had agreed to acquire the line, PaDOT joined CCPA and CCPR as parties⁷ and required them to participate in the PUC administrative proceeding.⁸ Had they not participated, the two crossing would have been suspended by the PUC and CCPR would not have been able to restore rail service to Darlington Brick, which is located to the east of the two crossings. Indeed, in his Recommended Decision dated August 13, 2001, the presiding ALJ

⁶ See Attachment 1, Amended Complaint, PUC Docket No. C-00981174, Commonwealth of Pennsylvania, Department of Transportation v. Railroad Ventures, Inc., et al.

⁷ See Attachment 2.

⁸ In its prior submission, CCPR did not include legal fees and related expenses associated with the PUC proceeding in its administrative overhead. Given the direct relationship between the PUC hearing and the ultimate reopening of the two crossings, those fees and expenses, which total \$15,828.59, should be applied against the escrowed funds.

suspended the crossings. Although the PUC subsequently agreed with CCPA and CCPR that the crossings should not be suspended,⁹ the matter was not finally resolved until August 2002 when CCPA, CCPR and PaDOT reached a stipulated settlement. As part of the stipulated agreement, CCPR was required to repair and maintain the crossings that had been paved over as a result of RVI's failure to maintain them.¹⁰

Given this background, the Board, based on unwarranted speculation, is requiring CCPA/CCPR to pay RVI what it cost to repair the problems created by RVI. It is material error to reward RVI, which lacks "clean hands" for its unlawful activities, by punishing CCPA/CCPR because there is some suspicion that CCPR might not have obtained other bids before it contracted with Ohio Track, an unaffiliated entity, to repair the two crossings.

According to the *December 2004* Decision, the Board claims (slip op. at 9 and 11) that it imposed a competitive bidding requirement on CCPA in the *November 2001* Decision. ***No such requirement can be found in the November 2001 Decision.*** In particular, a review of the Ordering Paragraphs in the *November 2001* Decision conclusively demonstrates that ***the Board did not impose a mandatory competitive bidding requirement on CCPA (much less a requirement that such bids be written) as a prerequisite to reimbursement for repairs made necessary by RVI's actions and inattention.*** Nor was CCPA at any other part of the *November 2001* Decision directed or ordered to obtain competitive bids by the Board. As a result, CCPA had no reason to understand that a competitive bid would later be deemed a mandatory condition precedent to the release of funds from the custody account that the Board created in its *November 2001* Decision.

⁹ See Attachment 3.

¹⁰ See Attachment 4.

The two key Ordering Paragraphs of that Decision that are relevant are paragraphs 6 and

8. *See November 2001 Decision at p. 8.*

As herein relevant, Ordering Paragraph 6 states that:

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.

In addition, Ordering Paragraph 8 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.

There is nothing in either of these, or any of the Board's other Ordering Paragraphs, that required CCPR or CCPA to obtain competitive bids before making any urgently required repairs to the line! This is particularly true of the repairs that were made shortly before the close of the 270-day period that was given to CCPR by the Board to complete repairs for which reimbursement could be sought from the escrow account. This included the repairs to the Old State Route 51 and Cannellton Road crossings which were at the heart of the Pennsylvania PUC proceedings. As Tracy Drake has explained at ¶ 16 of his Verified Statement:

Given the pressing need that existed in mid-2002 to get the entire line operational, the lack of any requirement for submission of written bids and because time was of the essence, I viewed these remaining repairs to be emergency in nature. As a result, CCPA would not have required CCPR to publish written requests for bids. Instead, consistent with general public procurement law standards, CCPA would have allowed bids to be solicited in person or over the phone for the repairs to several crossings in Pennsylvania, including both the Old State Route 51 and the Cannellton Road crossings. I should add that prior to becoming CCPA's Executive Director, I was involved in public procurement for over nine years as an Assistant Attorney General for the State of Maryland and Counsel to the Maryland Port Administration and am very well acquainted with governing procurement standards and practices.

Furthermore, there is no intimation that payments for necessary repairs would be disallowed after the fact in the absence of competitive bids. Nor is there any suggestion that the failure to obtain competitive bids would be considered tantamount to fraud. Therefore, CCPA had no reason to insist that CCPR demonstrate that it had or had not received a competitive bid before it contracted with Ohio Track to do the work at these two crossings or at any other crossings.

Even if it is assumed that the Board intended to include an explicit directive that all future repairs would have to be the subject of competitive bidding, that is not sufficient to hold CCPA accountable for the alleged failure to obtain competitive bids. As the D.C. Circuit explained in *McElroy Electronics Corporation v. F.C.C.*, 990 F.2d 1351, 1353 (D.C. Cir. 1993):

An agency cannot ignore its primary obligation to state its directives in plain and comprehensible English. When it does not live up to this obligation, we will not bind a party by what the agency intended, but failed to communicate.

The foregoing principle applies to the unarticulated “directive” that CCPA require competitive bidding in order to be reimbursed for repairs made necessary by RVI. Because it failed to include a specific requirement that CCPA require competitive bidding, the Board may not retroactively impose such a requirement in order to bind CCPA to an unspoken requirement.

Second, even if the competitive bid issue were relevant, which it is not, the Board’s decision appears to be based on speculation that certain bids were contrived. At page 11, the statement is made that:

it seems that for two crossing-repair projects that were paid out of the Fund after the November 2001 Decision--Old Route 51 (invoiced for \$36,720) and Cannellton Road (invoiced for \$32,400)--documents were contrived to give the appearance that CCPR had solicited competitive bids in advance when in fact such bids had not been submitted.

After noting that the bids received from Arkansas Shortlines' subsidiaries post-dated the Ohio Track invoice, the statement is made that "the purported competing bids came from an affiliate of CCPR raises suspicion, as CCPR would have been aware of Ohio Track's fee for the work and could have instructed D&R how high to make a bid so that CCPR could justify use of Ohio Track for the work." Such speculation is not only unsupported, but is illogical at best.

As explained in his Verified Statement in which he has corroborated the previous sworn testimony of Walter Gane, Steve Hames, after personally inspecting the two crossings, provided CCPR with an oral estimate, which he later submitted in written form.¹¹ As he has also explained, it would be counterintuitive for CCPR to have its corporate affiliate "overbid" Ohio Track for the work. Knowledge of a competitor's bid is used to undercut the competitor, not to "give away" work in which the party is interested. If it intended to game the situation, CCPR would have directed its affiliate to *underbid* Ohio Track in order to keep the funds within the corporate family. In addition, it would have been irrational to "allow" Ohio Track to capture the bid by directing D&R to overbid the job so that "CCPR could justify use of Ohio Track for the work." *Id.* at 12. At the time, CCPR was looking for work that it could give to the crews of its corporate affiliate, which were underemployed. Hence, it would have been in its corporate best interest to make sure that its affiliate got the work.¹² *See also*, V.S. Timothy Robbins at ¶_.

In the final analysis, because competitive bids were not ordered, the entire discussion of whether the bids were contrived is irrelevant. Even if it were to be assumed *arguendo* that CCPR did not obtain competitive bids before it awarded a contract to Ohio Track, that failure is

¹¹ V.S. Hames at ¶3. There were instances when bids were solicited telephonically due to time constraints. This would have been the case in late July 2002 as the time was beginning to run on the 270-day period established by the Board in its *November 2001* Decision.

¹² I would also have been in Hames' best interest as he would have earned a bonus. V.S. Hames at ¶4.

not controlling in the absence of an explicit order or directive that CCPA and CCPR obtain competitive bids before making repairs.

The Board's *December 2004* Decision also ignores the fact that in its *November 2001* Decision, the Board explicitly provided 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). The Board may not retroactively impose a different standard and, in the absence of fraud, hold CCPA liable for funds that were spent from the escrow account for repairs to the line that the Pennsylvania PUC has determined were necessitated by RVI's failure to maintain the two crossings. In this case, there is not a scintilla of evidence to support a finding of fraud. Therefore, the Board erred when it ordered CCPA to pay RVI the amount that was expended to make repairs that were required as a result of RVI's failure to maintain the safety of these two public crossings.

II. THE REQUIREMENT THAT CCPA/CCPR PAY RVI THE ENTIRE AMOUNT OF ITS ADMINISTRATIVE EXPENSES FOR 2001 AND \$10,656 OF REPAIR OVERHEAD EXPENSES FOR WORK PAID FOR WITH FEDERAL AND STATE GRANTS BECAUSE FUNDS COULD NOT BE RELEASED FROM THE ESCROW ACCOUNT CONSTITUTES MATERIAL ERROR AND A DENIAL OF DUE PROCESS.

A. Because RVI Prevented Funds From Being Withdrawn From The Escrow When Payments Were Due, There Is No Rational Basis For Disallowing Overhead Related To Needed Repairs That Were Paid For With State And Federal Grants.

In its *December 2004* Decision, the Board correctly determined that "[o]verhead expenses are an essential component of the cost of repairs, and it is standard industry practice for railroad contractors to incorporate such costs into their service fees." Slip op. at 13. It also found that "[w]ithout these additional expenses, the repairs would not have been completed." *Id.*

Although the Board also found (slip op. at 13) that “[a] 20% markup appears to be consistent with industry standards for contractor overhead,” the Board disallowed \$10,656 of overhead that was directly related to repairs of the line that were necessitated by RVI’s failure to keep the line operational. The explanation for its rejection of this portion of repair overhead is that “we adjust the amount of CCPA/CCPR’s overhead costs for these repairs to apply the 20% markup only to the cost of those projects shown to have been properly paid from the Fund.” *Id.*

Apparently, that decision was based on the “Pay Out Chart” that was attached to the Verified Statement of Timothy K. Robbins. *See id.* at n.13. A close review of the chart reveals a fundamental fallacy and inconsistency in the Board’s *December 2004 Decision*. On the one hand, the chart shows that ORDC paid \$5,507 for vegetation spraying, while CCPR paid an additional \$6,078 for the same service. Although the Board (slip op. at 13) has allowed overhead for the CCPR payments, it has rejected overhead for the ORDC payments. This was done even though the Board found that RVI should be held accountable for payments for vegetation spraying. As the Board reasoned (slip op. at 14):

when CCPA took possession of the line, the vegetation that was so thick that in some areas a chain saw was needed to remove it. Such excessive growth, which rendered the line inoperable until removed, suggests that vegetation had not been cleared for years before CCPA acquired the line. Accordingly we find that in this case these expenditures related to RVI’s failure to maintain the line in operable condition and thus were properly payable from the Fund.

Given this finding, there is no rational basis for the Board’s determination to disallow overhead simply because the expense was originally paid by ORDC, rather than CCPR, which was at all times responsible for oversight of the project. The same is also true of the \$24,480 of brush cutting that was paid for by ORDC.

A further review of the chart also demonstrates that the cost of repairs to the various crossings that are identified was split in many instances between CCPR and ORDC. There is nothing to indicate that the state funds were used for any purpose other than to repair the damage or deterioration for which RVI was responsible. Therefore, no legitimate distinction can be drawn between the funds expended by CCPR and ORDC. All of the funds were used for the same purpose.

Having declined to accept CCPA's proposal in its May 2001 Petition for Clarification that the Board adopt a procedure that would have allowed the Board *ab initio* to resolve any issue about whether a particular repair would be covered by the escrow,¹³ the Board should not engage in second guessing the decisions that were made during the repair process. Instead, it should stick to the standard that it originally imposed, namely that RVI would have the burden of demonstrating that a particular expenditure was fraudulent.

As the record clearly demonstrates, there is no suggestion that any of the repair charges on the "Pay Out Chart" were unneeded, much less fraudulent. Hence, under the ground rules established in the *November 2001* Decision, there is no legitimate reason to disallow repair overhead for those projects simply because the funds were paid by ORDC and not by the railroad. The bottom line is that the cost of the repairs totaled \$152,015. Because CCPR bore the overhead expense for all of the repair projects identified on the "Pay Out Chart" -- whether paid for by ORDC or by itself -- the arbitrary disallowance of overhead for the portion of the repairs paid for by ORDC constitutes material error.

¹³ See *November 2001* Decision, slip op. at 6.

B. CCPR Is Entitled As A Matter Of Law To Treat Overhead Expenses As An Essential Component Of The Cost Of Repairs.

The Board's decision to disallow the entire amount of \$119,806 claimed by CCPR for 2001 administrative overhead expenses, as well as \$48,791.05 of administrative expenses for 2002, is based on a unique evidentiary standard that could not have been anticipated by CCPA, CCPR or their counsel. The *December 2004* decision also violates the ground rules established in the *November 2001* Decision that expressly placed the burden of proof on RVI and its affiliates to show fraud. As the record reveals, there is no evidence of fraud. Furthermore, in discussing the services performed by members of the Robbins family, the Board found (*December 2004* Decision, slip op. at 14) that "[t]here is no dispute that these employees performed services pertaining to the rehabilitation of the Youngstown-Darlington line." Nevertheless, despite having placed the burden on RVI to challenge any disbursement on the grounds of fraud, the Board inexplicably states that "the burden is on CCPA/CCPR to present supporting evidence." *Id.* ***This was the very first time that CCPA/CCPR became aware that they had the burden of proof.***

When it shifted responsibility for the escrow account to CCPA, the Board rejected CCPA's request that, in view of the disagreement on coverage for repair sites, the Board:

establish a procedure affording RVI a time to identify any specific repair or restoration projects it considers not to be covered by the escrow provision and affording CCPA additional time to respond. Under CCPA's suggestion, we could then decide whether a particular repair is covered by the escrowed funds, and, if it is, we would then order a newly appointed escrow agent to disburse the funds to CCPA

November 2001 Decision, slip op. at 6. Instead, as the Board has now reconfirmed, "[g]iven the need from prompt payments for repairs and the inherent delay involved in obtaining regulatory approval, the Board authorized CCPA to make disbursements from the Fund, and the Board

deferred any challenge to those payments until after the Fund was expended.” *December 2004 Decision*, slip op. at 9. The Board, however, has chosen to disregard the fact that fraud was a clearly articulated prerequisite for any challenge by RVI and its affiliates.

When it issued its *November 2001 Decision*, the Board did not fashion any other procedure, direction or guideline to be followed to authenticate expenses or even to close out the escrow account. Nor did it provide any audit standards that would have to be followed. Instead, it imposed the requirements that all repairs had to be finalized within 270 days; that RVI would have to show fraud in order to challenge any expenditure of funds; and that CCPA would have to “keep account of all funds expended for repairs.” *November 2001 Decision*, slip op. at 7.

When it directed CCPA to “keep account of all funds spent,” the Board did not impose any requirement that CCPA ask for any special study or accounting system or perform a full-scale audit of CCPR’s books. Nor did it require CCPA to impose any specific formula on CCPR to be used to determine its administrative overhead allocations. Last, the Board did not provide either CCPA or CCPR with any evidentiary guidelines concerning what evidence would have to be submitted. It only required CCPA to “keep account” of how the expenses were paid and left it to RVI to demonstrate that the particular expense or overhead allocation was fraudulent.

Consistent with Ordering Paragraph 8 in its *November 2001 Decision*, slip op. at 8, which explicitly provides 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,” CCPA may not be faulted for CCPR’s assessment of what the Board has deemed “an essential component of the cost of repairs.”¹⁴ And as the Board also noted (*id.*), “it is standard industry practice for railroad

¹⁴ *December 2004 Decision* at 13.

contractors to incorporate such costs into their service fees.” Hence, no fraud is demonstrated either by CCPR seeking recovery of its administrative overhead expenses or by CCPA authorizing payment.

Indeed, the Board has not found that CCPR is not entitled to claim its overhead expenses. Rather, the Board has faulted CCPR for failing to present the backup documentation that would support its allocations. This failure must be attributed to the absence of clear direction. Plainly, when CCPA/CCPR filed their joint motion seeking final closure of the escrow, they intended to show that CCPA had complied with the Board’s directive that CCPA keep account of all funds spent. They had no inkling that the Board would retroactively shift the burden of proof for every repair to them or that they would be required to submit every scrap of paper in their possession, including individual time sheets and travel expenses, for an independent audit by the Board. Had they realized that the Board would shift the burden of proof from RVI to them and would require documentation for their allocation of administrative overhead, they would have taken a different approach when they assembled the data and would have included the materials that the Board has for the first time identified in its *December 2004* Decision.

It is respectfully submitted that because of the unique issues and novel nature of this case in which there are no established evidentiary guidelines, CCPR should be provided a further opportunity to submit additional documentation to support its request for payment of administrative overhead. Given the magnitude of the funds that have been disallowed, as well as the fact that RVI thwarted timely reimbursement of funds that were spent in repairing the line, any other result would be a denial of due process, especially when the Board has recognized that “[o]verhead expenses are an essential component of the cost of repairs.”¹⁵ Therefore, as a matter

¹⁵ *December 2004* Decision at 13.

of law, CCPR is entitled to claim overhead expenses and should not be denied any relief because it was forced to sail in uncharted waters in the midst of retroactively imposed shoals.

In seeking reopening, note is also taken of the fact that the Board routinely accepts Verified Statements that set forth the methodology that was used to derive administrative overhead and does not require the submission of underlying time logs, billing sheets and the like as part of the evidentiary submission. Nor does it routinely require fuel receipts, airline tickets, hotel receipts and other travel expenses or records to be included. If it were to do so, the Board would be inundated with countless scraps of paper.

In the final analysis, the public interest will be advanced by giving CCPR an opportunity to satisfy the burden of proof that the Board has now placed on it. Without question, CCPA has acted in good faith throughout this difficult situation. The same cannot be said of RVI which not only failed to honor its common carrier obligation, but willfully disrupted the orderly workings of the escrow account that this Board established in order to hold RVI accountable for its deliberate failure to keep the line operational during its ownership of the line. By any measure, the *December 2004* Decision has abandoned the course taken by the Board in its earlier decisions and has unjustly rewarded RVI for the damage that it alone has caused to the public interest. In order to rectify the situation, the Board should reopen and reconsider its decision with respect to the allocation of administrative overhead.

III. The Determination That RVI Should Not Be Held Accountable For Needed Repairs Is Contrary To The Evidence Of Record.

In requiring CCPA/CCPR to refund \$17,700 that was spent to address problems that were intensified by actions taken by RVI when it owned the line, the Board, without providing a citation, claims that CCPA/CCPR in their own evidence attributed “the damage to standing water

'caused {both} by change of drainage by neighbor and {by} track repairs.'" *December 2004*
Decision, slip op. at 15. A review of the evidence has not revealed the source of that statement.

Furthermore, it is contrary to the Rebuttal Verified Statement of Walter J. Gane, filed
April 21, 2003. As he explained, *id.* at ¶ 11:

while it is true that CCPR has charged the escrow for clearing and
drainage work at the overpass, those expenditures were
necessitated by the fact that RVI had allowed the City and
adjoining industry to dump runoff water at this point.

Even if it is true that certain problems may be associated with the fact that the rail line is
built in a depression, that has nothing to do with the repairs that were made to address the
excessive runoff that is solely attributed to RVI's decision to allow the City and the adjoining
industry to take actions that intensified the drainage problem. As Timothy Robbins has
explained, the drainage in that area was likely an ongoing problem for the railroad. However,
the problem was made much worse when RVI allowed a neighboring industry, which was
located to the west of the track, to move an intermittent stream and city water overflow runoff
ditch from their property and direct the water flow onto the railroad at the low point that was
already a problem. Had it not been for RVI's action, the drainage problem would not have been
more than an occasional nuisance. RVI's actions, however, forced CCPR to take further
remedial action that would not have been required if RVI had not authorized the actions taken by
the neighboring industry.

Not only has the Board engaged in unsubstantiated speculation without bothering to visit
the scene, but it has once again altered the burden of proof. The use of escrowed funds for these
repairs is related to RVI's failure to keep the line operational. If RVI had operated the line, it
would not have allowed the runoff to be modified in such a fashion. Furthermore, no fraud has

been demonstrated. Hence, the Board should reverse its finding that RVI is entitled to a refund of \$17,700.

Conclusion

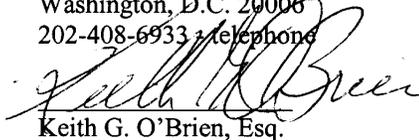
In conclusion, the Board should withhold any action until it determines whether any amount would remain in the escrow after it makes the adjustments that are required as a result of the newly tendered evidence. Because CCPR's invoiced costs originally exceeded the escrow limit by at least \$55,791, without consideration of legal and accounting fees that are related to the effort to vitalize the Board's prior decisions, no refund should be ordered until all expenses have been properly reviewed.

Furthermore, in the absence of demonstrated fraud, as a matter of equity, the Board should decline repayment on the grounds that RVI lacks clean hands. As noted above, had it not been for RVI's tortious interference with the escrow account, multiple repair projects would have been paid with escrowed funds, rather than public funds. Under these circumstances, it is unconscionable that the Board would retroactively alter the original standard governing challenges to the escrow account and unjustly enrich RVI by requiring the return of any funds to the escrow account.

Respectfully submitted,



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

Date: January 3, 2005

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Commonwealth of Pennsylvania,
Department of Transportation

Docket Number
C- 00981174

v.

Railroad Ventures, Inc., et al.

AMENDED COMPLAINT

AND NOW, comes the Commonwealth of Pennsylvania, Department of Transportation, by and through its counsel, Jason D. Sharp, and offers the following in support of its Amended Complaint:

1. The Formal Complaint of the Department of Transportation is incorporated as if set forth at length insofar as its is consistent with the averments made herein.
2. Railroad Ventures, Inc. ("RV") is the owner of the right-of-way, rail facilities and crossings that are the subject of this Complaint. RV is the successor in interest to the Youngstown and Ohio Railroad Company.
3. The Ohio and Pennsylvania Railroad Company ("O&P") has operating authority for the line in question pursuant to a contractual relationship with RV.
4. The crossing with RV's line and State Route 0051 in Darlington Township, Beaver County (AAR No. 869 979 V) should be suspended. The rail line is currently inactive and the Department believes and avers that RV does not intend to restore rail service to this line. The crossing had sunk below the approach pavement and had a loose rail. The rubber panels of the crossing were breaking apart. As a result, the Department removed and paved over the crossing. It is the opinion of the Department that the condition of the crossing created a safety hazard. The Department has already completed the alteration of this crossing, which O&P was unwilling to do. The cost of the repair work was approximately \$ 20,000. This crossing is the subject of a prior Commission Order, entered April 3, 1996 at A-00111616 which, inter alia, reestablished the suspended crossing and placed maintenance responsibility for the crossing on O&P. The Application Docket regarding this crossing, A-00111616, was closed pursuant to an Order issued at a Public Meeting held on November 1, 1996.
5. The crossing with RV's line and State Route 4004 in Darlington Township, Beaver County (AAR No. 869 973 E) should be suspended. The rail line is currently inactive and the Department believes and avers that RV does not intend to restore rail service to this line. The crossing is generally in poor condition and has deteriorated with lack of maintenance. It is the opinion of the Department that the current condition of the crossing creates a safety hazard.

6. The crossing with RV's line and State Route 4004 in Darlington Township, Beaver County (AAR No. 869 975 T) should be suspended. The rail line is currently inactive and the Department believes and avers that RV does not intend to restore rail service to this line. The crossing is generally in poor condition and has deteriorated with lack of maintenance. It is the opinion of the Department that the current condition of the crossing creates a safety hazard.

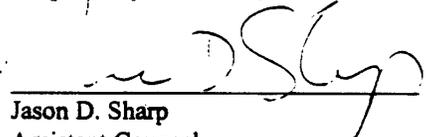
7. The crossing with RV's line and State Route ⁵⁵¹0651 in Darlington Township, Beaver County (AAR No. 869 985 Y) should be suspended. The rail line is currently inactive and the Department believes and avers that RV does not intend to restore rail service to this line. The crossing is generally in poor condition and has deteriorated with lack of maintenance. It is the opinion of the Department that the current condition of the crossing creates a safety hazard.

8. On information and belief, the Department avers that O&P does not intend to renew its agreement with RV when the term of that agreement expires.

9. On information and belief, the Department avers that RV intends to abandon the rail line in question.

WHEREFORE, the Department respectfully requests that the crossings be suspended and that the Department be reimbursed for its costs in altering the crossing referenced in paragraph 4, AAR No. 869 979 V. The Department further requests that, upon abandonment of the line, that this Commission order Railroad Ventures, Inc. to abolish the crossings, by its own application or under the current docket number.

Respectfully Submitted,


Jason D. Sharp
Assistant Counsel
Atty. Id. # 80488
Commonwealth of Pennsylvania
Department of Transportation
Office of Chief Counsel
Forum Place - 9th Floor
555 Walnut Street
Harrisburg, Pa. 17101-1900
(717) 787-3128

DATE: 2/2/78

CERTIFICATE OF SERVICE

I, Jason D. Sharp, Esq., hereby certify that a true and correct copy of the Department's Amended Complaint was served upon the parties listed below by first class mail, postage prepaid this 2nd day of February, 1998.

David L. Handel, President
Railroad Ventures, Inc.
c/o Handel Investments
721 Boardman-Poland Road
Youngstown, OH 44512

Pennsylvania Public Utility Commission
Bureau of Transportation and Safety - Legal Division
P.O. Box 3265
Harrisburg, PA 17105-3265

William Strawn, President
The Ohio and Pennsylvania Railroad Company
136 South 5th Street
Coshocton, OH 43812

Richard R. Wilson, Esq.
Richard R. Wilson, P.C.
1126 Eighth Avenue, Suite 403
Altoona, Pa 16602

Kelvin J. Dowd, Esq.
Slover and Loftus
1224 17th Street Northwest
Washington, D.C. 20036

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF TRANSPORTATION,	:	DOCKET NO.
Complainant	:	
	:	
v.	:	C-00981174
	:	
RAILROAD VENTURES, INC., <u>et al</u>	:	
Respondents	:	

MOTION TO JOIN NECESSARY PARTIES

AND NOW, comes the Commonwealth of Pennsylvania, Department of Transportation (Department), by and through its Counsel, Jason D. Sharp, and states the following in support of its motion to join the Columbiana County Port Authority (Port Authority) and the Columbiana Central and Pennsylvania Railroad Company (CCPR) to the present complaint docket, pursuant to 52 Pa. Code § 5.103:

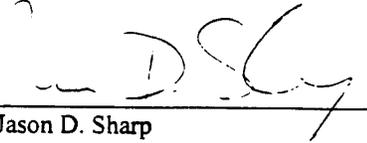
1. On or about January 7, 1998, the Department filed a formal complaint against Railroad Ventures, Inc. (RVI) relating to four (4) crossings on a rail transportation line owned by RVI between Youngstown, Ohio and Darlington, Pennsylvania. The subject AAR numbers of the crossings are: (AAR # 869 979 V), (AAR # 869 973 E), (AAR # 869 975 T) and (AAR # 869 985 Y).

2. On or about February 2, 1998, the Department filed an amended complaint realleging its statements in the original complaint and adding the Ohio and Pennsylvania Railroad Company (O&P) as an additional defendant.

SECRETARY'S BUREAU

JUN 26 PM 12:32

Respectfully Submitted,



Jason D. Sharp
Assistant Counsel
Atty. Id. # 80488
Commonwealth of Pennsylvania
Department of Transportation
Office of Chief Counsel
Forum Place - 9th Floor
555 Walnut Street
Harrisburg, Pa. 17101-1900
(717) 787-3128

DATED: 2/2/98

3. The Department's original and amended complaints generally state that the four (4) crossings should be suspended because of inadequate safety for the motoring public and general deterioration, in addition to other relevant reasons. Additionally, the Department seeks to recoup costs incurred due to the removal of the crossing at AAR # 869 979 V, also know as the State Route 0051 crossing.

4. Prior to the Department's filing of the above referenced complaint, RVI petitioned the Surface Transportation Board (STB) to abandon of the subject rail line. See generally STB Docket No. AB-556 (SUB-No. 2X); STB Finance Docket No. 33385.

5. The parties to this matter, in addition to Administrative Law Judge Gesoff, agreed to defer consideration of the Department's request for suspension of the four (4) crossings until the STB had made a final determination regarding the disposition of the Subject Rail line.

6. On November 8, 1999, the Port Authority filed an Offer of Financial Assistance (OFA) with the STB to purchase the subject rail line, including both portions in Ohio and Pennsylvania.

7. In a decision served on November 12, 1999, the STB determined that the Port Authority was a financial responsible entity and directed that the OFA process was to proceed to determine if the Port Authority and RVI could negotiate a settlement price.

8. In a order dated January 6, 2000, the STB determined that the net liquidation value for the subject line is \$1,080,560.00.

9. Upon information and belief, it is averred that on or about January 11, 2000, the Port Authority voted to accept the net liquidation value as set by the STB.

10. Upon information belief, it is averred that the Port Authority shall close upon the purchase of the line within ninety (90) days of the Port Authority's communication to the STB notice of election to purchase the line.

11. Upon information belief, it is averred that the Port Authority will own the subject rail line and lease it to the Columbiana Central & Pennsylvania Railroad Company, who will become the operator on the refurbished line.

12. The transfer of ownership of the subject rail line for RVI to the Port Authority will include the ownership of the right-of-way and thus the area of the crossings at issue in this case.

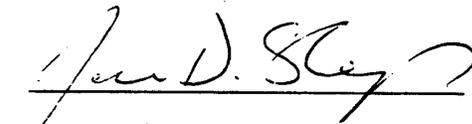
13. The transfer of the subject rail line from RVI to the Port Authority will impact this litigation due to the Port Authority's desire and intention to reestablish rail service over the subject line, necessitating the use of the subject crossings. Previously in this matter, it had had it been the intention of RVI, through the STB amendment process, to abandon the subject rail line and remove all trackage.

14. The Port Authority's decision as to the continued use and viability of the Pennsylvania portion of the subject rail line will directly impact the disposition of the four (4) crossings at issue in this case.

15. The operating rights of the Columbiana Central & Pennsylvania Railroad Company will be directly impacted by the disposition of the complaint regarding the crossings at issue in this case.

WHEREFORE, is respectfully submitted that it is necessary to join the Columbiana County Port Authority and the Columbiana Central & Pennsylvania Railroad Company, to the subject action, to preserve any and all rights incident to reestablishment of rail service on the subject line and to facilitate proper resolution and satisfaction of the present Complaint.

Respectfully Submitted,



Jason D. Sharp
Assistant Counsel
Pennsylvania Attorney Id. # 80488

Commonwealth of Pennsylvania
Department of Transportation
Office of Chief Counsel
9th Floor - Forum Place
555 Walnut Street
Harrisburg, PA 17101-1900
(717) 787-3128

DATE: 1/26/00

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF TRANSPORTATION,	:	DOCKET NO.
Complainant	:	
	:	
v.	:	C-00981174
	:	
RAILROAD VENTURES, INC., <u>et al</u>	:	
Respondents	:	

CERTIFICATE OF SERVICE

I, Jason D. Sharp, Assistant Counsel, hereby certify that a true and correct copy of the Department's Motion to Join was served upon the parties listed below by first class mail, postage prepaid this 26th day of January, 2000:

David A. Salapa, Esquire
Pennsylvania Public Utility Commission
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Harrisburg, PA 17105-3265

Kelvin J. Dowd, Esquire
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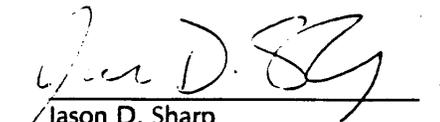
Richard R. Wilson, Esquire
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Mr. Ronald Finkbeiner, President and CEO
Columbiana Central & Pennsylvania Railroad Company
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Tracy V. Drake
Executive Director
Columbiana County Port Authority
1250 St. George Street
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Michael J. Kapp, Esquire
Columbiana County Port Authority
1250 St. George Street
East Liverpool, OH 43920

Honorable Michael A. Nemec
Administrative Law Judge
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300 Liberty Avenue
Pittsburgh, PA 15222



Jason D. Sharp
Assistant Counsel
Atty. Id. # 80488

Commonwealth of Pennsylvania
Department of Transportation
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Harrisburg, Pa. 17101-1900
(717) 787-3128

DATED: 1/25/00

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265**

Public Meeting held November 30, 2001

Commissioners Present:

Glen R. Thomas, Chairman, Statement attached
Robert K. Bloom, Vice Chairman
Aaron Wilson, Jr.
Terrance J. Fitzpatrick

Commonwealth of Pennsylvania
Department of Transportation

C-00981174

v.

Railroad Ventures, Inc., and the Ohio
and Pennsylvania Railroad Company

OPINION AND ORDER

BY THE COMMISSION:

Before the Commission for consideration and disposition are the Exceptions filed by Central Columbiana & Pennsylvania Railway, Inc. (CCPR) and the Columbiana County Port Authority (CCPA) on September 14, 2001, to the Recommended Decision of Administrative Law Judge (ALJ) Michael A. Nemecek issued on August 27, 2001, in the above-captioned proceeding. On September 21, 2001, the Commission's Bureau of Transportation and Safety (BTS) filed Reply Exceptions. On September 24, 2001, the Pennsylvania Department of Transportation (Complainant) also filed Reply Exceptions.

History of the Proceeding

On February 28, 1998,¹ the Complainant filed the Complaint now before us alleging that one of the Respondents, Railroad Ventures, Inc., (RVI) is the owner/operator of a line of railroad that is the subject of the Complaint, and that RVI is the successor to the interest of the Ohio and Pennsylvania Railroad Company (O&P), also a Respondent. The Complaint further contended that various crossings of the line of railroad should be abolished because the railroad is inactive and the Complainant believes that neither RVI nor O&P intend to restore rail service. Further, the Complaint averred that the crossings are safety hazards and that the Complainant should be reimbursed for its costs of repairing and maintaining one of the crossings, specifically, the crossing of State Route 0051 in Darlington Township, Beaver County.

On February 6, 1998, the Complainant filed an Amended Complaint which incorporated the original Complaint. Additionally, the Amended Complaint asserted that RVI is the owner and operator of the right-of-way, rail facilities and crossings at issue as successor in interest to the Youngstown and Ohio Railroad Company. The Amended Complaint stated that the O&P possesses operating authority for the line in question pursuant to a contractual relationship with RVI. The Amended Complaint provided specific allegations regarding two of the crossings. The Complainant averred that the O&P does not intend to renew its agreement with RVI and that RVI intends to abandon the rail line. The Complainant requested that this Commission suspend the crossing and direct RVI and the O&P to reimburse its costs, and to order RVI to abolish the crossings.

¹ Portions of this Section of the Opinion and Order are adopted from pages 1-3 of the Recommended Decision without further attribution.

Both RVI and O&P filed Answers and raised affirmative defenses. The Complainant filed Answers to both.

On January 20, 1999, the ALJ held the first telephonic Prehearing Conference from Pittsburgh. At that time, it appeared as if the Parties would reach a settlement of the matter in short order. However, no settlement was reached. Seven subsequent telephonic Prehearing Conferences were held from Pittsburgh, on April 22, 1999, August 18, 1999, October 22, 1999, January 19, 2000, July 12, 2000, November 9, 2000 and December 22, 2000. (Tr., pp. 1-139).

By Interim Order dated March 9, 2000, the ALJ found it necessary to join CCPR and CCPA as additional Respondents. On April 3, 2001, the O&P, CCPA and CCPR all filed Motions to Dismiss the Complaint. RVI joined in with its request on April 17, 2001. All Motions to Dismiss were denied by Interim Order dated April 20, 2001.

On April 24, 2001, the ALJ held the Initial Hearing in Pittsburgh. The record consists of a 268 page Transcript, four Complainant Exhibits, seven O&P Exhibits, fifteen RVI Exhibits and one BTS Exhibit. No Briefs were filed. The ALJ recommended that the Complaint be sustained. As mentioned above, CCPA and CCPR filed Exceptions to the Recommended Decision, to which the BTS and the Complainant filed Reply Exceptions.

Discussion

The ALJ made specific Findings of Fact and Conclusions of Law (R.D., pp. 3-9 and 13, respectively), which are adopted herein by reference, unless modified or reversed, expressly or by necessary implication, by this Opinion and Order.

As a preliminary matter, we note that any issue or Exception that we do not specifically address has been duly considered and will be denied without further discussion. It is well settled that we are not required to consider, expressly or at length, each contention or argument raised by the parties. (*Consolidated Rail Corporation v. Pennsylvania Public Utility Commission*, 625 A.2d 741 (Pa. Cmwlth. 1993); also see, generally, *University of Pennsylvania v. Pennsylvania Public Utility Commission*, 485 A.2d 1217 (Pa. Cmwlth. 1984)).

In their Exceptions, CCPR and CCPA assert that events which occurred after the April 24, 2001 Hearing, have mooted the need to suspend these crossings. CCPR and CCPA further contend that the unsafe conditions have been properly cured. (Exc., pp. 1-3).

CCPR and CCPA also argue that suspension of the crossings by this Commission, as recommended by the ALJ, would improperly impinge on the exclusive jurisdiction of the federal Surface Transportation Board (STB) regarding railroad abandonments and construction. To support its argument, CCPR and CCPA cite, among other cases, *Chicago & North Western Transportation Company v. Kalo Brick & Tile Company*, 450 U.S. 311, at 317 (1981). CCPR and CCPA also rely on the Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. §10101 *et seq.* which transferred the authority formerly exercised by the Interstate Commerce Commission to the STB. Since the rail line in question is operating in interstate commerce, CCPR and

CCPA submit that any order of this Commission to suspend the crossings would impinge on the authority granted to the STB by the United States Congress. Accordingly, CCPR and CCPA conclude that the ALJ's Recommended Decision should be adopted in all respects, except regarding the suspension of the crossings. (Exc., pp. 3-7).

In its Replies to the Exceptions, the BTS objects to CCPR and CCPA's attempt to introduce new evidence into the record in this proceeding by way of their Exceptions. The BTS contends that, if the assertions of CCPR and CCPA are accurate, then the crossings at issue may be operating without adequate protection. For these reasons, the BTS recommends that the ALJ's Recommended Decision be adopted with respect to directing RVI to reimburse the Complainant for the cost the Complainant incurred in removing the rails and paving at the S.R. 0051 crossing. The BTS further recommends that the proceeding be remanded to the Office of Administrative Law Judge to receive evidence regarding the level of railroad operations and the type of protection required at these crossings. (BTS R.Exc. pp. 1-3).

In its Reply Exceptions, the Complainant agrees with CCPR and CCPA that the crossings no longer require suspension. However, the Complainant disagrees that this Commission is impinging on the jurisdiction of the STB in asserting its authority over the crossings at issue here. To support its position, the Complainant relies on the Commonwealth Court decision at *Wheeling & Lake Erie Railway Company v. Pennsylvania Public Utility Commission*, 778 A.2d 785, 2001 Pa. Commw. LEXIS 356 (Pa. Cmwlth. 2001) (*Wheeling*). According to the Complainant, that case determined that there is no conflict between the jurisdiction of the STB and the PUC regarding this Commission's authority over these crossings. For these reasons, the Complainant recommends that this Commission adopt the ALJ's Recommended Decision regarding jurisdiction and allocation of costs, but not with respect to suspending the crossings. (PennDOT R.Exc., pp. 1-4).

In our consideration of these matters, we shall first address the issue of our jurisdiction over the crossings involved in this proceeding, since that issue is fundamental to any other actions we take regarding those crossings. In the Recommended Decision (pp. 11-12), the ALJ relied on the Commonwealth Court's *Wheeling* decision, *supra*, in determining that this Commission has authority over safety matters at these crossings. We concur. In *Wheeling*, after a comprehensive review of the issue of federal preemption regarding state authority to regulate conditions at rail/highway crossings, the Commonwealth Court stated, in pertinent part, as follows:

Moreover, there is no conflict between the exclusive jurisdiction of the Surface Transportation Board to economically regulate the rail carriers under the ICC Termination Act and the states' authority to regulate the public safety of the rail-highway crossing, which is also part of the public highway, see *CSX Transportation, Inc. v. City of Plymouth*, 92 F. Supp. 2d 643 (E.D. Mich. 2000).

(*Wheeling, supra*, 778 A.2d at 792). That determination of the Commonwealth Court is controlling in the proceeding now before us. Our regulation of safety issues at these crossings is an exercise of the traditional police powers conferred upon the states. Accordingly, we will deny the Exception of CCPR and CCPA regarding our authority to regulate safety at the crossings at issue here.

With respect to CCPR and CCPA's Exception that these crossings should not be suspended, we will accede to that request at this point in time. However, we are not doing so based on the arguments set forth by CCPR and CCPA. Based on our review of the record evidence, we shall remand this proceeding to the Office of Administrative Law Judge for the reception of further evidence regarding the level of rail and highway operations at the crossings, and the type of crossing protection needed. We further direct

the Parties to submit evidence, to the ALJ assigned to the proceeding who will make recommendations concerning the final allocation of maintenance responsibilities at these crossings. Accordingly, we will grant this Exception, in part.

Conclusion

We have reviewed the record as developed in this proceeding including the ALJ's Recommended Decision and the Exceptions and Replies filed thereto. Based on our review, we conclude that the Exceptions of the CCPR and CCPA are meritorious, in part, and will be granted, in part; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions filed by the Central Columbiana & Pennsylvania Railway, Inc. (CCPR) and the Columbiana County Port Authority (CCPA) on September 14, 2001, to the Recommended Decision of Administrative Law Judge Michael A. Nemec issued on August 27, 2001, are granted, in part.

2. That the Recommended Decision of Administrative Law Judge Michael A. Nemec is adopted, to the extent that it is consistent with this Opinion and Order.

3. That the Amended Complaint of the Pennsylvania Department of Transportation, docketed at C-00981174, is sustained, in part, consistent with this Opinion and Order.

4. That the action of the Pennsylvania Department of Transportation in removing the rails and paving over the crossing (AAR 869 979 V) of the track of

railroad, at grade, of State Route 0051 in Darlington Township, Beaver County is approved.

5. That the Pennsylvania Department of Transportation, at its initial cost and expense, shall maintain, in a smooth and safe condition, the highway approaches to the four crossings of State highways, State Route 0051 (AAR No. 869 979 V), State Route 4004 (AAR No. 869 973 E), State Route 4004 (AAR No. 869 975 T) and State Route 0551 (AAR 869 985 Y), all in Darlington Township, Beaver County, where these highways cross, at grade, the tracks of the Columbiana County (Ohio) Port Authority and the Columbiana Central & Pennsylvania Railroad Company, to a distance of eighteen (18) inches beyond the outermost track, until such time as the final allocation of maintenance responsibilities and costs is made.

6. That Darlington Township, at its initial cost and expense, shall maintain, in a smooth and safe condition, the highway approaches to the crossing of T-499 (AAR 869 981 W) in Darlington Township, Beaver County, where this highway crosses, at grade, the tracks of the Columbiana County (Ohio) Port Authority and the Columbiana Central & Pennsylvania Railroad Company, to a distance of eighteen (18) inches beyond the outermost track, until such time as the final allocation of maintenance responsibilities and costs is made.

7. That the Columbiana County (Ohio) Port Authority and the Columbiana Central & Pennsylvania Railroad Company, at their initial cost and expense, shall maintain, in a smooth and safe condition, the railroad facilities and tracks, including the paving between the tracks, and the pavement to a distance of eighteen (18) inches beyond the outermost track, where their tracks cross the following highways: State Route 0051 (AAR No. 869 979 V); State Route 4004 (AAR No. 869 973 E); State Route 4004 (AAR No. 869 975 T); State Route 0551 (AAR 869 985 Y), and Township

Route T-499 (AAR 869 981 W). All of the crossings are in Darlington Township, Beaver County, and this maintenance responsibility shall continue until such time as the final allocation of maintenance responsibilities and costs is made.

8. That Railroad Ventures, Inc., and the Ohio and Pennsylvania Railroad Company, jointly or severally, shall reimburse the Pennsylvania Department of Transportation the total amount of \$19,886.92 incurred in removing the rails and paving over the crossing of the line of railroad crossing, at grade, of State Route 0051 in Darlington Township, Beaver County, within sixty (60) days of the entry date of this Opinion and Order.

9. That this proceeding is remanded to the Office of Administrative Law Judge for further hearings as deemed appropriate culminating in the issuance of a Recommended Decision on Remand regarding the necessary level of protection at these crossings, and the final assignment of future maintenance responsibilities for the crossings and highway approaches thereto.

BY THE COMMISSION,

James J. McNulty
Secretary

(SEAL)

ORDER ADOPTED: November 30, 2001

ORDER ENTERED: December 7, 2001

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGE
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 300 LIBERTY AVENUE
 PITTSBURGH, PA 15222-1210

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TOTAL NO. OF PAGES: 10
 (Including this Sheet)

DATE: 9/5/02

COMMENTS:

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BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF TRANSPORTATION, :

Complainant :

v. :

RAILROAD VENTURES, INC. and :
THE OHIO & PENNSYLVANIA RAILROAD :
COMPANY, :

Respondents :

Docket Number

C-00981174

P.P.U.C.
SECRETARY'S BUREAU

STIPULATION OF SETTLEMENT BETWEEN THE COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, THE COLUMBIANNA COUNTY PORT AUTHORITY, AND THE CENTRAL COLUMBIANNA AND PENNSYLVANIA RAILROAD COMPANY.

AND NOW, come the Commonwealth of Pennsylvania, Department of Transportation (Department), the Columbiana County Port Authority (Port Authority) and the Central Columbiana and Pennsylvania Railroad (Railroad) and submit the following in support of their Stipulation of Settlement in the above captioned matter:

Whereas, four specific rail highway crossings are the subject of the above-referenced Commission action, specifically the crossing of State Route 51 in Darlington Township, Beaver County (AAR No. 869 979 V), State Route 4004 in Darlington Township, Beaver County (AAR No. 869 973 E), State Route 4004 in Darlington Township, Beaver County (AAR No. 869 975 T), and State Route 551 in Darlington Township, Beaver County (AAR No. 869 985 Y); and,

Whereas, previous hearings in this matter resulted in the finding that the Department was justified in the removal of the SR 51 crossing, and the paving of the additional subject crossings, because Railroad Ventures, Inc., and the Ohio and Pennsylvania Railroad Company failed to maintain the subject crossings in a satisfactory condition;

Whereas, previous hearings in this matter resulted in the issuance of a Commission order entered December 7, 2001, which ordered, *inter alia*, that Railroad Ventures, Inc., and the Ohio and Pennsylvania Railroad Company, jointly or separately, reimburse the Department in the amount of \$19,866.92 for work the Department completed in conjunction with the removal of the S.R. 51 crossing (AAR No. 869 979 V)¹; and,

Whereas, the Order further directed that the proceeding be remanded to the Office of Administrative Law Judge for further hearings regarding the necessary level of protection at the four subject crossings and for a final assignment of future maintenance responsibilities for the crossings and the highway approaches thereto; and,

Whereas, the Port Authority, via a Surface Transportation Board action docketed at STB Docket No. AB-556 (Sub-No. 2X), acquired the subject rail line from Railroad Ventures, Inc., and subsequently contracted with the Railroad to operate on the subject line, including operations over the four crossings at issue in this case; and,

¹ As of the date of this stipulation, the \$ 19,866.92 has not been paid by either Railroad Ventures, Inc. or the Ohio and Pennsylvania railroad Company, and the requested adoption of this stipulation should not be construed as affecting the right of the Department to seek to enforce the prior Commission Order in this case requiring reimbursement of the above referenced sum of money to the Department.

Whereas, the Department, the Port Authority, and the Railroad, have come to an agreement as to the four crossings at issue so as to allow for the operation of both rail and motor vehicles at the crossings in the interest of public safety and convenience; and,

Whereas, the parties wish to set forth in this stipulation their recommended proposal for the disposition of the appropriate warning devices and surfaces at the subject crossings.

Now therefore, in consideration of and in light of the forgoing, the parties signatory hereto stipulate as follows:

1. That, the preceding paragraphs be incorporated in this stipulation as if set at forth at length.
2. That, within one year of the entry of the order in this case, the Central Columbiana and Pennsylvania Railroad, at its initial cost and expense, do all work necessary to install manually operated, cantilevered flashing railroad warning light signals at the crossing where State Route 51 crosses the subject rail line, AAR No. 869 975 V, in accordance with all applicable State and Federal laws and regulations, including, but not limited to, the Manual on Uniform Traffic Control Devices.
3. That, upon completion of the above-referenced cantilevered light installation work at the State Route 51 crossing, the Central Columbiana and Pennsylvania Railroad report the actual date of completion of the above-referenced work to the Commission and to the parties in this case.
4. That, upon completion of the above-referenced installation of the cantilevered lights at the State Route 51 crossing, the Pennsylvania Department of Transportation, reimburse the Central Columbiana and Pennsylvania Railroad for the actual cost of installation of the cantilevered lights, and such reimbursement shall not exceed a total cost of \$80,000, all in accordance with 23 C.F.R. § 140 *et seq.*
5. That, if the installation of the above-referenced cantilevered lights at the State Route 51 crossing exceeds \$80,000, the Central Columbiana and Pennsylvania Railroad shall bear all costs above and beyond \$80,000 incident to the installation of the cantilevered lights.
6. That, within one year of the entry of the order in this case, the Central Columbiana and Pennsylvania Railroad, at its sole cost and expense, do all work necessary to remove the existing rail highway crossings at S.R. 4004 (AAR No. 869 973 E), S.R. 4004 (AAR No. 869

975 T) and S.R. 551 (AAR No. 869 985 Y) and further that the Central Columbiana and Pennsylvania Railroad do all work necessary to complete the reinstallation of new rail highway crossing surfaces at each of these three crossings, in kind, including providing for asphalt paving within two feet of the outermost rail on each side of the crossings.

7. That, within one year of the entry of this order, the Pennsylvania Department of Transportation, at its sole cost and expense, do all work necessary to complete the reinstallation of any and all appropriate advance warning signs at all crossings, including the installation of appropriate pavement markings.

8. That, within one year of the entry of this order, the Central Columbiana and Pennsylvania Railroad, at its sole cost and expense, install or replace at S.R. 4004 (AAR No. 869 973 E), S.R. 4004 (AAR No. 869 975 T) and S.R. 551 (AAR No. 869 985 Y) reflectorized crossbuck warning signs, including the indication of the number of tracks present at the crossing, if necessary, at each of these three crossings, in accordance with all federal and state laws and regulations, including, but not limited to, the Manual on Uniform Traffic Control Devices.

9. That, upon completion of the above-referenced work, the Central Columbiana and Pennsylvania Railroad and the Pennsylvania Department of Transportation report the actual date of completion to the Commission.

10. That, upon notification of completion of the above referenced work by the Central Columbiana and Pennsylvania Railroad and the Pennsylvania Department of Transportation, the Commission schedule a final inspection of the work completed.

11. That, upon completion of the above-referenced work, the Central Columbiana and Pennsylvania Railroad maintain the crossing surfaces at State Route 51 in Darlington Township, Beaver County (AAR No. 869 979 V), State Route 4004 in Darlington Township, Beaver County (AAR No. 869 973 E), State Route 4004 in Darlington Township, Beaver County (AAR No. 869 975 T), and State Route 551 in Darlington Township, Beaver County (AAR No. 869 985 Y) to a point twenty-four inches (24") outside of each rail, and further maintain all railroad warning signs and signals, in addition to all rail facilities at the crossings.

12. That, upon completion of the above-referenced work, the Pennsylvania Department of Transportation, at its sole cost and expense, maintain the highway approaches, advance warning signs, and any and all pavement markings at State Route 51 in Darlington Township, Beaver County (AAR No. 869 979 V), State Route 4004 in Darlington Township, Beaver County (AAR No. 869 973 E), State Route 4004 in Darlington Township, Beaver County (AAR No. 869 975 T), and State Route 551 in Darlington Township, Beaver County (AAR No. 869 985 Y).

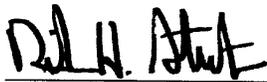
13. That this order be binding upon the respective parties' successors and assigns.

14. That this order, insofar as it orders work or costs to the parties involved, is without prejudice to the rights to recover said costs from others in accordance with any lawful agreement.

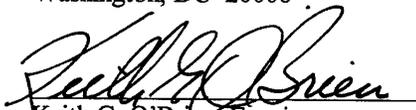
15. That the parties to this order cooperate with each other so as to effectuate the completion of the ordered crossing alterations.

16. That, the right of the Pennsylvania Department of transportation to seek enforcement of the Opinion and Order of the Commission, at this docket, dated December 7, 2001, shall not be modified or infringed by the current order.

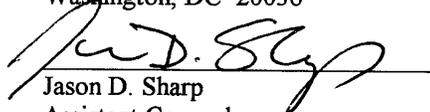
Respectfully Submitted:



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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

VERIFIED STATEMENT OF STEVE HAMES

1. My name is Steve Hames. My address is 8012 Greenland Drive, Alexander, Arkansas 72002. I am currently employed by CW & W Contracting Company in Sibley, Louisiana. I previously was employed as roadmaster by the Dardanelle & Russellville Railroad ("D&R"), which is headquartered in Russellville, Arkansas. D&R is owned by Arkansas Short Lines, Inc. ("ASL"). Prior to being hired by D&R, I worked for Arkansas Railroad Contractors, which was also owned by ASL. I have personal knowledge of the facts that are set forth in this statement.

2. ASL also owns and controls the Central Columbiana & Pennsylvania Railroad ("CCPR"). Between January 2001 and the date that I resigned from D&R in March 2003, CCPR was the operator of a line of railroad between Youngstown, Ohio and Darlington, Pennsylvania. During that period, I spent a considerable amount of time in Ohio to help with the repairs that were needed to restore rail operations over the line. Because the track had been paved over, badly damaged and allowed to deteriorate by its previous owner, CCPR was not able to begin operations until it finished some major repairs.

3. In my capacity as roadmaster for D&R, I was personally engaged in the effort

to repair the line of railroad so as to make it operational. The last portion of the line to be reopened was located at its extreme eastern end in Pennsylvania. To the best of my recollection, In July 2002, I personally inspected the two crossings that are at issue in the Darlington area, including the crossing at Cannelton Road and Old State Highway 51. After I inspected the crossings and prepared my estimate, I gave a preliminary oral bid to Tim Robbins or Bud Gane and later prepared and forwarded a written proposal that would have confirmed my earlier oral bid. D&R did not get the work because it was not the low bidder.

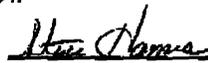
4. I disagree with the reasoning of the Board. At the time I prepared my bid, I was not aware of the Ohio Track bid. If I had known the amount of the Ohio Track bid, I would have tried to submit a lower bid in order to get the work. At the time, my crew was looking for work. Therefore, I had no reason to submit a higher bid than Ohio Track. Because we were in business to make a profit, the company would have benefited by being able to put my crew to work on these crossings. In addition, I would have earned a bonus. As a result, it would make no sense to overbid Ohio Track.

5. I must also state that I was never told what to bid on any job by anyone associated with ASL or any of the companies that it owned.

FURTHER SAYETH THE AFFIANT NOT.

VERIFICATION

I, Steve Hames, hereby declare under penalty of perjury that the foregoing is true and correct. Executed on December 31, 2004.



Steve Hames

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

VERIFIED STATEMENT OF TRACY V DRAKE

1. My name is Tracy V. Drake. I am the Executive Director/CEO, Columbiana County Port Authority ("CCPA"). My business address is 1250 St. George Street, East Liverpool, Ohio 43920. I further certify that I graduated from the University of Toledo, College of Law and am a licensed attorney in Maryland and the District of Columbia and am qualified and authorized to present this affidavit.

2. CCPA, which is a quasi-public agency organized under the laws of the State of Ohio, has been authorized by the Surface Transportation Board ("Board" or "STB") to acquire a line of railroad, between Darlington, Pennsylvania and Youngstown, Ohio, pursuant to an offer of financial assistance ("OFA") made by CCPA in accord with the provisions of 49 U.S.C. § 10904. The OFA was made to Railroad Ventures, Inc. ("RVI") in the STB's 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 FD 33385, *Railroad Ventures, Inc.-Acquisition and Operation Exemption-Youngstown & Southern Railroad Company*. Under the OFA process in the event that CCPA cannot make a go of rail

operation and desires to abandon the line at any time within five years it must make the line available back to RVI.

3. By its Decision, served October 4, 2000, the Board imposed various terms and conditions on the parties, including the requirement that "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." The closing date was thereby set at November 17, 2000. This was the second time that the Board established a closing date. In its January 7, 2000 Decision, the Board had previously ordered that "closing will occur" by April 6, 2000. Had it not been for RVI's continued attempts to thwart transfer of assets months after the Board ordered the sale of the line to CCPA, closing would have occurred in April 2000. Closing did not occur until January 25, 2001.

4. In 1997, when RVI sought authorization from the STB to acquire the line, it filed an affidavit that it would provide rail service. Based upon certain previously undisclosed contracts between RVI and third parties in regard to scrapping the line and developing related real estate that have come to light during the course of the abandonment proceeding, I believe that RVI never intended to provide rail service. *See also*, my paragraph 13 herein and my letter to David Handle, dated December 30, 2004, which is attached as Attachment C. In its October 4, 2000 decision, the Board noted that "RVI's blatant disregard of its common carrier obligation to provide service" was disturbing. And, "[i]n view of RVI's misconduct," it imposed the requirement that \$375,000 of the sale price be placed in an interest-bearing escrow account to "ensure that RVI pays for uncovering and restoring paved-over track and for reconnecting signal

equipment at road crossings.” By letter dated November 17, 2000, RVI insisted that “\$375,000 of the proceeds of sale will be escrowed with Attorney James Davis subject to the requirement that all expenditures of these funds must have the prior written approval of the Ohio Rail Development Authority.” At closing, the \$375,000 was deposited in the escrow account. Despite repeated attempts, CCPA could not thereafter get Attorney Davis to release the funds because of RVI’s opposition and interference.

5. On May 11, 2001, CCPA filed a “Request for Clarification and Order to Cease and Desist from Interference with Reimbursement for Restoration of Paved Over Tracks and Reconnecting Signals.” In its May 11 Petition, CCPA had asked the Board to enter an order which would specify the following: “That RVI will be afforded 15 days within which to identify any specific repair/restoration project(s) it considers not covered by the escrow provision and that CCPA be afforded 10 days to respond to that submission. Expedient consideration of such submissions would serve to facilitate completion of restoration of the line ...”

6. On that same date, RVI filed suit in the Northern District of Ohio against CCPA, its Executive Director, CCPR, the Ohio Rail Development Commission (“ORDC”) and its Executive Director and Commissioners. By its Complaint, RVI sought to

restrain and enjoin Defendants, and all those acting in concert with them, from further asserting, assessing, levying or collecting from Plaintiff any costs associated with, or related to, the restoration of at grade crossings or the reconnection of signal facilities at those at grade crossings in Mahoning County and Columbiana County, Ohio which exceed the restoration or reconnection costs directed by the federal Surface Transportation Board.

7. This collateral attack on the Board's Orders was ultimately rejected by the District Court in an unpublished opinion dated August 13, 2001. *See Railroad Ventures, Inc. v. Columbiana County Port Authority*, Case No. 4:01 CV 1164, August 13, 2001. As a result of this frivolous action, CCPA incurred legal fees in the amount of \$17,886.72. I mention this because David Handel, RVI's President, during a telephone conversation of January 29, 1997, threatened me by stating "that they have ten times more money than we can muster for legal fees to prolong the fight in order to see that the shippers eventually go away from the rail line." *See Attachment A hereto.* The Board's *December 2004 Decision* appears to reward RVI for its tenacity in prolonging the fight over the escrow account.

8. Rejecting CCPA's May 11, 2001 proposal that would have provided a structured methodology for expenditures from the escrow account, the Board, in a Decision served November 9, 2001 (the *November 2001 Decision*), instead ordered Attorney Davis, the original escrow agent, to transfer all funds in the escrow account to CCPA. CCPA was ordered to establish a separate escrow account with the proceeds that were transferred to it by Mr. Davis. As the Board recognized in its *November 2001 Decision*, CCPA's filing was necessitated by RVI's refusal to cooperate with the escrow agent, CCPA and Central Columbiana & Pennsylvania Railway, Inc. ("CCPR"), which is under contract with CCPA to operate the line and thereby assist in the economic development of the region. At my urging, CCPR had commenced making repairs immediately after closing in order to satisfy the statutory common-carrier obligation. However, even after completion of specific projects that would have qualified for use of escrow funds, no funds had been disbursed from the escrow account by the date that

CCPA filed its petition in May 2001. As the Board later found, “We ordered the establishment of the escrow account so that an independent manager would conserve the account’s assets, ensure timely payment of funds to CCPA, and surrender any unused funds to RVI after the repairs were made. RVI’s position and actions regarding the escrow account have not furthered these goals, but rather have frustrated the orderly administration of these funds and have prevented disbursement of funds from the account for legitimate expenditures that were meant to be covered by the fund.”

9. In the *November 2001* Decision, the Board ordered CCPA to keep account of all funds expended for repairs and to complete all repairs within 270 days of the effective date of its decision. Most importantly, from my understanding of the obligation imposed upon CCPA for expenditure of the escrow funds, the Board stated that funds expended in accordance with its order “*shall be subject to challenge by RVI or its affiliates only for fraud*” (emphasis added). Moreover, the Board specifically ordered that “*CCPA shall be held harmless*” (emphasis added).

10. Consistent with the Board’s Order, CCPA kept account of all funds expended for repairs that were required as a result of RVI’s failure to keep the line operational. Had CCPA realized that the Board in December 2004 would retroactively alter this standard by shifting the burden of proof so as to obliterate its prior order that CCPA “shall be held harmless,” CCPA would not have agreed to assume responsibility for payments from the escrow account.

11. It was and is my interpretation that the Board wanted to put an immediate end to RVI’s ability to interfere with necessary repairs and the reimbursement process. While CCPA would be required to account for the funds after the repairs were made, RVI

was not to have any say, much less a veto, over any repairs. The keeping of account of the funds did not require CCPA to perform an audit of CCPR's books and records before releasing payments. In fact, the Board's *November 2001* Decision lacked any specific requirements to guide CCPA in releasing funds from the escrow account other than the deadline of 270 days to complete the repairs thereunder. This was made clear by the Board's rejection of CCPA's May 11, 2001 proposal. See ¶ 5 *supra*.

12. On August 1, 2002, the United States Court of Appeals for the Sixth Circuit issued its decision in *Railroad Ventures, Inc. v. Surface Transportation Board*, 299 F.3d 523 (6th Cir. 2002) ("*RVI I*"). By its decision, the Sixth Circuit affirmed multiple Decisions of the Board which compelled RVI to transfer ownership of the line of railroad to CCPA. In addition, the Sixth Circuit found that "[c]onsidering RVI's conduct since acquiring the rail line, the STB, quite wisely, required an escrow of funds to repair the damage to the track done with RVI's authorization." *RVI I* at 560. The Court also recognized (*id.* at 547) that "[i]n view of RVI's interference with the administration of the escrow fund," that it had been necessary for the STB to modify the terms of the escrow account so as to eliminate RVI's ability to interfere further.

13. In the 9-month period between the date that CCPA finally acquired ownership of the line on January 25, 2001 and November 9, 2001, when the Board issued its *November 2001* Decision, giving CCPA access to the escrow funds, various repairs were made to the line that should have been covered by the escrow account. Due solely to RVI's intransigent refusal to allow the Board's orders to work, CCPA was required to draw down funds to pay for repairs from a grant from the Ohio Rail Development Commission. The initial repairs, which totaled \$149,872.69, are supported by the

invoices that are attached hereto. *See* Attachment B. All of these repairs involved work that was done prior to November 9, 2001 and should have been covered by the escrow account. CCPR did not assess any overhead against the invoices that were forwarded to ORDC.

14. Because these repairs should have been covered by the escrow account, the overhead involved is eligible for payment from the escrow account. Otherwise, RVI would completely avoid its responsibility for these repairs contrary to the Board's prior reasoning when it established the escrow account.

15. In its *December 2004* Decision, the Board has stated that CCPA was required to solicit competitive bids before authorizing any repairs. I have read the Board's *November 2001* Decision and have not been able to ascertain any requirement that CCPA obtain competitive bids before authorizing payment from the escrow account.

16. I am aware that CCPR requested oral bids for repair projects and encouraged them to get three such quotes whenever possible. As CCPA's rail repair expert, I relied on CCPR's engineering estimates to reflect an industry standard repair cost. I also discussed these estimates with ORDC and PaDOT to confirm reasonableness. Based upon my ongoing discussions with CCPR, when bids came in lower than their own estimates, it was an acknowledgement, as far as I was concerned, that the public interest was being served. It is my further understanding that, in order to ensure payment from the escrow account, CCPR had to complete all repairs by August 8, 2002. Given the pressing need that existed in mid-2002 to get the entire line operational, the lack of any requirement for submission of written bids and because time was of the essence, I viewed these remaining repairs to be emergency in nature. As a result, CCPA would not have

required CCPR to publish written requests for bids. Instead, consistent with general public procurement law standards, CCPA would have allowed bids to be solicited in person or over the phone for the repairs to several crossings in Pennsylvania, including both the Old State Route 51 and the Cannellton Road crossings. I should add that prior to becoming CCPA's Executive Director, I was involved in public procurement for over nine years as an Assistant Attorney General for the State of Maryland and Counsel to the Maryland Port Administration and am very well acquainted with governing procurement standards and practices.

17. After the repairs were completed, CCPA authorized payment for them. The fact that the bids accepted were below the bids that CCPR obtained from its corporate affiliate proved that Ohio Track's winning bids were competitive. This in itself was not surprising in that Ohio Track had certain competitive advantages, primarily due to the fact that it is a local company. These factors also served to validate Ohio Track's bids, which was the only issue that was relevant.

18. That CCPR's corporate affiliate may have submitted bids that turned out to be higher for that work than the low bidder does not constitute fraud. Nor would the fact that CCPR later submitted written copies of their bids to confirm their earlier bids constitute fraud. If CCPR's corporate affiliate had submitted a bid higher than industry standards and higher than another bidder, which was then accepted by CCPA, that might be considered inappropriate, unless it was the only bid submitted.

19. I also authorized payment of administrative overhead based on advice given to me by counsel and an economic consultant with years of experience in the rail industry. I was at all times aware that the owners of CCPR, Tim, Daniel, Bill and

Michael Robbins, were actively engaged in getting the line repaired so that rail service could be restored. It is my opinion, which was based on the afore-mentioned advice, that there was nothing to suggest fraud and that the allocations of time were reasonable and accurate. Because CCPA was not required to perform an audit, but rather to keep account of all expenditures, I relied on those allocations with the understanding, based on the Board's *November 2001 Decision*, that CCPA shall be held harmless if it kept account of all expenditures from the escrow account. I am not aware of any allegation that CCPA failed to keep account of all such expenditures.

FURTHER SAYETH THE AFFIANT NOT.

I, Tracy V. Drake, Executive Director/CEO, Columbiana County Port Authority, declare under penalty of perjury that the foregoing is true and correct. Executed on January 3, 2005.



Tracy V. Drake

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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

VERIFIED STATEMENT OF MICHAEL A. ROBBINS

1. My name is Michael A. Robbins. I am currently on a two-week leave from the military and will return to Iraq on January 8, 2005. I am stationed in Baghdad, Iraq as a part of the 39th Infantry Brigade, Arkansas Army National Guard, attached to the 1st Cavalry Division in Operation Iraqi Freedom II. My estimated date of return from OIF II is April 15th. I have personal knowledge of the facts that are set forth in this statement and am authorized to submit this testimony.

2. Before I was called to active duty, I was a member of the Board of Directors of Arkansas Short Lines, Inc. ("ASL") and the General Manager of the Ouachita Railroad, which is a wholly-owned subsidiary of ASL. At all relevant times, ASL also owned the Central Columbiana & Pennsylvania Railroad ("CCPR"). As a member of the Board of Directors and as the General Manager of the Ouachita Railroad, I was not required to keep hourly timesheets. However, because it forced me to spend time in Ohio in addition to my normal activities as the General Manager of the Ouachita Railroad, I have personal knowledge of the time that I spent working on the CCPR project.

3. I have reviewed the December 13, 2004 decision of the Surface Transportation Board in which the Board ordered CCPR and the Columbiana County Port Authority ("CCPA") to repay \$119,806 of administrative overhead costs to Railroad Ventures Inc. ("RVI"), the former owner of the line of railroad over which CCPR operated between January 2001 and December 2004. In 2001, after CCPR was allowed to enter the line, I traveled to Ohio to inspect the line and to assist in the extensive efforts to repair the line so that operations could be restarted. Based on my personal observations, in January 2001, it was impossible to operate a locomotive over the line because it had been paved over in many locations and because the track had been physically cut in others. Furthermore, vegetation had become so overgrown that it would have been impossible to operate a locomotive. In addition, the crossing signals were largely inoperable and had to be replaced. I am also aware that because we had not been able to physically inspect the entire line before we agreed to take over rail operations for CCPA, we greatly underestimated the repairs that we would have to make before we could begin operating.

4. In its decision, the Board has disallowed \$2,610 of overhead that was based on the expenditure of 10% of my time being devoted to the Youngstown-Darlington line for CCPR. Based on my personal knowledge of the time that I spent on the Ohio project, the original estimate was too low. At a minimum, in 2001, I spent over 15% of my time on the CCPR project in planning and operational issues associated with getting the line repaired and operational. My initial visit to Ohio lasted 10 days. During that initial visit, I assisted in the repair efforts. Thereafter, there were two major derailments that twice required me to spend a week at a time in Ohio, for a total of 14 days. I also made trip to Ohio every other month between March and the end of December. These shorter trips consumed 3 days apiece for a total of 18 days. In addition to the days that I spent in Ohio, I also devoted several hours per week

while in Arkansas working on the CCPR project between January and December 2001. In particular, I was in charge of preparing all paperwork that had to be filed on behalf of CCPR with the Federal Railroad Administration and the Railroad Retirement Board. I spent over 2 weeks alone in dealing with FRA and related issues on behalf of CCPR. I also worked with CSX and Norfolk Southern to set up interchange agreements and to establish rates and divisions.

5. Based on my position as a member of the ASL Board of Directors, I am also aware of the estimates of time spent by other ASL officers on this operation and I believe the numbers are very conservative. Based on my personal observations, Daniel spent more than 40% of his time working on the CCPR. In addition to the time that he spent in Ohio working on the original repairs, he was heavily involved in car management and interchange work, as well as working up rates for CCPR. My father, William K. Robbins, spent between 65 and 70% of his time on the project in an oversight capacity and in supervising the startup of operations. Tim, who was the person primarily in charge of all CCPR matters, spent approximately 98% of his time on the CCPR project.

6. As a member of the ASL Board of Directors, I am also aware that we greatly underestimated the legal fees that would be required to counter RVI's continuing efforts to disrupt our efforts to repair the line and resume operations. I am aware that the original amount of overhead expenses that was tendered to the Board to justify the payment of administrative overhead charges for 2001 and 2002 did not include any amount for legal fees and related expenses. Nor did it include any accounting fees that were paid to outside accountants in connection with this project.

FURTHER SAYETH THE AFFIANT NOT.

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01-03-2005 03:48pm From-WASHINGTON DC THORNBURG

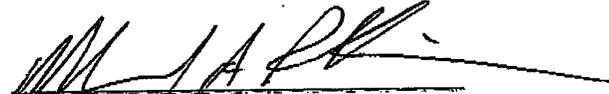
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VERIFICATION

I, Michael A. Robbins, hereby declare under penalty of perjury that the foregoing is true
and correct. Executed on January 3, 2005.


Michael A. Robbins