

Before the  
SURFACE TRANSPORTATION BOARD

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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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REPLY IN OPPOSITION TO PETITION FOR EXTENSION OF TIME AND  
SUPPLEMENTARY DISCOVERY

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Comes now Columbiana County Port Authority (“CCPA”), by and through its counsel of record, and respectfully requests the Board to deny the Petition for Extension of Time and Supplementary Discovery filed by Railroad Ventures, Inc. (“RVI”) on February 23, 2007 in response to the Board’s Decision, served February 13, 2007 (“*February 2007 Decision*”). As the Board plainly recognized therein, because the cost of repairing the damage to the line attributable to RVI far exceeded the amount that was set-aside, repayment of any amount of the set-aside fund to RVI would be contrary to the public interest as it would unjustly enrich RVI. Without question, repayment would retroactively repudiate the earlier decisions of the Board that were designed to ensure that set-aside funds would be used to “fix damage that was clearly attributable to RVI and for which RVI must be held accountable.”<sup>1</sup>

RVI’s Petition is based on two demonstrably false and misleading claims. RVI first says that “the Board itself raised the issue of signal restoration expenditure for the first time in its February 2007 decision, as a basis for denying RVI any refund of its escrowed monies.” That contention flies in the face of the Board’s explicit recognition that the issue of signal restoration

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<sup>1</sup> *February 2007 Decision*, Slip Op. at p. 6.

was first addressed over six years ago in the Board's *October 2000 Decision*. As the Board explained in its *February 2007 Decision* (emphasis added):

In the October 2000 Decision (at 19), the Board found that RVI had shown a "blatant disregard of its common carrier obligation to provide service," and had permitted various grade crossings to be paved over and **signals at crossings to be disconnected and fall into disrepair.**"<sup>2</sup>

The Board also observed that "[i]n the November 2001 Decision (at 6), the Board further clarified that RVI's liability extends not just to repairing damage that RVI actively invited, but also that which it passively permitted."<sup>3</sup> The *November 2001 Decision* explicitly stated 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."<sup>4</sup>

RVI's current position is further belied by the Board's recognition that in their January 2003 Closure Motion, "CCPA/CCPR provided documentation related not only to expenditures for which set-aside funds were used, but also to repairs that were funded by government grants."<sup>5</sup> As the Board also recognized, "clear evidence ... was in the record at the time demonstrating that the expenditures by ORDC to remedy the damage to road crossings and **signals at crossings** significantly exceeded the entire value of the set-aside fund."<sup>6</sup> In summary, the record flatly contradicts RVI's assertion that the issue of signal restoration expenditures was first raised by the Board in its most recent decision.

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *November 2001 Decision*, Slip Op. at p. 8.

<sup>5</sup> *February 2007 Decision*, Slip Op. at p. 7.

<sup>6</sup> *Id.* (emphasis added).

RVI's contention that it requires discovery "to determine the extent to which crossing and signal restoration expenses ... were paid for in whole or in part with federal funds" is both irrelevant and misleading. In the first place, RVI's reliance on the provisions of 23 C.F.R. § 646.210 is based on the baseless assumption that the set-aside funds would be used for railroad crossing improvements.<sup>7</sup> The set-aside funds at issue herein would not be used for "grade crossing improvements." The improvements were already in place when they were damaged by RVI. Plainly, if RVI had properly maintained the crossing signals, few, if any, expenditures would have been required to restore the existing signals and make them operable.

Second, RVI's argument is undercut by the undeniable fact that no set-aside funds would be used to install "new" signals. The Board has drawn a crystal-clear distinction between funds used to repair the "damaged" signals and funds used to install "new" signals.<sup>8</sup> Even if it is assumed *arguendo* that the set-aside funds could be used to fund the installation of "new" signals at crossings where no signals had previously existed, the Board did not authorize use of the set-aside funds for that purpose. Instead, it recognized that while set-aside funds could be used to cover the cost of new signals at Indianola Avenue and Western Reserve Road, "the remaining signal replacement costs still would be far more than enough to exhaust RVS's full \$375,000 in liability."<sup>9</sup>

Third, even assuming that the signals were originally installed solely for the public benefit, there is no avoiding the conclusion that RVI deliberately or negligently harmed the pre-existing signals and thereby deprived the public of the benefits associated with the signals. It is

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<sup>7</sup> RVI Petition at p. 2.

<sup>8</sup> See *February 2007 Decision*, at p. 7, n.7.

<sup>9</sup> *Id.* (emphasis in original). See also, *id.* at p. 9 ("ORDC apparently did upgrade the crossing protection at a number of other crossings by funding the installation of new warning signals where they did not exist before, but, as previously noted, the cost of those first-time signals is not included among the more than \$750,000 in signal funding relied upon here").

for that reason that RVI is being required to make restitution for the damage it caused through payments from the set-aside funds. Given the narrow facts of this case and the Board's goal of ensuring that RVI bear financial responsibility for the damage it caused, RVI's attempt to link "crossing improvements" with "signal restoration costs" in order to invoke the provisions of 23 C.F.R. § 646.210 is but a red herring.

Fourth, because the Board's action in requiring RVI to bear financial responsibility for the damage does not violate 23 C.F.R. § 646.210, and because the signal repair issue has been involved in this proceeding for over six year, there is no reason for any further discovery at this late date. In keeping with its determination in the *February 2007 Decision* that it may not consider evidence that could have been offered at an earlier stage of the proceeding, the Board would necessarily have to decline any evidence that RVI would perhaps dig up through its belated discovery. Hence, further discovery is irrelevant and immaterial to any issue remaining in this unduly protracted proceeding.

Last, CCPA once again notes that there is no suggestion of fraud associated with the expenditure of the set-aside fund. Given that the Board's finding that "the amount spent for repair of crossings and signals clearly exceeds (indeed, more than doubles) the \$375,000 limit of RVI's liability that we established,"<sup>10</sup> as well as its earlier directive 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,"<sup>11</sup> the time has come for the Board to finalize its *February 2007 Decision* and bring this proceeding to an end.

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<sup>10</sup> *Id.* at p. 8.

<sup>11</sup> *November 2001 Decision*, at p. 8.

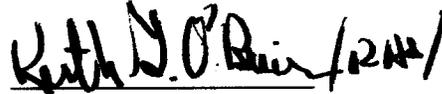
### Conclusion

For all the above-stated reasons, the Board should decline RVI's request for a further extension. Moreover, it should declare that no discovery is required given the fact that RVI has had over six full years to raise the issue that it belatedly seeks to raise at this time. Last, the Board should find that the issue RVI seeks to raise is irrelevant and immaterial to the proper disposition of this proceeding.

Respectfully submitted,



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Dated: February 26, 2007

CERTIFICATE OF SERVICE

I hereby certify that I have this 26<sup>th</sup> day of February, 2007, served a true copy of the foregoing Reply in Opposition to Petition for Extension of Time and Supplementary Discovery by first class mail, postage prepaid:

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A handwritten signature in black ink, appearing to read "R.H. Streeter", written over a horizontal line.

Richard H. Streeter