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January 21, 2003

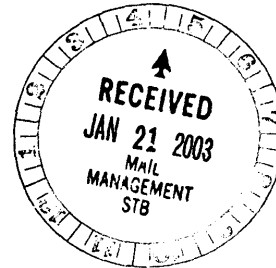
By Hand Delivery

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings

JAN 22 2003

Part of
Public Record



Re: 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

Dear Secretary Williams:

Enclosed for filing are an original and 10 copies of the "Joint Motion Seeking Final
Closure of Escrow Account" which is being filed on behalf of Columbiana County Port
Authority and Central Columbiana & Pennsylvania Railway, Inc.

Attachments to Mr. Ganes verified statement, which consist of multiple bids, will be
submitted on Thursday, January 23, 2003.

Very truly yours,

BARNES & THORNBURG

A handwritten signature in black ink, appearing to read "R.H. Streeter".

Richard H. Streeter

RHS:ppp
Enclosure

cc: Keith O'Brien

Indianapolis

Fort Wayne

South Bend

Elkhart

Chicago

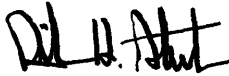
Washington, D.C.

CERTIFICATE OF SERVICE

I certify that I, on this 21st day of January 2003, have served a true copy of the **Joint**

Motion Seeking Final Closure of Escrow Account on the following by Fed Ex:

Mr. Richard R. Wilson, Esq.
Vuono & Gray, L.L.C.
127 Lexington Avenue
Suite 100
Altoona, PA 16601



Richard H. Streeter

ORIGINAL

Before the
SURFACE TRANSPORTATION BOARD

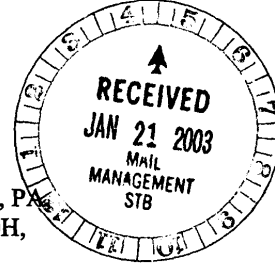
STB Docket No. AB-556 (Sub-No. 2X)

ENTERED
Office of Proceedings

JAN 22 2003

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Public Record

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



JOINT MOTION SEEKING FINAL CLOSURE OF ESCROW ACCOUNT

Come now Columbiana County Port Authority ("CCPA") and Central Columbiana & Pennsylvania Railroad ("CCPR") and file this "Joint Motion Seeking Final Closure Of Escrow Account." The motion seeks to have the Board terminate any further controversy concerning the funding of repairs that were required in order to reinstitute railroad operations over the line of railroad that was acquired by CCPA from Railroad Ventures, Inc. ("RVI"). The line was acquired pursuant to a series of Decisions issued by the Board in its 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, aff'd sub nom. Railroad Ventures, Inc. v. STB*, 299 F.3d 523 (6th Cir. 2002). In particular, this case involves the escrow fund that was established to ensure that RVI would be responsible for payment of repairs that were required before rail service could be reinstated.

As reflected by the Verified Statement of Timothy Robbins ("V.S. Robbins") and attachments thereto, the cost of essential repairs total \$2,009,529. Federal and State grants totaling \$1,536,855 covered a portion of the costs. The remaining \$472,674 of

costs, as well as a considerable portion of the repairs covered by the grants, were eligible to be covered from the escrow account. All of the interest generated by the account (\$16,647.81) was paid to RVI.¹

CCPR is providing the Board and RVI with a detailed breakdown of *all* repair costs. See V.S. Robbins and attachments thereto. Given the fact that it is virtually impossible to link many of the expenditures to a particular spot on the line, which is partially attributed to the lengthy delay in getting funds released from the escrow account, CCPR is making a full disclosure of all repairs and costs to show that funds were properly drawn down from the escrow account.

The funds that ultimately were disbursed cover only a fraction of the costs and expenses incurred by CCPR in making repairs that the Board intended to be covered by the escrow. The costs include, but are not limited to (i) expenditures for materials, supplies, tools, and equipment; (ii) costs of labor, supervision, overhead and indirect expenses utilized in performing the work; (iii) sums payable by CCPR to contractors and other consultants retained by CCPR in connection with the project ; (iv) insurance premiums; and (v) out of pocket expenses, travel and lodging expenses, telephone, facsimile, and mailing expenses. All such costs and expenses are standard for repair projects in the rail industry.

No funds were paid from the escrow account that duplicated payments received from State or Federal funds. See V.S. Robbins at ¶ 4. It must be stressed, however, that the Ohio Rail Development Commission ("ORDC") responded to RVI's deliberate policy of harassment and its non-stop interference with disbursements from the escrow account

¹ Copies of the bank statements and cancelled checks are attached to the Verified Statement of Stephen W. Cooper.

by providing public funds to cover the cost of repairs that would have been covered by the escrow account absent RVI's interference. Had ORDC not taken that step, resumption of service would have been delayed even though escrowed funds were theoretically available before November 9, 2001, the date that the Board intervened and modified the terms of the escrow.

Moreover, although a conscientious effort was made to complete all of the essential repairs that were needed to reinstate rail service in a safe and responsive fashion, the escrow account was depleted well before CCPR finished making all of the repairs that are attributed to RVI's failure to maintain the track and signals, or to its passive acceptance of their destruction. This includes, for example, the cost of completing the crossing at US Highway 51 outside Darlington, PA.²

Even today, CCPR is continuing to make additional repairs that are not being funded from the escrowed funds. And, as previously noted, State and Federal funds have been used to cover certain repairs that otherwise would have been assessed against RVI under the terms and conditions established by the Board if it had been possible to draw down funds in a timely fashion.

² Since acquiring the line, CCPA and CCPR have been compelled to participate in a formal Complaint proceeding originally brought by the Commonwealth of Pennsylvania against RVI to compel reimbursement to the Commonwealth of public funds that were expended to address multiple safety issues related to RVI's dereliction of its obligation and duty to maintain the line in a safe condition. *Commonwealth of Pennsylvania, et al. v. Railroad Ventures, Inc., et al.*, PAPUC Docket No. C-00981174. In order to terminate that proceeding, CCPR has been required to repair multiple rail highway crossings and install cantilevered lights to replace the signal lights that had been removed when RVI allowed the line to disintegrate.

The Board's Decision To Establish An Escrow Account Has Been Affirmed By The United States Court Of Appeals For The Sixth Circuit

Before turning attention to the itemized costs, the background of this controversy will be briefly discussed. By its Decision, served October 4, 2000, the Board granted the "requests of CCPA and ORDC to establish escrow accounts from which funds would be made available for repairs to, and restoration of, the track and materials." In particular, the Board imposed the requirement that CCPA place \$375,000 of the sale price in an interest-bearing escrow account to ensure payments by RVI for restoring the paved-over track and signals. In addition, RVI was ordered to "grant CCPA and its agents immediate access to the line to allow them to determine what repairs are required in order to restore service."

As the Board and the Sixth Circuit recognized, the amount ordered to be placed in the escrow account was based on verified statements submitted to the Board in May 2000 by Mr. Timothy Robbins, an official of CCPR, and Walter Gane, an employee of CCPR. Based on his limited inspection of "portions of the track that [were] visible from the highway and various public crossings," Mr. Gane estimated that:

it will cost at least \$300,000.00 to repair the damage that has been done to the track by removing it or paving it over. In addition, it will require an estimated \$35,000.00 to repair the recent damage that has been done to the track by cutting it rather than following the normal procedure of boring under the track bed.

Mr. Gane further testified that it would be necessary to reconnect signal equipment that had been disconnected. He estimated that it would cost between \$15,000.00 and \$20,000.00 to make the connections, an estimate that proved to be far too low, largely because of the condition of the signal equipment. In any event, because RVI had denied CCPA and CCPR access to the line, Mr. Gane was careful to note that "the

current condition of the line is unknown. There may be multiple, additional instances where the line has been cut without the knowledge and concurrence of either CCPA or CCPR." Mr. Gane's preliminary estimate concerning the cost of repairs was corroborated by Timothy Robbins.³

Following the issuance of the October 4, 2000 Decision, RVI filed a "Request for Clarification" in which it requested that the "funds be held in escrow by Attorney James Davis and disbursed for the purposes directed by the Board's order subject to the oversight and written consent of the Ohio Rail Development Commission [("ORDC")]."

By its December 7, 2000 Decision, the Board granted RVI's request.

On appeal, RVI challenged the Board's action in establishing an escrow account. However, the Sixth Circuit determined that "the STB acted reasonably in finding that RVI had an obligation to pay for any damage to the line." *Railroad Ventures, Inc. v. STB*, 299 F.3d at 560. The court reasoned (*id.*) 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." Because RVI did not seek a writ of certiorari from the Supreme Court, the Board's determination to require the establishment of the \$375,000 escrow account is not open to challenge.

The Sixth Circuit also observed that the Board, in a Decision served November 9, 2001, had clarified certain aspects of its prior Decisions. In particular, the court noted (*id.* at 547) that:

³ In addition, James E. Betts, Chairman of the Ohio Rail Development Commission, urged the Board to "require CCPA to pay at least \$25,000 of the established purchase price for the line into an escrow account to assure that RVI meets its commitment to restore crossing and reconnect railroad signal equipment."

In view of RVI's interference with the administration of the escrow fund, the STB further directed CCPA "to manage the funds directly" and "complete all repairs for which the escrow funds are to be used within 270 days from the effective date of this decision."

A separate appeal has been taken with regard to the Board's November 9, 2001 Decision.⁴ Nonetheless, the foregoing comment reflects the court's awareness of the many problems that CCPA and CCPR encountered when they reinstated rail service pursuant to the Board's orders.

Background: The evolution of the escrow account.

On January 24, 2001, the underlying transaction was consummated when CCPA acquired ownership of the line. Consistent with the Board's prior Decisions, \$375,000 was placed in an escrow account, with Attorney James H. Davis of the Chicago Title Agency of Mahoning County serving as the escrow agent.

Because no formal methodology was established by the Board to govern reimbursement of restoration costs from the escrow, a workable procedure had to be devised that would comply with the Board's intent before any disbursements could be made to cover the costs of repairing the line. Therefore, on February 8, 2001, representatives of ORDC, CCPA and CCPR met to discuss, along with several other topics, the procedures to be used to comply with the Board's orders.⁵ Given the need for Mr. Davis' approval, no agreement could have been reached on February 8, 2001

⁴ *RVI v. STB*, No. 01-4262 (6th Cir. Pet. for Review filed November 29, 2001). Subsequent to the filing of briefs.

⁵ In its Brief before the Sixth Circuit, RVI (Br. at pp. 24-27) has attempted to paint a speculative account of that meeting, including the claim that the parties conspired with one another to use escrow funds to cover reconstruction projects that ORDC had previously committed to fund. However, when the escrow fund was transferred to CCPA, no funds had been released to cover any repairs. Moreover, the repairs to the crossings at Miley Road and Western Reserve Road were paid for by ORDC.

concerning the escrow procedures. Nor was an agreement reached with respect to any particular expenditure or reimbursement for any repair. Following the February 8, 2001 meeting, ORDC also sought input from RVI concerning the escrow procedures. After receiving further comments from RVI, CCPA and the escrow agent, ORDC ultimately fashioned the procedures that would have been used had it not been for the resignation of the escrow agent prior to the release of any funds.⁶

Although RVI had made no attempt to maintain the line following its acquisition in 1996 from Youngstown & Southern Railway ("Y&S"), RVI sought to inject itself into the repair process *after* it sold the line to CCPA. An attempt was made to keep RVI informed concerning the repairs that were being made in order to reinstate rail service. However, recognizing that RVI had no expertise whatsoever with respect to track repairs and maintenance, CCPA and CCPR declined RVI's demands that it have a veto over any expenditures.

In response, RVI initiated a strategy of intimidation in order to prevent the use of escrow funds without RVI's prior approval, a process that was not authorized by the Board in establishing the escrow account. This campaign culminated in a letter to Mr. Davis in which Mr. Handel, RVI's President, stated "that no funds are to be

⁶ As part of its conspiracy theory, RVI has also claimed that the parties sought "to misappropriate the STB ordered escrow fund" in order to evade the 13 funding contingencies placed on CCPA by ORDC. Doc. 202422, V.S. Handel at pp. 9-10, J.App. 1384. It is readily admitted that the parties discussed the status of the efforts to comply with the conditions. However, there is nothing to indicate that the parties ever engaged in any activity that was designed or intended to evade the conditions placed on the project by ORDC. In this regard, the Board's attention is invited to the Affidavits of Lou Jannazo, Chief of Planning, ORDC, Tracy V. Drake, Executive Director, CCPA, and Timothy K. Robbins, Vice President, CCPR. These affidavits, which were submitted to the United States District Court for the Eastern District of Ohio in response to an Order of Judge Economus in *Railroad Ventures, Inc. v. Columbiana County Port Authority, et al.*, 4:01 CV 01164, are reproduced in the Addendum to this submission.

disbursed from the RVI Escrow Account without express written approval from my office.”⁷

On April 26, 2001, Mr. Davis advised the parties of his unwillingness to continue serving as the escrow agent and requested that he be relieved of that duty. As he advised the parties:

From all the communication it has become apparent that the parties are not in agreement as to how the escrow will work and what parties are actually responsible for certain repairs to the railroad line. My agreement to serve as escrow agent did not include being caught in the middle of an explosive situation which will most likely end up in further litigation.

Consequently, I am asking to be relieved of my duties as escrow agent. I will be happy to transfer the funds to a successor together with all of the correspondence that I have received to date. Until such time as an agreement is reached between the parties as to the release of escrow funds, I cannot disburse any of the funds.⁸

Thereafter, CCPA requested ORDC to consider whether it would be willing to assume the remaining escrow functions in conjunction with the oversight role that it had assumed at RVI's insistence. On May 7, 2001, ORDC responded that it would be willing to assume that function. On that same date, however, RVI objected to ORDC assuming the remaining escrow functions notwithstanding RVI's previous insistence that ORDC oversight would “ensure that escrow funds are utilized for purposes directed by the Board and are not expended in an inappropriate manner.”⁹ In stark contrast to its earlier position, RVI advised counsel for CCPA as follows:

I am advising you that your proposal is unacceptable to RVI because ORDC cannot serve as a disinterested party in this matter. As we have previously noted, ORDC is the government agency

⁷ CCPA, Request for Clarification, Doc. 202422 at 1.

⁸ CCPA, Request for Clarification, Doc. 202202 at Ex. 4.

⁹ RVI, Request for Clarification, Doc. 200518 at 2.

responsible for public funding your client's rail line in Ohio and as a consequence, there is an inherent tension and incentive for ORDC to spend RVI funds on crossing repairs rather than its own.¹⁰

On May 11, 2001, Columbiana County Port Authority ("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" with the Board.¹¹ By its petition, CCPA advised the Board that an impasse had been reached, which "threatens timely completion of essential restoration work to the detriment of all concerned."¹² In order to resolve the impasse, CCPA requested, as herein pertinent:

clarification from the Board concerning entitlement to reimbursement for specific restoration projects; [and an] appropriate replacement of James Davis as independent third party fiduciary.¹³

CCPA also proposed a procedural solution to the continuing debate over the permissible uses of the escrow account. Under CCPA's suggested proposal, RVI would be required to identify "any specific repair/restoration project(s) it considers not covered by the escrow provision."¹⁴ CCPA would then be given an opportunity to respond. CCPA also requested that the Board order RVI to:

cease and desist from interfering with reimbursement for all uncontested restoration/repair projects from escrow funds upon approval under the comprehensive procedures adopted by ORDC and from interfering with reimbursement for contested projects

¹⁰ Letter to Keith O'Brien from Richard R. Wilson, attached as Ex. 7 to CCPA, Request for Clarification, Doc. 202202.

¹¹ CCPA, Request for Clarification, Doc. 202202.

¹² *Id.* at p. 5.

¹³ *Id.*

¹⁴ *Id.*

upon determination by the Board that such projects are properly within the scope of the escrow provision.¹⁵

On that same date, RVI filed a civil action before the United States District Court for the Northern District of Ohio in which it named CCPA, its Executive Director, its Board Members, ORDC, its Executive Director, all ORDC Commissioners and CCPR as Defendants.¹⁶ By its Complaint, RVI sought to have the District Court enjoin the Defendants from drawing funds from the escrow account to pay for restoration of grade crossings or the reconnection of signal facilities in the absence of RVI's approval of payment of such costs. Recognizing that RVI's request for declaratory and injunctive relief with respect to the escrow provisions was no more than a collateral attack on the Board's orders and that the relief sought by RVI could impinge on the exclusive jurisdiction of the Court of Appeals, the District Court dismissed RVI's Complaint by Order filed August 10, 2001.

In the interim, RVI filed a pleading entitled "Reply of Railroad Ventures, Inc. To Columbiana County Port Authority's Request For Clarification and Cease And Desist Order."¹⁷ As part of its Reply, RVI submitted a Verified Statement from Mr. Handle, along with correspondence between the parties, notes obtained from the participants of the February 8, 2001 meeting, newspaper articles, photographs and even a copy of the Complaint that it had filed in the District Court.

On June 20, 2001, CCPA filed its Response to RVI's Reply.¹⁸ As herein pertinent, CCPA urged the Board to substitute ORDC in place of Mr. Davis. In

¹⁵ *Id.* at p. 6.

¹⁶ *Railroad Ventures, Inc. v. Columbiana County Port Authority, et al.*, 4:01 CV 01164.

¹⁷ RVI Reply, Document 202422.

¹⁸ CCPA Reply, Doc. 202698

particular, it addressed RVI's claims that it would not have requested that ORDC be designated to provide oversight and written consent to disbursements of escrow funds if it had known of ORDC's prior commitments to assist in the acquisition and restoration of the line. As CCPA observed:

RVI has long been aware from ORDC's public filings with the STB, as well as from letters written to RVI by ORDC, that ORDC has been committed to "working with Y&S shippers and local communities to preserve service on the Y&S."¹⁹

The November 9, 2001 Decision: Clarification and modification of the Escrow Account.

On November 9, 2001, the Board issued its Decision in which it clarified its intent with respect to the repairs that were to be paid for with the funds that had been placed in escrow by CCPA. In addition, the Board modified its prior order. This was done because the Board recognized that it was necessary to curtail RVI's repeated efforts to frustrate the orderly administration of the escrowed funds. Otherwise, it would be impossible to achieve reasonable compliance with the Board's determination that RVI should be held accountable for the repairs necessitated by RVI's egregious misconduct.

Instead of appointing ORDC as a substitute escrow agent, the Board created a depository arrangement whereby CCPA would be responsible for the disbursement of the funds. In so doing, the Board created guidelines to govern CCPA disbursement of funds and limited RVI's ability to challenge the expenditure of funds that complied with the guidelines to those instances when RVI could establish fraud.

The Board carefully addressed the "Covered Repairs." As the Board explained:

We first address the general dispute as to the kind of repairs intended to be covered by the escrowed funds. RVI has suggested that we did not mean for these funds to be used for capital expenditures or for any purpose other than removing asphalt or

¹⁹ *Id.* at p. 7-8 (J.App. 1614-15).

reconnecting signals. Our purpose in establishing the escrow was broader, however. We meant for the escrowed proceeds to be used to correct egregious misconduct, whether by RVI actively (by inviting road crews to pave over track) or passively (by failing to protect the property from others rendering the line unserviceable by paving over, removing, or destroying track or disconnecting signals). Contrary to RVI's allegations, expenditures necessitated by RIV's disregard for the common carrier obligation cannot be considered as capital expenditures, but rather as necessary repair expenses to restore the line to service and should be covered from the escrowed funds.

The Board's intent was further articulated in note 11, when it stated as follows:

RVI had an obligation to keep the line serviceable notwithstanding weather-related damage, which CCPA fixed within a short time and at little cost, as shown in a pleading filed in a related court case, Railroad Ventures, Inc. V. Columbiana County Port Authority, et al. (No. 4:01CV 01164 (N.D. Ohio) (Defendants' Response to Court Order of July 16, 2001, at Attachment B, Exhibit A). See GS Roofing Products Co. v. STB, 143 F.3d 387, 392 (8th Cir. 1998) (railroad has obligation to take reasonable steps to fix damage that is basis for embargo). RVI should not have allowed any portion of the track to become unserviceable through the actions of third parties, much less have invited those responsible for road repairs to pave over any portion of its tracks. Accordingly, it does not matter whether RVI authorized the modifications to the right-of-way or whether a simple lack of due diligence was the cause for sections of the track to become unserviceable: we hold RVI responsible.

Plainly, the Board did not modify the scope of the escrow account. Instead, it merely adjusted the disbursement procedures to ensure compliance with its orders.

Despite the Board's efforts to clarify the uses for which escrowed funds were to be disbursed, RVI obstinately continues to insist that repairs were to be limited to particular crossings. However, the Board has repeatedly explained that it did not intend to limit the use of escrowed funds to removing asphalt and repairing particular crossings.

As the Board explained in its November 9, 2001 Decision:

We earlier ordered the parties to escrow \$375,000 of the proceeds of the OFA sale to pay for *repairs that are needed to make*

serviceable any segment of the former Y&S line that RVI allowed to become unserviceable during its ownership.

Given RVI's refusal to accept the Board's repeated clarification of its intent, it is anticipated that RVI will continue to harass CCPA and CCPR. In order to terminate the underlying controversy (which would allow CCPA and CCPR to avoid further expenditure of funds on legal fees that could be used for repairs and other improvements), the Board is requested to review the itemized list of expenditures that is submitted herewith. Based on that review, the Board is urged to state affirmatively that CCPR and CCPA have complied with both the letter and spirit of the Board's Decisions related to the escrow account and thereby terminate this needless controversy.

The Instant Submission

Attached hereto are the Verified Statements of Timothy Robbins, CCPR's Vice President; Walter V. Gane, CCPR's Superintendent; Christina Nielsen, President of Nielsen Enterprises; and Stephen W. Cooper, who is CCPA's Secretary/Fiscal Officer. Their statements, which introduce the underlying evidence that has been demanded by RVI, serve to provide the Board with the essential factual material required to resolve the controversy that RVI insists on prolonging.

Mr. Robbins has also attached copies of all materials provided to CCPA that were used to justify the release of funds from the escrow account. In addition, Mr. Robbins has provided the Board with true copies of the various invoices that were submitted to CCPR for payment.

As he has also explained, CCPR did not draw down any funds from the escrow until December 2001. Moreover, out of an abundance of caution attributed to the uncertainty that the Court of Appeals would affirm the Board's creation of the escrow

account, CCPR took a very conservative approach to the escrow account and did not attempt to seek reimbursement of funds to cover repairs that had been made prior to December 2001, but which had been paid for with Federal or State grants, which could have been utilized for other purposes.

Mr. Robbins has also explained the methodology used to allocate various general administrative and overhead expenses. Ms. Nielsen, who is an economic consultant specializing in railroad transportation issues, has confirmed the appropriateness of the methodology used by Mr. Robbins and the reasonable nature of the allocations that he made.

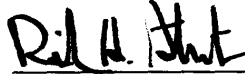
Mr. Gane's testimony is primarily focused on the work that was required with regard to the signaling equipment. As he has explained, because RVI disconnected the signals, turned off the power, and thereafter failed to perform any maintenance on the signaling equipment, that equipment was badly corroded and could not be reconnected. Furthermore, because of the deteriorated condition of the equipment and the length of time it had been disconnected, the power company insisted that CCPR install new poles, meter boxes, conduit, breaker boxes and weatherheads. Only after those repairs were finished could the signals pass post-repair inspections and be reactivated consistent with governing Federal Railroad Administration regulations. *See* 49 CFR Part 234.

In response to a demand made by RVI's counsel, Mr. Cooper has provided true copies of the bank statements issued by National City Bank following receipt of the original escrow account from Mr. Davis on November 30, 2001. The initial deposit of \$389,752.27, included the original \$375,000 forwarded by Mr. Davis, as well as accumulated interest in the amount of \$14,752.27.

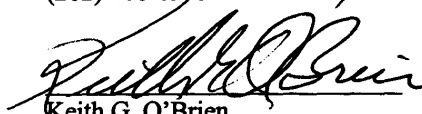
Conclusion

For all the above-stated reasons, the Board should determine that the use of the escrow funds was proper in all respects.

Respectfully submitted,



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

Dated: January 21, 2003