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June, 17, 2003

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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
and
Railroad Ventures, Inc. v. Surface Transportation Board in the United States of America, Docket No. 01-4262 (Sixth Circuit U.S. Court of Appeals)

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

ENTERED
Office of Proceedings

JUN 23 2003

Part of
Public Record

Dear Mr. Williams:

Enclosed for filing please find the Affidavit of John B. Nalbandian, Esq., Appellate Counsel for Railroad Ventures, Inc. (RVI) in the above captioned proceedings. This Affidavit is submitted in order to confirm the legal position adopted by the Surface Transportation Board before the Sixth Circuit Court of Appeals with respect to the appropriate standard to be utilized by the Board in its review of Central Columbiana and Pennsylvania Railroad Co. ("CCPR") expenditures authorized by Columbiana County Port Authority (CCPA) from the escrow account established in the Board's order of November, 2001.

Specifically, in its Brief filed with the Sixth Circuit Court of Appeals and in oral argument presented to the Court on behalf of the Board by Attorney Cecelia Cannizzaro, the Board disclaimed any adoption of a "fraud only" standard for its review of expenditures from the escrow account. In past pleadings filed by CCPA and CCPR, those parties have contended that expenditures from the escrow account can only be challenged for fraud. In light of the record before the Sixth Circuit Court of Appeals, it is clear that the Board's November 2001 Order imposed no such limitation on the Board's review of escrow account expenditures.

RVI respectfully requests that the enclosed Affidavit be made a matter of record in CCPA's and CCPR's Joint Motion for Closure of Escrow Account and RVI's Reply thereto seeking a refund of escrow account moneys. RVI also requests that in its review of that matter, the Board afford Attorney Nalbandian's Affidavit due consideration.

Vernon A. Williams

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June 17, 2003

Copies of this Affidavit have been served on all parties of record. Please date stamp and return to the undersigned the additional copy of this transmittal letter in the self addressed, stamped envelope provided.

Very truly yours,

VUONO & GRAY, LLC

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

Richard R. Wilson

Attorney for Railroad Ventures, Inc

RRW/bab

Enclosure

xc: Railroad Ventures, Inc.
John B. Nalbandian, Esq.
Cecelia Cannizzaro, Esq.
All Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. AB 556 (Sub No. 2X)

**RAILROAD VENTURES, INC.—EXEMPT ABANDONMENT
BETWEEN YOUNGSTOWN, OH AND DARLINGTON, PA,
IN MAHONING AND COLUMBIANA COUNTIES, OH
AND BEAVER COUNTY, PA**



AFFIDAVIT OF JOHN B. NALBANDIAN

1. My name is John B. Nalbandian and I am an attorney with Taft, Stettinius & Hollister LLP in Cincinnati, Ohio. Along with my law firm, I have represented Railroad Ventures, Inc. in its two appeals in Sixth Circuit that have arisen out of the forced-sale of the Youngstown & Southern rail line in northeastern Ohio and Western Pennsylvania.
2. The most recent of these appeals is denoted as Railroad Ventures, Inc. v. Surface Transportation Board (No. 01-4262). That appeal arose from RVI's challenge to an STB decision rendered in November 2001. Part of that STB decision concerned the administration of an escrow account for rail line repairs that the STB had set up in conjunction with the forced-sale of the rail line.
3. One of RVI's principle challenges to the STB's November 2001 Decision was that it appeared to deprive RVI of the right to challenge expenditures of escrow funds except for fraud. This appeared to deprive RVI of the right to challenge expenditures for projects that RVI should not have been responsible for under the STB's previous orders unless fraud could be alleged. RVI challenged this fraud-only standard.
4. In response, the STB disclaimed the notion of a fraud-only standard to the Sixth Circuit both in its briefing and at oral argument. In its principle brief to the Sixth Circuit, the STB represented to the Court that "RVI will have a full opportunity to be heard at the Board regarding individual disbursements from the fund, so that none of the fund is used for restoration projects for which RVI is not responsible under the Board's order." (Red Brief at 24) (Attachment A).
5. At oral argument on May 7, 2003, counsel for the STB, Cecelia Cannizzaro, told the Sixth Circuit that RVI had never been foreclosed from the right to challenge any escrow expenditures as being outside of the ambit of repairs for which it was responsible, even if no fraud were alleged. According to Ms. Cannizzaro, the Board's fraud language expanded

RVI's rights by allowing it not only to challenge expenditures that RVI thought were outside of the ambit of what the STB had authorized in setting up the account, but also to challenge otherwise authorized expenditures if there was fraud involved. I have attached a transcription of the relevant portions from Ms. Cannizzaro's argument at tab B.

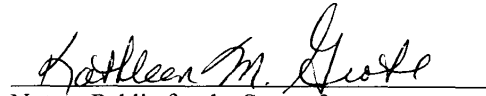
6. Based on these representations, the Sixth Circuit found that RVI's challenges to the escrow procedure were not ripe for review. In the Court's view, RVI must raise its challenges to the escrow expenditures in the Board first, which it has now done.

I swear and affirm under penalty of perjury that the foregoing is true and correct.

Executed on June 16, 2003.
Cincinnati, Ohio


John B. Nalbandian
Associate
TAFT, STETTINIUS & HOLLISTER LLP

SUBSCRIBED AND SWORN TO, before me, this 16th day of June, 2003.


Notary Public for the State of _____
My Commission Expires: _____



KAHTLEEN M. GROTE
Notary Public, State of Ohio
My Commission Expires 05-28-06

A

in the Nov. 2001 Decision. See Doc. 31956 at 9 n.11; J.A. 42 (“RVI may in turn seek to enforce against local governmental entities any promises that they would compensate RVI for its expenses of fixing the track and appurtenances”).

B. The Change in the Procedure for Handling the Set-aside Funds Was Reasonable and Does Not Deprive RVI of Due Process.

The new procedure for handling the set-aside funds did not alter the parties’ rights. Rather, it simply postponed to a later stage in the process RVI’s opportunity to challenge expenditures, so as to assure that the objectives of the escrow provision would be met—prompt restoration of the line and reactivation of rail service. Indeed, RVI concedes that rail service has now been restored. See Br. at 37.

RVI contends that the new disbursement procedures violated its due process rights. Br. 41-45. But the Board fully afforded RVI the essential requirements of due process, which are notice and an opportunity to be heard. *Leary v. Daeschner*, 228 F.3d 729, 743 (6th Cir. 2000), quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985).

RVI will have a full opportunity to be heard at the Board regarding individual disbursements from the fund, so that none of the fund is used for restoration projects for which RVI is not responsible under the Board’s order.

Doc. 202422 at 8-10; J.A. 1383-85. The Board simply deferred until the restoration is complete the point at which it would rule on such allegations. Thus RVI's due process rights are preserved.

III.

RVI HAS BEEN FULLY COMPENSATED FOR ALL OF THE PROPERTY SOLD, INCLUDING THE NEWLY LISTED LICENSE AGREEMENTS

Finally, RVI claims that the Board deprived it of property without compensation, in violation of its constitutional rights, when the agency required it to transfer to CCPA its interest in the 100 newly listed license agreements that are related to the property over which this rail line runs. Br. 46-47.

At the outset, it should be noted that the Board did not explicitly address these 100 agreements in its Oct. 2000 Decision because it did not know about them. At the time the Board was determining the value of the line, CCPA presented specific evidence of the existence, and monetary value, of the 156 license agreements of which it was aware. But RVI did not mention the additional 100 license agreements now in dispute in time for them to be separately valued.¹⁵ In setting the terms of an OFA sale, the Board must rely upon the record before it

¹⁵ Although RVI criticized CCPA's appraisal on other grounds in its Reply to CCPA's Request to Establish Terms, Doc. 196247, J.A. 815-26, RVI did not mention the additional 100 license agreements.

B

Transcript of Cannizzaro argument – CA6

Judge: Thank you counsel. We'll hear from the Board at this time.

Cannizzaro: May it please the Court, Cecelia Cannizzaro for the Surface Transportation Board and the United States. I believe the questions concerning mootness and ripeness are right on point. Railroad Ventures' main argument is that in one decision by the Board there's been a series of about six to nine, it's hard to count exactly how many, that in one decision the Board said you can challenge it for fraud, that is the decision before this Court. However, it's clear that what the Board was referring to was even if a payment out of this fund is within the ambit of the kinds of repairs for which Railroad Ventures should be held responsible, that even if it's within that ambit, you could challenge it for fraud. But there's no indication in the record or the Court's decision that Railroad Ventures may not challenge whether a particular repair is within the ambit of repairs for which it is responsible. Indeed it has done so. The pleading currently before the Board says on Railroad Ventures' part "Here's the number of expenditures not all but some from this fund that we believe were not within the ambit of your own Order."

Judge: It's not saying that this cluster was fraudulent. It's saying they were wrong.

Cannizzaro: No, it's saying this cluster doesn't belong in the kinds of repairs for which Railroad Ventures should be held responsible under your own Order.

Judge: So you are suggesting that the issue of whether or not they get a due process opportunity really is kind of uncertain.

Cannizzaro: Yes. It's not uncertain in this sense. It certain they made that argument, and we await the Board's decision, and that's why it's not ripe for review at this point. The Board is in the process of making that decision. I'm just saying the records remain before the Board which will reach its decision in due course. And, of course, that's challengeable if in any way the Board has foreclosed their opportunity to argue, "Well that's not within the ambit of the kinds of repairs we said this set-aside fund should be used for." They'll have their day in court. Either they'll meet at the Board, that's possible, or they will have their day before a court of appeals. That's why that part of the case is unripe.

Now if I could move over to the issue of the 96 licenses. The Court is correct that during the record they (unintelligible) before the Board, this is a record for which the Board has 30 days to get it and make a decision. I'm sorry, there's a number of days to submit the information to the Board, 30 days for the Board to reach a decision in valuing this real estate. It is clear on the record it is Joint Appendix that only 156 of these licenses were considered in the valuation that is put in by the purchaser. None of them were pointed out in any way, shape, or form in the appraisal done by the seller, Railroad Ventures. If there were a deficiency in the number of licenses mentioned, it certainly was incumbent upon