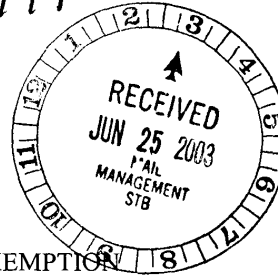


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Before the
SURFACE TRANSPORTATION BOARD

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



RAILROAD VENTURES, INC.-ABANDONMENT EXEMPTION
Office of Proceedings BETWEEN YOUNGSTOWN, OHIO AND DARLINGTON, PA
2003 IN MAHONING AND COLUMBIANA COUNTIES, OHIO
AND BEAVER COUNTY, PA

JOINT REPLY TO PETITION TO REOPEN

Come now Columbiana County Port Authority ("CCPA") and Central
Columbiana & Pennsylvania Railway, Inc. ("CCPR") and file their Joint Reply to the
"Petition of Railroad Ventures, Inc. to Reopen Administratively Final Action and
Request for Expedited Consideration." In its Petition to Reopen, Railroad Ventures, Inc.
("RVI") merely regurgitates various arguments that it has previously raised during the
course of this prolonged proceeding. The Board has previously issued multiple decisions,
all of which have been affirmed on judicial review, that rejected the very arguments
raised in RVI's latest petition. Therefore, the Board should decline to reopen.

Standard of Review Governing Reopening

As the Board recognized in *Idaho Northern & Pacific Railroad Company--
Abandonment and Discontinuance Exemption--In Washington and Adams Counties, ID*, 3
S.T.B. 50, 55 (1998):

The decision to grant or deny a petition to reopen is
within the broad discretion of the agency, and only on a
showing of a clear abuse of that discretion would a court
overrule the agency. *E.g., Bowman Transp. Inc. v. Arkansas
Best Freight System, Inc.*, 419 U.S. 281, 294-95 (1974).
Under 49 CFR 1115.4, a petition to reopen must state in detail

the respects in which the proceeding involves material error,
new evidence, or substantially changed circumstances.

1. RVI Has Not Introduced Any New Evidence Or Demonstrated Any Changed Circumstances That Would Warrant Reopening.

In its Petition, RVI claims that “new evidence of changed circumstances” warrants reopening. RVI Pet. at 4. RVI first claims that John Rossi, who prepared the appraisal report that established the net liquidation value (“NLV”) of the line,¹ failed to consider various real property improvements that the Board ordered RVI to sell to CCPA. *Id.*

To support its contention, RVI has identified six pictures that were shown to Mr. Rossi during a deposition taken in a state court proceeding on March 28, 2003. These pictures, which include a track shack in North Lima, the station house and a residence in Columbiana, and a Round House and other structures located in Negley, Ohio, do not constitute new evidence. *They were first introduced in this proceeding as far back as May 1999.* See Letter addressed to the Director of Historic Preservation in Harrisburg, PA, from Richard R. Wilson, dated November 4, 1998.² These same photographs were also part of the administrative record submitted to the United States Court of Appeals for the Sixth Circuit in Case Nos. 00-3261/3275/3317/, 00-4303/4345/4346/4435, *Railroad Ventures, Inc. v. Surface Transportation Board*, 299 F.3d 523 (6th Cir. 2001) (“*RVI I*”), (see Joint App. at 418-434), as well as the administrative record in Case No. 01-4262, *Railroad Ventures, Inc. v. Surface Transportation Board*, slip op. (6th Cir. filed June 4, 2003) (“*RVI II*”), (see Joint App. 268-280).

¹ In the course of his appraisal, Mr. Rossi applied the Board’s definition of NLV published at 49 C.F.R. § 1152.34(c).

² Richard R. Wilson was, and continues to be, RVI’s counsel before the Board.

In addition, Mr. Rossi's appraisal was criticized in the Verified Statement of David Handel, RVI's President, dated April 20, 2000, which was submitted to the Board in support of the "Reply of Railroad Ventures, Inc. to the Surface Transportation Board's Show Cause Order of April 5, 2000." In his Verified Statement, Mr. Handel argued as follows (emphasis in original):

On page 1 of Mr. Rossi's appraisal under the category of Identification and Brief description of Real Estate, he claims to have appraised a 303.81 acres which includes the entirety of the property which was transferred to RVI. Nowhere in Mr. Rossi's appraisal does he refer to the value of the improvements on the property owned by RVI at the time of his appraisal. These improvements include the track shed in North Lima, the station house and a residence in Columbiana, and the Round House and other structures located in Negley, Ohio.

The Board considered RVI's concerns in its Decision served October 4, 2000. As the Board explained (slip op. at 8):

In response to our show-cause order, RVI has presented detailed criticisms of the CCPA appraisal upon which we valued the land interests to be conveyed. But RVI has not explained why it failed to submit these criticisms within the 30-day statutory time period allotted for establishing the terms and conditions of an OFA sale.

Thereafter, the Board (*id.* at 14) stated that:

RVI argues that the purchase price we established for the land is too low because it does not account for the higher value of non-rail use of the land as an assembled corridor, and that requiring it to sell all of its interest in this rail line for the price we have set would constitute a taking of its property in violation of the Fifth Amendment."

The Board rejected RVI's arguments. In so doing, the Board made it clear that it would not reopen valuation issues that could have been presented in a timely fashion. As the Board explained:

We ordinarily will not reopen valuation issues for consideration of evidence that could have been, but was not, presented in a timely manner. Valuation issues must be raised and resolved within the time period allotted by Congress to ensure the prompt sale of a line and resumption (or continuation) of rail service under section 10904.

The Court of Appeals affirmed the Board's decisions.³

In summary, RVI had an opportunity in December 1999 to contest the valuation of the structures which are the subject matter of the photos. It simply failed to do so. Not only did it fail to place any value on the properties that it has now highlighted, it made no attempt to take Mr. Rossi's deposition in a timely fashion during the course of this proceeding. Instead, it waited over three years to do so in an unrelated State court proceeding.

As the Sixth Circuit concluded in *RVI II*, slip op. at 7, "RVI filed to protect its property interests when it had a chance to do so." While the Court's attention was focused on the various licenses and agreements (which will be discussed hereinafter), the Court's reasoning applies with equal force to the argument that RVI is rehashing with regard to the railroad shacks and other structures that have been identified.

By its decision served August 1, 2002, in *Railroad Ventures I*, the Sixth Circuit affirmed the Board's decisions, including the October 4, 2000 Decision, in which the Board initially declined to reopen the valuation proceeding. While RVI has attempted to dress up its argument to make it appear that it is introducing new evidence of changed circumstances, that position is baseless. The current argument is nothing more than a repeat of RVI's earlier arguments that were rejected in multiple Board Decisions that

³ Mr. Handel's argument was made a part of the Administrative Record in *RVI I*, J.App. at 1350-52 and in *RVI II*, J.App. at 1042-43.

subsequently were sustained on judicial review. As such, the principles of res judicata prohibit their relitigation at this late date.

Given the foregoing, the contention (RVI Pet. at 11) that "RVI had no opportunity to discover the nature and extent of CCPA's deceptive and defective appraisal due to the statutory time limitations in the OFA proceeding" is patently specious. As both the Board and the Court have recognized, RVI had sufficient time to present its case. Second, a careful reading of the transcript of Mr. Rossi's deposition and his appraisal will show that there is nothing that is either deceptive or defective in his approach.

2. The Issue Of The Valuation of Third Party Occupancy Agreements May Not Be Relitigated.

RVI's remaining arguments (RVI Pet. 5-7) involve the issue of the treatment of the various easement and license agreements. Once again, RVI is seeking to take an additional bite at the apple. In its Decision filed June 4, 2003, in *RVI II*, the Sixth Circuit affirmed the Board's November 8, 2001 Decision in which the Board concluded that CCPA had acquired the interests in the additional license agreements which were not among the 156 agreements in the list of agreements presented to the Board for its consideration by CCPA.

As the Sixth Circuit just ruled in *RVI II* (slip op. at 7):

RVI has known since October 1999 that CCPA intended to acquire all interests in the line except for the revenues generated by those 156 pre-existing licenses and agreements specifically evaluated and identified in the valuation. RVI made no attempt to protect its property interests by pointing out that there were ninety-six additional license agreements until it revealed them in May 2001. Having failed to inform the Board in a timely fashion that there were additional license agreements not reflected in the valuation, RVI cannot now complain that it was not adequately compensated by the valuation.

The Court's ruling is dispositive of all of RVI's remaining claims.

RVI first claims that Mr. Rossi's engagement letter did not cover the valuation of right-of-way easements and other agreements. Even if true, it is irrelevant. The controlling matter is that Exhibit A to the appraisal presented to the Board by CCPA openly set forth Mr. Rossi's "Estimate of the Contributory Value of Third-Party Agreements Assigned."⁴ And as Mr. Rossi explained with regard to his estimate:

An income producing property is not always a parcel of real estate that includes a complete or full bundle of rights -- that is fee simple rights. Income producing properties, by their very nature are often leased. Therefore, it may be necessary to consider a valuation of "lease interest" as well as valuation of the whole. Hypothetically, the lessor may have bargained away some of the property's value to the lessee, thereby creating two properties (interests) which may be appraised together or separately.

Considering the subsequent assignment of the prospective income once associated with the subject property, an estimate of the contributory value relating to the known third-party agreements would be warranted.⁵

The Board considered the information provided by CCPA regarding the valuation of the agreements. Once again, that same information was included in the administrative record in both *RVI I* (J.App. 1009-1019) and *RVI II* (J.App. 740-750).

Second, RVI insists (RVI Pet. at 5) that the verified statement of an RVI employee indicates that "she provided [Mr. Rossi] with all 252 third party agreements and that he did not request any additional information regarding those agreements." A careful review of the referenced Verified Statement of Ms. Celeste Lisko shows that RVI has misrepresented the contents of that Verified Statement.

⁴ For a copy of Exhibit A, see pages 124-134 of RVI's Petition to Reopen.

⁵ Rossi Appraisal Verified Statement at 126.

Third, RVI claims (*id.* at 6) that Mr. Rossi has admitted that he should not have deducted real estate taxes when calculating the capitalized value of the license agreements. A careful review of the transcript belies RVI's contention. Equally important, it has once again taken RVI over three years to get around to raising the issue. Mr. Rossi's capitalization methodology was plainly articulated in his appraisal. If RVI had any legitimate concerns, it should have voiced them in December 1999.

Rather ironically, even if it were to be accepted that Mr. Rossi erred, the result, when corrected, would further reduce the amount that CCPA must pay to RVI. As the Sixth Circuit recognized in *RVI II* (slip op. at 7):

no addition compensation is due because RVI has been compensated for a fee simple interest in the land. Any additional license agreements represent a burden on the land, which the Board would have taken into account. If the Board allowed RVI to retain its interest in the additional agreements, it would have reduced the purchase price further to reflect this burden on the property.

The same is true with respect to the tax payments. If they had not been deducted, the net income would have been higher. The higher the net income, the greater the deduction. RVI attempts to evade this result by claiming (RVI Pet. at n.6) that the value of the license agreements should have been added to the NLV, rather than deducted. That argument cannot be squared with the Court's recognition that they are a burden on the property.

RVI's claim (*id.*) that Mr. Rossi did not value any commercially developable land is also wide of the mark and untimely.⁶ Once again, RVI is rehashing arguments that

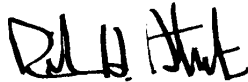
⁶ The comment at RVI's footnote 3 that the "Sixth Circuit noted that noncontiguous properties not included in the RVI abandonment application could not be conveyed by RVI to CCPA under OFA procedures" must be placed in context. Here, both contiguous and non-contiguous properties were specifically included in RVI's Petition for Exemption filed May 19, 1999. Also, as the Board found in its Decision, served October 4, 2000, slip op. at 10,

were previously made and rejected. At page 26 of his Verified Statement, dated April 20, 2000, Mr. Handel specifically covered each and every parcel that was discussed during the course of the March 31, 2003 deposition.⁷ As such, there is nothing new for the Board to consider.

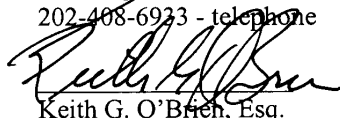
Conclusion

For all the above-stated reasons, RVI has not demonstrated any new evidence, substantially changed circumstances or any material error of law. Therefore, the Board should exercise its broad discretion and deny RVI's Petition to Reopen. Moreover, the Board should recognize the vexatious nature of RVI's conduct and should award attorney fees to CCPA to cover the cost of defending against RVI's latest Petition.

Respectfully submitted,



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Date: June 25, 2003

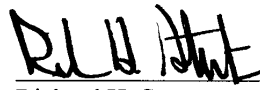
there is "a presumption that all of the property [assembled for, and dedicated to, rail service] is needed to provide effective transportation service." In this case, RVI failed to carry the heavy burden of rebutting that presumption.

⁷ As noted previously, Mr. Handel's Verified Statement was attached to the RVI's Reply to the Board's Show Cause Order of April 5, 2000 and was made part of the administrative record in *RVI I* at J.App. 1350-52 and again in *RVI II* at J.App. 1042-44.

CERTIFICATE OF SERVICE

I hereby certify that I have this 25th day of June, served a true copy of the foregoing Reply to Petition to Reopen via first-class mail, postage prepaid, on the following::

Richard R. Wilson, Esq.
Vuono & Gray, L.L.C.
2310 Grant Building
Pittsburgh, PA 15219

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

Richard H. Streeter