

Before the
SURFACE TRANSPORTATION BOARD

STB 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

REPLY TO RESPONSE OF RAILROAD VENTURES, INC.



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Comes now Columbiana County Port Authority ("CCPA") and files its reply to the Response of Railroad Ventures, Inc. ("RVI") to the Board's tentative Decision of February 13, 2007" ("*February 2007 Decision*"). By that tentative decision, the Board addressed the disposition of the \$375,000 fund that was set aside from the proceeds of the forced sale of the line at issue in this case. In particular, the Board determined that it had materially erred in its decisions served December 15, 2005 ("*December 2005 Decision*") and December 13, 2004 ("*December 2004 Decision*") by requiring CCPA to repay any portion of the set aside funds and by failing to consider all relevant information related to the cost of repairs tendered by CCPA in its initial submission. For all the reasons set forth hereinafter, the Board should reaffirm its *February 2007 Decision*.

Background and Introduction

This proceeding involves the forced sale from RVI to CCPA of a 35.7-mile line of railroad between Youngstown, OH, and Darlington, PA (hereinafter "the Line"). As the Board has reiterated in its *February 2007 Decision*, after it established the terms of the sale, the Board learned that the Line had suffered significant damage caused by RVI's

neglect and failure to perform necessary maintenance. In order to ensure that RVI would be held financially accountable for remedying the damage it caused to the Line, the Board, in its decision served October 4, 2000 ("*October 2000 Decision*"), required that \$375,000 proceeds from the sale of the Line be placed in an escrow account that would be used to fund repairs caused by RVI actions and neglect.

As the Board has also observed in its *February 2007 Decision*, RVI deliberately and repeatedly thwarted the timely implementation of the Board's *October 2000 Decision* and prevented CCPA's operator, the Central Columbiana & Pennsylvania Railroad ("CCPR"), from being able to use the escrowed funds to cover the cost of several hundred thousand dollars of repairs that should have been paid for with escrowed funds.¹ As a result, a significant number of repairs were paid for with public funds advanced by the Ohio Rail Development Commission ("ORDC") and CCPA. That, of course, was not the result that the Board intended when it created the escrow account.

In reaching its final decision, the Board is urged to consider the entire history of this matter. As the record reflects, and as Board's counsel has previously informed the United States Court of Appeals for the Sixth Circuit, RVI unlawfully acquired the Line in 1996 without notifying the Board. Moreover, it did so with the undisclosed intent to "liquidate the property in whole or in part to maximize the cash flow potential."² That stated intent has driven the course of this entire proceeding as RVI doggedly delayed the transfer of the Line and thereafter interfered with its repair. Although RVI says

¹ In order not to waive the argument, CCPA respectfully submits that were the Board to require it to repay any amount, the Board would violate its prior decision and deprive CCPA of due process by failing to adhere to the 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." At no time has RVI been able to demonstrate any fraud.

² Response of the Surface Transportation Board in Support of Emergency Motion For Injunction Pending Judicial Review at 4, *Railroad Ventures, Inc. v. Surface Transportation Board*, (6th Cir. 2000) (Nos. 00-3261, et al.).

(Response at p. 5) that the Board is trying to evade the accounting procedures that it established and that RVI is being penalized for insisting that those accounting procedures be followed, those claims should be rejected in light of RVI's pattern of abusive behavior since it unlawfully acquired the Line in 1996.

If the Board were to allow RVI to escape liability for its wrongdoing because ORDC and CCPA chose to hasten the rehabilitation process by advancing State and Federal funds in order to further the public interest by returning the line to service as quickly as possible, the Board "would undermine [its] October 2000 policy determination"³ and its other decisions that have reconfirmed that policy. Such a result would also be contrary to multiple orders of the Sixth Circuit, which refused to stay the Board's orders pending judicial review because a stay would "only further delay the restoration of rail service on the line and will be contrary to the public interest favoring continued rail service."⁴ Given the Sixth Circuit's understanding of the gravity of the situation, it would be unconscionable for the Board, six years after the fact, to require CCPA to repay funds to RVI when the evidence of record conclusively demonstrates that the cost of repairs related to RVI's deliberate misconduct and gross negligence far exceeded the total amount of the set aside funds. Indeed, as the Board recognized at page 10 of its *February 2007 Decision*, RVI has benefited by having to pay only \$375,000 of the cost of repairs, while State and Federal grant reimbursements exceeded \$1.5 million.

³ In supporting CCPA's November 2000 request for an extraordinary writ to compel RVI to close, the Board's General Counsel advised the 6th Circuit that RVI's action in delaying closing was an attempt to "undercut the *October 2000 Decision*."

⁴ Order filed November 17, 2000, *Railroad Ventures, Inc. v. Surface Transportation Board*, (6th Cir. 2000) (Nos. 00-3261, et al). See Attachment A hereto (note that the Order erroneously reflects the date of November 17, 2001, even though the transmittal properly reflects the date of November 17, 2000).

ARGUMENT

Consideration At This Date Of The Cost Of Crossing Signal Repairs Is Proper.

RVI properly concedes (Response at 4) that CCPA and CCPR could have submitted signal restoration expenditures in their original submission and charged them against the set aside funds. Nevertheless, it claims that the Board erred in its *February 2007 Decision* when it considered those expenditures because CCPA and CCPR did not attempt to charge them against the set aside funds in their original submission and instead chose to seek reimbursement of other expenditures. RVI also says that the Board's treatment of the signal restoration expenditures is inconsistent with its disallowance of \$149,822 in allegedly "untimely" submitted line expenditures.

The short answer to RVI's first contention is provided by the Board's recognition that it has an "independent obligation to use its judgment to advance the goals of the national Rail Transportation Policy."⁵ The second is answered by the Board's comment that it "overlooked clear evidence that was in the record [from the outset] 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."⁶

Without question, the set aside funds were intended to hold RVI accountable for its own inappropriate conduct. As the Board has recognized, holding RVI accountable "advances the Rail Transportation Policy by promoting the 'continuation of a sound rail transportation system ...to meet the needs of the public,' 49 U.S.C. 10101(4) and 'encourag{ing} honest and efficient management of railroads,' 49 U.S.C. 10101(9)." Because the expenditure of funds to repair crossing signals allows rail employees to

⁵ *February 2007 Decision*, at 8, n.14.

⁶ *February 2007 Decision*, at 7.

avoid the dangers associated with having to flag vehicular traffic in order for trains to safely transit highway at-grade crossings, the Board's decision is also consistent with the its mandate to encourage "safe and suitable working conditions in the railroad industry." 49 U.S.C. §10101(11). Given the multiple goals that are to be accomplished, it would be erroneous for the Board not to consider the cost of signal repairs even if CCPA had not included such costs in its initial submission for reimbursement.

A further answer to RVI's suggestion that the Board has acted inconsistently is that the Board erred when it disallowed the evidence that CCPA submitted on reconsideration regarding the \$149,822 of line expenditures. Although that error would be rendered moot if and when the Board finalizes its *February 2007 Decision*, CCPA, out of an abundance of caution, asserts that the Board erred by failing to accept all of the tendered evidence that relates to repairs of the Line. In order to avoid any potential waiver of any legal positions related thereto, CCPA also contends that the Board's application of the reconsideration standard in the context of this situation is erroneous. While it is true that the Board's ability to reopen and reconsider a prior decision is limited to material error, new evidence or substantially changed circumstances, the conclusion that "evidence that was reasonably available to the parties before the agency's original decision is not new evidence for purposes of seeking agency reconsideration" is based on an overly broad interpretation of the holding in *Friends of Sierra R.R. Inc. v. I.C.C.*, 881 F.2d 663, 667 (9th Cir. 1989), and the ICC's earlier decision in *Platnick Bros., Inc. v. Norfolk & Western Ry. Co.*, 367 I.C.C. 782, 785 (1983), upon which the Court of Appeals in *Friends of Sierra* relied. Those decisions are cited for the proposition that "evidence that was reasonably available to the parties before the agency's original decision is not

new evidence for purposes of seeking agency reconsideration.” However, a close reading of the actual holding in *Platnick Brothers* is that “evidence that was reasonably available to the parties *before the proceeding was concluded* is not new evidence” for purpose of seeking reopening. In stark contrast to the situations in *Platnick Brothers* and *Friends of Sierra*, this proceeding was not administratively final and had not been concluded when CCPA and CCPR timely sought reconsideration on the grounds of material error and submitted additional evidence.

Furthermore, the need to submit underlying corporate records and invoices to support statements made in verified statements, which was made clear only by the Board’s *December 2004 Decision*, marked an unexplained departure from ICC and Board practice and could not have been reasonably anticipated earlier in the proceeding.⁷ Without belaboring the issue, had CCPA and CCPR been aware that they had to submit the underlying documentation with the verified statements that summarized the expenditures, they would have done so from the outset rather than tendering it on reconsideration.

When CCPA and CCPR filed their Petition for Reopening and Reconsideration, they carefully explained the multiple errors that had been committed in the Board’s *December 2004 Decision* that effectively changed the rules of the game without prior notice.⁸ Such errors included the Board’s failure to properly consider RVI’s deliberate interference with the timely release of funds from the escrow account, which triggered the need for ORDC to pay for some of the initial repairs. Given the fact that the Board in

⁷ Generally speaking, such documentation is only introduced if a particular claim or statement in a verified statement is challenged on cross-examination.

⁸ See, CCPA and CCPR Petition for Reopening and Reconsideration, filed January 3, 2005. Those arguments are incorporated herein by reference.

its *February 2007 Decision* has mooted many of the errors identified by CCPA, there is no need to belabor the issue further.

In any event, evidence of the signal restoration expenditures was introduced by CCPA and CCPR in their initial submission, even if they did not originally seek to draw down the escrowed funds to pay for them. Nor is it possible to avoid the indisputable fact that the cost of repairing the crossing signals far exceeded the total amount of the escrowed or set aside funds. Hence, the Board acted appropriately when it considered the signal expenditures in its *February 2007 Decision*.

Reimbursement Of The Cost Of Signal Expenditures From The Set Aside Funds Would Not Result In An Unconstitutional Burden On RVI's Phantom Railroad Operations.

RVI's constitutional taking claim is foreclosed by the Sixth Circuit's determination that "there was no unconstitutional taking in this case." *Railroad Ventures, Inc. v. Surface Transportation Board*, 299 F.3d 523, 556 (6th Cir. 2002) ("*RVI I*"). After the Sixth Circuit affirmed the Board's determination of the fair market value of the property, it specifically affirmed the Board's determination that "RVI had an obligation to pay for any damage to the line." *Id.*, at 560. Because the Board's *February 2007 Decision* merely reaffirms the total amount of payments required by its prior decisions and approved by the Court of Appeals, it is neither retroactive nor unconstitutional.

In addition, RVI's contention that reimbursement of ORDC's crossing signal expenditures would retroactively impose an unconstitutional burden on its interstate railroad operations is patently absurd given the fact that RVI never operated the line. Indeed, the only actions that RVI took were to cut the line and allow it to be paved over by others, while failing to maintain the signals at a time when the Line was still an active rail line and at the same time that shippers were requesting service.

Although RVI continues to argue that the Line was already deteriorated prior to the time that RVI acquired it, that contention has been repeatedly taken into consideration by the Board and by the Sixth Circuit when it affirmed the Board's decision to establish the escrow account. As the Board specifically explained (*February 2007 Decision, at 1*), after it set the terms and conditions of the sale, it subsequently:

learned that the Line was in disrepair and required extensive rehabilitation. Although some of this damage pre-dated RVI's ownership, *significant damage was also caused by RVI's neglect and failure to perform necessary maintenance.*

Because there is record evidence to support this controlling factual finding, which has already been affirmed by the Sixth Circuit, law of the case principles prevent RVI from relitigating the "taking" issue.

Nevertheless, in an attempt to evade the full implications of the prior testimony of CCPR's witnesses, Walter J. Gane and Timothy K. Robbins, RVI has tendered a Verified Statement of William A. Strawn, II. As is obvious from the contents of the Strawn statement, that evidence has been available to RVI for several years. Hence, it is questionable whether it is admissible under the evidentiary standard announced in the *February 2007 Decision*.

In addition, the Strawn statement is so vague that it adds nothing of value to the record. Despite Strawn's belated attempt to claim that the signals were in poor shape when RVI acquired the line, there is no question but that RVI did not make any effort to maintain them. The Board's attention is once again invited to the Verified Statement of Timothy K. Robbins, dated January 3, 2003, in which he testified as follows (V.S. Timothy K. Robbins at ¶ 8):

When we finally took possession of the line in late January 2001, we discovered that RVI had allowed the line to deteriorate further

than we had anticipated. This is most easily demonstrated by reference to the restoration of signaling equipment, which is specifically covered by all of the Board's Decisions related to the use of escrowed funds. As the Board is aware, signaling equipment is subject to FRA regulations published at 49 CFR Part 234. In particular, § 234.247(b) imposes the requirement that when an grade crossing warning signal is temporarily taken out of service, it must be fully inspected and "all required tests must be successfully completed before railroad operations over the grade crossing resume." In addition, § 234.247(c) states that any "electronic device, relay, or other electromagnetic device that fails to meet the requirements of tests required by this part shall be removed from service and shall not be restored to service until its operating characteristics are in accordance with the limits within which such device or relay is designed to operate." As Mr. Gane will describe in detail, because RVI had turned off the power to the signaling equipment for several months, if not years, it was necessary to overhaul all of the signaling equipment. In the final analysis, more than \$750,000 was spent on signals. That alone was more than the entire amount placed in escrow at the outset of the project. However, the FRA left us no choice but to make all needed repairs to that vital component of railroad safety. **The \$752,221 figure does not include any amount for installation of new signal systems that did not previously exist, such as the grade crossing warning signals that were installed at Western Reserve Road in Boardman Township.** (Emphasis added).⁹

Furthermore, while Strawn seeks to shift the blame to RVI's predecessors, the Y&S and the PL&W, the only person who is competent to testify regarding the condition of the Line and signals during the periods prior to and after RVI's acquisition is Walter J. Gane, who was the locomotive engineer for the Y&S, the PL&W and CCPR. In his Rebuttal Verified Statement, executed April 18, 2003, Mr. Gane further testified (§§ 6, 8 and 9) as follows:

... with regard to [the] comment that "there was a crossing signal that did not work," I can only state that when PL&W ceased operations, everything worked.

⁹ Robbin's testimony regarding the deteriorated condition of the signals was corroborated by Walter Gane in his Verified Statement dated January 21, 2003. As Mr. Gane also observed, pursuant to 49 C.F.R. § 234.247, FRA required a full inspection and testing of the signals before railroad operations over any of the signaled crossings could be resumed. See Verified Statement, Walter J. Gane, dated January 21, 2003, at ¶ 9.

... In the first place, RVI is solely to blame for the destruction of the old signals. As I testified in my earlier affidavit, “[b]ecause of the length of time that had elapsed between the time that RVI had turned off the power and the date of our inspection, we discovered that the signals had been irreparably damaged. As a result of not being maintained, the batteries in the switches had become corroded and broken. The same was true of the relays. In many instances, birds and other animals had built nests in the meter boxes. Others had been vandalized. In the final analysis, not one of the devices was in a workable condition.” Furthermore, contrary to Mr. Wehner’s claim, while rust may prevent activation of signals, rust on the rails would not have caused the old island circuits to activate the signals without a train being present. Only the lack of maintenance through bad bond wires and track connections would cause a false activation. During my career with Y&S and PL&W prior to acquisition of the line by RVI, there was nothing wrong with the signals.

Mr. Wehner is wrong when he states at page 9 that the “new signals installed by CCPR use a motion detector to activate signals rather than the old island circuits.” There are no motion detector circuits on the Line.

Although Mr. Gane was responding to statements made by George Wehner, Gane’s comments apply with equal force to Strawn’s statements submitted with RVI’s Response. Gane’s testimony demonstrates that neither Y&S nor the PL&W can be held responsible for the condition of the Line and the signals. Those railroads did not allow state and local officials to pave over the Line. Nor did they dig up portions of the Line to create driveways. Nor did they turn off the power to the signals.

The Board’s *February 2007 Decision* Is Supported By FHWA’s Interpretation of “Crossing Improvements” And Is Consistent With The Provisions Of 23 C.F.R. § 646.210.

Based on a wholly implausible theory of federal preemption, RVI contends that because federal funds were used to cover the cost of repairing crossings, Federal Highway Administration (“FHWA”) regulations at 23 C.F.R. § 646.210 would prevent the Board from allowing the set-aside funds to be used to fund those repairs. RVI’s contentions lack merit.

In the first place, there is no federal preemption issue involved in this matter as no state law is involved that would require RVI to share in the cost of work. Instead, the Board is properly seeking to enforce its own Orders.

Second, the FHWA regulations do not prevent the Board, in the exercise of its jurisdiction, from requiring a railroad to repair damage to crossings. Furthermore, it is not the responsibility of the States to fund repairs to existing rail facilities as RVI seemingly suggests.¹⁰

Third, and most importantly, although RVI mistakenly refers to the crossing repairs as grade crossing “improvements,” it ignores the carefully drawn distinction between a repair or rehabilitation of an existing improvement and a project involving the installation of a crossing improvement. The statutory definition that underlies the FHWA regulations, which is set forth at 23 U.S.C. § 101(a)(18), draws a distinction between a “capital improvement for installation of” traffic control equipment and “resurfacing, restoring, or rehabilitating improvements.” RVI has simply ignored that distinction.

In addition, RVI’s arguments regarding 23 C.F.R. § 646.210 are undermined by FHWA’s recent explanation of the definitions of 23 U.S.C. § 101(a)(17) and (18). The Board’s attention is invited to the FHWA Policy Guide entitled *Transportation Systems Management & Operations: Operating Cost Eligibility Under the Federal-Aid Highway Program*. As explained therein (emphasis in original):

An “operational improvement” continues to mean a capital improvement for installation of traffic surveillance and control equipment; computerized signal systems; motorist information systems; integrated traffic control systems; incident management programs; transportation demand management facilities; strategies, and programs; and such other capital improvements to public roads

¹⁰ RVI Response at 13.

as the Secretary may designate, by regulation. ... By definition, an operational improvement still does **not** include restoration or rehabilitating improvements; construction of additional lanes, interchanges, and grade separations; and construction of a new facility on a new location.¹¹

In its *February 2007 Decision*, the Board has not authorized the use of set-aside funds to reimburse CCPR for grade crossing “improvements” that would fit within the meaning of 23 C.F.R. § 646.210. Instead, it has recognized that set-aside funds could be used to cover only the cost of resurfacing, restoring, or rehabilitating preexisting improvements.

The same is true with regard to the crossing signals. The crossing signals at issue herein were already in place and were working when they were irreparably damaged as a result of RVI’s shutting off the power and failure to maintain them. Therefore, under FHWA’s Policy Guide, the restoration and rehabilitation of the existing signals would not fit within the definition of a grade crossing improvement project as RVI contends. Of course, if RVI had properly maintained the crossing signals, few, if any, expenditures would have been required to restore or rehabilitate the existing signals in order to make them operable.

In the final analysis, FHWA regulations play little or no role *in this proceeding*. In reaching its decision, the Board must focus on Federal Railroad Administration (“FRA”) regulations at 49 C.F.R. Part 234--Grade Crossing Signal System Safety. The FRA’s regulations state that the railroads “shall take appropriate action” to adjust, repair and replace malfunctioning crossing signals. In particular, 49 C.F.R. § 234.207(a) provides that “[w]hen any essential component of a highway-rail grade crossing warning

¹¹ See Attachment B hereto.

system fails to perform its intended function, the cause shall be determined and the faulty component adjusted, repaired, or replaced without undue delay.”

The Board’s explicit recognition that RVI should bear the cost of repairing and restoring damaged signals is clearly consistent with the FRA’s governing regulations. Furthermore, it reflects the fact that CCPR, after it acquired the Line, could not operate over the Line until it was in compliance with the FRA regulations.

The Board’s Decisions Regarding Signal Repairs Are Consistent With And Complement The Safety Authority Jurisdiction Of The FHWA And The FRA.

RVI’s contentions regarding which federal agencies are responsible for rail and crossing safety are completely mooted by the fact, explained above, that the FWHA regulation RVI relies upon (23 CFR § 646.210) does not apply to resurfacing, restoring or rehabilitating preexisting improvements. Furthermore, while Congress has granted primary responsibility for rail safety to the FRA and primary jurisdiction for highway safety to the FHWA, that does not mean the STB lacks jurisdiction to complement the safety of its sister agencies.

As has been recognized in the judicial precedent cited by RVI, the “complementary exercise of their statutory authority reflects Congress’s intent” that they have a joint responsibility for promoting rail safety. *Tyrrell v. Norfolk Southern Railway Company*, 248 F.3d 517, 523 (6th Cir. 2001). As was the case in *Tyrrell*, there is no need to pigeon-hole the Board’s authority so as to prevent it from supplementing or complementing the safety authority granted to FRA and FHWA.

RVI’s contention (Response at p. 7) that “the Board has no jurisdiction to interfere with the administration of federal highway crossing funds” is, as characterized

by the D.C. Circuit, “a will-o-the-wisp.”¹² The action taken by the Board does not interfere in any respect with the administration of federal highway crossing funds by the FHWA. If anything, requiring RVI to pay for the repairs would, as the Board recognized, allow grant funds to be “used to fund other needed rail projects elsewhere.”¹³ By any definition, that does not constitute interference.

RVI’s contention that “Congress did not grant the STB authority to supplement DOT’s primary jurisdiction over rail crossing safety” flatly ignores the Board’s mandate to encourage “safe and suitable working conditions” for railroad employees.¹⁴ Plainly, requiring railroad employees to flag rapidly moving vehicular traffic in order for a train to cross a busy highway intersection is inherently dangerous. As Mr. Gane also testified as part of CCPA/CCPR’s initial submission:

while it may be true that a crossing can be flagged in the absence of signals, it would be foolhardy to try to operate the line without proper signals. The safety for both the railroad employees and the general public is greatly enhanced when signals are properly installed and maintained. Moreover, any attempt to operate the Line without signals would amount to a substantial downgrading of the Line to the detriment of all concerned.¹⁵

Plainly, by requiring RVI to bear the cost of repairing and replacing the signals that it allowed to deteriorate, the Board’s actions are consistent with the Rail Transportation Policy to promote safe and suitable working conditions for railroad employees.

As the Sixth Circuit also explained in *Tyrrell, supra*, 248 F.3d at 523:

Based on the federal railway statutes, the STB and FRA’s jurisdictional management, and the resulting regulatory systems, Congress vested the FRA with primary authority over national rail

¹² *Boston and Maine Corporation v. Surface Transportation Board*, 364 F.3d 318, 321 (D.C.Cir. 2004).

¹³ *February 2007 Decision* at 8.

¹⁴ 49 U.S.C. § 10101(11).

¹⁵ R.V.S. Gane at ¶ 9.

safety policy and assigned the STB the duty to encourage “safe and suitable working conditions” for railway employees through its assessment of individual railway proposals subject to its authority. As statutory “repeals by implication are disfavored” and there is no positive repugnancy between FRSA and the ICCTA’s jurisdictional provisions, this statutory construction properly reflects Congress’s purpose.

That line of reasoning applies herein. Given the lack of any positive repugnancy between the various jurisdictional provisions, the Board’s action must be viewed as complementing the primary jurisdiction of its sister agencies. In no way does it interfere with the ongoing primary jurisdiction of either FHWA or FRA related to railroad and highway safety.

RVI’s argument that the Board’s determination conflicts with FHWA regulations is further undercut by the undeniable fact that in its *February 2007 Decision*, the Board did not authorize use of the set-aside funds to pay for the installation of “new” signals at crossings where no signals had previously existed. Instead, the Board drew a clear distinction between funds used to repair and replace the “damaged” signals and funds used to install “new” signals at crossings where none previously had existed.¹⁶ As the Board has properly reasoned, even if set-aside funds could not be used to cover the cost of installing 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.”¹⁷

Even if it were to be assumed that the signals were originally installed solely for the public benefit, there is no avoiding the conclusion that RVI deliberately or negligently

¹⁶ See *February 2007 Decision*, at p. 7, n.7.

¹⁷ *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”).

harmed the pre-existing signals and thereby deprived the public of the benefits associated with the signals. It is 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.

Finally, while RVI has attempted to focus on the use of federal funds at a limited number of crossings, it cannot overcome the fact that ORDC also advanced over \$500,000 of State funds. This is readily confirmed by a letter dated February 1, 2001 addressed to Tracy V. Drake, Executive Director, Columbiana County Port Authority, by which CCPA was notified that "[t]he source of the grant funding for this project is ORDC's appropriation of the State of Ohio's General Revenue Fund (GRF)."¹⁸ Given the Board's explicit recognition that "it was not the Board's intention to permit RVI to escape liability if other funds were applied to remedy the damage RVI caused,"¹⁹ the Board cannot ignore its companion 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".²⁰

¹⁸ See Attachment C hereto. This letter was first introduced into the record in May 2001 and would not constitute new evidence.

¹⁹ *Id.* at p. 9.

²⁰ *Id.* at p. 10.

The Board's Action In Enforcing The Literal Terms Of The *October 2000 Decision* By Requiring RVI To Be Held Accountable Is Consistent With The Public Interest And The Goals And Objectives Of The National Transportation Policy And Complementary Of Other Federal Law.

The *October 2000 Decision* established the fundamental principal that the Board will demand accountability from those who, under the guise of acquiring a line of railroad in order to operate it, unlawfully dismantle the line. As the Board recognized when it recently announced its intent to examine issues related to rail traffic forecasts and infrastructure requirements, there is a need to focus on “the infrastructure investment needed to ensure that the Nation’s freight rail system continues to operate in an efficient and reliable manner.”²¹ Given the growing recognition of the necessity to preserve lines of railroad that are actually needed, such as the line involved in this proceeding, it serves no purpose to reward entities who are intent upon destroying the existing rail infrastructure for personal gain without consideration of the needs of shippers. Nor does it make any sense to use scare Federal and State funds to repair extensive damage to rail infrastructure that is deliberately or negligently inflicted by real estate developers and others who acquire lines of railroad under false pretexts, as was the situation herein.

In the final analysis, the Board’s creation of an escrow account was, in effect, equitable relief that was designed to ensure that RVI would not be unjustly enriched. That being the case, RVI must have clean hands in order to invoke any equitable relief of its own. As the Sixth Circuit unequivocally stated when it unanimously affirmed the Board’s decision to create the escrow account, “[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.” *Railroad Ventures, Inc. v. Surface*

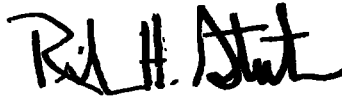
²¹ STB Ex Parte No. 671, *Rail Capacity and Infrastructure Requirements*, served March 6, 2007, slip op. at p. 2.

Transportation Board, 299 F.3d 523, 560 (6th Cir. 2002) (“*RVI I*”). If the Board were now to allow RVI to escape a penny’s worth of its liability by failing to appreciate the fact that the entire set aside fund should have been available from the outset to repair the damage to the tracks and signal systems, the Board would undermine its own objective that was specifically affirmed by the Sixth Circuit.

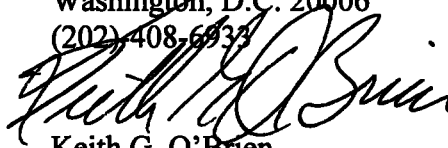
Conclusion

For all the above-stated reasons, the Board should affirm and finalize the conclusion reached in the *February 2007 Decision* that CCPA should not be required to repay any portion of the \$375,000 set-aside fund to RVI. Should the Board for whatever reason reverse that tentative conclusion, CCPA requests that it nevertheless dismiss RVI’s claim to a refund on the ground that no fraud has been demonstrated.

Respectfully submitted,



Richard H. Streeter
Stanley C. Fickle
Barnes & Thornburg LLP
750 17th Street, N.W., Suite 900
Washington, D.C. 20006
(202) 408-6933



Keith G. O'Brien
Rae, Cross & Auchincloss
1050 17th Street, N.W., Suite 600
Washington, D.C. 20036
(202) 785-3700

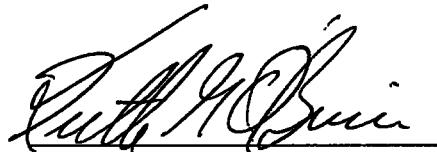
Dated: April 24, 2007

CERTIFICATE OF SERVICE

I hereby certify that I have this 24th day of April, 2007, served a true copy of the foregoing Reply to Response of Railroad Ventures, Inc. by first class mail, postage prepaid:

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

Alan H. Klodell
Associate Asst. Attorney General
c/o Ohio Rail Development Commission
150 East Gay Street, 17th Floor
Columbus, OH 43215



Keith G. O'Brien

Attachment A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

**100 EAST FIFTH STREET, ROOM 532
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988**

**LEONARD GREEN
CLERK**

**MS. MICHELLE M. DAVIS
(513) 564-7025**

28

Filed: November 17, 2000

R. Joseph Parker
Taft, Stettinius & Hollister
425 Walnut Street
Suite 1800 Firstar Tower
Cincinnati, OH 45202-3957

Cecelia H. Cannizzaro
Surface Transportation Board
1925 K Street, N.W.
Suite 600
Washington, DC 20423-0001

John P. Fonte
U.S. Department of Justice
Antitrust Division
Room 10546
601 D Street, N.W.
Patrick Henry Building
Washington, DC 20530

Keith G. O'Brien
Rea, Cross & Auchincloss
1707 L Street, N.W.
Suite 570
Washington, DC 20036

Richard H. Streeter
Barnes & Thornburg
1401 Eye Street, N.W.
Suite 500
Washington, DC 20005

RE: 00-4303
Railroad Ventrues vs. STB
District Court No. AB 556

Enclosed is a copy of an order which was entered today in the above-

styled case.

Leonard Green, Clerk

(Ms.) Michelle M. Davis
Case Manager

Enclosure

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**FILED**

NOV 17 2001

RAILROAD VENTURES, INC.,

Petitioner,

v.

SURFACE TRANSPORTATION BOARD;
UNITED STATES OF AMERICA,

Respondents,

COLUMBIANA COUNTY PORT AUTHORITY;
CENTRAL COLUMBIANA & PENNSYLVANIA
RAILWAY INC.,

Intervenors.

LEONARD GREEN, Clerk

ORDER

Before: RYAN, NORRIS, and CLAY, Circuit Judges

The petitioner seeks review of the October 3, 2000 decision of the Surface Transportation Board (the Board) directing the transfer of all assets related to a railroad right-of-way to the Columbiana County Port Authority by Friday, November 17, 2000. The petitioner sought a stay of ruling from the Board, but its request was denied on November 2, 2000. The petitioner is now before this court with an emergency motion for a stay pending review. The Board, the Columbiana County Port Authority, and an intervenor railway company oppose the stay motion. Boardman Township supports the petitioner's motion for a stay pending review.

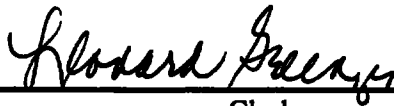
We balance the following factors in determining whether a stay pending review should issue:

1) whether the petitioner has demonstrated a likelihood of success on the merits; 2) whether the petitioner will be irreparably injured absent a stay; 3) whether issuance of the stay will substantially

injure the other interested parties; and 4) where the public interest lies. *State of Ohio, ex rel Celebrezze v. NRC*, 812 F.2d 288, 290 (6th Cir. 1987); see *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). Generally, "the probability of success that must be shown is inversely proportional to the degree of irreparable injury the plaintiffs will suffer absent an injunction." *Celebrezze*, 812 F.2d at 290. Although the petitioner has raised some serious appellate issues, it has not demonstrated significant irreparable harm. A stay of the transfer will only further delay the restoration of rail service on the line and will be contrary to the public interest favoring continued rail service.

The motion for a stay pending review is **DENIED**.

ENTERED BY ORDER OF THE COURT



Clerk

Attachment B

Transportation Systems Management & Operations: Operating Cost Eligibility Under the Federal-Aid Highway Program

Attachment

Contents

Federal-aid Eligibility Policy Guide

Introduction

Background / Legislative

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Questions & Answers

Federal-aid Eligibility Policy Guide

The operating costs for traffic monitoring, management, and control systems, such as integrated traffic control systems, incident management programs, and traffic control centers, are eligible for Federal reimbursement from National Highway System and Surface Transportation Program funding. For projects located in air quality non-attainment and maintenance areas, and in accordance with the eligibility requirements of 23 USC 149(b), Congestion Mitigation and Air Quality Improvement Program funds may be used for operating costs for a 3-year period, so long as those systems measurably demonstrate reductions in traffic delays. Operating costs include labor costs, administrative costs, costs of utilities and rent, and other costs, including system maintenance costs, associated with the continuous operation of the system.

Introduction

The movement of people, goods, and vehicles on the nation's surface transportation system is now critically dependent on how effectively that system is managed and operated. Adding to the roadway system is necessary in some key locations and corridors to serve the demands for this movement, and in some cases, provide for economic development in the area. However, the construction of new lanes will never alleviate the need for effective management and operations of the system - on existing as well as new segments. Well planned, cost-effective transportation operations and management actions can improve mobility, safety, and productivity of the system for transportation users in urban and rural areas.

Background - Legislative

The Transportation Equity Act for the 21st Century (TEA-21), signed into law on June 9, 1998, reinforces the Federal commitment to manage and operate the nation's transportation system. Under TEA-21, the Federal-aid Highway Program continues eligibility of operating costs for traffic monitoring, management, and control. The legislation defines operating costs as including labor costs, administrative costs, costs of utilities and rent, and other costs associated with the continuous management and operation of traffic systems, such as integrated traffic control systems, incident management programs, and traffic control centers.(1) An "operational improvement" continues to mean a capital improvement for installation of traffic surveillance and control equipment; computerized signal systems; motorist information systems; integrated traffic control systems; incident management programs; transportation demand management facilities; strategies, and

programs; and such other capital improvements to public roads as the Secretary may designate, by regulation.(2) By definition, an operational improvement still does not include restoration or rehabilitating improvements; construction of additional lanes, interchanges, and grade separations; and construction of a new facility on a new location.

For both National Highway System (NHS) and Surface Transportation Program (STP), TEA-21 continues the eligibility of capital and operating costs for traffic monitoring, management, and control facilities and programs.(3) Also, TEA-21 clarifies the eligibility of NHS and STP funds for Intelligent Transportation Systems (ITS) capital improvements to specifically allow funds to be spent for infrastructure-based ITS capital improvements.(4)

For the Congestion Mitigation and Air Quality Improvement Program, TEA-21 continues to include the establishment or operation of a traffic monitoring, management, and control facility or program as potentially eligible projects.(5) TEA-21 also explicitly adds, as an eligible condition for funding, programs or projects that improve traffic flow, including projects to improve signalization, construct high occupancy vehicle lanes, improve intersections, and implement ITS strategies.(6)

Interpretation / Rationale

Examples of typical eligible operating cost and expenses for traffic monitoring, management, and control include those costs mentioned in the legislative definition for operating costs.(1) In order to assure continuous operation, costs associated with maintaining these systems are necessary operating expenses so that traffic monitoring, management, and control facilities or programs provide their intended functions. Examples of these maintenance costs include system maintenance activities to assure peak performance (preventive computer maintenance) and replacement of defective or damaged computer components and other traffic management system hardware (including street-side hardware). Specific eligibility determinations related to traffic control operational costs and maintenance expenses are the discretion of the FHWA Division Office in a particular state.

This interpretation is consistent with the FHWA Strategic Plan, specifically related to the Mobility Goal and the Strategic Objective to "Improve the operation of the highway systems and intermodal linkages to increase transportation access for all people and commodities." In light of TEA-21, which reaffirms and increases the Federal commitment to manage and operate the nation's surface transportation system, this interpretation is also consistent with the intent of Congress.

It is appropriate for FHWA to adopt policies that encourage efficient management and operation of surface transportation. With a greater shift toward applying technology to addressing transportation needs, a broader life-cycle view of transportation operations is warranted that includes all activities related to sustaining system performance.

Examples

Some of the types of Federal-aid projects that may be funded include the installation and integration of the Intelligent Transportation Systems Infrastructure such as:

- Planning for regional Management and Operations programs
- Traffic Signal Control Systems
- Freeway Management Systems
- Incident Management Systems
- Multimodal Traveler Information Systems
- Transit Management Systems
- Electronic Toll Collection Systems
- Electronic Fare Payment Systems
- Railroad Grade Crossing Systems
- Emergency Services

- Implementation of the National ITS Architecture for metropolitan and rural areas
- Development of regional ITS Architecture

Some examples of typical Federal-aid capital improvement projects that may include eligible operating costs include:

- System Integration
- Telecommunications
- Reconstruction of Buildings or Structures that house system components
- Control / Management Center (Construction) and System Hardware and Software for the projects
- Infrastructure-based Intelligent Transportation System capital improvements to link systems to improve transportation and public safety services
- Dynamic / Variable message signs
- Traffic Signals

Some examples of typical eligible operating cost and expenses for traffic monitoring, management, and control include:

- Labor Costs
- Administrative costs
- Costs of Utilities and Rent
- Other costs associated with the continuous operation of the above-mentioned facilities and systems
- System Maintenance (activities to assure peak performance)
- Replacement of defective or damaged computer components and other traffic management system hardware (including street-side hardware).
- Computer hardware and software upgrades to remedy Year 2000 (Y2K) problems.

Questions and Answers

Q: What would not be considered eligible as an operating cost?

A: The discretion and flexibility afforded FHWA Division Offices in determining the eligibility of specific activities under this guidance, the allowances for preventive maintenance in Title 23(7), and other Federal-aid policies can allow for virtually any activity to be eligible. However, routine maintenance items that are not critical to the successful operation of the system, such as the painting of traffic signal controller cabinets or the maintenance of the exterior of transportation management center buildings, would normally fall outside of eligible operating costs.

Q: What are some typical activities associated with transportation management center computers whose costs could be eligible under Federal-aid?

A: Besides the costs associated with designing and procuring the computer system, other eligible activities could include regular checking of the computer components to make sure they are fully functional. Any corrective measures or upgrades (software or hardware) that are necessary would be eligible activities.

Q: Can "spare parts" be eligible for federal-aid?

A: System-critical parts (i.e., ones that are essential for the successful operation of the system) that are susceptible to failure, regardless of reason - acts of God, crashes, electronic "infant mortality" - have been determined by some FHWA Division Offices as eligible for federal-aid reimbursement.

Q: What documentation do states or local governments need to submit (or present upon request) for approval or authorization of operating costs?

A: The amount and specific nature of documentation are left to the judgement of the FHWA Division Office, but the documentation should be sufficient to determine that the proposed expenditures would be eligible for Federal-aid reimbursement.

Q: Besides TEA-21 and Title 23, what overall rules govern the eligible operating costs and procurement method?

A: The Office of Management and Budget (OMB) Circular A-87, Cost Principles for State and Local Governments (available at <http://www.whitehouse.gov/OMB/circulars/a087/a087-all.html>) establishes principles for determining the allowable costs incurred by State, local, and federally-recognized Indian tribal governments under grants, cost reimbursement contracts, and other agreements with the Federal Government. Part 18 of Title 49 of the Code of Federal Regulations (49 CFR Part 18, available at <http://www.access.gpo.gov/nara/cfr/index.html>) also includes information related to the administration of grants and cooperative agreements with State and local governments.

Q: Where can I find out more about the Congestion Mitigation and Air Quality Improvement (CMAQ) Program?

A: The latest guidance on the CMAQ Program was issued April 28, 1999, and is available from FHWA Division and FTA Regional offices. The guidance, along with other CMAQ Program information, is available on the internet at <http://www.fhwa.dot.gov/environment/cmaq.htm>.

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1. 23 USC 101(a)(17)
 2. 23 USC 101(a)(18)
 3. 23 USC 103(b)(6)(H) and 23 USC 133(b)(6)
 4. 23 USC 103(b)(6)(O) and 23 USC 133(b)(13)
 5. 23 USC 149(b)(4)
 6. 23 USC 149(b)(5)
 7. 23 USC 116(d)

FHWA

Attachment C



Ohio Rail Development Commission

50 West Broad Street, Suite 1510 • Columbus, Ohio 43215 • 614.644.0306 phone • 614.728.4520 fax

February 1, 2001

Mr. Tracy V. Drake, Executive Director
Columbiana County Port Authority
1250 St. George Street
East Liverpool, Ohio 43920

Tracy
Dear Mr. Drake:

On December 10, 1999 the Ohio Rail Development Commission (ORDC) passed Resolution 99-20 providing financial assistance in the form of a \$500,000 grant to the Columbiana County Port Authority (CCPA) to assist in the acquisition and rehabilitation of the 36-mile long Youngstown, OH to Darlington, PA "Youngstown and Southern" rail line. ORDC Resolution 99-20 included thirteen (13) conditions which the CCPA must meet prior to the release of ORDC funds. (Attached is a copy to the resolution and accompanying exhibits.) As a result of these conditions, ORDC will not encumber this commitment until all of the conditions in Resolution 99-20 are met.

The source of the grant funding for this project is ORDC's appropriation of the State of Ohio's General Revenue Fund (GRF). The ORDC's current fiscal year appropriation expires on June 30, 2001. Due to the budgetary constraints of ORDC as it approaches this date, unless the CCPA can provide evidence of compliance with all thirteen (13) conditions by February 28, 2001, ORDC funding for this project will not be available until state fiscal year 2002 beginning on July 1, 2001. This commitment will then be contingent on the availability of funds in ORDC's appropriation in the next state biennium budget.

Please continue to work with ORDC staff to bring this project to completion. If you have any questions, please feel free to contact me at (614) 644-0313 or Matthew Dietrich of my staff at (614) 644-0295.

Sincerely,

James E. Sney
James E. Sney
Executive Director