

SURFACE TRANSPORTATION BOARD

DECISION

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

Decided: April 24, 2008

This decision affirms the Board’s tentative conclusion in its decision served on February 15, 2007 (February 2007 Decision) that the Columbiana County Port Authority (CCPA) is not required to return to Railroad Ventures, Inc. (RVI), any portion of the \$375,000 set-aside fund that the Board created from the proceeds of the forced sale of the former Youngstown & Southern line (Y&S line) at issue in this case.¹

BACKGROUND

The complex history of this proceeding – as set forth in several prior Board decisions,² and in Railroad Ventures, Inc. v. STB, 299 F.3d 523 (6th Cir. 2002) (RVI v. STB) – revolves around RVI’s unlawful efforts to close the Y&S line, and develop the property for non-rail uses, notwithstanding the lawful efforts of governmental and civic interests in northeast Ohio to purchase the line and continue rail service.

RVI was formed to buy the Y&S line and acquired it in November 1996 without obtaining the necessary authority from the Board. RVI immediately ended all rail service to shippers and sold the future right to salvage the line’s track and other materials to a salvage company. The Board only learned of RVI’s acquisition after shippers began to complain about the termination of rail service. The Board then instituted an investigation of RVI’s illegal activities; and only then did RVI belatedly seek authority to acquire the rail line.³

¹ The Y&S line is a 35.7-mile line of railroad running from Youngstown, OH, to Darlington, PA, with a connecting 1-mile segment near Negley, OH. The line formerly was owned by the Youngstown & Southern Railroad Company.

² See February 2007 Decision at 1-5; decision served October 4, 2000 (October 2000 Decision) at 2-8; decision served November 9, 2001 (November 2001 Decision) at 1-8; decision served December 13, 2004 (December 2004 Decision) at 1-10.

³ See RVI v. STB, 299 F.3d at 533-35.

In its April 1997 request for authority for the November 1996 purchase, RVI represented to the Board that it had acquired the Y&S line for the purpose of continued rail operations and had made arrangements to restore rail service.⁴ RVI did not disclose to the Board that, shortly after buying the line, it had entered into a “management agreement” with its controlling shareholder “to liquidate the property in whole or in part to maximize the cash flow potential,” and to remove the track and ties, which it characterized as “debris.”⁵ Based on RVI’s purported willingness to restore rail service, the Board allowed the authorization to go into effect, but required RVI to submit bi-weekly reports on the status of the line’s restoration and to provide “specific details” of the cause of any delays in restoring service.⁶ However, meaningful rail service was not restored. RVI provided, at most, limited service for a few days in 1997, filed reports infrequently, and refused to fund repairs or cooperate with the governmental agencies that had committed funds for the restoration of rail service.⁷ RVI also turned off the power to the warning devices at road crossings along the line, disconnected at least some of these devices and invited the State of Ohio’s highway department to pave over the line at various points.⁸

In April 1999, RVI sought abandonment authority so that it could remove the line from the national rail system and carry out its original plan to liquidate the property. The Interstate Commerce Act, however, contains a preference that rail lines remain available for rail service if possible. As pertinent here, in order to promote continued rail service, the Act provides that, if a rail carrier receives Board authorization to abandon a line, a financially responsible person has the opportunity to purchase the line for continued rail service pursuant to an “Offer of Financial

⁴ Verified Notice For Exemption Under 49 U.S.C. 10901 Pursuant to 49 CFR 1150.31, at 4-8, filed April 2, 1997, STB Finance Docket No. 33385, Railroad Ventures, Inc.-Acquisition Exemption-Rail Line of Youngstown & Southern Railroad Co.

⁵ Decision served December 7, 2000 (December 2000 Decision) at 2. (The quoted language appears in a management agreement that RVI entered into with OLE, Ltd, a company controlled by RVI’s President, shortly after RVI purchased the Y&S line. The Board did not learn of the agreement until 3 years later, when RVI included it in a request for clarification filed with the Board on November 21, 2000.) See also RVI v. STB, 299 F.3d at 533-34.

⁶ Railroad Ventures, Inc.-Acquisition and Operation Exemption – Youngstown & Southern Railroad Company, STB Finance Docket No. 33385, slip op at 4 and 5, Ordering Paragraph 4 (STB served July 15, 1997).

⁷ Besides CCPA, the Ohio Rail Development Corporation, the Northeast Ohio Trade & Economic Consortium, and the Mahoning County Commissioners were willing to fund repairs.

⁸ See Railroad Ventures, Inc. — Abandonment Exemption — Between Youngstown, OH, and Darlington, PA, in Mahoning and Columbiana Counties, OH, and Beaver County, PA, STB Docket No. AB-556 (Sub-No. 1X) (STB served Jan. 22, 1999), slip op. at 5 (January 1999 Decision); decision served January 17, 2001 (January 2001 Decision) at 1-2.

Assistance” (OFA) under 49 U.S.C. 10904.⁹ In this case, after the Board found in September 1999 that the Y&S line was eligible for abandonment, CCPA came forward with a timely offer to buy the line pursuant to section 10904. After 16 months of litigation before the Board during which RVI took numerous actions to prevent the sale and encumber the property, the Board ordered RVI to sell the line to CCPA, the U.S. Court of Appeals for the Sixth Circuit directed RVI to comply with the Board’s order, and CCPA became the new owner of the line.¹⁰

During the OFA sale proceeding, it became apparent that, largely because RVI had failed to perform maintenance and had taken actions that had accelerated the deterioration of crossing safety devices, the line was in significant disrepair. Accordingly, the Board ordered RVI to set aside and place into an escrow fund \$375,000 of the sale proceeds (the “set-aside fund”) to be applied to amounts expended to remedy RVI-caused damage.¹¹ Because of interference by RVI, however, the escrow agent was not able to release funds to cover the repairs, and he ultimately resigned. In order to prevent further interference by RVI, the Board then ordered the funds transferred directly to CCPA, which was directed to keep account of their use and demonstrate that expenditures from the fund were proper.¹²

Since that time, there has been an ongoing dispute as to whether the funds were properly spent for the purpose of repairing the damage to the property caused by RVI. In the December 2004 Decision, the Board found that CCPA had not properly documented certain expenditures, and for that reason the Board required that a portion of the money be returned to RVI. In a subsequent decision served December 15, 2005 (December 2005 Decision), the Board reduced the amount of the refund to RVI based on additional documentation submitted by CCPA.

In the February 2007 Decision, at 7, the Board tentatively concluded that it had erred in ordering CCPA to return any portion of the \$375,000 set-aside fund to RVI. The Board explained that it had overlooked clear record evidence that had been timely filed by CCPA showing that at least \$759,437 had been expended to rehabilitate signals at eight crossings that RVI had allowed to fall into disrepair. Although these expenditures had been funded by government grants through the Ohio Rail Development Commission (ORDC), the Board

⁹ The OFA process requires a party that seeks abandonment authorization to instead sell the property to a “financially responsible” person that is willing and able to provide for continued rail service. If the parties cannot agree on an appropriate sale price, the Board sets the terms of sale at its constitutional minimum value. See RVI v. STB, 299 F.3d at 532-33.

¹⁰ See RVI v. STB, 299 F.3d at 537-48. Litigation over the property interests to be transferred continued after the closing. In a 2003 opinion, the Sixth Circuit upheld a Board order that required RVI to transfer to CCPA 96 additional licenses it had entered into but had not disclosed when the Board determined the line’s value. Railroad Ventures, Inc. v. STB, 70 Fed. Appx. 239, 2003 WL 2129184 (6th Cir. 2003).

¹¹ October 2000 Decision at 19.

¹² November 2001 Decision at 7-8.

observed that the repairs could have been paid for from the set-aside fund. The Board reasoned that requiring CCPA to repay any amount to RVI would undermine the fundamental purpose of the set-aside fund: that RVI (rather than CCPA, ORDC, or anyone else) would bear financial responsibility for the damage it had caused, up to the \$375,000 limit.¹³ The Board emphasized that denying RVI the monies in the set-aside fund would accomplish the goal of making RVI pay, at least in part, for repairing the damage it caused by its disregard of its common carrier obligation to provide service over the Y&S line (including its failure to maintain the line and its approval of or acquiescence in the dismantling and paving over of portions of the line) and for its interference with the release of the previously escrowed monies, which had forced CCPA to use federal and state funds for repairs to the crossing signals that should have been paid for out of the set-aside fund.¹⁴

Before taking any final action, however, the Board gave RVI an opportunity to submit comments “limited to addressing the signal replacement expenses discussed in [the February 2007 Decision].”¹⁵ RVI voiced its opposition in a response filed April 6, 2007. CCPA filed a reply on April 24, 2007.

RVI’S RESPONSE

In its response, RVI not only takes issue with the February 2007 Decision, but also challenges the Board’s findings of fact and conclusions of law as far back as the October 2000 Decision. RVI asserts that it should not be held responsible for signal repairs because the damage to the signals preceded its acquisition of the line. RVI further claims that the line was in such deteriorated condition that it could not have conducted profitable rail operations and argues that it had no common carrier or statutory obligation to provide rail service on the Y&S line at a loss. RVI, therefore, concludes that, by requiring it to pay for repairs, the February 2007 Decision would retroactively impose an unconstitutional burden on RVI.¹⁶

RVI’s other major argument is that the Board cannot require it to pay for any of the repairs to the railroad crossing signals because ORDC provided CCPA with funds from federal grants for the repair projects.¹⁷ RVI cites to the regulation of the Federal Highway Administration (FHWA) at 23 CFR 646.210(a), which provides that “[s]tate laws requiring railroads to share in the cost of work for the elimination of hazards at railroad-highway crossings

¹³ February 2007 Decision at 8.

¹⁴ Id. at 6, 8-9.

¹⁵ February 2007 Decision at 11, Ordering Paragraph 3.

¹⁶ Response at 3-5.

¹⁷ RVI submitted an affidavit from an ORDC employee stating that \$854,443 in federal funds had been granted to ORDC, which ORDC used to pay for repairs to the signals in question.

shall not apply to Federal-aid projects.”¹⁸ RVI argues that the Board may not do on behalf of these state agencies what they could not do for themselves, nor can the Board override FHWA’s safety funding regulations.¹⁹ RVI also claims that 49 U.S.C. 10501(b) – which vests exclusive jurisdiction over transportation by rail carriers in the Board – does not preempt FHWA’s authority in this case.²⁰

RVI also argues that consideration of the cost of the signal repairs funded by government grants is improper because the expenditures should have been presented for reimbursement in CCPA’s initial submission. RVI claims that the Board’s decision to charge these expenditures against the set-aside fund is a denial of due process and is inconsistent with the Board’s denial in the February 2007 Decision of CCPA’s claim for reimbursement of certain expenditures on the ground that the evidence should have been presented to the Board in CCPA’s initial submission.

DISCUSSION AND CONCLUSIONS

As discussed below, we have previously rejected RVI’s claim that it did not cause the damage to which the set-aside fund was addressed, and RVI’s attempt to reopen and set aside the Board’s judicially affirmed findings of fact and conclusions of law is unavailing. We also reject RVI’s argument that the Board does not have the authority in this case to require reimbursement for the cost of repairing the rail-highway crossing signals. Finally, we find no merit to RVI’s due process claim.

A. RVI’s Claim That It Is Not Responsible For Damage To The Line

The Board established the \$375,000 set-aside fund from the proceeds of the sale of the Y&S line in the October 2000 Decision, at 19, for the express purpose of applying the money to the costs of repairing the damage caused by RVI’s blatant disregard of its common carrier obligation when, among other things, RVI disconnected the signals or turned off the power at all of the railroad-highway crossings and authorized state highway crews to pave over the line. RVI sought judicial review of that decision in the United States Court of Appeals for the Sixth Circuit, claiming that it was not under a legal obligation to maintain the line for common carrier operations because the line had been embargoed during its ownership. The Sixth Circuit expressly rejected that argument, holding that RVI continued to be responsible for maintaining

¹⁸ The FHWA requires railroads to share in the cost of eliminating existing grade crossings at which active warning devices are in place, but not grade crossing improvements. See 23 CFR 646.210(b)(1).

¹⁹ Response at 9. CCPA counters that the FHWA regulations have no bearing in this case. CCPA argues that RVI was required to repair damage to the signals under Part 234 of the Federal Railroad Administration’s regulations, 49 CFR 234.1-.275.

²⁰ Response at 11-13.

the line and that the Board had “acted reasonably in finding that RVI had an obligation to pay for the damage to the line.” RVI v. STB, 299 F.3d at 559-60.

RVI seeks to revisit that finding here. This time, RVI posits that it had no common carrier obligation because the line was so seriously deteriorated from the outset that it could not have operated the line at a profit. RVI, therefore, argues that it cannot be held responsible for the condition of the line when it was sold to CCPA.

In essence, RVI would have us reopen the October 2000 Decision to change a key finding and conclusion. Under the statute and the Board’s regulations, a request to reopen and reconsider a prior Board decision must show material error, new evidence, or substantially changed circumstances. See 49 U.S.C. 722(c); 49 CFR 1115.3(b). See generally ICC v. Brotherhood of Locomotive Eng’rs, 482 U.S. 270 (1987). RVI does not allege changed circumstances, nor has it submitted any new evidence that was not available earlier. RVI seeks to introduce a new verified statement regarding the line’s condition, but that statement does not constitute new evidence. It is well established that new evidence is evidence that was not available earlier, not simply evidence that was not presented earlier.²¹ Thus, RVI’s attempt to have us revisit the Board’s earlier finding and conclusion must necessarily be based on a claim of material error. But RVI cannot avoid the preclusive effect of the prior court-affirmed decision in this very case, because the law-of-the-case doctrine precludes a reexamination in subsequent judicial or administrative proceedings of issues of law decided on appeal explicitly or by necessary implication.²²

Even if the issue could be revisited, RVI has not shown material error in the Board’s prior determination. The Y&S line was an operating line of railroad serving freight shippers on the day before RVI assumed control, cancelled the lease of the existing operator and discontinued rail operations – all without seeking advance authorization from the Board as required by 49 U.S.C. 10901. When RVI later sought after-the-fact authority to acquire the Y&S line (to avoid possible enforcement action for its illegal conduct) in April of 1997, it represented to the Board that it sought that authority “for the purpose of conducting rail freight common carrier operations on the former Y&S line.”²³ Based on this representation, the Board, in July 1997, denied petitions filed by CCPA to declare RVI’s acquisition unlawful and revoke the authorization.

When RVI made this representation to the Board, it had already owned the Y&S line for nearly 6 months and thus should have been well aware of the condition of the line. If the line

²¹ See Town of Springfield v. STB, 412 F.3d 187 (D.C. Cir. 2005); Friends of Sierra R.R. v. ICC, 881 F.2d 663, 666-67 (9th Cir. 1989); Beehive Tel. Co. v. FCC, 180 F.3d 314, 320 (D.C. Cir. 1999).

²² See DOE & DOD v. B. & O. Railroad Co., 10 I.C.C.2d 112, 132 n.67 (1994).

²³ Verified Notice for Exemption, supra note 4, at 6 (emphasis in original).

was in such disrepair in April 1997 that it was impossible to conduct common carrier rail freight operations, as RVI now claims, then its representations to the Board were materially misleading, and RVI should have sought authority more promptly to have the line removed from the interstate rail network, following its receipt of authority to operate the line. Instead, it was not until May 1999 – more than 2 years after it made its commitment to carry out its common carrier obligation – that RVI sought appropriate authority from the Board to remove the common carrier obligation that was attached to the Y&S line,²⁴ thereby triggering the OFA process.²⁵ Accordingly, RVI is estopped from arguing that the Y&S line was in such poor condition when it acquired the line that it cannot be held responsible for the line’s deteriorated condition. In any event, RVI’s own evidence shows that, as of 1999 – well into RVI’s tenure as owner – 8 of the 9 crossing signals were functional.²⁶ Yet when CCPA acquired the line in January 2001, none of the signals were operational.²⁷ The record is clear that the signals became non-operational during RVI’s ownership of the line.²⁸

²⁴ RVI first sought to invoke a “class exemption” for lines over which there has been no traffic for at least 2 years. See 49 CFR 1152.50. The Board found that this line did not qualify for that treatment in view of the local shippers’ continued efforts to have rail service restored. See January 1999 Decision at 5-6.

²⁵ Of course, had RVI sought authority to abandon the line sooner (in 1997 or 1998), then CCPA’s ability to purchase the line through the OFA process would have frustrated RVI’s secret plan to remove the railroad track and ties completely and “liquidate the property in whole or in part to maximize [its] cash flow potential.” RVI v. STB, 299 F.3d at 533. Instead of seeking prompt abandonment, RVI took a number of steps to make it much more difficult and costly for CCPA to buy the line and provide rail service, presumably so that CCPA would withdraw its offer. RVI accelerated the deterioration of the line by turning off the power to the signal boxes, disconnecting at least some of the warning devices or allowing them to be disconnected, permitting (indeed encouraging) state highway crews to pave over the track at various points, refusing to perform any maintenance or take any action to protect the line from vandalism, systematically stripping the line of potentially valuable property rights that might produce revenue to support future rail operations, and entering into a “poison pill” agreement with a township that was opposed to the resumption of rail service.

²⁶ RVI Response to Joint Motion (filed Apr. 4, 2003), V.S. of George Wehner, at 8-9. See also CCPA and Central Columbiana & Pennsylvania Railway, Inc. (collectively, CCPA/CCPR) Rebuttal (filed Apr. 21, 2003) Rebuttal V.S. of Walter Gane at 4 (maintaining that “there was nothing wrong with the signals” prior to RVI’s ownership).

²⁷ See CCPA/CCPR Joint Motion (filed Jan. 21, 2003), V.S. of Walter Gane, at 2-4.

²⁸ After CCPA made a qualifying offer for the Y&S line under the OFA process, RVI delayed and sought to thwart the sale through baseless objections and proposed terms and conditions that were patently unreasonable. See RVI v. STB, 299 F.3d at 536-47; October 2000 Decision at 2-8; December 2000 Decision at 2-3. The sale could not be completed until January 2001, and then only after the Court of Appeals ordered RVI to sell the line using the deed form prescribed by the Board. See Railroad Ventures, Inc. v. STB, Nos. 00-3261, et al. (6th Cir. filed (continued . . .)

RVI cites cases that it says place limits on the maintenance obligations of unprofitable carriers and rail lines.²⁹ But those cases hold only that, in certain situations, a carrier has the right to abandon a line rather than continue service. They do not stand for the principle, as RVI claims, that, prior to abandonment, a carrier has no obligation to provide service or maintain its line. Thus, none of the cases cited by RVI undercut the general proposition that, where shippers have requested service, a carrier must either keep its track in operating condition or promptly obtain authority to be relieved of the common carrier obligation. See G.S. Roofing Prods. Co. v. STB, 143 F.3d 387, 392 (8th Cir. 1998). Nor do they undercut the court's holding in RVI v. STB, 299 F.3d at 560, that the Board acted reasonably in holding RVI accountable for the damage to the signal devices by requiring the escrow fund.

B. The FHWA and FRA Regulations

RVI also argues that our February 2007 Decision trespasses upon the primary jurisdiction of the Federal Railroad Administration (FRA) and FHWA with respect to railroad safety and safety at railroad-highway crossings, respectively.³⁰ We disagree. RVI wrongly presumes that the Board has no authority of its own regarding the safety of railroads.³¹ To the contrary, Congress established railroad safety as an important policy for the Board to consider in exercising its regulatory responsibilities over the interstate railroad network.³²

Congress vested aspects of national rail oversight in four different federal agencies: the Board (with broad general jurisdiction over railroad activities conducted over the interstate

(. . . continued)

Jan. 5, 2001) (unreported). During the entirety of the OFA process, RVI did nothing to maintain the line.

²⁹ RVI refers to cases previously cited in its Jan. 20, 2006 filing in this docket, including: Purcell v. United States, 315 U.S. 381 (1942); Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981); and Brooks-Scanlon Co. v. R.R. Comm'n of Louisiana, 251 U.S. 396 (1921), among others. RVI also cites to In re Penn Cent. Transp. Co., 382 F. Supp. 856 (E.D. Pa. 1974); New York, N.H. & H. R.R. Co. v. United States, 289 F. Supp. 418 (S.D.N.Y. 1968); and Mississippi R.R. Comm'n v. Mobile & Ohio R.R. Co., 244 U.S. 388 (1917), among others.

³⁰ Response at 7-11.

³¹ Response at 10. The FRA decision cited by RVI, Petition of Paducah & Louisville Railway, No. FRA-1999-6138 (Jan. 13, 2000), is not on point. The issue addressed by the Administrator in that case was whether the FRA had any authority over nonsafety operating practices of railroads, not whether the STB had any authority over rail carrier safety.

³² In the Rail Transportation Policy, 49 U.S.C. 10101, Congress has directed the Board, among other things, "(3) to promote a safe and efficient rail transportation system . . . ; (8) to operate transportation facilities and equipment without detriment to the public health and safety; and (9) to encourage honest and efficient management of railroads."

railroad network); FRA (with primary jurisdiction over rail safety matters); FHWA (with authority to set safety standards for rail-highway crossings and warning devices); and the Department of Homeland Security (for national security matters).³³ The jurisdiction and regulatory responsibilities of these agencies necessarily overlap to some degree, and, where they do, the agencies coordinate and cooperate with each other as necessary and appropriate.³⁴ But the fact that FRA safety regulations are implicated in determining that RVI disregarded its common carrier obligation does not divest the Board of authority under the Interstate Commerce Act to remedy the violation. Nor is it necessary to refer any issues to FRA or FHWA where, as here, the Board is not faced with technical questions regarding railroad safety or the construction of safety devices at railroad-highway crossings.³⁵

Our actions here are entirely compatible with the regulatory schemes administered by FRA and FHWA. FRA regulations placed the obligation for the maintenance and repair of the railroad crossing signals on the Y&S line squarely on RVI, as the railroad that owned the line and had the responsibility to operate the line. See 49 CFR Part 234. This included the obligation “to adjust, repair or replace faulty components in highway-rail grade crossing warning systems without undue delay.” 49 CFR 234.207(a) (emphasis added).³⁶ FHWA also recognizes that the maintenance obligation for safety devices at crossings falls on the railroads.³⁷ Our decision here

³³ See CSX Transportation, Inc. – Petition For Declaratory Order, STB Finance Docket No. 34662, slip op. at 4 (STB served May. 3, 2005); CSX Transportation, Inc. – Petition For Declaratory Order, STB Finance Docket No. 34662, slip op. at 7 (STB served Mar. 14, 2005) (holding that both the Board and FRA have jurisdiction over railroad safety).

³⁴ See National R.R. Passenger Corp. – Petition – Weight of Rail, 4 S.T.B. 416 (1999) (Board sought the FRA’s expertise to resolve a technical dispute “over the appropriate weight [115-pound or 132-pound] of continuous welded rail that must be installed on a specified line in order to ensure that Amtrak would be able to operate its trains safely at speeds of up to 79 miles per hour.”).

³⁵ See Granite State Concrete Co. v. STB, 417 F.3d 85, 95 (1st Cir. 2005).

³⁶ As FRA states on its website (www.fra.dot.gov/us/printcontent/86, emphasis added): “Railroad companies own and maintain the tracks, and generally own the property (rights-of-way) to either side of the tracks. At grade crossings, they generally install and maintain the tracks, the roadway surface between and around the rails, and traffic control devices on their rights-of-way.”

³⁷ “The railroad-highway grade crossing is unique to other highway facilities in that railroads design, install, operate and maintain the traffic control devices located at the crossing. Even though a large portion of the cost of design and construction of crossings, including traffic control devices, is assumed by the public, current procedures place maintenance responsibility with the railroads.” U.S. Department of Transportation, Federal Highway Administration, Railroad-Highway Grade Crossing Handbook 185 (Revised 2nd ed. August 2007) (emphasis added).

simply finds that RVI, as a common carrier, had a duty to maintain its rail line in accordance with the rules and regulations of the FRA, and that it failed to do so. The Board has the authority and the responsibility to enforce RVI's obligation as a common carrier under the Interstate Commerce Act separate and apart from any action or regulation of the FRA.

Likewise, we do not find any conflict between our action and the policies of the FHWA regarding the funding of railroad-highway crossing projects. We set aside \$375,000 from the proceeds of the sale of the Y&S line in order to hold RVI financially responsible for the repair of the damage it caused by its "egregious conduct"³⁸ in failing to maintain the line during the course of its ownership and taking actions to accelerate the line's deterioration. We clarified that repairs covered by the set-aside fund included capital expenditures required to restore the line to service.³⁹

RVI argues that our action is inconsistent with FHWA's funding regulation at 23 CFR 646.210. But that regulation, on its face, does not apply to the Board or other federal agencies. Section 646.210 was promulgated by FHWA as part of its implementation of the Rail-Highway Crossings Program established by Congress in the Highway Safety Act of 1973, Pub. L. No. 93-87, 87 Stat. 282, codified as amended at 23 U.S.C. 130. That program provides states with federal funds "for the elimination of the hazards of railway-highway crossings." 23 U.S.C. 130(a). Under 23 U.S.C. 130(b) and (c), railroads are liable to the United States for the value of any benefit received as a result of federally funded railroad-highway improvement projects as determined by the Secretary of Transportation. FHWA, acting under delegated authority from the Secretary, has determined that projects for grade crossing improvements are generally "of no ascertainable net benefit to the railroads and there shall be no required railroad share of the costs." 23 CFR 646.210(b)(1). Since the determination of net benefit to and the resulting contribution by railroad to federally funded crossing-improvement projects are federal decisions, section 646.210 preempts the states from making their own conflicting determinations of these benefits.

The February 2007 Decision does not reflect any conflicting view regarding the net benefit to railroads from restoring crossing signals. Rather, it is based on RVI's failure to maintain the line during the period of its ownership in disregard of RVI's common carrier obligation. RVI has not cited any decision or other FHWA interpretation to suggest that 23 CFR 646.210 reflects a federal policy that allows railroads effectively to transfer their maintenance obligations to the taxpayers of the United States. To the contrary, FHWA has made it clear that, notwithstanding the availability of funds for designing and constructing crossings and traffic control devices, the maintenance responsibility for keeping existing crossings in good operating condition is on the rail carrier,⁴⁰ and RVI shirked that responsibility.

³⁸ November 2001 Decision at 6.

³⁹ Id. at 6-7.

⁴⁰ See Railroad-Highway Grade Crossing Handbook, *supra* note 37, at 185.

While FHWA's regulation preempts state laws that require railroads to share in the cost of federally funded projects for the elimination of hazards at railroad-highway crossings, it does not supersede the requirement that carriers keep their railroad lines in sufficiently good condition to comply with their common carrier obligation under 49 U.S.C. 11101 to provide service on reasonable request. Nor does it prevent the Board from addressing RVI's unlawful behavior by requiring RVI to bear some financial responsibility for its failure to maintain the crossings on the Y&S line in working order during the period of its ownership. Under RVI's interpretation of the FHWA regulation, unscrupulous carriers could shift maintenance responsibility to taxpayers by necessitating the replacement of inadequately maintained traffic control devices at the public's expense. There is no reason to believe that the intent of 23 CFR 646.210 was to excuse rail carriers from bearing financial responsibility for the cost of restoring rail-highway crossings to working order where the crossings were at one time safe but became hazardous as a result of the railroad's neglect or refusal to maintain the crossing signals. As noted in the November 2001 Decision (at 6-7), "expenditures necessitated by RVI'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 recovered from the escrowed funds." In the absence of any showing by RVI that 23 CFR 636.210 is intended to allow rail carriers to shift their maintenance responsibility to federal taxpayers, we see no conflict between our actions and FHWA policy. Rather, we are enforcing consistent federal policy requiring common carrier railroads to maintain their rail lines properly unless and until they are lawfully abandoned.

C. RVI's Due Process Claim

Finally, there is no merit to RVI's claim that it has been denied due process. RVI points to the Board's determination in the February 2007 Decision not to consider the \$149,872 in repairs funded by ORDC that were not timely submitted. As explained in the February 2007 Decision, CCPA's untimely evidence with regard to the \$149,827 in additional expenditures did not satisfy the section 722(c) criteria for reconsideration: changed circumstances, material error, or new evidence.⁴¹ By contrast, the evidence of the more than \$759,000 that ORDC spent on signal repairs was submitted in a timely manner, and the Board materially erred by initially failing to consider this evidence. In any event, because RVI had an opportunity to respond to the February 2007 Decision, it has been afforded due process.

⁴¹ These additional expenditures were advanced by ORDC because CCPA could not obtain disbursements from the escrow fund due to RVI's interference. Although CCPA did not include a specific accounting for these expenditures in its initial submission, it did provide evidence of the difficulties caused by RVI's obstruction of the timely release of funds from the escrow account that led to resignation of the escrow agent and the resulting need to obtain the money for these expenditures through other means.

D. Conclusion

The conclusion in the February 2007 Decision that the costs of the repairs to the crossing signals in question should be offset against the \$375,000 in the set-aside fund is appropriate. RVI caused the damage; it blocked the use of the escrowed funds to repair the damage; and it should not profit from the fact that government funds had to be used to repair some of that damage. Whether CCPA may retain those funds or whether ORDC or FHWA must be reimbursed the portion forfeited by RVI is a matter for those parties to sort through, not this agency. A copy of this decision will be served on ORDC and FHWA.⁴²

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The February 2007 Decision is reaffirmed. CCPA is not required to return to RVI any portion of the \$375,000 from the set-aside fund.
2. This decision is effective on May 28, 2008.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan
Acting Secretary

⁴² Even if FHWA determines that it has no recourse against CCPA or decides not to pursue any action for return of these funds, RVI is not aggrieved. Although this outcome could be seen as a windfall for CCPA, the more important policy is that RVI—not CCPA, the taxpayers of Ohio, or anyone else (including the federal government) — should bear the financial responsibility for the damage it caused (at least up to the \$375,000 limit of the set-aside fund). If RVI were allowed to keep this money simply because ORDC was able to convince FHWA to fund repairs for damage that RVI caused, then RVI would be receiving a windfall. Given RVI's past conduct as owner of the line, this would be an unconscionable outcome and contrary to the Rail Transportation Policy of 49 U.S.C. 10101.