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SERVICE DATE – FEBRUARY 15, 2007

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: February 13, 2007

This decision further addresses 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 by Railroad Ventures, Inc. (RVI) to the Columbiana County Port Authority (CCPA) under 49 U.S.C. 10904. Based on our consideration of the submissions filed by RVI and CCPA in response to the Board's decision served December 15, 2005 (December 2005 Decision), and our further review of the entire record of this dispute, in this decision we tentatively conclude that the Board materially erred in the decision served December 13, 2004 (December 2004 Decision), and in the December 2005 Decision, in requiring CCPA to repay any portion of those set-aside funds to RVI. We will, however, give the parties a final opportunity to comment on this tentative conclusion before taking any final action.

BACKGROUND

By decision served on January 7, 2000, the Board set the terms and conditions for the sale by RVI to CCPA of a 35.7-mile line of railroad between Youngstown, OH, and Darlington, PA, and a connecting 1-mile segment near Negley, OH (collectively, the Line).¹ Subsequently, the Board 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. In particular, the Board found, in a decision served on October 4, 2000 (October 2000 Decision), that RVI had allowed various crossings to be paved over and crossing signals to be disconnected.²

Accordingly, in the October 2000 Decision, the Board modified the terms of the OFA sale by adding a requirement that RVI place \$375,000 of the proceeds from the sale into an

¹ This decision was affirmed in Railroad Ventures, Inc. v. STB, 299 F.3d 523 (6th Cir. 2002) (RVI I).

² October 2000 Decision at 19. The October 2000 Decision also was affirmed in RVI I.

interest-bearing escrow account to cover the costs of repairs attributable to RVI's neglect of the line during its ownership. The amount of the funds placed in escrow derived from CCPA's estimate that it would cost approximately \$350,000 to remedy the damage caused by RVI, and the request of the Ohio Rail Development Commission (ORDC), a state agency whose mission is to promote economic development and rail branch-line preservation, to establish an escrow fund of at least \$25,000 to ensure that RVI would meet its commitment to state and local authorities to restore covered grade crossings and reconnect signal equipment.

The sale was completed on January 24, 2001. Soon afterward, CCPA engaged Central Columbiana & Pennsylvania Railway, Inc. (CCPR) to arrange for and oversee the necessary repairs, as well as serve as the line's operator,³ and repairs were commenced. Because of interference by RVI, however, the escrow agent was unable to make disbursements from the escrow account to cover the cost of repairs. Accordingly, ORDC provided \$177,210 to cover the costs of certain initial repairs.

Citing the high potential for litigation, the escrow agent resigned in mid-2001. CCPA then requested that ORDC take on the role of escrow agent, but RVI objected (despite earlier urging ORDC to serve in this role) and alleged a conspiracy between CCPA and ORDC.

³ On June 14, 2004, CCPR filed for bankruptcy protection. In The Ohio and Pennsylvania Railroad—Acquisition and Operation Exemption—Rail Lines of Columbiana County Port Authority in Mahoning and Columbiana Counties, OH and Beaver County, PA, STB Finance Docket No. 34632 (STB served Dec. 21, 2004), the Ohio and Pennsylvania Railroad was authorized to become the line's operator. In November 2006, several notices of exemption were filed which, taken together, contemplate that Eastern States Railroad, LLC (ESR) would acquire operating and lease rights over the Line (which lease includes an agreement to acquire the Line) and that Youngstown & Southeastern Railway Company, a new non-carrier affiliate of Indiana Boxcar Corporation, would sublease the line from ESR and operate it. See Eastern States R.R.—Exemption For Purchase Of Lease, Agreement To Acquire Leased Line, and Assignment Of Operating Rights—Central Columbiana & Pennsylvania Ry., Inc. and Columbiana County Port Auth., STB Finance Docket No. 34934 (notice of exemption filed Nov. 22, 2006); Indiana Boxcar Corp.—Continuance In Control Exemption—Youngstown & Southeastern Ry. Co., STB Finance Docket No. 34961 (notice of exemption filed Nov. 22, 2006); Youngstown & Southeastern Ry. Co.—Sublease and Operation Exemption—Lines of Eastern States R.R., STB Finance Docket No. 34962 (notice of exemption filed Nov. 22, 2006).

Because the escrow account arrangement had proven unworkable, the Board found, in a decision served on November 9, 2001 (November 2001 Decision), that “the best way to ensure that RVI does not interfere further with the orderly administration of these funds and the accomplishment of our original objectives in setting up the fund is to allow CCPA to manage the funds directly.” November 2001 Decision at 7. Accordingly, the Board ordered the escrow agent to transfer the \$375,000 directly to CCPA. However, to ensure that these funds were used efficiently and to remedy damage caused by RVI, the Board also directed CCPA to:

- (1) keep these funds in a separate account; (2) keep account of all funds expended for repairs, including evidence of competitive bids for each repair project (although we will allow for separate repairs to be grouped for the bidding process); and (3) complete all repairs for which escrow funds are to be used within 270 days from the effective date of this decision.

Id. The Board further provided that funds expended in this fashion would be subject to challenge by RVI only for fraud. Id.⁴

Repairs were performed and CCPA periodically drew down from the set-aside fund until it was exhausted. In January 2003, CCPA and CCPR submitted a Joint Motion Seeking Final Closure of the Escrow Account (Closure Motion) along with documentation purportedly in support of its expenditures from the set-aside fund, as well as documentation of certain other repairs to the line that were paid for not from the set-aside fund but rather through state or federal grants. However, CCPA/CCPR failed to produce records justifying some of the expenditures from the set-aside fund, failed to show that competitive bidding had been used in every instance, and failed to show that some of the repairs were to remedy damage caused by RVI. Accordingly, the Board found that it could not approve some of the claimed expenditures and, in a decision served on December 13, 2004 (December 2004 Decision), directed that CCPA refund to RVI \$217,282 of the \$375,000 set-aside fund.⁵

On January 3, 2005, as supplemented on January 4, 2005, CCPA (together with CCPR) filed a joint petition for reopening and reconsideration of the December 2004 Decision (Reconsideration Petition). CCPA argued that it had complied with the directives in the November 2001 Decision, and it included with the Reconsideration Petition, among other things,

⁴ We refer to the \$375,000 transferred by the escrow agent to CCPA and managed thereafter by CCPA pursuant to the November 2001 Decision as the “set-aside fund,” to distinguish it from the original escrow account it replaced. In Railroad Ventures, Inc. v. STB, 70 F. App. 239 (6th Cir. 2003) (RVI II), the United States Court of Appeals for the Sixth Circuit dismissed as unripe RVI’s challenge to the Board’s establishment of the set-aside fund and rejected RVI’s challenges to various other elements of the November 2001 Decision.

⁵ In the December 2005 Decision, the Board clarified that CCPA is the party responsible for refunding any monies to RVI. Accordingly, in discussing the remaining issues, we refer solely to CCPA.

documentation pertaining to \$149,872 of expenditures that had been funded by ORDC in 2001 while the original escrow account procedures were being disputed. CCPA claimed that the \$149,872 of expenditures would have been chargeable against the original escrow account but for RVI's interference with the escrow agent's disbursement of the funds and argued that RVI should be held liable for payment of those ORDC-funded repairs.⁶ CCPA also asserted that overhead costs related to those solely state-funded repairs should be payable from the set-aside fund.⁷ ORDC filed a pleading supporting the Reconsideration Petition, claiming that, if the refund to RVI were upheld, it was possible that this money would come indirectly from ORDC. RVI filed a response to the Reconsideration Petition on February 28, 2005.

In the December 2005 Decision, the Board concluded that CCPA had, in fact, adequately complied with the Board's directives with respect to \$8,531 in previously disallowed repair overhead expenses related to vegetation spraying and brush cutting. The Board also preliminarily found that, despite CCPA's failure to argue originally in the Closure Motion that the \$149,872 of ORDC-funded expenditures should be offset against the repair fund, that failure was outweighed by a countervailing public interest in ensuring that ORDC and the taxpayers of Ohio not bear expenses caused by RVI's negligence of the line and interference with the escrow account. Accordingly, the Board found that the \$217,282 refund to RVI ordered in the December 2004 Decision should be reduced by \$8,531 and, tentatively, by an additional \$149,872, resulting in a possible lowered refund of \$58,879. However, the Board provided RVI an opportunity to contest the tentative \$149,872 reduction.

After obtaining an extension of time, RVI timely submitted its response to the December 2005 Decision on January 20, 2006, and supplemented one of its witness's exhibits on February 6, 2006. In its response, RVI argued that, under the Board's statutes and regulations, the requested \$149,872 offset is not a proper matter for reconsideration because that evidence could have been, but was not, proffered with the CCPA/CCPR Closure Motion in January 2003. In addition, RVI claimed that any concern that ORDC and the Ohio taxpayers would be unfairly burdened with these expenses is unfounded, and thus, there is no countervailing public interest to be considered. RVI further asserted that, with one small exception, there is no evidence that any of the \$149,872 in claimed expenditures paid with grants from ORDC was to repair damage created by RVI; according to RVI, the \$83,340 attributed to salaries is not fully documented, as the submitted payroll records do not show the hours the employees devoted to RVI-related repair projects, and most of the \$66,532 claimed for materials is either unsupported by invoices or the invoices fail to demonstrate that the materials were used for RVI-created problems.

CCPA filed a reply to RVI's response on February 9, 2006.⁸ CCPA argued that RVI's

⁶ Reconsideration Petition at 4 (RVI should not be permitted to "escape liability for payment of repairs paid for by ORDC.").

⁷ Id. at 6 and V.S. of Tracy Drake ¶ 14.

⁸ As part of its submission on January 20, 2006, RVI included an anticipatory objection to any subsequent filing by CCPA/CCPR, and following CCPA's February 9, 2006 submission, (. . . continued)

submission is a collateral attack on the decision by ORDC to approve payment of the \$149,872 in funds, and that the Board “should not second guess ORDC’s determination.” CCPA also asserted that some \$752,221 in signal replacement costs should be applied against the \$375,000 fund, thus eliminating any reimbursement to RVI.

DISCUSSION AND CONCLUSIONS

The Reconsideration Standard

Under the Board’s governing statute and implementing regulations, the Board may reopen and reconsider a prior Board decision on the ground of material error, new evidence, or substantially changed circumstances. See 49 U.S.C. 722(c); 49 CFR 1115.3(b). As RVI correctly points out, the Board does not have the power to reopen and reconsider a prior Board action on any other ground. See BNSF Ry. Co. v. STB, 453 F.3d 473, 479 (D.C. Cir. 2006). Moreover, evidence that was reasonably available to the parties before the agency’s original decision is not new evidence for purposes of seeking agency reconsideration. See Platnick Bros., Inc. v. Norfolk & Western Ry. Co., 367 I.C.C. 782, 785 (1983); Friends of Sierra R.R. Inc. v. ICC, 881 F.2d 663, 667 (9th Cir. 1989). This limitation serves the important purpose of requiring parties before the Board to marshal all their available evidence and present all their arguments before the Board issues its decision, not after, thus avoiding (to the extent possible) unnecessarily protracted and piecemeal administrative adjudication.

Reconsideration of \$149,872 in ORDC-funded expenditures.

We agree with RVI that the Board erred in the December 2005 Decision in considering newly introduced evidence pertaining to the \$149,872 in ORDC expenditures on a public interest ground. As RVI correctly points out, this evidence does not meet any of the three permissible grounds for reconsideration. Petitioners do not argue that there are changed circumstances relating to the \$149,872 in expenses, and it is clear that there are none, as all of those expenditures pertain to repairs undertaken prior to November 9, 2001, and thus pre-date the January 2003 Closure Motion and the December 2004 Decision. Further, because all of the documents relating to the \$149,872 in expenditures pre-date the Reconsideration Petition and the December 2004 Decision, they are not new evidence.⁹ Finally, the Board had committed no

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RVI asked, in a letter filed February 24, 2006, that CCPA’s submission be stricken. In the interest of a full airing of views on this contentious issue, however, we will accept CCPA’s submission.

⁹ While CCPA stated (Closure Motion at 2) that it included with the Closure Motion evidence pertaining to expenses paid with government grants (because, it said, “it is virtually impossible” to link many of the repair expenditures to a particular spot on the line), much of the documentation regarding the \$149,872 (including the salary documentation and some of the materials invoices) was not, in fact, included with the Closure Motion (although all of it could have been). A few documents regarding the \$149,872 (for materials) were submitted with the

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error in the December 2004 Decision with respect to the \$149,872 in expenses because much of the documentation of those expenses that CCPA now relies upon was not submitted to the Board at that time, even though it could have been.¹⁰

In sum, there was no proper basis for the Board to consider CCPA's newly raised claim as to the \$149,872 of grant-funded repairs. Therefore, we must reverse that portion of the December 2005 Decision.

Material Error in the December 2004 and 2005 Decisions.

In reviewing the record developed prior to the December 2004 Decision regarding the disposition of the set-aside fund, we conclude that the Board materially erred in that decision and the December 2005 Decision in regard to disposition of the set-aside funds. Specifically, we believe that it was erroneous for the Board to order CCPA to refund any of the \$375,000 set-aside fund to RVI, because the record clearly showed that more than that amount was spent (by CCPA and ORDC collectively) to fix damage that was clearly attributable to RVI and for which RVI must be held accountable.

In the October 2000 Decision (at 19), the Board found that RVI had shown a “blatant disregard of its common carrier obligation to provide service,” and had permitted various grade crossings to be paved over and signals at crossings to be disconnected and fall into disrepair. The Board concluded that, because of RVI's wrongful conduct, RVI, rather than CCPA or anyone else, should bear the cost of remedying the damage it had allowed to occur. In the November 2001 Decision (at 6), the Board further clarified that RVI's liability extends not just to repairing damage that RVI actively invited, but also that which it passively permitted. The original escrow account (in the October 2000 Decision), and later the set-aside fund that replaced it (in the November 2001 Decision), were created as a means to an end—that is, a mechanism for accomplishing the stated goal to “ensure that RVI pays”¹¹ (up to a limit of \$375,000) for repairs resulting from the damage it had permitted, such as damage to paved-over grade crossings and deteriorated signals.

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Closure Motion, but only on reconsideration does CCPA identify and package those invoices as those submitted to ORDC for payment and argue that these materials could have been paid for out of the set-aside fund.

¹⁰ For the same reasons, CCPA's claim as to overhead costs related to the \$149,872 does not provide a permissible basis for reconsideration, as all of the newly proffered evidence of the \$149,872 in invoices submitted to ORDC was available to CCPA before the Closure Motion was filed.

¹¹ October 2000 Decision at 19 (emphasis supplied).

In the January 2003 Closure Motion seeking Board approval of the expenditures from the set-aside fund, CCPA/CCPR provided documentation related not only to expenditures for which set-aside funds were used, but also to repairs that were funded by government grants (including money from ORDC). In reviewing the repair documentation submitted prior to the December 2004 Decision, the Board erred by focusing too narrowly on evidence pertaining to expenditures drawn from the set-aside fund itself while largely ignoring the additional evidence of repairs undertaken with government grant funding that was necessary to remedy the damage for which RVI was to bear responsibility. The Board overlooked clear evidence that was in the record at the time 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.

That evidence included invoices from GE Transportation Systems Global Signaling, LLC (GE Transportation) documenting expenditures by ORDC to replace deteriorated signals at eight public crossings along the Line. At least \$759,437 in signal replacement costs are adequately documented as remedying damage traceable to RVI. The invoices from GE Transportation clearly identify the public crossings where the signals were installed,¹² and clearly identify the

¹² Included in the documentation that accompanied the CCPA/CCPR Closure Motion in January 2003 were invoices for signal installations at 9 public crossings: Indianola Blvd., Boardman, OH; Meadowbrook Avenue, Boardman, OH; Western Reserve Rd., Boardman, OH; Park Avenue, Columbiana, OH; State Rt. 164, North Lima, OH; State Rt. 7 (Market St.), North Lima, OH; State Rt. 7 (Depot St.), Rogers, OH; State Rt. 625 (Midlothian Blvd.), Youngstown, OH; and Indianola Avenue, Youngstown, OH. The total invoiced cost of those 9 projects was \$841,915.

The invoices and the testimony of CCPR witness Timothy K. Robbins indicate that one of those 9 signal projects was not a rehabilitation project (i.e., replacing previously existing signals with new ones), but rather an installation of signals for the first time at a crossing where none previously had existed. A handwritten notation on the GE Transportation invoice appears to indicate that the new signal installation was at Indianola Ave., Youngstown, OH (invoiced at \$89,694), which would result in a total cost of \$752,221 for the 8 remaining signal projects where the new signals replaced signals that RVI had allowed to fall into disrepair. However, it appears that this handwritten notation identified the wrong crossing: Mr. Robbins identified the crossing where signals were installed for the first time as Western Reserve Rd. in Boardman Township, OH (invoiced at \$82,478), not Indianola Avenue, which would make the total expense for the other 8 “rehabilitation” crossings \$759,437, not \$752,221. Correspondence from ORDC to CCPR on April 21, 2000 appears to confirm this, indicating that Western Reserve Road would be a “new” signal installation, while a chart summarizing RVI’s own crossing expense estimates indicates that Indianola Avenue would require “reactivation” of existing signals. Thus, it appears that the signal system that should be excluded as a “new” installation (rather than a replacement) is Western Reserve Rd., making the total expenditure for the 8 “replacement” signals \$759,437. In any event, although there is some ambiguity in the record as to precisely which one of the 9 invoiced signal installations should be excluded as a new installation rather than a rehabilitation, it is irrelevant to our analysis or the outcome here. Even excluding, for the sake of argument, both Indianola Avenue and Western Reserve Road, the

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expenditures as specifically for the installation of crossing signals. Further, the evidence indicates that at least \$759,437 was spent to replace signals at crossings where RVI had allowed the existing signals to deteriorate. Thus, the ORDC funding remedied a harm (deterioration of crossing signals) that had been expressly found attributable to RVI.

Although these signal replacement expenditures were not drawn from the set-aside fund, they could have been. And the fact that those costs were paid for by ORDC does not alter the underlying policy determination that RVI—not CCPA, the taxpayers of Ohio, or anyone else—ultimately should bear the financial responsibility for those expenses, up to the \$375,000 limit established in the October 2000 Decision. Had RVI not permitted the crossing signal systems to deteriorate, the grant funds that were used to replace them could have been used to fund other needed rail projects elsewhere.

For the Board to require CCPA to repay any amount to RVI would undermine the fundamental purpose of having established the escrow and set-aside funds: to ensure that RVI (rather than CCPA, ORDC, or anyone else) bears financial responsibility for the damage done by RVI, up to the \$375,000 limit. A refund would permit RVI to profit from precisely the kind of wrongful behavior for which the Board intended to hold RVI accountable. Because 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, the Board materially erred in December 2004 Decision and December 2005 Decision in ordering the refund of any set-aside funds to RVI.

We recognize that, in their Closure Motion, CCPA/CCPR did not specifically ask the Board to review or approve repair projects paid for with government grants rather than with the set-aside fund itself or specifically ask the Board to offset any such expenditures against the set-aside fund in the event that any of the claimed expenditures from the set-aside fund were disallowed. And generally, it would not be an error not to take an action that has not been requested or to decline to grant relief that has not been sought.¹³ However, the Board is not a prisoner of the parties’ submissions.¹⁴ In the October 2000 Decision, the Board found that RVI

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remaining signal replacement costs still would be far more than enough to exhaust RVI’s full \$375,000 in liability.

¹³ See, e.g., CSX Corp., et al.—Control and Operating Leases/Agreements—Conrail Inc. et al., 3 S.T.B. 764, 783 (1998) (no material error in failing to except a particular contract from the Board’s condition permitting the override of contractual nonassignability clauses, when the carrier in question did not request such an exception).

¹⁴ Indeed the Board has an independent obligation to use its judgment to advance the goals of the national Rail Transportation Policy. Baltimore & Ohio R.R. v. United States, 386 U.S. 372, 430 (1967) (Brennan, J., concurring). Here, as noted in the December 2005 Decision, holding RVI accountable for its own inappropriate conduct advances the Rail Transportation Policy by promoting the “continuation of a sound rail transportation system . . . to meet the needs

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should bear the financial responsibility for certain types of repairs resulting from its neglect of the Line. The set-aside fund (and the escrow account before it) were means to achieve that end. But it was not the Board's intention to permit RVI to escape liability if other funds were applied to remedy the damage RVI caused.

RVI has argued that in creating the original escrow account in 2000 the Board intended that the escrowed funds (and thus the later set-aside funds) could be used only to restore crossings to the status quo where RVI had permitted crossings to be paved over and signals disconnected, and that therefore RVI was not liable for costs "to replace existing signal equipment or upgrade signals."¹⁵ But as noted in the December 2004 Decision (at 10), RVI reads the Board's intent too narrowly. Although the Board referred to one of the expressly permitted purposes for the original escrow account as "reconnecting signal equipment," October 2000 Decision at 19, that, of course, presumed that the signals in question could simply be reconnected in order to maintain the crossing protection appropriate for the operation of the public crossings that RVI had failed to maintain. As CCPA/CCPR testified, however, in addition to certain electrical work needed initially to restore power to the existing signals,¹⁶ those existing crossing signal systems ultimately had to be replaced due to their deteriorated condition caused by RVI's lack of maintenance.¹⁷ The replacement of crossing warning devices that RVI had permitted to deteriorate is clearly within the scope of the liability the Board intended to impose on RVI as a result of its neglect of the Line. 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.

Moreover, the record does not indicate that the level of expenditures for the replacement crossing signal systems was excessive. To the contrary, the GE proposal was the lower of two competing bids. The record includes the GE bid proposal (from GE Harris Harmon DJR Services, LLC, dated June 22, 2001), which matches the amounts later invoiced by GE Transportation for the completed work; a competing bid from Balfour Beatty Rail Systems, Inc., dated June 25, 2001, reflecting a higher total bid for signals at the same crossings; and a memorandum from Bud Gane of CCPR to Mike Forte of ORDC, dated July 2, 2001, indicating that GE had been selected as the low bidder. The GE bid proposal did include certain electronic

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of the public," 49 U.S.C. 10101(4) and "encourag[ing] honest and efficient management of railroads," 49 U.S.C. 10101(9).

¹⁵ Reply of Railroad Ventures, Inc. To Columbian County Port Authority's Request For Clarification And Cease And Desist Order at 5 (filed May 31, 2001).

¹⁶ See V.S. of Walter J. Gane (filed Jan. 21, 2003).

¹⁷ See, e.g., Closure Motion, V.S. of Timothy K. Robbins at ¶¶ 8, 10; see also ORDC Petition to Intervene at 3 (filed June 21, 2005).

components beyond those called for in the project specifications, which GE considered “important to the proper and safe operation” of the crossing signal systems; but the addition of those components did not increase RVI’s liability. The cost of the project clearly would have vastly exceeded RVI’s liability cap of \$375,000 even without those components, as indicated by the fact that the competing bid by Balfour Beatty Rail Systems for the 8 crossings where deteriorated signals were replaced was even higher than GE’s bid even without the extra components that GE included.

CONCLUSION

In sum, the determination in the December 2005 Decision to consider CCPA’s newly introduced evidence of \$149,872 in claimed expenditures was not properly based on one of the three reconsideration criteria set forth by 49 U.S.C. 722(c) and that portion of the December 2005 Decision is reversed. However, we conclude that, in disallowing certain claimed expenditures from the set-aside fund in the December 2004 and December 2005 Decisions, the Board erred by failing to recognize that those disallowed expenditures were more than offset by other, clearly documented expenditures funded through ORDC that were eligible for payment from the set-aside fund and resulted from RVI’s neglect of the Line. Because the record that existed prior to the December 2004 Decision clearly shows that the cost of remedying the damage to the Line attributable to RVI, including the deterioration of crossing signals, far exceeded the full amount of the \$375,000 set-aside fund, it was error for the Board to have concluded in those decisions that RVI was entitled to repayment of any portion of those funds. Repayment of any funds to RVI would undermine the Board’s October 2000 policy determination that RVI, not CCPA or the taxpayers of Ohio, should bear financial liability for those costs, up to the \$375,000 limit established at CCPA’s and ORDC’s request.

We note that RVI has benefited from CCPA’s underestimation of the amount that would be needed to fix the damage caused by RVI. CCPA’s estimate of \$350,000 turned out to have been much lower than the amount actually needed (which included not only the over-\$750,000 spent by ORDC but also the additional expenditures by CCPA that the Board found, in the December 2004 and December 2005 Decisions, were appropriately drawn from the set-aside fund, totaling \$166,249). Thus, RVI has contributed much less money than was actually needed to remedy the damage it caused.

In determining that RVI is not entitled to a refund of any portion of the set-aside fund, we need not address whether CCPA should repay ORDC from the set-aside fund for repairs funded by ORDC. That is a matter for ORDC and CCPA to resolve between themselves. Regardless of whether any portion of the set-aside fund ultimately should be credited to ORDC, it is clear that none should be refunded to RVI.

Because our conclusion here rests in part on grounds different from those upon which the Board invited comment in the December 2005 Decision, we will afford RVI an opportunity to submit comments, limited to the signal replacement issue we discuss here, within 20 days of the service date of this decision. If RVI files such comments, CCPA will be permitted to file a reply within 40 days of the service date of this decision.

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

It is ordered:

1. RVI's motion to strike CCPA's reply is denied.
2. The December 2005 Decision is reversed to the extent that it had considered newly introduced evidence pertaining to the \$149,872 in ORDC expenditures, as discussed in this decision.
3. RVI may submit a pleading no later than March 7, 2007, limited to addressing the signal restoration expenditures discussed in this decision. If RVI submits such a pleading, CCPA may, no later than March 27, 2007, submit a reply limited to the matters discussed in RVI's pleading.
4. If RVI does not submit a pleading as permitted under the preceding paragraph, then on March 8, 2007, this decision shall become a final order of the Board, and the December 2004 Decision and the December 2005 Decision shall be modified to eliminate repayment of any portion of the \$375,000 set-aside fund to RVI.
5. This decision is effective on its service date.

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

Vernon A. Williams
Secretary