

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: December 14, 2005

This decision addresses two petitions related to the terms set by the Board for the purchase by Columbiana County Port Authority (CCPA) of a rail line from Railroad Ventures, Inc. (RVI), pursuant to the offer of financial assistance (OFA) provisions of 49 U.S.C. 10904 and 49 CFR 1152.27. The first is a petition for reconsideration filed by CCPA and the Central Columbiana & Pennsylvania Railway, Inc. (CCPR), CCPA's former operator of the line, seeking modification of the Board's December 13, 2004 decision (December 2004 Decision) in this proceeding. The second is a petition filed by CCPA for a declaratory order to clarify two issues pertaining to its purchase of the line.

For the reasons set forth below, we deny the petition for reconsideration in part, and grant it in part. With respect to the other petition, we clarify the issues as discussed below, but we find no need to institute a separate declaratory order proceeding.

BACKGROUND

By a decision served on January 7, 2000 (January 2000 Decision), *aff'd*, Railroad Ventures, Inc. v. STB, 299 F.3d 523 (6th Cir. 2002) (RVI I), the Board set the terms and conditions for the sale from RVI to CCPA of a 35.7-mile line of railroad extending from milepost 0.0 at Youngstown, OH, to milepost 35.7 at Darlington, PA, and a connecting 1-mile segment near Negley, OH (the Youngstown-Darlington line). In the initial, set-terms phase of the proceeding, CCPA had objected that RVI, in anticipation of the forced sale, had transferred many licensing agreements concerning the line to Venture Properties of Boardman, Inc. (VPB), an affiliate of RVI. CCPA had sought to have RVI's transfer of the licenses rejected, but the Board found "no evidence of record of a binding agreement that could obstruct future rail operations," and thus denied CCPA's request. See January 2000 Decision at 7. In determining the net liquidation value (NLV) of the land, the Board allowed RVI and VPB to retain 156 of these licensing agreements because CCPA had been made aware of those transfers by its appraiser, Mr. Rossi. However, the Board reduced the valuation of the line by \$100,000, which represented Mr. Rossi's assessment of the present value of the income stream for these 156 licenses. The Board directed RVI to transfer to CCPA all other licensing agreements concerning this line.

Subsequent to the January 2000 Decision, but prior to the completion of the sale, CCPA submitted newly discovered evidence that RVI had sold the rail, ties, and ballast on the Youngstown-Darlington line in 1996 — before RVI had lawfully acquired the line — to Kovalchick Corporation (Kovalchick) for \$400,000. This amount was less than the net salvage value (NSV) of the track materials the Board had computed in the January 2000 Decision.

In a decision served on October 4, 2000 (October 2000 Decision),<sup>1</sup> the Board concluded that RVI had sold to Kovalchick only the future right to remove track materials from the line, and the Board reduced its calculation of the NSV of the track materials to \$400,000 based on this new evidence. (The Board increased its calculation of the net liquidation value (NLV) of the land for other reasons.) In the October 2000 Decision, the Board also modified the terms of the OFA sale by adding a requirement that RVI place \$375,000 of the proceeds of the sale into an interest-bearing escrow account for CCPA to use to cover the costs of repairs attributable to RVI's neglect of the line during its ownership. See October 2000 Decision at 19.

The sale of the line, with the modified purchase price (reflecting the decreased NSV and the increased NLV), was completed on January 24, 2001.

In a decision served on November 9, 2001 (November 2001 Decision),<sup>2</sup> the Board concluded that the escrow arrangement was unworkable, due primarily to RVI's interference with the escrow agent's disbursement of funds, and instead ordered the transfer of the \$375,000 to CCPA on the condition that CCPA (1) keep the money in a separate account, (2) keep account of the money spent for repairs, including evidence of competitive bidding for the work, and (3) complete all repairs for which the money was intended within 270 days.

CCPA had engaged CCPR to arrange for and oversee the necessary repairs. In some instances, CCPR could not produce records justifying expenditures from the reserved funds. Accordingly, we were unable to approve those expenditures and, in the December 2004 Decision, we directed that CCPA/CCPR refund to RVI \$217,282 of the \$375,000 set-aside fund (Fund). Our decision to order the refund was based on our finding that, with respect to those expenditures, CCPA/CCPR had not demonstrated compliance with the requirements in the November 2001 Decision to keep account of the funds expended.

On January 3, 2005, as supplemented on January 4, 2005, CCPA/CCPR filed a joint petition for reopening and reconsideration of the December 2004 Decision. By a decision served on January 11, 2005 (January 2005 Decision), the Chairman granted CCPA/CCPR's request to

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<sup>1</sup> This decision also was affirmed in RVI I.

<sup>2</sup> The November 2001 Decision was affirmed in Railroad Ventures, Inc. v. STB, No. 01-4262 (6th Cir. June 4, 2003).

stay the effective date of the December 2004 Decision pending resolution of their petition for reconsideration.<sup>3</sup>

After receiving an extension, RVI filed a reply to the petition for reconsideration on February 28, 2005. The Board also received a letter from RVI on March 4, 2005, supplementing a legal argument it made in its reply. CCPA/CCPR responded to this supplemental information with its own letter, which the Board also received on March 4, 2005.

On June 15, 2005, CCPA filed a petition for declaratory order asking the Board to initiate a declaratory order proceeding to clarify two other issues (discussed below) pertaining to its ownership of the Youngstown-Darlington line.

## DISCUSSION AND CONCLUSIONS

### I. CCPA/CCPR's Petition for Reconsideration of the December 2004 Decision.

#### A. Preliminary Matters

Motion to Supplement Record. On January 4, 2005, CCPA/CCPR filed a motion to supplement the record with additional materials related to the timely petition for reconsideration it had filed a day earlier. Because consideration of these materials will not prejudice any of the parties, we grant CCPA/CCPR's motion to supplement.

Motion to File a Reply to a Reply. On March 15, 2005, CCPA/CCPR filed a motion for leave to file a reply to RVI's reply, or in the alternative, a motion to strike. CCPA/CCPR have already had more than sufficient opportunity to explain their use of the Fund, first in their original Joint Motion for Final Closure of the Escrow Account (Joint Motion), then in their rebuttal to RVI's reply during the first phase of this case, and finally in their petition for reconsideration. Moreover, much of CCPA/CCPR's tendered reply does not appear to be responsive to RVI's reply, but instead consists of new arguments. We therefore deny CCPA/CCPR's motion for leave to file a reply to a reply.

Motion to Strike. In their alternative motion to strike, CCPA/CCPR never clearly describe what portions of RVI's reply they object to, although they seem to primarily have issues with statements made by RVI's witness, George Wehner, in a verified statement that was attached to the reply. Because CCPA/CCPR's challenges to Mr. Wehner's verified statement go to the weight that we should give his statement, rather than to its admissibility, the motion to strike is denied.

Request for Intervention. By petition filed on June 21, 2005, the Ohio Rail Development Commission (ORDC) requests leave to intervene. ORDC states that its interest in this matter stems from its involvement with the preservation and rehabilitation of the Youngstown-

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<sup>3</sup> RVI's petition for judicial review of the December 2004 and January 2005 decisions is in abeyance pending the issuance of this decision. Railroad Ventures, Inc. v. Surface Transportation Board, No. 05-3157 (6th Cir. filed Feb. 18, 2005).

Darlington line. RVI opposed the ORDC request on July 13, 2005, arguing that it would be improper to permit ORDC to intervene at this point in the proceeding. CCPA filed a reply on July 14, 2005, contending that ORDC's petition will not introduce any new issues or new evidence, will not further delay the proceeding, and should be granted.

The record already contains the verified statement (V.S.) of an ORDC employee concerning ORDC's interest in this matter. See V.S. of Lou Jannazo, included in CCPA/CCPR's petition for reconsideration, supplemental filing of January 4, 2005. Moreover, ORDC did not seek to participate prior to the December 2004 Decision. It would not be appropriate to allow ORDC to intervene as a party at this late stage, after the evidentiary record has been closed. We will, however, grant ORDC's alternative request to participate as amicus curiae and consider its arguments as such.

RVI's Filing in Response to Stay. In light of the January 2005 Decision staying, pending reconsideration, the order requiring CCPA to return part of the Fund to RVI, and CCPA's representations that its financial condition was bleak, RVI submitted a request on January 31, 2005 asking that CCPA be directed to provide a verified financial statement and to post bond to secure its repayment obligation. However, as RVI's own petition shows, CCPA has assets of \$19 million and recently voted to borrow \$500,000 to supplement its \$400,000 in cash reserves. Thus, CCPA appears to have the means to satisfy our refund order, which is being modified by this decision, and neither the requested financial statement nor a bond appears to be necessary.

#### B. Merits of the CCPA/CCPR Petition

Under 49 CFR 1115.3, a party may petition the Board for reconsideration of a decision based on new evidence, changed circumstances, or material error. Here, CCPA/CCPR argue that the Board committed material error in finding that \$217,282 of the Fund should be repaid to RVI, and presented additional evidence for our consideration. For the most part, we affirm our prior ruling that CCPA/CCPR did not adequately document the specific expenditures for which they sought reimbursement from the Fund. We do, however, find that certain repairs undertaken with money provided by ORDC can qualify for reimbursement from the Fund. Thus, although this decision rejects most of CCPA/CCPR's claims of error in the December 2004 Decision, it does reduce the amount that CCPA/CCPR must return to RVI from \$217,282 to \$58,879.

The Repairs to the Crossings at Old Route 51 and Cannelton Road. In the December 2004 Decision, we found that CCPR, which was hired by CCPA to oversee rehabilitation of the Youngstown-Darlington line, had not competitively bid the repair work for these two projects, as required by the November 2001 Decision. The only documented bids for these repair projects came from Dardanelle & Russellville Railroad (D&R), an affiliate of CCPR, and those bids were submitted a day before the repair work was invoiced by the company that made the repairs, Ohio Track, Inc. We found it suspicious that "bids" were submitted the day before submission of the Ohio Track invoice, and we noted that we had not received copies of bids from Ohio Track. Because CCPR had not shown that the work for these two projects had been competitively bid, we ordered that the cost of these repairs, totaling \$69,120, be refunded to RVI.

## i) Competitive Bidding

In their petition for reconsideration, CCPA/CCPR argue that there was no competitive bidding requirement because no such requirement was expressly included in the ordering paragraphs of the November 2001 Decision. Alternatively, CCPA/CCPR claim the requirement was not clearly communicated, and thus, they were not required to follow it.

CCPA/CCPR's claim is without merit. Although competitive bidding was not specifically mentioned in the ordering paragraphs, it was clearly addressed within the body of the November 2001 Decision, as follows: "CCPA shall: (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 . . .*" November 2001 Decision, slip op. at 7 (emphasis added). That decision also permitted grouping of repair projects for the purpose of competitive bidding. Id.

Moreover, the record shows that CCPR clearly understood that the November 2001 Decision directed it to competitively bid all subsequent repair work. In a verified statement that was part of the original Joint Motion, Timothy Robbins, vice president of CCPR, stated: "[W]hile the Board directed CCPA to keep account of competitive bids for each repair project, it was not possible to apply that requirement retroactively. . . . In any event, after the Board issued its [November 2001 Decision], we resumed the practice of obtaining competitive bids." CCPA/CCPR's Joint Motion, filed Jan. 21, 2003, Robbins V.S., at 3-4. A similar statement is found in the verified statement of Walter Gane, CCPR's superintendent. See CCPA/CCPR's Joint Motion, Gane V.S., at 3. The fact that the two CCPR officials most responsible for overseeing the line's rehabilitation stated that they were aware that the Board required competitive bidding undermines CCPA/CCPR's current claim that they were unaware that there was such a requirement.

CCPA/CCPR also claim that the two crossing repair projects were in fact competitively bid. CCPA/CCPR now assert that the bids from D&R for these two projects initially were submitted orally and later confirmed in writing, and CCPA/CCPR submit an affidavit from the D&R employee who allegedly communicated the bids to CCPR.

CCPA/CCPR offered no such explanation for these two untimely bids when the record pertaining to the Fund was being developed, even after RVI raised questions about these specific bids in its reply. CCPA/CCPR had an opportunity to refute RVI's assertions in the rebuttal that CCPA/CCPR were permitted to file. CCPA/CCPR's expert, Mr. Gane, simply stated: "I should also note that I was aware of the D&R's proposed bid before I awarded the project to Ohio Track." CCPA/CCPR's Rebuttal, Walter Gane V.S., at 11. As we stated in the December 2004 Decision, this uncorroborated explanation was not enough to sufficiently demonstrate that competitive bidding had occurred. The evidence that CCPA/CCPR now offer was reasonably available to the parties before the proceeding was concluded; thus, it is not new evidence for purposes of obtaining agency reconsideration. Platnick Bros., Inc. v. Norfolk & Western Ry. Co., 367 I.C.C. 782, 785 (1983). See also Friends of Sierra R.R. Inc. v. ICC, 881 F.2d 663, 667 (9th Cir. 1989).

Even if we were to consider CCPA/CCPR's newly raised evidence, however, we would not find it persuasive. CCPA/CCPR claim that the written D&R bids — dated the day before the work was invoiced — were confirmations of oral bids. However, it seems unlikely that D&R would have gone to the trouble of submitting a written confirmation of its oral bid knowing not only that it had lost the project, but that the work had been completed.

ii) Pennsylvania Department of Transportation (PA-DOT) Claim

CCPA/CCPR also claim that just before CCPA's purchase of the line PA-DOT threatened to suspend these two crossings, which would have prevented the restoration of rail service by prohibiting use of the railroad tracks at the two roads in issue, and that it was only through CCPA's and CCPR's agreement to repair and maintain these crossings that PA-DOT agreed to withdraw the suspensions. CCPA/CCPR argue that it would thus be unfair to require them to refund the cost of repairs for these crossings, because it was RVI's failure to maintain the crossings that created the problem. CCPA/CCPR assert that they incurred \$15,828 in legal fees to participate in the PA-DOT proceeding, which they now claim they should be permitted to recover from the Fund.

We fail to see how the condition imposed by PA-DOT conflicted with CCPA/CCPR's duty to competitively bid these two crossing projects. As the owner and operator of the line, respectively, CCPA and CCPR would have needed to repair and operate these crossings regardless of the PA-DOT order. CCPA/CCPR should have been able to fulfill our bidding requirement, while also fulfilling its duty to PA-DOT.

As for CCPA/CCPR's legal fees for participating in the PA-DOT proceeding, we find that the fund was not set up to cover legal fees, and therefore we will not permit expenditures for such fees.

The 20% Repair Overhead. As explained in the December 2004 Decision, CCPR charged a 20% markup for the repairs that it conducted itself, to account for the overhead costs associated with these repairs. We found that the use of this markup was acceptable and that the 20% level was in accordance with industry standards. However, CCPR sought to use the Fund to pay for the markup for projects paid by state grants, as well as CCPA/CCPR-funded repairs, without offering any evidence that the state-funded projects included in the chart submitted by CCPA/CCPR were to repair damage that was attributable to RVI. Accordingly, we disallowed use of the Fund for the markup for repairs paid for by state funds, and we ordered CCPA/CCPR to return \$10,656 to RVI for that reason.

In their petition for reconsideration, CCPA/CCPR claim that the state-funded projects included in the chart were to repair damage that was attributable to RVI. As an example, they note that the December 2004 Decision allowed payment from the Fund for repeated vegetation spraying and brush cutting needed to remove substantial vegetation caused by RVI's lack of maintenance, but that state funds were also used to pay for vegetation spraying and brush cutting. According to CCPA/CCPR, if the Fund-covered portions of these repairs were properly attributable to RVI, the state-funded portions should be as well.

We agree with CCPA/CCPR that we erred in the December 2004 Decision by not allowing CCPA/CCPR to apply the 20% markup to all of the vegetation spraying and brush cutting, regardless of who bore the underlying expense. Having found that the need for such extensive spraying and cutting was attributable to RVI's failure to keep vegetation under control, CCPA/CCPR could charge the Fund for the overhead on this work even when state funds were used to pay for the non-overhead portion of the repair work. Similarly, for other repairs eligible to be paid from the Fund that were split between the Fund and state-furnished money, the corresponding overhead expense — which was not paid for by the State — can be paid from the Fund.

However, CCPA/CCPR still have provided no evidence that repairs that were paid solely by state funds (those with costs solely in the "State" column of the chart that was submitted) were to repair damage caused by RVI's conduct. CCPA/CCPR's argument that there is no evidence that shows this damage was not attributable to RVI would improperly shift the burden of proof to RVI. CCPA/CCPR, as the movant for a finding that its expenditures from the Fund were legitimate, bore the burden of showing that RVI's actions/inactions necessitated those expenditures.

Therefore, we adjust our prior calculation to permit payment from the Fund for the repair-overhead expense applied to i) the state-funded vegetation spraying and brush cutting; and ii) the state-funded portion of the underlying repairs where the costs were split. The 20% overhead charge for these repairs totals \$8,531. Thus, our earlier finding that \$10,656 should be refunded to RVI as improper overhead will be modified and CCPA/CCPR will be directed to refund to RVI only \$2,125 for improperly charged repair overhead.

Administrative Overhead. In addition to overhead for repair work that CCPR itself conducted, CCPA/CCPR charged \$119,806 against the Fund to cover administrative overhead costs associated with the rehabilitation of the line (for the year 2001). This administrative overhead included costs such as employee salaries, travel expenses, living expenses, and consulting fees. In the December 2004 Decision, we disallowed these administrative overhead charges, as CCPR had provided little documentation to support these expenses.

In their petition for reconsideration, CCPA/CCPR argue that there were no Board-established criteria or standards for CCPR to use to document these costs, and that there was no requirement that CCPA "audit" CCPR's accounting system or submit "every scrap of paper" regarding these expenses. CCPA/CCPR argue that the November 2001 Decision provided that repair costs would only be challengeable if there was fraud, and here, they assert, there was no fraud. Finally, CCPA/CCPR claim that they did in fact justify the administrative overhead expenses by using verified statements that "summarized" and explained the methodologies that were used to calculate the total cost of these expenditures.

## i) Documentation

It is true that the Board did not specify what type of documentation would be needed for amounts drawn from the Fund, but there was no reason to believe that more specific guidance was necessary. CCPA and CCPR are sophisticated parties that should have understood that some documentation would be needed to comply with the explicit directive that CCPA “keep account of all funds expended.” When giving an account of living and travel expenses, it is customary to produce receipts for rent and meals. Likewise, when claiming a portion of salaries, it is customary to produce time cards or the like.

We note that, prior to the time the Board issued its November 2001 Decision allowing the Fund to be transferred to CCPA, CCPR had been hiring contractors to perform the repairs and applying to the Fund to pay the contractors’ fees. Had CCPA/CCPR continued to arrange for the work in this manner, the only supporting documentation they would have needed to submit would have been written bids and invoices from the contractors for those projects that were to repair damage caused by RVI. Such records would not have been difficult to maintain and turn over; nor would they have required an audit by CCPA.

CCPR chose instead to apply over 30% of the amount in the Fund to administrative overhead. We concluded that the Fund could be used for such overhead because CCPA/CCPR were never explicitly restricted from using the money in this manner, and because such costs were necessary to the completion of repairs. See December 2004 Decision at 13. However, CCPA/CCPR were required to “keep account” of these expenses, just as they were for the actual repair work. And it is more complex to account for administrative overhead than for actual repair work. Unlike competitively bid repair work, which can be documented with a few sheets of paper (the written bids and a final invoice), expenses such as employee salaries, travel costs, and consulting fees require more extensive documentation, such as time cards, receipts, and billing sheets.

## ii) Burden

CCPA/CCPR’s claims that they were unaware that they had the burden to document their expenses, or that the Board switched the burden it established in the November 2001 Decision, are unpersuasive. The November 2001 Decision (at 7) states:

“CCPA shall: (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. Funds expended in this fashion shall be subject to challenge by RVI or its affiliates only for fraud.”

A reasonable interpretation of this language is that the burden was on CCPA (not RVI) to establish that the three numbered requirements were fulfilled (a burden that should not have been particularly onerous). Indeed, CCPA/CCPR requested that the Board determine whether they

spent the Fund in accordance with the Board's requirements.<sup>4</sup> Because CCPA/CCPR were the moving parties, they bore the burden of proof. CCPA/CCPR cannot expect the Board to simply deem their expenditures proper without their actually demonstrating the propriety of the expenditures.

Even if CCPA/CCPR could somehow be excused from failing to provide evidence initially in support of their request, they should have offered such evidence in their rebuttable submission to refute RVI's challenges.

Although the language of the November 2001 Decision was not explicit as to the exact method of accounting for the Fund, we do not see how CCPA/CCPR could have interpreted it as giving them a free pass to use the Fund without accounting for how the money was spent. Nothing in that decision indicates that the Board would serve as a rubber stamp, approving expenditures without determining that they were in fact legitimate.

CCPA/CCPR argue that RVI could challenge their expenditures only on the ground of fraud. However, a plain reading of the November 2001 Decision shows that RVI could also challenge whether the funds were expended on repairs necessitated by RVI's failure to keep the line operational and whether the Board's three numbered requirements (i.e., the use of competitive bidding, funds kept in a separate account, and funds spent within 270 days) were met. After listing the requirements, the Board stated that "[f]unds expended in this fashion shall be subject to challenge by RVI or its affiliates only for fraud." November 2001 Decision at 7 (emphasis added). Because the threshold requirements were not met, the fraud-only restriction was not at issue in this proceeding.

### iii) Verified Statements

We also find no merit to CCPA/CCPR's claim that their administrative overhead expenses were adequately justified by verified statements that summarized and explained the methodologies used to arrive at their calculations. CCPA/CCPR included with their original Joint Motion a verified statement from Christena Nielsen, an expert who stated that she examined the invoices of the repair work and concluded that all costs were appropriate. She also stated that the administrative overhead charged by CCPR was at or below the industry average. However, as discussed in the December 2004 Decision, Ms. Nielsen did not provide any supporting details about the invoices she examined, provide any analysis of these expenses, or include any attachments, such as charts or spreadsheets, to further explain the overhead costs.

The verified statement of Timothy Robbins from the original Joint Motion also fails to demonstrate the validity of the claimed administrative overhead expenses. Mr. Robbins explained how he calculated the \$74,118 in employee salaries that were included as part of the administrative overhead, and referred to an "attached study." However, the attachment consisted

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<sup>4</sup> See CCPA/CCPR Joint Motion for Final Closure, at 13 ("... the Board is requested to review the itemized list of expenditures that is submitted herewith. Based on that review, the Board is urged to state affirmatively that CCPR and CCPA have complied with both the letter and spirit of the Board's Decisions related to the escrow account . . .").

of an unorganized stack of documents (including copies of invoices, checks, written bids, and other charts and lists) that were not labeled or tabulated, leaving us only to guess as to the relevance of each document.

Thus, we can only presume that the relevant portion of the “study” that Mr. Robbins refers to is the chart entitled “Central Columbiana & Pennsylvania Railway, Inc. — Salary and Fringe Benefits Allocation From D&R RR to CCPR — 2001.” This chart summarizing Mr. Robbins’ calculations is based on undocumented statements regarding the amount of time that the four employees worked on the line. See December 2004 Decision at 14. Although the Board permits the use of charts to summarize or simplify a witness’ testimony, a statement about time spent working on a particular project must nonetheless be supported by some documentary evidence.

In sum, CCPA/CCPR have not provided the necessary documentation to support the charges for administrative overhead. Accordingly, we affirm the earlier decision that the \$119,806 charged for administrative overhead would properly be refunded to RVI.

#### iv) New Documentation

In response to our finding that CCPA/CCPR’s documentation was either missing, not relevant to the expenditure of the Fund, or too disorganized to determine its significance, CCPA/CCPR now submit, as part of their petition for reconsideration, hundreds of new pages of materials, consisting of copies of payroll records, invoices, and CCPR’s General Ledger Detail Report. This is not new evidence that was not available before the close of the record. But in any event, the newly submitted documentation by CCPA/CCPR would not warrant a different result because these documents are so disorganized that we would not be able to discern which expenses the documents support.

The Norfolk Southern Railroad (NSR) Overpass. In the December 2004 Decision, we found that CCPA/CCPR had not shown that RVI was directly responsible for a drainage problem at a spot on the line where the track travels under an NSR overpass. Thus, we ordered the \$17,700 CCPA/CCPR spent from the Fund for repairs at this location returned to RVI. See December 2004 Decision at 15. In their petition for reconsideration, CCPA/CCPR reargue that, had it not been for RVI’s inaction, the drainage problem would not have been more than an occasional nuisance.

However, CCPA/CCPR still have not sufficiently demonstrated that this drainage problem is attributable to RVI. CCPR acknowledges that “drainage in that area was likely an ongoing problem for the railroad.” See Petition for Reconsideration at 19. Because RVI apparently took no action when a nearby city and businesses began to divert runoff water to this location, which caused additional water to drain in the area of the overpass, there is no way to determine how much RVI’s inaction contributed to the damage, if at all. In other words, from the record, it appears that, even if RVI had prevented the dumping of runoff water in this area, there still may have been drainage problems. Because CCPA/CCPR did not sufficiently demonstrate proximate cause between RVI’s inaction and the drainage problem at the NSR overpass, we reaffirm our finding that the \$17,700 should be returned to RVI.

Reimbursement for Money Provided by ORDC. In their petition for reconsideration, CCPA/CCPR state that, because of RVI's interference with the Fund when it was still an escrow account, they were unable to draw money to pay for repairs during the earlier stages of the rehabilitation of the line. As a result, CCPA/CCPR note that ORDC, as part of its mission to promote economic development and rail branch-line preservation, provided \$177,210 to cover the costs of these initial repairs, most of which allegedly were necessitated by RVI's failure to keep the line operational. CCPA/CCPR and ORDC state that most of this \$177,210 of repairs—specifically, \$149,872—would have been paid from the Fund, were it not for RVI's improper conduct. Moreover, CCPA/CCPR argue that requiring them to return funds to RVI would be unfair and contrary to the public interest because it would foist onto taxpayers the responsibility that RVI should bear for its neglect and deliberate destruction of the line. Thus, CCPA/CCPR provided documentation to support reducing the amount required to be refunded to RVI by \$149,872.<sup>5</sup> (CCPA/CCPR has provided no evidence regarding the remaining \$27,338 of ORDC's \$177,210 grant.)

Having reviewed the documents submitted by CCPA/CCPR in support of the \$149,872 that was spent on work and repairs, we find that these expenditures were for damage that was the result of RVI's negligence of the line. Of this \$149,872, CCPA/CCPR received \$83,340 from ORDC to cover the salaries of CCPR's employees who worked on the line's rehabilitation. Unlike the documentation submitted in support of the administrative overhead, CCPA/CCPR has provided payroll reports that account for the number of hours each employee spent on the rehabilitation project between March and September 2001. Although this work occurred before the Board imposed the requirement that CCPA/CCPR keep account of all funds expended (and thus no such documentation was specifically required), the payroll reports sufficiently demonstrate that \$83,340 was spent solely for the purpose of the line's rehabilitation, which corresponds with the Board's intended purpose in creating the Fund. We note that this differs from the state-funded repairs to which CCPR applied its 20% overhead, as CCPA/CCPR never demonstrated whether those repairs were rehabilitation-related or simply routine maintenance.

The remaining \$66,532 that CCPA/CCPR received from ORDC was to cover the cost of materials needed to rebuild the line, including crossties, track spikes, relay rail, tie plates, joint bars, and limestone. Such materials were needed to fix crossings that had been paved over and spots on the line where vegetation had grown between the rails and ties, problems that we have concluded occurred during RVI's ownership.

CCPA/CCPR appear to have sufficiently documented the cost of these expenditures and that they were needed to repair RVI-caused damage. Accordingly, we agree with CCPA/CCPR that it would be contrary to the public interest and to our duties under 49 U.S.C. 10101 to require CCPA/CCPR to refund this amount to RVI, when—had the Fund been in place—such money would have been properly chargeable to the Fund. After CCPA/CCPR's acquisition of the line in January 2001, it was in CCPA's and the public's best interest for the line to be restored to operational status as quickly as possible. As CCPA explains, it therefore began ordering repairs

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<sup>5</sup> See CCPA/CCPR Petition for Reconsideration, Supplemental Filing, V.S. of Tracy Drake, Attachment B.

while the procedures for the disbursement of money from the original escrow fund were not yet finalized—due to RVI’s interference—and thus, it had to receive funds from ORDC to accomplish this task. In light of the circumstances at the time, CCPA’s and ORDC’s actions seem reasonable.

Accordingly, we find that it would be contrary to the public interest to require CCPA/CCPR to refund money to RVI, when it was RVI’s interference that caused the disbursement of funds from the former escrow account to be delayed. Such a result would not only allow RVI to profit from its own inappropriate conduct, but to do so at the expense of the taxpayers of Ohio, who ultimately provided the original \$149,872 for repairs to damage caused by RVI. Moreover, it would be contrary to the Board’s directive to “foster sound economic conditions in transportation . . .” and to “encourage honest and efficient management of railroads,” *see* 49 U.S.C. 10101(4) and (9), as CCPA and ORDC—which diligently sought to rehabilitate this line—would suffer economic harm, while RVI—which did not act in good faith—would be rewarded.

Prior to the December 2004 Decision, CCPA/CCPR had informed us that ORDC had provided to CCPA money to pay for the repairs that were allegedly attributable to RVI, but had not sought reimbursement from the Fund for these expenditures. However, we do not fault CCPA/CCPR for failing to make such a request or provide supporting evidence prior to the December 2004 Decision, as they evidently believed that the \$375,000 of expenditures originally claimed were sufficiently documented and that it was therefore unnecessary to justify expenses beyond that amount. Although normally we do not look favorably upon parties failing to present all of their arguments at the outset of a proceeding, we find that there is a significant countervailing public interest concern here, as discussed above, and we are reluctant to penalize ORDC and the taxpayers of Ohio, who will be looking to CCPA to repay funds loaned to it.

To ensure due process to RVI, we will afford it an opportunity to respond to CCPA/CCPR’s claim for reimbursement from the Fund for \$149,872 of expenditures. We note that, because this repair work was completed prior to the November 2001 Decision, the requirements set forth in that decision do not apply. Thus, unless RVI rebuts CCPA/CCPR’s evidence that such expenditures were for damage caused by RVI, CCPA/CCPR shall be permitted to reduce the refund owed to RVI by this amount.

Bankruptcy Stay. CCPR filed a bankruptcy petition in June 2004. CCPA/CCPR claim that the portion of the December 2004 Decision directing CCPA and CCPR collectively to refund \$217,282 to RVI may violate the bankruptcy stay as to CCPR.

The filing of a petition in bankruptcy creates an estate consisting of all of the debtor’s property, broadly defined, and imposes a broad stay of other proceedings against the debtor and its property. Chao v. Hospital Staffing Svcs., Inc., 270 F.3d 374, 382 (6th Cir. 2001) (Chao); *see* 11 U.S.C. 361(a). The stay helps to preserve what remains of the debtor’s insolvent estate and to provide a systematic and equitable liquidation procedure for all creditors. Holtkamp v. Littlefield, 669 F.2d 505, 508 (7th Cir. 1982).

The bankruptcy stay does not apply here, however, because this is not a proceeding against CCPR. Rather, RVI initiated this proceeding when it sought authority to abandon its rail line, and CCPA triggered the OFA stage of the proceeding when it filed an offer to purchase a rail line that otherwise would have been abandoned. As the proceeding progressed, CCPR joined CCPA in various pleadings. But that joinder was voluntary, because the Board never ordered CCPR to become a party to this proceeding. We included CCPR in the order to refund money only because CCPR had joined with CCPA in seeking closure of the account containing the Fund. Had CCPR not joined in that motion, we would have directed the refund order only to CCPA — the entity that purchased the line and had control over the Fund. And, as we explain below, we now clarify that it is CCPA to which our order should have been directed.

## II. RVI's Request for Clarification.

In a letter submitted on December 22, 2004, RVI requests that the Board clarify whether, under the December 2004 Decision, CCPA and CCPR are jointly and severally liable for the payment of the refund to RVI.

In the November 2001 Decision, the Board allowed the money in the Fund to be transferred directly to CCPA and imposed upon CCPA conditions for how the money was to be spent. Thus, the ultimate responsibility for overseeing how the Fund was expended fell on CCPA. We are mindful that CCPA (and by extension, ORDC) may suffer consequences for CCPR's actions. Although CCPR was the party that either conducted or arranged for the repairs and failed to comply with the Board's conditions, it was CCPA that turned over responsibility for the Fund to an operator and that chose CCPR to serve in that role. CCPR merely served as CCPA's agent, and it was incumbent upon CCPA to ensure adherence to the Board's requirements.

We note that our decision should not affect any indemnification agreement between CCPA and CCPR. It may be that CCPA, through private contract or other means, can seek to collect some or all of the refund from CCPR, if permitted by the bankruptcy court.

## III. CCPA's Petition for Declaratory Order.

Under 5 U.S.C. 554(e) and 49 U.S.C. 721, we may issue a declaratory order to terminate a controversy or remove uncertainty in a matter that falls within the Board's jurisdiction. As discussed below, we find that the issues raised by CCPA in its petition for a declaratory order can be resolved on the record in this proceeding. Therefore, there is no need to institute a declaratory order proceeding and CCPA's petition requesting that we do so will be denied.

In its petition for declaratory order, CCPA states that it has learned that RVI's affiliate, VPB, has reached an agreement with a third-party licensee, Qwest Communications (Qwest), to convert a license that had a 25-year term (with an option for a 25-year extension) into a permanent easement in exchange for \$212,500. Although the license was one of the 156 the Board permitted RVI and VPB to retain under the OFA sale terms, CCPA argues that the new agreement between VPB and Qwest would result in a new, permanent burden on the line. CCPA claims that, under the Board's prior decisions in this case, RVI and VPB were permitted to retain

only the income from the existing licenses, and that any new agreements extending the burden on the land can only be entered into by CCPA, as the fee owner of the real estate in the line.

Also, according to CCPA, Kovalchick placed a lien on the Youngstown-Darlington line's track and track materials in December 2000 (while the line was still owned by RVI) and Kovalchick refuses to release the lien. CCPA points to a verified statement made by Kovalchick's president, Mr. Joseph Kovalchick, submitted to the Board during the OFA phase of this proceeding, in which he stated that "if an OFA [sale] is completed I will accept the \$730,000 from RVI as full payment for my interest in the track material."<sup>6</sup> CCPA argues that, based on this statement, as well as the Board's requirement that the line be transferred to CCPA free of any encumbrances (except for the 156 licensing agreements), the Board should affirm that CCPA was to receive fee simple interest in the rail property unencumbered by any lien related to the pre-existing obligations of RVI.

RVI filed a reply on July 5, 2005. RVI argues that the dispute over VPB's new agreement with Qwest centers on the scope of authority provided by the terms of the licensing agreement, and that this is a matter of state contract and property law that must be determined by the state courts of Ohio.<sup>7</sup> RVI notes that CCPA has not alleged that the new Qwest agreement will interfere with rail operations over the Youngstown-Darlington line. Regarding the issue of the lien, RVI takes no position, as it claims that Kovalchick has released RVI from all obligations arising out of their future salvage-rights agreement.

Renewal of the 156 licensing agreements that RVI and VPB were permitted to retain as part of the OFA sale (or conversion of a term-limited license to a permanent easement) is permissible so long as the rights and privileges of the grantee are not expanded or broadened in a way that would interfere with CCPA's rail operations on the line. At the time the Board allowed RVI and VPB to retain the 156 licenses, the agency understood that limited-term licenses could be converted to permanent easements. Indeed, that very question had been brought before the Board early in these proceedings when CCPA questioned the appropriateness of RVI's conversion of the First Energy Corporation's licenses into a permanent easement. The fact that, when it credited CCPA's valuation of the licenses retained by RVI, the Board did not differentiate between those that had been converted into permanent easements and those that had not indicates that — contrary to CCPA's position here — the Board did not expect these licenses to become CCPA's property at the end of their then-current terms.

CCPA argues that ordering paragraph 4 of the November 2001 Decision suggests that CCPA retained an interest in the 156 licenses. That paragraph stated: "Except for unuseable chattels, and the income from licenses, crossings, leases, easements, and similar agreements specifically listed in Exhibit A (Confidential Version) to Exhibit 7 in CCPA's Request to Set

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<sup>6</sup> See V.S. of Joseph Kovalchick at 3, included in RVI's Reply to CCPA's Petition to Reopen, June 9, 2000. The \$730,000 amount is the NSV that the Board originally assigned to the track materials prior to learning of the RVI-Kovalchick agreement.

<sup>7</sup> The dispute is currently pending before the Court of Common Pleas of Mahoning County, OH, in Venture Properties of Boardman, Inc. v. Columbiana County Port Auth., Case No. 2005 CV 01479.

Terms [the 156 licenses], neither RVI nor VPB is entitled to any ownership interest in, or income from, the former [Youngstown-Darlington] rail line.” November 2001 Decision at 8. However, this language must be read within the context of the entire decision, in which the Board found that all licenses other than the 156 that had been accounted for in the reduced purchase price should have been transferred to CCPA and that, as the title-holder to the additional licenses, CCPA was entitled to receive the income those other licenses would produce (retroactive to the date CCPA purchased the line). See id. at 4-5. Thus, in ordering paragraph 4, the Board was distinguishing between the income produced from the 156 licenses and the income produced from all other licenses. It is clear that the Board was not (as CCPA suggests) voiding RVI’s and VPB’s ownership interest in the 156 licenses. Indeed, this is evidenced by the following statement in the text of the decision: “we clarify that neither RVI nor VPB has any remaining right, title, or interest in this rail line other than in the First Energy Corporation easements mentioned above and the licenses and crossings listed in Exhibit A (Confidential Version) to Exhibit 7 of CCPA’s Request to Set Terms. . . .” Id. at 5. In short, CCPA never obtained an interest in the 156 specifically identified licenses, including the rights to renewal.

CCPA also claims that the RVI I court decision suggests that RVI lost its right to either renew these licenses or convert them to permanent easements. That argument is incorrect. The court held that the Board’s October 2000 Decision had directed RVI to transfer to CCPA a fee simple interest in the line. However, the court specifically excluded the 156 licenses from that holding. See RVI I, 299 F.3d at 556 (“Because CCPA has not challenged the [Board’s] approval of RVI’s conveyance of certain property interests associated with the rail line after RVI filed its abandonment petition [specifically, the 156 licensing agreements], it is therefore unnecessary to remand for further proceedings since CCPA is not seeking to acquire those property interests not conveyed to it.”)

As to the Qwest licensing agreement, CCPA argues that, because this agreement was of limited term when it was first addressed in the Board’s decisions, allowing it to be renewed for an indefinite period of time would convert the license into a permanent easement, thereby “creating an entirely new and more extensive burden on CCPA’s rail property.” But so long as the easement does not allow the grantee any land-use rights that would interfere with CCPA’s rail operations, there is no additional burden placed on CCPA. CCPA has presented no evidence that the licensees have interfered with rail operations over the line up to this point or that such interference will now occur due to a permanent easement.

Kovalchick Lien. CCPA objects to Kovalchick’s continued lien on the track and track materials in this line. Although the purchase price of the line was reduced to reflect RVI’s deal with Kovalchick, CCPA argues that the lien can no longer be valid because the Board required that the property making up the Youngstown-Darlington line be transferred to CCPA free of any encumbrance except for the 156 licenses, and CCPA asks us to “reaffirm” this requirement.

We need not address the appropriateness of Kovalchick’s lien at this time, as the lien would only be at issue if CCPA obtained authority to abandon the line, thereby allowing the track and track materials to be salvaged. Moreover, if and when the line is abandoned, the validity of the lien would be a matter for a state court to decide under state property law. We

would be compelled to declare the lien invalid only if it interfered with CCPA's rail operations, which is not the case here.

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

It is ordered:

1. CCPA/CCPR's motion to supplement its petition for reconsideration is granted.
2. CCPA/CCPR's motion for leave to file a reply to RVI's reply and CCPA/CCPR's alternative motion to strike are denied.
3. ORDC's petition to intervene is denied and ORDC's alternative petition to participate as amicus curiae is granted.
4. RVI's petition for bond and confirmation of financial condition is denied.
5. CCPA/CCPR's petition for reconsideration is granted in part and denied in part.
6. RVI may submit a pleading within 20 days of the service date of this decision, challenging the claim for reimbursement from the Fund for \$149,872 of repairs documented by CCPA/CCPR in its petition for reconsideration.
7. Unless RVI challenges the \$149,872 offset amount to the refund within 20 days after the service date of this decision as provided in the preceding ordering paragraph, the December 2004 Decision in this proceeding shall be modified to require that CCPA pay \$58,879 to RVI, together with interest as set forth in the December 2004 Decision, as of January 14, 2006.
8. The stay issued on January 11, 2005, in this proceeding is vacated, on the effective date of this decision.
9. The Board's prior decisions in this proceeding are clarified to the extent discussed in this decision.
10. CCPA's petition for institution of a declaratory order proceeding is denied.
11. This decision is effective on January 14, 2006.

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

Vernon A. Williams  
Secretary