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 13, 2004

This decision resolves three remaining disputes between the parties to this proceeding concerning the sale of a rail line in eastern Ohio and western Pennsylvania pursuant to the offer of financial assistance (OFA) provisions of 49 U.S.C. 10904 and 49 CFR 1152.27. In a series of earlier decisions, the Board set the purchase price for the rail line and other terms of sale.

In this decision: (1) we deny the petition of the seller, Railroad Ventures, Inc. (RVI), asking us to reopen the decisions served January 7, 2000 *(January 2000 Decision)*, and October 4, 2000 *(October 2000 Decision)*, in which the Board established the net liquidation value (NLV) of the real estate acquired by the buyer, Columbiana County Port Authority (CCPA); (2) we grant a motion to compel discovery filed by CCPA and the operator of the line, Central Columbiana & Pennsylvania Railway, Inc. (CCPR) (collectively referred to as CCPA/CCPR), to require RVI to answer interrogatories and to produce documents concerning some assets in dispute;and (3) we direct CCPA/CCPR to refund to RVI a portion of the $375,000 fund set aside pursuant to the *October 2000 Decision* and a decision served on November 9, 2001 *(November 2001 Decision)*.

BY THE BOARD:

BACKGROUND

This case has a tortured history. This section provides a general overview of the history of the case at the Board and in the courts. Other facts relevant to the three issues addressed in this decision will be discussed below.

In November 1996, RVI purchased the 35.7-mile Youngstown-Darlington rail line from the Youngstown & Southern Railway Company (Y&S). RVI failed to obtain the necessary Board approval prior to purchasing the line from Y&S, but on April 24, 1997, RVI qualified retroactively to acquire and operate the line.[1] Nevertheless, RVI did not perform maintenance on the line or provide service, notwithstanding its common carrier obligation to do so.

RVI subsequently sought authority to abandon the line, and in a decision in this proceeding served on September 3, 1999, the Board granted RVI's request, subject to the filing of any OFA. CCPA then properly filed an OFA, and abandonment authority was postponed to permit RVI and CCPA time to negotiate the sale of the line. When the parties were unable to reach an

[1] *Railroad Ventures, Inc.–Acquisition and Operation Exemption–Youngstown & Southern Railroad Company*, STB Docket No. 33385 (STB served April 24, 1997), 62 FR 20061.

agreement for the sale of the line, CCPA filed a request under 49 U.S.C. 10904(e) and 49 CFR 1152.27(g)(1) for the Board to set the terms and conditions of the sale, including the purchase price.

The Board set those terms and conditions in its *January 2000 Decision*. Relying on the testimony of CCPA's appraiser, John Rossi, who appraised the line using an "across-the-fence" valuation method (comparing the value of individual segments of the right-of-way to the values of adjacent or nearby parcels of land, usually based on recent sales), the Board set the total purchase price for the line at $1,080,560. The Board's valuation included, among other things, the NLV of the land and the value of certain licensing agreements attached to the line. The Board's valuation had actually been higher, but it was reduced by $100,000 to account for the income produced by 156 licenses that RVI was allowed to retain (and thus were excluded from the sale). These 156 licenses were listed in Appendix A to CCPA's request to set terms and conditions (Confidential Version), filed December 8, 1999. All other licenses, however, were included as part of the sale of the line and were to be transferred to CCPA.

RVI subsequently attempted to convey to CCPA less than the full interest in the land. On April 5, 2000, the Board ordered RVI to show cause why the entire property should not be transferred to CCPA. In a series of filings, RVI attacked Mr. Rossi's appraisal, alleging that it contained errors, and sought to reopen the case so that the Board could revalue the line as an assembled corridor, which was the method previously rejected by the Board.

In the *October 2000 Decision*, the Board denied the petition to reopen as untimely under the statutes governing the OFA process, except for correcting two aspects of its earlier order. The Board increased the valuation of a 4-mile segment of the line based on further consideration of the previously submitted evidence. The Board also modified the terms of the 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.

The parties completed the OFA sale on January 24, 2001, and CCPA became the owner of the line. CCPA contracted with CCPR for CCPR to be the line's operator. CCPA also made arrangements for CCPR to complete the work to repair the line, but CCPA/CCPR could not reach agreement with RVI on the procedures for dispensing the escrow funds. In addition, after the line was sold, RVI revealed additional licenses that it claimed were unknowingly in its possession. RVI argued that it was not required to turn over these licenses to CCPA because CCPA had not separately compensated RVI for them.

In the *November 2001 Decision*, the Board once again ordered RVI to transfer to CCPA all licenses concerning the line other than the 156 that were excluded by the Board's prior order. Further, the Board concluded that the escrow arrangement was unworkable, and ordered it dissolved. The Board also ordered the transfer of the reserved funds 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.

During 2002, CCPA again advised the Board that RVI would not turn over the licenses. RVI contended that it had provided CCPA what it needed to manage its interests in those licenses and contended that it was still uncertain what licenses it had to turn over as part of the sale and which it was entitled to keep.

The first motion addressed in this decision is RVI's petition of May 2003 to reopen the valuation of the line. It was prompted by a deposition of Mr. Rossi in an Ohio state court proceeding[2] in which Mr. Rossi allegedly admitted making several errors in his valuation that resulted in a higher value for the line.

The second issue addressed in this decision is a motion to compel discovery. On April 21, 2003, CCPA served RVI with discovery requests prompted by an exhibit introduced in the Ohio proceeding, which CCPA claims shows 68 licenses that should have been turned over to it. On April 30, 2003, RVI asked the Board to quash the discovery requests. CCPA responded on May 7, 2003, by moving to compel discovery.

The third motion considered in this decision is CCPA/CCPR's Joint Motion to find that all of the transferred funds were properly spent in accordance with the Board's conditions.

DISCUSSION AND CONCLUSIONS

I. Valuation of the Line

A. Relevant History

In the *January 2000 Decision*, the Board set the total purchase price for the line at $1,080,560, which was the combined NLV of the land and the net salvage value of the track and materials. RVI and CCPA each submitted its own appraisal of the NLV of the land. Contrary to established Board standards for OFA sales,[3] RVI had valued the right-of-way as a single, "assembled" corridor. In contrast, CCPA's appraiser, Mr. Rossi, had used an across-the-fence methodology. Consistent with precedent, the Board found that Mr. Rossi's approach better measured the value of the land for nonrail use.

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[2] *Venture Properties of Boardman, Inc., et al. v. Boardman Supply Co.*, No. 00-CV-2275 (Court of Common Pleas, Mahoning County, OH).

[3] *See, e.g., Boston and Maine Corp.– Abandonment – in Hartford and New Haven Counties, CT: Request to Set Terms and Conditions*, STB Docket No. AB-32 (Sub-No. 83), *et al.*, slip op. at 4 (STB served July 1, 1998) *(Boston and Maine); Baltimore & O. RR. Co., et al.–Abandonment & Discontinuance of Service–in Montgomery County, MD, and the District of Columbia*, Docket No. AB-19 (Sub-No. 112), slip op. at 6 (ICC served August 17, 1988).

At the time of his valuation of the land, Mr. Rossi was aware that there were licensing agreements concerning the rail line. Subsequent to his land valuation, however, Mr. Rossi learned that RVI, in anticipation of the forced sale, had secretly transferred many licensing agreements with third parties to an affiliate, Venture Properties of Boardman, Inc. (VPB). This meant that the encumbrance on the land would remain, but that the future purchaser would not have the benefit of income from the licenses. Although the undisclosed transfer of these licenses to an affiliate was improper, in its *January 2000 Decision*, the Board allowed RVI to retain 156 of these licensing agreements, but reduced the valuation by $100,000, which was the income-producing value that CCPA's appraiser had assessed for these licenses. The Board directed RVI to transfer to CCPA all other licenses. As noted in the background section of this decision, the Board issued other orders as well.

RVI sought judicial review of the Board decisions establishing the terms and conditions of the sale. The United States Court of Appeals for the Sixth Circuit upheld the Board's valuation of the line, as well as the Board's order directing RVI to convey the remaining licenses to CCPA. *Railroad Ventures, Inc. v. STB*, 299 F.3d 523, 555-56, 559 (6th Cir. 2002) *(RVI I).*

The Sixth Circuit later upheld the Board's determination in the *November 2001 Decision* that RVI was not entitled to additional compensation for the licenses first revealed after the closing of the sale. The court ruled that the valuation of the fee simple interest in the rail line "justly compensated for the forced sale of [RVI's] property." *Railroad Ventures, Inc. v. STB*, 2003 U.S. App. LEXIS 11336 at *10 (June 4, 2003) *(RVI II)*. The court found that "the fact that there are additional license agreements that were not considered in the valuation of the property does not entitle RVI to additional compensation" because RVI "made no attempt to protect its property interests" by timely pointing out to the Board the existence of additional licenses. *Id.* The court reasoned that, having failed to timely inform the Board about the additional licenses, "RVI cannot now complain that it was inadequately compensated in the valuation." *Id.* at *11.

On May 27, 2003, RVI filed the pending petition to reopen the valuation of the line, claiming that, in the deposition, Mr. Rossi admitted to having made several errors that lowered his valuation of the line. Specifically, RVI alleges that Mr. Rossi did not include in his appraisal the value of the 156 licenses and that the Board therefore should not have deducted $100,000 from the purchase price. RVI also alleges that Mr. Rossi did not include the value of additional licenses in his appraisal, to which RVI claims he had been given access, and that in valuing the 156 licenses he incorrectly deducted the costs of real estate taxes. Finally, RVI argues again that, in employing an across-the-fence methodology, Mr. Rossi did not consider the parcels' value as commercially developable land and failed to include the value of various buildings and improvements on the property. On August 25, 2003, RVI submitted supplemental evidence to bolster its arguments, consisting of a copy of Mr. Rossi's handwritten notes of the licenses he examined at RVI's office as part of preparing his appraisal. RVI alleges that this list shows that Mr.

Rossi did in fact have access to more licenses than he included in his appraisal.

In their reply, submitted June 24, 2003, CCPA/CCPR object to reopening the Board's valuation. They maintain that RVI had the opportunity to raise all of these matters during the 30-day period provided under 49 U.S.C. 10904(f)(1)(A), but failed to do so. They also point out that RVI's evidence and argument about the buildings and improvements had been submitted earlier and rejected in the Board's judicially affirmed decisions.

B. Analysis

After CCPA asked the Board to establish the terms and conditions of sale, both parties submitted their own appraisals and supporting evidence. RVI had ample opportunity to challenge, and indeed did vigorously challenge, CCPA's appraisal at that time.

As discussed above, RVI submitted an appraisal based on a single, assembled-corridor approach, while CCPA's certified real estate appraiser used an across-the-fence methodology.
CCPA's approach was consistent with Board precedent, and has been judicially affirmed in this case. *RVI I*, 299 F.3d at 559. Nonetheless, RVI argues that the new evidence of Mr. Rossi's methods could not have been obtained during the 30-day period provided in 49 U.S.C. 10904(f)(1)(A) because that time period is so short that there was not an adequate opportunity for it to conduct discovery.

Although the 30-day time frame is short, it is the time allotted by Congress. Other carriers and offerors in OFA proceedings are able to comply with it, submitting detailed evidence. Indeed, if any party has difficulty complying with the deadline, usually it would be the offeror. Had RVI needed additional time to prepare its valuation evidence, it could have requested it. *See, e.g., Boston and Maine* (seller asked for and received additional time to refute the offeror's valuation). If RVI had questions about Mr. Rossi's calculations, RVI should have deposed him during the 30-day statutory period or as soon thereafter as it suspected there were errors.

RVI's attempt to renew its challenge to the underlying valuation methodology is repetitive and without merit and should not be considered further, as concerns for administrative finality, repose, and detrimental reliance counsel against a reopening here. More than 3 years elapsed after the Board's original assessment of the line before RVI tendered its purportedly "new" evidence. CCPA/CCPR reasonably relied on the Board's determination of the purchase price when they chose to proceed to acquire and operate the line, and they invested substantial resources to restore rail service. Were we to alter the purchase price at this time, CCPA could not simply walk away from the deal, as it could have when we originally set the price.

For all of these reasons, RVI's petition to reopen this proceeding and revisit the purchase price is denied.

II. Motion to Compel

A. Relevant History

On April 21, 2003, CCPA/CCPR served RVI with discovery requests in the Board's proceeding prompted by an exhibit introduced by VPB in the state court proceeding. CCPA/CCPR claim that this list reveals 68 licenses that were supposed to have been, but have not been, turned over to CCPA. CCPA/CCPR's discovery requests seek copies of those licensing agreements.

On April 30, 2003, RVI asked the Board to quash the discovery requests, arguing that CCPA/CCPR should pursue discovery through the state court in which the exhibit was introduced. On May 7, 2003, CCPA/CCPR responded to RVI's request and moved to compel discovery. In their pleading, CCPA/CCPR attached correspondence from the president of RVI that suggests that RVI and VPB are indeed still in possession of certain licenses and are attempting to enforce those agreements against the third-party licensees.

B. Analysis

In contrast to RVI's reopening petition, CCPA/CCPR's motion to compel discovery does not seek to reopen the merits of determinations made years earlier. Rather, CCPA/CCPR seek to obtain information needed to enforce the Board's prior decisions. The exhibit prepared by VPB for use in the state court proceeding details, for the first time, the licenses attached to the line. The exhibit purportedly reveals 122 licenses that were supposed to have been included in the sale of the line. Because CCPA claims it has received only 54 of these licenses from RVI, it appears that there are 68 additional licenses that RVI and VPB have failed to convey. According to CCPA, the 54 licenses that RVI has already turned over are the lowest revenue-producing licenses, generating only $1,542 of revenue annually; RVI's list indicates that the missing 68 licenses produce $34,077 of revenue annually.

To further support its argument that RVI continues to hold licenses it was ordered to transfer, CCPA/CCPR cite a letter to Tracy Drake, Executive Director of CCPA, dated April 18, 2002, in which RVI's president, David Handel, proposed that RVI invoice the third-party licenses on CCPA's behalf, with RVI retaining 10% of the collected revenue as a "management fee." But such a proposal is inconsistent with the Board's judicially affirmed *November 2001 Decision*, which directed RVI and VPB to convey to CCPA all licenses other than the 156 specifically identified in the Board's earlier decision.

CCPA/CCPR refer to another letter, dated May 2, 2002, in which Mr. Handel warned a third-party licensee that it is not permitted to assign its rights to a sub-licensee and threatened that RVI would take legal action to enforce the terms of the license. RVI's effort to enforce the license well beyond the date it should have been conveyed to CCPA provide further evidence that RVI failed to convey this license, as the Board had ordered.

CCPA is clearly entitled to receive the licenses retained by RVI. As noted previously, the Sixth Circuit has already upheld the Board's determination that RVI was not entitled to additional compensation for licenses first disclosed after the January 2001 closing of the sale. The value of all licenses (other than the 156 that RVI and VPB were authorized to retain), even those licenses that were unknown, was implicitly included in the valuation adopted by the Board in the *January 2000 Decision* and the *October 2000 Decision*, by virtue of the Board's consideration of, and reliance on, evidence presented by the parties at that time. RVI failed to present evidence of separate, additional value for those licenses, and it therefore bears the responsibility for any consequences of that failure. *See RVI II*, 2003 U.S. App. LEXIS at * 11.

In a letter to the Board dated May 29, 2002, RVI claimed that it was unsure which licenses it was required to hand over. Specifically, RVI claimed that the list in the appendix to CCPA's December 8, 2000 filing did not describe in sufficient detail which licenses may be retained. RVI asserts that, to properly distinguish between the two groups of licenses, it would need access to the notes of CCPA's appraiser, Mr. Rossi, who compiled the list in the appendix. Whatever the merits of that argument, those notes have now been provided to RVI, as RVI's August 25, 2003 filing compared Mr. Rossi's notes to the appendix and identified both the 156 licenses that were included in the appendix and the licenses that were not. Thus, any claim of confusion on RVI's part should now be moot.

RVI's argument that CCPA already possesses adequate information about the licenses, from Mr. Rossi's examination,[4] to enforce the agreements also lacks merit. RVI was ordered to transfer the actual, physical licenses to CCPA, regardless of what information might already have been in CCPA's possession.

Finally, RVI's argument that CCPA/CCPR should proceed through the Ohio state court is baseless. The material CCPA/CCPR seek pertains to the enforcement of Board decisions and is properly the subject of discovery under our rules.

So that CCPA/CCPR will know which licenses they ought to have and can take action if RVI continues to ignore or frustrate the Board's orders, CCPA/CCPR's motion to compel discovery will be granted and RVI will be required to respond on January 12, 2005. CCPA/CCPR shall report to us on whether RVI has answered the discovery requests. RVI should be on notice that, if it does not answer the interrogatories and produce the requested documents as ordered, it may be subject to appropriate enforcement action.

[4] RVI's August 25, 2003 filing shows that Mr. Rossi compiled a handwritten list of 237 licenses.

III. Final Accounting of the Former Escrow Fund

A. Relevant History

As previously discussed, under the Board-imposed terms and conditions of the sale of the line from RVI to CCPA, RVI was ordered to place $375,000 into an escrow account that CCPA could use to repair the line. After the escrow account arrangement failed, the Board ordered that CCPA be given the $375,000 directly, with the conditions that it keep account of expenditures for repairs, including evidence of competitive bidding; that it keep the funds in a separate account; and that it complete all repairs for which the account was intended within 270 days. CCPA employed CCPR to oversee the rehabilitation effort. The transferred funds are referred to as "the Fund."

According to CCPA/CCPR, repairs to the line totaled $2,009,529, of which $1,536,855 was funded by federal and state grants, leaving an additional $472,674 eligible to be covered by the Fund (which, as stated above, was limited to $375,000). In their joint motion asking the Board to find that CCPA properly spent the Fund in accordance with the Board's conditions, CCPA/CCPR submitted documents, consisting mostly of invoices from contractors and maintenance companies, as well as verified statements from CCPA/CCPR officials. On January 27, 2003, CCPA/CCPR supplemented the record with a compilation of the bid proposals that CCPR had received during the line's rehabilitation.

RVI filed a response on April 4, 2003, in which it claims that approximately $360,000 of the amount in the Fund should be refunded to it because most of the repairs allegedly were not competitively bid. RVI also raises several other challenges to CCPA/CCPR's use of the Fund, concerning which expenditures could be covered and whether CCPA assumed the fiduciary duties of an escrow agent.

On April 21, 2003, CCPA/CCPR tendered a rebuttal, which has been accepted for filing.[5] In the rebuttal, CCPR's witness Walter Gane explains that competitive bidding was not used for some of the work because most of the repairs had already commenced prior to imposition of the competitive bidding requirement. RVI replied to CCPA/CCPR's rebuttal on August 21, 2003. On September 17, 2003, CCPR filed a motion to strike portions of RVI's surrebuttal, which is denied, as CCPR's arguments go to the weight that should be accorded RVI's evidence rather than to admissibility. *See, e.g., CSX Transp., Inc.—Abandonment Exemption—in La Porte, Porter, and Starke Counties, IN*, STB Docket No. AB-55 (Sub-No. 643X), slip op. at 3 (STB served April 30, 2004).

[5] *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. 2X) (STB served July 30, 2003).

B. Analysis

We first address CCPA's duties with respect to the Fund and the scope of repairs for which the Fund could be used. We then turn to whether CCPA/CCPR have adequately supported their expenditures.

1. CCPA's Duties Concerning the Fund

RVI incorrectly contends that CCPA functioned as an escrow agent, subject to fiduciary duties, with respect to the Fund. In the *October 2000 Decision*, the Board provided for an "independent, third-party fiduciary" to be placed in charge of the Fund.[6] But when it became clear that an escrow arrangement would not be workable, the Board removed the requirement for a traditional formal escrow arrangement. Instead, in the *November 2001 Decision*, the Board provided for an alternative arrangement under which CCPA was directed to keep the Fund in a separate account, to keep account of expenditures, to obtain competitive bids, and to complete repairs within a specified time.[7] While the Board continued to refer to the Fund loosely as "a separate escrow account," *id.* at 8, it did not impose on CCPA all of the responsibilities of an independent escrow agent. Instead, it simply made CCPA accountable for expenditures. *Id.*

RVI argues that CCPA should have sought Board approval prior to making any expenditures. While this was one of the suggestions made by the parties after the resignation of the independent escrow agent, the Board did not adopt it. Given the need for prompt payments for repairs and the inherent delay involved in obtaining regulatory approval, the Board authorized CCPA to make disbursements from the Fund, and the Board deferred any challenge to those payments until after the Fund was expended. *November 2001 Decision* at 7.

2. Scope of Repairs

RVI claims that the Fund could only be used to repair signals and crossings, and not for repairs to any other parts of the line. But in the *October 2000 Decision*, the Board clearly envisioned a broader Fund that would be made available for repairs to, and restoration of, track and track materials as well. *October 2000 Decision* at 20. Indeed, the Board has already rejected RVI's narrower interpretation. *November 2001 Decision* at 6-7 ("RVI has suggested that we did not mean for these funds to be used for * * * any purpose other than removing asphalt or reconnecting signals. Our purpose in establishing the escrow account was broader, however."). So long as the Fund was used to repair damage that was the result of "RVI's failure to keep the line * * * operational," *id.* at 8, that expenditure is within the intended scope of the Fund.

[6] *October 2000 Decision* at 19.
[7] *November 2001 Decision* at 7.

RVI also contends that the Fund could only be used to repair, not to replace, existing equipment. RVI claims that CCPR's replacement of damaged equipment with new signal equipment, as well as CCPR's use of new ties for crossings that had been paved over, were unnecessary expenses. But as CCPA/CCPR point out in their pleadings, some of the signals were in such bad condition that even with repairs it would have been unsafe to use the existing equipment. And because the compacting of asphalt and the vehicle traffic over the paving, along with the abrasive actions inherent in removing the asphalt, can damage ties and foul ballast, standard engineering practice calls for the replacement of the ties and ballast.

3. Competitive Bidding

RVI seeks a return from the Fund because CCPA/CCPR did not employ the process of competitive bidding. CCPA/CCPR submitted copies of invoices and bids from contractors to show that competitive bidding was used in some instances. However, as RVI points out, that documentation is for *all* work performed on the line, including work funded by federal and state grants, and in most instances it is not possible to discern which bid proposals and invoices are relevant to this proceeding.

CCPA/CCPR claim that they provided evidence for all repair work because they were unable to "link many of the expenditures to a particular spot on the line."[8] However, the Board required CCPA to keep the Fund segregated from other monies, to account for all funds expended, and to maintain evidence of competitive bids. Had CCPA/CCPR properly complied with these directives, it should not have been difficult to distinguish projects paid out of the Fund from grant-funded projects. Furthermore, the list that they submitted of repairs paid for from the Fund lacks many important facts (such as dates and descriptions of the work performed) that would be needed to cross-reference bid proposals and invoices to these projects. Given the Board's explicit directive that all expenditures be fully supported, CCPA/CCPR's lack of organization is disturbing.

Based on what we are able to determine from the CCPA/CCPR evidence, only a few projects paid for from the Fund can be linked to submitted bids. We are left to presume that the other projects paid for from the Fund were not competitively bid.

a. Repairs Made Prior to the *November 2001 Decision*

After the Board created the escrow arrangement in its *October 2000 Decision*, CCPA/CCPR initially sought competitive bids, although at that time, bidding was not required by the Board. CCPA/CCPR state that the same contractors consistently provided the lowest bids and thus, to save time, CCPR began to hire those contractors directly, rather than going through a bidding

[8] CCPA/CCPR Joint Motion Seeking Final Closure of the Escrow Account (Joint Motion) at 2.

process. This was necessary, they claim, to restore the line to operational status as quickly as possible. CCPA/CCPR also point out that, at the time the line was being rehabilitated, RVI had challenged the Board's decision ordering the $375,000 to be placed in escrow. Because CCPA/CCPR faced the risk that the reviewing court might reverse the Board's order and the Fund would not be available to cover these costs, it was in CCPA/CCPR's own interest to spend the escrowed funds prudently.[9]

Because competitive bidding was not an explicit Board requirement at the time the escrow fund was established in our *October 2000 Decision*, but was only imposed after repairs had begun *(November 2001 Decision)*, we will not disqualify work performed prior to that decision simply because CCPA/CCPR did not use competitive bidding. RVI has not asserted that the *pre-November 2001 Decision* repair costs were unreasonably high, and it has not demonstrated any fraud or any other troubling irregularity as to those costs. Thus, we find that RVI is not entitled to a refund for the costs of any of those repairs.

b. Repairs Made After the *November 2001 Decision*

CCPA/CCPR assert that all projects that were performed after the *November 2001 Decision*, in which the Board imposed a competitive bidding requirement, were competitively bid. But that claim is contradicted by their own evidence. From our review of CCPA/CCPR's evidence, it seems that for two crossing-repair projects that were paid out of the Fund after the *November 2001 Decision* — Old Route 51 (invoiced for $36,720) and Cannellton Road (invoiced for $32,400) — documents were contrived to give the appearance that CCPR had solicited competitive bids in advance when in fact such bids had not been submitted. The purported "bids" for repairs to these two crossings were received from Dardanelle & Russellville Railroad (D&R), a corporate affiliate of CCPR, on July 22, 2002. However, just a day later, Ohio Track, the "winning" contractor, submitted invoices to CCPR for work already performed at these two sites. This indicates that the work had already been completed prior to D&R's purported bid. (Oddly, CCPA/CCPR also submitted "bids" from CCPR itself for the work at these two intersections, dated *after* the Ohio Track invoices for the work.) The statement by CCPA/CCPR's witness Gane that he was aware of D&R's bids prior to the awarding of the Old Route 51 and Cannelton Road projects is uncorroborated. If bidding had actually taken place, Ohio Track would have also submitted bids, but CCPA/CCPR have not submitted Ohio Track's bid proposals for this work, only the invoices, which were passed off as bid proposals. Finally, the fact that the purported competing bids came from an affiliate of CCPR raises suspicion, as CCPR would have been aware of Ohio Track's fee for the work and could have instructed D&R how high to make a bid so that CCPR could justify use of Ohio Track for the work.

[9] *See* CCPA/CCPR Joint Motion, V.S. of Timothy K. Robbins, at 2.

These suspicious bids demonstrate, at best, the unprofessional nature with which CCPA/CCPR documented the repairs, or at worst, their effort to mislead the Board. In either case, such conduct by CCPA/CCPR is disturbing. Because CCPA/CCPR did not comply with a basic requirement of the *November 2001 Decision* as to these projects, we find that RVI is entitled to a refund of the cost of these repairs, totaling $69,120.

For work performed for the crossing at Midlothian Boulevard (for which repairs were invoiced at $39,500), CCPA/CCPR submitted bid proposals from two independent contractors, and those bids are not suspicious in their appearance. Moreover, RVI has not challenged the validity of this repair. Accordingly, we find that CCPA/CCPR is entitled to apply money from the Fund for that work.

4. Overhead Costs

In addition to paying for repair work, CCPA/CCPR also used the Fund to pay for overhead costs incurred by CCPR in overseeing and contributing to the rehabilitation. CCPA/CCPR state that CCPR used its own employees and employees of corporate affiliates to perform many of the repairs because CCPR "knew [it] would be the low-cost contractor."[10] When CCPR used corporate affiliates to perform repair work, including grant-funded repairs, it included an amount for overhead and profit, which represented a markup or addition of approximately 20% over the cost of labor and equipment. We will refer to these expenses, totaling $41,059, as "repair overhead."

CCPA/CCPR also used the Fund to pay for what it calls "administrative overhead" costs, such as salaries, benefits, and other expenses incurred by employees of CCPR and its corporate affiliates who oversaw repairs performed by others.[11] CCPA/CCPR state that these administrative costs totaled $119,806 for 2001 and $48,791 for 2002. However, CCPA/CCPR claim these administrative costs only for 2001, as the Fund was not adequate to cover the 2002 administrative costs as well.

RVI argues that the Fund was not intended to cover overhead costs and that, even if it were, the administrative overhead costs are unsupported. It notes that there are no workforce accounting documents, no bills describing when and for what work consulting services were rendered, and no time sheets allocating particular expenses to specified projects or locations.[12] RVI also argues that the repair-overhead costs, if permitted, should have been applied only to repair projects paid from the Fund.

Overhead expenses are an essential component of the cost of repairs, and it is standard industry practice for railroad contractors to incorporate such costs into their service fees. Without these additional expenses, the repairs would not have been completed. Therefore, we conclude that money from the Fund may be used for legitimate overhead expenses. However, we agree with

[10] *Id.* at 4.
[11] *Id.* at 6.
[12] RVI Reply, V.S. of George Wehner, at 32.

RVI that the Fund should be used only for overhead related to projects properly paid for from the Fund and not for projects paid for with state and federal grants because there is not sufficient evidence that RVI was responsible for all the damage or deterioration for which those grants were used.

a. Repair Overhead

CCPA/CCPR's own evidence shows that the 20% markup to the total cost of repairs performed directly by CCPR and its affiliates was applied to both repairs paid from the Fund and grant-funded repairs.[13] A 20% markup appears to be consistent with industry standards for contractor overhead. But we adjust the amount of CCPA/CCPR's overhead costs for these repairs to apply the 20% markup only to the cost of those projects shown to have been properly paid from the Fund, which according to CCPA/CCPR's evidence is $152,015. This calculation yields a total permissible repair overhead cost of $30,403. Therefore, RVI is entitled to a refund of $10,656 ($41,059 – $30,403).

b. Administrative Overhead

The $119,806 claimed by CCPA/CCPR for 2001 administrative overhead costs covered the following expenses: consulting services, employee salaries, employer-paid benefits, vehicle expenses, and travel expenses (including meals and apartment rental). Employee salaries accounted for the largest expense ($74,118). These salaries were paid to four employees of Arkansas Short Lines who consulted with CCPR on the rehabilitation. To calculate these employees' fees, CCPA/CCPR's witness Timothy K. Robbins estimated how much of each employee's time was devoted to matters pertaining to the Youngstown-Darlington line rehabilitation, then applied this percentage to the employee's yearly salary. Based on these calculations, CCPA/CCPR used the Fund to pay for salaries of $9,890 to Danny Robbins (based on 40% of his time being devoted to the Youngstown-Darlington line), $2,610 to Mike Robbins (10% of his time), $22,957 to Tim Robbins (90% of his time), and $38,661 to W.K. Robbins, Jr. (67% of his time), for a total of $74,118. Witness Robbins claims that these figures are conservative because he only used a 10-month period (or for W.K. Robbins, Jr., a 7-month period), despite the fact that work to repair the line actually began before this time period.

However, we find no support in the record for Mr. Robbins' calculation of the employee salaries and benefits. Specifically, Mr. Robbins does not show how he determined the percentage of time that these employees worked on the Youngstown-Darlington rehabilitation. For example, he claims that Danny

[13] *See* CCPA/CCPR Joint Motion, V.S. of Timothy K. Robbins, Attachment A, "Pay Out Chart." This chart has two columns, one listing the amount paid out by the "Railroad," and the other the amount paid out by the "State." According to this chart, CCPR calculated a 20% markup to the total from *both* these columns.

Robbins devoted 40% of his time to working on the Youngstown-Darlington line. However, there is nothing in the record to document that Danny Robbins spent this amount of time on the project. Mr. Robbins' claim that his figures are conservative, because he only examined their work over a 10-month (rather than 12-month) time period, does not cure the lack of documentation.

There is no dispute that these employees performed services pertaining to the rehabilitation of the Youngstown-Darlington line. However, the burden is on CCPA/CCPR to present supporting evidence. Without any records of billing sheets or time logs, we cannot make an informed judgment as to whether to approve the claimed expenditures for salaries. Similarly, without receipts for vehicle and travel expenses or records of the consulting services performed by Robbins Railroad Consulting, Inc., we cannot approve those expenditures.

CCPA/CCPR's witness Christena Nielsen claims that she has reviewed invoices provided by CCPA/CCPR that justify these overhead costs. If these invoices exist, they should have been provided to the Board. CCPA/CCPR's witness Gane argues that shortline railroads typically do not keep accounting records of the amount of time employees work. While this may be true, the Board specifically ordered CCPA/CCPR to keep account of how the Fund was spent, and the burden of proof is on CCPA/CCPR to support its claims. Because CCPA/CCPR has not supported these administrative overhead expenses with documentation, we find that RVI is entitled to a refund of $119,806—the claimed administrative overhead costs for 2001.

5. Maintenance and Other Expenses

RVI's final arguments are that CCPA/CCPR improperly used the Fund to pay for normal maintenance expenses and for repairs for damage that RVI did not cause.

First, RVI challenges the expenditure of $6,078 for equipment rental and spraying to remove vegetation in the track bed, asserting that this is an ordinary maintenance expense that should be paid by CCPA/CCPR. However, when CCPA took possession of the line, the vegetation was so thick that in some areas a chainsaw was needed to remove it. Such excessive growth, which rendered the line inoperable until removed, suggests that vegetation had not been cleared for years before CCPA acquired the line. Accordingly, we find that in this case these expenditures related to RVI's failure to maintain the line in operable condition and thus were properly payable from the Fund.

Second, RVI asserts that there is no evidence that CCPA/CCPR's repairs to five track alignments (totaling $1,370) were for damage caused during RVI's ownership.[14] Because the line had been operated until RVI bought it,

[14] RVI also challenges the adequacy of this repair work. While the Board is charged with regulating in a manner that promotes a safe and efficient rail transportation system, 49 U.S.C. 10101(3), the Federal Railroad Administration (FRA) is charged directly with addressing rail safety. (continued...)

yet the damage was in place prior to CCPA's ownership, the damage to the track alignments most likely occurred during RVI's ownership. In any event, the damage had not been remedied by RVI, as it should have been to keep the line operable. Accordingly, the track alignment repairs were properly payable from the Fund.

Finally, RVI alleges that the $17,700 of clearing and drainage work at the Norfolk Southern Railway Company (NSR) overpass near Columbiana, OH, was to repair damage predating RVI's ownership. CCPA/CCPR complain that RVI had allowed the city and adjoining industry to drain runoff water at that location. In their own evidence, however, CCPA/CCPR attribute the damage to standing water "caused [both] by change of drainage by neighbor and [by] track repairs." And CCPA/CCPR do not rebut RVI's claims that the drainage problem was caused by the rail line having been built in a depression in order to get vertical clearance under an overpass — a situation predating RVI's ownership. Consequently, it appears that RVI's inattention was not responsible for the drainage problem and that payment for the repairs at that location was not properly made from the Fund. Therefore, RVI is entitled to a refund of the $17,700 spent on clearing and drainage work at the NSR overpass.

6. Total Amount Refunded

For the reasons discussed above, we find that RVI is entitled to refunds for the following disallowed amounts:

$36,720	Cost of repairs to the crossing at Old Route 51
$32,400	Cost of repairs to the crossing at Cannellton Road
$119,806	Cost of administrative overhead expenses for 2001
$10,656	Cost of overhead expenses for work funded by federal and state grants
$17,700	Cost of clearing/repairs at NSR overpass
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$217,282	Total principal

CCPA already has paid to RVI the interest earned on the Fund from the date of establishment of the account until the time that the principal was exhausted.[15] For RVI to be made fully whole, however, it should receive interest on the refunded amount ($217,282) for the intervening time period. CCPA is directed to pay to RVI interest on that amount, calculated in accordance with 49 CFR 1141, for that intervening time period.

All matters pertaining to the use and disposition of the Fund are hereby resolved and closed.

[14](...continued)
Therefore, any questions about the safety of this line should be directed to FRA.

[15] *See* CCPA/CCPR Joint Motion at 4 & V.S. of Stephen W. Cooper (attaching copies of checks to RVI totaling $16,642.81).

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

It is ordered:

1. CCPR's motion to strike portions of RVI's August 21, 2003 surrebuttal is denied.

2. RVI's petition to reopen this proceeding is denied.

3. CCPA/CCPR's motion to compel discovery is granted and RVI is directed to respond to the discovery requests served on April 21, 2003, on the effective date of this decision. Within 15 days, CCPA/CCPR should report to the Board on RVI's compliance with this decision.

4. CCPA/CCPR shall pay $217,282 to RVI, together with interest as set forth above, on January 12, 2005.

5. This decision is effective January 12, 2005.

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