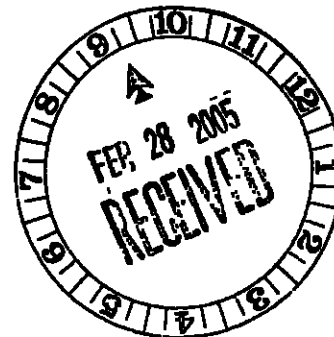


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Before the
SURFACE TRANSPORTATION BOARD



DOCKET NO: AB 556 (Sub No. 2X)

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RAILROAD VENTURES, INC -- ABANDONMENT EXEMPTION
BETWEEN YOUNGSTOWN, OH AND DARLINGTON, PA,
IN MAHONING AND COLUMBIANA COUNTIES, OH
AND BEAVER COUNTY, PA

**REPLY OF RAILROAD VENTURES, INC. TO THE
JOINT PETITION FOR REOPENING AND RECONSIDERATION**

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Dated: February 24, 2005

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On December 13, 2004 (“December 2004 Decision”), the Board ordered Columbiana County Port Authority (“CCPA”) and Central Columbiana and Pennsylvania Railway (“CCPR”) (Collectively referred to as “Petitioners”) to pay Railroad Ventures, Inc. (“RVI”) \$217,282 plus interest. That amount represented a partial refund of a \$375,000 escrow account established by the Board and entrusted to the CCPA under the Board’s November 8, 2001 decision (the “November 2001 decision”).

On January 3, 2005, as supplemented by a filing on January 6, 2005, Petitioners filed a Joint Petition for Reopening and Reconsideration asserting that due solely to material error, the Board should reopen and reconsider its December 13, 2004 decision. By decision dated January 10, 2005, the Board stayed the payment obligation of CCPA and CCPR under the December 13, 2004 decision. By order of January 21, 2005 the Board afforded RVI an extension until February 28, 2005 to file its Reply. For the reasons contained in the Verified Statement of George D. Wehner and as hereinafter set forth, RVI

respectfully requests that the Board dismiss the Joint Petition for Reopening and Reconsideration

In order to appropriately assess the Petition for Reopening and Reconsideration, it is necessary to briefly summarize the responsibilities and obligations imposed on CCPA by the Board's November 2001 order. Rather than characterize the provisions of the November 2001 order, RVI will simply quote those paragraphs of the 2001 order which pertain to the escrow fund

2 Escrow Disbursements The parties also disagree on the procedures and payment for repairs to the line. In our earlier decisions, we ordered the parties to place in escrow \$375,000 from the sale proceeds to pay for certain repairs to the line. RVI has raised questions about the breadth of repairs for which payment was to be made from the escrowed funds. Also, the designated escrow agent, attorney James Davis, is no longer willing to serve and has not disbursed any of the funds for repairs that already have occurred. CCPA asks us to establish a procedure for determining whether specific repairs were intended to be covered and to provide for disbursement from the escrow account. In connection with that request, CCPA asks us to order RVI to cease and desist from interfering with the disbursement of funds from the escrow account. In this decision, we clarify the type of repairs to be paid from the escrowed funds, order the immediate payment to CCPA of all of the funds in the escrow account, and order CCPA itself to keep account of those funds

. . .

3 The Escrowed Funds We earlier ordered the parties to escrow \$375,000 of the proceeds of the OFA sale to pay for repairs that are needed to make serviceable any segment of the former Y&S line that RVI allowed to become unserviceable during its ownership. Some repairs have been made, but none of the escrowed funds have been distributed to CCPA because escrow agent Davis resigned prior to the disbursement of any of the funds

a Covered Repairs We first address the general dispute as to the kind of repairs intended to be covered by the escrowed funds. RVI has suggested that we did not mean for these funds to be used for capital expenditures or for any purpose other than removing asphalt or reconnecting signals. Our purpose in establishing the escrow account was broader, however. We meant for the escrowed proceeds to be used to correct egregious misconduct, whether by RVI actively (by inviting road crews to pave over track) or passively (by failing to protect the property from others rendering the line unserviceable by paving over, removing, or destroying track or

disconnecting signals) 11 Contrary to RVI's allegations, expenditures necessitated by RVI's disregard for the common carrier obligation cannot be considered as capital expenditures, but rather as necessary repair expenses to restore the line to service and should be covered from the escrowed funds

.

Under these circumstances, we do not believe that finding a suitable replacement escrow agent would be an easy task. Nor do we believe that it is necessary to do so. Rather, we now conclude that the best way to ensure that RVI does not interfere further with the orderly administration of these funds and the accomplishment of our original objectives in setting up the fund is to allow CCPA to manage the funds directly. Accordingly, we will direct Mr. Davis (the escrow agent who resigned) to make a lump-sum, one-time payment of the entire amount in the escrow account to CCPA immediately. 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.

... ..

ORDER

5 Former escrow agent Davis shall immediately transfer to CCPA all funds in the escrow account established pursuant to previous order and shall be held harmless for doing so.

6 CCPA shall establish a separate escrow account with the proceeds transferred to it pursuant to paragraph 5. CCPA may withdraw from the escrow account such funds as are necessary to pay for repairs of this rail line at road crossings and the restoration of signaling equipment that occurred as a result of RVI's failure to keep the line of railroad operational, and shall keep account of all funds spent.

7. If any funds remain in the escrow account after the 270th day from the effective date of this decision, they shall be transferred to RVI at that time.

8 CCPA shall be held harmless for any funds spent from the escrow account for repairs to its line that were the result of RVI's failure to keep the line operational during its ownership of the line, except for any fraudulent expenditures.

As summarized in the Board's November 2001 and December 2004 decisions, the parties in this proceeding repeatedly differed over appropriate administrative and

accounting procedures for the escrow fund established by the Board. Finally, in the November 2001 decision the Board established those administrative and accounting procedures when it entrusted the escrow fund to CCPA. RVI thereafter sought accountings from CCPA and CCPR for monies expended from the fund. Finally, on January 21, 2003 petitioners filed a Joint Motion for Confirmation of Escrow Account Expenditures seeking final closure of the escrow account. Not surprisingly, petitioners claimed that its expenditure of all monies in the account complied with the Board's November 2001 order and were properly used for the purposes set forth by the Board in that order.

On April 3, 2004, RVI filed a reply to the joint motion for confirmation to which petitioners responded with rebuttal evidence on April 21, 2003 and to which RVI filed a Motion to Strike on April 30, 2004 to which petitioners responded on May 7, 2003. On August 21, 2003, RVI, at the Board's request, filed surrebuttal testimony to the CCPA/CCPR rebuttal and the pleadings were finally closed on September 17, 2003 when CCPR filed a Motion to Strike portions of RVI's surrebuttal statements. Thus, over a period of almost eight months in 2003 the issues and documentation related to the petitioners' expenditures from the escrow fund were fully and extensively litigated. Not only did petitioners open those pleadings as the moving parties, they also closed them and had a full and fair opportunity to respond to the legal arguments and evidentiary submissions made by RVI. Petitioners also had a full opportunity to provide whatever supplemental documentation they deemed appropriate to respond to RVI's objections to their expenditures. Indeed, each of the expense categories which the Board's December 2004 decision directs be reimbursed to RVI were explicitly raised and addressed in RVI's evidentiary submission in its April 3, 2003 Reply. As noted above, there were two

subsequent exchanges of pleadings and verified statements made by petitioners in which Mr. Walter J Gain and others submitted further testimony and documentation.

The parties then patiently waited fourteen months for the Board's December 13, 2004 decision. In that decision, the Board set forth an analysis of the various expenditures made by CCPA from the escrow account and addressed the various challenges and contentions raised by RVI with respect to the CCPA expenditures. Based on its analysis of the documentary evidence and testimony submitted by the parties, the Board identified five expense categories where it concluded that CCPA as the moving party had not sustained its burden of proving that it had complied with the escrow account procedures established by the Board in the November 2001 order.

Old Route 51, Cannelton Road Crossings

Specifically, with respect to the repairs to the crossings at Old Rt 51 and at Cannelton Road, the Board found that CCPA/CCPR had not submitted appropriate documentation to establish that these crossings had been awarded to the contractor on the basis on competitive bidding. Indeed, the Board expressed concern that the documents submitted and the explanations provided by CCPR suggested that petitioners may have attempted to mislead the Board regarding their noncompliance with the competitive bidding requirements. Based on these conclusions, the Board directed petitioners to refund the cost of those repairs totaling \$69,120.

2001 Administrative Overhead

The Board also disallowed \$119,806 in administrative overhead expenses for 2001. In reaching this conclusion, the Board detailed its analysis of the evidence submitted by the petitioners but noted that petitioners' evidence did not show how they determined the

percentage of time that CCPR personnel worked on the Youngstown-Darlington line rehabilitation. The Board noted that there was nothing to document the time which petitioners claimed CCPR employees spent on the line rehabilitation projects for which the escrow account was created. The Board stated, "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." It concluded, "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 cost for 2001."

Federal and State Grant Overheads

The Board also disallowed \$10,656 for overhead expenses associated with work funded by federal and state grants. Here again, the Board disallowed the expenses because petitioners failed to provide adequate evidence that the repair overheads paid for with state and federal grants were expended solely on those rehabilitation projects authorized to be paid from the escrow account under the Board's November 2001 order.

Norfolk Southern Underpass Repairs

Finally, the Board disallowed \$17,700 representing the cost of clearing and repairs at the Norfolk Southern underpass near Columbiana, Ohio. Once again, the Board's decision states that CCPA and CCPR did not submit adequate evidence to rebut RVI's evidence that the drainage problem at the underpass was caused by the rail line having been built in a depression in order to get vertical clearance beneath the NS line—a condition predating RVI's ownership. Thus, RVI's omissions were not responsible for that problem.

and payment of the repairs at that location was not properly made from the escrow fund. The total of these categories of disallowed expenditures was \$217,282.

LEGAL ARGUMENT

I Petitioners have failed to assert any material error which justifies reconsideration of the December 2004 order

A Applicable Standards for Petitions for Reconsideration

Under 49 C F R §1152 25(e)(4) the Board may only entertain a petition to reopen and reconsider on grounds of material error, new evidence, or substantially changed circumstances. Such a petition must state in detail the nature and the reasons for the relief requested. In the first sentence of the joint petition, CCPA/CCPR plainly state that their petition is submitted "on the basis of material error." Moreover, a petition for reopening and reconsideration must be timely filed within twenty days after the service date of the decision. In this case, the joint petition was not filed in the Office of Proceedings until January 4, 2005 although the cover sheet of the petition was date stamped as received on December 3, 2004, the twentieth day following the Board's December 13, 2004 order. However, the petition was supplemented with evidentiary exhibits on January 6, 2005. Accordingly, the January 6, 2005 supplemental filing is untimely and can not be considered by the Board. See 49 C F.R. §1104.6

The joint petition does not claim that it seeks to introduce new evidence or that there are changed circumstances. Rather, petitioners contend that the Board committed material error in its evaluation of the evidentiary record and in arriving at the legal conclusions which were based on that evidentiary record. Petitioners also assert that the Board improperly imposed the burden of proof on them to justify expenditures from the

escrow account As RVI will address in greater detail, a review of the allegations and assertions contained in the joint petition indicates that petitioners are simply trying to reargue those legal issues originally litigated in 2003 which were decided adversely against the petitioners after a full consideration of the record evidence by the Board in its December 13, 2004 decision While petitioners assert that the Board made material errors, a review of the pleading, verified statements and documents submitted by petitioners indicates that they are simply trying to supplement the prior record with additional information, documentation and testimony, all of which could and should have been provided to the Board in 2003. Even if the joint petitioners were to present some new fact or issue, the Board does not consider new issues raised for the first time on reconsideration where those issues could have been and should have been presented at an earlier stage of proceedings Moreover, the term "new evidence" as used in §1152 25(e)(4) refers to evidence that was not reasonably available to the party when the record was developed and not simply newly raised in a petition for reconsideration. See Friends of Sierra R R , Inc v ICC, 814 F2d 663, 667 (9th Cir. 1989) Nothing in the Board's regulation obligates it to rethink its decisions whenever a party wishes to try out a new theory or find new information at a later stage in the process Connecticut Trust for Historic Preservation v ICC, 841 F2 479, 484 (2d Cir. 1988) If a party were free to reshape its case, so long as it did so within twenty days after a decision, the administrative process might never end The Board is not expected to "behave like Penelope, unraveling each day's work to start the web again the next day." Western Corp Traffic League v ICC, 735 F2d 1408, 1411 (D C Cir. 1984).

Since petitioners have not asserted that the Board's December 13, 2004 decision must be reopened and reconsidered based on changed circumstances or new evidence, the Board must initially determine whether or not petitioners have stated any valid claim of material error to justify reopening this proceeding. While what constitutes material error is often determined by the context in which that claim arises in a particular decision, as a general rule, material error is any error regarding a factual interpretation or legal determination that is so important or essential to the disposition of a claim or defense that its correction would change the result of the prior decision. Examples of material errors include the application by an administrative agency of a judicially invalid rule, Platnick Brothers, Inc. v. Norfolk and Western Railway Co., 367 ICC 782, 785 (1983), the misapplication or misinterpretation of a statutory provision, Central States Enterprises v. ICC, 780 F.2d 664, 672-73 (7th Cir. 1985); the improper application of an administratively sanctioned valuation methodology, Western Pacific Stock Holders v. ICC, 848 F.2d 1301, 1303 (D.C. Cir. 1988) or where the agency erroneously interprets evidence in the record at the time of the initial adjudication Friends of Sierra Railroad, Inc. et al v. ICC, 881 F.2d 663, 669 (9th Cir. 1989).

B. Petitioners Claims of Material Error Unraveled

1.) Old Route 51 and Cannelton Road Crossings

In its petition for reopening and reconsideration, petitioners first assert that the Board's November 2001 decision did not contain any requirement for competitive bidding. However, such a contention requires the complete disregard of the Board's mandatory requirement set forth in the last paragraph on Page Seven under Paragraph B – Disbursement of Funds in the November 2001 decision. That sentence explicitly required

CCPA to “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).” Petitioners apparently rely on the transparent distinction that this requirement did not appear in the ordering paragraphs of the 2001 decision and purportedly they were under no legal obligation to observe competitive bidding requirements. Such an assertion is completely untenable and flies in the face of the general principle that administrative and judicial orders must be read in context of the decision which supports them. Mexrail, Inc v. Union Pacific Railroad Company and Missouri Pacific Railroad Company, STB Finance Docket No 32980, 2000 STB Lexis 389, July 11, 2000, Union Pacific Railroad Company – Petition for Declaratory Order – Rehabilitation of Missouri-Kansas-Texas Railroad Between Jude and Ogden Junction, TX, STB Finance Docket No 33611, 3 S T.B 646; 1998 STB Lexis 227, August 19, 1998; Mountain Laurel Railroad Company – Acquisition and Operation Exemption – Consolidated Rail Corporation, Finance Docket No. 31974

Moreover, petitioners’ arguments regarding compliance with competitive bidding requirements are untimely and should have been presented to the Board in the petitioners pleadings filed in response to RVI’s reply to the joint motion seeking final closure of the escrow account back in 2003. If petitioners believe they were not subject to competitive bidding requirements under the November 2001 decision, that defense should have been raised at that time in reply to RVI’s contention that petitioners had failed to observe those requirements with respect to the Old Route 51 and Cannelton Road crossings. As noted previously, the Board does not consider new issues raised for the first time on

reconsideration where those issues could have and should have been presented at an earlier stage of proceedings

Petitioners also complain that the Board's decision appears to be based on speculation that certain bids were contrived. However, the Board's December 13, 2004 decision is not based on speculation, it is based on the evidentiary record submitted by the joint petitioners themselves and the testimony of RVI's witness. The Board's decision made a careful review of the various documents submitted in connection with these two crossing projects and based on that evidence, and the testimony of CCPA and CCPR witnesses, the Board concluded that the explanations offered by those witnesses were simply not plausible or credible. Assessing the credibility of witness testimony is a matter solely within the discretion of the finder of fact 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), Surface Transportation Board, 2003 STB Lexis 121, March 14, 2003 Rio Grande Industries, Inc., and the Denver and Rio Grande Western Railroad Company – Control – Southern Pacific Transportation Company (Arbitration Review), STB Finance Docket No. 32000 (Sub No. 12) 2202 STB Lexis 550, September 17, 2002. Thus the conclusions reached by the Board are fully supported by the evidence of record which the Board found to be convincing and disturbing

Petitioners also allege that the competitive bidding requirements would be difficult to comply with particularly where repairs were made shortly before the close of the 270 day period that was given to CCPA and CCPR under the November 2001 order. However, given the time pressures to which petitioners claim they were subject, they provide no

explanation as to why they did not petition the Board for an extension of the 270 day period. At numerous points throughout this proceeding, the Board has granted extensions to both parties where additional time has been required to comply with filing deadlines but CCPA/CCPR never sought an extension the 270 day time limit. Petitioners now complain that the time limits imposed by the Board in its November 2001 order made compliance with the competitive bidding requirements unnecessary or unrealistic. However, since CCPA/CCPR failed to ask for an extension of that deadline, this argument provides no reason for the Board to reopen and reconsider its December 2003 order.

Next, the petitioners argue that there was no indication in the 2001 decision that payments for necessary repairs would be disallowed after the fact in the absence of competitive bids. This assertion is simply untenable in light of the specific requirements of the Board's November 2001 decision. Nor did the Board suggest that the failure to obtain competitive bids would be considered tantamount to fraud. What the Board found disturbing was the submission of documentation purporting to establish that competitive bidding requirements had been followed when in fact the information on the face of those documents refuted that assertion and suggested that petitioners had attempted to mislead the Board regarding their compliance with this requirement. In summary, the requirements of the 2001 order with regard to documentation of competitive bidding is clear, explicit, and was observed by petitioners with regard to other crossing projects funded by state and federal monies.

Finally, attempts by joint petitioners through this Petition for Reopening and Reconsideration to supplement the record with further evidence and testimony attempting to refute the factual findings of the Board's 2003 decision is improper. The verified

evidence and statements submitted by joint petitioners should have been submitted for the Board's consideration in 2003 in response to the arguments made by RVI that the Old Route 51 in Cannelton Road crossing projects had not been competitively bid and that the evidence submitted by CCPA and CCPR was misleading and deceptive. It is now simply too late for CCPA and CCPR to offer explanations or excuses which should have provided in 2003.

2. The Fraud Exception

Petitioners also argue that under the 2001 order the Board provided that CCPA should be held harmless for any funds expended from the escrow account for repairs to its line that were the result of RVI's failure to keep the lines operational during its ownership of a line, except for any fraudulent expenditures. However, here again petitioners failed to read this particular provision in the context of the 2001 order. Under the 2001 order, the Board provided blanket protection for CCPA for any expenditures from the escrow account provided CCPA demonstrated (i.e. sustain its burden of proof) that those expenditures were for repairs that were the result of RVI's failure to keep the line operational during its ownership and were made in compliance with the Board's administrative requirements for the fund. That is the reason why the Board imposed a requirement on CCPA to keep account of the projects on which the escrow funds were used. As the November 2001 order clearly states, if those threshold requirements were met, those expenditures could be challenged only if RVI could establish proof of fraud, such as the submission of documents establishing that claimed expenditure of funds did not in fact occur. To argue that the fraud exception contained in the Board's November 2001 order was the only basis for challenging CCPA/CCPR expenditures from the escrow account would simply abrogate

the other requirements established by the Board and render compliance with those requirements unnecessary. These administrative requirements and safe guards were established by the Board in its November 2001 order and petitioners claim that the Board retroactively imposed new and different standards in the December 2004 decision has no rational support and is totally without merit. Finally after RVI's submission to the Board of its June 17, 2003 letter and affidavit of Attorney Nalbandian regarding the Board's own disclaimer of a fraud only standard before the U S Sixth Circuit Court of Appeals, petitioners were fully aware of the grounds for contesting escrow account expenditures and the reassertion of a "fraud only" standard by petitioners is simply frivolous (Exhibit A.)

3 Overhead Allocations

Joint petitioners next complain that the Board's decision to disallow \$119,806 representing the cost of administrative overhead expenses for 2001 and \$10,656 representing the cost of overhead expenses for work funded by federal and state grants constitutes material error and a denial of due process. Petitioners also argue that because RVI prevented funds from being withdrawn from the escrow account when payments were due, there is no rational basis for disallowing overhead related to needed repairs that were paid for with state and federal grants. However, this misstates the Board's rationale for disallowing these expenditures.

As petitioners note, the Board recognized that overhead expenses could be properly paid from the escrow account but disallowed those expenditures because the overhead cost allocations submitted by CCPA and CCPR were unsupported by any evidence that these overhead expenses were attributable to repairs necessitated by RVI's ownership of the line. As the Board stated in its December 13, 2003 order. "the funds should be used only for

overhead related to projects properly paid from the fund and not from projects paid with state and federal grants because there is not sufficient evidence that RVI was responsible for all the drainage or deterioration for which those grants were used ” Based on CCPA and CCPR’s failure to provide such evidence, the Board revised the allowable overhead for repair projects and disallowed \$10,656 attributable to state funded repairs because CCPA/CCPR had not shown that those repairs addressed conditions which occurred solely during RVI’s period of ownership

Similarly, the Board disallowed \$119,806 for 2001 administrative overhead costs because the CCPR provided no support for the percentages of time which its employees attributed to repair work on the Youngstown/Darlington rehabilitation related to RVI’s period of ownership. The Board noted that there was no dispute that CCPR employees performed services pertaining to the rehabilitation of the Youngstown/Darlington line or that a portion of that rehabilitation work may have been attributed to RVI’s period of ownership. However, the Board held that the burden of proof was on CCPA/CCPR to present supporting evidence and that without any records or billing sheets or time logs allocating particular expenses to specific projects or locations, related to the damages or deterioration for which RVI was responsible, the Board could not make an informed judgment as to whether to approve claimed expenditures for salaries. The Board also noted that without receipts for vehicle or travel expenses or records of the consulting services performed, those expenditures could not be properly attributed to repairs or rehabilitation for which RVI was responsible and therefore could not be properly paid from the escrow account

The Board also observed that CCPA's and CCPR's evidence in this regard was contradictory. Witness Nielson claimed that she reviewed invoices provided by CCPA/CCPR which justified these overhead costs but Mr Gains suggested that short line railroads did not typically keep records of the amount of time employees work, suggesting that CCPR may not have done so. Whatever the state of CCPR's time sheets and consulting invoices, those documents were not presented to the Board in 2003 when these allocations were challenged by RVI. The Board specifically ordered CCPA/CCPR to keep account of how the escrow funds were spent and the burden of proof was on CCPA and CCPR to support its claims. Thus, CCPA and CCPR were clearly on notice under the Board's November 2001 decision that it would be necessary for them to adopt procedures necessary to document and substantiate expenditures for overheads paid from the escrow account for the repairs and rehabilitations attributable to RVI's ownership and that they would need documents to support their expenditure allocation before the Board after those expenditures had been made. As the Board itself stated regarding the escrow disbursement procedures in its brief to the Sixth Circuit Court of Appeals: "But the Board fully afforded [the parties] the essential requirements of due process, which are notice and an opportunity to be heard Leary v. Daeschner, 228 F3d 729, 743 (6th Cir. 2000), quoting Cleveland Bd of Education v. Lauderhill, 470 U S 532, 546 (1985)."

Allocating overhead expenses to particular projects on the basis of time sheets and expense logs are routinely utilized accounting procedures which are reasonable and well recognized. As noted by RVI's witness Wehner, FRA regulations at 23 C F R §140.907 require railroads or their contractors to maintain these records for the purpose of substantiating overhead allocations. See Verified Statement of George D Wehner and 23

C F R. §140 907 Nor did the imposition of the burden of producing such documentation on petitioners deny them due process In 5124 Drug Corporation v. Human Resource Administration, 535 F Supp 1113(U S D C. N.Y. 1982) the City of New York instituted proceedings for the recoupment of Medicaid overpayments to pharmacies. The City of New York had not specified precise procedural safeguards for the repayment of funds other than to state that records upon which the claim of overpayment was based would be available to the individual pharmacy and that the pharmacy could present rebutting documents. The principal protection against improper recoupment that the City made available to the pharmacies was a post-recoupment administrative hearing before an impartial examiner where the pharmacy could introduce evidence and the city as the moving party bore the burden of persuasion. The court concluded that this process abridged no constitutionally protected rights Under Federal Rule of Evidence 803(6) in the case of exceptions to the hearsay rule for the admission of business records, the party offering such evidence is required to demonstrate that the representations set forth in those documents are based on information kept during the course of a regularly conducted business activity. It was therefore not improper or overly burdensome for the Board to require CCPA and CCPR to provide sufficient underlying documentation to confirm their representations that all overhead costs were properly attributable to repairs related to RVI's period of ownership. See also In Re: Oxford Health Plans, Inc Securities Litigation, 2001 U.S Dis. Lexis 5017 (April 30, 2001) where the U S. District Court ruled that in addition to the underlying work papers defendant was required to produce internal audit manuals and materials in order for plaintiffs to understand whether or not defendant followed appropriate audit standards, and Newport News Building and Dry Dock Company v.

William H. Reed et al., 655 F. Supp. 1408 (1987) for an extensive discussion of the type of documentation including “time charging records of employees assigned to the internal audit department” which could be obtained by the Defense Contract Audit Agency or the Inspector General for the Department of Defense and where the court also noted that “auditors review employee time cards, subcontractor invoices, general vouchers, summary cost records and other direct and indirect contract costs.” These decisions clearly indicate the usefulness and necessity of the documentation requirements imposed by the Board on joint petitioners under its November 2001 order.

When the Board directed CCPA to “keep account of all funds spent,” for the purposes specified in the November 2001 order, that requirement necessarily and reasonably required CCPA to maintain and produce sufficient documentation to demonstrate to the Board’s satisfaction that the funds were expended for the purposes intended. Since overhead expenses are not related to particular activities or projects, they are routinely allocated to particular projects or activities on the basis of time spent on each project which can only be calculated and substantiated by underlying time records. This is a generally accepted and routinely utilized method for allocating overhead costs as noted in the foregoing decisions. The failure of CCPA and CCPR to submit such underlying documentation in support of its overhead cost claim precluded Board authorization of those expenditures from the escrow fund. In addition, petitioners allocated 100% of their 2001 overhead costs for payment from the escrow fund instead of presenting a reasonable allocation formula based on time records or other proportionate criteria. See Mech-Con Corp. v. West, 61 F.3d 883, 886 (Fed. Cir. 1995) (A contractor recovers its indirect costs by allocating them on a proportionate basis among all of its contracts.) An overhead cost

allocation formula must have a sufficient nexus between the overhead expenses claimed and the rehabilitation projects attributable to RVI's period of ownership Cf Frank Music Corp. v Metro-Golden-Mayer, Inc., 772 F2d 505,516 (9th Cir 1985), see also Goste v Kaiserman, 863 F2d 1061, 1071 (2d Cir. 1988) (rejecting a 90 percent allocation of overhead to an infringing song that represented 90 percent of the infringer's sales) Because petitioners made no attempt to allocate their 2001 overhead expenses between rehab projects related to RVI ownership and all other rehab work, the Board therefore properly disqualified payment of 2001 overheads from the escrow fund

The Verified Statements submitted by Michael A. Robbins and William J Robbins, Jr contain significant admissions that they did not maintain time records or account for administrative costs such as legal fees Knowing that they did not maintain adequate documents and records with which to allocate their 2001 overhead costs to repair projects attributable to RVI's period of ownership, they nonetheless submitted all of their 2001 overhead costs to CCPA for payment from the escrow account In its December 13, 2004 decision the Board carefully ordered refund of the 2001 overheads because CCPA/CCPR failed to submit evidence supporting an appropriate allocation of those overhead costs. The Board did not address the much more serious question which is now presented by CCPR's intentional submission of all 2001 overhead costs when their officers knew they did not maintain time records or other documents to support reimbursement of overhead costs for repair projects attributable to RVI's period of ownership since it was clearly evident to CCPR officials that they could not establish their entitlement to be paid these overhead costs from the escrow account, the submission of unallocated overhead costs by CCPR and their payment by CCPA was done intentionally or with reckless disregard for

the consequences. In either event, the knowing submission of claims for reimbursement of costs to which CCPR was not entitled and the payment of those claims by CCPA is now revealed to be fraudulent.

4 Burden of Proof

The procedures established by the Board in its November 2001 order was specifically intended to allow CCPA/CCPR to utilize funds in the escrow account without prior approval or review by the Board (or by RVI) without justifying those expenditures in advance. Ordering Paragraph 8 of the Board's November 2001 decision explicitly stated "CCPA shall be held harmless for any funds spent from the escrow account for repairs to its line were the result of RVI's failure to keep the line operational during its ownership of the line, except for any fraudulent expenditures." Accordingly, Petitioners were clearly on notice in November 2001 that it would have an obligation to demonstrate to the satisfaction of the Board that expenditures from the escrow account were made in accordance with Ordering Paragraph 8. Moreover, joint petitioners sought STB confirmation of the escrow account expenditures in their motion filed January 29, 2003. As the moving party seeking confirmation, the Board properly placed the burden of proof on joint petitioners. STB Docket No. AB-600 Yachima Inter Urban Lines Association – Adverse Abandonment-In Yachima County, Washington, service date November 18, 2004, MVC Transportation, LLC – Acquisition Exemption – P&LE Properties, Inc., STB Finance Docket 34462, October 20, 2004.

The propriety and reasonableness of imposing the burden of proof on petitioners is further supported by the fact that the STB gave petitioners the escrow fund, that petitioners had sole responsibility for and control over the various rehabilitation projects and

petitioners had both the opportunity and the obligation to establish whatever procedures they deemed appropriate to establish the propriety of their expenditures after the fact. All the information documenting these expenditures was controlled and maintained by petitioners. Thus the burden of proof was assigned by the Board to the parties which were best able to control and produce the evidence necessary to sustain that burden

Once again, it is too late for joint petitioners to argue that the Board erred in imposing the burden of proof on them in connection with expenditures from the escrow account. The time to raise that argument would have been in response to the November 2001 order. In issuing that order, the Board directed that \$375,000 of RVI's proceeds of sale be paid directly to CCPA and it attached certain conditions and requirements to the transfer of those funds. If CCPA and CCPR objected to those requirements and the obligations imposed by them, they should not have accepted the money. Furthermore, if there were any doubt or uncertainty regarding proper allocation of the burden of proof under the November 2001 order those issues could have been presented to the Board in a Petition for Clarification filed between November 2001 and January 2003. Finally, if the joint petitioners wanted to contest the allocation of the burden of proof, they had a full and fair opportunity to do so in the confirmation motion litigation which extended from January 2003 to August 2003. Petitioners failed to raise that issue and they cannot now contend that the Board improperly shifted the burden of proof regarding these expenditures from the escrow account.

Thus, Petitioners' assertions that the December 13, 2001 order was the first time CCPA/CCPR became aware that they had the burden of proof is simply untenable at this stage of the proceedings. There is nothing in the record of this proceeding over the last

four years that imposes a “unique evidentiary standard that could not have been anticipated by CCPA, CCPR or their counsel ” Nothing in the December 2004 decision violates any ground rules established by the Board in the November 2001 decision If CCPA, CCPR or their counsel honestly believed that the only basis upon which RVI could challenge escrow account expenditures was on grounds of fraud, it would have only been prudent, given the contested nature of this proceeding, to confirm that interpretation with the Board after the November 2001 order and there was certainly no basis for that belief after the Board disclaimed a “fraud only” standard before the Sixth Circuit Court of Appeals If CCPA and CCPR or its counsel were unclear or had questions regarding the procedures, directions or audit standards to be followed to authenticate expenses in order to close out the escrow account, they should have raised those issues with the Board at that time. RVI certainly did not misunderstand the Board’s November 2001 order and the requirement that joint petitioners sustained their burden of proof through the presentation of appropriate time documents, billing sheets and invoices describing when and for what work consulting services were rendered

Thus the November 2001 order clearly advised petitioners of the requirements which they would be expected to meet in order to confirm expenditures from the escrow account. No burden of proof was shifted because petitioners clearly were on notice that as the moving party seeking approval or confirmation of their expenditures, they would have the burden of proof. Nonetheless, petitioners on Page 17 of their pleading ask the Board to ignore the well established criteria for reopening and reconsideration and provide “a further opportunity to submit additional documentation to support its request for payment of administrative overhead”. For the Board to grant this request would be reversible legal

error Any documentation supporting payment of administrative overhead for 2001 could have and should have been presented to the Board in 2003. This issue was explicitly raised by RVI in its reply to petitioners' motion for confirmation. It is interesting to note that petitioners have had approximately the same amount time subsequent to the Board's December 13, 2004 decision to compile and present the documentation appended to the joint petition to reopen and reconsider that they had in 2003 to submit rebuttal testimony to the RVI reply However, petitioners did not assemble that documentation for submission to the Board in 2003 but are now attempting to do so in 2005. This request by petitioners is a transparent attempt to submit additional evidence which should have been prepared and provided to the Board in April 2003. Even if this information was not immediately available to joint petitioners in 2003, petitioners could have sought an extension for additional time required to compile that documentation However, CCPA and CCPR did not seek any such extension It would therefore violate the Board's regulations, its past decisions and well established principles of administrative finality were the Board to give CCPA/CCPR a further opportunity to relitigate these issues.

5 NS Underpass

Finally, petitioners contend the determination that RVI should not be held accountable for needed repairs to the NS underpass is contrary to the evidence of record. In this connection, CCPA and CCPR complain that the disallowance of \$17,700 spent to address drainage problems at the underpass beneath the NS line near Columbiana, Ohio was contrary to the evidence record. Petitioners assert that a review of the evidence has not revealed a source for the STB's finding that CCPA/CCPR attribute the damage to standing water" "[caused][both] by change of drainage by neighbor and [by] track repairs " First,

RVI witness, George Wehner provided a full description of the long term conditions at this underpass. Moreover, that was not the only evidentiary ground for the STB's factual conclusions. The Board noted specifically that "CCPA/CCPR do not rebut RVI's claim 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 " That evidentiary finding permitted the STB to reasonably conclude that RVI's inattention was not responsible for the drainage problem and that the payment for repairs at that location was not properly made from the fund. Thus, the Board's finding was supported by the testimony of RVI's witness who had substantial first hand knowledge of the rail line and its history going back over fifteen years and the fact that CCPA/CCPR failed to provide any evidence rebutting the knowledge and testimony of RVI's witness. Indeed, petitioners admit in their joint petition that their own witness, Tim Robbins, acknowledged the drainage problem in the area and that it was likely an ongoing problem for the railroad. In this instance, the Board's decision rests on evidence submitted by RVI and confirmed by petitioners own witness. Contrary to petitioners' claim, there was no shift in the burden of proof, petitioners simply failed to sustain the burden which they assumed when they took possession of the funds subsequent to the November 2001 decision. Petitioners make no assertion that necessary findings of fact were omitted by the Board or that the underpass repairs were supported by unrefuted substantial evidence attributing those repairs to RVI's period of ownership. Thus there is no material error with regard to the Board's determination that expenditures on the NS underpass were properly disallowed.

CONCLUSION

The foregoing analysis of Petitioners' claims of "material error" establishes that petitioners have ignored the solid and ample evidentiary basis for the STB ordered refund. That is, perhaps, not surprising given the fact that in each case, it was petitioners' evidentiary submission which failed to support the expenditures which the Board subsequently disallowed. Moreover, each category of expenses which comprised the refund was directly contested by RVI in its reply to petitioners Motion for Confirmation in 2003. In the period from January 27, 2003 to September 17, 2003 petitioners had a full and fair opportunity to present whatever supplemental evidence they felt was necessary to respond to the evidentiary inadequacies which RVI pointed out to the Board at that time. Petitioners are now merely seeking to supplement the record two years after the fact.

RVI has also demonstrated that the Board's evidentiary documentation requirements were not novel or unusually burdensome. Given the accounting requirements imposed by the Board on petitioners in the November 2001 order, Petitioners were properly assigned the burden of proof and should have known they would be required to support their fund expenditures with underlying time sheets, logs, and other expense documentation for the allocation percentages which petitioners represented as being attributable to repairs necessitated by RVI's ownership. Even if petitioners did not fully understand in November 2001 the nature of the documentation required to justify those allocation percentages, they certainly should have understood the need to produce that evidence in 2003 during the confirmation motion litigation when they could have presented that documentation at that time or sought an extension from the Board to do so.

Finally, the Board should recognize that petitioners claims of material error seeks an after the fact alteration of escrow account procedures which in practical effect would result in a reduction in the purchase price established by the Board for the rail line based on the parties' valuation evidence. On Page 5 of the Board's December 2004 decision, the STB addressed RVI's Petition to Reopen the valuation findings by the Board in the OFA proceeding. In analyzing RVI's request, the Board noted that both parties had submitted their own appraisals and supporting evidence and that RVI had an ample opportunity to challenge and did vigorously challenge CCPA's appraisal evidence at that time. In those circumstances, the Board denied RVI's petition to reopen the valuation proceeding.

The reasons for the Board's denial of RVI's petition to reopen the valuation decision is directly applicable to the joint petition to reopen the escrow fund. Both RVI and CCPA/CCPR submitted evidence to the Board regarding the escrow fund expenditures. Joint petitioners had an ample opportunity to document and justify their expenditures and RVI vigorously challenged petitioners' motion in 2003. Petitioners were able to file additional rebuttal testimony and evidence in response to RVI's challenges. Just as the Board noted in response to RVI's petition to reopen that "had RVI needed additional time to prepare its valuation evidence, it could have requested it," so too if joint petitioners needed additional time within which to compile more detailed documentation verifying and supporting their escrow account expenditures, they could have requested it but did not. Just as RVI's attempt to renew its challenge to the underlying valuation methodology was found to be repetitive and without merit, so too should the joint petitioners attempt to reopen and reconsider additional evidence and documentation which petitioners failed to submit in 2003. Just as consideration of the administrative finality,

repose and detrimental reliance required denial of RVI's petition to reopen, so too those same considerations also counsel against reopening the Board's decision regarding the disqualification of \$217,282 in escrow account expenditures. The parties have had a full and fair opportunity to litigate those expenditures and the underlying evidentiary documentation supporting them and after a considerable period of deliberation, the Board has finally issued an order addressing those matters.

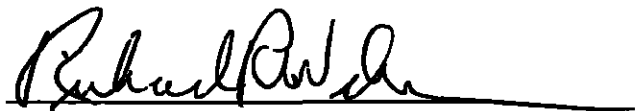
In these circumstances, the substantial burden which is imposed upon a party seeking to reopen and reconsider a final STB order must be weighed against the considerations of issue preclusion that form the basis for administrative finality. Under Section 27 of the Restatement Second of Judgments, when an issue of fact or law is actually litigated and determined to be a valid and final judgment, any determination that is essential to the judgment is conclusive in a subsequent action between the parties, whether on the same or different claim. Joint petitioners seek to relitigate the same issues of fact and law which were previously determined by the Board in its December 2004 decision. They have failed to meet the requirements for a petition to reopen and reconsider set forth in the Board's regulation. They have demonstrated no material error which would require that the determinations made by the Board in its December 2004 decision be altered because in every instance, the Board's determination were based on the evidentiary submissions (or lack of them) needed for joint petitioners to justify expenditures from the escrow account. Moreover, petitioners have not pled any new circumstances or new evidence in their petition to reopen and reconsider. Just as RVI has been denied an opportunity to relitigate valuation evidence submitted in connection with the OFA proceeding (where there was new evidence of admitted errors in sworn testimony from

CCPA's appraiser) so too joint petitioners should be precluded from reopening the Board's December 2004 decision simply because petitioners want a second chance to litigate the Board's disqualification of \$217,282 of escrow account expenditures. Finally, the intentional submission and payment of unallocated 2001 overhead costs where petitioners knew they did not maintain records necessary to establish their entitlement to payment of those costs from the escrow account reveals a continuing course of deception and fraudulent conduct in the administration of the escrow funds. Accordingly, RVI respectfully requests that the Board deny the joint petition to reopen and reconsider its December 2004 decision, dismiss its stay and direct CCPA to promptly pay \$217,282 plus interest to RVI within thirty days of its decision.

Respectfully submitted,

VUONO & GRAY, LLC

By



Richard R. Wilson

Attorney for Railroad Ventures, Inc

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CERTIFICATE OF SERVICE

I hereby certify that I have this 24th day of February, 2005 served a copy of the Reply of Railroad Ventures, Inc. to the Joint Petition for Reopening and Reconsideration upon the following by First Class United States Mail, postage prepaid

James E. Betts, Chairman
Ohio Rail Development Commission
50 W. Broad Street
15th Floor
Columbus, OH 43215

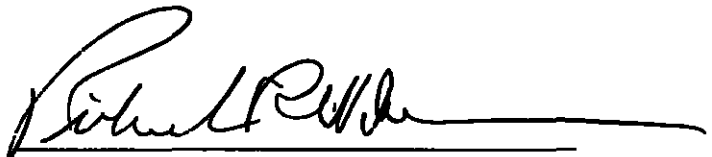
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A handwritten signature in black ink, appearing to read "Richard R. Wilson", written over a horizontal line.

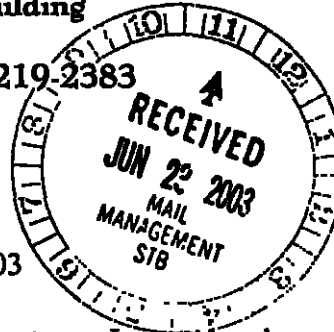
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June, 17, 2003

Re 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
and
Railroad Ventures, Inc. v. Surface Transportation Board in the United States of America,
Docket No 01-4262 (Sixth Circuit U S Court of Appeals)

Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001

Dear Mr. Williams

Enclosed for filing please find the Affidavit of John B. Nalbandian, Esq., Appellate Counsel for Railroad Ventures, Inc. (RVI) in the above captioned proceedings. This Affidavit is submitted in order to confirm the legal position adopted by the Surface Transportation Board before the Sixth Circuit Court of Appeals with respect to the appropriate standard to be utilized by the Board in its review of Central Columbiana and Pennsylvania Railroad Co. ("CCPR") expenditures authorized by Columbiana County Port Authority (CCPA) from the escrow account established in the Board's order of November, 2001.

Specifically, in its Brief filed with the Sixth Circuit Court of Appeals and in oral argument presented to the Court on behalf of the Board by Attorney Cecelia Cannizzaro, the Board disclaimed any adoption of a "fraud only" standard for its review of expenditures from the escrow account. In past pleadings filed by CCPA and CCPR, those parties have contended that expenditures from the escrow account can only be challenged for fraud. In light of the record before the Sixth Circuit Court of Appeals, it is clear that the Board's November 2001 Order imposed no such limitation on the Board's review of escrow account expenditures.

RVI respectfully requests that the enclosed Affidavit be made a matter of record in CCPA's and CCPR's Joint Motion for Closure of Escrow Account and RVI's Reply thereto seeking a refund of escrow account moneys. RVI also requests that in its review of that matter, the Board afford Attorney Nalbandian's Affidavit due consideration.

EXHIBIT A

Vernon A. Williams

Page 2

June 17, 2003

Copies of this Affidavit have been served on all parties of record. Please date stamp and return to the undersigned the additional copy of this transmittal letter in the self addressed, stamped envelope provided.

Very truly yours,

VUONO & GRAY, LLC

A handwritten signature in black ink, appearing to read "Richard R. Wilson", with a long horizontal line extending to the right.

Richard R. Wilson

Attorney for Railroad Ventures, Inc

RRW/bab

Enclosure

xc Railroad Ventures, Inc
John B. Nalbandian, Esq
Cecelia Cannizzaro, Esq
All Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. AB 556 (Sub No. 2X)

**RAILROAD VENTURES, INC.-EXEMPT ABANDONMENT
BETWEEN YOUNGSTOWN, OH AND DARLINGTON, PA,
IN MAHONING AND COLUMBIANA COUNTIES, OH
AND BEAVER COUNTY, PA**

AFFIDAVIT OF JOHN B. NALBANDIAN

- 1 My name is John B Nalbandian and I am an attorney with Taft, Stettinius & Hollister LLP in Cincinnati, Ohio. Along with my law firm, I have represented Railroad Ventures, Inc. in its two appeals in Sixth Circuit that have arisen out of the forced-sale of the Youngstown & Southern rail line in northeastern Ohio and Western Pennsylvania.
2. The most recent of these appeals is denoted as Railroad Ventures, Inc. v Surface Transportation Board (No 01-4262) That appeal arose from RVI's challenge to an STB decision rendered in November 2001 Part of that STB decision concerned the administration of an escrow account for rail line repairs that the STB had set up in conjunction with the forced-sale of the rail line
3. One of RVI's principle challenges to the STB's November 2001 Decision was that it appeared to deprive RVI of the right to challenge expenditures of escrow funds except for fraud This appeared to deprive RVI of the right to challenge expenditures for projects that RVI should not have been responsible for under the STB's previous orders unless fraud could be alleged. RVI challenged this fraud-only standard.
4. In response, the STB disclaimed the notion of a fraud-only standard to the Sixth Circuit both in its briefing and at oral argument In its principle brief to the Sixth Circuit, the STB represented to the Court that "RVI will have a full opportunity to be heard at the Board regarding individual disbursements from the fund, so that none of the fund is used for restoration projects for which RVI is not responsible under the Board's order " (Red Brief at 24) (Attachment A).
- 5 At oral argument on May 7, 2003, counsel for the STB, Cecelia Cannizzaro, told the Sixth Circuit that RVI had never been foreclosed from the right to challenge any escrow expenditures as being outside of the ambit of repairs for which it was responsible, even if no fraud were alleged According to Ms Cannizzaro, the Board's fraud language expanded

RVI's rights by allowing it not only to challenge expenditures that RVI thought were outside of the ambit of what the STB had authorized in setting up the account, but also to challenge otherwise authorized expenditures if there was fraud involved. I have attached a transcription of the relevant portions from Ms. Cannizzaro's argument at tab B.

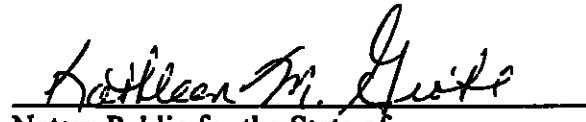
6. Based on these representations, the Sixth Circuit found that RVI's challenges to the escrow procedure were not ripe for review. In the Court's view, RVI must raise its challenges to the escrow expenditures in the Board first, which it has now done

I swear and affirm under penalty of perjury that the foregoing is true and correct

Executed on June 16, 2003
Cincinnati, Ohio


John B. Nalbandian
Associate
TAFT, STETTINIUS & HOLLISTER LLP

SUBSCRIBED AND SWORN TO, before me, this 16th day of June, 2003.


Notary Public for the State of _____
My Commission Expires _____



KAHTLEEN M. GROTE
Notary Public, State of Ohio
My Commission Expires 05-28-08

in the Nov. 2001 Decision. See Doc. 31956 at 9 n.11; J.A. 42 (“RVI may in turn seek to enforce against local governmental entities any promises that they would compensate RVI for its expenses of fixing the track and appurtenances”).

B. The Change in the Procedure for Handling the Set-aside Funds Was Reasonable and Does Not Deprive RVI of Due Process.

The new procedure for handling the set-aside funds did not alter the parties’ rights. Rather, it simply postponed to a later stage in the process RVI’s opportunity to challenge expenditures, so as to assure that the objectives of the escrow provision would be met—prompt restoration of the line and reactivation of rail service. Indeed, RVI concedes that rail service has now been restored. See Br. at 37.

RVI contends that the new disbursement procedures violated its due process rights. Br. 41-45. But the Board fully afforded RVI the essential requirements of due process, which are notice and an opportunity to be heard. *Leary v. Daeschner*, 228 F.3d 729, 743 (6th Cir. 2000), *quoting Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985).

RVI will have a full opportunity to be heard at the Board regarding individual disbursements from the fund, so that none of the fund is used for restoration projects for which RVI is not responsible under the Board’s order.

Doc. 202422 at 8-10; J.A. 1383-85. The Board simply deferred until the restoration is complete the point at which it would rule on such allegations. Thus RVI's due process rights are preserved.

III.

RVI HAS BEEN FULLY COMPENSATED FOR ALL OF THE PROPERTY SOLD, INCLUDING THE NEWLY LISTED LICENSE AGREEMENTS

Finally, RVI claims that the Board deprived it of property without compensation, in violation of its constitutional rights, when the agency required it to transfer to CCPA its interest in the 100 newly listed license agreements that are related to the property over which this rail line runs. Br. 46-47.

At the outset, it should be noted that the Board did not explicitly address these 100 agreements in its Oct. 2000 Decision because it did not know about them. At the time the Board was determining the value of the line, CCPA presented specific evidence of the existence, and monetary value, of the 156 license agreements of which it was aware. But RVI did not mention the additional 100 license agreements now in dispute in time for them to be separately valued.¹⁵ In setting the terms of an OFA sale, the Board must rely upon the record before it

¹⁵ Although RVI criticized CCPA's appraisal on other grounds in its Reply to CCPA's Request to Establish Terms, Doc. 196247, J.A. 815-26, RVI did not mention the additional 100 license agreements.