UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

February 17, 2026

CBCA 8701-FEMA

In the Matter of BUFFALO RIDGE REGIONAL RAILROAD AUTHORITY

John E. Taylor of Taylor Law Firm, P.C., Sioux Falls, SD, counsel for Applicant.

Alecia Frye and Ramoncito J. deBorja, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC, counsel for Federal Emergency Management Agency.

Before the Arbitration Panel consisting of Board Judges **LESTER**, **RUSSELL** (presiding), and **NEWSOM**.

LESTER, Board Judge, writing for the Panel.

Buffalo Ridge Regional Railroad Authority (BRRRA) seeks public assistance (PA) funding pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121-5207 (2018), to cover costs necessary to restore a rail line that it owns in Minnesota, which was extensively damaged by flooding during a presidentially-declared disaster. The Federal Emergency Management Agency (FEMA) denied BRRRA's funding request because BRRRA leases the rail line to a third party, Ellis & Eastern Company (E&E). FEMA believes that the lease agreement between BRRRA and E&E transfers responsibility for restoration of the rail line following a disaster event from the property's owner, BRRRA, to the lessee. The only question before the Board in this arbitration is whether BRRRA retained legal responsibility for disaster-related damage following its execution of the lease with E&E. For the following reasons, we conclude that it did. FEMA's finding in its first appeal decision that E&E assumed such responsibility through the lease agreement conflicts with the Minnesota lease contract interpretation rules that the parties made applicable to the agreement. Accordingly, we return this matter to

FEMA to reevaluate BRRRA's request for PA funding in a manner consistent with this decision.

Factual Background

I. Ownership of the Property at Issue

BRRRA is a political subdivision of the state of Minnesota. In 1989, with the assistance of the Minnesota Department of Transportation (MnDOT), BRRRA purchased certain real property, a railroad right of way, railroad facilities, and appurtenances located between Agate and Manley, Minnesota (the Railroad), which had essentially been abandoned by the prior operator of the rail line, the Chicago and Northwestern Railroad Company. BRRRA purchased the Railroad, which runs approximately 41.44 miles, for the purpose of resuming and providing rail service to the communities located along the line. With the financial assistance of the MnDOT, BRRRA made major improvements to the Railroad in 1993 to allow for that.

II. The Lease of the Property

On May 11, 2017, BRRRA executed a written lease with E&E for rental of the Railroad, as follows:

> BRRRA hereby agrees to lease and let to E&E, and E&E hereby agrees to rent and hire from BRRRA, for the rent, on the terms and subject to the conditions set forth herein, the real property, right-of-way, road bed, main track, sidings, industrial tracks, depots, yards, storage and parking areas, culverts, bridges, tunnels, buildings, structures, communication and signal facilities, fixtures and all other railroad appurtenances, located between Mile Post 0.0 at Agate, Minnesota and Mile Post 41.44 at Manley, Minnesota for operation as a common carrier of rail freight, all in "**AS IS, WHERE IS**" condition and without any express or implied warranties . . . .

Lease Agreement, art. I, ¶ 1; *see id.*, art. IV, ¶ 2. The initial term of the lease runs for a period of fifteen years from "the date E&E is granted authorization by the Surface Transportation Board . . . to operate as a common carrier over the Railroad" or until December 31, 2032, "whichever is longer." *Id.*, art. II, ¶ 1. The lease contains three options that will allow E&E to extend the term of the lease by thirty-five years, another thirty-five years, and fourteen more years, respectively (for a potential total of eighty-four years), *id.*, art. II, ¶ 3, but BRRRA is entitled to decline to accept the first option exercise if it wants to "directly assume operations of the Railroad, or . . . contract with a counterparty other than

E&E to operate the Railroad," or, alternatively, to sell the Railroad to E&E at a set price that is identified in the lease. *Id.*, art. II, ¶¶ 3-5.

The parties' expectation was that E&E, which accepted the Railroad as "Excepted Track," would operate the Railroad as a Class I railroad after upgrading the track at its own expense and would then maintain the Railroad at the Class I level, ordinary wear and tear excepted:[1]

> E&E acknowledges the agreements referenced in Recitals Five (5) and Six (6) intended the Railroad to be operated as a Class I railroad. E&E accepts the Railroad as Excepted Track. At its expense, E&E shall upgrade and maintain portions or all of the Railroad from excepted track to Class I track within a reasonable period of time as operational necessity and market conditions warrant. E&E shall maintain the Railroad, ordinary wear and tear excepted, so as to comply with the minimum safety requirements for "excepted track" or Class I track, as the case may be, all as specified in the Federal Railroad Administration Safety Standards of October 16, 1972, as amended.

Lease Agreement, art. IV, ¶ 2. E&E agreed that, during its operation of the track, it would "comply with all applicable federal or state governmental laws, rules, regulations, orders, and standards with respect to the Railroad and the use, operation and maintenance thereof." *Id.*, art. IV, ¶ 1. The lease provided that, to the extent that E&E expended monies to maintain the Railroad to a *higher* standard than required by the terms of the lease agreement, such improvements would be considered the property of E&E, rather than of BRRRA, during the term of the lease:

> Nothing herein shall preclude E&E, at its sole determination, cost and expense, from maintaining the Railroad to a standard higher than the minimum herein provided. In the event E&E undertakes repair, maintenance, and rehabilitation

---

[1] BRRRA submitted an affidavit from E&E's president in which he explained that "Excepted Track is the lowest designation" in the Federal Railroad Administration Track Safety Standards "and may be used only under strict limits, including a maximum freight speed of 10 miles per hour, a prohibition on occupied passenger service, and a cap of no more than five placarded hazardous-materials cars per train." Affidavit of Clark Meyer (Oct. 17, 2025) ¶ 5. "By contrast," he reported, "Class 1 track permits freight speeds up to 10 miles per hour and passenger speeds up to 15 miles per hour, does not impose the five-car hazardous-materials limit, and requires compliance with higher minimum geometry and condition standards." *Id.*

> of the Railroad so as to comply with the minimum safety requirements for Class I or Class II track as specified in the Federal Railroad Administration Safety Standards of October 16, 1972, as amended, and operates the track structure so as to comply with such Class I or Class II track standards or such standards as meet then current federal regulations for the applicable class of service, all track structures, rails, ties, switches, ballast and railroad facilities and appurtenances (collectively the "Track Materials") located thereon and affixed thereto become property of E&E during the Initial Term and any renewal term of this Lease.

Id., art. IV, ¶ 6.

E&E was required to "develop an annual maintenance plan for the Railroad, which shall include at minimum a five year plan for future maintenance" and had to "be presented annually to the Board of Commissioners of BRRRA," and to deliver to BRRRA each quarter "a report of all maintenance performed on the Railroad." Lease Agreement, art. VI, ¶¶ 1, 3. The lease also provided BRRRA the right to inspect the Railroad at various times during the lease period and to require E&E to conduct any repairs and maintenance that BRRRA found deficient, as follows:

> BRRRA shall, at least twice annually, have the right to inspect the Railroad, provided such inspection does not disrupt E&E operations. For safety reasons, BRRRA shall give E&E reasonable advance notice of any planned inspection. BRRRA shall notify E&E in writing of any deficiencies in E&E's obligation to maintain the Railroad to excepted status, and E&E, shall, within ninety (90) days of its receipt of such notice, commence necessary repairs and maintenance and shall proceed to complete same with reasonable diligence. Such maintenance will include any function which BRRRA, but for this Agreement, would be required to perform pursuant to applicable federal, state, and municipal laws, ordinances and regulations.

Id., art. IV, ¶ 5.

The lease required E&E to "procure and maintain in effect, during the term of th[e] Agreement, a policy or policies of liability insurance in an amount adequate to cover any occurrence to which E&E or BRRRA may be subject to liability in connection with the operation, use or maintenance of the Railroad, including personal injury or death," with a minimum coverage limitation of $5,000,000 per occurrence. Lease Agreement, art. VIII, ¶ 1. It further provided that "all insurance proceeds payable on account of any damage to or destruction of the Railroad or any part thereof shall be paid to E&E and shall be used

exclusively to repair or restore the Railroad as required by Article IV of this Agreement." *Id.*, art. VIII, ¶ 4. The exception to that requirement was if the property was subject to a flood, tornado, or windstorm, in which event paragraph 5 of Article VIII provided E&E the following options:

> In the even[t] an occurrence such as a flood, tornado or windstorm shall render the Railroad inoperable without major reconstruction, E&E may, at its option:
>
> a. Receive the related insurance proceeds and repair or reconstruct the Railroad as required by Article IV of this Agreement, or
>
> b. Elect to terminate this Agreement, in which case such insurance proceeds shall be divided between BRRRA and E&E, each in proportion to their losses, taking into account the maintenance and improvement to the Railroad made by E&E during the term of this lease on the segment(s) of the Railroad so affected.

Id., art. VIII, ¶ 5.

Although the lease required E&E to obtain liability insurance for damages incurred by third parties, it did *not* require E&E to obtain any other type of insurance to protect the Railroad. Specifically, the lease did not require E&E to hold a commercial property insurance policy, a flood insurance policy, or a fire insurance policy for the property. Although it appears that E&E obtained insurance covering some types of damage or losses beyond what was required, BRRRA informed the Board that the lease did not obligate E&E to obtain a more comprehensive insurance regimen because of the limited availability or even unavailability of such forms of insurance, particularly flood insurance, for this property.

Despite the requirement for E&E to make improvements to the property, the lease contains a provision making clear that, "[a]s between E&E and BRRRA, BRRRA shall and hereby does retain full legal title to the Railroad notwithstanding the delivery thereof to, and the use and possession thereof[,] by E&E." Lease Agreement, art. I, ¶ 3. Further, under the terms of the lease, BRRRA retained the following rights and obligations during the lease period:

> Unless otherwise specifically assigned to E&E, BRRRA retains for the term of this Agreement, all of BRRRA's rights and obligations under the leases, side and industrial track agreements, public and private grade crossing agreements, pipeline and wire agreements, licenses and other agreements which have been assigned to BRRRA by Chicago and North Western

> Transportation Company or entered into since BRRRA's acquisition thereof, which pertain to the Railroad. E&E shall not assume any obligations or responsibilities of BRRRA pursuant to any such agreements, licenses or easements, however, (1) E&E's use of the Railroad shall be subject to any such agreements, licenses, or easements and (2) any monetary compensation or payments due to BRRRA under any such agreements, licenses, or easements shall be and hereby are assigned to E&E.

Id., art. I, ¶ 2.

With regard to E&E's obligations at the end of the lease, E&E agreed, "[s]ubject to the provisions of Article VIII Paragraph 5 of th[e] Agreement, upon termination of this Agreement, [to] return the Railroad to BRRRA in at least as good and complete as it was at the commencement of this Lease and in an excepted status, or Class I status, as the case may be upon termination, reasonable wear and tear excepted." Lease Agreement, art. IV, ¶ 4. The exception to that requirement was that, if the property was subject to a flood, tornado, or windstorm, E&E was entitled to elect an option under paragraph 5 of Article VIII of the lease, which provided that E&E could use available insurance proceeds to repair or reconstruct the Railroad or, alternatively, could terminate the lease and divide available insurance proceeds between itself and BRRRA. *Id.*, art. VIII, ¶ 5.

III. Damage from the Disaster and BRRRA's Request for Funding

From June 16 through July 4, 2024, severe storms, which resulted in widespread flooding, caused extensive damage throughout the state of Minnesota. The President declared the storm event a major disaster on June 28, 2024 (DR-4797-MN), which made PA funding available for multiple counties within the state.

On or about July 29, 2024, BRRRA submitted requests for PA for multiple projects relating to damage to railroad tracks, culverts, and related components associated with the Railroad, three of which are at issue here: project nos. 757973, 757975, and 757976. Project no. 757973 involves the replacement of two flood-damaged concrete culverts with three concrete culverts at a cost of $77,266; project no. 757975 involves the repair of four concrete culverts and four corrugated metal pipes damaged by flood water at a cost of $115,744.42; and project no. 757976 involves repair to storm damaged railroad tracks and related components at a cost of $706,944.

FEMA learned of the lease between BRRRA and E&E during FEMA's recovery scoping meeting with BRRRA, and FEMA subsequently obtained a copy of the lease following its issuance of a request for information (RFI) to BRRRA. In a second RFI,

FEMA informed BRRRA of its view that, through language making E&E responsible for all maintenance and repair of the Railroad during the lease term, the lease effectively made E&E responsible for all repairs and restoration of damage caused by a disaster but requested any additional documentation that would support a contrary position.

On March 20, 2025, FEMA issued three determination memoranda (DMs), one for each of the three projects at issue here. In each DM, FEMA denied PA funding after finding that, based on its interpretation of BRRRA's lease with E&E, BRRRA had no legal responsibility for damage to the Railroad. FEMA acknowledged that BRRRA owned the Railroad but represented that, if the owner transfers responsibility for damage repair and restoration to a lessee, PA funding is not available to the owner.

On or about May 5, 2025, BRRRA submitted first-level appeals of DMs 757973, 757975, and 757976 to the Minnesota Department of Public Safety's Homeland Security and Emergency Management Division (MHSEM), which timely forwarded them to FEMA on May 16, 2025. On August 19, 2025, FEMA, through the Acting Regional Administrator for Region 5, denied all three first-level appeals in a consolidated decision, finding that "the Applicant has not demonstrated it was legally responsible for the repair of any disaster-related damages to the leased Facility at the time of the incident." First Appeal Analysis at 3.

IV. Proceedings Before the Board

On October 20, 2025, BRRRA filed a request for arbitration with the Board, which the Clerk of the Board docketed on October 21, 2025, as CBCA 8701-FEMA. Soon thereafter, BRRRA provided the Board with a copy of its lease with E&E. FEMA filed a response to the arbitration request on November 20, 2025; BRRRA filed a reply on December 4, 2025, in what it titled a joint brief with E&E; and FEMA filed a surreply on December 18, 2025. Although MHSEM submitted statements in support of BRRRA's first-level appeals before FEMA, MHSEM did not file an appearance here and did not participate in this arbitration matter.

At BRRRA's request, without objection from FEMA, the panel conducted an in-person hearing at the Board's offices in Washington, D.C., on January 29, 2026, at which two witnesses—Kyle Oldre, BRRRA's Executive Secretary, and Clark Meyer, E&E's President—testified on behalf of BRRRA about the background behind the execution of the lease for the Railroad and their intent in drafting the lease in the manner that they did. FEMA did not present any witnesses at the hearing, indicating its belief that the sole issue here is one of contract interpretation to which witness testimony about subjective belief is not relevant.

As made clear by the record in this matter and from the testimony at the hearing, both BRRRA and E&E submitted claims to their respective insurance companies in an effort to obtain insurance proceeds to cover losses from the 2024 flooding, but all claims were denied.

Discussion

I. Work Eligibility Requirements

Before work necessary to repair or restore damage from a disaster will be eligible for PA funding, the "work must . . . [b]e the legal responsibility of an eligible applicant," 44 CFR 206.223(a)(3) (2024)—that is, it must be "the legal responsibility of the Applicant requesting assistance." Public Assistance Program and Policy Guide (PAPPG) (June 2020) at 52. FEMA makes the work eligibility determination based upon the ownership of the property, supplemented by the terms of any written lease agreements that might affect the property owner's obligations:

> To determine legal responsibility for Permanent Work, FEMA evaluates whether the Applicant claiming the costs had legal responsibility for disaster-related restoration of the facility at the time of the incident based on ownership and the terms of any written agreements (such as for facilities under construction, leased facilities, and facilities owned by a Federal agency).

Id.

Although the PAPPG provides that "[o]wnership of a facility is usually sufficient to establish the Applicant's legal responsibility to restore the facility," that is not necessarily true if the facility is "leased to another entity at the time of the incident." PAPPG at 53. If the owner of the facility was leasing it to a third party during the disaster, FEMA is required to review the lease agreement, *see id.* (providing that FEMA's review of lease agreements is "required for leased facilities"), to determine whether the lease affects or transfers to the lessee the owner's legal responsibility for repairs. *See id.* ("FEMA reviews the lease agreement to determine legal responsibility for repair of damage caused by the incident."). "If the lease does not specify either party as responsible, FEMA considers the owner of the facility legally responsible for the costs to restore the facility." *Id.*

II. The Entity Responsible for Disaster Damage Restoration

A. "Maintain" and "Repair" Lease Provisions

The parties do not dispute that BRRRA is the owner of the Railroad. Although FEMA typically finds that ownership is sufficient to establish responsibility for restoring a facility following a disaster, PAPPG at 53, FEMA's challenge here is based on BRRRA's lease of the Railroad to E&E. To determine whether BRRRA, through the lease agreement, transferred responsibility for disaster damage restoration, we look to the lease agreement itself. *Id.*

The lease provides that both the "Agreement and the performance thereof shall be governed, interpreted, construed and regulated by the laws of the State of Minnesota." Lease Agreement, art. XV, ¶ 2. As a result, to determine the lease's meaning, we will look to Minnesota law. *See The Heirs of Bahawouddin v. Department of State*, CBCA 7135, 23-1 BCA ¶ 38,409, at 186,632 (applying the choice of law provision to which the parties agreed in the contract).

Both parties agree that the mere signing of a lease does not automatically transfer responsibility for repairs and restoration of property from the property owner to the lessee. As the United States Supreme Court recognized in *United States v. Bostwick*, 94 U.S. 53 (1876), a lease generally imposes an obligation on a lessee to use the property in a way that makes repairs unnecessary but does not, without more, require the lessee to assume responsibility for accidents or destruction that he did not cause:

> As to the destruction of a part of the buildings by fire. There was, as has been seen, no express agreement to repair in the lease. The implied obligation is not to repair generally, but to so use the property as to make repairs unnecessary, as far as possible. It is in effect a covenant against voluntary waste, and nothing more. It has never been so construed as to make a tenant answerable for accidental damages, or to bind him to rebuild, if the buildings are burned down or otherwise destroyed by accident. In this case it has not been found, neither is it claimed in the petition, that these premises were burned through the neglect of the [lessee]. No judgment can therefore be rendered against the [lessee] on this account.

Id. at 68; *see* Restatement (Second) of Property: Landlord & Tenant § 5.4 (1977) ("Except to the extent the parties to a lease validly agree otherwise, there is a breach of the landlord's obligations if, after the tenant's entry and without fault of the tenant, a change in the condition of the leased property . . . caused suddenly by a non-manmade force, makes the

leased property unsuitable for the use contemplated by the parties and the landlord does not correct the situation.").

That being said, parties can agree, through language in a contract, to have one party or the other assume the risk of loss to a piece of property caused by outside forces. *See RAM Mutual Insurance Co. v. Rohde*, 820 N.W.2d 1, 15 (Minn. 2012) ("In determining the expectations of the parties as articulated in the lease, courts should look for evidence indicating which party agreed to bear the risk of loss for a particular type of damage."); Restatement (Second) of Property: Landlord & Tenant § 5.6 ("The parties to a lease may agree to . . . decrease what would otherwise be the obligations of the landlord with respect to the condition of the leased property."). "[A] lease agreement is a contract, which [a tribunal] should interpret to determine whether it addresses the allocation of liability for a particular loss" using ordinary rules of contract interpretation. *Melrose Gates, LLC v. Chor Moua*, 875 N.W.2d 814, 818 (Minn. 2016); *see Pettit Grain & Potato Co. v. Northern Pacific Railway Co.*, 35 N.W.2d 127, 130 (Minn. 1948); *5th Street Ventures, LLC v. Frattallone's Hardware Stores, Inc.*, No. A03-2036, 2004 WL 1878822, at *2 (Minn. Ct. App. Aug. 24, 2004). "The primary goal of contract interpretation is to determine and enforce the intent of the parties." *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 271 (Minn. 2004). To determine what risks and obligations a lessee has assumed, a tribunal will first look to the plain and ordinary meaning of the language of the parties' agreement. *Brookfield Trade Center, Inc. v. County of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998). In doing so, the tribunal must "read contract terms in the context of the entire contract" (that is, read the contract as a whole); "interpret [the] contract in such a way as to give meaning to all of its provisions"; and not "construe the terms so as to lead to a harsh and absurd result." *Id.*; *see American Commercial Lines, Inc. v. Valley Line Co.*, 529 F.2d 921, 925 (8th Cir. 1976). "When contractual language is 'clear and unambiguous,' the [tribunal] must enforce the plain language of the contract." *Blattner Energy, LLC v. Fisher Associates, P.E., L.S., L.A., D.P.C.*, No. 25-2363 (JTR/LIB), 2025 WL 3653888, at *2 (D. Minn. Dec. 17, 2025) (citation omitted). If a contract "'is susceptible to two or more reasonable interpretations,'" rendering it ambiguous, the tribunal may then "look to considerations beyond the language itself" to discern the parties' intent. *Id.* (quoting *Dykes v. Sukup Manufacturing Co.*, 781 N.W.2d 578, 582 (Minn. 2010)).

In their briefing to the panel, both parties seem to treat the contract interpretation issues before the panel almost as ones of first impression. Although, for hundreds of years, it has been fairly common for leases to include provisions requiring the lessee to maintain, repair, and/or restore leased property and to return it at the end of the lease in the condition in which it was originally delivered (excepting ordinary wear and tear), neither party cites any case law or authority addressing the scope of responsibility that the type of language included in this lease normally is viewed as transferring to the lessee. They instead base their

interpretations of the lease solely upon their own conflicting views of and assumptions about the lease language. Yet, reviewing Friedman on Leases, a leading treatise on the history and development of the law as applied to lease contracts, it is clear that there is a well-understood history regarding the extent to which a lease agreement that imposes on the lessee a duty to maintain, repair, and/or restore leased property also imposes upon the lessee responsibility for the costs necessary to repair disaster-related damage not caused by the lessee.

"The common-law rule" in the United States during the late 19th and early 20th centuries "on damage or destruction of leased property was harsh on a tenant, at least when viewed from today's circumstances." 1 Milton R. Friedman, Friedman on Leases § 9.1, at 497 (4th ed. 1997). Because a lease was "regarded . . . as the grant of an estate for the leased term, . . . the tenant was obligated to pay the rent notwithstanding damage by fire, flood, or otherwise," even if the landlord did not "repair or restore the premises." *Id.* at 498. The author of the treatise opines that this "rule may not have been inappropriate at the time and in the circumstances it was developed—an agricultural lease in which the improvements were merely incidental"—and "[i]t was consistent with the theory that a lease is essentially a conveyance, under which the tenant is the owner of the property for the term and the conveyance represents the consideration supplied by the landlord." *Id.* at 499; *see* Restatement (Second) of Property: Landlord & Tenant § 5.4 cmt. b ("At old common law, the destruction of the leased buildings by a non-manmade force was not considered a destruction of the subject matter of the lease because the subject matter was assumed to be the land itself, not the buildings or improvements thereon."). Nevertheless, not every state followed that common-law rule, with some courts finding that "the damage that made the premises unusable by a tenant [to be] a substantial failure of consideration," which precluded the need for a tenant to continue rent payments. 1 Milton R. Friedman, *supra*, § 9.1, at 500.

Even under the common law, though, "[t]he tenant . . . was [typically] under no legal obligation to repair or restore if the damage was not due to his fault" *unless* language in the lease agreement so required. 1 Milton R. Friedman, *supra*, § 9.1, at 499. The language necessary to transfer responsibility, however, did not always have to be particularly explicit. Courts applying the common law generally found that, if a lease included "[a] tenant's covenant to repair," that type of language was sufficient to be "treated . . . as a covenant to restore, and a tenant who had agreed to repair was required to restore the improvements after accidental destruction." *Id.* at 503-04 (citing cases); *see Lewis v. Real Estate Corp.*, 127 N.E. 2d 272, 275 (Ill. App. Ct. 1955) ("[W]here the lease contains a covenant that the lessee should make repairs, together with a covenant that the lessee should deliver up the premises in the same condition as they were at the time of letting, the lessee is bound to restore the premises in the case of destruction by fire."). Some courts, however, "refused to follow the common-law rule and held that a covenant by the tenant to repair did *not* require the tenant to restore after a nonnegligent fire, this . . . on the ground that one could repair only

something in existence and that a covenant to repair could not require the creation of something new." 1 Milton R. Friedman, *supra*, § 9.1, at 505-06 (emphasis added).

Because of "[d]issatisfaction with the inequities of the common-law rule," many states have ameliorated it by statute. *See* 1 Milton R. Friedman, *supra*, § 9.2, at 517. Even in states in which there is no statutory ban on application of the common law, some courts have abandoned the common-law rule by judicial decision, finding it to be an outdated practice untethered from the realities of modern-day expectations of parties entering into contracts. *See id.*, § 9.4, at 540 ("It is doubtful if an appreciable number of people who use these terms [like 'repair' versus 'restore'] in legal instruments intend their literal meanings."); Restatement (Second) of Property: Landlord & Tenant § 5.4 cmt. b ("It is no longer appropriate to apply such a rule because in an industrialized and urban society it is not reasonable to assume that a lease of buildings is primarily a lease of the land under them.").

The Supreme Court of Washington's analysis in *Washington Hydroculture, Inc. v. Payne*, 635 P.2d 138 (Wash. 1981), is an example. In that case, a lease of two greenhouses contained what the court described as a "general, unqualified maintenance and delivery clause," as follows:

> During the term of this lease, lessee shall maintain said (greenhouses); and, upon expiration of the term hereof surrender in as good a condition as it shall be when lessee takes possession thereof, except for ordinary wear and tear.

Id. at 139. After a fire destroyed the greenhouses during the term of the lease, the landlord, without alleging that the lessee was responsible for the fire, sued the lessee for the cost of rebuilding the greenhouses. The court considered whether to impose a "rule requiring a tenant, regardless of fault, to rebuild leased premises destroyed by fire, where the tenant has entered into a lease containing a general maintenance and delivery clause with no exceptions other than normal wear and tear." *Id.* The court decided, consistent with its survey of courts of other states, that an agreement to "maintain" a facility did not mean that, if the facility was destroyed by an Act of God or some disaster outside of the lessee's control, the lessee would have to "rebuild" the facility:

> Without inquiry into fault on the part of lessee or intent at the time of execution of the lease, and without language expressly holding lessee responsible for rebuilding premises destroyed through no fault of his own, we cannot [hold the lessee liable in damages]. It defies reason and logic to hold lessee to a covenant containing words of art and magic language which lessor says we should construe as an "express covenant" to insure against acts of God and other casualties beyond the control of lessee. It is not express. "Maintain"

> does not mean "rebuild." One could agree to surrender premises in as good condition as when possession was taken in conjunction with a clause to maintain, and never contemplate their total destruction requiring rebuilding.

Id. at 142.

The Minnesota Court of Appeals in *Amoco Oil Co. v. Jones*, 467 N.W.2d 357 (Minn. Ct. App. 1991), cited *Washington Hydroculture* in deciding that language in a lease establishing a lessee's obligation to maintain and repair leased property and to return it at the end of the lease in at least as good condition as when delivered, except for normal wear and tear, did not transfer to the lessee the risk of catastrophic events outside of the lessee's control that might destroy or significantly damage the property. The clause in the lease of the gas station at issue there read as follows:

> Lessee shall keep the Premises, together with the adjoining sidewalks and entrance driveways, in good repair, appearance, and order; and, at the expiration of this lease, or upon sooner termination thereof, Lessee shall surrender the Premises to Lessor in substantially as good condition as when received, ordinary wear and tear excepted.

Id. at 358. The lessee was also required to "perform necessary upkeep and maintenance to the Premises, and in so doing shall follow reasonable guides outlining proper care which Lessor may from time to time provide to Lessee." *Id.* After the gas station was significantly damaged and partially gutted by a fire that the lessee had not caused, the lessor sued "for breach of the lease, alleging [the lessee] failed to return the station to [the lessor] in as good condition as when he received it." *Id.*

The *Amoco Oil* court recognized historical conflicts in the law involving lessee obligations to restore buildings destroyed or seriously damaged without fault by the lessee, finding that, in the past, "[j]urisdictions [were] split regarding whether a general repair and delivery covenant requires a tenant to rebuild where the tenant [was] not at fault," some finding that a covenant to "repair" implied an obligation to rebuild after a disaster and others finding the opposite because "repair" is not the same as "restore." *Amoco Oil*, 467 N.W.2d at 359. It decided that, "[r]ather than rely on 'magic words' to create a covenant to rebuild, courts [should] look to the intent of the parties at the time of the lease execution and the plain meaning of the language used." *Id.* at 360. It found that, "[w]hile Minnesota case law establishes a lessee's duty to repair leased property damaged through the lessee's negligence, these cases do not mandate application of the common law rule." *Id.* It held that "the common law rule is arbitrary and outdated" and that, in Minnesota, "[a]pplication of the 'magic' language places an unforeseen burden on the lessee—a burden which is most often

outside both parties' contemplation." *Id.* It determined that "[a] lease is a contract which should be construed according to ordinary rules of interpretation" and that "the better approach is to interpret the lease according to its plain language to ascertain the parties' intent." *Id.* It further held that, where "the plain language of the lease speaks of [the lessee's] responsibility for 'necessary upkeep and repairs,' including maintenance of sidewalks and driveways," it does not imply or indicate that "the parties intended [the lessee] to rebuild the property in the event of substantial damage or destruction." *Id.* It also rejected that idea that, "when the tenant covenanted to repair the property and return it in the same condition as when the lease was executed, the covenant included an obligation to rebuild regardless of the cause of the destruction." *Id.* at 359.

The problem with FEMA's interpretation of the maintenance, repair, and return provisions of BRRRA's lease as transferring to E&E the risk and cost of catastrophic damage from a disaster is made clear by an example. What if we placed maintenance, repair, and return provisions similar to those in the BRRRA lease in a lease for a residence with a monthly rent of $1000? Under FEMA's view, the tenant signing that lease would be obligated to rebuild the residence, even if the reconstruction costs involved hundreds of thousands of dollars, if it was destroyed by a fire caused by a lightning strike or by cataclysmic area flooding. Yet, no reasonable tenant signing a $1000-per-month residential rental agreement would think that, by agreeing to "maintain" the residence and keep up with repairs, he was signing up to fund expensive reconstruction of an entirely new building in the event that a disaster outside of his control destroyed the original. Under the modern view of maintenance and repair provisions that Minnesota has adopted, no such obligation arises. Under the modern view, "[a]n agreement, express or implied, which undertakes to decrease a landlord's obligations in regard to the condition of the leased premises," including destruction by a disaster, "will be construed strictly against the landlord." Restatement (Second) of Property: Landlord & Tenant § 5.6 cmt. d. "In other words, the extent of the [transfer of responsibility for unexpected damage from the landlord to the lessee] will be kept in as narrow a range as is consistent with the terms of the agreement entered into by the parties." *Id.* To the extent that the parties intend to transfer the risk and costs of catastrophic damage from a disaster from the landlord to the tenant, the parties *must* include express and explicit language making that intent essentially unmistakable:

> A promise in the lease that the tenant is to keep the leased premises in repair . . . will not ordinarily by construed to encompass a requirement of large expenditures by a tenant for restoration of extensively damaged premises, except where the construction is required by explicit language, as, for example, where the expenditure is to be made from the proceeds of insurance required to be obtained and kept in force by the tenant. The extent to which the promise shifts the responsibility for the condition of the premises to the tenant from

> what it otherwise would be is to be given a strict interpretation. If a more extensive shift is intended, it is the responsibility of the landlord to spell this out in the agreement between the parties.

Id.; *see* 2 Milton R. Friedman, *supra*, § 18.1, at 1193 ("This general type of clause . . . leaves the tenant with no liability for accidental fire or other damage" from a disaster event that was not caused by the tenant's negligence.).

Consistent with the Minnesota Court of Appeals' adoption of the modern view in *Amoco Oil*, and applying Minnesota law to the meaning of the lease at issue here, we cannot interpret the inclusion in BRRRA's lease of language imposing a duty on E&E to "maintain" the Railroad, to "repair" the Railroad, and to return the Railroad at the lease's end in its original condition less ordinary wear and tear as an implied transfer of responsibility to E&E to restore the Railroad in the event of a catastrophic incident, at least absent any negligence or fault on E&E's part in causing the damage. That language does not explicitly and unmistakably transfer BRRRA's responsibility as owner of the Railroad for catastrophic damage caused by a disaster to E&E.

B. Clause Identifying Options in the Event of a Flood

FEMA argues that, even if the duty to maintain, repair, and return the Railroad under the lease is insufficient to transfer restoration responsibilities following a disaster to E&E, the lease transferred that responsibility by providing E&E with only two options, which FEMA views as exclusive, "[i]n the even[t] an occurrence such as a flood . . . shall render the Railroad inoperable without major reconstruction." Lease Agreement, art. VIII, ¶ 5. The two options that the lease provides E&E are that (1) E&E may "[r]eceive the related insurance proceeds and repair or reconstruct the Railroad," or (2) E&E may "[e]lect to terminate this Agreement." *Id.* FEMA acknowledged at the hearing that, had E&E elected to terminate the lease after the flood disaster, it is likely that FEMA would have found BRRRA and the work necessary to restore the Railroad eligible for PA funding because the lease termination would have transferred responsibility for the restoration back to BRRRA. Nevertheless, E&E did not terminate the lease. Nor did it use "related insurance proceeds" to "repair or reconstruct the Railroad" because there were no such proceeds. By not electing either option, says FEMA, E&E is responsible for post-disaster reconstruction.

The provision upon which FEMA relies makes no explicit representation about reconstruction obligations absent insurance coverage. It simply identifies the legal options that would be available to E&E even if no such provision was included in the lease agreement. Normally, if a disaster renders property that a lessee is renting unusable for its intended purpose but the tenant has insurance (or was required to have insurance) that would

cover the damage, the tenant can use the insurance proceeds to repair or restore the damaged rental property. Restatement (Second) of Property: Landlord & Tenant § 5.6 cmt. d. Here, though, the lease did not require E&E to carry any type of insurance other than third-party liability insurance, *see* Lease Agreement, art. VIII, ¶ 1, and, although E&E applied for coverage from the liability and property insurance policies that it maintained, no insurance proceeds were recovered. Without insurance proceeds, the tenant's only remaining legal option is to terminate the lease. Restatement (Second) of Property: Landlord & Tenant § 5.4 cmt. f. That is because, absent express language to the contrary, a tenant cannot *require* an owner to restore property to its original leased condition following a destructive disaster "when [the owner] is not personally at fault for the damage which has been caused." *Id.* When a property is destroyed, an owner may not have the funding to restore, may decide that restoration is not worth the cost, or may decide to make a new use of the property. Because of these unknowns at the time of lease formation, particularly how much it would cost to rebuild an unknowable amount of damage following a disaster, tenants generally cannot force the owner to restore property to its pre-disaster condition, leaving termination as the tenant's only viable option (ending its obligation to continue paying rent). That does not mean, though, that the tenant automatically becomes responsible for restoring the property *absent* termination, unless the lease agreement contains explicit language to that effect. *See id*. § 5.6 cmt. d. Here, there is no such express language in the cited provision requiring E&E to restore the property absent insurance proceeds.

Like the lease agreement here, the lease at issue in the Minnesota Court of Appeals' decision in *Amoco Oil* contained a provision that identified options from which the lessee could choose if the property there was destroyed in full or in part, including rent abatement as of the date that the premises were rendered untenantable and a choice as to whether to terminate the lease. *See Amoco Oil*, 467 N.W.2d at 358. The court did not find that the clause containing such options for the lessee somehow implicitly transferred to the lessee the obligation to restore the damaged property if the lessee did not elect one of the identified options. *See id.* at 360. In the same way, although the lease agreement at issue in this matter provides that, in case of a flood, E&E can use available insurance proceeds to repair and restore the property or can terminate the lease, nothing in that language explicitly provides that, if E&E does not elect one of those two options (or does not receive insurance proceeds), E&E then becomes liable for the complete restoration of the disaster-damaged property.

BRRRA, not E&E, has responsibility for any restoration of the Railroad in response to the flooding disaster. Although E&E could not force BRRRA to restore the Railroad after the flooding, BRRRA has elected to do so. "Through the PA Program, FEMA provides supplemental Federal grant assistance for . . . the restoration of disaster-damaged, publicly owned facilities" as part of its mission to help "communities . . . quickly respond to and recover from major disasters or emergencies declared by the President." PAPPG at 17.

BRRRA is entitled to pursue restoration of the Railroad as part of its mission to provide surrounding communities with rail service. Because BRRRA, a public state entity, is responsible for any restoration costs, the restoration work is eligible for PA funding.

III. Improvements to the Railroad

We note that, although BRRRA owns the Railroad, the lease agreement indicates that E&E had originally anticipated making improvements to the Railroad involving "track structures, rails, ties, switches, ballast and railroad facilities and appurtenances" and that at least some of those improvements would "become property of E&E during the Initial Term and any renewal term of this Lease" even if affixed to the Railroad. Lease Agreement, art. IV, ¶ 6. Our decision here should not be interpreted as requiring FEMA to provide PA funding for improvements to the property that E&E, rather than BRRRA, owns. After this matter is returned to FEMA, BRRRA may attempt to segregate those costs associated with restoration of property for which it is responsible from those associated with the restoration of E&E-owned improvements, if any.

Decision

As owner of the Railroad, BRRRA has responsibility for any restoration of the Railroad necessitated by the disaster at issue in this matter. Contrary to FEMA's determination in its first appeal decision, the lease agreement between BRRRA and E&E did not transfer that responsibility to E&E. The panel returns the matter to FEMA for further review of BRRRA's PA funding requests in accordance with this decision.

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge

Beverly M. Russell
BEVERLY M. RUSSELL
Board Judge

Elizabeth W. Newsom
ELIZABETH W. NEWSOM
Board Judge