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SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35160

OREGON INTERNATIONAL PORT OF COOS BAY—FEEDER LINE APPLICATION—
COOS BAY LINE OF THE CENTRAL OREGON & PACIFIC RAILROAD, INC.

Decided: October 31, 2008

The Oregon International Port of Coos Bay (the Port), a noncarrier, asks us to use our authority under 49 U.S.C. 10907 to order Central Oregon & Pacific Railroad, Inc. (CORP) to sell a 111-mile rail line in southwestern Oregon to the Port. The line (referred to here as the Coos Bay Line or the Line) runs from Danebo, OR (milepost 652.114), to Cordes, OR (milepost 763.130).

In this decision we find, under 49 U.S.C. 10907, that the Line meets the statutory criteria for a forced sale and that the Port is financially responsible and thus eligible to purchase the Line. Accordingly, we order CORP to sell the Coos Bay Line to the Port should the Port accept the terms of sale we establish in this decision, and the constitutional minimum value for which the Line can be sold that we will establish in a subsequent decision. In today's decision we explain the methodology we will use for calculating the constitutional minimum value and order the parties to submit evidence on the net salvage value of the Line as of October 31, 2008.

The western 94 miles of the Line is the subject of an abandonment application filed by CORP, which we are granting today by a separate decision in Central Oregon & Pacific Railroad, Inc.—Abandonment and Discontinuance of Service—In Coos, Douglas, and Lane Counties, OR, STB Docket No. AB-515 (Sub-No. 2) (Coos Bay Line Abandonment). CORP will not be permitted to exercise that abandonment authority unless or until the feeder line process concludes without a sale. CORP will, however, be allowed to discontinue service on that segment of rail effective November 30, 2008.

BACKGROUND

CORP was created by RailTex, Inc. (a holding company that owned a number of short line railroads) to acquire the Coos Bay Line from Union Pacific Railroad Company's

predecessor, Southern Pacific Transportation Company, in 1994.¹ RailAmerica acquired RailTex in 2000. Fortress Investment Group LLC acquired RailAmerica in February 2007.²

On September 21, 2007, CORP embargoed³ 94 miles of the Coos Bay Line between milepost 669.0 near Vaughn, OR, and milepost 763.13 near Cordes, due to unsafe conditions in three of the Line's tunnels.⁴

On July 11, 2008, the Port filed this application under section 10907⁵ to acquire the entire 111-mile Coos Bay Line. On August 1, 2008, the Board accepted the Port's application for consideration but requested that the Port supplement its application with additional information by August 8, 2008, which the Port did.

On August 21, 2008, the Board held a public hearing in Eugene, OR, to permit interested persons to express their views on CORP's abandonment and discontinuance application as well as the Port's feeder line application.⁶

¹ See Central Oregon & Pacific Railroad, Inc.—Lease, Operation, and Acquisition Exemption—Southern Pacific Transportation Company, Finance Docket No. 32567 (ICC served Jan. 19, 1995).

² See Fortress Investment Group LLC, et al.—Control Exemption—Rail America, Inc., et al., STB Finance Docket No. 34972 (STB served Dec. 22, 2006).

³ An embargo is a notification to the railroad industry and affected shippers that, in the carrier's opinion, a disability exists that temporarily prevents it from providing service. The carrier issues an embargo through the Association of American Railroads pursuant to Circular TD-1. An embargo does not require prior Board approval. See, e.g., Bar Ale, Inc. v. California Northern Railroad Co. and Southern Pacific Transportation Company, STB Finance Docket No. 32821, slip op. at 5 (STB served July 20, 2001). If justified, the embargo will temporarily relieve the carrier of its common carrier obligation. Id., slip op. at 6.

⁴ On April 11, 2008, in Central Oregon & Pacific Railroad, Inc.—Coos Bay Rail Line, STB Finance Docket No. 35130, the Board ordered CORP to show cause why the Board should not consider CORP's ongoing failure to provide service on the embargoed portion of the Line to be an unlawful abandonment and why the Board should not order CORP to either repair the tunnels and resume service or file for abandonment authority. On May 12, 2008, CORP responded to the Board's show cause order, stating that it would file an application for abandonment and discontinuance authority, which it filed on July 14, 2008.

⁵ Section 10907 of Title 49 of the United States Code is popularly known as the "feeder line" provision of the statute because it was enacted to allow shippers and communities to require carriers to sell them lines that were either slated to be abandoned or which were receiving poor service. The section was termed the feeder line provision because Congress expected that it would be needed on branch lines or feeder lines where lower traffic volumes sometimes resulted in poor service or proposed abandonments.

⁶ The transcript of the August 21, 2008 hearing will soon be available on our website at www.stb.dot.gov.

On August 28, 2008, the State of Oregon and the Coos-Siskiyou Shippers Coalition both filed comments in support of the Port's feeder line application. On August 29, 2008, CORP also filed comments on the Port's application, mainly disputing the Port's calculation of the constitutional minimum value of the Line and the Port's request for CORP to fund repairs on the Line, but also disputing that the sale of the easternmost 17 miles of the Line meets the public convenience and necessity test of the feeder line statute.

On August 29, 2008, the Port filed a motion to compel discovery that would permit the Port to perform a second onsite inspection of the Line. On September 2, 2008, CORP filed in opposition to the discovery. On September 10, 2008, the Board granted the Port's motion. In the same decision, the Board granted the Port's request to supplement its reply, as the Port would not have completed the second inspection by the September 12, 2008 reply deadline. The Port filed a reply to the comments on September 12, 2008, and a supplement to that reply on September 30, 2008.

PRELIMINARY MATTERS

Several motions and submissions have been filed since the close of the procedural schedule, the most significant of which relate to additional data on steel prices. In this section, we determine whether to accept those late-filed pleadings.

On September 29, 2008, CORP filed a motion for leave to file a supplemental response in order to address new arguments and additional evidence submitted by the Port in its reply to comments on the application. CORP concurrently filed the supplement. CORP argues that the Port's reply: (1) alters the Port's prior representations regarding the amount of money that it is able and willing to commit to acquire, rehabilitate, and operate the Line; (2) presents a new request for escrow to fund improvements not required to restore service on the Line; (3) presents a new argument that CORP's failure to designate the Coos Bay Line as a candidate for abandonment on its system diagram map as early as 2004 was improper; and (4) presents a new estimate of bridge removal costs based on an estimate from a construction company owned by the Port's president. The Port filed a motion to strike CORP's September 29, 2008 supplement, arguing that it rehashes the same arguments put forth by CORP in its earlier filings and contains evidence and argument that could have been submitted earlier. The Port did not respond to CORP's argument that the Port had offered new arguments and presented additional evidence in its September 12, 2008 reply.

On October 17, 2008, the Port filed a petition for leave to supplement the record with changes to its estimate of the value of the Line's assets. The Port argues that scrap steel market prices have fallen significantly since August 2008 when CORP submitted its net liquidation value (NLV) estimate and presented evidence regarding current steel prices. In a single filing, CORP replied to the Port's October 7, 2008 motion to strike and the Port's October 17, 2008 petition for leave to supplement the record. CORP argues that the motion to strike should be denied and that the Board should consider the record closed as of September 30, 2008, thereby rejecting the Port's evidence of current steel prices. In the alternative, CORP requests that the Board use an average of American Metals Market (AMM) steel prices in calculating the NLV of the Line instead of the most recent prices submitted by the Port. On October 30, 2008, the Port

filed an update of steel prices as of October 29, 2008. Hours later, CORP filed a reply, arguing again that the Board should consider the record closed as of September 30 or, in the alternative, use an average of steel prices over the course of this proceeding.

CORP's September 29 motion to supplement its response will be granted and the Port's motion to strike that supplement will be denied. Our rules require that feeder line applications include an estimate of the value of the line to be acquired and the evidence offered in support of that estimate.⁷ In its reply to comments on its application, the Port presented additional evidence and offered new arguments greatly affecting the ultimate price the Port estimates it should pay for the Line. At a minimum, CORP is entitled to respond to the additional evidence and new arguments of the Port.

The Port's October 17, 2008 petition to supplement the record will be granted and its valuation update submitted October 17 and its steel price update submitted October 30 will be accepted into the record. Evidence of significant changes to the Line's value prior to the Board's decision is central to the Port's case, could not have been introduced earlier, and could materially influence the outcome of this proceeding.⁸ CORP's October 21 and October 30 replies will also be accepted. We discuss the relevance of the parties' additional evidence and argument later in this decision.

DISCUSSION AND CONCLUSIONS

The feeder line provision was enacted to enable shippers and communities to acquire rail lines that are proposed to be abandoned or over which rail service is inadequate.⁹ The Board may order the forced sale of a rail line to a financially responsible person in two situations. The first is when the line has been identified by the owning carrier on its "system diagram map" (filed at the Board as required by 49 CFR 1152 Subpart B) as a candidate for abandonment, but the carrier has not yet sought authority to abandon the line.¹⁰ The other is when inadequate service is alleged and the applicant shows that the public convenience and necessity require or permit the sale.¹¹ In the latter category of cases, we must determine whether it is appropriate to force a carrier to sell a line so that rail service can be restored, improved, or simply maintained. If we find that a forced sale is warranted, we must also set the terms for the sale and ensure that the potential purchaser is financially responsible.

⁷ 49 CFR 1151.3.

⁸ See Duke Energy Corporation v. Norfolk Southern Railway Company, STB Docket No. 42069, slip op. at 2 (STB served Mar. 25, 2003).

⁹ Cheney R. Co.—Feeder Line Acq., 5 I.C.C.2d 250, 251 (1989), aff'd sub nom. Cheney R.R. Co. v. ICC, 902 F.2d 66 (D.C. Cir. 1990); H.R. Conf. Rep. 96-1430, at 85 (1980), reprinted in 1980 U.S.C.C.A.N. 4110, 4116.

¹⁰ 49 U.S.C. 10907(b)(1)(A)(ii).

¹¹ 49 U.S.C. 10907(b)(1)(A)(i).

Public Convenience and Necessity

Initially, the Port argued that the public-convenience-and-necessity standard applied to the entire line. In its September 12, 2008 reply to comments on the feeder line application, the Port claims that because CORP designated, on its system diagram map, the westernmost 94 miles of the Line as a candidate for abandonment prior to the Port's filing of the feeder line application, the public convenience and necessity determination is necessary only for the easternmost 17 miles—the portion of the Line over which CORP is not seeking to abandon or discontinue service. CORP asserts generally that the public convenience and necessity do not require the sale of the 17-mile portion of the Line between Vaughn and Danebo. But CORP concedes that, if the Port acquires the Line from Vaughn to Cordes, it would make operational sense for the Port to acquire the remaining 17 miles of line.¹²

We will apply the public convenience and necessity criteria for the entire 111 miles. In this feeder line case it makes little sense to consider one portion of the Line under the public convenience and necessity criteria and the other portion under the system diagram map criteria given that the Line has historically been operated as a single entity and that CORP agrees that one carrier should operate the entire Line.

To find that the public convenience and necessity require or permit the sale of a rail line, we must find that the five criteria set forth in 49 U.S.C. 10907(c)(1) are met:

- (1) the rail carrier operating the line has refused to make the necessary efforts within a reasonable time to provide adequate service to shippers who transport traffic over the line;
- (2) the transportation is inadequate for the majority of shippers who use the line;
- (3) the sale will not have a significantly adverse financial effect on the rail carrier operating it;
- (4) the sale will not have an adverse effect on the overall operational performance of the rail carrier operating it; and
- (5) the sale will likely result in improved rail transportation for shippers that use the line.

As discussed below, we find that these criteria are met here.

1. Refusal to Provide Adequate Rail Service. CORP placed an embargo on the 94-mile western segment of the Line in September 2007, and has sought, and has today received, authority to abandon and discontinue service over that portion of the Line. Accordingly, shippers on the embargoed section have lost rail service altogether and would not regain it from CORP were CORP to exercise the abandonment and discontinuance authority it has received.

Shippers on the 17-mile still-active portion of the Line, which was not included in CORP's abandonment application, assert that service remains inadequate. Swanson Group, Inc. (Swanson Group), explains that it "has shipped very little by way of direct rail" due to

¹² CORP's August 29, 2008 comments, at 9.

CORP's unreliable service—830 cars in 2006, 667 cars in 2007, and 4 cars in 2008.¹³ Swanson Group states that, after CORP continuously failed to meet its shipping needs, it invested in lumber trucks and alternative loading sites.

Rosboro Lumber Company (Rosboro) states that, after the embargo, CORP's rail service deteriorated substantially, with slow delivery of empty cars and delayed pickup of outgoing loads. Rosboro has not used the Line since February 2008 due to market conditions in the lumber industry unrelated to CORP or the embargo, but anticipates shipping approximately 200 cars per year when it reopens its plant. Rosboro states that CORP's rail service is inadequate to meet its needs.

Swanson Brothers Lumber Company, Inc. (Swanson Brothers), currently ships 4 to 6 rail cars per month, and states that CORP's service is inadequate to meet the needs of the company. Swanson Brothers states that CORP's service has always been poor, explaining that it takes 1 to 2 weeks for CORP to respond to a car order, and another 1 to 2 weeks for CORP to pick up the loaded cars.

While CORP does not agree that its service on the active portion of the Line has been inadequate, it does not refute the specific shippers' claims. More importantly, CORP presents no evidence to suggest that it made the necessary efforts to provide adequate service to the shippers on the Line. CORP's abandonment application is evidence that it does not intend to make the repairs necessary to restore service on the embargoed section. Nor does CORP represent that it intends to take action to improve service on the active segment of the Line. Thus, CORP's failure to make the repairs and to provide service that is adequate to meet the shippers' needs meets the refusal-to-provide-adequate-rail-service criterion.

2. Transportation Inadequate for a Majority of the Lines' Shippers. Eleven of the 14 shippers that have used the Line in the last five years state that the transportation service has been inadequate. Seven of the 11 shippers that provided letters are or were frequent shippers on the Line: Georgia-Pacific West, Inc; Roseburg Forest Products; American Bridge Manufacturing; Southport Forest Products, LLC; Swanson Group; Swanson Brothers; and Ferrelgas. Four of the shippers that provided letters used rail service less frequently: Coos Head Forest Products; Rosboro; Ocean Terminals Co.; and Coos Bay Docks. CORP did not present evidence contesting the Port's evidence on this criterion. Thus, we find that the Port has shown that transportation over the Line is inadequate for the majority of shippers who transport traffic over the Line.

3. Effect of the Sale on CORP's Finances. The Port asserts that the forced sale of the Line would not have a significant adverse financial effect on CORP, but instead would have a positive effect by allowing CORP to avoid an annual operating loss of between \$1.5 and \$2 million; avoid spending millions of dollars for repair and rehabilitation; and receive the cash from the sale of the Line. CORP concedes that it was losing money by operating the Line and

¹³ Port's July 11, 2008 application, Exhibit 11.

that rehabilitating the Line will be costly. We agree that the sale of the Line would not have a significantly adverse financial effect on CORP.¹⁴

4. Effect of Sale on CORP's Operational Performance. The sale would not have an adverse effect on the overall operating performance of the rail carrier operating it. First, the Coos Bay Line and CORP's other line, the Siskiyou Line, are operated independently, as they are separated by approximately 8 miles of line owned by UP. Second, CORP does not appear to believe that ceasing operations over the Line would hinder its operating performance because CORP sought authority to abandon and discontinue service over all but 17 miles of it. Accordingly, we find no likelihood of adverse effect on CORP's operations.

5. Improved Rail Transportation for Shippers. The sale of the Line would likely result in improved railroad transportation for shippers who transport traffic over the Line. Most of the shippers on the Line currently have no access to rail service and no realistic chance of obtaining service from CORP. The Port has stated that it needs rail service to survive,¹⁵ and, perhaps more importantly, the Port has shown that it has the support of most of the shippers on the Line. This suggests that the Port and the shippers would work together to make rail service on the Line a success. Moreover, the Port states that it would restore rail service to the entire Line, and it has submitted a plan for operating the currently active portion of the Line, with an intent to modify that plan once the entire Line is active.

Under its operating plan, the Port intends to commence operations on the non-embargoed portion of the Line on or about January 1, 2009, or as soon as any feeder line sale is consummated. The embargoed portion of the Line would require extensive rehabilitation before rail service could resume. The Port explains that numerous short line railroads have expressed interest in operating the Line, and that it has issued a request for proposals to engage an operator. Once the Port chooses an operator, trains will travel westbound to the Coos Bay Yard from the Eugene Yard every Monday, Wednesday, and Friday.¹⁶ On the way, the trains would interchange with Portland & Western Railroad approximately 25 miles north of Cordes, if necessary, and provide switching for American Bridge in Reedsport. A local crew would also break up the train in the Coos Bay Yard, and provide switching for Southport Forest Products and AmeriGas on the North Spit, near Cordes.

¹⁴ See Caddo Antoine et al.—Feeder Li. Acq.—Arkansas Midland RR, 4 S.T.B. 610, 623 (2000) (no adverse effect where a carrier would realize a substantial cost savings from the sale), aff'd in part, rev'd in part on other grounds, G.S. Roofing Prods. v. STB, 262 F.2d 767 (8th Cir. 2001).

¹⁵ Draft transcript of August 21, 2008 hearing, at 176.

¹⁶ The Port intends to forge an agreement with UP for trackage rights between Eugene and Danebo, if necessary, and has indicated that it may seek to obtain trackage rights from UP for the line between Cordes and Coquille over which CORP has received discontinuance authority in STB Docket No. AB-515 (Sub-No. 2).

The Port states that the operator would provide local switching operations 5 or 6 days per week at the Coos Bay Yard. Local crews would assist in building the eastbound trains that would leave the Coos Bay Yard on Tuesdays, Thursdays, and Saturdays, and as the trains headed eastbound, would provide switching for Coos Head Lumber if necessary, as well as the three shippers in the Noti and Vaughn area. The Eugene-bound trains would also interchange with the Portland & Western Railroad before finally interchanging with UP at the Eugene Yard.

The Port also states that service would increase as needed, by either travelling in both directions 5 days a week with each crew staying with its designated train, or by operating 5 days a week and trading crews at the Mapleton Yard, a point near the middle of the Line.

The Port has sufficiently demonstrated that it would provide improved rail transportation to the shippers on the Line. Because CORP has embargoed 94 of the 111 miles on the Line and has sought to abandon that segment, any service offered by the Port on that segment would be improved service. The Port has provided us with an operating plan, a plan for obtaining an operator, and a stated intent to work toward reopening the entire Line. The Port's application to purchase the Line has the overwhelming support of the Line's shippers on both the active and embargoed portions of the Line. In sum, we find that the criteria of section 10907(c)(1) are met here with respect to the Port's feeder line application.

Valuation

When the Board orders a sale, it must set the price at not less than the line's "constitutional minimum value."¹⁷ The constitutional minimum value is statutorily presumed to be "not less than the net liquidation value of such line, or the going concern value of such line, whichever is greater."¹⁸ The Port and CORP agree that the Line has no positive going concern value (GCV), and that the appropriate measure of the constitutional minimum value here is the Line's net liquidation value (NLV). Accordingly, we will set the sale price at the NLV, which typically consists of the net salvage value (NSV) of the track and related materials plus the value of the underlying land. As discussed below, we will determine the NLV in a subsequent decision based on the methodology described herein.

The Port's NLV Estimate. The Port calculated the NSV of the Line based on inventory, condition assessment, unit volumes and costs by type of asset valued. The Port's initial NSV estimate was \$16,928,648,¹⁹ determined without access to much of the Line. After gaining access to the Line, the Port raised its NSV to \$19,408,031. The Port further revised its NSV estimates on September 30, 2008, to reflect a recent drop in steel prices, and did so again on October 17, 2008, as the price of steel continued to drop. Although the Port submitted further evidence of a continued decline in steel prices in its October 30, 2008 filing, it did not provide an updated NSV reflecting those prices.

¹⁷ 49 U.S.C. 10907(b)(1).

¹⁸ Id. 10907(b)(2).

¹⁹ For comparing pure NSV numbers with those of CORP, we have removed bridge and tunnel expenses from the Port's proposed NSV totals except where noted otherwise.

The Port calculated the value of the land using three steps: (1) the development of the “base value”; (2) base value adjustments; and (3) net present value analysis. Base values were calculated for each valuation unit (17 total) and the title defects existing for that valuation unit were deducted where appropriate. When the valuation unit was estimated to contribute to market value, an analysis of the net present value was conducted. In valuing the land, the Port used a “base homesite theory,” which does not utilize across-the-fence (ATF) values²⁰ of adjacent rural residential sites in its calculations. The Port argues that ATF values, which are used most often in Board proceedings, do not accurately reflect the value of the adjacent properties when considering rural residential sites. The Port’s valuation also assumes that roughly 78% of the land—1,466.89 acres out of 1,873.02 total acres—has a value of \$0 on the theory that it has no use other than for rail transportation. The Port also argues that a 50% discount rate is justified for some ATF values. The Port valued the land at a total of \$909,734.

Finally, the Port argues that we should deduct from the NLV the cost to remove two bridges, \$7,758,400, and the cost to barricade the tunnels on the Line, \$90,000. The Port asserts that federal law would require CORP to remove the Umpqua River and Siuslaw River bridges if land transportation were to cease over the Line. The Port also argues that the tunnels on the Line would need to be barricaded for safety and liability reasons.

CORP’s NLV Estimate. CORP submitted two purchase offers for the track assets on the Line. In separate inspections, L.B. Foster and Unitrac Railroad Materials, Inc. each determined the quality, quantity, and condition of the track assets, and gathered information necessary for determining the costs of removing and transporting the track materials. L.B. Foster offered \$17,599,000 to purchase the track assets, including salvaging the Siuslaw River and Umpqua River bridges. Unitrac offered to purchase the track assets, excluding the Siuslaw River and Umpqua River bridges, for \$19,580,204. CORP argues that the higher offer, submitted by Unitrac, is the fair market value of the track assets. CORP also argues that we should disregard the drop in steel prices reflected in the Port’s October 17 and 30 filings or, in the alternative, average steel prices over the pendency of the proceeding.

CORP calculated the real estate value of the Line in the following manner. First, CORP determined which parcels it did not own in fee simple and excluded them from the land valuation methodology. Second, CORP divided the remaining parcels into segments based on ATF land uses of adjacent properties. Third, CORP then determined the ATF unit value for the individual right-of-way segments by comparing historical sales of similar geographically located properties used in the same manner as those abutting the right-of-way. Where the land use was different on each side of the right-of-way, an average of the ATF unit values was determined. Fourth, CORP multiplied the ATF unit values by the area of the segments. Fifth, CORP discounted ATF values on portions of segments that are subject to other rights—the discount varied based on the nature of the rights reserved. Sixth, the ATF values of all segments were added together to arrive at the total ATF value of the right-of-way. Seventh, CORP discounted the total ATF value to account for the time required to sell the individual parcels, holding costs, the cost of sale, and the yield

²⁰ The across-the-fence methodology assumes that the value of the land underlying the rail line should bear some relationship to the value of the land through which it passes.

rate required by potential purchasers. Within its discount calculations, CORP estimated ad valorem taxes by adding the weighted average effective tax rate to the discount rate. Finally, CORP deducted from the present value of the right-of-way a value for timber rights reserved by parties other than CORP. Based on these steps, CORP calculated its land value to be \$7,231,000.

Adding its NSV figure of \$19,580,204 and its real estate valuation of \$7,231,000, CORP arrived at a NLV of \$26,811,204.

Board NLV Conclusions. *NSV.* We conclude that the NSV of the Line should be calculated as of the day of this decision. This proceeding began when the price of steel was abnormally high. Prior to the proceeding, from October 2007 through February 2008, the average price of scrap rail was between \$233 and \$287 per net ton.²¹ The price of scrap steel began to spike in mid-March when the average price rose to \$304 per net ton. In subsequent months, including July when this proceeding began, the average price continued to rise, peaking at \$540 per net ton in August.²² By September 26, 2008, however, the price had dropped to \$277 per net ton.²³ On October 16, 2008, the price of a net ton fell to \$188 per net ton,²⁴ and further fell to \$161 by October 30, 2008.²⁵

It is incumbent on the Board to use the best evidence available on the value of the NLV component. When a party submits evidence demonstrating that the market value of a major component of a railroad's NLV has changed in a significant manner during the pendency of the Board's proceeding aimed at determining NLV, we must determine whether the more recent evidence undercuts any other prior valuation evidence in the record or provides better evidence of the true value of a line. With some possible exceptions, which we discuss below, steel price valuation evidence that is contemporaneous with the Board's valuation decision is most likely to reflect the value of the property on the date that it is directed to be sold pursuant to the Board's decision—thereby ensuring that the property owner receives the constitutional minimum value. In this case, particularly given the significant drop in the price of steel between the conclusion of the formal procedural schedule and today's decision, we conclude that the fair market value of the Line's assets should be based on the current prices and not on the anomalous prices occurring during July and August of this year.²⁶ The current steel prices have now dropped below where

²¹ Port's September 30, 2008 supplement, V.S. of Gene A. Davis, at 6.

²² Id.

²³ Id. at 5.

²⁴ Port's October 17, 2008 valuation update, V.S. of Gene A. Davis, Attachment H.

²⁵ Port's October 30, 2008 steel price update, p. 2.

²⁶ See CSX Transportation, Inc.—Abandonment Exemption—In Laporte, Porter and Starke Counties, IN, STB Docket No. AB-55 (Sub-No. 643X) (STB served Apr. 30, 2004) (Laporte) (finding that it would be improper to reject late-filed evidence of steel price changes because doing so could result in an inaccurate NLV). We suspect that had the price of steel risen
(continued . . .)

they were prior to the mid-year spike, but they have not at this point fallen so much as to be significantly outside of an historically normal range or to reflect an anomalous downward spike.²⁷

While the Board has accepted firm bids in other cases as convincing evidence of the fair market value of a rail line,²⁸ we do not believe the bids submitted by CORP in this case represent the best evidence of what the track assets currently are worth in the marketplace. Both the Unitrac offer and the L.B. Foster offer contain language that the offeror retains the right to revise its offer if there is a substantial change in the market. That reservation of a unilateral right by the offeror to change its price to account for an event like the significant scrap steel price drop that actually occurred here, coupled with the lack of a deadline in either offer by which CORP must accept, precludes consideration of these offers as truly “firm.” Accordingly, we do not rely on the offers in reaching our NSV.

Nor will we use an average of steel prices over the pendency of this proceeding, as CORP suggested in its October 22 and October 30 replies.²⁹ In certain circumstances, the Board has used an average of steel prices over the course of a proceeding where there was significant upward and downward fluctuation that made it impossible to choose a single day’s steel price as representative of current prices.³⁰ Averaging is not appropriate in this case, however, because the change in steel prices since the market peaked in August has been one-way and extraordinarily steep. Were the Board to average prices between July 11 (when the Port filed its application) and today, the spike in steel prices earlier this year would artificially inflate the current value of the Line.

(. . . continued)

in this case, as it did in Laporte, CORP would be urging us to establish the NLV with the best and most recent data available.

²⁷ See Port’s October 17, 2008 valuation update, Exhibit 1 (AMM Weekly Steel Scrap Price Composite for 2006 and 2007).

²⁸ See, e.g., San Joaquin Valley Railroad Company—Abandonment Exemption—In Tulare County, CA, STB Docket No. AB-398 (Sub-No. 7X), slip op. at 4 (STB served Aug. 26, 2008).

²⁹ The Port also suggested earlier in this proceeding that the Board should use an average of steel prices from September 2007 to the present. To the extent that the Port has not abandoned that line of argument, we reject that longer-term averaging approach here as well.

³⁰ See Keokuk Junction Railway Company—Feeder Line Acquisition—Line of Toledo Peoria and Western Railway Corporation Between La Harpe and Hollis, IL, STB Finance Docket No. 34335, slip op. at 4 (STB served Oct. 28, 2004), aff’d sub nom. Toledo, Peoria & W. Ry. v. STB, 462 F.3d 736 (7th Cir. 2006). The ICC also accepted averaging in some abandonment cases with dissimilar facts. See e.g., Chicago and Northwestern Transportation Company—Abandonment—Between Marshalltown (Powerville) and Cedar Falls Junction and Between Hicks and Dike-In Marshall, Tama, Grundy and Blackhawk Counties, IA, Docket No. AB-1 (Sub-No. 211) (ICC served Dec. 7, 1988) (accepted carrier’s 6-month average of scrap prices; no argument that prices had risen or fallen dramatically in that time period).

We conclude that it is appropriate to establish the NSV using steel prices as of the date of this decision. Because such market data is not yet available today, we will order the Port to file an updated verified statement from its expert by November 5, 2008, in which the NSV of the Line is calculated using October 31, 2008's AMM steel prices and the quantities of materials its witness, Gene Davis, used to calculate the Line's NSV contained in its September 12, 2008 reply. The updated verified statement should include the work papers and evidence used to support the NSV estimate submitted. CORP may file a reply on or before November 7, 2008.

In its updated verified statement, the Port will be required to use the quantities of steel that it used in its NSV calculation in its September 12, 2008 reply. In the September 12 reply, the Port asserted that the NSV of the assets on the Line was \$19,408,031 before tunnel-closure and bridge-removal expenses were subtracted. This figure is strikingly similar to the \$19,580,204 NSV offered by CORP on August 29, 2008. That is not surprising: the parties' figures are based on the AMM steel prices from approximately the same point in time when the prices of steel were similar and the parties' estimates of the quantities of each type of track asset are comparable. The Port has periodically submitted updated verified statements from Mr. Davis, in which he calculates the NSV of the Line using those same quantities. We can assume that those updated NSV estimates closely approximate what CORP's figures would have been if they had been adjusted to reflect the decline in prices. Thus, we find the Port's quantities to be the best evidence of record upon which further NSV calculations should be based.

The parties' November 5 and 7 submissions may not be used to seek reconsideration of any of the Board's determinations in this decision. Rather, the submissions must be limited to the subjects described in the preceding two paragraphs. Any attempt by the parties to introduce argument or evidence in these submissions regarding other subjects, including, but not limited to, the Board's NSV methodology, land valuation, or escrow determinations, will not be accepted into the record.

Real Estate. We reject the land valuation method employed by the Port because it does not properly calculate the highest and best nonrail use for the Line's right-of-way. With minor corrections, we accept CORP's land value.

We reject the Port's valuation for several reasons. First, for residential valuation units, the Port introduced a land valuation methodology it refers to as the "base homesite" theory. Under that theory, any acreage above the minimum required for a residence is considered excess land and the excess land is assigned a per unit value less than that reflected in the sales price of the comparable property or less than that of the minimum portion of the lot required for a residence. We are not convinced of the theory's premise that excess property is undesirable or that an adjacent land owner would have little to no interest in acquiring the property. Therefore we do not believe the theory calculates values for the highest and best nonrail use for the right-of-way. Even if we were to consider this methodology credible, the Port's witness applied it incorrectly because he performed no pricing calculations to reflect the higher-valued base homesite portions in valuation units specified as residential properties. Nor did the Port provide any evidence on the minimum requirements for residential lots.

Second, the Board has historically employed the ATF methodology for valuing rail line corridors³¹ because that methodology presumes that sale to adjacent landowners yields the highest and best nonrail use of the rail corridor—a presumption that applies to most rail corridors.³² But the Port’s witness consistently applies the ATF method incorrectly or not at all, based on his stated belief that ATF is not appropriate here. For example, the Port used a limited set of comparable sales data, which resulted in applying ATF values to right-of-way properties not located within the relative geographical areas of the historical sales. The Port’s witness also ignored historical sales data that would have influenced the values that the ATF methodology attempts to determine.

Third, we do not find credible the Port’s argument that 78% of the right-of-way would have no resale value. The Port’s witness erred in placing many properties within zero-value units. We discuss a few prime examples below.

- The Port’s Unit 1 Consists of 61.87 acres of property that is comprised solely of scattered scraps of property, including public road crossings, rivers and lakes. The unit consists entirely of pieces of property excised from the physical and legal parcels in which they are actually located. The scraps have been lumped together purely for valuation purposes. The Port’s witness argues that these scraps would have no value because they are not usable by any purchaser. But the utility and hence the value of these pieces of property are properly determined in the context of the parcels to which they belong.
- Unit 2 consists of 307.56 acres of land adjacent to wetlands and federal- or state-owned land, and the Port assigned a \$0 value based on the assumption that the adjacent landowners would not purchase them. But the Port’s witness offers no basis for us to conclude that the adjacent landowners would not be interested in purchasing these lands. For that reason, and because the Port failed to employ the ATF methodology here, we conclude that the \$0 valuation of the property in this unit was in error.
- Unit 3 consists of 1031.62 acres of property abutting forest-zoned properties. The Port’s witness states that adjacent landowners would have no interest in purchasing the land in this unit because the properties lack timber rights—an assertion disputed by CORP—and because the land is encumbered by pipe and

³¹ See Laporte; Railroad Ventures, Inc.—Abandonment Exemption—Between Youngstown, OH and Darlington, PA, in Mahoning and Columbiana Counties, OH, and Beaver County, PA, STB Docket No. AB-556 (Sub-No. 2X) (STB served Jan. 7, 2000) (RVI, January 7, 2000), aff’d sub nom., R.R. Ventures, Inc. v. STB, 299 F.3d 523 (6th Cir. 2002) (R.R. Ventures; Boston and Maine Corp.—Abandonment—In Hartford and New Haven Counties, CT, STB Docket No. AB-32 (Sub-No. 83), et al. (STB served July 1, 1998) (Boston & Maine).

³² RVI, January 7, 2000, slip op. at 9; Boston & Maine, slip op. at 4.

communication line easements and by ballast in the rail right-of-way.³³ In his analysis, the Port's witness mentions five comparable sales, but fails to use them based on his assertion that the above encumbrances render the land worthless. We are not persuaded that the properties in this unit have a \$0 value even with the encumbrances. Instead of determining the value of the land in this unit by first using historical sales and then discounting the value based on the encumbrances of the land, the Port's witness completely ignores the historical sales. This method of valuation is not credible.

In contrast, CORP applied the ATF methodology, considering comparable sales and discounting the liquidated value to account for the time required to sell individual parcels. Because CORP applied the ATF methodology in a reasonable manner, we will accept CORP's land value as the best evidence of record. However, CORP made an error in its discounted cash flow calculations in determining the gross potential sales at the beginning of year three. After correcting CORP's minor error, we accept a land value of \$6,771,878.

Bridges and Tunnels. We will deny the Port's request to include the cost of removing bridges or closing tunnels in the NLV determination. Under our rules any asset with a negative NSV is assigned a value of zero.³⁴ While that regulation is an offer-of-financial-assistance (OFA) regulation, the forced-sale circumstances and valuation methodologies are comparable to the feeder line process.³⁵ We see no logical basis to allow for a negative NSV in the calculation of the NLV for one type of forced sale of a rail line but prohibit it for another. No party has offered any rationale for applying different methodologies to the valuation of rail properties subject to forced sales under section 10907 and section 10904. Therefore, even if we were to find that Coast Guard regulations would require removal of the Siuslaw River and Umpqua River bridges if the Line were abandoned, as the Port argues, any cost that exceeds the salvage value of those bridges is not to be considered in our calculation of the NLV. Similarly, costs associated with sealing or barricading tunnels to avoid entry, as well as other "restoration" costs asserted by the Port, are not appropriate in an NLV calculation because, as costs, they inherently have a negative NSV.

Net Liquidation Value. In a subsequent decision, the Board will determine the NSV of the Line as of October 31, 2008, and add that figure to the real estate value of \$6,771,878 to calculate the Line's NLV. Because we find that the Line has no positive GCV, the NLV will be the constitutional minimum value of the Coos Bay Line, and we will set the purchase price at

³³ CORP argues that the Port's assertion that CORP owns none of the timber rights associated with the land is incorrect because CORP repurchased the timber rights of the Douglas County properties from UP in 1998.

³⁴ See 49 CFR 1152.34(c)(1)(iii)(A)(2).

³⁵ See R.R. Ventures, 299 F.3d at 556 (equating the constitutional minimum value standard under the feeder line provisions of 49 U.S.C. 10907 with the constitutional minimum value standard under the offer of financial assistance provisions of 49 U.S.C. 10904).

that amount.³⁶ The Port will have 10 days from the service date of the decision setting the purchase price to notify the Board and CORP whether it wishes to proceed under the terms prescribed in this decision.

Financial Responsibility

To be an eligible purchaser under the feeder line program, an applicant must show that it is financially responsible.³⁷ To be considered financially responsible, section 10907(a) provides that the purchaser must be able (1) to pay the constitutional minimum value for the line and (2) to cover the expenses of operations on the line for at least the first 3 years. Governmental entities are presumed to be financially responsible.³⁸ No party has persuasively rebutted that presumption here.

The Port states that it has available \$7 million in cash, a \$4 million funding commitment from the Oregon Department of Transportation, and a \$12.5 million loan commitment from Umpqua Bank. The Port also explains that it is currently working with Congress to have \$8 million in federal funds that the Port planned to use to rehabilitate the Coos Bay swing bridge³⁹ redirected so that it may instead use those funds for the purchase and rehabilitation of the Coos Bay Line. CORP argues that the Port states that it is reluctant to take advantage of the loan commitment available to it and therefore that the Port is not a financially responsible person.

We find the Port to be financially responsible. The Port is a governmental entity. Because it is a state port, as evidenced by state legislation delegating the power and authority to operate the Port to the Port's Board of Commissioners⁴⁰ who are appointed by the Governor of Oregon,⁴¹ our regulations presume the Port is financially responsible. See 49 CFR 1152.27(c)(1)(ii)(B). While part 1152 is an OFA regulation, there is no logical basis to presume that governmental entities are financially responsible in one type of forced-sale proceeding, but not in another.⁴²

³⁶ The Port has requested that we determine that certain sales price provisions of a sale agreement to which CORP was a party will not be enforceable against the Port. No party has asserted any rights here under such provisions and, in any event, the effect of such provisions may not be factored into our calculation of the NLV of the Line.

³⁷ 49 U.S.C. 10907(b)(1)(B).

³⁸ 49 CFR 1152.27(c)(1)(ii)(B).

³⁹ The Coos Bay swing bridge is not located on the portion of the Line that the Port is seeking to acquire through this proceeding.

⁴⁰ Or. Rev. Stat. Ann. 777.920 (West 2003).

⁴¹ Or. Rev. Stat. Ann. 777.925 (West 2003).

⁴² See supra note 35 and accompanying text.

Escrow Request

In its application, the Port requested that the Board order CORP to repair tunnels 13, 15, and 18 prior to selling the Line to the Port or to compensate it for the necessary repairs based on the premise that CORP neglected the Line. In its September 12 reply, the Port now requests that the Board order part of the purchase price to be placed into escrow not only for repairs to those tunnels, but also for additional repairs needed on the Line. As justification for this request, the Port argues that CORP had extensive notice that the Line needed significant maintenance, but neglected to perform that maintenance while encouraging public investment in the Line. The Port also argues that CORP delayed seeking abandonment by improper use of the embargo process. Finally, the Port argues that CORP failed to designate the Coos Bay Line as a candidate for abandonment in a timely manner.

CORP argues that the Port is effectively requesting that the Board subtract the cost of repairing the Line from the purchase price, and that to do so would be contrary to Board precedent, section 10907, and the United States Constitution. CORP asserts that, in this case, section 10907 and the Constitution prohibit the Board from setting the sale price of the Line below the NLV, and that the current condition of the Line is irrelevant to the Line's NLV.

Section 10907 requires us to set the price at the higher of the GCV and NLV of the Line. The calculation of the GCV of a line often considers rehabilitation costs, because the calculation assumes that the line will continue to be used to provide rail service.⁴³ In contrast, rehabilitation costs are not considered in an NLV calculation, because the NLV calculation assumes that the subject line will be dismantled and taken out of service. In this case, the Port and CORP both agree that the Coos Bay Line has no GCV. Accordingly, we are precluded from considering rehabilitation costs in determining the constitutional minimum value.

The cases cited by the Port are inapplicable here. The Port relies on The Kansas City Southern Railway Company—Abandonment Exemption—Line in Warren County, MS, AB-103 (Sub-No. 21X) (STB served May 20, 2008) (Warren County) for the proposition that CORP should be required to compensate the Port for any deterioration that may have occurred on the Line since the embargo was instituted. But in Warren County, a third party began dismantling a bridge located on a line that was already the subject of a pending OFA. To maintain the integrity of the OFA process, the Board in Warren County held the abandoning railroad responsible for replacing the bridge so that the OFA applicant did not receive less than it believed it would be receiving at the time its offer was made.⁴⁴ Here, however, while CORP may not have actively maintained the Line since the embargo, there is no evidence that CORP took any affirmative act to adversely affect the condition of the Line (or permitted anyone else to do so) since it sought abandonment authority and the Port filed its feeder line application.

⁴³ See Pyco Industries, Inc.—Feeder Line Application—Lines of South Plains Switching, Ltd. Co., STB Finance Docket No. 34890, et al., slip op. at 30 (STB served Aug. 31, 2007).

⁴⁴ Warren County, slip op. at 5.

The Port also cites various decisions from 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), for the proposition that CORP should be required to return a portion of the purchase price to the Port for necessary repairs on the Line. In that case, however, a carrier sought to encumber and downgrade an active rail line on which shippers were still requesting service by, among other things, authorizing state road crews to pave over the line.⁴⁵ The Board established an escrow account to ensure that the selling rail carrier paid for its intentional damage to the Line.⁴⁶ The facts of the current proceeding are distinguishable, as there is no evidence that CORP intended to cause the Line to be unserviceable or took affirmative steps to degrade the Line. Indeed, in the accompanying abandonment decision, we find that CORP did not engage in deliberate downgrading on any portion of the Line.⁴⁷ Conversely, CORP has provided evidence in STB Docket No. AB-515 (Sub-No. 2) that it invested 49.4% of its gross revenues from 2002 to 2007 in the Coos Bay Subdivision, as it is described in that proceeding, through maintenance and capital investments.⁴⁸ Thus, we find no merit to the Port’s assertion that we should place a large portion of the purchase price into an escrow account for repairs on the Line.

Additionally, we are not persuaded by the Port’s argument that CORP planned to abandon the Line, but either failed to designate the Line as a candidate for abandonment earlier or used the embargo process as a way of delaying filing for abandonment authority. The Port offers no convincing evidence that CORP planned to seek abandonment authority before the Board’s April 11 show cause order.

Exemptions, Trackage Rights, and Prescriptions

Under section 10907(g)(1), a feeder line purchaser may elect to be exempt from any provisions of the Interstate Commerce Act other than the joint rate provisions of chapter 107. The Port does not seek to elect any such exemptions.

A feeder line applicant may request trackage rights from the selling carrier under section 10907(d), or a prescription of joint rates and divisions under section 10907(f), or both. The Port does not seek any trackage rights over CORP or a prescription of joint rates and divisions.

⁴⁵ 5 S.T.B. 283, 301 (2000), aff’d, R.R. Ventures, 299 F.3d 523 (6th Cir. 2002).

⁴⁶ Id.

⁴⁷ Coos Bay Line Abandonment, slip op. at 18-19 (STB served Oct. 31, 2008).

⁴⁸ CORP’s Sept. 12, 2008 rebuttal to protests, at 35-37. It should be noted that there is a difference between what is referred to in this proceeding as the Coos Bay Line and the line at issue in STB Docket No. AB-515 (Sub-No. 2). The Line here contains 17 additional eastern miles of line, but does not include the portions that CORP currently leases from other rail carriers.

Preconditions and Shipper Subsidies

49 U.S.C. 10907(i) requires that any person operating a line acquired under this section who seeks to determine preconditions, such as payment of a subsidy, that must be met by shippers in order to obtain service over such lines, must notify the shippers on the line of its intention to impose such preconditions. 49 CFR 1151.3(a)(9) further requires a feeder line applicant to state any preconditions that will be placed on shippers in order for them to receive service, and to state that if the application is approved, no further preconditions will be placed on the shippers without Board approval.

The Port states that the amount of subsidy it is currently discussing with shippers ranges from \$50 to \$600 per car, depending on the commodity. The Port also states that it will not place any further preconditions on the shippers without Board approval. This statement is binding on the Port.⁴⁹

Labor Protection

Under section 10907(e), the Board must require, to the maximum extent practicable, the use of the employees who would normally have performed work in connection with the railroad line sold under this section. The Port has pledged that it will make reasonable efforts to give prior consideration to qualified employees of CORP that have worked on the Coos Bay Line in meeting its staffing needs to provide service on the Line. However, because most of the Line has been inoperable since September 2007, the Port believes that CORP personnel who previously worked on the Line have transitioned to other employment.

As a term of the feeder line sale, we will require that, in the event the Port or its chosen operator hires new employees to operate or maintain the Line, it offer employment on a priority basis to qualified CORP employees who were working on the Line in September 2007 when the Line was embargoed or who have worked on the Line since September 2007.

Closing Terms

To ensure a smooth transfer of the Coos Bay Line, the following additional terms (traditionally used in cases where the Board orders the sale of a line) will be imposed: (1) payment must be made by cash, certified check, or electronic transfer to an account designated by CORP at closing; (2) closing must occur within 90 days after the service date of the Board's subsequent decision setting the purchase price; (3) CORP must convey all property by quitclaim deed; (4) CORP must deliver all releases from any mortgages and original documents conveying interest in the right-of-way to the purchaser within 90 days from closing; (5) all taxes must be prorated as of the date of closing; and (6) deed recording fees must be paid by the Port. Mortgage or lien release taxes or recording fees must be paid by CORP. CORP will be required to turn over to the Port, within 30 days after closing, all CORP records concerning the property being purchased, including any and all deeds, valuation maps, easement records,

⁴⁹ See 49 CFR 1151.3(a)(9).

engineering drawings, contracts, bridge inspection records, and all other records related to the property purchased. The terms of sale may be modified by mutual agreement between the parties.

It is ordered:

1. CORP's September 29, 2008 motion for leave to file a supplemental response is granted and its September 29, 2008 supplemental filing is accepted. The Port's October 7, 2008 motion to strike CORP's September 29, 2008 supplemental filing is denied.

2. The Port's October 17, 2008 petition for leave to supplement the record is granted. The Port's October 17, 2008 valuation update and its October 30, 2008 steel prices update are accepted.

3. CORP's October 21, 2008 and October 30, 2008 replies are accepted.

4. The Port's feeder line application to purchase the 111-mile Coos Bay Line from Danebo to Cordes, OR, is granted.

5. The purchase price for the Line will be set in a subsequent Board decision. Other terms of the sale are prescribed as set forth in this decision.

6. The Port will file by November 5, 2008, an updated verified statement from its expert, in which the expert will calculate the NSV of the Line using the AMM steel prices as of October 31, 2008, and the quantities used in the Port's calculation of NSV submitted on September 12, 2008.

7. CORP will have until November 7, 2008, to reply to the Port's November 5 filing.

8. The Port's request for an escrow account is denied.

9. The Port, or its chosen operator, must offer employment on a priority basis to qualified CORP employees who worked on the Line should the Port or its operator require new employees to operate or maintain the Line.

10. This decision is effective on its service date.

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

Anne K. Quinlan
Acting Secretary