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SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34335

KEOKUK JUNCTION RAILWAY COMPANY–FEEDER LINE ACQUISITION– LINE OF TOLEDO, PEORIA AND WESTERN RAILWAY CORPORATION BETWEEN LA HARPE AND HOLLIS, IL

Decided: February 7, 2005

On reconsideration, the Surface Transportation Board affirms its decision ordering the sale of a 76-mile rail line owned by Toledo, Peoria & Western Railway Corporation to Keokuk Junction Railway Company but increases the purchase price previously set by the Board and establishes a new closing date for the transaction.

In a decision served on October 28, 2004 (October Decision), the Board ordered Toledo, Peoria & Western Railway Corporation (TP&W) to sell its La Harpe-Hollis Line (the Line) in western central Illinois to Keokuk Junction Railway Company (KJRY) under the feeder line development provisions of 49 U.S.C. 10907. The Line extends 76 miles from La Harpe (milepost 194.5), where it connects with KJRY's line, to Hollis (milepost 118.5), where it connects with a line of the Union Pacific Railroad Company (UP). On November 29, 2004, TP&W filed a petition for reconsideration. TP&W's petition for reconsideration will be granted in part, and we will modify in some respects the purchase price for the Line. In all other respects reconsideration will be denied.

BACKGROUND

KJRY filed its feeder line application in April 2003. The Board found it deficient in a decision served in May 2003. An amended application (Application) was filed on June 9, 2003, and accepted in a decision served on July 9, 2003. TP&W and the United Transportation Union-Illinois Legislative Board (UTU-IL) opposed the application and filed verified statements and comments (Comments) in October 2003, to which KJRY filed a verified reply in

November 2003. In March 2004, TP&W sought to supplement the record with new evidence regarding the price of scrap steel, which TP&W claimed had increased dramatically, causing the Line to have a significantly higher net salvage value (NSV) than it had originally claimed. KJRY filed a reply later that month, which it supplemented in June 2004. In the supplement, KJRY claimed that the price of scrap steel had since dropped. TP&W also filed a reply in June 2004.

In the October Decision, we determined that the public convenience and necessity permitted the sale of the Line to KJRY, see 49 U.S.C. 10907(b)(1)(A)(i), and the Board set the purchase price at the Line's net liquidation value (NLV), see 49 U.S.C. 10907(b)(1), which we found to be \$3,940,756. Additionally, the Board stated that we would increase the Line's purchase price if TP&W submitted evidence establishing a higher net salvage value (NSV) for the Line's "reroll" rail. The Board gave KJRY until December 2, 2004 (or later if TP&W supplemented the record on reroll rail), to notify us and TP&W whether it wished to proceed with the purchase under the terms prescribed in the decision. We also ordered KJRY to hold open until December 2, 2004 (or later if TP&W supplemented the record), its offer to enter into an agreement that would provide TP&W with trackage rights over a portion of the Line for a nominal fee (\$1 per year). The parties were given 90 days to close on the sale of the Line.

KJRY accepted the terms prescribed in the October Decision in a letter filed on November 1, 2004. The October Decision became effective on November 27, 2004, after the Board's Chairman denied stay petitions filed by TP&W and UTU-IL. TP&W then filed the instant petition for reconsideration, which included updated data on the price of scrap steel and reroll rail. In December 2004, KJRY filed a motion to strike and replies to both TP&W's reroll rail evidence and petition for reconsideration, and TP&W filed a reply to KJRY's motion to strike. In a decision served on January 24, 2005, the Board extended the transfer closing date by 30 days, to February 25, 2005, and ordered KJRY to hold open until February 18, 2005, its trackage rights offer.¹

In setting the purchase price at \$3,940,756, we determined that the Line has an NSV of \$3,899,121. Our NSV determination primarily relied on TP&W's data as supplemented to factor in the current volatility in the price of scrap steel. We set the unit price for scrap steel at \$157.16 per ton, the composite monthly average for No. 1 heavy melt steel scrap from April 2003 (the month the feeder line application was filed) through July 2004 (which at the time was the last month of available data). This composite monthly average was based on the Mineral Industry

¹ The Board also denied KJRY's request for a directed service order; ordered TP&W to identify within 10 days, which, if any, of the properties it claimed (in its stay petition) to have sold were included in its valuation of the Line's right-of-way, and to refrain from any such sales; and ordered TP&W to refrain from removing the Line's track, switches, and other materials or otherwise taking steps that would further increase the cost of restoring rail service.

Surveys for Iron and Steel Scrap of the United States Geological Survey, which in turn is based on aggregate monthly data from two trade publications, American Metal Market (AMM) and Iron Age. Because similar data on reroll were believed to exist but were not of record or available to us, we relied on the unit values for reroll rail originally submitted by TP&W. We provided, however, that TP&W could supplement the record with a composite monthly average unit price for reroll rail using AMM and (if available) Iron Age data for the April 2003-May 2004 time period, and that KJRY would have 10 days to submit a reply.

Our land value determination primarily relied on TP&W's data and on expert testimony submitted by KJRY on rebuttal. In its Application, KJRY acknowledged that it had insufficient information on the quantity of land in the right-of-way or the quality of TP&W's interest in it. KJRY estimated that the right-of-way of the La Harpe-Mapleton segment consisted of 864 acres, assumed that TP&W held a fee interest in 50% of the acreage, and on that basis valued the right-of-way at \$100,000. On a pro rata basis, KJRY valued the right-of-way of the Mapleton-Hollis segment at \$6,336.

TP&W responded that KJRY had failed to produce a land valuation and offered its own land valuation analysis performed by Todd N. Cecil, Vice President of Real Estate for RailAmerica, Inc., TP&W's corporate parent. Cecil first analyzed the real estate deeds of the land parcels making up the right-of-way. He then developed values for the land parcels owned in fee by (1) dividing the right-of-way into 294 land parcels reflecting adjacent zoning and land use patterns; (2) reducing their acreage to account for land encumbered by road and street rights-of-way; (3) using an across-the-fence (ATF) analysis to identify 54 comparable property sales that had occurred since September 2000; (4) dividing the time-adjusted sale price of the comparables by their acreage to obtain unit values; (5) adjusting the resulting unit values where necessary by 10% to 20% to account for such factors as location, shape, size, access, physical orientation, and topography; and (6) multiplying the acreage of the fee-owned parcels by the appropriate adjusted unit values. Cecil discounted the resulting land values by 8% to account for commissions, administrative costs, advertising, and promotion, and by an additional 5%, on an end-of-year basis, to account for a 3-year sell-off period, reflecting his position that most of the property is very marketable and likely to sell within a short period of time. This yielded a total piecemeal land valuation of \$2,863,173.

In rebuttal, KJRY submitted two expert analyses: a land title evaluation prepared by Brian Mooty, an Illinois real estate attorney, and a verified statement prepared by L. Arlen Higgs, an Illinois-certified real estate appraiser. Mooty examined the more than 200 deeds appended to Cecil's verified statement, divided them into 18 groupings based on their form and language, and concluded that TP&W owned a fee interest in only 6 groupings, equating to 31.657 acres.

Higgs questioned the 54 comparable land sales used in Cecil's ATF analysis, claiming that they involved properties adjoining active rail lines, which are valued higher for their

industrial and commercial potential. Higgs developed his own analysis using the sales over a 15-year period of six abandoned Illinois rights-of-way to neighboring or nearby landowners, determined that the value of those properties had been discounted by 51% to 84% to account for unusual shapes, left-over ballast, and limited purchaser pool, and concluded that a 4-year sell-off period was more appropriate. KJRY further claimed that TP&W had a fee interest in only 28.24 acres and, based on Higgs' verified statement, applied an average discount of 70% to Cecil's adjusted land value, which KJRY prorated. KJRY then discounted the resulting values to reflect a 4-year sell-off period. We found Mooty's and Higgs' analyses more credible than that presented by TP&W, but we rejected the reduction in acreage that Mooty had calculated. We set the land value at \$41,635, based on 31.657 acres owned in fee.

DISCUSSION AND CONCLUSIONS

Motion to Strike

In its petition for reconsideration, TP&W raises a variety of arguments. The arguments on which the motion to strike focuses principally assert that the price set for the Line is far too low. Because the feeder line provisions effect a taking, TP&W argues, a price that is too low would violate its constitutional rights. Thus, in its petition for reconsideration, TP&W contends that it has a due process right to now submit additional evidence on the Line's NLV and that this right was recognized in the Board's decision denying TP&W's stay request.

Land Valuation. The valuation of the land could have the most significant impact on the overall price that TP&W receives for the Line. TP&W points out that KJRY's opening evidence was inadequate. TP&W thus states that it had no choice but to respond substantively and did so with Cecil's land-title analysis and ATF valuation, to which KJRY responded with what was effectively its case-in-chief, the opinion of Mooty and the verified statement of Higgs. Our acceptance of Mooty's opinion and Higgs' verified statement on rebuttal, TP&W maintains, deprived it of an opportunity to reply, constituted a denial of its due process rights, and resulted in material error.

TP&W's petition for reconsideration includes an entirely new land title analysis prepared by Wildman, Harold, Allen & Dixon (Wildman), a law firm retained for that purpose, and verified statements by Charles W. Rex and Douglas S. Golden. Rex and Golden analyze Cecil's appraisal and Higgs' verified statement and conclude that the former does, and the latter does not, comply with Board standards. Golden's verified statement includes a new valuation of the Line's real estate using the Wildman title analysis and Higgs' 4-year sell-off period.

As TP&W points out, in a feeder line application the burden of proof is on the applicant to establish, in its case-in-chief, the value of the rail line, including its real estate. Where the applicant fails to present its case-in-chief on opening, we may rely on the owner's valuation evidence. And even after we issue a decision on the merits, an owner may seek to introduce new

evidence that was not available earlier. The valuation evidence that TP&W submitted more than a year after Higgs submitted his appraisal, however, is not newly available evidence. Moreover, TP&W has gone beyond arguing that its earlier evidence on real estate value, rather than KJRY's, is correct. Rather, TP&W seeks to rely upon an entirely new valuation, submitted for the first time in its petition for reconsideration. TP&W's attempt to submit an entirely new land title analysis that would relitigate its ownership of the underlying real estate is inappropriate here, as TP&W could have submitted this evidence much earlier.

We recognize that our rules of practice, 49 CFR 1104.13(c), preclude replies to replies. But our rules are to be construed liberally to effect justice, 49 CFR 1100.3, and in several cases we have accepted replies to replies where it was appropriate to do so. See, e.g., SMS Rail Service, Inc.–Petition for Declaratory Order, STB Finance Docket No. 34403, slip op. at 3 (STB served Jan. 24, 2005). Given that the Mooty and Higgs analyses were not presented by KJRY until its rebuttal, we would have permitted TP&W to respond to them in a timely way, had it attempted to do so.

TP&W did not, however, respond in a timely way to the Mooty and Higgs analyses. Instead, it waited more than a year, and in addition to addressing those filings, it presented an entirely new case. We are here accepting for consideration TP&W's argument that the Higgs' analysis (for KJRY) was less credible than the Cecil analysis initially presented by TP&W. But TP&W's new analysis of what land is and is not held in fee is based entirely on evidence that was available at the time TP&W filed its Comments and could have been submitted at that time or in a subsequent motion to supplement the record. Our rules of practice specifically provide that a party seeking to introduce evidence on appeal must explain "why it was not previously adduced." See 49 CFR 1115.3(c). TP&W's due process argument does not explain its failure to introduce this evidence when the record was open. Both the Board and its predecessor, the Interstate Commerce Commission (ICC), have routinely refused to accept evidence on appeal if that evidence was available but was withheld until after a result is obtained that is not to a party's liking. See, e.g., Pejepsco Industrial Park, Inc. d/b/a Grimm Industries–Petition for Declaratory Order, STB Finance Docket No. 33989, slip op. at 3 (STB served Nov. 7, 2003); B. Willis C.P.A. Inc.–Petition for Declaratory Order, STB Finance Docket No. 34013, slip op. at 3-4 (STB served July 26, 2002); S.R. Investors, Ltd. d/b/a Sierra Railroad Company–Abandonment–in Toulumne County, CA, Docket No. AB-239X, slip op. at 3 (ICC served Jan. 26, 1988).

TP&W argues that in our November decision we recognized its due process right to now file new land valuation evidence on appeal. But TP&W misinterprets that decision. Indeed, that decision explicitly pointed out (at 3) that "TP&W could have petitioned for leave to supplement the record in response to KJRY's reply submission, as it did with respect to the salvage value of the rail on the Line, but chose not to do so." With respect to due process, the decision simply said (id.) that the Board would extend the deadline to petition for reconsideration. TP&W represented that it would submit newly available evidence supporting its claims that it had "sold

parcels along the Line that the Board has concluded are not owned by TP&W in fee simple as fee simple property and that the buyer has obtained title insurance for those parcels.” See TP&W stay petition at 9 n.5. But no evidence of new sales was submitted on reconsideration. Our statement about due process was hardly an invitation to file a brand new land valuation analysis consisting of evidence that was always available and that TP&W could have produced, but did not, for the record that led to the October Decision.

In any event, TP&W responded by letter on February 3, 2005, to our recent order directing it to identify which, if any, of the properties it claimed to have sold were included in its valuation of the Line’s right-of-way (see supra note 1). TP&W listed six properties in the Line’s right-of-way that were sold or transferred since it had filed its Comments in October 2003, and claimed that title insurance was issued for one of the six properties. TP&W’s title insurance claim, however, was neither verified nor supported by documentary evidence.

A feeder line case must end at some point even though constitutional minimum value is at issue. Indeed, in GS Roofing Products Co., Inc. v. STB, 262 F.3d 767, 774 (8th Cir. 2001), the Eighth Circuit agreed, explaining that it would not require the Board to consider “potentially endless submissions” of valuation evidence for a line being sold under 49 U.S.C. 10907. Likewise, the Board rejects late-filed valuation evidence in a forced sale under section 10904, where the party could have submitted that evidence earlier. See New York Central Lines, LLC—Abandonment Exemption—in Berkshire County, MA, STB Docket No. AB-565 (Sub-No. 3X), slip op. at 4 (STB served July 12, 2002) (the line’s owner “could have suggested this valuation method previously, but chose not to do so, and it is not entitled to have alternative approaches that were not timely presented to us considered now” on reconsideration).

Especially in light of the duration of this proceeding, in which TP&W has utilized many tactics to interpose delay, it would not be appropriate to permit TP&W to relitigate the case. Accordingly, KJRY’s motion to strike will be granted as to the portions of TP&W’s legal argument that relate to the new land title analysis prepared by Wildman, the Wildman title analysis, and Golden’s new appraisal of the Line’s real estate. KJRY’s motion to strike will be denied as to the portions of TP&W’s legal argument and the portions of Rex’s and Golden’s verified statements that allege material error in our land valuation analysis.

Net Salvage Value. TP&W also argues in its petition for reconsideration that we erred in averaging the price of scrap steel instead of valuing it at its market price on the day our decision was served. TP&W includes a verified statement prepared by Mark D. Gavin, four appended spreadsheets, and a chart. Using prices from AMM and Iron Age, the four spreadsheets show the NSVs of the La Harpe-Canton and Canton-Hollis segments of the Line as of November 1, 2004, the date TP&W allegedly would have sold the scrap if this were a voluntary sale. The chart shows the AMM prices for scrap steel and reroll rail as of the first day of each month from April 2004 through November 2004. TP&W argues that we should have set the price of scrap steel at

its market price as of November 1, 2004, and Gavin's verified statement and appendices restate the Line's NSV on that basis.

Under our appellate rules, TP&W has a right to allege material error and submit related evidence in support of its allegations if that evidence was not previously available. KJRY's motion to strike will therefore be denied with respect to the portions of TP&W's legal argument that allege material error in our use of averaging to set a price for scrap steel. Additionally, KJRY's motion to strike will be denied with respect to Gavin's verified statement and appendices.

TP&W's Settlement Offer. Finally, TP&W in its petition for reconsideration offered to settle the dispute by selling KJRY the 54.5-mile portion of the Line between La Harpe and Canton, IL (milepost 140), for an NLV that reflects the real estate and scrap values in TP&W's petition for reconsideration, and granting KJRY trackage rights over the portion of the Line between Canton-Hollis at standard industry rates and on standard industry terms. KJRY's motion to strike TP&W's settlement offer will be denied. KJRY contends that the offer is irrelevant to what was sought in filing the instant Application, that it has no place in a petition for reconsideration, and that it is not acceptable. While the settlement offer may be irrelevant to the issues on reconsideration, it is not prejudicial to KJRY's interests, and as a consequence we see no reason to strike it.

Request for Oral Argument

TP&W has asked, as part of its petition for reconsideration, that we grant oral argument. It argues that our decision constitutes a taking of unprecedented scope, applying to more than a third of its system; that circumstances have changed substantially and can be best explained in an oral argument; and that there are serious issues relating to railroad real estate and scrap steel. TP&W has failed to demonstrate why written pleadings are inadequate here, and we see no good reason to grant a request for oral argument at the reconsideration phase of this proceeding. Indeed, oral argument would delay even further the resumption of rail service to shippers, who have not had rail service since at least October 2002, when SF&L Railway, Inc. (SF&L) embargoed the La Harpe Line. See SF&L Railway, Inc.—Acquisition and Operation Exemption—Toledo, Peoria and Western Railway Corporation Between La Harpe and Peoria, IL, STB Finance Docket No. 33995 et al. (STB served Feb. 6, 2003) (denying a stay of the Board decision that ordered SF&L to reconvey its interest in the La Harpe Line to TP&W). TP&W's request for oral argument will therefore be denied.

Petition for Reconsideration

The Public Convenience and Necessity Determination.

TP&W argues that the record does not demonstrate that it refused to provide adequate service to the Line's shippers or that service to a majority of the Line's shippers was inadequate. TP&W claims that our findings in this regard were based on the unverified letters of 10 shippers who complained that service was inadequate and rates were too high, but none of whom had requested, or been denied, rail service. TP&W also claims that we erred in characterizing the rates it proposed to charge as unreasonable, contending that such determinations can be made only after we find that the rail carrier has market dominance over the transportation, 49 U.S.C. 10707, and make a reasoned finding of rate reasonableness under the appropriate standards.

In the October decision, we found persuasive evidence of both a need for rail service by the Line's shippers and an unwillingness or inability of TP&W to provide rail service at rates that would allow traffic to move. Based on these findings, and not on the intrinsic reasonableness of any specific rates, we concluded that TP&W's service was inadequate. Our conclusion was fully supported by: (1) the letters from shippers; (2) the evidence that TP&W actively discouraged the use of the Line west of milepost 121.5 at Kolbe, IL, where it connects to the Mapleton Industrial Spur and Wye Facilities (the Spur); (3) TP&W's previous actions concerning the La Harpe Line;² and (4) the legislative history of 49 U.S.C. 10907. Our reliance on shipper letters to establish a need for service was consistent with longstanding precedent in abandonment proceedings and most other areas of Board jurisdiction. Indeed, we must administer our regulatory responsibilities in a manner that meets the needs of the shipping public. See 49 U.S.C. 10101(4).

1. The Five Spur Shippers. TP&W argues that our finding that shippers were not receiving adequate service mistakenly characterized the five Spur shippers (who were continually provided service by TP&W) as overhead shippers. The argument is largely semantic, but in any case, it is not material to the result we reached. In finding service inadequate for the majority of shippers that use the Line, 49 U.S.C. 10907(c)(1)(B), we called the Spur shippers overhead shippers because they are located on the Spur, which TP&W will

² See SF&L Railway, Inc.—Acquisition and Operation Exemption—Toledo, Peoria and Western Railway Corporation Between La Harpe and Peoria, IL, STB Finance Docket No. 33995 et al. (STB served Oct. 17, 2002), clarified (STB served Jan. 31, 2003) (where TP&W sought to sell the right to operate over, along with the rail, ties, and certain assets on, the 71.5-mile La Harpe-Mapleton line (La Harpe Line) to SF&L so that the line could be abandoned and salvaged); SF&L Railway, Inc.—Abandonment Exemption—in Hancock, McDonough, Fulton and Peoria Counties, IL, STB Docket No. AB-448 (Sub-No. 2X) (STB served Sept. 23, 2002) (where TP&W sought to substitute itself for SF&L in the latter's effort to abandon the La Harpe Line).

continue to own and operate, and not on the Line itself. In any event, we found that the majority of the Line's shippers are not receiving adequate rail service regardless of whether the Spur shippers are considered online or overhead shippers.

2. The Mapleton-Hollis Segment. Additionally, TP&W argues that we should not order it to sell the Mapleton-Hollis segment of the Line, which connects at Kolbe with the Spur that TP&W is retaining. Although no shippers are physically located on the Mapleton-Hollis segment, TP&W contends that it has continuously operated over and marketed that segment, that none of the shippers located on the Spur have complained about the service it provides or the rates it charges for movement over that segment, and that it never sought to sell or abandon that segment. We continue to believe that the public interest requires the sale of the Mapleton-Hollis segment (over which KJRY is offering TP&W trackage rights) along with the rest of the Line.

Through this Application, KJRY seeks to reconnect and operate TP&W's entire West End from milepost 206.6 at Lomax, IL (on the Iowa-Illinois border) to Hollis.³ The West End is separated from the rest of TP&W's system.⁴ It was constructed in 1868 by The Toledo, Peoria & Warsaw Railroad, a TP&W predecessor, for access to the Mississippi River and beyond. And until TP&W sold the La Harpe Line to SF&L in 2000, the West End was properly considered a unitary, historically integrated line that was advertised and used as part of a through route linking the East to the West.

The value of the Mapleton-Hollis segment to TP&W is in the access it gives to the highly profitable Mapleton Spur, the source of the largest concentration of traffic on TP&W's system. But TP&W does not need to own the Mapleton-Hollis segment to retain the Spur traffic. Rather, acceptance of KJRY's offer of virtually cost-free trackage rights will ensure TP&W continued access to the Spur without it having to compete for Spur traffic or having to contribute to the segment's upkeep and maintenance.

On the other hand, full access to the Mapleton-Hollis segment is integral to KJRY's plan to reactivate and operate the La Harpe-Hollis Line as an effective and efficient route for local and through traffic, including traffic between the East and the West. TP&W has not offered KJRY trackage rights over just the Mapleton-Hollis segment. The trackage rights that TP&W

³ TP&W sold the 12.1-mile westernmost portion of the West End between Lomax and La Harpe to KJRY in December 2001. See Keokuk Junction Railway Co.—Acquisition and Operation Exemption—West End of the Toledo, Peoria and Western Railway Corporation, STB Finance Docket No. 34143 (STB served Jan. 11, 2002), 67 FR 1535 (Jan. 11, 2002).

⁴ TP&W accesses the West End using trackage rights over UP between Hollis and Peoria, IL, and over Peoria and Pekin Union Railway Company between Peoria and East Peoria, IL.

has offered — over the much longer 54.5-mile Canton-Hollis segment — have been offered at “standard industry” rates and terms, in contrast with KJRY’s offer to TP&W of virtually cost-free trackage rights over the Kolbe-Hollis segment.

Based on these considerations, we continue to believe that it was appropriate and consistent with the purposes of the Feeder Railroad Development Program to accept and grant KJRY’s feeder line application to purchase the entire La Harpe-Hollis Line.

3. Trackage Rights. Finally, TP&W disputes our finding that it will be in the same or a better position with trackage rights over the Kolbe-Hollis segment. TP&W’s contention, that trackage rights are not an adequate substitute for ownership and control, is curious given its own offer of trackage rights to KJRY over the much longer Canton-Hollis segment at the standard industry fee. Moreover, the long-term reliance by TP&W and its predecessors on trackage rights to connect the West End to the rest of their respective systems, and the corresponding long-term reliance of the national rail system on trackage rights, demonstrates the importance of trackage rights as an alternative to ownership. All things considered, we continue to believe that the public interest is best served if TP&W is required to operate over 3 miles of essentially free trackage rights.

TP&W renews its claim that KJRY’s trackage rights will be significantly more costly than its one dollar per year rental fee, but we find the claim to be without merit. We reviewed each of the charges in the proposed agreement and, with one exception, found them to be relatively minor and related to specific services KJRY might be asked to perform if TP&W does not operate in a responsible way. The one exception — that KJRY and TP&W share equally the cost of constructing any new connecting track or facilities that might be needed on the 3-mile Hollis-Kolbe segment — we also found within TP&W’s ability to avoid. We see no reason to question KJRY’s intent to carry out its obligations under the proposed trackage rights agreement. KJRY has stated that it will honor its agreement and will treat TP&W fairly, and we are prepared to act against impediments that could jeopardize TP&W’s ability to serve Spur shippers.

For all of these reasons, we reaffirm our findings that: (1) there is a need for rail service by a majority of the Line’s shippers; (2) TP&W is either unwilling or unable to provide rail service at commercially viable rates; (3) granting KJRY’s application will lead to improved service for the Line’s shippers; and (4) KJRY’s trackage rights offer provides TP&W with an operationally viable and virtually cost-free means to continue serving Mapleton Spur shippers.

The Valuation.

1. Going Concern Value. TP&W contends that, since its Comments were filed, a significant new shipper has emerged at Canton, and, as a result, the Canton-Hollis segment must now be considered a distinct line segment with a going concern value (GCV) and must be valued accordingly under 49 U.S.C. 10907(b)(2). TP&W contends that, under 49 U.S.C. 10907(b)(1),

the constitutional minimum value of the Line may not be set at less than \$9,152,955, based on an NLV of \$5,855,083 for the La Harpe-Canton segment (\$4,896,976 for NSV using AMM scrap prices and \$958,107 for land value) and a GCV of \$3,297,872 for the Canton-Hollis segment.

TP&W claims that it entered into discussions with the prospective new shipper in March 2004 and that a contract was ready to be executed when KJRY's feeder line application was granted in the October Decision. Contending that the decision caused the shipper to have second thoughts about entering into the contract, TP&W argues that it is entitled to be compensated for having sought and attracted the new traffic.

The prospective new shipper submitted a verified statement in which it acknowledged exchanging contract drafts with TP&W but emphasized that there was neither a meeting of the minds nor an agreement on a contract. According to the shipper, one significant issue and numerous smaller issues remained unresolved, making any potential agreement speculative. Moreover, the shipper maintains that it would not have agreed to any contract tonnage guarantees because of the other alternatives available to it and that TP&W was made aware of this at all times during the contract negotiations but continued to insist on tonnage guarantees. In view of the shipper's statement, we find TP&W's contract allegations speculative at best. Thus, we find no merit to its contention that the Canton-Hollis segment has a GCV. This finding moots the need to resolve whether part of the Line should be valued using the GCV methodology. See October Decision, slip op. at 11 n.16.

2. Land Value. Other than the Wildman analysis discussed above, TP&W has submitted no evidence or argument in support of its contention that we erred in finding that it owned a fee interest in only 31.657 acres of the Line's right-of-way. Because we have granted KJRY's motion to strike the Wildman analysis, we will consider only TP&W's claim that we committed material error in accepting Higgs' appraisal methodology over the methodology used by Cecil.

TP&W contends that Higgs presented an unacceptable corridor comparison and no appraisal. Specifically, TP&W contends that Higgs' corridor comparison is not a true ATF analysis and is not consistent with the methodology accepted by the Board in such cases as 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) and Boston and Maine Corporation—Abandonment—in Hartford and New Haven Counties, CT, STB Docket No. AB-32 (Sub-No. 8) (STB served July 1, 1998). For example, TP&W claims that the six comparable sales used in Higgs' analysis were too few; that they were not properly representative in that they occurred between 8 and 15 years ago, involved parcels that were at least 50-75 miles from the Line, included more than one rail corridor, and may not have involved abandoned rail properties or railroad transactions; and that they were not referenced or were improperly referenced to other comparable sales. Additionally, TP&W notes that it was KJRY's

attorneys and not Higgs who adopted the 70% discount factor and applied the 4-year sell-off period that led to our finding that the Line has a total land value of \$41,635.

On reconsideration, we agree with TP&W's contention that Cecil's analysis was more consistent with precedent and more credible than KJRY's analysis. Under Cecil's appraisal, which concluded that the bulk of the right-of-way was held in fee simple, the Line's real estate was valued at \$2,863,173 using a 3-year sell-off period for 95% of the land. We will adjust this figure upwards to \$2,946,245 to reflect a 4-year sell-off period for all of the land, which TP&W now accepts as more reasonable and which Golden used in his restatement of Cecil's appraisal. To develop a pro rata figure reflecting the portion of the right-of-way that we find to be held in fee, we must divide the \$2,946,245 appraisal by 672, the claimed total fee acreage in the Line's right-of-way, to obtain a per-acre unit value of \$4,384.29. Multiplying the \$4,384.29 unit value by 31.657 acres (the total acreage we found TP&W to hold in fee) yields a total land value of \$138,794.

3. Net Salvage Value. Instead of averaging the price of scrap steel, TP&W argues that we should have followed our recent decision in LaPorte, slip op. at 7-8, where we valued scrap steel using current market prices. The LaPorte decision, however, involved an offer of financial assistance (OFA), which requires the Board to set terms and conditions within 30 days of the OFA's filing date. See 49 U.S.C. 10904(f)(1). A feeder line proceeding under 49 U.S.C. 10907 involves a less abbreviated schedule. In this case, for example, the Application was filed in April 2003 but was not ruled upon until October 2004. Commodity prices are more likely to fluctuate widely over a longer time period, as demonstrated by the record here. It is appropriate when such fluctuations occur to average commodity prices over the length of the proceeding to protect sellers from dramatic price reductions and buyers from dramatic price increases. See October Decision, slip op. at 14.

In the October Decision, we provided that TP&W could supplement the record with a composite monthly average unit price for reroll rail using AMM and (if available) Iron Age data for the April 2003-May 2004 time period. TP&W responded by appending to Gavin's verified statement a chart showing the AMM price for scrap steel and reroll rail as of the first day of each month from April 2004 through November 2004. KJRY replied and submitted price quotes on reroll rail from AMM and Iron Age for the first day of each month from April 2003 through May 2004.

Gavin's data do not correlate to the time period set out in our decision. They include only the last 2 months of the 14-month period we requested, and the data for one of those months (April 2004) are incorrect. Additionally, Gavin's data are not structured as a composite monthly average, are limited to AMM, and include no supporting documentation. KJRY's submission — which supports a higher price for reroll rail — was more responsive to our request; it covered the full 14-month time-period and included both AMM and Iron Age data with supporting documentation. KJRY gave the market prices for reroll rail as of the first day of each month and

then calculated average AMM and Iron Age market prices of \$173.21 and \$176.86 per ton, respectively, for the full 14-month period. While we requested composite monthly averages, the data submitted by KJRY sufficiently satisfy the objective of our decision and will be accepted. Averaging the AMM and Iron Age market prices for reroll rail, as we did for scrap, yields a combined average price of \$175.04 per ton and increases the Line's NSV by \$127,828 to a total of \$4,026,948.

4. Tax Credits. TP&W claims that, under section 245 of the American Job Creation Act of 2004, Pub. L. No. 108-357 (codified at 26 U.S.C. 45G), enacted on October 22, 2004, it is also entitled to be compensated for tax credits it will lose if forced to sell the Line. Section 245 provides that, for tax years 2005, 2006, and 2007, small (Class II and III) railroads are entitled to a tax credit of \$3,500 per mile on a system-wide basis to the extent they make qualified investments ("expenditures . . . for maintaining railroad track (including roadbed, bridges, and related track structures) owned or leased as of January 1, 2005, by a Class II or Class III railroad") in those years of \$7,000 per mile on a system-wide basis.

TP&W states that it owns or leases 283 miles of track, including siding and yard track, and as a result must spend \$1,981,000 (283 multiplied by \$7,000) in qualified investments to receive the maximum yearly tax credit of \$990,500 (283 multiplied by \$3,500). Asserting that it will have spent \$2,096,553 in qualified investments in 2004, and will exceed that amount in 2005, 2006, and 2007, TP&W claims that it will be entitled to the maximum tax credit in each of the 3 years. Because the La Harpe-Hollis Line is 76 miles long and includes an additional 7.3 miles of side and yard track, for a total of 83.3 miles of track, TP&W claims that it will lose \$291,550 in tax credits (83.3 miles multiplied by \$3,500) in 2005 and a total of \$874,650 for the 3-year period, as a result of this sale.

Under 49 U.S.C. 10907(b)(1), we set the purchase price of a line at its constitutional minimum value, which is defined in 49 U.S.C. 10907(b)(2) as "not less than the net liquidation value of such line, or the going concern value of such line, whichever is greater." The Board, like the ICC before it, has historically and repeatedly in its regulations and decisions defined NLV as the value of the physical assets of a line at their highest and best nonrail use and has calculated NLV as the sum of the gross salvage value of rail and track materials, less removal and disposal costs, plus the value of the right-of-way real estate held in fee simple. The tax credits at issue here are not physical assets; they cannot be valued at their highest and best nonrail use, nor do they add value to assets that are being liquidated. They simply constitute a reduction in tax liability. To the extent they could be a consideration in computing constitutional minimum value, tax credits more likely would be a consideration in calculating GCV.

In any event, the tax credits for which TP&W seeks compensation here are speculative at best, as they depend on whether TP&W would actually spend the funds necessary to entitle it or its corporate parent to a tax credit, much less the maximum tax credit.

Request for Earlier Closing Date and Entry Order

In a letter filed on January 27, 2005, KJRY asks us to order TP&W immediately to allow KJRY to physically inspect the Line and to reschedule the closing to occur on or before February 11, 2005. KJRY also complained of TP&W's delay in accepting or rejecting its proffered trackage rights agreement for the Kolbe-Hollis segment, and attached a document mentioning the absence of "the diamond of Bushnell, Illinois." We address these matters in turn.

Physical Inspection. In a January 13, 2005 letter to us, TP&W stated that it "was willing to allow KJRY to inspect the line during the expected brief postponement [of the closing date] so that KJRY can determine what will be required for its track program." In a more recent letter to KJRY, however, TP&W declined KJRY's request for an inspection because KJRY had not formally accepted its earlier inspection offer and we had not specifically required an inspection. See attachment 2 to KJRY's January 27 letter.

We agree with KJRY that TP&W's new position represents an improper effort to delay closing as long as possible. A track inspection is critical to KJRY's ability to provide service safely to shippers. We will therefore order TP&W to provide KJRY with immediate physical access to the Line to permit an inspection.

Closing Date. KJRY convincingly argues that it has car orders for early February shipments by, and has entered into a transportation contract with, Farmers Elevator Company (Farmers), and that a closing in late February could cost KJRY the opportunity to win a contract for shipments over the line by another substantial agricultural shipper. KJRY also submitted letters from seven shippers in support of an earlier closing. To avoid any further delay in restoring needed service to willing shippers such as Farmers, and to avoid the loss of a second shipper, we will require that closing be effected on or before February 11, 2005, as KJRY now requests. The parties should be on notice that we will not entertain any further request to delay the closing.

Trackage Rights Agreement. In light of the need for an imminent closing date, we will not consider requests to change the terms of the trackage rights agreement. The agreement was proposed on June 9, 2003, and approved by us in the October Decision. TP&W had ample opportunity to complain about any of the details in its Comments or on reconsideration. We direct the parties to try to resolve all trackage rights terms and reach agreement prior to the new closing date. TP&W's failure to resolve the terms of the trackage rights will be at its own risk. If KJRY accepts the new price we are setting here, we order TP&W to close on the transaction, even in the absence of a signed trackage rights agreement. If the parties are unable to agree, we would be available to resolve any remaining issue on the terms of the trackage rights.

Bushnell Diamond. TP&W has represented that BNSF Railway Company (BNSF), can restore the diamond crossing at Bushnell, IL, within 38 hours. Because this diamond crossing is

needed for the movement of traffic over the Line, we expect that the carriers involved will fulfill their responsibilities to restore the Bushnell diamond on or before February 10, 2004 (the day prior to closing of this transaction). For this reason, a copy of this decision will be served on BNSF.

Summary. We reaffirm our finding in the October Decision that the public convenience and necessity permits the forced sale of the La Harpe-Hollis Line to KJRY. On reconsideration, we find that the 76-mile Line has an NLV of \$4,165,742, based on an NSV of \$4,026,948 and a land value of \$138,794. Because this figure is well within the financial responsibility finding we previously made, KJRY will be directed to notify TP&W and the Board within 24 hours as to whether it wishes to proceed with the sale at this revised purchase price. We will further direct that, if KJRY elects to proceed, the parties shall close on the sale on or by February 11, 2005.

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

It is ordered:

1. TP&W's petition to waive the page limitation of 49 CFR 1115.3(d) is granted.
2. TP&W's request for oral argument is denied.
3. KJRY's motion to strike TP&W's petition for reconsideration is granted as to those portions of TP&W's legal argument that relate to the new title analysis prepared by Wildman, the Wildman title analysis, and Golden's new real estate appraisal, and denied in all other respects.
4. TP&W's petition for reconsideration is granted with respect to the land valuation and denied in all other respects.
5. The purchase price for the Line is revised to \$4,165,742.
6. KJRY shall notify TP&W and the Board by telephone within 24 hours of the service of this decision if it wishes to proceed with this sale at this revised purchase price.
7. TP&W shall give KJRY immediate access to the Line for an inspection.
8. The Bushnell diamond shall be restored on or before February 10, 2005.
9. Closing shall occur on or before February 11, 2005.

10. This decision is effective on its service date.

11. A copy of this decision will be served on BNSF Railway Company.

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

Vernon A. Williams
Secretary