

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: March 12, 2009

By decision served in this docket on October 31, 2008 (October 31 Decision), the Board granted a feeder line application filed by the Oregon International Port of Coos Bay (the Port) to purchase a 111-mile rail line, the Coos Bay Line (the Line), in southwestern Oregon from the Central Oregon & Pacific Railroad, Inc. (CORP). The Line runs from Danebo, OR (milepost 652.114), to Cordes, OR (milepost 763.130). By decision served on November 20, 2008 (November 20 Decision), the Board set the purchase price of the Line at a constitutional minimum value of \$16,605,987. The Port has accepted the Board's terms and conditions and closing is set to occur on or before March 13, 2009.<sup>1</sup> In this decision, we deny the Port's petition for reconsideration, but grant a petition for technical correction filed by the Port, which adjusts the constitutional minimum value of the Line to \$16,585,760.

BACKGROUND

On July 11, 2008, the Port filed its feeder line application asking us to use our authority under 49 U.S.C. 10907 to order CORP to sell the Line to the Port. After conducting an oral hearing in Eugene, OR, on August 21, 2008,<sup>2</sup> and considering a voluminous record in this proceeding, in the October 31 Decision we determined that the Line met the statutory criteria for a forced sale and that the Port was financially responsible and thus eligible to purchase the Line. However, because the market for scrap steel had changed significantly during the pendency of

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<sup>1</sup> The November 20 Decision set a closing deadline of February 18, 2009. On February 11, 2009, the Port and CORP jointly requested an extension of the closing date until March 13, 2009. The request was granted by decision served on February 12, 2009.

<sup>2</sup> The hearing also addressed CORP's abandonment application filed in Central Oregon & Pacific Railroad, Inc.—Abandonment and Discontinuance of Service—in Coos, Douglas, and Lane Counties, OR, AB-515 (Sub-No. 2) (Coos Bay Line Abandonment). We granted CORP's abandonment application, subject to conditions, on October 31, 2008, but tolled the statutory timeframes for offers of financial assistance (OFA) under 49 U.S.C. 10904 until the resolution of the feeder line process. In that decision, we also held that CORP may not exercise abandonment authority if the Port consummates the feeder line sale in this proceeding.

the Port's application, we determined that we could not calculate the price for the Line based on the steel price evidence that had been submitted to date.<sup>3</sup> Consequently, we ordered the Port to file an updated verified statement calculating the net salvage value (NSV) of the Line using October 31, 2008<sup>4</sup> American Metals Market (AMM) scrap steel prices.

On November 5, 2008, the Port provided evidence of scrap steel prices from AMM as of October 31, 2008, as directed. In its November 5 filing, the Port also submitted a quote from Menard's Railroad Materials (Menard's) for the price of relay rail—a category of higher quality rail not included in scrap steel prices and not quoted by AMM. CORP filed a reply on November 7, 2008. On November 10, 2008, CORP filed a petition for a technical correction to the Board's real estate value calculation, to which the Port responded on November 12, 2008. In the November 20 Decision, we rejected the Port's new relay rail evidence, corrected the Line's real estate valuation, adjusted the cost of money and profit expenses, and set the Line's constitutional minimum value at \$16,605,987. On November 25, 2008, the Port filed a petition for a technical correction to our calculation of the profit and cost of money categories of the NLV. On December 1, 2008, the Port filed a letter accepting the terms and conditions established in the November 20 Decision and indicated its intent to proceed with the acquisition. On December 10, 2008, the Port filed a petition for reconsideration of the October 31 Decision and the November 20 Decision with regard to: (1) the effect bridge and tunnel removal costs should have on the Line's NLV; (2) disallowance of the new relay steel price evidence; (3) denial of the Port's request for a proposed escrow account; and (4) rejection of the Port's real estate valuation. CORP filed a reply on December 29, 2008.

## DISCUSSION AND CONCLUSIONS

### Petition for Reconsideration

Under 49 U.S.C. 722(c) and 49 CFR 1115.3(b), the Board will grant a petition for reconsideration only upon a showing that the prior action: (1) will be affected materially because of new evidence or changed circumstances, or (2) involves material error. Here, the Port advances four arguments in support of its petition for reconsideration, all of which allege material error. As discussed below, we find no material error warranting reconsideration of our prior decisions.

Bridge Removal and Tunnel Closure Costs. In the October 31 Decision, we valued the bridges and tunnels on the Line at zero dollars because the structures would have a negative NSV according to the Port's evidence that the costs for bridge removal and tunnel closure would

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<sup>3</sup> Because the parties stipulated that the Line has no positive going concern value, under 49 U.S.C. 10907(b)(2) we determined that the price for the Line, i.e., its constitutional minimum value, is its net liquidation value (NLV), comprised of the net salvage value (NSV) of the track and related materials plus the value of the underlying land.

<sup>4</sup> That date was chosen because it was the date the Board served its decision directing the property to be sold.

exceed the value of those assets. October 31 Decision, at 14. We did not assign the bridges and tunnels a negative number in our NLV determination, however, based on our rule in OFA proceedings that assets with a negative NSV shall be given a zero dollar value when calculating the overall NLV of a line. See id.; 49 CFR 1152.34(c)(1)(iii)(A)(2).<sup>5</sup>

The Port now claims that the Board committed material error by failing to factor the full amount of bridge removal and tunnel closure costs into the NLV determination. The Port points out that there are many instances where the agency has reduced the NSV of an asset because of removal costs and cites cases where the Board reduced the NSV of assets because of restoration costs. However, these cases do not support reopening here. The Port cites no feeder line or OFA cases where the Board factored a negative NSV into a NLV. Rather, the Port cites only to cases where the NSV of an asset is reduced but remains positive.

The Port cites two cases<sup>6</sup> for the proposition that the agency's precedent supports bridge removal and similar costs with a negative NSV to be factored into the valuation of a feeder line case. In both cases, however, the agency rejected the feeder line applicant's request to reduce

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<sup>5</sup> In the rulemaking process, the Board considered the inclusion of assets with negative salvage values. After receiving comments on this issue, the Board opted to give assets with a negative NSV a zero value. The Board explained:

. . . AAR [Association of American Railroads] has raised concerns about the proposed inclusion of negative salvage values for those assets where the cost of dismantling exceeds the value of the materials salvaged.

. . . AAR states that in OFA proceedings a negative value for the properties could result in an artificially low value being placed on the assets that are to be purchased. This situation, it claims, would also reverse the burden of proof from the offeror to the railroad in proving the value of the line's assets.

In light of the concerns of AAR as to the potential implications of including both a negative NLV and calculating a negative return on value, we have made appropriate changes to our proposed regulations regarding the calculation of subsidy payments or purchase price in OFA proceedings.

Aban. and Discon. of R. Lines and Transp. Under 49 U.S.C. 10903, 1 S.T.B. 894, 912 (1996).

<sup>6</sup> Caddo Antoine and Little Missouri Railroad Company—Feeder Line Acquisition—Arkansas Midland Railroad Company Line between Gurdon and Birds Mill, AR, Finance Docket No. 32479 (ICC served Apr. 18, 1995) (Caddo Antoine), rev'd on other grounds, Caddo Antoine & Little Missouri Railroad Co. v. United States, 95 F.3d 740 (8th Cir. 1996) and Keokuk Junction Railway Company—Feeder Line Acquisition—Line of Toledo Peoria & Western Railway Corporation between La Harpe and Hollis, IL, STB Docket No. 34335 (STB served Oct. 28, 2004) and (STB served Feb. 7, 2005), aff'd Toledo, Peoria & Western Ry. v. STB, 462 F.3d 734 (7th Cir. 2006), cert denied, 549 U.S. 1278 (2007) (TPW).

the value of the respective lines to factor in bridge removal costs. Because neither case addressed the issue of whether a negative asset value should be assigned to the bridges in calculating a line's NLV, these two cases do not support the Port's assertion.<sup>7</sup> The Port also cites the latter case, TPW, for the notion that the differences between the feeder line and OFA provisions require different treatment of negative asset values. The Board decided there to adopt a steel price averaging approach given the significant market fluctuations over the year-long pendency of the feeder line case. In doing so, it noted that such fluctuations were unlikely to occur in OFA cases because of the more abbreviated statutory schedule, which requires a Board decision establishing a price for the line within 30 days of a request to set terms. TPW, Feb. 7, 2005 decision, slip op. at 12. But the decision whether to use a current market price, or, alternatively, an average over time in either a feeder line case or an OFA case has nothing to do with the issue presented here: whether any asset should have a negative value in the NLV determination. Thus, TPW is inapposite.

Similarly, the Port incorrectly claims that the agency has a history of including assets with a negative value when calculating the NLV. The Port cites cases (including the November 20 Decision) where "restoration costs" have been used to reduce the NSV of an asset. But, none of these cases involve assets with restoration costs that exceed the value of the asset. Thus, they do not undermine our determination that assets should be valued at zero if the restoration costs exceed the value of the asset.

The Port compares the New Haven Inclusion Cases, 399 U.S. 392, 437 (1970) (New Haven) to the present case. But, New Haven involved the disposition of assets of a bankrupt rail carrier, not the condemnation and valuation of seized assets. Both parties had submitted line valuation studies to the Board's predecessor, the Interstate Commerce Commission (ICC), which included bridge removal costs that exceeded the value of the bridge assets. Id. The use of assets with negative NSV was not an issue in controversy in New Haven. Moreover, New Haven predated the enactment of the OFA and feeder line provisions. In promulgating rules implementing these statutory provisions the Board rejected the use of assets with a negative NSV. See supra note 5. Likewise, the Port cites Chicago and North Western Transportation Company—Abandonment—between Norma and Cornell—in Chippewa County, WI, Docket

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<sup>7</sup> The Port points out that in Caddo Antoine the ICC included removal costs for scrap ties even though the scrap ties did not have any market value. But scrap ties are merely a portion of a line's overall tie asset. See Caddo Antoine (cross ties category includes relay ties, landscape ties, and scrap ties). All ties are removed by the same process and at the same time, with the exact quality of the ties not even determined until after removal. Accordingly, the Board values ties as a single asset category although it does value particular ties differently depending on whether they are relay, scrap or landscape. See Fillmore Western Ry. Co.—Abandonment Exemption—In Fillmore County, NE, AB-492 (Sub-No. 2X), slip op. at 12 app. (STB served Oct. 31, 2001); Caddo Antoine at 15 app. C. But the agency has not permitted removal costs, no matter how great, to reduce the value of ties overall below zero in an OFA or feeder line case. Thus, even though we calculated removal costs in Caddo Antoine, the value of the ties (\$384,417) exceeded the combined removal costs of the scrap and relay ties (\$264,405). As a result, the NSV of the ties was positive.

No. AB-1 (Sub-No. 215), slip op. at 6 (ICC served Feb. 9, 1989) (Chicago and North Western), to claim that bridge removal costs should be deducted from the NLV. In Chicago and North Western the ICC's valuation of the line was only to assess the benefits that would flow to the carrier if abandonment were permitted. The ICC was not determining the constitutional minimum value of the line and expressly was "not concerned with how much a party should pay for a line of railroad . . . ." Id. Accordingly, both New Haven and Chicago and North Western are inapposite.

The Port criticizes the Board for its determination to be consistent in its methodology for valuing assets in feeder line and OFA cases. In the October 31 Decision, we noted that, while there is not a specific rule mandating that assets with a negative NSV be assigned a value of zero when factored into the NLV in the feeder line provisions, it would be illogical to not apply the corresponding OFA rule when determining the NLV in a feeder line case. The Port argues that OFAs and feeder line cases are different and while we do not assign negative values in OFAs, we are not precluded from doing so in feeder line cases. The Port notes: (1) that OFA and feeder line sales are based on different statutory provisions; (2) that the OFA provision envisions continued rail service while the feeder line provision envisions liquidation; (3) that OFAs are characterized by a short deadline; (4) that OFA valuations may be used for subsidies as well as purchases; (5) that because a feeder line requires a public convenience and necessity (PCN) showing to be made, "it seems logical" that the resulting price for the same line would be lower in an OFA case; and (6) that OFA precedents differ from feeder line precedents. The Port adds that the Board has not applied our "no negative value" holding in any prior case.

None of the Port's arguments persuade us that these two forced sale provisions should employ different NLV formulas when determining the value of railroad property. The mere fact that OFA and feeder line sales originate in different statutory provisions does not justify using two different valuation methods. Sales under both the OFA and feeder line provisions result in a takings under the Fifth Amendment of the Constitution. Thus, the Board's task in either type of proceeding is to ensure that the abandoning carrier receives a value for the line that comports with constitutional requirements. See 49 U.S.C. 10904 (OFA provision requiring the Board to determine a price not less than the fair market value) and 49 U.S.C. 10907 (feeder line provision requiring the Board to determine a price not less than the constitutional minimum value). Accordingly, this agency has long held, with judicial approval, that the same valuation standards<sup>8</sup>

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<sup>8</sup> We recently determined that in an OFA case, we will typically use steel price evidence submitted on the day specified in our OFA rules rather than the day of our decision (as we did in this case) because of the need to issue a decision in OFA cases within a short statutory deadline. See R.J. Corman R.R. Co./Pennsylvania Lines, Inc.—Abandonment Exemption—In Clearfield, Jefferson, and Indiana Counties, PA, AB-491 (Sub-No. 2X), slip op. at 6-7 (STB served Jan. 30, 2009). The short statutory deadlines in OFA cases create a need to control the timing of evidentiary proffers. However, those statutory deadlines do not apply in feeder line cases; therefore, the timing rules from OFA cases have no bearing on the underlying valuation methodology used to determine the NLV here.

apply when determining the price terms in OFA and feeder line provisions.<sup>9</sup> Given this history, it is not surprising that the court in Railroad Ventures, Inc. v. STB, 299 F.3d 523, 556 (6th Cir. 2002) (R.R. Ventures) cited the feeder line constitutional minimum value standard when reviewing the Board’s valuation in an OFA case.<sup>10</sup>

The Port’s argument that the feeder line provision “envisions liquidation” is belied not only by the statute but also by the record of this proceeding, including the representations made by the Port. Section 10907 requires that the provision may be invoked only by a financially responsible person who “is able to assure that adequate transportation will be provided over such line for a period of not less than 3 years.” To find that the PCN supports a grant of a feeder line application, we must be satisfied that a forced sale of the Line will “likely result in improved railroad transportation for shippers that transport traffic over such line.” 49 U.S.C. 10907(c)(1)(E). The Port claimed and we found that its application met that standard. In short, the entire thrust of the feeder line provision is continued rail service, and thus section 10907 serves the same general purpose as the OFA provisions.

The Port is correct that the OFA statute provides an expedited procedural schedule for the valuation of property, but it does not explain why that should affect the formulas for valuing rail property. Nor does the Port offer any rationale in support of its assertion that, because offers of financial assistance can consist of subsidies as well as purchases, the valuation method used in OFA purchase cases should differ from that in feeder line purchase cases. The Board thus finds no reason to conclude that these procedural differences—which could affect our evidentiary procedures—should affect the underlying NLV methodology. We thus reject the Port’s arguments.

The Port also argues that an applicant in a feeder line case has a more difficult burden to fulfill and therefore should be rewarded by paying a lower price than an applicant in an OFA proceeding. But, as discussed earlier, forced sales under both provisions constitute takings under the Fifth Amendment and thus require establishing a constitutionally permissible line value. Moreover, not all applications under section 10907 require the arguably more burdensome

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<sup>9</sup> See Cheney Railroad Co.—Feeder Line Acquisition—CSX Transportation, Inc., 5 I.C.C.2d 250, 268 (1989) (“[i]n valuing the line [in a feeder line application], we use the same criteria as are used for offers of financial assistance under [the OFA provision]”) aff’d sub nom. Cheney R.R. Co. v. ICC, 902 F.2d 66 (D.C. Cir. 1990); Sandusky County—Feeder Line Application—Consolidated Rail Corp., 6 I.C.C.2d 568, 573 (1990) (in valuing a line for a feeder line application, agency “appl[ies] the same criteria as for offers of financial assistance . . . .”); Feeder Railroad Development Program, 367 I.C.C. 261, 263-64 (1983) (criteria used to set price in feeder line and OFA proceedings the same).

<sup>10</sup> The Port takes issue with the proposition that the feeder line valuation standard has been judicially equated with that used in OFAs, claiming that language in R.R. Ventures to that effect is dicta. See Petition for Reconsideration at 10. But the language demonstrates that the court believed that the two standards are the same, and implies that they must be the same in order to satisfy constitutional requirements regarding takings.

showing of public convenience and necessity (PCN); placement of a line on a system diagram map as slated for abandonment also can trigger a feeder line proceeding but does not require a PCN showing. Thus, the logical extension of the Port's argument would require us to establish different valuation standards in feeder line cases depending on whether or not the applicant had to make a PCN showing, a patently anomalous result.

In support of its claim that the Board has addressed OFA valuations and feeder line valuations differently, the Port cites two cases: a decision by the U.S. Court of Appeals for the Seventh Circuit, Cisco Cooperative Grain Co. v. ICC, 717 F.2d 401, 403-04 (7th Cir. 1983) (Cisco) and the Board's decision in TPW. We have addressed the Port's reliance on TPW above. In Cisco, the court noted certain differences between the relief available under the feeder line statute and that available under an OFA. 717 F.2d at 403-04. For example, the court noted that feeder line cases are different from OFAs because: the agency can require the selling carrier to provide a feeder line purchaser with certain trackage rights and reasonable joint rates; the feeder line purchaser may elect to be exempt from Title 49 except as to joint rates; and the purchaser may determine preconditions to be met by shippers who want service over the acquired line. None of those differences, however, justify adopting differing methods for valuing assets with negative value, nor does the Port make any argument as to how they would.

The Port argues that the Board's decision to disallow the inclusion of salvage costs that exceed the value of the bridges and tunnels represents an inequitable gain for CORP. The Port claims it will be paying to abandon the Line twice if it chooses to abandon the Line in the future. The Port also cites a number of state and federal cases related to eminent domain and environmental clean-up.

The Port cites no precedent for the proposition that the valuation of a line should take into account speculation about the line's future once it is acquired pursuant to a forced sale. Essentially, the Port's position is that the sale price of the Line should include insurance against a future abandonment by the Port. But part of the foundation of the Port's feeder line application is that the Port is capable and willing to continue rail service on the Line.

Further, even if the Port were to abandon the Line in the future, there is no certainty that the Port would incur bridge removal and tunnel closure costs. There are other plausible alternatives for what could happen if the Port seeks to abandon the Line. For example, the Port might sell the Line to a carrier who will continue service or convert the Line into a trail; alternatively, the U.S. Coast Guard might not require the bridges to be dismantled. We will not further reduce the NLV of the Line based on the Port's incurring a contingent liability, a potential cost that it may never incur.

The Port equates the Line's bridges and tunnels to environmental contamination. The Port cites to state and federal eminent domain cases where the courts reduced the land value because of pollution or contamination. Characterizing existing rail structures as pollution is misguided. Even if they are in need of repair, the bridges and tunnels serve a valuable purpose: enabling rail service. We find no material error in the valuation of bridges and tunnels on the Line.

Evidence for Valuation of Assets. The Port argues that the Board committed material error by not considering the Port's new relay rail evidence. But the Port's new evidence of relay rail prices submitted after the October 31 Decision was outside the scope of the supplemental evidence we requested (see October 31 Decision, slip op. at 10, 19) and was properly rejected.

When we issued our decision on the merits in this proceeding and in Coos Bay Line Abandonment on October 31, 2008, we took the unusual step of asking the Port to submit, by November 7, 2008, updated evidence on the price of scrap steel as of October 31, 2008. In doing so, we essentially granted a petition filed by the Port on October 17, 2008, seeking leave to supplement the record with evidence of a reduced value of the Line based on a market decline in the price of scrap steel. Our decision to allow supplementation was based upon the significant drop in scrap steel prices between the conclusion of the established procedural schedule and October 31, 2008.

The Port filed evidence of reduced prices of scrap steel on November 5, 2008, as requested, but also filed unsolicited evidence and arguments supporting a reduction in the price of "relay rail," which is rail in such good condition that it can be relaid as track. The Port had not, prior to our issuing our decision on the merits, sought to submit new evidence of relay rail. In its petition for reconsideration, the Port argues that we must value all track assets as of October 31, 2008, that to do otherwise would be arbitrary, and that the Board must use the evidence of the latest date selected.

The Port's argument amounts to a claim that any party can compel this agency in a valuation case to base its decision on the latest evidence submitted by either party—"when later, more up-to-date valuation exists." See Petition for Reconsideration at 14. But more up-to-date information always exists—in each succeeding month, or week, or day—and, under the Port's theory the Board could not enforce any procedural schedule and, indeed, would have to accept additional evidence as long as one of the parties continued to tender it, thus potentially postponing indefinitely the Board's ability to render a decision. In this case, the Board determined that the later-filed evidence regarding scrap steel prices had cast doubt on the reliability of the earlier-filed evidence on scrap steel prices and therefore allowed supplementation of evidence on this issue only. But the Board made no such finding with regard to relay rail or other track assets and indeed the Port made no argument, prior to the October 31 Decision, that its evidence regarding relay rail or other track assets had been undermined.

Escrow Account. The Port asserts that the Board committed material error by not creating an escrow account to reimburse the Port for repairs on the Line resulting from CORP's neglect and violations of its common carrier obligation. The Port's arguments, however, are merely a rehash of arguments it has already made, which have been addressed and rejected by the Board. See October 31 Decision, slip op. at 16-17; Coos Bay Line Abandonment, slip op. at 11-12. The Port has presented no new arguments or evidence on reconsideration warranting a different result.

Real Estate Evidence. Finally, the Port claims that the Board committed material error by rejecting its evidence in the valuation of the Line's real estate. Specifically, the Port argues that we did not adequately take into account the credentials of the Port's real estate expert and that

we did not properly evaluate the Port's approach to land valuation. Lastly, the Port attacks CORP's method of land valuation and faults us for accepting it.

We find no merit to these claims. The basis of our decision here was not the credentials of the Port's expert, but rather a flawed land valuation. As noted in the October 31 Decision, slip op. at 12-14, the Port's land valuation method assigned a zero resale value to the vast majority of land without sufficient justification. We found unconvincing the Port's theory that excess property is undesirable or that adjacent landowners would not want the property, a claim unsupported by any testimony by the adjacent landowners. We concluded that the Port's valuation methodology did not properly calculate values for the highest and best non-rail use for the right-of-way. Finally, contrary to the Port's assertion, we also carefully evaluated CORP's evidence of land valuation and, with minor corrections, found that it had used a methodology that has been accepted by the agency in numerous proceedings and had applied that methodology in a reasonable manner. Thus, we properly found that CORP's evidence constituted the best evidence of record.

Nothing in the Port's petition gives us a reason to revisit our land valuation determinations. The burden of proof in feeder line cases rests with the offeror and absent probative evidence supporting the offeror's estimates, the rail carrier's evidence is accepted. See San Joaquin Valley Railroad Company—Abandonment Exemption—in Tulare County, CA, AB-398 (Sub-No. 7X), slip op. at 3-4 (STB served Aug. 26, 2008). Here, the Port has failed to show that its valuation methodology is more reliable than that submitted by CORP.

#### Petition for Technical Correction

In its November 25, 2008 petition for technical correction, the Port challenges the Board's calculation of the profit and cost of money categories of the NLV in the November 20 Decision. As discussed earlier, we rejected the Port's new evidence on the price of relay material, which resulted in a decrease in the value of the track assets. Because the Port did not submit a spreadsheet showing the track assets as reduced and did not appear to have submitted a formula for the Board to reduce those assets using the Port's methodology, the Board recalculated those two categories using a methodology that was intended to mirror the Port's.

In its petition, the Port asserts that we overlooked formulas contained in workpapers it previously submitted that would have allowed the Board to mirror the Port's calculation of the profit and cost of money. The Port also clarifies how its earlier evidence can be used to provide the formula it used for determining profit and the cost of money. Because CORP has not opposed the petition for technical correction, and because we are now able to substantiate the Port's formula from the record, we will grant the technical correction. The result is a reduction in the sale price by \$20,227.

It is ordered:

1. The Port's petition for reconsideration of the October 31 Decision and November 20 Decision is denied.

2. The Port's petition for technical correction is granted. The adjusted sale price for the Line is \$16,585,760.

3. This decision is effective on its service date.

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

Anne K. Quinlan  
Acting Secretary