

FEB 13 2008

TO: Anne Quinlin, Acting Secretary
Surface Transportation Board
395 E St. S.W.
Washington, D.C. 20423

FROM: James Riffin
1941 Greenspring Drive
Timonium, MD 21093
(443) 414-6210
February 12, 2008

Part of
Public Record

RE: AB-103 (Sub-No. 21X) Offer of Financial Assistance

Dear Ms. Quinlin:

In footnote 1 on page 2 of a letter to the Board dated February 8, 2008, regarding the Glass Road railroad bridge located at MP 229.80 on the Vicksburg Industrial Lead, which bridge had been removed without Board authority, Kansas City Southern Railway Company made the following statement:

“1. In fact, consistent with STB precedent, the net liquidation value of a bridge and its component parts is normally zero regardless of its condition. *See Union Pacific Railroad Company – Abandonment – Between Tekoa and Fairfield In Whitman and Spokane Counties, WA. Union Pacific Railroad Company – Abandonment – Between Colfax and Tekoa and Thornton and Seltice, In Whitman County, WA; In The Matter of a Request To Set Terms and Conditions, Docket No. AB-33 (Sub-Nos. 62 & 63) [Decided January 30, 1991, ICC Served February 6, 1991]. 1991 LEXUS 30 (ICC served Jan. 30, 1991). Mr. Riffin should not be entitled to compensation for something that has a zero value.*”

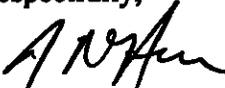
On February 11, 2008, I researched the Board’s archives and was able to find the entire decision KCSR made reference to. I found the decision to be informative, for it discussed when the tax consequences of a sale are to be taken into account, discussed the value to be attributable to railroad bridges, and indicated that if removal costs exceeded salvage value, then the NLV could well be a negative number. Since the decision has relevance to this proceeding, [and may have relevance to future OFA proceedings], and was difficult to find, I decided to make a copy of the decision, then append a copy of the decision hereto. That way all of your Web readers will be able to read this interesting decision.

KCSR’s statement, “the net liquidation value of a bridge and its component parts is normally zero regardless of its condition,” does not comport with the language in the Commission’s decision, which states in pertinent part:

“Contrary to Port’s suggestion, it is **not** always our custom to set the NLV of bridges at zero when removal costs exceed salvage value. Rather, our treatment depends on whether the bridges would be dismantled should abandonment occur. If these structures would not be dismantled, then the NLV is approximately zero. If they would be dismantled (either by choice of the railroad or because the railroad is compelled to take that action for some reason) **then the NLV – whether positive or negative – equals salvage value less removal costs.**” (Emphasis added.)

This prior Commission decision holds that if a railroad is compelled to take an action during the dismantling process [such as installing NPDES sediment controls], then the NLV equals salvage value less whatever the cost of that action might be, whether the cost of that required action produces a positive or negative NLV. This holding contravenes KCSR's argument in this proceeding, that the NLV cannot be a negative number.

Respectfully,


James Riffin

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of February, 2008, a copy of the foregoing Letter to Anne Quinlin, was mailed via first class mail, postage prepaid, to **William A. Mullins**, Baker & Miller PLLC, Ste 300, 2401 Pennsylvania Ave. N.W., Washington, DC 20037, attorney for Kansas City Southern Railway Company, and to **Craig Richey**, 315 W. 3rd Street, Pittsburg, KS 66762, attorney for Vicksburg Southern Railroad, Inc.



James Riffin

INTERSTATE COMMERCE COMMISSION

FEB 6 1991

DECISION

Docket No. AB-33 (Sub-No. 62)

UNION PACIFIC RAILROAD COMPANY--ABANDONMENT--BETWEEN TEKOA
AND FAIRFIELD IN WHITMAN AND SPOKANE COUNTIES, WA

Docket No. AB-33 (Sub-No. 63)

UNION PACIFIC RAILROAD COMPANY--ABANDONMENT--BETWEEN COLFAX
AND TEKOA AND THORNTON AND SELTICE, IN WHITMAN COUNTY, WA

IN THE MATTER OF A REQUEST TO SET TERMS AND CONDITIONS

Decided: January 30, 1991

In an initial decision served July 3, 1990, Administrative Law Judge Paul J. Clerman (ALJ) found that the public convenience and necessity permit the abandonment and discontinuance of operations by the Union Pacific Railroad Company (UP) of segments of UP's Tekoa and Pleasant Valley branch lines in Whitman and Spokane Counties, WA, pursuant to 49 U.S.C. 10903 et seq. The decision was appealed by the Port of Whitman County, WA (Port) and others, and the ALJ's initial decision was affirmed by the Commission in a decision served October 29, 1990.

On November 8, 1990, the Port filed an Offer of Financial Assistance (OFA) to acquire the lines, pursuant to 49 U.S.C. 10905. The Commission, by decision served November 15, 1990, found the Port's offer to be bona fide and reasonable to initiate negotiations between the parties, and postponed issuance of a certificate authorizing abandonment of the lines.

Although negotiations are continuing, on December 5, 1990, Port submitted a request that the Commission establish conditions and an amount of compensation under the OFA procedures. UP replied to the Port's request.

DISCUSSION AND CONCLUSIONS

Valuation and Evidentiary Standards: Under 49 U.S.C. 10905(f)(1)(C), the Commission may not set a price that is below the fair market value of the lines. In Chicago and North Western Transp. Co. - Abandonment, 363 I.C.C. 956 (1981) (Lake Geneva Line), aff'd sub nom. Chicago & North Western Transp. Co. v. ICC, 678 F.2d 665 (7th Cir. 1982), we determined that the proper valuation standard in proceedings under section 10905 is the net liquidation value (NLV) of the rail properties for their highest and best nonrail use (in the absence of a higher going concern value for continued rail use). Use of the NLV standard is not challenged here. The NLV, as we have normally determined it, is the real estate (land) value plus the gross salvage value of track and materials, less the cost of removal.

Port does not dispute the liquidation value of the rail line properties, \$2,245,483, found in the ALJ's decision. This finding was based on evidence submitted by UP during the evidentiary portion of the proceeding. Port suggests, further, that UP may have incorrectly included a negative value of \$266,540 for bridges on the rail lines, which resulted from UP's estimate that the cost to remove the bridges would exceed their salvage value. Port states that it is customary in OFA cases to treat the salvage value of bridges as zero when removal costs would exceed salvage value. Thus, liquidation value of the lines should be increased to \$2,512,023, argues Port. UP does not dispute this conclusion.

According to Port, the sole apparent disagreement is over whether or not the purchase price for the rail lines should reflect a deduction for income tax consequences from such liquidation value; Port contends that it should. Port submits that if liquidation value were adjusted downward to reflect UP's income tax liability, the net liquidation value of the rail lines would be \$1,607,694. Port's offer of \$1,750,000 reflects its estimate of NLV increased by approximately 9 percent for inflation since the NLV was determined.

Port argues that the governing statute and Commission regulations contemplate that the purchase price for a rail line is based on what the railroad would have had "but for the taking" which is equivalent to the net liquidation value adjusted for income tax consequences. Port believes that any capital gains tax owed to the federal and state governments should be deducted from the net liquidation value. Port reasons that this deduction would give the railroad the same amount of money it would ultimately receive had it sold the asset for a non-rail-market value.

Port points out that in the Commission's regulations in determining return on investment in road properties, the investment base is adjusted for income tax consequences (49 C.F.R. 1152.34 [c](1)). Consequently, Port argues, liquidation value in proceedings such as the instant one should also be adjusted for income tax consequences to determine the appropriate purchase price for a rail line under 49 U.S.C. 10905(f)(1)(C).

In response, UP argues that Port's offer understates the liquidation value for the lines, and that Port's \$1.75 million would not provide UP with what it would have had "but for the taking." If Port's offer were to prevail, UP says that it would receive, net after taxes, about \$1.2 million (assuming a 36 percent tax rate.) UP argues that this does not reflect the required fair-market value and that it would result in an unconstitutional taking. UP argues that the return on investment formula does not properly apply to a forced sale proceeding, although it may apply to financial assistance or subsidy proceedings at 49 C.F.R. 1152.30.

We agree with the UP's position on this point. Consideration of income tax consequences is appropriate in determining return on investment since the Commission must determine the cash that would be actually available for reinvestment if the abandonment was granted; the tax consequences will increase or decrease the amount of cash. The fair market value in forced sale proceedings must equal a purchase price for the assets. Since the railroads will actually have to pay taxes on the price it receives after the transaction is consummated, deducting expected tax consequences at this stage would result in double taxation to the railroad. This would not be an appropriate application of the net liquidation standard.

Port suggested, as discussed earlier, that UP may have incorrectly included a negative value of \$266,540 for bridges on the rail lines, resulting from UP's estimate that the cost to remove the bridges would exceed their salvage value. Correcting for this approach would increase the liquidation value of the lines to \$2,512,023.

Contrary to Port's suggestion, it is not always our custom to set the NLV of bridges at zero when removal costs exceed salvage value. Rather, our treatment depends on whether the bridges would be dismantled should abandonment occur. If these

structures would not be dismantled, then the NLV is approximately zero. If they would be dismantled (either by choice of the railroad or because the railroad is compelled to take that action for some reason) then the NLV--whether positive or negative--equals salvage value less removal costs.

In this proceeding, the record is unclear as to whether the bridges would have to be removed should abandonment occur. However, since Port itself has stated that total NLV should be increased by \$266,540 to correct treatment of bridge-related costs, we will adopt this adjustment.

As to Port's offer reflecting its estimate of NLV increased by approximately 9 percent for inflation since the NLV was determined, no evidence was provided to substantiate the 8 percent figure as a reasonable one, or the time period which it covers. We will not require an increase in the purchase price for inflation here.

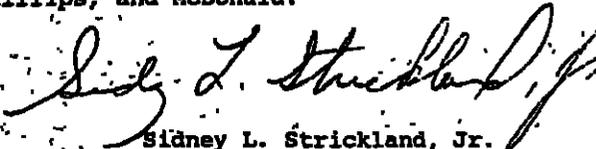
Terms of closing. To ensure an orderly transfer of the lines, we will establish the following terms: (1) payment will be made by cash or certified check; (2) closing will occur within 90 days of the service date of this decision; (3) UP shall convey all property by quitclaim deed; and (4) UP shall deliver all releases from any mortgages within 90 days of closing. The parties may alter any of these terms by agreement.

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

It is ordered:

1. The purchase price for the lines is fixed at \$2,512,023. Other terms of the sale must comply with the provisions discussed above.
2. Port must accept or reject in writing the terms and conditions established here by notifying the Commission and UP on or before February 19, 1991.
3. If Port accepts the terms and conditions established in this decision, Port and UP will be bound by this decision.
4. If Port withdraws its offer or does not accept the terms and conditions by February 19, 1991, the Commission will consider its offer withdrawn. In that event, the Commission will immediately issue an effective certificate authorizing abandonment of the line.
5. This decision is effective on February 6, 1991.

By the Commission, Chairman Philbin, Vice Chairman Emmett, Commissioners Simmons, Phillips, and McDonald.


Sidney L. Strickland, Jr.
Secretary

