# FINANCE DOCKET NO. 32479[1]

# CADDO ANTOINE AND LITTLE MISSOURI RAILROAD COMPANY — FEEDER LINE ACQUISITION — ARKANSAS MIDLAND RAILROAD COMPANY LINE BETWEEN GURDON AND BIRDS MILL, AR

*Decided May 3, 2000*

The Board, on reconsideration, establishes the purchase price of the Norman Branch line between Gurdon and Birds Mill, AR, under the feeder line provisions of 49 U.S.C. 10907 at its net liquidation value. In addition, the Board sets compensation for trackage rights over part of the Norman Branch, and it awards damages to compensate two shippers for an unlawful embargo of rail service on portions of the line.

BY THE BOARD[2]

Three proceedings before us involve the Arkansas Midland Railroad Company's (AMR) approximately 52-mile Norman Branch line between Gurdon and Birds Mill, AR. Our decision in *Caddo Antoine et al. — Feeder Li. Acq. — Arkansas Midland RR*, 4 S.T.B. 326 (1999) (*August 1999 Decision*), approving the feeder line application for sale of the entire Norman Branch under 49 U.S.C. 10907,[3] and setting a price and other terms of sale for the purchase, set out in

[1] This decision embraces Finance Docket No. 32625, *Dardanelle & Russellville Railroad Company — Trackage Rights Compensation — Arkansas Midland Railroad Company* and Docket No. 41230, *GS Roofing Products Company, Inc., Beazer West, Inc., d/b/a Gifford Hill & Company, Bean Lumber Company and Curt Bean Lumber Company v. Arkansas Midland Railroad Company and Pinsly Railroad Company, Inc.*

[2] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 83 (ICCTA), which took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(c) of the ICCTA provides, in general, that, if a court remands a suit against the ICC that was pending on the date of that legislation and involves functions retained by the ICCTA, subsequent proceedings related to the case shall proceed under the applicable law and regulations in effect at the time of the subsequent proceedings. The functions at issue in these proceedings were retained and are now found at 49 U.S.C. 10907 and 49 U.S.C. 11101(a).

[3] The Feeder Line Development Program at 49 U.S.C. 10907 enables shippers and communities to acquire marginal rail lines that are likely to be abandoned or are receiving (continued...)

detail the background of the three proceedings: the feeder line case (Finance Docket No. 32479), the trackage rights compensation case (Finance Docket No. 32625), and the damages case (Docket No. 41230).[4] For administrative convenience and to avoid unnecessary delay, we will consolidate the three proceedings, rule on the petition for administrative reconsideration of the purchase price set in the *August 1999 Decision* in Finance Docket No. 32479, set trackage rights compensation in Finance Docket No. 32625, and award damages in Docket No. 41230.

## PERTINENT BACKGROUND

AMR, a subsidiary of Pinsly Railroad Company, Inc. (Pinsly), acquired the Norman Branch line from what is now the Union Pacific Railroad Company (UP) in 1992.[5] The principal shipper on the line, International Paper Co. (IP), is located approximately 3 miles from Gurdon, where the line connects at the southern end with UP's main line. The line also serves GS Roofing Products Company, Inc. (GS Roofing), Beazer West, Inc. d/b/a Gifford-Hill & Company (Gifford-Hill), Bean Lumber Company and Curt Bean Lumber Company (Bean), and Barksdale Lumber Company (Barksdale) (collectively, the Shippers). The Shippers are located on the northern part of the line extending to Birds Mill.[6]

On December 3, 1993, a storm caused flooding, washouts, and landslides on the Norman Branch. On December 15, 1993, AMR notified the affected shippers

[3](...continued)
inadequate rail service.

[4] A petition for court review of the *August 1999 Decision* is pending in *GS Roofing Products, et al. v. STB*, (8th Cir. filed August 20, 1999). The court case is being held in abeyance pending our consideration of the petition for reconsideration of the constitutional minimum value we set in that decision, and of the reply, which also requested that we reopen on our own motion to adjust the purchase price.

[5] The Norman Branch was one of four rail lines that AMR purchased from UP's subsidiary, the Missouri Pacific Railroad Company (MP). *See, Arkansas Midland Railroad Company, Inc. — Acquisition and Operation Exemption — Missouri Pacific Railroad Company*, Finance Docket No. 31999 (ICC served March 6, 1992); *Pinsly Railroad Company, Inc. — Continuance In Control Exemption — Arkansas Midland Railroad Company, Inc.*, Finance Docket No. 32001 (ICC served March 6, 1992).

[6] Prior decisions in this proceeding described the Norman Branch as being 52.9 miles long between milepost 426.3 near Gurdon and milepost 479.2 at Birds Mill. Subsequently, the ICC accepted the assertion that the line terminates at the interchange with UP at milepost 426.87. *Dardanelle & Russellville Railroad Company — Trackage Rights Compensation — Arkansas Midland Railroad Company*, Finance Docket No. 32625 (ICC served June 22, 1995) (*Compensation I*), *at* 2-3. Thus, the Norman Branch is actually 52.33 miles long.

and the Association of American Railroads that the resulting track conditions required it to embargo service to four stations located at or near the northern end of the line, thereby interrupting service to GS Roofing and Bean. On February 22, 1994, AMR amended the embargo to include an additional station to the south of the initially embargoed stations due to track and bridge conditions, interrupting service to Gifford-Hill. However, AMR continued to serve IP on the southern portion of the line, which was apparently not affected by the flooding.

On February 18, 1994, AMR initiated the abandonment process, at first indicating its intent to abandon the entire line, and ultimately indicating its intent to abandon the Norman Branch except for the portion serving IP. These events led to the initiation of three different actions at the ICC. First, the Caddo Antoine and Little Missouri Railroad Company (CALM), a noncarrier subsidiary of the Dardanelle & Russell Railroad Company (DRRC), filed a feeder line application under former 49 U.S.C. 10910 (now 49 U.S.C. 10907) and 49 CFR part 1151 to acquire the entire Norman Branch (including the three miles necessary to serve IP). Second, on March 18, 1994, as supplemented on March 22, 1994, DRRC and CALM requested that the ICC issue a directed service order pursuant to 49 U.S.C. 11125[7] that would allow DRRC/CALM to begin immediate operations over the entire Norman Branch. Finally, on March 21, 1994, the Shippers filed a complaint in Docket No. 41230 seeking damages from AMR and Pinsly.

The complaint alleged that AMR's cessation of service from December 1993 until April 1994 over portions of the line violated the railroad's obligation under former 49 U.S.C. 11101(a) to provide transportation or service upon reasonable request. In a decision issued March 11, 1997, we concluded that AMR and Pinsly were not liable for damages because AMR's initial determination to suspend service over washed out track was not unreasonable, and AMR acted reasonably in not repairing the line immediately. On judicial review, the court agreed with our finding that AMR acted reasonably in initially embargoing the storm-damaged line, but concluded that AMR should have repaired the track as soon as possible even though AMR made a determination shortly after instituting the embargo to abandon or otherwise dispose of it. The court remanded the damages proceeding for the Board to determine damages. *GS Roofing Products Company, et al. v. STB*, 143 F.3d 387 (8th Cir. 1998) (*GS Roofing)*.[8]

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[7] Pursuant to 49 U.S.C. 11125, the ICC could direct service when a carrier lacked the funds to operate; a court had ordered the cessation of operations; or the railroad had unlawfully discontinued operations.

[8] The court denied a petition for rehearing and suggestion for rehearing *en banc* in July 1998.

On March 28, 1994, shortly after the feeder line application was filed, the ICC denied the request for directed service under section 11125 because it concluded that the statutory criteria had not been met. The carrier had not been shown to lack funds to provide service, had not been ordered to discontinue operations by a court, and had not "discontinued transportation without obtaining [an abandonment] certificate." 49 U.S.C. 11125(a)(3). Pursuant to 49 U.S.C. 11123(a), however, the ICC in *Service Order No. 1516*[9] authorized DRRC/CALM to provide voluntary interim service over the northern portion of the Norman Branch, including the portion affected by the embargo, based on its willingness to do so, and AMR's agreement to permit it to do so. The ICC also authorized DRRC/CALM to enter into an agreement with AMR to operate "overhead"[10] trackage rights over the rest of the line on which AMR continued to serve IP so that DRRC/CALM could interchange directly with UP.[11]

DRRC/CALM began operations in early April 1994, pursuant to the ICC service order. DRRC/CALM's service continued until August 10, 1996, when it ceased operations.[12] At the request of the Shippers, and with the consent of all parties, including AMR, we amended *Service Order No. 1516* and substituted the East Texas Central Railroad Company (ETC) as the authorized operator in September 1996.[13]

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[9] *Dardanelle & Russellville Railroad Company — Authorized to Operate — Lines of Arkansas Midland Railroad Company, Service Order No. 1516* (ICC served March 28, 1994) (*Service Order No. 1516*).

[10] The overhead trackage rights gave DRRC/CALM the right to operate trains over the southern portion, but the trackage rights were restricted against service to points on that portion of the line.

[11] Given the condition of the line, the ICC required that, before operations could commence, DRRC/CALM certify to the ICC that it had made repairs to the damaged portion of the line and that, in its opinion, the line was safe to operate.

[12] The parties disagreed on the amount of compensation DRRC/CALM was required to pay for trackage rights over the southern portion authorized by *Service Order No. 1516*. DRRC/CALM requested that the ICC set the amount of compensation it was obligated to pay AMR. The ICC did so in *Dardanelle & Russellville Railroad Company — Trackage Rights Compensation — Arkansas Midland Railroad Company*, Finance Docket No. 32625 (ICC served June 3, 1996) (*Compensation 2*), petition for rehearing and oral argument denied by decision served September 5, 1996 (*Compensation 3*). However, as explained in more detail *infra*, by decision served December 23, 1996, we reopened the compensation proceeding and stayed the effective date of the *Compensation 2* and *Compensation 3* decisions until the feeder line proceeding was resolved.

[13] *East Texas Central Railroad Company — Authority to Operate — Lines of Arkansas Midland Railroad Company*, Supplemental Order No. 7 to *Service Order No. 1516* (STB served September 24, 1996).

During the course of the ICC's feeder line proceeding, AMR entered into a lease and option to purchase agreement with Glenwood & Southern Railroad Company (GSR) for the northern portion of the line. However, the ICC subsequently disallowed GSR's lease of the line. GSR then filed a competing feeder line application, which was denied on the ground that GSR had not shown that it was financially responsible, as required by former 49 U.S.C. 10910(a).

In the feeder line proceeding, the ICC, by decision served on April 18, 1995, granted the feeder line application only for the 49-mile northern portion of the line that AMR had sought to abandon.[14] The ICC determined that the southernmost three-mile portion on which AMR continued to serve IP was not eligible for sale under the public convenience and necessity (PC&N) requirements in former section 10910(b)(1)(A)(I). CALM declined to acquire the northern portion of the line. Rather, CALM and the Shippers filed a petition for judicial review of the ICC's feeder line decision.[15] In 1996, the court, in *Caddo Antoine and Little Missouri R. Co. v. STB*, 95 F.3d 740 (8th Cir. 1996) *(Caddo Antoine)*, reversed the ICC's feeder line decision in *Caddo* and remanded the proceeding for the Board to consider CALM's application to purchase the entire Norman Branch under the PC&N standards now in section 10907(c)(1). The court noted that the Norman Branch had been historically operated as a single unit and, for this reason, it disagreed with the ICC's determination that the line could be segmented. The court directed that we consider the Norman Branch as a single line and determine whether the PC&N requires or permits sale of the entire Norman Branch under the feeder line statute, 49 U.S.C. 10907(c)(1), and, if so, what the sale price for the entire line should be. Following the court's remand, we reopened the feeder line proceeding and directed the filing of

[14] *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 April 18, 1995) (*Caddo*).

[15] On May 17, 1995, GSR filed a second notice of exemption in Finance Docket No. 32705 to lease and operate (with an option to purchase) the northern portion of track and to operate trackage rights over the southern portion of the line. GSR's notice became effective May 24, 1995, and was served on June 15, 1995, and published at 60 Fed. Reg. 31,494 (1995). The ICC subsequently denied a motion filed by CALM to have GSR's notice of exemption declared void *ab initio* or, in the alternative, to revoke GSR's notice of exemption. *Glenwood and Southern Railroad Company — Acquisition and Operation Exemption — Arkansas Midland Railroad Company, Inc.*, Finance Docket No. 32705 (ICC served August 8, 1995). CALM's petition for review of that decision is in abeyance in the Eighth Circuit pending the issuance of our decision on remand in the feeder line proceeding. GSR is not currently operating the line.

additional evidence and more current valuation estimates.[16] *See, August 1999 Decision* at 330.

As noted earlier, in 1998, the Eighth Circuit in *GS Roofing* reversed our decision in the damages case and denied our petition for rehearing. Following the court's denial of rehearing, we directed the parties to work with an Administrative Law Judge (ALJ) to attempt to reach a negotiated resolution of the pending feeder line, compensation, and damages proceedings. Several discussions were held. However, in a letter dated January 13, 1999, the Shippers advised the Board that the mediation process had reached an impasse and requested that the Board decide the three pending cases.

In our *August 1999 Decision*, we granted the feeder line application for sale of the entire Norman Branch and set the purchase price. The feeder line procedures require us to determine the purchase price at the constitutional minimum value of the line, which is defined as "not less than the net liquidation value of such line or the going concern value of such line, whichever is greater." 49 U.S.C. 10907(b). We based our purchase price ($1,628,727) on a combination of net liquidation value (NLV) of $901,834 for the northern portion and a going concern value (GCV) of $726,893 for the southern portion. We noted that the evidence before us showed that, while the entire line has an NLV, the parties had not submitted any acceptable GCV for the entire Norman Branch. Nonetheless, we determined that, because AMR served IP on the southernmost portion of the line at a profit, it would be appropriate in setting the constitutionally required minimum value for this line to add the GCV of the

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[16] Specifically, we directed the parties to submit updated evidence and argument as to whether the five criteria set forth in 49 U.S.C. 10907(c) require or permit a forced sale of the entire line. In addition, we noted that the Eighth Circuit in *Caddo Antoine* (95 F.3d at 748) indicated that we should take into account in reaching our decision on remand AMR's argument that it would suffer a grievous financial loss that would jeopardize the remainder of its rail line operations if it were required to sell the southernmost portion of the line on which it serves IP. We invited further evidence addressing the matter, particularly the views of AMR as to whether the impact of the loss of IP's traffic would be mitigated by receiving the proceeds from the sale of the line, as the Shippers had claimed. We also invited additional evidence on the Shippers' financial responsibility and the valuation of the line. Finally, we rejected AMR's request that we terminate the feeder line proceeding in view of the substitution of ETC as the operator of the line. We also denied AMR's motion to strike the financial projections submitted by the Shippers relating to ETC's proposed operations and found that GSR, which had indicated that it remained interested in leasing and operating the line under the notice of exemption in Finance Docket No. 32705, had a legitimate interest in this proceeding and should be able to participate.

The parties submitted supplemental statements on June 27, 1997, and reply statements on July 14, 1997. The feeder line applicants submitted a rebuttal statement on July 30, 1997. The data submitted by the parties included confidential data submitted under seal.

southern portion of the line on which AMR serves IP to the NLV of the remaining portion of the line.

To calculate the GCV for the southern portion, we used data furnished by the Shippers and AMR in their supplemental filings that reflected AMR's operations over the southern portion for the year 1996. That data showed that in 1996, AMR realized revenues of $425,660[17] and incurred variable costs of $297,000.[18] Applying a multiplier of 17.7% based on the 1996 pretax cost of capital rate for the railroad industry,[19] we computed the GCV of the southern portion at $726,893. Our GCV estimate did not include costs associated with rehabilitating the 3-mile southern portion of the line and did not include fixed costs.

## DISCUSSION

### I. *THE PETITION FOR RECONSIDERATION IN THE FEEDER LINE CASE.*

A. *Arguments of the Parties.* AMR has filed a petition for reconsideration of our $1,628,727 purchase price. It claims that we understated our determination of the constitutional minimum value of the Norman Branch because the $726,893 GCV we computed for the southern portion failed to include all revenues generated on that portion of the line. AMR argues that neither it nor the Shippers relied on or provided any break-out details for the 1996 evidence we relied on in calculating the GCV for the southern portion.[20] AMR contends that, because the Board rejected each of the parties' case-in-chief and constructed a GCV for the southern segment based on less than complete

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[17] The *August 1999 Decision* noted that AMR witness James A. Bowers had indicated that AMR realized revenues of $612,000 in 1996 from operating the southern portion and that Shipper witnesses Joseph J. Plaistow and Christina N. Adams had countered that AMR's revenues were $425,660, a figure that was based on revenue data which AMR had submitted on discovery. We accepted the Shippers' revenue figure as the better evidence based on the record.

[18] The cost figure was derived from a verified statement of AMR witness Bowers. Mr. Bowers did not provide a breakdown of the individual expenses that AMR incurred in 1996 from operating the southern portion.

[19] *In Railroad Cost of Capital — 1996*, 2 S.T.B. 344 (1996), we found that the after-tax cost of capital for 1996 is 11.9%. The pre-tax cost of capital equivalent of this number is 17.7% (which assumes 35% Federal and 2% state tax rates). We used a 1996 cost of capital in the *August 1999 Decision* because the parties' evidence was for 1996.

[20] AMR explains that at the time of the prior round of pleadings in this matter (Summer 1997) AMR was arguing that ETC's projections should be the basis for establishing the GCV of the line and the Shippers were arguing that 1993 AMR data should be used, if GCV was applied at all.

evidence, we should now adjust the GCV to include evidence of additional revenue not included in the parties' prior evidence.

Specifically, AMR states that the $425,660 in revenues, which we used to compute the GCV for the southern portion, represented only line-haul revenue that it realized for handling IP's carload traffic in 1996. AMR submitted a verified statement from James J. Plasse, Controller of Pinsly, AMR's parent, stating that AMR also realized $124,000 in car-hire income that was derived from using 30 60-foot leased boxcars for outbound movements of plywood from IP's facility.[21] AMR's witness states further that AMR realized $17,822 in trackage rights fees from the operator of the northern part of the Norman Branch under *Service Order No. 1516* and $44,459 in other revenue, including switching, demurrage, storage, car repair and miscellaneous income ("other revenue").[22] According to AMR's witness, GCV should be based on the total revenue realized by AMR on the southern portion in 1996, which, he submits, was $611,941.

AMR's witness also provided the following breakdown of the costs AMR allegedly incurred in 1996 from operating the southern portion:

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| Operating Crews (salary and benefits) | $67,000 |
| Track Maintenance | $31,000 |
| Locomotive Maintenance & Fuel | $43,000 |
| Property Taxes | $1,000 |
| Car Lease Costs (30 boxcars) | $154,800 |
| Total | $296,800 |

The total cost figure was rounded up $297,000.

Mr. Plasse states that train crew and locomotive expenses are based on actual experience from operating the southern portion. Train crew expenses are derived from a two-person crew, each with a 1996 salary of $21,000 and a 1.6 benefit

[21] AMR argues that the $124,000 for car-hire income should be included because the $297,000 in variable costs we included in developing a GCV contained $154,800 in Car Lease Costs. Evidently, AMR leases the boxcars used in the movement of IP traffic.

[22] According to Mr. Plasse, the Norman Branch's "other revenue" is an allocation of AMR's revenues of this type in 1996. The allocation was developed by comparing direct freight revenue on the Norman Branch South ($425,660) with AMR's total direct freight revenue ($3,148,841), and then applying that percentage ($425,660 ÷ $3,148,841 = 13.518%) to AMR's total "other revenue" in 1996 ($328,889 x 13.518% = $44,459).

factor. Assertedly, maintenance of way expenses and property taxes were apportioned from AMR's system totals, using a ratio of the southern portion to total AMR operating miles for maintenance of way expense. Property taxes were based on a ratio of the southern portion to total AMR owned miles for property taxes. Car lease costs were allegedly based on AMR's monthly lease rate for the 30 boxcars, $12,900, which results in an annualized cost of $154,800. Based on Mr. Plasse's verified statement, AMR asks that we recalculate the GCV of the southern portion of the line to be either $1,779,328 or $1,605,542, which would result in a total value for the line of $2,681,162 or $2,507,376.[23]

In reply, the Shippers agree that the determination of GCV in our *August 1999 Decision* for the southern portion is erroneous (albeit for very different reasons), and that reconsideration of the purchase price we set is in order. The Shippers contend that our attempt to use a combination of NLV and GCV to determine the value of the entire line is contrary to the feeder line statute and the court's decision in *Caddo Antoine*. The Shippers argue that the entire line should be valued at its NLV. The Shippers further contend that we made significant errors in calculating the GCV for the southern portion, because, in their view, we relied on unsupported, undocumented, and unverifiable cost and revenue evidence and failed to include all costs. Moreover, the Shippers note that in the earlier phases of this proceeding, AMR refused to provide financial data for the Norman Branch, claiming that its accounting records did not cover revenues and costs for specific branches. They object to the additional financial evidence belatedly submitted by AMR with its petition for reconsideration.

The Shippers have submitted a verified statement by Mr. Plaistow and Ms. Adams analyzing AMR's additional data. The Shippers' witnesses contend that the cost estimates used to compute the GCV were incomplete and failed to include any general and administrative costs, marketing costs, depreciation, and amortization costs that AMR incurred in 1996 from operating the southern portion. The Shippers' witnesses also question whether AMR included all the car costs associated with moving IP traffic. They note that AMR's witness indicated that IP moved 2,867 carloads in 1996, and that IP allegedly moved 405 carloads in leased boxcars for which AMR incurred $154,800 in car lease costs. They assert that the record fails to explain what, if any, additional car cost was incurred

[23] The difference depends on whether the Board simply recomputes the revenue figure or whether instead it makes AMR's other proposed changes to the Board's calculation of GCV. AMR does not seek reconsideration of our decision to use the 1996 railroad cost of capital as the earnings multiplier.

for the movement of the remaining 2,262 carloads of IP traffic and that these costs could be significant.

Furthermore, the Shippers' witnesses compare 1993 data for AMR operations over the southern portion with data reflecting operations in 1996. Mr. Plaistow and Ms. Adams are concerned that the data show that transportation expenses for operating the southern portion declined from $127,789 in 1993 to $67,000 in 1996, even though carloads increased from 2,676 to 2,867. Mr. Plaistow and Ms. Adams add that the only personnel expenses shown are for two crew members ($67,000), and that AMR's costs did not include a train dispatcher.

B. *Our Analysis*. The only issue we are asked to address in the feeder line case is the question of the constitutional minimum value of the Norman Branch.[24] To allow us to do so, we will accept the supplemental evidence submitted by AMR and the Shippers.

As noted above, the feeder line provisions define constitutional minimum value as not "less than the net liquidation value of such line or the going concern value of such line, whichever is greater." 49 U.S.C. 10907(b)(2). For the reasons stated in the *August 1999 Decision*, AMR normally would be entitled to the GCV for the portion of the line on which it is actively serving IP to compensate for the loss of IP's traffic. Thus, based on the evidence of record at that time, the Board determined the GCV for that portion. However, the parties' supplemental evidence raises questions of accuracy with respect to the previous record, and thus we are persuaded that the record now simply does not contain the information we need to compute a GCV for the southern portion of the line with any degree of accuracy. Moreover, upon reconsideration, it is not clear that a computation of GCV for the southern portion is permissible in this case in light of the Eighth Circuit's holding in *Caddo Antoine* that, for sale purposes, the Norman Branch must be treated as a single entity. Inasmuch as the parties have not provided any acceptable evidence as to GCV for the entire Norman Branch, the only meaningful evidence in the record of the constitutional minimum value for the line is the NLV for the entire Norman Branch. Accordingly, we will value the entire line at its NLV ($961,096.24).[25]

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[24] AMR does not challenge our decision to approve the feeder line application for the entire line under the PC&N standards at 49 U.S.C. 10907(c)(1). Nor does it question our determination that the Shippers are financially responsible.

[25] In the ICC's 1995 feeder line decision the ICC set the NLV of the entire Norman Branch at $972,282. The northern portion was valued at $901,834, and the southern portion at $70,448.

(continued...)

In its petition for reconsideration, AMR argues that the 1996 revenue data we used in calculating the GCV for the southern portion were too low. AMR points out that the same revenue estimate that it asks the Board to accept on reconsideration ($612,000) was included in the estimates provided by AMR witness Bowers in his statement filed June 27, 1997. While we rejected Mr. Bowers' revenue estimate in the *August 1999 Decision* because it was not supported, AMR has now provided more specific details.

But even with AMR's additional data, it still is not possible to develop a meaningful GCV for the southern portion of the line. To begin with, the $44,459 in revenues from other sources in AMR's petition for reconsideration is simply an allocation[26] of all other revenues from other sources, including switching, demurrage, storage and car repair revenues. Moreover, the Shippers have raised significant questions regarding AMR's failure to provide full information about the costs it incurred to operate the southern portion of the line. As the Shippers point out, Mr. Plasse's breakdown in the table reproduced above of AMR's alleged $297,000 in costs contains no costs at all for the generation of the $44,459 in alleged additional revenues. AMR also fails to include information on the costs associated with the additional $17,822 in trackage rights revenues under *Service Order No. 1516*, which AMR now claims should be included.[27] With the exception of the data on car-hire income (where AMR provided car lease costs), we could not include AMR's additional revenues without also including the costs associated with the generation of those revenues. AMR did not provide these additional costs, however, and there is insufficient detail in the record to allow a restatement.

Additionally, the Shippers make a persuasive argument that AMR's data regarding car costs AMR allegedly incurred to handle IP traffic is incomplete. IP moved 2,867 carloads in 1996. AMR's witness Plasse indicates IP moved 405 carloads in the leased boxcars for which AMR claims $154,800 in car lease costs. However, there is no evidence in the record to explain what, if any, additional car

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[25](...continued)
However, in prior decisions in the trackage rights compensation proceeding, the ICC accepted DRRC/CALM's adjustment of the mileage of the line. The ICC then determined the NLV of the entire line to be $961,096.24. Neither AMR nor the Shippers have updated the NLV data that was filed with the ICC.

[26] AMR states that these revenues are derived based on an allocation of all other non-line AMR revenues based on the percentage of revenues on the southern portion of the Norman Branch to total AMR revenue.

[27] For example, AMR does not include any costs relative to maintenance of way, general and administrative costs, or depreciation expense associated with the movement of overhead traffic from the northern portion of the Norman Branch.

cost was incurred for the movement of the remaining 2,262 carloads of IP traffic.[28] The costs associated with the movement of 2,262 carloads could be significant.[29]

The Shippers have pointed to other problems with the cost and revenue evidence we used to compute a GCV in our prior decision. For example, Mr. Plaistow and Ms. Adams explain that, under AMR's calculations, transportation expenses for the southern segment declined, without explanation, between 1993 and 1996, from almost $128,000 to $67,000, despite the fact that carloads increased from 2,676 to 2,867. Mr. Plaistow and Ms. Adams note that the only personnel expenses shown are for two crew members ($67,000) with no other personnel expenses indicated. However, crew members do not typically operate without a train dispatcher. Further, the Shippers' witnesses show that 1996 Uniform Rail Costing System data for the Western Region provide variable costs of $224.36 per carload, or $643,240 for 2,867 carloads, which is substantially higher than the cost we included in calculating GCV for the southern segment in our *August 1999 Decision*.

Finally, Mr. Plaistow and Ms. Adams contend that there is no supporting documentation for why 17% of AMR's total revenues are from the southern portion of the Norman Branch. They question why revenue per car for IP traffic rose 61% between 1993 and 1996, while revenue per car for all other AMR traffic rose only 21%.

Thus, after fully considering the parties' supplemental evidence, we must conclude that there is not enough evidence in the record to allow us to compute a meaningful GCV for the southern portion of the line. We do not necessarily agree with all of the arguments raised by the Shippers and their witnesses, but upon reconsideration it is clear that not all costs and revenues were properly accounted for in our attempt to develop a GCV in the *August 1999 Decision*. Thus, it would be inappropriate to use the GCV in our prior decision in setting the constitutional minimum value of this line. On reconsideration, the parties also have not given us the evidence we would need to restate the GCV for the southern portion of the line with any degree of accuracy.

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[28] It appears unlikely that all of IP's 2,867 carloads could move in the 30 leased cars. Under the best case scenario, the cars would have to realize a cycle time of 3.81 days per car. (2867/30 = 95.6 trips per car) (365 days / 95.6 = 3.81 cycle days per car.) Such efficient cycle times are normally only obtained in unit train operations and not in the single and multiple car movements involved in moving IP's traffic.

[29] The $425,660 in line-haul revenues we included in our *August 1999 Decision* included all of IP's 2,867 carloads.

AMR did provide us with 1996 data to support a GCV for the entire line ranging from $3,674,000 to $3,137,000 when we reopened the feeder line proceeding in 1997.[30] That GCV evidence, however, was previously considered and properly rejected. As we noted in the *August 1999 Decision*, AMR's estimates were based on ETC's projected revenues and costs for the years 1997 through 1999. We rejected AMR's calculations because the relevant GCV here is what the line is worth to AMR as a going concern, not its projected value to the acquiring company. *See, United States v. Miller*, 317 U.S. 369, 375 (1942). Therefore, ETC's projections are essentially irrelevant in the overall determination of GCV or value of the entire Norman Branch.

In their recently filed verified statement, Mr. Plaistow and Ms. Adams estimate a GCV for the entire line based on interim operations of DRRC/CALM and ETC over the northern portion and AMR operating over the southern portion of the Norman Branch in 1996. However, AMR did not operate the entire Norman Branch in 1996, and financial data for the interim operators are irrelevant to determining the value of the line to AMR as a going concern. Thus, the parties plainly have not provided any acceptable evidence from which we can compute a meaningful GCV for the entire line.

In short, the only reliable and verifiable record evidence for the constitutional minimum value of this line is the NLV for the entire Norman Branch. The parties have had ample opportunity to provide evidence on GCV. Our May 1997 decision in the feeder line case requested the parties to update the record for determining GCV and NLV, and the parties filed GCV evidence in response to that decision and following issuance of our *August 1999 Decision*. As discussed above, however, the GCV evidence we have before us is incomplete and unverifiable. In the absence of acceptable GCV evidence, or sufficient data to allow us to compute a meaningful GCV, we will set the constitutional minimum value for the entire Norman Branch at its NLV, which is $961,096.24.

Finally, it should be noted that, in the *August 1999 Decision*, in finding that the forced sale of the Norman Branch would not have a significant adverse financial impact on AMR as required by 49 U.S.C. 10907(c)(1)(c), we relied in part on the fact that the compensation AMR would receive from the sale of the

[30] At that point, the Shippers's witnesses had presented evidence that, in 1993, the last year AMR operated the entire Norman Branch, AMR's operations resulted in a negative GCV. (AMR's witness Bowers also acknowledged that the line lost money in 1993 and that data for that year would not produce a positive GCV.) In the *August 1999 Decision*, we rejected the 1993 data because the more current 1996 data in the record better reflected current traffic levels and demand for services. Nothing in the parties' subsequent pleadings indicates that we should reconsider that determination here.

line (including the GCV for the southern portion) would neutralize any adverse financial impact from the loss of IP's traffic. Therefore, our decision here that the only way to value the Norman Branch based on the evidence before us is at NLV requires that we reassess whether this line is eligible for sale under the PC&N standards. We conclude that the PC&N standards have been met in this case. As we stated in the *August 1999 Decision*, in the event of the sale of the entire Norman Branch, AMR would avoid the cost of rehabilitating the approximately 49-mile northern portion of the line. Since the northern portion of the line is in very poor shape, the cost of rehabilitation would substantially reduce, if not wipe out, AMR's profits from serving IP on the southern portion of the line. AMR would therefore realize substantial cost savings from elimination of the northern portion of the line, which would have a positive impact on its overall bottom line. In addition, if the northern portion of the line were not rehabilitated, we presume that it would continue to be operated at a loss. Finally, AMR's own witness provided evidence that, without the Norman Branch, AMR will continue to generate annual anticipated profits in excess of $250,000 from its operations over the remaining 52.63 miles of track in its system.

In sum, AMR will lose the compensation it presently receives from IP if the line is sold. However, it also will avoid the costs associated with operating over the southern portion of the line. Even though AMR would realize less compensation than we previously determined ($1,628,727), it will still realize cash proceeds from the sale of the line that it can invest in its other lines.[31] Given the compensation that AMR would receive from the sale and AMR's operations over the rest of its system, the loss of this income will not cripple AMR financially or operationally, and thus the PC&N standards are met with the entire line valued at NLV.

## II. *THE TRACKAGE RIGHTS COMPENSATION CASE.*

A. *The Prior Decisions.* As noted above, by decision served March 28, 1994, in *Service Order No. 1516*, DRRC/CALM was authorized to provide service on the Norman Branch under an emergency service order issued pursuant to 49 U.S.C. 11323. The service order permitted DRRC/CALM to provide interim service over the approximately 49-mile northern portion of the Norman Branch between Birds Mill and Gurdon, and to operate overhead trackage rights

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[31] AMR witness Plasse indicates that the leased cars that are used to serve IP would be assigned to another shipper on another AMR line after sale of the Norman Branch. Thus, AMR would continue to realize lease revenues in the event of a sale.

over the approximately 3-mile southernmost portion of the line to allow DRRC/CALM to connect with UP in Gurdon.

As a condition to *Service Order No. 1516*, the ICC required DRRC/CALM to compensate AMR for the overhead trackage rights at a "commercially reasonable rate." The parties, however, were unable to agree on that rate. AMR sought payment of $7.00 per car. DRRC/CALM contended that the rate should be no more than $3.72 per car. The ICC gave DRRC/CALM two options: (1) on an interim basis, it could pay AMR trackage rights compensation of $7 per car for the period June 1 to November 30, 1994; or (2) as an alternative, DRRC/CALM could pay AMR trackage rights compensation of $3.72 per car, if it simultaneously filed a petition requesting the ICC to determine the appropriate compensation.

DRRC/CALM chose the second option, and in a decision served June 22, 1995 (*Compensation 1)*, the ICC determined the formula it would use in setting the compensation,[32] and directed AMR and DRRC/CALM to submit evidence to determine the overhead trackage rights compensation under that formula.

In *Compensation 2*, we set compensation, based on the parties' submissions, at $9.75 per car for cars moved during the May 1994 through August 1995 period. DRRC/CALM filed an administrative appeal of that decision, which we denied in a decision served September 5, 1996 (*Compensation 3*), on grounds that DRRC/CALM had failed to submit cost evidence that would justify a compensation rate other than the one we had set. DRRC/CALM filed a petition for review of *Compensation 3* in *Caddo Antoine and Little Missouri R. Co. v. STB,* No. 96-3352 (8th Cir. Sept. 9, 1996), but action on the appeal has been held in abeyance pending our consideration of DRRC/CALM's supplement to its administrative appeal that was filed August 29, 1996, and thus was not considered in our decision denying reconsideration. That decision, although served September 5th, had been decided August 28th, the day before the supplement was filed.

Ten days after the issuance of our September 5, 1996, decision in the compensation case, the Eighth Circuit issued its decision in *Caddo Antoine*, reversing the ICC's feeder line decision and remanding the feeder line proceeding with instructions to consider the entire Norman Branch as a single line. Shortly thereafter, in a decision served December 23, 1996, we reopened the

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[32] The ICC stated that, in setting compensation, it would use the method usually employed to determine a tenant's payment for trackage rights. *See, Arkansas & Missouri R. Co. v. Missouri Pacific R. Co.*, 6 I.C.C.2d 619, 622 (1990), *aff'd sub nom. Missouri Pacific R. Co. v. ICC*, 23 F.3d 531 (D.C. Cir. 1994).

compensation proceeding and stayed the effective date of the *Compensation 2 and Compensation 3* decisions until the related feeder line case was resolved.

B. *Our Analysis*. We are now concluding the compensation case and will vacate the stay previously entered in this proceeding. We direct DRRC/CALM to compensate AMR for trackage rights over the 3.13-mile southernmost portion of the line under *Service Order No. 1516* in accordance with our prior decisions in this proceeding, with the following modifications.

First, we continue to believe we should use the methodology set out in our prior decisions to set compensation, *i.e.*, the method usually employed to determine a tenant's payment for trackage rights. However, the outcome of applying that methodology ($9.75 per car) results in a compensation rate that is significantly higher than the amount AMR sought in this case ($7 per car). Upon reconsideration, we now conclude it would be inappropriate to award AMR a compensation rate that is higher than AMR's own numbers. Accordingly, we conclude that $7 per car is a reasonable trackage rights compensation level here.[33]

Second, we are modifying *Compensation 2* to make it apply to the period that commenced on June 1, not May 1, 1994, and extended through August 1995. As pointed out by DRRC/CALM, the May date in *Compensation 2* was incorrect because the ICC previously had determined that compensation would begin on June 1, 1994. *See,* Supplemental Order No. 1 to *Service Order No. 1516* (ICC served April 26, 1994).

As a result of this modification, we will exclude the 332 carloads that moved over the 3.13-mile southern portion in May 1994. *See,* AMR Supplemental Evidence filed October 10, 1995. Thus, we now find that DRRC/CALM moved 4,488 cars from June 1994 through August 1995, which, at $7.00 per car, yields a total compensation of $31,416 for that period.

Furthermore, we want to make it clear that compensation for any additional trackage rights operations performed by DRRC/CALM, and subsequently by ETC, over the 3.13-mile southern portion can be sought, based on the same rate

[33] This approach is consistent with our decisions in the recent "UP/SP" and "CSX/NS" transactions, where we concluded that if the agreed-upon trackage rights fees are lower than the rate we would set, the fees are reasonable and will not be adjusted upward. *See, Union Pacific/Southern Pacific Merger,* 1 S.T.B. 233 (1996), *aff'd sub nom. Western Coal Traffic League v. STB*, 169 F.3d 775 (D.C. Cir. 1999); *CSX Corp. et al. — Control — Conrail Inc. et al.*, 3 S.T.B. 196 (1998) (Decision No. 89), *clarified and modified*, 3 S.T.B. 764 (1998) (Decision No. 96), *pets. for judicial review pending sub nom. Erie-Niagara Rail Steering Committee v. STB*, Nos. 98-4285 *et al.* (2d Cir. filed July 31, 1998).

of $7 per car.[34] The total amount of compensation due AMR also should be reduced by any payments by DRRC/CALM and/or ETC under *Service Order No. 1516.*

C. *Interest.* Finally, to the extent that DRRC/CALM and/or ETC have paid AMR less than the rate of $7 per car for trackage rights operations over the 3.13-mile southern portion of the line, it is appropriate that interest (based on the difference between $7 per car and the amount already paid) should accrue from the date of the interim operations until the date of payment by DRRC/CALM and/or ETC to AMR of the compensation found due in this decision.[35] Interest will be based on the 91-day Treasury Bill Equivalent yield for the quarter during which each payment was made. The 91-day Treasury Bill Equivalent yield is published by the U.S. Department of the Treasury in the Treasury Bulletin. Interest shall be calculated pursuant to the procedures outlined at 49 CFR 1141.1(a)(2) and 1141.1(b)(2). AMR shall calculate the interest due and provide DRRC/CALM and/or ETC with its calculations within 15 days from May 5, 2000, the service date of this decision. Within 30 days after the effective date of this decision, DRRC/CALM and/or ETC shall remit to AMR payment of the trackage rights compensation and interest as set forth in this decision.

III. *THE DAMAGES PROCEEDING.*

As discussed above, the Shippers' complaint in Docket No. 41230 alleged that AMR's cessation of service from December 1993 until March 1994 over portions of the line violated the railroad's common carrier obligation under former 49 U.S.C. 11101(a) to provide transportation or service upon reasonable request. In a decision issued March 11, 1997, we found that AMR and Pinsly (hereafter defendants or the railroads) were not liable for damages to the Shippers because AMR's initial determination to suspend service over washed out track was not unreasonable, and AMR acted reasonably in not repairing the line immediately.[36] On judicial review in *GS Roofing*, the court agreed with our finding that AMR acted reasonably in initially embargoing the line following the

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[34] DRRC/CALM operated over the Norman Branch until August 30, 1996, when ETC was substituted as interim operator. *East Texas Central Railroad Company—Authority to Operate — Lines of Arkansas Midland Railroad Company*, Supplemental Order No. 7 to *Service Order No. 1516* (STB served September 24, 1996).

[35] In its most recent filings, AMR states that it has received $17,822 in trackage rights fees. We assume that this payment was based on the $3.72 per car interim rate.

[36] *Gifford — Hill & Co. et al. v. Arkansas Midland RR et al.*, 2 S.T.B. 89 (1997).

December 3, 1993, storm, but concluded that AMR should have repaired the track as soon as possible even though AMR made a determination shortly after instituting the embargo to abandon or otherwise dispose of it. The court remanded the proceeding for the Board to determine damages.

A. *Preliminary Matters*. We will make our determination of damages based on the original record evidence that was filed in the damages proceeding.[37] The Shippers state that they seek damages for the period from December 15, 1993 — the date on which AMR notified the affected shippers and the Association of American Railroads that storm-related track conditions required it to embargo service to four stations, thereby interrupting service to GS Roofing and Bean[38] — until April 15, 1994, the date on which service to the Shippers was restored under the DRRC/CALM service order. The court, however, found AMR liable for damages sustained "during the period starting on the date on which the line should have been restored to service following the imposition of the embargo and ending on the date service was actually restored." *GS Roofing,* 143 F.3d at 394. We will set the date by which service should have been restored following the imposition of the embargo as December 24, 1993. This date is three weeks after the storm that caused the damage, which was sufficient time for AMR to have made the repairs that DRRC/CALM made to restart operations.[39] We agree with the Shippers that it is appropriate to end the period for which damages are to be assessed on April 15, 1994, the date that service to the Shippers actually was restored under the ICC's service order.[40] Therefore, we will award damages, as assessed below, only for this period.

B. *The Parties' Arguments*. The Shippers seek damages for lost profits, the cost of alternative transportation, and costs associated with their efforts to prevent

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[37] The complaint was filed on March 21, 1994. The Shippers filed an opening statement on July 22, 1994, defendants filed a reply on August 29, 1994, and the Shippers filed a rebuttal on September 29, 1994.

[38] Gifford-Hill was not affected until AMR extended the embargo on February 15, 1994.

[39] The Shippers themselves suggested this 3-week period. *See,* Complainants' Rebuttal Legal Argument Exhibits and Rebuttal Verified Statements, Vol. IV, at 14.

[40] The Service Order permitting DRRC/CALM's operations was issued March 28, 1994. According to the Shippers, DRRC/CALM provided some limited unauthorized operations over the Norman Branch tracks from milepost 426.9 to 430.0 as early as April 8, 1994. Complainants' Rebuttal Legal Argument Exhibits and Rebuttal Verified Statements Vol. IV, at 14. However, April 15, 1994 appears to be the date on which service actually was restored to the Shippers pursuant to the service order. *See, Id.* at 52. Therefore, April 15, 1994, is a more reasonable date to use in determining the time period for damages in this case.

further damages by substituting DRRC/CALM for AMR.[41] Specifically, the Shippers allege lost profits for GS Roofing of $240,975 for its inability to ship 22,500 tons of roofing granules to a customer in Houston, TX,[42] and of $7,596 for delayed shipments of stone dust to Fontana, CA.[43] According to the Shippers, GS Roofing spent $33,524.02 on a temporary transloading facility.[44] In addition, GS Roofing allegedly suffered $33,337.88 and $4,455 in freight rate differentials,[45] $46,897.50 in professional fees and $3,563.15 in related expenses.[46] Allegedly, Gifford-Hill experienced lost profits of $160,335, based on estimates of lost sales.[47] Gifford-Hill also seeks to recoup $39,821 in professional fees, plus $2,610.81 in related expenses, and $2,005.34 in miscellaneous expenses.[48] The Shippers state that Bean Lumber was unnecessarily forced to spend $110,047.60 for the interim transloading facility,[49] $11,200 due to rerouting of a shipment caused by the embargo,[50] and $9,137.50 in professional fees and $360.24 in expenses related to mitigation of damages.[51] In total, the Shippers seek damages of $707,278.41, plus interest.[52]

In reply, defendants maintain that the Shippers failed to substantiate their damage claims. The Shippers on rebuttal then replied to defendants' arguments.

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[41] The Shippers do not seek damages based on operations by DRRC/CALM over the line under the service order.

[42] Verified Statement of John W. Smith at 10 ¶ 27. Complainants' Opening Statement, Vol. II, Tab A (V.S. Smith).

[43] V.S. Smith at 11 ¶ 28.

[44] GS Roofing established this temporary transloading facility on the UP/MP line near Gurdon, AR, at the site of a former IP pulpwood yard, as an interim replacement for train service to GS Roofing's Glenwood facility. The transloading facility was shared with Bean Lumber.

[45] The truck differential was calculated at $39.60 per ton. *See,* V.S. Smith at 11 ¶ 30.

[46] V.S. Smith at 13-14 ¶ 35.

[47] Verified Statement of Ronald W. Finley, at 9-10 ¶ 18. Complainants' Opening Statement, Vol. II, Tab B (V.S. Finley).

[48] V.S. Finley at 12 ¶ 22.

[49] Verified Statement of Curt Bean at 7 ¶ 17. Complainants' Opening Statement, Vol. II, Tab C (V.S. Bean).

[50] Seven railcar loads of lumber were diverted to Kansas City, where the shipment was off-loaded, repackaged and subsequently shipped by truck to Glenwood. V.S. Bean at 7 ¶ 16.

[51] V.S. Bean at 7 ¶ 18.

[52] The Shippers originally sought damages in the amount of $760,528.16, plus interest. In response to the railroads' reply, this figure was adjusted downward on rebuttal by reducing a claim by GS Roofing for freight differentials from $88,000 to $33.337.88. This adjustment reduced the total amount claimed to $707,248.41.

C. *Our Analysis.*

1. *Lost Profits and Sales.* The Shippers contend they should be compensated for lost business profits. However, the Shippers plainly have not carried their burden of proof concerning the amount of lost profits because the documentation for their lost profit claims is too speculative and remote to be persuasive.

As defendants state, the ICC consistently rejected awarding damages based on estimates of lost profits. *See, e.g., Webb Coal v. New York Central R. Co.*, 278 I.C.C. 5, 15 (1950) (*Webb*); *Crosby v. St. L.-F. Ry. Co.*, 112 I.C.C. 239, 243 (1926) (*Crosby*). *Louisiana Railcar, Inc. v. Missouri Pacific Railroad Co.*, 5 I.C.C.2d 542, 549 (1989) *(Louisiana Railcar*), where a request for payment for lost profits was granted, is distinguishable. In that case, the record showed that the complainant, Louisiana Railcar, Inc. (LRC), could not conduct any regular operations without rail service. LRC's operations were limited to repairing railcars and, therefore, it could not provide any of its services without a rail link. In contrast, the record in this proceeding demonstrates that the shipments at issue here could have been moved by truck or by intermodal operations.[53] Moreover, none of the Shippers closed their facilities during the embargo due to the lack of rail service.

The Shippers state that they incurred difficulty obtaining motor carrier transportation, even to the interim loading facility,[54] which may have affected profits. But unlike the situation presented in *Louisiana Railcar*, these difficulties were only an indirect result of the embargo, as motor carrier transportation was attainable. Moreover, in *Louisiana Railcar*, the ICC noted in awarding damages based on lost profits that in that case the claims were tied to past profits, and it saw "no reason to believe that the 4-year average of past profits [did] not

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[53] *See, e.g., Request for the Rehabilitation of the Arkansas Midland Railroad (Rehab. Request)* submitted by the Arkansas State Highway and Transportation Department to the Federal Railroad Administration in December 1992 at 22 ("Truck competition for [Gifford Hill's] business is intense, and Gifford Hill can and has switched a portion of their business to truck." "GS Roofing * * * ship[s] * * * granule and filler. This product is also very truck competitive, and in the past GS Roofing has shown a willingness to move 100% of the filler to truck when Union Pacific attempted to raise the price. Moreover, interviews with GS Roofing management indicate that derailment delays have forced the company to turn to truck service for those customers that require just-in-time service. As a result, GS Roofing has built a base of truck vendors they did not previously have. As that list grows and relationships are strengthened, it becomes easier and easier for GS Roofing to turn to that alternative.") The *Rehab. Request* is found at Complainants' Legal Argument Vol. 1, Exhibit 1.

[54] *See,* R.V.S. Smith at 3-4 ¶¶ 7-8.

reasonably reflect the business LRC could have anticipated if [the railroad] had met its common carrier obligations." *Louisiana Railcar*, 5 I.C.C.2d at 549. Here, however, there is no evidence on which we can independently verify the alleged amount of lost profits or determine whether the alleged lost profits were actually lost or only delayed.

More specifically, the evidence comparing the Shippers' performance before and during the embargoes is not well documented. For example, in regard to the alleged lost profits of the largest affected shipper, GS Roofing, the record is not clear as to whether GS Roofing's negotiations to sell roofing granules ripened into a contract before the imposition of the first embargo and thus whether rail service was needed at the time of the embargo. GS Roofing also noted that "winter is [its] lowest volume season,"[55] which is the season during which the embargo was in effect. Moreover, there is evidence in the record that GS Roofing moved as much as 25% of its shipments by truck and did not even use rail service during the time of the year that the embargo was in effect. With respect to GS Roofing's alleged inability to ship stone dust to a customer in Fontana, it should be noted that GS Roofing itself stated that [its] unique stone dust sales were delayed 18 weeks, not lost. These shipments began only after the customer "had [depleted] its inventory * * *" (which occurred in May, well after DRRC/CALM began operating).[56] Thus, there is no reliable evidence from which to conclude that GS Roofing profits were lost because of the embargo, or even if they were, at what levels they were lost.

As for Gifford-Hill, AMR presented evidence that Gifford-Hill's sales projections have often been overstated when compared to the company's actual sales. Additionally, traffic to Gifford-Hill was affected by the embargo for only a little more than a month, and no credible evidence of actual lost business to that shipper was produced.

Under these circumstances, we conclude that the Shippers (in particular GS Roofing and Gifford-Hill) have not carried their burden of proof concerning the amount of lost profits. Nor have the Shippers demonstrated that the lack of rail service alone was the sole cause for any lost sales. Therefore, consistent with the agency's normal practice, we will not accept the lost profit claims.

2. *Professional Fees and Other Miscellaneous Expenses, Including Attorney Fees.* Awarding "professional fees" (and associated or miscellaneous expenses), including attorney fees involved in obtaining the service order that ended the

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[55] R.V.S. Smith at 3 ¶ 7.
[56] *See,* R.V.S. Smith at 4 ¶ 9.

embargo, or litigating the feeder line case in the circumstances presented here, would be contrary to agency practice.[57] The ICC consistently rejected awarding attorney fees unless specifically authorized by statute. *See, Webb; Crosby.* The Shippers rely on *Meeker v. Lehigh Valley R. Co.,* 236 U.S. 412 (1915), which they claim holds that carriers must pay for attorney fees for litigating complaints before the ICC regarding a carrier's duty to provide service. However, that case turned on a statutory requirement for the reimbursement of attorney fees, which has been repealed. The Shippers further argue that attorney fees may be recovered when they are incurred to mitigate damages. But the cases they rely on, *Women's Federal Sav. and Loan v. Nevada Nat. Bank*, 607 F. Supp. 1129, 1135-6 (D. Nev. 1985), *rev'd on other grounds*, 811 F.2d 1255 (9th Cir. 1987), and *American Fed. Of Mus. v. Reno's Riverside Hotel, Inc*., 86 Nev. 695, 475 P.2d 220, 222 (1970), were decided under Nevada state law and thus are not controlling. Furthermore, it would not be appropriate to award "professional fees" related to obtaining the service order where, as here, AMR promptly agreed to the provision of service by DRRC/CALM and then ETC and forwent monetary compensation except for the 3 miles of trackage rights over the southernmost portion of the line. Accordingly, we will not award damages based on these claims.

3. *Costs Associated With Alternative Shipping Methods and the Interim Transloading Facility*. We will, however, award damages based on the cost differentials for obtaining alternative transportation and the cost of construction for the interim transloading facility.[58] These costs appear to have been incurred as a direct result of the lack of rail service on portions of the Norman Branch from December 24, 1994, until April 15, 1994. Accordingly, they constitute appropriate damages under the court's decision in *GS Roofing*. Although, as defendants' claim, the documentation for some of these costs is not complete, the claims are nonetheless reasonable, based on what the parties presented to us, because they are supported by witnesses with personal knowledge that the

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[57] The Shippers state on rebuttal that they do not seek attorney fees incurred in litigating the damages case.

[58] The Shippers have rebutted AMR's claim that GS Roofing continued to use the interim transloading facility past the time that DRRC/CALM assumed responsibility for rail operations. The Shippers' witnesses explain that GS Roofing did not spend any money on the transloading facility after DRRC/CALM began operations, although some invoices may have been paid after that time. Rebuttal V.S. Smith, Tab L at 5-6 ¶¶ 11-12.

expenses were incurred.[59] Moreover, the Shippers explain that back-up documents that support the Shippers' calculations regarding truck movements were made available for inspection by defendants at the Shippers' offices, but defendants never availed themselves of the opportunity to examine all the documents. The railroads also failed to raise any issues with respect to access to documents during discovery conducted by the ICC's Office of Hearings in 1994. In these circumstances, we will accept the Shippers' figures.[60]

Limiting damages to the costs of construction of the interim terminal ($143,571.62) and of freight differentials for shipments that actually moved between December 24th and April 15th (evidently $48,992.88) results in total damages of $192,564.50, plus interest. These damages are limited to Bean Lumber, to which AMR is directed to remit $121,247.60, plus interest, and GS Roofing, to which AMR is directed to remit $71,316.90, plus interest.

4. *Interest.* Interest will accrue from the date of payment of each part of each shipper's particular damages, until the date of payment by AMR of damages found due in this decision. Interest will be based on the 91-day Treasury Bill Equivalent yield for the quarter during which each payment was made. The 91-day Treasury Bill Equivalent yield is published by the U.S. Department of the Treasury in the Treasury Bulletin. Interest shall be calculated pursuant to the procedures outline at 49 CFR 1141.1(a)(2) and 1141.1(b)(2). The Shippers shall calculate the interest due and provide AMR with their calculations within 15 days from May 5, 2000, the service date of this decision. Within 30 days after the effective date of this decision, AMR shall remit to GS Roofing and Bean Lumber payment of the damages and interest as set forth in this decision.

D. *AMR/Pinsly Relationship.*

1. *The Parties' Arguments.* Finally, the Shippers argue that Pinsly is the alter ego of AMR and therefore also is liable for the damages we are awarding. The Shippers allege that AMR has no real managerial, operational or financial independence from Pinsly. They point out that M. P. Silver is President and

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[59] In response to defendants' criticism of the truck rate differential for GS Roofing's shipments to Shreveport, Mr. Smith adjusted the claim downward from $88,000 to $33,337.88. Rebuttal V.S. Smith, Tab L at ¶¶ 14-15.

[60] We note that the Shippers' documentation is not always specific as to the date the costs were incurred. Our intent is to award damages only for the costs incurred from December 24, 1993, until April 15, 1994. We ask the parties themselves to adjust the final amount of damages owed if some of what we have included encompassed costs incurred before December 24th or after April 15th.

Treasurer of both AMR and Pinsly and a director in both companies; that John Levine is Vice President and Secretary of both companies and a director of both AMR and Pinsly; and that Marc R. Levine, Robert B. Smith, and Louis L. Lederman are each directors in both companies. The Shippers allege that Pinsly was directly involved in and approved the decision to issue the embargo and to seek abandonment authority instead of making repairs to reinstitute service on the northern portion of the line. While the Shippers acknowledge that the ICC previously denied a request to pierce the corporate veil between AMR and Pinsly in *Acquisition,*[61] the Shippers claim that, based on their new evidence, we now should treat AMR as Pinsly's alter ego.

Specifically, the Shippers state that, in *Acquisition*, the ICC found that Pinsly's financial commitments were limited to permissible start-up costs. The Shippers maintain that Pinsly's financial involvement with AMR actually is significantly greater, alleging that between February 21, 1992, and May 15, 1994: no AMR check was ever cut at any Arkansas facility; AMR checks were signed by officers of Pinsly in Massachusetts; all purchase orders exceeding $600 were approved and issued in Massachusetts; AMR had no financial or accounting personnel in Arkansas; and pricing arrangements with UP were negotiated by Pinsly, not AMR. The Shippers allege that Pinsly made capital infusions into AMR of almost $1.2 million between 1992 and 1994. They also claim that Pinsly maintained total operational control of AMR.[62]

In response, the railroads argue that Pinsly and AMR are independent corporations whose separate identities should not be disregarded, citing *Acquisition* at 3-4. They note that the new evidence offered by the Shippers to support piercing the corporate veil consists of statements of former AMR employees, all but one of whom were subsequently employed by DRRC/CALM. The railroads suggest that the testimony of these people may be compromised by their past experience with AMR. They reject the idea that because Mr. Levine, a vice president, secretary, and director in both corporations, prefers to work

[61] *Arkansas Midland Railroad Company, Inc. — Acquisition and Operation Exemption — Missouri Pacific Railroad Company*, Finance Docket No. 31999 (ICC served December 13, 1993) (*Acquisition*).

[62] Pinsly's control allegedly included: approval to hire personnel except for common laborers, frequent telephone calls to Pinsly officials by AMR officials, and involvement in AMR's marketing policies. The Shippers distinguish cases where the courts refused to pierce the corporate veil, noting that in *United States v. Elgin, J. & E. Ry.*, 298 U.S. 492, 495 (1936), the two companies had separate directors, separately owned all necessary equipment, made their own contracts, managed their own finances, and served their own patrons.

from Pinsly's Massachusetts offices, he cannot be considered local management for AMR.

Defendants rely on *Schenley Corp. v. United States*, 326 U.S. 432, 437 (1946), where the Supreme Court established a general proscription against piercing the corporate veil:[63]

> While corporate entities may be disregarded where they are made the implement for avoiding a clear legislative purpose, they will not be disregarded where those in control have deliberately adopted the corporate form in order to secure its advantages and where no violence to the legislative purpose is done by treating the corporate entity as a separate legal person.

The railroads point out that the Shippers have not alleged that AMR was formed for the purpose of evading the common carrier obligation of section 11101. They also note that the ICC based its refusal to pierce the corporate veil in *Acquisition* on "the insulation which the subsidiary [AMR] provides to the parent [Pinsly] and other members of the commonly controlled system from the financial risks of the new enterprise." *Acquisition,* at 3. The railroads argue that this insulation is sufficient reason for a corporation to form a subsidiary such as AMR, citing *Southeastern Rail Corp. — Acquisition and Operation Exemption — Gulf and Mississippi Railroad Corp.*, Finance Docket No. 31187 (ICC served August 31, 1989).

Sharing common officers and directors and even close control by the parent of its subsidiary does not warrant piercing the corporate veil, defendants argue, citing *Chesapeake and Albemarle Railroad Company, Inc. — Lease, Acquisition, and Operation Exemption — Southern Railway Company*, Finance Docket No. 31617, *et al.* (ICC served September 19, 1991). The railroads, while admitting the close relationship between Pinsly and AMR, explain that AMR conducts sufficiently independent operations and that its general manager makes daily management decisions, submitting as evidence numerous letters from Mr. Hunter to the Shippers. The railroads also point out that Pinsly controls 5 other railroads, as well as AMR, and state that the cases cited by the Shippers rest on the finding that the formation of the subsidiary was for the purposeful evasion of a statute, which, the railroads maintain, is not the case here.

2. *Our Conclusions.* The Board, like the ICC, does not ordinarily dictate the corporate structure under which railroads must be organized, and we will only

[63] The cases relied on by the Shippers, *Chicago, M., St.P. Ry. v. Minn. Civic Assn.*, 247 U.S. 490 (1918), and *United States v. Reading Co.*, 253 U.S. 26, 35 (1920), were decided long before *Schenley*.

disregard corporate structure in very limited circumstances, *i.e.*, if there were no legitimate financial reasons for the subsidiary or other corporate entity to be formed. *See, e.g., Schenley*, 326 U.S. at 437; *Railway Labor Exec. Ass'n v. ICC*, 999 F.2d 574 (D.C. Cir. 1993); *Railway Labor Exec. Ass'n v. ICC,* 914 F.2d 276 (D.C. Cir. 1990), *cert. denied*, 499 U.S. 959 (1991); *Railway Labor Exec. Ass'n v. United States*, 791 F.2d 994, 1006 (2d Cir. 1986); *Acquisition* at 3-4.

To determine whether to disregard corporate identities, the ICC developed and applied a so-called "alter ego" test focused on whether (1) the subsidiary was created to purchase the line for legitimate and substantial business reasons (*e.g.*, insulation from financial risk, preservation of service, or time constraints) and not solely to avoid regulatory requirements and (2) the dealings between the two companies were "at arms length and there [was] evidence of 'indicia of independence' of the subsidiary" and its parent or affiliated carriers. *New England Central Railroad, Inc. — Acquisition and Operation — Lines Between East Alburgh, VT and New London, CT*, Finance Docket No. 32432 (ICC served December 9, 1994), *aff'd sub nom. Brotherhood of R.R. Signalmen v. ICC,* 63 F.3d 638 (7th Cir. 1995), *reh'g denied*, September 12, 1995. The Board now uses the "alter ego" test. *Mountain Laurel Railroad Company — Acquisition and Operation Exemption — Consolidated Rail Corporation*, Finance Docket No. 31974 (STB served May 15, 1998).

The ICC already applied this "alter ego" test to AMR in *Acquisition*, and found that AMR was created for "substantial business reasons." *Acquisition* at 4. The Shippers have offered more documentation to support their claims of lack of independence by AMR's management. Moreover, they have shown that Pinsly contributes more than just start-up costs to AMR. But the evidence fails to establish that AMR is Pinsly's alter ego, that AMR was created for the purpose of avoiding Pinsly's statutory obligations, or that there are no legitimate business reasons for the corporate structure chosen. Because AMR thus is sufficiently independent of Pinsly, we reaffirm the ICC's decision in *Acquisition* not to pierce the corporate veil. Accordingly, we hold AMR solely accountable for the payment of the damages that we have awarded.

## SUMMARY

On the basis of the record that the parties compiled, we have established the appropriate purchase price for the Norman Branch; we have set compensation for trackage rights; and we have calculated appropriate damages.

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

*It is ordered*:

*In Finance Docket No. 32479:*

1. The feeder line application is granted.

2. The Shippers must notify the Board and AMR by May 22, 2000, whether they accept or reject our determination.

3. The purchase price of the Norman Branch is set at $961,096.24. The sale is subject to the labor protection condition voluntarily undertaken by the Shippers and the other terms of sale set forth in the *August 1999 Decision*.

*In Finance Docket No. 32625:*

1. The stay entered on December 23, 1996, is vacated, and the June 3 and September 5, 1996, decisions are reinstated, with the modifications described above.

2. DRRC/CALM is directed to pay AMR a total of $31,416 in compensation for using the 3.13-mile southernmost portion of AMR's Norman Branch from June 1994 through August 1995.

3. Within 15 days after the effective date of this decision, AMR shall provide its calculation of interest as set forth in this decision to DRRC/CALM. DRRC/CALM must pay the total amount due (including interest, but reducing any payments by DRRC/ CALM under *Service Order No. 1516*) to AMR by July 5, 2000.

4. Compensation for any additional trackage rights operations performed by DRRC/CALM and subsequently by ETC over the southern portion of the line can be sought (including interest).

*In Docket No. 41230:*

1. Within 15 days after the effective date of this decision, GS Roofing and Bean Lumber shall provide their calculation of interest as set forth in this decision to AMR.

2. AMR shall remit to GS Roofing and to Bean Lumber the damages and interest as set forth in this decision by July 5, 2000.

3. This decision is effective on June 4, 2000.

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.