

SERVICE DATE – MAY 3, 2021

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1296X

R. J. CORMAN RAILROAD PROPERTY, LLC—ABANDONMENT EXEMPTION—
IN SCOTT, CAMPBELL, AND ANDERSON COUNTIES, TENN.

Digest:¹ The Board denies a petition for reconsideration of its decision denying an appeal of an earlier decision rejecting an offer of financial assistance.

Decided: April 30, 2021

Arkansas-Oklahoma Railroad Co. (AOK), a Class III rail carrier, filed a petition for reconsideration of R. J. Corman Railroad Property—Abandonment Exemption—in Scott, Campbell, & Anderson Counties, Tenn. (Appeal Order), AB 1296X (STB served Sept. 23, 2020) (with Board Member Oberman dissenting).² In that decision, the Board denied the appeal of an earlier decision that rejected an offer of financial assistance (OFA) filed by AOK. For the reasons stated below, the Board will deny the petition for reconsideration.

BACKGROUND

R. J. Corman Railroad Property, LLC (RJC Railroad Property), filed a verified notice of exemption under 49 C.F.R. part 1152 subpart F—Exempt Abandonments to abandon a railroad line extending from milepost 0.95 at or near Oneida, Tenn., to the end of the line at milepost 42.0 at or near Devonia, Tenn., a distance of approximately 41.05 miles in Scott, Campbell, and Anderson Counties, Tenn. (the Line).³ Notice of the exemption was served and published in the

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol’y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

² AOK was joined on its petition for reconsideration by the North East Tennessee Railroad Authority (NETRA), which had earlier also filed what it captioned as an appeal. Whether NETRA had standing to file an appeal was a matter of dispute. In the Appeal Order, AB 1296X, slip op. at 2 n.3, the Board found that it need not resolve the standing issue for purposes of that decision, as it addressed NETRA’s arguments and evidence in any event. Likewise, the issue of NETRA’s standing to seek reconsideration need not be resolved here, as the petition was filed jointly with AOK. Accordingly, this decision will refer only to AOK as the filing party.

³ The verified notice also embraced Docket No. AB 875 (Sub-No. 1X), R. J. Corman Railroad Company/Bardstown Line—Discontinuance Exemption—in Scott, Campbell, &

Federal Register on March 9, 2020 (85 Fed. Reg. 13,696). By decision and notice of interim trail use or abandonment (NITU) served on April 17, 2020, the proceeding was reopened and a one-year period was authorized for the Tennessee Citizens for Wilderness Planning, Inc., and Cumberland Trail Conference, Inc. (collectively, Trail Sponsors), to negotiate with RJC Railroad Property for acquisition of the Line for use as a trail under the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d), and 49 C.F.R. § 1152.29.

Thereafter, AOK sought and received two extensions of the deadline to file an OFA, and on June 23, 2020, AOK filed an OFA to purchase the Line. On June 26, 2020, the Director of the Office of Proceedings (Director) rejected an OFA to purchase the Line filed by AOK. R. J. Corman R.R. Prop.—Aban. Exemption—in Scott, Campbell, & Anderson Cntys., Tenn. (Director Order), AB 1296X (STB served June 26, 2020). The Director held, based on the totality of the circumstances, that AOK failed to make the requisite showing that there is a continued need for rail service on the Line.

AOK filed an appeal of the Director Order on June 29, 2020, which was denied by the Board in the Appeal Order. The Board concluded that the Director made the correct decision—given the circumstances presented—in rejecting AOK’s OFA for failing to show a continued need for rail service on the Line and found that the evidence presented by AOK was generalized, speculative, and unsupported. See Appeal Order, AB 1296X, slip op. at 4-5. The Board also noted that, after the Director Order was served, NETRA submitted material, including a letter from Straight Fork Forest Management LLC (Straight Fork), and asked that the Board consider it. Additionally, also after the Director Order was served, IRAIL Car Services, LLC (IRAIL) submitted public and confidential versions of its own letter. Appeal Order, AB 1296X, slip op. at 2. Both IRAIL and Straight Fork claimed interest in shipping on the Line. Id. at 5-6. The Board found that, even if it were to consider the late-filed evidence, it would still conclude that AOK had failed to demonstrate a continued need for rail service on the Line. Id.

AOK filed a petition under 49 C.F.R. § 1115.3(a) for reconsideration of the Appeal Order on October 13, 2020.⁴ (Pet. for Recons. 1.) Specifically, AOK claims that it “can establish ‘the prior action involves material error’ based on the dissent issued in the [Appeal Order]” because “the dissent provides how AOK and NETRA have demonstrated ‘a continued need for rail service on the [Line].’” (Id. at 9.) AOK also claims to have new evidence that cures the identified deficiencies concerning IRAIL and Straight Fork and shows that there is a continued need for rail service on the Line. (Id. at 9-10.) As support, AOK provides letters from IRAIL, Columbia Forest Products (CFP), Frank Miller Lumber Company, Inc. (FM Lumber), as well as

Anderson Counties, Tenn., in which R. J. Corman Railroad Company/Bardstown Line sought an exemption to discontinue service over the Line.

⁴ On October 5, 2020, AOK filed a petition under 49 C.F.R. § 1115.3(f) to stay the Appeal Order pending resolution of its petition for reconsideration. (Pet. for Stay 4-8.) AOK subsequently filed a request seeking Board-sponsored mediation. In a decision served on December 1, 2020, the Board denied AOK’s petition for a stay but granted its request for Board-sponsored mediation. R. J. Corman R.R. Prop.—Aban. Exemption—in Scott, Campbell, & Anderson Cntys., Tenn., AB 1296X, slip op. at 3-5 (STB served Dec. 1, 2020). In a letter filed on February 22, 2021, the mediators informed the Board that mediation was unsuccessful.

a new entity expressing interest in shipping on the Line, Great Lakes Grain & Transportation, LLC (GLGT). (*Id.* at 10.) AOK also notes that NETRA and the Tennessee Department of Transportation have invested approximately \$1.7 million in the Line since 2008 to continue rail service, (*id.* at 7, 11, 14), and that the area is economically distressed, citing a letter from the Tennessee Department of Economic and Community Development, (*id.* at 13-14). AOK asserts that “[i]t would be inherently wrong now to allow this Line to be abandoned and allow RJC Railroad Property to scavenge the Line for its ‘harvestables,’” and that, “[i]n those circumstances, the Board has a statutory obligation to preserve and promote rail service over the Line by granting this [p]etition [for reconsideration].” (*Id.* at 14.)

On October 21, 2020, RJC Railroad Property filed a reply opposing AOK’s petition for reconsideration asserting, among other things, that it “failed to establish the [Appeal Order] will be affected materially because of new evidence or substantially changed circumstances, or that the [Appeal Order] involves material error.” (RJC R.R. Prop. Reply 2, Oct. 21, 2020.) In particular, RJC Railroad Property argues that AOK’s newly submitted evidence should be stricken from the record because AOK has failed “to explain why that evidence was not previously adduced,” (*id.* at 4 (citing 49 C.F.R. § 1115.3(c))), and that the evidence is not material in any event, (*id.* at 5). Additionally, RJC Railroad Property argues that AOK’s reliance on the dissent to the Appeal Order to support its claim of material error is misplaced because AOK’s argument is, effectively, that the Board should have weighed the evidence before it differently—that is, as AOK and the dissent did—and that, “[w]ithout question, such an argument does not constitute material error.” (*Id.* at 2-3.)

On October 22, 2020, U.S. Representative Charles J. Fleischmann filed a letter expressing his support for preserving the Line by allowing AOK to purchase it from RJC Railroad Property. (Rep. Fleischmann Letter 1.) On November 6, 2020, the Mayor of Scott County filed a letter in support of preserving the Line for freight rail service. (Scott Cnty. Letter 1.)

On December 11, 2020, Trail Sponsors jointly filed a letter “promoting the idea that the rail line being proposed for abandonment . . . might be developed as a biking and hiking trail” and questioning whether “a rail car storage facility constitute[s a] continuation of rail service.” (Trail Sponsors Letter 1, Dec. 11, 2020.) On March 1, 2021, U.S. Representative Tim Burchett filed in support of AOK’s plan to reopen the main line for freight service. (Rep. Burchett Letter 1.)⁵

⁵ On February 18, 2021, the Mayor of Anderson County, Terry Frank, filed a letter questioning whether a branch line authorized for construction in 1921 by the Interstate Commerce Commission, the Board’s predecessor, was ever properly abandoned, and asserting that, if it was not, that line would be cut off from the interstate rail system if the Line in this proceeding is abandoned. (Frank Letter 1, 2.) RJC Railroad Property responded to Mayor Frank’s letter on February 23, 2021, asserting, among other things, that it never sought or received authority over the branch line, that the branch line was likely abandoned decades ago, and that, if it was not abandoned, it has likely been out of use since before 1960. (RJC R.R. Prop. Reply 2-4, Feb. 23, 2021.) In raising questions about the branch line, Mayor Frank has not asked the Board to reopen the abandonment exemption granted for the Line in this proceeding or

On April 7, 2021, Trail Sponsors filed a request for a one-year extension of the negotiating period for the NITU imposed in the April 17, 2020 decision. (Trail Sponsors Mot. for Extension 1.) RJC Railroad Property responded the same day, asking that the extension be granted. (RJC R.R. Prop. Reply 1, Apr. 7, 2021.)

DISCUSSION AND CONCLUSIONS

A party may seek reconsideration of a Board decision by submitting a timely petition that (1) presents new evidence or substantially changed circumstances that would materially affect the prior decision; or (2) demonstrates material error in the prior decision. 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.3. “New evidence must be newly available. Reconsideration is not warranted if the pertinent evidence was available before the agency’s decision but was not timely raised.” Denver & Rio Grande Ry. Hist. Found.—Pet. for Declaratory Order, FD 35496, slip op. at 4 (STB served Mar. 24, 2015) (citing Friends of Sierra R.R. v. ICC, 881 F.2d 663, 667 (9th Cir. 1989)). Similarly, a petition for reconsideration may not be based on a “new argument that could have and should have been presented in the earlier stages of the proceeding.” Consumers Energy Co. v. CSX Transp., Inc., NOR 42142, slip op. at 24 n.29 (STB served Aug. 2, 2018) (citing Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry., 7 S.T.B. 803, 804 (2004)). “Nothing in the statute or the Board’s regulations obliges the agency to rethink its decisions whenever a party wishes to try out a new theory or finds new information at a late stage in the process.” Tex. Mun. Power Agency, 7 S.T.B. at 805 (citing Conn. Trust for Historic Pres. v. ICC, 841 F.2d 479, 484 (2d Cir. 1988)).⁶ In a petition alleging material error, a party must do more than simply make a general allegation; it must substantiate its claim of material error. See Canadian Pac. Ry.—Control—Dakota, Minn. & E. R.R., FD 35081, slip op. at 4 (STB served May 7, 2009). Moreover, no matter which type of reconsideration claim is presented (new evidence, changed circumstances, or material error), the alleged grounds must be sufficient to convince the Board that its prior decision in the case would be materially affected in order for reconsideration to be granted. See Montezuma Grain Co. v. STB, 339 F.3d 535, 541-42 (7th Cir. 2003); Canadian Nat’l Ry.—Control—EJ&E W. Co., FD 35087 (Sub-No. 8), slip op. at 4 (STB served Dec. 21, 2018).

As discussed below, AOK has neither shown material error in the Appeal Order nor has it presented new evidence that would materially affect the Appeal Order. Accordingly, AOK’s petition will be denied.

Material Error. AOK argues that the Board committed material error “based on the dissent” to the Appeal Order, stating that “the dissent provides how AOK and NETRA have demonstrated ‘a continued need for rail service on the line.’” (Pet. for Recons. 9.) AOK appears

made any arguments under the Board’s reopening (or other) standards. See, e.g., 49 U.S.C. § 1322(c); 49 C.F.R. § 1152.25(e)(4).

⁶ See also New Eng. Cent. R.R.—Trackage Rights Order—Pan Am S. LLC, FD 35842, slip op. at 5 (STB served Apr. 26, 2018) (“[T]he cases establishing that the Board will not consider arguments or evidence that should have been submitted at an earlier stage . . . apply to any materials that could and should have been presented prior to reconsideration, regardless of whether the petitioner alleges new evidence, changed circumstances, or material error.”).

to argue that the Board materially erred by weighing the evidence concerning the alleged need for continued rail service differently than did the dissenter. However, the Board denied AOK's appeal after careful review of the evidence presented at that time, and summarily asking the Board to reweigh the evidence is not sufficient to justify overturning the decision under review. See Canadian Pac. Ry., FD 35081, slip op. at 4.

Additionally, AOK argues that the Board erred in the Appeal Order because it failed to meet its statutory duty to preserve and promote continued rail service. (Pet. for Recons. 12.) It notes that the continuation of service is the goal of 49 U.S.C. § 10904 and that the policy objective of the Board's OFA process is to promote that statutory purpose. See Redmond-Issaquah R.R. Pres. Ass'n v. STB, 223 F.3d 1057, 1061 (9th Cir. 2000). AOK also points to New York Cross Harbor Railroad v. STB, 374 F.3d 1177, 1187 (D.C. Cir. 2004), where the court reversed the grant of an application under 49 U.S.C. § 10903 seeking adverse abandonment authority on the basis that the carrier was actively operating on the subject tracks and numerous active shippers would have lost access to rail service. (Pet. for Recons. 12.) AOK adds that the Board "is required to 'consider whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development.'" (Pet. for Recons. 13 (quoting § 10903(d))).

These arguments concerning § 10903 are misplaced, as they both focus on the underlying issue of abandonment, while here, AOK has not challenged RJC Railroad Property's qualification for the Board's class exemption for abandonment of a rail line.⁷ And even had AOK sought to challenge the underlying abandonment, there is no question that RJC Railroad Property's transaction qualifies for the abandonment class exemption. Thus, the provisions of § 10903(d) have no bearing on the issue before the Board,⁸ which is a narrow one: whether

⁷ As explained in the Board's regulations, this exemption from 49 U.S.C. § 10903 applies to lines over which no local traffic has moved for at least two years and overhead traffic, if any, could be rerouted over other lines. 49 C.F.R. § 1152.50(b). As further explained in the regulations, the Board has found that "its prior review and approval of these abandonments and discontinuances is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101" and that "these transactions are of limited scope and continued regulation is unnecessary to protect shippers from abuse of market power." 49 C.F.R. § 1152.50(c).

⁸ Although AOK has not argued that the abandonment does not qualify for the 49 C.F.R. § 1152.50 exemption from the provisions of 49 U.S.C. § 10903(d), the Board notes that the record contains differing assessments as to the speculated impacts of abandonment. (Compare Pet. for Recons. 13-14 (stating that "[t]he loss of the Line, which was in past years the leading economic engine for this region, will have a long-term effect on all efforts to strengthen" and lift the region out of economic distress) with RJC R.R. Prop. Reply 9, Oct. 21, 2020 ("[T]here was only ever one shipper on the Line—the coal mine—it was the *coal mine*, not the Line that was the leading economic engine for the region. As the coal mine has been closed for more than seven years, and there [] are no current or potential shippers on the Line, it is simply not true that removal of the Line will negatively impact the economic status of these counties. Moreover, the Line is in a rural, forested area, which essentially follows the winding New River until the Line dead ends at the now closed coal mine. While quite scenic, that characteristic does not lend itself to commercial developments in which commodities are shipped or received."))

AOK has met the standard to reconsider the Board’s prior decision affirming that AOK had not made a sufficient showing to proceed with the OFA process under § 10904. Moreover, contrary to AOK’s assertion, in the Appeal Order the Board did not fail to recognize the policy underlying the OFA process; indeed, the Board carefully reviewed the record on the very issue central to that policy: the continued need for rail service. The Board’s ultimate conclusion that the record failed to show a need for continued rail service sufficient to justify permitting the OFA process to continue does not mean the Board failed to consider the relevant policy. For these reasons, the Board finds no material error warranting reconsideration of the Appeal Order.

New Evidence. AOK argues that it “can show ‘[t]he prior action will be affected materially because of new evidence or changed circumstances’” based on newly presented information and arguments concerning IRAIL, Straight Fork, GLGT, and the economic investment in the Line.⁹ (Pet. for Recons. 9-11.) In response, RJC Railroad Property asserts that the additional filings should not be accepted as new evidence “[a]bsent an explanation why [the] evidence was not previously adduced,” as required under 49 C.F.R. § 1115.3(c). (RJC R.R. Prop. Reply 4, Oct. 21, 2020.) RJC Railroad Property argues that the only explanation offered for why the new evidence was not submitted earlier—because “it is not clear what evidence is needed”—is not credible because the “Board has not applied a new standard for demonstrating a continued need for rail service.” (Id.)

The Board finds that the newly presented information does not constitute “new evidence” that would materially affect the result in the Appeal Order. As explained above, “new evidence” must be evidence that was not reasonably available to the party when the record was previously developed. See Friends of Sierra R.R., 881 F.2d at 667. AOK suggests that the Board has instituted some sort of new evidentiary standard and that the OFA regulations are unclear. However, the Board’s regulations do provide that any OFA must “[d]emonstrate that there is a continued need for rail service on the line, or portion of the line, in question,” 49 C.F.R. § 1152.27(c)(1)(iv)(E), and the Board has explained that “an offeror is likely to have a more difficult time showing a continued need for service over a line where there has not been service in at least two years.” Offers of Financial Assistance, EP 729, slip op. at 14-15 (STB served June 29, 2017). Given the inherent challenge here—where there has not been service on the Line for more than seven years—it was foreseeable that specific evidence¹⁰ would be needed to

⁹ Although AOK introduces its argument as based on “new evidence or changed circumstances[.]” its claim appears to be based exclusively on new evidence. (See Pet. for Recons. 9-10.) AOK has offered no argument that the surrounding circumstances have materially changed since the Appeal Order.

¹⁰ For example, IRAIL states that it “did not give a direct letter of support” at the time AOK submitted the OFA because it was “under the impression that this was not immediately needed as [its] intent with regard to expanding [its] business was referenced” in NETRA’s comment supporting the OFA. (IRAIL Letter 2, July 2, 2020.) NETRA’s representation of IRAIL’s intent did not name IRAIL, but simply stated that “AOK also has secured a company wanting to set up a car repair business on the Line.” (NETRA Comment 3, June 23, 2020.) At the time the OFA was submitted, it was foreseeable that more specific evidence would be needed to substantiate a continued need for service on the Line than NETRA’s passing reference to an unnamed car repair company and later speculation from IRAIL, a company without relevant

demonstrate a continued need for service on the Line. See also Offers of Financial Assistance, EP 729, slip op. at 14-15 (evidence of the “continued need for rail service” must be both “specific and concrete”). AOK had an opportunity to submit such evidence in its OFA as well as the opportunity to litigate the sufficiency of such evidence on appeal, and granting AOK’s petition for reconsideration and permitting the OFA process to proceed on the basis of evidence that could have been submitted earlier would be extraordinary and unjustified.

First, AOK attaches a letter from IRAIL to bolster its claim about the continued need for service on the Line.¹¹ However, the evidence in the letter could have been provided earlier. Based on IRAIL’s admission that, at the time of its first filing, it had “been in active discussions with AOK representatives for a couple of months,” its service projections should have been reasonably available when the record was previously developed. (IRAIL Letter 2, July 2, 2020.)¹²

Second, AOK provides with its petition for reconsideration letters from two entities—CFP and FM Lumber¹³—in an attempt to demonstrate that Straight Fork has taken concrete steps to explore shipping by rail. AOK, however, makes no attempt to show how the information in either letter could not have been adduced earlier. See Denver & Rio Grande, FD 35496, slip op. at 4 (reconsideration not warranted if evidence was available before the agency’s decision but not timely raised). Moreover, neither letter would mandate a different result. The letters from CFP and FM Lumber (addressed to NETRA) attest to their ability to receive shipments by rail but do not support AOK’s claim that “these parties have seriously discussed the use of rail between them.” (See Pet. for Recons. 10.) Nor does the record support the petition’s statement that “*Straight Fork* can demonstrate it has taken these concrete steps,” as the petition is not from Straight Fork, there is no letter from Straight Fork, and both the CFP and FM Lumber letters

storage contracts or a facility on the Line. (See Pet. for Recons., IRAIL Letter 1.) See, e.g., Montezuma Grain Co., 339 F.3d at 541 (describing projections about future rail traffic from a company that had not reactivated its grain elevator and lacked a facility on the subject line as “highly speculative”).

¹¹ Although the letter is dated June 29, 2020 (months prior to the Board’s issuance of the Appeal Order), the Board assumes that this was typographical error, as the letter itself discusses the Appeal Order.

¹² The Board also notes that IRAIL admits that it does “not currently have storage contracts, nor [has it] purchased land and constructed a repair facility” on the Line. (Pet. for Recons., IRAIL Letter 1.) See, e.g., Mid-Mich. R.R.—Aban. Exemption—in Kent, Ionia, & Montcalm Cntys., Mich., AB 364 (Sub-No. 14X), slip op. at 3 (STB served Sept. 26, 2008) (describing a projected increase in rail use over a line that had not moved traffic in two years as “speculative at best” where, among other things, the potential shipper was negotiating for a warehouse facility but had “made no commitment to ship freight over the line”).

¹³ In its July 6, 2020 comment, NETRA submitted a letter from Straight Fork referring to CFP and FM Lumber as clients in the region. (NETRA Comment, Straight Fork Letter 1, July 6, 2020.)

were a response to an apparent request from NETRA, not Straight Fork, for confirmation that they have access to rail service.¹⁴

Third, AOK provides a letter dated October 12, 2020, addressed to NETRA from GLGT—an entity mentioned for the first time in AOK’s petition for reconsideration. In that letter, GLGT states that “[i]n recent months, we have been engaged in discussions with representatives of [AOK] regarding our desire to locate a transload facility” on the Line. (Pet. for Recons., GLGT Letter 1.) AOK’s petition states that GLGT “has been in discussions with AOK about locating a transload facility on the Line,” (*id.* at 10), but it is not clear that this evidence is “newly available,” *see Denver & Rio Grande*, FD 35496, slip op. at 4. Even if it were, however, GLGT’s rail traffic projections are speculative as they lack supporting documentation.

Finally, the fact that \$1.7 million in grant funding has been spent on rehabilitation and maintenance of the Line since 2008 is not new evidence, as it could have been raised prior to reconsideration. Moreover, it is not self-evident (and AOK has not explained) how those expenditures have created (or would create) a demand for freight rail service when no traffic has moved over the Line during the entirety of the cited investment period.

For the reasons discussed above, AOK has neither shown material error nor presented new evidence that would mandate a result different from the Appeal Order. Therefore, AOK’s petition for reconsideration will be denied.

Because the OFA process is concluded, it is appropriate to consider the Trail Sponsors’ request for a one-year extension of the NITU negotiating period. The request complies with the requirements of 49 C.F.R. § 1152.29¹⁵ and RJC Railroad Property consents to negotiate.¹⁶ Therefore, the request will be granted, and the negotiating period extended until April 17, 2022.

It is ordered:

1. AOK’s petition for reconsideration is denied.

¹⁴ Moreover, as RJC Railroad Property points out, Straight Fork “is not physically located on the Line” and does not utilize the Norfolk Southern Railway Company line that is near it—facts which AOK has not contested. (RJC R.R. Prop. Reply 5, Oct. 21, 2020; *see also* RJC R.R. Prop. Reply 7, July 9, 2020.)

¹⁵ Effective February 2, 2020, the Board modified its rules regarding the number and duration of, and standard for granting, extensions of the NITU negotiating period (as well as the duration of the initial NITU negotiating period). *See Limiting Extensions of Trail Use Negotiating Periods*, EP 749 (Sub-No. 1) et al. (STB served Dec. 4, 2019).

¹⁶ Where, as here, the carrier has not consummated the abandonment and is willing to continue trail use negotiations, the Board retains jurisdiction and the NITU negotiating period may be extended. *See Rail Abans.—Use of Rights-of-Way as Trails—Supplemental Trails Act Procedures*, 4 I.C.C.2d 152, 157-58 (1987); *see also Birt v. STB*, 90 F.3d 580, 588-90 (D.C. Cir. 1996); *Grantwood Vill. v. Mo. Pac. R.R.*, 95 F.3d 654, 659 (8th Cir. 1996).

2. The Trail Sponsors' request to extend the NITU negotiating period is granted, and the NITU negotiating period is extended until April 17, 2022.

3. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, Oberman, Primus, and Schultz. Board Member Oberman dissented with a separate expression.

BOARD MEMBER OBERMAN, dissenting:

I respectfully dissent from today's decision (Reconsideration Decision) denying reconsideration of R. J. Corman Railroad Property—Abandonment Exemption—in Scott, Campbell, & Anderson Counties, Tenn. (Appeal Order), AB 1296X (STB served September 23, 2020). In my view, the majority in the Appeal Order committed material error in concluding that AOK failed to demonstrate a continued need for rail service on the Line, "even if" evidence submitted after service of the Director Order were considered. Appeal Order, AB 1296X, slip op. at 5. As explained in my dissent to the Appeal Order, the Board should have considered that evidence when assessing whether AOK demonstrated a continued need for rail service on the Line. This was because application of the standard under 49 C.F.R. § 1152.27(c)(1)(iv)(E) was a matter of first impression before the Board, and the text of the regulation and discussion within the decision adopting it, particularly when considered together, are ambiguous and could have understandably led AOK to believe that evidence of community support alone would be sufficient to meet the standard.¹ Appeal Order, AB 1296X, slip op. at 8 (Board Member Oberman dissenting). More importantly, when considering all of the evidence in the record at the time of the Appeal Order, AOK had demonstrated a continued need for rail service. Id. at 13 (Board Member Oberman dissenting). The majority's error in finding otherwise was material because, from there, it concluded that AOK's OFA should not proceed in this case and it denied AOK's appeal. Id. at 6; see also, e.g., Vill. of Barrington, Ill. v. STB, 892 F.3d 252, 267 (7th Cir. 2018) (asking whether the error mandates a different result). I would have granted AOK's appeal and allowed its OFA to proceed, and accordingly, I would grant reconsideration today.²

¹ The majority in today's decision contends that "it was foreseeable" that evidence more specific than that initially submitted in support of AOK's OFA would be needed to substantiate a continued need for service on the Line. Recons. Decision 6-7 & n.10. I disagree for the reasons given above and in my prior dissent. Appeal Order, AB 1296X, slip op. at 8 (Board Member Oberman dissenting).

² It is unclear to me whether arguments that quote heavily from a dissent, as do certain of AOK's arguments for material error (Pet. for Recons. 4-7, 9), may be properly characterized as having been made "summarily," as does the majority here. Recons. Decision 5. Notably, the petitioner seeking reconsideration in Canadian Pacific Railway—Control—Dakota, Minnesota, & Eastern Railroad, FD 35081 (STB served May 7, 2009), cited by the majority in today's decision, did not rely upon a dissent. In any event, while the Board could be justified in denying a reconsideration petition that fails to "state in detail the nature of and reasons for the relief requested," as required under 49 C.F.R. § 1115.3(c), I do not feel bound by the descriptiveness of

The evidence submitted in support of reconsideration—which includes additional information from IRAIL regarding its business plans for the Line, statements from companies that receive timber from Straight Fork attesting to their ability to accept shipments by rail, information regarding a potential transloading facility to be located on the Line, and material on significant rehabilitation and maintenance expenditures spent on the Line since 2008—confirms the conclusions I previously reached that there is a sufficient need for rail service on the Line and that the public interest would strongly favor allowing the OFA process to proceed. (See Pet. for Recons. 7-11.) The majority’s description of this newly presented evidence as irrelevant and/or speculative, which is unnecessary given its finding that the evidence is not “newly available,” strikes me as a continuation of the unjustifiably high burden imposed by the majority in the Appeal Order on offerors for out-of-service lines, and a further moving of the “goal posts” on what those offerors must show to demonstrate a continued need for rail service.³ See Recons. Decision 6-8; Appeal Order, AB 1296X, slip op. at 11-13 (Board Member Oberman dissenting).

For the foregoing reasons, I respectfully dissent.

AOK’s pleading, or lack thereof, where I already found material error in the Appeal Order. The statute at 49 U.S.C. § 1322(c) allows the Board to grant reconsideration “on its own initiative.” This would be so regardless of whether a petitioner pleads material error with the specificity required under the Board’s procedures.

³ Query whether it is sound as a broad policy matter for the Board to require virtually no hard evidence of a need for service when considering the transportation merits of a contentious new rail construction project, but to impose a nearly impossible standard upon one pursuing an opportunity to pay fair market value to keep an existing rail line in service. Compare Seven County Infrastructure Coalition—Rail Construction & Operation Exemption—in Utah, Carbon, Duchesne, and Uintah Counties, Utah, FD 36284, slip op. at 5-6 & n.8 (STB served Jan. 5, 2021) (preliminarily approving construction project despite lack of traffic volume projections while ignoring other evidence that cast significant doubt on long-term need) with Appeal Order, AB 1296X, slip op. at 5-6 (summarily dismissing substantial evidence of continued need as lacking “detail” or “speculative and unsupported”).