

SERVICE DATE – NOVEMBER 20, 2023

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36447

LAKE PROVIDENCE PORT COMMISSION—
FEEDER LINE APPLICATION—LINE OF DELTA SOUTHERN RAILROAD LOCATED IN
EAST CARROLL AND MADISON PARISHES, LA.

Digest:¹ This decision denies Delta Southern Railroad’s motion to reject the Lake Providence Port Commission’s amended feeder line application and terminate this proceeding. If Lake Providence Port Commission certifies by November 30, 2023, that certain filings have been served on all required entities, the Board anticipates promptly issuing a decision conditionally accepting the amended application, and discovery relating to valuation may proceed. The decision also denies two motions to supplement the amended application. Finally, an administrative law judge is assigned to address any discovery disputes.

Decided: November 19, 2023

This proceeding involves efforts by the Lake Providence Port Commission (LPPC or Applicant), a noncarrier political subdivision of the State of Louisiana, to acquire portions of the McGehee-Tallulah rail corridor owned by Delta Southern Railroad, Inc. (DSR), a Class III rail carrier, through a Board-ordered sale under 49 U.S.C. § 10907 and 49 C.F.R. part 1151. The initial application, in which LPPC sought to acquire only an inactive segment of DSR’s line, was accepted as complete and a procedural schedule was established in early 2021. DSR then pursued discovery to prepare its response to that application and, separately, moved to dismiss the proceeding.² This triggered numerous filings and led the Board to suspend the procedural schedule to address several filings and disputes. While the procedural schedule was suspended, and following an unsuccessful Board-ordered mediation, LPPC sought leave to file a supplemental feeder line application to acquire the entirety of DSR’s line. The Board granted that request, allowed LPPC to file a “full amended application,” and started the process for

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 DSR also sought to hold the case in abeyance while the discovery issues and motion to dismiss were resolved. Both motions were denied as moot, following a suspension of the procedural schedule to address discovery issues and an unsuccessful mediation, when the Board granted LPPC leave to file an amended application to acquire DSR’s entire line on the McGehee-Tallulah rail corridor.

considering the amended application anew under 49 C.F.R. § 1151.2. Lake Providence Port Comm’n—Feeder Line Appl.—Line of Delta S. R.R. Located in E. Carroll & Madison Parishes, La. (Aug. 2022 Decision), FD 36447 (STB served Aug. 23, 2022).³ LPPC filed an amended feeder line application on January 4, 2023.

This decision addresses issues relating to the completeness of the amended feeder line application, a motion by DSR to reject the amended application, and motions by LPPC to compel discovery and supplement the amended application. Additionally, the Board assigns an administrative law judge to address any future discovery disputes.

BACKGROUND

The McGehee-Tallulah railroad corridor (the Corridor) extends from milepost 408.9 in McGehee, Ark., where it connects with Union Pacific Railroad Company (UP), south to milepost 498.44 in Tallulah, La., where it connects with Canadian Pacific Kansas City Limited (CPKC). At issue in this case is the southernmost segment of the Corridor from milepost 471.0 at Lake Providence, La., south to the connection with CPKC at milepost 498.44 in Tallulah. This portion (referred to hereafter as the Lake Providence Branch Line or the Line) is owned and operated by DSR.⁴ DSR has used a 20-mile portion of its Lake Providence Branch Line (between milepost 471.0 and milepost 491.0) to store rail cars for several years; DSR operates active rail service over the rest of the Line, from milepost 491.0 (where industrial track of the Madison Parish Port connects to the Line) to the CPKC interchange at Tallulah.⁵

Ownership and operation of the rest of the Corridor north of DSR’s Lake Providence Branch Line are as follows: LPPC owns the segment between milepost 471.0 at Lake Providence and milepost 454.8 at or near the Louisiana/Arkansas border; Southeast Arkansas Economic Development District (SEAEDD), a noncarrier, owns the segment between milepost 454.8 and milepost 433.0 at Lake Village, Ark.; and the northernmost segment, from milepost 433.0 to milepost 408.9, is owned jointly by LPPC and North Louisiana & Arkansas Railroad, Inc. (NLA). NLA holds operating authority over these three segments of the Corridor. (See, e.g., Am. Appl. 1, 19-20, 56; accord id., Ex. B, Southeast Arkansas and Northeast Louisiana Multimodal Freight Corridor Improvement Project FY 19-20 INFRA Grant Application, at 5 Tbl. 1.)

³ Details relating to the Board’s disposition of issues involving the initial feeder line application are provided in the August 2022 Decision.

⁴ In Delta Southern Railroad—Acquisition & Operation Exemption—Delta Southern Railroad, FD 33802 (STB served Sept. 1, 2023), the 1999 notice of exemption for DSR’s acquisition was corrected nunc pro tunc to reflect that the southern terminus of DSR’s Lake Providence Branch Line is at milepost 498.44.

⁵ DSR also operates a second line from Monroe, La., to Sterlington, La. (the Monroe Branch Line), which it leases from UP. Aug. 2022 Decision, FD 36447, slip op. at 4 n.9 & 7 n.16; (see also Am. Appl., Ex. B, Infrastructure for Rebuilding America (INFRA) Grant Application, page 12).

LPPC states that an INFRA grant⁶ to restore the Corridor was awarded to SEAEDD on behalf of a public-private partnership composed of SEAEDD, LPPC, the Madison Parish Port Commission (MPPC), NLA, and DSR in July 2019, and that grant funds are to be used to reopen the entire Corridor. (See Am. Appl. 34-36; *id.*, Ex. I, V.S. Hargrove, paras. 2, 10-11.) Because DSR thereafter would not commit to rehabilitating the 20-mile portion of the Line between milepost 471.0 and milepost 491.0, LPPC (with the approval of SEAEDD, MPPC, and NLA) filed its original feeder line application in November 2020 to acquire that portion of the Line. (Am. Appl. 36-44.)

By decision served December 11, 2020, the Board found that LPPC's initial application (to acquire the inactive 20-mile portion of the Line for future operation by NLA) was substantially complete except for the absence of information pertaining to the net liquidation value (NLV). The Board conditionally accepted the application subject to LPPC's submission of an NLV estimate and supporting information by December 28, 2020. Lake Providence Port Comm'n—Feeder Line Appl.—Line of Delta S. R.R. Located in E. Carroll & Madison Parishes, La. (Dec. 2020 Decision), FD 36447, slip op. at 1-2 (STB served Dec. 11, 2020). By decision served January 15, 2021, the application was accepted as complete and a procedural schedule was adopted. However, numerous motions and other filings by NLA, LPPC, and DSR followed, which led the Board to suspend the procedural schedule given the then-impending deadline for submitting verified statements and comments on the application. Lake Providence Port Comm'n—Feeder Line Appl.—Line of Delta S. R.R. Located in E. Carroll & Madison Parishes, La., FD 36447, slip op. at 2 (STB served Mar. 9, 2021).

After the Board issued decisions that addressed various discovery and evidentiary issues and ordered mediation (which ultimately was unsuccessful), LPPC sought leave to file a supplemental application to acquire DSR's entire Lake Providence Branch Line. The Board granted LPPC's request for leave in the August 2022 Decision.⁷ See Aug. 2022 Decision, FD 36447, slip op. at 5. LPPC also requested the Board to require DSR to provide it with verified data to allow LPPC to prepare its valuation of the Line. (LPPC Mot. 15, Mar. 4, 2022.) The Board denied that request as premature. See Aug. 2022 Decision, FD 36447, slip op. at 7 (stating that discovery should be sought concurrently with the filing of the amended application as specified in 49 C.F.R. § 1151.2(d)).

On January 4, 2023, LPPC filed its amended application to acquire the entirety of DSR's Lake Providence Branch Line. The Line "extends between milepost[] 471.0 and

⁶ The U.S. Department of Transportation (DOT) awards "INFRA" grants under the "Nationally Significant Multimodal Freight & Highway Projects" program to multimodal freight and highway projects of national or regional significance to improve the safety, accessibility, efficiency, and reliability of the movement of freight and people in and across rural and urban areas. See www.transportation.gov/grants/infra-grant-program.

⁷ LPPC states that its decision to seek to acquire DSR's entire Lake Providence Branch Line (from milepost 471.0 all the way to the southern terminus in Tallulah) arose from information learned after the initial application was filed and concerns that DSR would continue to refuse to hold out interchange service with NLA at Lake Providence, La. (See generally Am. Appl., Ex. D, V.S. Gilfoil, paras. 33-35, 38, 40.)

milepost 498.44 and the ancillary spur track that extends to the point of interchange with KCS [now CPKC], as well as all other spur tracks between the foregoing mileposts,” including access to and from the Madison Parish Port at milepost 491.0. (Am. Appl. 55.) Accompanying the amended application, LPPC filed a set of discovery requests it served on DSR.

On January 13, 2023, DSR moved to reject the amended application as incomplete and terminate the proceeding (or, in the alternative, require LPPC to show cause why the proceeding should not be dismissed), to which LPPC responded on January 20, 2023. By decision served February 2, 2023, the Board waived the 30-day deadline under 49 C.F.R. § 1151.2(b) for issuing a decision on the completeness of the amended application in light of the substantive questions raised by DSR’s motion to reject and LPPC’s response. Lake Providence Port Comm’n—Feeder Line Appl.—Line of Delta S. R.R. Located in E. Carroll & Madison Parishes, La. (Feb. 2023 Decision), FD 36447, slip op. at 2 (STB served Feb. 2, 2023).

On February 9, 2023, LPPC moved to compel DSR’s production of discovery information, and DSR responded on February 28, 2023. LPPC moved on January 25, 2023, to supplement its amended application with a copy of a 2015 management agreement among the former owner of DSR, the company that formerly managed DSR’s rail operations, and certain executives;⁸ DSR responded on January 31, 2023. On July 10, 2023, LPPC filed a second motion to supplement the amended application, to which DSR responded on July 28, 2023.⁹

This decision addresses DSR’s motion to reject the amended application, LPPC’s motion to compel production, and both of LPPC’s motions to supplement. As discussed below, DSR’s motion to reject the amended application and terminate this proceeding will be denied. If LPPC files a certificate by November 30, 2023, stating that the specified filings have been served on all applicable entities listed in 49 C.F.R. § 1151.2(a), the Board anticipates promptly issuing a decision conditionally accepting the amended application, and LPPC’s request for discovery relating to valuation may move forward under the process specified below. The Board also will deny the motions to supplement the amended application and will assign an administrative law judge to address any discovery disputes.

⁸ On September 23, 2022, a consortium led by Patriot Rail Company LLC filed a verified notice of exemption in Docket No. FD 36642 to acquire control of DSR. The Board denied LPPC’s request to reject the notice, see Patriot Rail Co.—Control Exemption—Delta Southern Railroad, FD 36642 (STB served Dec. 20, 2022), and the exemption took effect on January 6, 2023. See Patriot Rail Co.—Control Exemption—Delta S. R.R., FD 36642 (STB served Dec. 23, 2022).

⁹ On September 7, 2023, a letter urging the Board to decide expeditiously whether the amended application is complete was filed by U.S. Representatives Bruce Westerman and Troy Carter. A similar letter was filed by U.S. Senators John Kennedy, Bill Cassidy, Tom Cotton, and John Boozman and U.S. Representatives Eric Crawford and Julia Letlow, on November 13, 2023.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 10907(b)(1) and 49 C.F.R. § 1151.1, the Board is authorized to require the sale of a rail line to a financially responsible person if the public convenience and necessity (PC&N) require or permit the sale.¹⁰ LPPC asserts that the proposed sale of the Lake Providence Branch Line satisfies the PC&N criteria specified at 49 U.S.C. § 10907(c)(1)(A)-(E), (Am. Appl. 60-67), and that LPPC is a financially responsible person that offers to buy the line at its constitutional minimum value as determined by the Board, (*id.* at 57-58).¹¹

A feeder line application must include the information set forth at 49 C.F.R. § 1151.3(a). Under 49 C.F.R. § 1151.2(b), the Board must accept a complete feeder line application or reject one that is incomplete within 30 days after the application is filed (unless it waives the regulatory deadline, which the Board did here). An application is complete if it has been properly served and contains substantially all the information required by § 1151.3, except as modified by

¹⁰ An application under the PC&N standard must contain “detailed evidence that permits the Board to find,” in accordance with 49 U.S.C. § 10907(c), all of the following:

(A) The rail carrier operating the line refused within a reasonable time to make the necessary efforts to provide adequate service to shippers who transport traffic over the line;

(B) The transportation over the line is inadequate for the majority of shippers who transport traffic over the line;

(C) The sale of the line will not have a significantly adverse financial effect on the rail carrier operating the line;

(D) The sale of the line will not have an adverse effect on the overall operational performance of the rail carrier operating the line; and

(E) The sale of the line will be likely to result in improved railroad transportation for shippers who transport traffic over the line.

49 C.F.R. § 1151.3(a)(11)(i).

A sale to a financially responsible person is also required if the line is designated in category 1 or 2 of the owning railroad’s system diagram map and the owning railroad has not filed an application to abandon the line. *See* 49 U.S.C. § 10907(b)(1)(A)(ii); 49 C.F.R. § 1151.1. However, LPPC’s pending application is not based on this criterion.

¹¹ As a governmental entity, LPPC is presumed to be financially responsible. *See* 49 C.F.R. § 1152.27(c)(1)(iv)(B); *Or. Int’l Port of Coos Bay—Feeder Line Appl.—Coos Bay Line of Cent. Or. & Pac. R.R.*, FD 35160, slip op. at 15 (STB served Oct. 31, 2008) (explaining that, although this presumption is located in the regulations in part 1152 relating to offers of financial assistance, “there is no logical basis to presume that governmental entities are financially responsible in one type of forced-sale proceeding, but not in another”). Moreover, the amended application states that LPPC will bear the entire cost of the acquisition and does not anticipate that any form of subsidization will be required. (Am. Appl. 59.)

advance waiver. 49 C.F.R. § 1151.2(b)(1). Notice of an acceptance must be published in the Federal Register and provide a procedural schedule for the proceeding. Id.¹²

DSR's Motion to Reject the Amended Application and Terminate the Proceeding.

DSR's motion centers on one of the five PC&N criteria specified in 49 U.S.C. § 10907(c)(1) and its implementing regulations: the need to provide evidence that would permit the Board to find that "transportation over the line is inadequate for the majority of shippers who transport traffic over the line." 49 C.F.R. § 1151.3(a)(11)(i)(B); (DSR Mot. 3¹³ & n.1, Jan. 13, 2023 (stating that the motion "largely focuses" on this criterion and that DSR "reserves the right to challenge LPPC's satisfaction of other elements of that regulation on the merits, but believes that LPPC's failure to meet the requirements of subpart (B) dooms the Amended Application as incomplete")). DSR claims that "LPPC has not provided any indication that transportation over the line is inadequate for a majority of shippers on the line" and that the amended application is "plainly incomplete." (DSR Mot. 9.) DSR also asserts that "STB precedent makes clear that a party seeking feeder line relief must provide information sufficient to calculate whether a majority of shippers on the line are receiving inadequate service," and contends that "LPPC does not meet this standard of specificity here." (Id. at 11.)

DSR's arguments that the amended application does not meet criterion (B) of the PC&N criteria are not persuasive. As an initial matter, DSR misdescribes the standard, which considers adequacy of service for the majority of shippers who transport traffic "over the line," see 49 C.F.R. § 1151.3(a)(11)(B), not just shippers located "on the line" (see Mot. 9, 11). As the cases cited by DSR make clear, this criterion thus takes into account both overhead shippers and shippers located on the line. See Or. Int'l Port of Coos Bay—Feeder Line Appl.—Coos Bay Line of Cent. Or. & Pac. R.R., FD 35160, slip op. at 6 (STB served Oct. 31, 2008) (discussing shippers "that have used the Line"); Keokuk Junction Ry.—Feeder Line Acquis.—Line of Toledo Peoria & W. Ry. Between La Harpe & Hollis, Ill., FD 34335, slip op. at 7 (STB served Oct. 28, 2004) (considering both on-line and overhead shippers). Moreover, as the Board has explained in past feeder line proceedings, it "looks to former, current, and potential shippers when examining this prong of the PC&N test." KCVN, LLC—Feeder Line Appl.—Line of V & S Ry., Located in Crowley, Pueblo, Otero, & Kiowa Cntys., Colo., FD 36005, slip op. at 10 (STB served July 31, 2017).

¹² The decision accepting or rejecting a feeder line application is usually issued by the Director of the Office of Proceedings. As discussed below, the Board finds it appropriate to conditionally accept this application if the certificate specified in 49 C.F.R. § 1151.3(a)(16) and the verification contemplated by § 1151.3(a) are provided, and will waive any provisions that could otherwise support rejection of the amended application at this point because those materials were not included in that filing. The Board may waive its regulations, see 49 C.F.R. § 1110.9, and has done so on its own motion in various contexts, including in this case. See Feb. 2023 Decision, FD 36447, slip op. at 2; Dec. 2020 Decision, FD 36447, slip op. at 5 n.15; see also BNSF Ry.—Terminal Trackage Rts.—Kan. City S. Ry., FD 32760 (Sub-No. 46), slip op. at 2 n.3 (STB served July 3, 2019) (citing additional examples).

¹³ Citations to DSR's motion are to the page numbers of the .pdf file submitted by DSR because the motion contains no page numbers.

DSR does not dispute LPPC's verified evidence—from shippers, the connecting carrier that interchanges with DSR at the northern end of the Line (NLA), and DSR's former general manager (Craig Huff)—describing multiple instances in which DSR has refused to accept cars at interchange or pursue business opportunities.¹⁴ Nor does DSR dispute Applicant's evidence and argument that freight rail service has been impeded over the inactive portion of the Line (between mileposts 471.0 and 491.0) since 2017 and that DSR's owners actively discouraged providing such service and resisted undertaking needed repairs so that DSR could instead use that portion of the Line for a car storage business.¹⁵ Applicant's evidentiary showing here is similar to the circumstances described in KCVN, LLC—Feeder Line, where the Board found, over opposition by the incumbent carrier, that the criterion specified in criterion (B) of the PC&N standard was met. See KCVN, LLC—Feeder Line, FD 36005, slip op. at 10-11 (stating that “Bartlett, a former and potential shipper, and KCVN, a potential shipper, clearly support the application” and “[a]pplicants also point to a number of other entities interested in a new carrier on the Line,” and noting that the record showed that the incumbent carrier had “undermined service and let track deteriorate to a condition that rendered the Line inadequate to meet Bartlett's transportation needs and serve other former and potential shippers”).¹⁶ Accord PSI Energy, Inc.—Feeder Line Dev.—Norfolk S. Corp. Line Between Cynthiana & Carol, Ind., 7 I.C.C. 2d 227, 231 n.13 (1991) (noting that “it can be argued that *no* service at all is, *a fortiori*, an inadequate level of service”).

More specifically, here the amended application indicates that shippers currently located on the Line are Complex Chemical Company, Inc. (Complex Chemical), Terral River Service, Inc. (Terral), and Hollybrook Warehouse, Inc. (Hollybrook). (See Am. Appl. 31-32, 48-49; id., Ex. N, V.S. Martin, paras. 4, 6.) These companies express dissatisfaction that their freight has not been and cannot be transported safely and reliably over the inactive portion of DSR's Line, which they state DSR has refused to maintain and uses for car storage. (See Am. Appl., Ex. L, V.S. Melton [Complex Chemical], paras. 3, 6, 7; id., Ex. N, V.S. Amacker [Hollybrook], paras. 4-6; id., Ex. N, V.S. Martin [Terral], paras. 4-6.) DSR maintains that the statements from these three on-line shippers cannot support a finding of service inadequacy, but its claims lack merit:

¹⁴ (See, e.g., Am. Appl., Ex. K, V.S. Bush [Bayou Bioenergy LLC (Bayou Bioenergy)], paras. 4-5; id., Ex. E, V.S. Angel [Epstein Gin Co. and Epstein Transloading (collectively, the Epstein Companies)], para. 7; id., Ex. N, V.S. Livingston [Livingston Pecan & Metal, Inc. (Livingston Metal)], paras. 4-5; id., Ex. J, V.S. Robbins [NLA], paras. 12, 30, 33; id., Ex. H, V.S. Huff, paras. 5-8, 15, 17.)

¹⁵ (See, e.g., Am. Appl. 57; id., Ex. D, V.S. Gilfoil, para. 38; id., Ex. J, V.S. Robbins, para. 30; id., Ex. H, V.S. Huff, paras. 4-5, 8, 15-16.)

¹⁶ The Board notes that this decision, unlike the decision in KCVN, LLC—Feeder Line, is not a determination on the merits that the PC&N criteria have been satisfied. See KCVN, LLC—Feeder Line, FD 36005, slip op. at 1, 8-12. Rather, it is a determination that the evidence submitted in LPPC's amended application is sufficient to support a threshold finding, for purposes of assessing the application's completeness after taking into account the claims and contentions in DSR's motion to reject, that the criteria have been met.

- DSR argues that Complex Chemical’s verified statement “does not and cannot claim inadequate service” because that would contradict an earlier statement submitted on November 12, 2020. (DSR Mot. 12, Jan. 13, 2023.) However, DSR fails to consider the possibility that circumstances may have changed since then. Moreover, it is not clear that there is a contradiction.¹⁷ In any event, any contradiction that does exist would go to the weight and credibility that should be afforded to Complex Chemical’s more recent statement in a proceeding on the merits of the amended application, following evidence and arguments that DSR will remain free to present. The Board finds no basis for rejecting Complex Chemical’s more recent statement here.
- According to DSR, Terral’s verified statement that it “*has interest in shipping cottonseed from Madison Parish Port to UP*” [and that it] “*will also consider moving inbound aggregate that originates on UP*” . . . is not even definitive enough to trigger the common carrier obligation of a railroad, much less to support a finding of inadequate rail service.” (DSR Mot. 14.) The Board disagrees. The evidence included with the application would permit a finding that, in 2017, DSR closed the interchange with NLA and blocked the Line north of the Madison Parish Port with stored rail cars. Under these circumstances, it is not necessary for Terral to have made a formal request for service over the impassable portion of the Line to conclude that Terral has sufficiently alleged inadequate service. (Am. App., Ex. N, V.S. Martin, para. 6 (claiming that DSR’s conduct has “continuously adversely impacted Terral’s operations”).)
- As for Hollybrook, DSR argues that the Board “should disregard all the discussions about activity or service on the line from the distant past,” including the statement of Hollybrook’s Robert Amacker, who “provides no facts more recent than 2016.” (DSR Mot. 12 n.3.) But Mr. Amacker’s statement also discusses the current intention of Hollybrook and others to use the Line in the future: “If the Line is fully upgraded and future rail service is reliable, Hollybrook and other entities in and around Lake Providence will reduce their forced reliance on trucking and once again make full use of rail service.” (Am. Appl., Ex. N, V.S. Amacker, para. 6.)

DSR also contends that the amended application fails to “consider all shippers that currently use the Southern Segment of DSR’s line to move traffic between the Madison Parish Port and the DSR-KCS interchange at Tallulah.” (DSR Mot. at 16 (quoting Aug. 2022 Decision, FD 36447,

¹⁷ The more recent statement focuses on Complex Chemical’s view of the economic adequacy of DSR’s service, (Am. Appl., Ex. L, V.S. Melton, paras. 3, 6 (because of DSR’s refusal to maintain the portion of its Line from milepost 471 to milepost 491, “Complex Chemical has been forced to utilize the much longer DSRR/ KCS/ UP routing at a much higher rate than the rate [formerly] paid for its DSRR/NLA/UP routing,” causing DSR’s service “to be inadequate from an economic standpoint”)), whereas the earlier statement appeared to consider adequacy from the standpoint of whether DSR was able to transport Complex Chemical’s traffic to where it had to go, (Appl., Ex. 8 (“DSR is providing adequate service but is troublesome at times due to the crossing being blocked excessively with switching of rental storage cars.”)).

slip op. at 6-7 n.15).) However, DSR does not identify any on-line shipper that LPPC failed to consider, which DSR—as the incumbent owner and operator of the Line—would be in the best position to do.

With respect to overhead shippers, DSR asserts that “LPPC cannot plead or establish that there is inadequate rail service to a majority of shippers who hold themselves out to transport traffic over the line” because “it is not true.” (DSR Mot. 9, Jan. 13, 2023.) However, DSR did not provide any details or submit a verified statement to substantiate this claim. In contrast, LPPC included in the amended application evidence that various shippers, in addition to the three located on the Line, were unable to transport traffic over the Line:

- In 2016, Bayou Bioenergy opened a facility in Lake Providence (north of the Line) but was forced to close in December 2019 because, as described in the verified statement of its former manager, it was unable to obtain adequate rail service from DSR. (Am. Appl., Ex. K, V.S. Bush, paras. 2, 5-7.)
- In 2019, Livingston Metal requested rates from NLA and DSR. Although NLA provided rates, it later advised that it could not follow through because DSR refused to upgrade the tracks to where it could reopen the interchange with NLA. (Am. Appl., Ex. N, V.S. Livingston, para. 4.) Livingston Metal’s “repeated efforts to haul scrap to KCS over the Lake Providence Line” have been unavailing due to DSR’s lack of interest in rehabilitating its entire Line, and because of this, Livingston Metal is required to transport its scrap movements by truck. (*Id.*, para. 5.)
- In 2019, Epstein Gin tendered 43 cars to NLA for movement via DSR to KCS. “Although NLA was ready, willing and able to move the cars,” DSR refused interchange because its “tracks between mileposts 471.0 and 491.0 could not accommodate the movement of the cars,” and because DSR “had approximately 200 cars stored on [the Line.]” (Am. Appl., Ex. E, V.S. Angel, para.7.)
- Also in 2019, the Lansing Trade Group (now the Anderson group) tried to send its crop south over DSR, but DSR advised that it could not take the cars. (Am. Appl., Ex. J, V.S. Robbins, para. 33.)¹⁸

With the exception of Bayou Bioenergy, which was forced to relocate, these shippers (and others) have expressed interest in shipping over the Line when it is restored.¹⁹ And, as

¹⁸ (See also Am. Appl., Ex. J, V.S. Robbins, paras. 12, 27-30, 33 (describing other instances of DSR’s refusal or inability to accept or interchange rail cars); *id.*, Ex. E, V.S. Angel, paras. 6, 8 (describing DSR’s continuing refusal “to take any steps to rebuild the segment of track that must be rebuilt before Epstein Gin can reach KCS”); *id.*, Ex. N, V.S. Livingston, paras. 4-5 (same).)

¹⁹ (See Am. Appl., Ex. E, V.S. Angel, paras. 3, 8; *id.*, Ex. L, V.S. Melton, paras. 3-7; *id.*, Ex. N, V.S. Martin, para. 6; *id.*, Ex. N, V.S. Amacker, para. 6; *id.*, Ex. N, V.S. Livingston

discussed above, the amended application presents evidence they have encountered inadequate service from DSR. At the same time, there is no indication in the present record that any on-line or overhead shipper currently considers DSR's service adequate. In these circumstances, the Board finds that a sufficient showing has been made, for purposes of assessing the completeness of the amended application, that transportation is inadequate for the majority of shippers who transport traffic over the line.

DSR also argues, in support of its motion to reject, that "much of the evidence submitted by LPPC is not from shippers." (DSR Mot. 13, Jan. 13, 2023 (citing the verified statement of DSR's former general manager (Huff), and statements filed on behalf of LPPC (Gilfoil), Madison Parish Port (Murphy), NLA (Robbins), and SEAEDD (Hargrove)).) However, the regulations for the Feeder Line Development Program under 49 C.F.R. part 1151 do not foreclose the submission or consideration of evidence from sources other than shippers. They simply state that the application must include information "in the form of verified statements." 49 C.F.R. § 1151.3. The Board also notes that the non-shipper verified statements LPPC has submitted are from appropriate sources and consistent with the verified statements provided by shippers.²⁰

Similarly, DSR's arguments that the statements fail to use the precise words "inadequate service," are not about "any recent time," and in many instances, "prove that service is adequate," (DSR Mot. 12, Jan. 13, 2023), lack merit.²¹ As described above, the verified statements provide details about specific ways in which DSR's service is allegedly inadequate for shippers who wish to transport traffic over the Line. The statements also express continuing concerns about DSR's ability to safely and reliably transport freight over the entirety of the Line and its interest in doing so. (See, e.g., Am. Appl., Ex. D, V.S. Gilfoil, paras. 38, 40; *id.*, Ex. N, V.S. Livingston, paras. 6-7; *id.*, Ex. N, V.S. Martin, para. 5.)

Finally, DSR points to the recent movement of one specialized rail car and the opening of a new transload facility near the southern end of the inactive segment of the Line as proof that

para. 5; *id.*, Ex. J, V.S. Robbins, para. 10 & Attach. 4 (described as "[a] list of customers that indicated they would ship by rail once the tracks were restored").)

²⁰ For example, MPPC's executive director, as well as two shippers, have provided descriptions of how DSR's storage of rail cars on the inactive section of the Line interferes with port operations and access to adequate rail service by the port's tenants. (See Am. Appl., Ex. G, V.S. Murphy, paras. 6, 12-13; *accord id.*, Ex. N, V.S. Martin, para. 4 (impact on Terral's operations at the Madison Parish Port); *id.*, Ex. L, V.S. Melton, para. 6 (stating that "the crossing at the entrance of the Port is blocked excessively when DSR is switching rental storage cars").) DSR's selective account of the verified statements disregards this evidence.

²¹ DSR's claim that "Mr. Angel [of Epstein Gin] states that moving his freight with [DSR] 'works,'" (DSR Mot. 13), misstates the record. Mr. Angel was describing the alternate routing that Epstein Gin is required to use because a segment of DSR's Line is impassable. That routing involves "NLA moving the cars 24.1 miles [north] to McGehee, where they are interchanged with UP. UP then moves the cars 95 miles to Monroe, Louisiana where it interchanges with KCS." (Am. Appl., Ex. E, V.S. Angel, para. 3.)

service is adequate. (DSR Mot. 12-13, Jan. 13, 2023.) But DSR does not explain how either of these developments address the problems and continuing concerns about inadequate service described in the amended application and its supporting verified statements. For example, DSR does not explain how the movement of one specialized low-center-of-gravity rail car will alleviate the concerns reflected in the record that the track requires significant rehabilitation to enable it to safely and reliably handle the traffic that would travel over the Line,²² or state that DSR will stop storing rail cars north of the new transload facility.

For the reasons discussed above, the Board finds the amended application complete with respect to criterion (B) of the PC&N criteria for purposes of commencing a proceeding under 49 C.F.R. § 1151.2(b)(1). However, the Board reiterates its earlier reminder that a finding of completeness (on this or other criteria pertaining to the contents of a feeder line application prescribed in § 1151.3) is not a ruling on the merits that a Board-ordered sale would be warranted. See Aug. 2022 Decision, FD 36447, slip op. at 5 n.12. Should the Board ultimately accept LPPC's amended application and institute a proceeding, DSR will be free to present additional evidence and argument relating to the claims in its motion to reject (and other claims bearing on the merits of the amended application), and the Board will issue a decision on the merits of the application when the record is complete. See PYCO Indus., Inc.—Feeder Line Acquis.—S. Plains Switching, Ltd., FD 34844 et al., slip op. at 8 (STB served July 3, 2006) (accepting the application but reserving judgment on the merits pending completion of the record).

DSR also contends that LPPC failed to address the impact of a forced sale of the Line on DSR's financial and operating performance (PC&N criteria (C) and (D)). (DSR Mot. 15, Jan. 13, 2023; see id. at 9.) However, the amended application does address these criteria. Specifically, it alleges that the sale of the Line would not have a significantly adverse financial effect on DSR because it would allow DSR to avoid the cost of rehabilitating its track reflected in its estimates provided to the U.S. DOT during the INFRA grant application process,²³ and that DSR will continue to retain the revenues derived from the financially successful operations over its Monroe Branch Line. (Am. Appl. 66.) Similarly, the amended application alleges that sale of the Lake Providence Branch Line would not adversely affect DSR's overall operational performance because it would relieve DSR of its statutory common carrier obligation with respect to the Line and allow DSR to focus on serving the shippers located on its Monroe Branch Line. (Id. (also stating that NLA will offer to hire any DSR operating employees displaced by the sale).) For purposes of determining completeness under § 1151.2(b)(1), LPPC has made a sufficient showing of these PC&N criteria. As DSR notes, (DSR Mot. 3 n.1, Jan. 13, 2023), and

²² Epstein Gin's Mr. Angel, for example, describes the hesitancy to take a chance that the unrestored track would be able to safely handle the high-center-of-gravity hopper cars used to transport cotton seed, a large majority of which are privately owned, "having experienced several expensive derailments attributed to [DSR's] deteriorated tracks." (Am. Appl., Ex. E, V.S. Angel, paras. 3, 4.) Terral's Mr. Martin expresses similar concerns. (Am. Appl., Ex. N, V.S. Martin, para. 6.)

²³ (Am. Appl. 66; see id. at 34 (stating that DSR's estimated cost of rehabilitating the Line between mileposts 471.0 and 491.0 to FRA Class 2 status was \$11,448,000 in the 2017-18 INFRA grant application); id., Ex. H, V.S. Huff, para. 14 (same).)

as Board precedent recognizes, DSR retains the right to challenge LPPC's satisfaction of these criteria on the merits. PYCO Indus., Inc.—Feeder Line, FD 34844 et al., slip op. at 7 (finding the applicant had made a sufficient showing that the proposed sale of the line in question would not adversely impact the incumbent, which the incumbent "is free to contest" as the case proceeds).

In view of these determinations, DSR's motion to reject the amended application and terminate this proceeding (or issue a show cause order as to why the Board should not terminate the proceeding) will be denied.

Completeness of the Amended Application and Certification of Service.

As a general matter, the Board finds that the amended application contains substantially all of the other information required by 49 C.F.R. § 1151.3(a), including information pertaining to criteria (A) and (E) of the PC&N criteria specified at § 1151.3(a)(11)(i). See supra note 10 (listing criteria). However, the amended application contains some information (apart from the PC&N criteria) that is not reflected in the accompanying verified statements,²⁴ and the amended application itself is not substantiated by a verification from an authorized LPPC representative. Accordingly, consistent with the specification in § 1151.3(a) that information be verified, Applicant will be required to submit a separate verification pertaining to the information contained in the amended application. LPPC is also directed to submit a copy of any contract with NLA pertaining to the Line.²⁵

Additionally, as discussed in the August 2022 Decision, because the amended application encompasses rail line that has been in ongoing use by shippers, the procedures specified in 49 C.F.R. § 1151.2 must be satisfied anew with respect to that application to comply with the

²⁴ (See, e.g., Am. Appl. 58 (offer to purchase under 49 CFR § 1151.3(a)(5)); id. at 59 (statements pertaining to preconditions under § 1151.3(a)(9) and subsidization under § 1151.3(a)(10)); id. at 68 (extent to which owning railroad's employees will be used).) Moreover, beyond the presumption that LPPC is financially responsible as a governmental entity (discussed above), LPPC asserts, in connection with the requirement at § 1151.3(a)(3), that it "has the ability to cover expenses associated with providing service over the line (including, but not limited to, operating costs, rents, and taxes) for at least the first three (3) years after acquisition of the line." (Am. Appl. 57.)

²⁵ The Board's decision conditionally accepting LPPC's original application (which was limited to the inactive segment of the Line) directed LPPC to submit a copy of any contract with NLA pertaining to that line as soon as the parties reached an agreement. Dec. 2020 Decision, FD 36447, slip op. at 6 n.17. On December 22, 2020, LPPC filed an executed copy of a lease agreement between LPPC and NLA that, as described by LPPC, "will govern the expected operation of the [l]ine" beginning as of the effective date of decisions authorizing LPPC's acquisition and NLA's lease and operation of the additional trackage. (LPPC Suppl. Evidence 6 & attached lease agreement [.pdf pages 246-60], Dec. 22, 2020.) LPPC filed an unredacted version of that agreement on December 28, 2020. Although the amended application states that LPPC "will extend the lease agreement with NLA to include the additional mileage," (Am. Appl. 56), a copy of the referenced agreement was not attached to the amended application.

regulations that govern the service and assessment for completeness of applications filed under 49 U.S.C. § 10907. The amended application, however, does not include the certificate of service specified in 49 C.F.R. § 1151.3(a)(16) or otherwise indicate that a copy was served on the entities listed in § 1151.2(a).

As provided in § 1151.2(b)(1), an application may not be deemed complete until it is “properly served”—which, in this case, has not been shown. To the extent it has not already done so, LPPC will be directed to serve on each of the entities specified under 49 C.F.R. § 1152.1(a): (1) a copy of the amended application, (2) a verification of the information included therein, (3) copies of all LPPC filings in this docket that post-date the amended application, and (4) any agreement between LPPC and NLA pertaining to the Line. LPPC will be directed to file with the Board, by November 30, 2023, a certification that the foregoing service has been accomplished, a copy of the verification referred to above, and any agreement between LPPC and NLA pertaining to the Line. Upon the Board’s timely receipt of those submissions, the Board anticipates promptly issuing a decision conditionally accepting the amended application, and LPPC’s request for discovery on valuation issues may move forward as discussed below.

LPPC’s Motion to Compel Discovery Regarding Valuation of the Line.

The amended application was accompanied by numerous discovery requests that, according to Applicant’s cover letter, are needed to enable LPPC to prepare a going concern value assessment of the Line based on DSR’s current revenues. (See LPPC Letter 1, Jan. 4, 2023.) On February 9, 2023, LPPC moved to compel DSR to respond to the requests, asserting that discovery is needed because DSR has refused to provide data exclusively within its personal knowledge that would allow LPPC to provide a determination of the Line’s constitutional minimum value. (LPPC Mot. 1, Feb. 9, 2023.) LPPC also noted that its request for discovery is consistent with the Board’s determination that an earlier request for this information was premature and that a request should instead be filed concurrently with the amended application. (*Id.* 1-2 (citing Aug. 2022 Decision, FD 36447, slip op. at 7).)

DSR responded to the motion to compel on February 28, 2023. DSR argues that discovery should be denied altogether because the amended application does not state that it is incomplete and LPPC did not provide justification for, or affirmatively request, the Board to determine that the accompanying discovery sought by LPPC is “necessary for the application and primarily or exclusively within the knowledge of the owning carrier.” (DSR Reply 5-6, Feb. 28, 2023.)²⁶ DSR also argues that accepting the amended application as complete while allowing LPPC to pursue valuation discovery would deprive DSR of due process by making its feeder line application a “moving target.” (*Id.* at 13-14.) Finally, DSR raises specific objections to LPPC’s various discovery requests.

²⁶ DSR also asserts that LPPC “unequivocally stated that the Amended Application ‘is complete’” in its response to DSR’s motion to reject. (DSR Reply 1 & n.1, Feb. 28, 2023.) However, as DSR acknowledges, the grounds on which DSR moved to reject the amended application as incomplete are “issues unrelated to constitutional minimum value.” (*Id.* at 1 n.1.) Reasonably construed, LPPC’s reply that the application “is complete” should be understood in that context—not as an acknowledgement that discovery on valuation was not needed.

DSR's blanket objections to any discovery misconstrue the applicable regulations²⁷ and misdescribe the related process. As DSR notes elsewhere in its reply (and LPPC does not dispute), under the process specified in § 1151.2(d), the application remains pending until complete, and only then is the notice published and a procedural schedule set for further proceedings. (DSR Reply 9, Feb. 28, 2023 (citing 49 C.F.R. § 1151.2(d)(3) and (4)).) Thus, under this process, discovery is completed and any modifications to the pending application deemed appropriate by the applicant are filed and served before notice of the application is published for comment by DSR or others.

The Board finds that LPPC's request for valuation discovery is necessary and appropriate. See PYCO Indus., Inc.—Feeder Line, FD 34844 et al., slip op. at 7 (allowing applicant to propound discovery requests that accompanied the application and to amend its valuations to reflect the responses it received from respondent railroads). Similarly, as LPPC explains here, it seeks discovery “that will allow L.E. Peabody, Inc., to verify or adjust its calculation of the constitutional minimum value” of the Line. (LPPC Mot. 5, Feb. 9, 2023.) This opportunity will be provided at the outset, which should help minimize or eliminate the need for LPPC to adjust its calculations later because it lacked access to DSR's internal valuation information. In other words, it will help address DSR's concern about the amended application, if accepted, becoming a “moving target.” Accordingly, the Board rejects DSR's blanket objections to any discovery by LPPC.

This leaves DSR's specific objections to LPPC's many individual discovery requests. Consistent with Board precedent and as suggested by DSR,²⁸ the parties will be directed to (i) meet and confer on the scope of discovery necessary for LPPC to develop a sound valuation assessment and (ii) report to the administrative law judge assigned below on any remaining disputes within 30 days after the service date of a decision conditionally accepting the amended application.

The Board has signed a Memorandum of Understanding with the Federal Mine Safety and Health Review Commission to employ the services of administrative law judges on a case-by-case basis to perform discrete, Board-assigned functions such as adjudicating discovery disputes in cases pending before the Board. The Board hereby assigns and authorizes Administrative Law Judge Thomas McCarthy to entertain and rule upon discovery matters and to resolve initially any disputes concerning discovery in this proceeding that are filed after the

²⁷ As pertinent here, the regulations state only that if an applicant “is unable to obtain required information that is primarily or exclusively within the personal knowledge of the owning carrier, the applicant may file an incomplete application if it files at the same time a request for discovery under 49 CFR part 1114 to obtain the needed information from the owning carrier.” 49 C.F.R. § 1151.2(d)(1).

²⁸ See Lake Providence Port Comm'n—Feeder Line Appl.—Line of Delta S. R.R. Located in E. Carroll & Madison Parishes, La., FD 36447, slip op. at 4 n.7 (STB served June 1, 2021) (citing cases endorsing meet and confer process); (DSR Reply to Mot. to Compel 16, Feb. 28, 2023 (requesting, if Board permitted discovery regarding valuation, that Board order the parties to meet and confer on the scope of necessary discovery and DSRR's other specific objections to specific requests).)

service date of this decision. The parties are directed to send copies of all their filings and documents in this proceeding that pertain to the amended application to Judge McCarthy at 1331 Pennsylvania Avenue, N.W., Suite 520N, Federal Mine Safety and Health Review Commission, Washington, DC 20004-1710, and at ctolbert@fmshrc.gov and cbrightwell@fmshrc.gov.

The parties are further directed to notify the Board upon DSR's completion of discovery to which the parties mutually agree or that is ordered by the administrative law judge. LPPC will have **45 days** from the date of that notice to file and serve revised valuation calculations and supporting evidence in its amended application, if desired (and shall file and serve notification if no changes are required).²⁹ Upon completion of this process and the described filings, notice of the amended feeder line application will be published in the Federal Register and a procedural schedule will be issued.

LPPC's Motions to Supplement.

The January 2023 Motion. On January 25, 2023, LPPC filed a motion to supplement the amended application with newly discovered evidence.³⁰ The evidence in question is a copy of a Management Agreement entered into by Continental Rail, LLC (Continental Rail) and West Branch Intermediate Holdings, LLC (West Branch) (as, respectively, the former manager of DSR's railroad operations and a former owner of DSR), together with the individuals identified as key management executives, following West Branch's purchase of all of the issued and outstanding shares of DSR's common stock in 2015. The motion to supplement states that the Management Agreement was filed in a case pending in the Court of Chancery of the State of Delaware, Continental Rail, LLC v. West Branch Intermediate Holdings, LLC, Case No. 2022-0040, and that the document was discovered by counsel on January 24, 2023. (LPPC Mot. 1-2, Jan. 25, 2023.) LPPC states that the document reflects the relationship between Continental Rail, West Branch, and Golden Gate Capital (or GGC, which, according to the motion, had "ultimate control" over DSR), as well as "relevant information regarding the independent nature of DSR's operations of the Sterlington Division and the Lake Providence Division." (*Id.* at 2 (citing Schedule III and Exhibit B of the Management Agreement).) LPPC also contends that the newly discovered evidence "is responsive to the Board's directive" that the amended application "must include all historical information known or reasonably available to LPPC in support of its case-in-chief for a Board-ordered sale." (*Id.* at 1 (citing Aug. 2022 Decision, slip op. at 8).)

DSR responded on January 31, 2023, asserting that the motion ignores the instruction in the August 2022 Decision that, "[t]o ensure the fair and orderly resolution of LPPC's feeder line request, LPPC must include in its amended application all of the arguments and evidence on which it will rely." (DSR Reply 1, Jan. 31, 2023 (citing Aug. 2022 Decision, FD 36447, slip op. at 7).) DSR also points out that the information provided is not new and that the record in the Delaware Chancery Court case does not show any documents having been filed in that proceeding since March 2022. (DSR Reply 1 (attaching current docket sheet), Jan. 31, 2023.)

²⁹ Service shall include the entities specified in 49 C.F.R. § 1152.1(a).

³⁰ LPPC filed an errata the next day correcting the date of the agreement referenced on page one of the motion to read "June 22, 2015" (rather than June 22, 2016).

LPPC has not explained why the court document attached to its motion to supplement was not reasonably available when LPPC filed its amended application on January 4, 2023, or how LPPC would be prejudiced if the document were not considered in an assessment of its case-in-chief. Therefore, this motion to supplement will be denied. If appropriate to respond to verified evidence or argument that DSR may present in any merits phase of this proceeding, LPPC may offer the document in question in its verified reply.

The July 2023 Motion. On July 10, 2023, LPCC filed a pleading styled “motion to file contemporaneous new evidence,” seeking to introduce evidence that DSRR’s alleged failure to maintain a 1.25-mile segment of the Line has resulted in two recent derailments and continuing negative impacts on rail operations. (LPPC Mot. 1-2, July 10, 2023.) DSR responded in opposition on July 28, 2023, claiming that the motion was both procedurally improper and factually inaccurate. LPPC filed a reply on August 7, 2023, and a supplement thereto on August 8, 2023, accompanied by verified statements addressing claimed misrepresentations in DSR’s July 28, 2023 response. DSR filed a reply to LPPC’s supplemental filings on August 18, 2023, to which LPPC responded on August 21, 2023.

The Board will deny LPPC’s July 10, 2023 motion to file contemporaneous new evidence and will disregard the claims and contentions in the pleadings and letters from DSR and LPPC that followed. The information described in the motion would not impact the Board’s assessment of the completeness of the amended feeder line application. Relatedly, information of this nature—as well as the subsequent verified statements LPPC filed to address claims made in DSR’s reply filings of July 28 and August 18, 2023—is more properly presented in an applicant’s consolidated verified reply to claims that are made in verified statements and comments submitted in the course of a proceeding on the merits. If this case proceeds to the merits phase, DSR will have an opportunity to submit verified evidence and argument regarding the merits of the amended feeder line application (under 49 C.F.R. § 1151.2(e)), and LPPC will have an opportunity to submit a verified reply to the claims that are made (under 49 C.F.R. § 1151.2(f)). Any relevant evidence or argument from these interim, unauthorized filings can be submitted at the appropriate times during that phase of the proceeding.

It is ordered:

1. DSR’s motion to reject LPPC’s amended feeder line application and terminate this proceeding is denied.
2. Any provisions of 49 C.F.R. part 1151 that could otherwise support rejection of the amended application at this point because a certificate of service and verification were not included in the filing are waived as discussed above.
3. If LPPC files and serves a certificate of service in compliance with 49 C.F.R. § 1151.2(a) and § 1151.3(a)(16), together with the described verification and any agreement between LPPC and NLA pertaining to the Line, by November 30, 2023, the Board anticipates issuing a decision conditionally accepting the amended application, and LPPC’s request for discovery relating to valuation may move forward and the case will proceed, as discussed above and specified below:

a. Within 30 days after the service date of a decision conditionally accepting the amended application, the parties shall (i) meet and confer on the scope of discovery necessary for LPPC to develop a sound valuation assessment and (ii) report to the administrative law judge on any remaining discovery disputes.

b. Any remaining discovery disputes reported by the parties, and any other discovery matters that may arise in this proceeding, are assigned to the administrative law judge for handling and initial resolution as discussed above and specified below.

c. The parties shall notify the Board in writing upon the completion of discovery relating to valuation to which the parties mutually agree or that is ordered by the administrative law judge. LPPC will have **45 days** from the date of that notice to file and serve revised valuation calculations and supporting evidence in its amended application, if desired (and shall file and serve notification if no changes are required). Upon the completion of this process and the described filings, notice of the amended feeder line application will be published in the Federal Register and a procedural schedule will be adopted.

4. LPPC's January 25, 2023 and July 10, 2023 motions to supplement are denied.

5. The Board hereby ratifies the loan of Administrative Law Judge Thomas McCarthy to the office of administrative law judge in the Surface Transportation Board, under terms and conditions prescribed in 5 U.S.C. § 3344 and 5 C.F.R. § 930.208, and the Board today approves his appointment as the Board's own action under the Constitution.

6. This proceeding is assigned to Judge McCarthy for the handling of all discovery matters and initial resolution of all discovery disputes.

7. In addition to filing pleadings with the Board and serving copies on parties of record, parties must send a copy of all filings and documents relating to the amended application, including submissions already filed with the Board, to Judge McCarthy at 1331 Pennsylvania Avenue, N.W., Suite 520N, Federal Mine Safety and Health Review Commission, Washington, DC 20004-1710, and at ctolbert@fmshrc.gov and cbrightwell@fmshrc.gov.

8. Judge McCarthy will be added to the service list in this proceeding and a copy of this decision will be served upon him.

9. A copy of this decision will be served on the U.S. Office of Personnel Management (OPM), at Human Resource Solutions, ALJ Program Office, 1900 E Street N.W., Suite 2469, Washington, DC 20415-9400 and electronically at karyn.lusby@opm.gov. Judge McCarthy shall send a copy of the notice or order that constitutes the final disposition of his assignment of this case to OPM at the above address.

10. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.