

39030
EB

SERVICE DATE – LATE RELEASE MAY 20, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-103 (Sub-No. 21X)

THE KANSAS CITY SOUTHERN RAILWAY COMPANY—ABANDONMENT EXEMPTION—LINE IN WARREN COUNTY, MS

Decided: May 20, 2008

BACKGROUND

By decision served February 22, 2008 (February 22 Decision), the Board set the terms and conditions under 49 U.S.C. 10904(f)(1) for Raymond B. English (English) and James Riffin (Riffin) (collectively, Offerors) to jointly purchase 1.9 miles of rail line (the Segment) and for Riffin individually to purchase an additional 2.35 miles of the same line (the Remainder) from The Kansas City Southern Railway Company (KCSR). The Segment extends from milepost 225.6 to milepost 227.5, and the Remainder from milepost 227.5 to milepost 229.85, in Vicksburg, Warren County, MS. The Board set the purchase price at \$376,320 for the Segment and at \$128,295 for the Remainder. Together the Segment and the Remainder comprise the Vicksburg Industrial Lead (sometimes referred to as the Line), the 4.25-mile rail line that KCSR seeks to abandon in this proceeding.

After the Offerors requested that the Board set the terms and conditions of the sales, but before the Board served the February 22 Decision setting the terms and conditions, the Offerors submitted evidence that a bridge on the Remainder, the Glass Road Bridge, was being dismantled. In a decision served February 6, 2008, the Board ordered KCSR to respond to the Offerors' allegations regarding removal of the bridge. On February 8, 2008, KCSR responded, explaining that an official of Warren County had ordered the bridge to be removed, but that, once KCSR became aware of that fact, one of its officials directed the County to cease its efforts to remove the bridge, which the County did. The Offerors requested that the Board order KCSR to restore the bridge to its condition prior to the actions of the County. KCSR argued that this would be inappropriate because Riffin had assigned no value to the bridge in his request to set terms and conditions.

In the February 22 Decision, in addition to setting the terms and conditions for the sales of the Segment and the Remainder, the Board set up a procedural schedule to address the partial dismantling of the Glass Road Bridge. The Board further provided that, if the terms and conditions were accepted for both the Segment and the Remainder, Riffin could then return to the Board with a request that we determine what compensation, if any, would be owed by KCSR

due to any increased costs of restoring service on the Remainder caused by the partial dismantling of the Glass Road Bridge during the pendency of the section 10904 proceeding.¹

On March 24, 2008, the Offerors indicated that they would accept the terms and conditions set in the February 22 Decision, and they requested compensation for the partial removal of the Glass Road Bridge (March 24 Request or request for compensation).² In his request for compensation, Riffin argues that, because other older bridges on the Line are in serviceable condition, except for a few deficiencies, the Glass Road Bridge was in all likelihood serviceable prior to Warren County's actions. Riffin also argues that it would cost \$237,610 to restore the bridge to a serviceable condition using some of the remains of the bridge that are salvageable and excluding the cost to place rails and cross ties on the bridge (as both parties have stipulated that these items were not present immediately prior to the partial dismantling). Riffin further requests that the Board deduct from the purchase price of the Remainder whatever increased costs it determines are due.

On April 11, 2008, Riffin filed a supplement to his March 24 Request, requesting \$6,940 in additional compensation, representing his costs of preparing the request, including professional fees, document reproduction costs, and courier fees. In a later filing, Riffin asserts that his litigation costs associated with filing the March 24 Request total \$11,451.50.

On April 14, 2008, KCSR filed a reply to Riffin's March 24 Request (April 14 Reply).³ KCSR makes two arguments disputing the Board's decision to set up a procedure for possibly compensating Riffin for the partial removal of the bridge. First, KCSR argues that, because the Board in its February 22 Decision set the constitutional minimum value for purchasing the Remainder, which assigned no specific value for the Glass Road Bridge, it would be an unconstitutional taking to require KCSR to compensate Riffin for the damage to the bridge. KCSR also argues that, because KCSR did not dismantle the bridge itself and did not authorize Warren County to do so, the Board cannot require KCSR to compensate Riffin for the damage. Regarding the damage to the Glass Road Bridge, KCSR argues that the bridge was unusable prior to Warren County's actions and, therefore, the Board should deny altogether Riffin's request for compensation. Alternatively, the railroad argues that, although the bridge was unusable prior to the partial dismantling, Riffin's increased costs to restore service to the

¹ By decision served February 28, 2008, the Board denied a motion by the Offerors to stay the March 3, 2008 acceptance deadline. On March 3, 2008, the Offerors filed an acceptance of the terms and conditions set by the Board in the February 22 Decision. However, the Offerors sought to include additional conditions, which the Board rejected by decision served March 20, 2008. In the same decision, the Offerors were given an additional 10 days to withdraw their offer.

² Although the Offerors filed the March 24 Request jointly, only Riffin has been authorized to acquire the Remainder through the offer of financial assistance (OFA) process. Therefore, from this point forward we will only refer to Riffin when discussing the Remainder and the Glass Road Bridge.

³ On April 15, 2008, KCSR supplemented its reply in minor respects.

Remainder would be \$19,277. Additionally, KCSR argues that, if Riffin is awarded any compensation, he should not be paid until he restores the bridge.

On April 22, 2008, the Offerors filed a response to KCSR's reply (April 22 Response). In addition to Riffin contesting KCSR's legal and factual assertions, the Offerors state that they would now like to purchase the entire Line jointly, and Riffin provides invoices for some of the costs he incurred in putting together the request for compensation. On April 25, 2008, KCSR filed a motion to strike in its entirety the Offerors' April 22 Response as a reply to a reply, prohibited under 49 CFR 1104.13(c). The Offerors in turn filed a reply to KCSR's motion to strike on April 29, 2008 (April 29 Reply), to which KCSR responded on the same date.

PRELIMINARY MATTERS

Motion to Strike. We will accept the April 22 Response and deny KCSR's motion to strike. As KCSR recognizes, the Board did not expressly provide for a response by Riffin regarding the Glass Road Bridge matter in the procedural schedule set forth in the February 22 Decision. Nevertheless, because of the unique situation regarding the Glass Road Bridge, and in the interest of fairness, we will accept the Offerors' April 22 Response. In light of our ruling on KCSR's motion to strike, however, the Offerors' April 29 Reply to KCSR's motion to strike and KCSR's response to the April 29 Reply will both be rejected as unnecessary.⁴

Request to Purchase Line Jointly. In the request for compensation, it appeared that both English and Riffin were jointly seeking compensation for the damage to the Glass Road Bridge, and it became clear in their April 22 Response that they intended to seek joint compensation. In their April 22 Response, the Offerors also state that Riffin has persuaded English to purchase the entire Line with Riffin as joint tenants and they offer to purchase the entire Line jointly. In its April 14 Reply, KCSR argues that only Riffin would be entitled to compensation because the Glass Road Bridge is located on the Remainder, the portion of the Line that Riffin has offered to purchase individually.

In the Offerors' request to set terms and conditions, filed January 25, 2008, the Offerors made their intentions clear: English and Riffin jointly offered to purchase the Segment, but only Riffin offered to purchase the Remainder. In its February 22 Decision, the Board set the terms and conditions for English and Riffin to jointly purchase the Segment portion of the Line, and for Riffin to individually purchase the Remainder, as requested in the Offerors' January 25, 2008 filing. While the Board's regulations provide for the substitution of a corporate affiliate, see 49 CFR 1152.27(i)(1), English and Riffin do not profess to be corporate affiliates. The Offerors have offered no argument for such a change, and we find no reasonable basis to change the terms

⁴ In its motion to strike, KCSR also requested that the Board close the record and instruct the Offerors, and any other parties allied to them, to refrain from filing further evidence or argument. Alternatively, KCSR argued that, if the Board accepts the Offerors' April 22 Response, it should permit KCSR to respond. In light of our procedural rulings in this case, we will not rule on these requests, as they are now moot.

of sale at this late date. Accordingly, only Riffin is authorized to purchase the Remainder, and any compensation for damage to the bridge will be awarded to Riffin only.

DISCUSSION AND CONCLUSIONS

Legality of the Glass Road Bridge Compensation Proceeding. KCSR objects to the proposition that Riffin may be entitled to compensation from KCSR for the damage to the Glass Road Bridge, as neither party (nor the Board) had placed a monetary value on the bridge prior to its partial dismantling. Accordingly, KCSR argues that any compensation awarded to Riffin would cause the purchase price of the Line to fall below the constitutional minimum value already set by the Board and, therefore, would be an unconstitutional taking under the Fifth Amendment to the United States Constitution. KCSR further objects on the basis that Warren County is solely responsible for any damage to the bridge and that KCSR neither participated in nor authorized the dismantling of the bridge.

The Fifth Amendment provides that private property shall not be taken for public use without just compensation. U.S. Const. amend. V; see Chi., Milwaukee, St. Paul & Pac. R.R. Co. v. United States, 799 F.2d 317, 324 (7th Cir. 1986). Under 49 U.S.C. 10907(b)(1), Congress has authorized the Board to order the sale of a rail line at the line's constitutional minimum value, which is presumed to be "not less than the net liquidation value [NLV] of such line or the going concern value of such line, whichever is greater," 49 U.S.C. 10907(b)(2). See R.R. Ventures, Inc. v. STB, 299 F.3d 523, 556 (6th Cir. 2002) (Railroad Ventures) (equating the constitutional minimum value standard under the feeder line provisions of 49 U.S.C. 10907 with the constitutional minimum value standard under the offer of financial assistance provisions of 49 U.S.C. 10904). In the February 22 Decision, the Board found that the Line has no going concern value, and therefore the Board valued the Line as if it were to be dismantled and taken out of service. Using this method to derive the constitutional minimum value of a line does not mean that a railroad can allow the general condition of a line to be altered during the pendency of the OFA process. As explained in the February 22 Decision, diminishing the rail assets during the pendency of the OFA process undermines that process because it could obstruct or impede the efforts of the offeror to provide rail service.

KCSR argues that the County's actions have not changed the value of the Glass Road Bridge. However, while the bridge had no positive net salvage value, it potentially had value in its utility—a fact KCSR concedes when it argues that the most economical way to restore service is to restore the bridge to its pre-dismantling condition, instead of constructing an entirely new bridge in its place. In short, requiring KCSR to compensate Riffin for the increase, if any, in bridge-restoration-related costs associated with the actions of Warren County does not affect, and is not related to, the net liquidation value of the Remainder.

Congress's purpose for enacting section 10904 is clear: rail service should be preserved when there is an offeror willing to provide that service. And it is well-settled that administrative agencies have inherent authority to protect the integrity of the regulatory processes that they are

charged with administering.⁵ To ensure that the goal of section 10904 is not undermined, the Board holds the abandoning railroad responsible for ensuring that a rail line that is the subject of an OFA remains in substantially the same condition it was in when the railroad filed for abandonment authority. See Railroad Ventures, 299 F.3d at 554. Not only does this policy ensure that the offeror knows what it is acquiring, but it also promotes rail service by ensuring that assets to be used in providing rail service—whether assigned a net salvage value or not—will remain available once the transaction is completed.

KCSR argues that it should not have to pay for damage to the bridge because it was not responsible for the actions that led to the damage. We nonetheless look to KCSR to bear responsibility for actions taken by third parties prior to completion of the OFA process. If KCSR believes Warren County is solely responsible for the dismantling of the bridge, it may pursue any legal remedies available to it.

Riffin's Request to Deduct Compensation From the Price of the Remainder. In an argument somewhat akin to KCSR's constitutional claim, Riffin asks that we deduct whatever sum we award here from the price he must pay to buy the Remainder. We reject that request for essentially the same reasons we find the award of payment to be constitutional.

Riffin's request proceeds from the assumption that the purchase price for the Remainder and the damage caused by the bridge removal are integrally related. As we have pointed out, however, they are not. The purchase price is based on NLV, i.e., the real estate value plus net salvage value. See Railroad Ventures, 299 F.3d at 557. The parties assigned a value of zero to the bridge, meaning that they assumed that the amount for which they could sell the bridge components would be no greater than the costs of removing them. Whether or not it would in fact cost more to restore service now that Warren County has removed portions of the bridge has no bearing on whether the salvage value of the remaining portions of the bridge has changed. Thus, the payment of the purchase price at closing is independent of the payment of compensation by KCSR.

The Bridge Analysis. As we have noted, our February 22 Decision assigned no value to the Glass Road Bridge, because it had no net salvage value. But that does not necessarily mean that damaging this asset would cause no harm to Riffin. While the bridge itself may have had no salvage value, its partial removal could, in theory, affect Riffin's cost of restoring service to the Remainder. If, for example, the bridge could have carried freight traffic—perhaps with some rehabilitation—before its partial dismantling, then the damage caused by its dismantling may have increased the cost of restoring service to the Remainder. On the other hand, if the bridge had been in such a dilapidated and dangerous condition that it would have needed to be

⁵ See ICC v. Am. Trucking Ass'ns, Inc., 467 U.S. 354, 364-65 (1984); In re Permian Basin Area Rate Cases, 390 U.S. 747, 780 (1968); Consolo v. FMC, 383 U.S. 607, 620-21 (1966); Railroad Ventures, Inc.—Abandonment Exemption—Between Youngstown, OH, and Darlington, PA, in Mahoning and Columbiana Counties, OH, and Beaver County, PA, STB Docket No. AB-556 (Sub-No. 2X), et al., slip op. at 12 (STB served Oct. 4, 2000), aff'd, Railroad Ventures, 299 F.3d 523 (6th Cir. 2002).

completely replaced before service could be restored, then its partial removal could have actually reduced the cost of restoring service to the Remainder (by allowing Riffin to avoid the cost of the removal). Thus, we asked KCSR and Riffin to establish the extent, if any, to which the partial removal of the bridge increased the cost of returning the Remainder to active service.

The most direct way to ascertain that change would have been to subtract the cost of restoring service to the Remainder before the bridge's dismantling from the cost of restoring service to the Remainder now. To know the cost of restoring service to the Remainder before the bridge's dismantling, one would need to know what condition the bridge was in before Warren County removed some of its components.

There is some evidence of the bridge's prior condition, but it is scant and difficult to evaluate. KCSR argues that the bridge was inoperable and needed to be completely replaced, and therefore no compensation should be due. But KCSR has not adequately supported that argument. It has not shown that the entirety of the bridge structure would need to be removed prior to restoration. In fact, KCSR would be unable to make such a showing, as its witness John Dunsworth testifies that the remaining bridge structure can be used as a base for rebuilding the bridge for future rail service.⁶ Additionally, Riffin provided testimony that, although the Glass Road Bridge had not been maintained for many years, it was actuarially near, but not at the end of, its useful life.⁷ And in the February 22 Decision, the parties were instructed to address how much more it would cost to return the Remainder to service as a result of Warren County's actions. In its response, KCSR has failed to show that the removal of bridge components did not increase the cost of returning the bridge to service.

Nor has Riffin proven his case. Riffin has estimated the cost of restoring the bridge at \$237,610, plus the cost of preparing his estimate. However, this amount is predicated on his unsubstantiated claim that the bridge was in "serviceable" condition—a term he does not define—in January 2008, when the Warren County road department partially dismantled the trestle. Moreover, Riffin seems to equate serviceable with "new" because he seeks compensation based on the cost of new construction with new materials.

Warren County did not partially dismantle a new bridge. The Glass Road Bridge was built in 1922. It was refurbished in 1966. The materials that Warren County dismantled were 42 years old. Moreover, it appears that rail service ceased on the line segment that ran over the bridge in 1986. KCSR performed no maintenance at all for the 15 years it owned the bridge, and the record does not show that any maintenance was performed after that portion of the line was taken out of service in 1986, the last year for which an inspection certificate is available. Thus, it appears that the bridge had received no maintenance in the more than two decades since then.

⁶ April 14 Reply, V.S. of Dunsworth, at 9-11.

⁷ Riffin's witness Niemeyer testified that the life expectancy of a timber trestle bridge would be in excess of 50 years. April 22 Response, V.S. of Niemeyer, at 2. Given the maintenance history of the bridge, even a generous estimated life expectancy of 60 years would mean that the bridge components, at age 42, were more than two-thirds through their useful life when dismantled by the County.

Riffin's arguments boil down to the claim that he is entitled to replacement value for the damaged sections of the bridge. We disagree. The standard for measuring loss we set out in our February 22 Decision is "the extent, if any, to which the partial removal of the bridge has increased the cost of returning the Remainder to active rail service." Bridges, like other rail assets, deteriorate over time. But for the actions of Warren County, Riffin would have acquired a 42-year old structure that had been neglected for the past 20 years. He is not entitled to compensation based on the cost of a new bridge.

The lack of maintenance is significant. Over time, hardware rusts (especially in the humid climate of southern Mississippi in a town located on the banks of a river), joints loosen, and fasteners weaken. This bridge spans Glass Road, over which trucks, other heavy vehicles, and automobiles have been driven daily for more than 40 years, causing vibrations that strain and loosen hardware. Joints that are not tightened begin to "work," rubbing and wearing against each other. This is a problem to which bridges over roads, as opposed to bridges over water courses, are especially susceptible.

Regular maintenance is always important, but especially so under these conditions. An important part of maintenance is detecting rust and replacing hardware as necessary. As to the Glass Road Bridge specifically, the record contains an email from a KCSR employee, Peter Goodman, dated September 20, 2005, noting that kudzu—a vine with large leaves that trap heat and moisture, thereby fostering rust, rot, and other deterioration—had "taken the bridge over." The record also contains a verified statement from Goodman to the effect that, at the time of his 2005 visit to the bridge, he observed that "the deck boards and ballast retainers on top of the trestle would all have to be replaced, and that new ties and ballast would be needed before KCSR could even consider making use of the structure."⁸ In addition, a letter to KCSR from Richard George, president of the Warren County Board of Supervisors, dated February 22, 2008, stated that "falling debris from the [Glass Road] trestle continues to be a problem and a safety hazard to approaching traffic."⁹ Debris falling from the bridge at a rate that constitutes a safety hazard to oncoming traffic strongly suggests a state of advanced deterioration.

Riffin bases his case on the testimony of four witnesses: Joe Buckley, Bobby Carpenter, Theodore Niemeyer, and Donald Steele (who simply estimated the labor and materials that would be needed to reconstruct the bridge according to Riffin's approach). However, the evidence of Riffin's witnesses—that two engineers who looked at photographs taken of the bridge material that had been left deemed it "serviceable" and "good" and that an experienced bridge repairman who examined the remaining structure deemed it "likely serviceable"—ignores the indisputable fact that the bridge is an antiquated structure, in an unforgiving environment, that had not been maintained for at least 20 years. And Riffin's evidence of the present condition of the other four bridges on the Line is not indicative of the condition of the Glass Road Bridge. Not only are Riffin's witnesses' descriptions of the other bridges vague and conclusory, but the described conditions vary greatly among the bridges. Moreover, Riffin's witnesses also state

⁸ April 14 Reply, V.S. of Goodman, at 3.

⁹ April 14 Reply, Exhibit G.

that three of the remaining four bridges—the three bridges on the Remainder—need repairs.¹⁰ It is noteworthy that Bobby Carpenter—the only engineer to have visited the bridge site—offers no opinion on the Glass Road Bridge’s condition. His only testimony is that his photographs “accurately depict the condition of the Bridge at the time the photographs were taken.”¹¹ He says nothing about what that condition might be.¹²

The first step in most accurately determining the amount by which the partial removal of the bridge has increased the cost of returning the Remainder to active rail service would be to provide direct evidence regarding the condition of the bridge at the time KCSR initiated this abandonment proceeding. Because neither party has been able to establish that fact with any degree of accuracy, we will need to use a surrogate to resolve this issue indirectly, based on the parties’ evidence as to what it would cost now to return the Glass Road Bridge to a condition similar to its prior condition by repairing the damage done.

KCSR estimates the cost of restoration at \$19,277, plus the unstated value of used materials that the railroad proposes to offer Riffin in lieu of new materials Riffin proposes to employ. The proposal put forward by KCSR offers a methodology that far more closely provides Riffin with a remedy tailored to any damage resulting from the partial dismantling of the bridge. The railroad offers compensation based on the cost of repairing the 24 50-foot wooden piles severed by the County using a methodology known as the “frame bent process,” that is essentially unchallenged. KCSR’s witness Dunsworth, a bridge specialist with over 40 years of bridge construction and railroad experience, describes the frame bent process as one “used by most Class I railroads in my experience as a cost-effective method to replace defective pilings or to replace pilings due to fire or other such damage.”¹³ Dunsworth testifies that repairing the pilings in this manner “would be just as safe and as effective as restoring the Bridge to its original configuration and it would be fully capable of handling rail traffic at maximum speeds of up to 25 miles per hour.”¹⁴ Riffin’s witnesses do not challenge the viability of employing the frame bent process to restore the bridge.

¹⁰ March 24 Request, V.S. of Niemeyer, at 3, and V.S. of Buckley, at 2.

¹¹ March 24 Request, V.S. of Carpenter, at 1.

¹² Theodore Niemeyer, also an engineer, did not inspect the Glass Road Bridge, but instead provides his own summary of the testimony of the other three witnesses. Based mostly on the testimony of Buckley (which itself is vague and conclusory), he concludes that, because the four other bridges on the Industrial Lead are either currently serviceable or would be serviceable after repairs, according to Buckley, and given the reported condition of the remains of the Glass Road Bridge, it was his professional opinion that “the Glass Road Bridge was in all likelihood, in serviceable condition prior to its demolition.” March 24 Request, V.S. of Niemeyer, at 4.

¹³ April 14 Reply, V.S. of Dunsworth, at 11.

¹⁴ Id.

The record indicates that this process relies not on the strength of individual piles driven into the ground but, rather, on an above-ground structure comprised of shorter posts, affixed to the sawed-off remnants of the existing posts, and then strengthened at the connection and above grade by a supporting structure of lateral beams called sills or caps and by bracing.¹⁵ A frame bent is a structure characterized by horizontal sills that interrupt a series of vertical legs or piles. Trestles using this form of construction have been popular in areas of the country such as the Southwest, where trees do not grow as tall as they do in other parts of the country.

This method would obviate the need to incur a number of the costs included in Riffin's analysis, including the cost of new 50-foot piles and the costs associated with using a pile driver. While labor costs associated with installing the frame bents would have to be incurred, they would be less than the costs which Riffin has estimated in his analysis. In addition, in fabricating the frame bents, Dunsworth proposes not to use new material (to which, as we have already noted, Riffin is not entitled), but, rather, used material obtained from dismantling a number of trestles and bridges on the KCSR line between Victoria and Rosenberg, TX. Thus, the material provided would more closely reflect the condition of the 42-year old material that Warren County hauled away. Dunsworth would use new hardware and some new material (two 14" x 4" x 18' timber sills), but his hardware costs are less than those proposed by Riffin. Dunsworth offers no dollar value for the used material, instead offering the material itself, hauled free by KCSR from Texas to Vicksburg.

KCSR rejects both the labor and material costs associated with replacing the deck timbers, ballast boards, ballast guards and ballast, on the ground that the timbers and boards were rotten and the ballast was fouled, and that Riffin therefore was not harmed by their removal. To the contrary, its witness Dunsworth argues that Riffin benefited (in the amount of \$6,500) from the County's actions, which spared him from incurring the cost of removing and replacing this material in order to restore the bridge to active service. Dunsworth bases his conclusion on the fact that the cross ties that rested on top of the deck timbers were rotten (a fact that Riffin concedes), and that the Warren County employee who oversaw the removal of the material, Richard Winans, told him that the boards and guards were rotten and that the ballast was fouled.

In reply to KCSR, Riffin and Niemeyer do not argue that the frame bent construction proposed by KCSR is either infeasible or inappropriate. Rather, they claim that the bridge could be harder to inspect because the connections to the existing posts might be below grade. They speculate that the posts must have been splintered, requiring that they be severed below grade, but they did not actually determine that such was the case. They also claim that disturbing the earth around the posts to install the frame bents could render the bridge unstable, but that argument is belied by the extensive use of this technique.

Riffin and Niemeyer also attack Winans' credibility, arguing that, because Warren County could be liable for its actions in partially dismantling the bridge, statements by County employees are not credible. Elsewhere in his comments, however, Riffin states that Warren County is protected by sovereign immunity. Riffin also makes no claim that Winans is liable for

¹⁵ Id. at 9-11.

anything, or that he had any other motivation to provide false information on the bridge's condition. Indeed, Riffin cites Winans' testimony on the condition of the piles to argue that they were merely splintered and not rotten. Riffin and Niemeyer similarly attack the testimony of KCSR's employee Goodman on the theory that, because he works for KCSR, a party with an interest in this proceeding, his testimony is suspect. Under that approach, however, the testimony of Riffin and the witnesses he has retained presumably would also be suspect.

In his comments in reply to the KCSR filing, Niemeyer looks at the photographs that were available before and recites impressions that are more detailed than those he offered initially and more detailed than those offered by the other three witnesses. Niemeyer's response to photographs of the bridge taken in July 2007 showing a number of deck boards, particularly their ends and undersides, is only that they appear to be in good condition, but he does not say why, except to note that the tar that was placed on top of the boards is clearly visible.¹⁶ Niemeyer also cites the 1986 inspection report, noting that the report found the bridge to be in good condition. We note, however, that the cited report is now 22 years old.

The basis of Riffin's arguments in support of his proposal and his criticism of the railroad's position is that he is entitled to new construction with new materials. He argues that anything less could be unsafe, an argument that assumes that the antiquated structure taken down by Warren County was safe. But whether or not the pre-demolition bridge was safe—an assumption that is both unsupported by the conclusory assertions of Riffin's witnesses and doubtful given the age and maintenance history of the bridge—the fact is that KCSR's approach would ensure that Riffin would not have to pay more than he otherwise would have paid to provide service over the Remainder.

Thus, Riffin's argument that he should receive the services of an engineer to inspect the new construction misses the point. Riffin is not here entitled to full compensation for a new bridge or bridge inspection services. Rather, what he is entitled to is the extra amount it would cost to restore service given that some of the old bridge components, which had a limited remaining useful life, were hauled away to the Jeff Davis landfill. If Riffin places the bridge back in service, it will be his responsibility to assure that it can safely carry rail traffic.

In his response to KCSR's restoration cost testimony, Riffin challenges the practicality of how KCSR would reconstruct the bridge (e.g., whether KCSR's approach includes sufficient personnel and equipment to move the timbers). But although Riffin in his response provides a verified statement from his own professional engineer (Niemeyer), it is significant that Niemeyer does not assert in his verified statement that the techniques proposed by KCSR's witness Dunsworth, and endorsed by KCSR's other two witnesses, one of whom is a professional engineer, would be inappropriate. Thus, on these sorts of practical issues requiring technical expertise, we have no reason to doubt the essentially un rebutted testimony of KCSR's experts that railroads typically use the techniques to which they attest.

¹⁶ No other witness offers this testimony, including Carpenter and Buckley, who also visited the bridge site and took their own photographs.

In sum, on the record before us, the proposal offered by KCSR offers the most reasonable figure as to the increased cost of returning the bridge to service as a result of the County's actions.

Litigation Costs. Riffin's request for litigation costs will be denied. The Board has consistently rejected requests for such costs in the past. See, e.g., Groome & Assocs., Inc. v. Greenville County Econ. Dev. Corp., STB Docket No. 42087, slip op. at 17 (STB served July 27, 2005); Caddo Antoine et al.—Feeder Li. Acq.—Arkansas Midland RR, 4 S.T.B. 610, 630-31 (2000), aff'd in part, rev'd in part on other grounds, GS Roofing Prods. Co. v. STB, 262 F.3d 767, 778 (8th Cir. 2001); CF Industries, Inc. v. Koch Pipeline Company, L.P., 4 S.T.B. 637, 637 n.2 (2000).

When Compensation Must Be Paid. KCSR argues that, because the damages are designed to reimburse Riffin for extra costs associated with putting the bridge back into service, payment should not be required until Riffin has actually repaired the bridge. But the OFA provisions are designed to keep lines in the national rail system so that they can be used for rail service. Because we have authorized the OFA offeror in this case to acquire the Remainder in order to preserve rail service, it is appropriate to require KCSR to compensate Riffin once he has acquired the Remainder.

As we have noted, part of KCSR's evidence as to compensation is predicated on KCSR supplying some of the materials in kind, which would need to be transported from Texas before bridge restoration could proceed. Accordingly, KCSR will be required both to transport the used bridge material from Texas and tender it to Riffin in Vicksburg and to remit \$19,277 within 60 days after Riffin has paid the \$128,295 purchase price for the Remainder, for which the deadline is May 22, 2008. To ensure that KCSR provides usable materials to Riffin, the railroad will be required to have an independent bridge engineer attest to the Board that the materials KCSR delivers to Riffin are free from material defects.

Operating Authority. In their April 22 Response, the Offerors request clarification as to whether, after acquiring the Line, they would also need additional authority to operate the Line. No additional authority would be required because inherent in obtaining Board authorization to purchase a line of railroad through the OFA process is the authorization to operate over that line.¹⁷ However, if the Offerors intend to permit another entity to operate over the Line, that entity will be required to first apply for and receive operating authority from the Board.¹⁸

¹⁷ See Exemption of Rail Line Abandonments or Discontinuance—Offers of Financial Assistance, 4 I.C.C.2d 164, 173 (1987) (“[Board] approval is not required under 49 U.S.C. 10901 . . . for the purchaser to institute service and operate as a railroad subject to 49 U.S.C. 10501(a).”); see, e.g., CSX Transportation, Inc.—Abandonment Exemption—In Allegany County, MD, STB Docket No. AB-55 (Sub-No. 659X) (STB served Dec. 14, 2005) (authorizing the acquisition and operation of a rail line under 49 U.S.C. 10904).

¹⁸ See generally 49 U.S.C. 10901 (setting forth the requirement to obtain Board authorization to operate a rail line).

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

It is ordered:

1. KCSR's motion to strike is denied.
2. The Offerors' April 29 Reply is rejected.
3. KCSR's April 29, 2008 filing is rejected.
4. The Offerors' request to purchase the entire Line jointly is denied.
5. KCSR is ordered to remit \$19,277 to Riffin and to transport the used bridge material from Texas and tender it to Riffin in Vicksburg within 60 days after he pays \$128,295 for the Remainder, for which the deadline is May 22, 2008.
6. KCSR is ordered to have an independent bridge engineer attest to the Board, prior to delivery, that the materials KCSR will be delivering to Riffin are free from material defects.
7. This decision is effective on its service date.

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

Anne K. Quinlan
Acting Secretary