

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-1020X

EAST PENN RAILROAD, LLC—ABANDONMENT EXEMPTION—IN BERKS AND
MONTGOMERY COUNTIES, PA

IN THE MATTER OF A REQUEST TO SET TERMS AND CONDITIONS

Decided: January 28, 2009

By decision served on November 18, 2008, the Board, under 49 U.S.C. 10502, exempted from the prior approval requirements of 49 U.S.C. 10903 the abandonment by East Penn Railroad, LLC (ESPN) of an 8.6-mile line of railroad extending from milepost 0.0 at Pottstown to milepost 8.6 at Boyertown, in Berks and Montgomery Counties, PA. This grant of authority was made subject to public use, trail use, environmental, and standard employee protective conditions. The exemption was scheduled to become effective on December 18, 2008, unless stayed by the Board or unless a formal offer of financial assistance (OFA) under 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1) was filed by November 28, 2008.

On November 26, 2008, the Board of Commissioners of the County of Berks, acting on behalf of the County of Berks, PA (the County), timely filed an OFA under 49 U.S.C. 10904 and 49 CFR 1152.27 to purchase the entire 8.6-mile line. The County noted in a clarification filed on November 28, 2008, that it proposed to purchase the line for the total amount of \$500,000.

In a decision served on December 2, 2008, the Board, by the Director of the Office of Proceedings, found the County to be financially responsible and postponed the effective date of the exemption to permit the OFA process to proceed.

On December 24, 2008, the County filed a request asking that the Board set the terms and conditions of the line sale. The County completed its filing by submitting a supplement on December 29, 2008. The offeror asserts that the line's track structure is worth \$767,804, and after adjustment for \$390,000 in bridge removal costs, the line's Net Salvage Value (NSV) is \$377,804. To the \$377,804 NSV, the County adds \$219,000 for the fair market value of the real property to derive \$596,804 as the Net Liquidation Value (NLV) for the line.

Also on December 29, 2008, the railroad filed a preliminary reply to the County's request to set terms and conditions. ESPN filed a final reply on December 31, 2008. The railroad argues that the line's NLV is actually \$2,162,018. The railroad explains that it and Tie Yard of Omaha (Tie Yard) signed a July 2008 agreement for the sale of the track structure for a net amount of

\$1,082,000, and that that agreed amount should determine the line's NSV. ESPN further claims that the land value should be set at \$1,080,018.

PRELIMINARY MATTER

On January 7, 2009, ESPN filed a motion asking that the Board reject the County's request to set terms and conditions. ESPN argues that the County failed to comply with the service requirement of 49 CFR 1152.27(g)(1) (service by overnight mail) which specifically governs requests to set terms in OFA proceedings. The railroad also claims that the County failed to comply with 49 CFR 1104.12(a) (service on the parties should be by the same method and class of service used in serving the Board). ESPN argues that these shortcomings prejudiced it by not allowing ample time for it to verify the information in the December 24, 2008 filing or to expose misstatements and omissions in that filing. To illustrate its perceived harm, the railroad attaches additional evidence to its January 7, 2009 filing. The County replied on January 9, 2009, arguing that no prejudice has occurred here, and that the Board should strike the evidence submitted by the railroad. The County explains that, should the Board accept this evidence into the record, the offeror would be prejudiced because it would not be able to respond.

Although we are sympathetic with ESPN's concerns, we will not reject the County's request to set terms and conditions. In light of our findings below, the railroad's interests have not been prejudiced. We will also not accept ESPN's late-filed evidence.

DISCUSSION AND CONCLUSIONS

Valuation and Evidentiary Standards. Proceedings to set conditions and compensation are governed by the provisions of 49 U.S.C. 10904(d)-(f). Under section 10904(f)(1)(B), the Board may not set a price that is below the fair market value of the line. In the absence of a higher going-concern value for continued rail use, the proper valuation standard in proceedings for offers to purchase under section 10904 is the NLV of the rail properties for their highest and best nonrail use. Chi. & N. W. Transp. Co.—Abandonment, 363 I.C.C. 956, 958 (1981) (Lake Geneva Line), aff'd sub nom. Chi. & N. W. Transp. Co. v. United States, 678 F.2d 665 (7th Cir. 1982). NLV includes the value of the underlying real estate plus the NSV of the track and track materials.

The burden of proof is on the offeror, as the proponent of the requested relief. See Lake Geneva Line, 363 I.C.C. at 961. Placing the burden of proof on the offeror is particularly appropriate in forced sale proceedings under 49 U.S.C. 10904 because the offeror may withdraw its offer at any time prior to its acceptance of the terms and conditions that the Board establishes pursuant to a party's request. The rail carrier, on the other hand, is required to sell its line to the offeror at the price the Board sets, even if the railroad views the price as too low.

Because the burden of proof is on the offeror, absent probative evidence supporting the offeror's estimates, the rail carrier's evidence is accepted. In areas of disagreement, the offeror must present more specific evidence or analysis or provide more reliable and verifiable documentation than that which is submitted by the carrier. If the offeror does not present such

superior evidence and/or documentation, the Board accepts the carrier's estimates in these forced sale proceedings. See Burlington Northern Railroad Company—Abandonment Exemption—In Sedgwick, Harvey and Reno Counties, KS, Docket No. AB-6 (Sub-No. 358X) (ICC served June 30, 1994), and cases cited therein.

Track Materials

The railroad claims that the line's NSV should be determined by a salvage agreement it signed with Tie Yard in July 2008. The salvage agreement, which the railroad includes in its December 29, 2008 and December 31, 2008 filings, contractually obligates Tie Yard to pay ESPN \$1,082,000 for the rail, other track materials, and ties on the line.¹ This agreement includes the cost of removing these assets and restoring road crossings, but it does not include the salvage or removal of bridges, culverts, and ballast. ESPN also attaches to its December 31 filing a verified statement from Terry Peterson, President of Tie Yard, reaffirming the salvage agreement.

The offeror argues that this agreement should not serve as the measure of NSV. The County claims that the inclusion in the agreement of a condition subsequent, i.e., consummation of a forced sale by the Board pursuant to the OFA process unilaterally excusing Tie Yard's obligation to perform, renders the agreement potentially non-binding upon it, and thus invalid on its face as lacking consideration.² The County claims that the agreement is flawed just as were offers submitted in Oregon International Port of Coos Bay—Feeder Line Application—Coos Bay Line of the Central Oregon & Pacific Railroad, Inc., STB Finance Docket No. 35160 (STB served Oct. 31, 2008) (Coos Bay). In that case, the Board found that two offers to purchase track materials, which allowed the respective salvage companies to unilaterally withdraw their offers based on substantial market change, should not serve as measures of NSV.³ The Board found that, based on those escape clauses, those offers were not "firm."

The County claims that the Board should, just as the agency did in Coos Bay, measure the NSV of the line using current steel prices. The County notes that such a valuation is especially necessary here where the price of steel is so radically different now from when the railroad and the salvage company signed their contract last July. To this end, the County has provided a valuation prepared by its expert, Gary E. Landrio, an Assistant Vice President of the engineering consulting firm of TranSystems. According to the County, Mr. Landrio inspected the line and computed the NSV of the various grades of steel and ties comprising it. With regard to steel, the County states that Mr. Landrio relied upon the December 22, 2008 AMM Price Index Report to calculate the wholesale gross rail salvage value as \$714,704. With regard to ties, the County notes that Mr. Landrio's inspection revealed that virtually all of these ties are suitable only for landscape use. Mr. Landrio previously found that the average price for used ties suitable for landscape use is \$3 per tie, for a total of \$53,100. Mr. Landrio adds these sums together to reach a gross salvage value (GSV) of \$767,804.

¹ See the railroad's December 31, 2008 Reply at 35.

² See the County's December 24, 2008 filing at 8.

³ See Coos Bay, slip op. at 11.

The County further claims that the Board should reduce this GSV to account for the cost of removing the bridges and crossings on the line.⁴ The County claims, generally, that Board precedent dictates that bridge removal costs should be assessed against the line's owners and subtracted from the line's value, and that the removals would be in harmony with Pennsylvania state law.⁵ The County provides costs for removing six of the bridges that Mr. Landrio claims are non-compliant with the current Pennsylvania Utility Commission's (PUC) standards. According to the County, these non-compliant bridges would have to be removed at an average cost of \$65,000 per bridge, totaling \$390,000. The County subtracts this amount from \$767,804 to reach an NSV for the line of \$377,804.

After considering the parties' evidentiary submissions on the fair market value of the track structure, we find that the Tie Yard salvage agreement is the best evidence of record of what these assets are worth in the marketplace. This is a binding contract made at arm's length between a willing seller and a willing buyer, both very knowledgeable as to the value of such assets. We have found such a contract to be a reliable indicator of a line's value in the past, and we find the same here.⁶

Moreover, the County's valuation is not well supported. The County's assertions concerning 90-pound relay rail are particularly weak. The County claims that 90-pound relay rail is worth \$250 a ton based on AMM, but, as ESPN points out, AMM does not publish prices concerning relay rail.⁷ On the other hand, Tie Yard values this item at \$830 a ton, and the Tie Yard relay price has been verified by a quotation received by the railroad from Unitrac Railroad Materials, Inc.⁸ There are similar concerns regarding the County's valuation of 100-pound relay rail. Furthermore, the County's price for ties is not backed by any supporting evidence.

It is true that at the time ESPN and Tie Yard signed the contract, scrap steel prices were much higher than they are now. But ESPN verified that Tie Yard remains committed to purchase the assets at the agreed-to price despite the price fluctuations.⁹ Tie Yard's president explains that, while the price of scrap steel has declined since July, the price of relay rail has

⁴ Although the County references grade crossing restoration, it does not provide costs for this work. Rather, it accepts ESPN's representation that the Tie Yard net salvage bid includes these costs.

⁵ See the County's December 24, 2008 filing at 15.

⁶ See Portland Traction Company—Abandonment Exemption—in Multnomah and Clackamas Counties, OR, Docket No. AB-225 (Sub-No. 2X), slip op. at 5 (ICC served Jan. 10, 1990) (Portland Traction); 1411 Corporation—Abandonment Exemption—in Lancaster County, PA, STB Docket No. AB-581X, et al., slip op. at 4 (STB served Oct. 18, 2001); San Joaquin Valley Railroad Company—Abandonment Exemption—in Tulare County, CA, STB Docket No. AB-398 (Sub-No. 7X), slip op. at 4, 5 (STB served Aug. 26, 2008) (SJVR).

⁷ See ESPN's December 31, 2008 reply at 27-28.

⁸ Id. at 28.

⁹ Id., VS Peterson at 1.

increased, and he points out that the relay tonnage on the line is much higher than the scrap tonnage.¹⁰ Regardless, the contract continues to represent what an independent party would pay for the assets in the marketplace, and therefore, for our purposes, constitutes the constitutional minimum value for those assets. Thus, we properly rely on it as the best evidence of the line's NSV.

We are not persuaded by the County's attempt to discredit the contract by portraying it as suffering the same flaw as the offers submitted in Coos Bay. In Coos Bay, the offerors retained the right to revise their offers if there was a substantial change in the market and there was no deadline for the railroad to accept. Accordingly, we found that those offers could not be considered as truly firm. Here, Tie Yard has entered into an agreement without such a clause. Tie Yard's contract therefore had credibility when it was signed, and it continues to have credibility because the company still stands by its commitment.

The fact that Tie Yard's obligation might be superseded by operation of the statutory OFA process does not render the contract nonbinding or fatally undermine its credibility for our valuation purposes. This prospect does not allow for Tie Yard to unilaterally withdraw from the salvage agreement.

The Tie Yard contract does not cover the removal of the line's bridges. As discussed above, the County asks that we deduct \$390,000 from the NSV for the removal of six bridges. But ESPN contends that bridge removal costs are unwarranted because it does not plan on removing any bridges. ESPN states that it already has agreed to negotiate a trail use/rail banking agreement with Montgomery County for the portion of the line in that County and indicates that it would negotiate for trail use/rail banking for the remainder of the line in Berks County consistent with the Berks County Planning Commission's plan to incorporate the line into a planned trail system. ESPN also states that it has contacted the PUC regarding the proposed abandonment and that the PUC has not told ESPN it would have to remove any bridges. And ESPN argues that the County has failed to show that the removal costs of those bridges would exceed their salvage value. Moreover, our rules provide that, in determining the NLV of rail properties subject to the OFA process, we include any asset with a negative salvage value at a value of zero. 49 CFR 1152.34(c)(1)(iii)(A)(2).¹¹ We will therefore not adjust the line's NSV for bridge removal. Accordingly, we set the line's NSV at the \$1,082,000 agreed to between Tie Yard and the railroad.

Land

The County retained a certified general appraiser, Matthew Cremers, to perform an appraisal of the real estate included in the line's right-of-way that the County claims is held in fee by ESPN. Mr. Cremers broke the right-of-way into 10 distinct parcels, grouping property with similar attributes, including adjoining land uses. Mr. Cremers discovered historical sales of five rural land sales, two large building lot sales, and 10 commercial/industrial land sales for use in his appraisal. Mr. Cremers used all five rural land sales occurring from October 2007 to

¹⁰ See id.

¹¹ See, e.g., Coos Bay, slip op. at 14.

July 2008, none of the large building lot sales, and seven of the commercial/industrial sales occurring from December 2001 to December 2008 in his analysis. He assigned the historical sales to one or more of the County's 10 distinct parcels for which the historical sale has attributes, location, or usage similar to that anticipated for the parcel. He then adjusted the unit prices of the historical sales assigned to each parcel to account for factors of date of sale, frontage, topography, flood plain, shape, and water and sewer access. He then averaged the unit prices and multiplied those averages by the acreage in the parcel to determine the value of the parcel. He then calculated a net present value of the land using a 3 or 5-year sell-off period depending on the location of the property and included a 10% per year deduction for holding costs. Based on these computations, Mr. Cremers concludes that the land to which the railroad holds marketable title has a fair market value of \$219,000.

The railroad hired Mr. William Yetke, a certified general appraiser, to conduct its appraisal. Mr. Yetke broke the right-of-way into 13 distinct parcels. Mr. Yetke used the same methodology as the County, but used 10 historical sales, assigning them to one or more of their 13 distinct parcels with similar attributes. Their historical sales occurred from August 2005 through August 2008. Mr. Yetke made similar adjustments to the sales unit prices as the County and specified an estimated unit value for the various parcels. He treated that estimated parcel unit value as an approximate average as opposed to a mathematical average of the adjusted sales unit values. He then multiplied the parcel unit values by the area units of the corresponding parcels and added those results to calculate the total value of the right-of-way. Mr. Yetke then adjusted the total value to account for selling costs, holding costs or gains, and a discount factor by reducing the total value by 13%. Mr. Yetke concludes that the real estate comprising the line's right-of-way has a fair market value of \$1,080,018.

The wide divergence between the parties' valuations arises from the County's claim that the railroad does not hold marketable title to much of the land in question. The County retained Edwin L. Stock, a Pennsylvania-licensed real estate attorney, to review the conveyances recorded for the property along the line. According to the County, of the 70 instruments, 12 are "Deeds," 40 are "Releases," and 18 are "Charters." The County claims that, of these documents, only the deeds convey marketable title and should be factored into an NLV determination. The County determines that these deeds provide that the railroad only owns approximately 12 acres in fee.

Mr. Stock contends that many of the releases only conveyed a right-of-way. Mr. Stock supports his claim by pointing to the language of these instruments and a Pennsylvania court case, Bevan v. The Reading Company, 1969 Pa. Dist. & Cnty. Dec. LEXIS 349, 47 Pa. D. & C.2d 683 (Chester County CCP 1969), which examined similar instruments. He further asserts that the other releases and one agreement found in his searches do not convey a fee simple interest based on the documents' language. Additionally, Mr. Stock claims that the charters convey only a grant to construct a rail line in a public place.

ESPN takes issue with the claim that not all the instruments conveyed a fee simple interest. To this end, the railroad provides its own expert, Mr. Paul Catania, who has experience with the property interests of the former Reading Company and Consolidated Rail Corporation. Based on its expert, ESPN argues that easement deeds generally contain language calling for the

extinguishment of the railroad's easement or other such rights upon discontinuance of rail operations. The releases in question contain the opposite language and warrant or guarantee the continued ownership of the property by the railroad even if the railroad ceases to use the property for railroad purposes. The railroad also notes that many of the releases involve significant consideration. Accordingly, the railroad claims that it owns the land in fee, and that it has marketable title to 79.928 acres.¹²

Both parties have made colorable cases concerning whether ESPN has marketable title to the land. The questions and arguments are heavily grounded in Pennsylvania property law, and a court in that jurisdiction is better suited to answer them. While the releases do not appear to lapse upon the cessation of rail use, the question remains as to which party should bear the risk of loss. Should the County be able to acquire the disputed property for nothing and thereby impose on ESPN a loss from a forced transfer of valuable real estate for no compensation if the title that the County receives goes unchallenged? Or should the County pay full fee value and then face the risk that someone will demonstrate a reversionary interest or otherwise challenge the title? To resolve this situation, we find that the circumstances particular to this proceeding call for assigning full fee value for the property in dispute upon a condition that ESPN indemnify the County for any losses arising out of any defect to the title. This result is supported by agency precedent,¹³ allows a Pennsylvania court to resolve any title dispute, provides ESPN constitutional minimum value for its land, and protects the County in case the railroad does not have marketable title to all of the involved parcels.

As for the appraisals, both employed the across-the-fence method in determining the value of the land using past, comparable sales. Both parties made adjustments to the comparable sales unit sales price based on substantial differences between the attributes of the comparable sales and those of the right-of-way. Under our burden of proof analysis, the offeror must provide superior evidence or documentation in areas of disagreement. Because these appraisals are of equivalent weight as to methodology, the offeror has failed to meet its burden. Additionally, the County's appraisal only values the approximately 12 acres of property that it contends ESPN owns in fee. Thus, we use the appraisal submitted by the railroad when valuing the land. Accordingly, because we adopt the railroad's appraisal and its claim that it possesses marketable title to the land as conditioned above, we value the land at \$1,080,018.

Net Liquidation Value

Accordingly, relying on the best evidence of record, which the railroad has submitted, we set the purchase price for the line at \$2,162,018.

¹² See the railroad's December 31, 2008 reply at 14-23 and Exhibits 3 and 5.

¹³ Southern Pacific Transportation Company—Abandonment Exemption—Sacramento and El Dorado Counties, CA, Docket No. AB-12 (Sub-No. 159X) , slip op. at 9 (ICC served Oct. 20, 1994).

Terms of Sale.

In addition to the compensation for this line specified herein, we will impose our typical OFA terms: (1) payment is to be made by cash or certified check; (2) closing is to occur within 90 days of the service date of this decision; (3) ESPN shall convey all property by quitclaim deed, except that, as noted above, ESPN shall indemnify the County for any losses arising out of any defect to title; and (4) ESPN shall deliver all releases from any mortgage within 90 days of closing. The parties may alter any of these terms by mutual agreement.

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

It is ordered:

1. ESPN motion to reject the County's request to set terms and conditions is denied, and the evidence contained in that motion is not accepted into the record.

2. The purchase price for the line is set at \$2,162,018, and the parties must comply with the other terms of sale discussed above.

3. This decision will become binding on the parties unless the County notifies the Board and ESPN in writing, on or before February 9, 2009, that it is withdrawing its offer to purchase the line.

4. If the County withdraws its offer or does not accept the terms and conditions with a timely written notification, we will serve a decision by February 17, 2009, vacating the prior decision that postponed the effective date of the decision authorizing the abandonment.

5. This decision is effective on its service date.

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

Anne K. Quinlan
Acting Secretary