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SERVICE DATE - JANUARY 28, 2005

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-384 (Sub-No. 1X)

DELTA SOUTHERN RAILROAD, INC.–ABANDONMENT EXEMPTION–BETWEEN
LAKE VILLAGE, AR, AND SHELburn, LA

IN THE MATTER OF AN OFFER OF FINANCIAL ASSISTANCE

Decided: January 27, 2005

Delta Southern Railroad, Inc. (DSR), filed a notice of exemption under 49 CFR 1152 Subpart F–Exempt Abandonments to abandon a 30.0-mile portion of its Lake Providence Line (the line), between milepost 433.0, near Lake Village, AR, and milepost 463.0, near Shelburn, LA. Notice of the exemption was served and published in the Federal Register on June 10, 2004 (69 FR 32657-58), but for reasons explained in earlier Board decisions, the effective date of the abandonment authorization and the due date for any offers of financial assistance (OFAs) were delayed.

On November 30, 2004, Southeast Arkansas Economic Development District (SAEDD) and Lake Providence Port Commission (LPPC) timely filed an OFA under 49 U.S.C. 10904 and 49 CFR 1152.27(c) to purchase the line for \$815,000. Accordingly, the effective date of the exemption was further postponed, giving the parties until December 30, 2004, to reach an agreement for the sale of the line.

On December 30, 2004, SAEDD and LPPC, now joined by Madison Parish Port Commission (collectively, Offerors), requested that we set the terms and conditions for the sale because the parties were unable to agree on the sale price. In their request, the Offerors contend that the purchase price for the line should be \$733,325, consisting of \$1,000 for land and \$732,325 for track materials.

On January 7, 2005, DSR replied to the request to set terms and conditions. DSR contends that the fair market value of the line is \$1,831,408, consisting of \$849,408 for land and \$982,000 for track materials. DSR argues that the Offerors have not met their burden of demonstrating that their valuation is more reliable and verifiable than DSR's own valuation.

TERMS AND CONDITIONS

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 net liquidation value (NLV) of the rail properties for their highest and best nonrail use. Chicago and North Western Transp. Co.—Abandonment, 363 I.C.C. 956, 958 (1981) (Lake Geneva Line), aff'd sub nom. Chicago and North Western Transp. Co. v. U.S., 678 F.2d 665 (7th Cir. 1982). NLV includes the value of the underlying real estate plus the net salvage value (NSV) of track and 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 these proceedings because the offeror may withdraw its offer at any time prior to its acceptance of 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 evidence and/or documentation, then the Board accepts the carrier's estimates in these forced sales 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. We will address below the value of the land and the track materials.

Land. DSR has based its valuation of the real estate underlying the line on an appraisal by Robert Lowe. The Offerors do not challenge the methodology used by Mr. Lowe to arrive at his calculation, but instead contest the underlying assumption that DSR owns the subject property in fee simple. The Offerors assert that DSR cannot claim marketable title to any land it does not own in fee simple, and any land that a railroad does not hold by marketable title must be valued at zero.¹

The Offerors rely on an examination by J.W. Porter of DSR's title to the line's underlying real estate. According to Mr. Porter's verified statement, he reviewed all 75 instruments that conveyed to DSR or its predecessors an interest in parcels that currently comprise the line's underlying property. Based on this review, Mr. Porter concluded that DSR was granted a fee simple interest in only two deeds, totaling just 0.82 acres. The other 73 instruments, according to Mr. Porter, purport to grant the land for use as a "right of way" or "for railroad purposes," which he claims is indicative of the granting of reversionary interests, such as easements or rights-of-way. The Offerors, who note that the Board resolves disputes regarding

¹ See Lake Geneva Line at 959.

the marketability of title based on applicable state law, cite cases from both Arkansas and Louisiana in support of the proposition that deeds containing such language transfer only a reversionary interest. Mr. Porter attached copies of 11 of these deeds as a representative sample of all 73 reversionary-interest deeds.

Based on Mr. Porter's conclusions, the Offerors assert that DSR is only entitled to compensation for the 0.82 acres that it owns in fee simple, which Mr. Lowe appraised at \$1,000.

In its reply, DSR acknowledges that 10 of the 11 deeds submitted by Mr. Porter do in fact convey a reversionary interest. (DSR asserts that the remaining deed is for land that is not located within the rail line.) DSR has therefore reduced its original land valuation to exclude these 10 parcels.

DSR argues, however, that the Offerors have not met their burden of demonstrating that DSR does not hold marketable title to the remaining real estate. DSR notes that Mr. Porter has included only 11 of the 73 deeds that allegedly convey a reversionary interest, claiming these 11 to be representative of the remaining deeds. However, DSR claims that the 62 remaining deeds that have not been submitted cannot be examined and interpreted to determine which type of interest they convey.

DSR also refutes the Offerors' claim that use of the phrases "right of way" or "for railroad purposes" is automatically determinative of the nature of the deed. Instead, DSR asserts that, under Arkansas and Louisiana state case law, the language of the entire instrument must be examined to determine whether a fee simple or reversionary interest has been granted. The verified statement of DSR's witness, Stephen North, includes cites to cases in both states where a deed contained language indicating a reversionary interest, but the court still found – after examining the document in its entirety and evidence of the parties' intentions – that the deed conveyed a fee simple interest.² Mr. North also claims that, in his examination of some of the deeds, the phrases "right of way" and "for railroad purposes" were not consistently used, thus demonstrating the ambiguity as to which type of interest was conveyed, and highlighting the need for all deeds to be provided.

The Offerors have failed to demonstrate that the 11 deeds they submitted, which DSR acknowledges convey only a reversionary interest, are representative of the remaining 62 deeds. The Offerors have offered no explanation as to why the remaining 62 deeds are missing from their presentation. And if these 62 deeds do in fact convey only a reversionary interest, we fail to see why the Offerors would not have included them along with the 11 other deeds, especially since Mr. Porter took the time to locate each one and compile an index. See Mississippi

² See Coleman v. Missouri Pac. R.R. Co., 745 S.W.2d 622 (Ark. 1988); Arkansas Improvement Co. v. Kansas City So. Ry. Co., 181 So. 445 (La. 1938).

Tennessee Holdings, Inc.—Abandonment Exemption—In Union, Pontotoc and Chickasaw Counties, MS, STB Docket No. AB-868X (STB served Nov. 2, 2004) (rejecting the use of representative, or “sample” deeds, to demonstrate a lack of marketable title).

In this case, it is possible that the Offerors selected only those deeds that in their view clearly conveyed a reversionary interest, while disregarding those that were more ambiguous. As noted by DSR, there is no evidence that these 11 deeds contain similar provisions as in the other 62 deeds. Moreover, even assuming that these deeds contain similar language, that in and of itself would not be determinative of the nature of these instruments. DSR’s analysis of Arkansas and Louisiana state case law is more instructive, as the courts of those states have held that the parties’ intention regarding the conveyance must be determined from examining the context of the entire document, not just individual phrases.

For these reasons, we find that the Offerors have not met their burden of demonstrating their evidence to be more reliable and verifiable. Accordingly, we rely on DSR’s valuation of \$849,408 as the best evidence of the NLV of the land.

Track Materials. DSR’s figure of \$982,000 for the NSV of the track and track materials is based on an alleged offer from Romar & Associates (Romar) to purchase the track for \$950,000, and an alleged offer from Jerry Ramsey Construction, Inc. (Ramsey), to purchase the ballast and bridge materials for \$32,000. Both of those offers included the costs of removing the track materials and restoring grade crossings. According to the verified statement of William Wainright, the president of DSR, the offer from Romar was based on a bid for the scrap steel the track would produce.

The Offerors claim that the offer from Romar is not binding and does not provide any details about the proposed purchase (such as the price per ton that Romar was prepared to pay), and therefore it cannot be relied on by the Board. The Offerors have submitted their own valuation of the scrap steel. Based on a calculation of the tonnage of scrap steel that the line would produce (5,766 tons) by its witness, Wyly Gilfoil, and an estimate of the current value of the steel (\$100 to \$130 per net ton) by A&K Railroad Materials, Inc. (A&K), the Offerors calculate the salvage value of the track to be \$713,325. From this amount, Mr. Gilfoil then subtracted \$13,000, which he estimates to be the cost to restore the grade crossings, and added \$32,000, which he apparently agrees would be the net cost of the ballast and bridge materials, to arrive at a final NSV of \$732,325. (Because the parties appear to agree on the NSV of the ballast and bridge materials, we need not discuss that component of the valuation further.)

In its reply, DSR asserts that the lack of details by Romar about its offer is irrelevant since Romar offered to purchase the track for a lump sum. DSR also refutes the claim that the offer is not binding. Mr. Wainright, in his verified statement, states that DSR received a letter from Romar, dated January 3, 2005, which amended the offer to hold it open until January 28, 2005 (the date by which the Board must set the terms and conditions), and further states that he

has accepted Romar's offer. Because a written offer constitutes the best evidence of the fair market value of the track and track materials, and the offers here from Romar and Ramsey have been shown to be legitimate, DSR asserts that the Board must rely on DSR's NSV figure.

The issue of the validity of an offer to purchase track or track materials was previously raised in 1411 Corporation—Abandonment Exemption—In Lancaster County, PA, STB Docket No. AB-581X, et al. (STB served Oct. 18, 2001) (1411 Corporation). There, the offeror, Frank Sahd Salvage Center, Inc. (Sahd), argued that a third-party offer to purchase the rail assets of the abandoning carrier was a disguised attempt by the carrier to artificially inflate the value of the line to thwart Sahd's attempt to restore rail service. Sahd pointed out that the proposed purchaser did not make its offer until it became aware of Sahd's intention to make an OFA and that the offer had not been reduced to a final signed agreement. The Board found that there was not enough evidence to substantiate Sahd's claim that the third-party purchase offer was not bona fide. But the Board noted that, should the OFA sale not occur and the abandoning carrier then sell the rail assets for a price other than the one proffered by the proposed purchaser, Sahd could seek to have the proceeding reopened on the ground that there had been a material misrepresentation and an abuse of the Board's processes. As explained there, the Board could then reopen the matter and set new terms for the OFA sale. See 1411 Corporation, slip op. at 7 n.15.

Here, as in 1411 Corporation, we find that the Offerors have not submitted sufficient evidence to support a finding that the purchase offer from Romar is fraudulent. It is true that Romar's offer does not contain an express breakdown of the proposed purchase. But the January 3, 2005 letter from Romar to DSR (no doubt submitted in response to the Offerors' concern) states that Romar estimates that the track will produce 5,700 tons of scrap steel (close to the 5,766 tons estimated by the Offerors' witness). From this estimate and the total proposed purchase price of \$950,000, we can calculate that Romar is offering to pay approximately \$167 per ton. The fact that this amount per ton is significantly higher than the \$100 to \$130 per ton estimated by A&K gives us some pause, particularly in light of the fact that DSR has not submitted the other alleged bids it received for the scrap steel and that it received Romar's offer only after it learned that there was a proposed OFA. However, because Romar's offer appears to be binding, we accept it as a market valuation.

Because offers to purchase track and track materials generally constitute the best evidence of record,³ we rely here on the NSV of \$982,000 proposed by DSR. However, as in 1411 Corporation, we note that, should the Offerors decide not to purchase the line under the terms we establish here and should the subsequent sale of the track not be timely completed for the \$950,000 price contained in Romar's letter offer to DSR, the Offerors may seek to have this

³ See The Grand Trunk Western Railroad Company—Abandonment—In Clark, Madison and Fayette Counties, OR, Docket No. AB-31 (Sub-No. 29) (ICC served June 26, 1990).

proceeding reopened. Should that occur, the Board could then set new terms for the OFA sale, if appropriate, under 49 U.S.C. 722©).⁴

Summary. Relying on DSR's figure of \$849,408 for the value of the land and its figure of \$982,000 for the value of the track and track materials, we set the purchase price for the line at \$1,831,408.

In addition to the compensation specified herein, the Board imposes the following 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) DSR shall convey all property by quitclaim deed; and (4) DSR 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. The purchase price for the line is set at \$1,831,408, and the parties must comply with the other terms of sale discussed above.
2. To accept the terms and conditions established here, the Offerors must notify the Board and DSR in writing, on or before February 7, 2005.
3. If the Offerors accept the terms and conditions established by this decision, the Offerors and DSR will be bound by this decision.
4. If the Offerors withdraw their offer or do not accept the terms and conditions with a timely written notification, we will serve a decision by February 17, 2005, vacating the prior decision that postponed the effective date of the decision authorizing abandonment.

⁴ Should the Board find that this proceeding should be reopened on such grounds for establishment of new OFA terms, if track and track materials have been removed, DSR would be responsible for the cost of restoring the track and track materials.

5. This decision is effective on its service date.

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

Vernon A. Williams
Secretary