

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-33 (Sub-No. 170)

UNION PACIFIC RAILROAD COMPANY — ABANDONMENT — IN
POLK COUNTY, IA

IN THE MATTER OF A REQUEST TO SET TERMS AND CONDITIONS

Decided: June 19, 2002

By decision served on January 16, 2002 (January 16 decision), we granted the abandonment by Union Pacific Railroad Company (UP) of a 3.72-mile line of railroad extending from milepost 221.10 near SE 18th Street to milepost 217.38 near SW 30th Street in Des Moines, Polk County, IA (the line). On January 25, 2002, Mid-America Railroad, L.L.C. (MAR), timely filed an offer of financial assistance (OFA) under 49 U.S.C. 10904 and 49 CFR 1152.27. MAR did not, however, make the required demonstration that it was financially responsible and, accordingly, its OFA was rejected in a decision served on January 30, 2002. On February 8, 2002, MAR appealed the decision, and by decision served on March 22, 2002 (March 22 decision), we granted the appeal¹ and set April 22, 2002, as the deadline for either party to file a request that the Board establish the terms and conditions for the purchase if MAR and UP could not agree on the purchase price. The deadline for filing requests for the establishment of terms and conditions was extended through May 20, 2002, by decisions served on April 19, 2002, and May 3, 2002.

On May 20, 2002, as amended on May 22, 2002, MAR filed a timely request for the Board to set the terms and conditions for the sale of a segment of the line between milepost 217.38 and milepost 219.05² because the parties were unable to agree on the sale price and other terms of sale for the line

¹ MAR is a wholly owned subsidiary of Mid-America Development Company (Mid-America), which is part of Mid-America Group, LTD (MAG). MAR was formed by Mid-America specifically to make the OFA. Based upon supplemental information (financial statements of MAG and its subsidiaries filed under seal), we found that MAR was financially responsible, anticipating that MAG, through Mid-America, will financially support MAR in its endeavor to provide rail service. March 22 decision, slip op. at 2.

² UP states that milepost 219.05 has been corrected to reflect the actual milepost, which is
(continued...)

segment. MAR has offered to pay UP \$127,057 for the line segment. MAR's offer reflects a price of \$100,166 for the underlying real estate and \$26,891 for the NSV of the rail, ties, switches, equipment and other track material (rail assets). Additionally, MAR requests that the final sale be contingent on: (1) MAR's review and approval of the environmental status of the real estate, including any necessary indemnification from UP; and (2) MAR's acquisition of rights to acquire or use the Raccoon River Bridge.³

On May 24, 2002, as amended on May 30, 2002, UP replied to the request to set terms and conditions, arguing that MAR has not justified its valuation of the line segment or the imposition of the special terms and conditions that it seeks. UP contends that the fair market value of the line segment is \$611,046, which reflects a \$541,499 price for the underlying real estate and an NSV of \$69,547 for rail assets.⁴

DISCUSSION AND CONCLUSIONS

Valuation and Evidentiary Standards.

Under 49 U.S.C. 10904(f)(1)(B), we may not set an OFA sale price below the fair market value of the line. Where, as here, there is no evidence of a higher going concern value for continued rail use, we set the price at 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)

²(...continued)

218.90. While this discrepancy does not affect the valuation of the real estate parcels involved on the line, it does appear to impact the parties' estimates of net salvage value (NSV) for the track materials.

³ The Raccoon River Bridge is owned by The Burlington Northern and Santa Fe Railway Company (BNSF). The bridge would connect the line segment to a rail line operated by Iowa Interstate Railroad, LTD (IAIS), that provides service to the downtown Des Moines industrial area. In the underlying abandonment proceeding, Mid-America was one of the protestants opposing the abandonment and proponents of a plan to require UP to purchase the Raccoon River Bridge as an alternative to abandonment. UP estimated that it would cost at least \$400,000 to rehabilitate the bridge and connect it to the line. We found that the protestants had not shown that the bridge proposal was a viable alternative to abandonment. January 16 decision, slip op. at 7.

⁴ While UP has rounded the dollar amount for real estate down to \$540,000, we will use \$541,499 because it is a more accurate estimate of the value of the real estate as reflected in UP's new land appraisal. See discussion infra at 4. The \$611,046 figure, representing the fair market value of the line segment, reflects the more accurate real estate value.

(Lake Geneva Line), *aff'd sub nom. Chicago and North Western Transp. Co. v. United States*, 678 F.2d 665 (7th Cir. 1982). NLV includes both the value of the real estate and the NSV of the track and materials (gross salvage value less removal costs).

In proceedings to set conditions and compensation, the burden of proof is on the offeror, as the proponent of the requested relief. See Lake Geneva Line, 363 I.C.C. at 961.⁵ Thus, in areas of disagreement, the offeror must present more detailed evidence or analysis or provide more reliable and verifiable documentation than that which the carrier submits. Absent detailed evidence supporting the offeror's estimates and contradicting the carrier's estimates, we accept the carrier's estimates in a forced sale context. 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. See also Fillmore Western Railway Company — Abandonment Exemption — in Fillmore County, NE, STB Docket No. AB-492 (Sub-No. 2X), slip op. at 2-3 (STB served Nov. 1, 2001).

Underlying Real Estate.

1. Real Estate Findings.

In this proceeding, both parties have presented conflicting estimates of the land value for the line segment. MAR's appraiser, Patrick J. Schulte of Commercial Appraisers of Iowa, Inc., estimates an aggregate land value of \$530,744 for the nine parcels⁶ at issue, including the parcels MAR considers reversionary (see discussion *infra* at 5). Mr. Schulte then adjusts this value downward by approximately 24% to \$405,000 to account for the cost of disposing of the land (sales fees and other costs associated with holding and marketing the land) over a 1-year period.

MAR, however, only uses part of Mr. Schulte's appraisal to determine the land value for the line segment. Using Mr. Schulte's values for parcels 68, 69, 70, 71, 72, 73, and 74 and UP's land values for parcels 67 and 95, MAR developed "nominal appraisal values" for each parcel by using Mr.

⁵ Placing the burden of proof on the offeror is particularly appropriate in an OFA context, which involves an involuntary taking of property, because the offeror may withdraw its offer if it considers the price that we set to be too high, while the carrier must sell its line to the offeror at that price even if it considers the price to be too low.

⁶ The parcel numbers assigned to the line segment are 67, 68, 69, 70, 71, 72, 73, 74, and 95. Both parties agree that UP owns parcels 67, 69, 70, 73, and 95 in fee. There is a question regarding the title of parcels 68, 71, 72, and 74. Both MAR's and UP's appraisers use an "across the fence" methodology to determine the NLV.

Schulte's already reduced values for parcels 68, 69, 70, 71, 72, 73, and 74 while holding the values for parcels 67 and 95 constant.⁷ MAR further discounted parcels 67, 69, 70, 73, and 95 by approximately 30%⁸ and parcels 68, 71, 72, and 74 to \$10 per parcel, reflecting MAR's belief that those parcels are reversionary, resulting in a total land value for the subject line of \$100,166.

In its reply, UP presents a new land appraisal, tailored to the line segment MAR seeks to purchase. This new land appraisal was developed by Randy L. Seale of Allen, Williford and Seale, Inc., who appraises the line segment at \$541,499 after making adjustments for parcel size, location and physical characteristics. MAR alludes to this appraisal at pages 10-11 of its set-terms request.⁹

At the outset, we should note that there is less than an \$11,000 difference between MAR's starting estimate (Schulte's appraisal) and UP's new appraisal. However, Mr. Schulte has reduced his starting figure substantially without adequate support. While Mr. Schulte has explained how he has achieved his discounted rate (various percentage discounts for sales, marketing, miscellaneous costs, and the cost of having to sell property off in a 1-year period), he has failed to provide any probative support for the percentages he chose. Mr. Schulte's 24% discount for all factors involving the time and cost for liquidation of property for OFA purposes is inappropriate. We find that MAR has not supported this reduction in value of the line segment. See Union Pacific Railroad Company — Abandonment Exemption in Lancaster, NE, STB Docket No. AB-33 (Sub-No. 112X) (STB served Dec. 3, 1997), where we declined to make an adjustment for selling costs that would have reduced the real estate valuation. Moreover, MAR offers no support for its additional discount of 30%. The discount is based on a business judgment but not supported by any probative evidence. Accordingly, MAR has failed to meet its burden. Given that this is a forced sale proceeding, and that MAR has not impeached UP's estimate of \$541,499 for the land value of the line segment, we will use that figure instead of MAR's slightly lower initial figure.

⁷ We assume that MAR used UP's values for parcels 67 and 95 because they were lower than MAR's estimated values.

⁸ MAR states that this discount is based on informed business judgment and reflects the risks taken, including: (1) the development of a corridor that is only 100 ft. wide which limits the variety and scope of development activities that can be employed; (2) the possibility that portions of the corridor may not be contiguous because of reversionary parcels; and (3) the location of the property within a flood plain.

⁹ In its original application for abandonment, UP submitted a land appraisal, for the entire line, prepared by an in-house appraiser. As noted, UP's new appraisal addresses the specific acreage at issue here in response to MAR's appraisal.

2. Marketability of Title.

In addition to the parcels that both parties agree UP holds in fee, there are several parcels to which MAR contends UP holds only an easement right. MAR bases this argument on the following language in the granting clauses pertaining to parcels 68, 71, 72, and 74: “It is understood that the premises hereby conveyed are to be used for right of way, division terminal grounds, shops, yards and other railway purposes only.”¹⁰ MAR submits a memorandum of support from Mark McCormick, a former Iowa District Court Judge. While on the Supreme Court of Iowa, Judge McCormick authored the court’s opinion in Hawk v. Rice, 325 N.W.2d 97 (Iowa 1982) (Hawk).¹¹ Judge McCormick contends that the granting clauses in question are similar to the language in Hawk, and, therefore, the language at issue creates no more than an easement as found in that proceeding.

UP argues that the language in the title documents for those parcels is not similar to the language in Hawk. Rather UP argues that the addition of the words “sell and convey” in the deeds create a fee. UP maintains that the granting clauses are closer to the language in McKinley v. Waterloo R.R., 368 N.W.2d 131 (Iowa 1985), where the Iowa Supreme Court held that the language created a fee.¹² Additionally, UP cites Section 558.19, Iowa Code, 1975, Forms of conveyance, to support its position that the granting language created a fee.

Rather than attempting to assign full value or, alternatively, almost no value (\$10 per parcel, as valued by MAR) to the property based on an attempt to interpret Iowa real estate law, we will exercise our authority to establish terms and conditions for sales under 49 U.S.C. 10904 to find that UP has marketable title to parcel numbers 68, 71, 72, and 74, conditioned upon UP’s indemnifying MAR in full for any defect in title. If UP declines to provide such an indemnity, the titles to these parcels will be deemed not marketable and the parcels will be assigned no value. See Southern Pacific Transportation Company — Abandonment Exemption — Sacramento and El Dorado Counties, CA, Docket No. AB-12 (Sub-No. 159X) (ICC served Oct. 20, 1994).

¹⁰ See MAR’s Request for Terms and Conditions, Appendix A, Exhibit 3, copies of deeds to parcels 68, 71, 72, and 74.

¹¹ In Hawk and the subsequent case Macerich Real Estate Co. v. City of Ames, 433 N.W.2d 726 (Iowa 1988), the Supreme Court of Iowa found that the granting clauses described the conveyance as a right-of-way for construction and operation of a railroad, and therefore held that the conveyances were easements.

¹² The language provided that the grantors sell and convey for purposes of constructing and operating a railroad and described the conveyance as a right-of-way. Additionally, unlike the deeds at issue here, that deed explicitly provided for reversion.

Rail Assets.

MAR and UP include NSV for track materials of \$95,730 and \$86,382, respectively.¹³ However, MAR asserts that the NSV should be reduced by \$68,839 to allow for removal costs (\$50,381), brokerage commission (between 7%-10%) and other costs. MAR calculates a total NSV of \$26,891. UP estimates its removal cost at \$16,835, making its total NSV \$69,547.

UP argues that the NSV for the track materials is a function of the fair market value of the track material obtainable by UP and the costs UP would incur in salvaging the track materials. We agree. The price MAR could get for the track materials and the costs MAR would incur to salvage the track material are irrelevant to the valuation process. Moreover, MAR has not shown that UP's removal cost is understated or that UP's NSV is unreasonable. Therefore, we will accept UP's \$69,547 NSV for track materials as the best estimate of the NSV of track materials for the line segment.

Closing Conditions.

MAR has requested closing conditions that differ from our customary OFA conditions. MAR has requested that the final sale be conditioned on: (1) its review and approval of the environmental status of the real estate, including any necessary indemnification from UP; and (2) its acquisition of rights to acquire or use the Raccoon River Bridge.

We will not impose the special closing conditions requested by MAR. The contract terms requested by MAR relating to environmental liability and indemnity are beyond our standard terms. This case is distinguishable from 1411 Corporation — Abandonment Exemption — In Lancaster County, PA, STB Docket No. AB-581X et al., slip op. at 5 (STB served Apr. 12, 2002), where we included a pre-closing environmental review (and liability) condition only because the owner of the line had already agreed to such a condition in a sales contract with a third party. We found that the arm's-length contract was the best evidence of fair market value in that case, and that the purchase price in the contract could not be divorced from other relevant contract terms that necessarily affected the purchase price. Here, we will not impose as part of a forced sale additional expenses and burdens on UP other than those ordinarily encountered by a carrier under 49 U.S.C. 10904.

We also will not condition closing on MAR's acquisition of rights to acquire or use the Raccoon River Bridge. MAR could have acquired the rights to the Raccoon River Bridge before it asked us to

¹³ MAR's NSV for track materials is higher than UP's because it included a higher estimate of track material, which appears to be due to MAR's use of incorrect mileposts. Both parties use the same unit costs for track materials.

set terms and conditions. We will not hold up UP's abandonment application indefinitely because MAR is still negotiating for property outside the scope of the OFA.

As is customary in OFA sales where we are called upon to set terms, if MAR elects to proceed with the purchase of the line segment at the price set in this decision: (1) payment must be made by cash or certified check; (2) closing must occur within 90 days of the service date of this decision; (3) UP must convey all property by quitclaim deed, except as noted above; and (4) UP must deliver all releases from any mortgages within 90 days of closing. In addition, UP must, as noted above, agree to indemnify MAR from any losses due to title defects in parcel numbers 68, 71, 72, and 74. The parties, of course, may alter any of these terms by mutual agreement.

It is ordered:

1. The purchase price for the line segment is set at \$611,046 and the parties must comply with the other terms of sale discussed above.
2. If UP refuses to indemnify MAR for any title defects, the purchase price for the line segment will be \$261,116.
2. To accept the terms and conditions established here, MAR must notify the Board and UP, in writing, on or before June 29, 2002.
3. If MAR accepts the terms and conditions established by this decision, MAR and UP will be bound by this decision.
4. If MAR withdraws its offer or does not accept the terms and conditions with a timely written notification, we will serve a decision by July 9, 2002, vacating the prior decision that postponed the effective date of the decision authorizing abandonment.
5. This decision is effective on the date served.

By the Board, Chairman Morgan and Vice Chairman Burkes.

Vernon A. Williams
Secretary