

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: March 20, 2008

By decision served February 22, 2008 (February 22 decision), the Board, under 49 U.S.C. 10904(f)(1), set the terms and conditions for Raymond B. English (English) and James Riffin (Riffin) (collectively, Offerors or E&R) to jointly purchase 1.9 miles of rail line (the Segment) from The Kansas City Southern Railway Company (KCSR). The Segment extends from milepost 225.6 to milepost 227.5 in Vicksburg, Warren County, MS. In the same decision, the Board also set the terms and conditions for Riffin individually to purchase 2.35 miles of the same line extending from milepost 227.5 to milepost 229.85 (the Remainder). The Board set the purchase price at \$376,320 for the Segment and at \$128,295 for the Remainder. The Offerors were to notify both the Board and KCSR in writing by March 3, 2008, whether they accept the terms and conditions established by the agency. The Board further provided that, if the terms and conditions were accepted for both the Segment and the Remainder (together, the Line), Riffin could then return to the Board with a request that we determine the compensation, if any, 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.

On February 26, 2008, the Offerors filed a motion to stay the March 3, 2008 deadline for notifying the Board and KCSR whether they chose to proceed, under the terms and conditions set by the Board, and sought an opportunity for discovery regarding the Glass Road Bridge. KCSR opposed that motion. By decision served February 28, 2008, the Board denied the motion.

On March 3, 2008, the Offerors submitted a filing entitled “Offerors’ Acceptance of Terms and Conditions.” In that filing the Offerors state that they accept the terms and conditions set in the Board’s February 22 decision for both the Segment and the Remainder, but then identify three other terms of sale that they “desire,” purportedly “in accordance with” Board precedent in 1411 Corporation—Abandonment Exemption—In Lancaster County, PA, STB Docket No. AB-581X (STB served Apr. 12, 2002) (1411).¹

¹ In 1411 the Board clarified that the particular terms it had set in that case, which were based on and “inseparable from” the terms of an arm’s-length contract previously entered into by the abandoning railroad, should include terms comparable to those in that contract.

On March 12, 2008, KCSR requested clarification of the Offerors' March 3, 2008 filing. The railroad argues that the March 3, 2008 filing is not an unqualified acceptance of the terms and conditions established by the Board. KCSR therefore requests that the Board vacate its prior decision and authorize the discontinuance and abandonment of the Line. Alternatively, the railroad requests – to the extent the Board considers the Offerors' filing to constitute an acceptance of the Board's terms and conditions – that we clarify that KCSR is not required to consent to the three “desires” or statements set forth in paragraph 4 of the Offerors' filing.

Offerors replied to the request for clarification on March 17, 2008. In their reply, Offerors argue that they did not withdraw their offer to purchase the Line and were not required to explicitly accept the terms and conditions set by the Board, citing Railroad Ventures, Inc. v. Surface Transportation Board, 299 F.3d 523 (6th Cir. 2002) (Railroad Ventures). More specifically, quoting Railroad Ventures, 299 F.3d at 552 (“a qualified OFA purchaser is entitled to determine how much of the line it wishes to acquire”), Offerors argue that they “have the absolute exclusive right . . . to determine the conditions under which [they] are willing to acquire the Line.” Reply at 5. Offerors contend that “[t]he only thing the Board may do at this time, is the ministerial task of ordering KCSR to sell the Line to E&R pursuant to E&R's Offer.” Reply at 8. The Offerors then reiterate the arguments in support of the three additional terms that they seek, claiming that 1411 requires that they be imposed. In addition, Offerors in their reply seek a fourth condition: that the Offerors be permitted to place the funds to purchase the Line in an escrow account, pending the resolution of the Offerors' request for the compensation they argue they should receive as a result of the partial dismantling of the Glass Road Bridge.

DISCUSSION AND CONCLUSIONS

The Offerors labeled their March 3, 2008 filing as an “acceptance of terms and conditions,” and expressly stated that they agree to accept the terms and conditions in the Board's February 22 decision. Nevertheless, they also sought to specify additional or modified terms, set out in subparagraphs 4A, 4B and 4C of their March 3, 2008 filing, in a manner that rendered the nature of their purported acceptance ambiguous. Offerors maintain that they have the absolute right to determine the conditions of sale (Reply at 5), and that the Board's role is limited to a ministerial rubber-stamp of whatever offer the Offerors decide to make (id. at 8-9).

The statute at 49 U.S.C. 10904(f)(1)(B) provides, “Whenever the Board is requested to establish the conditions and amount of compensation under this section . . . for proposed sales, the Board shall determine the price and other terms of sale” Thus, the terms and conditions established by the Board are “binding on both parties” except that an offeror has the right to withdraw its offer within 10 days. 49 U.S.C. 10904(f)(2). Offerors have the right to determine how much of the line (geographically) they wish to acquire, but not to determine the conditions under which they will acquire the line. As the court in Railroad Ventures recognized, “[o]nce the offeror seeks to purchase the entire rail line or a portion thereof as described in the abandonment petition,” if the parties cannot agree, “the STB is then statutorily obligated to render a decision setting price and other sale terms” 299 F.3d at 552. When the court noted that “the STB can only set the terms on what the offeror has proposed to purchase,” id., it was referring to the

fact that the offeror can determine the length of the line it wishes to buy.² The court was not saying that the offeror can determine all of the terms and conditions of the sale. That authority is vested by the statute in the Board. In sum, the Offerors do not have the right to demand the inclusion of the terms they seek.

Nor have the Offerors shown that Board precedent requires including the terms they seek here. The Offerors rely on 1411 to incorporate certain terms from the April 5, 2007 Purchase and Sale Agreement between KCSR and the City of Vicksburg, MS (the PSA). That reliance however, is misplaced. In 1411, the terms of the contract at issue provided the sole basis for the Board's valuation of the line; the Board thus found that the purchase price it set, which it derived solely from that arm's-length contract, was "inseparable from" the other terms in that contract. Here, in contrast, the Offerors do not seek to incorporate the PSA terms in their entirety. Nor could they, as the sale contemplated in the PSA was more expansive than the sale that is before us in this proceeding. 1411 does not support a mix-and-match approach, as the Offerors seek here.

The mix-and-match nature of the Offerors' proposal is illustrated by several of the PSA terms they seek to incorporate here. For example, the Offerors state that they desire to acquire the "Entire Property." But the Offerors' reference to the "Entire Property" in connection with their demand that the Board impose PSA terms does not make sense, because, as used in the PSA, the term refers to a parcel of 155 acres,³ whereas Offerors are seeking to buy only 51.5 acres, which is all of the property that is before us in this abandonment proceeding.⁴

In connection with their claim to the "Entire Property," the Offerors would also include "any and all appurtenances thereto, and all improvements located thereon, and any and all easements, right-of-ways and rights of ingress and egress related thereto," specifically "INCLUDING any rail, ties, or other track materials." But the Offerors ignore another provision of the PSA that specifically allowed KCSR to remove rail, ties, or other track materials within a specified period of time.

The Offerors also state that they seek to acquire the property "FREE of all liens and encumbrances," citing paragraph 8 of the PSA. But the PSA, even if it were deemed to be a valid model for the terms and conditions we are establishing here, does not support imposing such a provision on KCSR. The PSA provided that the sellers would remove some of the liens and encumbrances on the property and that the buyers would remove others. Thus, there is no basis in the PSA for imposing such a requirement exclusively on the seller, as the Offerors propose. Moreover, the PSA imposes this requirement on the seller only in connection with the "fee simple property closing," a provision that has no parallel whatever in this transaction, because the real estate designated as the "fee simple property" in the PSA (to which the PSA

² Accordingly, English was allowed to limit his joint purchase offer with Riffin to 1.9 miles of the 4.25-mile Line authorized to be abandoned, i.e., the portion of the Line that connects English's company, Foam Packaging, Inc., to the KCSR rail system.

³ See PSA at 1.

⁴ See our February 22 decision at 6.

assigned a higher price per acre than for the portion of the property on which the rail line is situated) is not being transferred here.

In short, given the differences between the PSA and what Offerors seek, 1411 does not support, much less require, inclusion of the various terms that Offerors attempt to impose.

Finally, the Offerors have failed to persuade us that any of the terms that they propose here should be imposed for any other reason. We will discuss each proposed term in turn.

Subparagraph 4A: The Offerors first state that they desire to acquire the “Entire Property,” including “any and all appurtenances thereto, and all improvements located thereon, and any and all easements, right-of-ways and rights of ingress and egress related thereto.” We addressed the issue of the Offerors’ rights to appurtenances and improvements at some length in the February 22 decision in connection with the Offerors’ claim for relief for the partial removal of the Glass Road Bridge. The language that Offerors now seek contravenes the procedure that we set out for determining what, if any, relief the Offerors might be entitled to in connection with the bridge should they proceed with the sale.

Subparagraph 4B: The Offerors seek to acquire the property “FREE of all liens and encumbrances,” citing to paragraph 8 of the PSA. This term conflicts with the terms and conditions set by the Board in our February 22 decision, which required KCSR to convey the property by quitclaim deed and imposed no requirement that the railroad transfer the property free of all liens and encumbrances. The Offerors maintain in their March 17 reply that their proposed “FREE of all liens and encumbrances” language is compatible with conveyance by quitclaim deed, but they have not shown why simply requiring KCSR to convey all of its current interest in the property fails to meet the standards of section 10904.

Subparagraph 4C: The Offerors propose the following additional term, citing to paragraph 14 of the PSA: “All closing costs are to be divided equally between the parties, except that each party shall be responsible for its own attorney fees.” The Offerors have provided no reasonable basis for the Board to add this term to those set in our February 22 decision. It would not be appropriate to require KCSR to bear half of the closing costs, inasmuch as this is not a voluntary sale as to KCSR.

Escrow Condition: In their March 17, 2008 reply, Offerors for the first time seek the imposition of yet another condition. They ask that we provide that at closing, Offerors place the payment in an escrow account, pending the outcome of Riffin’s request for compensation for the partial dismantling of the Glass Road Bridge. The Offerors cite to the imposition of such a condition in 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), (STB served Oct. 4, 2000) (Railroad Ventures—Abandonment), *aff’d*, Railroad Ventures, 299 F.3d 523. In Railroad Ventures—Abandonment, the Board ordered an escrow fund because the abandoning carrier had taken numerous egregious actions in derogation of its common carrier obligation over the course of several years, including allowing crossing signals to deteriorate, inviting and permitting local officials to pave over a

section of track which the offeror there was seeking to acquire, and interfering with third-party efforts to repair the line.

The remedy in Railroad Ventures—Abandonment was tailored to the particular facts of that case. Here, there is no evidence of a pattern of egregious misconduct by KCSR that would justify escrowing any of the proceeds of the sale. While the Board takes strong exception to removal of rail assets during the pendency of an OFA process, KCSR asserts that it had no advance knowledge of, nor did it authorize, the bridge removal work initiated by a local government official. The KCSR official involved stated that the local officials could dismantle the bridge only after “proper approvals were obtained.”⁵ Moreover, there is no basis for an escrow here because there is no concern that KCSR would not or could not pay compensation ordered by the Board due to any potential increase in the costs of restoring the Remainder to service that might have been caused by the partial dismantling of the bridge.

In sum, we will not impose any of the requested additional terms. The only terms that we will impose are those set forth in our February 22 decision. The Offerors are, of course, free to negotiate privately with KCSR with respect to any terms they desire.

The Offerors will have an additional 10 days from the date this decision is served (until March 31, 2008) to notify the Board if they wish to withdraw their offer to purchase the Line. If they do not withdraw their offer, closing is to occur within 90 days of our February 22 decision.

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

It is ordered:

1. The requests of Offerors to modify and supplement the terms and conditions established by the Board in its February 22 decision are denied.
2. The terms and conditions we set in the February 22 decision are reaffirmed.
3. The Offerors may withdraw their offer to purchase the Line by March 31, 2008.
4. Clarification is granted as discussed in this decision.
5. Offerors’ request for establishment of an escrow fund is denied.
6. KCSR’s request to vacate our prior decision is denied.
7. KCSR’s alternative request to reject the Offerors’ three additional terms is granted.

⁵ See February 5, 2008 letter from William A. Mullins to Melvin Clemens, Director, Office of Compliance and Consumer Assistance, at 2, attached to KCSR’s reply filed February 8, 2008.

8. This decision is effective on its service date.

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

Anne K. Quinlan
Acting Secretary