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SERVICE DATE - JULY 1, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-32 (Sub-No. 83)

BOSTON AND MAINE CORPORATION--ABANDONMENT--IN HARTFORD AND NEW
HAVEN COUNTIES, CT

STB Docket No. AB-355 (Sub-No. 23)

SPRINGFIELD TERMINAL RAILWAY COMPANY--DISCONTINUANCE OF SERVICE--IN
HARTFORD AND NEW HAVEN COUNTIES, CT

REQUEST TO SET TERMS AND CONDITIONS

Decided: June 25, 1998

By decision served on April 22, 1998 (April 22 decision), we found that the public convenience and necessity permit Boston and Maine Corporation (B&M) to abandon and Springfield Terminal Railway Company (ST) to discontinue service over a line of railroad, known as the Canal Branch, extending from milepost 14.50 in Cheshire to milepost 24.00 in Southington, a distance of 9.50 miles, in Hartford and New Haven Counties, CT (the line). The decision authorizing abandonment and discontinuance was scheduled to become effective on May 22, 1998, unless an offer of financial assistance (OFA) was filed on or before May 1, 1998.

On May 1, 1998, Dalton Enterprises, Inc. (Dalton), filed an OFA under 49 U.S.C. 10904 and 49 CFR 1152.27(c) to purchase the line for \$650,240.¹ By decision served on May 5, 1998, Dalton was found to be financially responsible and the effective date of the decision authorizing abandonment and discontinuance was postponed to permit the financial assistance process to proceed.² The decision also noted that, on or before June 1, 1998, either party could request that the

¹ In the April 22 decision, we found that the net liquidation value (NLV) of the line is \$1,530,240. The NLV is the sum of the net salvage value (NSV) of the track, which we determined to be \$285,740, and the value of the land underlying the right-of-way, which we determined to be \$1,244,500.

² On May 4, 1998, Dalton filed a petition for stay of the effective date of the April 22 decision pending its appeal of the decision to the United States Court of Appeals for the Second Circuit. By decision served on May 18, 1998, the petition for stay was denied.

Board establish terms and conditions for the sale of the line if no agreement was reached during negotiations.

On June 1, 1998, Dalton requested that we establish the conditions and amount of compensation for the sale of the line. Applicants replied on June 8, 1998.³

PRELIMINARY MATTER

On June 12, 1998, Dalton filed a motion for leave to file a supplement to its request to set terms and conditions, along with the supplement. Dalton argues that it was prejudiced by the extension of time granted to applicants to file their response to the request to set terms and conditions because the extension gave applicants the opportunity to develop critiques of Dalton's evidence. According to Dalton, our regulations do not provide for such an extension and the 5-day period provided in the regulations is insufficient time to critique an offeror's evidence, as was done in this case. Accordingly, Dalton contends that it should now have an opportunity for rebuttal.

The motion will be denied. The reason for the short time allowed for applicants' response is that, by statute, we must issue our decision on the request to set terms and conditions within 30 days after it is filed. 49 U.S.C. 10904(f)(1)(A). Extensions of time that will not delay a decision are discretionary. In their response to a request set terms and conditions, applicants may submit information to challenge or rebut the offeror's information; that is the purpose of a response. In this case, the brief extension of time requested by applicants did not delay this proceeding and, in fact, applicants' response was filed only 1 business day after it was originally due. In any event, the supplemental statement submitted by Dalton with its motion does not contain any pertinent information that Dalton could not have submitted in its prior pleadings, but merely reiterates information and arguments Dalton has already made. Such a reply to a reply is not permitted and will not be considered. 49 CFR 1104.13(c).

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), we may not set a price that is below the fair market value of the line. In 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), it was determined that, 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

³ By letter filed June 2, 1998, applicants requested that the time for filing their evidence and response to Dalton's request be extended. By decision served on June 5, 1998, the due date for applicants' reply was extended to June 9, 1998.

highest and best nonrail use. NLV includes the value of the real estate plus the NSV of track and materials (gross salvage less removal costs).

In proceedings to set terms, the burden of proof is on the offeror, 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 established by the Board 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 we set, even if the railroad views the price as too low.

The burden of proof standard requires that, absent probative evidence supporting the offeror's estimates, the rail carrier's evidence be accepted. In areas of disagreement, the offeror must present more specific evidence or analysis or provide more reliable and verifiable documentation than that which the carrier submits. Absent specific evidence supporting the offeror's estimates and contradicting the rail carrier's estimates, the burden of proof requires that we accept 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 address below the various issues in this case.

Dalton asserts that the NLV of the line is \$580,304, but offers to purchase it for \$650,240. Applicants urge us to affirm our finding that the NLV of the line is \$1,530,240.

Land value. The parties differ in the methodology they use to value the land and in the adjustments they make for commissions and conveyance taxes. Dalton also makes an adjustment for the time it may take applicants to sell the land.

Methodology. In its request to set terms and conditions, Dalton submits an appraisal for the land underlying the right-of-way.⁴ Dalton states that it initially considered the possibility of breaking up the corridor and selling it piecemeal to the abutting landowners. It asserts, however, that the typical across-the-fence (ATF) valuation procedure would be difficult to apply in this case because there are insufficient comparable sales data in the area.⁵ Also, according to Dalton, parceling the land would reduce the economic return. Therefore, in an attempt to increase the marketability of the land, Dalton evaluated the right-of-way as a single corridor and compared it with sales of other corridors of land. It chose eight sales of former railroad lines to develop its

⁴ Dalton states that it found numerous easements that may affect the value of the land. No reversionary or other rights were found.

⁵ An ATF methodology estimates land values by determining the value, usually by recent sale, of comparable adjacent parcels of land.

estimate. After comparing the sales, Dalton estimated the gross value of the land to be approximately \$15,000 per acre. Multiplying the per acre value by the 72.79 acres in the right-of-way, it arrived at an unadjusted value for the land of approximately \$1,100,000.

In response, applicants argue that the \$1,244,500 figure contained in the April 22 decision sets the floor for land valuation purposes.⁶ They criticize Dalton's estimate because it uses an appraisal method which fails to incorporate the ATF method of valuation, generally considered to be the most appropriate method for estimating the market value of railroad rights-of-way. In addition, applicants object to certain downward adjustments which Dalton made to the sales data.⁷

Dalton's real estate valuation methodology is based on the sale of an intact corridor and unit costs are based on former railroad rights-of-way in the area. Unless there is a specific, documented interest expressed by a potential purchaser for an intact corridor, we do not consider this an acceptable method of valuation for NLV purposes. The highest and best non-rail use is to sell parcels to adjoining landowners or other interested parties.⁸ We find that the ATF method of valuation is appropriate for this case.

Commissions. Dalton argues that an \$85,000 adjustment is required for a broker's commission that would be incurred in selling the land. Applicants object to this deduction because B&M's real estate department sells its abandoned rights-of-way and, as a result, B&M does not incur broker's fees. Dalton has not shown that B&M cannot sell the property without a broker, as it has done in the past, so we will not include a broker's commission in our restatement.

Taxes. Dalton also asserts that the value of the land should be reduced by the state and municipal conveyance taxes that must be paid on the sale.⁹ Applicants object to the inclusion of

⁶ Applicants had proposed a much higher figure in their application.

⁷ Applicants also point out that Dalton's appraisal does not consider two other relevant sales within the market area that were higher than the average developed by Dalton. These properties consist of a 10.77 acre right-of-way running from Whitney Avenue in New Haven to the Hamden/New Haven city line. The property sold for \$73,372 per acre, considerably more than any of the railroad corridors used by Dalton. In addition, a 31.82 acre parcel running from Connolly Parkway in Hamden to Old Hill Road in Cheshire sold for \$46,354 per acre, also considerably more than those parcels considered by Dalton.

⁸ This does not preclude B&M from selling the property as a corridor to an interested buyer who has a particular need for the right-of-way and is willing to pay for it (e.g., for use as a linear park).

⁹ Conveyance taxes are computed as a percentage of the property value. The state tax is 1% (continued...)

conveyance taxes because it is their practice to make these costs the buyer's responsibility. The two conveyance taxes are required by Connecticut state law and local ordinance, and thus become part of the cost of the sale. Therefore, we will include these costs in our restatement.

Timing of the sale. Dalton argues that the value of the land must be reduced by the time it would take to sell the land, which Dalton estimates at 2.5 years based on the sales of similar corridors of property. An OFA is a forced sale, and is considered a one-time event. The transaction is not spread out over several years. Consequently, we find Dalton's time adjustment inappropriate and we will not include it in our restatement.

In sum, we will use the land value contained in the April 22 decision, reduced by the amount of the state and local conveyance taxes. Our restated land value is \$1,230,686.

Net salvage value. Dalton and applicants disagree on the value of the track materials and the cost of restoring the 16 grade crossings on the line. Dalton asserts that the NSV of the line is considerably less than zero, a negative \$175,261. Applicants assert that our previous finding that the NSV is \$285,740 is correct.

Track materials. Dalton retained Track Management Systems, Inc. (TMS) to make a physical inspection of the line over a 3-day period. Based on this inspection, Dalton states that there are 0.864 miles of 115-lb. rail and 8.365 miles of 80-lb rail, for a total of 9.229 miles.¹⁰ It includes costs to restore the grade crossings on the line, dispose of 19,920 scrap ties, and reclassify all of the 80-lb. rail as scrap instead of relay. Offsetting these downward adjustments, Dalton adds value for the sale of relay rail and landscape quality ties and it increases the unit cost for 115-lb. relay rail.

Applicants assert that Dalton's estimate of the amount of track on the line is inaccurate. Applicants state that there are 9.05 miles of 80-lb. jointed rail and 0.90 miles of 115-lb. jointed rail, amounting to a total of 9.95 track-miles, including sidings. Contrary to Dalton's assertion, applicants state that there is a market for 80-lb. relay rail and they submit a quotation indicating that the price is about \$230 per net ton (NT). Applicants also note that a recent price for scrap rail is \$135 per gross ton (GT), or about \$65 per GT if reduced by a removal cost of \$70 per GT. They

⁹(...continued)

and the municipal tax is 0.11%. Based on our land value of \$1,244,500, the state tax is \$12,445 and the municipal tax is \$1,369. Subtracting these tax amounts from the value of the land yields a net land value of \$1,230,686.

¹⁰ The document submitted to Dalton by TMS appears to be inconsistent. It also uses 8.646 miles of 80-lb. rail and 0.863 miles of 115-lb. rail, for a total of 9.509 miles.

submit two quotations in support of this amount.¹¹ Applicants assert that the methodology they use for tie costs in the abandonment and discontinuance application adequately considers tie disposal costs. Applicants point out that they currently have agreements with contractors for the disposal of scrap ties in exchange for the landscape ties on the line, after removal of all relay quality ties.

We agree with applicants' observation that Dalton's evidence contains several inconsistencies with respect to the number of track miles. Dalton does not explain the 0.721-mile discrepancy. Therefore, we find Dalton's estimate of the quantities of track materials to be unreliable.

Dalton asserts that 80-lb. rail is considered scrap regardless of condition, but it does not indicate the standards that it used to reclassify the rail as scrap. Dalton's reclassification of all 80-lb. rail as scrap is not based on the actual condition of the rail itself. It submits no evidence showing that the rail is damaged or excessively worn. Because of the lack of supporting evidence, we cannot accept Dalton's downgrading of all 80-lb. rail to scrap. Applicants, however, present evidence that 80-lb. rail has some marketability as relay rail. We note that applicants have submitted a quotation indicating that the current market price of 80-lb. relay rail is \$230 per NT, which is lower than the \$270 value they used in their abandonment and discontinuance application, and is better supported. Consequently, we will use the lower value in our restatement.¹²

Dalton prices landscape ties at \$2.00 each and relay ties at \$10.00 each, but does not indicate the source of its price. It estimates that there are 19,920 scrap crossties, and that the disposal cost is \$3.50 each, but does not indicate the source of its disposal cost. Dalton's prices for relay ties, landscape ties and disposal costs for scrap ties are unacceptable because it did not submit any supporting information in the form of quotations or other market data. We will continue to rely on applicants' approach to tie valuation in this case, i.e., that landscape ties are approximately equal in value to the disposal cost of scrap ties.

¹¹ This price is higher than Dalton's estimate of \$58 per GT, after removal costs have been deducted.

¹² Our restated value for relay rail is \$208,280, computed as follows: The gross salvage value of 80-lb. relay rail is \$196,000 (852 tons x \$230 per ton = \$195,960, rounded to \$196,000 to be consistent with applicants' methodology in their abandonment and discontinuance application and our April 22 decision). The gross salvage value of the 115-lb. relay rail remains unchanged from our April 22 decision, as do the costs of removal.

80-lb. rail	\$196,000
115-lb. rail	84,710
Cost to remove 80-lb. rail	(59,658)
Cost to remove 115-lb. rail	<u>(12,772)</u>
	\$208,280

Grade crossings. Dalton bases its grade crossing restoration cost of \$295,000 (\$18,438 for each crossing) on a bid from a contractor, A. J. Belliveau Railroad Construction, Inc.¹³ We note that the contractor specifies the weight of rail in each of the crossings. This is not relevant to the restoration costs because all rail is to have been removed by others prior to restoration. It may indicate, however, that the price includes the removal of the rail in each of the crossings. If so, the removal cost would be double counted. We also note that all but one of the crossings are timber, and from the photos provided in the real estate appraisal, most of the crossings appear to be relatively flat. Because of these considerations, the restoration of the crossings should be routine. Therefore, we find that Dalton's estimate is much too high.

Applicants state that grade crossing restoration, if performed by railroad employees, would cost less than \$100,000.¹⁴ While applicants' estimate appears high, it is the best evidence of record and we will accept it. Applicants, however, did not adjust their NSV to include this required cost. We will make this adjustment in our restatement.

Dalton has failed to support its estimate of NSV with reliable data. Therefore, we will use the NSV contained in our April 22 decision, adjusted to reflect applicants' revised value for 80-lb. relay rail and the cost of restoring grade crossings. Our restated NSV for the line is \$151,730.

¹³ Dalton provides a second bid from another contractor, Damours General Contractors (Damours), to remove all track materials and signals, regrade the roadbed, and restore grade crossings. Damours proposed a price of \$150,000 for the work, after taking into account the value of recovered materials. Damours includes the removal of three bridges, something neither party discusses. We cannot determine if this is a local requirement, or how much it costs for bridge removal. As a result, we believe that Damours' estimate is overstated.

¹⁴ Because applicants did not say how much less than \$100,000 it would cost to restore the grade crossing, we will use \$100,000 in our restatement.

Net liquidation value. Our restated NLV for the line is as follows:

Rail, relay	\$208,280
Rail, scrap	26,390
Joint bars, relay	11,600
Joint bars, scrap	1,540
Other Track Material, scrap	3,920
Grade crossing restoration	(100,000)

Net salvage value , track	\$151,730
Land	1,230,686

NLV	\$1,382,416

Summary. The purchase price for the right-of-way is \$1,382,416, consisting of \$1,230,686 for land and \$151,730 for NSV of track and materials.

Dalton requests that the terms routinely imposed in financial assistance proceedings be established. In their reply, applicants request that, in addition to the standard terms, we impose two additional conditions: (1) to require Dalton, if it purchases the line, to honor the service and crossing commitments applicants made to Rex Forge Division (Rex Forge)¹⁵ when they sought to abandon the line and discontinue service; and (2) in order to avoid any potential misunderstanding on the part of Dalton as to the responsibilities it will assume, to impose the service requirements and restrictions on transfer of the line set forth in 49 CFR 1152.27(i).¹⁶

Should Dalton elect to purchase the line, to ensure an orderly transfer of the line, we will establish the typical terms: (1) payment will be made by cash or certified check; (2) closing will occur within 90 days of the service date of this decision; (3) B&M shall convey all property by quitclaim deed; and (4) B&M shall deliver all releases from any mortgage within 90 days of closing.

¹⁵ In the April 22 decision, applicants stated that they have agreed to retain a temporary freight easement under which the 4-mile segment of track between milepost 24.00 at Southington and milepost 20.00 at Plantsville will be left intact for at least a 12-month period so that rail delivery of additional presses by Rex Forge can be accomplished on reasonable terms and conditions. In addition, according to Rex Forge, applicants and Rex Forge will seek an extension of the freight easement, not to exceed 6 months, from the Town of Southington and/or the Connecticut Department of Transportation, if necessary, to permit delivery of additional presses during the 6-month period.

¹⁶ These requirements are routinely imposed on sales pursuant to an OFA and will be imposed here. See ordering paragraph 4, infra.

In addition, we will require Dalton to honor the service and crossing commitments made by applicants to Rex Forge. The parties may alter any of these terms by agreement.

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

It is ordered:

1. Dalton's motion to file a supplement to its request to set terms and conditions is denied.
2. The purchase price for the line is set at \$1,382,416. Other terms of sale must comply with the provisions discussed above.
3. Within 10 days of the service date of this decision, Dalton must accept or reject, in writing, the terms and conditions established here by notifying the Board and applicants.
4. If Dalton accepts the terms and conditions established by this decision, Dalton and applicants will be bound by this decision. Dalton may not transfer or discontinue service on the line prior to the end of the second year after consummation of the sale, nor may it transfer the line, except to applicants, prior to the end of the fifth year after consummation of the sale.
5. If Dalton withdraws its offer or does not accept the terms and conditions with a timely written notification, the Board shall issue a decision within 20 days of the service date of this decision vacating the prior decision that postponed the effective date of the decision authorizing abandonment and discontinuance.
6. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary