

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-491 (Sub-No. 2X)

R.J. CORMAN RAILROAD COMPANY/PENNSYLVANIA  
LINES, INC.—ABANDONMENT EXEMPTION—IN CLEARFIELD, JEFFERSON, AND  
INDIANA COUNTIES, PA

IN THE MATTER OF A REQUEST TO SET TERMS AND CONDITIONS

Decided: January 30, 2009

R. J. Corman Railroad Company/Pennsylvania Lines, Inc. (RJCP), filed a notice of exemption under 49 CFR 1152 Subpart F—Exempt Abandonments to abandon a 7-mile segment of a line of railroad known as the Hillman Branch, extending from milepost 0 near McGees to the end of the line at milepost 7 near Hillman, in Clearfield, Jefferson, and Indiana Counties, PA (line). Notice of the exemption was served and published in the Federal Register on October 7, 2008 (73 FR 58710-11). The exemption was scheduled to become effective on November 6, 2008, unless it was stayed by the Board or a party filed a formal expression of intent to file an offer of financial assistance (OFA) under 49 U.S.C. 10904 and 49 CFR 1152.27(c) by October 17, 2008.

On October 15, 2008, P&N Coal Company, Inc. (P&N), filed a formal expression of intent to file an OFA either to subsidize operations over the line or to purchase the line. This filing automatically stayed the effective date of the exemption for 10 days, until November 16, 2008,<sup>1</sup> and extended the due date for an OFA to be filed until November 6, 2008. In the filing, P&N requested that RJCP provide it with the information set forth in 49 CFR 1152.27(a).

On November 3, 2008, P&N requested, pursuant to 49 CFR 1152.27(c)(2)(ii)(C), that the 30-day time period for filing an OFA be tolled an additional 30 days. On November 5, 2008, P&N filed an OFA but, in that filing, it requested that it have an opportunity to supplement or amend its OFA. By decision served on November 5, 2008, the due date for submitting an OFA was further tolled until December 8, 2008, so that P&N would have the opportunity to supplement or amend the OFA, and the effective date of the exemption was postponed until December 18, 2008.

On December 2, 2008, P&N filed a revised OFA under 49 U.S.C. 10904 and 49 CFR 1152.27(c) to purchase the entire line for \$186,576 (Revised OFA), using \$151,576 as the net

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<sup>1</sup> See 49 CFR 1152.27(c)(2)(i).

salvage value (NSV) of the line (after deducting \$64,800 for cost of removal) and \$35,000 for the value of the real estate.<sup>2</sup> As discussed below, P&N appears to have used appraisals from 2005 and 2008 provided to it by RJCP to value the railroad ties and switches on the line, to set the quantity of rail, siding, and other track materials (OTM), and to set the cost of removing the track materials. P&N contends that the American Metal Markets (AMM) Consumer Buying Prices Index (Index) for Pittsburgh, PA, should be used to value the rail, siding, and OTM and that three local real estate sales should be used to value the land underlying the line.

In a decision served on December 4, 2008, the Board, by the Director of the Office of Proceedings, found that P&N is financially responsible and postponed the effective date of the exemption to permit the OFA process to proceed. Although the Revised OFA figure was substantially lower than RJCP's minimum purchase price, the Director found that P&N had sufficiently explained the basis for the difference consistent with 49 U.S.C. 10904(c) and 49 CFR 1152.27(c)(1)(ii)(C).

Under 49 CFR 1152.27(g)(1), if the parties fail to agree on the amount of the purchase, either party may, within 30 days of the OFA, request the Board to establish the conditions and amount of compensation. On December 30, 2008, P&N filed supplemental exhibits. By pleading filed on December 31, 2008 (within 30 days of the December 2 Revised OFA), P&N requested that we set terms and conditions for the sale. But P&N did not submit any additional information with its request, apparently relying on the information in its Revised OFA.

On January 6, 2009, RJCP filed a response to P&N's request to set terms and conditions (RJCP's January 6 response). In that response, RJCP addressed the Revised OFA, criticizing its tie and switch values, adopting the AMM Index for Pittsburgh to value the rail, siding, and OTM (but updating the pricing date), and adopting two of P&N's real estate valuations and adjusting them based on the affidavit of Arthur Spiros (Spiros affidavit), a licensed real estate salesperson and a certified real estate appraiser with experience in railroad real estate. Based on these changes, RJCP contends that the minimum purchase price should be set at \$566,247, using \$515,729 as the NSV of the line (after deducting P&N's \$64,800 for cost of removal) and \$115,318 for the value of the real estate.

#### PRELIMINARY MATTERS

On January 13, 2009, P&N filed a motion to strike requesting that the Board reject Exhibits A, B, C, and E of RJCP's January 6 response because those exhibits were "new evidence." On January 16, 2009, RJCP replied to P&N's motion to strike, arguing that, if P&N was dissatisfied with the information RJCP had provided, P&N should have requested that the Board toll the OFA process before filing its OFA, as it did on November 3, 2008. RJCP also argues that, because the burden of proof is on the offeror to establish the net liquidation value (NLV) and minimum purchase price of the line, the rail carrier may reply to the offeror's

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<sup>2</sup> According to P&N, RJCP initially set the minimum purchase price at \$1,066,703, using \$766,703 as the NSV of the line (after deducting \$123,106 for cost of removal) and \$300,000 for the value of the real estate.

evidence and give support for the terms RJCP seeks. Here, each of RJCP's Exhibits A, B, C, and E replies to the Revised OFA, attempting properly to support its terms for the sale.<sup>3</sup> Thus, the motion to strike will be denied.

P&N also argues that Exhibits D and E to RJCP's January 6 response should be rejected as unverified because the filing's certification and verification was notarized on January 2, 2009, while Exhibits D and E are dated January 6, 2009. The independent certification contained in Exhibit E is sufficient to consider the exhibit verified. With respect to Exhibit D, P&N does not contest the accuracy. Thus, neither exhibit will be rejected.

In the alternative, P&N requests that the Board allow it to respond to RJCP's January 6 response. We have a strict statutory deadline when setting terms and conditions in an OFA proceeding (30 days after the request is due), and our consideration of evidence filed at a late date undermines our ability to meet that deadline. Thus, P&N's request to file a response to RJCP's January 6 response will be rejected here. For the same reason, we will not revise our calculations to include the information regarding steel prices for Pittsburgh as of January 27, 2009, filed by RJCP on January 29, 2009. See 49 CFR 1152.27(h)(4).

## 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 net salvage value of 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, the rail carrier's evidence is accepted absent probative evidence supporting the offeror's estimates. 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

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<sup>3</sup> The Board would not accept new evidence that was available when information was requested under 49 CFR 1152.27(a), but that was withheld so that the offeror would not be able to respond to it under 49 CFR 1152.27(h)(4). But that does not appear to be the case here.

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. To determine the minimum purchase price, we will address below the parties' evidence on the value of the track and track materials and the land.

#### Track and Track Materials.

Ties. P&N submits a one-page spreadsheet dated April 14, 2005, from RJCP (April 2005 appraisal), which lists the total value of the line's ties as \$43,596. P&N essentially makes two arguments that the April 2005 appraisal should be used in setting the NLV of the line. First, P&N points out that RJCP's appraisals have shown a 260% increase in the value of the ties on the line between April 2005 and October 2008, indicating that P&N believes that this increase is unusually large. In support, P&N provides portions of a R. J. Corman Railroad Group 2008 reappraisal report entitled "Railroad Reappraisal Report – Clearfield Cluster Trackage, May 2008" (2008 RJCP report) performed by TranSystems/Stone Consulting & Design (formerly Stone Consulting & Design, Inc.) (TranSystems). The 2008 RJCP report attaches a summary dated October 15, 2008 (October 2008 appraisal), which P&N claims is an update of the 2005 appraisal. The October 2008 appraisal lists the total value of the line's ties as \$114,471, which is approximately 260% higher than the 2005 appraisal.

Second, P&N argues that the April 2005 appraisal better reflects the valuation of the ties here than the October 2008 appraisal. In support of this argument, P&N submitted an e-mail quote from Nathan Kovalchick stating that Kovalchick Corporation (Kovalchick) would purchase relay ties for \$10 each, high quality landscape ties for \$3 each, low quality landscape ties for \$0 each, and scrap ties at a cost of \$6 each (Kovalchick quote). It also submitted a supplemental exhibit on December 30, 2008, containing a December 12, 2008 letter from Mr. Kovalchick (Kovalchick letter) expressing Kovalchick's interest in purchasing any railroad ties. Mr. Kovalchick states in his letter that relay ties, at \$10 per tie, are the same price as they were in 2005 and that the price of landscape ties has decreased from \$5 each in 2005 to only \$1 each. As a comparison, P&N provides a page from the 2008 RJCP report that describes a "2005 appraisal," presumably the April 2005 appraisal, as calculated using a value per tie of \$6 for ties with more than 20 years of estimated life remaining, \$4 for ties with 5-20 years of life, and \$3 for landscape ties, and a net disposal cost per tie of \$0.64 for unusable ties.<sup>4</sup> P&N argues that the

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<sup>4</sup> The RJCP 2008 report also provides pricing "for 2008" as calculated using a value per tie of \$9.38 for landscape ties, \$11.25 for ties with 5-20 years of estimated life remaining, and \$15.38 for ties with more than 20 years of life, and a net disposal cost per tie of \$2.43 for unusable ties. P&N contends that these prices come from an advertisement from The Adams Cole and Dalton Corporation (Adams), which, it argues, is inappropriate here. P&N points out that these prices reflect retail value of "pick-out your own ties" from a facility located in Boise, ID (not including freight from Boise). P&N attaches a pricing sheet from Adams showing prices of \$15 per tie for "Grade #1" ties, \$10 per tie for "Landscape Grade #1" ties, and \$8 per tie for "Landscape Grade #2" ties.

Kovalchick quote and Kovalchick letter show that the values used in the April 2005 appraisal are valid today. P&N concludes that “there is nothing to suggest the increase in value of the ties from 2005 . . . .”

In RJCP’s January 6 response, RJCP submits several recent quotes from A&K Railroad Material, Inc., Unitrac Railroad Materials, Inc., and Appalachian Timber Services of between \$23.50 and \$25 each (net shipping) for relay ties. RJCP also shows that its affiliate, R. J. Corman Railroad Construction (RJCC), received an average price of \$9.49 each for the sale of 5,471 landscape ties in 2008. RJCP also states that TranSystems indicated that the cost to dispose of defective ties is \$2.43 each.

In conjunction with its pricing evidence, RJCP uses a tie distribution from a recently completed application of R. J. Corman Railroad Group (RJCG), RJCP’s holding company, for a Railroad Rehabilitation and Improvement Financing (RRIF) loan that was granted by the Federal Railroad Administration in May 2008. RJCP submitted four pages containing tie distribution information provided by TranSystems that RJCP states was used in the RRIF loan application and shows the line as containing 4,076 relay quality railroad ties (relay ties), 7,392 landscape quality railroad ties (ties with a useful life of less than 20 years) (landscape ties), and 9,652 scrap or defective railroad ties. Based on this tie distribution, RJCP asserts that the total value of the line’s ties is \$144,534.08.<sup>5</sup>

P&N contends that its use of \$43,596 from the April 2005 appraisal is more realistic than RJCP’s 2008 valuations, given the much lower values in the Kovalchick quote and the Kovalchick letter. But it does not use the prices quoted in those documents to value the ties. In contrast to P&N’s use of the April 2005 appraisal, RJCP’s three separate quotes for relay ties are consistent with each other and, despite RJCC’s affiliation, its price estimates are based on actual sales in the regular course of business. Thus, RJCP’s averaging of three recent quotes for relay ties and its affiliate’s actual experience for landscape ties are the best evidence of record for valuing those ties on the line.

For defective ties, RJCP uses a removal cost of \$2.43 per defective tie, based on information from TranSystems. Although this cost is consistent with the cost shown in the 2008 RJCP report, there is no evidence on this record explaining how the \$2.43 figure was derived. P&N’s \$6 figure, by contrast, is based on the Kovalchick quote. Consistent with our longstanding precedent, we find that a quote reflecting current market conditions is the best evidence, and the evidence that we will use for the removal cost of defective ties.

Based on RJCP’s average quote for relay ties and its affiliate’s estimate for landscape ties, and the Kovalchick quote for defective ties, we find that the value of the ties on the line is \$110,062.

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<sup>5</sup> P&N relies on the line’s tie value listed in the 2005 appraisal, which does not delineate a tie distribution (number and breakdown of tie quality and quantities). It is unclear whether the tie distribution changed from 2005 to 2008.

Switches. The parties agree that there are three switches on the line. P&N uses the April 2005 appraisal to assign a value of \$10,500 for the three switches. Again, P&N argues that there is nothing to suggest that the value has gone up since 2005. RJCP argues that P&N errs in not using the 2008 RJCP report, in which TranSystems appraises the value of the switches at \$49,035. But it is reasonable to assume that prices have generally risen since 2005, and P&N, which has the burden of proof, may not simply cite 4-year-old costs in the face of the 2008 RJCP report with its more recent valuation. Thus, the 2008 RJCP report is the best evidence of record, and the value of the switches on the line is \$49,035.

Rail, siding, and OTM. The parties agree on the quantities of 1,231 gross tons of rail and siding and 307 tons of OTM on the line.<sup>6</sup> They also agree on the basis for establishing the final scrap price as the AMM Index for Pittsburgh, PA, for “No. 1 heavy melt – consumer” steel (heavy melt steel). The parties differ, however, on the date for which the AMM Index prices should be applied to the agreed-upon quantities. P&N submits the AMM Index prices, effective November 26, 2008, showing the price for heavy melt steel as \$130 per ton, resulting in a value of \$160,030 for the rail and siding.<sup>7</sup> RJCP submits the AMM Index prices from January 5, 2009, showing a heavy melt steel price of \$210 per ton and OTM price of \$200 per ton, resulting in a value of \$258,510 for the rail and siding and a value of \$61,400 for OTM on the line, or a total value of \$319,910.

In the Revised OFA, P&N contends that the Board has recently stated a preference for the most recent scrap steel values, even to the point of deferring that value to the date of the decision, citing 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 its rebuttal, P&N simply states that it has no objection to the Board determining final steel prices as of the date of the decision.

In Coos Bay, a feeder line case filed and processed under 49 U.S.C. 10907, we decided that it was necessary to determine whether later-submitted steel prices undercut the valuation evidence submitted earlier in that proceeding. In that case, the evidence on steel prices spanned approximately 7 months, and the Board had the flexibility to seek updated prices because feeder line cases are not subject to statutory deadlines. OFA proceedings, in contrast, are subject to short statutory deadlines, and the Board follows an established process to set the terms and conditions for the sale of a line so that those deadlines can be met.<sup>8</sup> Once a request has been

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<sup>6</sup> P&N uses 1,231 gross tons in its Revised OFA, despite using different amounts for the separate amounts of rail and siding. RJCP responded that it is reasonable to add OTM equaling 25% of the total gross tons of rail and siding, and P&N agrees in its rebuttal. We too agree that the addition of 307 gross tons of OTM is reasonable here.

<sup>7</sup> Although P&N did not include OTM in its NLV, in its motion to strike it states that adding OTM is reasonable and that the AMM Index price for December 1, 2008 for OTM was \$200 per ton.

<sup>8</sup> Our established process for handling OFAs, which relies on the evidence presented under the time-frames established in 49 CFR 1152.27, has been found to be appropriate in most

(continued . . . )

made, the Board has only 30 days to set the terms and conditions.<sup>9</sup> See 49 U.S.C. 10904(f)(1)(A). The OFA procedures do not provide for the filing of additional evidence or argument beyond the parties' initial filings (and hence we are rejecting RJCP's filing of January 29, 2009), as it is simply not feasible for the Board to receive another round of pleadings in this situation and still meet the short deadline in the statute. Thus, the AMM Index for January 5, 2009, is the best evidence of record and will be used in pricing the rail, siding, and OTM on the line, resulting in the total value of the rail, siding, and OTM as \$319,910.

Gates and Flashers. The parties agree on the value of the gates and flashers as \$2,250.

Cost of removal. The October 2008 appraisal shows a cost of removal of \$123,106 for the line, which, according to P&N, RJCP adopted in its initial purchase price provided to P&N. In the Revised OFA, P&N had used the cost of removal from the April 2005 appraisal of \$64,800, , and in its January 6 response, RJCP states that it would accept P&N's lower cost of removal. But as with switches, the 2005 cost data is not likely as accurate as the more recent data in the October 2008 appraisal, which, we note, is RJCP's own evidence. Because it would not be appropriate to permit RJCP to mix and match 2005 and 2008 data for its own convenience without explanation, we find that the most recent cost of removal (which appears to be an update of the April 2005 appraisal) is the best evidence of record for the cost of removing track and track materials.

Based on the parties' evidentiary submissions and the best evidence of record, we find that the track and track materials to be \$358,151, as reduced for cost of removal.

Land.

The parties agree on the length of the line as 7.2 miles and value the underlying real estate of the line on a per-mile basis. To calculate the value of the land, P&N uses three sales of abandoned lines sold for trail use within 20 miles of the line: (1) a 2001 sale of a 6-mile extension for \$35,000, or \$5,833 per mile; (2) a 2000 sale of a 7.5-mile line for \$38,000, or \$5,066 per mile; and (3) a 1992 sale of 14.5-mile line for \$10,000, or \$689.65 per mile. P&N states that it averaged those sales on a per mile basis, but, in indicating that the value for the line is "in the \$5,000 per mile range," P&N appears primarily to use the 2000 sale and 2001 sale to value the land underlying the line at \$35,000.<sup>10</sup>

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( . . . continued)

cases given the fact that, under the short statutory deadlines, "market data submitted by the parties in OFA proceedings . . . is largely contemporaneous with the market conditions that existed both at the commencement of the litigation and at the time of the final decision." Toledo, Peoria & W. Ry. v. STB, 462 F.3d 734, 748 (7th Cir. 2006).

<sup>9</sup> Congress reduced the Board's deadline for issuing a decision from 60 days to 30 days in the ICC Termination Act of 1995.

<sup>10</sup> P&N adds that line involved in the 1992 sale is an equally steep line and, adjusted for inflation, adds weight to the value placed on rural steep graded lines like the line here.

RJCP adopts the 2000 sale and 2001 sale as the basis for its land value, but makes two adjustments based on the Spiros affidavit. RJCP adjusts the two sales using a 5% annual compounded rate of increase, resulting in a price per mile of \$7,859 for the 2000 sale and \$8,615 for the 2001 sale, or an average price per mile of \$8,237. It also argues that its title is superior to what was sold in the two comparable sales. Those sales were not transfers of full fees, but instead transfers of real estate rights limited to trail use, with the grantors reserving significant rights in the land, including reservation of all mineral rights, reservation of all existing wire and pipe facilities, and reserving the right to grant easements and right-of-way and received consideration for public services and oil and gas pipelines. RJCP argues, supported by the Spiros affidavit, that the rights sold in the comparable sales were analogous to easements and that standard real estate pricing would treat what the grantee received in the 2000 and 2001 sales as 50% of the fee. Therefore, RJCP contends that the price for the land here should be doubled, raising the average price per mile to \$16,474 per mile, or a total of \$115,318 for the approximately 7 miles.

P&N does not support its contention that real estate prices have remained the same for the land underlying the line for over eight years. Indeed, the price per mile increased approximately 15% from the 2000 sale to the 2001 sale. RJCP provides the only evidence to update and adjust the 2000 sale and 2001 sale, and it will be adopted here as the best evidence of record. Thus, we set the value of the land underlying the line at \$115,318.

Net Liquidation Value.

Accordingly, relying on the best evidence of record, we set the purchase price for the line at \$473,469.

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) RJCP shall convey all property by quitclaim deed; and (4) RJCP 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. P&N's motion to strike is denied.
2. P&N's request to reject Exhibits D and E from RJCP's January 6 response is denied.
3. P&N's request to file a reply to RJCP's January 6 response is denied.

4. RJCP's filing of January 29, 2009 is rejected.
5. The purchase price for the line is set at \$473,469, and the parties must comply with the other terms of sale discussed above.
6. This decision will become binding on the parties unless P&N notifies the Board and RJCP in writing, on or before February 9, 2009, that it is withdrawing its offer to purchase the line.
7. If P&N withdraws its offer or does not accept the terms and conditions with a timely written notification, we will serve a decision by February 19, 2009, vacating the prior decision that postponed the effective date of the decision authorizing the abandonment.
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