

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-55 (Sub-No. 643X)

CSX TRANSPORTATION, INC.—ABANDONMENT EXEMPTION—
IN LAPORTE, PORTER AND STARKE COUNTIES, IN

Decided: April 30, 2004

By decision and notice of interim trail use or abandonment served on February 20, 2004, the Board granted a petition filed by CSX Transportation, Inc. (CSXT), for an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon an approximately 32.97-mile line of railroad in LaPorte, Porter, and Starke Counties, IN. The exemption was scheduled to become effective on March 22, 2004, unless an offer of financial assistance (OFA) was submitted under 49 U.S.C. 10904 and 49 CFR 1152.27(c).

On March 1, 2004, the Incorporated Town of North Judson (the Town) filed an OFA to purchase the entire line for \$1,200,000. The Town's \$1,200,000 figure was developed by applying the value for track materials that CSXT had presented in its exemption petition—\$1,050,500—and by adding the Town's estimated land value of \$149,450. On March 4, 2004, a decision was served postponing the effective date of the February 20, 2004 decision, and giving the parties until March 31, 2004, to reach an agreement for the sale of the line. However, the parties were unable to agree on the sale price, and on March 31, 2004, the Town filed a request pursuant to 49 U.S.C. 10904(e) for the Board to set terms and conditions of the sale.

On April 5, 2004, CSXT responded to the request to set terms and conditions. CSXT states that the Board should set the purchase price for the line at \$2,431,288, valuing the track materials at \$1,952,288 and the land at \$479,000. The \$1,952,288 figure for track materials is a substantial increase (86%) over the \$1,050,550 value CSXT originally asserted in its petition for exemption filed in November 2003, which the Town used in developing its offer. CSXT claims that the difference is due to a sharp increase in the price of scrap steel during the past 2 years.

On April 8, 2004, the Town filed a motion to strike a portion of the evidence and argument in CSXT's reply. The Town objects to CSXT's new evidence of the increased value of the line (specifically, the value of the track materials), claiming that CSXT unfairly and prejudicially withheld this evidence until now. It also claims that at no time during their negotiations in March 2004 did CSXT inform the Town that CSXT intended to increase its calculation of the net salvage value (NSV) of the track.

On April 13, 2004, CSXT filed a reply urging the Board to deny the motion to strike, claiming it did not provide information regarding the increased value of track materials because the Town never requested this information. CSXT also contends that the reason it did not inform the Town of the increase during negotiations was due to the Town's "intransigence" over the issue of land value, which prevented the parties from reaching the issue of the NSV of the track materials. The Town, in its motion to strike, explained that it focused on the value of the land because it believed that this was the only issue in dispute.

CSXT's April 5, 2004 evidence regarding the increased value of the track materials was not fully documented. Therefore, without ruling on the motion to strike, a decision served on April 19, 2004, directed the parties to submit, by April 21, 2004, additional information and evidence (including supporting workpapers) regarding the value of track materials.

PRELIMINARY ISSUE

Although the Board disfavors a party's later introduction of evidence that could have been presented in its initial pleading (particularly in OFA proceedings where the statutory time frames are short), the recent sharp increase in the price of scrap steel warrants consideration of the new evidence in light of the Board's duty to set a purchase price for the line that is no lower than the constitutional minimum value. The Town's motion to strike portions of CSXT's April 5, 2004 response will therefore be denied.

The Board agrees with the Town that CSXT should have presented this information in its petition for exemption, or if it was not available at that time, then soon after the Town filed its OFA. CSXT's claim that its failure to provide information on the increased price of scrap steel to the Town was proper because the Town never requested such information is without merit. The governing statute, at 49 U.S.C. 10904(b), requires the railroad to provide promptly to a party considering an OFA all pertinent information about the value of the line, not simply information that the party specifically requests. In addition, 49 CFR 1152.27(a)(3) requires the railroad in exemption proceedings to provide, upon a request for information by a party considering an OFA, ". . . at a minimum[,] the carrier's estimate of the net liquidation value of the line, with supporting data reflecting available real estate appraisals, [and] assessments of the quality and quantity of track materials in a line . . ." (emphasis added). The phrase "at a minimum" clearly indicates that all this information must be given to a party considering an OFA. The "request" referred to in 49 CFR 1152.27(a) simply refers to a party's notification to the railroad that it is interested in purchasing the line and does not connote that the party must ask specifically for each type of information the railroad must provide. Moreover, the Town's failure to specifically request this information is understandable because it reasonably believed that it was in agreement with CSXT regarding the NSV. Once CSXT intended to raise its estimate of the NSV, it should have provided the information to the Town.

Moreover, the Board is generally reluctant to take action that might encourage parties continually to file new evidence as economic conditions change. Here, however, notwithstanding CSXT's failure to properly follow the OFA procedures, the Board is bound by 49 U.S.C. 10904(f)(1)(B) to set a purchase price no lower than the fair market value of the property, which is the constitutional minimum value. See 49 CFR 1152.27(h)(6). Therefore, in the unique circumstances of this case, the Board finds that it would be improper to reject the new evidence on scrap steel prices, as doing so could lead to the establishment of a purchase price that is inaccurate and below the constitutional minimum. Consideration of this evidence will not prejudice or disadvantage the Town, as it was permitted to file additional evidence, which will also be considered, to support its own assessment of the value of track materials.

Finally, on April 28, 2004, CSXT also filed a motion to strike the letter of Mr. Mark J. Belfiore, submitted as Appendix 1 to the Town's April 21, 2004 supplemental filing on the ground that the quotes therein were not based on fair market value. The Town responded on April 29, 2004. The motion to strike goes to the weight the Board should accord the Town's appendix rather than to its admissibility. Therefore, the Board will not strike the challenged letter or any references thereto.

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 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 net liquidation value (NLV) of the rail properties for their highest and best nonrail use. NLV includes the value of the underlying real estate plus the NSV of track and materials.

In these proceedings, 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 given the burden of proof, the Board must 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. The Board addresses below the value of the track and materials, and the land.

Land. In its petition for exemption, CSXT included an exhibit in which the land was originally estimated at \$719,400,¹ while the Town, in its OFA, initially valued the land at \$149,450. After inspection of the land and an analysis of rail corridor sales by its witness, however, the Town reduced its valuation to \$25,700 in its request to set terms and conditions.

The Town's analysis of the land was based on a comparison of two sales of rail corridors in the same counties as the rail line being assessed in this proceeding,² one of which was on a line abandoned in 1980, the other in 1987. This approach, the Town claims, was accepted by the Board's predecessor, the Interstate Commerce Commission (ICC), in Illinois Central Gulf R. Co.—Abandonment, 363 I.C.C. 866 (1981) (Illinois Central Gulf). Based on the experiences in 1980 and 1987, the Town asserted that CSXT would be able to sell only 5% of the right-of-way (ROW) involved here, specifically only 17.3 acres of land at a total value of \$39,088. The Town then reduced this figure to reflect the timing of the sales, to account for the costs of real estate commissions and closing expenses, and to add a separate, unexplained 5% discount. After these reductions and rounding, the Town calculated that the NLV of the land is \$25,700.

In its presentation, CSXT used an across-the-fence (ATF) methodology to value the fee simple portions of the ROW. (All other parcels of land were not included in the appraisal and thus were valued at zero.) Under the ATF methodology, the NLV of the land is determined by comparing the values of adjacent or nearby parcels of land (based on recent sales) to parcels on the ROW, then adjusting the amount to account for characteristics specific to this ROW. CSXT calculated the total value of the fee simple parcels at \$1,161,815, then reduced this figure to account for timing (delays in sales), real estate commissions, and closing costs. CSXT then performed a discounted cash flow analysis, using an 18% discount rate (based on the risk seen in residential land development), to yield, after rounding, a final NLV estimate for land of \$479,000.

Each party attacks the methodology and calculations of the other. The Town claims that CSXT's ATF methodology is flawed because there are physical differences between parcels that make up a railroad's ROW and the adjacent parcels. The ROW is graded and has a 3-foot high

¹ CSXT's Petition for Exemption, Exhibit F.

² See Town's Request for Establishment of Conditions and Compensation, Verified Statement of Gary E. Landrio, at 3.

embankment, which would result in additional sale preparation costs. The Town also argues that cinders used to make the embankment on which the line sits taint the soil, preventing efficient crop growth and thus lowering the land value further. CSXT responds that, although it did not include the cost of clearing and removing the embankment, it also did not include in its estimate of the NSV the amount of compensation it would receive by selling the ballast (\$3,000 per mile),³ which would offset the cost of removing the embankment to prepare the property for sale (and the Board agrees with this approach). CSXT also argues that the Town's claim that cinders have irreparably damaged the soil is unsupported by any evidence and that this argument should be given no weight because the Town's witness is not a qualified expert in the areas of chemistry or agronomy.

CSXT argues that the Town's methodology of comparing the sale of previously abandoned rail corridors to this transaction is inaccurate. Those sales occurred 23 and 17 years ago, and there is no evidence that the land in those corridors has the same characteristics as the ROW in this case. CSXT also challenges the Town's claim that only 5% of the property that makes up this ROW would be marketable. According to CSXT, the reason so few parcels from its former ROWs were sold is that it did not own most of the land there in fee simple, and thus, most of the land reverted to the adjacent landowners. Here, however, CSXT owns a large portion of the ROW in fee simple. CSXT also argues that the Town's reliance on Illinois Central Gulf is misleading because the agency actually rejected the rail corridor comparison approach in the decision and, instead, relied on an appraisal that used a methodology similar to ATF.

Conclusions as to Land Valuation. Having carefully reviewed the parties' evidence of the value of the ROW, the Board finds that CSXT's evidence is the more accurate and reliable, and thus uses its valuation of \$479,000. CSXT has properly employed and supported the ATF methodology, making appropriate adjustments to account for those parcels that were unlikely to be sold in a reasonable time and for the expense of real estate commissions and closing costs. The only unsupported aspect of CSXT's appraisal—its assumption that 85% of the fee-owned land would be sold in a reasonable time—has been accepted by the Town and used in its analysis, and therefore, the Board will accept this figure as well.

CSXT is correct that the Board has relied on the ATF methodology in most OFA proceedings where it has been asked to set the terms and conditions, typically over methodologies that compare sales of former rail corridors.⁴ In these cases, the Board held that

³ See CSXT's Response, Verified Statement of William R. Pemberton, at 18.

⁴ See 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 Jan. 7, 2000) (Railroad Ventures); Boston and Maine Corp.—Abandonment—In Hartford and New Haven Counties, CT, STB Docket No. AB-

the highest and best non-rail use of the land was to sell it to adjacent landowners,⁵ a process that the ATF methodology tries to replicate. In any event, the Town's attempt to use previous rail corridor sales as the basis for its valuation is unavailing, as the previous sales do not involve comparable properties. As CSXT has explained, there were few willing purchasers for the parcels that made up its previously abandoned lines because CSXT did not own many of these parcels in fee simple, and thus the adjacent landowners were able to reclaim the various parcels without having to repurchase them. Here, by contrast, CSXT does own many of the parcels in fee simple and therefore would be able to resell the land. As the Town has not shown that there would be a lack of willing purchasers for this line, its reliance on previous sales is inapt.

Finally, the Town has not provided any evidence to support its assertion that the particular parcels that could be sold here would be less productive agriculturally. Even assuming, however, that this land would be less valuable due to damage to the soil, the Town has not provided any evidence of the extent to which the value of this land should be reduced. Without such evidence, the Board must accept the rail carrier's valuation.

Based on the evidence of record, the Board sets the value of the land at \$479,000.

Track Materials. In its petition for exemption, CSXT stated that the NSV for track materials was \$1,050,550. Subsequently, the Town filed its OFA, in which it agreed to that price. In its response to the Town's request to set terms and conditions, however, CSXT revealed for the first time that it now values the NSV of the track materials at \$1,952,288, an 86% increase over its original valuation. CSXT claims that the cause for this increase is a sharp increase in the price of scrap steel that has occurred since 2002. While CSXT filed its petition for exemption in November 2003, it now claims that it had relied on scrap steel cost data from 2002 to develop its NSV figure.

CSXT submitted evidence, both in its response to the Town's request to set terms and conditions and in its supplemental filing, in order to demonstrate that the price of scrap and reusable (or relay) steel has increased. Specifically, it claims that the price per ton of scrap steel has increased from \$85 in 2002 to \$235 in 2004. For relay steel, CSXT claims the value has reached anywhere from \$397 (up from its original value of \$366) to \$225 (up from its original value of \$180) per net ton, depending on the classification of the rail. Thus, CSXT now argues that the NSV for track materials should be set at \$1,952,288.

Although it initially agreed to the NSV figure of \$1,050,550 contained in CSXT's petition for exemption, in its supplemental evidence, the Town now argues that the NSV should

32 (Sub-No. 83), et al. (STB served July 1, 1998) (Boston and Maine).

⁵ See Railroad Ventures at 9; Boston and Maine at 4.

be reduced to zero, or, at most, to \$715,613. The Town states that it obtained an estimate of \$1,532,911 for track materials from A&K Railroad Materials, Inc. (A&K). It also obtained an estimate, from a salvage company, C&R Construction, of what it would cost to remove the track materials. The Town arrived at a calculation of a zero NSV because its estimated removal costs would exceed its estimated value of the track materials. The Town argues that, even if these removal costs were rejected in favor of CSXT's own proposed removal costs (\$817,298), the NSV of track materials would be reduced to \$715,613.

Discussion of Value of Track Materials. As discussed below, on the basis of the supplemental evidence, the Board finds that CSXT has adequately shown that there has been an increase in the price of scrap steel. However, CSXT's claim for an increase in the value of relay rail is unsupported. Therefore, the Board will use CSXT's increased values for scrap steel, but not relay rail.

a. Scrap Steel

In its response, CSXT's witness, William R. Pemberton values scrap steel at \$235 per ton, an increase from the \$85 per ton that CSXT used to develop its figure of \$1,050,550 in its petition for exemption. In its supplemental evidence, CSXT submits a verified statement from its witness, Leonard Whitehead,⁶ who supports CSXT's proposed increase. Mr. Whitehead provides three workpapers in support of his position. He provides two CSXT sales orders, submitted under seal,⁷ for the sale of scrap rail materials, one dated February 25, 2004, and the other dated March 4, 2004, but neither is probative. The February 25, 2004 order is for the sale of a certain amount of track feet of rail, but it is unclear whether the sale was for one rail or two. If the latter, the actual amount of rail sold would be double the amount of track feet stated in the order. The order also does not itemize the removal and transportation costs, thus making it impossible to tell how much of the sales price was actually for scrap steel. The March 4, 2004 sales order is also unreliable in that it states the price per gross ton but does not state the net weight of the steel being sold, making it impossible to convert the price into a value per net ton.

The third workpaper provided by Mr. Whitehead, however, appears to provide sufficient support for CSXT's increase in the price of scrap steel. It is a table of scrap iron and steel prices published by the American Metal Market on March 15, 2004. This table supports CSXT's calculation of \$235 per ton (Pittsburgh No. 1 Heavy Melt steel is valued from \$263 to \$265 per

⁶ Mr. Whitehead is CSXT's Senior Manager Investment Recovery, Materials and Purchasing, who has been involved in asset management for 25 years.

⁷ On April 28, 2004, the Board issued a protective order to keep these materials confidential.

net ton; Mr. Whitehead reduced this amount by \$30 based on his experience with the scrap steel market).

The Town, in response, has provided a quote from one scrap dealer, A&K, as its only source of the price of steel, both scrap and relay. According to the Town, A&K would offer to purchase the steel rails, which it would use as scrap, for \$1,532,911, or \$85 per net ton.

CSXT has shown that the price of scrap steel has increased. The table from the American Metal Market is independent, reliable, and verifiable. In contrast, the Town provided only one source (A&K) in support of its \$85 per ton valuation. Moreover, another reliable, independent source—Engineering News-Record (ENR) magazine—shows, in a March 22, 2004 published index, that the price of scrap steel (\$220/ton) is much closer to CSXT's valuation than that of the Town. Therefore, the Board will increase the NSV of the line to incorporate CSXT's proposed increase for the price of scrap steel.

b. Reusable (Relay) Steel

Mr. Whitehead states that his valuations of the reusable steel are based on quotes received from three secondhand railroad materials dealers: Progress Rail, L.B. Foster, and Unitrac Rail Products. Mr. Whitehead then averaged together the three quotes to obtain his values. However, in CSXT's April 5, 2004 response, Mr. Pemberton states that he derived his track materials value based on the average of quotes from four dealers (the three listed by Mr. Whitehead, as well as A&K). Despite this disparity, Mr. Whitehead and Mr. Pemberton arrive at the same average. CSXT provides no explanation as to why Mr. Whitehead relied on the three estimates while Mr. Pemberton had earlier relied on four, nor does it explain how its two witnesses arrive at exactly the same averages despite this discrepancy.

CSXT's valuation of relay steel is also problematic in that the three quotes Mr. Whitehead used are retail prices (that is, the price at which these dealers sell the steel to third parties). However, the Board's regulations and precedent require that it rely on wholesale (selling) prices to determine the NSV in OFA proceedings, not retail (purchase) prices.⁸ The Board has made exceptions in the past to allow the use of retail prices in cases where the railroad has clearly demonstrated that it will reuse the salvageable materials on its own line in the future.⁹

⁸ See 49 CFR 1152.27(h)(6); Buffalo Ridge R.R., Inc.—Abandonment Exemption—Between Manley, MN and Brandon, SD; in the Matter of a Request to Set Terms and Conditions, Docket No. AB-377X, slip op. at 7 (ICC served Jan. 22, 1993).

⁹ See Illinois Central R.R. Co.—Abandonment Exemption—In Perry County, IL, Docket No. AB-43 (Sub-No. 164), slip op. at 16-17 (ICC served Jan. 12, 1995) (“... the real worth of reusable property is likely reflected in the price that [the railroad] would have to pay to a supplier

However, Mr. Whitehead states (at 10 of CSXT's supplemental evidence) that he "used these quotes as the price that CSXT would sell the reusable material for in the open market," indicating that CSXT does not intend to reuse these materials. Because CSXT has not based its evidence on wholesale prices for relay steel, the Board cannot rely on this evidence.

Because CSXT has not provided any reliable evidence supporting its claim of an increase in the value of reusable steel, the Board rejects it. However, the Town's supplemental evidence regarding the value of relay rail is equally unreliable. As noted, the Town only submitted a quote from one scrap dealer, A&K, which cannot be considered a reliable source here, as it has also provided apparently different quotes to CSXT in this proceeding. Therefore, the Board will instead rely on the NSV originally stated by CSXT in its petition for exemption, and used by the Town in its OFA and request to set terms and conditions, as the best evidence of record.

Summary. The Board increases the NSV figure of \$1,050,550 provided in CSXT's petition for exemption by a total of \$444,491 (the increase for the 14.6-mile segment is \$33,927 and for the 18.37-mile segment is \$410,564). CSXT has shown that the price of scrap steel has increased from \$85 per net ton to \$235 per net ton. The Board finds the NSV for all track materials to be \$1,495,041. Adding the value of the land (\$479,000), the total NLV of the line is determined to be \$1,974,041. This amount shall be the purchase price.

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) CSXT shall convey all property by quitclaim deed; and (4) CSXT shall deliver all releases from any mortgage within 90 days of closing. The parties may alter any of these terms by mutual agreement.

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

It is ordered:

1. The Town's motion to strike is denied.
2. The purchase price for the line is set at \$1,974,041, and the parties must comply with the terms of sale discussed above.
3. To accept the terms and conditions established here, the Town must notify the Board and CSXT in writing, on or before May 10, 2004.

for like material, not the price that it could obtain from selling such property.).

4. If the Town accepts the terms and conditions established by this decision, the Town and CSXT will be bound by this decision.

5. If the Town withdraws its offer or does not accept the terms and conditions with a timely notification, the Board will serve a decision by May 20, 2004, vacating the prior decision that postponed the effective date of the decision and notice authorizing abandonment.

6. This decision is effective on the date of service.

By the Board, Chairman Nober.

Vernon A. Williams
Secretary