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SERVICE DATE – AUGUST 26, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-398 (Sub-No. 7X)

SAN JOAQUIN VALLEY RAILROAD COMPANY
–ABANDONMENT EXEMPTION–
IN TULARE COUNTY, CA

IN THE MATTER OF A REQUEST TO SET TERMS AND CONDITIONS

Decided: August 25, 2008

By decision and notice of interim trail use served on June 6, 2008, the Board, under 49 U.S.C. 10502, exempted from the prior approval requirements of 49 U.S.C. 10903 the abandonment by San Joaquin Valley Railroad Company (SJVR) of a 30.57-mile portion of the South Exeter Branch between milepost 268.60 at Strathmore and milepost 299.17 at Jovista in Tulare County, CA, subject to environmental, trail use and employee protective conditions. The exemption was scheduled to become effective on July 6, 2008, unless an offer of financial assistance (OFA) was filed on or before June 16, 2008.¹

On June 13, 2008, the Board of Supervisors of the County of Tulare (the County) timely filed an OFA under 49 U.S.C. 10904 and 49 CFR 1152.27 to purchase the instant 30.57-mile portion and the adjoining 9.20-mile portion of the South Exeter Branch that was proposed for abandonment in STB Docket No. AB-398 (Sub-No. 8X). On June 16, 2008, Tulare Valley Railroad Company (TVRR) also timely filed an OFA under 49 U.S.C. 10904 and 49 CFR 1152.27 to purchase the 30.57-mile rail line. On June 17, 2008, SJVR filed a response to the County's OFA.

In a decision served on June 20, 2008, the Board, by the Director of the Office of Proceedings, found that both the County and TVRR are financially responsible and postponed the effective date of the exemption to permit the OFA process to proceed. The Board noted that, when there are multiple offers, the carrier must select the offeror with which it wishes to transact

¹ In a concurrently served decision in San Joaquin Valley Railroad Company–
Abandonment Exemption–in Tulare County, CA, STB Docket No. AB-398 (Sub-No. 8X) (STB served June 6, 2008), the Board denied SJVR's petition for exemption to abandon an adjoining 9.20-mile portion of the South Exeter Branch located north of the subject line between milepost 259.40 near Exeter, CA, and milepost 268.60 at Strathmore.

business. The Board directed SJVR to provide written notification of its selection to the Board and all of the parties by July 1, 2008.²

On July 1, 2008, SJVR submitted a letter stating that it wanted to negotiate for the purchase of the 30.57-mile line with TVRR. By letter filed on July 16, 2008, TVRR notified the Board that, although it had not reached an agreement with SJVR, the offeror did not wish to file a request that the Board set the terms and conditions for purchase of the line.

When the preferred offeror does not file a request to set terms and conditions and does not purchase the line through private negotiations, the other offeror—in this case the County—has 10 days to file a request that the Board set terms and conditions for purchase of the line.³ Accordingly, by pleading filed on July 28, 2008, the County has requested that we set terms and conditions for the sale because it and the railroad were unable to agree on the sale price.

In its request, the County contends that the purchase price for the line should be set at \$1,198,850. It derives this figure by taking the net estimated value of \$1,257,350 for the rail and other track material (OTM), adding \$23,500 for signals and turnouts, and subtracting \$82,000 for the cost of restoring grade crossings,⁴ to arrive at the net liquidation value (NLV) for the line, which is the basis of its offer. In support of its rail and OTM figures, the County provides a verified statement from Gary V. Hunter, a transportation consultant with Railroad Industries Incorporated. The County's purchase price does not include any land value because the Union Pacific Railroad Company owns the underlying real estate.

Additionally, the County argues that, should SJVR submit an offer to purchase the rail assets on the line by A&K Railroad Materials (A&K), the Board should not use that value as a measure of the line's fair market value (FMV). The County contends that A&K is a track salvage company closely affiliated with TVRR and that TVRR only a few days ago declined to pay the same price that its purported noncarrier affiliate supposedly is now willing to pay. The County claims that such an offer may well be designed to artificially inflate the line's value. The County emphasizes that its offer is aimed at reviving rail service on the line as opposed to a nonrail use of the assets.⁵

On August 4, 2008, SJVR filed its reply and takes issue with the NLV proposed by the County. In particular, SJVR claims that the County's NLV is inaccurate because it: (1) is not

² As to the County's offer to acquire the 9.20-mile section of the line, the Board noted that the agency has no authority to consider the offer as part of the OFA here, but that the parties could negotiate for that segment's sale privately.

³ See 49 CFR 1152.27(l)(2)(i).

⁴ The County notes that these figures are rounded.

⁵ SJVR moves to strike the County's argument suggesting that an offer to purchase the line by A&K is part of a scheme to artificially inflate the NLV of the line. Because SJVR has not submitted evidence of an offer to purchase by A&K, we will deny the motion as moot.

based on an on-site inspection;⁶ (2) was not prepared by an expert in valuing track materials; (3) does not use the proper value for relay, reroll, and scrap steel; (4) improperly classifies the steel; (5) undervalues ties and creates an artificial removal cost; and (6) relies on an inaccurate removal cost.

SJVR claims that the NLV should be set at \$3,812,413. This number represents the highest of three valuations that SJVR received from three competing companies that purchase and sell track, ties, and other railroad materials. The separate valuations submitted by the companies, LB Foster Company (LB Foster), Tie Yard of Omaha (Tie Yard), and Unitrac Railroad Materials, Inc. (Unitrac), range from approximately \$3.6 million to \$3.8 million. The valuations are based on appraisals, dated from July 17 to July 30, which were made at those companies' expense after on-site inspections. The valuation made by Tie Yard is backed by a firm offer to purchase the rail assets from SJVR for \$3,308,000.

In support of its position and in opposition to the County's proposed NLV, SJVR includes a verified statement from Alan Pettigrew, Vice President – Purchasing for SJVR's parent company, RailAmerica, Inc. SJVR also submits the three valuations, letters from those companies, SJVR's own most recent estimated NLV of the line at \$3,451,210, and various other materials. SJVR's most recent estimate reflects a continuing rise in the value the railroad has placed on the line since September 28, 2007 (\$995,574) and June 13, 2008 (\$2,812,470). SJVR attributes the increase in its estimates to increasing world-wide demand for steel.

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 FMV 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.

⁶ SJVR claims that Mr. Hunter either observed the rail line from afar or inspected it by trespassing on SJVR's property, because he never received permission from SJVR to enter onto its property.

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 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.

After considering the parties' evidentiary submissions, we find this line's NLV to be the amount for which Tie Yard has offered to purchase the rail assets. That amount, \$3,308,000, includes removal costs and all the rail assets except the ballast, and provides for Tie Yard's profit. Tie Yard's firm offer, which it made on July 18, 2008, stands for 60 days and is only contingent on our approval of the abandonment.

Tie Yard's firm offer represents the best evidence of what this line would be worth in the marketplace. It constitutes an arm's-length proposal made by a salvage company bidding against other salvage companies. This is a firm cash offer in writing, and it will be held open until after the County has had the opportunity to accept our terms and conditions. All SJVR must do is accept Tie Yard's offer for it to become a binding contract. We have accepted executed contracts as the best evidence of NLV,⁷ and we find that this credible, firm offer—whose credibility is supported by its close proximity to the \$3.45 million valuation made by SJVR itself—constitutes the best evidence of this line's NLV.⁸

The other valuations in the record are not sufficiently supported to persuade us that they provide a superior indication of the line's FMV. For example, the County has submitted the one verified statement of Mr. Hunter in support of its NLV. But it is not certain that Mr. Hunter actually walked the line. Moreover, the County does not fully discuss or explain in any detail its unit costs and values for all items in its estimate. In particular, the County apparently has failed to value the steel in the market yielding the higher value (Midwest as opposed to West Coast) at the proper unit cost, resulting in a substantial understatement of the line's NLV. Also, the County has failed to substantiate the lack of any value for the ties on the line, which would further improperly understate the line's value.

Similarly, the various estimates of the NLV submitted by SJVR are not as persuasive as the firm offer to purchase by Tie Yard. Although it has submitted various valuations, the railroad, like the County, has provided very little testimony or workpapers explaining how it or these other companies have estimated the value of the various components of their valuations.

⁷ See Portland Traction Company—Abandonment Exemption—in Multnomah and Clackamas Counties, OR, Docket No. AB-225 (Sub-No. 2X), slip op. at 5 (ICC served Jan. 10, 1990) (Portland Traction); 1411 Corporation—Abandonment Exemption—in Lancaster County, PA, STB Docket No. AB-581X, et al., slip op. at 4 (STB served Oct. 18, 2001).

⁸ See Mississippi Tennessee Holdings, LLC—Abandonment Exemption—in Union, Pontotoc, and Chickasaw Counties, MS, STB Docket No. AB-868X, slip op. at 6 (STB served Nov. 2, 2004) (finding firm offer to be best evidence of record of rail line's fair market value).

And we note that Tie Yard's firm offer substantially exceeds SJVR's June 13, 2008 valuation and is comparable to SJVR's most recent estimate submitted with its August 4, 2008 reply.

SJVR claims that the three appraisals it received from LB Foster, Tie Yard, and Unitrac constituted offers to purchase the line and that we should find that the highest of the three (about \$3.8 million) constitutes the line's NLV. The record does not support SJVR's claim that it is entitled to more than even its own valuation of \$3.45 million. On July 18, Tie Yard offered \$3,308,000. Eleven days later, Tie Yard, at SJVR's request, filled out SJVR's NLV form in which it estimated the line's NLV to be higher (between \$3.6 million and \$3.8 million). But in an accompanying letter, Tie Yard stated that its offer to purchase the line "still stands at our previous price." Tie Yard's higher NLV figure, as well as those of LB Foster and Unitrac, was a mere valuation, not a firm offer to purchase the line.

Against this evidentiary backdrop, we find that the most reliable measure of the line's NLV is the amount that Tie Yard has firmly offered to pay. This is not to say that we will always use a firm offer as the decisive measure of a line's worth, but here the value set by such an offer represents the best evidence of record.

We are mindful that the three companies submitting valuations do not plan on providing continued rail service, should one of them acquire the line, and that the County does plan on providing continued rail service. However, the County's intent does not mean that SJVR is entitled to less than the minimum value guaranteed by the Takings Clause of the Constitution.⁹

Net Liquidation Value

Accordingly, relying on the best evidence of record, which the railroad has submitted, we set the purchase price for the line at \$3,308,000.

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) SJVR shall convey all property by quitclaim deed; and (4) SJVR 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. SJVR's motion to strike is denied.

⁹ See Portland Traction at 5.

2. The purchase price for the line is set at \$3,308,000, and the parties must comply with the other terms of sale discussed above.

3. This decision will become binding on the parties unless the County notifies the Board and SJVR in writing, on or before September 5, 2008, that it is withdrawing its offer to purchase the line.

4. If the County withdraws its offer or does not accept the terms and conditions with a timely written notification, we will serve a decision by September 15, 2008, vacating the prior decision that postponed the effective date of the decision authorizing the abandonment.

5. This decision is effective on its service date.

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

Anne K. Quinlan
Acting Secretary