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SERVICE DATE - LATE RELEASE MAY 30, 2002

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-581X

1411 CORPORATION—ABANDONMENT EXEMPTION—IN LANCASTER COUNTY, PA

STB Docket No. AB-529X

MIDDLETOWN & HUMMELSTOWN RAILROAD COMPANY—ABANDONMENT  
EXEMPTION—IN LANCASTER COUNTY, PA

IN THE MATTER OF A REQUEST TO SET TERMS AND CONDITIONS

Decided: May 30, 2002

These proceedings concern the transfer of a 2.5-mile rail line in Lancaster County, PA, under the forced sale provisions of 49 U.S.C. 10904. This decision denies a request for relief styled as a “Notice, Appeal and Petition relating to Decision Served April 12, 2002” in these proceedings.

BACKGROUND

The 1411 Corporation and the Middletown & Hummelstown Railroad Company (collectively, Applicants) filed separate verified notices of exemption under 49 CFR 1152 Subpart F—Exempt Abandonments, to abandon service over a line of railroad<sup>1</sup> extending from milepost 39.3, in the Borough of Columbia (Columbia), to milepost 37.2, in West Hempfield Township, a distance of approximately 2.5 miles, in Lancaster County, PA.<sup>2</sup> Notice of the exemption was served and published in the Federal Register on April 12, 2001 (66 FR 19000).

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<sup>1</sup> Due to the circumstances set out in the notices, both Applicants needed to seek authority to abandon the 2.5-mile line segment.

<sup>2</sup> Past agency decisions concerning this line indicated that the line extended from milepost 39.7 to milepost 37.2.

Before the exemption was scheduled to become effective, Frank Sahd Salvage Center, Inc. (Sahd) timely filed an Offer of Financial Assistance (OFA) under 49 U.S.C. 10904 and 49 CFR 1152.27 to purchase the line for continued rail service. Shawnee Run Greenway, Inc. (Shawnee) also filed for issuance of a notice of interim trail use and rail banking (NITU) under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and for a public use condition under 49 U.S.C. 10905. However, because an OFA takes priority over any requests for a NITU or for a public use condition, Shawnee's requests were held in abeyance until the OFA process was completed.<sup>3</sup>

By a decision served on July 16, 2001, Sahd was found to be a financially responsible entity, and the effective date of the abandonment exemption was postponed to permit the OFA process to proceed. Subsequently, as no agreement on a purchase price could be reached between Sahd and Applicants, Sahd requested that we establish the terms and conditions of sale, including the purchase price.

Shawnee, which had already acquired an option to buy the property for use as a trail following abandonment, sought to block Sahd's OFA by requesting that the Board either exempt these proceedings from the application of section 10904 or dismiss Sahd's OFA. Shawnee argued that Sahd's offer to buy the line was not motivated by a desire to provide continued rail service, and that an overriding public interest required the Board to exempt the proceedings from the OFA process. By decision served on September 6, 2001, the Board found that Sahd's OFA was bona fide, and, citing well-settled precedent that an OFA should take priority over a trail use proposal because of the strong Congressional intent to preserve rail service wherever possible, we denied Shawnee's request to exempt these proceedings from the OFA process or to dismiss the OFA.

By decision served on October 18, 2001, we set the purchase price of the line at \$125,000. This figure was based on an earlier fully executed contract (Purchase Contract) between Applicants and Shawnee and Colonial Metals Co. (Shawnee-Colonial) to transfer the line, including the underlying real estate and rail assets, from Applicants to Shawnee-Colonial for \$125,000. We found that the Purchase Contract was the best evidence of record of the fair market value of the rail assets and related real estate. The decision also imposed other terms and conditions that are typically specified in OFA cases.

Sahd accepted the terms and conditions and, by a decision served on November 8, 2001, Sahd was authorized to acquire the line and the abandonment exemption was to be dismissed effective upon the date of the sale. Closing was to occur by January 16, 2002. By petition filed on November 29, 2001, however, Sahd asked for clarification of the October 2001 decision. By a

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<sup>3</sup> Only if no sale or subsidy of the line for freight rail purposes were to take place would there be an opportunity for public use and trail use.

decision served on December 4, 2001, we extended the date for closing of the sale until 45 days after issuance of a decision addressing the petition for clarification.<sup>4</sup>

Sahd's petition for clarification sought a ruling to resolve certain issues concerning environmental liability. The Purchase Contract contained environmental and indemnification provisions that Sahd sought to have included in the terms governing its OFA purchase of the line. By a decision served on April 12, 2002 (April decision), we granted Sahd's request for clarification and found that the environmental and indemnification provisions as well as the other terms of the Purchase Contract should, in the absence of agreement between the parties, apply to Sahd's purchase under the OFA.<sup>5</sup> That decision had the effect of setting May 27, 2002 (45 days after service) as the date for closing.<sup>6</sup>

Also in April 2002, Columbia offered a settlement proposal to Sahd, conditioned on Sahd's withdrawing its OFA. By the terms of the offer, Columbia would acquire the property at issue by assignment of the Purchase Contract and would allow Sahd to operate the rail line, provided it met certain minimum carload requirements. Sahd rejected the offer. On May 2, 2002, Columbia filed the instant petition. On May 3, 2002, Shawnee filed a statement in support of Columbia. Sahd filed a reply on May 8, 2002, and, by separate motion, requested expedited consideration of this matter.

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<sup>4</sup> On February 8, 2002, Columbia filed a motion seeking 30 additional days to prepare and submit a response to Sahd's petition for clarification. A decision served on February 15, 2002 (February decision), stated that, although Columbia's motion was nominally directed at the petition for clarification then pending at the Board, the arguments raised concerned whether Sahd should be permitted to pursue its OFA. The February decision further stated that the issues raised in Columbia's motion had already been considered and settled in the administratively final September 2001 decision. Finally, it stressed that the Board may only reopen an administratively final action upon a showing of material error, new evidence, or substantially changed circumstances under 49 U.S.C. 722(c) and 49 CFR 1115.4. Because Columbia's motion failed to meet these standards, it was denied.

<sup>5</sup> The April decision also provided that Colonial Metals Co. (Colonial) could continue conducting environmental testing and cleanup of the line, provided it obtained Sahd's prior written consent. Columbia objects to this condition on the ground that Sahd has no right to interfere with Colonial's activities. Columbia's concerns are premature and speculative. In any event, Sahd has a right to purchase the line pursuant to the statute and has accepted the terms we have set, and therefore it has an interest in Colonial's activities on the property. Accordingly, the condition is reasonable.

<sup>6</sup> That date was subsequently extended to May 31, 2002, by mutual agreement of the parties.

## DISCUSSION AND CONCLUSIONS

Columbia's petition states that it is filed pursuant to 49 CFR Parts 1115 and 1117 in order to preserve a right of administrative appeal. Those parts of our regulations, however, deal with the Board's general appellate procedures. As relevant here, 49 CFR 1115.1(a) states that "[a]bandonments and discontinuance proceedings instituted under 49 U.S.C. 10903 are governed by separate appellate procedures exclusive to those proceedings. (See 49 CFR 1152)." Board decisions in abandonment proceedings are administratively final actions on the date they are served. 49 CFR 1152.25(e)(2). As such, appeals from these decisions are not entertained. Id. Instead, as we explained in our February decision, parties seeking relief from such decisions must file a petition to reopen pursuant to 49 CFR 1152.25(e)(4).

In order to justify reopening, a party must state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances. Further, we will grant a petition to reopen only upon a showing that the action would be affected materially by such a showing. 49 CFR 1152.25(e)(2)(ii). Here, Columbia has offered no new evidence or changed circumstances that would warrant reopening of our prior decision. Nor has Columbia charged us with material error.

Columbia's arguments either are a rehash of ones made by opponents of the OFA and rejected in our prior decisions in this matter or are simply unsupported. In seeking to justify its appeal of the April decision, Columbia offers four rationales. First, Columbia argues that Sahd's OFA and the extension of the date for closing of the OFA sale contained in the April decision somehow act as a barrier to exit from the industry for Applicants and otherwise contravenes the Rail Transportation Policy (RTP) codified at 49 U.S.C. 10101. Second, Columbia maintains that the Board should not allow Sahd to pursue its OFA because it is contrary to the public interest as it frustrates local land use plans. Third, Columbia contends that there is no need for rail service here,<sup>7</sup> and therefore the OFA is a taking in violation of the Fifth Amendment to the Constitution because the OFA does not serve a public purpose. Fourth, Columbia argues that, by imposing the environmental and indemnification provisions on the OFA sale, the Board might subject Applicants to further costs that would amount to an additional unconstitutional taking.

Columbia also reiterates arguments previously made by Shawnee that an overriding public interest requires us to exempt this proceeding from the OFA process in favor of a trail plan and greenway. This argument was previously rejected in light of the strong Congressional intent to preserve

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<sup>7</sup> In its filing joining in Columbia's appeal, Shawnee argues that Columbia has made Sahd a strong offer that would enhance the prospects of rail service on the property, and that Sahd's rejection indicates that its OFA was made for reasons other than a desire to provide rail service.

rail service wherever possible as manifested by section 10904 and Sahd's showing that the OFA is for continued rail freight service.

Columbia's assertion that Sahd's OFA is contrary to the RTP is without merit. Columbia's claim is apparently based on a single purported statement by Applicants, expressing concern that this proceeding was draining resources from other rail needs, even though Applicants have made no such argument themselves. The underlying rationale of the OFA provision in the statutory scheme represents an accommodation of the conflicting interests of railroads that desire to unburden themselves quickly of unprofitable lines, and shippers that desire continued rail service. See Hayfield Northern R. Co. v. Chicago & N.W. Tr. Co., 467 U.S. 622, 630 (1984). Thus, under this scheme, Applicants' exit from the industry is temporarily delayed to protect the possibility that rail service to shippers can be preserved. Rather than being contrary to the RTP, Sahd's OFA reflects the careful balancing of competing priorities in the statutory scheme.

At the heart of Columbia's petition is its view that there is no need for rail service here. This contention underlies its arguments that Sahd's OFA is contrary to the public interest, frustrates local land use plans, and is an unconstitutional taking. However, as we explained at length in the September 2001 decision, the OFA provisions reflect a clear Congressional intent that rail service should be preserved wherever possible. Here, Sahd, a shipper that has previously used the rail line at issue, has shown that it intends to use the line to reach more distant markets than it accesses currently. Columbia has not demonstrated material error in this finding, undermining both its public interest and "taking" arguments.<sup>8</sup>

Lastly, we find no merit in Columbia's argument that any additional environmental cleanup costs imposed on Applicants would amount to an unconstitutional taking. It has not been established that there will, in fact, be any such additional costs. But any costs that might be incurred would also have been incurred under the Purchase Contract and thus should be reflected in the fair market value of the property. In any event, it is not clear what interest Columbia, as opposed to the Applicants, has in making such an argument.

In sum, we conclude that Columbia has failed to demonstrate any grounds for reopening our April decision. Accordingly, its request for relief will be denied.

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<sup>8</sup> Similarly, we do not accept Shawnee's contention that Sahd's rejection of Columbia's settlement proposal indicates that it is not serious about rail service. Sahd was under no obligation to accept the settlement proposal and merely decided that it was not in its best interests to do so.

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

It is ordered:

1. Columbia's request for relief is denied.
2. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Burkes.

Vernon A. Williams  
Secretary