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SERVICE DATE - APRIL 12, 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: April 11, 2002

This decision concerns the transfer of a 2.5-mile rail line in Lancaster County, PA, under the Offer of Financial Assistance (OFA) forced sale provisions of 49 U.S.C. 10904. At the request of Frank Sahd Salvage Center, Inc. (Sahd), which is seeking to buy the line, the Board set the terms and conditions for the sale in a decision served on October 18, 2001 (October 18 decision). The sale price that we set was based on what appears to be an arm's-length contract for the property outside of the context of section 10904.

Sahd has now filed a petition for clarification of the October 18 decision, seeking a ruling resolving certain issues concerning environmental liability. The 1411 Corporation and the Middletown & Hummelstown Railroad Company (collectively Applicants), which filed for authority to abandon the line, have filed a reply to the petition for clarification (reply). Shawnee Run Greenway, Inc. (Shawnee), which is seeking to obtain the property through other means¹—and which, together with another corporation and Applicants, entered into the sales contract on which we based the OFA sale price—has also filed in opposition to the petition for

¹ In September 1999, before the Applicants applied to abandon the line, Shawnee had entered into an Option to Purchase Real Estate (Shawnee Option Agreement) with Applicants to purchase the line for trail use for the price of \$40,000. After Applicants sought abandonment authority, Shawnee filed a request 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), and a public use condition under 49 U.S.C. 10905. By decision served on May 8, 2001, we held Shawnee's request in abeyance until completion of the OFA process. Shawnee's subsequent motions seeking to block Sahd's OFA from going forward were denied in a decision served on September 6, 2001.

clarification.² In this decision, we will grant Sahd's request for clarification of the October 18 decision.

BACKGROUND

By decision served on April 12, 2001, we granted an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 for Applicants to abandon service over the line. Before the exemption was scheduled to become effective, Sahd timely filed an OFA under 49 CFR 1152.27(c) to purchase the line to provide continued rail service. Sahd was found to be financially responsible, and the effective date of the abandonment authority was postponed to permit the OFA process to proceed. Subsequently, as no agreement on a purchase price could be reached between Applicants and Sahd, Sahd requested that we establish the terms and conditions and amount of compensation for the sale of the line.

In the October 18 decision, we set the purchase price of the line based on a fully executed contract between Applicants, Shawnee, and Colonial Metals Co. (Colonial) to transfer the line, including the underlying real estate and rail assets, from Applicants to Shawnee-Colonial for \$125,000 (Shawnee/Colonial Purchase Contract). We found that the Shawnee/Colonial Purchase Contract was the best evidence of record of the fair market value of the rail assets and related real estate.³ The October 18 decision, in addition to setting the purchase price for the line, also imposed certain other terms that are typically specified in OFA cases for the transfer of a line under the OFA process.

Sahd accepted those terms and conditions, and by 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. On November 29, 2001, however, Sahd filed its petition for clarification. By decision served on December 4, 2001,

² On December 17 and December 26, 2001, Sahd sought to reply to Applicants' reply and to Shawnee's opposition. Because a reply to a reply is impermissible under our rules at 49 CFR 1104.13(c), and because Sahd's responsive pleadings do not add to our understanding of the issues, Sahd's requests for permission to file the replies will be denied.

³ In the request to set terms and conditions that resulted in the October 18 decision, Sahd made a \$51,000 offer, which reflected a figure of \$40,000 for the underlying real estate (based on the land valuation in the Shawnee Option Agreement) and \$11,000 for the salvage value of the rail, ties, turnouts, and other track material (OTM). Applicants declared the value to be \$118,150, which reflected a \$40,000 figure for the underlying real estate (also based on the Shawnee Option Agreement) and a \$78,150 figure for rail, ties, and OTM. We found the \$125,000 figure in the Shawnee/Colonial Purchase Contract to be better evidence of the value of the line than either Sahd's offer or Applicant's \$118,150 valuation, and so that was the valuation that we used.

we extended the due date for closing the sale of the line until 45 days after issuance of this decision addressing the petition for clarification.

POSITIONS OF THE PARTIES

Sahd. When Sahd filed its request for us to set terms and conditions, it asked for inclusion of covenants comparable to those in the earlier Shawnee Option Agreement that would protect Sahd from environmental clean-up costs associated with events predating Sahd's ownership of the line. Although the October 18 decision did not specifically address environmental liability, the terms and conditions that we set were derived from the Shawnee/Colonial Purchase Contract, which, like the Shawnee Option Agreement, included a provision addressing liability for environmental damage and associated inspection rights.⁴ Therefore, in its proposed sales contract, Sahd included an environmental provision that is essentially identical to the provision contained in the Shawnee/Colonial Purchase Contract.

Applicants, however, would not agree to the inclusion of this provision in the OFA sale, and so Sahd filed its petition for clarification of the October 18 decision to ensure that it receives the line on terms and conditions comparable to those contained in the Shawnee/Colonial

⁴ Paragraph 3(c) of the Shawnee/Colonial Purchase Contract provides as follows:

Railroad makes no warranties as to the environmental condition of the corridor. As between the parties, 1411 Corporation (or its assignee) shall remain liable, to the extent otherwise provided by law, after closing for all toxic substances or environmental hazards existing upon the corridor prior to closing (except for any such substance or hazard resulting from an action or inaction prior to closing by Purchaser), and, as between Railroad and [Shawnee], [Shawnee] (or its assignee) shall be liable, to the extent otherwise provided by law, for all toxic substances or environmental hazards which come into existence on the premises after closing. Unless otherwise limited by law, the party to whom responsibility is allocated for a particular liability or liabilities pursuant to this paragraph shall defend and hold harmless the other party from any and all suits, claims, loss, costs, damage or injury on account of that liability or liabilities. Purchaser shall have a right of entry to inspect the premises prior to closing, including the right to take soil tests and surveys. Purchaser shall provide Railroad with copies of all environmental surveys, tests, or reports. Should Purchaser upon inspection ascertain the presence of toxic substances or environmental hazards, Purchaser at its discretion may decline to close on the line.

Purchase Contract. In particular, Sahd seeks to have the environmental terms and conditions in paragraph 3(c) of the Shawnee/Colonial Purchase Contract imposed on the transfer of the line from Applicants to Sahd, and sufficient time to conduct environmental testing and analysis of the line.

Applicants and Shawnee. Applicants and Shawnee argue that the petition for clarification is an untimely and unsupported petition for reconsideration that seeks to alter the terms and conditions by which Sahd agreed to be bound. Because Sahd did not administratively appeal the October 18 decision, which did not explicitly impose an environmental liability condition, Applicants and Shawnee assert that, having accepted without qualification the terms and conditions that we set, Sahd is bound by them and may not seek to modify them.

Applicants and Shawnee point out that it has not been the agency's policy to impose such environmental conditions in OFA cases.⁵ They also point out that the Shawnee/Colonial Purchase Contract contains other terms that Sahd has ignored, including indemnifications running to Applicants, limitations on the indemnifications running to the purchaser, and an obligation to reconvey the property to Applicants under certain conditions.⁶

DISCUSSION AND CONCLUSIONS

In our October 18 decision, we found that, because the Shawnee/Colonial Purchase Contract appears to be an arm's-length agreement entered into in the free market, it constitutes the best evidence of the fair market value of the rail assets and related real estate. Therefore, we set the OFA sale price at the \$125,000 figure contained in that contract. We did not explicitly address Sahd's request that the OFA sales contract contain an environmental liability provision comparable to the one contained in the Shawnee/Colonial Purchase Contract, but we do not believe it was unreasonable for Sahd to have accepted the terms and conditions that we imposed

⁵ Applicants cite Consolidated Rail Corporation– Abandonment–Between Corry and Meadville, in Erie and Crawford Counties, PA, Docket No. AB-167 (Sub-No. 1139) (ICC served Nov. 7, 1994, and July 18, 1995) (Consolidated Rail Corporation), rev'd on other grounds, Consolidated Rail Corp. v. STB, 93 F.3d 973 (D.C. Cir. 1996), in which our predecessor, the Interstate Commerce Commission (ICC), declined to impose conditions requiring contractual terms for environmental liability and indemnity in OFA determinations on the ground that such conditions would address issues normally covered by voluntary contractual arrangements that should not be prescribed by the agency or imposed unilaterally by a party.

⁶ The Shawnee/Colonial Purchase Contract contains various provisions relating specifically to rail banking and interim trail use under 16 U.S.C. 1247(d). Other, more general conditions include paragraph 4(a), which provides for cross-indemnifications, insurance, and litigation responsibilities, and the portion of paragraph 4(b) that provides for consequences of a breach of paragraph 4(a).

on the assumption that the Applicants would be willing to incorporate the other pertinent terms and conditions contained in that contract. And, when it became evident that Applicants were unwilling to provide Sahd with terms and conditions comparable to those contained in the Shawnee/Colonial Purchase Contract, it was appropriate for Sahd to seek clarification of our October 18 decision.

Applicants and Shawnee argue that Sahd is not entitled to comparable terms and conditions, but we disagree. It is true that we do not normally impose environmental or other indemnification conditions in OFA sales, but where, as here, the Applicants have agreed to such terms and conditions for a sale to other buyers in an arm's-length transaction, they have no reasonable grounds upon which to object to the inclusion of the same terms in an OFA sale. Moreover, the purchase price of the contract, and thus the price that we set for the OFA sale, is necessarily affected by those conditions. Because none of the parties has presented any evidence that would enable us to separately value the environmental or indemnification provisions of the Shawnee/Colonial Purchase Contract, we cannot adjust the OFA sale price to exclude those conditions.⁷

Summary. Our use of the \$125,000 figure as the appropriate OFA sale price was based on, and is inseparable from, the contract terms of the Shawnee/Colonial Purchase Contract, which was the result of an arm's-length bargain in which Applicants, Shawnee and Colonial reached agreement on the allocation of environmental and indemnification obligations among themselves. We see no reason why Applicants should not be willing to offer, and Sahd to accept, this same allocation of those environmental and indemnification obligations in Applicants' sale of the line to Sahd under the OFA process. The \$125,000 fair market valuation is indivisible from the environmental and indemnification contract terms that gave rise to this price in the Shawnee/Colonial Purchase Contract.

⁷ Consolidated Rail Corporation is distinguishable. In that case, the parties agreed on a purchase price irrespective of the environmental conditions that each later sought unsuccessfully. See Consolidated Rail Corporation, slip op. at 3 (ICC served Nov. 7, 1994). Because the purchase price was not derived from a contract of which environmental indemnity provisions were an integral part, the ICC declined to impose such provisions. However, recognizing that indemnity and liability provisions do affect purchase price, the ICC stated that, had it imposed the sought indemnity and liability provisions, it would have adjusted the agreed-to purchase price accordingly. See Consolidated Rail Corporation, slip op. at 5 n.5 (ICC served July 18, 1995).

In contrast, in Southern Pacific Transportation Company—Abandonment Exemption—Sacramento and El Dorado Counties, CA, Docket No. AB-12 (Sub-No. 159X), slip op. at 10-11 (ICC served Oct. 20, 1994), as here, a portion of the property was valued by reference to an arm's-length offer (there, an offer on an adjacent parcel of land) that included an indemnity against title defects. Accordingly, the ICC found it appropriate to require the carrier to indemnify the purchaser for any defect in title.

Accordingly, except as the parties otherwise agree, the parties will be directed to proceed with the sale of the line under terms and conditions comparable to those terms and conditions stipulated in the Shawnee/Colonial Purchase Contract, except where a provision in the Shawnee/Colonial Purchase Contract plainly is inapplicable. Neither party is free to unilaterally and selectively choose terms from the Shawnee/Colonial Purchase Contract. Any variation from those terms and conditions must be the result of mutual agreement and consent. We expect the parties to act in good faith.⁸

Closing. Our December 4, 2001 decision extended the deadline for closing until 45 days after the issuance of this decision ruling on Sahd's petition for clarification. This 45-day period should provide the necessary time for Sahd to conduct environmental testing and to analyze the results.⁹

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

It is ordered:

1. Sahd's petition for clarification is granted to the extent discussed in this decision. The purchase price for the line remains at \$125,000, and the Applicants and Sahd must conform the terms of the purchase agreements to those of the Shawnee/Colonial Purchase Contract except as specified above.
2. Sahd's requests to respond to Applicants' reply and to Shawnee's opposition are denied.

⁸ Apparently the Applicants removed certain grade crossing signs at the request of the Commonwealth of Pennsylvania before filing for abandonment. Because the Shawnee/Colonial Purchase Contract, on which we based the purchase price, did not require the transfer of these grade crossing signs, we will not order Applicants to pay to restore them.

⁹ Colonial may continue conducting environmental testing and cleanup of the line, which we understand it is pursuing, while the OFA process continues so that, should Sahd ultimately decide not to proceed with the OFA sale, Shawnee, Colonial, and Applicants may be a step closer to pursuing alternative plans. However, any easement or examination agreement entered into between Applicants and Colonial that grants Colonial access to the line to conduct cleanup must include a provision providing for the express consent of Sahd.

3. Closing must occur by 45 days after the service date of this decision, unless the parties mutually agree to a later date.

4. This decision is effective April 22, 2002.

By the Board, Chairman Morgan, and Vice Chairman Burkes.

Vernon A. Williams
Secretary