

SERVICE DATE - LATE RELEASE SEPTEMBER 6, 2001

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

Decided: September 6, 2001

The issues addressed in this decision have arisen out of the efforts of a potential shipper, Frank Sahd Salvage Center, Inc. (Sahd), to invoke the offer of financial assistance (OFA) provisions of 49 U.S.C. 10904 to purchase, for continued railroad use, a line of railroad approved for abandonment. Shawnee Run Greenway, Inc. (Shawnee), which has acquired an option to buy the property for use as a trail, seeks to block Sahd's OFA. We are denying Shawnee's request that we exempt these proceedings from the application of section 10904. Because we find that the OFA here is bona fide, we are also denying Shawnee's related motion to dismiss Sahd's OFA.

BACKGROUND

On March 23, 2001, the "Applicants" — 1411 Corporation (1411) and the Middletown & Hummelstown Railroad Company (M & H) filed separate notices of exemption invoking our class exemption procedures at 49 CFR 1152 Subpart F—Exempt Abandonments and Discontinuances of Service and Trackage Rights to abandon service over a 2.5-mile line of railroad in Lancaster County, PA (the M&H Line or the Line).¹ The abandonment authority was scheduled to become effective on May 12, 2001.

We extended that date, by decisions served on May 8 and May 10, 2001, in response to Sahd's timely filed formal expression of intent to file an OFA to acquire the line pursuant to 49 U.S.C. 10904 and 49 CFR 1152.27. The May 8 decision also held in abeyance, pending completion of the OFA process, Shawnee's requests for issuance of a notice of interim trail use and rail banking under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and a public use condition under 49 U.S.C. 10905.

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

On July 5, 2001, Shawnee filed a motion asking us to exempt, pursuant to 49 U.S.C. 10502, these abandonment proceedings from the OFA provisions of 49 U.S.C. 10904. This action was intended to terminate further OFA proceedings. The Applicants support the relief sought by Shawnee, as indicated in their letter-statement filed on August 6, 2001. Sahd replied to Shawnee's exemption motion on July 25, 2001.

On July 11, 2001, Sahd timely filed an OFA, offering to purchase the line for \$51,000. By decision served on July 16, 2001, the Board, acting through our Director of the Office of Proceedings, found Sahd to be a financially responsible entity, further postponed the effective date of the abandonment exemption to permit the OFA process to proceed, and extended the deadline by which Sahd or the Applicants could ask the Board to establish the terms and conditions for involuntary sale under the OFA process. The Director's decision finding that Sahd was a financially responsible entity was not appealed. (The deadline for doing so was July 26, 2001.)

On July 30, 2001, Shawnee filed a motion to dismiss Sahd's OFA² and a separate motion directed to the procedural schedule. On August 20, 2001, Sahd replied.

By decision served on August 3, 2001, the Board: (1) further extended the deadline for filing requests to establish the terms and conditions for involuntary sale until 10 days after we rule on Shawnee's request to exempt these abandonment proceedings from the OFA provisions; and (2) denied Sahd's request to extend the expired deadline for filing appeals to the Director's decision finding that Sahd was a financially responsible party.³

In both its motion for exemption and in its motion to dismiss,⁴ Shawnee advances a two-pronged argument. First, Shawnee contends that Sahd's offer to buy the Line is not motivated by a desire to provide continued rail service. Second, Shawnee argues that an overriding public interest requires us to set aside the OFA process in this case.

The heart of the first argument is the fact that the Line has not been used in more than 10 years. That alone, Shawnee contends, suffices to show that there is no public need for rail service over the Line. Moreover, Shawnee says, resumption of rail service would be uneconomic due to the substantial cost outlays that would be required to return the Line to use. In addition,

² On August 2, 2001, we received a separate Appendix to this motion.

³ It is unclear why Sahd, rather than Shawnee or the Applicants, requested this extension.

⁴ Sahd argues that the motion to dismiss is nothing but an attempt by Shawnee, impermissible under our regulations, to reply to Sahd's own reply to the motion for exemption. Sahd does not ask us to reject the motion to dismiss, but observes that, because it is essentially a reiteration of the motion for exemption, a denial of the first would warrant denial of the other.

Shawnee argues that, because Sahd is a scrap dealer, Sahd is presumably interested in the Line only to acquire its 2.5 miles of steel rail.

In support of its second argument, Shawnee offers The Columbia Greenway Master Plan (the Plan), a document prepared for the Columbia Downtown Development Corporation (CDDC) by a team of consultants. The Plan proposes that the Line be converted into a recreational and scenic trail.

Sahd responds to these claims in replies to both the proposed exemption and the motion to dismiss. Sahd notes that it made extensive use of rail service in the 1960's and 1970's. In recent years, its markets had moved to nearby locales, necessitating the use of trucks (though Sahd claims to have used the Line as recently as the early 90's).⁵ Now, those customers have shut down, while newer, more competitive customers have located in the South, particularly in Virginia and the Carolinas.⁶ Sahd argues that rail is the only economic way to reach those more distant markets. Sahd asserts that there are at least 5 potential shippers on the Line, one of which (Anvil International Inc., a manufacturer of iron products) has supported Sahd's OFA with written submissions. Anvil says that it would use the Line for inbound shipments of raw materials.

Sahd rebuts the charge that it is interested in purchasing the Line only to obtain the scrap. Were it interested in doing so, Sahd says, it would be more economic simply to make an offer to buy the scrap at the market price. Under the OFA process, Sahd notes, it would be obligated to pay the market price for the scrap, acquire the ties and ballast as well, pay for the underlying real estate, and then hold these assets for 2 years before Sahd could seek authority to abandon and salvage the Line. This, Sahd argues, would be a very uneconomic and inefficient way to obtain scrap.

Sahd also takes issue with Shawnee's claim that the Plan represents an overriding public interest. Sahd notes that CDDC is a private organization and that the Plan has drawn substantial opposition in the affected community, both from public officials and from private citizens. Sahd

⁵ Indeed, Sahd attempted to acquire the M&H Line on November 3, 1992, through a notice of exemption, which was rejected for a procedural deficiency. Sahd recites that it gave M&H a \$5,000 deposit, which the latter has not returned. After the Board upheld the rejection on a petition for reconsideration, Sahd and M&H did not pursue the matter further. Sahd states that it renewed its offer in the autumn of 2000, but at that time the chief shareholder of M&H and 1411, Wendell Dillinger, told Sahd that he had contracted to sell the properties to a proprietor of Shawnee.

⁶ Sahd identifies Wheelabrator Abrasives in Bedford, Virginia; Chaparral Steel in Petersburg, Virginia; Charlotte Pipe in Charlotte, South Carolina; Georgetown Steel in Georgetown, South Carolina; and U.S. Pipe in Birmingham, Alabama.

points out that it has repeatedly offered to permit a recreational and scenic trail alongside the Line in order to provide for both recreational and commercial use. It states that this offer has been summarily rejected.

DISCUSSION AND CONCLUSIONS

1. Petition for Exemption from the OFA Process. The OFA provisions—which permit a party genuinely interested in providing continued rail service to acquire a line for that purpose over the objections of the owner or its successors—reflect a Congressional intent that rail service be preserved whenever possible. Exemptions from 49 U.S.C. 10904 have been granted from time to time, but primarily when the right-of-way is needed for an overriding public purpose and there is no apparent interest in continued rail service.⁷ Here, we find no basis for undercutting the Congressional objective of maintaining rail service.

⁷ See Blue Mountain Railroad, Inc.—Abandonment Exemption—In Whitman County, WA, and Latah County, ID, STB Docket No. AB-485X (STB served Mar. 4, 1997); CSX Transportation, Inc.—Abandonment—In Barbour, Randolph, Pocohontas, and Webster Counties, WV, STB Docket No. AB-55 (Sub-No. 500) (STB served Jan. 9, 1997); K&E Railroad Company—Exemption—In Alfalfa, Garfield, and Grant Counties, OK, and Barbour County, KS, STB Docket No. AB-480X (STB served Dec. 23, 1996). These cases are cited by Shawnee in support of its exemption request, but they are easily distinguishable because the motions for exemption from section 10904 in these cases were either supported or unopposed by the affected shippers. This constituted a strong showing that the lines were not needed for continued rail service. Here, in contrast, the primary shipper is the offeror, who opposes the exemption request. Shawnee also cites Missouri Pacific Railroad Company—Abandonment and Discontinuance of Operations Exemption—In Houston, Harris County, TX, STB Docket No. AB-3 (Sub-No. 139X) (STB served Dec. 31, 1996), in which the ICC exempted a line from OFA procedures to facilitate a private business purpose, but that case is similarly distinguished by the absence of any interest in continued rail service. Other cases cited by Shawnee are also distinguishable because they are third party or adverse abandonments. Conrail Abandonment of a Portion of the West 30th Street Secondary Track in New York, NY In the Matter of an Offer of Financial Assistance, ICC Docket No. AB-167 (Sub-No. 493N) (STB served Jan. 13, 1987); Norfolk and Western Railway Company—Abandonment Exemption—In Cincinnati, Hamilton County, OH, STB Docket No. AB-290 (Sub-No. 184X) (STB served May 13, 2001); and Grand Trunk Western Railroad, Incorporated—Adverse Discontinuance of Trackage Rights Application—A Line of Norfolk and Western Railway Company In Cincinnati, Hamilton County, OH, STB Docket No. AB-31 (Sub-No. 30). Although these proceedings implicate the abandonment provisions of the statute, 49 U.S.C. 10903, they are not, in fact, abandonments. Rather, a third party asks us to withdraw our primary jurisdiction in order to invoke some provision of state (or local or other Federal) law otherwise preempted by the ICCTA. Because an OFA would rely upon authority which our decisions in those cases withdraw, petitions invoking section 10904 are not entertained in those proceedings. Thus the cases cited by Shawnee are inapposite.

a.. Interest in Continued Rail Service. Shawnee's main argument is that the Line is not needed because it has not been used in recent years. The fact that a line has not carried any traffic in a decade could support the argument that there is no call for continued rail service. Here, however, Sahd has offered a convincing explanation for its recent reliance on trucks and its desire to resume using rail service, and it points to its past use of the Line and its previous attempts to buy the Line.⁸ Shawnee notes that Sahd has not documented its claim by submitting contracts with the southern customers that it has named, but we do not believe that such evidence is needed here.⁹

Shawnee argues that Sahd's line of work necessarily impeaches the bona fides of its commitments and shows that Sahd is only interested in scrapping the Line. But Sahd did not find the Line by canvassing likely candidates to buy and liquidate. Sahd has been located on the Line for many years, and has made extensive use of it for transportation service in connection with its business.¹⁰ Moreover, Sahd would have to purchase all the assets of the line, including a

⁸ The Applicants, which have contracted to sell the Line to Shawnee and presumably have records of Sahd's shipments, do not controvert these assertions.

⁹ Shawnee argues that our precedents require that ". . . Sahd must show that shippers are likely to make use of the line if continued service is made available, and there is sufficient traffic for the line to be viable." Shawnee Motion to Dismiss at 3. But Shawnee misconstrues our decisions. In Roaring Fork Railroad Holding Authority—Abandonment Exemption—in Garfield, Eagle and Pitkin Counties, CO, STB Docket No. AB-547X, slip op. at 4-5 (STB served May 21, 1999) (Roaring Fork), we stated that ". . . when disputed, an offeror must be able to demonstrate that its OFA is for continued rail freight service. [citations deleted] Where, as here, the line is not currently active, there must be some assurance that shippers are likely to make use of the line if continued service is made available and that there is sufficient traffic to enable the operator to fulfill its commitment to provide that service." But Roaring Fork does not set out a rigid test requiring an offeror to demonstrate that the line would be viable. It merely requires a sufficient showing to support a finding that an offer is, indeed, for continued freight service and not for some other purpose. As to that requirement, we believe that Sahd has met its burden. Sahd, which would be the principal shipper on the line, ships 15,000 to 25,000 tons of scrap metal annually, and it has projected that it will ship 70-90 cars per year. While it has not yet nailed down firm contracts for other traffic that is apparently available, a party filing an OFA does not need to prove in advance that its efforts to revive a failing line will without question succeed.

¹⁰ Thus, this case is similar to Illinois Cent. R.R. — Abandonment Exemption — In Perry County, IL, Docket No. AB-43 (Sub No. 164X) (ICC served Nov. 8, 1994), reconsideration denied and terms set (ICC served Jan 12, 1995) (finding an OFA to be bona fide where the offeror, a coal company, proposed to subsidize a carrier's costs to preserve a line in order to meet a potential future need for rail freight service).

fee simple interest in the underlying real estate,¹¹ and would be precluded from disposing of the Line for at least 2 years. The high price of the real estate relative to the price of the rail and the restrictions in section 10904 on disposal of the assets of a rail line make acquisition of the M&H Line solely to obtain the rail an unattractive and therefore unlikely proposition.

Shawnee argues that restoration of rail service would be uneconomic because rehabilitation and maintenance costs would be prohibitively expensive. But, although Shawnee offers a list of costs (such as reconnecting the Line with the adjacent through track, reestablishing crossings at four streets, and reconditioning the line), Shawnee offers no support for its assertion that these costs will add up to \$300,000.¹²

b. The Public Interest. The second part of Shawnee's argument, set out in both its request for an exemption and in its motion to dismiss, is that the Plan establishes an overriding public purpose for the Line that is inconsistent with continued rail service.¹³ But it is well settled that an OFA should take priority over a trail use proposal because of the strong Congressional intent to preserve rail service wherever possible.¹⁴

¹¹ As Sahd notes, the September 7, 1999 agreement between the Applicants and Michael Stark, president of Shawnee, is for transfer of a fee simple interest. Accordingly, the Line differs from the many rail lines where the abandoning carrier owns only an easement, and the scrap value of the rail constitutes the chief value component of the line's net liquidation value. Here, the value of the real estate is the chief component.

¹² Shawnee cites the Plan as its authority for the proposition that restoring service will be cost prohibitive, but that document, while offering that conclusion, presents no analysis to support it.

¹³ Shawnee stresses the benefits to the local community of a scenic trail. But the record (Sahd Reply to Motion to Dismiss) indicates that a significant portion of the community does not want a trail, at least as proposed by Shawnee and the CDDC. Some members do not want the trail at all, while others would prefer the retention of the M&H Line in the hope that it will promote economic development. In any event, Sahd itself has proposed the construction of a trail beside the Line, in order to realize the advantages of both rail service and a recreational trail.

¹⁴ See 49 CFR 1152.29(d) (trail use is provided for only if "continued rail service does not occur under 49 U.S.C. 10904. . .") See also Rail Abandonments—Use of Rights-of-Way As Trails, 2 I.C.C.2d 591, 608 (1986) ("Offers of financial assistance to acquire rail lines or subsidize rail operations under section 10905 [now 10904] take priority over both interim trail use and public use conditions because retention of existing rail service is mandatory under section 10905. . ."). Indeed, even under the Trails Act, trail use is interim and always subject to restoration of rail service over the line. 49 CFR 1152.29(a)(3).

_____. Accordingly, we find that regulation is necessary and that the exemption criterion of 49 U.S.C. 10502(a)(1) is not met.

2. Motion to Dismiss. The reasons discussed above for denial of the motion for exemption also necessitate denial of Shawnee's motion to dismiss Sahd's OFA.¹⁵ In addition, Shawnee has provided no evidence to show that we erred earlier in finding that Sahd is financially responsible.

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

It is ordered:

1. Shawnee's motion for an exemption from the OFA process is denied.
2. Shawnee's motion to deny the OFA filed by Sahd is denied.
3. This decision is effective October 6, 2001.

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

Vernon A. Williams
Secretary

¹⁵ The cases cited by Shawnee in support of its motion are distinguishable because in those cases the weight of the evidence supported a finding that the OFA's were not for continued rail service. Here, as discussed above, we find that the evidence points to a different conclusion.