

May 8, 2002

Via Messenger

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001



RE: STB Docket No. AB-529X, *Middletown & Hummelstown Railroad Company—
Abandonment Exemption in Lancaster County, PA*, and STB Docket No. AB-581X, *1411
Corporation Abandonment Exemption—in Lancaster County, PA*.

Dear Secretary Williams:

Enclosed please find an original and ten (10) copies of Frank Sahd Salvage Center, Inc.'s Opposition to the Borough of Columbia's "Notice, Appeal and Petition Relating to Decision Served April 12, 2002" and "Petition for Expedited Consideration of Borough of Columbia's Appeal Relating to April 12, 2002 Decision" to be filed in the above-referenced docket.

Also, enclosed is one additional copy of each pleading for stamp and return. Kindly date-stamp the additional copy for return to this office by messenger.

If you have any questions, please do not hesitate to call. My direct dial number is (202) 263-4107.

Sincerely,

Jeffrey O. Moreno
Michael H. Higgins
Attorneys for Frank Sahd Salvage Center, Inc.

cc: Andrew P. Goldstein, Esq.
Charles H. Montange, Esq.
Robert L. Pfannebecker, Esq.
Mr. Ronald Sahd

ENTERED
Office of the Secretary

MAY - 8 2002

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Public Record

EXPEDITED CONSIDERATION REQUESTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. AB-529X

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

DOCKET NO. AB-581X

1411 CORPORATION—ABANDONMENT
EXEMPTION IN LANCASTER COUNTY, PA

**FRANK SAHD SALVAGE CENTER, INC.'S OPPOSITION TO THE
BOROUGH OF COLUMBIA'S NOTICE, APPEAL AND PETITION RELATING TO
DECISION SERVED APRIL 12, 2002**

Frank Sahd Salvage Center, Inc. ("Sahd Salvage"), hereby submits its Opposition to the Borough of Columbia's "Notice, Appeal and Petition Relating to Decision Served April 12, 2002" ("Appeal"), served on May 1, 2002, in the above-captioned docket.¹ The Borough's Appeal is procedurally defective and substantively deficient, and therefore, it must be denied.

Sahd Salvage, by separate motion filed concurrently with this Opposition, requests expedited consideration of the Borough's appeal.

¹ According to the Certificate of Service, the Borough served its Appeal via first-class mail on May 1, 2002. Counsel for Sahd Salvage was unaware of the Appeal until it received an errata page from the Borough on May 6, 2002. On request, the Borough faxed the Appeal to Sahd Salvage on May 6, 2002.

I. THE BOROUGH'S APPEAL IS PROCEDURALLY DEFECTIVE.

The Borough has filed an untimely appeal pursuant to inapplicable procedures. The Borough states that its appeal is pursuant to 49 C.F.R. Parts 1115 and 1117. Appeal at 1. The Borough further states that it "reads 49 C.F.R. Part 1115 to afford the Borough only twenty (2) [sic] days to file a timely administrative appeal." *Id.* at 4-5. If the Borough had read Part 1115 as carefully as it claims, it would have noted in the very first section that "Abandonments and discontinuance proceedings instituted under 49 U.S.C. 10903 are governed by separate appellate procedures exclusive to those proceedings. (See 49 CFR part 1152)." 49 C.F.R. § 1115.1(a). Part 1117 also is not applicable because it applies only to relief not provided for in any other rule. 49 C.F.R. § 1117.1.

The appellate procedures for abandonments are clearly set out in 49 C.F.R. §1152.25(e). Section 1152.25(e)(2) states unequivocally that "Appeals to the Board's decision in abandonment or discontinuance proceedings will not be entertained. Those decisions are administratively final upon the date they are served." Instead, parties seeking further administrative action are instructed to file a petition to reopen the proceeding pursuant to 49 C.F.R. § 1152.25(e)(4). *See* 49 C.F.R. §1152.25(e)(2)(i). In order to afford the Board an opportunity to consider a petition to reopen before the abandonment decision becomes effective, parties are directed to file their petition "within 15 days after the administratively final decision is served together with a request for a stay of effectiveness under paragraph (e)(7)." *Id.* [emphasis added] The Borough has done neither.

The Appeal nominally purports to be of the Board's April 12 decision, in which case it was filed 5 days late. The substance of the Appeal, however, indicates that the Appeal really is of the Board's September 6 decision, in which case it is nearly 8 months late. The Borough appears to have bided its time, hoping that the Board or Sahd Salvage would terminate the OFA. Now that sale of the rail line is imminent, the Borough is engaging in a desperate eleventh hour attempt to reargue long-decided issues.

The Borough's failure to ascertain and follow applicable procedure is inexcusable. The Borough has been planning this appeal at least since February 7, 2002, when it filed a "Motion for Additional Time to Prepare and to Submit a Response or Other Appropriate Pleading." That Motion was denied by the Board in a decision served on February 15, 2002, in which the Board noted that the Borough would need to file a petition to reopen if it wished the Board to reconsider whether Sahd Salvage should be permitted to pursue its OFA.

II. THE BOROUGH'S APPEAL IS SUBSTANTIVELY DEFICIENT.

A petition to reopen will be granted "only upon a showing that the action would be affected materially because of new evidence, changed circumstances, or material error." 49 C.F.R. §1152.25(e)(2)(ii).² The Board reminded the Borough of this standard in its February 15, 2002 decision. Slip op. at 3. Yet, the Borough has made no pretense even of attempting to satisfy this standard.

The Borough's Appeal is nominally directed at the Board's April 12, 2002 decision in this docket granting Sahd Salvage's Petition for Clarification of the Board's terms and conditions. The overall theme, and underlying purpose, of the Borough's appeal, however, is that Sahd Salvage should not be permitted to pursue its OFA. This is precisely what the Borough attempted to do in its Motion that was denied by the Board's February 15, 2002 decision. In that decision, the Board stated:

Although [the Borough of] Columbia's request for additional time is nominally directed at the petition for clarification, which is currently pending before the Board, it appears that Columbia really seeks to reargue the question of whether Sahd should be permitted to pursue an OFA. That is a matter that has already been addressed and resolved in the Board's administratively final September 6 decision. While the Board may reopen and reconsider an administratively final decision at any time where there is material error, new evidence or substantially changed circumstances, Columbia has not alleged material error or substantially changed circumstances here, nor has it proffered new evidence.

² Even if Part 1115 were applicable, the standards for a petition to reopen under that part are identical to the standards in 49 C.F.R. §1152.25(e)(2)(ii). See 49 C.F.R. §1115.4.

Accordingly, there is no basis on which to grant Columbia's request.

Slip op. at 2-3 [emphasis added]. Despite this clear statement, the Borough once again has attempted to reargue the merits of the Sahd Salvage OFA without addressing the Board's standards.

The Borough seems to believe that, because Sahd Salvage has declined the Borough's settlement proposal, that is evidence of a non-rail related ulterior motive behind Sahd's OFA. Appeal at 2-5. As evidence, the Borough attaches settlement correspondence to and from Sahd Salvage. Appeal, Exhibits B and C. Much of this correspondence already has, or could have, been submitted to the Board in prior pleadings. The only new correspondence is the Borough's April 29, 2002 settlement proposal. The Borough, however, filed its appeal only two days later, before receiving Sahd Salvage's response. In the interest of a complete record, Sahd Salvage has attached its response as Exhibit 1 hereto. That response clearly explains why the Borough's proposals have been unacceptable to Sahd Salvage.³

It is unclear exactly what purpose the portion of the Appeal dealing with the correspondence between the Borough and Sahd Salvage is meant to serve. It is not presented as a basis for the appeal, which is covered by Section IV of the Appeal. Nor would this correspondence constitute a legitimate basis for appeal. The Board determined that there was a public need for rail service in its September 6, 2001 decision and nothing in the correspondence undermines that determination.

Section IV of the Appeal, which is titled "Protective Appeal," sets forth four grounds for the appeal. All but one repeats arguments made previously by either the Applicants, the Shawnee Run Greenway, Inc., and/or the Borough.

The only novel argument is the first one, which asserts a violation of the rail transportation policy. Appeal at 6-7. The only factual basis for this argument is an alleged hearsay statement made by the Applicants to the Borough expressing concern that this

³ Sahd Salvage also expressed its views on the Borough's correspondence in its February 13, 2002 Opposition to the Borough's February 7, 2002 Motion for Additional Time.

proceeding is exhausting the Applicants' resources and diverting attention from its rail service. On its face, the argument is ludicrous. Furthermore, it is not at all clear what standing the Borough has to make this argument, particularly since the Applicants have not expressed this concern to the Board, despite ample opportunity to do so. Moreover, Sahd Salvage, as the purchaser of the rail line, has an even stronger complaint because the resources that it had devoted to restore rail service are continually being drained to defend frivolous motions and appeals.

The Borough's second argument is that the Board "has repeatedly indicated that it will not allow its procedures to be employed to defeat local land use planning." Appeal at 7. This is the heart of the argument made by the Shawnee Run Greenway, Inc. when it moved to dismiss Sahd's OFA, and which was rejected by the Board's September 6, 2001 decision. This also is identical to an argument in the Borough's February 7, 2002 Motion for Additional Time, which the Board, in its February 15 decision, concluded did not satisfy the standards of a petition to reopen.

The Borough's third argument is that the Board's decisions are an unconstitutional taking in violation of the Fifth Amendment because there has been no demonstrated public need for continued rail service. Appeal at 7-9. This argument is just another variation of Shawnee Run's assertion that Sahd Salvage has not demonstrated a public need for rail service. That argument was rejected in the Board's September 6, 2001 decision. Moreover, since this is not a taking of Borough property, it is unclear what standing the Borough possesses.

The Borough's final argument, that the environmental condition imposed by the Board in its April 12 decision is without precedent, is an extension of its unconstitutional taking argument. Appeal at 9-13. These arguments were made by both the Applicants and Shawnee Run Greenway in prior pleadings and rejected by the Board in its September 6, 2001 and April 12, 2002 decisions.

III. THE BOARD SHOULD DISCOURAGE THE BOROUGH FROM FILING SIMILAR FRIVOLOUS PLEADINGS RELATED TO THE M&H RAIL LINE IN THE FUTURE.

This abandonment proceeding has been pending for nearly a year. The principle reason for this unusually prolonged action has been the aggressive tactics of the Shawnee Run Greenway to push its rails-to-trails project. Shawnee Run's arguments were considered and rejected by the Board in its September 6, 2001 decision. Shawnee Run then tried unsuccessfully to outbid Sahd Salvage to purchase the line. At that point, the Borough picked up the torch and has attempted to reargue every point previously presented by Shawnee Run. Although different entities, the Borough and Shawnee Run are lead by many of the same faces. The Borough, in essence, has become Shawnee Run's stalking horse to continue to prolong this proceeding.

In its February 15 decision denying the Borough's Motion for Additional Time, the Board signaled that it would not look favorably on attempts to reargue matters that already had been decided. The Board even went so far as to inform the parties that any appeal must be in the form of a petition to reopen that alleges material error, new evidence, or changed circumstances. Despite these facts, the Borough's Appeal is not styled as a petition to reopen, does not even acknowledge the standards that it must satisfy, and does not attempt to satisfy those standards.

Sahd Salvage is on the verge of concluding its purchase of the rail line, which finally would bring this proceeding to a close. To date, Sahd Salvage has expended substantial sums of money and effort to acquire the M&H Line through the OFA process in order to preserve rail service. Moreover, Sahd Salvage will expend a substantial sum of additional money to restore the rail line and attract new rail shippers. Yet, at the eleventh hour, Sahd Salvage is forced to respond to the same arguments for the second and third time. Each time Sahd Salvage must do so, it must spend money that is intended for restoration of the M&H Line. This clearly is part of

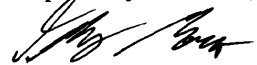
the strategy of the trail advocates.⁴ The Borough's Appeal, however, crosses the line into the frivolous and, if the Board had procedures comparable to Fed. R. Civ. P. 11, Sahd Salvage would be requesting its attorneys fees for responding to this Appeal.

The Board, however, can express its opinion quite clearly to the Borough that this Appeal is frivolous and a waste of resources. Moreover, the Board can caution the Borough (and Shawnee Run) that the Board will look with disfavor upon future attempts to divest Sahd Salvage of the rail line, by whatever process, unless there are material changed circumstances, or substantive new arguments and/or evidence that could not have been presented in this docket. Sahd Salvage asks the Board to do this with the hope that it at least will discourage similar frivolous filings in the future.

IV. CONCLUSION

Because the Borough of Columbia's Appeal is procedurally defective and because it fails to fails to allege material error, changed circumstances, or new evidence, Frank Sahd Salvage Center, Inc., respectfully requests that the appeal be denied in its entirety. This Opposition is subject to a separately filed Request for Expedited Consideration.

Respectfully submitted,



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*Attorneys for Frank Sahd Salvage
Center, Inc.*

May 8, 2002

⁴ Various advocates of the greenway project have threatened Sahd Salvage with ongoing litigation in an attempt to discourage or prevent Sahd Salvage from acquiring the rail line.

CERTIFICATE OF SERVICE

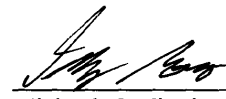
I hereby certify that I have served on this 8th day of May, 2002, a copy of the foregoing "Frank Sahd Salvage Center, Inc.'s Opposition to the Borough of Columbia's Notice, Appeal and Petition Relating to Decision Served April 12, 2002" by overnight delivery upon:

Charles H. Montage, Esq.
426 NW 162d St
Seattle, WA 98177

Robert L. Pfannebecker
Zimmerman, Pfannebecker, Nuffort & Albert
22 South Duke Street
Lancaster, PA 17602

And by hand-delivery upon the following:

Andrew P. Goldstein, Esq.
McCarthy, Sweeney & Harkaway, P.C.
2175 K Street, N.W.
Suite 600
Washington, D.C. 20423-0001



Michael H. Higgins
Jeffrey O. Noreno

EXHIBIT 1

May 2, 2002

Via First Class Mail

Joseph M. Wright Sr.
President, Columbia Borough Council
308 Locust Street
Columbia, PA 17512

RE: Middletown & Hummelstown R.R.

Dear Mr. Wright:

I am writing in response to your April 29, 2002 letter to Ron Sahd, which proposes a settlement of issues pertaining to the acquisition of the Middletown & Hummelstown rail line ("M&H Line") by Frank Sahd Salvage Center, Inc. ("Sahd"). While Mr. Sahd appreciates your attempt at settlement, the proposed settlement does not appear to be substantively different from the offer made by the Shawnee Run Greenway, Inc. last Summer, before the parties invested a substantial amount of time and money litigating matters at the Surface Transportation Board. That proposal did not address Mr. Sahd's concerns then and it does not do so now.

A fundamental problem is the scope of the trail project. As the Greenway noted in its motion to the STB to dismiss Sahd's OFA, the Master Plan simply does not contemplate, nor in many spots does it allow, a joint rail and trail project. Therefore, by necessity, the Master Plan must be sufficiently modified to accommodate joint use. Nothing in your proposal, however, appears to concede this point. In fact, your proposal contemplates construction of a trail over the existing rail bed, rather than adjacent to it. This issue must be addressed first and foremost.

Although not specifically addressed in your proposal, the original Greenway proposal required Sahd to incur both additional rail construction costs and trail relocation costs at the time it rehabilitates the rail line. Based upon certain statements in your letter, your proposal appears to be similar. This is not acceptable because it substantially increases the cost to Sahd of rebuilding the rail line.

Finally, a significant obstacle to any settlement is the personal distrust that this process has engendered between the parties. The actions and statements made by principals of the Greenway, and subsequently by many of the same individuals under the cloak of the Borough, throughout the OFA process, have exposed a reckless and overzealous motivation to develop their trail, without compromise, at any cost. They have made false and unsubstantiated statements that attribute sinister motives to Mr. Sahd and, we believe, have used their positions on the Borough Council to manipulate matters related to the M&H Line. The type of proposal that you have made requires Sahd to place a substantial amount of trust in these same people

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when there is absolutely no foundation for it. As a consequence, Sahd is much more comfortable with his ability to restore rail service to the M&H Line as the owner, rather than as a tenant.

Mr. Sahd repeatedly has stated that he will discuss trail options in greater detail once Sahd actually has acquired the line, and this letter should serve as confirmation of that commitment. Under the STB's April 12th order, however, Sahd has until Memorial Day to complete its environmental testing of the rail corridor and to consummate its purchase of the M&H Line. Sahd's resources are devoted to those tasks, which must be completed in a very short time. It is in the interest of all parties to bring that proceeding to a close so that efforts can be focused upon developing the rails-with-trails project.

Once Sahd acquires the rail line, which must occur by Memorial Day, any trail proposal that you wish to make will be welcome. Any such proposal, however, should address Sahd's concerns, as described in this letter.

Sincerely,



Jeffrey O. Moreno

cc: Ronald G. Sahd
Robert L. Pfannebecker, Esq.
Charles H. Montange, Esq.
Andrew M. Goldstein, Esq.
Leo Lutz, Mayor
Nora Stark, Vice President Borough Council
Tom Vecchiolli, Council Member
Mary Wickenheiser, Council Member
Paul Resch, Council Member
Laurie Gerfin, Council Member
David Rupp, Council Member