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SERVICE DATE – SEPTEMBER 26, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-364 (Sub-No. 14X)

MID-MICHIGAN RAILROAD, INC.—ABANDONMENT EXEMPTION—
IN KENT, IONIA, AND MONTCALM COUNTIES, MI

Decided: September 24, 2008

This decision denies the request of the City of Greenville, MI (Greenville or petitioner), to revoke or reopen our June 9, 2008 decision (June 2008 Decision) granting a petition for an abandonment exemption pursuant to 49 U.S.C. 10502. It also denies Greenville's request to extend the deadline for filing an offer of financial assistance (OFA) pursuant to 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1).

BACKGROUND

By petition filed on February 20, 2008, Mid-Michigan Railroad, Inc. (MMRR) sought an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a 24.70-mile rail line between milepost 103.20 at Lowell, MI, and the end of the line at milepost 78.50, at Greenville, MI, in Kent, Ionia, and Montcalm Counties, MI. MMRR also sought an exemption from the OFA procedures of 49 U.S.C. 10904. Notice of the filing was served and published in the Federal Register on March 11, 2008 (73 FR 13069), and the due date for comments was set at March 31, 2008. On March 6, 2008, West Michigan Trails and Greenways Coalition (WMTGC) filed a request for the issuance of a notice of interim trail use for that portion of the Line from milepost 103.20 near Lowell to milepost 81.32 near Greenville, a distance of 21.88 miles in Kent, Ionia, and Montcalm Counties, MI. No other comments, however, were timely filed opposing the requested exemption or the abandonment that it would authorize.

In the June 2008 Decision, the Board granted the exemption from 49 U.S.C. 10903, thereby authorizing the abandonment subject to historic preservation,¹ trail use, and standard employee protective conditions, but denied the request for an exemption from 49 U.S.C. 10904. The Board found that full regulation, i.e., detailed review of the proposed abandonment, was not necessary to protect shippers from an abuse of market power because a former shipper had closed its facility on the line in March 2006 and the only shipper left on the line had not used rail

¹ By decision served on September 22, 2008, this proceeding was reopened and the historic preservation condition was removed.

service since December 2006. The decision indicated that the deadline for submitting OFAs to allow rail service to continue was June 19, 2008, and that, provided no OFA was received, the exemption would be effective on July 9, 2008.² The decision added that, in the absence of an OFA, if an agreement for interim trail use/rail banking was reached with WMTGC by December 8, 2008, interim trail use could be implemented; if no trail use agreement was reached by that time, MMRR could fully abandon the line, provided the imposed conditions had been met.

On July 7, 2008, Greenville filed its petition to revoke the exemption authorized in the June 2008 Decision pursuant to 49 U.S.C. 10502(d) or, in the alternative, to reopen the exemption proceeding pursuant to 49 U.S.C. 722(c) and 49 CFR 1152.25(e)(4). Additionally, Greenville requests a 1-to 2-month extension of the deadline for submitting an OFA under 49 U.S.C. 10904. On July 28, 2008, MMRR replied in opposition.

POSITIONS OF THE PARTIES

Greenville argues that revocation of the exemption is warranted because the June 2008 Decision was not consistent with the rail transportation policy (RTP) of 49 U.S.C. 10101. Citing 49 U.S.C. 10101(4) and (5),³ petitioner states that access to this rail line is of paramount importance to economic development in Greenville, and that, by authorizing the abandonment of the line, the Board has essentially deprived the city of access to rail transportation. Petitioner adds that it has made significant efforts to attract new industrial development to the area and it anticipates that rail traffic will increase dramatically. In support of this claim, Greenville attaches a July 1, 2008 letter from Mid-Michigan BioOil, Inc. (MMBO). MMBO states that it is negotiating to purchase or lease part or all of a warehouse in Greenville for the production of bio oils and biodiesel fuel and anticipates using more than 400 railcars weekly in connection with its operations. MMBO strongly opposes the abandonment and states that the loss of rail service would terminate its interest in the property.

Alternatively, Greenville argues that the Board should reopen the exemption proceeding based on changed circumstances. Petitioner maintains that the new traffic from MMBO it has identified represents changed circumstances warranting reopening. Finally, Greenville argues that a 1- to 2-month extension of time for submission of OFAs is justified, given the potential impact of abandonment on the local community, as well as the Board's preference for continued rail service on existing lines, and because it did not have sufficient time to determine whether to submit an OFA or to locate sources of funding for an OFA before the deadline.

² Petitions to stay were due by June 24, 2008, and petitions to reopen were due by July 7, 2008.

³ Those provisions express a policy favoring development of a sound transportation system to meet public needs, and fostering sound economic conditions in transportation.

In reply, MMRR argues that the petition does not meet the criteria for revocation of an exemption or for reopening of an administratively final decision and does not justify the late filing of an OFA. As to revocation, MMRR maintains that regulation is not required to foster the RTP here, because the asserted need for future rail service is mere speculation and because revocation of the exemption would increase its financial burden. MMRR further argues that MMBO has put forward no concrete proposals and that the MMBO proposal, uncertain as it is, does not outweigh the demonstrated burden on the railroad.

Additionally, MMRR maintains that Greenville has not demonstrated changed circumstances justifying reopening, because MMBO's plans have been known since at least May 2008, when they were referenced in Greenville's letter filed after issuance of the Environmental Assessment (EA) in this proceeding. Moreover, MMRR argues that MMBO's plans are too speculative to justify the resumption of rail service on the line. MMRR also requests that the Board deny Greenville's request for an extension of the deadline for OFAs, given that no potential offeror has been identified. MMRR further maintains that an extension of the OFA process does not represent the Board's policy where the abandoning railroad opposes the extension and the railroad would suffer harm if the extension were granted.

DISCUSSION AND CONCLUSIONS

Revocation. The Interstate Commerce Act, as amended, at 49 U.S.C. 10502(a), favors exemptions from regulation whenever appropriate, and directs us to grant exemptions to the maximum extent consistent with that Act. Under 49 U.S.C. 10502(d), however, the Board may revoke an exemption in whole or in part if it finds that regulation is necessary to carry out the RTP set forth in 49 U.S.C. 10101. Here, petitioner wants us to revoke the exemption and withdraw our authorization of the abandonment. The party seeking revocation of an exemption has the burden of proof and petitions to revoke must be based on reasonable, specific concerns. I&M Rail Link LLC—Acquisition and Operation Exemption—Certain Lines of Soo Line Railroad Company d/b/a Canadian Pacific Railway, STB Finance Docket No. 33326 et al. (STB served Apr. 2, 1997), aff'd sub nom. City of Ottumwa v. STB, 153 F.3d 879 (8th Cir. 1998).

Citing RTP provisions favoring sound economic conditions in transportation and maintenance of a transportation system that meets public needs, petitioner seeks revocation on grounds that rail access is essential for the economic development of Greenville, and that a dramatic increase in rail traffic can be anticipated with the operations of a new shipper, MMBO. However, the anticipated increase in rail use over the line is speculative at best. No verified statement accompanies Greenville's filing, which is supported only by a letter from MMBO. In its letter, MMBO states that it is "in negotiations" to purchase or lease part or all of a warehouse in Greenville for the production of bio oils and biodiesel fuel. MMBO says it "anticipate[s] heavy rail use" and "estimate[s] using greater than 400 rail cars per week." But MMBO provides no business plan or timeline, describes no steps (other than negotiating for possible warehouse space) that it is taking to establish a facility in Greenville, and has made no commitment to ship freight over the line. Further, MMBO gives no indication that it currently

operates any production facilities anywhere; indeed, its letter does not even list a street address for the company. In short, the record does not suggest that the company exists anywhere except on paper, and it fails to include any evidence that would lend credence to the unverified assertion of future “heavy rail use” by the company. Furthermore, this is a line over which no traffic moved in 2007 or 2008 (prior to the filing of MMRR’s petition), and MMRR submitted evidence in its petition of the high capital expenditures and annual maintenance costs required for the line—evidence unchallenged at any point in this proceeding. When these facts are considered along with the significant opportunity costs and high net liquidation value associated with the line, we believe that MMRR has submitted persuasive evidence that revoking this exemption and forcing MMRR to continue to hold this line as part of the national rail system would present a financial burden to the railroad. Because the need for future rail service is uncertain at best and revocation would exacerbate MMRR’s financial burden, we find that regulation is not required to foster the RTP. Indeed, forcing railroads to maintain unprofitable rail lines would contravene the policies favoring sound economic conditions in rail transportation and a sound rail transportation system that meets the needs of the public (49 U.S.C. 10101(4), (5)); and it would frustrate the goal of “reduc[ing] regulatory barriers to . . . exit from the industry” (49 U.S.C. 10101(7)).⁴ Accordingly, Greenville has not shown that revocation is warranted.

Reopening. Under the Board’s governing statute and implementing regulations, the Board may reopen and reconsider a prior Board decision on the grounds of material error, new evidence, or substantially changed circumstances. See 49 U.S.C. 722(c); 49 CFR 1115.3(b). Greenville asserts that the new demand for rail service associated with MMBO’s development project, along with the potential for additional future demand, constitute a changed circumstance warranting reopening. We disagree. In many abandonment cases, shipper or community groups base their opposition on potential development of new business. But speculation about future traffic is not a sufficient basis upon which to deny or revoke an abandonment authorization. See CSX Transportation, Inc. – Abandonment Exemption – In Bell County, KY and Claiborne County, TX, Docket No. AB-55 (Sub-No. 478X), slip op. at 5-6 (ICC served Aug. 5, 1994). See also CSX Transportation, Inc. – Abandonment – Between Bloomington and Montezuma, In Parke County, IN, Docket No. AB-55 (Sub-No. 486), slip op. at 9-10 (STB served Sept. 13, 2002), aff’d, Montezuma Grain Co., LLP v. STB, 339 F.3d 535 (7th Cir. 2003). Here, as

⁴ Abandonment cases often pit shippers or communities that want a railroad to remain in place against a carrier seeking to abandon an unprofitable line. In determining, in a full abandonment proceeding, whether the public convenience and necessity supports abandonment, the agency balances the potential harm to affected shippers and communities against the burden that continued operations would impose on the carrier and on interstate commerce. See Redmond-Issaquah R.R. Preserv. v. STB, 223 F.3d 1057, 1059 (“In granting the STB . . . the authority to regulate abandonments, Congress sought to balance the railroad companies’ need to manage [their] tracks in an economically efficient manner with the public’s need for a functioning interstate railroad system.”). Thus, the fact that continued rail service may facilitate a community’s economic development does not mean that abandonment should not be authorized.

discussed above, MMBO's planned use of the rail line is highly speculative, and, given that the line has carried no traffic at all for years, the rail traffic that Greenville claims to anticipate is supported neither by the record before us nor by the line's history. In sum, the record before us does not support reopening and setting aside the abandonment authorization.

OFA deadline extension. Finally, Greenville has not justified the 1- to 2-month extension of the deadline to file an OFA that it seeks. As a participant in the abandonment proceeding, Greenville had notice of the deadline for filing OFAs. Under section 10904 and the Board's regulations, if Greenville (or anyone else) had wanted to file an OFA to acquire MMRR's line, it had the opportunity to do so anytime from the filing of the petition for exemption on February 20, 2008 through June 19, 2008, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). Greenville's conclusory assertion that the time afforded for filing an OFA was insufficient is unsupported, and granting Greenville's request would contravene the time limits imposed in section 10904. Greenville's extension request will therefore be denied. Greenville may, of course, negotiate to purchase the line outside the OFA process, or a rail carrier may do so at the city's behest.

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

It is ordered:

1. Greenville's petition to revoke or reopen the Board's June 2008 Decision is denied.
2. Greenville's request for an extension of the deadline to file an OFA is denied.
3. This decision is effective on its date of service.

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

Anne K. Quinlan
Acting Secretary