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SERVICE DATE - LATE RELEASE AUGUST 3, 1998

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-402 (Sub-No. 5X)

FOX VALLEY & WESTERN LTD.--ABANDONMENT EXEMPTION--IN KEWAUNEE  
COUNTY, WI

Decided: July 29, 1998

By petition filed April 15, 1998, Fox Valley & Western Ltd. (FVW),<sup>1</sup> seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903-05<sup>2</sup> to abandon a 16.7-mile line of railroad, known as the Luxemburg-Kewaunee Line, extending from milepost 18.9 near Luxemburg to milepost 35.6 at the end of the line near Kewaunee, in Kewaunee County, WI. Pursuant to 49 U.S.C. 10502(b), a notice was published in the Federal Register (63 FR 24840) on May 5, 1998, instituting an exemption proceeding. A request for issuance of a notice of interim trail use (NITU) was filed by the Wisconsin Department of Natural Resources (WisDNR),<sup>3</sup> acting through the Wisconsin Department of Transportation (WisDOT),<sup>4</sup> (collectively referred to as WisDNR/DOT). The United Transportation Union requests imposition of labor protective conditions. We will grant the exemption subject to trail use, environmental, and standard employee protective conditions.

BACKGROUND

FVW, a Class II rail carrier, operates approximately 450 miles of rail line in Wisconsin. The only active shipper on the line proposed for abandonment is Kewaunee Co-op, located in Kewaunee. It receives inbound shipments of various fertilizers, including potash, phosphates, urea

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<sup>1</sup> FVW is a wholly owned subsidiary of Wisconsin Central Transportation Corporation.

<sup>2</sup> In its petition, FVW has not supported its request for exemption from section 10904 involving offers of financial assistance and section 10905 involving public use conditions. Accordingly, we will limit our consideration of the exemption request to section 10903.

<sup>3</sup> WisDNR is the lead state agency responsible for designating, acquiring, developing, and maintaining a system of state trails for public use by equestrians, bicyclists, cross country skiers or hikers.

<sup>4</sup> WisDOT is the designated state agency for rail matters in the State of Wisconsin. It is responsible for all highway and airport construction within the state and has the statutory right to acquire for present or future transportation, recreational or scenic purposes any property used in operating a railroad that is abandoned in Wisconsin.

and ammonium sulfate. According to FVW, Kewaunee Co-op is planning to relocate its operations to another rail segment. FVW states that the only other shipper that could be affected by the proposed abandonment is a power facility in Kewaunee, which is jointly owned by Wisconsin Public Service (WPS) and Wisconsin Electric Power Company (WEPC) and is operated by WPS. In 1997, there were two shipments of large transformers delivered to the power facility, one in April and the other in December. There has been no service to the power facility in 1998. According to FVW, it contacted WPS and the operator indicated that it does not oppose the abandonment. After abandonment, FVW plans to use the line's salvageable track and materials to upgrade and maintain its other rail lines, and any remaining materials will be sold as scrap.

#### DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned without our prior approval. Under 49 U.S.C. 10502, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of the application process, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. Moreover, by allowing FVW to avoid maintenance and operating expenses on the line and to apply its assets more productively elsewhere on its system, an exemption will foster sound economic conditions and encourage efficient management [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be affected adversely.

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power because the only active shipper on the line is planning to move its operations to a location off the line.<sup>5</sup> Nevertheless, to ensure that the shippers on the line are informed of our action, we will require FVW to serve a copy of the decision on Kewaunee Co-op, WPS and WEPC within 5 days of the service date of this decision and notice and certify to us that it has done so.

Under 49 U.S.C. 10502(g), we may not use our exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, we will impose the employee protective conditions in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979).

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<sup>5</sup> Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

FVW has submitted an environmental report with its petition and has notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed abandonment. See 49 CFR 1105.11. Our Section of Environmental Analysis (SEA) has examined the environmental report, verified the data it contains, analyzed the probable effects of the proposed action on the quality of the human environment, and served an environmental assessment (EA) on June 12, 1998. In the EA, SEA indicated that the National Geodetic Survey (NGS) has identified three geodetic station markers that may be affected by the proposed abandonment. Therefore, SEA recommends that a condition be imposed on any grant of abandonment authority requiring FVW to notify NGS at least 90 days prior to any salvage activities that may disturb or destroy these markers so that plans can be made for their relocation.

In response to the EA, SEA received comments from WisDNR and FVW. WisDNR is concerned about possible arsenic contamination in the right-of-way. It states that, because the ballast will not be removed during salvage operations, no sampling will be required at this time. However, if the ballast is ever removed, WisDNR states that a sampling will be necessary to define the degree and extent of arsenic contamination and determine the appropriate remedy. FVW asserts that, while it often leaves the ballast undisturbed, it is the personal property of the railroad and may be salvaged. It claims that WisDNR does not have the authority to order a sampling of the right-of-way upon removal of the ballast. Further, FVW states that it objects to the condition that it notify NGS 90 days prior to any salvage activities.

SEA states that it is their understanding that the right-of-way is part of a designated arsenic contamination site, a portion of which has been remedied. It indicates that WisDNR is concerned that the possible remaining arsenic contamination will be dislodged and pose a potential risk to human health and the environment if the ballast along the right-of-way is disturbed during salvage operations and that such disturbance would require remediation by the railroad. FVW, in its environmental report, describes several possible methods that may be employed during salvage, one of which would leave the ballast relatively undisturbed. However, FVW does not indicate which salvage method will be used. SEA, therefore, recommends that a condition be imposed on any grant of abandonment authority requiring FVW to consult with WisDNR prior to undertaking any salvage operations in order to determine whether planned salvage operations and techniques could disturb ballast along the right-of-way, which in turn could dislodge remaining arsenic deposits, and to cooperate with WisDNR in any remediation measures that may be required as a result of this consultation.

We will impose the conditions recommended by SEA. Based on SEA's recommendation, we conclude that the proposed abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

WisDNR/DOT requests a NITU under the National Trails System Act, 16 U.S.C. 1247(d), and the regulations at 49 CFR 1152.29. WisDOT states that WisDNR will use or preserve the land

corridor and related real property for interim public transportation and recreational purposes (including highway, pedestrian and other trail uses), subject to restoration for railroad purposes. WisDNR has submitted a statement of willingness to assume financial responsibility for the right-of-way and acknowledged that use of the right-of-way is subject to possible future reconstruction and reactivation of the right-of-way for rail service as required under 49 CFR 1152.29. By letter filed on May 28, 1998, FVW states that it is willing to negotiate with WisDNR for interim trail use. WisDNR/DOT's request complies with the requirements of 49 CFR 1152.29 and FVW is willing to enter into negotiations. Therefore, we will issue a NITU for the described line. The parties may negotiate an agreement during the 180-day period prescribed below. If an agreement is executed, no further Board action is necessary. If no agreement is reached within 180 days, FVW may fully abandon the line, subject to the conditions imposed below. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

The parties should note that operation of the trail use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10904. As stated in Rail Abandonments--Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 608 (1986) (Trails), offers of financial assistance (OFA) to acquire rail lines for continued rail service or to subsidize rail operations take priority over interim trail use/rail banking and public use. Accordingly, if an OFA is timely filed under 49 U.S.C. 1152.27(c)(1), the effective date of this decision and notice will be postponed beyond the effective date indicated here. See 49 CFR 1152.27(e)(2). In addition, the effective date may be further postponed at later stages in the OFA process. See 49 CFR 1152.27(f). Finally, if the line is sold under the OFA procedures, the petition for abandonment exemption will be dismissed and trail use precluded. Alternatively, if a sale under the OFA procedures does not occur, trail use may proceed.

SEA has indicated in its EA that the right-of-way may be suitable for other public use after abandonment. We note that no one has sought a public use condition, and none will be imposed.

It is ordered:

1. Under 49 U.S.C. 10502, we exempt from the prior approval requirements of 49 U.S.C. 10903, the abandonment by FVW of the above-described line, subject to the employee protective conditions in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979), and the conditions that: (1) FVW shall comply with the interim trail use/rail banking procedures set forth below; (2) FVW shall notify NGS at least 90 days prior to any salvage activities that may disturb or destroy the geodetic station markers identified on the line so that plans can be made for their relocation; and (3) FVW shall consult with WisDNR prior to undertaking any salvage operations in order to determine whether planned salvage operations and techniques could disturb ballast along the right-of-way and cooperate with WisDNR in any remediation measures that may be required as a result of this consultation.

2. FVW must serve a copy of this decision and notice on Kewaunee Co-op, WPS, and WEPC within 5 days after the service date of this decision and notice and certify to the Board that it has done so.

3. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way.

4. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligations for the right-of-way.

5. If interim trail use is implemented and subsequently the user intends to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

6. If an agreement for interim trail use/rail banking is reached by the 180th day after service of this decision and notice, interim trail use may be implemented. If no agreement is reached by that time, FVW may fully abandon the line, provided the conditions imposed above are met.

7. An OFA under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by August 13, 1998, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by the filing fee, which currently is set at \$1,000. See 49 CFR 1002.2(f)(25).

8. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: **“Office of Proceedings, AB-OFA.”**

9. Provided no OFA has been received, this exemption will be effective September 2, 1998. Petitions to stay must be filed by August 18, 1998, and petitions to reopen must be filed by August 28, 1998.

10. Pursuant to the provisions of 49 CFR 1152.29(e)(2), FVW shall file notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by FVW's filing of a notice of consummation by August 3, 1999, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation

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exists at the end of the 1-year period, the notice of consummation must be filed no later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary