SURFACE TRANSPORTATION BOARD

DECISION AND CERTIFICATE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-303 (Sub-No. 27)

WISCONSIN CENTRAL LTD.–ABANDONMENT–
IN OZAUKEE, SHEBOYGAN AND MANITOWOC COUNTIES, WI

Decided: October 18, 2004

On June 30, 2004, Wisconsin Central Ltd. (WCL) filed an application under 49 U.S.C. 10903 seeking authority to abandon a line of railroad, known as the Plymouth Line. The line extends from milepost 114.8 near Saukville to milepost 151.8 near Kiel, a distance of approximately 37 miles in Ozaukee, Sheboygan and Manitowoc Counties, WI.[1] Notice of the filing was served and published in the Federal Register (69 FR 43485) on July 20, 2004.

A protest filed jointly by Adell Cooperative (Adell), Kettle Lakes Cooperative (Kettle Lakes), Lakeside Foods, Inc. (Lakeside), Neuens Fredonia Lumber Company (Neuens), and Glacier Transit & Storage, Inc. (Glacier) (jointly, protestants) opposes abandonment of a 20.2-mile segment of the line located between Saukville and Waldo (milepost 135.0) (southern segment). Protestants do not object to abandonment of the remaining 16.8-mile segment between Waldo and Kiel (northern segment).

The Wisconsin Department of Transportation (WisDOT) filed comments and, on behalf of the Wisconsin Department of Natural Resources (WDNR), requested issuance of a certificate of interim trail use (CITU) for the entire line and for a public use condition under 49 U.S.C.

[1] WCL's application included several supporting verified statements. Diane R. Monnich, Vice President of L. E. Peabody & Associates analyzed the costs incurred by WCL in operating the Plymouth Line. Brian McIntyre, Assistant Superintendent-Wisconsin Division, U.S. Region of Canadian National Railway Company (CN), who states that he is responsible for operations on the Plymouth Line and other WCL lines, discussed the operations and service on the Plymouth Line. Gary L. Kolbe, Assistant Vice President, Midwest Region Sales for CN, who states that he is responsible for sales functions for the Plymouth Line and other WCL lines, provided information about traffic moving over the Plymouth Line, the customers served on the line, and transportation alternatives. Gregory J. Guthrie, Senior Management Technical Services-U.S. Region for CN, who states that he is responsible for engineering for the Plymouth Line, discussed the condition of the line, rehabilitation, net liquidation value, and maintenance expenses.

10905 to negotiate with WCL for the right-of-way. In supplemental comments, WisDOT submitted a copy of an Economic Impact Study it conducted regarding the Plymouth Line. The Board has also received letters from United States Senators Herb Kohl and Russell D. Feingold, Congressman Thomas E. Petri, Wisconsin State Senators Mary Panzer and Joe Liebham, Wisconsin State Assembly Members Daniel LeMahieu, Steve Kestell, Mark Gottleib and Al Ott, Village of Elkhart Lake, Sheboygan County Transportation Committee, and the Random Lake Area Chamber of Commerce.

Board staff also conducted a public meeting in Random Lake, WI, on August 13, 2004, to receive public comments on WCL's application. The speakers at the meeting included public officials, shippers, business and community interests, and employees. Written comments were received from the Town of Fredonia, WisDOT, Ozaukee County Supervisor Rose Hoff Leider, State Representative Glen Grothman, Village of Saukville, Neuens, Sargento Foods, Inc. and the Wisconsin & Southern Railroad Co.

WCL filed a reply on August 30, 2004, that included verified statements from Ms. Monnich, analyzing the costs for operations over the southern segment, and Mr. Guthrie, and Mr. Koble.

Upon review of the record, we conclude that the application should be granted, subject to environmental and standard employee protective conditions. We will issue a CITU so that the state or community groups can pursue the option of trail use. In addition, if the state, community, or other interested party wishes to continue rail service on the line, the offer of financial assistance (OFA) process is available to it.

This decision first reviews the background of this case, including the revenues and costs associated with the line, alternative transportation options for shippers on the line, and shipper and community interests. After reviewing the background of this case, our decision will examine the issues raised that are relevant to the Board's analysis.

BACKGROUND

WCL was acquired by CN in 2001[2] and is currently operated as part of a system of railroads in the United States that is controlled by CN's wholly owned subsidiary, the Grand Trunk Corporation (GTC).

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[2] See Canadian National Railway Company, Grand Trunk Corporation, and WC Merger Sub, Inc.–Control–Wisconsin Central Transportation Corporation, Wisconsin Central Ltd., Fox Valley & Western Ltd., Sault Ste. Marie Bridge Company, and Wisconsin Chicago Link Ltd., STB Finance Docket No. 34000 (STB served Sept. 7, 2001).

The Plymouth Line is the middle portion of a WCL line that extends from North Milwaukee to Hilbert and Green Leaf, WI. In the application, WCL claims that the Plymouth Line is a low-density branch line that is suffering from extensive deferred maintenance and is incapable of supporting the rehabilitation expenses necessary to keep the line in operation. The application indicates that WCL's operations on the Plymouth Line are unprofitable and the current maintenance expenditures on the line are minimal. WCL asserts that the substantial rehabilitation and normalized maintenance that would be required for continued operation of the line are economically unjustified. WCL indicates that a portion of the Plymouth Line is currently out-of-service, and the remainder of the line averages four cars per week. The carrier asserts that there is no reasonable indication or likelihood that traffic will increase meaningfully in the future. The only significant traffic consists of inbound movements of agricultural fertilizer that move primarily during periods in the spring and fall. WCL claims that shippers have other rail and motor carrier service options to meet their needs, and several have affiliated rail-served facilities in nearby locations that could handle existing traffic.

Mr. Guthrie states that the Plymouth Line was in poor condition when WCL was acquired by CN, and that it has deteriorated since then. While the portion at the southern end of the line between milepost 114.8 and milepost 118.7 is classified as Federal Railroad Administration (FRA) Class 3,[3] the portion between milepost 118.7 and milepost 135.0 is FRA excepted track due to rail and tie conditions. And the northern segment between milepost 135.0 and milepost 151.8 is out-of-service as a result of track conditions. The track consists of 90-pound jointed rail laid in the 1920's and 100-pound jointed rail laid in 1966. The 4 miles of FRA Class 3 track is second hand 112-pound continuous welded rail that was laid in 1979. According to Mr. Guthrie, the last production tie installation was prior to 1985 and the last surfacing was performed in 1990-1991. In its comments, WisDOT indicates that, after inspecting the line with Mr. Guthrie, it substantially agrees with WCL's description of the line's condition.

I. COST AND REVENUE EVIDENCE

For the entire line, in the forecast year, WCL will realize revenues of $249,857 and incur avoidable costs of $410,024, resulting in a forecast year operating loss of $160,167. When opportunity costs are considered, avoidable losses are $355,065. When subsidization costs are considered, the estimated subsidy payment is $2,390,211 for the entire line. <u>See</u> Appendix A to this decision.

For the southern segment, in the forecast year, WCL will realize revenues of $249,857 and incur avoidable costs of $341,519, resulting in an avoidable loss of $91,662. When opportunity costs are considered, the total forecast year loss is estimated to be $203,210. When

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[3] FRA's track safety standards are published in 49 CFR part 213.

subsidy costs are added, WCL would require an estimated subsidy year payment of $1,116,579. See Appendix B to this decision.

We will now review the individual elements of these calculations.

A. TRAFFIC, OPERATIONS, AND REVENUES

Mr. Kolbe states that the line carried 199 carloads in 2002, 206 carloads in 2003 (WCL's base year) and 49 carloads for the first 4 months of 2004. He indicates that no overhead traffic is carried on the line. According to Mr. Kolbe, the principal traffic consists of inbound carloads of potash, urea and fertilizer that is delivered primarily during the spring and fall planting season to Adell and Kettle Lakes, the largest shippers on the line. WCL also delivered carloads of dry milk to Glacier, lumber to Neuens, miscellaneous agricultural products to Adell Warehouse Cold Storage (Adell Warehouse), and pea seed to Lakeside. WCL handled outbound shipments of logs by Weekly Timber & Pulp, Inc. and Zimmerman Logging. Mr. Kolbe states that overall traffic volumes on the Plymouth Line have remained relatively stable over the past several years, and that he is unaware of any market or business considerations that would indicate that volume would change in the future. For that reason, he used the base year traffic levels of 206 cars for WCL's forecast year and subsidy year projections.

Mr. McIntyre indicates that, since October 2002, service on the Plymouth line has been provided by a train that originated at DBR Junction, which is southwest of the line. During the first half of 2003, service was scheduled to operate 3 days a week. In July 2003, service was rescheduled for 2 days a week. Additional service was provided when needed, especially for seasonal movements of fertilizer.

In WCL's application, Ms. Monnich indicates that, during the forecast year (June 1, 2004 to May 31, 2005) and subsidy year, WCL would realize revenues of $238,387 from the 206 projected carloads, if it continued to operate the line.

Protestants challenge WCL's forecast year traffic projections, claiming that projected traffic should include increased traffic from 2 shippers. They note that WCL's application showed that Lakeside received 14 carloads during the first 4 months in 2004, compared to 5 carloads in the base year, after it acquired a new company. Protestants further assert that WCL's application indicates that Glacier received 15 carloads during the first 7 months of 2004, compared to 10 carloads in the base year.

Mr. Kolbe responds that the precise amount of traffic for a particular shipper fluctuates from year to year. He points out that, during the base year, Adell received 52 carloads and Kettle Lakes received 46 carloads, which, for both, was a substantial increase over the previous year. He notes that, during a comparable period in 2004, Adell received only 38 carloads and Kettle Lakes received only 34 carloads. Mr. Kolbe notes further that Lakeside has received no additional traffic in 2004. He indicates further that, during the first 7 months of 2004, 104 carloads moved on the line compared to 113 carloads in a comparable period in 2003. He continues to believe that forecast year traffic projections in WCL's application are reasonable.

Protestants have not presented any additional evidence showing an increase in the total traffic to be moved on the line. As a result, we will accept Mr. Kolbe's estimate as reasonable and as the best evidence for traffic projections for the forecast year and subsidy year.

Protestants argue that WCL did not include "system" revenues earned by CN, such as from traffic that originated in Canada. They assert that Adell and Kettle Lakes received carloads of fertilizer materials from Saskatchewan and Manitoba, and Neuens received carloads of lumber from British Columbia and Alberta. They claim that WCL did not include revenue from the Canadian portion of these movements in its application.

Ms. Monnich responds that WCL's application included "system" revenues for all of CN's affiliates operating in the U.S. as reported by GTC. According to Ms. Monnich , if any CN-affiliated U.S. carriers had participated in shipments to the line, the revenues and related costs would have been included in the application.

GTC accounts for revenue and costs for CN's U.S. operations in quarterly and annual reports to the Board. GTC's input costs are used for developing Uniform Rail Costing System unit costs. GTC also complies with the Board's accounting requirements in the Uniform System of Accounts. In contrast, CN does not have to use the Board's accounting requirements and does not maintain its accounts under the Board's requirements for its Canadian operations or submit reports to the Board. Our review confirms that WCL properly included the system revenue in its base year data and forecast year and subsidy year revenue projections data. WCL also included the associated system costs as reported by GTC for moving that traffic. In doing so, WCL has attributed revenues and costs to the line consistent with the accepted methodology for accounting for those items for Board regulatory purposes.

Moreover, Mr. Kolbe's reply statement indicates that WCL reviewed movement data for fertilizer traffic. According to Mr. Kolbe, the 80 carloads of fertilizer received by Adell and Kettle Lakes did not originate on CN, but were moved by Canadian Pacific Railway from Saskatchewan to Minneapolis and then interchanged with WCL for movement to those shippers. Ms. Monnich's reply statement indicates that WCL revenues reflected the movement of this traffic from Minneapolis. We agree with WCL's testimony that the revenues for these movements were properly reported in the application.

Ms. Monnich stated further that, after reviewing revenues and routing data, she determined that revenues of 8 cars of fertilizer from Manitoba were understated in WCL's application by $8,328. Accordingly, she adjusted WCL's forecast year and subsidy year revenue to be $249,857. We agree with the adjustments made by WCL and accept its revised estimate for forecast year and subsidy year revenues.

B. AVOIDABLE COSTS

Avoidable costs are costs that the applicant will cease to incur if it abandons the line. The data originally submitted by Ms. Monnich indicated that WCL will incur on-branch costs totaling $251,622 for the forecast and subsidy year and incur avoidable off-branch costs totaling $160,997 for the forecast year and subsidy year. Total avoidable costs reported are: $412,619 for the forecast and the subsidy year. Protestants object to several cost items.

Maintenance-of-way and structures. Mr. Guthrie estimates the annual maintenance cost for the entire line at $165,188 for the forecast year, based on an average annual expenditure of approximately $4,300.00 per mile for 37 miles. Mr. Guthrie's estimate includes normalized maintenance (programmatic surfacing and tie replacement), routine maintenance, signal maintenance and grade crossing maintenance.

Ms. Monnich's reply statement computes the maintenance costs for the southern segment by adjusting the costs provided by Mr. Guthrie in the application to reflect operation on the 20.2-mile segment. Ms. Monnich projects maintenance costs for the southern segment at $96,683.

Protestants dispute WCL's forecast year costs for routine track maintenance and grade crossing signal maintenance, claiming that WCL did not show that any of these costs were actually incurred on the line. Protestants indicate that WCL estimated labor costs for routine maintenance by allocating the wages of the employees who maintained the southern segment and other WCL lines. Protestants assert that these labor costs (and the fringe benefits applied to them) should be disallowed. They also point out that WCL's material costs for routine maintenance were based strictly on a mileage prorate and note that WCL concedes that the line has not seen crosstie replacement or ballast application in surfacing in 15 to 20 years.

They assert that labor costs for signal maintenance were based on a proportion of "work units" for signal devices on the line in relation to total "work units" on all signals assigned to two WCL signalmen. They contend that the allocation is unsupported and unexplained. According to protestants, there was no explanation of what a "work unit" consists of, or how it reasonably relates to time spent maintaining signals. Protestants also assert that WCL has not explained or supported material costs for signal maintenance. Protestants have not provided any evidentiary support for these assertions.

Mr. Guthrie disputes protestants' claim that, given the line's extremely poor condition and extensive deferred maintenance, it is unlikely that track crews spend any appreciable time doing routine maintenance on the line. He responds that WCL performs normal weekly inspections as required by the FRA, and the section gang on the Plymouth Line has to perform numerous activities throughout the year just to keep this line in service. He states that the poor condition of the line can increase the number and extent of these basic maintenance items that must be attended to, noting that poor tie support and track dynamics frequently cause missing track bolts and broken angle bars. The deteriorated crossings on the line often require patching, and have to be salted heavily in the winter to keep the flangeways open and the crossings passable. He points out that other tasks have to be performed that do not vary with the number of trains operating on the line, such as fencing repair and snow removal. He indicates that maintaining operational track geometry in the springtime can be especially difficult on a line like the Plymouth Line, which is laid on relatively inferior ballast.

He states that the southern segment is maintained by the two-man section gang that also maintains WCL's West Bend Subdivision. Mr. Guthrie indicates that, to account for lower maintenance on the Plymouth Line, he reduced by half the normal allocation of the section gang's expense to the Plymouth Line.

Mr. Guthrie states that signal maintenance "work units" are equivalent to Association of American Railroads signal units and are well-accepted in the railroad industry as the basic measure of time and cost for maintaining grade crossing warning signals. He asserts that signal material expenses on the Plymouth Line were based on an in-field estimate of actual expenses on the line and are far from excessive.

Concerning WCL's normalized maintenance figures, protestants dispute a 5-year track surfacing cycle on the Plymouth Line. Mr. Guthrie responds that a 5-year cycle is consistent with the range of normal industry practice. He also notes that the Plymouth Line is laid mostly with low-quality ballast, which does not drain well and is not as effective at holding track surface geometry. Mr. Guthrie indicates that, while normalized track surfacing cycles certainly can range up to 7 or 8 years in some cases, a 5-year cycle here is appropriate for this line and not excessive.

Protestants assert that normalized maintenance is not appropriate on the southernmost 3.9 miles of the Plymouth Line that is FRA Class 3. Mr. Guthrie indicates that the 112-pound continuous welded rail of that portion has few rail joints and holds gage and maintains surface better than other rail because of its heavier weight, wider and stronger beam and reduced flexing. Even so, Mr. Guthrie concedes that there have been no programmatic tie installations on this portion of the Plymouth Line since at least 1985, and likely none since the welded rail was laid on this segment in 1979, and no surfacing has taken place on the line for nearly 15 years. Mr. Guthrie indicates that his inspection indicated a significant number of defective ties on this segment. He states that, even with welded rail, the line segment could still be expected to deteriorate rapidly without a basic program of normalized maintenance.

Mr. Guthrie notes that protestants do not challenge WCL's normalized tie replacement costs. He notes, however, that WCL's overall normalized maintenance expenses do not include costs for bridge maintenance, grade crossing maintenance, rail replacement and other items.

We accept WCL's estimate for maintenance-of-way and structure for the entire line and southern segment and Mr. Guthrie's explanation supporting his maintenance cost estimates.

WCL's per-mile maintenance estimate are within the range of annual per-mile expenditures that the Board has accepted in other cases. Also, protestants do not provide any support for their criticisms of elements of WCL's maintenance cost estimate or provide an alternative cost analysis.

Maintenance of Equipment. WCL's application reports maintenance-of-equipment costs of $4,463 for the forecast year. Protestants point out that the application is inconsistent in reporting the number of train trips in the base year, noting that Exhibit F to Ms. Monnich's verified statement shows 102 train trips, while Appendix F of the same statement shows 100 train trips. Train trips are used as one base for maintenance-of-equipment costs. In her reply Ms. Monnich acknowledges the error in the number of train trips. As a result, she has adjusted the forecast year maintenance-of-equipment costs to total $4,375, which we accept.

Transportation Costs. WCL's application reports transportation costs totaling $66,806 in the forecast year. Protestants claim that overtime costs are overstated because 10 of the 30 train trips used to calculate those expenses occurred on days that trains did not operate on the line. Protestants assert further that the overtime expenses for the train crew serving the Plymouth Line should be allocated over the entire territory served by the crew. Protestants also claim that vacations, holidays and personal leave should not be included in crew wage costs.

Ms. Monnich responds that WCL records confirm that trains moved on the line on the disputed dates, but that the black and white copies of the color train movement records provided to protestant did not clearly show train movements. Ms. Monnich further responds that the overtime expenses are incurred solely to serve the Plymouth Line and will be eliminated when the line is abandoned.

In her reply statement, Ms. Monnich has adjusted crew wages and locomotive fuel costs to reflect the reduced number of train trips. The adjusted forecast year transportation costs total $65,508.

While protestants have provided no specific data to support their assertions regarding the items they have challenged, WCL has submitted a reasoned explanation for their inclusion. Therefore, we will accept WCL's overtime expenses as reasonable and as the best evidence of record. See Chicago and North Western Transportation Company–Abandonment Between Ingalton and Carol Stream, in Dupage County, IL, Docket No. AB-1 (Sub-No. 218) (ICC served Mar. 20, 1991). And, because Board regulations indicate that vacations, holidays and personal leave are properly included within transportation costs, we accept WCL's estimate for those costs as well. See 49 CFR 1152.33(c), and Idaho Northern & Pacific Railroad Company–Abandonment Exemption–in Wallowa and Union Counties, OR, Docket No. AB-433X (STB served Mar. 12, 1997). As adjusted, we find that WCL's estimate for transportation costs is reasonable, and we accept it.

Taxi Expenses. The application reports taxi expenses of $6,253 in the forecast year. Protestants question the taxi expenses claimed in the forecast year, contending that train movement records do not support the taxi expenses and that taxi expenses for the train crew serving the Plymouth Line should be allocated over the entire territory served by the crew. Ms. Monnich has responded that the taxi expenses are supported by train movement records. She notes further that these expenses were incurred as a result of work on the line that will be eliminated after the line is abandoned. We agree with Ms. Monnich that WCL has justified the taxi expenses as avoidable costs here.

After reviewing movement records, Ms. Monnich indicated that six dates on the movement records were unrelated to service on the line. As a result, she has reduced taxi expenses to $5,127. We accept Ms. Monnich's adjusted taxi expenses as reasonable and as the best evidence of record.

Return on Value-Locomotives. WCL's application reports return on value-locomotives of $4,164 in the forecast year. Ms. Monnich has adjusted the return on value-locomotives to reflect the reduction in train trips from 102 to 100 discussed previously. The adjusted return on value-locomotive for the forecast year is $4,081. We accept the adjusted figure.

Return on Value-Freight Cars. WCL's application reports return on value-freight car costs of $1,811 for the forecast year. Protestants argue in general that WCL cannot include freight car ownership costs for foreign line cars. We reject this assertion. While these costs cannot be claimed for private line cars, we agree with WCL that return on value for foreign-line freight cars is appropriate because, in many instances, WCL has used its own cars on the line. Apparently, WCL cars do not have their own designation but instead carry the CN designation. WCL's treatment of this cost item is consistent with 49 CFR 1152.32(g). See Southern Pacific Transportation Company–Abandonment–In Houston, Harris County, TX, Docket No. AB-12 (Sub-No. 106), slip op. at 4-5 (ICC served Sept. 12, 1986), and Consolidated Rail Corporation–Abandonment–Between North Warren and Kent, in Trumbull and Portage Counties, OH, Docket No. AB-167 (Sub-No. 1143), slip op. at 4 (ICC served Apr. 12, 1995). Accordingly, we accept WCL's calculation as reasonable and as the best evidence of record.

Rehabilitation. Mr. Guthrie estimates the cost to rehabilitate the entire line to meet FRA Class 1 standards at $2,032,731. The estimate includes replacing an average of 464 ties per mile of track; replacing six ties per 39-foot section of track for 11 switches; replacing all ties for the 480 feet of track associated with 23 road crossings; replacing two each tie plates per new tie; replacing 32 rail anchors per 39-foot section of track; and resurfacing 33.1 miles of existing rail. Mr. Guthrie indicates that he used unit costs from CN's 2004 system cost database for the above items of construction required to rehabilitate the track to FRA Class 1. WCL has not included the cost for rehabilitation of the FRA Class 3 section of track because it already exceeds FRA Class 1 standards.

Protestants criticize several aspects of WCL's estimate for rehabilitation. They assert that the number of ties that WCL has included in its estimate greatly exceeds the standard for FRA Class 1 track. They also argue that resurfacing and rail replacement is not required to meet FRA Class 1 standards. Finally, the shippers argue that FRA standards do not require rehabilitation of crossings, and that crossings can be maintained by the state or at least funded by the state as well as private land owners with respect to private crossings.

In response, Mr. Guthrie asserts that his estimate for the number of replacement ties is based on FRA Class 1 standards, considering the number of ties that will need to be replaced due to damage during resurfacing and reballasting operations. Mr. Guthrie indicates that, during his inspection of the line, he observed vertical and horizontal alignment problems that require resurfacing of the track. He notes that resurfacing is performed in conjunction with new tie installation and that the line has not been resurfaced for 15 years. Mr. Guthrie responds that his rail replacement estimates are based on the known deficiencies of the rail line that will inevitably result in higher maintenance and repair cost if not replaced, not to mention safety problems for crew and cargo as a result of running trains over defective rails.

Mr. Guthrie also cites Wisconsin statutes requiring railroads to maintain grade crossing surfaces at the railroad's expense to support the inclusion of grade crossing rehabilitation costs in WCL's rehabilitation cost estimate. He also submitted examples of real estate agreements that require the railroad to maintain private crossings on the line.

In her reply statement, Ms. Monnich computed rehabilitation costs for the southern segment by adjusting Mr. Guthrie's rehabilitation cost estimate for the entire line. Ms. Monnich estimated rehabilitation costs of the southern segment to be $910,870 in the forecast year.

We accept WCL's rehabilitation cost of $2,032,731 for the entire line and $910,870 for the southern segment as reasonable and as the best evidence of record. Mr. Guthrie has inspected the track and the track conditions and has submitted the only evidence of record concerning the condition of the track system. Mr. Guthrie also has provided evidence supporting the inclusion of the cost for public and private grade crossing rehabilitation and the replacement of track sections with known defects. Mr. Guthrie correctly notes that track replacement costs will be required as part of either rehabilitation or future maintenance. The level of rehabilitation and items of construction appear reasonable and in conformance with industry standards.

C. OPPORTUNITY COSTS

Opportunity costs (or total return on value of road property) reflect the economic loss experienced by a carrier from forgoing a more profitable alternative use of its assets. Under <u>Abandonment Regulations–Costing</u>, 3 I.C.C.2d 340 (1987), the opportunity cost of road property is computed on an investment base equal to the sum of: (1) allowable working capital; (2) the net liquidation value (NLV) of the line; and (3) current income tax benefits (if any) resulting from abandonment. The investment base (or valuation of the road properties) is multiplied by the current nominal rate of return, to yield the nominal return on value. The nominal return is then adjusted by applying a holding gain (or loss) to reflect the increase (or decrease) in value a carrier will expect to realize by holding assets for 1 additional year.

In the application, Ms. Monnich reports forecast year working capital of $10,022 and claims income tax consequences of ($406,916) for the entire line. Mr. Guthrie has provided estimates of the net salvage value of the track assets for the entire line at $1,248,522. The unit costs for removal of salvage items and the unit prices he used for salvaged items appear to be reasonable and are within the normal range received by the Board in other cases. The land value for the right-of-way of the entire line was appraised by Kenneth Young and Associates at $820,000.[4] The appraisal methodology and documentation appear to be adequate and within the norm of other cases we have considered. Based on these data, the NLV of the land and track for the entire line is estimated at $2,068,522. Ms. Monnich then applied a nominal rate of return of 13.32% and calculates a holding gain of $27,749 to produce an estimated opportunity cost of $194,912 for the entire line.

We have adjusted working capital to be $9,918 to reflect adjustments that WCL made to other costs. As adjusted the opportunity cost for the entire line would be $194,898.

For the southern segment, Ms. Monnich has reported working capital of $7,105 and income tax consequences of ($266,908). She then has computed the NLV of the southern segment at $1,216,286, by prorating the costs and values of the entire line provided by Mr. Guthrie and Mr. Young. Ms. Monnich then has applied a rate of return of 13.32% and calculates a holding gain of $15,855 to produce an opportunity cost of $111,549 for the southern segment.

No objection having been received to WCL's opportunity cost estimates, we find that WCL's estimate appears reasonable, and we will accept WCL's opportunity cost calculation.

II. ALTERNATIVE TRANSPORTATION

Mr. Kolbe indicates that shippers on the Plymouth Line will continue to have other reasonable transportation options in the area. The Plymouth Line is located between the metropolitan areas of Milwaukee and Green Bay, WI, and is served by a well-developed highway network. The Plymouth Line runs parallel to and is no more than 10-12 miles west of Interstate 43, the major artery between Milwaukee and Green Bay. The line is also directly adjacent to Wisconsin state highway 57, an important and mostly multi-lane secondary route in the region. Wisconsin state highways 84, 144, 28 and 23 provide east-west access along the line.

[4] A copy of the appraisal was submitted with WCL's application.

In addition, two other nearby rail lines provide service to the area. A Union Pacific Railroad Company (UP) rail line extends from Milwaukee to Sheboygan, WI, paralleling Interstate 43 and lies within 10 miles of most points on the Plymouth Line. WCL's West Bend Subdivision, between Milwaukee and West Bend, WI, is 15-20 miles southwest of most points on the Plymouth Line. WCL indicates that rail service will continue to be available on WCL's rail lines extending south from Saukville to Milwaukee and north from Kiel through Chilton to a connection with other WCL lines at Hilbert.

According to Mr. Kolbe, the area between Milwaukee and Green Bay and surrounding the Plymouth Line is served by a variety of truckload and less-than-truckload motor carriers. One carrier, Morrelle Transfer, Inc., operates from a transload facility on UP in Sheboygan and has had prior business interactions or contacts with fertilizer receivers on the Plymouth Line. Also the West Bend Commercial Warehouse on WCL's West Bend Subdivision is served by Krielkamp Trucking, a dry-van type carrier well-suited for handling food products and other non-bulk commodities. Mr. Kolbe notes that a number of the commodities handled on the Plymouth Line (lumber, logs, pea seed, dried milk) are exempted from regulation and therefore presumptively subject to effective motor carrier competition.

Mr. Kolbe indicates that Kettle Lakes has another facility located on UP's rail line at Sheboygan Falls, WI, that is located approximately 15-20 miles by highway from that shipper's Random Lake facility. According to Mr. Kolbe, Kettle Lakes could receive and distribute at least some portion of its potash and fertilizer supply there. Also, Lakeside has plants on UP's line at Belgium and Cedar Grove, WI, less than 10 miles from Lakeside's Random Lake facility, where it could receive inbound traffic. And he also notes that log loaders can and do use WCL team track facilities at West Bend.

III. SHIPPER AND COMMUNITY INTERESTS

Protestants assert they will suffer serious harm from abandonment of the southern segment because they would incur more than $145,106 in increased shipping costs and lost profits. In support, protestants submit verified statements from each protesting shipper.

Jerry Leick, Adell's General Manager states that Adell, which owns and operates facilities for storage and distribution of fertilizer and a feed mill, currently receives fertilizer materials and soybean meal by rail. If the rail line were to be abandoned, Mr. Leick acknowledges that Adell would receive that traffic in rail-truck service at a transloading facility located on UP at Sheboygan Falls. He claims that handling and trucking costs for fertilizer materials received at the transloading facility, however, would add approximately $7 per ton in costs, amounting to approximately $56,000 per year in increased shipping costs. He contends further that handling and truck costs for soybean meal received at the transloading facility would add $6 per ton in costs, amounting to approximately $6,120 per year in increased shipping costs.

Norbert Schleicher, Kettle Lakes' General Manager, testifies that Kettle Lakes, which owns and operates facilities for storing and distributing fertilizer materials, receives carloads of fertilizer materials by rail at Random Lake. Mr. Schleicher states that, if that shipper lost rail service, it would receive fertilizer materials in rail-truck service at its transload facility at Sheboygan Falls on UP's line. He contends that using the transload service would add a $6 per ton cost for trucking from Sheboygan Falls to Random Lake, amounting to approximately $51,600 per year.

Larry Huiras, Lakeside's Agricultural Manager, states that Lakeside owns and operates warehouse facilities for storage and distribution of pea seed at Random Lake. He indicates that Lakeside receives rail shipments of pea seed that originate in Idaho and Washington and that over 80% of the pea seed it receives is delivered by rail. According to Mr. Huiras, in 2003, Lakeside and another company recently acquired Chiquita Processed Foods of Oakfield, WI, and that Lakeside's rail traffic volume has more than doubled as a result of that transaction. He states that Lakeside expects that increased rail traffic volume will continue in the future. If Lakeside were to lose rail service at Random Lake, Mr. Huiras indicates that Lakeside would receive pea seed in rail-truck service at its rail-served facility at Belgium, WI, that is served by UP. That alternative would allegedly add transportation costs of $200 per truckload from Random Lake to Belgium, amounting to approximately $8,400 per year in increased transportation costs.

John Janick, Neuens's Chief Executive Officer, indicates that Neuens has had storage and distribution facilities for lumber and forest products at Fredonia, WI, since 1885 and has used rail service consistently. If Neuens were to lose rail service at Fredonia, Mr. Janick indicates that it would receive lumber in rail-truck service arranged for by an industry buying group. If it were to receive Canadian lumber in rail-truck service through an independent reload center, it would realize additional freight charges of about $2,431 per car.

Jeff Geolzer, Glacier's President, states that Glacier owns and operates a warehouse for storage and distribution of food products at Waldo, where it receives carloads of dried milk from California. He indicates that Glacier received 15 carloads of dried milk in the first 7 months of 2004, which compares to 10 rail carloads during all of 2003. He expects that the increased rail traffic volume will continue in the foreseeable future. Mr. Geolzer indicates that, if Glacier were to lose rail service at its warehouse at Waldo, it would likely lose the dried milk business, reducing its net income by approximately $8,400 per year.

In its comments, WisDOT states that it held a public information meeting on June 24, 2004, at Plymouth, WI, at which shippers and community leaders criticized the current level of service provided by WCL and the lack of commitment to the line by WCL. WisDOT contends that the community strongly believes that better rail service is needed on the Plymouth Line. WisDOT asserts further that WCL is creating an orphan line that will be more difficult for another operator to service, because WCL will control the exit and entrance and may be reluctant to grant trackage rights to permit a competitor on the line. It contends that WCL is seeking to abandon service without providing alternative service.

WisDOT notes that it has been asked by local political officials[5] to conduct an economic impact study of the effects of abandonment on the communities surrounding the Plymouth Line. WisDOT states that the carrier has a reasonable customer base to the north and south of the line. It notes that the area served by the line has great potential, being located between two areas that have significant economic development potential.

WisDOT's Economic Impact Analysis indicates that the proposed abandonment could diminish recruitment and retention efforts of municipalities and local economic development organizations. According to the study, rail service is viewed by these interests as an important economic recruitment tool, even though the tonnage and the number of rail cars currently moving on the line is minimal. The study indicates that, in order to generate interest in more businesses to use rail service, local officials and businesses have expressed the need for new investment and rehabilitation along the entire line.

August 13 Meeting. At the meeting that Board staff conducted at Random Lake on August 13, 2004, public officials expressed concerns that the abandonment would adversely affect economic development and would increase truck traffic. They indicated that the line would be needed in the future for mass transportation serving the Milwaukee area, and that abandonment would leave a major shipper in Saukville at the end of a long spur line. They also expressed concern that service on the line had eroded since CN acquired WCL, and that abandonment could create a ripple effect threatening rail service to other areas in the vicinity.

A representative of WisDOT indicated that the agency did not oppose abandonment and acknowledged that traffic levels on the line were not enough to cover the costs associated with the service. The agency also noted that the characterization of poor condition of the line was not overstated. It also indicated that it had a grant program for maintaining rail service, but that funds were limited and that it preferred to keep rail service in the private sector. WisDOT reiterated that it was studying the impact of the proposed abandonment, and that the first phase of the study determined that 257 jobs and $9.7 million in wages earned by businesses would be affected by the abandonment. It noted, however, that it did not find that those businesses would close or jobs would be lost. It indicated that the second phase would be a more extensive analysis, looking at the broader service area and potential impact, beyond those businesses currently served.

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[5] WisDOT submitted a copy of a letter from Wisconsin State Senators Mary Panzer and Joe Leibham and Wisconsin State Representatives Dan LeMahleu, Steve Kestell, Mark Gottlieb and Al Ott requesting WisDOT to conduct the study.

Representatives of commercial interests spoke of poor service on the line, resulting in one shipper that received 14 cars at once that could not be unloaded and then incurring demurrage. They also expressed concerns about agriculture being a low margin business that is very competitive, and that forcing farmers to shift to truck service would increase their costs, hurting farmers who are members of co-ops. They also noted that the line could not accommodate
50-foot cars. A lumber shipper was concerned that he would have to relocate his business to retain rail service, because truck transportation was more expensive, and the shipper could not compete with lumber operations that have access to direct rail service. They also doubted CN's commitment to the line and asserted that CN did not market the line or pursue business opportunities. And speakers expressed concern that the portions of the line that would continue to be served after abandonment would be vulnerable to future abandonment.

WCL Response. Mr. Kolbe responds that the shippers' claims that they would be harmed by significant additional transportation costs as a result of abandonment are overstated. He states that any additional cost of inbound fertilizer shipments to individual members of Adell and Kettle Lakes would accrue only if the farmer chooses to add an extra trucking step by purchasing the product from the those co-ops instead of a neighboring one. According to Mr. Kolbe, the local farmer could purchase fertilizer from Kettle Lakes' facility and other sources located on UP's line or WCL's West Bend Subdivision, where a significant amount of fertilizer is delivered each year. He indicates that fertilizer can move out of the alternative elevator directly to the farmers' fields for application, bypassing an intermediate trucking movement to the local co-op and the claimed additional trucking cost. He states that additional costs to the farmer, if any, will be minimal, and the same amount of product will move into the area, just not necessarily through the two specific co-op facilities that have handled this product in the past.

According to Mr. Kolbe, lumber also moves into reloading facilities on the UP and at West Bend on WCL, as well as other locations in the area. He asserts that lumber receivers should experience very little extra cost, if they purchase product from any of these sources. He claims that any additional costs incurred by the lumber shipper at Fredonia from continuing to stock the same amount of lumber from the same sources, as it does today, should be minimal.

Responding to assertions about inadequate service, Mr. Kolbe, states that most independent elevators or co-ops like Adell and Kettle Lakes would not commit to build a facility to load multiple cars (25 minimum), which would provide efficiencies to the railroad in handling a volume of cars at one time (reduced switching), because the grain market was not strong enough to use rail on a consistent basis. According to Mr. Kolbe, truck transportation, particularly into the local markets where most Wisconsin grain has been historically consumed, is less expensive than rail. He also indicates that the shipper who was concerned that the line could not handle 50-foot cars was already receiving shipments in these cars on WCL's West Bend Subdivision. He notes that new ethanol plants to be built in Wisconsin would provide new and more attractive destinations for local grain, but that traffic would also move primarily by truck.

Responding to comments about the reduction of train service that allegedly resulted in bunched cars during peak planting season, Mr. Kolbe states that such occurrences are not unusual, but, rather, are typical during those times no matter how frequent the service. When the fertilizer application season arrives, he notes that there is a demand for cars, not just at Adell and Kettle Lakes, but everywhere on the rail system. Most elevators and co-ops in fact receive their cars in bunches during those times and have prepared for it, and congestion situations are often not solely the fault of the serving rail carrier. He asserts that any delay during this period must be balanced against what would be the railroad's substantial ownership cost for a relatively few days of service given the limited amount of traffic that moves over the Plymouth Line.

DISCUSSION AND CONCLUSIONS

The statutory standard governing an abandonment or discontinuance of service is whether the present or future public convenience and necessity permit the proposed abandonment or discontinuance. 49 U.S.C. 10903(d). In implementing this standard, we must balance the potential harm to affected shippers and communities against the present and future burden that continued operations could impose on the railroad and on interstate commerce. Colorado v. United States, 271 U.S. 153 (1926).

The Board must determine whether the burden on the railroad from continued operation is outweighed by the burden on the shippers and public parties from the loss of rail service. This involves a question of whether, and to what degree, shippers will be harmed if rail service is no longer available. The fact that shippers are likely to incur harm and added expense is insufficient by itself to outweigh the detriment to the public interest of continued operation of uneconomic and excess facilities. Protestants must show that the harm to shippers and communities outweighs the demonstrated harm to the railroad and interstate commerce resulting from continued operation. See Chicago and North Western Transp. Co.–Abandonment, 354 I.C.C. 1, 7 (1977).

In determining whether to grant or deny an abandonment or discontinuance application, we consider a number of factors, including operating profit or loss, other costs the carrier may experience (including rehabilitation and economic costs), and the effects on shippers and communities. No one factor is conclusive. See Cartersville Elevator, Inc. v. ICC, 724 F.2d 668, aff'd on reh'g, en banc, 735 F.2d 1059 (8th Cir. 1984).

Protestants and other community interests seek to retain service on the southern segment as an alternative to complete abandonment. The burden of proof is on the proponents to establish the viability of the alternate service proposal. See State of Me. Dept of Transp. v. ICC, 587 F.2d 541, 543 (1st. Cir. 1978). Here the proponents of having the southern segment remain in service have not shown that their proposal is viable.

The factors weigh in favor of granting the abandonment. The record shows that continued operation of the entire line or just the southern segment will each impose a substantial economic burden on WCL. WCL's forecast year operating loss for the entire line is $160,167, and the forecast year avoidable loss, including return on value, is $355,065. For the southern segment, WCL's forecast year operating loss is $91,662 and the forecast year, including return on value, is $203,210.

We understand the concerns expressed by shippers, public officials, and other community interests about the proposed abandonment that were expressed in protests and written comments and by speakers at the August 13, 2004 public meeting regarding the loss of rail service. Also, WisDOT's study indicates that the area has other potential rail users and that local communities have planned for future industrial parks with access to rail. We recognize that shippers may incur higher transportation costs by using alternative service. However, WCL has shown that the shippers do have reasonable alternatives. The largest shippers on the line, Adell and Kettle Lakes, can receive fertilizer at transloading facilities at Sheboygan Falls on UP's line and can truck the product to their facilities. WCL notes that Kettle Lakes already owns a facility on UP's line where it could receive fertilizer. WCL also indicates that farmers have the option of having fertilizer trucked directly to their farms from the transloading facilities. While WisDOT's study indicates that there are other potential rail users for the line, there is nothing in the study to indicate when new traffic would be available and whether that new traffic would generate enough revenue to justify the substantial investment that would be needed for continued rail service.

The shipper and community interests have criticized WCL for not adequately serving the line or marketing the line to develop additional traffic, or for not making a long-term commitment to prompt shippers to improve their facilities to receive or ship traffic. Yet, WCL has shown that the Plymouth Line has carried a consistently low volume of traffic for many years, even before WCL acquired the line or CN acquired WCL. Testimony from Mr. Kolbe indicates that WCL has made aggressive efforts to market the line and met with shippers. He indicates, however, that, despite those efforts, shippers have always moved outbound grain and feed products by truck. And, we find little or no credible evidence in this record showing a potential for new traffic to be moved on the line that would overcome the substantial losses that WCL continues to incur and that would justify the investment needed for continued operation of the line.

Comments have been made that WCL is engaging in "cherry-picking" by abandoning the unprofitable middle portion of its longer line that currently runs between North Milwaukee and Hilbert and by retaining the more profitable segments of the line, thereby creating an orphan segment. WCL responds that, under that argument, it would be obligated either to relinquish ownership of the entire line, including the profitable segments, nullifying its business interests of hauling traffic and realizing sufficient profit levels to continue to provide rail service, or to cross-subsidize an unprofitable operation. There is merit to WCL's observation. We note that protestants do not object to abandonment of the northern portion of the line over which WCL has ceased operations because of track conditions, in effect conceding a segmentation of the line. WCL also states that CN would be willing to negotiate reasonable arrangements with a new operator to access the Plymouth Line. Thus, the record shows nothing improper about WCL's selection of the end points for its proposed abandonment here.

We conclude that any harm to the shippers and the community from the proposed abandonment of the Plymouth Line is outweighed by the demonstrated harm to WCL and the burden on interstate commerce through continued operation.

LABOR PROTECTION

In approving this abandonment application, we must ensure that rail employees are protected. 49 U.S.C. 10903(b)(2). We have found that the conditions imposed in Oregon Short Line R. Co.–Abandonment–Goshen, 360 I.C.C. 91 (1979), satisfy the statutory requirements, and we will impose them here.

ENVIRONMENTAL ISSUES

The Board is required to consider the environmental and energy impacts of the proposed abandonment. WCL submitted an environmental report with its application 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. The Board's Section of Environmental Analysis (SEA) has examined the environmental report, verified its data, and analyzed the probable effects of the proposed action on the quality of the human environment. SEA served an environmental assessment (EA) on August 2, 2004, and requested comments by September 1, 2004. Comments were filed by WisDOT, the Wisconsin Historical Society, the State Historic Preservation Officer (SHPO), and the U.S. Environmental Protection Agency, Region 5 (EPA).

In the EA, SEA notes that the National Geodetic Survey (NGS) has identified 10 geodetic station markers that may be affected by the proposed abandonment. Therefore, SEA has recommended that a condition be imposed requiring that WCL provide NGS with at least 90 days' notice prior to activities that may disturb or destroy any geodetic station markers.

SEA indicates that the U.S. Corps of Engineers, Detroit District (USACE), has not responded to reports by WCL that no work would be done in navigable water and no dredged or fill material would be discharged into any waters of the United States, including wetlands. Therefore, SEA has recommended that a condition be imposed requiring that WCL consult with USACE, prior to commencing any salvage activities, to determine whether a USACE permit under section 404 of the Clean Water Act (33 U.S.C. 1344) would be required.

SEA notes that EPA has expressed concern about salvage activities, and EPA has expressed concern in its comments to the EA about wetlands in the area of the abandonment. Based on EPA's concerns, SEA has recommended that a condition be imposed requiring that WCL contact EPA, prior to commencing salvage activities, to discuss: (1) removal and salvage methods to be used during the proposed abandonment; (2) final disposition of crossties preserved with creosote; (3) procedures for storing and fueling of construction equipment; (4) procedures to prevent and/or control spills from construction equipment; (5) bridge and culvert maintenance; and (6) erosion mitigation practices to be utilized during abandonment activities. At the suggestion of EPA, SEA has also recommended mitigation conditions requiring that WCL: (1) contain salvage activities to the right-of-way and use existing public and private crossings when removing materials, particularly in wooded areas and areas adjacent to wetlands; (2) restore disturbed soil to original grade; and (3) reseed disturbed areas with native flora.

SEA notes that the Wisconsin Department of Administration (WDA), which is responsible for implementing the state Coastal Zone Management Program, has not completed its review of the proposed abandonment. Therefore, SEA has recommended that a condition be imposed requiring that, prior to commencing any salvage activities, WCL consult with the WDA to determine whether the abandonment would affect coastal management areas and whether Wisconsin State Coastal Management consistency certification is required.

SEA indicates that Sheboygan County has commented that work done along the corridor in certain areas of the county may require a Sheboygan County Shoreland-Floodplain permit. Therefore, SEA has recommended that a condition be imposed requiring that WCL contact Sheboygan County prior to commencing any salvage activities regarding its floodplain requirements.

SEA indicates that WDNR is concerned about erosion control, bridge and culvert maintenance, and waste and demolition material disposal as well as the possible adverse impacts of the abandonment on remnant habitats and associated rare and endangered species and critical habitats. To address these concerns, SEA has recommended that a condition be imposed requiring that, prior to commencement of salvage activities, WCL contact: (1) WDNR to discuss (a) erosion control, (b) bridge, pier, and culvert maintenance, and (c) waste and demolition material disposal; and (2) Wildlife Biologist Dale Katsma at (920) 892-8756 ext. 3040 and Fisheries Biologist John Nelson at (920) 892-8756, regarding critical habitats.

SEA also notes that the U.S. Fish and Wildlife Service, Green Bay ES Field Office (FWS-GB), has indicated that the following federally listed endangered or threatened species occur in Manitowoc, Ozaukee, and/or Sheboygan Counties: bald eagle, Pitcher's thistle, eastern prairie fringed orchid, and Hine's emerald dragonfly. Additionally, FWS-GB has stated that critical habitat for the piping plover occurs in Manitowoc County. FWS-GB indicates that the site could be used by listed species/critical habitats at some future time and notes that updates on its list of threatened or endangered species are made every 6 months. Therefore, SEA has recommended that a condition be imposed requiring that WCL consult with FWS-GB prior to commencement of any salvage activities on the line.

In the EA, SEA noted that the SHPO had not completed its review of the proposed abandonment. In a comment, the SHPO now has indicated that there are 2 structures on the line, the Plymouth Depot and the double span bridge at milepost 116.16 that may be eligible for inclusion in the National Register of Historic Places. Therefore SEA now has recommended that a condition be imposed requiring that WCL retain its interest in and take no steps to alter the historic integrity of the Plymouth Depot or the double span bridge at milepost 116.16 until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f.

Finally, in comments submitted on August 27, 2004, WisDOT has expressed concern about salvage and clean-up activities, particularly at road crossings and has requested that WCL: (1) comply with the WisDOT Abandoned Railroad Salvage and Clean-up Policy/Standards/Procedures; (2) remove the rail, ties, and ballast at the crossings of the state highways; (3) obtain a permit from the District Maintenance section to work on highway right-of-way, handle traffic while the crossing is being removed, and restore the roadway in like kind; and (4) contact the maintaining authority regarding the removal of crossings across other streets and roadways. In addition, WisDOT is concerned about protecting surveying benchmarks, monumentation, and mapping information for the rail segment. To address these concerns, SEA now has recommended that a condition be imposed requiring that WCL consult with WisDOT prior to commencing any salvage activities on the line.

We agree with SEA's recommendations and will impose them. Based on SEA's recommendations, we conclude that the abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

TRAIL USE

WisDOT requests issuance of a CITU pursuant to section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), to enable WDNR to acquire the entire line for recreational use. WDNR 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 for rail service, as required under 49 CFR 1152.29. In a letter filed on September 20, 2004, WCL states that it is willing to negotiate with WDNR. Because WDNR's request complies with the requirements of 49 CFR 1152.29, and WCL is willing to enter into negotiations, we will issue a CITU. The parties may negotiate an agreement during the 180-day period from the effective date of this decision and certificate. If an agreement is executed, no further Board action is necessary. If no agreement is reached within 180 days, WCL 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), OFAs 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 certificate will be postponed beyond the effective date indicated here. See 49 CFR 1152.27(e)(1). 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 abandonment application will be dismissed and trail use precluded. Alternatively, if a sale under the OFA procedures does not occur, trail use may proceed.[6]

PUBLIC USE

SEA has indicated in its EA that the right-of-way may be suitable for other public use after abandonment. WisDOT has requested a public use condition under 49 U.S.C. 10905 for the entire line so that the right-of-way would be retained intact for future rail freight service. WisDOT requests that WCL be prohibited from disposing of the corridor or rails for a 180-day period from the effective date of the abandonment authorization. WisDOT indicates that the 180-day period is needed to conduct negotiations with WCL and to reach agreement with a short-line operator.

We will deny WisDOT's request for a public use condition. As noted by WCL in its September 20, 2004 letter, preserving a rail line for rail freight operations is not considered a public use under section 10905.[7] Section 10905 has been interpreted to promote the use of the property for alternate public purposes, such as highways, other forms of mass transportation, conservation, energy production or transmission or recreation.[8] In contrast, requests for continued rail service are governed by the forced-sale provisions of section 10904.

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[6] We note that, on August 16, 2004, the Decatur Junction Railway Co. (DJR) filed a notice of intent to file an OFA in this proceeding. Any OFA by DJR must be filed within the time period prescribed in this decision.

[7] See Wisconsin Central Ltd.–Abandonment Exemption–In Douglas, Washburn, and Barron Counties, WI, Docket No. AB-303 (Sub-No. 12X) (ICC served Apr. 20, 1993); Otter Tail Valley Railroad Company, Inc.–Abandonment–In Stearns, Todd, Douglas, Grant, and Otter Tail Counties, MN, Docket No. AB-330 (Sub-No. 1) (ICC served Apr. 8, 1991); and Georgia Southwestern Division, South Carolina Central Railroad–Abandonment Exemption–Between Preston and Omaha, GA, Docket No. AB-385 (Sub-No. 2X) (STB served July 12, 1996).

[8] See Chicago and North Western Transportation Company–Abandonment in Polk, Warren, Madison, Union, Ringgold, and Taylor Counties, IA and in Worth, Nodaway, Andrew, and Buchanan Counties, MO, Docket No. AB-1 (Sub-No. 159) (ICC served Sept. 12, 1984).

Even though a public use condition will not be imposed, the interim trail use condition we are imposing in this proceeding will accomplish WisDOT's goal to the extent that it would keep the right-of-way intact for future rail use and permit interim use of the right-of-way as a recreational trail should trail use negotiations prove successful.

We find:

1. The present or future public convenience and necessity permit the abandonment 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 WCL shall: (1) provide NGS with at least 90 days' notice prior to activities that may disturb or destroy any geodetic station markers; (2) consult with the USACE, prior to commencing any salvage activities, to determine whether a USACE permit under section 404 of the Clean Water Act (33 U.S.C. 1344) would be required; (3) contact EPA, prior to commencing salvage activities, to discuss (a) removal and salvage methods to be used during the proposed abandonment, (b) final disposition of crossties preserved with creosote, (c) procedures for storing and fueling of construction equipment, (d) procedures to prevent and/or control spills from construction equipment, (e) bridge and culvert maintenance, and (f) erosion mitigation practices to be utilized during abandonment activities; (4) consult with the WDA, prior to commencing any salvage activities, to determine whether the abandonment would affect coastal management areas and whether Wisconsin State Coastal Management consistency certification is required; (5) contact Sheboygan County prior to commencing any salvage activities regarding its floodplain requirements; (6) prior to commencement of salvage activities, contact (a) WDNR to discuss (i) erosion control, (ii) bridge, pier, and culvert maintenance, and (iii) waste and demolition material disposal, and (b) Wildlife Biologist Dale Katsma at (920) 892-8756 ext. 3040 and Fisheries Biologist John Nelson at (920) 892-8756, regarding critical habitats; (7) consult with FWS-GB prior to the commencement of any salvage activities on the line; (8) retain its interest in and take no steps to alter the historic integrity of the Plymouth Depot or the double span bridge at milepost 116.16 until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f; (9) consult with WisDOT prior to commencing any salvage activities on the line; (10) contain salvage activities to the right-of-way and use existing public and private crossings when removing materials, particularly in wooded areas and areas adjacent to wetlands; (11) restore disturbed soil to original grade; (12) reseed disturbed areas with native flora; and (13) comply with the interim trail use/rail banking procedures, as set forth below.

2. Abandonment of service over the line will not have a serious, adverse impact on rural and community development.

3. The line may be suitable for other public purposes.

4. As conditioned, this action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. WCL's request for a public use condition under 49 U.S.C. 10905 is denied.

2. The application is granted subject to the conditions specified above.

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, for 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 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 certificate 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 certificate, interim trail use may be implemented. If no agreement is reached by that time, WCL may fully abandon the line, provided the conditions imposed above are met.

7. WCL must promptly provide any interested persons the information they require to formulate an OFA to acquire or subsidize the line.

8. 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 October 28, 2004, 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 $1,100. See 49 CFR 1002.2(f)(25).[9]

9. 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."**

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[9] The filing fee for an OFA is scheduled to increase to $1,200 effective October 31, 2004. See Regulations Governing Fees for Services Performed in Connection with Licensing and Related Services–2004 Update, STB Ex Parte No. 542 (Sub-No. 11) (STB served Oct. 1, 2004).

10. Provided no OFA has been received, this decision and certificate will be effective November 17, 2004. Any petition to stay or petition to reopen must be filed as provided at 49 CFR 1152.25(e).

11. Pursuant to 49 CFR 1152.29(e)(2), WCL shall file a 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 WCL's filing of a notice of consummation by October 18, 2005, 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 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 Nober, Vice Chairman Mulvey, and Commissioner Buttrey. Vice Chairman Mulvey commented with a separate expression.

Vernon A. Williams
Secretary

Vice Chairman Mulvey, commenting:

I believe that the evidence substantially supports Wisconsin Central's (WCL) claim that the segment of the Plymouth line at issue is operating at a deficit and is eligible under our regulations for abandonment. At the same time, I believe that there are legitimate public interest concerns over how we approach this abandonment application that the Board should have taken greater efforts to address.

Five active shippers are served currently by this line, all of whom assert they will suffer serious harm from abandonment by way of increased costs and lost profits. Further, the record in this case contains considerably more public opposition to a proposed abandonment than generally occurs. Though the Board's decision to grant the abandonment would allow any interested persons to make an offer of financial assistance to acquire or subsidize the line, all they could acquire is a line sandwiched in between the Milwaukee-Saukville and Kiel-Hilbert Junction segments that will be retained by WCL. Given the fact that any new operator would be, in effect, captive to the residual WCL at both ends of their line, while also attempting to manage the poor state of the line's infrastructure, creating an economically viable operation under these conditions would be a difficult challenge, to say the least.

A more attractive operation might be one that connected with the Union Pacific in Milwaukee as well as with the WCL at Saukville. Though this would require the new operator to have trackage rights over the WCL's line between Saukville and Milwaukee, such an approach would create a more competitive environment that could benefit both shippers and the new operator. Therefore, I would have conditioned the abandonment on requiring that the WCL enter into negotiations with any successor operator of the abandoned segment to provide trackage rights to the nearest interchange point with another railroad, if the successor demonstrates that such rights are necessary for its operations to be feasible.

However, there is nothing in the record of this case indicating that any party has requested imposition of a trackage rights condition on approval of the abandonment, nor has an opponent to the abandonment argued that such a condition is necessary to attract a viable alternate operator. And while I recognize that it may not have been prudent for the Board to impose such a condition in the absence of a request by the parties to this case, I nevertheless believe that in the event an offer of financial assistance is made where the offeror demonstrates the need for trackage rights over the WCL, the Board should consider whether such rights should be granted.

Appendix A
REVENUES AND COSTS
PLYMOUTH LINE BETWEEN KIEL AND SAUKVILLE, WI

	Application Forecast year	Adjusted Forecast Year	Application Subsidy Year	Adjusted Subsidy Year
1. Freight Orig. and/or Term. on Branch	$238,387	$246,715	$238,387	$246,715
2. Bridge Traffic	0	0	0	0
3. All Other Revenue and Income	3,142	3,142	3,142	3,142
4. Total Attributable Revenue (Ls. 1 thru 3)	$241,529	$249,857	$241,529	$249,857
5. On-branch Costs:				
a. Maintenance-of-Way and Structures	$165,188	$165,188	$165,188	$165,188
b. Maintenance-of-Equipment (Including Depreciation)	4,463	4,375	4,463	4,375
c. Transportation	66,806	65,508	66,806	65,508
d. Joint Facilities	0	0	0	0
e. Deadheading, Taxi and Hotel	6,253	5,127	6,253	5,127
f. Overhead Movement	0	0	0	0
g. Freight Car Costs (Other Than Return)	2,937	2,937	2,937	2,937
h. Return on Value - Locomotives	4,164	4,081	4,164	4,081
i. Return on Value - Freight Cars	1,811	1,811	1,811	1,811
j. Revenue Taxes	0	0	0	0
k. Property Taxes	0	0	0	0
l. Total On-Branch Costs (Ls. 5a thru 5k)	$251,622	$249,027	$251,622	$249,027
6. Off-branch Costs:				
a. Off-Branch Costs (Other Than Return)	$155,241	$155,241	$155,241	$155,241
b. Return on Value - Freight Cars	$5,756	$5,756	$5,756	$5,756
Total Off-Branch Costs	$160,997	$160,997	$160,997	$160,997
7. Total Avoidable Costs (L. 5 l + L. 6)	$412,619	$410,024	$412,619	$410,024
8. Rehabilitation			$2,032,731	$2,032,731
9. Administrative Costs (Subsidy Year Only)			2,415	2,415
10. Casualty Reserve Account			0	0
11. Total Subsidization Cost (Ls. 8 thru 10)			$2,035,146	$2,035,146
12. Valuation of Road Properties				
a. Working Capital	$10,022	$9,918	$10,022	$9,918
b. Income Tax Consequences	(406,916)	(406,916)	(406,916)	(406,916)
c. Net Liquidation Value	2,068,522	2,068,522	2,068,522	2,068,522
d. Total (Ls. 12a thru 12c)	$1,671,628	$1,671,524	$1,671,628	$1,671,524
13. Nominal Rate of Return	13.32%	13.32%	13.32%	13..32%
14. Nominal Return on Value (L. 12d x L. 13)	$222,661	$222,647	$222,661	$222,647
15. Holding Gain (Loss)	$27,749	$27,749	$27,749	$27,749
16. Total Return on Value (L. 14 - L. 15)	$194,912	$194,898	$194,912	$194,898
17. Avoidable Loss from Operations (L. 4 - l. 7)	$171,089	$160,167	$171,090	$160,167
18. Avoidable Loss Including Return on Value (L.4 - Ls. 7&16)	$366,002	$355,065		
19. Estimated Subsidy Payment (L.4 - Ls. 7, 11, & 16)			$2,401,148	$2,390,211

Forecast year is June 1, 2004 to May 31, 2005.

Appendix B

REVENUES AND COSTS

SOUTHERN SEGMENT BETWEEN WALDO AND SAUKVILLE, WI

	Application Forecast Year	Adjusted Forecast Year	Application Subsidy Year	Adjusted Subsidy Year
1. Freight Orig. and/or Term. on Branch	$246,715	$246,715	$246,715	$246,715
2. Bridge Traffic	0	0	0	0
3. All Other Revenue and Income	3,142	3,142	3,142	3,142
4. Total Attributable Revenue (Ls. 1 thru 3)	$249,857	$249,857	$249,857	$249,857
5. On-branch Costs:				
a. Maintenance-of-Way and Structures	$96,683	$96,683	$96,683	$96,683
b. Maintenance-of-Equipment (Including Depreciation)	4,375	4,375	4,375	4,375
c. Transportation	65,508	65,508	65,508	65,508
d. Joint Facilities	0	0	0	0
e. Deadheading, Taxi and Hotel	5,127	5,127	5,127	5,127
f. Overhead Movement	0	0	0	0
g. Freight Car Costs (Other Than Return)	2,937	2,937	2,937	2,937
h. Return on Value - Locomotives	4,081	4,081	4,081	4,081
i. Return on Value - Freight Cars	1,811	1,811	1,811	1,811
j. Revenue Taxes	0	0	0	0
k. Property Taxes	0	0	0	0
l. Total On-Branch Costs (Ls. 5a thru 5k)	$180,522	$180,522	$180, 522	$180,522
6. Off-branch Costs:				
a. Off-Branch Costs (Other Than Return)	$155,241	$155,241	$155,241	$155,241
b. Off-Branch Costs Freight Car ROI Costs (net)	$5,756	$5,756	$5,756	$5,756
Total Off-Branch Costs	$160,997	$160,997	$160,997	$160,997
7. Total Avoidable Costs (L. 5 l + L. 6)	$341,519	$341,519	$341,519	$341,519
8. Rehabilitation			$910,870	$910,870
9. Administrative Costs (Subsidy Year Only)			2,499	2,499
10. Casualty Reserve Account			0	0
11. Total Subsidization Cost (Ls. 8 thru 10)			$913,369	$913,369
12. Valuation of Road Properties				
a. Working Capital	$7,105	$7,105	$7,105	$7,105
b. Income Tax Consequences	(266,908)	(266,908)	(266,908)	(266,908)
c. Net Liquidation Value	1,216,286	1,216,286	1,216,286	1,216,286
d. Total (Ls. 12a thru 12c)	$956,482	$956,482	$956,482	$956,482
13. Nominal Rate of Return	13.32%	13.32%	13.32%	13.32%
14. Nominal Return on Value (L. 12d x L. 13)	$127,403	$127,403	$127,403	$127,403
15. Holding Gain (Loss)	$15,855	$15,855	$15,855	$15,855
16. Total Return on Value (L. 14 - L. 15)	$111,549	$111,549	$111,549	$111,549
17. Avoidable (Loss) from Operations (L. 4 - L. 7)	($91,662)	($91,662)	($91,662)	($91,662)
18. Avoidable (Loss) or Profit Including Return on Value (L.4 - Ls. 7 & 16)	($203,210)	($203,210)		
19. Estimated Subsidy Payment (L.4 - Ls. 7, 11, & 16)			$1,116,579	$1,116,579

Forecast year is June 1, 2004 to May 31, 2005