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SERVICE DATE - LATE RELEASE NOVEMBER 18, 2003

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-855 (Sub-No.1X)

A & R LINE, INC.–ABANDONMENT EXEMPTION–
IN CASS AND PULASKI COUNTIES, IN

STB Docket No. AB-847 (Sub-No. 2X)

TOLEDO, PEORIA & WESTERN RAILWAY CORPORATION –
DISCONTINUANCE OF SERVICE EXEMPTION– IN
CASS AND PULASKI COUNTIES, IN

Decided: November 18, 2003

By petition filed on July 31, 2003,¹ A & R Line, Inc. (A&R) and Toledo, Peoria & Western Railway Corporation (TP&W) jointly seek an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 for A&R to abandon, and for TP&W to discontinue service over, a line of railroad known as the A&R line extending from milepost 5.1W near Kenneth to the end of the line at milepost 21.0W near Winamac, a distance of 15.9 miles in Cass and Pulaski Counties, IN. The line constitutes A&R's entire line of railroad. On August 20, 2003, The Board of Commissioners of Pulaski County, IN (County), filed comments and on August 26, 2003, the Indiana Department of Transportation (INDOT) filed a letter protest to the proposed abandonment. On September 25, 2003, A&R and TP&W replied. A late-filed request for imposition of a public use condition and issuance of a notice of interim trail use (NITU) was filed by the Indiana Trails Fund, Inc.

¹ Notice was served and published in the Federal Register on August 20, 2003 (68 FR 50214).

(ITF).² The Board will grant the exemption, subject to trail use, public use, environmental, and standard employee protective conditions as appropriate.

BACKGROUND

A&R and TP&W state that the line was formerly a main line of The Pennsylvania Railroad Company, which was transferred to the Consolidated Rail Corporation (Conrail) in 1976 as part of the Final System Plan. Conrail sold the line to the Winamac Southern Railway Company (WSRC) in 1993.³ In 1995, WSRC sold the Line to A&R,⁴ but continued to operate over the line. Cargill Incorporated (Cargill) acquired the stock in A&R from Daniel R. Frick in 1997,⁵ to ensure service to its grain elevator in Winamac at milepost 20.0W.⁶ Also in 1997, TP&W leased the line and began to operate over it.⁷ Cargill subsequently closed its grain elevator and sold A&R to RailAmerica, Inc.⁸

According to petitioners, Cargill, the only shipper on the line, has closed its grain elevator facility at Winamac, and there is no traffic on the line and no demand for service over it. TP&W

² The August 20 notice provided that any request for a public use condition under 49 CFR 1152.28 or for trail use/rail banking under 49 CFR 1152.29 was due by September 9, 2003. ITF's request was filed on October 15, 2003. In revising its abandonment rules in Aban. and Discon. of R. Lines and Transp. Under 49 U.S.C. 10903, 1 S.T.B. 894 (1996) and 2 S.T.B. 311 (1997), the Board retained the policy of accepting filings after the due date when good cause is shown. Because there is no indication that ITF's late-filed request will prejudice any party, it will be accepted.

³ See Winamac Southern Railway Company–Acquisition and Operation Exemption–Lines of Consolidated Rail Corporation, Finance Docket No. 32257 (ICC served Apr. 7, 1993).

⁴ See A. & R. Line, Inc.–Acquisition Exemption–Winamac Southern Railway Company, Finance Docket No. 32694 (ICC served July 6, 1995).

⁵ Mr. Frick acquired control of A&R in 1995. See Daniel R. Frick–Continuance in Control Exemption–J.K. Line, Inc., Winamac Southern Railway Company, and A. & R. Line, Inc., Finance Docket No. 32693 (ICC served July 6, 1995).

⁶ See Cargill, Incorporated–Acquisition of Control Exemption–A & R Line, Inc. and J.K. Line, Inc., STB Finance Docket No. 33458 (STB served Sept. 19, 1997).

⁷ See Toledo, Peoria & Western Railway Corporation–Lease and Operation Exemption–A & R Line, Inc., STB Finance Docket No. 33482 (STB served Oct. 16, 1997).

⁸ See RailAmerica, Inc., et al.–Control and Merger Exemption–A&R Line, Inc., and J.K. Line, Inc., STB Finance Docket No. 34269 (STB served Dec. 12, 2002).

transported 301 cars of corn for the year 2001, 60 cars for the year 2002, and, as of July 31, 2003, no cars for the year 2003. Prior to Cargill closing its facility, TP&W was providing service only on an as-needed basis. The last service on the line occurred on September 16, 2002. Petitioners state that the abandonment and discontinuance of service over the line would allow them to eliminate about \$80,000 in annual maintenance costs and to sell or reuse \$525,000 worth of rail, ties and other track materials. Petitioners believe that trail use may be the best alternative use for the line, and, thus, petitioners do not intend to salvage any of the bridge structures.

INDOT opposes the use of the exemption process for this abandonment proposal. INDOT cites the movement of traffic over the line during the past 2 years. (As petitioners point out, however, they are not proceeding under the Board's class exemption for 2-year out-of-service rail lines.) In particular, in its protest INDOT alleges that petitioners provided improper notification procedures that resulted in inaccurate information in its July 10, 2003 Environmental Report (July 10 Report). INDOT indicates that petitioners stated several times in their July 10 Report that various parties had been notified by letters about the abandonment, but that petitioners received no response. INDOT states that the notification letters were mailed on July 10, 2003, and the July 10 Report was signed and mailed on that same day. Therefore, it would have been impossible for any party to have responded in time so that its comments could have been included in the July 10 Report.

Petitioners state that they have complied with the Board's regulations at 49 CFR 1105.7(b) in serving the July 10 Report on the parties on that same day. This was done to give the parties as much information as petitioners had available at that time. Petitioners also state that they were in compliance when they notified the parties in the transmittal letters that accompanied the July 10 Report that they were expecting to file their petition with the Board on July 31, 2003, and requested their comments within 3 weeks, in accord with 49 CFR 1105.11. Petitioners state that they have incorporated the comments they received into their Environmental Report dated July 31, 2003 (July 31 Report), which they attached as Exhibit B to their petition, and that they attached the responses as Exhibit 3.

INDOT also disagrees with petitioners' assumption that there is no demand for rail service over the line. INDOT states that the line provides access to a large grain elevator facility in Winamac and believes that it could be utilized for grain shipments by rail for hundreds of farmers located within the surrounding area. INDOT also challenges petitioners' carload data for the line, citing annual reports submitted to it by A&R indicating that in the year 2001, there were 418 cars of corn transported instead of 301, and in the year 2002, 463 cars were transported instead of 60. And INDOT questions the propriety of the recent sales of the line.

In response, petitioners point out that INDOT has not provided any specific evidence of future traffic, nor given an explanation of why there will be a return or growth of traffic, when there has not been any activity on the line within the past year. After the last shipment of grain, Cargill removed the

yard and track serving the facility before selling A&R to TP&W and RailAmerica, which is TP&W's corporate parent, and Cargill does not oppose the abandonment.

Regarding the traffic figures, petitioners believe that INDOT may have confused or combined the reports submitted by A&R and its affiliate railroad, J. K. Line, Inc. (JK), which operates between North Judson and Monterey, IN. In the year 2001, JK transported 761 cars of soybean and corn, and in the year 2002, JK transported 463 cars, the latter being the same volume suggested for A&R. Petitioners note that INDOT has not included any reports with its submission.

As for the propriety of the recent transactions involving the line, petitioners state that there has been no wrong-doing in the purchase or sale of the line or of A&R. These transactions were made at arm's length, did not involve affiliated entities, and were brought before the Board or its predecessor for public view. Petitioners point out that INDOT has never shown any concern about, participated in, or even opposed any of those transactions, and that INDOT has not shown an abuse of the Board's processes involving the transactions.

Finally, INDOT raises environmental concerns, including the effect of increased truck traffic and the impact on biological resources in the area. INDOT also appears to oppose trail use for the right-of-way, expressing its concern, along with that of the County, over who will eventually bear the cost of removing the bridges on the line. But, as noted, ITF has filed a request for trail use and A&R has agreed to trail use negotiations.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned without the Board's prior approval. Under 49 U.S.C. 10502, however, the Board must exempt a transaction or service from regulation when it finds 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.

The petitioners have established that they are incurring losses on the line, and will continue to incur losses until they are permitted to abandon it. At present the line is carrying no traffic, and the last active shipper has removed the track connecting the line to its grain elevator and does not oppose the abandonment proposal. The traffic levels in recent years do not support any prediction of significant traffic levels in the future, especially given that Cargill has ceased using rail service on this line. INDOT's assertion that there is a need for the line in the future is speculative and unsupported by any evidence.

The petitioners have complied with Board processes in pursuing their petition for exemption here. There is no evidence in this record showing abuse of the Board's processes in this or in prior

proceedings involving the subject line. INDOT's primary concerns appear to be preserving rail service over the line, which it can do under the Board's offer of financial assistance (OFA) procedures, and making sure that A&R removes the bridges in the absence of a trail use request, which ITF subsequently has filed. Once A&R consummates the abandonment, INDOT and the County may pursue removal of the bridges under Indiana law. Also, the Board is imposing an environmental condition that addresses bridge and culvert maintenance activities following abandonment.

In these circumstances, 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)]. An exemption will also foster sound economic conditions and encourage efficient management by relieving petitioners from the expense of retaining and maintaining a line that generates no traffic and allowing TP&W to apply its assets more productively elsewhere on its rail system [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be adversely affected.

Regulation of the proposed abandonment and discontinuance is not necessary to protect shippers from an abuse of market power because there are no shippers on the line. Cargill, the only shipper, has closed its facility to rail service and has agreed not to oppose the abandonment and discontinuance of service. Nevertheless, to ensure that Cargill is informed of the Board's action, the Board will require A&R and TP&W to serve a copy of this decision and notice on Cargill within 5 days of the service date and certify to the Board that they have done so. In light of the market power finding, the Board need not determine whether the proposed abandonment is limited in scope.

Under 49 U.S.C. 10502(g), the Board's exemption authority may not be used to relieve a carrier of its statutory obligation to protect the interests of its employees. In STB Docket No. AB-855 (Sub-No. 1X), A&R is proposing to abandon a line that constitutes its entire rail system. When issuing abandonment authority for railroad lines that constitute the carrier's entire system, the Board does not normally impose employee protective conditions unless the evidence shows the existence of: (1) a corporate affiliate that will continue substantially similar rail operations; or (2) a corporate parent that will realize substantial financial benefits over and above relief from the burden of deficit operations by its subsidiary railroad. See Wellsville, Addison & Galetton R. Corp.—Abandonment, 354 I.C.C. 744 (1978); and Northampton and Bath R. Co.—Abandonment, 354 I.C.C. 784 (1978) (Northampton). As noted, A&R proposes to abandon its entire line. No A&R affiliate will continue these or similar rail operations, and A&R does not appear to have any corporate affiliate or parent for which the proposed abandonment could yield a benefit above relief from deficit operations. Further, no one has attempted to show that the situation under Northampton for imposing employee protection in entire line abandonments exists in this case. Under the circumstances, the Board will not impose employee protective conditions on A&R's abandonment. However, with respect to TP&W's discontinuance of service in STB Docket No. AB-847 (Sub-No. 2X), the interests of its employees will be protected by the conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979).

A&R and TP&W have submitted an environmental report with their petition and have 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 the data it contains, and analyzed the probable effects of the proposed action on the quality of the human environment.

SEA served an environmental assessment (EA) on September 29, 2003, recommending the imposition of three environmental conditions.

Based on the comments received on the EA, SEA recommends that the following conditions be placed on any decision granting abandonment authority: (1) prior to commencement of any salvage activities, A&R shall contact the Indiana Department of Environmental Management concerning its recommendations on water and biotic quality, air quality, potential right-of-way contamination, and any applicable environmental rules or permit requirements; and (2) prior to commencement of any salvage activities, A&R shall contact the U.S. Environmental Protection Agency, Region 5 (Kenneth A. Westlake, 312-886-2910), concerning removal and salvage methods, final disposition of crossties preserved with creosote, procedures for storing and fueling of construction equipment, procedures for the prevention and/or control of spills, stormwater runoff mitigation practices to be utilized during abandonment activities, and bridge and culvert maintenance activities following abandonment.

Based on the issues initially raised by the Indiana Department of Natural Resources, Division of Historic Preservation & Archaeology (SHPO), SEA recommended in the EA the imposition of an historic preservation condition pursuant to section 106 of the National Historic Preservation Act, 16 U.S.C. 470f. Following the receipt of additional comments from the SHPO, SEA has determined that the proposed abandonment will not affect historic properties listed in or eligible for inclusion in the National Register of Historic Places. Therefore, SEA has concluded that the previously recommended historic preservation condition is no longer necessary.

The conditions recommended by SEA will be imposed. Accordingly, based on SEA's recommendation, the Board concludes 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.

As previously noted, on October 15, 2003, ITF late-filed a request for issuance of a NITU under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act). ITF submitted a statement of willingness to assume financial responsibility for the right-of-way, and has 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. On October 20, 2003, A&R stated that it was willing to negotiate for interim trail use. Because ITF's request complies with the requirements of 49 CFR

1152.29 and A&R is willing to enter into trail use negotiations, the Board will issue a NITU for the subject 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, A&R 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.

SEA has indicated in its EA that, if abandonment and salvage of the line does take place, the right-of-way may be suitable for other public use. ITF requests imposition of a 180-day public use condition to allow it to study recreational uses for the right-of-way. ITF requests that A&R be prohibited from: (1) disposing of the rail corridor, other than the tracks, ties and signal equipment, except for public use on reasonable terms; and (2) removing or destroying potential trail-related structures such as bridges, trestles, culverts and tunnels.

The Board has determined that persons who file under the Trails Act may also file for public use under 49 U.S.C. 10905. See Rail Abandonments—Use of Rights-of Way as Trails, 2 I.C.C.2d 591, 609 (1986) (Trails). When the need for both conditions is established, it is the Board's policy to impose them concurrently, subject to the execution of a trail use agreement. ITF has met the public use criteria prescribed at 49 CFR 1152.28(a)(2) by specifying: (1) the condition sought; (2) the public importance of the condition; (3) the period of time for which the condition would be effective; and (4) justification for the period of time requested. Accordingly, a 180-day public use condition will be imposed on the line to be abandoned, commencing from the effective date of this decision, to enable any State or local government agency or other interested person to negotiate the acquisition of the line for public use. If a trail use agreement is reached on a portion of the right-of-way, A&R must keep the remaining right-of-way intact for the remainder of the 180-day period to permit public use negotiations. Also, the Board notes that a public use condition is not imposed for the benefit of any one potential purchaser. Rather, it provides an opportunity for any interested person to acquire the right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, A&R is not required to deal exclusively with ITF, but may engage in negotiations with other interested persons.

The parties should note that operation of the trail use and public use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10904. As stated in Trails, 2 I.C.C.2d at 608, an OFA to acquire a rail line for continued rail service or to subsidize rail operations takes priority over interim trail use/rail banking and public use. Accordingly, if an OFA is timely filed under 49 CFR 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 and public use precluded. Alternatively, if a sale under the OFA procedures does not occur, the trail use and public use processes may proceed.

It is ordered:

1. Under 49 U.S.C. 10502, the Board exempts from the prior approval requirements of 49 U.S.C. 10903 the abandonment by A&R of, and the discontinuance of service by TP&W over, the above-described line subject to the following conditions: (1) TP&W's discontinuance exemption is subject to employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979); (2) A&R shall leave intact all of the right-of-way, including bridges, trestles, culverts and tunnels (except track, ties and signal equipment), for a period of 180 days from the effective date of this decision and notice to enable any State or local government agency or any other interested person to negotiate the acquisition of the line for public use; (3) A&R shall comply with the interim trail use/rail banking procedures set forth below; (4) prior to commencement of any salvage activities, A&R shall contact the Indiana Department of Environmental Management concerning its recommendations on water and biotic quality, air quality, potential right-of-way contamination, and any applicable environmental rules or permit requirements; and (5) prior to commencement of any salvage activities, A&R shall contact the U.S. Environmental Protection Agency, Region 5 (Kenneth A. Westlake, 312-886-2910), concerning removal and salvage methods, final disposition of crossties preserved with creosote, procedures for storing and fueling construction equipment, procedures for the prevention and/or control of spills, stormwater runoff mitigation practices to be utilized during abandonment activities, and bridge and culvert maintenance activities following abandonment.

2. A&R and TP&W are directed to serve a copy of this decision and notice on Cargill within 5 days after the service date of this decision and notice and to certify to the Board that they have 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, A&R may fully abandon the line, provided the applicable 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 railroads and the Board by November 28, 2003, 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).

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 December 18, 2003. Petitions to stay must be filed by December 3, 2003 and petitions to reopen must be filed by December 15, 2003.

10. Pursuant to the provisions of 49 CFR 1152.29(e)(2), A&R 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 A&R's filing of a notice of consummation by November 18, 2004, 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.

Vernon A. Williams
Secretary