

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1053 (Sub-No. 2X)

MICHIGAN AIR-LINE RAILWAY CO.—ABANDONMENT
EXEMPTION—IN OAKLAND COUNTY, MICH.

Digest:¹ This decision allows Michigan Air-Line Railway Co. (MAL Railway) to end its responsibility to provide rail service over an approximately 5.45-mile rail line in Oakland County, Mich.

Decided: October 18, 2011

By petition filed on July 1, 2011, Michigan Air-Line Railway Co. (MAL Railway) sought an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10903 to abandon an approximately 5.45-mile rail line in Oakland County, Mich., extending from milepost 45.26 (Engineer's Profile Station 2389+72), at the west line of Haggerty Road, to milepost 50.65 (Engineer's Profile Station 2677+67), at the intersection with the right-of-way of a CSX Transportation, Inc. (CSXT) rail line in the City of Wixom. Notice of the filing was served and published in the Federal Register on July 21, 2011 (76 Fed. Reg. 43,743-44). In a reply filed with the Board on August 10, 2011, American Plastic Toys, Inc., (APT) opposed the petition. On August 30, 2011, MAL Railway filed both a petition for leave to file a surreply and a surreply. We will grant the petition for exemption, subject to environmental conditions related to the salvage of the line, as set forth below.

BACKGROUND

MAL Railway is a Class III common carrier, whose principal place of business is in Lincoln, Neb. Currently, the only active shipper on the line is APT, located in Walled Lake, Mich. APT receives inbound shipments of plastic pellets in rail hopper cars. It ships its outbound traffic via motor carrier. MAL Railway states that in 2008 there were 67 shipments on the line, 57 of which were delivered to APT. In both 2009 and 2010, there were 52 carloads on the line, all of which were delivered to APT. And in the first half of 2011, prior to the time MAL Railway filed its petition, there were 11 carloads on the line, all of which were delivered to APT. Pet. 7.

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

MAL Railway was initially organized as Coe Rail, Inc., a Michigan corporation, on January 31, 1984. It changed its name to Michigan Air-Line Railway Co. on June 28, 2006. At that time, all of the stock in MAL Railway was owned by Railmark Holdings, Inc. (Railmark). In November 2009, Browner Turnout Co. (Browner) purchased all of the issued and outstanding shares of stock from Railmark. Following that stock acquisition, Browner transferred the MAL Railway stock to RKB Holdings, Inc. Pet. 5; Pet., Exh. E at 1 (verified statement of Martin Ramsey). In connection with Browner's acquisition of MAL Railway's capital stock from Railmark, MAL Railway and Railmark agreed that Railmark, through its wholly owned subsidiary, Rail Freight Solutions, Inc. ("RFS"), would provide rail service on the line on behalf of MAL Railway. Pet., Exh. D at 4 (verified statement of R. Robert Butler). As discussed below, RFS did not seek Board authority for its operation of the line, which lasted from November 11, 2010, until June 10, 2011. Pet. 7.²

In the petition now before us, MAL Railway states that the proposed abandonment is necessary to avoid operating losses that would result from continued operations. Additionally, it calculates that maintenance of way (MOW)/rehabilitation costs associated with the line will total \$635,566.42. It also calculates that it will incur \$765,097.42 in opportunity costs if it is required to continue operating the line.

In its reply, APT argues that the Board should deny the petition because MAL Railway has provided unreliable, incomplete, and misleading information. APT disputes MAL Railway's operating costs, arguing that the Board should disregard them because they are different from the operating costs that RFS incurred when it provided service on the line, and because they vary from the operating costs that MAL Railway claimed in its prior January 28, 2011 petition to abandon the line, which the Board denied. APT further argues that MAL Railway's track maintenance cost figures are inaccurate because MAL Railway failed to account for potential grant money that could be used to pay for line MOW/rehabilitation costs. APT further contends that MAL Railway's opportunity cost calculations are inaccurate because, among other things, they rely upon an appraisal that does not comply with the Board's standards and the Uniform Standards for Professional Appraisal Practices (USPAP).

APT also argues against abandonment on several other grounds. It contends that the Board should not authorize abandonment of the line because: (1) MAL Railway allowed RFS to operate the line on its behalf without Board authorization; (2) MAL Railway has failed to maintain the line or market service on the line; and (3) MAL Railway never had any intention of fulfilling its common carrier obligation with respect to the line, thus making its effort to abandon the line an abuse of the abandonment process. APT also argues that abandonment is contrary to the transportation policy of 49 U.S.C. § 10101.

² In a petition filed on January 28, 2011, MAL Railway had previously sought Board authority to abandon the line that is the subject of this proceeding. The Board denied that petition because MAL Railway did not provide sufficient evidence regarding the revenues and costs associated with the line, making it impossible for the Board to determine what burden, if any, MAL Railway incurred in continuing to operate the line. Mich. Air-Line Ry.—Aban. Exemption—In Oakland Cnty., Mich., AB 1053 (Sub-No. 1X) (STB served May 18, 2011).

PRELIMINARY MATTERS

Show cause order. As part of our May 18, 2011 decision denying MAL Railway's previous petition to abandon the line, the Board ordered MAL Railway to show cause why the Board should not find that RFS was operating the line without required Board authority. MAL Railway filed its response to the Board's show cause order on June 6, 2011. MAL Railway argued that, because RFS acted as its agent, RFS was not required to obtain Board operating authority to operate the line. However, MAL Railway further stated that it would terminate its relationship with RFS and would resume operating the line itself. In the petition now before us, MAL Railway states that it has terminated its relationship with RFS and began operating the line itself on June 10, 2011.

RFS should have sought Board authority to operate the line in accordance with 49 U.S.C. § 10901 and the Board's rules at 49 C.F.R. § 1150.31. Because RFS no longer operates the line and MAL Railway now serves the line itself, the issue of RFS's need to obtain operating authority is moot. We admonish the parties, going forward, to devote full and proper attention to ensuring that they are in compliance with, and fulfill their responsibilities under, all statutory and regulatory requirements administered by this agency. Failure to do so could result in the imposition of administrative sanctions.

Surreply. In its August 30, 2011 filing, MAL Railway seeks leave to file a surreply in response to statements APT makes in its reply. MAL Railway's surreply is an impermissible reply to a reply under Board rules (49 C.F.R. § 1104.13(c)), and accordingly will not be made part of the record.

DISCUSSION AND CONCLUSIONS

Authority to abandon.

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

As detailed below, MAL Railway has demonstrated that the line proposed for abandonment will incur an operating loss during the forecast year, which extends from June 1, 2011, to May 31, 2012. It has also shown that the line requires substantial MOW/rehabilitation expenditures and that it will incur significant opportunity costs if it continues to operate the line. Accordingly, we find below that this transaction meets the exemption criteria under 49 U.S.C. § 10502, and we will grant MAL Railway's petition to abandon the line.

Forecast Year Operating Loss. MAL Railway argues that, during its forecast year, revenues generated by the line will total \$124,530.00, while operating expenses will total \$137,420.00, resulting in an operating loss of \$12,890.00.

In calculating its revenues, MAL Railway assumes that: (1) 52 carloads will be transported on the line during the forecast year (the same number of shipments as were transported in 2009 and 2010); (2) it will receive \$695.00 per carload from the division of revenues paid to it by CSXT (which interchanges all MAL Railway traffic); and (3) during each of the 12 months of the forecast year, MAL Railway will collect a flat monthly rate of \$7,250.00 from APT for service, which is the same rate that APT currently pays to MAL Railway.

MAL Railway's operating expenses include, but are not limited to, line items for wages, locomotive fuel and repair costs, emergency track repairs, utility and communications costs, supplies and materials, rentals and leases, and insurance premiums. MAL Railway's forecast year operating expenses include 2 additional line items that RFS did not incur when it provided service on the line: costs associated with wages and salaries, and costs for locomotive usage. The wages and salaries costs stems from MAL Railway's hiring of B. Allen Brown to arrange for the rail freight service to APT following its resumption of service. The locomotive usage line item is related to payments that MAL Railway now makes for use of its locomotive. Until early 2011, MAL Railway operated its locomotive pursuant to a no-cost lease between it and Lawrence I. Coe, one of the principals of Railmark. With the lease now terminated, Mr. Brown is purchasing the locomotive from Mr. Coe pursuant to an installment purchase agreement. Mr. Brown is allowing MAL Railway to use the locomotive in exchange for an amount equal to the monthly payment under the installment purchase agreement.

MAL Railway's forecast year operating loss calculations appear generally reasonable, although it makes 2 minor arithmetical errors in its calculation of its projected income—one in August 2011 and one in September 2011. In both of those months, it overstates its revenues by \$695.00. Accounting for these 2 errors, MAL Railway's forecast year operating loss is \$14,280.00. This estimated amount is based upon reasonable facts and assumptions and is the best evidence of record. Although APT argues that MAL Railway is bound by the operating costs contained in emails attached to its previous petition for abandonment of the line, we found that initial data to be incomplete and unreliable. The data submitted with this petition, in contrast, was prepared as part of a comprehensive analysis of operating costs. We find the data MAL Railway has submitted here to be more reliable. Because APT does not show that MAL Railway's statement of operating costs is inaccurate, or provide its own operating profit or loss calculations, we find MAL Railway's forecast year operating loss to be \$14,280.00.

MOW/rehabilitation costs. MAL Railway provides information regarding MOW/rehabilitation costs associated with the line. Based upon an assessment of the line prepared by Landreth Engineering, LLC, MAL Railway calculates that, in order to rehabilitate the line to Federal Railroad Administration Class I standards, it will need to make repairs and improvements totaling \$635,566.42 during the forecast year. MAL Railway further projects that during the next 4 years, the line will require additional MOW/rehabilitation expenditures totaling \$3,995,235.63. MAL Railway did not separately include MOW/rehabilitation costs in the operating expenses that it used to calculate its operating loss.

As documented in Landreth Engineering's assessment of the line (Exhibit 5, attached to Exhibit E of MAL Railway's Petition), MAL Railway's forecast year MOW/rehabilitation costs include, but are not limited to, \$164,100.00 in tie replacement costs, \$100,000.00 to repair grade crossing warning devices, \$64,033.20 to surface track, \$45,000.00 in ballast, \$32,940.00 to resurface a grade crossing, and \$28,647.85 in miscellaneous track repairs.

APT argues that the Board should reject MAL Railway's line MOW/rehabilitation costs due to its failure to account for potential grant money. APT's claim lacks support. Although it is theoretically possible that MAL could receive grant money to pay for certain line MOW/rehabilitation costs, neither MAL Railway nor APT provides substantial evidence, such as a monetary amount, or a letter from the state or other governmental entity that would provide a grant, to justify reliance upon a grant as part of our findings. Therefore, we will not adjust MAL Railway's track maintenance cost and we accept its estimated MOW/rehabilitation costs for the forecast year of \$635,566.42 as the best evidence of record.

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 Abandonment Regulations—Costing, 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.³ 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 one additional year.

MAL Railway calculates that, if it is required to continue operating the line, it will incur an opportunity cost of \$765,097.42 during the forecast year. In calculating its opportunity costs, MAL Railway assumes a \$4,335,500.00 value of the line's real estate and a net salvage value of \$543,500.00 for track materials associated with the line, which together total an NLV of \$4,879,000.00. MAL Railway also assumes working capital of \$31,766.55, and a nominal rate of return of 15.58%.

APT argues that the real estate appraisal submitted by MAL Railway in support of its opportunity cost calculations is flawed and should be rejected. It claims, among other things, that the appraisal was not performed in compliance with both Uniform Standards of Professional Appraisal Practice and Board (USPAP) standards. APT also argues that MAL Railway's opportunity cost calculations are invalid because they disregard the price Browner paid to acquire the line in 2009 and the sale of a previously abandoned connecting segment of rail line.

³ Under 49 C.F.R. § 1152.34(d), the rate of return used to calculate return on value represents the individual railroad's current pre-tax nominal cost of capital. Our after-tax cost of capital finding for the railroad industry currently in effect is used as the basis for developing the appropriate nominal rate of return. See R.R. Cost of Capital—2009, EP 558 (Sub-No. 13) (STB served Oct. 29, 2010).

We reject these arguments. MAL Railway's appraisal was completed by a licensed appraiser, appears to be reasonably developed,⁴ and the price MAL Railway paid to acquire the line in 2009 may not reflect current market conditions. Furthermore, APT does not provide an alternative appraisal value. We will therefore accept the appraisal of \$4,335,500.00 as the best evidence of record.

APT did not contest the net salvage value of \$543,500.00, the working capital of \$31,766.55, or the nominal rate of return of 15.58%. Although MAL Railway did not fully support the net salvage value, we will accept the value of \$543,500.00 as the best evidence of record. The working capital of \$31,766.55 was fully explained, and was not contested by APT. We therefore accept it. The nominal rate of return of 15.58% that MAL Railway used in its calculations is correct and we will accept it. Based on this analysis, we accept MAL Railway's opportunity cost of \$765,097.42.⁵

Because of MAL Railway's operating losses, the substantial line MOW/rehabilitation costs, and opportunity costs, we find that the transportation policy objectives of 49 U.S.C. § 10101 are met without subjecting this transaction to the detailed scrutiny required under 49 U.S.C. § 10903. By minimizing the administrative expense of the application process, an exemption will expedite regulatory action and reduce regulatory barriers to exit, in accordance with 49 U.S.C. §§ 10101(2) and (7). An exemption will also foster sound economic conditions and encourage efficient management by allowing MAL Railway to save the expenses of maintaining and operating a line that is minimally used and unprofitable. See 49 U.S.C. §§ 10101(5) and (9). Other aspects of the rail transportation policy will not be adversely affected by use of the exemption process.

The transaction will not result in an abuse of market power.⁶ APT, the sole shipper on this unprofitable line, can transport its inbound materials via truck. According to MAL Railway, APT has secured multiple bids for transloading of its materials. Pet. 13. APT has not rebutted this assertion. In addition, all of APT's finished products are currently shipped by truck (Pet., Exh. D at 3 (verified statement of R. Robert Butler)). Therefore, abandonment will not foreclose APT's ability to move its product. To ensure that APT is informed of our action, we will require MAL Railway to serve a copy of this decision on APT so that it is received by APT within 5 days of the service date of this decision and to certify contemporaneously to us that it has done so.

⁴ The Board does not require use of USPAP standards in the preparation of real estate appraisals.

⁵ Of note, as explained above, MAL Railway has demonstrated that the line incurs an operating loss and requires substantial maintenance expenditures. Therefore, even if MAL Railway were to incur no opportunity costs in continuing to operate the line, abandonment could still be authorized.

⁶ In light of our finding that the transaction will not result in an abuse of market power, we need not determine whether the proposed abandonment is limited in scope.

Other arguments. We reject APT's argument that MAL Railway's petition is an abuse of the abandonment process because Browner acquired MAL Railway in 2009 without any intention of fulfilling its common carrier obligations and with the intent to abandon the line. The evidence does not demonstrate that MAL Railway failed to fulfill its common carrier obligations and APT has never filed a complaint with the Board suggesting that it has. Here, it is clear that the line is unprofitable, that it requires extensive rehabilitation, and that traffic levels on the line have been minimal since the time prior to Browner's acquisition of the line.

APT also argues that MAL Railway has failed to maintain the line or market service on the line. APT has not provided evidence in support of these arguments and we therefore reject them.

Employee protection.

Under 49 U.S.C. § 10502(g), we may not use our exemption authority to relieve a carrier of its statutory obligation to protect the interests of its affected employees. Accordingly, as a condition to granting the exemption, we will impose the standard employee protective conditions set forth in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979).

Environmental review.

MAL Railway submitted a combined environmental and historic report with its petition and notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed abandonment. Our Office of Environmental Analysis (OEA) has examined the environmental and historical report, verified the data it contains, and analyzed the probable effects of the proposed action on the quality of the human environment. OEA served an Environmental Assessment (EA) in this proceeding on August 30, 2011.

In the EA, OEA stated that MAL Railway identified the following endangered species in the project area: Indiana bat (*myotis sodalis*); rayed bean mussel (*villosa fabalis*); snuffbox mussel (*epioblama triquerta*); and candidate eastern massasauga rattlesnake (*sistrurus catenatus*). In response to correspondence submitted in response to MAL Railway's previous petition, in an email dated April 28, 2011, the U.S. Fish and Wildlife Service (USFWS), stated that, if MAL Railway's salvage contractor accesses the line using only existing roads and streets that cross the railroad's right-of-way, salvage operations would not impact any federally listed threatened or endangered species. OEA therefore recommended that the Board impose a condition on MAL Railway requiring that salvage of the line be conducted as detailed by USFWS. This condition will be imposed. It is not a barrier to consummation of the line abandonment.

In the EA, OEA also stated that the National Geodetic Survey (NGS) identified 4 geodetic station markers that could be affected by line salvage activities. Therefore, OEA recommended that MAL Railway be required to consult with NGS at least 90 days before beginning any salvage activities that will disturb or destroy any geodetic station markers.

On August 19, 2011, MAL Railway forwarded to NGS a report prepared by Mr. Thomas M. Smith, a licensed surveyor, stating that no geodetic station markers could be located on the line's right of way. On August 26, 2011, NGS notified the Board that MAL Railway had completed all requirements regarding the station markers.

Based upon NGS's notification, OEA now recommends that the Board not impose the requirement that MAL Railway consult with NGS at least 90 days before beginning any salvage activities.

The Board concludes that the proposed abandonment, if implemented and conditioned as described above, will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. MAL Railway's request to file a surrepley is denied.
2. Under 49 U.S.C. § 10502, we exempt from the prior approval requirements of 49 U.S.C. § 10903 the abandonment by MAL Railway of the above-described line, subject to the employee protective conditions set forth in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979), and the condition that MAL Railway shall, during salvage of the rail line, access the line using only existing roads and streets that cross the line's right-of-way to ensure that salvage operations do not impact any federally listed threatened or endangered species.
3. MAL Railway is directed to serve a copy of this decision and notice on APT, its last remaining customer on the Line, so that it is received within 5 days of the service date of this decision, and to certify contemporaneously to the Board that it has done so.
4. An Offer of Financial Assistance (OFA) under 49 C.F.R. § 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by October 31, 2011, subject to time extensions authorized under 49 C.F.R. § 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27(c)(1). Each OFA must be accompanied by the filing fee of \$1,500. See 49 C.F.R. § 1002.2 (f)(25).
5. 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."
6. Provided no OFA has been received, this exemption will be effective on November 18, 2011. Petitions to stay must be filed by November 3, 2011. Petitions to reopen must be filed by November 14, 2011.
7. Pursuant to the provisions of 49 C.F.R. § 1152.29(e)(2), MAL Railway 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 MAL Railway's filing of a notice of consummation by October 19, 2012, 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 Elliott, Vice Chairman Begeman, and Commissioner Mulvey.