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SERVICE DATE - OCTOBER 14, 1999

SURFACE TRANSPORTATION BOARD<sup>1</sup>

DECISION

Docket No. AB-303 (Sub-No. 5X)

WISCONSIN CENTRAL LTD.—ABANDONMENT EXEMPTION—  
IN MARQUETTE COUNTY, MI

Decided: October 7, 1999

On July 23, 1990, Wisconsin Central Ltd. (WCL) filed a notice of exemption under 49 CFR 1152.50 to abandon its 0.75-mile line of railroad known as the Marquette Ore Dock Line between milepost 155.25 (the Ore Dock Approach) and the end of the Marquette Ore Dock, in Marquette County, MI.<sup>2</sup> Notice of the exemption was served and published in the Federal Register, at 55 FR 32707, on August 10, 1990. The exemption was scheduled to become effective on September 9, 1990, but a formal expression of intent to file an offer of financial assistance (OFA) to purchase the entire line, filed by BXB Corporation (BXB) on August 17, 1990, effectively stayed the effective date until September 19, 1990.<sup>3</sup>

On August 16, 1990, the ICC's Section of Energy and Environment (SEE)<sup>4</sup> served an environmental assessment (EA) in this proceeding. In the EA, SEE indicated that the Land and Water Management Division of the Michigan Department of Natural Resources (MI-DNR) had

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<sup>1</sup> The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and involves functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 10903-05. Therefore, citations in this decision are to the prior sections of the statute unless otherwise indicated. In any event, the substantive law pertinent to the matters addressed in this decision was the same prior to the ICCTA as it is after the ICCTA.

<sup>2</sup> According to WCL, the line was used solely to load ore boats from the dock, and no traffic has moved over the line since 1971.

<sup>3</sup> See 49 CFR 1152.27(c)(2).

<sup>4</sup> The environmental section of the Board is known as the Section of Environmental Analysis, with the acronym SEA.

determined that abandonment of the line would be inconsistent with the Michigan Coastal Zone Management Program (MI-CZMP). The Coastal Zone Management Act, 16 U.S.C. 1451 et seq., prohibited the ICC from granting any license or permit affecting a coastal zone until the State of Michigan (as applied here) certified the applicant's proposal to be consistent with the MI-CZMP. Therefore, SEE recommended that a condition be imposed requiring WCL to obtain consistency certification with the MI-CZMP.<sup>5</sup> Accordingly, by decision served September 19, 1990, the effective date of the notice of exemption was stayed pending consistency certification or a showing that certification is not required. In the same decision, the OFA process was stayed pending a determination whether the proposed abandonment would be permitted.<sup>6</sup>

On June 15, 1999, WCL submitted the required certification from the Michigan Department of Environmental Quality (MDEQ),<sup>7</sup> confirming that WCL has met the terms required by the State of Michigan to achieve consistency with the MI-CZMP. On July 13, 1999, WCL filed a petition requesting that we lift the stay of the effective date of the notice of exemption and of the OFA process. Because the railroad has complied with the MI-CZMP, the September 19, 1990 decision staying the effective date of the exemption and the OFA process will be vacated.

WCL, in its July 13, 1999 petition, also requests an exemption from the OFA, public use, and interim trail use procedures that would otherwise become applicable when the stay is lifted. WCL states that it has reached an agreement with Marquette Bay Association, LLC (Association), an entity that includes the City of Marquette (City), which intends to purchase the right-of-way in addition to other property along the City's lakefront in order to develop public parking areas and

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<sup>5</sup> SEE also noted that the Marquette Ore Dock was eligible for inclusion in the National Register of Historic Places and recommended imposition of a historic preservation condition. In Wisconsin Central Ltd—Exemption Acquisition and Operation—Certain Lines of Soo Line Railroad Company, Finance Docket No. 31102 (ICC served July 28, 1988), the ICC had imposed a condition that WCL retain its interest in and take no steps to alter the integrity of the Marquette Ore Dock and the Ore Dock Approach, thus ensuring compliance with the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f. The section 106 historic preservation condition recommended in this proceeding in the August 16, 1990 EA was never imposed because of the intervening stays. The condition imposed in Finance Docket No. 31102 was later removed by a decision served April 24, 1992, and a copy of that decision was served on all parties of record in this proceeding. Accordingly, the section 106 process regarding the Marquette Ore Dock and the rest of this line is complete.

<sup>6</sup> OFAs were due on September 9, 1990. On September 13, 1990, BXB filed a petition to revoke the exemption to the extent necessary for the ICC to consider its late-filed OFA, which it subsequently filed on September 22, 1990. No action on BXB's petition to revoke and its OFA was taken in view of the September 19 stay decision.

<sup>7</sup> MI-DNR is now a division of MDEQ.

extend public water and sewer mains.<sup>8</sup> WCL also states that, because the property is adjacent to the City's downtown commercial district, the City intends to construct bike/pedestrian paths that will link the downtown area to the lakefront, to create additional park and greenspace for the benefit of the public, and to return two creeks to their natural condition. Assertedly, exemption from the OFA and public use requirements of 49 U.S.C. 10905-06 (now 49 U.S.C. 10904-05) would expedite the post-abandonment transfer of the right-of-way.

Exemptions from 49 U.S.C. 10905-06 have been granted from time to time, but only when the right-of-way is needed for a valid public purpose and there is no overriding public need for continued rail service.<sup>9</sup> Here, WCL evidently has agreed to transfer the subject right-of-way to the Association for a valid public purpose, obviating the need for a public use condition. Moreover, allowing for an OFA process could delay transfer of the line to the Association and jeopardize the timely completion of the planned construction project. Significantly, there are no active shippers on the line, which traverses the downtown commercial district above grade,<sup>10</sup> and the City states that it has no present or future plans for industrial development. Furthermore, although BXB had requested, in a post-stay letter (filed September 27, 1990), that its OFA be held open pending reactivation of the OFA process, WCL served a copy of the instant petition on BXB's counsel of record, and no response was received. This suggests that BXB no longer is interested in going forward with an OFA.

Based on the evidence of record and the passage of time, we find that the proposed exemption from 49 U.S.C. 10905-06 meets the criteria of 49 U.S.C. 10505 (now 49 U.S.C. 10502). Applying OFA or public use requirements, in this instance, is not necessary to carry out the rail

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<sup>8</sup> WCL included a verified letter of support from Gerald R. Peterson, City Manager.

<sup>9</sup> See Doniphan, Kensett and Searcy Railway—Abandonment Exemption—In Searcy, White County, AR, STB Docket No. AB-558X (STB served May 6, 1999); Union Pacific Railroad Company—Abandonment Exemption—In Salt Lake County, UT, STB Docket No. AB-33 (Sub-No. 116X) (STB served Sept. 30, 1998); K&E Railway Company—Abandonment Exemption—In Alfalfa, Garfield, and Grant Counties, OK and Barber County, KS, STB Docket No. AB-480X (STB served Dec. 31, 1996), slip op. at 4, citing Southern Pacific Transportation Company—Discontinuance of Service Exemption—In Los Angeles County, CA, Docket No. AB-12 (Sub-No. 172X), et al. (ICC served Dec. 23, 1994); Missouri Pacific Railroad Company—Abandonment—In Harris County, TX, Docket No. AB-3 (Sub-No. 105X) (ICC served Dec. 22, 1992); Chicago & North Western Transportation Company—Abandonment Exemption—In Blackhawk County, IA, Docket No. AB-1 (Sub-No. 226X), et al. (ICC served July 14, 1989); and Iowa Northern Railway Company—Abandonment —In Blackhawk County, IA, Docket No. AB-284 (Sub-No. 1X) (ICC served Apr. 1, 1988).

<sup>10</sup> According to WCL, no shipper could physically reach the line due to the separation of grade.

transportation policy. Allowing the abandonment exemption to become effective expeditiously, without first being subject to these requirements, would minimize the need for Federal regulatory control over the rail transportation system, expedite the regulatory decision, and reduce regulatory barriers to exit [49 U.S.C. 10101a(2) and (7)]. As noted above, there are no shippers or potential shippers on the line. Therefore, regulation is not necessary to protect shippers from an abuse of market power.

As noted, BXB did not respond to WCL's petition. Presumably, it would have if it still had an interest in pursuing an OFA. However, to ensure that BXB is informed of our decision, we will require WCL to serve a copy of the decision on BXB's counsel of record within 5 days of the service date and to certify to us that it has done so. This will provide BXB with the opportunity to file an appropriate stay request, if it so chooses, within 15 days of the service date of this decision. Absent a stay, the effective date of the exemption to abandon the line and our decision to exempt the abandonment from the OFA and public use condition processes will be 30 days from the service date of the decision.

Finally, we see no need to provide the opportunity for the filing of trail use/rail banking requests. Trail use/rail banking is voluntary and can only be implemented if an abandoning railroad agrees to the imposition of trail use authority providing time to negotiate an agreement. See section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d). Here, WCL has made it clear that it will not consent to any negotiations under 16 U.S.C. 1247(d) and 49 CFR 1152.29.

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

It is ordered:

1. The September 19, 1990 decision staying the effective date of the exemption is vacated. WCL's exemption permitting abandonment of the line is effective November 13, 1999. Stay requests are due October 29, 1999.

2. Under 49 U.S.C. 10505, we exempt WCL from the requirements of 49 U.S.C. 10905-06 with regard to this line. This exemption is effective November 13, 1999.

3. WCL is directed to serve a copy of this decision on BXB's counsel of record within 5 days of the service date and to certify to the Board that it has done so.

4. Pursuant to the provisions of 49 CFR 1152.29(e)(2),<sup>11</sup> 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 14, 2000, 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.

5. This decision is effective on the date of service.

By the Board, Chairman Morgan, Vice Chairman Clyburn and Commissioner Burkes.

Vernon A. Williams  
Secretary

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<sup>11</sup> Because this proceeding was pending prior to the passage of the ICCTA and prior to the Board's adoption of section 1152.29(e)(2) of its regulations, the provisions of this section would not routinely apply. The notice of consummation requirement is appropriate here, however, as a means of providing certainty and closure in this long-pending proceeding.