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SERVICE DATE - LATE RELEASE JANUARY 31, 2000

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-402 (Sub-No. 7X)

FOX VALLEY & WESTERN LTD--ABANDONMENT  
EXEMPTION--IN FOND DU LAC AND WASHINGTON COUNTIES, WI

Decided: January 27, 2000

By petition filed on October 12, 1999,<sup>1</sup> Fox Valley & Western Ltd. (FVW) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a 24.64-mile line of railroad, known as the West Bend-Eden Line, extending from milepost 114.42 south of West Bend to milepost 139.06 in Eden, in Washington and Fond du Lac Counties, WI. A request for issuance of a notice of interim trail use (NITU) was filed by the State of Wisconsin Department of Natural Resources (WisDNR). We will grant the exemption subject to environmental, trail use, and standard employee protective conditions.

BACKGROUND

FVW, a Class II rail carrier, operates approximately 450 miles of rail line in Wisconsin. It is a wholly owned subsidiary of Wisconsin Central Transportation Corporation.

There are three shippers located on the West Bend-Eden Line: Gundrum Bros. Farm Supply, Inc. (Gundrum), at West Bend (milepost 117.6); Campbellsport Building Supply (Campbellsport) at Campbellsport (milepost 131.1); and Bend Industries (Bend) at West Bend.<sup>2</sup> In 1998, FVW moved 127 cars for Gundrum, 6 cars for Campbellsport, and none for Bend. During the first 9 months of 1999, FVW moved 122 cars for Gundrum, 7 cars for Campbellsport, and 3 cars for Bend.<sup>3</sup>

According to FVW, the city of West Bend (the City) is planning to redevelop downtown West Bend and, as part of that redevelopment, is working with FVW and the shippers on the line to

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<sup>1</sup> Notice of the filing was served and published in the Federal Register on November 1, 1999 (64 FR 58906).

<sup>2</sup> Bend is served from a transloading site in West Bend.

<sup>3</sup> Other than this traffic, the only activity on the line in 1998 or 1999 was a one-time service at a transloading site at the West Bend Yard of 47 cars of pipe for a pipeline that was being built. FVW embargoed the line between milepost 118.2 and milepost 138.2 on September 2, 1999.

relocate the shippers' facilities to another rail-served site off the line.<sup>4</sup> In the interim, FVW states that it has entered into a Continued Service Agreement with Gundrum to keep approximately 2 miles of the southern end of the line in place as a private industry spur to serve Gundrum until it relocates. Campbellsport, although it originally objected to the proposed abandonment, does not currently oppose it.<sup>5</sup> FVW will serve Bend from an alternate transloading site off the line after the abandonment.

#### DISCUSSION AND CONCLUSIONS

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

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

Regulation of the transaction is not necessary to protect shippers from the abuse of market power because the shippers on the line do not object<sup>6</sup> and are in the process of relocating their facilities.<sup>7</sup> Nevertheless, to ensure that these shippers are informed of our decision, we will require FVW to serve a copy of this decision on them within 5 days of the service date and certify to us that it has done so. Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

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<sup>4</sup> In its historic report, FVW states that the City supports the proposed abandonment because it wants to purchase the property in order to develop West Bend's central business district. The City's plans include an industrial park south of West Bend where it plans to relocate the shippers.

<sup>5</sup> In its environmental report, FVW notes that it was in negotiations with Campbellsport to find alternative arrangements. Campbellsport filed comments in opposition to the petition for exemption on November 22, 1999. In a letter filed December 13, 1999, Campbellsport seeks leave to withdraw the November 22 filing for the stated reason that all issues have been settled to its satisfaction. The November 22 filing will be considered withdrawn.

<sup>6</sup> FVW states that they were each served with a copy of the petition.

<sup>7</sup> As far as the main shipper is concerned, FVW has agreed to keep a portion of the line in operation to serve Gundrum until it relocates.

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

FVW has submitted an environmental report with its petition and has notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed abandonment. See 49 CFR 1105.11. Our Section of Environmental Analysis (SEA) has examined the environmental report, verified 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 December 10, 1999, and requested comments.

In the EA, SEA indicated that: (1) the Wisconsin Department of Transportation (WisDOT) expressed concern regarding proper cleanup of debris during salvage activities; (2) the National Geodetic Survey (NGS) identified six station markers that may be affected by the proposed abandonment; and (3) WisDNR expressed concern regarding the removal of the culverts/stream crossings during salvage activity. In the EA, SEA recommended that we impose conditions requiring FVW to: (1) comply with the WisDOT Abandoned Railroad Line Salvage and Clean-up Policy/Standards/Procedures (WisDOT Procedures) when it performs salvage activities; (2) notify NGS at least 90 days prior to salvage activities to allow NGS to plan for relocation of the station markers; and (3) consult with WisDNR prior to any salvage activity to determine if an erosion plan is needed.

Only one comment to the EA, filed by FVW, was received. FVW expresses concern over the conditions recommended in the EA. FVW states that, to its knowledge, WisDOT has only guidelines, not regulations, concerning salvage and cleanup, so that, while FVW is willing to consult with WisDOT on salvage issues, it feels that it should only be required to fulfill the mandates of state law. FVW states, moreover, that because there is a party interested in converting the right-of-way into a trail, it does not intend to remove culverts and stream crossings and, therefore, it does not anticipate a need to consult with WisDNR. FVW also states its intention to clean the right-of-way and recycle as much track material as possible. With regard to the WisDOT Procedures, we note that SEA did not reference specific WisDOT regulations in the EA, but recommended only that FVW comply with WisDOT's policy, standards, and procedures when salvaging the line. Such policy, standards and procedures, while not formal regulations, are presumed to be in accordance with state law. Concerning the need for FVW to consult with WisDNR about the removal of culverts and stream crossings, such consultation may be necessary if a trail use agreement is not reached and FVW abandons the line. Therefore, we will impose the conditions recommended by SEA. Accordingly, based on SEA's recommendation, we conclude that the proposed abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources. Although SEA has indicated that the right-of-

way may be suitable for public use under 49 U.S.C. 10905, no one has sought a public use condition, and none will be imposed.<sup>8</sup>

On October 25, 1999, WisDNR filed a request for interim trail use/rail banking for the line under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act). It 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. By letter filed on October 29, 1999, FVW states that it is willing to negotiate with WisDNR for interim trail use. Because WisDNR's request complies with the requirements of 49 CFR 1152.29 and FVW is willing to enter into negotiations, we will issue a NITU for the line. The parties may negotiate an agreement during the 180-day period prescribed below. If an agreement is executed, no further Board action is necessary. If no agreement is reached within 180 days, FVW may fully abandon the line. 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), offers of financial assistance (OFA) to acquire rail lines for continued rail service or to subsidize rail operations take priority over interim trail use/rail banking. 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 precluded. Alternatively, if a sale under the OFA procedures does not occur, the trail use process may proceed.

It is ordered:

1. Under 49 U.S.C. 10502, we exempt from the prior approval requirements of 49 U.S.C. 10903, the abandonment by FVW of the above-described line, subject to the employee protective conditions in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979), and the conditions that FVW: (1) comply with the WisDOT Procedures when it performs salvage activities; (2) consult with NGS and provide it with 90 days' notice prior to engaging in any activities that would disturb or destroy any geodetic markers identified on the line; (3) consult with WisDNR prior to any salvage activity to determine if an erosion plan is needed; and (4) comply with the interim trail use/rail banking procedures set forth below.

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<sup>8</sup> Public use requests were due by November 22, 1999.

2. FVW is directed to serve a copy of this decision on Gundrum Bros. Farm Supply, Inc., Campbellsport Building Supply, and Bend Industries within 5 days after the service date of this decision and to certify to the Board that it has done so.

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

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

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

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

7. An OFA under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by February 10, 2000, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by the filing fee, which currently is set at \$1,000. See 49 CFR 1002.2(f)(25).

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

9. Provided no OFA has been received, this exemption will be effective March 1, 2000. Petitions to stay must be filed by February 15, 2000, and petitions to reopen must be filed by February 25, 2000.

10. Pursuant to the provisions of 49 CFR 1152.29(e)(2), FVW 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 FVW's filing of a notice of consummation by January 31, 2001, 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.

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

Vernon A. Williams  
Secretary