

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-1017X

WEST SHORE RAILROAD CORPORATION—ABANDONMENT EXEMPTION—IN UNION
AND NORTHUMBERLAND COUNTIES, PA

Decided: May 20, 2008

West Shore Railroad Corporation (West Shore) filed a notice of exemption under 49 CFR 1152 Subpart F-Exempt Abandonments to abandon a line of railroad known as the Mifflinburg Branch, extending from milepost 0.0 at Montandon, in Northumberland County, PA, and extending in a generally westerly direction, crossing the West Branch of the Susquehanna River through Lewisburg to the Borough of Mifflinburg, ending at milepost 11.8 in Union County, PA. Notice of the exemption was served and published in the Federal Register on April 21, 2008 (73 FR 21406-07).¹ The exemption was scheduled to become effective on May 21, 2008, unless stayed by the Board or a formal expression of intent to file an offer of financial assistance (OFA) under 49 U.S.C. 10904 and 49 CFR 1152.27(c)(2) was filed by May 1, 2008.

On April 30, 2008,² the Mifflinburg Rail Company (MRC) filed a formal expression of intent to file an OFA to purchase West Shore's line proposed for abandonment, or portions thereof. This filing automatically stayed the effective date of the exemption for 10 days.³ In the filing, MRC not only asks the railroad for the information specified in the Board's rules, but for significant other information as well. MRC further requests that the Board toll for 60 days the initial due date for the filing of its OFA to give it adequate time to analyze the information provided by West Shore.

A potential offeror is entitled only to the specific information contained in the Board's rules at 49 CFR 1152.27 (a). As such, the information specified there is the only information West Shore will be required to provide to the offeror, and West Shore should promptly provide

¹ The notice also embraced STB Docket No. AB-1018X, Union County Industrial Railroad Company—Discontinuance of Service Exemption—in Union County, PA, in which Union County Industrial Railroad Company sought an exemption to discontinue service in Union County, PA, between Lewisburg and Mifflinburg.

² On May 1, 2008, an amended certificate of service was submitted for filing.

³ See 49 CFR 1152.27(c)(2)(i).

MRC with that information.⁴ There is no justification for the 60-day extension sought by MRC. Rather, an OFA will be due 10 days after West Shore notifies the Board in writing that it has provided MRC with that information, and the effective date of the exemption will be extended until 10 days after the due date for the filing of the OFA.

The Board's Section of Environmental Analysis (SEA) issued an environmental assessment (EA) in this proceeding which was served on April 25, 2008. In the EA, SEA indicated that the Natural Resources Conservation Service (NRCS) identified no impacts to prime agricultural farmland and, therefore, the proposed abandonment does not involve the Federal Farmland Protection Policy Act (7 U.S.C. 4201). NRCS noted, however, that erosion and sedimentation control practices should be planned, implemented and maintained if the proposed abandonment involves earthmoving, and it recommended that West Shore consult with the appropriate county conservation districts. Accordingly, SEA recommended a condition that, prior to commencement of any salvage activities, West Shore shall consult with the appropriate county conservation districts to ascertain the need for erosion and sedimentation control practices for any planned salvage activities.

SEA also stated that, in response to West Shore's initial consultation letter, the U.S. Fish and Wildlife Service, Pennsylvania Field Office (USFWS) noted that there are no Federally listed or proposed threatened or endangered species known to occur in the abandonment area (Reference: USFWS Project #2008-0489). Therefore, USFWS concluded that no biological assessment or further consultations under section 7 of the Endangered Species Act (16 U.S.C. 1535) would be required. However, USFWS added that, if abandonment is not consummated by January 2009 (i.e., one year from the date of USFWS's reply), an updated consultation would be required by USFWS. SEA therefore recommended a condition that, if abandonment is not consummated by January 17, 2009, West Shore will be required to conduct supplemental consultations with USFWS to determine if abandonment would impact any Federally listed or proposed threatened or endangered species, to report the results of any supplemental consultations with USFWS to SEA in writing, and, should any potential impacts be identified, to consult with SEA and USFWS to develop appropriate mitigation measures prior to initiating any salvaging activities.

SEA further stated that the U.S. Army Corps of Engineers—Baltimore District (Corps) has not responded to West Shore's environmental report regarding impacts to waters of the United States at the time the EA was prepared. SEA stated that, without a reply from the Corps and lacking information on proposed salvage activities, it is unable to conclude whether the proposed abandonment would require a permit under section 404 of the Clean Water Act (33 U.S.C. 1344). Therefore, SEA recommended a condition requiring West Shore to consult with the

⁴ By letter filed May 14, 2008, West Shore indicates that it has received MRC's notice of intent, that it will provide MRC with the information required under 49 CFR 1152.27(a), and that it believes it can do so within the statutory time period or it will seek an extension.

Corps prior to commencement of any salvage activities regarding potential impacts to waters of the United States, including wetlands, and to comply with the reasonable requirements of the Corps.

Finally, SEA stated that West Shore submitted an historic report as required in 49 CFR 1105.8(a), and served a copy of the report on the Pennsylvania Bureau of Historic Preservation (SHPO). However, in a reply of January 3, 2008, the SHPO stated that it had insufficient information to proceed with its review and requested additional information (Reference: ER 08-0539-042-A). In a letter dated January 9, 2008, West Shore supplied the SHPO with additional information. According to SEA, the SHPO had not responded to West Shore's information at the time the EA was prepared and it recommended a condition requiring West Shore to: (1) retain its interest in and take no steps to alter the historic integrity of all sites, buildings, and structures within the right-of-way that are eligible for listing or listed in the National Register of Historic Places (generally, 50 years old or older), until the section 106 process of the National Historic Preservation Act, 16, U.S.C. 470f, has been completed, (2) report to SEA regarding any consultations with the SHPO, and (3) not initiate any salvage activities related to abandonment (including removal of the tracks and ties) or file its consummation notice until the section 106 process has been completed and the Board has removed the condition.

Comments to the EA were due by May 9, 2008. SEA received comments from the SHPO and the National Geodetic Survey (NGS). SEA states in a Post EA memorandum (Post EA) that, by letter dated April 15, 2008, and received on April 28, 2008, the SHPO concluded that the rail line proposed for abandonment is not eligible for listing in the National Register of Historic Places. SEA further states that, pursuant to the section 106 regulations of the National Historic Preservation Act, 36 CFR 800.4(d)(1), and following consultation with the SHPO and the public, it has determined that the proposed abandonment would not affect historic properties listed in or eligible for inclusion in the National Register. Accordingly, SEA states that it no longer recommends the section 106 consultation condition found in the EA.

SEA further states that NGS noted that there are 12 geodetic survey markers located on the line proposed for abandonment. NGS has requested that West Shore consult with it at least 90 days prior to beginning salvage activities if those activities could disturb or destroy any of the markers. Therefore, SEA recommends a new condition requiring West Shore to notify NGS at least 90 days prior to beginning salvage activities that could disturb or destroy any geodetic survey markers in order to plan for the possible relocation of the markers by NGS.

SEA concludes that, as currently proposed, and, if the recommended conditions are imposed, abandonment of the line would not significantly affect either the quality of the human environment or the conservation of energy resources. Accordingly, the conditions recommended by SEA in the EA, as modified in the Post EA, will be imposed.

On April 24, 2008, Lewisburg Area Recreation Authority (LARA) filed a request for the issuance of a notice of interim trail use (NITU) for the line under the National Trails System Act,

16 U.S.C. 1247(d) (Trails Act), and for a public use condition under 49 U.S.C. 10905,⁵ in order to negotiate with West Shore for acquisition of the right-of-way for use as a recreational trail. LARA requests that West Shore be prohibited from disposing of the corridor, other than the tracks, ties, and signal equipment, except for public use on reasonable terms, and that West Shore be barred from removing or destroying any potential trail-related structures, such as bridges, trestles, culverts and tunnels, for a 180-day period from the effective date of the abandonment exemption. LARA states that the corridor would make an excellent recreational trail and that conversion of the right-of-way to trail use is in accord with local plans. LARA indicates that the 180-day period is needed to finalize its conditional sale transaction with West Shore, schedule a closing, and arrange for conveyance of the right-of-way.

LARA also submitted a statement of willingness to assume financial responsibility for the 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 payment of any and all taxes that may be levied or assessed against, the right-of-way, as required at 49 CFR 1152.29, and acknowledged that the use of the right-of-way for trail purposes is subject to possible future reactivation for rail service. West Shore has indicated its willingness to negotiate with LARA for interim trail use.

As an alternative to interim trail use under the Trails Act, the right-of-way may be acquired for public use as a trail under 49 U.S.C. 10905. See Rail Abandonments—Use of Rights-of-Way As Trails, 2 I.C.C.2d 591, 609 (1986). Under section 10905, the Board may prohibit the disposal of rail properties that are proposed to be abandoned and are appropriate for public purposes for a period of not more than 180 days after the effective date of the decision approving or exempting the abandonment. To justify a public use condition, a party must set forth: (i) the condition sought; (ii) the public importance of the condition; (iii) the period of time for which the condition would be effective; and (iv) justification for the imposition of the period of time requested. See 49 CFR 1152.28(a)(2).

LARA has satisfied the requirements for both a public use condition and a NITU and, therefore, imposition of both would be appropriate, commencing with the effective date of the exemption. However, an OFA takes priority over any requests for a NITU or for a public use condition. Therefore, issuance and effectiveness of a NITU and a public use condition will be delayed until the OFA process has been completed. If agreement is reached on sale or subsidy of the line, public use and trail use conditions would be unnecessary and unavailable. If no OFA is filed or if the OFA process terminates without a sale, the appropriate decision and notice of interim trail use or abandonment will be issued.

⁵ The EA indicated that the right-of-way may be suitable for other public use following abandonment.

On May 15, 2008, MRC filed a request that the Board toll the deadline for it to file its OFA until after LARA has had an opportunity to acquire the line for interim trail use. Alternatively, if the Board denies this request, MRC asks that the deadline for filing its OFA be extended until 45 days after service of a decision addressing MRC's request. MRC's requests will be denied. As indicated in the Board's April 21, 2008 notice, at note 3, OFAs to acquire rail lines for continued rail service or to subsidize rail operations take priority over interim trail use/rail banking. For this reason, and because the OFA procedures are subject to strict time frames (see 49 U.S.C. 10904 and 49 CFR 1152.27), the Board cannot, as requested by MRC, hold the OFA process in abeyance pending the outcome of trail use negotiations or extend the OFA deadline beyond the period needed for the potential offeror to receive necessary information from the abandoning carrier.

It is ordered:

1. This proceeding is reopened.
2. Upon reconsideration, the notice served and published in the Federal Register on April 21, 2008, exempting the abandonment of the line described above is subject to the following conditions: (1) prior to commencement of any salvage activities, West Shore shall consult with the appropriate county conservation districts to ascertain the need for erosion and sedimentation control practices for any planned salvage activities; (2) if abandonment is not consummated by January 17, 2009, West Shore shall conduct supplemental consultations with USFWS to determine if abandonment would impact any Federally listed or proposed threatened or endangered species. West Shore shall report the results of any supplemental consultations with USFWS to SEA in writing. Should any potential impacts be identified, West Shore shall consult with SEA and USFWS to develop appropriate mitigation measures prior to initiating any salvage activities; (3) prior to commencement of any salvage activities, West Shore shall consult with the Corps regarding potential impacts to waters of the United States, including wetlands, and shall comply with the reasonable requirements of the Corps; and (4) West Shore shall notify NGS at least 90 days prior to beginning salvage activities that could disturb or destroy any geodetic survey markers in order to plan for their possible relocation by NGS.
3. The request for issuance of a notice of interim trail use and for issuance of a public use condition is held in abeyance pending completion of the OFA process.
4. If the OFA process terminates without a sale, a decision and notice effective on its service date will be issued to impose interim trail use and a public use condition.
5. West Shore is directed to provide MRC with information contained in the Board's rules at 49 CFR 1152.27(a) to enable MRC to file an OFA. The time period for MRC to file an OFA is tolled until 10 days after West Shore notifies the Board in writing that it has provided MRC with the information, and the effective date of the exemption is postponed until 10 days after the due date for the filing of an OFA.

6. MRC's requests for information beyond that specified in 49 CFR 1152.27(a), to hold the OFA process in abeyance, and to extend the OFA deadline beyond the time specified above are denied.

7. This decision is effective on its date of service.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Anne K. Quinlan
Acting Secretary